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M. L. McBride

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STATE BAR ASSOCIATION OF NORTH DAKOTA

M. L. McBride, Editor

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NEW PRESIDENT

At the commencement of a new year of administration your president, your vice-president and your secretary and treasurer desire to express to you our sincere thanks for your confidence in our selection as your officers.

The coming year may be a fateful one; the clouds of war are thickening over us; as lawyers we are intensely interested in whether or not there will be any let down in the enforcement of our laws, for one of the real tests of democracy is whether it has the capacity to enforce the laws which are made by the people or its representatives. A breakdown at this point would mean a vital default. Recent months have disclosed that the failure of France, a great democratic nation, was not so much a military one as a collapse from within. The people had lost that durable quality of self discipline, and were unable to withstand any real aggression.

It is therefore more encumbent at this time, that we reexamine, and where we can, improve all of the processes of government in our state and nation. Particularly is it important that law enforcement agencies recognize this essential principle of government in this democracy.

Every public official charged with any responsibility of law enforcement, from the chief executive down to the township constable, should give serious

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concern to these days which will test our very national existence. Even the humblest law enforcement officer may feel that the faithful discharge of his duties not only helps to preserve peace, and order in his community, but is a real contribution to the cause of democracy.

The lawyers of this state can furnish leadership in this essential undertaking. In every municipality and county they can encourage cooperation with its officers to the end that we may go forward to a higher degree of law observance and law enforcement, and thus make our contribution toward the advance and preservation of Democracy in North Dakota and in the United States.

SEC'Y.

TAX DEEDS AND LIS PENDENS

In an action to quiet title to land where the defendant was the assignee of a purchaser of a tax lien who had filed a lis pendens, the plaintiff was the purchaser of a subsequent tax deed. In 1926 the assignor of the defendant, purchased the land in question at a tax sale for the delinquent taxes embracing the years 1920 through 1924 and he made a payment for the taxes of 1925 and 1926. In November, 1928, the land was sold for the taxes of 1927, and the plaintiff purchased the tax deeds at this sale. In 1929 Cowels, the assignor of the defendant, filed a lis pendens in regard to this land, and in the same month at a tax foreclosure proceedings he received a first lien on the property, no mention being made about or in regard to plaintiff's tax deed. Cowels then assigned his decree of foreclosure to the defendant. Plaintiff became the owner of the land in 1932 by a sheriff's deed that was subsequently recorded in 1933. Held for the plaintiff, that the purchaser of a tax certificate does not purchase pendente lite. "A sale for taxes is based on grounds which are adverse to all parties to an action involving title, and which are not in any way involved in the action, and hence the filing of a lis pendens does not make the purchaser at a tax sale a purchaser pendente lite." H. J. Coffin v. Old Line Life Ins. Co., 295 N. W. 884 (Neb. 1941).

This rule seems to be generally followed by the courts. Tax liens are paramount to all other liens and the lien of the state for taxes cannot be ousted by pending litigation. Security Trust Co. v. Root, 72 Ohio St. 535, 74 N. E. 1077 (1905). "Tax title is not a title of a person failing to pay taxes, but is a new title, in nature of an independent grant from the sovereignty, extinguishing all former titles and liens not expressly excepted." Warren v. Blackman, 62 S. D. 26, 250 N. W. 681 (1933). The general weight of authority seems to be that a tax sale is based on grounds adverse to all parties to an action. See note, Annotated Cases, 1918C 78.

Some courts on the other hand hold the opposite view. In an action for ejectment, the Wisconsin court stated: "The purchaser of a tax certificate or tax title, is not a bona fide purchaser, he buys under the rule of caveat emptor. He takes title subject to its infirmities. He knows that such a title grows out of proceedings hostile to the real owner, by which it is sought to divest him, in invitum, of his title, and that such a title is liable to be defeated by whatever irregularities or commissions may be in the proceedings . . . lis pendens binds both parties and privies. A purchaser pendente lite is assumed to have notice of the proceedings, because he is bound to take notice of the proceedings of the court. Bell v. Peterson, 105 Wis. 607, 81 N. W. 279 (1899) followed in 139 Wis. 398, 121 N. W. 255 (1909). Any person purchasing land at a sheriff's sale during the pendency of an action for the recovery of the land, takes subject to the pending action. Brinkley v. Sanford, 99 Ga. 130, 25 S. E. 32 (1896). A purchaser at a tax sale with the knowledge of a pending action in regard to the land in question is held to be a purchaser pendente lite. Hicks v. Port et al., 38 Tex. Civ. App. 334, 85 S. W. 437 (1905). The Federal Circuit Court seems to follow this same theory, holding the tax deed void and capable of being set aside, where an action had been commenced for the foreclosure of a mortgage and the taxes subquently became delinquent, and the purchaser of such tax certificate (who afterwards received a tax deed), was brought in as a party by the mortgagee. Cohen et al. v. Solomon et al., 66 Fed. 411 (1905). In an Iowa case where there was an action against a city claiming assessments were irregular on a street improvement project and where the land in question was sold for these taxes, the court ruled that the tax sale was held after the action to cancel the assessments had commenced, and that the purchaser of the tax deed purchased pendente lite, taking the land with constructive notice and subject to the result of the litigation. Comstock v. City of Eagle Grove, 133 Iowa 589, 111 N. W. 51 (1907).

North Dakota has not ruled on this same problem, but the court said in Nelson v. Kloster et al., 68 N. D. 108, 277 N. W. 390 (1928): "Under a tax deed, purchaser acquired not merely the title of the person who had been assessed for the taxes and neglected to pay them, but a new and complete title, an independent grant from the sovereign authority and which was independent of previous chain of title." It did not have to decide in the above case on any question relating to lis pendens or other litigation, but it did hold that a tax deed is a paramount deed, and therefore from this holding it would be possible to assume that North Dakota would follow Nebraska in holding that any person purchasing land and receiving a sheriff's deed would have a clear title, regardless of pending litigation. The filing of a lis pendens would be of no avail to any party in an action involving the title to land, the burden being on them to see that the taxes were paid.

GEORGE E. SORLIE,
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University of North Dakota.

LAW BOOKS FOR SALE

Corpus Juris, Vols. 1 to 72 inclusive; Annotations, 1921 to 1941 inclusive; Northwestern Reporter, Vols. 1 to 296 inclusive. Address inquiries to Mrs. Kathryn L. Brainard, Dickinson, N. D.

OUR SUPREME COURT HOLDS

In The State of North Dakota, ex rel Alvin C. Strutz, as Attorney General of the State of North Dakota, Pltf. and Respt., vs. Berta E. Baker, State Auditor of the State of North Dakota, and John Gray, State Tax Commissioner of the State of North Dakota, Defts., and John Gray, State Tax Commissioner of the State of North Dakota, Deft. and Applt.

That under the constitution of this state the people have reserved to themselves the power of initiating legislation and no such measure enacted by a vote of the electors "shall be repealed or amended by the legislature, except upon a yea and nay vote upon roll call of two thirds of all the members elected to each house." Section 25 of the Constitution as amended.

That where the legislature amends and re-enacts such an initiated measure, the "initiative" character of the measure is not destroyed, but remains in force, and any subsequent amendment of the initiated measure or of an amended or re-enacted portion thereof is subject to the constitutional limitation placed upon the legislature.

That Chapter 195 of the Session Laws of 1941, known as "Motor Vehicle Fuel Tax Act of 1941" is an attempted amendment of a measure initiated and enacted by the people; and not having received the prescribed two-thirds vote of each house, was not adopted constitutionally, and, therefore, is not a law of this State. Appeal from the District Court of Burleigh County, Hon. R. G. McFarland, Judge. AFFIRMED. Opinion of the Court by Burr, Ch. J. Morris and Burke, JJ. concur specially.

In Standard Oil Company of Indiana, a corporation, Pltf. and Respt., vs. State Tax Commissioner of the State of North Dakota, Deft. and Applt.

That Federal excise taxes on sales of gasoline (48 Stat. 764, 26 U. S. C. A. Sec. 2412) paid by the purchaser to the seller for payment by the latter to the Federal Government, do not constitute part of the sales price, or "gross receipts" of sales within the purview of the State sales tax law. (Laws 1939, Ch. 234; Laws 1937, Ch. 249).

Appeal from the District Court of Burleigh County, Hon. F. Jansonius, J. The State Tax Commissioner appeals from an order of the District Court setting aside an order of the State Tax Commissioner.

AFFIRMED. Opinion of the Court by Christianson, J.

In Home Owners' Loan Corporation, a corporation, Pltf. and Respt., vs. R. L. Wright, as County Treasurer of Williams County, North Dakota, Deft. and Applt.

That personal property taxes extended against real estate pursuant to the provisions of chapter 242, sessions Laws, N. D. 1929, become a lien on such real estate as of the date of the extension and entry thereof.

That the lien of personal property taxes extended against real estate is inferior, subsequent and subject to a mortgage placed of record against said real estate prior to the entry of the personal property tax lien.

That a county treasurer, after the date of the entry of a personal property tax lien against real estate, is without authority to accept payment of taxes on the real estate against which such entry has been made without making collection of the personal property tax lien.

That the priority of a mortgage lien is not affected by the statute requiring the county treasurer to make collection of extended personal property taxes at the time real estate taxes are paid.

That extended personal property taxes paid by the holder of a prior mortgage on the real estate may be recovered if paid under proper protest.

That taxes paid under protest may be recovered under the provisions and upon the conditions prescribed by chapter 286, session laws N. D. 1931.

That the complaint in this case is examined and it is held to set forth facts constituting a cause of action for the recovery of extended personal property taxes paid under protest by the holder of a prior real estate mortgage. Appeal from the District Court of Williams County, Hon. John C. Lowe, Judge. AFFIRMED. Opnion of the Court by Morris, J.

In Jalmer B. Stafney, Pltf. and Respt. vs. Standard Oil Company, a corporation, and R. H. Dodd, Defts. and Applts.

That the occasion and circumstances under which a communication said to be libellous is made determine whether such publication is privileged.

That a communication required to be made, and made in a proceeding authorized by law, is a privileged communication.

That where such privileged communication is made to a department of the state in the discharge of a duty under express requirement of law, such communication, if pertinent to the issue, is absolutely privileged.

That an absolutely privileged communication is one in respect of which, by reason of the occasion upon which it is made, no remedy can be had in a civil action of libel.

That in the case of such an absolutely privileged communication, no one may inquire as to whether the utterer was actuated by malice.

That where the occasion and the attending circumstances under which such communication is made are not in dispute, the question of whether the communication is absolutely privileged is for the court to determine.

That a communication made by an employer to the Unemployment Compensation Division of the Workmen's Compensation Bureau of this State, under the provisions of Chapter 232 of the Session Laws of 1937 requiring an employer to make out and deliver to the Bureau and to a discharged employee a statement required by the Bureau, showing the discharge of said employee and the reason therefor, is an absolutely privileged communication when made in the manner and form required by law, and can not be made the basis of any action for libel.

Appeal from the District Court of Grand Forks County, Hon. M. J. Englert, Judge.

REVERSED. Opinion of the Court by Burr, Ch. J.

In V. R. Middlemas, Pltf. and Applt., vs. Alvin C. Strutz, as Attorney General of the State of North Dakota, Deft. and Respt.

That in order to constitute a game of chance, which is played for a consideration, a lottery under the provision of Section 9660 Compiled Laws of North Dakota 1913 and Section 9674a1 Supplement to Compiled Laws

of North Dakota the prize or award which a player may win must be property or an interest in property.

That the definition of personal property contained in the penal code (sec. 10369 C. L. 1913) is sufficiently broad to include every statutory definition of personal property.

That the exclusive right to operate an amusement device is property.

That the playing of an amusement device, commonly called a pin ball machine which is played for a consideration and which offers to the player an opportunity, dependent chiefly upon chance, to win the right to the extended free use of the device for periods of varying duration, is a lottery. (Compiled Laws of North Dakota, Section 9660).

Appeal from the District Court of Burleigh County, Hon. Fred Jansonius, Judge.

AFFIRMED. Opinion of the Court by Burke, J., Christianson, J. dissents.

In Sax Motor Company, a corporation, Pltf. and Respt.vs. Paul Mann, Deft. and Applt.

That in claim and delivery proceedings, plaintiff must depend upon the strength of his own title.

That it is error to grant a motion to set aside a verdict and to enter judgment notwithstanding the verdict unless it clearly appears from the whole record that the moving party is entitled to judgment as a matter of law.

Appeal from the District Court of Stark County, Hon. H. L. Berry, Judge.

REVERSED. Opinion of the Court by Burr, Ch. J.

In Erna Janssen Pltf. and Applt., vs. J. A. Kohler, Sheriff in and for Burleigh County, North Dakota, et al Deft. and Respt.

That where evidence is properly admissible for a limited purpose, although not admissible upon other issues in the case, it is not error to receive it.

That where exemplary damages are demanded and the motives upon which defendants acted are at issue, any evidence bearing upon motive, including the circumstances surrounding the transaction and the information upon which the defendants acted is properly admissible.

That where plaintiff offers herself as a witness, that is to be deemed a consent to the examination of her attorney upon the same subject. (Sec. 7924 C. L. 1913).

That where one party's witness is allowed to refer to a memorandum for the purpose of refreshing his recollection while testifying and no foundation is laid to make the memorandum competent for any other purpose, and where the memorandum is not offered by the adverse party, it is not error to exclude it from evidence.

That it is for the jury to determine the weight which shall be given to the uncontradicted testimony of a party to an action where there is in the case evidence of facts and circumstances which are inconsistent with its truth.

Appeal from the District Court of Burleigh County, Hon. R. G. McFarland, Judge.

AFFIRMED. Opinion of the Court by Burke, J.

In State of North Dakota Pltf. and Applt., vs. Otto Rasmusson, County Auditor, Deft. and Respt.

That rights of purchasers of bonds of school districts are subject to the provisions of statutes in effect at the time of the issuance of the bonds, relating to detachment of territory from school districts, organization of new school districts and the equalization of property, funds on hand and debts between school districts which have been affected by a change in boundaries.

That where territory is detached from one school district and organized into a new school district, the tax levies made by the old district for debt service do not follow the detached territory except insofar as the same may be relevied by an arbitration board under the provisions of section 1328, Compiled Laws of 1913.

Appeal from the District Court of Cavalier County, Hon. W. J. Kneeshaw, Judge. AFFIRMED. Opinion of the Court by Burke, J.

In State of North Dakota, Pltf. and Applt., vs. H. C. Loy et al, Deft. and Respt.

That under the provisions of Section 8327, Compiled Laws of 1913, a "question of the title to real property in fee or for life" may not be submitted to arbitration.

That where, in an action to quiet title the parties submit to arbitration the only question upon which issue is joined and a decision upon that question is determinative of title to real property, the submission is one of a question of title to real property and void.

Appeal from the District Court of Mercer County, Hon. Harvey J. Miller, Judge. REVERSED. Opinion of the Court by Burke, J.

In Helen G. Mutschler, Pltf. and Respt., vs. Workmen's Compensation Bureau, Deft. and Applt.

That the record is examined and it is held, that plaintiff is entitled to share in the compensation fund administered by the Workmen's Compensation Bureau of this state.

AFFIRMED. Appeal from the District Court of Sheridan County, North Dakota. Hon. R. G. McFarland, Judge.

In Northwestern Mortgage & Security Company, and Providence Washington Insurance Co., Pltfs. Applts., vs. Noel Construction Company, a domestic corporation, and Dr. J. A. Carter, Defts. and Respts.

That chapter 174, laws 1935 which provides "that the use and operation by a nonresident or his agent of a motor vehicle upon and over the highways of the State * * shall be deemed an appointment by such nonresident of the Commissioner of Insurance of the State * * to be his true and lawful attorney upon whom may be served all legal processes in any action or proceeding against him growing out of such use or operation of a motor vehicle over the highways of the state, resulting in damages or loss to person or property." applies only in actions or proceedings against a nonresident. It has no application in an action or proceeding growing out of the use or operation of a motor vehicle over and upon the highways of this state resulting in damage or loss to person or property, where, at the time the loss or damage is alleged to have been sustained, the owner and operator of the motor vehicle had his legal residence or domicil in this state.

That a domicil once existing cannot be lost by mere abandonment even when coupled with the intent to acquire a new one, but continues until a new one is in fact gained.

That a person having his legal residence or domicil in this state, who removes from the place of his domicil with the intention not to reside there any longer and to remove to another state, is still a resident of, and has his domicil in, this state as long as he remains in the state. His domicil in this state continues until he acquires another domicil elsewhere.

Appeal from the District Court of Cass County, Hon. P. G. Swenson, Judge. Plaintiffs appeal from an order setting aside the service of summons upon the defendant, Dr. J. A. Carter.

AFFIRMED. Opinion of the Court by Christianson, Judge.

In Hilda Stelter, Respt., vs. Northern Pacific Ry. Company, et al., Applts.

That questions of negligence and contributory negligence are questions of fact for the jury unless the evidence is such that but one conclusion can be reasonably drawn therefrom.

That if the evidence concerning contributory negligence is such that but one inference can fairly and reasonably be drawn therefrom, the matter presents a question of law to be decided by the court.

That the evidence is examined and it is held that the plaintiff's negligence contributed proximately to her injury.

That where the negligence of two parties proximately contributes to the injury of one of the parties, the one who has the last clear chance to avoid the injury is considered solely responsible for it.

That in order for an injured party to successfully invoke the doctrine of the last clear chance, it must appear that the party against whom recovery is sought could have avoided the injury by the exercise of reasonable care. Appeal from the District Court of Grant County. Berry, J. REVERSED. Opinion of the Court by Morris, J.

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OF NORTH DAKOTA

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THE 64th ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION

Your President attended the 64th annual meeting of the American Bar Association as a state delegate from North Dakota.

The meeting occurred from Sept. 29th to Oct. 3, 1941, inclusive, in Indianapolis, Ind. There were about two thousand lawyers in attendance. This was somewhat less than what was expected, and is less than the registered attendance at some previous meetings.

Everett E. Palmer, of our Executive Committee, and A. R. Bergeson of Fargo also attended this meeting.

It was a notable meeting, with particular consideration given to various programs involving our National Defense. Walter P. Armstrong, a distinguished lawyer of Memphis, Tenn., was elected President of the Association for the ensuing year, with Harry Knight of Pennsylvania elected as Secretary and John H. Voorhees of South Dakota re-elected as Treasurer.

Your President also attended the 51st annual Conference of Commissioners on Uniform State Laws, with forty-three states represented, including North Dakota, in attendance. Jacob M. Lashly, President of the Association, gave an inspiring address before the Conference concerning its work and its importance. He characterized the Conference as one of the very finest drafting bodies in the world, and paid high tribute to the fine work that was being done in the field of

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Aeronautics and the aid being extended in the drafting of the new Aeronautical code covering the field of Aeronautical law.

There were also some very fine section meetings held, including the Junior Bar Conference and the section meeting on taxation which was well attended.

It is fairly well understood that the next meeting of the American Bar Association will occur very likely in the City of Detroit, Michigan. It is some years ago, in 1925 I believe, since the American Bar Association held a meeting there.

In the program of entertainment afforded visiting lawyers was a visit to the home of James Whitcomb Riley, the Hoosier Bard, author of "The Old Swimmin' Hole" and other poems.

HARRISON A. BRONSON, President.

LIMITATIONS OF ACTIONS WAIVER BY CORPORATIONS

A corporation can speak only through its officers and agents, and their declarations made in the course of their employment, and relating to the immediate transaction in which they are engaged, are always competent against the corporation. So thus it would be reasonable to say that if a corporation can waive the statute of limitation it would have to do so through its officers.

Where the directors of a corporation representing its entire stock and ownership, on recovering money by litigation, turned it over to the president to pay bills, without specifying any particular bill, and he paid the claim which was barred by the statute of limitations, it was held that the corporation cannot recover the payment of this claim in an action of money had and received. The president of a corporation may be expressly authorized, or may have authority by virtue of his being entrusted generally with the management of the business, to pay claims, and by such authority he may pay claims that are barred by the statute of limitations. And in an action for money had and received the corporation will not be successful.

Whether a corporate officer or agent is acting within the apparent scope of his authority is a question of fact, and is a question to be decided by the jury on all the evidence in the particular instance. However, the question of authority need not be submitted to the jury where the undisputed evidence shows that the officer or agent had general and special authority to do the acts in question. Whether an implied authority arises from certain facts is a question of law which should not be submitted to the jury, but to the court. Ordinarily, authority of corporation's agents to waive the statute of limitations will not be proved. Thus the authority of an officer or agent of a corporation to waive the statute of limitations rests on the principal of implied or express agency. A president of a corporation by mere virtue of his office has no authority to waive the statute of limitations, or to