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# Bar Briefs

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M. L. McBride

# BAR BRIEFS

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## FOR THE BAR BRIEFS

The Grand Forks County Bar Association at a meeting held in Grand Forks on Nov. 1, 1941 extended an invitation to the Executive Committee to hold the next annual convention of the Association in 1942 at Grand Forks. The last previous convention was held in Grand Forks on Sept. 6 and 7, 1935, at a time when C. L. Foster of Bismarck was President.

The Board of Governors of the American Bar Association have selected Detroit, Michigan as the place of the next annual convention to be held there during the last week of August, 1942.

The previous annual convention of the American Bar Association in Detroit was held on Sept. 2, 3 and 4, 1925, which your President then attended at a time when Charles E. Hughes, now retired, was President of the Association. His annual address there was a noteworthy effort worthy of his great achievements and his subsequent splendid services as Chief Justice of our United States Supreme Court.

The American Bar Journal, in the November 1941 number, contains the incoming address of Walter P. Armstrong before the House of Delegates as President of our American Bar Association.

It was delivered at Indianapolis upon his election as President of our American Bar Association.

It has been characterized by many members of our American Bar Association as equal to a State Paper,

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and it should be read by every member of our Association in this State.

The outstanding accomplishment of the annual meeting at Indianapolis was the minority report of Roscoe Pound, Dean Emeritus of the Harvard Law School. He presented a very strong presentation for the right of judicial review of administrative proceedings.

It may be remembered that Roscoe Pound delivered an address upon the Law of the Land at the annual meeting of our Association held at Grand Forks on Sept. 6 and 7, 1927 at a time when W. A. McIntyre was the President of the Bar Association.

HARRISON A. BRONSON, President.

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## REAL PROPERTY—JOINT TENANCY—MORTGAGE CONSTITUTES SEVERANCE

Where land is devised to A and B as joint tenants and A without the knowledge or consent of B gives a mortgage of his undivided interest to C and A dies before redemption or foreclosure, is the right of survivorship destroyed by said mortgage?

It is settled in law that a joint tenant may alienate or convey to a stranger his portion or interest in the reality and thereby defeat the right of survivorship, Wilken et al. v. Young, 144 Ind. 1, 41 N. E. 68 (1895). Having these rights and powers in the land so held, there can be no sufficient reason urged why the right of the joint tenant to mortgage the same should be denied. The right of the joint tenant to mortgage is supported by the following authorities: York v. Stone, 1 Selk. 158, 91 Eng. Rep. R. 146 (1709); Simpson's Lessee v. Ammons, 1 Bin. (Pa.) 175, 2 Am. Dec. 425 (1806).

If the joint tenant then has the power to mortgage his undivided interest, what is the effect upon the joint tenancy and survivorship? "A mortgage of a joint tenant of his share to a stranger, would be effectual against survivorship, and may amount to a severance of the joint estate." Washburn on Real Property (5th Ed. 1887) Section 412. According to Corpus Juris "The undivided interest of a joint tenant may be made the subject of a mortgage by him without the consent or concurrence of his cotenant, and to the extent of the mortgage lien the right of survivors will be destroyed or suspended, and the equity of redemption at the death of the mortgagor tenant will be all that will fall to his surviving cotenants." 33 C. J. 914. "The joint tenancy is severed by the mortgage at any rate for the time being, and until it is paid or redeemd." 2 Thompson on Real Property (1st. ed. 1924) Section 1716.

The authority for the above rules of law is found in four cases, York v. Stone, supra; Simpson's Lessee v. Ammons, supra;

In re Pollard's Estate, 3 De G. & Sm. 541, 46 Eng. Rep. R 746 (1863), and Wilken et al. v. Young, supra. Of these four cases the first three were decided in title theory jurisdictions. The latter of the four cases cited is the only instance where the issue was determined in a lien theory jurisdiction. The author has little doubt but that at common law a mortgage constituted a severance. With title passing, such a transaction would be analagous to a conveyance, and would doubtless constitute a severance thus defeating the survivorship doctrine. But in a lien theory jurisdiction where title is not transferred to the mortgagee, but remains in the mortgagor with the mortgagee holding only a lien, it is a more serious problem to spell out a severance of the joint tenancy. Wilken v. Young, supra, is the one case holding that in a lien theory state a mortgage constitutes a severance, and the court made no attempt to solve this problem. Tiffany, in his work on Real Property, (Vol. 1, 2d. Ed. 1920) Section 191 states that the Wilken Case does not appear to accord with the common law authorities to the effect, that the creation by a joint tenant of a mere charge upon the land, or the grant of a mere incorporeal thing, a privilege such as a right of profit, to be exercised upon the land, is a nullity as against the right of the other joint tenant as survivor.

If the rule as laid down in the Wilken Case is to be taken with a liberal interpretation one can then state with authority that a lien will constitute a severance of the joint tenancy thus defeating the doctrine of survivorship. Surely the lien of a judgment creditor would not create a severance. Before a judgment lien will operate as a severance there must be a levy and sale. 2 Thompson, Real Property, (1st. Ed. 1924) Section 1717. The Wilken Case is the result of the application of the common law rule to litigation in a state which has adopted the lien theory of mortgages. The reason for the rule no longer exists in lien theory states, since title is not transferred by a mortgage, but in the face of this the Indiana court applied the common law rule. Such is the result where stress is laid on the historical background rather than the reason and philosophy behind the rule. With the lien statute the reason for the common law rule was eliminated, but regardless of the reason behind the common law rule the Indiana court followed it.

With there being but one case litigated on this issue, and that being the Wilken case, it would appear that in North Dakota a like result would occur. Thus as to property mortgaged by A the right of survivorship is destroyed and the equity of redemption at the death of the mortgagor will be all that will fall to his cotenant. Although under the rules of joint tenancy one cannot properly make a blanket statement that a lien operates as a severance, under the present cases the lien created by a mortgage will have to be recognized as a severance.

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## LIMITATION OF ACTION WAIVER BY CORPORATION
## FOOTNOTES

1 Western Union Tel. Co. v. Baltimore etc. Tel. Co., 26 Fed. 55 (1885).

2 Kelly Asphalt Block Co. v. Brooklyn Asphalt Co., 180 N. Y. Supp. 805 (1920). No recovery could be had even if the president was the owner of all the stock of the corporation receiving the payment, and where such ownership was known to all of them.

3 Ibid.

4 Indiana Flooring Co. v. District Nat. Bank, 280 Fed. 522 (1922).

5 Fletcher, Cyc. Corps. (Perm. Ed.) § 488.

6 Ibid.

7 Kennedy v. Mutual Life Insurance Co. of Baltimore, 162 Md. 340, 159 Atl. 780 (Code Pub. Gen. Laws 1924 Act 57 § 1).

8 E. D. Morgan & Co. v. Merchants National Bank of Memphis, 81 Tenn. (Lea) 234 (1884).

9 Fletcher, Cy. Copps. (Perm. Ed.) § 618

10 Wash. Sav. Bank et al. v. Bucher's & Drovers 'et al., 107 Mo. 133, 17 S. W. 644 (1891).

11 Wells, Fargo v. Enright et al. and Commercial and Savings Bank of San Jose, 49 L. R. A. 647 (1900). An agreement not to plead the statute of limitations is not against public policy.

12 E. D. Morgan & Co. v. Merchants National Bank of Memphis, 81 Tenn. (Lea) 234 (1884).

13 Phillip Carey Mfg. Co. v. Dean, 287 U. S. 623, 53 S. Ct. 78, 77 L. Ed. 541 58 F. (2d) 737 (1932). And when the president and comptroller have this authority they may delegate it to the secretary to execute a waiver for them.

14 Piedmont Wagon & Mfg. Co. v. U. S., 6 F. Supp. 125 (1934).

15 Hammond v. Carthage Sulfite and Paper Co., 34 F. (2d) 155 (1928).

16 Note in 63 L. R. A. 193.

17 Abenakis Spring Co. v. Chabonneau, 34 Que. K. B. 402.

18 Kelly Asphalt Co. v. Brooklyn Asphalt Co., 180 N. Y. Supp. 805 (1920).

19 Cannel Coal Co. v. Luna, 144 S. W. 721 (Tex. 1912).

20 Jones v. Hughes, (1850) 5 Exch. 104, IX Mew's Digest 131.

21 W. J. Hein v. Geavelle Farmers Elv. Co., 78 A. L. R. 631 (1931). Here the directors owned most of the notes, and the corporation was insolvent at the time the part payment was made just for the purpose of reviving the claim on the notes.

22 Fletcher, Cyc. Corps. (Perm. Ed.) § 549.

23 Wych v. East India Co., (1734) 24 Eng. Rep. 1078, IX Mew's Digest 39.

24 Allen v. Smith, 129 U. S. 465, 9 S. Ct. 338, 32 L. Ed. 732 (1889).

25 In re Sheppard's Estate, 180 Pa. 57, 36 Atl. 422 (1897).

26 Brookfield Nat. Bank v. Kimble et al., 76 Ind. 195 (1877).

27 Cheshire v. Parker, 207 N. C. 364, 177 S. E. 21 (1934).

28 Waite et al. v. McKee, 95 Ark. 124, 128 S. W. 1028 (1910).

29 7 R. C. L. 510.

30 Johnson v. Albany & Susquehanna R. R. Co., 54 N. Y. 416 (1873).

31 Campbell v. Holt, 115 U. S. 620, 6 S. Ct. 209, 29 L. Ed. 483 (1885).

32 41 A. L. R. 925.

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## OUR SUPREME COURT HOLDS

**In the North Dakota Mill & Elevator Assn., Pltf. and Applt., vs. Hartford Steam Boiler Inspec. & Ins. Co., Deft. and Respt.**

That the Industrial Commission of the State of North Dakota consisting of the Governor, the Attorney General and the Commissioner of Agriculture and Labor of the State of North Dakota, is a state agency charged with the operation, management and control of The North Dakota Mill and Elevator Association. Pursuant to the statute (chap. 191, S. L. 1933) "all orders, rules, regulations, by-laws and written contracts adopted or authorized by the Commission shall, before becoming effective, be approved by the Governor, as chairman, and shall not be in force unless approved and signed by him," and (chap. 193, S. L. 1933) " * * Title to property pertaining to the operation of the Association shall be obtained and conveyed in the name of 'The State of North Dakota, doing business as the North Dakota Mill and Elevator Association.' Written instruments shall be executed in the name of the State of North Dakota, signed by any two members of the Industrial Commission, of whom the Governor shall be one * *." The Commission at a meeting held on April 26, 1939, on motion of one of the members thereof, unanimously resolved to cancel and terminate certain policies of insurance then in force covering property of the Association. The minutes of the meeting showing the action thus taken were signed by the Governor and the other two members of the Commission. The insurance company with which the policies were written, refused to repay the unearned premium in the amount claimed and demanded by the Commission, whereupon suit to recover the same was instituted. On the trial evidence tending to show that written acttion of the Commission cancelling the policies of insurance was given to the company by the secretary of the Commission and the policies surrendered for cancellation and that the company waived any objection on account of irregularity or insufficiency in the notice of cancellation or in the manner and method of the surrender of the policies, was offered and ruled inadmissible on the ground that the policies could not be cancelled under the pro-

visions of the statute above quoted except by written notice signed by the Governor and one of the other members of the Commission. HELD, for reasons stated in the opinion, that this ruling was erroneous. Appeal from the District Court of Cass County, Holt, J. Action to recover money. From a judgment for the defendant, plaintiff appeals.

REVERSED AND NEW TRIAL ORDERED. Opinion of the Court by Nuessle, J.

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In Peter F. Kelsch, Jr., Pltf. and Applt., vs. R. M. Dickson, Justice of the Peace in and for Stark County, North Dakota, Deft. and Respt.

That where the district court has jurisdiction of the subject matter of a case, and the parties to a cause of action appear before the court, so as to give the court jurisdiction of the persons, the decision of the court made therein is binding upon the parties affected until modified or reversed.

That the record is examined, and it is held: the trial court was justified in denying a writ of mandamus sought by the petitioner.

Appeal from the District Court of Stark County, Hon. Harvey J. Miller, Judge. AFFIRMED. Opinion of the Court by Burr, Ch. J.

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In State of North Dakota, Pltf. and Applt., vs. Grand Forks, a quasi Municipal Corporation, Deft. and Respt.

That a county treasurer, in collecting taxes and rentals of school lands for the state, does not act as the agent of the county but as an individual designated by his official name to collect for the state. (Sections 2156 and 326, C. L. 1913).

That statutes directing county treasurers to collect taxes and school land rentals for the state and providing for remittance thereof to the state treasurer contemplate that county treasurers shall, after collection, hold such funds as individuals in their official capacity subject to the orders of designated state officers.

That an allegation in an answer that a county treasurer deposited funds belonging to the state in a depositary for public funds does not warrant an implication that such funds were deposited in the name of the county.

That statute which declares that each county shall be responsible for all state taxes levied imposes a condition of potential liability or accountability and a county's duty to account for state taxes may be met by a showing that the county officers have adhered strictly to the statutor directions of the State Legislature and have acted with honesty, prudence and diligence.

That where a county treasurer was required by state statute, under a penalty of a misdemeanor, to deposit the proceeds of state tax collections in a depositary for public funds and was exempted from all liability for losses resulting from the failure of such depositary, an answer by a county, in a suit brought by the State to recover state taxes collected by the county's treasurer, alleging that such taxes had been deposited by the treasurer in a duly designated depositary for public funds and had been lost through the insolvency of the depositary, stated a sufficient accounting for the state taxes collected ad a defense to the action.

Appeal from the District Court of Grand Forks County, Swenson, J.

AFFIRMED. Opinion of the Court by Burke, J.

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In Ford Motor Company, a corporation, Plt. and Applt., vs. Berta E. Baker, State Auditor, Deft. and Respt.

That Section 186 of the Constitution of North Dakota (Article 53 of the Amendments to the Constitution, p. 497. Laws 1939) provides that no money

shall be paid out of the State Treasury except after appropriation by the legislature, but contains a proviso "that there is hereby appropriated the necessary funds * * required for refunds made under the provisions of * * the State Income Tax Law." It is held that such proviso operates to appropriate moneys required for the payment of a judgment that had been rendered against the State prior to the time the proviso was adopted as a part of a constitutional amendment.

That the State cannot be held to the payment of interest on any claim against it unless bound by an act of the Legislature or by a lawful contract of its executive officers made within the scope of their duly constituted authority.

That the State is not liable to pay interest on a claim for a refund of income taxes illegally assessed against, and paid to the State Treasurer by, a taxpayer under compulsion since there is no legislative enactment which either directly or by implication imposes such liability upon the state or evidences consent by the state to pay such interest. Neither is the State liable to pay interest on a judgment rendered against it for such claim.

Appeal from the District Court of Burleigh County, Hon. Fred Jansonius, J. Mandamus proceeding by Ford Motor Company against State Auditor to compel her to draw a warrant on State Treasurer for amount of plaintiff's judgment. From a judgment in favor of defendant, plaintiff appeals. REVERSED AND REMANDED. Opinion of Court by Berry, Dist. J. sitting in place of Morris, J., disqualified.

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In David Hamilton, Pltf. and Respt., vs. City of Bismarck, a municipal corporation, Deft. and Applt.

That in constructing a sewer system, a city acts in governmental capacity.

That a municipal corporation is not liable for damages caused by an over-flow of its sewer occasioned by extraordinary rains or floods.

That Section 14 of the North Dakota Constitution does not deal with damages resulting from the negligence of public corporations or their agents but only with those damages that are a consequence of the exercise of the power of eminent domain.

That where the right to take or damage private property for public use is acquired by contract, and nothing to the contrary appears, the acquisition is presumed to be accompanied by the same rights as though the power of eminent domain had been exercised in accordance with statutory and constitutional provisions.

Appeal from the District Court of Burleigh County, Hon. R. G. McFarland, Judge. REVERSED. Opinion of the Court by Morris, J. Burr, J. dissenting.

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In Tilda Nelson, Pltf., Respt., Applt., vs. A. R. Scherling and Sophia Scherling, Defts., Applts., Respts.

That a motion for judgment notwithstanding the verdict does not go to the weight of evidence. In case of an adverse verdict the evidence is considered in the light most favorable to the party obtaining the verdict; and where, upon the whole record, there is no issue of fact to submit to the jury, so that the moving party would be entitled to judgment as a matter of law, the motion for judgment nothwithstanding the verdict should be granted. However, if, upon the whole record, it is reasonable to believe the defects in the evidence may be supplied upon a new trial, so as to present an issue for the jury, the trial court should deny the motion for judgment nothwithstanding the verdict, and grant a new trial, when the motion is made in the alternative.

Appeal from the District Court of Cass County, Hon. P. G. Swenson, Judge. AFFIRMED. Opinion of the Court by Burr, Ch. J.