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Our Supreme Court Holds

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with the reserve they still have and income for this, and next year reaching about ($9,000.00) Nine Thousand Dollars, they should be able to carry on for the next biennium, and at the end of that time a survey can be made.

OUR SUPREME COURT HOLDS

In John Magnuson, as Administrator of the Estate of J. J. Breher, Deceased, Pltf. and Resp., vs. Anna Breher, Executrix of the Hubert Peerboom Estate, et al and Farmers State Bank of Aanmoose, et al., Defts., Intrs. and Applts.

That the purpose of the recording statutes is to give notice of and to protect, rights as against subsequent purchasers or encumbrancers, not to create rights not possessed, either of record or in fact.

That an order of the district court, entered pursuant to the provisions of Chapter 153, S. L. 1933, discharging of record mortgages not renewed or extended of record within the time provided by the statute, operates merely to clear the public record of such mortgages so that from the time of the entry of such order no constructive notice is afforded by the record.

APPEAL from the District Court of McHenry County, Hon. G. Grimson, Judge. Action to foreclose a mortgage on real estate. From a judgment for the plaintiff, intervenors appeal. AFFIRMED. Opinion of the Court by Nuessle, Ch. J.

In Frederick Van Camp, et al., Pltfs. and Applts., vs. Mary J. Peterson, and L. R. Baird, Receiver of the Far. State Bank of St. Thomas, North Dakota, Defts. and Respdts.

That an oral agreement to extend the period of redemption from real estate mortgage foreclosure sales beyond the time allowed by statute must be established by clear and convincing evidence.

That in view of the indefinite character of the evidence in this case, it is held that no agreement has been established extending the right to redeem beyond the year allowed by the statute.

That assignments of real estate mortgages as collateral security for a debt, although absolute in form, give the assignee only a qualified interest in the property thus pledged, and after the debt for which the collateral is pledged is paid, the rights of the assignee in the pledged property ceases, and it reverts to the assignor.

That where two contingent quarter sections of land are sold en masse at a mortgage foreclosure sale thereof, and the mortgagors seek to redeem therefrom, and do not question the validity of such sale until long after the redemption period has expired, they waive such irregularity.

APPEAL from the District Court of Pembina County, Hon. G. Grimson, Judge. Action in equity to compel specific performance of an alleged oral agreement to permit redemption after the statutory period expired. Judgment for the defendants. Plaintiffs appeal. AFFIRMED. Opinion of the Court by Englert, Dist. J.

In Ben C. Larkin, Petr., and Respt., vs. James D. Gronna, as Secretary of State for the State of North Dakota, Respt. and Applt.

That after the state canvassing board has examined the certified abstracts of votes cast for state officers, canvassed the returns made, and certified to the secretary of state the name of the person duly elected to a state office, it is the duty of the secretary to prepare a certificate of election for such person elected and to show therein not only that he was elected to the office, but also to specify the term of years of the office. (Sec. 1023, C. L.)

That adopting an amendment to the state constitution is not the exercise of legislative power in its ordinary sense. When such amendment is proposed

by initiative petition it is the exercise of the power of the people to change the constitution at will except so far as the exercise may be limited by some provision of the federal constitution or of a provision of the constitution of this state. The people are supreme in determining what the constitution shall be.

That Section 61 of the constitution of this state, providing "No bill shall embrace more than one subject, which shall be expressed in its title * * * * is not applicable to proposed amendments to the state constitution, but refers to legislative enactments only.

That an amendment to the constitution of this state may be proposed by initiative petition of the electors, and when so proposed it is subject to the provisions of Section 25 of the constitution requiring the petition embodying the proposed measure contain the full text of the measure, be signed by the required number of electors, and the measure be placed upon the ballot and submitted by a ballot title which shall fairly represent its subject matter.

That where an initiative petition proposes to amend the constitution of this state, Section 25 of the constitution provides:

"The secretary of state shall pass upon each petition, and if he finds it insufficient he shall notify the 'committee for the petitions' and allow twenty days for correction or amendment. All decisions of the secretary of state in regard to any such petition shall be subject to review by the supreme court. But if the sufficiency of such petition is being reviewed at the time the ballot is prepared, the secretary of state shall place the measure on the ballot and no subsequent decision shall invalidate such measure if it is at such election approved by a majority of the votes cast thereon. If proceedings are brought against any petition upon any ground, the burden of proof shall be upon the party attacking it."

That when an initiative petition proposing to amend the state constitution was filed with the secretary of state as required by the constitution and the secretary of state passed thereon as he did herein, he determined that the petition was signed by the requisite number of electors, that it contained the full text of the measure proposed, and that it had a sufficient title, and when thereafter he submitted the measure to the people at the general election for thir approval or rejection under the ballot title so prepared, he thereby decided that all of the constitutional provisions had been complied with, and no review of such decision having been sought prior to the election, the decision of the secretary of state is final and is not subject to review by this court thereafter.

That the declaration of section 64 of the state constitution, to-wit: "No bill shall be revised or amended, nor the provisions thereof extended or incorporated in any other bill by reference to its title only, * * * " is not applicable to a proposed amendment to the constitution of the state.

That by the terms of an amendment to section 82 of the constitution adopted by the people at the primary election in June, 1938, the term of office of railroad commissioners was reduced from the period of six years to a period of two years, and the candidate elected as railroad commissioner at the general election in November, 1938, was elected for the term of two years only, even though at the primary election he had been nominated for the term then fixed at six years.

APPEAL from the District Court of Morton County, Hon. H. L. Berry, Judge. REVERSED. Opinion of the Court by Burr, J. Morris, J., dissenting. Englert, Dist. J., sitting in place of Burke, J., disqualified.

In Henry Wallace, Pltf. and Respt., vs. North Dakota Workmen's Compensation Bureau, et al, Defts. and Applts.

That where a claimant has been awarded compensation by the Workmen's Compensation Bureau and the bureau, in the exercise of its continuing jurisdiction, terminates the award and thereafter the claimant applies to the bureau for an opportunity to combat this termination, which application the bureau agrees to hear, the claimant has the right, at proper times

and places, to examine all of the files and records in his case upon which the bureau based its decision to terminate the award, when necessary to prepare for the hearing on his application.

APPEAL from the decision of the District Court of Burleigh County granting a writ of mandamus, Hon. Fred Jansonius, Judge. AFFIRMED. Opinion of the Court by Burr, J.

In Darling and Company, a corporation, Pltf. and Applt., vs. Floyd Burchard, Deft. and Respt.

That neither the provision in the Constitution of the United States that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, nor the Act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the state court by which a judgment was rendered, in an action brought upon such judgment in a court of another state.

That in a suit in a state court upon a judgment rendered by a court of another state the jurisdiction of the court which rendered the judgment is open to judicial inquiry; and, when the matter of fact or law on which jurisdiction depends was not actually litigated in the original suit, the defendant may plead and prove in the suit on the judgment that the court which rendered the judgment was without jurisdiction over his person.

That in an action brought in a court of this state upon a personal money judgment rendered by a court of another state, the defendant, under proper averments in his answer, may show by extrinsic evidence that no summons was served upon him in the action in which the judgment was entered, notwithstanding any recitals in the record that such service was made.

That in such action, the defendant, notwithstanding the record shows a return of the sheriff that he was personally served with summons, may show that he was not served, and that the court never acquired jurisdiction of his person.

That the constitutional requirement that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state must be interpreted and applied in connection with the constitutional provision, adopted at a later date, which inhibits every state from depriving "any person of life, liberty or property without due process of law."

That notice to a party whose rights are to be affected by a judicial proceeding, and an opportunity to be heard in such proceeding before judgment is rendered therein, are essential elements of due process.

That in an action in a state court, wherein a personal judgment for money is sought, the defendant must be brought within the jurisdiction of the court by service of process within the state, or by his voluntary appearance in the action, and a personal money judgment rendered without service or appearance is violative of the constitutional requirement of due process.

That subject to the requirements and inhibitions of the Constitution of the United States, each state may determine for itself what manner of service shall be sufficient to bring a person into its courts in a civil action.

That in the instant case, the plaintiff seeks to recover upon a personal money judgment entered against the defendant in the circuit court of Antrim County, Michigan. The evidence is examined and, for reasons stated in the opinion, it is held that the trial court was correct in finding that no summons had been served upon the defendant in Michigan; that the Michigan court had no jurisdiction over the person of the defendant; and hence, had no authority to render judgment against him.

From a judgment of the district court of Burleigh County, McFarland, J., plaintiff appeals. AFFIRMED. Opinion of the Court by Christianson, J.

In Joan Svihovec, Elaine Svihovac, et al., Pltfs. and Respts., vs. Woodman Accident Company, a corporation, Deft. and Applt.

That in an action upon a policy of insurance, insuring against death by "violent, external and accidental means", the presumption is that the injury which caused death was unintentionally and not illegally inflicted.

That where a verdict of accidental death is founded upon proof of death by gunshot wound, aided by the presumption against an intentional or illegal injury, the verdict will not be set aside unless the other facts and circumstances proved, cannot be reconciled with and reasonable theory of accidental or non-intentional injury.

That where, in an action upon a policy of insurance insuring against death by "violent, external and accidental means", the insurer relies upon specific exceptions set forth in the policy, the burden is upon the insurer to establish that the injury received by the insured was within such exceptions.

That the burden to establish that the injury received by the insured was within the exceptions of the policy of insurance, though it was defendant's burden, may be sustained by plaintiff's evidence.

That evidence is examined and it is held: The facts and circumstances surrounding the injury and death of the insured can not be reconciled with any reasonable hypothesis of accidental or unintentional injury; that it is shown as a matter of law that the death of the insured was due to the intentional act of another person and therefore within the exceptions of the policy sued upon.

APPEAL from the District Court of Hettinger County, Hon. H. L. Berry, Judge. REVERSED. Opinion of the Court by Burke, J.

In State of North Dakota, Applt., vs. Carther Jackson and D. G. Kelly, Respts.

That the Sales Tax Act of 1935 does not establish a preference in favor of the state over other unsecured creditors in the distribution of the assets of the estate of an insolvent.

That the Sales Tax Act of 1935 "establishes the law of this state respecting the subject to which it relates" and the state may not resort to the common law to supply a right of preference which is not provided in the act.

APPEAL from the District Court of Grand Forks County, Hon. P. G. Swenson, Judge. AFFIRMED. Opinion of the Court by Morris, J.

In Devils Lake Steam Laundry, a corporation, Pltf. and Respt., vs. Otter Tail Power Company, a corporation, Dft. and Applt.

That where the Board of Railroad Commissioners, in the exercise of its statutory rate-making power, establishes a rate schedule for electrical service provided by a public utility, and where thereafter on application of the utility a lower rate schedule "defined as a temporary rate schedule, to be effective up to and including (a day certain) and to terminate as of that date" is put into effect, upon the expiration of the period covered by the temporary schedule the general rate schedule theretofore established automatically becomes effective without further action.

That Chapter 207, Session Laws 1937, which provides: "No change shall be made by any public utility in any tariffs, rates, joint rates, fares, tolls, schedules, or classifications, or service which have been filed and published by any public utility, except after thirty days' notice to the Commissioners, which notice shall plainly state the changes proposed, provided, that the Commissioners may, in their discretion and for good cause shown, allow changes upon less than the notice herein specified either in particular instances or by a general order applicable to special or peculiar conditions or circumstances," is considered and, for reasons stated in the opinion, it is held that the same has no application in the instant case.

APPEAL from the District Court of Ramsey County, Hon. P. G. Swenson, Judge. From a judgment restraining the defendant from cutting off its electrical service to the plaintiff, defendant appeals. REVERSED. Opinion of the Court by Nuessle, Ch. J.

In Elmer F. C. Tank, Pltf. and Applt., vs. Gladys Tank, Deft. and Respt.

That evidence is examined and it is held; the allegations of desertion and extreme cruelty stated in the complaint as grounds for divorce are not sustained by the evidence.

That under the express provisions of Section 4401, Compiled Laws of N. D., 1913, the Court may, in an action for divorce, provide for the maintenance of a wife and her children, though a judgment of divorce is denied.

That wherein an action for divorce, an injunction is decreed, enjoining the husband from selling or encumbering his property, there being no prayer for such relief in the pleadings and no evidence in the record tending to establish the need for such relief, the injunction will be set aside.

APPEAL from the District Court of Ward County, Hon. John C. Lowe, Judge. MODIFIED AND AFFIRMED. Opinion of the Court by Burke, J.

In State of North Dakota, Pltf. and Respt., vs. John Hopperstad, Deft. and Applt.

That witnesses whose names are not endorsed upon the information may be examined by the State when it is shown such witnesses are necessary, and in the absence of any showing of prejudice to the defendant.

That where a defendant is charged with driving an automobile on the public roads while intoxicated and he is taken into custody immediately, there is no error in permitting witnesses to testify as to his condition with reference to intoxication at the time he is arrested.

That evidence examined and it is held; the evidence is sufficient to sustain the verdict of conviction.

APPEAL from the District Court of Walsh County. Hon. W. J. Kneeshaw, Judge. AFFIRMED. Opinion of the Court by Burr, J.

In Mrs. William Stockfeld, Plt. and Applt., vs. Josiah L. Sayre, Deft. and Respt.

That under the provisions of Chapter 184 of the Session Laws of 1931, commonly known as the "guest statute" a guest who accepts a ride in any vehicle on the highways of the state, and while riding as such guest sustains an injury, has no right of recovery against the owner or driver of person responsible for the operation of such vehicle, nor does the estate or the legal representative or heir of such guest; unless the injury or death sustained proximately results from the intoxication, wilful misconduct, or gross negligence of the owner or person responsible for the operation of the vehicle, and in such case the burden is upon the plaintiff to establish that such delict was the proximate cause of the death or injury.

That where the injury to such a guest is caused by the concurrent act of negligence on the part of the host and negligence on the part of a third person for whose act neither the plaintiff nor the defendant is responsible and would not have happened in the absence of either, the concurring acts are the proximate cause of the injury, and each delinquent is answerable for the result.

That in such an action to recover damages for the death of a guest brought against the host and a third person for whose act neither the plaintiff nor the host is responsible, the host is not responsible in damages unless the plaintiff prove his concurring act of negligence was gross negligence, and the fact that the plaintiff has joined this third person as a joint tort feasor does not permit the plaintiff to recover against the host for ordinary negligence.

APPEAL from the District Court of Grand Forks County, Hon. P. G. Swenson, Judge. AFFIRMED. Opinion of the Court by Burr, J.