North Dakota Law Review

Volume 17 | Number 10 Article 5

1940

Our Supreme Court Holds

J. Morris

JJ Burke

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to themselves the power of initiating legislation and no such measure enacted by a vote of the electors "shall be repealed or amended by the legislature, except upon a yea and nay vote upon roll call of two thirds of all the members elected to each house."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.