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M. L. McBride

BAR BRIEFS

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—BY—

STATE BAR ASSOCIATION
OF NORTH DAKOTA

M. L. McBride, Editor

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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

(Continued on next page)

(Continued from page one)

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

bind the corporation by his promise not to plead the statute. But according to the more modern authorities, the president of a corporation has power to institute suits on its behalf, to accept service of citation, or other legal process, and to waive legal delays. Such a trend would suggest that a president could waive the statute of limitations without implied authority, or at least only very little implication of such authority would be needed to bind the corporation in the execution of such waiver.

Where the president of a bank had managed its affairs with little assistance from directors for five years previous to the suspension of the bank, and upon the suspension of the bank without being authorized by the directors the president issued scrip to the creditors payable in three years, and wound up the affairs of the bank, collected assets and applied them to payment of scrip until remaining assets were levied upon under execution, and the stockholders had not fully paid their subscriptions which were payable upon calls by the directors which they never made, the court held that, although upon the bank's suspension a cause of action arose in favor of creditors against the bank's stockholders for the unpaid subscription, the running of the statute of limitations was postponed for three years by the issuance of the scrip, and that the bank was bound by the issuance of such scrip. Also a waiver of the right to plead the statute of limitations to an action to enforce the liability of a bank as a stockholder in a corporation in consideration of extension of time, is binding on the bank when signed for its best interest by its president who was its general manager, and allowed to act for it according to his judgment, under a by-law giving him general supervision of the business of the corporation and power to perform duties which its interest might require, although the directors never knew of its execution. Where D bank was indebted to P Company, and P Company threatened to bring action on the debt, and upon seeing the president of the D bank, the president assured P Company that D bank would not plead the statute of limitations if more time were given to raise the money to pay the debt and that D bank would pay the debt as soon as it could raise the money, and P Company allowed the D bank more time, and the debt was not paid as promised, P Company brought action against the D bank which then pleaded the statute of limitations, the court held that the action and promise of the president of the D bank revived the debt and that the same was not barred by the statute of limitations.

Corporation cannot be heard to say that the president and comptroller in charge of tax matters were unauthorized to execute a waiver. Where waivers of limitations are signed by corporation's taxpayer's secretary and treasurer and bearing the corporate seal, it was held that such was valid and binding on the corporation as against the contention that the secretary and treasurer were without authority to execute the waiver. Where waiver exending time for assessment was filed by secretary and treasurer, who signed original income tax returns, it was held

binding on corporation and receiver. Insurance companies may also waive by their agents or officers the period within which action against the company may be brought, that is, the period allowed in which to file their claim against the company, or to notify the company of the claim. It is also held that the manager of a commercial company charged with its administration has power to acknowledge a debt in the ordinary course of business and thus interrupt prescription. Thus it can be seen that the right of an officer or agent of a corporation to waive the statute of limitations is determined from the facts relating to and leading up to the transaction.

The directors of a corporation, as its board, have the power to waive the statute of limitations as against a debt that is justly due and owing. And the board of directors may also bind the company by admissions and declarations, but a single director cannot do so except as a special agent of the company. Also where a debt is contracted by the directors of the corporation, as such, or a note or obligation is executed by them as such, a payment or new promise made by their successors in that office will keep the debt on foot and save it from operation of the statute of limitations. But where the corporation is insolvent and the directors own the notes which are barred by the statute, payment on notes is deemed void by Bankruptcy Law.

Generally, the powers of the executive committee are in some way stated in the by-laws; and ordinarily such committee is given all the authority of the board of directors, at least in the intervals between the sitting of the board. Thus it would be proper to presume that the executive committee could waive the statute of limitations to a just debt and which is still owing.

From an early ruling of an English court that held that a corporation is entitled to take advantage of the statute of limitations as well as a private person, a fair inference can be drawn that certainly at one time a serious doubt existed whether a corporation could plead the statute of limitations.

As to creditors objecting to the waiver of the statute, it is held, that no creditor can interfere to prevent his debtor from waiving the statute of limitations in regard to other claims. Also, a legatee whose share has been attached by a creditor may confess judgment in favor of the estate on a bona fide debt due the decedent's estate which is barred by limitations, and which more than offsets the legatee's share. Then also a husband may pay an honest debt to his wife, however, ancient and stale it may appear to his creditors, and he is not compelled by law to resort to the statute of limitations as a defense, nor can other creditors insist upon it for him, nor is she estopped to receive payment on the debt. His actions must not be fraudulent, for then it would be void.

As to the question whether directors or agents become personally liable for waiving the statute, it has been held that direc-

tors are not responsible for paying a just debt notwithstanding that the corporation was insolvent at the time; but if the payment was an unlawful preference, the remedy, if any is against the creditor. Where the statute of limitations has commenced to run against the liability of officers for a corporate debt, it seems that the running of the statute is not suspended or affected by the recovery of the judgment against the corporation upon the debt, nor by the renewal of the indebtedness by the corporation. In a court of equity, the court commented that at all events it is not too much to say that a party who claims to have paid a debt by a successful plea of the statute, and seeks an affirmative remedy on the ground of such fortunate venture, is not regarded as a special favorite of the court. The statute of limitations is a personal privilege accorded by law for reason of public expediency; and the privilege can only be asserted by a plea; the statute of limitations only bars the remedy and not the debt, and a debt uncollectable by operation of law taking away the remedy in sufficient consideration for the execution for a new promise to pay.

Although there is a dearth of authority, the cases there are reveal that a corporation can and may waive the statute of limitations by its officers or directors or agents. But as to the question of the liability of the directors and officers for so waiving the statute of limitations, no authority was found that dealt with the situation directly in point. However, there is no question that the moral obligation to pay a debt which has been barred by the statute of limitations still exists. And in light of justice, the performance of moral obligations should be encouraged instead of impeded by imposing the risk of liability. And to label this communicable performance by a manager of a corporation as mismanagement for which a liability can be imposed is analagous to saying that what is right is wrong. Thus it is submitted that no liability should be imposed upon director and officers for so waiving the statute of limitations.

P. M. SAND,
Former Law Student,
University of North Dakota.

OUR SUPREME COURT HOLDS

In Mrs. Hester McKinnon, Pltf. and Respt., vs. North Dakota Workmen's Compensation Bureau, Deft. and Applt.

That the Workmen's Compensation Act does not cover diseases contracted by an employee outside of his employment; and where compensation is sought on the theory that the death of the employee was caused by disease, it must be shown that the disease was approximately caused by the employment.

That where the alleged origin of such disease is purely speculative and the disease may equally have been caused by factors unconnected with the employment, the burden of proof has not been sustained, and no compensation can be allowed.

That evidence examined, and it is held: the plaintiff has failed to show that the disease from which the worker died was approximately caused by his employment.

(Syllabus by the Court)

Appeal from the District Court of Nelson County, Hon. P. G. Swenson, Judge.

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

In State of North Dakota, Pltf. and Applt., vs. Otto Rasmusson, as County Auditor of Cavalier County, North Dakota, 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.

(Syllabus by the Court)

Appeal from the district court of Cavalier County, Hon. W. J. Kneeshaw, Judge.

AFFIRMED. Opinion of the Court by Burke, J.

In the Matter of the Application of Joe Moore, for a Writ of Habeas Corpus.

That the Writ of Habeas Corpus cannot be used as a substitute for appeal or writ of Error to obtain a review of the correctness of acts or rulings of a court, acting within its jurisdiction. On Habeas Corpus the inquiry is limited to questions of jurisdiction.

That as a general rule a trial court has no authority to set aside a valid judgment and impose a new or different judgment increasing the punishment, after the original judgment has been put into operation. But the court's power to pronounce judgment is not exhausted where it has pronounced a judgment which is void, or so defective in matter of substance as to be unenforceable. In such case the court has power to substitute a legal and valid judgment for the former invalid one.

That where the judgment pronounced upon one who has been regularly convicted of a crime, orders imprisonment in a place other than that prescribed by law, the court which pronounced the judgment has authority to amend it to provide imprisonment in a place prescribed by law.

Original Writ by Joe Moore for a Writ of Habeas Corpus. WRIT DENIED. Opinion of the Court by Christianson, J.

In Steve Schnell, Pltf. and Respt., vs Northern Pacific Railway Co., et al., Defts. and Applts.

That where a plaintiff fails to make proofs sufficient to sustain a verdict in his favor, errors occurring in the course of the trial that do not affect the quantum of his proofs are nonprejudicial and immaterial and will not in themselves warrant the granting of a new trial.

That whether a new trial shall be granted rests largely in the sound discretion of the trial court and an order granting a motion therefor will not be disturbed unless it can be said that there was an abuse of that discretion. Such discretion, however, is a legal discretion to be exercised in the interest of justice, so if it appears on the record that the party making the motion has not made a case, and there is no reasonable probability that on a new trial he can make a case, an order granting a new trial will not be sustained.

That ordinarily the question as to whether there is contributory negligence is one of fact to be determined by the jury. But when the evidence is such that only one inference can fairly and reasonably be drawn therefrom, the question becomes one of law to be determined by the court.

That the record in the instant case is examined, and held, for reasons stated in the opinion, that the plaintiff was guilty of negligence which was a proximate cause of the accident and injury on account of which he seeks a recovery.

Appeal from the District Court of Cass County. Hon. M. J. Englert, Judge. Action for damages on account of negligence. Verdict for the defendants. From an order granting a new trial, defendants appeal. REVERSED. Opinion of the Court by Nuessle, J.

In David W. Goodman, et al., Petrs., vs. Fred Christensen, et al., Respts.

That under the provisions of sections 86 and 87, of the State Constitution and section 7339, Comp. Laws N. D. 1913, the Supreme Court has superintending control over all inferior courts and in the exercise thereof has power to issue such original writs as may be necessary.

That the provision in section 10 of chapter 269, Session Laws N. D. 1941, to the effect that decisions of the district court under that chapter are final, does not deprive the Supreme Court of superintending control over the district court or restrict its power and authority to exercise its superintending jurisdiction.

That the provision in section 10, chapter 269, Session Laws N. D. 1941, directing the district court to determine appeals under that chapter before the first day of October does not deprive that court of power to enter judgment after October first in a case wherein it has acquired jurisdiction pursuant to the statute, nor is the Supreme Court without authority to direct the district court to proceed in such a case after the date prescribed by statute has passed.

That no relief from alleged excessive assessments can be granted under chapter 269, Session Laws N. D. 1941, to petitioners who have not presented their complaints to local boards of review in organized territory or to the board of county commissioners acting as a local board of review if the property involved is taxable in unorganized territory.

That if a bill, containing an emergency clase, passed by the legislature and approved by the governor, failed to receive a favorable vote of two-thirds of the members present and voting in either house, the bill becomes a law on July first after the close of the legislative session.

That for reasons stated in the opinion, it is held that the provisions of chapter 269, Session Laws N. D. 1941, affording relief from excessive tax assessments are wholly prospective and do not apply to 1941 assessments. Original Application for Supervisory Writ. WRIT DENIED.

Opinion of the Court by Morris, J.

In Ruth J. Hoffman, Plt. and Applt. vs. John M. Ness, Administrator, et al., Defts. and Respts.

That where promissory notes are executed and delivered, and money borrowed thereon, and thereafter are renewed by the giving of other promis-

sory notes, the defense of the statute of limitations is of no avail when the action is brought upon the renewed note within six years from the time the renewal note was due, even though the original notes were given many years before.

That where an administrator borrows money for the purpose of preserving and caring for the estate, suit may be brought against him in the district court.

That where an administrator has borrowed money for the use and benefit of the estate, he has the right to present this to the county court for allowance as part of his expenses as administrator, even though he may not have been authorized by the county court to borrow the money.

That where the administrator borrows money for the use and benefit of the estate, he has the right to present this to the county court for allowance as part of his expenses as administrator, even though he may not have been authorized by the county court to borrow the money.

That where the administrator borrows money for the use and benefit of the estate, and presents the same to the county court for allowance as part of his expenses, it is the duty of the county court to examine the transaction and to allow the same if it be shown that such action on his part was necessary to preserve the estate, and the money borrowed was used for the benefit of the estate. If so found, the county court will allow this item as one of the expenses of administration to be paid out of the assets of the estate.

That under the record in this case, it was error on the part of the trial court to dismiss this action at the close of the plaintiff's case.

That on the retrial, if it be shown that the administrator borrowed the money for the use and benefit of the estate, and the money was furnished for that purpose, the trial court should ascertain the amount, and order the administrator to present the account to the county court as part of his expenses in the administration of the estate in order to determine what portion thereof, if any, the county court will allow to the administrator as part of his expenses in the administration.

Appeal from the District Court of Richland County, Hutchinson, J.

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

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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,

(Continued on next page)

(Continued from page one)

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.

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;