North Dakota Law Review

Volume 42 | Number 1 Article 5

1965

North Dakota Supreme Court Recent Decisions

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NOTE

NORTH DAKOTA SUPREME COURT RECENT DECISIONS

A year ago, the *Review* undertook to examine North Dakota Supreme Court decisions covering a two-year span, from September of 1962 to June of 1964. The response of North Dakota lawyers was encouraging. It was so encouraging, in fact, that the editorial staff of the *Review* decided to sustain the project on a continuing basis. However, to maintain a quality of freshness, the editors believe that more frequent periodic surveys—hopefully two a year—of the court's decisions are in order. Following are brief examinations, topically headed, of some of the most significant decisions handed down by the court during the year ending in June of 1965:

AUTOMOBILES

Guest Statute—In an action for injuries incurred in an automobile accident where the plaintiff was a guest passenger, the Supreme Court affirmed the definition of gross negligence as provided in the guest statute[1] as meaning "no care at all, or the omission of the care which even the most inattentive and thoughtless seldom fail to make their own concern, evincing a reckless temperament and lack of care which is practically willful in its nature."[2] The Court in addition specifically eliminated failure to keep a proper lookout, excessive speed, inadvertance and involuntary dozing without prior warning of the likelihood of sleep as not in themselves constituting gross negligence. *Holcomb v. Striebel*, 133 N.W.2d 435 (N. D. 1965).

Operator's License—An order by a District Court setting aside a revocation of operator's license by the Director of Safety Responsibility Division of the Highway Department was affirmed by the Supreme Court. The Court construed the statutory provisions governing operators' licenses[3] as providing for the right of appeal except where the revocation is mandatory by statute.[4] Mandatory grounds relate solely to the conviction of crimes where the existence of facts sufficient for revocation have been established by a court of competent jurisdiction. In those cases where the Highway Commissioner is required to evaluate the evidence, an appeal is avail-

1. N.D. CENT. CODE § 39-15-03 (1960).
2. Holcomb v. Striebel, 133 N.W.2d 435 (N.D. 1965); Anderson v. Anderson, 69 N.D. 229, 285 N.W. 294 (1939).
3. N.D. CENT. CODE § 39-06-31 through § 39-06-39 (1960).
4. N.D. CENT. CODE § 39-06-31 (1960).

able to insure operators "a judicial determination of the existence of grounds sufficient to cancel their licenses."[5] *Gregoryk v. Safety Responsibility Division*, 131 N.W.2d 97 (N. D. 1964).

CONTRACTS

Consideration—Declaring that forbearance to bring suit for enforcement of claimed legal rights is sufficient consideration to support a promise[6] by the deceased to leave all his property to the forbearer, the Supreme Court of North Dakota reversed a decision which denied the right of a stepdaughter to specific performance of an oral agreement whereby she agreed, following her mother's death, not to make demand upon her stepfather for her interest in her mother's estate. In return the stepfather promised to leave all his property to her, upon his death. The action was brought against the administrator when the deceased died intestate. The court supported the plaintiff's theory that an implied trust was created presumptively by operation of law[7] and that a legal detriment may be sustained by a promise to surrender a legal right, whether such right has substantial value or not.[8] However, the Court did not determine whether the stepdaughter would have prevailed had she commenced and tried an action at the time of her mother's death. It also was apparent that the Court took into consideration the lack of other heirs. *Keen v. Larson*, 132 N.W.2d 350 (N. D. 1965).

CONVEYANCES

Effect of Transfer on Solvency—On a question apparently of first impression in the jurisdiction, the North Dakota Supreme Court has adopted the view of California holding that to find a conveyance fraudulent under Section 13-02-07 of North Dakota Century Code, it is not necessary that the conveyance make the debtor insolvent.[9] Therefore, the Court reversed the trial court and allowed a conveyance to be set aside wherein the debtor conveyed real property to his wife without consideration, when he was pressed for payment of his accounts and threatened with foreclosure proceedings on a large portion of other holdings, even though the conveyance did not render him insolvent. The decision was based upon a similar California statute[10] and decisions rendered under such statute.[11] The Court also adhered to the requirement that it was necessary to prove by clear and convincing evidence that there was actual intent

5. Gregoryk v. Safety Responsibility Division, 131 N.W.2d 97, 99 (N.D. 1964).
6. Frieders v. Frieders' Estate, 180 Wis. 430, 193 N.W. 77 (1923).
7. N.D. CENT. CODE § 59-01-05 (1960); Redman v. Biewer, 78 N.D. 120, 48 N.W.2d 392 (1951).
8. Divide County v. Citizens State Bank, 52 N.D. 29, 201 N.W. 693 (1924).
9. Foss v. Wotton, 3 Cal. App. 2d 384, 44 P.2d 350 (1954).
10. CAL. CIV. CODE § 3439.07 (West 1954).
11. Freeman v. LaMonte, 148 Cal. App. 2d 670, 307 P.2d 734 (1957).

to defraud, hinder or delay creditors.[12] *H. A. Thompson & Sons, Inc. v. Hahn*, 135 N.W.2d 166 (N. D. 1965).

MINES AND MINERALS

Oil Spacing—In a proceeding to review an order of the State Industrial Commission denying an exception to a regular spacing pattern in an oil field, the Supreme Court upheld the Commission. The Court outlines the criterion required to meet the statutory provisions[13] necessary to obtain an exception to a spacing order. First of all, "a spacing order may not deprive an owner or lessee of land of a fair chance to recover the oil and gas in or under his land."[14] An applicant for an exception to prevent confiscation has "the burden of showing that he is entitled to the permit" and that "the well is necessary to protect his right to recover his fair share of the recoverable oil underlying his land."[15] Finally, "the right to be protected against confiscation under the spacing rule is not absolutely unconditional or unlimited,"[16] and where a situation has developed by voluntary acts of the parties after the rule has attached to the property, an exception is not necessitated.[17] *Tenneco Oil Co. v. State Industrial Comm'n.*, 131 N.W.2d 722 (N. D. 1964).

MORTGAGES

Foreclosure as exclusive statutory remedy—Except for those actions authorized by Sections 32-19-04 and 32-19-06 of the Century Code, all actions upon a debt secured by a real property mortgage only, without resort to foreclosure, are barred. Through a misunderstanding, the mortgagee delivered to the mortgagor a satisfaction of the mortgage in the mistaken belief that there was a contract between them for payment of an additional $5,000. In fact, there was no such contract. While the presumption that satisfaction of the mortgage extinguished the debt which it was given to secure was rebutted by conclusive evidence that the mortgagee did not intend to satisfy the debt, the court held that the mortgagee was barred by Section 32-19-07 from maintaining an action for any part of the debt remaining unpaid, because the mortgagee had accepted a payment to satisfy the mortgage without an agreement with the mortgagor as to what the effect of the satisfaction would be. *Loraas v. Connolly*, 131 N.W.2d 581 (N. D. 1964).

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12. Hedden v. Waldeck, 9 Cal. 2d 31, 72 P.2d 114 (1937).
13. N.D. CENT. CODE § 38-08-07 (1960).
14. Tenneco Oil Co. v. State Industrial Comm'n., 131 N.W.2d 722, 724 (N.D. 1964).
15. *Id.* at p. 725.
16. *Ibid.*
17. Atlantic Refining Co. v. Gulf Land Co., 122 S.W.2d 197, 199 (Tex. 1938).

NEGLIGENCE

Assumption of Risk—In a death action where the trial court instructed the jury on contributory negligence, but failed to include assumption of risk, which was pleaded, the Supreme Court reversed the verdict and granted a new trial. Following an earlier opinion which distinguished the affirmative defense of assumption of risk from contributory negligence as operating independently of negligence and proximate cause,[18] the Court held that the plaintiff may have acted with due care but still have negated the defendant's liability had the plaintiff assumed the risk. Assumption of risk is defined as including three elements: "(1) knowledge of a situation that was dangerous beyond that normally inherent in the operation. . . . (2) an appreciation of the danger and a voluntary choice to encounter it, and (3) injury proximately caused by the danger present."[19] *Larson v. Meyer*, 135 N.W.2d 145 (N. D. 1965).

Contributory Negligence—In an action arising out of an automobile collision the trial court instructed the jury on contributory negligence as negligence "cooperating in some degree, though slight, with the negligence of another."[20] The Supreme Court, reversing the decision on other grounds, pointed out that the language "though slight," if not erroneous in this case, should not be given as it tends to confuse and mislead the jury. Judge Lynch, writing the opinion for the Court, distinguishes earlier North Dakota opinions where "slight" or similar language was recognized as being *dictum*[21] or not specifically before the Court on appeal.[22] Slight negligence is said to be no degree of negligence at all but a remote cause and therefore not a proximate or direct cause.[23] *Spalding v. Loyland*, 132 N.W.2d 914 (N. D. 1965).

NEW TRIAL

New Trial as to one or more co-parties—Under the common law rule a new trial as to some joint tort-feasors requires a new trial as to all. Under the modern rule it is generally held that a new trial may be granted as to some of the defendants and the judgment or verdict allowed to stand as to others, if the new trial to some of the defendants does not confuse the issues, and justice does not require a new trial as to all. Although the modern rule is not universally accepted, North Dakota numbers among the majority of jurisdictions which do adhere. Refusing to discard the modern rule, the Supreme Court of North Dakota has held that

18. Borstand v. LaRoque, 98 N.W.2d 16 (N.D. 1959).
19. Larson v. Meyer, 135 N.W.2d 145, 164 (N.D. 1965).
20. Spalding v. Loyland, 132 N.W.2d 914, 918 (N.D. 1965).
21. Clark v. Feldman, 57 N.D. 741, 224 N.W. 167 (1929)
22. Ignatowitch v. McLaughlin, 66 N.D. 132, 262 N.W. 352 (1935).
23. Huey v. Milligan, 242 Ind. 93, 175 N.E.2d 698 (1961).

when a tort judgment against two or more defendants is vacated as to one of them and a new trial granted, the trial court need not for that reason alone vacate the judgment as to any of the others. However, if it appears that because of an interdependence of the right of the defendants, or because of other special factors which would make it prejudicial or inequitable to leave the judgment standing as to the others, then the "substantial injustice" exception to the modern rule would apply.[24] The "substantial injustice" exception is used to accord substantial justice to a co-defendant as to whom no error was committed, but against whom the judgment might work an injustice if left intact.[25] The Court's holding is a reasonable corollary to the express provisions of Sections 32-30-01 (2) and 28-27-29 and Chapter 32-38 of the North Dakota Century Code. *Regent Coop. Equity Exch. v. Johnston's Fuel Lines,* 130 N.W.2d 165 (N. D. 1964).

RECORDS

Microfilming—The North Dakota statutory provision for the use of photography in making county records[26] has been held valid. Whenever the county register of deeds is authorized to do so, by the Board of County Commissioners, he may microfilm the documents, instruments and decrees required to be recorded. In so ruling, the Supreme Court concluded that the statute is not ambiguous, and microfilming, being a process of photography, is a legal method of recording. However, Judge Strutz dissented, maintaining that it was not the intent of the Legislature to make such a "drastic" change to permit microphotographic copies of all recordable instruments. He also said that a microfilm is not a "copy"[27] since it is something from which a copy can be made, thus not readily available to the general public as required. *Rausch v. Nelson,* 134 N.W.2d 519 (N. D. 1965).

SEARCH AND SEIZURE

Exclusionary Rule—The Federal[28] and State[29] Constitutions guarantee the right of individuals to be secure in their persons, houses, papers and effects against unreasonable search and seizure. However, the fruits of such searches and seizures have been admissable in North Dakota Courts.[30] Following the directive of *Mapp v. Ohio,*[31] which applied the federal exclusionary rule to state courts, and *dictum* of an earlier opinion,[32] the Supreme Court reversed a con-

24. McCombs v. Ellsberry, 337 Mo. 491, 85 S.W.2d 135 (1935).
25. Hamilton v. Prescott, 73 Tex. 565, 11 S.W. 548 (1889).
26. N.D. CENT. CODE § 11-10-19 (1960).
27. Blatz v. Travelers Ins. Co., 272 App. Div. 9, 68 N.Y.S.2d 801 (1947).
28. U.S. CONST. AMMEND. IV.
29. N.D. CONST. art. I, § 18.
30. State v. Fahn, 53 N.D. 203, 205 N.W. 67 (1925).
31. 367 U.S. 643 (1961).

viction, of leaving the scene of an accident and for failure to render assistance, on the grounds that prejudicial evidence obtained by an illegal search was inadmissable. The court also adopted the strict rules applied by the federal courts in determining if such constitutional rights have been waived by the defendant.[33] *State v. Manning,* 134 N.W.2d 91 (N. D. 1965).

TAXATION

Commission Fees—The taxing power is exclusively a legislative function.[34] A fee exacted on potatoes being shipped with the amount to be determined and collected by the North Dakota Potato Development Commission under the Potato Improvement, Marketing and Advertising Act[35] was held to be an excise tax and therefore an unconstitutional delegation of legislative power to an executive board. The Court reasoned "that executive boards and officers may not be authorized to exercise uncontrolled discretion in determining the amount of a tax" or the "area or areas in which they apply."[36] This ruling raises serious constitutional questions regarding other statutory boards and commissions which operate from fees collected in such manner. The North Dakota Livestock Sanitary Board, for example, has discretion as to what will be the fees charged by the brand inspector,[37] while on the other hand the North Dakota Wheat Commission[38] and the North Dakota Dairy Products Promotion Commission operate on a fixed statutory fee. *Scott v. Donnelly,* 133 N.W.2d 418 (N.D. 1965).

WATER AND WATER COURSES

Accretion and Reliction—Although it appears to be commonly accepted that where land, which was riparian at the time of an original survey, is lost by erosion so that nonriparian land becomes riparian, and land is thereafter built by accretion to the land which was originally nonriparian, extending over the location formally occupied by the original riparian land, the title to such accreted land becomes that of the non-riparian land owner, the Court concluded otherwise. In order to arrive at this decision it was necessary for the Court to review its previous rulings and to attempt to determine the intent of the North Dakota Legislature by construing the applicable statute.[40] In so doing, it was found the statute was not intended to be applied where the result would be to divest title in

32. State v. Govan, 123 N.W.2d 110 (N.D. 1963).
33. Cross v. United States, 325 F.2d 629 (D.C. Cir. 1963).
34. N.D. CONST. art. XI, § 175.
35. N.D. CENT. CODE Ch. 4-10A (1960).
36. Scott v. Donnelly, 133 N.W.2d 418, 419 (N.D. 1965).
37. N.D. CENT. CODE § 36-22-03 (1960).
38. N.D. CENT. CODE Ch. 4-28 (1960).
39. N.D. CENT. CODE Ch. 4-27 (1960).
40. N.D. CENT. CODE § 47-06-05 (1960).

the riparian owner forever and vest title in the non-riparian owner to the land rebuilt where the former land of the original riparian owner was located. Judge Burke, in dissenting, agreed that if weight were to be given to case law only the minority view would be the better reasoned, but he asserted that the statute had been the law of Dakota Territory and the State of North Dakota since 1870, and there was no basis upon which to modify the clear language of the statute which states that accretions to the bank of a stream belong to the owner of the bank. *Perry v. Erling*, 132 N.W.2d 889 (N. D. 1965).

WILLS

Restraint of Alienation—Generally, when a will passes real estate in fee simple to the devisee, any attempt by the testator to restrain the devisee's power of disposition is repugnant to the nature of the estate given.[41] Therefore, when a testatrix conveyed title to certain real estate in fee simple with the condition the beneficiaries were to give her son "first option" to buy, the Court ruled this was a limitation contrary to the interests created and void under North Dakota Statutes.[42] Even though the son's "option" was held to be invalid, the Court suggested that had the testatrix given defeasible titles the problem of what would happen to the titles if the devisees failed to grant the son's option would no longer exist, thus the beneficiaries' interests would have been subject to a valid limitation. *Holien v. Trydahl*, 134 N.W.2d 851 (N. D. 1965).

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41. Langsten v. Wooten, 232 N.C. 124, 59 S.E.2d 605 (1910).
42. N.D. CENT. CODE § 47-02-26 (1960).