



1966

District Court Digest

North Dakota Law Review

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DISTRICT COURT DIGEST

CRIMINAL LAW—SEARCH AND SEIZURE—ADMISSIBILITY OF EVIDENCE PRODUCED BY SEARCHES WITH AND WITHOUT WARRANTS.—*State v Bullis*, FIRST JUDICIAL DISTRICT, GRAND FORKS COUNTY, HAROLD M. HAGER, DISTRICT JUDGE. (June 20, 1966) Hearing on a motion to suppress evidence.

The Bismarck police, pursuant to a warrant of arrest, arrested the defendant, Bailey, (one of three co-defendants), in front of a local motel. Upon arrest they searched his person, and discovered a key to a room in the motel, which was being used by the three co-defendants. The officers took Bailey with them to the room, opened and briefly searched it.

Bailey was then taken to the city police station, and a stakeout was placed on the motel room. Arrest of the other co-defendants followed.

None of the co-defendants were allowed to make a phone call until they were removed to the Valley City police station where they were wanted on suspicion of robbery

While all the defendants were in the Bismarck police station, the police returned to the motel room and gathered up all of the defendants' property. They also, at this time, seized a pickup truck belonging to the defendant, Collins. The property and the pickup were taken down to the police station and the police garage, respectively

The pickup was thoroughly searched at the garage. No search warrant was issued for either the search at the room, or the search of the pickup. The search of the pickup yielded burglary tools and \$2,000 in cash. These items were found in a box welded into the bumper and secured by a cotter pin.

The decision rendered was based on a categorization of the four searches into two types:

First, the search of the defendant, Bailey, immediately after his arrest, and the search of his room in his presence; and

Second, the search of the room, without a search warrant, after all the defendants were being held at the police station, and the search of the pickup, also without a search warrant, at the police garage.

The Court held that the motion in regard to the evidence produced as a result of the searches in the first category would be denied as these searches were reasonable and were "clearly incidental" to a valid arrest.

In regard to the searches in the second category, the motion was granted. Although the Court conceded that in North Dakota the reasonableness of a search without a warrant must be determined in relation to the facts in each case, *State v Chaussee*, 138 N.W.2d 788 (N. D. 1965), the situation in this case did not meet the test of reasonableness. The searches were not contemporaneous, nor were they necessary. The police had all the defendants in custody thus there was no chance for destruction or secreting of evidence, nor, in the case of the pickup, was there any chance that the locus of the search could be removed from the jurisdiction, as it had been impounded at the police garage. Thus, there was no reasonable excuse for not procuring a warrant prior to the search of the motel room and the vehicle.

EMINENT DOMAIN—DAMAGE BY OVERFLIGHTS—UNITED STATES AND STATE OF NORTH DAKOTA NOT LIABLE IN INVERSE CONDEMNATION FOR OVERFLIGHTS OF NATIONAL GUARD AIRCRAFT—*Griffeth v City of Fargo*, FIRST JUDICIAL DISTRICT, CASS COUNTY, HAROLD M. HAGER, DISTRICT JUDGE (July 11, 1966)

Inverse condemnation proceedings against the City of Fargo by a group of landowners living near the Fargo Airport. Plaintiff claimed that the overflight of their property by National Guard jets has caused such damage as to constitute a taking without compensation. Defendant brought a third-party action against two commercial airlines, the Air National Guard, the United States, and the State of North Dakota.

The United States, and the State of North Dakota filed motions to dismiss.

The District Court dismissed the third-party action against the United States on the basis of sovereign immunity. Although Congress has provided for suit against the United States in certain instances, it has also provided that the Federal Courts are the proper forum for such suits. Thus the United States is still immune from suit in State Courts in those areas in which consent to suit has been given.

In regard to the State of North Dakota, the District Court determined that the only connection the state had with the airport was due to the fact that the Air National Guard had leased facilities at the Airport. Thus the State, which had fulfilled the terms of its lease, was not in such a position of sovereignty as to make it liable for damages to Plaintiffs' property in an inverse condemnation. Action dismissed as to the State of North Dakota.

INSURANCE—COSTS OF DEFENSE—SECONDARY INSURER WHO DEFENDS MAY RECOVER PORTION OF COSTS FROM PRIMARY INSURER—*State Farm Mutual Automobile Ins. Co. v. National Farmers Union Property and Casualty Co.*, FIRST JUDICIAL DISTRICT, GRAND FORKS COUNTY, HAROLD M. HAGER, DISTRICT JUDGE. (June 29, 1966).

Suit by secondary insurer to recover costs of defense from primary insurer. (The question of primary and secondary coverage had been previously adjudicated in a Federal Court.) The primary insurer (defendant) had issued a policy to one Tande, the owner of one of the cars involved in the accident. The policy had \$10,000 and \$20,000 personal injury liability limits, and the standard agreement to defend. The secondary insurer (plaintiff) had issued a policy, with \$50,000 - \$100,000 limits, to the husband of the driver of the car. The type of accident, and the driver of the Tande car were under the coverage of both policies.

As a result of the accident, suit was brought against the driver of the Tande car to recover total damages of \$63,000. Defendant refused to defend this suit, and Plaintiff undertook the defense. Following trial, a judgment was entered against the insured in the amount of \$15,215.10. This was settled for the sum of \$9,000.

The District Court held that the Plaintiff was to recover that portion of the costs as was in proportion to the policy limits of the Defendant's policy compared to the amount of the amount of the judgment, in this instance \$10,000 to \$15,215.10, or roughly two-thirds of the costs.

The Court reasoned that the Plaintiff couldn't recover the total costs, as that, in effect, would give it a double recovery - first of the costs themselves, and second, of the premium paid in consideration of the duty to defend.

Neither could the Plaintiff be denied any recovery, as that would allow Defendant to shirk its duty, and still retain the premium paid in consideration of said duty

The Court felt that recovery under the doctrine of equitable subrogation in accordance with the proportional solution above set out would do the most substantial justice in this case.

NEGLIGENCE—SUMMARY JUDGMENT—SUMMARY JUDGMENT NOT GRANTED WHERE ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE ARE AT ISSUE.—*Lien v Holweger*, FIRST JUDICIAL DISTRICT, GRAND FORKS COUNTY, HAROLD M. HAGER, DISTRICT JUDGE. (July 15, 1966).

Plaintiff and a co-employee were working for the Defendant remodeling a schoolhouse. They were working on top of a scaffold provided by the Defendant. The scaffold had been used, by Plaintiff and the co-employee, for approximately a week before the accident. While they were removing Celotex sections from the ceiling of the schoolhouse, the scaffold tipped and fell, and the Plaintiff was injured.

Plaintiff brought an action against the employer, who moved for a summary judgment on the basis of the pleadings, answers to interrogatories, and a deposition of the Plaintiff. The District Court denied the motion stating that the issues of negligence, contributory negligence, fellow servant rule, simple tool doctrine, and assumption of risk were before the Court, and that according to North Dakota law these issues were for the jury, especially in the case of contributory negligence and assumption of risk.

PROCEEDINGS
of
SIXTY-SIXTH
ANNUAL MEETING

STATE BAR ASSOCIATION
OF NORTH DAKOTA

DICKINSON, NORTH DAKOTA

June 23-24, 1966

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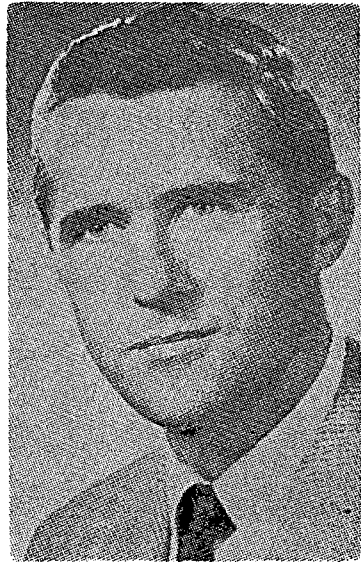
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