North Dakota Law Review

Volume 19 | Number 4 Article 4

1943

Our Supreme Court Holds

North Dakota Law Review

Dwelling House Insurance Co. v. Brodie, 52 Ark. 11, 11 S. W. 1016, 4 L. R. A. 458 (1889).

"The information given to the agent operated as notice to the company, and it having accepted the premium and assumed the risk, it must be held that the company has waived the condition, or if not, it is estopped from urging its breach as a defense. To permit such a defense would be highly unjust and iniquitous. It would shock the sense of right and fair dealing to permit money to be obtained under such assurances, and to permit the company to say, we are not bound, and did not intend, on our part, to be bound for any loss that might occur; we misled and deceived you into paying the premium, and although we did not intend to be bound, and knew we were not, still we will keep the premium, and you must suffer the loss. This is the substance of the defense and such a defense cannot be allowed to prevail." St. Paul Fire & Marine Insurance Co. v. Wells, 89 Ill. 82 (1876).

This writer is of the opinion that the court would have been justified in decreeing that the insurer was estopped from denying liability under the policy. In the case under discussion the federal court was bound to apply the law of the state where the contract was consummate and which happened to be New Jersey. It is highly probable that if the same court were trying an identical case and applying North Dakota law that the result would be contra to the New Jersey decision and in accord with the rule laid down in North Dakota and a majority of the state courts.

TELMAR E. ROLSTAD
Law Student
University of North Dakota.

OUR SUPREME COURT HOLDS

In Osage National Bank, a National Banking Corporation, Pltf. and Respt., vs. Oakes Special School District, a Public Corporation, Deft. and Applt.

That where the Legislature, under the State Constitution, had the power to authorize a school district to increase its debt limit upon securing the assent of a majority of the voters voting at an election held within the district, it could by retrospective legislation validate an indebtedness of a district which at the time it was incurred, was within the limit the Legislature had power to authorize and to which limit the electors of the district had assented at an election, which, though previously unauthorized, was such a proceeding that it would have constituted a valid election had it had prior legislative sanction.

That Chapter 278, Laws of North Dakota 1923 is, for the reasons stated in the opinion, held to validate certain warrants issued by the defendant.

Appeal from the District Court of Dickey County, Hon. W. H. Hutchinson, Judge. AFFIRMED. Opinion of the Court by Burke, J.

In State of North Dakota, Respt., vs. W. F. McClelland, Deft. and Applt.

That the right to a new trial is purely statutory and a trial court has no jurisdiction to entertain or grant a motion for a new trial noticed for

hearing after the statutory time for making a motion for new trial has expired.

That a motion for a new trial and an appeal from a judgment are separate remedies and the taking of an appeal does not extend the time within which a motion for a new trial must be made.

That the right of appeal is not conferred by the Constitutional. An appeal to the Supreme Court may be had only under such regulations as may be prescribed by law. (Sec. 109 N. D. Const.)

That an appeal from a judgment only, brings to the Supreme Court for review errors of law committed by the trial court and appearing in the record of the action which have been preserved and presented in the manner prescribed by statute.

That sufficiency of the evidence to sustain the verdict, not challenged either by motion for a new trial or for an advised verdict, cannot be considered on an appeal from the judgment alone.

That in order to secure a review of the propriety of instructions to the jury or the refusal of requested instructions, exceptions must be taken in the manner prescribed by sections 10824 and 10825, Comp. Laws N. D. 1913.

That where a witness answered an ambiguous question on cross-examination, it was not error to permit her to explain on redirect examination what she understood the question to be and to state what she meant by her answer.

Appeal from the District Court of Morton County, Hon. G. Grimson, Special Judge. AFFIRMED. Opinion of the Court by Morris, Ch.

In Edwin M. Bonde, Fred B. Bonde, Fannie E. Brownson, Flora K. Cooper, et al., Respts., vs. William Stern and B. G. Tenneson, Applts.

That an appeal does not operate as a stay of execution or performance of the judgment or order appealed from. (C. L. 1913, Sections 7825-7833), unless the appeal is one taken by the state, or a state board, in a purely official capacity, or a municipal corporation within the state. (C. L. 1913, Section 7834).

That stay of proceedings pending an appeal is an independent collateral proceeding, and the appellate proceeding proper remains wholly unaffected the reby. Absence of such stay, or defects rendering the stay order invalid, do not affect the right of the appellant to a review of the judgment or order appealed from.

That under the laws of North Dakota it is the trial court that is vested with authority to fix the amount of a stay bond and the conditions on which a stay may be had pending appeal to the supreme court in all cases where the amount of a stay bond or the conditions on which a stay may be had are required to be fixed by a court; and it is only "when the court or the judge thereof from which the appeal is taken or desired to be taken shall neglect or refuse to make any order or direction not wholly discretionary, necessary to enable the appellant to stay proceedings upon an appeal", that "the supreme court, or one of the justices thereof" may make "such order or direction." (C. L. 1913, Section 7835).

That an order overruling a demurer to a complaint is appealable (C. L. 1913, Section 7841, sub-division 3); and a defendant in a civil action has an absolute and unconditional right to appeal from an order overruling his demurrer to plaintiff's complaint; but he does not have such right to a stay of enforcement of such order pending appeal.

That whether there shall be a stay of proceedings pending an appeal from an order overruling a demurer to a complaint is a matter within the discretion of the trial court. The trial court may order a stay, and pre-

scribe the conditions on which the stay shall become effective, and as a part of such conditions he may order that the appellant furnish an undertaking in such sum and to such effect as the exigencies of the case warrant. (C. L. 1913, Section 7832).

That a stay order may be vacated for good cause shown. The application to vacate should be made to the court which ordered the stay; and where a district court has ordered a stay of proceedings under section 7832, C. L. 1913, application to vacate the stay should be made to the district court, it should not be made to the supreme court, in the first instance. Moore vs. Booker, 4 N. D. 543, 62 N. W. 607 distinguished.

That where the district court as a condition for stay of proceedings pending an appeal from an order overruling a demurer to a complaint required appellant to furnish a bond in a designated sum and to a specified effect, the stay order is not rendered invalid by the fact that notice of application for the stay was not given to the adverse party as prescribed by section 7836, C. L. 1913; but the stay order will remain in force, and be deemed binding and effective until it is set aside.

That an order staying proceedings pending appeal from an order overruling a demurrer to a complaint suspends the right of the plaintiff to proceed on the complaint, and he is not entitled to have defendant adjudged to be in default and to have judgment rendered in contravention of the stay order.

Application by plaintiffs for a writ commanding the district court to hear and determine plaintiffs' motion for default and for judgment; or for an order setting aside a stay order; and directing the district court to hear and determine plaintiffs' motion for default and for jujdgment.

DENIED. Per Curiam.

In Otter Tail Power Company, a corporation, Pltf. and Applt., vs. Ethel Baker and Frank Pfeifer, Defts., Frank Pfeifer, Deft. and Respt.

That this is a companion case to Otter Tail Power Company vs. Von Bank, —— N. D. —— N. W. 2d ——. All the questions of law raised in the Von Bank case were raised in the instant case and their determination in that case controls here.

That in the instant case plaintiff also predicated error on certain rulings on questions of evidence. The record is examined and held for reasons stated in the opinion, that the rulings challenged were erroneous and prejudicial.

Appeal from the District Court of Cass County, Holt J Proceeding in eminent domain to condemn an easement for a right of way for an electric transmission line. From a judgment for the defendant Pfeifer for damages, plaintiff appeals.

REVERSED. Opinion of the court by Nuessle, J.

In Esther Groff, Pltf. and Applt., vs. State of North Dakota doing business as Workmen's Compensation Bureau, Deft. and Respt.

That a claim to share in the workmen's compensation fund should be filed with the bureau within sixty days from the date of the accident but the bureau, in its discretion, may permit the filing of the claim after the expiration of the sixty days, provided the claim be filed within one year from the date of the accident.

That where one, claiming to share in the workmen's compensation fund, fails to file his claim with the bureau within sixty days from the date of the accident it is incumbent upon the claimant to show to the bureau a reasonable cause for the delay.

That where the workmen's compensation bureau refuses to permit the filing of such a claim on the ground that no reasonable cause was

shown for failing to fiel the claim within sixty days from the date of the accident the determination of this issue by the bureau is subject to review upon appeal; but such review must be based upon the showing made to the bureau.

That where the workmen's compensation bureau, after a hearing, refuses to permit the filing of the claim after the expiration of the sixty days from the date of the accident on the ground that no reasonable cause for the delay was shown the decision of the bureau will be affirmed on appeal when the evidence presented to the bureau and the record upon which its holding was made are not presented to the appellate court for review, the presumption being that the bureau exercised its discretion properly.

That where one claims the right to share in the workmen's compensation fund, because engaged in a hazardous occupation, it is incumbent upon the claimant to show he engaged in such hazardous employment under an appointment or contract of hire express or implied, oral or written, but if such employment is both casual and not in the course of the trade or business of the alleged employer the claimant is not such an employee as is protected by the fund.

Appeal from the district court of Stutsman County, Swenson, Special J. AFFIRMED. Opinion of the Court by Burr, J. Burke, J. Concurring spec.

In State of North Dakota for the Benefit of the Workmen's Compensation Fund of the State of North Dakota, and J. T. Wiese, Pltfs. and Applts., vs. City of Williston, North Dakota, a municipal corporation, and Joseph H. LeDosquet, Defts. and Respts.

That where on an appeal taken pursuant to section 7846, C. L. 1913, as amended by chapter 208, Laws 1933, the appellant demands a retrial of the entire case, the case must be decided on the record already prepared in the trial court, and the findings of the trial court must be given appreciable weight by the supreme court, especially when based upon the testimony of witnesses who appeared in person before the court.

That in an action for damages for injuries sustained by a person who fell into an excavation made incident to the laying of water and sewer pipes leading from the city mains to a dwelling house, the whole record is reviewed, and it is held, for reasons stated in the opinion, that the trial court did not err in finding that the party so injured failed to exercise his due care, and that such want of care on his part contributed proximately to the injuries sustained.

(Syllabus by the Court)

From a judgment of the district court of Williams County, plaintiffs' appeal. AFFIRMED. Opinion of the court by Christianson, J..