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M. L. McBride

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M. L. McBride, Editor

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STARE DECISIS — WHERE AWAY

Nowadays we wonder whether our ideas on what this term means are not becoming slightly mixed. To abide by the decided cases takes in a lot of territory. Facts alter cases but not the law. Perhaps to limit the term to the law in the particular case would make it a small doctrine but in establishing reliability and stability by decision we should not lose sight of equity. The courage of courts is in the exception and not the rule. No rule should be so hard and fast that with impunity it disregards inevitable change. But a variant from it must and should avoid retrospective application which visit unjust consequences on vested rights.

While we are a code state let's not go too far afield from the "characteristic" principle of the common law that gave this very principle birth. It drew its life from the equity in the case, from the exercise and right of justice to adjust the hard rule of law to fit the circumstances of the case.

And there is no reason why its practice should not be as flexible and adoptable to change as it was in its inception. It was then a legal servant— not our lord and master.

Though we want stable and reliable rules in our decisions. Our present situation in the legal field is at least partially due to a disregard of the principle of

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progress in the ever expanding administration of justice under new and changing conditions.

Of course our courts should distinguish the change—but brevity is still the soul of wit—and it can well be repeated that "adequate" brevity in this constantly increasing stream of the legal opinions of our courts would be much appreciated by the profession.

And while we are not advocates of statutory control of the decisions or the fixing of rules by that method to obtain stability, our labor is still an endless organic process to insure law to the undying body of society, it is still to the accurate, keen, just and fearless spirits of our profession to function and perform in the life of the law as it has been in the past. It is still not words but things that make the body of our law and if you haven't given much thought to old Stare Decisis you better begin to do so, before he gets out of control.

SEC.

EMERGENCY LAWS

For the past several years, your association has arranged with the Bismarck Tribune for the publication of the Emergency Laws and they have been sent to each member as a part of a regular issue of the Tribune. They are sent in this way to save expense. Each year we have paid part of the cost and have assisted in selecting the laws to be published. You can readily understand that it would be a useless expenditure to publish all of the Emergency Laws. For instance the renewal of the sales tax law; some repeals; some appropriations, etc. We intend to include everything of general interest, as well as those that are vital and important.

However, it takes time to obtain copies of all such laws. The force in the Secretary of State's office have their regular work and are getting out mimeograph copies of these laws as rapidly as possible. Those to be printed have been selected and are being set up for publication as fast as received from the Secretary of State's office. Headings on all of those not printed in full will be given, so that, if necessary, copies can be secured from the Secretary of State. We hope to have the publication in your hands within the next week or ten days.

SEC.

BANKRUPTCY - FRAZIER-LEMKE ACT
NATURE OF PROCEEDINGS

A farmer-debtor seeks to have the land appraised and be allowed to redeem it at that appraised amount. The secured creditor, however, claimed that according to Section 75 subsection (s) (3), its request for a sale took precedence over any such

right of the debtor. The lower courts affirmed the contentions of the secured creditor. Upon appeal to the Supreme Court it was held: the debtor was entitled to have the property reappraised or the value fixed at a hearing; that the value having been determined at a hearing in conformity with his request, he was then entitled to have a reasonable time, fixed by the court, in which to redeem at that value; and that if he did so redeem, the land should be turned over to him free and clear of encumbrances and his discharge granted. Only in case the debtor failed to redeem within a reasonable time would the court be authorized to order a public sale. Modified and remanded. Wright v. Union Central Life Insurance Company et al, 61 Sup. Ct. 196 (1940).

To see the effect of this case it might be well to consider the background as set out by prior decisions. Under the provisions of subsection (s) (3) the farmer is given the right to pay the amount of the appraisal into court and to secure title to and full possession of the property at the end of three years or at any time prior thereto. However, this is followed by a proviso that upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. This provision had been construed by the Supreme Court to give the secured creditor a right to bid at the public sale. In the words of the court — "but it must be assumed that the mortgagor will not get the property for less than its actual value. The act provides that upon the creditor's request the property must be appraised or sold at public auction; and the mortgagee may by bidding at such sale fully protect his interests." Wright v. Vinton Branch, 300 U. S. 440, 57 Sup. Ct. 556 (Va. 1937). As to the question whether the debtor had a right to purchase at the appraised value, quoting the words of the court in In re Anderson, 22 F. Supp. 928 (D. C. N. D. 1938) "this debtor apparently assumed that he could force the mortgagee to accept the appraised value. The Supreme Court in Louisville Joint Stock Land Bank v. Redford, 295 U. S. 555, at page 580, 55 Sup. Ct. 854, 859, 79 L. Ed. 1593, 97 A. L. R. 1106, said: 'this right of the mortgagee to insist upon full payment before giving up his security has been deemed of the essence of a mortgage.'" As a result of these decisions ". . . if the provisions regarding a public sale are strictly interpreted to permit creditors to demand public auctions arbitrarily and automatically and to bid the full amounts of their claims at such sales arbitrarily, it is evident that a farmer's hope of retaining his farm at its fair value is dependent entirely on the whim of his secured creditor." Alfred Letzler, Bankruptcy Reorganizations for Farmers, (1940) 40 Col. Law Rev. 1133, 1153. In In re Shenorhokian, 22 F. Supp. 695 (S. D. Cal. 1938) at page 696, the court said: "the right of a secured creditor to the amount of his debt or ultimately to bid that amount at a sale of the property . . . cannot be taken away from the creditor."

In the light of these decisions it would seem that the purpose and object of the FRAZIER-LEMKE ACT had been violated. In

a congressional committee report it was stated: "the object of section 75 is to save and protect the farmer's home and farm. Obviously that cannot be done if the mortgagee says 'I do not care what the value is. I will bid the full amount of the mortgage.' Vengeance and hatred should not be permitted by Congress or by courts when it has for its object the destruction of a home." Sen. Rep. No. 1045, 76th Cong., 1st. Sess. (1939). In a comprehensive and well-written article on this point (Bankruptcy Reorganizations for Farmers, supra), the author stated in footnote 73, p. 1155, "doubts have been expressed as to the constitutionality of a complete denial to creditors of the right to have a public sale and to bid thereat. . . . But a limited prohibition effected through a farmer's right to take the property at a fair appraised value would not seem an unreasonable requirement or an unconstitutional deprivation of any genuine property right." By the court's latest decision in the principal case this suggestion has been fulfilled.

What is the present position of the farmer-debtor? He now has an increased and effective bargaining power to aid in bringing about a composition agreement under section 75 subsections (a) to (r). Up to this time this section has been practically useless because the creditor could always have his public sale and bid the full amount thereof. There was no incentive for him to accept a less amount in full settlement. Now, however, if the creditor refuses the composition agreement presented by the farmer, he suffers the chance that upon appraisal the value may be set at a lower figure than that offered by the farmer. He, of course, now has the absolute prior right to purchase at that appraised value before a public sale can be demanded by the creditor. It would appear, then, that the Supreme Court by the decision in our instant case has put teeth in the FRAZIER-LEMKE ACT by permitting the farmer to secure part of that relief which it was the ultimate purpose of the Act to give. However, there is still an opening for the creditors under subsection (s) (3) which reads, "if, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this act." Although the phrase "unable to refinance" appears to give the creditor a lenient method to terminate the three-year stay, the court has interpreted this section to the effect that a farmer under this section is entitled to a three-year stay, which can be terminated prior to the end of the three years only if he fails to comply with the provisions of the law or with the orders of the court. Borchard v. California Bank, 107 F. (2d) 96 (C. C. A. 9th, 1940). "Under this interpretation, the court would not be authorized to terminate the stay and order the property sold prior to the end of the three-year period merely upon a showing that the debtor could not be rehabilitated." Bankruptcy Reorganizations for Farmers, supra, page 1149. However, the court was not too explanatory on this point and con-

sequently if the provisions of subsections (s) (3) are construed strictly, there is the questtion of what is meant by "inability to refinance" and also when may the creditor use this as a basis for a sale. In the case of Wright v. Vinton Branch, supra, the court appeared to take the stand that there must be evidence only after a "reasonable time" that the debtor is unable to refinance himself, and the case of Bartels v. John Hancock Mutual Life Insurance Company, 100 F. (2d) 813 (C. C. A. 5th, 1938), aff'd, 308 U. S. 180, 60 Sup. Ct. 221 (1939), would seem to interpret the "reasonable time" liberally. Nevertheless, the Supreme Court held in the instance case that even though the creditor does secure a termination of the three-year stay, the debtor still has the right to purchase at the appraised or reappraised value prior to a public sale.

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COURTS—AUTHORITY OF STATE DECISIONS IN FEDERAL COURTS

In an action to compel a corporation to restore remaindermen's rights in shares of stock which the corporation had wrongfully transferred to a life tenant without any disclosure of the limitation appearing upon the certificate, an intermediate appellate court of Ohio denied relief upon the ground that under Ohio law it was a prerequisite to recovery that remaindermen allege and prove demand upon the corporation to restore the remaindermen's rights, and that corporation had refused said demand. Demand was then made by the remaindermen and suit was instituted in a federal court, there being diversity of citizenship. Held, that federal courts are bound to apply a decision of an intermediate appellate state court as the "state law," when there has been no determination of the point in question by the state supreme court, and in the absence of persuasive data that the highest court of the state would decide differently. West et al. vs. American Telephone and Telegraph Company, 311 U. S. —, 61 S. Ct. 179, 85 L. ed. 146 (Ohio, 1940).

This is the farthest the Supreme Court has ever extended the doctrine of "state law" as defined in Sec. 34 of the Judiciary Act of 1789, 28 U. S. C. A. Sec. 725, 8 F. C. A. Tit. 28 Sec. 725; 28 U. S. C. Sec. 726; said provision reading: "The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply."

The construction of this section as announced in Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865 (1842), was followed for almost a century, and with increasing dissatisfaction by many judges and attorneys. In brief, the Swift case held that "state law" under

Section 34 applies only to positive state statutes and their interpretation by local tribunals and to local usages of a fixed and permanent nature, but not to questions of a more general character. But finally by its decision in Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, 114 A. L. R. 1487 (1938), the Supreme Court ended the checkered career of Swift v. Tyson, supra, with its doctrine of general federal law, ruling that the law to be applied in any case is the law of the state, whether declared by the state legislature in a statute or by the highest state court in a decision, and whether it be a matter of "general" law, or "local" law, there being no federal common law. Of course constitutionally recognized federal fields, such as bankruptcy, remain unaffected.

The main point to be noted in the recent case of West et al. v. American Telephone and Telegraph Company, supra, is that it went a step further than Erie Railroad Company v. Tompkins, supra, and held that federal courts are bound to follow decisions of a county court of appeals, in the absence of applicable decisions by the State Supreme Court. There is only one previous federal decision in accord with the doctrine announced in the West case. In re Shyvers, 33 F. Supp. 643 (1940), holds that a decision of a California District Court of Appeals, rehearing of which was denied by the California Supreme Court, is to be regarded as binding upon federal courts in California. On the other hand there have been numerous recent federal decisions to the contrary, holding that federal courts are not bound to follow decisions of intermediate appellate state courts. The Court states in the West case that decision of an intermediate appellate state court is not to be disregarded by a federal court, unless it is convinced by other persuasive data that the highest court of the State would hold otherwise. The question arises, what is meant by other persuasive data? It could not be a decision of the state supreme court on the same point as such decision would be controlling in the case under determination. It therefore seems that "persuasive data," as used, refers either to cases decided by the state supreme court which, although not in point, are similar to the immediate case; or that there has been some indication by dictum from the state supreme court that the point would be decided in a certain way. Conversely, the Court appears to indicate that inasmuch as that in the West case the Ohio Supreme Court had refused to review the decision of the intermediate appellate state court, this might be "persuasive data" that the State Supreme Court would be in accord with the inferior state court, thus making a stronger case in favor of following the decision of intermediate state court by the federal court.

What is to be done in the case where there are no state decisions for the federal courts to follow? The general rule seems to be that the point will be determined in light of general jurisprudence on the subject, and of state decisions on analogous question. Life. Assur. Assoc. of U. S. vs. First National Bank of Birmingham, 113 F. (2d) 272 (1940). Thus federal courts

may yet, just as state courts, have to ascertain common law points of first impression in the jurisdiction.

In conclusion, what is to be the "state law" where there are two or more appellate state courts in conflict in their decisions, and no State Supreme Court holding? When the supreme court decisions of the state are in conflict, the later decision is controlling on the federal court as expressing the present state law. Dayton and Michigan R. Co. v. Commission of Internal Revenue, 112 F. (2d) 627 (1940). It is submitted that the same method could be used in respect to intermediate appellate state courts, or possibly the law as determined by the state appellate court division in which the federal court in question is sitting could be used as the proper reference. In time, no doubt, the questions arising from the decision in the Erie Railroad Company case will be answered, as they come up before the United States Supreme Court, and the principal case is one helpful as a partial clarification of what is meant by "state law."

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OUR SUPREME COURT HOLDS

In Christine Messersmith, Pltf. and Applt., vs. Leo R. Reilly et al., Defts. and Respts.

That a promissory note containing a provision to pay interest at a rate which is lawful at the time the note is executed is not rendered usurious by the execution of a subsequent supplementary contract agreeing to pay interest in excess of the lawful rate as consideration for the extension of the time of payment of the original note.

That in the absence of legislative intent showing the contrary, a statute is deemed to act prospectively only; and legislation reducing the rate of lawful interest which may be charged, enacted subsequent to the execution of a note providing for interest at a rate then valid, does not taint the promissory note with usury.

That where after the execution of a promissory note, providing for the payment of interest at a valid rate, a contract is made to pay interest at a usurious rate, the payments of interest under such second contract must be credited upon the principal; but the rate specified in the promissory note stands. Appeal from the judgment of the District Court of Stark County; Hon. Harvey J. Miller, Judge. AFFIRMED. Opinion of the Court by Burr, Ch. J.

In State of North Dakota ex rel Reo L. Knauss, Petr., vs. Joseph Kohler, as Sheriff of Burleigh County, Respt.

That where a defendant has been convicted in a police magistrate's court of violating a city ordinance and sentenced to both fine and imprisonment, he may appeal to the district court from a judgment of conviction within ten days from the pronouncement of such judgment.

That where, in appealing from a police magistrate's court to a district court, the appellant files a notice of appeal which has not been served on the city attorney, and also files an undertaking on appeal limited in amount

which is approved by the magistrate and then certifies the record to the district court and release the appellant from custody, the magistrate may not ignore the appeal thus pending and remand the appellant to custody.

Original application for Writ of Habeas Corpus by Reo L. Knauss, Petitioner entitled to Writ. Opinion of the Court by Morris, J.

In the Federal Land Bank of St. Paul, a body corporate, Pltf. and Applt., vs. Bismarck Lumber Company, a corporation, et al., Defts. and Respts.

That the tax imposed by the State Sales Tax Act (Chapter 249, Session Laws 1937) is laid upon the buyer and not upon the seller. Jewel Tea Company vs. State Tax Commissioner, 70 N. D. —, 293 N. D. 386.

That the entire power of taxation abides in the states and except as restrained by the Constitution of the United States, the power of the states to tax is absolute.

That the test as to whether a tax laid on a federal instrumentality is constitutional and valid, is, does it hinder or embarrass the instrumentality in the performance of its governmental functions. If it does not, it is valid.

That the tax laid under the State Sales Tax (chapter 249, S. L. 1937) on sales to a federal land bank of lumber and other building material to be used in the conservation and repair of buildings and fences on farm lands acquired by the bank through the foreclosure of mortgages securing farm loans made pursuant to the Federal Farm Loan Act (Chapter 245, 39 Stats. 330, 12 U. S. C. A. sections 641 et seg, and acts amendatory thereto) is, for reasons stated in the opinion a valid and constitutional tax.

From a judgment of the District Court of Burleigh County, Hon. Fred Jansonius, Judge, plaintiff appeals. AFFIRMED. Opinion of the Court by Nuessle, J. Christianson, J. dissents. Morris and Burke, JJ not participating. Swenson and Grimson, District Judges sitting in their stead.

In Ernest E. Ostmo, Pltf. and Respt., vs. Alfred Tennyson, Deft. and Applt.

That on an appeal from an order denying a motion for a new trial, this court will not consider a second motion for a new trial made after the appeal and which is not included in the appeal.

That the fact that a witness was one of the bailiffs in charge of the jury during its deliberatitons is not in itself reversible error in the absence of a showing of prejudice to the appellant.

That upon an appeal from an order denying a motion for a new trial, this court does not review any alleged errors not brought to the attention of the trial court upon the hearing of the motion.

That where, upon the sustaining of an objection to questions propounded by one of the litigants this party makes an offer of proof, such offer must be sufficiently definite that the court may know therefrom what facts are sought to be introduced in order to determine whether the proffered testimony has any bearing upon the case.

That in an action to recover damages to a truck, the offending party is not entitled to show, for the purpose of minimizing the damages, that the truck was repaired at no expense to the owner.

That evidence examined, and it is held; that there was sufficient evidence on all debatable issues to require the trial court to submit all these issues to the jury, and the verdict of the jury thereon is controlling.

Appeal from the District Court of Grand Forks County, Hon. F. G. Swenson, Judge.

AFFIRMED.

Opinion of the Court by Burr, Ch. J.

BAR BRIEFS

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THE LAYMAN AS HIS OWN LAWYER

The attempt of the layman to be his own lawyer, is not restricted to the making of Wills. In the recent case of Hathy-vs.-Mathy, 291 NW 761, the Supreme Court of Wisconsin says:

"The plaintiff asks in an amended complaint for reformation of the original deed on the ground of mistake. But there is no evidence of any mistake in the drafting of it. None of the parties to the instrument testified to any mistake. It was perhaps a mistake to have had the deed drawn by one not a lawyer, but that is the kind of a mistake for the correction of which no remedy has yet been found."

The attorneys argued the lack of legal sequence in the language of the deed as affecting its legality, and the court said,—"It would be necessary to bear in mind in determining the meaning of the deed, that when the instrument is drawn on a printed form, written or typed portions of it are more strongly indicative of intent than seemingly inconsistent of the printed portion. Such provisions are likely to be inserted, especially by unskilled scriveners. wherever there is a blank space to insert them rather than where in legal sequence they properly belong."

Well, one might say,—All right, this sort of conveyancing makes work for the lawyers, and plenty of it where it goes to the Court of last resort as it did in the above case, but on the other hand it is an imposition upon the parties, and an infringment of the rights of attorneys and unauthorized practice. But today in this state it is a common practice for clerks to draw wills, and do conveyancing. It is difficult to fix the violation on the party; we are receiving much better cooperation from the banks as a whole than ever before but as to others it is just the same.

ANNUAL MEETING-SUGGESTIONS

The next annual meeting of the State Bar Association will be held at Bismarck, N. D., on September 18th and 19th, 1941, under the auspices of the Burleigh County Bar Association.

The plan inaugurated at the annual meeting last year at Fargo of a short legal institute will be continued under the joint guidance of the committee on the Legal Institute of which George A. Soule of Fargo is chairman, the local committee of the Burleigh County Bar, and your state officers.

And at this time we need the cooperation of the members in suggesting topics that they wish to have presented on this program, as well as lawyers who, in their judgment, are qualified to present practical discussions of their particular fields of law practice. Such suggestions can be sent to your secretary at the office of the association at Dickinson, N. D.

NAVIGABLE WATERS — WHAT UNDER THE CONSTITUTION IS A NAVIGABLE STREAM

This is an action by the United States to enjoin the construction of a dam on the New River in Virginia without a license from the Federal Power Commission, as provided for in the Federal Water Power Act of 1920. The respondent sets forth the following defenses: (1) That the New River is non-navigable; (2) That should the New River be declared navigable the conditions of any federal license must be strictly limited to the protection of the navigable capacity of the waters of the United States; (3) That the Commission's refusal to grant a minor part license containing only such conditions was unlawful, and that any relief should be conditioned upon the Commission's granting respondent such a license. Held, the New River is navigable and subject to federal control under the delegated powers in the Commerce Clause. (2) That the term navigation as construed covers more than just the control of the waterway itself. The Court states that the power is as broad as the needs of commerce, and that navigable waters are the subject of natural control and planning is the broad regulation of commerce granted to the federal government. (3) That the license may contain these provisions which the Commission may deem necessary in the exercise of supervision and control over such navigable waters. United States v. Appalachian Electric Power Company, 61 S. Ct. 291 (1940).

The above decision is the farthest the Supreme Court has ever gone by judicial construction in advancing the development of the federal control over rivers. The rule followed up to the time of this case was found in this Court's decision in The Daniel Ball, 10 Wall. 557, 19 L. Ed. 999 (1868), stated as follows: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they

are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are, or may be, conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the state, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water." This rule from The Daniel Ball case was the basis of the holding by the District Court and by the Circuit Court of Appeals, to the effect that the New River was not navigable. The early common law rule was that all rivers affected by the ebb and flow of the tides were navigable. Grand Rapids and Indiana Railroad Company v. Butler, 159 U. S. 87, 15 S. Ct. 991, 40 L. Ed. 85 (1895). But this rule has not found wide acceptance in the United States and Canada because of the great fresh water lakes and inland rivers found so commonly here, as to which the common law rule was inapplicable. In The Montello, 20 Wall. 450, 22 L. Ed. 391 (1853), the court held that the probability of use of waterway by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river. In the Economy Light and Power Company v. United States, 256 U. S. 113, 41 S. Ct. 409, 65 L. Ed. 847 (1920), the Court said navigability does not depend on the type of use or the difficulties attending navigation, such as falls, rapids, and sandbars, even though these be so great that they prevent the use of the best means of commerce. It is dependent rather upon whether the stream in its natural state is such that it affords a channel for useful commerce.

Among the considerations of prime importance in the determination of the navigability of rivers are: First—Its natural navigability. This is essential; no legislative enactment can declare a stream to be navigable when it is not so in its natural state. United States v. Cress, 243 U. S. 316, 37 S. Ct. 380, 61 L. Ed. 746 (1916). Secondly—The depth or capacity for floatage. United States v. Holt State Bank, 270 U. S. 49, 46 S. Ct. 197, 70 L. Ed. 465 (1925). Thirdly—In general, a stream must be used for trade or agriculture rather than for mere pleasure, and must be capable of sustaining more than a mere rowboat to be termed a navigable stream. North American Drege Company v. Mintzer, 245 Fed. 297, 157 C. C. A. 489 (1917). Fourthly—In order for a stream to be classified as navigable it need not be navigable in its entirety. It can be navigable in part only, and still be regarded as navigable in the parts that are navigable.. St. Anthony Falls Water Company v. St. Paul Water Commission, 168 U. S. 349, 118 S. Ct. 157, 42 L. Ed. 497 (1897). A stream that can be made navigable is navigable within the meaning of the constitution, and the true test of navigability is the capacity of the stream to be used after improvement for the purposes of transportation and commerce.. This is a question of fact, the