North Dakota Law Review

Volume 17 | Number 5 Article 1

1940

Bar Briefs

North Dakota State Bar Association

M. L. McBride

BAR BRIEFS

PUBLISHED MONTHLY AT DICKINSON
—BY—
STATE BAR ASSOCIATION
OF NORTH DAKOTA

M. L. McBride, Editor

Entered as Second Class Matter, Dec. 9, 1936, at the Postoffice at Dickinson, North Dakota, Under the Act of August 24, 1912.

VOL. 17. APRIL, 1941. NO. 5.

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

burden of establishing such resting upon the party affirming it. Charles L. Barnes v. United States, 46 Ct. Cl. 7 (1910).

Among the powers delegated to the federal government by the Commerce Clause of the Constitution is the exclusive control of the navigable waters of the United States. The expansion of the nation, the development of the scope of the constitution by judicial construction, and, finally, the powers assumed by the federal government, because of the exigencies of the great war, have all contributed to the development of an extreme federal attitude, a tendency toward federal control over rivers and lakes without regard for the rights of the states to control non-navigable waters. The precedents of the Supreme Court have uniformily tended towards the enlargement of federal authority and the whittling away of the powers of the states. Le Beouf, State or Federal Control of the Water Powers of Navigable Streams, (1927) 15 Geo. L. J. 201. In the Daniel Ball, supra, the court justified congressional jurisdiction over waters which had not been used for interstate commerce theretofore, but were susceptible of being so used. In Gilman v. Philadelphia, 3 Wall, 713, 18 L. Ed. 96 (1865), a more complete federalization of navigable waters was accomplished. The court held that commerce included navigation, that the power to regulate commerce comprehends control, for that purpose and to the extent necessary, of all the navigable waters of the United States, which are accessible from a state other than that in which it lies; that for this purpose, they are public property of the nation and subject to the requisite control of Congress. This necessarily includes the power to keep open and free from any obstruction to navigation, interposed by the states or otherwise; to remove such obstructions when they exist, and to provide for the punishment of offenders. For those purposes Congress possessed all the powers which existed in the states before the adoption of the National Constitution, and which have always existed in the Parliament of England. It is for Congress to determine when its power shall be brought into activity, and as to the regulations and sanctions which shall be provided.

The conclusive demonstration that the courts have created an independent life for the legal concept of navigation, based on the necessity of eliminating state-created barriers to national economic development, came in Arizona v. California, 283 U. S. 423, 51 S. Ct. 522, 75 L. Ed. 1154 (1931), where the Supreme Court held a simple congressional declaration that the shallow and rapid Colorado River was, in fact, navigable, justification for federal control, regardless of unanimous contrary testimony by regional hydrologic experts as to its actual navigability. Projects not affecting navigable waters require a license from the Federal Water Power Commission for the construction of dams or structures on rivers, even though they be not listed as navigable waters or affected with interstate commerce. 16 U. S. C. (sec.) 817. Section twenty-three of the present Act requires projects in non-traversible streams to be licensed, whenever the Commission finds "that the interests of interstate or foreign

commerce would be affected by such proposed construction . . . ." 49 Stat. 846 (1935). Thus once a relationship of the proposed project to navigation, either foreign or interstate, is found there is no longer a question as to the right of the Federal Water Power Commission to control such project very effectively.

THOMAS McCARTY,
Third Year Law Student,
University of North Dakota.

OUR SUPREME COURT HOLDS

In The First National Bank of Waseca, a Corporation, Respt., v. William L. Paulson, as Administrator with the Will Annexed of the Estate of A. P. Paulson, deceased, et al., Applts.

That Section 7639 C. L. 1913, which provides that in giving decision the trial court must state the facts found and the conclusions separately, does not apply where the final decision is embodied in and evidenced by an order, and no judgment is required to be entered.

That said Section 7639 C. L. 1913, is applicable only to cases where there is a trial by the court of an issue of fact, arising upon material averments, presented by formal pleadings, and where following the findings, a judgment must be entered.

That said Section 7639 C. L. 1913, does not apply to an order confirming a mortgage foreclosure sale, entered pursuant to Section 2, Chapter 165, Laws of 1939.

Appeal from the District Court of Stutsman County, Jansonius, J.

Action by the First National Bank of Waseca against William L. Paulson, et al., to foreclose a mortgage on real property.

Plaintiff appeals from an order confirming a mortgage foreclosure sale. AFFIRMED. Opinion of the Court by Christianson, J.

In Nome State Bank, a corporation, Respt., v. Melvin Brendmoen and Edna Brendmoen, Applts.

That in an action between a mortgagee and mortgagor for the foreclosure of a chattel mortgage an allegation in the complaint to the effect that the mortgagee surrendered a copy of the mortgage to the mortgagor is not essential to the statement of a cause of action.

That the failure of a mortgagee to surrender to the mortgagor a copy of a chattel mortgage at the time of the execution thereof does not render the mortgage void as between the parties thereto.

Appeal from the District Court of Barnes County, Hon. M. J. Englert, J. AFFIRMED. Opinion of the Court by Morris, J.

In Nanna M. Funk and C. E. Branick, Applts., v. L. R. Baird and T. A. Tollefson, Respts.

That in an action for specific performance of a contract for sale of real property, plaintiffs seek relief upon purely equitable grounds; and in order to be entitled to such relief they must show that they are ready, willing, and able to fully perform their part of the contract.

That as against the vendees of an executory land contract, the heirs of the deceased vendor have no right to substitute their personal covenants for those of the vendor, the vendees having made no contract with the heirs and not having contracted with the vendor to take conveyance from either her heirs or assigns.

That where, by the terms of an executory contract for the sale of land, the vendor agreed "to convey unto the said parties of the second part, or

their assigns, by deed of warranty and abstract of title" but did not contract with the vendor to take conveyance from either her heirs or assigns, the heirs may not, in an action for specific performance of the contract, compel the vendees to accept deeds of the heirs of the deceased vendor.

Appeal from the District Court of Stark County, Hon. Harvey J. Miller, J.

AFFIRMED. Opinion of the Court by Morris, J.

In St. Paul Foundry Company, a corporation, Applt., v. Burnstad School District No. 31, of Logan County, N. D., a public school corporation, Respt.

That under the facts in this case, where the plaintiff delivered to the defendant structural steel for the purpose of incorporating the same into a gymnasium being built by the defendant, and the property was so incorporated and the gymnasium completed so that the structural steel could not be returned to the plaintiff, any cause of action which the plaintiff had for the value of such steel accrued at the time the property was delivered and incorporated in the building so built.

That under the provisions of Secttion 7375 of the Compiled Laws, N. D., 1913, any action brought by the plaintiff to recover the value of such structural steel must be brought within six years from the time the cause of action accrued in order to be maintained against the defense that the statute of limitations had run.

Appeal from the District Court of Logan County, Hon. George M. McKenna, Judge.

AFFIRMED. Opinion of the Court by Burr, J.

In State of North Dakota ex rel Dell Perry, Petr., v. Joe Garecht, as sheriff of Stark County, Respt.

That where, after conviction for a crime, a defendant appears before the court for sentence and the court orally pronounces judgment and sentence upon him, the judgment so pronounced fixes the penalty imposed upon the defendant and the court may not, in the written judgment subsequently entered, add the requirement that the defendant serve a jail sentence in event of nonpayment of a fine, when such jail sentence was not included in the judgment pronounced.

That where, a defendant is held in custody under a provision in a written judgment requiring him to serve a jail sentence in event that a fine imposed upon him is not paid, and such provision was not included in the oral judgment pronounced by the court, the defendant is entitled to a writ of habeas corpus upon proper application.

Original application for a Writ of Habeas Corpus by Dell Perry. Petitioner entitled to Writ. Opinion of the Court by Morris, J.

In Joseph P. Durick, Pltf. and Applt., v. Oscar W. Winters, doing business as the Dacotah Cab Company, or 444 Cab, and George Richards, Defts., and Oscar W. Winters, doing business as the Dacotah Cab Company, or 444 Cab, Deft. and Respt.

That a motion for a new trial, based upon the insufficiency of the evidence, is addressed to the sound judicial discretion of the trial court, and its action thereon will not be disturbed unless it is shown there was an abuse of such discretion..

That an order granting a new trial stands upon firmer ground than one denying the same, as the outcome results merely in a reinvestigation of the entire issue on the merits.

Appeal from an order of the District Court of Grand Forks County granting a new trial, Hon. P. G. Swenson, Judge.

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

In Carl S. Brye, Pltf. and Respt., v. William E. Greenfield, et al., and State of North Dakota, Defts., and State of North Dakota, Applt.

That a complaint in an action to determine adverse claims to real property, which alleges that the state claims an interest in said property adverse to the plaintiff, and which fails to allege that the plaintiff filed an undertaking to pay any costs which may be adjudged against him in favor of the state, is not vulnerable to a demurrer by the state, alleging that the complaint does not state facts sufficient to constitute a cause of action. Dunham Lumber Company v. Gresz, et al., 70 N. D., 295 N. W. 500, followed.

Appeal from the District Court of Benson County, Hon. W. J. Kneeshaw, Judge. Per Curiam Opinion.

In Mrs. Frances Booke, Pltf. and Respt., v. North Dakota Workmen's Compensation Bureau, Deft. and Applt.

That an injury compensable from the Workmen's Compensation fund is an "injury by accident" arising in the course of employment, or a "disease approximately caused by the employment."

That the burden of proof is upon the claimant to show that the death of a former employee was the result of an injury by accident arising in the course of his employment, or the result of a disease approximately caused by the employment.

That where the death of a former employee is shown to be the result of the chronic heart condition known as angina pectoris, and the death occurred after the employment had ceased, it is incumbent upon the claimant to prove that this diseased condition was approximately caused by the employment, and such burden is not sustained where the proof is purely speculative and the record is silent as to the origin of the diseased condition.

That where a former employee died from agina pectoris some time after his employment had ceased, and the record shows that the attack was superinduced by exertion in walking and exposure to extreme cold, it is held: that claimant has failed to prove that this diseased condition was approximately caused by the former employment or was the result of an injury by accident occurring in said employment..

Appeal from the District Court of Stark County, Miller, J.

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

In Mrs. Florence Moug, Pltf. and Respt., v. North Dakota Workmen's Compensation Bureau, Deft. and Applt.

That Appellate courts determine only questions actually before them on appeal, and necessary for the decision of the case, and will not give opinions upon questions of law that are dependent upon a state of facts not established by the evidence.

That the North Dakota Workmen's Compensation Act provides for compensation only for "an injury arising in the course of employment."

That an injury is received in the course of the employment when it comes while the workman is doing the duty which he is employed to perform.

That on an appeal from a decision of the Workmen's Compensation Bureau disallowing a claim for compensation for injury, the claimant has the burden of proving that the injury for which compensation is claimed was received in the course of the employment.

That in the instant case it is held that the evidence fails to show that the injury for which compensattion is claimed was received in the course of employment.

Appeal from the District Court of Cass County, Englert, J.

REVERSED. Opinion of the Court by Christianson, J.

In J. H. Goldberg, Applt., v. John Gray, Tax Commissioner, Respt.

That the phrase "income derived from any source whatever" as used in Section 17, chapter 312, S. L. N. D. 1923, as amended by chapter 253, S. L. N. D. 1933, refers to the origin of the income, unrestricted by situs or location.

That tax statutes are construed most strictly against the government and in favor of the citizen.

That the purpose sought to be attained by the construction of any statute is to arrive at the intention of the lawmaking body that enacted it.

That the term "gross income" as defined in the income tax includes a resident partner's share of the net profits of a partnership that does business wholly outside the state of North Dakota.

Appeal from the District Court of Burleigh County, Jansonius, J.

AFFIRMED. Opinion of the Court by Morris, J.

In James Glinz and Christ Zurcher, Pltfs. and Respts., v. The State of North Dakota doing business as The State Hail Insurance Department, et al., Defts. and Applts.

That no insurance issued under the provisions of chapter 137, Session Laws N. D. 1933, takes effect until the application for insurance is actually received in the office of the Hail Insurance Department.

That where a crop is struck by hail at any time before the application for the policy is filed with the Hail Insurance Department, no policy issued under the provisions of the aforesaid act becomes effective.

That a crop is not "struck by hail" within the provisions of said chapter, unless the hail has caused material damage to the crop. Issendorf v. State, 69 N. D. 56, 283 N. W. 783, followed.

That damage to the crop means substantial damage, some injury by which the value is diminished or destroyed, an actual injury not determined by percentage merely, but a damage that is visible, observable, and material.

That evidence is examined and it is held: that before the application for insurance involved in this case was received by the Hail Insurance Department, the crop sought to be insured had been "struck by hail", and, therefore, there was no liability under the insurance policy.

Appeal from the District Court of Bottineau County, Hon. G. Grimson, Judge.

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

In Eleanor Bentley, Pltf. and Respt., v. Oldetyme Distillers, Inc., a corporation, Deft. and Applt.

That a general agent has authority to do everything necessary or proper and useful in the ordinary course of business for effecting the purpose of his agency.

That where an agency is proved by competent evidence, declarations of the agent made within the scope of his authority may be shown.

That evidence examined and it is held: the record shows that defendant's agent, acting within the scope of his authority, was conveying plaintiff on the business of the defendant; that at that time the plaintiff was injured by the negligence of the defendant, and without contributory negligence on her part; and that the damages assessed against the principal were not excessive.

Appeal from the District Court of Burleigh County, Hon. Fred Jansonius, Judge.

AFFIRMED. Opinion of the Court by Burr, Ch. J Nuessle, Morris, JJ. and Lowe, Dist. J., concur specially. Burke, J., disqualified did not participate, Lowe Dist. J. sitting.

BAR BRIEFS

PUBLISHED MONTHLY AT DICKINSON

—BY—

STATE BAR ASSOCIATION OF NORTH DAKOTA

M. L. McBride, Editor

Entered as Second Class Matter, Dec. 9, 1936, at the Postoffice at Dickinson, North Dakota, Under the Act of August 24, 1912.

VOL. 17. MAY, 1941. NO. 6.

NEW LOGAN-WALTER BILL

The history of the struggle of the Logan-Walter bill, intended to govern by law federal officers and agencies, is told in the March and April, 1941, numbers of the A.B.A. Journal. The House of Delegates of the American Bar Association at its meeting on March 17th, 1941, adopted a statement of principles, and expressed the opinion that Senate Bill 674, introduced by Senator Hatch, best embodied such principles. Since then, Congressman Walter has introduced H. R. 4238 in the House, which is almost the identical bill.

Hearings have commenced in the Senate and will probably continue for a month or six weeks. Numerous federal agencies are attacking the bill and they are, for the most part, insisting that their agencies be exempt therefrom. No one expects them to agree to any legislation which will in any considerable measure affect their powers and jurisdiction.

We must depend upon the lawyers in the respective states organizing and conducting such a campaign of education with the State Medical Associations, State American Legions, farm groups, patriotic groups and others, to support the Senators and Congressmen from the respective states in their fight for this legislation. The American people, of all classes and professions, made a magnificent fight in behalf of the Logan-Walter bill and we can make an even better one

(Continued on Next Page)

(Continued from First Page)
in behalf of the two bills I have mentioned, if the various state organizations and groups will inform themselves with respect thereto, and lend their active and vigorous assistance. The people and not the politicians will save this country from totalitarianism if it can be saved.

I therefore urge that every lawyer write our Senators and Congressmen asking them to support this worthy legislation and that you interest others to do the same.

H. G. NILLES,
President.

NATIONAL CONFERENCE OF JUDICIAL COUNCILS

Washington, D. C.—Impetus to the work of the National Conference of Judicial Councils was given at a luncheon here, held in connection with the meeting of the American Law Institute, at which members of the conference heard reports on what American lawyers are doing during the emergency and how their English brethren are carrying on under war conditions.

Sir Wilfred A. Greene, Master of the Rolls of England, and Dr. Arthur L. Goodhart, professor of Jurisprudence at Oxford University, gave off-the-record talks on conditions there. Other speakers were Jacob M. Lashly, president of the American Bar Association; Solicitor General Francis Biddle; and Judge Edward R. Finch, chairman of the conference. Arthur T. Vanderbilt, chairman of the conference Executive Committee, presided.

In attendance at the luncheon were Attorney General Jackson; justices of the United States Supreme Court; senior judges of the federal circuit court of appeals from several districts; judges of the United States Court of Appeals of the District of Columbia; chief justices of state supreme courts; law school deans, and others.

VACATION OF JUDGMENTS — EXTRINSIC AND INTRINSIC FRAUD

The principle that there has to be an end to litigation and that when a party has had his day in court the judgment thus rendered shall be final was first enunciated in 1702 by the Lord Keeper in the High Court of Chancery in the case of Tovey v. Young, 2 Vern. 437, S. C., 24 Eng. Rep. R. 93 (1702).

In the vacating of judgments, fraud plays an important part. Generally, fraud justifying equntable relief against enforcement of the judgment must be extrinsic to the issues. Con't. Nat'l Bank v. Holland Bank Co., 66 F. (2d) 823 (C.C.A. Mo. 1933). The leading case of United States v. Throckmorten, 98 U. S. 61, 25 L. ed. 93 (1878), held that fraudulent acts which will move a court of equity to set aside or annul a judgment or decree relate to frauds which are extrinsic to matters tried by the first court.