



1944

Our Supreme Court Holds

North Dakota State Bar Association

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Recommended Citation

North Dakota State Bar Association (1944) "Our Supreme Court Holds," *North Dakota Law Review*: Vol. 21 : No. 12 , Article 6.

Available at: <https://commons.und.edu/ndlr/vol21/iss12/6>

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purposes of government and the general law as servants of the people, supreme within its proper field where it proceeds from necessity and not to carry out the will of a dictator.

The judicial position is one of consequence in a community. It is one of the potential forces tending to create public and private virtue, patience with public and private efforts, a just measurement of motives, plans and prospects. The judiciary does not command the facilities of the public press, but it has its consideration and help.—We are not spiritual advisers with the advantage of a pulpit, but we are coworkers for a common good. We can use with courage and understanding the tenets of our social and political establishment within our field to fix upon a firmer foundation our cherished freedoms. Not looking backward except for guidance nor holding overlong to tradition, but with realization, however, that our four freedoms rest upon the strength of our nation, upon its wisdom and virtue, that back of precedents are the basic judicial conceptions which are the postulates of judicial reasoning and further back are the habits of life, the institutions of society in which those conceptions have their origin.—Bulletin of the State Bar Association of Wisconsin, August, 1945.

OUR SUPREME COURT HOLDS

In the Matter of Application for a Writ of Habeas Corpus In Behalf of Ronald Rixen.

That where Juvenile Court, after a hearing, made its order continuing the custody of a minor in a parent during the good behavior of the minor, it was without jurisdiction to take the minor from the custody of the parent and commit such minor to the State Training School, because of an alleged violation of the conditions of the original order without a further hearing held pursuant to due notice to the interested parties.

Application for a Writ of Habeas Corpus in behalf of Ronald Rixen. Ronald Rixen discharged from custody. Opinion of the Court by Burke, J.

In Felix Raymond, Petnr. and Apple., vs. Mrs. John Gerving, Respt. and Applt.

That the right to the custody of a minor child may be determined in habeas corpus proceedings.

That the parents of a minor child are equally entitled to its custody and neither can transfer such custody to any other person without the written consent of the other except in case of death or desertion or abandonment. The dying statement or request of the mother that someone other than the father have the custody of the child does not deprive the father of his natural right to the custody of his minor child.

That the natural right of a parent to the custody of his minor child is to be enforced in the light of the child's best interest.

That before the natural right of the parent to the custody of his minor child will be set aside by the court it must appear that the best interest of the child will suffer if it remain in the custody of the parent.

That where the father of a minor child is shown to be entitled to the custody of his child he has the right to change his residence from this state unless such removal will prejudice the best interest of the child. Appeal from the District Court of Mercer County. Broderick, J. AFFIRMED. Opinion of the court by Burr, J.

In the matter of the application of Thomas H. Amundson, Jr., for a writ of habeas corpus.

That where a prisoner, confined for a felony committed in one state, accepts and agrees to the conditions of a parole to the authorities of another state and enters the latter state without extradition, the former state does not lose jurisdiction over him and upon violation of the parole it may be revoked and the prisoner extradited from a third state to which he has fled, to the paroling state as a fugitive from justice therefrom.

SYLLABUS by the court. Original application for a writ of habeas corpus. WRIT QUASHED. Opinion of the Court by Morris, J.

In Union Brokerage Company, a corporation, Pltf. and Respt., vs. Norman Jensen, Deft. and Applt.

That an order denying a motion to dismiss an action is not appealable. Appeal from the District Court of Burke County, Gronna, J. Defendant appeals from an order denying his motion for a dismissal of the action. APPEAL DISMISSED. Per Curiam opinion.

In T. A. Swiggum, Applt., vs. Valley Investment Co., a corporation, Respt. T. A. Swiggum, Applt., vs. Valley Investment Co., a corporation, Northwestern Trust Co., a corporation, and Fred L. Goodman, Respts.

That Rule 15 of the rules of the Supreme Court, (41 ND. 696-696) which provides: "A petition for rehearing may be filed * * * at any time within fifteen days after the decision in the case is filed. In all cases, the remittitur shall be stayed until the expiration of the time for the filing of petitions for rehearing, or until the petition therefore shall be denied, unless this court shall otherwise order", does not operate to stay the consideration and determination of a petition for rehearing that is filed before the expiration of such fifteen day period. The purpose of the rule is to allow a defeated party a reasonable time within which to file "a petition for rehearing". When a party entitled to petition for rehearing has exercised his right and filed such petition, the question whether a rehearing shall be had is properly before the court.

That in this case it is held for reasons stated in the opinion that the remittitur was not sent down inadvertently or prematurely, and that no valid ground has been shown for recalling the same.

Motion by the Plaintifi to recall the remittitur in Swiggum vs. Valley Investment Co. and In Swiggum vs. Valley Invesement Co., et al., 73 ND. 15 NW (2d) 862. MOTION DENIED.

In D. Esther Brey, Pltf. and Respt., vs. Lars Tvedt, Jr., Deft. and Applt. That Section 7483, Comp. Laws N. D. 1913 (Section 28-0739, R. C. 1943) empowers the court, in the exercise of its discretion and upon such terms as may be just, to allow an answer or reply to be made after the time limited by the code of civil procedure.

That under the record in this case no abuse of discretion on the part of the trial court is shown in permitting the case to be reopened and allowing the plaintiff to reply to the defendant's counterclaim.

That statutes of fraud pertaining to sales of real estate apply to sales of privately owned real estate at public auction, with the express modification contained in Section 3-0502, R.C. 1943, which vests in the auctioneer the authority to make the required memorandum on behalf of both the bidder and vendor in the form and content prescribed by those statutes.

That oral contract for the sale of real estate, where there is no compliance with the statutes of fraud, is void.

That possession of real estate obtained without the acquiescence of a vendor is not such possession as will constitute part performance and thus satisfy the statute of frauds.

That part payment of the purchase price is not in itself sufficient performance to take an oral contract for the sale of real estate out of the statute of frauds.

Appeal from the District Court of Ward County; Hon. A. J. Gronna, Judge. **AFFIRMED.** Opinion of the Court by Morris, J.

In John Mielcarek, Pltf. and Respt., vs. Frank Riske, Deft. and Applt.

That where, in an action involving the right to possession of lands, a general verdict is returned in district court, and judgment is entered thereon, the judgment entered must conform to the verdict in all substantial particulars.

That in an action, where each party asserted sole right to the possession of certain lands, and the jury returned a general verdict "in favor of the defendant and against the plaintiff therein for a dismissal of the action," and where judgment was entered thereon in favor of the plaintiff for the possession of the land such judgment was entered irregularly. In such case it is proper practice for the defendant to move the court to vacate the judgment and to enter judgment in conformity with the verdict.

That where a judgment has been irregularly entered upon the general verdict of the jury and the aggrieved party moves the court to vacate the judgment and enter judgment in conformity with the verdict, an order denying the motion is an appealable order under the provisions of Subdiv. 2 Sec. 28-2702, Rev. Code, being "a final order affecting a substantial right made * * * upon a summary application in an action after judgment."

Appeal from the order of the District Court of Grand Forks County, refusing to vacate a judgment. Hon. M. J. Englert, Judge. **REVERSED.** Opinion of the Court by Burr, J.

In Myrtle C. Weldy, Pltf. and Applt., vs. W. E. Weldy, Deft. and Respt.

That where, in an action for divorce and alimony, a court of competent jurisdiction in California gives judgment for divorce and for the payment of alimony in monthly installments of a stated sum each, and the judgment and decree remains unmodified, the plaintiff has a vested interest in the due and unpaid installments of alimony. After these unpaid installments accrue no modification of the amount due can be made.

That a complaint in an action to establish such judgment in the courts of this state, that sets forth the decree and judgment entered by such court of competent jurisdiction in California, and further sets forth that the judgment was not modified and that the accrued alimony is due and unpaid, states a cause of action.

Appeal from an order of the District Court of Burleigh County, sustaining a demurrer to the complaint. Hon. R. G. McFarland, Judge. **REVERSED.** Opinion of the Court by Burr, J.