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Our Supreme Court Holds

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the same, the government goes into business in order to compete with the large corporations, this makes things no better. Meanwhile, the lawyer from the common walks of life, is still finding plenty to do but the people he deals with are more or less relief clients.

In a dictatorship country, the economic and the political systems combine into one function, will it be the extinction of the legal profession by law or will it be by process of slow starvation?

Contributed by
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OUR SUPREME COURT HOLDS

In State of North Dakota, Pltf. and Respt., vs. Fred Tayler, Deft. and Applt.

That every person who willfully seizes or confines another with intent to cause him, without authority of law, to be detained against his will is guilty of kidnapping under the provisions of subdivision 1, section 9514 of the Compiled Laws of this state.

That the terms, "kidnap" and "kidnapping" imply the taking and detaining of another, and this is sufficiently shown if there be an asportation of the victim, without any authority of law, and with the intent of detaining such person against his will.

That where an information charges kidnapping, it is sufficient to state the crime in the terms and the language of the statute. It is not necessary to state therein the purpose of the defendant. Neither is it necessary to allege actual violence; nor that the defendant had an intent to injure the victim; nor any intent other than the intention of doing the acts that are denounced by the statute.

That upon an arraignment on an information, the defendant may interpose the plea of once in jeopardy; and, if he desires to enter such plea, he must plead substantially that he has been once in jeopardy for the offense charged in this information, and at the same time, specify the time and place and the court in which such jeopardy occurred.

That to sustain a plea of former jeopardy for the offense charged in the information under which he is arraigned, it is necessary that the former information, under which the defendant claims to have been placed in jeopardy, show the same offense as the offense named in the information under which he is arraigned; and not merely that it grew out of the same transaction. The offenses charged and the acts on which the informations are based must be one and the same, and the legal character of the crimes charged must be the same.

That a plea of jeopardy is not in itself a denial of any of the allegations of the information, but sets up affirmative matter, and the burden of introducing evidence thereon is upon the defendant. If no evidence is presented on the trial in support of the plea, the court need not submit the plea to the jury.

That where the trial court is given by statute the discretion of imposing a penalty within limitations fixed by the statute, and the trial court, in passing sentence, exercises such discretion within the limitations fixed by statute, this court has no power to review the discretion of the court in fixing the term of imprisonment.

Appeal from the District Court of Williams County, Hon. A. J. Gronna, Judge. AFFIRMED. Opinion of the Court by Burr, J.

In Henry Wallace, Pltf. and Respt., vs. North Dakota Workmen's Compensation Bureau, and Commissioners thereof R. H. Walker, Chairman, W. E. Berwman, and P. B. Sullivan; J. E. Pfeifer, Secretary and A. M. Kuhfeld, Attorney, and all other employees of said Bureau, Deft. and Applt.

That where a party to an action in the district court has objection to the re-taxation of costs, his remedy is to have the re-taxation reviewed by the court upon motion to modify the judgment entered upon the re-taxation.

That costs are purely the creature of statute, and an allowance therefor can not be made by the trial court unless authorized by the statute.

That where, upon an appeal from the judgment of the district court granting a peremptory writ of mandamus, this court affirmed the judgment of the lower court, disposing of all matters that were in controversy and adjudging that the respondent recover his costs and disbursements upon the appeal, it is the duty of the district court to enter judgment in compliance with the order of this court, with such costs on the appeal as are provided for by statute. While under the provisions of section 7795 of the compiled laws the trial court has discretion in certain actions to allow costs for or against either party, it has no power upon remittitur to amend this judgment appealed from so as to include in the original judgment a further judgment for $200.00 as reimbursement to the prevailing party for the expenses and costs on the original proceeding, not having exercised its discretion at the time of ordering judgment, even if such section 7795 would permit such an allowance in the mandamus proceeding.

That section 396al7 of the supp., as amended by sec. 6, chap. 286 of the session laws of 1935, provides, that in proceedings brought against the workmen's compensation bureau, "The cost of such proceedings, including a reasonable attorney's fee to the claimant's attorney to be fixed by the trial judge, shall be taxed against the Bureau, which fee shall cover and constitute the entire remuneration for the claimant's attorney for all services in connection with such appeal, it being the intention to relieve the claimant of all expenses for attorney fees." However, the district court has no power, under such provision, to tax and allow an attorney's fee, except in a case where an appeal is taken from the final action of the bureau in denying the right of a claimant to participate at all in the workmen's compensation fund, and such provision has no application to a proceeding for the purpose of obtaining a writ of mandamus to allow the inspection of records of the bureau. Consequently, the allowance of an attorney's fee in such mandamus proceeding is without authority of law under the provision of such statute.

Appeal from the District Court of Burleigh County, Hon. Fred Jansonius, Judge. MODIFIED AND AFFIRMED. Opinion of the Court by Burr, J.

In Albert Stude, Pltf. and Applt., vs. Fred Mittelstedt and Roy Bakken, also known as R. T. Bakken, Defts. and Respt.

That an insolvent debtor may prefer a creditor, but if the creditor is a relative the transaction will be scrutinized closely.

That if a creditor receives a preference by way of transfer of property or an interest in property, he is protected only if he receives it solely for his own benefit. If he receives it with the intent to shield the debtor from other creditors it is void as to them no matter what the consideration.

That evidence examined and found to sustain the findings of the trial court.

Appeal from the District Court of Burleigh County, Hon. Fred Jansonius, J. AFFIRMED. Opinion of the Court by Grimson, Dist. J. (Burke, J., did not participate, Hon. G. Grimson, Judge of the Second Judicial District, sitting in his stead.)

In L. R. Baird, as Receiver of the Scandinavian American Bank of Minot, North Dakota, Pltf. and Respt., vs. J. N. Ellison and Otto Ellison, Defts. and Applt.s

That motion in the original action is an appropriate remedy for the vaca-

tion of a judgment where there was no service of process upon, or appearance by, the defendant.

That following Odland v. O'Keefe Implement Company, 59 N. D. 335, 229 N. W. 923, it is held: A defendant is entitled to relief from a judgment as a matter of right where the court was without jurisdiction to enter the same because no service of process had been made upon him.

That on a motion by a defendant to vacate a judgment on the ground that no service of summons was made upon him, the proof of service on which the judgment is predicated may be contradicted, and the defendant may show such proof of service is untrue. It is held, for reasons stated in the opinion, that in the instant case the defendants have established beyond substantial doubt that they were not served with summons in this action, and that the court was without jurisdiction to render judgments against the defendants.

Appeal from the District Court of Burleigh County, Hon. Fred Jansonius, J. The defendants, J. N. Ellison and Otto Ellison, appeal from an order denying their motion to vacate judgments against them. REVERSED. Opinion of the Court by Christianson, J.

In Evelyn Braun, Pltf. and Respt., vs. T. A. Martin and Wilson & Company, Inc., a corporation, Defts. and Applts.

That a party appealing from an order overruling a motion for a new trial can not urge upon appeal therefrom any alleged errors in the instructions to the jury that were not presented to the trial court on the motion for a new trial.

That it was not error for the trial court to deny a claim of mis-trial because of an alleged prejudicial statement in an answer of the plaintiff given in response to a question, when the alleged prejudicial statement was explanatory, was not prejudicial in its nature, and was stricken from the record.

That where, at the close of the opening argument of counsel for the plaintiff, the defendants allege misconduct of such counsel in his argument, object and take exception thereto on general grounds, the mere objection that the argument is improper does not present anything for review on appeal unless the specific statements of counsel alleged to constitute misconduct are called to the attention of the court. The opposing party must afford the trial court an opportunity to pass upon the effect of such alleged misconduct.

That where there is but one real issue before the jury—the amount of damages plaintiff is entitled to recover—it can not be said excessive damages were given because of passion and prejudice when the proof shows the injuries sustained were severe and the damages assessed were moderate.

That on appeal, this court will not consider assignments of error in overruling objections to questions propounded a witness, unless said alleged errors are brought to the attention of the trial court on the motion for a new trial.

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

In J. N. Ellison and Otto Ellison, Applts., vs. L. R. Baird, as Receiver of the Scandinavian American Bank of Minot, North Dakota, Respt.

That a district court has inherent power to vacate, on motion, a judgment that has been rendered by such court against a party who has not been served with summons in the action. A motion to vacate such judgment is not controlled by Section 7483, C. L. 1913.

That an independent equitable action to set aside a judgment will not lie in a case where it appears from the facts alleged in the complaint that the plaintiff has an adequate remedy by motion in the action in which the judgment was rendered.

Appeal from the District Court of Ward County, Hon. A. J. Gronna, J. Plaintiffs appeal from an order sustaining a demurrer to their complaint. AFFIRMED. Opinion of the Court by Christianson, J.

In Elda J. Williams, Pltf. and Respt., vs. Mark F. Williams, Deft. and Applt.

That where a wife has been granted a divorce and the custody of minor children, circumstances which are a proper consideration in the determination of a suitable allowance to the wife for alimony and the support of the children include the needs of the wife and the children in the light of the standards maintained by the husband and the wife while living together, the health of the wife and other circumstances affecting her ability to contribute to her own support, the relative fault of the parties and the income of the husband.

That the evidence is examined and it is held: allowance to a wife of $150.00 a month as alimony and for the support of two minor children aged seven years and four years respectively, suit fees in the sum of $100.00 together with a requirement that husband keep in force an insuranc policy and a savings certificate at an annual cost of $289.10 is not excessive.

That in an action for divorce, Supreme Court has appellate jurisdiction only and an application to modify a decree awarding alimony and support money because of a subsequent change in the condition of the parties must be first made in trial court.

Appeal from the District Court of Emmons County, Hon. Wm. H. Hutchinson, Judge.

Opinion of the Court by Burke, J.

AFFIRMED.

In First National Bank of Buffalo, Buffalo, North Dakota, a banking corporation, Plt. and Applt., vs. George F. Ford, as City Treasurer of the City of Mandan, North Dakota, Deft. and Respt., and V. J. LaRose, Intervenor and Respt.

That Section 3711, Comp. Laws 1913, which, after making provision for the issuance of special assessment warrants and the creation of a fund from which they shall be paid, provides "It shall be the duty of the city treasurer to pay such warrants and interest coupons as they mature and are presented for payment out of the district funds on which they are drawn, and to cancel the same when paid," is construed, and it is held, for reasons stated in the opinion, that pursuant to the terms of such statute special assessment warrants must be paid in the order of their maturity and presentation, funds permitting, regardless of whether or not it appears that there is or will be enough in the fund to pay warrants subsequently maturing.

Appeal from the District Court of Morton County, Hon. H. L. Berry, Judge. Application for writ of mandamus. From a judgment denying the writ, plaintiff appeals.

REVERSED.

Opinion of the Court by Nuessle, Ch. J.

In Augusta Borner and F. C. McCagherty, as administrator of the estate of Fritz Gappert, deceased, Fred Gappert, August Gappert, Theodore Gappert, Henry Gappert, Emelie Muhlhauser and Bertha Ellwein, Pltfs, and Applts., v. Abner Larson, as special guardian of Raymond Gappert and Charlotte Gappert, minors, Emelie Holle Wolfe, Henry C. Holle, Emelie Krecklow, August Krecklow, Fred Krecklow, Julius Krecklow, Mathilda Muhlhauser, Selma Gappert Becker, and George Gappert, Defts. and Respts.

That the right to administer the estate of a decedent is regulated entirely by statute, and letters of administration must be granted in the order and under the rules prescribed by statute.

That Section 8657 of the Compiled Laws, prescribing the order in which letters of administration must be granted, places the children of the decedent in a class superior to that of a sister of the decedent; and therefore children have, within the limits prescribed by the statute, a right to the administration of an estate superior to the right of a sister of the decedent.

That under the provisions of section 4448 of the Compiled Laws, adopted children, in so far as the "legal consequences and incidents of the natural relation of parent and child" are concerned, are as much the children of the adopting parent as if they were born to him in lawful wedlock; and these consequences and incidents include the right of inheritance, when this is con-

ferred on children. The term "children", as used in section 8657 of the Compiled Laws, includes children by adoption as well as by birth.

That adoption is a relationship artificially created by statute. The proceedings do not depend upon equitable principles; therefore, unless the statutory procedure be followed and compliance had with the essential requirements thereof, there is no legal adoption.

That the burden of establishing adoption is upon the claimant.

That the interest in the estate of a decedent claimed by one who relies upon an agreement to adopt made by the decedent rather than upon a decree of adoption regularly made and entered in the proper court is determined by the terms of the agreemnt to adopt, interpreted by equitable principles when necessary.

Appeal from the District Court of Morton County, Hon H. L. Berry, Judge.

REVERSED.

Opinion of the Court by Burr, J. Nuessle, Ch. J. and Burke, J. Dissenting.

In Midland Produce Company, a corporation, Pltf. and Applt., v. City of Minot, a municipal corporation, et al., Defts. and Respts.

That where there is no other plain, speedy and adequate remedy in the ordinary course of law, mandamus will lie to compel the members of a municipal board to perform an act which the law specially enjoins upon the members of such board as a duty resulting from their offices.

That the writ of mandamus will not issue unless the plaintiff (or relator) has a clear legal right to the performance of the particular act, performance of which is sought to be compelled by the writ.

That for reasons stated in the opinion, it is held, that no duty rested upon the mayor and city council of the City of Minot to issue a building permit to the plaintiff.

Appeal from the District Court of Ward County, Hon. A. J. Gronna, Judge. From a judgment in favor of the defendants, plaintiff appeals.

AFFIRMED.

Opinion of the Court by Christianson, J.

In Elin S. Rasmussen, Pltf. and Respt., v. The Mutual Life Insurance Company of New York, Deft. and Respt., and Jens C. Rasmussen and Julia Rasmussen, Defts. and Applts.

That where the insured reserves the right to change the beneficiary in a life insurance policy, the beneficiary named therein acquires no vested right in the policy prior to the death of the insured.

That where the insured has done substantially all that is required of him to effect a change of beneficiary and nothing remains to be done but ministerial acts of the insurer, its officers or agents, equity will consider that as done which ought to be done and will give effect to the intention of the insured, though the formal details of the change were not completed before his death.

That an insurer may waive strict compliance with the provisions of a life insurance policy relative to the changing of beneficiaries in so far as its right to object to the change is concerned.

That where rights to insurance proceeds have become vested upon the death of the insured, the insurer may not by subsequent waiver deprive a proper beneficiary of those rights.

That the record is examined and it is held: The insured not having attempted to change the beneficiary of the life insurance policy involved herein for over eleven years prior to his death, during which time the policy was in his possession, and it further appearing that the insured knew shortly prior to his death that the policy was payable to the original beneficiaries; that the beneficiaries named therein are entitled to the proceeds of the policy.

Appeal from the Judgment of the District Court of Grand Forks County, Hon. M. J. Englert, Judge.

REVERSED.

Opinion of the Court by Morris, J.