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Decisions Of Supreme Court

North Dakota Law Review

DECISIONS OF SUPREME COURT

From Ward County

Fannie Pace, Plaintiff and Respondent,

vs.

North Dakota Workmen's Compensation Bureau, Defendant and Appellant.

Syllabus:

1. In an action against the Workmen's Compensation Bureau to recover on account of an injury, resulting in death, alleged to have been received by the decedent in the course of his employment, the burden is on the claimant to prove, by preponderance of evidence, that the injury was received in the course of the employment, and an award should not be made upon mere surmise or conjecture.

2. It is the intent of the Workmen's Compensation Law that an employee, injured in the course of his employment, shall have relief in all cases where he would have had a right of action at common law, and, in addition thereto, to extend his right to recover in other cases, regardless of questions of negligence, contributory negligence, or assumption of risk.

3. A physical impact is not a necessary prerequisite to an "injury," within the compensation act.

4. In a case of prostration of an employee in the course of his employment, the claimant is entitled to compensation if the excessive or unusual heat was the proximate cause of the collapse and the subsequent bursting of a blood vessel, which resulted in death.

5. Whether, under the 4th subdivision of section 7660, C. L. 1913, a party is entitled to a new trial on the ground of newly discovered evidence, rests largely in the sound judicial discretion of the trial court and the appellate court will not interfere, unless it appears that such discretion has been abused.

6. Nothwithstanding the fact that existing disease or infirmity may have predisposed the employee to apoplexy, his dependents may be entitled to compensation if the rupture of the blood vessel, with resulting apoplexy, took place earlier because of the excessive artificial heat, under which the employee labored. Acceleration of a pre-existing disease to a fatal conclusion is, in such circumstances, an injury within the compensation law.

7. Certain findings of fact challenged by appellant examined, and, for reasons stated in the opinion, held to have substantial support in the evidence.

Appeal from the District Court of Ward County, North Dakota, Hon. George H. Moellring, J.

AFFIRMED. Opinion of the Court by Johnson, J.

Phillip Elliot and Scott Cameron, Bismarck, N. Dak., and O. B. Herigstad, Minot, N. Dak., Attorneys for Appellant.

McGee & Goss, Minot, N. Dak., Attorneys for Respondent.

From Stutsman County

R. G. Winslow, Plaintiff and Respondent,

vs.

George Klundt, et al, Defendants and Appellants.

Syllabus:

1. When a judgment roll, in an action to foreclose a mortgage on real property, is filed in the office of the clerk of the district court, and the judgment is docketed therein, the judgment becomes a lien on the real property of the judgment debtor in that county, or in any county where a transcript of the docket is filed, and such real property may be sold under execution by the sheriff without a levy by filing a notice in the office of the register of deeds. Section 7547, C. L. 1913, insofar as the filing of such a notice is required, does not govern.

2. Objection to an execution sale, pursuant to a judgment in a foreclosure action, made on motion after the sale had been reported to and confirmed by the court and a sheriff's deed issued to the assignee of the sheriff's certificate, comes too late, when the sole ground is noncompliance with a statute which requires the notice of sale to be published "once a week for at least thirty days prior to making such sale," in this, that, altho the notice was published five times for five consecutive weeks, the first publication being more than thirty days prior to the date of sale, there was published one issue of the weekly paper between the date of the last publication and the day of the sale in which such notice was not published. If this be a noncompliance, it does not render the sale void, but merely voidable.

3. Whether, in an action in equity, where all the issues may be fully investigated, a sale may, under any circumstances, after confirmation, be set aside on the ground of irregularity in publishing the notice of sale, is not decided.

Appeal from an order denying motion to vacate order confirming sale, made by Hon. J. A. Coffey, of the Stutsman County District Court.

AFFIRMED. Opinion of the Court by Johnson, J. Nuessle, J., being disqualified, did not participate, Hon. Fred Jansonius of the Fourth Judicial District, sitting in his stead.

John A. Jorgenson, Jamestown, N. Dak., Attorney for Appellants George and Margaretha Klundt.

Knauf & Knauf, Jamestown, N. D. Attorneys for Respondent.

From Stark County

The State of North Dakota, doing business as the Bank of North Dakota, Plaintiff and Appellant,

vs.

Dakota National Bank, of Dickinson, North Dakota, a corporation, and the Middlewest Trust Company of Valley City, North Dakota, a corporation, Defendants and Respondents.

Syllabus:

1. In an action by the State of North Dakota, doing business as the Bank of North Dakota, to recover the amount of a special deposit, made in defendant bank in connection with a farm loan transaction, it is held, for reasons stated in the opinion, that there is sufficient evidence to support a finding that the deposit was applied in discharging prior incumbrances pursuant to authority given by the plaintiff.

2. For reasons stated in the opinion, it is held, that the evidence is insufficient to support the verdict on the counterclaim for the difference between the special deposit and the amount of incumbrances discharged by the defendant bank.

Appeal from the District Court of Stark County, N. Dak., Hon. H. L. Berry, J.

Opinion of the Court by Johnson, J.

Judgment for defendant dismissing action affirmed; judgment on counterclaim reversed.

F. E. McCurdy and P. H. Butler, Bismarck, N. Dak., Attorneys for Plaintiff.

Crawford & Burnett, Dickinson, N. Dak., and Pierce, Tenneson, Cupler & Stambaugh, Fargo, N. Dak., Attorneys for Respondents.

From Morton County

Minneapolis Threshing Machine Company, Plaintiff & Appellant

vs.

Joseph Huncovsky, Defendant and Respondent.

Syllabus:

1. Where, thru inadvertence, no evidence is introduced and no finding is made, in an equity case, upon a material question, that bears directly upon the amount of damages awarder to defendant, the case will not be reversed generally on that ground alone, but should be remanded and reopened for the taking of testimony and for findings on the matter omitted.

2. For reasons stated in the opinion, it is held, that it was not an abuse of discretion to reopen the case and permit defendant to introduce more testimony after both sides had rested, but before judgment had been ordered, following Fried v. Olson, 23 N. D. 381, 133, N. W. 1041.

3. Evidence is properly admitted to prove notice given by vendee to vendor of warranted personal property to the effect that the property does not conform to the warranty.

4. When a reversal is ordered on appeal and a new trial is granted, it is proper to tax the costs of the first trial against the then losing party, who is also loser on the second trial, when the reversal and the new trial are not made necessary by any act or omission of the other party.

5. Expenditures for labor and repairs, reasonably made in a good faith effort to make the warranted article conform to the just require-

ments of the buyer, may be recovered by the vendee of the article in an action to recover damages for breach of warranty.

6. Evidence that a release of warranties was obtained by fraud and misrepresentation is admissible as tending to show that the instrument never had legal existence.

Appeal from the District Court of Morton County, North Dakota, Hon. H. L. Berry, J.

Opinion of the Court by Johnson, J.

REMANDED FOR FURTHER PROCEEDINGS.

Lawrence, Murphy & Niles, Fargo, N. Dak., Attorneys for Appellant.

Norton & Kelsch, Mandan, N. Dak., Attorneys for Respondent.

From Towner County

The State of North Dakota, ex rel.
L. N. Agneberg, Relator and Appellant

vs.

R. A. Peterson, as clerk of Perth Special School District No. 27, in Towner County, North Dakota, Defendant and Respondent.

Syllabus:

1. A statute providing a new mode of filling an office by appointment repeals by implication prior laws fixing a different mode.

2. In this case, it is held that Chapter 256, Laws 1913 which provides that at the annual meeting on the second Tuesday of July in each year the board of education of a special school district "shall appoint a clerk and a treasurer, not of their own number, who shall hold their offices during the pleasure of the board" operates as a repeal of Section 147, Chapter 266, Laws 1911, which provides: "The treasurer of any city, town or village comprising a special district shall be the treasurer of the board of education thereof; provided, however, should the said special school district have within its boundaries and be comprised partly of territory without the limits of said city, town or village, then the said special school district shall elect, at its regular elections, a treasurer in the manner provided by law for the election of school district treasurer."

Appeal from the district court of Towner County, Buttz, J.

Plaintiff appeals from a judgment dismissing his application for a writ of mandamus.

AFFIRMED.

Opinion of the Court by Christianson, J.

Cuthbert & Adamson, of Devils Lake, N. D., for appellant.

Chas H. Houska, of Cando, N. D., Newton, Dullam & Young, of Bismarck, N. D. (Of counsel), for respondents.

From Eddy County

Security National Bank of Fargo,
North Dakota, a corporation, Plaintiff-Appellant.

vs.

P. M. Mattson, Defendant-Respondent.

Syllabus:

In an action upon a promissory note, given in renewal of a former note and held as collateral security by plaintiff bank, where the defense was asserted that the renewal note was expressly delivered with the agreement and understanding of both the payee and plaintiff, as holder thereof, that the note should not be effective unless a certain life insurance policy was delivered, it is held, for reasons stated in the opinion, that the trial court properly submitted to the jury the issues whether the plaintiff was a holder in due course and whether the renewal note was in fact conditionally delivered.

Action in District Court, Eddy County, Jansonius, J.

Action upon a promissory note. From a judgment in defendant Mattson's favor plaintiff has appealed.

AFFIRMED.

Opinion of the Court by Bronson, Ch. J.

William Maloney and Lemke & Weaver, Fargo, N. D. Attorneys for Plaintiff and Appellant.

Knauf & Knauf, Jamestown, N. D., Attorneys for Defendant and Respondent.

From Pembina County

W. J. Newell, Plaintiff and Appellant

vs.

William McMurray, Defendant and Respondent

Syllabus:

1. In a conversion action to recover the value of a furnace removed from a house situated upon real property which had been, prior to such removal, conveyed to the plaintiff, it is held:

(a) Parties are at liberty to make any agreement or arrangement with respect to their property as they see fit and to give to fixtures the legal character of realty and personalty at their option; and if the arrangement is such a one as would make the property personal property, as between the parties, it is personal property, and may be so treated.

(b) For reasons stated in the opinion, it is held, that there is sufficient evidence in the record to support a finding that the furnace was installed in the house under an agreement, between plaintiff's grantor and the vendor of the plant, whereby the title thereto remained in the vendor until the furnace had demonstrated its capacity to heat the house to the satisfaction of the vendee.

2. An agreement to give fixtures the legal character of personalty avails as against the purchaser of the land, with actual or constructive notice of the agreement.

3. Actual notice consists in express information of a fact; a person is deemed to have notice of a fact when he has actual notice of circumstances sufficient to put a prudent man upon inquiry as to the existence of such fact, and who omits to make inquiry.

4. For the reasons stated in the opinion, it is held, that it was error to withdraw testimony from the consideration of the jury tending to show constructive notice of the agreement that title to the furnace should not pass to the vendee, plaintiff's grantor, until after satisfactory trial of the plant.

Appeal from the District Court of Pembina County, N. Dak., Hon. C. W. Buttz, J.

Opinion of the Court by Johnson, J.

AFFIRMED.

J. E. Garvey, Cavalier, N. D., Attorney for Appellant; H. C. DePuy, Grafton, N. D., of Counsel.

Thomas D. Stack, Walhalla, N. D., and Gray & Myers, Grafton, N. D., Attorneys for Respondent.

LEGISLATIVE RECOMMENDATIONS APPROVED BY ANNUAL MEETING

Criminal Law

1. More ample contingent funds for State's Attorneys.
2. Number and proportion of peremptory challenges.
3. Appellate procedure in criminal cases.
4. Appointment of disinterested alienists in cases where question of insanity arises.
5. Venue in bastardy cases.
6. Making conspiracy to commit a crime a felony.
7. Amendment of criminal statutes to check auto thefts.
8. Jail sentences as a minimum in grand larceny and increase of maximum penalty.
9. More stringent vagrancy statute.
10. Criminal prosecution of collectors using "fake summons."
11. Permit filing of information when a criminal is a fugitive, regardless of whether or not required for extradition.
12. Requiring prisoners in jails to work on highways.

Judicial

Establishment of a Judicial Council, consisting of: Chief Justice of Supreme Court as Chairman, one Judge from each Judicial District to be appointed by the Governor, and the President and the Secretary of the State Bar Association. Such Council would be charged with the duty of ascertaining the state of judicial business, gathering statistical information regarding the work of the courts, examining rules of procedure, suggesting changes in administration, studying work of law enforcement officials and suggesting improvement, equalizing trial work, revising rules, and considering complaints against courts and their officers.