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1976 NORTH DAKOTA SUPREME COURT REVIEW*

This is a review of important North Dakota Supreme Court decisions handed down by the court during 1976. The purpose of this review is to serve as a convenient overview of important decisions and, in some cases, a summary of the effect that these decisions will have on North Dakota law.

Not all 1976 decisions are discussed. Only those cases which will have the greatest impact on North Dakota law will be discussed.

The review is divided alphabetically by subject area. The following subjects are included:

Contracts 623
Corporate Law 626
Criminal Law 627
Criminal Procedure 628
Evidence 633
Government 634
Insurance 637
Natural Resources—Eminent Domain 638
Parent-Child 642
Professional Responsibility—Attorneys 646
Sales 646
Taxation 649
Torts 649
Wills and Trusts 651

CONTRACTS

The court handed down several decisions dealing with con-

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tract law. Three of those decisions dealt with interpretation of the terms of the offer or contract. Two other decisions applied estoppel principles to oral contracts.

Utilizing a unique fact situation in *Grove v. Charbonneau Buick-Pontiac, Inc.*, 240 N.W.2d 853 (N.D. 1976), the court reviewed several basic principles of contract interpretation. Grove brought suit to recover a car, or its value, offered by defendant "to the first entry who shoots a hole-in-one on Hole No. 8"[1] during the annual Labor Day golf tournament. The tournament was played by going around the nine hole course twice to eighteen separately located tees. For example, Hole No. 1 contained tees one and ten. Grove's hole-in-one occurred on the eighth hole from the seventeenth tee and he claimed the prize. Defendant refused to award the car, claiming the hole-in-one occurred on the seventeenth hole.[2]

In construing the language of an offer, the words should be given their ordinary and popular meaning.[3] However, in this case, either interpretation of the offer appeared acceptable.[4] If the language is ambiguous, "the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."[5] The determination of the existence of an ambiguity is a question of law for the court.[6]

The court found an ambiguity to exist, noting the alternate interpretations of: first, a hole-in-one on Hole No. 8 from the eighth tee; second, a hole-in-one on Hole No. 8 from the seventeenth tee; or third, a hole-in-one on the eighth hole played in sequence.[7] Therefore, the language was construed against the offeror and the interpretation proposed by plaintiff was accepted.

The case of *Schwartzenberger v. Hunt Trust Estate,* 244 N.W.2d 711 (N.D. 1976), dealt with the interpretation of an oil and gas lease. Plaintiffs executed a ten year lease covering 419.27 surface acres. The lease contained an "unless" clause providing for termination of the lease if drilling was not begun within a designated time, unless a delay rental of one dollar per mineral acre was paid by the lessor.[8] Defendant paid a delay rental of $398.31, which plaintiff contended was insufficient, thus terminating the lease.[9]

Defendant believed plaintiff owned ninety-five percent of the min-

1. Grove v. Charbonneau Buick-Pontiac, Inc., 240 N.W.2d 853, 855 (N.D. 1976).
2. *Id.*
3. N.D. CENT. CODE § 9-07-09 (1976); Overboe v. Overboe, 160 N.W.2d 650 (N.D. 1968).
4. 240 N.W.2d at 861.
5. N.D. CENT. CODE § 9-07-19 (1975). Cargill, Inc. v. Kavanaugh, 228 N.W.2d 133 (N.D. 1975); Watkins Products, Inc. v. Anhorn, 193 N.W.2d 228 (N.D. 1971); Stuart v. Secrest, 170 N.W.2d 878 (N.D. 1969).
6. Johnson v. Auran, 214 N.W.2d 641 (N.D. 1974).
7. 240 N.W.2d at 861.
8. Schwartzenberger v. Hunt Trust Estate, 244 N.W.2d 711, 712-13 (N.D. 1976).
9. *Id.* at 713.

erals underlying all surface acres, when in fact plaintiff owned one hundred percent of the minerals under one section and ninety-five percent of the minerals under the other lease sections. The true number of mineral acres was 406.24, causing the delay rental to be inadequate.[10] The trial court found that a mutual mistake existed and held that the lease should be reformed.[11]

On appeal the supreme court sustained the finding of mutual mistake but refused to reform the lease.[12] The court applied prior case law which held that

> [t]he generally accepted construction of the provisions for the termination of an 'unless' lease is that the 'unless' clause does not state a condition subsequent upon which the lease may be forfeited but states a common-law or special limitation upon which the interest of the lessee terminates immediately.[13]

Defendant sought to mitigate this holding by seeking application of the rule in a Texas case which required the lessor, when there is a mutual mistake, to notify the lessee to allow time for payment prior to termination.[14] The court rejected this argument, noting that the proposed defense would not protect defendant, who failed to promptly tender the excess after notice of the deficit.[15] Payment was withheld until after intitiation of this suit, five months later.[16] The court further distinguished the Texas case by noting that here, despite the mutual mistake, the facts were easily ascertainable and that defendant had acted negligently in his check of the real estate records.[17] Thus, the lease was automatically terminated.

The court was called upon to interpret an "option to purchase" agreement in *Berry-Iverson Co v. Johnson*, 242 N.W.2d 126 (N.D. 1976). The agreement was contained in a lease and covered only a small land area. The land was sold to a third party as part of a much larger tract without being offered to plaintiff, assignee of the lessee. Plaintiff sought specific performance while defendant claimed the agreement to be void for uncertainty.[18]

The court held that the "option to purchase" agreement was valid despite the fact that it did not contain the terms for the sale.[19] The contract provided that the terms and conditions of the

10. *Id.* at 714.
11. *Id.*
12. *Id.* at 715.
13. Woodside v. Lee, 81 N.W.2d 745, 746 (N.D. 1957).
14. Humble Oil & Refining Co. v. Harrison, 146 Tex. 216, 205 S.W.2d 355 (1947).
15. 244 N.W.2d at 717.
16. *Id.*
17. *Id.*
18. Berry-Iverson Co. v. Johnson, 242 N.W.2d 126, 128 (N.D. 1976).
19. *Id.* at 129.

sale were to be determined by those the owner might obtain and would accept from a third party.[20] The fact that the smaller parcel was not offered by itself was insufficient to bypass the lessee's preferential right. The court ordered specific performance based on the price offered for the entire tract.[21]

In *Farmers Cooperative Association of Churchs Ferry v. Cole,* 239 N.W.2d 808 (N.D. 1976), and *Jamestown Terminal Elevator, Inc. v. Hieb,* 246 N.W.2d 736 (N.D. 1976), the court applied estoppel principles to alleged oral contracts, but reached different conclusions. The fact situations were very similar, with the elevators contacting the farmers and allegedly reaching an oral agreement for the sale of grain. In both cases the grain was resold and the elevators covered at a loss when the farmers did not deliver.[22]

In the *Farmers Cooperative* case the court found against the elevator,[23] while holding the farmer estopped in *Jamestown.*[24] One difference appears to be the testimony of a third party in *Jamestown* who told of a conversation wherein the farmer discussed his sale to the elevator.[25] However, this statement was not relied upon by the elevator in its subsequent actions and thus could not form the basis for estoppel. Perhaps more important was the fact that in *Jamestown* there had been a prior course of dealing between the parties which was held to determine terms that had not been agreed upon in the oral contract.[26]

In both cases the court set out the elements of estoppel.[27] For the party being estopped the elements include: (1) conduct amounting to false representation or concealment; (2) the intention or expectation that this conduct will be acted upon; and (3) knowledge of the real state of facts. For the party claiming the estoppel, the elements are: (1) lack of knowledge or the means of obtaining knowledge of the true state of the facts; (2) good faith reliance upon the conduct or statements of the opposing party; and (3) a detrimental change in position or status.[28]

CORPORATE LAW

In *Stenehjem v. Sette,* 240 N.W.2d 596 (N.D. 1976), the court dealt with corporate shareholder agreements between stockholders which limit freedom of sale of stock to third parties. The usual

20. *Id.*
21. *Id.* at 135-36.
22. Farmers Coop. Ass'n of Churchs Ferry v. Cole, 239 N.W.2d 808, 811 (N.D. 1976); Jamestown Terminal Elevator, Inc. v. Hieb, 246 N.W.2d 736, 739 (N.D. 1976).
23. 239 N.W.2d at 811.
24. 246 N.W.2d at 739.
25. *Id.*
26. *Id.* at 740.
27. 239 N.W.2d at 813; 246 N.W.2d at 741.
28. 56 A.L.R.3d 1041 (1974).

purpose of such agreements is to discourage a sale of stock to outsiders to preserve continuity of corporate control and management. In this case plaintiff and defendant acquired the majority interest in a bank. They then entered into an agreement to give each other the first option to purchase the other's stock if one decided to sell. The alleged breach occurred when defendant attempted to sell his stock to a third party without first offering it to plaintiff.

The court noted that North Dakota has no statutory law specifically directed to these types of agreements. Therefore, they must be construed like any other private agreement on the same subject matter.[29] The court then made it clear that stock option agreements of this type are not encouraged. The decision explained that restrictions on the free marketability of securities are looked upon with disfavor and are strictly construed by courts.[30] In addition, the court stated that provisions of such agreements may be waived and the principle of estoppel may be applied to prevent enforcement.[31]

Applying these rules to the rather involved facts of the case, the court held that plaintiff had waived his rights and was estopped from enforcing the first-option agreement.[32]

CRIMINAL LAW

State v. Gann, 244 N.W.2d 746 (N.D. 1976), involved a defendant who was convicted of robbery. He appealed from the jury's guilty verdict on grounds that the trial court erred in consolidating his trial with another robbery with which he was charged, and that the court erred in refusing defendant's jury instructions on duress.

The supreme court held that there was no error in the joinder because the two robberies occurred less than a month apart and the manner in which they were committed was similar. The court held that this was sufficient, under Rule 8 of the *North Dakota Rules of Criminal Procedure*, to find the offenses to be of the "same or similar character," and therefore joinable. The court found no prejudice to defendant in the consolidated trial.[33]

On the issue of the refusal to instruct the jury on duress, the court held that in order for a defense of duress to be valid, there must be a showing that the compulsion or duress was of such a nature to induce a well-founded fear of immediate great bodily harm or death.[34] The court did not find defendant's acts, compelled by a

29. Stenehjem v. Sette, 240 N.W.2d 596, 600 (N.D. 1976).
30. *Id.* at 601.
31. *Id.* at 600, 601.
32. *Id.* at 601.
33. State v. Gann, 244 N.W.2d 746, 751 (1976).
34. *Id.* at 752.

need to provide his family with food and shelter, to come within the "fear of immediate great bodily harm or death" requirement.[35]

In *Hughes v. North Dakota Crime Victims Reparations Board,* 246 N.W.2d 774 (N.D. 1976), the claimant, who suffered personal injuries when assaulted in his home, and who lost three days' wages due to testifying against the offender, appealed from the decision of the Crime Victims Reparations Board denying him compensation for lost wages. On appeal, the district court dismissed the case for lack of jurisdiction.

The supreme court affirmed the district court's dismissal and the Board's denial of the claim. The dismissal was proper because although the Crime Victims Reparations Board is an administrative agency and appeal to the district court from the decisions of administrative agencies are normally allowed, North Dakota Century Code section 65-13-17 provides that appeals from the Board's decisions are not to be heard by the district courts, but are to be taken directly to the supreme court.[36]

The court also held that compensation allowed by the Uniform Crime Victims Reparations Act is limited to losses resulting directly from physical injury.[37] The claimant, therefore, could not receive compensation for lost wages caused by his appearing to testify against the offender in court.

The court also considered the awarding of attorneys fees. The court held that twelve guidelines would be considered in making an award: time and labor required; novelty and difficulty of the questions; requisite skill necessary to perform legal service properly; preclusion of other employment by the attorney due to acceptance of the case; customary fee; whether fee is fixed or contingent; time limitations imposed; amount involved and result obtained; experience; reputation and ability of attorney; undesirability of the case; nature and length of professional relationship with the client; and awards in similar cases.[38]

CRIMINAL PROCEDURE

The court dealt extensively with the area of criminal procedure. Many of these decisions are of considerable importance to the North Dakota criminal lawyer.

The North Dakota lawyer should note that his local grievance committee is not the only enforcer of professional ethics. In *State v. Howe,* 247 N.W.2d 647 (N.D. 1976), the supreme court reversed a

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35. *Id.*
36. Hughes v. North Dakota Crime Victims Reparations Bd., 246 N.W.2d 774, 776 (1976).
37. *Id.* at 777.
38. *Id.* at 777-78.

lower court's dismissal of an information charging Howe, a lawyer, with tampering with a witness.[39] The fact that the complaining witness had not yet been subpoenaed played no part in the court's holding that a lawyer's threat to "sue for your back teeth"[40] would constitute tampering with a witness.

In *State v. Carmody*, 243 N.W.2d 348 (N.D. 1976), petitioner argued that his sentence should be invalidated under the North Dakota Post-Conviction Procedure Act[41] because he had not been advised at sentencing of his right to appeal. The court agreed and remanded for resentencing, reasoning that failure to so advise invalidated any sentence to the extent it signaled the beginning of the running of the appeal period.

The court handed down two particularly relevant driving-while-intoxicated decisions. In *State v. Kolb*, 239 N.W.2d 815 (N.D. 1976), defendant contended he had been illegally stopped by the arresting officer. Dispensing with this contention, the court distinguished between reasonable cause to make an investigatory stop and reasonable cause to make an arrest.[42] Without detailing particular facts that will ordinarily justify an investigatory stop of an automobile, the court held that defendant's erratic driving behavior provided sufficient cause to justify the stop.[43]

In *State v. Erickson*, 241 N.W.2d 854 (N.D. 1976), defendant was charged with negligent homicide resulting from a car accident. The defendant relied on three grounds in challenging the blood alcohol test which was admitted in evidence:[44] (1) the implied consent law[45] applies only to those charged with driving while intoxicated; (2) the blood test result falls within the physician-client privilege; and (3) the blood test was not properly administered.

The court rejected all three grounds, holding that: (1) North Dakota Century Code sections 39-20-03 and 30-20-07,[46] when read to-

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39. The charge was brought under N.D. CENT. CODE § 12.1-09-01 (1976).

40. State v. Howe, 247 N.W.2d 647, 650 (N.D. 1976).

41. N.D. CENT. CODE ch. 29-32 (1974), *as amended*, (Supp. 1975). It is interesting to note that the court stated this Act could be used to appeal nonconstitutional issues as well as constitutional ones. State v. Carmody, 243 N.W.2d 348, 349 (N.D. 1976).

42. State v. Kolb, 239 N.W.2d 815, 817-18 (N.D. 1976). For a stop, only a minimal amount of justifying facts and circumstances need be shown as compared to an arrest where the facts observed must be sufficient to support a probable cause determination. *See* Terry v. Ohio, 392 U.S. 1 (1968).

43. The investigating officer was allowed, when testifying in opposition to a motion to suppress, to embellish upon very general facts stated in his officer's report. The court stated this is permissible if the testimony and the report are consistent with each other. If the testimony had been contradictory, defendant could have used the report as substantive evidence of the truth of matters asserted therein. State v. Kolb, 239 N.W.2d 815, 819 (N.D. 1976).

44. Two blood samples were extracted from defendant while he was unconscious by a medical technologist pursuant to police and a supervising doctor's directions.

45. N.D. CENT. CODE § 39-20-01 (1972).

46. Section 39-20-03 states that one who is "unconscious . . . shall be deemed not to have withdrawn . . . consent" and section 39-20-07 states that blood alcohol tests are admissible in evidence in "any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving . . . a motor vehicle while under the influence of intoxicating liquor. . . ."

gether, merit admission of test results in a non-DWI proceeding; (2) the test results are not "information" for purposes of the physician-patient privilege and because such tests were not taken for diagnostic or treatment purposes the privilege would not apply; and (3) a laboratory technician's testing of blood samples under the supervision of the state toxicologist is presumed to be properly and fairly administered.[47]

State v. Frye, 245 N.W.2d 878 (N.D. 1976), dealt with probable cause principles and their application. The court discussed the question of what constitutes unreasonable delay within the meaning of Rule 5(a) of the *North Dakota Rules of Criminal Procedure*.[48] Hinting that this rule is not of constitutional origin, the court once again reiterated that no specific time period between arrest and presentation to a magistrate will constitute an unreasonable delay per se. Stating that although a three day delay is open to question, such a delay will not be deemed unreasonable unless it was used to interrogate or obtain damaging statements from the accused.[49]

In *State v. Jensen*, 241 N.W.2d 557 (N.D. 1976), the court finally set out guidelines to determine which defendants are truly "indigent" within the meaning of Rule 44 of the *North Dakota Rules of Criminal Procedure*. Although the guidelines still leave the trial judge with a great amount of discretion, they do provide a basic framework within which that discretion should be exercised.

Basically, the standards set out are: (1) one is indigent "if his net financial resources and income are insufficient to enable him to obtain qualified counsel";[50] (2) any doubts should be resolved in favor of the defendant; (3) one may be partially eligible if his personal funds cover necessities of life but are not adequate to retain counsel; and (4) family resources are not to be considered unless the family indicates a willingness to pay or is under a statutory duty to support the defendant.[51]

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47. Blood alcohol analysis within the office of the State Toxicologist should be distinguished from analysis made by breathalyzer operators in the police stationhouse. In the latter situation the defendant is present at all times and has the opportunity to observe the operator's procedures, whereas in the former situation, he is not present and has no opportunity to observe. Given this predicament, absent a cross examination of the technician who had processed the sample, defense counsel has little or nothing to present in the form of contradictory evidence to rebut the presumption of regularity.

48. N.D.R. CRIM. P. 5(a) states: "An officer or other person making an arrest shall take the arrested person without unnecessary delay before the nearest available magistrate."

49. State v. Frye, 245 N.W.2d 878, 882 (N.D. 1976).

50. State v. Jensen, 241 N.W.2d 557, 562 (N.D. 1976). Factors to be weighed in considering insufficient income are:

> (a) the cost of providing the person and his dependents with the necessities of life, and (b) the cost of a defendant's bail bond if financial conditions are imposed, or the amount of the cash deposit defendant is required to make to secure his release on bond.

Id.

51. *Id.*

Jensen was also the first among a line of three 1976 cases[52] to restate the rule regarding release on bail pending appeal.

> "[A] convicted defendant is entitled to release while the appeal is pending only if it appears (1) that the appeal is not frivolous, (2) the appeal is not taken for the purpose of delay, (3) there is sufficient reason to believe that the conditions of release will reasonably assure that the defendant will not flee, and (4) there is sufficient reason to believe that the defendant does not pose a danger to any other person or to the community."[53]

It is interesting to note that in all three cases the applicant was denied relief because of the third and fourth factors. In most cases it appears that the post-conviction applicant must shoulder a much heavier burden than the pretrial applicant.

In *State v. Storbakken,* 246 N.W.2d 78 (N.D. 1976), and *State v. Lueder,* 242 N.W.2d 142 (N.D. 1976), competency issues were raised on appeal. Storbakken contended that a competency hearing should have been held before his plea of guilty was accepted by the court. The supreme court rejected this argument, stating that the facts before the court[54] were not such as to create a reasonable doubt as to defendant's competence.[55]

Lueder contended that a competency hearing should have been held to determine whether he was competent to stand trial. In this case the court relied on a different standard than the standard applied in *Storbakken*:

> [I]f a court has reasonable ground, before or during the trial, to believe that a defendant is insane or mentally defective to the extent that he is unable to understand the proceedings against him or assist in his defense, it shall hold a hearing to determine his mental condition.[56]

In holding that defendant's condition did not fall within this standard, the court also noted that the mere desire or need for psychiatric help is not the equivalent of lack of competency to stand trial.[57]

52. State v. Olmstead, 242 N.W.2d 644 (N.D. 1976); State v. Azure, 241 N.W.2d 699 (N.D. 1976); State v. Jensen, 241 N.W.2d 557 (N.D. 1976).
53. State v. Jensen, 241 N.W.2d 557, 559 (N.D. 1976), *quoting,* State v. Stevens, 234 N.W.2d 623, 626 (N.D. 1975).
54. Those facts were a presentence investigation report, defendant's courtroom demeanor, and defendant's personal background.
55. State v. Storbakken, 246 N.W.2d 78, 81 (N.D. 1976). The court principally relied on Pate v. Robinson, 383 U.S. 375 (1966), and N.D. CENT. CODE § 12.1-04-06 (1976).
56. State v. Lueder, 242 N.W.2d 142, 146 (N.D. 1976). In formulating this standard the court relied on Dusky v. United States, 362 U.S. 402 (1960), State v. Fischer, 231 N.W.2d 147 (N.D. 1972), and N.D. CENT. CODE § 29-20-01 (1974). Section 29-20-01 was repealed by ch. 116, § 41 [1973] N.D. Sess. Laws 215, 300, effective July 1, 1975. It was replaced by N.D.R. CRIM. P. 12.2.
57. 242 N.W.2d at 146.

In *Storbakken* the court also discussed judicial conduct incident to the acceptance of guilty pleas. The court indicated that two conditions must be fulfilled: (1) the plea must be voluntary and knowing; and (2) the defendant must be aware of various constitutional rights that he waives by pleading guilty.[58] As to the first condition, substantial compliance with Rule 11 of the *North Dakota Rules of Criminal Procedure* is sufficient.[59] However, the court stated that literal compliance would be the safer route and would prevent most constitutional attacks dealing with voluntariness.[60] Concerning the second condition, the court stated that neither Rule 11 nor due process standards[61] mandate a specific instruction to the defendant of the particular rights waived by pleading guilty. All that is required is that the defendant be aware of those rights and that such awareness be reflected in the record as a whole.[62]

In two cases arising out of the same incident, *State v. LaFromboise,* 246 N.W.2d 616 (N.D. 1976), and *State v. Azure,* 243 N.W.2d 363 (N.D. 1976), the court had the opportunity to consider the permissibility of in-court identifications after a potentially prejudicial single photo identification had been made. The court in *Azure* stated the following rule:

> [E]ach case must be considered on its own facts, and convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.[63]

Noting that single photograph identifications should be avoided, the court went on to state that in certain situations their use was necessary[64] and therefore permissible.[65]

The court had occasion to focus on speedy trial considerations in *State v. Erickson,* 241 N.W.2d 854 (N.D. 1976). The court outlined the balancing test, as set forth in *Barker v. Wingo,*[66] in which four

58. 246 N.W.2d at 82-83.
59. N.D.R. CRIM. P. 11 lists the advice which must be given to the defendant by the court and states that a guilty plea may not be accepted by the court unless that plea is voluntary.
60. 246 N.W.2d at 83 n.5.
61. *See* Boykin v. Alabama, 395 U.S. 238 (1969); Brady v. United States, 397 U.S. 742 (1970).
62. 246 N.W.2d at 84.
63. 243 N.W.2d at 366. *See also* Simmons v. United States, 390 U.S. 377 (1968).
64. The situations stated by the court were when an officer may not have access to multiple photographs, when it is necessary to make an identification in the field, or when used in an investigative process to eliminate suspects. 243 N.W.2d at 365-66.
65. The facts persuading the court to allow the in-court identification were that such identification was unequivocal, there was no indication that it was based on the out-of-court identification, the photographic identification was made on the same day as the crime, and the witness had no motive to falsify.
66. 407 U.S. 514 (1972).

factors are to be weighed to determine whether a speedy trial has been afforded: (1) length of delay; (2) reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant.[67] Without suggesting that any particular factor or combination of factors was controlling, the court held that under the circumstances in this case a speedy trial had been afforded defendant.[68]

In *State v. Metzner*, 244 N.W.2d 215 (N.D. 1976), the court dealt with consent searches and custodial interrogations. Defendant claimed his boots were unconstitutionally seized in violation of the fourth amendment and that he had been interrogated while in custody in violation of *Miranda v. Arizona*.[69]

The court, relying on the totality of the circumstances test,[70] held that Metzner had voluntarily consented to the search and seizure of the boots. In disposing of the *Miranda* argument, the court distinguished between a focus for purposes of investigation and a focus for purposes of custodial interrogation.[71] Although the court determined that there was a focus for purposes of investigation in this case, it stated that the fifth amendment and the exclusionary rule of *Miranda* apply only to testimonial evidence. The boots were not such evidence, hence the fifth amendment and *Miranda* had not been violated.[72]

EVIDENCE

State v. Smith, 238 N.W.2d 662 (N.D. 1976), was an appeal from the district court's order denying a motion for a new trial on defendant's burglary conviction. Defendant contended that the trial court erred in refusing to permit the defense to comment on the state's failure to call an accomplice as a witness.

The supreme court cited the general rule that comment by counsel on the opposing party's failure to call a witenss is permissible when the circumstances justify an unfavorable inference from such failure to use an available witness.[73] The court went on to state, however, that an adverse inference does not arise when the witness is available to either party, when the testimony would be cumula-

67. State v. Erickson, 241 N.W.2d 854, 859 (N.D. 1976).
68. 241 N.W.2d 854, 860. Defendant made no demand for a speedy trial, he was not incarcerated during the delay, the delay was partially caused by defendant's motions, and there was no showing of prejudice to the defendant.
69. 384 U.S. 436 (1966).
70. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (all the surrounding circumstances must be considered in determining whether consent is voluntary).
71. State v. Metzner, 244 N.W.2d 215, 223 (N.D. 1976). *See* Beckwith v. United States, 425 U.S. 341 (1976).
72. *Id.* at 224-25. *See also* Fisher v. United States, 425 U.S. 391 (1976); Schmerber v. California, 384 U.S. 757 (1966).
73. State v. Smith, 238 N.W.2d 662, 666-7 (1976).

tive or when the witness could be expected to exert a valid privilege.[74]

In affirming the lower court's order, the supreme court found that there was sufficient corroboration of testimony by the accomplice and that there is no requirement that every material fact testified to by an accomplice be corroborated.[75] Hence, there was no error in the court's refusal to permit defense counsel to comment on the state's failure to call an accomplice as a witness.

In *State v. Stevens*, 238 N.W.2d 251 (N.D. 1975), defendant, convicted of first-degree manslaughter of an infant, appealed. The issue before the supreme court was whether evidence of prior injuries to the child should have been received.

The court stated the general rule that evidence of prior acts or crimes cannot be received unless it is relevant for some purpose other than to show a probability that a person committed a crime because a person is of a criminal character.[76] The court weighed the fairness to defendant against the aims of full disclosure and concluded that most of the evidence of other injuries should have been excluded.[77] It found that this evidence was not really evidence of "other offenses or acts" of defendant, but was actually evidence of other injuries to the child, which may have been accidental or caused by another individual. Furthermore, because the evidence was offered not only to prove absence of accidental causation but also to prove identity of the person causing the injury, and because there was no direct evidence that defendant struck or abused the child, the evidence was too prejudicial to be admitted.[78]

The court took judicial notice of the "battered child syndrome" and stated that by its ruling it was not denying the existence of such a syndrome. It ruled only that the evidence could not be admitted because the prejudicial effect of some of the evidence outweighed its probative force.[79]

GOVERNMENT

The first two opinions discussed below deal with state election laws. The third case deals with unvouchered governmental expense accounts.

In *State ex rel. Olson v. Thompson*, 248 N.W.2d 347 (N.D. 1976), Kuhn was certified as the winner of an election for state representative. After a certification to the Secretary of State, but prior to the issuance of a certificate of election, Kuhn's opponent filed a

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74. *Id.* at 667.
75. *Id.* at 669-70.
76. State v. Stevens, 238 N.W.2d 251, 257 (1975).
77. *Id.* at 257-58.
78. *Id.*
79. *Id.* at 259.

demand for a recount. The Secretary of State withheld the certificate pending the recount.

After the recount, Kuhn's opponent, Wentz, was certified as the winner to the State Board of Canvassers. Before the Board of Canvassers could act, alternative writs of prohibition and mandamus were served, directing that a certificate of election be issued to Kuhn. The attorney general then brought an original action in the supreme court for a writ of prohibition to prevent the district court from enforcing its order.

The supreme court issued the prohibition and directed the Secretary of State and the State Board of Canvassers to meet, recanvass the election results, and correct any previous certification of the results of the election. Rejecting the argument that the recount procedure did not provide for recanvassing and was intended solely to provide evidence in case of an election contest in the legislature, the court reasoned that the recount would be an idle act unless the results of the election could be recertified based on the recount.[80]

Basic to the court's holding was the determination that a recount board[81] is the equivalent of a county board of canvassers within the meaning of North Dakota Century Code section 16-13-15.[82] This results in expanding the remedies available to a losing party in a contested election. While the recertification statute clearly allows for the correcting of clerical errors made by a county board of canvassers in certifying election results, the court holds that the outcome of a recount is also a basis for recertification and that the State Board of Canvassers can be ordered to issue a corrected certificate of election to the winner of the recount.

Kuhn v. Beede, 249 N.W.2d 230 (N.D. 1976), the second case dealing with election laws, arose from the same contested election noted in *Thompson*.[83] Kuhn petitioned for review of a decision by a district court that certain ballots were void. Sitting as supervisor of a recount board of canvassers, the district judge held that failure of the election officials to stamp and initial absentee ballots rendered them void even when voting machines were used to register the votes.

In an opinion joined by Chief Justice Erickstad, Justice Paulson held that the applicable statute was mandatory,[84] and, being designed to prevent fraud, was a reasonable restriction on the right to vote and thus was constitutional. Justice Sand concurred in the result,

80. 248 N.W.2d at 352.

81. *Id.* at 355.

82. N.D. CENT. CODE § 16-13-15 (1971) establishes the procedure for the county canvassing board to meet, recanvass the votes, and correct any previous certification made to the Secretary of State.

83. State ex rel. Olson v. Thompson, 248 N.W.2d 347 (N.D. 1976).

84. N.D. CENT. CODE § 16-13-01(1) (1971) provides:

but dissented on the finding of jurisdiction. He felt the court should leave the contest to be decided by the legislature.[85]

In a strongly worded dissent, Justice Vogel found that the statute served no useful purpose when applied to voting machines and should be construed as directory rather than mandatory. In the alternative, Justice Vogel declared that the statute should be declared unconstitutional because voters should not be disenfranchised through the inadvertence of election officials.[86]

A third case dealing with government concerned unvouchered expense accounts provided to certain state officials. In *Walker v. Omdahl*, 242 N.W.2d 649 (N.D. 1976), petitioner sought a writ of prohibition to prevent the Director of Accounts and Purchases from disbursing funds to certain government officials, including the Governor and Lieutenant Governor. Walker asserted that the unvouchered expense accounts were actually salary increases prohibited by the North Dakota Constitution.[87] The court agreed that all expenditures authorized by the legislature that have the effect of increasing the emoluments of office of elected officials are potentially within the prohibition of the constitution. However, longstanding custom in North Dakota shows that not all such benefits are unconstitutional. The Governor has been provided with certain benefits (e.g., a house and car) and legislators have been provided with unvouchered expenses for work performed during the interim. These customs show that unvouchered expenses are not per se unconstitutional. It follows, then, that these expenses may be increased from time to time to keep pace with the cost of living. But, when the court looked at the amount of the increases, it found them to be unrelated to the cost of living. Unvouchered expenses were increased from 187% to 275%, depending on the official, from 1973 to 1975. This finding demonstrated to the court's satisfaction that the unvouchered expenses were actually hidden salary increases prohibited by the state constitution.[88]

Even though the increases were unconstitutional, the court declined to issue a writ of prohibition. Citing cases in which public officials were protected from liability when they acted in good faith reliance on statutes prior to the statutes being declared unconstitu-

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In the canvass of the votes at any election, a ballot shall be void and shall not be counted if:

1. It is not endorsed with the official stamp and initials as provided in this title.

85. Kuhn v. Beede, 249 N.W.2d 230, 240 (N.D. 1976).
86. *Id.* at 241-49.
87. N.D. CONST. art. 3, § 84 provides:
Salaries of public officers shall be as prescribed by law, but the salaries of any of the said officers shall not be increased or diminished during the period for which they shall have been elected and all fees and profits arising from any of the said offices shall be covered into the state treasury.
88. Walker v. Omdahl, 242 N.W.2d 649, 658 (N.D. 1976).

tional, the court applied a modified "Sunburst Doctrine,"[89] and held that increases unrelated to the cost of living would not be struck down until after July 1977.[90] Not only were those officials who accepted the unconstitutional increase not required to pay it back, but they were allowed to continue receiving excess funds until the end of the term to which each had been elected.

This holding appears to be a significant modification of the doctrine which had previously been applied in North Dakota to protect those whose actions were taken in reliance on an unconstitutional statute[91] and those whose prior actions were taken in reliance on a judicial doctrine of long standing.[92]

INSURANCE

In *Schock v. Ocker Insurance Corp.*, 248 N.W.2d 786 (N.D. 1976), the court was faced for the first time with the question of whether knowledge of the medical history of an insurance applicant (other than knowledge of impending death) must be communicated by insurance agents or brokers to the insurer in a credit life insurance transaction when no statement of physical condition is required. The credit insurance was purchased from the bank and submitted to Ocker Insurance Corporation, which then placed it with the ultimate insurance carrier. The substance of the conversation between the bank manager and the insurance agent was in dispute concerning whether the agent was told that the applicant was suffering from a serious illness that might be terminal.[93]

The court held that knowledge of the insured's illness by the manager of the bank, who acted as the carrier's agent, was imputed

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89. *Id.* at 658-59. The "Sunburst Doctrine" was named after an opinion by Justice Cardoza in Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932), where the Court held:

> A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly, that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted.

Id. at 364 (emphasis in original) (citations omitted).

90. Although July 1977 was not specifically stated by the court, it is derived from the following language in the opinion:

> [U]nvouchered expenses in the future beyond those which could be considered reasonably necessary to cover cost of living increases will be illegal. Further, in the future they will be recoverable, for there will then be no basis for reliance on the statute. Hopefully, the problems we have confronted in this case will be considered fully by the Legislature when it next meets. . . .

242 N.W.2d at 659.

91. Johnson v. Hasset, 217 N.W.2d 771 (N.D. 1974) (Sunburst Doctrine applied to protect those who purchased insurance in reliance on guest statute and insurance companies which set rates in reliance on the statute).

92. Kitto v. Minot Park Board, 224 N.W.2d 771 (N.D. 1974) (Sunburst Doctrine applied to protect governmental subdivisions which had not purchased insurance in reliance on governmental immunity).

93. Schock v. Ocker Ins. Corp., 248 N.W.2d 786 (N.D. 1976).

to the insurer, and the insurer was estopped from asserting lack of disclosure as a defense.[94]

In the absence of any knowledge of the insured's impending death, the insurer who fails to require a medical examination waives disclosure of medical history by the insured in credit life insurance transactions. Any knowledge acquired by the insurer's agent is imputed to the insurer.[95] The only disclosure which is not waived is the knowledge of impending death. In this case no party to the insurance contract had any knowledge of the insured's impending death.[96]

NATURAL RESOURCES—EMINENT DOMAIN

The court handed down four important decisions in this area. Three of these cases deal with problems which arise when a state grants the power of eminent domain to a utility company. The fourth case deals with the issuance of water permits in North Dakota.

In *Eckre v. Public Service Commission*, 247 N.W.2d 656 (N.D. 1976), the court faced a collateral attack on eminent domain proceedings. Dome Pipeline Company applied for and received from the Public Service Commission (PSC) a certificate of public convenience and necessity for the construction of a pipeline. The certificate was granted after notice to competing utilities, county officials, and to the public through a press release. Landowners affected by the pipeline received no personal notice and were unaware of the hearing. After receiving the certificate, Dome contacted the landowners. When the landowners would not sell, Dome began eminent domain proceedings. The landowners then sought a writ of mandamus in district court to compel the PSC to vacate the previous certificate and begin the application procedure anew with notice to the landowners. The district court granted the mandamus and both the PSC and Dome appealed. The supreme court reversed.

The court first rejected Dome's assertion that it was not required to obtain a certificate of public convenience and necessity before beginning eminent domain proceedings.[97] It then decided the central issue in the case. The landowners argued that statutes relating to proceedings before the PSC[98] require that they be given notice and an opportunity to participate in the determination of public convenience and necessity. The court rejected this argument by stating that the determination of public convenience and necessity is a question of legislative fact which has been delegated to the PSC.

94. *Id.* at 790.
95. *Id.*
96. *Id.*
97. Eckre v. Public Serv. Comm'n, 247 N.W.2d 656, 663 (N.D. 1976).
98. N.D. CENT. CODE §§ 49-01-07 (1960) and 49-03-02 (1960), *as amended,* (Supp. 1975)

Due to the nature of the determination, it was within the discretion of the PSC to whom it would give notice, and failure to notify the landowners was not an abuse of that discretion. The court noted that the landowners' interests could be protected by participation in eminent domain proceedings and by intervention in proceedings under the Energy Conversion and Transmission Facility Siting Act.[99]

KEM Electric Cooperative, Inc. v. Materi, 247 N.W.2d 668 (N.D. 1976), involved an eminent domain action in which a power company was seeking to condemn a right-of-way for an electric transmission line. Defendants resisted, contending that no necessity for taking could be shown when the utility had a pre-existing right of way fifty to eighty feet from and parallel to the proposed route. Defendants presented no evidence at trial. Plaintiff's case was based on the testimony of the general manager who stated that one line was for transmission and the other for distribution. The safety of maintenance workers and the necessity of keeping one line in operation when the other was being repaired in order to provide uninterrupted service were the justifications offered for two lines. The supreme court held that this testimony was sufficient evidence from which the trial court could find the taking to be justified.[100]

The court stated that a landowner may not object merely because some other site might have been as suitable. A defendant must have evidence that the other site better serves the public interest. The mere fact that there is a pre-existing parallel right of way owned by the same utility is not a sufficient basis for denying the utility another right of way.[101]

In *United Plainsmen v. North Dakota State Water Conservation Commission*, 247 N.W.2d 457 (N.D. 1976), the court was faced with a problem concerning administration of water permits. United Plainsmen, a non-profit corporation, filed suit in district court seeking an injunction against the State Engineer and the State Water Conservation Commission to prevent any future issuance of water permits until there was a comprehensive short-term and long-term plan for development and conservation of the state's natural resources. The trial court dismissed the complaint with prejudice. The supreme court reversed and held the complaint stated a cause of action under the Public Trust Doctrine.[102]

The court interpreted North Dakota water statutes[103] as a legislative expression of the Public Trust Doctrine. The court stated

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99. N.D. CENT. CODE ch. 49-22 (Supp. 1975).
100. KEM Elec. Coop., Inc. v. Materi, 247 N.W.2d 668, 672 (N.D. 1976).
101. In its decision the court relied heavily on Otter Tail Power Co. v. Malme, 92 N.W.2d 514 (N.D. 1958).
102. United Plainsmen v. North Dakota State Water Conservation Comm'n, 247 N.W.2d 457, 464 (N.D. 1976).
103. N.D. CENT. CODE §§ 61-01-01, 06 (1960); §§ 61-01-07 (1960), *as amended*, (Supp. 1975) and 61-01-26 (Supp. 1975).

that the complaint charged a failure on the part of defendants to develop any water conservation plan and a failure to consider injury to the public in the issuance of water permits.[104] If the charges could be proven at trial, plaintiffs were entitled to relief. The court implied that evidence of some planning by state agencies would be sufficient to meet the requirements of the Public Trust Doctrine.[105]

The Public Trust Doctrine was first enunciated by the United State Supreme Court in *Illinois Central Railroad v. Illinois*.[106] In this case, the State of Illinois had attempted to sell the Chicago harbor to a railroad. The Court held that while a state generally has the power of alienating property held by it, in certain instances the property is held in trust by the state for the use and benefit of the people of the state, and, as such, it is inalienable. A state is not free to abdicate to private parties its governmental trust over navigable waterways and the land beneath them.[107]

While the North Dakota Supreme Court in *United Plainsmen* relied only on the narrow common-law doctrine enunciated in *Illinois Central*, there are hints that the court may be willing to entertain actions in other areas based on the Public Trust Doctrine.[108] Subjects that have been suggested by commentators include: clean air; natural, scenic, or historic areas; location of rights of way for utilities; strip mining; wetland filling; and dissemination of pesticides—at least when these activities involve state permits.[109]

In *Square Butte Electric Cooperative v. Hilken*, 244 N.W.2d 519 (N.D. 1976), the court was faced with the question of what constitutes a public use for purposes of exercising the power of eminent domain. The Square Butte Cooperative was organized by the Minnkota Power Cooperative[110] to generate and transmit electricity from Center, North Dakota, to Duluth, Minnesota. The electricity to be produced was to be converted to direct current (DC) at the point of production, carried to Duluth, then reconverted to alternating current (AC). Substantially all of the output was contracted to be sold to Minnesota Power and Light, a private utility, to meet the expanding needs of the taconite industry. Seven years after completion of construction, Square Butte would have had the option to purchase up to

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104. 247 N.W.2d at 464.
105. *Id.*
106. 146 U.S. 387 (1892).
107. *Id.* at 452-54.
108. *See* 247 N.W.2d at 463.
109. *See, e.g.*, Payne v. Kassab, 11 Pa. Commw. Ct. 14, 312 A.2d 86 (1973); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).
110. Minnkota is a cooperative made up of twelve rural electric cooperatives. Eight of its members are Minnesota cooperatives and four are North Dakota cooperatives. Each member has one seat on the board of directors of Minnkota, so Minnkota is effectively controlled by the Minnesota cooperatives. Square Butte is controlled by Minnkota and has only one employee—a general manager.

thirty percent of the generating capacity, provided five years advance notice was given.

For technical reasons, a DC transmission line, unlike an AC line, cannot be tapped between its endpoints. Since the entire output of Square Butte's plant was to be sent to Duluth, any electricity to be used in North Dakota would have to be returned to the state from Duluth after reconversion to AC. Square Butte commenced eminent domain proceedings for rights of way for the transmission line. Defendant landowners resisted on the ground that the rights of way were not being taken for a public use. The trial court agreed and dismissed Square Butte's complaint with prejudice.[111]

On appeal, the supreme court reversed. In deciding the case, the court set out the standards for determining the existence of a public use for purposes of exercising the power of eminent domain. Beginning with the premise that eminent domain is a power of the state and must be exercised for the benefit of the inhabitants of the state, the court examined at length cases from other jurisdictions. From these cases the court discerned three elements that must be present to find a public use. First, the public must have a right to benefit from the use and this benefit must be guaranteed by regulatory control or through actual benefit.[112] Second, the public of the state must derive a direct and substantial benefit.[113] Third, the benefit must be "inextricably attached to the territorial limits of the state."[114]

Analyzing the fact situation before it, the court determined that a public use was shown. Several factors, none of which was sufficient in itself, contributed to the finding. There was evidence that North Dakota's transmission system would be stabilized with the existence of the DC line. More power would be potentially available in times of shortage, and the possibility existed of residents of the state receiving power at a lower cost in the future if Square Butte exercised its options.

In a strongly worded dissent, Justices Sand and Vogel took issue with the majority's conclusions. While agreeing generally with the majority's statement of the law, the dissent concluded that any benefits of the project to the inhabitants of North Dakota were incidental and remote.[115]

It should be noted that while this case sets forth the elements of public use, *Square Butte* deals with a non-profit public utility which

111. For a discussion of the trial court proceedings, *see* Note, *Interstate Public Use: An Issue Occurring in Condemnation for Interstate Power Lines*, 52 N.D.L. REV. 563 (1976).
112. 244 N.W.2d at 525.
113. *Id.*
114. *Id.*
115. *Id.* at 536.

is exempt from PSC regulation of its services or business dealings[116] and from obtaining a certificate of public convenience and necessity before exercising the power of eminent domain.[117] Thus, the question of public use first arises during eminent domain proceedings. How this differs from the finding required to be made by the PSC when it issues a certificate of public convenience and necessity was not discussed. The court intimated that if *Square Butte* had been subject to PSC regulation, that alone would have been sufficient to allow an exercise of the power of eminent domain.[118]

PARENT-CHILD

Four court decisions dealt with state statutory law relating to juveniles, all interpreting the Uniform Juvenile Court Act[119] and one reconciling that Act with the Revised Uniform Adoption Act.[120] The Uniform Juvenile Court Act governs both those proceedings in which a juvenile is alleged to be delinquent, unruly, or deprived[121] and those proceedings adjudicating the termination of parental rights when such termination is unrelated to an adoption proceeding.[122] The court examined both aspects of the Act.

The court in *State v. Grenz*, 243 N.W.2d 375 (N.D. 1976), analyzed the rights that must be afforded a juvenile at a transfer hearing to assure that his subsequent hearing in adult criminal court would meet jurisdictional requirements. The supreme court found two rights to be crucial at a transfer hearing—the right to adequate notice of the hearing and the right to counsel unless knowingly and understandingly waived.

The preliminary issue facing the court was whether a defendant who pleaded guilty in adult court had waived any right he may have had to attack defects in a prior juvenile court transfer hearing. Recognizing the general rule that a guilty plea waives only non-jurisdictional defects, the court held that defendant did not waive his right to attack the defects of improper notice and improper inquiry into his knowledge of his right to counsel.[123]

After deciding there was no waiver of the right to attack defects in the transfer hearing, the court examined the contentions of improper notice and denial of the right to counsel. Relying on the statutory requirement of three days notice prior to the proceeding[124]

116. *See* N.D. CENT. CODE § 49-02-01.1 (1960), *as amended*, (Supp. 1975). Also exempted are utilities owned and operated by the state or other political subdivisions.
117. *See* N.D. CENT. CODE § 49-03-01.5 (Supp. 1975).
118. 244 N.W.2d at 528.
119. N.D. CENT. CODE ch. 27-20 (1974), *as amended*, (Supp. 1975).
120. N.D. CENT. CODE ch. 14-15 (1971), *as amended*, (Supp. 1975).
121. N.D. CENT. CODE § 27-20-03(1)(a) (1974).
122. N.D. CENT. CODE § 27-20-03(1)(b) (1974).
123. State v. Grenz, 243 N.W.2d 375, 378 (N.D. 1976).
124. N.D. CENT. CODE § 27-20-34(1)(b)(3) (Supp. 1975).

and on due process considerations, the court held that the notice given here was improper, and that such improper notice was a material jurisdictional defect.[125] The defect was not waived by the appearance of the juvenile or his parents at the hearing or by the failure to appeal from the transfer hearing itself.[126]

The court also held that the juvenile was not properly made aware of his right to counsel at the transfer hearing. He had received a written statement of his right to be represented, which the court briefly mentioned at the transfer hearing. However, this communication with the juvenile was an insufficient basis upon which to conclude that he had waived his right to counsel.[127] The presence of the parents at the hearing did not justify a failure to fully inquire into the defendant's knowledge of his right to counsel, especially since the parents took no active role in representing their son.[128] The court rejected the argument that the result of the hearing would have been the same had counsel been present.[129]

In addition to the court's acceptance that juvenile transfer hearings constitutionally require adequate notice and right to counsel, the *Grenz* case is significant in holding that defects at the hearing are not waived by a subsequent guilty plea in adult court.[130] Decisions of supreme courts in some other states have deemed the guilty plea to be a waiver.[131] Thus, North Dakota appears to be in the vanguard in recognizing the critical importance of a transfer hearing and the necessity for adequate notice and right to counsel. In North Dakota, these rights are of constitutional dimension, and waivers of those rights are difficult to show.

The Uniform Juvenile Court Act also applies to proceedings at which a child is alleged to be deprived.[132] Deprivation is one element in a cause of action for termination of parental rights. Faced with a mother's appeal from a determination that her children were deprived, the court in *In Interest of M.L.*, 239 N.W.2d 289 (N.D. 1976), distinguished the deprivation hearing from a divorce-modification custody hearing.

The court initially noted that the scope of review under the Uniform Juvenile Court Act, unlike in divorce-modification custody hearings, is not limited to the "clearly erroneous" rule of Rule 52(a)

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125. 243 N.W.2d at 379.
126. *Id.*
127. 243 N.W.2d at 379-81.
128. 243 N.W.2d at 380-81.
129. *Id.* at 381.
130. *Id.* at 378.
131. Constitutional requirements of fundamental fairness apply to a juvenile's transfer hearing, according to the *Grenz* court's interpretation of the United States Supreme Court decision in Kent v. United States, 384 U.S. 541 (1966). Although *Kent* did compel counsel at a transfer hearing, some supreme courts of other states have interpreted *Kent* as being decided purely on statutory grounds. *E.g.*, Powell v. Sheriff, 85 Nev. 684, ——, 462 P.2d 756, 757 (1969); Knott v. Langlois, 102 R.I. 517, ——, 231 A.2d 767, 769 (1967).
132. N.D. CENT. CODE § 27-20-44 (1974).

of the *North Dakota Rules of Civil Procedure*.[133] Instead, review in juvenile cases is similar to the former practice of trial *de novo*; the reviewing court gives "appreciable weight to the findings of the juvenile court."[134] The determination to be made in a divorce custody hearing is whether, considering the best interests of the child, there are material changes in circumstances justifying a change in custody, while in a deprivation hearing the determination to be made is whether the child is "deprived."[135] Other distinctions between a divorce custody hearing and a deprivation hearing are that at a divorce custody hearing the state is not a party and the burden of proof is by a preponderance of the evidence, while at a deprivation hearing, the state is a party and the burden of proof is by clear and convincing evidence.[136] A deprivation hearing cannot be changed into a custody hearing.[137]

In *Interest of R.W.B.*, 241 N.W.2d 546 (N.D. 1976), the court considered the admissibility of certain evidence in a proceeding to terminate parental rights. The factors required by statute to be proven by clear and convincing evidence before parental rights can be terminated are: that the child is deprived; that the conditions and causes of his deprivation are likely to continue or will not be remedied; and, as a result, that the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm.[138] The court upheld admission of the following evidence at a termination of parental rights hearing: the transcript and other testimony relating to a prior parental termination proceeding regarding another child;[139] evidence which showed that the parents had been informed that psychiatric treatment was recommended to them; a criminal record from a conviction of child abuse;[140] expert opinion of a medical doctor who recommended termination of parental rights;[141] testimony of a conversation between plaintiff and a social worker investigating a child abuse complaint when at the time plaintiff had not been informed of her right to counsel;[142] and testimony of the guardian *ad litem* who may not have been qualified as an expert when she recommended termination of parental rights.[143] Thus, once it is determined at a parental rights termination hearing that a child is a "deprived child," the court favors a broad scope of permissible

133. In Interest of M.L., 239 N.W.2d 289, 291 (N.D. 1976).
134. *Id., quoting* N.D. CENT. CODE § 27-20-56(1) (1974).
135. For the definition of "deprived child", *see* N.D. CENT. CODE § 27-20-02(5) (1974).
136. 239 N.W.2d at 295.
137. *Id.* at 296.
138. N.D. CENT. CODE § 27-20-44 (1974).
139. Interest of R.W.B., 241 N.W.2d 546, 554 (N.D. 1976).
140. *Id.*
141. *Id.* at 555.
142. *Id.* at 556.
143. *Id.* at 555.

evidence relating to the parents' present, past, and future abilities to properly care for the child.

In *Kottsick v. Carlson*, 241 N.W.2d 842 (N.D 1976), the court was concerned with the relationship of parental rights terminations under the Revised Uniform Adoption Act[144] and the Uniform Juvenile Court Act.[145] Plaintiff sought to adopt children of his wife's previous marriage, but the natural father refused to give his consent. Since termination of the natural father's parental rights is a necessary prerequisite for the step-father's adoption of the children,[146] the stepfather sought termination on the ground that "in the case of a parent not having custody of a minor, his consent is being unreasonably withheld contrary to the best interest of the minor."[147] This ground for termination is contained in the Revised Uniform Adoption Act.[148] Yet the grounds for termination in the Uniform Juvenile Court Act relate to abandonment or deprivation of the child absent consent of the natural parent.[149] The court held that the parental rights termination provisions of the Uniform Juvenile Court Act were not amended by implication by enactment of the Revised Uniform Adoption Act.[150] Merely showing that the natural father was unreasonably withholding his consent was not sufficient to support a termination of his parental rights. The natural father is constitutionally entitled to a hearing on his fitness as a parent before his parental rights can be terminated.[151] He is not a "parent not having custody" under the Revised Uniform Adoption Act because he shares the divorce custody of the children with his former wife even though the children are not in his physical custody.[152] The term "custody" as used in the Revised Uniform Adoption Act has a broader meaning than its use in a divorce hearing when custody does refer to the minor's physical presence with a parent. A natural parent who does not have physical custody of his children nevertheless has "custody" within the meaning of the Adoption Act when he retains a relationship with the child involving rights and duties on his part.[153] The court affirmed a natural parent's constitutional right to a hearing on his fitness as a parent before his parental rights can be terminated pursuant to either the Revised Uniform Adoption Act or the Uniform Juvenile Court Act.

144. N.D. CENT. CODE ch. 14-15 (1971), *as amended*, (Supp. 1975).
145. N.D. CENT. CODE ch. 27-20 (1974), *as amended*, (Supp. 1975).
146. Kottsick v. Carlson, 241 N.W.2d 842, 844 (N.D. 1976).
147. N.D. CENT. CODE § 14-15-19(3)(c) (1971).
148. *Id.*
149. N.D. CENT. CODE § 27-20-44 (1974).
150. 241 N.W.2d at 846.
151. *Id.*
152. *Id.* at 853.
153. *Id.*

PROFESSIONAL RESPONSIBILITY—ATTORNEYS

In *Matter of Pohlman,* 248 N.W.2d 833 (N.D. 1976), a disciplinary action under the North Dakota Supreme Court Rules of Disciplinary Procedure[154] was brought against an attorney who had been convicted on three counts of willful failure to file income tax returns for 1968, 1969, and 1970. The North Dakota Century Code calls for revocation or suspension of the license to practice law if the attorney has committed a felony or misdemeanor involving moral turpitude.[155]

The supreme court, for the first time, held "that the willful failure to file an income tax return is, *per se,* a crime involving moral turpitude."[156] An attorney who has specialized in income tax law and acknowledges that she is fully aware of the Internal Revenue Code provisions requiring a filing of an income tax return, sets a poor example for clients. Disregard of the law by an attorney is more heinous than such disregard by a layman.

A second case concerning the disciplining of attorneys was *LePera v. Snider,* 248 N.W.2d 862 (N.D. 1976), in which an attorney was held in contempt of court for failing to obey a direction by the Court to leave a telephone number by which he could be reached when the jury returned with a verdict. LePera was committed to county jail, and he made an application for a writ of habeas corpus. It was denied by the Burleigh County District Court. LePera then appealed to the supreme court.[157]

The supreme court reversed, holding that the trial court could not take summary action in holding LePera in contempt of court. The court's decision was based on the fact that the judge had not witnessed or had direct knowledge of all the evidence upon which the contempt citation was based.[158] If the essential elements of the offense are not observed by the judge, due process requires that the accused be accorded notice and a fair hearing.[159]

SALES

The warranty and damage provisions of the Uniform Commercial Code (U.C.C.) served as the basis for several decisions by the court.

In *Ray Farmers Union Elevator Co. v. Weyrauch,* 238 N.W.2d 47 (N.D. 1976), the court examined the U.C.C. damage provisions and held that the relief provided by a liquidated damage clause is exclusive and that a plaintiff is not entitled to relief under the optional

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154. The Disciplinary Rules were adopted pursuant to N.D. CENT. CODE § 27-02-07 (1974).
155. *Id.* § 27-14-02(1) (1974). For other acts or violations which may constitute cause for disciplinary proceedings see *id.* §§ 27-13-01 and 27-14-02 (1974).
156. Matter of Pohlman, 248 N.W.2d 833, 835 (N.D. 1976).
157. LePera v. Snider, 240 N.W.2d 862, 865 (N.D. 1976).
158. *Id.* at 866.
159. *Id.*

damage provisions of the U.C.C.[160] The contract between the parties provided for liquidated damages in the event of a breach. After a breach occurred the elevator company sought to recover either additional damages determined as of the date of the repudiation or the cost of cover.[161]

In affirming the lower court decision, the supreme court found that the elevator company was bound by the liquidated damage clause regardless of the actual damages incurred.[162] The alternatives sought by the elevator were alternate forms of the same remedy—damages—thus not fitting within the terms of the statute.[163] Plaintiff had not sought other remedies such as specific performance or rescission, and the court did not address the question of what the result would have been if such remedies had been sought.[164]

The case of *Schneidt v. Absey Motors, Inc.*, 248 N.W.2d 792 (N.D. 1976), dealt with a breach of warranty of good title and computation of resultant damages. Defendant, Absey Motors, had purchased a 1970 Lincoln Continental from Ramage, third party defendant. Neither of them knew that the car had been stolen from Hertz Corporation. The vehicle was subsequently sold to plaintiff, who in turn sold it to Bentley. When Hertz attempted to reclaim the car, it was returned to plaintiff and eventually delivered to Hertz pursuant to a court order.[165]

Plaintiff brought suit and defendant filed a third party complaint against its seller. Both plaintiff and Absey received summary judgment in their favor on the issue of liability.[166] At the time of Hertz's initial claim against Bentley, a settlement offer of $1,000 was made and apparently rejected by plaintiff. Absey claimed that the $1,000 should be the limit of plaintiff's recovery because he had a duty to mitigate damages by accepting the offer.[167] The trial court found that one of Absey's officers "knew" of the settlement offer despite the fact that Absey may not have been informed of the exact amount of that offer.[168]

The supreme court affirmed the trial court, holding that "where Absey would have had an equal opportunity to perform, in other words, to buy out Hertz Corporation, that Schneidt had no duty to do so."[169] Additionally, plaintiff was excused from performance because the settlement offer was not just a "trifling expense."[170]

160. N.D. CENT. CODE § 41-02-98 (1968).
161. Ray Farmers Union Elevator Co. v. Weyrauch, 238 N.W.2d 47, 49 (N.D. 1976).
162. *Id.* at 50. *See also* Bottineau Pub. School Dist. No. 1 v. Zimmer, 231 N.W.2d 178, 180 (N.D. 1975).
163. 238 N.W.2d at 49.
164. *Id.*
165. Schneidt v. Absey Motors, Inc., 248 N.W.2d 792, 794 (N.D. 1976).
166. *Id.*
167. *Id.* at 796.
168. *Id.*
169. *Id.* at 796-97.
170. *Id.* at 797. *See also* Nicola v. Meisner, 84 N.W.2d 702, 705-06 (N.D. 1957).

Plaintiff was entitled to both general and consequential damages. These damages, however, would not include any of the expenses relating to his sale and repurchase of the vehicle from Bentley.[171] The damages were to be measured by the car's value at the time plaintiff lost its use and not the value as measured by the purchase price from defendant. The case was remanded for determination of this value.[172]

In *Hoffman Motors, Inc. v. Enochson*, 240 N.W.2d 353 (N.D. 1976), the court found a complete disclaimer accompanying the sale of a tractor to be void because of the statutory protections extended to those purchasing farm equipment,[173] thus permitting an implied warranty of merchantability to be effective.[174]

In *Eichenberger v. Wilhelm*, 244 N.W.2d 691 (N.D. 1976), defendant crop sprayer applied Carbyne, a herbicide, to plaintiff's wheat crop, allegedly damaging the wheat. Plaintiff sought to recover, alleging negligence in his complaint. The implied warranty of merchantability claim first arose at trial, when plaintiff failed to prove negligence.[175] The court held that under notice pleading the allegation of negligence was sufficient to advise defendant of the matter being sued upon and "that he impliedly consented to trying the issue of warranty."[176] Case law and Rule 15(a) of the *North Dakota Rules of Civil Procedure* provide that issues not raised in the pleadings but tried at trial will be treated as being raised in the pleadings.[177] However, the court advised that complaints should clearly delineate the theory of liability—negligence, warranty, or strict liability—in an effort both to alert the opposing party and to allow the trial court to better record the findings.[178]

The farmer-buyer proved his claim for breach of an implied warranty of merchantability[179] by showing that defendant was a merchant with respect to the goods, that the spray was defective, and that the defective spray caused the crop damage.[180] The farmer-buyer was also held not to have assumed the risk of damage when he had no opportunity to read a disclaimer on the Carbyne can.[181]

The court also briefly noted that liability in this case could have been based on strict liability in tort rather than on a warranty theory.[182]

171. 248 N.W.2d at 799.
172. *Id.* at 800.
173. N.D. CENT. CODE § 51-07-07 (1974).
174. Hoffman Motors, Inc. v. Enochson, 240 N.W.2d 353, 355 (N.D. 1976).
175. Eichenberger v. Wilhelm, 244 N.W.2d 691, 696 (N.D. 1976).
176. *Id.*
177. *E.g.*, Askew v. Joachim Memorial Home, 234 N.W.2d 226 (N.D. 1975); N.D.R. CIV. P. 15(a).
178. 244 N.W.2d at 697.
179. N.D. CENT. CODE § 41-02-31 (1968).
180. 244 N.W.2d at 697.
181. *Id.*
182. *Id.* at 697, *citing* Johnson v. American Motors Corp., 225 N.W.2d 57 (N.D. 1974).

TAXATION

In a quiet title action, *Griffeth v. Cass County*, 244 N.W.2d 301 (N.D. 1976), the court invalidated a deed issued at a tax sale. Title to the property had been acquired by the county in 1971. In 1974, prior to the expiration of the redemption period, the city auditor sent a notice detailing such fact to the registered owner. The notice was sent without a street adress to Fargo, North Dakota. It was subsequently returned undelivered. Later the auditor learned the street address from the city assessor and included it in the notice which was published in the newspaper prior to a tax sale. The original notice was never remailed.[183]

The court found this failure to notify the registered owner fatal to the tax sale, relying on North Dakota case law holding that service of such notice "in the form, substance and kind prescribed by statute is jurisdictional."[184] A duty is thus placed on the auditor to make a diligent effort to obtain the address of the delinquent taxpayer and to provide actual notice.[185] In this case the duty was not met and the notice was defective, thus voiding the sale.[186]

TORTS

The court in *Hastings. v. James River Aerie No. 2337—Fraternal Order of Eagles*, 246 N.W.2d 747 (N.D. 1976), rejected the common law rule that a wife does not have a cause of action for loss of her husband's consortium. The husband's right to sue for loss of his wife's consortium has long been recognized in North Dakota,[187] while, until now, the wife's similar right has been non-existent.[188] This holding brings North Dakota in line with the trend of authority.[189]

Hastings was a dram shop action. To recover damages in such an action, the plaintiff must establish that he has been injured in either his "person, property, or means of support."[190] If the wife-plaintiff in *Hastings* was to succeed, she had to fit her claim for damages into one of the above mentioned areas of recovery. The court held that one spouse's right in the other spouse's consortium is "property" within the meaning of North Dakota's dram shop act.[191]

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183. Griffeth v. Cass County, 244 N.W.2d 301, 302-03 (N.D. 1976).
184. *Id.* at 304, *quoting* Brink v. Curless, 209 N.W.2d 758, 767 (N.D. 1973), *rev'd in other part*, City of Bismarck v. Muhlhauser, 234 N.W.2d 1, 5 (N.D. 1975).
185. 244 N.W.2d at 304.
186. *Id.* at 306.
187. Milde v. Leigh, 75 N.D. 418, 28 N.W.2d 530 (1947).
188. Hastings v. James River Aerie No. 2337—Fraternal Order of Eagles, 246 N.W.2d 747, 751 (N.D. 1976).
189. *See* 36 A.L.R.3d 900 (1971).
190. N.D. CENT. CODE § 5-01-06 (1975).
191. 246 N.W.2d at 749.

Although, as stated above, the wife was allowed to prove her loss of consortium, the daughter-plaintiff was found to have no actionable claim for loss of her father's comfort, counsel and guidance. The court held that while such a right of recovery might exist under the wrongful death act,[192] the same is not true under the dram shop act.[193] Therefore, the daughter's claims for loss of services, counsel, and guidance were rejected.

The court also had an opportunity to review both the licensee-invitee distinctions and the standard of care owed by the owner of animals. *Sendelbach v. Grad*, 246 N.W.2d 496 (N.D. 1976), was a dog-bite case that occurred in rural North Dakota. Although the court declined to abolish the licensee-invitee distinctions and their many exceptions in *Sendelbach*, this position was reversed in *O'Leary v. Coenen*, 251 N.W.2d 746 (N.D. 1977), a more recent decision. North Dakota, with the advent of the decision of *O'Leary*, has followed the current trend of authority and has adopted a single standard of reasonable care as the duty the landowner owes to all visitors except trespassers.

The plaintiff in *Sendelbach* urged the court to adopt the concept of strict liability for injuries caused by animals. The court refused to adopt the strict liability standard, and instead opted for a standard of care it felt would fit the "quality of life and the expectancies of the people of North Dakota."[194] Although defendant's dog may have been somewhat vicious, the court's primary focus was on the dog's utility and the corresponding utility of other animals in the state. The court held that, at least for animals that are not by nature inherently dangerous, the standard of care owed by the landowner is no different than that regarding injuries to visitors caused by other means.[195]

The case of *Sayler v. Holstrom*, 239 N.W.2d 276 (N.D. 1976), involved a personal injury action by an employee against an allegedly negligent third party. The third party impleaded the employer and sought indemnity or contribution. The court noted that the Workman's Compensation Act[196] provided an employer with immunity from direct or indirect suit by its employees. The court held that because of this immunity the requisite element of common liability was absent and

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192. N.D. CENT. CODE ch. 32-21 (1976). *See* Dahl v. North American Creameries, 61 N.W.2d 916 (N.D. 1953).

193. 246 N.W.2d at 753.

194. Sendelbach v. Grad, 246 N.W.2d 496, 500 (N.D. 1976).

195. *Id.* at 500-01. It should be noted that this action arose by plaintiff's visit to defendant's farm. The court did not comment on the corresponding standard of care owed by the animal onwer in the urban area, but it would seem that the standard of care would be much higher since the "utility" of the animal would probably be less. The defendant's dog in this case was used to herd cattle, and therefore it was deemed to have a high utility.

196. N.D. CENT. CODE tit. 65 (1960), *as amended*, (Supp. 1975).

therefore an employer could not be liable to a third party for contribution.[197]

The court also denied the third party indemnity from the employer. The third party alleged that it was entitled to indemnity because if it was negligent, its negligence was only passive or secondary, while the employer's negligence was active or primary. In most jurisdictions, proof of mere passive negligence entitles a defendant to complete indemnity from an actively negligent tortfeasor.[198] However, in *Sayler*, the court went against the rule applied in the majority of jurisdictions and rejected this "active-passive" negligence test for indemnity between joint tort-feasors. The court held that as long as a party is shown to be negligent, he will not receive indemnity from another tortfeasor merely because his negligence is minuscule while another tortfeasor's negligence is great.[199] The result is that unless there is contribution, a passively negligent party will be liable for one-hundred percent of the damages.

WILLS AND TRUSTS

In *Scheid v. Scheid,* 239 N.W.2d 833 (N.D. 1976), defendant appealed a district court judgment quieting title to property held by plaintiff. The property in question had been owned by plaintiff's father, who executed a quit claim deed to plaintiff prior to her marriage to defendant. Several years after the marriage, plaintiff executed a quit claim deed, transferring ownership of the property to defendant and herself as joint tenants with rights of survivorship. After dissolution of the marriage, plaintiff brought an action for a declaration that any interest that her ex-husband held in the property was held in trust for her benefit.

Implied trusts arise by operation of law and consist of two types; resulting and constructive. The court found no evidence that the parties intended or contemplated a trust relationship at the time plaintiff conveyed the property in joint ownership.[200] Therefore, there was no resulting trust. If an implied trust were present in the case it would have to be a constructive trust.

In an action for a declaration of a constructive trust the plaintiff must establish by clear and convincing evidence that such a trust should be imposed on the defendant's interest.[201] Such evidence, the court stated, must satisfactorily show a mutual mistake or a wrongful detention of the property, undue influence, or other wrongful act

197. Sayler v. Holmstrom, 239 N.W.2d 276, 278-79 (N.D. 1976).
198. *See* 53 A.L.R.3d 184, 190 (1973).
199. 239 N.W.2d at 281. The court declined to adopt the active-passive test because it is "fraught with difficulties and artificial distinctions in many [cases] and often [results] in inequities." *Id., quoting* 53 A.L.R.3d 184, 212 (1973).
200. Scheid v. Schied, 239 N.W.2d 833, 837-38 (N.D. 1976).
201. *Id.* at 838.

which would not allow the defendant, under the rules of equity and good conscience, to continue to hold the property.[202] After reviewing the evidence, the court concluded that the trial court had erred in imposing a constructive trust on defendant's joint tenancy interest because plaintiff had failed to meet her burden of proof.[203]

Matter of Estate of Culver, 246 N.W.2d 488 (N.D. 1976), was an action involving the construction of a will. The county court, after ordering two appraisals, found the appraised value of the estate to be different from both appraisals. The district court, on appeal, entered a judgment finding the value to be that set by the second appraisal.

The supreme court, recognizing that although the county court has the duty to determine the market value of all items in the estate, held that such duty may be limited by specific provisions in the will.[204] Here, the will provided for a devise in an amount to be determined by the value placed on such interest by the appraisers of the estate. On the issue of which appraisal should be used to make such determination, the court held that a county court has inherent power to order a reappraisal if good cause is shown.[205] The court found that the second appraisal was valid and that this appraisal was the value to be used in determining the amount of the devise.

CONCLUSION

The North Dakota Supreme Court decided cases in 1976 dealing with diverse areas of the law. One case that does not lend itself to easy categorization, however, is *Petition of Dengler*, 246 N.W.2d 758 (N.D. 1976).

Michael Dengler sought to change his name to 1069. He believed that a person's name should be a mark of appearance or indication which corresponds to and is a verbal and graphic manifestation of the person's philosophy. Each number stood for a definite meaning and the petitioner argued that his identity could only be expressed by the name 1069.[206]

The court held that the provisions of the North Dakota Century Code pertaining to name changes[207] did not contemplate a change from a name to a number. The legislature, in giving authority to the courts to change a name, had in mind a name as understood and defined by common law.[208] A name was held to consist of at least a Christian given name and a surname or family name as found at common law.[209]

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202. *Id.*
203. *Id.* at 840.
204. Matter of Estate of Culver, 246 N.W.2d 488, 489 (1976).
205. *Id.* at 490.
206. Petition of Dengler, 246 N.W.2d 758, 759-60 (N.D. 1976).
207. N.D. CENT. CODE ch. 32-28 (1976).
208. 246 N.W.2d at 764.
209. *Id.* at 760.