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# North Dakota Supreme Court Decisions 1965-1966

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# NORTH DAKOTA SUPREME COURT DECISIONS

## 1965 - 1966

*In response to the favorable commentary received from North Dakota practitioners, the "North Dakota Law Review is continuing the practice, established two year sago, of digesting significant decisions of the North Dakota Supreme Court. The following are decisions handed down by the court between June, 1965, and June, 1966.*

### IMPLIED WARRANTY—PRIVITY REQUIREMENT

In *Lang v General Motors Corporation*[1] the North Dakota Supreme Court held for the first time that privity requirement was no longer necessary for a suit between a consumer and a manufacturer where the manufacturer of a new motor vehicle puts such new vehicle into channels of trade and promotes its sale to the public by a wide program of advertising.

The plaintiff based his suit on negligence and on breach of warranty, alleging that the vehicle in question was not reasonably fit for the purposes for which it was produced. The defendant denied all of the allegations of plaintiff's complaint and alleged "that the vehicle described in the complaint was sold to the plaintiff by the Kline Chevrolet Company, of Minneapolis; that the seller is a separate corporation, engaged in the business of selling the defendant's products, that there were no dealings between the plaintiff and the defendant and no privity of contract between them, and that no implied warranties to the plaintiff could arise from the plaintiff's purchase of such vehicle from a third party"[2]

The Supreme Court reversed the trial court's order of summary judgment for the defendant. In relaxing the privity requirement, the court put great weight on the fact that modern business dealings have become complex and "the vast majority of transactions no

1. 136 N.W.2d 805 (N.D. 1965).
2. *Supra* note 1 at 807.

longer involve simply a buyer and a seller "[3] Furthermore, said the court, the buyer may be subject to intensive advertising by the manufacturer which induces the buyer to rely on representations made by the products' manufacturer

The court noted that the privity requirement was relaxed first in food and drink cases,[4] then in cosmetic cases,[5] and later in cases involving dangerous products.[6] It should also be noted that the plaintiff's damages were his expenses for correcting the defects which he alleges were due to the defendant's poor manufacture and assembly This case represents a further relaxation of the privity requirement, since the earlier cases usually involved personal injury[7] The court felt that the ultimate consumers can only be protected by eliminating the requirement of privity

## JUDGMENT—RES JUDICATA

In *Bismarck Public School District No. 1 v Hirsh*[8] a dispute arose over ownership of certain wood and steel bleachers situated on a tract of land owned by the defendant. The deed conveying the land to the defendants was dated August 1 1963 and filed August 28, 1963 with the Register of Deeds.

An order of dismissal with prejudice of a complaint was entered August 27, 1963, against the defendants' grantor in a collateral dispute over the land. The plaintiff claims that the defendant is bound by this judgment entered against the defendants' grantor The District Court of Burleigh County sustained the plaintiff's contentions by entering a summary judgment in their favor The Supreme Court of North Dakota reversed, holding that the doctrine of res judicata does not bind the defendant in this instance.

The court, applying the doctrine of res judicata, which binds only parties to the action in which the judgment was rendered and their privies and does not effect strangers to the judgment who are neither parties nor in privity with a party to the action,[9] found the

3. *Supra* note 2 at 808.
4. Simmins v. Wichita Coca Cola Bottling Co., 181 Kan. 35, 309 P.2d. 633 (1957) Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828, 142 A.L.R. 1479 (1942).
5. Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612, 75 A.L.R.2d 103 (1958).
6. Markovick v. McKesson & Robins, Inc., 106 Ohio App. 265, 149 N.E.2d 181 (1958).
7. *E.g., supra* notes 4, 5, & 6. "Either lack of privity should always be a defense in these cases, or it never should be." Spence v. Three Rivers Builders & Masonry Supply Inc., 353 Mich. 120, 90 N.W.2d 873 at 878 (1958).
8. 136 N.W.2d 449 (N.D. 1965).
9. Feather v. Krause, 91 N.W.2d 1 (N.D. 1958).

defendant not in privity because the date of the commencement of the collateral action was subsequent to the date of the defendant's succession to the rights of the property in question.

As the defendant had no notice of the collateral or subsequent action affecting the property, the court held "that the result of the application of the doctrine of collateral estoppel or res judicata could not be defended on principles of fundamental fairness in the due process sense."[10]

The court followed the great weight of authority in this jurisdiction[11] and in others[12] in applying the privity rule. The defendant was not in privy to the judgment because his succession to the rights of property in question occurred previous to the institution of the suit.

## JURIES—POLLING OF JURORS

Plaintiff was a passenger in a car operated by defendant who lost control of the car and crashed into a gasoline truck. Plaintiff was injured as a result of this accident and now seeks damages. After being instructed, the jury retired and later returned for further instructions as to whether a violation of the rules of the road constitutes gross negligence. Upon further instruction, the jury again retired and returned with a verdict of not guilty The jurors were then polled and one juror disagreed with the verdict. The court questioned him as to his reasons for dissenting, and the juror stated that he would like to find liability on mere negligence. The court stated this was not possible, that gross negligence had to be found. The juror replied that no evidence was offered to constitute gross negligence and that he would therefore assent to the verdict.

On appeal, plaintiff alleged error in that the jury should have been sent out for further deliberation after the juror dissented. The Supreme Court of North Dakota *held*, two justices dissenting, that this did constitute error and granted a new trial. The court arrived at this conclusion by interpreting sections 28-14-18 and 28-14-23 of the Century Code.[13] Section 28-14-18 permits the jury to render its verdict in court without retiring to the jury room to deliberate. Section 28-14-23 requires that when a poll of the jury reveals that at least one juror disagrees with the verdict, the jury must be sent out for

10. *Supra* note 8 at 454.
11. Hull v. Rolfsrud, 65 N.W.2d 94 (N.D. 1954).
12. Hawkeye Life Ins. Co. v. Valley-Des Moines Co., 220 Iowa 556, 260 N.W 669, 105 A.L.R. 1018 (1935).
13. N.D. CENT. CODE §§ 28-14-18 & 28-14-23 (1960).

further deliberation. The court harmonized these statutes by stating that since the jury retired to the jury room for deliberation, section 28-14-18 ceases to apply and section 28-14-23 is then applicable; thus, the trial court erred in not sending the jurors out for further deliberation.

The dissent was based on the fact that obviously the juror was only dissenting to the law since he wanted to find liability on mere negligence rather than gross negligence. His verdict was actually in accord with the rest of the jury and there was no need for further deliberation.[14]

The ruling in this case seems to be in accord with most jurisdictions.[15] The rule seems to imply that any dissent from the verdict shall constitute a reason for further deliberation. Some courts have avoided this strict construction by stating that if a juror dissents but indicates that he agreed for the sake of harmony, there is no need for further deliberation since a certain amount of harmony is needed for every verdict.[16] One court, in an old decision, indicated that as long as the juror does not specifically say, "I dissent," a comment by a juror would not vitiate the verdict.[17]

The case at hand and the above cases seem to have one thing in common. They appear to indicate that before any rule can be applied, there must be an indication by the juror as to why he dissents. In the case at hand, the juror indicated his disagreement and the court proceeded to question him as to why he disagreed. In *Williams v Williams*,[18] the court stated that if the juror indicates that he agreed for the sake of harmony, there is no need for further deliberation. In *Conyers v Kirk*,[19] the fact that a comment by a juror would not vitiate the verdict seems to imply that even if the juror says, "I dissent," a comment as to why he dissents is necessary The fact that a juror has to indicate his reason seems to run against the very idea of polling a jury and sending them out for further deliberation. For a court to properly adhere to the rule laid down, the jury must be sent out for further deliberation immediately upon an indication of dissent. The rule does not allow the disclosure of any reasons for such dissent. The dissenting opinion in *Stradinger v Hatzenbuhler*[20] loses its significance since no one but the juror should know why he dissents. What purpose would

14. Stradinger v. Hatzenbuhler, 137 N.W.2d 212 (1965).
15. *E. g.*, Bruce v. Chestnut Farms - Chevy Chase Dairy, 126 F.2d 224, (1942) Farmer v. Central Mut. Ins. Co., 145 Kan. 951, 67 P.2d 511 (1937), Williams v. North Alabama Exp., 83 So.2d 330 (1955), Weatherhead v. Bureau, 238 Minn. 134, 55 N.W.2d 703 (1952).
16. Williams v. Williams, 112 Ark. 507, 166 S.W. 552 (1914).
17. Conyers v. Kirk, 78 Ga. 480, 3 S.E. 442 (1887).
18. *Supra* note 15.
19. *Supra* note 16.
20. *Supra* note 13.

be served by sending the jury back for further deliberation if his reasons can be ironed out in open court? Whether this is the best policy or not is irrelevant. Strict construction of the rule demands this result.

Probably the best solution to overcoming this obstacle is that pointed up in *Reed v Kennick*.[21] There it was decided that a trial judge should be given considerable latitude in conducting a trial because the ultimate fairness of a judicial proceeding depends upon his wisdom and good judgment.[22] Using his discretion, a judge could determine whether or not the objection to the verdict is worthy of further deliberation. By allowing this discretion, the judge would also have the right to question a juror to find out why he dissents. This is what the courts are doing now, but under the common rule this does not appear to be permissible.

## NEGLIGENCE—CHARITABLE IMMUNITY DOCTRINE

The Supreme Court in *Granger v Deaconess Hospital of Grand Forks*,[23] a negligence suit by a patient against a hospital, affirmed a decision of the District Court, Grand Forks County, allowing the patient's motion to strike the defense of charitable immunity and held the charitable corporate hospital liable for injuries to the patient caused by the negligence of the hospital's employees. "As we have never applied the doctrine of charitable immunity in our state,"[24] cases from jurisdictions which have accepted the doctrine have little stare decisis value; and the question to be determined is if the doctrine should now be accepted. The court did discuss the doctrine in two prior cases,[25] but it was not applied in either case as the institutions in question were held to be run for profit and that portion of the decision is therefore not part of the court's holding in either case. Although the doctrine of immunity was itself judge-made, some states rationalize the acceptance of the doctrine on the basis of legislative approval due to the fact that the legislatures have failed to repudiate it.[26] In the principle case, the North Dakota Supreme Court said, "In the absence of statutory exemption, a non-profit corporation is liable for its torts the same as any other cor-

21. 389 Pa. 143, 132 A.2d 208 (1957).
22. *Supra* note 13.
23. 138 N.W.2d 443 (N.D. 1965).
24. *Supra* note 23, at 445.
25. Boetcher v. Budd, 237 N.W 650 (N.D. 1931) Fawacett v. Ryder, 23 N.D. 20, 135 N.W 800 (1912).
26. Howard v. South Baltimore Gen. Hosp., 191 M.D. 617, 62 A.2d 574 (1948), Smith v. Congregation of St. Rose, 265 Wis. 393, 61 N.W.2d 896 (1953).

poration."[27] The latter view would seem the soundest as it does not advocate judicial abrogation of legislative duties.

The original justification for immunity was known as the "trust fund theory" "To give damages out of a trust fund would not be to apply it to those objects whom the author of the trust had in view, but would be to divert it to a completely different purpose."[28] The best answer to this argument would seem to be that donors have neither the power nor the intention to exempt the objects of their philanthropy from the object of the ordinary laws of the land.[29] Furthermore, this argument would not seem consistent with decisions holding charities liable for damages for breach of contract and for negligence to certain classes of people, such as its employees.[30]

Other arguments favoring the doctrine have been the inapplicability of the doctrine of respondent superior, because the charity gets no profit from the enterprise in which it engages its employees,[31] and the implied waiver or assumption of risk by the plaintiff.[32] The real public policy behind the doctrine is to protect and encourage donations to charity, but it seems doubtful if its destruction would discourage such donations.[33]

The trend of recent cases seems to repudiate the doctrine of charitable immunity Some jurisdictions have limited the application of the doctrine to protection of property which is part of a charitable trust;[34] other limitations depend on the activities of the charity[35] or on who has been injured. Still others have repudiated the doctrine altogether and treat the charity the same as any other ordinary individual or corporation.[36] Only three jurisdictions—Alaska, Vermont, and Delaware—other than North Dakota, have "rejected the immunity rule as a matter of first impression."[37]

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27. *Supra* note 24.
28. Feofees of Heriot's Hospital v. Ross, 12 Clark & F 507, 513, 8 Eng. Rep. 1508 (1846).
29. Annot., 25 A. L. R. 2d 64 (1952).
30. *Supra* note 29 at 62.
31. Schumacher v. Evangelical Deaconess Soc., 218 Wis. 169, 260 N. W 476 (1935).
32. Wilcox v. Idaho Falls L. D. S. Hosp., 59 Idaho 350, 82 P.2d 849 (1938), Annot., 25 A. L. R. 2d 68 (1952).
33. President & Directors of Georgetowi College v. Hughes, 130 F.2d 810 (D. C. Cir. 1942).
34. O'Connor v. Boulder Colo. Sanitorium Assn., 105 Colo. 259, 96 P.2d 835 (1939) Wendt v. Servite Fathers, 332 Ill. App. 618, 76 N.E.2d 342 (1942) Moore v. Moyle 405 Ill. 555, 92 N.E.2d 81 (1950), Vanderbilt University v. Henderson, 23 Tenn. App. 135, 127 S.W.2d 284 (1938).
35. Peden v. Furman University, 155 S.C. 1, 151 S.E. 907 (1930), Smith v. Congregation of St. Rose, 265 Wisc. 393, 61 N.W.2d 896 (1953).
36. Annot., 25 A.L.R.2d 75 (1952).
37. HARPER AND JAMES, THE LAW OF TORTS, § 29.17 at 1675 (1956).

NEGLIGENCE—BAILMENT FOR HIRE

A fire occurred in defendant's body shop and as a result, plaintiff's property was destroyed. The owner and employees were not inside the body shop when the fire started, but the owner stated that several precautions had been taken to insure safety in the shop. The plaintiffs proceeded on the theory that they had left their cars with defendant as a bailee for hire for certain repairs and that there was a failure to return them. The trial court could find no direct evidence of negligence but concluded that there was a greater probability that the fire was caused by the defendant's negligence than from a cause for which the defendant would not be responsible.

The Supreme Court found that a bailment for hire situation was created and that the bailee must exercise ordinary care in the preservation of the bailor's property while it is being repaired. The ordinary care required of a bailee is such care as would be exercised by a reasonably prudent person under the same circumstances. The court pointed out that the plaintiff has the burden of proving that the defendant was responsible for some negligent act or omission and that such act or omission was the proximate cause of the plaintiff's injury [38] The court followed the modern rule that where a bailment for hire is proved and defendant bailee refused to return the goods, there is a presumption of negligence on the part of the bailee. The bailee must then show that the property was lost or destroyed and the manner in which it was lost. The burden of proof does not shift but the bailor is merely aided by the presumption. The bailor must still establish a prima facie case and then the burden shifts. The trier of facts must then determine whether the defendants were in fact negligent. If, after considering all of the evidence, including the inference of negligence, the trier of fact is not persuaded that loss was due to the defendant's negligence, the decision must be for defendants because the plaintiffs have failed to sustain the burden of proving negligence.

The court found that the evidence introduced by the defendant was sufficient to overcome the presumption of negligence but the inference of negligence still remained and, feeling that the plaintiffs had sustained the burden of proof, the court held for the plaintiffs.

In his dissent, Judge Strutz points out that this decision wipes out any requirement that the burden is upon the plaintiff to establish not only negligence, but that the defendant's negligence was the proximate cause of plaintiff's injury Judge Strutz claims this de-

38. Farmers Home Mut. Ins. Co. v. Grand Forks Implement Co., 79 N.D. 177, 55 N.W.2d 315 (1952).

cision places upon the operator of a body shop the burden of showing not only that he used due care but he must show what caused the fire and that it was not due to his negligence. When a fire of unknown cause occurs, the operator becomes responsible and this necessarily makes him an insurer of all automobiles left at his garage. He contends this is contrary to the general rule adopted by the majority of courts and he criticizes the court for citing the proper rules but then failing to apply them.[39]

Although the majority opinion is not written as clearly as it might be, it appears that the correct rules were applied to the facts in this case. The court is not concerned with a mere negligence question but rather with the question of bailment. It is well established that when a bailment situation is created, the bailor need only show that he delivered the goods and that they were not returned.[40] It is then up to the bailee to show why the goods were not returned.[41] A presumption of negligence arises and the bailee must prove facts which show that he was not negligent.[42] If the bailee can introduce evidence to overcome this presumption, the bailor must then go forward with proof of negligence.[43] In order for the bailee to show that he was not negligent, he must prove the actual circumstances of the loss.[44] Clearly, in the case at hand the defendant could not show the actual cause of the fire; thus it would appear that the case had not reached the point where the plaintiff would be required to prove negligence.

## NEGLIGENCE—GOVERNMENTAL IMMUNITY

In *Fetzer v Minot Park District*,[45] an action for damages for death by drowning caused by the alleged negligence of the pool employees in the operation of a swimming pool, the North Dakota Supreme Court held that the defendant was entitled to "governmental immunity."

This doctrine of governmental immunity can be traced to the position of the king in medieval time and his identification with the concept of "sovereignty" which arose during the sixteenth and seventeenth centuries.[46]

39. McKenzie v. Hanson, 143 N.W.2d 697 (N.D. 1966).
40. Gardner v. Jonothan Club, 35 Cal. 343, 217 P.2d 961 (1950).
41. *Ibid.*
42. Burt v. Blackfoot Motor Supply Co., 67 Idaho 548, 186 P.2d 498 (1947).
43. Frissell v. John W Rogers, Inc., 141 Conn. 308, 106 A.2d 162 (1954).
44. Leake & Nelson Co. v. W J. Megin, Inc., 142 Conn. 99, 111 A.2d 559 (1955).
45. 138 N.W.2d 601 (N.D. 1965).
46. HARPER & JAMES, THE LAW OF TORTS § 29.3 (1956).

The breadth of the defense of governmental immunity is the subject of a wide split of authority [47] In the narrow area of liability for the maintenance and operation of a swimming pool there are two lines of cases.[48] The Massachusetts rule holds that the maintenance and operation of a swimming pool is a governmental function and the city or park district is immune from liability.[49] The New York rule, which represents the modern trend of municipal law,[50] holds that the operation and maintenance of a public swimming pool is a mere "private" or "corporate" function which if performed in a negligent manner, imposes liability on the city or park district.[51]

Plaintiff in the instant case argued that the defense of governmental immunity is archaic and outmoded.[52] But Judge Strutz, speaking for the court, said that while this may be so it is up to the legislature and not the courts to change the law

The North Dakota Constitution[53] provides that governmental subdivisions, when acting in their *governmental* capacities, can be sued only "in such manner, in such courts, and in such cases, as the legislative assembly may direct." Combining this language with the language of a previous North Dakota case[54] that "[i]n this state a park district in the performance of its duties, is engaged in the performance of a public duty and the performance of such duty is a governmental function," the court felt constrained to hold that the negligent acts of the employees of the swimming pool fall within the governmental function and are entitled to governmental immunity However, the *Holgerson* case is distinguishable from the present case in that the only appellate question in *Holgerson* was whether the individual members of the park district board could be held liable for the acts of the board. In the instant case, the action was against the board as an entity.

The North Dakota Century Code[55] provides that a park district can "sue and be sued" and that it shall have a seal and perpetual succession, it may contract, it may purchase real estate. These are the traditional attributes of a private corporation.[56]

This is arguably direction and recognition by the legislative

47. See Felton v. City of Great Falls, 169 P.2d 229 (1946), which gives an extensive review of cases dealing with swimming pools.
48. *Id.* at 230.
49. *Ibid.*
50. ANTIEAU, MUNICIPAL CORPORATION LAW § 11.14 (1966).
51. Felton v. City of Great Falls, *supra* note 47.
52. Fetzer v. Minot Park District, 138 N.W.2d 601 (N.D. 1965).
53. N.D. CONST. § 22.
54. Holgerson v. City of Devils Lake, 63 N.D. 155, 246 N.W 641 (1933).
55. N.D. CENT CODE §40-49-04 (1960).
56. HENN, CORPORATIONS §90.

assembly that the park district can commit private or proprietary acts which allow it to sue and be sued. Indeed, in his opinion, Judge Strutz states, "While the plaintiff did contend that the defendant, in maintaining a swimming pool, was not engaged in a governmental function, he did not stress the argument." If the defense of governmental immunity arises again, the argument that the action committed was proprietary should be stressed and should be given serious consideration by the court if the legislature does not act to narrow the defense of governmental immunity The distinction between proprietary and governmental functions is valid. It is sound to hold the municipal corporation liable for negligence while performing proprietary functions which are entirely for the private advantage of the inhabitants of the city or park district. A municipal corporation has "two classes of power: one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other proprietary, quasi-private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants."[57] For these "private" services the municipal corporation should receive no different treatment than would the private citizen or corporation if it were providing the services. This is not the proper place for the defense of governmental immunity

## NEGLIGENCE—GOVERNMENTAL IMMUNITY

In *Kaczor v City of Minot*,[58] plaintiff sued for injuries caused by the alleged negligent operation of the city dump by the defendant. The supreme court held that the city has governmental immunity citing *Fetzer v Minot Park District*.[59] The court has held previously that disposal of garbage is a governmental function of a municipal corporation and not an act within its corporate or private capacity [60] Judge Knutson stated "[I]f it is desirable to change the rule of law, well settled in the state, the request for such change should be addressed to the legislative assembly "[61] However, the original determination that the activity was governmental and not proprietary was made by the court and if the legislature does not act, it is respectfully urged that the court hold the disposal of garbage

57. Savage v. City of Tulsa, 174 Okla. 416, 50 P.2d 712 (1935) (syllabus).
58. 138 N.W.2d 784 (N.D. 1965).
59. 138 N.W.2d 601 (N.D. 1965).
60. Mountain v. City of Fargo, 38 N.D. 432, 166 N.W. 416 (1917), Moulton v. City of Fargo, 39 N.D. 502, 167 N.W 717 (1917).
61. Kaczor v. City of Minot, 138 N.W.2d 784 (N.D. 1965).

to be a "private" activity The rule seems archaic and unjust, especially since the authorization by the legislative assembly allowing political subdivisions to purchase liability insurance.[62] The municipal corporation should be forced to accept the responsibility for its nigligent acts.

## PROCEDURE—CLASS ACTIONS

Armour and Company sold a milk and butter processing plant to Donald Wadzinski in 1961. Wadzinski operated the plant as the Capital Milk Products Company until he became indebted to three hundred or more patrons of the plant who had furnished milk or cream for processing. In 1962, the patrons assumed management of the company and operated it as the Capital Milk Patrons Committee. Wadzinski was still indebted to Armour and Company and when, in 1962, a shipment of butter under a bill of lading signed "Capital Milk Products" was sent to Armour and Company which retained the proceeds to apply toward satisfying the Wadzinski debt.

The plaintiffs claim that the patrons produced the butter at their expense while operating the milk product plant, that the butter belongs to the patrons, and they are entitled to the proceeds which Armour and Company hold and apply to Wadzinski's debt.

The District Court, Burleigh County, entered a judgment of $7,531.95 for plaintiffs and the defendants appeal. The Supreme Court held that the action was a spurious class suit but there were defects in that the represented members of the class were not before the court.[63] The court ordered a new trial to determine the amount of compensatory damages to which each patron plaintiff is entitled and ordered the trial court to allow the other patron members to intervene as parties plaintiff.

The central issue of the case seems to be whether or not the plaintiffs are proper parties impowered to bring this action. The court held that those plaintiffs who were not members of the company were not parties in interest and, therefore, not proper parties to the action. The court held that the patron plaintiffs were proper parties and could bring suit on their own right and on behalf of the other patrons under Rule 23 (a) (3) of the North Dakota rules of Civil Procedure. This rule provides:

If persons constituting a class are so numerous as to make

62. N.D. CENT. CODE §40-43-07 (1965).
63. Rath v. Armour and Co., 136 N.W.2d 142 (N.D. 1965).

> it impracticable to bring them all before the Court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

The court goes on to say, "It is generally held that a spurious class suit is a permissive joinder device."[64] If this is true, "the judgment has no effect except as to the parties named on the record, it may be that little is gained by saying that those persons actually named represent other members of the class, these 'nameless and as yet disembodied spirits' as a distinguished court has named them."[65] The plaintiffs only claim a right to share in the proceeds of the sale to the defendant in proportion to the amount of the debt owed to each of the patrons by Wadzinski. It would seem that the consequence of this class action as far as the nonparty patrons are concerned is that it is an open invitation for them to join in the suit. Furthermore, only the parties who are patrons are bound by the judgment, and if the other patrons refuse to enter the suit the judgment cannot be held to bind them.[66] Under the Federal Rules of Civil Procedure there may be some purpose to such an action,[67] but in state courts there would seem to be little purpose in section 3 of Rule 23 (a) [68]

## PROCEEDS OF ESTATE—WILLS—INTERPRETATION

*Graves v First National Bank in Grand Forks*[69] is an appeal from an order of the district court affirming an order of the county court allowing a final report and accounting and distribution of the proceeds of an estate. The will contained a provision which on its face seemed to promote the breakup of a marital relationship. The county court refused to construe the will, holding that this was not within the jurisdiction of the county court, and the district court affirmed. No testimony was taken in the county court and the only record that was available to the supreme court as to the meaning of the objectionable provision was the will itself. The supreme court held

64. *Supra* note 63, at 149.
65. BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE (Wright ed. 1961) § 562.3 at 275.
66. Beadle v. Daniels, 362 P.2d 128 (Wyo. 1961).
67. *Supra* note 4, 275 & n.36.4.
68. N.D.R. CIV. P., Rule 23 (a) (3).
69. 138 N.W.2d 584 (N.D. 1965).

that the county court has jurisdiction, not only to construe an ambiguous will in aid of administration of an estate, but to determine the validity of a part or all of a will.[70] They held further that the clause objected to was on its face invalid as repugnant to public policy Judge Teigen dissented in part, saying that the case was not ripe and should go back to the district court for testimony relating to the intention of the testator in placing the objectionable portions in the will. The majority disagreed saying that as the language of the will is clear and unambiguous and the intent of the testator must be determined from the language itself.[71] However the court has just recognized that it was within the jurisdiction and was the duty of the county court to interpret the will. Section 56-05-01 of the North Dakota Century Code provides that "a will is to be construed according to the intention of the testator " It further provides that his intention is to be carried out to the fullest degree possible. Where, as here, it appears that there may be a provision that is repugnant to public policy it would seem to be an appropriate place to take evidence to clarify the meaning of the testator in placing the provisions within the will. While it must be borne in mind that no extrinsic evidence is ever competent to control, vary, or add to the terms of the will,[72] it can be used to explain them. A will must be construed so as to give full force and effect to the purpose of the testator [73] This would seem to be better carried out by allowing a record to be built in the county court, rather than from the cold words that are available to the supreme court with no evidence of surrounding circumstances.

## PROPERTY—AFTER-ACQUIRED TITLE

Plaintiff is operator under certain oil and gas leases and brings this action to resolve conflicting claims as to oil and gas royalties. In 1931, one Carrie Ceynar was holder of record title to certain lands. At that time her husband joined with her in mortgaging the property to the State of North Dakota to secure a loan. They later assigned and conveyed royalties aggregating 10 per cent of the oil and gas produced on that land. A provision in the assignment included the following warranty·

(A) I do hereby assign said royalty under the lease now

70. See, 4 PAGE, WILLS § 31.5 at 188 (Bowe-Parker rev. 1961).
71. Graves v. First National Bank in Grand Forks, *supra* note 69.
72. In Re Glavhee's Estate, 34 N.W.2d 300, 306 (N.D. 1948.).
73. *Id.* at 305.

> covering said lands as well as any lease, or leases, that may be hereafter made covering said premises, and agree to warrant and defend the title to the same, and that I have lawful authority to sell and assign said royalty

The state instituted foreclosure proceedings and no redemption was made from the foreclosure sale. Some years later, the husband purchased the land from the state. He now contends that the grantees to the royalty assignments no longer have an interest since he was an indispensible party to the signing of the assignments of the royalty interests. In essence, he is contending that his purchase of the land in his name did not inure to the benefit of the grantees and that they can no longer claim a share of the royalties. The court found that the husband had a warranty obligation after he joined in the signing of the deed of his wife's separate property and that his later purchase inurred to the benefit of the original grantees.[74]

The court in the present case relied heavily on a prior North Dakota decision with similar facts.[75] In that case, the court found section 47-1015, North Dakota Revised Code of 1943,[76] which is identical to 47-10-15, North Dakota Century Code, to be inapplicable, stating that the assignment of royalty does not purport to grant real property in fee simple, rather, it is in the nature of a quitclaim and an after-acquired title does not pass by virtue of the statute.[77] The court has previously held that an assignment of royalty is a grant of interest in real property,[78] thus, a covenant of warranty of title to real estate would run with the land[79] when the grantor agreed to warrant and defend the title to the assigned interest. The court in *Corbett v LaBere*[80] went on to say that a warranty would not enlarge the estate conveyed, but may operate as an estoppel:

> [T]he addition of a warranty against the grantor or those claiming by, through, or under him will not estop the grantor to assert a title subsequently acquired, assuming that it is not derived through any act or conveyance of his own prior to the deed in question.

The doctrine of estoppel is thereby given great weight and may be the only recourse of a defrauded grantee. The very idea of the doc-

74. Skelly Oil Co. v. A. M. Fruh Co., 137 N.W.2d 664 (N.D. 1964).
75. Aure v. Mackhoff, 93 N.W.2d 807 (1958).
76. N.D.R.C. § 47-1015, 1943. After-Acquired Title—Where a person purports by proper instrument to grant real property in fee simple and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee or his sucessors.
77. *Accord*, Bilby v. Wire, 77 N.W.2d 882 (N.D. 1956).
78. Corbett v. LaBere, 68 N.W.2d 211 (N.D. 1955).
79. N.D. CENT CODE § 47-04-26 (1960).
80. *Supra* note 78.

trine of estoppel is to accomplish a result which conforms with the intent of the parties so that justice will be properly served.[81] Obviously, the warranty in the instant case has some meaning and the only fair construction that can be attributed to this language is to estop the grantor from later asserting a better title.

The doctrine of estoppel has not always been construed as such. In *Rowell v Rowell*,[82] having similar facts, using a statute identical to section 47-10-15,[83] and agreeing that the doctrine of passing after acquired title is based on estoppel, the Montana Supreme Court reached a contrary result. The court in that case construed the statute[84] to apply in cases where, at the time of the grant, the title of the grantor was either defective or lacking, and subsequent to the grant, the grantor obtained title or some portion thereof. The court went on to say that the grantor is estopped to assert an after-acquired title only when such assertion would involve the denial that the conveyance passed the interest or estate which it purported to pass. The grantor passed a fee simple, which was the interest he purported to pass, but the interest was lost by the subsequent foreclosure. Thus, his after-acquired title was a new and independent one.[85] When confronted with the covenant of warranty, the Montana court referred to a prior case which stated that ordinarily a covenant of warranty, when broken, ceases to run with the land and becomes a chose in action. The rights of the grantee are barred by the foreclosure decree, sale, confirmation and sheriff's deed, and the mineral deed ceases to have any force or effect.[86]

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81. Sisson v. Swift, 243 Ala. 289, 9 So.2d 891 (1942).
82. 119 Mont. 201, 174 P.2d 223 (1946).
83. MONT. REV. CODE § 6867 (1921).
84. *Ibid.*
85. *Supra* note 82.
86. Midland Realty Co. v. Halverson, 101 Mont. 49, 52 P.2d 159 (1935). See also, Schultz v. Cities Service Oil Co., 149 Kan. 148, 86 P.2d 533 (1939).