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Digest of Attorney General Opinions

North Dakota Law Review

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plaintiff's claim against him." (Emphasis added.) In view of this Judge Burtness stated, "A defendant may under such language be brought in even though at the time it has not been judicially determined that such third party is liable either to the plaintiff or is liable to the defendant for contribution. However under the rule the Court has discretion to grant any party's Motion for 'severance, separate trial, or dismissal of the third-party claim'."

"The jury trial would be greatly lengthened if the third-party proceedings were included. It is difficult for juries to distinguish between ordinary actionable negligence and gross negligence and it is not easy to prepare instructions to make them understand the differences. While that can be overcome in cases where the plaintiff sues both operators who are parties to a car collision . . . it becomes a different proposition where there is no actual trial between the plaintiff and the third-party defendant and the jury has to pass on the confusing issue of right of contribution. The possibility of mistrial, of hung juries and of further proceedings . . . are increased and those may in turn increase rather than decrease the costs to the county, may increase the time devoted to the entire proceedings by the court and may even result in the delay of justice."

The court went on, "However, as I am holding that the rule permits third-party proceedings in a case of this sort, I am in effect holding that there is no distinction under our contribution statute between joint tortfeasors and concurrent tortfeasors in spite of the use of the words 'common liability'. In my opinion the liability is 'common' even though in a given case one party is liable for ordinary actionable negligence and the other only for gross negligence. Of course, both parties must be legally liable to respond in damages in the same amount arising out of the same facts but necessarily on identical degrees of negligence."

DIGEST OF ATTORNEY GENERAL OPINIONS

HEALTH AND SAFETY—DEFINITION OF RESTAURANT September 30, 1958

Section 23-0901 of the North Dakota Revised Code of 1943 defines the word "restaurant" as "every building or other structure, or any part thereof . . . kept, used, maintained, advertised, or held out to the public as a place where meals or lunches are served. . ." Section 23-0917 provides that restaurants shall pay a license fee of two dollars and fifty cents.

“ . . . [B]oth of these sections are under the title of health and safety. This would indicate a legislative intent to provide for the health, safety and general welfare of the people by licensing and controlling restaurants and places which serve either meals or lunches. It is the opinion of this office that the stores which have the coin operated electrically controlled hot dog machines would constitute a restaurant within the meaning of the statute and consequently would be required to pay the \$2.50 license fee. . . .”

MOTOR VEHICLE REGISTRATION—MOTOR VEHICLE DEALERS' LICENSES
November 6, 1958

Section 39-0459 of the 1957 Supplement to the North Dakota Revised Code provides that “. . . No application [for a motor vehicle dealer's license] shall be granted nor a license issued to anyone until and unless the applicant . . . has an established place of business, and has facilities and equipment for the maintenance, servicing and repair of motor vehicles. . . .” The statute before amendment included the words “. . . or has the use of, facilities . . .”. 1945 Session Laws, Chapter 249, section 1.

The phrase “has facilities and equipment” requires that such are the facilities and equipment of the applicant for the dealer's license rather than of another person or that the applicant has such a property interest in and control over them that he is prepared to maintain, service and repair motor vehicles under any and all conditions. Where premises and equipment are leased the lessee actually having the authority to control and operate repair facilities for a fixed term, there is compliance with the statute. Where the applicant has only the *right to have* vehicles serviced, maintained and repaired on the same basis as the general public, whether for a fixed term or not, there is not compliance with the statute.

MUNICIPAL GOVERNMENT—PUBLICATION OF CITY COUNCIL
PROCEEDINGS
November 17, 1958

Section 40-0812 of the North Dakota Revised Code of 1943 provides that, “The city council *shall* publish a complete record of all its proceedings in its official newspaper.” (Emphasis added.)

The use of the word “shall” implies that the legislature intended the provision to be mandatory. This applies to all meetings, whether they be of regular, or special meetings called by the mayor. Failure to publish the record would not necessarily in-

validate all proceedings. "If the matter involved were merely general discussion of the possible procedures that were to be effectuated by further formal action of the council, it seems doubtful that the proceeding finally adopted would be thereby invalidated." Further, "it is our opinion that the statute does not require a verbatim publication of the minutes but rather that an analysis of the proceedings showing the substantive actions of the council would suffice."

NOTICE

Due to the expiration of the term of office of the Honorable Charles L. Foster, there exists a vacancy on the State Bar Board. Article VIII of the By-Laws of the State Bar Association of North Dakota provides that the Executive Committee shall select the names of three members of the Association in good standing for submission to the Supreme Court. On January 7, 1959, the Executive Committee selected Hon. Charles L. Foster, Mr. Theodore Kellogg, and Mr. Kenneth G. Pringle as nominees for membership on the Board.

Article VIII also provides that members of the Association may make additional nominations by a petition signed by ten members which shall be timely filed with the Secretary of the Association. Thereafter, in the event nominations by petition are made, the membership of the Association shall be polled; and the names of those receiving the highest number of votes, "up to the number of nominees to be chosen shall be presented to the Supreme Court as nominees of this Association for members of the State Bar Board."

Pursuant to Article VIII of the By-Laws you are hereby notified that nominations may be made by petition for the vacancy on the State Bar Board, and that such nominations must be filed with the Secretary of this Association not later than April 1, 1959.

ERRATUM

In the October, 1958, issue of the *North Dakota Law Review*, there appeared an error in footnote 1 on page 306. The staff apologizes to the author, Professor Jerome Hall, for erroneously stating the title of his book, the full title of which is *Studies in Jurisprudence and Criminal Theory*.