Review of North Dakota Decisions

North Dakota Law Review

cialism can be withstood is by keeping the officials in constant fear, not for their jobs, but for their skins. There is a steady, considered and highly sensitive spirit of repression which by coming out with promptness against the feeblest beginnings of officialism's attempts against public dignity, never needs to be called on to resist its more daring enterprises.

The author suggests that Americans, searching for available recourse in a now humiliating situation, might demand a plain discussion of the fundamental question, What is Law, by those who now lightly undertake to reprehend them for lawlesness.

We admit that the foregoing selection by our contributor, may sound somewhat radical, but we are reminded, at this point, of the last message of Judge Bagley, prepared, just prior to his death, for a district Bar meeting at Grafton; and Judge Bagley was not a radical, in the accepted sence of the word. Hence, we clip a few disconnected paragraphs from that address:

"Laws are the rules which bind men together. Those rules are man made and man enforced. They can be enforced only by the sovereign power of the State, and that sovereign power, in a modern state, is the general support, moral and physical, of a majority of the people. When that majority is large, the law enforces itself. When it is small, obedience is hard to secure. When it is doubtful, it is almost impossible. When there is no majority for a law of vital importance, then that law ceases to exist—though it remains in the Constitution or on the statute books until the day of doom. . . . To believe that there is anything sacred about written laws, poorly drafted and hurriedly passed by a few dozen untrained farmers and small business men, is sheer superstition. Read over the enacted laws of North Dakota from 1889 to 1929. Dozens of them are the passing expression of a political whim or delusion. More dozens of them are the children of sheer stupidity. Which ones of these laws are sacred? Which of them, in truth, are laws at all? The answer is —those which are Common Law—just those which the great majority of sensible men agree to observe and obey. . . . What I am trying to say to you sums up into this: Society is a growth, a growth ever evolving into higher forms. That growth is slow, it is gradual, but it is sure as the growth of an ox or of a tree; and as long as men live in organized society that growth will continue."

REVIEW OF NORTH DAKOTA DECISIONS

Billingsley vs. McCormick Transfer Company: Plaintiff was one of four passengers in her brother's Ford coupe. It collided with the defendant's truck, which was standing still on the extreme right side of the road. Plaintiff and her brother were injured, and started separate suits against the defendant company, of which defendant driver was an employee and in the course of his employment at the time of the collision. The defendant alleged contributory negligence. The evidence introduced in the case raised the question of the negligence of the driver of the car in which plaintiff was riding, also of the plaintiff's contributory negligence, and whether the driver's negligence was the proximate cause of the injury. The trial court refused to instruct the jury that plaintiff could not recover if such negligence (of driver and plaintiff) was shown to be the proximate cause of the in-

jury. Verdict for plaintiff. Defendant appealed, alleging error in the court's denial of requested instruction. HELD: Reversed. Where one who is a guest or passenger in an automobile contributes to the causes of the collision, by over-crowding or similiar acts, it is a question for the jury to determine whether such passenger is guilty of contributory negligence so as to preclude recovery. Where there is a collision between the car in which one is such guest or passenger and another vehicle such passenger cannot recover from the owner or driver of the other car for injuries sustained in the collision between the two cars if the negligence of the driver of the car in which he is a passenger is the cause of the collision, even if the driver of the other car be guilty of contributory negligence.—A. E. A.

THE FIRST REACTION

The following is the first reaction to a recent item in Bar Briefs. It was submitted by J. E. Skulstad, of Maddock:

"I note in your issue of Bar Briefs for October that lawyers have not come to an agreement as to the advisability of judges commenting on the weight of evidence and credibility of witnesses in jury cases, and that you quote expressions, from 'rather authoritative sources,' help matters along. Thank you.

"Of these expressions the one by Dean Pond appears to me quite original, and may prove particularly profitable (?) to the Bar in our deliberations on these subjects. Taking it in connection with your announced stand by laymen and legislators we might, as concerns our state courts, be satisfied as it is. There the privilege of comment in this particular is ours. Take the judges in on it and our final and usually most noted effort on the trial may be badly shattered and its effect to ourself, our clients, the 'pioneer community' et als, fatally impaired. Beside, we may in effect have a directed verdict.

"On the other hand, in due seriousness, and in view of the purpose of the trial and the ultimate dispensation of justice, the wisdom of the practice to submit these delicate and often intricate problems exclusively to the decision of twelve men or women of not more than average intelligence, must be assumed repugnant to higher intelligence. Assuming further that competence to deal with these problems is not a gift to man, but must be acquired by close study and observation, it fairly follows that, as concerns such competence, the prehistoric caveman might compare as favorably to the average juror as does the latter to the trial judge. And in justice to the trial judge, may we not conceive of a situation particularly humiliating to him, when, with hands tied, he sees justice in danger of miscarriage?

"Hence, and with permission, whenever there is anything in or about evidence or witnesses, material to the arrival at a just verdict, patent to the judge, but which he has reason to believe abstruse or, maybe, hidden to the jury, he should not only *have* the right to shed light on it, but it should be his duty; in order that a high degree of care be exercised with a view to enable the jury to perform its function intelligently."