North Dakota Law Review

Volume 5 | Number 7 Article 4

1928

Review of North Dakota Decisions

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(d) Relative Irresponsibility: This is not often mentioned. But it has no basis. For "irresponsibility," substitute "independence." The very anonymity of a verdict, and the prompt fading away of the jurors into the community mass, gives the individual juror a mental and moral freedom to believe and to say, "That witness X is a liar," which the judge never could have; for the judge would have to write it down in his opinion, in black and white, for all to read forever.

5. *Demerits Inherent and Not Remediable*

There seems to be only one charge that belongs here:

(a) Hardship to Citizens by Attendance as Jurors: This is a different thing from the *needless* waste of time in attendance, that is remediable. This charge emphasizes the *unavoidable* sacrifice of the citizen in leaving his occupation during the two weeks of attendance, once in three or four years. (Let us assume, of course, that by reason of reforming the system, so as to meet the seasonal convenience of the citizen, the hardship has been reduced to the minimum.)

It is astonishing to find this charge expressed in the following bold nakedness: "A business magnate can't afford to abandon transactions which may involve millions to help . . . in a series of petty disputes." Well, the magnate who would express such a view to the lawyer who published it is precisely the kind of person who would say to the lawyer, if we had judge trial, "How much will it cost us to buy that judge's opinion?"

Contrast with that anti-social attitude this famous passage from Jeremy Bentham: "Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a chimney-sweeper and a barrow-woman were in dispute about a halfpenny worth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No most certainly." All that Democracy means is symbolized in the duty of the citizen to contribute a small occasional sacrifice for the doing of justice to his fellow citizens. Military duty, witness duty, jury-duty—all stand on the same footing; and the jury-duty is the most equable in its burdens. So much, then, for the demerits of jury trial. Whatever the value of the opinions here expressed, the scheme of analysis here offered seems to afford the proper basis for a program for trial of jury trial.

REVIEW OF NORTH DAKOTA DECISIONS

Chicago Cash Store vs. Bender: Plaintiff had store at Regent. Defendant contracted to ship a carload of grapes delivered f.o.b. on cars from Shafter, California. Plaintiff contends that defendant warranted grapes would be in good condition on arrival at Regent. From a judgment for plaintiff, defendant appeals. Specifications of error involve instructions to the jury. HELD: Reversed. Where fruit is sold f.o.b. at place of production, delivery to carrier acts as transfer of title to buyer unless contrary intent clearly appears. In the instant cause where undisputed evidence shows transfer of title to buyer on delivery to carrier, it was error to submit to the jury the question of place of transfer of title.—A. E. A.

George vs. Odenthal: Both parties were farmers. Plaintiff set a straw stack (old butt) on fire, after guarding against escape by burning a strip of prairie (90 feet) to a prairie road, the north, east and

west sides being plowed or disced land. He did not extinguish the fire, which appeared to have died out by noon of the third day. While at lunch that day a violent northwest wind came along, and soon after smoke and fire appeared near another straw butt located about 150 feet south of the one to which fire had been set. The fire spread with the wind, destroyed considerable of plaintiff's property near by. Defendant alleged contributory negligence by reason the fact that plaintiff kept large quantities of straw over and around some of his buildings, and also relied upon Sections 2791 and 2792 C. L. 1913. HELD: Sections 2797 and 2798 C. L. 1913 are controlling. These Sections "impose a rule of absolute liability upon him who starts a fire, however proper its purpose may be, and leaves it unextinguished so that it escapes and spreads" and thereafter does damage. "These Sections impose a duty to extinguish any fire that may be made."

Olson vs. Wetzstein: Defendant, operating a passenger bus, collided with plaintiff's car, destroying the car. The testimony is conflicting as to negligence. Plaintiff sustained a fracture of the arm, and other bruises. Testimony of three doctors shows normal recovery of fracture with possible ten per cent limitation of motion of arm a year later. Doctor and hospital bills show at $100, loss of time proved about three months. Nothwithstanding findings of doctors, plaintiff testified to continued pain and loss of strength. The examination by the third physician was made at time of trial, about three years after accident, and his finding was "no disability." Defendant attempted to prove negligence on part of plaintiff, counterclaiming for $200 damage to bus. HELD: Evidence established defendant's liability, and that jury's verdict of $4,031.80 is not excessive. The definite proof shows $600 for loss of time, $300 for the automobile, $100 for medical and hospital expense; "just why defendants should limit pain and suffering to $500 is not clear; pain and suffering are not measured by any set monetary standard, for there is no market price for such conditions; it may be the jury was fairly liberal in its allowance, but this matter is for the jury to determine." (N. B.—This case is cited for the reason that it illustrates that one point, that there is no market value for pain and suffering. Every definite fact discloses justification for being aggrieved at the verdict. There was normal recovery, without complications through infection, etc., and the final result shows no permanent disability. Whether or not one agrees that the Court should not interfere in a case that discloses normal recovery, normal result and no "unusual" pain and suffering, under all of the medical findings, this fact is clear: that the estimates of juries in such cases are haphazard, unscientific guesses.)

Watland vs. Workmen's Compensation Bureau: Arose on demurrer, hence facts taken from complaint. They are: that plaintiffs, co-partners, intended to comply with compensation law, and authorized manager, about July 1, 1919, to pay premium; that blanks were requested from bureau; that blanks were mailed plaintiffs shortly after; that plaintiffs filled them out; that no order to pay premium followed upon return of blanks to bureau; that in November, 1919, plaintiffs again wrote bureau; that February 11, 1920, bureau sent out statement of premium and pay-in-order; that February 12, 1920, plaintiffs mailed the amount demanded, $52.16; that, in the meantime, an employee of plaintiffs was injured (February 2, 1920); that injured person filed

claim with the bureau; that bureau held there was no insurance at time of injury, and entered award against plaintiffs; that plaintiffs, after suit on the award, denied liability on ground that the injury was not in course of employment; judgment was entered against plaintiffs for $2,500 and 50% penalty; that, on appeal to Supreme Court, the penalty was stricken out; that plaintiffs paid judgment, totalling $3,000, in 1925, which is damage claimed against defendant. HELD: "The Compensation Bureau may not be regarded as a legal entity for the purpose of suit, and a suit against it is in legal effect a suit against the State;" that neither the limited right of appeal provided in the Compensation Act, nor Section 8175 of the Laws of 1913, support plaintiff's contention. The statement: "With reference to the Workmen's Compensation Fund the statute expressly authorized suit to be brought against the officers charged with the duty of administering the law," found in *Wirtz vs. Nestos*, 51 *N. D.* 626, is also explained, as referring to appeals and not to original actions.

WORKMEN'S COMPENSATION

An employee, on business for his employer, was traveling in an auto at a speed of 40 to 50 miles per hour as he approached a railroad crossing. He collided with a train and was killed. A special statute prohibited the operation of cars in such cases at more than 10 miles per hour, and the compensation law provided that no compensation was payable for injury or death due to "willful misconduct or willful failure or refusal to perform a duty required by statute." HELD: That the employee's acts would not prevent recovery by his dependents. There must be affirmative evidence in addition to the mere omission or failure to take statutory precautions, and mere negligence is not sufficient to show willfulness and wantonness.—Carroll vs. Insurance Co., 146 S. E. 788 (Georgia, Dec. 1928).

A large rock in a coal mine had been exposed or loosened by a charge of dynamite. The next morning an employee, working near the place, was told "that it was a very dangerous rock, to be sure and take it down, and not to work under it." The compensation law provided that compensation was not payable in case of willful misconduct. Acting on his own judgment, after the instruction, the employee undertook to support the rock with timber and then proceeded with the loading of coal. The rock fell, killing him. HELD: The willful and deliberate disobedience of the order amounted to such "willful misconduct" as is contemplated by the statute, and compensation was properly denied.—Collins vs. Collieries, 13 S. W. (2nd) 332 (Tennessee, Feb. 1929).

The Texas Penal Code prohibits the employment of minors under 17 in a mine, quarry or place where explosives are used. Another Section prohibits employment of minors under 15 more than 8 hours a day or 48 hours a week. A road construction crew employed a boy under 15 as errand boy 10 hours a day. Explosives were handled, but the boy was always removed to a safe place. Evidence indicated that the parents of the boy also worked for the same employer. The boy was killed, but not in connection with the use of explosives. HELD: The liability of the insurance carrier is contractual. The contract is for the benefit of lawful employees. There is no cause of action against the insurance carrier (workmen's compensation). The only cause of action is against the employer.—Aetna Ins. Co. vs. Gilley, 12 S. W.