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Review of North Dakota Decisions

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REVIEW OF NORTH DAKOTA DECISIONS

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Dolan vs. O'Rourke. Plaintiff brought suit against Defendant, a dentist, for damages for alleged negligence in administering an anaesthetic, claimed to have been the proximate cause of the death of Plaintiff's wife. Evidence showed that Defendant administered a general anaesthetic in extracting badly abscessed teeth and that patient never came out from under the influence of the anaesthetic. After verdict for Defendant, Plaintiff moved for a new trial on the ground that the Court erred in overruling Plaintiff's objection to the admission of opinion evidence as to degree of care used by Defendant. HELD: In a case where negligence on the part of a dentist is charged, opinion evidence as to carefulness is not admissible, and that rule as to reasonable care, skill and diligence applies to dentists as well as to physicians and surgeons.

Wilder vs. Murphy. The State Board of Administration was authorized by the Session Laws of 1927 to lease portions of the campus of state educational institutions to holding companies for the purpose of building dormitories thereon. A corporation, known as the University Dormitory Association of Grand Forks, was organized to erect dormitories on the University campus. Plaintiff, through injunctional process, seeks to restrain the Board of Administration on the ground that such statute is unconstitutional. Trial Court sustained the demurrer to the complaint. HELD: The Act of the 1927 Legislature under which the Board proceeded is unconstitutional, being a delegation of legislative power to an administrative board and thus contrary to Section 25 of the Constitution, and also authorizing the creation of state debts contrary to Section 182 of the Constitution.

McBain vs. Lang. Plaintiff sued to recover damages received while riding as a passenger in a Ferris Wheel, alleging in the complaint that such machinery is a dangerous instrumentality which it was the duty of the Defendants to keep in a safe condition, and that Defendants operated the Ferris Wheel carelessly so that Plaintiff was thrown out. After verdict for Plaintiff, Defendants moved for judgment notwithstanding the verdict or for new trial. The trial Court entered judgment notwithstanding the verdict in favor of Defendant McDonald, on the ground that the evidence showed he was an employee and had no interest in the Ferris Wheel. HELD: A servant is not liable for the negligence of his master as regards an instrumentality not operated or controlled by him. Such servant is accountable only for his own negligence in the performance of a legal duty owing to a third party.

Storm vs. Kohlman. Plaintiff's husband was killed while working as an employee in a coal mine. Employer was not insured under the Workmen's Compensation Act, and, on filing an "elective" claim with the Bureau, an award was entered in favor of the dependents of the deceased, payable by the employers. On failure to pay the award, Plaintiff brought action in District Court to enforce it as a liquidated

claim. Defendants contended that the injury did not occur in the course of employment, and the evidence disclosed that the injured employee had been forbidden to work in the particular room where the accident occurred and that mining operations had been completed there the day before. HELD: When an employee is injured while doing work he was employed to do, the fact that he was working at a place where he was forbidden to work is not fatal to a claim for compensation and it can not be said as a matter of law that the injury was not in the course of employment. Case distinguished from *Shoffler vs. Lehigh Valley Coal Co.*, 139 *Atl.* 192, and others cited in opinion.

BUSINESS — PUBLIC INTEREST

Prof. H. E. Willis, of the Indiana University Law School, and formerly Dean of the North Dakota Law School, discusses the question: "When is a business affected with a public interest?" in the February issue of the Indiana Law Journal.

The test of public calling is characterized as follows through various periods: In the early *Strict Period,* Prof. Willis contends, all businesses were common callings, and the fact that a business was pursued made it such. The second period, defined as the *Period of Equity,* found a division being made between public and private businesses, and the law of common callings became the law of public callings, the public control, however, to be explained on the theory of public grant of franchises, power of eminent domain, exclusive privileges or financial aid on condition of public service. The third period, designated as the *Period of Maturity,* was marked by the retirement of the law of public callings to the background, being supplanted by declarations of freedom of contract, laissez faire, competition and individualism. The fourth or modern period, *Period of Socialization,* marks the period of revival, with development traceable in the following decisions of the U. S. Supreme Court:

Munn vs. Illinois, 94 *U. S.* 113 (1876), a grain elevator case, in which charges were held to be subject to public regulation by reason of a virtual monopoly; *Budd vs. New York,* 143 *U. S.* 517 (1892), another grain elevator case, in which the operative facts — nature and extent of business, existence of virtual monopoly, business rendered possible by canal built at public expense, and similar facts — modified the test of virtual monopoly; *Brass vs. North Dakota,* 153 *U. S.* 391 (1894), also a grain elevator case, which almost abandoned the test of virtual monopoly and accepted that of legislative declaration, the high mark of state declaration being reached in *Green vs. Frazier,* 253 *U. S.* 233 (1920).

German Alliance Insurance Company vs. Lewis, 233 *U. S.* 389 (1914), an insurance case, though not overruling *Brass vs. N. D.,* made the test that of indispensable service and virtual monopoly; that test was also applied in the case of *Block vs. Hirsch,* 256 *U. S.* 135 (1921), which held the business of housing to be a public calling, at least in time of emergency.

Wolff Packing Company vs. Court of Industrial Relations of Kansas 262 *U. S.* 522 (1922), indirectly overruled *Brass vs. North Dakota,* holding that a business, in order to be affected with a public