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Review of North Dakota Decisions

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REVIEW OF NORTH DAKOTA DECISIONS

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State of N. Dak. v. Lacy. Tom Lacy was convicted in District Court of violating the prohibition law. On appeal, he alleges error in the rulings of the Court, particularly in the admission in evidence of the statements of one Wright, the state's principal witness. The evidence showed that Wright was not a police officer, that he had searched the Defendant forcibly without a search warrant, and that he had then found a can of alcohol. HELD: When one obtains evidence through illegal search and seizure, which evidence tends to prove that Defendant committed an offense, such evidence is admissible.

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State of North Dakota v. Mutschler. Defendant was convicted of the crime of arson on an information which omitted the statutory word "malicious", but alleged that defendant "wilfully, unlawfully, and feloniously" set fire to a building. A motion for arrest of judgment on the ground that the complaint did not state facts sufficient to constitute a public offense, was denied. Denial of this motion is here assigned as error. HELD: Error. The information does not state a public offense since it fails to allege "malice" as required by statute. A motion for arrest of judgment is sufficient to arrest judgment on an information which does not state a public offense.

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Barbnecht v. Great Northern Railway Company. Plaintiff sued the Defendant railway company to recover damages for injury caused her through the alleged misconduct of a porter on one of Defendant's trains. She asserted that he "insulted and attacked" her, causing her mental pain, etc. At the trial only insults were proved, and this appeal is taken on the ground of error in the court's instructions to the jury in the use of the word "assault". HELD: Where a complaint sets forth two causes of action and fails to substantiate one of them, it is sufficient if it substantiates the other. Where the jury has been influenced by the misuse of words, the Court will not reverse, but will order a reduction of damages.

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Heegard v. Kopka. Defendant executed a third mortgage on certain land to Plaintiff as security for a loan, with the understanding that the first and second mortgages would be discharged out of the proceeds of the loan. Plaintiff later paid the first mortgage debt but the loan was insufficient to pay the second mortgage debt. Plaintiff sues to foreclose the first mortgage, claiming as subrogees, or assignees. Defendant Nordahl, holder of the second mortgage, asserted title under mortgage foreclosure which he claimed was superior to Plaintiff's mortgage. HELD: Rights of holder of second mortgage were superior to Plaintiff's. Plaintiff discharged the first mortgage debt by payment thereof, and is not an assignee. The doctrine of equitable subrogation will not be invoked in this case because Plaintiff had allowed the holder of the second mortgage to bid in for the full amount of the claim thus discharging the third mortgage under the belief that the first mortgage was already discharged.

State ex rel Holter v. Olsness. The State obtained a deed to certain land on May 3 and the Bank of North Dakota thereafter leased the land to Plaintiff. Plaintiff insured the crops in the State Hail Insurance Department, loss was sustained by hail, and adjustment was made and certified to the State Hail Department. The Commissioner refused to certify to the State Auditor. The Code provides that land subject to the State Hail Insurance Act consist of taxable lands. The Constitution exempts state owned lands from taxation. Plaintiff contends that the Hail Insurance Act was intended to be applicable to all lands which produced crops, the question of ownership of property being unimportant. HELD: The law makes taxability the test of insurability. Here the land was exempt from taxation before the insurance contract became absolute. Therefore the crop was not insurable at the time of the loss.

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Pfaffengut v. Insurance Company. Plaintiff bought an automobile on the installment plan, giving a chattel mortgage which was assigned to the Commercial Credit Trust. Plaintiff secured an insurance policy from the Export Insurance Co., on this automobile, which policy provided that the loss should be payable to the holder of the chattel mortgage and also provided that if there was any other insurance on the property at the time of the loss, the policy would be void. Plaintiff secured a policy from the Home Fire Insurance Company. The automobile was destroyed by fire. The Export Insurance Company refused to pay Plaintiff on the ground that the property was covered by another company, but later paid the Commercial Credit Trust and took an assignment of the mortgage. The Home Fire Insurance Co. made an adjustment of the loss and issued a draft to Plaintiff and the Commercial Credit Trust jointly. Plaintiff brings two actions, one to recover on the policy of insurance from the Export Insurance Co., and the other, to determine the rights of the parties to the Draft issued in settlement of the second policy of insurance. HELD: Defendant waived its right to avoid the policy because it did not tender the unearned premium upon learning that Plaintiff had insured in another company. Such a provision in the policy made it voidable, not void.

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Rouse v. Zimmerman & Reite. Zimmerman gave a first mortgage on certain of his land to the Federal Land Bank, St. Paul, a second mortgage to Defendant Reite, and a third mortgage to Plaintiff. The Federal Land Bank began foreclosure of its first mortgage and Defendant to prevent foreclosure paid said bank the amount for which the mortgage was being foreclosed and accrued costs. Plaintiff then foreclosed its third mortgage and received a sheriff's deed. Plaintiff paid three subsequent installments to the Federal Land Bank. Defendant Reite foreclosed his second mortgage and secured the sheriff's deed and refused, upon demand of Plaintiff, to reimburse Plaintiff for payments made on the first mortgage to the Federal Land Bank. Plaintiff commenced this action to secure decree that Plaintiff was subrogated to rights, liens, and equities of the Federal Land Bank on its first mortgage to the amount paid by Plaintiff to the Bank. Defendant claimed that when Plaintiff foreclosed his own mortgage, he merged in the deed whatever right he may have had to subrogation, and that Plaintiff had not purchased the first mortgage

in its entirety. HELD: Plaintiff holder of third mortgage is entitled to be subrogated to rights under the first mortgage to the extent of his payments as against intervening second mortgagor, even though he has foreclosed his second mortgage and received sheriff's deed, in absence of proof showing an intention to merge the estates. It was not necessary to Plaintiff holder of the second mortgage to pay installments due in the future. Each installment is a separate debt and it is sufficient if he pays installments due on the debts for which he claims the right of subrogation.

WORKMEN'S COMPENSATION DECISIONS

An injury is received in the course of employment when it comes while the period of the employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in doing something incidental thereto; and where a day coal loader is killed while working in a mine at night solely for his own purpose and convenience he did not sustain the injury in the course of employment.—*Consolidation Coal Co. vs. Ratliff,* 288 *S. W.* 1057 (*Ky. Dec.* 1926).

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The Commission adopted the following rules of proof in hernia cases: (1) That the immediate cause is sudden effort, strain or blow; (2) That descent of hernia occurred immediately following; (3) that it was accompanied or immediately followed by severe pain in hernial region; (4) that same was noticed and fact communicated to one or more persons at once; but court held that while the Commission was not to be bound by ordinary rules of evidence or technical rules of procedure, it had no authority to make the foregoing rules in absence of specific delegation by the legislature. *Livingston vs Industrial Commission,* 251 *Pac.* 368 (*Utah, Nov.* 1926).

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Conflicting parts of statute: (1) "The percentage of permanent disability caused by any injury shall be so computed as to cover the permanent disability caused by that particular injury without reference to any injury previously suffered or any permanent disability caused thereby; (2) "Whenever this act, or any part or section thereof, is interpreted by a court, it shall be liberally construed by such court with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment;" were construed in case where employee lost his remaining eye through industrial accident. The Commission allowed for loss of one eye, but court held he was entitled to compensation for total permanent disability.—*Liptak vs Industrial Commission,* 251 *Pac.* 635 (*Cal. Dec.* 1926).

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A town board paid various farmers who presented themselves with team and wagon for hauling gravel to gravel a town road. The board provided the gravel pit and supervised the loading, designated the place of unloading, but later required the farmers to select their own checker and pit boss and to pay for dynamite. Pay was by the load so that it was immaterial how fast or how slowly the men worked. After the ground froze the men were told they must assume the risks incident to the work, as it appeared dangerous to the town officers to undermine the frozen ground. One of the men was