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Review of North Dakota Decisions

A E. Angus

REVIEW OF NORTH DAKOTA DECISIONS

BY A. ANGUS

Yarger Brothers vs. Dakota Trust Co. A road-building firm contracted with the North Dakota Highway Commission to build a road and furnished a bond, with the defendant as surety. The contractors hired plaintiffs to work on the highway, and incurred other debts in the hire of horses and machinery, and for gas and oil. These other claims were assigned to plaintiffs. Upon appeal from judgment for plaintiffs, HELD: Debt for hire of horses and machinery covered by bond, but surety is not liable for oil and gasoline used in machinery employed on highway; judgment should be so modified.

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Meidinger vs. Security State Bank. Action to determine homestead right to certain real estate and to declare the same free from attachment and judgment lien. Plaintiff judgment debtor was 83 years of age at death of wife and was moved to the home of his son-in-law because he was unable to take care of himself. HELD: A homestead, established during married life, continues to exist after the death of one spouse, unless voluntarily abandoned. Where it is necessary to take the husband to the home of a relative to be cared for, such absence does not constitute an abandonment of the homestead estate.

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Whitson vs. Hillis. Action to recover damages for malpractice. Plaintiff's leg was fractured, and defendant physician employed to take care of it. The complaint alleged negligence in defendant in diagnosis of nature of injury, location of fracture, and in allowing bones to unite in improper position. Plaintiff produced no expert witness to testify concerning the degree of skill required or to show that an X-ray should have been taken. Verdict for plaintiff, and defendant assigns as error the insufficiency of the evidence. HELD: The failure to employ X-ray, coupled with failure to locate fracture, is evidence of negligence, although expert testimony is usually required to prove negligence in malpractice actions.

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Wishek et al. vs. U. S. Fidelity and Guaranty Co. Action to recover on fidelity bond of defendant to plaintiffs covering fidelity of grain buyer in elevator. The elevator burned while the bond was in force, the loss being covered by fire insurance, which was paid. Plaintiffs introduced evidence to prove a shortage of grain attributable to the grain-buyer. Judgment for plaintiff, and defendant assigns as error the admission in evidence of "expert testimony" and the records of the grain-buyer. HELD: Expert testimony is admissible in a matter where ordinary individuals would be unable to form a correct judgment, and papers and records made and kept by the principal on a surety bond are admissible in an action against his surety.

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Martin vs. Parkins. Plaintiff sued to recover damages for death of two and a half year old child, claiming negligence on part of defendant, who ran over the child with a motor truck and killed it. Evidence showed that defendant was driving carefully against the glare of the setting sun. Verdict was for defendant. Plaintiff's motion for new trial on ground that the evidence was insufficient to sustain the verdict granted, and defendant appealed. HELD: When new trial is granted on the ground that the evidence is insufficient to

sustain the verdict the evidence will be considered only so far as necessary to determine whether the trial court acted within its discretion, and where no abuse of discretion is shown the action of the trial court will not be disturbed.

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Village of Reeder vs. Hanson. In condemnation action instituted by the Village of Reeder to condemn land belonging to defendant "for street purposes and for public grounds", the jury fixed the value of the land and the trial court ordered judgment for plaintiff. Defendant challenged plaintiff's right to maintain the action for the reason that no resolution, determining the public necessity for laying out the street before instituting action to condemn land had been published. HELD: 1. It is not necessary for city to publish resolution determining necessity for laying out street before commencing action; 2. Defendant had waived the objection because he did not object until after commencement of trial, and then made only a general objection to the jurisdiction of the court; 3. After the village had organized a park district, as provided by law, only park commissioners have the right to condemn for "public purposes". The board of Village trustees had no right to condemn for such purpose. New trial ordered.

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Baird as Receiver vs. Abraham. Action to recover on a promissory note given by defendant to Farmers Bank of Minot as part of a transaction in which he agreed to purchase capital stock in the Savings, Loan and Trust Co. of Minot. Defendant assigned, in writing, said capital stock to the Bank as security for the note in question. The officers of the Savings, Loan and Trust Co. and the Farmers Bank were the same persons, and the Farmers Bank falsely represented to defendant that the Savings Company was a solvent corporation, which representations the defendant relied upon. The stock of the Savings Company was actually worthless and was never delivered to the defendant. Defendant's plea was lack of consideration. The case was tried by the court without a jury, the court making findings in favor of the defendant. HELD: A case, properly triable by a jury, but tried by the court without a jury, is not triable anew in the Supreme Court. The findings of fact are presumed to be correct and appellant has the burden of showing that they are contrary to the evidence. In the instant case the facts found by the trial court, that the note was without consideration, are supported by the evidence.

WORKMEN'S COMPENSATION DECISIONS

Where third party is liable for injury employee may apply for compensation or proceed against third party by suit. He can not do both.—*Rasmussen vs. George Benz & Sons,* 212 *N. W.* 20 (Minn. Jan. 1927).

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Dependent of deceased workman claiming under compensation act can not deny right to have autopsy of body where the cause of death is obscure or disputed.—*Battle Creek Coal & Coke Co. vs. Martin,* 290 *S. W.* 18 (Tenn. Jan. 1927).

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Refusal of the Industrial Accident Board to allow a lump sum should be reversed only for strong and urgent reasons, because the intent of compensation acts is to safeguard the award.—*Kaylor vs. Callahan Zinc - Lead Co.,* 253 *Pac.* 132 (Idaho Jan. 1927).