North Dakota Law Review

Volume 39 | Number 1 Article 12

1963

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on in good faith with the intention to make a profit.[10] Another case has held that the term "carrying on any trade or business" is to be construed by the popular import given to these words.[11]

Decisions in the area of whether or not an activity is business or nonbusiness requires an examination of the facts in each case, since the element of the intent of the taxpayer is of importance.[12] In *Morton v. C. I. R.* the taxpayer attempted to deduct the expenses incurred on a farm where he and his family resided. The court held that the intent of the taxpayer to convert the farm to an income producing purpose was the important element, and denied the deduction when it concluded that no such intent existed.

Thus, a careful scrutiny of the case law and various factual situations may enable the attorney to cause his client's losses to fall within the scope of "trade or business". By constant attention to the new development of the broadening of the areas of definition perhaps the taxpayer may at least receive the benefit of the doubt in close cases.

MAURICE E. COOK

STATUTES — ENACTMENT — MODE OF VOTING — MAY A LIEUTENANT GOVERNOR GIVE THE "CASTING VOTE" IN A STATE LEGISLATURE? — A bill was presented to the Montana State Senate which would raise the fee for a drivers license from $3 to $4. A vote was taken which resulted in a tie. The Lieutenant Governor cast the tie breaking vote. The Supreme Court of Montana *held* that the power vested in the Lieutenant Governor to give the "casting vote" when the Senate is equally divided vests in the Lieutenant Governor alone, and such vote is to be counted, and when counted, it determines the fate of the bill or proposition being voted on and produces "a majority vote of all the members" in the Senate. *State v. Highway Patrol Board,* 372 P.2d 930 (Mont. 1962).

In arriving at this result the court was compelled to dis-

10. Wallace's Estate v. C.I.R., 101 F.2d 604 (4th Cir. 1939); Doggett v. Burnet, 65 F.2d 191, 194 (D.C. Cir. 1933).
11. Higgins v. C.I.R., 111 F.2d 795 (2nd Cir. 1940). This case held that expenses incurred while protecting one's own investments was not acting within the scope of trade or business.
12. Morton v. C.I.R., 174 F.2d 302 (2nd Cir. 1949).

tinguish between two constitutional provisions.[1] It was decided that the express and specific provisions of Section 15 of Article VII would control.

The decision in the instant case in contrary to decisions of the Supreme Courts of both Michigan and Kansas. In construing the provisions of the Michigan Constitution, which was subsequently amended, the court in *Kelly v. Secretary of State*[2] held that Section 19 of Article 4 which states that, "No bill or joint resolution shall become a law without the concurrence of a majority of all the members elected to each house," qualifies Section 14 of Article 5, which states that "The lieutenant governor, shall by virtue of his office, be president of the senate. In committee of the whole he may debate all questions; and when there is an equal division he shall give the casting vote." It was concluded in that case that the lieutenant governor had the right to break a tie vote only on measures which do not have the force of law.

The ruling in the Michigan case was followed by the Supreme Court of Kansas in *Coleman v. Miller*.[3] Here the lientenant governor was given the deciding vote after a deadlock by the senate only because the act of legislation did not have the force of law.

The court in the principal case emphazied the analogous situation of a mayor's right to break a tie when the voting members of the city council were evenly divided.[4] In *State v. Yates*[5] the mayor was allowed to vote after a tie because statutory provisions[6] specifically permitted him to do so. Thirty five years later, with the statutory provisions no longer in effect, the Montana court followed the rule in *State v. Loud*.[7] The remainder of the cases under consideration by the Montana court dealing with the mayor-council situation, in-

1. Mont. Const. art. VII, § 15. "The lieutenant governor shall be president of the senate, but shall vote only when the senate is equally divided. . . ."; Mont. Const. art. V, § 24. "No bill shall become a law except by a vote of a majority of all the members present in each house. . . ."
2. 149 Mich. 343, 112 N.W. 978 (1907).
3. 66 Kan. 259, 71 P.2d 518 (1937).
4. Siegel v. City of Belleville, 349 Ill. 240, 181 N.E. 687 (1932); City of Carrollton v. Clark, 21 Ill. App. 74 (1886); State v. Loud, 92 Mont. 307, 14 P.2d 432 (1932); State v. Yates, 19 Mont. 239, 47 Pac. 1004 (1897).
5. 19 Mont. 239, 47 Pac. 1004 (1897).
6. Mont. Comp. Stat. 5th div., § 367 (1887). "In case of a tie in any proceeding of the city council he shall have the casting vote, but not otherwise. . . ."
7. 92 Mont. 307, 14 P.2d 432 (1932).

volved statutes which either expressly or impliedly declared the mayor to be a member of the council, thus giving him the power to vote.

The North Dakota Constitutional provisions are almost identical to those of Montana, Michigan, and Kansas.[9] Where two constitutional provisions seem to be irreconcilable, as could very well be found in North Dakota, the courts must try to render every word operative rather than to leave any words of the constitution idle or nugatory.[10]

North Dakota courts have never been called upon to litigate a case of this nature. It is the writer's opinion that the better construction would be to follow the Montana court's lead and allow the lieutenant governor to give the "casting vote." It would seem unjust to declare all deadlocks by the senate to have defeated the legislation when Section 77 of Article III of the North Dakota Constitution expressly gives the lieutenant governor the right to break the tie with his vote.

It is further recommended that a clarification of the North Dakota Constitutional provisions[11] would prevent this problem.

MARK BUTZ

WATERS AND WATER COURSES — ABROGATION OF COMMON LAW DOCTRINE — RECOGNITION OF VESTED RIGHTS — Plaintiff brought an action to enjoin the city of Wichita from drilling and pumping a water well in the Wichita well-field area under the provisions of the 1945 Water Appropriation Act[1] providing for the appropriation of underground water. Plaintiff maintained said well would allow the defendant to divert subterranean percolating water from under his land causing irreparable damage and is therefore an unconstitutional taking of his property. From an adverse judgment of the district court the city appealed. The Kansas Supreme Court *held,* one

8. Siegel v. City of Belleville, 349 Ill. 240, 181 N.E. 687 (1932); City of Carrollton v. Clark 21 Ill. App. 74 (1886).

9. N.D. Const. art. III, § 77. "The lieutenant governor shall be the president of the senate, but shall have no vote unless they be equally divided. . . ."; N.D. Const. art. II, § 65. "No bill shall become a law except by a vote of a majority of all the members-elect in each house. . . ."

10. I COOLEY'S CONSTITUTIONAL LIMITATIONS 128 (8th ed. 1927).

11. **Supra** note 9.

1. Kan. Laws 1945, ch. 390; Gen. Stat. §§ 82a-701 to 82a-725 (1961 Supp.).