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Digest of Attorney General Opinions

North Dakota Law Review

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by Elizabeth and that the latter by accepting such benefits made irrevocable the alleged compact created by such alleged oral contract and purported mutual wills. It is further contended that Elizabeth lacked authority to dispose of such real estate, and plaintiff is thereby entitled to specific enforcement as a third party beneficiary and the contracts for deed should be set aside.

The court states that a mutual will is one executed pursuant to a compact or agreement by or between two or more persons to dispose of their property in a particular manner, each in consideration of the other, and such compact or agreement, if in existence, is irrevocable and enforceable in equity. One line of decisions support plaintiff's contention that wills containing reciprocal provisions are in themselves proof sufficient to establish a compact. This court, citing *O'Connor v. Immele*, 77 N.D. 346, 43 N.W.2d 649 (1950), states: "Accordingly, it follows in this State that while such reciprocal provisions, while raising no presumption, are some evidence of compact or agreement, yet the same is inconclusive and reference must be had to the particular facts and circumstances of each case to establish such contract, compact or agreement. And especially is such examination of surrounding circumstances necessary where, as in the instant case, no reference is made, or precatory language employed, in the term of the wills to any compact or agreement."

The court goes on to say that the existence of separate wills, without clear and convincing evidence in addition, indicates ". . . nothing more than common life, mutual affection, common purposes, and a common affection for third party beneficiaries".

"Such interpretation is consistent with the fact of the execution of the joint tenancy deed by which instrument title to the real property upon death of Adolph vested immediately in Elizabeth, the survivor, and by virtue thereof Elizabeth was empowered to dispose or encumber the property without the necessity of court order . . .".

The court found no contract to exist.

DIGEST OF ATTORNEY GENERAL OPINIONS

November 25, 1960

COUNTY AUDITOR — CONTRIBUTIONS OR TAXES

Is a county required to pay the taxes or contributions arising out of the situation where the County Auditor accepts applications, processes same, transmits them to the State Hail Insurance Department and is reimbursed by them for such work?

The opinion states: The contributions and reports required to be made as a result of the County Auditor performing services for the Hail Department and receiving remuneration for such services must be made and borne by the State Hail Insurance Department and not the county in which such Auditor is located. The same applies to the township assessor where he is remunerated for services rendered to the Hail Insurance Department in connection with accepting applications and transmitting same to the Hail Insurance Department.

It is our further opinion that the same rule applies to the situation where the County Auditor is reimbursed by the Game and Fish Department for issuing licenses, and so forth.

COUNTY OFFICERS — SALARY REGULATION

October 13, 1960

May the figures of the Census Bureau as reported in newspapers be considered official reports for the purpose of determining whether the salaries of the county officials may be lowered or raised as set out in the statute? (Section 11-1010, subsection 1, 1957 Supplement).

The opinion states: We recognize that newspaper reports are very informative and for the most part reliable, nevertheless, we cannot deem such news items as official reports.

The report filed by the Secretary of Commerce, or the Census Director under the direction of the Secretary of Commerce, with the President of the United States would constitute an official publication. In so much that neither the Secretary of Commerce nor the President of the United States is required to transmit to the State of North Dakota the results of the census, or is required to advise the State of North Dakota when such report has been filed and received, we must take the date of December 1, 1960 as the date on which the report is received.

It is our further opinion that the census population would be deemed officially published on December 1, 1960.

JUSTICE OF THE PEACE — FEES

October 27, 1960

May a justice of peace charge a fee of \$4.00 for hearing testimony "as a trial of issue" where the accused has pled guilty?

The opinion states: The fee for trial of issue quite obviously is

where the justice of peace is required to try the issue on a plea of not guilty, and does not include the situation where the justice of peace on his own wishes to hear testimony after a plea of guilty has been entered. While it is true a justice of peace might wish to hear some testimony to ascertain for himself whether or not the plea of guilty should be accepted, it is not mandatory or required that the justice of peace hear such testimony. Therefore, it would appear that the justice is not entitled to any fee for a trial of issue under these circumstances.

N. DAK. LAWS c. 100 § 1 — POSSESSION OF ALCOHOL

October 11, 1960

There has been little litigation on this type of statute. It would be our thought that where an officer discovers alcohol in an automobile occupied by more than one minor, not in the physical possession of any one individual but located or secreted somewhere in the automobile the legal responsibility of any individual member of the group must necessarily be determined on the basis of at least knowledge of the presence of the beverage concerned, and possibly some degree of responsibility for its being there. Probably finding of the liquor in the vehicle would make out a *prima facie* case against the person having custody and control of the vehicle. However, if the beverage were concealed, it is our thought that further investigation would be necessary to determine whether or not other passengers were in any way guilty of a violation.

PUBLIC ROADS — PRESCRIPTION

October 3, 1960

May landowners close a road or trail that has been used occasionally for a period of thirty or forty years and not maintained by the township?

The opinion states. It would appear that this "trail" is an open and public road (24-0701). The township board could, of course, vacate same. The landowners as such would have no right to close the road by the actions they have taken. There are, of course, statutory penalties for "obstructing highways". In proper circumstances an injunctonal proceedings could be brought to prevent such obstructions. The township board would be under no obligation to expend funds on this road.

SCHOOL DISTRICTS — TUITION

November 22, 1960

Who pays the tuition for a student who has not graduated from high school in four years if his residence is in a district different from the high school he attends?

The opinion says: The residence district of a high school student attending school in another district cannot pay that student's high school tuition for more than four years. And as the "host" district is required to charge tuition for non-resident high school students, it follows that the student himself must meet the tuition demand.

NOTICE OF APPRECIATION

The new cover, first appearing on this issue, was designed by Mrs. Jack Christensen of Grand Forks.

