



1961

District Court Digest

W. C. Lynch

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Recommended Citation

Lynch, W. C. (1961) "District Court Digest," *North Dakota Law Review*. Vol. 37 : No. 3 , Article 14.
Available at: <https://commons.und.edu/ndlr/vol37/iss3/14>

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NOTICE

The Seventh Annual Rocky Mountain Mineral Law Institute will be held July 27, 28, and 29, 1961 at Albuquerque, New Mexico. The North Dakota Oil and Gas Association is one of the sponsoring industry associations. The topic coverage will include: public, Indian, and state land leasing, mineral leasing by fiduciaries, tax considerations in mineral transactions, marketing and proration, shut-in gas wells, conservation laws—effect on lease provisions, multiple use problems, right of way, discovery requirements, assessment work requirements.

DISTRICT COURT DIGEST
EXTRAORDINARY REMEDIES—PREROGATIVE WRITS
IN THE DISTRICT COURT.

The State of North Dakota v. North Dakota Hospital Service, District Court of the Fourth Judicial District, Burleigh County, North Dakota, W. C. Lynch, District Judge.

This was an action brought by the State of North Dakota against a hospital insurance company seeking a restraining order to prevent the latter from modifying their insurance contracts without the consent or approval of the Commissioner of Insurance.

The issues were whether or not a district court could issue a prerogative writ such as this in the first place, and secondly whether they could do so without first issuing a summons and complaint.

Held: Even if the court had jurisdiction to issue such an order they were compelled to comply with the procedural prerequisite of first issuing a summons and complaint. The court also commented that they felt that the issuance of prerogative writs should lie solely in the jurisdiction of the Supreme Court. The latter should be the only source of any such extraordinary remedy such as a prerogative writ. Since such a writ is concerned with speedy and final relief, it would be only logical to initiate the action in the highest tribunal of the state and one from which there can be no appeal.

DIGEST OF ATTORNEY GENERAL OPINIONS

GENERAL FUND APPROPRIATIONS — INVESTMENT AND PROCEEDS
DECEMBER 19, 1960

- Does the Board of Higher Education have authority to invest funds which have been appropriated from the general fund and receive the proceeds from such investment for a certain institution?

The opinion states: To permit such an investment with the earnings accruing to the Board of Higher Education for the benefit of a certain institution, the appropriation statute would have to so provide. Further, there would be serious doubt whether the Board of Higher Education under Article 54 of the North Dakota Constitution could invest such moneys. The statutory and constitutional provisions simply do not authorize the Board to invest the money appropriated and receive the earnings therefrom.

Moreover, while the appropriation is made out of the general fund, the money still remains on deposit with the State Treasurer until demanded for the purposes for which it was appropriated. And until such money is actually expended, the State Treasurer invests such money and the earnings therefrom accrue to the State of North Dakota and become part of the general fund.

JUDGE ELECT — VACANCY — APPOINTEE'S DURATION
DECEMBER 30, 1960

If a judge elect dies before taking office may the appointed judge, should the incumbent retire, serve not only for the unexpired term but also until his successor is duly elected and qualified?

The opinion states: In considering Section 104 of the North Dakota Constitution, the first conclusion reached is that the incumbent judge (district) could continue to serve the remainder of his term and also continue to serve until his successor is duly elected and qualified. This, because no vacancy exists under Section 44-02-01 of the North Dakota Century Code. Further, by the majority view the rule obtains that the death or disability of an officer-elect before qualifying does not create a vacancy in the office which may be filled by the appointing power since he never occupied the office. And under the provision that an incumbent is entitled to continue in the office until the election and qualification of his successor.

Hence, although the proposition is not free from doubt and that an ultimate final determination would result only from a decision of a court of competent jurisdiction, we are strongly impressed with the majority view and sections 27-05-02 of the North Dakota Century Code and 104 of the Constitution. Thus, it is our considered opinion that either the incumbent judge or the appointed judge, should the incumbent judge retire, may serve not only for the unexpired term but also until his successor is elected and qualified.

TRAILER IDENTIFICATION PLATES — FEES
JANUARY 20, 1961

Does subsection 4 of section 39-04-19 of the North Dakota Century Code require a mandatory fee for trailer identification plates?

The opinion states: Our search of the provisions of the vehicle code discloses that there is no provision requiring identification plates to be affixed to trailers used on the highways of this state. Hence, the fee specified is not a mandatory fee.

Nevertheless, where a trailer is attached to a tractor unit and becomes an integrated part of the vehicle a number plate should be attached to the rear of the trailer as a part of the unit, with the other number plate in the front of the unit.

GOVERNOR'S ABSENCE — DUTIES OF LIEUTENANT GOVERNOR
FEBRUARY 6, 1961

If the Governor is absent from the state, what duties or powers, if any, devolve upon the Lieutenant Governor?

The opinion states: The answer is found in the construction placed upon section 72 of the Constitution which provides that "in case of the death, impeachment, resignation, failure to qualify, *absence from the state*, . . . the powers and duties of the office for the residue of the term, or until he shall be acquitted or the disability be removed, shall devolve upon the lieutenant governor." The Supreme Court of this state has never had occasion to construe the provisions of the Constitution or the statute specifically as to what is meant by the term "absence from the state." However, all the cases consulted, without reservation or qualification, all conclude that absence from the state by the Governor automatically devolves duties upon the Lieutenant Governor. The cases also hold that the absence need not be for any length of time or that the Governor must be a certain distance from the state.

Our constitutional provision is clear. The term "absent from the state" means just that. Our research does not disclose any instance where the acts of the Lieutenant Governor while the Governor was absent from the state were declared invalid under the constitutional provision "absence from the state." Thus, the Lieutenant Governor may and can act as Governor while the Governor is out of the State of North Dakota, and such acts will have the same legal effect as if performed by the Governor.