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In Theel Bros. Rapid Transit Co., Applts., vs. Great Northern Ry. Co. et al., Respts.

That under the provisions of chapter 164, S. L. 1933, the public service commission is not authorized to grant a certificate to a common motor carrier for freight in a territory served by existing transportation facilities when it appears from the evidence that the service now being furnished by such existing transportation facilities or that could be furnished by them is reasonably adequate for the needs and demands of the territory to be served.

That the public service commission has the jurisdiction to regulate and adjust, among other things, all claims of unfair competition between transportation agencies.

That the courts do not have the jurisdiction, primarily, to decide administrative questions assigned to the public utilities commission for determination, and where such commission in its proceedings, furnishes due process of law and there is substantial evidence to support the findings of the commission the courts have no authority to substitute their judgment for that of the commission.

That while the public service commission is invested with power and has the authority to supervise and regulate all common carriers of property so as to insure adequate transportation service to the territory traversed by such carriers, this power is to be exercised, among other things, so as to prevent substantial duplication of service between these common motor carriers and lines of competing steam and electric railroads; and it is not the province of the commission to substantially substitute the operation of motor common carriers for existing transportation facilities.

That an order made by the public service commission in matters properly before it must be based upon findings, and the findings based upon substantial evidence; and the court will not set aside such findings unless they are of such a character that the court can clearly say they are unreasonable.

That the record is examined in the case at bar where the public service commission made findings in a hearing had, and concluded to grant a certificate of public convenience and a permit to operate motor vehicles to furnish class "A" freight services, and such findings and decision were upon appeal reversed by the district court, and the public service commission appealed to this court demanding a trial de novo upon the evidence furnished, it is held: that upon a careful review of all the record there is not substantial evidence to sustain the determination of the public service commission and therefore the judgment of the lower court is affirmed.

Appeal from the judgment of the District Court of Steele County. AFFIRMED. Opinion of the Court by Burr, Cr. J.

In Mae Leonard, Pltf. and Respt. vs. N. D. Coop. Wool Marketing Assn., Deft. and Applt.

That the questions of the existence of an agency and the scope and extent of the agent's authority are to be decided from all facts and circumstances in evidence and are primarily questions of fact for the jury. It is only when the evidence is such that reasonable minds could draw but one conclusion that these questions are for the court.

That where an injury is the result of separate and distinct acts of negligence by different persons operating and occurring simultaneously and concurrently each act may be regarded as a proximate cause and recovery may be predicated upon either or both acts.

That questions of negligence, contributory negligence and proximate cause are always questions of fact for the jury in an action for personal injuries unless the evidence is such that reasonable minds can draw but one conclusion therefrom.

That the failure of the trial court to give a requested instruction to the effect that no damages for future detriment could be allowed except for detriment or damages which are certain to result in the future is held not to constitute prejudicial error under the circumstances in this case and in view of instructions that were given.

That it is held for reasons stated in the opinion that a verdict of $17,153.55 is excessive and it is reduced to $12,000 with an option to the plaintiff to file a remission of the excess or retry the case.

Appeal from the district court of Stark County, Miller, J. MODIFIED AND AFFIRMED CONDITIONALLY. Opinion of the court by Morris, J.; Nuessel and Burke, JJ dissenting.

In Jess Willard, Pltf. and Respt. vs. Ward County, et al, Defts. and Applts.

That where a county becomes the owner of a parcel of land by virtue of a tax deed and the county auditor thereafter sells said land at private sale under the provisions of sections 17 and 18 of chapter 286 S. L. 1941, such sale is merely tentative and the county auditor must thereupon give notice of such proposed sale to the former owner of the land or to his successor in interest, and said sale can not become complete until after the expiration of a period of thirty (30) days from the date of such notice to the owner or the successor in interest. During said period such owner or the successor in interest has the right to redeem the land so sold by paying in the full amount of all delinquent taxes with penalty and interest.

That where the county auditor makes such private sale the tax title to the land remains in the county until after the expiration of the thirty-day period and until the terms of the contract of sale are completed.

That in addition to the right of redemption given to the owner or his successor in interest by means of the provisions of said sections 17 and 18 of chapter 286, S. L. 1941, such owner or his successor in interest has the right to repurchase said land from the county so long as the tax title remains in the county, and where a sale has been made by the county auditor to a private party under the provisions of sec. 17, and while such sale is in abeyance under the provisions of sec. 18, the said owner or his successor in interest may repurchase the land from the county, through the board of county commissioners, and in case of such repurchase the sale made by the county auditor to a private party under the provisions of sections 17 and 18 of said statute becomes a nullity.

Appeal from the district court of Ward County, Lowe, J. REVERSED. Opinion of the Court by Burr, Ch. J.

In Nanna M. Funk and C. E. Branick, Applts. vs. L. R. Baird, et al, Respts.

That rescission of a contract operates not only to terminate it and to release the parties thereto from further obligations to each other in respect to the subject of the contract; but it abrogates the contract from the beginning and restores the parties to the relative positions which they would have occupied if no such contract had been made.

That the great principle which governs in cases involving adjustment of counter demands arising on rescission of a contract is that as far as pos-

sible the parties thereto shall be restored to the positions they relatively occupied prior to entering into the engagement.

That where a vendee in an executory contract for the sale of land is entitled to rescind, and rescinds such contract on account of default or dereliction on the part of the vendor, the vendee may recover what he has paid under the contract for purchase money, and for taxes with interest subject to a deduction or set-off in favor of the vendor for the use of the premises while in possession of the vendee, and for any waste the vendee may have committed.

That where an executory contract for the sale of land, which the vendee was put in possession of, is rescinded for causes free from fraud, the value of the use of the land will, as a general rule, be deemed equivalent to the interest on the purchase price fixed by the parties in the contract under which the vendee came into possession. This rule, however, is not absolute, and a reasonable discretion should be exercised in it application in view of all the circumstances in each particular case, the fundamental idea being to place the parties as far as possible in statu quo.

Appeal from district court of Stark County, Miller, J. AFFIRMED. Opinion of the court by Christianson, J.

In State of North Dakota, ex rel R. H. Andrews, Applt. vs. Ingvald P. Quam, as the County Auditor of Nelson County, North Dakota, and J. R. Tangen as Sheriff of Nelson County, North Dakota, and Thomas Hall, as the Secretary of State of the State of North Dakota, Respts.

That where the governor has issued a writ of election pursuant to section 44 of the State Constitution for the filling of a vacancy in the office of member of the House of Representatives, a court has no power to enjoin officers of the executive branch of the government from performing duties incident to the holding of such election on the ground that sufficient time is not allowed for publication of notice of the time of election.

That the House of Representative is the exclusive judge of the election returns and qualifications of its own members under section 47 of the State Constitution.

Appeal from order denying an injunction. Hon. P. G. Swenson, Judge of District Court, Nelson County.AFFIRMED. Opinion of the Court by Burr, J.

In the State of North Dakota, ex rel. Alvin C. Strutz, Attorney General, Pltf. and Respt., vs. Bert Nelson, as Treasurer of Griggs County, a municipal corporation in the State of North Dakota, Deft. and Applt.

That the county treasurer in collecting state taxes does not act as the agent of the county but as an individual designated by his official name to collect for the state, and the taxes thus collected are held by him subject to the orders of the state officers authorized to receive them.

That where state taxes are collected by a county treasurer and demand is duly made upon him for the same by the state officers authorized to receive them, he cannot withhold such taxes and apply them in satisfaction of a claim of the county against the state for prior overpayments made to it.

Appeal from the District Court of Griggs County, Hon. M. J. Englert, Judge. Proceeding in mandamus by the State on the relation of the attorney general against the defendant Bert Nelson as treasurer of Griggs County, to compel defendant to pay into the state treasury certain taxes collected for the state and withheld by him. From a judgment for the plaintiff, defendant appeals. AFFIRMED. Opinion of the Court by Nuessle, J.

In the State of North Dakota, Applt. vs. Northwestern Improvement Company, a foreign corporation, Respt.

That in the instant case a contract was made on April 14, 1910 whereby the owner in fee of a tract of land agreed that in consideration of the payment of a certain sum of money it sell such tract of land and execute and deliver to the vendee a deed of conveyance therefor. The contract provided for the sale and conveyance of the described premises with the hereditaments and appurtenances thereunto belonging, but excepted from the contract, and reserved unto the vendor "all minerals of any nature whatsoever including coal, iron, natural gas and oil, upon said land." The vendee made the initial payment stipulated in the contract and thereupon entered into possession, and remained in possession and on or before October 7, 1912 completed all payments stipulated in the contract. On October 7, 1912, the vendor executed and delivered a deed of conveyance strictly in accordance with the terms of the contract, and excepted from the deed, and reserved unto the vendor, "all minerals of any nature whatsoever, including coal, iron, natural gas and oil, upon or in said land."

Interim the making of the contract and the execution of the deed, the legislature enacted Chapter 304, Laws 1911 (approved March 17, 1911), which provided that "all deeds and transfers of real property in this state that shall reserve to the grantor the coal or other deposits in said property shall contain an accurate description of the coal or other mineral deposits reserved to the grantor, its nature, length, width and thickness, and the coal or other mineral deposits so reserved to the grantor shall be limited to such description;" and that "every deed and transfer of real property in this state that recites a reservation to the grantor of the coal deposits in said property, but which does not contain as accurate description of such deposits as required in section 1 of this act shall be construed to transfer to the grantee named in such deed, all right, title and interest to such property and all deposits of coal or other minerals imbedded therein nothwithstanding such attempted reservation."

For reasons stated in the opinion, it is held: — That the execution and delivery of the contract on April 10, 1910, accompanied by payment of part of the consideration and the written agreement to pay the balance of the purchase price, and the surrender of the possession of the premises to the vendee, resulted in a severance of the surface land from the mineral deposits upon or in the land, and operated as a transfer by the vendor to the vendee of the equitable title to the surface land; that the said Chapter 304, Laws 1911 did not apply to the contract and deed involved in this case, and that the reservation in the contract and deed are valid, and that the vendor retained title to the minerals so reserved.

From a judgment of the district court of Grant County, Miller, J., plaintiff appeals. AFFIRMED. Opinion of the Court by Christianson, J.