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Our Supreme Court Holds

North Dakota State Bar Association

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21 *W. J. Hein v. Geavelle Farmers Elev. Co.*, 78 A. L. R. 631 (1931). Here the directors owned most of the notes, and the corporation was insolvent at the time the part payment was made just for the purpose of reviving the claim on the notes.

22 *Fletcher, Cyc. Corps. (Perm. Ed.)* § 549.

23 *Wych v. East India Co.*, (1734) 24 Eng. Rep. 1078, IX *Mew's Digest* 39.

24 *Allen v. Smith*, 129 U. S. 465, 9 S. Ct. 338, 32 L. Ed. 732 (1889).

25 *In re Sheppard's Estate*, 180 Pa. 57, 36 Atl. 422 (1897).

26 *Brookfield Nat. Bank v. Kimble et al.*, 76 Ind. 195 (1877).

27 *Cheshire v. Parker*, 207 N. C. 364, 177 S. E. 21 (1934).

28 *Waite et al. v. McKee*, 95 Ark. 124, 128 S. W. 1028 (1910).

29 7 R. C. L. 510.

30 *Johnson v. Albany & Susquehanna R. R. Co.*, 54 N. Y. 416 (1873).

31 *Campbell v. Holt*, 115 U. S. 620, 6 S. Ct. 209, 29 L. Ed. 483 (1885).

32 41 A. L. R. 925.

OUR SUPREME COURT HOLDS

In the North Dakota Mill & Elevator Assn., Pltf. and Applt., vs. Hartford Steam Boiler Inspec. & Ins. Co., Deft. and Respt.

That the Industrial Commission of the State of North Dakota consisting of the Governor, the Attorney General and the Commissioner of Agriculture and Labor of the State of North Dakota, is a state agency charged with the operation, management and control of The North Dakota Mill and Elevator Association. Pursuant to the statute (chap. 191, S. L. 1933) "all orders, rules, regulations, by-laws and written contracts adopted or authorized by the Commission shall, before becoming effective, be approved by the Governor, as chairman, and shall not be in force unless approved and signed by him," and (chap. 193, S. L. 1933) " * * Title to property pertaining to the operation of the Association shall be obtained and conveyed in the name of 'The State of North Dakota, doing business as the North Dakota Mill and Elevator Association.' Written instruments shall be executed in the name of the State of North Dakota, signed by any two members of the Industrial Commission, of whom the Governor shall be one * *." The Commission at a meeting held on April 26, 1939, on motion of one of the members thereof, un-animously resolved to cancel and terminate certain policies of insurance then in force covering property of the Association. The minutes of the meeting showing the action thus taken were signed by the Governor and the other two members of the Commission. The insurance company with which the policies were written, refused to repay the unearned premium in the amount claimed and demanded by the Commission, whereupon suit to recover the same was instituted. On the trial evidence tending to show that written action of the Commission cancelling the policies of insurance was given to the company by the secretary of the Commission and the policies surrendered for cancellation and that the company waived any objection on account of irregularity or insufficiency in the notice of cancellation or in the manner and method of the surrender of the policies, was offered and ruled inadmissible on the ground that the policies could not be cancelled under the pro-

visions of the statute above quoted except by written notice signed by the Governor and one of the other members of the Commission. HELD, for reasons stated in the opinion, that this ruling was erroneous. Appeal from the District Court of Cass County, Holt, J. Action to recover money. From a judgment for the defendant, plaintiff appeals.

REVERSED AND NEW TRIAL ORDERED. Opinion of the Court by Nuessle, J.

In Peter F. Kelsch, Jr., Pltf. and Applt., vs. R. M. Dickson, Justice of the Peace in and for Stark County, North Dakota, Deft. and Respt.

That where the district court has jurisdiction of the subject matter of a case, and the parties to a cause of action appear before the court, so as to give the court jurisdiction of the persons, the decision of the court made therein is binding upon the parties affected until modified or reversed.

That the record is examined, and it is held: the trial court was justified in denying a writ of mandamus sought by the petitioner.

Appeal from the District Court of Stark County, Hon. Harvey J. Miller, Judge. AFFIRMED. Opinion of the Court by Burr, Ch. J.

In State of North Dakota, Pltf. and Applt., vs. Grand Forks, a quasi Municipal Corporation, Deft. and Respt.

That a county treasurer, in collecting taxes and rentals of school lands for the state, does not act as the agent of the county but as an individual designated by his official name to collect for the state. (Sections 2156 and 326, C. L. 1913).

That statutes directing county treasurers to collect taxes and school land rentals for the state and providing for remittance thereof to the state treasurer contemplate that county treasurers shall, after collection, hold such funds as individuals in their official capacity subject to the orders of designated state officers.

That an allegation in an answer that a county treasurer deposited funds belonging to the state in a depository for public funds does not warrant an implication that such funds were deposited in the name of the county.

That statute which declares that each county shall be responsible for all state taxes levied imposes a condition of potential liability or accountability and a county's duty to account for state taxes may be met by a showing that the county officers have adhered strictly to the statutor directions of the State Legislature and have acted with honesty, prudence and diligence.

That where a county treasurer was required by state statute, under a penalty of a misdemeanor, to deposit the proceeds of state tax collections in a depository for public funds and was exempted from all liability for losses resulting from the failure of such depository, an answer by a county, in a suit brought by the State to recover state taxes collected by the county's treasurer, alleging that such taxes had been deposited by the treasurer in a duly designated depository for public funds and had been lost through the insolvency of the depository, stated a sufficient accounting for the state taxes collected ad a defense to the action.

Appeal from the District Court of Grand Forks County, Swenson, J.

AFFIRMED. Opinion of the Court by Burke, J.

In Ford Motor Company, a corporation, Plt. and Applt., vs. Berta E. Baker, State Auditor, Deft. and Respt.

That Section 186 of the Constitution of North Dakota (Article 53 of the Amendments to the Constitution, p. 497. Laws 1939) provides that no money

shall be paid out of the State Treasury except after appropriation by the legislature, but contains a proviso "that there is hereby appropriated the necessary funds * * required for refunds made under the provisions of * * the State Income Tax Law." It is held that such proviso operates to appropriate moneys required for the payment of a judgment that had been rendered against the State prior to the time the proviso was adopted as a part of a constitutional amendment.

That the State cannot be held to the payment of interest on any claim against it unless bound by an act of the Legislature or by a lawful contract of its executive officers made within the scope of their duly constituted authority.

That the State is not liable to pay interest on a claim for a refund of income taxes illegally assessed against, and paid to the State Treasurer by, a taxpayer under compulsion since there is no legislative enactment which either directly or by implication imposes such liability upon the state or evidences consent by the state to pay such interest. Neither is the State liable to pay interest on a judgment rendered against it for such claim.

Appeal from the District Court of Burleigh County, Hon. Fred Jansonius, J. Mandamus proceeding by Ford Motor Company against State Auditor to compel her to draw a warrant on State Treasurer for amount of plaintiff's judgment. From a judgment in favor of defendant, plaintiff appeals. REVERSED AND REMANDED. Opinion of Court by Berry, Dist. J. sitting in place of Morris, J., disqualified.

In David Hamilton, Pltf. and Respt., vs. City of Bismarck, a municipal corporation, Deft. and Applt.

That in constructing a sewer system, a city acts in governmental capacity.

That a municipal corporation is not liable for damages caused by an over-flow of its sewer occasioned by extraordinary rains or floods.

That Section 14 of the North Dakota Constitution does not deal with damages resulting from the negligence of public corporations or their agents but only with those damages that are a consequence of the exercise of the power of eminent domain.

That where the right to take or damage private property for public use is acquired by contract, and nothing to the contrary appears, the acquisition is presumed to be accompanied by the same rights as though the power of eminent domain had been exercised in accordance with statutory and constitutional provisions.

Appeal from the District Court of Burleigh County, Hon. R. G. McFarland, Judge. REVERSED. Opinion of the Court by Morris, J. Burr, J. dissenting.

In Tilda Nelson, Pltf., Respt., Applt., vs. A. R. Scherling and Sophia Scherling, Defts., Appls., Respts.

That a motion for judgment notwithstanding the verdict does not go to the weight of evidence. In case of an adverse verdict the evidence is considered in the light most favorable to the party obtaining the verdict; and where, upon the whole record, there is no issue of fact to submit to the jury, so that the moving party would be entitled to judgment as a matter of law, the motion for judgment notwithstanding the verdict should be granted. However, if, upon the whole record, it is reasonable to believe the defects in the evidence may be supplied upon a new trial, so as to present an issue for the jury, the trial court should deny the motion for judgment notwithstanding the verdict, and grant a new trial, when the motion is made in the alternative.

Appeal from the District Court of Cass County, Hon. P. G. Swenson, Judge. AFFIRMED. Opinion of the Court by Burr, Ch. J.

