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## Our Supreme Court Holds

North Dakota State Bar Association

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## OUR SUPREME COURT HOLDS

In *L. R. Baird as Receiver of Farmers State Bank of St. Thomas, a corporation, Pltff. and App'tt., v. G. H. Larson, et al., Defts. and Respts.*

That a cause of action to foreclose a mortgage accrues when the debt matures.

That payment by one maker of a joint and several note does not interrupt the running of the statute of limitations as against another maker where the payment was not made with the authority or consent of the other joint maker.

That renewal or part payment of the debt by one of two joint debtors suspends the running of the statute of limitations as to both debtors upon a joint mortgage given to secure the debt.

That where husband and wife have given a joint mortgage upon non-homestead property held in the name of the husband to secure their joint and several note, and thereafter the property is deeded to the wife and subsequent to her death, while intestate, the debt is renewed by a note given by the husband before the statute of limitations has run against either the note or the mortgage, the renewal of the note by the husband tolls the statute of limitations as to the right to foreclose the mortgage against the interest of all the heirs of the deceased wife in the mortgaged property.

That where a mortgage given prior to July 1, 1919, is foreclosed, the rights of the purchaser at the foreclosure sale to rents and profits or the value of the use and occupation of the premises during the period of redemption are governed by Section 7762, Compiled Laws N. D. 1913.

Appeal from the District Court of Pembina County, Hon. W. J. Kneeshaw, J.

MODIFIED AND AFFIRMED. Opinion of the Court by Morris, J.

In *State of North Dakota ex rel. Roy A. Ilvedson, Relr., vs. The District Court in and for Ward County, North Dakota, and The Hon. John C. Lowe, as Judge of the District Court in and for Ward County, North Dakota, Respts.*

That the office of state's attorney is imbedded in the State Constitution, and the incumbent of such office is a constitutional officer.

That the people have reserved to themselves, in the State Constitution, the right to elect a state's attorney in each of the organized counties, and the method so provided for choosing the state's attorney is exclusive.

That where the Constitution provides that a state's attorney "shall be subject to removal for misconduct, malfeasance, crime of misdemeanor in office, or for habitual drunkenness or gross incompetency in such manner as may be provided by law," the causes for removal so specified are exclusive.

That where the Constitution provides that a certain elective constitutional officer, holding office for a fixed term, shall be subject to removal from office for certain enumerated causes "in such manner as may be provided by law," the manner of removal prescribed by the Legislature must conform to the fundamental principles of due process of law, unless the Constitution clearly discloses an intention that removal may be made without notice and hearing.

That Subdivision 3, Section 3376, C. L. 1913, which makes it the duty of a state's attorney to prosecute certain actions accruing to the State or his County, and Subdivision 9 of said Section, which provides that in case the state's attorney of any county refuses or neglects to perform such duty, after it has been properly brought to his attention; or neglects or refuses to institute "a civil action in which the state is a party" and which action "should be instituted and the fact of such refusal or neglect to perform such duty, and that the action is one that should be prosecuted, has been brought before the judge of the district court in the judicial district having jurisdiction

of such action, by affidavit or otherwise, and said judge is satisfied that such action should be prosecuted, and that said state's attorney has failed or neglected to perform his duty, then in that case, \* \* he shall appoint, by an order to be entered upon the minutes of the court, some suitable person, an attorney-at-law, and the person so appointed shall thereupon be vested with all the powers of such state's attorney for that action, but for no other purpose, and the district court shall by order, to be entered in the minutes of the court, fix his fee therefor, which amount shall be allowed by the board of county commissioners and which amount, if so ordered by the court, shall be deducted from the salary of the state's attorney and the person so appointed shall be the only person authorized to proceed therein", do not authorize the judge of the District to make an order without notice and hearing, determining that the state's attorney has failed and neglected to institute an action which it was his duty to institute, and appointing another attorney to institute such action instead of the state's attorney.

Application by the State on the relation of Roy A. Ivedson for a supervisory writ.

**WRIT GRANTED.**

Opinion of the Court by Christianson, J.

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In Ruth Wiseth, Pltf. and Applt., v. Traill County Telephone Company, a corporation, Deft. and Respt.

That where, under the statutes of this state, the workmen's compensation bureau was intrusted with the duty of enforcing the provisions of the minimum hour and wage law for women and was authorized to establish standards of hours of employment and of minimum wages, and it is shown that such standards were established for telephone exchanges in cities having five hundred or more inhabitants, the burden of showing that a departure from such standards was authorized by the bureau is upon the defendant in this case.

That upon examination of the record, it is held the court erred in admitting, over the objection of the plaintiff, an exhibit purporting to be an authorization on the part of the bureau to the defendant to depart from said standards, there being no proof that the exhibit was authorized by the bureau.

Appeal from a judgment of the district court of Traill County, Hon. M. J. Englert, Judge.

**REVERSED.**

Opinion of the Court by Burr, J.

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In General Motors Acceptance Corporation, a corporation, Pltf. and Applt., vs. Clara Thompson, individually and as Administratrix of the Estate of C. T. Thompson, Deceased, and the First National Bank in Grand Forks, North Dakota, a banking corporation, Defts. and Respts.

That when the owner of personal property turns possession thereof over to another whose use thereof is restricted by agreement and who agrees not to sell the property until after it has been paid for, an unauthorized sale by the person in possession creates a fiduciary relationship between the parties with respect to the consideration received from the sale of the property.

That money or property held in a fiduciary capacity may be followed and recovered when rights or equities of innocent third parties have not intervened.

Appeal from the District Court of Grand Forks County, Hon. P. G. Swenson, Judge.

**REVERSED.**

Opinion of the Court by Morris, J.

In *Wm. McKee, Jr., et al., Petrs., Conts., and Appls., v. G. E. Buck, Jr., as Acting Executor of the Alleged Last Will and Testament of Robert J. McKee, Deceased, et al., Respts., Propts. and Apps.*

That where an appeal is taken to this court from the decision of the district court, sitting as an appellate court to review the decision of the county court involving the discretion of the latter court in granting or refusing a rehearing in the matter of a contest of the probate of a will, and it is urged that the district court erred in reversing the county court, it is the judgment of the district court which is subject to review in this court.

That in such a proceeding, where the district court determines that the interests of justice require a rehearing of such contest of the probate of an estate, this court will not reverse the decision of the district court unless the record affirmatively shows error.

That the purpose of a hearing in a contest of the probate of an estate is to ascertain the truth, and where an estate has been probated, and thereafter a contest of the probate of said estate is initiated, and upon a hearing the contest is dismissed by the county court, and thereafter, the judgment of the county court dismissing the contest is reversed upon appeal to the district court and the proceeding remanded to the county court, and thereafter, an application is made to the county court for a rehearing in the contest proceeding which application is denied by the county court, and upon an appeal to the district court, the latter court orders a rehearing of the contest proceedings in the interests of justice, on the ground that because of accident mistake and excusable neglect, all evidence available was not presented to the county court, and the district court decides that a rehearing should be granted for the purpose of enabling the parties to present all the facts relevant to the issue that all the rights may be determined, upon appeal this court is less inclined to reverse a decision which in its very nature tends to secure all available evidence than in a case where a decision would prevent the furnishing of such evidence.

Appeal from an order of the district court of Stutsman County reversing the decision of the county court. Hon. M. J. Englert, Special Judge.

**AFFIRMED.**

Opinion of the Court by Burr, J.

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### WIT and HUMOR

The preacher was giving the congregation a heated sermon on drinking, "If I had every drop of liquor in the city I'd dump it in the river."

At the conclusion of the sermon the preacher requested a hymn.

The choir director made the following request: "Everyone will please sing heartily, 'Shall We Gather at the River?'"

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A young man had been in the hospital for some time and had a very pretty nurse.

"Nurse," he said one morning, "I'm in love with you and I don't want to get well."

"Don't worry," she replied, "you won't. The doctor's in love with me, too, and he saw you kissing me this morning."—*Morning Star.*

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The pompous judge glared sternly over his spectacles at the tattered prisoner who had been dragged before the bar of justice on a charge of vagrancy.

"Have you ever earned a dollar in your life?" he asked in scorn.

"Yes, your honor," was the response, "I voted for you at the last election."