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Review of North Dakota Decisions

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REVIEW OF NORTH DAKOTA DECISIONS

City of Williston v. Ludowese, et al.

The City Treasurer of Williston on April 14, 1923, unlawfully deposited in the Williams County State Bank, city funds in the sum of \$17,850.23, and received from the bank a certificate of deposit. To secure the deposit the bank delivered to the treasurer a warranty deed purporting to convey city real estate. The bank thereafter closed. The Bank of North Dakota and the receiver of the insolvent bank attack the transaction as ultra vires and against public policy. HELD: The receiver holds the property of the bank by the same right and title as the bank, subject to liens, priorities and equities existing at the time of his appointment, and can set up no claims which the bank could not maintain. Ultra vires transactions are unassailable and will stand as to rights acquired under them after full performance on both sides and cannot be avoided by one succeeding with notice to the rights of the corporation receiving the benefit of the contract. In this case the sovereign state alone can object in a direct proceeding to oust the corporation of its usurped powers. City commissioners acting singly as individuals or collectively as a group, but not regularly assembled as a board, have no power to bind the city by their acts, representations or declarations unless authority so to do is actually or ostensibly conferred upon them by the board. A municipality ordinarily is not estopped to question dealings with its officers of limited authority where this has not been exercised in the manner provided by law.

State v. Great Northern Railway Company, et al.

This suit is brought in the name of the state on the relation of the Workmen's Compensation Bureau, for the use and benefit of its fund and another. One of plaintiff's employes was engaged in hauling gravel by truck. He was severely injured when his truck collided with the engine of one of defendant's passenger trains. He recovered compensation from the Workmen's Compensation Fund, and the action was brought under Section 20 of the Compensation Act, as amended, to recover against the defendant on the theory that the injury was sustained under circumstances creating a liability in it. HELD: That the injured plaintiff as he approached the crossing, for a distance of at least six hundred feet, had an unobstructed view so he could see the train for approximately two thousand feet, the only obstruction being the top over the truck seat. He approached the crossing without stopping or looking to ascertain if a train was approaching, and was guilty of contributory negligence. Trainmen observing a motor driven vehicle approaching a railroad crossing at a slow rate of speed are not bound to anticipate that the driver will negligently refrain from using his senses to determine the approach of a train and may assume when a motor driven vehicle is approaching a railroad crossing where they are liable to meet, that they will be conceded the right-of-way. Negligence of the plaintiff without which the injury could not have been sustained, continuing until the moment of

the collision, is the proximate cause of the injury where any negligence of the defendant had ceased to be operative. (Opinion filed Jan. 9, 1926. Petition for rehearing pending.)

Flath v. Nelson.

This is a controversy between the grandparents of a minor child. The child's parents were married when very young, and when the child was still an infant both parents died. The child had been under the care of the maternal grandparents from its infancy, and after the death of the child's mother there was found a memorandum in her writing expressing a wish that her parents might have the child. Her husband has predeceased her. Both plaintiff and defendant appear capable of providing for the child. HELD: Under Section 4462, the custody is awarded to the maternal grandparents. (Opinion filed Jan. 29, 1926. Decision final.)

Board of Medical Examiners v. Shortridge.

The board of medical examiners on March 2, 1925, revoked the license of the defendant to practice medicine and surgery in this state on the ground that he had been convicted of a crime involving moral turpitude and later had been convicted of murder in the second degree. The proceeding was instituted on an order to show cause based on a complaint. Record evidence of the offenses was before the board, an order of revocation was entered and an appeal taken to the district court. In that court defendant successively demanded a change of venue, a trial de novo and a jury trial. All of these were denied, and the order of revocation was affirmed. It is held that the proceedings before the board are administrative in character, that on appeal from the decision of the board the trial in district court is upon the record and testimony before the board, and that the judgment of revocation must be affirmed. (Opinion filed Jan. 29, 1926.)

U. S. SUPREME COURT DECISIONS

Unincorporated joint stock companies are subject to income tax provisions the same as corporations. The term "partnership" as used in the law refers only to ordinary partnerships.—Burk-Waggoner Oil Assn. vs. Hopkins, 46 Sup. Ct. Rep. 48.

The Supreme Court will follow state statutes and decisions which determine that a litigant who has elected not to appeal directly to the state supreme court, but instead has appealed to an intermediate court has waived his right to test questions involving the Federal Constitution.—Central Union Tel. Co. vs. Edwardsville, 46 Sup. Ct. Rep. 40.

Where a litigant asks leave of an intermediate court to appeal to the state supreme court, and leave is denied, and where he might have appealed to the supreme court as of right, the Supreme Court of the