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**Damages--Duty to Pay Interest on Funds Withheld Under an Unconstitutional Statute**

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CASE COMMENTS

DAMAGES—DUTY TO PAY INTEREST ON FUNDS WITHHELD UNDER AN UNCONSTITUTIONAL STATUTE.—P leased land to D for the purpose of producing oil and gas. D deducted from the monthly installments of rent due under the lease one-eighth of the privilege tax paid by D on the gross value of the gas produced from the premises, as required by W. Va. Code c. 11, art. 13, § 2j (Michie, 1943). D continued these deductions until the act was declared unconstitutional. P brought suit to recover the amount deducted under the unconstitutional statute and sought to recover interest on the amount withheld. The trial court denied recovery of interest. Held, that the defendant was not exonerated from the payment of interest on the principal amount withheld even though relying in good faith, without fault or misconduct, on a statute subsequently held unconstitutional. Morton v. Godfrey L. Cabot, 63 S.E.2d 861 (W. Va. 1949) (3-2 decision).

The majority reasoned that an unconstitutional statute conferred no right, imposed no duty, and afforded no protection; it being as though no law had ever been passed. Norton v. Shelby, 118 U.S. 425 (1886). This reasoning led the court to the conclusion that the defendant had wrongfully withheld the money from its rightful owner.

The general rule is that one who wrongfully withholds a liquidated sum from its rightful owner is liable for interest thereon. Mairs v. Central Trust Co., 127 W. Va. 795, 803, 34 S.E.2d 742, 747 (1945). But to require a person who has acted in good faith to pay interest on the amount withheld presents a different problem.

An exception to the rule holding one liable for interest for money wrongfully withheld was declared in Board of Highway Comm'rs v. Bloomington, 253 Ill. 164, 97 N.E. 280 (1911), where taxes were assessed and collected under an unconstitutional statute, but in good faith, before the statute had been declared unconstitutional. In that case the township, in a suit to recover the principal, was held not entitled to the interest.

It will be noted that in both the Bloomington case, supra, and the instant case there was no element of tort connected with the collection of the money, nor was there any undue delay in paying the principal over to the plaintiffs.

As pointed out by the dissenting judges, the circumstances of this case would seem to have justified the court in declaring this an
exception to the general rule, relieving the defendant from the payment of interest where his conduct is innocent and without fault.

J. N. C.

INDEPENDENT CONTRACTOR—LIABILITY OF THE EMPLOYER IN WEST VIRGINIA.—D employed A, an independent contractor under a contract for the erection of a building on property adjoining that of P. Excavation for the foundation of the new building extended below the level of P’s adjoining building. Withdrawal of lateral support, together with A’s negligent failure to shore up or otherwise support the adjoining building caused the injury complained of by P. Held, that the general rule with reference to the immunity from liability for the negligence of a competent independent contractor has no application. An employer who orders work to be done, from which in the natural course of things, injurious consequence must be expected to arise unless means are adopted by which such consequence may be prevented, is bound to see that necessary precautions are taken, and such person cannot, by employing some other person, relieve himself of liability for failure to do what is necessary to prevent injury to the person or property of others. Law v. Phillips, 68 S.E.2d 542 (W. Va. 1952).

It might be suggested that the holding is new to West Virginia, but an inspection of the West Virginia cases indicates that it is not. Only the language is new. From these cases, however, it has been difficult to determine what exceptions to the rule of non-liability are recognized by the West Virginia court.

It has been well established that where the activity in which an independent contractor engages is of an inherently dangerous nature the employer is not released from liability by delegating the performance of the activity to an independent contractor. Walton v. Cherokee Colliery, 70 W. Va. 48, 73 S.E. 63 (1911). In the Walton case, the court held: “If the work is intrinsically dangerous, and is of such character as will likely produce injury to third persons, if proper care should not be taken, the owner cannot avoid liability by delegating its preformance to an independent contractor.” In this case, an independent contractor was hired to build a railway across the property of a third person, and damage resulted to the property from blasting rock for the construction of the railway. The court was dealing with a situation where the