North Dakota Law Review

Volume 40 | Number 1 Article 9

1964

Habeas Corpus - Exhaustion of Remedies - Failure to Appeal as a Bar to Federal Habeas Corpus for State Prisoners

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parental-immunity are now generally accepted, and as such, less noteworthy

Two of the pillar decisions[17] of parental-immunity best demonstrate the shocking injustice of which the rule is capable. The accomplishment of our principal case in putting this harsh, archaic doctrine to flight is of two-fold significance. One, it exceeded all prior exceptions by permitting recovery for simple negligence. Two, it leaves the parent protected from suit by his child only to the extent necessary for him to properly perform his parental function[18] as outlined by our accepted social standards.

There are no reported North Dakota cases on this subject. It is submitted that the approach taken by the Wisconsin court is just and realistic. North Dakota could well heed the example set by the Wisconsin decision but spare themselves, by legislative enactment, the construction problems which may confront this judge-made law

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HABEAS CORPUS — EXHAUSTION OF REMEDIES — FAILURE TO APPEAL AS A BAR TO FEDERAL HABEAS CORPUS FOR STATE PRISONERS — The petitioner was convicted of murder in 1942. He failed to appeal for fear of receiving a death sentence upon retrial and reconviction. The Federal District Court denied habeas corpus despite the state's admission that a coerced confession was the sole basis for conviction. The Circuit Court reversed and the Supreme Court affirmed. The Court *held*, three Justices dissenting: (1) that the adequate ground rule[1] as applied to direct review of state decisions does not apply to habeas corpus, (2) that the statutory requirement of exhaustion of remedies[2] applies only to those

17. *Supra* note 4. (denied recovery to a child wrongfully imprisoned in an insane asylum by a parent) Roller v. Roller, *supra* note 5. (recovery of damages was refused a daughter who had been raped by her father).
18. *Supra* note 3.

1. The Supreme Court will not review a state decision wherein, upon correcting its view of federal law, the same result would be reached on a basis of the state law also involved, for in such a case review would amount to no more than an advisory opinion. Herb v. Pitcairn, 324 U.S. 117 (1945) Murdock v. Memphis, 87 U.S. 429 (1874).

2. 28 U.S.C. Sec. 2254 "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgement of a State court shall not be

remedies existing at the time the writ is applied for, and (3) there was no waiver of the right to appeal which would bar relief. *Fay v Noia*, 372 U.S. 391 (1963)

Federal habeas corpus was extended to state prisoners as early as 1867,[3] and is granted on much the same basis today [4]

The exhaustion requirement originated in *Ex Parte Royall*,[5] which held that the writ should not be granted in advance of trial. This restraint was extended to completion of appellate review,[6] and subsequently the petitioner was required to invoke state collateral review if the merits had not been determined on appeal.[7] Later, review by the Supreme Court by writ of certiorari was added as a prerequisite to obtaining habeas corpus in the federal courts.[8] The instant case overrules *Darr v Burford*[9] to the extent that federal habeas corpus will not be denied where certiorari has not been timely sought.[10]

The exhaustion requirement is based on comity, not constitutional power [11] It provides for orderly procedure and gives the state courts an opportunity to give full effect to federal constitutional rights, which it is its duty to do.[12]

The statutory requirement of exhaustion[13] itself has been interpreted as a bar when a previously available remedy has been lost because of a procedural defect.[14] Other courts have taken the view, expressed in the instant case, that it applies only to remedies presently available.[15]

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granted unless it appears that the applicant has exhausted the remedies available in the courts of the State. "

3. The Judiciary Act of Feb. 5, 1867, ch. 28, sec. 1, 14 Stat. 385-386.

4. 28 U.S.C. sec. 2241 " (c) The writ of habeas corpus shall not extend to a prisoner unless. (3) He is in custody in violation of the Constitution or laws or treaties of the United States. "

5. 117 U.S. 254 (1886).

6. United States *ex. rel.* Kennedy v. Tyler, 269 U.S. 13 (1925), *Ex Parte* Fonda, 117 U.S. 516 (1886).

7. *Ex Parte* Hawk, 321 U.S. 114 (1944) Mooney v. Holohan, 294 U.S. 103 (1935).

8. Darr v. Burford, 339 U.S. 200 (1950).

9. *Ibid.*

10. Fay v. Noia, 372 U.S. 391, 435 (1963).

11. Bowen v. Johnston, 306 U.S. 19 (1939).

12. Wade v. Mayo, 334 U.S. 672 (1948).

13. *Supra* note 2.

14. Cranor v. Cooper, 203 F.2d 833 (9th Cir. 1953), *cert. denied,* 346 U.S. 839 (1953).

15. Morrison v. Smyth, 273 F.2d 544 (4th Cir. 1960) United States *ex rel.* Rooney v. Ragen, 158 F.2d 346 (7th Cir. 1946), *cert denied,* 331 U.S. 842 (1947) United States *ex. rel.* Martine v. Martin, 174 F.2d 582 (2nd Cir. 1949) (dictum).

The adequate ground rule as applied to direct review has never been squarely adopted in habeas corpus proceedings.[16] This court deemed the doctrine applicable only as a limitation on appellate review [17]

The petitioner is barred from obtaining habeas only if he has waived the state remedies. Although the court applies the classic definition of waiver as set forth in *Johnson v Zerbst*,[18] it does not fit exactly The principal case states that such an abandonment will not result in a waiver unless there is a deliberate by-passing of the state courts in order to obtain federal relief.[19]

The underlying issue in this case is the willingness of the federal courts to interfere with state criminal procedure to insure constitutional rights. It is submitted that the balance struck in this case is proper

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MORTGAGES — LIEN PRIORITY — REAL ESTATE TAXES PAID BY MORTGAGEE PREFERRED OVER A FEDERAL TAX LIEN — Plaintiff is the assignee of a mortgage executed July 17, 1953, and recorded July 20, 1953. On April 2, 1954, the United States filed a federal tax lien against the mortgaged land pursuant to federal statutes.[1] On October 13, 1958, the assignee of the mortgage paid past due real estate taxes on the land, as authorized by state law[2] and by the mortgage

16. See Irvin v. Dowd, 359 U.S. 394 (1959) (dissent by Frankfurter) See generally, Hart, *The Supreme Court*—1958 *Term.* 73 HARV. L. REV. 84, 118-25 (1959).
17. *Supra* note 10, at 429.
18. 304 U.S. 458, 464 (1938), "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."
19. *Supra* note 10, at 439.

1. 26 U.S.C. §§ 6321 and 6323(a) (1958) as follows.
Section 6321 "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States. "
Section 6323(a) "Invalidity of Lien Without Notice. [T]he lien imposed by section 6321 shall not be valid as against any mortgagee, until notice therof has been filed. "

2. N.D. CENT. CODE § 57-02-40 (1960)
"1. Taxes upon real property are a perpetual paramount lien thereon against all persons, except the United States and this state.
3. A tax lien shall include the principal of the tax, and all costs, penalties, interest, charges, and expenses which by law shall accrue, attach, or be incurred."
N.D. CENT. CODE § 35-01-07 (1960)