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A Brief Survey of Court Decisions Construing the North Dakota Bill of Rights

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A BRIEF SURVEY OF COURT DECISIONS CONSTRUING THE NORTH DAKOTA BILL OF RIGHTS

By Prof. Ross C. Tisdale

(Continued from last issue)

SECTION 2

All political power is inherent in the people. Government is instituted for the protection, security and benefit of the people, and they have a right to alter or reform the same whenever the public good may require.

"Article 1 of the Constitution is the declaration of rights. Section 2 thereof states: 'All political power is inherent in the people. Government is instituted for the protection, security and benefit of the people, and they have a right to alter or reform the same whenever the public good may require.' The people of this state are the sole authority in determining whether the proposed change is such as is required by the public good. Unless limited by some provision of the federal constitution, or self-limited by provisions of our own constitution, such as the compact with the United States, or methods of amendment, the people of this state are supreme in determining what their Constitution shall be. They have plenary power, by Constitutional amendment, to provide such method of government for the state or any portion thereof as they please, so long as there is no violation of the federal relations. . . .

While the provisions of article 1, by positive direction in § 24, are declared to be 'expected out of the general powers of government and shall forever remain inviolate,' this restriction is a limitation on legislation only; it does not hamper the people in amending the Constitution whenever they deem it necessary for the public good, and thus they may amend article 1 unless prohibited as heretofore stated." Burr, J., in LARKIN v. GRONNA,, SECRETARY OF STATE, 69 N. D. 234, 240, 285 N. W. 59, 62 (1939).

"Constitutions are adopted to insure a stable system of government. . . .such Constitutions are a means employed by the sovereign people to limit the powers of their agents, especially those of the legislative department. When a method of submitting amendments to the Constitution, originating in the legislative assembly, is provided, that body, in framing and submitting them to the electors for ratification or rejection, does not act in its legislative capacity, but as the agent of the sovereign people appointed by and through the terms of the organic law." Spalding, Ch. J., in STATE EX REL. MILLER V. TAYLOR, 22 N. D. 362, 367, 133 N. W. 1046, 1048 (1911). Hence, a proposal to amend the constitution by locating an additional normal school at Minot did not violate any constitutional limitation on the power of the legislature. STATE EX REL. MILLER V. TAYLOR, SUPRA.

The reservation of political power in the people prohibits the court as well as the legislature from interfering with pro-

posed constitutional amendments. However, where the proposed amendment is submitted under a constitutional provision which calls for future legislative action to make the constitutional provision effective, the court will intervene and enjoin submission of the void proposal. STATE EX REL. LINDE V. HALL, 35 N. D. 34, 159 N. W. 281 (1916). But "there is a broad line of demarcation between judicial interference with sovereign agencies of the people, in other departments of the government, . . .and a judicial interference with this exercise of the sovereign power of the people themselves, acting in their own right and pursuant to a power expressly reserved to them." Broson, J. (concurring opinion), in STATE EX REL. BYERLEY V. STATE BOARD OF CANVASSERS, 44 N. D. 126, 158, 172 N. W. 80, 94 (1919). Hence, as a general rule, the court will not pass on the constitutionality of a proposed initiated measure, ANDERSON V. BYRNE, 62 N. D. 218, 242 N. W. 687 (1932); and the same principle applies to a proposed constitutional amendment. The supreme court will not entertain an original writ to compel a state board to canvass the votes in a particular manner. In carrying out their duties the board exercises a political function as agents of the people. STATE EX REL. BYERLEY V. STATE BOARD OF CANVASSERS, SUPRA.

Of course, in the broadest sense, the people act through the legislature, and expressions of their will in the form of statutes can be questioned by the courts "only for two reasons, VIZ: (1) that it is contrary to a provision or provisions of the Constitution of the state; (2) that it contravenes a provision or provisions of the Constitution of the United States.

"If a law duly enacted. . .is not invalid for either of the causes above stated, it stands as an expression of the supreme will of the people of this state, and, under the Constitution, the courts have neither authority nor power to declare it invalid." Grace, J., in DALY V. BEERY, 45 N. D. 287, 292, 178 N. W. 104, 105 (1920); and see STATE EX REL. LINDE V. TAYLOR, 33 N. D. 76, 156 N. W. 561, L.R. A. 1918B. 156, Ann. Cas. 1918A. 583 (1916).

This section restates a fundamental principle found in all democratic governments—it is a government by and for the people. Clearly the interests of those who hold office or seek authority are of minor importance when considered in the light of the declared purpose of the Constitution." Burke, Ch. J., in STATE EX REL. SATHRE V. MOODIE, 65 N. D. 340, 361, 258 N. W. 558, 561 (1935).

SECTION 3

The state of North Dakota is an inseparable part of the American union, and the constitution of the United States is the supreme law of the land.

"The second paragraph of article 6 of the Constitution of the United States. . .provides: 'This Constitution, and the laws of the United States which shall be made in Pursuance thereof. . .

shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.'

"Section 3 of our own Constitution states: 'The state of North Dakota is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land.'

"Therefore, whenever an agency or instrumentality of the United States is lawfully operating in this state under a law of Congress, the court takes judicial notice of the law itself and its scope." Burr, J., in **Regional Rgri. Credit Corp. v. Stewart**, 69 N. D. 694, 698, 289 N. W. 801, 803 (1940).

And see **State ex rel. Olson v. Langer**, 65 N. D. 68, 90, 256 N. W. 377 (1934)), holding that conviction in a Federal court of an offense which is only a misdemeanor in North Dakota, but is a felony under Federal law, disqualifies an office holder under Section 127 of our Constitution.

SECTION 4

The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever guaranteed in this state, and no person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

"The civil authority, both legislative and judicial, are traversing, under our Constitutions, both national and state, in forbidden and prohibited territory when they assume to legislate, or to interpret laws which undertake to define and interpret doctrinal and ecclesiastical questions, so as to be binding upon individuals or interfere with the determination of the individual conscience with reference thereto." Grace, J., in **Bendewald v. Ley** 39 N. D. 272, 283, 168 N. W. 693, 696 (1918). In the instant case the court held that the constitution deprived it of jurisdiction to determine whether a schism had occurred when part of the congregation withdrew from one synod of the Lutheran Church and joined another, voting to sell the church property to the new group for one dollar. "We are clear that all such disputes. . .should not be decided by the civil courts, but by some ecclesiastical authority. . . The civil courts have jurisdiction to determine property rights between different religious organizations the same as between other persons or parties where there is not presented with the question of property right questions of heresy, schism, or questions of church polity, doctrinal beliefs, etc., upon which must be decided, and upon which right to the property is dependent." Id. 39 N. D. 291, 168 N. W. 699.

Section 147 of the state Constitution provides that all public schools "shall be open to all children of the state of North Dakota and free from sectarian control. . . ." Taken in connection with Section 4, it is held that the constitution does not prohibit the em-

ployment of members of a religious order having certificates authorizing them to teach in the public schools, although they may wear a distinctive garb and contribute their entire earnings to the order to which they belong. **Gerhardt v. Heidt,** 66 N. D. 444, 267 N. W. 127 (1936).

"The state has no concern with or control over the religious faith or belief of its citizens, except that of protecting each citizen in the enjoyment of the religious liberty guaranteed by the constitution. The fundamental theory of liberty upon which the government of our nation and state rests recognizes that while it is the duty of the state to establish free schools, open to every child, nevertheless there is no 'general power of the state to standardize its children by forcing them to accept instruction from public teachers only;' that 'the child is not the mere creature of the state;' and that 'those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.' **Pierce v. Society of Sisters,** 268 U. S. 510, 535, 69 L. Ed. 1070, 1078, 45 S. Ct. 571, 39 A. L. R. 468.

"It follows from the plain language of the provisions of our constitution that a parent has the right to instruct and guide his own children in religious training and that the state has no right to interfere therewith either directly, or indirectly, by means of sectarian instruction or exercises in the public schools; also that no person has the right to ask that the state through its school system, either directly or indirectly, impose upon other children the religious views which he holds and desires to have taught to his children." **Id.** Christianson, J., in 66 N. D. 458, 267 N. W. 134.

"We are all agreed that the wearing of the religious habit. . . does not convert the school into a sectarian school. . . . Such habit, it is true, proclaimed that the wearers were members of a certain denominatitonal organization, but so would the wearing of the emblem of the Christian Endeavor Society or the Epworth League. The laws of the state do not prescribe the fashion of dress of the teachers in our schools. . . .

"The fact that the teachers contributed a material portion of their earnings to the religious order of which they are members is not violative of the constitution. A person in the employ of the state. . .is not inhibited from contributing money. . .for the support of some religious body of which he or she is a member. To deny the right. . .would in itself constitute a denial of the right of religious liberty which the constitution guarantees." **Id.** 66 N. D. 459, 267 N. W. 135.

This section has also been referred to in relation to statutes regulating the operation of a business on the Sabbath. ". . .all such statutes, were enacted with the purpose of protecting that part of the public which consists of a large majority, in the exercise of their varying and different methods of religious worship, and in recognition of the sacredness of the Christian Sabbath. A number of the courts of the different states have passed upon this

question, and have held that this is a Christian nation, and that laws enacted to prevent the desecreation of the Sabbath are valid for that reason, notwithstanding Constitutional provisions similar to § 4, **supra**. . . . The courts of practically all other states have sustained such statutes as a legitimate exercise of the police power, intended to promote the welfare, morals, and sanitary condition of the people." Spalding, J., in **State ex rel. Temple v. Barnes**, 22 N. D. 18, 21, 132 N. W. 215, 216, 37 L. R. A. (N. S.) 114, Ann. Cas. 1913 E, 930 (1911).

"People are at liberty to attend the church of their choice or to continuously remain away from church. . . . The legislative assemly has, however, said that in doing so they must not interfere with the purpose of the day, as viewed in the light of the history of the times, when our Constitution was framed, and the purpose of the founders. In fact, it may be maintained that the only effect of Sunday laws like our own is to secure peace and quiet in the observance of religious ceremonies and worship of an overwhelming majority of our people. The fact that they happen to be adherents of the Christian faith may in no manner affect the principle. The legislature has reached the conclusion that the performance of ordinary labor and of certain other acts is an infringment upon the right of a great majority of the people to worship and to observe the day as set apart for that purpose, and as a day of rest." **Id.** 22 N. D. 26, 132 N. W. 218.

(Continued in next issue)

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OUR SUPREME COURT HOLDS

In W. E. LaPlante, Pltf. and Respt. vs Implement Dealers Mutual Fire Insurance Company, etal., Deft. and Aplts.

That a pre-trial conference held under the provisions of chapter 216, S.L.N.D. 1943, is not a special proceeding.

That a pre-trial order made under the provisions of sections 1 and 2 of chapter 216, S.L. N. D. 1943 after conference and before trial is subject to such modification by the judge presiding at the trial of the case as the ends of justice may require.

That a pre-trial order made after conference and before trial under the provisions of sections 1 and 2, chapter 216, S.L. 1943, is not appealable order.

Appeal from the District Court of Grand Forks County, Holt, J. APPEAL DISMISSED. Opinion of the Court by Morris, Ch. J.

In Isabel Clark, Pltf. and Applt. vs R. M. Stoudt, Deft. and Respt.

That the duty of keeping the sidewalks of a city free from ice and snow is upon the municipality itself.

That at common law, neither the owner nor the occupant of premises abutting on the sidewalk is liable for injuries caused by the natural accumulation of snow or ice thereon.