



1944

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

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Recommended Citation

Tisdale, Ross C. (1944) "A Brief Survey of Court Decisions Construing the North Dakota Bill of Rights," *North Dakota Law Review*. Vol. 20: No. 4, Article 3.

Available at: <https://commons.und.edu/ndlr/vol20/iss4/3>

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It was suggested that we have papers prepared and presented to the convention on the following subjects: (1) Administrative Law, which would deal with the growth of bureaucratic government, and with the possibility of securing legislation providing for appeal from decisions of the bureaus to our courts. (2) Preference of government claims in estates. (3) Socialized medicine, from a legal viewpoint. (4) Pre-trial procedure, and (5) Soldiers' and Sailors' Relief Act. After the presentation of each paper the matter would be open for general discussion by the convention.

If any member of the bar has in mind any subject that he feels would be of particular interest, we should be glad to have him write either me or to our Secretary. As soon as our program is completed it will be published in Bar Briefs.

I trust that as many of our attorneys as possible will plan to attend this meeting. There are many grave problems confronting our attorneys these days, and we need to get together and discuss these problems, and to receive inspiration for the tasks that lie ahead.

O. B. HERIGSTAD, President

BOOKS AND OFFICE EQUIPMENT

Any member interested in the purchase of Northwestern Reporter-first 300 Volumes; the latest Northwestern Digest, miscellaneous text books, and a complete set of office equipment write Myer R. Shark of Devils Lake, N. D.

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

By Prof. Ross C. Tisdale
(Continued from last issue)

SECTION 5

The privilege of the writ of habeas corpus shall not be suspended unless when in case of rebellion or invasion the public safety may require.

As intimated by Justice Burr in *State ex rel. Cleveringa v. Klein*, *supra*, page 1, Section 5 of the Bill of Rights was intended to protect citizens against "star chamber processes." The right to personal freedom¹ was considered "the birthright of every free-

¹. See Cooley, *Constitutional Limitations*, 8th ed., (1927), p. 710: ". . . Personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. It appears, therefore, that this power of locomotion is not entirely unrestricted, but that by due course of law certain qualifications and limitations may be imposed upon it without infringing upon constitutional liberty. Indeed, in organized society, liberty is the creature of law, and every man will possess it in proportion as the laws, while imposing no unnecessary restraints, surrounds him and every other citizen with protections against the lawless acts of others."

man" at common law. But in medieval times the power of the King, the Courts and of Parliament were not clearly defined. True, the courts recognized the principle, but being appointed at the King's pleasure, they could or would not always give relief against illegal detentions. The picture was further complicated by the development of the Court of Star Chamber,² which, dominated ultimately by the privy council, and intimately connected with the King's purse, enforced the royal will by imprisoning at will, persons whose conduct was considered inimical to the will of the sovereign. Abuses became so great that the Habeas Corpus Act was passed in 1679.³ Its purpose was to compel prompt action in any case in which illegal imprisonment was alleged. While the Act gave no new right to the subject, it did furnish a guide for the enforcement of already existing rights. It is recognized in the constitution of every state, and is "one of the principal safeguards to personal liberty."

SECTION 6

All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted. Witnesses shall not be unreasonably detained, nor be confined in any room where criminals are actually imprisoned.

This provision of the constitution "guarantees the right to bail before the trial in capital cases, unless the the proof of the commission of the capital offense is evident or the presumption thereof is great; and . . . does not forbid bail in a capital case where the proof of guilt is evident or the presumption thereof is great. On the one hand, the constitution itself does not give the right to bail in the class of cases last mentioned; and, on the other hand, the constitution does not inhibit the legislature from doing so

But, in ruling that the petitioner is not entitled to bail as a matter of strict legal right, this court does not hold that bail may not be granted the petitioner at all or for any reason The application may be either granted or refused, in the exercise of a sound judicial discretion." Wallin, C. J., in *State ex rel, West v. Collins*, 10 N. D. 464, 467, 88 N. W. 88, 89 (1901) (Murder, habeas corpus): Cited and followed in *State v. Hartzell*, 13 N. D. 356, 100 N. W. 745 (1904).

However, this Section does not entitle one convicted of a capital offense, to bail pending appeal. The constitutional provision refers to bail before conviction. *State v. Tucker*, 57 N. D. 508, 222 N. W. 651 (1928).

The provision in Section 6 regarding excessive fines does not render invalid a statute providing for the amercement of a sheriff

². See Holdsworth's History of English Law, Vol. 1, pp. 493-516; and, The Story of the Habeas Corpus, by Edward Jenks, Selected Essays in Anglo-American Legal History, Vol. II, pp. 531-548.

³. See Bailey on Habeas Corpus (1913) Vol. 1, pp. 2-6.

for failure to make return of a writ of execution on the return day. "The recovery, though penal in its nature, is in no sense a fine, but merely the damages which the law adjudges to the individual as the consequence of the failure of an officer to discharge an official duty The liability is not a punishment for crime. It is a condition upon the holding of the office, and a penalty, not so much imposed, but agreed by the sheriff to be paid in the case of a failure of duty. . . .

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LICENSED ATTORNEYS LIST

The list of licensed attorneys for 1944 will be submitted to the printer on May 15th, and in order that attorneys names appear in the list the fee should be paid by that time.

REQUEST TO ALL MEMBERS

Please forward names of attorneys recently entering the Armed Forces, to J. H. Newton, Secretary State Bar Board, Bismarck, N. D.

OUR SUPREME COURT HOLDS

In State of North Dakota, Pltf. and Respt. vs Gabriel Tennyson, Deft. and Applt.

That Section 10522, C. L. 1913, fixing the period of limitation for the prosecution of a misdemeanor, is not a statute of repose but creates a bar to the prosecution and the time within which such an offense is committed thus becomes a jurisdictional fact.

That the state has the burden of proving affirmatively the commission of an offense charged within the period limited for its prosecution.

That where on the face of an information it appears that the offense charged was not committed within the period limited for its prosecution, a motion to vacate and set aside a judgment of conviction entered on a plea of guilty and for a new trial should be granted.

Appeal from the District Court of Mercer County, Berry, J. From an order denying his motion to vacate and set aside the judgment of conviction and order a new trial, defendant appeals. REVERSED. Opinion of the Court by Nuessle, J.

In State of North Dakota, Pltf. and Respt. vs Gabriel Tennyson, Deft. and Applt.

That a court has no jurisdiction in the first instance to try a charge of larceny made pursuant to section 9928, C. L. 1913 on account of the stealing of property in another country and bringing it into the State of North Dakota unless such property is brought into or through the county in which the prosecution is had.

That where a judgment of conviction is entered on his plea of guilty against a defendant who appears without counsel, and on his motion to vacate and set aside such judgment, order a new trial, and permit him to withdraw his plea, it appears that the court had no jurisdiction to try the offense charged, and such motion should be granted. Appeal from the District Court of Mercer County, Berry, J. From an order denying his motion to vacate and set aside the judgment of conviction and order a new trial, defendant appeals. REVERSED. Opinion of the court by Nuessle, J.