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

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the franchise carries with it the duty to exercise it, and the duty to be well informed, to the end that they may be able to exercise it intelligently.

O. B. HERIGSTAD, President.

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

By Prof. Ross C. Tisdale

(Continued from last issue)

"When §7 of the Bill of Rights was proposed in the Constitutional Convention, a member offered an amendment to the folio as introduced to permit three-fourths of the members of a jury in civil cases to return a valid verdict. In the discussion that folfowed, the late Judge Carland opposed the amendment as a fundamental departure from 'trial by jury' as known in the territory and to the common law. It thus appears that the framers of the Constitution had before them the alternative of majority verdict in civil cases and rejected the proposal. The convention did, in another respect, recognize the existing practice in the territory. In § 7, it is provided that in courts not of record, a jury may consist of less than twelve men. In chapter 49, Sess. Laws, 1862, § 61, it was provided that in civil trials before a justice of the peace a jury should consist of six men, or less, if the parties agreed. In other words, the framers of this instrument not only adopted the rule which had been recognized in the territory for over twenty-five years, but by saying when a jury might consist of less than twelve men, excluded all other cases from the exception to the rule." Johnson, J., in **Power v. Williams,** 53 N. D. 54, 62, 205 N. W. 9, 12 (1925). Judge Johnson restated the proposition in these words: "We think it must be regarded as settled law that the right to a jury trial, secured by § 7 of the Bill of Rights, is the right as it existed at common law and under the Federal Constitution in Dakota Territory and that one of the incidents thereof was the requirements of unanimity. We see no escape from the conclusion that §7 was deliberately adopted for the purpose, among others, of securing for the future, until the fundamental law should be changed, that no man should be deprived of his property, his liberty or his life, in cases where a jury trial was had in courts of record, save upon the unanimous verdict of twelve persons . . ." **Id.,** 53 N. D. 64, 205 N. W. 13. See also, **National Cash Register Co. v. Midway City Creamery Co.,** 53 N. D. 256, 205 N. W. 624 (1925).

"The title and possession of specific personal property, prior to the adoption of the Constitution, was triable to a jury and remains inviolate under § 7 of the Constitution. The right is also protected by statute, § 7609, Compiled Laws 1913 unless a jury is waived." Burke, J., in **First Nat. Bank v. Kling,** 65 N. D. 264, 273, 257 N. W. 631, 635 (1934). Hence, where plaintiff brings in a third party in mortgage foreclosure proceedings, "who claims to be the owner and entitled to possession of the property, his

action to foreclose does not deprive such third party of his right to a trial by jury." **Ibid.**

On the other hand, the Constitution is not violated by denial of the right to jury trial in those cases where jury trial could not be had prior to the adoption of the Constitution. One was not entitled to a jury trial in equity. **First Nat. Bank v. Kling, supra.** And the power of a court to punish for contempt is not limited by Section 7. **State v. Markuson,** 5 N. D. 147, 64 N. W. 934 (1895). In this case it was seriously contended that since the statute empowering the court to punish with fine and imprisonment for violation of any injunction against maintaining a liquor nuisance,permitted the court to sentence the violator to the state penitentiary for second and third offenses, and in view of the fact that the state law defines a felony as an offense which carries a penitentiary sentence, and felons, prior to the adoption of the constitution were entitled to a jury trial, that the law violated Section 7. The court refused to accept this argument, stating "that at the time of the adoption of our Constitution a court might punish for contempt, without the intervention of a jury, in an amount greater than the punishment prescribed for a misdemeanor, so far as any statutory limitation was concerned, and the statute under consideration gives the court no greater power; hence it does not deprive plaintiff of any right of trial by jury that existed at the time of the adoption of the constitution." Bartholomew, J., in **State v. Markuson, supra,** at 5 N. D. 157, 64 N. W. 937. In accord, see **State v. Markuson,** 7 N. D. 155, 73 N. W. 82 (1897); **State v. Finlayson,** 41 N. D. 494, 170 N. W. 910 (1918, rehearing denied 1919).

"The summary power vested in all judicial tribunals to punish contempts of their proper authority, while it is inherent and necessary, is nevertheless arbitrary in its character; and in this country, at least, the decided trend of current authority is to regulate the exercise of such power by statutes passed for that purpose. While there is some conflict in the case, the better opinion is that the law-making branch of the government may primarily regulate the procedure, and also prescribe the penalties, for contempts of court. But the rule of legislative control is never announced, as to constitutional courts, without stating the necessary limitation which goes with the rule, namely, that the legislature cannot either destroy or substantially impair the inherent power vested in such courts to punish contempts of their authority by summary methods." Wallin, Ch. J. (concurring), in **State v. Markuson, supra,** at 5 N. D. 159, 64 N. W. 938.

A state statute authorizing the court to direct a reference, either on the motion of either party, or of its own motion ("When the trial of an issue of fact will require the examination of a long account on either side, in which case the referee may be directed to hear and decide the whole issue or to report upon any specific question of fact therein,") does not violate Section 7, in view of the fact that a territorial statute authorized compulsory references before adoption of the constitution. **Smith v. Kunert,** 17

N. D. 120, 115 N. W. 76 (1908). See also **Dreveskracht v. First State Bank of Balfour**, 16 N. D. 555, 113 N. W. 1032 (1907).

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OUR SUPREME COURT HOLDS

In Verner Campbell, Pltf. and Respt., vs. Leo Norgart, Deft. and Applt.

That in a proceeding had in the district court instituted by one who has received a discharge in bankruptcy, wherein it is sought to have a judgment discharged from record pursuant to the provisions of Sec. 7710, C. L. 1913, and the verdict and judgment are not determinative of the question as to whether the injury was wilful and malicious, the court may consider the entire record made in the action in which the judgment was rendered including the evidence presented at the trial.

That in a proceeding to discharge a judgment from record under the provisions of Sec. 7710, C. L. 1913, where the applicant has proved his discharge in bankruptcy, one who asserts that the judgment is not dischargeable because it represents a liability arising from "wilful and malicious injuries to the person or property of another" and is, therefore, excepted from the operation of the discharge as provided by Sec. 17a (2) of the Bankruptcy Act, has the burden of proving that the judgment comes within the exception.

That a judgment that results from ordinary negligence in the operation of a motor vehicle is dischargeable in bankruptcy.

That the term "malicious" as used in Sec. 17a (2) of the Bankruptcy Act does not necessarily involve hatred or ill will toward the person injured. Malice may be implied from a wrongful act done without just cause or excuse.

That a judgment against an automobile driver, whose car while being driven at excessive speed collided with a parked truck on the right side of a highway during a blinding snowstorm, resulting in personal injuries to another motorist, HELD not to be a liability "for wilful and malicious injuries to the person of another" within Sec. 17a (2) of the Bankruptcy Act.

Appeal from the District Court of Cavalier County, Grimson, J. REVERSED. Opinion of the court by Morris, Ch. J. Burr, J. dissenting.

In the State of North Dakota, Pltf. and Respt., vs. Albert Hummel, Deft. and Applt.

That whether a new trial shall be granted rests largely within the sound discretion of the trial court and the trial court's action in this regard will not be disturbed on appeal except in case of abuse of that discretion.

That the record in the instant case is examined and it is HELD, for reasons stated in the opinion, that there was an abuse of judicial discretion in denying defendant's motion for a new trial.

Appeal from the District Court of Hettinger County, Miller, J. Action to determine the paternity of a child born out of wedlock. From an adverse judgment and from an order denying his motion for a new trial, defendant appeals. REVERSED. Opinion of the Court by Nuessle, J.

In the Universal Motors, a corporation, Applt., vs. Lee Coman, Respt.

That orders made by the district court or judge thereof without notice are not appealable. (Subdivision 5 of Section 7841, C. L. 1913.) Appeal from the District Court of Morton County, Miller, J., DISMISSED. Opinion of the court by Burke, J.