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Courts - Extraordinary Writs - Quo Warranto in North Dakota

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NOTES

COURTS — EXTRAORDINARY WRITS — QUO WARRANTO IN NORTH DAKOTA. — The writ of quo warranto is of ancient origin and had its beginning as a prerogative writ issued by the king.[1] It was first devised as a common law civil remedy and was later modified to become criminal in character, i.e., the information in the nature of quo warranto. Regardless of this nature it is treated as a civil action,[2] since in most instances the two, writ of quo warranto and the information in the nature of quo warranto, are used synonymously.[3]

The definition of this writ given by Spelling in his treatise on extraordinary remedies is, "Quo warranto, or information in the nature of quo warranto, is the remedy or proceeding whereby the state inquires into the legality of the claim which a party asserts to an office or franchise, and to oust him from its enjoyment if the claim be not well founded, or to have the same declared forfeited, and recover it, if, having once been rightfully possessed and enjoyed, it has become forfeited for mis-user or non-user."[4] The North Dakota Code provides, "The remedies formerly attainable by the writ of scire facias, the writ of quo warranto, and proceedings by information in the nature of quo warranto may be obtained by civil action in district court. . . ."[5] Original jurisdiction to issue writs of quo warranto is vested by the North Dakota Constitution both in the supreme court[6] and in the district courts.[7] The Code provisions for the civil action instead of the writ, as set out above, have remained substantially the same in their language since territorial days.[8] The fact that this section did not abolish the constitutional grant of jurisdiction to issue such writs was brought out in the case of *State* ex rel. *Sathre v. Roberts*[9] where the court said:

> " There is no merit in the defendant's contention that the writ of quo warranto is abolished by section 531 of the Code of Civil Procedure of 1877, section 7969, Compiled Laws 1913 . . . If this section, which became law in 1877, abolished the writ of quo warranto and proceedings by information in

1. See 2 Bailey, Habeas Corpus 1245 (1913).
2. *Id.* at 1246-1249.
3. State *ex rel.* Smith v. Anderson, 8 So. 1, 3 (Fla. 1890) (dictum).
4. 2 Spelling, Injunctions and Other Extraordinary Remedies, 1516 (1901).
5. N. D. Rev. Code § 32-1301 (1943).
6. N. D. Const., Art. 87.
7. N. D. Const., Art. 103.
8. Comp. Laws N. D. § 7969 (1913); N. D. Rev. Code § 7349 (1905); N. D. Rev. Code § 5741 (1895); Dakota Codes, Code of Civ. Proc., § 531 (Levisee 1883).
9. 67 N. D. 92, 269 N.W. 913 (1936); See Wright v. Lee, 4 S. D. 237, 55 N.W. 931 (1893) (Construing a like provision in South Dakota Code).

> the nature of quo warranto, as appellant contends, then the power to issue the writ was duly restored by Section 87 of the Constitution adopted in 1889 . . . but section 7969 does not repeal or abolish the writ of quo warranto. It simply provides that the remedies formerly attainable by such writ or information may be obtained by a civil action."

A reading of the present and past statutory enactments providing for a civil action in place of the writ, together with a reading of the cases which have said that the statutes did not abolish the writ as it existed at common law, would lead one to believe that a party has two avenues of approach. The first is by way of petition for the issuance of a writ of quo warranto, invoking the original jurisdiction of the district court or the supreme court; the second is by way of instituting a civil action in district court.

The qualification in invoking the original jurisdiction of the Supreme Court, is that the matter must be consistent with the position and dignity of that body. Before the Supreme Court of North Dakota will recognize a petition for the writ in the first instance the question must be *publici juris* affecting the sovereignty of the state, its franchise prerogative, or the liberties of the people.[10] This is not only true of quo warranto but of all the other prerogative writs issuing from that court.[11]

TRYING TITLE TO OFFICE

Quo warranto is the proper proceeding to try the right or title to public office,[12] although North Dakota cases hold that in situations where there is a clear showing that one has a prima facie right to the office he may petition for a writ of mandamus.[13] In order for quo warranto to be applicable there must be an actual usurpation of the public office, and mere intent or attempt to do is not adequate.[14]

Another important factor is the status of the office in dispute, that is, whether or not it is classified as a public office. In *State* ex rel.

10. See State v. Nelson County, 1 N. D. 88, 45 N.W. 33, 38 (1890) (dictum).

11. State *ex rel.* Moore v. Archibald, 5 N. D. 359, 66 N.W. 234, 239, 240 (1896) (dictum).

12. See State *ex rel.* Johnson v. Meyers, 74 N. D. 678, 19 N.W.2d 745 (1945); Morrow v. City of Cleveland, 73 Ohio App. 460, 56 N.E.2d 333 (1943).

13. State *ex rel.* Langer v. McDonald, 41 N. D. 389, 170 N.W. 873 (1919); State *ex rel.* Butler v. Callahan, 4 N. D. 481, 61 N.W. 1025 (1895) (In this case the realtor, county superintendent of schools-elect, had been elected to that position, had qualified for office by taking oath and giving required bond, thereby giving him a clear right to the office while the defendant was the defeated incumbent).

14. Romine v. Black, 304 Ill. App. 1, 25 N.E.2d 404, 406 (1940) (dictum) (Here the action was brought in equity, defendant contended the proper proceeding was by writ of quo warranto. But the court said that the defendant had not exercised any control over the land in question when the bill was filed therefore quo warranto would not be proper); State *ex rel.* Johnson v. Consumers Public Power Dist., 143 Neb. 753, 10 N.W.2d 784, 793 (1943) (dictum).

McArthur v. McLean,[15] "public office" was defined as "a public position to which a portion of the sovereignty of the country, either legislative, executive or judicial, attaches for the time being, and which is exercised for the benefit of the public."

Cases in North Dakota illustrative of the use of quo warranto and the civil action provided in the code to try right or title to public office, have involved positions such as aldermen on a city council,[16] sheriff,[17] county superintendent of schools,[18] county judge,[19] state highway commissioner,[20] manager of the State Hail Insurance Department,[21] and governor of the state.[22]

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15. 35 N. D. 203, 159 N.W. 847 (1916).

16. See State *ex rel.* Sathre v. Quickstad, 66 N. D. 689, 268 N.W. 683 (1936) (A proceeding in quo warranto to test the right to hold this office. Defendants were in arrears in payment of real and/or personal property taxes. The court found them ineligible to hold office because statute provided that one must be a qualified elector and not in arrears in any tax or other liability due the city. Court also held that in spite of the statute making the city council the judge of election and qualification of its own members, this did not divest courts of jurisdiction in quo warranto).

17. See Holtan v. Beck, 20 N. D. 5, 125 N.W. 1048 (1910) (This was a civil action for purpose of trying under writ of quo warranto, the opposing claims of the parties to the office of sheriff. Judgment for the plaintiff was reversed and dismissed on the ground that he failed by competent evidence to prove the allegations necessary to sustain the action).

18. See Jenness v. Clark, 21 N. D. 150, 129 N.W. 357 (1910) (Civil action to try title to this office. The plaintiff had held the office but had not run for re-election. The defendant had been elected but was ineligible. Statute provided that the incumbent was to hold office until his successor qualifies. The plaintiff had turned the office over to the defendant before this action was brought, upon demand by the district court. The court held the plaintiff had sufficient interest as the incumbent to maintain the action, and that she had not voluntarily given up the office).

19. See State *ex rel.* Sathre v. Roberts, 67 N. D. 92, 269 N.W. 913 (1936) (Barry was elected county judge and served until he was found to be insane by commissioners of the county and was committed to the state hospital. Roberts was appointed to the position. Quo warranto was brought to try Roberts' right to the office. The court held for Barry on the ground that the finding of insanity was not a judicial determination and therefore the office had not been made vacant and Roberts was usurping the office held by Barry); Wishek v. Becker, 10 N. D. 63, 84 N.W. 590 (1900) (Action to remove defendant from office as county judge. Plaintiff's allegations charged malfeasance, while in office. Plaintiff was not seeking title to the office but his sole purpose was to remove defendant. The court held that in order to maintain the action he must have a special interest; that the defendant was lawfully in office and there were proper remedies to remove persons from office for just cause).

20. See State *ex rel.* Salisbury v. Vogel, 65 N. D. 137, 256 N.W. 404 (1943) (Application for writ of quo warranto directed to the state highway commissioner to show why he continued to hold office. He had been convicted of a felony. The court held quo warranto to be proper, it involved a public office and a conviction of a felony made the defendant ineligible to hold the office and it had become vacant. The state on relation of the new appointee may oust the intruder from office).

21. See State *ex rel.* Johnson v. Meyers, 74 N. D. 678, 19 N.W.2d 745 (1945) (Information in nature of quo warranto, to defendant to show by what warrant he holds the office in question. The basis for the information was that he had been removed from office by the acting Commissioner of Insurance, then was re-appointed by the regular Commissioner but the governor refused to approve the appointment which approval was required by statute. He exercised authority in the office without such approval. The court held the case was proper for original jurisdiction of the supreme court and the requirement of approval by the governor was constitutional and that defendant was a usurper).

22. See State *ex rel.* Olson v. Langer, 65 N. D. 68, 256 N.W. 377 (1934) (Application for writ of quo warranto on relation of the lieutenant governor requiring governor to show cause why he continued to exercise the duties of that office. Defendant had been convicted of a felony. The court held the conviction made him ineligible because he was no longer a qualified elector, therefore the office was vacant and the lieutenant governor could challenge the defendant's right. The court also said this was not an intrusion upon the legislature's power to impeach because the court merely determined that the defendant was unqualified to hold the office).

APPLICABILITY OF THE WRIT TO MUNICIPAL AND PUBLIC CORPORATIONS

The remedy of quo warranto is the one properly invoked in actions against municipal and public corporations[23] for extending their authority beyond the prescribed lawful limits.[24] This does not mean that merely exceeding its jurisdiction or authority will suffice, for in that type of case the proper remedy is injunction. The reason is that before quo warranto is applicable there must be an actual intrusion upon another's authority or jurisdiction.[25] In *Red River Valley Brick Co. v. Grand Forks*,[26] an action was brought to enjoin the City of Grand Forks from exercising any authority or collecting taxes from territory that it had attempted to annex. The defendant city contended that quo warranto was the proper remedy. But the court ruled that quo warranto was not an appropriate remedy because there was no usurpation of public office or franchise, and that the officers of the city "are simply going outside the territory over which they have jurisdiction, and performing acts under color of law which are unofficial and void, if not ratified."[27]

In contrast, the case of *Weiderholt v. Lisbon Spec. School Dist.*[28] concerned a situation where citizens and taxpayers residing in the district involved brought an action to prevent the board of directors of the defendant school district from exercising jurisdiction over the area annexed. The court held that the suit was correctly brought as a civil action for the remedy formerly attainable by writ of quo warranto since it was a direct attack on the defendant district's right to exercise authority over the territory in question. The two cases can be distinguished on the ground that in the former there was only an overextension of authority while in the latter there was an actual usurpation.

In actions against municipal corporations the relief generally granted is that of ouster of the intruder.[29] Forfeiture of the corporate franchise or charter is not given in these cases because to do so would be against public policy, for it would leave that body

23. N. D. Rev. Code § 10-0103 (1943) "Corporations are either public or private. Public corporations are those formed or organized for the government of a portion of the state. . . ."

24. State *ex rel.* Walker v. McLean Cunty, 11 N. D. 356, 92 N.W. 385 (1902).

25. Red River Valley Brick Co. v. Grand Forks, 27 N. D. 8, 145 N.W. 725 (1914); See also High, Extraordinary Legal Remedies 485, 486 (1884).

26. 27 N. D. 8, 145 N.W. 725 (1914).

27. *Id.* at 728.

28. 41 N. D. 146, 169 N.W. 809 (1918).

29. See City of South Miami v. State *ex rel.* Landis, 140 Fla. 740, 192 So. 624 (1939); State v. City of Topeka, 30 Kan. 653, 2 Pac. 587 (1883).

of people without a local government.[30] Ouster on the other hand will give adequate relief without the undesirable effects of forfeiture.

APPLICABILITY OF THE WRIT TO PRIVATE CORPORATIONS

In North Dakota it is provided by statute that the civil action may be brought when any office in a corporation created by the authority of the state is usurped.[31] However, there appear to be no cases in North Dakota involving a petition for writ of quo warranto, or the civil action in its stead for the usurpation of an office in private corporations or against private corporations for mis-user or non-user of a corporate franchise.

The general rule in other jurisdictions is that the remedy of quo warranto is available if there has been a usurpation of an office in a private corporation. This is based on the theory that private corporations are chartered by the state and are organized under the statutes of the state and therefore are public franchises, so that an intrusion on an office of such corporation is an abuse of the privilege granted by the state.[32]

PROPER PARTIES TO THE ACTION

As to the proper parties in this type of action the North Dakota Code provides: "An action may be commenced by the state, or any person who has a special interest in the action. . . ."[33] In *State* ex rel. *Frish v. Nohle*[34] the application for a writ of quo warranto was denied on the basis of the lack of any special interest. The court indicated that when it is shown that the relator has no more interest than any other resident or taxpayer the writ will not be issued even when indorsed by the attorney general. The matter of interest on the part of the motivating party is important for it is the state and not a private citizen who should champion the rights of the public through the use of this writ.[35]

TRIAL BY JURY

Considering briefly the question of trial by jury in quo warranto proceedings in North Dakota, the constitution provides that there

30. State *ex rel.* Cooper v. Ellis, 211 Ala. 489, 100 So. 866, 868 (1924) (dictum); Commonwealth v. Pittsburgh, 14 Pa. 177, 182 (1850) (dictum).

31. N. D. Rev. Code § 32-1303 (1) (1943).

32. Brooks v. State, 26 Del. 1, 79 Atl. 790, 796 (1911) (dictum); Komusymski v. Popovich, 218 Mich. 481, 188 N.W. 386, 387 (1922) (dictum).

33. N. D. Rev. Code § 32-1303 (1943); See also Tallmadge v. Walker, 34 N. D. 590, 159 N.W. 71 (1916).

34. 16 N. D. 168, 112 N.W. 141 (1907).

35. State *ex rel.* Frish v. Nohle, 16 N. D. 168, 112 N.W. 141, 143 (1907) (dictum).

shall be no trial by jury in the supreme court, but in cases that present questions of fact, such questions may be sent to a district court for trial.[36] This was done in the case of *State* ex rel. *Sathre v. Moodie*,[37] but the district court, because of the extremely high public feeling in the state at that time concerning the office of governor, returned a certificate to the supreme court stating that it would be impossible to obtain an impartial jury. The supreme court then ruled on both the questions of fact and the questions of law after both parties waived the jury trial. One year later in *State* ex rel. *Sathre v. Roberts*[38] a demand in district court for a trial by jury was refused, and the supreme court stated that the question was one of law and that it was not error to refuse it. These cases indicate that a right to a trial by jury is provided if questions of fact are involved.

RIGHTS OF BOTH PARTIES TO THE ACTION

The judgment in a proceeding in quo warranto can be rendered on the rights of both parties.[39] When rendered in favor of the one alleged to be entitled to the office, such person will immediately be able to act in that capacity.[40] In *Haaland v. Verendrye Electric Cooperative*,[41] a judgment had been rendered in district court for the plaintiff, annuling the newly passed by-laws and declaring that the plaintiffs were directors of the cooperative. The defendants made original application in the supreme court for an order staying execution of the judgment while they perfected their appeal. The plaintiffs contended that the judgment in the district court was in the nature of a judgment in quo warranto and as such was self-executing. In ruling in favor of the application for the order staying the judgment, the supreme court stated that the provisions of the code,[42] which the plaintiffs alleged were applicable to the judgment in the district court, applied only to public office and

36. See note 6 *supra*.
37. 65 N. D. 340, 258 N.W. 558, (1935).
38. 67 N. D. 92, 269 N.W. 913 (1936).
39. N. D. Rev. Code § 32-1306 (1943).
40. See N. D. Rev. Code § 32-1307 (1943).
41. 66 N.W.2d 902 (N. D. 1954).
42. N.D. Rev. Code § 32-1307 (1943) "If judgment is rendered upon the right of the person alleged to be entitled to the office and the same is in favor of such person, he shall be entitled, after taking the oath of office and executing such official bond as may be required by law, to take upon himself the execution of the office, and it shall be his duty immediately thereafter to demand of the defendant in the action all the books and papers in his custody or within his power, belonging to the office from which he shall have been excluded."; N. D. Rev. Code § 32-1308 (1943) "If the defendant refuses or neglects to deliver any of the books or papers demanded, as prescribed in section 32-1307, he is guilty of a misdemeanor, and the court, or a judge thereof, by order, may put the person entitled to the office in possession thereof and of all the books and papers belonging thereto, and any party refusing to deliver the same, when ordered as aforesaid, shall be punished as for a contempt."

not to offices of private corporations. The court stated further, that judgments rendered in civil actions in place of the writ of quo warranto were not completely self-executing because the statute provides that the usurper is not subject to contempt immediately for failure to comply with the judgment, but only after a demand had been made upon the usurper and after an order by the judge.

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TORTS — RIGHT OF PRIVACY — APPLICATION AND SCOPE OF THE RIGHT. — The right of privacy has been variously defined as the 'right to be let alone,"[1] to live a life of seclusion and to be free from public scrutiny and comment,[2] to be protected from any wrongful intrusion into one's private life which would outrage or cause mental suffering, shame or humiliation,[3] to be free from unauthorized and unwarranted publicity,[4] and to live without one's name, picture or statue being made public.[5] The right of privacy grew up as a defense against the modern techniques of transportation, communication, and publication. It is the abuse of such techniques which completely engulf an individual's personal life in the absence of legal remedy.[6] As the techniques continue to improve, so should the law progress.[7] The development of the right of privacy has had its difficulties because its need was not felt until after the common law had become well settled. Many judges, trained to rigidly apply the law as they found it, have in the past ignored the underlying traditions of Anglo-Saxon jurisprudence and have refused to recognize the right.[8] Even today a few judges maintain that position, but they are a rapidly dwindling minority.[9]

DEVELOPMENT OF THE RIGHT OF PRIVACY

At common law the action for the invasion of privacy did not exist.[10] Privacy, however, was protected in many instances, when it could be associated with some other common law action such as

1. Warren and Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193 (1890).
2. See Abenathy v. Thornton, 83 So.2d 235, (Ala. 1956).
3. See Lewis v. Physicians & Dentists Credit Bureau, 27 Wash.2d 267, 177 P.2d 896 (1956).
4. See Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927).
5. See Holloman v. Life Ins. Co. of Virginia, 192 S. C. 454, 7 S.E.2d 169 (1940).
6. Warren and Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193, 196 (1890).
7. Comment, 1952 Wis. L. Rev. 507, 520.
8. Nizer *The Right of Privacy*, 39 Mich. L. Rev. 525, 559 (1940-41).
9. Brunson v. Ranks Army Store, 161 Neb. 519, 73 N.W.2d 803 (1955); Yoeckel v. Samonig, 272 Wis. 430, 75 N.W.2d 925 (1956).
10. See Elmhurst v. Shoreham Hotel, 58 F. Supp. 484 (D. C. Cir. 1945) (dictum).