North Dakota Law Review

Volume 32 | Number 3 Article 1

1956

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THE PREROGATIVE JURISDICTION OF THE SUPREME COURT

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THE jurisdiction of the Supreme Court is derived from Sections 86 and 87 of the Constitution of the State of North Dakota. Section 86 declares that except as otherwise provided by the Constitution the Supreme Court shall have appellate jurisdiction only and shall have a general superintending control over all inferior courts in the state. Section 87 provides that the Supreme Court "shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari and injunction and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction."

The grant of appellate and superintending jurisdictions and the power to issue all necessary writs in aid of these jurisdictions is clear. On these matters there is no need for construction. Whether additional original jurisdiction exists is not so clear. The superintending control is a jurisdiction which is in a sense both appellate and original. It is principally original because all proceedings under it are independent proceedings and all process therein is directed to the trial judge, who has been charged with denying justice or acting beyond his jurisdiction. It is appellate in the sense that the Supreme Court in reaching its decision reviews a judicial act of a trial judge in some matter in litigation before him.

The difficult questions which faced the Supreme Court in its early interpretations of these sections were to determine what additional original jurisdiction was conferred by the Constitution and the nature and extent of this jurisdiction. The Supreme Court found the answer to these questions in *State v. Nelson County*[1] and in *State v. Archibald.*[2]

In reaching its construction of the Constitution the Court leaned heavily upon the decisions of the Supreme Court of Wisconsin in *Attorney General v. Blossom*[3] and *Attorney General v. Chicago & N. W. Ry.*[4] The latter opinion was written by the famous Chief

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*Chief Justice, Supreme Court of North Dakota. Text of an address delivered May 10, 1956, at the annual meeting of the North Dakota chapter of the Order of the Coif.

1. 1 N.D. 88, 45 N.W. 33 (1890).
2. 5 N.D. 359, 66 N.W. 234 (1896).
3. 1 Wis. 317 (1853).
4. 35 Wis. 425 (1874).

Justice Ryan and its analysis of the questions involved was meticulously followed by Judge Corliss in the *Archibald* case.

As has been suggested the question was two-fold. First, did the Supreme Court have the power to issue the writs mentioned in the Constitution in proceedings other than those which were appellate or supervisory in character? Second, if it had power to issue such writs in such proceedings, did it have the power in all cases where jurisdiction could be initiated by the issuance of one of the writs mentioned?

Several considerations impelled the Court to hold that original jurisdiction was granted. First it was said that the words, "except as otherwise provided by this Constitution" used in connection with the grant of appellate jurisdiction implied that elsewhere in the Constitution there was a grant of additional jurisdiction. Secondly, the writs mentioned in Section 87 were, with the exception of the writ of injunction, prerogative writs historically used to initiate jurisdiction. Thirdly, of the writs mentioned there was at least one, quo warranto, which could not be used in aid of appellate or supervisory jurisdiction and the inclusion of this writ among the five specifically enumerated gave character to all the rest and indicated that the other writs mentioned could be used to found jurisdiction as well as for other purposes.

Having determined that it had original jurisdiction, it remained for the Court to determine the extent of that jurisdiction. The Constitution vested in the district courts the jurisdiction to issue the same writs. Could it be that the framers of the Constitution intended to grant concurrent jurisdiction to the district courts and the Supreme Court in all matters wherein jurisdiction might be acquired by the issuance of one of these writs? The Court decided they had not. In reaching this conclusion the Court again referred to the fact that the writs named, with the exception of the writ of injunction, were originally used for prerogative purposes only, but pointed out that these writs had come to be used for private as well as public uses by the consent of the sovereign, and in many cases were now used to inaugurate jurisdiction in unimportant and insignificant controversies. The Court's conclusion was expressed in these words of Judge Corliss: "We are clear that the otherwise broad and comprehensive import of the words conferring original jurisdiction on this Court must be limited, by the rank of this Court in the judiciary of the state, and the character of the other powers vested in the Court, so that its original jurisdiction shall

comport with its dignity and its high place among the tribunals of the commonwealth, and thus the harmony of its powers will be preserved, the classes of jurisdiction conferred upon it — appellate, superintending and original, — all, under such construction having for their objects exalted duties, the final review of the judgments of inferior courts, the control of their actions and the guarding and conserving of the great interests and prerogatives of the sovereign people and the liberty of the citizen by original, prompt, and final action. The Court will then be symmetrical in its jurisdiction. Its powers will then be homogeneous, all partaking of its high and sovereign character, and not a heterogeneous mixture of the jurisdiction of the Supreme Court with some of the jurisdiction which is uniformly invested in inferior courts."[5]

The Court thus decided that the jurisdiction of the Supreme Court to issue original writs was limited to cases in which the issuance of the writs named in the Constitution was originally appropriate and possible under the common law. In defining the limits of that jurisdiction the Court stated: "It is impossible to define with precision the boundaries of this jurisdiction; but the general outlines have been marked to our satisfaction in *Attorney General v. City of Eau Clair*, 37 Wis. 400. We quote with approval the views there expressed: 'It is not enough to put in motion the original jurisdiction of this court that the question be *publici juris;* it should be a question *quod ad statum reipublicae pertinet,* — one effecting the sovereignty of the state, its franchises, or prerogatives or the liberties of its people,"[6] In so far as I can recall, this language culled from a decision of a great Wisconsin Court has been repeated by the North Dakota Supreme Court ever since in all cases where it was necessary to define the limits of its original jurisdiction.

This limitation upon original jurisdiction does not mean that a private citizen or corporation may not, as a relator, apply to the Supreme Court for an original writ. The state lends the aid of its prerogative writs to private corporations and citizens in all proper cases. In such cases, however, the interest of the state must be direct and not collateral. The Court does not give relief because of any private rights of the relator but solely to uphold the sovereignty of the state.[7] The state is always the plaintiff, and the *only* plaintiff. The relator is a mere incident who brings public injury to the

5. State *ex rel.* Moore v. Archibald, 5 N.D. 359, 371-72, 66 N.W. 234, 239 (1896).
6. State *ex rel.* Moore v. Archibald, 5 N.D. 359, 374, 66 N.W. 234, 240 (1896).
7. State *ex rel.* Moore v. Archibald, 5 N.D. 359, 374-76, 66 N.W. 234, 240,41 (1896).

attention of the Court.[8] Furthermore, even in a case properly within the original jurisdiction of the Supreme Court the relator is not entitled to a prerogative writ as a matter of right. Whether the Court will exercise its extraordinary jurisdiction in cases coming within the above rule is a matter within its sound judicial discretion, depending upon the facts in each particular case.[9] In the exercise of this discretion the Court will consider whether entrusting the decision to the district court would result in unreasonable delay or otherwise result in failure or inadequacy of relief.[10]

As to procedure, it must always be remembered that an information or petition addressed to the original jurisdiction of the Supreme Court must always be brought in the name of the state.[11] This is so even in cases where the proceeding is instituted at the instance of the Attorney-General. Originally it was held that "except in cases of habeas corpus, leave to file an information must be obtained from the Attorney-General."[12] In *State v. Wilcox,* however, this requirement was modified and it was held that the approval of the Attorney-General, while desirable, was not absolutely essential. There the Court said, "Cases may possibly arise when this Court, for the protection of grave public interests may deem it to be its duty to override the express wishes of the Attorney-General with respect to assuming original jurisdiction."[13] Later in *State v. Langer* [14] it was held that in a case where the Attorney-General was made a party defendant, it was not necesary to request the Attorney-General to institute the proceedings. Recent decisions of the Court, however, require a private relator to set forth in his petition that he has called the alleged infringement upon the sovereignty of the state to the attention of the Attorney-General and requested him to institute an original proceeding but that the Attorney-General has refused or unreasonably delayed so to do.[15] Upon the filing of an application in proper form the Supreme Court will issue an order to show cause or direct the clerk to issue an alternative writ addressed to the respondent and returnable at a time convenient to the Court and the parties.[16] The respondent may appear by written motion to quash,

8. Meyers v. Bertsch, 60 N.D. 127, 234 N.W. 513 (1930).
9. State v. Holmes, 16 N.D. 457, 114 N.W. 367 (1908); State v. Wilcox, 11 N.D. 329, 91 N.W. 955 (1902); State v. Norton, 20 N.D. 180, 127 N.W. 717 (1910).
10. State v. Thompson, 21 N.D. 426, 131 N.W. 231 (1911).
11. Meyers v. Bertsch, 60 N.D. 127, 234 N.W. 513 (1930).
12. State v. Nelson County, 1 N.D. 88, 101, 45 N.W. 33, 38 (1890).
13. State v. Wilcox, 11 N.D. 329, 335, 91 N.W. 955, (1902).
14. 46 N.D. 462, 473, 117 N.W. 408 (1920).
15. State v. Langer, 68 N.D. 167, 277 N.W. 504 (1938).
16. Supreme Court Rule 10.

by demurrer, or by answer and return. All issues that may arise in the controversy, including questions of jurisdiction and those relating to the final disposition of the controversy may be raised, without waiver, at one or different times, as may suit the convenience of the Court and the parties for the purpose of expedition.[17] Upon the hearing when the facts are controverted, affidavits and counter affidavits may be submitted. If the Court determines that it is necessary to take testimony, it may hear the testimony itself or refer the matter to a trial court or referee for the taking of such testimony.[18] I believe the *Moodie* case[19] is the only one in which the court has taken oral testimony itself.

In matters of this kind the practical question which always confronts a practicing attorney is whether the facts of his case make it one within the original jurisdiction of the Court. In this connection it should be pointed out that habeas corpus proceedings are not governed by the rules which are applicable to other proceedings invoking original jurisdiction. These, of course, need not be brought in the name of the state nor need any request be made to the Attorney-General as a condition precedent to the filing of an application for a writ. Futhermore, in such cases no question of jurisdiction can arise, for the Supreme Court has jurisdiction in every such case. As a matter of almost universal practice, however, the Supreme Court refuses, in the exercise of its discretion, to take jurisdiction of such cases until relief has been applied for in, and refused by, a district court. The question of whether other controversies come within the original jurisdiction is at times a difficult one. The Court has never attempted to define the limits of that jurisdiction with more precision than it did in *State v. Nelson,* when it first considered the question, and it has said that it will judge for itself in each case whether the case is properly one within the original jurisdiction and if it is, whether as a matter of discretion it will assume jurisdiction.

The practicing attorney has therefore two questions to consider. The first is whether the controversy with which he is concerned involves the the sovereignty of the state, and if it does, whether the interest of the state is direct or merely collateral. The second is whether the district court is the forum in which he may find speedy and just relief. In this regard it may be helpful to point out a few

17. Supreme Court Rule 12.
18. Supreme Court Rule 12.
19. State v. Moodie, 65 N.D. 340, 258 N.W. 558 (1935).

of the instances in which the Court has assumed jurisdiction and a few in which it has refused.

The Supreme Court has alway assumed jurisdiction of controversies concerning the title to a state office.[20] It has accepted jurisdiction in matters concerning the right of a candidate to have his name printed upon the ballot in state-wide elections.[21] Among other controversies within the original jurisdiction are those concerning the right of franchise,[22] the right of state officers to their pay,[23] and the jurisdictional foundation of the orders of state boards and commissions.[24]

Some of the controversies which the Court has refused to accept are those concerning the title to an office in a political party,[25] those concerning the division of a county,[26] the matter of the change of location of a county seat, [27] taxpayers' actions,[28] and questions concerning the discharge of the employees of a public board.[29]

The list is not by any means intended to be complete; it is merely illustrative. The volume of cases involving original jurisdiction in this state is very large. I have not had time to prepare to exhaust the subject nor if I had, would you have had time to listen to it. My hope is that you will find some benefit in what I have said.

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20. State v. Moodie, 65 N.D. 340, 258 N.W. 558 (1935); State v. Robinson, 35 N.D. 410, 160 N.W. 512 (1916); State *ex rel.* Salisbury v. Vogel, 65 N.D. 137, 256 N.W. 404 (1934); State *ex rel.* Olson v. Welford, 65 N.D. 522, 260 N.W. 593 (1935); State *ex rel.* Wehe v. Frazier, 47 N.D. 314, 182 N.W. 545 (1921).

21. State *ex rel.* Graham v. Hall, 73 N.D. 428, 15 N.W.2d 736 (1944); State *ex rel.* Sundfor v. Thorson, 72 N.D. 246, 6 N.W.2d 89 (1942); State v. Blaisdell, 18 N.D. 55, 118 N.W. 141 (1908).

22. State v. Thompson, 21 N.D. 426, 131 N.W. 131 (1911); State v. Lavik, 9 N.D. 461, 83 N.W. 914 (1900); State v. Hall, 74 N.D. 426, 23 N.W.2d 44 (1946).

23. State v. Jorgenson, 25 N.D. 539, 142 N.W. 450, 49 L.R.A. (N.S.) 67 (1913); State v. Kositzky, 44 N.D. 291, 175 N.W. 207 (1919).

24. State v. Aandahl, 47 N.D. 179, 181 N.W. 596 (1921).

25. State v. McLean, 35 N.D. 203, 157 N.W. 847 (1916).

26. State v. Fabrick, 17 N.D. 532, 117 N.W. 860 (1908).

27. State v. Gottbreht, 17 N.D. 543, 117 N.W. 864 (1908).

28. State v. Langer, 68 N.D. 167, 277 N.W. 504 (1938).

29. State v. Board of Higher Education, 78 N.W.2d 79 (N.D. 1956).