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Injunction in the Supreme Court

Andrew A. Bruce

INJUNCTION IN THE SUPREME COURT.

IN THE recent case of *State ex rel. Lofthus et al. v. William Langer, Attorney General,*[1] the supreme court of North Dakota, by a majority of three to two, and in the exercise of a supposed original jurisdiction removed a receiver of a private state bank who had been appointed by the State Banking Board, made an adjudication, upon proof furnished by affidavits merely, that the bank was not in fact insolvent, ordered it to be placed in the hands of another receiver to be by him, and when he saw fit, returned to its original officers and directors, and permanently enjoined the attorney general and the State Banking Board from thereafter interfering with its affairs.

The case is remarkable because in it a final injunction restraining state officers was issued upon affidavits merely. It is remarkable because the injunction was directed against the attorney general himself, although in North Dakota and in many other states it was for a long time, if not still, a mooted question whether the so-called quasi-prerogative writ of injunction could ever be issued by the supreme court, without the consent of the attorney general and it has never before been decided that it could be directed against him. It is remarkable since it furnishes the first instance in North Dakota, and perhaps in any other state, where this writ has been issued to impede and not help public officials in the performance of their duties and especially where private interests alone have been involved.

In addition to the question of the manifest impropriety of deciding a case of this nature upon affidavits alone, the controversy involves the question as to how far and over what matters the original jurisdiction of the supreme court extends.

The bank is an ordinary private state bank which was organized under the general banking laws and must not be confused with the Bank of North Dakota, which perhaps is more or less publicly owned, though the recent decision of District Judge W. L. Nuessle in the case of *State ex rel. Kositzky v. Bank of North Dakota*[2] has thrown some doubt even upon that question.

[1] (N. D. 1919) 174 N. W. —
[2] North Dakota district court.

It is true that the dominant political faction or party of the state is heavily interested in the local institution both as a borrower and as a depositor, but political parties or factions are not yet in law at any rate synonymous with the state itself, nor are their interests the interests of the sovereign people. The only concern therefore that the state as a whole can have in the affair must lie in the fact that the so-called Bank of North Dakota has had dealings with the local institution and holds among its collateral post-dated checks which were received from it and in the fact that the relator is the state bank examiner and that the receiver sought to be removed happens to be one of his deputies.

Chapter 55 of the North Dakota Session Laws of 1911 created a Department of Banking or State Banking Board and provided that the state examiner should be its secretary. This officer, if in the legal sense of the term officer he be, is at the present time the relator Lofthus. Though he has the title of bank examiner, he has no independent powers. Though under the Act of 1911 he is allowed deputies, and it is made his duty to examine the books and accounts of the various state banking institutions, he is to do so merely for the purpose of reporting to his superiors, and he has been expressly held to be an agent of the Banking Board and not an independent officer.[3] Section 3 of the statute provides that:

"The said board is hereby vested with the power and authority to appoint by its own order, receivers for insolvent corporations as defined in this article, and such receivers shall have the same power and authority, and their acts the same validity as if appointed under and by direction of a district court, but nothing herein contained shall be construed so as to take away from the courts the power to appoint receivers of such institutions at any stage of the proceedings and thus terminate the receivership ordered by the board."

Acting under these statutes and after an examination by a deputy bank examiner and a report of insolvency, the State Banking Board ordered the institution closed and placed a deputy bank examiner in charge as a receiver. This was done during the absence from the state of the chief bank examiner himself, though there is but little in this point as the examiner is merely an agent of the board. The deputy however was persona non grata to the bank and to its friends while the chief was not and the insolvency of the institution was denied. It was therefore determined to

[3] Youmans v. Hanna, (1916) 35 N. D. 479, 160 N. W. 705.

resort to the courts and either to have the receivership entirely dissolved or the bank examiner substituted in the place of his deputy.

Naturally and ordinarily the proceedings would and should have been instituted in the district court at Fargo, as not only had this court unquestioned jurisdiction in the premises, but the act under which the receiver was apponited seemed clearly to recognize the district court and the district court alone by providing that the receivers appointed by the board "shall have the power and authority and their acts shall have the same validity as if appointed under and by direction of a district court," and it is fair to assume that the courts afterwards referred to in the statute and to which resort should be had if a change of receivers was desired were courts of the same nature and jurisdiction. For some reason or other, possibly because the judge of the Fargo District has rendered an unfavorable decision in a former banking case of almost equal notoriety,[4] the chief examiner and the state bank did not desire to submit the decision to him. They therefore chose to petition the supreme court to take original jurisdiction of the case and applied for a writ of injunction which should restrain all interference with the affairs of the bank, and this both on the ground that the bank examiner had not been consulted in the premises and that the bank was not in fact insolvent.

A temporary injunction was issued and an order to show cause why this injunction should not be made permanent and the permanent injunction has now been issued. The decree, however, seems to recognize the fact that the affairs of the bank need some supervision, as it continues in charge the chief examiner who in the temporary order had been substituted for his deputy, and leaves it to him to turn the bank over to its original owners when he shall see fit to do so.

The supreme court of North Dakota therefore assumed jurisdiction not only to substitute one receiver for another, but to pass upon the solvency of the bank and the merits of the controversy, and to enjoin the attorney general and the Banking Board as a whole from interfering in the premises, and this was done on affidavits merely and against the protest of the attorney general who demanded a full hearing.

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[4] Youmans v. Hanna, (1916) 35 N. D. 479, 160 N. W. 705.

The main question, however, as we have before said is a question of jurisdiction.

The constitution of North Dakota provides that:

"Art. 4. Sec. 86. The Supreme Court, except as otherwise provided in this constitution shall have appellate jurisdiction only, which shall be co-extensive with the state, and shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law.

"Sec. 87. It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction, and shall have authority to hear and determine the same."

The questions at issue were: could the writs provided for in section 87, only be issued in aid of an appellate jurisdiction, for instance to require the clerk of a district court to send up the records on an appeal, or did the supreme court have an original jurisdiction outside of these matters and inherit the powers of the English Court of King's Bench as far as the common law writs of mandamus, habeas corpus, quo warranto and certiorari were concerned, and in addition the power (which the Court of King's Bench seems never to have possessed) to issue a quasi prerogative writ of injunction in chancery? If the supreme court had this power could it be exercised in any case except where the sovereignty, public rights, franchises and prerogatives of the state as a whole were concerned, and if not, did the bank controversy involve such sovereignty, public rights, franchises or prerogatives? Could the writ be issued when the law officer of the state not only disapproved but was himself the principal defendant?

The first North Dakota case upon the subject is that of *State of North Dakota v. Nelson County.*[5] In it, although the action was brought by the attorney general himself, an injunction was denied which sought to restrain the county from issuing seed grain bonds for the purpose of furnishing seed to needy farmers and this on the ground that the matter was of local interest merely. It was the intention of section 87 of the state constitution, the court said:

"To confer upon the supreme court, in the exercise of a jurisdiction vested in it, the duty of taking original cognizance only in the limited class of cases where the writs, except the writ of habeas corpus, are sought for on motion of the attorney gen-

[5] (1890) 1 N. D. 88, 45 N. W. 33.

eral as prerogative writs. Except in the case of habeas corpus leave to file and information must be obtained by the attorney general. When the information makes out a prima facie case the writ will issue only in cases publici juris, and those affecting the sovereignty of the state, its franchises or prerogatives or the liberties of its people."

These words are general, and through the application in the particular case was for a writ of injunction, they in terms and by way of dicta at any rate apply equally to the common law writs of mandamus, quo warranto, and certiorari. The language, also, is qualified and explained by the statement:

"The constitution of this state with respect to the original jurisdiction of the supreme court is substantially the same as that of the state of Wisconsin; and the interpretation given by the supreme court of that state to that part of its state constitution meets with the full approval of this court. See *Attorney General v. Railroad Companies,* 35 Wisconsin 425; *Attorney General v. City of Eau Claire,* 37 Wisconsin 400; *Wheeler v. Irrigation Company,* 9 Colo. 248, 11 Pac. Rep. 103. The case at bar affects only the local concerns of the county of Nelson, and its tax payers, and hence does not fall within the limited class of cases indicated above, and in which alone this court will assume original jurisdiction."

Thus, although there is in fact a difference between the constitutions of Wisconsin and North Dakota,—the constitution of the former state giving to the supreme court the general power to issue the writs mentioned[6] while that of North Dakota gives that court power only to issue the "writs of habeas corpus, mandamus, quo warranto, certiorari, injunction and such other original and remedial writs *as may be necessary to the proper exercise of its jurisdiction,*" and much more than that of Wisconsin would seem to limit the power to a jurisdiction already possessed,—the Wisconsin rule was stated to have been adopted in North Dakota.

As a matter of fact, however, the rule which was announced in the earlier North Dakota decisions was even more strict than that of the Wisconsin cases which had so far been decided. Though indeed in the case of *Attorney General v. Railroad Companies,*[7] Chief Justice Ryan had drawn a distinction between the chancery writ of injunction and the common law and jurisdictional writs of habeas corpus, mandamus, quo warranto and certiorari, he had none the less held that it was the intention of the

[6] See, sec. 3, art. vii.
[7] (1874) 35 Wis. 425.

framers of the constitution, as far as the supreme court was concerned, to make of the writ of injunction a quasi-prerogative and jurisdictional writ and to place it on a par with the unquestioned high prerogative and jurisdictional common law writs, and a few years later, in the case of *State ex rel. Lamb v. Cunningham*,[8] the right of a private relator to petition for the writ of injunction was fully established.

The North Dakota court on the other hand, in the earlier cases when the writ of injunction was prayed for, seemed to be of the opinion, if not positively to hold, that the sanction of the attorney general was absolutely necessary.[9] Though therefore we find in the North Dakota reports several instances where the common law writs seem to have been issued without the consent of the attorney general and even when the law officer of the state not only disapproved but appeared in person to represent the defendants,[10] we find at least one case where the writ of injunction was asked under similar circumstances its issuance was peremptorily denied.[11] Indeed it is but natural that the consent of the attorney general should at first have been deemed necessary. The writ was a high prerogative or at any rate quasi high prerogative writ. Originally and in England the prerogative was the prerogative of the throne and not of the private citizen, and the attorney general was the representative of the throne. In America, where the personal sovereign gave way to the sovereign people, the prerogative was still a sovereign or governmental prerogative, and it might well have been first contended that the law officer of the state would best know when the exercise of that prerogative was necessary and that he could be relied upon to petition for it whenever the public welfare really demanded its issuance.

The purpose of the high prerogative writs was to aid in the administration of government; and when the law and the government proceeded from the king, and in America where (as was first the case in North Dakota) there was a dominant political party entrusted with the affairs of government, it was seldom that the interests of the dominant party and of the attorney general were other than to further the governmental agencies and machinery and the workings of the established law. Occasions, however,

[8] (1892) 83 Wis. 90, 53 N. W. 35, 17 L. R. A. 147, 35 Am. St Rep. 27.

[9] State v. Nelson, (1890) 1 N. D. 88, 45 N. W. 33; Anderson v. Gordon, (1900) 9 N. D. 480, 83 N. W. 993.

[10] State ex rel. Fosser v. Lavik, (1900) 9 N. D. 461, 83 N. W. 914; State ex rel. Anderson v. Falley, (1900) 9 N. D. 464, 83 N. W. 913.

[11] Anderson v. Gordon, (1900) 9 N. D. 480, 83 N. W. 993.

soon arose, when the contest between the political factions became close and keen and the attorney general himself became an interested party. Such a case was presented in Wisconsin in the leading case of *State ex rel. Lamb v. Cunningham*,[12] where a democratic attorney general refused to ask for an injunction which would prohibit the sending out of election notices under a flagrantly unconstitutional statute which had so gerrymandered the state as to disfranchise thousands of republican voters, and it is but natural that the court should have then definitely stated that, even in the case of an injunction, the consent of the attorney general was not absolutely necessary to the exercise of jurisdiction and that in this respect there was no difference between injunctions and common law writs.

Never before, however, either in Wisconsin or North Dakota, has the supreme court asserted the right of not merely ignoring the wishes of the attorney general but of enjoining this officer himself from doing that which he believed his public duty demanded and especially in a case in which the relator represented private and not public rights. It is one thing indeed for the supreme court to take jurisdiction in a case where an injunction is sought against a private individual or subordinate officer to restrain him from interfering with the functioning of government and another to bring the chief law officer of the state before its bar and to prevent a state board from performing its duties. The high prerogative jurisdiction indeed was given that the administration of the government might be carried out and promoted and not that it might be prevented and delayed.

Up to the present time the supreme courts of both Wisconsin and North Dakota have steadily adhered to the rule that the writs which are authorized to be issued in the exercise of their original jurisdiction are, no matter by what name they may be called, strictly prerogative writs and that, for that reason, they can only be issued when the interests of the state as a whole and not of some mere individual or locality are concerned, no matter how interesting to all the controversy may be. They have taken jurisdiction therefore in the cases of controversies over supreme court and district court judicial offices because the people of the state as a whole are concerned in the proper administration of the civil and criminal law.[13] They have as-

[12] (1892) 83 Wis. 90, 53 N. W. 35, 17 L. R. A. 147, 35 Am. St. Rep. 27.
[13] State ex rel. Erickson v. Burr, (1907) 16 N. D. 581, 113 N. W. 705; State ex rel. Linde v. Robinson, (1916) 35 N. D. 410, 160 N. W. 512.

sumed jurisdiction in questions involving the right to the ballot and of representation upon the electoral tickets because the right to a free suffrage is one which it is the interest of all to preserve and the election of even county officers is a part of the general scheme of government.[14] They have assumed jurisdiction where general elections were sought to be called under unconstitutional laws and even where constitutional amendments were sought to be unconstitutionally initiated.[15] They have always been ready to interfere where public officers such as the state tax commissioners were sought to be hindered in or prevented from the performance of their duties.[16]

They have steadily refused to take jurisdiction in controversies involving the location of county seats,[17] for these are matters of local convenience merely; to interfere where the district court had jurisdiction in the matter of the extension of county boundaries, and even in the case of the location of election precincts which did not seem necessary to the exercise of the franchise but merely convenient.[18] They have refused to exercise jurisdiction in the case of a controversy over the office of chairman of the Democratic State Central Committee as the same was not a public office.[19] They have refused to review the action of the Board of Equalization in the case of an individual tax payer,[20] and to aid an insurance company in obtaining a permit to do business in the state.[21]

They have, in short, laid down the clear and explicit rule that in order that their original jurisdiction may be invoked it is necessary that:

"The interest of the state shall be primary and proximate, not indirect or remote; peculiar perhaps to some subdivision of the state, but affecting the state at large in some of its prerogatives; raising a contingency requiring the interposition of this court to preserve the prerogatives and franchises of the state

[14] State ex rel. Steel v. Fabrick, (1908) 17 N. D. 532, 117 N. W. 860; State ex rel. Buttz v. Lindahl, (1903) 11 N. D. 320, 91 N. W. 950; State ex rel. Fosser v. Lavik, (1900) 9 N. D. 461, 83 N. W. 914; State ex rel. Shaw v. Thompson, (1911) 21 N. D. 426, 131 N. W. 231.

[15] State ex rel. Linde v. Hall, (1916) 35 N. D. 34, 159 N. W. 281.

[16] Board of Control, State ex rel. Moore v. Archibald, (1896) 5 N. D. 359, 66 N. W. 234; State Board of Immigration, State ex rel. Baker v. Hanna, (1915) 31 N. D. 570, 154 N. W. 704.

[17] State ex rel. Walker v. McLean Co., (1903) 11 N. D. 356, 92 N. W. 385.

[18] State ex rel. Byrne v. Wilcox, (1903) 11 N. D. 329, 91 N. W. 955.

[19] State ex rel. McArthur v. McLean, (1916) 35 N. D. 203, 159 N. W. 847.

[20] Duluth Elevator Co. v. White, (1903) 11 N. D. 534, 90 N. W. 12.

[21] Homesteader v. McCombs, (1909) 24 Okla. 201, 103 Pac. 691.

in its sovereign character, this court judging of the contingency in each case for itself. For all else, although raising questions publici juris, ordinary remedies and ordinary jurisdictions are adequate, and only when for some peculiar cause these are inadequate will the original jurisdiction of this court be exercised for protection of merely private or merely legal rights."[22]

It is quite clear indeed that in the instant case the majority of the supreme court of North Dakota (and it is only fair to say that Chief Justice Christianson and Associate Justice Birdzell dissent) has performed a complete intellectual somersault. Formerly the jurisdiction of the supreme court was never exercised at the behest of a private individual, corporation or locality, unless the interests of the state as a whole were concerned, as in the contest over the office of a Judge who administered the penal and civil laws of the whole state, or as in the case of *State ex rel. Lamb v. Cunningham,* where an illegal, state-wide election was sought to be prevented, or *State ex rel. Linde v. Hall,* where an equally unconstitutional referendum was involved, and then only that the constitution might be made paramount. It was even denied in cases of the removal of county seats. Formerly it was held, or at least strongly intimated, that the consent of the attorney general was absolutely necessary and though this ruling was later modified, it was always held that the judgment of the attorney general should be given much weight and should only be overruled in matters of the gravest importance and of state-wide significance. Now the attorney general is not only not consulted but is himself enjoined and this on the relation of a private bank and of a mere agent and servant of the State Banking Board of which the attorney general is himself a member.

Formerly, too, courts of equity were loath to pass upon complicated statements of facts, and when there was any dispute as to right or to title were wont either to require the issues to be tried in a court of law and before a jury, or themselves to call in a jury for advisory purposes, or to submit the matter to referees or masters in chancery to take testimony and to report. In the instant case, however, the court decides a complicated matter of accounting on affidavits merely and, without affording an opportunity for cross-examination, sets aside the report of a bank examiner and overrules the discretion of a governmental department.

ANDREW A. BRUCE.

UNIVERSITY OF MINNESOTA.

[22] State ex rel. Steel v. Fabrick, (1908) 17 N. D. 532, 536, 117 N. W. 861; State ex rel. Linde v. Taylor, (1916) 33 N. D. 76, 156 N. W. 561; State ex rel. McArthur v. McLean, (1916) 35 N. D. 203, 159 N. W. 847.