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Courts - Extraordinary Writs - Habeas Corpus in North Dakota

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NOTES

COURTS — EXTRAORDINARY WRITS — HABEAS CORPUS IN NORTH DAKOTA. — The writ of habeas corpus is defined as, "a writ directed to the person detaining another and comanding him to produce the body of the prisoner at a certain time and place, with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf."[1] It is a legal process designed and employed to give summary relief against illegal restraint of personal liberty.[2] The action cannot be called criminal as it was not created to punish the official who affected the illegal confinement. Nor can it be called a civil action since the relief granted is from the state and no compensation may be had from the person causing the illegal detention. The North Dakota Supreme Court merely says that it is not a civil action nor is it a criminal action,[3] so that it would seem appropriate to term it an extraordinary remedy.

The origin of the writ is not clear, but history records its frequent use at the time of Henry VI,[4] and it was embodied in the English Law by the Habeas Corpus Act of 1679.[5] The writ was brought to America by the colonists and denoted as one of the immemorial rights descended to them from their ancestors.[6] The fundamental right to the writ is evident by its incorporation in the United States Constitution which provides that ". . . the privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it . . ."[7]

The North Dakota Constitution, has adopted the provisions for the writ as stated in the Federal Constitution.[8] North Dakota also has statutory provisions which facilitate the procurement of the writ.[9] Although it has been said that it is a prerogative writ, it is subject to reasonable regulations so long as its efficiency or the right thereto is not impaired.[10]

Every person who is imprisoned or is being restrained of his personal liberty is entitled to prosecute the writ.[11] The right to the

1. Bouvier, Law Dictionary (Rawle's, 3d Rev. 1914).
2. 2 Spelling, Injunctions and Other Extraordinary Remedies 977 (1901).
3. Carruth v. Taylor, 8 N. D. 166, 77 N.W. 617, 618 (1898) (dictum).
4. Ferris, Extraordinary Legal Remedies 22 (1926).
5. 1 Bailey, Habeas Corpus 2 (1913).
6. *Ibid.*
7. U. S. Const., art I, § 9, cl. 2.
8. See N. D. Const., art. 1 § 5.
9. See N. D. Rev. Code §§ 32-2201—32-2243 (1943).
10. Ferris, Extraordinary Legal Remedies 23 (1926).
11. N. D. Rev. Code § 32-2201 (1943).

writ is not determined by his guilt or his innocence.[12] It is said that a mere moral restraint is not sufficient to permit this right, however, it is not necessary that there be an actual physical restraint.[13] The test seems to be whether or not one is deprived of going where he pleases.[14]

The application for the writ is made by a petition signed by the person detained or by someone in his behalf and must state in whose interest the writ is being brought, the place of detention, the name of the restraining officer, and the cause or pretense of the confinement. If the restraint is by a warrant or process a copy shall be attached, also if the restraint is alleged illegal the petition should state the facts constituting the illegality. The application must be verified by the person making the application[15] and the writ must be directed to the restraining official.[16] The official must be in such control or custody of the person restrained that his body can be produced in court, thus the writ will not lie when the petitioner is out on bail.[17] When the petitioner has been ordered released in an action prior to the application for the writ the question becomes moot and the writ is accordingly denied.[18]

The writ may be granted by the supreme court or any judge thereof,[19] or by the district court or any judge of the district court.[20] When it appears upon application to the proper court that the writ ough to issue the same must be granted without delay.[21] If any judge empowered to issue the writ shall corruptly refuse to so issue the writ, such official shall pay to the party being detained a sum not exceeding five hundred dollars for each offense.[22]

APPLICATION TO CRIMINAL CASES

Habeas corpus is an important and fundamental method of testing the legality of criminal process under which a person is restrain-

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12. Ferris, Extraordinary Legal Remedies 30 (1926).
13. *Id.* at 33.
14. Green v. Wiese, 78 N.W.2d 776, 780 (N. D. 1956) (dictum). See also Ferris, Extraordinary Legal Remedies 32 (1926).
15. N. D. Rev. Code § 32-2203 (1943).
16. N. D. Rev. Code § 32-2207 (1943).
17. Green v. Wiese, 78 N.W.2d 776 (N. D. 1956) (The petitioner must establish that he is being detained or restrained.).
18. State *ex rel.* Magrum v. Nygaard, 76 N. D. 552, 38 N.W.2d 370 (1949).
19. See N. D. Const. art 4, § 87; N. D. Rev. Code § 32-2204 (1) (1943) (The Supreme Court has jurisdiction in every habeas corpus proceeding, but it is almost a universal practice that the Supreme Court refuses to take jurisdiction of these cases until an application for the writ has been made to, and refused by, a district court.).
20. See N. D. Const., art 4, § 103; N. D. Rev. Code § 32-2204 (2) (1943).
21. N. D. Rev. Code § 32-2205 (1943).
22. N. D. Rev. Code § 32-2237 (1943).

ed. The writ is not available as a substitute for appeal or writ of error,[23] but it is properly used to question the jurisdiction of the court committing the restrained person.[24] Proper jurisdiction empowers the court to determine every issue within the scope of its authority, according to its own interpretation of the law and the evidence, regardless of the correctness of the decision.[25] Questions of jurisdiction have been extended to a district court's right to try a juvenile,[26] to confinement without finding the petitioner delinquent as required by statute,[27] and to the sentencing of a felon by a county court of increased jurisdiction.[28] The writ will not inquire into errors which are not fatal to the jurisdiction of the court issuing the commitment.[29] Instances of such irregularities are where the petitioner was not present when the jury was dismissed upon failure to decide on a verdict,[30] where the district court clerk failed to indorse the information until some four months later,[31] where the petitioner was incarcerated in the wrong jail,[32] where the board of pardons did not act with respect to a maximum-minimum sentence,[33] and, where a defacto judge issued the order which incarcerated the petitioner.[34]

Notwithstanding the rule that habeas corpus is not a means of

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23. See Mazakahomni v. State, 75 N. D. 73, 25 N.W.2d 772 (1947) (The Supreme Court may only inquire into the correctness of the acts of the lower court to the extent of declaring whether it was within its jurisdiction.); State *ex rel.* Hagen v. Overby, 54 N. D. 732, 210 N.W. 652 (1926); State *ex rel.* Smith v. Lee, 53 N. D. 86, 205 N.W. 314 (1925); State *ex rel.* Styles v. Baeverstad, 12 N. D. 527, 97 N.W. 548 (1903).

24. See Gasch v. Kohler, 70 N. D. 358, 294 N.W. 441 (1940); State *ex rel.* NeVille v. Overby, 54 N. D. 295, 209 N.W. 552 (1926).

25. Ryan v. Nygaard, 70 N. D. 687, 297 N.W. 694, 700 (1941) (dictum).

26. See State *ex rel.* Solberg v. Sitcher, 52 N. D. 518, 203 N.W. 898 (1925).

27. *Ibid.*

28. See State *ex rel.* Stricker v. Andrews, 62 N. D. 215, 242 N.W. 912 (1932) (By statute such county courts were given concurrent jurisdiction with district courts to try offenses below the grade of felony. Petitioner was charged with aggravated assault and battery which the North Dakota statutes defined as being a felony).

29. See Davidson v. Nygaard, 78 N. D. 141, 48 N.W.2d 578 (1951) (The court will only determine whether the trial court had jurisdiction, if so, the application for the writ of habeas corpus will be denied).

30. See State v. Floyd, 22 N. D. 183, 132 N.W. 662 (1911) (Petitioner's proper remedy was by writ of error.).

31. See State *ex rel.* Swanson v. Lee, 53 N. D. 427, 206 N.W. 417 (1925).

32. See State *ex rel.* Nyhus v. Ross, 24 N. D. 586 139 N.W. 1051 (1913) (Petitioner, a resident of Steel county where there was no jail available, was ordered imprisoned in Traill county. The judge had overlooked an enactment which made the Cass county jail the proper place of incarceration; the court merely ordered petitioner moved to the proper jail).

33. See *Ex parte* Riley, 52 N. D. 471, 203 N.W. 676 (1925) (Petitioner was sentenced from 1-5 years in the penitentiary upon being convicted of burglary in the third-degree. Petitioner contended that since Board of Pardons had not fixed the date when sentence shall expire that the sentence is indefinite and he cannot be held. The court said the mere fact that the board had not met merely revealed that they were satisfied with the sentence as it stood and that since the minimum sentence had not expried the writ was denied).

34. See State *ex rel.* Bockmeier v. Ely, 16 N. D. 569, 113 N.W. 711 (1907) (The judge was acting as a district court judge in a district which had not, according to law, been established and become operative. There was an erroneous belief that the district was in existence).

reviewing a conviction by a court of competent jurisdiction, the North Dakota Supreme Court has said that it will look into the competency of the evidence upon which the magistrate exercised his judgment.[35] The evidence necessary is only that which will make it appear that a public offense had been committed and a belief that the accused is guilty therof.[36] The supreme court will not weigh the credibility of the witnesses in a lower court proceeding.[37]

CUSTODY OF CHILDREN — DETERMINATION

The scope of the writ of habeas corpus includes the determination of the custody of children. Not only is this a determination, but it compels relinquishment of possession and places the child in the custody of the party who will best serve the interests and future welfare of the child.[38] In an action to contest custody of children the mother and father are put on an equal footing.[39] This rule is set aside, however, in favor of the mother when the child is of tender years. If the evidence shows incapacity and an illicit or immoral status of the mother, her position will not be favored.[40] The courts have given preference to the father over the mother's sister,[41] and they have awarded custody to the child's foster parents over the wishes of the natural parents.[42] Where a child is of sufficient age to make an intelligent preference, his or her wishes will be weighed, but the paramount consideration is the child's welfare.[43]

Habeas corpus in this type of proceeding is of an equitable nature as it is dependent upon the welfare of the child. This type of proceeding involves the interests of the child, the state and parents, with the uppermost interest being that of the child. The order of the court is not a final order, and is reviewable when new facts or a change of circumstances has occurred which has altered the relative claims of the parties in some material respect.[44] The order

35. State *ex rel.* Ivetz v. Singleton, 53 N. D. 573, 207 N.W. 226 (1926) (The court here said that, "We have examined the evidence with great care, and it is the judgment of this court that there was some evidence and the writ must be denied."); *accord,* State *ex rel.* Styles v. Baeverstad, 12 N. D. 527, 97 N.W. 548 (1903).

36. State *ex rel.* German v. Ross, 39 N. D .630, 170 N.W. 121, 122 (dictum).

37. *Ibid.*

38. Ferris, Extraordinary Legal Remedies 94, 95 (1926).

39. N. D. Rev. Code § 14-0904 (1943).

40. See *In re* Kol, 10 N. D. 493, 88 N.W. 273 (1901).

41. See Raymond v. Gering, 74 N. D. 142, 20 N.W.2d 335 (1945) (The child's mother was dead and custody was given to her sister for a few days to bid farwell. When she was asked to surrender possession she refused. The court said that even though the mother's last wish was that the child should go to her sister that the welfare of the child was better achieved with her father).

42. See *Ex parte* Sidle, 31 N. D. 405, 154 N.W. 277 (1915).

43. See Knapp v. Tolan, 26 N. D. 23, 143 N.W. 915 (1913).

44. Larson v. Dutton, 40 N. D. 230, 168 N.W. 625, 626 (1918) (dictum).

is final as to any possible non-jurisdictional irregularity of a prior proceeding.

OTHER PROCEEDINGS

The North Dakota case of *State* ex rel. *Mears v. Barnes*[45] illustrates the use of habeas corpus in a contempt proceeding where the petitioner, a corporation president, was held in contempt for the failure to execute conveyances of real estate to the petitioner's corporation. The court said that if the trial court was mistaken in determining the petitioner's authority to issue the conveyance; it was merely an erroneous decision of fact and did not affect the jurisdiction of the court to issue a contempt order. Such error in a civil contempt can only be reviewed on appeal.[46] In a similar case, sentence was suspended and the petitioner was put on probation when the State's Attorney of his own volition ordered the petitioner to be taken into custody. The court granted the writ as the petitioner was imprisoned without the necessary order from the probation board.[47]

Habeas corpus may also be used in extradition proceedings but the court will not allow the admittance of evidence as to the commission of the crime as that must be decided in the demanding state.[48] Further, there is in fact, no right to go behind the determination of the Governor and to interfere with his discretion in the premises generally.[49]

In habeas corpus proceedings that question citizenship, the court has no right to determine whether the relator was a dangerous person and should be allowed to be at large during the time of war.[50]

It has been established that the constitutionality of an act may be passed upon in a habeas corpus proceeding.[51] The scope of this proceeding has been extended to the validity of a deportation order,[52] enforcement and validity of a city ordinance,[53] and to the

45. 5 N. D. 350, 65 N.W. 688 (1895).
46. *Ibid.*
47. State *ex rel.* Vadnais v. Stair, 48 N. D. 472, 185 N.W. 301 (1921).
48. See *Ex parte* Bruchman, 28 N. D. 358, 148 N.W. 1052 (1914).
49. *Ex parte* Bruchman, 28 N. D. 358, 148 N. D. 1052, 1054 (1914) (dictum).
50. See United States v. McCoy, 54 F. Supp. 679 (D. N. D. 1944) (The petitioner was born in Alsace in Europe. The court said that being he had not been naturalized elsewhere he was still a citizen of France, therefore, he could not be deemed to be a German citizen).
51. See State *ex rel.* Gaulke v. Turner, 37 N. D. 635, 164 N.W. 924 (1917).
52. See *Ex parte* Gytl, 210 Fed. 918 (D. N. D. 1914) (Petitioners were lawful immigrants to Canada. They entered into an agreement with an American to work for him in North Dakota. The petitioners did not know that they were transported to the United States and neither party knew that they had violated the Alien Labor Law. The immigration officer arrested them in violation of that law and they were ordered deported to "whence they came from." The court said that such an order did not mean to deport

validity of a warrant issued by the justice of the peace which ordered the removal of paupers from the state.[54]

North Dakota, by statute, has extended the scope of the writ of habeas corpus to question the insanity or necessity of the treatment of persons confined to state hospitals. If the court does decide that a person is so incapacitated this does not preclude a subsequent application for the writ for a rehearing where there has been a material change of the circumstances.[55]

CONCLUSION

When a person is held in restraint and deprived of his liberty there is no limit to the state court's jurisdiction except where he is being held by the authority of the United States. When the federal courts have taken jurisdiction of a suit or proceeding arising under the constitution or laws of the United States such jurisdiction is exclusive and a state court cannot interfere by habeas corpus or otherwise.[56]

Though review by habeas corpus is greatly restricted the North Dakota Supreme Court has acknowledged their constitutional discretionary right to review prior proceedings by the use of the discretionary right of superintending control.[57] Such exercise seems to be limited to the review of the district court proceedings as an expedient when there is no adequate remedy available.[58]

The very fundamental preservation of personal rights, by the appropriate installation of the writ of habeas corpus in the constitution, was clearly exemplified when it was said, "The writ of habeas corpus is a great writ of liberty; no human being ever sinks so low that he or she may not in the proper case apply to the courts of this land for and obtain the benefits of this great writ."[59]

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them back to Austria, but rather back to Canada where they had been properly admitted—to do otherwise would have been a wrong to Canada).

53. See Kist v. Butts, 71 N. D. 439, 1 N.W.2d 612 (1942) (The writ was denied and the court said that an ordinance in excess of that permitted by statute is not void and a sentence pronounced under such an ordinance may be enforced to the extent that it is within the statutory limitations).

54. See Hilbern v. Briggs, 58 N. D. 612, 226 N.W. 737 (1929) (The petitioners were residents of Minnesota, but were receiving relief in North Dakota. The statute under which petitioners were ordered removed from the state only went so far as to say that paupers could be moved from one poor relief district to another, within the state of North Dakota).

55. N. D. Rev. Code § 25-0328 (1943).

56. See 1 Bailey, Habeas Corpus 68, 69 (1913).

57. N. D. Const., art. 4, § 86.

58. See Green v. Wiese, 78 N.W.2d 776, (N. D. 1956); State *ex rel.* Johnson v. Broderick, 75 N. D. 340, 27 N.W.2d 849 (1947) See also Note, 32 N. D. Law Rev. 236, 240 (1956).

59. State *ex rel.* Vadnais v. Stair, 48 N. D. 472, 185 N.W. 301, 303 (1921).