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## Courts - Extraordinary Writs - Injunction in North Dakota

Raymond Hagen

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COURTS — EXTRAORDINARY WRITS — INJUNCTION IN NORTH DAKOTA. — Justice Story has described injunction as “a judicial process whereby a party is required to do a particular thing, or to refrain from doing a particular thing according to the exigency of the writ.”<sup>1</sup> Spelling, in discussing the office of the writ, has pointed out that courts of equity would possess little power without its aid and has stated that the writ “may be appropriately termed the strong arm of the courts of equity.”<sup>2</sup> The writ’s important function is the placing of a restraint on the party subject to it, thereby maintaining the “status quo”. The great number of cases involving injunction in North Dakota indicate its importance in solving legal disputes.

Historically speaking, the remedy of injunction was not one of the prerogative writs. The common law prerogative writs were jurisdictional writs, while injunction was an equitable remedy. Early equity courts required in most cases that jurisdiction be maintained on other grounds and would issue an injunction only after bill or information was filed.<sup>3</sup> In interpreting the provisions for injunctive relief provided in the North Dakota Constitution, the Supreme Court has termed the writ quasi-prerogative and has stated that the writ may be issued by the Supreme Court as readily as the other prerogative writs.<sup>4</sup>

#### ORIGINAL JURISDICTION OF THE SUPREME COURT

Original jurisdiction to issue the writ of injunction was conferred upon the Supreme Court<sup>5</sup> and the district courts by the state constitution.<sup>6</sup> The North Dakota Supreme Court was called upon to clarify the original jurisdiction conferred upon it in an early case involving injunction.<sup>7</sup> The court stated that the intention of the constitutional grants of original jurisdiction in both the Supreme Court and district courts was to confer upon the district courts, which are readily accessible, original cognizance of all ordinary cases and to confer upon the Supreme Court in its discretion original cognizance in a limited number of cases.<sup>8</sup> The requisites for original cognizance were stated to be: (1) Leave to file an information must be obtained by the Attorney General. (2) If the

1. 2 Story, *Equity Jurisprudence* § 861 (13th ed. 1886).

2. 1 Spelling, *Injunction and Other Extraordinary Remedies*, 3 (2nd ed. 1901).

3. *Attorney General v. Chicago & N. W. RR.*, 35 Wis. 425, 513 (1874).

4. *State ex rel. Moore v. Archibald*, 5 N. D. 359, 363, 66 N.W. 234, 236 (1896) (dictum).

5. N. D. Const., art 4, § 87.

6. N. D. Const., art. 4, § 103.

7. *State v. Nelson County*, 1 N. D. 88, 45 N.W. 33 (1890).

8. *Id.* at 101, 45 N.W. at 38.

information made out a prima-facie case the writ would issue in cases "publici-juris" and those affecting the sovereignty of the state, its franchises and prerogative, or the liberties of the people. The court was careful to point out that the granting of the writ remained discretionary.<sup>9</sup> Before original jurisdiction will attach, the sovereign power of the state must be *directly involved* (i. e. as opposed to collaterally).<sup>10</sup> The Supreme Court has recognized that a case may possibly arise where the court would allow a private relator to bring a suit without the permission of the Attorney General.<sup>11</sup> The constitutional provisions and subsequent court decisions have established the Supreme Court's power to grant writs of injunction, not only in aid of its appellate<sup>12</sup> and superintending jurisdiction,<sup>13</sup> but originally when the necessary prerequisites are present.<sup>14</sup>

### JURISDICTION OF THE DISTRICT COURTS

The North Dakota Supreme Court has also defined the extent of original jurisdiction conferred upon the district courts. The court, speaking of prerogative writs in general, said: "as a means of instituting private litigation the inferior courts of original jurisdiction have and should have, exclusive power to use them."<sup>15</sup> The constitutional provisions conferring jurisdiction in the district courts to grant injunctive relief have been further defined by statute.<sup>16</sup> The remedy of injunction has been designated by statute to be used in aid of other judicial remedies.<sup>17</sup>

### GENERAL APPLICATION OF INJUNCTION

The use of injunction in specific cases is beyond the scope of this note. The situations in which it is used are almost infinite. In North Dakota injunction cannot be used to establish title and ownership in real property<sup>18</sup> but it can be used to prevent a threatened disturbance of the peaceful use and enjoyment of real property.<sup>19</sup> While as a general rule if the legal remedy is adequate no injunc-

9. *Ibid.*

10. State *ex rel.* Moore v. Archibald, 5 N. D. 359, 66 N.W. 234 (1896) (The court was speaking of prerogative writs in general).

11. See State *ex rel.* Byrne v. Wilcox, 11 N. D. 329, 335, 91 N.W. 955, 959 (1902).

12. N. D. Const. art. 4, § 86; State v. Nelson County, 1 N. D. 88, 101, 45 N.W. 33, 37 (1890) (dictum).

13. N. D. Const. art. 4, § 86; State *ex rel.* Lemke v. District Court, 49 N. D. 27, 186 N.W. 381 (1921).

14. State v. Nelson County, 1 N. D. 88, 101, 45 N.W. 33, 38, (1890).

15. State *ex rel.* Moore v. Archibald, 5 N. D. 359, 373, 66 N.W. 234, 240, (1896).

16. N. D. Rev. Code c. 32-05; N. D. Rev. Code c. 32-06.

17. *E. g.*, N. D. Rev. Code § 28-2908 (1943) (mortgage foreclosure); N. D. Rev. Code § 32-1806 (1943) (cancellation of land contracts); N. D. Rev. Code § 35-2204 (1943) (foreclosure by advertisement); N. D. Rev. Code § 35-2302 (1943) (foreclosure on personal property).

18. Farmers Union Oil Co. v. Kilgore, 71 N. D. 199, 299 N.W. 318 (1941).

19. Gunsch v. Gunsch, 69 N.W.2d 739 (N. D. 1954).

tion will be granted, injunction may be obtained to prevent a continuous series of trespasses even though a legal remedy may be adequate for a single trespass.<sup>20</sup> Violation of a contract not to re-engage in business has been enjoined.<sup>21</sup> Injunction has been used to test the validity of a statute as well as the extent of authority which such statute may confer on an official charged with its execution.<sup>22</sup> In North Dakota it appears that the remedies of mandamus and injunction are complimentary with respect to their use in enforcing "ministerial" duties of public officers, mandamus being used to compel action and injunction to restrain unauthorized acts.<sup>23</sup> Injunction has been used to prevent an invalid attempt at annexing territory adjacent to a city<sup>24</sup> and where an official attempted to submit a proposed amendment not in the required form he was enjoined.<sup>25</sup> Generally an injunction cannot be had to restrain the commission of a crime, but where there is an actual interference or imminent threat of interference with some public or private legal right, which would result in irreparable damages, injunction may be used.<sup>26</sup> While mandatory injunctions are not favored, if preventive relief is not adequate, mandatory injunction will be used to restore the "status quo".<sup>27</sup>

#### NATURE AND REQUISITES OF THE REMEDY

In order to secure injunctive relief the plaintiff must establish some actual, threatened or irreparable injury to his rights.<sup>28</sup> Irreparable in this sense does not mean that the injury is beyond repair or compensation for damages, but rather that it must be of such constant and frequent occurrence, that the injured party cannot be adequately compensated for any damages, or that the resulting damages cannot be measured by any certain pecuniary standard but only by conjecture.<sup>29</sup> No injunctive relief will be granted where a plain, speedy, and adequate remedy at law is available.<sup>30</sup> The granting of a temporary or final injunction is a matter wholly within

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20. *Bartels Northern Oil Co. v. Jackman*, 29 N. D. 236, 150 N.W. 576 (1915).

21. *Hanson v. Wirtz*, 52 N. D. 604, 204 N.W. 672 (1925).

22. *Bartels Northern Oil Co. v. Jackman*, 29 N. D. 236, 150 N.W. 576 (1915).

23. See *State ex rel. Linde v. Hall*, 35 N. D. 34, 65, 159 N.W. 281, 294 (1916).

24. *Red River Valley Brick Co. v. Grand Forks*, 27 N. D. 8, 145 N.W. 725 (1914).

25. *State ex rel. Linde v. Hall*, 35 N. D. 34, 159 N.W. 281 (1916).

26. *E. g., Richmond v. Miller*, 70 N. D. 157, 292 N.W. 633 (1940).

27. *Viestenz v. Arthur Township*, 78 N. D. 1029, 54 N.W.2d 572 (1952).

28. *McIntyre v. State Board of Higher Education*, 71 N. D. 630, 3 N.W.2d 463 (1942).

29. *Bartels Northern Oil Co. v. Jackman*, 29 N. D. 236, 150 N.W. 576 (1915).

30. *Continental Hose Co. v. Mitchell*, 15 N. D. 144, 105 N.W. 1108 (1906).

the discretion of the trial court.<sup>31</sup> The remedy has been characterized as being summary, peculiar, and extraordinary.<sup>32</sup>

### TEMPORARY INJUNCTIONS

Temporary injunctive relief is provided for by statute in North Dakota.<sup>33</sup> "The injunction may be granted at the time of commencing the action, or at any time afterwards before judgment, upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff, or any other person, that sufficient grounds exist therefor."<sup>34</sup> When the conditions as set out in the statute have been established a temporary injunction will be granted, but only when it shall appear by the complaint that the plaintiff is entitled to the relief demanded.<sup>35</sup> The statute has vested in the trial court discretionary power to determine in the first instance whether relief should be granted and the exercise of such discretion will not be reversed or controlled by the Supreme Court except for error or abuse.<sup>36</sup>

The provisional remedy provided by statute, is granted to protect the plaintiff's rights<sup>37</sup> and can be issued only in a pending action or special proceeding.<sup>38</sup> Therefore, where the action is no longer pending, the judgment having become final, and no motion is made to vacate or satisfy the judgment, the defendant cannot get an injunction in the action in which the judgment was rendered.<sup>39</sup>

The defendant in a civil action is not entitled to the provisional remedies of injunction.<sup>40</sup> The statute gives the court the power to grant a *temporary injunction* ex parte and the question of whether a hearing shall be had prior to such granting is within the court's discretion.<sup>41</sup>

The statute also provides that *restraining orders* may issue ex parte or without a hearing, but restricts their use to occasions requiring their immediate issuance.<sup>42</sup> The purpose of a restraining

31. *Mevorah v. Goodman*, 65 N.W.2d 278 (N. D. 1954).

32. *Strobeck v. McWilliams*, 42 N. D. 30, 171 N.W. 865 (1919).

33. N. D. Rev. Code §§ 32-0601, 32-0602, 32-0603 (1943).

34. N. D. Rev. Code § 32-0603 (1943).

35. *Burton v. Walker*, 13 N. D. 149, 100 N.W. 257 (1904).

36. *Dickson v. Dows*, 11 N. D. 404, 92 N.W. 797 (1902) (dictum).

37. *Forman v. Healy*, 11 N. D. 563, 93 N.W. 866 (1903).

38. *Security State Bank of Crosby v. Peterson*, 59 N. D. 341, 229 N.W. 921 (1930).

39. *Ibid.*

40. *Forman v. Healy*, 11 N. D. 563, 93 N.W. 866 (1903) (The court stated that in order for the defendant to secure injunctive relief he must bring an independent suit; the theory being that the remedy was made available exclusively for the protection of the plaintiff's rights pending final determination of the case).

41. N. D. Rev. Code § 32-0606 (1943), *State v. Simpson*, 78 N. D. 360, 49 N.W.2d 777, (1953).

42. N. D. Rev. Code § 32-0607 (1943) provides: "A restraining order, or an order to show cause in the nature of a restraining order, will not be issued ex parte or without a

order is to keep matters in the "status quo" until such time as a determination can be made as to whether or not a temporary injunction should be issued.<sup>43</sup> The Supreme Court has held that a failure to grant a prior hearing is a mere irregularity and cannot be used as a defense in a criminal contempt proceeding against the defendant for violating the injunction.<sup>44</sup> When an injunction pendente lite has been granted without notice the defendant's remedy is a motion to vacate and until such motion is granted the injunction remains in full force.<sup>45</sup> The defendant may waive an impropriety in a temporary or restraining order by failing to move that it be quashed, by failure to insist on dissolution upon rehearing and by submission of the whole matter for a trial on the merits.<sup>46</sup> The defendant is protected by a statute<sup>47</sup> which requires that the plaintiff give a written undertaking to indemnify him.<sup>48</sup> This statute has also vested in the trial court discretionary power to assess damages payable to the plaintiff by the defendant. The trial court, in exercising this discretion, may properly leave the defendant to his remedy at law.<sup>49</sup> The defendant may attack the injunction with or without the answer,<sup>50</sup> and if the defendant's application to vacate is by affidavit the plaintiff may then oppose the same by affidavit or other proofs in addition to those upon which the injunction was granted.<sup>51</sup>

### FINAL INJUNCTION

A final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant: "(1) when pecuniary compensation would not afford adequate relief; (2) when it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief; (3) when restraint is necessary to prevent a multiplicity of judicial proceedings; or, (4) when

hearing, unless it shall be shown in the moving papers that there exists such an exigency or occasion as requires the immediate issuance of an order so that the rights of the parties may be preserved".

43. *Gunsch v. Gunsch*, 69 N.W.2d 741 (N. D. 1954).

44. *State v. Simpson*, 78 N. D. 360, 49 N.W.2d 777 (1953).

45. *Ibid.*

46. *Gunsch v. Gunsch*, 69 N.W.2d 741 (N. D. 1954).

47. N. D. Rev. Code § 32-0605 (1943).

48. *Murphy v. Swanson*, 50 N. D. 788, 198 N.W. 116 (1924).

49. *Wolfram v. Hall*, 79 N. D. 138, 54 N.W.2d 896 (1952).

50. N. D. Rev. Code § 32-0609 (1943) provides: "If an injunction is granted by a judge of a court without due notice, the defendant . . . may apply . . . to vacate or modify the same. The application may be made upon the complaint and the affidavits on which the injunction was granted or upon affidavits on the part of defendant, with or without the answer."

51. N. D. Rev. Code § 32-0610 (1943) provides: "If the application to vacate an injunction is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavit or other proofs in addition to those on which the injunction was granted."

the obligation arises from a trust.<sup>52</sup> After the plaintiff has established his legal right and the fact of its violation he is entitled to a perpetual injunction to prevent recurrence.<sup>53</sup> Where a final injunction is issued the rights of the parties must have first been determined and the injunction is then issued in aid of the decree. There are certain situations in which a final injunction cannot be granted.<sup>54</sup> A final injunction may be granted to prevent a breach of contract, only where the contract is one which will be specifically enforced.<sup>55</sup> An injunction may not be issued to prevent the execution of a public statute by officers of the law for the public benefit.<sup>56</sup> The Supreme Court has stated that this will not prevent an injunction, if the public officer is acting in excess or without authority.<sup>57</sup>

### APPEAL

The Supreme Court has appellate jurisdiction over injunctions issuing from the district courts.<sup>58</sup> An order continuing a temporary injunction after hearing is an appealable order.<sup>59</sup> When the Supreme Court reviews the granting of a temporary injunction and desires to reverse the granting below, it does not dismiss the appeal but remands the case to the trial court with instructions to dissolve the temporary injunction.<sup>60</sup> If, during the course of litigation below, the act complained of has been perfected no injunction can be obtained on appeal<sup>61</sup> or if the defendant has complied with the injunction and removed the obstruction complained of, the injunction is properly dissolved.<sup>62</sup> It is possible to obtain a reversal on appeal by showing an abuse of discretion.<sup>63</sup>

### CONCLUSION

Since relief by injunction is equitable in nature and based upon the discretion of the court, the plaintiff's ability to secure it will depend upon his ability to bring himself under some well recog-

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52. N. D. Rev. Code § 32-0504 (1943), *Strobeck v. McWilliams*, 42 N. D. 30, 171 N.W. 865 (1919) (The statute cited here was § 7213 of the Compiled Laws of 1913, which contained the first three provisions of the present statute).

53. *Gunsch v. Gunsch*, 69 N.W.2d 741 (N. D. 1954).

54. See N. D. Rev. Code § 32-0505 (1943).

55. *Mevorah v. Goodman*, 65 N.W.2d 278 (N. D. 1954).

56. N. D. Rev. Code § 32-0505 (4) (1943).

57. *Viestenz v. Arthur Township*, 78 N. D. 1029, 54 N.W.2d 572 (1952).

58. N. D. Rev. Code § 28-2702 (1943).

59. *Gillies v. Radke*, 78 N. D. 974, 54 N.W.2d 155 (1952).

60. *Brace v. Steele County*, 77 N. D. 276, 42 N.W.2d 672 (1950).

61. *Thompson v. Vold*, 38 N. D. 569, 165 N.W. 1076 (1917).

62. *Brace v. Steele County*, 77 N. D. 276, 42 N.W.2d 672 (1950).

63. Compare *Bissell v. Olson*, 26 N. D. 60, 143 N.W. 340 (1913) (The court said a mistake of law committed by the trial court was an abuse of discretion); with *Sand v. Peterson*, 30 N. D. 171, 152 N.W. 271 (1915) (The court held it was not an abuse of discretion by the trial court to deny a temporary injunction where the defendants verified answer positively denied the equity of the complaint).

nized grounds for equity jurisdiction.<sup>64</sup> The plaintiff must show that his injury is irreparable and that his remedy at law is inadequate. The terms irreparable and inadequate are not capable of a precise definition, therefore, each case must be decided on its individual merits. In North Dakota the statutory provisions must always be kept in mind.<sup>65</sup> A study of the cases indicates that a very strong case of prejudice to the plaintiff's rights must be presented before the court will grant a temporary injunction or restraining order *ex parte* or without a hearing. The effect of issuing a temporary injunction *ex parte* is to make the first notice of the action to the defendant the service of the writ on him. The court's reluctance to enjoin without notice is understandable. If a clear *prima facie* case is established, a temporary restraining order may be obtained until a hearing can be had on whether a temporary injunction may issue. Once the plaintiff's rights have been established, a final injunction may issue in aid of the decree.

RAYMOND HAGEN.

COURTS — EXTRAORDINARY WRITS — MANDAMUS IN NORTH DAKOTA. — Mandamus is a writ of ancient and obscure origin.<sup>1</sup> Its purpose was to prevent a failure of justice by compelling inferior courts to exercise their ministerial and judicial powers.<sup>2</sup> Originally it was a prerogative writ, issued by the king.<sup>3</sup> Later it became a prerogative of the legislature and finally it vested in the Court of King's Bench.<sup>4</sup> It has been defined as "a writ usually issuing out of the highest court of general jurisdiction in a state, in the name of the sovereignty, directed to any natural person, corporation or inferior court of judicature within its jurisdiction, requiring them to do some particular thing therein specified and which pertains to their office or duty."<sup>5</sup> The purpose of the writ as set forth by the North Dakota Revised Code of 1943 is "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled

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64. *Strobeck v. McWilliams*, 42 N. D. 30, 171 N.W. 865 (1919).

65. N. D. Rev. Code c. 32-06 (-943); N. D. Rev. Code c. 32-05 (1943).

1. See High, *Extraordinary Legal Remedies* 5 (1896).

2. *Ibid.*

3. *Commonwealth ex rel. Thomas v. Commissioners of Allegheny*, 32 Pa. (8 Casey) 218, 223 (1858) (dictum).

4. *Ibid.*

5. Bouvier, *Law Dictionary* (14th ed. 1873).