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Courts - Extraordinary Writs - Mandamus in North Dakota

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nized grounds for equity jurisdiction.⁶⁴ 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.⁶⁵ 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.¹ Its purpose was to prevent a failure of justice by compelling inferior courts to exercise their ministerial and judicial powers.² Originally it was a prerogative writ, issued by the king.³ Later it became a prerogative of the legislature and finally it vested in the Court of King's Bench.⁴ 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."⁵ 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

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).

and from which he is precluded unlawfully by such inferior tribunal, corporation, board or person."⁶

While mandamus is generally considered to be an ordinary civil remedy,⁷ in North Dakota the statute provides that the writ of mandamus shall be a special proceeding.⁸ An ordinary proceeding is an action in a court of justice whereby one party prosecutes another for the protection or the enforcement of a right, redress or prevention of a wrong, or for the punishment of a public offense; every other remedy is a special proceeding.⁹ It is triable to the court, but factual issues may be tried to a jury.¹⁰ Even in North Dakota mandamus has taken on many aspects of an ordinary civil action or remedy.¹¹

Some of the earlier North Dakota cases hold that the writ of mandamus is a prerogative writ.¹² However, the North Dakota Revised Code of 1943 provides "the writ *must* be issued in all cases when there is not a plain, speedy and adequate remedy in the ordinary course of law."¹³ This has been construed to mean that the court has no alternative but to issue the writ where the necessary prerequisites are present,¹⁴ and would mean to indicate that mandamus is a writ of right.¹⁵ From a practical viewpoint the issuance of the writ seems to be one of sound discretion,¹⁶ and if the courts believe that the necessary prerequisites are present, they will issue the writ.¹⁷ The discretion is not absolute, but is to be exercised in conformity with the rules of law and the court's experience.¹⁸ Of course the Supreme Court will first determine if the case is one calling for the exercise of its original jurisdiction.¹⁹

6. § 32-3401.

7. 2 Spelling, Injunctions and Other Extraordinary Legal Remedies, 1167 (1901).

8. N. D. Rev. Code § 32-3201 (1943).

9. State *ex rel.* Bickford v. Fabrick, 16 N. D. 94, 112 N.W. 74, 75 (1907) (dictum). Black, Law Dictionary (4th ed. 1951) (A special proceeding is a generic term for all civil remedies which are not ordinary actions).

10. State *ex rel.* Chamberlain v. Johnstone, 6 N. D. 727, 262 N.W. 193, 194 (1907) (dictum).

11. Schmitz v. Olsness, 59 N. D. 673, 231 N.W. 722, 723 (1930) (dictum). State *ex rel.* Dakota Hail Association of Plankinton v. Carey, 2 N. D. 42, 49 N.W. 164, 165 (1891) (dictum).

12. See State *ex rel.* Davies v. Willis, 19 N. D. 209, 124 N.W. 706 (1910); State *ex rel.* Shaw v. Thompson, 21 N. D. 426, 131 N.W. 231 (1911).

13. § 32-3402.

14. See Wallace v. North Dakota Workmen's Compensation Bureau, 69 N. D. 167, 284 N.W. 420 (1939).

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

16. See State *ex rel.* Johnson v. Ely, 24 N. D. 619, 137 N.W. 834 (1912).

17. *Ibid.*

18. 2 Spelling, Injunctions and Other Extraordinary Remedies, 1178 (1901).

19. State *ex rel.* Linde v. Robinson, 35 N. D. 525, 160 N.W. (1916) (court held it could exercise jurisdiction when a controversy between a majority of the present members of the Supreme Court and other successful candidates at last election who claim a right to occupy such offices and exercise the duties thereof); State v. Nelson County, 1 N. D. 88, 45 N.W. 33 (1890).

JURISDICTION OF THE COURTS TO ISSUE WRITS OF MANDAMUS

The North Dakota Constitution authorizes the Supreme Court to issue writs of mandamus when it is necessary in the exercise of their jurisdiction.²⁰ Since they exercise three types of jurisdiction, appellate, supervisory and original, mandamus may be used to implement any of the three.²¹ Before the Supreme Court will exercise its original jurisdiction, however, the case must be *publici juris* affecting the sovereignty of the state, its franchise, prerogative, or the liberties of the people.²² This rule applies only to The Supreme Court's original jurisdiction, and does not pertain to the writs which may be issued by that court in the exercise of its power of superintending control over inferior courts or in the exercise of its appellate jurisdiction.²³ In *State ex rel. Heffron v. District Court for Stark County*,²⁴ petitioner requested the Supreme Court to mandamus the District Court to try a contempt proceeding where the lower court had previously held that it did not have jurisdiction. The Supreme Court held that under the superintending control granted to it by the North Dakota Constitution, it may review a decision of the inferior court and consider whether it was the duty of such inferior court to hear the controversy. The power of superintending control, however, was not meant to supplant the review by appeal, but is only to be exercised in cases where other relief is inadequate or incomplete.²⁵

The District Courts of North Dakota are also empowered to issue writs of mandamus.²⁶ In matters not *publici juris* or affecting the sovereignty of the state and its franchises, *i. e.* where the Supreme Court has original jurisdiction, it has been felt that it was not the purpose of the Constitution to give the district court and the

20. N. D. Const., art. IV, § 87; N. D. Rev. Code § 27-0204 (1943 provides: "The Supreme Court may exercise appellate jurisdiction only, except when otherwise specially provided by law or by the Constitution. Such court in the exercise of its original jurisdiction may issue writs of . . . mandamus . . . (and) in the exercise of its appellate jurisdiction, and superintending control over inferior courts, it may issue such original and remedial writs as are necessary to the proper exercise of its jurisdiction."

21. *State ex rel. Moore v. Archibald*, 5 N. D. 359, 66 N.W. 234, 235 (1896) (dictum). For a discussion on the jurisdiction of the Supreme Court, see Burke, *The Prerogative Jurisdiction of the Supreme Court*, 32 N. Dak. L. Rev. 199 (1956).

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

23. *State ex rel. Jacobson v. District Court for Ward County*, 68 N. D. 211, 277 N.W. 843 (1938).

24. 26 N. D. 32, 143 N.W. 143 (1913).

25. See *State ex rel. Red River Brick Corporation v. District Court of Grand Forks County*, 24 N. D. 31, 138 N.W. 988 (1912) ("Superintending power is not given for purposes of review as by appeal. It is given to insure harmonious working for our judicial systems, to meet emergencies, and for cases where other relief is inadequate or incomplete").

26. N. D. Const., art. IV, § 103; N. D. Rev. Code § 27-0506 (1943).

Supreme Court concurrent jurisdiction.²⁷ Thus, except where mandamus is sought in the exercise of the appellate or supervisory powers, a suitor must apply to a district court to enforce strictly private rights.²⁸

PROPER PARTIES IN PETITION FOR WRIT OF MANDAMUS

Where the state itself is directly interested in the writ, the Attorney General is the proper party to apply for it or in some manner signify his assent to the petition.²⁹ Should the Attorney General refuse to bring the petition or unreasonably delay in doing so, the court will still exercise its original jurisdiction on petition of a private party.³⁰ The Attorney General has no duty to represent the state in court in any case where the name of the state is inserted only as a formality, and is not in fact an interested party.³¹ If the controversy concerns a large class of citizens in common, but not the state as such, the writ may be properly made by a citizen of the class affected.³² Mandamus to enforce a purely private right should be brought by the party beneficially interested, and not in the name of the state on relation of such interested party.³³ If the right is sought by an individual relator alone, he must show that he is in some way peculiarly affected.³⁴

NECESSARY PREREQUISITES FOR ISSUANCE OF WRIT

There are two prerequisites for the issuance of a writ of mandamus. First, the relator must show that he has a clear legal right to the performance of a particular duty, and second, that no other plain, speedy, and adequate remedy is available at law.³⁵ Consequently where the relators sought to enforce a payment of old age

27. See *Duluth Elevator Co. v. White*, 11 N. D. 536, 90 N.W. 13 (1902); *State ex rel. McArthur v. McLean*, 35 N. D. 204, 159 N.W. 847 (1916) ("Test of jurisdiction of the Supreme Court where issuance of an original writ is prayed for . . . is whether the individual relator is in fact a necessary party or a mere incident and whether after all it is a public injury which is sought to be remedied or prevented, and involves the franchise and prerogatives of the state").

28. See *Duluth Elevator Co. v. White*, 11 N. D. 536, 90 N.W. 13 (1902); *State v. Nelson County*, 1 N. D. 85, 45 N.W. 33 (1890) ("Purpose was to devolve upon district courts which are readily accessible and at all times open for public business, the duty of assuming original cognizance of all ordinary cases which are remediable by means of the writs, and confer upon the Supreme Court in exercise of a discretion vested in it the duty of taking original cognizance only in a limited class of cases . . .").

29. *State ex rel. Dakota Hail Assoc. of Plankinton v. Carey*, 2 N. D. 42, 49 N.W. 164, 165 (1891) (dictum) (Where the writ of mandamus is sought to enforce a duty due to the state as such the proceeding is to be entitled "in the name of State *ex rel.* _____").

30. See *State ex rel. McArthur v. McLean*, 35 N. D. 204, 159 N.W. 847 (1916).

31. *State ex rel. Dakota Hail Assoc. of Plankinton v. Carey*, 2 N. D. 42, 49 N.W. 164, 166 (1891) (dictum).

32. See *State ex rel. Braatlien v. Drakeley*, 26 N. D. 96, 143 N.W. 770 (1913).

33. N. D. Rev. Code § 32-3202 (1943).

34. *State ex rel. Dakota Hail Assoc. of Plankinton v. Carey*, 2 N. D. 42, 49 N.W. 164, 166 (1891) (dictum) (Petitioner must show that he will suffer some special damage as compared to the general class of people if the writ does not issue).

35. *Strauss v. Costello*, 29 N. D. 215, 150 N.W. 874, 875 (1915) (dictum).

assistance but failed to show the amount of their income from their homestead so that the amount of assistance due could be determined, the court refused mandatory relief on the grounds that the plaintiffs had not shown their clear legal right to the performance they demanded.³⁶ An adequate remedy has been construed to mean a civil remedy and not a criminal remedy.³⁷ Any incidental delay occasioned by an appeal would not justify issuance of the writ because of the lack of a speedy remedy.³⁸

APPLICATION OF WRIT OF MANDAMUS TO PUBLIC OFFICERS AND INFERIOR COURTS

Mandamus is an appropriate remedy to enforce performance by public officers of plain, legal, and imperative duties imposed by their office.³⁹ A public office has been defined as "a public position to which a portion of the sovereignty of the country, either legislative, or executive, or judicial, attaches for the time being and which is exercised for the benefit of the public."⁴⁰ Where the plaintiff paid special assessment taxes to a county treasurer for a drainage fund, the court held that upon collection of taxes mandamus will lie to compel a proper apportionment or division thereof among the municipalities and officers lawfully entitled thereto.⁴¹ The writ has been used to compel an insurance commissioner to issue a certificate of operation to an insurance company,⁴² to county commissioners to provide funds for office space,⁴³ to a state auditor to credit the account of the Supreme Court with appropriations authorized by statute for additional members of the court and to issue warrants for compensation,⁴⁴ to tax boards and officers to issue a proper tax deed,⁴⁵ to the Secretary of State to compel certification of legislative resolutions,⁴⁶ and to county auditors to calculate tax levies and extend them on tax lists against realty subject to taxation.⁴⁷

36. *State v. Borge*, 59 N. D. 1, 283 N.W. 521 (1939).

37. See *State ex rel. Braathien v. Drakeley*, 26 N. D. 96, 143 N.W. 770 (1913).

38. See *Strauss v. Costello*, 29 N. D. 215, 150 N.W. 874 (1915) ("If any incidental delay occasioned by an appeal would justify issuance of the writ of mandamus, then the procedure by means of that writ would be warranted in almost any case which might arise").

39. See *State ex rel. Langer v. Kositzky*, 38 N. D. 616, 166 N.W. 534 (1918).

40. *State ex rel. McArthur v. McLean*, 35 N. D. 203, 159 N.W. 847, 850 (1916) (dictum); In *State ex rel. Kopriva v. Larson*, 48 N. D. 1151, 189 N.W. 629 (1922) (The Supreme Court held that a bank in which was deposited the funds of a county was a legal depository and as such was in a position quasi official in nature as concerned the county and mandamus would issue to compel the paying of the money to a new treasurer.).

41. See *State ex rel. Viking v. Mikkelson*, 24 N. D. 175, 139 N.W. 525 (1912).

42. See *Halcomb v. Hamm*, 70 N. D. 153, 42 N.W.2d 70 (1950).

43. See *Cleary v. Eddy County*, 2 N. D. 400, 51 N.W. 586 (1892).

44. See *State ex rel. Langer v. Kositzky*, 38 N. D. 616, 166 N.W. 534 (1918).

45. See *State ex rel. Ebbert v. Fouts*, 26 N.D. 599, 145 N.W. 97 (1941).

46. See *State ex rel. Wineman v. Dahl*, 6 N. D. 81, 68 N.W. 418 (1896).

47. See *State ex rel. Strutz v. Huber*, 69 N. D. 791, 291 N.W. 126 (1940).

Mandamus has also issued to compel officers to hold their office at the place designated by law.⁴⁸ It is the proper remedy to compel the surrender to a successor in office of property, records and insignia of that office,⁴⁹ but if title to the office is in dispute quo warranto would seem to be the appropriate proceeding.⁵⁰ However, if quo warranto would not be a speedy and adequate remedy, and a prima facie right to the office is shown by the petitioner, mandamus will lie.⁵¹

The Supreme Court by mandamus may compel an inferior court to exercise jurisdiction where it has been refused. The refusal if erroneously made constitutes a refusal to perform a legal duty which mandamus will enforce.⁵² There is an important distinction between the writ as directed to an inferior court and that directed to an officer or public body to perform a ministerial function. In the former, the Supreme Court merely orders the inferior court to exercise a discretion or to proceed within its acknowledged powers, but it cannot be compelled to decide in a particular manner.⁵³ In the case of public officers, municipal bodies etc., the mandate is to perform some special act.⁵⁴ Should the act of the public official be quasi-judicial in character, he may be compelled to act, but cannot be ordered to act in a particular fashion.⁵⁵

Mandamus is the remedy for official inaction and will not lie to correct some wrong already perpetrated, *i. e.*, mandamus is the remedy for nonfeasance rather than misfeasance.⁵⁶ Even though all the prerequisites are present the writ will be denied if performance of the act would be nugatory and would render no beneficial result.⁵⁷ It is not to be used as a substitute for appeal,⁵⁸ nor is it to

48. See *State ex rel. Little v. Langlie*, 5 N. D. 594, 67 N.W. 958 (1896) (A taxpayer and resident of the county may apply for writ of mandamus to compel county officers to hold their offices at the legal county seat, and thus it is a proper remedy to determine whether the county seat has been legally changed).

49. See *State ex rel. Kopriva v. Larson*, 48 N. D. 144, 189 N.W. 626 (1922).

50. See *State ex rel. Johnson v. Meyers*, 74 N. D. 678, 19 N.W.2d 745 (1945). For a discussion of Quo Warranto in North Dakota, see 33 N. Dak. L. Rev. 98 (1957).

51. See *State ex rel. Langer v. McDonald*, 41 N. D. 392, 170 N.W. 874 (1919); *State ex rel. Butler v. Callahan*, 4 N. D. 481, 61 N.W. 1025 (1895); But see *State ex rel. Wehe v. North Dakota Workman's Compensation Bureau*, 46 N. D. 156, 180 N.W. 51 (1920) (Case appears to be contra, but perhaps can be reconciled in that all the cases seem to agree that if the defendant had color of title, mandamus would not lie.).

52. See *State ex rel. Heffron v. District Court for Stark County*, 26 N. D. 32, 143 N.W. 143 (1913).

53. See *Strauss v. Costello*, 29 N. D. 215, 150 N.W. 874 (1915).

54. See *Halcomb v. Hamm*, 70 N. D. 153, 42 N.W.2d 70 (1950); *State ex rel. Ebbert v. Fouts*, 26 N. D. 599, 145 N.W. 97 (1914); *State ex rel. Wineman v. Dahl*, 6 N. D. 81, 68 N.W. 418 (1896).

55. See *Mogaard v. City of Garrison*, 47 N. D. 473, 182 N.W. 760 (1921); *Fuller v. Board of University and School Lands*, 21 N. D. 212, 129 N.W. 1029 (1911).

56. *State ex rel. Conrad v. Langer*, 68 N. D. 184, 277 N.W. 504 (1938).

57. *State ex rel. Davies v. Willis*, 19 N. D. 209, 124 N.W. 706, 711 (1910) (dictum); *State ex rel. Johnson v. Ely*, 23 N. D. 619, 137 N.W. 834, 837 (1912) (dictum).

58. *Kelsch v. Dickson*, 71 N. D. 430, 1 N.W.2d 347 (1941).

be employed in place of other legal remedies where adequate legal action is available.⁵⁹ Mere contract rights cannot be determined by mandamus.⁶⁰ It would seem that mandamus will not issue when the object is to test the validity of a statute,⁶¹ but it has been held that the court may decide a question of constitutionality if it is raised by the respondent in defense to a petition for a writ.⁶²

PEREMPTORY AND ALTERNATIVE WRITS

The statutes of North Dakota provide that the writ may be either alternative or peremptory.⁶³ Unless the adverse party has notice of the proceedings, only the alternative writ will be issued first.⁶⁴ The peremptory writ, when issued following a hearing on the alternative writ, should conform in substance to the alternative writ.⁶⁵ More modern concepts have, however, allowed the final writ to be in any form consistent with the case made by the complaint and presented and embraced within the issues.⁶⁶ The District Courts also may modify the writ if the reason for so doing goes to the basis of the claim.⁶⁷ The peremptory writ does not regularly issue in a mandamus proceeding until the court by an order of judgment awards such a writ.⁶⁸ It will be awarded only if there is no material fact in controversy.⁶⁹ Therefore an order in a special proceeding to be appealable must be a final order or affect a substantial right.⁷⁰ Under the North Dakota Code, if the applicant receives the judg-

59. See *Oliver v. Wilson*, 8 N. D. 593, 80 N.W. 757 (1899) (Writ of mandamus was brought against the sheriff to have personal property exemption set aside. Sheriff on writ of attachment had seized property and refused to turn over the exemption to the debtor. Court refused the writ, holding that plaintiff had an action for conversion and therefore a legal remedy was available).

60. *Mootz v. Belyea*, 60 N. D. 743, 236 N.W. 358 (1931) (Court will not award a writ compelling a school board to comply with the terms of a contract of employment with a teacher, as the teacher has an adequate remedy at law for breach of contract).

61. See *Strauss v. Costello*, 29 N. D. 215, 150 N.W. 874 (1915).

62. *Department of State Highways v. Baker*, 69 N. D. 702, 290 N.W. 257 (1940) (Proceeding brought to compel auditor to disburse public funds under a statute. Attorney General advised auditor the statute was unconstitutional. The court held the question was of great public importance, affecting many people and the auditor could raise the question of constitutionality in a mandamus proceedings).

63. N. D. Rev. Code § 32-3403 (1943).

64. N. D. Rev. Code § 32-3404 (1943).

65. *Gunn v. Lauder*, 10 N. D. 389, 87 N.W. 999, 1005 (1901) (dictum); N. D. Rev. Code § 32-3403 (1943) provides: "The alternative writ must state generally the allegation against the party to whom it is directed and must command such party immediately upon the receipt of the writ, or at some other specified time, to do the act required to be performed or to show cause before the court at a specified time and place why he has not done such act. The peremptory writ must be in a similar form except that the words requiring the party to show cause why he has not obeyed the command must be omitted and a return day inserted."

66. *Ibid.*

67. See *Schmitz v. Olsness*, 59 N. D. 673, 231 N.W. 722 (1930).

68. See *Travelers Insurance Company v. Mayer*, 2 N. D. 234, 50 N.W. 706 (1891).

69. *State ex rel. Diebold Lock Co. v. Gretchell*, 3 N. D. 245, 55 N.W. 585, 586 (1893) (dictum).

70. See *Warren v. Slaybough*, 58 N. D. 910, 228 N.W. 416 (1929).

ment he may recover damages in addition to a preemptory writ.⁷¹ Should the defendant refuse to obey a peremptory of mandamus, the North Dakota Revised Code of 1943 provides for its enforcement by a fine, and imprisonment if necessary.⁷²

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71. N. D. Rev. Code § 32-3411 (1943).

72. § 32-3413.