Montana Law Review

Volume 21
Issue 1 *Fall 1959*

Article 15

July 1959

Writ of Prohibition—Jurisdiction of District Courts—Power to Restrain Ministerial Acts

Melvyn M. Ryan

It is hoped that when this case is noted in the future, it will be recognized that the court was anxious to reach what it considered a desirable result.[18] Such recognition will avoid undue weight being placed on the rules of law and construction adhered to in this decision.

DOUGLAS C. ALLEN

WRIT OF PROHIBITION—JURISDICTION OF DISTRICT COURTS—POWER TO RESTRAIN MINISTERIAL ACTS—The Montana Livestock Sanitary Board issued an order declaring Rosebud County a "disease control area" and ordered the respondent to present his cattle for brucellosis testing. Respondent obtained an alternative writ of prohibition from the district court. The Board moved to quash the writ on the ground that prohibition was not the proper remedy to test its orders which were ministerial in nature and were within its statutory jurisdiction. The motion was denied and, after hearing, a peremptory writ issued. On appeal to the Montana Supreme Court, *held,* judgment reversed and motion to quash granted. The statute permitting a district court to issue the writ of prohibition is unconstitutional insofar as it applies to ministerial acts. *State v. Montana Livestock Sanitary Board,* 339 P.2d 487 (Mont. 1959).

The first Montana statute defining prohibition was enacted in 1877 but did not mention ministerial acts.[1] The Montana constitution was adopted in 1889. Subsequently the statute was amended to its present form. It provides:[2]

> The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person, whether exercising functions judicial or ministerial, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person.

That the Supreme Court of Montana is powerless to issue the writ of prohibition to restrain ministerial acts has been settled. In *State ex rel. Scharnikow v. Hogan*[3] the petitioner sought a writ of prohibition to restrain the Secretary of State from certifying a Democratic nominee for district judge. The court held that it did not have the power, notwithstanding the statute, to restrain ministerial functions. Rather the court felt bound by the constitution to the scope of the writ as it existed at common-law. For authority the court relied upon two California decisions, *Maurer v. Mitchell*[4]

[18]As before suggested it is questionable whether the court actually did reach a desireable result; for if the word "herein" in the will is a word of limitation the court has defeated the trustor's intention by this decision.

[1]Laws of the Territory of Montana, 1877, § 561, at 184.

[2]REVISED CODES OF MONTANA, 1947, § 93-9201.

[3]24 Mont. 379, 62 Pac. 493 (1900).

[4]53 Cal. 289 (1878).

and *Camron v. Kenfield.*[5] In reference to a California statute identical to ours the court in the *Maurer* case stated:[6]

> We are all of opinion that the writ mentioned in the constitution is the writ of prohibition as known to the common-law. Nor does the language of section 1102 of the Code of Civil Procedure require of us to hold that the office of the writ has been extended, or that it should now issue in cases in which it could not have been resorted to prior to the statute.

It was expressly declared in the *Hogan* case, however, that nothing in the court's opinion is to be understood as denying to district courts the jurisdiction conferred by the statute. A similar reservation appeared in the *Camron* case.[7]

The question before the court in the instant case was whether *district courts* may be granted jurisdiction to restrain ministerial functions by prohibition. Again, the court adopted the reasoning of an early California decision, *Farmers' Co-operative Union v. Thresher,*[8] which said:[9]

> This case is within the principle decided in *Camron v. Kenfield,* 57 Cal. 550, in which it was held that the Legislature could not enlarge or extend the office of the writ of prohibition so as to include ministerial functions. We perceive no distinction, in this regard, in the provisions of the Constitution relating to the Supreme Court and the Superior Courts.

This reasoning might well be correct if the conclusion of the court in the instant case is correct where with reference to the powers of the two court systems it states "the jurisdiction of each of them is likewise provided by constitutional grant."[10] It seems, however, that there may be basis for saying that the Montana constitution treats the supreme court and the district courts differently. The power of the supreme court to issue extraordinary writs such as prohibition is set forth specifically as an exception to the provision that the supreme court shall have appellate jurisdiction only, and no such qualification appears in the constitution respecting the like power granted to the district courts.[11]

[5] 57 Cal. 550 (1881).
[6] *Supra* note 4 at 291-292.
[7] *Supra* note 5 at 554.
[8] 62 Cal. 407 (1882).
[9] *Id.* at 410.
[10] Instant case at 491. While the state constitutions are instruments of limitation, rather than grant, with reference to the power of the legislature, it is unclear whether the same is true of the judiciary. See Forsell, *What is the Nature of the Montana Constitution?*, 15 MONT. L. REV. 93, 100 (1954), where the author suggests that the nature of the grants of power to the different Montana court systems should be separately analyzed.
[11] The supreme court provisions are phrased as of grant. Art. VIII, § 2, provides: "The supreme court, except as otherwise provided in this constiution, shall have appellate jurisdiction only. . . ." Art. VIII, § 3, continues: "Said court shall have power in its discretion to issue and to hear and determine writs of . . . prohibition . . . and such other original and remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction." Compare this with the district courts provision, art. VIII, § 11, seemingly recognizing their general power: "The district courts shall have original jurisdiction in all cases at law and in equity. . . . Said courts and the judges thereof shall have power also to issue, hear and determine writs of . . . prohibition . . . and other original and remedial writs. . . ." The

At any rate the Montana court, relying on an 1882 California case, has failed to point out the more recent trend in that state liberalizing the use of extraordinary writs:[12]

> In *Stoehr v. Superior Court,* [cite], mortgaged chattels were attached, and the mortgagee, pursuant to statute, demanded that the attaching creditor pay the mortgage or release the property. The attaching creditor failed to do so, but the lower court made an erroneous order directing the sheriff *not* to release it and the sheriff accordingly refused to release. Thus the petitioner was confronted with a completed judicial act which he claimed was in excess of jurisdiction. Mandamus would hardly lie against the sheriff who was acting pursuant to a court order as yet unattacked; mandamus would not lie against the trial court to compel the release because it was not holding the property (the sheriff was); and, certiorari would not lie to annul the courts order because it was reviewable on appeal. Somehow the property wrongfully held had to be released, and relief in the nature of mandamus—to compel the sheriff, a ministerial officer, to release it, had to be given. Accordingly *prohibition* issued to "restrain respondent [superior court] from *refusing to release*" the property; i.e., the objective of mandamus to the ministerial officer was obtained by prohibition against the court, with the effect of certiorari (annulment of the invalid order).

This unique type of relief was aptly termed "mandamatory prohibition" by the California commentator. By similar holdings, "certiorarified prohibition,"[13] "certiorarified mandamus,"[14] "prohibitory mandamus,"[15] and others apparently have been created.[16] (Perhaps the petitioner in the instant case should have sought *mandamus* to *compel* the board *not* to perform its ministerial duty!)

Any attempt to reconcile the present California position with the *Maurer, Camron,* and *Farmers'* holdings proves difficult, to say the least. If the constitution limits the character and function of the extraordinary writs so as to preclude their enlargment by statute, surely the courts cannot justify the technique of escaping the limitations of one writ by enlarging the scope or function of another. Why, then, are the California courts permitting such obviously artificial practices? The question has been answered thus:[17]

---

difference in language seems significant. If the constitution intended to recognize the judicial power in the courts of general jurisdiction and simply describes or limits its exercise, there might be justification for permitting the legislature to extend the writs to cover new subject matter. If the constitution intended to grant the district courts only such authority as is specially set out, the legislature could not extend that authority. A definitive treatment of this complicated and intriguing constitutional question is beyond the scope of this recent decision.

[12] 3 WITKIN, CALIFORNIA PROCEDURE 2573 (1954).

[13] See Beard v. Superior Court, 39 Cal. App. 2d 284, 102 P.2d 1087 (1940).

[14] See Andrews v. Superior Court, 29 Cal. 2d 208, 174 P.2d 313 (1946).

[15] See Simmons v. Superior Court, 96 Cal. App. 2d 119, 214 P.2d 844 (1950).

[16] See generally 3 WITKIN, CALIFORNIA PROCEDURE 2571 (1954), for a discussion of these various mutations and cases where they have occurred.

[17] 29 CAL. S.B.J. 467, 469 (1954).

> They are not doing it for fun, nor for judicial perversity; nor are they deluded by professional incompetents representing petitioners. They have a very good reason: the archiac system of appellate review is bursting at the seams; the irresistible demand for a review denied by normal procedure has been met by this ingenious expansion of these historical forms, in the best traditions of the clerks of chancery.

This reference to the "archiac system of appellate review" is certainly justified. The present multitude of administrative boards, bureaus, and agencies had no counterpart in the government of the mid-1800's when the California and Montana constitutions were framed. Nevertheless, there has not been a serious attempt to overhaul the system of review since that time.

The Washington constitutional provisions regarding the jurisdiction of the supreme and superior courts are substantially the same as corresponding sections of the Montana and California constitutions. The Washington decisions in this area, however, are distinctly dissimilar.

In the instant case the Montana Supreme Court relies on the Washington case of *State ex rel. White v. Board of State Land Commissioners*[18] but it is not in point because it held only that the Washington Supreme Court could not issue the writ against a ministerial act. *Windsor v. Bridges,*[19] decided the same year, expressly disapproved the rationale of the *Farmers'* case as applied to the Washington superior courts. Although the *Windsor* case denied the supreme court power to issue the ministerial writ, with respect to the superior courts it quoted with approval the following:[20]

> "[T]he legislature, in pursuance of its authority given by the organic act to legislate upon all 'rightful subjects of legislation' has seen fit, and has the undoubted right, as occasions arise, to create new offenses, new subjects for judicial investigation and new ways and means to enforce the authority of the courts and officers and we can see no reason to conclude that the giving of additional power to the writ of prohibition was not a 'rightful subject of legislation.'" People v. House, 4 Utah 369, 10 Pac. 838 [1886].

In Washington today there are two recognized writs of prohibition: the constitutional or common-law writ issued by the supreme court, and the statutory writ issued only by the superior courts, which includes ministerial acts. The statutory writ has been quite useful in testing the validity of legislation and the legality of governmental action, since the only requirements for its issuance are inadequacy of appeal and contemplated action in excess of jurisdiction.[21]

By reason of the *Windsor* case, the Washington legislature is permitted to revise the extraordinary writs issued by the superior courts to keep pace with the changing requirements of judicial review. California, on the other

[18]23 Wash. 700, 63 Pac. 532 (1901).

[19]24 Wash. 540, 64 Pac. 780 (1901).

[20]*Id.*, 64 Pac. at 783. Dictum approved in People v. Hinkle, 130 Wash. 419, 227 Pac. 861, 864 (1924).

[21]Larson, *Administrative Determinations and the Extraordinary Writs in the State of Washington*, 20 WASH. L. REV. 81, 89 (1945).

hand, has said that, barring constitutional amendment, the writs are limited in scope to the common-law writs existing when the constitution was adopted. In actual practice, however, the courts there have devised ingenious mutations of the writs to grant the relief needed. This approach is certain to result in great confusion if it has not already done so.

The Montana court in adhering to the California approach apparently has closed the door on the possibility of modifying the writs by legislative action. It is reasonable to assume that the problem of adequate appellate review of actions of administrative tribunals will become more acute as this state continues to increase in population and begins to realize its economic and industrial potential. No doubt the best solution to the problem would be appropriate constitutional amendment, if required, coupled with a revision of the entire system of review, or adoption of some such statute as the Model Administrative Procedure Act.[22] But if such measures are not forthcoming it is entirely possible that Montana will follow the California lead further, as it has often done in the past. Indeed, it is not at all unlikely that one day we, in Montana, might be seeking a writ of "mandamatory prohibition" or "certiorarified mandamus."

MELVYN M. RYAN

[22]The model act was presented in the last legislature but failed of passage. See 1959 Montana Legislative Assembly, S. B. 179.