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Civil Procedure—Original Jurisdiction of the Montana Supreme Court—Declaratory Judgments

Charles C. Lovell

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RECENT DECISIONS

CIVIL PROCEDURE—ORIGINAL JURISDICTION OF THE MONTANA SUPREME COURT—DECLARATORY JUDGMENTS—On April 26, 1956, pursuant to chapter 278 Laws of 1955, the Montana Board of Examiners passed a resolution providing for issuance and sale of bonds to be drawn on the Capitol Building Land Grant Fund, for the purpose of renovating the state capitol building and purchasing and installing a roll call voting machine in the House of Representatives. A test case was sought by prospective purchasers, and on June 4, 1956, an action was commenced by a taxpayer against the Board praying the bond issue be enjoined and declared invalid. On appeal to the Montana Supreme Court, after a finding in the trial court for defendant Board, the question presented was whether the authority to "erect" as conferred by the Enabling Act[1] was strictly limited to erecting new structures or whether authority thereunder might not also extend to renovation, repair, and installation of fixtures. On December 7, 1956, in *Bryant v. Board of Examiners,*[2] the court held the Enabling Act was to be strictly construed, and the judgment was reversed with directions to award plaintiff the relief demanded. Justice Davis wrote the opinion of the court, Justices Bottomly and Adair concurred, Justice Anderson did not record his decision, and Justice Angstman dissented.

Thereafter, two vacancies having occurred on the court,[3] James T. Harrison was appointed chief justice and Wesley Castles associate justice, each assuming his respective office on January 7, 1957. On February 2, 1957, the Board of Examiners passed a resolution that it issue bonds in the amount of $25,000 for the purpose of satisfying indebtedness already incurred, to be paid from the Capitol Building Land Grant Fund pursuant to chapter 278, Laws of 1955. On February 5, 1957, an original petition was filed in the Supreme Court by the taxpayer plaintiff against the Board of Examiners praying an injunction and declaratory judgment. The complaint alleged two causes of action substantially to the effect that, even though the Supreme Court of Montana in *Bryant v. Board of Examiners* declared chapter 278, Laws of 1955 invalid, the defendant Board passed another resolution thereunder authorizing the issuance of more bonds; that the board had incurred other expenditures, and that it believed the decision in the *Bryant* case should be reconsidered. Original jurisdiction was based on the proposition that speedy determination of the questions was necessary so that legislature action by the assembly then in session could be sought before adjournment, if necessary. In the Montana Supreme Court, *held,*

[1]Sections 12, 17.

[2]305 P.2d 340 (Mont. 1956). Respondents moved for a rehearing which was subsequently denied, caused the record to be certified to the Supreme Court of the United States, and secured the drafting of a bill amending the Enabling Act to include repair and maintenance to be submitted to the Congress of the United States and the Montana legislature. The amending bill in Congress subsequently passed the House February 18, 1957, the Senate February 21, and was signed by the President on February 26. The act in the Montana legislature passed the House March 1, 1957, the Senate on March 5, and was signed into law by the Governor on March 9, 1957.

[3]Chief Justice Adair resigned from that position and was elected to the office of associate justice on the expiration of Justice Davis' term. Justice Anderson resigned his office upon being elected attorney general.

petition dismissed, but the authority to erect under the Enabling Act confers also the power to maintain existing structures and to install a roll call voting machine. The Enabling Act must be liberally construed and *Bryant v. Board of Examiners* is expressly overruled. *State ex rel. Morgan v. Board of Examiners,* 309 P.2d 336 (Mont. 1957) (Justices Adair and Bottomly dissenting).

The dissent in very positive terms sets out that no jurisdiction exists in the supreme court to hear original petitions for declaratory relief. The majority opinion, by Justice Angstman, anticipating this criticism, blandly states that the question need not be decided since an injunction also was sought, there being express constitutional authority for original injunction proceedings. Although not decided, the question is thus presented whether the Supreme Court of Montana has original jurisdiction to hear petitions for declaratory judgment. While other aspects of the decision are well worth comment, this discussion will necessarily be confined to the problem of original jurisdiction.

The Uniform Declaratory Judgments Act, contained in chapter 89 of title 93, Revised Codes of Montana, 1947, confers no additional jurisdiction on the court. Section 93-8901 provides, "Courts of record within their respective jurisdictions shall have power to declare. . . ." Thus, it is clear that the court must establish its jurisdiction without reference to this act.[4]

The Montana Constitution in article 8, section 3, provides:[5]

> "The appellate jurisdiction of the Supreme Court shall extend to all cases at law and in equity, subject, however to such limitations and regulations as may be prescribed by law. Said court shall have power in its discretion to issue and to hear and determine writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and injunction, and such other original and remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction. . . ."[6]

Except as otherwise provided in the constitution, the Supreme Court of Montana has appellate jurisdiction only,[7] and the six enumerated writs are the limit of the court's purely original jurisdiction.[8]

Mr. Justice Adair's position, then, is that since there is no express mention of the declaratory judgment in the constitution no basis exists for the

[4]For a full discussion of the application of this act in Montana see Note, 2 MONTANA L. REV. 106 (1941) and Note, 8 MONTANA L. REV. 57 (1947).

[5]See also REVISED CODES OF MONTANA, 1947, § 93-214 which is substantially a codification of the original jurisdiction provisions contained in this section of the constitution.

[6]Another criterion to be considered is Rule IV, Supreme Court Rules, which provides:

"This is an appellate court but it is empowered by the Constitution of Montana to hear and determine such original and remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction. The institution of such original proceedings in this Court is sometimes justified by circumstances of an emergency nature, as when a cause of action has arisen under conditions making due consideration in the trial courts and a due appeal to this court an inadequate remedy, or when supervision of a trial court other than by appeal is deemed necessary and proper."

[7]State *ex rel.* Scharnikow v. Hogan, 24 Mont. 379, 62 Pac. 493 (1900).

[8]Willis v. Pilot Butte Mining Co., 58 Mont. 26, 190 Pac. 124 (1920).

court's assumption of jurisdiction over such actions except in its appellate function which, he contends, is not being exercised in this case. But the phrase "such other original and remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction" has on numerous occasions been the basis for the assumption of original jurisdiction by the court. More specifically, in at least three instances the court has heard *original* petitions for declaratory judgment and has granted the relief prayed on the ground it was necessary and proper to the complete exercise of its *appellate* jurisdiction. In the case of *Gullickson v. Mitchell,*[9] plaintiff had been appointed "Acting Attorney General" during the absence of Attorney General Bonner, who was in military service. When his authority was challenged he sought a judicial determination of the question under the Uniform Declaratory Judgment Act. The court assumed original jurisdiction as necessary and proper to the complete exercise of its appellate jurisdiction, "since the importance and urgency of the questions presented are apparent."

Bottomly v. Meagher County[10] was a controversy between the State of Montana and Meagher County as to which should receive the proceeds of a certain estate. The plaintiff attorney general sought declaratory relief in an original action before the supreme court, and original jurisdiction was accepted under section 3, article 8 of the Constitution on the reasoning that it was necessary and proper to the complete exercise of the court's appellate jurisdiction since the final judgment might have required further enactments by the legislative assembly then convened, and the ordinary appellate process would not have been timely under the circumstances.

Carey v. McFatridge[11] is similar. In that case the court assumed original jurisdiction of a petition for declaratory judgment to determine the duties of the state treasurer with respect to issuance of a certain draft. Here again, the ordinary appellate procedure was deemed inadequate in view of the "emergency" presented and original jurisdiction was again held to be necessary and proper to the complete exercise of the court's appellate jurisdiction.

Mr. Justice Adair's dissenting opinion in the instant case cites the cases of *Bottomly v. Meagher County,* and *Carey v. McFatridge,* under the heading of "Sporadic Cases." They are criticized as improperly holding that necessity confers jurisdiction.[12] The *Gullickson* case is not cited but

[9]113 Mont. 359, 126 P.2d 1106 (1942).

[10]114 Mont. 220, 133 P.2d 770 (1943). No true comparison can be made between the position one takes as advocate and that which one takes as independent arbiter. Still, it is interesting to note that Justice Bottomly, who dissented in the instant case on the ground there is no jurisdiction in the supreme court to hear original petitions for declaratory judgment was the attorney general who sought original declaratory relief in Bottomly v. Meagher County.

[11]115 Mont. 278, 142 P.2d 229 (1943). Here also Justice Bottomly as attorney general represented the plaintiff, and Justice Adair, then on the court, did not take issue with its assumption of original jurisdiction. On the contrary, in a dissenting opinion he urged that the transaction in question be *declared* illegal and void.

[12]One other cogent argument which might possibly be made against such original jurisdiction is that the Constitution provides . . . "Original and remedial *writs*. . . ." There being no *writ* of declaratory judgment, the framers obviously never intended such a result. But might not a court willing to construe "erect" so as to include reconstruction, renovating and purchase and installation of fixtures, also construe "writ" to mean simply "relief," or some similar interpretation consistent with declaratory judgments?

would logically seem to belong with the other two. However, without commenting on the soundness of the reasoning, it is submitted that these three cases and others stand as authority for the proposition that the Supreme Court of Montana, under certain circumstances, has original jurisdiction grounded upon its appellate function. The court has said that even without objection it could not assume original jurisdiction unless authority to do so could be found in the constitution.[18] Therefore, it would seem implicit in the *Gullickson*, *Bottomly*, and *Carey* cases that, before hearing the petitions, the court had first decided it had original jurisdiction under the Montana Constitution.

Moreover, it is submitted that the instant case stands for the same proposition even though the court has not seen fit to expressly set it forth. Here the question has been evaded with the excuse that the petition prayed for an injunction, a specifically enumerated writ. Yet the declaratory relief sought was granted, although not *eo nomine*.

CHARLES C. LOVELL

CONSTITUTIONAL LAW—DUE PROCESS—PSYCHOLOGICALLY COERCED CONFESSION—After a series of housebreakings involving rape or attempted rape, petitioner, a 27 year old negro service station attendant, was arrested after midnight in a white neighborhood and jailed on an "open charge of investigation." Though no physical coercion was applied, petitioner was not presented for preliminary hearing but was kept practically incommunicado for five days, during which time he was interogated two to three hours each morning and afternoon. At that point a confession was made consisting mainly of yes-or-no answers to questions, some of which were quite leading. Five more days of incarceration with continuation of the same treatment culminated in a second confession. Defendant was convicted of burglary with intent to rape and sentenced to death largely on the weight of the two confessions. In connection with a pleaded defense of insanity, psychiatrists testified he was a schizophrenic and highly suggestible, and his mother testified he had always been "thickheaded," having entered school at age eight and left at sixteen while still in the third grade. On appeal the Supreme Court of Alabama affirmed. On certiorari to the Supreme Court of the United States, *held*, reversed. Confessions obtained as in this case are involuntary, notwithstanding the absence of physical brutality and long continued interrogation, and their use is a denial of due process. *Fikes v. Alabama*, 77 Sup. Ct. 281 (1957) (Justice Frankfurter, joined by Justice Brennan, concurring separately; Justice Harlan, joined by Justices Reed and Burton, dissenting).

This is the latest in a line of cases[1] involving the Court's declared rule

[18]*cf.* State *ex rel.* City of Helena v. Helena Waterworks Co., 43 Mont. 169, 115 Pac. 200 (1911).

[1]Principal United States Supreme Court cases in this series are: Brown v. Mississippi, 299 U.S. 278 (1936); Chambers v. Florida, 309 U.S. 227 (1940); White v. Texas, 310 U.S. 530 (1940); Lisbena v. California, 314 U.S. 219 (1941); Ward v. Texas, 316 U.S. 547 (1942); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Lyons v. Oklahoma, 322 U.S. 596 (1944); Malinsky v. New York, 324 U.S. 401 (1945); Haley