

MAGISTRATE COURTS:

Magistrate courts may issue writ of habeas corpus.

July 23, 1946

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Honorable H. A. Kelso
Prosecuting Attorney
Nevada, Missouri

*See also opinion to
O. Hampton Stevens
October 8, 1951*

Dear Mr. Kelso:

This Department is in receipt of your request for an official opinion, which reads as follows:

"Will the Probate Judge-Magistrate have jurisdiction in Habeas Corpus proceedings?"

At first glance it would appear that a magistrate court will have jurisdiction in habeas corpus proceedings, in view of the fact that under Section 19 of Senate Bill #207, passed by the 63rd General Assembly, a magistrate court is a court of record, and Section 1591, R.S. Mo. 1939, specifically provides that application for a writ of habeas corpus shall be made "to some court of record in term, or to any judge thereof in vacation".

However, Section 4, Article V of the Constitution of Missouri, 1945, provides:

"The supreme court, courts of appeals, and circuit courts shall have a general superintending control over all inferior courts and tribunals in their jurisdictions, and may issue and determine original remedial writs."

The above constitutional provision specifically sets forth and enumerates the courts that may issue and determine original remedial writs, one of which is the

writ of habeas corpus.

The question arises whether Section 4, Article V in setting forth the specific courts that could issue and determine remedial writs, thereby intended to limit such right exclusively to the courts therein enumerated.

There is a rule of construction that "expressio unius est exclusio alterius", i.e., that the expression of one thing is the exclusion of another. If this rule were applied in the instant case then the constitutional provision in mentioning three kinds of courts that may issue extraordinary writs thereby intended to exclude all other courts from issuing such writs. However, our Supreme Court has not looked with favor upon the application of this rule in construing a constitution. As was said by Judge Douglas speaking for the court en banc in *State ex inf. McKittrick vs. Williams*, 144 S.W. (2d) 98, 346 Mo. 1003: "* * * the above doctrine may be applied to a constitution only with great caution. * * *".

In *McGrew vs. Missouri Pac. Ry. Co.*, 132 S.W. 1076, 230 Mo. 496, our Supreme Court said, i.c. 527:

"In *Williams v. Mayor of Detroit*, 2 Mich. 560, 563-564, the court held that though the maxims expressio unius est exclusio alterius and expressum facit cessare tacitum generally apply to the construction of all instruments and laws, there are certain laws to which the maxims cannot be strictly applied without doing violence to the plain intent of the framers of the laws, and that this is especially true in the construction of state constitutions, owing to their character and objects, which the court explained at some length, and then, in effect, said that the imposition by the Constitution upon the Legislature of certain specific duties, limitations, restraints and regulations in certain important particulars, binds the Legislature, of course, in those particulars, but that notwithstanding that, all other acts properly

pertaining to the legislative power of the state are within the competency of the legislative department, and binding upon the people.

"The maxims mentioned in the case last cited have been, by all who make it, counsel and members of this court, invoked as the chief support for the contention that said portion of section 14 limits the power of the Legislature. But those maxims are not rigid rules of unvarying and universal application; they are merely rules adopted for the construction of written words, and like all such rules, are intended to be used for the purpose of ascertaining the true meaning of the words, in order that the purpose intended may be accomplished, and should never be permitted to be used to obscure that meaning or thwart that purpose.* * *".

Therefore, it cannot be said under the principle of "expressio unius est exclusio alterius" that all other courts other than those mentioned in Section 4, Article V, are necessarily excluded from issuing writs of habeas corpus, and we must look to the purpose and intent of the above section to determine whether such section is exclusive or not.

In interpreting a constitutional provision "it is proper to look to previous state of the organic law and the conditions sought to be remedied by the amendment". *Lovins vs. City of St. Louis et al.*, 336 Mo. 1194, 84 S.W. (2d) 127; 16 C.J.S. 69.

Section 4, Article V of the Constitution of Missouri, 1945, made no substantial change from the Constitution of Missouri, 1875. The Constitution of 1875 contained three sections which are now covered by Section 4, Article V.

Section 3, Article VI of the Constitution of 1875, provided that the Supreme Court should have general superintending control over all inferior courts, and have the power to issue various writs, including habeas corpus.

Section 12 of Article VI, Constitution of 1875, gave like power to the St. Louis Court of Appeals in substantially the same language.

Section 23, Article VI of the Constitution of 1875, gave the Circuit Court superintending control over all inferior tribunals in their respective circuits.

It will be seen that Section 4, Article V in the present Constitution merely compiles and condenses the three sections noted above into one provision. The only new feature is that Circuit Courts are specifically given the right to issue and determine remedial writs, which power the Constitution of 1875 had not specifically granted, but which had been implied from Section 22, Article VI, wherein it provided that: "The circuit court shall have jurisdiction over all criminal cases not otherwise provided for by law; exclusive original jurisdiction in all civil cases not otherwise provided for; * * *". State ex rel. York vs. Locker, 266 Mo. 384, 181 S.W. 1001. Therefore, the intent and purpose of Section 4, Article V, supra, was to set forth the jurisdiction of the three courts with which it specifically deals, i.e., Supreme Court, Courts of Appeals and Circuit Courts. The provision intended to apply to and treat with only those courts, and do not intend to determine the question of jurisdiction in habeas corpus proceedings.

This view is borne out by the statement in the Constitutional Convention as to the purpose of Section 4, Article V, supra. While it is true that the statements of the framers are of limited value in construing State Constitutions (State ex rel. Donnell vs. Osburn, 147 S.W. (2d) 1065, 347 Mo. 469), still they may be of material assistance in showing that a clause was used in a certain sense by the framers (11 Am. Jur. 708). Mr. Righter in the Constitutional Convention said in speaking on behalf of Section 4, Article V:

"MR. RIGHTER: I shall appreciate it if the clerk will read Section 4.

(Clerk read as follows:)

"Section 4. The Supreme Court, courts of appeals, and circuit courts shall

have a general superintending control over all inferior courts and tribunals in their jurisdictions, and may issue and determine original remedial writs.

"MR. RIGHTER: Mr. President, this is one instance in which (sic) we were able greatly to condense and shorten the proper article without in any respect changing its effect. Section 4 is a condensation of sections, parts of sections 3, 12, 23 and I believe Section 8 of the amendment. Heretofore there have been separate sections saying that the Supreme Court had superintending control and that it could issue writs and certiorari prohibitions, mandates, and what not and then sections with respect to the circuit courts and court of appeals. We merely consolidated those all into one short section."

It is well settled in Missouri that prior to the adoption of the Constitution of 1945, those courts mentioned in Sections 3, 12 and 23, Article VI of the Constitution of 1875, did not have exclusive jurisdiction of the writ of habeas corpus, but that other courts, e.g. a county court, could issue such writs under authority given by statute. State ex rel. Hiett vs. Simmons, 87 S.W. 35, 112 Mo. App. 535; State ex rel. York vs. Locker, 266 Mo. 384, 181 S.W. 1001. Therefore, since Section 4 of Article V of the Constitution of Missouri, 1945, is merely a consolidation of Sections 3, 12 and 23, Article VI, Constitution of 1875, then the same rule would apply to that section because the adoption in a later Constitution of the words and contexts by another which have been construed by a court of last resort is presumed to have been done to give the adopted contexts their adjudicated meaning. Ludlow-Saylor Wire Co. vs. Wollbrinck, 275 Mo. 339, 205 S.W. 196.

Therefore, in view of the above authorities it would appear that a magistrate court would have jurisdiction to entertain an application for a writ of habeas corpus.

CONCLUSION

It is, therefore, the opinion of this Department that a magistrate court has jurisdiction to issue a writ of habeas corpus.

Respectfully submitted,

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