EDITORIAL NOTES

THE WASHINGTON UNIVERSITY LAW QUARTERLY

The student section, as well as the leading article section of this issue of the Quarterly is devoted to problems of state constitutional law. It might also be noted that bibliographies will be found at the end of each of the leading articles. These bibliographies contain suggestions by the authors of additional references in the particular field.

THE SCHOOL OF LAW

The law school program is being set up for the duration of the war on a year-around basis. Students who enter the school in February, June, or September, may by continuous attendance graduate in two calendar years from time of entrance. The summer of 1942 is to be divided into two sessions. In the first session, from June 15 to July 23, the following courses will be offered: Contracts I, Property I, Partnership, Federal Jurisdiction and Procedure, and Municipal Corporations. Contracts II, Property II, Quasi-contracts, Legislation, and Damages will be offered in the second session, which will last from July 27 to September 3.

NOTE AND COMMENT

THE MISSOURI PROVISION FOR PERIODIC CONSTITUTIONAL REVISION

Article XV, section 4 of the Missouri Constitution provides that there shall be a submission of the question, "Shall there be a convention to revise and amend the Constitution?" at a special election to be held in 1921 and at the general election next following the lapse of twenty years and at twenty-year periods thereafter.[1] By the clear meaning of the section a submission is called

1. The exact language of art. XV, §4 is as follows: "The question 'Shall there be a convention to revise and amend the Constitution,' shall be submitted to the electors of the state at a special election to be held on the first Tuesday in August, one thousand nine hundred and twenty-one, and at each general election next ensuing the lapse of twenty successive years since the last previous submission thereof, and in case a majority of electors voting for and against the calling of a convention shall vote for a convention, the governor shall issue writs of election to the sheriffs of the different counties, ordering the election of delegates, and the assembling of such convention, as is provided in the preceding section."

for at the general election of 1942. This section is of peculiar importance because some doubt has arisen as to the nature of the provision and the sanctions behind the constitutional language. It has been suggested that the secretary of state is not required to submit the question because the general assembly has adjourned without authorizing the submission.[2] The secretary of state publicly declared that he would submit the question regardless of legislative action.[3] It is submitted that the secretary of state is correct in his position since he may not be restrained from such action by injunction,[4] and mandamus would lie to compel him to submit the question.[5]

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2. Faust, Popular Sovereignty (1942) 27 WASHINGTON U. LAW QUARTERLY 312.

3. Ibid.

4. "* * * The courts will not interfere by injunction to restrain officers of a state from compliance with a law of the state requiring the performance of a public duty at their hands." High, *Injunctions* (4th ed. 1905) 1340; People ex rel. O'Reilly v. Mills (1902) 30 Colo. 262, 70 Pac. 322 (Refusal to enjoin secretary of state from submitting constitutional amendment because the duty was enjoined by law); Fleming v. Gutherie (1889) 32 W. Va. 1, 9 S. E. 23, 3 L. R. A. 53 (Refusal to issue a writ of prohibition against a mandamus action on grounds of an injunction pending because the injunction would not lie to restrain a duty compelled by law). It is apparent that this rule is applicable to the present discussion because, if there is an unqualified duty to submit the question at a particular time, the courts may not restrain its submission.

A number of cases have held that the courts may not by injunction restrain the holding of an election *even though it is without authority of law.* State ex rel. Allen v. Dawson (1920) 284 Mo. 427, 224 S. W. 824; 4 Pomeroy, *Equity Jurisprudence* (4th ed. 1919) §§1753-1755, and cases cited thereunder. The courts based this rule on the ground that no property right was sought to be protected; hence equity had no jurisdiction. However, Missouri, along with many other states, will allow an injunction to prevent an unauthorized election on the ground that the taxpayer has a right to prevent the waste of public funds in a useless election. This view was taken in Baum v. City of St. Louis (1938) 343 Mo. 738, 123 S. W. (2d) 48 in which the court enjoined the election commissioners from holding an election which was not authorized by law and which would cost the taxpayers $200,000. Note other cases in which the amount of expense has been controlling; thus where only a negligible cost would result from the election or where the election would only require an addition to the ballot the injunction has beeen refused. Brumfield v. Brock (Miss. 1932) 142 So. 745, 747; State ex rel. Fulton v. Zimmerman (1926) 191 Wis. 10, 210 N. W. 381.

The above discussion applies only when the election is not authorized by law. It is submitted that under art. XV, §4 of the Missouri constitution there is a clear authorization of the submission; hence regardless of the amount of interest the injunction would not lie.

5. It is well established in Missouri that a public officer may be compelled to perform a mandatory and ministerial duty by mandamus. In State ex rel. Donnell v. Osburn (1941) 347 Mo. 469, 147 S. W. (2d) 1065, 1069 the court stated: "It is our judgment that the duty * * * imposed on the Speaker is clear, peremptory and ministerial and therefore one which may be directed by mandamus." In Bakersfield News v. Ozark County (1936) 338 Mo. 519, 522, 92 S. W. (2d) 603 the court stated: "If a public officer

The fundamental nature of state constitutions requires that there be constant revision in response to the popular will.[6] It

fails to perform mandatory, ministerial duties, he may be compelled to do so by mandamus." See: State ex rel. Register of Lands v. Secretary of State (1863) 33 Mo. 293; State ex rel. Broadhead v. Berg (1882) 76 Mo. 136, 142; Dreyfus v. Lonergan (1898) 73 Mo. App. 336; State ex rel. Schade v. Russell (1908) 131 Mo. App. 638, 110 S. W. 667; State ex rel. Byrd v. Knott (Mo. App. 1934) 75 S. W. (2d) 86; State ex rel. Allen v. Deatherage (Mo. App. 1938) 120 S. W. (2d) 193; Note (1936) 20 ST. LOUIS LAW REVIEW 346, 355; Comment (1941) 26 WASHINGTON U. LAW QUARTERLY 442.

Mandamus has been held applicable to compel a recalcitrant secretary of state to obey constitutional and legislative commands. In State ex rel. Stoakes v. Roach (Mo. 1916) 190 S. W. 277, 278 the court stated: "This court has repeatedly declared that * * * [the secretary of state] is purely a ministerial officer and as such may be compelled to do what he ought to do." State ex. rel. Register of Lands v. Secretary of State (1863) 33 Mo. 293; State ex rel. Jones v. Cook (1903) 174 Mo. 100, 73 S. W. 489; State ex rel. Maring v. Swanger (1908) 212 Mo. 472, 111 S. W. 7; State ex rel. Lashly v. Becker (1921) 290 Mo. 560, 235 S. W. 1017. See also the following cases from other jurisdictions: State ex rel. Fleming v. Crawford (1891) 28 Fla. 441, 10 So. 118, 14 L. R. A. 253; Davis v. Crawford (1928) 95 Fla. 438, 116 So. 41; Thompson v. Vaughan (1916) 192 Mich. 512, 159 N. W. 65; Scott v. Vaughan (1918) 202 Mich. 629, 168 N. W. 709; State ex rel. Peterson v. Hall (1919) 43 N. D. 628, 176 N. W. 117; Looney v. Leeper (1930) 145 Okla. 202, 292 Pac. 365; State ex rel. Smith v. Kozer (1924) 112 Ore. 286, 229 Pac. 679; Taylor v. King (1925) 284 Pa. 235, 130 Atl. 407; 38 C. J. 666.

In State ex rel. Wineman v. Dahl (1896) 6 N. D. 81, 68 N. W. 418, it was held that the secretary of state could be compelled to submit the question of calling a constitutional convention. In the *Dahl* case the constitutional provision required that the legislature authorize the submission. After the legislature had done so the secretary of state was compelled by mandamus to submit the question. The constitution required that the legislature determine *when* the question was to be submitted, whereas art. XV, §4 of the Missouri constitution does not leave that determination to the legislature. If mandamus is applicable where the legislature has authorized the submission it is apparent that the writ would issue when the same duty is commanded by the constitution itself.

The people, speaking through their constitution, have commanded that the question be submitted at the 1942 general election. No individual could conceivably have a special or particular interest in having a submission; hence, the interest must be one held by the citizens of Missouri in common. It is apparent that the secretary of state owes his duty to the general public. It has been held that a private citizen, without special interest, may bring mandamus to compel the performance of a duty owed to the general public. The leading Missouri case on this point is State ex rel. Francis v. Wear (1888) 95 Mo. 44, 8 S. W. 1, in which the court stated: "* * * Where a public right is involved, and the object is to enforce a public duty, the people are regarded as the real party, and in such case the relator need not show any special interest in the result, * * *. The great weight of authority supports this view." See: Concurring opinion of Sherwood, J., in State ex rel. Thomas v. Hoblitzelle (1885) 85 Mo. 620, 625; State ex rel. Morris v. Railroad (1885) 86 Mo. 13, 16; State ex rel. Barricelli v. Noonan (1894) 59 Mo. App. 524, 530; State ex rel. Rutledge v. School Board (1895) 131 Mo. 505, 514, 33 S. W. 3; State ex rel. Black v. Wilson (1911) 158 Mo. App. 105, 119, 139 S. W. 705; State ex rel. Faust v. Thomas (1926) 313 Mo. 160, 165, 282 S. W. 34; State ex rel. Johnson v. Sevier (1936) 339 Mo. 483, 487, 98 S. W. (2d) 677.

6. Graves, *American State Government* (rev. ed. 1941) 61.

is almost axiomatic that the longevity of a constitution depends upon its flexibility.[7] This quality has been achieved in the Federal Constitution by the general terms in which the document is written and by judicial interpretation; state constitutions, on the other hand, have been more detailed and therefore relatively inflexible.[8] For this reason states have had to look to amendment and revision to bring their constitutions into line with constantly changing conditions. There must be a process of revision which is readily responsive to the popular will; this in turn makes periodic revision both desirable and necessary.

The force of these considerations has been clearly illustrated by the development of the Missouri constitution.[9] Under the procedure provided before 1920, which left constitutional revision totally dependent upon legislative acquiescence,[10] numerous problems were encountered. Amendments were adopted with great difficulty and the legislature under article XV, section 3 consistently refused to submit the question of a constitutional convention to the people for popular vote.[11] Because of legislative reluctance to submit the question, in 1920 the people of Missouri by initiative wrote article XV, section 4 into our organic law.[12]

7. Ibid.

8. Id. at 54.

9. The Missouri Constitution of 1820 had no provision for any sort of revision nor was there popular referendum of amendments. (Mo. Const. 1820) Amendments were entirely legislative; the general assembly proposed amendments by a two-thirds vote and the next general assembly ratified the amendment by a two-thirds vote. In 1865 popular amendment was written into the constitution and it was provided that the question of whether or not a constituional convention should be called should be submitted to the people. (Mo. Const. (1865) art. XII, §§2, 3) Determination as to *when* the question should be submitted was left entirely up to legislative discretion. (Mo. Const. (1865) art. XII, §3) This procedure was restated in the constitution of 1875. (Mo. Const. (1875) art. XV, §3) In 1920 the 1865 procedure was again reaffirmed and it remains art. XV, §3 of the present constitution. But in 1920 by initiative art. XV, §4 was ratified; this provided for periodic popular vote on the question of whether a constitutional convention should be called.

10. See note 9, supra.

11. William W. Hollingsworth, The New Constitution of Missouri (1924) 9 ST. LOUIS LAW REVIEW 71-72 states as follows: "Since the adoption of the present constitution [Mo. Const. (1875)] there have been proposed approximately one hundred amendments, about twenty of which have been adopted.

"For more than a decade a movement for a convention to revise the constitution of Missouri has been under way, but there was no well-organized effort before 1918. Each successive session of the legislature was prevailed upon to submit the question to the voters of the state, but without avail. Finally the New Constitution Association of Missouri took form and began to function. Since the legislature refused to submit the matter to the voters, it was decided that the next best step was to change by means of the initiative the method of calling constitutional conventions."

12. Ibid.

Article XV, section 4 does not name the secretary of state but merely states that the "question * * * shall be submitted * * * at each general election next ensuing the lapse of twenty successive years since the last previous submission thereof, * * *."[13] This language clearly indicates that the submission was meant to be periodic, recurring, and automatic.[14] From this it is arguable that by fair implication the section appropriates the election machinery for the submission of similar issues.[15] Since the submission of similar questions is enjoined upon the secretary of state[16] it may be suggested that this duty also rests upon that official. However, it is not necessary to base the duty on implication because the legislature has specifically provided that the duty of submitting such questions should rest upon the secretary of state. R. S. Mo. (1939) §11676 provides:

> Whenever a proposed constitutional amendment *or any other question* is to be submitted to the people of the state for popular vote, the secretary of state shall duly, and not less than twenty days before the election, certify the same to the clerk of each county court of the state, * * *.[17]

It is apparent that the submission called for under article XV, section 4 comes within the above language. Additional sections provide for the placing of the question upon the ballots,[18] the form of the ballots,[19] and the method of voting.[20] The language

13. Mo. Const. (1875) art. XV, §4.

14. Dean Isidor Loeb, writing immediately before the ratification of art. XV, §4 interpreted the provision as requiring that the question "* * * be automatically submitted to the voters." Loeb, *Constitutions and Constitutional Conventions in Missouri* (1922) 237.

15. In the Prohibitory-Amendment Cases (1881) 24 Kan. 700 the court held that the language, "at the general election," in a provision for the submission of an amendment, appropriated the general election law; the court pointed out that the proposition was meant to be submitted in accordance with the ordinary election procedure in similar submissions.

In State ex rel. Goodin v. Thoman (1872) 10 Kan. 191 the court held that the constitutional provision, "There shall be elected * * * a district judge, who shall hold his office for the term of four years, * * *," implied that there should be an election at the general election even though there was no express provision for its submission. The court stated at p. 197: "The constitution is the paramount law. It is above the legislatures and courts. It was intended as a paramount rule, to be changed only by the people in their sovereign capacity. * * * As between two constructions * * * that which gives stability and force is preferred to that which makes it simply an expression of desire, subject to the omissions or caprices of each succeeding legislature. The manifest purpose of the provision was to secure to the people at stated intervals the opportunity of changing the incumbents."

16. Mo. Const. (1875) art. IV, §57.

17. Italics added.

18. R. S. Mo. (1939) §11596.

19. R. S. Mo. (1939) §11680.

20. Ibid.

of article XV, section 4, the customary procedure in the submission of analogous questions, and direct statutory enactment compel the view that the duty of submitting the question is directed to the secretary of state.

The section by its obvious and ordinary meaning[21] directs a mandatory and peremptory duty. The provision is couched in mandatory language; it is provided that the question "shall" be submitted.[22] "Shall" is a peremptory word in common usage,[23] and it is customarily used to express a constitutional mandate.[24] This language stands in violent contrast to that used in article XV, section 3 which provides that the legislature "may" authorize a vote by the people.[25] The apparent difference between the "may" of this section and the "shall" of article XV, section 4 cannot be said to be without significance. The framers in their careful selection of words have used a word of command in article XV, section 4 whereas permission and discretion was rested in the legislature by use of the word, "may," in article

21. The Missouri Supreme Court has stated many times that in constitutional construction the words must be given their ordinary and obvious meaning. State ex rel. Barrett v. Hitchcock (1911) 241 Mo. 433, 146 S. W. 40; State ex rel. Buck v. St. L. & S. F. R. R. (1915) 263 Mo. 689, 174 S. W. 64; Elsberry Drainage Dist. v. Winkelmeyer (1919) 278 Mo. 268, 212 S. W. 893; State ex rel. Otto v. Kansas City (1925) 310 Mo. 542, 582, 276 S. W. 889. In State ex rel. Heimberger v. Board of Curators (1916) 268 Mo. 598, 610, 188 S. W. 128, the court stated: "When the words used themselves permit of no doubt as to the meaning, that ends the matter. There is no room for construction."

22. Mo. Const. (1875) art. XV, §4.

23. In Oakland Paving Co. v. Hilton (1886) 69 Cal. 479, 11 Pac. 3, 9, the court stated that the words "shall be" in a constitution are words of command. The court stated: "Such is their natural and ordinary meaning. They are not * * * directory * * * but mandatory and peremptory, exacting compliance with and obedience to them, and prohibitory of any action conflicting with them." In Chenoweth v. Chambers (1917) 33 Cal. App. 104, 164 Pac. 428, 430, the court stated: "You 'shall' or they 'shall' means, I will compel you or them to act. * * * Consequently you (he or they) 'shall,' expresses commands * * *." This rule was followed by the Missouri Supreme Court in State ex rel. Donnell v. Osburn (1941) 347 Mo. 469, 147 S. W. (2d) 1065 in which it was held that art. V, §3 of the Missouri constitution, which provides that the speaker "shall" open and publish, is a peremptory and mandatory provision. See also: Coleman v. Eutau (1908) 157 Ala. 327, 47 So. 703; Varney v. Justice (1888) 86 Ky. 596, 6 S. W. 457, 459; State ex rel. Gouge v. Burrow (1907) 119 Tenn. 376, 104 S. W. 526, 529, 14 Ann. Cas. 809; Baer v. Gore (1916) 79 W. Va. 50, 90 S. E. 530, 581.

24. Mo. Const. (1875) art. XI, §7; art. XI, §10; art. XI, §11; art. XI, §12.

25. Mo. Const. (1875) art. XV, §3 provides as follows: "The general assembly *may* at any time authorize by law that a vote of the electors of the state be taken upon the question, 'Shall there be a convention to revise and amend the Constitution,' * * *."

XV, section 3.[26] Moreover the history of the former section[27] compels the view that it was meant to be mandatory.[28]

It is obvious that the framers intended that the duty enjoined by article XV, section 4 be non-discretionary and ministerial;[29] the plain and ordinary language of the section[30] designates *what* question shall be submitted[31] and *when* it shall be submitted.[32] Furthermore little discretion is permitted as to *how* the question is to be submitted. Statutes have provided specific directions as to the proper mode of procedure.[33] Yet even if it were to be found that there is discretion as to certain details in the submission it is apparent that the determination as to whether the question shall or shall not be submitted is out of the hands of the secretary of state.[34]

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26. It is a well established rule of constitutional construction that the intent of the framers and ratifiers should be carried out. In State ex rel. Litson v. McGowan (1897) 138 Mo. 187, 192, 32 S. W. 771, the court stated: "The organic law is subject to the same general rules of construction as other laws, due regard being had to the broader objects and scope of the former, as a charter of popular government. The intent of such an instrument is the prime object to be attained in construing it." In State ex rel. Norman v. Ellis (1930) 325 Mo. 154, 165, 28 S. W. (2d) 363 the court stated: "* * * the *intention* of the law-makers and Constitution-makers must be gathered when interpreting an act or a constitutional provision. Law-makers and the people adopting a constitution have a right to put an interpretation on the words they use which meets their intention." See also: State v. Hope (1889) 100 Mo. 347, 361, 13 S. W. 490, 8 L. R. A. 608; State ex rel. Hussman v. St. Louis (1928) 319 Mo. 497, 509, 5 S. W. (2d) 1080; Graves v. Purcell (1935) 337 Mo. 574, 582, 85 S. W. (2d) 543; 1 Cooley, *Constitutional Limitations* (8th ed. 1927) 124.

27. Another recognized rule of constitutional interpretation requires the court to look to the historical conditions and the evil sought to be eradicated by the provision. In State ex rel. O'Conner v. Riedel (1932) 329 Mo. 616, 626, 46 S. W. (2d) 131, the court stated: "In placing a construction on a Constitution, or any clause or any part thereof, a court should look to the history of the times and examine the state of things existing when the Constitution was framed or adopted, * * *." See also: Hamilton v. St. Louis County Court (1851) 15 Mo. 3, 23; State ex rel. Boonville v. Hackman (1922) 293 Mo. 313, 240 S. W. 135, 136; State ex rel. Russell v. State Highway Comm. (1931) 328 Mo. 942, 42 S. W. (2d) 196; 11 Am. Jur. 676-677, and cases cited thereunder.

28. See notes 11 & 14, supra.

29. See note 11, supra.

30. See note 21, supra.

31. See note 1, supra.

32. See note 1, supra.

33. R. S. Mo. (1939) §§11676, 11596, 11680.

34. In Norris v. Cross (1909) 25 Okla. 287, 105 Pac. 1000, 1012 the court held that the secretary of state could not be compelled to act in a particular way, but, though in details he had discretion, mandamus would lie to compel him to act in some way. The court stated: "* * * after a careful examination of authorities we have been able to find no case wherein it was sought to compel a Secretary of State to discharge duties in connection with the submission of a constitutional amendment, or other question authorized to be voted upon by the people, where such duties were im-

The duty of the secretary of state is independent of legislative authorization. The section makes no mention whatever of action by the general assembly.[35] Nor can it be justifiably argued that by implication the legislature has the power to approve or disapprove the submission, for those who framed and ratified the section intended that it be independent of legislative acquiescence.[36] This intent would be effectively defeated[37] and the constitutional mandate would be unenforceable if the duty were construed to be conditioned upon such legislative action. Furthermore it would render article XV, section 4 nugatory; in effect the section would then become a mere recommendation to the general assembly. By reason of article XV, section 3 the legislature already has power to submit the question at will; the legal effect of the two sections *must* have been meant to be different. To read legislative acquiescence into article XV, section 4 would be to fly in the face of recognized rules of constitutional interpretation and the apparent will of the people as expressed in their constitution.[38]

H. S. H.

POWER OF THE LEGISLATURE TO AMEND OR REPEAL DIRECT LEGISLATION

It is a fundamental principle of our system of representative government that the legislative department has plenary power to enact laws and to amend or repeal them, subject only to the provisions of the constitution from which this power arises. During the first two decades of this century, however, the spirit of governmental reform which produced such phenomena as the Progressive Movement, resulted in the adoption in most of our western states of constitutional changes designed to reserve to the people the right to enact legislation directly, independently of

posed upon him by constitutional provision or by statute, and he refused to act, that the writ [of mandamus] was not allowed."

35. See note 1, supra.

36. See notes 11 & 14, supra.

37. A rule of constitutional construction requires that the courts give effect to every part of the constitution. 1 Cooley, *Constitutional Limitations* (8th ed. 1927) 128 states:

"* * * The courts * * * must lean in favor of a construction which will render every word operative, rather than one which will make some words idle and nugatory."

38. The writer suggests that article XV, section 3 be revised to expressly place the duty upon the secretary of state with or without legislative authorization and also to provide expressly that he may be compelled by mandamus to submit the question under the periodic provision. This would obviate all possibility of litigation.