the federal court or prevent the jurisdiction of the federal court from attaching by way of joinder rather than by assignment, the federal court, when called upon to hear a motion for removal from a state court, must strike formal, nominal, colorable, and uninterested parties. The same result follows when the action is first brought in the federal court. After striking, the court will determine whether it must take jurisdiction. S. F.

MANDAMUS—ISSUANCE TO LEGISLATIVE OFFICER—NATURE OF SPEAKER'S DUTY TO DECLARE ELECTION OF GOVERNOR—[Missouri].—The Constitution of Missouri provides that "The returns of every election" for governor "shall be sealed up and transmitted by the returning officers to the Secretary of State, directed to the Speaker of the House of Representatives, who shall, immediately after the organization of the House, and before proceeding to other business, open and publish the same in the presence of a majority of each House of the General Assembly, * * *. The person having the highest number of votes" for the office of governor "shall be declared duly elected; * * *."[1] On the face of the returns of the election for governor in 1940, relator received a plurality of the votes cast for the office. Immediately after the organization of the House, the General Assembly, charging irregularity and fraud in the election, passed a resolution providing for an investigation. In accord with this resolution the speaker refused to open and publish the returns and to declare the election of relator, pending an inquiry into the legality of the votes. Relator sued for a writ of mandamus to compel the speaker to act. *Held*, that mandamus must issue because the Constitution of Missouri imposed a ministerial duty on the speaker, free from legislative control, to open, publish, and declare the results of the election. *State ex rel. Donnell v. Osburn.*[2]

Mandamus will ordinarily issue to compel the performance of a ministerial,[3] as distinguished from discretionary,[4] duty. The writ will not issue if the duty, though ministerial, rests upon the legislature,[5] or upon a legis-

1. Mo. Const. art. V, sec. 3.
2. (Mo. 1941) 147 S. W. (2d) 1065.
3. State ex rel. Register of Lands v. Secretary of State (1863) 33 Mo. 293; Dreyfus v. Lonergan (1898) 73 Mo. App. 336; State ex rel. Schade v. Russell (1908) 131 Mo. App. 638, 110 S. W. 667; Note (1935) 20 ST. LOUIS LAW REVIEW 346, 355.
4. State ex rel. Best v. Jones (1900) 155 Mo. 570, 56 S. W. 307; State ex rel. Clark v. West (1917) 272 Mo. 304, 198 S. W. 1111. However mandamus will issue to compel the exercise of discretion though the court will not substitute its judgment for that of the recalcitrant officer. State ex rel. Gehrig v. Medley (1930) 28 S. W. (2d) 1040. Mandamus will also issue to correct an abuse of discretion. State ex rel. Kelleher v. Public Schools (1896) 134 Mo. 296, 35 S. W. 617; State ex rel. Journal Printing Co. v. Dreyer (1914) 183 Mo. App. 463, 167 S. W. 1123; State ex rel. Farmers' Bank v. Township Board (1915) 188 Mo. App. 266, 175 S. W. 139; Comment (1940) 26 WASHINGTON U. LAW QUARTERLY 134.
5. Mandamus will not issue against the legislature because of the respect accorded the co-ordinate branch and because of the unenforceability of the writ against that body. The cases indicate that under no circumstances will the writ lie. However, the decision might also be explained as concerning discretionary duties. French v. State Senate (1905) 146 Cal. 604, 80

lative officer acting under legislative direction, where the officer refuses to act and the legislature approves his refusal.[6] Mandamus will lie if a legislative officer refuses to act and this refusal is against the will of the legislature.[7] The court in the instant case created a new category, holding that under the constitution mandamus will lie if the ministerial duty is directed to a legislative officer who is not subject to legislative direction, even though the legislature approves of the officer's conduct.

The duty in the instant case is clearly mandatory and ministerial,[8] but the constitution does not expressly provide that the speaker shall open and

---

Pac. 1031, 69 L. R. A. 556, 2 Ann. Cas. 756; Fergus v. Marks (1926) 321 Ill. 510, 152 N. E. 557, 46 A. L. R. 960. See State ex rel. Vogel v. Bersch (1900) 83 Mo. App. 657.

6. Ex parte Pickett (1854) 24 Ala. 91; Ex parte Matthews (1875) 52 Ala. 51; State ex rel. North & S. Ry. v. Meier (1898) 143 Mo. 439, 449, 45 S. W. 306; Capito v. Topping (1909) 65 W. Va. 587, 64 S. E. 845, 22 L. R. A. (N. S.) 1089. Legislative acquiescence is the determining factor in cases where the officer is under legislative control for purposes of a ministerial duty. In State ex rel. North & S. Ry. v. Meier, *supra,* mandamus was held to lie to compel the signature of the presiding officer to a bill of a municipal council where the officer refused to obey the will of the body. In Ex parte Echols (1866) 39 Ala. 698, the court refused to issue mandamus to compel the speaker to send a bill to the senate because the house had approved his conduct. Albright v. Fisher (1901) 164 Mo. 56, 64 S. W. 106, purported to overrule the *Meier* case, but it did not involve mandamus and the action was not directed to a legislative officer. State ex rel. Davisson v. Bolte (1899) 151 Mo. 362, 370, 52 S. W. 262, 74 Am. St. Rep. 537, attempted to distinguish a duty in the speaker to sign an act from an identical duty in the *Meier* case by indicating that the latter case involved an officer of an inferior legislature. Since in the *Meier* case the officer of the council was treated as the presiding officer of a co-ordinate branch, it would seem that the cases must be distinguished on other grounds. Logically, the *Bolte* case does not conflict with the *Meier* case because it falls, like the *Echols* case, into the category in which the officer's refusal is sustained by the legislature, whereas the officer in the *Meier* case acted against the legislative will.

7. State ex rel. Biggs v. Corley (1934) 36 Del. 135, 172 Atl. 415; Ex parte Echols (1866) 39 Ala. 698; Barkworth v. Tateum (1893) 95 Mich. 314, 54 N. W. 887; State ex rel. Davisson v. Bolte (1899) 151 Mo. 362, 52 S. W. 262, 74 Am. St. Rep. 537. But cf. Wolfe v. McCaull, Clerk (1882) 76 Va. 876.

8. The speaker's function was held to be analogous to that of a canvassing officer. A canvassing clerk may be compelled by mandamus to perform the ministerial duty of casting up the vote certified by the returns and ascertaining who received the highest number of votes. State ex rel. Metcalf v. Garesche (1877) 65 Mo. 480. The court also placed great emphasis on the constitutional requirement that the duty be performed before proceeding to other business. A contest would obviously be impossible in such a limited time. The court also referred to the separation of the clause setting forth the contest power (Mo. Const. art. V, sec. 25) from the election clause (Mo. Const. art. V, sec. 3), and by reference to the constitutional debates. The debates, as recorded in 4 Loeb and Shoemaker, *Debates, Missouri Constitutional Conventional of 1875* (1938) 428, et. seq., indicate that it was the clear intent of the framers to make this a mandatory and ministerial duty, whether it rested upon the speaker or the legislature, and that the *prima facie* returns should suffice to seat the governor.

publish the returns free from legislative control.[9] It is apparent, therefore, that the express language of the constitution does not compel the decision. It would seem that the basis for the decision must be found in the weight of persuasive arguments rather than in a simple interpretation of the constitutional language. *State ex rel. Benton v. Elder*,[10] which had great persuasive weight in the instant decision, is the only case in point. Language seemingly *contra* to the instant decision may be found in other cases, but may be disregarded as *dicta*,[11] or as pertinent to different constitutional provisions.[12] The *Elder* case itself may be distinguished inasmuch as Nebraska decisions have held that the doctrine of separation of powers does not prevent the issuance of mandamus even to a co-ordinate branch of the government.[13] The courts of Missouri refuse to interfere by mandamus in co-ordinate spheres.[14]

The court reasoned that the duty in the instant case is not under legislative control because it does not involve legislation. *Marbury v. Madison*[15] was cited for the proposition that it is the nature of the duty and not of the office by which the propriety of issuing mandamus is to be determined.

---

9. The ambiguity of the constitutional language permits the decision of the court but it would also seem to permit a different result. The speaker is elected a member of the House and he is elected by the House as presiding officer. A reasonable interpretation could find him subject to the legislative will in the duty of opening, publishing and declaring the election. The constitutional debates, 4 Loeb and Shoemaker, *Debates Missouri Constitutional Convention of 1875* (1938) 440, show that the framers intended to impose the duty on the legislature. This view might be further substantiated by the statutory interpretation of the constitution. R. S. Mo. (1939) sec. 11461 provides, "In case of an alleged mistake in any return * * * the two houses shall in joint session, correct such mistake if any, and determine which is the true and correct return by a majority of the members present, and the same shall be counted by the speaker, *under the direction and control of the two houses thus assembled* * * *." (Italics supplied.) The court held that the legislature had control only where there was a mistake on the face of the returns. Clearly the element of control was the most difficult question in the decision.

10. (1891) 31 Neb. 169, 47 N. W. 710.

11. In re Speakership (1891) 15 Colo. 520, 25 Pac. 707, 708; State ex rel. Loomis v. Moffitt (1832) 5 Ohio Rep. 359, 367. But see Ex parte Norris (1876) 8 S. C. 408, 465; Robertson v. State (1886) 109 Ind. 79.

12. State ex rel. Morris v. Bulkeley (1892) 61 Conn. 287, 23 Atl. 186, 14 L. R. A. 657, 663; Dickson v. Strickland (1924) 114 Tex. 176, 265 S. W. 1012, 1016; Goff v. Wilson (1889) 32 W. Va. 393, 398.

13. State ex rel. Bates v. Thayer (1891) 31 Neb. 82, 47 N. W. 704 (mandamus to compel governor to canvass votes for office of judge). See State ex rel. Wright v. Savage (1902) 64 Neb. 684, 697, 90 N. W. 898; Cahill, The Separation of Powers in Nebraska (1939) 18 Neb. L. Bull. 367, 390.

14. State ex rel. Robb v. Stone (1894) 120 Mo. 428, 25 S. W. 376; State ex rel. Vogel v. Bersch (1900) 83 Mo. App. 657. The court in the instant case stated, "In no way would we be interfering in this case with the legislative power, since the thing to be done involves neither legislative duty nor discretion. *If either were involved we could not interfere because of the constitutional separation of powers which we must and we do uphold.*" (Italics supplied.)

15. (U. S. 1803) 1 Cranch 137.

It would seem that this reasoning would not apply in those cases where the duty rests upon a legislative officer under legislative control, and therefore would not help to solve the problem of whether legislative control in fact exists. In issuing mandamus against the speaker the court was silent as to the enforceability of the writ.[16]

Probably the largest single factor inducing the decision was the public policy involved. A different decision would have given the legislature power to ignore the *prima facie* returns and to delay indefinitely the seating of the governor, while important business of the state would have had to await the outcome of a long and spirited election contest. H. S. H.

16. The speaker, being a member of the legislature, might be held to be immune from arrest in contempt proceedings should he refuse to obey the writ of mandamus. Mo. Const. art. XIV, sec. 12.