of action. For example, in *State ex rel. Journal Printing Co. v. Dreyer*,[9] involving the award of a public contract, the statute required that the board award the contract to the lowest and best bidder. The facts were undisputed that the relator submitted the lowest and best bid. The board, in effect, thus admitted that had it exercised its discretion properly it could have reached but one result. Therefore, instead of issuing mandamus to compel proper exercise of discretion, the court issued mandamus to compel the board to award the contract to relator. Again, in *State ex rel. McCleary v. Adcock*,[10] the statute set up certain requirements as a prerequisite to the granting of a license. Since it was undisputed that the relator had fulfilled the requirements, mandamus issued to compel the granting of the license.

Paradoxically, the rule as to direct control by mandamus when all facts essential to relator's right are admitted was first enunciated in a case whose holding contravenes the orthodox application of mandamus. In that case, *State ex rel. Kelleher v. Board, St. Louis Public Schools*,[11] the statute provided for the appointment by a school board of judges and clerks for its elections. No requirements were set out as to the political affiliations of the appointees, but, because of the danger of a "gross fraud" on the public, mandamus issued to compel the selection of an equal number of Republicans and Democrats. The board's discretion, exercised properly under the terms of the statute, was directly controlled by the court.

The rule, then, seems to be that mandamus will issue (1) to compel performance of a ministerial duty;[12] (2) to compel exercise of discretion when there has been a refusal to take action;[13] (3) to compel the exercise of discretion in a proper manner when its exercise has been arbitrary, capricious, or unlawful;[14] and (4) to compel a particular result when the authority in whom discretion is vested admits in effect that, in the proper exercise of its discretion, there can be but one result.[15] Since the instant case falls into none of these categories, mandamus was properly denied.

N. B. K.

TORTS—RIGHT OF PRIVACY—LIABILITY FOR VIOLATING RETIREMENT OF PUBLIC FIGURE—[Federal].—Plaintiff was a former child prodigy who had drawn wide publicity when at the age of eleven he lectured to mathematicians on the fourth dimension and when at the age of sixteen he was graduated from Harvard. Some thirty years later he was living as unobtrusively as possible, working at a petty office job, and rooming in a boarding house in Boston. Defendant, publisher of *The New Yorker* maga-

9. (1914) 183 Mo. App. 463, 481, 167 S. W. 1123, 1127.
10. (1907) 206 Mo. 550, 105 S. W. 270.
11. (1896) 134 Mo. 296, 35 S. W. 617.
12. See cases cited supra note 2.
13. See cases cited supra note 5.
14. See cases cited supra note 6.
15. State ex rel. Journal Printing Co. v. Dreyer (1914) 183 Mo. App. 463, 481, 167 S. W. 1123, 1127; State ex rel. McCleary v. Adcock (1907) 206 Mo. 550, 105 S. W. 270.

zine, ferreted him out, and published without his permission an article entitled "April Fool," sketching his present mode of living. Since the plaintiff was suing in a federal court on grounds of diversity of citizenship, he was entitled by the doctrine of *Erie Railroad v. Tompkins*[1] to recover under the law of any state in which publication occurred. Thus the plaintiff brought suit stating three causes of action: (1) violation of his common law right of privacy; (2) infringement of the rights afforded him by the New York Civil Rights Law;[2] and (3) malicious libel.[3] The lower court granted defendant's motion to dismiss the first two causes of action and plaintiff appealed. *Held:* (1) There was no invasion of plaintiff's common law right of privacy, because plaintiff was still a subject of public interest; (2) the statutory action must fail since his name was not used for "trade purposes" within the meaning of the New York statute. *Sidis v. F-R Publishing Co.*[4]

Since the historic article by Warren and Brandeis,[5] there have not been as many cases on the right of privacy as one might expect. A common law right of privacy has been recognized by the courts of Georgia,[6] Kentucky,[7] Kansas,[8] and Missouri.[9] The courts of California have established a right of privacy by a questionable interpretation of the state constitution.[10] On the other hand, the doctrine has been flatly rejected in Rhode Island[11] and Washington.[12] Until the case of *Roberson v. Rochester Folding Box Co.*,[13] the trend in New York was unmistakably toward recognition of the right.[14]

1. Erie R. R. v. Tompkins (1938) 304 U. S. 64.
2. N. Y. Thompson's Laws (1939) Civil Rights Law, art. 5, secs. 50 and 51.
3. This issue was not decided by this court.
4. (C. C. A. 2, 1940) 113 F. (2d) 806.
5. The Right of Privacy (1890) 4 Harv. L. Rev. 193.
6. Pavesich v. New England L. I. Co. (1905) 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561; Bazemore v. Savannah Hospital (1930) 171 Ga. 257, 155 S. E. 194; Goodyear Tire & Rubber Co. v. Vandergriff (1936) 52 Ga. App. 662, 184 S. E. 452.
7. Brents v. Morgan (1927) 221 Ky. 765, 299 S. W. 967, 55 A. L. R. 964; Douglas v. Stokes (1912) 149 Ky. 506, 149 S. W. 849, 42 L. R. A. (N. S.) 386, 32 Ann. Cas. 374; Foster-Milburn v. Chinn (1909) 134 Ky. 424, 120 S. W. 364, 34 L. R. A. (N. S.) 1137, 135 Am. St. Rep. 417; Jones v. Herald Post Co. (1929) 230 Ky. 227, 18 S. W. (2d) 972; Rhodes v. Graham (1931) 238 Ky. 225, 37 S. W. (2d) 46.
8. Kunz v. Allen (1918) 102 Kan. 883, 172 Pac. 532, L. R. A. 1918D 1151.
9. Munden v. Harris (1911) 153 Mo. App. 652, 134 S. W. 1076.
10. In Melvin v. Reid (1931) 112 Cal. App. 285, 297 Pac. 91, the court based the right of privacy on art. I, sec. 1, of the California constitution: "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness." Since many other states have similar constitutional provisions, this seems to be a strained construction.
11. Henry v. Cherry & Webb (1909) 30 R. I. 13, 73 Atl. 97, 24 L. R. A. (N. S.) 991.
12. Hillman v. Star Publishing Co. (1911) 64 Wash. 691, 117 Pac. 594, 35 L. R. A. (N. S.) 595.
13. (1902) 171 N. Y. 538, 64 N. E. 442, 89 A. L. R. 828, 59 L. R. A. 478.
14. See Ragland, The Right of Privacy (1929) 17 Ky. L. J. 85.

One case seemed impliedly to recognize the right, and one year later this implied recognition ripened into express recognition in the case of *Schuyler v. Curtis*.[15] But this case was reversed, and the subsequent rejection of the right in the *Roberson*[16] case led to the passing of the New York Civil Rights Law.[17] Thus, right of privacy in New York depends entirely on the courts' interpretation of the statute.

The common law right of privacy has been defined as "the right to live one's life in seclusion without being subjected to unwarranted and undesired publicity."[18] This definition has been accepted by most of the courts recognizing the right. However, where one becomes, willingly or not, an actor in an occurrence of public or general interest, he emerges from his seclusion, and it is generally recognized that it is not an invasion of his right of privacy to publish his photograph or to write about him.[19] But a problem arises as to just how long a person in whom there is news value must remain out of the public eye before his news value dies. A California case held that a person who had retired from the public eye for seven years was no longer a subject of public interest.[20] A more recent case in the same forum held that retirement for one year was enough to preclude the subject from public speculation.[21] On the other hand, the principal case found that thirty years of retirement did *not* end public interest. Here, however, there is an intimate connection between the past prominence which made plaintiff "newsworthy" and the present privacy which is alleged to have been invaded. As the court put it, "His subsequent history, containing as it did the answer to the question of whether or not he had fulfilled his early promise, was still a matter of public concern."[22] Interest in the one contained the seeds of interest in the other. The article, moreover, was conceived and written in that light. In the California cases[23] there was no such connection. The closed chapter in each life was reopened for its own sake and without regard to, or thought for, the subsequent pursuits of the subject.

This distinction suggests that the duration of retirement from the public gaze is not the determinative factor in cases of this sort. Rather it is the nature of the former prominence and of the public interest aroused by it to which the court must look. If the acts of the plaintiff which brought him to public attention were such as to arouse a continued public interest in the plaintiff's future, then the defendant will be justified in satisfying that

15. (Sup. Ct. 1893) 24 N. Y. S. 509.
16. Roberson v. Rochester Folding Box Co. (1902) 171 N. Y. 538, 64 N. E. 442, 89 A. L. R. 828, 59 L. R. A. 478.
17. N. Y. Thompson's Laws (1939) Civil Rights Law, art. 5, secs. 50 and 51.
18. Warren and Brandeis, The Right of Privacy (1890) 4 Harv. L. Rev. 193.
19. Metter v. Los Angeles Examiner (1939) 95 P. (2d) 491.
20. Melvin v. Reid (1931) 112 Cal. App. 285, 297 Pac. 91.
21. Mau v. Rio Grande Oil Inc. (D. C. N. D. Cal. 1939) 28 F. Supp. 845.
22. Sidis v. F-R Publishing Co. (C. C. A. 2, 1940) 113 F. (2d) 806, 809.
23. Melvin v. Reid (1931) 112 Cal. App. 285, 297 Pac. 91; Mau v. Rio Grande Oil Inc. (D. C. N. D. Cal. 1939) 28 F. Supp. 845.

interest at a later date, even if the plaintiff has withdrawn from the public eye.

J. J. E.

UNAUTHORIZED PRACTICE OF LAW—LAY PRACTICE BEFORE INTERSTATE COMMERCE COMMISSION — ENFORCEMENT OF EMPLOYMENT CONTRACT — [Missouri].—Plaintiff, a duly authorized and licensed layman practitioner before the Interstate Commerce Commission, sued the defendant corporation in Missouri for fees for services rendered under a contract of employment made in Illinois. By the terms of the contract plaintiff was to represent defendant on a contingent fee basis in certain rate reduction cases before the Interstate Commerce Commission. Defendant demurred to plaintiff's petition, alleging that the contract was contrary to the public policy of Missouri, since it called for services amounting to the practice of law as defined by statute in Missouri. The demurrer was sustained and plaintiff appealed to the supreme court. *Held*, that the lower court erred in sustaining the demurrer to plaintiff's petition.[1] The contract was valid according to federal law, which was binding on the State of Missouri under the "supreme law of the land" clause of the Federal Constitution,[2] and the Missouri statute defining and regulating the practice of law does not declare a policy against any right accorded by federal law. *De Pass v. Harris Wool Co.*[3]

The Missouri statute defines the practice of law as, *inter alia*, "the appearance as an advocate in a representative capacity * * * before * * * any body, board, committee or commission constituted by law or having authority to settle controversies * * *."[4] Thus in Missouri only a licensed lawyer can appear and practice before an administrative agency. The Supreme Court of Missouri has held, for example, that this statute, as a valid exercise of the police power, confines the practice of law before the State Public Service Commission to duly licensed attorneys.[5] Plaintiff, therefore, could not have entered into a valid contract to appear as an advocate before any state agency.[6]

With the rapid growth of administrative agencies in recent years, practice before state and federal agencies has been much discussed by legal writers.[7] There is no uniformity among the forty-eight states as to the rights of laymen to appear before the various state agencies.[8] There is

1. Defendant thereupon appealed to the Supreme Court of Missouri *en banc*.
2. Art. 6, cl. 2.
3. (Mo. 1940) Div. 1, May Term, No. 36,559 (unpublished).
4. R. S. Mo. (1929) sec. 11692.
5. Clark v. Austin (1937) 340 Mo. 467, 101 S. W. (2d) 977.
6. See Howard, Control of Unauthorized Practice Before Administrative Tribunals in Missouri (1937) 2 Mo. L. Rev. 313.
7. See Gambrell, Lay Encroachment on the Legal Profession (1931) 29 Mich. L. Rev. 989; Hicks and Katz, The Practice of Law by Laymen and Lay Agencies (1931) 41 Yale L. Rev. 69; Howard, supra note 6.
8. In response to questionnaires sent to the attorney generals of the forty-eight states by Professor Ralph Fuchs of Washington University Law