

business. Again, consider the case of *Sewell v. Swift*<sup>57</sup> in which the court ignored the fact that the notes were placed in the plaintiff's hands with the understanding that they were not to be regarded as promissory notes obligating the defendant to pay, but were to be held by the plaintiff as evidence of an indebtedness in the event of the defendant's death before the formation of a certain company. The writer believes that the absurdity of applying the general rule to such cases is patent when the court admits that it would reach an opposite decision if a contrary intent were shown.

In brief the author contends that by judicial decision or by statute, the rule applicable to ordinary demand notes should be changed so as to require an actual demand as a condition precedent to the accrual of a cause of action; that being the case the statute of limitations would not begin to run until the demand had been made. In this way resort to the "intention rule," at best always an uncertain and unreliable doctrine, would be rendered unnecessary, and an uniformity, at present unknown in this field, would be attained.

MALCOLM L. BARTLEY '35.

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### THE USE OF MANDAMUS IN MISSOURI

Mandamus is a writ of very ancient and obscure origin. It seems originally to have been one of the many writs or mandates by which the sovereign of England directed the performance of any desired act by his subjects. These were not judicial writs, merely commands. The command being a law in itself from which there was no appeal, it was not merely declaratory of a duty under existing law but created the law and imposed the duty, the performance of which it commanded. It later assumed a judicial nature, and as a judicial writ mandamus probably appeared in use as early as the 14th and 15th centuries.<sup>1</sup> It, however, did not come into systematic use until the latter part of the 17th century and was then a purely prerogative writ proceeding from the king himself in the court of King's Bench. Its original purpose was to prevent disorder from a failure of justice and defect of police and grew out of the necessity of compelling inferior courts to exercise judicial and ministerial powers invested in them, by not only restraining their excesses but also preventing their negligence and restraining their denial of justice.<sup>2</sup>

The modern writ of mandamus may be defined as a command

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<sup>57</sup> *Ibid.*

<sup>1</sup> High, *Extraordinary Legal Remedies*, (1884), sec. 2. (For convenience this work will hereinafter be cited merely as "High.")

<sup>2</sup> Ferris, *Extraordinary Legal Remedies*, (1926), p. 219.

issuing from a common law court of competent jurisdiction in the name of the state or sovereign, directed to some corporation, officer or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed or from operation of law.<sup>3</sup> Although in England today the writ retains some of its prerogative features, issuing not of right but at the will of the sovereign, yet in the United States it is generally held to have lost its prerogative character, being now merely in the nature of a civil action or proceeding to enforce a legal right.<sup>4</sup> And even though still considered somewhat extraordinary in nature, its use is not arbitrary with the court, but is governed by fixed rules and principles.<sup>5</sup>

A mandamus proceeding is generally classified or regarded as a civil action, especially as contradistinguished from a criminal proceeding; and it is a proceeding at common law as distinguished from one in equity.<sup>6</sup> Judge Lamm of the Missouri Supreme Court has referred to mandamus as "a hard and fast writ, an unreasoning writ, a cast-iron writ, the right arm of the court. It is," he says, "essentially the exponent of judicial power and hence is reserved for extraordinary emergencies."<sup>7</sup>

Such are the general characteristics of mandamus; in its application to specific circumstances there is, as in most categories of American law, an inevitable lack of uniformity. We shall attempt here to examine the decisions of the Missouri courts which limit the circumstances under which the writ will issue and determine its availability for judicial control of various types of official action.

## LIMITATIONS ON THE ISSUANCE OF THE WRIT

### I. WHEN THE CONSTITUTIONALITY OF A STATUTE IS INVOLVED

The authorities are not in accord in regard to when the constitutionality of a statute may be challenged in mandamus proceedings, but the decisions indicate that Missouri courts have arrived at a somewhat definite conclusion as to the local policy on this matter. The question generally arises in two ways: (1) where the relator questions the constitutionality of a statute which if valid would excuse the respondent from performing the act or duty sought to be enforced, and (2) where the respondent

<sup>3</sup> 3 Blackstone Comm. 110; *Dunklin County v. County Court* (1856) 23 Mo. 449.

<sup>4</sup> Ferris, *op. cit.* p. 221.

<sup>5</sup> High, secs. 3, 4, 5.

<sup>6</sup> 18 R. C. L. 88; *In re Nathan Frank* (1928) 320 Mo. 1087, 9 S. W. (2d) 153.

<sup>7</sup> *State ex inf. Kansas City v. Kansas City Gas Co.* (1913) 254 Mo. 515, 163 S. W. 854.

claims that the statute relied on by the relator as imposing on him the duty sought to be enforced is unconstitutional and therefore he is under no obligation to perform such duty.<sup>8</sup>

The majority of the courts have taken the view that the relator may attack the constitutionality of the statute relied on by the respondent as excusing him from the performance of the duty.<sup>9</sup> The Missouri courts, however, have apparently taken the opposite stand and adhere to the general principle that "courts will not declare an act unconstitutional in an application for a mandamus."<sup>10</sup> In the case of *State ex rel. Crandall v. McIntosh*<sup>10a</sup> the court, intimating that under some circumstances this rule might not be adhered to, nevertheless asserted that one alleging an act to be unconstitutional cannot seek by mandamus to compel action under it, thus affirming the proposition that the constitutionality of a statute cannot be questioned by one who seeks to avail himself of its provisions. The general principle was also approved in the later case of *State ex rel. Rainwater v. Ross*<sup>11</sup> denying the relator the right to question the legality of a Local Option election in a proceeding to compel the county court judges to grant him a dramshop license. However, in *State ex rel. Kemper v. Carter*<sup>12</sup> when the validity of a Local Option election was again contested, the court, indicating that unusual circumstances will cause a relaxation of the rules, proceeded to consider the matter as it was inseparably connected with another point which demanded immediate consideration. And in the case of *State ex rel. Case v. Wilson*<sup>13</sup> the Court of Appeals went contrary to established principles in restoring to office a major who was wrongfully removed from same for failure to approve an ordinance which the court, in the application for reinstatement, examined and declared invalid.

Although on the second question the authorities are in conflict,<sup>14</sup> Missouri has quite uniformly adhered to the doctrine that "the constitutionality of a statute imposing ministerial duties upon a ministerial officer cannot be raised by him in a mandamus proceeding instituted for the purpose of compelling him to perform those duties."<sup>15</sup> This rule is based on the theory that only

<sup>8</sup> 18 R. C. L. 105.

<sup>9</sup> 18 R. C. L. 106; In re Ayers (1887) 123 U. S. 443.

<sup>10</sup> *State ex rel. Crandall v. McIntosh* (1907) 205 Mo. 589, 103 S. W. 1078; *State ex rel. Buder v. Brand* (1924) 305 Mo. 321, 265 S. W. 989.

<sup>10a</sup> *Supra*, note 10.

<sup>11</sup> (1912) 245 Mo. 36, 149 S. W. 451; *State ex rel. Clark v. Smith* (1891) 104 Mo. 661, 16 S. W. 503; *State ex rel. Jamison v. Lesueur* (1894) 126 Mo. 413, 29 S. W. 278.

<sup>12</sup> (1913) 257 Mo. 52, 165 S. W. 773.

<sup>13</sup> (1910) 151 Mo. App. 723, 132 S. W. 625. Here of course, the factual analogy is not perfect but the same legal principles should control.

<sup>14</sup> 18 R. C. L. 108; note, 19 St. L. R. 340.

<sup>15</sup> *State ex rel. Wiles v. Williams* (1910) 232 Mo. 56, 133 S. W. 1; *State*

those directly affected by the operation of a statute may question its validity, and that a ministerial officer lacks this necessary interest. The courts, however, have approved certain exceptions to this principle, and allow the defense of invalidity to be raised where the statute has previously been declared invalid by the court,<sup>16</sup> where a case on that issue was at the time pending before a court,<sup>17</sup> or where the refusal to act is based on the advice of the Attorney General that the statute is unconstitutional.<sup>18</sup> More in the nature of a departure from the rule, rather than a mere exception to it, is the recent case of *State ex rel. Cranfill v. Smith*,<sup>19</sup> in which the Supreme Court refused to compel city authorities to submit to a vote an ordinance which if adopted would be unconstitutional. Though sufficiently different in facts not to be in conflict with prior decisions, the case clearly indicates a tendency away from a strict construction of the recognized rule.

## II. WHEN SOUGHT TO INTERFERE WITH ANOTHER DEPARTMENT OF GOVERNMENT

Although it is generally recognized that "it is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined,"<sup>20</sup> yet there is conflict as to whether the writ must not be denied as against certain executive and legislative officers merely because of the nature of their office. In this respect, Missouri, with a majority of the states, has established the doctrine that the governor of the state is, as to the performance of any and all official duties, entirely removed from the control of the courts, and that he is beyond the reach of mandamus not only as to duties of a strictly executive or political nature, but even as to acts purely ministerial whose performance the legislature may have required at his hands. And this, even though he voluntarily submits to the jurisdiction of the court.<sup>21</sup> This refusal of the judiciary to interfere with the operation of another department of government is also the basis for the

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ex rel. Stokes v. Roach (Mo. 1916) 190 S. W. 277; *State ex rel. Thompson v. Jones* (1931) 328 Mo. 267, 41 S. W. (2d) 393.

<sup>16</sup> *State ex rel. Forgrave v. Hill* (1917) 272 Mo. 206, 198 S. W. 844.

<sup>17</sup> *State ex rel. Stoecker v. Lemay Ferry Sewer Dist.* (1933) 332 Mo. 965, 61 S. W. (2d) 724.

<sup>18</sup> *State ex rel. Chicago, R. I. & Pac. Ry. Co. v. Becker* (1931) 328 Mo. 541, 41 S. W. (2d) 188; *State ex rel. Bldg. Assn. v. Brown* (Mo. 1934) 68 S. W. (2d) 55.

<sup>19</sup> (1932) 330 Mo. 252, 48 S. W. (2d) 891.

<sup>20</sup> Chief Justice Marshall in *Marbury v. Madison*, (1803) 1 Cranch 137

<sup>21</sup> High, sec. 120; *State ex rel. Robb v. Stone* (1893) 120 Mo. 428, 25 S. W. 376; *State ex rel. Bartley v. Governor* (1867) 39 Mo. 338; the secretary of state however acts for the most part ministerially, and may be coerced by mandamus. *State ex rel. Stokes v. Roach*, supra note 15.

kindred rule that legislative officers, in their purely legislative functions, are beyond the control of the courts by the writ of mandamus.<sup>22</sup> However, where the duty required of the legislative officer is simply of a ministerial nature, not calling for the exercise of any special legislative functions nor involving any degree of official discretion, mandamus may be allowed. Accordingly, it has been held that the president of a city council may be required to sign a bill,<sup>23</sup> and that a city manager may be compelled to submit a budget to the city council, which body must then effectuate the plan by ordinance.<sup>24</sup> Likewise the writ has issued to compel a mayor to revoke permits which he has issued illegally.<sup>25</sup> On the other hand, the following functions of legislative bodies and officials have been held beyond control by mandamus: the determination by the municipal assembly of the qualifications of its own members,<sup>26</sup> the refusal of the presiding officer of the Senate to sign a bill,<sup>27</sup> the refusal of the Attorney General to bring a quo warranto proceeding,<sup>28</sup> and the power of the circuit court to redistrict the city into Senatorial districts as required by the Constitution.<sup>29</sup> In a recent case, the city clerk in determining the sufficiency of initiative petitions, was also given this immunity.<sup>30</sup>

### III. WHEN ACT SOUGHT TO BE COMPELLED IS PROHIBITED BY LAW OR INJUNCTION

It is well established that mandamus will be denied where it appears that the acts sought to be coerced are unauthorized or forbidden by law, or that they tend to aid an unlawful purpose.<sup>31</sup> With this proposition the Missouri courts have had little difficulty and are in full accord.<sup>32</sup> Likewise in accordance with general principles, the courts have refused to grant relief when an injunction is in force against the performance of the duty sought to be compelled.<sup>33</sup> This doctrine is recognized even though the party seeking mandamus is not named in the injunction suit; it

<sup>22</sup> High, sec. 135.

<sup>23</sup> State ex rel. Railroad Co. v. Meier (1897) 143 Mo. 439, 45 S. W. 306.

<sup>24</sup> State ex rel. Bd. of Police Commrs. v. Beach (1930) 325 Mo. 175, 28 S. W. (2d) 105.

<sup>25</sup> State ex rel. Barricelli v. Noonan (1894) 59 Mo. App. 524.

<sup>26</sup> State ex rel. Vogel v. Bersch (1900) 83 Mo. App. 657.

<sup>27</sup> State ex rel. Davisson v. Bolte (1899) 151 Mo. 362, 52 S. W. 262.

<sup>28</sup> State ex inf. Folk v. Talty (1901) 166 Mo. 529, 66 S. W. 361.

<sup>29</sup> State ex rel. Barrett v. Hitchcock (1911) 241 Mo. 433, 146 S. W. 40.

<sup>30</sup> State ex rel. Johnson v. Regan (Mo. App. 1934) 76 S. W. (2d) 736.

<sup>31</sup> 38 C. J. 556.

<sup>32</sup> State ex rel. Kent v. Olenhouse (1929) 324 Mo. 49, 23 S. W. (2d) 83; State ex rel. Motz v. Kelloren (Mo. App. 1925) 271 S. W. 544; State ex rel. Seeligman v. Hays (1872) 50 Mo. 34; In re Nathan Frank (1928) 320 Mo. 1087, 9 S. W. (2nd) 153.

<sup>33</sup> State ex rel. Phelan v. Engelmann (1885) 86 Mo. 551; State ex rel. Thomas v. Williams (1889) 99 Mo. 291, 12 S. W. 905.

is sufficient that the defendant was bound thereby.<sup>34</sup> But if the court issuing the injunction had no jurisdiction to do so, the order is no obstacle to the issuance of mandamus.<sup>35</sup> Similarly a pardon issued by the Governor without authority (because directed against a violation of a city ordinance) has been held not to bar mandamus to compel execution of the judgment.<sup>36</sup>

#### IV. WHEN TITLE OR RIGHT TO OFFICE IS INVOLVED

It is stated as a general rule that the title to an office cannot be determined in mandamus, the proper remedy usually being held to be quo warranto or a specific statutory proceeding.<sup>37</sup> Missouri cases support this general doctrine and have invoked it in a variety of circumstances. Most frequently the issue has arisen upon application for mandamus to compel the allowance of a salary for an office to which there is a conflicting claim. It is the rule that the *prima facie* right must be recognized, until all rights are finally determined by contesting the election or by proceeding in quo warranto, in both of which actions the other contestant must be a party. Accordingly, where the relator presents a better right, mandamus will lie in his favor.<sup>38</sup> But if someone other than the relator appears to have the better title, the writ must be refused.<sup>39</sup> Likewise where it is sought to determine a contested title to an office by compelling a counting of the votes, mandamus will be refused and the parties left to other remedies, as provided by law.<sup>40</sup> And though when title to an office is settled, mandamus will lie to compel the delivery of books and papers belonging to the officer, yet when title thereto is still in dispute, mandamus is not the proper remedy.<sup>41</sup>

A somewhat different question arises when the eligibility to hold office rather than legal title to the office is involved. Such a case is presented when a claimant seeks to obtain a certificate of election,<sup>42</sup> or a certificate of nomination,<sup>43</sup> or the approval of his

<sup>34</sup> State ex rel. Davis v. State Highway Comm. (1925) 312 Mo. 230, 279 S. W. 689. This case indicates that a possible exception to the rule exists where a paramount public interest is involved, yet denies the existence of such here.

<sup>35</sup> State ex rel. School District v. Byers (1878) 67 Mo. 706.

<sup>36</sup> State ex rel. Kansas City v. Renick (1900) 157 Mo. 292, 57 S. W. 713.

<sup>37</sup> 38 C. J. 589.

<sup>38</sup> State ex rel. Tolerton v. Gordon (1911) 236 Mo. 142, 139 S. W. 403; State ex rel. Frank v. Goben (1912) 167 Mo. App. 613, 152 S. W. 93.

<sup>39</sup> State ex rel. Jackson v. Auditor (1864) 34 Mo. 375; Winston v. Moseley, Auditor (1864) 35 Mo. 146; State ex rel. Jackson v. State Auditor (1865) 36 Mo. 70; State ex rel. Simmons v. John (1833) 81 Mo. 13.

<sup>40</sup> State ex rel. Bland v. Rodman (1869) 43 Mo. 256; State ex rel. Jamison v. Lesueur, *supra* note 11.

<sup>41</sup> State ex rel. Cannon v. May (1891) 106 Mo. 488, 17 S. W. 660; State ex rel. Tracy v. Taaffe (1887) 25 Mo. App. 567.

<sup>42</sup> State ex rel. Snyder v. Newman (1886) 91 Mo. 445, 3 S. W. 849; State ex rel. Thomas v. Williams, *supra* note 33.

<sup>43</sup> State ex rel. Farris v. Roach (1912) 246 Mo. 56, 150 S. W. 1073.

bond for office.<sup>44</sup> In the last two circumstances the writ will generally issue, though in the first mandamus is denied. The distinction is best stated by the following excerpt from a New York case, frequently quoted with approval by the Missouri courts:

“When the act, the doing of which is sought to be compelled by mandamus, is the final thing, and if done, gives to the relator all that he seeks proximately or ultimately, then the question whether he is entitled to have that act done, may be inquired into by the officer or person to whom the mandamus is sought, and is also to be considered by the tribunal which is moved to grant the mandamus; but where the act to be done is but a step towards the final result, and is but the means of setting in motion a tribunal which is to decide upon the right to the final relief claimed, then the inferior officer or tribunal may not inquire whether there exists the right to the final relief, and can only ask whether the relator shows a right to have the act done which is sought from him or it.”<sup>45</sup>

It has been repeatedly asserted that mandamus is the proper remedy for restoration to public office after improper removal.<sup>46</sup> This is approved by Missouri decisions, along with the recognized exception that mandamus does not lie to induct a claimant into an office already filled by a person with color of right. The remedy in such a case is by quo warranto, thus giving the de facto officer a hearing. Mandamus can only be used where the relator holds the uncontested title or where his title has been adjudicated and finally established by a competent tribunal.<sup>47</sup> However, where the office is filled by a mere intruder with no color of right, mandamus will lie, for title to office is not involved and only the validity of the ouster is questioned.<sup>48</sup>

#### V. WHEN SOUGHT TO COMPEL ACTS UNAVAILING, IMPOSSIBLE, OR ALREADY PERFORMED

It is a fundamental principle of the law of mandamus that the writ will never be granted in cases where, if issued, it would prove unavailing.<sup>49</sup> In the Missouri cases this principle has been

<sup>44</sup> *State ex rel. Cameron v. Shannon* (1895) 133 Mo. 139, 33 S. W. 1137; *State ex rel. Sanders v. Wear* (1889) 37 Mo. App. 325; *Ibbetson v. Schulz* (Mo. App. 1933) 64 S. W. (2d) 313.

<sup>45</sup> *People ex rel. v. Canal Appraisers* (1878) 73 N. Y. 443.

<sup>46</sup> 18 R. C. L. 264; *State ex rel. Kansas City v. Coon* (1926) 316 Mo. 524, 296 S. W. 90.

<sup>47</sup> *State ex rel. Gallagher v. Kansas City* (1927) 319 Mo. 705, 7 S. W. (2d) 357.

<sup>48</sup> *St. Louis County Court v. Sparks* (1846) 10 Mo. 117; *State ex rel. Guion v. Miles* (1907) 210 Mo. 127, 109 S. W. 595; *State ex rel. Case v. Wilson* (1910) 151 Mo. App. 723, 132 S. W. 625.

<sup>49</sup> High, sec. 14.

invoked as grounds for refusing to issue the writ where the acts sought to be compelled are impossible of performance, or for some reason, even if performed, would be ineffective, or where the acts have already been performed and there is therefore nothing remaining which mandamus should direct to be done. Often there is an element of uncertainty as to what would be the ultimate effect of the writ; in such cases this is a matter to be considered by the court in the exercise of its judicial discretion.

An act has been deemed impossible of performance when the party against whom the writ is invoked has no power to execute its mandate,<sup>50</sup> or where a compliance with the mandate would require the expenditure of funds which the respondent does not possess and which he has no means of obtaining.<sup>51</sup> The futility of compliance with the writ as a ground for its denial has most frequently arisen in those cases where the time for exercising the right which it is sought to enforce by mandamus, has nearly, if not completely expired.<sup>52</sup>

In another group of cases mandamus has been refused to reinstate a discharged officer for irregularities in removal proceedings when it is acknowledged there was sufficient cause for removal and he would undoubtedly be removed on restoration.<sup>53</sup>

More often the writ has been refused because the acts sought to be compelled have already been performed. Accordingly, where the relator sought a certificate of indebtedness only to call the matter to the attention of the legislature, but it appeared they

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<sup>50</sup> High, sec. 14; *State ex rel. Onion v. Supreme Temple Pythian Sisters* (1932) 227 Mo. App. 557, 54 S. W. (2d) 468; *State ex rel. Smith v. Platte County Court* (1884) 83 Mo. 539.

<sup>51</sup> 18 R. C. L. 140; *State ex rel. Wilcox v. Draper* (1872) 50 Mo. 24; *State ex rel. Special Road District v. Holman*, (1924) 305 Mo. 195, 264 S. W. 908; *State ex rel. Special Road District v. Cole County* (Mo. 1927) 300 S. W. 267.

<sup>52</sup> *State ex rel. Williams v. Harrison* (1902) 173 Mo. 19, 72 S. W. 1072 (time in which license was to be effective had expired); *State ex rel. Hughlett v. Finley* (1898) 74 Mo. App. 213 (term of office had nearly expired).

<sup>53</sup> *State ex rel. Stickle v. Martin* (1916) 195 Mo. App. 366, 191 S. W. 1064; *State ex rel. Young v. Temperance Benev. Assn.* (1890) 42 Mo. App. 485. Similarly in *State ex rel. Castlio v. Edwards* (1881) 11 Mo. App. 152 the court refused to compel a trial judge to enter judgment on a verdict where in the exercise of his discretion he had granted a new trial, being satisfied that the verdict was obtained by the perjury of a party in interest. Though he be required to enter judgment, he would still be bound to set it aside for cause. Recognizing the general rule, the court in *State ex rel. Scanland v. Thompson* (1916) 196 Mo. App. 12, 187 S. W. 804 created an exception and issued mandamus in favor of a widow to enforce her absolute right to appointment as administratrix. There being no appeal from a refusal to grant letters, and the admitted objections to her serving not constituting absolute disqualification, the court was bound to grant the letters. Any objections could be used in removal proceedings from which an appeal would lie.



already knew of it, mandamus was denied.<sup>54</sup> Often performance is subsequent to the issuance of the alternative writ in which case the proper procedure is to refuse to make it peremptory.<sup>55</sup> In this connection it has been pointed out that mandamus was never intended to be invoked simply to demonstrate the existence of the State's power. It is properly invoked to remedy "rights that lack assistance or wrongs that need resistance."<sup>56</sup>

#### VI. WHEN SOUGHT TO ENFORCE PRIVATE RIGHTS

From what has already been said it is obvious that mandamus lies only for the enforcement of duties incumbent by law upon the person or body against whom the coercive power of the court is invoked. Therefore contract rights of a private or personal nature, involving no question of trust or of official duty, cannot be enforced by mandamus.<sup>57</sup> Nor is the remedy appropriate to command the performance of a duty at the hands of one who does not occupy an official or quasi-official relation.<sup>58</sup> So generally is this proposition recognized and acquiesced in that it has received only slight attention by the Missouri courts. In an early case the Supreme Court stated the rule that mandamus does not lie to enforce simple common law rights between individuals based on contract for the payment of money.<sup>59</sup> Accordingly it was later held that the writ will not lie against a mere private person compelling him to produce books of a private nature detained by him.<sup>60</sup> It was subsequently decided that mandamus could not issue against an executrix as she is a mere trustee engaged in administering a private trust and holds neither an official nor quasi-official position.<sup>61</sup>

#### SCOPE OF THE WRIT

In considering the variety of functions against which mandamus may be directed, it must be borne in mind that the most prolific source of controversy in the use of this writ has been the fundamental rule, often difficult of application, that mandamus cannot be used to dictate an act which is discretionary in character. The person against whom the writ is invoked may be

<sup>54</sup> State ex rel. Wilcox v. Draper, *supra* note 51.

<sup>55</sup> State ex rel. Ranney v. MacChesney (1911) 237 Mo. 670, 141 S. W. 640; State ex rel. Meyers v. Shinnick (Mo. 1929) 19 S. W. (2d) 676; State ex rel. Clement v. Stokes (1903) 99 Mo. App. 236, 73 S. W. 254.

<sup>56</sup> State ex rel. Thompson v. Board of Regents (1924) 305 Mo. 57, 264 S. W. 693.

<sup>57</sup> High, sec. 25; Payne v. School District (1901) 87 Mo. App. 415.

<sup>58</sup> High, sec. 25.

<sup>59</sup> State ex rel. Bohannon v. Howard County Court (1867) 39 Mo. 375.

<sup>60</sup> State ex rel. Cooper County v. Trent (1875) 58 Mo. 571.

<sup>61</sup> State ex rel. Lionberger v. Tolle (1880) 71 Mo. 645. The court also held as sufficient reason for refusing the writ that the probate court has ample authority to compel the executrix to perform her duty under the law.

compelled to exercise his discretion but cannot be compelled to act in a particular way. However, if the act in question is purely a ministerial duty involving no discretion on the part of the person charged with the duty to act, mandamus will lie to compel the discharge of that duty. In this respect a ministerial act has been defined as "one which a public officer is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed."<sup>62</sup>

A qualification of the above rule has been recognized to the extent that when an inferior tribunal or official body charged with the performance of a discretionary duty is guilty of a gross and palpable violation of the discretion confided to it, mandamus may lie to command its due exercise.<sup>63</sup> This exception is based on the idea that the abuse of discretion may be such a gross evasion of a positive duty that it is equivalent to a refusal to perform the duty enjoined, or to act at all, in contemplation of law.<sup>64</sup>

That this rule, together with its exception, has always been a part of the Missouri law, cannot be disputed. And the court in considering whether to grant or refuse a mandamus in a particular case, is in every instance guided by the principles stated above, subject of course, to the other considerations pointed out in the preceding sections of this article.

However, it is within the province of the courts in each case to decide whether an act sought to be enforced is or is not ministerial,<sup>65</sup> and the distinctions drawn are often arbitrary ones, recognized only in order to reach a desired result. Thus additional flexibility is given to the scope of the writ in addition to that already existing because of the discretion as to its issuance inherent in the court.

#### I. IN THE FIELD OF TAXATION

Mandamus has been used in the field of taxation in Missouri in several ways. Most often it has been utilized to compel a public body to levy a tax to pay off an indebtedness. To this end it has issued against municipal corporations, or their officers or trustees,<sup>66</sup> judges of the county court,<sup>67</sup> and supervisors of various

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<sup>62</sup> Finkelnburg and Williams, *Missouri Appellate Practice*, (2d ed. 1906), p. 228; *State ex rel. Railroad Co. v. Meier*, supra note 23.

<sup>63</sup> Finkelnburg and Williams, *op. cit.*, p. 229.

<sup>64</sup> 18 R. C. L. 126.

<sup>65</sup> 38 C. J. 597.

<sup>66</sup> *Flagg v. Mayor of City of Palmyra* (1863) 33 Mo. 440; *State ex rel. Rogers v. Hug* (1869) 44 Mo. 116; *State ex rel. Cassidy v. Slavens* (1882) 75 Mo. 508; *Hambleton v. Town of Dexter* (1886) 89 Mo. 188, 1 S. W. 234.

<sup>67</sup> *State ex rel. White v. Clay County* (1870) 46 Mo. 231; *State ex rel. Frazer v. Holt County Court* (1896) 135 Mo. 533, 37 S. W. 521.

levee, school and sewer districts.<sup>68</sup> From this group of decisions it has become the law of this state that mandamus will issue to compel a municipal corporation to levy a tax to pay a judgment obtained against the city.<sup>69</sup> It was originally required that execution on this judgment must have issued and have been returned unsatisfied,<sup>70</sup> but a later case indicates that it is sufficient to state that the town has no property whereon to levy execution and no money in the treasury subject to the payment of the judgment.<sup>71</sup> However, when a city has taxed to the limit of its statutory authority, mandamus will not issue to compel the levy of a special tax, even for the satisfaction of a tort judgment.<sup>72</sup> From what has already been pointed out, it necessarily follows that mandamus will not lie to compel the levy of a tax for payment of warrants drawn on a municipal corporation treasury before the warrants have been reduced to judgment.<sup>73</sup> Yet it is a recognized exception that when the debt is to be paid from a special fund or is being asserted against officers of a special district, such as the supervisors of a levee district, no judgment is necessary.<sup>74</sup>

In these cases the court assumed that the duty in each instance was a ministerial one. In the case of *State ex rel. Carpenter v. St. Louis*<sup>75</sup> it was held that when a special tax has been authorized by the people, the duty to levy it is ministerial and the writ will lie. Accordingly it is recognized that when any specific ministerial duty, mandatory in nature, is imposed on an officer or board, with respect to the levy, assessment and application of taxes mandamus will lie to compel its performance.<sup>76</sup>

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<sup>68</sup> *State ex rel. McWilliams v. Bates* (1911) 235 Mo. 262, 138 S. W. 482; *State ex rel. Boatmen's Bank v. Sewer District* (1930) 327 Mo. 594, 37 S. W. (2d) 905; *State ex rel. Stoecker v. Lemay Ferry Sewer Dist.*, *supra* note 17.

<sup>69</sup> *State ex rel. Cassidy v. Slavens*, *supra* note 66; *Heather v. City of Palmyra* (1925) 311 Mo. 32, 276 S. W. 872. See also R. S. Mo. (1929) sec. 1233.

<sup>70</sup> *Cloud v. Inhabitants of Pierce City* (1885) 86 Mo. 357.

<sup>71</sup> *Hambleton v. Town of Dexter*, *supra* note 66.

<sup>72</sup> *State ex rel. Emerson v. Mound City* (Mo. 1934) 73 S. W. (2d) 1017. The court pointed out though, that it is no defense to the tort action that the taxation limit has already been reached. This case, in placing Missouri in accord with the prevailing view, overruled a prior group of contra decisions creating an exception in favor of tort judgments. See *State ex rel. Poole v. Willow Springs* (Mo. 1915) 183 S. W. 589.

<sup>73</sup> *State ex rel. Jeffries v. Trustees, Town of Pacific* (1875) 61 Mo. 155.

<sup>74</sup> *Sheridan v. Fleming* (1887) 93 Mo. 321, 5 S. W. 813; *State ex rel. McWilliams v. Bates* (1911) 235 Mo. 262, 138 S. W. 482.

<sup>75</sup> (1927) 318 Mo. 870, 2 S. W. (2d) 713.

<sup>76</sup> *State ex rel. Zoolog. Board v. St. Louis* (1927) 318 Mo. 910, 1 S. W. (2d) 1021; this doctrine has been invoked in a variety of circumstances. In *State ex rel. Thompson v. Jones* (Sup. Ct. Mo. 1931, 41 S. W. (2d) 39) mandamus was awarded to compel the county clerk to compute and extend taxes on certain personality omitted by the county assessor from the assess-

A somewhat different use of the writ in this field, though by no means unique in Missouri,<sup>77</sup> was allowed in *American Mfg. Co. v. Alt*,<sup>78</sup> where the court held that where one is threatened by a tax-collecting officer with prosecution unless he pays a tax, he may tender the amount he deems due and on refusal of the collector to accept it, proceed by mandamus to ascertain his rights. Likewise in the case of *State ex rel. Flaugh v. Jaudon*<sup>79</sup> mandamus was allowed to compel the city to accept as full taxes the amount tendered, representing the tax before the raise, in order to thus determine whether the 20% tax increase over the amount tendered was valid.

## II. IN THE ISSUING OF LICENSES

The cases in which mandamus has been sought to compel the issuance of a license fall into several well-defined categories. The Missouri decisions uniformly support the accepted rules that when the duty to issue a license is a ministerial one, mandamus will lie, but that where the granting of the license is a matter of discretion, mandamus cannot be invoked unless that discretion has been arbitrarily exercised.<sup>80</sup> It has been suggested<sup>81</sup> that in order to impose a valid license fee under the police power, some qualified officer must exercise a discretion in the issuance of the license. But where the fee is exacted under the taxing power the license must be issued to all applicants tendering the prescribed fee.<sup>82</sup> Yet in considering whether or not mandamus is to issue, any distinction founded strictly on a discretion-non-discretion rationale is questionable and the true basis of the decisions seems

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ment books and thereafter placed on said books and the valuation thereof fixed by the State Tax Commission. Likewise in *State ex rel. Thompson v. Dirckx* (Mo. 1928) 11 S. W. (2d) 38, the State Board of Equalization was granted mandamus to compel the county board to adjust its tax books to conform to the order of the state board as to the assessment of a particular class of property. In *State ex rel. Insurance Co. v. Hyde* (1921) 292 Mo. 342, 241 S. W. 396 mandamus was admitted to be the proper remedy to compel the Superintendent of the Insurance Department to certify to the State Auditor the amount of tax due from a foreign life insurance company and to compel the State Treasurer to receive and accept such amount in payment of taxes.

<sup>77</sup> 38 C. J. 781.

<sup>78</sup> (Mo. 1915) 184 S. W. 1167.

<sup>79</sup> (1920) 286 Mo. 181, 227 S. W. 48.

<sup>80</sup> 18 R. C. L. 292.

<sup>81</sup> Wilmer T. Fox in 66 Central Law Journal 314.

<sup>82</sup> However, as shall be pointed out, Missouri decisions have in some cases refused to recognize the existence of a discretion even though the license statute be an exercise of the police power. No mandamus cases on a license for taxing purposes have arisen in this state but it seems likely that as such statutes merely require the payment of a license fee and in some cases the submission of a special deposit or bond, that the duty to issue the license will be held ministerial. See R. S. Mo. (1929) sec. 10105 (itinerant vendors); R. S. Mo. (1929) sec. 13190 (employment agencies).

to be the nature of the act or business sought to be licensed, subject to exceptions in some instances where the express wording of the pertinent statutes so demand.

In those instances where the business sought to be licensed bears only an incidental relation to public health, welfare or morals, generally the only statutory prerequisites for a license are the performance of certain definitely specified acts, and it has been held that in such cases the duty to license is ministerial, and subject to control by the court. So where the ordinance only required payment of a fee and the filing of a certificate from the board of health to the effect that the party had filed a statement in compliance with another section of the ordinance, the duty to issue a license for the removal of garbage upon compliance with these provisions is ministerial.<sup>83</sup> Likewise in *State ex rel. Jones v. Cook*<sup>84</sup> it was held that under R. S. Mo. (1899) sec. 1277, regulating the licensing of private banking establishments, and providing that "in each case the Secretary of State shall find that all the provisions of the law have been complied with by the institution herein named which desires to be authorized to do business, he shall grant them a certificate to that effect" the duty was ministerial and mandamus would lie.<sup>85</sup> However, where a license for the construction of a sidewalk was sought in *State ex rel. Connon v. St. Louis*<sup>86</sup> it was held that the word "may" appearing in the ordinance invested the licensing official with a discretion and mandamus could not issue.

At the other extreme are those cases where it is sought to obtain a license to practice a profession such as medicine or dentistry. Here, because of the intimate connection between the vocation and the public health, the courts are reluctant to interfere with the action of the licensing officials. Hence the statutes have been liberally construed as conferring discretionary powers free from control by the judiciary. Accordingly it has been stated as the policy that "whenever an element, shred, or degree

<sup>83</sup> *St. Louis v. Weitzel* (1895) 130 Mo. 600, 31 S. W. 1045.

<sup>84</sup> (1902) 174 Mo. 100, 73 S. W. 489.

<sup>85</sup> Of a similar nature is the Missouri Blue Sky Law (R. S. Mo. 1929, sec. 7744) which provides that "if the commissioner shall find that the applicant is of good repute and has complied with the provisions of this section including the payment of the fee hereinafter provided he shall register such applicant as a dealer upon his filing a bond in the sum of \$5,000." Though the courts have not yet passed upon whether mandamus will lie under this statute it seems likely they will be guided by the decision on the private banking license law and hold the duty thereby imposed to be ministerial. Like treatment, if the occasion arises will probably be accorded similar statutes providing for licensing of itinerant vendors (*supra*, note 82), employment agencies (*supra*, note 82), registered motor vehicle operators (R. S. Mo. 1929, sec. 7766) and egg dealers (R. S. Mo. 1929, sec. 13059).

<sup>86</sup> (1900) 158 Mo. 505, 59 S. W. 1101.

of discretion enters into the duty to be performed, the functions of mandatory authority are shorn of their customary potency and become powerless to dictate terms to that discretion.<sup>87</sup> In that case mandamus was refused and a discretion held to exist in the state board of health as to granting a license to practice medicine, although the statute was mandatory in wording and under it the only function of the board was to find that the relator's diploma was genuine and that the person named therein was the person claiming and presenting the same.<sup>88</sup> Likewise held to confer discretionary powers on the board of health are statutes conferring the right to refuse a medical license to individuals guilty of unprofessional or dishonorable conduct,<sup>89</sup> or to applicants presenting degrees from questionable colleges.<sup>90</sup> But in the case of *State ex rel. McCleary v. Adcock*<sup>91</sup> it was held that when all such conditions of the act were admittedly complied with and the board of health had only to determine the pure fact question as to whether or not the applicant was in school at a certain date, the duty was a ministerial one which could be controlled by mandamus.

As to the function of the Dental Board a somewhat different rule has been established. In *State ex rel. Wolfe v. Dental Board*<sup>92</sup> it was finally settled that as the granting of a certificate of registration was based on an examination there was a discretion and mandamus would not lie.<sup>93</sup> But as the statute provided that on presentation of the certificate of registration and payment of a nominal license fee "the applicant shall be entitled to a license"<sup>94</sup> it was held that the granting of such license and all annual renewals thereof was a mere ministerial function, all question as to the applicant's qualifications being eliminated by the granting

<sup>87</sup> *State ex rel. Granville v. Gregory* (1884) 83 Mo. 123.

<sup>88</sup> Act of April 2, 1883. It read "If the diploma is found to be genuine and if the person named therein be the person claiming and presenting the same, the state board of health shall (italics by the writer) issue its certificate to that effect . . . and such diploma and certificate shall be deemed conclusive as to the right of the lawful holder of the same to practice medicine in this state." Note however that this differs little from the private banking license law which was held to create only a ministerial function.

<sup>89</sup> R. S. Mo. (1889), sec. 6878; *State ex rel. Hathaway v. State Board of Health* (1890) 103 Mo. 22, 15 S. W. 322.

<sup>90</sup> R. S. Mo. (1889), sec. 6872; *State ex rel. Johnston v. Lutz* (1896) 136 Mo. 633, 38 S. W. 323.

<sup>91</sup> (1907) 206 Mo. 550, 105 S. W. 270.

<sup>92</sup> (1921) 289 Mo. 520, 233 S. W. 390.

<sup>93</sup> Though to date the matter has not been presented, it seems likely that statutes regulating the licensing of druggists (R. S. Mo. 1929, sec. 13141) and nurses (R. S. Mo. 1929, sec. 13486), which also provided that qualification for the license shall be based on the results of an examination, will necessarily receive the same construction by the courts in a mandamus proceeding.

<sup>94</sup> Sec. 5489, Laws 1917, p. 256.

of the registration certificate. Though apparently limiting the discretionary character of the duties of the board, the necessary safeguards are preserved under this ruling.

Where the license is sought for the operation of a dramshop or pool room a wide discretion is generally granted. The statutory language often embraces this result, and even where it is not clear discretion has been preserved by the courts' interpretation that such statutes confer a *privilege* rather than a right.<sup>95</sup> Accordingly, the policy has been indicated that any doubt as to the discretion of licensing officials is to be resolved in their favor.<sup>96</sup> The statutes generally establish certain conditions prerequisite to the granting of a license and then provide that the officials "shall have power to license."<sup>97</sup> The cases have decided that such laws merely prescribe a qualification for a privilege and do not confer a vested right, since many other considerations, such as the location of the proposed business, or the expediency of having another such shop in the town, still remain to affect the discretion of the court.<sup>98</sup> In the licensing of pool halls it has even been said that under the statute "the county court has the right to refuse to license without giving any reason whatever other than they may determine that such an institution in a community is a nuisance."<sup>99</sup>

However, where the statute is explicit and provides that "if the court shall be of the opinion that the applicant is a law-abiding person . . . and the petition required . . . contains the proper names subscribed thereto . . . , then the court shall grant such license,"<sup>100</sup> the duty is considered ministerial and mandamus will lie to compel issuance of the license if the applicant complies with all requirements.<sup>101</sup> Still it has been held that a discretion exists as to whether these prerequisites have been satisfied and this in some cases may warrant refusal of the writ.<sup>102</sup> Where, however, as with the board of health in granting medical licenses,

<sup>95</sup> State ex rel. Hawkins v. Harris (1924) 304 Mo. 309, 263 S. W. 807; State ex rel. Gazzalo v. Hudson (1882) 13 Mo. App. 61.

<sup>96</sup> State ex rel. Gumperts v. Higgins (1900) 84 Mo. App. 531.

<sup>97</sup> R. S. Mo. (1919), sec. 9644 (pool room license). In R. S. Mo. (1909), sec. 7191 regulating the licensing of dramshops, it is provided that "if the court shall be of the opinion that the applicant is a law abiding citizen above 21 years of age, the court may grant a license."

<sup>98</sup> State ex rel. Brown v. Stiff (1903) 104 Mo. App. 685, 78 S. W. 675; State ex rel. McClanahan v. DeWitt (1911) 160 Mo. App. 304, 142 S. W. 366.

<sup>99</sup> State ex rel. Hawkins v. Harris, *supra* note 95.

<sup>100</sup> R. S. Mo. (1909), sec. 7191 (dramshop license statute).

<sup>101</sup> State ex rel. Heller v. Thornhill (1913) 174 Mo. App. 469, 160 S. W. 558; State ex rel. Sheffel v. McCammon (1905) 111 Mo. App. 626, 86 S. W. 510; State ex rel. Hanks and Miller v. Packett (1909) 136 Mo. App. 700, 119 S. W. 25. These furnish an interesting comparison with the treatment accorded the medical and banking license statutes.

<sup>102</sup> State ex rel. Heller v. Thornhill, *supra* note 101.

the licensing body admits the existence of all qualifications and the only dispute is over the amount of the license to be paid, the determination is one which may be controlled by mandamus.<sup>103</sup>

### III. IN THE ALLOWANCE AND PAYMENT OF CLAIMS

Active use has been made of mandamus in compelling the proper authorities to allow and pay claims held by the relator against public bodies. It has been held that the county court in refusing to allow an account, exercises a discretion and its action cannot be controlled by mandamus.<sup>104</sup> Yet where the claim is reduced to judgment, or has already been audited and allowed by another official body, or where the amount is a sum fixed by law as a salary and there is no disputed fact to be determined in order to arrive at the amount, mandamus will lie to compel the court to issue a warrant for it, this being a mere ministerial function.<sup>105</sup> That the State Auditor occupies a similar position seems to be equally settled, and accordingly, where the claims have been authorized by law or approved by some official board, his duty to draw a warrant on the state treasurer may be compelled by mandamus.<sup>106</sup> However in all other cases, where the claim against the State is in the first instance presented to him for allowance, he is vested with a discretion which cannot be interfered with if it is properly exercised.<sup>107</sup> In this connection, it has been held that he acts properly in refusing to audit or draw a warrant for a claim for which no appropriation has been made.<sup>108</sup>

It is quite uniformly recognized that the disbursing officer, the treasurer in most instances, is under a duty to honor a warrant properly drawn on him, if funds for its payment are available; and this ministerial function may be enforced by mandamus.<sup>109</sup> However, when the payment of the warrant would require a

<sup>103</sup> State ex rel. Shaw v. Baker (1888) 32 Mo. App. 98.

<sup>104</sup> State ex rel. Watkins v. Macon County Court (1878) 68 Mo. 29; State ex rel. Smith v. Platte County Court (1884) 83 Mo. 539. R. S. Mo. (1929), sec. 7184 however provides that if the proper official fails to pass on a claim within a reasonable time he may be compelled by mandamus to act in the matter.

<sup>105</sup> State ex rel. Baker v. Fraker (1901) 166 Mo. 130, 65 S. W. 720; State ex rel. Koehler v. Bulger (1921) 289 Mo. 441, 233 S. W. 486; State ex rel. Holman v. Trimble (1926) 316 Mo. 1041, 293 S. W. 98; Perkins v. Burks (Mo. 1935), 78 S. W. (2d) 845; State ex rel. Stipp v. Cornish (1929) 223 Mo. App. 978, 24 S. W. (2d) 667.

<sup>106</sup> State ex rel. Treas. State Lunatic Asylum v. State Auditor (1870) 46 Mo. 326; State ex rel. Hawes v. Mason (1899) 153 Mo. 23, 54 S. W. 524; State ex rel. Meals v. Hackman (Mo. 1919) 217 S. W. 271.

<sup>107</sup> State ex rel. Gehner v. Thompson (1926) 316 Mo. 1169, 293 S. W. 391.

<sup>108</sup> State ex rel. Murray v. Brown (1879) 141 Mo. 21, 41 S. W. 911; State ex rel. Buder v. Hackmann (1924) 305 Mo. 342, 265 S. W. 532.

<sup>109</sup> State ex rel. Thomas v. Treas. Callaway County (1869) 43 Mo. 228; State ex rel. Ins. Agents' Assn. v. Kansas City (1927) 319 Mo. 386, 4 S. W. (2d) 427; State ex rel. Nolen v. Nelson (1925) 310 Mo. 526, 275 S. W. 927; State ex rel. Hixson v. Nerry (1904) 105 Mo. App. 458, 79 S. W. 993.



decision by the treasurer on a question of law, mandamus must be refused, since he lacks the capacity to act in the matter.<sup>110</sup>

#### IV. IN CONTROLLING THE JUDICIAL ACTION OF COURTS

By virtue of Article VI, Sections 3, 12, and 23, of the Missouri Constitution, the circuit courts, Courts of Appeals, and the Supreme Court are given superintending control over inferior courts and tribunals, and as an incident of such control are given power to issue writs of mandamus.

In the exercise of such power, however, the courts have been limited by several generally accepted legal principles. Predominant among these restrictions is the rule that mandamus cannot interfere with the discretion of a judicial body.<sup>111</sup> The remedy is rather by appeal from the judicial action.<sup>112</sup> Accordingly, it seems to now be established in Missouri that mandamus will not lie to review the discretion of a lower court in refusing to issue a mandamus. When the lower court has jurisdiction to determine the question whether the petition states a cause for the issuance of an alternative writ of mandamus, its determination is a judicial act which cannot be controlled by mandamus.<sup>113</sup> And when it was sought to compel the lower court to change a judgment already rendered and enter another one, mandamus has been refused.<sup>114</sup> However, when a court wrongfully refuses to act in a case, mandamus is admittedly the proper remedy to compel it to take jurisdiction and deliver a judgment on the merits.<sup>115</sup> But the writ may not determine what particular judgment shall be rendered.<sup>116</sup> So, if the court has declined to hear the merits of the cause on a preliminary objection to its jurisdiction, mandamus will lie if the lower court misconstrued the law or made an erroneous finding of the facts as to this preliminary point.<sup>117</sup>

<sup>110</sup> *State ex rel. Sweaney v. Gentry* (1905) 112 Mo. App. 589, 87 S. W. 68.

<sup>111</sup> *State ex rel. Lashly v. Wurdeman* (Mo. 1916) 187 S. W. 257; *Trainer v. Porter* (1870) 45 Mo. 336.

<sup>112</sup> *State ex rel. Lashly v. Wurdeman*, *supra* note 111.

<sup>113</sup> *State ex rel. Tate v. Sevier* (Mo. 1933) 68 S. W. (2d) 50. In asserting this to be the rule, the Supreme Court ignored an apparently *contra* holding by the Court of Appeals, *State ex rel. Sharp v. Knight* (1930) 224 Mo. App. 761, 26 S. W. (2d) 1011.

<sup>114</sup> *State ex rel. Sparks v. Wilson* (1871) 49 Mo. 146; *State ex rel. Smith v. Platte County Court*, *supra* note 104; *State ex rel. Burton v. Bagby* (1921) 288 Mo. 482, 232 S. W. 474.

<sup>115</sup> *Ex parte Cox* (1847) 10 Mo. 742; *State ex rel. Huey v. Cape Girardeau Court Common Pleas* (1881) 73 Mo. 560; *State ex rel. Meinhard v. Stratton* (1892) 110 Mo. 426, 19 S. W. 803.

<sup>116</sup> *Miltenberger v. St. Louis County Court* (1872) 50 Mo. 172; *State ex rel. Monett Milling Co. v. Neville* (1900) 157 Mo. 386, 57 S. W. 1012.

<sup>117</sup> *Castello v. St. Louis Circuit Court* (1859) 28 Mo. 259; *State ex rel. Harris v. Laughlin* (1882) 75 Mo. 358; *State ex rel. Bayha v. Philips* (1888) 97 Mo. 331, 10 S. W. 855; *State ex rel. Field v. Ellison* (1918) 277 Mo. 46, 209 S. W. 107.

Likewise, where the court assumes jurisdiction of a case on appeal, and then proceeds to dispose of it, but not on the merits, mandamus will issue to compel it to exercise its whole jurisdiction in the appeal, and to determine all issues presented therein.<sup>118</sup> But where a justice of the peace exceeded his limited powers and dismissed a complaint for insufficiency after a jury was paneled, he was not exercising judicial power or discretion and mandamus was held to be the proper remedy to compel him to proceed with the trial.<sup>119</sup> In all such cases an absolute duty to hear the cause is imposed on the court; it has no discretion in the matter.

The courts also recognize the rule that an abuse of judicial discretion may be corrected by mandamus; for when it is arbitrarily exercised, a discretion is regarded as abandoned. So although it may be in the court's discretion as to when a certain inquiry shall be held, it is bound to have this done within a reasonable time. A delay of four months in the case of *State ex rel. South St. Joseph Town Co. v. Mosman* was declared an abuse of discretion which could be corrected by mandamus.<sup>120</sup>

Similarly, during the course of the disposition of a case, the duty to perform many other judicial acts might become mandatory on the courts and subject to be compelled by mandamus. It has accordingly been held that in proper cases the writ lies to compel the court to receive a good verdict of a jury,<sup>121</sup> and to enter up a judgment,<sup>122</sup> or, having done so, to order a writ of execution to issue on the judgment.<sup>123</sup> Likewise, where the law secures the right of appeal to a party, and he has done everything necessary to entitle him to it, mandamus will issue to secure this right if it has been wrongfully denied by the court.<sup>124</sup> And when an inferior court has been commanded by a superior tribunal to act in a certain specific manner, it has no discretion

<sup>118</sup> *State ex rel. Modern Woodmen of America v. Broaddus* (1911) 239 Mo. 359, 143 S. W. 455. This decision was finally reached only after a line of contra cases had been established holding that even such a ruling was a judicial act and a final decision with which mandamus cannot interfere. This opposite view was also taken by the United States Supreme Court in "*In re Key*" (1902) 189 U. S. 84.

<sup>119</sup> *State ex rel. Benson v. Brooks* (1912) 167 Mo. App. 619, 150 S. W. 725.

<sup>120</sup> (Mo. App. 1916) 187 S. W. 1122.

<sup>121</sup> *State ex rel. Webster v. Knight* (1870) 46 Mo. 83.

<sup>122</sup> *Vernon and Blake v. Boggs* (1821) 1 Mo. 117; *State ex rel. Wright v. Adams* (1882) 76 Mo. 605. As in *State ex rel. Albers v. Horner* (1881) 10 Mo. App. 307 this use is often made of the writ when the judge is about to set aside the jury's verdict erroneously for cause not permitted. In no case, though, can this interfere with a properly exercised discretion.

<sup>123</sup> *State ex rel. Kansas City v. Renick* (1900) 157 Mo. 292, 57 S. W. 713; *State ex rel. Captain v. Graves* (Mo. 1916) 190 S. W. 859.

<sup>124</sup> *State ex rel. Spickerman v. Allen* (1887) 92 Mo. 20, 4 S. W. 414; *In re Campbell* (Mo. 1929) 19 S. W. (2d) 752; *State ex rel. Millet v. Field* (1889) 37 Mo. App. 83.

and its duty to follow such directions may be enforced by mandamus.<sup>125</sup>

Numerous other cases may be found in which a court, by means of constitutional provision or legislative enactment,<sup>126</sup> a mandate from a superior court,<sup>127</sup> or by operation of law,<sup>128</sup> is stripped of its usual judicial discretion and clothed with a mere ministerial duty, the performance of which may be compelled by mandamus. But in each case it is essential to ascertain that an absolute duty has been imposed, not a mere authority to act; leaving in the court's discretion the ultimate decision whether or not to do so, with which discretion of course, mandamus cannot interfere, unless it has been arbitrarily exercised.<sup>129</sup>

#### V. TO COMPEL THE PERFORMANCE OF VARIOUS OTHER MINISTERIAL DUTIES IMPOSED UPON PUBLIC OFFICIALS

A variety of cases may be found considering the ministerial functions of various public officials, but not falling strictly within any of the aforementioned categories. For the most part, as in the cases already examined, the writ has been granted or refused according to whether the action sought to be compelled is thought to be ministerial or discretionary, subject always of course to the exception that an abuse of discretion likewise is subject to correction by mandamus.

In a number of cases the writ has been invoked against directors of school districts or the boards of education. Consequently it seems now to be settled that the duties of such bodies to use certain books that have been selected by a superior authority,<sup>130</sup>

<sup>125</sup> State ex rel. Knisely v. Holtcamp (1915) 266 Mo. 347, 181 S. W. 1007; State ex rel. Powell v. McCarty (Mo. 1921) 240 S. W. 1085; State ex rel. Wattenbarger v. Lamb (1913) 174 Mo. App. 360, 160 S. W. 55.

<sup>126</sup> State ex rel. N. Y. Life Ins. Co. v. Philips (1888) 96 Mo. 570, 10 S. W. 182 involved the constitutional duty of the Court of Appeals to transfer a cause to the Supreme Court when one judge is of the opinion that their decision conflicts with a prior ruling of the Supreme Court. In Bennett v. McCaffery (1887) 28 Mo. App. 220 the justice of the peace was under a statutory duty to certify the case to the circuit court when an affidavit that the suit involved the title to realty as an issue therein had been filed before the justice. The case of Beck v. Jackson (1868) 43 Mo. 117 concerned the statutory duty to pass on the sufficiency of a bond presented by one with prima facie evidence of title to office. But as there is a discretion the court cannot be compelled to approve the bond.

<sup>127</sup> Boone County v. Todd (1832) 3 Mo. 140 (an order from the circuit court requiring the county court to direct their treasurer to pay a bill); Railroad Co. v. Morgan County Court (1873) 53 Mo. 156 (an order to deliver up bonds to the county fiscal agent).

<sup>128</sup> State ex rel. Carter v. Bollinger (1908) 219 Mo. 204, 117 S. W. 1132; State ex rel. Road Dist. v. Burton (1920) 283 Mo. 41, 222 S. W. 844; State ex rel. Lashly v. Wurdeman (1914) 183 Mo. App. 28, 166 S. W. 348.

<sup>129</sup> State ex rel. Howell County v. Howell County Court (1875) 58 Mo. 583; Railroad Co. v. Buchanan County Court (1867) 39 Mo. 485; State ex rel. Curtis v. Thomas (1904) 183 Mo. 220, 82 S. W. 106; State ex rel. Bartle v. Coleman (1888) 33 Mo. App. 470.

<sup>130</sup> State ex rel. Roberts v. Springfield School Directors (1881) 74 Mo. 21.

to reinstate a public school pupil who has been illegally excluded or expelled,<sup>131</sup> or to issue a certificate of graduation in a proper case where it has been withheld without cause,<sup>132</sup> are of such a ministerial nature that they may be ordered by mandamus. Likewise, where the statute imposes a duty to establish and maintain certain schools, and conditions are such that compliance therewith is possible and desirable, the writ may issue to require the directors to so act.<sup>133</sup> Often however because of inadequate funds or lack of a suitable location the board retains a discretion which will not be interfered with unless it is arbitrarily exercised.<sup>134</sup>

An abuse of discretion was corrected in *State ex rel. Kelleher v. Public Schools*<sup>135</sup> where the school board was required to set aside its appointment of judges and clerks for an election of school board members, because in appointing only Republicans "the school board so abused the discretion confided to it that it was a virtual refusal to perform the duty of holding an impartial election and in contemplation of law it has refused to act at all." It was held that mandamus lay to force a proceeding in a lawful way, and that the mere fact that the board acted as it did was immaterial.

In another group of cases mandamus has issued against officials of a municipality to compel them to comply with the ordinance declaring it to be their duty to award contracts to the lowest bidder. Though a discretion exists in these cases since the officials are often required to determine the "best" bidder, and are given power to reject any and all bids,<sup>136</sup> yet the courts have not hesitated to prevent an abuse of discretion by interfering when the award is made for purely personal or political purposes.<sup>137</sup>

It has also been established that the board of canvassers may

<sup>131</sup> *State ex rel. Biggs v. Penter* (1902) 96 Mo. App. 416, 70 S. W. 375; In the matter of *Rebenack* (1895) 62 Mo. App. 8. But it is not illegal expulsion when there is a failure to comply with the vaccination requirement, a reasonable rule which it was within the power of the board to make.

<sup>132</sup> *State ex rel. Roberts v. Wilson* (1927) 221 Mo. App. 9, 297 S. W. 419.

<sup>133</sup> *State ex rel. Best v. Jones* (1899) 155 Mo. 570, 56 S. W. 307; *State ex rel. Morehead v. Cartwright* (1906) 122 Mo. App. 257, 99 S. W. 43.

<sup>134</sup> *State ex rel. Mills v. Turnage* (1924) 217 Mo. App. 273, 263 S. W. 497; *State ex rel. Gehrig v. Medley* (Mo. App. 1930) 28 S. W. (2d) 1040; *Corley v. Montgomery* (1931) 226 Mo. App. 795, 46 S. W. (2d) 283.

<sup>135</sup> (1896) 134 Mo. 296, 35 S. W. 617.

<sup>136</sup> *State ex rel. State Bank v. Hariss* (Mo. 1915) 176 S. W. 9; *State ex rel. Montfort v. Meier* (1910) 142 Mo. App. 309, 126 S. W. 986.

<sup>137</sup> *State ex rel. First Natl. Bank v. Bourne* (1910) 151 Mo. App. 104, 131 S. W. 896; *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. These cases seem to suggest a possible method of greatly curtailing some of the existing political corruption.

be compelled by mandamus to count the returns,<sup>138</sup> and when they have illegally refused to count certain votes, the writ will issue to compel them to act properly.<sup>139</sup> But the mandamus suit cannot in this respect be made to perform the function of an election contest.<sup>140</sup>

Thus it appears that in almost any case where the court decides that a ministerial duty has been imposed on a public officer, mandamus is proper to compel the performance of such duty. Accordingly, the writ has issued to compel the State Auditor to approve, register, and certify, a proper bond issue,<sup>141</sup> and against the record of voters, to allow inspection of the poll books.<sup>142</sup>

In certain other cases the courts have expanded their conception of a ministerial duty in order to give relief merely because a clear right existed without other adequate remedy.<sup>143</sup> Consequently, to reconcile all the cases on a discretion-nondiscretion rationale would be impossible. Nevertheless, apparently conflicting decisions may be harmonized with the general rules on the common bases of justice and public welfare, considerations which motivate and no doubt justify every deviation from the beaten paths.

#### VI. AS INVOKED AGAINST PRIVATE CORPORATIONS AND ASSOCIATIONS

The jurisdiction by mandamus over private corporations is of ancient origin and is well established; it is exercised where a specific duty is imposed by law upon a private corporation and there is no other adequate or specific remedy for its enforcement.<sup>144</sup> In Missouri the writ has performed various functions in the exercise of this jurisdiction. It was originally invoked against public service corporations to require them to perform duties imposed by their charters. In this capacity it has, for instance, issued against a railroad to prevent interference with the use

<sup>138</sup> *State ex rel. Metcalf v. Garesche* (1877) 65 Mo. 480; *State ex rel. Steadley v. Stuckey* (1898) 78 Mo. App. 533.

<sup>139</sup> *State ex rel. Broadhead v. Berg* (1882) 76 Mo. 136.

<sup>140</sup> *State ex rel. Jamison v. Lesueur* (1894) 126 Mo. 413, 29 S. W. 278.

<sup>141</sup> *State ex rel. School Dist. v. Gordon* (1910) 231 Mo. 547, 133 S. W. 44; *State ex rel. Jefferson City v. Hackman* (1920) 287 Mo. 156, 229 S. W. 1082.

<sup>142</sup> *State ex rel. Thomas v. Hoblitzelle* (1885) 85 Mo. 620. In a somewhat different case, *State ex rel. Public Service Comm. v. Mo. Pac. Ry. Co.* (1919) 280 Mo. 456, 218 S. W. 310, the writ issued at the relation of the Public Service Commission against a railroad to enforce compliance with an order of the Commission. (See R. S. Mo. 1929, sec. 5185). Though little used in Missouri such a function of the writ is common elsewhere. 38 C. J. 813.

<sup>143</sup> *State ex rel. Holladay v. Withrow* (Mo. 1893) 24 S. W. 638; *State ex rel. Martin v. Wofford* (1893) 121 Mo. 61, 25 S. W. 851; *State ex rel. Lanyon v. Joplin Water Works* (1892) 52 Mo. App. 312.

<sup>144</sup> High, sec. 276-277.

of a public highway,<sup>145</sup> or to compel its operation in accordance with charter requirements,<sup>146</sup> and to compel the telephone and the water companies to render service to a properly qualified customer.<sup>147</sup> Later cases have established it as the remedy to enforce both the common law and statutory rights of shareholders to inspect the books of the corporation.<sup>148</sup> But pursuant to the general policy of refusing the writ where there is an adequate remedy at law for damages, mandamus to compel a corporation to transfer stock on its books has been refused.<sup>149</sup>

Not infrequently mandamus has been employed to ascertain membership rights, and in this connection both incorporated and unincorporated organizations have been subjected to its command. It is the rule that a violated property right is necessary to relief by mandamus.<sup>150</sup> Thus it has been held that a member of a mutual benefit society, expelled without due notice and opportunity to be heard, may, if he has a property interest in the society, compel restoration of his privileges by mandamus.<sup>151</sup> But relief has been denied where mandamus is sought to compel reinstatement into a voluntary association, such as a medical so-

<sup>145</sup> State ex rel. Morris v. H. & St. J. Ry. Co. (1885) 86 Mo. 13.

<sup>146</sup> State ex rel. Public Service Comm. v. Railroad Co. (1919) 279 Mo. 455, 214 S. W. 381. See also R. S. Mo. (1929) sec. 5185.

<sup>147</sup> State ex rel. Payne v. Kinloch Telephone Co. (1902) 93 Mo. App. 349, 67 S. W. 684; State ex rel. Laynon v. Joplin Water Works, supra note 143. See also R. S. Mo. (1929) secs. 5227, 5205.

<sup>148</sup> Though generally the relator's motive for demanding the right cannot be inquired into, yet the common law right is subject to the limitations that it cannot be asserted to an extent detrimental to the interest of the corporation and the rights of other shareholders. State ex rel. Wilson v. Railroad Co. (1888) 29 Mo. App. 301. The writ should not be granted for speculative purposes or to gratify idle curiosity or aid blackmail, but the mere fact that the relator holds stock in a competing company does not justify refusal. State ex rel. English v. Lazarus (1907) 127 Mo. App. 401, 105 S. W. 780. And although when the right of inspection is statutory, this is, as with all statutory rights, regarded as practically absolute, yet it seems that it is proper to deny mandamus in aid of it when it appears that the inspection is sought for mere curiosity or for an unlawful purpose such as to constitute an abuse of the right rather than a legitimate exercise thereof. State ex rel. Holmes v. Doe Run Lead Co. (Mo. App. 1915) 178 S. W. 298; State ex rel. Haeusler v. Insurance Co. (1912) 169 Mo. App. 354, 152 S. W. 618. See also R. S. Mo. (1929) sec. 4550.

<sup>149</sup> State ex rel. Bornefeld v. Rombauer (1870) 46 Mo. 155.

<sup>150</sup> 18 R. C. L. 144, 145; though some courts have taken the view that the right of membership is per se a property right for the satisfaction of this requirement (State v. Georgia Medical Society, 1868, 38 Ga. 608) yet Missouri holds that this must be a valuable severable proprietary right which may be transferred to others and which would be subject to payment of debts or descend to heirs. State ex rel. Hyde v. Medical Society (1922) 295 Mo. 144, 243 S. W. 341.

<sup>151</sup> Lvsaght v. St. Louis Operative Stonemasons' Assn. (1893) 55 Mo. App. 538. The requirement that a property right exist was deemed satisfied as the laws of the society provided for benefit payments to defray the funeral expenses of members and their wives.

ciety, in which the relator has no property rights.<sup>152</sup> It has also been established that if the member admits guilt of an offense that would warrant his expulsion, mandamus will not perform the useless function of reinstating him merely that he may be tried for such offense and then lawfully expelled.<sup>153</sup>

In accord with the prevailing view it has been held that as members of an association are subject to the reasonable rules of the organization concerning tenure of membership, proceedings for mandamus to compel reinstatement will not lie in favor of a member who has not pursued or exhausted his remedies by appeal provided by the rules of the society.<sup>154</sup>

Relief by mandamus has been granted in analogous cases where a court lacking jurisdiction to do so act has illegally suspended an attorney from his right to practice in that court,<sup>155</sup> and where a child has been unlawfully excluded or expelled from a public school.<sup>156</sup> But when expulsion has been for violation of a rule alleged to have been prescribed by the board of regents without authority, it is held that one need not first appeal, as provided by statute, to that board before invoking the aid of the courts.<sup>157</sup>

In conclusion, it should be pointed out as supplementary to what appears in this article, that although the courts have established fairly definite rules and principles by which they are to be guided in passing on an application for a writ of mandamus, yet from the very nature of things, much still remains to be decided in each particular case. Especially important for the court is the question of whether particular acts are to be regarded as ministerial or discretionary and whether in each case of discretion, it has been arbitrarily exercised. Accordingly in proper cases we have seen the courts refuse the writ because a bare ele-

<sup>152</sup> *State ex rel. Hyde v. Medical Society*, supra note 150. This case held that merely because the society owned realty, that relator paid dues and that the membership was valuable in a business and professional way did not create the necessary property right. In *State ex rel. Hynes v. Catholic Church* (1914) 183 Mo. App. 190, 170 S. W. 396, this same doctrine was invoked by the court as grounds for their refusal to take jurisdiction of a suit to restore to his position and salary a Catholic priest who claimed he had been wrongly excommunicated. It was held that no property right existed and in the absence of such, only the ecclesiastic tribunal had jurisdiction of the controversy.

<sup>153</sup> *State ex rel. Young v. Temperance Benev. Assn.* (1890) 42 Mo. App. 485.

<sup>154</sup> 18 R. C. L. 176; *State ex rel. Cammann v. Tower Grove Turn Verein* (Mo. App. 1918) 206 S. W. 242.

<sup>155</sup> *State ex rel. Storts v. Peabody* (1895) 63 Mo. App. 378.

<sup>156</sup> *State ex rel. Biggs v. Penter* (1902) 96 Mo. App. 416, 70 S. W. 375; *In the matter of Rebenack* (1895) 62 Mo. App. 8.

<sup>157</sup> *State ex rel. Clark v. Osborne* (1887) 24 Mo. App. 309. Probably sufficiently different facts in this case avoid a conflict with the Tower Grove Turn Verein case (supra, note 154); yet the court does manifest a different attitude.

ment of discretion enters into the act sought to be compelled; on the other hand, what seems to be a field for discretion has often been deemed ministerial, or at the best, a limited discretion subject to control for even the slightest abuse. And in almost countless cases the writ has been issued for little reason other than that there was a "clear right and no other adequate remedy."

But it seems that this is a step in the proper direction,—a basis for the writ which should be utilized to an even greater degree. To the end that when a proper case for relief is presented it should never be denied unless full justice can be obtained in another action which can be definitely indicated and is immediately available. It may be advisable that the benefits of this valuable writ should be made even more accessible by changing its status to that of an ordinary legal action, available in any proper case without regard to the existence of another remedy. Such a step, however, rests ultimately with the legislature; the courts can do no more than point the way.

I. JAMES WOLF, '35.