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Article 11

Municipal Corporations - Schools and School Districts - Mandamus - When "May" means "Must"

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cars, and to help defray the cost of installation and supervision, may be used. Since such things as telephone posts and telegraph poles were permitted, parking meters should also be permitted, since they facilitate the use of public ways for purposes of transportation or passage, and promote the safety and comfort of those who travel. *In re Opinion of the Justices* (Mass. 1937) 8 N.E. (2d) 179.

In Frost & Frost Trucking Co. v. *Railroad Commission of California,* 271 U.S. 583, 46 Sup. Ct. 605, 70 L.ed. 1101 (1926) Mr. Justice McReynolds in a concurring opinion expressed the general idea of liberality that the courts should take in construing regulations concerning transportation on public highways as follows: "The states are now struggling with new and enormously difficult problems incident to the growth of automotive traffic, and we should carefully refrain from interference unless and until there is some real, direct, and material infraction of rights guaranteed by the Federal Constitution."

EDWARD F. ZAPPEN.

Municipal Corporations—Schools and School Districts—Mandamus—When "May" Means "Must."—Mandamus to compel defendant, a common school district, to furnish free transportation to and from school to an eight year old boy living about four and a half miles from school. The Statute provided that a school board "may" provide for the free transportation of pupils to and from school at the expense of the school district, provided funds for such purposes are available. Defendant denied plaintiff's request. Plaintiff contended that the statute imposed a duty to furnish the transportation. The trial court quashed the alternative writ and plaintiffs appealed. On appeal, *held,* judgment affirmed. The statute merely authorized the school board to act. Mandamus will not be granted to control discretion by directing its exercise in a particular way. *State ex rel. Klimek* v. *School Dist. No. 70, Otter Tail County* (Minn. 1939) 283 N.W. 397.

When administrative officers refuse to perform a mere ministerial duty imposed upon them by law, mandamus may issue to compel them to perform such duty; but, when such official act requires the exercise of judgment or discretion mandamus will not be granted. *State ex rel. Gericke* v. *The Mayor and Common Council of Ahnapee,* 99 Wis. 322, 74 N.W. 783 (1898); *State ex rel. Drew* v. *Shaughnessy,* 212 Wis. 322, 249 N.W. 522 (1933); *State ex rel. Atty. Gen.* v. *Cunningham,* 81 Wis. 440, 51 N.W. 724 (1892); *United States ex rel. Baynton* v. *Blaine,* 139 U.S. 306, 11 Sup. Ct. 607, 35 L.ed. 183 (1891). However, an officer may be required by mandamus to exercise his discretion in one way or the other. *Browning* v. *Daw,* 60 Cal. App. 680, 213 Pac. 707 (1923); *People* v. *Russell,* 294 Ill. 283, 128 N.E. 495 (1926); *Beem* v. *Davis,* 31 Idaho 730, 175 Pac. 959 (1918).

The word "may," according to its ordinary construction, is permissive, and should receive that interpretation, unless such construction would be obviously repugnant to the intention of the Legislature, or would lead to some other inconvenience or absurdity. *Medbury* v. *Swan,* 46 N.Y. 200 (1871); *Barber Asphalt Paving Co.* v. *City of Oshkosh,* 140 Wis. 58, 121 N.W. 603 (1909). Whether the word "may" in a statute is to be construed as mandatory and imposing a duty, or merely as permissive and conferring discretion, is to be determined in each case from the apparent intention of the statute as gathered from the context. *Colby University* v. *Village of Cavandaigna,* 69 Fed. 671 (1895); *Kemble* v. *McPhaill,* 128 Cal. 444, 60 Pac. 1092 (1900); *People ex rel. Chiperfield* v. *Sani-*

tary Dist. of Chicago, 184 Ill. 597, 56 N.E. 953 (1900). Authority given in permissive language must be exercised where other persons have an absolute right to have it exercised. *Kelley* v. *Milwaukee,* 18 Wis. 83 (1864).

There is a division of authority as to the interpretation of "may" in statutes like that involved in the principal case. A New York statute authorizing inhabitants of a school district to provide for transportation of pupils, and providing that the trustees "may" contract for their conveyance, was held to be permissive and not mandatory. *In Re Board of Education of Union Free School Dist. No. 2 of Town of Brookhaven, Suffolk County,* 210 N.Y. Supp. 439 (1925). However, under a similar statute in South Dakota the court held "may" to mean "must" because public interest and individual rights call for the exercise of powers given. *Swenehart* v. *Strathman,* 12 S.D. 313, 81 N.W. 505 (1900); *State ex rel. Coolsaet* v. *City of Veblen,* 58 S.D. 451, 237 N.W. 555 (1931). Under an Illinois statute "may" was similarly construed. *People ex rel. Brokaw* v. *Commissioners of Highways,* 130 Ill. 482, 22 N.E. 596 (1889).

The Wisconsin statute authorizing the transportation of children to and from school, WIS. STAT. (1937) § 40.34, uses "may" when referring to the authority of the school district meeting, and "shall" when referring to the authority of the school board. The Attorney-General has indicated that under this statute mandamus will not lie to compel a school district to provide transportation for children living more than two and a half miles from school, on the ground that the statute makes adequate provision for their transportation when the district fails to provide it. 24 Atty. Gen. 652. The statute provides for the compensation of parents who furnish transportation for their children if the school district fails to transport them.

WILLIAM R. CURRAN.

Workmen's Compensation Acts—Meaning of "Accident."—Plaintiff alleged that he suffered an accident in the course of his employment. He had been employed by the defendant for more than a year at a machine that made building blocks composed of sand, ashes and cement. Sand and ashes often collected in the plaintiff's shoes. He claimed to have a small dark-pigmented mole above his little toe and that the sand and ashes entered this mole and caused an irritation which produced a melanoma. He underwent several operations, but he was denied compensation by the Workmen's Compensation bureau, which found that the condition was purely occupational and was not the result of an accident arising out of and in the course of employment. On appeal, *held,* judgment affirmed. Where no specific time can be fixed as the time when an accident occurred, there is no accident within the meaning of the Workmen's Compensation Act. *Ballinger* v. *Wagaraw Bldg. Supply Co.* (New Jersey, 1938) 200 Atl. 744.

The instant case is an illustration of the majority rule on the meaning of the term "accident." Where no specific time or occasion can be fixed as the time of the alleged accident there can be no "injury by accident" within the Workmen's Compensation Act. *Szalkowski* v. *C. S. Osborne & Co.,* 9 N.J. Mis. 538, 154 Atl. 611 (1931). An occurrence to constitute an "accident" within the meaning of the Workmen's Compensation Act must be traceable to a definite time, place, and cause and must have been unexpected. *Prouse* v. *The Industrial Commission of Colorado,* 69 Colo. 382, 29 P. (2d) 625 (1921). Where incapacity results from the natural and gradual wearing away of physical capacity or con-