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Mandamus as a Remedy Against Private Corporations in Kentucky

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STUDENT NOTES

MANDAMUS AS A REMEDY AGAINST PRIVATE CORPORATIONS IN KENTUCKY

The common law on the question of mandamus to private corporations is clear and unequivocal. It was early settled that mandamus was an appropriate means to control the operations of private corporations.[1] It is regarded as the most efficient way for the common law courts to enforce certain obligations of civil corporations.[2] The general rule on the subject may be stated as follows: "When the law imposes a specific duty upon a private corporation and there is no other specific and adequate remedy provided for its enforcement, mandamus will lie."[3]

The state courts follow the general rule in allowing the writ so consistently that it may be said to be the overwhelming weight of authority in this country.[4] The courts reach this result on various grounds. Two examples will serve to illustrate the diversity. The Minnesota court justified the rule in an interesting manner. It held that since the state had no visitorial power over unincorporated societies, it was improper to use mandamus against them but since the state had that power over its private corporations, they were subject to the writ.[5] The Florida Court based its result on the common law, discussing it at length, and merely cited the statute without discussion.[6] Thus, it is demonstrated that although the same result is generally obtained, the rationalization of that result differs among the various jurisdictions. The result is obtained in three possible ways: (1) the common law; (2) a statute expressly naming the writ of mandamus as a remedy against private corporations; and (3) an extension of existing powers of the state over its private corporations.

The situation in Kentucky presents a confused picture. The Kentucky Civil Code defines the writ of mandamus as an order of a court of competent and original jurisdiction to an *executive* or *ministerial officer*.[7] There are two cases which established opposite

[1] HIGH, EXTRAORDINARY LEGAL REMEDIES (3rd ed., 1896) sec. 276.
[2] *Ibid* at p. 262.
[3] 34 AM. JUR., Mandamus, sec. 94.
[4] See American cases collected in 34 AM. JUR., Mandamus, at p. 882, n. 14.
[5] State ex rel McGill v. Cook, et al., 119 Minn. 407, 138 N. W. 432 (1912).
[6] Soreno Hotel Co. v. State ex rel Otis Elevator Co., 107 Fla. 195, 144 So. 339 (1932).
[7] Kentucky Civil Code (Carroll, 1938), sec. 477: "The writ of mandamus, as treated of in this chapter, is an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act, or omit to perform an act, the performance or omission of which is enjoined by law; and is granted on the motion of the party aggrieved, or of the commonwealth when the public interest is affected."

lines of authority in this state. The first was *Cook* v. *College of Physicians and Surgeons*.[8] In this case, the court took the position that the legislature had restricted the application of the writ to certain classes of persons, regardless of the common law rule, by the adoption of the above code provision. The court emphasized the part of the provision which said that the writ was addressed to *executive* or *ministerial officers* and said that a private corporation did not qualify under the definition. This language of the court in applying the Code to the question is plain:

> ". . . the Code of Practice, in its general scope, is not a statute granting rights, but one defining remedies for the enforcement of rights. In defining the remedy asked for in this proceeding, it confines its application to certain classes of persons, and the courts cannot, upon the idea that it should be liberally construed, extend it to other persons than those embraced by the classes named by the legislature."

The other case is *Orr* v. *Bracken County, et al.*[9] In this case, the court granted a writ of mandamus to compel the officers of a turnpike company to hold an election of officers for the corporation. It was said that mandamus would lie against a private corporation.[10] It is submitted that this case is extremely weak to establish a precedent. There was no discussion or even citation of the earlier *Cook* case or of the code provision. In addition, it can well be said that the business of operating a turnpike is affected with a public interest and that, therefore, this was not a case of a purely private corporation. Yet the subsequent decisions see-saw between the two cases, following one without mention of the other. Two years later the court declined to grant the writ against the officers of an incorporated lodge, reverting to the *Cook* case and the code provision.[11] The *Orr* case was not mentioned. The Federal Court was puzzled over the law of Kentucky in respect to the question.[12] Twenty three years later the court reversed the sustaining of a demurrer to an application for a writ of mandamus against a private corporation.[13] It relied upon the *Orr* case and again neglected to mention the code provision. The last case which can be found on the subject was decided three years later. Here, the court went back to the *Cook* case and the Code and declared that the writ of mandamus did not lie against a private corporation.[14] It was further said that the

[8] 72 Ky. (9 Bush) 541 (1872).

[9] 81 Ky. 593, 5 K. L. R. 632 (1884).

[10] *Ibid.* Apparently the sole basis for the decision was a citation from a treatise by Angell and Ames on Corporations.

[11] Shmidt v. Abraham Lincoln Lodge, 84 Ky. 490, 2 S. W. 156 (1886).

[12] For discussion and application of Shmidt and Cook cases by the Federal Court, see 130 Fed. 251, 256 (1903).

[13] O'Hara, et al. v. Williamstown Cemetery Co., 133 Ky. 828, 119 S. W. 234 (1909).

[14] Marion Electric Light and Ice Co. v. Rochester, 149 Ky. 810, 149 S. W. 977 (1912).

proper remedy in such a case could be secured by means of a mandatory injunction. As far as can be found, this was the last pronouncement by the Kentucky Court on the matter. The court has stated, by way of dictum in a later case involving an application for a mandatory injunction against a circuit judge, that a mandatory injunction is equivalent in legal effect to a mandamus.[15]

It is submitted that the law in Kentucky on this question is confused because of an unfortunate decision in the *Orr* case. The objections to that case have been previously noted. The main objection to that case is that it does not in any way consider the Code. It would be a strained interpretation, to say the least, to hold that an *executive* or *ministerial officer* and a private corporation charged with not even a quasi public duty are one and the same thing. The latest case on the subject reaches the proper result under the Code and declares the proper remedy to be used. Therefore, it would appear that the court should overrule the *Orr* case to remove this unfortunate decision and its successors as a line of authority. It may well be argued that Kentucky should follow the general rule of other states and the common law. The fact remains, however, that so long as this Code provision with its peculiar wording is retained, that result cannot be reached. The law in Kentucky today is, and should remain, so long as section 477 of the Code remains in its present form, that mandamus will not lie against a private corporation, the proper remedy being by means of the mandatory injunction.

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INSURANCE PAYABLE TO A MARRIED WOMAN—EFFECT OF K.R.S. 297.140

K.R.S. 297.140 provides: "A policy of insurance on the life of any person expressed to be for the benefit of . . . any married woman . . . shall inure to her separate use and benefit and that of her children. . . ."

Where the married woman beneficiary survives the insured no difficulty arises. The statute is inoperative and the beneficiary takes the proceeds of the policy under the terms of the contract. No case has been found that questions her right to the entire proceeds, and it is very clear that in such a case the statute neither creates a life estate in the mother with a vested remainder to her children, nor a joint tenancy. A child takes nothing by virtue of the contract.

Where the beneficiary predeceases the insured and leaves no children, the statute is also inoperative. Her personal representative takes the proceeds to be distributed according to her will or the statute of descent and distribution.[1] But where she predeceases

[15] Hargis v. Swope, 272 Ky. 257, 114 S. W. (2d) 75 (1938).

[1] Bradley v. Bradley's Administrators et al, 178 Ky. 239, 198 S. W. 905 (1917); Buckler et al v. Supreme Council Catholic Knights of America et al, 143 Ky. 618, 136 S. W. 1006 (1911); Finn et al v.