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THE USE OF MANDAMUS TO COMPEL EDUCATIONAL INSTITUTIONS TO CONFER DEGREES

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Although mandamus has been in use as a judicial writ for more than five hundred years and has for the last two hundred years been used in a great variety of cases, it has not until recently been called into requisition to compel the conferring of degrees by educational institutions.

Originally, the writ was a mere mandate, issuing directly from the King to the subject, to compel the performance of the royal will. It was in no sense judicial, but prerogative, and as such was used by the King as a police regulation in preserving the peace of the realm.

In the course of time, however, and especially during the struggle between parliament and the King, its arbitrary use as a royal mandate for police regulation, merely, was discontinued, and it became a judicial writ by which the Court of King's Bench assumed the right to correct and remedy official inaction, and to compel inferior courts, tribunals, and officers to do their duty. Originally the King sat in person in this court, and when he ceased to do so, yet by a fiction of the law, he was presumed to be present. At first the writ was issued from the King's Bench only in cases in which the King or the public at large were interested, and for that reason was called a prerogative writ, and not one of right to be invoked by the individual. A growing tendency to strip it of its prerogative character and treat it as a writ of right marked its increasing use, however, and, to-day, it is almost universally regarded in the nature of a suit between parties, where

the aggrieved party shows himself entitled to the particular relief sought. In his excellent treatise on mandamus, High [1] uses this language: "The remedy by mandamus, as discussed and illustrated in the preceding chapters, has been shown to be substantially a civil remedy in its nature, and one which is applied for the protection of purely civil rights."

The remedy is open to a party who seeks it for the purpose of enforcing a private right, as well as for the enforcement of a public one. If it be a case of the first kind it must clearly appear that the petitioner's individual rights are affected. If it be a case of the latter kind, the petitioner need not show anything beyond his interest as a citizen. The granting of the writ rests largely in the discretion of the court, however, and with great uniformity it is held that it should not be awarded in a doubtful case, or a case where it will prove barren or fruitless. To be more specific, to entitle the applicant to the writ, he must show a clear legal right to have the act sought by it done, and in the manner sought; that it was the defendant's imperative duty to perform the act; that at the time it is sought to coerce him, it is yet within the power of the defendant to perform, and that the case is one in which the remedy would be effectual. In its early use as a judicial writ it was a rule of universal application that mandamus would not lie where there was another specific remedy open to the petitioner. But if the refusal of the defendant to perform be clearly shown and it clearly appears that the petitioner's rights are thereby injuriously affected, a growing tendency on the part of courts in this country, federal and state, to award the writ even where another remedy exists, is manifest, especially if the other remedy be insufficient to place the party in the same position he occupied before the omission of the party complained of or would have occupied had the duty been performed. In a number of jurisdictions it has been held that if the other remedy afforded but a tedious method of redress and one where delay was likely to result in material injury, it would be no bar to the writ. In some of the states, notably, Illinois, it is provided by statute that the existence of another adequate legal remedy does not bar the petitioner. And so, it may be said, there has been for the last fifty years or more a general trend toward enlarging the scope of the writ, both as to variety of cases and as to effectuating redress for the applicant.

[1] Sect. 430.

Where the duty to perform is judicial or requires the exercise of discretion upon the part of the defendant, courts are quite cautious in awarding the writ. In such a case the function of the writ is merely to set in motion. If the defendant be a judicial officer, it may require him to decide the controverted question and pronounce judgment, but will not direct how the question be decided or what judgment be rendered. If the defendant be an officer clothed with discretion, it may require him to exercise the discretion, but will not direct how it be exercised.

The courts have at times been embarrassed in determining what constitutes a ministerial duty as distinguished from a discretionary duty. It is not always easy to determine where the line of demarkation lies. Where the law prescribes and defines the duty to be performed with such certainty as to leave nothing to the exercise of discretion, the act is ministerial. A ministerial duty, as understood and defined by the courts, is an absolute and imperative duty, the discharge of which requires neither the exercise of discretion nor judgment. On the other hand, discretion is the power or right conferred by law upon an official to act according to the dictates of his own judgment and conscience, uncontrolled by the judgment or conscience of others. The exercise of official discretion or the performance of a judicial act usually involves some ministerial duty. For instance, a board of aldermen may be charged with the duty of deciding by resolution a question of municipal policy: the introduction of the resolution and placing it before the body for vote are ministerial acts, while the decision of the question by vote is an exercise of discretion. A judge by statute may be required to convene and organize his court on a certain day, to keep a docket for all cases and call them for trial in a certain order, and in the performance of those duties he acts in a ministerial sense; but when he, in the trial of a case, passes upon the admissibility of testimony, grants or refuses instructions, or decides the case, he acts in a judicial sense. The embarrassment to the courts above mentioned has chiefly arisen in just such cases—cases where ministerial acts and those of a discretionary character, to be performed by the same official, are closely interwoven.

That courts will not interfere by mandamus in the discharge of a discretionary act is subject to the exception of abuse of discretion. Where it is clearly shown that the action taken was arbitrary, capricious, dictated by selfish motives, or amounts to a wil-

ful evasion of duty, the court will not hesitate to review and control. The doctrine may be very well illustrated by two notable cases. In the case of the *People ex rel. Sheppard v. The Illinois State Board of Dental Examiners*,[2] the petitioner, a citizen of the State of Illinois, and a graduate of the Indiana Dental College, applied to the Supreme Court of Illinois for a writ of mandamus to compel the Illinois State Board of Dental Examiners to issue to him a license to practice dentistry. Under an act to insure the better education of practitioners of dental surgery, the defendant board was authorized to conduct examinations of applicants for a license to practice, and no person was allowed to practice without such license. The act also provided that the board should at all times issue a license to any regular graduate of any reputable college without examination upon the payment of a certain fixed fee. In his petition the relator showed that the Indiana Dental College was an institution duly organized under the laws of Indiana for the purpose of educating persons in the theory and practice of dental surgery; that it had a full corps of professors, who gave complete courses of instruction, and that it was a reputable school of the kind; that he had attended such college as a student for the required length of time, had pursued all courses of study under the direction and tuition of the professors, and had graduated from the same; that he presented his diploma to the board, together with the required fee, and demanded a license to practice dentistry, which the board refused. The Supreme Court held that the board was clothed with the discretion of determining what was a "reputable dental college"; and that as it had decided that the Indiana College was not a reputable one, the relator was not entitled to a writ of mandamus in the absence of an averment and proof that the board had, in so deciding, abused the discretion with which it was clothed.

In the *Illinois State Board of Dental Examiners v. The People ex rel. Cooper*,[3] the relator applied for a writ to compel the board to issue to him a license upon a diploma of the Northwestern College of Dental Surgery, and showed that he had, as a student, successfully completed the course of that institution which, as he averred, was a reputable dental college. It appeared from the petition that the relator, on November 4, 1884, matriculated as a student in the Chicago College of Dental Surgery, in which

[2] 110 Ill., 180.

[3] 123 Ill., 227.

four of the five members of the board were instructors, and pursued his studies for one year; that in November, 1885, he entered the Northwestern College of Dental Surgery, a rival to the Chicago College of Dental Surgery, and there completed his course; that the refusal of the board to give him a license was through malice, because he had left the Chicago College and entered the other institution. The court held upon demurrer to the petition that there was an abuse of discretion on the part of the board; that while it had a right to decide whether the college at which the applicant for license was reputable or not, it must decide the question upon just and fair principles. It held that if the members of the board were making use of their power under the state law to build up their own institution and crush out a rival, as was averred and admitted by the demurrer, they were acting from selfish and improper motives, and that mandamus was the proper remedy to control their action.

Although a great majority of cases in mandamus have been against judicial, state and municipal officers and corporations serving the public for profit under charters granted by the state, its use to compel school officers to establish, maintain, and regulate schools has not been infrequent. Courts have readily awarded the writ to compel school trustees to perform their ministerial duties in building school houses and furnishing proper school facilities, to compel school superintendents to examine teachers and act upon their applications, to compel school directors to admit duly qualified pupils, or to reinstate those who had been illegally expelled. Acting in such cases, however, the courts have been careful not to invade the discretionary authority vested in the officials sought to be coerced. The cases, too, have been chiefly ones in which the schools were equipped and maintained, directly or indirectly, by taxation. How far the courts will go in regulating the action of trustees and superintendents of denominational and private schools, open to the public upon the payment of tuition, is a matter largely of conjecture. Certainly, a distinction should be observed between schools which are supported by taxation (those which are public in the highest sense) and those which are not supported by taxation, but are creatures of private enterprise. To illustrate: A court will not hesitate to compel the trustees of a public school, possessing funds for that purpose, to enlarge the facilities for accommodating an increase

of students. It would hesitate to coerce the trustees of a private institution to do such a thing.

As stated at the beginning of this article, not until quite recently has the aid of mandamus been invoked to coerce the trustees and faculties of universities, colleges, and professional schools into conferring degrees; and in the few published cases where the question is involved there does not appear entire uniformity of opinion.

In *State ex rel. Burg v. Milwaukee Medical College et al.*,[4] the relator in his petition showed that he, in 1902, matriculated as a student in the Milwaukee Medical College, a chartered institution of learning, with authority to confer degrees and issue diplomas, and registered in the department of dentistry; that he attended for the full three years required, paid all the fees required, pursued all courses required for the degree of Doctor of Dental Surgery as set forth in the published announcement of the college, and successfully passed all final examinations; that he had fulfilled all conditions required of a matriculated student, but that the college authorities refused to confer upon him a degree or issue to him a diploma.

The return admitted the allegations of the petition and set up in justification of the refusal to confer the degree that the state board of dental examiners, about the time the relator matriculated, abrogated a rule which enabled him to make up certain deficiencies in entrance requirements during the first year of his attendance, and passed a rule compelling all entrance requirements to be completed before registration; that the relator was notified of the change after he had matriculated, but continued in attendance, and that in March, 1905, the defendant received notice from the state board of dental examiners that the relator, because of his failure to comply with the rule relative to entrance requirements, should not be graduated and should receive no credit for his first year's work in the dental department. There being no dispute about the facts, the only question submitted for decision in the Circuit Court was whether the defendants were justified in refusing the diploma by following the requirements of the Wisconsin State Board of Dental Examiners. The court found that it was not a sufficient justification and awarded the writ. Upon appeal to the Supreme Court, the judgment was reversed and the writ quashed, but not upon the ground that the justifica-

[4] 128 Wis., 7.

tion pleaded was sufficient and should have been sustained. The judgment was reversed upon a point not raised by counsel for the defendant, either in their printed brief or on oral argument. In the reported opinion the court, admitting the contention of the relator that he contracted with the Milwaukee Medical College for a course in its dental department, and completed the prescribed course, paid the required fee, performed all the conditions to be performed on his part, that under the terms of the contract and the performance thereof he became entitled to a diploma, and that the same had been refused, held that "the case made is clearly one of breach of contract, and that mandamus will not lie to compel a private corporation to perform its contract."

Announcing the doctrine that "duties imposed upon corporations, not by virtue of express laws or by the condition of their charters, but arising out of contract relations, will not be enforced by mandamus," the court holds in effect that although a student may have fulfilled all the requirements for a degree announced by a college corporation, as to entrance, attendance, payment of fees, courses of study, passing of examinations, and moral character, and although it is the clear duty of the college authorities to confer on him the degree which is arbitrarily and from improper motives refused, yet the college cannot by mandamus be coerced to a performance of its duty.

Under the doctrine laid down in this case, I cannot conceive of a student's case so strong in facts as to entitle him to mandamus. With all due respect to the high character of the Supreme Court of Wisconsin, I cannot but feel that the soundness of the holding is open to question. It must be conceded, of course, that the general rule is that a right resting in contract cannot be enforced through mandamus. All students of the question understand that the remedy can be used only to enforce the performance of duties resulting from an office, trust, or station; but where the contract gives the relator the right to come within the class entitled to enforce the performance of a duty devolving upon one holding an office, trust, or station, and the right of the relator is in the nature of a privilege, it should be no objection to enforce such duty by mandamus that the relator brought himself within the class by making a contract.

Quite a different holding is made in *People ex rel. Cecil v. Bellevue Medical College.*[5] In that case Cecil, a student, applied

[5] 14 N. Y. Supp., 490.

for a writ of mandamus to compel the respondent to admit him to final examination, and on his passing, to confer on him the degree of Doctor of Medicine. The evidence showed the respondent to be a medical college, incorporated under the laws of New York, for the purpose of giving instruction in medicine. It issued circulars, wherein it specified the fee to be paid by students, the courses of study, and the qualifications which students must possess to entitle them to the degree of Doctor of Medicine. The relator entered the college for the purpose of taking the regular courses of study and procuring the degree. At the end of the course, and after fulfilling all the conditions entitling him to final examination, he was informed by the secretary of the faculty that he would not be admitted to final examination, and that the college would not confer a degree upon him. It does not appear upon what grounds the refusal was based; but the court declined to award the writ and the relator appealed. In reversing the order, Van Brunt, P. J., speaking for the court, used the following language: "When a student matriculates under such circumstances, it is a contract between the college and himself that if he complies with the terms prescribed therein, he shall have the degree, which is the end to be obtained. This corporation cannot take the money of a student, allow him to remain * * * * and then arbitrarily, when he has completed his term of study, refuse to confer upon him that which it has promised, namely, the degree of Doctor of Medicine, which authorizes him to practice that so-called science. It may be true that this court will not review the discretion of the corporation in the refusal for any reason or cause to permit a student to be examined and receive a degree; but where there is an absolute and arbitrary refusal, there is no exercise of discretion. It is nothing but a wilful violation of the duties assumed."

In *People ex rel. Jones v. New York Homeopathic Medical College and Hospital,*[6] the relator, a student in the defendant college, claiming that he had performed all the duties required of him and passed all of his examinations, applied for a writ to compel the defendant to issue to him a diploma. The doctrine announced in *People ex rel. Cecil v. Bellevue Medical College,* that mandamus is available to compel an educational institution to perform its agreement in matter of conferring degrees and issuing diplomas, was recognized, although the writ was denied. It was denied be-

[6] 20 N. Y. Supp., 379.

cause under the rules of the college a student's right to a diploma was dependent upon a decision of the medical faculty as to his qualification and a recommendation to the board of trustees, and the medical faculty had declined to approve the relator's qualifications and recommend him for a diploma.

The right to the writ to enforce performance of a contract of a like kind was also recognized a year later, in *People ex rel. O'Sullivan v. New York Law School et al.*[7] In that case a law student, who had completed the prescribed course and passed the final examinations, applied for and obtained a writ compelling the law school authorities to confer on him the degree of Bachelor of Laws. Although the order was reversed, the court being of the opinion that the court below invaded the discretionary authority of the defendants to refuse the degree to a contumacious student, the principle involved in the Cecil case was recognized.

The question was recently before the Maryland Court of Appeals, *Baltimore University v. Colton.*[8] In that case Colton, who had been a student in the law school of the Baltimore University, was notified by the law faculty that he would not be admitted to final examinations and would not be considered as a candidate for graduation. He applied for and obtained from the Baltimore City Court a writ of mandamus. On appeal one of the points of contention made by the university was that the rights of the petitioner arose out of a contract with a private corporation and that they could not be enforced by action of mandamus. The Court of Appeals overruled the contention and held that neither a suit at law to recover damages for breach of contract nor a bill in equity for specific performance constituted a remedy, barring the right of the petitioner to compel his re-instatement as a student and candidate for the degree of Bachelor of Laws.

Conceding that the writ may be awarded to compel the performance of a contract where the performance would invest the petitioner with some special honor or privilege and that an academic or professional degree is such, how far the courts will go in regulating the acts of those clothed with the authority to confer degrees becomes a very serious question.

Quite an interesting case is now pending in the Superior Court in Chicago, *Orin R. Wakefield v. The Board of Trustees of the University of Illinois et al.* Wakefield matriculated in the Uni-

[7] 22 N. Y. Supp., 663.
[8] 98 Maryland, 623.

versity of Illinois in June, 1906, and registered in its college of medicine, located in Chicago. After he had attended as a student for the required four years and had pursued the prescribed course of study, the medical faculty refused to recommend him to the trustees for graduation, because of poor scholarship and because he had failed in final examination to pass a required course denominated Medicine. The passing grade in all departments of the university is 70 on a scale of 100. Wakefield had taken all the required courses and a number of electives. He was obliged to pass in four thousand hours' of work, required and elective. He passed in five thousand, although the grade he received in a large part of his work was only 70.

To a petition for mandamus to compel the trustees to confer on the petitioner the degree of Doctor of Medicine the defendant answered, justifying the action of the medical faculty and setting up that the petitioner was not entitled to the degree because of his poor scholarship, generally, and because he had failed to pass in a required course. To meet the contention of the petitioner that he had passed final examinations in a thousand hours' more work than that actually required for graduation, and was, therefore, entitled to his degree, the answer recited a rule adopted by the university authorities that, "a student having grades below 75 in subjects aggregating twenty-five per cent of his entire work, should not be graduated," and charged that the petitioner came within the inhibition contained in the rule. The petitioner replied as to the matter set up in justification, that his failure to pass final examination in Medicine, a required course, did not bar his right to a degree for the reason that the medical faculty had adopted a rule which allowed a student to graduate who had not failed in more than two courses, and that he should not be barred because of poor examination grades, for the reason that his grades were withheld from him during the four years of his attendance and that the only notification that he had ever received with reference to them was that he had "passed." To the replication the trustees demurred and upon argument contended that the rule of the medical faculty which allowed a student to graduate who had not failed in more than two courses did not divest the faculty of its discretion, but left it with the right to recommend or to refuse to recommend for degree a student who had failed in not more than two courses. The faculty might be willing to so recommend as to a student who had made exceptionally good

grades in all but two minor courses and refuse recommendation as to a student of poor grade who had failed in only one important course. It was, also, contended that it was a matter of discretion whether grades be given out or withheld from students—a discretion with which the court should not interfere. The court, McSurely presiding, sustained the demurrer and, in refusing to carry the demurrer back to the answer, held that the matters therein specifically set up were sufficient. The case is still pending upon the issue, raised by an amended replication, that the discretion vested in the medical faculty has been abused.

In conclusion, I desire to emphasize the thought that in all such applications for this extraordinary writ the courts will avoid much embarrassment by standing close to the landmark, established early in the development of the remedy, that in matters requiring the exercise of official discretion the courts will only compel the official to act and not undertake to control his judgment. The rule is most admirably stated in *High on Extraordinary Legal Remedies*,[9] as follows: "Whenever officers or bodies are vested with discretionary power as to the performance of any duty required at their hands, or where in reaching a given result of official action, they are necessarily obligated to use some degree of judgment and discretion, while mandamus will lie to set them in motion and to compel action on the matters in controversy, it will in no manner interfere with the exercise of such discretion, nor control or dictate the judgment or decision which shall be reached."

The faculties of educational institutions having power to confer degrees, and teachers in any particular department of a university having the right to recommend to the trustees of the university students deemed to be worthy of degrees, are necssarily vested with large discretion in determining who shall receive those honors, or be recommended for such distinction. They prescribe the courses of study, the length of time they shall be pursued, and the degree of efficiency which students must attain in them; they decide upon methods of instruction and methods by which efficiency may be tested, and, by quizzes and final examinations, make the tests. They have the authority to regulate the conduct of students as to study, recreation, and social enjoyment. In exercising their authority over the student, both as to study and general conduct, to the end that he may be best prepared for

[9] Page 26.

a life of usefulness, they must be vested with broad discretion. They know more about such matters than the courts or anyone else. Their habits of thought, study, and life better fit them for the exercise of correct judgment than others, and, except in clear cases of abuse of discretion, courts should keep their hands off.

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