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Mandamus - Compelling an Official to Perform Discretionary Duty

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Conclusion

The future of the loan industry in Louisiana is uncertain. Almost everyone agrees that finance companies are necessary, but they disagree as to rates, pre-payment refunds, collection methods, and miscellaneous charges. What effect, if any, the federal *Truth-in-Lending Act*[37] will have on loan companies is unknown. The Act does not contain rate controls nor does it provide for a refund of unearned interest.[38]

There may, however, be hope for the unwary borrower should Louisiana adopt the Uniform Commercial Code.[39] The UCC has a provision[40] that could enable the court to find as a matter of law that the discounting of exorbitant interest is unconscionable and thereby take appropriate action. The outcome of the court's finding would depend entirely upon their definition of the term "unconscionable." The UCC does not attempt to define the term, thus leaving much discretion in the courts.

Herschel C. Adcock

MANDAMUS—COMPELLING AN OFFICIAL TO PERFORM DISCRETIONARY DUTY

Plaintiffs, desiring to complete a course in barber college, were unable to fulfill the requirements within the time alloted by law[1] and sought an extension from the Louisiana State Board of Barber Examiners. The Board, "in its discretion,"[2] refused to allow the requested extension and plaintiffs brought

enabling them, for the first time in most states, to actually have a meaningful opportunity to shop for the best credit buy."

37. 15 U.S.C. §§ 1601-1677 (1968).

38. A bill such as La. H.B. 556, even though it contained some inequitable provisions, would have been a welcome relief.

39. Louisiana is the only state that has not adopted the Uniform Commercial Code; however, the Louisiana Law Institute is presently studying the UCC with an eye toward its possible adoption by Louisiana.

40. UNIFORM COMMERCIAL CODE § 2-302: "(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

"(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination."

1. LA. R. S. 36:363 (1950).

2. *Id.* 36:366 gives the Board the power to extend the time permitted for completion of the required course. To give, or not to give, an extension is within the Board's discretion, but it may only grant an extension upon a showing of good cause.

suit seeking a writ of mandamus compelling the Board to grant the additional time. On appeal, in affirming the trial court's dismissal, the First Circuit *held* that the writ of mandamus would not lie to compel a discretionary duty *even if* there had been an abuse of that discretion. *State ex rel. Hayes v. Louisiana State Board of Barber Examiners*, 208 So.2d 369 (La. App. 1st Cir. 1968), *cert. denied*, 252 La. 169, 210 So.2d 53 (1968).[3]

The function of the extraordinary writ of mandamus is to provide a legal action which can be used to compel the performance of certain duties or acts.[4] Historically, mandamus has been the proper remedy for such cases, and has been viewed as clearly drawing the issue whether or not a public official has acted in an illegal manner, including whether he has grossly abused the discretion entrusted to him. Being a summary proceeding,[5] it was designed and traditionally used to afford a degree of relief unavailable through ordinary proceedings.[6]

The Louisiana law prior to the Code of Civil Procedure of 1960 appears to have been that mandamus would not lie to reach or correct the performance of any duty which, in manner or degree, was discretionary with a public board or official.[7] The courts refused to "second guess" an administrative body on a discretionary question, fearing that the judgment of the courts might eventually become substituted for that of the agencies. However, the courts also established an exception to the above

3. This holding was relied on and reaffirmed in a later First Circuit case which denied the relator's petition for a writ of mandamus to be issued to compel the State Banking Commissioner to issue to relator a small loan license on the ground that the writ of mandamus will not compel the performance of a discretionary duty even where there had been a gross abuse of discretion. State *ex rel.* Citizen's Fin. of Hammond v. James, 213 So.2d 64 (La. App. 1st Cir. 1968). Although the *Hayes* opinion referred to "abuse," the *Citizen's Fin.* case expanded the holding to include the term "gross abuse."

4. LA. CODE CIV. P. arts. 3861-3867.

5. *Id.* arts. 3781, 3862.

6. *Id.* arts. 2591-2595. *See also* note 34 *infra*.

7. State *ex rel.* Eberle v. Orleans Parish School Bd., 221 La. 243, 59 So.2d 177 (1952); State *ex rel.* Hutton v. City of Baton Rouge, 217 La. 857, 47 So.2d 665 (1950); Houeye v. St. Helena Parish School Bd., 213 La. 807, 35 So.2d 739 (1948); City of Gretna v. Parish of Jefferson, 161 La. 406, 108 So. 787 (1926); State *ex rel.* Guion v. Chauvin, 147 La. 703, 85 So. 645 (1920); State *ex rel.* Citizen's Bank of La. v. Webre, 44 La. Ann. 1081, 11 So. 706 (1892); State *ex rel.* New Orleans Gaslight Co. v. City of New Orleans, 32 La. Ann. 268 (1880); State *ex rel.* St. Martin v. Police Jury of St. Charles Parish, 29 La. Ann. 146 (1877); State *ex rel.* Moncure v. Dubuclet, 28 La. Ann. 698 (1876); Hughes v. Parish Council of East Baton Rouge, 48 So.2d 823 (La. App. 1st Cir. 1950); State *ex rel.* O'Beirne v. Police Jury of Red River Parish, 16 La. App. 581, 135 So. 57 (3d Cir. 1931); Kostmayer v. Police Jury of Jefferson, 1 La. App. 618 (Orl. Cir. 1925). It should be noted that in most of these cases the question of whether or not a gross abuse of discretion was a basis for granting a writ of mandamus did not arise or was not necessary to the decision.

rule in cases of clear and flagrant abuses of vested discretion.[8] Though variously worded in many cases,[9] a clear statement of the rule is:

> "While it is the general rule that mandamus may be invoked only to coerce the performance of duties that are purely ministerial in nature, it is well settled in this state as well as in other jurisdictions that the writ may also be employed to reach and correct an arbitrary or capricious abuse of discretion by public boards or officials."[10] (Citations omitted.)

There is no question that the "gross abuse" exception was a part of our law prior to 1960, although it seems to have been jurisprudentially created, since it was not specifically provided for in the Code of Practice of 1870, but was not inconsistent with that code.[11] The "gross abuse" exception is not peculiar to Louisiana, but has been established and is accepted in the common law jurisdictions as well.[12]

The provisions of the Code of Civil Procedure of 1960 which govern the use of mandamus are articles 3861-3866. Article 3863 provides that mandamus may be used to compel the per-

8. State *ex rel.* Torrance v. City of Shreveport, 231 La. 840, 93 So.2d 187 (1957); State *ex rel.* Kohler's Snowite Laundry & Cleaners v. State Bd. of Commerce & Industry, 205 La. 622, 17 So.2d 899 (1944); Charbonnet v. Board of Architectural Examiners, 205 La. 232, 17 So.2d 261 (1944); Saint v. Irion, 165 La. 1035, 116 So. 549 (1928); State *ex rel.* Peoples State Bank v. Police Jury of Red River Parish, 154 La. 389, 97 So. 584 (1923); State *ex rel.* Texas Grading Co. v. Buie, 144 La. 39, 80 So. 191 (1918); State *ex rel.* Thurmond v. City of Shreveport, 124 La. 178, 50 So. 3 (1909); State *ex rel.* Galle v. City of New Orleans, 113 La. 371, 36 So. 999 (1904); State *ex rel.* Mayor v. Judge, 35 La. Ann. 637 (1833); State *ex rel.* Yglesias v. Soule, 48 So.2d 717 (La. App. 1st Cir. 1950); State *ex rel.* Ratliff v. Village of Roseland, 21 So.2d 96 (La. App. 1st Cir. 1945; State *ex rel.* Meaux v. Village of Morse, 6 So.2d 221 (La. App. 1st Cir. 1942); State *ex rel.* Fourroux v. Board of Directors of Public Schools of Jefferson Parish, 3 La. App. 2 (Orl. Cir. 1925). *See* Notes, 19 TUL. L. REV. 147, 149 (1944), 6 TUL. L. REV. 493, 494 (1932).

9. *See* cases cited note 8 *supra.*

10. State *ex rel.* Torrance v. City of Shreveport, 231 La. 840, 846, 93 So.2d 187, 189 (1957). This case was relied on by the relators in the instant case but was held to have been overruled by the 1960 Code. *See* State *ex rel.* Hayes v. Louisiana St. Bd. of Barber Examiners, 208 So.2d 369, 371 (La. App. 1st Cir. 1968).

11. State *ex rel.* Hayes v. Louisiana St. Bd. of Barber Examiners, 208 So.2d 369, 371 (La. App. 1st Cir. 1968). *See* La. Code of Practice arts. 829-844 (1870).

12. 55 C.J.S. *Mandamus* § 63(c) (1948): ". . . [T]he great weight of authority is to the effect than an exception to the general rule that discretionary acts will not be reviewed or controlled [by mandamus] exists when the discretion has been abused, if the facts otherwise justify the issuance of the writ. [footnotes omitted]." *Accord,* 34 AM. JUR. *Mandamus* §§ 66-69, 126 (1951); 2 W. BAILEY, HABEAS CORPUS AND SPECIAL REMEDIES §§ 201 (1913); F. FERRIS, THE LAW OF EXTRAORDINARY LEGAL REMEDIES §§ 206, 209 (1926); 2 T. SPELLING, INJUNCTION AND OTHER EXTRAORDINARY REMEDIES § 1433 (2d ed. 1901); Note, 5 TUL. L. REV. 149 (1930).

formance of a "ministerial duty required by law." Comment (b) thereunder states that "The following rules established by the jurisprudence are retained: . . . . It may be used only to compel the performance of purely ministerial duties."

Since the adoption of the 1960 Code of Civil Procedure, other Louisiana courts of appeal[13] have held still apropos the rule that mandamus will lie to review and correct an arbitrary and capricious gross abuse of discretion by a public board or official.[14]

After recognizing the former law[15] and this post-1960 jurisprudence,[16] the court in *Hayes* nonetheless felt that "the provisions of Articles 3861 and 3863 of the Code of Civil Procedure *preclude* such an interpretation."[17] (Emphasis added.) The court seemed to place considerable emphasis upon Comment (b) under Article 3863, mentioned previously. The court reasoned that by this language the legislature had "rejected the use of mandamus to compel the performance of any discretionary duty by a public officer or board, even in cases in which there had been an abuse of discretion."[18] This decision, if accepted, will obviously work a substantial change in the use of writ of mandamus in Louisiana.[19] Such a change is neither desirable nor necessary under our Code.

There are three grounds which the courts may employ in retaining the "gross abuse" exception. First, in considering the requirements of the Code, a " 'Ministerial' duty is to be dis-

13. *See* specific cases of the Second, Third, and Fourth Circuits in note 14 *infra*.

14. Deville v. City of Oakdale, 180 So.2d 556 (La. App. 3d Cir. 1968); Lamartinere v. Daigrepont, 168 So.2d 373 (La. App. 3d Cir. 1964) (referring specifically to art. 3863); Cloud v. Bushnell, 168 So.2d 275 (La. App. 3d Cir. 1964), *writs refused*, 247 La. 299, 170 So.2d 509 (1965); Lambert v. La Bruyere, 154 So.2d 466 (La. App. 4th Cir. 1963); West Carroll Nat. Bank of Oak Grove v. West Carroll Parish School Bd., 136 So.2d 699 (La. App. 2d Cir. 1961); State *ex rel.* Summit Fid. & Surety Co. v. Police Jury of Rapides Parish, 131 So.2d 623 (La. App. 3d Cir. 1961).

15. *See* text at note 8 *supra*.

16. *See* note 14 *supra*.

17. State *ex rel.* Hayes v. Louisiana State Bd. of Barber Examiners, 208 So.2d 369, 371 (La. App. 1st Cir. 1968).

18. *Id.* In State *ex rel.* Citizen's Fin. of Hammond, Inc. v. James, 213 So.2d 64, 65 (La. App. 1st Cir. 1968), this was clarified by using the term "a gross abuse" instead of "an abuse" as was used here. *See* note 3 *supra*.

19. 208 So.2d 369, 371 (La. App. 1st Cir. 1968). It is interesting to note that even the defendant in *Hayes*, in his appellate brief, admitted and acknowledged the existence of the "gross abuse" exception, his argument being that as the relator did not allege facts sufficient to establish a showing of genuine "gross abuse," the application of the exception was not presently proper. Brief for Appellee at 3, 4, State *ex rel.* Hayes v. Louisiana State Bd. of Barber Examiners, 208 So.2d 369 (La. App. 1st Cir. 1968).

tinguished from discretionary power, that is to say, where a choice is confided to the official."[20] A ministerial duty is one which is performed without requiring the exercise of judgment, in obedience to some clear command.[21] Article 3863 and Comment (b) thereunder limit the use of mandamus to only compelling the performance of ministerial duties. With reference to the distinction between "ministerial" and "discretionary" duties, this limitation is exactly the same as a rule excluding the use of mandamus to compel discretionary duties.[22] The basis for this juggling of words is that the two terms are mutually exclusive.[23] Thus, the former jurisprudential rule that mandamus will not lie to compel a discretionary duty has been stated in other words in Article 3863 and its comments. The gross abuse exception was a *part and parcel* of this rule before it was restated in the 1960 Code.[24] In view of the fact that mandamus is so well suited to meet the needs of justice, and has been the traditional remedy in cases of gross abuse, it does not seem profitable to hold that the redactors, in an attempt to use positive rather than negative phraseology,[25] intended to eliminate the use of mandamus in such cases. The courts, therefore, could hold that the new statute itself retains the pre-1960 "gross abuse" exception to the non-availability of mandamus.

Secondly, the *Hayes* ruling raises possible constitutional problems. It is beyond doubt that a public officer or agency cannot lawfully be vested with unfettered and unreviewable discretion. If such were possible, blatantly unconstitutional actions could be maintained as long as they were the product of discretion instead of legislation.

In *Sunday Lake Iron Co. v. Township of Wakefield*[26] the United States Supreme Court said:

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the

20. Sachse, *Justice—The Duty of the State To Submit to the Legal Process*, 18 LA. L. REV. 437, 442 (1958).

21. Although some interpretation of law and determination of fact is necessary, the duty may still be ministerial. Cook v. City of Shreveport, 163 La. 518, 112 So. 402 (1927); State *ex rel.* Warren Realty Co. v. Montgomery, 43 So.2d 33 (La. App. Orl. Cir. 1950); Dupuy v. Jones, 15 So.2d 528 (La. App. Orl. Cir. 1943).

22. Instead of using a negative expression excluding the use of mandamus in cases of discretionary duties, the redactors simply made use of a positive limitation.

23. *See* notes 7, 8, 18, and 20-22 *supra;* BLACK, LAW DICTIONARY 1148 (4th ed. 1957).

24. *See* notes 8, 12, and 14 *supra.*

25. *See* note 22 *supra.*

26. 247 U.S. 350 (1917).

> State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."[27]

It has been further held, in *Glicker v. Michigan Liquor Control Comm'n*,[28] that the federal government has the right to insure that state regulations of franchises, property rights, and *mere privileges* granted or withheld by the state at its pleasure are not determined in an arbitrary or discriminatory manner.[29] As early as 1904 the Louisiana Supreme Court recognized that a discretionary power, in order to escape unconstitutionality, must not be arbitrarily or unjustly exercised.[30] These constitutional limitations are clearly illustrated by noting that the exact cause of action dismissed by the state court in *State ex rel. Citizens Fin. Co. of Hammond v. James*[31] has been presented in federal district court, alleging a violation of plaintiff's right to equal protection of the laws.[32] In an identical case, the same court recently ordered a preemptory writ of mandamus to issue, compelling the defendant to issue to plaintiff the small loan license sought.[33] It is submitted, therefore, that the state courts cannot constitutionally refuse to review a gross abuse of discretion by official state agents, thereby giving them an unlimited discretion.[34]

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27. *Id.* at 352.

28. 160 F.2d 99 (6th Cir. 1947).

29. Glicker v. Michigan Liquor Control Comm'n, 160 F.2d 99, 100 (6th Cir. 1947). *Accord*, Niemotko v. Maryland, 340 U.S. 268 (1951); Walton v. City of Atlanta, 181 F.2d 693 (5th Cir. 1950).

30. State *ex rel.* Galle v. City of New Orleans, 113 La. 371, 36 So. 999 (1904).

31. *See* note 3 *supra*.

32. Specifically, a violation of 28 U.S.C. § 1343(3) (1964) was alleged. Citizen's Fin. of Hammond, Inc. v. James, Civil No. 68-167 (U.S. Dist. Ct., E.D. La., filed October 11, 1968). The action was later dismissed when the license sought was voluntarily granted. Baton Rouge Morning Advocate, Nov. 5, 1968, § B, at 6, col. 3.

33. Citizen's Fin. Co. of Covington, Inc. v. James, Civil No. 67-173 (U.S. Dist. Ct., E.D. La., filed March 29, 1968). The only distinguishing difference in the two cases is the location of the business offices, one being in Hammond, La., and the other being in Covington, La.

34. It must be noted that the new Administrative Procedure Act of 1967 does provide a method of review of certain administrative decisions. LA. R. S. 49:451-466 (Supp. 1967). The reviewing court is empowered to reverse an administrative decision for stated reasons, one of which is a finding that the decision was "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion . . . " *Id.* 49:964(G)(5). Insofar as an agency decision may be reviewed under this statute, the constitutional argument presented above loses force; however, since the statute specifically preserves any other actions that might be taken to obtain relief, the first and third grounds given in the text for reversing *Hayes* remain unimpaired. *Id.* 49:964(A). In determining the effect of the new act, it is significant that its provisions are applicable only to *state* agency (*id.* 49:951(2)) decisions or orders which are required to be preceded by notice and opportunity for a hearing. *Id.* 49:951(3). Further, certain state agencies are ex-

In light of the above observations, a third rationale is possible; that is, admitting the *Hayes* interpretation to read a constitutional test into Article 3863.

It can be said that even when one has it within his discretion to perform or not to perform, he is nevertheless under a ministerial duty to exercise his discretion in a lawful manner. That lawful manner is determined by the grant of authority he has received and by the United States Constitution. As noted above,[35] the Constitution requires that discretionary duties not be performed in an arbitrary, capricious, or unreasonable manner. A "ministerial" duty, provided by the clear command of the Constitution, exists to exercise one's authority and discretion in a reasonable fashion. Thus, the courts could uphold the statute by reading a "reasonableness" requirement into the definition of "ministerial."

The holding of *Hayes* unnecessarily limits the use of mandamus, and though not necessary under the Code, is unconstitutional unless tempered with a "reasonableness" requirement.[36] The proper and more desirable conclusion is that the jurisprudentially created "gross abuse" exception is not precluded by the Code of Civil Procedure.

Jerry F. Davis

NULLITY OF MARRIAGE BECAUSE OF SIMULATED CONSENT

The Twenty-Second Judicial District Court declared null a marriage in which the man's consent was obtained because of the woman's mistaken claim that she was pregnant.[1] The record shows that the formalities of law necessary for a valid marriage were observed and that the outward manifestations of the parties were to enter into a valid marriage. The girl believed she was pregnant and in order to avoid the embarrassment and

cepted from the provisions of the act. *Id.* 49:951(2)(C). Thus, as beneficial as the Administrative Procedure Act is, it does not moot the arguments presented in this Note, especially when one begins to enumerate the many remaining state, parish, and municipal agencies which are vested with discretion which, if abused, could easily prejudice substantial rights.

35. *See* text at notes 26-31 *supra.*

36. It is interesting to note that in the Introduction to Title III of the *Louisiana Code of Civil Procedure (Extraordinary Remedies)* it is stated, in a "Summary of Procedural Changes in Title III" by the late Henry G. McMahon that: "The *only changes* in the procedural rules governing the extraordinary remedies of habeas corpus, mandamus, and quo warranto are those made by Art. 2823 [which relates to service of habeas corpus]." (Emphasis added.)

1. McDonald v. Galloway, No. 29063, La. 22d Judicial District (1968).