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RIGHT OF MANDAMUSED OFFICIAL TO RAISE ISSUE OF CONSTITUTIONALITY

I

Three recent cases have brought into prominence again the problem of recognizing the right of a public officer to raise the defense of unconstitutionality of a statute in a mandamus proceeding to compel him to act under that statute.¹ The doubtful judicial attitude towards this question will probably be more finely crystallized within the next few years primarily because of the mass of new legislative enactments, both state and national, imposing numerous duties upon established or newly-created administrative officials and agencies. "New Deal" recovery and economy laws enacted by the forty-nine jurisdictions within the United States must be carried out to a considerable extent by executive agencies, as the law-making bodies recognize. May the constitutionality of these new functions be questioned by those upon whom they are imposed, is the question which is likely to arise. Procedurally, the question is most likely to be presented in mandamus actions to compel officials to act. For example, if a normal Republican state which was carried along by the Democratic landslide in 1933 returns a Republican majority in subsequent elections, will these newly elected officers be permitted to question the validity of state or national enactments opposed to their party policies?

As a general rule, a public officer whose duties are of a ministerial nature cannot raise the defense of unconstitutionality of the statute imposing them.² A number of reasons have been advanced by the courts to justify the rule. The most important of these is the commonly acknowledged principle that the validity of

¹ *City of Montpelier v. Gates et al.* (Vt. 1934) 170 Atl. 473; *State ex rel. Equality Building Association v. Brown* (S. C. Mo. 1934) 68 S. W. (2d) 55; *State ex rel. Webster Groves Loan and Building Association v. Brown* (S. C. Mo. 1934) 68 S. W. (2d) 60.

² *State ex rel. Chicago R. I. & P. Ry. Co. v. Becker* (1931) 328 Mo. 541, 41 S. W. (2d) 188; *State ex rel. Clinton Falls Nursery Co. v. Steel County Board of County Commissioners* (1930) 181 Minn. 427, 232 N. W. 737; *Levitt v. Attorney-General* (1930) 111 Conn. 634, 151 Atl. 171; *State ex rel. Wiles v. Williams* (1910) 232 Mo. 56, 133 S. W. 1; *State ex rel. N. A. R. Co. v. Johnston* (1911) 234 Mo. 338, 137 S. W. 595; *State v. Sedillo* (1929) 34 N. M. 1, 275 Pac. 765; *State ex rel. Lockwood v. Tyler* (1922) 64 Mont. 124, 208 Pac. 108; *Estus v. State* (1921) 83 Okla. 181, 200 Pac. 1002; *Mohall Farmers' Elevator Co. v. Hall* (1920) 44 N. D. 430, 176 N. W. 131; *Attorney-General v. Taubenheim* (1917) 178 App. Div. 321, 164 N. Y. S. 904; *Ridgell v. Hall* (1915) 99 Nebr. 89, 155 N. W. 223, 156 N. W. 16; *People ex rel. Cruce v. Cease* (1911) 28 Okla. 271, 114 Pac. 251; *Capito v. Topping* (1909) 65 W. Va. 587, 64 S. E. 849; *Foshe v. Burley* (1908) 80 S. C. 127, 61 S. E. 255; *Clark v. Miller* (1874) 54 N. Y. 523.

a statute may be questioned only by those whose private rights are affected.³

Other cogent, but less frequently advanced reasons, include the following: Respect for the integrity and ability of the legislature should cause judicial reluctance to declare a statute unconstitutional unless absolutely necessary to the decision in a case.⁴ Efficient administration demands that statutes be not questioned by ministerial officers.⁵ An administrative official cannot assume a judicial function.⁶ A petty ministerial officer of the State cannot be allowed to ignore a legislative mandate which he deems invalid.⁷ Obedience to its laws is absolutely essential in a well-regulated government.⁸

The significance of all these objections is illustrated practically by the subject-matter involved in the following typical situations which usually arise: where an official attempts to resist a tax which he is required by statute to collect. (Here the courts have almost without exception refused to permit a public officer to defend a mandamus suit on the ground that the law under which the tax is levied is unconstitutional, for the apparent reason that so to do would interfere with the efficient operation of the government);⁹ where the duty is merely a manual or physical one;¹⁰ where the direction is to create a minor or inferior public

³ *J. & T. Cousins Co. v. Shoe and Leather Workers' Industrial Union* (1934) 268 N. Y. S. 547; *Conway v. Lane Cotton Mills Co.* (L. A. 1934) 152 So. 312; *Clark v. State* (Miss. 1934) 152 So. 820. The rule applies to all legal proceedings. 12 *Corpus Juris* 760-1: "It is a firmly established principle of law that the constitutionality of a statute may not be attacked by one whose rights are not affected by the operation of the statute. This rule applies to all cases both at law and in equity, and is equally applicable in both civil and criminal proceedings. . . . In other words, one attacking the constitutionality of a statute must show that it affects him injuriously and actually deprives him of a constitutional right."

⁴ *State v. Seebold* (1905) 192 Mo. l. c. 731, 91 S. W. 491.

⁵ *State ex rel. Wiles v. Williams*, *supra*, note 2, l. c. 190: "Since such an officer has no personal interest involved, to tolerate his objections to the validity of the law would lead to delays and endless confusion in the administration of the law." Also note 2, *supra*.

⁶ *State ex rel. N. A. R. Co. v. Johnston*, *supra*, note 2.

⁷ *Threadgill v. Cross* (1910) 26 Okla. 403, 109 Pac. 558, 138 Am. St. Rep. 964.

⁸ *State ex rel. New Orleans Canal & Banking Co. v. Heard* (1895) 47 La. Ann. 1679, 18 So. 746 l. c. 752.

⁹ *Wright v. Kelly* (1894) 41 Idaho 624, 43 Pac. 565; *Bassett v. Barbin* (1856) 11 La. Ann. 672; *People ex rel. Attorney-General v. Saloman* (1870) 54 Ill. 39.

¹⁰ *State ex rel. Chicago R. Is. and P. Ry. Co. v. Becker*, *supra*, note 2 (issuance of a statutory corporation license); *Franklin County v. State* (1888) 24 Fla. 55, 12 Am. St. Rep. 183, 3 So. 471 (requiring county commissioners to receive and keep election returns); *Commonwealth v. James* (1890) 135 Pa. 480, 19 Atl. 950, (compelling county clerk to file and record certain resolutions of a school board); *State ex rel. Cruce v. Cease*, *supra*, note 2, (com-

office;¹¹ where a subordinate officer, in carrying out the orders of his superior, wishes to challenge the constitutionality of the statute under which his superior acts.¹²

II

A few jurisdictions go to the extreme of holding that public officials may at any time raise the question of the constitutionality of a statute in a mandamus suit against them.¹³ The recent case of *City of Montpelier v. Gates et al.* (1934) propounds this minority view as one ground for its decision. The Vermont tax act of 1931 changed radically the State's tax scheme, to the detriment, particularly, of the towns of the State. To compensate for this the statute provided for various reimbursements by way of certificates to be issued by the tax commissioner. Certificates were issued, but the State fiscal officers refused to pay. Mandamus was brought, the defense being that the tax law was unconstitutional. The Court held that the officers were sufficiently interested to enable them to raise the question of validity because an unconstitutional law is no law at all.¹⁴

It would seem that this minority rule might disturb too frequently the governmental processes. In view of the multifarious objections to such a judicial holding,¹⁵ the court in the *Gates* case should have avoided such unequivocal support of the

elling county officers of new county to hold their offices at a county seat designated by the governor in pursuance of a statute); *Threadgill v. Cross*, *supra*, note 7, (requiring the Secretary of State to file an initiative petition).

¹¹ *State ex rel. Nicholls v. Shakespeare* (1889) 41 La. Ann. 156, 6 So. 592 (to compel the mayor to create a police board); *U. S. ex rel. Schumacher v. Marble* (1883) 3 Mackey (D. C.) 32, (registry of trade marks and patents).

¹² *People ex rel. State Board of Equalization v. Pitcher* (1916) 61 Colo. 149, 156 Pac. 812; *Utah v. Candland*, *supra*, note 13; *Woodall v. Darst* (1912) 71 W. Va. 350, 77 S. E. 264. Nor can an interpretation of law by the superior officer be challenged by a subordinate. *State ex rel. Miller v. Buchanan* (1884) 24 W. Va. 362.

¹³ *City of Montpelier v. Gates et al.* (1934), *supra*, note 1; *Van Horn v. State ex rel. Abbot* (1895) 46 Nebr. 62, 83; 64 N. W. 365, 372; *Utah v. Candland* (1909) 36 Utah 406, 104 Pac. 285; *Brandenstein v. Hoke* (1894) 101 Cal. 131, 35 Pac. 526; *McCurdy v. Tappan* (1872) 29 Wis. 664, 9 Am. Rep. 622; *Norman v. Kentucky Bd. of Examiners* (1892) 93 Ky. 537, 20 S. W. 901; *Tombs v. Sharkey* (1925) 40 Miss. 676, 106 So. 273. In *Utah v. Candland*, *supra*, the court said: "No other conclusion is permissible if the Constitution is the supreme law, and if legislative acts in conflict therewith are not merely voidable but are absolutely void. A legislative act which is in conflict with the Constitution is still born and of no force or effect—impotent alike to confer rights or to afford protection." 104 Pac. 1. c. 290.

¹⁴ *Supra*, note 12, l. c. 476: "This must be so if, as we are taught, an unconstitutional statute is a mere nullity that confers no rights, imposes no duties, and affords no protection."

¹⁵ See *supra*, notes 3, 4, 5, 6, 7, 8.

minority, and based its decision upon the more satisfactory ground that since public funds were involved, public interest required that the officer be allowed to defend the action.¹⁶ A too liberal tendency away from the principle allowing only an interested party to question the constitutionality of a law may open the judicial door to constant abuse by public officers, both of the legislature and its enactments and of the judicial process itself.

III

The general rule on authority provides a more fundamentally sound approach to the difficulty involved. Manifestly, strict compliance with the rule by the courts would result in many cases in inconvenience and injustice. For these reasons the Courts have supplied flexibility in the general principle by attaching certain exceptions to its operation, all of them generally recognized.

Two Missouri cases, *State ex rel. Equality Building Association v. Brown*, and *State ex rel. Webster Groves Loan and Building Association v. Brown*, both decided at the present spring term of court, adopt the view that the general rule will cease to operate when the attorney-general of the State advises a public officer that the statute passed by the Legislature is unconstitutional.¹⁷ The basis for this exception, which has gained a prevalent recognition, is suggested in *State ex rel. Wiles v. Williams*,¹⁸ Judge Woodson indicating that the attorney-general and his assistants must as a duty give legal advice to other officers of the State when called upon for an opinion regarding the administration of the affairs of their respective offices.¹⁹ Apparently the Courts are willing to concede that the legal opinions of the attorney-general should be sufficient evidence to overcome the presumption that the statute is constitutional.

A second exception arises where to enforce the request of the relator for a mandamus would result in a violation of the re-

¹⁶ See *infra*, note 25.

¹⁷ *Supra*, note 1. In the Equality Building Association case, the association applied to the Secretary of State for an extension by statutory method (Laws of Missouri, 1931, p. 158) of its corporate charter. The Secretary refused to issue the extension until relator paid a fee based upon its capital stock, contending that the statute was unconstitutional, and further, that he had obtained an opinion from the attorney-general so advising. *Held*: "Respondent's return apparently brings him within the well-recognized exception that even such an officer can justify his refusal to perform when advised by the attorney-general of the State that the statute is unconstitutional." 1. c. 58. See also: *State ex rel. Wiles v. Williams*, *supra*, note 1; *State ex rel. v. Becker*, *supra*, note 1; *Commonwealth ex rel. Attorney-General v. Mathues* (1904) 210 Pa. 372, 59 Atl. 961.

¹⁸ *Supra*, note 1.

¹⁹ *Ibid.*, 133 S. W. 1. c. 6.

spondent's oath of office.²⁰ However, as declared in *State ex rel. Railroad v. State Board of Equalizers*, the Courts which adhere to this exception tolerate a fallacy for the reason that every act of the legislature is "presumptively constitutional until judicially declared otherwise, and that the oath of office 'to obey the Constitution' means to obey the Constitution not as the officer decides, but as judicially determined."²¹ The better policy would require something more than the mere violation of the oath of office before the officer involved may be permitted to invoke a plea of unconstitutionality of a legislative enactment.

Although the situation has seldom come into issue, where the relator seeks mandamus to compel a public officer to disregard a subsequent statute as unconstitutional, and act under a previous one, the public officer may properly raise the question regarding the constitutionality of the previous enactment.²² Not to do so might result in the declaration by the Court that only the subsequent statute is unconstitutional while the same or similar objections could be raised by the respondent against the validity of the prior enactment.

The Courts have always maintained the right of a ministerial officer to resist a mandamus action when the performance of his duty under an unconstitutional statute would subject him to penalties or personal liability.²³ While universally named as an *exception* to the rule, here the interest of the administrator is not merely official. Representative of this class of cases is *State ex rel. Pierce v. Slusher* wherein a sheriff was allowed to question the constitutionality of an income tax act because if the act were unconstitutional, the sheriff "would not be protected by that law in the event that he seized and sold the property of the alleged delinquent taxpayers."²⁴

But when the element of personal liability does not appear the Courts must consider the right to question the statute as a de-

²⁰ *State ex rel. Miller v. Leech* (1916) 33 N. D. 513, 157 N. W. 492; *Norman v. Ky. Bd. of Managers*, *supra*, note 13; *Rhea v. Newman* (1913) 153 Ky. 604, 156 S. W. 154; *State ex rel. Lockwood v. Tyler* (1922) 64 Mont. 124, 208 Pac. 1081.

²¹ (1922) 84 Fla. 592, 94 So. 681 l. c. 683.

²² *People ex rel. Woodyatt v. Thompson* (1895) 155 Ill. 451, 40 N. E. 307. The relator contended that the Illinois law of apportioning the state into senatorial districts was unconstitutional, and that therefore the apportionment must be according to the act of 1882. The county clerk interposed the defense that the act of 1882 was unconstitutional. The Court held that both acts may be subject to the same vice, and the just and reasonable solution would be to allow the defense (l. c. 309).

²³ *State ex rel. Pierce v. Slusher* (1926) 119 Or. 141, 248 Pac. 358; *Attorney-General v. Taubenheimer*, *supra*, note 2; *Capito v. Topping*, *supra*, note 2; *Norman v. Kentucky Bd. of Managers*, *supra*, note 20; *Utah v. Candland*, *supra*, note 13; *Summer v. Beeler* (1875) 50 Ind. 341.

²⁴ *Supra*, note 23, l. c. 360.

fense to mandamus from a standpoint of sound policy, as indicated previously. This policy is most frequently exercised in the most difficult exception to the general rule, namely, that where the general public interest so requires, the Constitutional point should be decided in the mandamus action.²⁵ This broad ground of exception might well have been the sole basis for the decision in *City of Montpelier v. Gates* because the defendants in that case were "in a very real sense, the custodians and conservators of the public funds, which they are forbidden to disburse except as the Legislature appropriates them."²⁶ It would seem advisable to allow a liberal construction in favor of the respondent in any case where a substantial expenditure of public funds is involved. This would also be true where a prompt ascertainment of the constitutional status of a legislative enactment is desirable. An excellent illustration of the advantage accruing when a public officer is allowed to raise the constitutional issue in the latter case, is the situation where school funds are authorized under a legislative mandate to be diverted from the school fund, and the public officer refuses so to divert.²⁷ It would result adversely to the community as a whole to refuse a prompt and final judicial declaration as to the status of these school funds.

A few jurisdictions, however, refuse to recognize the "public interest" exception.²⁸ It is plausible to assume that in these jurisdictions postponement of the final determination of the constitutional issue may, and often will, result subsequently in great public inconvenience and loss.²⁹

IV

With relation to the national Congress, a mooted point will arise should an administrative official against whom mandamus

²⁵ *City of Montpelier v. Gates*, *supra*, note 1; *Coleman v. Hurst* (Ky. 1928) 11 S. W. (2d) 133; *State ex rel. Foreman v. Wheatley* (1917) 113 Miss. 555, 74 So. 427; *People ex rel. Colorado Tax Commission v. Pitcher* (1914) 56 Colo. 343, 138 Pac. 509; *Attorney-General v. Mathues* (1904) 210 Pa. 372, 59 Atl. 961; *School District v. Snyder* (1923) 29 Wyo. 163, 212 Pac. 758; *State ex rel. Miller v. Ludz* (1916) 33 N. D. 513, 157 N. W. 492; *Woodall v. Darst* (1912) 71 W. Va. 350, 77 S. E. 264; *Gilmer v. Holton* (1881) 98 N. C. 26, 3 S. E. 812; *Stockman v. Leddy* (1912) 55 Colo. 24, 129 Pac. 220.

²⁶ *Supra*, note 1, l. c. 476.

²⁷ *State ex rel. School District v. Snyder*, *supra*, note 25. The legislature attempted to authorize a diversion of the rents and profits from certain oil lands from the permanent school fund. Respondent was allowed to question the constitutionality of the enactment.

²⁸ *State ex rel. New Orleans Canal and Banking Co. v. Heard*, *supra*, note 2; *Suit by relator on certain bonds*. Respondent contended that the bonds were null and void. Approximately \$10,000 was involved. The defense of unconstitutionality was held unavailable.

²⁹ Such would have been the consequence in the *Snyder* case, *supra*, note 27, had not the court considered the validity of the statute.

is brought attempt to test the validity of an enactment by the legislature under its spending power. Apparently, the only restrictions upon this power have been that the money be appropriated for the general welfare and for a national purpose.³⁰ The decision as to what is "general welfare" or a "national purpose" seems to lie with Congress alone.³¹ If that body acts unwisely, responsibility is to its constituency—not to the Courts. If this is the judicial attitude then it is not conceivable that mandamus will lie.

Some doubt is cast upon this accepted concept by two federal decisions. In an early *District of Columbia Appeals* case, mandamus was brought against a disbursing officer of the Federal government to compel him to pay certain sugar bounties provided for under a Congressional Act. The officer raised the question of constitutionality of the statute.³² The Court, without any consideration of the right of the officer to use such a defense, determined the constitutional issue, for it believed "the question one that should be met and determined."³³

Whether the particular remedy of mandamus may be used has never been directly decided by the federal Supreme Court. That Court has stated, by way of dictum, that it might be possible to raise the issue as to whether or not an appropriation by Congress is national and for purposes of the general welfare.³⁴

The better policy would seem to favor the right of the public officer, if mandamus is brought against him, to resist the issuance of the writ upon the exceptional ground of "public interest."³⁵ The element of stability given by a judicial decision would seem to enhance rather than to detract from the Congressional power. State cooperation would seem to be more secure.

V

The clear tendency in the cases where mandamus is brought against the administrative official seems to be toward exactness in applying both the rule and its exceptions. The courts have often forgotten or overlooked the fact that the writ of mandamus is an

³⁰ Corwin, E. S., "The Spending Power of Congress." (1923) 36 Harv. L. Rev. 548, l. c. 575-6.

³¹ *Ibid.*, l. c. 576. Modern writers confirm this view, p. 576, f. n. 75. *Massachusetts v. Mellon* (1923) 262 U. S. 447, held that a taxpayer's interest is too infinitesimal to allow him to oppose a Congressional Act, thus leaving mandamus as a possible remedy.

³² U. S. *ex rel.* Miles Planting and Manufacturing Co. v. Carlisle (1894) 5 D. C. App. 138.

³³ *Ibid.*, l. c. 146.

³⁴ *United States v. Realty Co.* (1896) 163 U. S. 427 l. c. 440.

³⁵ *Supra*, note 25.

extraordinary legal remedy. It need not be granted as a matter of right; it is an unusual remedy, the application of which is within the discretion of the court.³⁶ It is, therefore, unnecessary as well as undesirable for judges to attempt to categorize the factual situations which will or will not cause an issuance of the writ. It would seem that the guiding factors should be public interest and expediency, unimpeded by rigid rules of classification. The precedents of the past should serve as useful guides, but a careful investigation of the public convenience should be the ultimate determining factor.

It is arguable that an extension of the use of declaratory judgments and advisory opinions would be a more satisfactory solution to the problem.³⁷ By the requirement that courts hand down their opinions as to the validity of statutes preparatory to their execution, all questions of expediency, efficiency in government and public interest become immaterial. The courts as a matter of law would be compelled to determine the constitutional question which may arise; and the extraordinary remedy of mandamus against the public officer would no longer be necessary.

P. RASHBAUM, '34.

³⁶ Ferriss, "Law of Extraordinary Legal Remedies" (1926) pp. 230-1: "Mandamus is not a writ of right. Its issuance unquestionably lies in the sound judicial discretion of the court. . . . Before granting the writ the court may, and should, look to the larger public interest which may be concerned. . . . It is in every case a discretion dependent upon all the surrounding facts and circumstances."

³⁷ Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. . . . The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree." Uniform Declaratory Judgment Act, 9 Unif. Laws Anno. 119. That this type of remedy will be expanded is more than probable since the implied affirmation by the United States Supreme Court of the Tennessee Declaratory Judgments Act. *Nashville Ry. v. Wallace* (1933) 288 U. S. 249.