

ranty deed by Homer B. McColley, and wife, if married, will be sufficient to convey the title of said premises to the state of Ohio.

Attention is also directed to the necessity of a proper certificate from the director of finance to the effect that there are unencumbered balances legally appropriated sufficient to cover the purchase price before the purchase can be finally consummated.

The abstract submitted is herewith returned.

Respectfully,  
C. C. CRABBE,  
*Attorney General.*

---

2554.

APPROVAL, BONDS OF MONROE TOWNSHIP, RURAL SCHOOL DISTRICT, DARKE COUNTY, \$6,000.00.

COLUMBUS, OHIO, June 9, 1925.

*Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.*

---

2555.

APPROVAL, BONDS OF HOMER TOWNSHIP RURAL SCHOOL DISTRICT, MORGAN COUNTY, \$3,000.00.

COLUMBUS, OHIO, June 9, 1925.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

---

2556.

SUNDAY DANCE LAW—LICENSING AUTHORITY MAY REFUSE PERMIT FOR A PUBLIC DANCE ON SUNDAY.

**SYLLABUS:**

1. *Probate judges and mayors of municipalities other than chartered cities, where the licensing authority is vested in some other officer than the mayor, are not required by section 13393, General Code, to grant a permit for a public dance to be held on Sunday.*

2. *Such officers may issue a permit for public dances for such times as they deem best, and exclude therefrom such dances on Sunday.*

COLUMBUS, OHIO, June 10, 1925.

HON. B. S. JOHNSON, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—Your request for an opinion referring to Senate Bill No. 176, which amended section 13393 of the General Code, in which you ask,

“May I request your opinion as to whether or not the mayor of the city or village, or a probate judge, as the case may be, could issue a license and except from the license dancing on Sunday or the Sabbath?”

has been received.

Said section 13393 as amended, and which becomes effective July 10, 1925, reads as follows:

“No person shall give a public dance, roller skating or like entertainment in a city, village or township without having previously obtained a permit from the mayor of such city or village if such public dance, roller skating or like entertainment is given within the limits of a municipal corporation; or from the probate judge if such public dance, roller skating or like entertainment is given outside a city or village, or permit another so to do. All permits issued under the authority of this section shall be subject to revocation at all times. The provisions of this section shall not apply to charter cities where the licensing authority is vested in some other officer than the mayor,”

Said section is a conditional prohibition of public dancing and the condition under which public dancing may be conducted is only upon “permit” given by the mayor of a city or village, if the public dance is held within the municipality, or by the probate judge if said dance is conducted outside of the limits of a municipality. This is made apparent not only by the amended section itself but is emphasized in the title of the act which reads as follows:

“An act to amend section 13393, and to supplement section 13393 by the enactment of supplemental section 13393-1 and 13393-2 of the General Code, prohibiting public dancing, roller skating or like entertainment without permit.”

I call special attention to the language in the title which reads:

“An act to \* \* \* prohibit public dancing \* \* \* without permit.”

Therefore, the legislature has prohibited public dancing in municipalities unless the mayor of the municipality sees fit to grant the permit and the same applies outside of municipalities unless the probate judge sees fit to grant a permit.

I desire to call your attention to the provisions of the statute and say that said statute does not authorize a permit to operate a public dance hall. The language of the statute is that no person shall “give a public dance” and that refers to each entertainment.

After carefully studying this section I can find no mandatory language in the section which requires any of the officers mentioned therein to issue a permit. The

language of the section is directed to the prohibition of public dancing without such a permit. No standard has been placed therein which is binding upon said officers or which gives the applicant any rights under the law to conduct a public dance.

In this connection I have also examined supplemental section 13393-1, General Code, which is a part of the same act, and which reads as follows:

"No person who is the proprietor of any public dance hall or who conducts or manages, or is in charge of any public dance hall, shall permit or allow the use of any intoxicating liquor or the presence of intoxicated persons in such dance hall or on the premises, on which such dance hall is located, or the presence at such public dance hall of any child of less than eighteen years of age not accompanied by his or her father or mother or legal guardian."

Said section is made to apply to all proprietors of any public dance hall, and, if such person obtains a permit and permits the things mentioned in said supplemental section such manager has violated the act in the same respect as though he had not obtained any permit and it is a separate and distinct offense. This is emphasized in supplemental section 13393-2, which reads as follows:

"Any person violating any of the provisions of the two preceding sections shall be fined not less than twenty-five dollars nor more than five hundred dollars or imprisoned not more than six months or both."

This supplemental section provides that any person violating either section 13393 or the supplemental section 13393-1 thereof, shall be guilty of an offense.

If a right exists to have a license granted under the provision of the above mentioned section and the officer refuses to grant the same said right could only be enforced in an action in mandamus. Such an action is a statutory action and lies only under favor of section 12283 of the General Code, which reads as follows:

"Mandamus is a writ issued, in the name of the state, to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station."

Since no absolute statutory duty is found within the act before us, clearly mandamus would not lie unless it could be shown that there was a gross abuse of discretion by the officer.

It is a well established principle of law that mandamus cannot be used to control the discretion of an officer who has a duty to perform and no authorities will be cited upon this point.

We do find some helpful principles laid down in *State ex rel. Insurance Co. vs. Moore*, 42 O. S., page 103, the second and third branches of the syllabus, reading as follows:

"2. Where a public officer is called upon to perform a plain and specific public duty positively required by law, ministerial in its nature, calling for the use of no discretion, nor the exercise of official judgment, his performance of such duty may, upon the refusal and in the absence of other means of relief, be enforced by mandamus.

"3. When such officer, in determining upon the performance of a public duty, is called upon to use official judgment and discretion, his exercise

of them, in the absence of fraud, bad faith, and abuse of discretion, will not be controlled or directed by mandamus."

The duty imposed upon the officers in the act in question clearly falls within the third syllabus, the one last above quoted, and, of course, if there was any fraud, bad faith, or abuse of discretion, the officer's action could be reached by mandamus. All of these, of course, would be a matter of fact and fraud and bad faith need no discussion.

I find that *abuse of discretion* is defined in Bouvier's Law Dictionary as :

"A discretion exercised to an end or purpose not justified by and clearly against reason and evidence."

The same definition is found in Vol. 1 Cyc., page 219.

We also find a helpful discussion of the subject in Vol. 29 Cyc., page 1432, in which it is pointed out that mandatory and directory statutes may be enforced by the court and then follows :

"From another point of view powers of officers are classified as discretionary or ministerial. Over the former the courts have no control, except where the discretion has been abused. Thus, if the power has by law been given an officer to determine a question of fact, his determination is final in the absence of any controlling provisions of statute, provided he has not been guilty of an abuse of discretion."

There is also another principle equally applicable to actions in mandamus and that is that a party endeavoring to exercise said power must have a right under the law to obtain the relief sought.

In Vol. 26 Cyc. at page 151, I find :

"The legal right of the plaintiff or relator to the performance of the particular act of which performance is sought to be compelled must be clear and complete."

As stated above an examination of the act before us does not in its terms permit persons to give public dances but on the contrary prohibits them, save and except under the conditions and terms mentioned therein, to-wit: a permit from the proper officer.

We also find in the same volume of Cyc. at page 162 :

"The duties which will be enforced by mandamus must be such as are clearly and peremptorily enjoined by law."

Our supreme court had passed upon section 13393, General Code, before it was amended by the last general assembly in the case of *Rowland vs. The State*, 104 O. S. 366, the second branch of the syllabus is as follows :

"By virtue of that statute, the mayor is vested with full power and authority to either issue or refuse to issue such a permit to any and all persons and places within a city or village without giving any reasons therefor, and such exercise of such power under such statute is not an arbitrary abuse of the statutory or constitutional power."

Said section before amendment read as follows :

"Whoever gives a public dance, roller skating or like entertainment in a building, hall, room or rink in a city or village without having previously obtained a permit from the mayor thereof, or permits another so to do, or, being the owner or lessor of a building containing a dance hall, room or rink fails to post in a conspicuous place therein a copy of this section, shall be fined not less than fifteen dollars nor more than one hundred dollars or imprisoned not more than sixty days, or both."

The court in its opinion also says that:

"It should be observed that the statute in a general way outlaws "a public dance."

The section as amended is more specific in outlawing a public dance than the original section because the original section commenced with "Whoever gives a public dance" and the section as amended reads: "No person shall give a public dance."

The court further says in its opinion:

"The mayor did not arbitrarily say that Rowlands was an unfit and unsuitable person or that the place was unfit or unsuitable for a public dance, but held under the statute, that no public dance should be given at the time and place in question."

I am therefor, of the opinion that if a permit is granted under this section to hold a public dance no conditions can be attached thereto but the granting officer has power to refuse a permit to hold a public dance at such places and for such times as he thinks best.

Respectfully,  
C. C. CRABBE,  
*Attorney General.*

2557.

**ROADS—TOWNSHIP TRUSTEES MAY USE TOWNSHIP ROAD FUNDS  
IN CONSTRUCTION AND MAINTENANCE OF BRIDGES AND CULVERTS ON TOWNSHIP ROADS.**

**SYLLABUS:**

*In performing the mandatory duty of keeping township roads in good repair, imposed by the provisions of sections 3370 and 7464 of the General Code, township trustees may appropriate and use township road funds in the construction and maintenance of bridges and culverts on township roads within their respective jurisdictions.*

*Opinion found in volume 2, page 1813 of the opinions of the attorney general for 1917, modified.*

COLUMBUS, OHIO, June 10, 1925.

HON. FRED E. CHERRINGTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication in which, in substance, you submit the following inquiry: