

1075.

MANDAMUS—WHEN WRIT MAY ISSUE—SUCH REMEDY IS PROPER TO ENFORCE PERFORMANCE BY MUNICIPAL COUNCIL OF MINISTERIAL DUTIES BUT NOT LEGISLATIVE DUTIES—CITY OF ALLIANCE—WHERE BOND ISSUE VOTED BY ELECTORS FOR MUNICIPAL GAS PLANT—COUNCIL FAILS TO PASS ORDINANCE TO ISSUE BONDS.

1. *The extraordinary remedy of mandamus can only be invoked to command the performance, by an inferior tribunal, of an act of duty specially enjoined by law, and while it may require an exercise of judgment and the discharge of functions, it can not control discretion.*

2. *Mandamus is the proper remedy to enforce the performance, by a council of a municipality, of duties ministerial, but not duties legislative.*

COLUMBUS, OHIO, March 13, 1920.

The Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your letter enclosing a communication from the city solicitor of Alliance, and requesting my written opinion in answer to his questions. The statement and request of the city solicitor are as follows:

“The council of the city of Alliance, Ohio, on August 4, 1919, passed an ordinance declaring it necessary to issue bonds in the sum of \$525,000, for the purpose of building and erecting a municipal gas plant for the furnishing of artificial gas to the citizens of Alliance, Ohio. This ordinance was submitted to the electors of said city at a special election, as provided by law, and the report of the election showed that the ordinance was approved by more than two-thirds majority, as provided by law.

The council of the city of Alliance, Ohio, failed to pass the ordinance required by law to issue the bonds, after the question had been approved by the electors of said city as provided by section 3947 of the General Code. The personnel of council changed January 1, 1920, and the present council has refused to issue the bonds for the purpose of erecting the gas plant as voted on by the people at the special election hereinbefore referred to.

I am of the opinion that section 3947 G. C. is mandatory and that a mandamus proceeding will lie, compelling the council of said city to issue the bonds as approved by the electors of the municipality.

Will you kindly submit this proposition to the Attorney-General for an opinion construing section 3947, as to whether or not same is mandatory and whether or not a mandamus proceeding would lie to compel the council to issue such bonds? If such action will not lie, what recourse, if any, have the citizens of Alliance to carry into effect their decision expressed at the special election?”

Section 12283 G. C. defines mandamus as:

“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.”

Section 12285 G. C. provides:

"The writ may require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions, but it cannot control judicial discretion."

And it is provided by section 12287 that the writ must not be issued in a case where there is a plain and adequate remedy in the ordinary course of the law.

I may say that while the general law of mandamus is well established, the proposition submitted by the solicitor of Alliance is not free from doubt.

The common council of a municipality is subject to control by mandamus in certain particulars, and others it is not. If the duties which council has to perform with reference to the issuing of the bonds in question are legislative, they are not subject to control by the courts by mandamus; such duties are in the highest sense discretionary. (4 W. Va., 300.)

In 110 U. S., 321 (28 L. Ed., 162), speaking with reference to a discretion in municipal authorities, the supreme court say:

"No court has the right to control that discretion, much less to usurp and supersede it."

But the performance of a mere ministerial duty may as well be enforced when it rests upon an aggregate body, like the common council, as when incumbent upon a single officer. (28 Mich., 228.)

It is held in 2 Bailey on Mandamus, page 1076, that the duty of issuing bonds for public improvements, *where imposed by law* is mandatory, and hence may be coerced by mandamus.

And in 41 La., Annual, 156, it is held that mandamus is the proper remedy to compel the mayor and common council to execute duties *imposed on them by law in the performance of which they are allowed no discretion*.

In the West Virginia case above referred to, at page 303, the court say:

"The writ is a proper remedy to compel all inferior tribunals to perform the duties required of them by law. When there is left to the inferior tribunal *no discretion but to perform the duty in a particular way by doing a certain specific act*, then the inferior tribunal acts ministerially and may be compelled by mandamus not only to perform its duties, but to perform them *by doing the specific act*. If there is a discretion to perform in any other way than by doing a certain specific act, it can compel them by mandamus to act and perform a duty required by law; but cannot direct *what decision shall be made*."

It is apparent that the question of the city solicitor cannot be answered specifically without more facts. The voters could not decide on the number of bonds, the rate of interest, the denomination, and the time of maturity; all these matters are left to the discretion of the council, which discretion, as already shown by the authorities cited, cannot be controlled by mandamus.

Again, certain other facts must be taken into consideration before it can be said the right to have the bonds issued is clear and unmistakable. Sections 3952 and 3954-1 G. C. provide that the net indebtedness created or incurred by a municipal corporation under authority of sections 3939 to 3947 G. C., together with subsequent amendments, shall never exceed in total five per cent. of the total value of all property in such municipal corporation as listed and assessed for taxation.

Information is lacking as to whether this proposed bond issue of \$525,000 will overreach the limit of bonded indebtedness in Alliance, thus fixed by statute.

Section 11 of article XII of the Constitution provides that no bonded indebtedness of any political subdivision of this state shall be incurred unless, in the legislation under which such indebtedness is incurred, provision is made for levying and collect-

ing annually by taxation an amount sufficient to pay the interest on such bonds, and to provide a sinking fund for their final redemption at maturity. We are not told whether, to comply with this constitutional provision, the limit of taxation may be exceeded.

So that assuming, but without expressing an opinion thereon, that section 3947 G. C. is mandatory, and that council's duty thereunder is purely ministerial, many other facts than the mere statement that the electors have voted in favor of issuing \$525,000 in bonds to erect a municipal gas plant, must be made to appear before it could be said that the duty to provide for the issue of the bonds*is one specifically enjoined by law upon the council.

Inasmuch as it appears from his letter that the solicitor is of the opinion that mandamus will lie to coerce council to issue the bonds as voted by the electors, and that such action is immediately contemplated by him, and in the absence of the facts above referred to, no more definite opinion on his inquiry can be expressed.

As to the other branch of his question, viz.,

“If such action will not lie, what recourse, if any, have the citizens of Alliance to carry into effect their decision expressed at the special election?”,

answer may be made that appeal can always be made to the ballot to retire officials who are unresponsive to the needs and requirements of their constituents.

Respectfully,

JOHN G. PRICE,
Attorney-General.

1076.

APPROVAL, BOND ISSUE, CITY OF WARREN, OHIO, SEWER IMPROVEMENTS IN AMOUNT OF \$6,700.

COLUMBUS, OHIO, March 13, 1920.

Industrial Commission of Ohio, Columbus, Ohio.

1077.

APPROVAL, DEFICIENCY BONDS OF BRYAN VILLAGE SCHOOL DISTRICT IN AMOUNT OF \$44,300.

COLUMBUS, OHIO, March 13, 1920.

Industrial Commission of Ohio, Columbus, Ohio.