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REVIEWING ADMINISTRATIVE ACTION BY WRIT OF MANDAMUS IN SOUTH CAROLINA

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I.

INTRODUCTION

In South Carolina, as in other states and the federal government, there has been an increasingly vast amount of litigation handled by the various administrative boards. Besides expertly administering the law in their respective fields, the expeditious handling by administrative boards of matters which would otherwise seriously clutter the courts has prompted legislation for new agencies as well as a greater continued use of the ones in existence. It thus appears that administrative-handled litigation is a permanent and important element of our law.

While the use of administrative agencies is essential to our government, and although it institutes a definite improvement in handling certain types of litigation, it nevertheless presents problems. The courts have constantly been asked to review such litigation as well as other administrative actions. Time after time our Supreme Court has been faced with these problems: may the courts review a certain board's action? And if so, has the complainant selected the proper means for judicial review? As a consequence, review of administrative action has become increasingly important; the method selected for review, as the writer will attempt to show herein, is a cardinal point in the procedure for review.

There are various methods[1] of reviewing administrative actions, these being governed by common law and statutory provisions and restrictions. This article is an attempt to clarify the law in South Carolina only with regard to the use of the *writ of mandamus*[2] as a proper method of review.[3]

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1. The most common methods of review are: mandamus, certiorari, prohibition, injunction, and appeal. The Court has also made a statement that it was "reviewing" administrative action. Note 57 *infra*.

2. As to the constitutional authority of Supreme Court justices and Circuit Court judges to issue the writ of mandamus, at chambers or in court, see: S. C. CONST., Art. 5 §§ 4, 24 and annotations thereunder. See also: CODE OF LAWS OF SOUTH CAROLINA, 1952 § 15-121 and annotations thereunder.

3. For general authorities holding mandamus a proper remedy, see 55 C.J.S. 206 (Mandamus, § 122) *et seq.*

II.

NATURE AND CHARACTERISTICS OF THE WRIT

The common definition given mandamus is that it is a command issuing from a court of law in the name of the state to an inferior court, tribunal, board, or person, requiring the performance of a particular duty which results from the official station of the party to whom the writ is directed or from the operation of law.[4]

This definition recognizes the public character of the remedy, thereby excluding the idea that it may be resorted to for the purpose of enforcing performance of duties in which the public has no interest.[5] This "public interest" requirement does not, however, exclude a private right, our Court saying that mandamus is ". . . available to any private citizen to protect a private right when it is an appropriate remedy. Therefore, the use of the name of the State in such cases is a mere form and may be treated as surplusage."[6]

The apparent rule is, therefore, that a private right may be enforced by mandamus if there is sufficient public interest involved and the other requirements are met. What constitutes sufficient public interest may often be questionable on a given set of facts; nevertheless, several South Carolina cases have placed great stress on this factor.[7]

Several other characteristics of the writ should be kept in mind. It is not a preventive remedy but is essentially a coercive writ. It should also be distinguished as one that commands a thing to be done as differentiated from an order to desist doing a thing.[8]

The writ of mandamus is generally considered to be one of the extraordinary legal remedies. As to its being considered a preroga-

4. 34 AM. JUR. 809; 18 R. C. L. 87.

5. 34 AM. JUR. 809. The matter of public interest, as distinguished from a purely private interest, has been emphasized in several South Carolina cases. See note 7 *infra*.

6. State *ex rel.* Watts v. Cain, 78 S. C. 348, 349, 58 S.E. 937, 938 (1907).

7. In Parker v. Brown, 195 S. C. 35, 10 S.E. 2d 625 (1940), a county tax collector petitioned mandamus to compel the county treasurer to issue execution for delinquent taxes as required by statute. Petitioner (tax collector) showed only fees and commissions which he would receive as his interest in the petition. Petitioner's pecuniary interest was held insufficient to warrant mandamus. An earlier case, State *ex rel.* Fooshe v. Burley, 80 S. C. 127, 61 S.E. 255, 16 L. R. A., (N.S.), 266 (1908), where a newspaper editor was allowed mandamus to force a supervisor to perform his statutory duty of publishing the audited list of claims, was distinguished on the ground that the editor's claim represented public interest and that the case was actually decided on that ground, whereas in the tax collector's case public interest was not present. See also: State v. McIver, 2 S. C. 25 (1870); Runion v. Latimer, 6 S. C. 126 (1875).

8. 34 AM. JUR. 809.

tive writ in South Carolina, our cases are not in agreement. The opinion in one case[9] makes the following statement:

> In modern practice mandamus is not a prerogative writ running in the name of the sovereign but is an ordinary process . . . .

A later opinion[10] of the Court held opposite, stating:

> Mandamus is a high prerogative writ — the highest known to the law — and according to all the authorities, only issues when there is a specific legal right or a positive duty to be performed, and when there is no other appropriate remedy.

In describing the type of suit being maintained in a mandamus proceeding, our Supreme Court has had this to say in several cases:[11]

> Mandamus is somewhat of a hybrid proceeding. It is not a suit in tort, nor is it a suit in contract; it is not strictly a law case, nor is it one in equity. It is based on the theory that an officer charged with a purely ministerial duty can be compelled to perform that duty in case of refusal.

In determining the province of the writ, the following is perhaps as general a statement as may be found on that point:

> The province of a writ of mandamus is to afford redress where a party has a right to have anything done and has no other specific means of compelling its performance.[12]

This statement is indicative of the language throughout the cases. Its principle, which will be discussed in detail hereafter, should be borne in mind as a cardinal premise on which the writ is based.

III.

RULES GOVERNING THE WRIT'S ISSUANCE

The South Carolina Supreme Court has said in numerous instances that the issuance or the denial of a writ of mandamus lies "within the discretion of the Court." The exercise of this discretion is gov-

9. State *ex rel.* Watts v. Cain, note 6 *supra.*
10. Parker v. Brown, 195 S. C. 35, 56, 10 S.E. 2d 625 (1940), quoting from the (earlier than State v. Cain, note 9) case of State *ex rel.* Myers v. Appleby, 25 S. C. 100, 102 (1885).
11. Federal Land Bank of Columbia v. State Highway Department, 172 S. C. 207, 210, 173 S.E. 635 (1933); Lombard Iron Works v. Town of Allendale, 187 S. C. 89, 196 S.E. 513 (1938); same *reaffirmed* in Chesterfield County v. State Highway Department, 181 S. C. 323, 187 S.E. 548 (1936).
12. Guenther v. Charleston Light & Water Co., 68 S. C. 540, 47 S.E. 979, 983 (1904).

erned by equitable principles as stated in the case of *Linton v. Gaillard*:[13]

> Of course the discretion to be exercised is not an arbitrary discretion, but a judicial or legal discretion founded upon equitable principles, the abuse of which would constitute error of law.

With the issuance placed as a matter of the court's discretion, the next question presenting itself is: under what circumstances should a court issue the writ in properly exercising its discretion? Stated another way, what are the "equitable principles" by which the courts are to be guided and on which the writ will issue? The South Carolina cases have formulated the following conditions, which the applicant must show in his petition, as requirements on which the writ will be granted:

1. That the duty which the applicant seeks to have performed is ministerial in character.
2. That the applicant has a legal right to the discharge of that duty by the respondent (who must have a legal obligation to perform).
3. That there is no other sufficient and adequate remedy available to the applicant.[14]

With these requirements in mind (plus the added element of a sufficient public interest when an issue), consideration is given to the fulfillment of them, as well as ramifications of these requirements and other conditions imposed in connection with them.

1. *Ministerial Duty.*

Many of our cases have stated that mandamus "will issue to require an officer to perform a plain ministerial duty"[15]—if the applicant shows a "legal right to the writ and no other remedy."[16]

13. Linton v. Gaillard, 203 S. C. 19, 23, 25 S.E. 2d 896 (1943). See also: State *ex rel.* McInvaille v. Rouse, 86 S. C. 344, 68 S.E. 629 (1910); Atlantic Coast Line Railroad Company v. Caughman, 89 S. C. 472, 72 S.E. 18 (1911); Brown v. Town of Patrick, 203 S. C. 236, 25 S.E. 2d 896 (1943); Aetna Casualty & Surety Company v. Quarles, 92 F. 2d 321 (3rd Cir. 1937).

14. For the leading cases see: Gardner v. Blackwell, 167 S. C. 313, 166 S.E. 338 (1932); Draughton v. Colbert, 171 S. C. 22, 171 S.E. 445 (1933); Parker v. Brown, note 10 *supra; In re* Brandenburg, 164 S. C. 460, 162 S.E. 432 (1932); Fort Sumter Hotel v. South Carolina Tax Commission, 201 S. C. 50, 21 S.E. 2d 393 (1942); Lake v. Mercer, 214 S. C. 189, 51 S.E. 2d 742 (1949).

15. State *ex rel.* Harley v. Lancaster, 46 S. C. 282, 289, 24 S.E. 198, 202 (1895); Walpole v. Wall, 153 S. C. 106 (1929); Breedin v. Town of Manning, 168 S. C. 69, 167 S.E. 2 (1932).

16. Parker v. Brown, note 10 *supra*. Generally, see note 14 *supra*.

The theory on which this is based is simply that a ministerial act is such that the person charged may be compelled to perform.[17]

The opinion of our Supreme Court in the case of *Parker v. Brown*[18] states:

> A ministerial duty is one described and defined by law with such precision as to leave nothing to the exercise of judgment or discretion. It is absolute, certain and imperative, and involves the execution of a set task.

This definition seems very appropriate and its application to a given set of facts appears to be simple. Nevertheless, to determine its impact it is necessary to look at some of the duties which have been held to be or not to be ministerial.

Applying the county valuation of property as the town valuation has been held to be ministerial; as such, mandamus was allowed in *Breedin v. Town of Manning*[19] to compel town officials to use for assessment purposes the valuation appearing on the county auditor's books. The Court held that adopting the auditor's valuation was rendered "purely ministerial" by the constitutional provision that "State, county, township, school, municipal and all other taxes shall be levied on the same assessment which shall be that made for State taxes."

The duty of a board in issuing payment of a salary "fixed by law" has been held to be ministerial by a number of cases.[20] It is quite logical to assume that "fixed by law" would exclude cases where there is a controversy of the amount to which a claimant is entitled, even under a statute providing payment but without a definite amount. It would likewise exclude cases in which there is a controversy as to whether the respondent agreed to any extent of liability.[21] In such cases of controversy the duty to pay has not become sufficiently ministerial to invoke the writ as a remedy. The proper step for a claimant is to obtain first a judgment against the respondent board,

17. See note 15 *supra.*
18. Parker v. Brown, note 10 *supra.*
19. Breedin v. Town of Manning, note 15 *supra.*
20. State *ex rel.* Marshall v. Starling, 13 S. C. 262 (1879); Grimball v. Beattie, 174 S. C. 422, 177 S.E. 668 (1934); Smith v. Ashmore, 184 S. C. 316, 192 S.E. 565 (1937); Gaffney v. Mallory, 186 S. C. 337, 195 S.E. 840 (1938).
21. In Miller v. Cooper, 118 S. C. 10, 109 S.E. 800 (1921), a demand was made on administrative officials to present, audit, and approve a dentist's claim for services performed on inmates of the state penitentiary. The ground for refusal to grant the writ was the officials' contention that the state had not agreed to pay such expenses; the board's refusal to act on this contention created sufficient controversy to deny the writ.

since the writ will not issue until a judgment or a pay warrant has been rendered in the claimant's favor.[22]

The law seems to be equally clear that once a judgment or pay warrant is secured, additional acts, *e. g.*, approvals or the actual payment, become ministerial, and mandamus would issue to obtain such necessary actions in the course of payment.[23] The theory on which this is based is that upon issuance of the warrant or judgment the officials no longer have discretionary power to refuse payment. By a judgment the courts have fixed by law a definite amount to which the claimant is entitled; the respondent board, by issuing a pay warrant, admits a definite liability due the claimant. Thus with the board's discretion withdrawn, voluntarily or by court compulsion, additional acts become "ministerial" and mandamus will issue to compel performance of such.[24]

Where an officer has a certain duty sufficiently described by statutory provisions or rules and regulations, such duty would be considered ministerial; such a duty imposed by law is certain, when it "must be performed", and the officer has no discretion.[25]

The statutory duty of a county treasurer to issue execution for delinquent taxes has been held to be ministerial in character;[26] likewise is the duty of an officer to publish claims of his office as provided by a legislative act.[27] Similarly, the duty of a board of canvassers to count ballots in an election is sufficiently ministerial for the writ to issue.[28] In these cases, the apparent theory is that when the legislature provided the precise duty, it thereby withdrew all discretion which an officer would have possessed relating to performing that duty.

22. Draughton v. Colbert, 171 S. C. 22, 171 S.E. 445 (1933).
23. Walpole v. Wall, 153 S. C. 106 (1929); Draughton v. Colbert, *supra*.
24. This has been held true even where the issuing officer refuses approval believing the statute did not provide for the claimant's continued employment and salary. In Walpole v. Wall, *supra*, a new school district was created with a new administration. Plaintiff was elected a teacher prior to the creation of the new district by legislation which declared that existing teacher contracts shall not be affected by the district's creation. Approval of a pay warrant by the trustees was held consistent with law and the superintendent's defense that plaintiff was not elected by the new administration was of no avail and mandamus was issued to compel his approval.
25. Morton, Bliss, & Company v. Comptroller General, 4 S. C. 430 (1873).
26. Parker v. Brown, 195 S. C. 35, 10 S.E. 2d 625 (1940). The writ was denied on grounds that claimant did not show a legal right and no other remedy. Also lack of public interest was a feature in the writ's denial.
27. State *ex rel.* Fooshe v. Burley, 80 S. C. 127, 61 S.E. 225, 16 L. R. A., (N.S.), 266 (1908).
28. *Ex parte* Mackey, 15 S. C. 322 (1881). The writ was denied because there was the remedy of appeal to the state board of canvassers. See further disposition of this case discussed under *"Other Remedies"*, p. 434 *infra*. Note 41 *infra*.

2. Legal Right to the Writ.

"Legal right" to the writ should be differentiated from the "legal duty" of the person charged. That the respondent has the legal duty to perform the act is actually another requirement for the writ,[29] but this is not a frequent issue in the cases, because there is generally no doubt that a board has a certain duty. As a general coverage is given under other topics herein, it will not be treated as a separate topic in this article. It might be noted, however, that duties of an administrative board are generally prescribed sufficiently by statute; and only for the enforcement of such duties will the writ lie.[30]

In many of our cases involving mandamus are found statements that "the applicant must have a clear and legal right to the performance of the act sought to be enforced".[31] Although our Court has not said a great deal about what constitutes a "legal right" to the writ, a few cases have thrown light on the meaning of this term.

To have a legal right, as one case stated, the claimant must have a sufficient interest in the subject of the petition for the writ.[32] This statement only leads to another question — what constitutes a "sufficient interest" in the subject? The same case held that there would be sufficient interest only if an injury would result to the claimant by disallowing the writ. Another case held similarly, stating that if neglecting a duty becomes a "wrong" to the applicant, the applicant has sufficient legal interest to petition for mandamus.[33]

Where a statute gives a person a certain right to be administered by a board, it is generally considered a legal right,[34] especially where the statute specifically creates that right.[35] Even a right appearing in a procedural statute may afford one a legal right.[36]

A mere pecuniary interest in itself is not a sufficient interest to compel issuance of the writ.[37] However, a citizen and taxpayer has a right to compel collection and payment of taxes by mandamus; petitioner must be both a citizen and a taxpayer, and he cannot enforce such collection and payment for years in which he was not a

29. Note 14 *supra.*
30. Gardner v. Blackwell, 167 S. C. 313, 166 S.E. 338 (1932).
31. Note 14 *supra.*
32. State *ex rel.* Guenther v. Charleston Light & Water Company, 68 S. C. 540, 47 S.E. 979 (1904).
33. Morton, Bliss, & Company v. Comptroller General, 4 S. C. 430 (1873).
34. Gardner v. Blackwell, 167 S. C. 313, 166 S.E. 338 (1932); *In re* Brandenburg, 164 S. C. 460, 162 S. E. 432 (1932); State *ex rel.* Harley v. Lancaster, 46 S. C. 282, 24 S.E. 198 (1895).
35. Fort Sumter Hotel v. South Carolina Tax Commission, 201 S. C. 50, 21 S.E. 2d 393 (1942).
36. *Ibid.*
37. Parker v. Brown, 195 S. C. 35, 10 S.E. 2d 625 (1940).

taxpayer.[38] A definite stipulated right, *e. g.*, an issued pay or fund warrant, as differentiated from a mere claim to it, is sufficient.[39]

In summary it appears that a legal right is one due an applicant absolutely and without doubt, the refusal of which would cause him (applicant) a wrongful injury or undue hardship. It is a right so clearly due him that litigation is not necessary to determine whether or not his claim is valid.

3. *Other Remedies.*

Because the writ is such an extraordinary legal device granted only with special caution, the South Carolina Supreme Court, from the earliest to the most recent cases, has held that it will not issue unless there is "no other adequate remedy available".[40] Therefore it becomes necessary to determine what is "another adequate remedy available" to a claimant.

Numerous cases have held that where there is a right of appeal, by statute or otherwise, mandamus will not lie, since appeal is *generally* considered sufficiently adequate to exclude the writ. This rule will now be discussed in detail.

In the case of Ex parte *Mackey*[41] mandamus to compel a board of county canvassers to count votes was denied on the ground that appeal did lie to the state board whose powers are revisory and judicial.[42] The Court stated, however, that mandamus would lie to compel the county board to count the votes (cast in the same election) for congressman; as to federal elections, the state's board was excluded from revisory and judicial powers by statute. The power of the Congress to judge election of its members was held not to constitute "another remedy". The Court added that for the writ to issue in the congressional election, the petition must be separate from that entered in the state elections.

Whenever appeal is allowed from a county board to its state board, mandamus will not issue to compel the county board to perform its duty. Thus because claimant could appeal, mandamus to compel a superintendent of education to approve fund warrants for school

38. Garrison v. City of Laurens, 54 S. C. 449, 32 S.E. 696 (1899).
39. Draughton v. Colbert, 171 S. C. 22, 171 S.E. 445 (1933).
40. State v. Bruce, 3 Brev. 264, 1 Tread. Const. 165, 6 Am. Dec. 576 (S. C. 1812); Rouse v. Benton, 100 S. C. 150, 84 S.E. 533 (1915); Federal Land Bank v. State Highway Department, 172 S. C. 207, 173 S.E. 635 (1933); Chesterfield County v. State Highway Department, 181 S. C. 323, 187 S.E. 548 (1936). See also note 14 *supra*.
41. *Ex parte* Mackey, 15 S. C. 322 (1881).
42. Where a board has judicial powers, it is beyond the reach of mandamus, generally. *Ibid.*

districts was denied,[43] although it was held proper to compel his approval of pay warrants for a teacher.[44] But until the warrant is issued, the remedy of an unpaid school teacher employed by a board of education is not by mandamus but by an action at law against the board.[45] Based on the availability of appeal to the state board, the writ was denied to require a county board of education to issue a teacher's certificate;[46] likewise, it was denied to compel a county superintendent to honor a claim by the trustees of another county for support of a joint school.[47]

In *White v. Barberry*[48] the writ was denied a judgment debtor who sought to require a levying constable to set aside homestead. Here, the debtor was appealing the judgment and levy on his crops. The Court held that he clearly had an adequate remedy at law by appealing the denial of homestead as well as the judgment and levy.

Mandamus will not issue where the claimant has a cause of action at law. Such was the case of *Chesterfield County v. State Highway Department*[49] where the county demanded that the highway department surrender bonds furnished by the county for highway construction which the county did not receive. The writ was denied on the ground that the county could maintain an action for recovery of just compensation for private property taken for public use.

Where there is more than one claimant and one will be adversely affected by a board's decision, the proper remedy is to litigate the matter to determine the rightful claimant or to settle the claims of all the parties by ordinary action where feasible.[50] Thus where the Board of Condemnation passed a resolution paying damages to a mortgagor for condemned property, the mortgagee who had foreclosed the mortgage can not maintain mandamus for the award, but he may litigate to determine the rightful claimant by suing the mortgagor for the amount of the award.[51]

A suit to recover taxes paid under protest has been held to be an adequate remedy where there is an unlawful assessment of property

43. State v. Hiers, 51 S. C. 388, 29 S.E. 89 (1898).
44. See note 24 *supra.*
45. Draughton v. Colbert, note 39 *supra.*
46. Greenville College for Women v. Board of Education of Greenville County, 75 S. C. 93, 55 S.E. 132 (1906).
47. Rouse v. Benton, note 40 *supra.*
48. White v. Barberry, 103 S. C. 223, 88 S.E. 132 (1916).
49. Chesterfield County v. State Highway Department, note 40, *supra.*
50. State *ex rel.* Snelling v. Turner, 32 S. C. 348, 11 S.E. 99 (1890). Here an ordinary action to settle claims of all parties was held proper remedy where return to the petition showed another *bona fide* claimant to surplus proceeds of tax sale. See also: State *ex rel.* Scott v. Smith, 7 S. C. 275 (1876).
51. Federal Land Bank of Columbia v. State Highway Department, 172 S. C. 207, 173 S.E. 635 (1933).

for taxation.[52] However, the opposite result was reached where the property evaluation had been wrongfully increased by an auditor; here such a suit was held inadequate and mandamus issued to reduce the assessment.[53]

Where a claimant is entitled by law to property pending another decision, action at law for its possession would not be an adequate remedy, especially if it would place an additional burden on the claimant. Thus mandamus would issue to compel the return of seized liquors pending decision as to the lawfulness of its condemnation; a suit at law would be inadequate since it would make the claimant an actor in a suit involving the question of whether the liquors were contraband, an issue which would not be before the court hearing the petition for mandamus.[54]

Although another adequate remedy would exclude the writ of mandamus, that other remedy must be not only adequate but also free of any doubt or uncertainty. Thus where the right of appeal is doubtful, the right to the writ is still available.[55] Likewise, where the remedy of damages resulting from non-issuance of the writ is doubtful and uncertain in character, it would not supersede the "specific and speedier" remedy of mandamus.[56]

It might be noted at this point that a statutory provision for review of a board's decisions by mandamus is not exclusive, unless the statute provides that it shall be exclusive, and such board's action may be reviewed by other methods when proper.[57]

IV.

OTHER FEATURES OF THE WRIT

The three broad principles governing the issuance of the writ of mandamus, as just discussed, seem indeed to be the points about which most of the litigation in this state has been concerned. Nevertheless, there are other features, uses, and restrictions on use, of

52. National Loan & Exchange Bank of Greenwood v. Jones, 103 S. C. 80, 87 S.E. 482 (1915).
53. State v. Cromer, 35 S. C. 213, 14 S.E. 493 (1893).
54. Fort Sumter Hotel v. South Carolina Tax Commission, 201 S. C. 50, 21 S.E. 2d 393 (1942).
55. State v. Watson, 2 Speers 97 (S. C. 1843).
56. State v. McIver, 2 S. C. 25 (1870).
57. King, Insurance Commissioner, v. Aetna Insurance Company, 168 S. C. 84, 167 S.E. 12 (1932). The statutory provision for review of the Commissioner's decisions "by certiorari or mandamus proceedings" was held not exclusive when the Commissioner filed the petition of his action in the original jurisdiction of the South Carolina Supreme Court. Respondent's contention that certiorari and mandamus were the only methods of review was overruled by the Court stating it was actually reviewing the decision by hearing the case.

the writ which do not very well fall under either of the above-discussed topics. The remainder of this article will treat with these additional aspects which should be considered with the three broad principles already discussed.

1. *A Board's Discretion.*

Where an administrative board has wide discretion over its activities, mandamus will not issue to dictate how it shall exercise that discretion. The rule is well established that the writ "never goes to control judgment"[58] or discretion.[59]

Several exceptions to the above general rule have developed. The writ may issue to direct the manner of exercising the discretion if there is a clear abuse of that discretion; but, even here, the action must have been so clearly arbitrary and capricious as not to admit of two reasonable opinions.[60] It will issue in cases of such abuse, since holding otherwise would be allowing official power or duty to be misconceived and the purpose of the law defeated.[61]

Even where a board's judgment and discretion cannot be controlled by mandamus, the courts may issue the writ to compel the board to exercise its judgment.[62] Here the exercise of discretion is the duty of the board; thus compelling exercise of discretion is enforcing performance of the board's legal duty.

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58. State v. Ansel, 76 S. C. 396, 57 S.E. 185 (1906).

59. State v. Verner, 30 S. C. 277, 9 S. E. 185 (1889); Brown v. Ansel, 82 S. C. 141, 63 S.E. 449 (1909); Paslay v. Brooks, 198 S. C. 345, 17 S.E. 2d 865 (1942). See also: 1920 OP. ATTY. GEN. 27 (S. C. 1920).

60. Douglass v. City Council of Greenville, 92 S. C. 374 (1912), where the Court stated that the only motives of council members in passing an ordinance which can be inquired into, are those appearing on its face or inferred from its operation, and only action to be upset by the courts are those arbitrary and capricious. See also: Commissioners of Poor v. Lynah, 2 McCord 170 (S. C. 1822); note 61 *infra*.

61. State *ex rel.* Mauldin v. Matthews, 81 S. C. 414 (1908). The code provided that the Board of Pharmaceutical Examiners "shall alone possess and exercise the powers of granting, withholding or vacating the license of pharmacists . . . ," and the graduate of "any reputable college" of pharmacy does not have to take the state examination in order to practice. The applicant, a University of Maryland graduate, was refused admittance by diploma, the Board stating his school was not a reputable one. The Supreme Court issued mandamus directing his admittance, stating it was common knowledge that it was a reputable school. See also: State *ex rel.* Smith v. Matthews, 77 S. C. 357, 57 S.E. 1099 (1907); James v. Board of Examiners of Public Accountants, 158 S. C. 491, 155 S.E. 158 (1930).

62. Atlantic Coast Line Railroad Company v. Railroad Commission, 89 S. C. 472 (1911); City of Columbia v. Pearman, 180 S. C. 296, 185 S.E. 747 (1936).

2. The Possibility of Issuance Being Nugatory.

Even though an applicant for mandamus has met all the requirements for its issuance, if the issuance appears to be a nullity, the writ will be denied. The general rule in this state is that mandamus will not compel a futile, nugatory, or unavailing act.[63] Under this rule an applicant can not compel approval of a fund or pay warrant where there appears not to be sufficient funds to pay the warrant if approved.[64] A further restriction is that such sufficient funds must be "legally applicable" to paying the claim for which applicant seeks payment.[65]

Where it is at least doubtful whether it is the duty of the board from which performance is demanded, mandamus will not lie to compel that act.[66] Nor does it lie where it is doubtful whether the act demanded is required for the purpose for which the applicant demands it.[67] Likewise, it will be denied if the objective of the writ is to aid a cause which is declared to be of no legal effect; thus it will not issue to compel a tax levy to redeem bills of credit which are null and void, since such act would be vain and fruitless.[68]

If the performance of an act would be a violation of law, especially of a legislative act, mandamus will not issue.[69] Nor will it be granted if the act be only violative of legislative intent.[70] The underlying principle involved here is that a person will not be compelled to violate the law.

The writ will not issue where the return to the petition shows that the duty is impossible of performance.[71] To issue in such cases would be a nullity, since a person cannot be made to perform that which is impossible.

The performance of an act already legally barred will not be compelled by mandamus. Thus it will not issue to allow an applicant to open a dispensary in a community which had by law voted not to have such.[72]

One cannot compel, by use of the writ, that which there is an in-

63. Blalock v. Johnston, 180 S. C. 40, 185 S.E. 51, 105 A. L. R. 1115 (1936); Easler v. Maybank, 191 S. C. 511, 5 S.E. 2d 288 (1939).
64. Rouse v. Benton, 100 S. C. 150, 84 S.E. 533 (1915).
65. Paslay v. Brooks, 198 S. C. 345, 17 S.E. 2d 865 (1942).
66. *Ex parte* Barnwell, 8 S. C. 264 (1876).
67. State v. Thomson, 19 S. C. 599 (1883).
68. State v. Comptroller General, 4 S. C. 185 (1873).
69. State *ex rel.* Fooshe v. McDonald, 82 S. C. 22, 63 S.E. 3 (1908).
70. Moore v. Napier, 64 S. C. 564, 42 S.E. 997 (1902).
71. State v. Lehre, 7 Rich. 234 (S. C. 1854).
72. Wilson v. Cox, 13 S. C. 398, 53 S.E. 613 (1906).

junction against the claimant obtaining.[73] Even though the claimant could prove his right to the claim, the injunction must be dissolved before issuance of the writ; in such cases the proper procedure would be to have the injunction set aside, then petition for mandamus.

3. *Pendency of Another Method.*

Even where mandamus is a proper remedy, it will not issue if such issuance will interfere with review by another method which is pending. Therefore, when one method of review has been instituted, all other methods are excluded, at least until termination of the review first instituted. In other words, if appeal from a board's action is being prosecuted, mandamus will be denied, even though it would have been granted if petitioned in the first instance.[74]

It should be noted, however, that the above is true only if the method first instituted is proper and valid. If the proceedings are void for any defect, mandamus may issue just as though the earlier method had not been instituted, since void proceedings are of no effect and actually a nullity. This is especially true where the respondent is the party which prosecuted the void proceedings which he seeks to use as a defense to a petition for mandamus against him.[75]

4. *A Defect in the Board's Action.*

The apparent rule in South Carolina is that mandamus will issue to cause dismissal of a board's action when there is some inherent defect in its jurisdiction or its handling of the case. In one early case the writ was issued because a board took action with an insufficient number of its members present hearing the case; this was held to constitute a lack of jurisdiction to try the case and pass on the merits.[76]

Another early South Carolina case held that where there is an

73. Kuhn v. Electric Manufacturing & Power Company, 92 S. C. 488, 75 S.E. 791 (1912).

74. Banks v. Wells, 92 S. C. 436, 75 S.E. 791 (1912). To the same effect is White v. Barberry, 103 S. C. 223, 88 S.E. 132 (1916), refusing mandamus to have homestead set aside from levy when the judgment and levy were being appealed.

75. State v. Black, 34 S. C. 194, 13 S.E. 361 (1891). Here certiorari proceedings were void for lack of jurisdiction when pending before the judge of another circuit.

76. Getter v. Commissioners for Tobacco Inspection, 1 Bay 354 (S. C. 1794). The act created a commission of five. The Court held that action by four members was invalid, since the commission was new to the common law and, therefore, strict construction must be given the statute in the absence of its saying a majority may act. This rule was reaffirmed in State *ex rel.* Fouche v. Verner, 30 S. C. 277 (1888).

inherent defect in the procedure by which a board reached a decision, mandamus would issue to compel the board to declare that decision null and void. Therefore, removal of an employee in an action in which rules of procedure were disregarded in that charges were not specific, witnesses were not under oath, and testimony was not taken so that judges might determine the guilt, was held to be sufficient for the issuance of the writ.[77]

In several other cases mandamus was allowed to test the grounds of a board's action. In *State* ex rel. *Stephens v. Commissioners*[78] it was held proper to raise the question of whether the charge against a public-employed pilot was of a character to authorize suspension. This case, in actual effect, held that a petition for the writ of mandamus is proper to raise a demurrer to a board's action. The petitioner's contention that the charges if proved were not actionable, placed the case in the category of a demurrer. In *State* ex rel. *McDonald v. Courteney,*[79] characteristics of a board's procedure were allowed to be attacked by the writ. Here mandamus was allowed to test whether there was sufficient regularity of the board's procedure. These two cases were regarded as "not authority" in the subsequent case of *State* ex rel. *Fouche v. Verner*[80] which held the writ will not issue to pass on the sufficiency of the grounds or evidence on which a board acted. The reason for its denial was that such duty required discretion and was not a mere ministerial act. It appears that the earlier cases may be distinguished[81] in that they posed a more precise and definite question than that presented in *Fouche v. Verner.*

77. Singleton v. Commissioners of Charleston Tobacco Inspection, 2 Bay 105 (S. C. 1797).

78. State *ex rel.* Stephens v. Commissioners of Pilotage of Beaufort, 23 S. C. 175, 177 (1885). The writ was denied, the Court finding that the charge was sufficient for suspension. Nevertheless, the sufficiency of the charge was passed on under a petition for mandamus. Mr. Justice McIver dissented as to the use of mandamus to raise this question.

79. State *ex rel.* McDonald v. Courteney, 23 S. C. 180 (1885). The same conclusion as in note 78 was reached, Mr. Justice McIver again dissenting for same reason.

80. State *ex rel.* Fouche v. Verner, 30 S. C. 277 (1888). Mr. Justice McIver, who dissented in the two preceding cases, State v. Commissioners of Pilotage and State v. Courteney, wrote this opinion, holding the cases in which he dissented as no authority since mandamus was not issued in either of them.

81. It should be noted that Fouche v. Verner did not overrule Stephens v. Commissioners and McDonald v. Courteney. The facts presented in the petitions are at variance and of a different nature. Each case, therefore, stands on its facts and is proper law for the facts presented therein.

V.

CONCLUSION

In South Carolina the right to a writ of mandamus may indeed be called a "limited right". Our Supreme Court has encumbered it with many requirements and conditions which serve as conditions precedent to issuance. The discretion to grant or deny the writ is controlled by these conditions and the claimant, to secure issuance, must show that *all* the requirements and conditions have been fulfilled. Briefly outlined, they appear as follows:

1. There must be sufficient "public interest", as distinguished from a "purely personal interest", in the enforcement of the particular duty. This requirement should be noted as not preventing a successful claimant from being a private citizen enforcing a private right. It only requires the presence of a public interest. This has not been a frequent issue in the cases, and in the writer's opinion its purpose is to bar a selfish pecuniary claim or one engendered by antagonism rather than to require a public interest in every case.

2. The particular duty must be ministerial in character. This would include duties which are so absolute and precise that the administrative board has no discretion but to do a certain duty in a certain manner. Various factors may constitute such characteristics. Often a statute or a board's rules and regulations alone, or these coupled with other factors, *e. g.,* acts of the particular board or another board, make duties ministerial which would otherwise be discretionary. Likewise, a board's judgment alone, as well as a court order or judgment, may remove all discretion in a particular case. Thus when any legally combined number of factors places some positive duty in the hands of a board, that duty is deemed "ministerial" for purposes of the writ. Even where a board has discretion in a matter, the act of exercising that discretion becomes "ministerial" when it is the legal duty of the board.

3. A petitioner must have a "legal right" to the writ. This requirement is generally satisfied by determining whether the petitioner is the proper party to compel a duty's performance, *i.e.,* will he be "wronged" by disallowing the writ. Beyond this may be added the requirement that the petitioner must show that the right is absolute and beyond doubt, thereby making litigation to establish his claim's validity unnecessary.

4. It would be useless to attempt a summary of the requirement that the respondent must have the legal duty to perform the act which the petitioner demands. It is only logical to say that a board

will not be compelled to perform that which does not legally fall within its scope of power or duty, by statute or otherwise; conversely, those falling within that scope would be legal duties.

5. It is essential that there be no other sufficient remedy. If another method of action is available and adequate, the writ will not issue. Not only must the other remedy be both available and adequate, but it must not place an additional burden on the claimant. Lastly, the other remedy must contain no doubt or uncertainty as to validity, availability, and sufficiency.

Besides the preceding rules, other conditions have great impact on whether a court will grant the writ in a particular case. Where a board is invested with discretion, a discretionary ruling or act will not be upset by mandamus unless there was a clear abuse of discretion by the board, in which case it will be granted.

Whenever the court hearing the petition for mandamus determines that, for some reason, the writ's issuance would be nugatory and of no actual effect, it (the court) will deny the writ. The same result would follow where the court is in doubt as to the duty of the respondent board or is doubtful that the duty is necessary for the purpose for which it is sought by the petitioner. It will likewise be denied if the action as demanded would violate a law or has been barred by legal means before the petition was entered.

Mandamus will not issue in cases where another method of review is pending if the other action is proper and valid; but if the other action is ineffective or void it is not a bar to a petition for mandamus.

Early South Carolina cases have very well established the rule that mandamus will issue to dismiss a ruling or act obtained through procedure with some inherent defect therein which invalidated the jurisdiction of the board to render such. Also decided is the apparent rule that mandamus will issue to test the sufficiency of a charge upon which a board passed, but not the grounds or evidence on which it reached a decision, *i. e.,* in the nature of a demurrer.

In final analysis, it is the writer's opinion that the rules restricting the issuance of the writ of mandamus sensibly regulate the review of administrative action by the courts. By these limitations the appropriate lines are drawn between the circumstances under which mandamus would issue and those under which another method would be proper, often times by statute. Such lines make possible the least overlapping of functions by the various methods of judicial review. To abolish or diminish these limitations would, in reality, be allowing mandamus to totally or partially replace other forms of review.