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Mandamus to the Governor in Minnesota

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MANDAMUS TO THE GOVERNOR IN MINNESOTA

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THE confusion which attends the subject of mandamus to the governor is well illustrated by the cases from Minnesota. The supreme court of this state in its various decisions has expressed a variety of opinions, so conflicting in their nature that it would test the ability of our best lawyers to predict with accuracy the trend of future decision. This becomes apparent on a brief review of the cases.

The first use of the writ against the governor was in 1858 when it was sought to compel him to perform a constitutional duty, i. e., the issuance of bonds under article 9, section 10.[1] Mandamus was awarded with no discussion as to the governor's amenability to the writ.[2]

In the case next arising[3] the court departed from the attitude of 1858 and took the first step toward the extreme view later to be developed. In this case, as in the earlier, mandamus was sought to compel the issuance of bonds under article 9, section 10. The facts, however, differed in this, that in the latter case the governor claimed exemption from the operation of the writ. His claim, with respect to constitutional duties, was recognized, the court saying:

"This court will not undertake to compel the governor of the state to the performance of any duty devolving upon him as the chief executive, and properly pertaining to such office. In all such matters the executive is of necessity independent of the judiciary. But when some official act, not necessarily pertaining to the duties of the executive of the state, and which might be performed as well by one officer as another is directed by law to be done, then any person who clearly shows himself entitled to its performance and has no other adequate remedy, may have a writ of mandamus against such officer, even although the law may have designated

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[1]Minnesota and Pacific Rd. Co. v. Sibley, (1858) 2 Minn. 13 (Gil. 1).

[2]But note the statement in Chamberlain v. Sibley, (1860) 4 Minn. 309 (Gil. 228) at 312. "In the case reported in 2 Minn. 13, we allowed a writ of mandamus to issue against the governor of the state, but in that instance the question here raised was distinctly waived. Indeed the governor seemed only desirous of obtaining for his guidance a judicial interpretation of a clause in the constitution, and was unwilling to interpose technical objections."

[3]Chamberlain v. Sibley, (1860) 4 Minn. 309 (Gil. 228).

the chief executive of the state as a convenient officer to perform the duty. We do not think that in such cases there is any ground for distinguishing the chief executive from any other officer who may be designated to do a mere ministerial act, otherwise a party might be entirely without remedy.

"When, however, the governor is directly empowered or required to do an act, not by statute simply, but, as in this instance, by the constitution of the state, we do not feel authorized to hold that it does not pertain to the office of the chief executive, or that we could compel the performance of this, or any other executive duty, prescribed by the organic law."[4]

Since the duty in question was imposed by the constitution, the writ was refused.

The distinction so carefully made between statutory and constitutional duties was wiped out in the case next presented.[5] The duties there dealt with were statutory. Instead of following the preceding case the court preferred to rest its decisions on broad constitutional principles and after quoting article 3, which embodies the doctrine of the separation of powers, it continued:

"The judicial and executive departments are thus made distinct and independent, and as neither is responsible to the other for the performance of its duties, so neither can enforce the performance of the duties of the other. Upon this ground, the writ prayed for must be refused."[6]

The independence of the governor was again asserted a few years later.[7]

The complete exemption thus established for the chief executive was extended next to the lesser officers of his department. In *State v. Dike* the court held that the state treasurer was not subject to the writ since he, equally with the governor, was a member of the executive department.[8] A like exemption was granted by this case to the secretary of state as well. This case also decided that such an officer could not consent to the issuance of the writ, for his exemption was not personal, for his benefit alone, but was intended rather for the public good. His consent could not confer upon the courts a jurisdiction which they were forbidden by the constitution to exercise.

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[4]Emmett, C. J., in Chamberlain v. Sibley, (1860) 4 Minn. 309, 312-13.
[5]Rice v. Austin, (1872) 19 Minn. 103 (Gil. 74).
[6]Berry, J., in Rice v. Austin, (1872) 19 Minn. 103, 105-06.
[7]St. Paul and Chicago Ry Co. v. Brown, (1877) 24 Minn. 517. In the opinion it is said that the independence of the governor from the operation of mandamus results from article 3 of the constitution (separation of powers) and cannot be affected by legislative act.
[8](1874) 20 Minn. 363 (Gil. 314).

By 1882 the exemption of these lesser officers was so well established that Justice Mitchell declared:

"It is the settled law of this state, if anything can be settled by repeated adjudications, that an executive officer of the state is not subject to the control or interference of the judiciary in the performance of duties belonging to him as an executive officer, and that no act done or threatened to be done by him in his official capacity can be brought under judicial control or interference by mandamus or injunction; that this is the rule even when the act is purely ministerial."[9]

Such exemption was to be extended to ex officio duties as well as to those pertaining more directly to the office.[10]

These cases represent the furthest development of executive independence. The tendency of later years has been to return once more to judicial control, beginning with the lesser officers. In 1902 the court ordered the secretary of state to add the name of a certain candidate to the ballots.[11] Two years later the same officer was again subjected to court order.[12]

Then, a few years after, in granting an injunction against the state auditor the court declared:

"Upon principle, and a full consideration of the previous decisions of this court relevant to the question, we hold: courts cannot, by injunction or mandamus, or other process, control or direct the head of the executive department of the state in the discharge of any executive duty involving the exercise of his discretion; but where duties purely ministerial in character are conferred upon the chief executive, or any member of the executive department, as defined by our constitution, and he refuses to act, or when he assumes to act in violation of the constitution and laws of the state, he may be compelled to act, or restrained from acting, as the case

[9]Secombe v. Kittleson, (1882) 29 Minn. 555, 561, 12 N.W. 519. This case, being one of injunction, is not cited as authority for mandamus, except so far as the above dictum is entitled to weight.

[10]State ex rel. Thompson v. Whitcomb, (1881) 28 Minn. 50, 8 N.W. 902; State ex rel. Tuttle v. Braden, (1889) 40 Minn. 174, 41 N.W. 817.

It was not to go, however, to "mere administrative agents who are created, and their powers and duties defined, by the legislature. The courts may entertain suits against them as against any merely ministerial officers." St. Paul and Chicago Ry. Co. v. Brown, (1877) 24 Minn. 517, 574. Further the propriety of the executive's action was not to be free from judicial scrutiny when necessary to a determination of the case before the court. State ex rel. Clapp v. Fidelity and Casualty Ins. Co., (1898) 39 Minn. 538, 41 N.W. 108. Nor could exemption be claimed where private rights solely were involved, with the state having no property interest, as in the case of private funds wrongfully withheld by the state auditor. Hayne v. Metropolitan Trust Co., (1897) 67 Minn. 245, 69 N.W. 916.

[11]Davidson v. Hanson, (1902) 87 Minn. 211, 91 N.W. 1124, 92 N.W. 93. See also an earlier case, Higgins v. Berg, (1898) 74 Minn. 11, 76 N.W. 788, 42 L.R.A. 245.

[12]State ex rel. Day v. Hanson, (1904) 93 Minn. 178, 100 N.W. 1124, 102 N.W. 209.

may be, by the courts at the suit of one who is injured thereby in his person and property, for which he has no other adequate remedy."[13]

In a case still more recent the court asserts that it is now in harmony with those states which mandamus the governor. The rule is declared to be that:

"Duties imposed by law upon the chief executive which are purely ministerial in their nature, and which do not necessarily pertain to the function of the office, and which might have been imposed upon any other state officer, are subject to judicial control."[14]

It is to be observed that both of these latter cases deal with remedies other than mandamus, and that the statements with reference to that remedy are accordingly obiter dicta. But the statements are so emphatic that they may not be disregarded. If they represent a continuing tendency, the governor will be subjected to mandamus when the case next arises. On the other hand, if the court chooses to stand upon the actual decisions in this state, the governor will still be exempt from the operation of the writ. Thus the trend of future decisions is marked with uncertainty.

This confusion is by no means limited to the law of Minnesota. If we view the cases from the country as a whole we find them in irreconcilable conflict. Learned commentators and judges cannot agree even as to which view has the weight of authority.[15]

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[13]Start, C. J., in Cooke v. Iverson, (1909) 108 Minn. 388, 393, 122 N.W. 251.

[14]Lewis, J., in State ex rel. Kinsella v. Eberhart, (1911) 116 Minn. 313, at 318, 133 N.W. 857, Ann. Cas. 1913B 785. In this case a writ of certiorari was sought to review the governor's action in removing a county attorney from office.

[15]High, Extraordinary Legal Remedies, 3rd ed., sec. 120, and 2 Spelling, Injunctions and Other Extraordinary Remedies, 2nd ed., sec. 1452, regard the clear weight of authority as being in favor of the principle that mandamus can not be issued to the governor even in the case of merely ministerial duties. See also Wood on Mandamus, 2nd ed., 88, and Black, Constitutional Law, 3rd ed., sec. 54. Similar statements are to be found in Mauran v. Smith, (1865) 8 R.I. 192, 5 Am. Rep. 564; State ex rel. Oliver v. Warmouth, (1870) 22 La. Ann. 1, 5, 2 Am. Rep. 712; Bates v. Taylor, (1889) 87 Tenn. 319, 324, 11 S.W. 266; Rice v. The Governor, (1910) 207 Mass. 577, 579, 93 N.E. 821; State ex rel. Atty. Gen. v. Huston, (1910) 27 Okla. 606, 611, 113 Pac. 190; and People ex rel. Bruce v. Dunne, (1913) 258 Ill. 441, at 447, 101 N.E. 560. The Nebraska court, numbered among those which control the governor, says: "It must be admitted that, according to the clear weight of authority, the chief executive can not, under any circumstances, be controlled by the writ of mandamus; but in this state, and some other jurisdictions, a different rule prevails." Sullivan, C.J., in State ex rel. Wright v. Savage, (1902) 64 Neb. 684, 697, 90 N.W. 898, 91 N.W. 557. It is stated in a Mississippi case that this view has the "overwhelming weight of authority." Vicksburg and Meridian Rd. Co. v. Lowry, (1883) 61 Miss. 102, 103, 48 Am. Rep. 76. In two of the decisions cited above, it is declared that this view is favored not only by

On the one hand, the governor's exemption is established by the vague, but fundamental doctrine of the separation of powers. The distribution of the powers of government among three independent and co-ordinate branches, the legislative, executive, and judicial, is construed as prohibiting any such interference with the chief executive. On the other hand, the governor is made subject to the writ by virtue of the equally majestic principle of the supremacy of the law. Nor does the latter view stop with this one principle. It is insisted that the doctrine of the separation of powers, if it be but properly interpreted, likewise will empower the courts to mandamus the governor as to duties merely ministerial. Such a use of the doctrine by both sides well illustrates its indefinite nature.

This principle, though vague, is fundamental in our system of government. It is observed in federal and state constitutions alike. In a number of them it is expressed in the clearest of terms. Note, for instance, the Massachusetts constitution of 1780 which provides:

"In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them: to the end that it may be a government of laws and not of men."[16]

Or article 3 of the constitution of Minnesota:

"The powers of the government shall be divided into three distinct departments, the legislative, executive and judicial; and no person or persons belonging to or constituting one of these departments, shall exercise any of the powers properly belonging to

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the weight of authority but by the weight of reason as well. Bates v. Taylor, (1889) 87 Tenn. 319, 11 S.W. 266, and Rice v. The Governor, (1910) 207 Mass. 577, 93 N.E. 821. The contrary view, which would subject the governor to the operation of the writ, declares that it is supported by the weight of reason. Such a claim is made in Martin v. Ingham, (1888) 38 Kan. 641, 660, 17 Pac. 162; State ex rel. Bates v. Thayer, (1891) 31 Neb. 82, 92, 47 N.W. 704; State ex rel. Trauger v. Nash, (1902) 66 Ohio St. 612, 617, 64 N.E. 558; State ex rel. Irvine v. Brooks, (1905) 14 Wyo. 393, 412, 84 Pac. 488, 6 L.R.A. (N.S.) 750; State ex rel. White v. Dickerson, (1910) 33 Nev. 540, 565, 113 Pac. 105; and Ellingham v. Dye, (1912) 178 Ind. 336, 400, 99 N.E. 1. Some cases assert that this view represents the actual weight of authority. Martin v. Ingham, (1888) 38 Kan. 641, 660, 17 Pac. 162; State ex rel. Irvine v. Brooks, (1905) 14 Wyo. 393, at 412, 84 Pac. 488, 6 L.R.A. (N.S.) 750; Ellingham v. Dye, (1912) 178 Ind. 336, 400, 99 N.E. 1; and the writer of the exhaustive note in 6 L. R. A. (N.S.) 750, at 751, asserts that "the reason, if not the weight, of authority would subject the governor to the control of the writ as to the duties merely ministerial."

[16]Bill of rights, sec. xxx.

either of the others, except in the instances expressly provided in this constitution."

In theory, the separation is complete, and the application of the doctrine is simple. The legislature has been given the power to make the laws, the executive the power to enforce them, while it is for the court to interpret and apply the laws in such cases as are regularly brought before it. When a new situation arises, the power in question has merely to be assigned to its place in this theoretical system.

In practice, the subject has proved less simple. This is shown by the cases on mandamus already referred to. It was there noted that the courts with this doctrine have proved both sides of the question with equal facility. In such a situation, it may be proper to examine the principle at some length in order to determine which view has the sounder basis; or perhaps, by going behind the principle, to see what forces are actually influencing the attitude of the courts.

It is well to observe at the outset that there are at least three methods by which the principle may be interpreted and applied. They are the theoretical, the historical, and the teleological. The first already has been mentioned. The second, in doubtful cases, would take a historical approach. The past would be examined to see what powers actually have been exercised by the various departments. The power in question would then be assigned to that department which had exercised in the past the powers most closely related to it. Thus the development of the principle would be through historical reference instead of abstract speculation.

The third is the teleological. This method would emphasize the end rather than the means of the law. Great emphasis would be placed upon the interests which the law seeks to protect. The rules, principles, and standards by which such interests are protected would be of secondary importance. Thus, in considering the question of whether the governor should be subject to mandamus, the court would first examine the claims presented by the individual, society and the state; would evaluate them where they conflict in order to determine which should receive the law's protection, and would then adopt that principle which would give the fullest protection to such legally recognized interests.

So far in mandamus cases the courts appear to have used only the first of these methods, the theoretical. We have already noted the indefinite nature of the theory, have seen how it is used to

support both sides of the question. In such a situation its history may be relevant. Where the principle itself is obscure, some light may be gained by an examination of its purpose. We accordingly shall examine briefly the history of the theory, to see with what object the powers of government were separated.

It is customary to begin with Aristotle. In his Politics he points out a three-fold division of power into the deliberative, executive and judicial elements.[17] Such separation as exists is not intended to guard against governmental tyranny, but aims rather at the exercise of power by such groups as will best promote a well-ordered organization.[18]

Polybius, who lived in the second century B. C., commends the distribution of powers as a means of creating a system of checks and balances, and thus preserving the purity of government. He develops a historical cycle of government. Beginning with a despotism, it goes through the successive stages of kingship, tyranny, aristocracy, oligarchy, and democracy.[19] In time the last degenerates into mob rule, from which a despot emerges, and the cycle again commences. The Roman government, by having combined the elements of the three general forms, has secured itself against decay.

"For when any one of the three classes [which exercise the powers of government] becomes puffed up, and manifests an inclination to be unduly encroaching, the mutual interdependency of all the three, and the possibility of the pretensions of any one being checked and thwarted by the others, must plainly check this tendency; and so the proper equilibrium is maintained by the impulsiveness of the one part being checked by its fear of the other."[20]

Thus a separation of powers insures the stability of government.

The Roman period, while remarkable for its legal contribution, made no great advancement in political thought. Nor did the Middle Ages contribute to the theory we are considering. The attention of the time was focused on the dramatic struggle between Pope and Emperor, and the greatest philosophers of the age dealt with the conflicting claims to temporal authority.[21]

It is apparent from this that the principle of the separation of

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[17]Bk. VI, chs. 14, 15 and 16.
[18]See his Politics, Bk. III, chs. 10 and 11.
[19]The Histories of Polybius, Bk. VI, sec. 14. In Schuckbergh's Trans., Vol. I, pp. 460-1.
[20]Ibid, Bk. VI, sec. 18. In Schuckburgh's Trans., Vol. I, p. 474.
[21]Coker, Readings in Political Philosophy, 121.

powers, now considered so fundamental, has been of slight importance until relatively recent times. In fact, its real significance dates from the natural law period of the seventeenth and eighteenth centuries. This period enhanced the importance of the individual. In theory, governments were instituted for the protection of individual rights.[22] Lest the government overrride the very liberties it was designed to protect, a separation of powers was deemed to be indispensable. The classic exposition of the theory was by Montesquieu and his treatise on the Spirit of the Laws served as a veritable text book for the American statesmen of the eighteenth century.[23] His view is expressed in the following words:

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

"Again, there is no liberty if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

"There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise these three powers, that of enacting laws, that of executing the public resolutions, and of trying the cases of individuals."[24]

A similar view had been expressed somewhat earlier by Locke.[25] Blackstone also considers the point and says:

"In all tyrannical governments, the supreme magistracy, or the right of both making and enforcing the laws, is vested in one and the same man, or one and the same body of men; and whenever

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[22]Note, for example, the Declaration of Independence which says: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men." A similar viewpoint is taken in the Massachusetts Constitution of 1780, preamble, and part I, article I.

[23]Beard, American Government and Politics, 4th ed., 113; 1 Bryce, The American Commonwealth, new and rev. ed., pp. 29, and 283. In the latter place Bryce says that "Montesquieu's treatise was taken up by the thinkers of the next generation as a sort of Bible of political philosophy. Hamilton and Madison, the two earliest exponents of the American Constitution they had done so much to create, cite it in the Federalist much as the Schoolmen cite Aristotle, that is, as an authority to which everybody will bow."

[24]The Spirit of the Laws, Bk. XI, ch. 6.

[25]Locke, On Civil Government ch. 12. It is to be noted, however, that Locke's separation is two-fold merely, into legislative and executive.

these two powers are united together, there can be no public liberty.[26]

To the American colonist, these expressions of Montesquieu, Locke, and Blackstone might seem to be confirmed by his observation of the English government. Following the Puritan Revolution of 1688 Parliament had achieved a large degree of independence, the Bill of Rights had freed the judiciary from royal interference, while the Crown still appeared to have wide field of uncontrolled activity.[27] The Cabinet system had not yet so fully developed as to make the legislature seem supreme. Instead, there appeared to be a separation of governmental powers among three independent and co-ordinate departments.

The desirability of the separation, lauded by political theorists, and seemingly present in the English government, was confirmed further by colonial experience.[28] It is not surprising, therefore, that we should find in the constitutions of the Revolutionary period a distribution of the powers of government. Such a division has been continued in the state constitutions of the present.

Our central government, as well, embodies the principle of three independent and co-ordinate branches. It is true that there was under the Articles of Confederation a single house, with no separate executive and judicial departments. But when the Constitutional Convention met in 1787 one of the first proposals was for the creation of a government of three branches. That the idea prevailed is indicated by our present system.

The separation of powers has thus become a fundamental principle of our constitutional law, and as shown by its historical background, was intended to protect the liberty of the individual against possible governmental tyranny. In a purely theoretical examination of our subject we may, perhaps, come to a sounder conclusion if we but bear in mind this purpose.

We are now ready to examine the cases dealing with mandamus to the governor.[29]

A few words as to the nature of mandamus may be appropriate. The object of the writ is to compel the performance of a duty enjoined by law. The need for such a remedy is apparent in many

[26]Commentaries, Bk. I, ch. 1, star page 146.
[27]Kimball, The National Government of the United States, p. 67.
[28]1 Bryce, The American Commonwealth, new and rev. ed., 283.
[29]There are, of course, other methods of control which might be equally effective. Among the more notable which might be mentioned are injunction, impeachment, criminal proceedings, and recall elections. For the purposes of this paper, however, mandamus alone will be considered.

cases. A situation easily may arise in which the inaction of a public officer threatens greater injury than might result from wrongful affirmative action in a different situation. Take, for example, the facts presented by the well-known case of *Marbury v. Madison.*[30] In this instance, Marbury had been appointed by President Adams as a justice of the peace for the District of Columbia. His commission had been completed and signed. Nothing remained to be done but to deliver the document to the appointee. Before delivery had been made, there was a change of administration, and the new Secretary of State, Madison, refused to deliver the commission. As a consequence, Marbury could not hold the office. The injury here was the result of inaction on the part of a public official.

We may expect a number of cases of this nature. The uncertainty of statutes is often such that an official may honestly doubt his power to act. In such a situation, the most reasonable course might seem to be one of inaction. Such is the course the officer will be inclined to follow. In that case, if the executive will not act, and the courts cannot, the party is without a remedy. But it would seem to be contrary to the spirit of our law to deny a remedy in such a case. As was said by Marshall, C. J.,

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.[31]

In such a situation as we have supposed the ordinary remedies at law may be inadequate. The law, however, has provided an extraordinary remedy in mandamus. This writ has been defined as:

"A command issuing from a common law court of competent jurisdiction, in the name of the state or sovereign, directed to some corporation, officer or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official status of the party to whom the writ is directed, or from operation of law . . . It should be granted in all cases where the law has established no specific remedy and where in justice there should be one."[32]

The writ is of ancient origin and according to some authorities was used as early as the reign of Edward II, though it was not brought into systematic use until about the close of the seventeenth

[30](1803) 1 Cranch (U.S.) 137, 2 L.Ed. 60.
[31]Marbury v. Madison, (1803) 1 Cranch (U.S.) 137, 163, 2 L.Ed. 60.
[32]High, Extraordinary Legal Remedies, 3rd ed., sec. 1.

century,[33] and was not fully considered and understood until the time of Lord Mansfield.[34] It was originally a prerogative writ proceeding from the king himself, in his court of King's Bench.[35] No corresponding courts are provided in our system of government, and the better considered doctrine is that the writ has lost its high prerogative features; and that:

"A mandamus in modern practice is nothing more than an action at law between the parties."[36] That "the right to the writ, and the power to issue it, has ceased to depend upon any prerogative power, and it is now applied as an ordinary process in cases to which it is applicable.[37]

It remains an extraordinary remedy at law in the sense in which injunction remains an extraordinary remedy in equity.[38]

It is well settled that this writ is not available to compel the doing of a discretionary act in a particular manner. The reason is self-evident. Were the court to issue its command to do the act in a particular fashion, it would have substituted its own discretion for that of the officer. The judiciary would have usurped a field assigned to the executive. Where the constitution or statute requires an officer to exercise his own discretion in a matter, the judgment of even the most insignificant official must be entitled to greater weight in the eyes of the law than the opinion of the highest court. It is a well established principle that the courts will not interfere with executive officers, whether of high or low degree, to compel the doing of a discretionary duty in a particular manner.[39] Some cases dealing with the governor are collected in a footnote.[40]

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[33]Short, Informations, Mandamus, and Prohibition, 1st Am. from 1887 English edition by F. F. Heard, pp. 252-3.

[34]2 Spelling, Injunctions and other Extraordinary Remedies, sec. 1362.

[35]High, Extraordinary Legal Remedies, 3rd ed., sec. 3.

[36]Taney, C. J., in Kentucky v. Dennison, (1860) 24 How. (U.S.) 66, 97, 16 L.Ed. 717.

[37]Ibid.

[38]High, Extraordinary Legal Remedies, 3rd ed., sec. 5.

[39]"The most important principle to be observed in the exercise of the jurisdiction by mandamus, and one which lies at the very foundation of the entire system of rules and principles regulating the use of this extraordinary remedy, is that which fixes the distinction between duties of a peremptory or mandatory nature, and those which are discretionary in their character, involving the exercise of some degree of judgment on the part of the officer or body against whom the mandamus is sought. This distinction may be said to be the key to the extended system of rules and precedents forming the law of mandamus, and few cases of application for the extraordinary remedy occur which are not subjected to the test of this rule. Stated in general terms, the principle is that mandamus will lie to compel the performance of duties purely ministerial in their nature, and so clear and specific that no element of discretion is left in their performance, but that as to all acts or duties necessarily calling for the exercise of judgment and

There remains, however, a wide field of official duty to which this general principle does not apply. This is the field of acts ministerial in their nature.[41] It is here that we are presented with a great division of authority, and much confusion in the reasons upon which the decisons are based.

We shall examine first those cases which deny jurisdiction over the governor as to ministerial duties.

The arguments which have been advanced in this group of decisions may be classified as follows:

(1) The separation of governmental powers prohibits judicial control of the head of the executive department. (This is the argument on which the greatest reliance is placed.) (2) The issuance of the writ may lead to public disorder and confusion. Such would be the result if the governor were to nullify the writ by use of his commanding position as head of the militia, or if he were to be imprisoned for contempt of court for refusal to obey the writ. (3) It is to be presumed that the governor will act as fairly as the courts. (4) The governor, as successor to the king of England, has inherited his exemption from suit. (5) If the governor is subjected to court control the dignity of the office is lessened, difficulties are created in attempting to draw the line between ministerial and discretionary duties, executive discretion is interfered with, etc. (6) Exemption of the governor is sound policy.

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discretion on the part of the officer or body at whose hands their performance is required, mandamus will not lie."—High, Extraordinary Legal Remedies, 3rd ed., sec. 26. However, the writ may be used to set in motion the exercise of discretion. See the cases collected in 26 Cyc. 158.

[40]Berryman v. Perkins, (1880) 55 Cal. 483; Householder v. Morrill, (1895) 55 Kan. 317, 40 Pac. 664; Miles v. Bradford, (1864) 22 Md. 170, 85 Am. Dec. 643; State ex rel. State Pub. Co. v. Smith, (1899) 23 Mont. 44, 57 Pac. 449; State ex rel. State Journal Co. v. Boyd, (1893) 36 Neb. 60, 53 N.W. 1116.

[41]"A ministerial act may be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done." Perkins, J., in Flournoy v. City of Jeffersonville, (1861) 17 Ind. 169, 174. "Discretion in the manner of the performance of an act arises when the act may be performed in one of two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed. But when a positive duty is enjoined and there is but one way in which it can be performed lawfully then there is no discretion." Beard, J., in State ex rel. Irvine v. Brooks, (1905) 14 Wyo. 393, 411, 84 Pac. 488, 6 L.R.A. (N.S.) 750. A rather curious definition is that of Ferries, Special Justice, in Bledsoe v. Int'l Rd. Co., (1874) 40 Tex. 537, where he says: "The word 'ministerial' has reference generally to an act done under authority of a superior, and in this sense it could never apply to the chief executive with respect to anything required by the legislative authority."

As indicated above, the argument upon which the most reliance is placed is that of the separation of powers. The division was made in order to preserve the liberty of the individual.

"This wise and beautiful system [of dual governments and a separation of powers]," says the Arkansas court, "may safely be pronounced the highest invention of the human judgment; for it enlists interest on the side of patriotism, and appoints each of the governments with their respective and separate departments, as so many sentinels to guard the rights of the constitution, and to watch over the liberty of the people."[42]

Each department is intended to be supreme within its sphere. All are to stand upon an equality. There can be no equality, it is argued, if the courts are to have the power of controlling the executive. Instead, we shall have a great department subordinate to the judiciary. Such was not the object for which the powers were separated.

In support of such an interpretation and application of the doctrine a number of the cases refer to Montesquieu and other political writers at length.[43]

Among the more elaborate opinions is that of Judge Cooley in *Sutherland v. Governor*,[44] which is probably the leading case on this side of the question. After asserting the necessity of such a division in any free government this learned judge proceeds to show how a system of checks and balances has been established as a means of keeping each department within proper limits. Should any department go beyond these bounds,

"The remedy is by impeachment, and not by another department of the government attempting to correct the wrong by asserting a superior authority over that which by the Constitution is its equal."[45]

It is admitted, declares Judge Cooley, that the legislature cannot dictate the judgment of the courts, nor can the courts compel the legislature to take any action. If these departments are admit-

[42]Lacy, J., in Hawkins v. The Governor, (1839) 1 Ark. 570, 590, 33 Am. Dec. 346.

[43]See, for example, Hawkins v. The Governor, (1839) 1 Ark. 570, 590, 33 Am. Dec. 346.

[44]People ex rel. Sutherland v. The Governor, (1874) 29 Mich. 320, 18 Am. Rep. 89.

[45]Ibid., at 325. Note also State ex rel. Atty.-Gen. v. Huston, (1910) 27 Okla. 606, 113 Pac. 190, where the court, after declaring the governor not subject to judicial control, went on to say: "But, in so holding, it does not follow that the governor of a state is above the law. He and his acts are as much subject to the law as the humblest citizen of the commonwealth. But a tribunal other than the courts must be resorted to for a correction of his official wrongs, if any, to wit, the legislature." Williams, J. at 614.

tedly free from intervention, what plausible reason can be advanced for control of the executive by another department? This eminent jurist sees none. Nor does he believe that the courts can compel the governor to do a ministerial act, merely because they might have compelled action had the duty been laid upon a minor officer rather than upon the chief executive. Any such view, he asserts, does not take into account the distinction between the governor who heads an independent department, and minor administrative officers who necessarily are subject to the regulation and control of other departments. A proper interpretation of the principle, according to this authority, must except the governor from judicial control.

In a Louisiana case, the doctrine is combined with the novel principle that it is for the governor to determine whether his acts are discretionary or ministerial.

"A difficulty of no inconsiderable magnitude, we apprehend, arises from the attempt to establish that a distinction is to be taken between an act purely and simply ministerial, and one in which a discretion to perform it or not remains with the executive, and thence to conclude that the performance of the mere ministerial act by the executive may be enforced by the judicial order of a court. We think the doctrine objectionable in this, that it accords to the judiciary the large discretion of determining the character of all acts to be performed by the chief executive officer, as being merely ministerial or otherwise. This would infringe the right of the executive to use discretion in determining the same question. He must be presumed to have this discretion, and the right of deciding what acts his duties require him to perform; otherwise his functions would be trammeled, and the executive branch of the government made subservient, in an important factor, to the judiciary."[46]

Cases relying upon the doctrine, either solely or in connection with other arguments, are collected in a footnote.[47] This principle

[46]State ex rel. Oliver v. Warmouth, (1870) 22 La. Rep. 1, 3, 2 Am. Rep. 712.

[47]Hawkins v. The Governor, (1839) 1 Ark. 570, 33 Am. Dec. 346; State ex rel. Bisbee v. Drew, (1879) 17 Fla. 67; People ex rel. Billings v. Bissell, (1857) 19 Ill. 229, 68 Am. Dec. 591; People ex rel. Bruce v. Dunne, (1913) 258 Ill. 441, 101 N.E. 560; Hovey v. State ex rel. Schuck, (1890) 127 Ind. 588, 27 N.E. 175, 11 L.R.A. 763, 22 A.S.R. 663; State ex rel. Oliver v. Warmouth, (1870) 22 La. Ann. 1, 2 Am. Rep. 712; Dennet, Petitioner, (1851) 32 Me. 508, 54 Am. Dec. 602; Rice v. The Governor, (1910) 207 Mass. 577, 93 N.E. 821; Rice v. Austin, (1872) 19 Minn. 103 (Gil. 107), 18 Am. Rep. 330; Vicksburg and Meridian Rd. Co. v. Lowry, (1883) 61 Miss. 102, 48 Am. Rep. 76; State ex rel. Bartley v. Fletcher, (1867) 39 Mo. 388; State ex rel. Robb v. Stone, (1894) 120 Mo. 428, 25 S.W. 376, 23 L.R.A. 194, 41 A.S.R. 705; State v. The Governor, (1856) 25 N. J. Law 331; Jonesboro, Fall Branch and Blair's Gap Turnpike Co. v. Brown, (1875) 8 Baxter (Tenn.) 490, 35 Am. Rep. 713; Bates v. Taylor (1889)

alone is deemed sufficient to establish the governor's exemption. Some decisions, however, mention other points as well which we shall consider.

One of these is that the issuance of mandamus to the governor would lead to public disorder. Any attempt on the part of the courts to coerce the governor would result, it is said, in conflict between the two departments.[48] The possibility of a use of the militia in such a case is vaguely hinted at.[49]

Or if the governor should be imprisoned, disorder might result. Such imprisonment "would disturb the constitutional balance of power between the three great departments of government."[50] The possibility of imprisonment is regarded as decisive by the Mississippi supreme court, which points out the important duties entrusted to the governor.

"The chief executive power of the state is vested in him. It is his duty to see that the laws are faithfully executed. The power of the state is at his command for this purpose. He may in cases of emergency convene the legislature. He has important functions as part of the law-making power."[51]

The remaining arguments of those classified above are very little used. One is to the effect that it may as well be supposed that the courts will act perversely as that the governor will do so. That the "presumption is, that one is as likely to be right or as liable to err, as the other," and that the same remedy, impeachment, is applicable to both.[52] The final decision in all cases must be left somewhere, and having been made must be taken as cor-

87 Tenn. 319, 11 S.W. 266; Houston Tap and Brazoria Ry. Co. v. Randolph, (1859) 24 Tex. 317 (Dictum).

The Texas case argues that the people have selected their officers and have a right to expect that the duties alloted to each department will be performed by the members of that department. The people could hardly have intended, says the court, to have the governor's duties prescribed by some county judge.

[48]State v. The Governor, (1856) 25 N.J. Law 331; State ex rel. Bartley v. Fletcher, (1867) 39 Mo. 388; Appeal of Hartranft, (1877) 85 Pa. 433, 446, 27 Am. Rep. 667; Bates v. Taylor, (1889) 87 Tenn. 319, at 332, 11 S.W. 266; People ex rel. Bruce v. Dunne, (1913) 258 Ill. 441, 456-7, 101 N.E. 560. Note also, Mauran v. Smith, (1865) 8 R.I. 192, 217, 5 Am. Rep. 564.

[49]Rice v. The Governor, (1910) 207 Mass. 577, 580, 93 N.E. 821.

[50]Vann, J., in People ex rel. Broderick v. Morton, (1898) 156 N.Y. 136, 148, 50 N.E. 791, 41 L.R.A. 231, 66 A.S.R. 547.

[51]Campbell, C. J., in Vicksburg and Meridian Rd. Co. v. Lowry, (1853) 61 Miss. 102, 104. See also State ex rel. Low v. Towns, (1850) 8 Ga. 360, 372, and the dissenting opinion in Harpending v. Haight, (1870) 39 Cal. 189, 223, where it is said, "If the governor be imprisoned but for one hour, the public safety is jeopardized; for, during that very time, it may be necessary for him to exercise his high powers to preserve the public peace." Temple, J.

[52]People ex rel. Billings v. Bissell, (1857) 19 Ill. 229, 233.

rect. "The presumption is just as conclusive in favor of executive action as in favor of judicial."[53]

Some courts would carry the presumption of executive fairness to the point of making it conclusive. This is to be seen in a Georgia case.[54] After pointing out that in England the crown may be petitioned and recovery had, the court continues:

"Such being the established course of the executive department of the government of Great Britain, we cannot, and we will not presume, that the chief magistrate of a republican state would, for one moment, hesitate to issue a commission to the relator; when his right and title to the office shall have been established by the judgment of a court of competent jurisdiction. To presume that the executive officer of the government would withhold the commission . . . would be to say . . . that such officer was above the laws of the people; that he had the right to exercise despotic power, regardless of the laws of the people. . . . This court will never indulge in such a presumption—respect for the laws of the country, and especially respect for a co-ordinate department of the government, utterly forbids the idea, that the vested rights of the citizen will not be entirely protected, according to law, by the chief officer of the state."[55]

The succession of the governor to the king's exemption from suit is advanced with other arguments in a New York decision.[56] It is there said that the power of the king, except as it has been delegated in part to the legislative and judicial branches, remains unchanged, and has been transmitted to the governor. The writ, issued in the king's name, would not run against the king himself. It therefore will not run against his successor, the governor.

O'Brien, J., declares in a strong dissent that such reasoning ignores another principle, that no man is above the law. He continues:

"The proposition that there is or may be one man in the state so far above his fellow citizens that the courts cannot reach him, in a case like this, where there is no discretion, sounds very much like a voice from the middle ages, or the decree of the Roman

[53]Judge Cooley in People ex rel. Sutherland v. Governor, (1874) 29 Mich. 320, 330, 18 Am. Rep. 89.

[54]State ex rel. Low. v. Towns, (1850) 8 Ga. 360.

[55]Warner, J., in State ex rel. Low v. Towns, (1850) 8 Ga. 360, 373.

[56]People ex rel. Broderick v. Morton, (1898) 156 N.Y. 136, 50 N.E. 791, 41 L.R.A. 231, 66. A.S.R. 547. But note the statement in People ex rel. La Chicotte v. Best, (1907) 187 N.Y. 1, 79 N.E. 890 by the same judge that "under the provisions of the Code of Civil Procedure the writ issues as an order of the court in cases in which it was authorized at common law and, therefore, it cannot issue to the executive, the legislative, or judicial branch of the government, except to such inferior courts as are subject to review by the judicial branch of the government having such jurisdiction." Haight, J., at 5.

Senate in its declining days when it declared the Emperor above the laws."[57]

Further arguments which have been advanced against the issuance of the writ to the governor are that it lessens the responsibilities of the latter's position, and so weakens the dignity of his office;[58] and that there is difficulty in drawing a line between discretionary and ministerial duties.[59]

Finally, we have the argument that, viewed as a political, rather than as a legal question, the exemption should be granted on grounds of public policy. In the words of the Georgia court:

"Viewed as strictly a legal question, we cannot see any satisfactory reason why he [the governor] should not, according to the general principles of law [be subjected to mandamus as to ministerial duties] . . . But while we are unable to give a satisfactory legal reason why the remedy sought should be denied to the citizen, yet we are satisfied that for political reasons alone, the remedy by mandamus ought not to be enforced against the chief executive officer of the state. The ultimate effect of this remedy, in case of refusal by the governor to obey the laws of the land, would be to deprive the people of the state of the head of one of the departments of government. This ministerial act required by the law, is to be performed by the same officer who is, by the constitution, placed at the head of one of the departments of the government and is required by the constitution to perform certain other duties of which the people may not be deprived."[60]

Thus the courts which deny mandamus to the governor even in the case of ministerial duties proceed upon a variety of arguments. The basis upon which most of the cases are placed is, as we have seen, the doctrine of the separation of governmental powers. Not wholly satisfied with this, they bring in also the arguments that to attempt to coerce the governor would result in public disorder, that it is to be presumed that the governor will act as fairly as the courts, that the governor, as successor to the king of England, has inherited exemption from the writ, that to issue the writ would lessen the dignity of the office, and that there would be great difficulty in drawing the line between discretionary and ministerial duties. And finally, we have the argument that public policy demands exemption from the writ in the case of the state executive.

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[57]People ex rel. Broderick v. Morton, (1898) 156 N.Y. 136, at 157, 50 N.E. 791, 41 L.R.A. 231, 66 A.S.R. 547.

[58]State ex rel. Oliver v. Warmouth, (1870) 22 La. Rep. 1, 2 Am. Rep. 712.

[59]People ex rel. Sutherland v. Governor, (1874) 29 Mich. 320, 18 Am. Rep. 89.

[60]Warner, J., in State ex rel. Low v. Towns, (1850) 8 Ga. 360, 372. See also Hawkins v. The Governor, (1839) 1 Ark. 570, at 587.

The variety of reasoning exemplified in the foregoing cases would lead us to suspect that the courts do not always proceed from some necessarily logical principle. It would appear rather that the judge often feels intuitively that he should exempt the governor from the writ, and the theory which leads to this conclusion is accepted as a matter of course. No doubt the ground of policy which the Georgia court so boldly recognized lies behind all of these decisions. But the basis of the policy, the interests, social, public and private, which demand exemption for the governor, are not displayed. We are given merely the principles by which policy is made into law.[61]

A much greater singleness of opinion is to be observed in the second class of cases, to which we now turn. These cases hold that the governor may be compelled to perform duties of a merely ministerial nature. This is said to result from the supremacy of the law. The decisions are placed squarely upon the principle that under our system of government no man is above the law.[62]

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[61]Before leaving this class of cases we should note the result of a voluntary submission of the dispute by the governor to the courts. Some courts apparently regard the exemption as personal. The governor is permitted to waive it, and to submit to the court's jurisdiction. People ex rel. Stickney v. Palmer, (1872) 64 Ill. 41. See also Territory ex rel. Sulzer v. Canvassing Bd., (1917) 5 Alaska 602; People ex rel. Akin v. Matteson, (1855) 17 Ill. 167; People ex rel. Billings v. Bissell, (1857) 19 Ill. 229, 68. Am. Dec. 591; and State ex rel. Stewart v. Marks, (1880) 6 Lea (Tenn.) 12. Note also the statement in Chamberlain v. Sibley, (1860) 4 Minn. 309 (Gil. 228).

A contrary view has appeared in other cases. It is said that where the court has no jurisdiction the Governor's consent cannot confer it. State ex rel. Robb v. Stone, (1894) 120 Mo. 428, 25 S.W. 376, 23 L.R.A. 194, 41 A.S.R. 705. (Note Pacific Rd. v. The Governor, (1856) 23 Mo. 353, 66 Am. Dec. 673). Neither can the legislature and governor together waive the exemption, since it is founded upon the constitution. St. Paul and Chicago Ry. Co. v. Brown, (1877) 24 Minn. 517, 574.

A further argument is advanced to the effect that the governor's assent does not alter the principle that the issuance of the writ tends to produce conflict. State v. The Governor, (1856) 25 N.J. Law 331, 351.

As to the inability of a lesser executive officer to waive his exemption see State ex rel. County Treasurer of Mille Lacs County v. Dike, (1874) 20 Minn. 363 (Gil. 314).

[62]Tennessee and Corsa Rd. Co. v. Moore, (1860) 36 Ala. 371; Greenwood Cemetery Land Co. v. Routt, (1892) 17 Colo. 156, 28 Pac. 1125, 15 L.R.A. 369, 31 A.S.R. 284; Magruder v. Swann, (1866) 25 Md. 173; State ex rel. Bates v. Thayer, (1891) 31 Neb. 82, 47 N.W. 704; State ex rel. White v. Dickerson, (1910) 33 Nev. 540, 113 Pac. 105; State ex rel. Whiteman v. Chase, (1856) 5 Ohio St. 528; State ex rel. Trauzer v. Nash, (1902) 66 Ohio St. 612, 64 N.E. 558.

"All this is but the result of a just and wholesome principle, that no public functionary, whatever his official rank, is above the law, or will be permitted to violate its express command with impunity." Walker, J., in Tennessee and Corsa Rd. Co. v. Moore, (1860) 36 Ala. 371, 382.

Note also Martin v. Ingham, (1888) 38 Kan. 641, where the writ was denied on the merits, but the court asserted its power to mandamus the

A remark of Chief Justice Marshall is much quoted in this connection. In *Marbury v. Madison* he says:

"It is not by the office of the person to whom the writ is directed, but by the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined."[63]

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governor in a proper case; and Traynor v. Beckham, (1903) 116 Ky. 13, 74 S.W. 1105, 76 S.W. 844, 25 Ky. Law Rep. 283, 981, where the court, in issuing the writ, bases its decision on the general ground of the supremacy of the law, rather than on a statute dealing with the issuance of mandamus.

[63]1 Cranch (U.S.) 137, 170, 2 L.Ed. 60. This is quoted in Tennessee and Corsa Rd. Co. v. Moore, (1860) 36 Ala. 371, 380; People ex rel. McCauley v. Brooks, (1860) 16 Cal. 11, 54, 57; Middleton v. Low, (1866) 30 Cal. 596, at 601; Greenwood Cemetery Land Co. v. Routt, (1892) 17 Colo. 156, at 167, 28 Pac. 1125, 15 L.R.A. 369, 31 A.L.R. 284; Martin v. Ingham, (1888) 38 Kan. 641, 653; Traynor v. Beckham, (1903) 116 Ky. 13, 24, 74 S.W. 1105, 76 S.W. 844, 25 Ky. Law Rep. 283, 981; Chumasero v. Potts, (1875) 2 Mont. 242, 256; State ex rel. Wright v. Savage, (1902) 64 Neb. 684, 696, 90 N.W. 898, 91 N.W. 557; State ex rel. Whiteman v. Chase, (1856) 5 Ohio St. 528, 534; State ex rel. Irvine v. Brooks, (1905) 14 Wyo, 393, 412, 84 Pac. 488, 6 L.R.A. (N.S.) 750. This statement of Marshall's has had so much weight because it "so clearly and correctly announces the legal principle applicable to proceedings by mandamus, against public officers under republican forms of government." Elliott, J. in Greenwood Cemetery Land Co. v. Routt, (1892) 17 Colo. 156, at 167, 28 Pac. 1125, 15 L.R.A. 369, 31 A.L.R. 284. The influence of the case is shown in Cotton v. Ellis, (1860) 52 N. Car. (7 Jones) 545, 550 where Pearson, C.J., declares: "The power of a court, by the writ of mandamus, to compel an executive officer to do an act merely ministerial, in order to enforce an ascertained legal right, is settled by the cases of Marbury v. Madison, (1803) 1 Cranch (U.S.) 137, 2 L.Ed. 70, and Kendall v. United States, (1838) 12 Pet. (U.S.) 524."

That the case can be used for the opposite view is evidenced by Hawkins v. The Governor, (1839) 1 Ark. 570, 584. And Judge Cooley argues that Marbury v. Madison is no authority for holding the governor liable, since that case cannot be regarded as holding the president to be subject to mandamus. "It cannot be justly claimed, when federal and state governments have been formed, so far as distribution of power is concerned, on the same general plan, that the executive of the union can claim immunity from judicial process any more than the governor of one of the states." People ex rel. Sutherland v. Governor, (1874) 29 Mich. 320, 327-8.

It should be noted that there is a wide difference in the vesting of executive power in the federal constitution and in a constitution such as that of Minnesota. In the former it is provided that "the executive power shall be vested in a president of the United States of America." Art. II, sec. 1. But in the latter "the executive department shall consist of a governor, lieutenant governor, secretary of state, auditor, treasurer, and attorney general." Art. 5, sec. 1.

Thus the president is *the* executive department, while the governor in many states is one merely among several members of the department.

"Marbury v. Madison, 1 Cranch (U.S.) 137, 2 L.Ed. 70, is often cited, often misunderstood, and often not followed. The real logic of it is that the courts may reach the executive indirectly as to ministerial or jurisdictional matters, and in the case of the head the impediment is referable to matters of policy rather than competency." Marshall, J., in Ekern v. McGovern, (1913) 154 Wis. 157, 220, 142 N.W. 595, 46 L.R.A. (N.S.) 796.

If, by the law, a man is entitled to relief, it makes no difference whether the act is due from the highest executive officer or the lowest. Under such a view, all men, regardless of any differences in wealth, or rank, or power, stand on an equality before the law.

It may seem at first glance that this theory is inconsistent with that of the separation of powers. Such, however, need not be the case, if we consider, as a guiding principle in our interpretation of the latter doctrine, the end for which the separation was made. We have seen that that end is the protection of the individual against possible tyranny. Thus interpreted, the doctrine is quite in accord with judicial control of the governor in ministerial acts.

Under our system of government the ultimate supremacy does not lie with the officers of government but with the people themselves. They alone are sovereign.[64] For the purposes of government they have created an organization to which they have granted certain powers. The body so set up is nothing more than an agency for the expression and execution of the sovereign will. The officers of that organization are merely the agents of the people.[65]

As a means of protection it has seemed proper to divide these assigned powers among three independent and co-ordinate departments. As among themselves each department may seem supreme in the sense that its proper functions are not subject to the will of a co-ordinate branch of the government. It is to be remembered, however, that all three are inferior to the sovereign people.

There is some overlapping of the powers assigned. Speaking generally, though, the legislature has been created primarily as an agent to enact the laws, the executive as an agent to enforce the laws, while the judiciary has been assigned the province of interpretation and application. It is not considered an assertion of supremacy for the legislature to enact laws, which include the courts. Nor is it thought to be contrary to the principle of the separation of powers for the executive to enforce the laws as fully

[64]"We have no sovereign departments. We have no triple sovereignty. . . . This whole matter has been settled by judicial construction, and were it not so, it would seem too plain to require argument for its elucidation. The theory of our government is, that all its powers are derived from the people." Smith, J., in Attorney General ex rel. Bashford v. Barstow, (1866) 4 Wis. 567, 779. Note also State ex rel. Rawlinson v. Ansel, (1907) 76 S.C. 395, 413, 57 S.E. 185.

[65]"He (the governor) similarly with other public officers, is the chosen servant of the people." Talbot, J., in State ex rel. White v. Dickerson, (1910) 33 Nev. 540, 561, 113 Pac. 105. See also Attorney General ex rel. Bashford v. Barstow, (1866) 4 Wis. 567, 755 et seq.

against members of the bench as against the public at large. Both agencies are regarded as exercising the powers conferred upon them. As agents of the sovereign public they are in their proper fields superior to either of the other departments.[66] By the same reasoning, it should not be regarded a usurpation of power for the courts to interpret the law, and apply it even though it be to the chief executive of the state.

The courts' particular province is the interpretation and application of the law.[67] In this they are bound to consider not only the statutes, but the constitution as well. Their search is for the law. If this be the nature of their agency, are they not acting within its limits when they determine what bounds the law has placed in the powers of the other departments? Are they not merely interpreting the sovereign will when they determine whether the governor, as agent of the public, has exceeded the limits of his agency? They are doing no more than this when they issue a mandamus to the governor. They are not attempting to assert their own supremacy, but to assert the supremacy of the sovereign will, the interpretation of which is their especial province.[68]

The assumption that this theory permits judicial control of the governor gains added weight from a consideration of the object for which the powers were separated. The separation was not made to protect the executive agent against the operation of

[66]"Each department in its own sphere is supreme. But each outside its own sphere, is weak and must obey." Valentine, J., in Martin v. Ingham, (1888) 38 Kan. 641, 657.

[67]Greenwood Cemetery Land Co. v. Routt, (1892) 17 Colo. 156, 28 Pac. 1125, 15 L.R.A. 369, 31 A.S.R. 284; Martin v. Ingham, (1888) 38 Kan. 641; Traynor v. Beckham, (1903) 116 Ky. 13, 74 S.W. 1105, 76 S.W. 844, 25 Ky. Law Rep. 283, 981. A Nevada decision states that the court, in denying the writ in a proper case, would be exercising legislative power, in that it would assume the power to say whether a given statute should be the law. State ex rel. White v. Dickerson, (1910) 33 Nev. 540, 113 Pac. 105.

[68]"Each co-ordinate state agent stands for the whole people within its proper sphere. When the court speaks within its sphere it is not the justices who speak, but the people through their chosen agent, the court. To it is delegated all judicial authority, whether it concerns the executive or any other individual. To that authority all must bow. In that there is subordination—not to the court—not to the justices of the court—but to the sovereignty of the people." Marshall, J., in Ekern v. McGovern, (1913) 154 Wis. 157, 217, 142 N.W. 595, 46 L.R.A. (N.S.) 796. The court in issuing mandamus to the governor "does not attempt to perform the act; but simply interprets the provisions of the constitution and laws under which the governor is required to act. That is the particular province of the judiciary, and its interpretation of the law is as binding upon the executive as upon any other citizen." Beard, J., in State ex rel. Irvine v. Brooks, (1905) 14 Wyo. 393, 412, 84 Pac. 488, 6 L.R.A. (N.S.) 750.

the supreme will. It was not made to grant him exemption from liability when he chose to override the rights of the citizen. Rather, the separation was effected to guard the people against tyranny, and to protect individual rights. This is amply evidenced by the writings of Montesquieu, Blackstone, and others who brought this theory before the people. It is indeed a step toward tyranny when a department so far encroaches on another as to gather to itself the major duties of the latter. But it is quite the opposite where a department acts to prevent another from overriding the rights of the citizen. If the object for which the separation was made was to protect these rights, it would seem to be erroneous reasoning so to interpret the principle as to deny protection to the rights it was intended to preserve. It is hardly proper so to interpret the means as to subvert the ends for which they were established. Not only the principle itself, but the end for which it was introduced would appear to declare the governor subject to the courts as interpreters of the law. Logically, the courts which subject the governor to the writ appear to have the stronger position.

A few of them, however, have limited slightly the scope of their power by a somewhat illogical distinction between ministerial duties placed upon the governor by the constitution, and those imposed merely by statute. As to the former they refuse to act, while asserting full competence as to the latter.

This distinction is first made in an early Ohio case.[69] It is there declared that:

"However . . . the governor, in the exercise of the supreme executive power of the state, may, from the inherent nature of the authority in regard to many of his duties, have a discretion which places him beyond the control of the judicial power, yet in regard to a mere ministerial duty enjoined on him by statute, which might have been devolved as well on another officer of the state, and affecting any specific private right, he may be made amenable to the compulsory process of this court by mandamus."[70]

A similar distinction is made in several later cases.[71]

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[69]State ex rel. Whiteman v. Chase, (1856) 5 Ohio St. 528.

[70]Bartley, C. J., in State ex rel. Whiteman v. Chase, (1856) 5 Oh. St. 528, 535.

[71]Tennessee and Corsa Rd. Co. v. Moore, (1860) 36 Ala. 371; People ex rel. McCauley v. Brooks, (1860) 16 Cal. 11; Middleton v. Low, (1866) 30 Cal. 596; Chamberlain v. Sibley, (1860) 4 Minn. 309 (Gil. 228). See also Ellingham v. Dye, (1912) 178 Ind. 336, 402, 99 N.E. 1; State ex rel. White v. Dickerson, (1910) 33 Nev. 540, 560, 113 Pac. 105; and note the distinction made in the headnote in Martin v. Ingham, (1888) 38 Kan. 641, 17 Pac. 162.

That all duties laid upon the governor by the constitution are political

The great majority of cases concern statutory duties and the distinction therefore is not of great importance. In the only cases found in this class of states which related to constitutional duties of a ministerial nature the writ was refused in one case[72] and allowed in two others.[73] The Minnesota case takes express notice of the distinction. It is not mentioned in the cases from Maryland.

To summarize, then, the views of the courts which subject the governor to the writ of mandamus: the authority is found in the principle that under our system of government no man is above the law. The doctrine of the separation of powers is not opposed to this view; but on the contrary sustains it when interpreted in the light of the end for which the separation was made. A distinction between constitutional and statutory duties has been noted but it is not widely accepted and is of slight consequence. In a considerable number of states, therefore, practically all ministerial duties are thus subject to judicial control.[74]

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and exempt from judicial control is stated in State ex rel. Bartley v. Fletcher, (1867) 39 Mo. 388, 399.

[72]Chamberlain v. Sibley, (1860) 4 Minn. 309 (Gil. 228).

[73]Magruder v. Swann, (1866) 25 Md. 173; Groome v. Gwinn, (1875) 43 Md. 572.

[74]The following lists attempt a complete collection of the state cases on mandamus to the governor. They are arranged according to (1) states which subject the governor to the writ (2) states which exempt the governor from the writ and (3) states in which the question has not been decided, although mentioned. In some instances it is difficult to classify the state, due to the influence which may have been exercised by the governor's consent to the jurisdiction of the court.

The majority of the cases are to be found in an exhaustive note in 6 L.R.A. (N.S.) 750.

In the following states the governor is declared to be subject to the writ as to his ministerial duties:

(1) Alabama. Tennessee and Corsa Rd. Co. v. Moore, (1860) 36 Ala. 371; State ex rel. Turner v. Hendersen, (1917) 100 Ala. 244, 74 So. 344. The doctrine of the former case is questioned in Chisholm v. McGehee, (1867) 41 Ala. 192, 197; the difficulty of the problem is referred to in State ex rel. Plock and Co. v. Cobb, (1897) 64 Ala. 127, 151; while the court declines to express its opinion in State ex rel. Higdon v. Jenks, (1902) 138 Ala. 115, 38 So. 755.

(2) California. Middleton v. Low, (1866) 30 Cal. 596; Stuart v. Haight, (1870) 39 Cal. 87; Harpending v. Haight, (1870) 39 Cal. 189, 2 Am. Rep. 432; Elliott v. Pardee, (1906) 149 Cal. 516, 87 Pac. 1087. Note also People ex rel. McCauley v. Brooks, (1860) 16 Cal. 11.

(3) Colorado. Greenwood Cemetery Land Co. v. Routt, (1892) 17 Colo. 156, 28 Pac. 1125, 15 L.R.A. 369, 31 A.S.R. 284 (Governor, member of a board, subject to mandamus). Note also Orman v. The People ex rel. Cooper, (1903) 18 Colo. App. 302, 71 Pac. 430.

(4) Kansas. Martin v. Ingham, (1888) 38 Kan. 641, 17 Pac. 162. Note also State ex rel. Crawford v. Robinson, 1863) 1 Kan. 17; In the matter of the application of Evalina Clara Cunningham, (1875) 14 Kan. 416; and State ex rel. Attorney General v. St. John, (1879) 21 Kan. 591. In the case last cited the governor consented to the court's jurisdiction and the court therefore regarded the question of jurisdiction as not presented.

The hint that the governor might use the militia to oppose the order of the court has been met by some of the courts which issue mandamus to that officer. In Justice Marshall's masterly opinion in *Ekern v. McGovern* he says:

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(5) Kentucky. Traynor v. Beckham, (1903) 116 Ky. 13, 74 S.W. 1105, 76 S.W. 844, 25 Ky. L. Rep. 283, 981; McCreary v. Williams, (1913) 153 Ky. 49, 154 S.W. 417; Gordon v. Morrow, (1920) 186 Ky. 713, 218 S.W. 258; Cockran v. Beckham, (1905) 28 Ky. L. Rep. 370, 89 S.W. 262. Reference is made in two of the cases to a statute as covering the subject. 116 Ky. 13, 23; and 28 Ky. L. Rep. 370, 371.

Note also Wilson v. Bradley, (1898) 105 Ky. 52, 48 S.W. 166, 1088, 20 Ky. L. Rep. 1118; Jarvis v. Stanley, (1917) 176 Ky. 630, 197 S.W. 183; and Booker v. Stevenson, (1871) 8 Bush (Ky.) 39.

(6) Maryland. Magruder v. Swann, (1866) 25 Md. 173; Groome v. Gwinn, (1875) 43 Md. 572. See also Brown v. Bragrenier, (1894) 79 Md. 234, 29 At. 7.

(7) Montana. Chumasero v. Potts, (1875) 2 Mont. 242 (governor of a territory, member of a board, declared subject to mandamus); State ex rel. State Publishing Co. v. Smith, (1899) 23 Mont. 44, 57 Pac. 449. Note also Territory ex rel. Tanner v. Potts, (1879) 3 Mont. 364; and State ex rel. Evans v. Rickards, (1895) 16 Mont. 145, 40 Pac. 210, 28 L.R.A. 298, 50 A.S.R. 476.

(8) Nebraska. State ex rel. Bates v. Thayer, (1891) 31 Neb. 82, 47 N.W. 704 (governor, member of a board, declared subject to mandamus). Note also State ex rel. State Journal Co. v. Boyd, (1893) 36 Neb. 60, 53 N.W. 1116; State ex rel. Cromelien v. Boyd, (1893) 36 Neb. 181, 54 N.W. 252, 19 L.R.A. 227; and State ex rel. Wright v. Savage, (1902) 64 Neb. 684, 90 N.W. 898, 91 N.W. 557.

(9) Nevada. State ex rel. White v. Dickerson, (1910) 33 Nev. 540, 113 Pac. 105 (mandamus granted against acting governor). Note also State ex rel. Wall v. Blasdel, (1868) 4 Nev. 241 where the writ was issued but jurisdiction was not discussed; and State ex rel. Laughton v. Adams, (1886) 10 Nev. 370, 12 Pac. 488.

(10) North Carolina. Cotten v. Ellis, (1860) 52 N.Car. (7 Jones) 545.

(11) Ohio. State ex rel, Whiteman v. Chase, (1856) 5 Ohio St. 528; State ex rel. Tranger v. Nash, (1902) 66 Ohio St. 612, 64 N.W. 558. Note also State ex rel. Maffett v. Chase, (1857) 7 Ohio St. 372; and State ex rel. v. Foster, (1883) 38 Ohio St. 599.

(12) Wyoming. State ex rel. Irvine v. Brooks, (1905) 14 Wyo. 393, 84 Pac. 488, 6 L.R.A. (N.S.) 750. It should be noted that Article 5, section 3 of the state constitution of Nov. 5, 1889, provides that "the supreme court shall have original jurisdiction in . . . mandamus as to all state officers."

The contrary view is taken in the following states which exempt the governor from mandamus, not only as to discretionary duties but as to ministerial as well.

(1) Arkansas. Hawkins v. The Governor, (1839) 1 Ark. 570, 33 Am. Dec. 346. Note also Taylor v. The Governor, (1837) 1 Ark. 21.

(2) Florida. State ex rel. Bisbee v. Drew, (1879) 17 Fla. 67.

(3) Georgia. State ex rel. Low v. Towns, (1850) 8 Ga. 360. In Bonner v. State ex rel. Pitts, (1849) 7 Ga. 473 the court had said obiter dictum that the governor might be subjected to court control.

(4) Illinois. People ex rel. Billings v. Bissell, (1857) 19 Ill. 229, 68 Am. Dec. 591; People ex rel. Harless v. Hatch, (1863) 33 Ill. 9, at 148 (dictum); People ex rel. Harless v. Gates, (1863) 40 Ill. 126; People ex rel. Bacon v. Cullom, (1881) 100 Ill. 472; People ex rel. Bruce v. Dunne, (1913) 258 Ill. 441, 101 N.W. 560. Note also People ex rel. Akin v. Matteson, (1855) 17 Ill. 167; and People ex rel. Stickney v. Palmer, (1872) 64 Ill. 41 where the governor submitted voluntarily to the action and the question of jurisdiction was not raised.

"Some courts have given the weak excuse for doubting their right to send a writ to a governor, directly or indirectly questioning his executive act, that the court might be powerless to enforce obedience—even suggesting the possibility of executive control of the militia having to be contended with; as if a court with knowl-

(5) Indiana. Hovey v. State ex rel. Schuck, (1890) 127 Ind. 588, 27 N. E. 175, 11 L.R.A. 763, 22 A.S.R. 663. But note Governor v. Nelson, (1855) 6 Ind. 496; and Baker v. Kirk, (1870) 33 Ind. 517 where the writ was issued without the question of jurisdiction being raised. And note also that the writ was issued against the governor and other members of a state board over the governor's objection in Gray v. State ex rel. Coghlen, (1880) 72 Ind. 567. This decision is based upon the idea that the exemption applies only to executive duties, that the executive power is in the governor alone and that consequently "any duty which he (the governor) is by law required to perform, in connection with others, in which they have an equal voice with him, can in no sense be said to be an executive duty." P. 578.

In Ellingham v. Dye, (1912) 178 Ind. 336, at 400, 99 N.W. 1 it is said that the weight of authority and reason would subject the governor to mandamus, and that the question is not positively and clearly settled by the Indiana cases.

(6) Louisiana. State ex rel. Oliver v. Warmouth, (1870) 22 La. Ann. 1, 2 Am. Rep. 712; State ex rel. Mississippi Valley Navigation Co. v. Warmouth, (1872) 24 La. Ann. 351, 13 Am. Rep. 126. Note also State ex rel. Hope and Co. v. Board of Liquidation, (1890) 42 La. Ann. 647, 7 So. 706, 8 So. 577; and compare with Gray v. State ex rel. Coughlen, (1880) 72 Ind. 567.

(7) Maine. Dennett, Petitioner, (1851) 32 Me. 508, 54 Am. Dec. 602.

(8) Massachusetts. Rice v. The Governor, (1910) 207 Mass. 577, 93 N.E. 821.

(9) Michigan. People ex rel. Sutherland v. Governor, (1874) 29 Mich. 320, 18 Am. Rep. 89.

(10) Minnesota. Chamberlain v. Sibley, (1860) 4 Minn. 309 (Gil. 228); Rice v. Austin, (1872) 19 Minn. 103 (Gil. 74), 18 Am. Rep. 330; St. Paul and Chicago Ry. Co. v. Brown, (1877) 24 Minn. 517 (Governor a member of a state board); Western Rd. Co. v. De Graff, (1880) 27 Minn. 1, 6 N.W. 341 (dictum).

Note that mandamus was issued against the governor without discussion as to the jurisdictional question in Minnesota and Pacific Rd. Co. v. Sibley, (1858) 2 Minn. 13 (Gil. 1).

A tendency toward judicial control is observable in the language of Cooke v. Iverson, (1909) 108 Minn. 388, 122 N.W. 251 (injunction to auditor); and State ex rel. Kinsella v. Eberhart, (1911) 116 Minn. 313, 133 N.W. 857, Ann. Cas. 1913B 785 (certiorari to review governor's action). In the latter case the court says that it is now in accord with the states which hold the governor subject to the writ as to ministerial duties. Whether a distinction is to be taken between constitutional and statutory duties, says the court, will be decided when the need arises.

(11) Mississippi. Vicksburg and Meridian Rd. Co. v. Lowry, (1883) 61 Miss. 102, 48 Am. Rep. 76

(12) Missouri. State ex rel. Bartley v. Fletcher, (1867) 39 Mo. 388; State ex rel. Robb v. Stone, (1894) 120 Mo. 428, 25 S.W. 376, 36 L.R.A. 194, 41 A.S.R. 705. Note also Pacific Rd. v. The Governor, (1856) 23 Mo. 353, 66 Am. Dec. 673.

(13) New Jersey. State v. The Governor, (1856) 25 N.J. Law 331.

(14) New York. People ex rel. Broderick v. Morton, (1898) 156 N.Y. 136, 50 N.E. 791, 41 L.R.A. 231, 66 A.S.R. 547 (governor a member of a state board). Note also People ex rel. La Chicotte v. Best, (1907) 187 N.Y. 1, 79 N.E. 890.

(15) Oklahoma. City of Oklahoma City v. Haskell, (1910) 27 Okla. 495, 112 Pac. 992; State ex rel. Dunlap v. Cruce, (1912) 31 Okla. 486, 122 Pac. 237 (governor a member of a state board). Note also Haskell v.

edge of its constitutional authority would be justified, under any circumstances, in not using it merely because the one who would be otherwise acted upon, even though he be the chief conservator of the law, might commit treason, as it were, rather than submit to duly constituted authority.[75]

While the Wyoming court asserts that "the jurisdiction of the court does not depend upon its physical ability to enforce its judgments."[76]

If we turn to actual conditions, the facts give no support to the fear that the governor will oppose the orders of the court with

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Reigel, (1910) 26 Okla. 87, 108 Pac. 367. And see Betts v. Comm'rs of the Land Office, (1910) 27 Okla. 64, 110 Pac. 766 where the question of jurisdiction was not raised (governor a member of a state board).

(16) Tennessee. Jonesboro, Fall Branch and Blair's Gap Turnpike Co. v. Brown, (1875) 8 Baxt. (Tenn.) 490, 35 Am. Rep. 713; Bates v. Taylor, (1889) 87 Tenn. 319, 11 S.W. 266; State ex rel. Latture v. Board of Inspectors, (1904) 114 Tenn. 516, 86 S.W. 319.

And note State ex rel. Stewart v. Marks, (1880) 6 Lea (Tenn.) 12, where the governor's consent to the jurisdiction was given and so the question was not gone into.

(17) Texas. Houston Tap and Brazoria Ry. Co. v. Randolph, (1859) 24 Tex. 317 (dictum). Note that the state constitution, article 5, section 3, as amended in 1891 exempts the governor from mandamus. Statutory provision to the same effect is to be found in the act of April 13, 1892.

The following territories and states are to be classed as doubtful. The cases in which the subject is mentioned are cited.

(1) Alaska. Territory ex rel. Sulzer v. Canvassing Board, (1917) 5 Alaska 602 (governor a member of the board). In this case the governor submitted to the court's jurisdiction so the question was not raised.

(2) Arizona. Directors of Insane Asylum v. Wolfly, (1889) 3 Ariz. 132, 22 Pac. 383, 8 L.R.A. 188.

(3) Iowa. State ex rel. Lockwood v. Kirkwood, (1862) 14 Ia. 162.

(4) Pennsylvania. Mott v. Penn. Rd. Co., (1858) 30 Pa. St. 9, 33, 72 Am. Dec. 664 (dictum denying control).

(5) Rhode Island. Mauran v. Smith, (1865) 8 R. I. 192, 5 Am. Rep. 564. The case leaves open the question of whether the court would enforce a statutory duty which might as well have been put upon an officer other than the governor. The duty involved in the cases, though statutory, was one which the court held could not have been properly placed upon any other officer.

(6) South Dakota. Woods v. Sheldon, (1896) 9 S.Dak. 392, 69 N.W. 602 (jurisdiction consented to and so not discussed).

(7) West Virginia. Goff v. Wilson, (1889) 32 W.Va. 393, 9 S.E. 26, 3 L.R.A. 58.

(8) Wisconsin. Ekern v. McGovern, (1913) 154 Wis. 157, 142 N.W. 595, 46 L.R.A. (N.S.) 796. Note also Attorney General ex rel. Bashford v. Barstow, (1866) 4 Wis. 567.

[75]154 Wis. 157, 213-4.

[76]State ex rel. Irvine v. Brooks, (1905) 14 Wyo. 393, 414, 84 Pac. 488, 6 L.R.A. (N.S.) 750. Note also Greenwood Cemetery Land Co. v. Routt, (1892) 17 Colo. 156, at 166, 28 Pac. 1125, 15 L.R.A. 369, 31 A.S.R. 284; Ellingham v. Dye, (1912) 178 Ind. 336, 408, 99 N.E. 1; Martin v. Ingham, (1888) 38 Kan. 641, 656, 17 Pac. 162. "Whilst respect for a co-ordinate department of the state government suggests that it must be assumed the executive would promptly comply with the mandate of the courts, there would be no difficulty in finding appropriate and effective means to enforce obedience should occasion require it." McSherry, J., in Brown v. Bragunier, (1894) 79 Md. 234, 236, 29 Atl. 7.

force. In many states the governor may be ordered to perform duties of a ministerial character. Yet no instance is cited from such a state in which the governor has seen fit to use force against the court's decrees. The law has prevailed and the governors have shown a spirit of obedience to the law as judicially declared.

On the other hand, the disorder and confusion of recent years have occurred in states in which the governor is exempt from the writ. It may be merely a coincidence but Governors Small of Illinois, Walton of Oklahoma, and McCrae of Indiana are all representatives of states in which mandamus is denied against the chief executive. The theory and the facts do not agree.

This concludes our examination of the state law. It may be proper, however, before proceeding to the relation between the governor and the federal courts, to note the use of the teleological method. It is true that this view finds no direct recognition in the cases, but it properly may be considered here with a view to logical completeness. In fact, it is in just such situations as this that it may have its greatest value. The foregoing decisions on mandamus to the governor have shown the ineffectiveness of the theoretical method, the abstraction and confusion to which it leads.

Grant that the court proceeds by inexorable logic from the principle to the decision. It still remains an undeniable fact that in the selection of the principle and in its interpretation the court has had a great deal of latitude. Where it wishes to exempt the governor it has taken the theory of the separation of powers and interpreted it in such a way as to free the governor from judicial control. On the other hand, if it wishes to subject the governor to the writ, it has done so by starting from another principle, that of the supremacy of the law, or even by adopting the theory of the separation of powers, and interpreting it in a fashion of its own. The juristic reasoning by which the starting point was selected is not made known to us. The starting point is advanced as fundamental.

The teleological method would differ in this: that it would go consciously behind the principle to be applied. A legal theory or principle no longer would be regarded as something fundamental, a definitely assigned starting point from which the court must proceed by strict logic to an inevitable conclusion. Rather, the court would look beyond the principle to what it conceives to be the true end of the law; i. e., the securing of the greatest sum of legally protected interests. It would seek to recognize and to give

effect to the claims presented by the individual, society and the state. Where these interests conflict, it would weigh them and give effect to the greater. That principle would then be selected which would best protect these weightier interests. Thus the principle would cease to be an end in itself and would become but the means to an end, an end, however, even more fundamental in its character.

All this would be done in the open. What is now done under the theoretical method intuitively and often without a full comprehension of the interests involved would there be done with the court's attention directed openly to the claims presented. For example, in the case of mandamus to the governor the court would find that certain interests demanded the governor's subjection to the writ.

Primarily, these are individual.[77] To state them more exactly they are claims to personality and substance, that is, individual claims to liberty and the possession of property. If the governor is to be above the law, the liberty and property of the citizen may be endangered. The citizen claims the protection of the law. His claims find concrete recognition in the principle of legal supremacy.

These individual interests, however, are not the only ones demanding the subjection of the governor to the writ. The welfare of society as a whole also demands it. The supremacy of the law is needed to establish security of transactions and of acquisitions. The social structure in large measure rests upon the institutions of contract and property, upon the expectation that what a person has obligated himself to do he will do, and that what he has acquired under existing laws will remain his undisturbed. Where contracts and property are not respected social progress is hindered. The security of transactions and acquisitions can be guaranteed only by the supremacy of the law. With this principle in operation it will not be within the power of the governor to threaten such security.

Such are the interests which insist that the governor be subject to mandamus. Opposed to them are important public claims. These arise out of the conception of the state as a juristic person, possessed of personality, and subject like a natural person to a sense of indignity. It is felt that it is incompatible with the state's dignity to subject its chief executive to the operation of

[77]The classification from which these interests have been drawn is to be found in Pound's Outlines of Lectures on Jurisprudence, 3rd ed., pp. 79-88.

mandamus. Such an instinctive feeling finds expression in that class of cases which grants exemption to the governor. It is to be observed that where lesser executive officers are concerned the sense of indignity apparently is not as great, for most states which exempt the chief executive refuse to extend the principle to the lesser officers of the department.

The claim advanced by the state is reinforced by certain social interests. Society's interest in the general security already has been mentioned. Society as a whole has a great interest in the maintenance of peace and order. May this not be threatened by the possibility of conflict between the governor and the courts? If it may, that claim must be considered in a weighing of interests.

Such are the main interests involved in the question.

It would be the duty of the court to weigh these conflicting claims to determine which should prevail. In this evaluating process there could be no question as to the significance of those individual claims which demand the supremacy of the law. There is a greater difficulty in giving a proper valuation to these public claims which demand the governor's exemption.

In this connection, is it not possible that we have been inclined to exaggerate somewhat the dignity of the state? In early times it admittedly was of more consequence; in those remote days when the central government of England was weak and struggling with powerful nobles. Today the situation is quite otherwise. The state is secure, and assaults are aimed at the existing laws rather than the government or the state itself.

In weighing these claims there is, of course, much room for difference of opinion. As between the individual and public interests just considered, it is the writer's opinion that a teleological view should give the greater weight to the individual claims. This would result in the supremacy of the law and the subjection of the governor to the writ.

It may be asked whether the interests of society in the general security would alter the case. We have seen that the interests of society in the security of transactions and acquisitions demands the supremacy of the law. On the other hand, the social interest in peace and order demands that the governor be exempted from the operation of the writ in order that conflict between the courts and the executive may be avoided. Here again, there is room for difference of opinion. In view, however, of the absence of conflict as shown by the actual facts of the situation, this claim too

may be discounted and at best gain equal weight with the contrary social claims.

The result of a weighing of all would be then the supremacy of the law. The governor would thus be subject to mandamus as to all ministerial acts.

In connection with the teleological method it may be noted that it serves as a guide for legislative action as well as judicial. It is true that the court in a sense legislates in the applicatoin of this method. But it does so only within a limited sphere. Under our system it is for the legislature to determine the broad grounds of public policy. How may the legislature by a weighing of interests aid in the problem we are considering? The answer is obvious. The legislature may aid by placing the purely routine duties upon the lesser executive officers, reserving to the governor only such duties as are of a broad discretionary nature. We already have observed that the state's dignity does not suffer noticeably when the lesser officers are made subject to mandamus. Hence such an allotment of duties safeguards adequately the public interest in the dignity of the state. At the same time, by placing the officer beneath the law, the individual and social interests are fully protected. In such fashion the claims of the individual, society, and the state would receive their fullest recognition.

Control of the Governor by the Federal Courts

We turn now to the relation between the governor and the federal courts, to see to what extent these courts may control the chief executive officer of the state. The cases in point are few and indecisive. The commentators likewise are of little aid. High declares that the governor is not subject to the writ from such a court;[78] Merrill declares as emphatically that the governor is.[79]

The former authority relies mainly on the case of *Kentucky v. Dennison.*[80] The state of Kentucky, in this controversy, sought a writ of mandamus directed to Dennison, governor of Ohio, to compel him to deliver up a fugitive from justice. Such delivery was required by act of Congress. The Supreme Court regarded the duty in this case to be "merely ministerial—that is, to cause the party to be arrested and delivered to the agent or authority of the state where the crime was committed."[81] But the Court

[78]High, Extraordinary Legal Remedies, 3rd ed., sec. 124.
[79]Merrill, Mandamus, sec. 98.
[80]Kentucky v. Dennison, (1860) 24 How. (U.S.) 66, 16 L.Ed. 717.
[81]Ibid. at 106.

denied the existence of any power to issue the writ to such an officer. The relation existing between federal and state governments was such that the statute was not mandatory but merely declaratory of the governor's moral duty to act. Chief Justice Taney, speaking for the court says:

"The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the constitution which arms the government of the United States with this power. Indeed, such a power would place every state under the domination and control of the general government, even in the administration of its internal concerns and reserved rights. And we think it clear, that the federal government, under the constitution, has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it, for if it possessed this power, it might overload the officer with duties which would fill up all his time and disable him from performing his obligations to the state, and might impose on him duties of a character incompatible with the rank and dignity to which he is elevated by the state."[82]

Congress may require the state executive to perform a certain act, but it does not follow that the governor can be coerced if he neglects its performance.

It might be thought that this opinion is colored by Taney's attitude toward state rights; and that with the great expansion of federal power since that day a change in viewpoint may be expected. Such, however, is not the case if the modern view is correctly represented in *Huidekoper v. Hadley.*[83] In this instance, a bondholder petitioned in the federal court for a mandamus directed to the members of the Missouri State Board of Equalization. This board was composed of the governor, state auditor, state treasurer, secretary of state, and attorney general. The bonds held by petitioner had been issued by Macon County to aid in railroad building. Payment could be made only by a tax levy of a certain per cent. To limit payment, the county assessed the property therein at a low rate, and the State Board of Equalization refused to equalize the property among the counties at its true value, notwithstanding statutory requirements of full valuation. The petitioner turned to the federal courts for relief. Relief was denied in the lower court, and an appeal was taken. In the circuit

[82]Ibid., at 107-8.

[83]Huidekoper v. Hadley, (1910) 177 Fed. 1, 100 C.C.A. 395, 40 L.R.A. (N.S.) 505 reversing 171 Fed. 118. Writ of certiorari dismissed per stipulation of counsel in 223 U.S. 735 (1911) 56 L.Ed. 635, 32 S.C.R. 529.

court of appeals the decision was reversed as to all members of the board except the governor.

It is evident that the court regards the duty in question as ministerial. It is said that the governor in serving on the board "is performing an executive duty in no other or different sense than when performing any ministerial act devolving upon him as chief executive of the state."[84] The court then shows that under the law of Missouri the governor is not subject to mandamus in either his discretionary or ministerial duties. Whether the Missouri law is binding on the court in such a case is not decided. But for the sake of harmony, and to avoid confusion, and because the Missouri view represents the great weight of authority, says the court, it will conform to that view and hold the governor to be exempt from mandamus in the case in hand.

Nor is the writ thought to be necessary in the case of the governor. This officer is sufficiently moved by his sense of duty.

"The reason why the governor can not be coerced by mandamus is that he needs no such coercion; he is conclusively presumed to be willing to perform all his executive duties. His constitutional obligation is to see that the laws of the state shall be faithfully executed and his oath of office requires him to support the constitution and demean himself faithfully in office."[85]

It is to be observed that the remaining members of the board were subjected to the writ. Apparently the sense of duty is not as strong in the case of lesser executive officers.

It should be noted in connection with this decision that the governor with one other member of the board had led the fight for full valuation but had been outvoted by a three to two vote. The court plainly was influenced by this. As it remarked, theory and practice in the case of the governor were in accord. Whether the presumption of executive fairness would be so conclusive where it did not accord with the facts is a question which the federal courts have yet to decide.

The federal cases, then, are indecisive on the question of whether the governor is subject to the jurisdiction of the federal courts in mandamus cases.[86] On the basis of the Missouri case,

[84]Ibid., at 11.
[85]Ibid., at 12.
[86]The rule is otherwise in the case of injunction. The federal courts have found no difficulty in enjoining the governor and other state executive officers in a proper case. See Davis v. Gray, (1872) 16 Wall. 203, 21 L.Ed. 477; Board of Liquidation v. McComb, (1875) 92 U.S. 531, 23 L.Ed. 623; Penneyer v. McConnaughy, (1890) 140 U.S. 1, 11 S.C.R. 699, 35 L.Ed. 363. In the third case, the governor and a commissioner of the general land office were enjoined; in the other cases the writ issued against the members of state board, among them the governor.

jurisdiction would be declined, at least with reference to the governors of those states in which by the state law the governor is exempt. The circumstances, however, under which that decision was rendered, detract considerably from its weight. It is quite probable that the decision would be of slight influence were the federal supreme court to be squarely presented with such a case. But what the development will be can not be foretold