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Administrative Law—Mandamus-A Discretionary Remedy

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reversal, but did not consider the dismissal on the merits because that issue had not been before the Appellate Division. The minority (2) dissented on the ground that the Appellate Division's reversal of the leave to apply *de novo* altered the effect of the dismissal by making it conclusive of the entire matter, which it had not been previously. Because of the change in the effect of the dismissal the minority felt that that issue was before them and that the case should have been remanded for a full hearing on the merits, which hearing had not been given on the original trial.

Both in New York and in other jurisdictions, it is clear that a party must raise an issue in an intermediate appellate court in order to preserve that issue for determination in a higher court.²⁴ On its face the minority's contention that the Appellate Division decision effected the dismissal on the merits and thus brought that issue before the Court of Appeals, is appealing. However, at the time of the Commission's appeal the petitioner could have foreseen the effects of a reversal on the question of reapplication. At that time by choosing not to appeal the dismissal on the merits, he waived his right to litigate the issue further. Such a result may seem unduly technical, but it is historically accepted and probably necessary to an orderly system of appellate review.

MANDAMUS—A DISCRETIONARY REMEDY

Mandamus is an extraordinary remedial device which is granted only after the exercise of sound judicial discretion.²⁵ Since it is a discretionary remedy, it is difficult to set out any definitive standard wherein its issuance is assured. However, there appear to be two circumstances that will cause the Court to deny the remedy: (1) first, where the order would cause disorder and confusion in public affairs;²⁶ (2) and second, where there is a more appropriate remedy available.²⁷

In *Ahern v. Board of Supervisors*,²⁸ the Board of Supervisors of Suffolk County appointed a Democratic Election Commissioner without the appointee having been recommended by the Chairman of the Democratic Committee as required by Subdivision 2 of Section 52 of the Election Law.²⁹ The Chairman

24. *Stack v. Nat'l City Bank*, 278 N.Y. 388, 394, 16 N.E.2d 376, 378 (1938); *In re 43d Ave.*, 282 N.Y. 42, 47, 24 N.E.2d 841, 842 (1939); *In re Segall's Will*, 287 N.Y. 52, 60, 38 N.E.2d 126, 130 (1941); *Bank of Ariz. v. Thomas Heavy Co.*, 232 U.S. 106, 110 (1913); *Automobile Supply Co. v. Scene-in-Action Corp.*, 340 Ill. 196, 172 N.E. 35 (1930); *Stafford v. Stafford*, 299 Ill. 438, 132 N.E. 452 (1921); *Cline v. Niblo*, 117 Tex. 474, 8 S.W.2d 633 (1928).

25. *Andresen v. Rice*, 277 N.Y. 271, 14 N.E.2d 65 (1938); *Duncan Townsite Co. v. Lane*, 245 U.S. 308 (1917).

26. *Andresen v. Rice*, *supra* note 25.

27. *Walsh v. LaGuardia*, 269 N.Y. 437, 199 N.E. 652 (1936); *In re Gardner*, 68 N.Y. 467 (1877).

28. 6 N.Y.2d 376, 189 N.Y.S.2d 888 (1959).

29. N.Y. ELECTION LAW § 52(2) provides that:

At least five days before the first day of January in each odd numbered year . . . the respective chairman of the county committees of each of the two political parties . . . shall certify the name of a person who is recommended as a fit and proper person to be appointed a commissioner of elections.

would only recommend himself and the Board, acting within its discretionary limits, refused to accept him. Petitioner brought a mandamus-type proceeding³⁰ to revoke the Board's appointment and Special Term granted the order.³¹ The Appellate Division reversed,³² and the Court of Appeals affirmed (4-3).³³

The majority held that the Appellate Division had not abused its discretion in denying the writ. It agreed that issuance of the mandamus order could result in damage to the public interest in that it would cause a complete breakdown of the election machinery.³⁴ The dissent contended that this was not a real danger because the Democratic Chairman could be forced to submit a name other than his own, thereby, giving the Election Commission its required bi-partisan membership.

It appears that even if mandamus would be an appropriate remedy, some overriding factor may cause the Court to deny it.³⁵ This is true even where the order asked for is to prevent the derogation of a strict legal right.³⁶ This is a harsh rule and an appellate court should closely scrutinize the discretion to insure that it is not abused. In this case it seems that there was an abuse of discretion since the danger of public disorder did not appear to be well founded.

MANDAMUS TO REVIEW ELECTION PETITIONS

In *Mansfield v. Epstein*³⁷ the Court of Appeals held that two different procedures are available to review acts of the Commissioners of Elections where the acts complained of are ministerial and mandamus will lie. An order had been sought under Article 78 of the Civil Practice Act to compel the Ulster County Commissioners of Election to print appellants' names on the ballot for the forthcoming election. The petitions nominating the appellants had been rejected because the Commissioners were in disagreement as to their validity. The Supreme Court had considered the action as one under Section 330 of the Election Law,³⁸ which section gives the Supreme Court summary jurisdiction in election cases. This position of the Court, based on a decision that a mandamus order could not be directed to the Commissioners, was affirmed by the Appellate Division.³⁹

The Court of Appeals reversed this determination and held that the Com-

30. N.Y. CIV. PRAC. ACT art. 78.

31. 17 Misc. 2d 164, 184 N.Y.S.2d 894 (Sup. Ct. 1959).

32. 7 A.D.2d 538, 185 N.Y.S.2d 669 (1959).

33. *Supra* note 28.

34. Petitioner asserted, in an action brought to restrain the Board of Elections from functioning when there is only one commissioner in office, that the board has no right to perform any of its duties until a representative of the Democratic party is properly appointed. If petitioner is correct in its assertion, it would cause a disfranchisement of the voters of Suffolk County.

35. For a discussion of the problem, see 4 BUFFALO L. REV. 334 (1955).

36. See *Warehousemen's Ass'n of Port of New York v. Cosgrove*, 241 N.Y. 580, 150 N.E. 563 (1925) where the court held that the remedy of mandamus may be withheld where the enforcement of a strict legal right would work unnecessary hardship.

37. 5 N.Y.2d 70, 180 N.Y.S.2d 33 (1958).

38. N.Y. ELECTION LAW § 330.

39. *Mansfield v. Epstein*, 7 A.D.2d 612, 178 N.Y.S.2d 812 (3d Dep't 1958).