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**Remedies — Mandamus — Procedure Used to Omit
Former Deputy's Name on Ballot for Sheriff**

Ps, citizens of Lincoln County, West Virginia, sought an original writ of mandamus to compel *D*, board of ballot commissioners, to omit the name of *A*, a former deputy sheriff of Lincoln County, from the ballot in the general election. *Ps* contended that *A* was not eligible for sheriff. The West Virginia Constitution, art. IX § 3, forbids any person, who has served as deputy sheriff, from being the successor to the sheriff under whom he has served. *A* admitted the allegations of the petition, but answered that his resignation one year in advance of the expiration of the present sheriff's term rendered him eligible to be elected, and that this challenge of eligibility was premature. *Held*, writ awarded, ordering the omission of *A*'s name from the ballot. Where deputy sheriff resigned prior to the expiration of the regular term of sheriff, mandamus was a proper procedure to determine his eligibility and was not premature, although prior to the general election. The intent of the constitutional provision was applied to deny the former deputy sheriff eligibility. *State ex rel. Zickefoose v. West*, 116 S.E.2d 398 (W. Va. 1960). For a later decision with the same result, see *State ex rel. Duke v. O'Brien*, 117 S.E.2d 353 (W. Va. 1960).

Two problems are presented by the principal case. The first concerns the interpretation of the constitutional bar to consecutive terms by sheriffs. W. VA. CONST. art. IX, § 3.

The pivotal issue presented by the instant case concerns the procedure employed to enforce the constitutional provision, as interpreted. The West Virginia Constitution, art. VIII, § 3, grants the West Virginia Supreme Court of Appeals original jurisdiction in cases of mandamus. The West Virginia Code, ch. 3, art. 5, § 41 (Michie 1955), provides that persons (ballot commissioners) upon whom any duty is devolved, may be compelled to perform that duty by writ of mandamus. *Adams v. Londeree*, 139 W. Va. 748, 83 S.E.2d 127 (1954).

Mandamus is one of the principal methods used by courts to control administrative officers. Davis, *Mandamus to Review Administrative Action in West Virginia*, 60 W. VA. L. REV. 1 (1957). The historic view of mandamus is described in 34 AM. JUR. *Mandamus* § 62 (1941). "The writ creates no new authority or duty and cannot be invoked to enlarge or confer a power upon the respondent to act." The writ only issues to enforce existing duties

and will not be granted to compel performance where there is no legal duty to perform.

The legal duty to perform, concerning the board of ballot commissioners in the principal case, is to place the name of every candidate on the ballot. W. VA. CODE ch. 3, art. 5, § 3 (Michie 1955); *State ex rel. Schenerlein v. City of Wheeling*, 108 S.E.2d 788 (W. Va. 1959); *State ex rel. Harwood v. Tynes*, 137 W. Va. 52, 70 S.E.2d 24 (1952). The board of ballot commissioners may exercise no discretion concerning a nominee's eligibility. The result of the principal case is to allow mandamus to compel the board of ballot commissioners to omit the name of a candidate from the ballot. The historic (technical) view and that of the dissenters in the instant case draw a line of distinction at this point and follow the comparison between mandamus and injunction in 43 C.J.S. *Injunction* § 9 (1945): "Also mandamus is a remedy to compel action while injunction is a remedy to prevent action . . . it is very generally held that mandamus is not the proper remedy where the relator does not ask that defendant be compelled to do an act, but demands on the contrary that he be forbidden to do certain acts, and that mandamus cannot be made to perform the office of an injunction."

The West Virginia Supreme Court of Appeals does not have original jurisdiction to issue an injunction. W. VA. CONST. art. VIII, § 3; *State ex rel. Duke v. O'Brien, supra*. The board of ballot commissioners cannot be compelled to omit a candidate's name by writ of prohibition. W. VA. CODE ch. 53, art. 1, § 1 (Michie 1955); *Wiseman v. Calvert*, 134 W. Va. 303, 59 S.E.2d 445 (1950).

The majority opinion relied heavily on the wording in *Adams v. Londeree, supra*: ". . . to hold that mandamus cannot be invoked in such cases . . . would have the effect of denying any remedy prior to the election. . . ." Conceding that a candidate is clearly ineligible to hold the office sought, which it appears even the dissenters in the principal case have done, the only problems remaining are: should the law change, and if so, how should the law change so as to avoid the election of an ineligible candidate?

It has been suggested that the scope of the writ of mandamus has been expanded in modern times, 60 W. VA. L. REV. 1, *supra*, and when there is a clear need for timely relief, and no question of substantive rights, mandamus should lie, although not within the

technical boundary of the right to issuance. In a strong dissenting opinion to the principal case, Judge Haymond attacks this as a "departure from the doctrine of stare decisis."

Although this is a case of first impression in West Virginia, there is a clear split of authority throughout the United States concerning the use of the writ to compel a negative act. Compare generally, *Brandon v. Adams*, 110 Cal. App. 2d 835, 243 P.2d 26 (1952) and *Smoker v. Bolin*, 85 Ariz. 171, 333 P.2d 977 (1958). For example, the majority opinion in the principal case refers the reader to 55 C.J.S. *Mandamus* § 142 (1948), in support of the majority position, to show the similar use of mandamus in other jurisdictions. However, even a part of the language of that publication illustrates the diversity of opinion: ". . . the writ will not lie to compel the striking out of a name . . . where it is the statutory ministerial duty of the official to include such name. . . ."

The conclusion to be drawn from the instant case is that the limitation on the use of the writ of mandamus, not to compel a negative act, has been broadened through judicial legislation.

James William Sarver

Rules of Civil Procedure — Interposing Counterclaim

— Effect on Venue and Jurisdiction

In an action for a declaratory judgment, *P*, a Michigan corporation, claimed it was the sole owner of certain patents. *D*, a resident of Canada, filed a counterclaim, which he thought was compulsory under FED. R. CIV. P. 13(a), with his answer. Later *D* filed a motion to dismiss for lack of personal jurisdiction over him, and lack of jurisdiction over the subject matter. The lower court, Holtzoff, J., held the counterclaim to be permissive under FED. R. Civ. P. 13(b). By asserting it, *D* actually invoked the jurisdiction of the court, thereby waiving any objection to service of process or jurisdiction of the person. However, the court on its own motion invoked the doctrine of *forum non conveniens*. *Held*, on appeal, that the doctrine of *forum non conveniens* was improperly applied. Whether the counterclaim is compulsory or permissive is immaterial, for in either case *D* was not compelled to pursue it unless properly served. FED. R. CIV. P. 12(b) permits challenging the jurisdiction of the person by a motion made prior to the filing of an answer or counter-