Supreme Court of the United States

ORIGINAL NO. 2. OCTOBER TERM, 1916.

COMMONWEALTH OF VIRGINIA, Complainant,

VS.

STATE OF WEST VIRGINIA, HONORABLE WELLS GOODYKOONTZ ET AL., Senators of the State of West Virginia, HONORABLE JOSEPH S. THURMOND ET AL., members of the House of Delegates of the State of West Virginia, Defendants.

WEST VIRGINIA'S BRIEF IN SUPPORT OF HER MOTION TO DISCHARGE THE RULE IN MANDAMUS HEREIN.

E. T. ENGLAND,
Attorney General of West Virginia.

JOHN H. HOLT,
Special Counsel for State of West Virginia.

March 5, 1917.

Supreme of Court the United States

ORIGINAL NO. 2. OCTOBER TERM, 1916.

COMMONWEALTH OF VIRGINIA, Complainant,

VS.

STATE OF WEST VIRGINIA, HONORABLE WELLS GOODYKOONTZ ET AL., Senators of the State of West Virginia, HONORABLE JOSEPH S. THURMOND ET AL., members of the House of Delegates of the State of West Virginia, Defendants.

WEST VIRGINIA'S BRIEF IN SUPPORT OF HER MOTION TO DISCHARGE THE RULE IN MANDAMUS HEREIN.

STATEMENT OF CASE.

On the 14th day of June, 1915, this Court, in the exercise of its original jurisdiction under Sec. 2 of Art. 3 of the Constitution, entered a judgment in favor of the Commonwealth of Virginia against the State of West Virginia for the sum of $12,393,929.50, with interest thereon from July 1, 1915, until paid at the rate of 5% per annum.

On June 5, 1916, the Commonwealth of Virginia, after notice given, moved for a writ of execution

upon said judgment; but the writ was denied, upon the ground that the application therefor was premature, in consequence of the fact that the Legislature of the State of West Virginia had not met since the rendition of the judgment, and it had had no opportunity to provide for the payment of the debt.

Commonwealth of Virginia v. State of West Virginia, 241 U. S., 531.

Subsequently, that is to say, upon the 10th day of January, 1917, the West Virginia Legislature convened in regular biennial session, and, while still in session, and before the adjournment thereof, the Commonwealth of Virginia applied for and obtained leave to file a petition for a writ of mandamus against the State of West Virginia and the individual members of both branches of her Legislature, commanding the Legislature of said State to provide for the payment of said judgment by a levy of taxes or through the medium of a bond issue.

The petition was received, and, on the 5th of February, 1917, a rule in mandamus was issued, commanding the Honorable Wells Goodykoontz, President of the West Virginia Senate, and the other members of that body, as well as the Honorable Joseph S. Thurmond, Speaker of the House of Delegates of the State of West Virginia, and the other members of that House, to show cause before this Court on the 6th day of March, 1917, "why a writ of mandamus should not issue against them as prayed in said petition".

The rule was served upon the individual members of the Legislature upon the 23rd day of February, 1917, and, by a joint resolution on that day

passed, the Attorney General of the State and special counsel were authorized and directed to appear and make appropriate defense against said rule for and on behalf of the State of West Virginia, the Legislature thereof and the several Senators and Delegates constituting the membership of said Legislature.

Upon the return day of the rule, and pursuant to the resolution aforesaid, the Attorney General of the State and special counsel retained for the purpose appeared on behalf of the respondents, and filed a motion to discharge the rule.

GROUNDS OF THE MOTION TO DISCHARGE.

The grounds of the motion to discharge are assigned as follows:

1. A writ of mandamus from the Supreme Court of the Nation coercing the legislative department of a State, and compelling it to enact a revenue law, or to lay a tax for State purposes, would infringe upon the constitutional rights of the States expressly reserved unto them by the Tenth Amendment to the Federal Constitution.

2. The constitutional grant of jurisdiction to hear and determine controversies between States does not include, as an incident to such jurisdiction, the power to enforce a judgment, rendered in the exercise thereof, by a writ of mandamus addressed to a State Legislature, coercing and controlling it in the exercise of its legislative functions.

3. Such a writ for such a purpose would be contrary to the principles and usages of law, and does not fall within the category of final writs against a State.

4. It is not the office of a writ of execution, nor can it be of any writ used as a substitute therefor, to create property, by legislation or otherwise, for the satisfaction of a debt, but only to seize and subject property already in existence for that purpose.

5. Sec. 8 of Art. 8 of the West Virginia Constitution of 1863 imposed no ministerial duties upon the Legislature of the State, but only judicial and legislative duties.

6. Mandamus is a discretionary writ, and to issue it in this case would give an undue advantage to the relator, and operate unjustly against the respondents.

ARGUMENT.

1. *A writ of mandamus from the Supreme Court of the Nation coercing the legislative department of a State, and compelling it to enact a revenue law, or to lay a tax for State purposes, would infringe upon the constitutional rights of the States expressly reserved unto them by the Tenth Amendment to the Federal Constitution.*

That Amendment reads:

> "10. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

The power of laying taxes for State purposes has not been "delegated to the United States by the Constitution, nor prohibited by it to the States", and, in

consequence, this power has been "reserved to the States". It was never contemplated that the States would lay levies for national purposes, or that the Federal Government would lay them for State purposes. On the contrary, we have, under the Constitution, two distinct powers of taxation, the one for federal, and the other for State purposes; and it is exercised, in the one case, exclusively by the federal government, and, in the other, by the State. Neither may encroach upon the other, but each must turn upon its own separate axis, and revolve in its particular orbit. Otherwise, there would be an irreconcilable conflict between an indestructible Union, upon the one hand, and equally indestructible States, upon the other. It is true that one State may not destroy the Union, but it is equally true that the Union may not destroy one State. In addition to this, the power of taxation in each government is lodged in the legislative department thereof, and may not be exercised by the judicial department of either government, or in any case.

What, then, is the character and the purpose of the particular tax that it would be sought to levy by the writ of mandamus prayed? Clearly it is a State tax, to be devoted exclusively to a State purpose; that is to say, to the payment of a State debt, and is such a tax as may be authorized, in consequence of the Tenth amendment, only by the State government. It involves one of the expressly reserved sovereignties of the State, and this express reservation may not be overturned by an antecedent implication that the power to decide necessarily embraces the power to execute. The conclusion, therefore, would seem to be irresistible that the Federal Government cannot,

through its judicial or any other department, coerce a State in the exercise of its reserved powers by compelling the legislature thereof to exercise such powers contrary to its discretion, and in opposition to its will. The existence and exercise of such a power would overturn the Tenth Amendment, and make serious inroads upon the fundamental rights of the States. In other words, the provision contained in Sec. 2 of Article III, of the Constitution, giving the Supreme Court original jurisdiction "in all cases * * * in which a State shall be a party", if it should have added to it, by inference or argument, and as an incident to such jurisdiction, the power to enforce a judgment rendered in any such case through the medium of a writ of mandamus controlling the legislative action of a State in respect to its reserved powers, would render the subsequently adopted Tenth Amendment abortive.

In the case of South Dakota v. North Carolina, 192 U. S., 286 (48 L. ed., 448), Mr. Justice Brewer, in delivering the majority opinion of the Court, speaks of "the absolute inability of a court to compel a levy of taxes by the legislature"; and the foregoing conclusion is further strengthened by the opinions of this Court, speaking through Mr. Justice Miller, in the cases of Heine v. Board of Levee Comrs., 19 Wall., 655, and Rees v. Watertown, 19 Wall., 107. In the first case, he makes use of the following language:

> "The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, state or national. In

the case before us, the national sovereignty has nothing to do with it. The power must be derived from the legislature of the State. So far as the present case is concerned, the State has delegated the power to the Levee Commissioners. If that body has ceased to exist, the remedy is in the legislature either to assess the tax by special statute, or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any federal court. It is unreasonable to suppose that the legislature would ever select a federal court for that purpose. It is not only not one of the inherent powers of the Court to levy and collect taxes, but it is an invasion by the judiciary of the Federal Government of the legislative functions of the State government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee."

And, in the second, he says:

"We are of the opinion that this Court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only, and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important."

To like effect is the case of Meriwether v. Garrett, 102 U. S., 472, decided by this Court in 1880, wherein Mr. Justice Field, in delivering a concurring opinion for himself, Mr. Justice Miller and Mr. Justice Bradley, made use of the following language:

> "The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the Legislature upon considerations of policy, necessity and the public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government throughout the State and in all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced.
>
> It is the province of the Courts to decide causes between parties, and, in so doing, to construe the Constitution and the Statutes of the United States and of the several States, and to declare the law, and, when their judgments are rendered, to enforce them by such remedies as legislation has prescribed, or as are allowed by the established practice. When they go beyond this, they go outside of their legitimate domain, and encroach upon the other departments of the government; and all will admit that a strict confinement of each department

within its own proper sphere was designed by the founders of our government, and is essential to its successful administration."

Page 515.

Continuing, he further says:

"These authorities, and many others to the same purport might be cited, are sufficient to support what we have said, that the power to levy taxes is one which belongs exclusively to the legislative department, and from that it necessarily follows that the regulation and control of all the agencies by which taxes are collected must belong to it.

When creditors are unable to obtain payment of their judgments against municipal bodies by execution, they can proceed by mandamus against the municipal authorities to compel them to levy the necessary tax for that purpose, if such authorities are clothed by the Legislature with the taxing power, and such tax, when collected, cannot be diverted to other uses; but if those authorities possess no such power, or their offices have been obolished and the power withdrawn, the remedy of the creditors is by an appeal to the Legislature, which alone can give them relief. No Federal Court, either on its law or equity side, has any inherent jurisdiction to lay a tax for any purpose, or to enforce a tax already levied, except through the agencies provided by law. However urgent the appeal of creditors and the apparent hopelessness of their position without the aid of the Federal Court, it cannot seize the power which belongs to the leg-

islative department of the State and wield it in their behalf."

Pages 517 & 518.

The reasoning of this Court in *ex parte* Kentucky v. Dennison, 24 How., 66; 16 L.ed., 717, is analogous. There paragraph two of Sec. 2 of Art. IV. of the Federal Constitution, requiring the executive authority of one State to deliver up on demand fugitives from justice, and the Act of Congress of 1793, providing the regulations necessary to the execution of such constitutional provision, were construed, and the extent of their force defined. One Willis Lago, indicted in the State of Kentucky for a crime under the laws of that State, fled into the State of Ohio, and a requisition issued by the Governor of Kentucky, under the constitutional provision and Act of Congress aforesaid, upon the Governor of Ohio for his return was denied. Thereupon, the State of Kentucky instituted a mandamus proceeding in the Supreme Court of the United States against the Governor of Ohio, asking that the latter be compelled to obey the requisition; and, although this Court assumed jurisdiction, and held that mandamus was the proper proceeding, if there were any remedy at all applicable to the controversy, it denied the writ, upon the ground that the constitutional provision and the Act of Congress aforesaid only appealed to the moral duty and fidelity of the States, and did 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"; and Mr. Chief Justice Taney, who delivered the opinion of the Court, concluded the same with the following language:

> "And it would seem that when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union. Hence the use of the words ordinarily employed when an undoubted obligation is required to be performed, 'it shall be his duty'.
>
> But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the judicial department or any other department, to use any coercive means to compel him.
>
> And upon this ground the motion for the mandamus must be overruled."

See also Carter v. State, 42 La. Ann., 927; 21 Am. St. Rep. 404.

2. *The constitutional grant of jurisdiction to hear and determine controversies between States does not include, as an incident to such jurisdiction, the power to enforce a judgment, rendered in the exercise thereof, by a writ of mandamus addressed to a State Legislature, coercing and controlling it in the exercise of its legislative functions.*

Jurisdiction to hear and determine may, and does ordinarily, include the power to enforce (or rather the power to issue proper writs for the enforcement of a judgment); but mandamus cannot, under the Constitution, become a substitute for a writ of execution upon a judgment against a State. Execution may be issued upon a judgment regularly rendered against a State, and be levied upon any property owned by the State, and not devoted to political or governmental purposes, and, if no such property be found, the writ must be returned *nulla bona*, and the end of the law has been reached, because, as we have seen, the legislative department of a State may not be coerced, under the Constitution; and there is nothing remarkable in this situation, because frequently judgments are rendered and executions issued thereon which are returned *nulla bona*, and all legal remedies thereby exhausted. The Courts can only give suitors the proper process, original and final, and, if these fail to satisfy the creditor's claim, there is no fault in the judiciary. In other words, jurisdiction does not include or imply the collection or satisfaction of a debt, but only means the power to hear and determine, and to render judgment therefor and issue proper process thereon.

The cases cited by counsel for Virginia at page three of their brief (Supervisors v. U. S. etc.) are beside the question, do not meet the situation, and throw no light whatever upon it. We will notice each briefly.

In the case of Supervisors v. U. S., 4 Wall., 435; 18 L.ed., 419, the County of Rock Island, in the State of Illinois, pursuant to the authority of the Legisla-

ture of that State, subscribed for stock in the Warsaw & Rockford R. R. Co., and issued and negotiated in payment thereof certain coupon bonds of the County. The earlier coupons were paid, but the County finally defaulted. Thereupon, the holder of the bonds instituted an action in the Circuit Court of the United States for the Northern District of Illinois upon the overdue and unpaid coupons, and recovered a judgment for $2,554.60 and costs The County failed and declined to pay this judgment, and mandamus was resorted to by the judgment creditor to compel the County Supervisors, under the Illinois statute, to levy a tax for its satisfaction. The Circuit Court in regular course awarded a peremptory writ of mandamus, and to this judgment the County Supervisors prosecuted a writ of error to the Supreme Court. The contention here was that the Act of the Legislature of the State of Illinois of February 16, 1863, authorizing the Board of Supervisors in such Counties as might owe debts which their current revenue was insufficient to meet to levy a tax for the purpose of liquidating such indebtedness, conferred only a discretionary power upon the Supervisors, which could not be controlled by mandamus; but this Court held that the statute was mandatory, and, in consequence, affirmed the judgment in mandamus of the Court below. In other words, the State was not a party, and the writ was not directed to the Legislature thereof. Indeed, the Legislature had already acted. It had authorized the issuance of the bonds and the levy of a tax for their payment, and had appointed the County Supervisors as its agents for the execution of its mandates.

Under such circumstances, there was no invasion of sovereignty, or coercion of legislative action. On the contrary, it was the enforcement of ministerial acts already authorized and directed by legislative authority.

Von Hoffman v. City of Quincy, 4 Wall., 535; 18 L.ed., 403, simply presents a case where a municipality, under the authority of the legislature, issued bonds, with the power of local taxation necessary to pay the same, and, after the indebtedness had been so incurred, the legislature, by subsequent action, undertook to repeal its former law, thereby impairing the obligation of a contract, which it was held it could not do under the Constitution, and mandamus went to its county agents compelling them to levy the necessary tax to pay the bonds issued under the original law.

The City of Galena v. Am, 5 Wall., 705; 18 L.ed., 560, practically decides both questions involved in the two preceding cases, viz., that an Act authorizing a municipality to levy an annual tax to be paid on its debt is imperative, and that bonds once issued under the authority and direction of a legislative enactment may not be impaired by a subsequent repeal of that Act. Here again, as before, the Legislature had acted, and had named the agents for the execution of what it had authorized, and these agents were subject to mandamus compelling them to perform their imperative ministerial duties.

Riggs v. Johnson County, 6 Wall., 166; 18 L.ed., 768, was likewise an application to the Circuit Court of the United States for a mandamus to compel the supervisors of Johnson County, Iowa, to levy a tax

for the payment of a judgment rendered by the Circuit Court against said County on account of overdue and unpaid interest on certain of its bonds theretofore issued in aid of railroad construction under certain Acts of the State Legislature, which mandamus was refused by the Circuit Court; but its judgment was reversed upon writ of error by this Court, and the writ directed. The same principles were applied as in the preceding cases, and there was nothing new for consideratiton, except the County made return to the alternative writ that it had been enjoined by the State Court from levying the tax in question, and would be in contempt if it were to do so under mandate from the Federal Court. This was held to be no defense. Again the State was not a party, and its Legislature was neither requested nor compelled to do anything. It had already acted, and the judgment of this Court simply operated upon the State's agents, and required them to perform certain mandatory duties previously laid upon them by legislative action. Walkley v. City of Muscatine, 6 Wall., 481; 18 L.ed., 930, simply holds that in cases like the above, and after a return of *nulla bona*, a bill in equity will not lie to compel the levying of a tax for the payment of a judgment, but that mandamus is the proper remedy. The decision has nothing to do with the present controversy.

Labette County Comrs. v. Moulton, 112 U. S., 217; 28 L. ed., 698, is to the same effect.

3. *Such a writ for such a purpose would be contrary to the principles and usages of law, and does not fall within the category of final writs against a State.*

At common law, Parliament never was, and could not be, coerced by the writ of mandamus.

People v. Morton, 156 N. Y., 136.

And, in this country, the same principles and usages have always obtained.

Ex parte Echols, 39 Ala., 698.
State v. Bolte, 151 Mo., 362.

Certainly such is true with respect to the mandamus of State Legislatures by State Courts, and there is no case on record where this Court has ever addressed a writ of this character to the law-making power of a State.

4. *It is not the office of a writ of execution, nor can it be of any writ used as a substitute therefor, to create property, by legislation or otherwise, for the satisfaction of a debt, but only to seize and subject property already in existence for that purpose.*

We are not unmindful of the dangers and difficulties of analogy; but, if this were the case of an individual judgment debtor, it is plain that, after a writ of excution had gone against him and been returned *nulla bona*, and after it had been ascertained, in addition thereto, that he had no real estate out of which to satisfy the judgment, although he might have great earning capacity, no one would contend that the exercise thereof might be compelled by the

writ of mandamus. He might be able to sing or dance, and even be bound by contract to do both, and yet he would not be compelled to do either.

Lumley v. Wagner, 1 De G., M. & G., 604.

It may be answered that a fund was created by mandamus for the payment of a debt in the case of Supervisors v. U. S., 4 Wall., 435, *supra*, and like cases hereinbefore reviewed; but it will be observed that in each of those cases all necessary legislative action had theretofore been had, and the proper ministerial agents appointed for the effectuation thereof; so that nothing was left to be done except to have resort either to the State or Federal Courts (for both had jurisdiction in the cases referred to) for a writ of mandamus to compel the performance of a purely ministerial act; made mandatory by the act of the only branch of government having any discretion in the premises.

5. *Sec. 8 of Art. 8 of the West Virginia Constitution of 1863 imposed no ministerial duties upon the Legislature of the State, but only judicial and legislative duties.*

This constitutional provision reads as follows:

> "8. An equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, in the year one thousand, eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same

> as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

And the contention of Virginia is that, by reason of these terms, "the Legislature of West Virginia is under an express constitutional obligation to provide for the payment of the amount ascertained by the Court to be due by West Virginia * * * ," and that "it is clearly within the power of the Court to compel the Legislature of West Virginia, in conformity with this constitutional requirement, to make provision for the payment of the decree and judgment, which represent the ascertained equitable proportion of the Virginia debt assumed by West Virginia" (brief of counsel for relator, pages 7 & 8).

But it would seem that that portion of the constitutional provision declaring that "the Legislature shall ascertain the same" (the equitable proportion of the debt to be paid) "as soon as may be practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years" is no part of the contract. Otherwise, this Court would have had no jurisdiction to ascertain West Virginia's equitable proportion of the debt, because, if effect were given to the portion of the constitutional provision relied upon, the West Virginia Legislature would have had the exclusive right to ascertain such amount; but this Court has held otherwise. It says in the case of Virginia v. West Vir-

ginia, 220 U. S., page 1, that —

> "The provision in the Constitution of the State of West Virginia that the Legislature shall ascertain the proportion as soon as may be practicable was not intended to undo the contract in the preceding words by making the representative and mouth-piece of one of the parties the sole tribunal for its enforcement. It was simply an exhortation and command from supreme to subordinate authority to perform the promise as soon as might be, and an indication of the way."

Certain it is that one-half of the constitutional provision last quoted has been stricken from the contract, and the power to ascertain the amount taken out of the hands of the Legislature and assumed by the Court, and that too for the reason that, "apart from the language used, what is just and equitable is a judicial question similar to many that arise in private litigation, and in no wise beyond the competence of a tribunal to decide." And, if that be true, the residue of the provision, even if it should be permitted to stand and be given full force, would be left as a legislative function, over which the judiciary would have no control.

We come right back, therefore, to the question whether or not this Court can or will interfere by mandamus to coerce the action of a State Legislature in the performance of purely legislative functions within its exclusive jurisdiction, and this, it is submitted, this Court will not do, for the same reason, among others, that it refused in the case of

Louisiana v. Jumel, 107 U. S., 711; 27 L. ed., 448, to oust the political power of the State of Louisiana of its jurisdiction, and set the judiciary in its place; and it is no answer to say that the present case is distinguishable from that of United States v. Jumel, in that there the State made no appearance, while West Virginia has here appeared and submitted herself to the jurisdiction; because wherever jurisdiction is conferred and process is regularly issued and served, as in this case, it makes no difference whether the defendant appears or not, because the defendant is before the Court anyhow, and a judgment by default could be rendered, which would be just as binding as one upon appearance. The appearance, in other words, has nothing to do in the case of a State by way of giving consent to be sued, because that consent was given long ago by the adoption of the Federal Constitution in 1789.

It should be further observed in this connection and as bearing upon the constitutional provision referred to, that the petition prays for a mandamus commanding "the Legislature to assess and levy a tax upon the property within the State of West Virginia sufficient to provide for the payment of said judgment * * * * unless the Legislature shall * * * make provision for the payment of said judgment by a duly authorized issue of bonds, the proceeds of which shall be sufficient to pay said judgment in full in cash." This not only illustrates but actually invokes, the discretion of the Legislature, and does not at that embody all of its discretionary power when measured by the constitutional provision invoked. The Legislature could perhaps,

under the State Constitution, either (1) lay a tax upon all property, real and personal, within the State, to be collected at once, sufficient to pay the judgment, or (2) it might, under that Constitution, distribute the tax over a period of years, or (3) it might resort to a bond issue, which would be governed either by Sec. 8 of Art. 8 of the Constitution of 1863, or by Sec. 4 of Art. 10 of the present Constitution, which reads as follows:

> "No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years."

If under the former, a sinking fund would have to be provided "sufficient to pay the accruing interest and redeem the principal within thirty-four years"; that is to say, the period of payment might be short or long, either one year or thirty-four, within the discretion of the Legislature. And if under the latter, payment would have to be "equally distributed over a period of at least twenty years"; that is to say, the annual contributions to the sinking fund would have to be equal for a period of twenty years or more, again at the discretion of the Legislature.

In any event, the wide discretion of the Legislature is illustrated; and it should be further borne in

mind that that body is composed of two Houses, one of which might deem its discretionary duty to lie in one direction, and the other in another direction, and yet the two must concur in order to lay a levy or issue bonds.

If these things be true, the discretion of the Legislature becomes apparent, and that discretion will not be controlled by mandamus.

6. *Mandamus is a discretionary writ, and to issue it in this case would give an undue advantage to the relator, and operate unjustly against the respondents.*

While the writ of mandamus is no longer prerogative, yet it is highly extraordinary, and its issuance is at the sound discretion of the Court.

Re Key, 189 U. S., 85.
Life & Fire Ins. Co. of N. Y. v. Wilson, 8 Peters, 291; 8 L. ed., 949.
State v. Buchanan, 24 W. Va., 362.
State v. Melton, 62 W. Va., 253.
Cyc., Vol. 26, pages 143-6.

The matter set up in the return of the respondents relative to the cession of the northwest territory is an appeal to this Court to exercise its discretion against the issuance of the writ herein, under all the circumstances.

Respectfully submitted,

E. T. ENGLAND,
Attorney General of West Virginia.

JOHN H. HOLT,
Special Counsel for State of West Virginia.