JUDICIAL CONSTRUCTION OF THE WRIT OF MANDAMUS

Notes by Robert E. Freer

INTERSTATE COMMERCE COMMISSION v. UNITED STATES, EX REL WASTE MERCHANTS ASSOCIATION OF NEW YORK, 260 U.S. 32.

Complaint was filed with the Interstate Commerce Commission by the Waste Merchants Association of New York against the Director General of Railroads and 184 transportation companies, alleging that existing tariffs on paper stock shipped in carload lots from New York Harbor imposed upon carriers the duty of loading cars, that carriers had failed in that duty, and that members of complainant were obliged to perform that service at their expense. Prayer was for payment by way of reparation of allowances for the loading service under Sec. 15 of the Act, other damages for violation of the law, and that carriers be required to observe the law in the future. Hearings were had and the Commission issued a report of its findings of fact and conclusions, and issued an order dismissing the complaint, 57 I.C.C. 686, on the ground that the rates were not unreasonable, unjustly discriminatory, or unduly prejudicial in violation of the Interstate Commerce or Federal Control Acts and there was no obligation on the part of carriers to make an allowance to complainant's members for the loading service. Motion for rehearing based on alleged errors in conclusions of law and fact and newly discovered evidence was denied by the Commission.

Petition for mandamus was filed in the Supreme Court of the District of Columbia by the Association and a rule to show cause issued. Jurisdiction of that Court was questioned and the case was heard on petition, answer, and demurrer to answer. Petition was dismissed on the ground that relators having participated in and received benefits from the alleged violations, could not be heard to complain. 50 M.L.R. 3.

Appeal was taken to the Court of Appeals of the District of Columbia where the judgment was reversed and cause remanded with directions to issue the writ upon the ground that the Commission's conclusion of law was contrary to its findings of fact. 277 Fed. 538.

On writ of error to the Supreme Court of the United States, Mr. Justice Brandeis, in 260 U.S. 32, said at p. 35:

"Petitioners sought in the proceeding to set aside the adverse decision of the Commission on the merits and to compel a decision in their

favor. The Court of Appeals granted the writ. This was error. Mandamus cannot be had to compel a particular exercise of judgment or discretion, Riverside Oil Company v. Hitchcock, 190 U.S. 316; Ness v. Fisher, 223 U.S. 683; Hall v. Payne, 254 U.S. 343; or be used as a writ of error. Commissioner of Patents v. Whiteley, 4 Wall. 522. The case at bar is not like Interstate Commerce Commission v. Humboldt S. C. Co., 224 U.S. 474, and Louisville Cement Co. v. Interstate Commerce Commission, 246 U.S. 638, where the Commission had wrongly held that it did not have jurisdiction to adjudicate the controversy; nor is it like Kansas City Southern Ry. Co. v. Interstate Commerce Commission, 252 U.S. 178, where the Commission wrongly refused to perform a specific peremptory duty prescribed by Congress."

(Point 1.)

WILBUR v. UNITED STATES OF AMERICA, EX REL KADRIE, 74 L. ED. 433.

In this case a decision was rendered in 1919 by the Secretary of Interior, upon advice by the Solicitor, to the effect that certain Indians should be placed on rolls and receive sums under an Act of Congress. Later, in 1927, the succeeding Secretary of the Interior, upon advice of a succeeding Solicitor, held that the Indians were not entitled to share in the funds and directed that no further payments be made to them.

Petition for mandamus was filed in the Supreme Court of the District of Columbia to compel the Secretary of the Interior to restore the names of the Indians on the rolls and make payments to them when allotments were made of the funds in the Treasury. The writ was denied.

An appeal was taken to the Court of Appeals of the District of Columbia where the judgment of the Supreme Court of the District of Columbia was reversed and the cause demanded for further proceedings not inconsistent with the opinion 30 Fed. (2d) 989, where case was against West, then Secretary of Interior.

On writ of certiorari to the Supreme Court of the United States, that Court, speaking through Mr. Justice Van Devanter, in 74 L. ed. 433, said, at pp. 439-440:

> "Mandamus is employed to compel the performance when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either."

(Point 2.)

UNITED STATES EX REL. KANSAS CITY SOUTHERN RY CO., ET AL v. INTERSTATE COMMERCE COMMISSION, 6 Fed. (2d) 692 (55 App. D.C. 389).

Pursuant to the provisions of Section 19a of the Interstate Commerce Act, the Interstate Commerce Commission undertook to investigate, ascertain and report the value of the property owned and used by the Kansas City Southern Railway Company and others comprising the so-called Kansas City Southern System. The Commission to that end issued tentative valuations to which protests were filed. Hearings were held and the case was submitted on briefs and arguments and a report and order was filed by the Commission. 75 I.C.C. 223. Thereafter carrier filed a motion for a rehearing. A supplemental tentative valuation was issued by the Commission and the carrier moved to amend the same. Arguments were heard upon the motions and evidence was taken upon the protests filed to the supplemental tentative valuation. The Commission issued a second report and order in 84 I.C.C. 113.

Because they claimed that the Commission had failed in certain respects to carry out the mandate of the Valuation Act, the carriers prayed for a writ of mandamus in the Supreme Court of the District of Columbia directing and requiring the Commission (a) to investigate, ascertain and report the true economic value of the property, (b) to state an analysis of the methods employed in arriving at a single sum value, (c) to ascertain and report separately other values and elements of value inhering in said properties, (d) to ascertain and report the original cost to date of each piece of property owned or used by carriers as such, and (e) to ascertain and report the original cost to date, cost of reproduction new, cost of reproduction less depreciation, and value of carriers' rights in certain terminal properties, a grain elevator and certain other railroads. Upon the Commission's motion the petition was dismissed. 53 W.L.R. 536.

An appeal was taken to the Court of Appeals to the District of Columbia where that Court, speaking through Chief Justice Martin, said: (6 Fed. (2d) 692, 694)

> "The reports of the Commission are brought by reference into the record. They disclose that each of these objections, including the reference to properties alleged to have been

> omitted, was presented to the Commission by the appellants, and was fully investigated, considered, and passed upon by it. * * * * * it is manifest that the Commission fully assumed and exercised the authority or jurisdiction imposed upon it by the Act, and that the real complaint of the appellants is, not that the Commission refused to consider the points in question, but that it considered them and thereupon decided them erroneously. The real relief sought by the appellants, accordingly, is that the valuation reported by the Commission be set aside, and other valuations ordered. This clearly brings the case within the well established rule that the action of mandamus cannot be used as a substitute for an appeal, nor as a writ of error. The petition of the appellants in effect calls for such a review of the proceedings of the Commission, in violation of the rule just stated. It was rightly dismissed."

An application for a writ of certiorari was denied by the Supreme Court of the United States in 269 U.S. 570.

(Point 2.)

UNITED STATES EX REL. KNICKERBOCKER INS. CO. OF NEW YORK v. MELLON, 41 Fed. (2d) 119 (59 App. D.C. 325).

An unincorporated association during the World War was formed to insure hulls and cargoes, and paid claims covered by policies; association later became a stock insurance corporation which merged with the Knickerbocker Ins. Co. of New York; the latter company presented claim to Mixed Claims Commission on account of losses suffered by the unincorporated association and award was made.

Certain members of the association existing prior to its incorporation filed bill in equity in the Supreme Court of the District of Columbia against the Secretaries of State and Treasury, the Treasurer of the United States, and the Insurance Company, praying that Secretary of State be enjoined in certifying the award to the Secretary of the Treasury and that payment of award be enjoined; also that a receiver be appointed and the fund distributed according to the rights of the parties. Insurance Company moved to quash on grounds it was a foreign corporation not doing business in the District of Columbia, motion was overruled and an answer filed.

Another motion to dismiss was overruled and the cause referred to the Auditor to ascertain to whom funds awarded should be paid. That cause is pending.

Petition for mandamus was filed by the Insurance Company and plaintiffs in equity cause was not made parties. Answer recited that the equity court had assumed jurisdiction and that plaintiffs in that cause were indispensable, to which petitioner demurred; demurrer was overruled and petition dismissed.

On appeal to the Court of Appeals of the District of Columbia that Court, speaking through Mr. Justice Robb, in 41 Fed. (2d) 119, at p. 120, said:

> "The decision below was right. The equity court had assumed jurisdiction, and appellant's remedy, if any, is by way of appeal from the decision of that Court. It is settled law that mandamus will not serve the purpose of an appeal or writ of error." (Citing cases)

(Point 3.)

DONNER STEEL CO., INC. v. INTERSTATE COMMERCE COMMISSION, 285 Fed. 955 (52 App. D.C. 221).

Donner Steel Company filed complaint with the Interstate Commerce Commission alleging violations of Sections 1, 2, and 3, of the Interstate Commerce Act to its damage, the alleged damage arising from failure of the carriers to spot cars for appellants, which service was rendered to others. The Commission held hearings and issued a report and order denying reparation but finding that Section 3 had been violated in that spotting cars for others while refusing to spot them for complainant was unduly prejudicial to it. 57 I.C.C. 745.

Petition for mandamus or certiorari was filed in the Supreme Court of the District of Columbia to review the Commission's decision, but was dismissed. 51 W.L.R. 70.

An appeal was taken to the Court of Appeals of the District of Columbia, where, speaking through Mr. Justice Van Orsdel, that Court said in 285 Fed. 955, at pages 958-959:

> "While it is difficult to understand just the theory upon which the Commission, in the light of its former decisions, reached the conclusion that appellant had not been damaged, yet the law reposes in it jurisdiction to pass upon issues of fact, and if evidence has been excluded that should have been admitted, or a wrong conclusion of fact has been reached and errors of law occur, it results from a mistaken judgment which can only be reviewed and corrected in a proceeding in error.
>
> "Appellant is here attempting to require the Interstate Commerce Commission to set aside its judgment and award damages upon the facts adduced. It is not contended that the Commission was without jurisdiction to hear the complaint and make the order complained of, or that its ruling is expressly inhibited by statute; but it is urged that the Commission after finding discrimination, committed an error of law in refusing to award damages to appellant. However inequitable and inconsistent the ruling, it cannot be corrected in this proceeding. It is

> too well settled to require discussion that the writ of mandamus cannot be converted into a writ of error, for the purpose of reviewing errors of law committed by a tribunal whose jurisdiction to make the order of judgment complained of is conceded."

Certiorari was denied by the Supreme Court of the United States in 270 U.S. 651.

(Point 3.)

BARTLESVILLE ZINC CO. v. INTERSTATE COMMERCE COMMISSION, 30 Fed. (2d) 479 (58 App. D.C. 316).

Complaint was filed with the Interstate Commerce Commission by the Zinc Co., against the Director General, as agent, for recovery of demurrage charges assessed against and paid by the Company, which it alleged were illegally assessed because of absence of written notice in violation of carrier's applicable demurrage tariff. Hearings were held by the Commission and arguments heard and the Commission issued its report and order dismissing the complaint on the ground that the charges were assessed substantially in compliance with the applicable tariff and were not unlawful. 74 I.C.C. 26.

The Zinc Company filed a petition for mandamus in the Supreme Court of the District of Columbia to compel the Commission to award reparation. The cause was submitted on the petition answer, and reply, and was dismissed.

An appeal was taken to the Court of Appeals of the District of Columbia where that Court, speaking through Mr. Chief Justice Martin in 30 Fed. (2d) 479, at p. 480, said:

> "We think this ruling of the lower court was right, for it is an established rule that the action of mandamus cannot be used as a substitute for an appeal nor as a writ of error, whereas the relief sought by the company in its petition was essentially of that character. For it is conceded that the Commission took jurisdiction of the Company's complaint, and, after hearing testimony and argument concerning the issue, considered and decided it upon the merits. The Commission accordingly fully exercised its jurisdiction, and its decision, whether correct or not, was regularly entered. It was therefore not erroneous for the lower court to refuse a writ of mandamus as sought by the company, for the writ if granted could have had no other effect than to review the decision which the Commission had reached upon its consideration of the facts and the law in controversy."

Certiorari was denied by the Supreme Court of the United States in 279 U.S. 856.

(Point 3.)

UNITED STATES, EX REL. REDFIELD v. WINDOM, 137 U.S. 636.

One Mitchell performed certain labors and furnished material for life-saving service; the Commissioner of Customs wrote to Mitchell stating that a certain sum was due him and that draft would be remitted. A draft was issued to Mitchell but delivered to the Capt. of Life-Saving Service with instructions to hold same until Mitchell should pay claims presented to Treasury Department against him for materials and labor. Redfield as assignee appointed by the Supreme Court of New York applied for mandamus in the Supreme Court of the District of Columbia, against the Secretary of the Treasury to compel payment of the draft which had been returned to the Secretary of the Treasury on the ground that claims were unjust but even if they were not the assignee had no right under assignment to pay them and could not pay them unless draft be delivered to him. Petition and rule were stipulated to be taken as alternative writ, demurrer was interposed and overruled and answer filed. Answer alleged that the full sum was not due to Mitchell as he had incurred penalties for delays in completing work which were waived, upon condition that Mitchell was to allow the disbursing officer to whom the draft was sent to pay the claims against him; Mitchell had failed to carry out his part of the agreement and that the government had a right to make deductions. The Court discharged the rule and denied the writ.

On writ of error to the Supreme Court of the United States, that Court, speaking through Mr. Justice Lamar, said in 137 U.S. 636, at page 644:

> "It is proper here to remark, as applicable to the determination of this case, that, in the extreme caution with which this remedy is applied by the courts, there are cases when the writ will not be issued to compel the performance of even a purely ministerial act. In a case, for instance, where the intention of the officer, though acting within the scope of his duty, had been frustrated by a clerical mistake (United States v. Schurz, supra); or where the case is one of doubtful right (New York, L. & F. Ins. Co. v. Wilson, 33 U.S. 8, Pet. 291, 302 (8: 949, 953)); or in

a case where the relator having another adequate remedy, the granting of the writ may in this summary proceeding affect the rights of persons who are not parties thereto, or where it will be attended with manifest hardship and difficulties. People v. Forquer, 1 Ill. 68; Van Rennsselaer v. Sheriff of Albany, 1 Cow. 501, 512; Oakes v. Hill, 8 Pick. 47."

(Point 6.)

STONE v. FARMERS LOAN AND TRUST CO., 116 U.S. 307.

Suit by the Farmers Loan and Trust Company against the Railroad Commission of Mississippi to enjoin the enforcement against the Mobile and Ohio Railroad of the provisions of an Act of the State Legislature to provide for the regulation of freight and passenger rates on railroads in the State and to create a Commission to supervise the same, and for other purposes. The claim was made that this Act impaired the obligation of the charter contract between the State and the Mobile and Ohio which gave the latter the right to manage its affairs and fix its rates free of legislative control. The Act was held unconstitutional in 20 Fed. 270, by the Circuit Court.

On Appeal to the Supreme Court of the United States that Court, inter alia said, in 116 U.S. 307, speaking through Mr. Chief Justice Waite:

> "As yet the Commissioners have done nothing. There is certainly much they may do in regulating charges within the State which will not be in conflict with the Constitution of the United States. It is to be presumed they will always act within the limits of their constitutional authority. It will be time enough to consider what may be done to prevent it when they attempt to go beyond."

Decree below was reversed with instructions to dismiss the bill.

(Point 8.)

UNITED STATES, EX REL. WESTERN UNION TELEGRAPH CO. v. INTERSTATE COMMERCE COMMISSION, 279 Fed. 316 (51 App. D.C. 334).

The Interstate Commerce Commission, pursuant to Section 19a of the Act in the cases of the Texas Midland Railway and the Kansas City Southern Railway in determining the cost of reproduction allowed certain sums which had been paid by the carriers for the setting of poles owned by the Telegraph Company along their lines, on the theory that the railways would equip themselves in such manner if they were reproducing their properties. 75 I.C.C. 1, 45, 79; and 75 I.C.C. 223, 240, 382. The Commission reserved the right to take such further action with respect to value as might be deemed appropriate.

Telegraph Company petitioned the Supreme Court of the District of Columbia for mandamus to compel the Commission to correct its valuation of the two railroads by removing all telegraph property belonging to it from the schedules of property attributed to the railways. Petition was denied on the ground that it was prematurely filed.

On appeal to the Court of Appeals of the District of Columbia that Court, speaking through Mr. Justice Robb, in 279 Fed. 316, said, at page 317:

> "Valuation of appellant's property has not yet been made, and, of course, the Commission fully concedes appellant's right to be heard on the question as to whom ultimate credit should be given for the amount contributed by the railways toward the labor cost of setting these telegraph poles. It must be assumed that, when such a hearing is had, all the parties in interest, including the railways (which, though interested, are not parties here), will be before the Commission, and that its decision will be in accordance with the law and the evidence. It results that this petition was prematurely filed, as found by the trial court, and hence that the judgment must be affirmed, with costs.
>
> "Affirmed."

Upon stipulation of the parties an appeal docketed in the Supreme Court of the United States was dismissed.

UNITED STATES v. LOS ANGELES & SALT LAKE RAILROAD COMPANY, 273 U.S. 299.

The Interstate Commerce Commission issued a report and order under Section 19a of the Interstate Commerce Act purporting to determine the final value of the property of the carrier. 75 I.C.C. 463, 97 I.C.C. 737; 103 I.C.C. 398.

Suit was brought in the Federal Court for Southern California by the carrier against the United States, in which the Commission intervened, to annul and enjoin the Commission's order on the ground that it was in excess of Commission's power to make same, was contrary to the Valuation Act and violated the 5th amendment. The details were enumerated in which it was alleged the order was invalid.

The United States moved that the bill be dismissed, the motion was overruled and the case heard on the pleadings and evidence; a decree was entered annulling the order in 4 Fed. (2d) 736; 8 Fed. (2d) 747.

On appeal to the Supreme Court of the United States, that Court, speaking through Mr. Justice Brandeis in 273 U.S. 299, said at page 314:

> "Little need be added concerning the further contention that the suit should be entertained under the general equity power of the Court. Two arguments are urged in support of the proposition. One is that since the Commission has by reason of errors of law and of judgment grossly undervalued the property, its report will, unless suppressed, injure the credit of the carrier with the public. The other is that the Commission may itself be misled into illegal action by the erroneous conclusions and may apply them to the carriers' injury, since use of the final valuation is required in making rates pursuant to Section 15a of the Act to Regulate Commerce, as amended by Transportation Act, c. 91, Section 421, 41 Stat. 456; in prescribing divisions of joint rates under Section 15; in determining the limit upon the amount of capitalization, in the event of a consolidation under Section 5; in determining the propriety of an issue of

securities, under Section 20a; or as the basis of computation of the amount of excess earnings to be recaptured under Section 15a. Neither argument is persuasive. The first reminds of the effort made in Pennsylvania R.R. Co. v. United States Railroad Labor Board, 261 U.S. 72, to suppress the report of that Board. The second reminds of the attempt to secure a declaratory judgment in Liberty Warehouse Co. v. Crannis, ante, p. 70; and, also, of cases in which it was sought to enjoin a municipality from passing an illegal ordinance."

(Point 10.)

UNITED STATES ex rel. RED RIVER LUMBER COMPANY v. FISHER, 39 App. D.C. 181.

The sole question presented turns upon the interpretation placed upon the Act of Congress by the Secretary of the Interior. It is manifest that in the disposition of the case he was called upon to interpret the statute. That he may have wrongfully construed it will not authorize the issuance of the writ. The letter to the chief of field division, calling for an investigation, instigated by disclosures made in entryman's own testimony, opened the investigation, which was pending at the expiration of the two-year period, and which ultimately led to the cancellation of the entry. It was for the Secretary to determine whether or not this constituted a protest or contest within the statute. He held that it did. His construction of the Act was a possible one, and will not, therefore, be reviewed in mandamus * * * .

The judgment dismissing the petition is affirmed * * * .

(Writ of error to the Supreme Court of U.S. denied.)

MOORE v. UNITED STATES ex rel. BOYER, 32 App. D.C. 243.

This is clearly an instance of judicial interference with the discretionary power of an executive officer of the Government. It is elementary that a Court is powerless to direct the action of an executive officer unless a positive legal right is being invaded by the officer, where the duty imposed upon him is clearly prescribed and enjoined by law. The duty, however, must be so plain and positive that the officer has no discretion left. Merrill, Mandamus, p. 64.

Judgment of Supreme Court D.C., granting mandamus, reversed. Writ of error to Supreme Court U.S. allowed January 14, 1909. Dismissed as per stipulation.

UNITED STATES ex rel. REYNOLDS v. LANE, 45 App. D.C. 50.

It is too clear for argument that petitioner's action is premature. Mandamus is not the remedy to relieve against an anticipated injury. The regulation complained of was made by the Secretary of the Interior under authority of an Act of Congress. The discretion and power to make the regulation implies that the power and discretion to change or totally abrogate it. It has no compelling force on the Secretary in this case. Before the lease reaches him the rule may be changed or no longer in existence, or the consideration of this lease might, for aught we know, impel such change. There is not even a threatened injury, since the Secretary answers that he is not advised of the action he will take when the lease is submitted to him for approval. * * * The matter of approval or disapproval is still within the discretion of the Secretary, notwithstanding the regulation. Until there has been a positive refusal on the part of the Secretary to approve the lease, no cause exists upon which an action for mandamus can be predicated. * * * The lease in due course has not reached the Secretary, and until it does, and he has acted or refused to act, no cause of action exists.

Order of Court below dismissing petition affirmed.

Writ of error to Supreme Court U.S. about 1916 or 1917. Dismissed with costs on motion of Counsel for Plaintiff in error (Reynolds).

UNITED STATES ex rel. LOUISVILLE CEMENT COMPANY v. INTERSTATE COMMERCE COMMISSION, 42 App. D.C. 514, by Mr. Chief Justice Shepard: (Rev'd. 246 U.S. 638)

The Interstate Commerce Commission is an administrative body with certain judicial functions. In the exercise of these functions, it is called upon to exercise judgment and discretion. It took jurisdiction of the complaint, but refused the order for the payment of part of the same, because, in its opinion, it was barred by the limitation provided in the Act. It was the duty of the Interstate Commerce Commission to determine the question whether the claim was barred by limitation, and it did so in accordance with former decisions of the same tribunal. Whether its decision is right or wrong is not the question. This Court has no general supervisory power over the Interstate Commerce Commission by which to control its action upon questions within its jurisdiction. Mandamus is not the proper writ to control the judgment and discretion of an executive tribunal in the decision of a matter, the decision of which is by law imposed upon it. It cannot be made the substitute for a writ of error. United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U.S. 316, 325, 47 L. ed. 1074, 1078, 23 Sup. Ct. Rep. 698. (See citations in 50 Sup. Ct. 320, Wilbur Case.)

There may have been error in its adjudication of the question of limitation, but that error we cannot review.

A mandamus proceeding cannot be converted into a writ of error for the review of findings of fact made by the Commissioners of the District of Columbia in a matter of which they have jurisdiction. United States ex rel. Schwerdtfeger v. Brownlow, 45 App. D.C. 412; 44 L.R.A. 746 (Index-Digest of District of Columbia Cases, 1914-1920, Supplement Torbert).

UNITED STATES ex rel. DUNKLEY CO. v. EWING, 42 App. D.C. 176, by Mr. Justice Robb: (patent case)

The jurisdiction of the Commissioner in the premises, therefore, is not questioned. The ground of attack is the manner of the exercise of that jurisdiction. * * * It is apparent at once that appellants overlook the fact that mandamus cannot be made to perform the function of an appeal or writ of error, and that it ordinarily will not be granted if there is another legal remedy, nor unless the duty sought to be enforced is clear and indisputable.

UNITED STATES ex rel. T. C. STEEL CO. v. EWING, 42 App. D.C. 179, by Mr. Justice Van Orsdel: (patent)

The determination of the existence of an interference is confided by statute to the judgment and discretion of the Commissioner of Patents, and whether in the exercise of that judgment in the present case he was right or wrong, the conclusion was a possible one, and is not subject to review by mandamus.

50 W.L.R. 3, Waste Merchants Case (51 App. D.C. 136; 277 Fed. 538; 260 U.S. 32) writ denied by D. C. Supreme Court issued by Court of Appeals, set aside by Supreme Court of United States. (See p. 110, I.C.C. Cases.)

In United States of America at the relation of the Western Union Telegraph Company v. Interstate Commerce Commission of the United States, 50 W.L.R. 243 (51 App. D.C. 136), where the W. U. sought to have certain property attributed to other corporations valued to it, Mr. Justice Robb said: (279 Fed. 316)

> "Valuation of appellant's property has not yet been made, and, of course, the Commission fully concedes appellant's right to be heard on the question as to whom ultimate credit should be given for the amount contributed by the railways toward the labor cost of setting these telegraph poles. It must be assumed that when such hearing is had all the parties in interest, including the railways (which, though interested, are not parties here), will be before the Commission, and that its decision will be in accordance with the law and the evidence. It results that this petition was prematurely filed, as found by the trial Court, and hence that the judgment must be affirmed, with costs."

UNITED STATES OF AMERICA AT THE RELATION OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY, ET AL v. INTERSTATE COMMERCE COMMISSION, 53 W.L.R. 536, by Mr. Chief Justice Martin (55 App. D.C. 389; 6 F. (2d) 692; 269 U.S. 520).

It is true that the Commission did not base its valuation upon the earning capacity of the carrier properties to the extent claimed by the appellants, nor upon the market value of their outstanding securities. Nevertheless it is manifest that the Commission fully assumed and exercised the authority or jurisdiction imposed upon it by the Act, and that the real complaint of the appellants is not that the Commission refused to consider the points in question; but that it considered them and thereupon decided them erroneously. The real relief sought by the appellants, accordingly, is that the valuation reported by the Commission be set aside, and other valuations ordered. This clearly brings the case within the well established rule that the action of mandamus cannot be used as a substitute for an appeal, nor as a writ of error. The petition of the appellants in effect calls for such a review of the proceedings of the Commission, in violation of the rule just stated. It was rightly dismissed.

UNITED STATES OF AMERICA, ex rel. DONNER STEEL COMPANY, INC. v. INTERSTATE COMMERCE COMMISSION, 53 W.L.R. 824 (56 App. D.C. 44; 8 F. (2d) 905) (second case, held res adjudicata), by Mr. Chief Justice Martin. First case, 51 W.L.R. 70, 52 App. D.C. 221, 285 Fed. 955.

While it is difficult to understand just the theory upon which the Commission, in the light of its former decisions, reached the conclusion that appellant had not been damaged; yet the law reposes in it jurisdiction to pass upon issues of fact, and if evidence has been excluded that should have been admitted, or a wrong conclusion of fact has been reached and errors of law occur, it results from a mistaken judgment which can only be reviewed and corrected in a proceeding in error.

Appellant is here attempting to require the Interstate Commerce Commission to set aside its judgment and award damages upon the facts adduced. It is not contended that the Commission was without jurisdiction to hear the complaint and make the order complained of, or that its ruling is expressly inhibited by statute, but it is urged that the Commission, after finding discrimination committed an error of law in refusing to award damages to appellant. However inequitable and inconsistent the ruling, it cannot be corrected in this proceeding. It is too well settled to require discussion that the writ of mandamus cannot be converted into a writ of error, for the purpose of reviewing errors of law committed by a tribunal whose jurisdiction to make the order or judgment complained of is conceded.

UNITED STATES ex rel. CRIPPLE CREEK AND COLORADO SPRINGS RAILROAD COMPANY v. INTERSTATE COMMERCE COMMISSION, 54 W.L.R. 342, by Mr. Justice Van Orsdel: (56 App. D.C. 168, 11 F. (2d) 554)

The Commission has construed the statute and applied its construction to the facts, and however erroneous its conclusions under recent decisions of the Supreme Court, are beyond our jurisdiction to correct in this proceeding.

THE UNITED STATES OF AMERICA ex rel. ABILENE & SOUTHERN RAILWAY COMPANY v. INTERSTATE COMMERCE COMMISSION, 53 W.L.R. 806, by Mr. Justice Van Orsdel: (8 F. (2d) 901, 56 App. D.C. 40)

The statute here under consideration provides for the payment of a deficit to railroads not under Federal operation, the deficit to be ascertained by the Interstate Commerce Commission in the manner provided in the Transportation Act. This duty imposed upon the Commission is judicial in character, calling for a determination not only upon the facts arising in the particular case, but for an interpretation of the law applicable thereto. This, we think, calls for more than a mere ministerial act to be performed by the Commission under express direction of law. It invokes the exercise of judicial discretion which cannot be controlled by the writ of mandamus. To determine the matters raised by this appeal, the Court is called upon to review the proceedings had before the Commission, and to determine whether or not error was committed. To thus review the case in the present proceeding, would amount to the conversion of the writ of mandamus into a writ of error. This, it has been universally held, cannot be done.

In United States ex rel. Humboldt S. S. Co. v. Interstate Commerce Commission, 39 W.L.R. 386, it was held that the writ should issue because the Commission refused to take jurisdiction. (37 App. D.C. 266, 224 U.S. 474)

In United States ex rel. Graylock Mills v. Blair, At Law 67451, it was objected that United States was not made a party and that it was indispensable. (54 App. D.C., 27, 293 Fed. 846, 52 U.L.R. 40. See 264 U.S. 587).

EX PARTE TIFFANY, 252 U.S. 32.

Application by receiver for mandamus or, in alternative, writ of prohibition, to require District Judge and District Court of the United States (District of New Jersey) to order assets of corporation in hands of Federal receiver to be turned over to applicant for administration by him as receiver appointed by New Jersey Court of Chancery.

The Court said:

> It is well settled that where a party has the right to a writ of error or appeal, resort may not be had to the extraordinary writ of mandamus or prohibition.

LA ROQUE v. UNITED STATES, 239 U.S. 62, 64.

Suit to cancel a trust patent for an allotment in the White Earth Indian Reservation.

The Court said:

> The regulations and decisions of the Secretary of the Interior, under whose supervision the act was to be administered, show that it was construed by that officer as confining the right of selection to living Indians and that he so instructed the allotting officers. While not conclusive, this construction given to the act in the course of its actual execution is entitled to great respect and ought not to be overruled without cogent and persuasive reasons.

EX PARTE SLATER, 246 U.S. 128-134.

A full hearing was had and in regular course the Court ruled that one applicant was and the other was not the proper party, and then entered an order reviving the suit accordingly. That was a judicial act done in the exercise of a jurisdiction conferred by law, and even if erroneous, was not void or open to collateral attack, but only subject to correction upon appeal.

EX PARTE HARDING, 219 U.S. 363, 371.
(Diversity of citizenship case.)

Court, quoting in part from Ex Parte Nebraska, 209 U.S. 436, said:

> "Upon the hearing on the return to this rule the Court declined to take jurisdiction and review the action of the trial Court. It was said that the Circuit Court had jurisdiction to pass upon the questions raised by the motion to remand, and if error was committed in the exercise of its judicial discretion 'the remedy is not by writ of mandamus, which cannot be used to perform the office of an appeal or writ of error.'"

This case contains a review of many cases on the subject of mandamus, and when the writ will issue.

EX PARTE METROPOLITAN WATER COMPANY OF WEST VIRGINIA, 220 U.S. 539-546. (On a right to a three-Judge Court)

"This being the case, it necessarily follows that mandamus is the proper remedy, since the section made no provision for an appeal from an order made by a single judge, denying an interlocutory injunction, and a right of appeal is not otherwise given by statute."

UNITED STATES ex rel. KNICKERBOCKER INS. CO. OF NEW YORK v. MELLON, SECRETARY OF THE TREASURY, ET AL, 59 App. D.C. 325.

The decision below was right. The equity court had assumed jurisdiction, and appellant's remedy, if any, is by way of appeal from the decision of that court. It is settled law that mandamus will not serve the purpose of an appeal or writ of error. Interstate Commerce Commission v. United States ex rel. Waste Merchants' Assn., 260 U.S. 32, 43 Sup. Ct. 6, 67 L. ed. 112; United States v. York, 55 App. D.C. 139, 2 F. (2d) 941; United States v. Interstate Commerce Commission, 56 App. D.C. 40, 8 F. (2d) 901, certiorari denied 270 U.S. 650, 46 Sup. Ct. 351, 70 L. ed. 781; United States v. Robertson, 57 App. D.C. 179, 18 F. (2d) 829, certiorari denied 275 U.S. 532, 48 Sup. Ct. 29, 72 L. ed. 411; United States v. Robertson, 58 App. D.C. 266, 29 F. (2d) 639; Bartlesville Zinc Co. v. Interstate Commerce Commission, 58 App. D.C. 316, 30 F. (2d) 479, certiorari denied 279 U.S. 856, 49 Sup. 351, 73 L. ed. 997.

"Mandamus issues to compel an officer to perform a purely ministerial duty. It cannot be used to compel or control a duty in the discharge of which by law he is given discretion." Work v. Rives, 267 U.S. 175, 177, 45 S. Ct. 252, 69 L. ed. 561.