Record - - No. 46

MORTIMER W. WEST AND PHILIP J. SCHECK, PETITIONERS,

VS.

THOMAS L. A. MUSGRAVE, DEFENDANT.

EDGAR ALLAN POE,

ISAAC LOBE STRAUS,

Attorneys for Appellants.

ROLAND R. MARCHANT,

ENOS S. STOCKBRIDGE,

WILLIAM M. KERR,

DANIEL ELLISON,

SIMON E. SOBELOFF,

Attorneys for Appellee.

IN THE

Court of Appeals

OF MARYLAND.

APPEAL FROM THE BALTIMORE CITY COURT.

APPEAL TO THE OCTOBER TERM, 1927, OF THE COURT OF APPEALS OF MARYLAND.

Filed July 28th, 1927.

Press of
THE DAILY RECORD COMPANY
15 East Saratoga Street
Baltimore, Md.

TRANSCRIPT OF RECORD

FROM THE

BALTIMORE CITY COURT

IN THE CASE OF

MORTIMER W. WEST AND PHILIP J. SCHECK,
PETITIONERS,

VS.

THOMAS L. A. MUSGRAVE, DEFENDANT,

TO THE

COURT OF APPEALS OF MARYLAND.

EDGAR ALLAN POE,

ISAAC LOBE STRAUS,

Attorneys for Appellants.

ROLAND R. MARCHANT,

ENOS S. STOCKBRIDGE,

WILLIAM M. KERR,

DANIEL ELLISON,

SIMON E. SOBELOFF,

Attorneys for Appellee.

IN THE COURT OF APPEALS OF MARYLAND.

APPEAL FROM THE BALTIMORE CITY COURT.

Action commenced in the Baltimore City Court on the 13th day of June, in the year nineteen hundred and twenty-seven, by the filing by Mortimer W. West and Philip H. Scheck, the Plaintiffs in this cause, a Petition for a Writ of Mandamus directed to Thomas L. A. Musgrave, the Defendant, commanding him to vacate the office of Councilman of the City of Baltimore, and to cease from exercising any of the functions of said office.

Petition for a Writ of Mandamus, filed the 13th day of June, 1927:

In The Baltimore City Court.

Mortimer W. West and Philip J. Scheck, Petitioners,

vs.

Thomas L. A. Musgrave, Defendant.

To the Honorable, the Judge of said Court:

The Petition of Mortimer W. West and Philip J. Scheck respectively show:

1. That your petitioners are now and have been for some years citizens of Baltimore City, and voters and taxpayers in said city and as such are interested in having the affairs of said City managed in an orderly and lawful manner and by officials duly qualified under the law to manage the same; and your petitioners file this petition on behalf of themselves and all other citizens similarly situated who may be willing to unite with them in this action.

Your petitioner Philip J. Scheck was also a candidate for the City Council from the Fifth Councilmanic Dis-

trict in said City at the recent municipal election held in Baltimore City on May 3rd, 1927, and was in every respect eligible and qualified for membership in said City Council under and in accordance with Section 210 of the Baltimore City Charter, hereinafter fully set forth; the other candidates for said City Council from said district being the defendant, Thomas L. A. Musgrave; William G. Albrecht; Howard M. Rollins; George G. Griffin and Grafton T. Maynard; the official vote at said election being as follows:

William G. Albrecht	17,544 votes
Geo. G. Griffin	12,698 votes
Grafton T. Maynard	12,750 votes
Thomas L. A. Musgrave	15,627 votes
Howard M. Rollins	15,651 votes
Philip J. Scheck	13,469 votes

2. That the "Mayor and City Council of Baltimore" is a municipal corporation, duly incorporated by the General Assembly of Maryland. Section 210 of its Charter provides as follows:

"210. The City Council shall consist of nineteen members, one of whom shall be the President thereof, and shall possess the qualification and be elected as hereinafter provided. The other eighteen members shall be elected from the six Councilmanic Districts, three from each district, as hereinafter provided.

The members of the City Council, except the President thereof, shall be citizens of the United States, above the age of twenty-one years, residents of the City of Baltimore three years prior to their election, and for the same time residents of the Councilmanic District for which they are elected, and assessed with property to the amount of three hundred dollars ($300.00) each, who have paid taxes on the same one year prior to their election, and they shall hold office for four years. Each member of the City Council shall be paid a salary of fifteen hundred dollars ($1,500.00) per annum, payable monthly."

3. That the defendant, Thomas L. A. Musgrave, at the time of the said municipal election in Baltimore City, held on May 3, 1927, was not assessed with property

upon the tax books of said City in the amount of three hundred dollars (or in any amount whatsoever, upon which he had paid taxes one year prior to said election and therefore did not possess the qualifications required by Section 210 of said Charter of Baltimore City for membership in said Council and was therefore at the time of said election not eligible as a member of said City Council.

That notwithstanding such disqualification and ineligibility, the defendant, claiming to have been elected at said municipal election held on May 3rd, 1927, as a member of said City Council, on Thursday, May 19th, 1927, present himself to Honorable William F. Broening, Mayor of Baltimore City, who thereupon administered to him the oath required to be taken by members of said City Council, and thereupon the said defendant took his seat as a member of said City Council and since that time has attempted to act and has acted as a member thereof, and has declared his intention of continuing to so act.

4. That at a session of the City Council on June 6, 1927, the City Council by a vote of 11 to 8 held that the defendant was duly qualified according to law and was entitled to his seat as a member of the City Council, and your petitioners feeling aggrieved by said finding and decision have brought this proceeding in order that the alleged disqualification of the defendant may be judicially inquired into and determined.

5. Your petitioners allege that by reason of the fact that the said defendant, Thomas L. A. Musgrave, was disqualified at the time of his election to membership to said City Council from acting as a member thereof, the election of said defendant was void, and it was the duty, therefore, of the said defendant to wholly refrain from acting or attempting to act as a member of said City Council, or from entering upon or discharging, or attempting to enter upon or discharge any of the duties, privileges, powers and functions pertaining to the office of a member of said City Council, and that it is now his duty to vacate said office and to cease from performing or attempting to perform any of the functions thereof, but that nevertheless the said defendant, wholly disre-

garding his duty in the premises, declines and refuses to vacate said office, and continues and is now undertaking to perform, and is exercising and performing all the functions thereof.

Wherefore your petitioners pray that a writ of mandamus may be issued directed to the said Thomas L. A. Musgrave commanding him to vacate the office of Councilman of the City of Baltimore, and to cease from exercising any of the functions of said office.

And as in duty bound, etc.

EDGAR ALLAN POE,

Attorney for Petitioners.

MORTIMER W. WEST.

PHILIP J. SCHECK.

Affidavit on the Petition for a Writ of Mandamus:

State of Maryland, City of Baltimore, ss:

I Hereby Certify that on this 13th day of June, 1927, before me the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, aforesaid, personally appeared Mortimer W. West and Philip J. Scheck, who made oath in due form of law that the matters and facts stated in the foregoing petition are true to the best of their knowledge, information and belief.

Witness my hand and Notarial seal.

CARL R. McKENRICK,

(Notarial Seal.) Notary Public.

Order of Court on Petition for a Writ of Mandamus:

ORDERED, this 13th day of June, 1927, by the Baltimore City Court, upon the foregoing Petition and Affidavit, that a rule be and it is hereby laid on the said Thomas L. A. Musgrave, requiring him to show cause on or before the 23rd day of June, 1927, why a Writ of Mandamus should not be issued as prayed, provided a copy

of this Order and of the foregoing Petition be served on the said defendant on or before the 16th day of June, 1927.

ALBERT S. J. OWENS.

DOCKET ENTRIES.

13th June, 1927—Copy of the Petition, Affidavit and Order of Court sent to the Sheriff to be served on the Defendant, Thomas L. A. Musgrave. "Copy of the within Petition and Order of Court served on Thomas L. A. Musgrave, on the 13th day of June, 1927, at 4.57 o'clock P. M. in the presence of George Pattison. John E. Potee, Sheriff."

22nd June, 1927—Appearance of Roland R. Marchant, Enos S. Stockbridge, William M. Kerr, Daniel Ellison and Simon E. Sobeloff as Attorneys for the Respondent, filed.

Demurrer on behalf of the Respondent to the whole of the Petition for a Writ of Mandamus, filed the 22nd day of June, 1927:

The Respondent in the above entitled cause demurs to the whole of the petition herein filed and for ground of demurrer says: That the same is bad in substance and insufficient in law, and for further ground says, that the facts set out in said petition do not entitle the petitioner to the issuance of the writ of mandamus as therein prayed.

THOMAS L. A. MUSGRAVE,

Respondent.

ROLAND R. MARCHANT,

ENOS S. STOCKBRIDGE,

WILLIAM M. KERR,

DANIEL ELLISON,

SIMON E. SOBELOFF,

Attorneys for Respondent.

Service of copy admitted this 22nd day of June, 1927.

EDGAR ALLAN POE,
Attorney for Petitioners.

Affidavit of the Respondent that the Demurrer is not filed for the purpose of delay:

State of Maryland, City of Baltimore, to wit:

I Hereby Certify, that on this 21st day of June, 1927, before me the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, personally appeared Thomas L. A. Musgrave, and made oath in due form of law that the within demurrer is not filed for the purpose of delay.

As Witness my hand and Notarial Seal.

A. WALTER KRAUS,
Notary Public.

(Notarial Seal.)

Service of copy admitted on the 22nd day of June, 1927, and Issue joined (short) on the Demurrer.

Petition of the Defendant, Thomas L. A. Musgrave, filed the 22nd day of June, 1927:

To the Honorable, the Judge of said Court:

The petition of Thomas L. A. Musgrave in the above proceedings respectfully shows unto your Honor that acting under advice of counsel he has demurred to the petition filed herein and accordingly requests that the time for answering said petition may be extended for

the period of fifteen (15) days after the determination of this Honorable Court upon said demurrer.

And as in duty, etc.

THOMAS L. A. MUSGRAVE,

Respondent.

ROLAND R. MARCHANT,

ENOS S. STOCKBRIDGE,

WILLIAM M. KERR,

SIMON E. SOBELOFF,

Attorneys for Respondent.

Affidavit on Petition:

State of Maryland, City of Baltimore, to wit:

I Hereby Certify that on this 21st day of June, 1927, before me a Notary Public, of the State of Maryland, in and for the City of Baltimore, personally appeared Thomas L. A. Musgrave and made oath in due form of law that the matters and facts set forth in the foregoing request for an extension of time for filing an answer in these proceedings are true and correct as therein stated.

As Witness my hand and Notarial Seal.

A. WALTER KRAUS,

(Notarial Seal.) Notary Public.

Order of Court on Petition:

Upon the foregoing request and affidavit it is this 22nd day of June, 1927,

ORDERED by the Baltimore City Court that the time for filing an answer to this cause be and the same is hereby extended for a period of fifteen days from the determination of the demurrer of the respondent to the petition for the writ of mandamus.

ALBERT S. J. OWENS.

DOCKET ENTRIES.

7th July, 1927—Appearance of Isaac Lobe Straus as Attorney for the Petitioners filed.

13th July, 1927—Demurrer to Petition for a Writ of Mandamus "Sustained" and the Petition "Dismissed."

Opinion of Judges Owens, Frank and Stanton, filed the 13th day of July, 1927:

In The Baltimore City Court.

Mortimer W. West and Philip J. Scheck, Petitioners,

vs.

J. Warren Burgess, Defendant.

Mortimer W. West and Harry J. McClellan, Petitioners.

vs.

Thomas L. A. Musgrave, Defendant.

OPINION.

(The Court) The two cases present the same legal propositions, based upon substantially the same facts, and are presented upon the same state of the pleadings.

The facts as stated in said petitions, as far as necessary to be here set out, are these:

J. Warren Burgess and Thomas L. A. Musgrave were elected members of the City Council of Baltimore at the election held in this City on May 3rd, 1927, the former was elected from the 3rd Councilmanic District, and the latter from the 5th Councilmanic District of the City.

The City Charter requires, among other qualifications, that the members of the Council, representing the Councilmanic Districts, shall each be assessed with property to the amount of $300.00, on which the taxes have been

paid by the Councilman one year prior to his election. City Charter, Sec. 210.

The petitioners in each case are Mr. Mortimer W. West and a defeated candidate in each of the two Councilmanic Districts, who file the petitions as citizens of Baltimore and voters and taxpayers in said City.

In each petition it is alleged:

Paragraph 3: "That the defendant at the time of said municipal election was not assessed with property upon the tax books of said city in the amount of three hundred dollars or in any amount whatsoever upon which he paid taxes one year prior to said election and therefore did not possess the qualifications prescribed by Section 210 of said Charter of Baltimore City for membership to said Council and was therefore at the time of said election not eligible as a member of said City Council.

That notwithstanding such disqualification and ineligibility the defendant claiming to have been elected at said Municipal Election held on May 3, 1927, as a member of said City Council on Thursday, May 14th, 1927, presented himself to Honorable William F. Broening, Mayor of Baltimore City, who thereupon administered to him the oath required to be taken by Members of said City Council and thereupon the said defendant took his seat as a member of said City Council, and since that time, has attempted to act, and has acted as a member thereof and has declared his intention of continuing so to act."

Paragraph 4: "That at a session of the City Council on June 6th, 1927, the City Council by a vote of 11 to 8 held that the defendant was duly qualified according to law and was entitled to his seat as a member of the City Council, and your Petitioners feeling aggrieved by said finding and decision have brought this proceeding in order that the alleged disqualification of the defendant may be judicially inquired into and determined."

And the Petitioners in each case pray:

"That a writ of mandamus may be issued directed to the defendant commanding him to vacate the office of

Councilman of the City of Baltimore and to cease from exercising any of the functions of said office."

The Petitions in each case are filed under oath.

A Demurrer, verified by affidavit, is filed by the Defendant in each case, worded as follows:

"The Respondent in the above entitled cause demurs to the whole of the Petition herein filed and for ground of demurrer says: That the same is bad in substance and insufficient in law, and for further ground says that the facts set out in said Petition do not entitle the Petitioner to the issuance of the writ of mandamus as therein prayed. The specific point presented is as follows: Section 217 of the present City Charter contains this provision: 'The City Council shall judge of the election and qualifications of its members subject to appeal by Petition of the party aggrieved to the Baltimore City Court.' "

It is contended by the Defendants that this provision of the City Charter provides a specific and adequate remedy for the conditions complained of in the Petitions and therefore mandamus will not lie.

The precedure in mandamus cases is set out in detail in Article 60 of the Annotated Code of Maryland and it is provided specifically that the defendant shall answer the petition and there is no express authority for a demurrer to the Petition, and our Court of Appeals in Sudler vs. Lankford, 82 Md. 148, and Beasley vs. Ridout, 94 Md. 641, say that in a purely statutory procedure such as has been provided by our Code for mandamus, a demurrer does not admit the facts alleged in the Petition.

In the cases at bar, however, the demurrers rely upon the written law as contained in the City Charter, and practically assert that the law controls the situation, independently of a denial of the facts alleged in the Petitions.

And the demurrers filed in these cases were apparently recognized by both sides to be the appropriate pleading and the Court, therefore, so accepts it.

The Petitioners contend under the authority of Hammelshine vs. Hirsh, 114 Md. 59, that mandamus is the

appropriate remedy, and if this is not so, and an appeal to the Baltimore City Court is the appropriate proceeding the Petitions filed herein are of such a character that the Court may properly consider them as the "Appeal by Petition," provided for by Section 217 of the City Charter. This second contention clearly can not be sustained by authority.

The proceeding by mandamus is of Common Law origin, and at the beginning was a voluntary exercise of kingly power, arising from his innate sense of justice, in cases in which the subject possessed an *undoubted* right for the enforcement of which there existed no legal machinery. After the establishment of the Court of King's Bench, in which, in theory, the King presided, jurisdiction in mandamus cases was vested in that tribunal, and in full keeping with the origin of the proceeding, from the beginning of regulated court procedure it was established as a fundamental proposition regarding mandamus that it was a prerogative writ, issuable only in cases where there was no other adequate remedy.

The Maryland Colonists brought with them the Common Law of England, and during the Colonial Period the Common Law of England was the basis of the law of the land. Mandamus was even then a recognized Common Law procedure. As far back as 1709 our Provincial Court had before it the Mandamus Case of Bordley vs. Lloyd, which is reported in 1st Harris & McHenry, at page 21.

When the Colony became a State, it was set out in the Declaration of Rights: "That the inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury according to the course of that law and to the beenfit of such of the Engish Statutes as existed on the 4th day of July, 1776, and which by experience have been found applicable, to their local and other circumstances, and having been introduced, used and practiced by the Courts of Law and Equity." And so from the earliest days of the State Government, the Writ of Mandamus was in use, whenever the occasion required its use, in fact, in our Maryland Reports there are a great number of mandamus cases from the case of Runkel and Winemiller, 4 Harris & McHenry, down to the

present time, and it has always been conceded in this State that the underlying rule with reference to mandamus is that the writ will not be issued when there exists another specific and adequate remedy.

It, therefore, becomes necessary to consider whether or not the remedy provided by Section 217 of the City Charter is a specific and adequate remedy under the circumstances presented by the Petitions.

The City of Baltimore is the metropolis of the State. Within its ninety-six square miles of territory more than one-half of the entire population of this State lives and conducts its life's work. Estimating its population at 800,000 in this restricted area, there are living more than 8,000 people to the square mile. It is manifest that the government of a population so congested presents problems infinitely more intricate and of an entirely different character than those presented with reference to the outlying sections of the State, where the average density of population does not exceed 75 to the square mile. As far back as the Constitution of 1851, Baltimore was taken out of Baltimore County, and made a separate political entity. In the Constitution of 1867 a special article was contained applicable to Baltimore City, giving it large self-governing powers, but still retaining to the State in most particulars the ultimate control of the Municipal Government.

The constantly increasing population of the City, made evident the necessity of a more effective autonomy, and after continued demands upon the Legislature Article 11A of the State Constitution was passed by the Legislature and approved by the people of the State in November, 1915. Under this Article the City of Baltimore was authorized by a vote of its people to adopt a charter. This was done in 1918, and our Court of Appeals has upheld this Charter. This Charter was amended in many particulars by a vote of our people on November 7th, 1922, and among these amendments, the City Council was made to consist of a Single Branch instead of the two branches as theretofore existing.

Sections 210 and 217 of this Amendment are the Sections under consideration, the former prescribing the qualifications of the Councilman, and the latter contain-

ing the provisions now to be construed: "The City Council shall judge of the election and qualification of its members, subject to appeal by Petition of the party aggrieved to the Baltimore City Court."

Bearing upon the construction to be placed upon the Charter of Baltimore City, as amended, attention should be called to the fact that Section 4 of Article 11A of the State Constitution provides that "from and after the adoption of this Charter by the City of Baltimore" no public local law shall be enacted by the General Assembly for said City on any subject covered by the express powers granted by said Amendment, 11A.

Section 217, as heretofore stated, provides that the City Council shall judge of the election and qualification of its members, subject to appeal to the Baltimore City Court. Somewhat similar language appears in most of the State Constitutions with reference to the powers of the State Legislatures. In the Constitution of the United States the form of this grant of power is as follows: "Each house shall be the judge of the elections, returns and qualifications of its own members."

Section 5, of our State Constitution has the same power in this form: "Each house shall be judge of the qualifications and elections of its members, as prescribed by the Constitution and Laws of this State."

No question would now be raised that this grant of power to the Congress of the United States, and to the Legislature of our own State is subject to judicial control.

But when the people of this City, acting under the authority of the Constitution of the State, came to the consideration of the qualification of their Councilmen and the method of securing a Council of qualified men, they fully realized two things: That the law-making body of this City must be composed of men who had a share in the community, and if one was selected who lacked that qualification that there should be a sure and speedy way to get rid of such disqualified person, and the best way to do this appeared to them to be to leave the final determination of this question to our local Courts in such manner as to prevent the delays incident

to protracted litigation. The ability promptly to exercise a power in cases such as are here presented, is as valuable as the existence of the power. This plan carried forward as the people understood it—the principle of complete autonomy. To leave the matter subject entirely to the determination of the Council might defeat the very purpose of prescribing qualifications for our Councilmen, but to let the matter be primarily determined by that body, subject to the control of the Courts, was eminently safe and eminently effective.

The appeal provided is by Petition of the party aggrieved to the Baltimore City Court. This is a simple and effective remedy.

As an answer to the suggestion that when Section 217 was framed the draftsman had only in mind a simple election contest, and that the words "party aggrieved" mean the defeated person in such contest, attention is called to the fact that Section 217 of the City Charter provides that the Council shall judge the *election* and *qualifications* of its members and gives the right of appeal by petition to "the party aggrieved." Two classes of cases are here involved. First, a disputed election and, second, the question of the qualifications of members returned as elected. In the first class of cases the contest would evidently be between the elected and defeated candidate, and the unsuccessful contestant would clearly be "the party aggrieved." In the case of a dispute over the qualifications of a member returned as elected, no question of the number of votes cast being involved, the defeated candidate, as such, obviously would have no special right involved. Regardless of the result of the controversy, he would not be affected as a defeated candidate. His only interest in the result would be that of any other taxpayer and citizen. In such a controversy, he could not be held to be "the party aggrieved" as a defeated candidate, regardless of the outcome of the controversy. In this class of cases, it is clear that "the party aggrieved" must be a taxpayer and citizen generally. The conclusion, therefore, is inescapable that in the sort of controversy involved in the pending proceeding "the party aggrieved" must be a taxpayer. A fair construction of the language makes it sufficiently broad to cover all the situations that might

arise. It could not be supposed that the people intended that the City Council should pass upon an election contest that might require a recount of the ballots of an entire district and, at the same time, be denied the power to bring the City Tax Collector and the requisite books before it which are housed in the same building in which the Council meets, and ascertain from him and his books whether or not a certain man is assessed for $300.00 worth of property and if his taxes for the past year are paid. That a taxpayer in Baltimore City is "the party aggrieved" within the proper construction of this provision seems clear from the opinion of the late Judge Thomas in the Hummelshime case, to which reference has hereinbefore been made, and also from the matter of the Appeal of John T. Cottrell and others reported in 10 Rhode Island at page 615.

The distinction between the case at bar and the Hummelshime case, upon which the Petitioners rely, consists primarily in the fact that the City Council in that case refused to consider the protest made to it, and also there was no such specific grant of power to it, as is given to the City Council of Baltimore by Section 217 of the Charter.

If in this case the City Council had refused to consider the matter a different situation than the one here presented would have arisen, but it did consider the eligibility of the defendants and it did decide they were both eligible, and the right of appeal to the Baltimore City Court is still open and can be availed of by these Petitioners.

Looking at the matter from another point of view, attention is called to the fact that the case of Spitzer vs. Martin, 130 Md. 428, is authority for the statement that when the defendants presented their credentials to the Mayor of the City, even if he knew, as alleged in the petitions, that they did not possess the requisite qualification, it was incumbent upon him to administer the oath of office mentioned in the petition, and had he refused mandamus would have been the appropriate remedy to compel him to administer the said oath.

Had the mandamus petition been filed between the time of the administration of the oath by the Mayor and

the meeting of the City Council, seeking to restrain that body from admitting the Defendants as members of the City Council, it seems perfectly obvious that the answer of the City Council would have been: Such proceeding is premature because the City Council has the right to pass upon the qualifications of its members, as provided by Section 217 of the City Charter, subject to the right of appeal to Baltimore City Court.

If this is so, it is apparent that after the City Council has done its part by passing upon the qualifications of the Defendants, that the equally efficacious answer now to be made is that the time has not arrived for the issuance of the Writ of Mandamus, assuming but not deciding that such a proceeding is necessary, because there yet remains to be taken the deciding step authorized by the City Charter, and this proceeding intercepts the orderly and regular proceeding provided for in Section 217.

The Court, therefore, holds: That the provisions contained in Section 217, regarding the determination of the qualifications of Councilmen, furnishes a specific and adequate remedy in the situation set out in the Petitions, and for that reason Mandamus does not lie. An order will be signed, sustaining the demurrer filed in each case and dismissing the Petitions.

It only remains to say that this decision does not determine in any manner the rights of the respective parties in these cases. It only determines the regular and orderly procedure thereto applicable.

The Court calls the attention of the counsel on both sides to the fact that our Courts, notwithstanding the summer recess, are capable of functioning to the full extent of their jurisdiction, and a Jury is at all times available. Therefore, should the determination of this Court be accepted, arrangements may be made for the immediate hearing of the matters involved on appeal to the Baltimore City Court.

The Court feels it is but due counsel to say that these cases were presented on both sides not only with zeal but with great ability and eloquence. The bar is, indeed, to be congratulated that it can call from its midst upon such short notice so many men who stand, and are entitled to stand, in the front ranks of the profession.

13th July, 1927—Judgment on the Demurrer to the Petition for a Writ of Mandamus in favor of the Defendant for costs.

Appeal to the Court of Appeals of Maryland on behalf of the Petitioners, the Plaintiff, in above entitled cause, filed the 13th day of July, 1927:
Mr. Clerk:

Enter an appeal for and on behalf of the petitioners, the plaintiffs in the above entitled cause, from the Order and Judgment of the Baltimore City Court sustaining the defendant's demurrer to the plaintiffs' petition and dismissing the petition, to the Court of Appeals of Maryland, and transmit at once the complete record of the proceedings in said cause to the Court of Appeals.

EDGAR ALLAN POE,

ISAAC LOBE STRAUS,
Attorneys for the Petitioners,
the Plaintiffs.

Appellants' Costs, $15.75.
Appellee's Costs, $6.75.

Test: GEORGE CAREY LINDSAY,
Clerk of the Baltimore City Court.

State of Maryland, City of Baltimore, Set:

I, George Carey Lindsay, Clerk of the Baltimore City Court, Do Hereby Certify, that the aforesaid is a full, true and entire Transcript, taken from the Record and Proceedings of the said Court in the therein entitled cause.

In Testimony Whereof, I hereunto set my hand and affix the seal of the Baltimore City Court aforesaid on this 19th day of July, nineteen hundred and twenty-seven.
(Seal.)

GEORGE CAREY LINDSAY,
Clerk of the Baltimore City Court.

Record - - No. 47

MORTIMER W. WEST AND HARRY M. McCLENNAN, PETITIONERS,

VS.

J. WARREN BURGESS, DEFENDANT.

EDGAR ALLAN POE,

ISAAC LOBE STRAUS,

Attorneys for Appellants.

ROLAND R. MARCHANT,

ENOS S. STOCKBRIDGE,

WILLIAM M. KERR,

SIMON E. SOBELOFF,

Attorneys for Appellee.

IN THE

Court of Appeals

OF MARYLAND.

APPEAL FROM THE BALTIMORE CITY COURT.

APPEAL TO THE OCTOBER TERM, 1927, OF THE COURT OF APPEALS OF MARYLAND.

Filed July 28th, 1927.

Press of
THE DAILY RECORD COMPANY
15 East Saratoga Street
Baltimore, Md.

MORTIMER W. WEST and PHILIP J. SCHECK, Appellants, vs. THOMAS L. A. MUSGRAVE, Appellee.	IN THE *Court of Appeals* OF MARYLAND.
MORTIMER W. WEST and HARRY J. McCLELLAN, Appellants, vs. J. WARREN BURGESS, Appellee.	OCTOBER TERM, 1927. GENERAL DOCKET Nos. 46 and 47.

APPELLANTS' BRIEF.

STATEMENT.

These appeals are from judgments of the Baltimore City Court sustaining demurrers to Petitions filed by the appellants for writs of mandamus commanding the appellees to vacate the offices of Councilmen of the City of Baltimore and to cease from exercising the functions of said offices. The nature of the proceeding and the questions involved are the same in both cases.

The Petition in each case was filed by the appellants as citizens, taxpayers and voters of Baltimore City, one of the appellant taxpayers in each of the cases being also a defeated candidate in the election involved therein. The Petitions set forth the provisions of the City Charter with respect to the constitution and membership of the City Council of Baltimore as follows:

"210. The City Council shall consist of nineteen members, one of whom shall be the President thereof, and shall possess the qualification and be elected as hereinafter provided. The other eighteen members shall be elected from the six Councilmanic Districts, three from each district, as hereinafter provided.

The members of the City Council, except the President thereof, shall be citizens of the United States, above the age of twenty-one years, residents of the City of Baltimore three years prior to their election, and for the same time residents of the Councilmanic District for which they are elected, and assessed with property to the amount of three hundred dollars ($300.00) cash, who have paid taxes on the same one year prior to their election, and they shall hold office for four years."

The Petitions then allege that the defendants, the appellees, Thomas L. A. Musgrave and J. Warren Burgess, at the time of the municipal election in Baltimore City, held on May 3, 1927, were not assessed with property upon the tax books of said city in the amount of three hundred dollars, or in any amount whatsoever, upon which they had paid taxes one year prior to said election and therefore did not possess the qualifications required by Section 210 of said Charter of Baltimore City, for membership in said Council and were therefore at the time of said election not eligible as members of said City Council.

The Petitions further state that notwithstanding such disqualification and ineligibility the defendants, claiming to have been elected at said election as members of the City Council, took the requisite oath of office and thereupon took their seats as members of said City Council and since that time have attempted to act and have acted as members thereof and have declared their intention of

continuing so to act. The Petitions then proceed as follows:

> "(4) That at a session of the City Council on June 6, 1927, the City Council by a vote of eleven to eight held that the defendant was duly qualified according to law and was entitled to his seat as a member of the City Council, and your petitioners feeling aggrieved by said finding and decision have brought this proceeding in order that the alleged disqualification of the defendant may be judicially inquired into and determined.
>
> "(5) Your petitioners allege that by reason of the fact that the said defendant, Thomas L. A. Musgrave (Mr. Burgess being named in the petition in his case) was disqualified at the time of his election to membership to said City Council, from acting as a member thereof, the election of said defendant was void, and it was the duty, therefore, of the said defendant to wholly refrain from acting or attempting to act as a member of said City Council, or from entering upon or discharging or attempting to enter upon or discharge, any of the duties, privileges, powers and functions pertaining to the office of a member of said City Council, and that it is now his duty to vacate said office and to cease from performing or attempting to perform any of the functions thereof, but that nevertheless the said defendant, wholly disregarding his duty in the premises, declines and refuses to vacate said office, and continues to, and is now undertaking to perform, and is exercising and performing all the functions theerof."

The appellees demurred to the Petitions and the Court sustained the demurrers and entered judgments on the demurrers in favor of the defendants for costs. These appeals are from those judgments.

The Court below held as the basis of its judgment in each case that the appellants were not entitled to the

writ of mandamus requiring the ineligible and unlawfully elected appellees to vacate the office of Councilman of the City of Baltimore and to cease from exercising the functions of said office because by Section 217 of the City Charter a specific and adequate remedy was provided and afforded the full and particular relief sought by the complaining citizens and taxpayers and to which they were entitled.

The appellants, the Petitioners below, contend that mandamus is the *only* remedy which will afford them the specific, adequate, direct and full relief to which they are unquestionably entitled as citizens and taxpayers of the City, namely, an Order of Court specifically, promptly and directly *ousting* the intruding appellees from the municipal offices for which they were not legally eligible and from which they were disqualified by law at the time of their alleged election, and which therefore they were holding in violation of law and of the acknowledged rights of the municipal citizen and taxpayer.

Section 217 of the City Charter provides:

> "The City Council shall judge of the election and qualifications of its members subject to appeal by petition of the party aggrieved to the Baltimore City Court."

The Court below held that citizens, taxpayers and voters of Baltimore City were within and were concluded by this provision of the City Charter; that it afforded them a specific, adequate, direct and complete remedy for their rights as citizens, taxpayers and voters, in the premises; that it barred and excluded them from their remedy in the Courts and ousted the Courts of their common law and constitutional jurisdiction to protect the municipal citizen and taxpayer against the illegal occu-

pancy and exercise of the office of City Councilman by persons neither lawfully eligible for nor lawfully elected to that office.

The appellants maintain that mandamus is the only appropriate remedy, because it is the only remedy which will specifically, directly and effectively secure to them their rights to *oust* the illegal intruders from the offices in question; that they are not within the Charter provision; that no procedure has been established or supplied by law for the institution, conduct and due disposition of a case adequate for the enforcement and effectuation of their rights before and in the City Council as a judicial tribunal, nor for the prosecution of an appeal from a determination by the Council to the Baltimore City Court; that a judgment of the Council and of the Baltimore City Court upon appeal from the action of the Council would not specifically, promptly and directly *oust* the illegal tenants from the office prohibited to them *ab initio* by law; and that even if they were held under the Charter provision to be disqualified, such a holding and decision would not *ex proprio vigore* oust the trespasser from the office, but if he declined to vacate it would still render a mandamus necessary to put him out.

In other words, the appellants contend that as the Charter provision does not, *per se*, secure to the citizen and taxpayer his unquestioned and admitted right, firmly settled by the decisions of this Court, to oust the illegal trespasser from the municipal office, but would leave him without the *only* remedy which in this State can specifically, directly and effectually enforce and consummate the right by actually *ousting* the trespasser from the office, it, the Charter provision in question, does not afford to the injured citizen and taxpayer that adequate, specific, direct and complete remedy which alone suffices and must

be found to exist in order to oust the superior courts of their inherent jurisdiction under the constitution and the common law to award the remedy of mandamus in appropriate cases.

If, on the other hand, the provision of Section 217 of the City Charter *does* supply, adequately, specifically, directly and fully, the relief to which the municipal citizen and taxpayer is admittedly entitled to protect and enforce his right to have the unlawful invader of the office *put out of it*, then the appellants point out and maintain that *their Petitions are in every substantial and essential respect expressly and plainly within the provisions and requirements of Section 217 of the City Charter*, in that the Petitions fully set forth the action and determination of the Council, at its session of June 6, 1927, by a vote of eleven to eight, holding that the defendants, the appellees, were duly qualified according to law and were entitled to their seats as members of the City Council; and further, that the Petitioners *"feeling aggrieved by said finding and decision have brought this proceeding in order that the alleged disqualification of the defendant may be judicially inquired into and determined;"* and further, after alleging that by reason of the fact that the defendants, Musgrave and Burgess, were disqualified at the time of their election to membership in said City Council from acting as members thereof, the election of said defendants was void, and that it was the duty, therefore, of said defendants to refrain from acting or *attempting* to act as a member of said City Council, or from entering upon or discharging its duties and functions, and that it is now their duty to vacate said office and to cease from performing or *attempting* to perform any of the functions thereof, but that nevertheless the defendants decline and refuse to vacate said office and continue and are now undertaking

to perform and are exercising all the functions thereof, the Petitions pray that a writ of mandamus may be issued *commanding each of the defendants to vacate the office of Councilman of the City of Baltimore, and to cease from exercising any of the functions of said office* (Record, pp. 5-6).

It is therefore fully apparent and obvious that the Petitions in actual substance and effect show upon their face the decision and determination of the Council, duly rendered by its vote of eleven to eight upon the date named, that the defendants were qualified and entitled to seats as members of the City Council, and that the Petitioners, *"feeling aggrieved by said finding and decision"* have *"brought this proceeding in order that the alleged disqualification of the defendant may be judicially inquired into and determined;"* and that "this proceeding" brought by the *parties aggrieved* by the said finding and decision of the Council that the defendants were qualified and entitled to membership in the City Council, in order to have that very matter so found and decided by the Council, judicially determined by the *Baltimore City Court,* the particular Court specified as the appellate tribunal in Section 217, is clearly and unquestionably an *appeal* from the finding and decision of the Council to the designated appellate tribunal for the specific purpose declared in the Petitions that the alleged disqualification, so passed upon by the finding and decision of the City Council, "may be judicially inquired into and determined" by that Court.

Pursuant to the above, the Petiton prays that the appellate tribunal, the Baltimore City Court, may command each of the defendants *"to vacate the office of Councilman of the City of Baltimore and to cease from exercising any of the functions of said office."* There-

fore, if the remedy afforded by Section 217 of the City Charter does in fact go to the extent of authorizing the Baltimore City Court upon appeal from the decision of the Council to order each of the defendants to vacate the said office and to cease from exercising or attempting to exercise its functions, the Petitions themselves are unquestionably, in every essential element and requisite, *appeals* from the decision of the Council to the Baltimore City Court for the specific, direct and complete relief indispensably necessary to protect and enforce the right of the citizen and taxpayer to oust an illegal intruder from an office which he is not entitled to hold and which the law prohibits him from holding. The fact that the order asked for by the Petition is designated "mandamus," makes no difference in this respect, because if the Charter provision authorizes the Baltimore City Court to issue an order commanding the defendants to *vacate* the office which they are illegally occupying, then the order is nothing else than a "mandamus," which is simply a writ *commanding* the person to whom it is directed to do a specific act conformably to law. To say that a Court is authorized by statute to command by its order a trespasser unlawfully holding an office to vacate it and at the same time to deny such an order to a petitioning citizen and taxpayer clearly entitled to it, because in his petition the order sought is designated "mandamus," will hardly commend itself to justice or common sense.

As shown hereinafter, according to the settled law of Maryland, a citizen and taxpayer has the right to have a person occupying a municipal office in violation of law ordered to vacate the office; and it is equally settled by the law of Maryland, as is also shown hereinafter, that mandamus is the *only* remedy in this State to *oust* such an illegal occupant from an office which the law declares he

may not hold. Therefore, if the Charter provision extends to and includes the power and duty of the Baltimore City Court, upon appeal from a decision of the City Council, to order a person disqualified by law from occupying a seat in the Council to vacate the office, then the Charter provision must of necessity authorize the relief prayed for by the Petitioners herein, namely, a mandamus or Order of Court "*commanding him to vacate the office of Councilman of the City of Baltimore and to cease from exercising any of the functions of said office.*" *Ubi jus, ibi remedium.* If the citizen and taxpayer has the *right,* as is admitted, to have a disqualified person removed from a municipal office illegally held by him, then he must be entitled to the *remedy* which solely and alone can enforce and effectuate his right. Therefore, the matter presented for decision in these appeals comes to this:

(1) If Section 217 of the City Charter does not, as the appellants maintain, afford the specific, direct and effective remedy of immediately *ousting* the illegal intruders from the offices of Councilman, then the jurisdiction of the Baltimore City Court under the constitution and common law to award *mandamus* upon the suit of a citizen and taxpayer to accomplish that end cannot be denied, and the Court below erred in denying it.

(2) If, however, the provisions of Section 217 of the City Charter *do* authorize the Baltimore City Court upon appeal to grant the relief and remedy to which the petitioning citizen and taxpayer is entitled, namely, an Order of Court specifically and directly commanding the wrongful intruder immediately to vacate the office, then the petitions, asserting upon their face every essential of an appeal from the finding and decision of the City Council in favor of the qualifications and title of the defendants

to seats in the Council to the Baltimore City Court in order to have the subject matter of such finding and decision of the Council judicially reviewed and determined are within the provisions of Section 217, and ought so to have been taken by the Court below and (upon the stated assumption that the Court under Section 217 could grant the specific and requisite remedy of OUSTING the intruder from the office) the Court should have overruled the demurrers and entertained the petitions, and if the evidence established the disqualification of the defendants charged in the petitions, the Court should have issued the order prayed for commanding the defendants to vacate the offices.

In other words, in either of the aspects of the case above presented, the Court below erred and the demurrer should have been overruled.

Before proceeding to the formal argument, we beg further, at this place, to direct the attention of this Court to the law, settled by the overwhelming weight of the authorities in this Country, that the constitutional and common law jurisdiction of the Courts to award *mandamus* or *quo warranto*, upon the suit of the citizen and taxpayer, to oust an unlawful tenant of a municipal office, is not to be held to have been taken away and extinguished by such a provision as that contained in Section 217 of the Baltimore City Charter, unless it affirmatively appears *"with unequivocal certainty"* in the legislative act that the legislature undoubtedly intended to take such power and jurisdiction away and extinguish it. This subject, with the numerous applicable authorities, is fully discussed hereinafter.

ARGUMENT.

I.

The qualifications for election to membership in the City Council of Baltimore prescribed by Section 210 of the City Charter (1 Annotated Code, 1924, page 148), including the requirement that the members of the City Council shall be "assessed with property to the amount of three hundred dollars ($300.00) each, who have paid taxes on the same one year prior to their election," are indispensable to election and membership. The important purposes of these requirements are to secure, as public officers, persons of substance and responsibility, who will be interested in the welfare of the community, and especially such as will be in favor of careful and economical administration in order to secure as low a rate of taxation as is consistent with good government.

Vanneman v. Pusey, 93 Md. 690.
Hummelshime v. Hirsch, 114 Md. 54-54, 56-57.
Spitzer v. Martin, 130 Md. 428.
Hatcheson v. Tilden, 4 H. & McH. 279.
Richardson v. Blackston, 135 Md. 530.
Kean v. Rizer, 90 Md. 507.
28 Cyc., Mun. Corp. 323.

II.

These qualifications must exist at *the time of the election* of the member of the City Council, and if they do not then exist, the candidate is ineligible and legally disqualified from election to the City Council, and any attempted election of such ineligible and disqualified candidate is illegal, null and void.

Hatcheson v. Tilden, 4 H. & McH. 279.
Kean v. Rizer, 90 Md. 507.

Hummelshime v. Hirsch, 114 Md. 53-57.
Spitzer v. Martin, 130 Md. 434-435.
Richardson v. Blackston, 135 Md. 530.

In Kean v. Rizer, 90 Md. at page 514, it is said:

> "It is well-settled law that the election of a disqualified person is a nullity—the election is a failure and a new election must be held. Judge Dillon in his work on Municipal Corporations, page 279, says: 'If the law requires freeholders to be chosen for certain offices, the election of a person not a freeholder is void.'
>
> "It is quite certain, then, that if the appellee, Edwin F. Rizer, did not possess at the time of his election, as alleged, the qualifications prescribed by the Charter for the office of City Councilman of Cumberland, he was never legally elected thereto, and his predecessor would have been entitled to the remedy by mandamus without resorting to any other proceeding."

It is universally settled in this country that the "election" of an ineligible person to a public office is a nullity and confers no rights upon such person, or even upon a rival candidate having the next highest number of votes in the election.

23 Amer. & Eng. Enc. of Law, 2nd Ed., 332, 338.

20 Corpus Juris, pp. 207-208, Sec. 267.

9 Ruling Case Law, p. 1125, Sec. 126.

15 Cyc. 391.

State v. Bell, 169 Ind. 61, 121 A. S. R. 203 and note 13 L. R. R. (N. S.) 1013 and note, etc.

18 Century Digest, Title, Elections, Sec. 207.

III.

Mandamus is not only the proper but the **ONLY REMEDY TO OUST** a person acting as a municipal officer from an office to which he was not legally elected.

In Hummelshime v. Hirsch, 114 Md., at page 50, it was said:

> "It seems, therefore, that mandamus is not only the appropriate remedy, but that, in this State, it is the *only* remedy by which one may be *removed* from an office to which he is not legally entitled."

Harwood v. Marshall, 9 Md. 98-100.
Hawkins v. State, 81 Md. page 314.
Wilson v. Triesler, 89 Md. page 177.
Pope v. Whitridge, 110 Md. page 485.
Truit v. Collins, 122 Md. page 532.
2 Poe, Pl. & Pr., last edition, Section 710A, page 673.

In Section 710A of his work on Practice, page 673, Mr. Poe says:

> "And it (mandamus) is, it has been decided, available in favor of one desiring to *oust* one unlawfully in possession of an office, although the one seeking such relief has no interest in the matter other than as citizen and taxpayer."

IV.

The *controlling principle applicable to these appeals* is clearly stated and expounded in the leading case of Harwood v. Marshall, 9 Md. 83, at page 98, where it is said that when it is claimed that there is another legal remedy than mandamus to meet the case in question, such other legal remedy must be *specific* and *adequate*

to the *object in view and framed to effect directly the desired end.*

And to the same effect are—

Hummelshime v. Hirsch, 114 Md. page 57.
Levering v. Park Commissioners, 134 Md. page 59.
Levering v. Supervisors, 129 Md. 335.
Baltimore University v. Colton, 98 Md. page 636.
Hardcastle v. R. R. Co., 32 Md. 35.
Worcester Co. v. School Commissioners, 113 Md. page 313.
Miles v. Stevenson, 80 Md. 358.
Triesler v. Wilson, 89 Md. page 177.
Hawkins v. State, 81 Md. 314.
Poe's Practice, last ed., page 665, Sec. 709.
Evan's Practice, 2nd ed., pp. 524-525.
23 Am. & Eng. Encyc. of Law, 2nd ed., 618-619, 630.
38 Corp. Jur., Sec. 32, p. 561.
18 Ruling Case Law, Sec. 45, p. 132.
3 Blackst. Comm. 110.
High on Extraord. Remedies, Sec. 17, page 24.
2 Spelling, Extraord. Relief, paragraph 1375.
Tapping, Mandamus, 18, 19.

In the case of Harwood v. Marshall, 9 Md. 83, at pp. 98-100, it is said:

> "It is said, however, that the writ is not demandable in the present instance, because the right to the office may be otherwise tried. It is clear that it will not lie if there be another legal remedy, *but that remedy must be specific and adequate to the object in view, 'framed to effect directly the desired end.' State v. Holliday,* 3 Halst. 206. *It must afford 'com-*

plete satisfaction, equivalent to a specific relief.' King v. Bank of England, 2 Doug. 525. We are told, in *Ch. Gen. Pr.* 789, on the authority of *Andoley v. Joyce*, Poph. 176, that the writ of *mandamus* may be compared to a bill in equity for *a specific performance. Evans Pr.* 404. In *Regents, etc., v. Williams*, 9 G. & J. 365, the rights of the parties to the controversy were determined in an action for money had and received, but if that course had been pursued by this appellee, the judgment would not have placed him in possession of the office. *His ultimate success might have depended on its voluntary surrender by the appellant.* In *Marbury v. Madison, supra*, it was held, that the action of *detinue* was not a specific remedy, because the judgment would be for the thing itself, (the commission,) *or* its value, whereas the party was entitled to the office or to nothing, and the commission was necessary to the enjoyment of the office. And in *Kendall v. United States*, 13 Pet. 607, the court said, as a reason for sustaining the *mandamus*, and in reply to the argument that the postmaster might be sued, that private actions at law seldom afforded adequate relief in these cases.

Quo warranto, or an information of that nature, has been resorted to in some cases, as *preliminary to* the *mandamus*, but we do not think that remedy necessary in this case. *It might prove very inadequate, by reason of the delay.* We must bear in mind that the claimant seeks *not only the removal of the incumbent, but the possession of the office. No form of proceeding that will give him less than he asks, and has a right to claim, can be said to furnish specific, adequate relief.* Under the *quo warranto* information the judgment might move the occupant but would not install the claimant. *He might still find it necessary to resort to other process against some other person or officer who might deem it his duty to keep him out, and thus his whole term might expire in vain efforts to obtain that to which the Constitution and laws may have declared him to be entitled.* In *Strong's Case*, 20 Pick. 497, involving this

very point, the court held, that the remedy by action at law, or *quo warranto, would be very imperfect and partial, and that the evil could be reached only by mandamus.* And in *Dew's Case,* 3 Hen. & Munf. 23, Tucker, J., in answer to the very objection now urged by the appellant, after quoting 3 *Bl. Com.* 110, to show that this writ may be issued in some cases where the law gives another more tedious mode of redress, *as in the case of admission or restitution to an office,* added: 'This is the very case before us, and *although possibly the injured party may have another remedy, I think there is no other so well adapted to the nature of the case as that of mandamus.*' In the same case, Roane, J., said, it was important that a speedy decision should be given, and, as conducive to that end, *the most direct remedy should be pursued,* which is consistent with justice and the policy of the laws. And, as to the *quo warranto* proceeding, he added, that 'it was not in itself a specific remedy; *it only paved the way for the introduction of a specific remedy,* by producing a judgment of *ouster* against the person in actual possession.' We consider this a very reasonable and correct view of the law of *mandamus.*''

In 38 C. J., title ''Mandamus,'' Sec. 32, p. 561, it is said:

''The mere fact that there is another remedy will not prevent the issuance of a writ of mandamus if the other remedy is not adequate, and where it is doubtful whether or not there is an adequate specific remedy in the ordinary course of law, mandamus will ordinarily issue. The remedy which will supersede mandamus may be described in general terms as one competent to afford relief upon the very subject matter in question (citing the Hummelshime case and Harwood v. Marshall), and which is equally convenient, beneficial, and effectual. Ordinarily the remedy must be such as will enforce the right or compel the performance of the particular duty in question—in effect specific performance—and not

> merely a remedy which in the end saves the party to whom the duty is owed unharmed by its non-performance. It must also be a remedy to which the petitioner may at all times resort without hindrance for full relief, and one which the courts of the state in which the proceeding is brought can apply and which does not compel the party to go into the courts of a foreign jurisdiction to avail himself of it; and it must be a legal rather than a physical remedy. Mandamus may lie where other existing remedies are tedious, are not sufficiently speedy, or in case they have become obsolete, or are *circuitous.*"

In 18 R. C. L., title "Mandamus," Sec. 45, p. 132, it is said:

> "To exclude resort to mandamus on the ground that the relator has another remedy, such remedy must be an adequate one and well adapted to remedy the wrong complained of; if it is inconvenient or incomplete the court exercises a sound discretion in granting or refusing the writ. Another remedy tedious and not so well adapted to the nature of the case as that by mandamus will not operate to prevent resort to the latter remedy, and it is said the other remedy must be one competent to afford relief upon the very subject matter involved, that it must not only be adequate but specific."

In 3 Blackstone's Commentaries 110, quoted and followed not only in the great judgment of this Court in Harwood v. Marshall, but in the celebrated decisions of the Supreme Court in Marbury v. Madison and Kendall v. U. S., it is said:

> "It is a high prerogative writ, of a most extensively remedial nature; and may be issued in some cases where the injured party has also another more tedious method of redress, as in the case of admission or restitution of an office; but it issues in all cases where the party hath a right to have any thing

done, and hath no other *specific means of compelling its performance.*"

In Poe's Practice, last edition, Section 709, page 665, it is said:

> "If there be any other remedy, either at law or in equity, *which is* ADEQUATE *to give the* SPECIFIC RELIEF *prayed for,* the writ ought not to be issued."

In Hummelshime v. Hirsch, 114 Md. at p. 57, this Court said:

> "In regard to the defense that the pending election contest between the appellee Hirsch and the appellant is a bar to relief in this case, it is only necessary to say that the appellee Devecmon is not a party to those proceedings, and that he cannot, in that case, obtain the relief here sought. In order that other proceedings may be a sufficient answer to the petitioner's prayer for a mandamus, it must appear that the petitioner can obtain *full and adequate* relief in such proceedings, and it is not sufficient that in a suit pending between one of the petitioners and the respondent, involving different issues, the judgment may indirectly and ultimately bring about the same result sought to be accomplished by the writ."

In State, etc. v. Johnson (Fla.), 18 L. R. A. 410, at p. 419, the Court said:

> "When the power has been executed in due form it is the duty of the suspended officer to cease to exercise the duties of his office, and it is likewise his duty to turn over the books to the appointee commissioned by the governor to perform the duties of the office. If it is not done voluntarily, and there is no remedy to compel it, then nothing but confusion in government will follow. *It is a mistake to suppose that mandamus is excluded or avoided by the mere fact that there is another remedy. The law*

is that there must be another specific and adequate remedy. Ray v. Wilson, 29 Fla. 342, 14 L. R. A. 773; Tapping, Mandamus, 18, 19; High, Extr. Legal Rem., par. 9, 15-17; Baker v. Johnson, 41 Me. 15; People v. Stevens, supra; Harwood v. Marshall, 9 Md. 83."

In the well-reasoned case of McCoy v. Handlin (S. D.), reported in L. R. A. 1915-E, page 859, at page 870, the Court said:

"Defendant, in his return, contends that plaintiff has a plain, speedy, and adequate remedy at law. * * * In the second place, it requires more than a right of recovery in the future to constitute adequate relief and to justify a refusal of relief by mandamus. 'The "other remedy," the existence of which will oust, or, rather, prevent the invocation of, jurisdiction by mandamus, must be *equally* convenient, beneficial, and *effective as mandamus.* * * * It must be a remedy which will place the relator in *statu quo;* that is, in the same position he would have been had the duty been performed. Etheridge v. Hall, 7 Port. (Ala.) 47. Indeed, it must be *more* than this. It *must be* a *remedy* which *itself enforces* in some way the *performance* of the *particular duty,* and not merely a remedy which in the end saves the party, to whom the duty is owed, unharmed by its non-performance. Sessions v. Boykin, 78 Ala. 328; 2 Spelling, Extr. Relief, par. 1375; Merrill, Mandamus, par. 53. Hence, it is that, while mandamus will not lie to enforce a duty which may be coerced by the ordinary civil actions at law, as where the duty is merely to pay money or to deliver property, it does lie whenever such actions cannot be availed of to the *specific performance* of the *official act which the relator is entitled to have performed,* as where a disbursing officer refuses to draw a warrant it is his duty to draw, in which case an action for damages, *while it would eventually save the relator harmless, would not coerce the discharge of the specific duty.*'

State ex rel. Brickman v. Wilson, 123 Ala. 259, 45 L. R. A. 772, 26 So. 482."

In the case of Ray, etc. v. Wilson (Fla.), 14 L. R. A., p. 773, at pp. 778-779, the Court said:

> "It is true that in some cases the right to the writ is put on the ground that an ordinary action at law will not lie against the county or municipality on the claim. We fail to see that such an action against the county is a sufficient remedy. If the claim is lawful and has been audited and ordered paid by the proper authority, and the officer whose function it is to pay has been furnished with and has the public money for its payment, *there is a palpable insufficiency in a remedy which would give him a personal judgment against the county or municipality, to be followed it may be by a* MANDAMUS *to compel the levy of a tax to pay the same in case the money in the treasury should have been used,* or there was not enough to pay the accrued interest, and all this, too, simply because an officer whose duty it is to pay lawful claims sees fit to refuse to do his duty. The holder of such a claim has an IMMEDIATE right to the money provided and held for his payment *and a remedy which imposes any of the delay indicated and its attendant expense, is entirely* INADEQUATE. A remedy which will avoid mandamus must be both *specific* and *adequate.* Baker v. Johnson, supra; Tapping, Mandamus, 18, 19; High, Extr. Legal Rem., par. 9, 15-17."

In the case of Thomas v. Bell (Colo.), reported in 31 L. R. A. (N. S.) page 664, which was an action of mandamus brought against the sheriff for the restoration of certain property, it was said by the Court, at p. 666:

> "Furthermore to supersede the remedy by mandamus, a party must not only have an adequate legal remedy, but one competent to afford the SPECIFIC RELIEF *to which the party is entitled under the*

> *statute.* It is certain that an action in replevin, or for damages against the sheriff for neglect of duty, would not be equally convenient, beneficial and effective as the proceeding by mandamus, since it would *not necessarily compel him to do the specific act* which the law requires him to perform, to wit, the restoration of the property. Even in replevin the property might not be restored. Moreover, the statute imposing the duty to return the property to the person from whom it was taken, when it has been ascertained that the same was not stolen, *provides no remedy for failure so to do. Where a statute prescribes no remedy for the refusal to perform a duty made imperative thereby, or in case of doubt whether there be another* EFFECTUAL *remedy, the writ will be allowed.*"

In the case of Commercial Bank v. Robinson (Okla.), reported in L. R. A. 1918-C, page 410, which was an action brought in mandamus to compel the delivery of bonds by a municipal officer to the plaintiff bank, the Court said, at page 412:

> "A remedy at law which will operate as a bar to mandamus must ordinarily be such as will *enforce the right or compel the performance of the duty; and the remedy is not plain and adequate unless it is commensurate with the necessities and rights of the complaining party under all the circumstances of the case.*"

In the case of State, etc. v. Johnson et al. (Wis.), 51 L. R. A., p. 33, at page 65, the Court said, *inter alia,* in dealing with the supervisory jurisdiction of the Supreme Court:

> "The general rule of law undoubtedly is that mandamus will not lie where there is a remedy by appeal or writ of error. Merrill, Mandamus, par. 201; 2 Spelling, Extraordinary Relief, par. 1390; State ex rel. Spence v. Dick, 103 Wis. 407, 79 N. W. 421. But

the remedy by appeal *must be substantially adequate* in order to prevent relief by mandamus. If it appears that an appeal will not be an adequate remedy, mandamus may still issue. Merrill, Mondamus, par. 201; Merced Min. Co. v. Fremont, 7 Cal. 130; Hawes Jurisdiction of Courts, par. 141."

At pages 69-70, the Court said:

"Second. Even admitting that issues of fact were raised by the answer, we cannot admit that the legislature has any power to deprive this court of any part of its constitutional jurisdiction to fully hear and try such questions. By the Constitution this court was given power to exercise fully and completely the jurisdiction of superintending control over all inferior courts. This power carries with it, not only the writs necessary to its exercise, but the right to hear and determine the cause when the writ has brought it before the court. *No part of that power can be taken away by a statute.* This court will always pay all due deference to the legislative will, and upon mere questions of practice or orderly proceeding will heed and conform to the statute; *but when the statute invades or attempts to take away any of the constitutional powers of the court the court would be untrue to itself, and to the people, from which it holds its commission, if it permitted the statute to control.* As said in Klein v. Valerius, 87 Wis. 54, 22 L. R. A. 609, 57 N. W. 1112: '*It must be remembered that this court as well as the legislature gets its judicial power and jurisdiction directly from the Constitution.*'"

In the Note to the case of George S. Chatfield Co. v. Francis T. Reeves, Mayor of Waterbury (Conn.), reported in L. R. A. 1916-D, the following cases are summarized at pages 331, 332, 333:

"It is said in Raisch v. Board of Education (1889), 81 Cal. 542, 22 Pac. 890, that 'it has been held

in this state that to supersede the remedy by mandamus, the party must not only have a specific, adequate, legal remedy, but *one competent* to afford *relief* upon the VERY *subject-matter of his application*, and *one which is equally convenient*, beneficial and *effective* as the proceeding by mandamus.'

And it is said in Ross v. Board of Education (1912), 18 Cal. App. 222, 122 Pac. 967, that 'the general rule that mandamus will not lie where any other remedy is provided is subject to the qualification that mandamus may be invoked in those cases where the remedy by any other form of action or proceeding would not be EQUALLY *as convenient, beneficial and* EFFECTIVE.' "

V.

A citizen and taxpayer is entitled to apply for a mandamus to oust a person from the office of city councilman on the ground of ineligibility and disqualification for the office, although the petitioner does not himself lay claim to the office. This applies to a legal disqualification arising from a failure to have been assessed for and to have paid taxes upon property at the time of the election of the person attempting to occupy and exercise the office.

Hummelshime v. Hirsch, 114 Md. 39, 51-52, 53-55.

Thomas v. Field, 143 Md. 141.

Poe's Practice, last ed., page 673, Section 710-A.

Ann. Cases, 1913 C, see Annotation, page 909.

23 American and English Ency. of Law, 2nd Ed., page 618.

22 R. C. L. Sec. 25, page 692, 693.

VI.

The provision of Sec. 217, Revised Charter of Baltimore City, 1915, page 178, that "each branch of the City Council shall judge of the election and qualifications of its own members, subject to appeal by the party aggrieved, to the Baltimore City Court"—

(1) Does not apply to suits by citizens and taxpayers, themselves not claiming the office, for the *only and exclusive remedy available to them,* namely, mandamus, to *oust* a person intruding into the office of City Councilman without legal right and in violation of law.

It was specifically and expressly laid down in Hummelshime v. Hirsch, 114 Md., at page 50, that mandamus is the only remedy, in Maryland, available for that purpose.

Moreover, the right of the citizen and taxpayer to require, and the public purposes to be accomplished by requiring a person not lawfully entitled to an office, but unlawfully attempting to exercise it, to vacate it, grow out of and are connected with matters entirely different from those which provisions in municipal charters like that above quoted are intended to subserve.

The right of the municipal citizen and taxpayer, in the respect here under consideration, is concerned with and is directed to protect the economical, political and social interests of the great body of people who compose the municipality. These high and important purposes are recognized and acknowledged in Hummelshime v. Hirsch, 114 Md., at page 51, and also at page 57, and are forcibly set forth in Judge Henderson's opinion in deciding the case in the Circuit Court for Allegany County.

The citizen and taxpayer is entitled to protect these important rights *in the Courts,* which are established and maintained by the people for their protection against lawless invasions of their rights, and it certainly could never have been contemplated by the City Charter that the citizen and taxpayer should be barred and excluded from the Courts and required to seek protection for his rights in the municipal council.

> Record and Briefs in Hummelshime v. Hirsch, 114 Md. 39, at page 23 of the record therein.

See also—

> Worcester Co. v. School Commissioners, 113 Md., p. 317.
> Miles v. Stevenson, 80 Md. 357.

(2) Does not oust the Superior Courts of Law of their Constitutional and Common Law Jurisdiction by mandamus at the suit of citizens and taxpayers to require the illegal intruder to vacate the office.

The Constitution of Maryland, Article IV, Judiciary Department, Section 1, provides that:

> "The *Judicial Power* of this State shall be vested in a Court of Appeals, Circuit Courts, Orphans' Courts, and such Courts for the City of Baltimore as are hereinafter provided for," etc.

By Section 27 of the same Article of the Constitution entitled "Courts of Baltimore City," it is further provided:

> "There shall be in the Eighth Judicial Circuit, six Courts to be styled the Supreme Bench of Baltimore City, the Superior Court of Baltimore City,

the Court of Common Pleas, the Baltimore City Court, the Circuit Court of Baltimore City and the Criminal Court of Baltimore City."

Section 28 of the same Article provides:

"The Superior Court of Baltimore City, the Court of Common Pleas, and the Baltimore City Court, shall each have concurrent jurisdiction in *all civil common law cases,* and concurrently *all the jurisdiction which the Superior Court of Baltimore City and the Court of Common Pleas now have,* except jurisdiction in equity," etc.

Except by Constitutional amendment, the judicial power and jurisdiction thus constitutionally conferred and imposed upon the Courts named, cannot be changed.

State v. Mace, 5 Md. 347.
Broadbent v. State, 7 Md. 430.
Manley v. State, 7 Md. 146.
Capron v. Devries, 83 Md. 224.
Cook v. Cook, 41 Md. 362.
Baltimore v. Kane, 125 Md. 139.
Wilmer v. Savings Ass'n., 141 Md. 240-241, 242.

In the case last cited, 141 Md. 242, it was said:

"The assignment of the judges to each of the Courts of Baltimore City by the Supreme Bench of Baltimore City is provided by Section 32 of Article 4 of the Constitution of the State, and it will be seen that the provisions of Chapter 425 of the Acts of 1920, herein set out, are in direct conflict with that Section of the Constitution, and are invalid and unconstitutional, and therefore null and void."

It will be further noted that the Constitution does not give any directions to the General Assembly with ref-

erence to the apportionment of the *Judicial Power* so above vested in the Circuit Courts for the Counties and the Superior, Common Pleas and City Courts of Baltimore City, but, with respect to the subject of *elections,* the direction of the Constitution is, Article 3, Section 47, "the General Assembly shall make provisions for all cases of *contested elections* of any of the officers not herein provided."

It is obvious that it is only in the sense and to the extent that Legislative enactments vesting in municipal councils the right to judge of the election and qualifications of their members, are designed to cover *election contests* relating to membership in those bodies, that the Legislature was authorized by the Constitution to vest in them a judicial power to decide *such* questions *in exclusion* of the Judicial Power lodged by the Constitution in the Courts of Baltimore City and vesting in them jurisdiction in all civil common law cases, and all the jurisdiction which the Superior Court of Baltimore City and the Court of Common Pleas had at the time of the adoption of the Constitution of 1867.

It would, therefore, seem that under the Constitution of this State, vesting as above set forth, the judicial power and jurisdiction in the Eighth Judicial Circuit in the Courts of Baltimore City, those decisions which hold that the Legislature is not constitutionally authorized to take from the Superior Courts of Record their judicial power and jurisdiction, as lodged in them by the Constitution, by transferring and vesting a part of such power, to the exclusion of said Courts, to be solely and finally exercised by municipal councils created by legislative act, are clearly and directly applicable in this State.

People v. Bingham, 82 Cal. 238.
State v. Morris, 14 Wash. 262.

State vs. Cosgrave, 85 Nebraska 187, 26 L. R. A (N. S.) 207, 216.
State v. DeGress, 53 Tex. 387; 72 Tex. 242.
People v. Hall, 80 N. Y. 117, 122-123.
State v. Johnson (Wisconsin), 51 L. R. A. 33, 68-70.
State v. Kempf, 69 Wisconsin 470, 2 A. S. R. 753.
State v. Kraft, 18 Oregon 550.

In the carefully considered and leading case of People v. Cosgrave, 85 Neb. 187, fully reported with elaborate annotation in 26 L. R. A. (N. S.) 207, the Court said:

> "Under the Constitution and laws of this State relating to *quo warranto*, there is no question but that the remedies by contest and quo warranto are cumulative, and that the legislature would have no power to take away the right to apply to the Courts to inquire by what right the incumbency of an office is held. Kane v. People, 4 Neb. 509, State ex rel. Fair v. Frazier, 28 Neb. 438, 44 N. W. 471; State ex rel. Barton v. Frantz, 55 Neb. 167, 75 N. W. 546. In this respect we agree with the Supreme Court of Wisconsin in State ex. rel. Anderton v. Kempf, supra, and other Courts adhering to the same doctrine."

See particularly the important and instructive cases of:

State v. Kempf, 69 Wis. 470, 2 A. S. Reports, 753.
State v. Kraft, 18 Ore. 550.

In 22 R. C. L. Quo Warranto, in discussing this particular subject, it is said:

> "It has in fact been seriously questioned whether the Legislature has the power to exclude the juris-

diction of the Courts in such cases, and in some instances such provisions have been held invalid under particular constitutional provision."

VII.

Assuming, however, that the Legislature may constitutionally take away from the Judiciary Department, as a co-ordinant branch of the Government, the judicial power in question and transfer it solely, exclusively and finally to a municipal council, it is now settled by the overwhelming weight of judicial decisions, recognized and declared in all the authoritative text works upon the subject, that such judicial power and jurisdiction in question will not be regarded as having been taken away from the Superior Courts, where the Constitution has placed it, except and unless *it appear with unequivocal certainty from the legislative act that the Legislature undoubtedly intended to take it away. This is now the settled and almost universal law of this country.*

1 Dillon, Mun. Corp. 5th Ed. Sec. 379.
McCrary on Elections, 4th Ed., Sec. 380.
High, Extraordinary Remedies, 3rd Ed., Sec. 617-A.
10 Amer. & Eng. Enc. of Law, Elections, 800.
15 Cyc. Elections, 395, 396.
2 Spelling, Extraordinary Remedies, 2nd Ed. Sec. 1776.
20 Corpus Juris, Elections, 213-216.
9 Ruling Case Law, Elections, pp. 1060-1061, Sec. 150.
22 Ruling Case Law, Quo Warranto, Sec. 6, also Sec. 25, pp. 692-693.
26 L. R. A. (N. S.) Anno., p. 210, also pp. 208-209.

17 Amer. & Eng. Enc. of Pleading & Practice, p. 424, 425.
Throop, Public Officers, Sec. 397.
Mechen, Public Offices and Officers, Sec. 214, 2nd Par. upon p. 139.
Board of Aldermen v. Darrow, 16 Amer. State, Rep. Anno., p. 220.
Ex Parte Heath, 3 Hill, N. Y. 42.
People v. Hall, 80 N. Y. 117.
McVeany v. N. Y., 80 N. Y. 185.
McVeany v. N. Y., 59 Howard's Practice, 106.
State v. Camden, 47 N. J. Law, 64.
Meachen v. New Brunswick, 73 N. J. Law, 121.
Commonwealth v. McCluskey, 2 Rawle Pa. 369.
Commonwealth v. Allen, 70 Pa. State, 465.
State v. Kempf, 69 Wis. 470.
State v. Gates, 35 Minn. 385.
People v. Bingham, 82 Cal. 238.
Carter v. Sup. Ct. 138 Cal. 150.
People v. Londoner, 13 Cal. 303, 6 L. R. A. 442.
People v. Wells, 78 Col. 77, 239 Pacific 726 (Col. 1925).
Darrow v. People, 8 Col. 417.
People v. Bird, 20 Ill. Ap. 568.
People v. Altenberg, 260 Ill. 191, 103 N. E. 67, Anno. Cases, 1914 D. 272.
State v. Kraft, 18 Ore 550.
State v. McKinnon, 8 Ore. 493.
State v. Cosgrove, 85 Nebr. 187, 26 L. R. A. (N. S.) 207.
Doherty v. Cripps, 82 Ark. 529.
State v. Egry, 79 Ohio State, 391.
State v. O'Brien, 47 Ohio State, 464.
State v. Morris, 14 Wash, 262.

Echols v. State, 56 Ala. 131.
State v. Wilmington, 3 Harrington (Del.) 294.
Patterson v. People, 65 Ill. Ap. 651.
Wilson v. LaCroix, 111 Me. 324.
Payne v. Hodgson, 34 Utah, 269.
State v. Shay, 101 Ind. 36.
State v. Funck, 17 Iowa, 365.
Haverstock v. Aylesworth, 113 Iowa, 378.
State v. Fitzgerald, 44 Mo. 425.
State v. Anderson, 26 Fla. 240.
Harden v. Colquitt, 63 Ga. 588.
Stack v. Commonwealth, 118 Ky. 481.
Hawley v. Wallace, 137 Minn. 183.
State v. Craig, 100 Minn: 352.
State v. Kearn, 17 R. I. 391.
State v. Peter, 21 Wash. 243.
Jobson v. Bridges, 84 Va. 298.
Tarbox v. Sughrue, 36 Kan. 228.
Rhode Island v. South Kingston, 22 L. R. A. 65, 67, 68.
State v. Franshan, 19 Mont. 273.

The profound and obvious distinction between the status and powers of the sovereign Legislatures of the States and of municipal councils, set forth in the leading case of *People v. Hall,* 80 N. Y. 117, has been repeated and followed in many subsequent decisions.

People v. Londoner, 13 Colo. 303, 6 L. R. A. 444.
People v. Wells, 78 Colo. 77, 239 Pac. 726.
Commonwealth v. Allen, 70 Pa. State 465.
Machem v. New Brunswick, 73 N. J. Law 121.
State v. Kempf, 69 Wis. 470.
State v. McKinnon, 8 Ore. 493.

State v. Cosgrave, 85 Neb. 215-216.
16 Amer. State Reports 220-222, Annotation.
9 Ruling Case Law, Elections Sec. 150, pp. 1160-1161.

In the work last cited it is said with respect to the "unsound" analogy between a State Legislature and a municipal council:

> "It is pointed out that there is no true analogy between a State Legislature and a council of a city; that the Legislature and the Courts derive their existence from the Constitution itself, are co-ordinate, independent branches of the government standing on an equality in the exercise of these powers which the Constitution empowers to each in its own sphere; that a City Council is not in any proper sense a Legislature; that it does not make laws but ordinances; nor are the members Legislators with the constitutional privileges and immunities of legislators; and that the Courts never had jurisdiction to determine the election and qualifications of Legislatures, whereas they have inherent jurisdiction to issue writs of *quo warranto* to determine title to offices in Councils when not expressly deprived of it by statute."

VIII.

The clause in question in Section 217 of the City Charter of itself affords no complete, adequate and sufficient remedy to the citizen and taxpayer, because nothing appears in the clause itself to show that any competent authority has legally provided an appropriate and sufficient procedure, in and before the City Council, to bring the matter effectually before the Council, or with respect to testimony, hearing, time of sessions, order of procedure, the time or manner of proper and necessary steps in the proceedings, or as to the time or man-

ner of the appeal. As to not a single one, whatever, of these essentials, all so obviously necessary to afford a clear, definite, expeditious, adequate and complete remedy to the citizens and taxpayers to require persons usurping membership in the Council in violation of law to cease their unauthorized usurpation and yield up to the people of the municipality the office which belongs to them, has any provision by law been made. Under these circumstances it is well settled in Maryland and elsewhere that a specific, adequate and complete remedy has not been provided.

Judge Phelps' decision in Venable v. Upshur, Daily Record, Oct. 11, 1901.
Groome v. Gwinn, 43 Md. 572.
Cull v. Wheltle, 114 Md. pages 85 and 86.
State v. Funck, 17 Iowa 365.
State v. Morris, 14 Wash. 262.
State v. Peter, 21 Wash. 343.

In 20 Corpus Juris, Elections, Sec. 273, page 215, it is said:

> "The jurisdiction of the Council is not exclusive where the Constitution confers jurisdiction on the Courts or where the Charter * * * is not followed by an ordinance providing a method for trying contests."

In State v. Funck, 17 Iowa 365, it was held that until the Council has by ordinance provided the method for conducting cases of contests, the claimant is not bound to submit his claims to the city tribunal, but may file his information and have his right to the office determined by the Courts of the County. The Court said:

> "For until the council has acted and adopted some regulations and forms for carrying the power thus

given into execution, no one claiming the office can know what steps to take or how to proceed. When or how is he to appear? What notice is to be given? How, and under what rules, is testimony to be taken? Within what time is he to make his claim? * * * *These and many other inquiries which naturally suggest themselves, seem to show the necessity of some action upon the part of the Council to make this power effective, and that without such action it would be unwise, impolitic and even grossly unjust to deny to the claimant the right to resort to a remedy—plain, simple and clearly pointed out by the law.*"

IX.

If, however, the municipal citizen and taxpayer is "a party aggrieved" within the meaning of the clause in Section 217 of the Charter, then Paragraph IV of the Petition in each case shows that the petitioners are within the provisions of Section 217 of the Charter. After showing the ineligibility of the defendants for the councilmanic office, that their election was as a matter of law illegal, null and void, that they are occupying the offices in violation of law, and, therefore, should be required to vacate them, the Petitions proceed in Paragraph IV to set forth that, at a session of the City Council on June 6, 1927, the City Council by a vote of 11 to 8, held that the defendants were duly qualified and according to law were entitled to their seats as members of the City Council, and that the petitioners feeling aggrieved by said finding and decision, have brought this proceeding in order that the alleged disqualifications of the defendants may be judicially inquired into and determined (Records, p. 5). The proceeding is thus shown clearly to be in the nature of an appeal from the decision of the Council whereby the petitioners are aggrieved, and being avowedly brought for the purpose of having the matter of the decision of the Council upon the election and qualifications of the defen-

dants, by which decision the petitioners declare themselves aggrieved, judicially reviewed in the Baltimore City Court, the tribunal designated by the Charter provision for reviewing the decision of the Council, every essential of the Charter provision obtains and concurs, upon the face of the petition, and there is nothing whatever of substance wanting to bring these proceedings within the Charter provisions, assuming that it extends to the case of a municipal citizen and taxpayer exercising his undoubted legal right to have an illegal intruder into a municipal office ousted from the office from which the law itself excludes him.

If the Charter provision in question embraces the case of the municipal citizen, voter and taxpayer in the exercise of his legal right to have a person unlawfully holding and exercising a municipal office, *evicted* from the office, then it *must* contemplate the employment by the citizen, voter and taxpayer of the *only remedial procedure by which the specific object in view, namely, the ousting of an unlawful occupant from the office, may be accomplished.*

The *right* in question of the citizen and taxpayer is *to oust the intruder from the office;* and his interest and his object are to accomplish that right, namely, the *ousting* of the intruder from the office; if he may not employ the *remedy,* whereby alone his right may be effectually exercised, and the object of its exercise attained, he may as well not have the right, because without the remedy to make it effective, it would be utterly futile and worthless. But the well-settled and familiar rule in such case is *ubi jus, ibi remedium;* therefore, if the provision of the charter *includes* the right of a municipal citizen and taxpayer to *oust* the unlawful claimant and occupant of the office from the office which he has no right to, then the Charter

provision *must necessarily and inevitably contemplate and include the only remedy afforded by the law to put the unlawful occupant out of the office, namely, the remedy by mandamus;* and in view of this plain, undeniable and irresistible conclusion, if the Charter provision *includes* the case of the taxpayer entitled to have the intruder *evicted,* it consequently includes also the right to use *the only remedy whereby the intruder may be ousted, and the petitions in this case asking that the Baltimore City Court review the decisions of the Council whereby the petitioners have been aggrieved, and award the petitioners the only remedy whereby they may effectuate their right to have an illegal intruder ousted from the office, are within the Charter provision and in accord with its provisions.*

On the other hand, if the Charter provision *does not extend to and include* the case of a municipal citizen and taxpayer exercising his legal right to have a person unlawfully occupying the municipal office ousted from it by the only remedy which the law affords specifically and directly to put the intruder out, namely, mandamus, then the Charter provision does not afford a *specific, direct, adequate and complete remedy to effectuate the particular right of the municipal citizen and taxpayer, and the latter's right to proceed by mandamus in the Baltimore City Court, under its inherent and general jurisdiction, as broadly conferred by the State Constitution, is entirely free from all doubt and controversy.*

In Hummelshime v. Hirsch, where, according to the decision in Spitzer v. Martin, 130 Md. at page 431, there was an implied inherent right in the municipal Council to judge the election and qualifications of its members, and also the express statutory right of having the title to the office determined and the

unlawful occupant of it declared not to be entitled to it by way of an election contest which was then actually pending in the Circuit Court for Allegany County, the Court of Appeals nevertheless held that the right of the citizen and taxpayer to proceed in Court to oust the unlawful intruder from the office of City Councilman upon the ground that he was ineligible because lacking the necessary and proper qualifications at the time of his alleged election, by the only proceeding, namely, mandamus, by which that right could be effectuated and the wrong complained of remedied and redressed by the specific and direct ousting of the intruder, was not at all impaired or affected by the pending election contest or, it may be assumed from Spitzer v. Martin, by the implied right in the Council of Cumberland to judge the election and qualifications of its members. The Court said:

> "In regard to the defense that the pending election contest between the appellee Hirsch and the appellant is a bar to relief in this case, is is only necessary to say that th eappellant Devecmon is not a party to those proceedings and that he cannot, in that case, obtain the relief here sought. In order that other proceedings may be a sufficient answer to the petitioner's prayer for mandamus, it must appear that the petitioner can obtain *full and adequate* relief in such proceedings, and it is not sufficient that in a suit pending between one of the petitioners and the respondent involving different issues, the judgment may indirectly and ultimately bring about the same result sought to be accomplished by the writ."

X.

The case of State ex rel. Holland v. County Commissioners, 46 Md. 621, was relied on, and was *all* that was relied on at the oral argument below, to extricate the appellees from the dilemma pointed out in the last preceding

paragraph hereof. The appellees relied upon that case as showing that the appeal by petition by the party aggrieved to the Baltimore City Court, mentioned in the Charter provision in question, could not include a petition of a municipal citizen and taxpayer for a mandamus specifically and directly ousting an illegal incumbent from the office to which he had no title or right.

It requires only a little reflection to perceive that even if the case referred to had the effect which the defendants thus seek to ascribe to it, it would not relieve them of their difficulty or aid in the least in sustaining their demurrer, for the plain and conclusive reason that if it be true that the appeal by petition by the party aggrieved to the City Court does not afford and secure to the citizen and taxpayer of the city his right and remedy directly to oust the unlawful intruder from the office, then the specific, adequate and complete remedy, which the taxpayer is entitled to, is not afforded and secured to him by the Charter provision and, therefore, it cannot have the effect of ousting the constitutional common law power and jurisdiction of the higher Courts to grant to the citizen and taxpayer the specific right and remedy to which he is admittedly entitled.

This being true, it is really superfluous to pursue further, in its application to these appeals, the case in question, State ex rel. Holland v. County Commissioners, but the fact is that the effect which the defendants ascribe to that case, particularly in the application of it attempted by them herein, has been expressly and definitely denied to it by the Court of Appeals itself. In the later case of O'Brian v. County Commissioners, 51 Md. 15, dealing with the same statute and the same authority of the County Commissioners relating to Wilkens Avenue, the

Court of Appeals, at page 87 of Chief Judge Bartol's opinion said:

> "There is no valid reason why the act should not be carried into execution by the County Commissioners. Not being clothed with the jurisdiction or power to decide upon the constitutionality of the law, their judgment that it was unconstitutional and
>
> void does not relieve them from the duty of carrying the law into effect and the discharge of this duty *may be enforced by mandamus.*
>
> We desire to say in this connection that the decision in State ex rel. Holland v. County Commissioners, 46 Md. 621, is *not to be construed as a denial of the powers of the courts to grant the right of mandamus in a proper case,* requiring the County Commissioners to carry out the provisions of the Act of 1876. In that case the power of the County Commissioners to adjudge the Act unconstitutional was not discussed or questioned in the argument and it does not appear to have been considered or decided by the Court. We have adverted to the decision in that case for the purpose of preventing it from being misunderstood."

But in the next place even if the decision in the Holland case were as the appellees, the defendants below, set up and the opposite of what the Court of Appeals in the O'Brian case declared was its true meaning and effect, the case could not be properly interpreted and applied as the defendants have sought to do in this case. The statute involved in that case was the Act of 1876, Ch. 101, which named and appointed a Board of Examiners empowered to make assessments upon owners of land upon and near Wilkens Avenue for the purpose of completing it. That Board was directed to make a report of their proceedings to the County Commissioners of Baltimore

County, *for their ratification, amendment or rejection,* and the Act further provided that any person interested in the proceedings might appeal from the final order of ratification or rejection of the report of the Commissioners to the Circuit Court of Baltimore County. The examiners made the assessments and reported them to the Commissioners; but the Commissioners considering that the Act of 1876 was unconstitutional, rejected the report and passed an order quashing the proceedings thereunder. It is perfectly plain that the power and duty conferred upon and permitted to the Board of Commissioners of Baltimore County to ratify, amend, or reject the report of the examiners, and which duty they exercised in accordance with the power and discretion granted them, was not a matter to which mandamus applied or within the peculiar and exclusive purview or scope of that remedy, but was merely an ordinary appeal to the Circuit Court to decide whether upon the proceedings before them, it was proper or not proper either to *ratify* or *amend* or *reject* the examiner's report, as the case might arise. The County Commissioners having exercised the power and duty committed to their judgment and discretion, such exercise of their judgment and discretion was not reviewable or controllable by *mandamus,* and the appeal could not have been by *mandamus,* but was merely the ordinary review by the Court of the decision of the County Commissioners in either adopting, amending or rejecting the report. And as the Court intimated, from the statement of facts, namely, that the Commissioners had exercised their judgment and performed their duty and in doing so had rejected the report, there was no case for mandamus which remedy could have been issued *only* to compel them to exercise their judgment and discretion, but not to control or review their exercise of it. For that purpose the statute

afforded an entirely different remedy, namely, an appeal, and *clearly and definitely not a mandamus,* which could not lie for the purpose of reviewing and controlling the discretion and judgment actually exercised and the duty actually performed. The appeal provided by the statute was plainly of a nature entirely different from mandamus.

In the subsequent decision above referred to in the case of O'Brian v. County Commissioners, 51 Md. 27, wherein the Holland case in 46 Md. is considered in the respect of there having been a *refusal* upon the part of the County Commissioners *to carry the act into execution* upon the ground that in their judgment it was unconstitutional and void, the Court said:

> "Not being clothed with the jurisdiction or power to decide upon the constitutionality of the law, their judgment that it was unconstitutional and void, does not *relieve* them from the *duty of carrying the law into effect,* and the discharge of *this* duty may be enforced by mandamus."

And Chief Judge Bartol further adds:

> "We deside to say in this connection that the decision in State ex rel. Holland v. County Commissioners, 46 Md. 621, is not to be construed as a denial of the power of the Courts to grant the writ of mandamus in a *proper case* requiring the County Commissioners to *carry out* the provisions of the Act of 1876."

XI.

There was a distinct supposition upon the part of the learned Judges below, in their opinion herein, that the City Council of Baltimore had been co-ordinated, by Article XI-A of the Constitution, with the Legislative

Department and the Judicial Department of the State Government under the Constitution. There is no force in this position either absolutely or as applicable to this case. Section 9 of Article XI of the Constitution, still effective and operative, provides "the General Assembly may make such changes *in this Article* except in Section 7 therein (relating to municipal debts and loans) as it may deem best; and this Article shall not be construed or taken to make the political corporation of Baltimore independent or free from the control which the General Assembly of Maryland has over all such corporations in this State."

This Section of the Constitution is referred to and expounded in the great case of Baltimore v. State, 15 Md. 463, wherein it was said that the City of Baltimore, could not under the Constitution, be erected into an *imperium in imperio.*

And in that case and in many succeeding decisions of the Court of Appeals it has been definitely and repeatedly laid down that whilst the power of the Legislature over the City is not absolutely unlimited, the State does possess wide and paramount powers of control and legislation over the municipality.

Baltimore v. State, 15 Md. 463.
Pumphrey v. Baltimore, 47 Md. 152.
Daly v. Morgan, 69 Md. 460.
Baltimore v. Gorter, 93 Md. 5.
Baltimore v. Keeley Institute, 81 Md. 115.
Thrift v. Laird, 125 Md. 67.
Williams v. Broening, 135 Md. 226, 234-236.
Jones v. Broening, 135 Md. 237, 241.
Levering v. Supervisors, 137 Md. 290.

And Section 1 of Article XI-A specifically provides that the City Charter after its adoption shall become a law af said city *"subject only to the Constitution and the Public General Laws of this State."*

And by Section 2 of Article XI-A, it is provided that the *express powers* granted to the City of Baltimore shall *not be enlarged or extended by any Charter form under the provisions of this Article, but such powers may be extended, modified, amended or repealed by the General Assembly.*

And Sections 2 and 4 of the same Article are in full accord with the provisions above referred to of Sections 1 and 2.

1 Ann. Code, 1924, pages 132 and 152.

That the Constitutional Amendment embodied in Article XI-A did not at all co-ordinate the municipal government of Baltimore City with the State Government in its various Departments, but reserved to the State its ultimate and paramount control over the powers of the City, is made conclusively clear and certain by the recent decision of this Court in the case of State v. Stewart, decided March 3, 1927, and published in The Daily Record of March 14, 1927. In that case His Honor, Judge Digges, speaking for the Court, said:

> "This Article empowers the General Assembly to designate the subjects in respect to which the City or Counties may legislate locally. In other words, this article of the Constitution itself does *not* grant the power to Baltimore Ciy to legislate locally on all subjects, but only in respect to such subjects as are delegated to it in the legislative grant of powers. That is to say, the General Assembly has full power to designate the subjects in respect to which the power of legislation is delegated to the local authorities, but reserving to the Legislature the power and

> authority to enlarge, repeal or change the grant of powers theretofore made. * * * If the General Assembly, in its grant of powers to Baltimore City, subsequently concludes that the grant of powers contained a subject upon which the General Assembly should have authority to legislate, and not the city authorities, it can only accomplish this by amending or repealing the act granting and delineating the powers. The Legislature has the power to describe the field within which the local authorities may legislate, but having once done this, it cannot restrict or limit this field of legislation without changing its boundaries."

XII.

Nor does State v. Jarrett, 17 Md. 309, sustain the appellees in these cases. The Constitution of 1851, ordered that "the Legislature shall make provision for all cases of *contested elections* of any of the officers not herein provided for." The Constitution did not provide how a contested election for Comptroller should be disposed of, and, therefore, provision for such *contested election* had to be made by the Legislature. Such provision was made by the Act of 1853, Ch. 444, codified as Section 52 of Article 359, the Code, that: "*All contested elections* for Comptroller and Commissioner of Land Office *shall* be decided by the House of Delegates." The Court of Appeals decided that by the Constitutional mandate and the statute pursuant to it declaring that the House of Delegates shall decide all *contested elections* for Comptroller, there was no tribunal other than the House of Delegates which could decide a contested election for Comptroller. There the remedy for the decision of *contested elections* for Comptroller was specific, complete and exclusive.

That a *contested election* and legislative provision for deciding a *contested election* are entirely different and

distinguishable from the municipal taxpayers' petition by mandamus to *oust* an *illegal intruder* from an office held by him in violation of law is specifically declared and decided in Hummelshime v. Hirsh, 114 Md. at page 57, in the paragraph hereinabove quoted from the opinion in that case. The difference and distinction are also very clearly shown by the opinion of Judge Henderson at Circuit in that case and by numerous other authorities hereinabove cited, and also by

> Magruder v. Swann, 25 Md. pp. 204-205, and
> Richardson v. Blackstone, 135 Md. 530, at pp. 537, 541.

Finally, it is respectfully submitted that the *high Courts of this State*—the last reliance and protection of the people—ought not to disclaim and abdicate their constitutional and common law jurisdiction and duty to protect the rights herein involved of the taxpayers and people of Baltimore City—rights of such varied, great and far-reaching import with reference to their economic, financial, political and social interests—and thereby leave them without their only specific and direct legal remedy against individual and public wrong, unless the Courts are inescapably constrained to do so by requirements of law so "*unequivocally certain*" and *compelling* that they cannot be resisted.

It is respectfully submitted that the judgments below in both of these causes should be reversed and the causes remanded for further proceedings.

ISAAC LOBE STRAUS,

EDGAR ALLAN POE,

Attorneys for the Appellants.

MORTIMER W. WEST and PHILIP J. SCHECK, Petitioners, vs. J. WARREN BURGESS, Defendant.	IN THE *Court of Appeals* OF MARYLAND.
MORTIMER W. WEST and HARRY J. MCCLELLAN, Petitioners, vs. THOMAS L. A. MUSGRAVE, Defendant.	OCTOBER TERM, 1927. GENERAL DOCKET Nos. 46 and 47.

BRIEF FOR APPELLEES.

STATEMENT OF FACTS.

The present appeals are from an order of the Baltimore City Court sustaining demurrers to petitions for mandamus to test the qualification and eligibility of the defendants to seats in the Baltimore City Council.

The petitions allege, in substance, that the defendants were not assessed with property upon the tax books of Baltimore City in the amount of three hundred dollars, upon which they had paid taxes one year prior to their election, and that therefore they did not possess the qualifications prescribed by Section 210 of the Charter of Baltimore City for membership in the Council.

The petitions allege that the defendants were elected on May 3, 1927; that they presented themselves to the

Mayor on May 14, 1927; and that he administered to them the oath of office, and that they took their seats as members of the Baltimore City Council.

The petitions further allege that on June 6, 1927, the Baltimore City Council held that the defendants were duly qualified according to law and were entitled to their seats; and that the petitioners, feeling aggrieved by the "said finding and decision have brought this proceeding in order that the alleged disqualification of the defendants may be judicially inquired into and determined."

The relevant provisions of the Baltimore City Charter are Sections 210 and 217, as follows:

> Section 210. "The members of the City Council, except the President thereof, shall be citizens of the United States, above the age of twenty-one years, residents of the City of Baltimore three years prior to their election, and for the same time residents of the Councilmanic District for which they are elected, and assessed with property to the amount of three hundred dollars each, who have paid taxes on the same one year prior to their election, and they shall hold office for four years."
>
> Section 217. "The City Council shall judge of the election and qualification of its members, subject to appeal by petition of the party aggrieved to the Baltimore City Court."

ARGUMENT.

I.

DEMURRER IS THE PROPER METHOD OF TESTING THE LEGAL SUFFICIENCY OF A PETITION FOR MANDAMUS.

We understand that the petitioners and respondents agree that the legal sufficiency of the petitions for mandamus filed in the Baltimore City Court may properly

be tested by demurrer. The Court below, in its opinion, discussed the propriety of filing demurrers in these cases, and seemed to rely upon the fact "the demurrers filed in these cases were apparently recognized by both sides to be the appropriate pleading, and the Court, therefore, so accepts it." We deem it, therefore, not inappropriate to cite decisions of the Court of Appeals in support of the procedure followed by the respondents.

In Gross vs. Baltimore City, 111 Md. 543, a petition for mandamus was instituted to compel the City Solicitor to bring a condemnation case to trial. The City demurred to the petition for mandamus, and the demurrer was sustained. This action was reviewed and approved by the Court of Appeals.

In the case of Wight vs. Hubelin, 111 Md. 649, a petition for mandamus was filed against a corporation to require it to permit an examination of its books. The defendant corporation demurred to the petition. This method of testing the legal sufficiency of a petition for mandamus was recognized as proper. After the demurrer was overruled the Court permitted an answer to be filed as is customary in other cases.

The case of Beasley vs. Rideout, 94 Md. 649, recognizes that a demurrer may be filed to a petition for mandamus, and holds that its effect is not to dispense with the necessity for proof before the issuance of the writ.

In Pumphrey vs. Baltimore, 47 Md. 145, it appears that the City demurred to a petition for mandamus. No question was raised as to the propriety of such procedure.

From these citations it is apparent that the demurrers were properly interposed in the cases at bar.

II.

MANDAMUS WILL NOT LIE IN THESE CASES BECAUSE THE PETITIONERS HAVE A SPECIFIC AND ADEQUATE REMEDY AT LAW.

We will not discuss the history of the writ of mandamus and its development, as the lower Court, in the opinion which is a part of the Record, has fully and learnedly covered the subject. It is sufficient to state the rule recognized in Maryland from the earliest days: that mandamus will not lie if there is a specific and adequate remedy at law. It is not a writ of right, say the authorities, and it will not be granted if another remedy exists which is specific and adequate.

> "*Mandamus* is a most valuable and essential remedy in the administration of justice, but it can only be resorted to to supply the want of some more appropriate ordinary remedy. Its office, as generally used, is to compel corporations, inferior tribunals, or public officers to perform their functions, or some particular duty imposed upon them, which, in its nature, is imperative, and to the performance of which the party applying for the writ has a clear legal right. The process is extraordinary, and if the right be doubtful, or the duty discretionary, or of a nature to require the exercise of judgment, or if there be any ordinary adequate legal remedy to which the party applying could have recourse, this writ will not be granted."
>
> George's Crk. C. & I. Co. vs. Co. Com., 59 Md. 255, 259.

Poe, Pleading & Practice, Vol. II, Sec. 709, says:

> "It is a summary remedy for the want of a specific

one, where there would otherwise be a failure of justice."

See also—

High on Extraordinary Remedies, Sec. 49 and Sec. 10.

In the case of In re Huguley Mfg. Co., 184 U. S. 297, the Supreme Court used the following language at p. 301:

> "The writ of mandamus cannot be used to perform the office of an appeal or writ of error, and is only granted, as a general rule, where there is no other adequate remedy."

The case of Hummelshime vs. Hirsch, 114 Md. 39, relied upon by the petitioners as the mainstay of their case, affirmed the principle for which we contend. In that case the Court maintained jurisdiction in mandamus because the Charter of Cumberland did not contain a provision similar to Section 217 of the Baltimore City Charter granting jurisdiction to the City Council to determine the qualification of its members.

There are no exceptions to this rule in Maryland. The cases which seem to hold otherwise will be found, on careful analysis, to support the general rule. In the case of Price vs. Ashburn, 122 Md. 514, the Board of Canvassers refused to canvass the votes of certain election districts, and the Court of Appeals decided that the writ of mandamus was properly issued directing them to canvass the returns, so that a certificate of election could issue; but the Court distinctly disclaimed the intention to settle the title to the office, as this was a question committed by the Constitution to the State Senate. The act which the defendants were compelled by the writ of mandamus to perform was merely the act of canvassing or

counting the returns, a mere ministerial act, which is clearly distinguishable from the act of determining the qualifications of an elected official, which involves the exercise of discretion and cannot be controlled by mandamus.

III.

IN MARYLAND IT IS THE FIRMLY ESTABLISHED RULE THAT WHEN THE POWER IS GIVEN TO LEGISLATIVE BODIES TO DETERMINE THE ELECTION AND QUALIFICATIONS OF THEIR MEMBERS THAT POWER IS EXCLUSIVE.

Regardless of some few decisions to the contrary which may exist elsewhere, in Maryland it is the settled law that the power given to legislative bodies to determine the election and qualifications of their own members *and others* is exclusive.

Indeed, there is not wanting authority to support the proposition that, quite apart from any grant or failure to grant specific authority to a legislative body to judge of the election and qualifications of its members, every legislative body is the sole judge of these questions.

See opinion of Judge Stockbridge in

Spitzer vs. Martin, 130 Md. 428 at 431.

But there can be no question as to the jurisdiction of the City Council when, as in the instant cases, such jurisdiction is expressly granted and was in fact exercised as alleged in the petitions.

In Maryland the doctrine has never been countenanced that there is concurrent jurisdiction between the Courts and a special tribunal to which the law has committed the power to judge of the election and qualifications of of-

ficers. Our Courts have always held that when jurisdiction to judge an election or the qualifications of an officer is referred by law to a certain tribunal, that tribunal has exclusive jurisdiction.

One of the earliest cases announcing this principle is that of State vs. Jarrett, 17 Md. 309, wherein the Courts were appealed to by one claiming the office of Comptroller. The Court held that it was bound by the jurisdiction of the Legislature, which was the sole judge of the contested election, and the Court merely decided who was entitled to the office pending the qualification of the successful contestant before the Legislature. The Court reached its decision because of the provision in the Maryland Constitution that "all contested elections for Comptroller shall be decided by the House of Delegates." This language is analogous to the language of Section 217 of the City Charter: "The City Council shall judge of the election and qualifications of its members."

This Court, in the Jarrett case, held the constitutional grant of jurisdiction to the Legislature to be exclusive, although there was no express language in the Constitution providing that the House of Delegates *alone* shall decide such contests. And likewise, in construing Section 217 of the City Charter, no other language is necessary to vest in the Council exclusive authority to judge of the qualifications of its members, subject, of course, to the right of appeal to the Courts as provided in the Charter.

Likewise in Covington vs. Buffet, 90 Md. 569. A petition for mandamus was filed to compel the printing of the name of a candidate for Senator on the ballot. It was alleged that the incumbent had vacated his office by accepting another office. Section 19 of Article 3 of our

Constitution provides that the Senate shall be the judge of the election and qualifications of its members. The Court of Appeals said "until that tribunal which is entrusted with the *exclusive* authority decides whether a vacancy exists the Courts are without jurisdiction to interfere."

We ask the Court to note it was held that the grant of power to the Senate is exclusive, although there is no express language in the Constitution granting exclusive jurisdiction. The language is merely that "each House of the Legislature shall be the judge of the qualifications or election of its own members."

In the case of Brooks vs. Widdecomb, 39 Md. 386, a candidate for Court Clerk filed a petition for mandamus to test title to that office. The Court of Appeals held that, inasmuch as Article 4, Section 12 of the Maryland Constitution refers to the House of Delegates the power to judge elections for Court Clerks, the Court was without jurisdiction to try the question, and the petition for the writ of mandamus was dismissed. The Court in that case merely held that, pending the contest, the person holding the certificate of election was entitled to the office, and refused to inquire into the title to the office, as this was within the sole province of the House of Delegates.

This Court held, in Canvassers vs. Noll, 127 Md. 299, that canvassers of an election may be compelled to make a canvass as provided by Section 86 of Article 33, but that the title to the office there involved (Clerk of Court) must be determined by the Legislature, and that the Court has no jurisdiction to deal with this question.

The Courts of other States almost universally hold that

when the law refers the question of the election and qualification of a member of the legislative body to that body, it has *sole* jurisdiction over the question. Even though the law does not expressly oust the jurisdiction of the Courts, the language "shall judge of the qualifications, elections and returns" is held exclusive.

The City Council is made "the judge of the election and qualification of its own members." Held to confer exclusive jurisdiction.

Seay vs. Hunt, 55 Texas 545.

"That the Common Council shall be the judge of the election and qualifications of its own members." Held exclusive.

People vs. Harshaw, 60 Mich. 200.

Village trustees "shall have power to judge of the election and qualification of its own members." Held, county courts are deprived of their jurisdiction.

Foley vs. Tyler, 161 Ill. 167.

Common Council shall "judge of the election, returns and qualifications of their own members." Held not only exclusive, but also final.

Stearns vs. Wyoming, 53 Ohio State 352, 353.

This rule is in line with the decisions in other States where similar constitutional provisions prevail with respect to the powers of the Courts.

See—

Peabody vs. School Commsrs., 115 Mass. 383.
State vs. Marlow, 15 Ohio State 114.
Atty.-Gen. vs. Sands, 68 New Hamp. 57.
People vs. Metzger, 47 Cal. 524.

The power is political and not judicial and it cannot be reviewed by a Court unless such power is specifically granted the Court.

See also—

22 R. C. L. 224.

Even if the decisions were not so clear on this point, and there were room for the contention that the grant of jurisdiction to a legislative body does not necessarily negative concurrent jurisdiction in the Courts, we think that the provisions in Section 217 of the Charter, that the special jurisdiction in the Council is subject to the right of appeal to the Baltimore City Court, would be a sufficient answer to such contention. Surely it cannot be argued that this provision of the Charter, which grants appellate jurisdiction to the Baltimore City Court, intended to preserve original jurisdiction in the same tribunal.

EVEN IF THERE IS CONCURRENT JURISDICTION, THE JURISDICTION FIRST ATTACHING IS CONTINUING AND EXCLUSIVE.

We respectfully submit that the authorities quoted and cited under the next preceding caption effectually dispose of any basis for the claim of jurisdiction in any Court to be exercised concurrently with the City Council.

However this may be, it is a well settled rule of law that where there is concurrent jurisdiction the first attaching is continuing and exclusive of all others. Hence, in the case at bar the action of the Baltimore City Council in passing upon the qualifications of the two respondents removed any purported jurisdiction of any Court to inquire into the matter except in the manner provided in the Charter, viz, *by appeal* of the party aggrieved.

See—

S. D. & T. Co. vs. Coyle, 133 Md. 343 at 350.
Wingert vs. State, 132 Md. 243 at 245, 249.
McLaughlin vs. Magee, 131 Md. 156 at 162.
Whiting vs. Shipley, 127 Md. 113 at 119.
Preston vs. Poe, 116 Md. 1.
Magin vs. Minor, 110 Md. 299 at 305.

V.

THE COURT'S JURISDICTION ON APPEAL IS NOT TO BE CONFUSED WITH ORIGINAL JURISDICTION IN MANDAMUS.

The suggestion of counsel for the petitioners that if the petitions for mandamus are not maintainable as such they should be considered "appeals by petition," contemplated in Section 217 of the Charter, is without foundation. The Courts of Maryland have always carefully distinguished between proceedings by way of appeal and proceedings for mandamus.

In the case of State vs. County Commissioners, 46 Md. 621, the Court had before it a statute empowering a Board of Examiners to make assessments for the purpose of constructing Wilkens Avenue. The statute directed them to report their findings to the Commissioners of Baltimore County for ratification, amendment or rejection. The Act further provided that any person interested in the proceedings might appeal from the final order of the Commissioners to the Circuit Court for Baltimore County. When the Commissioners rejected the report, the plaintiff instituted mandamus proceedings in the Circuit Court for Baltimore County—the very Court, as in the instant case, to which the statute provided an appeal. Inasmuch as the petitioner sought to invoke the aid of the same Court to which the statute gave him a right of appeal, the Court, if it had been in-

fluenced by the kind of argument made by counsel for the petitioners in the case at bar, would have sustained jurisdiction in mandamus or have treated the petition as an appeal. The Court, however, refused to obliterate the well defined distinction between jurisdiction on appeal on the one hand and original jurisdiction in mandamus on the other. The opinion, at p. 622, contains the following language:

> "From this state of facts, it is quite clear, the appellants are not entitled to the writ of mandamus, because by the express terms of the Act, they have *a full and adequate remedy by an appeal* to the Circuit Court for Baltimore County. This is not a case in which the Commissioners have refused to perform an act commanded by law; on the contrary, power was expressly vested in them either to ratify or reject the report of the examiners, and to all persons aggrieved thereby an appeal was provided to the Circuit Court of the county."

It is interesting to compare the cases of Pumphrey vs. Baltimore, 47 Md. 145, and Bembey vs. Anne Arundel County, 94 Md. 330. In the former case a citizen was granted a writ of mandamus to compel the City to perform its duty to maintain a certain bridge. It clearly appeared that the citizen had no other adequate remedy at law. In the latter case the Court denied a citizen a writ of mandamus to compel the County Commissioners to repair a county bridge, since, under the statute applicable to that case, he was given the right to petition the County Commissioners in the first instance, subject to appeal in the event of an adverse decision to the Circuit Court for Anne Arundel County. The Court held

> "The statute in explicit terms gives to the relators an adequate and complete remedy, adapted to the precise condition of which they complain and molded by the Legislature to fit the exact circumstances of

> the case. Should a Court of law upon an application for a writ of *mandamus* undertake to order the County Commissioners to repair the bridge it could only do so by deliberately disregarding and repudiating the statutory remedy especially provided to meet just the contingency which is here presented. In the face of this specific remedy neither the Court below nor this Court on appeal could, in the light of settled legal principles, undertake to interpose by the writ of *mandamus*, and thereby deprive the Circuit Court of the clearly defined appellate jurisdiction exclusively conferred upon it."

Besides being well grounded in authority, the distinction is not without practical consequences. From an order directing the writ of mandamus to issue, an appeal will lie to the Court of Appeals; from the Court's decision in an appeal from the City Council no appeal lies to the Court of Appeals.

See—

Warfield vs. Latrobe, 46 Md. 123.

VI.

THE PETITIONERS HAVE A SPECIFIC AND ADEQUATE REMEDY AT LAW.

The Charter proceeding is both specific and adequate. "Specific" means particular or special.

(See Webster, or any other Standard Dictionary.)

"Adequate" means sufficient to accomplish its purpose. The Court being given jurisdiction to review, necessarily has implied power to enforce its decree. The decree in mandamus possesses no peculiar or magical attributes not possessed by similar decrees in any other proceedings appropriate to the subject-matter.

The petitioners have urged that Section 217 of the Charter does not provide an adequate remedy inasmuch as it does not prescribe the means by which the City Council shall judge of the election and qualification of its members, and for the further reason that no machinery is provided by the statute to enable the City Council to perform this function. Reliance is placed upon the case of Groome vs. Gwinn, 43 Md. 572, to support this contention and also upon the *nisi prius* case of Venable vs. Upshur, decided by Judge Phelps and reported in The Daily Record of October 11, 1901.

The case of Groome vs. Gwinn is distinguishable from the present case upon two important grounds. Firstly, the Court of Appeals in the Groome case held that although the Governor was empowered by the Constitution to judge of the election of the Attorney-General, he could not exercise that power because the necessary supporting legislation had not been enacted by the Legislature and he was without means for the exercise of his constitutional power. The Court makes much of the circumstance that the Governor, an executive officer, had been entrusted with a function not usually considered appertaining to his office, and that therefore no intendments would be made in support of this unusual grant of power. The pending case presents no such situation. Here a legislative body is granted jurisdiction to judge of the election of its own members. So far from being considered "not appertaining," we find that this power is almost universally considered appropriate and suitable to be granted to a legislative body. It is the general practice in this country to grant such power to a legislative body; hence the difficulty which the Court of Appeals met in construing the nature and extent of the power of an executive officer to judge an election need not trouble the Court in this case.

Moreover, in the Groome case the Court further correctly pointed out that Article 3, Section 56 of the State Constitution provides that the General Assembly "shall have power to make all such laws as may be necessary to carry into execution the powers passed by this constitution." The Court of Appeals concludes that this provision clearly evidences the intention of the framers of the Constitution that the Legislature shall pass additional legislation. In other words, the Court of Appeals held that the grant of power to the Governor was not absolute, but was conditional and tentative and by the terms of the constitutional grant required further action by the Legislature. The grant of power to the Baltimore City Council is not so limited. It is absolutely the judge without restriction and the Act contemplates no further legislative action as was the case with the grant of power to the Governor. The same section of the Charter which commits to the City Council the power to judge of the election and qualifications of its members provides that the Council "shall adopt its own rules of procedure, not inconsistent with this article."

The case of Venable vs. Upshur, which cites Groome vs. Gwinn, is in no respect like the pending cases. Venable vs. Upshur was a petition for mandamus to compel the Board of Police Commissioners to produce certain ballot boxes before the City Council. The law, as it then stood, contained no provision for the production of ballot boxes before the City Council, but quite to the contrary the Code then provided specifically and in detail for the custody of ballot boxes, and these provisions negatived any other disposition of the ballot boxes, including even their production before the City Council. Judge Phelps was correct in refusing on this ground alone to order the Police Commissioners to produce the ballot

boxes before the City Council. The reference in Judge Phelps opinion to the case of Groome vs. Gwinn not only overlooks the obvious distinctions between the grant of power to the Governor in that case and to the City Council in the case before him, but the opinion he expressed on this point is purely *obiter.* It may be of interest to observe that whatever disability the City Council may have been thought to be under at the time Judge Phelps made his decision, Article 33, Section 154, was passed in 1902 for the purpose of remedying the situation. Moreover, as the cases now before the Court involve a question of *qualification,* and not *election,* it is difficult to see how any of these considerations affect the question now before the Court.

There is authority for the proposition that the Council may in judging election cases proceed in accordance with a general rule previously adopted, or in accordance with special rules for each particular case. "Every legislative body which has the power to pass upon the returns and qualifications of its members may (in the absence of express constitutional or statutory provisions on the subject) adopt their own rules of procedure for all such cases, or special rules for each particular case."

Lewis and Putney, Hand Book on Election Laws (1922) p. 197.

And it has been held that the Council may act in such cases by resolution.

Seay vs. Hunt, 55 Texas 545.

Great care should be exercised, in considering cases outside of Maryland, to observe the constitutional and

statutory provisions in those States in respect to jurisdiction and procedure. In some States the nature of the Court's jurisdiction in mandamus is different from ours by reason of special constitutional or statutory enactments, and the decisions in those cases have no application in Maryland, where jurisdiction in mandamus is from the very nature of the writ limited to cases in which no other specific and adequate remedy exists at law. As we have seen above, there is in Maryland no general jurisdiction in mandamus, but the writ is available only to prevent a failure of justice when no other remedy exists.

CONCLUSION.

With great respect we urge that the authorities uphold the views entertained by the appellees that the demurrers in these cases were properly interposed to test the legal sufficiency of the petitions; that the City Council duly exercised the authority exclusively vested in it by the express provisions of the City Charter; that such jurisdiction having been exercised by the Council, the proper procedure to have been taken by the appellants was to appeal from the Council's action to the Baltimore City Court, which tribunal was vested with appellate jurisdiction in the premises; that the remedy provided in Section 217 of the Charter is specific and adequate to protect any rights which the petitioners may have in the premises, and, therefore, the Court is without jurisdiction in mandamus; that the appellants, petitioners below, having filed their petitions by way of original actions praying for the writ of mandamus, have mistaken their rem-

edy and, therefore, the action of the lower Court in sustaining the demurrers was correct and should be affirmed.

Respectfully submitted,

ROLAND R. MARCHANT,

SIMON E. SOBELOFF,

ENOS S. STOCKBRIDGE,

WILLIAM M. KERR,

DANIEL ELLISON,

Attorneys for Appellees.

TRANSCRIPT OF RECORD

FROM THE

BALTIMORE CITY COURT

IN THE CASE OF

MORTIMER W. WEST AND HARRY M. McCLELLAN, PETITIONERS,

VS.

J. WARREN BURGESS, DEFENDANT,

TO THE

COURT OF APPEALS OF MARYLAND.

EDGAR ALLAN POE,
ISAAC LOBE STRAUS,
Attorneys for Appellants.

ROLAND R. MARCHANT,
ENOS S. STOCKBRIDGE,
WILLIAM M. KERR,
SIMON E. SOBELOFF,
Attorneys for Appellee.

IN THE COURT OF APPEALS OF MARYLAND.

APPEAL FROM THE BALTIMORE CITY COURT.

Action commenced in the Baltimore City Court on the 13th day of June, in the year nineteen hundred and twenty-seven, by the filing by Mortimer W. West and Harry J. McClellan, the Plaintiffs in this cause, a Petition for a Writ of Mandamus directed to J. Warren Burgess, the Defendant, commanding him to vacate the office of Councilman of the City of Baltimore and to cease from exercising any of the functions of said office.

Petition for a Writ of Mandamus, filed the 13th day of June, 1927:

In The Baltimore City Court.

Mortimer W. West and Harry J. McClellan, Petitioners,

vs.

J. Warren Burgess, Defendant.

To the Honorable, the Judge of said Court:

The petition of Mortimer W. West and Harry J. McClellan, respectfully shows:

(1) That your petitioners are now and have been for some years citizens of Baltimore City and voters and taxpayers in said City, and as such are interested in having the affairs of said City managed in an orderly and lawful manner and by officers duly qualified under the law to manage the same, and your petitioners file this petition on behalf of themselves and all other citizens similarly situated who may be willing to unite with them in this action.

Your petitioner, Harry J. McClellan, was also a candidate for the City Council from the Third Councilmanic

District in said city at the recent municipal election held in Baltimore City on May 3, 1927, and was in every respect eligible and qualified for membership in said City Council under and in accordance with Section 210 of the Baltimore City Charter, hereinafter fully set forth; the other candidates for said City Council from said District being the defendant, J. Warren Burgess, John P. Brandau, Lawrence W. Houston, Thomas J. Flaherty and Edward F. Shea, the official vote at said election for said candidates being as follows:

J. Warren Burgess	17,101	votes
John P. Brandau	17,459	"
Lawrence W. Houston	17,080	"
Thomas J. Flaherty	15,619	"
Harry J. McClellan	15,559	"
Edward F. Shea	15,291	"

That Thomas J. Flaherty did not possess at the time of said election the qualifications prescribed by Section 210 of the Baltimore City Charter.

(2) That the "Mayor and City Council of Baltimore" is a municipal corporation, duly incorporated by the General Assembly of Maryland. Section 210 of its Charter provides as follows:

"210. The City Council shall consist of nineteen members, one of whom shall be the President thereof, and shall possess the qualification and be elected as hereinafter provided. The other eighteen members shall be elected from the six Councilmanic Districts, three from each district, as hereinafter provided.

The members of the City Council, except the President thereof, shall be citizens of the United States, above the age of twenty-one years, residents of the City of Baltimore three years prior to their election, and for the same time residents of the Councilmanic District for which they are elected, and assessed with property to the amount of three hundred dollars ($300.00) cash, who have paid taxes on the same one year prior to their election, and they shall hold office for four years. Each member of the City Council shall be paid a salary of fifteen hundred dollars ($1,500.00) per annum, payable monthly."

(3) That the defendant, J. Warren Burgess, at the time of the said municipal election in Baltimore City, held on May 3, 1927, was not assessed with property upon the tax books of said city in the amount of three hundred dollars, or in any amount whatsoever, upon which he had paid taxes one year prior to said election and therefore did not possess the qualifications required by Section 210 of said Charter of Baltimore City, for membership in said Council and was therefore at the time of said election not eligible as a member of said City Council.

That notwithstanding such disqualification and ineligibility, the defendant, claiming to have been elected at said municipal election held on May 3, 1927, as a member of said City Council, on Thursday, May 19, 1927, presented himself to Honorable William F. Broening, Mayor of Baltimore City, who thereupon administered to him the oath required to be taken by members of said City Council and thereupon the said defendant took his seat as a member of said City Council and since that time has attempted to act and has acted as a member thereof and has declared his intention of continuing to so act.

(4) That at a session of the City Council on June 6, 1927, the City Council by a vote of eleven to eight held that the defendant was duly qualified according to law and was entitled to his seat as a member of the City Council, and your petitioners feeling aggrieved by said finding and decision have brought this proceeding in order that the alleged disqualification of the defendant may be judicially inquired into and determined.

(5) Your petitioners allege that by reason of the fact that the said defendant, J. Warren Burgess, was disqualified at the time of his election to membership to said City Council, from acting as a member thereof, the election of said defendant was void, and it was the duty, therefore, of the said defendant to wholly refrain from acting or attempting to act as a member of said City Council, or from entering upon or discharging or attempting to enter upon or discharge, any of the duties, privileges, powers and functions pertaining to the office of a member of said City Council, and that it is now his duty to vacate said office and to cease from performing or attempting to perform any of the functions thereof,

but that nevertheless the said defendant, wholly disregarding his duty in the premises, declines and refuses to vacate said office, and continues to, and is now undertaking to perform, and is exercising and performing all the functions thereof.

WHEREFORE your petitioners pray that a writ of mandamus may be issued, directed to the said J. Warren Burgess commanding him to vacate the office of Councilman of the City of Baltimore and to cease from exercising any of the functions of said office.

AND as in duty bound, &c.

EDGAR ALLAN POE,

Attorney for Petitioners.

MORTIMER W. WEST.

HARRY J. McCLELLAN.

Affidavit on the Petition for a Writ of Mandamus:

State of Maryland, City of Baltimore, to wit:

I Hereby Certify, that on this 13th day of June, 1927, before me, the subscriber, a Notary Public, of the State of Maryland and Baltimore City aforesaid, personally appeared Mortimer W. West and Harry J. McClellan, and made oath in due form of law that the matters and facts alleged in the foregoing petition are true as therein stated to the best of their knowledge, information and belief.

Witness my hand and Notarial seal.

CARL R. McKENRICK,

(Notarial Seal.) Notary Public.

Order of Court on the Petition for a Writ of Mandamus:

ORDER.

ORDERED this 13th day of June, 1927, by the Baltimore City Court, upon the foregoing petition and affi-

davit, that a rule be and it is hereby laid on the said J. Warren Burgess, requiring him to show cause on or before the 23rd day of June, 1927, why a Writ of Mandamus should not be issued as prayed; provided that a copy of this Order and of the foregoing Petition be served on the said defendant on or before the 16th day of June, 1927.

ALBERT S. J. OWENS,

Judge of the Baltimore City Court.

DOCKET ENTRIES.

13th June, 1927—Copy of the Petition, Affidavit and Order of Court sent to the Sheriff to be served on J. Warren Burgess, the Defendant. "Copy of the within Petition for Mandamus and Order of Court served on J. Warren Burgess, on the 13th day of June, 1927, at 4.55 o'clock P. M. in the presence of George Pattinson. John E. Potee, Sheriff."

22nd June, 1927—Appearance of Roland R. Marchant, Enos S. Stockbridge, William M. Kerr and Simon E. Sobeloff, as Attorneys for the Respondent, filed.

Demurrer on Behalf of the Respondent to the whole of the Petition for a Writ of Mandamus, filed the 22nd day of June, 1927:

The Respondent in the above entitled cause demurs to the whole of the petition herein filed and for ground of demurrer says: That the same is bad in substance and insufficient in law, and for further ground says, that the facts set out in said petition do not entitle the petitioner to the issuance of the writ of mandamus as therein prayed.

J. WARREN BURGESS,

Respondent.

ROLAND R. MARCHANT,
ENOS S. STOCKBRIDGE,
WILLIAM M. KERR,
SIMON E. SOBELOFF,

Attorneys for Respondent.

Service of copy admitted this 22nd day of June, 1927.

EDGAR ALLAN POE,

Attorney for Petitioners.

Affidavit of the Respondent that the Demurrer is not filed for delay:

State of Maryland, City of Baltimore, to wit:

I Hereby Certify, that on this 21st day of June, 1927, before me the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, personally appeared J. Warren Burgess and made oath in due form of law that the within demurrer is not filed for the purpose of delay.

As Witness my hand and Notarial Seal.

A. WALTER KRAUS,

(Notarial Seal.) Notary Public.

Service of copy admitted on the 22nd day of June, 1927, and issue joined (short) on the Demurrer.

Petition of the Defendant, J. Warren Burgess, filed the 22nd day of June, 1927:
To the Honorable, the Judge of said Court:

The petition of J. Warren Burgess, in the above proceedings respectfully shows unto your Honor that acting under advice of counsel he has demurred to the petition filed herein and accordingly requests that the time for answering said petition may be extended for the period

of fifteen (15) days after the determination of this Honorable Court upon said demurrer.

And as in duty, etc.

J. WARREN BURGESS,

Respondent.

ROLAND R. MARCHANT,

ENOS S. STOCKBRIDGE,

WILLIAM M. KERR,

SIMON E. SOBELOFF,

Attorneys for Respondent.

Affidavit on Petition:

State of Maryland, City of Baltimore, to wit:

I Hereby Certify, that on this 21st day of June, 1927, before me a Notary Public of the State of Maryland, in and for the City of Baltimore, personally appeared J. Warren Burgess and made oath in due form of law that the matters and facts set forth in the foregoing request for an extension of time for filing an answer in these proceedings are true and correct as therein stated.

As Witness my hand and Notarial Seal.

A. WALTER KRAUS,

(Notarial Seal.) Notary Public.

Order of Court on Petition:

Upon the foregoing request and affidavit it is this 22nd day of June, 1927,

ORDERED by the Baltimore City Court that the time for filing an answer to this cause be and the same is hereby extended for a period of fifteen days from the determination of the demurrer of the respondent to the petition for the writ of mandamus.

ALBERT S. J. OWENS.

DOCKET ENTRIES.

7th July, 1927—Appearance of Isaac Lobe Straus for the Petitioners filed.

13th July, 1927—Demurrer to the Petition for a Writ of Mandamus "Sustained," and the Petition dismissed.

Opinion of Judges Owens, Frank and Stanton, filed the 13th day of July, 1927:

NOTE: (The Opinion of Judges Owens, Frank and Stanton filed on the 13th day of July, 1927, is fully set forth in the Record of Mortimer W. West and Philip J. Scheck versus Thomas L. A. Musgrave, and sent to the Court of Appeals of even date herewith.)

13th July, 1927—Judgment of the Demurrer to the Petition for a Writ of Mandamus in favor of the Defendant for costs.

Appeal to the Court of Appeals of Maryland on behalf of the Petitioners, the Plaintiffs in above entitled cause, filed the 13th day of July, 1927:
Mr. Clerk:

Enter an appeal for and on behalf of the petitioners, the plaintiffs in the above entitled cause, from the Order and Judgment of the Baltimore City Court, sustaining the defendant's demurrer to the plaintiffs' petition and dismissing the petition, to the Court of Appeals of Maryland, and transmit at once the complete record of the proceedings in said cause to the Court of Appeals.

EDGAR ALLAN POE,
ISAAC LOBE STRAUS,
Attorneys for the Petitioners,
the Plaintiffs.

Appellants' Costs, $15.75.

Appellees' Costs, $6.75.

Test: GEORGE CAREY LINDSAY,
Clerk of the Baltimore City Court.

State of Maryland, City of Baltimore, Set:

I, George Carey Lindsay, Clerk of the Baltimore City Court, Do Hereby Certify, that the aforesaid is a full, true and entire Transcript, taken from the Record and Proceedings of the said Court in the therein entitled cause.

In Testimony Whereof, I hereunto set my hand and affix the seal of the Baltimore City Court aforesaid on this 19th day of July, nineteen hundred and twenty-seven.

(Seal.)

GEORGE CAREY LINDSAY,

Clerk of the Baltimore City Court.