

## Highs Extraordinary Legal Remedies (1874)

"The test to be applied, therefore, in determining upon the right to relief by mandamus, is to inquire whether the party aggrieved has a clear, legal right, and whether he has any other adequate remedy, since the writ only belongs to those who have legal rights to enforce, who find themselves without an appropriate legal remedy. [People v. Thompson, 25 Barb. 73.]... "To warrant the relief, however, the right whose enforcement is sought must be complete and not merely an inchoate right. [People v. Corporation of Brooklyn, 1 Wend. 318] And the relator must not only show a clear, legal right to have the particular thing in question done, but also the right to have it done by the persons against whom the writ is sought. [People v. Mayor of Chicago, 51 Ill. 28]" § 10, p. 13

Where an individual right is concerned a demand to perform the duty and a refusal to do it must be shown. Paraphrased from § 13, pp. 14, 15.

"The existence or non-existence of an adequate and specific remedy at law in the ordinary forms of legal procedure is, therefore, one of the first questions to be determined in all applications for the writ of mandamus, and whenever it is found that such remedy exists, and that it is open to the party aggrieved, the courts uniformly refuse to interfere by the exercise of their extraordinary jurisdiction." § 15, p. 17, citing extensive list of cases.

"The object of a mandamus being to enforce specific relief, it follows that it is the inadequacy rather than the absence of other legal remedies., coupled with the danger of a failure of justice without the aid of a mandamus, which must usually determine the propriety of this species of relief. And the existence of possible equitable remedies does not affect the jurisdiction of courts of law by the writ of mandamus, for while such remedies may properly be taken into consideration in determining the exercise of judicial discretion in allowing the writ, they do not affect the question of jurisdiction. **Indeed, the courts have gone still farther, and have held that by a legal remedy, such as will bar relief by mandamus, is meant a remedy at law as contra-distinguished from a remedy in equity,** and that the mere existence of an equitable remedy is not, of itself, a conclusive objection to the exercise of the jurisdiction, although it may and should influence the court in the exercise of its discretion in the particular case. [People v. Mayor of New York, 10 Wend 395; Commonwealth v. Commissioners of Allegheny, 32 Pa. St. 218]" § 20, p. 21.

If equity jurisdiction has already been invoked the rule is different and he may not obtain mandamus being estopped by his own conduct of seeking relief in another jurisdiction. Paraphrase of § 21, p. 22.

Discretion may not be regulated by mandamus by may be compelled

into motion by mandamus. Ministerial acts, involving no discretion, may be compelled by Mandamus. Paraphrase of § 24, pp. 25, 26

Note: Constitutional requirement that accused be informed of nature and cause of criminal accusation is (arguable) a ministerial duty of the prosecution, imposed by the constitution, in a criminal case.

"The granting of the writ of mandamus is the exercise of an original jurisdiction and not of an appellate jurisdiction, the writ itself being original process." § 27, p. 27.

"In the United States, the jurisdiction by mandamus is usually exercised by the court of general common law jurisdiction throughout the different states." 30, p. 29.

### **FORM**

"It is presumed that all the material facts upon which the relator finds his claim of relief are stated in the alternative writ, since it is from this source only that the respondent can learn what the requirements of the court are and what he is commanded to do. Great strictness is, therefore, requisite in the forms and contents of the alternative writ, which must neither be enlarged beyond nor restricted within the limits of the order of the court. [Hawkins v. More, 3 Ark. 345] Any substantial variance, changing the character of the act required to be done, will be fatal and may be taken advantage of on a motion to quash. [*id.*] And an alternative mandamus which does not allege the facts upon which the relator relies, and which fails to apprise the respondent of the grounds on which relief is sought, is fatally defective, and the defect being in substance, it is held that it may be taken advantage of at any stage of the proceedings. [Canal Trustees v. The People 12 Ill. 254.] The writ should also call attention of the respondent with especial certainty and particularity to the precise thing which he is required to do. [People v. Brooks, 57 Ill. 142]" S 538, **pp.** 380381.

### **ORDER OF PLEADING**

#### *Petition*

Alternative of **Mandamus** (**stands** in same place as declaration in action at common law. **Paraphrase S** 449, pp. 320-321.

Plea in Abatement (**waived if not** taken before return). paraphrase of § 452, **p. 322.** (**also I** believe it is waived if not taken before demurrer, **demurrer going** to the merits).

Demurrer § 502, p. 361.

or Return on the Merits (**must be** accepted by the court as true)

All defects that **may be taken** advantage of in a declaration may be assigned against the Alternative Writ of Mandamus. § 454, p. 323.

The Return must show "not merely what would be a *prima facie* right in the respondent, in the absence of an allegation to the contrary, but to show a right to refuse obedience to the writ in view of the allegations which it contains, and if it fails to do this it is demurrable." § 460, p. 330. If the writ is not Quashed the return must positively deny the allegations of the writ or state some other facts sufficient in law to defeat the writ. Issuance of the writ is treated as a finding of the court that its allegations are *prima facia* true. Inferences of fact are insufficient.

Presumption is normally in favor of the return, but presumption is against the return where it fails to answer important facts alleged in the petition. paraphrase § 462, p. 331.

Demurrer (taken against plea on issue of immaterial facts which neither traverse nor confess and avoid material allegations) paraphrase of § 452, p. 322. Sufficiency of the return is tested by demurrer, and hearing on the question. Foot note 4, p. 327.

or Traverse to Return (Statutory short cut) (If traverse is chosen it contests the facts stated in the return and throws the case into to proceedings similar to an action for false return under old English statutes, or American Statutes that provided this short-cut). § 458 & § 459, p. 327.

Traverse must be taken before matter is set down for argument on sufficiency of the return. Foot note 4, p. 326.

If Return is adjudged sufficient in point of law, without traverse, but is actually false it appears the remedy is still action for false return. § 458, p. 327.

### *Practice*

Application verified by oath or supported by affidavits praying the aid of mandamus. S 502

"Affidavits, upon which the application for a mandamus is based, should not be entitled, and the same rule applies to the application or relation itself, which should simply be addressed t the court to which it is presented, without being entitled in any cause, since the proceedings at this stage are merely *ex parte* [Chance v. Temple, 1 Iowa, 179; Price v. Harned, Ib. 473]" S 514, p. 366.

Upon *prima facie* case shown in application, alternative writ

## **MANDAMUS - COMMON LAW PRACTICE**

... This writ is grounded on a suggestion, by the **oath of the party injured**, of his **own right**, and the **denial of justice** below: whereupon, in order more fully to satisfy the court that there is **a probable ground for such interposition**, a rule is made (except in some general cases, where the probable ground is manifest) directing the party complained of to show cause why a writ of

*mandamus* should not issue, at first in the alternative, either to do thus, or signify some reason to the contrary; to which a return or answer must be made at a certain day. And, if the inferior judge, or other person to whom the writ is directed, returns or signifies an insufficient reason; then there issues in the second place a *peremptory mandamus*, to do the thing absolutely; to which no other return will be admitted, but a certificate of perfect obedience and due execution of the writ. If the inferior judge or other person makes no return, or fails in his respect or obedience, he is punishable for his contempt by attachment. But, if he, at the first, returns a sufficient cause, although it should be false in fact, the court of king's bench will not try the truth of the fact upon affidavits; but will for the present believe him, and proceed no further on the *mandamus*.

**But then the party injured may have an action against him for his false return, and (if found to be false by a jury) shall recover damages equivalent to the injury sustained; together with a *peremptory mandamus* to the defendant to do his duty. Thus much for the injury of neglect or refusal of justice." Blackstone's Commentaries, Book III, ch. 7, § 132, pp. 1634-1635.**

The writ is applied to a variety of circumstances to require the performance of public duties. *Bayard v. United States*, 127 U.S. 246, 32 L. Ed. 116, 8 Sup. Ct. 1223. [From Blackstone's Commentaries, Book III, ch. 7, § 132, n. 18, pp. 1633.]