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TWO QUESTIONS CONCERNING MANDAMUS.

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It is an interesting and instructive exercise to follow through a line of successive opinions of the court of last resort, of a State, the gradual unfolding, by repeated applications to new conditions and circumstances, of some particular principle, rule or doctrine of law. To see how step by step, a little added here, a little there, perhaps sometimes a little abated here or there, the principle is developed, expanded, clarified. There are many such lines which may be followed in our Connecticut reports, some of them relating to the construction of important statutes, as the statute of frauds, upon which there are enough decisions in this State to fill an entire volume of our reports. The statute relating to mechanic's liens, the statute of charitable uses, of perpetuities, various sections concerning probate law and procedure, wills and administration; some of them also not based on statute, as concerning hearings in damages, upon default or demurrer overruled; the effect of retention of possession by vendor of personal property, after sale; conditional sales, what findings in reference to negligence may be reviewed, as questions of law, and what may not, as questions of fact, and scores of others, which might be mentioned. It is the purpose of this paper to take up and pursue one of those subjects, and thereby discover, as best we may, how the Supreme Court of Connecticut has answered two questions concerning the extraordinary writ of mandamus, namely; first,

under what circumstances and upon what principle may a public officer, entrusted with power, be controlled in respect to the exercise of that power by mandamus? And second, when and upon what principle is the action of the trial court, in granting or refusing a mandamus, subject to revision on appeal? I shall, in reference to each question, considering them in the above order, state, first, the most important, the illustrative cases, and, briefly, the points decided, and shall then endeavor to give the sum or conclusion, to be derived from them all, taken collectively and as a whole. Taking up the first question, then; It was held in *Treat v. Middletown*, 8 Conn. 243, that mandamus lay to compel selectmen to open a highway laid out. The Court, punctuating each sentence, with reference to authorities, said, "The common law has provided a writ to prevent a failure of justice, where there is no established specific remedy, and where in justice and good government there ought to be one. A mandamus lies to compel any person, corporation, or inferior court, *to do a particular act, which they neglect*. And whenever a statute directs something to be done the court will enforce the doing of it, by *mandamus*. In England, this writ may reach a judge on the bench, and direct him to enter up a judgment, as well as a church warden who refuses to admit a sexton. And in our country it may enter the bureau of the Secretary of State" (citing the then recent case of *Marbury v. Madison*, 1 Cranch. 171) "as well as the more humble office of a town clerk, or that of the trustees of an academy," (citing Strong's case, Kirby, 345, and *Fuller v. Plainfield*, 6 Conn. 532).

In the *Town of Waterbury v. The H., P. & F. R. R. Co.*, 27 Conn. 146, it was held that a mandamus to compel the defendant corporation to construct a highway in place of one taken by them for the site of their road, could not be maintained, the reason given being, that the subject matter was within the jurisdiction of the commissioners on the railroad, and that "so long as the commissioners were acting within their jurisdiction, and *without fraud*, their determination could not be reviewed by the Superior Court."

In *State v. Hd. & N. H. R. R. Co.*, 29 Conn. 538, it was held that mandamns lay to compel a railroad corporation to carry out the objects of its creation, to conform to its charter, and to run trains over its whole road.

A similar case is that of the *State v. The N. Y., N. H. & H. R. R. Co.*, 37 Conn. 163, where the writ issued to compel the corporation to re-establish a depot, unlawfully discontinued.

In *Freeman v. Selectmen of New Haven*, 34 Conn. 406, it was held that it did not lie to compel selectmen to qualify applicants for elector's privileges, on the ground that the constitution of the State (Art. 6, sec. 5,) gives to the selectmen and town clerk of each town the power to decide on the qualifications of persons applying to be admitted as electors, and that the superior court has no power by writ of mandamus, to control their action. The opinion quotes the case of *Goddard v. Seymour*, 30 Conn. 399, not, however, a case of mandamus, where the court, in speaking of the duties of assessors and boards of relief, say "The law imposes upon these officers, duties which they cannot possibly discharge to the satisfaction of all. * * * But it is enough for the present purpose to say, that the law has constituted these officers, and not judges of the superior court, the tribunal to determine the valuation of taxable property."

In the case of *Seymour v. Ely*, 37 Conn. 103, the important principle was laid down that an officer clothed with discretion, could, by mandamus, be compelled to exercise it, although the mode of exercise would be left unrestrained. The language used in the opinion is this, "Mandamus from the superior court lies to compel an inferior tribunal to perform an official duty to which a party is clearly entitled, and which is refused to him, when no other remedy is effectual and appropriate, as to appoint an auditor, allow an appeal, render a judgment, and the like; and also to oblige a judicial or ministerial officer to perform an act which it is the imperative duty of such officer to perform, and with regard to the manner of the performance of which he has no reasonable discretion. When the right to the exercise of discretion exists, and its exercise in a proper case is refused, the magistrate or officer may be compelled to the discharge of his duty and the exercise of his judgment; but in the particular mode of its exercise, he must be left free from coercion and restraint."

In the case of *Smith v. Moore*, 38 Conn. 105, it was held that a justice of the peace could be compelled, by mandamus, to make a true record, and to furnish a copy of record. These were held to be ministerial, not judicial acts, and calling for no exercise of discretion.

In *Pond v. Parrot*, 42 Conn. 16, this *dictum* may be found; "The writ of mandamus lies to compel a public officer to perform a duty, concerning which he is vested with no discretionary power, and which is either imposed upon him by some express enactment, or necessarily results from the office which he holds."

In *Batters v. Dunning*, 49 Conn. 479, it was held that County

Commissioners, having a discretion to grant or refuse license to persons recommended by the selectmen as suitable persons to sell intoxicating liquors, the exercise of their judgment in the matter could not be controlled by mandamus, the court saying, in a way suggestive of a desire to finally close debate on a matter so often decided, "That the particular manner of exercising such judgment cannot be controlled by any court is too obvious to require the citation of any authorities."

In *State v. Ousatonic Water Co.*, 51 Conn. 137, it was held that the charter made it the duty of the company to protect highways from obstruction by water or ice, caused by their dam, and that it was not left to their discretion. That the duty being clear, mandamus at the suit of the State was the proper remedy. But that the company had the right to use their own judgment, as to the mode of remedying the evil, and that therefore a mandamus that ordered them to do it by altering the course or bed of the road, was improper. That the court had no right to prescribe the particular manner in which it should be done.

In *Taylor v. Gillette*, 52 Conn. 216, a case similar in principle to *Smith v. Moore*, *supra*, a mandamus was issued to compel a judge of probate to correct an appeal, it being held that in entering up an appeal he was not acting judicially but clerically. The court said, "The judgment of a judge in the performance of a judicial duty cannot be controlled by that writ, though the performance of a judicial duty can be compelled by it, but the duty here is not judicial, but merely clerical. Even in the granting of an appeal, he can hardly be said to be acting judicially, in any proper sense; he has no discretion in the matter."

In *Daly v. Dimock*, 55 Conn. 579, it was held that neither the coroner, the clerk or the court had any discretionary power to withhold from the inspection of any interested person, the coroner's return, containing the testimony of witnesses and finding upon an inquest; and that "While a court will in many cases exercise its discretion, as to granting the writ of mandamus, yet, it will not refuse it where the applicant has a clear legal right, a substantial matter is involved, and there is no other adequate legal remedy."

In the case of *Doolittle, State's Atty. v. Selectmen of Branford*, 59 Conn. 402, application for mandamus to compel certain alterations in highways, ordered by the railroad commissioners, for the purpose of removing grade crossings, the court said: "The question whether or not public safety requires any change of a highway at a grade crossing, is one that the legislature has

intrusted solely to the railroad commissioners, as an original one, and to the superior court only by an appeal from their doings. On the hearing of an application for a mandamus to compel a town to construct such highway, the court has no authority to pass upon that question."

We now reach the case of *American Casualty Insurance Co. v. Fyler*, 60 Conn. 448, and of *State v. Staub*, 61 Conn. 553, the latest and very important cases on the point under consideration. The former was an application for a writ to compel the defendant, the insurance commissioner of this State, to admit the appellant, a foreign insurance company, to do business in the State. The writ was refused by the superior court, for reasons stated on pages 452 and 453 of the report, and by the supreme court for reasons given in an elaborate opinion written by the chief justice, in which, after declaring that "the principle upon which persons holding public office may be compelled, by a writ of mandamus, to perform duties imposed upon them by law, has been pretty clearly defined, and strictly adhered to in numerous cases in this court and in the other States," and stating that principle; it said, "It is admitted that there is no statute or rule of law that in terms makes it the duty of the defendant to admit the plaintiff to do in the State the kinds of business specified in its application. If it is his duty so to admit the plaintiff, it is because such duty falls within the ordinary duties of his office, and this must be gathered from a construction of the insurance statutes. The defendant has construed these statutes, as requiring, or at least as authorizing him to refuse the plaintiff's application. The plaintiff insists that such construction is wrong. The whole contention of the plaintiff's counsel is that the statutes of this State, respecting insurance, if construed in the light of the policy of this State towards the insurance companies of other States, and in the light of State comity, would make it the duty of the defendant to grant the plaintiff's request; and they say that their interpretation of these statutes is too obviously correct to admit of dispute, and that therefore the duty which they ask that the defendant should perform is purely a ministerial one. This contention, however, involves a contradiction. The construction of a statute is not a ministerial act, it is the exercise of judgment. * * * If the court was of the opinion that the defendant's construction of the insurance statutes was an incorrect one, it could not interfere by way of mandamus. That would be to substitute the judgment of the court for the judgment of the officer appointed by law, and would in effect make the court the insurance commissioner, instead of the defendant."

In *State v. Staub*, *supra*, it was held that a writ of mandamus lay to compel the State comptroller to distribute the school money to the towns. The State constitution (Art. 4, par. 19) provides that the comptroller shall "audit and settle all public accounts, except grants and orders of the General Assembly." The court held that while the comptroller might exercise his discretion in the settlement of an unliquidated claim, yet, where the law fixes definitely the amount of a claim, the time and manner of its payment, and the person to whom it is to be paid, he has no duty to perform on its presentation but to draw his order in payment of it. The act which the comptroller is to perform is a purely ministerial one. And the court said, p. 567, "It is the nature of the thing to be done, by which the propriety or impropriety of issuing a mandamus is to be determined, and not the office of the person to whom the writ is directed, nor the source from which he derives his power. Subject possibly, to some exception, we think the law to be this: That whenever any public officer, however humble, is intrusted with power, in the exercise of which he may use his discretion, in respect to such exercise, he cannot be controlled by mandamus, and that whenever any public officer, however high, is commanded by the constitution, or by any statute, to perform a ministerial act, the performance of such act may be compelled by a mandamus." Surely nothing could be more explicit than this statement. Finally, then, the results to be deduced from the line of cases which we have cited may be summed up in five propositions:

First, Where it appears or can be proved that there is a fixed, definite, precise act, which it is the absolute duty of a public officer to do, in a particular way, and at a particular time, which has arrived, and the clear legal right of the plaintiff to have so done; a right concerning a substantial matter, and there is no other adequate legal remedy, the performance of such act, of such duty, the enforcement of such right, can be secured by mandamus.

Second, If the act is not of a fixed, definite, precise character, or if the duty of the officer to do it, and the right of the plaintiff to have it done, are not absolute and independent of the judgment of the officer, but, are dependent upon the result reached through the use of judgment, that is, of discretion by such officer, which he is vested with jurisdiction to exercise, the performance of an act, so uncertain or dependent in its nature, can never be directed by mandamus. Such requirement would be merely the unwarranted substitution of the discretion of the court, in place

of that of the officer whom the law has selected to exercise the jurisdiction.

Third, Where the thing to be done is itself fixed, definite, precise, and the duty and right absolute, but the officer is vested with discretion relating only to the manner in which the duty shall be performed, in order to accomplish the specific and required results, there performance may be directed by mandamus, but the mode of such performance cannot be regulated. (See *State v. Ousatonic Water Co.*, *supra*).

Fourth, The exercise of existing discretion by the officer vested with it, may itself be an act of such fixed, definite, and precise nature, and so the absolute duty of the officer and right of the plaintiff, that such officer may be compelled, by mandamus, to exercise such discretion, to hear and to determine, although as to such determination, beyond the simple direction to make it, he must be left free. (See *Seymour v. Ely*, *supra*).

Fifth, An officer vested with discretion may have, in fact, so used it, that as a result, the prior duty of such officer to exercise such discretion, and the prior right of the plaintiff to require that exercise, may have given place to a duty and right relating to some specific act, the performance of which, if refused, may be compelled by mandamus.

While this last proposition is believed to be indisputable, it should be stated that the direct authority for its support, in the Connecticut Reports, is to be found only in the language of the author of this article, in the opinion of the Superior Court, in *American Casualty Ins. Co. v. Fyler*, *supra*, p. 452. The point was this: the right of the company to be admitted to do insurance business in this State, depended upon the company's compliance, in all respects, with the statutes and laws of the State, relating to the premises. The determination of this question was exclusively the province of the commissioner, and the court could not interfere to control him in the exercise of his judgment, or decide upon the result. But suppose, as was claimed, that the record showed he had exercised that judgment or discretion, and found that all such requirements had been duly complied with, but nevertheless refused to admit the company on the ground that notwithstanding such compliance, it would be against the public policy of the State to do so, the decision of which matter was not within his jurisdiction. In reference to such a supposed condition, it was said, "If the commissioner has decided, or is satisfied, that all the statutory requirements and laws have been complied with, his remaining duties are purely ministerial, and his action can be compelled by mandamus."

The other question, when and upon what principle is the action of the trial court in granting or refusing a mandamus subject to revision on appeal, may be much more briefly treated. It was said in *Chesebro v. Babcock*, 59 Conn. 217, that "the granting or refusing a mandamus is a matter resting in the sound discretion of the court, and the exercise of that discretion is not the subject of revision on appeal." Notwithstanding which positive statement, it was said in the same opinion, and almost immediately following the language which we have quoted, that "The writ of mandamus ought never to be granted unless in cases where there is a clear legal right, on the part of the applicant, and when it will work no injury to the party against whom it is sought." In view of repeated decisions of the court, in which the judgments of the superior court, on mandamus, have not only been reviewed, but reversed; *Waterbury v. H. P. & F. R. R. Co.*, *supra*, *Seymour v. Ely*, *supra*, *Pratt v. Meriden Cutlery Co.*, 35 Conn. 36, *Cook v. Tanner*, 40 Conn. 378, *State v. N. H. & N. Co.*, 41 Conn. 134, can it be doubted that if in *Chesebro v. Babcock*, *supra*, it had appeared that there was no clear legal right on the part of the applicant, or that the writ would work injustice to the party against whom it was sought, the judgment would have been reviewed and set aside? It follows then that the general statement must be understood with limitations. And one statement of these limitations may be found in the well-considered language of Judge Hovey, delivering the opinion of the Supreme Court in *N. H. & N. Co. v. the State*, 44 Conn. 390. He said: "But it is insisted by the defendant in error that the granting or refusing of a writ of mandamus is a matter resting in the sound discretion of the court, and that the exercise of that discretion is not the subject of review, on a writ of error. It is undoubtedly a correct general proposition that the exercise of the jurisdiction to grant writs of mandamus rests, to a considerable extent, in the sound discretion of the court, and that where, in the exercise of such discretion, the writ is refused, the judgment of refusal will not be reviewed on error. But I am not prepared to hold that where the writ is granted in a case in which the court might, in its discretion have refused it, a revision of the legal question will be precluded. However this may be, no doubt can exist that in a case like the one in the court below, where the writ is applied for to enforce an act of the legislature, for the public benefit, and there is no other adequate remedy for its enforcement, the State, or its attorney, is entitled to the writ, as of right, and there is no discretion in the court to refuse it." Another limitation, or per-

haps the same, is suggested by the language which has been quoted from *Daly v. Dimock*, *supra*, "While a court will, in many cases, exercise its discretion as to granting a writ of mandamus, yet, it will not refuse it where the applicant has a clear legal right, a substantial matter is involved, and there is no other adequate legal remedy." So that as a result of the cases, the question under consideration may be answered in this wise: Whenever the record shows that the case turned upon the opinion of the trial court, as to the legal sufficiency of the facts averred or found, that opinion, being one the correctness of which may be tested, and can only be tested by fixed principles of law, may be reviewed, as in no sense a matter of discretion. Whenever, on the other hand, the record shows that the case turned upon the opinion of the court, as to its intrinsic merits, in fact as for instance whether there was "a substantial matter involved," and not upon any question of law, there being nothing in the case to disclose any strict legal right, decisive of it, the decision is final and cannot be reviewed. And, finally, whenever a certain ruling may or may not have been made, in the exercise of a discretionary power, being in relation to a matter over which the court has discretion, in the absence of any decisive indication to the contrary, the presumption is that it was so made. *State v. Alvord*, 31 Conn. 40.