Weaver

v.

Zimmerman.

Order, That writ of Mandamus heretofore issued in this case be superseded, and the attachment quashed.

Filed May 4th 1865

William H. Maulsdale } Court of Appeals
vs. } of Md.
L. J. Tammurman } April Term 1865

The motion in this case to supersede the writ of mandamus and to quash the attachment heretofore issued in the case by this Court, standing ready for hearing, were argued by the counsel of the respective parties, and the proceedings have since been read and considered by the Court: It is thereupon this 4th day of May, 1865, by the Court of Appeals of Maryland, and by the authority thereof, adjudged ordered & decreed, that the writ of mandamus heretofore issued in this case be & the same is hereby superseded & the attachment also heretofore issued in the case be and the same is hereby quashed, the appellants & appellees each to pay their own costs.

Rich J. Bowie
Jas. L. Bartol.
Wm. J. Goldsborough
S. Morris Cochran
D. Weisel

"

23 Sides

No 230 Office Docket.

Weaver & Others

v

Zimmerman

Mandamus,
Attach't Motions &c.

B. B. G. & C. W.

To be Reported.

Opinion
Baldwin J.

Filed May 4th 1865

Wm H Weaver & Others
v
L. F Zimmerman

In the opinion ~~delivered~~ in this cause, delivered by this Court at the June Term, we did not enter fully into a statement of the changes of the law in cases of Mandamus, wrought by the act of 1858 Ch. 285, now embodied in the Code Article 59; Nor is it necessary now to do so. The chief purpose of that act was to avoid the delays attendant upon the proceeding at Common Law, and to make the remedy more speedy and effectual. To accomplish that object, the Legislature has abolished the alternative writ,

requiring the defendant in his answer to the rule to shew cause issued upon the petition, to state the grounds upon which he means to rely, as causes why the writ should not issue as prayed; thus placing the answer to the rule, in some respects, on the footing of the return to the alternative writ. One other material change has also been effected by the statute. While at the common law the averments made in the return to the alternative writ were not traversable; and if not true the relator was put to his action for a false return;- the statute now provides that the petitioner may plead to or traverse all and any of the material averments set forth in the answer to the petition,

and the defendant is required to take issue, or demur to the plea, or traverse; and thereupon such further proceedings shall be had for the determination thereof, as if the petitioner had brought an action for a false return.

The act further directs that the issue shall be tried by a jury, if either party desire it; or heard and determined by the Court if both parties agree;- and if a verdict be found for the petitioner, or the Court on a hearing determine in his favour, or judgment be given for him upon demurrer, or for want of a plea, he shall thereupon recover his damages and costs, as he might have done in an action on the

case for a false return, to be levied by execution; and a peremptory writ of mandamus shall be granted thereupon without delay against the defendant.

Before proceeding to examine the particular questions arising upon the motions now before us, it is proper to remark:

First.—That while these material changes have been made by the Code, in the course and manner of proceedings in cases of this kind, the essential nature of the remedy or of the writ is not changed. It is still what it was at the common law, a prerogative writ, not demandable ex debito justitiæ, but granted at all times in the sound discretion of the Court;

under the rules long recognized and established at the Common Law. When the ~~Statute~~ Code therefore directs that upon the Verdict being found in favour of the petitioner, a peremptory writ of Mandamus shall be granted thereupon without delay; it is not to be understood as taking away the discretion of the Court, still to refuse the writ if for sufficient legal cause it shall appear in its discretion the writ ought not to issue.

Secondly. In the opinion of this Court the essential properties of the writ itself have not been changed; and when it has been issued by a competent Court, in the peremptory form, it has

the same force and effect as the peremptory writ at the Common law; and the defendant cannot disobey it for any cause or reason which might have been urged in resisting the application for the writ.-

After this appeal was heard at the June Term, this court affirmed the ruling of the Superior Court set forth in the bills of exceptions, and ordered the writ to be issued. ~~[illegible]~~ in the peremptory form. It was made returnable to the December Term. By the change in the Constitution, which went into effect on the first day of November, the December Term was abolished; and by the act of assembly passed at the last Session

issued on the 29th day of October, 1894, and

a Special Term was directed to be held on the 24th day of January 1865. ~~to~~ which all writs and process returnable to the December Term 1864 ~~were~~ made returnable.

The defendants failing to return the writ; upon application to this Court on the 2d day of March a rule was laid upon them to make return of the same, on or before the 7th day of March. ~~Which~~ That rule having been duly ~~served~~, and its exigency not having been obeyed, the Court on the 8th day of March directed an attachment for contempt to be issued against the parties, returnable on the 14th day of March. On that day the defendant Weaver upon whom alone the peremptory writ had been

served appeared in person, and first having by leave of the Court upon solemn oath purged himself of the contempt alleged against him; was permitted ~~to excuse~~ to file in Court by his Counsel, a return to the writ setting forth certain causes ~~for~~ which he alleged it had become impossible to execute the same. And thereupon motions were filed to quash and discharge the attachment, and also to quash and supersede the writ of Mandamus. These motions were set down for hearing, and have been fully argued by Counsel, and considered and now remain to be disposed of.

We have said that the writ when issued in Maryland in the peremptory form, has the same

force and effect as at the Common Law, and the same rule applies, that ordinarily no return thereto will be accepted, except a certificate of obedience. Tapping on Mandamus 408. Queen vs Sedgard 41 Eng C. L. 699. 700. This is the general rule; nevertheless it is settled that a peremptory writ may be quashed or set aside if it has prematurely or improperly issued, or if it has unnecessarily issued; or if it be on its face bad in substance. Tapping 408. 409. Or if it be impossible or illegal to obey it State vs. Jones 1 Iredell 414.

This brings us to the examination of the grounds alleged in support of these motions.

First. It is suggested that the writ was prematurely or improvidently issued; inasmuch as the judgment rendered by the Superior Court was merely a judgment for costs, and no writ of mandamus being ordered by that Court; the appellate Court ought upon the affirmance of the judgment to have remanded the Cause upon procedendo; so that the discretion of the Court below might be exercised in awarding or refusing the Writ. This matter was very carefully considered when the decision of the Cause was made at the June Term. Of the power of this Court to award the writ under the 16 sec. Art 5. of the Code, without sending back the case under procedendo, no doubt whatever exists: and we are equally clear that upon the record and the bills of exceptions

as they appeared before us at the trial, no reason whatever existed why a procedendo should be issued; no cause was apparent upon the record or suggested in the argument why the writ should not be granted: and therefore it was within the power of this Court, and entirely in conformity with justice and the precedents in similar cases, that said judgment should be entered here. As the case then stood the writ was not improvidently issued.

Second. The next cause assigned for disobeying the writ is that at the time when the return was made a Court of competent jurisdiction, upon a bill filed alleging the Same had by reason of matters happening

Since the judgment of the Court below enjoined the petitioner (Zimmerman) from entering or attempting to enter the pulpit of said Church; or from interfering with, or interrupting the pastor now in charge of the Congregation, until the cause in that Court could be heard and determined; that the proceedings are still pending, and the writ could not be obeyed without violating the injunction. A copy of the bill of complaint filed in the Circuit Court of Baltimore City upon which the injunction was obtained, together with a copy of the docket entries of the cause, is filed with these motions. By reference to these proceedings it appears that the bill was filed in the name of the Corporation "The German Evangelical Lutheran St Stephens Church"

on the 31st day of October 1864, ten days after the opinion of this court was filed, deciding that the petitioner was entitled to the writ, and two days after the writ was ordered and issued; and yet the bill failed to disclose to the Circuit Court any of the proceedings which had been taken in the Court of Appeals, says nothing of any appeal having been taken, or of the decision and judgment of this court.

If these facts had been disclosed, it is not supposed for a moment, that the Judge of the Circuit Court would have granted the injunction;

and we are forced to the conclusion, that the action of that Court was obtained by a partial representation of the facts.

But in no event could an injunction so obtained serve as an excuse for disobeying a peremptory writ of mandamus, issued by this Court, or by any other court of competent jurisdiction. When once issued it cannot be stayed by injunction like an ordinary execution upon a judgment at law. To allow such interference would interrupt the course of judicial proceedings, and lead to a conflict of jurisdiction, producing the greatest confusion, and tending to subvert the administration of justice

The Circuit Court had no jurisdiction, or authority to

issue the injunction, and such a proceeding therefore furnishes no ground for quashing the writ, or excuse for disobeying it.

If by reason of matters subsequent the writ cannot, or ought not to be executed, they may be made known, and relied upon in the Court issuing the writ, and which alone has jurisdiction, and control over it; and are not proper subjects for the action of a court of equity by injunction, or otherwise.

Held. The mandamus in this case was issued to restore the petitioner, Zimmerman, to his office and functions of pastor of "the German Evangelical Lutheran St Stephens Church"

to which he had been duly appointed, and from which he had been unlawfully removed by the respondents. By the act of incorporation of the Church, 1802 ch 111, it is required that the minister be a member of the Evangelical Lutheran Synod of Maryland, under whose jurisdiction the Church is placed.

It now appears by this motion and return verified by the hand of the secretary and the seal of the Synod; that at a meeting of that body held from the 14th to the 18th day of October 1864, the petitioner Zeinneman was "expelled from the ministry and his name stricken from the roll" of members.—

So that since the trial of the

cause in this Court, the petitioner has been rendered by the action of the Synod, disqualified from holding the office of Pastor, under the Charter.

If this fact had been made known to this Court before the writ was ordered; no writ would have been issued: and now being shown by proof uncontradicted, it is in our opinion good cause for quashing the writ, and discharging the parties from the attachment.

— It is unnecessary to notice the other grounds set forth in the Motion, and return.

For the reason last stated, the attachment will be ~~quashed~~, and the writ set aside;

without prejudice however to the right of the petitioner to renew in the Superior Court, his application for the writ, and of trying the facts before a jury.

Writ superseded & attach[t] quashed.