WILLIAMSON, *Ex Parte.*

It is a general rule that a mandamus does not lie unless the party applying has no other specific legal remedy.

It will not be granted where error will lie. Nor where the party has a remedy by appeal. It will not be granted to compel an inferior court to render a particular judgment.

Plaintiff brought unlawful detainer under the act of 10th January, 1845. The court ordered him to enlarge his bond, he declined, and the suit was dismissed at his costs. Defendant moved the court for judgment of restitution, and it overruled the motion—HELD that error would lie to this decision; and that mandamus would not be granted to compel the judge to award restitution.

The *dictum* in *Hartgraves* v. *Dural*, 1 *Eng. R.* 506, that error would not lie to the decision of the court refusing a judgment *de retorno habendo* in replevin, overruled.

On Petition for Mandamus.

At the July term of this court, 1847, Garret Williamson filed a petition for mandamus to the judge of the Hot Spring Circuit Court. The petition and transcript filed with, and made part of it, show the following facts:

On the 27th April, 1846, John C. Hale brought an action of unlawful detainer, in the Hot Spring Circuit Court, against Williamson, for possession of some improvements situated in the valley of Hot

Springs. The action was brought under the forcible entry and detainer act of 10th January, 1845. Hale, the plaintiff in said suit, executed bond to the sheriff in a penalty of $400, to indemnify Williamson, and the sheriff put him into possession of the improvements.

At the return term, September, 1846, Williamson pleaded not guilty and the limitation clause of the said act, and after demurrer sustained to the second plea, and it amended, the cause was continued, on the application of Hale, for cause shown. Williamson then filed an affidavit that the bond given by the plaintiff was not sufficient in amount; and moved the court to require him to enlarge the bond; and Hale was required to show cause at the next term, or enlarge the bond. At the next term, March, 1847, he filed a response to the rule, alleging that the bond was an ample indemnity to defendant. The court, on hearing evidence, decided that the bond was too small, and required the plaintiff to give bond in the sum of six hundred dollars. He declined giving a new bond, and on motion of Williamson, the court dismissed the suit, giving judgment in favor of defendant for costs. Williamson moved for judgment of restitution, but the court refused it.

On the above facts the petitioner, Williamson, prayed this court to award a writ of mandamus to the judge of the Hot Spring Circuit Court, to compel him to order a writ of restitution in said case.

This court ordered an alternative writ to issue, and the Hon. Christopher C. Scott, then Judge of the 8th Judicial Circuit, and of the Hot Spring Circuit Court, made the following response thereto:

"The respondent shows to the Hon. the Supreme Court, that he is of the opinion that the forcible entry and detainer act of 1845, under which the case of Hale against Williamson was brought, does not authorize a judgment for restitution in such case as the record in this case presents. And he is of the opinion that the act of 1846, to 'amend' said act of 1845, is *prospective* in its operation, and has no application to suits brought previously to its passage. And that the remedy being statutory, he can only render such *judgments* as are authorized by the act creating the remedy, so far at least as restitution is concerned, as held by the Supreme Court of the replevin statutes. He therefore respectfully submits whether, upon the facts pre-

sented by the transcript of the record in the case of Hale v. Williamson, (which transcript he refers to as part of this response). and under the law applicable to the case, he is bound to render the judgment of restitution sought by Williamson."

On the coming in of this response, the attorney of Williamson moved the court for a peremptory mandamus.

FOWLER, for petitioner. By the act of Jan'y 10, 1845, (*Pamphlet p.* 104, *sec.* 9), on a verdict for the defendant in such case, the court is directed "to give judgment," &c., and "shall also issue a writ of restitution," &c., to cause the defendant to be repossessed. By the act of Dec. 23, 1846, passed after the institution of the suit, (*Pamphlet p.* 112, *sec.* 5), on a judgment of discontinuance, such other judgment also shall be rendered against the plaintiff as the nature of the case may require, in order to restore to the defendant the possession of the estate, &c. Rights of parties vested under the former act, where the remedy is changed by the latter act, must be pursued and enforced according to the rule prescribed in the latter act. 7 *Paige's Rep.* 360, *Parsons* v. *Boune et al.* 1 *Cond. Rep.* 258, *The United States* v. *The Schooner Peggy.*

Where an inferior court refuses to act, or by its acts so encumbers the remedy as to impair the vested rights of the parties, the Supreme Court will compel it to proceed by *mandamus.* 5 *Ark. Rep.* 50, *Taylor, ex parte.* 12 *Petersdorf* 469. 1 *Eng. Rep.* 11, *Trapnall, ex parte.* So where a justice of the peace refuses to grant an appeal. 5 *Ark. Rep.* 371, *Martin, ex parte.*

The refusal to award or issue the writ of restitution is not a judicial act revisable on error, but is a ministerial act, and the court can only be compelled to do its duty in such a case by mandamus.

The decision of the Circuit Court overruling a motion for an award of the writ of *retorno habendo* in replevin, cannot be revised on error. 1 *Eng. Rep.* 508, *Hartgraves* v. *Duval.*

Signing the record of a judgment in the Circuit Court, is a ministerial act, and may be enforced by *mandamus.* 8 *Pet. Rep.* 304, *Life and Fire Ins. Co. of N. Y.* v. *Wilson's heirs.* A Circuit Court may be compelled by mandamus to sign a bill of exceptions.

5 *Pet. Rep.* 190, *Crane et al. ex parte.* A Circuit Court on refusal to grant an injunction, may be compelled by mandamus. 4 *Ark. Rep.* 302, 326, 327, *Conway et al. ex parte.* Awarding an attachment, injunction, or *ne exeat,* is a ministerial act. 4 *Ark. Rep.* 326, 327. So the award of a writ of restitution.

Mandamus is proper, where there is a legal right and no other appropriate legal remedy. 3 *Ark. Rep.* 430. 18 *John. Rep.* 242, *Bright* v. *Supervisors of Chenango.* I *Ark. Rep.* 587, *Hawkins* v. *The Governor.* A party may have relief by *mandamus,* although he might possibly have some other remedy. 3 *Ark. Rep.* 430, *Gunn's ad.* v. *Pulaski county.*

An award of restitution is not a final judgment to which error will lie; consequently may be coerced by mandamus. 9 *Pet. Rep.* 7, *Smith* v. *Trabue's heirs.*

And as to writ of restitution, see, *also,* 5 *John. Rep.* 366, *Jackson ex dem. Ostranda et al.* v. *Hasbrook.* 1 *Cro. Eliz.* 163, *Annesley* v. *Johnson.* 10 *John. Rep.* 308.

E. H. ENGLISH, WATKINS & CURRAN, contra. Williamson seeks to compel a judge to render a *judgment* of restitution, *contrary* to his *judgment.*

Will the writ of mandamus lie in a case like this? It will lie to compel an inferior court to do any act positively enjoined by law; as to hold a term, or try a particular case; but it will not lie to compel a judge to give a particular decision in a case. Where a plain and positive duty is required by law, it will lie to compel the court to act, if it refuse; but it never issues to control the *judgment* or *discretion* of the court. 5 *Bacon's Abridg. tit. Mandamus (D.) Trapnall, ex parte.* 1 *English's Rep.* 11. And so all the books agree.

There was no statute, as we shall presently see, requiring the judge to order a writ of restitution in this case; we know of no common law applicable. It was a motion addressed to the judgment of the court, to be determined on general principles, and in the exercise of that judgment it decided that there was no law authorizing the writ; and now petitioner seeks to force it to decide against its judgment. If the decision of the judge in this case may be reviewed on manda-

mus, why not in any other? Where is the use of writs of error and appeals?

But if mandamus would lie in a case where the statute expressly requires the court to give judgment for restitution, it will not lie here, because the act of 1845, (sec. 9), under which the suit was brought, only authorizes judgment for restitution *on verdict* for defendant. Will this court extend the act, and make it embrace cases not included in its terms? They refused to do so with the replevin statute. See *Hartgraves* v. *Duval,* 1 *English's Rep.* 506. The statutes are analogous.

The act of 1846 (*Pamphlet Acts, p.* 111-2) was passed (*Dec.* 23*d,* 1846) after this suit was brought, and after the rule upon Hale to show cause why he should not enlarge his bond. The bond was not objected to under the act of 1846—it was not in existence. The 5th sec. of that act authorizes restitution in a case like this, where suit is brought since its passage.

The legislature may, perhaps, give acts affecting the remedy only a retrospective operation, but it must be done by express words, otherwise the courts will not give them that effect. *Couch* v. *McKee,* 1 *English's Rep.* 487. *Dash* v. *Van Kleek,* 7 *John. R.* 447. By the terms of the act of 1846, it is prospective. There was no act, therefore, requiring the court to award restitution, when it was refused.

OLDHAM, J. It is a general rule that a mandamus does not not lie unless the party applying has no other specific legal remedy. 3 *Black. Com.* 265, *note* 7; and so it has frequently been held by this court. *Goings* v. *Mills,* 1 *Ark. Rep.* 11. *Taylor* v. *The Governor,* 1 *Ark. Rep.* 21. *Trapnall, ex parte,* 1 *Eng.* 9. *Cheatham, ex parte, ib.* 437. It will not be granted where error will lie. *Ex parte, Nelson,* 1 *Cow.* 417. *Ex parte, Bostwick, ib.* 143. *Bank of Columbia* v. *Sweeney,* 1 *Pet.* 567. Nor will it lie where the party has a remedy by appeal. *Cheatham, ex parte,* 1 *Eng.* 437. *State* v. *Mitchell, Const. Rep.* 703. It will not be granted to compel an inferior court to render a particular judgment. *Trapnall, ex parte,* 1 *Eng.* 9. *Life Ins. Co.* v. *Adams,* 9 *Pet.* 573.

If the Circuit Court erroneously overruled the motion of the petitioner for re-restitution, his remedy was by appeal or writ of error to this court. An appeal or writ of error lies to this court from every final judgment and decision of the Circuit Court. *Rev. Stat. ch.* 43, *sec.* 1; *ch.* 116, *sec.* 141. The decision overruling the motion was a final decision, from which the party was entitled to an appeal or writ of error. Such was the case of *Fleeman and Leggett* v. *Horen and Simpson,* decided at the present term. The *dictum* contained in the opinion delivered in *Hartgraves* v. *Duval,* 1 *Eng.* 506, was without due examination, as to the extent of the statute, and under the impression that a writ of error would only lie to a final judgment; but it will also lie to a final decision of the court, such as the refusal of the court to award re-restitution, as in the transcript accompanying the petition in this case. The application for a peremptory mandamus must be denied.