unless in extraordinary and exceptional instances of gross abuse, subject to judicial control;[1] but duties imperatively enjoined may, as we have just shown, be enforced by *mandamus*.

The general rule is this: If the inferior tribunal, corporate body, or public agent or officer has a *discretion, and acts and exercises it*, this discretion cannot be controlled by *mandamus*. But if the inferior tribunal, body, officers, or agents *refuse to act* in cases where the law requires them to act, and the party has no other legal remedy, and where, in justice, there ought to be one, a *mandamus* will lie to set them in motion, to compel action; and, in proper cases, the court will settle the legal principles which should govern, but without controlling the discretion of the subordinate jurisdiction, body, or officer.[2]

Barb. 404; Rock Island Co. Sup. *v.* United States, 4 Wall. 435, 444 (1866), where Mr. Justice *Swayne* distinguishes the two classes of powers; Rex *v.* Eye Bor., 2 D. & R. 172, construing the words "shall be lawful."

[1] *Ante*, chap. v. sec. 94; *supra*, sec. 827; *post*, chaps. xxii. (sec. 857), xxiii.

Where a discretion is abused, and made to work injustice, it may be controlled by *mandamus*. Glencoe *v.* The People, 78 Ill. 382; Keogh *v.* Wilmington, 4 Del. Ch. 491. Where an act requires the exercise of the judgment of an officer *mandamus* will not lie. Sansom *v.* Mercer, 68 Tex. 488.

[2] Giles's Case, 2 Stra. 881; Rex *v.* Nottingham Jus., Sayer, 217; Hull *v.* Oneida Co. Sup., 19 Johns. 259 (1821); Gourley *v.* Allen, 5 Cow. (N. Y.) 644; People *v.* Albany Co. Sup., 12 Johns. 414; Nelson, *In re*, 1 Cow. (N. Y.) 417; Baily, *In re*, 2 Cow. (N. Y.) 479; Elkins *v.* Athearn, 2 Denio (N. Y.), 191; People *v.* Dutchess Co. Sup., 1 Hill (N. Y.), 50; People *v.* N. Y. Sup., *Ib.* 362; People *v.* Dutchess & C. R. R. Co., 58 N. Y. 152 (1874); People *v.* La Salle Co. Sup., 84 Ill. 303; Commonwealth *v.* Park, 9 Phila. (Pa.) 481; People *v.* Cass Co. Comm'rs, 77 Ill. 438 (1875); Turner, *In re*, 5 Ohio, 542, 543, *per Lane*, J.; McKean *v.* Louisville, 18 B. Mon. (Ky.) 9; Commonwealth *v.* Henry, 49 Pa. St. 530; Kennedy *v.* Washington, 3 Cranch C. C. 595; State *v.* Robinson, 1 Kan. 188, 220; Magee *v.* Calaveras Co. Sup., 10 Cal. 376; State *v.* Wilmington Council, 3 Harring. (Del.) 294; Michigan City *v.* Roberts, 34 Ind. 471; Dechert *v.* Commonwealth, 113 Pa. St. 229; Hudmon *v.* Slaughter, 70 Ala. 546; Madison *v.* Smith, 83 Ind. 502; Rice B. & F. Mach. & I. Co. *v.* Worcester, 130 Mass. 575; Mau *v.* Liddle, 15 Nev. 271; Ahrens *v.* Fiedler, 43 N. J. L. 400; State *v.* Ames, 31 Minn. 440. 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 on him by some express enactment, or necessarily results from the office which he holds. Pond *v.* Parrott, 42 Conn. 13 (1875). A *mandamus* will not issue to compel a public officer to perform a ministerial duty, when the evidence shows that his ability to do so depends on the co-operative action of a third person who is not before the court. State *v.* Cavanac, 30 La. An. 237; *ante*, sec. 113; *post*, sec. 864, note.

The principle in the text is well illustrated by the case of The King *v.* Bristol Dock Co., 6 B. & C. 181, in which the dock company was authorized by Parliament to make a floating harbor in the city, and *required* "to make such alterations and amendments in the sewers of said city as might or should be necessary in consequence of the floating of said harbor," and it was decided that the directors might by *mandamus* be commanded, in the words of the act, "to make such alterations," &c.; but the nature of the alterations could not be specified, as this was a matter committed by Parliament to the judgment and discretion of the directors of the company.

The rule is further illustrated in two cases in Massachusetts, being applications for *mandamus* to compel a mayor to sign licenses, which had been granted by the board of aldermen. In Braconier *v.* Packard, 136 Mass. 50, the writ was awarded because, under the statute in force, the signing of the license was a merely ministerial duty. In Deehan *v.* Johnson, 141 Mass. 23, the writ was refused because the particular statute conferred upon the mayor a separate responsibility and discretion as to signing the license. But in Amperse *v.* Kalamazoo Council, 59 Mich. 78, a *mandamus* was awarded to compel a common council *to approve a liquor dealer's bond*, though by statute it had power to determine upon its sufficiency, holding that it must, without unnecessary delay, either approve the bond or give its reasons for not doing so. Where, however, there was nothing to show that the refusal to approve the bond was capricious or to rebut the presumption that all questions had been fairly passed upon, *mandamus* was refused. Parker *v.* Portland Trs., 54 Mich. 308.

Mandamus held not to lie to enforce the award of a *contract to the lowest bidder*. State *v.* Fond du Lac Bd. of Ed., 24 Wis. 683; State *v.* Comm'rs of Printing, 18 Ohio St. 386; Welch *v.* Mahaska Co. Sup., 23 Iowa, 199; People *v.* Contracting Board, 27 N. Y. 378; s. c. 46 Barb. 254; s. c. 33 N. Y. 382; Commonwealth *v.* Henry, 49 Pa. St. 530; People *v.* Brennan, 39 Barb. 651; Boren *v.* Darke Co. Comm'rs, 21 Ohio St. 311; State *v.* Barlow, 48 Mo. 17 (1871); Dean *v.* Borchsenius, 30 Wis. 236 (1872); People *v.* Campbell, 72 N. Y. 496; Kelly *v.* Chicago, 62 Ill. 279 (1871). *As to rights of lowest bidder*, *ante*, chap. xiv. secs. 466–470.

[1] Kendall *v.* United States, 12 Pet. 524; Decatur *v.* Paulding, Sec. Navy (to compel defendant to pay pension), 14 Pet. 497 (1840); Reeside *v.* Walker, Sec. Treas., 11 How. 272; United States *v.* Guthrie, Sec. Treas., 17 How. 284; Same *v.* Seaman, *Ib.* 225; Brashear *v.* Mason, 6 How. 97; United States *v.* Land Comm'rs, 5 Wall. 563; De Groot, *In re*, 6 Wall. 497; Secretary of Int. *v.* McGarrahan, 9 Wall. 298, 312; Carrick *v.* Lamar, 116 U. S. 423; Bayard *v.* United States, 127 U. S. 246; Parker, *Re*, 120 U. S. 736; Brown, *Re*, 116 U. S. 401; Newport *v.* Berry, 80 Ky. 354.

A State court cannot issue a *mandamus* to an officer of the United States. McClung *v.* Silliman, 6 Wheat. 598.

[2] When the act neglected to be done by *the governor of a State* is purely ministerial, not discretionary, and affects a specific

§ 833 (670). **Same subject. Mandamus to Federal Officers.** — Thus a *mandamus* will, in cases to which the writ is adapted, be issued by the proper Federal court to an officer of the Federal government, commanding him *to do a mere ministerial act*, but not one which involves the exercise of judgment and discretion.[1]

§ 834 (671). **Same subject. Writ to Public Officers of a State.** — So where there is a duty *purely ministerial, and not discretionary*, devolved by law upon the public officers of a State, and the refusal or neglect to perform the duty affects a specific legal right, the person thereby injured may have a *mandamus*. This doctrine, under the conditions just stated, has been very generally considered to be applicable to the *executive head* of the State; but if so, it should obviously be limited to cases where the right of the relator is plain and the duty of the executive clearly ministerial, and not discretionary. The leading cases on this subject are referred to in the note.[2]

§ 835 (672). **Official Discretion not controllable by Mandamus.** — On the principle that *official discretion cannot be judicially interfered with by mandamus,* this writ will not lie to control the discretion of commissioners to determine the site for a county seat, they having been directed to locate it as near the centre of the county as a suitable location could be obtained, and having made a selection, although it was admitted that it would be granted to compel them to act.[1] So where the statute vests the county commissioners with the power to determine *when a court house and jail shall be erected* by the county, *mandamus* will not lie to compel them to erect those buildings, or, if the contract has been let, to proceed with the erection thereof.[2] But if a county board neglecting a plain statute duty fails to provide any kind of a jail, and the finances of the county

private right, a *mandamus* may issue. State *v.* Chase, Gov., 5 Ohio St. 528 (1856). Thus *the governor* will, by *mandamus*, be compelled, in a proper case, to issue commission to an officer presenting legal evidence of his election. State *v.* Moffit, 5 Ohio, 358, 362, *per Hitchcock*, J.; State *v.* Chase, Gov., 5 Ohio St. 528 (1856). *Contra*, Hawkins *v.* Conway, Gov., 1 Ark. 570 (1839); State *v.* Price, Gov., 25 N. J. L. 331 (1856), in which the right to issue a *mandamus* to the governor, in *any case*, is denied. People *v.* Governor, 29 Mich. 320 (1874); s. c. 18 Am. Rep. 89, where the subject is elaborately considered and the conflicting cases cited by *Cooley*, J.; he draws a distinction between the governor and the heads of executive departments. People *v.* Bissell, Gov., 19 Ill. 229; State *v.* Warmoth, Gov., 22 La. An. 1 (1870); s. c. 13 Am. Rep. 126; Rice *v.* Austin, Gov., 19 Minn. 103 (1872); s. c. 18 Am. Rep. 330; State *v.* Dike, Treas., 20 Minn. 363 (1874); Selma & G. R. R. Co., *In re*, 46 Ala. 230 (1871). It has been elsewhere held that the governor or executive officers of a State may, by means of this writ, be compelled to perform a mere ministerial duty or act in which individuals have an interest. State, *ex rel.* Low *v.* Towns, Gov., 8 Ga. 360 (1850); Middleton *v.* Low, Gov., 30 Cal. 596; Harpending *v.* Haight, Gov., 39 Cal. 189; s. c. 2 Am. Rep. 432; Board of Liquidation of La. *v.* McComb, 92 U. S. 531 (1877); State *v.* Kirkwood, Gov., 14 Iowa, 162; Magruder *v.* Swann, Gov., 25 Md. 173; Cotten *v.* Ellis, Gov., 7 Jones L. (N. C.) 545; State *v.* Wrotnowski, Sec., 17 La. An. 156; Biddle *v.* Willard, Gov., 10 Ind. 62 (1857); Bryan *v.* Cattell, Aud., 15 Iowa, 538; Nichols *v.* Crabbe, Compt., 4 Stew. & P. (Ala.) 154 (1833); 36 Ala. 371; Pacific R. R. Co. *v.* Price, Gov., 23 Mo. 353; Chamberlain *v.* Sibley, Gov., 4 Minn. 309. In Maurin *v.* Smith, 5 Am. L. Reg. (N. S.) 630; s. c. 8 R. I. 192; 5 Am. Rep. 564, *mandamus* was held not to lie to compel the governor to perform one of his statutory duties as commander-in-chief. *Mandamus* lies against the *auditor of State* or comptroller of public accounts, where the right of the plaintiff is clear and no other remedy is provided, and the duty is not discretionary. Divine *v.* Harvie, 7 T. B. Mon. (Ky.) 440; State *v.* Graham, Aud., 24 La. An. 429 (1872); Nichols *v.* Crabbe, Compt., 4 Stew. & P. (Ala.) 154 (1833); Fowler *v.* Peirce, Compt., 2 Cal. 165; Towle, Compt., *v.* State, 3 Fla. 202; State *v.* Anderson (N. J.), 18 At. Rep. 584 (1889). *To State treasurer.* State *v.* Dubuclet, 24 La. An. 16. *Contra*, State *v.* Dike, 20 Minn. 363 (1874).

[1] State *v.* Bonner, Busbee L. (N. C.) 257 (1853). As to county seat elections, and the remedy for frauds therein, by *mandamus* and in equity, see People *v.* Wiant, Treas., 48 Ill. 263 (1868); see, also, People *v.* Salomon, Cook Co. Clerk, 51 Ill. 39.

[2] Black, *In re*, 1 Ohio St. 30 (1852); *post*, sec. 865, note.

justify the construction thereof, the board may be compelled by *mandamus* to build or provide one, but the court cannot control the discretion of the board as to the kind of jail.[1]

§ 836 (673). **Same subject.** — So where the *building of bridges, or the making of local improvements, is a discretionary power* entrusted to public or municipal corporations, and the proper authorities thereof have, in good faith, decided according to their judgment, *mandamus* will not be issued to compel them to a different course.[2] But a provision in a municipal charter that the council shall "cause the *streets to be kept in repair*" has been held not to confer a discretionary power, but to enjoin a duty, the performance of which may in cases to which the writ is adapted be compelled by *mandamus*.[3] The performance of this duty is sometimes enforced by

[1] People *v.* La Salle Co. Sup., 84 Ill. 303. See as to discretionary powers, Hull *v.* Oneida Co. Sup., 19 Johns. 259; People *v.* Albany Co. Sup., 12 Johns. 414; People *v.* Superior Court, 5 Wend. 114; Gourley *v.* Allen, 5 Cow. (N. Y.) 644; King *v.* Bristol Dock Co., 6 Barn. & C. 181; 13 E. C. L. 139.

[2] State *v.* Essex Co. Fr., 23 N. J. L. 214 (1851); Mich. City *v.* Roberts, 34 Ind. 471 (1870); State *v.* Jefferson Par. Pol. Jury, 22 La. An. 611 (1870); *post*, chap. xxiii.

The judgment and discretion of the town supervisors as to the necessity of *bridges* and repairs thereon cannot be controlled by *mandamus* when the statute makes *them* the judges of the necessity. State *v.* Mt. Pleasant Sup., 16 Wis. 613. But the duty to *repair and rebuild bridges* may, when it is not discretionary and is clear, be enforced by *mandamus*. Howe *v.* Crawford Co. Comm'rs, 47 Pa. St. 361; Treat *v.* Middletown, 8 Conn. 243; Augusta Tp. Municipality, *In re*, 12 Up. Can. Q. B. 522; Queen *v.* Haldimond Co. Mun. Corp., 7 Up. Can. L. J. 266; Brander *v.* Chesterfield Co. Ct. Jus., 5 Call (Va.), 548; Ottawa *v.* People, 48 Ill. 233; People *v.* Dutchess Co. Sup., 1 Hill (N. Y.), 50; People *v.* Dutchess Co. R. R. Co., 58 N. Y. 152 (1874); Pumphrey *v.* Baltimore, 47 Md. 145. County commissioners were, by statute, "*authorized*" annually, at their June session, to levy a tax "for the construction and maintenance of a free turnpike road through their county." It was held that it "authorized," but did not require, the levy of the tax, and, no private rights having intervened, a *mandamus* to levy the tax was refused. Rollersville Turnp. R. Comm'rs *v.* Sandusky Co. Comm'rs, 1 Ohio St. 149, approving and distinguishing New York *v.* Furze, 3 Hill (N. Y.), 612. In England it has been held that *mandamus* will not be issued to determine which of two parishes is liable to repair a road, under local acts. Regina *v.* Oxford & W. Turnp. Roads, 12 A. & E. 427. See Rex *v.* Llandilo Dist. R. Comm'rs, 2 D. & E. T. R. 232. *Municipal duties as to ferries may be enforced by mandamus. Ante*, sec. 114.

[3] Hammar *v.* Covington, 3 Met. (Ky.) 494 (1861); Uniontown Bor. *v.* Commonwealth, 34 Pa. St. 293 (1859); State *v.* Orange, 31 N. J. L. 131. The foregoing cases approved and followed in People *v.* Bloomington, 63 Ill. 207 (1872), where express power to keep streets in repair and to prohibit obstructions was held to impose the duty; and the court, at the instance of a private relator, granted a *mandamus* to compel the city to remove specified obstructions in the street. It was held in *Illinois* to be no objection to maintaining a *mandamus* to compel highway commissioners to remove specified obstructions in the highway, that there was a statutory remedy by indictment, as under the legislation of that State the remedy by *mandamus* is not affected by the existence of another legal remedy. People *v.* Commissioners, 22 Northeast. Rep. 596 (1889). Distinguished, Michigan City *v.* Roberts,

indictment, but more frequently by the indirect means of a private action for damages.[1]

§ 837. **Instances illustrating Use and Application of the Writ.** — In a somewhat recent case, a statute after authorizing the city of Boston, for the purpose of abating a public nuisance, to raise the grade of lands in a particular district and to assess the expense thereof upon the owners of the lands, enacted that any person entitled to any estate in such land, and dissatisfied with the assessment, might give notice to the city council, and thereupon the city shall take his land, the title by the statute vesting absolutely in the city, and within sixty days thereafter file in the registry of deeds a description thereof, together with a statement that it was taken under the statute, which description and statement should be signed by the mayor, and the title to the land so taken should vest in the city. The owner of an estate in such land, being dissatisfied with the assessment, gave notice accordingly, and offered to surrender his estate to the city. The city council neglected to take it, but instead it passed an order vacating the assessment. The owner applied for a writ of *mandamus* to the city council and to the mayor, both of whom in their answers relied on the order vacating the assessment. It was held that, as soon as the assessment was made, the owner had the right under the statute to surrender his estate, and the city council could not afterwards vacate the assessment; and that the *mandamus* should issue, not only to the city council to take the land, but also to the mayor to sign the description and statement, although he could not do so, or be in default for not doing so, until the city council had passed an order taking the land, and although he might by the terms of the statute sign the description and statement at any time within sixty days after the taking.[2]

The performance of the duty enjoined by statute upon a municipal corporation to run a ferry as a toll ferry may be compelled by *mandamus* although the city council may have a discretionary power to fix the rates of toll.[3]

Mandamus to Election Officers.

§ 838 (674). **Mandamus as respects Municipal Elections and Officers. In England.** — In a previous chapter the powers of municipal corporations as to *elections and officers therein* have been considered;[1] and it may be here stated as a general proposition that *mandamus* is ordinarily the appropriate remedy to compel them and their officers, in case of refusal or neglect, to perform their duties in these respects.[2] In England the writ lies, and is constantly issued, to compel the corporation to elect a mayor and other corporate officers according to their duty;[3] but if the office is full by the possession of an officer *de facto* under color of right, a *mandamus* will not, as hereafter explained, be granted to proceed to a new election until the person in possession has been ousted upon proceedings in *quo warranto*.[4] "The court," says Mr. Willcock,[5] "will grant a *mandamus* to proceed to an election of a new mayor, *after the charter day has passed* without such election, where the former mayor having the power to do so holds over, and refuses to convoke an assembly[6] for that purpose, unless the charter restrains

34 Ind. 471 (1870); Indianapolis & Cinc. R. R. Co. *v.* State, 37 Ind. 489; *ante*, chapter on Streets, sec. 728, note.

[1] See, *post*, chap. xxii.; also, chap. xxiii., as to liability for defective streets. *Post*, secs. 933, 934.

[2] Hamsworth *v.* Boston, 121 Mass. 173. See *ante*, secs. 608, 609, 610.

[3] Attorney-General *v.* Boston, 123 Mass. 469 (1877); *ante*, sec. 114.

[1] *Ante*, chap. ix., on Municipal Elections and Officers.

[2] *Ib.*; Lamb *v.* Lynd, 44 Pa. St. 336; s. c. Brightly's Election Cases, 624–631, and note of the learned editor. Demarest *v.* Wickham, 63 N. Y. 320, 324 (1875); Lewis *v.* Marshall Co. Comm'rs, 16 Kan. 102 (1876); Glencoe *v.* People, 78 Ill. 382 (1875). In *Kentucky mandamus* is the proper remedy to prevent the entry upon record of a vote upon a "local option" law, if the act is unconstitutional. Gayle *v.* Owen Co. Court, 83 Ky. 61.

[3] Rex *v.* Cambridge, 4 Burr. 2008; Rex *v.* Tregony, 8 Mod. 113; Rex *v.* Abington, 1 Ld. Raym. 561; Rex *v.* St. Martin, 1 Term R. 149; Rex *v.* Liverpool, 1 Barnard. 83; Rex *v.* Woodrow, 2 Term R. 732; Rex *v.* Scarborough, 2 Stra. 1180; Rex *v.* Leyland, 3 M. & S. 184; Rex *v.* Thetford, 8 East, 270; Rex *v.* Norwich, 1 B. & Ad. 310; Willc. 357, pl. 45; *Ib.* 361, pl. 56; Tapping on *Mandamus*, 165; Rex *v.* York, 4 D. & E. T. R. 669; Stephens's *Nisi Prius*, 2293–2295; Rex *v.* Winchester, 7 A. & E. 215; Regina *v.* Pembroke (corporation of), 8 Dowl. P. C. 302; Regina *v.* Leeds, 7 A. & E. 963; Grant on Corp. 204, 208, 213, 219.

[4] Rex *v.* Bankes, 3 Burr. 1454; Rex *v.* Cambridge, 4 Burr. 2011; Rex *v.* Radford, 1 East, 80; Rex *v.* Truro, 3 B. & A. 592; Rex *v.* Derby, 7 A. & E. 419; Reg. *v.* Hiorns, *Ib.* 960; *Ib.* 966; Rex *v.* Colchester, 2 Term R. 259; *infra*, secs. 842–846; *post*, sec. 892. Section cited and approved. People *v.* Brooklyn Council, 77 N. Y. 503.

[5] Willc. 357, pl. 45; *Ib.* 361, pl. 56; Rex *v.* Cambridge, 4 Burr. 2011; Rex *v.* Scarborough, 2 Stra. 1180; Rex *v.* Norwich, 1 B. & Ad. 310; Angell & Ames, sec. 700.

[6] As to Corporate Assembly, see *ante*, chap. x.

Where, "by the charter," the office of alderman becomes immediately vacant by his election and acceptance of a public office, he is neither an alderman *de facto* nor *de jure*, and it is the duty of the common council to order a special election to fill the vacancy. If the officer acts as alderman the remedy is not by *quo warranto* but by *mandamus* to compel the ordering of a special election. People *v.* Brooklyn Council, 77 N. Y. 503; People *v.* Nostrand, 46 N. Y. 381; People *v.* Carrique, 2 Hill (N. Y.), 93; Lamb *v.* Lynd, 44 Pa. 336; State *v.* Rahway, 33 N. J. L. 110; Fish *v.* Weatherwax, 2 Johns. Cas. 217.

If municipal corporations neglect to hold elections as empowered by the remedial statute of 11 Geo. I., chap. iv., by which they are authorized to supply the vacant offices of mayor, they may be compelled to fill them by *mandamus*. Rex *v.* Oxford, Cas. temp. Hardw. 178; Rex *v.* Cambridge, 4 Burr. 2011; Willc. 360.

the right of electing to a particular time;" and "it will be granted for the election of bailiffs, chamberlains, coroners, and other annual officers, although not the chief officers of the corporation."

§ 839 (675). **In this Country.** — So, in this country it has been decided that an election for municipal officers *may be held after the charter day*, and that a *mandamus* may be granted to compel the proper officers to give notice thereof.[1] And the writ will lie *in the name of the State on the relation of a voter* to compel the municipal council to hold or appoint a *special election*, according to the charter, to fill a vacancy in their body, when this is a duty enjoined upon them; and to justify the writ there need not be a positive refusal; unreasonable delay, manifesting an intention not to perform the duty, is sufficient.[2] So where it is made by charter the duty of the select and common councils *to assemble in joint meeting* to appoint certain corporate officers, not elected by the people, and the time for the meeting is fixed by law or ordinance, it is not discretionary in one of these bodies to refuse to meet with the other, and if it does so refuse, its members may be compelled by *mandamus*.[3]

§ 840 (676). **To Canvass Votes.** — Municipal councils, as we have before seen, are often invested with the control of municipal elections, and are *made canvassers and judges of the result*, and they may be compelled to perform their duties in this respect by *mandamus*.[4]

As to right of *officer to hold over*, see authorities last cited, and also *ante*, chap. ix. sec. 217.

[1] People *v.* Fairbury, 51 Ill. 149 (1869); s. p. State *v.* Smith, 22 Minn. 218 (1875). *Cornell*, J., says: "So far as relates to the time when such election [for city assessors] should be made, the statute is directory. The city council having neglected its duty at the proper time from whatever cause, the obligation still rested upon it to elect at the earliest opportunity." Citing the text. *Quo warranto* refused against an alderman elected on a wrong day, no fraud being alleged. State *v.* Tolan, 33 N. J. L. 195; *ante*, sec. 217 *et seq.*; Tapping on *Mandamus*, 165; *post*, sec. 900. *Mandamus* may issue to compel public officers to perform a public duty, although the time prescribed by the statute has passed, and if the public officer has been succeeded by another, it is the duty of the *successor* to obey the writ when required, which his predecessor omitted. Reg. *v.* Monmouth, L. R. 5 Q. B. 251; Rochester *v.* Reg., 27 Law J. Q. B. 436; Add. on Torts (4th Eng. ed.), 1057. *Ante*, secs. 216–221, 224; *post*, secs. 885–887.

[2] State *v.* Rahway, 33 N. J. L. 110 (1868). *Vacancies in municipal offices. Ante*, sec. 222. Text cited and approved. People *v.* Brooklyn Council, 77 N. Y. 503, 512 (1879).

[3] Lamb *v.* Lynd, 44 Pa. St. 336 (1863); s. c. Brightly's Election Cases, 624, and note. *Read*, J., concurred because this was a necessary result of Kerr *v.* Trego, 47 Pa. St. 292; s. c. Brightly's Election Cases, 632, where he dissented; *ante*, chap. x. sec. 284. Further, as to *contested election cases*, Brightly's Election Cases, 270, 455, 466, 656; *post*, chap. xxi. on Quo Warranto.

[4] *Ante*, chap. ix. sec. 200 *et seq.*; Lamb *v.* Lynd, Brightly's Election Cases, 624, 630, and note; s. c. 44 Pa. St. 336.

Mandamus will lie to compel *election canvassers*, whose duties are ministerial, to act, but not to control their judgment; Magee *v.* Calaveras Co. Sup., 10 Cal. 376; State *v.* Marshall Co. Judge, 7 Iowa, 186; Rice *v.* Smith, 9 Iowa, 570; State *v.* Bailey, 7 Iowa, 390; *ante*, sec. 204, note; Moses on *Mandamus*, chap. xiii.; Brightly's Election Cases, 261, 300, 305, 423, 434; State *v.* Marston, 6 Kan. 524 (1870).

It will also lie, upon the relation of any voter or taxpayer interested, to compel an election officer *to announce the result* of an election. People *v.* Salomon, 46 Ill. 415. So it will lie to a returning officer, board of examiners, or managers of an election, or council, to compel them to *give a certificate of election* to the person elected. State *v.* Judge Cir. Ct., 13 Ala. 805 (1848); Strong, Petitioner, 20 Pick. (Mass.) 484 (1838); Putnam *v.* Langley, 133 Mass. 204. *Mandamus* will not lie to compel the making of a certificate of election to one who does not possess the requisite qualifications to the office to which he was elected. State *v.* Newman, 91 Mo. 445; O'Ferrall *v.* Colby, 2 Minn. 180; State *v.* Moffitt, 5 Ohio, 358, 362; Rex *v.* York, 4 D. & E. T. R. 669. Such certificates are important, since they are *prima facie* evidence of title, though not conclusive in the trial of contested elections. Kerr *v.* Trego, 47 Pa. St. 292 (1864); s. c. Brightly's Election Cases, 632, 641, and note; Carpenter *v.* Ely, 4 Wis. 420; Brightly's Election Cases, 258, 314, 320, 435. So *mandamus* lies to a municipal corporation to compel it to act according to its duty upon the *sufficiency of sureties* offered by a person elected to a municipal office. *Ante*, sec. 215, note. *Mandamus* lies in favor of relators duly elected to a municipal office to compel the mayor or proper officer to administer *the oath of office* to them. Heath, *In re*, 3 Hill (N. Y.), 42 (1842). *Mandamus* to compel corporation to *amove* an officer. *Ante*, sec. 251, note.

To take Municipal Office.

§ 841 (677). **Whether compellable to serve.** — In England, on the principle heretofore adverted to,[1] if a corporator, elected to a corporate office, neglect or refuse, without sufficient legal excuse, *to serve, he may be compelled by mandamus;* but it is doubtful, as before suggested, how far this doctrine is applicable in this country.[2]

To admit to Municipal Office.

§ 842 (678). **To compel Admission to Office.** — In appropriate cases, *mandamus* will lie to compel the proper officers of a municipal corporation *to admit to the possession of his place* one elected to any municipal or corporate office.[3] *Mandamus* is not considered, in England, the proper remedy to try the right to a public or municipal office, and a *mandamus* to admit gives no title to the person admitted, but it enables him to try or enforce his right; and if there is another remedy open to the applicant, as, for instance, an infor-

[1] *Ante*, sec. 223; Douglass *v.* Essex Co. Freeh., 38 N. J. L. 214; Rex *v.* Bedford, 1 East, 80; Rex *v.* Leyland, 3 M. & S. 184; Willc. 367. When the writ lies to compel an officer to take upon himself the duties of his office. *Ante*, sec. 223; Tapping on *Mandamus*, 189.

[2] *Ante*, secs. 223, 226.

[3] State *v.* Rahway, 33 N. J. L. 111 (1868); followed in McDermott *v.* Miller, 45 N. J. L. 251; Smith *v.* Eaton Co. Sup., 56 Mich. 217; Willc. 368, pl. 74; Angell & Ames on Corp. sec. 703. The writ was refused when applied for to compel admission to an office pending proceedings in *quo warranto* between the same parties, though on appeal. Hannon *v.* Halifax Co. Comm'rs, 89 N. C. 123.

mation in the nature of *quo warranto* (which lies where the adverse claimant or officer is in possession), a *mandamus* will not be granted. But it will be granted, says Mr. Willcock, "where *quo warranto* does not lie, although the office be already full, as otherwise in many cases the applicant would be without remedy."[1] In cases where *mandamus* lies, the applicant will be refused the writ unless he shows a *prima facie* title.[2]

§ 843 (679). **Same subject. American Decisions.** — In this country the same general principles are recognized, although there is, as we shall see, some difference of opinion as to the scope of the remedy by *mandamus* where there is an officer or adverse claimant in possession. Thus *mandamus* lies to compel the city council *to admit a councilman* duly elected to that office.[3] But on the ground that *mandamus* is not a proper proceeding to try the right to a public office, the court declined to make an order to show cause, in a case where the relator claimed to have been elected by the common council to the office of assessor, and also claimed that the council wrongfully deprived him of his office by refusing to count the vote of one of the members in his favor.[4]

§ 844 (680). **Respective functions of Quo Warranto and Mandamus.** — The adjudged cases in this country agree that *quo warranto*, or an information or proceeding in the nature of a *quo warranto*, is the appropriate remedy, when not changed by charter or statute, for an *usurpation of a municipal franchise*, as well as for unauthorized usurpations and *intrusions into municipal offices*.[5] When no

[1] Regina *v.* Leeds, 11 A. & E. 512; Rex *v.* Winchester, 7 A. & E. 215; Rex *v.* Sawyer, 10 B. & C. 486; Regina *v.* Slatter, 11 A. & E. 502; Regina *v.* Derby Bor. Council, 7 A. & E. 419; Same *v.* Hiorns, *Ib.* 960; Frost *v.* Chester, 5 E. & B. 531; Willc. 373, pl. 87. The *requisites of returns* to writs of *mandamus to admit* are stated by Mr. *Willcock*, at pp. 413–417, and by Angell & Ames, sec. 722.

[2] Willc. 368, pl. 74.

[3] State *v.* Rahway, 33 N. J. L. 111 (1868); Ellison *v.* Raleigh, 89 N. C. 125; Doyle *v.* Raleigh, 89 N. C. 133.

[4] People *v.* Detroit, 18 Mich. 338 (1869). *Mandamus* and *quo warranto* are sometimes concurrent remedies to try the right of contending parties to an office. State *v.* Falconer, 44 Ala. 696 (1870); State *v.* Palmer, 10 Neb. 203. See, also, Reid, *In re*, 50 Ala. 439 (1874). The *right to an office* cannot be tried in a proceeding by *mandamus* to compel the payment of salary to one who claims the office, or to compel another officer to perform an official duty in favor of one who claims an office. State *v.* John, 81 Mo. 13.

[5] Reynolds *v.* Baldwin, 1 La. An. 165; followed, Cochran *v.* McCleary, 22 Iowa, 75 (1867); *Re* Sawyer, 124 U. S. 200 (1887); State *v.* Ramos, 10 La. An. 420; People *v.* Matteson, 17 Ill. 167; People *v.* Stevens, 5 Hill (N. Y.), 616 (1843); Hullman *v.* Honcomp, 5 Ohio St. 237 (1855); Worthley *v.* Steen, 43 N. J. L. 542; Brennan *v.* Bradshaw, 53 Tex. 330; *ante*, sec. 272; *post*, secs. 890–892.

Legality of election and title to office cannot [ordinarily] be tested by *bill in chancery*. *Ib.* *Re* Sawyer, 124 U. S. 200 (1887), where *Gray*, J., considers at large the nature and extent of the jurisdiction in equity, where not enlarged by statute. But see, in exceptional instances, Kerr *v.* Trego, 47 Pa. St. 292 (1864); cited *ante*, sec. 275; s. c. Brightly's Election Cases, 632. *Remedy by injunction.* Brightly's Election Cases, 573, 623, and cases cited. *Infra*, sec. 847, note.

The *title to office* must in general be tested on *quo warranto*, and cannot be questioned collaterally. People *v.* Fletcher, 3 Ill. 487; Bonner *v.* State, 7 Ga. 473 (1849), and cases cited; People *v.* Kip, 4 Cow. (N. Y.) 382, note; *Ib.* 358 (1822); Lewis *v.* Oliver, 4 Abb. Pr. Rep. 121; St. Louis Co. Court *v.* Sparks, 10 Mo. 117 (1846); Winston *v.* Moseley, 35 Mo. 146. In *North Carolina* the remedy to try title to office is *quo warranto*. Howerton *v.* Tate, 66 N. C. 231, and note; *ante*, chap. ix. sec. 202; *ante*, chap. x.; *post*, sec. 892. In *Pennsylvania*, *quo warranto* lies to try the right to *all* offices, military as well as civil. Commonwealth *v.* Small, 27 Pa. St. 31; Field *v.* Commonwealth, 32 Pa. St. 478. So in *Alabama* and *Connecticut*. Harris, *In re*, 52 Ala. 87 (1875); Duane *v.* McDonald, 41 Conn. 517 (1874).

[1] *Ante*, chap. ix. secs. 202–205; People *v.* Detroit, 18 Mich. 338.

[2] State *v.* Dunn, Minor (Ala.), 46 (1821); State *v.* Thompson, Aud., 36 Mo. 70 (1865), *per Wagner*, J.; People *v.* Scrugham, 20 Barb. 302; *post*, sec. 892.

[3] Lindsey *v.* Luckett, 20 Tex. 516.

[4] Bonner *v.* State, 7 Ga. 473 (1849); State *v.* Deliesseline, 1 McCord (S. C.), 52; State *v.* Dunn, 1 Minor (Ala.), 46; People *v.* New York, 3 Johns. (N. Y.) Cas. 79; Rex *v.* Colchester, 2 D. & E. T. R. 259; s. p. St. Louis County Court *v.* Sparks, 10 Mo. 117 (1846). "*Mandamus* will not be issued to admit a person to an office while another is in under color of right." State *v.* Thompson, Aud., 36 Mo. 70, *per Wagner*, J. *Mandamus* will not lie to turn out one officer and to admit another in his place. People *v.* Matteson, 17 Ill. 167; People *v.* Head, 25 Ill. 325; People *v.* Hilliard, 29 Ill. 413 (1862). But a groundless, colorless claim to an office, or a pretended intrusion into or retention of it, will not, as against a person duly elected and acting, be sufficient to drive the informant to a *quo warranto*, and he may have a *mandamus* to compel such person, though he was the informant's predecessor in office, to deliver up the books and property belonging to the office. People *v.* Kilduff, 15 Ill. 492 (1854); Rex *v.* Cambridge, 4 Burr. 2008; Boffing (*al.* Tintagel) Bor., *In re*, 2 Stra. 1003; Rex *v.* Winchester, 7 A. & E. 215. When *mandamus* is *the proper* remedy to determine the right to an office. Grant on

special tribunal, with exclusive and final power to settle contested titles to office, is provided, the regular method unless it is otherwise provided by statute is by *quo warranto;*[1] and the instances are exceptional when this may be done on *mandamus*. If another is commissioned, and in actual discharge of the duties of the office, an adverse claimant to the office is not entitled to a *mandamus*, but must resort to *quo warranto;* it was admitted, however, that where the office is attempted to be held under an appointment which is merely colorable and void, *mandamus* would lie.[2] In Texas it is held that *mandamus* will lie to recover or to be admitted to the possession of an office to which the claimant has been elected and commissioned.[3] In Georgia, and in some of the other States, the English rule is maintained, namely, that where a person is an officer *de facto*, — that is, is in the exercise of the duties of an office under a *prima facie* right or color of title, — the remedy to admit another having a lawful claim is not by *mandamus*, but by an information in the nature of a *quo warranto*.[4]

§ 845 (681). **Maryland Rule; Title to Office tried in Mandamus.** — But, in a case in Maryland,[1] in which the claimant sought not only the removal of the incumbent, but the possession of the office for himself, the objection was made that *quo warranto*, and not *mandamus*, was the proper remedy to try the title to the office; the Court of Appeals held, however, that the objection was not well taken, and that the plaintiff need not resort to *quo warranto* as preliminary to *mandamus*, as this might prove inadequate, by reason of the delay it would occasion. The court was of opinion that *mandamus* to compel the defendant to surrender to the petitioner the office was the only complete remedy, since "under the *quo warranto* information the judgment might amove the occupant, but would not install the claimant."[2] And the court further held that *mandamus* might issue although the office was filled by the defendant, who claimed title. It admitted the conflict of decisions on this point, but regarded *mandamus* as particularly applicable to the cause before the court.

§ 846 (682). **Same subject.** — Where the subject is not controlled by legislation there is much *to recommend the views of the Maryland court* in the case just referred to, since the delays of resorting to *quo warranto* are such, in consequence of the short terms of our elective officers, as generally to amount to a denial of justice. Before the *quo warranto* proceedings can be determined, the term of the claimant frequently expires, and a judgment in his favor is a barren victory.[3] It is agreed that where, for any reason, *quo warranto* will not lie, and there is no other adequate remedy provided, the right to a disputed office may be settled on *mandamus*.[1] Looking at the question in view of our short official terms, we should say that where the effect of compelling a resort to *quo warranto* would be unreasonably to delay the decision of the disputed right (which concerns not only the individuals, but the public), the court would be justified in interfering by *mandamus*, so far, at least, as to see that the incumbent is actually a *bona fide* possessor of the place, and that there is a real dispute, and fair doubt as to which party has the legal title.[2]

Corp. 216; *post*, secs. 891, 892. *Mandamus* will not be issued to compel a municipal council to do an act which they have no legal duty to perform; as, for example, to direct the treasurer to retain a portion of the school fund, and apply it to the payment of certain special assessments against school property. State *v.* Board of Council (N. J.), 18 Atl. Rep. 571 (1889). But the treasurer having so applied a portion of the fund against the objection of the board of education, a *mandamus* will lie to compel him to restore it to the school account. *Ib.*

[1] Harwood *v.* Marshall, 9 Md. 83 (1856).

[2] *Ib.*; citing Strong's Case, 20 Pick. (Mass.) 497; Dew's Case, 3 Hen. & M. (Va.) 1, 23. See, also, in *Massachusetts*, Howard *v.* Gage, 6 Mass. 462.

[3] Where a judgment of ouster in *quo warranto* has been rendered in an inferior court and the defendant has duly appealed and filed the necessary *supersedeas* bond, *mandamus* from the superior court to the inferior court to execute the judgment of ouster will not be awarded, although the term of office will expire before the appeal can be regularly heard in the appellate tribunal. United States *v.* Addison, 22 How. 174 (1859). If the appellant fails to prosecute his appeal with effect, it is intimated by Mr. Justice *McLean* that the *supersedeas* bond would be available in such a case to the appellee or defendant in error as an indemnity. *Ib.* 185; *infra*, sec. 884.

To restore to Municipal Office.

§ 847 (683). **To restore Officer.** — The power of municipal corporations *to amove officers* has been treated in a former chapter;[3] and the corporation, as we have seen, may in some cases be compelled by *mandamus* to exercise this power.[4] Where a municipal officer or member of a municipal council has been illegally suspended or illegally removed, he is, in general, entitled to a *mandamus* to be restored.[5] The doctrine has been sanctioned, that where an officer

[1] Willc. 373, pl. 87; People *v.* Stevens, 5 Hill (N. Y.), 616 (1843).

[2] *Post*, chap. xxi. When *conflicting claims to office* may be settled on *mandamus*, — discussed, but not determined, in The People *v.* Stevens, 5 Hill (N. Y.), 616 (1843); see Rex *v.* Cambridge, 4 Burr. 2008; People *v.* Scrugham, 20 Barb. 302; People *v.* Kilduff, 15 Ill. 492; Banton *v.* Wilson, 4 Tex. 400; Lindsey *v.* Luckett, 20 Tex. 516; Diggs, *In re*, 52 Ala. 381 (1875); Angell & Ames, sec. 706. Where a municipal charter provided for the election of a member of the board of education by the mayor and aldermen by ballot, and no other official was directed to declare or certify such election, and no provision was made for a contest, it was held in *Tennessee* that the validity of such an election could be determined by *mandamus*. Lawrence *v.* Ingersoll, 12 Southwest Rep. 422 (1889). In Heath, *In re*, 3 Hill (N. Y.), 42, the question whether the relators were duly elected to municipal offices was incidentally determined on *mandamus*, but the question as to the "proper remedy was not made." People *v.* Stevens, 5 Hill, 629, *per Bronson*, J. But where *mandamus* is resorted to in order to try which of two persons has been elected to an office, and indeed in every such proceeding except *quo warranto*, the regular determination of the board of canvassers is conclusive. People *v.* Stevens, 5 Hill (N. Y.), 616, where the court refused the application of relator to compel, by *mandamus*, his predecessor in office to deliver books and papers, because the relator's title to the office was not clear. People *v.* Vail, 20 Wend. 12, 14; *post*, sec. 892. If there be any doubt as to the validity of an election, the court will not interfere by *mandamus* in the first instance, but will put the parties to their remedy by *quo warranto*. Commonwealth *v.* Phila. Co. Comm'rs, 5 Rawle (Pa.), 75.

[3] *Ante*, chap. 9, secs. 238–256; Willc. 375; Grant on Corp. 243, 416.

[4] *Ante*, sec. 248, note; Delahanty *v.* Warner, 75 Ill. 185 (1874).

[5] *Ante*, sec. 248, note; sec. 255; Duffield's Case, Bright. Elec. Cas. 646; Mayor of Durham's Case, 1 Sid. 33; Bac. Abr. title "*Mandamus;*" Grant on Corp. 247–250; Willc. 378; State *v.* Jersey City (suspension of councilman), 25 N. J. L. 536; State *v.* Paterson (city treasurer), 38 N. J. L. 190; Delahanty *v.* Warner, 75 Ill. 185 (1874); State *v.* Watertown Council, 9 Wis. 254; Dew *v.* Judges, 3 Hen. & M. (Va.) 1. Where county commissioners removed a clerk, the court ordered a per-