of a corporation has been *irregularly* removed, yet if the court see good cause for the removal, that is, if they see that by regular proceedings another amotion for the same cause would follow, and that it is the *duty* of the corporation to exercise the power to amove, the peremptory writ to compel his restoration may, in the discretion of the court, be refused.[1]

To enforce Delivery and Inspection of Books and Papers.

§ 848 (684). **In respect of Corporate Papers and Records.** — *Mandamus*, as we have before seen, is a proper remedy for the duly elected officer of a municipal corporation to obtain possession of the *seal, books, papers, and records* appertaining to such office, from his predecessor;[2] but, as elsewhere stated, the courts will not, in general, try by *mandamus* whether one person is entitled to an office actually filled by another under commission or color of right.[3] In this country, the records, books, and by-laws of municipal corporations are of a public nature, and if such a corporation should refuse *to give inspection* thereof to any person having an interest therein, or, perhaps, for any proper purpose to any inhabitant of the corporation, whether he had any special or private interest or not, a writ of *mandamus* will lie to command the corporation to allow such inspection, and copies to be taken, under reasonable precautions to secure the safety of the originals.[1]

emptory *mandamus* to restore the party removed to his office, because the record did not show the ground of removal. Street *v.* Gallatin Co. Comm'rs, Breese (1 Ill.), 25. Where a corporate body strikes off the name of a member without notice to him, a *mandamus* to restore him will be granted. Delacy *v.* Neuse River Nav. Co., 1 Hawks (N. C.), 274 (1821); Duffield's Case, Bright. Elec. Cas. 646. *Mandamus* will not lie to restore one to an office to which he is not entitled, though he may have been illegally removed. Major *v.* Randolph, 4 Watts & Serg. (Pa.) 514; People *v.* Metropolitan Police Board, 26 N. Y. 316. Forasmuch as an officer unlawfully removed has a remedy by *quo warranto* or by *mandamus* to restore, when either of these remedies is proper, *a city officer cannot resort to equity* to enjoin the corporate authorities from unlawfully removing him and appointing a successor. Delahanty *v.* Warner (street commissioner), 75 Ill. 185 (1874); s. c. 20 Am. Rep. 237. *Supra*, sec. 844, note. Index, tit. *Equity, Injunction.*

[1] Rex *v.* Axbridge, Cowper, 523; Rex *v.* London, 2 D. & E. T. R. 181, 182, *per Ashhurst*, J.; Rex *v.* Bristol, 1 D. & R. 389; s. c. 5 B. & Ald. 731; Paine, *In re*, 1 Hill N. Y., 665, 667 (1841), *per Cowen*, J.; Rex *v.* Bank, 2 B. & Ald. 620; *ante*, sec. 235, note; sec. 254. Mr. *Willcock* (Munic. Corp. 379, pl. 100) stated the doctrine thus: A peremptory *mandamus* to be restored "will not be granted to a public officer who admits that he was justly but irregularly amoved;" citing Rex *v.* Axbridge, Cowper, 523. See, also, Rex *v.* Campion, 1 Sid. 14; Rex *v.* Oxon, 2 Salk. 429; Rex *v.* Slatford, 5 Mod. 316; Reg. *v.* Ipswich, 2 Ld. Raym. 1240.

Requisites of returns to a mandamus to restore. Willc. 417–424; Angell & Ames, secs. 723–725, 729.

[2] *Ante*, sec. 302; People *v.* Kilduff, 15 Ill. 492 (1854); Tapping on *Mandamus*, 50, 94; 3 Black. Com. 110; Rex *v.* Buller, 8 East, 388; Rex *v.* Hopkins, 1 Q. B. 161; Rex *v.* Greene, 6 A. & E. 549. *Relator, who?* Bates *v.* Plymouth, 14 Gray (Mass.), 163; Frisbie *v.* Clarksville, 78 Ind. 269; *post*, sec. 900.

[3] People *v.* Head, 25 Ill. 325; People *v.* Hilliard, 29 Ill. 413 (1862); *supra*, secs. 842–846; Tapping on *Mandamus*, 27, 28; State *v.* Pitot, 21 La. An. 336 (1869); Grant on Corp. 216, and authorities cited. Lies against *mere usurpers*, without color of right. Kimball *v.* Lamprey, 19 N. H. 215.

To enforce Duties towards Creditors.

§ 849 (685). **At instance of Creditors.** — *Mandamus* is one of the principal remedies by which municipal and public corporations are compelled to *perform their duties towards their creditors.* The rightful authority of the legislature over these corporations is such that it may require them to levy a tax to pay creditors, and obedience to such requirement may be enforced by *mandamus.*[2] The power of municipal corporations to make contracts and to create liabilities has been before considered,[3] and this authority imposes the duty of providing for the payment of obligations and liabilities in the special mode prescribed by law, and if no such mode is prescribed, then by the levy and collection of taxes under the provisions of the charter

[1] *Ante*, sec. 303. *Further, as to inspection:* 1 Greenl. Ev. secs. 471–478; Angell & Ames, secs. 707; Tapping on *Mandamus*, 52, 95; Rex *v.* Newcastle, 2 Stra. 1223; Rex *v.* Babb, 3 D. & E. T. R. 580; Rex *v.* Shelley, *Ib.* 142; Rex *v.* Lucas, 10 East, 235; Rex *v.* Tower, 4 M. & S. 162. *Mandamus* will lie to compel an officer to deliver up property of the State held by him without any right or authority of law. State *v.* Bacon, 6 Neb. 286, (1877). It will also lie to compel the custodian of registration lists, poll books, &c., to grant an inspection of them to one who is interested in enforcing a public or private right. State *v.* Hoblitzelle, 85 Mo. 620.

[2] Commonwealth *v.* Pittsburgh, 34 Pa. St. 496 (1859); Meriwether *v.* Garrett, 102 U. S. 472; Meyer *v.* Brown, 65 Cal. 583; Shelley *v.* St. Charles County, 30 Fed. Rep. 603; Munday *v.* Rahway, 43 N. J. L. 338; Lilly *v.* Taylor, 88 N. C. 489; Bloomfield *v.* Charter Oak Bank, 121 U. S. 121. In the New England States judgments against municipalities are not enforced by *mandamus*, but in a mode peculiar to those States. By the common law of the New England States, derived from immemorial usage, the estate of any inhabitant of a county, town, territorial parish, or school district, is liable to be taken on execution on a judgment against the corporation. 5 Dane Ab. 158; Hawkes *v.* Kennebec County, 7 Mass. 461, 463; Chase *v.* Merrimack Bank, 19 Pick. (Mass.) 564, 569; Gaskill *v.* Dudley, 6 Met. (Mass.) 546. "In *Connecticut*, as in *Massachusetts* and *Maine*, by common law or immemorial usage, the property of any inhabitant may be taken on execution upon a judgment against the town." *Per Gray*, J., in Bloomfield *v.* Charter Oak Bank, 121 U. S. 129 (1886); Eames *v.* Savage, 77 Me. 212; Beardsley *v.* Smith, 16 Conn. 368. In *Massachusetts*, payment of such a judgment has never been compelled by *mandamus* against the corporation, as in other parts of the United States. *Per Gray*, C. J., Hill *v.* Boston, 122 Mass. 344; *ante*, sec. 576; *post*, sec. 962, note; Newman *v.* Scott Co. Ct. Jus., 5 Sneed (Tenn.), 695 (1854); *ante*, chap. iv. secs. 62, 63, 69; Darlington *v.* New York, 31 N. Y. 164; Commonwealth *v.* Allegheny County Comm'rs, 37 Pa. St. 277; Bassett *v.* Barbin, 11 La. An. 672; Von Hoffman *v.* Quincy, 4 Wall. 535 (1866); text approved, Brown *v.* Gates, 15 W. Va. 131; *supra*, sec. 826; *post*, sec. 962, note.

[3] *Ante*, chap. xiv. on Contracts; *post*, chap. xxiii.

or other legislative act.[1] Whether the duty to provide for the payment of the liabilities of the corporation be specially enjoined, or whether it results from the general powers and nature of the corporation, it may, in all proper cases, be equally enforced by *mandamus*.[2]

[1] Commonwealth *v.* Pittsburgh, 34 Pa. St. 496, 510 (1859); Commonwealth *v.* Allegheny Co. Comm'rs, 37 Pa. St. 277 (1860). In this case, *Thompson*, J., says: "The authority to create a debt implies an obligation to pay it, and where no special mode is provided, it is implied that it is to be done in the ordinary way, by the levy and collection of taxes." 37 Pa. St. 290; s. p. United States *v.* New Orleans, 98 U. S. 381; United States *v.* New Orleans, 17 Fed. Rep. 483; compare Knox *v.* Baton Rouge, 36 La. An. 427; and see Ralls County *v.* United States, 105 U. S. 733. Where power to levy taxes for general purposes was expressly limited, an authority to contract debts beyond that amount for special purposes was held not to imply an authority to levy taxes to pay such special debts. State *v.* Guttenberg, 39 N. J. L. 660; text approved, Brown *v.* Gates, 15 W. Va. 131. See *ante*, chap. xix. on Taxation; Hasbrouck *v.* Milwaukee, 25 Wis. 122 (1870). See Macon Co. Case, 99 U. S. 582, referred to below. *Ante*, secs. 769, 826. *Post*, sec. 851 *et seq.*

[2] See cases cited in last note; also, Walkley *v.* Muscatine, 6 Wall. 481; Davenport *v.* Lord, 9 Wall. 409; Heine *v.* Levee Comm'rs, 19 Wall. 655 (1873); Rees *v.* Watertown, *Ib.* 107 (1873); *ante*, sec. 826; Young *v.* Clarendon, 132 U. S. 340 (1889); text approved, Brown *v.* Gates, 15 W. Va. 131; Commonwealth *v.* Allegheny Co. Comm'rs, 32 Pa. St. 218 (1858); Commonwealth *v.* Perkins, 43 Pa. St. 400; Maddox *v.* Graham, 2 Met. (Ky.) 56 (1859); Lexington *v.* Mulliken, 7 Gray (Mass.), 280 (1856); State *v.* Milwaukee, 20 Wis. 87 (1865); Von Hoffman *v.* Quincy, 4 Wall. 535 (1866); Butz *v.* Muscatine, 8 Wall. 575 (1869); distinguished, Supervisors *v.* United States, 18 Wall. 71 (1873); Galena *v.* Amy, 5 Wall. 705 (1866); Peagram *v.* Cleaveland Co. Comm'rs, 64 N. C. 557 (1870); Soutter *v.* Madison, 15 Wis. 30; Flagg *v.* Palmyra, 33 Mo. 440; Columbia Co. Comm'rs *v.* King, 13 Fla. 451; Brown *v.* Crego, 32 Iowa, 498; State *v.* Buffalo Co. Comm'rs, 6 Neb. 455 (1877); State, *ex rel.* Hasbrouck *v.* Milwaukee, 25 Wis. 122 (1869); State *v.* Burbank, 22 La. An. 318 (1870); Addison on Torts (4th Eng. ed.), 1069; Kelly *v.* Wimberly, 61 Miss. 548; Kennedy *v.* Sacramento, 19 Fed. Rep. 580; Hawley *v.* Fayetteville Comm'rs, 82 N. C. 22.

Form of alternative writ in favor of creditor. Commonwealth *v.* Pittsburgh, 34 Pa. St. 496.

In *Mississippi*, *mandamus* is the proper remedy of the creditor to compel the county board of police *to proceed to audit the claim*, and when audited the party is entitled to a county warrant on the treasurer, and, if there is no money in the treasury, *mandamus* will lie to compel the board *to levy a tax* to pay the warrant. Attala Co. Bd. of Pol. *v.* Grant, 9 Sm. & M. (17 Miss.) 77 (1847); Madison Co. Court *v.* Alexander, Walker (Miss.) Rep. 523 (1832); Carroll *v.* Tishamingo Co. Bd. Pol., 28 Miss. 38; Klein *v.* Warren Co. Sup., 51 Miss. 878; Klein *v.* Smith Co. Sup., 54 Miss. 254.

In *Tennessee:* Newman *v.* Scott Co. Jus., 1 Heisk. 787.

In *Arkansas:* Gunn's Adm. *v.* Pulaski County, 3 Ark. 427; Vance *v.* Little Rock, 30 Ark. 435 (1875).

In *California*, where a money judgment is recovered against a county, no execution can issue; and the only remedy is to present it to the board of supervisors for allowance as an audited claim, within the time prescribed by law; and if the board refuse to perform its duty by allowing it as such, it may be compelled to do so by *mandamus*. Alden *v.* Alameda County, 43 Cal. 270 (1872).

In *New Jersey*, *mandamus* is generally a proper remedy to enforce the *levy of taxes for the payment of judgments* against municipal corporations, when the ordinary process of execution is inadequate. State *v.* Guttenberg Council, 39 N. J. L. 660. In this case the court say: "Every lawful tax rests upon legislative enactment, and

§ 850 (686). **Creditor sometimes required to Recover Judgment before being entitled to a Mandamus.** — We have seen that it is a subordinate bodies that seek to impose such a burden upon the citizen must be able to show a power so to do, derived from positive statute. The grant relied on must also be evident and unmistakable. It is not, perhaps, requisite that express authority to levy taxes for every specific purpose for which they are imposed should be produced. The power, or more guardedly speaking, an extension of power, might, under certain circumstances, be implied. For example, if a municipality, restricted as to the purposes for which it might incur debts or expend moneys, had, under its charter, unlimited authority to impose taxes for these purposes, then a subsequent extension of its power of expenditure, or of contracting obligations, would usually, by implication, enlarge also its power of taxation, so as to embrace these new purposes. Such an inference would arise, because *taxation furnishes the common source of revenue for these public bodies;* and when the legislature authorized increased expenditure on the part of such a body, whose power to tax had been limited only by its power to spend, it would be reasonable to suppose that the use of this sole power that it possessed to raise the means for its expenditures was also intended. As, however, the power of taxation is a high prerogative of sovereignty, and one whose exercise directly divests the citizen of his property, its grant by implication is but little favored, even as compared with other implied grants; and the inference of its existence, in any case, is easily rebutted. An authority to wield it cannot be collected by doubtful inferences from other powers, or powers relating to other subjects, nor deduced from any considerations of convenience or advantage. Nothing short of express words or necessary implication will answer the purpose. It should never be exercised where the right is doubtful."

In *Wisconsin*, by construction of the statute, *judgments against incorporated cities are to be enforced*, not by execution, but the amount is to be made part of the next tax roll, and collected as other taxes. Crane *v.* Fond du Lac, 16 Wis. 196 (1862). But judgments in that State may be enforced by *mandamus* to levy and collect the requisite tax to pay them. State *v.* Milwaukee Council, 20 Wis. 87; State *v.* Beloit Sup., *Ib.* 79; State *v.* Madison Council, 15 Wis. 30.

In *Iowa*, the remedy of a creditor against county corporations (State *v.* County Judge, 5 Iowa, 380) and upon ordinary municipal indebtedness *is by suit, and not by mandamus*, where the indebtedness is in the original form, as a simple contract debt. Coy *v.* Lyons, 17 Iowa, 1; State *v.* Davenport, 12 Iowa, 335. The remedy of one who has paid a tax in aid of a railroad, which is afterwards declared illegal, is by *mandamus* against the proper officers to compel them to return it. Eyerly *v.* Jasper County, 72 Iowa, 149. Compare Barnes *v.* Marshall County, 56 Iowa, 20.

In *Alabama:* Miller *v.* McWilliams, 50 Ala. 427 (1874); Elmore County *v.* Long, 52 Ala. 277 (1875). Nor can a suit be maintained against a county on a claim which has been audited and allowed without reduction. The only remedy is by *mandamus* to compel the levy of such tax as the law permits to be levied, to pay the claim (overruling Randolph County *v.* Hutchins, 46 Ala. 397), Covington County *v.* Dunklin, 52 Ala. 28 (1875). See, also, Shinbone *v.* Randolph County, 56 Ala. 183.

In *Pennsylvania*, it is held that *an ordinary execution cannot be issued against a municipal corporation;* that none of the property of such a corporation, whether real or personal, "necessary for governmental purposes," can be seized or sold thereon; and that the proper remedy for the judgment creditor is the *mandamus execution* provided by statute, which commands the corporation treasurer to pay the amount of the judgment out of any unappropriated moneys in his hands, and which must be obeyed by the officer whether the council have made an appropriation therefor or not. These writs have priority in the order in which they are served. Monaghan *v.* Philadelphia, 28 Pa. St. 207 (1857); Commonwealth *v.*

general rule, relating to the writ under consideration, that it will not lie if there be a plain and complete remedy by the ordinary processes of the law; and this principle has been applied to the mode of compelling municipal corporations to meet their liabilities and obligations. Therefore, it has been generally, but not uniformly, held, if the creditor may bring suit against the corporation and obtain a judgment, which may be enforced and rendered effectual by ordinary execution, that *mandamus* will not lie to compel payment, in

Pittsburgh, 88 Pa. 66; *infra*, sec. 851, note. And in the same State, it has been held that an action would not lie upon the resolution of a municipal corporation directing the mayor to issue certificates of debt to an individual, the only remedy being by *mandamus*. Commonwealth *v.* Lancaster, 5 Watts (Pa.), 152. *Mandamus* to county commissioners to draw *orders on county treasury* refused where the treasury has no money therein with which the orders can be paid. Commonwealth *v.* Phila. Co. Comm'rs, 1 Whart. (Pa.) 1; S. P. Same *v.* Same, 2 Whart. (Pa.) 286. Remedy of a claimant against a county in *Pennsylvania*, when by action and when by *mandamus*, see Hester's Case, 2 Watts & S. (Pa.) 416; Commonwealth *v.* Allegheny Comm'rs, 16 Serg. & R. (Pa.) 317; Lyon *v.* Adams, 4 Serg. & R. (Pa.) 443; Wilson *v.* Huntingdon Co. Comm'rs, 7 Watts & S. (Pa.) 197.

Remedy by mandamus to compel payment of county orders or warrants, or audited claims. Coleman *v.* Neal, 8 Ga. 560; *ante*, chap. xiv. on Contracts; State *v.* Mount, 21 La. An. 352; Connor *v.* Morris, 23 Cal. 447; Keller *v.* Hyde, 20 Cal. 593; Cuthbert *v.* Lewis, 6 Ala. 262. *Mandamus* does not lie, in *New York*, to compel supervisors to audit and allow the amount of a tax illegally assessed and collected from the relator. People *v.* Chenango Co. Sup., 11 N. Y. 563. In *Iowa*, it is held that *mandamus* will not lie to compel the county auditing officer to act by either allowing or disallowing a claim against the county, for the reason that the claimant has, by an action in the courts, a plain and adequate remedy. State *v.* Floyd Co. Judge, 5 Iowa, 380. *Mandamus* lies to a city treasurer to compel a performance of the ministerial act of *issuing a warrant for an audited or approved bill*. State *v.* Mount, 21 La. An. 352, 369; Reynolds *v.* Taylor, 43 Ala. 420; People *v.* Brennan, 39 Barb. 536. *Mandamus* will not lie to an auditor of a county or other public corporation to draw an order when the amount has not been ascertained, and when he has by law no power to fix the amount. Putnam Co. Comm'rs *v.* Allen Co. Aud., 1 Ohio St. 322; Burnett *v.* Portage Co. Aud. &c., 12 Ohio St. 57; State *v.* Hamilton Co. Aud., 19 Ohio, 116; State *v.* Mount, 21 La. An. 352; People *v.* Flagg, 17 N. Y. 584. The statutes of *Missouri* require the warrant holder to reduce his claim to judgment before applying for a *mandamus*. State *v.* Pacific Trs., 61 Mo. 155 (1875); State *v.* Clay County, 46 Mo. 231; State *v.* Bollinger Co. Ct. Jus., 48 Mo. 475.

The writ of *mandamus* is the proper remedy against an auditor who refuses to issue a county warrant when directed to do so by the board of supervisors. An action on the auditor's official bond is not a "plain, speedy, and adequate remedy." Babcock *v.* Goodrich, 47 Cal. 488 (1874); *ante*, sec. 487.

When debt is payable out of a *particular fund*, the remedy is ordinarily by *mandamus*, and not by action. Ill. Hosp. for Insane *v.* Higgins, 15 Ill. 185. *Mandamus* to town auditor in *Illinois* to audit debt granted. U. S. *v.* Ottawa Aud., 28 Fed. Rep. 407. *Mandamus* will not lie to compel the county court to grant an application of a judgment creditor of the county to issue a warrant on the treasury payable out of a particular fund, the action of the court being judicial, and an appeal lying therefrom to the circuit court. State *v.* Macon Co. Court, 68 Mo. 29; see *ante*, chap. xiv. on Contracts. Liability to be sued, see *post*, chap. xxiii. *Ante*, sec. 505.

advance of judgment recovered; and this view is the one most consistent with principle, when the matter stands wholly unaffected by legislation.[1] When judgment is rendered, and there is no property

[1] People *v.* Clark Co. Sup., 50 Ill. 213 (1869); State *v.* Floyd Co. Judge, 5 Iowa, 380, 383; Coy *v.* Lyons, 17 Iowa, 1; State *v.* Davenport, 12 Iowa, 335; Lexington *v.* Mulliken, 7 Gray (Mass.), 280 (1856); State *v.* Union Tp. Com., 37 N. J. L. 84; see Knapp *v.* Hoboken, 38 N. J. L. 371; State *v.* Clay County, 46 Mo. 231 (1870); State *v.* New Orleans, 30 La. An. 82; Marsh *v.* Little Valley, 64 N. Y. 112 (1876); People *v.* N. Y. Bd. of App., 64 N. Y. 627 (1876); State *v.* New Orleans, 30 La. An. 129; State *v.* Pacific Trs., 61 Mo. 155 (1878); Mansfield *v.* Fuller, 50 Mo. 338 (1872), and cases cited by *Bliss*, J.; Moran *v.* Elizabeth, 9 Fed. Rep. 72. Text approved. Brown *v.* Gates, 15 W. Va. 131. See and compare Buck *v.* Lockport, 6 Lansing (N. Y.), 251 (1872); *supra*, secs. 576, 829-831.

In Hambleton *v.* Dexter, 89 Mo. 188, it was held that, while it should appear in the alternative writ that the relator has no other remedy, it is *not necessary to show that an execution has been issued* and been unavailing; proof that the town has no property upon which it could be levied and no money subject to the payment of the judgment is sufficient. But if required by statute, a return of the *fi. fa.* will be held necessary in the Federal Court. Laird *v.* De Soto, 25 Fed. Rep. 76.

In Greene County *v.* Daniel, 102 U. S. 187, the ruling was that, although by statute of a State *mandamus* will lie to compel the assessment and levy of taxes to pay interest on bonds, yet the holder who resorts to the courts of the United States must first obtain judgment before he is entitled to that remedy. S. P. Osborne *v.* Adams Co. Comm'rs, 7 Fed. Rep. 441. *Post*, sec. 856.

In Chicago *v.* Hasley, 25 Ill. 595 (1861), the question was presented, whether, at common law, or *in the absence of an express statute authorizing it, a judgment against a municipal corporation could be enforced by an ordinary fieri facias.* The majority of the court were of opinion that such a writ was not allowable, and quashed it, holding that the only proper course for the creditor to pursue, after refusal to pay, was by *mandamus* to compel payment, or the levy of a sufficient tax for that purpose. The conclusion that their property is exempt from sale on execution is based upon the propositions, that such corporations are created for public and civil purposes; that to pay their debts, they are clothed with the power to raise money by taxation; that their property is possessed for corporate purposes, and not in the way in which it is possessed by individuals; that to levy upon and sell such property — for instance, water-works, fire-engines, public buildings, the revenues, &c. — would destroy the corporation, or, at least, the means of enabling it to discharge its proper functions. No execution can be awarded against a municipal corporation in Illinois. Bloomington *v.* Brokaw, 77 Ill. 194 (1875), following Chicago *v.* Hasley, 25 Ill. 598; Olney *v.* Harvey, 50 Ill. 453; Elrod *v.* Bernadotte, 53 Ill. 368; Morrison *v.* Hinkson, 87 Ill. 587.

As to exemption of municipal revenues from judicial seizure, see *ante*, secs. 100, 101. *As to sale of municipal property on execution*, see *ante*, chap. xv. sec. 576; *ante*, secs. 773, 774.

In the absence of an express provision of law to that effect, creditors of a municipal corporation cannot, outside of the New England States, resort to the *individual property of the inhabitants* for the purpose of discharging a judgment against the corporation. Their remedy is by *mandamus* to compel the corporation to pay the debt by levying a tax; but the failure of the corporation to make the levy, or of the inhabitants to pay the tax, does not render their individual property liable to be taken by the creditor. Horner *v.* Coffey, 25 Miss. 434 (1853). In this case it appeared that the town of Grand Gulf was incorporated, with the usual power of contracting, suing and being sued, and levying taxes. A judgment was recovered against the corporation, on which execu-

subject to execution out of which it can be made, *mandamus* will lie, and is the proper remedy, to compel the levy and collection of the necessary tax to pay the judgment. When the claim is reduced to judgment, the duty to provide for its payment becomes perfect, and if it can be paid in no other way, it must be done by the levy and collection of a tax for that purpose, and this duty will be enforced by *mandamus*.[1] Indeed *mandamus and not a bill in equity*

tion was returned "*nulla bona*." The corporation refused to levy a tax to pay the judgment, whereupon the creditor issued another execution, and levied the same upon the private property of the inhabitants. The court restrained the proceedings, holding that, in the absence of *express* provision, private property could not be taken for corporate debts; and refusing to follow the doctrine laid down in Angell & Ames on Corp. sec. 629, and in Beardsley *v.* Smith, 16 Conn. 368. See Bloomfield *v.* Charter Oak Bank, 121 U.S. 121 (1886). *Ante*, chap. xv. sec. 576; *infra*, sec. 861, note; *post*, sec. 962.

[1] Rock Island Co. Sup. *v.* United States, 4 Wall. 435 (1866); Louisiana, *ex rel.* Nelson *v.* St. Martin's Par. Pol. Jury, 111 U. S. 716; Coy *v.* Lyons, 17 Iowa, 1; Olney *v.* Harvey, 50 Ill. 453 (1869); Frank *v.* San Francisco Sup., 21 Cal. 668; Schaffer *v.* Cadwallader, 36 Pa. St. 126; Galena *v.* Amy, 5 Wall. 705 (1866); Von Hoffman *v.* Quincy, 4 Wall. 535; Riggs *v.* Johnson County, 6 Wall. 166 (1867); Weber *v.* Lee County, *Ib.* 210; United States *v.* Keokuk Council, *Ib.* 514; Britton *v.* Platte City, 2 Dillon C. C. 1 (1871); State *v.* Hug, 44 Mo. 116 (1869); State *v.* Milwaukee Council, 20 Wis. 87 (1865); State *v.* Beloit Sup., 20 Wis. 79 (1865); State *v.* Madison Council, 15 Wis. 30; State *v.* Wilson Sup., 17 Wis. 687; Watertown *v.* Cady, 20 Wis. 501; People *v.* Cairo, 50 Ill. 155; Olney *v.* Harvey, 50 Ill. 454; Rogers *v.* People, 68 Ill. 154; Peoria Co. Sup. *v.* Gordon, 82 Ill. 435; Lyons *v.* Coolidge, 89 Ill. 529; Klein *v.* Warren Co. Sup., 51 Miss. 878; Klein *v.* Smith Co. Sup., 54 Miss. 254; Commonwealth *v.* Pittsburgh, 88 Pa. St. 66; State *v.* Elizabeth Treas., 42 N. J. L. 79; State *v.* Jersey City Treas., *Ib.* 94; State *v.* New Orleans, 30 La. An. Pt. 1, 705. Text approved. Brown *v.* Gates, 15 W. Va. 131; United States *v.* Ottawa Aud., 28 Fed. Rep. 407; Fisher *v.* Charleston, 17 W. Va. 595; *Ib.* 682; State *v.* Jackson Co. Comm'rs., 19 Fla. 17; Fry *v.* Montgomery Co. Comm'rs, 82 N. C. 304; Corpus Christi *v.* Woessner, 58 Tex. 462. The writ will be refused where it will be *unavailing*. State *v.* New Orleans, 35 La. An. 221; State *v.* New Orleans, *Ib.* 68; Wells *v.* Mason, 23 W. Va. 456; Fisher *v.* Charleston, 17 W. Va. 595; Spiritual Atheneum Soc. of W. R. *v.* Randolph, 58 Vt. 192. Held to lie, in a *State court*, to enforce a *judgment in the Federal court* of the district; but *quære*. State *v.* Beloit, 20 Wis. 79. See Holman, *In re*, 28 Iowa, 88. A *written demand* upon a city for the payment of a judgment, without asking for the levy of a tax for the purpose, is sufficient to authorize a *mandamus* requiring the levy of a tax for the payment of the judgment. Cairo *v.* Everett, 107 Ill. 75. *Mandamus* may be issued without previous demand for payment where the demand would be a mere idle act. United States *v.* Brooklyn, 8 Fed. Rep. 473. Where one seeks by *mandamus* to compel the levy of a tax to pay a judgment, on the ground that a change in the law limiting the power of taxation was in violation of the contract, he must allege and prove that his judgment was founded upon a contract. State *v.* St. Martin's Par. Pol. Jury, 32 La. An. 884. But there is an implied contract to pay for official services at the rate of compensation in force when the services were rendered, which cannot be impaired by subsequent legislation. Fisk *v.* Jefferson Par. Pol. Jury, 116 U. S. 131; Stewart *v.* Same, *Ib.* 135. *Mandamus* to enforce the collection of a judgment against a municipal corporation is legally equivalent to a statutory execution, and is subject to the same limitation as to time when it may be

is, as will be presently stated more at length, the proper mode of compelling the performance, by a municipality, of the duty of levying a tax to pay judgments against it.[1]

§ 851. **Special Limitations on the Power to levy Taxes.** — Where a bonded debt is authorized, and *the power of taxation for its payment is limited* by the enabling act itself, and by the general statutes in force at the time, to the special tax designated in the act, there is want of power to levy any greater tax than the one thus specially provided and limited. If there is no statute giving the power to issue bonds, the municipality is not bound, and cannot be compelled by *mandamus* to levy a tax to pay them.[2] So, too, if the municipality

resorted to. United States *v.* Oswego Tp., 28 Fed. Rep. 55. The writ lies against a county to enforce a judgment against an incorporated township within its limits, when by statute it is the duty of the county to make provision for its payment. Labette County *v.* Moulton, 112 U. S. 217.

Where a city corporation was commanded to levy and collect a *specific* tax sufficient to pay the relator's judgment, a return showing that they had levied a tax to pay this judgment, and *other claims* is not sufficient. Other claims cannot, in such case, be included. The return must state facts showing performance of the mandate, or a sufficient excuse for the non-performance of the duty enjoined. Benbow *v.* Iowa City, 7 Wall. 313 (1868). Mr. Justice *Davis*, in this case, observes: "To make the return properly responsive to the writ, it was necessary to disclose the whole act constituting the levy, so as to enable the court to determine whether it was sufficient to pay the judgment of the relator." This remark is made in relation to that part of the return which states, in general terms, that the defendant had levied a tax sufficient to pay the judgment. Under a special statute, held to be a duty enforceable by *mandamus* to levy a tax to pay improvement bonds on *all the taxable property* of the city, and not simply upon the property improved or locally benefited. United States *v.* Fort Scott, 99 U. S. 152.

An assignee of a judgment against a city may enforce payment by *mandamus*. Chicago *v.* Sansum, 87 Ill. 182. On the application for such *mandamus*, the original defence cannot be set up a second time. *Ib.*

As to the right of the creditor to have the *tax*, which is ordered to be levied, *set apart* and applied to his use, see, also, Coy *v.* Lyons, 17 Iowa, 1; Galena *v.* Amy, 5 Wall. 705; Loute *v.* Allegheny County, 10 Pittsburgh Legal Journal, 241; Pollock *v.* Lawrence County, 7 Pittsburgh Legal Journal, 373. Judgment creditor entitled, as a reward of his diligence, to priority over simple contract creditors. Coy *v.* Lyons, *supra*. *Mandamus* may be refused if the corporation has been guilty of no unreasonable or improper delay in levying the tax. Tillson *v.* Putnam Co. Comm'rs, 19 Ohio, 415.

[1] Walkley *v.* Muscatine, 6 Wall. 481 (1867); *supra*, sec. 826; *infra*, secs. 855, 861 *a*; Rees *v.* Watertown, 19 Wall. 116 (1873); Heine *v.* Levee Comm'rs, 19 Wall. 655 (1873); Meriwether *v.* Garrett, 102 U. S. 472 (1880); *ante*, secs. 169 *a*, 170, and cases cited in notes; *post*, secs. 861 *a*, 861 *b*. The effect of *dissolution* and of the *repeal* of municipal charters and *change of boundaries* on the rights of creditors, and the jurisdiction of equity in such cases, has been discussed in previous chapters (vii. and viii.) of this work. *Ante*, secs. 169 *a*, 170, 172, 173, 186–189. In proceedings in *mandamus* the respondent will not be allowed to make allegations which contradict the record of the judgment. Harshman *v.* Knox Co. Court, 122 U. S. 306; see *infra*, sec. 851, note, and compare with Brownsville Tax. Dist. Comm'rs *v.* Loague, 129 U. S. 493.

[2] United States *v.* Macon Co. Court,

has no power, either by *express grant or by implication*, to raise the money by taxation to pay the indebtedness, the municipal authorities cannot be required to levy a tax for that purpose.[1] But the Supreme

99 U. S. 582, distinguishing United States *v.* Clark County, 96 U. S. 212; *supra*, secs. 769, note and cases, 849, note; *infra*, sec. 851 *a*; McPherson *v.* Foster, 43 Iowa, 48 (1876); People *v.* Jackson, 92 Ill. 444; State *v.* Macon Co., 68 Mo. 29; Aspinwall *v.* Daviess Co. Comm'rs, 22 How. 364; Marsh *v.* Fulton County, 10 Wall. 676 (1870); Sykes *v.* Columbus, 55 Miss. 115; Williamson *v.* Keokuk, 44 Iowa, 88 (1876); Bissell *v.* Kankakee, 64 Ill. 249 (1872); Chicot County *v.* Kruse, 47 Ark. 80; Knox Co. Court *v.* United States, 109 U. S. 229; *ante*, sec. 769; also, chap. xiv. on Contracts. Duty of city and rights of bondholder where his bonds are payable only out of the *general fund* levied for current expenses. East St. Louis *v.* United States, *ex rel.* Zebley, 110 U. S. 321.

Where, by statute, the amount of tax which a county can lawfully levy is limited to six mills, and the judgment creditor had no contract for the levy of a special tax, and the whole six mills was necessary for the ordinary current expenses of the county, it was held that the court could not in a *mandamus* proceeding, direct one mill, or any portion of the six mills tax authorized by law, to be levied separately from the rest and set apart for the payment of the judgment; following East St. Louis *v.* United States, *ex rel.* Zebley, 110 U. S. 321; Clay County *v.* McAleer, 115 U. S. 616 (1885). Subsequent constitutional provision held to have the effect to remove a prior charter limitation on the power of the council to levy a tax for the payment of bonded debt thereafter incurred. East St. Louis *v.* Amy, 120 U. S. 600 (1886). *Ante*, sec. 769; *post*, sec. 851 *a*, and note.

[1] United States *v.* Macon Co. Court, 99 U. S. 582; M. E. Church, *In re*, 66 N. Y. 395 (1876); State *v.* Guttenberg, 39 N. J. L. 660. In the case of The United States *v.* Macon Co. Court, *supra*, *Waite*, C. J., in delivering the opinion of the court, says: "If there had been nothing in the act to the contrary, it might perhaps have been fairly inferred that it was the intention of the legislature to grant full power to tax for the payment of the extraordinary debt authorized, to an amount sufficient to meet both principal and interest at maturity. *This implication is, however, repelled* by the special provision for the *tax of one-twentieth of one per cent*, and the case is thus brought directly within the maxim, *Expressio unius est exclusio alterius.* Thus, while the debt was authorized, the power of taxation for its payment was limited by the act itself and the general statutes in force at the time to the special tax designated in the act, and such other taxes applicable to the subject as then were or might thereafter by general or special acts be permitted. No contract has been impaired by taking away a power which was in force when the bonds were issued. The general power of taxation to pay county debts is as ample now as it was when the railroad company was incorporated and the debt incurred. The difficulty lies in the want of original power. While there has undoubtedly been great recklessness on the part of the municipal authorities in the creation of bonded indebtedness, there has not unfrequently been gross carelessness on the part of purchasers when investing in such securities. *Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued.* If the statute gives no power to make the bond, the municipality is not bound. So, too, if the municipality has *no power*, either by express grant or by implication, *to raise money by taxation to pay the bond*, the holder cannot require the municipal authorities to levy a tax for that purpose. If the purchaser in this case had examined the statutes under which the county was acting, he would have seen what might prove to be difficulties in the way of payment. As it is he holds the obligation of a debtor who is unable to provide the means of payment. We have *no power* by *mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation.* In this case it appears that the special tax of one-twentieth of one per cent has been regularly levied, collected, and applied, and no complaint is made as to the levy of the one-half of one per cent for general purposes. What is wanted is the levy beyond these amounts, and that, we think, under existing laws, we have no power to order."

The case of The United States *v.* Macon Co. Court (99 U. S. 582), just noticed, should be read in connection with Harshman *v.* Knox Co. Court (122 U. S. 306, 1886), and the latter in connection with Brownsville Tax Dist. Comm'rs *v.* League (129 U. S. 493, 1888). In Harshman *v.* Knox Co. Court, the bonds recited specifically that they were issued under an act which *limited* (as in U. S. *v.* Macon Co. Court) *the power and duty* "to levy a tax each year, not to exceed one-twentieth of one per cent, upon the assessed value of the taxable property." When the bondholder brought action upon the bonds he alleged in his declaration that they were issued under the General Railroad Law. This law provided that a special tax might be levied to pay the bonds, and did *not limit the amount.* Judgment was taken by *default* for the amount of the bonds. Harshman *v.* Knox Co. Court was a subsequent *mandamus* proceeding based upon this judgment. The county showed that it had levied the one-twentieth of one per cent. But the relator claimed that his judgment on the bonds estopped the county in the *mandamus* proceeding to show, by the recitals of the bonds or otherwise, that the recital as to *the* act under which the bonds were issued was correct; that it estopped the county to show that they were *not* issued under the General Railroad Act. The Supreme Court held with the relator, and decided that he was entitled to a peremptory *mandamus* under the General Railroad Act, without limitation as to amount. In Brownsville *v.* League, *supra*, the bondholder had recovered judgment on the bonds of the city of Brownsville which recited that they were issued under a statute which was abrogated; and in the subsequent *mandamus* proceeding it was held that the estoppel of the judgment on the bonds did not conclude the city from showing that the act under which they were issued, and which contained the only provision for levying a tax for their payment, was void; and, being void, the Supreme Court further held that the judgment creditor was not entitled to a writ of *mandamus* to compel the collection of any tax for their payment. The questions are nice and delicate; but the author confesses his difficulty in reconciling the two cases, or, to speak more precisely, he thinks it may hereafter deserve re-examination whether the principle of *res judicata* was not carried to an unsound extent in Harshman *v.* Knox Co. Court. In the action on the bonds the only material issue, it is submitted, would be whether the county owed the debt, *i. e.*, whether the bonds were valid; and they were equally valid whether they were issued under the act recited in the bonds or under the act alleged in the declaration; and thus the averment was, in that action, immaterial. As the county did not deny the debt it suffered judgment by default. In the *mandamus* proceedings the issue was wholly different. The county did not there contest the debt or the judgment; but it did contest the extent of its power and its duty to levy a tax to pay the debt. That question did not and could not arise in the action on the bonds. It arose for the first time in the *mandamus* proceeding. It could not have arisen before. For these reasons may not the principle of estoppel have been carried too far, or possibly have been wholly misapplied, in Harshman *v.* Knox Co. Court? With deference we suggest the doubt for further consideration.

Court of the United States has held that when, in order to execute a public work, a municipal corporation has been vested with authority to borrow money or incur an obligation, it has the power to levy a tax to raise revenue wherewith to pay the money or discharge the obligation, without any special mention that such power is

granted, unless the implication is repelled by other provisions in the charter or legislative enactments.[1]

§ 851 *a*. **Judgment Creditor not entitled to Mandamus to enforce Collection of Tax under an abrogated Statute.** — The principle that mandamus *does not confer new authority*, but lies only to enforce the performance of a legal duty which respondents must have the power to perform, is further strikingly illustrated in a case in the Supreme Court of the United States.[2] Bonds to pay for stock in a railway company had been issued under an act of February 8, 1870, which act contained the only authority to issue the bonds and to levy a tax for their payment, and was wholly abrogated by an amended Constitution which took effect May 5, 1870, and before the bonds were voted or issued. A bondholder had recovered judgment on such bonds, and in 1886 sought to enforce the levy and collection of a tax under the act of 1870 to pay the judgment. The court below held that, although the act of 1870 was wholly abrogated by the State Constitution, and the bonds were therefore void, yet the relator's judgment conclusively established, so far as that judgment was concerned, the validity of the bonds, and at the same time, *quoad* the judgment, it also conclusively established the validity of the act of 1870 giving the remedy by a levy of taxes for the payment of the bonds. This decision was, however, reversed by the Supreme Court, which held that the judgment on the bonds did not estop the municipality from showing that it had no legal power to levy the tax by reason of the abrogation of the act of 1870, under which the bonds were issued, and which was the only source of authority to levy a tax for their payment.

§ 852 (687). **Where Creditor is entitled to have a special Tax levied.** — Where the law under which the debt was incurred provides for *the levy of a special tax to pay it*, this contract duty will be enforced by *mandamus*, and in such a case it is no answer to the creditor's application for this remedy that an execution has not been returned *nulla bona*, or that the corporation debtor may have property subject to a sale on execution.[1]

[1] United States *v.* New Orleans, 98 U. S. 391. See United States *v.* Lincoln Co., 5 Dillon, 184, 194, where the cases are cited. See, also, cases cited in last note.

[2] Brownsville *v.* Loagne, 129 U. S. 493 (1888), distinguishing Harshman *v.* Knox Co. Court, 122 U. S. 306. *Ante*, sec. 851, note. "*Res judicata*," says Chief Justice *Fuller*, giving the judgment of the court, "may render straight that which is crooked, and black that which is white, *facit ex curvo rectum, ex albo nigrum* (Jeter *v.* Hewitt, 22 How. 352, 364); but where application is made to collect judgments by process not contained in themselves, and requiring, to be sustained, reference to the alleged cause of action upon which they are founded, the aid of the court should not be granted when upon the face of the record it appears, not that mere error supervened in the rendition of such judgments, but that they rest upon no cause of action whatever." 129 U. S. 493, *supra*.

Mandamus awarded to compel levy of tax to the *full limit in force when the debt was created*, notwithstanding a subsequent constitutional restriction on the amount of taxes which might be levied. Fisk *v.* Jefferson Par. Pol. Jury, 116 U. S. 131 (1885); *supra*, sec. 850, and note.

§ 853 (688). **Where Statute gives Creditor the Right to a Tax Levy; Prior Judgment not always required.** — Where a municipal corporation *is authorized by the legislature to create a debt of a specific character*, to borrow money to pay it, and to make provision for the payment of the principal and interest of the money so borrowed, by the assessment and collection of such taxes as may be necessary, a *mandamus* is the appropriate remedy of the creditor to compel the corporation to levy and collect the taxes to pay such debt or the interest thereon.[2] It has been several times adjudged, where there is a duty to levy and collect a *special tax* to pay a specified class of

[1] Knox Co. Comm'rs *v.* Aspinwall, 24 How. 376 (1860). In this case an act of assembly authorized the county to issue its bonds and coupons (see 21 How. 542), and made it the duty of the county commissioners, for the purpose of paying the interest due on the bonds, "at the levying of the county taxes for each year, to assess a special tax sufficient to realize the amount of the interest to be paid for the year." S. P. State *v.* Davenport, 12 Iowa, 335; Louisiana, *ex rel.* Nelson *v.* St. Martin's Par. Pol. Jury, 111 U. S. 716; Greenfield *v.* Moore, 113 Ind. 597 (to compel the council to order an estimate for an assessment for a street improvement). See Benbow *v.* Iowa City, 7 Wall. 313 (1868).

The rights of the creditor under a *mandamus* execution against a county, and its effect upon the county and its funds, under the statute of *Pennsylvania*, are very fully considered in Loute *v.* Allegheny County, 10 Pittsburgh Legal Journal, 241, and Pollock *v.* Lawrence County, 7 *Ib.* 373. It is held by these cases that the effect of such an execution is to set apart for the creditor all unappropriated money in the treasury, and also the first that may come into it, so far as necessary, to pay the execution. See, also, Commonwealth *v.* Pittsburgh, 34 Pa. St. 496, 523, as to nature of *mandamus* execution; Monaghan *v.* Philadelphia, 28 Pa. St. 207 (1857); *supra*, sec. 849, note; State *v.* Burbank, 22 La. An. 298.

[2] Von Hoffman *v.* Quincy, 4 Wall. 535 (1866); Walkley *v.* Muscatine, 6 Wall. 481; Commonwealth *v.* Pittsburgh, 34 Pa. St. 496 (1859); State *v.* Clinton Co. Comm'rs, 6 Ohio St. 280 (1856); Flagg *v.* Palmyra, 33 Mo. 440; Commonwealth *v.* Allegheny Co. Comm'rs, 37 Pa. St. 277 (1860); Maddox *v.* Graham, 2 Met. (Ky.) 56 (1859); Rock Island Co. Sup. *v.* United States, 4 Wall. 435 (1866); Riggs *v.* Johnson County, 6 Wall. 166; Knox Co. Comm'rs *v.* Aspinwall, 24 How. 384; Davenport *v.* Lord, 9 Wall. 409; Washington Co. Sup. *v.* Durant, *Ib.* 415. Text approved. Brown *v.* Gates, 15 W. Va. 131; Limestone Co. Comm'rs Court *v.* Rather, 48 Ala. 433 (1872). In *Kentucky* the provisions in regard to ordinary county claims do not apply to county bonds payable to bearer and issued under special legislative authority. Elliott County *v.* Kitchen, 14 Bush (Ky.), 289. The proper remedy of a holder of such county bonds is by *mandamus* to compel the levy of a tax to pay the bonds as provided in the act authorizing their issue. *Ib.* Subsequent legislation impairing the right and remedy of a creditor to a specific tax levy unconstitutional. Louisiana, *ex rel.* Nelson *v.* St. Martin's Par. Pol. Jury, 111 U. S. 716. *Infra*, sec. 854; *ante*, chap. iv.