§ 861 *b* (886). **Boutwell's Case not applicable to Corporate Duties; No Abatement by Death or Resignation.** — The principle of Boutwell's Case — that a writ of *mandamus* directed to a *public officer abates on his death or resignation* if there be no statute to the contrary — *does not, however, apply to the case of duties devolved by law upon municipal or public corporations in their corporate character.* Some repudiating municipalities sought to evade their duties towards their creditors by encouraging and accepting the resignations of the officers to whom the writs of *mandamus* were directed or upon whom they were served, so that the particular officers upon whom the alternative writ was served would not be in office when the peremptory writ was applied for, or the officer to whom the peremptory writ was directed would resign before the writ could be served, or after the service and before the time fixed for the performance of its command, and the successor would claim that he could not be held liable, as for a contempt or otherwise, for the default of his predecessor. But when the question under such circumstances came before the Supreme Court of the United States that tribunal decided, upon a correct conception of the principles of corporate law, that where the duty was one to be performed by the corporation, *the writ may be directed to the corporation in its corporate name or to the proper officers in their corporate capacity and official style without naming them,* and that when it is once duly served its power remains, notwithstanding changes in the officers by death, resignation, or the election of successors, until the duty which is commanded is performed; that the officers in existence at the time when the act is required to be done are those whom the court will hold responsible for the performance of what is commanded; and hence writs commanding the performance of corporate duties do not, as in Boutwell's

to levy and collect the required taxes. Looking at this case in the light of the decision and reasoning in the Watertown Case, and in Heine *v.* The Levee Comm'rs, 19 Wall. 655, and of the above suggestions, it would seem to rest upon a very narrow basis. If the court is without power to make such an appointment without the aid of the statute, it was certainly a very broad and liberal view of the language of that statute to hold that the "act" contemplated by it included the act of levying and collecting taxes, giving acquittances therefor, and selling property to enforce the payment thereof, and making conveyances to complete the sales. See Heine *v.* The Levee Comm'rs, 19 Wall. 661; *ante*, secs. 170, 826, 855, 861, and cases cited. The statement in the opinion of *Nelson, J.*, that this statute "is but a modification of the law of England and of the New England States, which provides for the execution of a judgment recovered against a county, city, or town, against the private property of any individual inhabitant, giving him the right to claim contribution from the rest of the people," can hardly be maintained in view of the decision in the Watertown Case, and the other cases above referred to, and it seems obvious that the section of the *Iowa* statute referred to was intended for no such purpose.

Case, abate by changes in the officers of a corporation. The writ, although directed to the corporation, is enforced through the members or officers whose duty it is to obey its commands, and if part of the officers or members have done all within their power to comply with the writ, the court will punish only those who are actually guilty of disobedience. Whatever uncertainty might have been supposed to exist on this point is definitely removed by the decisions of the Supreme Court of the United States cited in the note,[1] resting as they do upon sound reason, and supported as they are by the decisions of several of the State courts.

[1] Leavenworth Co. Comm'rs *v.* Sellew, 99 U. S. 624 (1878); Leavenworth *v.* Kinney, 99 U. S. 623 (1878). *Infra*, secs. 871–874, 884.

Thus where the duty to levy taxes to pay the debt of a county is devolved upon the "board of county commissioners," which is the corporate name by which counties are made capable of suing and being sued, the *writ may be directed to "the board of county commissioners;"* and in the case of a city corporation it may be directed to the *mayor and city council in their corporate capacity*, and it need not be directed to the persons who are mayor and councilmen. And it being provided in the case of legal proceedings against a county that process may be served upon the clerk of the board, a like service of the writ of *mandamus* is assumed, and stated to be sufficient, in the case of Leavenworth County, *supra*. In pronouncing the judgment of the court upon these important points, Mr. Chief-Justice *Waite* says: —

"In United States *v.* Boutwell, 17 Wall. 607, it was decided that as a *mandamus* was used 'to compel the performance of a duty resting upon the person to whom the writ is sent,' if directed to a public officer, it abated on his death or retirement from office, because it could not reach the office. That principle does not, as we think, apply to this case. There the officer proceeded against was the Secretary of the Treasury of the United States, and the writ was 'aimed exclusively against him as a person.' Here the writ is sent against the board of county commissioners, a corporation created and organized for the express purpose of performing the duty, among others, which the relator seeks to have enforced. The alternative writ was directed both to the board in its corporate capacity and to the individual members by name, but the peremptory writ was ordered against the corporation alone. As the corporation can only act through its agents, the courts will operate upon the agents through the corporation. When a copy of the writ which has been ordered is served upon the *clerk* of the board, *it will be served on the corporation*, and be equivalent to a command upon the persons who may be members of the board to do what is required. If the members fail to obey, those guilty of disobedience may, if necessary, be punished for the contempt. Although the command is in form to the board, it may be enforced against those through whom alone it can be obeyed. One of the objects in creating such corporations, capable of suing and being sued, and having perpetual succession, is that the very inconvenience which manifested itself in Boutwell's Case may be avoided. In this way the office can be reached and the officer compelled to perform its duties, no matter what changes are made in the agents by whom the officer acts. The board is in effect the officer, and the members of the board are but the agents who perform its duties. While the board is proceeded against in its corporate capacity, the individual members are punished in their natural capacities for failure to do what the law requires of them as the representatives of the corporation. We think, therefore, that *the peremptory writ was properly directed to the board in its corporate capacity.* In this way the power of the writ is retained until the thing is done which is commanded, and it may at

§ 861 *c* (887). **Resignation to avoid Duty, when ineffectual until Successor is qualified.** — Where a statute in relation to a public or municipal officer provides that such *officer shall continue in office until his successor is qualified, a resignation made in order to avoid auditing or paying a judgment against the corporate town or municipality* is not a sufficient return to an alternative *mandamus* to compel such officer to make such audit and payment. A resignation under such circumstances does not relieve the officer from the responsibility and duties of office until his successor is appointed and qualified. In the opinion of the court, Mr. Justice Hunt says: "The provisions as to these officers and as to the town officers are parts of the same system. The resignations may be made to and accepted by the officers named; but, to become perfect, they depend upon and must be followed by an additional fact, to wit, the appointment of a successor and his qualification. When it is said in the statute that the resignation may be thus accepted, it is like to the expiration of the term of office. In form the office is thereby ended, but to make it effectual it must be followed by the qualification of a successor." [1]

§ 861 *d*. **Same subject. Principle limited and Case distinguished.** — The *principle referred to in the preceding section does not apply*, where, by statute, an officer has the right to resign at will, and the statute provides that the resignation shall take effect as soon as it is filed with a designated officer. A recent case declares and well illustrates this distinction. By the statute of Wisconsin service of process upon cities must be made "by delivering a copy thereof to the mayor and city clerk," and by the charter of the defendant

all times be enforced through those who are for the time being charged with the obligation of acting for the corporation. If, in the course of the proceedings, it appears that a part of the members have done all they could to obey the writ, the court will take care that only those who are actually guilty of disobedience are made to suffer for the wrong that is done. Those who are members of the board at the time when the board is required to act will be the parties to whom the court will look for the performance of what is demanded. As the corporation cannot die or retire from the office it holds, the writ cannot abate, as it did in Boutwell's Case. The decisions in the State courts in which this practice is sustained are numerous. Maddox *v.* Graham, 2 Met. (Ky.) 56; State, *ex rel.* Soutter *v.* Madison Council, 15 Wis. 37; Pegram *v.* Cleaveland Co. Comm'rs, 65 N. C. 114; People *v.* Collins, 19 Wend. 68." Columbia Co. Comm'rs *v.* King, 13 Fla. 451 (1870); Little Rock *v.* Board of Improvements, 42 Ark. 152.

[1] Badger *v.* United States, 93 U. S. 599, affirming the same case, 6 Biss. 308. Followed in Jones *v.* Jefferson, 66 Tex. 576, where the service of a citation upon officers three years after they had resigned, no successors having been appointed or elected, and there being evidence that the object of the failure to elect was to defeat the collection of debts against the city, was held to be valid.

city, service must be made upon the mayor. At the time when summons against the city in an action of debt was issued there was no mayor or acting mayor of the city, his resignation having taken effect. Service of the summons was made upon the last mayor, the city clerk, the city attorney, and the last presiding officer of the board of street commissioners, the return reciting that the office of mayor was vacant and that there was no president of the common council or presiding officer thereof in office. It was held that the court had no jurisdiction upon such service to render a judgment against the city.[1]

§ 862. **Distinction between Negotiable Bonds and ordinary Warrants as to Enforcement.** — What we have heretofore said has related to the enforcement of municipal bonds where there is an *express* authority given or duty enjoined to levy a tax or a special tax to pay them. We have adverted in a preceding chapter [2] to the distinction between negotiable municipal bonds, issued under direct authority from the legislature, and ordinary municipal or county orders or warrants. The *distinction between the two classes of instruments* often becomes important when it is sought to enforce payment by means of *mandamus*. The latter class of instruments, not being commercial paper,— being in the nature of vouchers to the ordinary

[1] Amy *v.* Watertown (No. 1), 130 U. S. 302 (1889). *Bradley*, J., giving the opinion of the court, says: "The case is different from those in which we have held that a resignation of an officer did not take effect until it was accepted or until another was appointed. In those cases either the common law prevailed or the local law provided for the case and prevented such a vacancy. Such were the cases of Badger *v.* Bolles, 93 U. S. 599; Edwards *v.* United States, 103 U. S. 471; Salamanca *v.* Wilson, 109 U. S. 627. The statutes of *Wisconsin* provided that any city officer might resign at pleasure, and that his resignation 'should take effect at the time of filing the same.' The provisions of the statute law are decisive, and preclude the operation of any such rule as was recognized in Badger *v.* Bolles and Edwards *v.* United States. The service upon the last mayor, therefore, was of no force, and had no effect whatever. The cases are numerous which decide that where a particular method of serving process is pointed out by statute, that method must be followed, and the rule is especially exacting in reference to corporations" (citing cases). "The law of *Wisconsin* is perfectly clear that the service of process in this case was ineffective and void. City of Watertown *v.* Robinson, 69 Wis. 230. This court in the construction of a State statute in a matter purely domestic, gives great weight to the decisions of the highest tribunals of the State." This case was distinguished from Broughton *v.* Pensacola, 93 U. S. 266, and Mobile *v.* Watson, 116 U. S. 289, where the question was as to the liability of new corporations made out of old ones for the debts of the old corporations. *Ante*, sec. 224.

Inability to serve process upon a city, although caused by its designed elusion thereof, does not stop the running of the statute of limitations. Amy *v.* Watertown (No. 2), 130 United States, 320 (1889); Knowlton *v.* Watertown, *Ib.* 327.

[2] Chap. xiv., *ante*, vol. i.

creditor and put in the shape of warrants or orders for his convenience,— are to be paid in the manner provided by the charter or legislation of the State. The provisions are variant in different charters and in different States. In some of the States these instruments are to be registered and paid in the order of their registration, and there is no provision for the levy of a special tax to pay them; and it is contemplated that, as they are issued in payment of the ordinary expenses of the city, town, or county, they are to be paid out of the ordinary revenues or resources. It has recently become quite common for the non-resident holders of such instruments to sue thereon in the Federal courts, hoping to obtain thereby some of the advantages which have been accorded by those courts to the holders of negotiable securities.

§ 863. **Enforcement of Warrants or Orders in the Federal Courts.** — Where *such warrants or orders have been issued by corporate or quasi corporate organizations* capable of being sued in the State courts, the Federal courts, so far as our observation goes, have held that the non-resident owner thereof may also sue thereon in the Federal court, and by its judgment establish the validity and amount of his debt, and such judgment may become the basis of an application made in due form for the writ of *mandamus;* but the writ when so issued will only command the proper officers to discharge the legal duties they owe, under the charter or statute, to the warrant-holder.[1] The Federal courts cannot overturn or interfere with the policy of the State in respect to the rights or remedies of this class of creditors. The leading case on this subject is The Supervisors of Carroll County *v.* The United States.[2] Counties in Iowa are authorized to issue, for ordinary expenses, orders or warrants payable to bearer, and are liable to be sued upon them. The statute limited the power of the county authorities "for ordinary county revenue" to the levy each year of "not more than four mills on the dollar." It made no provision (as the statute was construed by the Supreme Court of the State, whose construction was regarded by the Federal courts as binding on them) for the levy of a *special tax* to pay judgments obtained on such warrants. The judgment creditor in the Federal court claimed that he was entitled to the levy of a *special* tax to pay his judgment. But the Supreme Court of the United States held otherwise, and decided that a return to an alternative writ of *mandamus* by the county authorities that they had already levied a four-mill county

[1] Jordan *v.* Cass County, 3 Dillon C. C. R. 185 (1874).

[2] Carroll Co. Sup. *v.* United States, 18 Wall. 71.

tax for the current year (that being the *maximum* amount allowed by statute) was a sufficient return.[1]

Application for the Writ; Relator; Rule Nisi.

§ 864 (694). **Basis for the Writ.** — It is not our purpose to treat at large of *the proceedings and practice* in respect to the remedy by *mandamus.* We shall refer to these in a general way only, in order the better to illustrate the application of the writ to municipal corporations and municipal officers. The practice in the different States is as at common law, modified by statutory enactment. The *writ is not granted of course, but on motion, based upon affidavits, or upon a suggestion supported by oath,* which must be drawn up with precision, and state with clearness and certainty the grounds for the application, and must also present a case in which the writ lies. If there be another remedy apparently adequate and complete, the affidavits must show why it is not sufficient or why it would prove ineffectual.[2]

[1] Carroll Co. Sup. *v.* United States, 18 Wall. 71. The text succinctly states the principle established by this case. In respect of the local statute of *Iowa* (sec. 3770 of the Iowa Revision) the court distinguished and explained the case of Butz *v.* Muscatine, 8 Wall. 575, — perhaps it ought to be said it overruled it on this particular point. *Supra,* sec. 861 *a.*

The Circuit Court of the United States for the Eastern District of *Arkansas,* 4 Dillon, 215 (1876), in conformity with the doctrines of the text, upon a review of the legislation of that State touching the indebtedness of counties on *warrants,* and the provisions of the new Constitution on the subject of county indebtedness, declared the following propositions: —

1. That the county court, in case the county is indebted, owes a legal duty to the creditor or warrant-holder to exert the power of levying taxes to the *maximum* limit allowed by law, if necessary to pay the outstanding indebtedness of the county. The *maximum* rate can in no event be exceeded. *Ante,* sec. 857, and cases there cited.

2. That a creditor who has obtained a judgment in this court against a county may, after proper demand on the county court to discharge its duty in this regard, and a neglect or refusal on the part of the court to comply with such demand, have a *mandamus* to compel the performance of such duty. There must be such a demand or averment of facts of such a nature as will dispense with the demand.

3. Under the new Constitution of *Arkansas* (art. xiv. sec. 9) as to indebtedness then existing, there is a duty, which creditors may enforce, resting on the county court to levy a tax not exceeding one-half of one per cent. Such tax when levied and collected cannot "be used for any other purpose" than the payment of such indebtedness (art. xvi. sec. 11), and must, according to our present impression, although the court does not hold itself concluded on the point, be collected in money, and not in other warrants.

A judgment creditor of a county in *Missouri,* whose judgment is based on municipal bonds secured by the right to a special tax, who has received under a *mandamus* a county warrant therefor, which is refused payment, may have another *mandamus* to enforce the judgment, and is not bound to take his turn under the statute among ordinary county warrant-holders. This ruling coincides with the distinction pointed out in the text. United States *v.* Vernon Co. Court (Western District of Missouri), 2 Cent. Law Jour. 771; s. c. 3 Dillon, 281 (1875).

[2] Rex *v.* Oxford, 7 East, 345; Buller's *Nisi Prius,* 201; Stephens's *Nisi Prius,*

§ 865 (695). **Official and Private Relators.** — Where the application for the writ relates to a matter affecting the public, such as the enforcement of an act of the legislature for the public benefit, the State or its attorney, in a proper case, is entitled to the writ as of right.[1] It is sufficient, we think, to entitle a person to become an applicant or relator in such cases, that *he* is interested as a citizen;[2] but the decisions on this point are not entirely uniform. The principal reasons urged against the doctrine are that the writ is prerogative in its nature, — a reason which is of no force in this country, and no

2318 ; Willc. 357, pl. 43, 44 ; Rex *v.* Margate Pier Co., 3 B. & Ald. 221, 224 ; People *v.* San Francisco Sup., 27 Cal. 655 ; People *v.* Chicago, 51 Ill. 17 ; s. c. 2 Am. Rep. 278. *An alternative writ stands in the place of the declaration in an ordinary action, and must show a good prima facie case, or it is demurrable. Ib.;* People *v.* Ransom, 2 Comst. (2 N. Y.) 490 ; Hoxie *v.* Comm'rs, 25 Me. 333 ; Ill. & Mich. Canal Trs. *v.* People, 12 Ill. 254 ; State *v.* Bailey, 7 Iowa, 390 ; State *v.* Haben, 22 Wis. 660 ; People *v.* Hilliard, 29 Ill. 413; People *v.* Baker, 35 Barb. 105 ; State *v.* Johnson Co. Bd. of Equal., 10 Iowa, 157; People *v.* Hayt, 66 N. Y. 606.

"In practice," says *Thompson*, J., "the party seeking the remedy by *mandamus* presents to the court a *prima facie* case, entitling him to the writ by way of suggestion [or by affidavit or sworn information]. This being in proper form and sufficient in substance, an alternative *mandamus* may be awarded upon it, reciting the complaint of the relator and his demand for redress, and commanding the party to whom it is directed either to obey it or return his reasons for not doing so. This alternative is what gives the denomination of 'alternative *mandamus*' to the first writ. The establishment of a duty, and the obligation to perform it, is upon the plaintiff to show, and this is considered as done, *prima facie*, when the court awards the writ. The respondent, upon service of it, is bound either to obey, or show that the plaintiff has no right to demand obedience, or that no duty exists which he can be compelled to perform. Whenever this is not accomplished by a demurrer, or by a general traverse of the facts set forth in the writ, it is generally done by matters averred in the return by way of confession and avoidance." Commonwealth *v.* Allegheny Co. Comm'rs, 37 Pa. St. 277, 279 (1860).

If there be no special *statutory limitation*, the application for the writ may be made within the period given by statute for bringing ordinary actions for similar injuries. People *v.* Westchester Co. Sup., 12 Barb. 446 ; Prescott *v.* Gonser, 34 Iowa, 175 (1872). The author doubts whether the three years' statute applied to the last cited case. But the writ, not being one of right, there is a discretion to refuse it if the applicant has been guilty of unreasonable laches and delay in asserting his right. The Queen *v.* Halifax Road Trs., 12 Q. B. 442 ; Savannah *v.* State, 4 Ga. 26 ; Rex *v.* Lancashire, 12 East, 366 ; Rex *v.* Stainforth & K. Canal Co., 1 M. & S. 32 ; Regina *v.* Leeds & L. Canal Co., 11 A. & E. 316 ; True *v.* Melvin, 43 N. H. 503. When there is ordinarily no discretion to refuse the writ, see *infra*, sec. 865. There is no limitation in *Mississippi* which cuts off a creditor's remedy by *mandamus*. Klein *v.* Smith Co. Sup., 54 Miss. 254 ; Carroll *v.* Tishamingo Co. Bd. of Pol., 28 Miss. 38 ; Klein *v.* Warren Co. Sup., 51 Miss. 878.

If no just and useful purpose requires the writ of mandamus to be granted, the court has discretion to refuse it. State *v.* Graves, 19 Md. 351, 374 ; Williams *v.* Lincoln Co. Comm'rs, 35 Me. 345 ; People *v.* Westchester Co. Sup., 15 Barb. 607; People *v.* Pratt, 30 Cal. 223. So in a case where the substantial *right* claimed by the relator *is doubtful*. Life & F. Ins. Co. of N. Y. *v.* Wilson's Heirs, 8 Pet. 291 ; People *v.* Chicago, 51 Ill. 17 ; Stephens's *Nisi Prius*, 2293 ; *ante*, sec. 830. *Or is insignificant*, as where only two dollars are involved. People *v.* Hatch, 33 Ill. 9. It seems that the court has the discretion, *if a single levy of taxes* will be oppressive, not to order all the accumulated past due indebtedness to be collected in one year *en masse*. East St. Louis *v.* Amy, 120 U. S. 600 (1886). Where individuals apply for *mandamus* or *quo warranto*, it is discretionary to grant or refuse the rule. Rex *v.* Ward, L. R. 8 Q. B. 210 ; Rex *v.* Trevensen, 2 B. & A. 479. Lord *Mansfield* says : "No precise rule can be laid down in these cases ; but all the circumstances of the case taken together must guide the discretion of the court." Rex *v.* Stacey, 1 D. & E. T. R. 13.

"The granting of the writ of *mandamus* rests in the sound judicial discretion of the court, which has cautiously ab-

stained," says *Gray*, C. J., in Attorney-General *v.* Boston, 123 Mass. 460, "from laying down any limits to the exercise of this discretionary power." Commonwealth *v.* Hampden Co. Ses. Jus., 2 Pick. (Mass.) 414, 419; Strong, Petitioner, 20 Pick. 484, 495 ; Carpenter *v.* Bristol Co. Comm'rs, 21 Pick. 258, 259 ; St. Luke's Church Prop. *v.* Slack, 7 Cush. (Mass.) 226, 239 ; American Ry. Frog Co. *v.* Haven, 101 Mass. 398. In *Strong's Case*, Mr. Justice *Morton* said : "In every well-constituted government, the highest judicial authority must necessarily have a supervisory power over all inferior or subordinate tribunals, magistrates, and all others exercising public authority. If they commit errors, it will correct them. If they refuse to perform their duty, it will compel them, — in the former case by writ of error, in the latter by *mandamus*. And generally in all cases of omissions or mistakes, where there is no other adequate specific remedy, resort may be had to this high judicial writ. It not only lies to ministerial, but to judicial, officers. In the former case it contains a mandate to do a specific act, but in the latter only to adjudicate, to exercise a discretion upon a particular subject."

[1] Tapping on *Mandamus*, 54, 56, 288. Thus, where the application is to proceed to the election of burgess in the place of one deceased, the motion is *ex debito justitiæ*, and there is no discretion to refuse the writ. *Ib.;* State *v.* Hartford & N. H. R. R. Co., 29 Conn. 538 ; People *v.* Attorney-General, 22 Barb. 114 ; People *v.* Tracy, 1 Denio (N. Y.), 617 ; Moses *v.* Kearney, 31 Ark. 261 (1876).

[2] Pike Co. Comm'rs *v.* State, 11 Ill. 202 ; Ottawa *v.* People, 48 Ill. 233 ; Hall *v.* People, 57 Ill. 307 (1870) ; Glencoe *v.* People, 78 Ill. 390 (1875) ; Regina *v.* Archbp. of Cant., 11 Q. B. 578 ; People *v.* Halsey, 53 Barb. 547 ; People *v.* Brooklyn, 22 Barb. 404 ; Hamilton, Aud., *v.* State, 3 Ind. 452 ; People *v.* Collins, 19 Wend. 56 ; Moses on *Mandamus*, 197, author's opinion ; Fuller, *In re*, 25 Ark. 261 ; People *v.* San Francisco, 36 Cal. 594 ; State *v.* Marshall Co. Judge, 7 Iowa, 186 ; Bryan *v.* Cattell, 15 Iowa, 538. Compare Sanger *v.* Kennebec Co. Comm'rs, 25 Me. 291 ; People *v.* Mich. Univ. Regents, 4 Mich. 98 (1856) ; People *v.* Prison Inspectors, *Ib.* 187 ; Bates *v.* Plymouth, 14 Gray (Mass.), 163 ; Watts *v.* Carrol Par. Pol. Jury, 11 La. An. 141 ; Cannon *v.* Janvier, 3 Houst. (Del.) 27 ; State *v.* Rahway, 33 N. J. L. 110 ; King *v.* Severn & Wye Ry. Co., 2 B. & Ald. 646 ; Clarke *v.* Leic. & N. Canal Co., 6 Q. B. 898 ; Forster *v.* Forster, 4 B. & S. 187, 199 ; London *v.* Cox, L. R. 2 H. L. C. 239, 280 ; Worthington *v.* Jeffries, L. R. 10 C. P. 379 ; Chambers *v.* Green, L. R. 20 Eq. 552 ; Attorney-General *v.* Boston, 123 Mass. 460, 479 (1877). The rule stated in the text has the support of the judgment of the Supreme Court of the United States. "There is," says *Strong*, J., "a decided preponderance of American authority in favor of the doctrine that *private persons may move for a mandamus to enforce a public duty*, not due to the government as such, without the intervention of the government law officer." Union Pac. R. R. Co. *v.* Hall, 91 U. S. 343 (1875), and cases cited on page 355 ; s. c. 4 Dillon, 479 ; Pumphrey *v.* Baltimore, 47 Md. 145. In the case last cited a *mandamus* was sustained, sued out at the instance of private persons, to compel the city of Baltimore to assume charge of a bridge and maintain it as a public highway, in obedience to an act of the legislature, mandatory in its terms, requiring this duty of the city corporation.

longer in England, — and that it exposes a defendant to be harassed with many suits. An answer to the latter objection is that, as granting the writ is discretionary with the court, it may well be assumed that it will not be unnecessarily allowed. Accordingly, a voter in a municipality may apply for a *mandamus* to compel the council to hold an election to fill a vacancy in their body,[1] or to test the validity of an election.[2] In this country the writ is resorted to for the enforcement, in proper cases, of individual rights, or rights of a private nature, in the absence of any other adequate legal remedy, and to prevent a failure or defect of justice; and, in such cases, the party really or beneficially interested in the performance of the legal duty which the defendant neglects or refuses to perform may apply for the writ.[3]

[1] State *v.* Rahway, 33 N. J. L. 110 (1868); People *v.* Brooklyn Council, 77 N. Y. 503.

[2] State *v.* Marshall Co. Judge, 7 Iowa, 186; State *v.* Bailey, *Ib.* 390.

In *Kansas* a private citizen cannot compel the performance of a purely public duty by *mandamus;* the proper public officer must move. Bobbett *v.* Dresher, 10 Kan. 9 (1872); Wyandotte & K. C. Br. Co. *v.* Wyandotte Co. Comm'rs, 10 Kan. 331. So elsewhere. Graves *v.* Cole, 3 Dak. 301; State *v.* Ware, 13 Oreg. 380.

[3] Commonwealth *v.* Allegheny Co. Comm'rs, 37 Pa. St. 277, 279 (1860); Bryan *v.* Cattell, 15 Iowa, 538, *per Wright*, J.; Ottawa *v.* People, 48 Ill. 233 (1868); Maddox *v.* Graham (right of municipal creditors), 2 Met. (Ky.) 56 (1859); People *v.* Pacheco, St. Treas., 29 Cal. 210; Marbury *v.* Madison, Sec. State, 1 Cranch, 137; Kendall, Postm. Gen., *v.* Stokes, 3 How. (U. S.) 87. *As to the rights of taxpayers, post*, chap. xxii. See Rex *v.* Frost, 8 A. & E. 822, for a case in which an individual having a remote interest in corporation funds was held not entitled to the writ. *Ante*, sec. 266, note.

Who may be a relator. The *inhabitants of a county* who are put to inconvenience in reaching the court-house have such an interest in the erection of a new one in the new county site as will authorize them, as relators, to sue out a *mandamus* to the proper authorities or officers to proceed to the construction of the new court-house, as provided by law, and to levy taxes pursuant to the requirements of the statute. Watts *v.* Carrol Par. Pol. Jury, 11 La. An. 141 (1856); *supra*, sec. 835; Union Pac. R. R. Co. *v.* Hall, 91 U. S. 343 (1875); s. c. 3 Dillon, 515; 4 Dillon, 479, and cases; Graves *v.* Cole, 3 Dak. 301; State *v.* Ware, 13 Oreg. 380; 2 Morawetz on Corp., sec. 1132, and cases; High on Extraordinary Remedies, secs. 431–433.

Under a provision in the *Ohio* code (sec. 570) that the writ "may issue on the information of the party beneficially interested," the writ may properly issue, and the proceedings be conducted *in the name of the State*, on the relation of the party interested. State, *ex rel.*, &c., *v.* Perry Co. Comm'rs, 5 Ohio St. 497 (1856); State *v.* Zanesville & M. Turnp. Co., 16 Ohio St. 308, construing the phrase "beneficially interested."

In *Iowa*, by statute, the writ and proceeding are in the name of the State if a public interest be involved, and of the relator if only a private interest is concerned. Revision of 1860, sec. 3761; State *v.* Davis Co. Judge, 2 Iowa, 280; State *v.* Bailey, 7 Iowa, 390. And in a matter of public right any citizen may be the relator in an application for a *mandamus*. State *v.* Marshall Co. Judge, 7 Iowa, 186.

In *Connecticut*, private parties cannot have *mandamus* to call public meeting. Lyon *v.* Rice, 41 Conn. 245 (1874).

In *California*, a private party applying for a writ of *mandamus* must have an interest in the subject-matter of the action which is distinguished from the mass of the community. Linden *v.* Alameda Co. Sup., 45 Cal. 6 (1875).

An act of the legislature specially commanded the town council *to open a certain alley*, and it was held that the incidental advantages which a certain person would derive from the opening of the alley, by reason of the location of his property, did not entitle *him* to a *mandamus* to compel the performance of the duty enjoined by the act, the relator's right being regarded as one held in common with other inhabitants of the place. Heffner *v.* Commonwealth, 28 Pa. St. 108 (1857). *Contra*, Hall *v.* People, 57 Ill. 307 (1870); and see chap. xviii. on Streets, *ante*. So where an obstruction to a sidewalk is no more injurious to the relators than to others, and where there is a remedy by indictment, it was held that *mandamus* was not the proper remedy to compel the city council to open streets and to remove encroachments thereon. Reading *v.* Commonwealth, 11 Pa. St. 196 (1849); *ante*, secs. 660, 661, 836.

Canal appraisers, appointed by the State to appraise damages, and who, in a case within the statute, refuse to act, may be compelled to proceed by *mandamus*, and estimate the relator's damage, and pay the same. Jennings, *In re*, 6 Cow. (N. Y.) 518 (case growing out of the construction of Erie Canal); People *v.* Seymour, 6 Cow. 579; Rogers, *In re*, 7 Cow. 526 (1827).

Where a work of public necessity is done under an invalid contract and the legislature makes an appropriation to pay for it by a valid act, a disbursing officer cannot refuse to make payment on the ground of the invalidity of the contract. People *v.* Schuyler, 79 N. Y. 189 (1879).

§ 866 (696). **Demand and Refusal.** — When the writ is sought to enforce individual rights, the affidavits must show in the applicant or relator a *prima facie* case, and that he has complied with every requisite, to perfect his right to this remedy. Thus, as it is, in general, necessary that the *defendant should have been requested* to do that of which performance is sought by means of the writ (the object being that he shall have the option to do or to refuse that which is demanded), the affidavits must show the demand and the neglect or refusal, or circumstances, such as unreasonable delay or neglect to discharge a public duty, which clearly evince an intention not to do the act required.[1]

[1] State *v.* Rahway, 33 N. J. L. 110 (1868); State *v.* Jersey City, 38 N. J. L. 259; Tapping on *Mandamus*, 283; Wille. 357, pl. 44; State *v.* Lehre, 7 Rich. (S. C.) 234, 322; Commonwealth *v.* Allegheny Co. Comm'rs, 37 Pa. St. 237 (1860); Angell & Ames, sec. 707, and cases cited; Commonwealth *v.* Allegheny Co. Comm'rs, 37 Pa. St. 277, 291 (1860), *per Thompson*, J.; People *v.* Whittemore, State Treas., 4 Mich. 27; Stephens's *Nisi Prius*, 2292, 2318, 2319; Maddox *v.* Graham, 2 Met. (Ky.) 56, 70 (1859); Alexander *v.* McDowell, 67 N. C. 330 (1872). The objection, as to the neglect of a demand or the absence of a refusal, should, in order to prevent a waste of time, be made in the first instance, viz., in showing cause against the rule for the writ, and may come too late after the merits of the case have been discussed. Chicago *v.* Sansum, 87 Ill. 182.

A *mandamus* is never granted on facts merely raising a presumption that the respondents will refuse to perform their duty when the proper time arrives. State *v.* York Co. Sch. Dist., 8 Neb. 92; State *v.* Ramsey, *Ib.* 286. It will only issue upon an affidavit setting forth the facts; a verification on information and belief merely, where the defendants did not appear, was held to be insufficient. State *v.* Clay Co. Sch. Dist., 8 Neb. 98.

Further, as to demand and refusal, and when necessary. Tapping, 285, 286; Rex *v.* Brecknock & A. Canal Co., 3 A. & E. 217; *Ib.* 477; Regina *v.* Bristol & E. Ry. Co., 4 Q. B. 162; 3 G. & D. 384. But

§ 867. **Formal Demand not always necessary.** — There may be such an unequivocal manifestation of a settled purpose and determination not to perform a definite public duty as not only to *dispense with a formal demand*, but to justify the court in *awarding the writ before the evil is done*, or the dereliction of duty has actually occurred. Thus, where the city council in violation of statute ordered that a ferry should be run on and after a certain fixed future day free of tolls, it was held, upon a full review of the cases, that the court might, before the day thus fixed had arrived and without a formal demand, award a writ of *mandamus* to the city council commanding them to continue to collect the required tolls.[1]

an objection for want of demand may come too late after the merits of the case have been heard. Tapping, 287; approved, State *v.* Lehre, 7 Rich. 322; Queen *v.* Eastern Counties Ry. Co., 10 A. & E. 531. The board of supervisors of a county were directed by statute to meet at a specified place and time, and then and there subscribe a specified sum to the stock of a railroad company, and it was held that the company must tender its books to the officers of the county and demand the subscription, before it could apply for a *mandamus* to compel the county to subscribe. Oroville & V. R. R. Co. *v.* Plumas Co. Sup., 37 Cal. 354 (1869). The Supreme Court of *Kansas* has held that the vote of the people of a county to subscribe for the stock of a railroad company and to issue its bonds does not create a *contract* between the county and the company, even though such vote was upon conditions which the company subsequently performed; and the court refused on *mandamus* to compel the subscription. Union Pac. R. R. Co. *v.* Davis Co. Comm'rs, 6 Kan. 256 (1870). See State *v.* Saline Co. Court, 45 Mo. 242; *ante*, sec. 70. No demand to levy a tax was considered necessary where the duty was imperative. Columbia Co. Comm'rs *v.* King, Treas., 13 Fla. 451; *infra*, sec. 867, and note.

[1] Attorney-General *v.* Boston, 123 Mass. 460 (1877). The following is extracted from the instructive judgment in the case last cited, delivered by Chief Justice *Gray* in support of the propositions contained in the text: —

"Applications for writs of *mandamus* being addressed to the sound judicial discretion of the court, the circumstances of each case must be considered in determining whether a writ of *mandamus* shall be granted [*ante*, sec. 864, note]; and the court will not grant the writ, unless satisfied that it is necessary to do so in order to secure the execution of the laws. But when the person or corporation against whom the writ is demanded has clearly manifested a determination to disobey the laws, the court is not obliged to wait until the evil is done before issuing the writ. It is said in Tapping on *Mandamus*, 10, that 'a *mandamus* will not be granted in anticipation of a defect of duty or error of conduct.' But the only reference of the learned author in support of this proposition is to Blackborough *v.* Davis, 1 P. Wms. 48; and an examination of that case shows that the passage referred to was but a remark of counsel, not assented to or acted upon by the court. Nor does the Queen *v.* Kendall, 1 Q. B. 366, 386, note, s. c. 4 Per. & Dav. 603, 606, support the proposition in Tapping. The passage in High on Extraordinary Remedies, sec. 12, substantially accords with the statement of Tapping, above quoted. But the only cases there referred to are from *Maryland*, *Kansas*, and *Louisiana*, and differ so widely from the case before us that we need not consider whether they were well decided. In the cases in *Maryland* and in *Kansas*, the only day when the respondents could by law act upon the subject in question, had either passed or had not arrived when the writ of *mandamus* was applied for. Commissioners of Schools *v.* County Comm'rs, 20 Md. 449; State *v.* State Canvassers, 3 Kan. 88. The cases in *Louisiana* were attempts by a creditor of a municipal corporation, or of the State, to secure a priority by writ of *mandamus* to its treasurer to pay the debt of the petitioner; and the writ was refused, in the one case, because it appeared by the record that the proceedings were fictitious and collusive, and, in the other, because the treasurer had not received the money, and could not therefore be in fault in not paying it. State *v.* Burbank, 22 La. An. 298; State *v.* Dubuclet, 24 La. An. 16. . . . In Webb *v.* Herne Bay Comm'rs, L. R. 5 Q. B. C. 642, commissioners were incorporated by Act of Parliament for the purpose of improving a town, and were empowered to levy rates, to borrow money, and to issue debentures. A holder of such debentures moved for a *mandamus* to compel the commissioners to apply their funds in payment of the interest thereon. It was objected that rates might not be levied, and that the form of the *mandamus* should have been to levy rates out of which to pay the interest on the debentures. But the court held that the *manadmus* should issue as prayed for, and said that if the commissioners should not levy rates, the petitioner would be entitled to another *mandamus* to compel them to do so." See, also, Farnsworth *v.* Boston, 121 Mass. 173.

Answering the objection of the *want of a demand* the learned and eminent Chief Justice continues: —

"It is argued that it does not appear that the city has been requested and has refused to do the act sought to be enforced, and that therefore the writ of *mandamus* should not be issued. But, as Lord *Denman* observed, it is not necessary that the word 'refused' or any equivalent to it should be used, 'but there should be enough to show that the party withholds compliance, and deliberately determines not to do what is required.' The King *v.* Brecknock & A. Canal Co., 3 A. & E. 217, 222; s. c. 4 Nev. & Man. 871. See, also, The King *v.* Lord of Milverton, above cited; The King *v.* East India Co., 4 B. & Ad. 530; The King *v.* Archd. of Middlesex, 3 A. & E. 615; s. c. 5 Nev. & Man. 494; The Queen *v.* St. Margaret's Vestry, 8 A. & E. 889; s. c. 1 Per. & Dav. 116; Maddox *v.* Graham, 2 Met. (Ky.) 56. As a general rule, indeed, there must have been an express demand of that which the party moving for the writ desires to enforce. Tapping on *Mandamus*, 283, 284; United States *v.* Boutwell, 17 Wall. 604, 607. But where a municipal corporation or board has distinctly manifested its intention not to perform a definite public duty, clearly required of it by law, no demand is necessary before applying for the writ. Commonwealth *v.* Allegheny Co. Comm'rs, 37 Pa. St. 237; State *v.* Rahway Council, 33 N. J. L. 110. In the present case, the city of Boston, after purchasing the ferry, and running it as a toll ferry according to law for seven years, has then, by [an unauthorized] vote of both branches of the city council, ordered that on the first day of January next the tolls on the ferries shall be abolished and the ferries run free to the public travel. This order, unless controlled by the process of this court, will go into operation without further action on the part of the city, and shows such a deliberate assertion of an authority not conferred by law, and determination not to perform the duties required of the city by the statutes of the commonwealth, as to make a peculiarly strong case for issuing a writ of *mandamus*." Attorney-General *v.* Boston, *supra*.

[1] State *v.* Fairchild, 22 Wis. 110 (1867);

§ 868 (697). **Rule to show Cause; Alternative Writ.** — If the affidavits, information, or petition under oath show the case to be one in which the writ lies, and make out a *prima facie* case for the applicant, *a rule is granted upon the defendants*, that is, to the persons to whom the writ is to be directed, *to appear and show cause why the writ shall not issue*. In the practice in this country the rule *nisi*, or notice, is often dispensed with, and an alternative writ granted *ex parte* in the first instance.[1] If, upon the rule *nisi*, or notice, the