defendant does what is sought, the rule will be discharged. The defendant may show for cause, by affidavits, that the case is not one in which the writ lies, that there is a specific or other adequate legal remedy, or that the relator or applicant has no title or right to the writ, or that by his neglect or misconduct he is not entitled to the benefit of the remedy or the assistance of the court. If after the defendant has shown cause there remains a reasonable ground of right in the applicant, the rule for a *mandamus* will be made absolute, and an alternative writ will issue, which must substantially follow, and not materially vary from, the affidavits, petition, or rule upon which it is founded.[1]

Form, Direction, and Service of the Writ.

§ 869 (698). **Form and Requisites of the Writ.** — The writ of *mandamus* has the usual formalities of other writs, but *no precise formula* is necessary in the language to be employed in framing it. It must show with certainty the duty to be performed, and command those to whom it is directed to perform some specific and definite act or acts. It must follow the rule, or affidavits, or information upon which it is founded, must be properly directed, must bear teste in term time, and, under the practice at common law, it must be tested on the very day on which the rule for the writ is made absolute.[2]

State *v.* Lean, 9 Wis. 279 ; Chance *v.* Temple, 1 Iowa, 179.

[1] 3 Black. Com. 110, 111 ; Willc. 387.

[2] Commonwealth *v.* Pittsburgh, 34 Pa. St. 496 (1859) ; Rex *v.* Dublin, 1 Stra. 540 ; Selwin's *Nisi Prius*, 1061 ; Sterling's Case, 1 Sid. 340 ; Rex *v.* Willis, 7 Mod. 262 ; Rex *v.* Kingston, 8 Mod. 210 ; s. c. 11 Mod. 382 ; s. c. 1 Stra. 578 ; Rex *v.* Wildman, 2 Stra. 880 ; Willc. 387 ; Reg. *v.* Conyers (teste), 8 Q. B. 981 ; Stephens's *Nisi Prius*, 2321 ; Chance *v.* Temple, 1 Iowa, 179, where the practice is fully stated by *Isbell*, J. ; Price *v.* Harned, 1 Iowa, 473.

The duty required must be specifically stated, and not in the alternative, as that a municipal corporation pay a judgment, *or* issue its bonds in payment, *or* levy a tax to pay it. State *v.* Milwaukee, 22 Wis. 397 ; Rex *v.* Kingston, *supra ;* Tapping, 327. A writ commanding the trustees of a town to pay the relator warrants, and in case there should be no money in the treasury, then to levy a tax to pay the same, was held bad, because in the alternative, and as commanding distinct acts. State *v.* Pacific T. Trs., 61 Mo. 155 (1875); *quære.* Why is such a command uncertain ? In Regina *v.* St. Margaret's, 1 P. & D. 116 ; 8 Ad. & E. 889, it was held to be no ground of objection to a command in the alternative to do one of three things, if the duty enjoined by Act of Parliament forms one of them, and there has been a general refusal. Queen *v.* Southeastern Ry. Co., 4 H. L. Cas. 471. The command must be *to perform the act*, and not to command *others to perform it.* Rex *v.* Derby, 2 Salk. 436.

When there is no rule of law or rule of court controlling it, *the writ may be made returnable* at the same term it is issued, or at the next term, in the discretion of the court. Harwood *v.* Marshall, 10 Md. 451; Fitzhugh *v.* Custer, 4 Tex. 391 ; State *v.* Jones, 1 Ired. L. (N. C.) 129.

§ 870 (699). **Writ, how directed.** — The *direction of the writ* is one of the most material portions of it. It must be directed to the persons or officers, or to the corporate body legally bound to execute it, and it should be directed to such only. The common-law consequence of a failure to observe this rule is, that the writ may be either superseded or quashed. If a *joint act* is to be performed by two or more, the writ must be directed to all, though only a portion have refused to do the act, and the rest are willing.[1] There may be a *single writ to all of the officers* concerned in the separate, but connected steps relating to the ultimate duty commanded.[2] The writ, when *directed to a corporate body*, should state the title of the corporation with accuracy, using the name prescribed by charter or statute ; if there be none such, and a name has been acquired by reputation, the writ may be directed accordingly.[3] The effect of misnaming the corporate body is that the writ will be quashed, unless by the law, or the practice of the particular State, it may be amended.[4]

[1] Tapping on *Mandamus*, 310, where an alphabetical series of the usual *directions* of the writ in England is given. People *v.* Yates, 40 Ill. 126 ; State *v.* Jones, 1 Ired. L. (N. C.) 129 ; Rex *v.* Hereford, 2 Salk. 701 ; Buller *Nisi Prius*, 204 ; People *v.* Hayt, 66 N. Y. 606.

[2] Labette Co. Comm'rs *v.* Moulton, 112 U. S. 217 ; noted *infra*, sec. 872, and note.

[3] *Ante*, secs. 177, 178 ; Rex *v.* Smith, 2 M. & S. 598 ; Estwick *v.* London, Sty. 43, 32 ; Carpenter's Case, Raym. 439 ; Tapping, 314 ; Tavener's Case, Raym. 446.

[4] Davenport *v.* Lord, 9 Wall. 409 (1869) ; Tapping on *Mandamus*, 314.

Amendments. In England the statute of 9 Anne, chap. xx. sec. 7, extended the statutes of *jeofails* "to all writs of *mandamus* and informations in the nature of *quo warranto*, and all the proceedings thereon for any of the matters in this act mentioned." As to the extent of the right in England to amend the writ, and the return. Willc. 433–437 ; Regina *v.* Conyers, 8 Q. B. 981 ; Commonwealth *v.* Pittsburgh, 34 Pa. St. 496, 515. In this last case *Strong*, J., remarks : "Formerly, when the doctrine of amendments remained as at common law, the court would not allow the writ of *mandamus* to be amended after return filed ; but, as is said by Tapping, p. 334, the strict rule of the common law has been, of late years, altogether departed from, the principle as to amendment which now obtains being that it shall be allowed in all cases when such a course will promote justice. Thus, in a late case, the court ordered the writ to be amended during an argument, in order that such argument might proceed independently of such objection. Reg. *v.* Newbury, 1 Q. B. 759." Amendments in form and substance may be made at any stage when justice will be thereby promoted. United States *v.* Union Pac. R. R. Co., 4 Dillon, 479 (1875) ; and in this case the alternative writ was amended by striking out part of its mandate. *Ib. ;* s. c. 91 U. S. 343 ; High on Extr. Rem. 519 ; s. p. State *v.* State Bd. of Canv., 13 Fla. 55 (1869). As to amendment of the *peremptory writ. Infra*, sec. 879, and cases cited.

Further as to amendments. Willc. 433; Stephens's *Nisi Prius*, 2324 ; Johnes *v.* State Auditor, 4 Ohio St. 493 ; Powsheik Co. Sup. *v.* Durant, 9 Wall. 736 (1869) ; State *v.* Milwaukee, 22 Wis. 397 ; Lyons Highway Comm'rs *v.* People, 38 Ill. 347 ; State *v.* Elwood, 11 Wis. 17 ; State *v.* Hastings, 10 Wis. 518 ; Springfield *v.* Hampden, 10 Pick. (Mass.) 59. *Writ and information amendable.* State *v.* Bailey, Chickasaw Co. Judge, 7 Iowa, 390 ; Chance *v.* Temple, 1 Iowa, 179 ; State *v.* Keokuk, 18 Iowa, 388 ; State *v.* Johnson Co. Judge, 12 Iowa, 237 ; Regina *v.* Con-

But in some cases, there is an option to direct the writ either to that *part* of the corporation which alone has the power to execute it and on which alone the particular duty rests, or to the *whole corporation* by its corporate name or title.[1]

§ 871 (700). **Direction of Writ; English Cases.** — We have heretofore pointed out the difference between an old English municipal corporation, consisting of integral parts or different classes, and American municipal corporations,[2] and this distinction is to be regarded in the application of the decisions of the English courts respecting the direction of writs of *mandamus*. In England, if the act commanded must be done by the whole corporation, the writ should be directed to the corporation in its corporate name, and not by an enumeration of the classes which compose the corporation, nor should it be directed to all the members as individuals. Thus, if the corporation be styled "Mayor and Commonalty," but consists of mayor, aldermen, and burgesses, the writ must be directed to the "Mayor and Commonalty" (that being the corporate name), and it must be so directed, although the mayor, who is an integral part of the corporation, be dead.[3] Our municipal corporations do not con-

yers, 8 Q. B. 981. A peremptory writ of *mandamus* held not amendable; its mandate must correspond with that of the alternative writ, and if that be defective, or claim too much, it may be amended. Columbia Co. Comm'rs *v.* King, 13 Fla. 451 (1870); see *infra*, sec. 879.

If it appears to the court that the relator is entitled to a *mandamus* the writ will not be quashed because the petition or suggestion or affidavits do not state that the relator is without other adequate remedy. People *v.* Hilliard, 29 Ill. 413.

[1] Tapping on *Mandamus*, 315, 317. The author here refers to the English cases under the old corporations on this subject, and observes that "the result of the above cases, therefore, is, that if the *writ be directed* neither to the corporation by its corporate name, nor to those who should execute it by their proper descriptions [but 'in terms extends the descriptions beyond the part legally liable to execute the writ'], it is clearly bad, and is liable either to be superseded or quashed." *Ib.* 317; Rex *v.* Smith, 2 M. & S. 598; Rex *v.* Abington, 2 Salk. 700; Rex *v.* Norwich, 1 Stra. 55; Pees *v.* Leeds, *Ib.* 640. "The writ," says Mr. Willcock (Corp. 389, pls. 135, 137), "may be directed in the corporate name, although the act commanded is to be done by a select body, without the interference of the rest, for their act in such capacity is the act of the corporation; yet, where the act is to be done by a select body alone, the writ may be directed to them alone in their name as a select body."

"If the writ is directed to the corporation, it has been held good. But if it be directed to those who, by the constitution of the corporation, ought to do the act, without doubt it is good also." *Per Holt*, C. J., Rex *v.* Abingdon, 1 Ld. Raym. 560. See, also, s. c. 2 Salk. 700; Rex *v.* Oxford, 6 Ad. & E. 349; Rex *v.* Hereford, 1 Ld. Raym. 559; Regina *v.* Ledgard, 1 Ad. & E. (N. S.) 616; Regina *v.* Stamford, *Ib.* 433.

[2] *Ante*, chap. iii.

[3] Rex *v.* Smith, 2 M. & S. 598; Rex *v.* Abingdon, 1 Ld. Raym. 560; Rex *v.* Plymouth, 1 Barnard. 81; Rex *v.* Cambridge, 4 Burr. 2011. Under the Municipal Corporations Act, 5 and 6 Wm. IV. chap. lxxvi., *ante*, sec. 16, "The corporation," says Mr. Grant, "acts by the agency of the council, and, therefore, the acts of the council are the acts of the corporation. Hence, a *mandamus* ought to be directed to the corporation by their corporate name, though the thing in it required to be done is, by the statute, to be done by the council." Grant on Corp. 355, note, citing Rex *v.* Oxford, 6 Ad. & E. 349; Rex *v.* Gloucester, 3 Bulst. 190; Rex *v.* Abingdon, 2 Salk. 699; Rex *v.* Hereford, *Ib.* 701; Queen *v.* Ledgard, 1 Q. B. 620, 621; Sandwich *v.* Queen, 10 Q. B. 574, 579. This corresponds with the rule in this country, except that with us there is often an election to direct the writ to the corporation by name or to the proper officers in their official capacity, as below stated.

[1] Commonwealth *v.* Pittsburgh, 34 Pa. St. 496 (1859); Davenport *v.* Lord, 9 Wall. 409 (1869); Maddox *v.* Graham, 2 Met. (Ky.) 56 (1859); Louisville *v.* Kean, 18 B. Mon. 9, 13 (1857). The doctrine of the text applied. Glencoe *v.* People, 78 Ill. 382 (1875); Wren *v.* Indianapolis, 96 Ind. 206; *supra*, secs. 861 *a*, 861 *b*, and cases cited. In Commonwealth *v.* Pittsburgh, above cited, the writ was directed, "To the Select and Common Councils of the City of Pittsburgh, composed of D. Fitzsimmons" and others [stating the names of all the individuals composing the said bodies, without discriminating which of the persons named belonged to the select, and which to the common, council], and the writ was held to be well directed, although the corporate name of the city was, "The Mayor, Aldermen, and Citizens of Pittsburgh." The misdirection of the writ was set up in the return, and in treating of the objection *Strong*, J., delivering the opinion of the court, observes: "The next averment of the return is, that there is no such corporation or body politic known to the law as the city of Pittsburgh, of whose councils, select or common, the persons named in the writ are supposed to be members, but that the corporate name is, 'The Mayor, Aldermen, and Citizens of Pittsburgh.' The writ is directed to 'The Select and Common Councils of the City of Pittsburgh, composed of D. Fitzsimmons and others, defendants.' It is not directed to the city, but to the individuals who constitute the select and common councils. The question is not, therefore, whether, if an action had been brought at law against the city of Pittsburgh, the misnomer might have been pleaded in abatement, for it is not the corporation which is sued. But, even if it

sist of integral parts and distinct classes, but usually have a specific name, and their legislative powers are exercised by a council. These circumstances influence the direction of the writ, for, as we shall presently see, the writ, in all cases where the duty to be performed rests upon the council, may, in the absence of statutory regulation, be directed to the corporation by its corporate name, or to the officers composing the council in their official capacity.

§ 872 (701). **American Rule.** — In *this country the ancient strictness in respect to the direction of the writ* is somewhat modified by judicial decision and statutory enactment. Where there is a duty resting on the corporation to levy taxes for the benefit of its creditors, the writ may be directed to the individuals, in their official capacity, composing the council or other body, whose duty it is to make the levy and who have the power to execute the writ; and in such a case, the writ may, we think, be properly directed to the corporation by its corporate name, and be served upon the officers thereof who have the power, and whose duty it is, to execute it.[1] A single writ directed to all the officers concerned

in the separate but connected steps for levying and collecting a tax is proper; as, for example, where it was the duty of county commissioners to levy and collect a tax for the payment of certain bonds of a township, a writ directed to the Board of County Commissioners was held to be proper, although the commissioners were not parties to the judgment sought to be enforced.[1]

were, the mistake is amendable. [*Supra*, sec. 870, note.] It needs no argument to prove that justice would not be promoted by turning the relator out of court because he has described the defendants as members of the select and common councils of Pittsburgh instead of members of the select and common councils of the 'Mayor, Aldermen, and Citizens of Pittsburgh.' Even the very act which incorporated the city more than once denominates it the city of Pittsburgh. One of our statutes of amendments authorizes an amendment of the record of an action in any stage of the proceedings, when it shall appear, by any sufficient evidence, that a mistake has been made in the Christian name or surname of any party, plaintiff or defendant. As statutes of *jeofails* are construed liberally, it would seem to be within the spirit of this act to allow an amendment of a corporate name when a corporation is a party; but whether it would or not need not now be decided, for the *mandamus* is not to the artificial being known either as the city of Pittsburgh or as 'the Mayor, Aldermen, and Citizens of Pittsburgh.' It is not, therefore, misdirected. Next, the return avers that the select and common councils are not integral parts of the corporation, but only several and co-ordinate branches of the legislature thereof, acting separately and independently of each other; that the concurrence of both bodies is essential to the validity of all legislative acts affecting the corporation; and that the defendants are without power, of themselves, to assess or impose taxes, or to compel the concurrence of the other branch of said councils in any act. We do not perceive that this is any answer to the mandate of the writ, and no attempt has been made to show us how the fact averred is material. The defendants are *all* the members of *both branches*, and if each discharges his duty, there can be no want of concurrence of councils." 34 Pa. St. 496, *supra*. See, also, Rex *v.* Tregony, 8 Mod. 111.

In Davenport *v.* Lord, above cited, it appeared that the municipality was incorporated by the name of "The City of Davenport," and by *that* name had power "to sue and be sued in all courts," and that the "city council," which exercised all the legislative powers of the corporation, and had the sole power to levy and collect taxes, was composed of the mayor and aldermen, and a writ of *mandamus* in favor of a judgment creditor of the city, commanding the levy of taxes to pay the judgment, was directed "To the Mayor and Aldermen" of the city. The objection was made that the writ ought to have been directed to the city by its corporate title, but the objection was not sustained. The view of the Supreme Court was, that since the affairs of the city were managed by the mayor and aldermen composing the city council, which had the sole power to levy and collect taxes and provide for the payment of the debts of the corporation, the writ was well enough directed. The exact language of the court is: "The point that the writ was misdirected is not well taken, — the direction was *substantially correct*." There can, we think, be little doubt that the writ could have been properly directed to the corporation by its corporate title; and as the duty was a corporate one, though to be performed by the council, the direction of the writ in such a case to the corporation by its charter name, and service upon the proper officers, would seem to be an equally appropriate mode.

Writ directed to the Mayor and City Council is good, and it need not necessarily be directed to the corporation. People *v.* Bloomington, 63 Ill. 207 (1872); followed, Glencoe *v.* People, 78 Ill. 382 (1875). But a peremptory writ of *mandamus* against a municipal corporation was said to be governed by different principles, and must be served upon those persons composing the council at the time of service. *Ib.*

§ 873 (702). **Direction of Writ; Distinction.** — *A distinction is to be observed between a misdirection*, by being directed to the wrong persons, and a direction to the right persons by an erroneous name. In the former case the writ may be superseded on motion, while in the latter case the defect must be relied upon in the return, and the objection is in the nature of a plea in abatement.[2]

§ 874 (703). **Direction; Official rather than Personal Name.** — It is advisable that the *writ to officers of a municipal or public corporation* to perform an official duty should be directed to them in their official names, as "To the Mayor and Aldermen of," &c., omitting the personal names of the officers, as this course precludes questions which might be made arising from a change of officers.[3] The writ must be directed to officers in their proper capacity.

§ 875 (704). **Service of the Writ.** — The writ must, as we have seen, be directed to those who are to execute it, or do the thing required, and it must be *delivered to, or served upon*, those who are to make the return.[4] Whether the writ be directed to the corporation

[1] Labette Co. Comm'rs *v.* Moulton, 112 U. S. 217 (1884); Cherokee Co. Comm'rs *v.* Wilson, 109 U. S. 621. Same principle, Farnsworth *v.* Boston, 121 Mass. 173.

[2] Rex *v.* Smith, 2 M. & S. 598; Reg. *v.* Ipswich, 2 Ld. Raym. 1239; s. c. 2 Salk. 435; Rex *v.* Norwich, 1 Stra. 55; Willc. 388, pl. 131.

[3] Tapping on *Mandamus*, 315, 317; Louisville *v.* Kean, 18 B. Mon. 9, 13 (1857); *infra*, sec. 884; State *v.* Elkinton, 30 N. J. L. 335; Beachy *v.* Lamkin, 1 Idaho, 48; State *v.* Gates, 22 Wis. 210; People *v.* Bacon, 18 Mich. 247; State, *ex rel.* Soutter *v.* Madison Council, 15 Wis. 30; Rex *v.* West Looe, 3 B. & C. 685; Willc. 391, pl. 140; State *v.* New Orleans, 35 La. An. 68. (The proceeding does not abate because of the change of officials.)

In Regina *v.* Eye (Mayor of), 9 A. & E. 676, where the mayor and assessors, under the English Municipal Corporations Act, had expunged the name of the relator from the burgess roll, and the relator, at the next term, obtained a rule for a *mandamus to the mayor* (the proper officer under the act) to insert his name, the court made the rule absolute, *directing* the *mandamus to the mayor generally*, notwithstanding that the mayor, who had expunged the name, had ceased to be mayor before the rule *nisi* was obtained, that no application had been made to the mayor then in office, and that the year to which the burgess list belonged had expired before making the rule absolute. In one case in England, where it was doubtful whether the last mayor had power to hold over, the court ordered that the writ should be directed to the *late mayor*, without specifying his name. Willc. 389, pl. 133. *Mandamus* may be directed to a *de facto* officer to compel him to perform the duties of his office; he cannot defend by setting up that he is not in possession of his office *de jure*. Kelly *v.* Wimberly, 61 Miss. 548.

[4] Rex *v.* Hereford, 2 Salk. 701; Rex *v.* Derby, *Ib.* 436; Pees *v.* Leeds, 1 Stra. 640. Service upon a board of county commissioners in *Indiana* may be made upon the president without service on the other members. Clarke Co. Comm'rs *v.* State, 61 Ind. 75.

or to the council,[1] *the service* ought in our opinion to be made upon the officers who, under the law, have the power to do the act commanded, and against whom an attachment to enforce obedience should issue.

The Return, and Subsequent Proceedings.

§ 876 (705). **Return: by whom made, and Requisites.** — The *return to the alternative writ* must be made by the corporation, body, officers, or persons to whom the writ is directed; must state facts clearly, positively, and without ambiguity or evasion; if it traverses the facts stated in the writ, it must deny or answer all that are material, or it may aver, in accordance with the rules of pleading, other facts in avoidance, and such facts "must also be clearly and specifically set forth in the return with sufficient certainty, and not argumentatively, inferentially, or evasively, so that the court may see at once that such facts, if established or admitted, are sufficient as the alternative for obedience to the writ."[1] The return need not be single, but may state several distinct grounds in answer to the writ, and it is enough if any one of them be sufficient, that is, discloses legal reasons why the act commanded by the writ should not be performed.[2]

[1] *Supra*, secs. 870–874. On this subject some decisions have been made in England which seem to the author to be inapplicable, at least in their full extent, to our municipal corporations. Thus, it is held, that where a *mandamus* is directed to the "mayor, &c.," the mayor alone can make return, and the other integral parts of the corporation cannot disavow it. The reason assigned is, that the court cannot refuse the mayor's return, he being the principal officer to whom the writ is directed and to whom it is actually delivered, and all the court can do is to compel a return; and if the mayor makes a return contrary to the votes of the majority concerned, it is at his peril, and he may be punished by information in the King's Bench. Rex *v.* Abingdon, 2 Salk. 431; *Ib.* 699; Stephens's *Nisi Prius*, 2326. Accordingly, it has also been held that if the writ be directed to a corporation, it ought to be served upon the mayor. Rex *v.* Exeter, 12 Mod. 251. So, on a *mandamus to elect a clerk*, it was decided that the writ should be delivered to the mayor, as the most visible part of the corporation, notwithstanding the power of election was in the common council. Regina *v.* Chapman, 6 Mod. 152. (See State *v.* Milwaukee, 22 Wis. 396, 397.) In another case it was held that *personal service on the town clerk* of a peremptory writ to the corporation was sufficient to found an application for an attachment. Rex *v.* Fowey, 4 D. & R. 132. It seems that an attachment may be granted against a mayor, on affidavits that the writ has been left at his house, he having kept out of the way to avoid it. Rex *v.* Tooley, 12 Mod. 312; Willc. 450. At common law *the return* to a writ of *mandamus to a corporation*, being an act to be entered of record, it need not be under the seal of the corporation, or signed by the head or other officer of the corporation, for at common law no officers are obliged to sign their returns. Rex *v.* Exeter, 1 Ld. Raym. 223; Rex *v.* Clarke, 2 Ld. Raym. 848; *Ib.* 849; Rex *v.* Wigan, 3 Burr. 1645; Grant on Corp., 63, 228, 229.

In this country the *mode of service* is usually prescribed by statute. State, *ex rel.* Havemeyer *v.* Mineral Pt. Sup., 22 Wis. 396, construing the statute of *Wisconsin* to require the board of supervisors to be served by leaving the original writ of *mandamus* with the chairman, and a copy with each of the supervisors. In *New Jersey* (see State *v.* Elkinton, 30 N. J. L. 335), the writ should be delivered or shown to the person to whom it is addressed. *Ib.* "Service of the writ may be by delivery of a copy, but the original ought to be shown to each party served at the time of due delivery of the copy." Add. on Torts (4th Eng. ed.), 1074; Reg. *v.* Birmingham, &c. Ry. Co., 1 El. and Bl. 293. Proper mode of making return by county justices or supervisors. Lander *v.* McMillan, 8 Jones L. (N. C.) 174; McCoy *v.* Harnett Co. Jus., 4 Jones L. (N. C.) 180; People *v.* San Francisco Sup., 27 Cal. 655.

§ 877 (706). **Return not conclusive; What Course open to Respondent.** — Under the statute of Anne, or similar statutes adopted or enacted in most of the States, or by the course of practice therein, *the return, if false in fact, is not conclusive* in the *mandamus* proceeding, and the relator or prosecutor is not driven as at common law to his action on the case for a false return, but may directly contest the truth of the return.[3] It may be stated to be generally true in this country, that upon service of the alternative writ the respondent, or party to whom it is directed, may either (1) obey the command of the writ and show that fact; or (2) he may object to the writ for defects therein, and move to quash or supersede the same; or (3) he may demur to the writ; or (4) traverse in the return the facts set forth in the writ; or (5) aver in the return other facts by way of confession and avoidance of the facts stated in the writ.[4] And the

[1] Commonwealth *v.* Allegheny Co. Comm'rs, 37 Pa. St. 277, 279 (1860), *per Thompson*, J., where the principle is well illustrated and applied. People *v.* Baker, 35 Barb. 105; Willc. 401–409; Loute *v.* Allegheny County, 10 Pittsb. Leg. J. 241; s. c. 2 Pittsb. R. 411; Pollock *v.* Lawrence County, 7 P. L. J. 373; s. c. 2 Pittsb. R. 137; Tallapoosa Comm'rs' Ct. *v.* Tarver, 21 Ala. 661; Commonwealth *v.* Pittsburgh, 34 Pa. St. 496 (1859); State, *ex rel.* Soutter *v.* Madison Council, 15 Wis. 30; Grant on Corp. 228–240. The mandatory part of the alternative writ, if certain, may be general, but the return must be minute in stating facts, showing why the party did not do the act required. Regina *v.* Southampton, 1 Ellis, B. & S. 5. Writ directed to G. and others as Township Committee; a return by them as *late* Township Committee was held sufficient. State *v.* Griscom, 3 Halst. (N. J.) 136. Equitable defence to the demands of the relator, and mode of asserting it. Neuse River Nav. Co. *v.* Newberne Comm'rs, 6 Jones Law (N. C.), 204. *Mandamus* not allowed where the right was merely equitable. Regina *v.* Balby & W. Tp. Road Trs., 16 Eng. Law & Eq. 276; 22 L. J. Q. B. 164.

[2] Rex *v.* Norwich, 2 Ld. Raym. 1244; s. c. 2 Salk. 436; Reg. *v.* Pomfret, 10 Mod. 107; Rex *v.* Cambridge, 2 T. R. 461; Rex *v.* York, 6 T. R. 495; Wright *v.* Fawcett, 4 Burr. 2044; Legg *v.* Mayor, &c., 42 Md. 203. See People, *ex rel.* Pekin, L. & D. R. R. Co. *v.* Logan Co. Sup., 63 Ill. 374 (1872), as to what return may be made.

[3] Maddox *v.* Graham, 2 Met. (Ky.) 56, 69 (1859); Angell & Ames Corp., secs. 727, 728; People *v.* Hudson H. Comm'rs, 6 Wend. 559; People *v.* Finger, 24 Barb. 341; Selma & G. R. R. Co., *In re*, 46 Ala. 230 (1871).

[4] Commonwealth, *ex rel.* Armstrong *v.* Allegheny Co. Comm'rs, 37 Pa. St. 277, 279; Same, *ex rel.* Middleton *v.* Same, *Ib.* 237, opinion of *Woodward*, J.; Tapping on *Mandamus*, 347; Tarver *v.* Tallapoosa

issues of law and the issues of facts thus presented will be disposed of according to the statutes and the practice of the court.[1]

Peremptory Writ.

§ 878 (707). **When issued; How obeyed.** — If the return to the alternative writ be disallowed as insufficient in law, or if the facts averred in the return be found and adjudged untrue, a *peremptory writ will be issued,* which, as its name implies, requires to be obeyed, and it cannot be disobeyed on any ground which might have been urged in resisting the application for the writ.[2] While it is true that the general rule is that no return can be made to the peremptory writ except obedience, yet a subsequent *valid* statute, forbidding obedience or making obedience impossible, will from necessity be a sufficient return.[3] If the defendants have appeared to a rule or notice of an application for a *mandamus,* and have been heard, and there is no controversy in respect to the facts, and the right of the relator is clear, a peremptory writ may, in the discretion of the court, be issued *in the first instance.*[4] Thus, where a specific duty, *e. g.,* the

Comm'rs' Ct., 17 Ala. 527; Commonwealth *v.* Lyndall, 2 Brew. (Pa.) 425; *ib.* 441; Dane *v.* Derby, 54 Me. 95. The statute of 9 Anne, chap. xx., is not in force in *Alabama.* Tallapoosa Comm'rs' Ct. *v.* Tarver, 21 Ala. 661. Nor in *Maryland.* Harwood *v.* Marshall, 10 Md. 451.

On application for a *mandamus* against the common council, they may call in question the constitutionality of an act which legislates them out of office. State *v.* Newark, 40 N. J. L. 297 (1878).

[1] Silverthorne Treas. *v.* Warren R. R. Co., 33 N. J. L. 173. The prosecutor or relator may *demur to the return. Ib.* Or *plead* to and controvert the facts stated therein. Maddox *v.* Graham, 2 Met. (Ky.) 56, 68 (1859); People *v.* Metrop. Pol. Board, 26 N. Y. 316; State *v.* Jones, 10 Iowa, 65; Fowler *v.* Peirce, Compt., 2 Cal. 165; 9 Anne, chap. xx. secs. 1, 2; Grant on Corp. 228–240; People, *ex rel.* Pekin, L. & D. R. R. Co. *v.* Logan Co. Sup., 63 Ill. 374 (1872). This section of the text cited with approval in St. Louis *v.* Green, 7 Mo. App. 468 (1878).

[2] Stevens' Case, T. Raym. 432; Rex *v.* Norwich, 2 Ld. Raym. 1245; People *v.* Seymour, 6 Cow. (N. Y.) 579; Commonwealth *v.* Pittsburgh, 34 Pa. St. 496 (1859); Weber *v.* Zimmerman, 23 Md. 45; People *v.* Richmond Co. Sup., 28 N. Y. 112.

[3] Sedberry *v.* Chatham Co. Comm'rs, 66 N. C. 486, 492 (1872); Bayne *v.* Jenkins, *Ib.* 356.

[4] Knox Co. Comm'rs *v.* Aspinwall, 24 How. 376 (1860); Jennings, *In re,* 6 Cow. (N. Y.) 529; Rogers, *In re,* 7 Cow. 526; State *v.* Elkinton, 30 N. J. L. 335; Harkins *v.* Sencerbox, 2 Minn. 344; Clarke Co. Ct. Jus. *v.* Paris, W. & K. R. Turnp. Co., 11 B. Mon. 143; Attala Co. Board of Pol. *v.* Grant, 9 Sm. & M. (17 Miss.) 77. So, if no return be made to an alternative writ, the court, instead of proceeding by attachment, may direct the peremptory writ to issue. State *v.* Jones, 1 Ired. L. (N. C.) 129; People *v.* Pearson, 4 Ill. 271. A peremptory writ in the first instance is proper only when the right of the relator is clear and unquestionable. People *v.* Greene Co. Sup., 64 N. Y. 600 (1876). Where the facts are not in dispute, the right clear, and the matter one of public interest in relation to an officer having a short term, a peremptory writ may properly issue. State *v.* Hudson Co. Freeh., 35 N. J. L. 269. So on the direction of the court after full hearing on the rule to show cause. Cleveland *v.* Jersey City, 39 N. J. L. 629.

levy of a special tax, required to be performed by public officers at a prescribed time, is omitted to be performed without a reason, or for a reason merely colorable, a peremptory *mandamus,* without a previous alternative, may be issued in the first instance, if the defendant have previously appeared to a notice or rule commanding the duty to be performed *forthwith.*[1] So, where the plaintiff's claim has been reduced to a judgment, a peremptory writ *may,* in a proper case, be awarded in the first instance.[2]

§ 879. **Form of Peremptory Writ.** — It has been frequently declared to be a well-settled principle that the *peremptory writ must conform strictly to the alternative,* and cannot be limited or varied.[3] It may be doubted whether even the older cases warrant so broad and unqualified a statement of the general rule; but, if so, the rule in modern times has been relaxed, and the better view is that, within reasonable and proper limits, by amendment of the alternative writ or otherwise, the peremptory writ may be moulded so as to effectuate justice. While the general command of the peremptory writ must be the same as the alternative, it may vary in unsubstantial matter of detail, particularly where the variation is to the ease of the respondent.[4]

§ 880 (708). **When not issued; When set aside.** — Although the return to the alternative writ is insufficient, yet, if upon the whole case it clearly appears that the relator is not entitled to the advantage which the peremptory writ would give him, the court will not issue it.[5] If issued, it may, on motion, be set aside, on proof that it

[1] Knox Co. Comm'rs *v.* Aspinwall, 24 How. 376 (1860). The court, in its discretion, may order an alternative *mandamus* on making a rule to show cause absolute. A peremptory *mandamus* is allowed in the first instance only when the legal right is clear, where the facts are not in dispute, and the matter is of public and urgent interest. Hugg *v.* Camden, 39 N. J. L. 620 (1877).

[2] Lutterloh *v.* Cumberland Co. Comm'rs, 65 N. C. 403 (1871). The practice in the Eighth Federal Judicial Circuit is in general *not* to award a peremptory writ, in the first instance, even to *judgment* creditors.

[3] Tapping on *Mand.* 305, 402; 1 Redf. Railways, 649; High, Extr. Remedies, chap. ix., cited by *Folger,* J., in People *v.* Dutchess & C. R. R. Co., 58 N. Y. 152 (1874), where the authorities upon the proper *form of the writ,* and as to *variance between the alternative and peremptory writ,* are collected and reviewed in a learned and able opinion which will not fail to commend itself to the enlightened judgment of the bar.

[4] People *v.* Dutchess & C. R. R. Co., 58 N. Y. 152 (1874); United States *v.* Union Pac. R. R. Co., 4 Dillon, 479; s. c. 91 U. S. 343. Further, as to *amendments,* see *supra,* sec. 870, and cases cited in the notes.

[5] Willc. 444, pl. 303, citing Rex *v.* Campion, 1 Sid. 14; Rex *v.* Axbridge, Cowp. 523; Rex *v.* Griffiths, 5 B. & Ald. 735; Legg *v.* Mayor, &c., 42 Md. 203; *supra,* sec. 847.

was unfairly or improperly obtained, or commands the performance of an illegal act.[1] If when issued it is not fully and effectually obeyed, the relator may oppose the motion to file the return.[2]

Attachment.

§ 881 (709). **How Obedience is enforced; Attachment.** — Obedience *to the peremptory writ is enforced by attaching the persons* guilty of the disobedience for contempt.[3] If a corporation makes no return to a writ duly issued and served, the attachment issues against the individuals guilty of the contempt in their natural capacity.[4] If the writ be directed to several persons in their natural capacities, unless all join in the return, the attachment must go against all, though such as were willing to do the act commanded will not be punished. But where the writ is directed to a corporation by name, the attachment should issue against the guilty only, not against those who have done all within their power to obey the writ.[5]

§ 882 (710). **Attachment, how obtained; Practice.** — The *application for an attachment* is by motion for a rule *nisi*, founded upon affidavits, which gives the defendant an opportunity to show cause.[6] But the rule is here often dispensed with, and upon a clear showing that the writ has been served, and that the disobedience is wilful, or the contempt gross, an attachment may be issued at once.

§ 883 (711). **State Court injunction no Excuse if Federal Court first acquired Jurisdiction.** — The defendants cannot, on being attached for disobedience of a peremptory *mandamus*, issued by a *Federal court*, excuse or justify such disobedience by showing that they have since been enjoined by a *State court* from doing the act commanded by the former court.[1]

Judgment in Mandamus.

§ 884 (712). **Abatement; Change of Membership; Public Officer.** — A *change in the membership of a municipal council*, pending proceedings in *mandamus* against the council, does not abate the proceedings; and where such a change occurred, and the new members were made parties, and afterwards a peremptory writ ordered, this was regarded as in effect a judgment against the corporation, and binding upon the councilmen in office at the time of its rendition, and whose duty it was to execute it.[2] But a judgment in *mandamus*,

[1] People *v.* Everett, 1 Caines (N. Y.), 8; Weber *v.* Zimmerman, 23 Md. 45; State *v.* Johnson Co. Judge, 12 Iowa, 237.

[2] Reg. *v.* Ipswich, 2 Ld. Raym. 1233.

[3] Commonwealth *v.* Taylor, 36 Pa. St. 263, which contains C. J. *Lowrie's* address on behalf of the Supreme Court of *Pennsylvania* to the members of the municipal council of Pittsburgh, attached for contempt for not levying as commanded a tax to pay creditors. Loute *v.* Allegheny County, 10 Pittsb. Leg. J. 241; s. c. 2 Pittsb. R. 411; Angell & Ames, sec. 730; Willc. 448. A municipal corporation cannot be guilty of contempt; the contempt is that of individuals, as, *e. g.*, the municipal officers. Bass *v.* Shakopee, 27 Minn. 250; Davis *v.* New York, 1 Duer, 451; London *v.* Lynn, 1 H. Bl. 206.

[4] Mills' Case, T. Raym. 152.

[5] Bailiffs of Brigenoth, 2 Stra. 808; Rex *v.* Salop, Buller's *Nisi Prius*, 198, 201 (*b*).; New Sarum, Comb. 327.

[6] Tidd's Prac. 484; Chaunt *v.* Smart, 1 B. & P. 477. Under the practice at common law, an attachment is not granted for not making a return to the peremptory writ on the day assigned, but it is granted after a peremptory rule to return the writ. Rex *v.* Fowey, 5 D. & R. 614; Coventry's Case, 2 Salk. 429; Willc. 449. If there has been *no service of the writ* according to law, an attachment for contempt will not be issued. State, *ex rel.* Havemeyer *v.* Mineral Pt. Sup., 22 Wis. 396 (1867). If a "town council" to which a *mandamus* is directed adjourn the corporate assembly to prevent a return being made, the members will be punishable for contempt. Regina *v.* Heathcote, 10 Mod. 56. To a rule to show cause why officers of a county should not be attached for contempt in not levying as commanded a tax sufficient to pay the plaintiff's claim against a county, it was held a good answer that a sufficient tax had been levied, and the lists placed in the hands of the collecting officer. Johnston *v.* Cleaveland Co. Comm'rs, 67 N. C. 101 (1870). Discretion of officers as to raising part by taxation and part by the issue of bonds. *Ib.* See Sedberry *v.* Chatham Co. Comm'rs, 66 N. C. 486.

[1] Riggs *v.* Johnson County, 6 Wall. 166; Lansing *v.* County Treasurer, 1 Dillon, C. C. 522; Washington Co. Sup. *v.* Durant, 9 Wall. 415; Davenport *v.* Lord, *Ib.* 409; Seibert *v.* Lewis, 122 U. S. 284 (1886); *supra*, sec. 854, note. A town treasurer, who has collected the money due a judgment creditor, cannot be compelled by *mandamus* to pay it to the creditor while enjoined at the suit of another. State *v.* Kispert, 21 Wis. 387.

Courts of equity will not ordinarily interfere by injunction to stay proceedings upon a writ of *mandamus*. Columbia Co. Comm'rs *v.* Bryson, 13 Fla. 281 (1871).

[2] Maddox *v.* Graham, 2 Met. (Ky.) 56, 63, 71 (1859). Approved, Leavenworth Co. Comm'rs *v.* Sellew, 99 U. S. 624 (1878); Louisville *v.* Kean, 18 B. Mon. 9, 13 (1857). In the last case, the city of Louisville was held entitled to prosecute an appeal in its name from a proceeding in *mandamus* against the mayor and the members of the council of the city. In thus holding, the court, by *Simpson*, J., remarks: "The act they [the mayor and council] were required to perform was a corporate act. The judgment against them should, therefore, be regarded as having been rendered against them in their corporate character. Indeed, the proceeding should properly have been against the corporation, or against the general council, as that body represented the corporation. If it should be regarded as a proceeding against the mayor and general council individually, the judgment might have been unavailing if they had not been in office at the time it was rendered; and might, therefore, have been made ineffectual by their resignation during the pendency of the motion. But regarding it as a proceeding against the corporation, it would be obligatory on the members of the general council in office at the time of its rendition; and it would not assume the character of a proceeding against individuals, unless it became necessary to issue an attachment for the enforcement of the judgment. Therefore, the appeal is properly prosecuted in the name of the city." In State, *ex rel.* Soutter *v.* Madison Council, 15 Wis. 30, it was held that if the mayor and part of the council go out of office after the alternative writ is served, their duties devolve on their successors, and that the peremptory writ may be directed to the mayor and council generally. Approved by the