aggrieved party is, in such case, entitled to a *certiorari ex debito justitiæ*.[1] Thus, if no appeal or other mode of review be given, and if there be no statute to the contrary, the legality of convictions in *municipal courts* will be revised on *certiorari*.[2] So, under the same circumstances and in the same way, the proceedings of municipal corporations in *opening streets*,[3] in making *local assessments*, in *levying*

[1] State *v.* Bill, 13 Ired. (N. C.) Law, 373 (1852); Marion Int. *v.* Chandler, 6 Ala. 899 (1844); Carroll *v.* Tuskaloosa, 12 Ala. 173; Miller *v.* Jones, 80 Ala. 89; *Ib.* 287; Jackson *v.* People, 9 Mich. .111 (1860), cited *ante*, sec. 440, note. There ought to be substantial grounds to justify disturbing the action of public bodies by this writ. Gager *v.* Chippewa Co. Sup., 47 Mich. 167. See further on the subject of the text: State *v.* Stewart, 5 Strob. L. (S. C.) 29; State *v.* Swift, 1 Hill (S. C.), 360; *Re* Schmidt, 24 S. C. 363; State *v.* Fort, 24 S. C. 510; Dwight *v.* Springfield, 4 Gray (Mass.), 107 (1855); Parks *v.* Boston, 8 Pick. (Mass.) 218 (1829); Fay, Petitioner, 15 Pick. (Mass.) 243 (1834); Cunningham *v.* Squires, 2 West Va. 422 (1868); Taylor *v.* Americus, 39 Ga. 59 (1869); Macon *v.* Shaw, 16 Ga. 172 (1854); Shaw *v.* Macon, 19 Ga. 468; Burns *v.* La Grange, 17 Tex. 415 (1856); Buckner, *In re*, 9 Ark. 73, 148; Camden Treas. *v.* Mulford, 26 N. J. L. 49; Carron *v.* Martin, *Ib.* 594 (1857); Morris Canal & B. Co. *v.* Jersey City, 12 N. J. Eq. 252; Holmes *v.* Jersey City, *Ib.* 299; State *v.* Newark, 25 N. J. L. 399 (1856); State *v.* Hudson, 32 N. J. L. 365; Swan *v.* Cumberland, 8 Gill (Md.), 150 (1849); Dorchester *v.* Wentworth, 31 N. H. 451; Chicago & R. I. R. R. Co. *v.* Whipple, 22 Ill. 105; Ewing *v.* St. Louis, 5 Wall. 413 (1866); Kip *v.* Paterson, 26 N. J. L. 298; State *v.* Zeigler, 32 N. J. L. 262; Holberg *v.* Macon, 55 Miss. 112, citing and approving text; Miller *v.* Sch. Trustees, 88 Ill. 26; Doolittle *v.* Galena & C. U. R. R. Co., 14 Ill. 381; Sonora H. Com. *v.* Carthage Sup., 27 Ill. 140; Geneseo H. Comm'rs *v.* Harper, 38 Ill. 103; *ante*, secs. 440, 611, 804, 907; Tierney *v.* Dodge, 9 Minn. 166; State *v.* Dowling, 50 Mo. 134 (1872); St. Paul *v.* Marvin, 16 Minn. 102; Corbett *v.* Duncan, 63 Miss. 84; Loeb *v.* Duncan, 63 Miss. 89; McCreary *v.* Rhodes, 63 Miss. 308; Collins *v.* Davis, 57 Iowa, 256; Stubenrauch *v.* Neyenesch, 54 Iowa, 567; Oshkosh *v.* State, 59 Wis. 425; Board of Ald. of Denver *v.* Darrow (Col. 22 Pac. Rep. 784, 1889), citing text, and explaining on one point Darrow *v.* People, 8 Col. 418; s. c. 8 Pac. Rep. 661; *ante*, sec. 550, note.

A *certiorari* will not be granted where the object thereof can be attained in an appeal pending, — as here, from the decision of county commissioners locating or discontinuing a way, to quash the record. Hodgdon *v.* Lincoln Co. Comm'rs, 68 Me. 226; *infra*, sec. 929.

[2] Taylor *v.* Americus, 39 Ga. 59 (1869); Marion Int. *v.* Chandler, 6 Ala. 899 (1844); Jackson *v.* People, 9 Mich. 111 (1860), and remarks of Mr. Justice *Campbell*; *ante*, sec. 440, and notes; State *v.* Davey (writ refused), 39 La. An. 992.

[3] Tarlton, *In re*, 2 Ala. 35; Dwight *v.* Springfield, 4 Gray (Mass.), 107; Carron *v.* Martin, 26 N. J. L. 594 (1857); Dorchester *v.* Wentworth, 31 N. H. 451; Parks *v.* Boston, 8 Pick. (Mass.) 218, 225; Ewing *v.* St. Louis, 5 Wall. 413 (1866), cited *ante*, sec. 611, note; St. Charles *v.* Rogers, 49 Mo. 530 (1872).

It seems to be the settled view in *New York* that without a statutory enlargement of the functions of the writ of *certiorari*, it will be denied, or if granted it will be quashed, when it is sought for the purpose of reviewing the official or *corporate* proceedings of a common council when they are of a *legislative, executive, or ministerial character*; as, for example, the regularity of proceedings by ordinances or resolutions under the right of eminent domain to *open streets, squares, &c., and for constructing sewers in streets, and the like improvements, including assessments therefor*; and the regularity of proceedings voting taxes, appointing officers, making by-laws, &c. People *v.* New York, 2 Hill (N. Y.), 9 (1841). In Matter of Mount Morris Square, *Ib.* 14, questioning Parks *v.* Boston, *supra*, which holds that proceedings to open streets may be reviewed on *certiorari*, and also doubting Le Roy *v.* New York, 20 Johns. 430, and Baldwin *v.* Calkins, 10 Wend. (N. Y.) 166, so far as the latter asserts that the *principle of assessment* may be reviewed by *certiorari*. It is admitted, however (2 Hill, 24), that the writ will lie to the local courts or corporate officers *exercising judicial functions*. See, further, as to remedy by *certiorari*, People *v.* Allegany Co. Sup., 15 Wend. 198; People *v.* Queens Co. Sup., 1 Hill (N. Y.), 195; 23 Wend. 277; Stone *v.* New York, 25 Wend. 157, 167, *per Paige*, Senator; *Ib.* 693. The doctrine of the *New York* cases denying that the proceedings of municipal corporations in opening streets, making assessments, &c., can be reviewed on *certiorari*, followed in Dixon *v.* Cincinnati, 14 Ohio, 240 (1846); but the weight of authority is otherwise. See chapter on Eminent Domain, *ante*, sec. 611. Later *New York* cases are to the effect that upon a common-law *certiorari* "the duty of the court is not limited to the inquiry whether the lower tribunal had jurisdiction over the parties and the subject-matter; but it is the duty of the court, in addition thereto, to examine the evidence, and determine whether there was any competent proof of the facts necessary to authorize the adjudication made, and whether, in making it, any rule of law affecting the rights of the parties has been violated." *Per Grover*, J., People *v.* Smith, 45 N. Y. 772 (1871). See previous cases cited and reviewed by *Woodruff*, J., People *v.* Metrop. Pol. Bd., 39 N. Y. 506 (1868). Where assessors for a local improvement adopt the correct legal rule, — *i. e.*, that all property benefited must be assessed, — an error in determining what property is in fact benefited must be reviewed and corrected by *certiorari*, not by suit. Kennedy *v.* Troy, 77 N. Y. 493; Le Roy *v.* New York, 20 Johns. 430; People *v.* Brooklyn Bd. of Ass., 39 N. Y. 81; People *v.* Metrop. Pol. Bd., 39 N. Y. 506; People *v.* Hillhouse, 1 Lans. (N. Y.) 87; Western R. R. Co. *v.* Nolan, 48 N. Y. 513; Heywood *v.* Buffalo, 14 N. Y. 541; see *infra*, sec. 928, note. Defects in notices preceding orders of the city council for the improvement of streets can only be availed of by *certiorari* in *Massachusetts*; such orders cannot be impeached for this reason, in an action to recover money paid for betterments under protest. Foley *v.* Haverhill, 144 Mass. 352; Lowell *v.* Hadley, 8 Met. 180, 192; Taber *v.* New Bedford, 135 Mass. 162; Sisson *v.* New Bedford, 137 Mass. 255; Gilkey *v.* Watertown, 141 Mass. 317. Whether an assessment for a sewer is made in accordance with a statute, and whether the statute is constitutional, can only be raised on *certiorari*, and not upon trial of a petition for a revision of the assessment. Snow *v.* Fitchburg, 136 Mass. 179.

[1] State *v.* Newark, 25 N. J. L. 399 (1856); Swann *v.* Cumberland, 8 Gill (Md.), 150 (1849); Buckner, *In re*, 9 Ark. 73 (1848); Carroll *v.* Tuskaloosa, 12 Ala. 173; Milwaukee Iron Co. *v.* Schubel, 29 Wis. 444 (1872), where the authorities are very fully considered by *Cole*, J. See also, People *v.* Ogdensburg, 48 N. Y. 390 (1872), holding that the action of the assessors in putting upon and refusing to strike from the roll non-taxable property can be reviewed on *certiorari*. *Ante*, sec. 804, and note.

Certiorari lies at common law *to remove a tax assessment*, but as the allowance of the writ is discretionary, it is generally refused on grounds of public policy and convenience. *Per Beardsley*, J., Weaver *v.* Devendorf, 3 Denio (N. Y.), 117–119; 15 Wend. 198; 1 Hill (N. Y.), 195; 2 Hill, 9, 11; *Ib.* 14, 21. But it ought, we think, to be freely allowed whenever necessary to protect the citizen in his legal rights. Effect of not resorting to *certiorari*, on the right to an injunction against assessments for local improvements. Ottawa *v.* Chicago & R. I. R. R. Co., 25 Ill. 43 (1860); Ewing *v.* St. Louis, 5 Wall. 413; *ante*, sec. 550, note.

[2] Cunningham *v.* Squires, 2 West Va. 422 (1868). Further, as to power to review on *certiorari* the regularity of the proceedings of inferior tribunals in cases of *contested elections*. Gibbons *v.* Sheppard, 65 Pa. St. 20 (1870); s. c. Bright-

taxes,[1] in contested *election cases*,[2] and the like, will be examined and

reviewed, to ascertain whether they are legal and regular, and, if not so, they will be quashed.[1]

§ 927 (741). **Same subject.** — At common law *certiorari* only lies to inferior *courts* and officers exercising *judicial* powers; not only so, but the act to be reviewed must be *judicial* in its nature, and not merely ministerial.[2] But the doctrine that *certiorari* lies only

ly's Election Cases, 538; State *v.* Lamberton (review on *certiorari* refused), 37 Minn. 362; *ante*, chap. ix. on Municipal Elections, also secs. 440, 891. Certain constitutional provisions and concurrent charter remedies held not to take away the jurisdiction of the superior courts on *quo warranto* to determine the legal right to the office of mayor. People *v.* Londoner, Col., 22 Pac. Rep. 764 (1889). In *Michigan*, *certiorari* is held to be the proper mode of reviewing the *proceedings of a special statutory board* in apportioning property and moneys between a county and a new county which is created out of its territory. Alcona *v.* White, 54 Mich. 503.

[1] In the case of Wilson, *In re*, 32 Minn. 145, this section (sec. 926) was cited "as authority that courts will on *certiorari* examine the proceedings of municipal corporations, whether *legislative* or *judicial*," and *Mitchell*, J., in his opinion, says the author "did not intend to convey the idea that mere legislative or ministerial acts could thus be reviewed," because an examination of the cases cited shows that none support such a proposition, and because the illustrations in the last half of the section are all of *judicial acts*. The learned judge seems to have entirely overlooked the following section.

The doctrines of the text were approved and applied by the Supreme Court of Colorado in the case of the Board of Aldermen of Denver *v.* Darrow, 22 Pac. Rep. 784 (1889). The statute of that State provided that the writ of *certiorari* should be granted in all cases where inferior tribunals, boards, or officers exercising judicial functions exceed their jurisdiction, and there is no appeal, or, in the judgment of the court, other plain, speedy, and adequate remedy. Darrow was elected an alderman of the city of Denver, qualified, took his seat, and was chosen and had for some time acted as president of the board. The board, on the ground that he was ineligible to that place by reason of not having been for at least one year a taxpayer of the city, without charge, notice, or opportunity to be heard (although he was present), passed a resolution, against his protest, summarily removing him from his position as alderman, and he was forcibly compelled to vacate his seat. The charter of the city provided that the board of aldermen "shall be the sole judge of the qualifications, election, and returns of its own members." Darrow brought a proceeding by a *certiorari* to review the action of the board of aldermen in thus removing him. It was held, in a very able opinion, by *Richmond*, C.: 1st. That the writ of *certiorari* was applicable to the case, and not *quo warranto*. 2d. That the provision of the charter making the board the judge of the qualifications, election, and return of its members did not divest the superior courts of the power to review by *certiorari* the regularity of the proceedings of the board in removing Darrow, explaining on this point Darrow *v.* People, 8 Col. 414; s. c. 8 Pac. Rep. 661. 3d. That one who has been elected and inducted into office cannot be summarily removed by resolution, upon a charge of disqualification, without notice and an opportunity to be heard. 4th. That the controversy between Darrow and the board of aldermen was judicial in its nature, and that the board in its action was to be regarded as exercising judicial functions within the meaning of the statute in relation to the writ of *certiorari*.

[2] Bacon's Abr. *Certiorari*, B.; People, &c. *v.* New York, 2 Hill (N. Y.), 9, 11; *Ib.* 14, 21, (1841); People *v.* Park Comm'rs, 97 N. Y. 37. Street and assessment cases. People *v.* Covert, 1 Hill (N. Y.), 674; *Re*

to examine the validity of such ordinances and acts of a municipal corporation as are of a *judicial* character, and not such as are legislative or ministerial in their nature, is not adopted in New Jersey, and in that State this writ has long been used to test the validity of the acts and ordinances of such corporations, whatever their nature, whether legislative, ministerial, or judicial, and it is considered ordinarily to be the appropriate remedy; but equity will also, in proper cases, entertain jurisdiction.[1] And in other States the powers with which the municipal authorities are clothed, to be exercised whenever in their opinion the convenience or welfare of the inhabitants requires it, are considered to be *judicial*, and hence *certiorari* lies to remove proceedings thereunder to the proper court for examination; but if the local authorities have decided that the public convenience or welfare requires the exercise of the power, as, for example, the establishment or improvement of a street, the decision of such a question cannot, without statutory provision to that effect, be judicially revised on *certiorari*.[2] This is so for the reason that, aside from

Wilson, 32 Minn. 145; State *v.* St. Paul, 34 Minn. 250; Attorney-General *v.* Northampton, 143 Mass. 589, holding that this writ does not lie to quash proceedings of a city council in appointing a police officer in violation of a statute for the improvement of the civil service.

Thus a taxpayer may apply for *certiorari* to annul an order or resolution made in excess of the jurisdiction of the board when exercising judicial functions. In *California*, the county board has no power to contract for any county printing without ten days' public notice that such contract will be let to the lowest bidder. Maxwell *v.* Stanislaus Co. Sup., 53 Cal. 389. In Fonda *v.* Canal Appraisers, 1 Wend. (N. Y.) 288, a *certiorari* was granted where the damages of a party were appraised without notice, and without giving him an opportunity to be heard or to produce testimony.

[1] Camden Treas. *v.* Mulford, 26 N. J. L. 49 (1856); Carron *v.* Martin, *Ib.* 594 (1857); Morris Canal & B. Co. *v.* Jersey City, 12 N. J. Eq. 252; Holmes *v.* Jersey City, *Ib.* 299. Further, as to office of the writ. State *v.* Hudson, 32 N. J. L. 365; State *v.* Donahay, Col., 30 N. J. L. 404; Jersey City *v.* State, *Ib.* 521; State *v.* Jersey City W. Comm'rs, *Ib.* 247; *supra*, sec. 906, and note; Mowery *v.* Camden, 49 N. J. L. 106. The Supreme Court will not weigh the evidence. State *v.* Newark Pol. Comm'rs, 49 N. J. L. 170. What acts are judicial, and what ministerial, in their nature. Camden Treas. *v.* Mulford, *supra;* Iske *v.* Newton, 54 Iowa, 586; Board of Aldermen of Denver *v.* Darrow, *supra*. The writ is properly *directed* to the municipal corporation by name, since the possession of the record by its officer or agent is, in legal contemplation, its own possession. Davis *v.* Harrison, 43 N. J. L. 79; *ante*, secs. 870–874; *infra*, sec. 929, note.

[2] Dwight *v.* Springfield, 4 Gray (Mass.), 107 (1855); Parks *v.* Boston, 8 Pick. (Mass.) 218 (1829); Stone *v.* Boston, 2 Met. (Mass.) 220; Fay, Petitioner, 15 Pick. 243 (1834); Monterey *v.* Berkshire Co. Comm'rs, 7 Cush. (Mass.) 394 (1851); *ante*, sec. 94. In *Georgia*, *certiorari* was held to lie to a city council that accused, tried, and dismissed a city officer for alleged official neglect, the Constitution providing that the superior courts "shall have power to correct errors in inferior judicatories by a writ of *certiorari*," the council, in trying and dismissing their officer, being regarded as a judicatory. Macon *v.* Shaw, 16 Ga. 172 (1854). See Shaw *v.* Macon, 19 Ga. 468; Board of Aldermen of Denver *v.* Darrow, *supra*.

such a statute, questions of this character are not judicially reviewable,[1] and for the further reason that *certiorari*, unless otherwise provided by statute, only lies to correct *errors of law* in inferior jurisdictions. Where an appeal is allowed, it, in general, takes up the cause or proceeding for determination *de novo*, unless otherwise ordered by statute; but *certiorari* is not a substitute for an appeal, and is not designed to correct errors of fact.[2]

§ 928 (742). **What may be examined and reviewed.** — Although there is some contrariety of opinion as to just what the writ removes, and as to whether the evidence, if certified, can be considered at all, the more liberal and better view is that the revisory court may not only *inquire into the jurisdiction of the inferior tribunal, but into errors of law* occurring in the course of the proceedings and affecting the merits of the case, and may also examine the *evidence* embodied in the return, "not to determine whether the probabilities preponderate one way or the other, but simply to determine whether the evidence is such that it will justify the finding as a legitimate inference from the facts proved, whether that inference would or would not have been drawn by the superior tribunal."[3]

[1] *Ante*, secs. 94, 908.

[2] State *v.* Bill, 13 Ired. L. 373; State *v.* Stewart, 5 Strob. (S. C.) 29; State *v.* Swift, 1 Hill (S. C.), 360; State *v.* Cockrell, 2 Rich. (S. C.) 6; *post*, sec. 928.

[3] Jackson *v.* People, 9 Mich. 111 (1860), where the subject is fully and ably examined by Mr. Justice *Campbell*, and the propositions of the text fortified by the authorities cited. In *Massachusetts* it is held that the Superior Court, on *certiorari*, can only examine into the regularity and legality of the proceedings; that is, whether the inferior jurisdiction has pursued the powers granted, and conformed to the requirements of the law under which it professes to act. *Ante*, sec. 440, note; Parks *v.* Boston, 8 Pick. (Mass.) 218; Dwight *v.* Springfield, 4 Gray (Mass.), 107; Fay, Petitioner, 15 Pick. 243.

On a petition to quash the proceedings of the selectmen of a town, claiming to act under Statutes of 1873, chap. ccxiv., in making certain public improvements, and in assessing the expenses thereof on the estates benefited, it was held in Locke *v.* Lexington, 122 Mass. 290: 1. That a writ of *certiorari* lies only to correct the errors and restrain the excesses of jurisdiction of inferior courts, or officers acting judicially. Rex *v.* Lediard, Sayer, 6; Rex *v.* Lloyd, Cald. 309; Constables of Hipperholm, *In re*, 5 D. & L. 79, 81; Regina *v.* Hatfield Peverel, 14 Q. B. 298; Regina *v.* Salford Tp. Ov. 18 Q. B. 687; Parks *v.* Boston, 8 Pick. (Mass.) 218; Farmington River W. P. Co. *v.* Berkshire Co. Comm'rs, 112 Mass. 206. 2. The selectmen of a town are not a court, and, independently of the Statutes of 1873, chap. ccxiv., exercise no judicial functions which could be reviewed by writ of *certiorari*. Young *v.* Yarmouth, 9 Gray, 386, 390; Robbins *v.* Lexington, 8 Cush. (Mass.) 292: Hooper *v.* Bridgewater, 102 Mass. 512. 3. Sec. 9 of said act, providing that "this act shall take effect at a legal meeting called for the purpose," the meeting at which said statute was accepted by the town, having been held on the second day after its passage, under a warrant served on the inhabitants some days before its passage, was not legally called; the statute never took effect, the selectmen never acquired any judicial powers, and the petitioners have an appropriate remedy by action. Ewing *v.* St. Louis, 5 Wall. 413, 418; People *v.* Court, 1 Hill (N. Y.),

§ 929 (743). **When Certiorari does not lie.** — From inferior jurisdictions an appeal or writ of error exists only as it is provided by law, but where a remedy by writ of error or by appeal is given, a *common-law certiorari will not, without legislative aid*, be sustained.[1] But if an appeal where it exists is improperly denied, or if the party is deprived of it by fraud or accident, he may have his whole case reviewed by *certiorari*, both as to matters of law and of fact; and where the right of appeal is not allowed or does not exist, the aggrieved party is still entitled to have his case revised by a superior tribunal.[2]

Remedy by Prohibition.

§ 930 (744). **When proper Remedy.** — In some of the States the *writ of prohibition* is resorted to to prevent municipal corporations

674; Daws, *In re*, 8 A. & E. 936; s. c. 1 P. & D. 146. In *Missouri*, *certiorari* brings up for review only the facts appearing on the face of the record. State *v.* Kansas City, 89 Mo. 34.

In *New York* it was held that the supervisory court is confined, if its powers are not enlarged by the statute, to an examination "to see whether the limited (or subordinate) jurisdictions have exceeded their bounds," kept within the limits of the jurisdiction. The case cannot be retried upon the evidence or its merits. The record alone, or that which stands for it, is regarded. People *v.* New York, 2 Hill (N. Y.), 9 (1841); Mount Morris Square, *In re*, 2 Hill (N. Y.), 14; 1 Hill (N. Y.), 674; Stone *v.* New York, 25 Wend. 157, 167, and authorities cited by *Paige*, senator; People *v.* Rochester, 21 Barb. 656; s. p. 2 Hill (N. Y.), 27, and cases there cited; Rex *v.* Morely, 2 Burr. 1040, 1042; 25 Wend. 168, and authorities there cited; Albany, *In re*, 23 Wend. (N. Y.) 277, and cases cited and commented on by *Cowen*, J., 6 Wend. (N. Y.) 565. Construing code as to what may be determined upon the return to a writ of *certiorari*. People *v.* Comm'rs, &c., 106 N. Y. 64 (1887); People *v.* Fire Comm'rs, 106 N. Y. 257 (1887); People *v.* Fire Comm'rs, 100 N. Y. 82. In *Wisconsin*. Milw. Iron Co. *v.* Schubel. 29 Wis. 444 (1872); Driscoll *v.* Smith, 59 Wis. 38; Oshkosh *v.* State, 59 Wis. 425.

[1] Duggen *v.* McGruder, Walk. (Miss.) 112; Rundle *v.* Baltimore, 28 Md. 356 (1867); Beasley *v.* Beckley, 28 West Va. 81; Wilson *v.* Burks, 71 Ga. 862; *Re* Pearce, 44 Ark. 509; Galloway *v.* Corbitt, 52 Mich. 460; Storm *v.* Odell, 2 Wend. (N. Y.) 287; State *v.* Wakely, 2 Nott & McC. (S. C.) 410; Mount Morris Square, *In re*, 2 Hill (N. Y.), 14, 27, and the many authorities cited by *Cowen*, J.; and it was there held that the right of opposing in the Supreme Court the report of the commissioners of estimate and assessment in proceedings to open and widen streets was in the nature of a remedy by appeal, and therefore *certiorari* would not lie to review their proceedings. See, also, People *v.* Covert, 1 Hill (N. Y.), 674; *ante*, secs. 200, 440, 611. So *delay* may defeat right to a *certiorari*. Elmendorf *v.* New York, 25 Wend. 693, adopting analogy of statute relative to writs of error. Reynolds *v.* Los Angeles Co. Sup'r Court, 64 Cal. 372; Williams *v.* Sacramento Co. Sup., 65 Cal. 160. *Supra*, secs. 804, note, 924, note. *Writ, how directed.* Bogart *v.* New York, 7 Cow. (N. Y.) 158; Davis *v.* Harrison, *supra*, sec. 927, note. *Practice under writ.* Macon *v.* Shaw, 14 Ga. 162.

[2] State *v.* Bill, 13 Ired. L. 373 (1852). As to right and manner of appeals by municipal corporations, see, generally, chapter on Municipal Courts, *ante*, secs. 432, 439, 440; also, Pottsville Bor. *v.* Curry, 32 Pa. St. 443; Robinson *v.* Jefferson County, 6 Watts & S. 16; Monaghan *v.* Philadelphia, 28 Pa. St. 207. *Supersedeas* necessary to stay proceedings to open street. Dusseau *v.* Municipality, 6 La. An. 575.

from transcending the bounds of their jurisdiction or exercising powers not conferred.[1] A manifest difference between the writ of prohibition and the writ of injunction is this: the former operates upon the *court*, and the judge or officer who disregards it may be punished; the latter operates upon the *party* alone, but does not interfere with the court itself.[2] Where prohibition is a proper remedy, the writ will not be granted unless the party is in danger of being injured by a suit *actually depending*; it will not be granted because such a suit is threatened.[3]

[1] Mayo *v.* James, 12 Gratt. 17; Warwick *v.* Mayo, 15 Gratt. 528; Clayton *v.* Heidelberg, 9 Sm. & M. (17 Miss.) 623. In *Arkansas* the writ does not lie where the inferior court has jurisdiction of the subject-matter, on a suggestion of erroneous proceedings. Blackburn, *In re*, 5 Ark. 21. So in *Georgia*. Turner *v.* Forsyth, 3 South East. Rep. 649 (1887). So in *Minnesota*. State *v.* Cory, 35 Minn. 178 (1888). The reports of judicial decisions in *South Carolina* show that it is the constant practice in that State to restrain by *prohibition*, not only inferior *judicial* tribunals, but also municipal corporations and corporations *sub modo*, from the exercise of unwarranted powers, or the imposition of penalties beyond their jurisdiction. State *v.* Christ Church Par. R. Comm'rs, 1 Mill Const. (S. C.) 55 (1817), where the subject is fully examined; McKee *v.* Anderson Council, Rice L. (S. C.) 24 (1838); Charleston Council *v.* Pinckney, 1 Tr. Const. (S. C.) 42 (1812); s. c. 3 Brev. 217; Zylstra *v.* Charleston, 1 Bay (S. C.), 382. If an appeal is given, that course is the proper one for the aggrieved party to pursue if he wishes a trial *de novo*, and, in general, he is entitled to a *certiorari*, if he has no other remedy, in order to review errors of law committed by the inferior jurisdiction. State *v.* Wakely, 2 Nott & McC. (S. C.) 410 (1820); State *v.* Cockrell, 2 Rich L. 6, *per Evans*, J.; McDonald *v.* Elfe, 1 Nott & McC. (S. C.) 501.

A *writ of prohibition* will not lie to prevent the execution of a contract for a sidewalk. The remedy is by injunction; a writ of prohibition only lies to prevent making the contract. Bluffton *v.* Silver, 63 Ind. 262.

[2] Mealing *v.* Augusta, Dud. (Ga.) 221 (1833). Where a city council is not a *court*, but is exercising the powers given to it as the governing body of the corporation, it is not such a tribunal as can, in the opinion of the Superior Court of *Georgia*, be reached by prohibition. Mealing *v.* Augusta, Dud. (Ga.) 221.

[3] Mealing *v.* Augusta, Dud. (Ga.) 221 (1833). Text approved, Bluffton *v.* Silver, 63 Ind. 262. In Smith *v.* Whitney, 116 U. S. 167 (1885), the nature of the writ of prohibition was very fully considered. Mr. Justice *Gray*, referring to the authorities, says: "Where the inferior court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as matter of right; and a refusal to grant it, where all the proceedings appear of record, may be reviewed on error. This is the clear result of the modern English decisions, in which the law concerning writs of prohibition has been more fully discussed and explained than in the older authorities." But in that case it was held that the writ of prohibition did not lie to the action of the Secretary of the Navy convening a court-martial, nor to a court-martial to correct mistakes in the decision of questions of law and fact within its jurisdiction.

Respecting the *writ of prohibition and the practice under it*. Mayo *v.* James, 12 Gratt. 17; Ellyson, *In re*, 20 Gratt. 10 (1870), where a writ of prohibition is distinguished from a writ of error; Culpeper Co. Sup. *v.* Gorrell, 20 Gratt. 484; 3 Black. Com. 112; 8 Bac. Abr. 206, title, *Prohibition;* 7 Com. Dig. 135, same title; Home *v.* Earl Camden, 2 H. Bl. 533; Gould *v.* Gapper, 5 East, 345; 1 Saund. 136, and notes; Williams, *In re*, 4 Ark. 537, and note, giving *forms* used in the proceeding; Arnold *v.* Shields, 5 Dana (Ky.), 18; Clayton *v.* Heidelberg, 9 Sm. & M. (17 Miss.) 623 (1848), where the office of the writ is discussed. Under the Constitution of *South Carolina* the Supreme Court of that State has no jurisdiction of an original application for a writ of prohibition to prevent a municipal corporation from issuing licenses. State *v.* Columbia, 16 S. C. 412.

Remedy by Indictment.

§ 931 (745). **In England.** — It is a clear principle of the *English law* that *all corporations, municipal as well as private*, which owe duties to the public, are liable to indictment for malfeasance as well as nonfeasance in respect to such duties. The duty, however, must be one which is devolved on the corporation by prescription or by statute; it must be a duty or obligation of a public nature, and one, it is supposed by the author, mandatory in its nature, and not discretionary. This method of redress on the part of the public against municipal corporations is most frequently resorted to for their failure to maintain and repair bridges or highways, in compliance with a prescriptive duty or statutory requirement; but the principle is general in its character within the limits above stated.[1]

§ 932 (746). **In this Country.** — In *this country* the same principles have been recognized, and corporations are generally regarded as indictable for misfeasance, as well as nonfeasance, respecting duties of a public nature plainly enjoined by the legislature for the benefit of the public. The modern view is to assimilate corporations, as to their duties and responsibilities, so far as possible, to individuals. It is admitted that they cannot be indicted for felonies, but it is clear that they may be indicted for acts done to the injury and annoyance of the public, and which amount to a nuisance.[2]

[1] Lyme Regis *v.* Henley, 3 B. & Ad. 77; s. c. 2 Clark & Fin. 331; Call. Sewers, 116, 117; Regina *v.* Gt. N. of E. Ry. Co., 9 Q. B. 315; Rex *v.* Stratford-upon-Avon Bor., 14 East, 348; Grant Corp. 283; Reg. *v.* Birmingham & Gl. Ry. Co., 9 Car. & P. 469; Rex *v.* Oxfordshire, 16 East, 223; 1 Kyd, 225, 226; 6 Maule & S. 365, note; *ante*, sec. 237, note; sec. 642, and notes. See Regina *v.* Nott, 4 Q. B. 773; Add. on Torts (Am. ed.), 274, 275, 889. Other mode of enforcing *such* duties, see chapter on Mandamus, *ante*.

Appearance is enforced by distress. Regina *v.* Birmingham & Gl. Ry. Co., 3 Q. B. 223. And, upon conviction, the corporation may be fined. *Ib.* Upon an indictment against a town for not making or repairing a highway, the town cannot object that the record of the laying out of the road shows that one of *the landowners*, over whose land the road was laid, *was not notified*. Such an objection should be made before the road was finally established. State *v.* Raymond, 27 N. H. 388 (1853). *Notice, ante*, sec. 606.

[2] Commonwealth *v.* New Bedford Br. Prop., 2 Gray (Mass.), 339, and cases cited; Commonwealth *v.* Vt. & Mass. R. R. Corp. 4 Gray, 22 (1855); Sussex Co. Freeh. *v.* Strader, 18 N. J. L. 108. Approved: Cooley *v.* Essex Co. Freeh., 27 N. J. L. 415; State *v.* Morris & E. R. R. Co., 23 N. J. L. 360; State *v.* Hudson County, 30 N. J. L. 137 (1862), cited *infra;* State *v.* Vt. Cent. R. R. Co., 27 Vt. 103; Phillips *v.* Commonwealth, 44 Pa. St. 197;

§ 933 (747). **Neglect of Duty in Respect of repair of Streets, &c.** — In Tennessee a municipal corporation is considered liable, upon the general principles of the common law, to indictment for *neglecting its duty to keep its streets in reasonable repair*, and it is no defence that the street is little used and is in a remote part of the town.[1] And the mayor and aldermen may also be personally indicted for like neglect of duty.[2] So in the same State it is held, upon the general principles of the law, that if a municipal corporation has power by its charter to pass such ordinances as may be necessary "*to preserve the health* of the town, and to prevent and remove nuisances," it is its positive duty to exercise this power, and that for a *neglect of this public duty* it or its officers are liable to an indictment. An indictment against the mayor and aldermen was accordingly sustained for

Saukville *v.* State, 69 Wis. 178; McCrowell *v.* Bristol, 5 Lea (Tenn.), 685; State *v.* Portland, 74 Me. 268 (an indictment for so constructing a sewer that the outfall created a public nuisance sustained); Redfield on Railways, chap. xxix.; Morawetz Corp. (2d ed.), secs. 732, 733. It is held in *Massachusetts* that a railroad constructed over a public highway in such a manner as to obstruct the public travel is liable to indictment, this being a proper mode of redress for the public. Commonwealth *v.* Nashua & L. R. R. Corp., 2 Gray (Mass), 54 (1854); Cambridge *v.* Charlestown R. R. Co., 7 Met. (Mass.) 70. See Louisville & N. R. R. Co. *v.* State, 3 Head (Tenn.), 523.

Twenty years' acquiescence, on the part of a town, in the doings of their selectmen in the laying out of a highway and the making of repairs during that period, estops the town when indicted from denying that the road was legally laid out. State *v.* Boscawen, 32 N. H. 331 (1855). See *ante*, chapter on Dedication, secs. 637, 642.

[1] Chattanooga *v.* State, 5 Sneed, 578 (1858); State *v.* Barksdale, 5 Humph. 154; State *v.* Murfreesboro, 11 Humph. 217, where form of indictment is given; Louisville & N. R. R. Co. *v.* State, 3 Head, 523; *post*, chap. xxiii., as to repairs of streets.

[2] Hill *v.* State, 4 Sneed, 443 (1857).

And in *Pennsylvania* an indictment lies as at common law against public officers for neglect of public duties; and the principle was extended to a contractor for the repair of roads. Phillips *v.* Commonwealth, 44 Pa. St. 197.

Authorities relating to indictments against *public officers*, see chapter on Corporate Officers, *ante*, chap. ix. sec. 237, note. The Supreme Court of *Illinois* has decided that an alderman was indictable as at common law for a proposal made by himself to receive a bribe to influence his official action. Walsh *v.* People, 65 Ill. 58 (1873); s. c. 5 Chicago Legal News, 541.

Requisites of indictment against official or corporate body for non-repair of streets. State *v.* Halifax Comm'rs, 4 Dev. L. (N. C.) 345; *ante*, chap. ix. sec. 237, note. Facts which will sustain an indictment. Davis *v.* Bangor, 42 Me. 522; Howard *v.* Bridgewater, 16 Pick. (Mass.) 189.

An indictment under statute of *Alabama* which charges that defendants, "aldermen and corporate officers of the town of G., failed and refused, as officers and supervisors of the public streets and highways in said town, to perform their duties as said corporate officers of all the public streets," is fatally defective on demurrer; 1st, because it does not state that the said town of G. is incorporated under the laws of the State; 2d, because it does not state that the inhabitants of said town are exempted from working on public roads; 3d, because it does not state that any of the streets of said town were out of repair, and so remained for more than ten days at any one time, without reasonable excuse. Nowlin *v.* State, 49 Ala. 41 (1873).

permitting a slaughter-house to be kept upon the private property of a citizen of the town, to the annoyance of the inhabitants and the endangering of the public health, the court remarking that "an indictment against the corporation is the proper mode of redress by the public for a grievance of this nature."[1] So, also, in Kentucky a municipal corporation is indictable as at common law for *suffering its streets* to become and remain out of repair.[2] In Vermont a town is liable to an indictment as at common law for not *erecting a bridge* pursuant to an order from a competent tribunal.[3] In Maine, towns charged with the maintenance of *public highways* are by *statute* indictable for failing to discharge their duty in this respect; and the general principle is asserted in such cases, that where the town is civilly liable in damages it may be indicted.[4]

§ 934 (748). **Repair of Bridges; Omission of Duty.** — On the ground that the legislation, both colonial and State, had imposed the

[1] State *v.* Shelbyville, 4 Sneed (Tenn.), 176 (1856); Hill *v.* State, *Ib.* 443; McCrowell *v.* Bristol, 5 Lea (Tenn.), 685. But in *Vermont* it has been held that a town is not indictable for not removing nuisances; as, for example, a stagnant and noxious pool of water beside a street, not created by it or its agents. State *v.* Burlington, 36 Vt. 521 (1864). Whether a municipal corporation is liable to indictment for keeping and maintaining a "*caloboose*," if it is so situated or managed as to become a nuisance, *quære*. Paris *v.* People, 27 Ill. 74.

[2] Commonwealth *v.* Hopkinsville, 7 B. Mon. (Ky.) 38 (1846); Hamar *v.* Covington, 3 Met. (Ky.) 494 (1861), *per Peters*, J.

[3] State *v.* Whittingham, 7 Vt. 390 (1835).

[4] *Per Weston*, C. J., State *v.* Gt. Works Milling & M. Co., 20 Me. 41 (1841); Davis *v.* Bangor, 42 Me. 522 (1856); State *v.* Gorham, 37 Me. 451 (1854), where a town was held indictable for neglecting to keep in repairs a bridge and abutments erected by a *railroad company* over a railroad where it crosses the public highway. The *primary* liability under the statute, as respects the public, was considered as resting upon the town rather than upon the railroad company; the latter, however, would be liable to the town, which could enforce such liability by *mandamus*, to compel the railroad companies to keep such bridges as the law requires them to maintain in repair; and see State *v.* Portland, 74 Me. 268, noted *ante*, sec. 932, note. See Cambridge *v.* Charlestown R. R. Co., 7 Met. (Mass.) 70; Reg. *v.* Birmingham & Gl. Ry. Co., 9 Car. & P. 469. *Mandamus* lies to compel a railroad company to restore the highway. People *v.* Dutchess & C. R. R. Co., 58 N. Y. 152 (1874); Indianapolis & Cinc. R. R. Co. *v.* Lawrenceburg, 37 Ind. 489. *Remedy by indictment.* Rex *v.* Oxfordshire, 16 East, 223; Pittsburg, V. & C. Ry. Co. *v.* Commonwealth, 101 Pa. St. 192; Louisville & N. R. R. Co. *v.* State, 3 Head (Tenn.), 523. Or, if money be expended by the town in necessary repairs, by *an action on the case*. Further, as to liability of towns for defects in railroad bridges erected on a public highway, see Sawyer *v.* Northfield, 7 Cush. (Mass.) 490, where under the statute of *Massachusetts*, a different conclusion was reached. Under the statute of the latter State, the liability of the town is qualified, and does not exist where the turnpike or bridge or railroad company is bound by law or charter to keep the roads and bridges built by them in repair, in which case they, and not the towns, are liable for neglect of this duty. See, further, *ante*, sec. 707, and note; *post*, chap. xxiii. sec. 1037; 2 Thomps. Neg. 805.

duty of *repairing bridges* on the township, and had never recognized the common-law principle of holding the inhabitants of counties responsible for repairs, the Supreme Court of New Jersey holds that the *inhabitants of counties* in that State are not indictable for not repairing bridges over rivers; nor at common law were they so indictable for not repairing bridges over canals. The court enters a *caveat* against "acquiescing in the *dicta* in the books," asserting a doctrine which would make the inhabitants of townships or the board of freeholders indictable for the non-repair of bridges.[1] Under a statute investing the county commissioners "with a general superintendence over the public roads," prescribing their duties and the manner of raising means, and also providing for the indictment of the commissioners for "palpable omission of duty," no prosecution can, in the opinion of the Supreme Court of Illinois, be sustained, unless there was a palpable omission of a duty imperatively required by law in a matter involving no discretion, or a wilful and corrupt as well as palpable neglect of a discretionary duty; mere error of judgment or departure from sound policy not being sufficient where the defendants are vested with a discretionary power.[2]

§ 934 *a*. **Concluding Observations.** — Except the subject of ordinary common-law actions to enforce by way of damages the liabilities of municipal corporations on contracts and for torts, which will be treated in our next chapter, we have in this, and in the two preceding chapters relating to *mandamus* and *quo warranto*, completed our survey of the circle of remedies in our jurisprudence applicable to such corporations. While taken as a whole it cannot be said that either the public or individuals aggrieved are left without substantial means to keep municipalities and their officers within their chartered limits and powers, and to compel obedience to law, the result of the examination strongly impresses our mind with the conviction that the remedies to effectuate these ends are unnecessarily artificial, intricate, and uncertain. It is Utopian to suppose that in our advanced and complex civilization legal rights are always simple,[3] or

[1] State *v.* Hudson County, 30 N. J. L., 137 (1862). The opinion in this case, by *Vredenburgh*, J., was evidently prepared with much care, and is highly interesting. *Ante*, sec. 708.

[2] Eyman *v.* People, 6 Ill. 8 (neglecting to repair bridge), and see State *v.* Portland, 74 Me. 268. Further, as to *Bridges*, see chap. xviii. on Streets, *ante*, sec. 728; chap. xx. on Mandamus, sec. 836; *post*, chap. xxiii.

[3] "The rights of men are incapable of [exhaustive] definition, but are not impossible to be discerned." — *Burke, French Revolution.* While this profound political thinker had especial reference to the natural or civil rights of men, his observation equally applies to their legal rights.

that by legislative provision they can all be clearly defined, catalogued, and formulated, in advance; but there is no inherent reason why remedies for the enforcement of rights and the redress of wrongs should not in all cases be simple and easily understood. Owing to the accidental and irregular mode in which our law has been developed,[1] we have in almost every case to consider: (1) Whether any of the usual common-law actions is adapted to the case in hand, and adequate to the ends of justice. (2) Whether there is any special statutory remedy; and if so, whether it is exclusive or cumulative. (3) Whether any of the extraordinary remedies, as distinguished from the ordinary remedies of the common law, and also as distinguished from equitable remedies, is applicable to the case, and adequate. The boundary between these extraordinary remedies *inter sese*, and between them and the ordinary remedies at law, is at many places confused or obscure. And when we reach the grave question whether there is in the particular instance a remedy in equity, we are driven to ascertain the general boundary lines of the province of remedial equity, as distinguished, not only from the ordinary, but also as distinguished from the extraordinary remedies of the common law, — an inquiry which, while always important in our jurisprudence as it stands, is oftentimes one of exceeding difficulty and nicety. It is obvious that by judicious legislation remedial procedure could be greatly simplified and improved. It is satisfactory to observe the marked tendency within the last fifty years both of legislatures and courts to disembarrass legal proceedings from needless refinements and technicalities; but there are obstacles in the way of a harmonious and complete system of remedial procedure which can only be removed and wants which can only be supplied by legislative action.

[1] "Our system of remedial law resembles an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls are magnificent and venerable, but useless, and therefore neglected. The inferior apartments, now accommodated to daily use, are cheerful and commodious, though their approaches may be winding and difficult." 3 Black. Com. 268. This is a true picture; it is as exact as it is elegant, and none but a master could have produced it. May we be permitted to add that in making the reparations we would not destroy, plow under and build anew, but would make the approaches in the existing structure, few and plain, instead of leaving them numerous, winding, and difficult.