CHAPTER IX.

OF THE REMEDY BY QUO WARRANTO.

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§ 476. **In general.**—As has been frequently seen in earlier portions of this work, the remedy usually adopted for the purpose of trying the title to public office is that ordinarily spoken of as *quo warranto*. In some of the States special remedies have been provided for the purpose, but in the majority of them the proceeding by *quo warranto* is still retained, and seems to deserve separate consideration.

§ 477. **Nature of the Remedy.**—The ancient writ of *quo warranto* was a high prerogative writ, in the nature of a writ of right for the king, against one who usurped or claimed any office, franchise or liberty of the crown, to inquire by what authority he supported his claim, in order to determine the right.[1]

In modern times in England, and in the United States, the ancient writ has fallen entirely into disuse, and is superseded by

[1] High Ex. Leg. Rem. § 592.

the information in the nature of a *quo warranto*, which is a proceeding by information in the proper court to determine by what authority, *quo warranto*, he assumes to hold and exercise the office in question. The use of this remedy, and the practice and procedure in seeking and applying it, have been regulated by statute in many of the States and in some superseded altogether, but where still in use, its main features are still the same.[1]

§ 478. **In what Cases applied.**—The proceeding by *quo warranto* is the proper and appropriate remedy for trying and determining the title to a public office, and of ascertaining who is entitled to hold it; of obtaining the possession of an office to which one has been legally elected and has become duly qualified to hold, and also of removing an incumbent who has usurped it, or who claims it by an invalid election, or who illegally continues to hold it after the expiration of his term.[2] Both of these remedies may be sought by the same information.[3]

Quo warranto is also an appropriate remedy for testing the validity of a statute under which the respondent's office was created.[4]

For the purpose of ousting an actual incumbent and of

[1] Superseded by other remedies in New York. Form but not the substance changed in Dakota. Territory *v.* Hauxhurst, 3 Dak. 205; Lies in Kansas, notwithstanding statute. Tarbox *v.* Sughrue, 36 Kans. 225.

[2] Griebel *v.* State, 111 Ind. 369, 12 N. East. Rep. 700; Williams *v.* State, 69 Tex. 368, 6 S. W. Rep. 845; State *v.* Owens, 63 Tex. 261; Owens *v.* State, 64 Tex. 500; State *v.* Meehan, 45 N. J. L. 189; Territory *v.* Ashenfelter, — N. M. —, 12 Pac. Rep. 879; Davidson *v.* State, 20 Fla. 784; Osgood *v.* Jones, 60 N. H. 543; French *v.* Cowan, 79 Me. 426; Tarbox *v.* Sughrue, 36 Kans. 225; Neeland *v.* State, 39 Kans. 154; State *v.* Commissioners, 39 Kans. 85, 19 Pac. Rep. 2; Collins *v.* Huff, 63 Ga. 207; Hardin *v.* Colquitt, 63 Ga. 589; People *v.* Waite, 70 Ill. 25; People *v.* Moore, 73 Ill. 132; People *v.* Callaghan, 83 Ill. 128; Stone *v.* Wetmore, 44 Ga. 495; People *v.* Sweeting, 2 Johns. (N. Y.) 184; State *v.* Schnierle, 5 Rich. (S. C.) 299; State *v.* Brown, 5 R. I. 1; Territory *v.* Hauxhurst, 3 Dak. 205; Hammer *v.* State, 44 N. J. L. 667; State *v* Stein, 13 Neb. 529; Gass *v.* State, 34 Ind. 425; Farrington *v.* Turner, 53 Mich. 72, 51 Am. R. p. 88.

[3] Griebel *v.* State, 111 Ind. 369, 12 N. East. Rep. 700.

[4] People *v.* Riordan, — Mich. —, 41 N. W. Rep. 482; People *v.* Maynard, 15 Mich. 463; Attorney-General *v.* Holihan, 29 Mich. 116; Attorney-General *v.* Amos, 60 Mich. 372.

admitting another to the office, *quo warranto* is, as has been seen,[1] the remedy and not mandamus.[2]

[1] *Ante*, §§ 216-218.

[2] Frey *v.* Michie, 68 Mich. 323, 36 N. W. Rep. —, 12 West. Rep. 586.

French *v.* Cowan, 79 Me. 426. In this case FOSTER, J., says:

"The office to which the petitioner seeks to be restored is actually filled by another, claiming under a legal appointment, admitted and sworn and exercising the functions of the office under color of right. In such case, the appropriate remedy of the petitioner in the first instance, if entitled to any, is by *quo warranto*, and not by *mandamus* alone. In this case, the petitioner is virtually attempting to oust an actual incumbent, and to place himself in an office, the title to which is in controversy, and which cannot be tried in a proceeding of this kind. The general and well nigh universal rule is that *mandamus* is not an appropriate remedy to try the title to an office as against one actually in possession under color of law. The decided weight of authority, both in the English and American courts, is in support of this doctrine.

In Dane's Abridgement the rule is thus stated: 'But if the office be already full by the possession of an officer *de facto*, no writ will be granted to proceed to a new election, until the person in possession has been ousted on proceedings in *quo warranto*.'

Judge Dillon, in his work on municipal corporations, after stating the English rule as above given, and that the same is generally recognized to be the law in this country, says: 'We have before seen that it is the doctrine of the English law, quite generally adopted in this country, that where a person is in the actual possession of an office under an election or a commission, and is thus exercising its duties under color of right, that the validity of his election or commission cannot, in general, be tried or tested on a *mandamus* to admit another, but only by an information in the nature of *quo warranto*.' § § 674, 678, 679, 680, 716.

The same doctrine is more emphatically laid down in High on Ex. Leg. Rem. § 49, and he asserts that the rule is established by an overwhelming current of authority that *mandamus* will not lie to compel the admission of another claimant nor to determine the disputed question of title to an office, where it is already filled by an actual incumbent who is exercising the functions of the office *de facto* and under color of right. In such cases, the party complaining and desirous of an adjudication upon his alleged title and right of possession, must assert his rights by the only proper, efficacious and speedy remedy, and that is an information in the nature of a *quo warranto*.

A careful examination of the decisions both of the English and American courts will not fail to convince the most doubting mind that the general current of authority runs in the same direction, and that the exceptions to the rule are rare and not well founded. A few of the very many authorities bearing directly upon this rule are given,—enough when examined to authenticate the assertion that the rule is too well settled to be denied. King *v.* The Mayor of Winchester, 7 A. & E. (34 E. C. L. 81); The Queen *v.* The Mayor of Derby, 7 A. & E. (34 E. C. L. 135);

So a bill in equity will not lie at the suit of a private individual to restrain the exercise of official functions, but resort must be had to the remedy by *quo warranto*.[1]

King *v.* The Mayor of Oxford, 6 A. & E. 348 (33 E. C. L. 89); Frost *v.* The Mayor of Chester, 5 E. & B. 538 (85 E. C. L. 536). COLERIDGE, J.: 'A mandamus goes only on the supposition that there is no one in office, for the purpose of restoring a party to office or to cause an election to be held.' The King *v.* The Mayor of Colchester, 2 T. R. 259; The Queen *v.* Phippen, 7 A. & E. 966 (34 E. C. L. 263); People *v.* New York, 3 Johns. Cases 79; in this case the court held: 'Where the office is already filled by a person who has been admitted and sworn, and is in by color of right, a mandamus is never issued to admit another person, and it is there laid down that the proper remedy, in the first instance, is by information in the nature of a *quo warranto* by which the rights of the parties may be tried. People *v.* Stevens, 5 Hill (N. Y.) 629; People *v.* Lane, 55 N. Y. 219; *In re* Gardner, 68 N. Y. 467; Dunne *v.* McDonald, 41 Conn. 517; Wood *v.* Fitzgerald, 3 Oregon 568; Underwood *v.* Wylie, 5 Ark. 248; Bonner *v.* The State, 7 Ga. 473; People *v.* Detroit, 18 Mich. 338; Brown *v.* Turner, 70 N. C. 93; Denver *v.* Hobart, 10 Nev. 28; Meredith *v.* Supervisors, 50 Cal. 433. 'Mandamus will not be issued to admit a person to an office while another is in under color of right,' State *v.* Auditors, 36 Mo. 70; 'Mandamus will not lie to turn out one officer and to admit another in his place;' People *v.* Matteson, 17 Ill. 167; People *v.* Head, 25 Ill. 325; Hill *v.* Goodwin, 56 N. H. 441; *Ex parte* Harris (Alabama) 14 Am. Law Reg. (N. S.) 646; McGee *v.* State, 1 West. Reporter, 467 (Indiana); Ellison *v.* Raleigh, 89 N. C. 125. 'By *quo warranto* the intruder is ejected. By mandamus the legal officer is put in his place.' Prince *v.* Skillin, 71 Maine, 366.

That there have been exceptions to the rule is true. But upon what principle the exceptions have been founded, where there has been an actual incumbent, exercising the functions of the office, and being in under color of right, the decisions themselves fail to afford any satisfactory answer. In Maryland and Virginia, the courts have held that in such cases mandamus would lie. Thus in Dew *v.* The Judges of the Sweet Springs Dist. Court, 3 Hen. & Munf. 1, it was held that mandamus was the best remedy. So in Harwood *v.* Marshall, 9 Md. 83, the court of appeals of Maryland, came to the conclusion that resort to *quo warranto* as preliminary to mandamus was not necessary on the grounds of delay growing out of the use of the process, citing in support of its decision the case of Strong, Pet. 20 Pick. 484, a case more generally referred to as an exception to the rule than any other authority. But an examination of that case shows the fact that it was mandamus to the board of examiners to issue a certificate of apparent election to the petitioner, although, as the court there say, he might then be

[1] Osgood *v.* Jones, 60 N. H. 513, Equity not the proper form to try title to office: Hinckley *v.* Breen, 55 Conn. 119.

Quo warranto will also lie for the purpose of ousting an incumbent whose title to the office has been forfeited by misconduct or other cause.[1] And in such a case it is not necessary that the question of forfeiture should ever before have been presented to any court for judicial determination, but the court, having jurisdiction of the *quo warranto* proceeding, may determine the question of forfeiture for itself.[2] The question must, however, be judicially determined before he can be ousted. "And if the alleged ground for ousting the officer," says VALENTINE, J., "is that he has forfeited his office by reason of certain

obliged to resort to *quo warranto* to test the title to the office. A distinction is there made between the cases where applications had been made to be admitted to an office by proceedings on mandamus, and the case there decided, where the petitioner only sought for a *certificate* of his election, like the case of Marbury *v.* Madison, 1 Cranch 168-9, and The King *v.* The Mayor of Oxford, 6 A. & E. 349 (33 E. C. L. 89), where it was said that the certificate was only one step toward the completion of the title. The court also in Strong's Case admitted that the two processes might be necessary to enable the petitioner to get possession of the office,—the one establish the legality of his election, the other to set aside that of the incumbent, and that although they were independent of each other, they might have been applied for at the same time and proceeded *pari passu*. The court *arguendo* claimed that there are authorities in support of the doctrine that mandamus is the appropriate remedy where there is an actual incumbent acting *de facto*, but the decision of the court is not based upon that ground, and is not authority to the extent claimed in Conklin *v.* Aldrich, 98 Mass. 558, where it is referred to. The general tenor of the decisions from Massachusetts recognize and adopt the rule rather than the exception to it. Attorney-General *v.* Simonds, 111 Mass. 256. It is a fundamental principle that mandamus can be used only to compel the respondent to perform some duty which he owes to the petitioner, and can be maintained only on the ground that the petitioner has a present, clear, legal right to the thing claimed, and that there is a corresponding duty on the part of the respondent to render it to him. If therefore, as in the case at bar, the two persons are claiming the title to office adversely to each other, the respondent being in possession and exercising the duties pertaining to that office *de facto* under color of right, mandamus will not lie to compel the admission of the petitioner, or to determine the disputed question of title."

[1] Commonwealth *v.* Walter, 83 Penn. St. 105, 24 Am. Rep. 154; State *v.* Collier, 72 Mo. 13, 37 Am. Rep. 417; State *v.* Wilson, 30 Kans. 661; Dullam *v.* Willson, 53 Mich. 392, 51 Am. Rep. 128.

[2] Commonwealth *v.* Walter, 83 Penn. St. 105, 24 Am. Rep. 154; State *v.* Wilson, 30 Kans 661; State *v.* Allen, 5 Kans. 213; State *v.* Graham, 13 Kans. 136.

acts or omissions on his part, it must then be judicially determined, before the officer is ousted, that these acts or omissions of themselves work a forfeiture of the office. Mere misconduct, if it does not of itself work a forfeiture, is not sufficient.[1] The court has no power to create a forfeiture, and no power to declare a forfeiture where none already exists. The forfeiture must exist in fact before the action of *quo warranto* is commenced."[2]

§ 479. **Will not lie where Position is not a public Office.**— The State does not inquire by *quo warranto* into the title to a position which is not a legally authorized public office.[3] The right to a mere employment must be tested by other means.[4] What are public offices, and how they are distinguished from mere employments has been already considered in an earlier portion of this work,[5] and further illustrations will be given in the following section.

Courts are also averse to granting leave to file an information in *quo warranto*, where the office in dispute is a petty and insignificant one.[6] So "although the statute says the information may be filed against '*any* person' usurping office in '*any* corporation' created by authority of this state, yet there must be very many cases in which the court would be at liberty to refuse to listen to the controversy. When the proprietors of a country store, or the members of a village library association, or the participants in a district school debating society, or an association of musical amateurs, may incorporate themselves under our general laws, and establish various grades of offices for the purposes of their organization, it can scarcely be seriously urged," says COOLEY, J., "that the supreme court can be required to settle all their contested elections and appointments in this proceeding. There are grades of positions denominated offices which do not

[1] Citing Cleaver *v.* Commonwealth, 34 Penn. St. 283; Brady *v.* Howe, 50 Miss. 624, 625; Lord Bruce's Case, 2 Strange, 819; King *v.* Ponsonby, 1 Ves. Jr. 1, 7; People *v.* Whitcomb, 55 Ill. 172, 176; High on Extraordinary Legal Remedies, § 618.

[2] Citing above authorities and State *v.* Hixon, 27 Ark. 398, 402.

[3] State *v.* North, 42 Conn. 79; State *v.* Dearborn, 15 Mass. 125.

[4] People *v.* DeMill, 15 Mich. 164; Eliason *v.* Coleman, 86 N. C. 235; People *v.* Hills, 1 Lans. (N. Y.) 202; Burr *v.* McDonald, 3 Gratt. (Va.) 215; Dean *v.* Healy, 66 Ga. 503.

[5] See *ante*, § 2

[6] Anonymous, 1 Barn. K. B. 279.

rise to the dignity of being entitled to the notice of the attorney-general by information."[1] And in a later case[2] the same judge says that "it is at least doubtful whether the proceeding by information is applicable to the case of any office not created by the State itself."

§ 480. **Same Subject—What are Offices within the Rule.**—Illustrations of what are, and what are not offices, have been already given, but a brief statement will here be made of some of the positions which have been deemed public offices for the purposes of *quo warranto* proceedings.

Thus the following officers have been subjected to inquiry:—governor,[3] lieutenant-governor,[4] except where the jurisdiction is solely in the general assembly,[5] sheriff,[6] deputy sheriff,[7] county clerk,[8] county treasurer,[9] judge of probate,[10] circuit judge,[11] presiding officers of legislature,[12] directors of asylums,[13] an officer in a railroad company who is appointed by the State,[14] tax collector,[15] commissioner of highways,[16] commissioners to locate a county seat, lay out state roads and the like,[17] assessors,[18] school district clerk,[19] mayor of city,[20] school director,[21] city marshal.[22]

So the title of military officers is also open to inquiry upon this proceeding.[23]

[1] People *v.* DeMill, 15 Mich. 164.

[2] Throop *v.* Langdon, 40 Mich. 673.

[3] Attorney-General *v.* Barstow, 4 Wis. 567.

[4] State *v.* Gleason, 12 Fla. 265.

[5] Robertson *v.* State, 109 Ind. 79.

[6] People *v.* Mayworm, 5 Mich. 146; Commonwealth *v.* Walter, 83 Penn. St. 105, 24 Am. Rep. 154; People *v.* Cicott, 16 Mich. 283, 97 Am. Dec. 141.

[7] State *v.* Goff, 15 R. I. 505, 2 Am. St. Rep. 921.

[8] People *v.* Miles, 2 Mich. 348.

[9] Clark *v.* People, 15 Ill. 217.

[10] People *v.* Heaton, 77 N. C. 18.

[11] Commonwealth *v.* Gamble, 62 Penn. St. 343, 1 Am. Rep. 422.

[12] Clark *v.* Stanley, 66 N. C. 59; Howerton *v.* Tate, 68 N. C. 547.

[13] Nichols *v.* McKee, 68 N. C. 429; Welker *v.* Bledsoe, 68 N. C. 457; State *v.* Harrison, 113 Ind. 434, 3 Am. St. Rep. 663.

[14] Howerton *v.* Tate, 68 N. C. 547.

[15] Patterson *v.* Hubbs, 65 N. C. 119; Hyde *v.* State, 52 Miss. 665; People *v.* Callaghan, 83 Ill. 128.

[16] People *v.* Hurlbut, 24 Mich. 59, 9 Am. Rep. 103.

[17] People *v.* Hurlbut, *supra*.

[18] State *v.* Hammer, 42 N. J. L. 435.

[19] State *v.* Jenkins, 46 Wis. 616.

[20] People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; Commonwealth *v.* Jones, 12 Penn. St. 365.

[21] State *v.* Boal, 46 Mo. 528.

[22] State *v.* Lupton, 64 Mo. 415, 27 Am. Rep. 253.

[23] State *v.* Brown, 5 R. I. 1; Commonwealth *v.* Small, 26 Penn. St. 31.

§ 481. **Same Subject—What are not Offices.**—But the following are not public officers within this rule:—chief engineer of a railroad,[1] or other officers of a corporation elected by the directors,[2] a clerk in a municipal office,[3] a college professor,[4] a pilot,[5] special commissioners, appraisers, referees and the like,[6] and many others mentioned in a preceding chapter.[7]

§ 482. **Possession and User of the Office must be shown.**—It is indispensable to the jurisdiction in *quo warranto* that the respondent should be shown to have been in the actual possession and user of the office. It is not enough that he should claim the office, but an actual user must be shown.[8]

"But that which constitutes a sufficient user," says Mr. STEPHEN, "depends upon the nature of the office or franchise claimed; thus, where it appeared in the case of a freeman or free burgess of a corporation, that he had been sworn in, though no act or claim be stated to have been done or made by the defendant, the information was granted; and though a mere claim to be sworn in is no usurpation, yet a swearing in, though defective in law, may be; and where a defendant has taken the oath in such a way as he thought to be sufficient at the time to make him a free burgess, it was considered to be an user."[9]

Hence it is held that the taking of the oath within the time prescribed by law is a sufficient user, though the respondent has not actually performed the duties of the office.[10]

So where a person, who has been duly elected to an office and has qualified and taken possession of it, commits such acts while in the office as to work a forfeiture of it, he may be proceeded against by *quo warranto*, even though at the time he has practically abandoned the office but without resigning his claim to it.[11]

§ 483. **Is a civil Proceeding.**—Though originally regarded as

[1] Eliason *v.* Coleman, 86 N. C. 235.
[2] People *v.* Hills, 1 Lans. (N. Y.) 202; Burr *v.* McDonald, 3 Gratt. (Va.) 215.
[3] Throop *v.* Langdon, 40 Mich. 673.
[4] Butler *v.* Board of Regents, 32 Wis. 124.
[5] Dean *v.* Healy, 66 Ga. 503.
[6] Matter of Hathaway, 71 N. Y. 238, 244.
[7] See *ante*, Book I. chap. II.
[8] King *v.* Whitwell, 5 T. R. 85.
[9] 3 Stephen's Nisi Prius, 2441.
[10] People *v.* Callaghan, 83 Ill. 128; King *v.* Tate, 4 East. 337; King *v.* Harwood, 2 East. 177.
[11] State *v.* Graham, 13 Kans. 136.

a criminal proceeding, the remedy by information has now come to be considered as a purely civil one, which, while partaking in some of its forms and incidents of the nature of criminal process, is yet a strictly civil proceeding, resorted to for the purpose of testing a civil right by trying the title to an office or franchise and ousting the wrongful possessor.[1]

§ 484. **Is a discretionary Remedy.**—The pursuit of the remedy by information in *quo warranto* is not ordinarily a matter of right but one resting in the sound discretion of the court, and in England since the statute of Anne[2] and in many of the United States[3] it can only be filed, on the relation of a private individual, by leave of the court first had and obtained. In some of the States, however, such leave is not required.[4] It may be

[1] High. Ex. Leg. Rem. § 603, citing State *v.* Hardie, 1 Ired. (N. C.) 42; State Bank *v.* State, 1 Blackf. (Ind.) 267; State *v.* Ashley, 1 Ark. 279; Lindsey *v.* Attorney-General, 33 Miss. 508; State *v.* Lingo, 26 Mo. 496; State *v.* Stewart, 32 Mo. 379; State *v.* Lawrence, 38 Mo. 535; State *v.* Kupferle, 44 Mo. 154, 100 Am. Dec. 265; Commonwealth *v.* Birchett, 2 Va. Cas. 51; Attorney-General *v.* Barstow, 4 Wis. 567; Commonwealth *v.* Commissioners, 1 S. & R. (Penn.) 382; Commonwealth *v.* McCloskey, 2 Rawle (Penn.) 381, opinion of GIBSON, C. J.; State *v.* Price, 50 Ala. 568; State *v.* DeGress, 53 Tex. 387. *Contra*, in Illinois; Donnelly *v.* People, 11 Ill. 552, 52 Am. Dec. 459; People *v.* Railroad Co. 13 Ill. 66; Wight *v.* People, 15 Ill. 417; Hay *v.* People, 59 Ill. 94.

See also Osgood *v.* Jones, 60 N. H. 543; Ames *v.* Kansas, 111 U. S. 449; Foster *v.* Kansas, 112 U. S. 201.

[2] Rex *v.* Dawes, 4 Burr. 2120; Rex *v.* Martin, 4 Burr. 2122; King *v.* Hythe, 5 A. & E. 832; King *v.* Peacock, 4 T. R. 684; King *v.* Stacy, 1 T. R. 1; Rex *v.* Sargent, 5 T. R. 467; Rex *v.* Parry, 6 Ad. & E. 810.

[3] People *v.* Waite, 70 Ill. 25; People *v.* Moore, 73 Ill. 132; People *v.* Callaghan, 83 Ill. 128; People *v.* Railroad Co. 88 Ill. 537; Commonwealth *v.* Cluley, 56 Penn. St. 270, 94 Am. Dec. 75; Commonwealth *v.* Jones, 12 Penn. St. 365; State *v.* Tolan, 38 N. J. L. 195; Commonwealth *v.* Reigart, 14 Serg. & R. (Penn.) 216; Commonwealth *v.* Arrison, 15 Serg. & R. 133; People *v.* Sweeting, 2 Johns. (N. Y.) 183; State *v.* Schnierle, 5 Rich. (S. C.) 299; State *v.* Fisher, 28 Vt. 714; State *v.* Smith, 48 Vt. 266; People *v.* Keeling, 4 Col. 129; State *v.* Bridge Co. 18 Ala. 678; State *v.* Mead, 56 Vt. 353.

[4] Informations in Michigan may be filed in the Supreme Court by the Attorney-General to test the title to public office, either upon his own relation or upon the relation of any private party, without applying for leave. How. Stat. § 8635. See People *v.* Knight, 13 Mich. 230.

Informations may be filed in the circuit courts by the prosecuting attorney on his own relation or that of any citizen of the county, without leave, or by any citizen of the county alone on obtaining special leave. How. Stats. § 8662, subsection 2. See

filed by the State, in its sovereign capacity, by its attorney-general, without leave.[1]

The remedy being thus usually a discretionary one, it is well settled that the court, upon application to it, will consider all of the circumstances of the case,[2] and leave to file the information will not be granted, although the defect in the defendant's title may be manifest, where it is evident that it will be of no avail, as where it is clear that the respondent will remain in office whatever may be the decision ;[3] or where the proceeding could be of little practical benefit, as when the term of the disputed office will expire before the trial can be had,[4] or when the court is satisfied that, if re-instated, relator might legally and would be dismissed again immediately,[5] or when a new election is about to

Vrooman *v.* Michie, — Mich. —, 36 N. W. Rep. 749, 13 West. Rep. 159.

[1] Commonwealth *v.* Walter, 83 Penn. St. 105, 24 Am. Rep. 154; State *v.* Vail, 53 Mo. 97.

[2] State *v.* Tolan, 33 N. J. L. 195, where DEPUE, J. says: "In Rex *v.* Dawes and Rex *v.* Martin, 4 Burr. 2122, which are known as the Winchelsea Cases, Mr. Justice YATES says: 'In all questions of this kind, one great distinction is always to be attended to, that these are applications by common relators who have no inherent rights of prosecution, but by the statute of Queen Anne, are left to the discretion of the court, whether they shall be permitted to prosecute or not. In the exercise of this discretion the court is not merely to consider the validity or defect of the defendant's title, but the expediency of allowing or stopping the prosecution under all its circumstances.' In that case, Lord Mansfield, in the exercise of that discretionary power, viewed the facts of the case—*first*, in the light in which the relators, informing the court of the defect of title, appear, from their behavior and conduct, in relation to the subject-matter of their information previous to their making the application; *secondly*, in the light in which the application itself manifestly shows their motives, and the purpose which it is calculated to suit; and, *thirdly*, the consequences of granting the information; and the application for leave was denied, although it appeared clear that the title of both the defendants was invalid. King *v.* Parry, 6 A. & E. 810; Cole on Criminal Informations, 165; Grant on Corporations, 253; Willcock on Corporations, 476; State *v.* Utter, 2 Green, 84."

[3] State *v.* McCullough, — Nev. —, 18 Pac. Rep. 756.

[4] People *v.* Sweeting, 2 Johns. (N. Y.) 184; Commonwealth *v.* Reigart, 14 Serg. & R. (Penn.) 216; Proceedings may be dismissed where title has expired at time of trial. State *v.* Porter, 58 Iowa 19; State *v.* Jacobs, 17 Ohio 143; State *v.* Tudor, 5 Day (Conn.) 329, or nearly expired; State *v.* Ward, 17 Ohio St. 543.

[5] *Ex parte* Richards, 3 Q. B. Div. 368, 28 Eng. Rep. 322.

occur which will afford the parties full redress;[1] or where the results of granting the leave would be much more disastrous than if it were denied, as when the successful prosecution of the remedy would cause the suspension of all municipal government in a city for more than a year.[2] It must also appear that there is a reasonable probability of being able to sustain the proceedings.[3]

Where the court has granted a rule to show cause why the information should not be filed, its discretion is not exhausted, but upon the return to the rule the leave to file the information may be denied if it appears that the rule was improvidently granted.[4]

But where the court has once granted the leave to file the information, it is held that its discretion or power is at an end, and that the issues raised must then be tried and determined according to the strict rules of law and right as in other cases.[5]

The discretion to be exercised by the court is not, however, a purely arbitrary one, and while leave to file the information is not granted as a matter of course, it will not be arbitrarily refused, but the court will exercise a sound discretion, according to law.[6]

§ 485. **Effect of Acquiescence.**—Where the information is filed on the relation of a private individual, to oust the incumbent and install the relator, the court will take into consideration the conduct of the latter, and where he has himself concurred in the respondent's holding,[7] or where he has acquiesced in the very irregularities of which he complains,[8] or where he has delayed for an unreasonable time in presenting his claims,[9] the relief will not be granted him.

[1] State *v.* Schnierle, 5 Rich. (S. C.) 299; Commonwealth *v.* Athearn, 3 Mass. 285; People *v.* Harshaw, 60 Mich. 200.

[2] State *v.* Tolan, 33 N. J. L. 195.

[3] People *v.* Callaghan, 83 Ill. 128.

[4] Commonwealth *v.* Cluley, 56 Penn. St. 270, 94 Am. Dec. 75; Gilroy *v.* Commonwealth, 105 Penn. St. 484.

[5] State *v.* Brown, 5 R. I. 1. But see Vrooman *v.* Michie, 69 Mich. 42, 36 N. W. Rep. 749, 13 West. Rep. 159, where it is said "the court has discretion to proceed to judgment or not, according as the public interests do or do not require it, and will not do so where no good end will be subserved by it."

[6] People *v.* Waite, 70 Ill. 25.

[7] Queen *v.* Greene, 2 A. & E. (N. S.) 460.

[8] Queen *v.* Lockhouse, 14 L. T. R. (N. S.) 359; Dorsey *v.* Ansley, 72 Ga. 460; State *v.* Tipton, 109 Ind. 73.

[9] Queen *v.* Anderson, 2 A. & E. (N. S.) 740.

But where the proceeding is on behalf of the State, the lapse of time will not bar the action,[1] nor will it be defeated by the acquiescence of the relator.[2]

§ 486. **Will not lie where there is other plain and adequate Remedy.**—As a general rule, a court having the power to exercise jurisdiction in *quo warranto* proceedings will not exercise its jurisdiction where some other plain and adequate remedy exists.[3]

§ 487. **Is superseded by special statutory Remedy.**—So, as has been seen in an earlier section, where a special proceeding has been provided by law for the trial of contested claims to public office, such proceeding is usually held to supersede the remedy by *quo warranto*.[4]

§ 488. **Proceedings usually conducted in Name of the Public.**—While the proceedings in *quo warranto* are civil in their nature, they are so far criminal in their form that they are usually conducted in the name of the sovereign power, and, except where by statute private individuals are authorized to institute them, they are begun, carried on and controlled only by the public legal officer, as the attorney-general or prosecuting attorney.[5]

[1] Commonwealth *v.* Allen, 128 Mass. 308.

[2] State *v.* Sharp, 27 Minn. 38.

[3] State *v.* Wilson, 30 Kans. 661; State *v.* Marlow, 15 Ohio St. 114; State *v.* Taylor, 15 Ohio St. 137; State *v.* Hixon, 27 Ark. 398; Commonwealth *v.* Leech, 44 Penn. St. 332; People *v.* Turnpike Co. 2 Johns. (N. Y.) 190; Neely *v.* Wadkins, 1 Rich. (S. C.) L. 42; Lord Bruce's Case, 2 Strange 819; King *v.* Ponsonby, 1 Ves. Jr. 1, 7, 8; King *v.* Heaven, 2 Durn. & E. 772.

[4] See *ante*, § 215.

[5] Must be in name of Attorney-General in New Hampshire, Osgood *v.* Jones, 60 N. H. 543, and in Illinois, People *v.* Railroad Co. 88 Ill. 537; attorney-general or prosecuting-attorney may bring in Ohio, Res. Stats. § 6763; State *v.* Anderson, 45 Ohio St. 196, 12 N. E. Rep. 656; must be by attorney-general, in supreme court, in Michigan, Babcock *v.* Hanselman, 56 Mich. 27; Vrooman *v.* Michie, 69 Mich. 42, 36 N. W. Rep. 749, 13 West. Rep. 159. See also State *v.* Schnierle, 5 Rich. (S. C.) 299; Lindsey *v.* Attorney-general, 33 Miss. 508; State *v.* Stein, 13 Neb. 529; Robinson *v.* Jones, 14 Fla. 256; State *v.* Gleason, 12 Fla. 190; Barnum *v.* Gilman, 27 Minn. 466; Saunders *v.* Gatling, 81 N. C. 298; Bartlett *v.* State, 13 Kans. 99; Harrison *v.* Greaves, 59 Miss. 453.

"In this country the proceeding is conducted in the name of the State or of the people, according to the local form of indictments, and a departure from this form is a substantial and fatal defect." SWAYNE, J. in Territory *v.* Lockwood, 3 Wall. (U. S.) 236, citing Wright *v.* Allen, 2 Tex.

In certain cases the name of the attorney-general is used in proceedings virtually controlled by private parties, and by statute in some States the proceedings may be prosecuted entirely without his intervention.[1]

Where the office is one held under the government of the United States, proceedings in *quo warranto* must be prosecuted in the name of the United States and not in that of the State[2] or Territory[3] in which he exercises his functions.

§ 489. **Practice in instituting the Proceedings.**—The practice usually pursued in instituting proceedings in *quo warranto* is for the attorney-general to present to the court a petition or motion, based upon affidavits, for leave to file the information. A rule *nisi* is then made requiring the defendant to show cause why the information; should not be filed against him. The defendant shows cause by affidavits, when, if sufficient, the proceedings will be discontinued, but if not, the rule for the information is made absolute.[4]

Upon leave being granted, the information is filed, and a summons issues to the defendant requiring him to appear and answer to the information; the order to show cause, or the defendant's appearance for that purpose, not being sufficient to give the court jurisdiction for the trial of the information[5] unless the formal process be waived.[6]

The practice of proceeding by the rule *nisi* is by no means uniform; and in some States the practice is to ask for leave in

158; Wight *v.* People, 15 Ill. 417; Donnelly *v.* People, 11 Ill. 552, 52 Am. Dec. 459; Eaton *v.* State, 7 Blackf. (Ind.) 65; Commonwealth *v.* Lex. & H. T. Co. 6 B. Mon. (Ky.) 398.

See also Wallace *v.* Anderson, 5 Wheat. (U. S.) 291.

[1] See State *v.* Thompson, 34 Ohio St. 365.

[2] State *v.* Bowen, 8 S. C. 400, a presidential elector.

[3] Territory *v.* Lockwood, 3 Wall. (U. S.) 236, a territorial judge.

[4] People *v.* Waite, 70 Ill. 25; Commonwealth *v.* Jones, 12 Penn. St. 356; United States *v.* Lockwood, 1 Pinn. (Wis.) 359; People *v.* Tibbitts, 4 Cow. (N. Y.) 383; People *v.* Richardson, 4 Cow. 103 and notes.

[5] People *v.* Richardson, 4 Cow. (N. Y.) 103; Commonwealth *v.* Sprenger, 5 Binn. (Penn.) 353; Rex *v.* Trinity House, Sid. 86; Attorney-General *v.* Railroad Co. 38 N. J. L. 282.

[6] *In re* County Judge, 33 Gratt. (Va.) 443; Hambleton *v.* People, 44 Ill. 458.

the first instance without the rule,[1] and, of course, where no leave is required, the information is filed at once.[2]

§ 490. **Interest of Relator.**—The State has always a sufficient interest to entitle it to call upon any one assuming to exercise the functions of a public office to show his title thereto,[3] and when the information is filed in its name by the attorney-general it will be presumed that he does so in his official capacity[4] and for the purpose of vindicating the rights of the State.[5]

But when the proceedings are instituted at the instance of a private individual, it must appear that he has some interest in the question,[6] for, as has been said, it would be a grievous rule which should compel a public officer to be called upon at any time to defend his title at the suit of every officious intermeddler.[7]

The interest of a citizen as a tax payer is sufficient to authorize him to institute an inquiry into the title of one who assumes to exercise the functions of a municipal officer.[8] All that the court requires in such cases, it is said, is to be satisfied that the relator is of sufficient responsibility, is acting in good faith and not vexatiously, and has not become disqualified by his own conduct with respect to the election or appointment he seeks to impeach.[9]

But where the proceeding is instituted by a private relator not only for the purpose of ousting the incumbent but also for

[1] Rule *nisi* is no longer required in Pennsylvania, where proceedings are by Attorney-General, Gilroy *v.* Commonwealth, 105 Penn. St. 484, nor in New Jersey, Attorney-General *v.* Railroad Co. 38 N. J. L. 282.

[2] As in Michigan, see *ante*, § 484, note 4. See also Taggart *v.* James, — Mich. —, 41 N. W. Rep. 262.

[3] State *v.* Dahl, 65 Wis. 510, 27 N. W. Rep. 343.

[4] Commonwealth *v.* Fowler, 10 Mass. 290.

[5] Commonwealth *v.* Walter, 83 Penn. St. 105, 24 Am. Rep. 154.

[6] State *v.* Vail, 53 Mo. 97, 109.

[7] Commonwealth *v.* Meeser, 44 Penn. St. 341.

[8] State *v.* Hammer, 42 N. J. L. 435; State *v.* Martin, 46 Conn. 479; Commonwealth *v.* Commissioners, 1 S. & R. (Penn.) 380. But *contra*, see Miller *v.* Palermo, 12 Kans. 14.

In Churchill *v.* Walker, 68 Ga. 681, it is held that every citizen of a town has such an interest in its municipal offices as will enable him to support a *quo warranto* proceeding to test the right of incumbents thereto. JACKSON, C. J., concurred *dubitante*.

In Commonwealth *v.* Meeser, 44 Penn. St. 341, it is held, though with much doubt, that the proceeding could be instituted by a private citizen who appeared to be acting in good faith and to represent a large and responsible number of other citizens.

[9] In State *v.* Hammer, *supra*.

the purpose of installing himself in the office, he must show not only the defects in the defendant's title but also that he was himself eligible,[1] that he has the legal title to the office[2] and that he has done nothing to acquiesce in the condition of which he complains.[3] Where both he and the respondent claim title through the same election, the relator cannot defeat the respondent's title by showing the invalidity of the election, because he thereby shows the frailty of his own title as well.[4]

§ 491. **The Requisites of the Information.**—Something of diversity of opinion exists as to the requisites of the information in *quo warranto* cases. While the proceedings are civil in their nature, they are usually criminal in their form, and the information in ordinary cases conforms more largely to the forms used in criminal proceedings, though the modern tendency is to assimilate it to the forms of civil proceedings.[5]

Originally and primarily a proceeding upon the part of the sovereign to oust and punish usurpers and not to induct the legally entitled officer, the remedy has been gradually extended by statutes until it has become, in many of the States at least, practically a statutory remedy by which one person claiming to be entitled to a public office seeks to oust the possessor and to install himself.[6] This fact explains much of the diversity in the rulings in the different States and between the earlier and the later cases.

Where the proceeding is instituted by and on behalf of the State in its sovereign capacity to test the title of an alleged usurper, much more of generality of allegation is tolerated than in cases where a private individual is the prosecuting party. The title to all offices being derived from the State, and it having an inherent right at any time to call upon one who assumes

[1] State *v.* Long, 91 Ind. 351; State *v.* Bieler, 87 Ind. 320.

[2] State *v.* Stein, 13 Neb. 529; State *v.* Boal, 46 Mo. 528; Miller *v.* Palermo, 12 Kans. 14; People *v.* Ryder, 12 N.Y. 433, State *v.* Tipton, 109 Ind. 73; Collins *v.* Huff, 63 Ga. 207; Hardin *v.* Colquitt, 63 Ga. 587.

[3] State *v.* Tipton, 109 Ind. 73.

[4] Collins *v.* Huff, 63 Ga. 207; Hardin *v.* Colquitt, 63 Ga. 589.

[5] People *v.* Clark, 4 Cow. (N. Y.) 95; State *v.* Commercial Bank, 10 Ohio 535; State *v.* Kupferle, 44 Mo. 154, 100 Am. Dec. 265.

[6] It is impracticable to set out here the statutes of the several states upon this subject. The practitioner in each state will of course consult his own.

to exercise the functions of a public office, to show his right to do so,[1] it is evident that no specific allegations of right or title on the part of the State can be necessary. It is often said, therefore, in such cases, that the State is under no obligation to show any thing on its part,[2] and that a charge in general language that the respondent has intruded into, usurped and unlawfully exercised the functions of a certain office is all that is required to put him to his answer.[3] The existence of the office and its description must be made to appear with reasonable certainty.[4] The State is not bound to allege or show that it has made a demand for the office.[5] In all these cases, the State seeks to recover, not so much upon the strength of its own title as upon the weakness or defects in the respondent's title, which it calls upon him to establish. Defective allegations in the information should be taken advantage of by special demurrer.[6] The information may be amended and merely formal defects will be ignored.[7]

But where, on the other hand, the proceedings are instituted by or on behalf of a private relator, and are designed not only to oust the respondent but also to install the relator as the person legally entitled to the office, different considerations obviously apply. In these cases, which are largely the creatures of statute, it is usually held that the information must state clearly and

[1] "The State has always a right to demand of any one assuming a public office or franchise to show his authority." COOLEY, J., in People v. DeMill, 15 Mich. 164, 181. See to like effect: People v. Thacher, 55 N. Y. 525, 14 Am Rep. 312; State v. Gleason, 12 Fla. 265.

[2] "The people are not required to show anything." BREESE, J., in People v. Ridgley, 21 Ill. 67. "The state is bound to make no showing." CAMPBELL, J., in People v. Mayworm, 5 Mich. 146, 148.

[3] State v. Dahl, 65 Wis. 510, 518, citing State v. Messmore, 14 Wis 115, 116; People v. Pease, 30 Barb. (N. Y.) 588; State v. Goetze, 23 Wis. 363; State v. Tierney, 23 Wis 430; State v. Hoelflinger, 35 Wis. 393; State v. Pierce, 35 Wis. 93; State v. Purdy, 36 Wis. 213;

See also People v. Woodbury, 14 Cal. 43; People v. Abbott, 16 Cal. 356; People v. Miles, 2 Mich. 348; People v. Ridgley, 21 Ill. 67; Clark v. People, 15 Ill. 217.

[4] People v. DeMill, 15 Mich. 164; People v. Ridgley, 21 Ill. 67.

[5] State v. McDiarmid, 27 Ark. 176.

[6] State v. Boal, 46 Mo. 528; Territory v. Lockwood, 3 Wall. (U. S.) 236; Regina v. Smith, 2 M. & Rob. 109; Regina v. Law, 2 M. & Rob. 197; People v. Palmer, 14 Cal. 43; Commonwealth v. Commercial Bank, 28 Penn. Stat. 383.

[7] Commonwealth v. Commercial Bank, 28 Penn. St. 383; People v. Richardson, 4 Cow. (N. Y.) 109 note.

specifically the facts which show that the relator is entitled to the office; it must, therefore, show that he was eligible,[1] that he possessed all the qualifications required by law,[2] and that he was duly elected to the office.[3] Defects in this respect render the information obnoxious to a demurrer.[4]

The essentials of an information, in these cases now under consideration, are said to be "that it contain such a plain statement of the facts which constitute the grounds of the relator's claim as makes it affirmatively appear that he has title to the office in controversy, so as to 'show his interest in the matter.'"[5]

§ 492. **The Defendant's Pleadings.**—The defendant, by his plea, must either deny that he has or claims any title to the office in question, or he must show that his title to it is perfect. In other words he must either disclaim or justify. He cannot plead either not guilty or *non usurpavit*.[6]

If he seeks to justify, he must do so fully and specifically. It is not enough for him to allege generally that he was duly elected or appointed, but he must show, upon the face of his plea, such facts as, if true, will vest in him the legal title to the office.[7]

[1] State *v.* Stein, 13 Neb. 529; State *v.* Boal, 46 Mo. 528; Miller *v.* Palermo, 12 Kans. 14; People *v.* Ryder, 12 N. Y. 433.

[2] State *v.* Long, 91 Ind. 351; State *v.* Bieler, 87 Ind. 320; Reynolds *v.* State, 61 Ind. 392.

[3] State *v.* Boal, 46 Mo. 528.

[4] State *v.* Boal, 46 Mo. 528.

[5] Jones *v.* State, 112 Ind. 194, 11 West. Rep. 243.

[6] State *v.* Utter, 14 N. J. L. 84; State *v.* Barron, 57 N. H. 498; Illinois, &c., Ry. Co. *v.* People, 84 Ill. 426; Clark *v.* People, 15 Ill. 217; State *v.* Gleason, 12 Fla. 236; People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; State *v.* Ashley, 1 Ark. 513; State *v.* Harris, 3 Ark. 570, 36 Am. Dec. 467; People *v.* Utica Ins. Co. 15 Johns. (N. Y.) 358, 8 Am. Dec. 243.

[7] State *v.* Harris, 3 Ark. 570, 36 Am. Dec. 467; Clark *v.* People, 15 Ill. 217; State *v.* Jones, 16 Fla. 306; People *v.* Richardson, 3 Cow. (N.Y.) 113, note.

In pleading an election to the office of director, by the stockholders of a corporation, defendant must show that the election was held agreeably to law, and in conformity with and in pursuance of the ordinances and regulations of the governing board of the corporation, and that at such election he received a majority of the legal votes; if his claim is by virtue of an election by the board of directors, to supply a vacancy therein, he must show the existence of a board competent to elect, and that a vacancy existed therein and how such vacancy arose, and his subsequent election to fill it. But his pleadings need only show a *prima facie* legal right to the office; if his

And not only must he show that he possessed the necessary qualifications at the time of his election or appointment, but it is held that he must go further and show the continued existence of every qualification necessary to the enjoyment of the office. The law makes no presumption of their continuance.[1]

It is no defense to him, when questioned by the State, to show that the relator is not entitled to the office: He is called upon to make good his own title, and if he can not do that, it is of no avail to him that the relator's title is equally defective.[2]

Where, however, the proceeding is instituted, under a statute, by a private relator who claims the office, and who, as has been seen,[3] must show his own title thereto, the rule is different. "No private citizen," says CAMPBELL, J., "has any right to compel an officer to show title, until he has shown his own right, in the first place, to attack it. In such a controversy, it is manifest that a plea showing that relator has no rights is as appropriate as one setting up title in the respondent. Either, if established, is a complete defence."[4]

The defendant may interpose as many defences as he has,[5] or he may justify in part and disclaim in part.[6]

The plea need not be verified unless required by statute.[7]

pleadings show an election by electors acting under color of legal right, it is sufficient, and if the electors were not possessed of the proper qualifications, this must be shown by this state; State *v.* Harris, 3 Ark. 570, 36 Am. Dec. 460.

Defendant's pleadings are insufficient if they do not show that he qualified under the appointment by which he claims; State *v.* McCann, 88 Mo. 386.

In showing title to an elective office, a plea is sufficient which shows the authority for holding the election, the fact that it was held, and that the respondent received the largest or the requisite number of votes. It is not necessary to allege that the canvassers strictly performed their duty in all respects. People *v.* VanCleve, 1 Mich. 362. Neither is it necessary that respondent should allege his citizenship or other qualifications for the office. The fact of his election is enough to call upon the prosecution to show its invalidity by facts in reply. Attorney-General *v.* McIvor, 58 Mich. 516.

[1] People *v.* Mayworm, 5 Mich. 146; citing State *v.* Beecher, 15 Ohio 723; People *v.* Phillips, 1 Denio (N. Y.) 388; State *v.* Harris, 3 Ark. 570, 36 Am. Dec. 460; State *v.* Ashley, 1 Ark. 513.

[2] Clark *v.* People, 15 Ill. 217.

[3] See *ante*, § 490.

[4] Vrooman *v.* Michie, 69 Mich. 42, 36 N. W. Rep. 749, 13 West. Rep. 159.

[5] People *v.* Stratton, 25 Cal. 242.

[6] People *v.* Richardson, 4 Cow. (N. Y.) 113 note.

[7] Attorney-General *v.* McIvor, 58 Mich. 516.

§ 493. **The Replication.**—The plea of the respondent having been put in, the State may then reply. This replication sets forth the particular acts, omissions or defects upon which the State relies to controvert or defeat the claims of title made by the respondent.[1]

§ 494. **The Burden of Proof.**—1. When the respondent is called upon at the suit of the State to show by what warrant he assumes to exercise the functions of a public office, the burden of proving his title rests upon the respondent. As has been seen,[2] the State on its part is not required in the first instance to show anything, and the respondent must either disclaim or justify. The burden of proof is, therefore, upon him.[3]

When, however, the respondent has made out a *prima facie* right to the office, as by showing that he was declared duly elected by the proper officers or has received a certificate of election or holds the commission of appointment by the executive to the office in question, the burden of proof shifts. The certificate or returns of the election officers, as has been seen,[4] are *prima facie* evidence of the title, but they are not conclusive, and while they may not be impeached in a collateral inquiry, yet in a direct proceeding, like *quo warranto*, to determine the title, it is entirely competent to go behind the returns and ascertain the true condition of affairs.[5] The burden of impeaching the returns must rest upon the State.[6] But when this has been done and the returns are rejected, then the respondent is bound to establish his title by other proof, and if he fails to do so, the State is entitled to a judgment against him.[7]

[1] Commonwealth *v.* Commercial Bank, 28 Penn. St. 383; State *v.* Commercial Bank, 10 Ohio 535; Attorney-General *v.* Petersburg R. R. Co. 6 Ired. (N. C.) 456.

[2] See *ante*, § 491.

[3] People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312; People *v.* Utica Ins. Co. 15 Johns. (N. Y.) 353, 8 Am. Dec. 243; People *v.* Thompson, 21 Wend. (N. Y.) 252; People *v.* Pease, 27 N. Y. 63, 84 Am. Dec. 242; State *v.* McCann, 88 Mo. 386.

[4] See *ante*, § 212.

[5] People *v.* Pease, 27 N. Y. 63, 84 Am. Dec. 242; People *v.* Seaman, 5 Denio (N. Y.) 409; People *v.* Ferguson, 8 Cow. (N. Y.) 102; People *v.* Van Slyck, 4 Cow. (N. Y.) 297; People *v.* Vail, 20 Wend. (N. Y.) 12; Attorney-General *v.* Megin, 63 N. H. 379.

[6] People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

[7] People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

2. When the proceeding is instituted in behalf of a private individual, and has for its object not only to oust the respondent but to install the relator, the burden of proving the relator's title rests upon himself. Even though the respondent's title may be impeached, this does not establish the relator's right,[1] but before there can be a judgment in his favor he must show that he is legally entitled to receive the office upon the respondent's ouster.[2]

§ 495. **Trial by Jury.**—Trial by jury is not a matter of right in *quo warranto* cases,[3] but is provided for by the statutes of many of the States.[4]

§ 496. **The Judgment.**—Where the defendant disclaims, the State is entitled to an immediate judgment of ouster. If the issues were found in favor of the respondent, the judgment, at common law, was that he be allowed his office.[5]

Where, however, the defendant made default[6] or the issues were decided against him, the judgment, at common law, was that the defendant be fined for his usurpation and be ousted from his office.[7]

Under the modern statutes where the proceedings are instituted by the State, or by a private individual, not only to oust the respondent but also to install the relator, the judgment is ordinarily more comprehensive. In such a case the respondent may be ousted without the relator's being installed,[8] but ordina-

[1] People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

[2] People *v.* Lacoste, 37 N. Y. 192; Miller *v.* English, 21 N. J. L. 317; State *v.* Norton, 46 Wis. 332; State *v.* Hunton, 28 Vt. 594.

[3] See State *v.* Johnson, 26 Ark, 281; State *v.* Lupton, 64 Mo. 415, 27 Am. Rep. 253; State *v.* Vail, 53 Mo. 97; State *v.* Johnson, 26 Ark. 281.

But see White *v.* Doesburg, 16 Mich. 133; State *v.* Allen, 5 Kans. 213; State *v.* Burnett, 2 Ala. 140.

[4] In New York, see People *v.* Albany, &c., R. R. Co. 57 N. Y. 161. In Minnesota, see State *v.* Minnesota Thresher Mfg. Co. — Minn. —, 41 N. W. Rep. 1020.

[5] High, Ex. Rem. 745.

[6] In Michigan it was held that on the default of the respondent the court could give judgment of ouster, but could not determine the right of the relator to the office. People *v.* Connor, 13 Mich. 238. But see Attorney-General *v.* Barstow, 4 Wis. 567.

[7] High, Ex Rem. §§ 745, 747.

[8] The judgment of ouster against the respondent does not of itself establish relators' right, but he must prove his title. People *v.* Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

rily the judgment determines the rights both of the respondent and the relator, finding one to be and the other not to be entitled to the office according to the facts.[1]

Where, under the statutes, the relator is entitled to costs upon a judgment of ouster, the fact that the term of office of the usurper has expired since the beginning of the proceeding[2] or that he has vacated[3] or resigned[4] the office, does not ordinarily operate to prevent the rendition of the judgment, but the court will proceed to settle the rights of the parties and to award judgment.

The imposition of a fine is usually a matter resting in the sound discretion of the court, and where no improper motives are shown it will usually be merely nominal.[5]

§ 497. **Effect of the Judgment.**—"It is foreign to the objects and functions of the writ of *quo warranto*," says SMITH, J., in a leading case in Wisconsin, "to direct any officer what to do. It

If relator's right is in doubt, judgment may be given against the respondent, leaving relator's title to be settled in another proceeding. People *v.* Phillips, 1 Denio (N. Y.) 388.

"The title of a relator can only be adjudicated when, upon the facts lawfully established in the cause, his right necessarily appears from the finding. It is no part of the principal issue in the cause, and disproving respondent's right does not establish his. People *v.* Connor, 13 Mich. 238; People *v.* Miles, 2 Mich. 348; People *v.* Knight, 13 Mich. 230." People *v.* Molitor, 23 Mich. 341.

[1] In Michigan, the statute (H. S. § 8638) provides: "In every such case judgment shall be rendered upon the right of the defendant, and also upon the right of the party so entitled; or only upon the right of the defendant, as justice shall require."

[2] People *v.* Hartwell, 12 Mich. 508, 86 Am. Dec. 70; People *v.* Loomis, 8 Wend. (N. Y.) 396, 24 Am. Dec. 33. In the latter case NELSON, J., said: "The remedy must be entirely fruitless in this case, as the term of office of the defendants has long ago expired. If application had been made for the *quo warranto*, we should have denied it, as was done in the People *v.* Sweeting, 2 Johns. 184. Although judgment of ouster will be unavailing and the damages, if a suggestion be made, must be very trifling, still I am of opinion we can not suspend the judgment, as the revised statutes are imperative, and give to the prevailing parties costs."

To like effect: Hammer *v.* State, 44 N. J. L. 667; State *v.* Pierce, 55 Wis. 93.

But *contra*, see State *v.* Porter, 58 Iowa 19, and see State *v.* Jacobs, 17 Ohio 143, and State *v.* Ward, 17 Ohio St. 543.

[3] King *v.* Williams, 1 Black W. 93. See also State *v.* Taylor, 12 Ohio St. 130.

[4] King *v.* Warlow, 2 M. & S. 75.

[5] State *v.* Brown, 5 R. I. 1.

is never directed to an *officer* as such, but always to the *person*—not to dictate to him what he shall do in his office, but to ascertain whether he is constitutionally and legally authorized to perform any act in or exercise any functions of the office to which he lays claim."[1]

It is, therefore, held in that case "that a judgment of ouster against the incumbent of an office in no way affects the office. Its duties are the same, whether the original incumbent remains in it, or whether another is substituted in his place. If a removal from an office by a judgment of ouster against the incumbent would affect the office itself, so also would a removal by the death of the incumbent or his resignation. In all these cases we think the office is in no way affected. It remains as it was before the removal."[2]

But while the office thus remains the same, the legal effect of the judgment of ouster upon the pretended officer is to completely remove him from the office, to render null and void all his pretended official acts after the rendition of the judgment, to deprive him of all further official authority,[3] and to conclude him from again asserting title to the same office by virtue of any prior election or appointment.[4] But a judgment of ouster does not affect one who was not in any way a party to the action.[5] Hence while subordinates or assistants appointed by or holding under the deposed officer, and whose title is dependent upon his, lose their offices when his ceases,[6] yet where an assistant does not derive his office from, or in any manner hold under the deposed officer, the judgment against the latter in no way concludes the former.[7]

§ 498. **Damages for Usurpation.**—The awarding of damages to the relator against the respondent for the unlawful usurpation and detention of the office was no part of the functions of the

[1] Attorney-General *v.* Barstow, 4 Wis. 567, at p. 773.

[2] Attorney-General *v.* Barstow, 4 Wis. 567, at p 659.

[3] State *v.* Johnson 40 Ga. 164; King *v.* Serle, 8 Mod. 332.

[4] King *v.* Clarke, 2 East 75.

[5] People *v.* Murray, 73 N. Y. 535; State *v.* Camden, 47 N. J. L. 454; Campbell *v.* Hall, 16 N. Y. 575.

[6] King *v.* Lisle, Andrews 163; King *v.* Hebden, Andrews 389; King *v.* Grimes, 5 Burr. 2599; King *v.* Mayor, 5 D. & E. 66; People *v.* Anthony, 6 Hun (N. Y.) 142; People *v.* Murray, 73 N. Y. 535.

[7] People *v.* Murray, 73 N. Y. 535.

common law proceeding, but the modern statutes have in some cases so enlarged its scope as to permit the relator to claim and recover such damages.[1]

When so awarded, they are determined by substantially the same rules which prevail in other cases. The relator's right to damages covers the whole period of his exclusion, and the extent of the recovery is to be measured by what he has lost.[2] Where a salary is attached to the office, it would ordinarily furnish the measure,[3] but where there is no salary the revenue of the office would be ascertainable by other means.[4]

The fact that the respondent acted in good faith would not prevent the relator from recovering the actual damages sustained,[5] nor would he be compelled to allow the respondent to set off the value of the latter's services in performing the duties during the time he held the office.[6]

§ 499. **Costs.**—The same statutes usually provide for the recovery of costs by the successful party.[7]

[1] Thus in Michigan, by H. S., § 8641-3, the relator may at any time within a year from the judgment in his favor, file a suggestion as to damages, which shall be tried, and the relator "shall be entitled to recover the damages which he may have sustained by reason of the usurpation." People *v.* Miles, 2 Mich. 350; People *v.* Hartwell, 12 Mich. 522, 86 Am. Dec. 70; People *v.* Cicott, 15 Mich. 327; People *v.* Miller, 24 Mich. 458, 9 Am. Rep. 131; Comstock *v.* Grand Rapids, 40 Mich. 397; People *v.* Sackett, 15 Mich. 315.

[2] People *v.* Miller, 24 Mich. 458, 9 Am. Rep. 131.

[3] See People *v.* Miller, 24 Mich. 458, 9 Am. Rep. 131; Auditors *v.* Benoit, 20 Mich. 176, 4 Am. Rep. 382, Dolan *v.* Mayor, 68 N. Y. 274, 23 Am. Rep. 168; Matthews *v.* Supervisors, 53 Miss. 715, 24 Am. Rep. 715; McCue *v.* Wapello County, 56 Iowa 698, 41 Am. Rep. 134; Commissioners *v.* Anderson, 20 Kans. 298, 27 Am. Rep. 171; McVeany *v.* Mayor, 80 N. Y. 185, 36 Am. Rep. 60).

[4] See Stuhr *v.* Curran, 15 Vroom (N. J.) 181, 43 Am. Rep. 353.

[5] People *v.* Miller, 24 Mich. 458, 9 Am. Rep. 131.

[6] People *v.* Miller, 24 Mich. 458, 9 Am. Rep. 131.

[7] Peter *v.* Blue;40 Kans. —, 20 Pac. Rep. 852; Moss *v.* Patterson, 40 Kans. 720, 20 Pac. Rep. 457.

BOOK III.

OF THE AUTHORITY OF OFFICERS, AND THE MANNER OF ITS EXECUTION.

CHAPTER I.

OF THE NATURE AND EXTENT OF THE AUTHORITY.

§ 500. Purpose of this Chapter:

I. OF THE SOURCE OF THE AUTHORITY.

501. Authority is created by Law.
502. Same Subject—Statutory and Common Law offices.
503. Authority may be changed by Law.
504. Same Subject—Authority of constitutional Office cannot be affected by Legislature.

II. OF THE NATURE OF THE AUTHORITY.

505. Authority varies with Nature of Office.
506. Authority of public Officer must be ascertained.
507. What constitutes Authority.
508. Authority confined to territorial Limits.
509. Authority limited to official Term.
510. Same Subject—Exceptions—Completing Service, Correcting Record.
511. Grants of Power strictly construed.
§ 512. Same Subject—How differs from private Agency.
513. Same Subject—Limits to Discretion.
514. Judicial Power limited to Jurisdiction conferred.
515. Judicial Power can be conferred only on judicial Offices.
516. Same Subject—General and special Jurisdiction.
517. Disqualification of Judge from acting—1. By Interest.
518. Same Subject—2. By Relationship or Affinity.
519. Same Subject—3. By friendly or hostile Relations.
520. Same Subject—4. By having been Counsel for either Party.
521. Legislative Power limited by the Constitution.
522. Ministerial Powers limited to those expressly granted or necessarily implied.
523. Ministerial Officer cannot question Validity of Law requiring his Action.

§ 524. Ministerial Officer cannot act in his own Behalf.
525. Presumption of Authority.

III. AUTHORITY BY RATIFICATION.

1. *In General.*

526. Authority may be conferred by Ratification.
527. What is meant by Ratification.

2. *What Acts may be Ratified.*

528. In general.
529. The general Rule.
530. Torts may be ratified.
531. Void Acts cannot be ratified—Voidable Acts may be.
532. Illegal Acts cannot be ratified.

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533. In general.
534. Corporations, private and municipal may ratify.
535. State may ratify.
536. When Officer may ratify.

4. *Conditions of Ratification.*

537. In general.
538. 1. Principal must have been identified.
539. 2. Principal must have been in Existence.
540. 3. Principal must have present Ability.
541. 4. Act must have been done as Agent.
542. 5. Knowledge of material Facts.
543. 6. No Ratification of Part of Act.
544. 7. Rights of other Party must be prejudiced.

5. *What amounts to a Ratification.*

545. Written or unwritten,—Express or implied.

a. Express Ratification.

§ 546. General Rule.

b. Implied Ratification.

547. In general—Variety of Methods.
548. By accepting Benefits.
549. By bringing Suit based on Agent's Act.
550. Ratification by Acquiescence, Silence.
551. Same Subject—Election.
552. Same Subject—Must elect within a reasonable Time.
553. Same Rule applies to private Corporations.
554. And to Municipal and Quasi Municipal Corporations.
555. How in case of a State.

6. *The Results of Ratification.*

556. What for this Subdivision.

1. In General.

557. Equivalent to precedent Authority.
558. Exception, Intervening Rights cannot be defeated.
559. Ratification irrevocable.

2. As between Principal and Officer.

560. Ratification releases Officer from Liability to Principal.

3. As between Principal and the other Party.

561. *a.* Other Party against Principal.
562. *b.* Principal against the other Party.

4. As between Officer and other Party.

563. Ratification releases Officer on Contract.
564. Otherwise in Tort.

§ 500. **Purpose of this Chapter.**—It is obviously impossible, within the limits necessarily fixed to such a work as this, to undertake to go into a detailed examination of the authority of

the various classes of public officers. But the general principles by which the question of the source, nature and extent of the authority of public officers is to be determined, can and will be here considered.

I.

OF THE SOURCE OF THE AUTHORITY.

§ 501. **Authority is created by Law.**—Under our political system, as has been already stated, the entire source of public governmental authority is found in the people themselves. Either directly or through their chosen representatives, they create such offices and agencies as they deem to be desirable for the administration of the public functions, and declare in what manner and by what persons they shall be exercised.[1] They prescribe the quantum of power to be attached to each department, and the conditions upon which its continuation depends. Their will, in these respects, finds its expression in their constitutions and laws.

The right to be a public officer, then, or to exercise the powers and authority of a public office, must find its source in some provision of the public law.[2]

Where, however, there is a law which authorizes the officer's act, it is immaterial whether he *intended* to act under that law or not.[3]

§ 502. **Same Subject—Statutory and Common Law Offices.**—But while the source of the authority of every public officer is

[1] "A public office is an agency for the State, and the person whose duty it is to perform the agency is a public officer. This, we consider to be the true definition of a public officer in its original broad sense. The essence of it is, the duty of performing an agency, that is, of doing some act or acts or series of acts for the State." PEARSON, C. J., in State *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488.

[2] "It is a principle universally settled in our system that all officers and functionaries exercising powers of government and control over political action must derive their powers and office, either from the people directly, or from the agents or representatives of the people. CAMPBELL, J., in Attorney-General *v.* Detroit Common Council, 58 Mich. 213, 219, 55 Am. Rep. 675.

[3] Davis *v.* Brace, 82 Ill. 542.

thus found in some public law, the nature and extent of that authority or the manner of its exercise are not always prescribed in express terms in the written law.

Where the office is a new one, or one unknown to the common law, the nature and extent of the authority and the terms, manner and conditions of its exercise must be set forth, in some express enactment, with sufficient clearness and fullness to enable it to be interpreted and executed with reasonable certainty.[1]

Where, however, the office is one which was recognized and regulated by the common law, while it is undoubtedly competent for the law-making power to expand or curtail its limits or declare the manner in which it is to be exercised, yet where this has not been done, but, as is customary in the case of sheriffs, coroners, constables and other common-law officers, the office is simply created by name without any definition of its powers and duties, it will be presumed that the intention was that the office should be exercised as at common law and the common-law incidents, powers and limitations will attach to it.[2]

§ 503. **Authority may be changed by Law.**—Where the office is one created by the legislature or lesser municipal body,

[1] In Morton *v.* Comptroller General, 4 S. C. 430, 442, WILLARD, J. in speaking of statutes creating public offices, says: "Where the rights, obligations or powers which are the subject of the statute appertain to a public function of the government, to be exercised through or by means of a public office, such office, by its established title, or the public officer who holds it, by his name of office, is, according to parliamentary usage and common understanding, the immediate and direct subject of the statute.

If the statute intends merely a modification of some particular power or duty appertaining to an existing office, the office is still, in a reasonable sense, the proper subject of the statute; but if, as in the present case, the object of the statute is to create or bring into existence an office not theretofore existing, such office is, in the strictest sense, the proper subject of the statute.

In a statute creating a public office, whatever is regarded by the legislature as requisite to describe or establish the nature of the office, the character, limit and effect of the powers communicated, the nature and extent of the duties intended to be imposed on its incumbent, and the official and personal rights intended to be claimed and exercised by such incumbent, as well as all provisions intended to afford means of carrying out the objects contemplated by the establishment of such office, may be regarded as part of the subject matter and entering into the proper subject of the statute."

[2] See Allor *v.* Wayne County Auditors, 43 Mich. 76; King *v.* Hunter, 65 N. C. 603, 6 Am. Rep. 754; State *v.* Brunst, 26 Wis. 412, 7 Am. Rep. 84.

that body has, as has been seen,[1] complete control over the office. It may, therefore, increase or diminish its authority at pleasure, even during the term of the then incumbent.[2]

§ 504. **Same Subject—Authority of constitutional Office can not be affected by the Legislature.**—Where, however, the office is one provided for by the constitution, even though that instrument does not define its powers and duties, it cannot be denuded of its duties and functions by the legislature.[3]

II.

OF THE NATURE OF THE AUTHORITY.

§ 505. **Varies with Nature of Office.**—In the case of private agents, it is common to classify authorities according to their nature and effect, into universal, general and special agencies.[4] It will be evident, however, that this classification cannot apply in its entirety to the case of public agents. Universal authority in any public agent cannot exist under our constitutional government. Public officers there are, however, whose authority is general in its nature, while that of others is expressly limited and special.

But beyond this, the analogies between public and private agents are not sufficiently close to make the authority in the one case the criterion for that in the other.

Thus—

§ 506. **Authority of Public Officer must be ascertained.**—The authority of the public officer being created by law or being a matter of public record, of which every person interested is bound to take notice, it is presumed that all persons having occa-

[1] See *ante*, § 465.

[2] State *v.* Douglass, 26 Wis. 428, 7 Am. Rep. 87; People *v.* Morrell, 21 Wend. (N. Y.) 563; Conner *v.* Mayor, 5 N. Y. 285; Commonwealth *v.* Bacon, 6 S. & R. (Penn.) 322; Commonwealth *v.* Mann, 5 W. & S. (Penn.) 418; Augusta *v.* Sweeney, 44 Ga. 463, 9 Am. Rep. 172; Butler *v.* Pennsylvania, 10 How. (U. S.) 402.

[3] State *v.* Brunst, 26 Wis. 412, 7 Am. Rep 84; King *v.* Hunter, 65 N. C. 603, 6 Am. Rep. 754; Commonwealth *v.* Gamble, 62 Penn. St. 343, 1 Am. Rep. 422; Allor *v.* Wayne County Auditors, 43 Mich. 76; Matter of Head Notes, 43 Mich. 641.

[4] Mechem on Agency, § 271–292.

sion to deal with a public officer have knowledge of his authority.[1] It is not enough, therefore, for such persons to rely upon any mere presumptions as to the officer's authority, but they must see to it that it is in fact sufficient for the assumed purpose.

§ 507. **What constitutes Authority.**—The authority of a public officer in any given case consists of those powers which are expressly conferred upon him by the act appointing him, or which are expressly annexed to the office by the law creating it or some other law referring to it, or which are attached to the office by common law as incidents to it.

Of the former kind are the powers of special statutory offices where the statute prescribes the limits within which they are to be exercised. Of the latter kind are the familiar common law offices such as that of sheriff, constable and the like, to which when created by law without more, the usual common law powers and duties attach.

§ 508. **Authority confined to territorial Limits.**—The authority of public officers being derived from the law, it necessarily follows that the authority can not exist in places where that law has no effect. The authority of all public officers is, therefore, limited and confined to that territory over which the law, by virtue of which they claim, has sovereign force.

But not only this, for public officers in general, and particularly those chosen within and for the lesser municipal subdivisions such as counties, towns and cities, are elected or appointed such in and for some specified district or territory as such county, town or city, and, unless greater authority is expressly conferred upon them, it is the general rule that their official authority is limited to the district within and for which they were chosen.

Thus a state officer can exercise no official authority beyond the confines of the State.[2] So, without express authority, a

[1] Mayor of Baltimore *v.* Eschbach, 18 Md. 282; Mayor of Baltimore *v.* Reynolds, 20 Md 1, 83 Am. Dec. 535; State *v.* Bank, 45 Mo. 528; Lee *v.* Munroe, 7 Cranch (U. S.) 366; Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423; State *v.* Hays, 52 Mo. 578; Wallace *v.* Mayor, 29 Cal. 181; Sutro *v.* Pettit, 74 Cal. 332, 5 Am. St. Rep. 442; Day Co. *v.* State, 68 Tex. 526; Tamm *v.* Lavalle, 92 Ill. 263.

[2] Jackson *v.* Humphrey, 1 Johns. (N. Y.) 498.

sheriff can not execute civil process beyond the limits of his county;[1] a justice of the peace can not hold court or exercise judicial functions or take acknowledgments outside of the county within and for which he was elected;[2] a constable is not vested with official character when acting in a county to which he does not belong;[3] a United States marshal can not execute process beyond his district.[4]

§ 509. **Authority limited to official Term.**—So it is evident that the authority of the public officer must be limited in its exercise to that term during which he is by law invested with the rights and duties of the office. Subject to what has already been said in reference to *de facto* officers,[5] and to the right to hold over, it follows, therefore, that he can, in general, exercise no authority before his term begins or after it has terminated.

The same principle applies as well where the officer is one chosen for the performance of a single act as when he is chosen

[1] Page *v.* Staples, 13 R. I. 306. In this case, MATTESON, J. said: "In the absence of statutory provisions the power of a sheriff is limited to his own county. He is to be adjudged a sheriff in his own county and not elsewhere. He can not, therefore, execute a writ out of his own county, and if he attempts to do so he becomes a trespasser. The only exceptions to this principle are that having a prisoner in his custody upon a writ of *habeas corpus* he has power, by virtue of the writ, to travel through other counties, if necessary, in order to take his prisoner to the place where the writ is returnable; and he may also, upon fresh pursuit, retake a prisoner who has escaped from his custody into another county. Platt *v.* The Sheriffs of London, Plowd. 35, 37; Hammond *v.* Taylor, 3 B. & A. 408; Watson's Sheriff, 60, 61; Avery *v.* Seely, 3 Watts & Serg. 494, 497. In the case at bar the prisoner did not escape from the defendant's custody into Kent county, but was voluntarily taken by the defendant into that county. The moment they crossed the line between the counties into Kent county the defendant ceased to have any authority over the plaintiff. He had no more right to detain him in that county than he would have had to arrest him there."

See also Mitchell *v.* Malone, 77 Ga. 301.

[2] Share *v.* Anderson, 7 Serg. & R. (Penn.) 43, 10 Am. Dec. 421; Brown *v.* McCormick, 28 Mich. 215; Gittings *v.* Hall, 1 H. & J. (Md.) 14, 2 Am. Dec. 502.

[3] People *v.* Burt, 51 Mich. 199. Constables, however, are not merely local officers: "They are ministers of public justice, and in that capacity are State ministerial officers, with some powers strictly local and some not local." Drain Commissioner *v.* Baxter, 57 Mich. 127. See also Allor *v.* Wayne County Auditors, 43 Mich. 76.

[4] Carr *v.* Phillips, 39 Mich. 319.

[5] See *ante*, §§ 315-346.

for a definite term. When chosen to act in reference to a particular subject his powers exhaust themselves in the acting, and having once acted he is henceforth *functus officio* and can neither act again in reference to the same subject-matter nor undo what he has done.[1]

§ 510. **Same Subject—Exceptions—Completing Service—Correcting Records.**—But this rule that authority ceases at the expiration of the term of office is subject to certain well recognized exceptions.

Thus it is a well settled rule of the common law, recognized and confirmed by statutes, that when an executive officer, *e. g.*, a sheriff,[2] has during his term begun a service or commenced the performance of a duty and thereby incurred a responsibility, he has not only the authority but is ordinarily bound to go on and complete it although his official term may sooner expire.[3]

So it is well settled that the record of his official action may, after the expiration of his term, be so amended or corrected by him as to conform to the true state of the facts.[4] But the

[1] State *v.* Donnewirth, 21 Ohio St. 216; Attorney-General *v.* Iron County Canvassers, 64 Mich. 607.

[2] Sheriff may and should complete service or execution of process begun by him while in office, notwithstanding that his term has since expired. Allen *v.* Trimble, 4 Bibb. (Ky.) 21, 7 Am. Dec. 726; Purl *v.* Duvall, 5 H. & J. (Md.) 69, 9 Am. Dec. 490; Lemon *v.* Craddock, Litt. Sel. Cas. (Ky.) 251, 12 Am. Dec. 301; Tukey *v.* Smith, 18 Me. 125, 36 Am. Dec. 704; People *v.* Boring, 8 Cal. 406, 68 Am. Dec. 331. Thus he may make a deed after expiration of office for land sold by him while in office. Allen *v.* Trimble, *supra*, Lemon *v.* Craddock, *supra*, he may sell property after expiration which was seized before. Purl *v.* Duvall, *supra;* he may receive redemption money after expiration of term for land previously sold. Elkin *v.* People, 3 Scam. (Ill.) 207, 36 Am. Dec. 541; he may retain possession of property previously seized to await judgment and execution. Tukey *v.* Smith, *supra;* he may and should complete a levy begun during his term. State *v.* Roberts, 7 Halst. (N. J.) 114, 21 Am. Dec. 62. Same rule applies to deputies. Tuttle *v.* Jackson, 6 Wend. (N. Y.) 224; 21 Am. Dec. 306.

See also Clark *v.* Pratt, 55 Mo. 546; Newman *v.* Beckwith; 61 N. Y. 205; Crane *v.* Hardy, 1 Mich. 56; Miner *v.* Cassat, 2 Ohio St. 198; Doolittle *v.* Bryan, 14 How. (U. S.) 563.

Contra, Bank of Tennessee *v.* Beatty, 3 Sneed. (Tenn.) 305, 65 Am. Dec. 58.

[3] Lawrence *v.* Rice, 12 Metc. (Mass.) 533, per SHAW, C. J.

[4] Kiley *v.* Cranor, 51 Mo. 541; Kiley *v.* Oppenheimer, 55 Mo. 374; Gibson *v.* Bailey, 9 N. H. 168.

The power to make additions or amendments after expiration of office is denied in People *v.* Highway Commissioners, 16 Mich. 63.

amendment must, in all cases, be made by the person who was in office when the proceedings in question were had and not by a stranger.[1]

A former public officer, however, has no authority to certify proceedings had before him while in office.[2]

§ 511. **Grants of Power strictly construed.**—Express grants of power to public officers are usually subjected to a strict interpretation,[3] and will be construed as conferring those powers only which are expressly imposed or necessarily implied.[4]

Such an officer, therefore, can create rights against the State or other public authority represented by him, only while he is keeping strictly within the limits of his authority as so construed.[5]

[1] Gibson *v.* Bailey, 9 N. H. 168.

[2] Gaillard *v.* Anceline, 10 Mart. (La.) 479, 13 Am. Dec. 338.

[3] Green *v.* Beeson, 31 Ind. 7.

[4] Vose *v.* Deane, 7 Mass. 280.

[5] Mayor of Baltimore *v.* Eschbach, 18 Md. 282; Mayor of Baltimore *v.* Reynolds, 20 Md. 1, 83 Am. Dec. 535; Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423. In this case, DILLON, J. says: "The general principle of law is well known and definitely settled that the agents, officers or even city council of a municipal corporation can not bind the corporation when they transcend their lawful and legitimate powers.

This doctrine rests upon this reasonable ground: The body corporate is constituted of all the inhabitants within the corporate limits. The inhabitants are the corporators. The officers of the corporation, including the legislative or governing body, are merely the public agents of the corporators. Their duties and their powers are prescribed by statute. Every one, therefore, may know the nature of these duties and the extent of these powers. These considerations, as well as the dangerous nature of the opposite doctrine, demonstrate the reasonableness and necessity of the rule, that the corporation is bound only when its agents, by whom from the very nature of its being it must act if it acts at all, keep within the limits of their authority. Not only so, but such a corporation may successfully interpose the plea of *ultra vires;* that is, set up as a defense its own want of power under its charter or constituent statute to enter into a given contract or to do a given act in violation or excess of its corporate power and authority. The cases asserting these principles are numerous and uniform; some of the more important and striking ones need only be cited: Mayor of Albany *v.* Cunliff (city not liable for negligently building bridge under an unconstitutional statute) 2 N. Y. 165 (1849), reversing s. c. 2 Barb. 199; Cuyler *v.* Trustees of Rochester (laying out street contrary to charter), 12 Wend. (N. Y.) 165 (1834); Hodges *v.* Buffalo (4th of July appropriation) 2 Denio 110 (1846); Halstead *v.* Mayor, 3 N. Y. 430 (1850); Martin *v.* Mayor, 1 Hill 545; Boom *v.* Utica, 2 Barb. 104; Cornell *v.* Guilford, 1 Denio 510; Boyland *v.* Mayor and Aldermen of New York, 1 Sand. 27 (1847); Dill *v.* Wareham, 7 Metc. 438 (1844); Vincent *v.* Nantucket, 12 Cush. 103, 105 (1858), per MERRICK,

So it is well settled that when such officers undertake, by virtue of the authority conferred upon them, to build up rights against third persons, especially where their acts may result in penalties or forfeitures against such third persons, the limits and conditions imposed upon their authority must be rigidly observed or their acts will be unavailing.[1]

§ 512. **Same Subject—How differs from private Agency.**—The fact that a given act might have been deemed to be within the scope of the authority if created by a private individual is not conclusive.[2] Thus in a case involving the validity of a contract made by the city commissioner of Baltimore, the court said: "Although a private agent, acting in violation of specific instructions, yet within the scope of a general authority, may bind his principal, the rule as to the effect of a like act of a public agent is otherwise. The city commissioner was the public agent of a municipal corporation, clothed with duties and powers specially defined and limited by ordinances bearing the character

J.; Stetson *v.* Kempton, 13 Mass. 272, 7 Am. Dec. 145; Parsons *v.* Inhabitants of Goshen, 11 Pick. 396; Hood *v.* Inhabitants of Lynn, 1 Allen, 103 (1861); Spaulding *v.* Lowell, 23 Pick. 71; Mitchell *v.* Rockland, 41 Me. 363 (1858) s. c. 41 Me. 363, 66 Am. Dec. 252; Anthony *v.* Adams, 1 Met. 284 (1840); Western College *v.* Cleveland, 12 Ohio St. 375 (1861); Commissioners *v.* Cox, 6 Ind. 403 (1855); Inhabitants *v.* Weir, 9 Ind. 224 (1857); Smead *v.* Indianapolis, &c. R. R. Co. 11 Ind. 104 (1858); Brady *v.* Mayor, 20 N. Y. 312; Appleby *v.* Mayor, 15 How. Pr. 428; Estep *v.* Keokuk County, 18 Iowa 199, and cases cited by COLE, J.; Clark *v.* Polk County, 19 Iowa 247."

A State officer can only deal or contract in relation to the property of the State when he is authorized so to do by the express provisions of law; and any agreement he may make, or attempt to make, in relation to such property, when he is not so authorized is void as against the State. McCaslin *v.* State, 99 Ind. 428, 440.

See also State *v.* Hastings, 12 Wis. 596; Nalle *v.* Fenwick, 4 Rand. (Va.) 585; Yancey *v.* Hopkins, 1 Munf. (Va.) 419.

[1] See *post*, § 522.

[2] Mechem on Agency, § 292. Mayor of Baltimore *v.* Eschbach, 18 Md. 282; Mayor of Baltimore *v.* Reynolds, 20 Md. 1, 83 Am. Dec. 535; State *v.* Hays, 52 Mo. 578; Tamm *v.* Lavalle, 92 Ill. 263.

By the law of agency at the common law there is this difference between individuals and the government; the former are liable to the extent of the power they have apparently given to their agents, while the government is liable only to the extent of the power it has actually given to its officers. Per LORING, J., in Pierce *v.* United States, 1 Nott & Hun (U. S. Ct. of Cl.) 270, s. c., *sub nom* The Floyd Acceptances, 7 Wall. (U. S.) 666.

and force of public laws, ignorance of which can be presumed in favor of no one dealing with him on matters thus conditionally within his official discretion. For this reason, the law makes a distinction between the effect of the acts of an officer of a corporation and those of an agent for a principal in common cases. In the latter, the extent of authority is necessarily known only to the principal and agent, while in the former it is a matter of record in the books of the corporation or of public law."[1]

The language of Judge STORY upon this subject is also quoted with approval: "In respect to the acts and declarations and representations of public agents, it would seem that the same rule does not prevail which ordinarily governs in relation to mere private agents. As to the latter, the principals are in many cases bound, where they have not authorized the declarations and representations to be made. But in cases of public agents, the government or other public authority is not bound, unless it manifestly appears that the agent is acting within the scope of his authority, or he is held out as having authority to do the act, or is employed, in his capacity as a public agent, to make the declaration or representation for the government. Indeed, this rule seems indispensable in order to guard the public against losses and injuries arising from the fraud or mistake, or rashness and indiscretion of their agents. And there is no hardship in requiring from private persons dealing with public officers the duty of inquiring as to their real or apparent power and authority to bind the government."[2]

§ 513. **Same Subject—Limit to Discretion.**—So although the terms of the law creating the authority confer upon the officer general discretionary power without qualification, his authority is not to be deemed an unlimited one. The exercise of the officer's discretion is still limited, by legal construction, to the evident purposes of the act, and to what is known as a sound and legal discretion, excluding all arbitrary, capricious, inquisitorial and oppressive proceedings.[3]

[1] Mayor of Baltimore *v.* Eschbach, 18 Md. 282.

[2] Story on Agency, § 307 *a*.

[3] United States *v.* Doherty, 27 Fed. Rep. 730; Rose *v.* Stuyvesant, 8 Johns. (N. Y.) 426; President, &c. *v.* Patchen, 8 Wend. (N. Y.) 47; *In re* Holbrook, 99 N. Y. 539, 2 N. East. Rep. 887; United States *v.* Kirby, 7 Wall. (U. S.) 486.

§ 514. **Judicial Power limited to Jurisdiction conferred.**—The judicial power of the government is usually vested by express provisions of the constitution in certain courts and officers therein named or provided for. The effect of the provisions is to vest the *whole* judicial power of the State in the courts and officers named in the constitution, unless there is some further provision therein conferring upon some other court or officer a portion of such judicial power, or authorizing the legislature to confer it; and in the latter case, it can only be possessed or conferred by such further provision expressly or by a necessary implication which would have the effect to take the case out of the operation of the general provisions of the constitution.[1]

§ 515. **Judicial Power can be conferred only on judicial Officers.**—Under such provisions, therefore, judicial powers can only be conferred upon judicial officers,[2] and upon those only who are chosen in the manner prescribed by the constitution.[3]

Where the power is vested in the *court* as such, it exists only

[1] Chandler *v.* Nash, 5 Mich. 409, per CHRISTIANCY, J., citing 2 Story on Const. §§ 1590–1592; People *v.* Maynard, 14 Ill. 420; Gibson *v.* Emerson, 2 Eng. (Ark.) 173.

[2] Allor *v.* Wayne County Auditors, 43 Mich. 76; Gough *v.* Dorsey, 27 Wis. 119; Attorney-General *v.* McDonald, 3 Wis. 805; Conroe *v.* Bull, 7 Wis. 408; Gregory *v.* State, 94 Ind. 384, 48 Am. Rep. 162; Little *v.* State, 90 Ind. 338, 46 Am. Rep. 224; Schoultz *v.* McPheeters, 79 Ind. 373; Wright *v.* Defrees, 8 Ind. 298; Waldo Wallace, 12 Ind. 569; Columbus,&c., Ry. Co. *v.* Board, 65 Ind. 427.

Where the constitution vests all judicial powers in certain courts and justices of the peace, a statute permitting parties to a cause to stipulate that, in case of the disqualification of the judge, it shall be tried before some member of the bar agreed upon by them, who "shall have all the powers and perform all the duties of the judge of said court in said cause," is unconstitutional and void, and a judgment rendered by such member of the bar is void. Van Slyke *v.* Trempealeau Ins. Co., 39 Wis. 390, 20 Am. Rep. 50.

Where the constitution vests the judicial powers in certain courts and justices of the peace, a statute authorizing a notary public to exercise judicial powers in case of the disqualification of the proper officer, is void. Chandler *v.* Nash, 5 Mich. 409.

Under like provisions, a statute giving the clerk of a court power to fix the amount of bail is unconstitutional as conferring judicial power upon a ministerial officer. Gregory *v.* State, 94 Ind. 384, 48 Am. Rep. 162.

[3] Where, by the constitution, judicial officers are to be *elected* by the people, judicial powers cannot be conferred upon an officer appointed. Chandler *v.* Nash, 5 Mich. 409.

in the court, and the judges, as judges, out of court do not possess it and cannot be vested with it.[1]

§ 516. **Same Subject—General and special Jurisdiction.**—The jurisdiction conferred upon the judicial officer may be one of two kinds. It may be an authority to act in all cases at law or in equity which may be brought before him, or, in other words, a *general* jurisdiction; or it may be an authority to act in special cases only or only upon certain conditions and contingencies, in which case it may be called a *special* jurisdiction. In neither case is the jurisdiction unlimited, but it is obviously much greater in the former case than in the latter, and a much different presumption is indulged in one case than in the other. For it is the constant presumption of the law, in respect to courts of general jurisdiction, that they had jurisdiction over a case in which they have assumed to act;[2] while, in respect to courts of special or limited jurisdiction, no such presumption is indulged, but whoever claims any right or benefit under the actions of such a court must show affirmatively that it had jurisdiction.[3]

§ 517. **Disqualification of Judge from acting—1. By Interest.**—"It is a maxim of every code in every country," says SANDFORD, Chancellor,[4] "that no man shall be judge in his own cause. The learned wisdom of enlightened nations, and the unlettered ideas of ruder societies, are in full accordance upon this point, and wherever tribunals of justice have existed, all men have agreed that a judge shall never have the power to decide where

[1] Toledo, &c. Ry. Co. *v.* Dunlap, 47 Mich. 456. See also Risser *v.* Hoyt, 53 Mich. 185.

[2] Butcher *v.* Bank of Brownsville, 2 Kans. 70, 83 Am. Dec. 446; Shumway *v* Stillman, 4 Cow. (N. Y.) 294, 15 Am. Dec. 374; Reynolds *v.* Stansbury, 20 Ohio 344, 55 Am. Dec. 459; Cooper *v.* Sunderland, 3 Iowa 114, 66 Am. Dec. 52; Withers *v.* Patterson, 27 Tex. 491, 86 Am. Dec. 643; Cook *v.* Skelton, 20 Ill. 107, 71 Am. Dec. 250.

[3] Roderigas *v.* East River Sav. Institution, 63 N. Y. 460, 20 Am. Rep. 555; Reynolds *v.* Stansbury, 20 Ohio 344, 55 Am. Dec. 459; Hahn *v.* Kelly, 34 Cal. 391, 94 Am. Dec. 742; Mallett *v.* Mining Co. 1 Nev. 188, 90 Am. Dec. 484; Bloom *v.* Burdick, 1 Hill (N. Y.) 130, 37 Am. Dec. 299; Foot *v.* Stevens, 17 Wend. (N. Y.) 485; Wheeler *v.* Raymond, 8 Cow. (N. Y.) 314; Adams *v.* Jeffries, 12 Ohio 253, 40 Am. Dec. 477; Lowry *v.* Erwin, 6 Rob. (La.) 192, 39 Am. Dec. 557.

[4] In Washington Ins. Co. *v.* Price. Hopk. (N. Y.) Ch. 1. See also Hall *v.* Thayer, 105 Mass. 219, 7 Am. Rep. 513.

he is himself a party. In England, it has always been held that however comprehensive may be the terms by which jurisdiction is conferred upon a judge, the power to decide in his own cause is always a tacit exception to the authority of his office. Such I conceive to be the law of this State."

"No man ought to be judge in his own cause, is a maxim," says BELL, C. J.[1] "aimed at the most dangerous source of partiality in a judge.[2] It is not necessary that a judge should be a party to the cause to create this disqualification. If he is interested in a suit brought in another's name, he is equally disqualified.[3] Any, the slightest pecuniary, interest in the result, not merely possible and contingent;[4] though merely as trustee or executor,[5] and though indemnified,[6] even the interest which would, in former times, have disqualified a party to be a witness, —will be quite sufficient."[7]

The members of partnerships and corporations,[8] though their interest may be very trifling,[9] are nevertheless disqualified;[10] except in cases where a party is a mere inhabitant of a public municipal corporation as a town or county, entitled to receive the fines and costs imposed on offenders. In such cases, the

[1] In Moses *v.* Julian, 45 N. H. 52, 84 Am. Dec. 114.

[2] Citing Peck *v.* Freeholders, 20 N. J. L. 457; Hawley *v.* Baldwin, 19 Conn. 585; Russell *v.* Perry, 14 N. H. 152; Allen *v.* Bruce, 12 N. H. 418; Dig. I., 1 tit. De Jurisdictione; 1 Brooke's Abr. 177, tit. Conusans, 27; Broom's Maxims, 84; Co. Lit. 141*a*; *Id* Sec. 212; Derby's Case, 12 Coke 114; Dig. L. 5, tit. 1, 17.

See also Peninsular R. R. Co. *v.* Howard, 20 Mich. 25.

[3] Citing Foot *v.* Morgan, 1 Hill (N. Y.) 654; Wright *v.* Crump, 2 Ld. Raym. 766.

[4] Citing Steamship Co. *v.* Livingston, 3 Cow. (N. Y.) 724; Hawes *v.* Humphrey, 9 Pick. (Mass.) 350, 20 Am. Dec. 481; Wilbraham *v.* County Com'rs, 11 Pick. 322; Danvers *v.* County Com'rs, 2 Metc. (Mass.) 185; Peck *v.* Freeholders, 20 N. J. L. 457; Northampton *v.* Smith, 11 Metc. (Mass.) 390.

[5] Citing Knight *v.* Hardeman, 17 Ga. 253.

[6] Citing Oakley *v.* Aspinwall, 3 N. Y. 547.

[7] Citing Smith *v.* Boston, &c., R. R. 36 N. H. 492; Derby's Case, 12 Coke 114; 1 Rolle Abr. 491, 2; Day *v.* Savadge, Hob. 87; Ranger *v.* Great Western Ry. Co. 27 Eng. L. & Eq. 35; Baldwin *v.* McArthur, 17 Barb. (N. Y.) 414

[8] Citing Voet ad Pand, lib. 5, tit 2, 45, Washington Ins. Co. *v.* Price, 1 Hopk. Ch. 1; Peace *v.* Butternuts, &c., Co. 28 Barb. (N. Y.) 503; Dig. 49, 4, 11; Pothier's Pro. Civ. c. 2, 55.

[9] Citing Gregory *v.* Railroad Co., 4 Ohio St. 675.

[10] Citing Northampton *v.* Smith, 11 Metc. 390; Petition of Nashua, 12 N. H. 425.

members of such corporations are not disqualified, either as judges or jurors.[1]

Generally, an interest in the question, as distinct from a pecuniary interest in the result of the cause is no valid ground for recusation.[2] To this, however, there is an exception: Where the judge has a lawsuit pending or impending with another person which rests upon a like state of facts, or upon the same points of law, as that pending before him,—this is a valid disqualification.[3]

§ 518. **Same Subject—2. By Relationship or Affinity.**—At the common law, relationship by affinity or consanguinity to a party in interest did not disqualify a judge.[4] But at the civil law and by statutes in most of the States the rule is different. Thus, continues BELL, C. J.,[5] "Relationship or affinity to either party in interest, though only a stockholder in a corporation,[6] or not a party to the suit,[7] is a cause of recusation by either,[8] in civil matters to the fourth degree at least, that is, to cousins german inclusive.[9] In many jurisdictions, the exclusion extends much further.[10] The judge whose wife is related by blood or affinity to a party is recusable, as if he were of the same relationship himself; and *vice versa*, the judge related by blood or affinity to the

[1] Citing London *v.* Wood, 12 Mod. 686; Northampton *v.* Smith, 11 Metc. 390; Hill *v.* Wells, 6 Pick. 104; Justices *v.* Fennimore, 1 N. J. L. 190; Commonwealth *v.* Emery, 11 Cush. (Mass.) 406; Commonwealth *v.* Burding, 12 *Id.* 506; Commonwealth *v.* Tuttle, 12 *Id.* 505; Corwein *v.* Hames, 11 Johns. (N. Y.) 76; Wood *v.* Rice, 6 Hill (N. Y.) 58.

[2] Citing Northampton *v.* Smith, 11 Metc. 390; Pothier's Pro. Civ. c. 2, Sec. 5; People *v.* Edmonds, 15 Barb. (N. Y.) 529.

[3] Citing Davis *v.* Allen, 11 Pick. (Mass.) 466, 25 Am. Dec. 386; Ersk. Inst. tit. 2, 26, Pothier *ubi sup.*; Voet ad Pand. lib. 5, tit. 1, 44.

[4] Matter of Dodge *v.* Stevenson Mfg. Co. 77 N. Y. 101; Place *v.* Butternuts &c. Mfg. Co. 28 Barb. (N. Y.) 503.

[5] In Moses *v.* Julian, 45 N. H. 52, 84 Am. Dec. 114.

[6] Citing Place *v.* Butternuts &c. Co., 28 Barb. 503.

[7] Citing Foot *v.* Morgan, 1 Hill (N. Y.) 654.

[8] Citing Steamboat Co. *v.* Livingston, 3 Cow. (N. Y.) 724; Kelly *v.* Hocket, 10 Ind. 299; Pothier Pro. Civ. c. 2 sec. 5; Dig. 47, 10, 5; Code du Pro. Civ. 378; Ersk. Inst. tit. 2, 33; Durand's Spec. Juris. 19.

[9] Citing Sanborn *v.* Fellows, 22 N. H. 473; Bean *v.* Quimby, 5 *Id.* 98; Gear *v.* Smith, 9 *Id.* 63; Voet ad Pand. lib. 5, tit. 1, 45.

[10] Citing Oakley *v.* Aspinwall, 3 N. Y. 547; Voet ad Pand. *ubi sup.*; People *v.* Cline, 23 Barb. (N. Y.) 200; Post *v.* Black, 5 Denio (N. Y.) 66.

wife of a party is disqualified as he would be if related in the same degree to the party himself;[1] but the *consanguinei* of the husband are not at all related to the *consanguinei* of the wife; as where the justice's brother married the plaintiff's sister, the justice was held related to the plaintiff's sister, but not at all to the plaintiff.[2] The affinity, and the recusation which results from it, is extinguished when the marriage, which forms it, is dissolved and there remains no issue of the marriage.[3] The judge is none the less recusable though related by blood or marriage in the same degree to both the parties.[4] The disability resulting from relationship is held by the civil law to extend much further, where, from the absence of nearer relatives, the judge and party stand in the relation of heirs presumptive to each other; and this rule seems to be founded in good reason."[5]

§ 519. **Same Subject—3. By friendly or hostile Relations.**—"The friendly or hostile relations," continues BELL, C. J.,[6] "existing between a judge and one of the parties may be good ground of recusation.[7] Of the first class there are various circumstances referred to as examples indicating a state of feeling inconsistent with impartiality; as where the judge has received himself, or his near relative, important benefits or donations from one of the parties;[8] where the relation of master and servant exists between the judge and a party;[9] or where the relation of protection and subjection exists between the judge and a party, as in the case of a guardian and ward[10] *Qui jurisdictioni præst neque sibi jus dicere debet, neque uxori vel liberis suis, neque libertis vel cæteris quos secum habet.*[11] It is a good cause to remove a plea, that the bailiff who is the judge is of the robes of the

[1] Citing Paddock *v.* Wells, 2 Barb. Ch. 333; Carman *v.* Newell, 1 Denio (N. Y.) 25; Code Civ. Proc. 378; Pothier Pro. Civ. c. 2, sec. 50.

[2] Higbe *v.* Leonard, 1 Denio (N. Y.) 186.

[3] Citing Cain *v.* Ingham, 7 Cow. (N. Y.) 478 and note; Foot *v.* Morgan, 1 Hill (N. Y.) 654; see Winchester *v.* Hinsdale, 12 Conn. 88; Eggleston *v.* Smiley, 17 Johns. (N. Y.) 133.

[4] Citing Ersk. Inst. tit. 2, 26; Pothier Pro. Civ. c. 2, sec. 5.

[5] Citing Voet ad Pand. lib. 5, tit. 2, 45.

[6] In Moses *v.* Julian, 45 N. H. 52, 84 Am. Dec. 114.

[7] Citing Voet ad Pand. lib. 5, tit. 2, 45.

[8] Citing Pothier Pro. Civ. c. 2, sec. 5.

[9] Citing Pothier *ubi sup.*; Smith *v.* Boston &c. R. R. 36 N. H. 492.

[10] Citing Pothier *ubi sup.*

[11] Citing Dig. 2, 1, 10; Ersk. Inst. tit. 2, sec. 26; 1 Rolle Abr. 492; 6 Vin. Abr. 1, tit. Connuisance O.

plaintiff.[1] But a creditor, lessee or debtor may be judge in the case of his debtor, landlord or creditor, except in cases where the amount of the party's property involved in the suit is so great that his ability to meet his engagements with the judge may depend upon the success of his suit.[2]

Enmity, indicated by threats, verbal or written, pending or shortly preceding the suit,[3] or otherwise,[4] and a lawsuit pending between a judge and a party, are good causes for recusation. Generally, such a lawsuit between a party and the nearest relative of the judge is not sufficient cause of recusation, though this may depend upon the state of feeling between the judge and the party, to which the lawsuit has given rise. The bitterness of feeling resulting from a lawsuit is supposed to subside when the lawsuit has terminated. A party cannot disqualify a judge to sit in his case by bringing an action against him after the principal suit is commenced.

Under this head falls the class of cases where a judge has a bias or prejudice in favor of or against one of the parties. Such bias, caused by hearing an *ex parte* statement of the facts of a case would be a disqualification to try it. A judge, anxiously on his guard to hear nothing of the cases which may come before him, except what is said in court and in presence of the adverse party, may yet find that he has been imposed upon by artful statements designed to create a prejudice in his mind relative to the case. In such a case, he may well decline to sit in the case."[5]

§ 520. **Same Subject—4. By having been Counsel of either Party.**—So the fact that the judge has been of counsel to either party in the same suit is deemed a just cause of disqualification.[6]

§ 521. **Legislative Power limited by the Constitution.**—The government of the United States is one of enumerated powers.[7]

[1] Citing 12 H. 4, 13; S. P., Brooke Abr., *Cause a remover*, pl. 13.

[2] Citing, Pothier *ubi sup.*

[3] Citing Voet and Pothier *ubi sup.*

[4] Citing Turner *v.* Commonwealth, 2 Met (Ky.) 619.

[5] Citing Williams *v.* Robinson, 6 Cush. (Mass.) 334.

[6] Moses *v.* Julian, 45 N. H. 52, 84 Am. Dec. 114; citing Ten Eick *v.* Simpson, 11 Paige (N. Y.) 179; McLaren *v.* Charrier, 5 *Id.* 532, Pothier and Voet, *ubi sup.*, State *v.* Houser, 28 Mo. 233.

[7] Cooley, Const. Lim. 10.

In the words of Chief Justice MARSHALL, it "can claim no powers which are not granted to it by the constitution; and the powers actually granted must be such as are expressly given or given by necessary implication." [1]

In the case of the States, however, the rule is different. Their constitutions are not grants of power, but are rather limitations upon the powers which the States inherently possess.[2] The whole legislative power of the State being vested in the legislature, the legislative power of that body is absolute except so far as it is limited by the constitution.[3] The power to determine whether the limits imposed have been exceeded rests in the courts, but the courts will always presume that the legislature intended to keep within its constitutional powers and will only declare an act of the legislature void where the violation of the constitution is clear.[4]

But within its constitutional limits, the legislature is the sole and final judge of all questions of policy and equity,[5] and the courts are not at liberty to declare the acts of the legislature void because of their apparent injustice or impolicy, nor because in their opinion an act is opposed to what is believed to be the spirit of the constitution.[6]

But while its legislative power is thus practically absolute, the legislature cannot usurp the powers allotted to other departments of the government. It can not, therefore, exercise judicial power, nor directly or indirectly control the exercise by the courts of their judicial functions.[7]

[1] Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 326.

[2] Cooley, Const. Lim. 11.

[3] Cooley, Const. Lim. 201.

[4] Cooley, Const. Lim. 205, 206.

[5] Sheley *v.* Detroit, 45 Mich. 431.

[6] Cooley, Const. Lim. 202, 207.

[7] "It is well settled," says COOLEY, J., in Butler *v.* Supervisors, 26 Mich. 22, 27, "that the apportionment of legislative power to one department of the government will not authorize it to exercise any portion of the judicial power, which is apportioned to another department. The apportionment is, of itself, an implied prohibition upon the exercise by the legislature. That body, consequently, can not set aside a judgment or decree, nor can it even require the judiciary to give a new hearing in a case once passed upon. The line which separates judicial from legislative authority is clear and distinct, and the principle is so well settled and understood that it is seldom called in question, and probably not often violated except through inadvertence. A reference to a few of the many cases in which it has been applied is made here by

§ 522. **Ministerial Powers limited to those expressly granted or necessarily implied.**—The powers conferred upon ministerial officers, are, as has been seen,[1] ordinarily confined within the limits of a strict construction. From the very nature of the case a distinction arises. They are authorized to do acts,—not usually to exercise judgment or discretion. The manner of doing the act is often prescribed, but in any event no greater authority is required than that which suffices for accomplishing the purpose specified.

It is, therefore, the general rule that the authority of ministerial officers will be strictly construed,[2] and will be held to include those powers only which are expressly conferred or are necessarily to be implied.[3]

§ 523. **Ministerial Officer can not question Validity of Law requiring his Action.**—It is not within the scope of the duties of a ministerial officer to pass upon the validity of laws, instructions or proceedings *prima facie* valid, and requiring his action. His only duty in such a case is obedience, and, as will be seen hereafter,[4] he can not excuse himself by undertaking to show the unconstitutionality or other invalidity of the law, or the irregularity of the proceedings.[5]

§ 524. **Ministerial Officer can not act in his own Behalf.**—It is a principle of great importance, and quite general acceptance, that no officer shall act as such in a matter in which he is personally interested as a party. Hence it has frequently been held that a ministerial officer can not make a valid service of process in a cause to which he is a party.[6]

way of illustration merely. Lewis *v.* Webb, 3 Me. 326; Lane *v.* Dorman, 3 Scam. (Ill.) 242, (36 Am. Dec. 543); Campbell *v.* Union Bank, 6 How. (Miss.) 661; Ervine's Appeal, 16 Penn. St. 266, (55 Am. Dec. 499); Cash, Appellant, 6 Mich. 193; McDaniel *v.* Correll, 19 Ill. 226, (68 Am. Dec. 587); Denny *v.* Mattoon, 2 Allen (Mass.) 361, (79 Am. Dec. 784); Budd *v.* State, 3 Humph. (Tenn.) 483, (39 Am. Dec. 189); Wally *v.* Kennedy, 2 Yerg. (Tenn.) 554, (24 Am. Dec. 511); Picquet, Appellant, 5 Pick. (Mass.) 64."

[1] See *ante*, § 511.

[2] Green *v.* Beeson, 31 Ind. 7; Nalle *v.* Fenwick, 4 Rand. (Va.) 585; Yancey *v.* Hopkins, 1 Munf. (Va.) 419; Day Co. *v.* State, 68 Tex 526.

[3] Vose *v.* Deane, 7 Mass. 280.

[4] See *post*, § 523.

[5] State *v.* Buchanan, 24 W. Va. 362; Waldron *v.* Lee, 5 Pick. (Mass.) 323; People *v.* Collins, 7 Johns. (N. Y.) 549; Smyth *v.* Titcomb, 31 Me. 273.

[6] Singletary *v.* Carter, 1 Bailey (S. C.) 467, 21 Am. Dec. 480; Morton *v.* Crane, 39 Mich. 526; Gage *v.* Graf-

§ 525. **Presumption of Authority.**—It is a constant presumption, attending the execution of official authority, where a public officer has assumed as such to do any act which could be lawfully done only under the protection and by virtue of official power, that he was authorized to do the act in the manner and under the circumstances existing and adopted in that case.[1]

III.

AUTHORITY BY RATIFICATION.

1. *In General.*

§ 526. **Authority may be conferred by Ratification.**—But the act or contract of a public officer or agent which shall be binding upon his principal, may be not only that which was previously expressly authorized, but also that which, from the subsequent acts or conduct of the principal, the law, for the protection of third persons who have relied thereon in good faith, will presume to have been previously authorized.

§ 527. **What is meant by Ratification.**—When it is brought to the knowledge of the principal in the transaction that a public officer or agent has, while assuming to act in that capacity, exceeded the powers lawfully conferred upon him, one of three courses may be pursued in reference to his act:—1. It may be expressly repudiated and disowned; 2. It may be expressly adopted and confirmed, or 3. No express action of any kind may be taken in reference to it, the intention of the principal being left to be determined from his subsequent acts and conduct, and this, as will be seen, may be such as to raise the legal presumption that the act has been adopted and confirmed.

fam, 11 Mass. 181; Woods *v.* Gilson, 17 Ill. 218; Filkins *v.* O'Sullivan, 79 Ill. 524; Boykin *v.* Edwards, 21 Ala. 261; Ford *v.* Dyer, 26 Miss. 243; Chambers *v.* Thomas, 3 A. K. Marsh. (Ky.) 536.

In New York, he may serve a summons, but not a warrant or execution. Bennet *v.* Fuller, 4 Johns. 486; Tuttle *v.* Hunt, 2 Cow. 436; Putnam *v.* Man, 3 Wend. 203, 20 Am. Dec. 686.

[1] Bank of United States *v.* Dandridge, 12 Wheat. (U. S.) 64, 70; Rex *v.* Verelst, 3 Camp. 432; McGahey *v.* Alston, 2 M. & W. 206; Faulkner *v.* Johnson, 11 M. & W. 581; Doe *v.* Young 8 Q. B. 63; McMahon *v.* Lennard, 6 H. L. Cas. 970.

This adoption and confirmation, whether made expressly or presumed from subsequent conduct, is the act here to be considered under the title of ratification.

2. *What Acts May be Ratified.*

§ 528. **In general.**—Repeating to some extent what has been said in another place,[1] it may be said that the power to ratify an act done for and in behalf of another, necessarily presupposes in that other the power to do the act himself, both in the first instance[2] and at the time of ratification;[3] it also presupposes the power in that other to have authorized the doing of the act in the first instance and also to authorize its doing at the time of ratification.[4] Hence—

§ 529. **The general Rule.**—It is, therefore, the general rule that one may ratify the previous unauthorized doing by another in his behalf, of any act and of that only which he might then and could still lawfully do himself, and which he might then and could still lawfully delegate to such other to be done.[5]

§ 530. **Torts may be Ratified.**—It is immaterial whether the unauthorized act arises from a contract or is founded upon a tort. Whoever, with knowledge of the facts, adopts as his own or knowingly appropriates the benefits of a wrongful act which another has, without authority, assumed to do in his behalf, will be deemed to have assumed the responsibility of the act.[6]

§ 531. **Void Acts can not be ratified—Voidable Acts may be.**—An act which was absolutely void at the time it was done can not be ratified. If the principal himself could not lawfully

[1] See Mechem on Agency, § 110 *et seq.*

[2] Davis *v.* Lane, 10 N. H. 156.

[3] Cook *v.* Tullis, 18 Wall. (U. S.) 332.

[4] *Post*, § 540.

[5] Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96; McCracken *v.* San Francisco, 16 Cal. 619; Brady *v.* Mayor, 16 How. (N. Y.) Pr. 432; O'Connor *v.* Arnold, 53 Ind. 205; Armitage *v.* Widoe, 36 Mich. 124; Supervisors *v.* Arrighi, 54 Miss. 668; Taymouth *v.* Koehler, 35 Mich. 22; Clarke *v.* Lyon Co. 8 Nev. 188.

[6] Wilson *v.* Tumman, 6 Man. & G. 242; Morehouse *v.* Northrop, 33 Conn. 380, 89 Am. Dec. 211; Griswold *v.* Haven, 25 N. Y. 595, 82 Am. Dec. 380; Lee *v.* West, 47 Ga. 311; National Life Ins. Co. *v.* Minch, 53 N. Y. 144; Lane *v.* Black, 21 W. Va. 617; Tucker *v.* Jerris, 75 Me. 184.

have done the act, or if it could not lawfully have been done by any one, no subsequent ratification or confirmation can give it force or effect.[1] If, however, the act were voidable merely it can, of course, be rendered valid.

§ 532. **Illegal Acts can not be ratified.**—It is but a re-statement of the same rules to say that an act done in violation of law or in contravention of public policy, the performance of which could not lawfully be delegated to an agent, cannot be lawfully ratified.[2]

3. *Who May Ratify.*

§ 533. **In general.**—The act of ratification in the case of a public officer may involve the power of two distinct classes of principals,—1. The State or other public body in whose behalf the officer or agent assumed to act, or 2. A private individual, who, for his own purposes, has set the public officer in motion, as in the case of a suitor who has employed a sheriff to execute process. Cases of the first class fall most properly within the scope of this work, while those of the second belong more appropriately to a treatise on agency or master and servant. It is, however, the

General Rule, that whoever was capable of performing an act or entering into a contract which another, unauthorized, has assumed to perform or make for him as his agent, and who is still capable of performing or entering into it, is capable of ratifying that act or contract, thereby rendering it good from the beginning and the same as though he had originally authorized or made it.[3]

§ 534. **Corporations, private and municipal, may ratify.**—And this rule is as true in the case of a corporation, private or

[1] Armitage *v.* Widoe, 36 Mich 124; Chapman *v.* Lee, 47 Ala. 143; Day *v.* McAllister, 15 Gray (Mass.) 433; Workman *v.* Wright, 33 Ohio St, 405; 31 Am. Rep. 546; Decuir *v.* Lejeune, 15 La. Ann. 569; Harrison *v.* McHenry, 9 Ga. 164, 52 Am. Dec. 435; Bird *v.* Brown, 4 Ex. 786.

[2] State *v.* Matthias, 1 Hill (S. C.) 37; Turner *v.* Phœnix Ins. Co. 55 Mich. 287; Harrison *v* McHenry, *supra.*

[3] Wilson *v.* Dame, 58 N. H. 392; Williams *v.* Butler, 35 Ill, 544; Indianapolis, &c., R. R. Co. *v.* Morris, 67 Ill. 295; Pollock *v.* Cohen, 32 Ohio St. 514; Sentell *v.* Kennedy, 29 La. Ann. 679; McCracken *v.* San Francisco, 16 Cal. 591.

municipal, as of an individual. An act not within the corporate powers of the corporation cannot be rendered operative by ratification,[1] but if the act were one which the corporation might lawfully have done or authorized in the first instance, its unauthorized performance, in its behalf, may be ratified in the same manner and with the like effect as by an individual.[2]

So, as in the case of an individual, it is not necessary that there should be a direct proceeding, with an express intention to ratify. It may be done indirectly, and by acts of recognition or acquiescence, or by acts inconsistent with repudiation or disapproval.[3]

§ 535. **State may ratify.**—So, within the same limits, a State or other greater governmental power may ratify the unauthorized acts of its officers and agents.[4] Thus it is said in a case[5] in Minnesota speaking of an unauthorized sale of public property by an agent of the State: "It was competent, however, for the State as principal to make it good by legislative enactment, adopting it as its own; for it could have authorized it in the first instance, and whatever it can do or direct to be done originally, it can subsequently and when done lawfully ratify and adopt

[1] Taymouth *v.* Koehler, 35 Mich. 22; Highway Commissioners *v.* Van Dusan, 40 Mich. 439; Supervisors *v.* Arrighi, 54 Miss. 668; Smith *v.* Newburgh, 77 N. Y. 130; Green *v.* Cape May, 41 N. J. L. 45; Hague *v.* Philadelphia, 48 Penn. St. 528; Bangor Boom Co. *v.* Whiting, 29 Me. 123.

[2] Kelsey *v.* National Bank, 69 Penn. St. 426; Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 363; Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111; Bulkley *v.* Derby Fishing Co., 2 Conn. 252, 7 Am. Dec. 271; Peterson *v.* Mayor, 17 N. Y. 449; Baker *v.* Cotter, 45 Me. 236; Despatch Line *v.* Bellamy Mnf'g Co., 12 N. H. 205, 37 Am. Dec. 203; Whitewell *v.* Warner, 20 Vt. 425; City of Detroit *v.* Jackson, 1 Doug. (Mich.) 106; Church *v.* Sterling, 16 Conn. 388; Planters' Bank *v.* Sharp, 4 Smedes & M. (Miss.) 75, 43 Am. Dec. 470.

[3] Scott *v.* Methodist Church, 50 Mich. 528; Taymouth *v.* Koehler, 35 Mich. 22; Sherman *v.* Fitch, 98 Mass. 59; Lyndeborough Glass Co. *v.* Massachusetts Glass Co., 111 Mass. 315; Brown *v.* Winnisimmet Co., 11 Allen (Mass.) 326; Arlington *v.* Peirce, 122 Mass. 270; Hoyt *v.* Thompson, 19 N. Y. 307; Scott *v.* Middletown, &c., R. R. Co. 86 N. Y. 200; Gold Mining Co. *v.* National Bank, 96 U. S. 640; Law *v.* Cross, 1 Black (U. S.) 533.

[4] State *v.* Torinus, 26 Minn. 1, 37 Am. Rep. 395; State *v.* Delafield, 8 Paige (N. Y.) 527; Day Land & Cattle Co. *v.* State, 68 Tex. 526; Michigan State Bank *v.* Hastings, 1 Doug. (Mich.) 225, 41 Am. Dec. 549.

[5] State *v.* Torinus, 26 Minn. 1, 37 Am. Rep. 395.

with the same effect as though it had been properly done under a previous authority."

§ 536. **When Officer may ratify.**—An officer or agent cannot ratify his own unauthorized act;[1] nor can one of two joint agents ratify the act of his coagent;[2] but where the act, which when done by one agent was unauthorized, is within the general power of another agent of the same principal, the doing of the act by the first agent may be ratified by the second.[3] This doctrine is frequently applied to the ratification of the acts of subordinate agents by the superior agents of corporations.[4] So inasmuch as the public can only act through its officers and agents, it is only through its superior officers and representatives that the acts and contracts of its inferior officers and agents can be confirmed.

Ratification by an officer or agent depends upon certain facts which must affirmatively be made to appear: (1) The agent ratifying must have had general power to do himself the act which he ratifies.[5] (2) They must both be agents of the same

[1] Trudo *v.* Anderson, 10 Mich. 357, 81 Am. Dec. 795; Hotchin *v.* Kent, 8 Mich. 526.

[2] Penn. *v.* Evans, 28 La. Ann. 576.

[3] Mound City Mutual L. Ins. Co. *v.* Huth, 49 Ala. 530; Whitehead *v.* Wells, 29 Ark. 99; Dorsey *v.* Abrams, 85 Penn. St. 299; Palmer *v.* Cheney, 35 Iowa 281.

[4] Thus see Cairo & St. L. R. R. Co. *v.* Mahoney, 82 Ill. 73, 25 Am. Rep 299; Toledo. Wab. & West. R. R. Co. *v.* Rodrigues, 47 Ill. 188, 95 Am. Dec. 484; Toledo, &c., R. R. Co. *v.* Prince, 50 Ill. 26; Ballston Spa Bank *v.* Marine Bank, 16 Wis. 129; Anglo-Californian Bank *v.* Mahoney Mining Co. 5 Sawy. (U. S. C. C.) 255, s. c 104. U. S. 192; Sherman *v.* Fitch, 98 Mass. 59; Walworth Co. Bank *v.* Farmers' L. & T. Co., 16 Wis. 629; Hoyt *v.* Thompson, 19 N. Y. 207; Darst *v.* Gale, 83 Ill. 136; First National Bank *v.* Kimberlands, 16 W. Va. 555; Burrill *v.* Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; Wood *v.* Whelen, 93 Ill. 155; Chouteau *v.* Allen, 70 Mo. 290; Reichwald *v.* Commercial Hotel Co. 105 Ill. 439; Lyndenborough Glass Co. *v.* Mass. Glass Co. 111 Mass. 315; Olcott *v.* Tioga R. R. Co. 27 N. Y. 546, 84 Am. Dec. 298; Union Mutual Life Ins. Co. *v.* Masten, 3 Fed. Rep. 881.

[5] Thus in Delafield *v.* State, 2 Hill (N. Y.) 175, it is said: "The appellant relies on the fact that the governor, after he knew of the first contract, signed the bonds and caused them to be delivered; and that some of the other public officers of the State acted under the contracts, drawing for money and receiving payments. But the difficulty is that the governor was no more than an agent for the State, and he, as well as the commissioners, acted under a limited authority; and the same remark is applicable to the auditor and other

principal, and the agent whose act is in question must have professed to act as agent of the common principal.[1]

4. *Conditions of Ratification.*

§ 537. **In general.**—The question of the conditions which must exist to effect a ratification so far as they affect a private agency have been considered in another place,[2] but as the same principles must, in general, apply to the case of a public agency, they may, perhaps, be properly recapitulated here.

§ 538. **1. Principal must have been identified.**—The act to be ratified must have been done by one claiming to represent the person ratifying or persons of his description.[3] It is not necessary that the intended principal be known to the agent at the time, but it is necessary that the person for whom the agent professes to act must be a person who is then capable of being ascertained. Neither is it necessary that he should have been named, but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound.[4]

§ 539. **2. Principal must have been in Existence.**—It follows necessarily from the doctrine of the preceding section that the principal must also have been in existence at the time the act to be ratified was done. A principal, *e. g.*, a corporation, subsequently coming into existence may become liable upon contracts assumed to have been made in its behalf before its organization by persons who undertook to bind it in advance, as where the corporation when organized, with knowledge of the facts, appropriates and retains the benefits of the contracts so made on its account;[5] but this liability is rather that of a new implied con-

public officers. None of them had authority to make such contracts as these were; and if they could not make them originally, they could not ratify them."

[1] Ironwood Store Co. *v.* Harrison, 75 Mich. 197, 42 N. W. Rep. 808.

[2] Mechem on Agency, § 124 *et seq.*

[3] Foster *v.* Bates, 12 M. & W. 226.

[4] Watson *v.* Swann, 11 C. B. (N.S.) 771; 102 Eng. Com. Law Rep. 770; Kelner *v.* Baxter, L. R. 2 C. P. 174.

[5] Rockford, &c., R. R. Co. *v.* Sage, 65 Ill. 328, 16 Am. Rep. 587; Bell's Gap R. R. Co. *v.* Christy, 79 Penn. St. 54, 21 Am. Rep. 39; Paxton Cattle Co, *v.* First National Bank, 21 Neb. 621, 59 Am. Rep. 852; Western

tract than the ratification of one which was made before the corporation had acquired a legal existence.[1]

§ 540. 3. **Principal must have present Ability.**—As has been seen, the power to ratify presupposes a present ability in the principal to do the act himself or to authorize it to be done.[2] If, therefore, for any reason, the principal has become, since the doing of the act to be ratified, incapable of doing the act himself and of authorizing it to be done, he is incapable of ratifying it.[3]

And so if third persons acquire rights after the act is done and before it has received the sanction of the principal, the ratification cannot operate retrospectively so as to overreach and defeat those rights.[4]

§ 541. 4. **Act must have been done as Agent.**—The act ratified must also have been done by the assumed agent as agent and in behalf of the principal. If the act was done by him as principal and on his own account, it cannot thus be ratified.[5]

§ 542. 5. **Knowledge of material Facts.**—It is also the general rule, that, except in those cases where the principal intentionally assumes the responsibility without inquiry, or deliberately ratifies, having all the knowledge in respect to the act which he cares to have,[6] any ratification of an unauthorized

Screw Co. *v.* Cousley, 72 Ill. 531; New York, &c., R. R. C. *v.* Ketchum, 27 Conn. 170.

[1] Morawetz on Corporations, § 548.

[2] Zottman *v.* San Francisco, 20 Cal. 96, 81 Am. Dec. 96. "Ratification can only be made when the principal possesses at the time the power to do the act ratified. He must be able at the time to make the contract to which, by his ratification, he gives validity." FIELD, J., in McCracken *v.* San Francisco, 16 Cal. 591. See also Grogan *v.* San Francisco, 18 Cal. 590; Marsh *v.* Fulton County, 10 Wall. (U. S.) 676; Davis *v.* Lane, 10 N. H. 158.

[3] Cook *v.* Tullis, 18 Wall. (U. S.) 332.

[4] Wood *v.* McCain, 7 Ala. 800, 42 Am. Dec. 612; Stoddart's Case, 4 Ct. of Cl. 511.

[5] Collins *v.* Snau, 7 Robt. (N. Y.) 623; Hamlin *v.* Sears, 82 N. Y. 327; Pittsburgh, &c., R. R. Co *v.* Gazzam, 32 Penn. St. 340; Collins *v.* Waggoner, Breese (Ill.) 26; Beveridge *v.* Rawson, 51 Ill. 504; Commercial Bank *v.* Jones, 18 Tex. 811; Grund *v.* Van Vleck, 69 Ill. 479; Harrison *v.* Mitchell, 13 La. Ann. 260; Roby *v.* Cossitt, 78 Ill 638; Allred *v.* Bray, 41 Mo. 484; Vanderbilt *v.* Turnpike Co. 2 N. Y. 479; Brainerd *v.* Dunning, 30 N. Y. 211.

[6] Lewis *v.* Read, 13 M. & W. 834; Kelley *v.* Newburyport Horse R. R. Co., 141 Mass. 496; Phosphate of

contract, in order to be made effectual and obligatory upon the alleged principal, must be shown to have been made by him with a full knowledge of all the material facts connected with the transaction to which it relates; and especially must it appear that the existence of the contract and its nature and consideration were known to him.[1] It is not necessary, however, that he should also be informed of the legal effect of the facts. If he knows the facts, it is enough. But if the material facts were suppressed, or were unknown to him, except as the result

Lime Co. *v.* Green, L. R. 7 C. P. 43, 1 Eng. Rep. 98.

[1] Dickinson *v.* Conway, 12 Allen (Mass.) 491; Combs *v.* Scott, *Id.* 493; Owings *v.* Hull, 9 Pet. (U. S.) 607; Hardeman *v.* Ford, 12 Ga. 205; Mapp *v.* Phillips, 32 Ga. 72; Mathews *v.* Hamilton, 23 Ill. 470; Tidrick *v.* Rice, 13 Iowa 214; Dodge *v.* McDonnell, 14 Wis. 553; Fletcher *v.* Dysart, 9 B. Mon. (Ky.) 413; Woodbury *v* Larned, 5 Minn. 339; Humphrey *v.* Havens, 12 *Id.* 298; Seymour *v.* Wyckoff, 10 N. Y. 213; Brass *v.* Worth, 40 Barb. (N. Y.) 648; Roach *v.* Coe, 1 E. D. Smith (N. Y.) 175; Pittsburgh, &c., R.R. Co. *v.* Gazzam, 32 Penn. St. 340; Dupont *v.* Wertheman, 10 Cal. 354; Billings *v.* Morrow, 7 Cal. 171, 68 Am. Dec. 235; Ward *v.* Williams, 26 Ill. 447, 79 Am. Dec. 385; Manning *v.* Gasharie, 27 Ind, 399; Ætna Ins. Co. *v.* N. W. Iron Co , 21 Wis. 458; McCants *v.* Bee, 1 McCord Ch. 383, 16 Am. Dec. 610; White *v.* Davidson, 8 Md. 169,63 Am. Dec. 699; Bryant *v.* Moore, 26 Me. 84, 45 Am. Dec. 96; Pennsylvania Steam Nav. Co. *v.* Dandridge, 8 Gill & John. (Md.) 248, 29 Am. Dec. 543; Bohart *v.* Oberne, 36 Kan. 284; Spooner *v.* Thompson, 48 Vt. 259; Reynolds *v.* Ferree, 86 Ill. 570; Adams Exp. Co. *v.* Trego, 35 Md. 47; Lester *v.* Kinne, 37 Conn. 9; Delaney *v.* Levi, 19 La. Ann. 251; Williams *v.* Storm, 6 Cold. (Tenn.) 203; Miller *v.* Board of Education, 44 Cal. 166; Commercial Bank *v.* Jones, 18 Tex. 811; Bannon *v.* Warfield 42 Md. 22; Bosseau *v.* O'Brien, 4 Biss. (U. S. C. C.) 395; Union Gold Mine Co. *v.* Rocky Mt. Nat. Bank, 2 Col. 565; Bank of Owensboro *v.* Western Bank, 13 Bush. (Ky.) 526, 26 Am. Rep. 211; Meyer *v.* Baldwin, 52 Miss. 263; Kerr *v.* Sharp, 83 Ill. 199; Stein *v.* Kendall, 1 Ill. App. 103; Snow *v.* Grace, 29 Ark. 131; Turner *v.* Wilcox, 54 Ga. 593; Craighead *v.* Peterson, 72 N. Y. 279, 28 Am. Rep. 150; Smith *v.* Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Baldwin *v.* Burrows, 47 N. Y. 212; Silverman *v.* Bush, 16 Ill. App. 437; Hovey *v.* Dover, 59 N. H. 522; Curry v. Hale, 15 W. Va. 859; Bell *v* Cunningham, 3 Pet. (U. S.) 69; Pacific Rolling Mill Co. *v.* Dayton, 7 Sawyer, (U. S. C. C.) 67, 5 Fed. Rep. 852; Forrestier *v.* Bordman, 1 Story, (U. S. C. C.) 52; Reese *v.* Medlock, 27 Tex. 120, 84 Am. Dec. 611; Bennecke *v.* Ins. Co. 105 U. S. 355; Fuller *v.* Ellis, 39 Vt. 345, 94 Am. Dec. 327; Deihl *v.* Adams Ins. Co. 58 Penn. St. 443; Bevin *v.* Conn. Mut. L. Ins. Co. 23 Conn. 244; International Bank *v.* Ferris, 118 Ill. 465. But see Scott *v.* Middletown, &c., R. R. Co. 86 N. Y. 200, as to when knowledge will be presumed

of his intentional and deliberate act, the ratification will be invalid because founded upon mistake or fraud.[1] And the same rule applies to the settlement of the liability of the agent to his principal for his unauthorized act.[2]

§ 543. 6. **No Ratification of Part of Act.**—It is a fundamental rule that if the principal elects to ratify any part of the unauthorized act he must ratify the whole of it. He cannot avail himself of it so far as it is advantageous to him, and repudiate its obligations; and this rule applies not only when his ratification is express but also when it is implied.[3]

§ 544. 7. **Rights of other Party must be prejudiced.**—The acts claimed to effect a ratification must be of such a nature that the rights of the other party who has relied upon them will be prejudiced if a ratification has not taken place.[4]

[1] In a recent case in Massachusetts it is held that it is not necessary that the principal should have knowledge not only of all of the facts, but also of the legal effect of the facts, and that he should then, with a knowledge of both law and facts, have ratified the contract by some independent and substantive act. "It is sufficient," says ALLEN, J., "if a ratification is made with a full knowledge of all the material facts. Indeed, a rule somewhat less stringent may properly be laid down where one purposely shuts his eyes to means of information within his own possession and control, and ratifies an act deliberately, having all the knowledge in respect to it which he cares to have." In Kelly *v.* Newburyport Horse R. R. Co., 141 Mass. 496, citing Combs *v.* Scott, 12 Allan (Mass.) 493; Phosphate of Lime Co. *v.* Green, L. R. 7 C. P. 43, 1 Eng. Rep. 89.

[2] Bank of Owensboro *v.* Western Bank, 13 Bush (Ky.) 526, 26 Am. Rep. 211; Hoffman *v.* Livingston, 46 N. Y. Super. Ct. 552.

[3] McClure *v.* Briggs, 58 Vt. 82, 56 Am. Rep. 557; Eberts *v.* Selover, 44 Mich. 519, 38 Am. Rep. 278; Rudasill *v.* Falls, 92 N. C. 222; Tasker *v.* Kenton Ins. Co., 59 N. H. 438; Barhydt *v.* Clark, 12 Ill. App. 646; Southern Express Co. *v.* Palmer, 48 Ga. 85; Krider *v.* Western College, 31 Iowa 547; Crawford *v.* Barkley, 18 Ala. 270; Hodnett *v.* Tatum, 9 Ga. 70; Henderson *v.* Cummings, 44 Ill. 325; Elam *v.* Carruth, 2 La. Ann. 275; Widner *v.* Lane, 14 Mich. 124; Peninsular Bank *v.* Hanner, *Id.* 208; Coleman *v.* Stark, 1 Oregon, 115; Crans *v.* Hunter, 28 N. Y. 389; Ruffner *v.* Hewett, 7 W. V. 585; Mercier *v.* Copelan, 73 Ga. 636; Hutchings *v.* Ladd, 16 Mich. 493.

[4] Doughaday *v.* Crowell, 11 N. J. Eq. 201.

What Amounts to a Ratification.

§ 545. **Written or unwritten—Express or implied.**—As has been seen and will hereafter be more clearly seen, the ratification of an unauthorized act is deemed to be equivalent to a prior authority to perform it; and as that prior authority may have been written or unwritten, express or implied, so this ratification may be effected in the same way.[1]

Where the facts are undisputed, the question whether or not they amount to a ratification, is one of law for the court; but in other cases the question of ratification or not becomes one of fact to be determined by the jury.[2]

a. Express Ratification.

§ 546. **General Rule.**—It is the general rule that the act of ratification must be of the same nature as that which would be required for conferring the authority in the first instance.[3] If, therefore, sealed authority was indispensable, sealed ratification must be shown; and if written authority was required, written ratification must appear.[4] So if the authority could only have been conferred by an act of the legislature[5] or the resolution of a common council,[6] or by any other formal means or proceedings, the act of ratification must, in general, be evidenced in the same way.[7]

[1] Goss *v.* Stevens, 32 Minn. 472; *Post*, Subd. *a* and *b*; Taylor *v.* Conner, 41 Miss. 722, 97 Am. Dec. 419.

[2] Swartwout *v.* Evans, 37 Ill. 443; Trustees *v.* McCormick, 41 Ill. 323; Marine Co. *v.* Carver, 42 Ill. 66; Paul *v.* Berry, 78 Ill. 158; Henderson *v.* Cummings, 44 Ill. 325.

[3] "A ratification of an act done by one assuming to be an agent relates back and is equivalent to a prior authority. When, therefore, the adoption of any particular form or mode is necessary to confer the authority in the first instance there can be no valid ratification except in the same manner." PARKER, C. J. in Despatch Line *v.* Bellamy Mfg. Co. 12 N. H. 205, 37 Am. Dec. 203.

[4] Pollard *v.* Gibbs, 55 Ga. 45; Grove *v.* Hodges, 55 Penn. St. 504; Palmer *v.* Williams, 24 Mich. 328; and cases cited in following section. Where a statute required that the authority of an agent to make contracts of suretyship should be in writing, a subsequent parol ratification was held insufficient. Ragan *v.* Chenault, 78 Ky. 545.

[5] See State *v.* Delafield, 8 Paige (N. Y.) 527; State *v.* Torinus, 26 Minn. 1, 37 Am. Rep. 395.

[6] McCracken *v.* San Francisco, 16 Cal. 591; Piemental *v.* San Francisco, 21 Cal. 351; Cross *v.* Morristown, 18 N. J. Eq. 305.

[7] Peterson *v.* Mayor, 17 N. Y. 449.

b. Implied Ratification.

§ 547. **In general—Variety of Methods.**—But by far the most numerous class of cases is that in which the ratification was not express but is inferred from the acts and conduct of the parties.

The methods by which a ratification may be effected are as numerous and as various as the complex dealings of human life. It is impossible to state them all. But certain forms that have been judicially passed upon may be grouped, and instances be given which may furnish a rule for future cases.

§ 548. **By accepting Benefits.**—It is a rule of quite universal application that he who would avail himself of the advantages arising from the act of another in his behalf must also assume the responsibilities. If the principal has knowingly appropriated and enjoyed the fruits and benefits of an agent's act, he will not afterwards be heard to say that the act was unauthorized. One who voluntarily accepts the proceeds of an act done by one assuming, though without authority, to be his agent, ratifies the act and takes it as his own with all its burdens as well as all its benefits. He may not take the benefits and reject the burdens, but he must either accept them or reject them as a whole.[1] But here, as in other cases, it is indispensable that the principal should have had full knowledge of the material facts, or that he should have intentionally accepted the benefits without inquiry. Otherwise the receipt and retention of the benefits of the unauthorized act, is no ratification of it.[2]

[1] Ruggles *v.* Washington Co. 9 Mo. 496; Hastings *v.* Bangor House, 18 Me. 436; Low *v.* Conn. &c. R. R. Co. 46 N. H. 284; Reid *v.* Hibbard, 6 Wis. 175; Cushman *v.* Loker, 2 Mass. 106; Narragansett Bank *v.* Atlantic Co. 3 Metc. (Mass.) 282; Codwise *v.* Hacker, 1 Cai. (N. Y.) 526; Moss *v.* Rossie Co. 5 Hill (N. Y.) 137; Palmerton *v.* Huxford, 4 Den (N. Y.) 166; Houghton *v.* Dodge, 5 Bosw. (N. Y.) 326; Farmers', &c. Bank *v.* Sherman, 6 *Id.* 181; State *v.* Perry, Wright (Ohio) 662; Davis *v.* Krum, 12 Mo. App. 279; Parish *v.* Reeve, 63 Wis. 315; Hauss *v.* Niblack, 80 Ind. 407; Rich *v.* State Natl. Bank, 7 Neb. 201; Fowler *v.* N. Y. Gold Exchange, 67 N. Y. 138; Snow *v.* Grace, 29 Ark. 131; State *v.* Smith, 48 Vt. 266; Dunn *v.* Hartford, &c. R. R. Co. 43 Conn. 434; Hurd *v.* Marple, 2 Ill. App. 402; Ely *v.* James, 123 Mass. 36; Aurora Agl. Soc. *v.* Paddock, 80 Ill. 263; Bacon *v.* Johnson, 56 Mich. 182; Eadie *v.* Ashbaugh, 14 Iowa 519; Mundorff *v.* Wickersham, 63 Penn. St. 87, 3 Am. Rep. 531; Waterson *v.* Rogers, 21 Kans. 529.

[2] Bohart *v.* Oberne, 36 Kans. 234; Schutz *v.* Jordan, 32 Fed. Rep. 55; Kelley *v.* Newburyport Horse R. R.

§ 549. **By bringing Suit based on Agent's Act.**—One of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action at law based upon such act. Thus a demand made by an agent will be deemed to be ratified by the principal, if he brings an action founded upon such demand,[1] and ratification by a bank of its cashier's endorsement of a note is established by the fact that the bank prosecutes an action on the note in the name of the endorsee;[2] so if the principal appear in court and prosecute an action of attachment begun in his name by one assuming to act as his agent, he will be held to have ratified the act of such agent in signing his name to the attachment bond.[3] And where a vendor who has been defrauded in a sale of his goods made by an agent, proceeds to judgment against the vendee after being fully apprised of the fraud, he ratifies the sale.[4] And where an agent without authority had consigned his principal's goods for sale, and the principal brought an action against the agent for the price and value of the goods so consigned, it was held a *prima facie* ratification of the consignment,[5] and an action to enforce a contract made by an agent, is sufficient evidence of the agent's authority to make it.[6] And an action to recover upon a note taken in payment of goods sold by an agent, ratifies the sale, and with it, in cases where the agent would have authority to warrant, a warranty made by the agent as a part of the sale.[7] And bringing an action on a mortgage taken by an agent, ratifies his act in taking it.[8] So a principal's abandonment of a suit upon a

Co. 141 Mass. 496; Combs *v.* Scott, 12 Allen (Mass.) 493; Phosphate of Lime Co. *v.* Green, L. R. 7 C. P. 43, 1 Eng. Rep. 98, and cases cited in preceding note.

[1] Ham *v.* Boody, 20 N. H. 411, 51 Am. Dec. 235; Payne *v.* Smith, 12 N. H. 34; Town of Grafton *v.* Follansbee, 16 N. H. 459, 41 Am. Dec. 736.

[2] Corser *v.* Paul, 41 N. H. 24, 77 Am. Dec. 753.

[3] Bank of Augusta *v.* Conrey, 28 Miss. 667; Dove *v.* Martin, 23 Miss 588.

[4] Lloyd *v.* Brewster, 4 Paige (N. Y.) 537; Bank of Beloit *v.* Beale, 34 N. Y. 473.

[5] Frank *v.* Jenkins, 22 Ohio St. 597.

[6] Dodge *v.* Lambert, 2 Bosw. (N. Y.) 570; Benson *v.* Liggett, 78 Ind. 452.

[7] Franklin *v.* Ezell, 1 Sneed (Tenn.) 497; Cochran *v.* Chitwood, 59 Ill. 53; Smith *v.* Tracy, 36 N. Y. 79.

[8] Partridge *v.* White, 59 Me. 564. And see Beidman *v.* Goodell, 56 Iowa 592; Roberts *v.* Rumley, 58 Iowa 301.

compromise of the cause of action by an agent ratifies the compromise.[1]

§ 550. **Ratification by Acquiescence—Silence.**—It is a maxim of the law that he who remains silent when in conscience he ought to speak, will be debarred from speaking when in conscience he ought to remain silent, and this rule is of frequent application in determining whether or not an alleged principal has set the seal of his sanction upon a transaction assumed to have been done in his behalf.

§ 551. **Same Subject—Election.**—A principal upon being informed of the unauthorized act of another in his behalf, has the right to elect whether he will ratify or repudiate the act.[2] And this right of election belongs in the first instance to him alone, and so long as the condition of all parties remains unchanged, he cannot be prevented from ratifying because the other party may, for any reason, prefer to treat the act as invalid.[3] And even though at first he may disapprove, he may afterwards, if the condition of all parties remains unchanged, elect to give confirmation to the act.[4]

§ 552. **Same Subject—Must elect within a reasonable Time.**—But where the rights and obligations of third persons may depend on his election, it is obvious that he is bound to act or suffer the necessary consequences of inaction, and that if, after knowledge, he remains entirely passive in regard to the transaction, it is but just, when the protection of third persons may require it, to presume that what upon knowledge he has failed to repudiate, he has at least tacitly confirmed.[5] If therefore he would escape responsibility for the act, he must give notice of his non-concurrence. The time within which this notice is to be given has not been settled with absolute harmony by the courts. Many cases hold that the principal is bound to act at once upon receiving knowledge,[6] but the better rule and the one supported by the

[1] Hoit *v.* Cooper, 41 N. H. 111.
[2] Andrews *v.* Ætna L. Ins. Co. 92 N. Y. 596.
[3] Idem. But see *post*, § 562.
[4] Woodward *v.* Harlow, 28 Vt. 338.
[5] Saveland *v.* Green, 40 Wis 431.
[6] Ward *v.* Williams, 26 Ill. 447, 79 Am. Dec. 385; Johnston *v.* Berry, 3 Ill. App. 256; Pitts *v.* Shubert, 11 La. 286, 30 Am. Dec. 718; Kehlor *v.* Kemble, 26 La. Ann. 713; Foster *v.* Rockwell, 104 Mass. 167; Crane *v.* Bolwell, 25 Miss. 507; Bredin *v.* Dubarry, 14 Serg. & R. (Penn.) 27; Kel-

majority of the authorities, is, that if the principal desires to repudiate the transaction he must give notice thereof within a reasonable time after becoming fully informed; and that if he does not so dissent his silence will afford conclusive evidence of his approval.[1] What shall be deemed to be a reasonable time depends in this case as in others upon the situation of the parties and the facts and circumstances of the case.[2]

§ 553. **Same Rule applies to private Corporations.**—And, as has been seen, these rules apply as well to corporations within the scope of their corporate powers as to individuals.[3]

"It seems to be now well settled," says Chief Justice SHAW, "since the great multiplication of corporations, extending to almost all the concerns of business, that trading corporations, whose dealings embrace all transactions from the largest to the minutest and affect almost every individual in the community, are affected like private persons with obligations arising from implications of law, and from equitable duties which imply obligations; with constructive notice, implied assent, tacit acquiescence, ratifications from acts and from silence, and from their acting upon contracts made by those professing to be their agents;

sey *v.* National Bank of Crawford Co. 69 Penn. St. 426; Williams *v.* Storm, 6 Cold. (Tenn.) 203; Fort *v.* Coker, 11 Heisk. (Tenn.) 579; Hart *v.* Dixon, 5 Lea (Tenn.) 336; Meister *v.* Cleveland Dryer Co. 11 Ill. App. 227.

[1] Saveland *v.* Green, 40 Wis. 431; Heyn *v.* O'Hagen, 60 Mich. 157; Mobile & Montgomery Ry. Co. *v.* Jay, 65 Ala. 113; Miller *v.* Excelsior Stone Co. 1 Ill. App. 273; Hamlin *v.* Sears, 82 N. Y. 327; Meyer *v.* Morgan, 51 Miss. 21, 24 Am. Rep. 617; Wright *v.* Boynton, 37 N. H. 9; Gold Mining Co. *v.* National Bank, 96 U. S. 640; Parish *v.* Reeve, 63 Wis. 315; Alexander *v.* Jones, 64 Iowa, 207; Laffite *v.* Godchaux, 35 La. Ann. 1161; Breed *v.* Central City Bank, 6 Col. 235; Gold Mining Co *v.* Rocky Mt. Nat. Bank, 2 Col. 565; Law *v.* Cross, 1 Black (U. S.) 533; Norris *v.* Cook, 1 Curt. (U. S. C.C.) 464; Abbe *v.* Rood, 6 McLean (U. S.C.C.) 106; Brigham *v.* Peters, 1 Gray (Mass.) 139; Lorie *v.* North Chicago City Ry. Co. 32 Fed. Rep. 270; Bray *v.* Gunn, 53 Ga. 144; Oliver *v* Johnson, 24 La. Ann. 460; Reese *v.* Medlock, 27 Tex. 120, 84 Am. Dec. 611; Clay *v.* Spratt, 7 Bush (Ky.) 334; Cooper *v.* Schwartz, 40 Wis. 54; Hepburn *v.* Dunlop, 1 Wheat. (U. S.) 179; Connett *v.* Chicago, 114 Ill. 233; Booth *v.* Wiley, 102 Ill. 84; Johnston *v.* Wingate, 29 Me. 404; Farwell *v.* Howard, 26 Iowa 381; International Bank *v.* Ferris, 118 Ill. 465.

[2] McDermid *v.* Cotton, 2 Ill. App. 297; Philadelphia, &c. R. R. Co. *v.* Cowell, 28 Penn. St. 329, 70 Am. Dec. 128; Reese *v.* Medlock, *supra.*

[3] Sheldon Hat Blocking Co. *v.* Eickemeyer Hat Blocking Co., 90 N. Y. 607; Kelsey *v.* National Bank of Crawford Co., 69 Penn. St. 426.

and generally by those legal and equitable considerations which affect the rights of natural persons." [1]

§ 554. **And to Municipal and Quasi-Municipal Corporations.** —The same rules apply also to municipal and *quasi*-municipal corporations,[2] although, from their nature, a ratification by acquiescence is not so readily to be inferred as in the case of individuals or of private corporations. The numbers composing the municipal corporation being large and their direct participation in municipal affairs being less, the evidence of ratification, where it is based upon acquiescence, must manifestly be sufficient to show the approval of the corporation as such. It cannot be based alone upon the acquiescence of unofficial individuals who have no authority to act for or bind the entire body.[3]

But here also must be kept in mind a point already considered, that those acts only can be ratified which might originally have been authorized, for if the act in question was one not within the corporate powers of the municipality, no subsequent acquiescence or approval could give it validity.[4]

[1] Melledge *v.* Boston Iron Co., 5 Cush. (Mass.) 158, 51 Am. Dec. 59. "The law is well settled that a principal who neglects promptly to disavow an act of his agent by which the latter has transcended his authority, makes the act his own; and the maxim which makes ratification equivalent to a precedent authority, is as much predicable of ratification by a corporation as it is of ratification by any other principal, and it is equally to be presumed from the absence of dissent." WILLIAMS, J., in Kelsey *v.* National Bank, *supra*.

[2] For illustrations of ratification by acquiescence by municipal corporations, see Mills *v.* Gleason, 11 Wis. 470, 78 Am. Dec. 721; Hasbrouck *v.* Milwaukee, 13 Wis. 48; Supervisors *v.* Schenck, 5 Wall. (U. S.) 782; People *v.* Swift, 31 Cal. 26; Clarke *v.* Lyon County, 8 Nev. 181; Crawshaw *v.* Roxbury, 7 Gray (Mass.) 374; Peterson *v.* Mayor, 17 N. Y. 449; Backman *v.* Charlestown, 42 N. H. 125; Harris *v.* School District, 28 N. H. 65; Wilson *v.* School District, 32 N. H. 118.

[3] School District *v.* Ætna Ins. Co., 62 Me. 330; Chamberlain *v.* Dover, 13 Me. 466, 29 Am. Dec. 517; Davis *v.* School District, 24 Me. 349; White *v.* Sanders, 32 Me. 188; Fisher *v.* School District, 4 Cush. (Mass.) 494; Bliss *v.* Clark, 16 Gray (Mass.) 60; Wilson *v.* School District, 32 N. H. 118.

[4] Highway Commissioners *v.* Van Dusan, 40 Mich. 429; Taymouth *v.* Koehler, 35 Mich. 22; Marsh *v.* Fulton Co., 10 Wall. (U. S.) 676; Horton *v.* Town of Thompson, 71 N. Y. 513; McCracken *v.* San Francisco, 16 Cal. 591; Ashbury, &c. Co. *v.* Riche, L. R. 7 H. L. 653, 14 Eng. Rep. 42; Jefferson County *v.* Arrighi, 54 Miss. 668; Nash *v.* St. Paul, 11 Minn. 174; Green *v.* Cape May, 41 N. J. L. 45; Smith

§ 555. **How in Case of a State.**—The limitations applicable in the case of a municipal corporation operate with still greater force in the case of a State. As has been said, "a State cannot act in the same form, nor with the same promptitude as an individual."[1] Where the ratification of the act requires an act of the legislature, a year or two may often intervene before that body will be in session. And in no case can the same degree of promptness be expected of the State that would be required of an individual. Nor, as a general rule, can the State lose anything by the non-action or laches of its office.[2]

6. *The Results of Ratification.*

§ 556. **What for this Subdivision.**—The question of the results which flow from the ratification of an unauthorized act is obviously one of the most important connected with the subject. This question has been considered in another place,[3] but a brief résumé of the subject seems appropriate here also.

It is obvious that there are several parties whose rights and obligations may be affected by a ratification, and the question will be considered,—I. In general. II. As between principal and the officer. III. As between the principal and the other party. IV. As between the officer and the other party.

1. In General.

§ 557. **Equivalent to precedent Authority.**—By ratifying the unauthorized act the principal assumes and adopts it as his own, and this adoption extends to the whole of the act,—it goes back to its inception and continues to its legitimate end. Subject therefore to an exception to be noticed in the following section, it is the universal rule that as against the principal the ratification is retroactive and equivalent to a prior authority,[4] or to use

v. Newburgh, 77 N. Y. 130; Peterson *v.* Mayor, 17 N. Y. 449; Reilly *v.* Philadelphia, 60 Penn. St. 467.

[1] Delafield *v.* State, 2 Hill (N. Y.) 176.

[2] Lake Shore, &c. Ry. *v.* People, 46 Mich. 193; Detroit *v.* Weber, 26 Mich. 284; Attorney-General *v.* Supervisors, 30 Mich. 388.

[3] See Mechem on Agency, § 166, *et seq.*

[4] Fleckner *v.* Bank of U. S., 8 Wheat. (U. S.) 338; Cook *v.* Tullis, 18 Wall. (U. S.) 332; Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Clealand *v.* Walker, 11 Ala. 1058, 46 Am. Dec. 238; McMahan *v.* McMahan, 13 Penn. St. 376,

the language of a distinguished writer and judge, "No maxim is better settled in reason and law than the maxim *omnis ratihabitio retrotrahitur, et mandato priori equiparatur;* at all events where it does not prejudice the rights of strangers."[1]

"The ratification operates upon the act ratified precisely as though the authority to do the act had been previously given, except where the rights of third parties had intervened between the act and the ratification."[2] And this rule applies as well to corporations as to individuals.[3]

It has been seen also, that the principal cannot avail himself of the benefits of the act and repudiate its obligations.[4] Having with full knowledge of all the material facts ratified, either expressly or impliedly, the act assumed to be done in his behalf, he thenceforward stands responsible for the whole of it to the full extent to which the agent assumed to act, and he must abide by it whether the act be a contract or a tort,[5] and whether it results to his advantage or detriment.[6]

§ 558. **Exception—Intervening Rights can not be defeated.**—But this general rule is subject to one exception, which is that the intervening rights of third persons cannot be defeated by the ratification. If prior to the ratification the principal has put it out of his power to perform the contract ratified, by conveying the subject-matter thereof to a third person who took the

53 Am. Dec. 481; Pearsons *v.* McKibben, 5 Ind. 261, 61 Am. Dec. 85; Wood *v.* McCain, 7 Ala. 800, 42 Am. Dec. 612; Planter's Bank *v.* Sharp, 4 Smedes & M. (Miss.) 75, 43 Am. Dec. 470; Starks *v.* Sikes, 8 Gray (Mass.) 509, 69 Am. Dec. 270; Goss *v.* Stevens, 32 Minn. 472; United States Express Co. *v.* Rawson, 106 Ind. 215; Bronson *v.* Chappell, 12 Wall (U. S.) 681; Lawrence *v.* Taylor, 5 Hill (N. Y.) 107; Lowry *v.* Harris, 12 Minn. 255; Hankins *v.* Baker, 46 N. Y. 666; Hammond *v.* Hannin, 21 Mich. 374, 4 Am. Rep. 490; McIntyre *v.* Park, 11 Gray (Mass.) 102, 71 Am. Dec. 690; Louisville, &c., Ry. Co. *v.* McVay, 98 Ind. 391, 49 Am. Rep. 770.

[1] STORY, J., in Fleckner *v.* Bank, *supra.*

[2] FIELD, J., in Cook *v.* Tullis, *supra.*

[3] Planters' Bank *v.* Sharp, *supra;* Despatch Line *v.* Bellamy Mfg. Co. *supra,* Leggett *v.* N. J. Mfg. and Banking Co., 1 Saxt. Ch. (N. J.) 541, 23 Am. Dec. 728; Frankfort S. T. Co. *v.* Churchill, 6 T. B. Monroe (Ky.) 427, 17 Am. Dec. 159; Everett *v.* United States, 6 Port. (Ala.) 166; 30 Am. Dec. 584.

[4] *Ante,* § 542.

[5] Cooley on Torts, 127.

[6] Wood *v.* McCain, and cases cited in note 4, p. 361.

same in good faith,[1] or if third parties have in good faith acquired an estate, or interest in, or a lien or claim upon the subject-matter by attachment,[2] judgment or otherwise, these rights cannot be cut off at the mere volition of the principal.[3] Nor will the principal by ratifying be permitted to impose substantial duties or obligations upon third persons which would not exist if ratification had not taken place.

§ 559. **Ratification irrevocable.**—As has been seen, the principal upon being fully informed of the unauthorized act of one assuming to be his agent has the right to elect whether he will ratify such act or not; but when he has once exercised this right the election is final. If therefore he adopts the act, even for a moment, he adopts it forever, and he will not be allowed, at least where the rights of other parties may be affected thereby, to revoke his ratification.[4]

2. As between Principal and Officer.

§ 560. **Ratification releases Officer from Liability to Principal.** —It is the general rule that by ratifying the unauthorized act the principal absolves the agent from all responsibility for loss or damage growing out of the unauthorized transaction.[5] Here, as in other cases, the ratification must have been made with full

[1] McCracken *v.* City of San Francisco, 16 Cal. 624.

[2] Wood *v.* McCain, 7 Ala. 800, 42 Am. Dec. 612; Taylor *v.* Robinson, 14 Cal. 396.

[3] Cook *v.* Tullis, 18 Wall. (U. S.) 332; McMahan *v.* McMahan, 13 Penn. St. 376, 53 Am. Dec. 481; Stoddard's Case, 4 Ct. of Cl. 511; Pollock *v.* Cohen, 32 Ohio St. 514.

[4] Jones *v.* Atkinson, 68 Ala. 167; Smith *v.* Cologan, 2 T. R. 189; Clarke *v.* Van Reimsdyk, 9 Cranch (U. S. C. C.) 153; Hazelton *v.* Batchelder, 44 N. Y. 40; Brock *v.* Jones, 16 Tex. 461; Beall *v.* January, 62 Mo. 434.

[5] Hoffman *v.* Livingston, 46 N. Y. Super. Ct 552; Courcier *v.* Ritter, 4 Wash C. C. 549; Cairnes *v.* Bleecker, 12 Johns. (N. Y.) 300; Pickett *v.* Pearsons, 17 Vt. 470; Hanks *v.* Drake, 49 Barb. (N. Y.) 202; Vianna *v.* Barclay, 3 Cow. (N. Y.) 283; Towle *v.* Stevenson, 1 Johns. (N. Y.) Cas. 110; Ward *v.* Warfield, 3 La. Ann. 471; Flower *v.* Downs, 6 *Id.* 538; Oliver *v.* Johnson, 24 *Id.* 460; Hazard *v.* Spears, 4 Keyes (N. Y.) 485; Woodward *v.* Suydam, 11 Ohio 360; Green *v.* Clark, 5 Denio (N. Y.) 503; Skinner *v.* Dayton, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286; Bray *v.* Gunn, 53 Ga. 144; Foster *v.* Rockwell, 104 Mass. 172; Clay *v.* Spratt, 7 Bush (Ky.) 335; Bank of St. Mary's *v.* Calder, 3 Strob. (S. C.) 403; Ætna Ins. Co. *v.* Sabine, 6 McLean (U. S. C. C.) 393.

knowledge of all the material facts, and if the agent has kept back or suppressed any such facts, the ratification of the principal made in ignorance of them is no defense to the agent.[1] And even if the agent communicate to his principal all the facts known to him at the time, but if afterwards it turns out that the facts so communicated were not the real facts of the case, the agent is not relieved by a ratification made under such a misapprehension,[2] although the facts and circumstances may have been innocently concealed or inadvertently misrepresented.[3] In such a case the assumed condition is not that claimed to have been ratified.

3. As between Principal and the other Party.

§ 561. *a.* **Other Party against Principal.**—As soon as the unauthorized act is ratified, the principal who before was only nominally a party to the transaction, becomes in reality the party responsible. From this time on he is subject to all the obligations that pertain to the transaction in the same manner and to the same extent that he would be had the act been done originally by him in person, or by his express authority. The other party therefore may demand and enforce on the part of the principal the full performance of the contract entered into by his agent.[4] And if the act or contract of the agent was tainted or procured by fraud, the principal by ratification assumes responsibility for the fraud.[5]

§ 562. *b.* **Principal against the other Party.**—Where, however, the principal attempts, by means of a subsequent ratification, to build up affirmative rights against the other party, different considerations apply. As a rule the obligations of a contract must be mutual,—both parties must be bound or neither. Hence if the contract made by the agent was not binding upon the principal because of the agent's want of authority, the contract lacks

[1] Bell *v.* Cunningham, 3 Pet. (U.S.) 69, and cases last cited; Bank of Owensboro *v.* Western Bank, 3 Bush (Ky.) 526, 26 Am. Rep. 211.

[2] Bank of Owensboro *v.* Western Bank, *supra.*

[3] Vincent *v.* Rather, 31 Tex. 77, 98 Am. Dec. 516.

[4] See cases cited in § 557, *ante.*

[5] National Life Ins. Co. *v.* Minch, 53 N. Y. 144; Elwell *v.* Chamberlin, 31 N. Y. 611; Smith *v.* Tracy, 36 N. Y. 79; Lane *v.* Black, 21 W. Va. 617.

this element of mutuality, and the principal not being bound the other party is free also.

The principal, however, as has been seen, may by his subsequent affirmance become bound by the contract, but it is obvious that unless the other party has expressly agreed to that effect, it cannot rest with the principal alone to bind the other party also to the contract. That can be done only by some act on the part of the other party signifying his present consent to be bound. His attempt to enforce the contract against the principal upon the basis of the latter's affirmance of it, or his acceptance of the principal's performance of it, would be such an act, and, as in the case of the principal, if he elects to avail himself of the benefits, he must also assume the obligations.

The principal, therefore, when the other party thus evinces his affirmance of the contract, is invested with all the rights against such other party which the contract confers, and may enforce its performance in the same manner as though it had been originally made with him in person.[1] But in the absence of this affirmance by the other party, the principal cannot, while the contract remains purely executory, by his affirmance alone, create obligations in his behalf against the other party.[2]

4. As between Officer and other Party.

§ 563. **Ratification releases Officer on Contract.**—Where the contract has been made in the name and on behalf of the alleged principal, and the latter, with full knowledge of the facts, has ratified it, the contract then becomes in fact, so far as the rights of the other party are concerned, what at first it only assumed to be,—the contract of the principal. The other party has then what he contracted for,—the liability and responsibility of the principal; and he can obviously suffer no injury from the fact that the agent's act was originally unauthorized. The agent or officer, therefore, drops out of sight. His identity is thereafter merged in that of the principal and he cannot personally

[1] State *v.* Torinus, 26 Minn. 1, 37 Am. Rep. 395; Soames *v.* Spencer, 2 Dowl. & R. 32; Hammond *v.* Hannin, 21 Mich. 374, 4 Am. Rep. 490; Day Land & Cattle Co. *v.* State, 68 Tex. 526.

[2] Dodge *v.* Hopkins, 14 Wis. 630; Atlee *v.* Bartholomew, 69 Wis. 43, 5 Am. St. Rep. 103.

call upon the other party for performance, nor can performance be demanded of him. He cannot sue in his own right, nor can he be rendered personally liable upon the ground of the failure of an assumed authority.[1]

§ 564. **Otherwise in Tort.**—But while, by ratifying the tort committed by his agent the principal becomes liable therefore, this is an additional liability and not a substituted one. The agent still remains liable to third persons and satisfaction may be demanded either of the principal or of the agent or of both. It is no defence to one who is sued for committing a trespass to reply that he acted as agent of another.[2]

But a distinction is made in this respect in the case of a public officer. Thus, it is said by PARKE, B., in a leading case:[3] "If an individual ratifies an act done in his behalf, the nature of the act remains unchanged, it is still a mere trespass, and the party injured has his option to sue either; if the Crown ratifies an act, the character of the act becomes altered, for the ratification does not give the party injured the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the Crown only (such as it is), and actually exempts from all liability the person who commits the trespass. Whether the remedy against the Crown is to be pursued by petition of right, or whether the injury is an act of state without remedy except by appeal to the justice of the state which inflicts it, or by the application of the individual suffering to the government of his country to insist upon compensation from the government of this—in either view the wrong is no longer actionable."

[1] See East India Co. *v.* Hensley, 1 Esp. 112; Polhill *v.* Walter, 3 B. & Ad. 114; Bowen *v.* Morris, 2 Taunt. 374.

[2] Stephens *v.* Elwall, 4 M. & S. 259; Perminter *v.* Kelly, 18 Ala. 716, 54 Am. Dec. 177; Josselyn *v.* McAllister, 22 Mich. 300; Wright *v.* Eaton, 7 Wis. 595; Thorp *v.* Burling, 11 Johns. (N. Y.) 285; Richardson *v.* Kimball, 28 Me. 463; Burnap *v.* March, 13 Ill. 535.

[3] Buron *v.* Denman, 2 Ex. 167.

CHAPTER II.

OF THE EXECUTION OF THE AUTHORITY.

§ 565. Purpose of this Chapter.

I. THE NECESSITY OF PERSONAL EXECUTION.

566. An Office cannot be held in Trust.
567. Judgment and Discretion can not be delegated.
568. Mechanical or ministerial Duties may be delegated.
569. Authority to appoint Deputies.
570. Authority of Deputies.

II. OF THE EXECUTION OF A JOINT AUTHORITY.

571. Private Trust or Agency must be executed by all.
572. Public Trust or Agency may be executed by a Majority, though all must meet and confer.
573. Same Subject — Presumption that all acted.
574. Same Subject—Where no Majority possible all must act.
575. Same Subject—Full Board must be in Existence.
576. Same Subject—Not required to meet in any particular Office.
577. Same Subject — Previous Agreement as to joint Action void.
578. Same Subject—All may ratify Act of Part.
579. Presumption of due Execution.
580. Same Subject—Presumption not indulged in to show other Officer in Default.
581. Same Subject—Exceptions—Presumption not indulged to support Proceedings *in Invitum*.

III. IN WHOSE NAME AUTHORITY SHOULD BE EXERCISED.

582. Public officer acts in Name of State.
583. Should not make Contracts or transact Business for Public in his own Name.
584. In whose Name Deputy should act.

§ 565. **Purpose of Chapter.**—In discussing the question of proper execution of the authority, a number of considerations must be regarded. Thus, 1. The necessity of personal execution. 2. The execution by two or more officers. 3. In whose name authority is to be executed.

I.

THE NECESSITY OF PERSONAL EXECUTION.

§ 566. **An Office can not be held in Trust.**—It is the presumption of the law that a public office is to be held and executed by the person appointed or elected to it, and it is opposed to the policy of the law to permit an office to be held by one ostensibly as the real officer, but in secret trust for another.[1]

§ 567. **Judgment and Discretion can not be delegated.**—It is a well settled rule, in the case of private agents, that where the execution of the trust requires, upon the part of the agent, the exercise of judgment or discretion, its performance can not, in the absence of express or implied authority, be delegated to another.[2] In such cases it is presumed that the agent was selected because his principal desired and relied upon the agent's personal judgment and discretion, and, unless authority to delegate it be expressly or impliedly given, the agent can not entrust the performance to another to whom the principal may be, perhaps, a stranger, and in whom he might not be willing to confide.[3]

This rule applies also to public officers. In those cases in which the proper execution of the office requires, on the part of the officer, the exercise of judgment or discretion, the presumption is that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and, unless power to substitute another in his place has been given to him, he can not delegate his duties to another.[4]

The applicability of the principle would be obvious in the case of judges of courts, who clearly could not be permitted to delegate or farm out their judicial duties to others,[5] but it applies as well to all cases in which judicial and discretionary

[1] Garforth *v.* Fearon, 1 H. Bl. 327.

[2] Mechem on Agency, §§ 184–197.

[3] For a full discussion of the subject, see Mechem on Agency, Book I, Chap. VI.

[4] State *v.* Paterson, 34 N. J. L. 163; Sheehan *v.* Gleeson 46 Mo. 100; Abrams *v.* Ervin, 9 Iowa, 87; Lewis *v.* Lewis, 9 Mo. 183, 43 Am. Dec. 540.

[5] See VanSlyke *v.* Insurance Co., 39 Wis. 390, 20 Am. Rep. 50.

power is to be exercised. Thus the power to fix and to admit to bail is a judicial one which can not be delegated.[1]

It is also frequently invoked in the case of municipal boards and officers. Wherever these boards and officers are vested with discretion and judgment, to be exercised in behalf of the public, the board or officer must exercise it in person and can not, unless expressly or impliedly authorized to do so, delegate it to others.[2]

Thus a common council charged with the duty of exercising its judgment and discretion in that respect, can not delegate to an officer, committee or other person the right and power to decide upon the time and manner of constructing side walks,[3] or of grading or paving streets,[4] or of regulating and licensing hacks,[5] or of regulating wharves and fixing the rate of wharfage,[6] or of constructing and repairing a pier and regulating the tolls thereon,[7] or of deciding upon and purchasing a school or market site,[8] or of controlling a public market and renting the stalls therein.[9]

So a board of supervisors cannot delegate their power and duty of regulating the bridging of public streams,[10] or of deter-

[1] Jacquemine *v.* State, 48 Miss. 280; State *v.* Clark, 15 Ohio, 595; Morrow *v.* State, 5 Kans. 563.

[2] Birdsall *v.* Clark, 73 N. Y. 73, 29 Am. Rep. 165; Matthews *v.* Alexandria, 68 Mo. 115, 30 Am. Rep. 776; Gale *v.* Kalamazoo, 23 Mich. 344, 9 Am. Rep. 80; Thompson *v.* Schermerhorn, 6 N. Y. 92, 55 Am. Dec. 385; Hydes *v.* Joyes, 4 Bush (Ky.) 464, 96 Am. Dec. 311; State *v.* Hauser, 63 Ind. 155; State *v.* Bell, 34 Ohio St. 194; Brooklyn *v.* Breslin 57 N. Y. 591; Maxwell *v.* Bay City Bridge Co., 41 Mich. 453; Clark *v.* Washington, 12 Wheat. (U. S.) 54; Davis *v.* Read, 65 N. Y. 566; Supervisors *v.* Brush, 77 Ill. 59; Thompson *v.* Boonville, 61 Mo. 282; State *v.* Fiske, 9 R. I. 94; State *v.* Paterson, 34 N. J. L. 168; Oakland *v.* Carpentier, 13 Cal. 540; Whyte *v.* Nashville, 2 Swan. (Tenn.) 364; Lord *v.* Oconto, 47 Wis. 386; Lauenstein *v.* Fond du Lac, 28 Wis. 336; Indianapolis *v.* Indianapolis Gas Co., 66 Ind. 396; Ruggles *v.* Collier, 43 Mo. 353; Meuser *v.* Risdon, 36 Cal. 239; Darling *v.* St. Paul, 19 Minn. 389; St. Louis *v.* Clemens, 43 Mo. 395, s. c. 52 Mo. 133.

[3] Birdsall *v.* Clark, 73 N. Y. 73, 29 Am. Rep 165.

[4] Thompson *v.* City of Boonville, 61 Mo. 282; Thompson *v.* Shermerhorn, 6 N. Y. 92, 55 Am. Dec. 385.

[5] State *v.* Fiske, 9 R. I. 94.

[6] Matthews *v.* City of Alexandria, 68 Mo. 115, 30 Am. Rep. 776.

[7] Lord *v.* Oconto, 47 Wis. 386.

[8] Lauenstein *v.* Fond du Lac, 28 Wis. 336; State *v.* Paterson, 34 N. J. L. 167.

[9] Gale *v.* Kalamazoo, 23 Mich. 344, 9 Am. Rep. 80.

[10] Maxwell *v.* Bay City Bridge Co., 41 Mich. 453.

mining upon the conditions precedent to a county subscription.[1]

§ 568. **Mechanical or ministerial Duties may be delegated.**—Where, however, the question arises in regard to an act which is of a purely mechanical, ministerial or executive nature, a different rule applies.[2] It can ordinarily make no difference to any one by whom the mere physical act is performed when its performance has been guided by the judgment or discretion of the person chosen. The rule, therefore, is that the performance of duties of this nature may, unless expressly prohibited, be properly delegated to another.[3]

Where, however, the law expressly requires the act to be performed by the officer in person it can not, though ministerial, be delegated to another.[4]

§ 569. **Authority to appoint Deputies.**—Authority to appoint deputies is expressly conferred by statute upon a great variety of public officers, and the qualifications, powers and duties of such deputies are usually prescribed by the same statutes.

But in the absence of such express power, the question arises: When will the authority to appoint deputies be implied? This question, it will be observed, is substantially the same as that discussed in the previous sections. The rules prevailing at common law cannot, perhaps, be better stated than in the language of Bacon's Abridgement.[5]

"As to the execution of an office by deputy, we must observe that there are some offices which in their nature and constitution imply a power or right of exercising them by deputy; some that in their nature cannot be exercised by deputy; and some that by having such a power annexed to the grant or institution may be

[1] Supervisors *v.* Brush, 77 Ill. 59.

[2] See, in the case of private agents, Mechem on Agency, § 193.

[3] Abrams *v.* Ervin, 9 Iowa 87; Edwards *v.* Watertown, 24 Hun (N. Y.) 428, s. c. 61 How. Pr. 488; Lewis *v.* Lewis, 9 Mo. 183, 43 Am. Dec. 540.

[4] Under a statute providing that "When the signature of a person is required, he must write it or make his mark," a return of a constable signed by another in his presence and by his express direction is not good, Chapman *v.* Limerick, 56 Me. 390. Though the court admit that such a signature might bind the principal of a private agent. See Mechem on Agency, § 96.

[5] The quotation here is made from the first American from the sixth London edition; 1813. Vol. V. tit. Offices and Officers, p. 206, sub. L.

so exercised, though without such an express provision they could not.

Offices of inheritance, for years, and those which require only a superintendency and no particular skill, may regularly be exercised by deputy; such as that of earl-marshal of England, forester, park-keeper, etc.

A sheriff, though he is an officer made by the king's letters patent, and though it be not said that he may execute his office *per se vel sufficientem deputatum suum*, yet he may make a deputy,[1] which is the under sheriff, against whom actions may be brought by the parties grieved.

And it is said in general that when an officer hath power to make assigns, he may implicitly make a deputy.

A judicial officer cannot, it is said, make a deputy, unless he hath a clause in his patent to enable him; because his judgment is relied on in matters relating to his office, which might be the reason of making the grant to him; neither can a ministerial officer depute one in his stead, if the office be to be performed by him in person; but when nothing is required but a superintendency in the office, he may make a deputy.

It is clear that the judges of Westminster Hall, as well as all others having judicial authority, must hold their courts in their proper persons, and cannot act by deputy, nor in any way transfer their power to another.

A coroner cannot make a deputy, nor an escheator; because these are judicial offices which they must exercise in person; but it is said that the king by special commission may appoint a deputy escheator to inquire by office of the death of a nobleman, or, as the book seems to hold, of any other person though under that degree.

It is held that the office of constable, being wholly ministerial and no way judicial, he may appoint a deputy to execute a warrant directed to him when by reason of sickness, absence or otherwise, he cannot do it himself; for the public good requires that there should be always some officer ready at hand to execute such warrants, and the too rigorous restraint of the service of them to the proper officer could not but sometimes cause a

[1] Sheriff may appoint a special deputy at common law. Guyman v. Burlingame, 36 Ill. 201; Dungan v. Hall, 64 Ill. 254.

failure of justice. But it is said that a constable cannot make a deputy without some such special cause.[1]

It seems the better opinion that a recorder of a town cannot make a deputy without a special grant or custom for that purpose, being a judicial office relating to the administration of justice.[2] And, therefore, where a writ was directed to the mayor, alderman and recorder of Lancaster, and the record was certified by the mayor, aldermen and deputy recorder, without showing that the recorder had power to make a deputy, the return was held naught.

It is held that the marshal of the king's bench, having the inheritance of the office with power to grant the same for life, cannot, notwithstanding, give power to such grantee for life to make a deputy.

Regularly, a deputy cannot make a deputy, because it implies an assignment of his whole power, which he cannot assign over. But if A being appointed steward of a copyhold court, to be exercised *per se vel deputatum suum*, and he appoint B his deputy who hath long exercised the said office, and B authorize C and D, jointly and severally, to take a surrender of a copyhold tenement from J. S., which is done by C, without reciting his power or any relation had to it, the surrender is good, being only a single act; for the constitution in this manner gives C the color and reputation of an authority to act as a steward *de facto*, and what he does as such is sufficient among the tenants, for they have no power to examine his authority, nor is he to render them any account of it.

It is said there cannot be an officer without deed, nor can there be any deputation of an office without deed, being a matter which lies in grant.[3] But the high sheriff may make an undersheriff, or his deputy, without deed, for he claims no interest in the office but as servant."[4]

[1] In Taylor *v.* Brown, 4 Cal. 188, 60 Am. Dec. 604, it is said that a constable may appoint as many deputies as he pleases. To like effect, Jobson *v.* Fennell, 35 Cal. 711.

[2] A clerk of court may appoint a deputy at least for the performance of ministerial acts. Bonds *v.* State, 1 Mart. & Yerg. (Tenn.) 143, 17 Am. Dec. 795.

[3] A deputy clerk may be appointed without deed. Bonds *v.* State, 1 Mart. & Yerg (Tenn.) 143, 17 Am. Dec. 795.

[4] A sheriff can not constitute a deputy for a particular act, except by warrant in writing. People *v.* Moore,

A notary public cannot act by deputy, nor can protest of negotiable paper, except where authorized by statute or sanctioned by usage,[1] be made by the notary's deputy, clerk[2] or partner[3] though the latter be himself a notary.

§ 570. **Authority of Deputies.**—Where a public officer is authorized to appoint a deputy, the authority of that deputy, unless otherwise limited, is commensurate with that of the officer himself, and, in the absence of any showing to the contrary, it will be so presumed.[4]

Such a deputy is himself a public officer, known and recognized as such by law. Any act, therefore, which the officer himself might do, his general deputy may do also.[5]

2 Doug. (Mich.) 1. See also to like effect the exhaustive discussion in Meyer *v.* Bishop, 27 N. J. Eq. 141, affirmed in Meyer *v.* Patterson, 28 N. J. Eq. 239.

[1] Usage may sanction protest by clerk or deputy: Munroe *v.* Woodruff, 17 Md. 159; Miltenberger *v.* Spaulding; 33 Mo. 421; Commercial Bank *v.* Varnum, 49 N. Y. 269; McClane *v.* Fitch, 4 B. Mon. (Ky) 599; Carter *v.* Union Bank, 7 Humph. (Tenn.) 548, 46 Am. Dec. 89; Locke *v.* Huling, 24 Tex. 311; Chenowith *v.* Chamberlain, 6 B. Mon. (Ky.) 60, 43 Am. Dec. 145.

[2] In the absence of such an usage, the notary must act in person and not by his deputy or clerk: Ellis *v.* Commercial Bank, 7 How. (Miss.) 294, 40 Am. Dec. 63; Carmichel *v.* Bank, 4 How. (Miss.) 567, 35 Am. Dec. 408; Donegan *v.* Wood, 49 Ala. 242, 20 Am. Rep. 275; Onondaga County Bank *v.* Bates, 3 Hill (N. Y.) 59; Sacrider *v.* Brown, 3 McLean (U. S. C. C.) 481; Ocean Nat Bank *v.* Williams, 102 Mass. 143; Cribbs *v.* Adams, 13 Gray (Mass.) 597; Commercial Bank *v.* Barksdale, 36 Mo. 565.

[3] Commercial Bank *v.* Barksdale, 36 Mo. 565.

[4] "When the law gives him power to appoint a deputy, such deputy, when created, may do any act that the principal might do. He can not have less power than the principal." Abrams *v.* Ervin, 9 Iowa 87; Parker *v.* Kett, 1 Ld. Raym. 658; Ellison *v.* Stevenson, 6 T. B. Mon. (Ky) 275; Triplett *v.* Gill, 7 J. J. Marsh. (Ky.) 444; Commonwealth *v.* Arnold, 3 Littell (Ky.) 316; Hope *v.* Sawyer, 14 Ill. 254.

[5] Abrams *v.* Ervin, 9 Iowa 87.

Deputy county clerk may issue summons in his own name: Calender *v.* Olcott, 1 Mich. 344. Deputy sheriff may make return in his own name: Wheeler *v.* Wilkins, 19 Mich. 78. Deputy auditor general may sign deed in his own name: Westbrook *v.* Miller, 56 Mich. 148; Drennan *v.* Herzog, 56 Mich. 467; Feils *v.* Barbour, 58 Mich. 49. Deputy sheriff may conduct drawing to settle a tie vote: Evans *v.* Sutherland, 41 Mich. 177, or make sale on mortgage foreclosure. Heinmiller *v.* Hatheway, 60 Mich. 391; Hoffman *v.* Harrington, 33 Mich. 392. Deputy clerk may administer oaths: Torrans *v.* Hicks, 32 Mich. 307; State *v.* Barrett, — Minn. —, 41 N. W. Rep. 459. Court will take judicial notice

Where, however, the deputy is a special one, authorized to perform a specific act, his authority will be limited to the doing of that act only, and his powers cannot exceed those expressly conferred upon him and such as are necessarily implied.

A special deputy, it is said, is in no sense a public officer, but is merely the private agent or servant of the principal, and neither his appointment nor his relation to his principal can be presumed from his acts.[1]

II.

OF THE EXECUTION OF A JOINT AUTHORITY.

§ 571. **Private Trust or Agency must be executed by all.**— Where authority is conferred upon two or more agents to represent their principal in the transaction of business of a private nature, the rule is well settled that the agency will be presumed to be joint, and that it can only be performed by them all jointly when no intent appears that it may be otherwise executed.[2]

This rule is well illustrated in the case of arbitrators chosen to settle a private controversy, all of whom must concur in the award unless the parties have otherwise stipulated.[3] Numerous other cases are also given in the notes.

of deputy county clerks: State *v.* Barrett, *supra*. Deputy county clerk may take acknowledgments: Touchard *v.* Crow, 20 Cal. 150, 81 Am. Dec. 108; Rose *v.* Newman, 26 Tex. 131, 80 Am. Dec. 646, overruling on this point Miller *v.* Thatcher, 9 Tex. 482, 60 Am. Dec. 172.

Deputy auditor of state may make sale of lands: Bansemer *v.* Mace, 18 Ind. 27, 81 Am. Dec. 344.

[1] Meyer *v.* Bishop, 27 N. J. Eq. 141, affirmed in Meyer *v.* Patterson, 28 N. J. Eq. 239.

[2] See this subject fully discussed in Mechem on Agency, § 76–78. See Cedar Rapids, &c. R. R Co. *v.* Stewart, 25 Iowa 115; Kupfer *v.* Augusta, 12 Mass. 185; Caldwell *v.* Harrison, 11 Ala. 755; Soens *v.* Racine, 10 Wis. 271; White *v.* Davidson, 8 Md. 169 63 Am. Dec. 699; Rogers *v.* Cruger, 7 Johns. (N. Y.) 557; Damon *v.* Granby, 2 Pick (Mass.) 345; Sutton *v.* Cole, 3 Pick. 232; Woolsey *v.* Tompkins, 23 Wend. (N. Y.) 324; Hartford F. Ins. Co. *v.* Wilcox, 57 Ill. 180; Scott *v.* Detroit, &c. Society, 1 Doug. (Mich.) 119; Low *v.* Perkins, 10 Vt. 532, 33 Am. Dec. 217; Towne *v.* Jaquith, 6 Mass. 46, 4 Am. Dec. 84; Heard *v.* March, 12 Cush. (Mass.) 580; Hawley *v.* Keeler, 53 N. Y. 114; Johnston *v.* Bingham, 9 W. & S. (Penn.) 56.

[3] Moore *v.* Ewing, Coxe (N. J.) 144, 1 Am. Dec. 195; Blin *v.* Hay, 2 Tyler (Vt.) 304, 4 Am. Dec. 738; Green *v.* Miller, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184; Patterson *v.* Leavitt, 4 Conn. 50, 10 Am. Dec. 98; Wilder *v.* Ran-

§ 572. **Public Trust or Agency may be executed by a Majority, though all must meet and confer.**—Where, however, a trust or agency is created by law or is public in its nature and requires the exercise of deliberation, discretion or judgment, whether it be judicial or *quasi*-judicial in its character, the rule is otherwise, and while all of the trustees, agents or officers, except where the law makes a less number a quorum, must be present to deliberate or, what is the same thing,[1] must be duly notified and have an opportunity to be present, yet, except where the law clearly requires the joint action of them all, it is well settled that a majority of them, where the number is such as to admit of a majority, if present, may act and that their act will be deemed the act of the body.[2] Where the law prescribes what shall constitute a quo-

ney, 95 N. Y. 7; Brennan *v.* Willson, 71 N. Y. 502; Penn. *v.* Evans, 28 La. Ann. 576.

[1] Notice, and refusal to attend are equivalent to attendance in such a case. Horton *v.* Garrison, 23 Barb. (N. Y.) 179; Williams *v.* School District, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; First National Bank *v.* Mount Tabor, 52 Vt. 37, 36 Am. Rep. 734.

[2] First National Bank *v.* Mount Tabor, 52 Vt. 87, 36 Am. Rep. 734; People *v.* Nichols, 52 N. Y. 478, 11 Am. Rep. 734; Williams *v.* School District, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; McCready *v.* Guardians, 9 Serg. & R. (Penn.) 94, 11 Am. Dec. 667; Downing *v.* Rugar, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223; Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Scott *v.* Detroit, &c., Society, 1 Doug. (Mich.) 119; Jewett *v.* Alton, 7 N. H. 253; Soens *v.* Racine, 10 Wis. 271; Caldwell *v.* Harrison, 11 Ala. 755; Kingsbury *v.* School District, 12 Metc. (Mass.) 99; Cooley *v.* O'Connor, 12 Wall. (U. S.) 391; Baltimore Turnpike, Case of, 5 Binn. (Penn.) 481; Louk *v.* Woods, 15 Ill. 256; Jefferson County *v.* Slagle, 66 Penn. St. 202; Austin *v.* Helms, 65 N. C. 560; Commissioners *v.* Lecky, 6 S. & R. (Penn.) 166; Commonwealth *v.* Commissioners, 9 Watts (Penn.) 466, 471; Cooper *v.* Lampeter, 8 Watts 125; Charles *v.* Hoboken, 3 Dutch. (N. J.) 263; Curtis *v.* Butler, 24 How. (U. S.) 435, 450; Jones *v.* Andover, 6 Pick. (Mass.) 59; Crocker *v.* Crane, 21 Wend. (N. Y.) 211, 218; Groton *v.* Hurlburt, 22 Conn. 178; Johnson *v.* Dodd, 56 N. Y. 76; George *v.* School District, 6 Metc. (Mass.) 497; Board *v.* Sackrider, 35 N. Y. 154; People *v.* Supervisors, 11 N. Y. 563, 571; Powell *v.* Tuttle, 3 N. Y. 396; Olmsted *v.* Elder, 5 N. Y. 144; Pell *v.* Ulmar, 18 N. Y. 139; White *v.* Lester, 1 Keyes (N. Y.) 316; L'Amoreux *v.* O'Rourke, 2 Keyes, 499; Lee *v.* Parry, 4 Denio (N. Y.) 125; McCoy *v.* Curtice, 9 Wend. (N. Y.) 19, 24 Am Dec. 113; Whitford *v.* Bissell, 14 How. Pr. (N. Y.) 302; Horton *v.* Garrison, 23 Barb. (N. Y.) 176; People *v.* Walker, 23 Barb. 304; Keeler *v.* Frost, 23 Barb. 400; *Ex parte* Rogers, 7 Cow. (N. Y.) 526; Parrott *v.* Knicker-

rum, a majority of that quorum may act.[1] The rule which applies in these cases has been comprehensively stated by Chief Justice SHAW as follows: "Where a body or board of officers is constituted by law to perform a trust for the public, or to execute a power or perform a duty prescribed by law, it is not necessary that all should concur in the act done. The act of the majority is the act of the body. And where all have due notice of the time and place of meeting, in the manner prescribed by law if so prescribed, or by the rules and regulations of the body itself if there be any, otherwise if reasonable notice is given, and no practice or unfair means are used to prevent all from attending and participating in the proceeding, it is no objection that all the members do not attend if there be a quorum."[2]

But if the statute clearly requires the joint action of all, a majority can not act.[3]

The act of the majority can only be upheld, however, when the conditions named exist. For if the minority took no part in the transaction, were ignorant of what was done, gave no implied consent to the action and were neither consulted nor had any opportunity to exert their legitimate influence in determining the course to be pursued, the action of the majority will be unavailing.[4]

§ 573. **Same Subject—Presumption that all acted.**—It will be presumed in the absence of anything to the contrary that all

bocker, 38 How. Pr. 508; Harris *v.* Whitney, 6 How. Pr. 175; Beekman's Petition, 31 How. Pr. 17; Whiteside *v.* People, 26 Wend. (N. Y.) 635; Field *v.* Field, 9 Wend. 394; Woolsey *v.* Tompkins, 23 Wend. 326; Babcock *v.* Lamb, 1 Cow. (N. Y.) 238; Paradise Road, *In re* 29 Penn. St. 20; Co. Litt. 181, b; Billings *v.* Prinn, 2 Bl. 1017; King *v.* Forrest, 3 T. R. 38; King *v.* Beeston, 3 T. R. 592; Withnell *v.* Gartham, 6 T. R. 388; Grindley *v.* Barker, 1 B. & P. 229; Attorney-General *v.* Davy, 2 Atk. 212; Blacket *v.* Blizard, 9 B. & C. 851; Cook *v.* Ward, 2 Com. P. Div. 255, 20 Eng. Rep. 514; Plymouth *v.* Plymouth Co. 16 Gray (Mass.) 341; People *v.* Porter, 113 Ind. 79.

[1] See Morawetz on Corp., § 531; Crocker *v.* Crane, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228.

[2] In Williams *v.* School District, 21 Pick. (Mass.) 75, 32 Am. Dec. 243.

[3] First National Bank *v.* Mount Tabor, 52 Vt. 87, 36 Am. Rep. 734; New York L. Ins. Co. *v.* Staats, 21 Barb. (N. Y.) 570; Powell *v.* Tuttle, 3 N. Y. 396; People *v.* Coghill, 47 Cal. 361.

[4] Schenck *v.* Peay, 1 Woolw. C.C. 175.

met and deliberated or were duly notified[1] unless the statute requires an express statement of that fact in the record. If that be required, parol evidence of the fact is inadmissible.[2]

So where the statute makes the act of the board or body conclusive and a majority have duly acted, it is sufficient and parol evidence will not be heard to impeach its conclusiveness.[3]

§ 574. **Same Subject—When no Majority possible, all must act.**—Where the number is such as not to admit of a majority, as where there are only two officers, the concurrence of both is indispensable;[4] though it is said that if one should die or become disabled the other might act alone,[5] except in the case of judicial officers.[6] But—

§ 575. **Same Subject—Full Board must be in Existence.**—The rule permitting a majority to act implies that a full board as required by law is actually in existence. Thus where by law a board cannot consist of less than three members and only two qualify, the two cannot act for there is then no board of which the two would constitute a majority.[7]

§ 576. **Same Subject—Not required to meet in any particular Office.**—Though all are required to meet, it is not, unless expressly made so by the statute, indispensable to the validity of their action that they should meet in the office which they are required by law to keep. They may validly act elsewhere.[8]

[1] McCoy *v.* Curtice, 9 Wend. (N. Y.) 17, 24 Am. Dec. 113; People *v.* Whiteside, 23 Wend. 15; Woolsey *v.* Tompkins, 23 Wend. 326; Doughty *v.* Hope, 3 Denio (N. Y.) 253, Miller Garlock, 8 Barb. (N.Y.) 157; Doolittle *v.* Doolittle, 31 Barb. 313; Oakley *v.* Aspinwall, 3 N. Y. 565; Gidersleeve *v.* Board of Education, 17 Abb. Pr. 210; Downing *v.* Rugar, 21 Wend. 178, 34 Am. Dec. 223; People *v.* Palmer, 52 N. Y. 87; Board *v.* Sackrider, 35 N. Y. 154.

[2] Stewart *v.* Wallis, 30 Barb. (N.Y.) 344, 347; People *v.* Williams, 36 N. Y. 441; People *v.* Hynds, 30 N. Y. 470; Marble *v.* Whitney, 28 N. Y. 207.

[3] First National Bank *v.* Mount Tabor, 52 Vt. 87, 36 Am. Rep. 734; First National Bank *v.* Concord, 50 Vt. 257, 281.

[4] Downing *v.* Rugar, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223, citing 6 Vin. Abr. Coroner (H.) —, 14 Vin. Abr. Joint and Several (B.) pl. 1; Rex *v.* Warrington, 1 Salk. 152.

[5] Downing *v.* Rugar, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223, citing 14 Vin. Abr. Joint and Several (B.) pl. 1.

[6] Downing *v.* Rugar, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223, citing Auditor Curle's Case, 11 Rep. 2; Jenk. 40, case 76.

[7] Williamsburg *v.* Lord, 51 Me. 599; Schenck *v.* Peay, 1 Woolw. C. C. 175.

[8] Jefferson County *v.* Slagle, 66 Penn. St. 202.

§ 577. **Same Subject—Previous Agreement as to joint Action void.**—Inasmuch as the law thus contemplates that all will meet together and that the public will have the benefit of their combined judgment and discussion, it follows that their previous individual agreement as to how they will act when they meet as a body is opposed to public policy and void.[1]

Thus when the individual members of a school board had in writing agreed to a contract to purchase supplies for the district, and had in the same writing requested a special meeting of the board to be called, "at which meeting we agree with each other that we will ratify this contract," the court held the contract so agreed upon was void.

"The board is constituted," said the court, "by statute, a body politic and corporate in law, and as such is invested with certain corporate powers and charged with the performance of certain public duties. These powers are to be exercised, and these duties discharged, in the mode prescribed by law. The members composing the board have no power to act as a board except when together in session. They then act as a body or unit. The statute requires the clerk to record, in a book to be provided for that purpose, all their official proceedings. They have, in their corporate capacity, the title, care and custody of all school property whatever within their jurisdiction, and are invested with full power to control the same in such manner as they may think will best subserve the interest of the common schools and the cause of education. They are required to prescribe rules and regulations for the government of all the common schools within the township. Clothed with such powers, and charged with such duties and such responsibilities, it will not be permitted to them to make any agreement among themselves or with others by which their public action is to be or may be restrained or embarrassed, or its freedom in anywise affected or impaired. The public, for whom they act, have the right to their best judgment after free and full discussion and consultation among themselves of and upon the public matters entrusted to them in the session provided for by the statute. This cannot be when the members by pre-engagement are under contract to pursue a certain line of argument or action whether the same will be conducive to the

[1] McCortle v. Bates, 29 Ohio St. 419, 23 Am. Rep. 758.

public good or not. It is one of the oldest rules of the common law that contracts contrary to sound morals or against public policy will not be enforced by courts of justice,—*ex facto illicito non oritur actio;* and the court will not enter on the inquiry whether such contract would or would not in a given case be injurious in its consequences if enforced. It being against the public interest to enforce it, the law refuses to recognize its claim to validity."[1]

§ 578. **Same Subject—All may ratify Act of Part.**—But where a portion of the board or body have attempted to do an act not within their power but within the power of the whole body when lawfully convened, the act so done may subsequently be ratified and confirmed by the whole body when they are duly assembled as such.[2]

§ 579. **Presumption of due Execution.**—The law constantly presumes that public officers charged with the performance of official duty have not neglected the same but have duly performed it at the proper time and in the proper manner.[3] In the absence of evidence to the contrary, this presumption will prevail, but it is not an indisputable one and may be overcome by countervailing evidence.[4] Where the rights of the public require it the presumption in favor of due performance is liberal, and the evidence to overthrow it must be clear.[5]

This presumption is in accordance with the established and familiar maxim, *Omnia presumuntur rite et solemniter esse acta donec probetur in contrarium*—everything is presumed to be rightly and duly performed until the contrary is shown.[6]

[1] Boynton, J., in McCortle *v.* Bates, 29 Ohio St. 419, 23 Am. Rep. 758.

[2] *In re* Pearsall, 9 Abb. (N. Y.) Pr. (N. S.) 203.

[3] Hartwell *v.* Root, 19 Johns. (N. Y.) 345, 10 Am. Dec. 232; Terry *v.* Bleight, 3 T. B. Mon. (Ky.) 270, 16 Am. Dec. 101; Farr *v.* Sims, Rich. (S. C.) Eq. Cas. 122, 24 Am. Dec. 396; Commonwealth *v.* Slifer, 25 Penn. St. 23, 64 Am. Dec. 680; Squier *v.* Stockton, 5 La. Ann. 120, 52 Am. Dec. 583; Dubuc *v.* Voss, 19 La. Ann. 210, 92 Am. Dec. 526.

[4] Dubuc *v.* Voss, 19 La. Ann. 210, 92 Am. Dec. 526.

[5] Commonwealth *v.* Slifer, 25 Penn. St. 23, 64 Am. Dec. 680.

[6] Broom's Legal Maxims, 944; Story, J., in Bank of United States *v.* Dandridge, 12 Wheat. (U. S.) 69, 70.

The presumption is constantly indulged in support of all kinds of official action.

§ 580. **Same Subject—Presumption not indulged to show other Officer in Default.**—But the law will not indulge the presumption that one officer has performed his duty for the mere purpose of establishing the assumption that another officer has neglected his.[1] As is said by COOLEY, J., "it would be a curious jumble of presumptions if we were to presume that one public officer had failed in his duty, because we could not presume that another had."[2] In such a case the presumption applies with equal force to each.

§ 581. **Same Subject—Exceptions—Presumption not indulged to support special statutory Proceeding in Invitum.**—But to this presumption of the due execution of official authority certain exceptions exist. Thus where the officer acts under a naked statutory power with a view to divest upon certain contingencies the title or right of a citizen, as in the case of the sale of lands for taxes[3] or its seizure under the right of eminent domain,[4] the

[1] Weimer *v.* Bunbury, 30 Mich. 216; Supervisors *v.* Rees, 34 Mich. 481.

[2] In Weimer *v.* Bunbury, 30 Mich. 216.

[3] FIELD, C. J., in Keane *v.* Cannovan, 21 Cal. 291, 82 Am. Dec. 738. "It may be said to be the general rule," says Judge COOLEY, "that the party claiming lands under a sale for taxes must show affirmatively that the law under which the sale was made has been substantially complied with not only in the sale itself, but in all the anterior proceedings." Cooley on Taxation, 2d Ed. p. 472, citing Stead *v.* Course, 4 Cranch (U. S.) 403; Parker *v.* Rule, 9 Cranch 64; Williams *v.* Peyton, 4 Wheat. (U. S.) 77; McClung *v.* Ross, 5 Wheat. 116; Thatcher *v.* Powell, 6 Wheat. 119; Games *v.* Stiles, 14 Pet. (U. S.) 322; Pillow *v.* Roberts, 13 How. (U. S.) 472; Moore *v.* Brown, 11 How. 414; Early *v.* Doe, 16 How. 610; Parker *v.* Overman, 18 How. 142; Little *v.* Herndon, 10 Wall. (U. S.) 26; Hughey *v.* Horrell, 2 Ohio 233; Holt *v.* Hemphill, 3 Ohio 232; Lafferty *v.* Byers, 5 Ohio 458; Thompson *v.* Gotham, 9 Ohio 170; Kellogg *v.* McLaughlin, 8 Ohio 114; Polk *v.*

[4] See Lewis on Eminent Domain §§ 600-606; Martin *v.* Rushton, 42 Ala. 289; Nichols *v.* Bridgeport, 23 Conn. 189, 60 Am. Dec. 636; Harlow *v.* Pike, 3 Me. 438; Prentiss *v.* Parks, 65 Me. 559; Owings *v.* Worthington, 10 G. & J. (Md.) 283; People *v.* Highway Commissioners, 16 Mich. 63; Ells *v.* Pacific R. R. Co. 51 Mo. 200; Zimmerman *v.* Snowden, 88 Mo. 218; White *v.* Memphis, &c., R. R. Co. 64 Miss. 566; Gilbert *v.* Columbia Turnpike Co., 3 Johns. (N. Y.) Cases 107; Harbeck *v.* Toledo, 11 Ohio St. 219; State *v.* Officer, 4 Oreg. 180.

regularity of the proceedings will not be presumed, but it is incumbent upon the person claiming by virtue of them to show that every preliminary step required by the law has been taken.

III.

IN WHOSE NAME AUTHORITY SHOULD BE EXERCISED.

§ 582. **Public Officer Acts in Name of Government.**—The government being the source of the authority of the public officer from which all his rights and powers are derived, it follows that the execution of his authority and the justification of his lawful act should be in the name of the government.

By the express terms of the constitutions of many of the States, the style of all process shall be: "In the name of the People of the State," or other equivalent expression.[1]

§ 583. **Should not make Contracts or transact Business for Public in his own Name.**—In transacting business and making

Rose, 25 Md. 153, 89 Am. Dec. 773; Pope *v.* Heaiden, 5 Ala. 433; Elliott *v.* Eddins, 24 Ala. 508; Garret *v.* Wiggins, 2 Ill. 335; Fitch *v.* Pinckard, 5 Ill. 69; Doe *v.* Leonard, 5 Ill. 140; Wiley *v.* Bean, 6 Ill. 302; Irving *v.* Brownell, 11 Ill. 402; Spellman *v.* Curtenius, 12 Ill. 409; Marsh *v.* Chesnut, 14 Ill. 224; Goewey *v.* Urig, 18 Ill. 242; Lane *v.* Bommelmann, 21 Ill. 143; Charles *v.* Waugh, 35 Ill. 315; Norris *v.* Russell, 5 Cal. 250; Keane *v.* Cannovan, 21 Cal. 291, 82 Am Dec. 738; O'Brien *v.* Coulter, 2 Blackf. (Ind.) 421; Williams *v.* State, 6 Blackf. 36; Wiggins *v.* Holley, 11 Ind. 2; Gavin *v.* Shuman, 23 Ind. 32; Ellis *v.* Kenyon, 25 Ind. 134; Jackson *v.* Shepard, 7 Cow. (N. Y.) 88, 17 Am. Dec. 502; Atkins *v.* Kinnan, 20 Wend. (N. Y.) 241, 32 Am. Dec. 534; Sharp *v.* Speir, 4 Hill (N. Y.) 76; Sharp *v.* Johnson, 4 Hill 92, 40 Am. Dec. 259; Newell *v.* Wheeler, 48 N. Y. 486; Westfall *v.* Preston, 49 N.Y. 349; Hall *v.* Collins, 4 Vt 316; Bellows *v.* Elliott, 12 Vt. 569; Brown *v.* Wright, 17 Vt. 97, 42 Am. Dec. 481; Waldron *v.* Tuttle, 3 N. H. 340; Cass *v.* Bellows, 31 N. H. 501, 64 Am. Dec. 317; Harvey *v.* Mitchell, 31 N. H. 575; Annan *v.* Baker, 49 N. H. 161; Scott *v.* Detroit, &c. Society, 1 Doug. (Mich.) 119; Latimer *v.* Lovett, 2 Doug. (Mich.) 204; Scott *v.* Babcock, 3 Greene (Ia.) 133; Gaylord *v.* Scarff, 6 Ia. 179; McGahen *v.* Carr, 6 Iowa 331, 71 Am. Dec. 421; Morton *v.* Reeds, 6 Mo. 64; s. c. 9 Mo. 868; Nelson *v.* Goebel, 17 Mo. 161; Kelly *v.* Medlin, 26 Tex. 48; Cummings *v.* Holt, 56 Vt. 384; Woodbridge *v.* State, 43 N. J. 262.

[1] This provision in Michigan applies only to writs issued by courts or judical officers; Tweed *v.* Metcalf, 4 Mich. 579; Wisner *v.* Davenport, 5 Mich. 501, and so in Illinois, Ferris *v.* Crow, 5 Gilm. 96; Missouri, Little *v.* Little, 5 Mo. 227.

contracts in behalf of the public, the officer should make all contracts and take all obligations in the name of the public. Public policy forbids that he should transact public business in his own name.[1]

So all accounts, vouchers and other evidences of public rights and transactions should be kept and made in the name of the public and in such a manner as to be readily distinguishable from his own.[2]

§ 584. **In whose Name Deputy should act.**—The question in whose name a deputy officer should act is one of much importance and of considerable apparent uncertainty. The conflict in the cases is, however, believed to be more apparent than real, and to be readily settled by reference to principles already considered.

In several of the States the authority to act in an official capacity is given to the principal alone, or, if the appointment of deputies is recognized or authorized by law, they are regarded as the mere private agents or servants of the principal and not as independent public officers deriving independent authority from the law. Where such is the case, the authority exercised by the deputy is, manifestly, a derivative and subsidiary one,—it is the authority conferred upon the principal and not an authority inherent in the deputy. It follows then, logically and legally, that the authority should be exercised in the name of him in whom it exists and not in his name who of himself has no recognized authority at all. The execution should, therefore, be in the name of the principal alone or in the name of the principal by the deputy.[3]

[1] Hunter *v.* Field, 20 Ohio 340; Gilmore *v.* Pope, 5 Mass. 491; Irish *v.* Webster, 5 Greenl. (Me.) 171.

[2] Hunter *v.* Field, 20 Ohio 340.

[3] Returns of the service of process, &c., must be in name of the principal, and a return in the name of "A. B. Deputy," &c., is invalid; Joyce *v.* Joyce, 5 Cal. 449; Rowley *v.* Howard, 23 Cal. 402. (In California the official power is vested in the principal.) Ryan *v.* Eads, Breese (Ill.) 168; Ditch *v.* Edwards, 1 Scammon (Ill.) 127, 26 Am. Dec. 414; Village of Glencoe *v.* People, 78 Ill. 382. (In Illinois the statute gives effect to the acts of the deputy when done in the name of his principal.) Arnold *v.* Scott, 39 Tex. 378. (The earlier Texas cases were the other way. Miller *v.* Alexander, 13 Tex. 497, 65 Am. Dec. 73; Towns *v.* Harris, 13 Tex. 507. See also State *v.* Brooks, 42 Tex. 66.) Simonds *v.*

In other States, as has been seen, the deputy is recognized as an independent public officer and is endowed by law with authority to do any act which his principal might do. In these cases where the authority exists in the deputy himself by operation of law and is not derived solely through the principal, it is well executed in the name of him in whom it exists, the deputy himself.[1]

Under either state of facts, the authority of a special deputy, who, as has been seen, is regarded as the mere private agent or servant of the principal, would, unless otherwise provided by statute, be properly exercised in the name of the principal.[2]

Catlin, 2 Cai. (N. Y.) 61; Ferguson *v.* Lee, 9 Wend. (N. Y.) 258.

Deeds on sheriffs' sales are not valid where made in name of deputy. Lewes *v.* Thompson, 3 Cal. 266; Evans *v.* Wilder, 7 Mo. 359; Anderson *v.* Brown, 9 Ohio 151; Parker *v.* Kett. 1 Salk. 96.

[1] Deputy county clerk may issue summons in his own name. Calender *v.* Olcott, 1 Mich. 344. Deputy or under sheriff may make return in his own name. Wheeler *v.* Wilkins, 19 Mich. 78; Allen *v.* Hazen, 26 Mich. 142; Calender *v.* Olcott, *supra;* Eastman *v.* Curtis, 4 Vt. 616; DeVillers *v.* Ford, 2 McCord 144. Deputy auditor-general may make deed in his own name. Westbrook *v.* Miller, 56 Mich. 148; Drennan *v.* Herzog, 56 Mich. 467; Fells *v.* Barbour, 58 Mich. 49.

[2] Village of Glencoe *v.* People, 78 Ill. 382.

BOOK IV.

OF THE RIGHTS, DUTIES AND LIABILITIES GROWING OUT OF THE RELATION.

CHAPTER I.

OF THE DUTIES AND LIABILITIES OF PUBLIC OFFICERS TO INDIVIDUALS—IN GENERAL, WITH SUBDIVISIONS.

§ 585. Purpose of Book IV.
586. What necessary to be considered.
587. How Officers classified for this Purpose.
588. How Subject divided.

§ 585. **Purpose of Book IV.**—Having seen in the preceding chapters how public offices are filled and vacated; what power attaches to them, and how it is to be construed and executed, it remains to consider here what rights, duties and liabilities grow out of the relation.

§ 586. **What necessary to be considered.**—In order to a clear idea of the whole subject, some consideration may perhaps be advantageously given at the outset to the nature of the duties and liabilities of public officers in general, and that subject will be treated in the following chapter.

§ 587. **How Officers classified for this Purpose.**—Many classifications of public officers have been made, some of which have been already noticed. No one of these is, for all purposes, entirely satisfactory. The supreme court of Indiana, in one case,[1] have classified all civil officers as political, judicial and ministerial, including under the first head (1) those officers whose duties pertain to the administration of the government, the

[1] Waldo *v.* Wallace, 12 Ind. 569.

administrative or executive officers, and, (2) those who make the laws by which the government is to be executed, or the legislative officers. For convenience sake, and not because it is considered the best possible, this classification will be adopted for the present purposes, and the subject will be considered under the heads of (1) governmental, (2) judicial, (3) legislative and (4) ministerial officers.

§ 588. **How Subject divided.**—In order to a complete view of the subject we shall consider:—

A. Their liability in tort.

B. Their liability in contract.

Under A. will be considered:—

I. Their liability for their own torts.

II. Their liability for the torts of their official subordinates.

III. Their liability for the torts of their private servants or agents.

Under each of these last subdivisions must be treated:

1. The duties and liabilities of governmental officers.
2. The duties and liabilities of judicial officers.
3. The duties and liabilities of legislative officers.
4. The duties and liabilities of ministerial officers.

CHAPTER II.

OF DUTIES AND LIABILITIES IN GENERAL.

§ 589. Purpose of this Chapter.

I. OF DUTIES IN GENERAL.

590. Classification—Duties to Public; Duties to Individuals.
591. 1. Of Duties to the Public.
592. 2. Of Duties to Individuals.
593. When Authority to act implies the Duty to do so—"May" construed to mean "shall."
594. Performance of Duties resting in Discretion.
595. Effect of increasing Duties without increasing Compensation.
596. How when no Compensation attached to Office.

II. OF LIABILITY IN GENERAL.

597. Liability follows Duty.
598. No Right of Action by an Individual for a Breach of Duty owing solely to the Public.
599. Same Subject—Inquiry alone does not confer Right of Action.
600. Individual suing must show special Injury to himself.

§ 589. **Purpose of this Chapter.**—Before proceeding to a detailed consideration of the duties and liabilities of particular classes of officers, some attention may well be paid to certain of the principles governing public duties and liabilities generally. Here, therefore, will be considered:—

I. Duties in general.

II. Liabilities in general.

I.

OF DUTIES IN GENERAL.

§ 590. **Classification—Duties to Public; Duties to Individuals.**—Public officers may be divided, in respect of the person to whom the performance of their duty is due, into two general classes, the distinguishing lines of which are not always clearly discernible but which are yet important to be considered.

§ 591. **1. Of Duties to the Public.**—The first of these classes embraces those officers whose duty is owing primarily to the

public collectively,—to the body politic,—and not to any particular individual; who act for the public at large, and who are ordinarily paid out of the public treasury.

The officers whose duties fall wholly or partially within this class are numerous and the distinction will be readily recognized. Thus the governor owes a duty to the public to see that the laws are properly executed, that fit and competent officials are appointed by him, that unworthy and ill-considered acts of the legislature do not receive his approval, but these, and many others of a like nature, are duties which he owes to the public at large and no one individual could single himself out and assert that they were duties owing to him alone. So members of the legislature owe a duty to the public to pass only wise and proper laws, but no one person could pretend that the duty was owing to himself rather than to another. Highway commissioners owe a duty that they will be governed only by considerations of the public good in deciding upon the opening or closing of highways, but it is not a duty to any particular individual of the community.

These illustrations might be greatly extended, but it is believed that they are sufficient to define the general doctrine.

§ 592. **2. Of Duties to Individuals.**—The second class above referred to includes those who, while they owe to the public the general duty of a proper administration of their respective offices, yet become, by reason of their employment by a particular individual to do some act for him in an official capacity, under a special and particular obligation to him as an individual. They serve individuals chiefly and usually receive their compensation from fees paid by each individual who employs them.

A sheriff or constable in serving civil process for a private suitor, a recorder of deeds in recording the deed or mortgage of an individual, a clerk of court in entering up a private judgment, a notary public in protesting negotiable paper, an inspector of elections in passing upon the qualifications of an elector, each owes a general duty of official good conduct to the public, but he is also under a special duty to the particular individual concerned which gives the latter a peculiar interest in its due performance.

The results of these distinctions will be observable further on.

§ 593. **When Authority to act implies the Duty to do so—"May" construed to mean "shall."**—Authority to perform acts of public concern is often conferred in language which, in form, seems to be permissive only, leaving it to the option of the officer whether he will act or not, and the question arises whether the imposition of the authority creates an implied duty to exercise it.

In a case[1] involving this question it appeared that an act of the legislature had made it lawful for a municipal corporation to make and repair sewers, and that the corporation had appointed officers to attend to this matter. An individual claiming to be injured by a defective sewer brought an action against the corporation, and it was objected that it was under no obligation to keep them in repair. But the court by NELSON, Ch. J., said: "This statute is one of public concern, relating exclusively to the public welfare; and, though permissive merely in its terms, it must be regarded, upon well settled rules of construction, as imperative and peremptory upon the corporation. When the public interest calls for the execution of the power thus conferred, the defendants are not at liberty arbitrarily to withhold it. The exercise of the power becomes then a duty which the corporation are bound to fulfill. In the case of The King v. The Inhabitants of Derby,[2] a motion was made to quash an indictment found against the inhabitants for refusing to meet and make a rate to pay the constables' tax. The ground taken for the motion was that the statute was not imperative, but merely 'they *may* meet,' etc. The court, however, said: '*May*, in the case of a public officer, is tantamount to *shall*; and if he does not do it (the act required), he shall be punished, etc.' The same principle was also held in the case of The King *v.* Barlow,[3] where church wardens were indicted for not making a rate or assessment under the 14 Car. 2 ch. 12, § 18. The statute said they 'shall have power and authority to make a rate,' etc.; and it was insisted they were simply invested with a power to do the act, but were under no such obligation or duty to perform it as to render them punishable for neglecting it. The court held otherwise, observing that 'where a statute directs the doing of

[1] Mayor *v.* Furze, 3 Hill (N. Y.) 612.

[2] Skinner, 370.

[3] 2 Salk. 609, s. c. Carth. 293.

a thing for the sake of justice or the public good, the word *may* is the same as the word *shall*.' And it was added that where a statute says 'the sheriff *may* take bail, this is construed he *shall*, for he is compelled to do so.'"[1]

The Rule—"The inference," continues the same judge, "deducible from the various cases on this subject seems to be that *where a public body or officer has been clothed by statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted on as a duty though the phraseology of the statute be permissive merely and not peremptory.*"[2]

§ 594. **Performance of Duties resting in Discretion.**—There is, however, a large class of cases where the question of acting or not is one resting purely in the discretion of the officer. Where this discretion exists, no other criterion can be resorted to. The pardoning power of the executive furnishes one of many illustrations of this rule. The governor *may*, in his discretion, grant a pardon, but no one can have a legal right to be pardoned, nor can he appeal to any other tribunal than that created by law,—the executive discretion. The law does not attempt by its process to control discretionary power.

Analogous to but not identical with this, is the case in which the law requires the officer to *act* according to his discretion. Here the *duty* to act is imperative, but the *manner* of acting is discretionary. The performance of the duty may be enforced, but the exercise of the discretion will not be coerced. In other words, the officer may be required to act, but not to act in any particular way. Illustrations of this, among many others, may be found in the duty of auditing officers. They may be required to meet and hear the claims to be presented, but whether they

[1] See also Comb. 220; Backwell's Case, 1 Vern. 153 and note 1. The People *v.* Corporation of Albany, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95; Attorney-General *v.* Lock, 3 Atk. 166; Stamper *v.* Miller, 3 Atk. 212; Newburgh Turnp. Co. *v.* Miller, 5 Johns. (N. Y.) Ch. 101, 113, 9 Am. Dec. 274; Malcolm *v.* Rogers, 5 Cowen (N. Y.) 188, 15 Am. Dec. 464.

[2] The rule had been previously stated by Chancellor KENT, in almost the same words in Newburgh Turnp. Co. *v.* Miller, 5 Johns. (N. Y.) Ch. 101, 113, 9 Am. Dec. 274, and has been approved in many subsequent cases. Logansport *v.* Wright, 25 Ind. 512; Cutler *v.* Howard, 9 Wis. 309; Smith *v.* State, 1 Kans. 365.

shall approve or disapprove of them rests in their official discretion.[1]

§ 595. **Effect of increasing Duties without increasing Compensation.**—Public offices and the rights and duties attached to them being created by law, it is, as has been seen,[2] except in certain cases protected by the constitution, entirely within the discretion of the legislature to increase or diminish the duties of a public office at pleasure. The fact that, during the term of an incumbent, the duties are increased by the addition of others falling within the general scope of the office, without increasing the compensation, does not relieve the officer from his duty of performance.[3]

§ 596. **How when no Compensation attached to Office.**—Compensation is usually attached to a public office, but it is not always or necessarily so. Some offices, as has been seen,[4] are honorary, and where such an office is accepted and its performance is assumed, the officer must owe to the persons entitled by law to demand his services and to the public the same duty of due performance as though his office were one of profit.[5]

II.

OF LIABILITY IN GENERAL.

§ 597. **Liability follows Duty.**—The *liability* of a public officer to an individual or the public is based upon and is co-extensive with his *duty* to the individual or the public. If to the one or the other he owes no duty, to that one he can incur no liability.

[1] Lowrie, C. J., in a Pennsylvania case, expresses the rule as follows: "Where any person has the right to demand the exercise of a public function, and there is an officer or set of officers authorized to exercise that function, there the right and the authority give rise to the duty; but when the right depends upon the grant of authority, and that authority is essentially discretionary, no legal duty is imposed." Carr *v.* Northern Liberties, 35 Penn. St. 324, 78 Am. Dec. 342.

[2] See *ante*, § 465.

[3] Andrews *v.* United States, 2 Story (U. S. C. C.) 202, 208.

[4] See *ante*, § 15.

[5] See *post*, § 681.

From this it follows as a necessary consequence that there can be—

§ 598. **No Right of Action by an Individual for a Breach of Duty owing solely to the Public.**—As has been seen above, public officers, in respect of the person or persons to whom their duty is owing, are divided into two classes,—those whose duty is owing solely to the public, and those whose duty is owing in some degree to individuals. The first question for determination, therefore, in considering the liability of a public officer to private action is whether that officer owes any duty to the individual complaining. If he does not, then the individual has no right of action, even though he may have been injured by the action or non-action of the officer.[1] The remedy in such a case must be by public prosecution.[2]

§ 599. **Same Subject—Injury alone does not confer Right of Action.**—The mere fact that the individual has sustained injury by reason of the act of the public officer is not enough to create a right of action. In order to create the right of action, two things must concur,—damage to himself and a wrong committed by the other party.[3] Otherwise it is *damnum absque injuria.*

The action of public officers may often result in an injury to an individual. Thus, says Judge COOLEY,[4] in speaking of officers entrusted with the power to lay out, alter or discontinue highways: "They may decline to lay out a road which an individual desires, or they may conclude to discontinue one which it is for his interest should be retained. There is in such a case a damage to him but no wrong to him. In performing or failing to perform a public duty, the officer has touched his interest to his prejudice. But the officer owed no duty to him as an individual; the duty performed or neglected was a public duty. An individual can never be suffered to sue for an injury which technically is one to the public only; he must show a wrong which he specially suffers, and damage alone does not constitute a wrong."

[1] Moss *v.* Cummings, 44 Mich. 359; Butler *v.* Kent, 19 Johns. (N. Y.) 223, 10 Am. Dec. 219; Cooley on Torts, (1st ed.) 379; State *v.* Harris, 89 Ind. 363, 46 Am. Rep, 169.

[2] Bartlett *v.* Crozier, 17 Johns. (N. Y.) 449, 8 Am. Dec. 428.

[3] Waterer *v.* Freeman, Hob. 266; BAYLEY, J., in Rex *v.* Commissioners 8 B. & C. 362.

[4] Cooley on Torts (1st ed.) 382.

§ 600. **Individual suing must show special Injury to himself.**—And to sustain an action by a private individual against a public officer it must not only appear that the duty violated was one owing to individuals, but the individual suing must show some reason why he singles himself out as the party injured. In other words, he must show that he, as distinguished from individuals in general, has suffered some special and peculiar injury from the wrongful act of which he complains.[1]

[1] Moss v. Cumming, 44 Mich. 359; Raynsford v. Phelps, 43 Mich. 342, 38 Am. Rep. 189.

CHAPTER III.

OF THE LIABILITY OF GOVERNMENTAL OFFICERS TO PRIVATE ACTION.

§ 601. Purpose of this Chapter.
602. Each Branch of the Government independent.
603. Governmental Duties are owing to the Public.
604. Governmental Powers are confided to the Discretion of the Officer.
605. Governmental Officers not liable to private Action.
606. Upon what Officers this Power is conferred.

I. EXECUTIVE OFFICERS OF THE GOVERNMENT.

607. President of the United States.
608. Cabinet Officers and Heads of Departments.
609. Governors of States.
610. Same Subject—How in Case of ministerial Duties.
611. Other State Officers.

II. PUBLIC BOARDS, COMMISSIONERS AND TRUSTEES.

612. In general.
613. Enjoy Immunity as State Agencies.
614. Individual Members liable when.
615. How when Trustees, &c. are incorporated.

§ 601. **Purpose of this Chapter.**—It is the purpose in this chapter to discuss the liability to private action of that large class of public officers who are directly concerned in the administration and execution of the government. For convenience sake, they are here designated governmental officers, and are to be distinguished from the legislative or law making officers; from the judicial or law construing and applying officers; and from the ministerial officers who execute the mandates of superior officers and courts.

602. **Each Branch of the Government independent.**—Under our system of government, the governmental powers are distributed among the three great departments, the executive, the legislative and the judicial; and each of these departments while acting within its limits is, and of necessity must be, independent of the others. It is, therefore, a fundamental principle in our law that neither shall be subordinated to another, and hence

neither of the other two can be called upon to answer to the judicial department for the manner in which it exercises the powers which have been confided to it.[1]

§ 603. **Governmental Duties are owing to the Public.**—Again, the duties which are imposed upon these great departments are such as are owing to the public at large and not to individuals, and this rule is as true of the executive department in the exercise of the constitutional powers confided to it as such, as it is of either of the others. For the performance of such duties, as has been seen, the officer must respond only to the public and not to individuals.[2]

§ 604. **Governmental Powers are confided to the Discretion of the Officer.**—So, also, the powers which by the constitution are conferred upon the executive department are usually of such a nature as are confided to its discretion. They are often called political powers, and for their due administration the judgment and discretion of the officer to whom they are confided must be appealed to. In the exercise of such powers, it is well settled that the officer will not be controlled by the courts,[3] but he is, as was said by Chief Justice MARSHALL, "accountable only to his country in his political character, and to his conscience."[4]

§ 605. **Governmental Officers not liable to private Action.**—Following out the doctrine of the preceding sections, therefore, it may be laid down as a general rule that no public officer or agency charged with the exercise of governmental authority of this description, can be called upon to answer, in a private action, for the manner in which that authority has been exercised.[5]

§ 606. **Upon what Officers this Power is conferred.**—This discretionary, governmental authority is conferred most largely upon the chief executive of the government; but it is not confined to him and will be found confided to a large number of inferior officers and boards who are entitled to the same immunity.

[1] See Cooley's Const. Lim. 49, *et seq.*; Cooley on Torts, 377.

[2] See *ante*, § 598.

[3] See *post*, § 945.

[4] In Marbury *v* Madison, 1 Cranch (U. S) at p. 166.

[5] See Shearman & Redfield on Negligence [last ed.], § 253.

I.

EXECUTIVE OFFICERS OF THE GOVERNMENT.

§ 607. **President of the United States.**—No case has yet arisen in which it has been attempted to hold the President of the United States amenable to a private action for his official conduct; and, certainly, so far as the performance of the great political powers which are conferred upon him is concerned, no such action could be maintained. Speaking of this subject, Chief Justice MARSHALL said: "It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[1]

§ 608. **Cabinet Officers and Heads of Departments.**—The same immunity has been extended to cabinet officers and the heads of departments in the performance of those duties which are confided to their official judgment and discretion.[2]

Where, however, these officers have been charged with the performance of purely ministerial duties for the benefit of individuals, they have been compelled by mandamus to do their duty.[3]

No case has been discovered in which damages were sought to be recovered against such an officer for the non-performance of his legal duty, but in cases of the second class no satisfactory reason is apparent why such an action should not lie.

§ 609. **Governors of States.**—The same immunity extends also to the governors of States. "The governor of the State,"

[1] In Marbury *v.* Madison, 1 Cranch (U. S.) at p. 170.

[2] United States *v.* Commissioner, 5 Wall. (U. S.) 563; Decatur *v.* Paulding, 14 Pet. (U. S.) 497; New York Ins. Co. *v.* Adams, 9 Pet. (U. S.) 573.

[3] Kendall *v.* United States, 12 Pet. (U. S.) 524; Butterworth *v.* United States, 112 U. S. 50.

says Judge COOLEY, "is vested with a power to grant pardons and reprieves, to command the militia, to refuse his assent to laws, and to take the steps necessary for the proper enforcement of the laws; but neglect of none of these can make him responsible in damages to the party suffering therefrom. No one has any legal right to be pardoned, or to have any particular law signed by the governor, or to have any definite step taken by the governor in the enforcement of the laws. The executive, in these particulars, exercises his discretion, and he is not responsible to the courts for the manner in which his duties are performed. Moreover, he could not be made responsible to private parties without subordinating the executive department to the judicial department, and this would be inconsistent with the theory of republican institutions. Each department, within its province, is and must be independent."[1]

In accordance with this theory of the independence of the executive, it is held by many of the courts that mandamus will not lie against the governor to compel the performance of any of the duties which the law imposes upon him.[2]

§ 610. **Same Subject—How in case of ministerial Duties.**—But, as will be seen,[3] there is a growing tendency on the part of the courts in other States to hold that where the duty of performing purely ministerial acts, in which private individuals have a special interest, is positively imposed upon the governor of a State by law, the performance of the duty may be enforced by mandamus as in other cases of ministerial action.[4]

[1] Cooley on Torts (1st ed.) 377.

[2] See *post*, § 954; Hawkins *v.* Governor, 1 Ark. 570, 33 Am. Dec. 346; State *v.* Warmoth, 22 La. Ann. 1, 2 Am. Rep. 712; Mauran *v.* Smith, 8 R. I. 192, 5 Am. Rep. 564; State *v.* Warmoth, 24 La. Ann. 351, 13 Am. Rep. 126; People *v.* Governor, 29 Mich. 320, 18 Am. Rep. 89; Jonesboro Turnpike *v.* Brown, 8 Baxt. (Tenn.) 490, 35 Am. Rep. 713; Vicksburg R. R. Co. *v.* Lowry, 61 Miss. 102, 48 Am. Rep. 76; State *v.* Drew, 17 Fla. 67; Low *v.* Towns, 8 Ga. 360; People *v.* Bissell, 19 Ill. 229; People *v.* Yates, 40 Ill. 126; People *v.* Cullom, 100 Ill. 472; Dennet *v.* Governor, 32 Me. 508; Rice *v.* Austin, 19 Minn. 103, 18 Am. Rep. 330; Western R. R. Co. *v.* De Graff, 27 Minn. 1; State *v.* Governor, 39 Mo. 388; State *v.* Price, 1 Dutch. (N. J.) 931.

[3] See *post*, § 556.

[4] Martin *v.* Ingham, 38 Kans. 641; Harpending *v.* Haight, 39 Cal. 189, 2 Am. Rep. 432; Middleton *v.* Low, 30 Cal. 596; Tennessee R. R. Co. *v.* Moore, 36 Ala. 371; Wright *v.* Nelson, 6 Ind. 496; Baker *v.* Kirk, 33 Ind. 517; Gray *v.* State, 72 Ind. 567; Ma

No case has been discovered in which an action for damages has been sought to be maintained against the governor for his neglect or refusal to perform such an act, but if he is amenable to mandamus, no satisfactory reason is apparent why he may not be compelled to respond in damages.

§ 611. **Other State Officers.**—The same rules have been applied to other State officers. As will be seen, the courts will not undertake to control official discretion or the performance of doubtful or uncertain duties, but where the duty to perform a ministerial act is clearly and imperatively imposed upon such an officer, the courts will enforce its performance by mandamus.[1]

II.

PUBLIC BOARDS, COMMISSIONERS AND TRUSTEES.

§ 612. **In general.**—It frequently becomes necessary in carrying on the general functions of the government, particularly in in those cases in which the government is undertaking the construction or operation of public works, to delegate to a board of commissioners, trustees or the like, some portion of the governmental powers to be exercised in that regard.

§ 613. **Enjoy Immunity as State Agencies.**—In such cases, such boards become agencies of the State, and the members of them enjoy the immunity from private action which attends the exercise of governmental powers.[2]

§ 614. **Individual Members liable when.**—The individual members are, therefore, not liable to private action for the results of the due and proper exercise of the powers lawfully conferred upon them;[3] nor can they be held liable for the doing or not doing of those things which the law has confided to their official

gruder *v.* Swann, 25 Md. 173; Groome *v.* Gwinn, 43 Md. 572; Chamberlain *v.* Sibley, 4 Minn. 309; Chumasero *v.* Potts, 2 Mont. 242; State *v.* Blasdel, 4 Nev. 241; Cotten *v.* Ellis, 7 Jones (N. C.) L. 545; State *v.* Chase, 5 Ohio St. 528.

[1] See *post*, §§ 954-962.

[2] See Walsh *v.* Trustees, 96 N. Y. 427; Nugent *v.* Levee Commissioners, 58 Miss. 197; Mersey Docks *v.* Gibbs, 11 H. L. Cas. 686.

[3] Walsh *v.* Trustees, 96 N. Y. 427; Hall *v.* Smith, 2 Bing. 156.

discretion.[1] Neither, in the absence of any personal negligence, can they be held personally liable for the defaults or neglects of the servants or agents whom they are officially required to employ.[2]

Where, however, clear and positive duties are imposed upon them in whose due performance individuals have a special interest, they may be held liable for neglects or defaults in the performance of such duties.[3] And such an officer may also be held liable for the misconduct or neglect, in the scope of their employment, of those employed by or under him, voluntarily and privately, and paid by or responsible to him.[4]

§ 615. **How when Trustees, etc., are incorporated.**—The questions presented here are to be distinguished from those arising in those cases, far from uniform, in which the liability of *incorporated* boards, trustees and commissioners was involved, and in which it is generally held that where an incorporated body is charged with the performance of a public duty and is provided with funds for its performance, it may be charged as an incorporated body for its neglect in performance.[5]

[1] Hannon *v.* Agnew, 96 N. Y. 439, where trustees of the Brooklyn bridge were held not liable for an error in judgment in not providing a sufficient police force on the bridge.

[2] Walsh *v.* Trustees, 96 N. Y. 427. In this case trustees of Brooklyn bridge were held to be "either agents of the State or agents of the two cities of New York and Brooklyn for the construction of the bridge, and hence that they were not the legal superior of the laborers, and were responsible only for their own personal misconduct or negligence." Trustees of schools not liable, where acting gratuitously as public officers, for neglect of persons necessarily employed by them. Donovan *v.* McAlpin, 85 N. Y. 185; Bassett *v.* Fish, 75 N. Y. 303. See also Lane *v.* Cotton, 1 Ld. Raym. 646; Whitfield *v.* Le Despencer, Cowp. 754; Nicholson *v.* Mounsey, 15 East. 384.

[3] See Bassett *v.* Fish, 75 N. Y. at p. 310; Hover *v.* Barkhoof, 44 N. Y. 113.

[4] Bassett *v.* Fish, 75 N. Y. at p. 310; Shepherd *v.* Lincoln, 17 Wend. (N. Y.) 250.

[5] See Mersey Docks *v.* Gibbs, 11 H. L. Cas. 686; Coe *v.* Wise, 5 Best & S. 439; Winch *v.* Conservators, L. R. 7 C. P. 458, 3 Eng. Rep. 344 s. c. L. R. 9 C. P. 378, 10 Eng. Rep. 212; Glavin *v.* Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675.

Contra, Nugent *v.* Levee Commissioners, 58 Miss. 197; McDonald *v.* Massachusetts General Hospital, 120 Mass. 432; Fire Ins. Patrol *v.* Boyd, 120 Penn. St. 624, 6 Am. St. Rep. 745.

CHAPTER IV.

OF THE LIABILITY OF JUDICIAL OFFICERS TO PRIVATE ACTION.

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633. Same Subject—Reasons assigned for this Distinction.
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II. QUASI-JUDICIAL OFFICERS.

636. In general.
637. Quasi-Judicial Functions defined.
638. Quasi-Judicial Officer exempt from civil Liability for his official Actions.
639. Same Subject—To what Officers this Rule applies.
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641. Same Subject—Officer must keep within his Jurisdiction.
642. Same Subject—Quasi-Judicial Officer liable who invades Rights of Property.
643. Same Subject—Liable where he acts ministerially.

§ 616. **Purpose of this Chapter.**—Coming now to the second great class of public affairs, it is proposed to examine into the

liability which a judicial officer may incur to private individuals while exercising or assuming to exercise the authority conferred upon him.

§ 617. **Who meant by Judicial Officer.**—By the term *judicial officer* is meant, in its broad sense, whatever public officer is invested by law with the power and duty of exercising judicial powers. But—

§ 618. **Same Subject—Judicial Officer, Quasi-judicial Officer.**—In deference to a somewhat extended practice, as well as in view of certain distinctions supposed to exist, the term judicial officer will here be used to signify such officers as exercise judicial powers in *courts* of greater or less jurisdiction, *i. e.*, judges and inferior magistrates.

On the other hand those officers who are called upon to exercise judgment and discretion, but not in courts, will be designated by the term *quasi*-judicial officers.

I.

JUDICIAL OFFICERS.

§ 619. **Judicial Officer not liable to private Action for judicial Act within his Jurisdiction.**—It is a general principle, abundantly sustained by authority and reason, that no civil action can be sustained against a judicial officer for the recovery of damages by one claiming to have been injured by the officer's judicial action within his jurisdiction.[1] From the very nature of the

[1] Randall *v.* Brigham, 7 Wall (U. S.) 535; Bradley *v.* Fisher, 13 Wall. (U. S.) 335; Fray *v.* Blackburn, 3 B. & S. 576; Floyd *v.* Barker, 12 Coke 25; Hire *v.* Sedgwick, 2 Roll. 109; Hammond *v.* Howell, 1 Mod. 184; Groenvelt *v.* Burwell, 1 Salk. 396, 1 Ld. Raym. 454; Miller *v.* Seare, 2 Bl. 1145; Mostyn *v.* Fabrigas, 1 Cowp. 172; Terry *v.* Huntington, Hard. 480; Bushell's Case, 1 Mod. 119; Gwinne *v.* Pool, Lutw. 290; Ackerly *v.* Parkinson, 3 Maule & S. 411; Garnett *v.* Ferrand, 6 B. & C. 611; Miller *v.* Hope, 2 Shaw 125; Dicas *v.* Lord Brougham, 6 C. & P. 249; Houlden *v* Smith, 14 Ad. & El. (N. S.) 841, 19 L. J. Q. B. 170; Ward *v.* Freeman, 2 Ir. C. L. Rep. 460; Kemp *v.* Neville, 10 C. B. (N. S.) 523; Scott *v.* Stansfield, 3 L. R. Ex. 220; Lowther *v.* Earl of Radnor, 8 East 113; Pike *v.* Carter, 3 Bing. 78; Basten *v.* Carew, 3 B. & C. 652; Holroyd *v.* Breare, 2 B. & Ald. 473; Fawcett *v.* Fowlis, 7 B. & C. 394; Yates *v.* Lansing, 5 Johns. (N. Y.) 232, 9 *Id.* 395, 6 Am. Dec. 290;

case, the officer is called upon by law to exercise *his judgment* in the matter, and the law holds his duty to the individual to be

Lange *v.* Benedict, 73 N. Y. 12, 29 Am. Rep. 80; Phelps *v.* Sill, 1 Day (Conn.) 315; Morgan *v.* Dudley, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735; Piper *v.* Pearson, 2 Gray (Mass.) 120, 61 Am. Dec. 438; Clarke *v.* May, 2 Gray (Mass.) 410, 61 Am. Dec. 470; Ela *v.* Smith, 5 Gray (Mass.) 136, 66 Am. Dec. 356; Barkeloo *v.* Randall, 4 Blackf. (Ind.) 476, 32 Am. Dec. 46; Pratt *v.* Gardner, 2 Cush. (Mass.) 63, 48 Am. Dec. 652; Bailey *v.* Wiggins, 5 Harr. (Del.) 462, 60 Am. Dec. 650; Little *v.* Moore, 4 N. J. L. 74, 7 Am. Dec. 574; Gregory *v.* Brown, 4 Bibb. (Ky.) 28, 7 Am. Dec. 731; McCall *v.* Cohen, 16 S. Car. 445, 42 Am. Rep. 641; Grove *v.* Van Duyn, 44 N. J. L. 654, 43 Am. Rep. 412; Busteed *v.* Parsons, 54 Ala. 393, 25 Am. Rep. 688; Rains *v.* Simpson, 50 Tex. 495; 32 Am. Rep. 609; Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65; Jordan *v.* Hanson, 49 N. H. 199, 6 Am. Rep. 508; Stone *v.* Graves, 8 Mo. 148, 40 Am. Dec. 131; Reid *v.* Hood, 2 Mott & McC. (S. C.) 168, 10 Am. Dec. 582; Wilson *v.* Mayor, 1 Denio (N. Y.) 595, 43 Am. Dec. 719; Wertheimer *v.* Howard, 39 Mo. 420, 77 Am. Dec. 623; Cunningham *v.* Bucklin, 8 Cowen (N. Y.) 178, 18 Am. Dec. 432; Tompkins *v.* Sands, 8 Wend. (N. Y.) 462, 24 Am. Dec. 46; Butler *v.* Potter, 17 Johns. (N. Y.) 145; Craig *v.* Barnett, 32 Ala. 728; Carter *v.* Dow, 16 Wis. 298; Wall *v.* Trumbull, 16 Mich. 228; Clark *v.* Holdridge, 58 Barb. (N. Y.) 61; Evans *v.* Foster, 1 N. H. 374; Burnham *v.* Stevens, 33 N. H. 247; Ramsey *v.* Riley, 13 Ohio 157; Taylor *v.* Doremus, 16 N. J. 473; Morris *v.* Carey, 27 N. J. 377; Mangold *v.* Thorpe, 33 N. J. L. 134; Hamilton *v.* Williams, 26 Ala. 527; Walker *v.* Hallock, 32 Ind. 239; Morrison *v.* McDonald, 21 Me. 550; Downing *v.* Herrick, 47 Me. 462; Londegan *v.* Hammer, 30 Iowa 508; Fuller *v.* Gould, 20 Vt. 643; East River Gas. L. Co. *v.* Donnelly, 93 N. Y. 557; Steele *v.* Dunham, 26 Wis. 393; Porter *v.* Haight, 45 Cal. 631; Harman *v.* Brotherson, 1 Denio (N. Y.) 537; Palmer *v.* Lawrence, 6 Lans. (N. Y.) 282; Chickering *v.* Robinson, 3 Cush. (Mass.) 543; Way *v.* Townsend, 4 Allen (Mass.) 114; Millard *v.* Jenkins, 9 Wend. (N. Y.) 298; Wickware *v.* Bryan, 11 Wend. 545; Raymond *v.* Bolles, 11 Cush. (Mass.) 315; Lilienthal *v.* Campbell, 22 La. Ann. 600; Pickett *v.* Wallace, 57 Cal. 555; Bullett *v.* Clement, 16 B. Mon. (Ky.) 193; Walker *v.* Floyd, 4 Bibb. (Ky.) 237; Lining *v.* Bentham, 2 Bay (S. C.) 1; State *v.* Johnson, 2 Bay (S. C.) 385; Brodie *v.* Rutledge, 2 Bay 69; Holcomb *v.* Cornish, 8 Conn. 375; Blythe *v.* Thompkins, 2 Abb. (N. Y.) Pr. 468; Evarts *v.* Kiehl, 102 N. Y. 296; White *v.* Morse, 139 Mass. 162; Connelly *v.* Woods, 31 Kans. 359; Hughes *v.* McCoy, — Col. —, 19 Pac. Rep. 674; Merwin *v.* Rogers, 1 N. Y. Sup. Rep. 211, 2 *Id.* 396; Irion *v.* Lewis, 56 Ala. 190; Harrison *v.* Clark, 4 Hun (N. Y.) 685; Clark *v.* Spicer, 6 Kans. 440; Garfield *v.* Douglass, 22 Ill. 100, 74 Am. Dec. 137; Kennedy *v.* Terrill, Hard. (Ky.) 499; Johnson *v.* Tompkins, 1 Bald. (U. S. C. C.) 571; Inos *v.* Winspear, 18 Cal. 397; Flack *v.* Harrington, Breese 165, 12 Am. Dec. 170; Revill *v.* Pettit, 3 Metc. (Ky.) 314; Terrail *v.* Tinney, 20 La. Ann. 444; Spencer *v.* Perry, 17 Me. 413; Sullivan *v.* Jones, 2 Gray (Mass.) 570; Grumon *v.* Raymond, 1 Conn. 40, 6 Am. Dec. 209; Jones *v.*

performed when he has exercised it, however erroneous or disastrous in its consequences it may appear either to the party or to others.

A number of reasons, any one of them sufficient, have been advanced in support of this rule. Thus it is said of the judge: "His doing justice as between particular individuals, when they have a controversy before him, is not the end and object which were in view when his court was created, and he was selected to preside over or sit in it. Courts are created on public grounds; they are to do justice as between suitors, to the end that peace and order may prevail in the political society, and that rights may be protected and preserved. The duty is public, and the end to be accomplished is public; the individual advantage or loss results from the proper and thorough or improper and imperfect performance of a duty for which his controversy is only the occasion. The judge performs his duty to the public by doing justice between individuals, or, if he fails to do justice as between individuals, he may be called to account by the State in such form and before such tribunal as the law may have provided. But as the duty neglected is not a duty to the individual, civil redress, as for an individual injury, is not admissible."[1]

§ 620. **Same Subject—Other Reasons.**—Other and very potent reasons are found in the requirements of the public policy. Thus it is said:

"1. The necessary result of the liability would be to occupy

Hughes, 5 S & R. (Penn.) 298, 9 Am. Dec. 364; Tracy *v.* Williams, 4 Conn. 107, 10 Am. Dec. 102; Adkins *v.* Brewer, 3 Cow. (N. Y.) 206, 15 Am. Dec. 264; Kelly *v.* Rembert, Harp. L. 65, 18 Am. Dec. 643; Bissell *v.* Gold, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480; Everston *v.* Sutton, 5 Wend. (N. Y.) 281, 21 Am. Dec 217; Rogers *v.* Mulliner, 6 Wend. (N. Y.) 597, 22 Am. Dec. 546; State *v.* Flinn, 3 Blackf. (Ind.) 72, 23 Am. Dec. 380; Stewart *v.* Cooley, 23 Minn. 347, 23 Am. Rep. 690; Doherty *v.* Munson, 127 Mass. 495; Truesdell *v.* Combs, 33 Ohio St. 186; Jones *v.* Brown, 54 Iowa 74, 37 Am. Rep. 185; Bell *v.* McKinney, 63 Miss. 187; Heard *v.* Harris, 68 Ala. 43; Bocock *v.* Cochran, 32 Hun (N. Y.) 521; Johnston *v.* Moorman, 80 Va. 131; Ambler *v.* Church, 1 Root (Conn.) 211; Wilcox *v.* Williamson, 61 Miss. 310; Mills *v.* Collett, 6 Bing, 85; Woodruff *v.* Stewart, 63 Ala. 206; Cooke *v.* Bangs, 31 Fed. Rep. 640; Kennedy *v.* Barnett, 64 Penn. St. 141; Ross *v.* Griffin, 53 Mich. 5; Borden *v.* State, 11 Ark. 519, 54 Am. Dec. 217; Elmore *v.* Overton, 104 Ind. 348, 54 Am. Rep. 343.

[1] Cooley on Torts (1st ed.) 380.

the judge's time and mind with the defense of his own interests, when he should be giving them up wholly to his public duties, thereby defeating to some extent the very purpose for which his office was created.

2. The effect of putting the judge on his defense as a wrong-doer necessarily is to lower the estimation in which his office is held by the public, and any adjudication against him lessens the weight of his subsequent decisions. * * *

3. The civil responsibility of the judge would often be an incentive to dishonest instead of honest judgments, and would invite him to consult public opinion and public prejudices when he ought to be wholly above and uninfluenced by them. * * *

4. Such civil responsibility would constitute a serious obstruction to justice, in that it would render essential a large increase in the judicial force, not only as it would multiply litigation, but as it would open each case to endless controversy. * * * If one judge can be tried for his judgment, the one who presides on the trial may also be tried for his, and thus the process may go on until it becomes intolerable.

5. But where the judge is really deserving of condemnation, a prosecution at the instance of the State is a much more effectual method of bringing him to account than the private suit. * * * It may require the facts of many cases to establish the fault; it may be necessary to show the official action for years. Where an officer is impeached, the whole official career is or may be gone into; in that case one delinquency after another is perhaps shown—each tends to characterize the other, and the whole will enable the triers to form a just opinion of the official integrity. But in a private suit the party would be confined to the facts of his own case; it is against inflexible rules that one man should be allowed to base a recovery for his own benefit on a wrong done to another, and could it be permitted, the person first wronged, and whose right to redress would be as complete as any, would lose his advantage by the very fact that he stood first in the line of injured persons." To these is to be added another:

6. Judicial offices would never be accepted by any man of standing, reputation or financial worth, "if, at the peril of his

fortune, he must justify his judgments to the satisfaction of a jury summoned by a dissatisfied litigant to review them." [1]

"Whenever, therefore," continues the distinguished judge whose language has been quoted, "the State confers judicial powers upon an individual, it confers them with full immunity from private suits. In effect, the State says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the State, and the peace and happiness of society; that if he shall fail in a faithful discharge of them he shall be called to account as a criminal; but that in order that he may not be annoyed, disturbed and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages. This is what the State, speaking by the mouth of the common law, says to the judicial officer." [2]

§ 621. **This Immunity from Liability is not affected by Motives.**—This immunity of judicial officers from civil liability is not affected by the motives with which they are alleged to have performed their duties. If the officer be in fact corrupt, the public has its remedy, but the defeated suitor cannot be permitted to obtain redress against the judge by alleging that the judgment against him was the result of corrupt or malicious motives. [3]

[1] Cooley on Torts (1st ed.) 406-408.

[2] Cooley on Torts (1st ed.) 408-409, quoted and approved in Hughes v. McCoy, — Colo. —, 19 Pac. Rep. 674; Johnston v. Moorman, 80 Va. 131, 139;

[3] Bradley v. Fisher, 13 Wall. (U. S.) 335; Fray v. Blackburn, 3 Best & Smith, 576; Floyd v. Barker, 12 Coke 25; Rains v. Simpson, 50 Tex. 495, 32 Am. Rep. 609; Weaver v. Devendorf, 3 Denio (N. Y.) 117; Pratt v. Gardner, 2 Cush. (Mass.) 63, 48 Am. Dec. 652; Cunningham v. Bucklin, 8 Cowen (N. Y.) 178, 18 Am. Dec. 432; Stone v. Graves, 8 Mo. 148, 40 Am. Dec. 131; Johnston v. Moorman, 80 Va. 131; Henke v. McCord, 55 Iowa 378; Jones v. Brown, 54 Iowa 74, 37 Am. Rep. 185; Green v. Talbot, 36 Iowa 499; Wasson v. Mitchell, 18 Iowa 153; Merwin v. Rogers, 1 N. Y. Sup. Rep. 211, 2 *Id.* 396; Hughes v. McCoy, — Colo. —, 19 Pac. Rep. 674; Irion v. Lewis, 56 Ala. 190; Heard v. Harris, 68 Ala. 43; Evans v. Foster, 1 N. H. 377; 2 Saunds Pl. & Ev. 613; Barnardiston v. Soame, 1 East. 566, n.; Stowball v. Ansell, Comb. 116; Garnett v. Ferrard, 6 B. & C. 611; Dicas v. Lord Brougham, 6 C. & P. 249; Brittain v. Kinnaird, 1 Brod. & Bing.

The reasons for this rule have been well stated by Mr. Justice FIELD as follows: "Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in the courts, in which there is great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which imposes upon the judge the severest labor, and often creates in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case, is he apt to complain of the judgment against him, and, from complaints of the judgment, to pass to the ascription of improper motives to the judge. When the controversy involves questions affecting large amounts of property, or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision often finds vent in imputations of this character, and from the imperfection of human nature, this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts, would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action.

If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every

441; Barbyte *v.* Shepherd, 35 N. Y. 242; Wilson *v.* Mayor, 1 Denio (N. Y.) 599, 43 Am. Dec. 719; Steele *v.* Dunham, 26 Wis. 396; Yates *v.* Lansing, 5 Johns. (N. Y.) 282, 9 *Id.* 414, 6 Am. Dec. 290; Jordan *v.* Hanson, 49 N. H. 202, 6 Am. Rep. 508; Little *v.* Moore, 4 N. J. L. 74, 7 Am. Dec. 574.

litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party—and that judge perhaps one of an inferior jurisdiction—that he decided as he did with judicial integrity; and the second judge would be subjected to a similar burden as he in his turn might also be held amenable by the losing party." [1]

§ 622. **This Immunity extends to Judicial Officers of all Grades.**—This exemption from civil action extends to every judicial officer of whatever grade,—from the highest judge in the land to the humblest justice who tries petty cases.[2] Whoever is invested by law with judicial powers, whether of high or low degree, cannot be called to account to the private individual for his judicial acts within his jurisdiction, although, as has been seen, the aggrieved party may allege that the act was corrupt or malicious.[3] For such acts, the officer must account only to his conscience and the State.

§ 623. **Officer must have acted officially.**—It is indispensable to this exemption that the officer shall have assumed to act as such by virtue of the authority vested in him by law.[4] For

[1] In Bradley *v.* Fisher, 13 Wall. (U. S.) 335.

[2] Garnett *v.* Ferrand, 6 B. & C. 611; Butler *v.* Potter, 17 Johns. (N. Y.) 145; Pratt *v.* Gardner, 2 Cush. (Mass.) 63, 48 Am. Dec. 652; Carter *v.* Dow, 16 Wis. 298; Wall *v.* Trumbull, 16 Mich. 228; Waldron *v.* Berry, 51 N. H. 136; Wilson *v.* Mayor, 1 Denio (N. Y.) 595, 43 Am. Dec. 719; Cole *v.* Trustees, 27 Barb. (N. Y.) 218; Kavanagh *v.* Brooklyn, 38 Barb. (N. Y.) 232; Mills *v.* Brooklyn, 32 N. Y. 489; Weaver *v.* Devendorf, 3 Denio (N. Y.) 117; Johnston *v.* Moorman, 80 Va. 131; Irion *v.* Lewis, 56 Ala. 190; Merwin *v.* Rogers, 1 N. Y. Sup. Rep. 211, 2 *Id.* 396; Ayers *v.* Russell, 3 N. Y. Sup. Rep. 338; Rains *v.* Simpson, 50 Tex. 495, 32 Am. Rep. 609; Allee *v.* Reece, 39 Fed. Rep. 341.

[3] There are, in some of the cases, *dicta* to the effect that inferior judicial official officers and magistrates may be held liable for the judicial acts, even though acting within their jurisdiction, if they were actuated by corrupt or malicious motives, but they are not sustained by the authorities. As is said in Irion *v.* Lewis, 56 Ala. 190, 196. "In support of such action, even when the judicial error complained of is corrupt or malicious, few authorities can be found."

See also Johnston *v.* Moorman, 80 Va. 131; Merwin *v.* Rogers, 2 N. Y. Sup. Rep. 396; Stone *v.* Graves, 8 Mo. 148, 40 Am. Dec. 131.

The subject is also ably and fully discussed in Mangold *v.* Thorpe, 33 N. J. L. 134.

[4] Lange *v.* Benedict, 73 N. Y. 12, 29 Am. Rep. 86.

his own private wrongs he is liable like any other individual, and his official character affords him no protection.

§ 624. **Jurisdiction essential to this Immunity.**—So in order that there shall be this immunity from civil action, the act done by the officer must have been done in a matter within his jurisdiction.[1] By this is meant, when the officer assumed to do the act as a judge, that he had judicial jurisdiction both of the person or thing, if any, acted upon, and of the subject-matter in respect of which it was done.[2]

§ 625. **Jurisdiction defined—Jurisdiction of the Person, of the Subject-Matter, of the Res.**—Jurisdiction in a judge has been defined as the authority of law to act officially in the matter then in hand.[3]

Jurisdiction of the person exists when the person acted upon is before the judge, either constructively or in fact, by reason of the service upon him of appropriate process duly issued and executed or by his voluntary appearance.[4]

Jurisdiction of the subject-matter exists when the officer possesses the power lawfully conferred to deal with the general subject involved in the action.[5]

Jurisdiction of the subject-matter does not mean that the officer has by the appropriate and proper procedure brought the particular matter in question within his jurisdiction,—whether he has done so or not is often the point most difficult to deter-

[1] See generally cases cited in note 1 to § 620, *supra*.

See also Wright *v.* Rouss, 18 Neb. 234; Estopinal *v.* Peyroux, 37 La Ann. 477; Truesdell *v.* Combs, 33 Ohio St. 186; Patzack *v.* Von Gerichten, 10 Mo. App. 424; Holtzman *v.* Robinson, 2 McAr. (D. C.) 520; Kibling *v.* Clark, 53 Vt. 379; Hitch *v.* Lambright, 66 Ga. 228; Mangold *v.* Thorpe, 33 N. J. L. 134; Bullett *v.* Clement, 16 B. Mon. (Ky.) 193; Walker *v.* Floyd, 4 Bibb. (Ky.) 237; Lining *v.* Bentham, 2 Bay (S. C.) 1. State *v.* Johnson, 2 Bay 385; Reid *v.* Hood, 2 Nott. & McC. (S. C.) 168, 10 Am. Dec. 582; Holcomb *v.* Cornish, 8 Conn. 375; Blythe *v.* Thompkins, 2 Abb. (N. Y.) Pr. 468; Downing *v.* Herrick, 47 Me. 462; Gregory *v.* Brown, 4 Bibb. (Ky.) 28, 7 Am. Dec. 731; Little *v.* Moore, 4 N. J. L. 74, 7 Am. Dec. 574; Chickering *v.* Robinson, 3 Cush. (Mass.) 543.

[2] Lange *v.* Benedict, 73 N. Y. 12, 29 Am. Rep. 80.

[3] Cooley on Torts (1st ed.) 417.

[4] Lange *v.* Benedict, 73 N. Y. 12, 29 Am. Rep. 80; Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 316.

[5] Hunt *v.* Hunt, 72 N. Y. 217, 28 Am. Rep. 129.

mine;—but it means that he is by law invested with authority to deal with similar cases,—with cases of that class.[1]

Jurisdiction of the res is obtained by a seizure under process of court, whereby it is held to abide such order as the court may make concerning it.[2]

§ 626. **Act must be confined within his Jurisdiction.**—And not only must the judge have jurisdiction of the person and the subject-matter, but the act must be confined within that jurisdiction. It must have been done while he was acting as a judge in his judicial capacity and within his jurisdiction.[3] "For," as has been said, "it is plain that the fact that a man sits in the seat of justice, though having a clear right to sit there, will not protect him in every act which he may choose or chance to do there. Should such an one, rightfully holding a court for the trial of civil actions, order the head of a bystander stricken off, and be obeyed, he would be liable."[4]

So where a judge of a municipal court was charged with maliciously conspiring with others to institute in his court a malicious prosecution against the plaintiff, it was held that the defendant's judicial character was no defense, for the act of entering into such an agreement was not done in the course of any judicial proceeding, or in the discharge of any judicial function or duty.[5]

§ 627. **Same Subject—When Jurisdiction presumed—Superior and inferior Courts.**—A marked distinction is made by the

[1] By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers or in authority specially conferred." MILLER, J., in Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 316.

[2] Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 317.

[3] Lange *v.* Benedict, 73 N. Y. 12, 29 Am. Rep. 80.

[4] FOLGER, J., in Lange *v.* Benedict, *supra.*

[5] Stewart *v.* Cooley, 23 Minn. 347, 23 Am. Rep. 690. As to this case Judge COOLEY says: "The wrongful act on the part of the judge here must have consisted in the issuing of process; and as to that, he could have had no discretion if the complaint was sufficient, or, if he had, it was a judicial discretion, and to hold him liable by charging some bad motive lying back of it, seems to come directly within the condemnation of Bradley *v.* Fisher, 13 Wall. 335, above referred to." Cooley on Torts (1st ed.) p. 412, note 5.

law between courts of general and superior jurisdiction, and those of limited and inferior jurisdiction. In favor of the former, it is presumed that they have not acted without jurisdiction. Whoever assails them, therefore, on that ground, must be prepared to show wherein the lack of jurisdiction consists.[1]

No such presumption, on the contrary, is indulged in favor of courts whose jurisdiction is limited and inferior. In such a case the jurisdiction must be made to appear,—that is, it must appear by the record itself. If, therefore, the court acquires jurisdiction only in a certain way, or by certain procedure, or upon a certain contingency, this pre-requisite must appear upon the face of the proceedings to have existed in the manner and to the extent required, or the proceedings must fail. Whoever relies upon the judgment of such a court must establish every fact necessary to give it jurisdiction.[2]

This distinction becomes of great importance in determining the liability of the judicial officer who has erroneously assumed jurisdiction, or has erroneously decided that the power to do a certain act is within the jurisdiction conferred upon him. Thus—

§ 628. **Same Subject—Judge of superior Court liable only where there is clear Absence of all Jurisdiction.**—The presumption being that courts of general and superior jurisdiction have not exceeded their authority, it is well settled that the judges of such courts can only be held liable in a civil action in those cases in which there is a clear absence of all jurisdiction whatever.[3] That he merely exceeded his jurisdiction is not enough.[4]

[1] Lowry *v.* Erwin, 6 Rob. (La.) 193, 39 Am. Dec. 556; Palmer *v.* Oakley, 2 Doug. (Mich.) 433, 47 Am. Dec. 41; Kenney *v.* Greer, 13 Ill. 432, 54 Am. Dec. 439; Reynolds *v.* Stansbury, 20 Ohio 344, 55 Am. Dec. 459.

[2] Rossiter *v.* Peck, 3 Gray (Mass.) 539; Case *v.* Woolley, 6 Dana (Ky.) 17, 32 Am. Dec. 51; Bloom *v.* Burdick, 1 Hill (N. Y.) 130, 37 Am. Dec. 299; Lowry *v.* Erwin, 6 Rob. (La.) 193, 39 Am. Dec. 556; Levy *v.* Shurman, 6 Ark. 182, 42 Am. Dec. 690; Gay *v.* Lloyd, 1 Greene (Iowa) 78, 46 Am. Dec. 499; Palmer *v.* Oakley, 2 Doug. (Mich.) 433, 47 Am. Dec. 41; Spear *v.* Carter, 1 Mich. 19, 48 Am. Dec. 688; Kenney *v.* Greer, 13 Ill. 432, 54 Am. Dec. 439; Reynolds *v.* Stansbury, 20 Ohio 344, 55 Am. Dec. 459; Tucker *v.* Harris, 13 Ga. 1, 58 Am. Dec. 488.

[3] Bradley *v.* Fisher, 13 Wall. (U. S.) 335; Randall *v.* Brigham, 7 Wall.

[4] Bradley *v.* Fisher, 13 Wall. (U. S.) 335.

§ 629. **Same Subject—Distinction between Absence and Excess of Jurisdiction.**—In the leading case[1] upon this subject in the United States, it is said "A distinction must be observed between excess of jurisdiction, and the clear absence of all jurisdiction over the subject-matter. Where there there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised, are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgment may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration whenever his general jurisdiction over the subject-matter is invoked."

(U. S.) 523; Calder *v.* Holket, 3 Moore 28, 75.

A United States district judge is within this exemption. Lange *v.* Benedict, 73 N. Y. 12, 29 Am. Rep. 80.

[1] Bradley *v.* Fisher, 13 Wall. (U. S.) 335, 352, per FIELD, J., Lange *v.* Benedict, 73 N. Y. 12, 20 Am. Rep. 80; McCall *v.* Cohen, 16 S. C. 445, 43 Am. Rep. 641.

§ 630. **Same Subject—Judge of inferior Court liable where he acts without or in Excess of his Jurisdiction.**—When, however, the question arises in reference to an inferior judge or magistrate a somewhat different rule applies. The judge of a court of inferior or limited jurisdiction, or a justice or magistrate exercising limited and inferior powers, is as free to exercise his judicial judgment or discretion and is as exempt from liability for the exercise of his judicial powers within the limits of his jurisdiction, as the judge of a court of general or superior powers, no matter how mistaken or erroneous his judgment may be,[1] or how corrupt or malicious may be the motives with which it is alleged he was inspired.[2]

[1] Mangold *v.* Thorpe, 33 N. J. L. 134; Hitch *v.* Lambright, 66 Ga. 228; Irion *v.* Lewis, 56 Ala. 190; Johnston *v.* Moorman, 80 Va. 131; Heard *v.* Harris, 68 Ala. 43; Bell *v.* McKinney, 63 Miss. 187; Abrams *v.* Carlisle, 18 S. C. 242; Walker *v.* Floyd, 4 Bibb (Ky.) 237; Gregory *v.* Brown, 4 Bibb 28, 7 Am. Dec. 731; Bullitt *v.* Clement, 16 B. Mon. (Ky.) 193; Lining *v.* Bentham, 2 Bay (S. C.) 1; State *v.* Johnson, 2 Bay 385; Reid *v.* Hood, 2 Nott & McC. (S. C.) 168, 10 Am. Dec. 582; Downing *v.* Herrick, 47 Me. 462; Little *v.* Moore, 4 N. J. L. 74, 7 Am. Dec. 574; Chickering *v.* Robinson, 3 Cush. (Mass.) 543.

A justice is not liable who erroneously dismisses an action for the non-appearance of the plaintiff, Hitch *v.* Lambright, 66 Ga. 228; or who erroneously decides that the circumstances proved are sufficient to authorize him to issue a warrant, Mangold *v.* Thorpe, 33 N. J. L. 134; or for failing to render judgment within the time prescribed by law, Evarts *v.* Kiehl, 102 N. Y. 296; or for issuing an attachment upon an affidavit alleging a debt to be due, although it appeared by the note filed with him that it was not due, Connelly *v.* Woods, 31 Kans. 359; nor for erroneously awarding judgment for costs in a case where he had no authority to do so, White *v.* Morse, 139 Mass. 162; Downing *v.* Herrick, 47 Me. 462. See also Butler *v.* Potter, 17 Johns. (N. Y.) 145; nor for committing slaves as runaways having determined, though erroneously, that they were such, Bullitt *v.* Clement, 16 B. Mon. (Ky.) 193; nor for any other erroneous decision upon a matter within his jurisdiction, Walker *v.* Floyd, 4 Bibb (Ky.) 237; Holcomb *v.* Cornish, 8 Conn. 375; nor for an error of judgment in taking a recognizance on appeal in insufficient form, Chickering *v.* Robinson, 3 Cush. (Mass.) 543; nor for an error in judgment in determining the sufficiency of bail; Lining *v.* Benthan, 2 Bay (S. C.) 1. See also State *v.* Johnson, 2 Bay, 385; nor for erroneously deciding that plaintiff was entitled to

[2] Mangold *v.* Thorpe, 33 N. J. L. 134; Irion *v.* Lewis, 56 Ala. 190; Merwin *v.* Rogers, 1 N. Y. Sup. Rep. 211, 2 *Id.* 396; Hughes *v.* McCoy, — Colo. —, 19 Pac. Rep. 674.

But, on the other hand, if he usurps jurisdiction where by law he has none, or if he acts without jurisdiction of the person or the subject-matter, or if he exceeds the limits of the jurisdiction lawfully conferred upon him, he is held to be liable in damages to the party injured thereby, notwithstanding that he was acting in good faith in the honest endeavor to discharge his duty and with the best of motives.[1]

an immediate execution, Abrams *v.* Carlisle, 18 S. C. 242. See also Keeler *v.* Woodard, 4 Chand. (Wis.) 34; or for erroneously making a writ returnable at a wrong time, Reid *v.* Hood, 2 Nott & McC. (S. C.) 168, 10 Am. Dec. 582; or for erroneously granting a rehearing and altering his previous judgment, Gregory *v.* Brown, 4 Bibb (Ky.) 28, 7 Am. Dec. 731; or for erroneously entering judgment and issuing execution against a defendant upon the confession of judgment by a co-defendant, Little *v.* Moore, 4 N. J. L. 74, 7 Am. Dec. 574; nor for erroneously refusing to grant an appeal, it being a judicial act, Jordan *v.* Hanson, 49 N. H. 199, 6 Am. Rep. 508 (but otherwise, where it is regarded as a ministerial act, Tompkins *v.* Sands, 8 Wend. (N. Y.) 462, 24 Am. Dec. 46; Tyler *v.* Alford, 38 Me. 530; Hardison *v.* Jordan, Cam. & N. (N. C.) 454;) nor for erroneously entering up judgment and issuing execution before the time limited by law. Abrams *v.* Carlisle, 18 S. C. 242; Keeler *v.* Woodard, 4 Chand. (Wis.) 34.

[1] Wingate *v.* Waite, 6 Mees & Wels. 739; Houlden *v.* Smith, 14 Q. B. 841; Case of the Marshalsea, 10 Coke 68; Groenvelt *v.* Burwell, 1 Ld. Raym. 454; Yates *v.* Lansing, 5 Johns. (N. Y.) 282; Phelps *v.* Sill, 1 Day (Conn.) 315; Palmer *v.* Carroll, 24 N. H. 314; Craig *v.* Burnett, 32 Ala. 728; Clarke *v.* May, 2 Gray (Mass.) 410, 61 Am. Dec. 470; Piper *v.* Pearson, 2 Gray 120, 61 Am. Dec. 438; Kelly *v.* Bemis, 4 Gray 84, 64 Am. Dec. 50; Hendrick *v.* Whittemore, 105 Mass. 28; Morrill *v.* Thurston, 46 Vt. 732; Carleton *v.* Taylor, 50 Vt. 220; Vaughn *v.* Congdon, 56 Vt. 111, 48 Am. Rep. 758; Holtzman *v.* Robinson, 2 McAr. (D. C.) 520.

A justice who, having jurisdiction only to bind over for trial in a higher court, inflicts a penal sentence is liable as a wrong doer. That he had jurisdiction over the subject-matter of complaint for another purpose, or that he acted in good faith is no defense: Patzack *v.* Von Gerichten, 10 Mo. App. 424; Bore *v.* Bush, 9 Mart. (La.) 1.

A justice of the peace has no authority to commit a person to prison for non-payment of a fine where the judgment imposing the fine does not provide for imprisonment, and he is liable in damages to the person so committed: Lanpher *v.* Dewell, 56 Iowa 153.

A justice of the peace who, without any reason or probable cause, causes another to be arrested and imprisoned is liable therefor. Kelly *v.* Moore, 51 Ala. 364; Johnson *v.* Tompkins, 1 Bald. (U. S. C. C.) 571.

A justice of the peace is liable where he issues an attachment, without jurisdiction: Wright *v.* Rouss, 18 Neb. 234, or causes the arrest of a person upon a complaint not charging an offence against any one; Truesdell *v.* Combs, 33 Ohio St. 186; Esto-

This rule and the reasons for it are well stated in a leading case in Massachusetts. There the defendant, a justice of the peace of the county of Middlesex, had assumed jurisdiction of an offense of which the police court of the city of Lowell had by statute exclusive jurisdiction. In the course of the trial of the case, the defendant committed the plaintiff for contempt in refusing to testify. The defendant had authority to so commit the

pinal *v.* Peyroux, 37 La. Ann. 477, or who issues an execution upon a void judgment; Inos *v.* Winspear, 18 Cal. 397; or who acts in a case, committing to prison, where by law he must associate another with him: Revill *v.* Pettit, 3 Metc (Ky.) 314. To like effect, Kelly *v.* Rembert, Harp. (S. C.) L. 65, 18 Am. Dec. 643; or inflicts punishment under a repealed or unconstitutional statute: Ely *v.* Thompson, 3 A. K. Marsh (Ky.) 70; Kelly *v.* Bemis, 4 Gray 83, 64 Am. Dec. 50; or causes to be seized by process issued by him the property of another than a party to the suit: Terrail *v.* Tinney, 20 La. Ann. 444; or proceeds to render judgment and issue execution after the cause has been discontinued by irregular adjournment: Spencer *v.* Perry, 17 Me. 413; or who issues an execution for the arrest of a party in a case in which the law prohibits such arrest: Sullivan *v.* Jones, 2 Gray (Mass.) 570. (See this case distinguished from White *v.* Morse, 139 Mass. 162); or who refuses to take proper and sufficient bail, and causes the party to be imprisoned: Gucather *v.* Whiteacre, 24 Mich. 504; or who issues a warrant of arrest officiously without complaint or oath or personal knowledge that a crime has been committed: Flack *v.* Harrington, Breese, 165, 12 Am. Dec. 170; or who commits a witness for contempt in a cause in which he had no jurisdiction: Piper *v.* Pearson, 2 Gray (Mass.) 120, 61 Am. Dec. 438; or which had previously been concluded: Clarke *v.* May, 2 Gray (Mass.) 410, 61 Am. Dec. 470; or who causes an arrest upon an insufficient warrant. Blythe *v.* Tompkins, 2 Abb. (N. Y.) Pr. 468; or who issues a search warrant without the preliminary requisites, or, if it be general in form, Grumon *v.* Raymond, 1 Conn. 40, 6 Am. Dec. 206; or who issues an attachment without proof of an essential prerequisite: Adkins *v.* Brewer, 3 Cowen (N. Y.) 206, 15 Am. Dec. 264; or who issues a warrant under a statute which does not apply to the case: Everitson *v.* Sutton, 5 Wend. (N. Y.) 281, 21 Am. Dec. 217; or who issues a warrant without the required complaint in writing: Tracy *v.* Williams, 4 Conn. 107, 10 Am. Dec. 102; or who causes an arrest for an offense known to have been committed outside of the State: Miller *v.* Grice, 2 Rich. (S. C.) L. 27, 44 Am. Dec. 271; or who commits a prisoner upon a complaint showing on its face that the offense charged is barred by the statute of limitations: Vaughn *v.* Congdon, 56 Vt. 111, 48 Am. Rep. 758; or who surrenders a principal to his bail in a case where no such surrender is authorized by law: Morrill *v.* Thurston, 46 Vt. 732; or who issues a warrant, causes the arrest, tries, convicts and sentences a party after his term of office had expired though the justice was in good faith ignorant of that fact: Grace *v.* Teague, — Me. —, 18 Atl. Rep. 289.

plaintiff if he had jurisdiction of the offense, but it was held that, having no jurisdiction of the offense, the defendant had no power to commit, this power being merely incidental to the authority to try. In giving the opinion of the court,[1] BIGELOW, J., said: "The decision of this case depends on the familiar and well settled rule concerning the liability of courts and magistrates, exercising an inferior and limited jurisdiction, for acts done by them, or by their authority, under color of legal proceedings. One of the leading purposes of every wise system of law is to secure a fearless and impartial administration of justice, and at the same time to guard individuals against a wanton and oppressive abuse of legal authority. To attain this end, the common law affords to all inferior tribunals and magistrates complete protection in the discharge of their official functions so long as they act within the scope of their jurisdiction, however false and erroneous may be the conclusions and judgments at which they arrive.

But, on the other hand, if they act without any jurisdiction over the subject-matter, or if, having cognizance of a cause, they are guilty of an excess of jurisdiction, they are liable in damages to the party injured by such unauthorized acts. In all cases, therefore, where the cause of action against a judicial officer, exercising only a special and limited authority, is founded on his acts done *colore officii*, the single inquiry is whether he has acted without any jurisdiction over the subject-matter, or has been guilty of an excess of jurisdiction. By this simple test, his legal liability will at once be determined.[2] If a magistrate acts beyond the limits of his jurisdiction, his proceedings are deemed to be *coram non judice* and void; and if he attempts to enforce any process founded on any judgment, sentence or conviction in such case, he thereby becomes a trespasser." [3]

§ 631. **Same Subject—Liability for acting under void Statute.** —This rule has been carried to the extreme of holding an infe-

[1] Piper *v.* Pearson, 2 Gray (Mass.) 120, 61 Am. Dec. 438.

[2] Citing 1 Chitty Pl. (6th Am. ed.) 90, 209-213; Beaurain *v.* Scott, 3 Camp. 388; Ackerley *v.* Parkinson, 3 Maule & Sel. 425, 428; Borden *v.* Fitch, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; Bigelow *v.* Stearns, 19 Johns. (N. Y.) 39, 10 Am. Dec. 189; Allen *v.* Gray, 11 Conn. 95.

[3] Citing 1 Chitty Pl. 210; Bigelow *v.* Stearns, 19 Johns. (N. Y.) 39, 10 Am. Dec. 189; Clarke *v.* May, 2 Gray (Mass.) 410, 61 Am. Dec. 470.

rior magistrate liable where he has in good faith acted under a statute afterwards held unconstitutional;[1] but the severity of this rule has called forth forcible dissent, inasmuch as the magistrate, when called upon to act under it, is obliged impliedly if not expressly to pass upon its validity, thus clearly exercising judicial powers, for an error in which he ought not to be held liable.[2]

[1] Kelly *v.* Bemis, 4 Gray (Mass.) 83, 64 Am. Dec. 50; Ely *v.* Thompson, 3 A. K. Marsh (Ky.) 70.

In the case first cited, BIGELOW, J., said: "The defendant in the present case seeks to justify the tort charged in the declaration by proof that he acted as a magistrate in the performance of certain duties under statute of 1852, c. 322, sec. 14. But that section of the statute has been adjudged to be unconstitutional and void: Fisher *v.* McGirr, 1 Gray 1, (61 Am. Dec. 381.) It therefore conferred no authority or jurisdiction upon magistrates. Under a government of limited and defined powers, where, by the provisions of the organic law, the rights and duties of the several departments of the government are carefully distributed and restricted, if any one of them exceeds the limits of its constitutional power, it acts wholly without authority itself, and can confer no authority upon others. The defendant could derive no power or jurisdiction from a void statute. He therefore acted without any jurisdiction; and upon familiar and well-settled principles is liable in this action: Fisher *v.* McGirr, *supra;* Piper *v.* Pearson, 2 Gray 120 (61 Am. Dec. 438); Clarke *v.* May, *Id.* 410 (61 Am. Dec. 470)."

See also Sumner *v.* Beeler, 50 Ind. 341, 19 Am. Rep. 718; Astrom *v.* Hammond, 3 McLean (U. S. C. C.) 107; Woolsey *v.* Commercial Bank, 6 McLean 142; Osborn *v.* Bank, 9 Wheat. (U. S.) 738, 868; Meagher *v.* Storey County, 5 Nev. 244; Campbell *v.* Sherman, 35 Wis. 103.

[2] In speaking of this case in Henke *v.* McCord, 55 Iowa 378, 385—a case involving the liability of a justice who had proceeded under an ordinance which the court now declares void—DAY, J. said: "This is the only case which we have found that goes to this extreme length, and the doctrine, notwithstanding the learning and ability of the court by which it was pronounced, does not meet our approval. When the information was presented to the justice in this case all the matters pertaining to his right to issue a warrant were properly brought within his jurisdiction. He was called upon to exercise judicial powers. If the ordinance was valid, it was his duty to issue a warrant. A refusal to do so would be a disregard of the obligations imposed upon him by his office. He could justify his refusal only upon the ground that the ordinance was invalid. He was thus called upon to pass judicially upon the validity of the ordinance. In making this determination he acted strictly within his jurisdiction. An erroneous decision upon the subject is a mere mistake in judgment for which he ought not to be held responsible. If a judge of a circuit or a district court had committed a like error, it would hardly be claimed that he would be liable to a civil action. There is neither reason nor justice, it

§ 632. **Same Subject—Limitations on Liability of inferior Officer for Error in assuming doubtful Jurisdiction.**—Under the strict rule above referred to, as will be seen from the cases cited in the note, it is held that the justice or other inferior magistrate is liable for a jurisdiction wrongfully assumed or for proceeding without jurisdiction, even though he was called upon to decide whether the preliminary facts, complaint or affidavit were sufficient to confer jurisdiction and acted in good faith in deciding that they were.[1]

This doctrine has, however, met with much forcible and reasonable dissent in recent times. There are undoubtedly cases in which the rule stated is properly applicable, as where jurisdiction is assumed or exercised without even the color of authority, or beyond limits which are clearly and unambiguously defined, or in the face of express statutory prohibitions. But where, on the other hand, the officer has jurisdiction of the subject-matter, *i. e.*, of that class of cases, but the question of jurisdiction in that particular case depends upon some question for judicial determination, as upon the validity or proper construction of a doubtful statute, or upon the technical legal sufficiency of the averments of a preliminary complaint or affidavit, or the existence of jurisdictional facts,—questions upon which he is bound to decide, and questions, too, upon which, as is often the case, the learned judges of the courts of last resort are unable to agree,—it certainly seems not only impolitic, but a violation of the well established principle governing the liability of judicial officers, to hold the inferior officer liable, at any rate where he has acted in good faith and with an honest endeavor to do the right.[2]

seems to us, in holding a justice of the peace liable to a civil action for such an error in judgment."

See also Sessums *v.* Botts, 34 Tex. 334; State *v.* McNally, 34 Me. 210, 56 Am. Dec. 650.

[1] It is said to be no protection that the inferior court in good faith decides that the law confers jurisdiction. Wingate *v.* Waite, 16 M. & W. 739; Houlden *v.* Smith, 14 Q. B. 841; Piper *v.* Pearson, 2 Gray (Mass.) 120, 61 Am. Dec. 438. Cooley on Torts (3d ed.) 491, note 1.

See also Truesdell *v.* Combs, 33 Ohio St. 186; Estopinal *v.* Peyroux, 37 La. Ann. 477; Wright *v.* Rouss, 18 Neb 234; Adkins *v.* Brewer, 3 Cowen (N. Y.) 206, 15 Am. Dec 264; Tracy *v.* Williams, 4 Conn. 107, 10 Am. Dec. 102; Grumon *v.* Raymond, 1 Conn. 40, 6 Am. Dec. 200.

[2] A justice or other magistrate acts judicially in deciding whether a

Indeed, it is difficult to see why in this, as in any other case of judicial action, the question of immunity should not be decided regardless of the motive alleged. Such, as has been seen, is the rule applied to judges of superior courts, and the same rule has in recent cases been extended to the case of inferior magistrates.

Thus in an action against a justice of the peace for an unlawful imprisonment, the Court of Errors and Appeals of New Jersey held him not liable, though he had erroneously issued a warrant, by virtue of which the plaintiff was arrested, upon a complaint which stated no offense known to the statute.[1] After reviewing the cases, BEASLEY, C. J., says "that the true general rule with respect to the actionable responsibility of a judicial officer having the right to exercise general powers, is that he is so responsible in any given case belonging to a class over which he has cognizance, unless such case is by complaint or other proceeding put *at least colorably* under his jurisdiction. Where the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a judicial act, and such officer is not liable in a suit to the person affected by his decision, whether such decision be right or wrong.

But when no facts are present, or only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the magistrate to take jurisdiction is not, in any manner, the performance of a judicial act, but simply the commission of an unofficial wrong. This criterion seems a reasonable

complaint or affidavit is sufficient to confer jurisdiction, and is not liable for an error in this respect. Bocock *v.* Cochran, 32 Hun (N. Y.) 521; Harrison *v.* Clark, 4 Hun 685; Stewart *v.* Hawley, 21 Wend, (N. Y.) 552; Harman *v.* Brotherson, 1 Denio (N. Y.) 537; Clark *v.* Holdridge, 58 Barb. (N. Y.) 61; Kenner *v.* Morrison, 12 Hun 204; Clark *v.* Spicer, 6 Kans. 440.

[1] Grove *v.* Van Duyn, 44 N. J. L. 654, 42 Am. Rep. 648, n.

To the same effect are McCall *v.* Cohen, 16 S. C. 445, 42 Am. Rep. 641; Henke *v.* McCord, 55 Iowa 378; Maguire *v.* Hughes, 13 La. Ann. 281; see also, per MARCY, J., in Savacool *v.* Boughton, 5 Wend. 172, 21 Am. Dec. 181; Lange *v.* Benedict, 73 N. Y. 12, 29 Am. Rep. 80, is an interesting and valuable case upon the general question.

The same principle was also applied in Jordan *v.* Hanson, 49 N. H. 199, 6 Am. Rep. 508, where a justice of the peace was held not liable for erroneously refusing to grant an appeal, it being a question for him to determine whether the right existed, and, if so, whether it was demanded in due time and form.

See also Bailey *v.* Wiggins, 5 Harr. (Del.) 462, 60 Am. Dec. 650.

one; it protects a judge against the consequences of every error of judgment, but it leaves him answerable for the commission of wrong that is practically wilful; such protection is necessary to the independence and usefulness of the judicial officer, and such responsibility is important to guard the citizen against official oppression."

§ 633. **Same Subject—Reasons assigned for this Distinction.** —"Why the law should protect the one judge and not the other," says Judge COOLEY,[1] "and why if it protects one only, it should be the very one who, from his higher position and presumed superior learning and ability, ought to be most free from error, are questions of which the following may be suggested as the solution:

"The inferior judicial officer is not excused for exceeding his jurisdiction because, a limited authority only having been conferred upon him, he best observes the spirit of the law by solving all questions of doubt against his jurisdiction. If he errs in this direction, no harm is done, because he can always be set right by the court having appellate authority over him, and he can have no occasion to take hazards so long as his decision is subject to review. The rule of law, therefore, which compels him to keep within his jurisdiction at his peril, cannot be unjust to him, because by declining to exercise any questionable authority, he can always keep within safe bounds, and will violate no duty in doing so. Moreover, in doing so he keeps within the presumptions of law, for these are always against the rightfulness of any authority in an inferior court which, under the law, appears doubtful. On the other hand, when a grant of general jurisdiction is made, a presumption accompanies it that it is to be exercised generally until an exception appears which is clearly beyond its intent; its very nature is such as to confer upon the officer entrusted with it more liberty of action in deciding upon his powers than could arise from a grant expressly confined within narrow limits, and the law would be inconsistent with itself if it were not to protect him in the exercise of this judgment. Moreover, for him to decline to exercise an authority because of the existence of a question, when his own judgment favored it,

[1] Cooley on Torts, 2d ed. 491.

would be to that extent to decline the performance of duty, and measurably to defeat the purpose of the law creating his office; for it cannot be supposed that this contemplated that the judge should act officially as though all presumptions opposed his authority when the fact was directly the contrary."

§ 634. **Same Subject—Officer not liable when Jurisdiction is assumed through Mistake of Fact.**—But, even under the more stringent rule, judicial officers cannot be held liable for acting without jurisdiction, or for exceeding the limits of their authority, where the defect or want of jurisdiction is occasioned by some facts or circumstances applicable to a particular case of which the officer had neither knowledge nor the means of knowledge. In other words, if the want of jurisdiction over a particular case is caused by matters of fact, it must be made to appear that they were known, or ought to have been known, to the officer, in order to hold him liable for acts done without jurisdiction. Otherwise the maxim *Ignorantia facti excusat* applies.[1]

§ 635. **Judicial Officer is liable when he acts ministerially.**—But a judicial officer may be and often is called upon to perform duties which are ministerial in their nature rather than judicial; and when so acting he is liable like any other ministerial officer and his judicial character affords him no protection.[2]

Thus a justice of the peace acts ministerially and is liable for negligence in entering up a judgment,[3] or in making return to an appeal,[4] or in entering a stay of execution.[5] So, it has been held, that he acts ministerially in approving an appeal bond, or in

[1] Clarke *v.* May, 2 Gray (Mass.) 410, 61 Am. Dec. 470; Vaughn *v.* Congdon, 56 Vt. 111, 48 Am. Rep. 758; Pike *v.* Carter, 3 Bing. 78, s. c. 10 Moore, 376; Lowther *v.* Earl of Radnor, 8 East 113, Calder *v.* Halket, 3 Moo. P. C. C. 28.

[2] Howe *v.* Mason, 14 Iowa 510; Ambler *v.* Church, 1 Root (Conn.) 211; Christopher *v.* Van Liew, 57 Barb. (N. Y.) 17; Houghton *v.* Swarthout, 1 Denio (N. Y.) 589; Kerns *v.* Schoonmaker, 4 Ohio 331, 22 Am. Dec. 757; Briggs *v.* Wardwell, 10 Mass. 356; Taylor *v.* Doremus, 1 Harr. (N. J.) 473; Spears *v.* Smith, 9 Lea (Tenn.) 483; McTeer *v.* Lebow, 85 Tenn. 121; Pike *v.* Megoun, 44 Mo. 491; Stone *v.* Graves, 8 Mo. 148, 40 Am. Dec. 130.

[3] Christopher *v.* Van Liew, 57 Barb. (N. Y.) 17.

[4] Houghton *v.* Swarthout, 1 Denio (N. Y.) 589.

[5] Kerns *v.* Schoonmaker, 4 Ohio 331, 22 Am. Dec. 757.

refusing to do so, and if he corruptly refuses to approve such a bond, he is liable to an action on the case.[1] So, it is held, that a justice acts ministerially in issuing executions; and if in doing so he acts irregularly or officiously, he is liable; though if he had committed the irregularity as the agent of the party, and was acting within his jurisdiction, he would be excused.[2]

The issuing of executions has, however, been also held to be a judicial and not a ministerial act, and the justice, therefore, not liable for a loss occasioned by his failure to make the writ returnable in the proper time.[3]

An inferior judicial officer has been said to be liable for accepting an insufficient guardian's bond only if he acted wilfully or maliciously,[4] and in another case it was said that to render a judicial officer liable when acting ministerially he must be shown to have acted wilfully, corruptly or maliciously.[5]

II.

QUASI-JUDICIAL OFFICERS.

§ 636. **In general.**—The power and duty to exercise judgment and discretion is not conferred upon those officers alone who sit as judges in courts. There is still a large class of officers whose duties lie wholly outside of the domain of courts of justice, or concern the business of courts only incidentally or occasionally, and who are yet called upon by law to exercise, for the benefit of the public or of individuals, powers very nearly akin to those of judges in the courts.

[1] Tompkins *v.* Sands, 8 Wend. (N. Y.) 462, 24 Am. Dec. 46. See also Tyler *v.* Alford, 38 Me. 530; Hardison *v.* Jordan, Cam. & N. (N. C.) 454. *Contra*, Jordan *v.* Hanson, 49 N. H. 199, 6 Am. Rep. 508.

[2] Percival *v.* Jones, 2 Johns. (N. Y.) Cases 49; Taylor *v.* Trask, 7 Cowen (N. Y.) 249; Liable for issuing it too soon: Briggs *v.* Wardwell, 10 Mass. 356.

[3] Wertheimer *v.* Howard, 30 Mo. 420, 77 Am. Dec. 623. The court did not consider the question free from doubt saying that their inclination was "to hold all his acts, which from the beginning to the end of a suit the law requires him to perform, as judicial, and involving only that responsibility which attends all judicial officers."

[4] Boyd *v.* Ferris, 10 Humph. (Tenn.) 406; Spears *v.* Smith, 9 Lea (Tenn.) 483; McTeer *v.* Lebow, 85 Tenn. 121.

[5] Tompkins *v.* Sands, *supra*.

The powers conferred upon this class of officers are often, to distinguish them from those of judges proper, termed *quasi*-judicial or discretionary.

§ 637. **Quasi-Judicial Functions defined.**—"*Quasi*-judicial functions," says Mr. Bishop,[1] "are those which lie midway between the judicial and ministerial ones. The lines separating them from such as are thus on their two sides are necessarily indistinct; but, in general terms, when the law, in words or by implication, commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed *quasi*-judicial."

§ 638. **Quasi-Judicial Officer exempt from civil Liability for his official Actions.**—The same reasons of private interest and public policy which operate to render the judicial officer exempt from civil liability for his judicial acts within his jurisdiction apply to the *quasi*-judicial officer as well, and it is well settled that the *quasi*-judicial officer can not be called upon to respond in damages to the private individual for the honest exercise of his judgment within his jurisdiction however erroneous or misguided his judgment may be.[2]

The name applied to the office or the officer is immaterial. The question depends in each case upon the character of the act.[3] If it be judicial or *quasi*-judicial in its nature, the officer acts judicially and is exempt.

Neither is it material that the officer usually or often acts ministerially, in those cases in which he does act judicially he is, nevertheless, exempt.[4]

§ 639. **Same Subject—To what Officers this Rule applies.**—This rule extends to the protection of *arbitrators* in their decision upon the controversy submitted to them;[5] *jurors* in their delib-

[1] Bishop on Non-Contract Law, §§ 785, 786.

[2] See the cases cited in detail in the following section.

[3] Wall *v.* Trumbull, 16 Mich. 228; Henderson *v.* Smith, 26 W. Va. 829, 53 Am. Rep. 139.

[4] Wall *v.* Trumbull, 16 Mich. 228; Jenkins *v.* Waldron, 11 Johns. (N. Y.) 114, 6 Am. Dec. 359; Weaver *v.* Devendorf, 3 Denio (N. Y.) 117; Henderson *v.* Smith, 26 W. Va. 829, 53 Am. Rep. 139.

[5] Jones *v.* Brown, 51 Iowa, 74, 37 Am. Rep. 185; Pappa *v.* Rose, L. R. 7 C. P. 32, 1 Eng. Rep. 87; s. c.

erations and verdicts;[1] *assessors* in the valuation of property for taxation;[2] *town-boards* of equalization in determining the value of lands;[3] *commissioners* appointed to determine and award damages for property taken by virtue of the right of eminent domain;[4] *highway officers* authorized to lay out, alter or discontinue highways,[5] or to decide upon exemption from highway taxes,[6] or to exercise their judgment as to the making or repairing of highways,[7] or the construction of ditches for their drainage,[8] or the building of dams;[9] *municipal boards* authorized to hear and determine claims;[10] *collectors of customs* in the sale of perishable property;[11] *school officers* in deciding upon the removal of a teacher,[12] or the expulsion of a scholar;[13] *aldermen*

on appeal L. R. 7 C. P. 525, 3 Eng. Rep. 375.

[1] Turpen *v.* Booth, 56 Cal. 65, 38 Am. Rep. 48; Hunter *v.* Mathis, 40 Ind. 356.

[2] Dillingham *v.* Snow, 5 Mass. 547; Easton *v.* Calendar, 11 Wend. (N. Y.) 90; Weaver *v.* Devendorf, 3 Denio (N. Y.) 117; Vail *v.* Owen, 19 Barb. (N. Y.) 22; Brown *v.* Smith, 24 Barb. 419; People *v.* Reddy, 43 Barb. 539; Vose *v.* Willard, 47 Barb. 320; Bell *v.* Pierce, 48 Barb. 51; Barhyte *v.* Shepherd, 35 N. Y. 238; Western R. R. Co. *v.* Nolan, 48 N. Y. 513; Steam Navigation Co. *v.* Wasco County, 2 Ore. 209; Macklot *v.* Davenport, 17 Iowa 379; Muscatine, &c., R. R. Co. *v.* Horton, 38 Iowa 33; Walker *v.* Hallock, 32 Ind. 239; Wall *v.* Trumbull, 16 Mich. 228; Lilienthal *v.* Campbell, 22 La. Ann. 600; Williams *v.* Weaver, 75 N. Y. 30; Buffalo, &c., R. R. Co. *v.* Supervisors, 48 N. Y. 93; McDaniel *v.* Tebbetts, 60 N. H. 497; Wilson *v.* Marsh, 34 Vt. 352; San Jose Gas Co. *v.* January, 57 Cal. 614.

[3] Steele *v.* Dunham, 26 Wis. 393.

[4] Van Steenbergh *v.* Bigelow, 3 Wend. (N. Y.) 42.

[5] Sage *v.* Laurain, 19 Mich. 137. *Contra*, where highway was laid out for express purpose of avoiding a toll gate. Turnpike Road *v.* Champney, 2 N. H. 199.

[6] Harrington *v.* Commissioners, 2 McCord, (S. C.) 400; Freeman *v.* Cornwall, 10 Johns. (N. Y.) 470.

[7] Rowe *v.* Addison, 34 N. H. 306.

[8] Waldron *v.* Berry, 51 N. H. 136; Adams *v.* Richardson, 43 N. H. 212.

[9] McOsker *v.* Burrell, 55 Ind. 425; Spitznogle *v.* Ward, 64 Ind. 30.

[10] Wall *v.* Trumbull, 16 Mich. 228.

[11] Gould *v.* Hammond, 1 McAllister. (U. S. C. C.) 235.

[12] Burton *v.* Fulton, 49 Penn. St. 151; see also Chamberlain *v.* Clayton, 56 Iowa 331, 41 Am. Rep. 101; Gregory *v.* Small, 39 Ohio St. 346; Morrison *v.* McFarland, 51 Ind. 206. Is liable where he acts maliciously. Elmore *v.* Overton, 104 Ind. 348, 54 Am. Rep. 343.

[13] Stewart *v.* Southard, 17 Ohio 402, 49 Am. Dec. 463; Donahoe *v.* Richards, 38 Me. 379, 61 Am. Dec. 256; Stephenson *v.* Hall, 14 Barb. (N. Y.) 222; Dritt *v.* Snodgrass, 66 Mo. 286, 27 Am. Rep. 343; Spear *v.* Cummings, 23 Pick. (Mass.) 224, 34 Am. Dec. 53; McCormick *v.* Burt, 95 Ill. 263, 35 Am. Rep. 163.

in deciding upon the letting of contracts,[1] or the approval of liquor bonds,[2] or in deciding a building to be a nuisance and ordering its destruction;[3] *county commissioners* in deciding upon an application for a permit to sell intoxicating liquors;[4] *supervisors* in determining upon the sufficiency of an officer's bond and whether, by failing to file a new bond required by them, he has forfeited his office;[5] *pilot officers* in deciding that a pilot was no longer authorized to act as such and therefore revoking his license;[6] *commissioners* authorized to straighten a river to prevent inundations;[7] *inspectors of election*[8] and *boards of registration*[9] in deciding upon the existence of the necessary qualifications of a voter; *notaries* in taking and certifying acknowledgments;[10] *inspectors of provisions* in deciding upon

[1] East River Gas L. Co. *v.* Donnelly, 25 Hun (N. Y.) 614 s. c. 93 N. Y. 557.

[2] Amperse *v.* Winslow, 75 Mich. 234, 42 N. W. Rep. 823.

[3] Pruden *v.* Love, 67 Ga. 190.

[4] State *v.* Commissioners, 45 Ind. 501.

[5] People *v.* Supervisors, 10 Cal. 344, 346.

[6] Downer *v.* Lent, 6 Cal. 94, 65 Am. Dec. 489.

[7] Green *v.* Swift, 47 Cal. 536.

[8] Bevard *v.* Hoffman, 18 Md. 479, 81 Am. Dec 618; Friend *v.* Hamill, 34 Md. 298; Elbin *v.* Wilson, 33 Md. 135; Anderson *v.* Baker, 23 Md. 531; Gordon *v.* Farrar, 2 Doug. (Mich.) 411; Jenkins *v.* Waldron, 11 Johns. (N.Y.) 114, 6 Am. Dec. 359; Goetcheus *v.* Matthewson, 61 N. Y. 420; Weckerley *v.* Geyer, 11 S. & R. (Penn.) 35; Morgan *v.* Dudley, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735; Caulfield *v.* Bullock, 18 B. Mon. 495; Chrisman *v.* Bruce, 1 Duval (Ky.) 63, 85 Am. Dec. 603; Miller *v.* Rucker, 1 Bush (Ky.) 135; Carter *v.* Harrison, 5 Blackf. (Ind.) 138; Rail *v.* Potts, 8 Humph. (Tenn.) 225; Wheeler *v.* Patterson, 1 N. H. 88, 8 Am. Dec. 41; Peavey *v.* Robbins, 3 Jones (N. C.) L. 339; Fausler *v.* Parsons, 6 W. Va. 486, 20 Am. Rep. 431; State *v.* McDonald, 4 Harr. (Del.) 555; State *v.* Porter, 4 Harr. 556; Patterson *v.* D'Auterive, 6 La. Ann. 467, 54 Am. Dec. 564; Dwight *v.* Rice, 5 La. Ann. 580; Bridge *v.* Oakey, 2 La. Ann. 968; Keenan *v.* Cook, 12 R. I. 52; Ashby *v.* White, 2 Ld. Raym. 938.

A different rule prevails in Massachusetts and Ohio, although the officers have acted in good faith; Lincoln *v.* Hapgood, 11 Mass. 350, 355; Kilham *v.* Ward, 2 Mass. 236; Capen *v.* Foster, 12 Pick. 485, 23 Am. Dec. 632; Henshaw *v.* Foster, 9 Pick. 312; Keith *v.* Howard, 24 Pick. 229; Blanchard *v.* Stearns, 5 Metc. 298; Larned *v.* Wheeler, 140 Mass. 390, 54 Am. Rep. 483; Jeffries *v.* Ankeny, 11 Ohio 372; Anderson *v.* Millikin, 9 Ohio St. 568; Monroe *v.* Collins, 17 Ohio St. 665.

See also Murphy *v.* Ramsey, 114 U. S. 15.

[9] Fausler *v.* Parsons, 6 W. Va. 486, 20 Am. Rep. 431.

[10] Henderson *v.* Smith, 26 W. Va. 829, 53 Am. Rep. 139; Commonwealth

their fitness and quality;[1] *boards of health* in examining and deciding upon nuisances and the sources of disease;[2] *boards of prison commissioners* in deciding to annul a contract;[3] *wardens* and *inspectors of prisons* in their action in permitting convicts to go at large.[4]

§ 640. **Same Subject—Whether Liability affected by Motive.**—This immunity from liability where the officer has acted in good faith and with honest motives is unquestioned, as will be apparent from the cases cited in the foregoing section. But when the question arises whether he can be held liable if it is alleged that he was actuated by wilful, corrupt or malicious motives, a field of great uncertainty and confusion is to be entered.

There are certainly many cases which assume that under such circumstances no immunity exists, and many others which hold that an action can not be maintained without proof of an improper motive;[5] but the cases in which this precise question was directly involved and which hold that the action can be maintained because of the existence of the motive are few, and are

v. Haines, 97 Penn. St. 228, 39 Am. Rep. 805. But see upon this subject the fuller treatment, *post* § 703 *et seq.*

[1] Fath *v.* Koeppel, 72 Wis. 289, 7 Am. St. Rep. 867; Seaman *v.* Patten, 2 Caines (N. Y.) 312. *Contra* Hayes *v.* Porter, 22 Me. 371; Nickerson *v.* Thompson, 33 Me. 433.

See, in full, *post* § 702

[2] Raymond *v.* Fish, 51 Conn. 80, 50 Am. Rep. 3; City of Salem *v.* Eastern R. R. Co., 98 Mass. 431, 96 Am. Dec. 650.

[3] Porter *v.* Haight, 45 Cal. 631.

[4] Schoettgen *v.* Wilson, 48 Mo. 253.

[5] See thus Dillingham *v.* Snow, 5 Mass. 547; Easton *v.* Calendar, 11 Wend. (N. Y.) 90; Macklot *v.* Davenport, 17 Iowa 379; Muscatine, &c. R. R. Co. *v.* Horton, 38 Iowa 33; Walker *v.* Hallock, 32 Ind. 239; Williams *v.* Weaver, 75 N. Y. 30; Wilson *v.* Marsh, 34 Vt. 352; Rowe *v.* Addison, 34 N. H. 306; Waldron *v.* Berry, 51 N. H. 136; Adams *v.* Richardson, 43 N. H. 212; McOsker *v.* Burrell, 55 Ind. 425; Spitznogle *v.* Ward, 64 Ind. 30; Burton *v.* Fulton, 49 Penn St. 151; Stewart *v.* Southard, 17 Ohio 402, 49 Am. Dec. 463; Donahoe *v.* Richards, 38 Me. 379, 61 Am. Dec. 256; Gœtcheus *v.* Matthewson, 61 N. Y. 420; Miller *v.* Rucker, 1 Bush (Ky.) 135; Carter *v.* Harrison, 5 Blackf. (Ind.) 138; Rail *v.* Potts, 8 Humph. (Tenn.) 225; Peavey *v.* Robbins, 3 Jones (N. C.) L. 339; Keenan *v.* Cook, 12 R. I. 52; Bevard *v.* Hoffman, 18 Md. 479, 81 Am. Dec. 618; Edwards *v.* Ferguson, 73 Mo 686; Reed *v.* Conway, 20 Mo. 22; Raynsford *v.* Phelps, 43 Mich. 342, 38 Am. Rep. 189; Gregory *v.* Small, 39 Ohio St. 346; Morrison *v.* McFarland, 51 Ind. 206; McCormick *v.* Burt, 95 Ill. 263, 35 Am. Rep. 163; Dritt *v.* Snodgrass, 66 Mo. 286, 27 Am. Rep. 343; Henderson *v.* Smith, 26 W. Va. 829, 53 Am. Rep. 138.

chiefly those growing out of the denial of the elective franchise.[1]

So discriminating a writer as Mr. Bishop[2] recognizes the distinction, saying that "from the ground on which this doctrine rests, it follows that, if the *quasi*-judicial act is corrupt * * it will not be protected."

But, on the other hand, the distinction has been expressly repudiated in many well considered cases in which it was directly called in question.

Thus it has been held that an arbitrator can not be held liable

[1] Of this class, i. e., those arising out of violations of the elective franchise, are: Friend *v.* Hamill, 34 Md. 298; Elbin *v.* Wilson, 33 Md. 135; Weckerley *v.* Geyer, 11 S. & R. (Penn.) 35; Caulfield *v.* Bullock, 18 B. Mon. (Ky.) 495; Morgan *v.* Dudley, 18 B. Mon. 693, 68 Am. Dec. 735; Bridge *v.* Oakey, 2 La. Ann. 968; Patterson *v.* D'Auterive, 6 La. Ann. 467, 54 Am. Dec. 564; Pike *v.* Megoun, 44 Mo. 491; Bernier *v.* Russell, 89 Ill. 60.

Of other cases the writer has discovered but few, but in this line are Gregory *v.* Brooks, 37 Conn. 365; Billings *v.* Lafferty, 31 Ill. 318.

Elmore *v.* Overton, 104 Ind. 348, 54 Am. Rep. 343, supports the distinction. It was there held that a county school superintendent wilfully or corruptly refusing a license to teach to one lawfully entitled, is liable in damages. The court held the power to license to be neither judicial or *quasi*-judicial, but merely administrative in its character.

Previous cases had held that analogous actions could not be maintained without proof of malice: Burton *v.* Fulton, 49 Penn. St. 151; Gregory *v.* Small, 39 Ohio St. 346; Morrison *v.* McFarland, 51 Ind. 206; McCormick *v.* Burt, 95 Ill. 263, 35 Am. Rep. 163; Dritt *v.* Snodgrass, 66 Me. 286, 27 Am. Rep. 343; Stewart *v.* Southard, 17 Ohio 402, 49 Am. Dec. 463; Donahoe *v.* Richards, 38 Me. 376, 61 Am. Dec. 256.

[2] Bishop on Non-Contract Law, § 789. Mr. Bishop here cites Harman *v.* Tappenden, 1 East. 555; Pike *v.* Megoun, 44 Mo. 491; Walker *v.* Hallock, 32 Ind. 239; Lilienthal *v.* Campbell, 22 La. Ann 600; Gregory *v.* Brooks, 37 Conn. 365; Gould *v.* Hammond, McAllister (U. S. C. C.) 235; Bennett *v.* Fulmer, 49 Penn. St. 157.

Of these, the last case is evidently a miscitation: Burton *v.* Fulton, 49 Penn. St. 151, being undoubtedly intended. Two of these cases only can fairly be said to support the text—Pike *v.* Megoun, 44 Mo. 491 (an action against registration officers), and Gregory *v.* Brooks, 37 Conn. 365. (This was an action against a wharfmaster for removing a ship from a dock. The court held that the action *might* be sustained if the order for removal was given maliciously and with the purpose to cause injury, but that the evidence to this point was insufficient). In the other cases, there was either no malice alleged or found or the rule was stated negatively—that the action could not be maintained unless such a motive was established.

in a civil action for damages for an award alleged to have been made by him fraudulently and corruptly;[1] nor a grand juror for conduct as such alleged to have been wilful and malicious;[2] nor a pilot commissioner for wrongfully and maliciously revoking a pilot's license;[3] nor members of a common council for wilfully and corruptly refusing to accept the plaintiff's bid for doing public work;[4] nor members of a board of registration for erasing the plaintiff's name from the list of registered voters, though it was alleged to have been done "wilfully, unlawfully, knowingly, maliciously and corruptly," the board having complied with all the requirements of the statute necessary to give them jurisdiction;[5] nor assessors who are alleged to have wilfully and corruptly refused to allow the plaintiff an exemption from taxation to which he was entitled;[6] nor a member of a common council

[1] Jones *v.* Brown, 54 Iowa 74, 37 Am. Rep. 185.

[2] Turpen *v.* Booth, 56 Cal. 65, 38 Am. Rep. 48. The court cite and rely upon Weaver *v.* Devendorf, 3 Denio (N. Y.) 120, 121; Bradley *v.* Fisher, 13 Wall. (U. S.) 335, and Downer *v.* Lent, *post*.

[3] Downer *v.* Lent, 6 Cal. 94, 65 Am. Dec. 489.

[4] East River Gas Light Co. *v.* Donnelly, 93 N. Y. 557, affirming 25 Hun 914. In this case, DANFORTH, J., said that it is "the well settled rule of law that no public officer is responsible in a civil suit for a judicial determination, however erroneous or wrong it may be, or however malicious even the motive which produced it."

[5] Fausler *v.* Parsons, 6 W. Va. 486, 20 Am. Rep. 431.

[6] Weaver *v.* Devendorf, 3 Denio (N. Y.) 117. In this case the court per BEARDSLEY, J., said: "The act complained of in this case was a judicial determination. The assessors were judges acting clearly within the scope and limit of their authority. They were not volunteers, but the duty was imperative and compulsory; and, acting as they did, in the performance of a public duty, in its nature judicial, they were not liable to an action, however erroneous or wrongful their determination may have been. This case might be disposed of on narrow ground, for there was no evidence to justify the conclusion that the defendants acted maliciously in fixing the value of the property of the plaintiff or of any one else; and surely it will not be pretended they were liable for a mere error of judgment. But I prefer to place the decision on the broad ground that no public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it. Such acts, when corrupt, may be punished criminally, but the law will not allow malice and corruption to be charged in a civil suit against such an officer for what he does in the performance of a judicial duty. The rule extends to judges from the highest to the lowest; to jurors and to all public officers, whatever name they may bear, in the exercise of judicial pow-

for "wilfully, wrongfully and maliciously and well knowing his duty" refusing to vote for the approval of a liquor bond.[1]

These cases are believed to follow the better and the safer rule. If the action is really judicial, the immunity which adheres to judicial action should be applied whether the officer sits upon the bench of a regularly established court or not. As has been said,[2] if the action can be maintained by the allegation of improper motives, no litigant will fail to allege that they existed, and the public officer may constantly be called upon to defend himself from actions at law brought with motives fully as malicious as those which are asserted to have inspired him. Public policy, it is believed, requires that *all* judicial action shall be exempt from question in private suits.

§ 641. **Same Subject—Officer must keep within his Jurisdiction.**—But in order to render the *quasi*-judicial officer exempt, he must, like the judicial,[3] keep within the limit, fixed by law, of his jurisdiction; for if he exceeds it, except as the result of a mistake of fact,[4] he will be liable to the party injured.[5]

Illustrations of this liability may be found in the cases in which an assessor has undertaken to tax persons or property not within his jurisdiction,[6] or election officers have insisted upon other proof of qualification than that which the law declared sufficient,[7] or highway officers have undertaken to do a thing prohibited by law.[8]

As to the rule which should apply in the case of a *quasi*-judicial officer who is called upon to decide from the facts presented

er." Followed in Brown *v.* Smith, 24 Barb. (N. Y.) 419.

The rule here laid down was also approved in Wisconsin: Steele *v.* Dunham, 26 Wis. 393.

[1] Amperse *v.* Winslow, 75 Mich. 234, 42 N. W. Rep. 823.

[2] Bradley *v.* Fisher, 13 Wall. (U. S.) 335.

[3] See *ante*, § 624.

[4] As to which, see *ante*, § 634.

[5] Freeman *v.* Kenney, 15 Pick. (Mass.) 44; Gage *v.* Currier, 4 Pick. 399; Suydam *v.* Keys, 13 Johns. (N. Y.) 444; Mygatt *v.* Washburn, 15 N. Y. 316; Hays *v.* Steamship Co. 17 How. (U. S.) 596; Williams *v.* Weaver, 75 N. Y. 30; Goetcheus *v.* Matthewson, 61 N. Y. 420.

[6] Freeman *v.* Kenney, 15 Pick. (Mass.) 44; Gage *v.* Currier, 4 Pick. (Mass.) 399; Suydam *v.* Keys, 13 Johns. (N. Y.) 444; Mygatt *v.* Washburn, 15 N. Y. 316.

[7] See *post*, § 695.

[8] Adams *v.* Richardson, 43 N. H. 212, as explained in Waldron *v.* Berry, 51 N. H. 136. See also Rowe *v.* Addison, 34 N. H. 306; Sawyer *v.* Keene, 47 N. H. 173.

to him whether he has jurisdiction or not, and who thereupon erroneously decides in the affirmative, the authorities directly in point are not clear, but upon principle it would seem that the same rule should apply which has been noticed in respect of inferior courts and magistrates,—that he is not liable where a case, belonging to a class of which he has jurisdiction, is by complaint, affidavit, petition or other prescribed kind of proceeding, put at last colorably under his jurisdiction.[1]

§ 642. **Same Subject—Quasi-judicial Officer liable who invades Rights of Property.**—But inasmuch as the law quite universally protects private property from appropriation to the public use without compensation, the judgment or discretion of the *quasi*-judicial officer, though exercised honestly and in good faith, will not protect him where by virtue of it he undertakes to invade the private property rights of others, to whom no other redress is given than an action against the officer.[2]

"The principle involved in this holding, and which, upon the whole, I believe to be sound," said Judge DILLON in an Iowa case,[3] "is this: That where a public officer other than a judicial

[1] See *ante*, § 632.

[2] McCord *v.* High, 24 Iowa 336; Cubit *v.* O'Dett, 51 Mich. 347. In both of these cases, highway officers had injured private property by cutting drains. In the latter case COOLEY, J., said: "Highway authorities have no more right than private persons to cut drains, the necessary result of which will be to flood the lands of individuals. This was shown in Ashley *v.* Port Huron, 35 Mich. 296, s. c. 24 Am. Rep. 552, where many authorities are referred to. The highway officer no doubt has a discretion in deciding how and where he will expend highway labor; but it is a discretion limited by the rights of individuals, and when he invades those rights he becomes liable. Tearney *v.* Smith, 86 Ill. 391. And when he is liable for a lawless act, all his assistants are liable with him for the consequent injury. Story on Agency, §§ 311, 312; Brown *v.* Howard, 14 Johns. (N. Y.) 119; Coventry *v.* Barton, 17 Johns. 142, s. c. 8 Am. Dec. 376; Fielder *v.* Maxwell, 2 Blatch. (U. S. C. C.) 552; Tracy *v.* Swartwout, 10 Pet. (U. S.) 80; Smith *v.* Colby, 67 Me. 169. This rule sometimes, when the agent has acted in good faith and without knowledge of the want of legal authority, may seem to operate oppressively, but it is a necessary and very just rule notwithstanding, and full protection of the citizen in his legal rights would be impossible without it. Absence of bad faith can never excuse a trespass, though the existence of bad faith may sometimes aggravate it. Every one must be sure of his legal right when he invades the possession of another."

See also Stone *v.* Augusta, 46 Me. 137.

[3] DILLON, Ch. J., in McCord *v.*

one, does an act directly invasive of the private rights of others, and there is otherwise no remedy for the injury, such officer is personally liable without proof of malice and an intent to injure."

This question most frequently arises in actions against officers charged with the duty of laying out, constructing and keeping in repair public roads, bridges and water ways. As to whom, the same judge continues, "The discretion which protects such an officer as the road supervisor stops at the boundary where the absolute rights of property begin."

But in most of the States provision is made by statute for the acquisition of the rights required under the power of eminent domain, or the township, county or other municipality is made liable for the acts of the officer. In such States the officer who keeps within his jurisdiction, is not personally liable.[1]

§ 643. **Same Subject—Liable where he acts ministerially.**—But the *quasi*-judicial officer, like the judicial, may and often does act ministerially, and, when so acting, he is liable for carelessness or negligence like any other ministerial officer.[2]

What acts are ministerial, and what the liability is which attends upon such acts, will be considered in a following chapter.[3] But, in general, it is said[4] "There can be no great difficulty in determining, when an officer is charged with both judicial and ministerial duties, to which class of duties a particular act belongs.

The character of the act itself will usually determine whether it be judicial or ministerial. If it be the execution of a deter-

High, 24 Iowa 336, 350. In this case, the learned judge held that the action could neither be brought against the road district, the township nor the county.

[1] McOsker *v.* Burrell, 55 Ind. 425; Spitznogle *v.* Ward, 64 Ind. 30; Waldron *v.* Berry, 51 N. H. 136, 144.

But see Callender *v.* Marsh, 1 Pick. (Mass.) 418, 432; Benden *v.* Nashua, 17 N. H. 477.

"There is no liability," says CHAMPLIN, J., "for doing an act which is either directed or authorized by a valid statute, if performed with reasonable care and skill." Highway Commissioners *v.* Ely, 54 Mich. 173. See also Sage *v.* Laurain, 19 Mich. 137.

[2] McCord *v.* High, 24 Iowa 336, 345; Wilson *v.* Marsh, 34 Vt. 352; Rowe *v.* Addison, 34 N. H. 306.

[3] See *post*, §§ 699–701.

[4] In McCord *v.* High, 24 Iowa 336, 345.

mination, committed by the law to the judgment and discretion of the officer, which could be as well done by another as by the one thus clothed with the power of determination, it is a ministerial act. The fact that it requires skill and involves judgment and discretion will not give it a judicial character."

Continuing, the same judge illustrated the distinction in the case at bar, as follows: "The proper performance of grading, ditching and the construction of masonry, though they may require the highest order of engineering and mechanical skill, and demand the exercise of a high order of judgment in the selection of materials, and of discretion in the choice of means, cannot be regarded as the discharge of judicial functions. But the determination that such work is necessary and must be accomplished, may properly be said to partake of a judicial character.

This brings me to the application of these principles to the case at bar. The defendant, as supervisor of roads, is required by law to keep the highways in repair; he determines when and where repairs are necessary, and what work shall be done in order to effect the repairs. The determination may be regarded as of a judicial nature.

He also is required to direct the work, to make the repairs he has determined upon; this is simply a ministerial duty."[1]

[1] Citing Lacour *v.* Mayor of New York, 3 Duer. 406; Lloyd *v.* Mayor of New York, 5 N. Y. 369, 55 Am. Dec. 347; City of Camden *v.* Mulford, 2 Dutch. (N. J.) 56; Rochester White Lead Co. *v.* City of Rochester, 3 N. Y. 463, 53 Am. Dec. 316.

CHAPTER V.

OF THE LIABILITY OF LEGISLATIVE OFFICERS TO PRIVATE ACTION.

§ 644. Legislative Officers not liable to civil Action for legislative acts.
645. Same Subject—Motive alleged is immaterial.
646. Same Subject—Immunity extends to all Grades of legislative Action.
647. Same Subject—Officer liable when he acts ministerially.
648. Constitutional Privileges — Freedom from Arrest, or Suit while on Duty.
649. Same Subject—Freedom of Speech and Action while on Duty.
650. Same Subject—Scope of the Privilege.
651. Same Subject—House must be in Session—Acts in Committee or joint Convention.
652. Same Subject—Illustrations—Slander and Libel—Imprisonment for Contempt.
653. Same Subject—Privilege confined to Member.

§ 644. **Legislative Officers not liable to civil Action for legislative Acts.**—Members of public legislative bodies are chosen by their constituents to enact such laws, regulations and rules of conduct as in their judgment are best suited to the welfare and prosperity of the people within their jurisdiction. They are called upon to exercise their judgment and discretion as to what the people need and what will best supply the requirements. The performance of their duties is owing to the public,—to the community at large, and not to individuals; and they would certainly perform their duties in a timid and time-serving manner,—if, indeed, they would undertake their performance at at all,—if every dissatisfied person could compel them to vindicate the wisdom of their enactments in an action for damages.

For these and other reasons, similar to those which operate the immunity of judicial officers, the rule is well settled that a public legislative officer is not liable to individuals for his legislative action.[1]

[1] Cooley on Torts (1st ed.) 276; Rep. 508; Baker v. State, 27 Ind. Jones v. Loving, 55 Miss. 109, 30 Am. 485; County Commissioners v.

§ 645. **Same Subject—Motive alleged is immaterial.**—"It certainly can not be argued," says CHALMERS, J., "that the motives of the individual members of a legislative assembly, in voting for a particular law, can be inquired into, and its supporters be made personally liable upon an allegation that they acted maliciously toward the person aggrieved by the passage of the law."[1] This is but the same rule which, as has been seen, applies to the judicial officer, and it rests upon the same considerations.[2]

§ 646. **Same Subject—This Immunity extends to all Grades of legislative Action.**—This immunity is not confined to members of national and state legislatures, but extends to the protection of the members of the inferior legislative bodies such as boards of supervisors, county commissioners, city councils,[3] and the like.[4] Here, as the case of the judicial officer, it is the character of the duty and not the name of the office which controls. Thus continues CHALMERS, J., "Whenever the officers of a municipal corporation are vested with legislative powers, they hold and exercise them for the public good, and are clothed with all the immunities of government and are exempt from all liability for their mistaken use."[5]

§ 647. **Same Subject—Officer liable where he acts ministerially.**—But the legislative officer, like the judicial, may be called upon to act ministerially, as when he is required to do some act in a prescribed manner irrespective of his own judgment as to the propriety or desirability of its being done, and in such a case he will be liable to the individual injured by his failure or neglect, as in other cases of ministerial action.[6] But the party complaining must, in this as in other cases,[7] show a special injury to himself.[8]

Duckett, 20 Md. 469, 83 Am. Dec. 557; Borough of Freeport *v.* Marks, 59 Penn. St. 253; Wilson *v.* Mayor of New York, 1 Denio (N. Y.) 595, 43 Am. Dec. 719; Ferguson *v.* Kinnoull, 9 Cl. & Fin. 251.

[1] Jones *v.* Loving, 55 Miss. 109, 30 Am. Rep. 508; Amperse *v.* Winslow, 75 Mich. 234.

[2] See *ante*, § 621.

[3] Amperse *v.* Winslow, 75 Mich. 234.

[4] Cooley on Torts, 376; Jones *v.* Loving, 55 Miss. 109, 30 Am. Rep. 508; County Commissioners *v.* Ducket, 20 Md. 468, 83 Am. Dec. 557; Borough of Freeport *v.* Marks, 59 Penn. St. 253.

[5] In Jones *v.* Loving, *supra*.

[6] Cooley on Torts, 377.

[7] See *ante*, § 600.

[8] Amperse *v.* Winslow, 75 Mich. 234.

So the performance of their duty by such officers either individually or collectively may, as will be seen, be enforced in proper cases by mandamus.[1]

§ 648. **Constitutional Privileges—Freedom from Arrest or Suit while on Duty.**—But not only are legislative officers thus exempt from general liability, but certain special privileges are accorded them by the respective constitutions under which they act.

Thus the constitution of the United States declares that senators and representatives shall in all cases, except treason, felony or breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same.

The constitutions of most of the States, however, extend this privilege still further, and the members are not only privileged from arrest either in criminal or civil cases but from the service of all civil process during the session of the legislature and while coming from and returning to their homes.

Courts do not take judicial notice of this privilege, but the party entitled to it must claim its benefit by proper plea or motion, or it will be deemed to have been waived.[2]

Officers having writs to serve against the person of a legislator are not bound to notice his privilege from arrest, but may execute their process without liability, leaving the party to insist upon his privilege in the proper manner.[3]

§ 649. **Same Subject—Freedom of Speech and Action while on Duty.**—So the constitution of the United States provides that members of the national legislature, for any speech or debate in either house, shall not be questioned in any other place; and a similar provision is found in the constitutions of most if not all of the States.

These provisions, it has been held, should be liberally rather than strictly construed. Thus in a leading case in Massachusetts,[4]

[1] *Ex parte* Pickett, 24 Ala. 91.

[2] Prentis *v.* Commonwealth, 5 Rand. (Va.) 697, 16 Am. Dec. 782; Holiday *v.* Pitt, 2 Strange 985; McPherson *v.* Nesmith, 3 Gratt. (Va.) 241; Lyell *v.* Goodwin, 4 McLean (U. S. C. C.) 29; Gyer *v.* Irwin, 4 Dall. 107; Chase *v.* Fish, 16 Me. 136.

[3] Carle *v.* Delesdernier, 13 Me. 363, 29 Am. Dec. 508; Tarlton *v.* Fisher, Doug. 671; Sperry *v.* Willard, 1 Wend. (N. Y.) 32; Secor *v.* Bell, 18 Johns. (N. Y.) 52; Chase *v.* Fish, 16 Me. 132.

[4] Coffin *v.* Coffin, 4 Mass. 1, 3 Am. Dec. 189.

whose constitution secured "freedom of deliberation, speech and debate," Chief Justice PARSONS said: "These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I, therefore, think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered."

§ 650. **Same Subject—Scope of the Privilege.**—"I will not confine it," continues the learned judge,[1] "to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office. And I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular, according to the rules of the House, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representatives' chamber."

§ 651. **Same Subject—House must be in Session—Acts in Committee or joint Convention.**—"He cannot be exercising the functions of his office as a member of a body," continues the learned judge,[1] "unless the body be in existence. The house must be in session to enable him to claim that privilege; and it is in session notwithstanding occasional adjournments for short intervals, for the convenience of its members. If a member, therefore, be out of the chamber, sitting in committee, executing the commission of the house, it appears to me that such member is within the reason of the article, and ought to be considered within the privilege. The body of which he is a member is in session, and he, as a member of that body, is in fact discharging the duties of his office. He ought, therefore, to be protected from civil or criminal prosecutions for everything said or done by him in the exercise of his functions as a representative, in

[1] In Coffin *v.* Coffin, *supra*.

committee, either in debating, in assenting to, or in draughting a report. Neither can I deny the member his privilege when executing the duties of his office in a convention of both houses, although the convention should be held in the senate chamber."

This construction of the privilege is approved by the Supreme Court of the United States.[1]

§ 652. **Same Subject—Illustrations—Slander and Libel—Imprisonment for Contempt.**—The privilege has been most frequently invoked in actions of slander and libel—to which, within the limits fixed, it furnishes a complete defense—for words spoken or written by the member in speeches upon the floor of the house or in reports made by him as a member of committees,[2] but it has also been frequently appealed to in actions for false imprisonment where the legislature has acted under its power to punish for contempt.

The power of either house to imprison for an alleged contempt of its rules or orders has been thoroughly considered in several important cases, and its extent has been defined with clearness.[3]

A legislative body, like the United States House of Representatives possesses the power to punish its own members for disorderly behavior and this punishment may be by imprisonment;[4] it may also punish in the same way its members for their absence;[5] as incidental to its power to decide upon the qualification and election of its members it has an undoubted right to examine witnesses and inspect papers, and to punish for contempt witnesses who refuse to testify;[6] as incidental to its power to impeach officers of government, it may compel witnesses to attend and

[1] Kilbourn *v.* Thompson, 103 U. S. 168, 203.

[2] Stockdale *v.* Hansard, 9 Ad. & El. 1; Coffin *v.* Coffin, 4 Mass. 1, 3 Am. Dec. 189.

[3] Among the leading English cases are: Crosby's Case, 3 Wils. 188; Burdett *v.* Abbott, 14 East 1; Case of the Sheriff of Middlesex, 11 Ad. & El. 273; Keilley *v.* Carson, 4 Moo. P. C. 63; Beaumont *v.* Barrett, 1 Moo. P. C. 59; Fenton *v.* Hampton, 11 Moo. P. C. 347; Doyle *v.* Falconer, L. R. 1 P. C. 328.

[4] Kilbourn *v.* Thompson, 103 U. S. 168; Hiss *v.* Bartlett, 3 Gray (Mass.) 468, 63 Am. Dec. 768.

[5] Kilbourn *v.* Thompson, 103 U. S. 168.

[6] Kilbourn *v.* Thompson, 103 U. S. 168, Burnham *v.* Morrissey, 14 Gray (Mass.) 226, 74 Am. Dec. 676.

answer;[1] but it possesses no general power to punish for contempt, and can only punish a witness for contumacy where his testimony is required in a matter into which it has jurisdiction to inquire.[2]

Its power, in any case, is not a question for its determination alone, but wherever it attempts to affect individual rights or liberty, its jurisdiction is always open to judicial inquiry in the proper court.[3]

§ 653. **Same Subject—Privilege confined to Member.**—But the privilege is confined to the member alone and, though it may afford him protection against an action for slander or libel for language used by him, it will not protect the outsider who publishes it;[4] and though the member who has concurred in directing an arrest in a case beyond the jurisdiction of the house will not be liable, the officer who makes the arrest will not be privileged.[5]

[1] Kilbourn *v.* Thompson, 103 U. S. 168.

[2] Kilbourn *v.* Thompson, 103 U. S. 108.

[3] Kilbourn *v.* Thompson, 103 U. S. 168, overruling to this extent Anderson *v.* Dunn, 6 Wheat. (U. S.) 204, Williamson *v.* Berry, 8 How. (U. S.) 495; Thompson *v.* Whitman, 18 Wall. (U. S.) 457; Knowles *v.* Gas L. Co. 19 Wall. 58; Pennoyer *v.* Neff, 95 U. S. 714. See also to like effect, Burnham *v.* Morrissey, 14 Gray (Mass.) 226, 74 Am. Dec. 676.

[4] Stockdale *v.* Hansard, 9 Ad. & El. 1.

[5] Kilbourn *v.* Thompson, 103 U. S. 168, overruling Anderson *v.* Dunn, 6 Wheat. (U. S.) 204.

CHAPTER VI.

OF THE LIABILITY OF MINISTERIAL OFFICERS TO PRIVATE ACTION.

§ 654. In general.
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657. Ministerial Functions and Officers defined.
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660. Same Subject—Judicial Officer may act ministerially.
661. Ministerial Officer acting with due Care according to law incurs no Liability.
662. Unconstitutional Law affords no Protection.
663. Officer must keep within Authority conferred by Law.
664. Ministerial Officer who fails to act or who acts improperly liable to Party specially injured.
665. Same Subject—What this Rule includes.
666. Duty must be one which Officer may lawfully perform.
667. Duty of Officer must be absolute.
668. Duty of Officer must be personal.
§ 669. Officer must have legal Authority and Ability to perform.
670. Mistake or good Faith no Excuse.
671. That Violation is punishable no Defence.
672. No Excuse that Duty was owing primarily to Public if Individual has special Interest.
673. But no Liability where Duty owing solely to the Public.
674. Party suing must show Injury from Breach of Duty owing to himself.
675. Only proximate Damages can be recovered.
676. *De Facto* Officer liable for Negligence.
677. Presumption of due Performance.
678. Subordinate Officers are liable for their own Defaults.
679. Liability of Deputies.
680. Effect of contributory Negligence.
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II. LIABILITY OF PARTICULAR OFFICERS.

683. In general.
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684. Liable for Neglect of prescribed Duties.

2. *Canal Contractors.*

§ 685. Are liable for Injuries from Defaults.

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686. Are liable for ministerial Defaults.

687. Duty to allow Inspection of Records.

688. Duty to furnish Copies of Records.

4. *Collector of Taxes.*

689. Must act by Warrant.

690. Protected by Process fair on its Face.

691. Effect of extrinsic Knowledge of Defects.

692. Collector not protected if Warrant not fair on its Face.

693. Collector liable if he exceeds or abuses his Authority.

694. Liability for Money received on void Process.

5. *Election Officers.*

695. Inspectors.

696. Registration Officers.

697. Canvassers.

698. Inducting Officers.

6. *Highway Officers.*

699. Not liable for lawful Acts within their Jurisdiction.

700. Distinction between judicial and ministerial Acts by such Officers.

701. Liable for Neglect to repair where charged with Duty and provided with Funds.

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707. Same Subject—1. For knowingly making a false Certificate.

708. Same Subject—2. For Mistakes in Identity of Parties.

709. Same Subject—3. For defective Certificate.

710. Same Subject—Default of Notary must be proximate Cause of Injury.

711. Same Subject—The Measure of Damages.

712. Same Subject—Mitigation of Damages.

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713. Each liable for his own Defaults only.

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714. Distinction to be made between public and private Schools.

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715. Have Power to enact reasonable Rules and Regulations.

716. What this Rule includes.

717. Rules need not be formal or of Record.

718. School Officers not liable for Errors in Judgment.

719. Are liable only when actuated by Malice.

720. Question of Reasonableness of Regulations is for the Court.

721. What Rules and Regulations are valid—Instances.

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723. Regulations must be enforced in reasonable Manner.

724. Liability for not repairing.

§ 725. Liability for not performing ministerial Duty — Requiring Bond from Contractors.

b. Teachers.

726. Are to some extent public Officers.
727. Are subject to Rules prescribed by Board.
728. Where Board has prescribed no Rules Teacher may do so.
729. Rules prescribed by Teacher must be reasonable.
730. Authority of Teacher not confined to School-room.
731. Right to inflict corporal Punishment.
732. Teacher not liable to Parent for refusing to receive Child as Pupil.

11. *Recorders of Deeds.*

733. Duties are chiefly owing to Individuals.
734. Duty to record proper Instruments.
735. Must not deliver Deed before recording it.
736. Liable for making an imperfect Record.
737. Liable for not making Index as required.
738. Duty to allow Inspection of Records.
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743. What Parties are interested.

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744. Duty to execute lawful Process.
§ 745. Must serve irregular or voidable Process.
746. Need not serve void Process.
747. Right to demand Prepayment of his Fees.
748. Right to demand Indemnity.
749. If no Indemnity demanded, Officer is bound to serve.
750. When promise of Indemnity will be implied.
751. Officer liable for Loss resulting from neglecting Instructions.
752. Officer bound for reasonable Skill and Diligence.
753. Liable for Negligence in serving Process for Appearance.
754. Liable for Negligence in searching for Property.
755. Liable for Negligence in making an insufficient Levy.
756. Liable for surrendering Property without Cause.
757. Liable for negligent Delay in making Levy.
758. Liable for Neglect to levy at all.
759. Liability for Escapes.
760. Liability for Neglect in keeping Property seized.
761. Same Subject—Delivery Bonds —Receiptors.
762. Liability for accepting insufficient Bonds.
763. Liability in making Sales.
764. Liability for not making Return and for a false Return.
765. Liability for Money received.
766. The Measure of Damages.

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767. In general.
768. No Liability arises from proper Service of valid Process.
769. Same Subject—What is meant by Process.
770. Liability for illegal Arrest.
771. Liability for refusing Bail or other Abuses.

§ 772. Liability for Levy under void, paid, expired or superseded Process.
773. Liability for excessive Levy,
774. Liability for disregarding Exemptions.
775. Liability for Neglect in caring for Property.
776. Liability for taking insufficient Security.
777. Liability for Misconduct in making Sale.
778. Liability for other Abuse of Process.
779. Liability for unlawfully Breaking into the Dwelling house.

c. To Strangers to the Writ.

780. In general.
781. Liability for Arrest upon Warrant against another.
782. Liability for taking Goods of one Person on Writ against another.
783. Liability for Levy on mortgaged Property.

13. *Tax Officers.*

784. Liability for not levying Tax.
785. Same Subject—The Measure of Damages.
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789. Public Officer of Government not liable for Acts of his official Subordinates.
790. Same Subject—Exceptions to this Rule.
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792. 2. To Mail Contractors.
793. 3. To Collectors of Customs.
794. 4. To Captain of Ship of War.
795. 5. To Confederate District Commissary.

II. PUBLIC TRUSTEES AND COMMISSIONERS.

796. Not liable for Negligence of Subordinates.

III. MINISTERIAL OFFICERS.

797. Liable for Defaults of their Deputies.
798. This Rule applies—1. To Sheriffs.
799. 2. To Recorders of Deeds.
800. 3. To Clerks of Courts.
801. 4. To other Officers.

C. FOR DEFAULTS OF HIS PRIVATE SERVANT OR AGENT.

802. Liable for Torts of Private Servant or Agent.

§ 654. **In general.**—Having now considered the question of the liability to private action of three of the great classes of public officers,—the governing or executive class; the weighing, deliberating, deciding or judicial class, and the law making or legislative class, it now remains to deal with the fourth great class of public officers,—those who execute and enforce the judgments, decrees and orders of superior courts and officers and who perform all those various duties for individuals which the law has, for their security and protection, clearly and absolutely imposed.

§ 655. **How here designated—Ministerial Officer.**—This class of officers is known by different names. They are sometimes called executive officers, sometimes administrative, sometimes ministerial, and with slight shades of distinction. But for convenience sake, and as may properly be done, they will all be treated here under the general head of ministerial officers, and there will be included all officers whose duties are wholly or chiefly ministerial.

§ 656. **How Subject divided.**—In doing this, the general questions of the nature of the duty and the liabilities it imposes will first be considered, after which several of the more important classes of ministerial officers will be separately dealt with.

Regard must also be had to the distinctions between the liability of the officer for his own defaults, for those of his official subordinates and for those of his own private servants and agents. Hence—

A.

LIABILITY FOR HIS OWN DEFAULTS.

I.

IN GENERAL OF THE DUTY AND THE LIABILITY.

§ 657. **Ministerial Functions and Officers defined.**—The difficulty of dealing with questions of liability for judicial or ministerial action does not lie so much in the determination of the proper principle of law to be applied when the nature of the action has been ascertained, as in determining whether the given act shall be considered as judicial or ministerial in its character.

The majority of cases, perhaps, are easily distinguished, but there are still many others which lie so near the line that courts have found it extremely difficult to decide upon the true nature of the duty.

No inflexible rule can be laid down by which this difficulty can be solved in every case. Each case must be determined upon an examination of all its facts. Here, too, as in other cases already considered, it is the nature of the duty and not the title of the officer which determines the liability.

The most important criterion, perhaps, is that the duty is one which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion.

Many definitions have been attempted by the courts. Thus it is said by a learned judge: "The duty is ministerial, when the law, exacting its discharge, prescribes and defines the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion. Official action, the result of performing a certain specific duty arising from designated facts is a ministerial act."[1]

In the same line, a ministerial act has also been defined as "an act performed in a prescribed manner, in obedience to the law or the mandate of legal authority, without regard to, or the exercise of, the judgment of the individual upon the propriety of the acts being done."[2]

Other definitions appear in the note.[3]

§ 658. **Same Subject—Determination of Occasion or Conditions not excluded.**—That a necessity may exist for the ascertainment, from personal knowledge or by information derived from other sources, of those facts or conditions, upon the exist-

[1] CLOPTON, J., in Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65.

[2] Pennington *v.* Streight, 54 Ind. 376; Flournoy *v.* Jeffersonville, 17 Ind. 169, 79 Am Dec. 468; Ray *v.* Jeffersonville, 90 Ind. 572.

[3] "A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." State *v.* Johnson, 4 Wall. (U. S.) 475, 498.

"A ministerial duty is one in respect to which nothing is left to discretion." Sullivan *v.* Shanklin, 63 Cal. 247, 251.

"A duty is ministerial when an individual has such a legal interest in its performance that neglect of performance becomes a wrong to such individual." Morton *v.* Comptroller-General, 4 S. C. 430, 474.

"Where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment the act is ministerial." Commissioner *v.* Smith, 5 Tex. 471; Arberry *v.* Beavers, 6 Tex. 467; Rains *v.* Simpson, 50 Tex. 495, 32 Am. Rep. 609.

ence or fulfillment of which, the performance of the act becomes a clear and specific duty, does not operate to convert the act into one judicial in its nature.[1] Such, it is said, is not the judgment or discretion which is an essential element of judicial action.[2]

Thus a sheriff must determine whether process coming into his hands for service, is issued from a court of competent jurisdiction and is regular on its face, and a treasurer of public money must ascertain whether a warrant for its payment is drawn by such an officer and is in such a form that its payment becomes a duty; but the execution of the process and the payment of the warrant are ministerial acts. So a judge must determine whether a judgment is entered according to the verdict of the jury or the consideration of the court, and whether a bill of exceptions correctly recites the proceedings; but the act of signing the judgment or the bill of exceptions is a ministerial one.[3]

So, again, it is said that every selectman before the appointment of an overseer, and every sheriff previous to taking bail, makes inquiry to aid him in the legal performance of his duty, but the act in either case is ministerial.[4]

§ 659. **Same Subject—Tested by Mandamus.**—It has been said that, perhaps, as safe a criterion as any other to ascertain whether a private suit will or will not lie, is to adopt the rule which governs in determining whether mandamus would or would not be granted to compel the officer to perform the duty.[5]

This rule, which will be hereafter more fully considered,[6] is, briefly, that in matters which require judgment and consideration to be exercised by the officer, or which are dependent upon his discretion, mandamus will not be granted, but that for minis-

[1] Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65; Flournoy *v.* City of Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468; Ray *v.* City of Jeffersonville, 90 Ind. 572; Crane *v.* Camp, 12 Conn. 464; Betts *v.* Dimon, 3 Conn. 107.

[2] Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65; Crane *v.* Camp, 12 Conn. 464.

[3] Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65.

[4] Betts *v.* Dimon, 3 Conn. 107.

[5] Rains *v.* Simpson, 50 Tex. 495, 32 Am. Rep. 609; Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65.

[6] See *post*, § 947.

terial acts in the performance of which no exercise of judgment or discretion is required, the writ will be granted.[1]

§ 660. **Same Subject—Judicial Officer may act ministerially.**—That the officer in question is one who usually acts judicially or *quasi*-judicially is not conclusive, for such officers may be and are frequently called upon to perform ministerial acts, and as to such acts they are governed by the same rules which control ministerial action in other cases.[2]

§ 661. **Ministerial Officer acting with due Care according to Law incurs no Liability.**—As has been seen, the judicial and the legislative officer acting in good faith within his jurisdiction incurs no liability to private individuals, notwithstanding that they may have erred in judgment or that individuals may have suffered injury. A somewhat similar but more absolute immunity attaches to the ministerial officer.

He is by law required to act; the manner, time and circumstances of his action are prescribed; he has no discretion whether to act or not; his action may be compelled by legal process; his duty is to do, not reason why. Such duties and responsibilities demand commensurate protection, and it is well settled that the ministerial officer who performs in the prescribed manner and with due care and diligence an act imposed upon him by law incurs no liability to any individual however much the latter may be injured.[3]

Even though the power which set him in motion may have erred, yet if the command comes from the proper source and on its face fairly requires that he should act, he may act without fear of personal consequences to himself.

§ 662. **Unconstitutional Law affords no Protection.**—But here, as has been elsewhere noted, it must be borne in mind that an unconstitutional law is, in legal effect, no law at all, and the

[1] Carrick *v.* Lamar, 116 U. S. 423; Decatur *v.* Paulding, 14 Pet. (U. S.) 497; United States *v.* Guthrie, 17 How. (U. S.) 284; United States *v.* Commissioner, 5 Wall. (U. S.) 563; Litchfield *v.* Register, 9 Wall. (U. S.) 574; Tally *v.* Grider, 66 Ala. 119.

[2] Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65; Thompson *v.* Holt, 52 Ala. 491; People *v.* Provines, 34 Cal. 520; People *v.* Bush, 40 Cal. 344.

[3] Highway Commissioners *v.* Ely, 54 Mich. 175; Sage *v.* Laurain, 19 Mich. 137.

ministerial officer can not, therefore, justify his action under it, even though he acted in good faith upon the presumed validity of the law which had not yet been declared to be unconstitutional.[1]

§ 663. **Officer must keep within Authority conferred by Law.**—It is self-evident, also, since the officer must justify his action, if at all, by showing that he was authorized of law so to act, that if he commits an act which his authority will not justify, or if he exceeds, ignores or disregards the limits set to his authority, he cannot then justify at all, but must respond to the party injured like any other wrongdoer.[2]

§ 664. **Ministerial Officer who fails to act or who acts improperly liable to Party specially injured.**—But, on the other hand, it is equally well settled that where the law imposes upon a public officer the performance of ministerial duties in which a private individual has a special and direct interest, the officer will be liable to such individual for any injury which he may proximately sustain in consequence of the failure or neglect of the officer either to perform the duty at all, or to perform it properly.

In such a case the officer is liable as well for non-feasance as for misfeasance or malfeasance.[3]

[1] Fisher *v.* McGirr, 1 Gray (Mass.) 1, 61 Am. Dec. 381; Ely *v.* Thompson, 3 A. K. Marsh. (Ky.) 70; Osborn *v.* Bank, 9 Wheat (U. S.) 738; Norton *v.* Shelby County, 118 U. S. 442; United States *v.* Lee, 106 U. S. 196; Cunningham *v.* Macon R. R. Co. 109 U. S. 446; Poindexter *v.* Greenhow (Virginia Coupon Cases) 114 U. S. 270; Sumner *v.* Beeler, 50 Ind. 341, 19 Am. Rep. 718; Lynn *v.* Polk, 8 Lea (Tenn.) 121; Board *v.* McComb, 92 U. S. 531; Astrom *v.* Hammond, 3 McLean (U. S. C. C.) 107.

[2] Orr *v.* Quimby, 54 N. H. 590.

[3] Rowning *v.* Goodchild, 2 W. Bl. 906; Ashby *v.* White, 2 Ld. Raym. 938; Lane *v.* Cotton, 1 Salk. 17; Amy *v.* Supervisors, 11 Wall. (U. S.) 136; Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; Bassett *v.* Fish, 12 Hun (N. Y.) 209; Piercy *v.* Averill, 37 Hun 360; Bennett *v.* Whitney, 94 N. Y. 302; Jenner *v.* Joliffe, 9 Johns. (N. Y.) 381; Adsit *v.* Brady, 4 Hill (N. Y.) 630, 40 Am. Dec. 305; Rounds *v.* Mansfield, 38 Me. 586; Bailey *v.* Mayor, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; Maxwell *v.* Pike, 2 Me. 8; McCarty *v.* Bauer, 3 Kans. 237; Wilson *v.* Mayor, 1 Denio (N. Y.) 595, 43 Am. Dec. 719; Robinson *v.* Chamberlain, 34 N. Y. 389, 90 Am. Dec. 713; Raynsford *v.* Phelps, 43 Mich. 342, 38 Am. Rep. 189; Clark *v.* Miller, 54 N. Y. 528, 534; Keith *v.* Howard, 24 Pick. (Mass.) 292; Hover *v.* Barkhoof, 44 N. Y. 113; St. Joseph

§ 665. **Same Subject—What this Rule includes.**—"Non-feasance," said Judge METCALFE,[1] "is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; and malfeasance is the doing of an act which a person ought not to do at all." The rule above stated therefore includes:

1. Non-feasance, or the neglect or refusal, without sufficient excuse, to perform an act which it was the officer's legal duty to the individual to perform.[2]

2. Misfeasance or negligence which here as elsewhere is the failure to use, in the performance of a duty owing to the individual, that degree of care, skill and diligence which the circumstances of the case reasonably demand.[3]

3. Malfeasance or the doing, either through ignorance, inattention or malice, of that which the officer had no legal right to do

Ins. Co. *v.* Leland, 90 Mo. 177, 59 Am. Rep. 9; Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65.

[1] In Bell *v.* Josselyn, 3 Gray (Mass.) 309, 63 Am. Dec. 741. See also Mechem on Agency §§ 571, 572.

[2] Grider *v.* Tally, 77 Ala. 422, 54 Am. Rep. 65; St. Joseph Ins. Co. *v.* Leland, 90 Mo. 177, 59 Am. Rep. 9; Amy *v.* Supervisors, 11 Wall. (U. S.) 136; Clark *v.* Miller, 54 N. Y. 528; Russell *v.* Brace, 42 Mich. 377; Piercy *v.* Averill, 37 Hun (N. Y.) 360; Adsit *v.* Brady, 4 Hill (N. Y.) 630, 40 Am. Dec. 305; Governor *v.* Dodd, 81 Ill. 163; Kolb *v.* O'Brien, 86 Ill. 210; Baltimore County *v.* Baker, 44 Md. 1; Chouteau *v.* Rowse, 56 Mo. 65; Briggs *v.* Coleman, 51 Ala. 561; Hicks *v.* Dorn, 9 Abb. Pr. (N. S.) 54; People *v.* Tweed, 13 Abb. Pr. (N. S.) 80; Hickok *v.* Plattsburgh, 15 Barb. (N. Y.) 443; Smith *v.* Wright, 24 Barb. 172; Fish *v.* Dodge, 38 Barb. 173; Mott *v.* Railroad Co. 8 Bosw. 353; Exchange F. Ins. Co. *v.* Canal Co. 10 Bosw. 187; Paulding *v.* Cooper, 10 Hun (N. Y.) 22; Bassett *v.* Fish, 12 Hun 210; Connors *v.* Adams, 13 Hun 430; Huston *v.* Mayor, 9 N. Y. 169; Robinson *v.* Chamberlain, 34 N. Y. 390, 90 Am. Dec. 713; Hicks *v.* Dorn, 42 N. Y. 53; Hover *v.* Barkhoof, 44 N. Y. 116; McCarthy *v.* Syracuse, 46 N. Y. 196; Olmsted *v.* Dennis, 77 N. Y. 382; Ferguson *v.* Kinnoull, 9 Cl. & Fin. 279; Vose *v.* Reed, 54 N. Y. 657.

[3] Eslava *v.* Jones, 83 Ala. 139, 3 Am. St. Rep. 699; Kendall *v.* Stokes, 3 How. (U. S.) 87; Piercy *v.* Averill, 37 Hun (N. Y.) 360; Robinson *v.* Chamberlain, 34 N. Y. 389, 90 Am. Dec. 713; Hover *v.* Barkhoof, 44 N. Y. 116; Clark *v.* Miller, 54 N. Y. 528; Kennedy *v.* Ryall, 67 N. Y. 379; Bennett *v.* Whitney, 94 N. Y. 302; Shepherd *v.* Lincoln, 17 Wend. (N. Y.) 250; McCord *v.* High, 24 Iowa 336; Nowell *v.* Wright, 8 Allen 166, 80 Am. Dec. 62; Bailey *v.* Mayor, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; McCarty *v.* Bauer, 3 Kans. 237; Henly *v.* Mayor of Lyme Regis, 5 Bing. 91; Morse *v.* Sweenie, 15 Ill. App. 486; Hayes *v.* Porter, 22 Me. 371; Stevens *v.* Dudley, 56 Vt. 158; Wooley *v.* Baldwin, 101 N. Y. 688.

at all, as where he acts without any authority whatever, or exceeds, ignores or abuses his powers.[1]

These three divisions cover, in a general way, all classes of defaults in the performance of ministerial duties. The particular application of these rules will appear in later sections.

§ 666. **Duty must be one which Officer may lawfully perform.**—It is self-evident that the duty which the officer is called upon to perform, or the non-performance of which is complained of, must be one which the officer could lawfully perform. The law does not permit, much less require, its own violation.

§ 667. **Duty of Officer must be absolute.**—It also follows from the very nature of the case that the duty, the violation of which is complained of, must be one which the law imposes upon the officer absolutely, for no action can, as has been seen, arise from the non-performance of that, the doing or not doing of which rested in the officer's judgment or discretion.[2]

The party suing must show a plain duty violated.[3]

§ 668. **Duty of Officer must be personal.**—The duty must also be one which the particular officer in question, as distinguished from all other officers, was, either by virtue of an express enactment, or of a lawful demand, or of a personal undertaking, or otherwise, under a legal obligation to perform.[4]

§ 669. **Officer must have legal Authority and Ability to perform.**—So, obviously, the duty must be one which the officer has legal authority to perform, irrespective of superior officers;[5] and, where its performance requires the possession or use of particular means or agencies or the expenditure of money, it must appear that the officer had either the means, agencies or funds required, or the facilities for acquiring them.[6]

[1] Jewell *v.* Swain, 57 N. H. 506; Taylor *v.* Jones, 42 N. H. 25; Griel *v.* Hunter, 40 Ala. 542; Brackett *v.* Vining, 49 Me. 356; Melville *v.* Brown, 15 Mass. 81; Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551; Wallis *v.* Truesdell, 6 Pick. (Mass.) 455; Smith *v.* Gates, 21 Pick. 55; Williamson *v.* Dow, 32 Me. 559; Sawyer *v.* Wilson, 61 Me. 529; Handy *v.* Clippert, 50 Mich. 355.

[2] See *ante*, § 594.

[3] Fitzpatrick *v.* Slocum, 89 N. Y. 358.

[4] Nowell *v.* Wright, 3 Allen (Mass.) 166, 80 Am. Dec. 63.

[5] Nowell *v.* Wright, 3 Allen (Mass.) 166, 80 Am. Dec. 62; Hover *v.* Barkhoof, 44 N. Y. 113; Adsit *v.* Brady, 4 Hill (N. Y.) 630, 40 Am. Dec. 305; Robinson *v.* Chamberlain, 34 N. Y. 389, 90 Am. Dec. 713.

[6] Nowell *v.* Wright, 3 Allen (Mass.)

§ 670. **Mistake or good Faith no Excuse.**—It is no defense to such an officer, upon whom the law has imposed the positive duty of performance, that he was mistaken as to the nature or extent of his obligation, or that he acted in entire good faith and with an honest intention to do his duty.[1]

§ 671. **That Violation is punishable no Defence.**—That the failure of performance is by law made a penal offence is no bar to the maintenance of an action by the individual injured.[2]

§ 672. **No Excuse that Duty was owing primarily to Public if Individual has special Interest.**—So it is immaterial that the duty is one primarily imposed upon public grounds and therefore a duty owing primarily to the public, if, notwithstanding, the individual has in it a distinctive and direct interest and the legal right to require its performance; the right of action springs from the fact that the private individual receives a special and peculiar injury from the neglect in performance against which it was in part the purpose of the law to protect him.[3]

§ 673. **But no Liability where Duty is owing solely to Public.**—But, as has been seen, where the duty is one owing solely to the public, no liability for its non-performance is incurred to the individual however much he may be injured.[4]

§ 674. **Party suing must show Injury from Breach of Duty owing to himself.**—It is largely a restatement of the same rule to say that the individual suing must show that he has suffered an injury from the breach of a duty owing to himself. It is not enough that he has sustained an injury, or that the officer has violated a duty owing to some one; but the plaintiff must show that these two things concur: that he has sustained a special and peculiar injury, and that it results from a breach of duty which the officer owed to him.[5]

166, 80 Am. Dec. 62; Hover *v.* Barkhoof, 44 N. Y. 113; Garlinghouse *v.* Jacobs, 29 N. Y. 297; Weed *v.* Ballston Spa, 76 N. Y. 329; Hines *v.* Lockport, 50 N. Y. 238.

[1] Amy *v.* Supervisors, 11 Wall. (U. S.) 136.

[2] Raynsford *v.* Phelps, 43 Mich. 342, 38 Am. Rep. 189; Hayes *v.* Porter, 22 Me. 371.

[3] Per COOLEY, J. in Raynsford *v.* Phelps, 43 Mich. 342, 38 Am. Rep. 189. The decision in this case was dissented from in State *v.* Harris, 89 Ind. 363, 46 Am. Rep. 169.

[4] See *ante*, § 598.

[5] Eslava *v.* Jones, 83 Ala. 139, 3 Am. St. Rep. 699; State *v.* Harris, 89 Ind. 363, 46 Am. Rep. 169. In this case, ELLIOTT, J. states the rule with

§ 675. **Only proximate Damages can be recovered.**—In actions against officers, as in other cases, the injury sustained and

so much fullness and clearness as to seem to warrant the following extract from his opinion: "It is not enough in any case for a plaintiff, who seeks to recover for an injury caused by the negligence of another, to show simply injury and negligence; he must also show that there was a breach of duty owing to him. This general rule applies with peculiar force to persons who sue for injuries caused by official misconduct. It is not every person who sustains an injury from the negligence of a public officer that can maintain an action on the officer's bond.

In general, a public officer is liable only to the person to whom the particular duty is owing, and the ruling question in all cases of the kind is as to whether the plaintiff shows the breach of particular duty owing to him. It is not sufficient to show a general public duty, or a duty to some other person directly interested. Judge COOLEY says: 'But the sheriff can only be liable to the person to whom the particular duty was owing; the party to whom he is bound by the duty of his office.' Cooley on Torts, 394, n. 1. In another elementary treatise it is said: 'It is a general rule that wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he has an interest in the performance of the duty, and that the duty was imposed for his benefit.' Shearm. & Redf. Neg. § 174.

The adjudged cases illustrate and enforce this principle. In Harrington v. Ward, 9 Mass. 251, it was said: 'No action lies against the sheriff, either for his own default or for that of his deputy, but at the suit of one to whom the sheriff is bound by the duty of his office. In relation to a suit pending, whether in the service of the original writ, the execution or any intermediate process, he is answerable for his neglects to none but the plaintiff or the defendant in such suit.' The same principle is laid down in the cases of Compton v. Pruitt, 88 Ind. 171; Gardner v. Heartt, 3 Denio (N. Y.) 232, and Bank of Rome v. Mott, 17 Wend. (N. Y.) 554. In the last case cited, COWEN, J., said: 'The law can not, in such cases, look beyond the proximate mischief resulting to a vested right, and do more than redress that mischief at the suit of the person immediately wronged.'

The case of Strong v. Campbell, 11 Barb. (N. Y.) 135, is an interesting and instructive one. It appeared in that case that a statute provided for the publication of the list of uncalled for letters, and that it should be made in the newspaper having the largest circulation in the town. Plaintiffs were publishers of such a paper; publication of the list was denied them, and it was held that they could not maintain an action, the court saying: 'To give a right of action for such a cause, the plaintiff must show that the defendant owed the duty to him personally. Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit.'

If we look to kindred cases we shall find strong support for this view, for the analogy is close and full. Thus in cases against attorneys for negligence, it is well settled that only

the damages claimed must be the proximate and not the remote result of the breach of duty complained of.[1]

§ 676. **De Facto Officer liable for Negligence.**—As has already been seen, the *de facto* officer is liable to third persons for

the person with whom the attorney contracted can maintain the action, for it is to him alone that he owes a particular duty. Fish *v.* Kelly, 17 C. B. (N. S.) 194; Savings Bank *v.* Ward, 100 U. S. 195; Commonwealth *v.* Harmer, 6 Phila. 90; Robertson *v.* Fleming, 4 Macq. App. Cas. 167.

In Ware *v.* Brown, 2 Bond (U. S. D. C.) 267, a notary public had made a false certificate to a deed, and it was held that no one but the party to the original deed could maintain an action. So where a recorder gives an erroneous certificate, an action can be maintained only by the person to whom it was given. Houseman *v.* Girard, &c. Assn. 81 Penn. St. 256; Wood *v.* Ruland, 10 Mo. 143. Builders of public works are answerable only to their employers for want of skill and care in executing their contract: Mayor *v.* Cunliff, 2 N. Y. 165; Pickard *v.* Smith, 10 C. B. (N. S.) 470; Castle *v.* Parker, 18 L. T. Rep. (N. S.) 367. A railway company is not liable to an interloper for injuries resulting from negligence: Lary *v.* Cleveland, &c. R. Co. 78 Ind. 323; 41 Am. Rep. 572; Everhart *v.* Terre Haute, &c. R. Co. 78 Ind. 292, 41 Am. Rep. 567.

In Winterbottom *v.* Wright, 10 M. & W. 109, the plaintiff proved that a mail coach had been defectively constructed; that it was constructed under a contract with a public officer, and that because of its defective construction plaintiff sustained an injury; and the court denied a recovery upon the ground that the coachmaker owed plaintiff no duty: Lord ABINGER, in the course of his opinion, said: 'Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.' This corresponds with Judge CLIFFORD'S statement that 'There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect.' Savings Bank *v.* Ward, *supra*.

In Dale *v.* Grant, 5 Vroom (N. J.) 142, it was held that an action would not lie in favor of a customer against a wrong-doer who stopped the machinery of a manufactory and prevented the manufacturer from performing a contract, and thereby caused loss to the plaintiff, to whom the manufacturer had agreed to furnish goods. The court said: 'But the law does not attempt to give full reparation to all parties injured by a wrong committed. If this were so, all parties holding contracts, if such exist, under the plaintiffs and who may have been injuriously affected by the conduct of the defendants, would be entitled to a suit. It is only the proximate injury that the law endeavors to compensate; the more remote comes under the head of *damnum absque injuria*.' Interesting discussions of kindred questions are contained in Loop *v.* Litchfield, 42 N. Y. 351, 1 Am. Rep. 543, and Anthony *v.* Slaid, 11 Metc. 290."

[1] Eslava *v.* Jones, 83 Ala. 139, 3 Am. St. Rep. 699; Winterbottom *v.* Wright, 10 M. & W. 109; State *v.* Harris, 89 Ind. 363, 46 Am. Rep. 169.

negligence or malfeasance in the performance of the duties of the office assumed by him, or for not completing a service which he has officially undertaken, in the same manner and to the same extent as though his title to the office were perfect.[1]

§ 677. **Presumption of due Performance.**—As has also been seen, it is a presumption constantly attending the performance of official duty, that the officer has not neglected his duty, nor misapplied nor abused his powers.[2] The burden of proving the default complained of rests therefore upon the party alleging it.[3]

§ 678. **Subordinate Officers are liable for their own Defaults.**—The rule of liability for official misconduct applies as well to inferior and subordinate officers as to those of higher rank. As will be seen in a subsequent section,[4] public officers of government are held, with certain exceptions there stated, to be not liable for the defaults of their official subordinates. Such inferior officers are themselves public officers, and are personally liable for their own defaults.[5]

§ 679. **Liability of Deputies.**—So, though their principals may be liable also, deputy officers are personally liable to third persons for their acts of misfeasance or malfeasance.[6] Such acts

[1] See *ante*, § 338.

Allen *v.* Archer, 49 Me. 346; Bearce *v.* Fossett, 34 Me. 575; Longacre *v.* State, 3 Miss. 637; Sandwich *v.* Fish, 2 Gray (Mass.) 298; Williamson *v.* Willis, 15 Gray (Mass.) 427; Johnston *v.* Wilson, 2 N. H. 202; Horn *v.* Whittier, 6 N. H. 88; Jones *v.* Scanland, 6 Humph. (Tenn.) 195; Trescott *v.* Moan, 50 Me. 347; Wentworth *v.* Gove, 45 N. H. 160; Billingsley *v.* State, 14 Md. 369; Borden *v.* Houston, 2 Tex. 594.

[2] See *ante*, § 579.

Dunlop *v.* Munroe, 1 Cranch C. C. 536; People *v.* Auditor, 2 Scam. (Ill.) 567; Vaughn *v.* Biggers, 6 Ga. 188; Strother *v.* Lucas, 12 Pet. (U. S.) 410; Ross *v.* Reed, 1 Wheat. (U. S.) 482; United States *v.* Arredondo, 6 Peters, 691; Philadelphia, &c. R. R. Co. *v.* Stimpson, 14 Peters, 448; Delassus *v.* United States, 9 Peters 117; Wilkes *v.* Dinsman, 7 How. (U. S.) 89; Minter *v.* Crommelin, 18 How. (U. S.) 87; Mandeville *v.* Reynolds, 68 N. Y. 528; Sutherland *v.* Ingalls, 63 Mich. 620, 6 Am. St. Rep. 332.

[3] National Bank *v.* Herold, 74 Cal. 603, 5 Am. St. Rep. 476.

[4] *Post*, § 789.

[5] Keenan *v.* Southworth, 110 Mass. 474, 14 Am. Rep. 614; Robertson *v.* Sichel, 127 U. S. 507; Conwell *v.* Voorhees, 13 Ohio 523, 42 Am. Dec. 206; Hutchins *v.* Brackett, 22 N. H. 252, 53 Am. Dec. 249; Dunlop *v.* Munroe, 7 Cranch (U. S.) 242; Schroyer *v.* Lynch, 8 Watts (Penn.) 453; Bishop *v.* Williamson, 11 Me. 495.

[6] Purrington *v.* Loring, 7 Mass. 388; Ross *v.* Philbrick, 39 Me. 29; Remlinger *v.* Weyker, 22 Wis. 383.

would render the principal liable if performed by him in person and the deputy can not, it is evident, find justification for the performance of an unlawful act in the order or command of a principal who had himself no legal authority either to perform or direct it.

For acts of non-feasance,[1] however, *i. e.* for the non-performance of a duty owing to his principal, the deputy is, it is held, liable to his principal only, and the latter alone must answer for it to the person injured.[2]

Whether the deputy and his principal can be held jointly liable for the deputy's misfeasance or malfeasance is a question upon which the authorities are not agreed.

§ 680. **Effect of contributory Negligence.** — "That public officers should be held to a faithful performance of their official duties," it is said in one case, "and made to answer in damages to all persons who may have been injured through their malfeasance, omission or neglect, to which the persons injured have in no respect contributed, cannot be denied. But it is equally true that if the result complained of would have followed, notwithstanding their misconduct, or if the injured party himself contributed to the result in any degree by his own fault or neglect, they cannot be held responsible. If the position of the injured party would have been just the same had not the alleged misconduct occurred, he has no legal ground of complaint; and if his own conduct or the conduct of his attorney contributed to the result, he is *in pari delicto*, and the law leaves him where it finds him." [3]

§ 681. **Liability when Services are gratuitous.**—In the case of many public officers, the compensation provided for their services is a fixed salary payable out of the public treasury, and they are required by law to render their services to such individuals as are legally entitled to them without any further com-

[1] See, as to the distinction, Mechem on Agency, §§ 569-572.

[2] McNutt *v.* Livingston, 7 Sm. & M. (Miss.) 641; Snedicor *v.* Davis, 17 Ala. 472; Cameron *v.* Reynolds, Cowp. 403; Buck *v.* Ashley, 37 Vt. 475; Rose *v.* Lane, 3 Humph. (Tenn.) 218; Paddock *v.* Cameron, 8 Cow. (N. Y.) 212; Armistead *v.* Marks, 1 Wash. (Va.) 325.

[3] Lick *v.* Madden, 36 Cal. 208, 95 Am. Dec. 175; Boardman *v.* Hayne, 29 Iowa 346.

pensation or reward. So also there are cases where the office is expressly made a gratuitous one with no salary or compensation attached, and the officer who accepts such an office would be bound by law to act, for those legally entitled to require his action, without compensation.

The great majority of purely ministerial officers, however, are compensated by fees payable by each individual who requires their services. These fees the officer may lawfully require to be pre-paid to him before he undertakes the service, and may, without liability, refuse to act until they are paid.[1] But, as this provision is for his own benefit, he may waive it if he pleases, and if, without requiring his fees to be prepaid, he undertakes the service, he will then be held to the same liability as though he had been paid. Having assumed the service, the trust and confidence reposed furnish a sufficient consideration for his implied undertaking to perform it properly.[2]

§ 682. **Liability of Officer upon his Bond.**—The bonds given by public officers are required and given to secure the faithful discharge by the officer of the official duties which the law imposes upon him. They are given to indemnify the public and individuals having occasion to deal with him against the consequences of his unlawful action or inaction as an *officer* and not as a private *individual*, and they are far from being security for his general good conduct, or protection against every act which the officer may commit.[3]

To give a cause of action, therefore, upon the officer's bond for his inaction, it must appear that the act left unperformed was one which it was his official duty to perform; and to give a cause of action for the doing of an act which, it is alleged, he ought not to have done, it must appear that the act complained of was one which it was official duty not to perform.

The liability of the officer upon his bond is, where no special defense is open to the sureties, co-extensive with the liability of

[1] Ripley *v.* Gifford, 11 Iowa 367.

[2] See Mechem on Agency, § 478; Passano *v.* Acosta, 4 La. 26, 23 Am. Dec. 470; Williams *v.* Higgins, 30 Md. 404; Short *v.* Skipwith, 1 Brock. C. C. 104; Walker *v.* Smith, 1 Wash. C. C. 152; Spence *v.* Towles, 18 Mich. 9; Williams *v.* Higgins, 30 Md. 404.

[3] State *v.* Conover, 28 N. J. L. 230; Commonwealth *v.* Cole, 7 B. Mon. (Ky.) 250, 46 Am. Dec. 506.

the sureties thereon,—a question already discussed.[1] The officer may be liable to a greater extent as an individual, but his liability upon his bond is limited to a breach of its conditions.

II.

LIABILITY OF PARTICULAR OFFICERS.

§ 683. **In General.**— Having thus considered the general principles applicable to the subject of this chapter, some illustrations of their application to the case of particular officers will now be given. It is obviously impossible to instance every case in which a ministerial officer may be held liable, but sufficient will be given to illustrate the principles. In many of the cases which will be noticed, the officer might, perhaps, have been as properly classed under the head of the *quasi*-judicial, but inasmuch as they are all called upon to perform duties often, if not chiefly, of a ministerial nature, no confusion will, it is believed, result from the classification here adopted.

1. *Assignee in Bankruptcy.*

§ 684. **Liable for Neglect of prescribed Duties.**—An assignee in bankruptcy is liable in damages to creditors of the bankrupt if he wilfully omits or improperly performs official duties which are clearly prescribed and do not involve the exercise of discretion or judicial powers, as where he wilfully omits to give them notice of a meeting with the intent to injure them; and it seems that State courts have jurisdiction of the action against him.[2]

2. *Canal Contractors.*

§ 685. **Are liable for Injury from Defaults.**—Canal contractors in New York are public ministerial officers[3] and are liable to individuals injured by reason of their failure to keep the canal in repair[4] or free from obstructions to navigation,[5] or for negligence

[1] See *ante*, § 282 *et seq.*

[2] Russell *v.* Phelps, 42 Mich. 377.

[3] Robinson *v.* Chamberlain, 34 N. Y. 389, 90 Am. Dec. 713.

[4] Robinson *v.* Chamberlain, 34 N. Y. 389, 90 Am. Dec. 713; Hicks *v.* Dorn, 42 N. Y. 47; Conroy *v.* Gale, 47 N. Y. 665; Fulton F. Ins. Co. *v.* Baldwin, 37 N. Y. 648; French *v.* Donaldson, 57 N. Y. 496.

[5] Hicks *v.* Dorn, 54 Barb. 172, 42

in the construction of the work,[1] or for trespassing upon private property.[2]

3. *Clerks of Courts.*

§ 686. **Are liable for ministerial Defaults.**—Clerks of courts exercise chiefly ministerial functions, and are liable in damages to the person injured by their omissions or neglects, as where they take or approve insufficient bonds or security,[3] or are negligent in filing papers,[4] or carelessly give a false certificate;[5] or neglect to enter a cause upon the docket,[6] or to issue a writ or file a bill of exceptions in a proper case,[7] or refuse without sufficient reason to issue proper process,[8] or are negligent in entering up a judgment.[9]

But no action lies against a clerk upon his official bond for the recovery of damages sustained by a father by reason of the marriage of his minor daughter under a license unlawfully issued by the clerk without the father's consent.[10]

§ 687. **Duty to allow Inspection of Records.**—It is the duty of the clerk to permit persons having a present or prospective interest in particular public records in his office to inspect and copy the same at reasonable times and under reasonable regulations.[11] The performance of this duty may be enforced by man-

N. Y. 47; Fulton F. Ins. Co. *v.* Baldwin, 37 N. Y. 648.

[1] St. Peter *v.* Denison, 58 N. Y. 416.

[2] Hicks *v.* Dorn, 42 N. Y. 47.

[3] Topping *v.* Windley, 99 N. C. 4, 5 S. E. Rep. 14; McNutt *v.* Livingston, 7 Smedes & M. (Miss.) 641; Billings *v.* Lafferty, 31 Ill. 318; Hubbard *v.* Switzer, 47 Iowa 681; Haverly *v.* McClelland, 57 Iowa 182; Brock *v.* Hopkins, 5 Neb. 231.

[4] Rosenthal *v.* Davenport, 38 Minn. 543, 38 N. W. Rep. 618.

[5] Maxwell *v.* Pike, 2 Me. 8.

[6] Brown *v.* Lester, 13 Smedes & M. (Miss.) 392.

[7] Collins *v.* McDaniel, 66 Ga. 203.

[8] Anderson *v.* Johett, 14 La. Ann. 614.

[9] Governor *v.* Dodd, 81 Ill. 163.

[10] Holland *v.* Beard, 59 Miss. 161, 42 Am. Rep. 360, overruling State *v.* Baker, 47 Miss. 88, and disapproving White *v.* Henry, 24 Me. 531.

[11] Boylan *v.* Warren, 39 Kans. 301, 7 Am. St. Rep. 551; *In re* McLean, 8 The Rep. 813; Lum *v.* McCarty, 39 N. J. L. 287 (overruling Flemming *v.* Clerk, 30 N. J. L. 280). See also Buck *v.* Collins, 51 Ga. 395; Bean *v.* People, 7 Col. 202; German American Loan & Trust Co. *v.* Richards, 99 N. Y. 620; Hanson *v.* Eichstaedt, 69 Wis. 538; State *v.* Rachac, 37 Minn. 372; State *v.* Williams, 96 Mo. 13, 8 S. W. Rep. 711; State *v.* Hoblitzelle, 85 Mo. 624.

For a full discussion of this gen-

damus,[1] or, for an unlawful refusal to perform it, an action may be maintained.[2]

But the party demanding inspection must have some other interest than mere curiosity,[3] and the injury complained of must have been the proximate result of the refusal.[4]

§ 688. **Duty to furnish Copies of Records.**—So it is frequently made the duty of the clerk to furnish copies of particular records to parties desiring them upon the payment of a prescribed fee. The performance of this duty, also, may be enforced by mandamus,[5] or, for its non-performance, an action may be maintained.[6]

So it is his duty to use reasonable diligence to make true and perfect copies, and for negligence in this regard he would also be liable.[7]

4. *Collector of Taxes.*

§ 689. **Must act by Warrant.**—The collector of taxes is a ministerial officer whose duty it is to collect of the persons and in the amounts set down in his warrant the taxes which have been assessed by the proper officers. The warrant for their collection received from the constituted authority is the process by which he is to proceed. It alone confers authority upon him to act and without it he is a trespasser.[8]

§ 690. **Protected by Process fair on its Face.**—The collector of taxes has, ordinarily, nothing to do with their assessment, and in no case has he authority to revise, review or refuse to collect

eral question, see the title Recorders of Deeds, *post*.

[1] Boylan *v.* Warren, *supra*.

[2] Lyman *v.* Windsor, 24 Vt. 575; Lyman *v.* Edgerton, 29 Vt. 305, 70 Am Dec. 415; Lum *v.* McCarty, 39 N. J. L. 287.

[3] Randolph *v.* State, 82 Ala. 527, 60 Am. Rep. 761. Upon this point see Burton *v.* Tuite, — Mich. —, 44 N. W. Rep. — (not yet reported).

[4] Lyman *v.* Edgerton, 29 Vt. 305, 70 Am. Dec. 415.

[5] Strong's Case, Kirby (Conn.) 345; *Ex parte* Goodell, 14 Johns. (N. Y.) 325; Silver *v.* People, 45 Ill 225.

[6] Boyden *v.* Burke, 14 How. (U. S.) 575

[7] See Smith *v.* Holmes, 54 Mich 104; Chase *v.* Heaney, 70 Ill. 268; Clark *v.* Marshall, 34 Mo. 429; Savings Bank *v.* Ward, 100 U. S. 195.

[8] Hilbish *v.* Hower, 58 Penn. St. 93, citing Pearce *v.* Torrence, 2 Grant's Cas. 82; Stephens *v.* Wilkins, 6 Penn. St. 260. To like effect: Donald *v.* McKinnon, 17 Fla. 746; Taft *v.* Barrett, 58 N. H. 447; Pearson *v.* Canney, 64 Me. 188.

them. His duty is simply to make the collection in accordance with his warrant without questioning the legality of the action which has preceded his.

It is, therefore, the well settled rule that the collector of taxes legally qualified and acting within the scope of his authority, by virtue of a warrant coming from the proper officers and which is legal in form and on its face contains nothing by way either of recitals or omissions to apprise him that it was issued without legal authority, will be protected in such action against all illegalities except his own.[1]

[1] Nowell *v.* Tripp, 61 Me. 426, 14 Am. Rep. 572; Judkins *v.* Reed, 48 Me. 386; Caldwell *v.* Hawkins, 40 Me. 526; Ford *v.* Clough, 8 Me. 342, 23 Am. Dec. 513; Kellar *v.* Savage, 20 Me. 199; State *v.* McNally, 34 Me. 210, 56 Am. Dec. 650; Tremont *v.* Clark, 33 Me. 482; Bethel *v.* Mason, 55 Me. 501; Bird *v.* Perkins, 33 Mich. 28; Wall *v.* Trumbull, 16 Mich. 228; Savacool *v.* Boughton, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181; Chegaray *v.* Jenkins, 5 N. Y. 376; McGuinty *v.* Herrick, 5 Wend. 240; Wilcox *v.* Smith, 5 Wend. 231, 21 Am. Dec. 213; Alexander *v.* Hoyt, 7 Wend. 89; Beach *v.* Furman, 9 Johns. (N. Y.) 228; Coon *v.* Congden, 12 Wend. 496; Bennett *v.* Burch, 1 Denio (N. Y.) 141; Webber *v.* Gay, 24 Wend. 485; Abbott *v.* Yost, 2 Denio 86; Dunlap *v.* Hunting, 2 Denio 643, 43 Am. Dec. 763; Cornell *v.* Barnes, 7 Hill (N. Y.) 35; People *v.* Warren, 5 Hill 440; Sheldon *v.* Van Buskirk, 2 N. Y. 473; Turner *v.* Franklin, 29 Mo. 285; Glasgow *v.* Rowse, 43 Mo. 479; St. Louis &c. Assn. *v.* Lightner, 47 Mo. 393; State *v.* Dulle, 48 Mo. 282; Walden *v.* Dudley, 49 Mo. 419; Ranney *v.* Bader, 67 Mo. 476; Holden *v.* Eaton, 8 Pick. (Mass.) 436; Colman *v.* Anderson, 10 Mass. 105; Sprague *v.* Bailey, 19 Pick. (Mass.) 436; Upton *v.* Holden, 5 Metc. (Mass.) 360; Lincoln *v.* Worcester, 8 Cush. (Mass.) 55; Aldrich *v.* Aldrich, 8 Metc. 102; Hays *v.* Drake, 6 Gray (Mass.) 387; Howard *v.* Proctor, 7 Gray 128; Williamstown *v.* Willis, 15 Gray 427; Cheever *v.* Merritt, 5 Allen (Mass.) 563; Underwood *v.* Robinson, 106 Mass. 296; Brainerd *v.* Head, 15 La. Ann. 489; Blanchard *v.* Goss, 2 N. H. 491; Henry *v.* Sargent, 13 N. H. 321, 40 Am. Dec. 146; State *v.* Weed, 21 N. H. 262, 53 Am. Dec. 188; Rice *v.* Wadsworth, 27 N. H. 101; Keniston *v.* Little, 30 N. H. 318, 64 Am. Dec. 297; Kelley *v.* Noyes, 43 N. H. 209; Moore *v.* Allegheny City, 18 Penn. St. 55; Billings *v.* Russell, 23 Penn. St. 189, 62 Am. Dec. 330; Cunningham *v.* Mitchell, 67 Penn. St. 78; Shaw *v.* Dennis, 5 Gilm. (Ill.) 405; Hill *v.* Figley, 25 Ill. 156; Allen *v.* Scott, 13 Ill. 80; Loomis *v.* Spencer, 1 Ohio St. 153; Thames Manuf. Co. *v.* Lathrop, 7 Conn. 550; Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324; Neth *v.* Crofut, 30 Conn. 580; Grumon *v.* Raymond, 1 Conn. 40, 6 Am. Dec. 200; Prince *v.* Thomas, 11 Conn. 472; McLean *v.* Cook, 23 Wis. 364; Noland *v.* Busby, 28 Ind. 154; LeRoy *v.* East Saginaw C. Ry. Co., 18 Mich. 233, 100 Am. Dec. 162; Lott *v.* Hubbard, 44 Ala. 593; State *v.* Lutz, 65 N. C. 503; Gore *v.* Mastin, 66 N. C.

The same rule protects a collector of internal revenue under like circumstances.[1]

§ 691. **Effect of extrinsic Knowledge of Defects.**—Whether the officer would be protected where, at the time of execution of his process, he had knowledge from other sources of the invalidity of the action upon which it is based, is a question upon which the authorities are not completely in harmony, but the weight of authority seems to be that he would be protected.[2]

§ 692. **Collector not protected if Warrant not fair on its Face.**—The converse of the general rule is equally true, for if the warrant is not fair upon its face, as where it manifestly lacks an element required by the statute,[3] or shows that the tax is not one which could lawfully be collected,[4] or appears to be issued by the wrong officer,[5] or to have been issued too soon,[6] it will afford the officer no protection.

§ 693. **Collector liable if he exceeds or abuses his Authority.**—But here, as in other cases, the protection of his process extends to the officer only while acting in pursuance of it and within the scope of his authority. For if he commits acts which his process though valid would not justify, as if he acts without any authority at all,[7] or exceeds his authority,[8] or abuses his powers,[9] or seizes the property of one person to satisfy the

371; Erskine *v.* Hohnbach, 14 Wall. (U. S.) 613; Bailey *v.* Railroad Co. 22 Wall. 604; Byles *v.* Genung, 52 Mich. 504.

[1] Erskine *v.* Hohnbach, 14 Wall. (U. S.) 613.

[2] Wall *v.* Trumbull, 16 Mich. 228; Bird *v.* Perkins, 33 Mich. 28; Rainey *v.* State, 20 Tex. App. 455; Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324; Webber *v.* Gay, 24 Wend. (N. Y.) 485; Wilmarth *v.* Burt, 7 Metc. (Mass.) 257.

Contra, Grace *v.* Mitchell, 31 Wis. 533, 11 Am. Rep. 613; Leachman *v.* Dougherty, 81 Ill, 324.

[3] Warrensburg *v.* Miller, 77 Mo. 56; Van Rensselaer *v.* Witbeck, 7 N. Y. 517.

[4] Eames *v.* Johnson, 4 Allen (Mass.) 382.

[5] Chalker *v.* Ives, 55 Penn. St. 81.

[6] Westfall *v.* Preston, 49 N. Y. 349.

[7] Hilbish *v.* Hower, 58 Penn. St. 93; Gale *v.* Mead, 4 Hill (N. Y.) 109; Donald *v.* McKinnon, 17 Fla. 746.

[8] Williamson *v.* Dow, 32 Me. 559. As where he sells more property than is necessary to satisfy the tax, he is a trespasser as to the excess: Seekins *v.* Goodale, 61 Me. 400, 14 Am. Rep. 568; Cone *v.* Forest, 126 Mass. 97.

[9] Blake *v.* Johnson, 1 N. H. 91. Keeping the property longer than the specified time before sale renders the officer a trespasser: Brackett *v.* Vining, 49 Me. 356. See also Pierce *v.* Benjamin, 14 Pick. (Mass.) 366, 25

tax against another,[1] he is liable in damages to the party injured.

§ 694. **Liability for Money received on void Process.**—Where money illegally collected by color of law still remains in the hands of the collector it may be recovered from him by the party paying it,[2] but if it has been paid over by the collector to the proper authorities, he is no longer responsible for it though it appears that he acted under an authority which was void.[3]

5. *Election Officers.*

§ 695. **Inspectors.**—As has been already seen,[4] inspectors of elections are usually held to act in at least a *quasi*-judicial capacity in determining the qualifications of an elector, and for an erroneous decision are liable,[5] and, except in Massachusetts[6] and Ohio,[7] liable only,[8] where they have acted wilfully, corruptly or maliciously.

Am. Dec. 396; Noyes *v.* Haverhill, 11 Cush. (Mass.) 338; or seizing property too soon: Veit *v.* Graff, 37 Ind. 253; or selling it before the time fixed: Buzzell *v.* Johnson, 54 Vt. 90; or falsely returning *nulla bona:* Raynsford *v* Phelps, 43 Mich. 342, 38 Am. Rep. 189; but see State *v.* Harris, 89 Ind. 363, 46 Am. Rep. 169.

[1] Hurlburt *v.* Green, 41 Vt. 490.

[2] See Mechem on Agency, § 561; Hardesty *v.* Fleming, 57 Tex. 395.

[3] Dickins *v.* Jones, 6 Yerg. (Tenn.) 483; Crutchfield *v.* Wood, 16 Ala. 702; Lewis County *v.* Tate, 10 Mo. 650. But see Wood *v.* Stirman, 37 Tex. 584.

[4] See *ante*, § 639.

[5] Liable when malicious or corrupt: Friend *v.* Hamill, 34 Md. 298; Elbin *v.* Wilson, 33 Md. 135; Weckerley *v.* Geyer, 11 Serg. & R. (Penn.) 35; Caulfield *v.* Bullock, 18 B. Mon. (Ky.) 495; Morgan *v.* Dudley, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735; Bridge *v.* Oakey, 2 La. Ann. 968; Patterson *v.* D'Auterive, 6 La. Ann. 467, 54 Am. Dec. 564; Pike *v.* Megoun, 44 Mo. 491; Bernier *v.* Russell, 89 Ill. 60.

[6] Liable though neither corruption or malice is charged: Lincoln *v.* Hapgood, 11 Mass. 350, 355; Kilham *v.* Ward, 2 Mass. 236; Capen *v.* Foster, 12 Pick. (Mass.) 485, 23 Am. Dec. 632; Henshaw *v.* Foster, 9 Pick. 312; Keith *v.* Howard, 24 Pick. 292; Blanchard *v.* Stearns, 5 Metc. (Mass.) 298; Larned *v.* Wheeler, 140 Mass 390, 54 Am. Rep. 483; Lombard *v.* Oliver, 3 Allen (Mass.) 1; Gates *v.* Neal, 23 Pick. 308; Bacon *v.* Benchley, 2 Cush. (Mass.) 100

[7] Massachusetts rule prevails in Ohio; Jeffries *v.* Ankeny, 11 Ohio 372; Anderson *v* Millikin, 9 Ohio St. 568; Monroe *v.* Collins, 17 Ohio St. 665.

[8] Liable only when malicious or corrupt: Bevard *v.* Hoffman, 18 Md. 479, 81 Am. Dec. 618: Anderson *v.* Baker, 23 Md. 531; Gordon *v.* Farrar, 2 Doug. (Mich.) 411; Jenkins *v.* Wal-

In some States, however, it has been deemed the better policy to make the elector himself responsible for the possession of the necessary qualifications and to constitute his taking of an oath prescribed the test of his capacity. In such States, the inspectors have no judicial powers to exercise. If the oath is taken, it is their duty to receive the vote. In this they act ministerially merely, and are liable if they wrongfully refuse to receive it, even though they had no ill motive.[1]

§ 696. **Registration Officers.**—The same principles govern the liability of registration officers. Where they are called upon by law to pass upon the qualifications of one claiming to be entitled to registration as a voter, they would be liable for an erroneous decision only when their action was wilful or corrupt.[2]

If, however, the taking of a prescribed oath by the applicant was by law made the test of his eligibility, their action in administering the oath and in registering his name would be ministerial merely and they would be liable for erroneous action though their motives were good.[3]

§ 697. **Canvassors.**—The duties of boards of canvassers are purely ministerial.[4]

§ 698. **Inducting Officers.**—So it is held that an action cannot be maintained against the officers whose duty it is to accept an officer's bond and induct him to the office where they have, in good faith, refused to do so on the ground that he was ineligible. But if their action was inspired by malice or was designed to accomplish any unlawful end, it was held that the action would lie.[5]

dron, 11 Johns. (N. Y.) 114, 6 Am. Dec. 359; Morgan *v.* Dudley, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735; Chrisman *v.* Bruce, 1 Duval (Ky.) 63, 85 Am. Dec. 603; Goetcheus *v.* Matthewson, 61 N. Y. 420; Miller *v.* Rucker, 1 Bush (Ky.) 135; Carter *v.* Harrison, 5 Blackf. (Ind.) 138; Rail *v.* Potts, 8 Humph. (Tenn.) 225; Wheeler *v.* Patterson, 1 N. H. 88, 8 Am. Dec. 41; Peavey *v.* Robbins, 3 Jones (N. C.) L. 339; Fausler *v.* Parsons, 6 W. Va. 486, 20 Am. Rep. 431; Dwight *v.* Rice, 5 La. Ann. 580; Keenan *v.* Cook, 12 R. I. 52.

[1] Gillespie *v.* Palmer, 20 Wis. 544; Goetcheus *v.* Matthewson, 61 N. Y. 420, reversing 5 Lans. 214; Spragins *v.* Houghton, 3 Ill. 377.

[2] Fausler *v.* Parsons, 6 W. Va. 486, 20 Am. Rep. 431.

[3] See Goetcheus *v.* Matthewson, 61 N. Y. 420; Gillespie *v.* Palmer, 20 Wis. 544.

[4] People *v.* Van Cleve, 1 Mich. 362, 53 Am. Dec. 69; People *v.* Cicott, 16 Mich. 283, 321, 97 Am. Dec. 141; People *v.* Hilliard, 29 Ill. 423.

[5] Hannon *v.* Grizzard, 96 N. C. 293.

6. *Highway Officers.*

§ 699. **Not liable for lawful Acts within their Jurisdiction.**—Highway officers who are called upon to exercise judgment and discretion in the laying out or altering of highways, enjoy, as has been seen,[1] the immunity which attends that kind of action. They therefore are not liable for their action in laying out a highway where they have jurisdiction and violate no law.[2]

§ 700. **Distinction between judicial and ministerial Acts by such Officers.**—Highway officers are frequently required in the performance of their duties to exercise powers both *quasi*-judicial and ministerial. Some attention to the distinction between these two classes has already been given,[3] but it is important to be still retained in mind. In ordinary cases these officers are given quite general authority over the construction and repair of highways, and are called upon (1.) to determine when and where and how work shall be done, and (2.) to execute or direct the work determined upon. Here, obviously, are duties of differing natures. The first requires the exercise of *quasi*-judicial powers, and, in accordance with the rule governing responsibility in such cases, it is well settled that, except where they invade the rights of private property,[4] highway officers are not liable for their erroneous judgment in determining when and where work must be done and what shall be its general nature.[5]

On the other hand, the execution of the work is purely ministerial, and for defaults in its performance the same liability attaches as in other cases of ministerial action.[6]

§ 701. **Liable for Neglect to repair where charged with Duty and provided with Funds.**—In some of the States, highway officers are charged by statute with the absolute duty of keeping the highways in repair and are provided with or authorized to procure funds for that purpose. Where the duty is thus imperatively imposed, and the officer has the necessary funds or

[1] See *ante*, § 639.
[2] Sage *v.* Laurain, 19 Mich. 137.
[3] See *ante*, § 643.
[4] See *ante*, § 642.
[5] McCord *v.* High, 24 Iowa 336, 345; Smith *v.* Gould, 61 Wis. 31. But see Tearney *v.* Smith, 86 Ill. 391.
[6] McCord *v.* High, 24 Iowa, 336; Tearney *v.* Smith, 86 Ill. 391.

could procure them by using the means at his command, he is liable to a person injured by his neglect to repair.[1]

But lack of funds or the ability to procure them is a sufficient defense.[2] The officer is not bound to undertake repairs beyond the extent of the funds at his disposal,[3] nor, where they are insufficient to make all the repairs needed, is he liable for an error in judgment in expending them in one place when another place stood in greater need.[4]

7. *Inspectors of Provisions.*

§ 702. **Liable for Negligence.**—Inspectors of provisions and other commodities owe duties to the public and, according to some authorities, to individuals also. To individuals, it is held by these authorities, they owe the duty to bring to their undertaking reasonable skill and to perform it with reasonable care and diligence. If they fail in this respect they are, therefore, liable to the individual who employs them,[5] or to the one who buys the goods relying upon their inspection,[6] for the injury sustained.

In other cases, however, they are, with what seems to be the better reason, likened to *quasi*-judicial officers, and held not liable without proof of malice or corruption.[7]

The fact that the neglect of duty also subjects the officer to a penalty does not bar the private action.[8]

[1] Hover *v.* Barkhoof, 44 N. Y. 113; Adsit *v.* Brady, 4 Hill (N. Y.) 630, 40 Am. Dec. 305; Piercy *v.* Averill, 37 Hun (N. Y.) 360; Robinson *v.* Chamberlain, 34 N. Y. 389, 90 Am Dec. 713; Bennett *v.* Whitney, 94 N. Y. 308; Warren *v.* Clement, 24 Hun (N. Y.) 472; Babcock *v.* Gifford, 29 Hun 186; Pomfrey *v.* Saratoga, 104 N. Y. 459.

Bartlett *v.* Crozier, 17 Johns. 449, 8 Am. Dec. 428, is distinguished in Hover *v.* Barkhoof, 44 N. Y. 113.

[2] Garlinghouse *v.* Jacobs, 29 N. Y. 297; Weed *v.* Ballston Spa, 76 N. Y. 329; Hines *v.* Lockport, 50 N. Y. 238.

[3] Boots *v.* Washburn, 79 N. Y. 207.

[4] Monk *v.* New Utrecht, 104 N. Y. 552; Garlinghouse *v.* Jacobs, 29 N. Y. 297.

[5] Hayes *v.* Porter, 22 Me. 371.

[6] Nickerson *v.* Thompson, 33 Me. 433; Tardos *v.* Bozant, 1 La. Ann. 199.

[7] Seaman *v.* Patten, 2 Caines (N. Y.) 312; Fath *v.* Koeppel, 72 Wis. 289, 7 Am. St. Rep. 867. In this case the court do not notice the Maine or Louisiana cases above cited.

[8] Hayes *v.* Porter, 22 Me. 371.

8. *Notaries Public.*

§ 703. **In general.**—Notaries public form a well known class of public officers, whose duties are chiefly ministerial, but in some instances judicial. They are usually appointed by the governor, and are required to give a bond for the faithful performance of their duties which are largely regulated by statute.

§ 704. **Liable for Negligence in presenting or protesting negotiable Papers.**—One of the most common duties imposed upon notaries is that of presenting and protesting negotiable instruments. Much of the undertaking of the notary, as in presenting and demanding payment or acceptance of negotiable paper and in giving notice of its dishonor, where an official protest is not required, is rather that of a private agent than of a public official. Where protest is necessary, the notary must present the bill in person,[1] except where an established usage warrants a presentment by deputy.[2]

Whether, however, he acts officially or as a private agent only, it is well settled that he must bring to his undertaking, whichever it may be, and exercise in its performance a reasonable degree of skill, care and diligence, and if, by reason of his failure to do so, his employer suffers proximate loss, the notary is liable therefor.[3]

A distinction is, however, to be observed in respect to the extent of the notary's undertaking, dependent upon the question whether he acts officially as notary only, or as the private agent of the holder. In the latter case, the agent entrusted with the duty of collecting negotiable paper is bound to take all the steps necessary to secure and preserve the liability thereon of all parties prior to his principal. He must, therefore, present the bill for acceptance without delay and present it for payment at maturity, and if it be not duly accepted or paid, he must cause it

[1] See *ante*, § 567.

[2] Commercial Bank *v.* Varnum, 49 N. Y. 269.

[3] Hyde *v.* Planters' Bank, 17 La. 560, 36 Am. Dec. 621; First Nat. Bank *v.* Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618; Allen *v.* Merchants' Bank, 22 Wend. 215. 34 Am. Dec. 289; Chapman *v.* McCrea, 63 Ind. 360; Bowling *v.* Arthur, 34 Miss. 41; Bank of Mobile *v.* Marston, 7 Ala. 108.

to be immediately protested, where protest is necessary, and cause notice to be duly given of its dishonor.[1] With the notary, however, the case is different. When he has presented it for acceptance or payment, as the case may be, and has protested it in case of its dishonor, his duty is done and he is not, as notary, unless required by statute, obliged to go on and give notice, though he may do this as agent as well as any other person.[2]

Where due demand has already been made by the bank which employs him, he is not liable for negligence in not making a further demand.[3] He is not bound to know the place of residence of the parties on whom he is to call and, if he has used reasonable diligence, he is not liable for a mistake growing out of misinformation.[4] So it has been held that he is not obliged as a notary to search for such residence[5] nor to hunt up the parties,[6] nor, it has been held in one case, to demand payment of a note placed in his hands for protest.[7] In such matters, he acts as agent merely and not as a public officer.

§ 705. **Same Subject—What will excuse the Notary.**—In order to charge the notary, his default must be the proximate cause of the loss.[8] He is not liable if he acts according to instructions though they prove erroneous;[9] nor where the owner of the paper, advised of the notary's negligence, omits other proceedings or remedies which would have prevented loss;[10] nor where the owner by his own laches has deprived the notary of the right of subrogation.[11] So if notwithstanding the notary had done his duty the owner could not have recovered, the notary is not liable.[12]

§ 706. **Liability for Defaults in taking Acknowledgments.—**

[1] Mechem on Agency, § 511.

[2] Daniels Neg. Inst. II, § 960; Morgan *v.* Van Ingen, 2 Johns. (N. Y.) 204.

[3] Warren Bank *v.* Parker, 8 Gray (Mass.) 221.

[4] Bellemire *v.* Bank, 4 Whart. (Penn.) 105, 33 Am. Dec. 46.

[5] Mulholland *v.* Samuels, 8 Bush (Ky.) 63.

[6] Bennett *v.* Young, 18 Penn. St. 263.

[7] Vandewater *v.* Williamson, 13 Phila. 140.

[8] Emmerling *v.* Graham, 14 La. Ann. 389.

[9] Commercial Bank *v.* Varnum, 49 N. Y. 269.

[10] Franklin *v.* Smith, 21 Wend. (N. Y.) 624.

[11] Emmerling *v.* Graham, 14 La. Ann. 389.

[12] Reed *v.* Darlington, 19 Iowa 349.

The statutes of most of the States authorize notaries public to take and certify to the acknowledgment by the grantors of the execution of deeds, mortgages and other conveyances of property, and outside of the commercial centres this forms the largest portion of a notary's official duties. The form in which acknowledgments shall be taken is prescribed by statute in most instances, and in many cases technical adherence to the requirements is of vital importance to the full effectiveness of the conveyance.

In general the notary is required to certify that the parties appeared in person before him, that he knows them to be the parties named in and who executed the instrument in question, and that they acknowledged that they executed it as their free act and deed. In certain States, the acknowledgment of a married woman must appear to have been taken after an examination apart from her husband and upon certain formalities designed to evidence her free and unrestrained action.

The notary may make default in the performance of this duty chiefly in one of three classes of cases,—1. Where he knowingly and wilfully makes a false certificate. 2. Where he is deceived as to the identity of the parties, and 3. Where he omits in taking or certifying to the act of acknowledgment some fact which the statute makes indispensable. These three cases will be separately considered.

§ 707. **Same Subject—1. For knowingly making a false Certificate.**—There would seem to be no question that a notary who knowingly makes a false certificate of a material fact in reference to an acknowledgment, by which the person to whom he owed the duty of due performance sustains proximate injury, is liable therefor.

Thus where the notary himself forges the signatures and then certifies that the parties named appeared and acknowledged the execution, it is a plain misfeasance.[1] And so it would be where he knowingly certifies that a party appeared and acknowledged who did not in fact appear.[2] And it is likewise a misfeasance for him to sign a certificate reciting the appearance of parties without reading it.[3]

[1] People v. Butler, — Mich. —, 42 N. W. Rep. 273.

[2] Curtiss v. Colby, 39 Mich. 456.

[3] Curtiss v. Colby, 39 Mich. 456. In

Such an act is also clearly a breach of his official bond given to secure the faithful discharge of the duties of his office, and his sureties are therefore liable, and may be sued alone.[1]

§ 708. **Same Subject—2. For Mistakes in Identity of Parties.** —Upon the question of the liability for a mistake in the identity of parties, the authorities are not entirely in harmony. It is held in several cases, and it is believed to be the better rule, that the notary is bound to exercise a reasonable degree of care and caution in assuring himself that parties who present themselves before him are the identical parties that they assume to be, and that for negligence in this respect proximately causing loss the notary and his bondsmen are liable.[2]

this case it is said at p. 458: "This, however, is not a case where a mistake was made through inadvertence, or that due caution was exercised; it was a clear case of misfeasance. He certified that a certain person appeared before him and acknowledged the execution of the instrument, who did not in fact appear at all, and who had not even signed it. If he had read what he was certifying to he must have known that it was untrue in substance and in fact. The most charitable view to be taken of the transaction would be that he signed the certificate without reading it or knowing the contents thereof. Even this view would not relieve him, as no one has a right to sign an instrument, acting officially, without at least having read the same; to do otherwise would show such gross carelessness, and indicate such a reckless disregard for the rights of others, that his liability for damages resulting therefrom could not be made to depend upon his purpose of enabling some person to defraud third parties. In such a case his object or motive need not be inquired into in an action brought to recover the actual damages sustained in consequence of his wrongful act."

Compare with Commonwealth *v.* Haines, 97 Penn. St. 228, 39 Am. Rep. 805.

[1] People *v.* Butler, — Mich. —, 42 N. W. Rep. 273, citing McCormick *v.* Bay City, 23 Mich. 457; Detroit *v.* Weber, 29 Mich. 24; Governor *v.* Perkins, 2 Bibb (Ky.) 395; Smith *v.* Commonwealth, 59 Penn. St. 320; Cummings *v.* Little, 45 Me. 183.

[2] State *v.* Meyer, 2 Mo. App. 413; Curtiss *v.* Colby, 39 Mich. 456. In the case last cited, it is said: "A person may be deceived, no matter how carefully and cautiously he may act, in taking acknowledgments of parties who represent themselves to be the persons described in and who executed certain instruments. If they are strangers to him he may make the proper and necessary inquiries or investigation, and he may therefrom come to the conclusion that they are the proper persons and so certify, and yet be mistaken and deceived. In such a case, the question or degree of care exercised by him would become material.

If, however, the parties described in the instrument were well known to him, but did not appear before him, or if third persons well known to him not to be the proper persons

On the other hand, it is held in Pennsylvania that the notary acts judicially in taking the acknowledgment, and that he can only be held liable upon proof of "a clear and intentional dereliction of duty." [1]

The same result is reached in Iowa where the statute makes the officer liable who "knowingly mis-states" a fact in the certificate; mere negligence is there not enough.[2]

§ 709. **Same Subject—3. For defective Certificate.**—The same conflict in the authorities prevails in respect to the liability of the notary who makes a certificate which is defective in failing to show some fact which the statute imperatively requires. It is held in some cases, and it is believed with the better reason, that the notary and his bondsmen are liable for such defects where they cause proximate injury.[3] The notary, it is said in one case,[4] "held himself out to the world as a person competent to perform business connected with the office. By accepting the office, he contracted with those who might employ him that he would perform it with integrity, diligence and skill. He had given a bond to indemnify those who should suffer by the unfaithful or unskillful performance of his duty."

On the other hand, it is held that the officer, in taking the acknowledgment, acts judicially, and although he negligently and unskillfully omits certain words required by the statute, so that his certificate is void, he is not liable; but only where he acts corruptly or maliciously.[5]

should appear, representing themselves as the proper persons, and he in either case should certify that the parties described did appear before him, and acknowledge the execution of the instrument, it would be difficult to see how his act could be considered in any light which would exempt him from liability."

As to the inquiries the officer should make, see State *v.* Meyer, 2 Mo. App. 413.

[1] Commonwealth *v.* Haines, 97 Penn. St. 228, 39 Am. Rep. 805, citing Withers *v.* Baird, 7 Watts (Penn.) 227, 32 Am. Dec. 754; Jamison *v.* Jamison, 3 Whart. (Penn.) 457, 31 Am. Dec. 536; Heeter *v.* Glasgow, 79 Penn. St. 79, 21 Am. Rep. 46; Singer Mfg. Co. *v.* Rook, 84 Penn. St. 442, 24 Am. Rep. 204.

See also Henderson *v.* Smith, 26 W. Va. 829, 53 Am. Rep. 139.

[2] Scotten *v.* Fegan, 62 Iowa 236.

[3] Fogarty *v.* Finlay, 10 Cal. 239, 70 Am. Dec. 714; Curtiss *v.* Colby, 39 Mich. 456, 458; Oakland Bank *v.* Murfey, 68 Cal. 455; McAllister *v.* Clement, 75 Cal. 182.

[4] Fogarty *v.* Finlay, 10 Cal. 239, 70 Am. Dec. 714.

[5] Henderson *v.* Smith, 26 W. Va. 829, 53 Am. Rep. 139.

§ 710. **Same Subject—Default of Notary must be proximate Cause of Injury.**—But here, as in other cases, in order to hold the notary and his bondsmen liable for an injury occasioned, the default complained of must have been the proximate cause of the injury sustained. Some illustrations of this rule in this connection are given in the note.[1]

§ 711. **Same Subject—The Measure of Damages.**—The meas-

[1] In People *v.* Butler, — Mich. —, 42 N. W. Rep. 273, the facts were as follows: A notary public applied to the agent of plaintiff's intestate, who was an attorney, and acting as agent in the loaning of intestate's money, for a loan for one K., his brother-in-law, on the latter's farm. The agent and notary went together and examined the farm; abstracts were furnished and a day fixed for the parties to meet. On the day set the notary took the mortgage and note, which the agent had prepared, to his house, where he claimed his brother in-law was, and afterwards brought it back to the agent, with what purported to be the names of the brother-in-law and his wife signed thereto, and a certificate of acknowledgment by the notary. On his representation that he was authorized to receive the money, the agent paid it over to him, and received the note and mortgage, which proved to be forgeries. *Held*, that the false certificate was the proximate cause of the loss, and that the surety of the notary's bond for the the faithful discharge of his official duties was liable.

But in Oakland Bank *v.* Murfey, 68 Cal. 455, it was held that the negligence of the defendant notary was not the proximate cause. The facts in brief were as follows: One Leroy went to office of defendant, introduced himself as M. B. West, and requested defendant to draw a deed of certain real estate from him to one Henry Harmon. Defendant drew the deed, and Leroy signed and acknowledged it as M. B. West. Defendant affixed his certificate, stating that M. B. West, the person described and who had executed the deed, was personally known to him and had acknowledged the execution of the deed before him as notary. Leroy then took the deed and went to the plaintiff's bank, where he introduced himself to the president as Henry Harmon, and requested a loan upon the land. The bank's searcher examined the title and found it to be in M. B. West. LeRoy thereupon produced the deed purporting to be from M. B. West to Henry Harmon. A mortgage was then prepared and Leroy executed and acknowledged it, in the name of Henry Harmon, before the bank notary, who in his turn certified that Henry Harmon, the person described in and who had executed the deed, was personally known to him, and had acknowledged the execution of the deed before him as notary. Leroy thereupon obtained the loan. No one of the officers of the bank had ever seen Leroy until he came and introduced himself as Henry Harmon, nor was any inquiry made by any of them as to his identity. In an action to recover upon the bond of the first notary, it was held that the bank's negligence and not his was the proximate cause of the loss.

ure of damages is the amount of the loss proximately sustained by the notary's default. Thus where by his negligence in making a proper certificate a mortgage became worthless it was held that the amount of the debt and interest intended to be secured by the mortgage was the proper measure.[1] And the same measure was applied where he had knowingly made a false certificate.[2]

The notary's liability on his bond for falsely certifying to the acknowledgment of a mortgage cannot be made to depend upon whether the mortgagee has redeemed a prior mortgagee and has so reduced his damages.[3]

§ 712. **Same Subject—Mitigation of Damages.**—Here, as in other cases, that the party suffered no loss, or that he failed to avail himself of remedies or proceedings which would have reduced or prevented his loss, or that he had other ample security, may undoubtedly be shown in bar or in mitigation of damages.[4]

So that the property, upon which a mortgage inoperative because of defective acknowledgement was taken, was worthless may be shown in bar of damages.[5]

9. *Post Officers.*

§ 713. **Each is liable for his own Defaults only.**—It is well settled both in England and America, that the postmaster general, the local postmasters, and their assistants and clerks appointed and sworn as required by law, are public officers, each of whom is responsible for his own defaults and for his own defaults only, and not for those of any of the others, although selected by him, and subject to his orders,[6] unless he

[1] Fogarty *v.* Finlay, 10 Cal. 239, 70 Am. Dec. 714.

[2] People *v.* Butler, — Mich. —, 42 N. W. Rep. 273.

[3] Curtiss *v.* Colby, 39 Mich. 456.

[4] See Abbott *v.* Gillespy, 75 Ala. 180; State *v.* Cave, 49 Mo. 129; Norris *v.* State, 22 Ark. 524. See for similar rulings in case of sheriffs, *post* § 766.

[5] McAllister *v.* Clement, 75 Cal. 182.

[6] Keenan *v.* Southworth, 110 Mass. 473, 14 Am. Rep. 613; Lane *v.* Cotton, 1 Ld. Raym. 646; Whitfield *v.* Lord Le Despencer, 2 Cowp. 754; Dunlop *v.* Munroe, 7 Cranch (U. S.) 242; Schroyer *v.* Lynch, 8 Watts (Penn.) 453; Bishop *v.* Williamson, 11 Me. 495; Hutchins *v.* Brackett, 22 N. H. 252, 53 Am. Dec. 249.

has negligently or willfully appointed or retained unfit or improper persons;[1] or has failed to require of them conformity to the prescribed regulations;[2] or has so carelessly conducted the affairs of his office as to furnish opportunity for such default;[3] or unless he has co-operated in, or authorized the wrong.[4]

Whether contractors for carrying the mail are public governmental officers withing the meaning of this rule, so as to be exempt from liability for the defaults of their subordinates, is a question upon which there is no conflict of authority, but the better opinion is that they are not.[5]

10. *Public School and College Officers and Teachers.*

§ 714. **Distinction to be made between public and private Schools.**—A distinction is to be made, in many respects, between public and private schools. The latter are founded and carried on by private individuals at private expense, and the terms of admission, instruction and control are largely matters of express or implied contract between the parties.

But our public schools and colleges, provided by law and maintained by public funds stand upon different ground. They are public institutions, their officers are, to some extent at least, public officers and the public have rights and privileges in them which the law creates, controls and enforces.

[1] Wiggins *v.* Hathaway, 6 Barb. (N. Y.) 632.

[2] Bishop *v.* Williamson, 11 Me. 495. In this case the postmaster was held liable for the default of an assistant whom he had not required to take the oath prescribed by law. To same effect: Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; Bolan *v.* Williamson, 1 Brev. (S. C.) 181.

[3] Dunlop *v.* Munroe, 7 Cranch (U. S.) 242; Ford *v.* Parker, 4 Ohio St. 576.

[4] Tracy *v.* Cloyd, 10 W. Va. 19.

If a clerk at a postoffice receives a letter containing money to be sent as a registered letter to X under the mistaken belief that letters can be registered to that place, and, upon discovering the mistake send it unregistered by the direction of his superior, both are liable for the value of the letter if it be lost. Fitzgerald *v.* Burrill, 106 Mass. 446.

[5] Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; Foster *v.* Metts, 55 Miss. 77, 30 Am. Rep. 504; *contra*, Conwell *v.* Voorhees, 13 Ohio 523, 42 Am. Dec. 206; Hutchins *v.* Brackett, 22 N. H. 252, 53 Am. Dec. 248.

a. Officers.

§ 715. **Have Power to enact reasonable Rules and Regulations.**—Officers charged by law with the general care, conduct and supervision of public schools and colleges are usually clothed by statute with express authority to enact such rules and regulations as may reasonably be necessary for that purpose, but even where this authority is not expressly conferred, the accepted doctrine is that the general power conferred by law to take charge of the educational affairs of a district or prescribed territory includes the power to make all reasonable rules and regulations for the discipline, government and management of the schools within the district or territory.[1]

§ 716. **What this Rule includes.**—This rule includes not only the power to provide rules for the discipline and government of the pupils, and the general conduct of the school, but, except where otherwise provided by law, the directors or other officers may make reasonable provisions as to what branches shall be taught and what text-books shall be used.[2]

§ 717. **Rules need not be formal or of Record.**—It is not necessary that all the rules, orders and regulations for the discipline, government and management of schools shall be a matter of record by the school board, or that every act, order or direction shall be authorized or confirmed by a formal vote. No system of rules, however carefully prepared, can provide for every emergency or meet every requirement. In consequence, much must necessarily be left to the individual members of the school boards, and to the superintendents and teachers of the several schools.[3]

[1] Fertich *v.* Michener, 111 Ind. 472, 60 Am. Rep. 709, 11 N. E. Rep. 605; Thompson *v.* Beaver, 63 Ill. 353; Roberts *v.* City of Boston, 5 Cush. (Mass.) 198; Sherman *v.* Charlestown, 8 Cush. 160; People *v.* Medical Society, 24 Barb. (N. Y.) 570; Spiller *v.* Woburn, 12 Allen (Mass.) 127; Hodgkins *v.* Rockport, 105 Mass. 475; State *v.* Burton, 45 Wis. 150, 30 Am. Rep. 706; Ferriter *v.* Tyler, 48 Vt. 444, 21 Am. Rep. 133; Dritt *v.* Snodgrass, 66 Mo. 286, 27 Am. Rep. 343; State *v.* White, 82 Ind. 278, 42 Am. Rep. 496.

[2] McCormick *v.* Burt, 95 Ill. 263, 35 Am. Rep. 163.

[3] Fertich *v.* Michener, 111 Ind. 472, 60 Am. Rep. 709, 11 N. E. Rep. 605; Russell *v.* Lynnfield, 116 Mass. 365.

§ 718. **School Officers not liable for Errors in Judgment.**—Being required by law to exercise their judgment and discretion in the management and control of the schools within their jurisdiction, it is well settled that, like other *quasi*-judicial officers,[1] they cannot be held liable to an individual for any injury which he may have sustained by reason of any error of judgment, however great, committed by them while acting honestly and in good faith within their jurisdiction.[2]

§ 719. **Are liable only when actuated by Malice.**—Such officers are, however, held liable when, and only when, in the exercise of the powers conferred upon them, they have acted wilfully or maliciously.

Thus a county school superintendent who wilfully, corruptly or maliciously refuses a license to teach to one lawfully entitled to receive it, is held liable in damages,[3] but, unless it be shown that they have acted maliciously or corruptly, school directors are not personally liable in damages for erroneously dismissing a teacher[4] or expelling or suspending a scholar.[5]

§ 720. **Question of Reasonableness of Regulations is for the Court.**—The question of the reasonableness of the rules and regulations established by school officers is one of law to be determined by the court, and not a question of fact to be decided

[1] See *ante*, § 638—639.

[2] Fertich *v.* Michener, 111 Ind. 472, 60 Am. Rep. 709, 11 N. E. Rep. 605; Dritt *v.* Snodgrass, 66 Mo. 286, 27 Am Rep. 343; McCormick *v.* Burt, 95 Ill. 263, 35 Am. Rep. 163; Elmore *v.* Overton, 104 Ind. 348, 54 Am. Rep. 343; Dauenhoffer *v.* State, 69 Ind. 295, 35 Am. Rep. 216; Cooper *v.* McJunkin, 4 Ind. 290; Gardner *v.* State, 4 Ind. 632; Churchill *v.* Fewkes, 13 Ill. App. 520; Gregory *v.* Small, 39 Ohio St. 346; Morrison *v.* McFarland, 51 Ind. 206; Burton *v.* Fulton, 49 Penn. St. 151.

[3] Elmore *v.* Overton, 104 Ind. 348, 54 Am. Rep. 343. See *ante*, § 639.

[4] Burton *v.* Fulton, 49 Penn. St. 151; Gregory *v.* Small, 39 Ohio St. 346; Morrison *v.* McFarland, 51 Ind. 206; Chamberlain *v.* Clayton, 56 Iowa 331, 41 Am. Rep. 101. See also Park *v.* School District, 65 Iowa 279; Smith *v.* School District, 42 Iowa 522; Kirkpatrick *v.* School District, 53 Iowa 585.

By law that teacher may be dismissed at any time by majority of board is reasonable: McLellan *v.* School Board, 15 Mo. App. 362.

[5] Dritt *v.* Snodgrass, 66 Mo. 286, 27 Am. Rep. 343; McCormick *v.* Burt, 95 Ill. 263, 35 Am. Rep. 163; Stewart *v.* Southard, 17 Ohio 402, 49 Am. Dec. 463; Donahoe *v.* Richards, 38 Me. 379, 61 Am. Dec. 256.

by a jury.[1] In this respect they are likened to municipal ordinances.

§ 721. **What Rules and Regulations are valid—Instances.**—No inflexible rule can be laid down by which the question of what is reasonable can in every case be determined. Each case must be judged by its own circumstances, regard being had to the time, place and purpose. Emergencies often require a departure from established rules or the adoption of new ones. Subsequent events may demonstrate that what at the time appeared best and reasonable was harmful or unwise. Officers having practical experience in the conduct and management of schools are usually better qualified to judge of the wisdom or expediency of a measure than a person who has had no such experience. For these reasons courts will in doubtful cases tend rather to the support of rules and regulations adopted and enforced in good faith by officers to whom all the circumstances were present, than to overthrow them. Where, on the other hand, the unreasonableness is clear, courts will not hesitate to declare them so.

Thus the following regulations have been held valid:—A rule that pupils in a public high school shall employ a certain period in the study and practice of music and provide themselves with certain books therefore, or for unexcused disobedience be expelled;[2] that pupils who are absent, without satisfactory excuse, six half days in four consecutive weeks shall be suspended;[3] that schools shall be opened with reading from the Bible and prayer during which each pupil shall lay aside his books and remain quiet,[4] or shall bow his head unless his parents request that he shall be excused from doing so, and for wilful disobedience he may be expelled;[5] that pupils shall write compositions[6] and take

[1] Fertich *v.* Michener, 111 Ind. 472, 60 Am. Rep. 709, 11 N. E. Rep 605; State *v.* White, 82 Ind. 278, 42 Am. Rep. 496.

[2] State *v.* Webber, 108 Ind. 31, 58 Am. Rep. 30.

[3] King *v.* Jefferson City School Board, 71 Mo. 628, 36 Am. Rep. 499. To same effect: Burdick *v.* Babcock, 31 Iowa 562, even though absent by direction of the priest to attend religious services: Ferriter *v.* Tyler, 48 Vt. 444, 21 Am. Rep. 133.

[4] McCormick *v.* Burt, 95 Ill. 263, 35 Am. Rep. 163.

[5] Spiller *v.* Woburn, 12 Allen (Mass.) 127.

[6] Guernsey *v.* Pitkin, 32 Vt. 224, 76 Am. Dec. 171.

part in rhetorical exercises,[1] or be suspended for disobedience; that pupils guilty of persistent misconduct be expelled;[2] that children of immoral and licentious character be excluded;[3] that the doors shall be locked and no scholar admitted for fifteen minutes during the opening exercises in the morning, provided due regard is had to the weather, and the age, health and comfort of the excluded pupils;[4] that white and colored children shall be taught in separate apartments provided equal accommodations are provided for both.[5]

§ 722. **What Rules and Regulations are not reasonable—Instances.**—But, on the other hand, the following regulations have been held unreasonable: That no pupil shall, during the school term, attend a social party, and for disobedience expelling him;[6] that pupils who carelessly or wantonly injure or destroy the school property shall pay for the same, and for a failure to pay, whipping[7] or expelling[8] them; barring the doors in cold weather against little children who are late;[9] refusing admission to a public college because the applicant is a member of a Greek letter fraternity or other secret college society;[10] requiring every scholar on returning from recess to bring in a stick of wood for the fire.[11]

§ 723. **Regulations must be enforced in reasonable Manner.**—But even though the regulation be in itself reasonable it must also be enforced in a reasonable manner and under proper cir-

[1] Sewell *v.* Board of Education, 29 Ohio St. 89.

[2] Hodgkins *v.* Rockport, 105 Mass. 475; Rulison *v.* Post, 79 Ill. 567; Murphy *v.* Directors, 30 Iowa 429.

[3] Sherman *v.* Charlestown, 8 Cush. (Mass.) 160.

[4] Fertich *v.* Michener, 111 Ind. 472, 60 Am. Rep. 709. But see Thompson *v.* Beaver, 63 Ill. 353.

[5] Roberts *v.* Boston, 5 Cush. (Mass.) 198; Cory *v.* Carter, 48 Ind. 327, 17 Am. Rep. 738; Ward *v.* Flood, 48 Cal. 36, 17 Am. Rep. 405; State *v.* Duffy, 7 Nev. 342, 8 Am. Rep. 713; State *v.* McCann, 21 Ohio St. 198; County Court *v.* Robinson, 27 Ark. 116.

[6] Dritt *v.* Snodgrass, 66 Mo. 286, 27 Am. Rep. 343; State *v.* Osborne, 24 Mo. Ap. 309.

[7] State *v.* Vanderbilt, 116 Ind. 11, 9 Am. St. Rep. 820, 18 N. E. Rep. 266.

[8] Perkins *v.* Directors, 56 Iowa 476; Holman *v.* Trustees, — Mich. —, 43 N. W. Rep. 996.

[9] Thompson *v.* Beaver, 63 Ill. 353. See also Fertich *v.* Michener, 111 Ind. 472, 60 Am. Rep. 709.

[10] State *v.* White, 82 Ind. 278, 42 Am. Rep. 496

[11] State *v.* Board of Education, 63 Wis. 234, 53 Am. Rep. 282.

cumstances, with due regard to the health, comfort and welfare of pupils and teachers.[1]

§ 724. **Liability for not repairing.**—Members of the school board are not ordinarily liable personally for a failure to keep the school property within their jurisdiction in repair, but they may be expressly charged with that duty by statute and when so charged and provided with funds or the means to procure funds for that purpose, they will be liable to one who sustains injury from their neglect.[2]

§ 725. **Liability for not performing ministerial Duty—Requiring Bond from Contractors.**—School officers, like others, are liable to third persons to whom they owe the duty of performing ministerial acts required of them by law. Thus school trustees who were required by statute to require contractors for building school houses to give a bond for the payment of laborers and material men, were said to be liable to such a material man for losses which he had sustained by reason of their failure to exact the bond.[3]

b. Teachers.

§ 726. **Are to some Extent public Officers.**—Teachers in public schools while standing largely *in loco parentis* to their pupils and occupying as to them rather a domestic than an official relation, yet are, in some respects at least, properly to be regarded as public officers.[4]

§ 727. **Are subject to Rules prescribed by Board if any.**—Rules and regulations for the government and conduct of public schools are usually prescribed by the board, trustees, committee, or other officers to whom that subject is by law entrusted; and where such rules and regulations have been prescribed, they are, if reasonable, to be the guide of the teacher who is to modify and control his action by them.[5]

[1] Fertich *v.* Michener, 111 Ind. 472, 60 Am. Rep. 709.

[2] Bassett *v.* Fish, 75 N. Y. 303.

[3] See Owen *v.* Hill, 67 Mich. 43, 34 N. W. Rep. 649.

[4] See Lander *v.* Seaver, 32 Vt. 114, 76 Am. Dec. 156; Spear *v.* Cummings, 23 Pick. 224, 34 Am. Dec. 53.

[5] Spear *v.* Cummings, 23 Pick. (Mass.) 224, 34 Am. Dec. 53; State *v.* Burton, 45 Wis. 150, 30 Am. Rep. 706; Dr.tt *v.* Snodgrass, 66 Mo. 286,

§ 728. **Where Board has prescribed no Rules, Teacher may do so.**—But where no rules and regulations have been prescribed by the board, the teacher is authorized to make such reasonable rules as shall best promote the welfare of his school and secure order and discipline therein.[1]

And even where rules have been prescribed by the board, the teacher may, unless expressly prohibited, make such additional rules and requirements as special cases or sudden emergencies may render necessary.[2]

§ 729. **Rules prescribed by Teacher must be reasonable.**—But as the rules prescribed by the school board must be reasonable ones, *a fortiori* must those be reasonable which are ordained by the teacher. Instances of what rules are or are not reasonable have already been given in the preceding subdivision, and the same principles would apply to those made by teachers. But, in general, "acts done to deface or injure the school-room, to destroy the books of scholars, or the books or apparatus for instruction, or the instruments of punishment of the master; language used to other scholars to stir up disorder and insubordination, or to heap odium and disgrace upon the master; writings and pictures placed so as to suggest evil and corrupt language, images and thoughts to the youth who must frequent the school;"[3] using profane language, quarrelling and fighting among each other,[4]—these and many other similar and obvious acts the teacher may prohibit and punish.

So, in regard to the studies to be pursued, the teacher may, where no rules are prescribed by the board, exercise a reasonable discretion "as to the order of teaching them, the pupils who shall be allowed to pursue them, and the mode in which they shall be taught;"[5] but the teacher should not compel a scholar to pursue

27 Am. Rep. 343; Hodgkins *v.* Rockport, 105 Mass. 476; Russell *v.* Lynnfield, 116 Mass. 366; Roberts *v.* Boston, 5 Cush. (Mass.) 209.

[1] Deskins *v.* Gose, 85 Mo. 485, 55 Am. Rep. 387; Patterson *v.* Nutter, 78 Me. 509, 57 Am. Rep. 818; State *v.* Burton, 45 Wis. 150, 30 Am. Rep. 706; State *v.* Pendergrass, 2 Dev. & Bat. (N. C.) 365, 31 Am. Dec. 416.

[2] Fertich *v.* Michener, 111 Ind. 472, 60 Am. Rep. 709; State *v.* Burton, 45 Wis. 150, 30 Am. Rep. 706.

[3] ALDIS, J., in Lander *v.* Seaver, 32 Vt. 114, 76 Am. Dec. 156.

[4] Deskins *v.* Gose, 85 Mo. 485, 55 Am. Rep. 387; Hutton *v.* State, 23 Tex. App. 386, 59 Am. Rep. 776.

[5] Guernsey *v.* Pitkin, 32 Vt. 224, 76 Am. Dec. 171.

a study which he knows the parent has forbidden his child to take.[1]

§ 730. **Authority of Teacher not confined to School-room.**—The authority of the teacher is not confined to the school-room or grounds, but he may prohibit and punish all acts of his pupils which are detrimental to the good order and best interests of the school whether such acts are committed in school hours or while the pupil is on his way to or from school or after he has returned home.[2]

§ 731. **Right to inflict corporal Punishment.**—It is settled beyond controversy that for a violation of lawful rules the teacher may inflict upon the scholar reasonable corporal punishments.[3] Upon this subject the rule laid down by ALDIS, J., has been quite generally approved:—

"A school-master has the right to inflict reasonable corporal punishment. He must exercise reasonable judgment and discretion in determining when to punish and to what extent. In determining upon what is reasonable punishment, various considerations must be regarded,—the nature of the offense, the apparent motive and disposition of the offender, the influence of his example and conduct upon others, and the sex, age, size and strength of the pupil to be punished.

Among reasonable persons, much difference prevails as to the circumstances which will justify the infliction of punishment, and the extent to which it may properly be administered. On account of this difference of opinion, and the difficulty which

[1] Morrow *v.* Wood, 35 Wis. 59, 17 Am. Rep. 471; Rulison *v.* Post, 79 Ill. 567.

[2] Lander *v.* Seaver, 32 Vt. 114, 76 Am. Dec. 156; Hutton *v.* State, 23 Tex. App. 386, 59 Am. Rep. 776; Bolding *v.* State, 23 Tex App. 172; Deskins *v* Gose, 85 Mo. 485, 55 Am. Rep. 387; Burdick *v.* Babcock, 31 Iowa 562; Sherman *v.* Charlestown, 8 Cush. (Mass.) 160.

[3] Deskins *v.* Gose, 85 Mo. 485, 55 Am. Rep. 387; Patterson *v.* Nutter, 78 Me. 509, 57 Am. Rep. 818; Hutton *v.* State, 23 Tex. App. 386, 59 Am Rep. 776; Heritage *v.* Dodge, 64 N H. 297, 9 Atl. Rep. 722; Vanvactor *v.* State, 113 Ind. 276, 3 Am. St. Rep. 645; Cooper *v.* McJunkin, 4 Ind. 290; State *v.* Burton, 45 Wis. 150, 30 Am. Rep. 706; Dancnhoffer *v.* State, 69 Ind. 295, 35 Am. Rep. 216; State *v.* Pendergrass, 2 Dev. & Bat. (N. C.) L. 365, 31 Am. Dec. 416; Commonwealth *v.* Randall, 4 Gray (Mass.) 36; Lander *v* Seaver, 32 Vt. 114, 76 Am. Dec. 156.

exists in determining what is a reasonable punishment and the advantage which the master has by being on the spot to know all the circumstances, the manner, look, tone, gestures and language of the offender (which are not always easily described), and thus to form a correct opinion as to the necessity and extent of the punishment, considerable allowance should be made to the teacher by way of protecting him in the exercise of his discretion.

Especially should he have this indulgence when he appears to have acted from good motives, and not from anger or malice. Hence the teacher is not to be held liable on the ground of excess of punishment, unless the punishment is clearly excessive, and would be held so in the general judgment of reasonable men. If the punishment be thus clearly excessive, then the master should be held liable for such excess, though he acted from good motives in inflicting the punishment, and in his own judgment considered it necessary, and not excessive. But if there is any reasonable doubt whether the punishment was excessive, the master should have the benefit of the doubt."[1]

But if the punishment were inflicted for the violation of an unreasonable rule it could not be justified.[2] The presumption, however, is that the teacher has not exceeded his powers and the burden of proving the contrary is upon him who alleges it.[3]

Within the same limits, the teacher may detain or keep the pupil in after hours as a reasonable means of punishment.[4]

§ 732. **Teacher not liable to Parent for refusing to receive Child as a Pupil.**—Between a schoolmaster employed by a school board and the parents of pupils, there is, it is held, no privity of contract, and hence an action will not lie against the teacher when brought by the parent for refusing to receive and instruct his child. The proper remedy is to appeal to the school board.[5]

[1] In Lander *v.* Seaver, 32 Vt. 114, 76 Am. Dec. 156. An instruction to the jury that punishment is not excessive unless "all hands" would pronounce it so, is erroneous. The general judgment of reasonable men is the test. Patterson *v.* Nutter, 78 Me. 509, 57 Am. Rep. 818. What punishment is reasonable is a question of fact. Sheehan *v.* Sturges, 53 Conn. 481.

[2] State *v.* Vanderbilt, 116 Ind. 11, 18 N. E. Rep. 266.

[3] Vanvactor *v.* State, 113 Ind. 276, 3 Am. St. Rep. 645.

[4] Fertich *v.* Michener, 111 Ind. 472, 60 Am. Rep. 709.

[5] Spear *v.* Cummings, 23 Pick. (Mass.) 224, 34 Am. Dec. 53.

11. *Recorders of Deeds.*

§ 733. **Duties are chiefly owing to Individuals.**—The recorder of deeds is a ministerial officer whose duties are owing chiefly to those particular individuals who have occasion to employ him, and to whom he usually looks for his compensation. He does, indeed, owe a general duty to the public at large as one part of the machinery of municipal government, but the recording of deeds and other instruments and the making of abstracts or copies of the records for each individual who requires this service forms the largest portion of his duty.

§ 734. **Duty to record proper Instruments.**—It is his duty to accept for record and to record every instrument presented to him for that purpose which is entitled to record in his office and which is accompanied with the payment of his lawful fees; and for a violation of this duty he is liable to the person who was entitled to his service.[1] That he acted in good faith or with honest intentions would not excuse his refusal or neglect to perform an absolute and certain duty.[2]

The performance of his duty to record an instrument entitled to record may be enforced by mandamus.[3]

§ 735. **Must not deliver Deed before recording.**—It being thus his duty to record an instrument properly entitled to be recorded, and left with him for that purpose, he will be liable if after accepting a deed for record he permits it to be taken away without recording it.[4]

§ 736. **Liable for making an imperfect Record.**—It is not only his duty to record but to record correctly, and he would undoubt-

[1] Cooley on Torts, 384. See Davis *v.* Thompson, 1 Nev. 17; Bishop *v.* Schneider, 46 Mo. 477, 2 Am. Rep. 533.

[2] See Clark *v.* Miller, 54 N. Y. 528; Keith *v.* Howard, 24 Pick. (Mass.) 292.

[3] Strong's Case, Kirby (Conn.) 345; *Ex parte* Goodell, 14 Johns. (N. Y.) 325; People *v.* Miner, 37 Barb. (N.Y.) 466.

Mandamus will not be granted at the suit of a grantee to compel the recorder to record a deed delivered to him *in escrow* and withheld from record by the grantor's order. Austin *v.* Register of Deeds, 41 Mich. 723.

[4] Welles *v.* Hutchinson, 2 Root (Conn.) 85.

edly be liable to one who is injured by his negligence in recording an instrument which he had accepted for that purpose.[1]

§ 737. **Liable for not making Index as required.**—So where the law requires the recorder to keep an index of the conveyances recorded, while the failure to index a conveyance will not destroy the effect of the instrument if properly recorded,[2] the recorder will be liable to one who is injured by the absence of a proper index or by using a defective index upon which he had a right to rely.[3]

§ 738. **Duty to allow Inspection of Records.**—It is the duty of the recorder to permit persons having a special interest, present or prospective, in particular instruments, records or chains of title recorded in his office, to inspect the same and to make abstracts or copies thereof, either in person or by attorney, upon a proper request at reasonable times and under reasonable regulations adapted to the transaction of the business of his office and the care and preservation of the records.[4] The performance of this duty may be enforced by mandamus,[5] or for a neglect or refusal to perform in a proper case, the party entitled may sustain an action.[6]

The right of inspection or copying does not exist, however,

[1] See Sinclair *v.* Slawson, 44 Mich. 123, 38 Am. Rep. 235.

[2] Bishop *v.* Schneider, 46 Mo. 472, 2 Am. Rep. 533; Schell *v.* Stein, 76 Penn. St. 398, 18 Am. Rep. 416; Chatham *v.* Bradford, 50 Ga. 327, 15 Am. Rep. 692.

[3] Hunter *v.* Windsor, 24 Vt. 327; Chatham *v.* Bradford, 50 Ga. 327, 15 Am. Rep. 692; Lyman *v.* Edgerton, 29 Vt. 305, 70 Am. Dec. 415.

[4] Randolph *v.* State, 82 Ala. 527, 60 Am. Rep. 761, and note; Boylan *v.* Warren, 39 Kans. 301, 7 Am. St. Rep. 551; State *v.* Rachac, 37 Minn. 372; Hanson *v.* Eichstaedt, 69 Wis. 538; *In re* McLean, 8 The Rep. 813, People *v.* Richards, 99 N. Y. 620; People *v.* Reilly, 38 Hun (N. Y.) 429; People *v.* Cornell, 47 Barb. (N. Y.) 329; Hawes *v.* White, 66 Me. 305; O'Hara *v.* King, 52 Ill. 303.

A demand accompanied by insult or abuse is not a legal demand, but a subsequent proper demand cannot be refused because of the prior misconduct or to compel an apology. Boyden *v.* Burke, 14 How. (U. S.) 575.

[5] See Randolph *v.* State, 82 Ala. 527, 60 Am. Rep. 761; Boylan *v.* Warren, 39 Kans. 301, 7 Am. St. Rep. 551; Diamond Match Co. *v.* Powers, 51 Mich. 145; State *v.* Williams, 96 Mo. 13, 8 S. W. Rep. 771; State *v.* Hoblitzelle, 85 Mo. 624; and generally the cases cited in previous note.

[6] Lyman *v.* Windsor, 24 Vt. 575; Lyman *v.* Edgerton, 29 Vt. 305, 70 Am. Dec. 415; Boyden *v.* Burke, 14 How. (U. S.) 575; Lum *v.* McCarty, 39 N. J. L. 287.

where the person seeking it has no interest in the matter, but is prompted only by idle curiosity or speculative purposes.[1]

So to sustain an action for refusing inspection, it must appear that the plaintiff had such an interest as entitled him to the right, that it was refused without lawful excuse, and that the injury complained of was the proximate result of the refusal.[2]

§ 739. **Duty of permitting Strangers to make Abstracts of Title.**—The duty of the recorder to permit extracts and copies of the records of his office to be made being confined to those who have a special interest in some particular instrument or chain of title, it is well settled that, unless required to do so by statute as in some States,[3] the recorder will not be compelled to permit parties having no such special interest to make general abstracts of title for the purpose of afterwards furnishing, as a business enterprise, the information so acquired to persons who may desire it.[4]

[1] Randolph *v.* State, 82 Ala. 527, 60 Am. Rep. 761; Brewer *v.* Watson, 71 Ala. 299, 46 Am. Rep. 318; Phelan *v.* State, 76 Ala. 49; Webber *v.* Townley, 43 Mich. 534, 38 Am. Rep. 213; Diamond Match Co. *v.* Powers, 51 Mich. 145. But see Burton *v.* Tuite, — Mich. —, 44 N. W. Rep. — (not yet reported), quoted from in note to following section, where the necessity of a special interest is denied by MORSE, J.

See cases cited in following section.

[2] Lyman *v.* Edgerton, 29 Vt. 305, 70 Am. Dec. 415.

[3] State *v.* Rachac, 37 Minn. 372, 35 N. W. Rep. 7; Hanson *v.* Eichstaedt, 69 Wis. 538, 35 N. W. Rep. 30; People *v.* Richards, 99 N.Y. 620, 1 N. East. Rep. 258; People *v.* Reilly, 38 Hun (N. Y.) 429.

In Hawes *v.* White, 66 Me. 305, the court enforced the right of inspection and abstracting conferred by statute upon the county commissioners.

A statute conferring the right must be clear and it will not be extended by construction. Webber *v.* Townley, 43 Mich. 534, 38 Am. Rep. 213.

[4] Webber *v.* Townley, 43 Mich. 534, 5 N. W. Rep. 971, 38 Am. Rep. 213; Buck *v.* Collins, 51 Ga. 391, 21 Am. Rep. 236; Brewer *v.* Watson, 71 Ala. 299, 46 Am. Rep. 318; Randolph *v.* State, 82 Ala. 527, 60 Am. Rep. 761; Cormack *v.* Wolcott, 37 Kans. 391, 15 Pac. Rep. 245; Boylan *v.* Warren, 39 Kans. 301, 7 Am. St. Rep. 551; Bean *v.* People, 7 Colo. 202, 2 Pac. Rep. 909; Phelan *v.* State, 76 Ala. 49.

In Webber *v.* Townley, 43 Mich. 534, 537, 38 Am. Rep. 213, 5 N. W. Rep. 971, where the relators applied for a mandamus to permit them to make a complete abstract of the records of the office, it is said: "We are of opinion that under the common law relators have not the right claimed. The right to an inspection and copy or abstract of a public record is not given indiscriminately to each and all who may, from curiosity or otherwise, desire the same, but is limited to those who have some interest therein. What this interest

The cases, generally, admit that the right of inspection at common law is not broad enough to cover this demand, and the practice must be we are not called upon in the present case to determine. The question has usually arisen where the right claimed was to inspect or obtain a copy of some particular document, or those relating to a given transaction or title. We have not been referred to any authority which recognizes the right of a person under the common law to a copy or abstract of the entire records of a public office in which he had no special interest, the object in view being simply private gain from the possession and use thereof.

The object sought by the relators may be considered as of such modern origin as not to have been contemplated or covered by the common law authorities relating to the inspection of public records, and the reason upon which those authorities rest would exclude relators from the right claimed. What is the right which relators seek and the result thereof? But first let us see what it is not. It is not for a public purpose. They do not seek these abstracts for purposes of publication for the use, benefit or information of the public, even if such an unlimited publication could be justified. Relators do not ask for an inspection of a record and abstract thereof relating to lands in which they claim to have any title or interest, or concerning which they desire information in contemplation of acquiring some right or interest either by purchase or otherwise. It is not as the agents or attorneys of parties seeking information because interested or likely to become so. On the contrary, the right is based upon neither a present nor prospective interest in the lands, either personally or as representative of others who have, but is for the future private gain and emolument of relators in furnishing information therefrom to third parties for a compensation then to be paid. It is a request for the law to grant them the right to inspect the record of the title to every person's land in the county, and obtain copies or abstracts thereof to enable them hereafter, for a fee or reward, to furnish copies to such as may desire the same, whether interested or not, and irrespective of the object or motive such persons may have in view in seeking such information. In other words, relators ask the right of copying or abstracting the entire records of the county for private and speculative purposes, they having no other interest whatever therein.

Conceding to them this right under such circumstances, and the same must be accorded to all others asking it. Every resident of Jackson county may of right claim a similar privilege. Indeed, the right for such purpose, if it exists at all, can not be restricted by the residence of the party, so that the result may be more applicants than the register's office could afford room to. Farther than this to make such abstracts being thus open to all, and being a matter of right, must be granted in such a manner and such reasonable facilities must be afforded, that the right claimed and exercised will not be barren but profitable. If none but the applicants are permitted to work, the time consumed in making the abstract will, in many counties, be so long that the full fruits thereof can not be reaped during the life-time of the parties. An opportunity, therefore, should be afforded to all to have the work done within a

tical disadvantage to the public business and interests also furnish, in most cases, a sufficient reason why the right should not be extended.

reasonable time. If, therefore, each applicant, with a corps of assistants and clerks, makes demand upon the register for facilities to prepare abstracts, may not that officer find his position a somewhat embarrassing one, and his office uncomfortably crowded, to his inconvenience and that of the public? If, however, this is a matter of right, open and common to all, and which may be enforced by *mandamus*, must not the proper authorities in such county furnish suitable room and facilities to accommodate all who may desire to exercise this right? If not, and there is to be any discrimination, who shall be favored—who shall be admitted and who excluded? How many clerks or assistants shall each applicant have the right to employ? Who shall determine what shall be considered a reasonable time within which each may complete his abstract? And, as the use of the public records can not thus be handed over to the indiscriminate use of those not interested in their future preservation, how shall the register protect them from mutilation? This he cannot do personally without neglecting his official duties, and if he must employ clerks or appoint deputies for such purposes, at whose expense shall it be, the law having made no provision for such emergencies?

These and many other embarrassing questions must arise if this right is found to exist.

It would not, however, end here. This being a right which we might term one not coupled with an interest, must apply equally to the records in each and every public office. True, the copies or abstracts from each of the several public offices might not be so profitable to the parties making the same as would those from the register's office, but this would not go to the right to make the abstract. May then parties in no way interested, other than as are these relators, insist upon the right to inspect and copy or abstract the records of our courts—of the treasurers of our counties—of the several county officers; and, indeed, why with equal propriety may it not be extended to a like right in each of the several State offices? The right once conceded, there is no limit to it, until every public office is exhausted. The inconveniences which such a system would engraft upon public officers; the dangers both of a public and private nature, from abuses which would inevitably follow in the carrying out of such a right, are conclusive against the existence thereof. It may be said that, even admitting the right to exist, there would be no such number of persons desirous of making abstracts, and that the dangers pointed out would not therefore arise, and in corroboration thereof the past may be referred to. How far the uncertainty of the existence of such an unlimited right in the past may have kept the number of applicants within proper bounds, may have some bearing upon the question, and it may be true that the demand for abstracts of title would have some effect upon the supply offered for sale. We must bear in mind, however, that the larger and more populous the county, the greater would be the demand, and because of the larger number of volumes of records in such a county, a correspondingly increased time and

§ 740. **Duty in furnishing Copies of Record.**—It is usually made the duty of the recorder, by statute, to furnish to parties desiring them copies of particular records of his office in which they have an interest upon a demand for the same and the payment of prescribed fees. The performance of this duty may be enforced by mandamus,[1] or, for a refusal to perform, a remedy may be had by an action against the recorder.[2]

A demand accompanied by abuse or insult is not a legal demand, but a subsequent proper demand can not be refused by reason of the prior misconduct, or to compel an apology.[3]

force would be required for each person to perfect his abstract, and the greater danger from abuses exist. Besides, in ascertaining whether the right exists, we have a right to inquire into the evils which it would be likely to lead to, and may for this purpose follow up the natural and probable consequences likely to result therefrom, and thereby determine whether justified by the principles of the common-law decisions." Writ denied.

But in Burton *v.* Tuite, — Mich. —, 44 N. W. Rep. — (not yet reported), MORSE, J. says: "I can not agree with the opinion of this court or the reasons given for it in Webber *v.* Townley, *supra*. Nor do I anticipate that hardly any, if any, of the results imagined by the writer of that opinion would ever occur if the holding were otherwise. If any of them should happen, the law is powerful enough to remedy them, and 'sufficient unto the day is the evil thereof.'

I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to and public inspection of public records. They have an interest always in such records, and I know of no law, written or unwritten, that provides that before an inspection or examination of a public record is made, the citizen, who wishes to make it, must show some special interest in such record. I have a right, if I see fit, to examine the title of my neighbor's property, whether or not I have any interest in it or intend ever to have. I also have the right to examine any title that I see fit, recorded in the public offices, for purposes of selling such information if I desire."

In this case mandamus was granted against the city treasurer of Detroit to compel him to grant to relator, who was engaged in making and selling abstracts of title, the right to inspect the records of the city tax sales. A statute, however (Acts 1889, No. 205), in terms conferred the right. CHAMPLIN, J. concurred with MORSE, J.; CAMPBELL, J. concurred in the result. The two other justices did not sit. MORSE, J. cited Lum *v.* McCarty, 39 N. J. L. 287; Boylan *v.* Warren, 39 Kans. 301; Cole *v.* Rachac, 37 Minn. 372; German Am. L. & T. *v.* Richards, 99 N. Y. 620; Hanson *v.* Eichstaedt, 69 Wis. 538, all of which are cited above.

[1] See Silver *v.* People, 45 Ill. 225; Strong's Case, Kirby (Conn.) 345; *Ex parte*, Goodell, 14 Johns. (N. Y.) 325.

[2] Boyden *v.* Burke, 14 How. (U. S.) 575.

[3] Boyden *v.* Burke, 14 How. U. S.) 575.

And not only is it the duty of the recorder to furnish copies, but it is also his duty to use reasonable care and diligence to furnish correct ones, and if, through negligence, he supplies erroneous copies he will be liable to the party requiring it.[1]

§ 741. **Liability for Negligence in making Searches or Abstracts of Title.**—It is a common undertaking of the recorder to make searches of the records contained in his office and to furnish certificates or abstracts of the results of such searches to those at whose request they were made. The recorder does not, unless by express contract, guarantee the correctness of his work, but he does agree that he possesses the requisite knowledge and skill and that he will exercise reasonable care and diligence in the performance of his undertaking. If he fails in this performance, whereby the person who employs him suffers proximate injury, he is liable for the damages sustained.[2]

12. *Sheriffs, Marshals, Coroners and Constables.*

§ 742. **Duties and Liabilities are similar.**—Sheriffs, marshals, coroners and constables when considered in respect of their rights, duties and liabilities in the service of civil process, constitute the largest and one of the most important classes of ministerial officers.

Their rights, duties and liabilities in this respect are substantially similar, and they will all be here considered together, it being understood that rules laid down in reference to one apply also, unless otherwise indicated, to the others.

§ 743. **What Parties are interested.**—It will be obvious that three classes of persons are chiefly interested in the due performance of the officer's duties,—the plaintiff in the writ, the defend-

[1] Smith *v.* Holmes, 54 Mich. 104, 111; Chase *v.* Heaney, 70 Ill. 268; Clark *v.* Mar-hall, 34 Mo. 429; Savings Bank *v.* Ward, 100 U. S. 195.

[2] As where he negligently omits a mortgage: Smith *v.* Holmes, 54 Mich. 104, or certifies that there are no mortgages when in fact there is one on record: McCaraher *v.* Commonwealth, 5 Watts & Serg. (Penn.) 21, 39 Am. Dec. 106; Ziegler *v.* Commonwealth, 12 Penn. St. 227; or omits an assessment which constitutes a lien: Morange *v.* Mix, 44 N. Y. 315.

See also Chase *v.* Heaney, 70 Ill. 268, applying the same rule to a professional abstractor, and Savings Bank *v.* Ward, 100 U. S. 195, where the same rule is applied to an attorney who undertakes to make a search.

ant in the writ, and strangers to the process whose rights may, in the attempted execution of the process, be unlawfully invaded by the officer. There will, therefore, be here considered the question of the duties and liabilities of the officer—

a. To the plaintiff in the process.

b. To the defendant in the process.

c. To strangers to the process.

a. To the Plaintiff in the Process.

§ 744. **Duty to execute lawful Process.**—It is, in general terms, the duty of the officer to the plaintiff in the proceedings to execute with reasonable diligence according to its terms all lawful civil process to which the plaintiff is a party and which is duly delivered to him for service within his jurisdiction.[1]

§ 745. **Must serve irregular or voidable Process.**—The duty of the officer is ministerial, not judicial. His province is to execute the process regularly delivered to him for service and not to sit in judgment upon the regularity of the proceedings upon which it was obtained. He is protected by the law, as will be seen hereafter,[2] in executing according to its tenor all process, fair upon its face, which is delivered to him for service.

He will, therefore, be protected in executing, and it is his legal duty to execute process, though it be irregular, erroneous or voidable where it comes in due form from a court of competent jurisdiction, and neither his own intrinsic knowledge that there existed no cause of action,[3] or that the judgment, not reversed or stayed, was fraudulently obtained,[4] nor the fact that the judgment or proceedings were irregular,[5] nor any other defect or irregularity not rendering the process void, can excuse him from its service.[6]

[1] Cole *v.* Parker, 7 Iowa 167, 71 Am. Dec. 439; People *v.* Palmer, 46 Ill. 398, 95 Am. Dec. 418; Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238; Lindsay *v.* Armfield, 3 Hawks. (N. C.) 548, 14 Am. Dec. 603; Fletcher *v.* Bradley, 12 Vt. 22, 36 Am. Dec. 324; Whitney *v.* Butterfield, 13 Cal. 335, 73 Am. Dec. 584.

[2] See *post*, § 768.

[3] Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324.

[4] Baker *v.* Sheehan, 29 Minn. 235.

[5] Bensel *v.* Lynch, 44 N. Y. 162.

[6] Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324; Stevenson *v.* McLean, 5 Humph. (Tenn.) 333, 42 Am. Dec. 434; Cody *v.* Quinn, 6 Ired. (N.

"Mere formal defects in the process," it is said, "not rendering it void, even if considerable enough to cause it be abated, quashed or set aside as irregular, on proper motion or plea by the party directly affected by it, but which, if not so moved, do not affect the legal validity of the process, can never be interposed by the officer, in whose hands it is placed for service, as a shield to protect him from the consequences of plain derelictions of duty in respect to it."[1]

A distinction is, however, to be observed between process which is irregular, defective or voidable only, and that which is void for want of jurisdiction or other cause. For—

§ 746. **Need not serve void Process.**—The rule that an officer is justified by his process, not void upon its face, is one of protection merely; and although the officer may execute such process, yet if it is in fact void for want of jurisdiction in the court or officer issuing it, he may refuse to execute it and no action will lie against him for such refusal.[2]

Hence where an execution regular on its face is issued without

C.) 191, 44 Am. Dec. 75; Chase *v.* Plymouth, 20 Vt. 469, 50 Am. Dec. 52; McComb *v.* Reed, 28 Cal. 281, 87 Am. Dec. 115; Stoddard *v.* Tarbell, 20 Vt. 321; Martin *v.* Hall, 70 Ala. 421; Bensel *v.* Lynch, 44 N. Y. 162; Roth *v.* Duvall, 1 Idaho 149; Albee *v.* Ward, 8 Mass. 79; Kleissendorff *v.* Fore, 3 B. Mon. (Ky.) 473; Jordan *v.* Porterfield, 19 Ga. 139, 63 Am. Dec. 301.

[1] Davis, J. in Chase *v.* Plymouth, 20 Vt. 469, 50 Am. Dec. 52.

[2] Newburg *v.* Munshower, 29 Ohio St. 617, 23 Am. Rep. 769; Reid *v.* Stegman, 99 N. Y. 646; Crocker on Sheriffs, §§ 284, 286; Earl *v.* Camp, 16 Wend. (N. Y.) 562; Cornell *v.* Barnes, 7 Hill (N. Y.) 35; Gwynne on Sheriffs, 573.

In Tuttle *v.* Wilson, 24 Ill. 561, approved in Housh *v.* People, 75 Ill. 491, it is said: "The rule that a ministerial officer is protected in the execution of process, issued by a court or officer having jurisdiction of the subject-matter and of the process, if it be regular on its face and does not disclose a want of jurisdiction, is a rule of protection merely, and beyond that confers no right; it is held to be personal to the officer himself, and affords no shelter to the wrong doer under color of whose process, if it be void, the officer is called upon to act.

Such an officer may stop in the execution of process, regular on its face, whenever he becomes satisfied there is a want of jurisdiction in the officer or court issuing it, and if sued for neglect of duty may show in his defence and want of jurisdiction. Earl *v.* Camp, 16 Wend. 562. He can, if he chooses, take the responsibility of determining the question of jurisdiction, or any other question to which the process may give rise."

a judgment to support it, the officer to whom it is directed may disregard its command without incurring any liability.[1]

§ 747. **Right to demand Prepayment of Fees.**—An officer whose services are to be compensated by fees paid by the person who employs him may demand that his lawful fees be paid to him before he will undertake the service, but he may waive prepayment, and if he expressly or tacitly assumes to perform the duty without demanding it, he will be deemed to have waived it, and he will be held to the same liability for faithful service as though his fees had been advanced to him.[2]

§ 748. **Right of Officer to demand Indemnity.**—The officer to whom a writ for the seizure of property is delivered for service is bound ordinarily not only to serve it, but, at his peril, to seize only the property of the defendant therein named and subject to such seizure. In order, however, to relieve the officer from such a hazardous liability in doubtful cases, statutes have been enacted in most of the States authorizing the officer, where there is reasonable doubt as to the ownership of the goods or their liability to seizure either to test the question by some preliminary proceeding, as by a sheriff's jury, or to demand indemnity from the person who requires their seizure.[3]

Whether the right to demand indemnity exists, except as conferred by statute, may not be altogether clear, but the decided tendency of the courts is to permit the officer to demand it whenever there is a reasonable doubt as to the defendant's title or the liability of the property to the writ.[4]

§ 749. **If no Indemnity demanded, Officer is bound to serve.**—"When a sheriff takes a writ," says Chief Justice PARKER, "with directions to serve it in a particular manner, without requiring a written indemnity, he is bound to serve it, if he may, according to the instructions; and it is not a sufficient excuse

[1] Newburg *v.* Munshower, 29 Ohio St. 617, 23 Am. Rep. 769.

[2] Carlisle *v.* Soule, 44 Vt. 265; Alexander *v.* State, 42 Ark. 41.

Jones *v.* Gupton, 65 N. C. 48.

[3] These statutes are collected in Murfree on Sheriffs, Ch. XIII.

[4] Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28; Smith *v.* Cicotte, 11 Mich. 383; Spangler *v.* Commonwealth, 16 Serg. & R. (Penn.) 68, 16 Am. Dec. 548.

See Freem. Ex., § 275.

Contra, Adair *v.* McDaniel, 1 Bailey (S. C.) L. 158, 19 Am. Dec. 664.

for him that he subsequently obtained some information which led him to suppose that a service in the manner directed would be ineffectual for the interests of the plaintiff, and even expose himself to an action, if his supposition was erroneous, and a service in the manner directed would, in fact, have been legal and effectual. He is liable unless he can show that he could not lawfully have obeyed the directions. He may require an indemnity, with a surety, if that be important for his security. If he make no such request, but undertakes to serve the process, it is not sufficient for him to say that he had some information which led him to believe that it was unsafe so to serve it. To admit such an excuse would be dangerous, and the authorities are the other way."[1]

§ 750. **When Promise of Indemnity will be implied.**—Where the creditor directs the service of the process in any particular manner, a promise to indemnify the officer for serving in that manner, will, it is said, be implied from the directions. "The creditor giving the instructions undertakes that they may be obeyed."[2]

§ 751. **Officer liable for Loss resulting from neglecting Instructions.**—An officer who receives a writ for service with instructions as to the time or manner of its execution or as to the property or the persons to be subjected to it, is bound to observe the instructions, if he lawfully can, and is liable for a loss resulting from his neglect to do so.[3]

[1] Ranlett *v.* Blodgett, 17 N. H. 298, 43 Am. Dec. 603, citing Ball *v.* Badger, 6 N. H. 405; Marshall *v.* Hosmer, 4 Mass. 63; Bond *v.* Ward, 7 Mass. 123, 5 Am. Dec. 28.

[2] Ranlett *v.* Blodgett, 17 N. H. 298, 43 Am. Dec. 603; Gower *v.* Emery, 18 Me. 79.

[3] "He is liable unless he can show that he could not lawfully have obeyed the directions." Ranlett *v.* Blodgett, 17 N. H. 298, 43 Am. Dec. 603; Ball *v.* Badger, 6 N. H. 405; Smith *v.* Judkins, 60 N. H. 127; Kimball *v.* Davis, 19 Me. 310; Abbott *v.* Jacobs, 49 Me. 319; Ansonia Brass Co. *v.* Babbitt, 74 N. Y. 395; Rogers *v.* McDearmid, 7 N. H. 506; Richardson *v.* Bartley, 2 B. Mon. 328; Patton *v.* Hamner, 28 Ala. 618; Poston *v.* Southern, 7 B. Mon. 289; Walworth *v.* Readsboro, 24 Vt. 252; Shryock *v.* Jones, 22 Penn. St. 303.

Plaintiff in the judgment or his assignee may direct all or part thereof to be made out of property of any of the defendants where a judgment has been recovered against several defendants and execution issued against all; and the sheriff is liable if he refuses to comply with the directions. Root *v.* Wagner, 30 N. Y. 9, 86 Am.

Thus if the plaintiff informs the officer of the danger of delay and directs an immediate service, the officer will be liable for a loss resulting from his neglect to act as directed;[1] so if the plaintiff points out property upon which an execution may be levied and directs the levy to be made, the officer will be liable for a loss if he neglects until some one else has acquired priorities,[2] or the debtor has sold the property.[3]

The fact that he acted in good faith and with the belief that it was for the plaintiff's interest to do so, will not excuse him.[4]

Where, by statute, instructions are required to be in writing, the officer is not bound by any not so given.[5]

§ 752. **Officer bound for reasonable Skill and Diligence.**— But in the absence of instructions, the officer to whom valid civil process is delivered for service owes to the plaintiff in the writ the duty to execute the process according to its terms with reasonable skill, care and diligence, and for a violation of this duty without sufficient reason, he will be liable to the plaintiff for the damages which he has proximately sustained thereby.[6]

Dec. 348, citing Walters *v.* Sykes, 22 Wend. (N. Y.) 566; Godfrey *v.* Gibbons, 22 Wend. 569.

Plaintiff may direct execution to be made in whole or in part out of any one of several joint defendants. Starry *v.* Johnson, 32 Ind. 440.

Plaintiff may direct execution to be held temporarily or permanently without service. Smith *v.* Erwin, 77 N. Y. 471; Jackson *v.* Anderson, 4 Wend. 474; Morgan *v.* People, 59 Ill. 60; or that it need not be returned. Wehle *v.* Connor, 69 N. Y. 550, or he may leave it in the officer's discretion to do the best he can. Walker *v.* Haskell, 11 Mass. 177.

But an officer is not bound to follow plaintiff's instructions if they are oppressive or will produce a great sacrifice of property. McDonald *v.* Neilson, 2 Cow. (N. Y.) 139, 14 Am. Dec. 431.

[1] Tucker *v.* Bradley, 15 Conn. 46; Peirce *v.* Partridge, 3 Metc. (Mass.) 44; Smith *v.* Judkins, 60 N. H. 127; Hunter *v.* Phillips, 56 Ga. 634; Kittredge *v.* Bellows, 7 N. H. 399.

[2] Kittredge *v.* Bellows, 7 N. H. 399. That there was a mortgage on the land upon which he was directed to levy, even though in an amount equal to the value of the land, does not excuse the officer for not levying. Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238. Officer is not liable for not levying on property designated if he made a levy upon sufficient other property to satisfy the writ. *Id.*

[3] Townsend *v.* Libbey, 70 Me. 162.

[4] Smith *v.* Judkins, 60 N. H. 127, where the officer refrained in good faith thinking that an attachment would drive the defendant into insolvency.

[5] Sanford *v.* Boring, 12 Cal. 539; Betts *v.* Norris, 15 Me. 468.

[6] State *v.* Finn, 87 Mo. 310; State *v.* Finn, 24 Mo. App. 344; Noble *v.*

This requirement of diligence extends from the commencement of the service to its termination,—from the acceptance of the writ until its due return.

Following this duty into details, we have—

§ 753. **Liable for Negligence in serving Process for Appearance.**—The officer is therefore bound to exercise reasonable diligence in serving process for defendant's appearance. What is reasonable, depends in this case, as in others, upon the circumstances. The officer ordinarily should serve process in the order in which it is delivered to him.[1] He is not obliged to neglect the business of everybody else[2] nor start the instant he receives the writ,[3] but has, under ordinary circumstances, until the return day in which to make the service.[4]

Desmond, 72 Cal. 330; Carter *v.* Duggan, 144 Mass. 32; Kreher *v.* Mason, 25 Mo. App. 291; Freeman *v.* Leonard, 99 N. C. 274; Schneider *v.* Sears, 13 Ore. 69; State *v.* Rayburn, 22 Mo. App. 803; Smith *v.* Judkins, 60 N. H. 127; State *v* Ownby, 49 Mo. 72; Ansonia Brass & C. Co. *v.* Babbitt, 74 N. Y. 395; Robinson *v.* Brennan, 90 N. Y. 208; State *v.* Schar, 50 Mo. 393; Freudenstein *v.* McNier, 81 Ill. 208; Evans *v.* Thurston, 53 Iowa 122; Bonnell *v.* Bowman, 53 Ill. 460.

Isolated cases lay down somewhat varying rules as "due diligence," Hallett *v.* Lee, 3 Ala. 28; Andrews *v.* Keep, 38 Ala. 315; Harris *v.* Murfree, 54 Ala. 161; "diligence," Hunter *v.* Phillips, 56 Ga. 634; Wakefield *v.* Moore, 65 Ga. 268; Henry *v.* Commonwealth, 107 Penn. St. 361; "active diligence," Harwell *v.* Worsham, 2 Humph. (Tenn.) 524, such skill and diligence as a reasonable man would exercise under like circumstances. Crosby *v.* Hungerford, 59 Iowa 712. "Ordinary skill and diligence" is the test laid down in Shearman & Redfield or Negligence. II., § 619. "The utmost expedition" was required in Lindsay *v.* Armfield, 3 Hawks. 548, 14 Am. Dec. 603.

[1] Rust *v.* Pritchett, 5 Harr. (Del.) 260.

[2] Commonwealth *v.* Gill, 14 B. Mon. (Ky.) 20.

[3] Whitney *v.* Butterfield, 13 Cal. 336, 73 Am. Dec. 584.

In this case the court said, per TERRY, C. J.: "The law is reasonable in this as in all other things. It holds public officers to a strict performance of their respective duties. It tolerates no wanton disregard of these duties. It sanctions no negligence, but it requires no impossibilities, and imposes no unconscionable

[4] While he has ordinarily until the return day, the circumstances may be such as to require immediate action. State *v.* Rollins, 13 Mo. 179; State *v.* Ferguson, 13 Mo. 167; State *v.* Leland, 82 Mo. 260; Whitney *v.* Butterfield, 13 Cal. 335, 73 Am. Dec. 584; Trigg *v.* McDonald, 2 Humph. (Tenn.) 386; Commonwealth *v.* Gill, 14 B. Mon. (Ky.) 20; Barnes *v.* Thompson, 2 Swan (Tenn.) 313.

But if he is informed of unusual circumstances which require more haste, as if the debtor is about to depart from the country or is only temporarily within the jurisdiction,[1] or if the statute of limitations is liable to expire, or if, for any other reason, the plaintiff should direct that it be served immediately, the officer would be bound to use a greater degree, but still the same kind of diligence,—reasonable diligence under the unusual circumstances.[2]

This duty requires that the officer shall exercise reasonable diligence to find the defendant, and reasonable care to make a proper and sufficient service;[3] but, at the same time, the officer is not bound to find the defendant at all hazards, and he is not liable if he does not find him, though within reach of his process, if he used reasonable diligence.[4]

§ 754. **Liable for Negligence in searching for Property.**—Where an officer receives process for the seizure of property,

exactions. When process of attachment or execution comes to the hands of the sheriff, he must obey the exigency of the writ. He must, in such cases, execute the writ with all reasonable celerity. Whenever he can make the money on execution, or secure the debt by attachment, he must do it. But he is not held to the duty of starting on the instant after receiving a writ to execute it, without regard to anything else than its instant execution. Reasonable diligence is all that is required of him in such instances. But this reasonable diligence depends upon the particular facts in connection with the duty. If, for example, a sheriff has an execution against A, and has no special instruction to execute it at once, and there is no apparent necessity for its immediate execution, it would not be contended that he was under the same obligation to execute it instantaneously, as if he were so instructed and there were circumstances of urgency. So in respect to an attachment. If an attachment were sued out on the ground of a defendant's fraud, or his being in the act of leaving the State, or removing his property, the very fact of the issuance of the attachment, or the making of the affidavit, would seem to indicate to the officer the necessity of immediate action."

[1] Phillips *v.* Ronald, 3 Bush (Ky.) 244, 96 Am. Dec. 216, where sheriff was charged for neglecting to arrest an absconding debtor on a warrant placed in his hands early in the evening with notice that debtor was at hotel in the same town and would depart before morning.

[2] Kittredge *v.* Bellows, 7 N. H. 399; Tucker *v.* Bradley, 15 Conn. 46; Smith *v.* Judkins, 60 N. H. 127; Hunter *v.* Phillips, 56 Ga. 634.

[3] The officer should go to the defendant's house and make inquiries in the neighborhood, and not return the writ *non est inventus*, relying on mere rumor: Hinman *v.* Borden, 10 Wend. 367, 25 Am. Dec. 568.

[4] Strout *v.* Pennell, 74 Me. 264.

either generally as in the case of an attachment or execution,[1] or specifically as in the case of replevin,[2] he is bound to use reasonable diligence to execute the writ according to its command.

It is not infrequent that the plaintiff points out property when it is not known to the officer, but if it be pointed out by another, or if the officer has knowledge of it, no matter how obtained, or if by the exercise of reasonable diligence he might have discovered it, within his bailiwick, subject to seizure, he will be liable if he neglects to levy.[3]

He should ordinarily retain the writ and continue his endeavors to find the property up to the time fixed for its return.[4]

But the mere fact that the defendant had property within the bailiwick liable to seizure is not enough to charge the officer with neglect. If he has used reasonable diligence to discover it, he will have done his duty, even if he did not find the property,[5]

[1] State *v.* Finn, 87 Mo. 310; Fisher *r.* Gordon, 8 Mo. 386; State *v.* Ownby, 49 Mo. 72; Taylor *v.* Wimer, 30 Mo. 126; Douglass *v.* Baker, 9 Mo. 41; Bonnell *v.* Bowman, 53 Ill. 460; Whitney *r.* Butterfield, 13 Cal. 335, 73 Am. Dec. 584; Lindsay *v.* Armfield, 3 Hawks 548, 14 Am. Dec. 603; Fletcher *v.* Bradley, 12 Vt. 22, 36 Am. Dec 324; Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238; Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324; Tucker *v.* Bradley, 15 Conn. 46; Dayton *r.* Lynes, 31 Conn. 578; Elmore *r.* Hill, 46 Wis. 618; State *r.* Leland, 82 Mo. 260; Bell *v.* Commonwealth, 1 J.J. Marsh (Ky.) 551; State *v.* Roberts, 12 N. J. L. 114, 21 Am. Dec 62; Garrett *v.* Hamblin, 11 Smedes & M. (Miss.) 219, 49 Am. Dec. 53; State *v.* Bondy, 15 La. Ann. 573; Marshall *r.* Simpson, 13 La. Ann. 437; Waite *v.* Delesdernier, 15 Me. 144; Thompson *r.* Morris, 2 B. Mon. (Ky.) 36; Commonwealth *v.* Lightfoot, 7 B. Mon. 298; McKinney *v.* Craig, 4 Sneed (Tenn.) 577; Kennedy *r.* Brent, 6 Cranch (U. S.) 187; Dunlap *v.* Berry, 4 Scam. (Ill.) 327, 39 Am. Dec. 413; Hargrave *r.* Penrod, Breese (Ill.) 401, 12 Am. Dec. 201; Trigg *v.* McDonald, 2 Humph. (Tenn.) 386; Barnes *r.* Thompson, 2 Swan (Tenn.) 313; Finnigan *v.* Jarvis, 8 U. C. Q. B. 210; Hutchins *r.* Ruttan, 6 U. C. C. P. 452; Fisher *r.* Gordon, 8 Mo. 386.

Not liable for not levying on interest in land of which he did not know, and which was not of record, the defendant not being in possession: Force *v.* Gardner, 43 N. J. L. 417.

[2] People *r.* Wiltshire, 9 Ill. App. 374; Wilson *r.* Strobach, 59 Ala. 488.

[3] State *r.* Ownby, 49 Mo. 71; Bell *r.* Commonwealth, 1 J.J. Marsh (Ky.) 551; State *v.* Roberts, 7 Halst. (N. J.) 114, 21 Am. Dec. 62. If plaintiff's attorney refuses information, when asked, officer can not be charged with it: Batte *r.* Chandler, 53 Tex. 613.

[4] Henry *r.* Commonwealth, 107 Penn. St. 361.

[5] State *v.* Ownby, 49 Mo. 71; Fisher *v.* Gordon, 8 Mo. 386; Jacobs *v.* McDonald, 8 Mo. 565; Haynes *v.* Tunstall, 5 Ark. 680; Lawton *v.* Erwin, 9 Wend. (N. Y.) 233.

though where the creditor shows that such property existed, the burden is upon the officer to show that by reasonable diligence it could not have been discovered.[1]

§ 755. **Liable for Negligence in making an insufficient Levy.** —So the officer is liable where, through negligence, he fails to levy upon property sufficient to satisfy the debt and costs.[2] "In determining what is a sufficient levy for that purpose," says WALKER, J., "he is left to exercise his own judgment, free from the restraint or control of either the plaintiff or defendant; and is accountable to the plaintiff, on the one hand, if he fails to levy on as much as a reasonable, prudent man would deem sufficient for that purpose, (if so much is to be found within his legal grasp); and, on the other, to the defendant, for an unreasonable and unnecessary levy on his property."[3]

The valuation of the property by the appraisers appointed under the statute is not conclusive for or against the officer's liability.[4] The true standard is the fair value at the time, taking into consideration the probable extent of sacrifice to which it would be subject at a public sale.[5] If the property when levied upon is sufficient under this rule to satisfy the writ, the officer will not be liable though before the sale, not delayed by his fault, the property so depreciates as to be insufficient.[6]

If the officer is unable upon the first levy to obtain sufficient property to satisfy the writ, he should, if other property can be found, make a second levy in order to supply the deficiency.

He will not be justified in taking the debtor's estimate of the value of the property,[7] but he will not be liable if the levy is insufficient because of the act or direction of the plaintiff or his agent.[8]

[1] Bonnell *v.* Bowman, 53 Ill. 460.

[2] French *v.* Snyder, 30 Ill. 339, 83 Am. Dec. 193; Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238; Commonwealth *v.* Lightfoot, 7 B. Mon. (Ky.) 298; Governor *v.* Powell, 9 Ala. 83; Griffin *v.* Ganaway, 8 Ala. 625; Ransom *v.* Halcott, 18 Barb. (N. Y.) 56; Adams *v.* Spangler, 17 Fed. Rep. 133; Pitcher *v.* King, 5 Ad. & El. (n.s.) 758.

[3] In Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238.

[4] Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238.

[5] This depreciation, says the court, in French *v.* Snyder, 30 Ill. 339, 83 Am. Dec. 193, the officer should constantly bear in mind.

[6] Governor *v.* Carter, 3 Hawks. (N. C.) 328, 14 Am. Dec. 588.

[7] Adams *v.* Spangler, 17 Fed. Rep. 133.

[8] Billingsly *v.* Rankin, 2 Swan (Tenn.) 82.

§ 756. **Liability for surrendering Property without Cause.**—Equivalent to an insufficient levy, and hence subjecting the officer to liability, is his inexcusable relinquishment of property lawfully seized upon the writ,[1] as where he gives it up because he concludes erroneously that he has no right to hold it,[2] or where he allows the defendant an unauthorized exemption.[3]

Where goods levied upon as those of the defendant are claimed by a stranger to the writ, the officer who surrenders them to the claimant must assume the burden of proving that they were not, in fact, the goods of the defendant,[4] but if this be proved it is a good defense,[5] even though he has been offered an indemnity.[6]

§ 757. **Liable for negligent Delay in making Levy.**—In a recent case[7] it said that "the result of the adjudications on the subject seems to be that on receipt of the execution, in the absence of specific instructions, the officer must proceed with reasonable celerity to seize the property of the debtor, if he knows, or by reasonable effort can ascertain, that such debtor has property in his bailiwick liable to seizure on execution. The officer must do this as soon after the process comes to his hands as the nature of the case will admit. If he fails to execute the process within an apparently reasonable time, the burden is upon him to show, by averment and proof, that his delay was not in fact

[1] Schneider *v.* Sears, 13 Ore. 69; State *v.* Rayburn, 22 Mo. App. 303.

As to requirements of proof, see Wheeler *v.* McDill, 51 Wis. 356.

[2] Ansonia Brass and Cop. Co. *v.* Babbitt, 74 N. Y. 395.

[3] State *v.* Spencer, 64 Mo. 355, 27 Am. Rep. 244.

[4] Wadsworth *v.* Walliker, 45 Iowa 395, 24 Am. Rep. 788.

[5] Wadsworth *v.* Walliker, 45 Iowa 395, 24 Am. Rep. 788; Denny *v.* Willard, 11 Pick. (Mass.) 519, 22 Am. Dec. 389; Potts *v.* Commonwealth, 4 J.J. Marsh. (Ky.) 202, 20 Am. Dec. 213; Dewey *v.* Field, 4 Metc. (Mass.) 383, 38 Am. Dec. 376; Fuller *v.* Holden, 4 Mass. 501; Tyler *v.* Ulmer, 12 Mass. 169; Learned *v.* Bryant, 13 Mass. 224.

[6] Wadsworth *v.* Walliker, 45 Iowa 395, 24 Am. Rep. 788; Commonwealth *v.* Vandyke, 57 Penn. St. 34; Commonwealth *v.* Watmough, 6 Whart. (Penn.) 117 (distinguishing Connelly *v.* Walker, 9 Wright 449); Lummis *v.* Kasson, 43 Barb. (N. Y.) 373, 376; Dolson *v.* Saxton, 11 Hun (N. Y.) 565.

Evans *v.* Thurston, 53 Iowa 122; *contra*, was based largely upon the statute of that State, and distinguished between an attachment and an execution.

[7] Elmore *v.* Hill, 46 Wis. 618, approved in Elmore *v.* Hill, 51 Wis. 365.

unreasonable. Failing in this, he must respond in damages to the party injured by his negligence."[1]

How much delay will be tolerated depends largely upon the circumstances of each case, but under varying conditions an unexcused delay for four days,[2] for eight days,[3] for three weeks,[4] and for six months[5] has been held to be too great.

This requirement of diligence is increased where the officer is informed of special circumstances which demand immediate action or where he is specially instructed to make the levy at once.[6]

In such a case a delay without excuse for one day[7] may charge the officer, and *a fortiori* a delay for a month.[8]

§ 758. **Liability for Neglect to levy at all.**—*A fortiori* is the officer liable where, without sufficient excuse, he omits to make any levy at all.[9] Where after the exercise of reasonable diligence he has been unable to find property upon which to

[1] Lindsay *v.* Armfield, 3 Hawks (N. C.) 548, 14 Am. Dec. 603; Hearn *v.* Parker, 7 Jones (N. C.) L. 150; Hinman *v.* Borden, 10 Wend. (N. Y.) 367, 25 Am. Dec. 568; Janvier *v.* Vandever, 3 Harr. (Del.) 29; State *v.* Roberts, 12 N. J. L. 114, 21 Am. Dec. 62; State *v.* Brophy, 38 Wis. 413, were cited.

See also Caruthers *v.* Sprayberry, 26 Ga. 437; Chapman *v.* Thornburgh, 17 Cal. 87, 76 Am. Dec. 571; Hunter *v.* Phillips, 56 Ga. 634; Tucker *v.* Bradley, 15 Conn. 46; Kittredge *v.* Bellows, 7 N. H. 399; Garrett *v.* Hamblin, 11 Smedes & M. (Miss.) 219, 49 Am. Dec. 53; Davidson *v.* Waldron, 31 Ill. 120, 83 Am Dec. 206; People *v.* Palmer, 46 Ill. 398, 95 Am. Dec. 418; Farrar *v.* Wingate, 4 Rich. (S. C.) L. 35, 53 Am. Dec. 709.

[2] Elmore *v.* Hill, 51 Wis. 365; State *v.* Roberts, 12 N. J. L. 114, 21 Am. Dec. 62.

[3] Hearn *v.* Parker, 7 Jones (N. C.) L. 150.

[4] Lindsay *v.* Armfield, 3 Hawks (N. C.) 548, 14 Am. Dec. 603.

[5] French *v.* Kemp, 64 Ga. 749. But where no reason for haste is made known, and no request by plaintiff for immediate action, a delay of three or four weeks without collusion or fraud is not enough to make the officer liable: Commonwealth *v.* Magee, 8 Penn. St. 240, 49 Am. Dec. 509, nor is a delay for fourteen days: State *v.* Blanch, 70 Ind. 204.

[6] Hunter *v.* Phillips, 56 Ga. 634; Tucker *v.* Bradley, 15 Conn. 46; Kittredge *v.* Bellows, 7 N. H. 399.

[7] Chapman *v.* Thornburgh, 17 Cal. 87, 76 Am. Dec. 571.

[8] Hunter *v.* Phillips, 56 Ga 634.

[9] Dennis *v.* Whetham, L. R. 9 Q. B. 345, 8 Eng. Rep. 380; Dunlap *v.* Berry, 4 Scam. (Ill.) 327, 39 Am. Dec. 413; Sexton *v.* Nevers, 20 Pick. (Mass.) 451, 32 Am. Dec. 225; Isham *v.* Eggleston, 2 Vt. 270, 19 Am. Dec. 714; Hodsdon *v.* Wilkins, 7 Greenl. (Me.) 113, 20 Am. Dec. 347.

levy, he is, as has been seen,[1] not liable; but where leviable property is shown to exist, the officer has the burden of proving a sufficient reason for not levying.[2]

A bare suspicion that there may be difficulty in regard to the title of property pointed out to him will not justify the officer in refusing to levy;[3] nor that the defendant threatened an injunction which the officer thought would be granted;[4] nor that he was ignorant of his legal right;[5] nor that he supposed that he would best subserve the plaintiff's interests thereby.[6]

Neither is the sickness of the officer any defense. He should either have a sufficient number of deputies or should turn the writ over to another officer.[7]

But where the the writ has been duly recalled,[8] or its further execution stayed,[9] or enjoined,[10] the officer is not liable for not proceeding thereafter. So that the writ was void,[11] (but not where it was merely voidable),[12] or that the property was exempt,[13] or that it did not belong to the debtor, will excuse the officer.[14]

That the property was exempt is a defense which the officer must prove.[15] If he has been duly indemnified he can not then, it has been held, object that the ownership of the property or its liability to the writ was in doubt,[16] but this decision was based largely upon a statute which required the sheriff to proceed if

[1] See *ante*, § 754.

[2] Bonnell *v.* Bowman, 53 Ill. 460; People *v.* Palmer, 46 Ill. 398, 95 Am. Dec. 418.

[3] Marshall *v.* Simpson, 13 La. Ann. 437. Nor will the mere idle assertion of third persons justify him: Dunlap *v.* Berry, 4 Scam. (Ill.) 327, 39 Am. Dec. 413; Robertson *v.* Beavers, 3 Port. (Ala.) 385.

[4] Dawson *v.* Bank, 30 Ga. 664.

[5] Ansonia Brass and Cop. Co. *v.* Babbett, 74 N. Y. 395.

[6] Smith *v.* Judkins, 60 N. H. 127.

[7] Freudenstein *v.* McNier, 81 Ill. 208; Evans *v.* Thurston, 53 Iowa 122.

[8] Wetherbee *v.* Foster, 5 Vt. 136.

[9] Commonwealth *v.* Magee, 8 Penn. St. 240, 49 Am Dec. 509; State *v.* Gilreath, 18 S. C. 100.

[10] McCall *v.* McRae, 10 Ala. 313.

[11] Newburg *v.* Munshower, 29 Ohio St. 617, 23 Am. Rep. 769; Hill *v.* Wait, 5 Vt. 124; Albee *v.* Ward, 8 Mass. 79.

[12] See *ante*, § 745.

[13] Terrell *v.* State, 66 Ind. 570; Bonnell *v.* Bowman, 53 Ill. 460.

[14] Canada *v.* Southwick, 16 Pick. (Mass.) 556; Boynton *v.* Willard, 10 Pick. (Mass.) 166; Cowart *v.* Dunbar, 56 Ga. 417; Crosby *v.* Hungerford, 59 Iowa 712.

[15] Bonnell *v.* Bowman, 53 Ill. 460.

[16] Evans *v.* Thurston, 53 Iowa 122, distinguishing Wadsworth *v.* Walliker, 45 Iowa 395, 24 Am. Rep. 788; Van Cleef *v.* Fleet, 15 Johns. (N. Y.) 147.

indemnified, and in the absence of such a statute, the better rule seems to be the other way.[1]

§ 759. **Liability for Escapes.**—So the officer at common law is liable for the escape of a defendant lawfully arrested upon civil process whether mesne or final.[2] Whenever a person, once lawfully under arrest, is at large, unless by the consent of the creditor or the authority of law, it is an escape. Every liberty not authorized by law constitute an escape.[3]

There are, at the common law, two kinds of escapes; the one wilful or *voluntary*, as it is often called; the other, *negligent*. The escape is voluntary where it is with the knowledge or consent of the officer, and negligent where the prisoner escapes without the knowledge or consent of the officer.[4]

Nothing will excuse an escape at common law of a defendant lawfully arrested except the act of God or the public enemy.[5]

[1] Lummis *v.* Kasson, 43 Barb. (N. Y.) 373, 376; Bayley *v.* Bates, 8 Johns. (N. Y.) 185; Dolson *v.* Saxton, 11 Hun (N. Y.) 565; Commonwealth *v.* Vandyke, 57 Penn. St. 34; Commonwealth *v.* Watmough, 6 Whart. (Penn.) 117.

[2] Blackstone Com. III. 415; Adams *v.* Turrentine, 8 Ired. (N. C.) L. 147, 150, where Chief Justice RUFFIN discusses the question exhaustively: Lansing *v.* Fleet, 2 Johns. (N. Y.) Cas. 3, 1 Am. Dec. 142; Russell *v.* Turner, 7 Johns. (N. Y.) 189, 5 Am. Dec. 254; Blanding *v.* Rogers, 2 Brevard (S. C.) 394, 4 Am. Dec. 595; Duncan *v.* Klinefelter, 5 Watts. (Penn.) 141, 30 Am. Dec. 295; State *v.* Mullen, 50 Ind. 598; State *v.* Hamilton, 33 Ind. 502; Hopkinson *v.* Leeds, 78 Penn. St. 396; Crane *v.* Stone, 15 Kans. 94; Browning *v.* Rittenhouse, 38 N. J. L. 279; Farnsworth *v.* Tilton, 1 D. Chip. (Vt.) 297; Middlebury *v.* Haight, 1 Vt. 423; Crary *v.* Turner, 6 Johns. (N. Y.) 51; Kellogg *v.* Gilbert, 10 Johns. (N. Y.) 220; Pease *v.* Hubbard, 37 Ill. 257; Lantz *v.* Lutz, 8 Penn. St. 405; Faulkner *v.* State, 6 Ark. 150; Brown Co *v.* Butt, 2 Ohio 348; Hootman *v.* Shriner, 15 Ohio St. 43; Colby *v.* Sampson, 5 Mass. 310.

[3] Adams *v.* Turrentine, 8 Ired. (N. C.) L. 147; Colby *v.* Sampson, 5 Mass. 310; McMichel *v.* Rapelye, 4 Ala. 383; Nall *v.* State, 34 Ala. 262; Gage *v.* Graffam, 11 Mass. 183; Bartlett *v.* Willis, 3 Mass. 86; Stevens *v.* Webb, 2 Vt. 344; Sherburn *v.* Beattie, 16 N. H. 437; Bolton *v.* Cummings, 25 Conn. 410, 423; Clap *v.* Cofran, 10 Mass. 373; Burroughs *v.* Lowder, 8 Mass. 373; Freeman *v.* Davis, 7 Mass. 200; McLellan *v.* Dalton, 10 Mass. 190; Riley *v.* Whittiker, 49 N. H. 145, 6 Am. Rep. 474.

[4] Blackstone Com. III. 415; Adams *v.* Turrentine, 8 Ired. L. 147.

[5] Adams *v.* Turrentine, 8 Ired. L. 147; Saxon *v.* Boyce, 1 Bailey (S. C.) 66; Cook *v.* Irving, 4 Strobhart (S. C.) 204; Smith *v.* Hart, 2 Bay. (S. C.) 395; Abbott *v.* Holland, 20 Ga. 598; Fairchild *v.* Case, 24 Wend. (N. Y.) 380; Green *v.* Hern, 2 Penn. 167; Wheeler *v.* Hambright, 9 Serg. & R. (Penn.)

After a voluntary escape, on final process the officer could not retake or detain the prisoner without authority from the plaintiff; but in the case of an escape either voluntary or negligent on mesne process the officer might retake the prisoner, and if he did so before action brought, the recaption formed a defense.[1]

Whether before or after judgment, the common law gave an action on the case for an escape of either kind.[2] Afterwards by statute the action of debt was given against the officer for escapes of debtors in execution.[3]

In the action on the case, the measure of damages was the amount of actual loss sustained;[4] while in debt, for the escape of prisoners arrested on final process, the damages were the full amount of the debt and costs.[5]

In the United States the liability of officers for escapes is usually regulated by statutes which the practitioner should first consult. In general, however, some distinction is made in the nature of the action and the measure of damages between escapes on mesne and final process. So also is a distinction usually made between voluntary and negligent escapes. In the former case the officer is held liable for the whole amount of the debt whether the debtor be solvent or insolvent;[6] while in the latter case, though the whole judgment is *prima facie* the measure of the damages, the officer may show in mitigation that the debtor had no property with which he could have paid or secured the debt in whole or in part.[7]

396; Slemaker *v.* Marriott, 5 G. & J. (Md.) 410; Riley *v.* Whittiker, 49 N. H. 145, 6 Am. Rep. 474.

[1] Lansing *v.* Fleet, 2 Johns. Cas. (N. Y.) 3, 1 Am. Dec. 142; Adams *v.* Turrentine, 8 Ired. L. 147; Bonafous *v.* Walker, 2 T. R. 126; Riley *v.* Whittiker, 49 N. H. 145, 6 Am. Rep. 474; Pariente *v.* Plumbtree, 2 B. & P. 35; Alingham *v.* Flower, 2 B. & P. 246; Langdon *v.* Hathaway, 1 N. H. 369; Butler *v.* Washburn, 25 N. H. 251, 258; Clark *v.* Cleveland, 6 Hill (N. Y.) 344; Breck *v.* Blanchard, 20 N. H. 323, 51 Am. Dec. 222.

[2] Adams *v.* Turrentine, 8 Ired. L. 147.

[3] 13 Ed. I, c. 11; 1 Rich. 2, c. 12. Now changed, 5 and 6 Vic. ch. 98, § 31.

[4] Blanding *v.* Rogers, 2 Brev. (S. C.) 394, 4 Am. Dec. 595; Russell *v.* Turner, 7 Johns. (N. Y.) 189, 5 Am. Dec. 254; Duncan *v.* Klinefelter, 5 Watts. (Penn.) 141, 30 Am. Dec. 295.

[5] Duncan *v.* Klinefelter, 5 Watts. (Penn.) 141, 30 Am. Dec. 295; Shewell *v.* Fell, 3 Yeates (Penn.) 17; 4 Yeates 47.

[6] State *v.* Hamilton, 33 Ind. 502.

[7] State *v.* Mullen, 50 Ind. 598.

But it is a good defense to an action for an escape that the process was void,[1] or the arrest unlawful, as that the defendant was privileged from arrest.[2]

§ 760. **Liability for Neglect in keeping Property seized.**— Having lawfully seized property upon his writ, the officer owes a duty to the plaintiff in keeping the property until the time arrives when it may lawfully be sold and its proceeds applied upon the plaintiff's claim.

The officer is not an insurer of the safety of the property, nor is he liable, absolutely and in all events, for its safe keeping.[3] His duty is to exercise reasonable and ordinary care and diligence in the matter.[4] If he does this, he is not liable though the property be injured or destroyed ;[5] if he does not do this, he is liable to the plaintiff for such damages as he may sustain by reason of injury to or destruction of the property thereby occasioned.[6]

[1] Housh *v.* People, 75 Ill. 487; Albee *v.* Ward, 8 Mass. 79; Howard *v.* Crawford, 15 Ga. 423; Ray *v.* Hogeboom, 11 Johns. (N. Y.) 433; Phelps *v.* Barton, 13 Wend. (N. Y.) 68; Carpenter *v.* Willett, 31 N. Y. 90.

[2] Bissell *v.* Kip, 5 Johns N. Y. 89; Scott *v.* Shaw, 13 Johns. (N. Y.) 378.

[3] Eastman *v.* Judkins, 59 N. H. 576.

[4] Cresswell *v.* Burt, 61 Iowa 590; Burns *v.* Lane, 138 Mass. 350; Eastman *v.* Judkins, 59 N. H. 576; Noble *v.* Desmond, 72 Cal. 330; Browning *v.* Hanford, 5 Hill (N. Y.) 588, 40 Am. Dec. 369; Mills *v.* Gilbreth, 47 Me. 320, 74 Am. Dec. 487; Crofut *v.* Brandt, 58 N. Y. 111; Moore *v.* Westervelt, 21 N. Y. 107, 27 N. Y. 234; Briggs *v.* Taylor, 28 Vt. 180; Dorman *v.* Kane, 5 Allen (Mass.) 38; Parrott *v.* Dearborn, 104 Mass. 104; Snell *v.* State, 2 Swan (Tenn.) 344; Bridges *v.* Perry, 14 Vt. 262; Runlett *v.* Bell, 5 N. H. 435; Richards *v.* Gilmore, 11 N. H. 493; Lovell *v.* Sabin, 15 N. H. 29; Kendall *v.* Morse, 43 N. H. 553; Jenner *v.* Joliffe, 9 Johns. (N. Y.) 381; Stewart *v.* Nunemaker, 2 Ind. 47; State *v.* Nelson, 1 Ind. 522.

A greater degree of care is required in some cases. Thus in Hartleib *v.* McLane, 44 Penn. St. 510, 84 Am. Dec. 464, it is held that a sheriff is absolutely liable for the forthcoming of property levied on by him under an execution, unless he has been deprived of it by the act of God, inevitable accident or the public enemy.

See also holding more than ordinary care requisite: Collins *v.* Terrall, 3 Smedes & M. (Miss.) 386; Richardson *v.* Spencer, 6 Ohio 4; Wheeler *v.* Hambright, 9 Serg. & R. 390; Gilmore *v.* Moore, 30 Ga. 628.

The weight of authority, however, supports the text.

[5] Thus he is not liable for destruction of goods by accidental fire: Browning *v.* Hanford, 5 Hill (N. Y.) 588, 40 Am. Dec. 369: Price *v.* Stone, 49 Ala. 551; Crofut *v.* Brandt, 47 How. Pr. 267, 58 N. Y. 111; or by a storm: Moore *v.* Westervelt, 25 How. Pr. Ex. 281, 21 N. Y. 107, 27 N. Y. 234.

[6] As to liability of United States marshal for negligent keeping of a ship, see Jones *v.* McGuirk, 51 Ill. 382, 99 Am. Dec. 556.

Ordinary care in such cases has been said to be that degree of care which an owner of ordinary prudence and sagacity would exercise in preserving like property of his own.[1]

§ 761. **Same Subject—Delivery Bonds—Receiptors.**—The statutes of many of the States provide that a defendant, whose property has been seized upon a writ, may be permitted to retain it in his possession by executing and delivering to the officer a bond with sureties conditioned that the property shall be forthcoming when necessary to satisfy the writ. These bonds are ordinarily known as delivery or forthcoming bonds.

The officer is not an insurer of the solvency of the obligors in such a bond, but is bound to use reasonable care and diligence in accepting only such as are solvent and competent.[2]

It is also a common practice for the officer to release the property upon taking from the defendant or others a receipt for the property conditioned for the delivery of the property to the officer at a time specified or the payment of the claim, interests and costs. Such a receiptor is regarded as the bailee or servant of the officer, and the officer is liable for a loss occurring by the negligence, infidelity or insufficiency of the receiptor,[3] but not for losses for which the officer would not himself have been liable had the goods remained in his own possession.[4]

But the officer can not be held liable for the default of a receiptor chosen by the plaintiff himself.[5]

§ 762. **Liability for accepting insufficient Bonds.**—So where it is the duty of the officer to take, for the protection of the plaintiff, bonds or other securities, it is the officer's duty not only to obtain the bond, bail or other security but to use reasonable care and diligence to see that none but competent and responsible sureties are accepted, and that the securities themselves are in proper and sufficient form.[6]

[1] Croswell *v.* Burt, 61 Iowa 590. See also Jones *v.* McGuirk, 51 Ill. 382, 99 Am. Dec. 556; Noble *v.* Desmond, 72 Cal. 330.

[2] People *v.* Robinson, 89 Ill. 159.

[3] Donham *v.* Wild, 19 Pick. (Mass.) 520, 31 Am. Dec. 161.

[4] Browning *v.* Hanford, 5 Hill. (N. Y.) 588, 40 Am. Dec. 369.

[5] Donham *v.* Wild, 19 Pick. (Mass.) 520, 31 Am. Dec. 161; Hamilton *v.* Dalziel, 2 W. Bl. 952; DeMoranda *v.* Dunkin, 4 T. R. 119.

[6] Noble *v.* Desmond, 72 Cal. 330; Carter *v.* Duggan, 144 Mass. 32; Kreher *v.* Mason, 25 Mo. App. 291; Harriman *v.* Wilkins, 20 Me. 93.

He is not an insurer of the solvency of the sureties, unless the statute makes him so, nor is he liable, though deceived, where he exercises reasonable care,[1] but if he discharges the debtor or the goods without any bond at all,[2] or one on which the sureties' names are forged;[3] or if he accepts insufficient sureties without making a reasonable effort to ascertain their solvency,[4] he is liable. *A fortiori* is he liable where he accepts sureties who he knows are irresponsible.[5]

That the plaintiff sued upon the bond taken and was unable to recover is evidence of the insufficiency of the bond.[6]

If the surety is solvent when taken, his after occurring insolvency will not render the officer liable.[7]

The liability of the officer in this, as in other cases, is to the plaintiff whose writ he serves and not to the other creditors.[8]

§ 763. **Liability in making Sales.**—The officer also owes to the plaintiff the duty to use reasonable care and diligence in so selling the property seized as to realize from it the largest proceeds. Hence if he negligently fails to properly advertise the sale,[9] or fails to use reasonable diligence in procuring the best price,[10] he is liable to the plaintiff for the loss sustained.

His sale must be at auction,[11] and for cash.[12] If he gives credit,[13] or permits a purchaser to take away the property without payment,[14] he is liable to the plaintiff. He should demand the money of the purchaser, and, if not paid, he should then and there avoid the sale and re-sell the property, or postpone the sale, giving notice, and make a new sale.[15] If he receives from

[1] Hirdal *v.* Blades, 1 Marsh. 27, 5 Taunt. 225; Robinson *v.* People, 8 Ill. App. 279.

[2] Crane *v.* Warner, 14 Vt. 40.

[3] Marsh *v.* Bancroft, 1 Metc. (Mass.) 497.

[4] Scott *v.* Waithman, 3 Stark. 168; Jeffery *v.* Bastard, 4 Ad. & El. 823; Newbert *v.* Cunningham, 50 Me. 231.

[5] Gerrish *v.* Edson, 1 N. H. 82.

[6] Carter *v.* Duggan, 144 Mass. 32.

[7] Commonwealth *v.* Thompson, 3 Dana (Ky.) 301.

[8] Ford *v.* Perkerson, 59 Ga. 359.

[9] Freeman *v.* Leonard, 99 N. C. 274; Sexton *v.* Nevers, 20 Pick. (Mass.) 451, 32 Am. Dec. 225; Johnson *v.* Reese, 28 Ga. 353, 73 Am. Dec. 757.

[10] Todd *v.* Hoagland, 36 N. J. L. 352.

[11] Sheehy *v.* Graves, 58 Cal. 449.

[12] Payne *v.* Cowan, 1 J. J. Marsh. (Ky.) 12.

[13] Disston *v.* Strauck, 42 N. J. L. 546.

[14] Disston *v.* Strauck, 42 N. J. L. 546.

[15] Robinson *v.* Brennan, 90 N. Y. 208.

a purchaser anything instead of money, he is bound to account for it to the plaintiff.[1]

No damages, however, can be recovered where the sale is not held or is delayed at the direction of the plaintiff or his attorney.[2]

§ 764. **Liability for not making Return and for a false Return.** —It is the duty of the officer to whom a writ has been delivered for service to return the same within the time prescribed by law with a true statement endorsed thereon of what he has done by virtue of it in the execution of its command. The return should show either that the officer has fully executed it according to its command, or, if this has not been done, then it should show a sufficient excuse for not doing so.

The time, nature and essentials of a valid return of process of various kinds are quite fully regulated by statutes in the different States, which also prescribe the method of enforcing a return and the penalties and remedies for a neglect.

But, in general, under these statutes, though perhaps not at common law,[3] the officer is liable to the plaintiff in the writ for such damages as he may proximately sustain by reason of the officer's neglect to make any return at all.[4] He is also liable for making a false return.[5]

[1] Robinson *v.* Brennan, 90 N. Y. 208.

[2] State *v.* Yongue, 9 Rich. (S. C.) 413; State *v.* Boyd, 63 Ind. 428.

[3] Moreland *v.* Leigh, 1 Stark, 388, note; Commonwealth *v.* McCoy, 8 Watts (Penn.) 153, 34 Am. Dec. 445; Pardee *v.* Robertson, 6 Hill (N. Y.) 550.

[4] Sloan *v.* Case, 10 Wend (N. Y.) 370, 25 Am. Dec. 569, and note; Laflin *v.* Willard, 16 Pick. (Mass.) 64, 26 Am. Dec. 629; Isham *v.* Eggleston, 2 Vt. 270, 19 Am. Dec. 714; Johnston *v.* Governor, 2 Bibb (Ky.) 186, 4 Am. Dec. 694; Clark *v.* Foxcroft, 6 Greenl. (Me.) 296, 20 Am. Dec. 309; Fowler *v.* Lee, 10 Gill. & J. (Md.) 358, 32 Am. Dec. 172; Evans *v.* Governor, 18 Ala. 659, 54 Am. Dec. 172; White *v.* Wilcox, 1 Conn. 347; Burk *v.* Campbell, 15 Johns. (N. Y.) 456; McGregor *v.* Brown, 5 Pick. (Mass.) 170; Keith *v.* Commonwealth, 5 J. J. Marsh. (Ky.) 359; Runlett *v.* Bell, 5 N. H. 433; Goodnow *v.* Willard, 5 Metc. (Mass.) 517; Milburn *v.* State, 11 Mo. 188, 47 Am. Dec. 148; Norris *v.* State, 22 Ark. 524; Noble *v.* Whetstone, 45 Ala. 361; James *v.* Thompson, 12 La. Ann. 174; Moore *v.* McClief, 16 Ohio St. 50; Fowler *v.* McDaniel, 6 Heisk. (Tenn.) 529; Smith *v.* Tooke, 20 Tex. 750; Dunphy *v.* Whipple, 25 Mich. 10.

[5] Corson *v.* Hunt, 14 Penn. St. 510, 53 Am. Dec. 568; Houser *v.* Hampton, 7 Ired. (N. C.) 333; McArthur *v.* Pease, 46 Barb. (N. Y.) 423; Green *v.* Ferguson, 14 Johns. (N. Y.) 389;

In an action for not making a return, the plaintiff need only show the issue of the writ to the officer; the latter must then show an excuse for its non-return.[1]

It is no excuse for not returning a writ that the defendant is insolvent,[2] or bankrupt,[3] or that the writ was irregular,[4] but it is a defense that the judgment was paid before the writ issued.[5]

Where a sheriff fails to return an execution, the debt is assumed to be lost, and the execution creditor is *prima facie* entitled to recover of him the full amount, but the sheriff may, nevertheless, show that the defendant had no property from which the debt could have been made.[6]

The officer can not be held liable for neglecting to return [7] or for a false return [8] where the plaintiff has suffered no injury.

§ 765. **Liability for Money received.**—It is, of course, the duty of the officer to pay over to the plaintiff, less his legal costs and fees, the proceeds realized upon the writ, and for a default he [9] and his sureties [10] are liable.

And if the officer has accepted something else than money he must account for what he has received.[11]

§ 766. **The Measure of Damages.**—The measure of damages to be recovered in an action against the officer is the actual amount of the loss sustained by his default. If the whole debt is lost, then it constitutes the proper measure; but if part of the debt only is lost, then that part is the measure.[12] The loss complained of must, as in other cases, be the proximate

Palmer *v.* Crane, 8 Mo. 619; Koch *v.* Coots, 43 Mich. 30; Raynsford *v.* Phelps, 43 Mich. 342, 38 Am. Rep. 189; Prosser *v.* Coots, 50 Mich. 262; Dennis *v.* Whetham, L. R. 9 Q. B. 345, 8 Eng. Rep. 380; Brasyer *v.* Maclean, L. R. 6 Pr. C. C. 398, 13 Eng. Rep. 222.

[1] State *v.* Schar, 50 Mo. 333.

[2] Atkinson *v.* Heer, 44 Ark. 174; Heer *v.* Atkinson, 40 Ark 377; McGee *v.* Robins, 2 La. Ann. 411; Bassett *v.* Bowmar, 3 B. Mon. 325.

[3] Noble *v.* Whetstone, 45 Ala. 361; Cox *v.* Ross, 56 Miss. 481.

[4] McRae *v.* Colclough, 2 Ala. 74.

[5] Evans *v.* Boggs, 2 Watts & Serg. (Penn.) 229.

[6] Dunphy *v.* Whipple, 25 Mich. 10.

[7] State *v.* Case, 77 Mo. 247; Stevenson *v.* Judy, 49 Mo. 227. But *contra*, see Bachman *v.* Fenstermacher, 112 Penn. St. 331; Atkinson *v.* Heer, 44 Ark. 174.

[8] Stimson *v.* Farnham, L. R. 7 Q. B. 175, 1 Eng. Rep. 60.

[9] Norton *v.* Nye, 56 Me. 211.

[10] Nash *v.* Muldoon, 16 Nev. 404.

[11] Robinson *v.* Brennan, 90 N. Y. 208.

[12] People *v.* Palmer, 46 Ill. 398, 95 Am. Dec. 418; French *v.* Snyder, 30

result of the officer's default, and it must also have been one to which the plaintiff's own negligence or default has not contributed.[1]

It is, therefore, always open for the officer to show that, notwithstanding his default, the plaintiff has suffered no injury,[2] or that it was brought about by the plaintiff's own conduct.[3]

A distinction is, however, made between acts done with the intent to injure and those where the loss occurred through the mere unintentional neglect of an officer acting in good faith.

Thus, as has been seen,[4] an officer who has permitted a voluntary escape of a debtor held on execution, may be charged with the whole debt whether the debtor be solvent or insolvent;[5] and so the officer will be charged with the full amount where he wilfully neglects to serve an execution with the intention of injuring the plaintiff.[6]

But, in other cases, the actual amount lost is the amount to be recovered. Thus in an action for not levying upon certain property, the value of the property, when less than the amount of the judgment, is the proper measure and not the full amount of the judgment.[7] So, as has been seen, the officer may show that the debtor was insolvent,[8] that goods pointed out were exempt from execution,[9] or that they belonged to another,[10] or that the debt is still collectible from the defendant.[11]

Ill. 339, 83 Am. Dec. 193; Mortland *v.* Smith, 32 Mo. 225, 82 Am. Dec. 128; Corson *v.* Hunt, 14 Penn. St. 510, 53 Am. Dec. 568; Arnold *v.* Commonwealth, 8 B. Mon. (Ky.) 111; Bondurant *v.* Lane, 9 Port. (Ala.) 484; Marshall *v.* Simpson, 13 La. Ann. 437; State *v.* Miller, 48 Mo. 251; Dorrance *v.* Commonwealth, 13 Penn. St. 160; Sherrill *v.* Shuford, 10 Ired. (N. C.) L. 200; Blodgett *v.* Brattleboro, 30 Vt. 579; Wakefield *v.* Moore, 65 Ga. 268; Ivy *v.* Colquitt, 63 Ga. 509; State *v.* Lowrance, 64 N. C. 483; Abbott *v.* Gillespy, 75 Ala. 180.

[1] State *v.* Cave, 49 Mo. 129; Norris *v.* State, 22 Ark. 524; Shannon *v.* Clark, 3 Dana (Ky.) 154; Robinson *v.* Harrison, 7 Humph. (Tenn.) 189; State *v.* Yongue, 9 Rich. (S. C.) 443.

[2] Abbott *v.* Gillespy, 75 Ala. 180; Stimson *v.* Farnham, L. R. 7 Q. B. 175, 1 Eng. Rep. 60.

[3] See cases in note 1, *supra*.

[4] See *ante*, § 759.

[5] State *v.* Hamilton, 33 Ind. 502.

[6] Hodsdon *v.* Wilkins, 7 Greenl. (Me.) 113, 20 Am. Dec. 347.

[7] Corson *v.* Hunt, 14 Penn. St. 510, 53 Am. Dec. 568; Dennis *v.* Whetham, L. R. 9, Q. B. 345, 8 Eng. Rep. 380; Parker *v.* Peabody, 56 Vt. 221; Harris *v.* Murfree, 54 Ala. 161.

[8] McNally *v.* Kerswell, 37 Me. 559; Wilson *v.* Strobach, 59 Ala. 488.

[9] Terrell *v.* State, 66 Ind. 570; Bonnell *v.* Bowman, 53 Ill. 460.

[10] Canada *v.* Southwick, 16 Pick. (Mass.) 556.

[11] Townsend *v.* Libbey, 70 Me. 162.

b. To the Defendant in the Writ.

§ 767. **In general.**—The officer may also incur liability to the defendant in the writ. This liability may arise in a variety of ways, as from an arrest or seizure without process or upon void process, the arrest of a person privileged from arrest, the seizure of exempt property, and the like, all of which will be specifically considered.

But, first, it must be noticed that—

§ 768. **No Liability arises from proper Service of valid Process.**—Where process, fair upon its face, is put into the officer's hands for service, it is his duty, as has been seen,[1] to proceed to execute it according to its command. Out of this duty arises the necessity of protection, and the rule is well settled that for the proper service of such process the office incurs no liability, however disastrous may be the effects upon the defendant, or however unlawful may have been the proceedings which preceded it.[2]

A more stringent rule has been applied in Vermont, it being there held that where he refuses or neglects to levy he makes the debt his own, and cannot escape by showing that the debtor was insolvent. Hall *v.* Brooks, 8 Vt. 485, 30 Am. Dec. 485.

[1] See *ante*, § 744–745.

[2] Nowell *v.* Tripp, 61 Me. 426, 14 Am. Rep. 572; Judkins *v.* Reed, 48 Me. 386; Caldwell *v.* Hawkins, 40 Me. 526; Ford *v.* Clough, 8 Me. 342, 23 Am. Dec. 513; Kellar *v.* Savage, 29 Me. 199; State *v.* McNally, 34 Me. 210, 56 Am. Dec. 650; Tremont *v.* Clark, 33 Me. 482; Bethel *v.* Mason, 55 Me. 501; Bird *v.* Perkins, 33 Mich. 28; Wall *v.* Trumbull, 16 Mich. 228; Savacool *v.* Boughton, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181; Chegaray *v.* Jenkins, 5 N. Y. 376; McGuinty *v.* Herrick, 5 Wend. 240; Wilcox *v.* Smith, 5 Wend. 231, 21 Am. Dec. 213; Alexander *v.* Hoyt, 7 Wend. 89; Beach *v.* Furman, 9 Johns. (N. Y.) 228; Coon *v.* Congden, 12 Wend. 496; Bennett *v.* Burch, 1 Denio (N. Y.) 141; Webber *v.* Gay, 24 Wend. 485; Abbott *v.* Yost, 2 Denio 86; Dunlap *v.* Hunting, 2 Denio 643, 43 Am. Dec. 763; Cornell *v.* Barnes, 7 Hill (N. Y.) 35; People *v.* Warren, 5 Hill 440; Sheldon *v.* Van Buskirk, 2 N. Y. 473; Turner *v.* Franklin, 29 Mo. 285; Glasgow *v.* Rowse, 43 Mo. 479; St. Louis &c., Assn. *v.* Lightner, 47 Mo. 393; State *v.* Dulle, 48 Mo. 282; Walden *v.* Dudley, 49 Mo. 419; Ranney *v.* Bader, 67 Mo. 476; Holden *v.* Eaton, 8 Pick. (Mass.) 436; Colman *v.* Anderson, 10 Mass. 105; Sprague *v.* Bailey, 19 Pick. (Mass.) 436; Upton *v.* Holden, 5 Metc. (Mass.) 369; Lincoln *v.* Worcester, 8 Cush. (Mass.) 55; Aldrich *v.* Aldrich, 8 Metc. 102; Hays *v.* Drake, 6 Gray (Mass.) 387; Howard *v.* Proctor, 7 Gray 128; Williamstown *v.*

The process which will afford the officer this protection, as being fair upon its face, has been defined by Judge COOLEY as that "which proceeds from a court, magistrate or body having authority of law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority."[1]

§ 769. **Same Subject—What is meant by Process.**—"The word process," continues Judge COOLEY,[2] "is made use of in this rule in a very comprehensive sense, and will include any writ, warrant, order or other authority which purports to empower a ministerial officer to arrest the person, or to seize or enter upon the property of an individual, or to do any act in respect to such person or property, which, if not justified, would constitute a trespass.[3] Thus, a capias *ad respondendum*, or any warrant of arrest, is process;[4] so is a writ of possession,[5] (or a writ of right);[6] so is any execution which authorizes a levy upon property;[7] and

Willis, 15 Gray 427; Cheever *v.* Merritt, 5 Allen (Mass.) 563; Underwood *v.* Robinson, 106 Mass. 296; Brainerd *v.* Head, 15 La. Ann. 489; Blanchard *v.* Goss, 2 N. H. 491; Henry *v.* Sargent, 13 N. H. 321, 40 Am. Dec. 146; State *v.* Weed, 21 N. H. 262, 53 Am. Dec. 188; Rice *v.* Wadsworth, 27 N. H. 104; Keniston *v.* Little, 30 N. H. 318, 64 Am. Dec. 297; Kelley *v.* Noyes, 43 N. H. 209; Moore *v.* Allegheny City, 18 Penn. St. 55; Billings *v.* Russell, 23 Penn. St. 189, 62 Am. Dec. 330; Cunningham *v.* Mitchell, 67 Penn. St. 78; Shaw *v.* Dennis, 5 Gilm. (Ill.) 405; Hill *v.* Figley, 25 Ill. 156; Allen *v.* Scott, 13 Ill. 80; Loomis *v.* Spencer, 1 Ohio St. 153; Thames Manuf. Co. *v.* Lathrop, 7 Conn. 550; Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324; Neth *v.* Crofut, 30 Conn. 580; Grumon *v.* Raymond, 1 Conn. 40, 6 Am. Dec. 200; Prince *v.* Thomas, 11 Conn. 472; McLean *v.* Cook, 23 Wis. 364; Noland *v.* Busby, 28 Ind. 154; LeRoy *v.* East Saginaw C. Ry. Co., 18 Mich. 233, 100 Am. Dec. 162; Lott *v.* Hubbard, 44 Ala. 593; State *v.* Lutz, 65 N. C. 503; Gore *v.* Mastin, 66 N. C. 371; Erskine *v.* Hohnbach, 14 Wall. (U. S.) 613; Bailey *v.* Railroad Co. 22 Wall. 604; Byles *v.* Genung, 52 Mich. 504.

[1] Cooley on Torts, 460.

[2] Cooley on Torts, 460.

[3] Citing McGuinty *v.* Herrick, 5 Wend. (N. Y.) 240; Loomis *v.* Spencer, 1 Ohio St. 153.

[4] Citing Parsons *v.* Lloyd, 3 Wils. 341; Neth *v.* Crofut, 30 Conn. 580; Brother *v.* Cannon, 2 Ill. 200; Brainard *v.* Head, 15 La. Ann. 489; State *v.* McNally, 34 Me. 210, 56 Am. Dec. 650; State *v.* Weed, 21 N. H. 262, 53 Am. Dec. 188; Warner *v.* Shed, 10 Johns. (N. Y.) 138; Underwood *v.* Robinson, 106 Mass. 296.

[5] Citing Lombard *v.* Atwater, 43 Iowa 599.

[6] Citing Colman *v.* Anderson, 10 Mass. 105.

[7] Citing Thames Manuf. Co. *v.* Lathrop, 7 Conn. 550; Ives *v.* Lucas,

so is any authority which is issued to a collector of taxes and which purports to empower him to collect the tax by distress of goods.[1] These are only illustrations of a class too numerous to be specified in detail."

§ 770. **Liability for illegal Arrest.**—But where the officer arrests a person without a warrant where a warrant is required,[2] or upon a warrant not fair upon its face as already defined,[3] or where, through mistake or otherwise, he arrests one person, without his fault, upon a warrant issued against another;[4] or arrests the right person, by the wrong name, unless it be shown that he was known as well by one as by the other;[5] or where he makes the arrest in a place beyond his jurisdiction;[6] or where he takes the body of a debtor on execution without searching for goods;[7] in these, and other like cases, the officer's character or writ affords him no protection and he is liable to the party injured.

The officer is bound to know the law in respect to these matters, and must keep within it at his peril.[8]

1 C. & P. 7; Hill *v.* Figley, 25 Ill. 156; Gott *v.* Mitchell, 7 Blackf. (Ind.) 270; Watkins *v.* Wallace, 19 Mich. 57.

[1] Citing Erskine *v.* Hohnbach, 14 Wall. (U. S.) 613; Shaw *v.* Dennis, 10 Ill. 405; Noland *v.* Busby, 82 Ind. 154; Kellar *v.* Savage, 20 Me. 199; Caldwell *v.* Hawkins, 40 Me. 526; Nowell *v.* Tripp, 61 Me. 426, 14 Am. Rep. 572; Clark *v.* Axford, 5 Mich. 182.

[2] Malcomson *v.* Scott, 56 Mich. 459, as where the officer acts upon a letter or telegram from one who purports to be an officer in another State; Bright *v.* Patton, 5 Mack. (D. C.) 534, 60 Am. Rep. 396; Bath *v.* Metcalf, 145 Mass 274, 1 Am. St. Rep. 455: cases where the arrest was made upon suspicion; Brock *v.* Stimson, 108 Mass. 520, 11 Am. Rep. 390; State *v.* Parker, 75 N. C. 249, 22 Am. Rep. 669: cases where the officer after the arrest failed to take the defendant before the court.

[3] Savacool *v.* Boughton, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181; Mitchell *v.* Foster, 12 A. & E. 472; Commonwealth *v.* Crotty, 10 Allen (Mass.) 403, 87 Am. Dec. 669, Kilbourn *v.* Thompson, 103 U. S. 168.

[4] Dunston *v.* Paterson, 2 C. B. (N. S.) 495; Formwalt *v.* Hylton, 66 Tex. 288; Hays *v.* Creary, 60 Tex. 445.

[5] Griswold *v.* Sedgwick, 6 Cow. (N. Y.) 456, s. c. 1 Wend. 126; Mead *v.* Haws, 7 Cow. (N. Y.) 332; McMahan *v.* Green, 34 Vt. 69, 80 Am. Dec. 665; Shadgett *v.* Clipson, 8 East 328; Hoye *v.* Bush, 1 Man. & G. 784; Kelly *v.* Lawrence, 3 H. & C. 1; Johnston *v.* Riley, 13 Ga. 97.

[6] People *v.* Burt, 51 Mich. 199.

[7] Barhydt *v.* Valk, 12 Wend. (N. Y.) 145; 27 Am. Dec. 124, but plaintiff must show that he had property clearly subject to execution and that he disclosed the fact to the officer, who nevertheless refused to take it.

[8] Malcomson *v.* Scott, 56 Mich. 459.

A warrant, though fair upon its face, issued under an unconstitutional statute affords the officer no protection.[1]

The arrest, however, of a person privileged from arrest does not, as has been seen, render the officer liable.[2]

§ 771. **Liability for refusing Bail or other Abuses.**—So though the process for the arrest of the defendant is valid, yet the officer may render himself liable to the defendant for abuses of his process, as where the officer refuses proper bail,[3] or uses excessive force or subjects the defendant to unwarrantable insults or indignities, or treats him with cruelty, denies him proper food, or otherwise subjects him to oppression or undue hardship,[4] or uses the process to extort money or other things from the defendant.[5]

§ 772. **Liability for Levy under void, paid, expired or superseded Process.**—So where the officer makes a levy upon the defendant's property under a writ which is void upon its face,[6] or if he proceeds with the execution of a writ after he has received knowledge that it has been stayed, superseded or enjoined,[7] or after the time limited for its service has expired,[8] his process will afford him no justification, and he will be liable to the defendant for the injury he inflicts.

Until he receives notice of the supersedeas of his writ he is bound to proceed.[9] And he is not liable for proceeding with an execution, though the judgment has been paid since its issue of which fact the debtor informs him, if the plaintiff has not directed him to forbear.[10] Neither is he liable for serving an exe-

[1] Fisher *v.* McGirr, 1 Gray (Mass.) 1, 61 Am. Dec. 381; Ely *v.* Thompson, 3 A. K. Marsh. (Ky.) 70.

[2] See *ante*, § 648 n. 3.

[3] Berrier *v.* Moorhead, 22 Neb. 687, 36 N. W. Rep. 118.

[4] Wood *v.* Graves, 144 Mass. 365, 59 Am. Rep. 95; Baldwin *v.* Weed, 17 Wend. (N. Y.) 224; Page *v.* Cushing, 38 Me. 523.

[5] Holley *v.* Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; Baldwin *v.* Weed, 17 Wend. (N. Y.) 224.

[6] Cable *v.* Cooper, 15 Johns. (N. Y.) 152.

[7] Hopkinson *v.* Sears, 14 Vt. 494, 39 Am. Dec. 236; O'Donnell *v.* Mullin, 27 Penn. St. 199, 67 Am. Dec. 458; Buffandeau *v.* Edmondson, 17 Cal. 436, 79 Am. Dec. 139.

[8] Vail *v.* Lewis, 4 Johns. (N. Y.) 450, 4 Am. Dec. 309; Stoyel *v.* Lawrence, 3 Day (Conn.) 1.

[9] Johnson *v.* Fox, 51 Ga. 270; Bryan *v.* Hubbs, 69 N. C. 428.

[10] Twitchell *v.* Shaw, 10 Cush. (Mass.) 46, 57 Am. Dec. 80; Wilmarth *v.* Burt, 7 Mete. (Mass.) 257; Mason *v.* Vance, 1 Sneed (Tenn.) 178, 60 Am. Dec. 144.

cution, fair on its face, issued upon a judgment previously paid.[1]

§ 773. **Liability for excessive Levy.**—So the officer is liable to the defendant in the writ if he makes an excessive levy.[2] What rules govern the question of an excess in levying have already been considered.[3]

§ 774. **Liability for disregarding Exemptions.**—The officer is also liable to the defendant where he disregards, ignores or denies the exemptions to which the defendant is by law entitled.[4] Such an act, in the case of personality, constitutes a conversion and, where he knows of the exemption, or is bound by law to ascertain and set it off, renders the officer liable as a trespasser from the beginning.[5]

The measure of damages is, ordinarily, the value of the property of which the party has been wrongfully deprived.[6] These damages may, in most of the States, be recovered in an action

[1] Mason *v.* Vance, 1 Sneed (Tenn.) 178, 60 Am. Dec. 144; Luddington *v.* Peck, 2 Conn. 700; Lewis *v.* Palmer, 6 Wend. (N. Y.) 367.

[2] Lawson *v.* State, 10 Ark. 28, 50 Am. Dec. 238; Williamson *v.* Dow, 32 Me. 559; Handy *v.* Clippert, 50 Mich. 355; Cornelius *v.* Burford, 28 Tex. 203, 91 Am. Dec. 309.

In an action against a sheriff for an excessive levy made by one of his deputies, COOLEY, J., said: "It cannot be tolerated that such a seizure shall go unrebuked. The officer is or should be a minister of justice, not of oppression; and he should execute every writ put into his hands in such a manner as to do as little mischief to the debtor as possible." Handy *v.* Clippert, 50 Mich. 355.

[3] See *ante*, § 755.

[4] McCoy *v.* Brennan, 61 Mich. 362, 1 Am. St Rep. 589; Van Dresor *v.* King, 34 Penn St. 201, 75 Am. Dec. 643; Dow *v.* Smith, 7 Vt. 465, 29 Am. Dec. 202; Hall *v.* Penney, 11 Wend. (N. Y.) 44, 25 Am. Dec. 601; State *v.* Moore, 19 Mo. 369, 61 Am. Dec. 563; Stilson *v.* Gibbs, 53 Mich. 280; Spencer *v.* Brighton, 49 Me. 326; Mark's Appeal, 34 Penn. St. 36, 75 Am. Dec. 631; Bonnel *v.* Dunn, 28 N. J. L. 153; Cornelia *v.* Ellis, 11 Ill. 585; Freeman *v.* Smith, 30 Penn. St. 264; Stephens *v* Lawson, 7 Blackf. (Ind.) 275; Atkinson *v.* Gatcher, 23 Ark. 101; Perry *v.* Lewis, 49 Miss. 443; Handy *v.* Clippert, 50 Mich. 355; Scott *v.* Kenan, 94 N. C. 296; McGuire *v.* Galligan, 57 Mich. 38.

[5] State *v.* Johnson, 12 Ala. 840, 46 Am. Dec. 283.

McCoy *v.* Brennan, 61 Mich. 362, 1 Am. St. Rep. 589; Wilson *v.* Ellis, 28 Penn. St. 238. See Bonnel *v.* Dunn, 29 N. J. L. 435; McGee *v.* Anderson, 1 B. Mon. (Ky.) 187, 36 Am. Dec. 570; State *v.* Morgan, 3 Ired. (N. C.) L. 186, 38 Am. Dec. 714.

[6] Stilson *v.* Gibbs, 53 Mich. 280.

of trespass, case or trover, or their equivalent actions under the reformed procedure.[1]

The specific articles may, likewise, in most of the States, be recovered by the debtor in an action of replevin.[2]

[1] Van Dresor *v.* King, 34 Penn St. 201, 75 Am. Dec. 643, where it was held that the case would lie as well as trespass. In an exhaustive note to this case it is said: "At common law, an officer who disregards a debtor's exemption right properly perfected, and sells the property without allowing the debtor the benefits of the exemption statute, is a trespasser, and is liable to the debtor in an action of trespass. Dow *v.* Smith, 7 Vt. 465, 29 Am. Dec. 202; Bonnell *v.* Dunn, 28 N. J. L. 153; Cornelia *v.* Ellis, 11 Ill. 585; Pace *v.* Vaughan, 6 Ill. 30; Wymond *v.* Amsbury, 2 Col. 213; Wilson *v.* Ellis, 28 Penn. St. 238; Freeman *v.* Smith, 30 Penn St. 264; Stephens *v.* Lawson, 7 Blackf. (Ind.) 275; Atkinson *v.* Gatcher, 23 Ark. 101; Hall *v.* Penney, 11 Wend. 44, 25 Am. Dec. 601; see Davis *v.* Bryan, 7 Yerg. (Tenn.) 88; Hutchinson *v.* Campbell, 25 Penn. St. 273; Bean *v.* Hubbard, 4 Cush. (Mass.) 85; Connah *v.* Hale, 23 Wend. 466; Perry *v.* Lewis, 49 Miss, 443. In Vermont it has been held that case will not lie, but that trespass is the proper form of action. The decision was based on usage, trespass having been the form always used in that state; Dow *v.* Smith, 7 Vt. 465, 29 Am. Dec. 202. The principal case sufficiently demonstrates on principle that trespass on the case will lie. In Spencer *v.* Brighton, 49 Me. 326, the action was case; and in Mississippi, the statute makes the sheriff liable to an action either of trespass or case; Perry *v.* Lewis, 49 Miss. 443. In Tennessee the action is brought in the form of trover; McCoy *v.* Dail, 6 Baxt. 137; Pollard *v.* Thomason, 5 Humph. 56; Woltenbarger *v.* Standifer, 3 Sneed. 661. In Williams *v.* Miller, 16 Conn. 144, the action was trespass with a count in trover. In States where the common law forms of action are not retained, the action will be an ordinary action for damages. Spencer *v.* Long, 39 Cal. 700; Fuller *v.* Sparks, 39 Tex. 136. In Pennsylvania, where the statute does not exempt specific property, but where, on demand, it is the duty of the officer to allow an exemption of a specified value, the debtor has no right to the proceeds of the sale, his sole remedy being an action against the officer for the trespass; Mark's Appeal, 34 Penn. St. 36, 75 Am. Dec. 631; Hammer *v.* Freese, 19 Penn. St. 255; Hatch *v.* Bartle, 45 Penn. St. 166; Bonsall *v.* Comly, 44 Penn. St. 442."

In Michigan the action is usually case, Stilson *v.* Gibbs, 53 Mich. 280, or trover.

[2] Goozen *v.* Phillips, 49 Mich. 7; Hutchinson *v.* Roe, 44 Mich. 389; Maxon *v.* Perrott, 17 Mich. 332, 97 Am. Dec. 191; Wood *v.* Bresnahan, 63 Mich. 614; Vanderhorst *v.* Bacon, 38 Mich. 669.

In the note to 75 Am. Dec. 643, above quoted from, it is said: "Upon the question whether replevin may be maintained against an officer who takes property by virtue of a writ, the cases are conflicting, some authorities holding that the property is in the custody of the law, and hence replevin will not lie either for a third person whose property has been taken as that of the judgment debtor, or for the judgment debtor whose

In the case of the homestead, however, the rule is different. Such a sale is void and the pretended purchaser gets no title. The defendant's damages, if any,[1] can not exceed the costs and damages which he may sustain by reason of the officer's neglect to lay off to him his homestead.[2]

§ 775. **Liability for Neglect in caring for Property.**—It has been seen that the officer owes to the plaintiff in the writ the duty to exercise reasonable care and prudence in caring for property seized upon the writ. He is also under a like duty to the defendant. For there may be many cases in which the defendant will be entitled to have the property restored to

exempt property has been taken; Kellogg *v.* Churchill, 2 N. H. 412, 9 Am. Dec. 104; Gist *v.* Cole, 2 Nott & McC. (S. C.) 456, 10 Am. Dec. 616; Smith *v.* Huntington, 3 N. H. 76, 14 Am. Dec. 331; Spring *v.* Bourland, 11 Ark. 658, 54 Am. Dec. 243. Other authorities maintain that a third person, whose property has been levied on, may replevy it out of the hands of the officer who has taken it under a writ against another; but that this remedy does not lie in favor of an execution defendant whose exempt property has been levied on; Dunham *v.* Wyckoff, 3 Wend. (N. Y.) 280, 20 Am. Dec. 695; Bruen *v.* Ogden, 6 Halst. (N. J.) 370, 20 Am. Dec. 593; Allen *v.* Crary, 10 Wend. (N. Y.) 349, 25 Am. Dec. 566; Phillips *v.* Harris, 3 J. J. Marsh. (Ky.) 122, 19 Am. Dec. 166; Clark *v.* Skinner, 20 Johns. (N. Y.) 465, 11 Am. Dec. 302; Dearmon *v.* Blackburn, 1 Sneed (Tenn.) 390, 60 Am. Dec. 160. The rule of the common law, that property levied on under execution is *in custodia legis*, and cannot therefore be replevied from the possession of the levying officer, has been much modified in many states by statutes and codes of procedure, which permit this remedy to a stranger to the writ whose property has been levied on, and in many states to the execution defendant also, whose exempt property has been taken. And even in the absence of statutes of this kind, logic and law would permit this remedy to the debtor. There are many authorities, however, which deny him this right. This subject is discussed in the notes to Dunham *v.* Wyckoff, 20 Am. Dec. 696–699; Kellogg *v.* Churchill, 9 *Id.* 105. That the debtor may maintain replevin, see the late cases: Carlson *v.* Small, 32 Minn. 492; Frazier *v.* Syas, 10 Neb. 115, 35 Am. Rep. 465; Douch *v.* Rahner, 61 Ind. 64; Chapin *v.* Hoel, 11 Ill. App. 309. In Mississippi, it is held that the debtor's statutory remedy is not exclusive, but that he may maintain replevin if he chooses. Ross *v.* Hawthorne, 55 Miss 551."

[1] A complaint alleging that a sheriff levied upon and sold the homestead of the plaintiff, states no cause of action. "If the property sold was a homestead," said TERRY, C. J., "the sheriff's deed conveyed nothing; the purchaser at such sale could acquire no right to the property, and the plaintiff suffer no injury." Kendall *v.* Clark, 10 Cal. 17, 70 Am. Dec. 691.

[2] McCracken *v.* Adler, 98 N. C. 400, 2 Am. St. Rep. 340.

him, as where it was seized without cause, or where before its sale the debt has been paid, or where, when seized upon mesne process, the plaintiff fails to obtain judgment. In such cases, if, through the negligence of the officer, the property has been lost or injured, he must answer in damages to the owner.[1]

The duty of the officer is confined to the keeping of the property, and he should not therefore ordinarily use the property, as to work a horse seized upon the writ,[2] and such a use, where the property has been injured, or it has been used by the officer for his own benefit or that of some person other than the debtor,[3] unless justified by peculiar circumstances, has been held to render the officer liable as a trespasser *ab initio*.[4] *A fortiori* would this be true if he cruelly overworks an animal taken on the writ.[5]

§ 776. **Liability for taking insufficient Security.**—The officer may also incur liability to the defendant by taking insufficient bonds or other securities in those cases in which the law has provided that such security shall be taken for the defendant's protection, as in an action of replevin. And where he takes such a bond as the statute does not authorize, or fails to comply with the statutory provisions for his own protection, he is held to assume the risk himself.[6]

§ 777. **Liability for Misconduct in making Sales.**—The defendant has also an interest in the manner in which his property

[1] As in Barrett *v.* White, 3 N. H. 210, 14 Am. Dec. 352, where the sheriff unnecessarily removed hay and grain seized by him, in the night time and in bad weather, whereby it was greatly injured and wasted; or in Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551, where the officer handled household goods, seized by him, in a rough and reckless manner, and carried them away exposed to a severe rain, by means of which they were injured.

See also Abbott *v.* Kimball, 19 Vt. 551, 47 Am. Dec. 708; Hale *v.* Huntley, 21 Vt. 152; Nutt *v.* Wheeler, 30 Vt. 439; Tinker *v.* Morrill, 39 Vt. 482; Buck *v.* Ashley, 37 Vt. 478.

Officer is liable where he so carelessly keeps the property that it is lost. Conover *v.* Commonwealth, 2 A. K. Marsh. (Ky.) 566, 12 Am. Dec. 451.

Officer is liable who fails to reasonably supply impounded animals with food and water. Adams *v.* Adams, 13 Pick. (Mass.) 384.

[2] Bushey *v.* Raths, 45 Mich. 181.

[3] And only in such cases, Paul *v.* Slason, 22 Vt. 231, 54 Am. Dec. 75.

[4] Lamb *v.* Day, 8 Vt. 407, 30 Am. Dec. 479.

[5] Briggs *v.* Gleason, 29 Vt. 78.

[6] Fletcher *v.* Lee, 65 Mich. 557.

shall be sold by the officer in pursuance of a writ against him. That interest is, if the property is to be sold at all, that it be sold at the proper time and place, on due notice, and that no more shall be sold than is sufficient to satisfy the writ. The officer, too, can justify any sale only by his writ and if he does an act which the writ will not justify, he is as to that a trespasser and may become a trespasser *ab initio*.

Hence if the officer sells without giving the notice required by law,[1] or if he sells the property at a different time[2] or place[3] from that named in the notice without adjournment to such time or place or without the consent of the execution debtor, or if he sells more than enough to satisfy the claim and costs,[4] or if he himself becomes the purchaser,[5] he is liable.

§ 778. **Liability for other Abuses of Process.**—On similar grounds, it is said,[6] an officer becomes responsible in damages for abuse of process, or is a trespasser *ab initio* by reason of such abuse, who omits to give an impounded beast reasonable food and water while under his care,[7] or who stays too long in a store where he has attached goods,[8] or keeps a keeper too long in possession of attached property,[9] or who places in a dwelling house an unfit person as keeper, against the owner's remonstrance.[10]

So the officer is liable for an abuse of process who unnecessarily makes a levy in the night time or accompanies his act with violence, insult, or oppression.[11]

[1] Hayes *v.* Buzzell, 60 Me. 205; Sawyer *v.* Wilson, 61 Me. 529; Carrier *v.* Esbaugh, 70 Penn. St. 239; Freeman *v.* Leonard, 99 N. C. 274.

[2] Smith *v.* Gates, 21 Pick. (Mass.) 55; Pierce *v.* Benjamin, 14 Pick. (Mass.) 356.

[3] Hall *v.* Ray, 40 Vt. 576, 94 Am. Dec. 440. See also Evarts *v.* Burgess, 48 Vt. 208.

[4] Aldred *v.* Constable, 6 A. & E. (N. S.) 370, 381; Stead *v.* Gascoigne, 8 Taunt. 526; Shorland *v.* Govett, 5 B. & C. 485.

[5] Giberson *v.* Wilber, 2 N. J. 410.

[6] C. ALLEN, J., in Wood *v.* Graves, 144 Mass. 365, 59 Am. Rep. 95.

[7] Adams *v.* Adams, 13 Pick. (Mass.) 384.

[8] Rowley *v.* Rice, 11 Metc. (Mass.) 337; Williams *v.* Powell, 101 Mass. 467, 3 Am. Rep. 396; Davis *v.* Stone, 120 Mass. 228.

[9] Cutter *v.* Howe, 122 Mass. 541.

[10] Malcom *v.* Spoor, 12 Metc. (Mass.) 279, 46 Am. Dec. 675.

[11] McElhenny *v.* Wylie, 3 Strob. (N. C.) 284, 49 Am. Dec. 643; Barrett *v.* White, 3 N. H. 210, 14 Am. Dec. 352; Beaird *v.* Foreman, Breese, (Ill.) 303, 12 Am. Dec. 197.

§ 779. **Liability for unlawfully Breaking into the Dwelling-house.**—Every man's dwelling-house, or, as it is often termed in the common law, his castle, affords to him certain privileges which the officer must respect. "A dwelling house," says Mr. Bishop, "is the apartment, building or cluster of buildings in which a man with his family resides."[1] The privacy and seclusion of this dwelling-house, not even the law may, in many cases, invade.

Thus an officer armed with civil process may not, in general, break and enter the outer walls or doors of the dwelling-house for the purpose of executing the writ, as to arrest the occupant, levy an execution upon his goods or serve upon him process for his appearance as a witness or a party to legal proceedings; and if the officers fails to respect this privilege, he is liable as a trespasser.[2]

The privilege of the dwelling-house does not, however, extend to the case of an officer armed with a lawful writ for the dispossession of the occupant,[3] nor, in most States, by statute, to the seizure upon a writ, as of replevin, of specific goods therein contained. Neither does it prevent the breaking to search a

[1] Bishop on Statutory Crimes, § 278.

The privilege, however, does not extend to stores barns or other buildings disconnected from the dwelling-house, and forming no part of the curlitage: Haggerty *v.* Wilber, 16 Johns. (N. Y.) 286, 8 Am. Dec. 321; Burton *v* Wilkinson, 18 Vt. 186, 46 Am. Dec. 145; Penton *v.* Browne, 1 Sid 181, 186.

When di-tinct portions of the same building are used for a store and for a dwelling-house, and have a common outer entrance, an officer in serving process, *e. g.* a writ of attachment, may break the door to reach the goods in the store: Stearns *v.* Vincent, 50 Mich. 209, 45 Am. Rep. 37. The question is here fully and clearly discussed by COOLEY, J.

To the same effect: Solinsky *v.* Lincoln Savings Bank, 85 Tenn. 369, 4 S. W. Rep. 836.

But the rule is otherwise where the same room is used both as store and dwelling: Welsh *v.* Wilson, 34 Minn. 93, 24 N. W. Rep. 327.

[2] Semayne's Case, 5 Coke 91, 1 Smith's Lead. Cas. (9 Am. Ed.) 228; Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551; Ilsley *v.* Nichols, 12 Pick. (Mass.) 270, 22 Am. Dec. 425; Burton *v.* Wilkinson, 18 Vt. 186, 46 Am. Dec. 145; Swain *v.* Mizner, 8 Gray (Mass.) 182, 69 Am. Dec. 244; Keith *v.* Johnson, 1 Dana (Ky.) 604, 25 Am. Dec. 167; Hooker *v.* Smith, 19 Vt. 151, 47 Am. Dec. 679; People *v.* Hubbard, 24 Wend. (N. Y.) 369, 35 Am. Dec. 628; Boggs *v.* Vandyke, 3 Harr. (Del.) 288; Calvert *v.* Stone, 10 B. Mon. (Ky.) 152; Curtis *v* Hubbard, 4 Hill (N. Y.) 437, 40 Am. Dec. 292.

[3] Semayne's Case, 5 Coke 91.

particular dwelling-house upon a lawful search warrant which describes it.[1]

In the case of criminal process the privilege does not exist for obvious reasons of public policy.[2] In such cases, "the right to break outer doors to make an arrest extends," says Mr. Bishop,[3] "to every sort of indictable wrong where the arresting party is acting under a lawful warrant, and to all lawful arrests for past offences, whether by officers or private individuals. It also extends to processes for legislative contempts and contempts to the ordinary courts of justice."

The officer may also lawfully break in to effect the re-arrest of one lawfully arrested out of the dwelling-house upon civil or criminal process who has escaped and fled thither for protection;[4] and having once gained lawful admission and begun the service of his process, he may, if ejected, lawfully break in to complete it;[5] or, if locked in, he may break out or others may break in to rescue him.[6]

The privilege is, however, confined to the outer doors and walls only, and if the officer has once gained peaceable admission through the outer door, he may then lawfully break inner doors, closets, trunks and other inclosures to complete the execution of his process.[7]

Before breaking either inner or outer doors, the officer must make known his business and demand admission.[8]

[1] Cooper *v.* Booth, 3 Esp. 135; Bell *v.* Clapp, 10 Johns. (N. Y.) 263, 6 Am. Dec. 339. See also Kneas *v.* Fitler, 2 Serg. & R. (Penn.) 263.

[2] Semayne's Case, 5 Coke 91; Launock *v.* Brown, 2 B. & Ald. 592; Burdett *v.* Abbott, 14 East 1, 157; Hawkins *v.* Commonwealth, 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147; Commonwealth *v.* Reynolds, 120 Mass. 190, 21 Am. Rep. 510; Kneas *v.* Fitler, 2 Serg. & R. (Penn.) 263; State *v.* Shaw, 1 Root (Conn.) 134; Kelsy *v.* Wright, 1 Root, 83; State *v.* Smith, 1 N. H. 346; Barnard *v.* Bartlett, 19 Cush (Mass.) 501, 57 Am. Dec. 123.

[3] Bishop on Crim. Proc. 1 § 196.

[4] Genner *v.* Sparkes, 1 Salk. 79, 6 Mod. 173; Oystead *v.* Shed, 13 Mass. 520, 7 Am. Dec. 172; Allen *v.* Martin, 10 Wend. (N. Y.) 300, 25 Am. Dec. 564.

[5] Sandon *v.* Jervis, 4 Jur. (N. S.) 737, 5 *Id.* 360; Allen *v.* Martin, 10 Wend. (N. Y.) 300, 25 Am. Dec. 564.

[6] White *v.* Wiltshire, Cro. Jac. 555.

[7] Lee *v.* Gansell, Cowp. 1; Lloyd *v.* Sandilands, 8 Taunt. 250; Hutchison *v.* Birch, 4 Taunt. 620; State *v.* Thackam, 1 Bay (S. C.) 358; Williams *v.* Spencer, 5 Johns. (N. Y.) 352; Prettyman *v.* Dean, 2 Harr. (Del.) 494.

[8] Launock *v.* Brown, 2 Barn. & Ald. 592; Ratcliffe *v.* Burton, 3 Bos. & P. 229; Semayne's Case, 5 Coke 91;

To constitute a breaking it is not necessary that the door be locked; it is sufficient if it is closed. Opening the closed door, as by lifting the latch, is then a breaking,[1] although the owner may be absent,[2] and makes the officer a trespasser if it be not authorized.

The dwelling-house of a third person affords no protection to the defendant; for the officer, being denied admission upon proper notice and demand, may lawfully break into the dwelling-house of A. to arrest B. on civil or criminal process, or to seize the goods of B. therein contained.[3] The officer can, however, it is held, justify the breaking of the door of third persons only by the event of finding therein the goods of the defendant,[4] and the same ruling has been made in respect to warrants for the arrest of the person [5] though the better authorities do not, in criminal cases at least, so confine the privilege but justify the officer if he had reasonable grounds to believe the defendant to be therein although the fact be otherwise.[6]

By the early English cases, though the officer unlawfully broke doors to make a levy and thus made himself a trespasser, yet the levy was held good,[7] but this distinction has been repudiated in the United States and the levy is held void.[8]

Burdett *v.* Abbott, 14 East. 1, 163; Commonwealth *v.* Reynolds, 120 Mass. 190, 21 Am. Rep. 510; Hawkins *v.* Commonwealth, 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147.

[1] Ratcliffe *v.* Burton, 3 Bos. & Pul. 223; Lee *v.* Gansel, 1 Cowp. 1; Penton *v.* Brown, 1 Keb. 698; Curtis *v.* Hubbard, 1 Hill (N. Y.) 337, 4 *Id.* 437, 40 Am. Dec 292.

[2] Curtis *v.* Hubbard, 1 Hill (N. Y.) 337.

[3] Semayne's Case, 5 Coke 91; Oystead *v.* Shed, 13 Mass. 520, 7 Am. Dec. 172; Commonwealth *v.* Reynolds, 120 Mass. 190, 21 Am. Rep. 510; Hawkins *v.* Commonwealth, 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147; State *v.* Shaw, 1 Root (Conn.) 134; Kelsy *v.* Wright, 1 Root 83; State *v.* Smith, 1 N. H. 346; Keith *v.* Johnson, 1 Dana (Ky.) 605, 25 Am. Dec. 167; De Graffenreid *v.* Mitchell, 3 McCord (S. C.) 506, 15 Am. Dec. 648.

Under this rule, not only the owner, but his children and domestic servants and permanent boarders are entitled to the protection of the dwelling-house: Oystead *v.* Shed, 13 Mass. 520, 7 Am. Dec. 172.

[4] Johnson *v.* Leigh, 1 Marsh 565; Morrish *v.* Murrey, 13 Mees. & W. 52; Ratcliff *v.* Burton, 3 B. & P. 229; Cooke *v.* Birt, 5 Taunt. 765.

[5] Hawkins *v.* Commonwealth, 14 B. Mon. (Ky.) 395, 61 Am. Dec, 147.

[6] Commonwealth *v.* Reynolds, 120 Mass. 190, 21 Am. Rep. 510; Commonwealth *v.* Irwin, 1 Allen (Mass.) 587.

[7] Semayne's Case, 5 Coke 91.

[8] Ilsley *v.* Nichols, 12 Pick.

c. To Strangers to the Writ.

§ 780. **In general.**—The officer derives his authority to interfere with the goods or person of any one only from his writ, and the writ confers authority to seize the body or the goods of no one but the defendant named therein. Any interference, therefore, with the person or the property of a stranger, unless it be caused by the act of the stranger intervening between the officer and the lawful execution of his writ, makes the officer a trespasser. Hence—

§ 781. **Liability for Arrest upon Warrant against another.**—If the officer having a warrant for the arrest of one person arrests another, though of the same name,[1] he is liable to the latter,[2] unless the mistake was caused by the act or statement of the person arrested.[3] So is he liable where he arrests the right person, but by the wrong name, unless it be shown that he was known by one name as well as by the other.[4]

§ 782. **Liability for taking Goods of one Person on Writ against another.**—So the officer will be liable if he takes the goods of one person upon a writ against another.[5]

(Mass.) 270, 22 Am. Dec. 425 (explaining the *dictum* to the contrary of PARSONS, C. J., in Widgery *v.* Haskell, 5 Mass. 155, 4 Am. Dec. 41; People *v.* Hubbard, 24 Wend. (N. Y.) 369, 35 Am. Dec. 628; Curtis *v.* Hubbard, 4 Hill (N. Y.) 437, 40 Am. Dec. 292; Closson *v.* Morrison, 47 N. H. 482, 93 Am. Dec. 459.

[1] Jarmain *v.* Hooper, 6 M. & G. 827, 847.

[2] Formwalt *v.* Hylton, 66 Tex. 288; Hays *v.* Creary, 60 Tex. 445; Comer *v.* Knowles, 17 Kans. 436.

[3] Price *v.* Harwood, 3 Camp. 108 (as where the person arrested asserts, when asked, that he is the person described); Formwalt *v.* Hylton, 66 Tex. 288.

[4] Johnston *v.* Riley, 13 Ga. 97; Griswold *v.* Sedgwick, 6 Cow. (N. Y.) 456, s. c. 1 Wend. 126; Mead *v.* Haws, 7 Cow. (N. Y.) 332; McMahan *v.* Green, 34 Vt. 69, 80 Am. Dec. 665; Shadgett *v.* Clipson, 8 East 328; Hoye *v.* Bush, 1 Man. & G. 784; Kelly *v.* Lawrence, 3 H. & C. 1.

[5] Allen *v.* Crary, 10 Wend. (N. Y.) 349, 25 Am. Dec. 566; Bruen *v.* Ogden, 6 Halst. (N. J.) 370, 20 Am. Dec. 593; Fonda *v.* Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; Forsythe *v.* Ellis, 4 J.J. Marsh. (Ky.) 298, 20 Am. Dec. 218; Jamison *v.* Hendricks, 2 Blackf. (Ind.) 94, 18 Am. Dec 131; Phillips *v.* Hall, 8 Wend. (N. Y.) 610, 24 Am. Dec. 108; Symonds *v.* Hall, 37 Me. 354, 59 Am. Dec. 53; Lentz *v.* Chambers, 5 Ired. (N. C.) L. 587, 44 Am. Dec. 63; Pascal *v.* Ducros, 8 Rob. (La.) 112, 41 Am. Dec. 294; Duperron *v.* Van Wickle, 4 Rob. (La.) 39, 39 Am. Dec. 509; Overby *v.* McGee, 15 Ark. 459, 63 Am. Dec. 49;

If the goods of a stranger have been negligently or fraudulently so commingled with the goods of the defendant that the officer can not distinguish them and the owner does not identify them, the officer may lawfully seize the whole mass and hold it until the stranger to the writ identifies and demands his own.[1] But the officer must distinguish them if he can,[2] and he will not be justified in seizing the whole if the owner be present and offers to select his own.[3]

So in executing writs against one of two or more co-tenants, though the officer may lawfully take into his possession and hold until the sale the whole of the common property,[4] he can legally sell only the interest of the defendant therein, and if he sells the entire interest he will be liable to the other co-owners.[5]

The liability of the officer may be enforced in an action of trespass or trover,[6] or, except in the case of co-tenants or other

State v. Conover, 4 Dutch. (N. J.) 224, 78 Am. Dec. 54; Hanchett v. Williams, 24 Ill. App. 56; State v. Hope, 88 Mo. 430; Screws v. Watson, 48 Ala. 628; Duke v. Vincent, 29 Iowa 308; Wintringham v. Lafoy, 7 Cow. (N. Y.) 735; Wellman v. English, 38 Cal. 583.

[1] Smith v. Morrill, 56 Me. 566; Yates v. Wormell, 60 Me. 495; Shumway v. Rutter, 8 Pick. (Mass.) 447, 19 Am. Dec. 340; Overby v. McGee, 15 Ark. 459, 63 Am. Dec. 49; Bond v. Ward, 7 Mass. 123, 5 Am. Dec. 28.

[2] Carlton v. Davis, 8 Allen (Mass.) 94; Smith v. Sanborn, 6 Gray (Mass.) 134.

[3] Yates v. Wormell, 60 Me. 495.

[4] See Freeman on Cotenancy and Partition, §§ 214, 215; Caldwell v. Auger, 4 Minn. 217, 77 Am. Dec. 515; Welch v. Clark, 12 Vt. 686, 36 Am. Dec. 368; Waddell v. Cook, 2 Hill (N. Y.) 47, 37 Am. Dec. 372; Reed v. Shepardson, 2 Vt. 120, 19 Am. Dec. 697; Heald v. Sargeant, 15 Vt. 506, 40 Am. Dec. 694; Bernal v. Hovious, 17 Cal. 547, 79 Am. Dec. 147; Veach v. Adams, 51 Cal. 611; Branch v. Wiseman, 51 Ind. 3; Pettingill v. Bartlett, 1 N. H. 87; Blevins v. Baker, 11 Ired. (N. C.) 291; Haskins v. Everett, 4 Sneed (Tenn.) 531; Waldman v. Broder, 10 Cal. 378; Walsh v. Adams, 3 Denio (N. Y.) 125; Phillips v. Cook, 24 Wend. (N. Y.) 389; Whitney v. Ladd, 10 Vt. 165; Brown v. Lane, 19 Tex. 203; Converse v. McKee, 14 Tex. 30.

[5] Waddell v. Cook, 2 Hill (N. Y.) 47, 37 Am. Dec. 372; Smyth v. Tankersley, 20 Ala. 212, 56 Am. Dec. 193; White v. Morton, 22 Vt. 15, 52 Am. Dec. 75; Rains v. McNairy, 4 Humph. (Tenn.) 356, 40 Am. Dec. 651; Heald v. Sargeant, 15 Vt. 506, 40 Am. Dec. 694; Lothrop v. Arnold, 25 Me. 136, 43 Am. Dec. 256; Edgar v. Caldwell, Morris (Iowa) 434; Neary v. Cahill, 20 Ill. 214; Sheppard v. Shelton, 34 Ala. 652; Melville v. Brown, 15 Mass. 82; Moulton v. Robinson, 27 N. H. 550; Mussey v. Cummings, 34 Me. 74; Frisbee v. Langworthy, 11 Wis. 375.

[6] See cases cited in preceding note.

But in Heald v. Sargeant, 15 Vt. 506, 40 Am. Dec. 694, it was held, contrary to the great majority of the

owners of an undivided interest,[1] recovery of the specific property may be had by an action of replevin.[2]

The measure of damages is ordinarily the value of the goods taken, with interest,[3] but compensation may also be had for elements of aggravation or oppression where they are present.[4] But the officer may show matters in mitigation, as that the goods were afterwards seized and sold upon another and valid writ against the owner,[5] or that upon the sale they were bid in for the owner at an undervalue.[6]

The seizure and sale of the goods of one person upon a writ against another is, as has been seen, held to be such a breach of the officer's duty as to render liable the sureties upon his official bond.[7]

§ 783. **Liability for Levy on mortgaged Property.**—Analogous to the subject of the last section is that of the levy upon mortgaged chattels. Under the statutes or decisions of many of the States the interest of the mortgagor in such chattels may lawfully be seized and sold upon a proper writ against him,[8] but no more than his interest can be sold, and the officer will be liable to the mortgagee if he ignores, denies or refuses to respect the latter's claim.[9]

cases, that the officer could not be held liable as a trespasser *ab initio*.

[1] Hackett *v.* Potter, 131 Mass. 50; Kimball *v.* Thompson, 4 Cush. (Mass.) 447, 50 Am. Dec. 799; Hart *v.* Fitzgerald, 2 Mass. 509, 3 Am. Dec. 75; Kindy *v.* Green, 32 Mich. 310; Price *v.* Talley, 18 Ala. 21; Parsons *v.* Boyd, 20 Ala. 112; Miller *v.* Eatman, 11 Ala. 609; Bell *v.* Hogan, 1 Stew. (Ala.) 536; Frierson *v.* Frierson, 21 Ala. 549.

[2] Carew *v.* Matthews, 41 Mich. 576; Cooper *v.* Tompkins, 43 Mich. 406; Heyman *v.* Covell, 44 Mich. 332 (which maintain the right to bring replevin in a State court against a United States Marshal); Gimble *v.* Ackley, 12 Iowa 27; Smith *v.* Montgomery, 5 Iowa 370; Thompson *v.* Button, 14 Johns. (N. Y.) 84.

[3] See Sutherland on Damages, Vol. III. pp. 487–537.

[4] Pascal *v.* Ducros, 8 Rob. (La.) 112, 41 Am. Dec. 294.

[5] Curtis *v.* Ward, 20 Conn. 204.

[6] Forsyth *v.* Matthews, 14 Penn. St. 100, 53 Am. Dec. 522.

[7] See *ante*, § 284.

[8] Cary *v.* Hewitt, 26 Mich. 228; Macomber *v.* Saxton, 28 Mich. 516; Smith *v.* Judge, 53 Mich. 560; Daggett *v.* McClintock, 56 Mich. 51; Haynes *v.* Leppig, 40 Mich. 602.

[9] Williams *v.* Raper, 67 Mich. 427.

13. *Tax Officers.*

§ 784. **Liability for not Levying Tax.**—The amount which shall be raised by tax in any given locality at a certain time is usually a matter left to the discretion of the officers to whom that subject is by law entrusted, but there are cases in which the duty to levy a specific tax becomes a fixed and imperative one, as where it has been directed to be done by a court of competent jurisdiction for the purpose of paying a judgment recovered against the municipality.

In such a case the act becomes one of a purely ministerial nature, and the officer is liable for its non-performance as in other cases of a like kind. Thus in the leading case[1] upon this subject, it was said by the Supreme Court of the United States, speaking through Mr. Justice SWAYNE: "The rule is well settled that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender. The question of the rule by which the measure of damages is to be ascertained is not before us, and we do not feel called upon to express any opinion upon the subject."[1]

§ 785. **Same Subject—The Measure of Damages.**—The question of the measure of damages arose, however, in the same court, a few years later, and the court then held that the plaintiff was entitled to recover the actual damages which he had sustained, as "the expense and cost of the vain effort to have the judgment placed on the tax list; the loss of the debt, if it had been lost; any impairment of the efficiency of the tax levy, if such there had been; in short, any conceivable actual damage," but that in the absence of any proof of actual damage, the defendants were liable to nominal damages and costs, and no more.[2]

The court, through Mr. Justice MILLER, said: "There is no

[1] Amy v. Supervisors, 11 Wall. (U. S.) 136.

[2] Dow v. Humbert, 91 U. S. 294.

profit in the office itself. It is undertaken mainly from a sense of public duty; and, if there be any compensation at all, it is altogether disproportionate to the responsibility and trouble assumed. They are in no sense the agents of creditors, and receive no compensation from holders of judgments or other claims against the town for the collection and payment of their debts. There are no prisons under their control, no prisoners committed to their custody, no *posse comitatus* to be brought to their aid; but without reward, and without special process of a court to back them, they are expected to levy taxes on the reluctant community at whose hands they hold the office. To hold that these humble but necessary public duties can only be undertaken at the hazard of personal liability for every judgment which they fail to levy and collect, whether through mistake, ignorance, inadvertence, or accident, as a sheriff is for an escape, without any proof that the judgment creditor has lost his debt, or that its value is in any manner impaired, is a doctrine too harsh to be enforced in any court where imprisonment for debt has been abolished."[1]

§ 786. **Same Subject—Action may be brought in foreign State.** —And not only may an action be maintained against the officer who neglects or refuses to levy the tax as it was his duty to do, but in a late case[2] in Missouri it is held that the action may be sustained in the courts of one State against the officer of another State, the court having acquired jurisdiction of the person.

The court distinguish the case from those in which the right of action depends upon a local statute,[3] saying, "The right of action against a ministerial officer for a violation or neglect of duty by one injured in consequence thereof is a different matter. The common law gave the party aggrieved an action against the officer in such case. There is authority[4] for the broader position that 'wherever, by either the common law or the statute law of a State, a right of action has become fixed, and a legal lia-

[1] Clark *v.* Miller, 54 N. Y. 528, was disapproved, and People *v.* Supervisors, 28 N. Y. 112, was approved.

[2] St Joseph Ins. Co. *v.* Leland, 90 Mo. 177, 59 Am. Rep. 9.

[3] As in Vawter *v.* Missouri Pacific Ry. Co. 84 Mo. 679, 54 Am. Rep. 105.

[4] Dennick *v.* Railroad, 103 U. S. 18.

bility incurred, that liability may be enforced and the right of action pursued, in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties.'"[1]

§ 787. **Liability for false Return.**—Whether a collector of taxes may be held liable for a false return whereby an individual suffers injury, is a question whose determination depends upon the distinction already referred to—whether his duties are owing to individuals or to the public only, and upon this question the authorities are in conflict.

In a case[2] in Michigan it appeared that a tax collector had

[1] The court also cite Leonard *v.* Navigation Co. 84 N. Y. 48, 38 Am. Rep. 491; McDonald *v.* Mallory, 77 N. Y. 547, 33 Am. Rep. 664.

[2] Raynsford *v.* Phelps, 43 Mich. 342, 38 Am. Rep. 189. Said COOLEY, J.: It was decided in Rowning *v.* Goodchild, 2 W. Bl. 906, that a public officer having ministerial duties to perform in which a private individual has a special and direct interest, is liable to such individual for any injury sustained by him in consequence of the failure to perform such duties. It was an officer connected with the postal service who was held liable in that case, and the decision is followed in this country. Teall *v.* Felton, 1 N. Y. 537 (49 Am. Dec. 352) s. c. in error, 12 How. (U. S.) 284; election officers have been held liable on the same ground. (Ashby *v.* White, Ld. Raym. 938, 1 Salk. 19; Lincoln *v.* Hapgood, 11 Mass. 350; Jeffries *v.* Ankeny, 11 Ohio 372); and so have commissioners of highways (Hover *v.* Barkhoof, 44 N. Y. 113; Hathaway *v.* Hinton, 1 Jones (N. C.) 243); and so have inspectors of provisions (Hayes *v.* Porter, 22 Me. 371; Nickerson *v.* Thompson, 33 Me. 433; Tardos *v.* Bozant, 1 La. Ann. 199); and so have tax and other officers (Amy *v.* Supervisors, 11 Wall. (U. S.) 136; Tracy *v.* Swartwout, 10 Pet. (U. S.) 80; Brown *v.* Lester, 21 Miss. 392; Bolan *v.* Williamson, 1 Brev. (S. C.) 181). It is immaterial that the duty is one primarily imposed on public grounds, and therefore primarily a duty owing to the public; the right of action springs from the fact that the private individual receives a special and peculiar injury from the neglect in performance which it was in part the purpose of the law to protect him against. It is also immaterial that a failure in performance is made by the law a penal offense. Hayes *v.* Porter, 22 Me. 371. The exceptions are of those cases in which the functions of the office are judicial, or partake of the judicial. Sage *v.* Laurain, 19 Mich. 137; Goetcheus *v.* Matthewson, 61 N. Y. 420; Bevard *v.* Hoffman, 18 Md. 479 (81 Am. Dec. 618); Harrington *v.* Commissioners, &c., 2 McCord 400. But even in these cases the officer is responsible if he acts maliciously. Gordon *v.* Farrar, 2 Doug. (Mich.) 411; Bennett *v.* Fulmer, 49 Penn. St. 157 (a misicitation probably. Burton *v.* Fulton, 49 Penn. St. 151, was doubtless intended); Gregory *v.* Brooks, 37 Conn. 365; Strickfadden *v.* Zipprick, 49 Ill. 286.

The principle is as familiar as it is sound. It is nevertheless in-

falsely returned a warrant *nulla bona*, by reason of which the tax became a lien upon certain land which was sold for its satisfaction. At the time of the return, the plaintiff had a mortgage upon the same land, and he was compelled to redeem from the tax sale. He thereupon brought an action of trespass on the case against the collector for the damages thereby sustained. It

sisted that the present case is not within it. Tax collectors, it is truly said, are chosen because the machinery of government must be kept in motion, and to that end it is essential that the public revenue should be collected. They are chosen, therefore, and their duties imposed on public grounds, not on private. If through any negligence on the collectors' part, the State loses a portion of its dues, the officer is responsible to the State for the loss; but it is denied that he owes any duty to the individuals, except to abstain, as every citizen must, from committing trespasses on their rights. The question of negligence in the performance of public duties must always concern the public only.

But conceding that the law creates the office of collector in order that the public revenues may be collected, it does not follow that it leaves that officer at liberty to disregard private interests in their collection. When the law prescribes who shall be liable for the payment of taxes, and whose property may be levied upon therefor, it at the same time by implication forbids the officer to seize upon the property of others, or by act or omission make the tax a charge upon such property. The implied prohibition creates a duty in favor of the person whose property is the subject of it, and he is at liberty to buy or sell in reliance upon the duty being performed. He has a right to understand that the officer is commissioned by the law to act only with due respect to the rights of individuals, and that if he acts otherwise and causes special injury, he disobeys his commission, and is not within the protection the commission might otherwise give.

The plaintiff owned a mortgage on lands, on which a tax was assessed for the year 1874. A warrant was issued for the collection of this tax, and was placed in the hands of defendant for service. The plaintiff's case is that during the life of this warrant, and while the defendant held it, there was personal property upon the land, belonging to one French, who had purchased the equity of redemption after the first Monday of May, and before the first Monday of December of that year, from which it was the duty of defendant, under the express provisions of the statute, to make collection. Comp. L. § 1006. Instead of performing this duty, he falsely made return of no goods, whereby the tax became established as a lien upon the land, and the land was sold for its satisfaction. Meantime the plaintiff had foreclosed his mortgage and become owner of the lands, and was compelled to redeem from the tax sale.

Is the plaintiff wronged by this false return? We think he is. It was his legal right that the goods of French should be sold to satisfy the tax, and the law always intends that legal rights shall be respected. Moreover, he alone suffered injury from

was urged in defense that the duty of the defendant was one owing to the public only, and that the individual had no right of action. But the court, per COOLEY, J., held that there was a duty owing to individuals, and as the plaintiff had suffered special injury, the action might be maintained.

But in a similar case[1] in Indiana, a different result was reached.

the false return. The public suffered nothing, for the lien on the land remained and was enforced, and the only injurious consequence of the misfeasance in public office was that the tax was collected from one man when the command of the law was that it should be collected from another.

If there is no wrong without a remedy, then it would seem that the action should be supported for the defendant is the only wrong doer. It may be suggested that the plaintiff might have a cause of action against French for money paid to his use; but this is not clear. The statute does not make the purchaser of land under such circumstances personally liable; it only renders his property subject to seizure during the life of the tax warrant. Payment by defendant did not release the property of French, for it was released by the neglect of the officer which is complained of in this suit. The general rule is that taxes can only be enforced by means of the statutory remedies. Crapo *v.* Stetson, 8 Metc. (Mass.) 393; Shaw *v.* Peckett, 26 Vt. 482; Camden *v.* Allen, 26 N. J. L. 399; Packard *v.* Tisdale, 50 Me. 376; Carondelet *v.* Picot, 38 Mo. 125. But whether or not the rule applies here is immaterial, as this action in either case is well grounded in common law principles."

[1] State *v.* Harris, 89 Ind. 363, 46 Am. Rep. 169. Said the court per ELLIOTT, J.: "The failure of the treasurer to levy on personal property does work some injury to the mortgagee, for it adds to the burdens borne by the mortgaged land, and thus lessens the value of the security, but while this is true, it is also true that the injury is indirect and remote. It is not enough in any case for a plaintiff, who seeks to recover for an injury caused by the negligence of another, to show simply injury and negligence; he must also show that there was a breach of duty owing to him. This general rule applies with peculiar force to persons who sue for injuries caused by official misconduct. It is not every person who sustains an injury from the negligence of a public officer that can maintain an action on the officer's bond.

In general, a public officer is liable only to the person to whom the particular duty is owing, and the ruling question in all cases of the kind is as to whether the plaintiff shows the breach of a particular duty owing to him. It is not sufficient to show a general public duty, or a duty to some other person directly interested. Judge COOLEY says: 'But the sheriff can only be liable to the person to whom the particular duty was owing; the party to whom he is bound by the duty of his office.' Cooley on Torts, 394, n. 1. In another elementary treatise it is said: 'It is a general rule that wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he has an interest in the

There the action was brought by a mortgagee against a county treasurer for the failure of that officer to collect taxes assessed

performance of the duty, and that the duty was imposed for his benefit.' Shearm. & Redf. Neg. § 174.

The adjudged cases illustrate and enforce this principle. In Harrington *v.* Ward, 9 Mass. 251, it was said: 'No action lies against the sheriff, either for his own default or for that of his deputy, but at the suit of one to whom the sheriff is bound by the duty of his office. In relation to a suit pending, whether in the service of the original writ, the execution or any intermediate process, he is answerable for his neglects to none but the plaintiff or the defendant in such suit.' The same principle is laid down in the cases of Compton *v.* Pruitt, 88 Ind. 171; Gardner *v.* Heartt, 3 Denio (N. Y.) 232, and Bank of Rome v. Mott, 17 Wend. (N. Y.) 554. In the last case cited, COWEN, J., said: 'The law can not, in such cases, look beyond the proximate mischief resulting to a vested right, and do more than redress that mischief at the suit of the person immediately wronged.'

The case of Strong *v.* Campbell, 11 Barb. (N. Y.) 135, is an interesting and instructive one. It appeared in that case that a statute provided for the publication of the list of uncalled for letters, and that it should be made in the newspaper having the largest circulation in the town. Plaintiffs were publishers of such a paper; publication of the list was denied them, and it was held that they could not maintain an action, the court saying: 'To give a right of action for such a cause, the plaintiff must show that the defendant owed the duty to him personally. Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit.'

If we look to kindred cases we shall find strong support for this view, for the analogy is close and full. Thus in cases against attorneys for negligence, it is well settled that only the person with whom the attorney contracted can maintain the action, for it is to him alone that he owes a particular duty. Fish *v.* Kelly, 17 C. B. (N. S.) 194; Savings Bank *v.* Ward, 100 U. S. 195; Commonwealth *v.* Harmer, 6 Phila. 90; Robertson *v.* Fleming, 4 Macq. App. Cas. 167.

In Ware *v.* Brown, 2 Bond (U. S. D. C.) 267, a notary public had made a false certificate to a deed, and it was held that no one but the party to the original deed could maintain an action. So where a recorder gives an erroneous certificate, an action can be maintained only by the person to whom it was given. Houseman *v.* Girard, &c. Assn. 81 Penn. St. 256; Wood *v.* Ruland, 10 Mo. 143. Builders of public works are answerable only to their employers for want of skill and care in executing their contract: Mayor *v.* Cunliff, 2 N. Y. 165; Pickard *v.* Smith, 10 C. B. (N. S.) 470; Castle *v.* Parker, 18 L. T. Rep. (N. S.) 367. A railway company is not liable to an interloper for injuries resulting from negligence: Lary *v.* Cleveland, &c. R. Co. 78 Ind. 323; 41 Am. Rep. 572; Everhart *v.* Terre Haute, &c. R. Co. 78 Ind. 292, 41 Am. Rep. 567.

In Winterbottom *v.* Wright, 10 M. & W. 109, the plaintiff proved that a mail coach had been defectively constructed; that it was constructed under a contract with a public officer,

against the mortgagor out of personal property owned by him within the county, whereby the tax became a lien upon the

and that because of its defective construction plaintiff sustained an injury; and the court denied a recovery upon the ground that the coachmaker owed plaintiff no duty: Lord ABINGER, in the course of his opinion, said: 'Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.' This corresponds with Judge CLIFFORD'S statement that 'There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect.' Savings Bank *v.* Ward, *supra*.

In Dale *v.* Grant, 5 Vroom (N. J.) 142, it was held that an action would not lie in favor of a customer against a wrong-doer who stopped the machinery of a manufactory and prevented the manufacturer from performing a contract, and thereby caused loss to the plaintiff, to whom the manufacturer had agreed to furnish goods. The court said: 'But the law does not attempt to give full reparation to all parties injured by a wrong committed. If this were so, all parties holding contracts, if such exist, under the plaintiffs and who may have been injuriously affected by the conduct of the defendants, would be entitled to a suit. It is only the proximate injury that the law endeavors to compensate; the more remote comes under the head of *damnum absque injuria*.' Interesting discussions of kindred questions are contained in Loop *v.* Litchfield, 42 N. Y. 351, 1 Am. Rep. 543, and Anthony *v.* Slaid, 11 Metc. 290.

A departure from these settled and salutary principles would involve us in doubt and confusion; once departed from there would be no rule by which the liability of sureties on official bonds could be measured. Everything would be involved in uncertainty, and sureties might be harrassed by actions for causes never contemplated. If we say a mortgagee may maintain an action like this, then is there any reason why a judgment creditor, the holder of a mechanics' lien, the possessor of a vendor's lien, or even the owner of a tax title, might not successfully sue? If we abide not by the settled rules, who shall set limits, and what shall be the guide?

The only case we have found in conflict with the doctrine here approved is Raynsford *v.* Phelps, 43 Mich. 342 (38 Am. Rep. 189, *ante*), and we cannot yield to it, although the opinion was prepared by Judge COOLEY, a judge whose opinions are always entitled to respect. It seems to us that the doctrine of that case cannot be harmonized with the rule declared in the learned judge's work on torts, to which we have already referred. The error in the decision under immediate mention is, we deferentially submit, clearly proved by the nicely drawn and accurately marked distinctions found in the author's discussion of the liability of recorders of deeds. Cooley, Torts, 383, 387.

The case under examination is very different from that of an officer committing a direct and willful tort, and, as is clearly shown by Judge COOLEY, radically different from that of an officer who has duties imposed

mortgaged land. It was urged there, as held in Michigan, that there was the breach of a duty owing to the individual for which he might sustain an action, but the court held that the duty was one imposed solely for the benefit of the public and that the plaintiff had no right of action. The decision in the Michigan case was cited and disapproved.

B.

FOR DEFAULTS OF HIS OFFICIAL SUBORDINATES.

§ 788. **In general.**—Having now seen what liability attaches to the public officer for his own defaults, there remains to be considered here the liability which he incurs by reason of the defaults of his official subordinates.

Of the various classes of public officers, attention will be directed first to public officers of the government.

I.

PUBLIC OFFICERS OF GOVERNMENT.

§ 789. **Public Officer of Government not liable for Acts of his official Subordinates.**—It is well settled as a general rule that public officers of the government, in the performance of their public functions, are not liable to third persons, either for the misfeasances or positive wrongs, or for the non-feasances, negligences or omissions of duty of their official subordinates.[1]

upon him directly for the benefit of individuals. It is plain to us that the duty of collecting taxes is imposed upon the treasurer for the benefit of the public, and not for the benefit of individuals."

[1] Robertson *v.* Sichel, 127 U. S. 507, 515; City of Richmond *v.* Long, 17 Gratt. (Va.) 375, 94 Am. Dec. 461; Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; Dunlop *v.* Munroe, 7 Cranch (U.S.) 242; Tracy *v.* Cloyd, 10 W. Va. 19; Lane *v.* Cotton, 1 Ld Raym. 646; Whitfield *v.* Lord Le Despencer, 2 Cowp. 754; Keenan *v.* Southworth, 110 Mass. 474, 14 Am. Rep. 613; Foster *v.* Metts, 55 Miss. 77, 30 Am. Rep. 504; Schroyer *v.* Lynch, 8 Watts (Penn.) 453; Wiggins *v.* Hathaway, 6 Barb. (N. Y.) 632; Booth *v.* Lloyd, 33 Fed. Rep. 593; Ely *v.* Parsons, 55 Conn. 83, 10 Atl. Rep. 499.

This immunity rests upon obvious considerations of public policy, the necessities of the public service and the perplexities and embarrassments of a contrary doctrine.[1]

These official subordinates are themselves public officers, though of an inferior grade, and are directly liable, in those cases in which any such public officer is liable, for their own defaults.[2] They are not infrequently appointed directly by the governmental power, and are removable only at its pleasure, but even in those cases in which they are appointed and removed by their immediate official superior, the latter is not liable.[3]

§ 790. **Same Subject—Exceptions to this Rule.**—But this general rule is subject to certain exceptions, important to be borne in mind and as well settled as the rule itself. Thus the superior officer will be liable, (1) where, being charged with the duty of employing or retaining his subordinates, he negligently or wilfully employs or retains unfit or improper persons;[4] or, (2) where, being charged with the duty to see that they are appointed or qualified in a proper manner, he negligently or wilfully fails to require of them the due conformity to the prescribed regulations;[5] or (3) where he so carelessly or negligently oversees, conducts or carries on the business of his office as to furnish the opportunity for the default;[6] or (4) and *a fortiori*, where he has directed, authorized or co-operated in the wrong.[7]

§ 791. **This Rule applies—1. To Post officers.**—This rule has frequently been applied to the officials of the post-office department, and the law is well settled, both in England and America, that the postmaster-general, the local postmasters and their assistants and clerks, appointed and sworn as required by law, are public officers, each of whom is responsible for his own defaults only, and not for those of any of the others, although selected by him and subject to his orders,[8] unless he has negligently or wil-

[1] City of Richmond *v.* Long, 17 Gratt. (Va.) 375, 94 Am. Dec. 461.

[2] See *ante*, § 657 *et seq.*

[3] Keenan *v.* Southworth, 110 Mass. 474, 14 Am. Rep. 613.

[4] Wiggins *v.* Hathaway, 6 Barb. (N. Y.) 632; Schroyer *v.* Lynch, 8 Watts (Penn.) 453.

[5] Bishop *v.* Williamson, 11 Me. 495.

[6] Dunlop *v.* Munroe, 7 Cranch (U. S.) 242; Schroyer *v.* Lynch, 8 Watts (Penn.) 453; Ford *v.* Parker, 4 Ohio St. 576.

[7] Ely *v.* Parsons, 55 Conn. 83, 10 Atl. Rep. 499; Tracy *v.* Cloyd, 10 W. Va. 19.

[8] Keenan *v.* Southworth, 110 Mass. 474, 14 Am. Rep. 613; Lane *v.* Cot-

fully appointed or retained unfit or improper persons,[1] or has failed to require of them conformity to the prescribed regulations;[2] or has so carelessly conducted the affairs of his office as to furnish opportunity for such default;[3] or unless he has co-operated in or authorized the wrong.[4]

§ 792.—**2. To Mail Contractors.**—The same rule has also been extended for the protection of contractors for carrying the mail so as to exempt them from liability for the defaults of their agents, assistants and subordinates, on the ground that these latter are themselves public officers and alone liable for their own defaults.[5] It is believed, however, that the better opinion is the other way.[6]

§ 793.—**3. To Collectors of Customs.**—So a collector of customs is not personally liable for a tort committed by his subordinates, there being no evidence to connect the collector personally with the wrong, or that the subordinates were not competent or were not properly selected for their positions.[7]

§ 794.—**4. To Captain of a Ship of War.**—So it has been held that the captain of a ship of war, whose subordinate officers are appointed by the government, is not liable for an injury caused by the negligence of his lieutenant.[8]

§ 795.—**5. To Confederate District Commissary.**—And a con-

ton, 1 Ld. Raym. 646; Whitfield *v.* Lord Le Despencer, 2 Cowp. 754; Dunlop *v.* Munroe, 7 Cranch (U. S.) 242; Schroyer *v.* Lynch, 8 Watts (Penn.) 453; Bishop *v.* Williamson, 11 Me. 495; Hutchins *v.* Brackett, 22 N. H. 252, 53 Am. Dec. 249; Foster *v.* Metts, 55 Miss. 77, 30 Am. Rep. 504.

See *ante* § 713.

[1] Wiggins *v.* Hathaway, 6 Barb. (N. Y.) 632.

[2] Bishop *v.* Williamson, 11 Me. 495. In this case the postmaster was held liable for the default of an assistant whom he had not required to take the oath prescribed by law. To same effect: Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 94 Am Dec. 445; Bolan *v.* Williamson, 1 Brev. (S. C.) 181.

[3] Dunlop *v.* Munroe, 7 Cranch (U. S.) 242; Ford *v.* Parker, 4 Ohio St. 576.

[4] Tracy *v.* Cloyd, 10 W. Va. 19.

[5] Conwell *v.* Voorhees, 13 Ohio 523, 42 Am. Dec. 206; Hutchins *v.* Brackett, 22 N. H. 252, 53 Am. Dec. 248.

[6] Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; Foster *v.* Metts, 55 Miss. 77, 30 Am. Rep. 504.

[7] Robertson *v.* Sichel, 127 U. S. 507; Brissac *v.* Lawrence, 2 Blatchf. (U. S. C. C.) 121.

[8] Nicholson *v.* Mounsey, 15 East 384.

federate district commissary in Virginia during the late war was held not to be responsible for the misfeasance and wrong doings of his subordinates unless he co-operated in or authorized the wrong.[1]

II.

PUBLIC TRUSTEES AND COMMISSIONERS.

§ 796. **Not liable for Negligence of Subordinates.**—The same rule of immunity has also been extended to the case of persons acting in the capacity of public agents engaged in the public service and acting solely for the benefit of the public, although not strictly filling the character of officers or agents of the government.

Thus it has been held that overseers of highways entrusted with the supervision of highways, discharging the duty gratuitously and being personally guilty of no negligence, are not responsible for an injury sustained by an individual through the negligence of workmen employed under them.[2]

So trustees and commissioners acting gratuitously for the benefit of the public, and guilty of no personal negligence, who are entrusted with the conduct of public works, are not liable for an injury occasioned by the negligence or unskillfulness of workmen and contractors employed by them in the execution of the work.[3]

So trustees of schools, charged with the safe keeping of the school property, and authorized to make needful repairs within certain limits, who act gratuitously and without any personal negligence or omission of duty, can not be held liable to one who is injured by the negligence of workmen whom they have employed to make repairs upon a school building.[4]

[1] Tracy *v.* Cloyd, 10 W. Va. 19.

[2] Holliday *v.* St. Leonard, 11 Com. Bench (N. S.) 192; Duncan *v.* Findlater, 6 Cl. & Fin. 894; Humphreys *v.* Mears, 1 M. & R. 187.

[3] Hall *v.* Smith, 2 Bing. 156; Harris *v.* Baker, 4 M. & S. 27; Sutton *v.* Clarke, 6 Taunt. 34.

[4] Donovan *v.* McAlpin, 85 N. Y. 185, 39 Am. Rep. 649. In this case ANDREWS, J., said: "The trustees, in directing the repairs to be made, and in employing workmen for that purpose, were acting within the scope of their authority. They were charged with the safe keeping of the school property in their ward, and authorized to made needful repairs

In the same line it is held that the trustees of Brooklyn bridge, not themselves in fault, are not liable for an accident caused by the negligence of a laborer employed on the bridge.[1]

So commissioners of emigration are not liable for a loss of baggage through the acts or defaults of the owners or masters of ships licensed by them.[2] And county commissioners are not liable for an injury occasioned by the neglect of laborers employed by a supervisor of roads, although the latter was appointed by them.[3]

III.

MINISTERIAL OFFICERS.

§ 797. **Liable for Defaults of their Deputies.**—But in the case of ministerial, executive and administrative officers who are

within certain limits. The employment of workmen for this purpose was necessary, and if they employed competent men, and exercised reasonable supervision over the work, their whole duty as public officers was discharged. They were acting as gratuitous agents of the public, and it could not be expected that they should be personally present at all times during the progress of the work, to supervise the conduct of the workmen. It was said by BEST, C. J., in Hall v. Smith, 2 Bing. 156, that no action can be maintained against a man, acting gratuitously for the public, for the consequence of any act which he was authorized to do, and which, so far as he is concerned, is done with care and attention, and that such a person is not answerable for the negligent execution of an order properly given; and it was said by NELSON, C. J., in Bailey v. Mayor, 3 Hill (N. Y.) 538, (38 Am. Dec. 669), that if a public officer authorize the doing of an act not within the scope of his authority, or if he be guilty of negligence in the discharge of duties to be performed by himself, he will be held responsible; but not for the misconduct or malfeasance of such persons as he is obliged to employ.

In this case it must be assumed that the defendants were not chargeable with personal negligence, and they omitted no duty imposed upon them by law. It would be equally opposed to justice and sound public policy to make them answerable for the negligence of the workmen. They were acting as public officers, and, in respect to the acts of persons necessarily employed by them, the doctrine of *respondeat superior* has no application. Story on Agency, § 321."

See also Finch v. Board of Education, 30 Ohio St. 37, 27 Am. Rep. 414; Donovan v. Board of Education, 85 N. Y. 117.

[1] Walsh v. Trustees, 96 N. Y. 427.

[2] Murphy v. Commissioners, 28 N. Y. 134.

[3] County Commissioners v. Duvall, 54 Md. 350, 39 Am. Rep. 393.

charged with the performance of duties to individuals, a different rule applies. These officers, as has been seen, are bound to perform their duties in a legal and proper manner, exercising due care and diligence, and respecting and protecting the legal rights of others.[1] This responsibility can not be evaded by delegating the performance to another, but, whether the officer acts in person or through the medium of another, his legal duties and responsibilities remain the same.

The rule is, therefore, as just as it is well settled, that the ministerial, executive or administrative officer who owes a duty to an individual is liable to that individual for the misfeasance, malfeasance or non-feasance of his deputy to whom he has confided its performance, so long as the deputy acts by color of his office.[2] That the deputy is himself, to some extent, regarded as an independent officer does not diminish this liability,[3] nor does the fact that the person complaining requested the services of that particular deputy,[4] unless he is a *special* deputy appointed for that particular service at the nomination and request of the complainant.[5]

But the officer is not liable for the extra-official acts or misconduct of his deputy, as where the latter goes outside the execution of his duty, impelled by some private motive or malice of his own;[6] nor for the omission or neglect of any act or duty which the law does not require him officially to perform;[7] nor for the consequences of acts which were directed by the complaining party himself.[8]

[1] See *ante*, §§ 664–679.

[2] Hazard *v.* Israel, 1 Binn. (Penn.) 240, 2 Am. Dec. 438; Forsythe *v.* Ellis, 4 J. J. Marsh (Ky.) 298, 20 Am. Dec. 218; Kennon *v.* Ficklin, 6 B. Mon. (Ky.) 414, 44 Am. Dec. 776; Harrington *v.* Fuller, 18 Me. 277, 36 Am. Dec. 719; State *v.* Moore, 19 Mo. 369, 61 Am Dec. 563; Flanagan *v.* Hoyt, 36 Vt. 565, 86 Am. Dec. 675; Prosser *v.* Coots, 50 Mich. 262; McNutt *v.* Livingston, 7 Smedes & M. (Miss.) 641; Snedicor *v.* Davis, 17 Ala. 472; Wood *v.* Farnell, 50 Ala. 546; Welddes *v.* Edsell, 2 McLean (U. S. C. C.) 366; Van Schaick *v.* Sigel, 60 How. Pr. 122.

See generally the cases cited in the following sections:

[3] See Campbell *v.* Phelps, 1 Pick. (Mass.) 62, 11 Am. Dec. 139; Draper *v.* Arnold, 12 Mass. 449.

[4] Van Schaick *v.* Sigel, 60 How. (N. Y.) Pr. 122.

[5] Skinner *v.* Wilson, 61 Miss. 90.

[6] See State *v.* Moore, 19 Mo. 369, 61 Am. Dec. 563.

[7] Harrington *v.* Fuller, 18 Me. 277, 36 Am. Dec. 719; Knowlton *v.* Bartlett, 1 Pick. (Mass.) 270; Cook *v.* Palmer, 6 B. & C. 739.

[8] Gorham *v.* Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549; Sheldon *v.*

§ 798. **This Rule applies—1. To Sheriffs.**—This rule has been most frequently applied to sheriffs, and it will be settled that the sheriff is liable for the misconduct, abuses, trespasses or neglect of his deputy, acting by color of his authority,[1] and must respond for all damages which he may thereby occasion either to the plaintiff[2] in the process or to the defendant[3] or to strangers.[4]

This is so completely the liability of the sheriff as such that the sureties upon the latter's official bond must answer for it.[5]

But the sheriff is not liable for the wanton, extra official acts of his deputy,[6] nor for the neglect or omission of an act which it was not his legal duty to perform,[7] nor for the results of acts which the complaining party himself directed to be done,[8] nor for the act of a special deputy nominated by the complaining party and appointed at his request.[9]

The sheriff and his deputy are one person in law, so far as to make the former responsible for the acts of the latter, but not so far as to require impossibilities of the sheriff or to impose un-

Payne, 7 N. Y. 458; Acker *v.* Ledyard, 8 Barb. (N. Y.) 517.

[1] Hazard *v.* Israel, 1 Binn. (Pinn.) 240, 2 Am. Dec. 438; Forsythe *v.* Ellis, 4 J. J. Marsh (Ky.) 298, 20 Am. Dec. 218; Kennon *v.* Ficklin, 6 B. Mon. (Ky.) 414, 44 Am. Dec. 776; Harrington *v.* Fuller, 18 Me. 277, 36 Am. Dec. 719; State *v.* Moore, 19 Mo. 369, 61 Am. Dec. 563; Flanagan *v.* Hoyt, 36 Vt. 565, 86 Am. Dec. 675; Prosser *v.* Coots, 50 Mich. 262.

[2] Blunt *v.* Sheppard, 1 Mo 219; Marshall *v.* Hosmer, 4 Mass. 60; Esty *v.* Chandler, 7 Mass. 464; McIntyre *v.* Trumbull, 7 Johns. (N. Y.) 35; Mason *v.* Ide, 30 Vt. 697; Seaver *v.* Pierce, 42 Vt. 325; Whitney *v.* Farrar, 51 Me. 418; Ross *v.* Campbell, 19 Hun (N. Y.) 615; Smith *v.* Judkins, 60 N. H. 127.

[3] Grinnell *v.* Phillips, 1 Mass. 529; Knowlton *v.* Bartlett, 1 Pick. (Mass.) 270.

[4] Campbell *v.* Phelps, 17 Mass. 244; Norton *v.* Nye, 56 Me. 211; Rider *v.* Chick, 59 N. H. 50.

[5] State *v.* Moore, 19 Mo. 369, 61 Am. Dec. 563.

[6] State *v.* Moore, 19 Mo. 396, 61 Am. Dec. 563.

[7] Harrington *v.* Fuller, 18 Me. 277, 36 Am. Dec. 719; Knowlton *v.* Bartlett, 1 Pick. (Mass.) 270; Cook *v.* Palmer, 6. B. & C. 739. As in foreclosing a chattel mortgage, as the agent of the mortgagee, Dorr *v.* Mickley, 16 Minn. 20; or in performing any other unofficial act: Moulton *v.* Norton, 5 Barb. (N. Y.) 286.

[8] Eastman *v.* Judkins, 59 N. H. 576; Odom *v.* Gill, 59 Ga. 180; Smith *v.* Berry, 37 Me. 298; Stevens *v.* Colby, 46 N. H. 163; Gorham *v.* Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549; Sheldon *v.* Payne, 7 N. Y. 458; Acker *v.* Ledyard, 8 Barb. (N. Y.) 517.

[9] Skinner *v.* Wilson, 61 Miss. 90.

conscionable exactions. And the mere omission of a deputy to inform the sheriff that he has process in his hands is not such negligence as to charge the sheriff in case a writ last in hand is executed first.[1] So the legal identity of the sheriff with his deputies cannot be extended so far as to make the sheriff chargeable with notice of all that has come to the knowledge of any of his deputies. Hence where an execution is delivered to a deputy sheriff who returns it unsatisfied for want of property and the sheriff, without notice of the execution in the hands of his deputy, finds property and seizes it upon a junior execution against the same defendant, he is not liable to the senior execution creditor for having first satisfied the junior execution.[2]

§ 799. **2. To Recorders of Deeds.**—The rule applies also to recorders of deeds who are liable for the negligence or misconduct of their deputies in recording deeds, and in making searches and abstracts of title.[3]

§ 800. **3. To Clerks of Courts.**—And to clerks of courts for the defaults of their deputies.[4]

§ 801. **4. To other Officers.**—The rule of liability is also extended by statute to the case of a great variety of officers who are authorized to appoint deputies and who are made responsible for their defaults.[5]

B.

FOR DEFAULTS OF HIS PRIVATE SERVANT OR AGENT.

§ 802. **Liable for Torts of private Servant or Agent.**—A public officer of whatever grade is subject to the same liability for the negligence or other defaults of his private servant or agent as adheres to any other principal. Hence when the subordinate, whose acts are the subject of the inquiry, "holds not

[1] Whitney *v.* Butterfield, 13 Cal. 335, 73 Am. Dec. 584.

[2] Russell *v.* Lawton, 14 Wis. 202, 80 Am. Dec. 769.

[3] Van Schaick *v.* Sigel, 60 How. (N. Y.) Pr. 122. See Smith *v.* Holmes, 54 Mich. 104.

[4] McNutt *v.* Livingston, 7 Sm. & M. (Miss.) 641; Snedicor *v.* Davis, 17 Ala. 472; Welddes *v.* Edsell, 2 McLean (U. S. C. C.) 366.

[5] Probate judge liable for default of his clerk: Wood *v.* Farnell, 50 Ala. 546.

an office known to the law, but his appointment is private and discretionary with the officer, the principal is responsible for his acts." [1]

This distinction was applied in the case of a mail carrier who was held, contrary to some cases previously referred to,[2] to be not a public officer but the mere private servant or agent of the contractor, who was therefore liable for the carrier's negligence or default in the performance of his duties.[3]

It has also been applied to the case of a laborer employed by a selectman to cut brush and trees in order to make a highway passable, and who, while so engaged, through mistaken judgment but not maliciously or wantonly, cut down some trees upon the land of an adjoining proprietor, the removal of which was not necessary. The selectman was held liable.[4]

[1] Note to 1 Am. Lead Cases (Wilson *v.* Peverly), p. 785, quoted in Ely *v.* Parsons, 55 Conn. 83, 10 Atl. Rep. 499.

[2] See *ante*, § 791.

[3] Sawyer *v.* Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445.

[4] Ely *v.* Parsons, 55 Conn. 83, 10 Atl. Rep. 499.

CHAPTER VII.

OF THE LIABILITY OF PUBLIC OFFICERS ON CONTRACTS.

I. IN GENERAL.

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I.

IN GENERAL.

§ 803. **Government can act only through its Officers or Agents.** —From the very nature of the case it is evident that the public —the government, be it national, state or lesser municipal, can

deal with third persons and enter into contracts with them, only through the instrumentality of its public officers or agents, duly authorized by law and acting within the scope of the authority conferred upon them.[1]

§ 804. **Officer or Agent should act only in Name of the Government.**—As in the case of the agent of a private principal, though with stronger reasons, the public officer or agent in his dealings with third persons should disclose the fact and the nature of his representative capacity, and, in his contracts and dealings, should act only in the name of his principal.[2]

§ 805. **Public Agents are presumed not to be personally liable.**—A well defined distinction is made by the law between contracts entered into by the agent of a private principal and those of the agents of the public.[3] It is constantly presumed that the latter do not intend personally to assume the public burdens, and that persons dealing with them do not rely upon their individual responsibility.[4] "On the contrary," says Judge Story,[5] "the natural presumption in such cases is that the contract was made upon the credit and responsibility of the government itself, as possessing an entire ability to fulfil all its just contracts, far beyond that of any private man; and that it is ready to fulfil them not only with good faith, but with punctilious promptitude, and in a spirit of liberal courtesy."

"It much against public policy," says Beasley, C. J., "to cast the obligations that justly belong to the body politic, upon this class of officials."[6]

[1] See Mayor of Baltimore *v.* Reynolds, 20 Md. 1, 83 Am. Dec. 535; People *v.* Talmage, 6 Cal. 256; Delafield *v.* Illinois, 2 Hill (N. Y.) 159; State *v.* Little Rock, &c., Ry. 31 Ark. 701; Osborne *v.* Tunis, 25 N. J. L. 633.

[2] See Mechem on Agency, § 417; White *v.* Cuyler, 6 T. R. 176; Brinley *v.* Mann, 2 Cush. (Mass.) 337, 48 Am. Dec. 669; Hale *v.* Woods, 10 N. H. 470, 34 Am. Dec. 176; Merchants' Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665; Clealand *v.* Walker, 11 Ala. 1058, 46 Am. Dec. 238; Wood *v.* Goodridge, 6 Cush. (Mass.) 117, 52 Am. Dec. 771.

[3] See Mechem on Agency, § 426.

[4] Knight *v.* Clark, 48 N. J. L. 22, 57 Am. Rep. 534; Hodgson *v.* Dexter, 1 Cranch (U. S.) 345; Crowell *v.* Crispin, 4 Daly (N. Y.) 100; Tippets *v.* Walker, 4 Mass. 595, 597; Pine *v.* Huber Mfg. Co., 83 Ind, 121.

[5] Story on Agency, § 302.

[6] In Knight *v.* Clark, 48 N. J. L. 22, 57 Am. Rep. 534.

§ 806. **Will not be held personally liable except where the Intent is clear to make him so.**— Hence it is well settled, as a general rule, that public officers and agents will not be held personally liable upon contracts entered into by them in the public behalf,[1] except in those cases where the intent is clearly apparent so to bind them.[2] And, as is said by Chief Justice MARSHALL, "The intent of the officer to bind himself personally must be very apparent indeed to induce such a construction of the contract."[3]

§ 807. **To what Contracts this Rule extends.**—This rule applies not only to simple contracts whether written or unwritten but to sealed instruments as well.[4] The fact that the agent of a

[1] Hodgson *v.* Dexter, 1 Cranch (U. S.) 345; Knight *v.* Clark, 48 N. J. L. 22, 57 Am. Rep. 534; Jones *v.* Le Tombe, 3 Dall. (U. S.) 384; Fox *v.* Drake, 8 Cow. (N. Y.) 191; Tutt *v.* Hobbs, 17 Mo. 486; Miller *v.* Ford, 4 Rich. (S. C.) L. 376, 55 Am. Dec. 687; Brown *v.* Austin, 1 Mass. 208, 2 Am. Dec. 11; McClenticks *v.* Bryant, 1 Mo. 598, 14 Am. Dec. 310; Belknap *v.* Reinhart, 2 Wend. (N. Y.) 375, 20 Am. Dec. 621; Stinchfield *v.* Little, 1 Greenl. (Me.) 231, 10 Am. Dec. 65; Dawes *v.* Jackson, 9 Mass. 490; Freeman *v.* Otis, 9 Mass. 272, 6 Am. Dec. 66; Walker *v.* Swartwout, 12 Johns. (N. Y.) 444, 7 Am. Dec. 334; Wallis *v.* Johnson School Township, 75 Ind. 368; Macbeath *v.* Haldinand, 1 T. R. 172; Bowen *v.* Morris, 2 Taunt. 374; Unwin *v.* Wolseley, 1 T. R. 674; Brown *v.* Austin, 1 Mass. 208, 2 Am. Dec. 11; Dawes *v.* Jackson, 9 Mass. 490; Bainbridge *v.* Downie, 6 Mass. 253; Osborne *v.* Kerr, 12 Wend. (N. Y.) 179; Rathbon *v.* Budlong, 15 Johns. (N. Y.) 1; Mott *v.* Hicks, 1 Cow (N. Y.) 513, 13 Am. Dec. 550; Sheffield *v.* Watson, 3 Caines (N. Y.) 69; Bronson *v.* Woolsey, 17 Johns. (N. Y.) 46; Bernard *v.* Torrance, 5 Gill. & J. (Md.) 383; Enloe *v.* Hall, 1 Humph. (Tenn.) 303; Brazelton *v.* Colyar, 2 Baxt. (Tenn.) 234; Twycross *v.* Dreyfus, L. R. 5 Ch. Div. 605, 22 Eng. Rep. 344; McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468; Cutler *v.* Ashland, 121 Mass. 588; Comer *v.* Bankhead, 70 Ala. 493; Lyon *v.* Irish, 58 Mich. 518; Melchart *v.* Halsey, 3 Wils. 149; City of Providence *v.* Miller, 11 R. I. 272, 23 Am. Rep. 453; Perrin *v.* Lyman, 32 Ind. 16.

[2] Simonds *v.* Heard, 23 Pick. (Mass.) 120, 24 Am. Dec. 41; Cahokia *v.* Rautenberg, 88 Ill. 219; Fowler *v.* Atkinson, 6 Minn. 579; Wing *v.* Glick, 56 Iowa 473, 37 Am. Rep. 142, n; Bayliss *v.* Pearson, 15 Iowa 279; Exchange Bank *v.* Lewis County, 28 W. Va. 273; Ross *v.* Brown, 74 Me. 352.

[3] In Hodgson *v.* Dexter, 1 Cranch (U. S.) 345.

[4] Knight *v.* Clark, 48 N. J. L. 22, 57 Am. Rep. 534; Hodgson *v.* Dexter, 1 Cranch (U. S.) 345; Unwin *v.* Wolseley, 1 T. R. 674; Walker *v.* Swartwout, 12 Johns. (N. Y.) 444, 7 Am. Dec. 334.

private principal would have been personally bound under like circumstances is not conclusive.

§ 808. **But where Intent is clear they will be personally charged.**—But, on the other hand, where such intent is clearly apparent, as where he uses apt words to charge himself personally, the public officer or agent will be held personally bound.[1]

Whether he is so bound or not becomes, therefore, largely a question of evidence, to be determined according to the facts and circumstances of each particular case.

It is, then, always admissible for the plaintiff to show, if he can, that though the defendant was a public officer, he yet in that particular case contracted as an individual.[2]

§ 809. **Public Officer not ordinarily held to an implied Warranty of Authority.**—"When public agents," says EMMETT, C. J.,[3] "in good faith, contract with parties having full knowledge of the extent of their authority, or who have equal means of knowledge with themselves,[4] they do not become individually liable, unless the intent to incur a personal responsibility is clearly expressed, although it should be found that through ignorance of law they may have exceeded their authority. * * In this, as in other cases, the intention of the parties governs, and when a person, known to be a public officer, contracts with reference to the public matters committed to his charge, he is presumed to act in his official capacity only, although the contract may not in terms allude to the character in which he acts, unless the officer by unmistakable language assumes a personal lia-

[1] Simonds *v.* Heard, 23 Pick. (Mass.) 120, 34 Am. Dec. 41; Cahokia *v.* Rautenberg, 88 Ill. 219; Fowler *v.* Atkinson, 6 Minn. 579; Wing *v.* Glick, 56 Iowa 473, 37 Am. Rep. 142, n; Bayliss *v.* Pearson, 15 Iowa 279; Exchange Bank *v.* Lewis County, 28 W. Va. 273; Ross *v.* Brown, 74 Me. 352; City of Providence *v.* Miller, 11 R. I. 272, 23 Am. Rep. 453; Sheffield *v.* Watson, 3 Caines (N. Y.) 69; Gill *v.* Brown, 12 Johns. (N. Y.) 385; Horsley *v.* Bell, 1 Bro. C. C. 101.

[2] Ogden *v.* Raymond, 22 Conn. 379, 58 Am. Dec. 429.

[3] In Sanborn *v.* Neal, 4 Minn. 126, 77 Am. Dec. 502. See to like effect: McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468; New York, &c., Co. *v.* Harbison, 16 Fed. Rep. 688; Perry *v.* Hyde, 10 Conn. 329; Murray *v.* Carothers, 1 Metc. (Ky.) 71.

[4] See also upon this point Newman *v.* Sylvester, 42 Ind. 112; Jenkins *v.* Atkins, 1 Humph. (Tenn.) 294, 34 Am. Dec. 648.

bility[1] or is guilty of fraud or misrepresentation. Being a public agent with his powers and duties prescribed by law, the extent of his powers is presumed to be as well known to all with whom he contracts as to himself.[2] When, therefore, there is no want of good faith, a party contracts with such an officer with his eyes open, and has no one to blame if it should afterwards appear that the officer had not the authority which it was supposed he had."[3]

§ 810. **But Officer may be bound by express Representation as to his Authority.**—But the officer may undoubtedly be held liable to one who sustains injury thereby where, though in good faith but erroneously, he induces the making of the contract by express assertions, representations or warranties of his authority as a matter of fact,[4] as distinguished from matters of law,[5] of the falsity of which the other party did not and was not by law presumed to have knowledge.[6]

[1] See also *ante* § 806, and cases cited.

[2] Persons dealing with a public agent are charged with knowledge of the law conferring his authority. Mayor of Baltimore *v.* Eschbach, 18 Md. 283; Mayor of Baltimore *v.* Reynolds, 20 Md. 1, 83 Am. Dec. 535; Lee *v.* Munroe, 7 Cranch (U. S.) 366; State *v.* Bank, 45 Mo. 528; State *v.* Hastings, 10 Wis. 518; Hull *v.* Marshall County, 12 Iowa 142; Silliman *v.* Fredericksburg, &c., R. R. Co., 27 Gratt. (Va.) 119; The Floyd Acceptances, 7 Wall. (U. S.) 680; Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423; State *v.* Hays, 52 Mo. 578; Delafield *v.* State, 26 Wend. (N. Y.) 192; People *v.* Bank, 24 Wend. (N. Y.) 431; Whiteside *v.* United States, 93 U. S. 247; Newman *v.* Sylvester, 42 Ind. 112.

[3] "If the party contracts as a public officer, and in that capacity acts honestly, he will not ordinarily be personally liable. Belknap *v.* Reinhart, 3 Wend. (N. Y.) 375, (20 Am. Dec. 621); Hodgson *v.* Dexter, 1 Cranch (U. S.) 345; Nichols *v.* Moody, 22 Barb. (N. Y.) 611, and cases cited. If his authority to act is defined by public statute, all who contract with him will be presumed to know the extent of his authority, and cannot allege their ignorance as a ground for charging him with acting in excess of such authority, unless he knowingly misled the other party." Newman *v.* Sylvester, 42 Ind. 112.

[4] See Mechem on Agency, § 542; Kroeger *v.* Pitcairn, 101 Penn. St. 311, 47 Am. Rep. 718; Bartlett *v.* Tucker, 104 Mass. 336, 6 Am. Rep. 240; Jefts *v.* York, 10 Cush. (Mass.) 392, s. c. 4 Cush. 371, 50 Am. Dec. 791; Bank of Hamburg *v.* Wray, 4 Strob. (S. C.) 87, 51 Am. Dec. 659; Belisle *v.* Clark, 49 Ala. 98.

[5] See Mechem on Agency, §§ 515, 553. Beattie *v.* Lord Ebury, L. R. 7, Ch. App. 777, 3 Eng. Rep. 625.

[6] See McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468.

§ 811. **Or where he is guilty of Fraud or Misrepresentation.**—*A fortiori* may the officer be held liable where he fraudulently or deceitfully conceals or misrepresents the facts in respect to his authority.[1]

§ 812. **Officer may be Liable where knowing he has no Authority he makes Contract implying its Existence.**—So the officer may be liable where, knowing that he has no authority, as where it was never conferred or has terminated, or depends upon the existence of extrinsic facts peculiarly within his own knowledge,[2] he yet, though without express assertions of authority, deals with the other party who has not and is not by law presumed to have knowledge of his authority,[3] as one possessing competent authority and without disclosing the lack of it, whereby the other party suffers injury.[4]

But the officer can not be held personally liable where the other party knew or had the means of knowing that the officer was unauthorized, unless the latter has expressly charged his personal responsibility.[5]

§ 813. **Officer liable who disavows his official Character.**—In Freeman v. Otis,[6] the court said that where a public agent makes a contract in the name and behalf of the government, the

[1] See Mechem on Agency, § 543, citing Kroeger *v.* Pitcairn, 101 Penn. St. 311, 47 Am. Rep. 718; Smout *v.* Ilbery, 10 Mees & Wels. 1; Bank of Hamburg *v.* Wray, 4 Strob. (S. C.) 87, 51 Am. Dec. 659. See also Newman *v.* Sylvester, 42 Ind. 112; Sanborn *v.* Neal, 4 Minn. 126, 77 Am. Dec. 502; McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468; New York, &c., Co. *v.* Harbison, 16 Fed. Rep. 688; Perry *v.* Hyde, 10 Conn. 329; Murray *v.* Carothers, 1 Metc. (Ky.) 71.

[2] McClenticks *v.* Bryant, 1 Mo. 598, 14 Am. Dec. 310. See also McDonald *v.* Franklin County, 2 Mo. 218; Ruggles *v.* Washington County, 3 Mo. 501.

[3] McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468.

[4] See Mechem on Agency, § 544.

[5] McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468; Newman *v.* Sylvester, 42 Ind. 106, 113. In the last case it is said: "It is material in such cases that the party complaining of a want of authority in the agent should be ignorant of the truth touching the agency. If he has full knowledge of the facts, or of such facts as fairly and fully put him upon inquiry for them, or the means of knowledge reasonably accessible to him, he cannot say he was misled, simply on the ground that the party assumed to act as agent without authority in the absence of fraud."

[6] Freeman *v.* Otis, 9 Mass. 272, 6 Am. Dec. 66. See also Brown *v.* Austin, 1 Mass. 208, 2 Am. Dec. 11.

agent is not liable to the action of the party contracted with, who must look to the government. But if such agent should deny to the government that he had entered into such contract, and by such interference prevents the party from availing himself of his remedy against the government, he must be personally liable, as he has, by his conduct, in effect disavowed his acting in the character of a public agent.

§ 814. **Officer Liable who conceals Fact of his Agency.**—So the officer would, like a private agent,[1] undoubtedly be held personally liable where he conceals the fact of his representative capacity, and contracts as the real principal.

§ 815. **Officer may be liable where there is no responsible Principal.**—So also, as in the case of a private agent,[2] the officer may be personally liable where he assumes to represent a principal which has no legal existence or status, or which has no legal responsibility.[3]

§ 816. **Where Officer is liable on the Contract made without Authority.**—Whether the officer can be held liable upon the very contract itself which he has, without authority, assumed to make, or whether the other party must find his relief in some other form of action, are questions upon which the authorities are not entirely in harmony. But the true rule seems to be that the officer can only be held liable upon the contract itself in those cases in which he has used apt words to bind himself, or has expressly pledged his personal responsibility, or in which the credit was given to him personally.[4]

§ 817. **How Liability enforced in other Cases.**—The liability of the officer can be enforced in other of such cases, if he be liable at all, only in an appropriate action based upon the express

[1] See this question fully discussed in Mechem on Agency, § 554.

[2] See Mechem on Agency, § 557.

[3] See Blakely *v.* Bennecke, 59 Mo. 193.

[4] Ogden *v.* Raymond, 22 Conn. 379, 58 Am. Dec. 429; McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468. See also Hall *v.* Crandall, 29 Cal. 567, 89 Am. Dec. 64; Duncan *v.* Niles, 32 Ill. 532, 83 Am. Dec. 293; Harper *v.* Little, 2 Me. 14, 11 Am. Dec. 25; Stetson *v.* Patten, 2 Me. 358, 11 Am. Dec. 111; Abbey *v.* Chase, 6 Cush. (Mass.) 56; McHenry *v.* Duffield, 7 Blackf. (Ind.) 41.

See Mechem on Agency, § 550.

or implied warranty of authority,[1] or upon the fraud, misrepresentation or deceit.[2]

§ 818. **How when, though authorized, he fails to bind the Public.**—But there are still other cases in which the officer, being fully authorized to bind the public to the contract in question and intending in good faith to accomplish that result, may yet, through the failure to use appropriate language or to observe prescribed forms, entirely fail to make such a contract as is in law binding upon his principal. The question will then arise whether he is himself bound.

This question must be determined by reference to the same principles which have been already considered. It is, as has been seen, the constant presumption that the public officer does not intend to bind himself personally.[3] He can, as has also been seen, be held personally liable only where the intent to be so is clearly apparent.[4] The mere fact that he has failed to give a cause of action upon the contract against his principal does not necessarily lead to the result that he is himself bound.[5]

Guided by these principles then, it follows that he can in such a case be held personally liable upon the contract itself only when he has used apt words to charge himself personally, or when he has expressly pledged his personal responsibility, or when the credit was given to him individually.[6] In other cases the contract may bind no one at all, or may be utterly void, in which event the other party must seek his remedy, if he has any, either upon an implied contract based upon the original consideration, or upon some express or implied warranty of the sufficiency of the execution.[7]

[1] See Baltzen *v.* Nicolay, 53 N. Y. 467; Patterson *v.* Lippincott, 47 N. J. L. 457, 1 Atl. Rep. 506, 54 Am. Rep. 178.

[2] See Noyes *v.* Loring, 55 Me. 408.

[3] See *ante*, § 805.

[4] See *ante*, § 806.

[5] Ogden *v.* Raymond, 22 Conn. 379, 58 Am. Dec. 429; McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468. See also Dung *v.* Parker, 52 N. Y. 494; Baltzen *v.* Nicolay, 53 N. Y. 467.

[6] Ogden *v.* Raymond, 22 Conn. 379, 58 Am. Dec. 429; McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468; Newman *v.* Sylvester, 42 Ind. 112; Sanborn *v.* Neal, 4 Minn. 126, 77 Am. Dec. 502.

[7] See Hall *v.* Crandall, 29 Cal. 567, 89 Am. Dec. 64.

II.

UPON CONTRACTS NOT NEGOTIABLE.

§ 819. **Illustrations of Rule holding Officer not liable.**—Illustrations of the rule that the public agent is not liable personally upon contracts made by him in behalf of the public, except where the contract evinces a clear intention that he should be so liable, are numerous.

Thus an instrument in writing beginning "For value received, we," A. S. C., W. M. C. and J. H. K., "members of the township committee of the township of Harrison, * * and our successors in office, promise to pay," etc.; authorizing any attorney-at-law appointed by the payee to prosecute suits "against us or our successors in office on said note" and to confess judgment for any sums in the payment of which "we or our successors in office may be delinquent," and signed with the individual names of the makers and sealed with their seals, is not binding upon the signers personally.[1]

So where a lease was made between H. of the one part and D., "secretary of war," of the other, whereby H. leased to D. "and his successors," and D. "for himself and his successors" covenanted to pay rent, etc., the lease being signed by H. and D. in their individual names, the Supreme Court of the United States held that D. was not personally liable upon his covenants.[2]

An instrument reading "On settlement with Sylvanus Fox for work and labor on the court house in the village of Owego, we find there to be due him" a certain sum "which we promise to pay on the first day of June next," signed by D. and P. with the addition "Commissioners for building the court house at Owego Village," is not personally binding upon the signers.[3] And an instrument by which certain persons, "school directors of Heidelberg township" acknowledged themselves bound, and conditioned to be void if the persons named, "school directors of Heidelberg township * * and their successors in office * * shall pay," etc., signed in the individual names of the

[1] Knight v. Clark, 48 N. J. L. 22, 57 Am. Rep. 534.

[2] Hodgson v. Dexter, 1 Cranch (U. S.) 345.

[3] Fox v. Drake, 8 Cow. (N. Y.) 191.

makers, with their seals attached, binds the district and not the makers.[1]

An order addressed to J. F., "commissioner of common schools," in a certain district, directing the payment of a sum of money to a person named, and signed by two individuals with the addition "Trustees," does not make the signers personally liable.[2]

So an officer has been held not to be personally liable who has contracted "as superintendent of the State prison,"[3] or as "committee of the commissioners of roads."[4]

So an agreement between H. A. L. of the one part, and G.W. I. and M.C. "trustees of the village of Grand Ledge" by which the said G.W. I. and M.C. "trustees of the village of Grand Ledge" covenanted and agreed to pay H. A. L. a certain sum for building a bridge in the village, and which was signed H. A. L. (L. S.), G. W. I. "Trustee" (L. S.) M. C. (L. S.) is not binding upon the two latter personally.[5]

§ 820. **Cases holding Officer liable.**—But, on the other hand, where the committee of a town entered into a contract for the erection of a bridge, reciting that it was between H. H., E. S. and N. H. "committee of the town of Wayland" on the one part and S. and C., on the other, wherein among other things it was agreed that "said committee are to pay" said S. and C. a certain sum of money on completion of the work, and which was signed by the members of the committee in their individual names, the court held that it was apparent from the face of the contract that the committee intended to bind themselves and became personally responsible. The court, however, while recognizing the rule exempting public officers from personal liability, held that it had no application to this case, "it not being a contract in behalf of the public, but, at most, of a corporation capable of making contracts and liable to an action on its contracts."[6]

So where a contract was made between E. J. and W. parties

[1] Heidelberg School District *v.* Horst, 62 Penn. St. 301.

[2] Tutt *v.* Hobbs, 17 Mo. 486.

[3] Dawes *v.* Jackson, 9 Mass. 490.

[4] Miller *v.* Ford, 4 Rich. (S. C.) L. 376, 55 Am. Dec. 687.

[5] Lyon *v.* Irish, 58 Mich. 518.

[6] Simonds *v.* Heard, 23 Pick. (Mass.) 120, 34 Am. Dec. 41.

of the first part, and D. "in behalf of the city of Providence" party of the other part, whereby the first parties agreed that, in consideration that the city would widen a certain street, they would convey to the second party a certain piece of land for a certain price, etc; the contract being signed and sealed by the parties in their individual names, it was held that the contract was personally obligatory upon D., and not upon the city of which he was the mayor.[1] The court recognized the rule usually applicable to public officers, but held that D. had chosen to become individually liable, saying, moreover, that it has been held "that the rule in regard to public officers does not apply in favor of the officers of a municipal corporation which is capable of making contracts for itself, and is liable to be sued thereon."[2]

III.

UPON NEGOTIABLE INSTRUMENTS.

§ 821. **In general.**—When, however, the case of negotiable instruments is considered, other elements appears. Such paper is intended to serve as a means of commercial exchange and to largely take the place of money. It is, therefore, highly desirable that it should tell its own story and be unfettered and unlimited by any restrictions or exceptions not apparent upon its face. At the same time, there is nothing in this fact sufficient to override other established principles.

The cases dealing with this class of instruments are extremely conflicting. In many of them, the tendency of the courts has been to apply the same rules which govern the construction of similar instruments when made by a private agent, and to overlook or disregard the distinctions properly applicable in the case of public agents. Others, however, as will be seen, find no difficulty in applying to negotiable instruments the same rules and presumptions which govern in cases of non-negotiable contracts. Thus—

[1] City of Providence *v.* Miller, 11 R. I. 272, 23 Am. Rep. 453.

[2] As so holding, the court cite Simonds *v.* Heard, 23 Pick. 120, 34 Am. Dec. 41, (*supra*) and Hall *v.* Cockrell, 28 Ala. 507.

§ 822. **Cases applying Rule applicable to private Agency.**— Where a note reading "I promise to pay," etc., was signed by G. H. and A. P. "School trustees," it was held that the note was the individual obligation of the signers, and that the words "School trustees" were but descriptive of the persons;[1] and a similar ruling was made where the paper headed "State of Iowa, County of Jones, Township of Hale," read "we agree to pay," etc., and was signed W. H. G., "Pres. School Board," and I. B. S. "Sec'y School Board."[2] So where notes reading, "I promise," etc., were signed J. B. "Agent for Lewis County," it was held that J. B. was personally bound.[3] And a note reading "For valued received as treasurer of the town of Monmouth, I promise to pay," etc., and signed W. G. B. "Treasurer," was held to be the individual note of B.[4]

So individuals who promised "as committeemen for the erection of a school house in District No. 1," but signed in their own names were held personally liable;[5] and where a note reading "For value received in policy No. 138,181, * * issued by the American Insurance Company * * we promise to pay to said Company," etc., was signed E. G. "president." J. A. C. "secretary," and E. S. "director," it was held that it was the individual note of the persons named.[6]

So again, where a note reading "For value received I promise to pay," etc., "for causing full page view of the Leonard graded school building to be printed in the atlas of Clearfield County,"

[1] Village of Cahokia *v.* Rautenberg, 88 Ill. 219. To same effect, see Fowler *v.* Atkinson, 6 Minn. 579.

[2] Wing *v.* Glick, 56 Iowa 473, 37 Am. Rep. 142, note.

[3] Exchange Bank *v.* Lewis County, 28 W. Va. 273.

[4] Ross *v.* Brown, 74 Me. 352.

[5] Bayliss *v.* Pearson, 15 Iowa 279.

[6] American Ins. Co. *v.* Stratton, 59 Iowa 696.

These cases in Iowa must evidently be distinguished from certain others in the same State. Thus where a note reading "we, the undersigned, directors of school district No. 4, Montpelier township, promise to pay;" &c., was signed by the individual names of the officers, it was held not binding on them personally. Baker *v.* Chambles, 4 Greene (Iowa) 428. So, where a similar note reading "we, the board of school district No. 1" promise to pay, &c., was signed in the individual names. Lyon *v.* Adamson, 7 Iowa 509.

The court in these cases holds that, under the Code, the form adopted is the proper form in which to pledge the responsibility of the district. The same Code, however, provides a different name by which districts shall be known, and by which they shall make contracts, be sued, &c.

was signed J. T. L. "President Sch. Bd," which was found to mean President of the School Board, it was held that L. was personally bound.[1]

§ 823. **Cases distinguishing Public Officers.**— But, on the other hand, upon the ground that they were public officers, where two notes headed "Monticello, Ind.," and reading "we promise to pay," etc., were signed one H. P. A., W. S. H., C. W. K., "Trustees of Monticello School," and the other H. P. A., C. W. K., "School Trustees," it was held that the words "Trustees of Monticello School," and "School Trustees" were not mere *descriptio personae*, but indicated an intent to charge the school town,[2] and the same ruling has been reaffirmed in later cases in the same State.[3] *A fortiori* did the same court apply this rule where a note reading "I promise to pay," etc., "to be paid out of the township funds," was signed F. K. M, "Trustee of Johnson T'p."[4]

Where a sealed note reading, we, A. S. C., W. M. C., and J. H. K., "members of the township committee of the township of Harrison, * * * and our successors in office, promise to pay," was signed by the parties in their individual names, the court applied the doctrine in regard to public agents and held the signers not personally liable.[5]

Where a note reading "we, as trustees of school district No. 10," promise to pay, etc, was signed with the individual names of the makers, the court held that there could not well be any doubt that it was the promise of the district and not of the persons signing it, but that, if there was, it could be removed by showing the intention.[6]

[1] Forcey *v.* Caldwell—Penn.—9 Atl. Rep. 466.

[2] School Town of Monticello *v.* Kendall, 72 Ind. 91, 37 Am. Rep. 139.

[3] Moral School Tp. *v.* Harrison, 74 Ind. 93.

[4] Wallis *v.* Johnson School Tp. 75 Ind. 368. In this case the court said: "Where it appears that the consideration moved to the township, and it also further appears, from the whole instrument, that it was intended to impose an obligation upon the township, there can be no doubt that the contract should be regarded as that of the corporation, and not as that of the officer whose name is signed to it," citing McKenzie *v.* Board, 72 Ind. 189; Sheffield School Tp. *v.* Andress, 56 Ind. 157.

[5] Knight *v.* Clark, 48 N. J. L. 22, 57 Am. Rep. 534.

[6] Sanborn *v.* Neal, 4 Minn. 126, 77 Am. Dec. 502.

§ 824. **Admissibility of parol Evidence to show Intent.**—Whether parol evidence may be resorted to to show the person intended to be bound is a question which, in the case of negotiable instruments executed by a private agent, has been much considered and upon which the courts are almost hopelessly in conflict. This question in that connection has been discussed with some fulness by the writer in another place.[1] In the case of public agents, however, the question has not frequently arisen.

In Iowa, where a note containing a promise, individual in form, was signed E. G., "President," J. A. C., "Secretary," and E. S., "Director," it was held that it was the individual promise of the persons named, and that parol evidence was not admissible in an action by the payee against the makers to show that it was given and accepted as the promise of the school district of which the signers were the respective officers indicated, and not as the individual promise of the signers.[2]

In Minnesota it was held, in accordance with the rule generally approved in cases of private agency, that where the paper is upon its face ambiguous as to the party to be charged, extrinsic evidence may be resorted to to show the real intention.[3]

The instrument in that case read, "we, as trustees of school district No. 10," promise, etc., and was signed with the individual names of the makers. The action was brought by the payee. The court considered it at least doubtful whether the note was an individual obligation.

In Missouri, the same rule prevails, and where a note reading "I promise to pay," etc., "for building a school-house in Dist. No. 3," was signed by P. T. R., "Local Director," it was held, in an action brought by the payee against the signer, that it was so far ambiguous that the director might show that it was intended to be the note of the district.[4]

See also Baker *v.* Chambles, 4 Greene (Iowa) 428, and Lyon *v.* Adamson, 7 Iowa 509, referred to a note to the preceding section.

[1] Mechem on Agency, § 441 *et seq.*

[2] American Ins. Co. *v.* Stratton, 59 Iowa 696, upon the authority of Wing *v.* Glick, 56 Iowa 473, 37 Am. Rep. 142, note.

[3] Sanborn *v.* Neal, 4 Minn. 126, 77 Am. Dec. 503. See also Pratt *v.* Beaupre, 13 Minn. 187.

[4] McClellan *v.* Reynolds, 49 Mo. 312. See also in Missouri, Musser *v.* Johnson, 42 Mo. 74, 97 Am. Dec. 316; Shuetze *v.* Bailey, 40 Mo. 69; Washington Ins. Co. *v.* Seminary, 52 Mo. 480; Klosterman *v.* Loos, 58 Mo. 290;

§ 825. **The true Rules.**—The adjudications upon many points of importance are yet so few as to render it impossible to construct from them a complete statement of the rules which govern in this relation.[1] The question is of importance, and the rules may well be different, in two classes of cases:—

1. Those between the original parties.
2. Those between the maker and a third party.

I. In the former class it is believed that the following rules are consonant with reason and with justice, and are not in conflict with the authorities:—

1. Where the paper on its face is clearly the direct and personal promise of the signer, no reference being made to an official character, the signer must be deemed to have intended to pledge his individual responsibility and must, therefore, be held personally bound. In such a case extrinsic evidence is not admissible to exonerate him.[2] So, where it is unmistakably the principal's promise, such evidence can not be resorted to to charge the agent.[3]

2. Where the instrument is ambiguous on its face, so as to render it doubtful as to the intention, the presumption of the law will be that a known public officer did not intend to charge himself personally, and extrinsic evidence may be introduced to clear up the ambiguity by showing the actual intention.[4]

3. In view of the presumption of the law against a personal obligation, a contract which, upon its face, bears some evidence of a representative capacity (as by the addition of the words "school trustees" and the like, and *a fortiori* so, where the name of the principal is also disclosed), is to be deemed at least ambiguous within the meaning of the preceding rule.[5]

Ferris *v.* Thaw, 5 Mo. App. 279; Turner *v.* Thomas, 10 Mo App. 342.

[1] For the rules in case of a private agent, see Mechem on Agency, § 413.

[2] See Phelps *v.* Borland, 30 Hun (N. Y.) 362; Auburn Bank *v.* Leonard, 40 Barb. (N. Y.) 119; Babbett *v.* Young, 51 N. Y. 238; Hancock *v.* Fairfield, 30 Me. 299; Collins *v.* Buckeye State Ins. Co. 17 Ohio St. 215, 93 Am. Dec. 612; Brown *v.* Parker, 7 Allen (Mass.) 339.

[3] Falk *v.* Moebs, 127 U. S. 597.

[4] Sanborn *v.* Neal, 4 Minn. 126, 77 Am. Dec. 502; McClellan *v.* Reynolds, 49 Mo. 312.

[5] Sanborn *v.* Neal, 4 Minn. 126, 77 Am. Dec. 502; McClellan *v.* Reynolds, 49 Mo. 312.

The Indiana cases go further, and hold that the words "Trustees of Monticello School," "School Trustees," &c. are sufficient to show an intention to charge the township.

Where the paper discloses upon its face the name of a principal competent to make it, with such other words as indicate that the signer acted in a representative capacity, the paper is to be deemed that of the principal and not that of the agent.[1]

5. The fact that the instrument does not, either from lack of authority or of due execution, bind the principal, is not alone sufficient to charge the agent upon it.[2]

II. In the second class,—that of a third person against the maker,—the same rules should apply, except that extrinsic evidence ought to be admitted only in cases—

1. Where the third person is not a *bona fide* holder.

2. Where the instrument bears sufficient evidence upon its face, or is so ambiguous, as to fairly put a reasonably prudent man upon inquiry.[3]

School Town of Monticello *v.* Kendall, 72 Ind. 91, 37 Am. Rep. 139; Moral School Tp. *v.* Harrison, 74 Ind. 93; Wallis *v.* Johnson School Tp. 75 Ind. 368.

In New Jersey the cases also go further, and a promise, though under seal made by certain persons, "members of the township committee of the township of Harrison * * and our successors in office," is not the individual obligation of the signers, though they sign and seal as individuals: Knight *v.* Clark, 48 N. J. L. 22, 57 Am. Rep. 534.

The Iowa cases are *contra:* American Ins. Co. *v.* Stratton, 59 Iowa 696; Wing *v.* Glick, 56 Iowa 473.

[1] Baker *v.* Chambles, 4 Greene (Iowa) 428; Lyon *v.* Adamson, 7 Iowa 509; School Town of Monticello *v.* Kendall, 72 Ind. 91, 37 Am. Rep. 139; Moral School Tp. *v.* Harrison, 74 Ind. 93; Wallis *v.* Johnson School Tp. 75 Ind. 368; Knight *v.* Clark, 48 N. J. L. 22, 57 Am. Rep. 534.

[2] Ogden *v.* Raymond, 22 Conn. 379, 58 Am. Dec. 429; McCurdy *v.* Rogers, 21 Wis. 197, 91 Am. Dec. 468.

[3] School Town of Monticello *v.* Kendall, 72 Ind. 91, 37 Am. Rep. 139. In this case, where an indorsee was plaintiff, the court held the words "School Trustees" and "Trustees of Monticello School" affixed to the signature sufficient to show an intention to charge the school town.

CHAPTER VIII.

OF THE LIABILITY OF THE PUBLIC FOR THE ACTS AND CONTRACTS OF ITS OFFICERS AND AGENTS.

§ 826. Purpose of this Chapter.
827. How Subject divided.

I. UPON CONTRACTS MADE BY OFFICER.

828. Authority is created by Law.
829. Persons dealing with Officer must ascertain his Authority.
830. Authority will be strictly construed.
831. Contract must be in Form prescribed by Law.
832. Limits fixed by Law must not be exceeded.
833. Conditions precedent must be complied with.
834. Public only bound while Officer keeps within his Authority.
835. Contract authorized and duly executed is binding.
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840. To what Officers this Rule applies.

II. FOR THE ACTS, DECLARATIONS AND ADMISSIONS OF THE OFFICER.

841. Stricter Rule prevails than in private Agency.
842. Acts within the Scope of his Authority bind the Public.
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III. BY NOTICE TO THE OFFICER.

844. In private Agencies, Notice to Agent is Notice to Principal.
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846. Notice to the Officer, when Notice to the Public.

IV. FOR THE TORTS OF ITS OFFICERS.

847. In general.

1. *The Liability of the United States.*

848. United States Government not liable for Torts of its Officers and Agents.

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849. State not liable for Torts of its Officers and Agents.

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850. Municipal Corporation not liable for Torts of its Public Officers.
851. Same Subject—Illustrations of this Rule.
852. Municipal Corporations not liable for Acts done *ultra Vires*.
853. Municipal Corporation is liable for Torts of its Servants and Agents committed in execution of its Powers.

§ 826. **Purpose of this Chapter.**—Having heretofore considered the liability of the officer himself, attention may next be given to the liabilities imposed upon the public by his acts and contracts.

§ 827. **How Subject divided.**—This will involve a consideration of the liability of the public—1. For the officer's contracts; 2. For his declarations and admissions; 3. For notice to him; 4. For his torts.

I.

UPON CONTRACTS MADE BY OFFICERS.

§ 828. **Authority is created by Law.**—As has been seen,[1] the authority of every public officer to act in behalf of the public, is created by law, and unless so created and conferred it can not exist. Said Mr. Justice MILLER, in response to the inquiry, where are we to look for the authority of the office?: "The answer, which at once suggests itself to one familiar with the structure of our government, in which all power is delegated and is defined by law, constitutional or statutory, is, that to one or both of these sources we must resort in every instance. We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the President, the Legislature, and the Judiciary, exercise powers in some sense left to the more general definitions necessarily incident to fundamental law found in the constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law."[2]

§ 829. **Persons dealing with Officer must ascertain his Authority.**—Every person, therefore, who seeks to obtain, through the dealings with the officer, the obligation of the public, must, at his peril, ascertain that the proposed act is within the scope of the authority which the law has conferred upon the officer.[3]

[1] See *ante*, § 501.

[2] In The Floyd Acceptances, 7 Wall. (U. S.) 666, 676.

[3] The Floyd Acceptances, 7 Wall. (U. S.) 666; Sutro *v.* Pettit, 74 Cal. 332, 5 Am. St. Rep. 442; McDonald

§ 830. **Authority will be strictly construed.**—The authority of the officer being a matter of public record or of public law of which every person interested is bound to take notice, there is no hardship in confining the scope of the officer's authority within the limits of the express grant and necessary implication, and such is the well established rule.[1] There can be no occasion or excuse in such a case for indulging in presumptions or relying upon appearances, but the authority must be traced home to its source and must be shown actually to exist.[2] The fact, therefore, that the same act might have been within the scope of the authority if created by a private principal is not conclusive.[3]

§ 831. **Contract must be in Form prescribed by Law.**— So where the law expressly requires that the contract shall be executed in a certain manner or shall be in writing,[4] or shall be also

v. Mayor, 68 N. Y. 23, 23 Am. Rep. 144; Barton *v.* Swepston, 44 Ark. 437; Dorsey County *v.* Whitehead, 47 Ark. 205; Merchants' Bank *v.* Bergen County, 115 U. S. 384; Wallace *v.* Mayor, 29 Cal. 181; Bloomington School Tp. *v.* National School Furnishing Co. 107 Ind. 43; Pine Township *v.* Huber, 83 Ind. 121; Axt *v.* Jackson School Tp. 90 Ind. 101; Reeve School Tp. *v.* Dodson, 98 Ind. 497; Union School Tp. *v.* First. Nat. Bank, 102 Ind. 464; Summers *v.* Board. 103 Ind. 262, 53 Am. Rep. 513; Platter *v.* Board, 103 Ind. 360; Hodges *v.* Buffalo, 2 Denio (N. Y.) 110; Cornell *v.* Guilford, 1 Denio (N. Y.) 510; Savings Bank *v.* Winchester, 8 Allen (Mass.) 109.

[1] Mayor of Baltimore *v.* Eschbach, 18 Md. 282; Mayor of Baltimore *v.* Reynolds, 20 Md. 1, 83 Am. Dec. 535; Clark *v.* Des Moines, 19 Iowa 199, 87 Am. Dec. 423; The Floyd Acceptances, 7 Wall. (U. S.) 666; Lee *v.* Munroe, 7 Cranch (U. S.) 366; Whiteside *v.* United States, 93 U. S. 247; State *v.* Bank, 45 Mo. 528; Curtis *v.* United States, 2 N. & H. (U. S. Ct. Cl.) 144; Pierce *v.* United States, 1 N. & H. 270; Silliman *v.* Fredericksburg, &c. R. R. Co. 27 Gratt. (Va.) 119; State *v.* Hays, 52 Mo. 578; Delafield *v.* State, 26 Wend. (N. Y.) 192; Hull *v.* Marshall County, 12 Iowa, 142.

[2] State *v.* Bevers, 86 N. C. 588.

[3] Mayor of Baltimore *v.* Eschbach, 18 Md. 282; Mayor of Baltimore *v.* Reynolds, 10 Md. 1, 83 Am. Dec. 535.

[4] Thus where the statute required contracts made by certain officers to be in writing and to be executed with prescribed formalities, a contract not so executed can not be enforced. Said Mr. Justice BRADLEY, of the United States Supreme Court: "It (the statute) makes it unlawful for contracting officers to make contracts in any other way than by writing signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. A party who makes a contract with an officer without having it reduced to writing is knowingly accessory to a violation of duty on his part. Such a party aids in the violation of the law. We are of

approved by some other officer,[1] such requirement must be complied with or the contract will not be binding upon the government.

§ 832. **Limits fixed by Law must not be exceeded.** — So where the law authorizing the officer to act or contract fixes limits to his authority, his act or contract in excess of the limits fixed is not binding on his principal.[2] Here, as in other cases, the party dealing with him is bound, at his peril, to observe the limitations which the law prescribes.[3]

§ 833. **Conditions precedent must be complied with.** — So where the law authorizes the act or contract only in certain cases or at certain times, or upon certain conditions, as upon its approval by public vote or the determination by some other board or body of its necessity, or after advertising for bids, he who seeks to enforce the contract must see to it that the condition precedent has been complied with.[4]

§ 834. **Public only bound while Officer keeps within his Authority.**—It is a necessary conclusion from the principles already stated that the public, whether it be the national, state or lesser municipal government, can be bound by the acts and contracts of its officers and agents only when such officer or agent has acted strictly within the scope of his authority as created, conferred and defined by law, and that it is not bound where

opinion, therefore, that the contract itself is affected, and must conform to the requirements of the statute until it passes from the observation and control of the party who enters into it. After that, if the officer fails to follow the further directions of the act with regard to affixing his affidavit, and returning a copy of the contract to the proper office, the party is not responsible for this neglect." Clark *v.* United States, 95 U. S. 539, 542. See also Camp *v.* United States, 113 U. S. 648. But see Salomon *v.* United States, 19 Wall. (U. S.) 17.

[1] Thus see Parish *v.* United States, 8 Wall. (U. S.) 489; Filor *v.* United States, 9 Wall. 45; McDonald *v.* Mayor, 68 N. Y. 23, 23 Am. Rep. 144.

[2] Daviess County *v.* Dickinson, 117 U. S. 657; Merchants' Bank *v.* Bergen County, 115 U. S. 384; Sutro *v.* Pettit, 74 Cal. 332, 5 Am. St. Rep. 442.

[3] Sutro *v.* Pettit, 74 Cal. 332, 5 Am. St. Rep. 442; Wallace *v.* Mayor, 29 Cal. 181; Merchants' Bank *v.* Bergen County, 115 U. S. 384.

[4] Fluty *v.* School District, 49 Ark. 94; McClure *v.* Oxford, 94 U. S. 429; Toledo Bank *v.* Trustees, 110 U. S. 608; Carroll County *v.* Smith, 111 U. S. 556; Dixon County *v.* Field, 111 U. S. 83; McDonald *v.* Mayor, 68 N. Y. 23, 23 Am. Rep. 144.

such officer or agent has transcended or exceeded his lawful and legitimate powers.[1]

[1] The Floyd Acceptances, 7 Wall. (U. S.) 666; Whiteside *v.* United States, 93 U. S. 247; Mayor of Baltimore *v.* Reynolds, 20 Md. 1, 83 Am. Dec. 535; State *v.* Bevers, 86 N. C. 588; Newberry *v.* Fox, 37 Minn. 141, 5 Am. St. Rep. 830, 33 N. W. Rep. 333; Mayor *v.* Ray, 19 Wall. (U. S.) 468; Brady *v.* Mayor, 20 N. Y. 312; Hague *v.* Philadelphia, 48 Penn. St. 527; Nash *v.* St. Paul, 8 Minn. 172.

Speaking in a case against a municipal corporation, Clark *v.* City of Des Moines, 19 Iowa 199, 87 Am. Dec. 423, DILLON, J. said: "The general principle of law is well known and definitely settled, that the agents, officers, or even city council of a municipal corporation, can not bind the corporation when they transcend their lawful and legitimate powers.

This doctrine rests upon this reasonable ground: The body corporate is constituted of all of the inhabitants within the corporate limits. The inhabitants are the corporators. The officers of the corporation, including the legislative or governing body, are merely the public agents of the corporators. Their duties and their powers are prescribed by statute. Every one, therefore, may know the nature of these duties and the extent of these powers. These considerations, as well as the dangerous nature of the opposite doctrine, demonstrate the reasonableness and necessity of the rule, that the corporation is bound only when its agents, by whom, from the very necessities of its being, it must act, if it acts at all, keep within the limits of their authority.

Not only so, but such a corporation may successfully interpose the plea of *ultra vires;* that is, set up as a defense its own want of power, under its charter or constituent statute, to enter into a given contract or to do a given act in violation or excess of its corporate power and authority.

The cases asserting these principles are numerous and uniform; some of the more important and striking ones need only be cited:

Mayor of Albany *v.* Cunliff (city not liable for negligently building bridge under an unconstitutional statute) 2 N. Y. 165 (1849), reversing s.c. 2 Barb. 199; Cuyler *v.* Trustees of Rochester (laying out street contrary to charter), 12 Wend. (N. Y.) 165 (1834); Hodges *v.* Buffalo (4th of July appropriation) 2 Denio 110 (1846); Halstead *v.* Mayor, 3 N.Y. 430 (1850); Martin *v.* Mayor, 1 Hill 545; Boom *v.* Utica, 2 Barb. 104; Cornell *v.* Guilford, 1 Denio 510; Boyland *v.* Mayor and Aldermen of New York, 1 Sand. 27 (1847); Dill *v.* Wareham, 7 Metc. 438 (1844); Vincent *v.* Nantucket, 12 Cush. 103, 105 (1858), per MERRICK, J.; Stetson *v.* Kempton, 13 Mass. 272, 7 Am. Dec. 145; Parsons *v.* Inhabitants of Goshen, 11 Pick, 396; Hood *v.* Inhabitants of Lynn, 1 Allen. 103 (1861); Spalding *v.* Lowell, 23 Pick. 71; Mitchell *v.* Rockland, 41 Me. 363, (1858) s. c. 41 Me. 363, 66 Am. Dec. 252; Anthony *v.* Adams, 1 Met. 284 (1840); Western College *v.* Cleveland, 12 Ohio St. 375 (1861); Commissioners *v.* Cox, 6 Ind. 403 (1855); Inhabitants *v.* Weir, 9 Ind. 224 (1857); Smead *v.* Indianapolis, &c. R. R. Co. 11 Ind. 104 (1858); Brady *v.* Mayor, 20 N. Y. 312; Appleby *v.* Mayor, 15 How. Pr. 428; Estep *v.* Keokuk County, 18 Iowa 199, and cases cited by COLE, J.; Clark *v.* Polk County, 19 Iowa 247."

§ 835. **Contract authorized and duly executed is binding.—How construed.** —But a contract fully authorized and duly executed is as binding upon the public as upon the private principal. Said ALLEN, J., of the New York Court of Appeals: "The State, in all its contracts and dealings with individuals, must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other. There is not one law for the sovereign and another for the subject; but, when the sovereign engages in business and the conduct of business enterprises, and contracts with individuals, although an action may not lie against the sovereign for a breach of the contract, whenever the contract, in any form, comes before the courts, the rights and obligations of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor and suitor. The State is not in tutelage, as one incapable of acting *sui juris*, but has capacity to act in all matters by its representatives and agents, and is bound by the acts and admissions of its duly appointed and recognized officers and representatives, acting within the general scope of their constitutional powers, whether ministerial or executive. In the absence of fraud or collusion, the acts of public officers, within the limits of the authority conferred upon them, and in the performance of the duties assigned them in dealing with third persons, are the acts of the State, and can not be repudiated. Neither can the State allege infancy, incompetency or disability to avoid the effects of the official acts of its agents. This is of

A State officer can only deal or contract in relation to the property of the State when he is authorized so to do by the express provisions of law; and any agreement he may make, or attempt to make, in relation to such property, when he is not so authorized is void as against the State. McCaslin *v.* State, 99 Ind. 428, 440.

See also State *v.* Hastings, 12 Wis. 596; Nalle *v.* Fenwick, 4 Rand. (Va.) 585; Yancey *v.* Hopkins, 1 Munf. (Va.) 419.

See also Knox County *v.* Aspinwall, 21 How. (U. S.) 539; Marsh *v.* Fulton County, 10 Wall. (U. S.) 676; East Oakland *v.* Skinner, 94 U. S. 255; South Ottawa *v.* Perkins, 94 U. S. 260; Post *v.* Kendall County, 105 U. S. 667; Lewis *v.* Shreveport, 108 U. S. 282; Hayes *v.* Holly Springs, 114 U. S. 120; Bates County *v.* Winters, 97 U. S. 83; Harshman *v.* Bates County, 92 U. S. 569; McClure *v.* Oxford Tp. 94 U. S. 429.

necessity; for, as the State can only act by its duly constituted authorities, there would be no safety in dealing with the State, if it were otherwise, and each succeeding official could repudiate the acts, avoid the contracts, rescind settlements and reclaim payments."[1]

§ 836. **State liable for Breach of binding Contract—Prospective Profits.**—Where the State has thus become bound by a duly executed contract, it incurs the same liability for its breach as a private individual. And this liability includes a liability for prospective profits when it has arrested the performance of its lawful contracts to the same extent that private individuals could be held liable for such profits.[2]

But a suit against the State cannot be maintained without its own consent,[3] and this limitation can not be evaded by bringing the action against a State officer based upon what is in reality the obligation of the State.[4]

§ 837. **Estoppel of Government to deny Officer's Authority.**—"The government," says Mr. BISHOP,[5] "is never estopped, as an individual or private corporation may be, on the ground that the agent is acting under an apparent authority which is not real; the conclusive presumption that his powers are known rendering such a consequence impossible. So that the government is bound only when there is an actual authorization."[6]

But while the State may thus not be estopped,[7] it is clear that the lesser municipal corporations, such as counties, townships and cities may by their conduct, as by holding the officer out to the public as fully competent,[8] or by expressly or tacitly recognizing

[1] People *v.* Stephens, 71 N. Y. 527, 549; Danolds *v.* State, 89 N. Y. 36, 42 Am. Rep. 277.

[2] Danolds *v.* State, 89 N. Y. 36, 42 Am. Rep. 277.

[3] Railroad Company *v.* Tennessee, 101 U. S. 337; Board of Liquidation *v.* McComb, 92 U. S. 531.

[4] Hagood *v.* Southern, 117 U. S. 52; Louisiana *v.* Jumel, 107 U. S. 711; *In re* Ayers, 123 U. S. 443.

[5] Bishop on Contracts, § 993.

[6] Citing State *v.* Bevers, 86 N. C. 588; State *v.* Hastings, 10 Wis. 518; Mayor of Baltimore *v.* Eschbach, 18 Md. 282: Woodward *v.* Campbell, 39 Ark. 580; Mayor of Baltimore *v.* Reynolds, 20 Md. 1, 83 Am. Dec. 535.

[7] See also Pulaski *v.* State, 42 Ark. 118; Attorney-General *v.* Marr, 55 Mich. 445; State *v.* Brewer, 64 Ala. 287.

[8] Davies *v.* Mayor, 93 N. Y. 250; Cook County *v.* Harms, 108 Ill. 151; Sexton *v.* Chicago, 107 Ill. 323; Chi.

his acts when, if unauthorized, they should have repudiated them,[1] estop themselves from denying the authority to one who, in good faith, has put value in jeopardy in reasonable reliance upon their conduct.[2]

§ 838. **Ratification of unauthorized Acts and Contracts.**—The subject of the ratification of the unauthorized acts or contracts of public officers has already been considered at some length in earlier sections of this work.[3] It was there seen, to recapitulate, that authority for the doing of a lawful act, or the making of a lawful contract, can not only be conferred by previous authorization, but a retrospective authority may also be conferred by a subsequent ratification. For it is a principle applicable to States and lesser municipal governments and agencies, as well as to private principals,[4] that whatever the principal might originally and could still lawfully do himself, and might then and could still lawfully delegate to an agent, he may subsequently, when done in his name and on his behalf, lawfully ratify and adopt with the same effect as though it had been properly done under a previous authorization.[5]

But here, as in the case of the private principal, it must appear,—except in those cases where the principal intentionally assumes the risk without inquiry,[6] or deliberately ratifies having all the knowledge in respect to the transaction which he cares to

cago *v.* Railroad Co. 105 Ill 85; Chicago *v.* McGraw, 75 Ill. 570.

[1] See various cases of estoppel arising from recitals in municipal bonds: Colomba *v.* Eaves, 92 U. S. 484; Douglas County *v.* Bolles, 94 U. S. 104; Marion County *v.* Clark, 94 U.S. 278; Henry County *v.* Nicolay, 95 U. S. 619; Rock Creek Tp. *v.* Strong, 96 U. S. 271; San Antonio *v.* Mehaffy, 96 U. S. 312; Warren County *v.* Marcy, 97 U. S. 96; Nauvoo *v.* Ritter, 97 U. S. 389; Calhoun County *v.* Galbraith, 99 U. S. 214; Orleans *v.* Platt, 99 U. S. 676; Lyons *v.* Munson, 99 U. S. 684; Walnut *v.* Wade, 103 U. S. 683; Clay County *v.* Savings Society, 104 U. S. 579; Sherman County *v.* Simons, 109 U.S. 735; Grenada County *v.* Brogden, 112 U. S. 261.

[2] See also Beers *v.* Dalles City, — Oreg. — 18 Pac. Rep. 835.

[3] See *ante*, §§ 526–564.

[4] As to ratification by private principal see Mechem on Agency, Book I., Chap. V.

[5] State *v.* Torinus, 26 Minn. 1, 37 Am. Rep. 395; Sullivan *v.* School District, 39 Kans. 347, 18 Pac. Rep. 287; Duke *v.* Williamsburg, 21 S. C. 414; People *v.* Stephens, 71 N. Y. 527.

[6] Lewis *v.* Read, 13 Mees. & Wels. 834; Phosphate of Lime Co. *v.* Green, L. R. 7 C. P. 43, 1 Eng. Rep. 98; Mechem on Agency, §§ 128–129.

have,'—that the adoption and ratification were made by him with a full knowledge of all of the material facts connected with the transaction, and especially that the existence of the contract and its nature and consideration were known to him.[2] It is not necessary, however, that he should also be informed of the legal effect of the facts.[3] But if the material facts were suppressed, or were unknown to him, except as the result of his intentional and deliberate act, the ratification will be invalid because founded upon mistake or fraud.[4]

So, here, as in other cases, the whole act must be ratified or none of it. The principal can not take the benefits and reject the burdens.[5]

Ratification by the public, unlike that by the private individual, must, from the very nature of the case, be effected through other agents or officers. For while an agent cannot ratify his own unauthorized act,[6] nor one of two joint agents ratify the act of his co-agent,[7] yet where the act, which, when done by one agent is unauthorized, is within the general power of another agent of the same principal, the doing of the act by the first agent may be ratified by the second.[8] But in order to

[1] Kelley *v.* Newburyport Horse R. R. Co. 141 Mass. 496. Mechem on Agency, §§ 128, 129.

[2] Mechem on Agency, § 129; Wheeler *v.* Northwestern Sleigh Co. 39 Fed. Rep. 347.

[3] Kelley *v.* Newburyport Horse R. R. Co. 141 Mass. 496; Roberts *v.* Rumley, 58 Iowa 301; Combs *v.* Scott, 12 Allen (Mass.) 493; Phosphate of Lime Co. *v.* Green, L. R. 7 C. P. 43, 1 Eng. Rep. 98.

[4] Bank of Owensboro *v.* Western Bank, 13 Bush (Ky.) 526, 26 Am. Rep. 211; Wheeler *v.* Northwestern Sleigh Co., 37 Fed. Rep. 347; Hoffman *v.* Livingston, 46 N. Y. Super. 552; Miller *v.* Board of Education, 44 Cal. 166; Dean *v.* Bassett, 57 Cal. 640; Adams Express Co. *v.* Trego, 35 Md. 47.

[5] Mechem on Agency, § 130; McClure *v.* Briggs, 58 Vt. 82, 56 Am. Rep. 557; Eberts *v.* Selover, 44 Mich. 519, 38 Am. Rep. 278; Rudasill *v.* Falls, 92 N. C. 222; Tasker *v.* Kenton Ins. Co., 59 N. H. 438; Barhydt *v.* Clark, 12 Ill. Ap. 646; Southern Express Co. *v.* Palmer, 48 Ga. 85; Krider *v.* Western College, 31 Iowa 547; Ruffner *v.* Hewitt, 7 W. Va. 585; Mercier *v.* Copelan, 73 Ga. 636; Henderson *v.* Cummings, 44 Ill. 325.

[6] Mechem on Agency, § 121; Trudo *v.* Anderson, 10 Mich. 357, 81 Am. Dec. 795; Hotchin *v.* Kent, 8 Mich. 526.

[7] Mechem on Agency, § 121; Penn *v.* Evans, 28 La. Ann. 576.

[8] Mechem on Agency, § 121; Ironwood Store Co. *v.* Harrison, 75 Mich. 197, 42 N. W. Rep. 803; Cairo, &c., R. R. Co. *v.* Mahoney, 82 Ill. 73, 25 Am. Rep. 299; Toledo, &c., R. R. Co. *v.* Rodrigues, 47 Ill. 188, 95 Am. Dec. 484; Toledo, &c., R. R. Co. *v.* Prince,

effect this ratification, it must appear (1) that the act is one which the principal himself could lawfully do or delegate;[1] (2) that the agent ratifying must have had general power to himself do the act which he ratifies;[2] and (3) that they were both agents of the same principal and that the agent whose act is ratified must have professed to act as agent of the common principal.[3]

§ 839. **Officer can not deal with himself without Principal's Knowledge and Consent.**—It is a rule of universal application in the law governing the dealings between principals and agents, both public and private,[4] that the agent shall not be permitted, in the course of the execution of his agency, to put himself in such a position that his own interests shall be antagonistic to those of his principal. By accepting the undertaking he impliedly agrees, and it becomes his duty, to use all his endeavors for the benefit and advantage of his principal, to whom belong all the profits, increase and advantages which may result from its execution. This duty can not be performed if the agent is to be permitted to take advantage of his position and its opportunities to make gain for himself. Public policy, therefore, demands and the law declares, that, except with the full knowledge and consent of his principal, the agent shall not in the execution of his trust deal with or for himself, whether directly or indirectly.[5]

Without such knowledge and consent, therefore, an agent if

50 Ill. 26; Ballston Spa Bank *v.* Marine Bank, 16 Wis. 129; Anglo-Californian Bank *v.* Mahoney Mining Co., 5 Sawy. (U. S. C. C.) 255, s. c. 104 U. S. 192; Sherman *v.* Fitch, 98 Mass. 59; Walworth Bk. *v.* Farmers' L. & T. Co., 16 Wis. 629; Hoyt *v.* Thompson, 19 N. Y. 207; Darst *v.* Gale, 83 Ill. 136; First Nat. Bank *v.* Kimberlands, 16 W. Va. 555; Burrill *v.* Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec 395; Wood *v.* Whelen, 93 Ill. 155; Chouteau *v.* Allen, 70 Mo. 290; Reichwald *v.* Commercial Hotel Co. 106 Ill. 439; Lyndeborough Glass Co. *v.* Massachusetts Glass Co., 111 Mass. 315; Olcott *v.* Tioga R. R. Co. 27 N. Y. 546, 84 Am. Dec. 298; Union Mutual L. Ins. Co. *v.* Masten, 3 Fed. Rep. 881.

[1] Mechem on Agency, § 111.

[2] Mechem on Agency, § 121; Ironwood Store Co. *v.* Harrison, 75 Mich. 197, 42 N. W. Rep. 808.

[3] Mechem on Agency, § 121, 127; Ironwood Store Co. *v.* Harrison, 75 Mich. 197, 42 N. W. Rep. 808.

[4] See the whole subject discussed in Mechem on Agency, §§ 454–472.

[5] See People *v.* Township Board, 11 Mich. 222. Tisdale *v.* Tisdale, 2 Sneed (Tenn.) 596, 64 Am. Dec. 775; Switzer *v.* Skiles, 3 Gilm. (Ill.) 529, 44 Am. Dec. 723; Bunker *v.* Miles, 30 Me. 431, 50 Am. Dec. 632; Miller *v.* Davidson, 3 Gilm. (Ill.) 518, 44 Am. Dec. 715.

authorized to sell or lease property for his principal can not sell or lease it to himself;[1] or, if authorized to purchase or lease can not purchase or lease it of[2] or for[3] himself; or, if authorized to

[1] People *v.* Township Board, 11 Mich. 222; Clute *v.* Barron, 2 Mich. 194; Dwight *v.* Blackmar, 2 Mich. 330, 57 Am. Dec. 130; Moore *v.* Mandlebaum, 8 Mich. 433; Powell *v.* Conant, 33 Mich. 396; Merryman *v.* David, 31 Ill. 404; Kerfoot *v.* Hyman, 52 Ill. 512; Cottom *v.* Holliday, 59 Ill. 176; Mason *v.* Bauman, 62 Ill. 76; Stone *v.* Daggett, 73 Ill. 367; Tewksbury *v.* Spruance, 75 Ill. 187; Hughes *v.* Washington, 72 Ill. 84; Ruckman *v.* Bergholz, 37 N. J. L. 437; Bain *v.* Brown, 56 N. Y. 285; Tynes *v.* Grimstead, 1 Tenn. Ch. 508; Cumberland Coal Co. *v.* Sherman, 30 Barb. (N. Y.) 553; Copeland *v.* Mercantile Ins Co. 6 Pick. (Mass.) 198; Parker *v.* Vose, 45 Me. 54; White *v.* Ward, 26 Ark. 445; Stewart *v.* Mather, 32 Wis. 344; Marsh *v.* Whitmore, 21 Wall. (U. S.) 178; Scott *v.* Mann. 36 Tex. 157; Francis *v.* Kerker, 85 Ill. 190; Grumley *v.* Webb, 44 Mo. 444, 100 Am. Dec. 304; Robertson *v.* Western F. & M. Ins. Co. 19 La. 227, 36 Am. Dec. 673; Florance *v.* Adams, 2 Rob. (La.) 556, 38 Am. Dec. 226; Butcher *v.* Krauth, 14 Bush. (Ky.) 713; Moseley *v.* Buck, 3 Munf. (Va.) 232, 5 Am. Dec. 508; McKinley *v.* Irvine, 13 Ala. 681; Banks *v.* Judah, 8 Conn. 145; Church *v.* Sterling, 16 Conn. 388; Sturdevant *v.* Pike, 1 Ind. 277; Matthews *v.* Light, 32 Me. 305; Moore *v.* Moore, 5 N. Y. 256; Shannon *v.* Marmaduke, 14 Tex. 217; Segar *v.* Edwards, 11 Leigh (Va.) 213.

[2] Taussig *v.* Hart, 58 N. Y. 425; Tewksbury *v.* Spruance, 75 Ill. 187; Harrison *v.* McHenry, 9 Ga. 164, 52 Am. Dec. 435; Florance *v.* Adams, 2 Rob. (La.) 556, 38 Am. Dec. 226; Ely *v.* Hanford, 65 Ill. 267; Conkey *v.* Bond, 36 N. Y. 427; Beal *v.* McKiernan, 6 La. (O. S.) 407; Keighler *v.* Savage Mfg. Co., 12 Md. 383, 71 Am. Dec. 600.

[3] Kraemer *v.* Deustermann, 37 Minn. 469, 35 N. W. Rep. 276; Rose *v.* Hayden, 35 Kans. 106, 57 Am. Rep. 145; Van Horne *v.* Fonda, 5 Johns. (N. Y.) Ch. 388; Sweet *v.* Jacocks, 6 Paige (N. Y.) 355, 31 Am. Dec. 252; Pinnock *v.* Clough, 16 Vt. 500, 42 Am. Dec. 521; Dennis *v.* McCagg, 32 Ill. 444; Hitchcock *v.* Watson, 18 Ill. 289; McMurray *v.* Mobley, 39 Ark. 309; Ringo *v.* Binns, 10 Pet. (U. S.) 269, Wolford *v.* Herrington, 74 Penn. St. 311, 15 Am. Rep. 548; Van Hurter *v.* Spengeman, 17 N. J. Eq. 185; Van Epps *v.* Van Epps, 9 Paige (N. Y.) 237; Torrey *v.* Bank of Orleans, 9 Paige 649; Eshleman *v.* Lewis, 49 Penn. St. 410; Smith *v.* Brotherline, 62 Penn. St. 461; Krutz *v.* Fisher, 8 Kans. 90; Fisher *v.* Krutz, 9 Kans. 591; Winn *v.* Dillon, 27 Miss. 494; Wellford *v.* Chancellor, 5 Gratt. (Va.) 39; Church *v.* Sterling, 16 Conn. 388; Rhea *v.* Puryear, 26 Ark. 344; Matthews *v.* Light, 32 Me. 305; McMahon *v.* McGraw, 26 Wis. 615; Barziza *v.* Story, 39 Tex. 351; Chastian *v.* Smith, 30 Ga. 96; Cameron *v.* Lewis, 56 Miss. 76; Gillenwaters *v.* Miller, 49 Miss. 150; Sanford *v.* Norris, 4 Abb. App. Dec. (N. Y.) 144; Parkist *v.* Alexander, 1 Johns. (N. Y.) Ch. 394; Wood *v.* Rabe, 96 N. Y. 414, 48 Am. Rep. 640; Burrell *v.* Bull, 3 Sandf. (N. Y.) Ch. 15; Bennett *v.* Austin, 81 N. Y. 308; Hargrave *v.* King, 5 Ired. (N. C.) Eq. 430; Kendall *v.* Mann, 11 Allen (Mass.) 15; Jackson *v.* Stevens, 108

let or grant rights or contracts, can not let or grant them to himself;[1] or, if authorized to settle claims against his principal, can not buy them in himself and enforce them as his own.[2] Neither will he be permitted to make profit or advantage for himself based upon his own neglect or default,[3] as by purchasing at a tax sale lands upon which it was his duty to pay the taxes and the payment of which would have prevented the sale.[4]

If the agent or officer violates this rule, the principal may, at his option, repudiate the transaction and recover whatever he has parted with,[5] and may, if the agent has purchased in his own name or derived profits lawfully belonging to the principal, compel the agent to convey or account for the same;[6] or, he may affirm the transaction and enforce it against the officer or agent, as though originally authorized.

The right of the principal to disaffirm the transaction exists irrespective of the agent's motive or the fairness of the contract. If he elects to repudiate it he may do so, notwithstand-

Mass. 94; McDonough *v.* O'Neil, 113 Mass. 92; Sandfoss *v.* Jones, 35 Cal. 481; Snyder *v.* Walford, 33 Minn. 175; Soggins *v.* Heard, 31 Miss. 426; Seichrist's Appeal, 66 Penn. St. 237; Peebles *v.* Reading, 8 Serg. & R. (Penn.) 484; Onson *v.* Cown, 22 Wis. 329; Bryant *v.* Hendricks, 5 Iowa 256; Judd *v.* Moseley, 30 Iowa 424; Jenkins *v.* Eldredge, 3 Story (U. S. C. C.) 183; Baker *v.* Whiting, 3 Sumner (U. S. C. C.) 476; Rothwell *v.* Dewees, 2 Black (U. S.) 613.

For lease cases, see Davis *v.* Hamlin, 108 Ill. 39, 48 Am. Rep. 541; Vallette *v.* Tedens, 122 Ill. 607, 3 Am. St. Rep. 502; Grumley *v.* Webb, 44 Mo. 444, 100 Am. Dec. 304.

[1] Flint, &c., R. R. Co. *v.* Dewey, 14 Mich. 477; Pickett *v.* School District, 25 Wis. 551, 3 Am. Rep. 105; Currie *v.* School District, 35 Minn. 163, 27 N. W. Rep. 922.

[2] Davis *v.* Smith, 43 Vt. 269; Case *v.* Carroll, 35 N. Y. 385; Noyes *v.* Landon, 59 Vt. 569; 10 Atl. Rep. 342; Albertson *v.* Fellows, — N. J. —, 17 Atl. Rep. 816; Reed *v.* Norris, 2 Myl. & C. 361; Smith *v.* Brotherline, 62 Penn. St. 461.

[3] Adams *v.* Sayre, 70 Ala. 318.

[4] Bowman *v.* Officer, 53 Iowa 640; Ellsworth *v.* Cordrey, 63 Iowa 675; Collins *v.* Rainey, 42 Ark. 531; Woodman *v.* Davis, 32 Kans. 344; Curts *v.* Cisna, 7 Biss. (U. S. C. C.) 260; Franks *v.* Morris, 9 W. Va. 664; Barton *v.* Moss, 32 Ill. 50; Oldhams *v.* Jones, 5 B. Mon. (Ky.) 458; Krutz *v.* Fisher, 8 Kans. 90; Mathews *v.* Light, 32 Me. 305; Huzzard *v.* Trego, 35 Penn. St. 9; Bartholomew *v.* Leech, 7 Watts. (Penn.) 472.

[5] Louisville Bank *v.* Gray, 84 Ky. 565; People *v.* Township Board, 11 Mich. 222; Currie *v.* School District, 35 Minn. 163, 27 N. W. Rep. 922; Pickett *v.* School District, 25 Wis. 551, 3 Am. Rep. 105.

[6] Rose *v.* Hayden, 35 Kans. 106, 57 Am. Rep. 145, and cases cited in note 3, p. 563.

ing that the agent may have acted in the best of faith, or that the transaction as entered into may appear to be for the principal's advantage.[1]

What the agent or officer can thus not do directly he will not be permitted to do indirectly, as by dealing in the name of another but for his own benefit. The law looks behind the appearance to the realty, and holds it voidable at the principal's election.[2]

§ 840. **To what Officers this Rule applies.**— This rule is of constant application to the case of private agents,[3] but it applies also to public or *quasi*-public officers, such as administrators,[4] executors,[5] guardians,[6] sheriffs,[7] deputy-sheriffs,[8] trustees,[9] assignees,[10] commissioners in bankruptcy,[11] judges of probate,[12]

[1] Taussig *v.* Hart, 58 N. Y. 425; Harrison *v.* McHenry, 9 Ga. 164, 52 Am. Dec. 435; People *v.* Township Board, 11 Mich. 222; Currie *v.* School District, 35 Minn. 163, 27 N. W. Rep. 922; Flagg *v.* Manhattan Ry. 10 Fed. Rep. 413; Cumberland Coal Co. *v.* Sherman, 30 Barb. (N. Y.) 553; Stewart *v.* Lehigh Valley R. Co. 38 N. J. L. 505; Smith *v.* Albany, 61 N. Y. 444; Marsh *v.* Whitmore, 21 Wall. (U. S.) 178; Wardell *v.* Railroad Co. 103 U. S. 651.

[2] Cameron *v.* Lewis, 56 Miss. 76; Eldridge *v.* Walker, 60 Ill. 230; Hughes *v.* Washington, 72 Ill. 84; Rogers *v.* Rogers, 1 Hopk. (N. Y.) 524; Kruse *v.* Steffens, 47 Ill. 112; Forbes *v.* Halsey, 26 N. Y. 53; Davoue *v.* Fanning, 2 Johns. (N. Y.) Ch. 257; Beaubien *v.* Poupard, Harr. (Mich.) Ch. 206.

[3] See Mechem on Agency, §§ 454–472.

[4] Dwight *v.* Blackmar, 2 Mich. 330, 57 Am. Dec. 130; Pearson *v.* Moreland, 7 Smedes & M. (Miss.) 609, 45 Am. Dec. 319; Scott *v.* Freeland, 7 Smedes & M. (Miss.) 409, 45 Am. Dec. 310; Planters' Bank *v.* Neely, 7 How. (Miss.) 80, 40 Am. Dec. 51; McGowan *v.* McGowan, 48 Miss. 553; Hoffman *v.* Harrington, 28 Mich. 106; Obert *v.* Hammel, 3 Har. (N. J.) 74; Coat *v.* Coat, 63 Ill. 73; Kruse *v.* Steffens, 47 Ill. 112; Smith *v.* Drake, 23 N. J. Eq. 302.

[5] Rogers *v.* Rogers, 1 Hopk. (N. Y.) 524; Schenck *v.* Dart, 22 N. Y. 420; Winter *v.* Geroe, 5 N. J. Eq. 319; Dunlap *v.* Mitchell, 10 Ohio 117; Worthy *v.* Johnson, 8 Ga. 236, 52 Am. Dec. 399; Scott *v.* Gorton, 14 La. 115, 33 Am. Dec. 578.

[6] Ward *v.* Smith, 3 Sandf. (N. Y.) Ch. 592.

[7] Harrison *v.* McHenry, 9 Ga. 164, 52 Am. Dec. 435; Carr *v.* Houser, 46 Ga. 477; Flury *v.* Grimes, 52 Ga. 343; Mayor of Macon *v.* Huff, 60 Ga. 228.

[8] Perkins *v.* Thompson, 3 N. H. 144.

[9] Robertson *v.* Western F. & M. Ins. Co. 19 La. 227, 36 Am. Dec. 673; Green *v.* Winter, 1 Johns. (N. Y.) Ch. 26; Davoue *v.* Fanning, 2 Johns. (N. Y.) Ch. 257.

[10] *Ex parte* Lacey, 6 Ves. Jr. 626.

[11] *Ex parte* Bennett, 10 Ves. Jr. 384.

[12] Walton *v.* Torrey, Har. (Mich.) Ch. 259.

county treasurers,[1] commissioners to sell land,[2] school trustees,[3] boards of health,[4] who are not permitted to purchase or lease property which as such officers they are authorized to sell or let, or to enter into contracts with themselves for furnishing the labor or materials which they are authorized to contract for upon the public behalf.[5]

II.

FOR THE ACTS, DECLARATIONS AND ADMISSIONS OF THE OFFICER.

§ 841. **Stricter Rule prevails than in private Agencies.**—"Different rules," says Mr. Justice CLIFFORD, "prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principals, in the latter category, are in many cases bound by the acts and declarations of their agents, even where the act or declaration was done or made without any authority, if it appear that the act was done or the declaration was made by the agent in the course of his regular employment; but the government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, or that he had been held out as having authority to do the act, or was employed in his capacity as a public agent to do the act or make the declaration for the government."[6]

§ 842. **Acts within the Scope of his Authority bind the Public.**—Where, therefore, by law a public officer or agent is authorized to act in reference to a certain matter, his acts done within the scope of the authority so conferred are binding as the acts of his

[1] Clute *v.* Barron, 2 Mich. 192; Pierce *v.* Benjamin, 14 Pick. (Mass.) 356.

[2] Ingerson *v.* Starkweather, Walk. (Mich.) Ch. 346.

[3] Currie *v.* School District, 35 Minn. 163, 27 N. W. Rep. 922; Pickett *v.* School District, 25 Wis. 551, 3 Am. Rep. 105.

Contra, see Junkins *v.* Union School District, 39 Me. 220.

[4] Fort Wayne *v.* Rosenthal, 75 Ind. 156, 39 Am. Rep. 127.

[5] People *v.* Township Board, 11 Mich. 222.

[6] Whiteside *v.* United States, 93 U. S. 247, 256, citing Story on Agency (6th ed.) § 307 a.; Lee *v.* Munroe, 7 Cranch (U. S.) 366.

principal.[1] But beyond the scope of the authority so conferred, his acts bind himself alone or no one.

§ 843. **When bound by his Declarations and Admissions.**—Where a public officer or agent is authorized to act or contract, his admissions and declarations made while engaged in the execution of his authority in reference to its subject-matter and so near in point of time as to constitute part of the *res gestæ* are binding upon his principal to the same extent as his acts and contracts.[2]

But his declarations and admissions not constituting a part of the *res gestæ* or made in respect to a matter over which he has no authority—not being made while engaged in the execution of his lawful authority and in respect to its subject-matter—are not binding upon the public.[3]

III.

BY NOTICE TO THE OFFICER.

§ 844. **In private Agencies Notice to Agent is Notice to Principal.**—In the case of an agent acting for a private principal,[4] the law imputes to the principal and charges him with all notice or knowledge relating to the subject-matter of the agency which

[1] People *v.* Stephens, 71 N. Y. 527; Gray *v.* Rollinsford, 58 N. H. 253; Harpswell *v.* Phipsburg, 29 Me. 313; Grimes *v.* Keene, 52 N. H. 330.

[2] Glidden *v.* Unity, 33 N. H. 571; Sharon *v.* Salisbury, 29 Conn. 113; La Salle County *v.* Simmons, 10 Ill. 513; Washburn *v.* Commissioners, 104 Ind. 321, 54 Am. Rep. 332; People *v.* Stephens, 71 N. Y. 527, 550.

"A fact once admitted by a corporation through its officer, duly and properly acting within the scope of his authority, is evidence against it, and can not be withdrawn to the prejudice of any one who in reliance upon it has changed his situation in respect to the matter affected thereby. In such a case the doctrine of estoppel applies to a corporation as well as to an individual: Curnen *v.* Mayor, 79 N. Y. 514." Per MILLER, J. in O'Leary *v.* Board of Education, 93 N. Y. 1, 45 Am. Rep. 156.

[3] Mitchell *v.* Rockland, 41 Me. 363, 66 Am. Dec. 252; Morrell *v.* Dixfield, 30 Me. 157; Burgess *v.* Wareham, 7 Gray (Mass.) 345; Green *v.* North Buffalo, 56 Penn. St. 110; La Salle County *v.* Simmons, 10 Ill. 513; Sooy ads State, 39 N. J. L. 135, citing Bank *v.* Dunn, 6 Pet. (U. S.) 51; Fairfield County Turnpike Co. *v.* Thorp, 13 Conn. 173; United States *v.* Savings Bank, 6 McLean (U. S. C. C.) 130; Peirce *v.* United States, 1 Nott & Hun, 270; Schumack *v.* Lock, 10 Moore 39.

[4] See this subject fully discussed in Mechem on Agency, §§ 718–731.

the agent acquires or obtains while acting as such agent and within the scope of his authority, or which he may previously have acquired and which he then has in mind,[1] or which he had acquired so recently as to reasonably warrant the assumption that he still retained it;[2] provided, however, that such notice or knowledge will not be imputed: 1. where it is such as it is the agent's duty not to disclose,[3] or, 2, where the agent's relations to the subject-matter, or his previous conduct, render it certain that he will not disclose it,[4] or, 3, where the person claiming the benefit of the notice, or those whom he represents, colluded with the agent to cheat or defraud the principal.[5]

This rule rests upon the principle that it is the agent's duty to communicate to the principal all knowledge and information possessed by him in respect to the subject-matter of his agency and which is necessary for the principal's protection or guidance.[6] The rule does not depend upon the fact that the agent *has* disclosed the knowledge or information to his principal; subject to the exceptions named, the law conclusively presumes that he has done so, and charges the principal accordingly.[7]

§ 845. **Same Rule applies to private Corporations.**—The same rule applies, and with peculiar force, to private corporations.[8]

[1] Lebanon Savings Bank *v.* Hollenbeck, 29 Minn. 322; Dresser *v.* Norwood, 17 C. B. (N. S.) 466; The Distilled Spirits, 11 Wall. (U. S.) 367; Fairfield Savings Bank *v.* Chase, 72 Me. 226, 29 Am. Dec. 319; Constant *v.* University, 111 N. Y. 604, 7 Am. St. Rep. 769.

[2] Chouteau *v.* Allen, 70 Mo. 290; Mountford *v.* Scott, 1 T. & R. 274; The Distilled Spirits, 11 Wall. (U. S.) 367.

[3] The Distilled Spirits, 11 Wall. (U. S.) 367; Fairfield Savings Bank *v.* Chase, 72 Me. 226, 39 Am. Rep. 319.

[4] Innerarity *v.* Merchants' National Bank, 139 Mass. 332, 52 Am. Rep. 710; Dillaway *v.* Butler, 135 Mass. 479; Atlantic Cotton Mills *v.* Indian Orchard Mills, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. Rep. 496; Hummel *v.* Bank of Monroe, 75 Iowa 690 37 N. W. Rep. 954; Frenkel *v.* Hudson, 82 Ala. 158, 60 Am. Rep. 736; Wickersham *v.* Chicago Zinc Co. 18 Kans. 481, 26 Am. Rep. 784; Atlantic National Bank *v.* Harris, 118 Mass. 147; Loring *v.* Brodie, 134 Mass. 453; Kennedy *v.* Green, 3 Myl. & Keene 699; Cave *v.* Cave, 15 Ch. Div. 639; *In re* European Bank, 5 Ch. Ap. 358; *In re* Marseilles Extension Ry. 7 Ch. Ap. 161, 1 Eng. Rep. 490.

[5] National L. Ins. Co. *v.* Minch, 53 N. Y. 144.

[6] See Mechem on Agency, § 721.

[7] The Distilled Spirits, 11 Wall. (U. S.) 367; Dresser *v.* Norwood, 17 Com. B. (N. S.) 466.

[8] See Mechem on Agency, §§ 729–731; Holden *v.* Bank, 72 N. Y. 286; Union Bank *v.* Campbell, 4 Humph.

But, on account of the large number of agents necessarily employed by corporations, it is imperative that the limits fixed to the rule should be observed,—the notice or knowledge must have come to an agent whose powers and authority extend over the particular subject-matter to which the notice or knowledge applies.[1]

Thus the directors of a corporation are not individually its agents for the transaction of its ordinary business, which is usually delegated to its executive officers, such as its president, secretary, treasurer and the like. The powers of the directors reside in them as a board, and not as individuals, and only when they are acting as a board are they the representatives of the corporation. Notice to them when so assembled would be notice to the corporation.[2] So notice to a director actually communicated to the board,[3] or given to him for the express purpose of being communicated to the board,[4] or possessed by him in reference to a matter concerning which he acts with the board and as a member of it,[5] would be imputed to the corporation. But in other cases the private knowledge of one or more individual directors concerning corporate business will not be imputed to the corporation,[6] unless such director has been charged with some

(Tenn.) 394; Waynesville Nat. Bank *v.* Irons, 8 Fed. Rep. 1; Hart *v.* Farmers' Bank, 33 Vt. 252; Mihills Mfg. Co. *v.* Camp, 49 Wis, 130; Webb *v.* Graniteville Mfg. Co., 11 S. C. 396, 32 Am. Rep. 479; Farmers' Bank *v.* Payne, 25 Conn. 444, 68 Am. Dec. 362; Wilson *v.* McCullough, 23 Penn. St. 440, 62 Am. Dec. 347; Fairfield Savings Bank *v.* Chase, 72 Me. 228, 39 Am. Rep. 319.

[1] Conger *v.* Chicago, &c., Ry. Co., 24 Wis. 157, 1 Am. Rep. 164; Stewart *v.* Sonneborn, 49 Ala. 178; Cook *v.* Anamosa, 66 Iowa 427, 23 N. W. Rep. 907; Russell *v.* Cedar Rapids Ins. Co,— Iowa —, 42 N.W. Rep. 654.

[2] First National Bank *v.* Christopher, 40 N. J. L. 435, 29 Am. Rep. 262; Fulton Bank *v.* New York Canal Co. 4 Paige (N. Y.) 127; Toll Bridge Co. *v.* Betsworth, 30 Conn. 380.

[3] Farmers' Bank *v.* Payne, 25 Conn. 444, 68 Am. Dec. 362; Bank of Pittsburgh *v.* Whitehead, 10 Watts (Penn.) 397, 36 Am. Dec. 186.

[4] United States Ins. Co. *v.* Shriver, 3 Md. Ch. 381; Boyd *v.* Chesapeake Canal Co., 17 Md. 195, 79 Am. Dec. 646.

[5] National Security Bank *v.* Cushman, 121 Mass. 490; Innerarity *v.* Merchants' National Bank, 139 Mass. 332, 52 Am. Rep. 710; Union Bank *v.* Campbell, 4 Humph. (Tenn.) 394; Bank *v.* Davis, 2 Hill (N. Y.) 451; Savings Bank *v.* Thomas, 2 Mo. App. 367.

[6] Wilson *v.* McCullough, 23 Penn. St. 440, 62 Am. Dec. 347; Farmers' Bank *v.* Payne, 25 Conn. 444, 68 Am. Dec. 362; Farrel Foundry *v.* Dart, 26 Conn. 376; Winchester *v.* Baltimore R. R. Co. 4 Md. 231; Gen-

special authority to act for the corporation in respect to the matter to which the notice or knowledge applies.[1]

So, in accordance with the second exception to the general rule, it is held that when the director is himself dealing as the opposite party with the corporation, the corporation will not be charged with notice of that knowledge possessed by the director which his own interest impelled him to conceal,[2] even though he acts with the board in reference to it.[3]

Stockholders in a corporation are, as such merely, in no sense its agents, and notice to them in that capacity only will not be imputed to the corporation.[4]

§ 846. **Notice to the Officer, when Notice to the Public.**—How far all of the rules applicable to private agencies will obtain in respect to public officers is not yet fully settled by the authorities. There is, however, much stronger reason for the application of the general rule, than in the case of private agencies, inasmuch as it is only through its agents and officers that the public can receive official notice in any case. And it is well settled, as a general rule, that notice to a public officer in respect to a matter over which his authority extends, and in reference to which it is his duty to act, is notice to the public.[5] But notice

eral Insurance Co. *v.* United States Ins. Co., 10 Md. 517, 69 Am. Dec. 174; United States Ins. Co. *v.* Shriver, 3 Md. Ch. 381; First National Bank *v.* Christopher, 40 N. J. L. 435, 29 Am. Rep. 262; Westfield Bank *v.* Cornen, 37 N. Y. 320, 93 Am. Dec. 573; Bank *v.* Davis, 2 Hill (N. Y.) 463; National Bank *v.* Norton, 1 Hill (N. Y.) 572; Atlantic Bank *v.* Savery, 18 Hun 41, s. c. 82 N. Y. 291, 308; Getman *v.* Second National Bank, 23 Hun (N. Y.) 503; Sawyer *v.* Pawners' Bank, 6 Allen (Mass.) 207.

[1] Smith *v.* Bank, 32 Vt. 341.

[2] Innerarity *v.* Merchants' National Bank, 139 Mass. 332, 52 Am. Rep. 710; First National Bank *v.* Christopher, 40 N. J. L. 435, 29 Am. Rep. 262; Commercial Bank *v.* Cunningham, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; National Security Bank *v.* Cushman, 121 Mass. 491; Frost *v.* Belmont, 6 Allen (Mass.) 163; Atlantic Cotton Mills *v.* Indian Orchard Mills, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. East. Rep. 496.

[3] Innerarity *v.* Merchants' National Bank, 139 Mass. 332, 52 Am. Rep. 710; Custer *v.* Bank, 9 Penn. St. 27; Terrell *v.* Branch Bank, 12 Ala. 502. See *contra*, Bank *v.* Davis, 2 Hill (N. Y.) 451, and Union Bank *v.* Campbell, 4 Humph. (Tenn.) 394; Tagg *v.* Tennessee Nat Bank, 9 Heisk. (Tenn.) 479.

[4] Housatonic Bank *v.* Martin, 1 Metc. (Mass.) 294; Union Canal *v.* Lloyd, 4 Watts & S. (Penn.) 393.

[5] Notice of a nuisance is insufficient if given to a city clerk who is but a recording officer, unauthorized to re-

or knowledge in reference to a matter over which he has no authority and in respect to which he has no duty to perform can not be deemed notice to the public.

This question has most frequently arisen in its application to municipal corporations, particularly in respect to defective streets, walks and bridges, and it has in some States been regulated by statute.

IV.

FOR THE TORTS OF ITS OFFICERS.

§ 847. **In general.**—It is not within the scope of this work to enter into a minute discussion of the subject-matter of this chapter, particularly as the questions have most frequently arisen respecting municipal corporations whose liability depends in large measure upon their respective charters and upon the general principles of law governing such bodies, the discussion of which more properly belongs to a treatise upon that subject.

But certain general rules are deemed appropriate here and will be given.

1. *The Liability of the United States.*

§ 848. **United States Government not liable for Torts of its Officers and Agents.**—"No government," says Mr. Justice MIL-

ceive or act upon such notice; but it is sufficient if given to the mayor, as he is the chief executive officer, whose duty it is to exercise a general supervision and control over the interests of the city. Nichols *v.* Boston, 98 Mass. 39, 93 Am. Dec. 132.

The knowledge of a policeman of a dangerous and unauthorized obstruction in a public street of a city is notice to the city where the police are charged with the duty of removing nuisances from the street. Rehberg *v.* New York, 91 N. Y. 137, 43 Am. Rep. 657; Carrington *v.* St. Louis, 89 Mo. 208, 58 Am. Rep. 108. Notice to a city councilman of a defect in a street is notice to the city, although the councilman is not at the time engaged in any official act. Logansport *v.* Justice, 74 Ind. 378, 39 Am. Rep. 79. (ELLIOTT, J., delivered an elaborate dissenting opinion.)

But notice to a city marshal of a defective street is not notice to the city, though notice to the mayor or council would be: Cook *v.* Anamosa, 66 Iowa 427, 23 N. W. Rep. 907.

[1] Cook *v.* Anamosa, 66 Iowa 427, 23 N. W. Rep. 907.

LER of the Supreme Court of the United States,[1] "has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers and agents. In the language of Judge STORY,[2] 'it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all operations in endless embarrassments and difficulties and losses, which would be subversive of the public interests.'"[3]

2. *The Liability of States.*

§ 849. **State not liable for Torts of its Officers or Agents.**—The same rule of immunity is also applied to the States. In a recent case[4] in North Carolina, SMITH, C. J., says, quoting the language of Justice MILLER above cited, "That the doctrine of *respondeat superior* applicable to the relation of principal and agent created between other persons, does not prevail against the sovereign in the necessary employment of public agents, is too well settled upon authority and practice to admit of controversy."

In that case it was held that the State is not answerable in damages for injuries sustained by a convict in its State prison through the negligence of the prison officers. And a similar ruling has been made in New York.[5]

3. *The Liability of Municipal Corporations.*

§ 850. **Municipal Corporation not liable for Torts of its public Officers.**—The same immunity, except where otherwise declared by express enactment, extends to municipal corporations for the torts of such of its public officers, who, though appointed or elected, and paid by it, are yet charged with the performance of a public service in which the corporation as such has

[1] In Gibbons *v.* United States, 8 Wall. (U. S.) 269.

[2] Story on Agency, § 319.

[3] See United States *v.* Kirkpatrick, 9 Wheat. (U. S.) 720; Dox *v.* Postmaster-General, 1 Peters, (U. S.) 318; Gibbons *v.* United States, 8 Wall. (U. S.) 269; Langford *v.* United States, 101 U. S. 341.

[4] Clodfelter *v.* State, 86 N. C. 51, 41 Am. Rep. 440.

[5] Lewis *v.* State, 96 N. Y. 71, 48 Am. Rep. 607.

no particular interest and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community.[1]

The power intrusted to the corporation in such cases is intrusted to it as one of the political divisions of the State, and it is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens. The officers who exercise this power are not then the agents or servants of the municipality, but are public officers, agents or servants of the public at large,[2] and the corporation is not responsible for their acts or omissions nor for the acts or omissions of the subordinates appointed by them.[3]

§ 851. **Same Subject—Illustrations of this Rule.**—In pursuance of this rule it has been held that municipal corporations are not liable for the negligence of its firemen[4] or its fire-department;[5]

[1] Jewett *v.* New Haven, 38 Conn. 368, 9 Am. Rep. 382; Torbush *v.* Norwich, 38 Conn. 225, 9 Am. Rep. 395; Elliott *v.* Philadelphia, 75 Penn. 342, 15 Am. Rep. 591; Ogg *v.* Lansing, 35 Iowa 495, 14 Am. Rep. 499; Brown *v.* Vinalhaven, 65 Me. 402, 20 Am. Rep. 709; Maximilian *v.* Mayor, 62 N. Y. 160, 20 Am. Rep. 468; Mead *v.* New Haven, 40 Conn. 72, 16 Am. Rep. 14; Robinson *v.* Evansville, 87 Ind. 334, 44 Am. Rep. 770; Greenwood *v.* Louisville, 13 Bush (Ky.) 226, 26 Am. Rep. 263; Wilcox *v.* Chicago, 107 Ill. 334, 47 Am. Rep. 434; Welsh *v.* Rutland, 56 Vt. 228, 48 Am. Rep. 762; McElroy *v.* Albany, 65 Ga. 387, 38 Am. Rep. 791; Calwell *v.* Boone, 51 Iowa 687, 33 Am. Rep. 154; Grumbine *v.* Mayor, 2 McArth. (D. C.) 578, 29 Am. Rep. 626; Pollock *v.* Louisville, 13 Bush (Ky.) 221, 26 Am. Rep. 260; Wallace *v.* Menasha, 48 Wis. 79, 33 Am. Rep. 804; Rowland *v.* Gallatin, 75 Mo. 134, 42 Am. Rep. 395; Summers *v.* Commissioners, 103 Ind. 262, 53 Am. Rep. 512; Bryant *v.* St. Paul, 33 Minn. 289, 53 Am. Rep. 31; Tindley *v.* Salem, 137 Mass. 171, 50 Am. Rep. 289; Richmond *v.* Long, 17 Gratt. (Va.) 375, 94 Am. Dec. 461; Dargan *v.* Mobile, 31 Ala. 469, 70 Am. Dec. 505; Stewart *v.* New Orleans, 9 La. Ann. 461, 61 Am. Dec. 218; School District *v.* Williams, 38 Ark. 454.

See also the cases cited in the following section.

[2] See cases in preceding note, and Prather *v.* Lexington, 13 B. Mon. (Ky.) 559, 56 Am. Dec. 585

[3] Maximilian *v.* Mayor, 62 N. Y. 160, 20 Am. Rep. 468; Fisher *v.* Boston, 104 Mass. 87, 6 Am. Rep. 196.

[4] Jewett *v.* New Haven, 38 Conn. 368, 9 Am. Rep. 382; Torbush *v.* Norwich, 38 Conn. 225, 9 Am. Rep. 395.

[5] Robinson *v.* Evansville, 87 Ind. 334, 44 Am. Rep. 770; Greenwood *v.* Louisville, 13 Bush (Ky.) 226, 26 Am. Rep. 263; Wilcox *v.* Chicago, 107 Ill. 334, 47 Am. Rep. 434; Welsh *v.* Rutland, 56 Vt. 228, 48 Am. Rep.

for the negligence, misconduct or trespasses of its police-officers[1] and magistrates;[2] for the negligence of its health officers;[3] for the trespasses of its assessors and collectors of taxes;[4] for the negligence or misconduct of its selectmen,[5] or aldermen,[6] or overseers of the poor;[7] for the negligence of the employees of its commissioners of public charities;[8] for the negligence or trespasses of its surveyor of highways;[9] for the negligence of its boards for the revision and correction of assessments;[10] for the negligence of its department of instruction or of the agents or servants of that department;[11] for the negligence of the officers of its hospitals and asylums;[12] for the negligence of its common council acting in a special capacity by virtue of an act of the legislature, as commissioners for the improvement of a canal.[13]

§ 852. **Municipal Corporation not liable for Acts done ultra Vires.**—So a municipal corporation can not be held liable for the torts of its officers and agents committed in the performance of acts which were wholly beyond the authority or power of the corporation.[14]

762; Hafford *v.* New Bedford, 16 Gray (Mass.) 297; Fisher *v.* Boston, 104 Mass. 87, 6 Am. Rep. 196; Hayes *v.* Oshkosh, 33 Wis. 314, 14 Am. Rep. 760; Burrill *v.* Augusta, 78 Me. 118, 57 Am. Rep. 788.

[1] McElroy *v.* Albany, 65 Ga. 387, 38 Am. Rep. 791; Calwell *v.* Boone, 51 Iowa 687, 33 Am. Rep. 154; Grumbine *v.* Washington, 2 McArth. (D. C.) 578, 29 Am. Rep. 626; Pollock *v.* Louisville, 13 Bush (Ky.) 221, 26 Am. Rep. 269; Buttrick *v.* Lowell, 1 Allen (Mass.) 172, 79 Am. Dec. 721; Campbell *v.* Montgomery, 53 Ala. 527, 25 Am. Rep. 656; Hart *v.* Bridgeport, 13 Blatchf. C. C. 289; Cook *v.* Macon, 54 Ga. 468; Harris *v.* Atlanta, 62 Ga. 290; Odell *v.* Schroeder, 58 Ill. 353; Attaway *v.* Cartersville, 68 Ga. 740; Corsicana *v.* White, 57 Tex. 382.

[2] Grumbine *v.* Washington, 2 McArth. (D. C.) 578, 29 Am. Rep. 626.

[3] Ogg *v.* Lansing, 35 Iowa 495, 14 Am. Rep. 499; Bryant *v.* St. Paul, 33 Minn. 289, 53 Am. Rep. 31; Spring *v.* Hyde Park, 137 Mass. 554, 50 Am. Rep. 334; Mitchell *v.* Rockland, 52 Me. 118, s. c. 45 Me. 496; s. c. 41 Me. 363, 66 Am. Dec. 252.

[4] Rossire *v.* Boston, 4 Allen (Mass.) 57; Alger *v.* Easton, 119 Mass. 77; Dunbar *v.* Boston, 112 Mass. 75.

[5] Cushing *v.* Bedford, 125 Mass. 526.

[6] Child *v.* Boston, 4 Allen (Mass.) 41, 81 Am. Dec. 680.

[7] New Bedford *v.* Taunton, 9 Allen (Mass.) 207.

[8] Maximilian *v.* Mayor, 62 N. Y. 160, 20 Am. Rep. 468.

[9] Walcott *v.* Swampscott, 1 Allen (Mass.) 101.

[10] Tone *v.* Mayor, 70 N. Y. 157.

[11] Ham *v.* Mayor, 70 N. Y. 459.

[12] Murtaugh *v.* St. Louis, 44 Mo. 480, Sherburne *v.* Yuba County, 21 Cal. 113.

[13] New York, &c., Lumber Co. *v.* Brooklyn, 71 N. Y. 580.

[14] Browning *v.* Commissioners, 44

Neither is it liable for the illegal or unauthorized acts of its officers, though done *colore officii*, unless it previously authorized or subsequently ratified them.[1]

§ 853. **Municipal Corporation is liable for Torts of its Servants and Agents committed in Execution of its Powers.**—But it is equally well settled that for the acts of its servants and agents committed in the execution of its general powers, and either previously authorized or subsequently ratified, the municipal corporation is liable like any other master or principal.[2]

It may also be liable for the omissions and neglects of its servants and agents. Thus, says Judge DILLON,[3] "The doctrine may be considered as established that where a duty is a corporate one, that is, one which rests upon the municipality in respect of its special or local interests, and not as a public agency, and is absolute and perfect, and not discretionary or judicial in its nature, and is one owing to the plaintiff, or in the performance of which he is specially interested, that the corporation is liable in a civil action for the damages resulting to individuals by its neglect to perform the duty, or for the want of proper care or want of reasonable skill of its officers or agents, acting under its direction or authority in the execution of such a duty; and, with the qualifications stated, it is liable, on the same principles and to the same extent, as an individual or private corporation would be under like circumstances."[4]

Ind. 11; Haag *v.* Commissioners, 60 Ind. 511, 28 Am. Rep. 654; Mayor of Albany *v.* Cunliff, 2 N. Y. 165; Cuyler *v.* Rochester, 12 Wend. (N. Y.) 165; Morrison *v.* Lawrence, 98 Mass. 219; Seele *v.* Deering, 79 Me. 343, 1 Am. St. Rep. 314; Cavanagh *v.* Boston, 139 Mass. 426, 52 Am. Rep. 716; Hilsdorf *v.* St. Louis, 45 Mo. 94, 100 Am. Dec. 352; Hart *v.* Bridgeport, 13 Blatch. C. C. 289.

[1] Thayer *v.* Boston, 19 Pick. (Mass.) 511, 31 Am. Dec. 157; Brown *v.* Vinalhaven, 65 Me. 401, 20 Am. Rep. 709; Woodcock *v.* Calais, 66 Me. 234; Smith *v.* Rochester, 76 N. Y. 510; Trammell *v.* Russelville, 34 Ark. 105, 36 Am. Rep. 1.

[2] Sprague *v.* Tripp, 13 R. I. 38, 43 Am. Rep. 11; Durkee *v.* Kenosha, 59 Wis. 123, 48 Am. Rep. 480; Aldrich *v.* Tripp, 11 R. I. 141, 23 Am. Rep. 434.

[3] Dillon's Munic. Corp. § 980.

[4] See Bailey *v.* Mayor, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; Rochester White Lead Works *v.* Rochester, 3 N. Y. 467, 53 Am. Dec. 316.

CHAPTER IX.

OF THE RIGHTS OF THE OFFICER AGAINST THE PUBLIC.

§ 854. In general.

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II. RIGHT TO REIMBURSEMENT AND INDEMNITY.

877. Right to Reinbursement.
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§ 854. **In general.**—The officer also has rights against the public which it is desirable to consider. The most important of

these are, 1, The officer's right to compensation, 2, The officer's right to indemnity.

I.

THE RIGHT TO COMPENSATION.

§ 855. **Right to Compensation is created by Law, not by Contract.**—As has been seen, the relation between an officer and the public is not the creature of contract, nor is the office itself a contract.[1] So his right to compensation is not the creature of contract. It exists, if it exists at all, as the creation of law, and, when it so exists, it belongs to him "not by force of any contract, but because the law attaches it to the office."[2]

The most that can be said is that there is a contract to pay him such compensation as may from time to time be by law attached to the office.[3]

§ 856. **No Compensation can be recovered unless provided by Law.**—Unless, therefore, compensation is by law attached to the office, none can be recovered. A person who accepts an office to which no compensation is attached is presumed to undertake to serve gratuitously,[4] and he can not recover anything upon the ground of an implied contract to pay what the service is worth.[5]

The rule is otherwise where a person undertakes to render service for a municipal corporation, not as a public officer but as its private agent. In such a case, he may recover the reasonable value.[6]

§ 857. **In Absence of constitutional Prohibition, Compensation may be altered, decreased or discontinued.**— Neither is there any contract, except by virtue of a constitutional provision,

[1] See *ante*, § 463.

[2] See Fitzsimmons *v.* Brooklyn, 102 N. Y. 536, 55 Am. Rep. 835; Steubenville *v.* Culp, 38 Ohio St. 18, 43 Am. Rep. 417.

[3] Hoboken *v.* Gear, 27 N. J. L. 265; Locke *v.* Central City, 4 Col. 65, 34 Am. Rep. 66.

[4] State *v.* Brewer, 59 Ala. 130; Wortham *v.* Grayson County, 13 Bush (Ky.) 53.

[5] White *v.* Levant, 78 Me. 568, 7 Atl. Rep. 539; Talbot *v.* East Machias, 76 Me. 415; Sikes *v.* Hatfield, 13 Gray (Mass.) 347; Walker *v.* Cook, 129 Mass. 578.

[6] Detroit *v.* Redfield, 19 Mich. 376. But compare Sidway *v.* Park Commissioners, 120 Ill. 496.

for the permanence of the compensation.[1] Unless restrained by the constitution, the power authorized to fix the compensation may, even during the term of an incumbent, alter or diminish his future compensation or terminate it altogether.[2]

An act, however, fixing the officer's salary at a given sum, is not, unless that clearly appears to be the intention,[3] impliedly repealed or amended by one subsequently passed appropriating for its payment a smaller sum, and the officer is not estopped from recovering the greater sum by the fact that he has accepted the smaller.[4] So where the compensation of an inferior officer is fixed by law, it can not be cut down by the officer's superior, and he may recover the full amount notwithstanding that he has for a time taken the smaller sum.[5] And where the compensation of the officer is to be paid by fees prescribed by law, it is not within the power of the county board of supervisors to fix and pay to the officer an annual salary in lieu of all fees.[6]

Where the compensation of one officer is made the same as that of another officer, an increase in the compensation of the

[1] Koontz *v.* Franklin County, 76 Penn. St. 154.

[2] Farwell *v.* Rockland, 62 Me. 296; State *v.* Gales, 77 N. C. 283; Castle *v.* Uinta County, 2 Wy. 126; Butler *v.* Pennsylvania, 10 How. (U. S.) 402, 416; Conner *v.* New York, 2 Sandf. (N. Y.) 355, 369, 5 N. Y. 285; Wyandotte *v.* Drennan, 46 Mich. 478; Knappen *v.* Barry County, 46 Mich. 22; United States *v.* Hartwell, 6 Wall. (U. S.) 385; Newton *v.* Commissioners, 100 U. S. 559; Warner *v.* People, 2 Denio (N. Y.) 272, 43 Am. Dec. 740; Perkins *v.* Corbin, 45 Ala. 103, 6 Am. Rep. 698; Augusta *v.* Sweeney, 44 Ga. 463, 9 Am. Rep. 172; State *v.* Douglass, 26 Wis. 428, 7 Am. Rep. 87; People *v.* Green, 58 N. Y. 295; State *v.* Van Baumbach, 12 Wis. 310; Coffin *v.* State, 7 Ind. 157; Evans *v.* Populus 22 La. Ann. 121; Commonwealth *v.* Bacon, 6 S. & R. (Penn.) 322; Commonwealth *v.* Mann, 5 W. & S. (Penn.) 403; Koontz *v.* Franklin County, 76 Penn. St. 154; French *v.* Commonwealth, 78 Penn. St. 339; County Commissioners *v.* Jones, 18 Minn. 199; People *v.* Lippincott, 67 Ill. 333; Kendall *v.* Canton, 53 Miss. 526; Williams *v.* Newport, 12 Bush (Ky.) 428; State *v.* Kalb, 50 Wis. 178; Robinson *v.* White, 26 Ark. 139; Alexander *v.* McKenzie, 2 S. C. 81.

[3] As where the appropriation is expressly made "in full compensation:" United States *v.* Fisher, 109 U. S. 143; or where the appropriation expressly declares that it is made in payment at a different sum: United States *v.* Mitchell, 109 U. S. 146.

[4] State *v.* Steele, 57 Tex. 200; State *v.* Cook, 57 Tex. 205. See also People *v.* McCall, 65 How. (N. Y.) Pr. 442.

[5] Kehn *v.* State, 93 N. Y. 291.

[6] Hewitt *v.* White — Mich. —, 43 N. W. Rep. 1043.

latter does not work a corresponding increase in that of the former officer.[1]

§ 858. **Constitutional Provisions prohibiting Increase or Decrease during Term.**—It is a common provision in the constitutions and statutes of the States, that the salary or compensation of a public officer shall not be increased or diminished during his term.[2] The wisdom of this provision is obvious, and the courts will not permit it to be evaded.[3] Hence, although the increase was made only two days after the commencement of the officer's term, he is not entitled to it.[4]

Where, however, the salary or compensation has not been fixed at all at the time of the election or appointment, this provision does not prevent its being fixed after the term begins.[5]

Although the officer is not entitled to an increase made during his term, he may, if he be re-elected or re-appointed, have it during his second term;[6] but he will not be permitted to evade the provision by resigning his office and being at once re-appointed.[7]

§ 859. **When Officer may recover Compensation of two Offices.**—An officer who holds two or more separate and distinct offices, not incompatible with each other, to each of which compensation is attached, may recover the compensation provided by law for each office.[8] He cannot, however, recover a *per diem* from each of two or more sources for the same day's service.[9]

§ 860. **Forfeits Salary of first Office by accepting incompatible Office.**—As has been seen, an officer holding one office who ac-

[1] Johnston *v.* Lovett, 65 Ga. 716; Kinsey *v.* Sherman, 46 Iowa 463.

[2] The language frequently used is, "during his continuance in office." This language is construed to mean during his continuance in office by virtue of his first appointment or election: Smith *v.* Waterbury, 54 Conn. 174.

[3] Garvie *v.* Hartford, 54 Conn. 440.

[4] Weeks *v.* Texarkana, 50 Ark. 81, 6 S. W. Rep. 504.

[5] State *v.* McDowell, 19 Neb. 442; Purcell *v.* Parks, 82 Ill. 346; Rucker *v.* Supervisors, 7 W. Va. 661.

Where an ordinance increasing the salary is passed before the term begins, officer may receive it, though from the necessity of publication it does not take effect till after the term begins: Stuhr *v.* Hoboken, 47 N. J. L. 147.

[6] Smith *v.* Waterbury, 54 Conn. 174.

[7] State *v.* Hudson County, 44 N. J. L. 388.

[8] United States *v.* Saunders, 120 U. S. 126, 7 S. C. Rep. 467; *In re* Conrad, 15 Fed. Rep. 641.

[9] Montgomery County *v.* Bromley, 108 Ind. 158.

cepts a second incompatible with the first is held in law thereby absolutely to have forfeited the first office,[1] With the first office also, he thereby forfeits the salary or other compensation attached to it from the time of the acceptance of the second, though no judgment of ouster has been pronounced.[2]

§ 861. **Officer may not recover Reward offered by Public for Act within the Scope of his Duty.**—It is the duty of the officer to execute the functions of his office for the compensation attached to it by law, and he will not be permitted to recover a reward offered by the public for the performance of an act which it was a part of his official duty to perform if he could. To permit such a recovery would contravene the public policy.[3]

§ 862. **Can not recover extra Compensation for added or incidental Services.**—An officer who accepts an office, to which a fixed salary or compensation is attached, is deemed to undertake to perform its duties for the salary or compensation fixed, though it may be inadequate, and if the proper authorities increase its duties by the addition of others germane to the office,[4] the officer must perform them without extra compensation.[5] Neither can he recover extra compensation for incidental or collateral services which properly belong to or form a part of the main office.[6] An

[1] See *ante*, § 420.

[2] State *v.* Comptroller-General, 9 S. C. 259.

[3] Pool *v.* Boston, 5 Cush. (Mass.) 219.

See also *post*, §. 858.

[4] See *ante*, § 465.

[5] Bayha *v.* Webster County, 18 Neb. 131; People *v.* Devlin, 33 N. Y. 269, 88 Am. Dec. 377; Haynes *v.* State, 3 Humph. (Tenn.) 480, 39 Am. Dec. 187; Turpen *v.* Commissioners, 7 Ind. 172; Miami *v.* Blake, 21 Ind. 32; United States *v.* Smith, 1 Bond (U. S. C. C.) 68; Lancaster County *v.* Fulton, — Penn. —, 18 Atl. Rep. 384.

"It is a well settled rule that a person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary. He can not legally claim additional compensation for the discharge of these duties, even though the salary may be a very inadequate remuneration for the services. Nor does it alter the case that by subsequent statutes or ordinances his duties are increased and not his salary. His undertaking is to perform the duties of his office, whatever they may be, from time to time during his continuance in office for the compensation stipulated—whether these duties be diminished or increased. Whenever he considers the compensation inadequate, he is at liberty to resign:" Evans *v.* Trenton, 24 N. J. L. 764, citing Andrews *v.* United States, 2 Story, C. C. 202; People *v.* Supervisors, 1 Hill (N. Y.) 362; Bussier *v.* Pray, 7 Serg. & R. (Penn.) 447.

[6] Decatur *v.* Vermillion, 77 Ill. 315;

express contract to pay such extra compensation or an express allowance of it is void.[1]

§ 863. **But may recover for Services in independent Employment.**—"But this rule nevertheless," it has been said, "has its limit. It does not follow from the principles laid down that a public officer is bound to perform *all manner of public service* without compensation because his office has a salary annexed to it. Nor is he in consequence of holding an office rendered legally incompetent to the discharge of duties which are clearly extra-official, outside of the scope of his official duty."[2]

Where, therefore, a public officer is employed to render services in an independent employment, not germane or incidental to his official duties, as where the mayor of a city, who is also an attorney at law, is, without fraud or collusion, employed by the common council to defend a suit against the city,[3] or a police justice is employed to revise the city ordinances,[4] or a receiver of public moneys is employed to assist in disposing of Indian lands,[5] he may recover for such services.

§ 864. **Officer not entitled to Salary during Suspension from Office.**—An officer who has been lawfully suspended from his office is not entitled to compensation for the period during which he was so suspended, even though it be subsequently determined that the cause for which he was suspended was insufficient. The reason given is "that salary and perquisites are the reward of express or implied services, and therefore cannot belong to one who could not lawfully perform such services."[6]

§ 865. **But may recover for Period of unlawful Removal.**—But where an officer, *e. g.*, a city policeman, entitled to a fixed annual salary, was unlawfully removed, and was prevented for a

Rowe *v.* Kern County, 72 Cal. 353, 14 Pac. Rep. 11, Sidway *v.* Park Commissioners, 120 Ill. 496.

[1] Adams County *v.* Hunter, — Iowa —, 43 N. W. Rep. 208; Griffin *v.* Clay County, 63 Iowa 413.

[2] Evans *v.* Trenton, 24 N. J. L. 764.

[3] Niles *v.* Muzzy, 33 Mich. 61, 20 Am. Rep. 670.

[4] McBride *v.* Grand Rapids, 47 Mich 236, s. c. 49 Mich. 239.

[5] United States *v.* Brindle, 110 U. S. 688.

[6] Steubenville *v.* Culp, 38 Ohio St. 18, 43 Am. Rep. 417, citing Smith *v.* Mayor, 37 N. Y. 518; Auditors *v.* Benoit, 20 Mich. 176, 4 Am. Rep. 382, Attorney-General *v.* Davis, 44 Mo. 131; Westberg *v.* Kansas City, 64 Mo. 493.

time by no fault of his own from performing the duties of the office, it was held that he might recover, and that the amount that he had earned in other employment during his unlawful removal should not be deducted from his unpaid salary.[1]

And it has been held that he may recover the full amount notwithstanding that during the period of his removal the salary has been paid to another appointed to fill the vacancy unlawfully created.[2]

§ 866. **Not deprived of Salary by Sickness.**— But the sickness of a public officer, to whose office a salary is attached, will not deprive him of his salary while he is permitted to retain the office.[3]

§ 867. **Can only recover when lawfully elected and qualified.** —In order to be entitled to recover from the public the salary or compensation attached to an office, the officer must show that by a lawful election and qualification he is the officer *de jure*. A mere *de facto* officer can not recover.[4]

A fortiori, one getting possession of a public office forcibly and without authority cannot recover the salary thereof from the public.[5]

But the fact that the officer *de jure* has, from the wrongful refusal of other officers to recognize him as such, been unable to fully perform the duties of the office, will not prevent his recovery of the salary.[6]

§ 868. **Same Subject — Compensation when continued for second Term.**—It is the rule governing in private agencies that if an agent, employed at a fixed compensation for a definite term, continues in the principal's service after the expiration of that term, without any new or other arrangement, he will be presumed to be continuing on the old terms, and there can be no recovery on a quantum meruit.[7]

[1] Fitzsimmons *v.* Brooklyn, 102 N. Y. 536, 55 Am. Rep. 835.

[2] Andrews *v.* Portland, 79 Me. 484, 10 Atl. Rep. 458.

[3] O'Leary *v.* Board of Education, 93 N. Y. 1, 45 Am. Rep. 156.

[4] Matthews *v.* Supervisors, 53 Miss. 715, 24 Am. Rep. 715; McCue *v.* Wapello County, 56 Iowa 698, 41 Am. Rep. 134; Darby *v.* Wilmington, 76 N. C. 133.

[5] Meehan *v.* Hudson, 46 N. J. L. 276, 50 Am. Rep. 421.

[6] Williams *v.* Clayton, — Utah —, 21 Pac. Rep. 398.

[7] Mechem on Agency, §§ 212, 608;

The same rule has been applied to public officers who, being employed for a fixed term at a given salary, are continued for a second term with no new adjustment of the salary: they are presumed to continue at the old rate and cannot, therefore, recover on a quantum meruit.[1]

§ 869. **Same Subject—Compensation while holding over.**—An officer lawfully holding over is entitled to receive the compensation attached to the office until his successor is chosen and qualified, even though the qualification is deferred by delay in canvassing the votes.[2]

§ 870. **Forfeits Right to Compensation with the Office.**—The right to receive or recover the salary or other compensation attached to an office being vested in him only who is by law the duly chosen and qualified incumbent of it, it follows necessarily that when the right of the officer to the office ceases, either through his resignation, removal, misconduct or abandonment, his right to longer receive the compensation thereupon ceases also.[3]

§ 871. **When Payment to Officer de Facto bars Claim of Officer de Jure.**—But where the title to the office is in controversy, and one of the claimants has entered under color of title and performed the duties of the office, and drawn the salary for the time he so performed, the other claimant, upon establishing his title to the office, can not recover from the public the amount so paid to the officer *de facto* for the services performed by him before the adjudication upon the title.[4] The remedy of the offi-

Sines *v.* Superintendents of the Poor, 58 Mich. 503; Tallon *v.* Mining Co. 55 Mich. 147; Tatterson *v.* Suffolk Mfg. Co. 106 Mass. 56; Alba *v.* Moriarty, 36 La. Ann. 680; McCullough Iron Co. *v.* Carpenter, 67 Md. 554; Weise *v.* Milwaukee County Supervisors, 51 Wis. 564; Wallace *v.* Floyd, 29 Penn. St. 184, 72 Am. Dec. 620; Ranck *v.* Albright, 36 Penn. St. 371.

[1] Capps *v.* Adams County, — Nebr. —, 43 N. W. Rep. 114.

[2] Hubbard *v.* Crawford, 19 Kans. 570.

[3] State *v.* Comptroller-General, 9 S. C. 259; Chisholm *v.* Coleman, 43 Ala. 204, 94 Am. Dec. 678.

[4] Auditors *v.* Benoit, 20 Mich. 176, 4 Am. Rep. 382; Dolan *v.* Mayor, 68 N. Y. 274, 23 Am. Rep. 168; Saline County *v.* Anderson, 20 Kans. 298, 27 Am. Rep. 171; Shaw *v.* Pima County, — Ariz. —, 18 Pac. Rep. 273; Selby *v.* Portland, 14 Ore. 243, 58 Am. Rep. 307; 12 Pac. Rep. 377; Hannon *v.* Grizzard, 96 N. C. 293, 2 S. E. Rep. 600; Parker *v.* Supervisors, 4 Minn. 59; McAffee *v.* Russell, 29 Miss. 84, 97; Wheatley *v.* Covington, 11 Bush (Ky.) 18, 22; Mc-

cer *de jure* is, as has been seen,[1] in an action against the officer *de facto* to recover the amount so received by him. The fact that the officer *de facto* is insolvent, does not affect the question.[2]

But where the public authorities continue to pay the officer *de facto* after notice of the adjudication in favor of the officer *de jure*, the latter may recover from the public the amount so paid after such adjudication and notice.[3]

§ 872. **When Officer recovers, his Recovery is not diminished by other Earnings.**—When the officer who has been unlawfully deprived of the office is found to be entitled to recover, the amount that he has earned in the interval at other employment is not to be deducted from the salary due him.[4] The contrary rule prevailing in actions between master and servant has no application here, "and for the obvious reason," says the court of appeals of New York,[5] "that there is no broken contract, or damages for its breach where there is no contract. We have often held that there is no contract between the officer and the State or municipality by force of which the salary is payable. That belongs to him as an incident of his office, and so long as he holds it; and when improperly withheld he may sue for it and recover it. When he does so, he is entitled to its amount, not by force of any contract, but because the law attaches it to the office, and there is no question of breach of contract or resultant damages out of which the doctrine invoked has grown."

Manus *v.* Brooklyn, 5 N. Y. Supplement, 424.

People *v.* Smyth, 28 Cal. 21, and Carroll *v.* Siebenthaler, 37 Cal. 193, have been elsewhere disapproved, as in Auditors *v.* Benoit, *supra*, and Saline County *v.* Anderson, *supra*.

Memphis *v.* Woodward, 12 Heisk. (Tenn.) 499, 27 Am. Rep. 750, is opposed to the text, but, as is said in the note by the editor of the American Reports, it is opposed to the weight of authority. Andrews *v.* Portland, 79 Me. 484, is also opposed to the text. It was there held that knowledge that the title was in litigation was notice of the plaintiff's claim, and that the legal title would draw with it the salary.

[1] See *ante*, § 333.

[2] Saline County *v.* Anderson, 20 Kans. 298, 27 Am. Rep. 171.

[3] McVeany *v.* Mayor, 80 N. Y. 185, 36 Am. Rep. 609.

[4] Fitzsimmons *v.* Brooklyn, 102 N. Y. 536, 55 Am. Rep. 835; Andrews *v.* Portland, 79 Me. 484.

[5] Fitzsimmons *v.* Brooklyn, 102 N. Y. 536, 55 Am. Rep. 835.

§ 873. **When Officer may retain Salary from Fees collected.** — An officer who is compensated by a salary payable out of the public treasury, and whose duty it is to pay into the treasury the fees received by him, cannot retain from such fees the amount of his salary, or offset the amount due to him as salary against an action for the fees so collected.[1] Said the court in such a case of one who was wharfinger of a city and *ex officio* collector of levee dues: "His duties were to collect the moneys due to the city in the department in which he held office; his obligation was to deposit the money so collected in the city treasury. His salary was to be paid as the salaries of other officers of the city were paid, to wit: out of the common treasury. There is no place for the plea of compensation in a case of this kind. Compensation takes place of right between individuals when the debts due by the respective parties are equally due and demandable, and where the character of the debts is the same. It cannot be opposed by a fiduciary acting in the line of his duty. There is no such thing as compensating a debt due by an agent for moneys collected by him in the performance of his duties, by a debt due by the principal to the agent. No officer of a government, State or municipal, is empowered to pay himself his salary, or plead in compensation a demand made against him for moneys collected by him in his official capacity, by an amount due him on account of his salary. His duty is to discharge the obligations of his office according to the terms of his acceptance thereof and to get his pay as other officers get theirs. In other words, he cannot pay himself."[2]

§ 874. **Assignment of unearned Compensation opposed to public Policy.**—While the compensation already earned by a public officer may validly be assigned by him, it is settled by a clear preponderance of authority that an assignment of future compensation not yet earned, whether payable by salary or fees, is opposed to public policy and void.[3] "Salaries," it is said in one

[1] New Orleans *v.* Finnerty, 27 La. Ann. 681, 21 Am. Rep. 569.

[2] New Orleans *v.* Finnerty, (1875) 27 La. Ann. 681, 21 Am. Rep. 569, per MORGAN, J.

[3] Bliss *v.* Lawrence, 58 N. Y. 442, 17 Am. Rep. 273; Bangs *v.* Dunn, 66 Cal. 74, 4 Pac. Rep. 963; Schloss *v.* Hewlett, 81 Ala. 266, 1 S. Rep. 263; King *v.* Hawkins, — Ariz. —, 16 Pac. Rep. 434; Flarty *v.* Odlum, 3 T. R. 681; Stone *v.* Lidderdale, 2 Anstr.

case,[1] "are, by law, payable after work is performed and not before, and, while this remains the law, it must be presumed to be a wise regulation, and necessary, in the view of the law-makers, to the efficiency of the public service. The contrary rule would permit the public service to be undermined by the assignment to strangers of all the funds appropriated to salaries. It is true that, in respect to officers removable at will, this evil could in some measure be limited by their removal when they were found assigning their salaries; but this is only a partial remedy, for there would still be no means of preventing the continued recurrence of the same difficulty. If such assignments are allowed, then the assignees, by notice to the government, would, on ordinary principles, be entitled to receive pay directly and to take the place of their assignors in respect to the emoluments, leaving the duties as a barren charge to be borne by the assignors. It does not need much reflection or observation to understand that such a condition of things could not fail to produce results disastrous to the efficiency of the public service."

§ 875. **Public may not be garnished for Compensation of its Officers.**—It is well settled that the public, whether it be the United States,[2] State[3] or municipal government such as that of counties,[4]

533; Davis *v.* Marlboro, 1 Swanst. 79; Lidderdale *v.* Montrose, 4 T. R. 248; Barwick *v.* Read, 1 H. Bl. 627; Arbuckle *v.* Cowtan, 3 Bos. & P. 328; Wells *v.* Foster, 8 M. & W. 149; Hunter *v.* Gardner, 6 Wilson & Shaw, 618; Hill *v.* Paul, 8 Cl. & Fin. 307; Palmer *v.* Bate, 2 Brod. & Bing. 673; Liverpool *v.* Wright, 28 L. J. (N. S.) Ch. 871; Palmer *v.* Vaughan, 3 Swanst. 173; Parsons *v.* Thompson, 1 H. Bl. 322.

State Bank *v.* Hastings, 15 Wis. 78, is *contra*, but this case is disapproved in other American cases.

Brackett *v.* Blake, 7 Metc. (Mass.) 335, 41 Am. Dec. 442, is also, at least, indirectly, *contra*. See also Mulhall *v.* Quinn, 1 Gray (Mass.) 105, 61 Am. Rep. 414; Macomber *v.* Doane, 2 Allen (Mass.) 541.

[1] Bliss *v.* Lawrence, 58 N. Y. 442, 17 Am. Rep. 273, per JOHNSON, J.

[2] Buchanan *v.* Alexander, 4 How. (U. S.) 20.

[3] Divine *v.* Harvie, 7 T. B. Mon. (Ky.) 439, 18 Am. Dec. 194; McMeekin *v.* State, 9 Ark. 553; Tracy *v.* Hornbuckle, 8 Bush (Ky.) 336; Dewey *v.* Garvey, 130 Mass. 86.

[4] Ward *v.* Hartford, 12 Conn. 404; McDougal *v.* Hennepin County, 4 Minn. 184; Boone County *v.* Keck, 31 Ark. 387; Commissioners *v.* Bond, 3 Col. 411; Wallace *v.* Lawyer, 54 Ind. 501, 23 Am. Rep. 661; State *v.* Eberly, 12 Neb. 616.

townships,[1] cities[2] and school districts[3] can not be charged in garnishment or attachment for the compensation due to its public officers. This exemption is based upon public policy, and is not for the benefit of the officer but for that of the public that the latter may not be harassed or inconvenienced by suit against it, and that the efficiency of its servants be not interfered with by any uncertainty as to their payment.

§ 876. **Public Officer can not be charged as Garnishee.**—It is also well settled that a public officer, who has money in his hands which is due from him in his official capacity to a third person, can not be charged as the garnishee of such person on account of such indebtedness. This rule has been applied to county treasurers,[4] clerks of courts,[5] sheriffs,[6] justices of the peace,[7] receivers[8] and the like.

But if the officer does not hold the money and owe a duty to disburse it in his official capacity, but merely as the agent, bailee or debtor of the third person, it may be reached by garnishment. Thus money in a sheriff's hands which remains after satisfying an execution against the debtor,[9] or money in the hands of a

[1] Bradley *v.* Richmond, 6 Vt. 121; Jenks *v.* Osceola Township, 45 Iowa 554.

But see Whidden *v.* Drake, 5 N. H. 13.

[2] Memphis *v.* Laski, 9 Heisk. (Tenn.) 511, 24 Am. Rep. 331; Hawthorn *v.* St. Louis, 11 Mo. 59, 47 Am. Dec. 141; Merwin *v.* Chicago, 45 Ill. 133, 92 Am. Dec. 204; McLellan *v.* Young, 54 Ga. 399, 21 Am. Rep 276; Erie *v.* Knapp, 29 Penn. St. 173; Baltimore *v.* Root, 8 Md. 95; Mobile *v.* Rowland, 26 Ala. 498; Fortune *v.* St. Louis, 23 Mo. 239; Burnham *v.* Fond du Lac, 15 Wis. 193; Buffham *v.* Racine, 26 Wis. 449; Merrell *v.* Campbell, 49 Wis. 535; People *v.* Omaha, 2 Neb. 166.

Contra, Rodman *v.* Musselman, 12 Bush (Ky.) 354, 23 Am. Rep. 724.

[3] Marathon School District *v.* Gage, 39 Mich. 484, 33 Am. Rep. 421; Hightower *v.* Slaton, 54 Ga. 108, 21 Am. Rep. 273; Clark *v.* Mobile School Commissoners, 36 Ala. 621.

[4] Chealey *v.* Brewer, 7 Mass. 259; Stillman *v.* Isham, 11 Conn. 124.

[5] Ross *v.* Clarke, 1 Dall. 354; Hunt *v.* Stevens, 3 Ired. (N. C.) 365.

[6] Robinson *v.* Howard, 7 Cush. (Mass.) 257; Morris *v.* Penniman, 14 Gray (Mass.) 220, 74 Am. Dec. 675; Farmers' Bank *v.* Beaston, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226; Lightner *v.* Steinagel, 33 Ill. 510, 85 Am. Dec. 292.

[7] Corbyn *v.* Bollman, 4 Watts & Serg. (Penn.) 342.

[8] People *v.* Brooks, 40 Mich. 333; Glenn *v.* Gill, 2 Md. 1; Taylor *v.* Gillean, 23 Tex. 508.

[9] King *v.* Moore, 6 Ala. 160, 41 Am. Dec. 44; Watson *v.* Todd, 5 Mass. 271; Tucker *v.* Atkinson, 1 Humph. (Tenn.) 300, 34 Am. Dec. 650; Pierce *v.* Carleton, 12 Ill. 358, 54 Am. Dec. 405; Adams *v.* Lane, 38 Vt. 640.

clerk of court which he has been ordered to pay over,[1] or money in the possession of a justice of the peace which he holds as agent of the party,[2] may be reached by garnishment, as the officer, in all of these cases, does not hold it as officer but as a mere debtor or bailee.

II.

RIGHT TO REIMBURSEMENT AND INDEMNITY.

§ 877. **Right to Reimbursement.**—Where a public officer in the due performance of his duty, has been expressly or impliedly required by law to incur expense on the public account, not covered by his salary or commission and not attributable to his own neglect or default, the reasonable and proper amount thereof forms a legitimate charge against the public for which he should be reimbursed. Such a charge may be recovered by action against such inferior municipal governments as are subject to the ordinary process of courts, or against the State or United States government when appropriate tribunals or remedies are provided for that purpose, or credit should be allowed for it in his account.[3]

§ 878. **Right to Indemnity.**—So, it would seem, that, within the same limits, the officer is entitled to be indemnified by the public against the consequences of acts which he has been expressly or impliedly required to perform upon the public account, and which are not manifestly illegal and which he does not know to be wrong. Such a right is enforced in the case of a private agent.[4]

[1] Gaither *v.* Ballew, 4 Jones (N. C.) 488, 69 Am. Dec. 763.

[2] Clark *v.* Boggs, 6 Ala. 809, 41 Am. Dec. 85.

[3] United States *v.* Flanders, 112 U. S. 88; Andrews *v.* United States, 2 Story C. C. 202; Powell *v.* Newburgh, 19 Johns. (N. Y.) 284.

[4] Mechem on Agency, § 653; Moore *v.* Appleton, 26 Ala. 633, s. c. 34 Ala. 147, 73 Am. Dec. 448; Ramsay *v.* Gardner, 11 Johns. (N. Y.) 439; Stocking *v.* Sage, 1 Conn. 522; Greene *v.* Goddard, 9 Metc. (Mass.) 212; Powell *v.* Newburgh, 19 Johns. (N. Y.) 284; Avery *v.* Halsey, 14 Pick. (Mass.) 174; Drummond *v.* Humphreys, 39 Me. 347; Saveland *v.* Green, 36 Wis. 612; Howe *v.* Buffalo, &c. R. R. Co. 37 N. Y. 297; Nelson *v.* Cook, 17 Ill. 443; Adamson *v.* Jarvis, 4 Bing. 66.

But however may be the question of the right—

§ 879. **Public has Power to indemnify Officers.**— It is well settled that the public, such as towns or cities, have the *power* to indemnify their officers against liability which they may incur in the *bona fide* discharge of their duties, and may raise money for that purpose,[1] or appropriate to it money raised for general purposes,[2] even though the result may show that the officers exceeded their legal authority.[3] But the subject must be one concerning which the municipality has a duty to perform, an interest to protect or a right to defend, and in which it has a pecuniary or corporate interest.[4]

Where, however, the subject-matter is one in which the municipality has no interest and in reference to which it has no duty or authority; where it has no direction or control over the officer, is not responsible for his fidelity, gains nothing by his diligence and loses nothing by his want of care; where the duties are imposed specifically upon the officer by statute and the municipality has no duty to perform, no right to defend and no interest to protect, in such cases the right to indemnify does

[1] Cushing *v.* Stoughton, 6 Cush. (Mass.) 392; Fuller *v.* Groton, 11 Gray (Mass.) 340; Friend *v.* Gilbert, 108 Mass 412; Lawrence *v.* McAlvin, 109 Mass. 312.

[2] State *v.* Hammonton, 9 Vroom (N. J.) 430, 20 Am. Rep. 404.

[3] Bancroft *v.* Lynnfield, 18 Pick. (Mass.) 566, 29 Am. Dec. 623.

[4] Thus the town may indemnify members of a school committee sued for libel because of statements in their official reports: Fuller *v.* Groton, 11 Gray (Mass.) 340; or for digging a ditch for the purpose of settling the bounds of a highway: Bancroft *v.* Lynnfield, 18 Pick. (Mass.) 566, 29 Am. Dec. 623; or to refund a tax illegally assessed and collected: Nelson *v.* Milford, 7 Pick. (Mass.) 18; Pike *v.* Middleton, 12 N. H. 281; or for bringing an action to recover public moneys, on account of which they were sued for malicious prosecution: State *v.* Hammonton, 9 Vroom (N. J.) 430, 20 Am. Rep. 404; or for expenses incurred in defending an unsuccessful investigation into their official conduct, which had been ordered to be made by the city government: Lawrence *v.* McAlvin, 109 Mass. 311; or against an action for false imprisonment based upon discharge of his official duty: Sherman *v.* Carr, 8 R. I. 431; or for defending town property: Babbitt *v.* Savoy, 3 Cush. (Mass.) 530; Briggs *v.* Whipple, 6 Vt. 95: or for appropriating certain property to build a town hall: Hadsell *v.* Hancock, 3 Gray (Mass.) 526.

not exist, and any attempt to do so, or any vote or contract to that effect, will be void.[1]

[1] Merrill *v.* Plainfield, 45 N. H. 126, and Gove *v.* Epping, 41 N. H. 545, where it was held that a town could not lawfully indemnify its selectmen for resisting criminal prosecutions brought against them for refusing to insert names of voters upon the proper list: Gregory *v.* Bridgeport, 41 Conn. 76, 19 Am. Rep. 458, where it was held that a city may not indemnify an officer against the consequences of an act committed while he was not acting in an official capacity for the city. So public funds can not be appropriated to indemnify officers for refusing to discharge their official duties: Halstead *v.* Mayor, 3 N. Y. 430; nor to indemnify justice of the peace prosecuted for official misconduct: People *v.* Lawrence, 6 Hill (N. Y.) 244; nor to indemnify a cattle driver for impounding cattle: Vincent *v.* Nantucket, 12 Cush. (Mass.) 105.

CHAPTER X.

OF THE RIGHTS OF THE OFFICER AGAINST THIRD PERSONS.

§ 880. Purpose of this Chapter.

I. HIS RIGHT TO COMPENSATION.

881. Officer can not recover from third Person where his Compensation is paid by the Public.
882. When Payment of Fees is regulated by Law, Officer can not recover otherwise.
883. Officer making void Contract for Fees can not recover *quantum meruit.*
884. Fees unlawfully exacted may be recovered or set off.
885. Officer can not recover Reward for Act within Line of Duty.
886. When no Fees are fixed ministerial Officer may recover reasonable Value.
887. Officer may demand Prepayment of his Fees.
888. Officer may retain Papers on which he has expended Labor until paid.

II. HIS RIGHT TO REIMBURSEMENT AND INDEMNITY.

§ 889. Right of Reimbursement.
890. Indemnity to Officer.

III. RIGHT OF ACTION FOR TORTS.

891. May recover for Injury to Property in his Possession.
892. When Officer must sue in Name of his Office.

IV. RIGHT OF ACTION UPON BONDS, CONTRACTS, &C.

893. Has implied Right to bring necessary Actions.
894. Right to sue in his own Name on Bonds.
895. Same Subject—Officer suing should sue by his official Title.
896. Officer can not sue in his own Name on simple Contracts made in Behalf of Public.

§ 880. **Purpose of this Chapter.**—The officer has rights against third persons also which are important to be considered. The third persons will be those usually who have employed him in his official capacity, but he may have rights against strangers as well. Chief among the rights against those who employ him will be: 1, his right to compensation; 2, his right to reimbursement and indemnity; against strangers the most important will be—3, his right to recover for injuries to property or rights in his possession or under his control as an officer.

I.

HIS RIGHT TO COMPENSATION.

§ 881. **Officer can not recover from third Person where his Compensation is paid by the Public.**— A public officer whose salary or compensation is fixed by law and is payable by or made a charge against the public, cannot recover compensation from third persons for the performance of acts within the scope of his official duty, even though the acts were performed at their request,[1] or though they may have expressly promised to pay him.[2] The performance of his official duties for such members of the public as have occasion to require them, when the duties are owing to individuals, or for the public at large, when they are owing only to the public, forms the consideration for which the public undertakes to pay him his official salary or compensation, and it would be contrary to public policy to permit him to recover more.[3]

§ 882. **When Payment of Fees is regulated by Law, Officer can not recover otherwise.**—So where the payment of fees for specified services is regulated by law, the officer can not recover additional compensation or any greater or different fees than those fixed,[4] even though the party employing him expressly promised to pay more;[5] nor from other persons than those specified, though the services may have been performed at the request of another party.[6]

[1] Brophy *v.* Marble, 118 Mass. 548, citing Andrews *v.* United States, 2 Story C. C. 202; Converse *v.* United States, 21 How. (U. S.) 463; Hatch *v.* Mann, 15 Wend. (N. Y.) 44; Evans *v.* Trenton, 24 N. J. L. (4 Zab.) 764; Pool *v.* Boston, 5 Cush. (Mass.) 219; New Haven, &c., Co. *v.* Hayden, 117 Mass. 433.

[2] See Hatch *v.* Mann, 15 Wend. (N. Y.) 44.

[3] See *ante*, § 374.

[4] Wilcoxson *v.* Andrews, 66 Mich. 553, 33 N. W. Rep. 533; Peck *v.* Bank, 51 Mich. 353, 16 N. W. Rep. 681; Buck *v.* Webb, 32 Mich. 174; Vandercook *v.* Williams, 106 Ind. 345, 1 N. E. Rep. 619; Fort Wayne *v.* Lehr, 88 Ind. 62; Willemin *v.* Bateson, 63 Mich. 309.

[5] A contract or agreement to pay more than the legal fees, is void as opposed to public policy. Hatch *v.* Mann, 15 Wend. (N. Y.) 44; Vandercook *v.* Williams, 106 Ind. 345; Fort Wayne *v.* Lehr, 88 Ind. 62.

[6] Baldwin *v.* Kouns, 81 Ala. 272, 2 S. Rep. 638.

But where the statute prescribes the fees which the officer shall receive, but omits to specially provide when, how or by whom they shall be paid, it is the general rule that the person at whose request the service is rendered is liable, and the officer is entitled to payment as the services are performed.[1]

Obviously, where the fees for particular services are fixed by law, the officer cannot recover *quantum meruit*, especially where he seeks to recover more than the law allows.[2]

§ 883. **Officer having made Contract as to Fees void as against public Policy cannot recover quantum meruit.**— So where the officer has made a special contract in reference to his fees or compensation which is void as opposed to public policy,[3] he cannot, by disregarding the contract, recover on a *quantum meruit*.[4] "It is a remarkable claim," says CAMPBELL, C. J., "that where work is done under such a contract, the contract may be treated as null, and the services regarded as rendered properly. No one can use a void contract as a means of getting better terms than he could have claimed under it. The whole transaction is covered by the same taint and must be treated as beyond the protection of courts of justice."[5]

§ 884. **Fees unlawfully exacted may be recovered or set off.**— If the officer has demanded and received illegal fees, they may be recovered by the party paying them, though paid without protest,[6] or they may be set off in an action brought by the officer to recover other fees lawfully due.[7]

§ 885. **Officer can not recover Reward for Act within line of his Duty.**—So, upon grounds of public policy,[8] it is settled that a public officer cannot recover from an individual a reward offered by the latter for the performance of an act which it was

[1] Baldwin *v.* Kouns, 81 Ala. 272; People *v.* Harlow, 29 Ind. 43; Ripley *v.* Gifford, 11 Iowa 367.

[2] Wilcoxson *v.* Andrews, 66 Mich. 553, 33 N. W. Rep. 533.

[3] As to this, see *ante*, §§ 374–377.

[4] Willemin *v.* Bateson, 63 Mich. 309; Wilcoxson *v.* Andrews, 66 Mich. 553. See Hawkeye Ins. Co. *v.* Brainard, 72 Iowa 130.

[5] In Willemin *v.* Bateson, 63 Mich. 309.

[6] American Steamship Co. *v.* Young, 89 Penn. St. 186, 33 Am. Rep. 748. See also Prior *v.* Craig, 5 Serg. & R. (Penn.) 44; Walker *v.* Ham, 2 N. H. 238; Reed *v.* Cist, 7 Serg. & R. (Penn.) 183.

[7] Dew *v.* Parsons, 2 B. & Ald. 562.

[8] See *ante*, § 376.

the officer's official duty to perform if he could. For all acts within the line of his official duty, the fees or salary provided by law, are deemed to be an adequate compensation, and the officer will not be permitted to recover more.[1]

But for an act which is not within the scope of his duty, and which his office does not require him to perform, the officer may receive a reward like a private individual,[2] as where a sheriff, in reliance upon the offer of a reward, searches for a criminal who has escaped beyond his county, and captures him in another county,[3] or follows a fugitive from justice and apprehends him in another State,[4] or makes the arrest while the officer is temporarily suspended from duty,[5] or is only a special constable.[6]

§ 886. **Where no Fees are fixed, ministerial Officer may recover reasonable Value.**—Where, however, no fees or compensation are fixed by law, a public ministerial officer required to render services for individuals may, where no other agreement is made at the time they are rendered, recover from such individual the reasonable value of the services rendered.[7]

§ 887. **Officer may demand Prepayment of his Fees.**—In the absence of a statute to the contrary, a public ministerial officer entitled to a fixed fee or reasonable compensation, may, unless he has waived his right, insist that the individual who requires his services shall pay his fees before the service is rendered.[8]

§ 888. **Officer may retain Papers on which he has expended Labor until paid.**—So, it is said, that for any services rendered the officer may retain any papers or documents in his possession

[1] Kick *v.* Merry, 23 Mo. 72, 66 Am. Dec. 658; Stamper *v.* Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296; Smith *v.* Whildin, 10 Penn. St. 39, 49 Am. Dec. 572; Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1; Gillmore *v.* Lewis, 12 Ohio 281; Day *v.* Putnam Ins. Co., 16 Minn. 408; Warner *v.* Grace, 14 Minn. 487; Marking *v.* Needy, 8 Bush (Ky.) 22; Brown *v.* Godfrey, 33 Vt. 120; City Bank *v.* Bangs, 2 Edw. (N.Y.) Ch. 95.

[2] Davis *v.* Munson, 43 Vt. 676, 5 Am. Rep. 315; Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1; Pilie *v.* New Orleans, 19 La. Ann. 274; Smith *v.* Moore, 1 C. B. 438.

[3] Davis *v.* Munson, 43 Vt. 676, 5 Am. Rep. 315 (distinguishing Brown *v.* Godfrey, 33 Vt. 120); Russell *v.* Bartlett, 44 Vt. 170.

[4] Gregg *v.* Pierce, 53 Barb. 387; Morrell *v.* Quarles, 35 Ala. 544.

[5] Smith *v.* Moore, 1 C. B. 438.

[6] Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1.

[7] Ripley *v.* Gifford, 11 Iowa 367.

[8] Ripley *v.* Gifford, 11 Iowa 367.

in and about which he has bestowed labor, until his compensation therefor is paid.[1]

II.

HIS RIGHT TO REIMBURSEMENT AND INDEMNITY.

§ 889. **Right to Reimbursement.**—A public ministerial officer who is called upon by an individual to render for him official services, in the course of the performance of which the officer is obliged in good faith and for his employer's benefit, to incur expenses, not covered by his salary or fees and not attributable to his own neglect or default, is entitled to be reimbursed for such expenses by the party so employing him.[2]

But he is not entitled to reimbursement for expenses caused by his own negligence or default, or incurred in violation of his duty or in opposition to the directions of his principal.[3]

§ 890. **Indemnity to Officer.**—An agreement to indemnify an officer against the consequence of an act known to him to be unlawful is void as opposed to the policy of the law.[4] So, clearly, is an agreement void for the indemnity of an officer for violating or neglecting his official duty.[5]

But where the act is not known to be unlawful, and where the parties employing the officer are acting in good faith in the assertion of what they believe to be their rights under the law, an agreement to indemnify the officer will be valid, even though it should subsequently appear that they were not justified in doing the acts against the consequences of which the indemnity was given.[6]

[1] Ripley *v.* Gifford, 11 Iowa 367.

[2] See Ruffner *v.* Hewitt, 7 W. Va. 585; Warren *v.* Hewitt, 45 Ga. 501; Maitland *v.* Martin, 86 Penn. St. 120; Beach *v.* Branch, 57 Ga. 362; Searing *v.* Butler, 69 Ill. 575; Elliott *v.* Walker, 1 Rawle (Pa.) 126.

[3] See Godman *v.* Meixsel, 65 Ind. 32; Maitland *v.* Martin, 86 Penn St. 120.

[4] Collier *v.* Windham, 27 Ala. 291; Prewitt *v.* Garrett, 6 Ala. 128, 41 Am. Dec. 40; Hunter *v.* Agee, 5 Humph. (Tenn.) 57; Morgan *v.* Hale, 12 W. Va. 713.

[5] Hodsdon *v.* Wilkins, 7 Greenl. (Me.) 113, 20 Am. Dec. 347; Ayer *v.* Hutchins, 4 Mass. 370, 3 Am. Dec. 232; Love *v.* Palmer, 7 Johns. (N. Y.) 159; Webber *v.* Blunt, 19 Wend. (N. Y.) 188, 32 Am. Dec. 445; Buffendeau *v.* Brooks, 28 Cal. 641.

See also *ante*, § 368.

[6] Ives *v.* Jones, 3 Ired. (N. C.) L.

The necessity for indemnity arises most frequently in the case of ministerial officers who are called upon to execute the process of courts and judicial officers, and the question in respect to such officers has been fully discussed in another place.[1]

III.

RIGHT OF ACTION FOR TORTS.

§ 891. **May recover for Injury to Property in his Possession.** —A public officer who has the goods of another peaceably in his possession may, by virtue of that possession alone, recover against a mere stranger for trespasses committed by him in respect to the goods, as by injuring or converting them.[2]

So where, by virtue of his office, he has acquired a special property in the goods, as in the case of a sheriff or other officer who has made a valid levy upon them, the public officer may recover to the extent of his interest against any one, though it be the general owner himself,[3] who injures or converts them.[4]

538, 40 Am. Dec. 421; Coventry *v.* Barton, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376; McCartney *v.* Shepard, 21 Mo. 573, 64 Am. Dec. 250; Jacobs *v.* Pollard, 10 Cush. (Mass.) 287, 57 Am. Dec. 105; Shotwell *v.* Hamblin, 23 Miss. 156, 55 Am. Dec. 83; Cumpston *v.* Lambert, 18 Ohio 81, 51 Am. Dec. 442; Acheson *v.* Miller, 2 Ohio St. 203, 59 Am. Dec. 663; Marsh *v.* Gold, 2 Pick. (Mass.) 285; Anderson *v.* Farns, 7 Blackf. (Ind.) 343; Stark *v.* Raney, 18 Cal. 622; Davis *v.* Tibbats, 7 J. J. Marsh. (Ky.) 261; Stanton *v.* McMullen, 7 Ill. Ap. 326.

[1] See *ante*, §§ 748-750.

[2] Cooley on Torts, 436.

[3] "The sheriff by a levy acquires the legal property in the goods. He may maintain an action against the defendant and all other persons. When the executions are satisfied any goods which may remain in the sheriff's hands, are revested in the defendant, or an other person to whom he may have assigned his right. To one of these the sheriff is liable for a redelivery of such goods; and to meet that liability must have an action against a wrongful taker." Weatherby *v.* Covington, 3 Strob. (S. C.) 27, 49 Am. Dec. 623.

[4] Sheriff by levy on goods acquires special property in them by virtue of which he may maintain trover. Williams *v.* Herndon, 12 B. Mon. (Ky.) 484, 54 Am. Dec. 551; Weatherby *v.* Covington, 3 Strob. (S. C.) 27, 49 Am. Dec. 623; Brewster *v.* Vail, 1 Spencer (N. J.) 56, 38 Am. Dec. 547; Dezell *v.* Odell, 3 Hill (N. Y.) 215, 38 Am. Dec. 628; Lockwood *v.* Bull, 1 Cow. (N. Y.) 322. 13 Am. Dec. 539; Badlam *v.* Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202; Fitch *v.* Dunn, 3 Blackf. (Ind.) 142; Wilbraham *v.* Snow, 2 Saund. 47; Clark *v.* Withers, 6 Mod. 292.

Whether the true owner when sued may set up his title in defense to the action by the officer, has been both affirmed[1] and denied.[2]

§ 892. **When Officer must sue in Name of his Office.**—It has been laid down as a general rule that where the plaintiff sues for anything relating to his office he ought to name himself by the name of his office, or otherwise it may be pleaded in abatement.[3] But this rule, it has been said,[4] "will be found to extend only to such actions as are peculiar to the office or special character of the plaintiff, and where the very statement of the cause of action shows that it is an action that can be brought only by some dignitary or officer, or some person holding a special character. For instance, an action for a rescue can only be brought by a sheriff, and he must therefore call himself sheriff. So a real action for lands belonging to a prebend can only be brought by the prebendary. So if a prior, being parson of D., sues for a matter appertaining to that church, he must call himself parson, for none other can bring such action. Whereas any man, who has property in himself as an individual, either general or special, may bring trover, in his own name, whether he acquired that property, as purchaser, as a common carrier, as special bailee, or in the discharge of his duty as a sheriff or other public officer. It can never be necessary, in an action of trover, for a plaintiff to set out the history of his title or the office he bears, unless the property sued for belongs to that office; or unless he sues in *autre droit*."

IV.

RIGHT OF ACTION UPON BONDS AND OTHER CONTRACTS.

§ 893. **Have implied Right to bring necessary Actions.**—Where the law has not created prohibitions, public officers have an implied authority to bring and maintain all suits, as incident to their office, which the proper and faithful discharge of the

[1] Merritt *v.* Miller, 13 Vt. 416.

[2] Weidensaul *v.* Reynolds, 49 Penn. St. 73.

[3] Com. Dig. tit. Abatement, E. 21.

[4] By HORNBLOWER, C. J., in Brewster *v.* Vail, 1 Spencer (N. J.) 56, 38 Am. Dec. 547.

duties of the office requires. Their right, in this respect, is commensurate with their public trusts and duties.[1]

§ 894. **Right to sue in his own Name on Bonds.**—It is frequently provided by law that the official bonds of inferior officers, and bonds given for the faithful performance of contracts and the like, shall be executed to some superior officer by his official title. Actions upon such bonds are usually also regulated by statute, and it is not infrequently provided that suits shall be brought thereon by the then incumbent of the office for the benefit of the persons interested.

Where, however, no such provision is made, it is the general rule that the action must be brought in the name of the Commonwealth, State, or other government having the legal interest in the bond,[2] or in the name of the present incumbent of the office named, and that the officer can not maintain the action in his own name,[3] nor can it be maintained in his name after his term of office has expired.[4]

§ 895. **Same Subject—Officer suing should sue by his official Title.**—But where the officer is authorized to sue he should sue in his own name with the addition of his official title. He should not ordinarily sue either in his own name alone[5] or in the name of the office alone.[6] Errors in this respect, however, may usually be cured by amendment or may be waived by the pleadings.[7]

[1] Overseers of Pittstown *v.* Overseers of Plattsburgh, 18 Johns. (N. Y.) 407; Supervisor *v.* Stimson, 4 Hill (N. Y.) 136; Todd *v.* Birdsall, 1 Cow. (N. Y.) 260; Haynes *v.* Butler, 30 Ark. 69; Berrien County Treasurer *v.* Bunbury, 45 Mich. 79; Commissioners *v.* Walker, 6 How. (Miss.) 143, 38 Am. Dec. 433.

[2] Inhabitants of Northampton *v.* Elwell, 4 Gray (Mass.) 81; Bissell *v.* Spencer, 9 Conn. 267, 23 Am. Dec. 336; State *v.* New London, 22 Conn. 170.

[3] Bagby *v.* Baker, 18 Ala. 653.

[4] Jansen *v.* Ostrander, 1 Cow. (N. Y.) 670; Armine *v.* Spencer, 4 Wend. (N. Y.) 406; Bagby *v.* Baker, 18 Ala. 653.

When bond runs to The People, the action should be in that name. Lawton *v.* Erwin, 9 Wend. (N. Y.) 233.

That officer may sue in his own name when he is the party legally interested, see Hunnicutt *v.* Kirkpatrick, 39 Ark. 172; Haynes *v.* Butler, 30 Ark. 69.

[5] Bagby *v.* Baker, 18 Ala. 653.

[6] Commissioners *v.* Peck, 5 Hill (N. Y.) 215; Supervisors *v.* Stimson, 4 Hill (N. Y.) 136; Overseers *v.* Ely, Lalor's Sup. (N. Y.) 379; Agent *v.* Rikeman, 1 Denio (N. Y.) 279; Berrien County Treasurer *v.* Bunbury, 45 Mich. 79; Commissioners *v.* Walker, 6 How. (Miss.) 143, 38 Am. Dec. 433.

[7] Berrien County Treasurer *v.* Bun

§ 896. **Officer can not sue in his own Name on simple Contracts made in behalf of Public.**—As has been seen, it is the presumption that public officers while acting in the public behalf do not intend to bind themselves personally, and they will only be held to be so bound where the intent is clear so to charge them.[1] But the rights and liabilities are reciprocal, and where the public is bound by the contract, it is entitled to enforce it.[2] It is, therefore, the general rule, to use the language of a Minnesota judge, that "Where a public officer, acting solely on behalf of his government, within the scope of his authority, enters into a contract or performs any official act, if his official character in the transaction is known presumptively or in fact to the other party, a suit thereon must be brought in the name of the government when the redress is sought in its behalf; and a suit in the name of the officer in the absence of express authority, cannot be maintained."[3]

Thus upon a note running to I. E. F., "United States Indian Agent, his successors in office or order,"[4] or to J. I., "State's Agent or his successor in office,"[5] or to J. I., "Land Agent of Maine, or order,"[6] the payee may not recover in his own name.

bury, 45 Mich. 79; Johr *v.* Supervisors, 38 Mich. 532; Agent *v.* Rikeman, 1 Denio (N. Y.) 279.

[1] See *ante*, § 805, *et seq.*

[2] See Mechem on Agency, § 769.

[3] Per McMillan, J., in Balcombe *v.* Northrup, 9 Minn. 172.

[4] Balcombe *v.* Northrup, 9 Minn. 172.

[5] Irish *v.* Webster, 5 Me. 171.

[6] State *v.* Boles, 11 Me. 474.

CHAPTER XI.

OF THE LIABILITY OF THE PARTY WHO SETS THE OFFICER IN MOTION.

§ 897. Purpose of this Chapter.

I. IN CASE OF JUDICIAL OFFICERS.

898. In general.
899. Not liable for judicial Action of Court of general Jurisdiction.
900. Liable for setting inferior Magistrate in Motion without Jurisdiction.
901. Liability for causing Proceedings under unconstitutional Statute.
902. Liable for setting Magistrate in Motion on false Showing.
903. Liable for malicious Prosecution.

II. IN CASE OF MINISTERIAL OFFICERS.

904. No Liability for employing Officer to do lawful Act.
905. But Party is liable who authorizes, directs or participates in an unlawful Act.
906. Same Subject—Liability for false Imprisonment.
907. Same Subject—Effect of Ratification.

§ 897. **Purpose of this Chapter.**—It is not within the scope of this work to go minutely into the liability of the persons upon whose motion or at whose request the officer acts; that subject belongs more appropriately to a treatise on the law of torts. At the same time, some consideration of the question is deemed material to a complete view of the whole relation and its consequences, and will be given. The liability resulting from setting in motion judicial and ministerial officers will be separately considered.

I.

IN CASE OF JUDICIAL OFFICERS.

§ 898. **In general.**—It is the right of every individual believing himself to have a lawful cause of action against another to appeal to the proper court for its enforcement; and though his

belief may prove groundless, he incurs no liability to respond in damages to the party prosecuted.[1]

So it is not only the right but the duty of every individual who, in good faith and with probable cause, believes that a public offense has been committed by another to institute the proper proceedings for the punishment of the supposed offender; and though the prosecution should fail, the complainant incurs no liability to the defendant.[2]

§ 899. **Not liable for judicial Action of Court of general Jurisdiction.**—So where an individual goes before a court or officer having general jurisdiction over the subject-matter, and in good faith lays before the court or magistrate the facts in respect to the supposed cause of action or offense, and the court or magistrate thereupon decides that there is authority to act and does so, the person thus setting the court or magistrate in motion can not be held to respond in damages if the action proves to have been unauthorized.[3] This, as has been seen, is judicial action [4] and protects both the magistrate and the party who set him in motion.

§ 900. **Liable for setting inferior Magistrate in Motion without Jurisdiction.**—The same immunity extends to actions before inferior courts and magistrates where they have jurisdiction, or where, when the jurisdiction depends upon the showing, there is evidence laid before the magistrate having a legal tendency to make out a case in all its parts within his jurisdiction.[5]

[1] Cooley on Torts, 180.

[2] Cooley on Torts, 180.

[3] West *v.* Smallwood, 3 M. & W. 418; Fischer *v.* Langbein, 103 N. Y. 84; Hahn *v.* Schmidt, 64 Cal. 284; Landt *v.* Hilts, 19 Barb. (N. Y.) 283; Marks *v.* Townsend, 97 N. Y. 590; Miller *v.* Adams, 7 Lans. 133, 52 N. Y. 409; Dusy *v.* Helm, 59 Cal. 188; Murphy *v.* Walters, 34 Mich. 180; Fenelon *v.* Butts, 49 Wis. 342; Von Latham *v.* Rowan, 17 Abb. Pr. 237; Von Latham *v.* Libby, 38 Barb. (N. Y.) 339; Carratt *v.* Morley, 1 A. & E. (N. S.) 18; Brown *v.* Chapman, 6 M. G. & S. 365; Langford *v.* Boston, &c. R. Co. 144 Mass. 431.

[4] See *ante*, § 619, *et seq.*

[5] The rule upon this subject stated by Bronson, C. J., in Miller *v.* Brinkerhoff, 4 Denio (N. Y.) 118, 47 Am. Dec. 242, has been quite generally approved. He said: "When certain facts are to be proved to a court of special and limited jurisdiction, as a ground for issuing process, if there be a total defect of evidence as to any essential fact, the process will be declared void, in whatever form the question may arise. * * But when

But where the party sets the magistrate in motion to do an act which he has no authority to do—as to which there is a total lack or excess of jurisdiction,[1]—or where he sets him in motion with an entire lack of evidence of some material fact which the law requires to be shown,[2] or without compliance with the conditions precedent which the law prescribes,[3] he will be held liable for an injury thereby occasioned.

§ 901. **Liability for causing Proceedings under unconstitutional Statute.**—A party who procures the issuance and execution of a warrant under an unconstitutional statute is liable to the injured party in damages;[4] but it has been held that one

the proof has a legal tendency to make out a proper case, in all its parts, for issuing the process, then, although the proof may be slight and inconclusive, the process will be valid, until set aside by a direct proceeding for that purpose. In one case, the court acts without authority; in the other, it only errs in judgment upon a question properly before it for adjudication: Matter of Faulkner, 4 Hill (N. Y.) 598; Harman *v.* Brotherson, 1 Denio (N. Y.) 537; Vosburgh *v.* Welch, 11 Johns. (N. Y.) 175; Tallman *v.* Bigelow, 10 Wend. (N. Y.) 420. In one case, there is a defect of jurisdiction; in the other, there is only an error of judgment. Want of jurisdiction makes the act void; but a mistake concerning the just weight and importance of evidence only makes the act erroneous, and it will stand good until reversed."

See to like effect and approving this rule, Staples *v.* Fairchild, 3 N. Y. 41; Johnson *v.* Maxon, 23 Mich. 129, 137; Dusy *v.* Helm, 59 Cal. 188, 190; Gillett *v.* Thiebold, 9 Kans. 427; Skinnion *v.* Kelly, 18 N. Y. 355; Outlaw *v.* Davis, 27 Ill. 466.

[1] "Where a party procures an inferior magistrate to exceed his jurisdiction, and extend his powers to a case to which they can not lawfully be extended, he becomes a trespasser, and is amenable to the party injured." Barkeloo *v.* Randall, 4 Blackf. (Ind.) 476, 32 Am. Dec. 46, citing Curry *v.* Pringle, 11 Johns. (N. Y.) 444. See also Painter *v.* Ives, 4 Neb. 123.

Party is liable for sale upon execution which he caused to be issued on a void judgment: Gunz *v.* Heffner, 33 Minn. 215.

[2] Swart *v.* Kimball, 43 Mich. 443; Crumpton *v.* Newman, 12 Ala. 199, 46 Am. Dec. 251; Hauss *v.* Kohlar, 25 Kans. 640 (citing Spice *v.* Steinruck, 14 Ohio St. 213; Von Kettler *v.* Johnson, 57 Ill. 109; Johnson *v.* Von Kettler, 66 Ill. 63; Gorton *v.* Frizzell, 20 Ill. 292; Proctor *v.* Prout, 17 Mich. 473; Cody *v.* Adams, 7 Gray (Mass.) 59; Hall *v.* Rogers, 2 Blackf. (Ind.) 429; Taylor *v.* Moffatt, 2 *Id.* 305; Painter *v.* Ives, 4 Neb. 122; Gillett *v.* Thiebold, 9 Kans. 427; Prell *v.* McDonald, 7 Kans. 426; Bauer *v.* Clay, 8 Kans. 580).

[3] Diehl *v.* Friester, 37 Ohio St. 473; Barkeloo *v.* Randall, 4 Blackf. (Ind.) 476, 32 Am. Dec. 46; Hauss *v.* Kohlar, 25 Kans. 640.

[4] Merrit *v.* City of St. Paul, 11 Minn. 233.

who, in good faith and with probable cause, merely make a complaint to the magistrate is not liable in trespass for the acts done under the warrant which the magistrate thereupon issues though the statute, under which the complaint is made and upon which the magistrate proceeds to act, is unconstitutional.[1] The magistrate and the officer, however, would be liable.[2]

§ 902. **Liable for setting Magistrates in Motion on false Showing.**—So a party is liable who sets the judicial officer in motion upon a false statement of facts which, if true, would have been sufficient to confer jurisdiction and to justify the proceedings.[3]

§ 903. **Liable for malicious Prosecution.**—Clearly, also, is the party liable who, maliciously and without probable cause, institutes proceedings against another.[4] To maintain an action for a malicious prosecution, three distinct propositions must be established:

First. The fact of the alleged prosecution and that it has come to a legal termination in the plaintiff's favor.

Second. That the defendant had not probable cause.

Third. That he acted from malicious motives.[5]

The full exposition of these several requirements is beyond the scope of this volume, but it will be found in the excellent treatises on torts of Judge Cooley and Mr. Bishop.

[1] Barker *v.* Stetson, 7 Gray (Mass.) 53, 66 Am. Dec. 457.

[2] Fisher *v.* McGirr, 1 Gray (Mass.) 1, 61 Am. Dec. 381; Kelly *v.* Bemis, 4 Gray (Mass.) 83, 64 Am. Dec. 50; Barker *v.* Stetson, 7 Gray (Mass.) 53, 66 Am. Dec. 457.

[3] Connelly *v.* Woods, 31 Kans. 359; Ogg *v.* Murdock, 25 W. Va. 139; *Ex parte* Thompson, 1 Flippin, C. C. 507; Dennis *v.* Ryan, 65 N. Y. 385, 22 Am. Rep. 635.

[4] Forrest *v.* Collier, 20 Ala. 175, 56 Am. Dec. 190; Brown *v.* Randall, 36 Conn. 56, 4 Am. Rep. 35; Cardival *v.* Smith, 109 Mass. 158, 12 Am. Rep. 682; Shaul *v.* Brown, 28 Iowa 37, 4 Am. Rep. 151; Galloway *v.* Stewart, 49 Ind. 156, 19 Am. Rep. 677; Lawrence *v.* Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Closson *v.* Staples, 42 Vt. 209, 1 Am. Rep. 316; McCardle *v.* McGinley, 86 Ind. 538, 44 Am. Rep. 343; Graves *v.* Dawson, 130 Mass. 78, 39 Am. Rep. 429; Hatch *v.* Cohen, 84 N. C. 602, 37 Am. Rep. 630.

[5] Hamilton *v.* Smith, 39 Mich. 222; Cooley on Torts, 181.

II.

IN CASE OF MINISTERIAL OFFICERS.

§ 904. **No Liability for employing Officer to do lawful Act.**—It is the right of every one, having lawful occasion, to avail himself of the services of a public ministerial officer authorized by law to perform the desired act at the time and under the circumstances given. It is the presumption of the law that the officer not only understands his duty, but will perform it in the manner and with the precautions which the law prescribes. No one can complain of the lawful doing of that which the person doing it or causing it to be done had a legal right to do. No liability, therefore, can attach to one who, in a lawful manner, merely sets a public officer in motion to perform a lawful act within the scope of his authority. If the officer, in the course of his performance, commits a trespass or does any other unauthorized act, he alone must answer for it, and his employer, who neither authorized nor ratified it, can not be held liable.[1]

§ 905. **But Party is liable who authorizes, directs or participates in an unlawful Act.**—But, on the other hand, the party is liable where he authorizes, encourages, directs or assists the officer to do an unlawful act, or to do a lawful act in an unlawful manner, or to abuse, exceed or disregard his duty or authority; as where he directs the service of void process, or the arrest of

[1] Thus, says CAMPBELL, C. J., in Sutherland *v.* Ingalls, 63 Mich. 620, 6 Am. St. Rep. 332, "No one can be held liable as a trespasser at all for employing an officer to execute lawful process. It is the right of every one to have his regular and valid writ served and enforced. The officers of the law are bound to perform that duty, and can not be blamed for doing it in a legal manner. Every one has a right to suppose the ministers of the law will not abuse their functions, and no one who lawfully employs them is liable if they do: Michels *v.* Stork, 44 Mich. 2. It is only where the party himself orders or encourages lawlessness that he can be treated as a joint wrong-doer, and then he is liable because he is actually a trespasser, and liable to the extent of his own misconduct."

See also Wilson *v.* Tumman, 6 M. & G. 244; Whitmore *v.* Greene, 13 M. & W. 104; Walley *v.* McConnell, 13 A. & E. (N. S.) 911; Averill *v.* Williams, 1 Denio (N. Y.) 501, 4 *Id.* 295, 47 Am. Dec. 252; Abbott *v.* Kimball, 19 Vt. 551, 47 Am. Dec. 708; Perrin *v.* Claflin, 11 Mo. 13; Princeton Bank *v.* Gibson, 20 N. J. L. 138; Snively *v.* Fahnestock, 18 Md. 391; Clay *v.* Sandefer, 12 B. Mon. (Ky.) 334; Welsh *v.* Cochran, 63 N. Y. 181, 20 Am. Rep. 519.

a privileged person, or the seizure of exempt goods or the goods of a third person, or directs the refusal of lawful bail, or procures an arrest without process, or counsels, causes, directs or participates in the doing of any other act which the process or authority of the officer will not legally justify.[1]

§ 906. **Same Subject—Liaiblity for false Imprisonment.**— The liability of the party in these cases most frequently arises in actions for false imprisonment, and, in accordance with the rule of the last section, it is well settled that whoever, whether it be a natural person or a corporation,[2] in person or by agent,[3] and

[1] Bonesteel *v.* Bonesteel, 28 Wis. 245, 30 *Id.* 511; Gibbs *v.* Randlett, 58 N. H. 407; Develing *v.* Sheldon, 83 Ill. 390: Plaintiff in execution is equally liable with officer for abuse of process by the latter if he commands or advises such abuse; and he is liable in trespass for his act, not only where the proceedings are irregular, or where the court had no jurisdiction, but also in a case where all the proceedings are regular, and where he would not, except for such abuse, incur liability: Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551. Party's participation in an unlawful sale upon execution will render him liable with the officer: Deal *v.* Bogue, 20 Penn. St. 228, 57 Am. Dec. 702. Party is liable where he directs the levy of an execution upon the goods of a stranger to the writ: Allen *v* Crary, 10 Wend. (N. Y.) 349, 25 Am. Dec. 566; Corner *v.* Mackintosh, 48 Md. 374; Tompkins *v.* Haile, 3 Wend. (N. Y.) 406; or where, after a levy by the officer, he refuses to permit the property to be restored to its owner, a stranger to the writ: Cook *v* Hopper, 23 Mich. 511; Root *v.* Chandler, 10 Wend. (N. Y.) 110, 25 Am. Dec. 546.

"When an execution is issued on a judgment to an officer by law authorized to execute it, he must execute it as commanded in the writ, and in the manner provided by law, and will be liable to any person or party aggrieved if he fails to do so. But if the plaintiff in the execution directs that it be executed in a different manner, and the officer so executes it, he makes the officer his own agent, and is bound by whatever is done or omitted by the officer by his direction; and if the plaintiff directs the officer to levy on certain personal property, to satisfy the execution, which belongs to a stranger to the judgment, or is not subject to levy and sale, or is issued upon a void judgment, and the officer take it, both are trespassers, and he is equally liable with the officer in an action for the wrongful taking of the property, and the owner of it may maintain his action against the plaintiff who directed the levy or sale, or against the officer, or against both together:" Shaw *v.* Rowland, 32 Kans. 154. Party is liable where he directs the officer to refuse proper bail offered: Gibbs *v.* Randlett, 58 N. H. 407.

[2] Wheeler & Wilson Mfg. Co. *v.* Boyce, 36 Kans. 350, 59 Am. Rep. 571; Owsley *v.* Montgomery R. R. Co. 37 Ala. 560; Lynch *v.* Metropolitan Ry. Co. 90 N. Y. 77, 43 Am. Rep. 141.

[3] Wheeler & Wilson Mfg. Co. *v.* Boyce, 36 Kans. 350, 59 Am. Rep.

whether personally present or not, directs, procures or participates in the unlawful and unauthorized arrest and imprisonment of another is liable in damages to the party injured.[1]

§ 907. **Same Subject—Effect of Ratification.**—But it is not alone where the wrongful act of the officer was previously authorized or directed by the party that he is liable; he may become liable where, after the act has been committed, he ratifies and confirms it.

But here, as in other cases,[2] the rule applies that, except in those cases in which the party intentionally assumes the responsibility without inquiry,[3] or deliberately ratifies having all the knowledge in respect to the act which he cares to have,[4] it must appear that the person ratifying did so with full knowledge of all of the material facts relating to the transaction; otherwise any alleged ratification will be unavailing.[5]

So the evidence of the ratification must be clear and explicit, and such as indicates the intention of the party, after full knowledge of the facts, to adopt the act as his own.[6]

An express ratification, however, is not requisite, but it may be inferred, in this as in other cases, from such acts or omissions

571; Harris *v.* Louisville, &c. R. R. Co. 35 Fed. Rep. 116.

[1] Floyd *v.* State, 12 Ark. 43, 54 Am. Dec. 250; Chapman *v.* Dyett, 11 Wend. (N. Y.) 31, 25 Am. Dec. 598; Emery *v.* Hapgood, 7 Gray (Mass.) 55, 66 Am. Dec. 459; Pierson *v.* Gale, 8 Vt. 509, 30 Am. Dec. 487; Allison *v.* Rheam, 3 Serg. & R. (Penn.) 139, 8 Am. Dec. 644; Fotheringham *v.* Adams Express Co. 36 Fed. Rep. 252; Harris *v.* Louisville, &c. R. R. Co. 35 Fed. Rep. 116; McGarrahan *v.* Lavers, 15 R. I. 302; Wheeler & Wilson Mfg. Co. *v.* Boyce, 36 Kans. 350, 59 Am. Rep. 571; Clifton *v.* Grayson, 2 Stew. (Ala.) 412; Stoddard *v.* Bird, Kirby (Conn.) 65; Burlingham *v.* Wylee, 2 Root (Conn.) 152; Stoyel *v.* Lawrence, 3 Day (Conn.) 1; Vredenburgh *v.* Hendricks, 17 Barb. (N. Y.) 179; Curry *v.* Pringle, 11 Johns. (N. Y.) 444; Winslow *v.* Hathaway, 1 Pick. (Mass.) 211; Cody *v.* Adams, 7 Gray (Mass.) 59; Bright *v.* Patton, 5 Mackey (D. C.) 534.

[2] See Mechem on Agency, §§ 109-182. See also full discussion, § 526, *et seq.*

[3] Lewis *v.* Read, 13 M. & W. 834.

[4] Kelley *v.* Newburyport Horse R. R. Co., 141 Mass. 496.

[5] Lewis *v.* Read, 13 M. & W. 834; Hyde *v.* Cooper, 26 Vt. 552; Tucker *v.* Jerris, 75 Me. 184; Adams *v.* Freeman, 9 Johns. (N. Y.) 118.

[6] Tucker *v.* Jerris, 75 Me. 184; Adams *v.* Freeman, 9 Johns. (N. Y.) 118; West *v.* Shockley, 4 Harring. (Del.) 287; Kreger *v.* Osborn, 7 Blackf. (Ind.) 74; Abbott *v.* Kimball, 19 Vt. 551, 47 Am. Dec. 708.

as indicate the intention of the party to approve and confirm the act.[1]

Thus where the party expressly indemnifies the officer against the consequences of the act, he will be deemed thereby to ratify it.[2] And so he will where, knowing that the act was unauthorized, as if the goods of a stranger have been seized upon his execution, he refuses to permit the wrong to be made right, as by returning or releasing the goods;[3] and where, knowing the facts, he seeks to avail himself of the benefits of the unlawful act.[4]

But where the party has not authorized or directed the wrongful act, he will not be deemed to have ratified it merely by accepting from the officer what he would have been entitled to receive had the act been properly performed.[5] Nor will the party's mere omission to interpose to prevent the unauthorized act, amount to a ratification.[6]

[1] See Mechem on Agency, §§ 146-165.

[2] Knight *v.* Nelson, 117 Mass. 458; Beveridge *v.* Rawson, 51 Ill. 504; Davis *v.* Newkirk, 5 Denio (N. Y.) 92; Ball *v.* Loomis, 29 N. Y. 412; Crossman *v.* Owen, 62 Me. 528; Root *v.* Chandler, 10 Wend. (N. Y.) 110, 25 Am. Dec. 546; Herring *v.* Hoppock, 15 N. Y. 409; Lovejoy *v.* Murray, 3 Wall. (U. S.) 1.

[3] Cook *v.* Hopper, 23 Mich. 511; Root *v.* Chandler, 10 Wend. (N. Y.) 110, 25 Am. Dec. 546.

[4] Hyde *v.* Cooper, 26 Vt. 552; Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551. Obtaining the issue and service of an execution upon goods unlawfully seized upon attachment ratifies the attachment: Peterson *v.* Foli, 67 Iowa 402.

[5] Hyde *v.* Cooper, 26 Vt. 552.

[6] Hyde *v.* Cooper, 26 Vt. 553.

CHAPTER XII.

OF THE RIGHTS OF THE PUBLIC AGAINST THE OFFICER.

§ 908. In general.

I. DUTY TO ACCOUNT FOR PUBLIC FUNDS.

909. In general.
910. At what time Officer should account.
911. When Officer chargeable with Interest.
912. Extent of Liability under Statutes and Bonds, and Excuses for Defaults.
913. Same Subject — Legislature may relieve Officer from his Liability.
914. When Action may be begun.
915. Can not set up Illegality of Transaction to defeat Right to an Accounting.

II. DUTY TO ACCOUNT FOR PUBLIC PROPERTY.

916. Nature and Extent of the Duty.

§ 908. **In general.**—The rights of the public, viewed collectively, against the officer are numerous and many of them obvious. It has a right to insist that he shall do his duty,—that he will be faithful and honest, that he will protect and preserve the rights and interests entrusted to his care, that he will exercise due diligence and wisdom in the exercise of his functions, that he will enforce the prerogatives and observe the limitations which the law attaches to his office, and that, upon the expiration of his term, he will surrender his trust with all of its rights and incidents to him who has been lawfully chosen to succeed him.

Remedies of various kinds for the enforcement of these rights exist, in the power of removal, of impeachment, and of the election of a successor. These, however, are for consideration in another place.

Certain other rights growing out of the agency relation of the officer and the public exist, and are here to be considered. These, chiefly, are, 1. The duty of the officer to account for moneys received; and, 2. The duty of the officer to account for public property.

I.

DUTY TO ACCOUNT FOR PUBLIC FUNDS.

§ 909. **In general.**—It is the duty of the public officer, like any other agent or trustee, although not declared by express statute, to faithfully account for and pay over to the proper authorities all moneys which may come into his hands upon the public account, and the performance of this duty may be enforced by proper actions against the officer himself, or against those who have become sureties for the faithful discharge of his duties.

§ 910. **At what Time Officer should account.**—Where, by the law creating the office or otherwise, the time for accounting is expressly fixed, that provision would, of course, govern. Where, however, no such time has been fixed, it would be the duty of the officer, ordinarily, in analogy with that of a private agent,[1] to account upon lawful demand, and, at all events, within a reasonable time.[2]

§ 911. **When Officer chargeable with Interest.**—A public officer who duly accounts for public funds at the proper time would not, unless by express statute or special agreement, be chargeable with interest thereon. But if he makes default in payment at the proper time,[3] or omits to include a portion in his account,[4] or appropriates it to his own use,[5] or retains it for an unreasonable time,[6] he will be liable for interest upon the amount retained from the time when it should have been paid.[7]

§ 912. **Extent of Liability under Statutes and Bonds, and Excuses for Defaults.**—But the nature and extent of the liability in this respect is usually prescribed by express statutes, and bonds are required to secure the faithful performance of the duty. In determining the extent of the liability, therefore, regard must be had to these instruments which declare it.[8]

[1] See Mechem on Agency, § 530.
[2] Leake *v.* Sutherland, 25 Ark. 219.
[3] State *v.* Sooy, 10 Vroom (N. J.) 539.
[4] Supervisors *v.* Birdsall, 4 Wend. (N. Y.) 453.
[5] People *v.* Gasherie, 9 Johns. (N. Y.) 71.
[6] Board of Justices *v.* Fennimore, Coxe (N. J.) 242.
[7] State *v.* Van Winkle, 43 N. J. L. 125.
[8] See full discussion, § 297-303.

Under some of these statutes, the money becomes, upon its payment to the officer, in legal effect his money, and he becomes a debtor to the public for the amount of it.[1] In such a case it is obvious that his liability is absolute, and, like any other debtor, he must repay although he may have been so unfortunate as to lose or be deprived of the money without his fault.[2]

In most cases, however, it is made the duty of the officer, either by the terms of the statute prescribing his duties, the performance of which the bond, in general terms, is given to secure, or by the very language of the bond itself, to safely keep the public funds which come into his hands and to pay them over according to law. In a few instances it is further provided that they shall be deposited in a certain manner or shall be kept in certain safes or other receptacles provided by the public; in which cases the officer who complies with the requirements is relieved from liability.[3]

But, except in such instances, the officer's liability is, according to the great majority of the decisions, held to be fixed by the terms of the statute or the language of the bond, and he is regarded not as a mere bailee, but as one who, by the terms of his undertaking, has incurred a fixed and absolute liability to keep the money safely at all hazards.[4]

[1] Perley *v.* County of Muskegon, 32 Mich. 132, 20 Am. Rep. 637.

[2] Muzzy *v.* Shattuck, 1 Denio (N. Y.) 233; (See Supervisors *v.* Dorr, 25 Wend. (N. Y.) 440;) Colcrain *v.* Bell, 9 Metc. (Mass.) 499; Hancock *v.* Hazzard, 12 Cush. (Mass.) 112, 59 Am. Dec. 171; Egremont *v.* Benjamin, 125 Mass. 19; Agawam National Bank *v.* South Hadley, 128 Mass. 507; Halbert *v.* State, 22 Ind. 131; Allen *v.* State, 6 Blackf. (Ind.) 252; Morbeck *v.* State, 28 Ind. 86; Rock *v.* Stinger, 36 Ind 346; Steinbuck *v.* State, 38 Ind. 483; Board of Justices *v.* Fennimore, Coxe (N. J.) 242; Inglis *v.* State, 61 Ind. 212; Shelton *v.* State, 53 Ind. 331, 21 Am. Rep. 197; New Providence *v.*; McEachron, 33 N. J. L. 339.

[3] But this could only be where the law was established by competent authority. Otherwise the mere fact that the money was kept in a safe provided by the public would be no defence. Halbert *v.* State, 22 Ind. 131; Cumberland *v.* Pennell, 69 Me. 357, 31 Am. Rep. 284; Jefferson County *v.* Lineberger, 3 Mont. 231, 35 Am. Rep. 462.

[4] The leading case upon this subject in United States *v.* Prescott, 3 How. (U. S.) 578. There a receiver of public money had given a bond conditioned, among other things, that he would "well, truly and faithfully keep safely all the public moneys collected by him," &c. He sought to justify a default upon the ground that the money had been

Thus a county or township treasurer or other receiver of public moneys, is not discharged from liability by the failure of a bank in which he had deposited the funds, though he was guilty of no negligence in ascertaining its financial condition, [1] and although the county provided no safe place for its deposit; [2] or by being violently robbed of it; [3] or by its being stolen from the county

stolen from him without his fault. But the court held that this was no defence, and McLEAN, J., of the United States Supreme Court, said, in language which has been quoted: "This is not a case of bailment, and, consequently the law of bailment does not apply to it. The liability of the defendant arises out of his official bond, and principles which are founded upon public policy. * * * The obligation to keep safely the money is absolute, without any condition, express or implied, and nothing but the payment of it, when required, can discharge the bond. * * * Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that he 'should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs so as to establish his loss without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public. No such principle has been recognized or admitted as a legal defence. * * * As every depositary receives the office with a full knowledge of its responsibilities, he cannot, in case of loss, complain of hardship. He must stand by his bond, and meet the hazards which he voluntarily incurs."

This case has been followed with approval in many others: United States *v.* Morgan, 11 How. (U.S.) 154; United States *v.* Dashiel, 4 Wall. (U. S.) 182; United States *v.* Keehler, 9 Wall. (U. S.) 83; Boyden *v.* United States, 13 Wall. (U. S.) 17; Bevans *v.* United States, 13 Wall. (U. S.) 56; District Township of Taylor *v.* Morton, 37 Iowa 555; District Township of Union *v.* Smith, 39 Iowa 9, 18 Am. Rep. 39; State *v.* Moore, 74 Mo. 413, 41 Am. Rep. 322; Jefferson County *v.* Lineberger, 3 Mont. 231, 35 Am. Rep. 462; Commonwealth *v.* Comly, 3 Penn. St. 372; Lowry *v.* Polk County, 51 Iowa 50, 33 Am. Rep. 114; State Township *v.* Powell, 67 Mo. 935, 29 Am. Rep. 512; Ward *v.* School District, 10 Neb. 293, 35 Am. Rep. 477; Wilson *v.* Wichita County, 67 Tex. 647; State *v.* Harper, 6 Ohio St. 610, 67 Am. Dec. 363; State *v.* Nevin, 19 Nev. 162, 3 Am. St. Rep. 873; State *v.* Houston, 78 Ala. 576, 56 Am. Rep. 59.

[1] State *v.* Moore, 74 Mo. 413, 41 Am. Rep. 322; State Township *v.* Powell, 67 Mo. 395, 29 Am. Rep. 512; Wilson *v.* Wichita County, 67 Tex. 647; Ward *v.* School District, 10 Neb. 293, 35 Am. Rep. 477.

[2] Lowry *v.* Polk County, 51 Iowa 50, 33 Am. Rep. 114.

[3] United States *v.* Prescott, 3 How.

safe without any lack of care upon his part;[1] or by the destruction of the money without his fault.[2]

In a few cases, however, this absolute liability has been denied and the officer has been held to be excused by the act of God or the public enemy,[3] or by losses occurring without fault upon his part.[4]

§ 913. **Same Subject—Legislature may relieve officer from his Liability.**—But although the officer may be liable to make good the loss, though happening without his fault, it is competent for the legislature to relieve him from this liability, and authorize the deficiency to be made up by levying a tax for that purpose.[5]

§ 914. **When Action may be begun.**—The right to institute an action upon the officer's bond will ordinarily arise only when, by the terms of the bond or the provisions of law, his duty to account has matured and he has made default. This may be at the end of his term or at varying intervals before, according to the circumstances.

But where the officer admits the defalcation but claims the right to interpose an untenable defense, it is held that the State is not compelled to wait until the close of the officer's term before beginning an action upon the bond.[6]

(U.S.) 578; State *v.* Nevin, 19 Nev. 162, 3 Am. St. Rep. 873; State *v.* Harper, 6 Ohio St. 607, 67 Am. Dec. 363.

[1] Jefferson County *v.* Lineberger, 3 Mont. 231, 35 Am. Rep. 462.

[2] District Township of Union *v.* Smith, 39 Iowa 9, 18 Am. Rep. 39.

See *ante*, §§ 297–303.

[3] Thus in United States *v.* Thomas, 15 Wall. (U. S.) 337, it was held that a receiver of public money who had given a bond to keep it safely and pay it when required, is not bound absolutely, but is discharged if it be lost by the act of God or the public enemy—in this case the Confederate army.

The decision in United States *v.* Prescott, 3 How. (U. S.) 587, was very much weakened by United States *v.* Thomas, *supra*, if not, so far as it held to the rule of unconditional liability, overruled.

[4] Thus in an elaborately reasoned case in Maine it is held that a county treasurer is not liable for public moneys of which he has been violently robbed without his fault. Cumberland *v.* Pennell, 69 Me. 357, 31 Am. Rep. 284.

And in South Carolina a county treasurer was released from liability by the failure of a bank which was in good standing at the time of deposit. York County *v.* Watson, 15 S. C. 1, 40 Am. Rep. 675.

[5] Board of Education *v.* McLandsborough, 36 Ohio St. 227, 38 Am. Rep. 582; Mount *v.* State, 90 Ind. 29, 46 Am. Rep. 192.

[6] State *v.* Nevin, 19 Nev. 162, 3 Am. St. Rep. 873.

§ 915. **Can not set up Illegality of Transaction or Defects in Title to defeat Right to an Accounting.**—A public officer, like an agent, who has received money from, or in behalf of, his principal, can not defeat an action brought by the principal to recover it, upon the ground that the contract under which the money was paid, or the transaction from which it was realized, or the purpose to which it was to be devoted, was illegal.[1]

Thus a collector of taxes cannot deny the right of his principal to receive them on the ground that they were illegally levied;[2] an agent who in unlawful speculations has received money belonging to his principal can not refuse, on that ground, to pay it to him;[3] nor can an agent who has received money from his principal to be employed for an unlawful purpose, but who has not so employed it, refuse to return the money to his principal because of the illegality of the purpose contemplated.[4]

So a public officer who has received money from the State to be applied to a designated purpose can not defeat the right of the State to demand an account of it by showing that the title of the State to the money was defective.[5]

II.

DUTY TO ACCOUNT FOR PUBLIC PROPERTY.

§ 916. **Nature and Extent of the Duty.**—It is frequently the case that public officers, by virtue of their position, come into the possession of property, both real and personal, belonging to the public. Certain of this property, such as real estate occu-

[1] Snell *v.* Pells, 113 Ill. 145; Chinn *v.* Chinn, 22 La. Ann. 599; Murray *v.* Vanderbilt, 39 Barb. (N. Y.) 140; Daniels *v.* Barney, 22 Ind. 207; Kiewert *v.* Rindskopf, 46 Wis. 481, 32 Am. Rep. 731; Brooks *v.* Martin, 2 Wall. (U. S.) 70; Gilliam *v.* Brown, 43 Miss. 641; Reed *v.* Dougan, 54 Ind. 307; Baldwin *v.* Potter, 46 Vt. 402; First National Bank *v.* Leppel, 9 Col. 594; Souhegan Bank *v.* Wallace, 61 N. H. 24.

See also DeLeon *v.* Trevino, 41 Tex. 88, 30 Am. Rep. 101, with criticisms in the note.

See also the cases next cited.

[2] Placer County *v.* Astin, 8 Cal. 303; Clark *v.* Moody, 17 Mass. 145; Hammond *v.* Christie, 5 Robt. (N. Y.) 160; Galbraith *v.* Gaines, 10 Lea (Tenn.) 568.

[3] Norton *v.* Blinn, 39 Ohio St. 145.

[4] Kiewert *v.* Rindskopf, 46 Wis. 481, 32 Am. Rep. 731.

[5] People *v.* Swineford, — Mich. —, 43 N. W. Rep. 929.

pied for public purposes, and the public books, records and furnishings form permanent appurtenances of the office, designed by law to be transmitted to his successor, and it is the officer's duty, therefore, upon the expiration of his term, to duly deliver them over to the public authority lawfully entitled to receive them.[1] Proceedings for the enforcement of this duty are usually provided by law,[2] and its violation is made a criminal offense.

While in the possession of such property, it is the duty of the officer to keep and preserve it with reasonable diligence and care. In this respect he stands in the attitude of a bailee, and unless he has expressly incurred an absolute liability by his bond or otherwise, he is not liable for a loss or destruction of the property without his fault.[3]

So where property comes into the possession of a public officer by reason of his official position and in accordance with the usage of his office, although it is not made by law the duty of his office to receive it, he owes a duty of ordinary care in the preservation of it, and occupies the position of a bailee in reference to it.[4]

[1] Where the right to occupy a building is part of the officer's compensation, his right terminates with his term, and he may then be ousted. Frazier *v.* Virginia Military Institute, 81 Va. 59.

[2] See McGee *v.* State, 103 Ind. 444; State *v.* Mecker, 19 Neb. 444; Huffman *v.* Mills, 39 Kans. 577.

[3] United States *v.* Thomas, 15 Wall. (U. S.) 337, 342.

[4] Phelps *v.* People, 72 N. Y. 334.

CHAPTER XIII.

OF THE RIGHTS OF THE PUBLIC AGAINST THIRD PERSONS.

§ 917. Purpose of this Chapter.
918. Public may enforce Contracts made with its Officers and Agents.
919. Same Subject — Undisclosed Principal.
920. Public may recover Value of Goods sold by its Agents.
921. Public may recover Money wrongfully paid out.
922. Same Subject — How far Public may follow its Funds.
923. Public may recover Property wrongfully disposed of.
924. State not estopped by unauthorized Acts of its Officers.
925. State entitled to Priority of Payment.

§ 917. **Purpose of this Chapter.**—The rights of the public against third persons are numerous, and arise out of a great variety of considerations. It is, however, those only which arise out of the acts and dealings of third persons with the agents and officers of the public which it is proposed to consider here. In a large sense it is true, inasmuch as the public can deal with or act toward third persons only through the intervention of its officers and agents, that all of the rights of the public must fall under the classification given; but it is not in this largest sense that the subject is deemed germane to the purpose of this treatise.

§ 918. **Public may enforce Contracts made with its Officers and Agents.**—As has been seen, it is the constant presumption of the law that public officers and agents in their official dealings with third persons intend to bind the public by their acts and contracts rather than themselves personally. Unless, therefore, there appears a clear intention on the part of the officer to assume a personal obligation, his acts and contracts are held to be binding upon the public and not upon himself.[1] But the rights and obligations of the contract are usually reciprocal, and it is

[1] See *ante*, § 805.

well settled, as in the case of private agencies,[1] that, except in those cases where the contract is clearly with the officer personally, the State or other authority on whose behalf the contract was made may enforce it by proper actions brought in its own name.

Thus where a bill of exchange was endorsed to T., treasurer of the United States, the Supreme Court, in sustaining the right of the government to sue upon it in its own name, said: "There is a fitness that the public by its own officers should conduct all actions in which it is interested, and in its own name; and the inconveniences to which individuals may be exposed in this way, if any, are light when weighed against those which would result from its being always forced to bring an action in the name of an agent. Not only the death or bankruptcy of an agent may create difficulties, but set-offs may be interposed against the individual who is plaintiff, unless the court will take notice of the interest of the United States; and if they can do this to prevent a set-off, which courts of law have done, why not at once permit an action to be instituted in the name of the United States?"[2]

[1] See Mechem on Agency, §§ 768, 777. As to the right in case of private agents, see Tutt *v.* Brown, 5 Littell (Ky.) 1, 15 Am. Dec. 33; Pitts *v.* Mower, 18 Me. 361; 36 Am. Dec. 727; Gilpin *v.* Howell, 5 Penn. St. 41, 45 Am. Dec. 720; Girard *v.* Taggart, 5 S. & R. (Penn.) 19, 9 Am Dec. 327; Arlington *v.* Hinds, 1 D. Chip. (Vt.) 431, 12 Am. Dec. 704; Bayley *v.* Onondaga Co. Mut. Ins. Co. 6 Hill (N. Y.) 476, 41 Am. Dec. 759; Violett *v.* Powell, 10 B. Mon. (Ky.) 347, 52 Am. Dec. 548; Ruiz *v.* Norton, 4 Cal. 355, 60 Am. Dec. 618; Ilsley *v.* Merriam, 7 Cush. (Mass.) 242, 54 Am. Dec. 721; Eastern R. R. Co. *v.* Benedict, 5 Gray (Mass.) 561, 65 Am. Dec. 384; Taintor *v.* Prendergast, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; Huntington *v.* Knox, 7 Cush. (Mass.) 371; Edwards *v.* Goldsing, 20 Vt. 30; Salmon Falls Mnfg. Co. *v.* Goddard, 14 How. (U. S.) 446; Foster *v.* Smith, 2 Cold. (Tenn.) 474, 88 Am. Dec. 604; Winchester *v.* Howard, 97 Mass. 303, 93 Am. Dec. 93; Ford *v.* Williams, 21 How. (U. S.) 287; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 *Id.* 344, 381; Woodruff *v.* McGehee, 30 Ga. 158, Ames *v.* St. Paul, &c., R. R. Co. 12 Minn. 413; Mildred *v.* Hermano, 8 App. Cases 874, 35 Eng. Rep. (Moak) 97; Norfolk *v.* Worthy, 1 Camp. 337; Wilson *v.* Hart, 7 Taunt. 295; Bickerton *v.* Burrell, 5 Maule & Sel. 383; Elkins *v.* Boston, &c., R. R., 19 N. H. 337.

[2] Dugan *v.* United States, 3 Wheat. (U. S.) 172.

See also Bainbridge *v.* Downie, 6 Mass. 253; Irish *v.* Webster, 5 Greenl. (Me.) 171; Bowen *v.* Morris, 2 Taunt. 374.

§ 919. **Same Subject—Undisclosed Principal.**—In the case of private agents, it is well settled that the principal may thus intervene and enforce contracts made with his agent in the agent's own name, even though the other party was ignorant of the fact of the agency and of the name or existence of a principal, and dealt with the agent as being himself the real party in interest.[1] But where the undisclosed principal thus intervenes and seeks to appropriate the benefits of the transaction, he must also assume its burdens, and it is, therefore, equally well settled that the other party, who has acted in good faith and with reasonable care and diligence, may avail himself, as against the principal, of every defense, whether it be by common law or statute, which existed in his favor against the agent at the time the principal first interposed and demanded performance to himself.[2] So the principal, if he intervenes, is affected by and subject to every defense which the other party may have, based upon such fraud, misrepresentation, concealment or other misconduct as is, either by the prior authorization or subsequent ratification, properly chargeable to the principal as having been done or committed by the agent within the scope of his authority, although the principal himself may have been entirely innocent.[3]

These same principles will, it is believed, be applicable also to the public when it seeks to enforce its rights as an undisclosed principal.[4]

§ 920. **Public may recover Value of Goods sold by its Agents.**—So where the goods or other property of the public, as of the State, have been sold by its officers or agents, the State may sue in its own name for the recovery of the price.[5]

§ 921. **Public may recover Money wrongfully paid out.**—So where a public officer has paid out the public money without authority of law,[6] or under a mistake of fact,[7] or where it has

[1] Mechem on Agency, §§ 769, 772.
[2] Mechem on Agency, § 773.
[3] Mechem on Agency, § 775.
[4] When a State sues, it is limited in its recovery by any defenses that might be set up against individual plaintiffs: Ambler *v.* Auditor General, 38 Mich. 746.
[5] State *v.* Torinus, 28 Minn. 175.
[6] Commonwealth *v.* Field, 84 Va. 26, 3 S. E. Rep. 882.
[7] Belden *v.* State, 103 N. Y. 1.

been obtained from him by false pretenses, misrepresentations or fraud,[1] the State or other public authority may maintain an action for its recovery.

§ 922. **Same Subject—How far Public may follow its Funds.** —In the case of private agencies[2] it is well settled that wherever money of the principal comes or is placed in the hands of the agent which it is his duty to pay over to his principal or to apply in any other designated manner, the law impresses upon that money, for the benefit of the principal, a trust for the performance of the object contemplated, which can only be satisfied by its devotion to that object, unless the principal directs it otherwise. While the money remains in the hands of the agent, he cannot shake off the trust by any manner or number of alterations or changes in its specific character, unless all trace of it be completely lost, for it is well settled that equity will follow the fund through any number of transmutations and preserve it for the true owner as long as it can be identified.[3]

And this trust is not confined to the period during which the money remains in the hands of the agent, but follows it into the hands of whomsoever it may come, until it reaches the possession of one who is a *bona fide* holder for value without notice of the trust. It is not necessary to charge a third person as trustee that he should be an active wrongdoer or should attempt to defeat the trust; or that he had notice of the trust at the time the money came into his hands, if he receives notice in time to protect himself. It is enough that he is not a *bona fide* holder for value without notice.[4]

The same principles have been applied to public officers and agents.[5] Thus where one Vincent, who was known to his credi-

[1] See People *v.* Denison, 80 N. Y. 656.

[2] For a fuller discussion of this subject, see Mechem on Agency, § 780, *et seq.*

[3] Farmers' &c., Bank *v.* King, 57 Penn. St. 202, 98 Am. Dec. 215; Van Alen *v.* American National Bank, 52 N. Y. 1; National Bank *v.* Insurance Co., 104 U. S. 54.

[4] Farmers' &c., Bank *v.* King, 57 Penn. St. 202, 98 Am. Dec. 215; Van Alen *v.* American National Bank, 51 N. Y. 1; National Bank *v.* Insurance Co., 104 U. U. S. 54; Jaudon *v.* City Bank, 8 Blatchf. (U. S. C. C.) 430; Fifth National Bank *v.* Village of Hyde Park, 101 Ill. 595, 40 Am. Rep. 218; Riehl *v.* Evansville Foundry, 104 Ind. 70; Baker *v.* New York Bank, 100 N. Y, 31, 53 Am. Rep. 150; Gage *v.* Stimson, 26 Minn. 64.

[5] The State may follow her funds

tor, Wolffe, to be the State treasurer, endorsed and delivered to his creditor in payment of his own private debt, a draft payable to himself as treasurer, it was held that the creditor was chargeable with notice of the official character of the funds and became liable to the State for the money. "The money," said the court, "was trust money in Vincent's hands, bore on its face the impress that it was trust money; Vincent held it as trustee, and, by aiding him in its misapplication, Wolffe constituted himself trustee *in invitum*, co-trustee with Vincent, and liable to account for its misappropriation." [1]

Where, however, the officer becomes the *debtor* of the public, the money becomes in effect his, he may deal with it as he pleases, and the public may resort only to him and his sureties for repayment.[2] So the State may not ordinarily sue to recover its funds until default has been made in paying them into the State treasury,[3] nor can the State recover funds belonging to a county.[4]

§ 923. **Public may recover Property wrongfully disposed of.** —So where the property of the public has been sold or disposed

into lands unlawfully purchased with them: State *v.* Bevers, 86 N. C. 588, citing Cook *v.* Tullis, 18 Wall. (U. S.) 332; Cooper *v.* Landis, 75 N. C. 526; Beam *v.* Froneberger, *Id.* 540; Younce *v.* McBride, 68 N. C. 532.

[1] Wolffe *v.* State, 79 Ala. 201, 58 Am. Rep. 590, citing Lee *v.* Lee, 67 Ala. 406; Milhaus *v.* Dunham, 78 Ala. 48; National Bank *v.* Insurance Co., 104 U. S. 54; Shaw *v.* Spencer, 100 Mass. 382, 1 Am. Rep. 115; Skinner *v.* Merchants' Bank, 4 Allen (Mass.) 290; Cobb *v.* Wanemaker, 78 Penn. St. 501. The court distinguish the case at bar from Van Dyke *v.* State, 24 Ala. 81, and dissent from Perley *v.* County of Muskegon, 32 Mich. 132, 20 Am. Rep. 637, and State *v.* Keim, 8 Neb. 63. The former of these two cases is easily distinguishable from the one at bar, as will be seen from the text; but the Nebraska case, in the writer's opinion, judging from the meager statement of facts given in the official report, is not consistent with reason or authority, if it was intended to hold that the State could not recover the money at all. In this case the State treasurer had, in violation of law, loaned $2,000 of the State funds to the defendants. The State declared upon the transaction as upon a deposit by it to be repaid upon demand. The court held that as the State had never authorized or ratified the loan, the transaction set forth in the petition constituted no cause of action.

[2] Perley *v.* County of Muskegon, 32 Mich. 132, 20 Am Rep. 637.

[3] State *v.* Rubey, 77 Mo. 610.

[4] State *v.* Rubey, 77 Mo. 610; Perley *v.* County of Muskegon, 32 Mich. 132, 20 Am. Rep. 637.

of by its officers or agents, without authority of law, the State or other proper authority may maintain an action for its recovery.[1] And this recovery may ordinarily be had, not only against the immediate party acquiring it, but also against his grantee.[2] As has been seen, all persons dealing with a public officer must, at his peril, ascertain the extent of his authority, and one who claims title through the act of such an officer is bound to see that his powers were adequate to the transaction undertaken.[3]

§ 924. **State not estopped by unauthorized Acts of its Officers.** —"The State," it is said in a recent case, "can not be estopped by the acts of any of its officers, done in the exercise of a power not conferred upon them, any more than it can be bound by contracts made by its officers which they were not empowered to make. The powers of all officers are defined and conferred by law, and of these all persons who deal with them must take notice. Acts done in excess of the powers conferred are not official acts."[4]

But while the State may thus not be estopped by the unauthorized acts[5] or by the non-action[6] of its officers, it may, it is held, be estopped in some cases by an express grant.[7]

§ 925. **State entitled to Priority of Payment.**—In analogy to the prerogative right of the crown at common law, it is held in most of the States that the State has, except where an express lien has intervened, a prerogative right to have priority in the payment of its claims out of the estates of debtors.[8]

[1] Day Company *v.* State, 68 Tex. 526.

[2] Day Company *v.* State, 68 Tex. 526.

[3] Day Company *v.* State, 68 Tex. 526.

[4] Day Company *v.* State, 68 Tex. 526.

[5] State *v.* Brewer, 61 Ala. 287; Pulaski *v.* State, 42 Ark. 118; United States *v.* Kilpatrick, 9 Wheat. (U. S.) 735.

[6] Lake Shore, &c., Ry. Co. *v.* People, 46 Mich. 193; Detroit *v.* Weber, 26 Mich. 284; Attorney-General *v.* Supervisors, 30 Mich. 388; Attorney-General *v.* Marr, 55 Mich. 445.

[7] See Magee *v.* Hallett, 22 Ala, 699; Carver *v.* Astor, 4 Pet. (U. S.) 1.

[8] Orem *v.* Wrightson, 51 Md. 34, 34 Am. Rep. 286; State *v.* Bank of Maryland, 6 G. & J. (Md.) 205, 26 Am. Dec. 561; Jones *v.* Jones, 1 Bland's Ch. (Md.) 443, 18 Am. Dec. 327; Commonwealth *v.* Logan, 1 Bibb (Ky.) 529; Commonwealth *v.* Lewis, 6 Binn. (Penn.) 266.

This right, however, is denied in New Jersey: Middlesex County *v.* State Bank, 29 N. J. Eq. 268, s. c. 30 *Id.* 311.

BOOK V.

OF SPECIAL REMEDIES AND PROCEEDINGS.

CHAPTER I.

OF MANDAMUS TO PUBLIC OFFICERS.

§ 926. Purpose of this Chapter.

I. THE GENERAL NATURE OF THE REMEDY.

927. Antiquity of the Writ.
928. Originally a prerogative Writ.
929. The modern Writ defined.
930. Authority to issue, how conferred.
931. Is an original Writ.
932. Not a prerogative Writ in the United States.
933. Is a Writ of Right.
934. Is a civil Proceeding.
935. Is not a creative Remedy.
936. How compares with Injunction.

II. UNDER WHAT CONDITIONS ISSUED.

937. Lies only to enforce existing specific Duty.
938. Does not lie to enforce doubtful Right.
939. Must be Officer having Power and Duty to act—*De Facto* Officers.
940. Same Subject—Effect of Termination of Term—Abatement of Pending Proceedings.
§ 941. Does not lie where there is other adequate Remedy.
942. Does not lie to compel Performance of useless, impossible or unlawful Acts.
943. May be denied in Exercise of legal Discretion.
944. Lies only to compel Performance of official Duty, not Contracts.
945. Does not lie to control Discretion.
946. But Officer vested with Discretion may be compelled to take Action.
947. Ministerial Officer may be compelled to perform his Duty.
948. Upon whose Application Writ will be issued.
949. Necessity of Demand before Issue.
950. Writ not granted till Officer in Default.

III. MANDAMUS TO PARTICULAR OFFICERS.

951. In general.

§ 1. *To Officers of the United States.*

952. 1. To President.
953. 2. To Heads of Departments.

2. *To State Officers.*

1. Governor.

954. Does not lie to control his official Discretion.
955. How in case of ministerial Acts—Authorities against its Use.
956. Same Subject — Authorities permitting its Use.

2. Other State Officers.

957. Lies to enforce ministerial but not discretionary Duties.
958. 1. To Secretary of State.
959. 2. To State Treasurer.
960. 3. To State Auditor.
961. 4. To Attorney-General.
962. 5. To Commissioner of Insurance.

3. *To County Officers.*

963. In general.
964. 1. To County Treasurer.
965. 2. To County Clerk.
966. 3. To Recorders of Deeds.
967. 4. To Sheriffs.

4. *To County and Other Boards and Bodies.*

968. Granted to require Performance of ministerial Duties, but not to control Discretion.

5. *To Municipal Officers.*

969. In general.

§ 970. Granted to enforce ministerial Duty, but not to control Discretion.

6. *To Taxing Officers.*

971. Lies to compel Levy of Tax to pay established Claim.

7. *To School Officers.*

972. Lies to compel Performance of Duty.

8. *To Election Officers.*

973. Lies to compel Performance of ministerial Duties.

9. *To Judicial Officers.*

974. Judicial Discretion not interfered with.
975. Judicial Officer may be compelled to act.
976. Judicial Officer may be compelled to perform ministerial Acts.

10. *To Legislative Officers.*

977. Does not lie to control legislative Action.

11. *To try Title to Office.*

978. Does not lie to try Title.
979. Lies to instate one whose Title is clear.
980. Lies to restore Officer wrongfully removed.
981. Lies to restore Insignia of Office.

12. *To Compel Delivery of Books and Papers.*

982. Lies to compel Officer to deliver Books and Papers to his Successor.

§ 926. **Purpose of this Chapter.**—The most important of the special remedies or proceedings which the law provides to secure the due performance of his duties by a public officer is the ancient proceeding by the writ of mandamus.

Mandamus lies, as is well known, not only against public officers, but against private officers in certain cases, and against pub-

lic and private corporations. The latter cases lie obviously outside of the scope of this work, and for these, as well as for a fuller treatment of the application of the writ in the case of public officers, the reader must have recourse to the special treatises upon the subject. Some consideration, however, of the remedy as applied to public officers seems pertinent to the subject of this work and will be given.

I.

THE GENERAL NATURE OF THE REMEDY.

§ 927. **Antiquity of the Writ.**—The writ of mandamus is of very ancient origin, instances being found of its application as early as the times of Edward II,[1] but it was not until the latter part of the seventeenth century that it began to take systematic form as a regular portion of the judicial procedure.[2]

§ 928. **Originally a prerogative Writ.**—"It is," says Blackstone, "a high prerogative writ, of a most extensively remedial nature," and he defines it as "a command issuing in the king's name from the court of king's bench, and directed to any person, corporation or inferior court of judicature within the king's dominions, requiring them to do some *particular* thing, therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice."[3]

§ 929. **The modern Writ defined.**—"The modern writ of mandamus," says Mr. High,[4] "may be defined as a command issuing from a common-law court of competent jurisdiction, in the name of the State or sovereign, directed to some corporation, officer or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law."

[1] See Dr. Widdrington's Case, 1 Lev. p. 1, 23.

[2] High on Ex. Leg. Proc. § 2.

[3] Blackstone's Com. p. 110.

[4] High on Ex. Leg. Rem. § 1, citing 3 Black. Com. 110; Dunklin County v. District County Court, 23 Mo. 449; Rainey v. Aydelette, 4 Heisk. (Tenn.) 122. See also McBride v. Common Council, 32 Mich. 360, 364.

§ 930. **Authority to issue, how conferred.**—Authority to issue the writ is, in the United States, usually conferred in express terms, either by the constitution or by the statutes, and the practice is, in many States, also made a subject of statutory regulation.

In the Circuit Courts of the United States, the power to issue the writ is not general, but is limited to those cases in which it is necessary to the exercise of their respective jurisdictions;[1] and the same construction has been placed upon statutes conferring the power upon the subordinate State courts.[2]

§ 931. **Is an original Writ.**—It is well settled that the issue of the writ of mandamus is an exercise of original and not of appellate jurisdiction. Where, therefore, the court is invested with appellate jurisdiction only, it can not issue the writ at all except in those cases in which it may be necessary to render its appellate jurisdiction effectual.[3] It can not grant the writ as an original proceeding.[4]

Nor can the legislature confer the power upon a court which, by the constitution, is clothed only with appellate jurisdiction.[5]

§ 932. **Not a prerogative Writ in the United States.**—"Mandamus in modern practice," says Chief Justice TANEY, "is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English Crown, and was subject to regulations and rules which have long since been disused. But the right to the writ, and the power to issue it, has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable."[6]

[1] Bath County *v.* Amy, 13 Wall. (U. S.) 245; McIntire *v.* Wood, 7 Cranch (U. S.) 504; Graham *v.* Norton, 15 Wall. (U. S.) 427.

[2] See McBride *v.* Common Council, 32 Mich. 360.

[3] People *v.* Turner, 1 Cal. 143, 52 Am. Dec. 295.

[4] Daniel *v.* County Court, 1 Bibb. (Ky.) 496; Westbrook *v.* Wicks, 36 Iowa 382; Whitfield *v.* Greer, 3 Baxt. (59 Tenn.) 78; State *v.* Hall, 6 Baxt. (62 Tenn.) 3.

[5] Morgan *v.* Register, Hardin (Ky.) 609.

[6] Commonwealth *v.* Dennison, 24 How. (U. S.) 66, 97; Kendall *v.* United States, 12 Pet. (U. S.) 615; Kendall *v.* Stokes, 3 How. (U. S.) 100; Arberry *v.* Beavers, 6 Tex. 457, 55 Am. Dec. 791; Gilman *v.* Bassett, 33 Conn. 298.

§ 933. **Is a Writ of Right.**—While, as will be seen,[1] the issuance of the writ in a particular case is a matter resting in the sound discretion of the court, and while it will not be issued without a proper showing exhibiting an appropriate case for its exercise, it is generally held that the writ is a writ of right in those cases in which it is applicable.[2]

§ 934. **Is a civil Proceeding.**—Although the proceedings in mandamus are usually criminal in their form, the remedy is one essentially civil in its nature, having all the qualities and attributes of a civil action.[3]

§ 935. **Is not a creative Remedy.**—The writ of mandamus does not in any case, says the court in Virginia, "have the effect of creating any authority, or of conferring power which did not previously exist; its proper function being to set in motion and compel action with reference to previously existing and clearly defined duties. It is, therefore, in no sense a creative remedy, and is only used to compel persons to act where it is their plain duty to act without its agency."[4] The same rule is tersely expressed by another judge as follows: "It neither confers power nor imposes duty, but is a command to exercise a power already possessed and to perform a duty already imposed,".[5]

§ 936. **How compares with Injunction.**—"An injunction," says Mr. High,[6] in comparing the two writs, "is essentially a preventive remedy; mandamus a remedial one. The former is usu-

But see per COOLEY, J., *arguendo* that it is a prerogative writ: McBride *v.* Common Council, 32 Mich. 360, 364. See also School Inspectors *v.* People, 20 Ill. 530; People *v.* Hatch, 33 Ill. 134; People *v.* Police Board, 26 N. Y. 316; Moody *v.* Fleming, 4 Ga. 115, 48 Am. Dec. 210; People *v.* Judge, 41 Mich. 31; People *v.* Ferris, 76 N. Y. 326; Tawas, &c, Co. *v.* Judge, 44 Mich. 479.

[1] See *post*, § 943.

[2] Commonwealth *v.* Dennison, 24 How. (U. S.) 66; Gilman *v.* Bassett, 33 Conn. 298; Arberry *v.* Beavers, 6 Tex. 457, 55 Am. Dec. 791; Fisher *v.* Charleston, 17 W. Va. 595; People *v.* Regents, 4 Mich. 98.

Contra, see cases cited in note 8 to preceding section. See also People *v.* Judge, 41 Mich. 31.

[3] High Ex. Leg. Rem. § 8; State *v.* Bailey, 7 Iowa 390; Judd *v.* Driver, 1 Kans. 455.

[4] Tyler *v.* Taylor, 29 Gratt. (Va.) 765.

[5] Lowe *v.* Phelps, 14 Bush (Ky.) 642. See also People *v.* Gilmer, 10 Ill. 242; People *v.* Village of Crotty, 93 Ill. 180.

[6] High's Ex. Leg. Rem. § 6.

ally employed to prevent future injury, the latter to redress past grievances. The functions of an injunction are to restrain motion and enforce inaction, those of a mandamus to set in motion and compel action. In this sense an injunction may be regarded as a conservative remedy, mandamus as an active one. The former preserves matters *in statu quo*, while the very object of the latter is to change the status of affairs and to substitute action for inactivity. The one is, therefore, a positive or remedial process, the other a negative or preventive one."

II.

UNDER WHAT CONDITIONS ISSUED.

§ 937. **Lies only to enforce existing, specific Duty.**—Such being the nature and functions of the writ, it is well settled that it can be resorted to only for the purpose of enforcing the performance of a specific duty already existing and clearly imposed upon the officer either by express law or as one of the necessary functions or attributes of the office which he holds.[1]

§ 938. **Does not lie to enforce doubtful Right.**—It is but a restatement of the previous rule, and it is equally well settled, that the writ will not be issued to enforce a doubtful right, nor where the legal duty is not clear and certain.[2]

[1] Meadows *v.* Nesbit, 12 Lea (Tenn.) 489; People *v.* Hatch, 33 Ill. 9; People *v.* Lieb, 85 Ill. 484; People *v.* Klokke, 92 Ill. 134; State *v.* Francis, 95 Mo. 44; State *v.* District Court, 49 N. J. L. 537; State *v.* Board, 28 S. C. 258; State *v.* Weld, — Minn. —, 40 N. W. Rep. 561; Hall *v.* Steele, 82 Ala. 562; People *v.* Chapin, 104 N. Y. 96; People *v.* Judges, 1 Dougl. (Mich.) 302.

[2] Cassatt *v.* Barber County, 39 Kans. 505; Elizabeth *v.* Essex County Court, 49 N. J. L. 626; People *v.* Johnson, 100 Ill. 537, 39 Am. Rep. 63; Police Board *v.* Grant, 9 Smedes & M. (Miss.) 77, 47 Am. Dec. 102; People *v.* Brooklyn, 1 Wend. (N. Y.) 318, 19 Am. Dec. 502; People *v.* Salomon, 46 Ill. 415; People *v.* Mayor, 51 Ill. 17; People *v.* Glann, 70 Ill. 232; Peck *v.* Booth, 42 Conn. 271; Tarver *v.* Commissioners, 17 Ala. 527; People *v.* Supervisors, 64 N. Y. 600; People *v.* Hayt, 66 N. Y. 606; Dutten *v.* Hanover, 42 Ohio St. 215; Commonwealth *v.* Mitchell, 82 Penn. St. 343; Cook *v.* Peacham, 50 Vt. 231; State *v.* New Haven, &c. Co. 45 Conn. 331; State Board *v.* West Point, 50 Miss. 638; Sabine *v.* Rounds, 50 Vt. 74. Tyler *v.* Taylor, 29 Gratt. (Va.) 765; Townes *v.* Nichols, 73 Me. 515; People *v.* Judges, 1 Dougl. (Mich.) 302; People *v.* Judges, 1 Dougl. (Mich.) 319; People *v.* Judges, 19 Mich. 296; Pack *v.*

And the party applying for the writ must show by his application that all the conditions exist which are necessary to create the duty. They must not be left to inference.[1]

§ 939. **Must be Officer having Power and Duty to act—De Facto Officers.**—"It is of the very essence of this proceeding," says Chief Justice DIXON, "that there be some officer or officers in being having the power and whose duty it is to perform the act. If there be no such officers, it is obvious that the writ cannot go, nor the mandate of the court be enforced."[2]

But if the office be filled by an officer *de facto*, he may be compelled to act;[3] the rule above referred to applying only when there is neither a *de jure* nor a *de facto* officer.[4]

§ 940. **Same Subject—Effect of Termination of Term—Abatement of pending Proceedings.**—Mandamus will not be granted to require action on the part of an officer whose authority to do the act has terminated,[5] or whose term of office has expired.[6]

So it has been held that an abatement of pending proceedings takes place by the expiration of the term of office of respondents whose alleged delinquency was personal and did not involve any charge against the government whose officers they were.[7]

But where the duty, whose violation or neglect is complained of, is a continuing one, attaching to the office irrespective of the person who may chance to fill it, and the proceeding is taken to enforce, through the officer, the obligation of the corporation, municipality or government whose officer he is, it is well settled that the proceedings do not abate by the termination of the term of him who was the incumbent at their inception but may go on and be enforced against his successor.[8] "The proceedings may

Supervisors, 36 Mich. 377; Peck *v.* Supervisors, 47 Mich. 477; Post *v.* Sparta, 63 Mich. 323.

[1] People *v.* Woodhull, 14 Mich. 28; People *v.* Judges, 19 Mich. 296.

[2] State *v.* Beloit, 21 Wis. 280, 91 Am. Dec. 474.

[3] Kelly *v.* Wimberly, 61 Miss. 548; State *v.* Fortenberry, 56 Miss. 286; State *v.* McEntyre, 3 Ired. (N. C.) 171.

[4] State *v.* Beloit, *supra*.

[5] Hall *v.* Steele, 82 Ala. 562.

[6] Lamar *v.* Wilkins, 28 Ark. 34; Mason *v.* School District, 20 Vt. 487; State *v.* Lynch, 8 Ohio St. 347.

[7] Secretary *v.* McGarrahan, 9 Wall. (U. S.) 298; United States *v.* Boutwell, 17 *Id.* 604, as explained in Thompson *v.* United States, 103 U. S. 480, 485.

[8] State *v.* Warner, 55 Wis. 271; State *v.* Gates, 22 Wis. 210; People *v.* Collins, 19 Wend. (N. Y.) 56; Mad-

be commenced with one set of officers and terminate with another, the latter being bound by the judgment."[1]

§ 941. **Does not lie where there is other adequate Remedy.** —The writ of mandamus being an extraordinary one, granted only for the furtherance of justice and that right may not fail for want of a remedy, it is well settled that it will not be granted where the party applying for it has, either by an ordinary action at law or by virtue of some statutory provision, an other adequate and specific remedy at law for the wrong complained of.[2] Thus, as one of many instances, the writ will not be granted where the party has an adequate remedy by appeal.[3]

But in order to bar the right to mandamus, the party must not only have a specific, adequate and legal remedy, but it must be one competent to afford relief upon the very subject-matter of his application;[4] and if it is doubtful whether such action or

dox *v.* Graham, 2 Met. (Ky.) 56; Pegram *v.* Commissioners, 65 N. C. 114; Reeder *v.* Wexford Co. 37 Mich. 351; People *v.* Champion, 16 Johns. (N. Y.) 60; Thompson *v.* United States, 103 U. S. 480, 483, and cases cited, per BRADLEY, J.

[1] Thompson *v.* United States, 103 U. S. 480, 483.

[2] State *v.* Kinkaid, 23 Neb. 641, 37 N. W. Rep. 612; Moon *v.* Wellford, 84 Va. 34, 4 S. E. Rep. 572; State *v.* Buhler, 90 Mo. 560; Excelsior Mut. Aid Ass'n. *v.* Riddle, 91 Ind. 84; King William Justices *v.* Munday, 2 Leigh (Va.) 165, 21 Am. Dec. 604; Commonwealth *v.* Rosseter, 2 Binn. (Penn.) 360, 4 Am. Dec. 451; American Asylum *v.* Phoenix Bank, 4 Conn. 172, 10 Am. Dec. 112; *Ex parte* Cheatham, 6 Ark. 437; *Ex parte* Williamson, 8 Ark. 424; Peralta *v.* Adams, 2 Cal. 594; Early *v.* Mannix, 15 Cal. 149; People *v.* Hubbard, 22 Cal. 34; People *v.* McLane, 62 Cal. 616; People *v.* Hatch, 33 Ill. 9; People *v.* Salomon, 46 Ill. 415; Louisville, &c., R. R. Co. *v.* State, 25 Ind. 177; Fogle *v.* Gregg, 26 Ind. 345; State *v.* County Judge, 5 Iowa 380; Marshall *v.* Sloan, 35 Iowa 445; State *v.* Judge, 12 La. Ann. 342; State *v.* Police Jury, 29 La. Ann. 146; People *v.* Supervisors, 11 N. Y. 563; People *v.* Hawkins, 46 N. Y. 9; State *v.* Supervisors, 29 Wis. 79; Lexington *v.* Mulliken, 7 Gray (Mass.) 280; Shelby *v.* Hoffman, 7 Ohio St. 450; State *v.* Engleman, 45 Mo. 27; Mansfield *v.* Fuller, 50 Mo. 338; Ward *v.* County Court, 50 Mo. 401; Alger *v.* Seavers, 138 Mass. 331; People *v.* Judges, 1 Dougl. (Mich.) 302; People *v.* Judges, 1 Dougl. (Mich.) 319; People *v.* Judge, 1 Mich. 359; People *v.* Judge, 19 Mich. 296; Wiley *v.* Judge, 29 Mich. 487.

[3] State *v.* Babcock, 22 Neb. 38; Barnett *v.* Earlham, 73 Iowa 134; State *v.* Megown, 89 Mo. 156; Hemphill *v.* Collins, 117 Ill. 396; State *v.* Lubke, 85 Mo. 338; Pickell *v.* Owen, 66 Iowa 485; Hightower *v.* Overhaulser, 65 Iowa 347; Ewing *v.* Cohen, 63 Tex. 482.

[4] Fremont *v.* Crippen, 10 Cal. 212, 70 Am. Dec. 711; Babcock *v.* Goodrich, 47 Cal. 503; California, &c., R

proceeding will afford him a complete remedy the writ should issue.[1] If the other remedy does not secure to the party the actual performance of the duty owing to him, if it does not afford him the particular right which the law intended to secure to him, if it does not place him in the position in which he would have been had the duty been performed, if it does not end in the actual performance of the duty, it is not such an adequate and specific remedy as will prevent the issuance of the writ.[2] Thus the fact that the party may have a remedy by a criminal prosecution[3] or by an action upon the case against the officer[4] or by bringing suit upon the officer's bond,[5] will not prevent the granting of the writ. So a remedy by a bill in equity does not bar the relief.[6]

§ 942. **Does not lie to compel Performance of useless, impossible or unlawful Acts.**—So the writ will not be granted to direct the doing of an act where it is apparent that the writ, if granted, could not be enforced,[7] or, for any other reason, would be unavailing,[8]

R. Co. *v.* Central, &c., R. R. 47 Cal. 531; Price *v.* Riverside, &c., Co., 56 Cal. 434; State *v.* Wright, 10 Nev. 175; Etheridge *v.* Hall, 7 Port. (Ala.) 47; Mobile, &c., R. R. Co. *v.* Wisdom, 5 Heisk. (Tenn.) 125; Porter Township *v.* Jersey Shore, 82 Penn. St. 275.

[1] State *v.* Wright, 10 Nev. 175; Etheridge *v.* Hall, 7 Port. (Ala.) 47; Fremont *v.* Crippen, 19 Cal. 212, 70 Am. Dec. 711. As where the other remedy is not sufficiently speedy. Tawas, &c., Co. *v.* Judge, 44 Mich. 479.

[2] See Etheridge *v.* Hall, 7 Port. (Ala.) 47; Fremont *v.* Crippen, 10 Cal. 212, 70 Am. Dec. 711; Babcock *v.* Goodrich, 47 Cal. 508; State *v.* Wright, 10 Nev. 175.

[3] Fremont *v.* Crippen, 10 Cal. 212, 70 Am. Dec. 711; Rex *v.* Severn, &c., Ry. Co., 2 B. & Ald. 646; Etheridge *v.* Hall, 7 Port. (Ala.) 47; *In re* Trustees of Williamsburgh, 1 Barb. (N. Y.) 34; People *v.* Mayor, 10 Wend. (N. Y.) 395; Ayres *v.* Auditors, 42 Mich. 422.

[4] Fremont *v.* Crippen, 10 Cal. 212, 70 Am. Dec. 711; Mobile, &c., R. R. Co. *v.* Wisdom, 5 Heisk (Tenn.) 125.

[5] Babcock *v.* Goodrich, 47 Cal. 508; State *v.* Dougherty, 45 Mo. 294; *Contra*, where writ was asked to compel sheriff to make a levy. Habersham *v.* Sears, 11 Oreg. 431, 50 Am. Rep. 481.

[6] People *v.* State Treasurer, 24 Mich. 468; People *v.* Mayor, 10 Wend. (N. Y.) 395.

[7] Bassett *v.* School Directors, 9 La. Ann. 513.

[8] As to instate an officer who if instated would be at once ousted, State *v.* Board of Health, 49 N. J. L. 349; or whose term has already expired, Fitzpatrick *v.* Kirby, 81 Va. 467; Lacoste *v.* Duffy, 49 Tex. 767, 30 Am. Rep. 122; or to compel an officer to act whose term has expired, Lamar *v.* Wilkins, 28 Ark. 34; or whose jurisdiction has ceased, Williams *v.*

or where the act is impossible[1] or unlawful[2] to be done. So the writ will not be granted where, though the act in question was once the duty of the officer, it has now ceased to be so,[3] or where he has been enjoined from acting,[4] or where the action is barred by the statute of limitations.[5] *A fortiori* will it not be granted where the act has been already done.[6]

Neither will the writ be granted to compel the doing of that which the officer offers to do without a mandamus.[7]

§ 943. **May be denied in Exercise of legal Discretion.**—Notwithstanding that there is, as has been seen,[8] a strong tendency to regard the writ as one of right in cases to which it is properly applicable, it is not so far a writ of right as to leave the court

County Commissioners, 35 Me. 345; or to compel a clerk to send up a cause for hearing, where if sent up it could not be heard, Roberts *v.* Smith, 63 Ga. 213; or to compel school officers to admit a scholar to a term of school where the application was made one day before the term would expire, and could not be heard until afterwards, Cristman *v.* Peck, 90 Ill. 150; or to compel the designation of an official paper where no paper of the kind required exists, State *v.* Mayor, 40 N. J. L. 152; or to grant a hearing for a motion for a new trial where the motion was made too late to be heard, Clark *v.* Crane, 57 Cal. 629; or to compel the payment of orders drawn upon an exhausted fund, Cabaniss *v.* Hill, 74 Ga. 845, or to compel officers to meet for the purpose of agreeing upon a matter, where it appears that they have often met but cannot agree, Case *v.* Blood, 68 Iowa 486; or to levy a tax where the power to levy has been already exhausted, Clay County *v.* McAleer, 115 U. S. 616.

For other illustrations, see: People *v.* Chicago, &c., R. R. Co. 55 Ill. 95; People *v.* Dulaney, 96 Ill. 503; Price *v.* Walker, 44 Iowa 458; Bassett *v.* School Directors, 9 La. Ann. 513; Woodbury *v.* County Commissioners, 40 Me. 304; State *v.* Vanarsdale, 42 N. J. L. 536; People *v.* Dutchess, &c., R. R. Co., 58 N. Y. 153; State *v.* Perrine, 5 Vroom (N. J.) 254; O'Hara *v.* Powell, 80 N. C. 104.

[1] Bates *v.* Porter, 74 Cal. 224; Silverthorn *v.* Warren R. Co., 33 N. J. L. 173; (unless the impossibility is caused by respondent's own act. Queen *v.* Birmingham, &c., R. Co, 2 Ad. & El. (N. S.) 47); State *v.* Perrine, 34 N. J. L. 254; Ackerman *v.* Desha Co., 27 Ark. 457; Ball *v.* Lappius, 3 Oreg. 55.

[2] People *v.* Hyde Park, 117 Ill. 462; Gillespie *v.* Wood, 4 Humph (Tenn.) 437; Ross *v.* Lane, 11 Miss. 695; People *v.* Fowler, 55 N. Y. 252; Johnson *v.* Lucas, 11 Humph. (Tenn.) 306.

[3] Hall *v.* Steele, 82 Ala. 562.

[4] People *v.* Supervisors, 30 Hun (N. Y.) 146; Railroad Co. *v.* Wyandot Co., 7 Ohio St. 278.

[5] People *v.* Chapin, 104 N. Y. 96.

[6] Spiritual Athenæum Society *v.* Randolph, 58 Vt. 192.

[7] People *v.* Dulaney, 96 Ill. 503.

[8] See *ante*, § 933.

no discretion as to its issue; for it is well settled that, to a large degree at least, the question whether it shall be granted or not is one resting in the sound discretion of the court.[1] The court will, therefore, refuse to interfere where it might work injustice or hardship, or will affect persons who have had no opportunity to be heard,[2] or is sought to compel the observance of the strict letter of the law in violation of its true spirit,[3] or to gratify personal spite.[4]

But the discretion which is to be exercised is not an arbitrary or capricious one, but is a sound, legal discretion to be exercised in accordance with established principles and the well settled rules of law.[5]

§ 944. **Lies only to compel Performance of official Duty, not Contracts.**—The writ lies only to enforce the performance of official duty,[6] and it is not considered an appropriate remedy to compel the performance of mere contract obligations.[7]

§ 945. **Does not lie to control Discretion.**—Where the law imposes upon a public officer the right and duty to exercise judgment or discretion in respect to any matter submitted to him or in reference to which he is called upon to act, it is, of course, *his* judgment or discretion that is to be exercised, and not that of

[1] State *v.* Graves, 19 Md. 351, 81 Am. Dec. 639; Dane *v.* Derby, 54 Me. 95, 89 Am. Dec. 722; State *v.* Kirke, 12 Fla. 278, 95 Am. Dec. 314; Booze *v.* Humbird, 27 Md. 4; State *v.* Kirkley, 29 Md. 109; Jennings *v.* Fisher, 7 Cush. (Mass.) 239; *Ex parte* Fleming, 4 Hill (N. Y.) 583; People *v.* Hatch, 33 Ill. 134; People *v.* Ketchum, 72 Ill. 212; State *v.* Commissioners, 26 Kans. 419; State *v.* Commissioners, 28 Kans. 67; Belcher *v.* Treat, 61 Me. 577; Davis *v.* Commissioners, 63 Me. 396; Free Press Association *v.* Nichols, 45 Vt. 7.

[2] People *v.* Forquer, Breese (Ill.) 68.

[3] State *v.* Commissioners, 26 Kans. 419.

[4] Hale *v.* Risley, 69 Mich. 596, 14 West. Rep. 188.

[5] Brooke *v.* Widdicombe, 39 Md. 386: "The application is to the discretion of the court; but this is not an arbitrary discretion; it is a judicial discretion; and when there is a right, and the law has established no specific remedy, this writ should not be denied. This writ was granted only to prevent a failure of justice, and is no doubt more freely and frequently granted at the present time than it was formerly." Jennings *v.* Fisher, 7 Cush. (Mass.) 239.

[6] Mayo *v.* Commissioners, 141 Mass. 74.

[7] Tobey *v.* Hakes, 54 Conn. 274, 1 Am. St. Rep. 114; Parrott *v.* City of Bridgeport, 44 Conn. 180, 26 Am. Rep. 439; Cushman *v.* Thayer Mfg. Co., 76 N. Y. 365, 32 Am. Rep. 315; Port Huron Board of Education *v.* City Treasurer, 57 Mich. 46.

any other officer or court. Courts, therefore, will not attempt by mandamus to compel the officer vested with such discretion to exercise it in any particular way, or to come to any particular decision,[1] or to revise or alter his judgment when he has once exercised it.[2]

Thus the writ will not be granted to review, revise or control the discretion of an officer authorized and required to exercise it in granting licenses,[3] or approving the appointment of teachers,[4] or letting contracts to the lowest responsible bidder,[5] or in fixing the compensation of other officers or agents,[6] or judging of the sufficiency of bonds,[7] or deciding upon the suspension of a pilot,[8] or deciding whether to license the sale of liquors,[9] or granting leave to practice as a physician,[10] or deciding upon the allowance of claims,[11] or deciding upon the expulsion of a member from a body which is the final judge of the qualifications of its members,[12] or deciding whether an applicant is qualified to receive a certificate as a teacher,[13] or removing subordinate officers,[14] or

[1] People v. Knickerbocker, 114 Ill. 539, 55 Am. Rep. 879; People v. Pearson, 2 Scam. (Ill.) 204, 33 Am. Dec. 445; Village of Glencoe v. People, 78 Ill. 383; County of St. Clair v. People, 85 Ill. 396; People v. Williams, 55 Ill. 178; Commonwealth v. McLaughlin, 120 Penn. 518, 14 Atl. Rep. 377; State v. Webber, 38 Minn. 397; State v. Board, 28 S. C. 258; State v. St. Bernard, 39 La. Ann. 759, 2 S. Rep. 305; Commonwealth v. Boone City Court, 82 Ky. 632; State v. St. Louis Court of Appeals, 87 Mo. 374; Weeden v. Town Council, 9 R. I. 128, 98 Am. Dec. 373; Houghton Co. v. Auditor-General, 36 Mich. 271; People v. Auditor-General, 3 Mich. 427.

[2] State v. Young, 84 Mo 90; People v. Chapin, 104 N. Y. 96, 10 N. E. Rep. 141; People v. Equitable L. Assur. Society, 103 N. Y. 635.

[3] People v. Thacher, 42 Hun (N. Y.) 349; Deehan v. Johnson, 141 Mass. 23.

[4] Wintz v. Charleston Board, 28 W. Va. 227.

[5] State v. McGrath, 91 Mo. 356.

[6] Cicotte v. Wayne County, 59 Mich. 509.

[7] Arapahoe County v. Crotty, 9 Colo. 318; McHenry v. Township Board, 65 Mich. 9; Post v. Township Board, 64 Mich. 597; Buckman v. Commissioners, 80 N. C. 121; Swan v. Gray, 44 Miss. 393.

[8] State v. Commissioners, 23 S. C. 175.

[9] Stanley v. Monnet, 34 Kans. 708.

[10] State v. Gregory, 83 Mo. 123, 53 Am. Rep. 565; State v. State Medical Board, 32 Minn. 324, 50 Am. Rep. 575.

[11] People v. Auditors, 10 Mich. 307; People v. Supervisors, 26 Mich. 422.

[12] People v. Mayor, 41 Mich. 2.

[13] Bailey v. Ewart, 52 Iowa 111.

[14] State v. Fire Commissioners, 26 Ohio St. 24.

suspending a pupil for misconduct,[1] or locating a county seat,[2] or deciding whether such facts exist as make it his duty to call an election,[3] or deciding upon the qualifications of a voter.[4]

§ 946. **But Officer vested with Discretion may be compelled to take Action.**—But though the officer vested with discretion will thus not be compelled to reach any particular conclusion, he can not refuse, in violation of his duty, to act at all, and if he does, mandamus may be resorted to to compel him to act, —to take whatever action is necessary as a preliminary to the exercise of his discretion, as to hear the claim, or entertain the petition, or pass upon the bond, or meet to confer, or pass upon the matter, as the particular case may require.[5]

§ 947. **Ministerial Officer may be compelled to perform his Duty.**—When, however, the domain of the purely ministerial duties is reached, the application of the writ is frequent and certain. For it is well settled that where a clear and specific duty of a ministerial nature, involving no element of judgment or discretion, is positively imposed upon a public officer by law, its performance may be enforced by mandamus where no other adequate and specific remedy exists. In such a case, the writ may command the performance of the very act itself.[6]

§ 948. **Upon whose Application will Writ be issued.**—Where the writ of mandamus is sought for the purpose of enforcing a purely private right, in which the public, as such, has no special

[1] State *v.* Burton, 45 Wis. 150.

[2] State *v.* Bonner, Busb. (N. C.) L. 257.

[3] Sansom *v.* Mercer, 68 Tex. 488, 2 Am. St. Rep. 505.

[4] Weeden *v.* Town Council, 9 R. I. 128, 98 Am. Dec. 373.

[5] State *v.* Webber, 38 Minn. 397; Case *v* Blood, 71 Iowa 632; Eden *v.* Templeton, 72 Iowa 687; People *v.* Barnes, 66 Cal. 594; Mobile Ins. Co. *v.* Cleveland, 76 Ala. 321; People *v.* Judge, 27 Mich. 170; Attorney-General *v.* Common Council, 29 Mich. 108; State *v.* Commissioners, 31 Ohio St. 451.

[6] Humboldt County *v.* Commissioners, 6 Nev. 30; People *v.* Bender, 36 Mich. 195; People *v.* Auditor-General, 3 Mich. 427; United States *v.* Seaman, 17 How. (U. S.) 225; United States *v.* Commissioners, 5 Wall. (U. S.) 563; United States *v.* Schurz, 102 U. S. 378; *Ex parte* R. R. Co. 46 Ala. 423; State *v.* Secretary of State, 33 Mo. 293; Freeman *v.* Selectmen, 34 Conn. 406; State *v.* Robinson, 1 Kans. 188; People *v.* Sexton, 37 Cal. 532; Barksdale *v.* Cobb, 16 Ga. 13; *Ex parte* Banks, 28 Ala. 28; People *v.* Collins, 19 Wend. (N. Y.) 56; Howland *v.* Eldredge, 43 N. Y. 457; Citizens' Bank *v.* Wright, 6 Ohio St. 318; People *v.* Supervisors, 3 Mich. 475.

interest, the application for the writ should be made by and in the name of the party who is directly and particularly interested.[1]

In the case of purely public duties, however, except those due to the government as such, the rule is not so well or clearly settled, but the preponderance of authority is in favor of the rule that private persons, even though they have no other interest than that of any citizen, may institute the proceeding to compel the officer to perform his public duty.[2]

But this rule is not universal, and mandamus has been denied, upon the application of a private individual showing no peculiar interest, in Michigan to compel the regents of a university to appoint a college professor,[3] or the inspectors of a State's prison to discontinue teaching trades;[4] in Maine to compel the location of a road;[5] in Pennsylvania to require the opening of an alley;[6] in Kansas to compel the calling of an election to fix a county seat,[7] or to determine upon an issue of bonds,[8] or to compel the canvassing of votes:[9] and in Iowa, though stress was laid upon the peculiar language of their statute, to compel a railroad company to relocate its road.[10]

§ 949. **Necessity of Demand before Issue.**—Where the duty

[1] Sanger *v.* County Commissioners, 25 Me. 291; Heffner *v.* Commonwealth, 28 Penn. St. 108; Bobbett *v.* State, 10 Kans. 9; State *v.* Henderson, 38 Ohio St. 644.

[2] State *v.* Weld, 39 Minn. 426; Throckmorton *v.* State, 20 Neb. 647; Union Pacific R. R. Co. *v.* Hall, 91 U. S. 343, 355; Village of Glencoe *v.* People, 78 Ill. 382; State *v.* Gracey, 11 Nev. 223; State *v.* Shropshire, 4 Neb. 411; People *v.* Collins, 19 Wend. (N. Y.) 56; Pike County *v.* State, 11 Ill. 202; Ottawa *v.* People, 48 Ill. 233; Hall *v.* People, 57 Ill. 307; People *v.* Halsey, 37 N. Y. 344; State *v.* Rahway, 33 N. J. L. 110; Pumphrey *v.* Mayor, 47 Md. 145, 28 Am. Rep. 446; State *v.* Commissioners, 17 Fla. 707; Moses *v.* Kearney, 31 Ark. 261; Hamilton *v.* State, 3 Ind. 458; Templeton *v.* Police Jury, 11 La. Ann. 141; State *v.* Francis, 95 Mo. 44; Cannon *v.* Janvier, 3 Houst. (Del.) 27.

[3] People *v.* Regents, 4 Mich. 98, 18 Mich. 469, 30 Mich. 473.

[4] People *v.* Inspectors, 4 Mich. 187. And to like effect: Police Justice *v.* Kent Supervisors, 38 Mich. 421.

[5] Sanger *v.* County Commissioners, 25 Me. 291. See also Mitchell *v.* Boardman, 79 Me. 469.

[6] Heffner *v.* Commonwealth, 28 Penn. St. 108.

[7] Bobbett *v.* State, 10 Kans. 9; Adkins *v.* Doolen, 23 Kans. 659.

[8] Turner *v.* Commissioners, 10 Kans. 16.

[9] Reedy *v.* Eagle, 23 Kans. 254.

[10] Crane *v.* Chicago, &c. Ry. Co. 74 Iowa 330, 7 Am. St. Rep. 479.

whose performance is sought to be enforced is one owing to an individual, it must appear that the officer from whom the performance is due has been requested to perform the duty and that he has, without lawful excuse, refused or neglected to comply.[1]

Where, however, the duty is one owing to the public, and not to individuals, and no one is expressly designated by law to make a demand, it is generally held that no specific demand and refusal need be shown. In such a case, the law stands in place of a demand, and it is enough that the officer has distinctly manifested an intention not to perform a clear and specific duty which the law imposes.[2]

By some authorities, however, a demand and refusal are said to be necessary in all cases.[3]

§ 950. **Writ not granted till Officer in Default.**—It is a general rule, and so supported both by reason and authority, that the duty whose performance it is sought to enforce must, at the time of making the application, be one fully matured and ripe for performance, and that the writ will not be granted to compel the performance of an act which the officer is not yet under any obligation to perform.[4] The law presumes that the officer will do his duty when the time arrives, and hence, in general, no mere threats of non-performance will be sufficient to set the court in motion.[5]

Thus the writ will not issue to compel the payment of an

[1] People *v.* Hyde Park, 117 Ill. 462; State *v.* Adams, 19 Nev. 370; Attorney-General *v.* Boston, 123 Mass. 460, 477; State *v.* Schaack, 28 Minn. 358; Jefferson County *v.* Arrighi, 54 Miss. 667; State *v.* Davis, 17 Minn. 429; State *v.* Lehre, 7 Rich. (S. C.) 234; Oroville, &c. R. Co. *v.* Supervisors, 37 Cal. 354; State *v.* Board of Liquidation, 31 La. Ann. 273.

[2] Attorney-General *v.* Boston, 123 Mass. 460, 477; Commonwealth *v.* Commissioners, 37 Penn. St. 237; State *v.* Rahway, 33 N. J. L. 110; State *v.* County Judge, 7 Iowa 186.

[3] See Coit *v.* Elliott, 28 Ark. 294; Condit *v.* Commissioners, 25 Ind. 422; State *v.* Davis, 17 Minn. 429; State *v.* Schaack, 28 Minn. 358; Kemerer *v.* State, 7 Neb. 130; State *v.* Governor, 25 N. J. L. 331. But in all these cases except the second, the duty was one owing chiefly to the individual applying for the writ.

[4] State *v.* Van Winkle, 43 N. J. L. 125; State *v.* Board, 31 La. Ann. 273; Mayor *v.* Stoll, 52 Md. 435; State *v.* Houston, 40 La. Ann. 393, 8 Am. St. Rep. 532.

[5] State *v.* Carney, 3 Kans. 88; Commissioners of Schools *v.* County, 20 Md. 449.

order out of a fund which the officer has not yet received,[1] nor to require him to take action during a time which the law expressly gives him for deliberation.[2]

But this general rule is not a conclusive one. It is simply an aid to the court in exercising that sound legal discretion which is the basis of its action, and which is of greater importance than the rule. When, therefore, the officer 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.[3]

III.

MANDAMUS TO PARTICULAR OFFICERS.

§ 951. **In general.**—Having thus examined some of the general principles governing the application of this remedy, some attention will now be given, by way of illustration, to its use in the case of certain of the more important public officers.

1. *To Officers of the United States.*

§ 952. **1. To President.**—No case has been discovered in which the question of the power to control the official actions of the President of the United States has been directly involved, but it is clear from the principles so forcibly stated by Chief Justice MARSHALL in the great case of Marbury v. Madison,[4] and so frequently applied in the case of the governors of the States,[5] that the performance of those important duties of a political or discretionary nature which the constitution has confided to the

[1] State *v.* Burbank, 22 La. Ann. 208.

[2] Mayor *v.* Stoll, 52 Md. 435.

[3] Attorney-General *v.* Boston, 123 Mass. 460, 474, citing King *v.* Milverton, 3 A. & E. 284; Queen *v.* Eastern Railways, 10 A. & E. 531; Attorney-General *v.* Birmingham Railway, 4 DeG. & Sm. 490, 498; Queen *v.* York Railway, 1 E. & B. 178; Queen *v.* Lancashire Ry. *Id.* 228; Queen *v.* Great Western Ry. *Id.* 253; Edinburgh, &c. Ry. *v.* Philip, 2 Macq. 514, 526; Webb *v.* Commissioners, L. R. 5 Q. B. 642; Farnsworth *v.* Boston, 121 Mass. 173.

[4] Marbury *v.* Madison, 1 Cranch (U. S.) 137.

[5] *Post*, §§ 954–956.

executive as one of the co-ordinate branches of the government, is beyond the regulation or control of the courts. What would be the rule applied in case a merely ministerial duty, not necessarily belonging to the executive functions, should be imposed upon the President by express law, is a question upon which the cases dealing with similar questions in the case of the governors of the States, as hereinafter noticed,[1] may throw some light.

§ 953. **2. To Heads of Departments.**—It is clear, also, in the case of the heads of departments, like the various members of the President's cabinet, that similar considerations must, in many cases, apply. Many of the duties imposed upon these officers are political or discretionary, and are a part of the great executive power with which the President is clothed. Thus it is said by Chief Justice MARSHALL, in the case referred to:[2] "By the constitution of the United States the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. In such cases their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts."

But in addition to this class of powers and duties, duties are frequently imposed upon these officers which are not discretionary or political, but ministerial in their nature, being positively imposed by express law, and of a kind which might have been

[1] *Post*, §§ 954-956.

[2] Marbury *v.* Madison, 1 Cranch (U. S.) 137, 166.

required of any other officer. As to these, the general principles governing the performance of ministerial duties must apply. Thus, continues Chief Justice MARSHALL, in the case already quoted from,[1] "when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts;—he is so far the officer of the law, is amenable to the laws for his conduct, and cannot at his discretion sport away the vested rights of others."

In accordance with these principles, mandamus will lie to compel a governmental officer of this class to perform a ministerial duty, but it will not issue where the duty is a discretionary one, involving the exercise of judgment, or where his duty to perform the act in question is not clear and absolute.

Thus it lies against the postmaster-general to compel him to credit relators with certain fixed sums to which, by law, they are entitled;[2] and against the commissioner of patents to require him to prepare, sign and present to the secretary of the interior for his signature, a patent to which the commissioner has decided the relator is entitled.[3]

But the writ does not lie to require the secretary of the navy to revise a ruling of his predecessor and grant relator a pension to which, as he has been advised by the attorney-general, the relator is not entitled;[4] nor to the commissioner of pensions to require him to increase petitioner's pension where, after hearing, he has decided adversely to the claim;[5] nor to the commissioner of the general land office to compel him to issue a patent, where the right to it is yet unsettled and requires the exercise of judicial functions;[6] nor to the secretary of the treasury to require him to pay a claim for which no appropriation has been made.[7]

[1] Marbury *v.* Madison, 1 Cranch (U. S.) 137, 166.

[2] Kendall *v.* United States, 12 Peters (U. S.) 524.

[3] Butterworth *v.* United States, 112 U. S. 50.

[4] Decatur *v.* Paulding, 14 Peters (U. S.) 497.

[5] United States *v.* Black, 128 U. S. 40.

[6] United States *v.* Commissioner, 5 Wall. (U. S.) 563. See also Browning *v.* McGarrahan, 9 Wall. (U. S.) 298.

[7] Reeside *v.* Walker, 11 How. (U. S.) 272. See also Kentucky *v.* Boutwell, 13 Wall. (U. S.) 526; United States *v.* Bayard, 127 U. S. 251.

2. *To State Officers.*

1. Governor.

§ 954. **Does not lie to control his official Discretion.**—The question of how far the governor of a State is subject to the supervisory control of the courts through the writ of mandamus, is one of great importance and delicacy, and upon which the authorities are in conflict.

Under our political system the executive is, by the constitutions of the States, one of the co-ordinate branches of the government, each of which, within the sphere of its constitutional, governmental powers, is independent of the others. Within these limits, the legislative branch can not control the judicial, nor the judicial the legislative branch, nor either the executive. The governor of the State is, by the constitution, invested with certain important governmental or political powers and duties belonging to the executive branch of the government, the due performance of which is entrusted to his official honesty, judgment and discretion.

So far, therefore, as these governmental, political or discretionary powers and duties, which adhere and belong to the executive branch of the government, are concerned, it is universally agreed that the courts possess no power to supervise or control the governor in the manner of their discharge or exercise.[1]

[1] Hawkins *v.* Governor, 1 Ark. 570, 33 Am. Dec. 346; Tennessee, &c. R. R. Co. *v.* Moore, 36 Ala. 371; State *v.* Warmoth, 22 La. Ann. 1, 2 Am. Rep. 712; s. c. 24 La. Ann. 351, 13 Am. Rep. 126; Mauran *v.* Smith, 8 R. I. 192, 5 Am. Rep. 564; People *v.* Governor, 29 Mich. 320, 18 Am. Rep. 89; Rice *v.* Austin, 19 Minn. 103, 18 Am. Rep. 330; Harpending *v.* Haight, 39 Cal. 189, 2 Am. Rep. 432; Jonesboro, &c. Turnpike Co. *v.* Brown, 8 Baxt. (Tenn.) 490, 35 Am. Rep. 713; Vicksburg, &c. R. R. Co. *v.* Lowry, 61 Miss. 102, 48 Am. Rep. 76; Middleton *v.* Lowe, 30 Cal. 596; Wright *v.* Nelson, 6 Ind. 496; Baker *v.* Kirk, 33 Ind. 517; Gray *v.* State, 72 Ind. 567; Magruder *v.* Swann, 25 Md. 173; Groome *v.* Gwinn, 43 Md. 572; Chamberlain *v.* Sibley, 4 Minn. 309; Chumasero *v.* Potts, 2 Mont. 242; Wall *v.* Blasdel, 4 Nev. 241; Cotten *v.* Ellis, 7 Jones (N. C.) L. 545; State *v.* Chase, 5 Ohio St. 528; State *v.* Drew, 17 Fla. 67; Low *v.* Towns, 8 Ga. 360; People *v.* Bissell, 19 Ill. 229; People *v.* Yates, 40 Ill. 126; People *v.* Cullom, 100 Ill. 472; Dennett *v.* Governor, 32 Me. 508; Western R. R. Co. *v.* DeGraff, 27

§ 955. **How in Case of ministerial Acts—Authorities against its Use.**—But there is still another class of powers and duties often imposed upon the governor which do not necessarily belong to his office as part of the functions of the chief executive, but which are created by express statutes and which, in many instances, might have been as well imposed upon any other of the State officers as upon the governor. Where these duties require the exercise of judgment or discretion, mandamus would not, of course, be issued to control it, even if it might issue to compel action. But many of the duties belonging to the class now under consideration, are positive ones, partaking largely, if not entirely, of a purely ministerial character. And it is as to these that the difficulty arises.

On the one hand, there is a large and respectable number of authorities which hold that mandamus will not issue to the governor to compel the performance by him of *any* act pertaining to his office, whether it be a discretionary one, or one of a purely ministerial character.[1] Indeed the cases of this class refuse to attempt a discrimination between those duties of the governor which are governmental or political in their character and those which are ministerial. Between these there is, it is said, no very clear and palpable line of distinction, "and if we should undertake to draw one, and to declare that in all cases falling on one side the line the governor was subject to judicial process, and in all falling on the other he was independent of it, we should open the doors to an endless train of litigation, and the cases would

Minn. 1; State *v.* Governor, 39 Mo. 388; State *v.* Price, 1 Dutch. (N. J.) 331; Hartranft's Appeal, 85 Penn. St. 433; Martin *v.* Ingham, 38 Kans. 641; State *v.* Johnson, 28 La. Ann. 932; State *v.* Moffitt, 5 Ohio 358; Miles *v.* Bradford, 22 Md. 170; State *v.* Champlin, 2 Bail. (S. C.) 220; Houston, &c. Co. *v.* Randolph, 24 Tex. 317.

[1] Hawkins *v.* Governor, 1 Ark. 570, 30 Am. Dec. 346; State *v.* Warmoth, 22 La. Ann. 1, 2 Am. Rep. 712; Mauran *v.* Smith, 8 R. I. 192, 5 Am. Rep. 564; State *v.* Warmoth, 24 La. Ann. 351, 13 Am. Rep. 126; People *v.* Governor, 29 Mich. 320, 18 Am. Rep. 89; Jonesboro, &c. Turnpike Co. *v.* Brown, 8 Baxt. (Tenn.) 490, 35 Am. Rep. 713; Vicksburg, &c. R. R. Co. *v.* Lowry, 61 Miss 102, 48 Am. Rep. 76; State *v.* Drew, 17 Fla. 67; Low *v.* Towns, 8 Ga. 360; People *v.* Bissell, 19 Ill. 229; People *v.* Yates, 40 Ill. 126; People *v.* Cullom, 100 Ill. 472; Dennet *v.* Governor, 32 Me. 508; Rice *v.* Austin, 19 Minn. 103, 18 Am. Rep. 330; Western R. R. Co. *v.* DeGraff, 27 Minn. 1; State *v.* Governor, 39 Mo. 388; State *v.* Price, 1 Dutch. (N. J.) 331.

be numerous in which neither the governor nor the parties would be able to determine whether his conclusion was, under the law, to be final, and the courts would be appealed to by every dissatisfied party to subject a co-ordinate department of the government to their jurisdiction. However desirable a power in the judiciary to interfere in such cases might seem from the standpoint of interested parties, it is manifest that harmony of action between the executive and judicial departments would be directly threatened, and that the exercise of such power could only be justified on most imperative reasons."[1]

In accordance with these views it has been either expressly decided or tacitly assumed that mandamus will not be issued to the governor to compel him to issue a commission to a public officer alleged to be entitled to it;[2] or to issue or deliver the bonds of the State to persons who allege that they are by law entitled to receive them;[3] or to canvass votes and declare the applicant elected;[4] or to deposit a bill in the office of the secretary of state;[5] or to call an election;[6] or to make requisition upon the state treasurer for the payment of funds;[7] or to make a certificate that public work has been, as is admitted, performed according to contract;[8] or to execute and deliver a deed of lands to persons claiming a right to them;[9] or to subscribe, in the name of the State, to stock in a corporation in pursuance of an act of the legislature;[10] or to convene a court-martial.[11]

§ 956. **Same Subject—Authorities permitting its Use.**—But, on the other hand, it is held by a large number of cases, if not by the weight of authority, that where a positive duty of a merely ministerial character is imposed upon the governor, its perform-

[1] Per COOLEY, J. in People *v.* Governor, 29 Mich. 320, 18 Am. Rep. 89.

[2] Hawkins *v.* Governor, 1 Ark. 570, 33 Am. Dec. 346; State *v.* Drew, 17 Fla. 67; Low *v.* Towns, 8 Ga. 360; State *v.* Governor, 30 Mo. 388.

[3] Jonesboro, &c. Turnpike Co. *v.* Brown, 8 Baxt. (Tenn.) 490, 35 Am. Rep. 713; People *v.* Bissell, 19 Ill. 229.

[4] Dennett *v.* Governor, 32 Me. 508.

[5] People *v.* Yates, 40 Ill. 126.

[6] People *v.* Cullom, 100 Ill. 472.

[7] Vicksburg, &c. R. R. Co. *v.* Lowry, 61 Miss. 102, 48 Am. Rep. 76.

[8] People *v.* Governor, 29 Mich. 320, 18 Am. Rep. 89.

[9] Rice *v.* Austin, 19 Minn. 103, 18 Am. Rep. 330.

[10] State *v.* Warmoth, 24 La. Ann. 351, 13 Am. Rep. 126.

[11] Mauran *v.* Smith, 8 R. I. 192, 5 Am. Rep. 564.

ance may be enforced by mandamus in the same manner as against any other public officer.[1] A ministerial act in this connection has been well defined to be "one which a public officer or agent is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed."[2]

"It will be readily admitted," it is said in one case, "that the courts cannot control any executive act of the governor, or any executive power conferred upon him. But may they not control ministerial power wherever placed? Is not ministerial power always inferior to judicial power, and subject to judicial control? The recipient of ministerial power exercises no judgment, no discretion, but is simply bound to obey the law under a given state of facts; and to construe this law, and to ascertain these facts, are peculiarly within the province of the courts. If an applicant for relief on the ground of the refusal to exercise or the wrongful exercise of ministerial power by the governor has no remedy in the courts, then he has no remedy at all. The remedy of impeachment, and the remedy of subsequent elections, suggested by some of the courts, may be a remedy to the public in general, but it cannot be a remedy to an individual sufferer for injuries or loss in person or to his property."[3]

In accordance with such views it has been held that the governor may be compelled by mandamus to perform a positive duty of a ministerial character,[4] as to accept a bond and draw an order upon compliance with fixed conditions;[5] or to sign and issue a patent for lands to one lawfully entitled to it;[6] or to

[1] Harpending *v.* Haight, 39 Cal. 189, 2 Am. Rep. 432; Middleton *v.* Lowe, 30 Cal. 596; Tennessee R. R. Co. *v.* Moore, 36 Ala. 371; Wright *v.* Nelson, 6 Ind. 496; Baker *v.* Kirk, 33 Ind. 517; Gray *v.* State, 72 Ind. 567. Magruder *v.* Swann, 25 Md. 173; Groome *v.* Gwinn, 43 Md. 572; Chamberlain *v.* Sibley, 4 Minn. 309; Chumasero *v.* Potts, 2 Mont. 242; Wall *v.* Blasdel, 4 Nev. 241; Cotten *v.* Ellis, 7 Jones (N. C.) L. 545; State *v.* Chase, 5 Ohio St. 528.

[2] Per VALENTINE, J. in Martin *v.* Ingham, 38 Kans. 641, 651.

[3] Per VALENTINE, J. in Martin *v.* Ingham, 38 Kans. 641, 653.

[4] Martin *v.* Ingham, 38 Kans. 641.

[5] Tennessee, &c. R. R. Co. *v.* Moore, 36 Ala. 371.

[6] Wall *v.* Blasdel, 4 Nev. 241; Middleton *v.* Low, 30 Cal. 596.

authenticate a statute as required by law;[1] or to issue a commission to an officer entitled to receive it;[2] or to deliver[3] or pay[4] bonds in conformity to a statute; or to canvass a vote as was his duty;[5] or to issue a warrant for salary to one having a clear right to demand it;[6] or to issue a proclamation that a corporation was entitled to do business.[7]

2. Other State Officers.

§ 957. **Lies to enforce ministerial but not discretionary Duties.**—The authority of courts to control the action of other State officers by mandamus has, in some States,[8] been entirely denied; but the better opinion seems clearly to be that while the courts will not undertake to control the exercise of judgment or discretion,[9] nor compel the performance of doubtful or uncertain duties, they may, by this writ, enforce the performance by State officers of ministerial duties which the law clearly imposes.[10]

§ 958. **1. To Secretary of State.**—Thus the writ will issue against the secretary of state to compel the performance of a clear duty of a ministerial nature, as to furnish a copy of the laws for publication,[11] or to authenticate a commission duly granted,[12] or to revoke a license issued to a foreign corporation but which has been clearly forfeited,[13] or to issue a certificate of

[1] Harpending *v.* Haight, 39 Cal. 189, 2 Am. Rep. 432.

[2] Wright *v.* Nelson, 6 Ind. 496; Baker *v.* Kirk, 33 Ind. 517; Magruder *v.* Swann, 25 Md. 173; Groome *v.* Gwinn, 43 Md. 572.

[3] Chamberlain *v.* Sibley, 4 Minn. 309.

[4] Gray *v.* State, 72 Ind. 567.

[5] Chumasero *v.* Potts, 2 Mont. 242.

[6] Cotten *v.* Ellis, 7 Jones (N. C.) L. 545.

[7] State *v.* Chase, 5 Ohio St. 528.

[8] Commonwealth *v.* Wickersham, 90 Penn. St. 311; Chalk *v.* Darden, 47 Tex. 438; Galveston, &c., Co. *v.* Gross, 47 Tex. 428; Bledsoe *v.* International R. R. Co., 40 Tex. 537; Railroad Co. *v.* Randolph, 24 Tex. 317. See also State *v.* Braden, — Minn. —, 41 N. W. Rep. 817.

[9] State *v.* Gregory, 83 Mo. 123, 53 Am. Rep. 565; State *v.* State Medical Board, 32 Minn. 324, 50 Am. Rep. 575.

[10] Martin *v.* Ingham, 38 Kans. 641; State *v.* Doyle, 40 Wis. 175, 220; State *v.* Wrotnowski, 17 La. Ann. 156; State *v.* Houston, 40 La. Ann. 393, 8 Am. St. Rep. 532.

[11] State *v.* Barker, 4 Kans. 379.

[12] State *v.* Wrotnowski, 17 La. Ann. 156.

[13] State *v.* Doyle, 40 Wis. 175, and 220.

election to one entitled to it,[1] or to certify an account as required by law.[2] But it will not issue to compel him to certify as a law that which he does not officially know to be such,[3] or to promulgate a law whose validity and authenticity are in grave doubt,[4] or to issue a patent which it is the duty of the governor to issue,[5] or to compel him to receive materials under a contract which the State has repudiated.[6]

§ 959. **2. To State Treasurer.**—The same general principles apply to the state treasurer. Thus the writ may be granted to compel the performance of a clear and imperative duty, as to issue bonds of the State to a railway which has complied with the requirements entitling it to them,[7] or to pay warrants where there is no question as to his duty,[8] or to surrender to a municipality bonds deposited by it and of which it is entitled to a return,[9] or to accept in payment of taxes the amount legally due.[10]

But the writ will only be issued where the duty is unquestionable and clearly defined,[11] and it will not, therefore, be granted to compel payment of funds in the absence of the necessary appropriation,[12] or of an indispensable special act authorizing it,[13] nor where he has been forbidden by the legislature to make the payment,[14] nor where the fund from which payment is required is exhausted.[15]

So the writ will not be issued to compel payment where the treasurer is required to investigate and decide upon the merits of the claim before payment and has decided against it.[16]

§ 960. **3. To State Auditor.**—Upon the same principles, an

[1] State *v.* Lawrence, 3 Kans. 95.
[2] State *v.* Secretary of State, 33 Mo. 293.
[3] People *v.* Hatch, 33 Ill. 9.
[4] State *v.* Deslonde, 27 La. Ann. 71.
[5] Crane *v.* Secretary of State, 51 Mich. 195.
[6] People *v.* Secretary of State, 58 Ill. 90.
[7] Northwestern, &c., R. R. Co. *v.* Jenkins, 65 N. C. 173.
[8] State *v.* Dubuclet, 26 La. Ann. 127.
[9] Bay City *v.* State Treasurer, 23 Mich. 499; LaGrange *v.* State Treasurer, 24 Mich. 468.
[10] State *v.* Francis, 23 Kans. 495, 24 *Id.* 750.
[11] Bresler *v.* Butler, 60 Mich. 40.
[12] Weston *v.* Dane, 51 Me. 461.
[13] State *v.* Bishop, 42 Mo. 504.
[14] Wilson *v.* Jenkins, 72 N. C. 5.
[15] Huff *v.* Kimball, 39 Ind. 411; State *v.* State Treasurer, 32 La. Ann. 177.
[16] Louisiana College *v.* State Treasurer, 2 La. 394.

auditor of state may be compelled by mandamus to issue orders and warrants in payment of salaries and other claims against the State where the right to such payment is clearly fixed or ascertained,[1] or to furnish bank notes to a bank which has complied with all the requirements of the law,[2] or to make a conveyance of lands to one legally entitled thereto,[3] or to advertise for bids for doing public work;[4] or to reject taxes unlawfully levied.[5]

But it will not be granted to compel payment of an unlawful charge,[6] nor where there is no money appropriated out of which it can be paid,[7] nor where the matter in controversy is one left to his discretion.[8]

§ 961. **4. To Attorney-General.**—Mandamus will not issue to control the discretion of the attorney-general, as in determining whether or not to institute proceedings in *quo warranto*.[9]

§ 962. **5. To Commissioner of Insurance.**—The transaction of the insurance business in most, if not all, of the States is now regulated by express statutes which usually create an insurance department or bureau in charge of a special superintendent or commissioner, whose license or authority is necessary to enable a company to transact business. These provisions, while similar in their general character and purpose, vary greatly in the details of their enforcement.

Where, under the statutes applicable to a particular case, the regulation of the business or the granting of a license is a matter entrusted to the discretion of the commissioner or superintendent, he may, as in other cases, be compelled to act, but he

[1] People *v.* Schuyler, 79 N. Y. 189; Smith *v.* Strobach, 50 Ala. 462; Bryan *v.* Cattell, 15 Iowa 538; State *v.* Gamble, 13 Fla. 9; Danley *v.* Whiteley, 14 Ark. 687; People *v.* Auditor-General, 9 Mich. 141; Lachance *v.* Auditor-General, — Mich. —, 43 N. W. Rep. 1005.

[2] Citizens' Bank *v.* Wright, 6 Ohio St. 318.

[3] McCulloch *v.* Stone, 64 Miss. 378.

[4] Ayres *v.* Auditors, 42 Mich. 422.

[5] People *v.* Auditor-General, 9 Mich. 134.

[6] People *v.* Hatch, 33 Ill. 9.

[7] State *v.* Jumel, 31 La. Ann. 142.

[8] Ambler *v.* Auditor General, 38 Mich. 746; Houghton County *v.* Auditor-General, 36 Mich. 271; People *v.* Adam, 3 Mich. 427. See also Ottawa Supervisors *v.* Auditor-General, 69 Mich. —.

[9] People *v.* Attorney-General, 41 Mich. 728; People *v.* Attorney-General, 22 Barb. (N. Y.) 114; People *v.* Fairchild, 67 N. Y. 334. See Coon *v.* Attorney General, 42 Mich. 65.

will not be compelled to act in any particular way, nor will his lawful discretion in granting, refusing or revoking authority to do business be controlled by mandamus.[1] Where, however, the granting of the license is a mere ministerial duty, to be performed upon fixed conditions, mandamus will lie.[2]

If the authority to revoke a license is to be exercised after certain proceedings and hearings are had as provided by law, it can be exercised only when these conditions have been complied with.[3]

3. *To County Officers.*

§ 963. **In general.**—The same general principles apply also to the various officers of counties,—the writ being granted to compel the performance of clear and specific ministerial duties, and denied to control discretion or to enforce doubtful or uncertain rights. Thus—

§ 964. **1. To County Treasurer.**—The writ will go to the county treasurer to require him to pay other officers their salaries and fees as provided by law;[4] to pay orders and warrants properly drawn upon him for the payment of debts and demands against the county;[5] to require him to keep his office at the county seat;[6] to assign tax certificates to a purchaser entitled to them;[7] to require him to pay over to the proper local officers the amount of liquor taxes to which by law they are entitled;[8] to compel him to permit a citizen having an interest therein to inspect liquor dealers' bonds deposited in his office;[9] or to require him to pay a judgment against the county.[10]

[1] Insurance Company *v.* Wilder, 40 Kans. 561.

[2] See Employers' Assur. Co. *v.* Commissioner of Insurance, 64 Mich. 614; Hartford Fire Ins. Co. *v.* Commissioner of Insurance. 70 Mich. —, 14 West. Rep. 632.

[3] National Life Ins. Co. *v.* Commissioner of Insurance, 25 Mich. 321.

[4] Baker *v.* Johnson, 41 Me. 15; People *v.* Edmonds, 15 Barb. (N. Y.) 529; State *v.* Ocean Co. 48 N. J. L. 70; State *v.* Orleans Judge, 38 La. Ann. 43.

[5] State *v.* Philbrick, — N. J. —, 8 Atl. Rep. 122; School District *v.* Root, 61 Mich. 373; Byirgton *v.* Hamilton, 37 Kans. 758; Port Huron *v.* Runnells, 57 Mich. 46; Hon *v.* State, 89 Ind. 249; State *v.* Roderick, 23 Neb. 505.

[6] Rice *v.* Shay, 43 Mich. 380.

[7] State *v.* Magill, 4 Kans. 415.

[8] East Saginaw *v.* County Treasurer, 44 Mich. 273.

[9] Brown *v.* County Treasurer, 54 Mich. 132, 52 Am. Rep. 800.

[10] Brown *v.* Crego, 32 Iowa 498.

But he can not be compelled to pay without the proper warrant;[1] nor to pay a warrant issued without authority of law,[2] or for a demand not legally chargeable against the county,[3] or allowed by a body having no authority,[4] or obtained through fraud.[5]

Where mandamus is sought to require the payment of specific funds, it must be shown that they have come into the treasurer's possession.[6]

§ 965. **2. To County Clerk.**—So the clerk of the county, who is usually clerk of the courts also, will be compelled to perform ministerial duties, such as to receive and file papers which by law are to be filed in his office,[7] or to approve of bonds where no discretion is to be exercised,[8] or to issue process to a party entitled to it,[9] or to permit inspection of his records to a person having a special interest therein,[10] or to furnish copies thereof upon lawful demand,[11] or to issue a certificate of election to one by law entitled to receive it,[12] or to transfer the proper records to a new county.[13]

But the writ will not be granted to compel the issuing of a certificate of election where, if issued, it would give no substantial relief,[14] nor to compel the approval of bonds where the question is one confided to the discretion of the clerk,[15] though he may be compelled to pass upon it,[16] nor to make a transcript of a record where the party has another adequate remedy by writ of error,[17] nor to issue process where the right to it is doubtful.[18]

So the writ will go to compel the clerk to call an election

[1] People v. Fogg, 11 Cal. 351.

[2] Honea v. Monroe County, 63 Miss. 171.

[3] Keller v. Hyde, 20 Cal. 593.

[4] People v. Lawrence, 6 Hill (N.Y.) 244. See also Mead v. County Treasurer, 36 Mich. 416.

[5] People v. Wendell, 71 N. Y. 171.

[6] Minneapolis, &c., Ry. Co. v. County Treasurer, — Iowa —, 39 N. W. Rep. 260.

[7] People v. Fletcher, 2 Scam. (Ill.) 482.

[8] Gulick v. New, 14 Ind. 93, 77 Am. Dec. 49.

[9] Attorney-General v. Lum, 2 Wis 507; People v. Loucks, 28 Cal. 68.

[10] State v. Hoblitzelle, 85 Mo. 620.

[11] State v. Meagher, 57 Vt. 398.

[12] People v. Rives, 27 Ill. 242.

[13] Hooten v. McKinney, 5 Nev. 194.

[14] Sherburne v. Horn, 45 Mich. 160.

[15] Swan v. Gray, 44 Miss. 393.

[16] Mobile Ins. Co. v. Cleveland, 76 Ala. 321.

[17] State v. Engleman, 45 Mo. 27. See also Wright v. Clark, 43 Mich. 642.

[18] Hall v. Stewart, 23 Kans. 396.

where his duty is clear,[1] but not where it would be unavailing as where no election districts have been established.[2]

§ 966. **3. To Recorders of Deeds.**—So the writ will be issued to compel a recorder of deeds to perform ministerial acts, such as to record a conveyance lawfully entitled to record,[3] to permit an inspection of the records by a person having a special interest in particular instruments or chains of title;[4] or to permit the recorder of a new county organized out of the old to make transcripts of such of the records as relate to the new county.[5]

But, as has been seen, it will not be granted to compel the officer to permit abstracts of all the records of his office to be made for the purpose of private gain,[6] nor to discharge a mortgage of record where the facts in regard to the right are in controversy;[7] nor to record a deed which was delivered to him, not in an official capacity, but in *escrow*,[8] nor to erase a tax sale before final judgment as to its validity.[9]

§ 967. **4. To Sheriffs.**—Mandamus will also be granted to compel a sheriff to perform definite and positive duties, as to keep his office at the county seat;[10] to appoint appraisers[11] and cause appraisal to be made[12] in order that exemptions may be selected; to make a sale of mortgaged lands in one parcel;[13] to imprison a defendant when necessary to compel him to secure the relator the relief to which he is entitled;[14] to execute and deliver a deed of lands sold by him to the purchaser though he has previously made a deed of the same land to another;[15] to execute and serve proper process;[16] or to permit a prisoner to see and consult with his counsel.[17]

[1] State *v.* Ware, 13 Oreg. 380.
[2] State *v.* Emery, 20 Neb. 301.
[3] Strong's Case, Kirby (Conn.) 345; *Ex parte* Goodell, 14 Johns. (N. Y.) 325.
[4] Boylan *v.* Warren, 39 Kans. 301, 7 Am. St. Rep. 551; see *ante*, § 738.
[5] State *v.* Meadows, 1 Kans. 90.
[6] See *ante*, § 739.
[7] People *v.* Miller, 43 Hun (N. Y.) 463.
[8] People *v.* Curtis, 41 Mich. 723.
[9] State *v.* Batt, 40 La. Ann. 582.
[10] State *v.* Walker, 5 S. C. 263.
[11] People *v.* McClay, 2 Neb. 7.
[12] Pudney *v.* Burkhart, 62 Ind. 179.
[13] Morris *v.* Womble, 30 La. Ann. 1312.
[14] Waite *v.* Washington, 44 Mich. 388.
[15] People *v.* Fleming, 4 Denio (N. Y.) 137.
[16] North Pacific R. R. Co. *v.* Gardner, —, 21 Pac. Rep. 735; Fremont *v.* Crippen, 10 Cal. 212, 70 Am. Dec. 711.
[17] People *v.* Risley, 66 How. Pr. (N. Y.) 67.

But the writ will not be issued to compel the sheriff to perform doubtful duties or unlawful acts, as to issue a deed or serve a writ in favor of one whose right to it is in dispute [1] or to insert in the deed recitals contradicted by his return.[2] Neither will it issue where the party has another adequate remedy at law, and for this reason mandamus to compel a sheriff to levy an execution has been refused.[3]

4. *To County and other Boards and Bodies.*

§ 968. **Granted to require Performance of ministerial Duties, but not to control Discretion.**—The same principles apply to official boards and bodies as to individual officers,—the performance of clear and definite duties of a ministerial nature will be compelled, but discretion will not be interfered with nor will doubtful or uncertain duties be required.

Thus the writ will be granted against a board of supervisors, auditors or freeholders to compel them to draw an order or warrant for the payment of an allowed claim,[4] to deliver the warrant to the person entitled to it,[5] to apportion according to law a tax to be raised,[6] to spread upon the tax rolls a sum required to be raised by taxation,[7] to allow a claim in regard to which they have no discretion,[8] to admit a person whose right to a seat has been duly determined,[9] to provide for the payment of a credit due to a township transferred to another county,[10] to levy a tax to pay a judgment recovered against the county,[11] to hear applications for refunding taxes illegally assessed,[12] and to refund them where the right is clear,[13] to subscribe to stock in a railway company where

[1] Williams *v.* Smith, 6 Cal. 91; State *v.* Craft, 17 Fla. 722.

[2] Hewell *v.* Lane, 53 Cal. 213.

[3] Habersham *v.* Sears, 11 Oreg. 431, 50 Am. Rep. 481. See also State *v.* Craft, 17 Fla. 722.

[4] State *v.* Titus, 47 N. J. L. 89.

[5] People *v.* Auditors, 5 Mich. 223.

[6] Auditor-General *v.* Supervisors, 24 Mich. 237.

[7] People *v.* Supervisors, 30 Mich. 388.

[8] People *v.* Supervisors, 3 Mich. 475; People *v.* Auditors, 13 Mich. 233; People *v.* Auditors, 82 N. Y. 80.

[9] Robinson *v.* Supervisors, 49 Mich. 321.

[10] Higgins *v.* Supervisors, 52 Mich. 16.

[11] Labette County Commissioners *v.* Moulton, 112 U. S. 217.

[12] People *v.* Supervisors, 70 N. Y. 228.

[13] People *v.* Supervisors, 51 N. Y. 401.

their duty is plain,[1] or to provide by tax for the payment of county bonds.[2]

But the writ will not be granted to control the lawful judgment or discretion of such boards or bodies in fixing the compensation of officers,[3] in passing upon claims against the political bodies which they represent,[4] in passing upon the sufficiency of bonds,[5] or in letting contracts.[6]

So the writ will not go to require them to audit a claim which is not properly a charge against the county,[7] nor to correct assessments after the matter has passed out of their hands, and the collection of the tax has been begun.[8]

5. *To Municipal Officers.*

§ 969. **In general.**—Mandamus is most often sought against municipal officers when the purpose is to enforce, through them, the performance of some duty incumbent upon the municipal corporation. This subject is not within the scope of this treatise, but will be found fully considered in the excellent works of Judge DILLON on Municipal Corporations and Mr. High on Extraordinary Legal Remedies.

Some questions are, however, germane to the present endeavor. Thus—

§ 970. **Granted to enforce ministerial Duty but not to control Discretion.**—Mandamus will go to compel the mayor of a city to perform the ministerial act of signing a license which has been duly granted by the proper authorities;[9] or to order an election, where the facts, which make it his duty to do so, exist;[10]

[1] Napa Valley R. Co. *v.* Supervisors, 30 Cal. 435.

[2] Robinson *v.* Supervisors, 43 Cal. 353.

[3] Cicotte *v.* Wayne County, 59 Mich. 509.

[4] People *v.* Auditors, 10 Mich. 307; Mixer *v.* Supervisors, 26 Mich. 422; Videto *v.* Supervisors, 31 Mich. 116; Barry County *v.* Supervisors, 33 Mich. 497; Clark *v.* Supervisors, 38 Mich. 658; People *v.* Johnson, 17 Cal. 305.

[5] Arapahoe County *v.* Crotty, 9 Colo. 318.

[6] State *v.* McGrath, 91 Mo. 386; Mayo *v.* Commissioners, 141 Mass. 74; Hanlin *v.* Charles City, 66 Iowa 69.

[7] People *v.* Auditors, 72 N. Y. 310.

[8] Life Ins. Co. *v.* Supervisors, 24 Barb. (N. Y.) 166.

[9] Braconier *v.* Packard, 136 Mass. 50.

[10] Sansom *v.* Mercer, 68 Tex. 488, 2 Am. St. Rep. 505.

or to deliver the corporate seal of the corporation to his successor;[1] to issue bonds in payment for land condemned;[2] or to appoint commissioners for the performance of a public duty as provided by statute.[3]

But the writ will not be granted to control the discretionary powers vested in the mayor,[4] nor where there is an ample remedy at law.[5]

So the writ will issue to compel municipal officers to enforce the city ordinances,[6] or to compel the municipal treasurer to pay proper orders and warrants.[7]

C. *To Taxing Officers.*

§ 971. **Lies to compel Levy of Tax to pay established Claims.** —So it is well settled that mandamus will be granted to compel the proper officers of municipal corporations, such as counties, cities and townships, to levy a tax to provide for the payment of established claims against the municipality, as to pay municipal bonds, warrants and orders and to pay judgments rendered against it.[8]

But the writ will not be granted where the right is not clear or established, and the municipality has not been heard.[9]

[1] People *v.* Kilduff, 15 Ill. 492, 60 Am. Dec. 769.

[2] Duncan *v.* Mayor, 8 Bush (Ky.) 98.

[3] Mayor *v.* State, 4 Ga. 26.

[4] Commonwealth *v.* Henry, 49 Penn. St. 530.

[5] People *v.* Wood, 35 Barb. (N. Y.) 653.

[6] State *v.* Francis, 95 Mo. 44.

[7] State *v.* Roderick, 23 Neb. 505; Byington *v.* Hamilton, 37 Kans. 758; Port Huron *v.* Runnells, 57 Mich. 46; Hon *v.* State, 89 Ind. 249; School District *v.* Root, 61 Mich. 373.

[8] Walkley *v.* Muscatine, 6 Wall. (U. S.) 481; Riggs *v.* Johnson County, *Id.* 166; Weber *v.* Lee County, *Id.* 210; United States *v.* Keokuk, *Id.* 514; Amy *v.* Des Moines County Supervisors, 11 Wall. (U. S.) 136; Greenfield *v.* State, 113 Ind. 597; Shelley *v.* St. Charles County, 30 Fed. Rep. 603; Deere *v.* Rio Grande County, 33 Fed. Rep. 823; State *v.* Railway, 49 N. J. L. 384; State *v.* Jacksonville, 22 Fla. 21; Harshman *v.* Knox County, 122 U. S. 306; Lehigh Coal Co.'s Appeal, 112 Penn. St. 360.

[9] Cassatt *v.* Barber County, 39 Kans. 505.

7. *To School Officers.*

§ 972. **Lies to compel Performance of Duty.**—Mandamus is frequently resorted to to compel boards of trustees and other officers, having charge of the public schools, to perform their legal duties. Thus it will be issued to compel a school board to provide school facilities where this is made their legal duty,[1] and to do so and admit scholars therein, without discrimination as to color,[2] though, in the absence of other discrimination, there is no legal objection to providing separate schools for colored scholars,[3] or to grading the scholars according to age or attainments;[4] to compel the board to reinstate a teacher wrongfully discharged[5] or a scholar excluded in pursuance of a rule which the board had no authority to adopt;[6] to compel the board to adopt the text-books which the law prescribes,[7] and, when once adopted, to permit scholars to use those books until others are lawfully adopted in their stead.[8]

But the writ will not be granted where it would be unavailing, as to reinstate scholars in a term of school which will expire before a hearing can be had,[9] or to compel school to be held in the appointed place where it has been but temporarily removed and the term has nearly expired.[10]

Where school officers are invested with discretionary powers, the courts will not attempt to control their discretion, but it will compel them to take action.[11]

[1] Maddox *v.* Neal, 45 Ark. 121, 55 Am. Rep. 540.

[2] Maddox *v.* Neal, 45 Ark. 121, 55 Am. Rep. 540; People *v.* Board of Education, 18 Mich. 400; State *v.* Duffy, 7 Nev. 342, 8 Am. Rep. 713; Clark *v.* Directors, 24 Iowa 266; Smith *v.* Directors, 40 Iowa 518; Dove *v.* School District, 41 Iowa 689.

[3] Ward *v.* Flood, 48 Cal. 36, 17 Am. Rep. 405.

[4] People *v.* Board of Education, 18 Mich. 400.

[5] Gilman *v.* Bassett, 33 Conn. 298; Morley *v.* Power, 5 Lee (Tenn.) 691.

[6] Perkins *v.* Board of Directors, 56 Iowa 476; Trustees *v.* People, 87 Ill. 303, 29 Am. Rep. 55.

[7] State *v.* School Directors, 74 Mo. 21.

[8] State *v.* Board of Education, 35 Ohio St. 368.

[9] Christman *v.* Peck, 90 Ill. 150.

[10] Colt *v.* Roberts, 28 Conn. 330.

[11] Case *v.* Blood, 71 Iowa 632; Eden *v.* Templeton, 72 Iowa 687.

8. *To Election Officers.*

§ 973. **Lies to compel Performance of ministerial Duties.**—It has been already seen[1] that mandamus is not the remedy to try the title to public office, nor to compel admission to a disputed office.

But, as has also been seen, the officers of election who are charged with the performance of ministerial duties, as to make a full and true canvass of the votes,[2] or to make returns thereof,[3] or to declare the result,[4] or to issue a certificate to the one receiving the highest number of votes,[5] may be compelled by mandamus to perform their duty.

But the writ will not be granted to compel the performance of duties confided to their judgment or discretion,[6] nor will it be granted before the performance of the duty is due, nor where, if granted, it would be unavailing.[7]

The writ will lie to the recorder of votes to require him to permit the lists of voters to be inspected or copied.[8]

9. *To Judicial Officers.*

§ 974. **Judicial Discretion not interfered with.**—It has been seen in a preceding section that mandamus will not be issued to control the discretion with which any public officer is by law invested. And this is particularly true of that class of officers

[1] See *ante*, § 478.

[2] State *v.* Gibbs, 13 Fla. 55, 7 Am. Rep. 233; Lewis *v.* Commissioners, 16 Kans. 102, 22 Am. Rep. 275; Hudmon *v.* Slaughter, 70 Ala. 546; Kisler *v.* Cameron, 39 Ind. 488; Clark *v.* McKenzie, 7 Bush (Ky.) 523; State *v.* Robinson, 1 Kans. 17; State *v.* Canvassers, 36 Wis. 498; State *v.* Garesche, 65 Mo. 480; State *v.* Stearns, 11 Neb. 104; State *v.* Berg, 76 Mo. 136.

[3] State *v.* Circuit Judge, 9 Ala. 338; *In re* Strong, 20 Pick. (Mass.) 484.

[4] State *v.* Gibbs, 13 Fla. 55, 7 Am. Rep. 233; State *v.* Garesche, 65 Mo. 480.

[5] People *v.* Rives, 27 Ill. 242; State *v.* Lawrence, 3 Kans. 95; Clark *v.* McKenzie, 7 Bush (Ky.) 523; Ellis *v.* Commissioners, 2 Gray (Mass.) 370; State *v.* Gibbs, 13 Fla. 55, 7 Am. Rep. 233; *In re* Strong, 20 Pick. (Mass.) 484; People *v.* Hilliard, 29 Ill. 419.

[6] Arberry *v.* Beavers, 6 Tex. 457; Mayor *v.* Rainwater, 47 Miss. 547; State *v.* Selectmen, 25 La. Ann. 310.

[7] Peters *v.* Canvassers, 17 Kans. 365.

[8] State *v.* Hoblitzelle, 85 Mo. 624; State *v.* Williams, — Mo. —, 8 S. W. Rep. 771.

whose functions are properly designated as judicial. Wherever, therefore, the law has clothed an inferior court, magistrate or judicial officer with power and duty to act or decide according to his discretion or judgment, and wherever such court, magistrate or officer has duly acted in reference to a matter so intrusted to him according to his judgment or discretion, mandamus will not be granted, in the one case, to control, direct or coerce that discretion or judgment or compel it to take any particular action or to come to any designated conclusion, or, in the other case, to compel an alteration, change or revision of the results to which such judgment or discretion has led.[1]

§ 975. **Judicial Officer may be compelled to act.**—But while a judicial officer will not be compelled to act in any particular way or to reach any designated conclusion, and while when he has once acted he will not be compelled to act again or alter his decision, he cannot refuse to act at all in a case properly within his jurisdiction, and if he does, mandamus will be granted to compel him to act,—to set him in motion, to compel him to exercise his judgment or discretion in reference to the particular matter which by law is confided to it.[2]

§ 976. **Judicial Officer may be compelled to perform ministerial Acts.**—So where, as is frequently the case, the law has imposed upon a judicial officer the duty of performing certain acts of a ministerial nature which do not depend upon his judgment or discretion but are absolutely imposed by positive enactments, the performance of such a specific duty may be compelled as in other cases.

Thus a judicial officer may be compelled to correct clerical

[1] People v. Pratt, 28 Cal. 166, 87 Am. Dec. 110; Weeden v. Richmond, 9 R. I. 128, 98 Am. Dec. 373; People v. Pearson, 2 Scam. (Ill.) 189, 33 Am. Dec. 445; Commonwealth v. Boone City Court, 82 Ky. 632; State v. Megown, 89 Mo. 156; State v. St. Louis Court of Appeals, 87 Mo. 374; State v. Young, 84 Mo. 90; People v. Judge, 1 Mich. 359; Mabley v. Judge, 32 Mich. 190; Wiley v. Judge, 29 Mich. 487; Olson v. Judge, 49 Mich. 85.

[2] *Ex parte* Mahone, 30 Ala. 49, 68 Am. Dec. 111; Weeden v. Richmond, 9 R. I. 128, 98 Am. Dec. 373; People v. Barnes, 66 Cal. 594; State v. Webber, — Minn. —, 37 N. W. Rep. 949; Lloyd v. Judge, 56 Mich. 236; Locke v. Speed, 62 Mich. 408; La Barr v. Osborn, 38 Mich. 313.

errors in his record,[1] or to issue an execution,[2] or to sign a bill of exceptions,[3] or grant an appeal,[4] or certify a cause.[5]

10. *To Legislative Officers.*

§ 977. **Does not lie to control legislative Action.**—The same principles apply to the case of legislative officers. The due performance of their duties as such is confided to their official judgment and discretion and, as in the case of other officers exercising like powers, the courts will not undertake to control such judgment and discretion by mandamus. It will not, therefore, lie against the speaker of the house of representatives to compel him to send to the senate a bill which he has held not to have passed the house.[6]

So in the case of lesser legislative bodies, as of the common council of a city, the writ will not be granted to compel the members of the council to attend the meetings of the council and perform their general official duties regularly.[7]

But the writ has been granted to compel the performance of a purely ministerial act, as to require the speaker to certify the amount of mileage to which a member is entitled.[8]

11. *To try Title to Office.*

§ 978. **Does not lie to try Title.**—As has previously been seen, mandamus will not lie to settle the title to an office as between adverse claimants, *quo warranto* being the proper remedy.[9] But—

§ 979. **Lies to instate one whose Title is clear.**—Where a person holds an uncontested title to the office or where his title has been adjudicated upon and finally established by a competent tribunal, mandamus may issue to put him in possession.[10]

[1] Taylor *v.* Gillette, 52 Conn. 216.
[2] State *v.* District Court, 49 N. J. L. 537.
[3] People *v.* Anthony, 25 Ill. App. 532.
[4] State *v.* Allen, 92 Mo. 20.
[5] Bennett *v.* McCaffery, 28 Mo. App. 220.
[6] *Ex parte* Echols, 39 Ala. 698, 88 Am. Dec. 749.
[7] People *v.* Whipple, 41 Mich. 548.
[8] *Ex parte* Pickett, 24 Ala. 91.
[9] See *ante*, § 478.
[10] Mannix *v.* State, 115 Ind. 245, 17 N. E. Rep. 565; McGee *v.* State, 103 Ind. 444.

§ 980. **Lies to restore Officer wrongfully removed.**—So mandamus lies to restore an officer to his office where, while having the actual possession and undisputed right to the same, he has been illegally ousted therefrom either by removal or suspension.[1]

§ 981. **Lies to restore Insignia of Office.**—And the officer may have this writ in such a case, for the restoration to him of the office-room with the books, records and insignia of the office.[2]

12. *To Compel Delivery of Books and Papers.*

§ 982. **Mandamus lies to compel Officer to deliver Books and Papers to his Successor.**—Mandamus is the proper remedy to compel an officer whose term of office has expired to deliver to his successor the books, papers, seals and other appurtenances and insignia of the office.[3]

[1] Metsker *v.* Neally, — Kans. —, 21 Pac. Rep. 206; *Ex parte* Lusk, 82 Ala. 519; *Ex parte* Diggs, 52 Ala. 381; *Ex parte* Wiley, 54 Ala. 226; State *v.* Common Council, 9 Wis. 254; State *v.* Jersey City, 25 N. J. L. 536; *In re* Strong, 20 Pick. (Mass.) 484; Milliken *v.* City Council, 54 Tex. 388; Delahanty *v.* Warner, 75 Ill. 185.

[2] Metsker *v.* Neally, — Kans. —, 21 Pac. Rep. 206; State *v.* Sherwood, 15 Minn. 221: People *v.* Kilduff, 15 Ill. 419; People *v.* Head, 25 Ill. 325; Trustees *v.* Fogg, 78 Ind. 269; Nelson *v.* Edwards, 55 Tex. 389; Delahanty *v.* Warner, 75 Ill. 185.

[3] People *v.* Kilduff, 15 Ill. 492, 60 Am. Dec. 769; People *v.* Head, 25 Ill. 329; People *v.* Hilliard, 29 Ill. 419; Delahanty *v.* Warner, 75 Ill. 186; Huffman *v.* Mills, 39 Kans. 577; State *v.* Meeker, 19 Neb. 444; McGee *v.* State, 103. Ind. 444.

CHAPTER II.

OF INJUNCTIONS AGAINST PUBLIC OFFICERS.

§ 983. Purpose of this Chapter.

I. OF THE NATURE OF THE REMEDY.

984. In general.
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§ 983. **Purpose of this Chapter.**—In the preceding chapter there has been considered the remedy which the law provides for the purpose of compelling public officers to act, either generally or in a particular manner specifically pointed out. Occasion may arise, however, for producing the opposite result,—that of restraining action on the part of the officer, and for that purpose, the ordinary writ of injunction is the remedy which the law provides.

I.

OF THE NATURE OF THE REMEDY.

§ 984. **In general.**—The general nature of the remedy by injunction is so well understood and so fully and ably treated in

works devoted exclusively to that subject, that but little space need be given to it here.

The writ has been defined by Mr. High[1] as "a judicial process, operating *in personam*, and requiring the person to whom it is directed to do or to refrain from doing a particular thing." When granted to direct the doing of an act, the writ is usually designated as a mandatory injunction; and it is called a preventive injunction when granted to require the defendant to refrain from doing.[2] It is in the latter case, that it is most frequently applied to public officers; its mandatory functions being generally superseded by the writ of mandamus.

§ 985. **Does not lie where there is adequate Remedy at Law.** —Like mandamus, injunction is an extraordinary remedy, and it is well settled that it will not be granted where the party applying for it has a full and adequate remedy at law.[3]

But, as in the case of mandamus also, to bar relief by injunction in an otherwise appropriate case, "it must appear," says Mr. High,[4] "that the remedy at law is plain and adequate; in other words, that it is as practical and efficient to secure the ends of justice and its proper and prompt administration as is the remedy in equity. And unless this is shown a court of equity may lend its extraordinary aid by injunction, notwithstanding the existence of a remedy at law. But by a plain and adequate remedy at law within the meaning of the rule is not meant the right to resort to every remedy given by the forms of legal procedure; and if any form of action at law will afford a complete and adequate remedy, the case falls within the principle which tests the right to resort to equity, and the court will refuse to interfere by injunction."

II.

AGAINST WHAT OFFICERS GRANTED.

§ 986. **Does not lie against the President.**—For reasons similar to those which, as has been seen,[5] influence the courts in

[1] High on Inj., § 1.
[2] High on Inj., § 2.
[3] Adams *v.* Harrington, 114 Ind. 66; Weber *v.* Timlin, 37 Minn. 274; Bloomington *v.* Blodgett, 24 Ill. App. 650; Fincke *v.* Police Commissioners, 6 How. (N. Y.) Pr. 318.
[4] High on Inj. § 30.
[5] See *ante*, § 954.

refusing to interfere by mandamus with the executive officers of government, it is held that the courts have no jurisdiction of a bill to enjoin the President of the United States in the performance of his official duties.[1]

Nor does it make any difference that the President be not described as such but merely as a citizen of one of the States.[2]

§ 987. **Nor against executive Officers of Government.**—Neither will the writ lie against the executive officers of the government, as the secretary of the interior or commissioner, register or receiver of the land offices, to restrain them from acting in matters resting in the judgment and discretion of those officers as representatives of the executive department of the government.[3]

§ 988. **Whether lies against Governor and other State Officers.**—As has been seen in a previous section,[4] the authorities are much in conflict as to the power of the courts to control the official acts of the governor and other State officers, and the same principles would apply to proceedings by injunction. It is, of course, clear that the courts will not undertake to interfere with the performance of that class of duties which belong strictly to the executive character and appeal to the official discretion and judgment of the officer.[5] But in the case of merely ministerial duties, the question is not so clear, and while there are authorities which deny the power to interfere in any case,[6] there are others which declare the performance of ministerial duties clearly imposed to be subject to the control of the judicial tribunals.[7]

[1] State of Mississippi *v.* Johnson, President, 4 Wall. (U. S.) 475.

[2] State of Mississippi *v.* Johnson, *supra*.

[3] Gaines *v.* Thompson, 7 Wall. (U. S.) 347; Litchfield *v.* Register, 9 Wall. (U. S.) 575.

[4] See *ante*, § 954.

[5] See *ante*, § 954.

Thus it will not lie against the comptroller-general to restrain him from issuing execution for the collection of the public revenues. Scofield *v.* Perkerson, 46 Ga. 350; nor against the auditor and treasurer to prevent them from enforcing a public law, Gibbs *v.* Green, 54 Miss. 592; nor against the commissioners of the canal fund to restrain them from making a loan. Thompson *v.* Commissioners, 2 Abb. (N. Y.) Pr. 248.

[6] Does not lie against State Treasurer to restrain his official action. Secombe *v.* Kittelson, 29 Minn. 555.

[7] Martin *v.* Ingham, 38 Kans. 641.

See also Flint, &c., Ry. Co. *v.* Auditor-General, 41 Mich. 635.

§ 989. **Does not lie against Judges.**—Courts of equity may interfere by injunction to restrain parties from prosecuting actions at law, but an injunction will not be granted to restrain the judge of a court from exercising his judicial functions,[1] even though he is proceeding under an unconstitutional statute.[2]

III.

IN WHAT CASES APPLICABLE.

§ 990. **Does not lie to prevent Officer from exercising his legal Authority.**—In determining the cases in which a public officer may be restrained by injunction, it may first be noticed that the writ will not be granted to restrain a public officer from acting where he is proceeding by the authority and in pursuance of the law regulating his powers and duties, unless such law be unconstitutional or otherwise invalid.[3] What a valid law authorizes the officer to do, the courts will not undertake to prevent, even though it be alleged that the officer is actuated by unworthy motives.

§ 991. **Does not lie to interfere with official Discretion.**—So it is well settled that where the law invests public officers with discretionary or *quasi*-judicial powers in reference to matters within their jurisdiction, courts of equity will not interfere by injunction to restrain, control or review the exercise of the powers so conferred; the proper remedy, if any exists, is by *certiorari*.[4] Illustrations of powers falling within this classification have already been given, and the refusal to interfere by injunction is in harmony with the rules which, as has been seen, govern attempts to hold such officers liable to private action,[5] or to control their performance by mandamus.[6]

§ 992. **Will not lie to restrain criminal Proceedings or Enforcement of Ordinances.**—It is also well settled that an injunc-

[1] Sanders *v.* Metcalf, 1 Tenn. Ch. 419.

[2] Jones *v.* Stallsworth, 55 Tex. 138.

[3] Whitman *v.* Hubbell, 20 Abb. N. Cas. (N. Y.) 385; Delaware County's Appeal, — Penn. —, 13 Atl. Rep. 62; People *v.* Supervisors, 75 Cal. 179; Suge *v.* Fifield, 68 Wis. 546.

[4] Mooers *v.* Smedley, 6 Johns. (N. Y.) Ch. 28.

[5] See *ante*, § 594.

[6] See *ante*, § 945.

tion will not be granted to restrain a criminal prosecution, or proceedings for the enforcement of municipal ordinances, upon the ground that the ordinance is illegal or that the party accused is innocent.[1] An appeal furnishes an adequate remedy in such a case.

But a court of equity has jurisdiction to enjoin the enforcement of a city ordinance having for its purpose the destruction of valuable property rights, acquired by franchise from the municipality, and in which the public has an interest and where the injury will be irreparable.[2]

§ 993. **Does not lie to restrain Passage or Signing of Ordinances.**—Neither will the writ be granted to restrain municipal officers, in the exercise of the legislative and administrative powers conferred upon them by law, from passing or adopting an ordinance.[3]

So it will not be granted to prevent the mayor from signing an ordinance duly passed.[4]

§ 994. **Does not lie to try Title to Office.**—It is well settled also, as has heretofore been seen,[5] that the writ can not be made, directly or indirectly, to take the place of *quo warranto* and other similar remedies, in trying the title to public office.[6] It will, therefore, not be granted to prevent one alleged to have no legal title from exercising the functions of an office during a trial to determine the title,[7] or from qualifying for,[8] or entering

[1] Poyer *v.* Village of Des Plaines, 123 Ill. 111, 5 Am. St. Rep. 494; Waters Pierce Oil Co. *v.* Little Rock, 39 Ark. 412; Suess *v.* Noble, 31 Fed. Rep. 855; Kansas City Ry. Co. *v.* Kansas City, 29 Mo. App. 89; West *v.* Mayor, 10 Paige (N. Y.) 539; Cohen *v.* Commissioners, 77 N. C. 2; Yates *v* Batavia, 79 Ill. 500; Moses *v.* Mayor, 52 Ala. 198; Burnett *v.* Craig, 30 Ala. 135, 68 Am. Dec. 115; Hamilton *v.* Stewart, 59 Ill. 330; Davis *v.* American Society, 75 N. Y. 362.

[2] Port of Mobile *v.* Louisville, &c., R. R. Co., 84 Ala. 115, 5 Am. St. Rep. 342; City Council *v.* Louisville, &c., R. R. Co., 84 Ala. 127.

[3] Harrison *v.* New Orleans, 33 La. Ann. 222, 39 Am. Rep. 272.

[4] New Orleans Ry. Co. *v.* New Orleans, 39 La. Ann. 127.

[5] See *ante*, § 477.

[6] Kilpatrick *v.* Smith, 77 Va. 347; Beebe *v.* Robinson, 52 Ala. 66; Planters' Company *v.* Hanes, 52 Miss. 469; Patterson *v.* Hubbs, 65 N. C. 119; Dickey *v.* Reed, 78 Ill. 261; Moulton *v.* Reid, 54 Ala. 320.

[7] Foster *v.* Moore, 32 Kans. 483; McDonald *v.* Rehrer, 22 Fla. 198; People *v.* Draper, 24 Barb. (N. Y.) 265; Hagner *v.* Heyberger, 7 W. & S. (Penn.) 104, 42 Am. Dec. 220; Updegraff *v.* Crans, 47 Penn. St. 103.

[8] Moulton *v.* Reid, 54 Ala. 320.

upon the exercise of the office,[1] or from receiving the salary or fees attached to it.[2]

Neither will the writ be granted to prevent the appointment of one to fill a vacancy alleged to have been created by the unlawful removal of the former occupant,[3] or to prevent the calling of an election which has been determined upon by those to whom the law has delegated the power and duty.[4]

But while the writ will not be granted to try the title to an office, it may be issued to protect the actual incumbents in their exercise of it by preventing others from interfering until the title can be determined by the proper proceedings.[5]

§ 995. **Writ will be granted to restrain illegal Action affecting private Rights.**—But, on the other hand, it is equally well settled that where public officers are proceeding, without authority of law or in violation of its provisions or by virtue of an unconstitutional enactment, to the performance of acts which will materially affect, impair, injure or destroy the private vested rights of individuals, and for which they have no adequate remedy at law, an injunction will be granted to restrain them.[6]

The jurisdiction in this respect is frequently invoked to prevent the unlawful appropriation of private property to public use, or its injury or destruction, as in opening, extending or altering highways,[7] constructing sidewalks,[8] removing fences,[9] destroying docks,[10] obstructing streets,[11] draining swamps,[12] creating nuisances,[13] and the like.

[1] Beebe *v.* Robinson, 52 Ala. 66.

[2] Colton *v.* Price, 50 Ala. 424; Tappan *v.* Gray, 9 Paige (N. Y.) 507; Stone *v.* Wetmore, 42 Ga 601.

[3] Delahanty *v.* Warner, 75 Ill. 185.

[4] Harris *v.* Schryock, 82 Ill. 119; Jones *v.* Black, 48 Ala. 540.

[5] Brady *v.* Sweetland, 13 Kans. 41.

[6] Cooper *v.* Alden, Harr. (Mich.) 72; Brown *v.* Gardner, *Id.* 291; Ryan *v.* Brown, 18 Mich. 196; Owens *v.* Crossett, 105 Ill. 354; Morgan *v.* Miller, 59 Iowa 481; Wetherell *v.* Newington, 54 Conn. 67; Belknap *v.* Belknap, 2 Johns. Ch. (N. Y.) 463, 7 Am. Dec. 548.

[7] Morgan *v.* Miller, 59 Iowa 481; Wetherell *v.* Newington, 54 Conn. 67; Weiss *v.* Jackson County, 9 Oreg. 470

[8] Bryan *v.* East St Louis, 12 Ill. App. 390.

[9] Owens *v* Crossett, 105 Ill. 354.

[10] Ryan *v.* Brown, 18 Mich 196.

[11] Cooper *v.* Alden, Harring. (Mich.) 72.

[12] Belknap *v.* Belknap, 2 Johns. (N. Y.) Ch. 463, 7 Am. Dec. 548.

[13] Upjohn *v.* Richland, 46 Mich. 542. See also Palmer *v.* Rich, 12 Mich. 414; Kinyon *v.* Duchene, 21 Mich. 498; Merrill *v.* Humphrey, 24 Mich. 170;

§ 996. **Writ lies to prevent illegal Expenditures or Appropriations of public Funds.**—So the writ will be granted to prevent public officers having the matter in charge from making illegal expenditures or appropriations of the public funds, or from levying an unjust or unlawful tax.[1]

What shall be the interest which will suffice to entitle a private person to invoke the application of the remedy is a question upon which the authorities are not in full accord. It is undoubtedly the right of the attorney-general or other law officer of the public to interfere to prevent the wrongful expenditure or appropriation of the public funds,[2] and it is held, in some States, that he alone is the proper party and not a private tax-payer, unless the tax-payer be one who has a special interest or suffers a special injury not shared in common by all of the other tax-payers of the community.[3] But by the great preponderance of authority, it is settled that any single tax-payer, or any number of them, may intervene to prevent by injunction an unlawful levy, appropriation or expenditure by which the burden of the tax-payer as such would be unjustly and illegally increased, and that a special or peculiar interest or injury is not indispensable.[4]

Clement *v.* Everest, 29 Mich. 19; Bristol *v.* Johnson, 34 Mich. 123; Marquette, &c., R. R. Co. *v.* Marquette, 35 Mich. 504; Flint, &c., R. R. Co. *v.* Auditor-General, 41 Mich. 635; Folkerts *v.* Power, 42 Mich. 283.

[1] McCord *v.* Pike, 121 Ill. 288, 2 Am. St. Rep. 85; The Liberty Bell, 23 Fed. Rep. 843; Hospers *v.* Wyatt, 63 Iowa 264; Grayville *v.* Gray, 19 Ill. App. 120; Davenport *v.* Kleinschmidt, 6 Mont. 502; New London *v.* Brainard, 22 Conn. 552; Rothrock *v.* Carr, 55 Ind. 334; Henderson *v.* Covington, 14 Bush (Ky.) 312.

[2] Cooley on Taxation, 2nd ed. 764; State *v.* County Court, 51 Mo. 350, 11 Am. Rep. 454. But see *contra*, State *v.* McLaughlin, 15 Kans. 228, 22 Am. Rep. 264.

[3] Kilbourne *v.* St. John, 59 N. Y. 21, 17 Am. Rep. 291; Wood *v.* Bangs, 1 Dak. 179; Louisiana National Bank *v.* New Orleans, 27 La. Ann. 446; Merriam *v.* Supervisors, 72 Cal. 517.

In Michigan, see Miller *v.* Grandy, 13 Mich. 540; Steffes *v.* Moran, 68 Mich. 291, 12 West. Rep. 555; Curtenius *v.* Grand Rapids, &c., R. R. Co., 37 Mich. 583.

[4] Crampton *v.* Zabriskie, 101 U. S. 601; Hospers *v.* Wyatt, 63 Iowa 264; Davenport *v.* Kleinschmidt, 6 Mont. 502; Newmeyer *v.* Missouri, &c., R. R. Co. 52 Mo. 81, 14 Am. Rep. 394; McCord *v.* Pike, 121 Ill. 288, 2 Am. St. Rep. 85; Colton *v.* Hanchett, 13 Ill. 615; Prettyman *v.* Supervisors, 19 Ill. 406, 71 Am. Dec. 230; Perry *v.* Kinnear, 42 Ill. 160; Drake *v.* Phillips, 40 Ill. 389; Chestnutwood *v.* Hood, 68 Ill. 132; Devine *v.* Commissioners, 84 Ill. 590; City of Springfield *v.* Edwards, 84 Ill. 626; Leitch *v.* Wentworth, 71 Ill. 147;

§ 997. **Lies to prevent Violation of Duty.**—So it is said to be "well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of *mandamus* and injunction are somewhat correlative to each other."[1]

§ 998. **Lies to prevent Removal of Office.**—The writ will therefore, lie to prevent county officers from removing their offices from the county seat, pending the determination of a suit to settle its location.[2] But the court will not interfere after the question of the removal has been determined by the appropriate tribunal.[3]

Mayor of Baltimore *v.* Gill, 31 Md. 375; Willard *v.* Comstock, 58 Wis. 565; Place *v.* Providence, 12 R. I. 1; Sinclair *v.* Commissioners, 23 Minn. 407; Smith *v.* Magourich, 44 Ga. 163; Wheeler *v.* Philadelphia, 77 Penn. St. 338; City of Valparaiso *v.* Gardner, 97 Ind. 1; Merrill *v.* Plainfield, 45 N. H. 126; London *v.* Wilmington, 78 N. C. 109; Winston *v.* Tennessee, &c., R. R. Co., 1 Baxt. (Tenn.) 60.

[1] Board of Liquidation *v.* McComb, 92 U. S. 531, 541.

[2] Shaw *v.* Hill, 67 Ill. 455.

[3] Sanders *v.* Metcalf, 1 Tenn. Ch. 419; Ellis *v.* Karl, 7 Neb. 381.

CHAPTER III.

OF CERTIORARI TO PUBLIC OFFICERS.

§ 999. Purpose of this Chapter.

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1002. Is not a Writ of Right
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1005. Does not lie to review Discretion.
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1009. Presumption that Proceedings are regular.
1010. How when Writ addressed to inferior Courts or Tribunals.
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§ 999. **Purpose of this Chapter.**—The writ of *certiorari* is most frequently used in its office as a branch of the regular machinery of the courts, and as such its consideration belongs rather to a work upon practice than to this. Some general consideration of the writ, however, as one applicable to a large class of officers who do not sit as judges in courts, is deemed germane to the scope of this work and will therefore be given.

I.

OF THE NATURE OF THE REMEDY.

§ 1000. **Definition of the Writ.**—*Certiorari* is a writ issuing from a superior court to an inferior court, tribunal or officer exercising judicial power whose proceedings are summary or not according to the course of the common law, commanding that the records of a cause or matter depending before such court, tribu-

nal or officer be certified to the superior court from which the writ was issued.[1]

§ 1001. **Lies only to review judicial Action.**—The writ of *certiorari* lies to correct errors or restrain excesses of jurisdiction of inferior courts and officers acting judicially only.[2] It will, therefore, not be issued to officers whose functions and duties are ministerial, executive or legislative and not judicial.[3]

§ 1002. **Is not a Writ of Right.**—The writ of *certiorari* is not one strictly of right, but rests in the sound and legal but not capricious discretion of the court,[4] to be allowed or not as may best promote the ends of justice. Statutory provisions respecting its exercise do not alter this rule.[5]

[1] "The writ of *certiorari* is a writ issuing sometimes out of chancery, and sometimes out of the king's bench or common pleas; and lieth where the king would be certified of any record which is in the treasury, or in the common pleas, or in any other court of record; or before the sheriff and coroner; or of a record before the commissioners, or before the escheator; in which cases he may send this writ to any of the said courts or officers, to certify such record before him *in banco* or in chancery, or before other justices, where the king pleaseth to have the same certified; and he or they to whom the *certiorari* is directed, ought to send the same record, or the tenor of it, as commanded by the writ; and if they fail so to do, then an *alias* shall be awarded, and afterwards a *pluries*, with a clause of *vel causam nobis significes*, and after that an attachment, if good cause be not returned upon the *pluries*." TIDDS, Pr. 397. See also Farmington River Water Power Co. *v.* County Commissioners, 112 Mass. 206; Lynch *v.* Crosby, 134 Mass. 313.

[2] Locke *v.* Selectmen, 122 Mass. 290; Queen *v.* Hatfield Peverel, 14 Q. B. 298; Queen *v.* Salford, 18 Q. B. 687; Parks *v.* Mayor, 8 Pick. (Mass.) 218.

[3] Attorney-General *v.* Northampton, 143 Mass. 589; *In re* Wilson, 32 Minn. 145; People *v.* Common Council, 38 Hun (N. Y.) 7; State *v.* St. Paul, 34 Minn. 250; Stone *v.* Mayor, 25 Wend. (N. Y.) 157; People *v.* Mayor, 2 Hill (N. Y.) 9; People *v.* Supervisors, 1 *Id.* 195; People *v.* Walter, 68 N. Y. 403; Robinson *v.* Supervisors, 16 Cal. 208; Thompson *v.* Multnomah County, 2 Oreg. 34; Locke *v.* Selectmen, 122 Mass. 290; Supervisors *v.* Auditor-General, 27 Mich. 165; State *v.* St. Paul, 34 Minn. 250; Esmeralda County *v.* District Court, 18 Nev. 438; *In re* Saline County, 45 Mo. 52, 100 Am. Dec. 337.

[4] Supervisors *v.* Magoon, 109 Ill. 142; *Ex parte* Pearce, 44 Ark. 509; Duggen *v.* McGruder, Walk. (Miss.) 112, 12 Am. Dec. 527; Welch *v.* County Court, 29 W. Va. 63, 1 S. E. Rep. 337; Knapp *v.* Heller, 32 Wis. 467; Walbridge *v.* Walbridge, 46 Vt. 617; People *v.* Andrews, 52 N. Y. 445; Roediger *v.* Commissioner, 40 Mich. 745; Gager *v.* Supervisors, 47 Mich. 167.

[5] *In re* Lantis, 9 Mich. 324, 80 Am. Dec. 58.

§ 1003. **Does not lie where other Remedy exists.**—So it is well settled that the writ will not be issued where the law gives by appeal, exceptions or writ of error another remedy for the correction of the errors complained of.[1] The fact that through the ignorance or neglect of the party or his attorney the time for availing himself of such other remedy has expired, will not ordinarily suspend the operation of this rule;[2] but where the right to pursue the other remedy has been lost by the neglect, fraud or collusion of others for whom the party applying for the writ is not responsible, the writ has, in some cases, been allowed.[3] It has also been allowed in other cases where special circumstances exist showing that a failure of justice would result if the writ were denied.[4]

§ 1004. **Not granted where Party has been guilty of Laches.**—And it is a general rule that the party applying for the writ must have acted promptly,[5] and the court will not interfere where the application has been delayed until new rights or interests have intervened.[6] The reasons for refusing the writ are greater where important public works are involved, and the application has not been made as soon as practicable.[7]

Even though the writ has been granted in the first instance, it will be dismissed upon the hearing where the party has been

[1] State *v.* Lowery, 49 N. J. L. 391; Alabama, &c., R. R. Co. *v.* Christian, 82 Ala. 307; Beasley *v.* Beckley, 28 W. Va. 81; Ransom *v.* Cummins, 66 Iowa 137; Wilson *v.* Burks, 71 Ga. 862; State *v.* County Court, 80 Mo. 500; Galloway *v.* Corbitt, 52 Mich. 460; Pettigrew *v.* Washington County, 43 Ark. 33; Stuttmeister *v.* Superior Court, 71 Cal. 322; Farrell *v.* Taylor, 12 Mich. 113; Specht *v.* Detroit, 20 Mich 168; Smith *v.* Reed, 24 Mich. 240; Ishpeming *v.* Maroney, 49 Mich. 226; Tucker *v.* Drain Commissioners, 50 Mich. 5.

But see in Texas, Ray *v.* Parsons, 14 Tex. 370, and in New Jersey, New Jersey R. R. *v.* Suydam, 2 Harr. 25; Krumeick *v.* Krumeick, 2 Green 39.

[2] Turner *v.* Powell, 93 N C. 341; Stocking *v.* Knight, 19 Ill. App. 501; Smith *v.* Abrams, 90 N. C. 21; Norman *v.* Snow, 94 N. C. 431.

[3] See Perkins *v.* Hadley, 4 Hayw. (Tenn.) 143; Copeland *v.* Cox, 5 Heisk. (Tenn.) 172; King *v.* Williams, 7 *Id.* 303; Skinner *v.* Maxwell, 67 N. C. 257.

[4] Specht *v.* Detroit, 20 Mich. 168.

[5] *In re* Lantis, 9 Mich. 324; Rentz *v.* Detroit, 48 Mich. 544; Carpenter *v.* Commissioner, 64 Mich. 476.

[6] Wilson *v.* Gifford, 42 Mich. 456.

[7] Dunlap *v.* Toledo, &c., R. R. Co., 46 Mich. 190; Bresler *v.* Ellis, 46 Mich. 335; Rentz *v.* Detroit, 48 Mich. 544.

guilty of laches in applying it,[1] or the writ has been improvidently granted.[2]

§ 1005. **Does not lie to review Discretion.**—Neither will the writ be issued to review matters which rested in the discretion of the court or officer below.[3] The fact that a public agent exercises judgment or discretion in the performance of his duty does not make his action or his functions judicial.[4]

§ 1006. **Party applying for Writ should have special Interest.**—The writ will not be issued where it does not appear that the person applying for it has a special and substantial interest in the subject-matter and will suffer actual and substantial wrong or injury if the relief should be denied.[5] The court will not interfere where the right of the party is speculative or doubtful, nor unless substantial and material relief can be afforded by its intervention. There must be "something material to be accomplished,—something on which the judgment of the court can act effectively and work advantage to the plaintiff."[6]

II.

TO WHAT OFFICERS WRIT IS ISSUED.

§ 1007. **Issued only to judicial and not to ministerial, executive or legislative Officers.**—As has been seen, *certiorari* lies only to review judicial action.[7] It will be issued, therefore, only to officers exercising judicial functions,[8] and not to those whose

[1] Trustees *v.* Directors, 88 Ill. 100; Kimple *v.* San Francisco, 66 Cal. 136; State *v.* Milwaukee County, 58 Wis. 4; People *v.* Commissioners, 77 N. Y. 605.

[2] Vanderstolph *v.* Boylan, 50 Mich. 330; Whitbeck *v.* Hudson, 50 Mich. 86.

[3] Ketchum *v.* Superior Court, 65 Cal. 494; Supervisors *v.* Auditor-General, 27 Mich. 165; Hildreth *v.* Crawford, 65 Iowa 339; Benton *v.* Taylor, 46 Ala. 388; Livingston *v.* Rector, 45 N. J. L 230.

[4] People *v.* Commissioners, 97 N. Y. 37; People *v.* Walter, 68 N. Y. 403.

[5] State *v.* Lamberton, 37 Minn. 362; People *v.* Leavitt, 41 Mich. 470; Davison *v.* Otis, 24 Mich. 23.

[6] GRAVES, J., in People *v.* Leavitt, *supra;* People *v.* Phillips, 67 N. Y. 582; People *v.* Walter, 68 N. Y. 403.

[7] See *ante* § 1001.

[8] See Miller *v.* Trustees, 88 Ill. 26; Moreland *v.* Whitford, 54 Wis. 150; People *v.* Judge, 32 Mich. 95; Hitchcock *v.* Sutton, 28 Mich. 86; McGregor *v.* Supervisors, 37 Mich. 388; Clay *v.* Creek, 34 Mich. 204; Names

functions, powers and duties are ministerial, executive or legislative in their nature.[1]

§ 1008. **Illustrations of the Application of the Writ.**—Illustrations of the application of the writ to inferior courts and tribunals are sufficiently afforded by any of the works of practice, but in the case of those officers not sitting as judges in courts, some illustrations may be of use.

I. Thus the writ lies to review the proceeding of commissioners, supervisors and overseers in the opening of ditches and drains,[2] the establishing, laying out and altering of highways,[3] or the condemning of lands for public use;[4] to review the action of a board of supervisors,[5] or of a township board,[6] in deciding upon the removal of an officer; of trustees of schools in deciding upon the uniting of school districts;[7] of a superintendent of public instruction in dividing school districts;[8] of assessors of taxes in valuing and assessing property;[9] of supervisors in acting as a board of equalization;[10] of commissioners and special tribunals in passing upon contested elections;[11] of a police board in imposing a fine for absence from duty;[12] of commissioners in portioning

v. Commissioners, 30 Mich. 490; Townsend v. Howe, 41 Mich. 263; Merrick v. Town Board, 41 Mich. 630; Mayor v. Shaw, 16 Ga. 172.

[1] Attorney-General v. Northampton, 143 Mass. 589; *In re* Wilson, 32 Minn, 145; State v. St. Paul, 34 Minn. 250; People v. Common Council, 38 Hun (N. Y.) 7; People v. Park Commissioners, 97 N. Y. 37; Williams v. Supervisors, 65 Cal. 160.

[2] People v. Burnap, 38 Mich. 350. But see Tucker v. Commissioners, 50 Mich. 5; Dietz v. Commissioners, 50 Mich. 227.

[3] French v. Barre, 58 Vt. 567; Tewksbury v. Commissioners, 117 Mass. 563; Dorchester v. Wentworth, 31 N. H. 451; *Ex parte* Keenan, 21 Ala. 558; Names v. Commissioners, 30 Mich. 490; People v. Brighton, 20 Mich. 57; Keys v. Marin County, 42 Cal. 252.

[4] St. Charles v. Rogers, 49 Mo. 530; Dunlap v. Toledo, &c., R. R. Co, 46 Mich. 190.

[5] McGregor v. Supervisors, 37 Mich. 388.

[6] Merrick v. Township Board, 41 Mich. 630.

[7] Miller v. Supervisors, 88 Ill. 26.

[8] State v. Whitford, 54 Wis. 150.

[9] Milwaukee Iron Co. v. Schubel, 29 Wis. 444, 9 Am. Rep. 591; Carroll v. Mayor, 12 Ala. 173; People v. Assessors, 39 N. Y. 81; People v Assessors of Albany, 40 N. Y. 154.

But see *contra*, Whitbeck v. Hudson, 50 Mich. 86; Hudson v. Whitney, 53 Mich. 158.

[10] Royce v. Jenney, 50 Iowa 676.

[11] Chenowith v. Commissioners, 26 W. Va. 230; Election Cases, 65 Penn. St. 30; Whitney v. Delegates, 14 Cal. 479.

[12] People v. Police Board, 39 N. Y. 506.

lands;[1] of township trustees in calling election to vote on a tax in aid of railroads.[2]

II. But, on the other hand, where the action is not judicial, the writ will not lie, as of a board of county commissioners in forming a new school district,[3] or organizing a new township;[4] or of a board of supervisors in creating a swamp land district;[5] or of a board of park commissioners in consenting to and contracting for a bridge;[6] or of a municipal board in appointing a policeman,[7] the act in these cases being legislative in its nature. So the action of the auditor-general of the State in charging back to a county certain taxes in his settlement with the county, is the exercise of an official discretion belonging to an executive department of the State government, and can not be reviewed upon *certiorari*.[8]

III.

WHAT QUESTIONS ARE OPEN TO REVIEW.

§ 1009. **Presumption is that Proceedings are regular.**—The well known presumption of the law that public officers have acted within their jurisdiction and have pursued and observed the limits set by law to their authority, applies here as elsewhere, and the party applying for the writ must be prepared to show wherein the alleged defects or irregularities exist.[9]

§ 1010. **How when Writ addressed to inferior Courts and Tribunals.**—The writ of *certiorari* lies to review questions of law only,[10] and where the writ is issued to bring up the record of

[1] Dyer *v.* Lowell, 30 Me. 217.

[2] Jordan *v.* Hayne, 36 Iowa 9.

[3] Lemont *v.* County Commissioners, 39 Minn. 385, 40 N. W. Rep. 359; *In re* Wilson, 32 Minn. 145. "Unless we are prepared," says the court in the first case, "to assume a general supervision over all municipal corporations, boards, commissions and public officers in the State, this writ must be confined to its legitimate office, which is to review proceedings judicial in their nature which affect the citizen in his rights of person or property."

[4] Christlieb *v.* County Commissioners, — Minn. —, 42 N. W. Rep. 930.

[5] Williams *v.* Supervisors, 65 Cal. 169.

[6] People *v.* Park Commissioners, 97 N. Y. 37.

[7] Attorney-General *v.* Northampton, 143 Mass. 589.

[8] Supervisors *v.* Auditor-General, 27 Mich. 165.

[9] State *v.* County Clerk, 59 Wis. 15.

[10] Hyde *v.* Nelson, 11 Mich. 353;

an inferior court or tribunal, the court will only inquire into the question of the jurisdiction of the inferior tribunal,[1] and will not review questions of fact or examine the evidence except to determine whether there is an entire absence of proof upon some material fact.[2] In the latter event, a finding of fact becomes erroneous as matter of law.[3]

§ 1011. **How when Writ addressed to quasi-judicial Officer.** —But when the writ is issued to an officer having only *quasi*-judicial powers, the scope of the remedy is enlarged, and the court will enquire not alone whether the officer had jurisdiction, but also whether he has kept within it, and has acted strictly according to law. To this end, errors and irregularities may be corrected, and the court will examine the evidence, to determine whether there was any competent evidence to justify the adjudication made, and whether, in making it, any rule of law affecting the rights of the parties has been violated.[4]

State *v.* Whitford, 54 Wis. 150; Farmington, &c. Co. *v.* County Commissioners, 112 Mass. 206; State *v.* Hudson, 32 N. J. L. 365; Lapan *v.* County Commissioners, 65 Me. 160; Starr *v.* Trustees, 6 Wend. (N. Y.) 564; Chicago, &c. R. R. Co. *v.* Whipple, 22 Ill. 105; De Rocherbrune *v.* Southeimer, 12 Minn. 78.

[1] State *v.* Whitford, 54 Wis. 150; Hamilton *v.* Harwood, 113 Ill. 154; Locke *v.* Selectmen, 122 Mass. 290; Farmington, &c. Co. *v.* County Commissioners, 112 Mass. 206; Phillips *v.* Welch, 12 Nev. 158; Chittenden *v.* State, 41 Wis. 285; Baxter *v.* Brooks, 29 Ark. 173; Andrews *v.* Pratt, 44 Cal. 309; Monreal *v.* Bush, 46 Cal. 79; Frankfort *v.* County Commissioners, 40 Me. 389; Doolittle *v.* Galena R. R. Co. 14 Ill. 381.

[2] Jackson *v.* People, 9 Mich. 111; Hyde *v.* Nelson, 11 Mich. 353; Linn *v.* Roberts, 15 Mich. 443; Lynch *v.* People, 16 Mich. 472; Brown *v.* Blanchard, 39 Mich. 790; Genesee Savings Bank *v.* Michigan Barge Co., 52 Mich. 164.

[3] Hyde *v.* Nelson, 11 Mich. 353; Cicotte *v.* Morse, 8 Mich. 424; Jackson *v.* People, 9 Mich. 111; Berry *v.* Lowe, 10 Mich. 9.

[4] Milwaukee Iron Co. *v.* Schubel, 29 Wis. 444, 9 Am. Rep. 591; State *v.* Whitford, 54 Wis. 150; People *v.* Police Board, 69 N. Y. 411; People *v.* Betts, 55 N. Y. 600; People *v.* Assessors, 40 N. Y. 154; St. Paul *v.* Marvin, 16 Minn. 104; Scrafford *v.* Supervisors, 41 Mich. 647.

CHAPTER IV.

OF THE WRIT OF PROHIBITION.

§ 1012. Purpose of this Chapter.
1013. Definition of Writ.
1014. Lies only to prevent Excess of Jurisdiction.
1015. I not a Writ of Right.
1016. Writ not granted when other Remedy exists.
§ 1017. Not issued when Act already done.
1018. Party must have objected to Jurisdiction.
1019. Lies only to restrain judicial Action.
1020. Does not lie to restrain executive or ministerial Action.

§ 1012. **Purpose of this Chapter.**—Like the writ of *certiorari* the writ of prohibition is so largely used as one of the means[1] by which the supervisory control of the superior courts over the inferior is exercised, that its consideration belongs properly to a treatise upon the practice of the courts. Yet, like that writ also, it seems that some consideration of it properly belongs to such a treatise as this.

§ 1013. **Definition of Writ.**—The writ of prohibition is an extraordinary judicial writ, issuing from a court of superior jurisdiction, to prohibit the exercise, by an inferior tribunal or officer, of judicial powers with which he is not legally vested.[1] As stated in one case, its purpose is "to prevent the exercise, by a tribunal possessing judicial powers, of jurisdiction over matters not within its cognizance, or exceeding its jurisdiction in matters of which it has cognizance."[2]

[1] For other definitions see Blackstone's Com. 112; High on Ex. Leg. Rem. § 762; Hudson *v.* Judge of Superior Court, 42 Mich. 239; Smith *v.* Whitney, 116 U. S. 167.

[2] ALLEN, J. in Thomson *v.* Tracy, 60 N. Y. 31.

"The writ of prohibition," says MARSTON, J., in Hudson *v.* Judge, 43 Mich. 239, at p. 248, "is a remedy provided by the common law to prevent the encroachment of jurisdiction. It is a proper remedy in cases where the court exceeds the bounds of its jurisdiction, or takes cognizance of matters not arising within its juris-

§ 1014. **Lies only to prevent Excess of Jurisdiction.**—The writ lies only to prevent actions in excess of the jurisdiction conferred by law, and not to regulate or control the manner in which a lawful jurisdiction shall be exercised.[1] A mistaken or erroneous exercise of powers conferred by law must be remedied in some other way. The writ, therefore, will not lie to prevent an inferior court or tribunal from deciding erroneously in a matter within its jurisdiction, nor to prevent the enforcement of such an erroneous judgment.[2]

§ 1015. **Is not a Writ of Right.**—Like the other extraordinary writs which have already been considered, prohibition is not, where the party has any other remedy, a writ of strict right, but the question of its exercise is one resting in the sound, legal discretion of the court, and it will be granted or not according to the circumstances of each particular case.[3]

Where, however, the court or officer has clearly no jurisdiction of the proceeding and the party has objected to the jurisdiction at the outset and has no other remedy, it is said that he is entitled to the writ as a matter of right, and that a refusal to

diction. It can only be interposed in a clear case of excess of jurisdiction, and may lie to a part and not to the whole. It simply goes to the excess of jurisdiction, and the application for the writ may be made by either the plaintiff or the defendant in the case, or if more than one, by either where the excess of jurisdiction affects him. It can only be resorted to where other remedies are ineffectual to meet the exigencies of the case. It is a preventive rather than a remedial process, and can not, therefore, take the place of a writ of error or other mode of review. It must also appear that the person applying for the writ has made application in vain for relief to the court against which the writ is asked. The writ is not granted as a matter of strict right, but rests in a sound judicial discretion, to be granted or not, according to the peculiar circumstances of each particular case when presented: 8 Bac, Abr. tit. Prohibition: 3 Bl. Com. 111; Appo *v.* People, 20 N. Y. 531; People *v.* Seward, 7 Wend. (N. Y.) 518; Arnold *v.* Shields, 5 Dana (Ky.) 21; Washburn *v.* Phillips, 2 Metc. (Mass.) 299; *Ex parte* Hamilton, 51 Ala. 62; Blackburn *Ex parte*, 5 Pike (Ark.) 22; High Extr. Rem. §§ 773, 765."

[1] *Ex parte* Green, 29 Ala. 52; *Ex parte* Peterson, 33 Ala. 74; Murphy *v.* Superior Court, 58 Cal. 520; Buskirk *v.* Judge, 7 W. Va. 91; Jacks *v.* Adair, 33 Ark. 161.

[2] Bank Lick Turnpike Co. *v.* Phelps, 81 Ky. 613; More *v.* Superior Court, 64 Cal. 345.

[3] Hudson *v.* Judge Superior Court, 42 Mich. 239; State *v.* Monroe, 33 La. Ann. 923; State *v.* Judge, 4 Rob. (La.) 48.

grant it, where all the proceedings appear of record, may be reviewed on error.[1]

§ 1016. **Writ not granted where other Remedy exists.**—So, as in the case of other extraordinary remedies, this writ will not be granted where the party applying for it has another adequate remedy at law.[2] Thus the writ will not be issued where the law provides a complete remedy by appeal, nor can the writ be made to serve the purpose of a writ of error or *certiorari*.[3]

Neither will it be issued to usurp the province of an information in *quo warranto*, as to prevent the usurpation of an office.[4]

§ 1017. **Not issued when Act already done.**—Prohibition is a preventive rather than a remedial process, and will not, therefore, be issued where it would be ineffectual to prevent the act, as where the act complained of has already been done.[5]

§ 1018. **Party must have objected to Jurisdiction.**—The court will not interfere by prohibition, unless the party applying for the writ has previously interposed the proper plea or objection to the jurisdiction attempted to be exercised, and has failed to arrest its progress.[6]

§ 1019. **Lies only to restrain judicial Action.**—It is well-settled that the writ lies only to prevent the unauthorized exercise by courts and officers of *judicial* powers, whether the respondent is sitting as a judge in regularly established courts or not.[7]

[1] GRAY, J., in Smith *v.* Whitney, 116 U. S. 167, 173.

[2] *Ex parte* Braudlacht, 2 Hill (N. Y.) 367, 38 Am. Dec. 593; Hudson *v.* Judge, 42 Mich. 239; *Ex parte* Hamilton, 51 Ala. 62; People *v.* Wayne Circuit Court, 11 Mich. 393, 83 Am. Dec. 754; State *v.* Braun, 31 Wis. 600; Sherlock *v.* Jacksonville, 17 Fla. 93.

[3] Shell *v.* Cousins, 77 Va. 328; State *v.* Monroe, 33 La. Ann. 923; *Ex parte* Reid, 50 Ala. 439; Wreden *v.* Superior Court, 55 Cal. 504; People *v.* Nichols, 79 N. Y. 582; State *v.* Municipal Court, 26 Minn. 162; Smith *v.* Whitney, 116 U. S. 167.

[4] Buckner *v.* Veuve, 63 Cal. 304.

[5] Haldeman *v.* Davis, 28 W. Va. 324; State *v.* Stackhouse, 14 S. C. 417; Hudson *v.* Judge, 42 Mich. 239, 248; United States *v.* Hoffman, 4 Wall. (U. S.) 158.

[6] State *v.* Williams, 48 Ark. 227; State *v.* Steele, 38 La. Ann. 569; Hudson *v.* Judge, 42 Mich. 239.

[7] *Ex parte* Braudlacht, 2 Hill (N. Y.) 367, 38 Am. Dec. 593; Hobart *v.* Tillson, 66 Cal. 210; LaCroix *v.* Fairfield County Commissioners, 50 Conn. 321; People *v.* Lake County District Court, 6 Colo. 534; Spring Valley Water Works *v.* Bartlett, 63

§ 1020. **Does not lie to restrain executive or ministerial Action.**—Hence the writ will not be granted to restrain the secretary of the interior from convening a court-martial [1] or the governor from issuing a commission; [2] nor to restrain the mayor [3] or common council [4] of a city from proceeding to investigate charges against a municipal officer; nor to restrain a tax collector from collecting a tax; [5] nor to interfere with a board of supervisors in fixing water rates; [6] nor to restrain county commissioners [7] or a city council [8] from granting licenses for the sale of liquor; nor to prevent a board of commissioners from calling an election; [9] nor to restrain a fence officer from deciding whether a fence should be built or not.[10]

Cal. 245; Le Conte *v.* Berkeley, 57 Cal. 269; People *v.* San Francisco Election Commissioners, 54 Cal. 404; People *v.* Supervisors, 1 Hill (N. Y.) 195; Clayton *v.* Heidelberg, 17 Miss. 623; State *v.* Gray, 33 Wis. 93; State *v.* Justices, 41 Mo. 44; Low *v.* Mining Co., 2 Nev. 75; Chandler *v.* Mass. R. R. Commissioners, 141 Mass. 208; Smith *v.* Whitney, 116 U. S. 167.

But *contra*, see State *v.* Commissioners, 1 Mill (S. C.) 55, 12 Am. Dec. 596; Harrington *v.* Commissioners, 2 McCord (S. C.) 400; Lynah *v.* Commissioners, Harper (S. C.) 336; Price *v.* Commissioners, 3 Hill (S. C.) 314.

[1] Smith *v.* Whitney, 116 U. S. 167.

[2] Grier *v.* Taylor, 4 McCord (S. C.) 206.

[3] Burch *v.* Hardwicke, 23 Gratt. (Va.) 51.

[4] People *v.* Lake City District Court, 6 Colo. 534.

[5] Hobart *v* Tillson, 63 Cal. 210; Le Conte *v.* Berkeley, 57 Cal. 269; People *v.* Supervisors, 1 Hill (N. Y.) 195, Clayton *v.* Heidelberg, 17 Miss. 623.

But *contra*, People *v.* Works, 7 Wend. (N. Y.) 486; Burger *v.* State, 1 McMull. (S. C.) 410.

[6] Spring Valley Water works *v.* Bartlett, 63 Cal. 245.

[7] La Croix *v.* Fairfield County Commissioners, 50 Conn. 321.

[8] State *v.* Columbia, 16 S. C. 412.

[9] People *v.* San Francisco Election Commissioners, 54 Cal. 404.

[10] Seymour *v.* Almond, 75 Ga. 112.

CHAPTER V.

OF CRIMINAL PROCEEDINGS AGAINST PUBLIC OFFICERS.

§ 1021. Purpose of this Chapter.
1022. Disregard of Duty punishable as a Crime.
1023. What Officers not indictable.
1024. Officer *de Facto* liable.
1025. Liability for particular Offenses.

§ 1021. **Purpose of this Chapter.**—It is not within the scope of this work to enter at large into a discussion of the various criminal proceedings to which public officers may be liable. Too much depends, in this respect, upon local statutes, as well as the general principles of the criminal law, to make it possible to give adequate consideration to this subject within the limits of a single chapter. For this subject, therefore, the reader must be referred to the writers upon the criminal law, and to no one, with more satisfaction, than to Mr. Bishop.

But, in general—

§ 1022. **Disregard of Duty punishable as a Crime.**—"Any act or omission," says Mr. Bishop,[1] "in disobedience of official duty, by one who has accepted public office, is, when of public concern, in general, punishable as a crime."[2] This is particularly so where the thing required is of a ministerial or other like nature, and there is reposed in the officer no discretion.[3]

[1] Bishop on Crim. Law, § 459.

[2] Citing State *v.* McEntyre, 3 Ire. (N. C.) 171, 174; Reg. *v.* Neale, 9 Car. & P. 431; Respublica *v.* Montgomery, 1 Yeates (Penn.) 419; Reg. *v.* James, 1 Eng. L. & Eq. 552; Rex *v.* Howard, 7 Mod. 307; Rex *v.* Angell, Cas. temp. Hardw. 124; Anonymous, 6 Mod. 96; Crouther's Case, Cro. Eliz. 654; Smith *v.* Langham, Skin. 60; W's Case, Lofft. 41; Adams *v.* Tertenants, Holt 179; State *v.* Leigh, 3 Dev. & Bat. (N. C.) 127; Rex *v.* Commings, 5 Mod. 179; Rex *v.* Hemmings, 3 Salk. 187; Smith's Case, Syme 185; Wilkes *v.* Dinsman, 7 How. (U. S.) 89; Rex *v.* Harrison, 1 East P. C. 382; Reg. *v.* Buck, 6 Mod. 306; Mann *v.* Owen 9 B & C. 595; Rex *v.* Bootie, 2 Bur. 864; Rex *v.* Fell, 1 Salk. 272; Reg *v.* Tracy, 6 Mod. 30; State *v.* Buxton, 2 Swan (Tenn.) 57.

[3] Citing Rex *v.* Osborn, 1 Comyns

But this doctrine has its exceptions and qualifications; thus one serving in a judicial or other capacity in which he is required to exercise a judgment of his own, is not punishable for a mere error therein, or for a mistake of the law. His act, to be cognizible criminally, or even civilly, must be wilful and corrupt.[1] And if it is strictly judicial, and he is, for instance, a justice of the peace, and has jurisdiction, he will not be liable to the suit of the party, however the law may be as to a criminal prosecution, though corruption is alleged."[2]

§ 1023. **What Officers not indictable.**—"It is sufficiently settled," continues Mr. Bishop, "that legislators,[3] the judges of our highest courts and of all courts of record acting judicially,[4]

240; Commonwealth *v.* Genther, 17 S. & R. (Penn.) 135; People *v.* Norton, 7 Barb. (N.Y.) 477; Anonymous, Lofft. 185; Rex *v.* Seymour, 7 Mod. 382; State *v.* Maberry, 3 Strob. (S. C.) 144; Taylor *v.* Doremus, 1 Harrison (N. J.) 473; Stone *v.* Graves, 8 Mo 148 (40 Am Dec. 131); State *v.* Stalcup, 2 Ire. (N. C.) 30.

[1] Citing State *v.* Porter, 2 Tread. (S. C.) 694; People *v.* Coon, 15 Wend. (N. Y.) 277; State *v.* Odell, 8 Blackf. (Ind.) 396; Reg. *v.* Badger, 6 Jur. 994; Commonwealth *v.* Rodes, 6 B. Mon. (Ky.) 171; Lining *v.* Bentham, 2 Bay (S. C.) 1; State *v.* Johnson, *Id* 385; State *v.* Gardner, 2 Mo. 23; State *v.* Glasgow, Cam. & N. (N. C.) 38 (2 Am. Dec. 629); Cooper *v.* Adams, 2 Blatchf. (Ind.) 294; People *v.* Norton, 7 Barb. (N. Y.) 477; Rex *v.* Phelps, 2 Keny. 570; Rex *v.* Okey, 8 Mod. 45; Rex *v.* Allington, 2 Stra. 678; Garnett *v.* Ferrand, 6 B. & C. 611; Rex *v.* Webb, 1 W. Bl. 19; Rex *v.* Halford, 7 Mod. 193; Rex *v.* Seaford, 1 W. Bl. 432; Rex *v.* Lediard, Say. 242; Cope *v.* Ramsey, 2 Heisk. (Tenn.) 197; Downing *v.* Herrick, 47 Me. 462.

In State *v.* Glasgow, Cam & N. (N. C.) Conf. Rep. 38, 2 Am. Dec. 629, *supra*, it is said: "If a public officer, intrusted with definite powers, to be exercised for the benefit of the community, wickedly abuses or fraudulently exceeds them, he is punishable by indictment, although no injurious effect results to an individual from his misconduct. The crime consists in the public example, in perverting those powers to the purposes of fraud and wrong, which were committed to him as instruments of benefit to the citizens and of safety to their rights."

[2] Citing Pratt *v.* Gardner, 2 Cush. (Mass.) 63, (48 Am. Dec. 652); Floyd *v.* Barker, 12 Coke 23, 25; Cunningham *v.* Bucklin, 8 Cow. (N. Y.) 178, (18 Am. Dec. 432); Garnett *v.* Ferrand, 6 B. & C. 611; Tyler *v.* Alford, 38 Me. 530; Furr *v.* Moss, 7 Jones, (N. C.) 525; Kelley *v.* Dresser, 11 Allen (Mass.) 31; Weaver *v.* Devendorf, 3 Denio (N. Y.) 117; Steele *v.* Dunham, 26 Wis. 393.

[3] Citing Story Const. § 795; 1 Kent Com. 235, note; Lord Brougham in Ferguson *v.* Kinnoull, 9 Cl. & F. 251; Mr. Justice Coleridge, in Howard *v.* Gosset, May Parl. Law, 2d ed. 151.

[4] Citing 1 Hawk. P. C. Curw. ed.

jurors,[1] and probably such of the high officers of each of the governments as are intrusted with responsible discretionary duties,[2] are not liable to an ordinary criminal process, like an indictment, for official doings however corrupt. There is some apparent authority for including with them justices of the peace, in respect of things judicial, and within their jurisdiction;[3] but the plain weight of authority, probably of reason also, excludes them; holding them liable to the ordinary criminal processes, though not to the civil as we have seen, in cases of corruption, not of mere mistake or error."[4]

§ 1024. **Officer de Facto liable.**—For malfeasance in office the officer *de facto* is liable as though he were *de jure*.[5]

§ 1025. **Liability for particular Offenses.**—A few particular offenses may deserve particular mention in this connection. Thus, the public officer, whether he be such *de jure* or *de facto*,[6] may be punished criminally for—

Extortion—which is "the corrupt demanding or receiving,

p. 447, § 6; Yates *v.* Lansing, 5 Johns. (N. Y.) 282; 9 *Id.* 395 (6 Am. Dec. 290); Cunningham *v.* Bucklin, 8 Cow. (N. Y.) 178; Hamond *v.* Howell, 2 Mod. 218; Floyd *v.* Barker, 12 Coke 23, 25.

[1] Citing 1 Hawk. P. C. Curw. ed. p. 447, § 5; Yates *v.* Lansing, 5 Johns. (N. Y.) 282, 293; yet see Rex *v.* Bynon, 2 Show. 302; Wyld *v.* Cookman, Cro. Eliz. 492.

[2] Citing 4 Bl. Com. 121; 2 Woodd. Lect. 355.

[3] Citing State *v.* Campbell, 2 Tyler (Vt.) 177; Yates *v.* Lansing, 2 Johns. (N. Y.) 282; Floyd *v.* Barker, 12 Coke 23, 25.

[4] Citing Wallace *v.* Commonwealth, 2 Va. Cas. 130; Commonwealth *v.* Alexander, 4 Hen. & Munf. (Va.) 522; Rex *v.* Borron, 3 B. & Ald. 432; Rex *v.* Harrison, 1 East. P. C. 382; Rex *v.* Seaford, 1 W. Bl. 432; Rex *v.* Smith, 7 T. R. 80; Rex *v.* Fielding, 2 Bur. 719; Rex *v.* Allington, 1 Stra. 678; Lord Brougham in Ferguson *v.* Kinnoull, 9 Cl. & F. 251, 290; Rex *v.* Okey, 8 Mod. 45; Rex *v.* Phelps, 2 Keny 570; Rex *v.* Davis, Lofft. 62; *In re* Fentiman, 4 Nev. & M. 126; Rex *v.* Brooke, 2 T. R. 190; Rex *v.* Jones, 1 Wils. 7; Rex *v.* Cozens, 2 Doug. 426; Jacobs *v.* Commonwealth, 2 Leigh. (Va.) 709; Rex *v.* Angell, Cas. temp. Hardw. 124; State *v.* Gardner, 2 Mo. 23; Lining *v.* Bentham, 2 Bay (S. C.) 1; People *v.* Coon, 15 Wend. (N. Y.) 277; State *v.* Porter, 2 Tread. (S. C.) 694; Rex *v.* Justices, Say. 25; Rex *v.* Baylis, 3 Bur. 1318; Rex *v.* Jackson, Lofft. 147; Rex *v.* Wykes, Andr. 238; Rex *v.* Harries, 13 East 270; Rex *v.* Bishop, 5 B. & Ald. 612; Reg. *v.* Jones, 9 Car. & P. 401; State *v.* Porter, 3 Brev. (S. C.) 175.

[5] State *v.* McEntyre, 3 Ired. (N. C.) 171; State *v.* Cansler, 75 N. C. 442; State *v.* Long, 76 N. C. 254; Kitton *v.* Fag, 10 Mod. 288.

[6] State *v.* McEntyre, 3 Ired. (N. C.) 171, 174.

by a person in office, of a fee for services which should be performed gratuitously; or, where compensation is permissible, of a larger fee than the law justifies, or a fee not due;"[1] or, under appropriate statutes, for—

Embezzlement—which is the fraudulent appropriation of property by a person to whom it has been intrusted;[2] or for

Wilful Disregard of Duty, an offense whose character is sufficiently indicated by its name.[3]

[1] Bishop Crim. Law, § 390, *et seq.* Absence of corrupt intent no excuse in an action against an officer for a statutory penalty for taking illegal fees: Cobbey *v.* Burks, 11 Neb. 157, 38 Am. Rep. 364.

[2] Fortenberry *v.* State, 56 Miss. 286; State *v.* Goss, 69 Me. 22.

[3] State *v.* Kern, — N. J. —, 17 Atl. Rep. 114.

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