CHAPTER IX.

MUNICIPAL ELECTIONS AND OFFICERS.

§ 193 (133). **Subject outlined.** — In considering the Creation and Constitution of Municipal Corporations, we have now reached, in its order, the subject of MUNICIPAL ELECTIONS AND OFFICERS. It will be treated under the following heads: —

1. Municipal Popular Elections — secs. 195–199.
2. Special Tribunal to determine Election Contests for Municipal Offices — secs. 200–205.
3. Power to create and appoint Municipal Officers — secs. 206–213.
4. Oath and Official Bond of Municipal Officers — secs. 214–216.
5. Duration of Official Term of Municipal Officers — secs. 217–221.
6. Vacancies in Municipal Offices — sec. 222.
7. Refusal to serve in Municipal Offices — sec. 223.
8. Resignation of Municipal Officers — secs. 224–228.
9. Compensation of Municipal Officers — secs. 229–234.
10. Liability of the Corporation to the Officer. Right of Officer to salary — sec. 235.
11. Liability of the Officer to the Corporation and to Others — sec. 236.
12. Amotion and Disfranchisement — secs. 238–256.

§ 194. **Municipal Popular Elections.** — *Elections must be held at the time and place provided by the charter or by statute.* Where the law fixes no time, but leaves the time and place to be fixed by some authority named therein, it is essential to the validity of the election that it be called and the time and place thereof fixed by the agency designated by law, and none other; as where the mayor and city council are the designated authority, neither the mayor alone nor the council alone has power to call such an election; if either neglect its duty, *mandamus* is the remedy.[1]

[1] Stephens *v.* People, 89 Ill. 337; Glencoe *v.* People, 78 Ill. 382; Dickey *v.* Hurlbut, 5 Cal. 343; People *v.* Murray, 15 Cal. 221; People *v.* Harvey, 58 Cal. 337; Juker *v.* Commonwealth, 20 Pa. St. 484; Chadwick *v.* Melvin, 68 Pa. St. 333; Knowles *v.* Yates, 31 Cal. 82; Clarke *v.* Board, &c., 27 Ill. 310; Miller *v.* English, 1 Zabr. (21 N. J. L.) 317; Marshall *v.* Cook, 38 Ill. 44; Marshall *v.* Kerns, 2 Swan (Tenn.), 68; Force *v.* Batavia, 61 Ill. 99; Foster *v.* Scarf, 15 Ohio St. 535. As to *mandamus* to compel the holding of an election, see *post*, secs. 197, 838, 839. If such an election is held it is void, and cannot be ratified by the municipal authorities. Stephens *v.* People, *supra*. An election is not complete and the candidate is not qualified to serve unless the requirements of the statutes providing a mode for determining and declaring the result of the election have been complied with. People *v.* Crissey, 91 N. Y. 616; People *v.* North, 72 N. Y. 124 (1878).

§ 195 (134). **Ballot; Qualification of Voters; Residence.** — Elections by the people, with exceptions in a few States, are by *folded or secret ballot*, and not open or *viva voce*.[1] The *qualifications of electors or voters* are fixed by the Constitution and laws, and cannot be changed by any ordinance or act of the corporation.[2] *Residence for a certain period within the municipality* is almost invariably required in express terms, as one of the qualifications of the right to vote at elections therein and as one of the conditions of eligibility to hold a municipal office. Non-residents of the corporation have, however, been held competent to be elected to office when residence was not expressly required, but the decisions cannot, perhaps, be

[1] Cooley, Const. Lim. chap. xvii. 598, where the subject of popular elections, the right to participate therein, the conditions necessary to the exercise of the right, the manner of voting, the conduct and sufficiency of elections are satisfactorily presented. The rules and doctrines deduced from the cases are, in general, applicable to popular municipal elections. *Ante*, sec. 39. A ballot implies absolute secrecy, and where the Constitution of a State declares that "all elections by the people shall be by ballot," the legislature cannot by law require the outside of the ballot to be numbered so as to correspond with the number placed opposite the name of the voter on the poll list. Williams *v.* Stein, 38 Ind. 89 (1871); s. c. 10 Am. Rep. 97.

In 1872, Parliament passed a *Ballot Act*, which with modifications is embraced in the Municipal Corporations Act of 1882, 45 and 46 Vic. chap. 50, referred to in a previous chapter. In 1869, it passed a Municipal Corporations Election Act, and in 1872 the Corrupt Practices (Municipal Elections) Act, and in 1877 the Municipal Corporations New Charters Act, and in 1878 the Registration Act, by which the subject of elections is minutely regulated. These Acts contain many provisions which are worth the study of the American legislator. Pol. Science Quarterly, vol. iii. 664–676 (Decr., 1888); *Ib.* vol. iv. p. 204 *et seq.* (June, 1889).

[2] Petty *v.* Tooker, 21 N. Y. 267; Commonwealth *v.* Woelper, 3 Serg. & Rawle (Pa.), 29; People *v.* Phillips, 1 Denio (N. Y.), 388; Rex *v.* Spencer, 3 Burr. 1827; Rex *v.* Mayor of Weymouth, 7 Mod. 371; Newling *v.* Francis, 3 T. R. 189; Rex *v.* Chitty, 5 Ad. & E. 609; Rex *v.* Bumstead, 2 B. & Ad. 699. The provision of the Constitution that "every male person twenty-one years old, resident in the State twelve months and in the county *thirty* days, shall be an elector," applies in corporated cities, and disables the legislature from requiring *ninety* days residence in a city as a qualification for voting for city officers. People *v.* Canaday (charter of Wilmington), 73 N. C. 198 (1875); s. c. 21 Am. Rep. 465. *Ante*, sec. 39, note; *post*, sec. 207. A charter provision requiring the *registration of the voters* in a city held constitutional. McMahon *v.* Savannah, 66 Ga. 217. As to the qualifications of voters for city officers under the Constitution of *Rhode Island*, see *In re* the Newport Charter, 14 R. I. 655.

said to conclude the point,[1] and, if extended to the higher offices, are hardly consistent with the fundamental idea of municipal or local self-government.

[1] Municipal officers may be elected from non-residents of the corporation when there is no statute or Constitution prohibiting it, particularly when the office to be filled is one requiring professional skill, and not representative or legislative in its character. State *v.* Blanchard (city surveyor), 6 La. An. 515 (1851). The conclusion was reached with hesitation, but the whole court concurred. *Ib.* State *v.* George, 23 Fla. 585 (1887). So in The State *v.* Swearingen, 12 Ga. 23 (1852), it was decided where the charter of the town provided "for the election of city officers by the people of the city qualified to vote," and was silent as to requiring the officers to be residents, that a person might legally be elected and qualified who was not a resident of the place. Residence as a qualification for municipal office. See Commonwealth *v.* Jones, 12 Pa. St. 365.

As to residency and inhabitancy, and who are residents. Cohen *v.* Wigfall, 8 Rich. Law, 237 ; 2 *Ib.* 489 ; Gildersleeve *v.* Alexander, 2 Speer (S. C.), 298 ; Seay *v.* Hunt, 55 Tex. 545. In England by the *Municipal Corporations Act* (sec. 9), inhabitant householders resident within the borough, or within seven miles of the borough, and rated to the relief of the poor, are made burgesses or citizens. Before that act was passed, residence in the freeman or citizen was sometimes required to render him eligible to office, although non-residents, wherever residing, might, by a similar perversion of the purposes of a municipal corporation, be admitted to freedom or membership, unless expressly restrained by the charter ; and if residence was expressly required as a condition of eligibility, it was not necessary that the officer should continue to reside in the place while holding the office. Not only so, but it was held that where residence was necessary as a qualification during office, it was not, by implication, necessary that the person elected should have been a resident at the time of the election. And when inhabitancy was requisite, it meant not merely residence, but keeping a house within the place, and paying scot and lot. Willcock on Munic. Corp. 188, pl. 472 ; *Ib.* 191, pl. 481 ; *Ib.* 193, 488 ; Rex *v.* Monday, Cowp. 539 ; Rex *v.* Mallet, 2 Barnard. 408 ; Rex *v.* Cambridge, 4 Burr. 2008 ; Rex *v.* Heath, 1 Barnard. 417. These rules seem to the author of very doubtful application in this country, since here all of the inhabitants are members of the corporation, and non-residents cannot become such. See on this point opinion of *Read*, J., in People *v.* Canaday, *supra*. *Ante*, chap. 1. And, in general, it may be said that *a person is an inhabitant or resident* who has his domicile or home in the place ; but it is foreign to the purpose of this work to enter into the difficult questions which have arisen with respect to residency and domicile. Hinds *v.* Hinds, 1 Iowa, 36 ; Story, Confl. Laws, sec. 43 ; Putnam *v.* Johnson, 10 Mass. 488 ; Thorndike *v.* Boston, 1 Met. (Mass.) 245. Public officers *vacate their office by permanent removal* from territorial limits of the corporation. Barre *v.* Greenwich, 1 Pick. (Mass.) 120 ; Rumsey *v.* Campton, 16 N. H. 567 ; Giles *v.* School District, 11 Fost. (31 N. H.) 304 ; *infra*, sec. 228. But a *temporary removal* with an intention to return, will not, of itself, have this effect. Van Orsdall *v.* Hazard, 3 Hill (N. Y.), 243 (1842) ; People *v.* Metropolitan Police Board, 19 N. Y. 201 ; Lyon *v.* Commonwealth, 3 Bibb (Ky.), 430 ; Rex *v.* Exeter, Comb. 197 ; Hannon *v.* Grizzard, 89 N. C. 115.

"Nice questions," says Mr. Harrison (Munic. Manual for Upper Canada, 2d ed. 60, note), "arise as to when a party can or cannot be said to be a *resident* of a municipality." Attorney-General *v.* Parker, 3 Atk. 576 ; Etherington *v.* Wilson, L. R. 1 Ch. Div. 160 ; King *v.* Foxwell, L. R. 3 Ch. Div. 518. A man cannot, within the meaning of the municipal laws of Canada, be said to be resident in *two* municipalities at the same time. Marr *v.* Vienna, 10 Upper Can. L. J. 275. A man's residence is where his home is situate, — where his family live. The King *v.* Inhabitants of North Curry, 4 B. & C. 959. An occasional absence from his home to attend to business in another municipality does not make his home less his residence. Withorn *v.* Thomas, 7 M. & G. 1. Where A. had a dwelling-house at Bowmanville, where his wife and family lived, but had a saw-mill and store and was postmaster in the township of Cartwright, which occasioned him frequently to visit that place, and who, while there, used to board with one of his men in a house owned by himself, — *Held*, that after voting in Bowmanville, he had no right to vote in Cartwright. The Queen, *ex rel.* Taylor *v.* Cæsar, 11 Upper Can. Q. B. 461. *Infra*, sec. 198, note. Mere colorable residence is in no case sufficient. The King *v.* Duke of Richmond, 6 T. R. 560. Each case must, to a great extent, depend on its own circumstances. As to what is sufficient, see The King *v.* Sargeant, 5 T. R. 466 ; Bruce *v.* Bruce, 2 B. & P. 229 ; The King *v.* Mitchell, 10 East, 511 ; Withorn *v.* Thomas, 7 M. & G. 1 ; The Queen, *ex rel.* Forward *v.* Bartels, 7 Upper Can. C. P. 533 ; Queen *v.* Boycott, 14 L. T. N. S. 599 ; Queen *v.* Exeter, L. R. 4 Q. B. 110 ; Manning *v.* Manning, L. R. 2 P. & D. 223 ; Taylor *v.* Parish, &c., L. R. 6 C. P. 309 ; Bond *v.* St. George, L. R. 6 C. P. 312 ; Queen *v.* St. Ives, L. R. 7 Q. B. 467 ; Durant *v.* Carter, L. R. 9 C. P. 261 ; Ford *v.* Pye, L. R. 9 C. P. 269 ; Ford *v.* Hart, L. R. 9 C. P. 273 ; Wilton *v.* Falmouth, 3 Shep. 479 ; State *v.* Decasinova, 1 Tex. 401 ; State *v.* Frost, 4 Harring. 558 ; Fry's Election, 71 Pa. St. 302 ; s. c. 10 Am. Rep. 698.

[1] Spear *v.* Robinson, 29 Me. 531 (1849) ; State *v.* Swearingen, 12 Ga. 23 (1852) ; State *v.* Gastinel, 20 La. An. 114 (1868) ; see also, State *v.* Newman, 91 Mo. 445 ; State *v.* Trumpf, 50 Wis. 103.

[2] State *v.* Swearingen, 12 Ga. 23 ; Sublett *v.* Bedwell, 47 Miss. 266 ; s. c. 12 Am. Rep. 338 ; State *v.* Giles, 1 Chand. (Wis.) 112 ; State *v.* Smith, 14 Wis. 497 ; Saunders *v.* Haynes, 13 Cal. 145 ; State *v.* Gastinel (under charter), 20 La. An. 114 ; Cooley, Const. Lim. 620 ; Commonwealth *ex rel.* McLaughlin *v.* Cluley (Sheriff), 56 Pa. St. 270 (1868) ; People *v.* Clute, 50 N. Y. 451 (1872) ; s. c. 10 Am. Rep. 508 ; Wood *v.* Bartling, 16 Kan. 109, 114 (1876). *Infra*, secs. 198, note, 199, note. The following points are ruled in People *v.* Clute, *supra*. Where a majority of the electors, through ignorance of the law or the fact, vote for one ineligible to the office, the votes are not nullities ; but while they fail to elect, the office cannot be given to the qualified person having the next highest number of votes. The election is a failure, and a new election must be had. A minority of the whole body of qualified electors may elect to an office where the majority decline to vote, or where they vote for one who is ineligible to the office, knowing of the disqualification. Notice of the disqualifying fact, and of its legal effect, may be given so directly to the voter as to charge him with actual knowledge of the disqualification ; or the disqualifying fact may be so patent or notorious as that his knowledge of the ineligibility may be presumed as matter of law. But not only the fact which disqualifies, but also the rule or enactment of law which makes it thus

§ 196 (135). **Electing disqualified Person.** — The *choice of a disqualified person* is ineffectual. Thus, if the law requires freeholders to be chosen for certain offices, the election of a person not a freeholder is void.[1] But unless the votes for an ineligible person are expressly declared to be *void* the effect of such a person receiving a majority of the votes cast is, according to the weight of American authority, and the reason of the matter (in view of our mode of election, without previous binding nominations, by secret ballot, leaving each elector to vote for whomsoever he pleases), that a new election must be held, and not to give the office to the qualified person having the next highest number of votes.[2]

§ 197 (136). **Unauthorized Election; Notice.** — Where it is discretionary with the municipal authorities whether they will hold an election or not, votes at an *unauthorized election* are simply nullities.[1] Elections *fixed by law at a certain time and place* may be legally holden, although *notice* has not been published or given; but if the time be not defined by statute, and is to be fixed by notice, the notice required is imperative.[2] Time and place are generally essential, but many of the details as to the conduct of elections are usually regarded as directory.[3]

effectual, must be brought home so clearly to the knowledge or notice of the elector as that to give his vote therewith indicates an intent to waste it in order to render his vote a nullity.

But in *Indiana* the view is taken that, whether an election, because of the ineligibility of the candidate receiving the highest number of ballots, is a failure, and must be held over, or whether the highest eligible candidate is elected, depends upon circumstances: 1. If the candidate receiving the highest number of votes is ineligible, but from a cause *unknown* to the voters, and which they were *not bound to know*, — as, for example, infancy, want of naturalization, and the like, — the result is a failure, and there must be another election. 2. If the voters know, or are bound to know, the ineligibility of a candidate, the election is not a failure, as the eligible candidate receiving the highest number of votes is legally elected. 3. Where the ineligibility of a candidate arises from his holding, or having held, a public office, the people within the jurisdiction of such office are held in law to know — are chargeable with notice of — such ineligibility, and votes given for such a candidate are of no effect, and his highest eligible competitor is elected. Gulick *v.* New, 14 Ind. 93, 102 (1860), *per Perkins*, J.; commenting on State *v.* Swearingen (case of non-residency), 12 Ga. 23; Price *v.* Baker, 41 Ind. 572 (1873); s. c. 13 Am. Rep. 346, where the extent of this rule is stated by *Downey*, J. Opinion of Judges, 38 Me., appendix, where a portion of the people voted for a person not in being. State *v.* Giles, 1 Chand. (Wis.) 112.

In *England*, candidates are previously nominated and known, and the votes, until recently, have been open, and there are cases there which decide or favor the proposition, that votes for a disqualified person, given after notice of disqualification, are thrown away, and the other candidate is elected. Grant on Corporations, 203–208, and cases cited. But see, as to disqualification and notice, Regina *v.* Hiorns, 7 Ad. & E. 960; Regina *v.* Councillors of Derby, 7 Ad. & E. 419; and particularly Regina *v.* Mayor of Tewkesbury, Law Rep. 3 Q. B. 629 (1868); Regina *v.* Ledyard, 8 Ad. & E. 535; Rawlinson on Corporations (5th ed.), 64, note, and authorities. "The principle of these decisions," says the London Law Times, January 25, 1873, "must be materially affected by secret voting." This subject was much discussed in the debates before the Electoral Commission created by Congress to decide the presidential contest of 1876. In 1872, Parliament passed a Ballot Act, applicable to municipalities. Ballot papers are to be provided by the mayor, and the form thereof is prescribed.

[1] Opinions of Judges, 7 Mass. 525; Same, 15 Mass. 537; Cooley, Const. Lim. 603; People *v.* Mathewson, 47 Cal. 442 (1874); George *v.* Oxford Township, 16 Kan. 72, 80 (1876); Force *v.* Batavia, 61 Ill. 99; Marshall *v.* Silliman, 61 Ill. 218; Wiley *v.* Silliman, 62 Ill. 170; Harding *v.* R. I. & St. L. R. R. Co., 65 Ill. 90; People *v.* Santa Anna, 67 Ill. 57. *Ante*, sec. 194.

[2] Cooley, Const. Lim. 303, and cases cited; People *v.* Brenham, 3 Cal. 477 (1851); People *v.* Fairbury, 51 Ill. 149 (1869). *Computation of time of notice.* Queen *v.* Justices, 8 Ad. & E. 173; Mitchell *v.* Foster, 9 Dowl. P. C. 527; Warsop *v.* Hastings, 22 Minn. 437.

[3] Dickey *v.* Hurlbut, 5 Cal. 343; People *v.* Knight (essentialness of place), 13 Mich. 424; Gass *v.* State, 34 Ind. 425 (1870). Where the legislature provided that *the polls* of the different wards *should be kept open* until 10 o'clock P. M. and they were closed at 8 o'clock, the election was set aside. Pennsylvania District Election, 2 Par. (Pa.) 526; Clark's Case, *Ib.* 521. Illegal *adjournment* of election to a *different place* from the one designated in the notice. Commonwealth *v.* Commissioners, &c., 5 Rawle (Pa.), 75. Where an election is held on a *day subsequent* to that named in the charter, the acts of officers thus elected are valid, as respects the public and third persons, and cannot be collaterally inquired into. Coles County *v.* Allison, 23 Ill. 437, distinguished from Haynes *v.* Washington County, 19 Ill. 66, and approved in People *v.* Fairbury, 51 Ill. 149 (1869). As to election held on a day prior to the date provided by law, see People *v.* Keeling, 4 Col. 129. Title of officers elected before the legal incorporation of a place may be validated by the legislature. State *v.* Kline, 23 Ark. 587; *post*, secs. 256, 276, 892, note.

It is a canon of election law *that an election is not to be set aside for a mere informality or irregularity* which cannot be said in any manner to have affected the result of the election. Commonwealth *v.* Smith, 132 Mass. 289; Walker *v.* West Boylston, 128 Mass. 550; The Queen *v.* The Rector of St. Mary, Lambeth, 8 Ad. & E. 356; Regina, *ex rel.* Walker *v.* Mitchell *et al.*, 4 Upper Can. P. R. 218; Monk Election, *In re*, 32 Upper Can. Q. B. 147; The Queen *v.* Plenty, L. R. 4 Q. B. 346; The Queen *v.* Ward, L. R. 8 Q. B. 210; Regina *v.* Cousins, 28 L. T. N. S. 116; Regina, *ex rel.* Harris *v.* Bradburn, 6 Upper Can. P. R. 308; Regina, *ex rel.* Preston *v.* Touchburn, *Ib.* 344; Shaw *v.* Thompson, L. R. 3 Ch. Div. 233; People *v.* Cook, 14 Barb. (N. Y.) 259; Clifton *v.* Cook, 7 Ala. 114; Truehart *v.* Addicks, 2 Tex. 217; Dishon *v.* Smith, 10 Iowa, 212; Atty. Gen. *v.* Ely, 4 Wis. 420; State *v.* Jones, 19 Ind. 356; People *v.* Higgins, 3 Mich. 233; Gorham *v.* Campbell, 2 Cal. 135; Taylor *v.* Taylor, 10 Minn. 112; Bourland *v.* Hildreth, 26 Cal. 161; Day *v.* Kent, 1 Oreg. 123; Piatt *v.* People, 29 Ill. 54; Ewing *v.* Filley, 43 Pa. St. 384; Howard *v.* Shields, 16 Ohio St. 184; McKinney *v.* O'Connor, 26 Tex. 5; Sprague *v.* Norway, 31 Cal. 173; Fry *v.* Booth, 19 Ohio St. 25. But where it appears that the irregularity is of such character and of such magnitude that it may have affected the result, the election ought to be set aside. Hackney Election, 31 L. T. N. S. 69; Woodward *v.* Sarsons, L. R. 10 C. P. 743; Mather *v.* Brown, L. R. 1 C. P. Div. 596; Johnson *v.* Lambton, 40 Upper Can. Q. B. 297; Harrison's Municipal Manual, 4th ed.

"*If rioting takes place* to such an extent that ordinary men, having the ordinary nerve and courage of men, are thereby prevented from recording their votes, the election is void by the common law, for the common law provides that an election should be free in the sense that all persons shall have an opportunity of coming to the poll and voting without fear or molestation." Nottingham, *In re*, 1 O'M. & H. 245; Stafford, *In re*, *Ib.* 234; Drogheda, *In re*, *Ib.* 252. The freedom of elections is of the utmost importance. Any attempt to interfere with the electors in the peaceable and quiet exercise of their rights or to improperly influence them against their judgment or desire is a crime; and in addition to the ordinary punishment of the crime of bribery of an elector it is a constitutional provision in many States that whoever shall be convicted of the crime shall forfeit the right to any office of profit or trust under the State. McCrary, Elections, sec. 432.

[1] Skerritt's Case, 2 Par. (Pa.) 516; Boileau's Case, 2 Par. (Pa.) 505; Carpenter's Case, 2 Par. (Pa.) 537; New Orleans *v.* Graihle, 9 La. An. 573; Clifton *v.* Cook, 7 Ala. 114; People *v.* Cook, 14 Barb. (N. Y.) 259; 8 N. Y. 67; Regina *v.* Touchburn, 6 Upper Can. P. R. 344; United States *v.* Memphis, 97 U. S. 284, approving text. The rule as therein stated is regarded by Mr. Justice *Cooley*, as "an

Courts are anxious rather to sustain than to defeat the popular will.[1]

§ 198 (137). **Subject illustrated.** — Thus, *an inaccurate designation of the name of the office* voted for, — as, for example, "Police Justice," instead of "Police Magistrate" (the term used in the statute), — will not render the votes invalid, where the legislative provisions make clear the intention of the voters in thus casting their ballots, — to which intention effect should be given.[1] But if a specific number of officers only can be chosen, — for example, *four*, — ballots containing the names of *more* than four persons for the office in question must be rejected. Any other doctrine might result in giving the elector two votes. There are usually two competing tickets, and if an elector can, in the case supposed, cast a ballot containing *five* names, he may one of *eight*, and thus vote (if he chooses to insert the names) for both tickets.[2]

eminently proper one, and to furnish a very satisfactory test of what is essential, and what not, in election laws." Const. Lim. 618. See, also, as to charter elections and returns, Heath, *In re*, 3 Hill (N. Y.), 42, 53; People *v.* Stevens, 5 Hill, 616; Morgan *v.* Quackenbush, 22 Barb. (N. Y.) 72. Courts will not *enjoin municipal elections* unless the power and right to do so plainly exist. Smith *v.* McCarthy, 56 Pa. St. 359; *post*, sec. 308, note. *The legislature may ratify the title to an office*, in which case it cannot be questioned on *quo warranto*. People *v.* Flanagan, 66 N. Y. 237 (1876). *Acts of officers de facto*, *post*, secs. 221, note, 256, 276, 763, note, 892, note; compensation or salary of officers *de facto*. Samis *v.* King, 40 Conn. 298 (1873).

[1] People *v.* Matteson, 17 Ill. 167 (1855).

[2] People *v.* Loomis, 8 Wend. (N. Y.) 396 (1832); People *v.* Seaman, 5 Denio (N. Y.), 409; State *v.* Griffey, 5 Neb. 161 (1876). Where only *one vacancy* exists, votes given for *two persons jointly* are thrown away. Rex *v.* Mayor of Leeds, 7 Ad. & E. 963; and in this case it was held that a third candidate chosen by a single regular vote was elected; but as to votes being thrown away, see *supra*, sec. 196. Where, by an erroneous construction of the act, an election has been held for but one councillor, instead of two, the candidate second on the poll cannot have a *mandamus* to admit him to the office. Regina *v.* Hoyle, H. L. 1855, cited in Rawl. on Corp. 65, note. His remedy is, by *mandamus*, to have a new election held for councillor, or (if the office be filled) by a *quo warranto*. *Ib.* The *voting papers* (corresponding in function to the American ballot, except that it is to be signed by the voter and openly voted) must distinguish between different classes of candidates; and hence where an election of four councillors had taken place on the 1st of November, three of whom were to supply ordinary vacancies, and one an extraordinary vacancy, but no distinction had been made between them in the notice of election, in the voting papers, or in publishing the names of the persons elected, the election was irregular and void. Regina *v.* Rowley, 3 Q. B. 143; s. c. in Exchequer Chamber, 6 Q. B. 668. See sec. 47, Municipal Corporations Act, and also 7 Will. IV. and 1 Vict. chap. lxxviii. sec. 11. *Patterson*, J., says: "There is no objection to the votes all being given on the same paper, if a proper distinction were made." Regina *v.* Rowley, *supra;* and see Reg. *v.* Winchester, 7 Ad. & E. 215. By the English Municipal Corporations Act of 1835, sec. 32, the voting paper is required to contain "the *Christian* and surnames of the persons for whom the burgess votes, with their respective *places of abode*, such voting paper being previously *signed* with the *name* of the burgess voting and the name of the street in which the property for which he appears to be

§ 199 (138). **Effect of Illegal Votes being received.** — Receiving *illegal or improper votes* will not alone vitiate an election. It must be shown affirmatively, in order to overturn the declared result, that the wrongful action *changed* it. This rule applies to corporation elections as well as others.[1]

§ 200 (139). **Special Tribunal to decide Election Contests for Municipal Offices.** — *A constitutional provision* that the *judicial power* of the State shall be vested in a supreme court and inferior courts, does not disable the legislature, in creating municipal corporations, from providing that the *city council shall be the judge of the election of its mayor, members, and other officers*, and from prohibiting the ordinary courts of justice from inquiring into the validity of the determination of the city council.[2]

rated is situate." In construction of this section, it is held that the Christian name of the person voted for need not be written out in full; the contraction ordinarily used is sufficient. Regina *v.* Bradley, 3 E. & E. 634. But it seems that an initial letter only would not be sufficient. *Ib.* Though it would be in the signature of the voter. Regina *v.* Avery, 18 Q. B. 576; Regina *v.* Tart, 1 E. & E. 618. "Places of abode" held to mean places of residence, not of business. Regina *v.* Hammond, 17 Q. B. 772; *ante*, sec. 195; Regina *v.* Deighton, 5 Q. B. 896; Dav. & M. 682.

The Ballot Act of 1872, now embraced in the Municipal Corporations Act of 1882, prescribes the form of the ballot papers, and these are required to be furnished by the Mayor.

[1] Murphy, *In re*, 7 Cow. (N. Y.) 153 (1827); People *v.* Cicotte, 16 Mich. 283 (1868); First Parish *v.* Stearnes, 21 Pick. (Mass.) 148; Judkins *v.* Hill, 50 N. H. 140 (1870); Johnston *v.* Charleston, 1 Bay (S. C.), 441 (1795). In this last case the city council was specially authorized to judge of elections of corporation officers, and the court, respecting a contest before the council, said: "If the bad votes be deducted from the highest candidate, and he still has a majority, his election is good; but if, after such deduction, the next candidate has an equal or greater number of votes than the other, and *it is doubtful* which candidate had the greatest number of valid votes, the council should send the matter back to the people." *Ante*, sec. 196, and note.

[2] Mayor, &c. *v.* Morgan, 7 Martin, La. (N. S.) 1; 9 *Ib.* (N. S.) 381 (1828); *infra*, secs. 202, note, 235, note, 244, 250, note. While the duty and power in the city council to adjudicate or decide cannot be delegated to a committee, it is competent for the council to appoint a committee to take testimony and to report the same and the facts to the council for its action thereon. Salmon *v.* Haynes, 50 N. J. L. 97 (1888). In Wammacks *v.* Holloway, 2 Ala. 31 (1841), a shrievalty contest, it was denied that it was within the constitutional power of the legislature to *deprive* a party claiming a public office *of the right to a jury trial* by making the summary or extra-judicial method conclusive. And to this effect was the opinion of two of the judges in The People *v.* Cicotte, 16 Mich. 283. Since elections to offices are not in the nature of contracts, there does not seem to be any substantial reason, in view of the plenary authority of the legislature over offices and officers, to doubt its power, in the absence of special constitutional restriction, to provide, prospectively, by a general act, the mode in which contests shall be determined. See Govan *v.* Jackson, 32 Ark. 553 (1877); State *v.* Fitzgerald, 44 Mo. 425 (1869); Ewing *v.* Filley, 43 Pa. St. 384; Commonwealth *v.* Leech, 44 Pa. St. 332; Cooley, Const. Lim. 276; *Ib.* 623, 624, note; Smith *v.* New York,

§ 201 (140). **Same subject.** — Where, by the charter, the *council are authorized to provide, by ordinance, a special tribunal* before which contested municipal elections shall be tried, and to provide the mode of procedure, it may pass such ordinance *after* an election has been held, and authorize it to determine contests arising out of a previous election. After such determination, *quo warranto* will lie against the party who was unsuccessful before the local tribunal, if he continue to claim and exercise the office.[1]

§ 202 (141). **Jurisdiction of the Courts of Law.** — *Common law courts of general and original jurisdiction* have the admitted power to inquire into the regularity of elections, corporate and others, by *quo warranto*, or an information in that nature, and, in certain cases, by *mandamus*. It is not unusual for charters to contain provisions to the effect that the *common council or governing body of the municipality "shall be the judge of the qualifications,"* or "*of the qualifications and election of its own members,*" and of those of the other officers of the corporation. What effect do such provisions have upon the jurisdiction of the superior courts? The answer must depend upon the language in which these provisions are couched, viewed in the light of the general laws of the State on the subjects of contested elections and *quo warranto*.[2] The principle is, that *the jurisdiction of the court remains* unless it appears with unequivocal certainty that the legislature intended to take it away. Language like that quoted above will not ordinarily have this effect, but will be construed to afford a cumulative or primary tribunal only, not an exclusive one. A provision that no court should take cognizance of

37 N. Y. 518; People *v.* Mahaney, 13 Mich. 481; Steele *v.* Martin, 6 Kan. 430; State *v.* Lewis, 51 Conn. 113; Williamson *v.* Love, 52 Tex. 335; Seay *v.* Hunt, 55 Tex. 545. If the charter provides that "the common council shall be the judge of the election and qualifications of its own members, and shall have the power to determine contested elections," its action under and pursuant to this power is final and not subject to review. People *v.* Harshaw, 60 Mich. 200.

When a city charter makes the *common council the final judges* of the election of aldermen, *mandamus* will not lie to compel them to reinstate one whom they had excluded without a proper hearing on the merits. People *v.* Fitzgerald, 41 Mich. 2; Alter *v.* Simpson, 46 Mich. 138. Where the charter makes the council the judges of the election or qualification of its members, the *power expires with the council which admits the member;* the question cannot be opened by a subsequent council. Doran *v.* De Long, 48 Mich. 552; *infra*, sec. 204, note. *Quorum of council, post*, sec. 278 *et seq.*

[1] State *v.* Johnson, 17 Ark. 407 (1856), (mayoralty contest). See *post*, chap. xxi., *quo warranto*.

[2] Text quoted and approved in Kendall *v.* Camden, 47 N. J. L. (18 Vroom) 64. The decision of a city council as to the *eligibility* of a member is not reviewable in a proceeding by *quo warranto*. Seay *v.* Hunt, 55 Tex. 545. See *ante*, secs. 200, 201; *post*, secs. 255, note, 892.

election cases by *quo warranto*, etc., would doubtless be sufficient to divest the jurisdiction of the judicial tribunals. And so, in general, of a provision that the council should have the *sole* or the *final* power of *deciding* elections.[1]

[1] Heath, *In re*, 3 Hill (N. Y.), 42, 52, and cases cited by *Cowen*, J., who is of opinion that no mere negative words, and that nothing less than *express words*, will oust the supervisory jurisdiction of the courts. *Infra*, secs. 204, note, 205, note. The amended charter of a city provided "that the board of councilmen shall be the *final* judges of the election returns, and of the validity of elections and qualifications of its own members." *Park*, J., says: "The statute in question was clearly intended to apply to cases of this kind. It makes the common council of the city final judges of the election returns and qualifications of its members. By the use of the word 'final' the legislature intended to divest the superior court of jurisdiction in such cases, and make the common council the sole tribunal to determine the legality of the election of its members." Sellick *v.* Common Council, &c., 40 Conn. 359 (1873); citing, *inter alia*, Commonwealth *v.* Baxter, 35 Pa. St. 263; Commonwealth *v.* Leech, 44 Pa. St. 332; Lamb *v.* Lynd, 44 Pa. St. 336; Commonwealth *v.* Meeser, 44 Pa. St. 341; People *v.* Witherell, 14 Mich. 48; O'Docherty *v.* Archer, 9 Tex. 295. In Linegar *v.* Rittenhouse, 94 Ill. 208, and Oregon *v.* McKennon, 8 Oreg. 485, the rule referred to in the text is cited and applied. In *California*, when the charter of a city provides that the common council "shall judge of the qualifications, elections, and returns of their own members," the *council possesses the exclusive authority* to pass on the subject, and the courts have no jurisdiction to inquire into the qualifications, elections, or returns of members of the council. People *v.* Metzker, 47 Cal. 524 (1874). See, in support of the text, Grier *v.* Shackelford, Const. Rep. 642; State *v.* Fitzgerald, 44 Mo. 425 (1869); Commonwealth *v.* McCloskey, 2 Rawle (Pa.), 369 (two judges dissenting); Strahl, *In re*, 16 Iowa, 369 (1864); State *v.* Funck, 17 Iowa, 365 (1864); Kane *v.* People, 4 Neb. 509 (1876); Bateman *v.* Megowan, 1 Met. (Ky.) 533; Wammacks *v.* Holloway, 2 Ala. 31 (1841) (shrievalty contest); Hummer *v.* Hummer, 3 G. Greene (Iowa), 42; Macklot *v.* Davenport, 17 Iowa, 379; Gass *v.* State, 34 Ind. 424 (1870); State *v.* Marlow, 15 Ohio St. 114; distinguished, Kane *v.* People, 4 Neb. 509 (1876); *post*, chapters on *Quo Warranto, Mandamus*, and Remedies against Illegal Corporate Acts. Action of *board of canvassers* is not conclusive of the right of the party to an office, though it may deprive him, in the first instance, of a commission or certificate. *Quo warranto* lies notwithstanding the determination of the board of canvassers, on which full investigation may be had. State *v.* Governor, 1 Dutch. (N. J.) 331 (1856); State *v.* The Clerk, *Ib.* 354; People *v.* Kilduff, 15 Ill. 492; Cooley, Const. Lim. 623, and cases cited; Hadley *v.* Mayor, 33 N. Y. 603 (1865); Anthony *v.* Halderman, 7 Kan. 50 (1871).

Conformably to the views expressed in the text it has been decided by the Supreme Court of *Pennsylvania*, that the right given to *city councils to be the judges of the qualification* of their own members "in like manner as each branch of the legislature," does not preclude the jurisdiction of the courts to try the question of qualification by *quo warranto*, though the opinion of the profession seems to be otherwise, and it was otherwise held in the court below. Commonwealth *v.* Allen, 70 Pa. St. 465 (1872).

A special remedy given by statute is cumulative, and not exclusive of the ordinary jurisdiction of the courts, unless such be the manifest intention of the statute. Attorney-General *v.* Corporation of Poole, 4 Mylne & Cr. 17, overruling 2 Keen, 190; see, also, Attorney-General *v.* Aspinwall, 2 Mylne & Cr. 613. And hence a breach of a public trust by a municipal corporation is held, in England, to be cognizable in chancery, notwithstanding a special appeal be given in the particular matter to the lords of the treasury. *Ib.* Parr *v.* Attorney-General, 8 Cl. & F. 409; Attor-