§ 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-

§ 203 (142). **Same subject.** — Agreeably *to the rule just stated*, a clause in the charter of a municipal corporation, that the city council "shall be the judges of the election, returns, and qualifications of their own members, and of all other officers of the corporation," was held by the Supreme Court of Delaware *not to oust the Superior Court of the State* (invested with the usual powers of the King's Bench) *of its superintending jurisdiction over corporations*, and it was declared, if the council should erroneously decide that a person duly elected by the people to an office was not qualified to hold it, a *mandamus* might issue commanding them to admit him to the office.[1]

ney-General *v.* Corporation of Litchfield, 11 Beav. 120; see chapter on Remedies against Illegal Corporate Acts, *post*, sec. 910.

Jurisdiction and powers of courts of chancery. A court of chancery has no jurisdiction to enjoin the *holding of an election* by the people, and a writ issued for that purpose is void, and disobedience thereof will not subject a party to punishment as for a contempt of court. Darst *v.* People, 62 Ill. 306 (1872); Walton *v.* Develing, 61 Ill. 201 (1871). As to *jurisdiction of federal courts of equity* in respect of State or municipal offices, see *Re* Sawyer, 124 U. S. 200; *post*, secs. 205, 255, 275, 890, 906, note. *Courts of equity* have no inherent power to try *contested elections*, and have never exercised it except in cases where it has been conferred by express enactment or necessary implication therefrom. Dickey *v.* Reed, 78 Ill. 261 (1875). Where an election was held in a city on the question of whether the municipality should become incorporated under the general incorporation act for cities and villages, and a writ of injunction was issued out of the Circuit Court *enjoining the board of canvassers from canvassing the returns and declaring the result*, it was held that the Circuit Court, unaided by statute and exercising jurisdiction only according to the general usage and practice of courts of equity, had no power to issue the writ; that it was utterly void; that the canvassers were not bound to obey it, and could not be punished for contempt for refusing to do so. *Ib.* An injunction restraining a board of canvassers from proceeding to canvass and certify the result of an election until the further order of the judge granting the same, where the statute requires the board to proceed by a certain day, is unauthorized. State, *ex rel.* Bloxham *v.* State Board of Canvassers, 13 Fla. 55 (1869). Equity will not interfere, by injunction, to restrain persons from *exercising the functions of public offices* on the ground of the want of binding force in the law under which their appointments were made, but will leave that question to be determined at law. Sheridan *v.* Colvin, 78 Ill. 237 (1875). In this case it was sought to enjoin the city council from enforcing an ordinance on the sole ground that, if the ordinance was enforced, it would deprive the complainants of the functions of offices which they held in the city; and it was held that a court of chancery had no jurisdiction. *Ib. Infra*, secs. 245, 255, 275, and note. Jurisdiction in equity over *contested county seat* elections in *Illinois*. Dickey *v.* Reed, 78 Ill. 261 (1875); Shaw *v.* Hill, 67 Ill. 455 (1873).

The expenses of a municipal election must be borne by the municipality, and not in whole, or in part, by the county; but to a bill by resident taxpayers to restrain the city from paying the election officers for their services, such officers are necessary parties. Bingham *v.* Camden, 29 N. J. Eq. (2 Stew.) 464 (1878); Butcher *v.* Camden, *Ib.* 478; *post*, sec. 911 *et seq.*

[1] State *v.* Wilmington, 3 Harring. (Del.) 294 (1840); s. p. State *v.* Fitzgerald, 44 Mo. 426 (1869). So in *Iowa*, where the city charter provided that the council should be "the judge of the election and qualifications of its own members," but no ordinance had been passed prescribing any method of trial, it was held that *the mere provision in the charter* did not preclude a contestant from a resort

§ 204 (143). **Same subject.** — Where the *legislative intent* is clear *that the action of the council* in contested election cases *shall be final*, the court will not inquire into election frauds, since the council is the judge of this matter as of others pertaining to the election; but *the courts will inquire whether, in point of law*, there was an office or vacancy to be filled.[1]

§ 205 (144). **Special Statutory Jurisdiction held to exclude Quo Warranto.** — Where, by statute, the returns of all municipal elections

to an information in the nature of a *quo warranto*. State *v.* Funck (mayoralty contest), 17 Iowa, 365 (1864). In a previous case the same court decided that under a charter making the council "judges of the election, returns, and qualifications of their own members," it was competent for the council to pass a general ordinance providing for the trial of contested elections of city officers, and making the council the tribunal for the trial of the same, such an ordinance being consistent with the general laws of the State, which, in providing special tribunals for contesting State, county, and township offices, omitted to make any special provision for contested elections to municipal offices. Strahl, *In re*, 16 Iowa, 369 (1864) (mayoralty contest). See sec. 202, note. *Re* Sawyer, 124 U. S. 200.

[1] Commonwealth *v.* Leech, 44 Pa. St. 332 (1863); Commonwealth *v.* Meeser, *Ib.* 341. Construction of words making the number of members of the council from a ward depend upon "the *list* of the taxable inhabitants." *Ib.*; People *v.* Witherell, 14 Mich. 48; Tompert *v.* Lithgow, 1 Bush (Ky.), 176 (1866).

Pending legal proceedings, the court, in favor of the officer apparently entitled, *enjoined the adverse* claimant from attempting to take possession of the office. Ewing *v.* Thompson, 43 Pa. St. 384 (1862); Kerr *v.* Trego, 47 Pa. St. 16, 292 (1864), noted, *infra*, sec. 275. *Ante*, sec. 202, note; *infra*, sec. 255, note. *Certificate of election* is the *prima facie* written title to office, and remains so until regularly set aside or annulled. *Ib.*; *post*, sec. 275; People *v.* Thatcher, 55 N. Y. 525 (1874).

The *council, as board of canvassers*, cannot investigate the *legality* of an election, but are concluded by the returns of the judges; but the council, when *sitting as a tribunal* to judge of the election of members of their body, may go behind the returns and inquire into the fact as to who is elected. State *v.* Rahway, 33 N. J. L. 111 (1868). Under special charter the declaration and decision of the council as to who are elected, held essential to a complete election. People *v.* North, 72 N. Y. 124 (1878); People *v.* Crissey, 91 N. Y. 616. A charter provision making the board of aldermen the judge of the election, &c., of its own members, "subject, however, *to the review of any court of competent jurisdiction*," held not to oust the courts of jurisdiction or prevent them from entertaining original proceedings. People *v.* Hall, 80 N. Y. 117; McVeany *v.* Mayor, &c. of New York, 80 N. Y. 185, where the charter provided that the city council should "be the judges of the election and qualification of their own members," *without indicating an intention to make their action final*, it was held that the jurisdiction of the courts to try the question of such an election was not excluded. State *v.* Gates, 35 Minn. 385; *ante*, secs. 202, and note, 255, note. When a council, being by charter the sole judge of the election of its members, has investigated and seated a member, *it cannot reopen the matter* and order a second investigation. Kendell *v.* Camden, 47 N. J. L. (18 Vroom) 64; *supra*, sec. 200, note; *infra*, sec. 205, note. And where the charter *provided for contesting elections before the judge of the Circuit Court*, who was empowered "to pronounce judgment in the case according to the facts," it was held that his judgment was conclusive, and admissible in evidence in an action to recover the office. Davidson *v.* Woodruff, 68 Ala. 356.

were declared to be "subject to the inquiry and determination of the Court of Common Pleas upon the complaint of fifteen or more voters filed in said court within twenty days, and the court, in judging of such elections, was directed to proceed upon the *merits* thereof, and *determine finally* concerning the same according to the laws of the Commonwealth," this was held *to exclude the remedy by quo warranto* and all common-law remedies as to matters which might have been investigated in the special mode prescribed by the statute. The opinion was expressed that the judgment of the Common Pleas was final; that it could not be reversed by *quo warranto* or in any other collateral manner; and that even a *certiorari* would enable the appellate court to examine only the regularity of the proceedings of the Common Pleas, but not to examine the case on its merits as disclosed in the evidence.[1]

[1] Commonwealth *v.* Garrigues, 28 Pa. St. 9 (1857); Commonwealth *v.* Baxter, 35 Pa. St. 263; Commonwealth *v.* Leech, 44 Pa. St. 332; followed and approved, State *v.* Marlow, 15 Ohio St. 114; see Ewing *v.* Filley, 43 Pa. St. 386; Lamb *v.* Lynd, 44 Pa. St. 336. Ellison, *In re*, 20 Gratt. (Va.) 10, 29 (1870), commenting on Commonwealth *v.* Garrigues, *supra*. Function and powers of common council as election canvassers. Morgan *v.* Quackenbush, 22 Barb. (N. Y.) 72. A city council, under authority "to canvass returns, and determine and declare the result" of elections to municipal offices, *exhausts its power when it has once legally canvassed the returns and declared the result*, and it cannot at a subsequent meeting make a re-canvass and reverse its prior determination. Hadley *v.* Mayor, 33 N. Y. 603 (1865), *supra*, sec. 204, note. The rule stated in the text (sec. 202), that the original or superintending jurisdiction of the superior courts should not be held to be taken away by any language which does not expressly, or by unequivocal implication, show this to have been the legislative intention, is a salutary one, but seems in some cases not to have been very strictly observed. In *Texas*, where the statute conferred upon the county court the power to determine contested elections of county officers, and gave no right to appeal, it was considered to be the policy of the statute to secure an early determination of such disputes, and it was held that the judgment of the county court could not be revised either upon appeal or *certiorari*, and was final. O'Docherty *v.* Archer, 9 Tex. 295 (1852). The special mode provided by law for contesting elections must be followed. Dickey *v.* Reed, 78 Ill. 261 (1875); *post*, chap. xxii.

The Constitution of *Ohio* requires the General Assembly "to determine by law before what authority, and in what manner, the trial of contested elections shall be conducted;" and accordingly a specific mode of contesting elections in that State was provided by statute; and this mode was held *to exclude the common-law mode by proceedings in quo warranto*, and the result to bind the State as well as individuals. State *v.* Marlow, 15 Ohio St. 114 (1864).

In *South Carolina* it was held, where the legislature had authorized managers of elections "to hear and determine" cases of contested elections, without making any provision for an appeal, or any reference in the act to proceedings by *quo warranto*, that their decision was, without any express statutory declaration to that effect, final and conclusive, and that courts had no control over it. Grier *v.* Shackelford, 3 Brevard (S. C.), 491 (1814) (*Nott*, J., dissenting); followed in The State *v.* Deliesseline, 1 McCord (S. C.), 52 (1821) (two judges dissenting). See State *v.* Huggins, Harper, Law, 94 (1824). But note remarks of *Evans*, J., in State *v.* Cockrell, 2 Rich. Law (S. C.), 6, who, speaking of the subsequent act of 1839 (requiring the managers to hear and determine the validity of the election, and providing that their "decisions shall be final"), says: "I take it to be clear that the validity of an election, in all cases, must (under the act), in the first instance, be decided by the court of managers duly authorized according to law. All questions, whether of law or fact, must be submitted to this tribunal. Their decisions, on questions of *fact*, must necessarily be final, as no appeal is given; but I do not mean to say that their *errors of law* may not be corrected by *certiorari*, or such of the prerogative writs as may be best suited to the case." Accordingly, where an election within the act had not been contested before the managers, the court refused leave to file an information in the nature of a *quo warranto*. It was afterwards stated, by a distinguished judge in that State, that the scrutiny of municipal elections, as an incidental power, belongs in the first place to the city council; and if they abuse that power, the correction of that abuse devolves upon the courts by information in the nature of a *quo warranto*. *Per O'Neall*, J., in State *v.* Schnierle, 5 Rich. Law (S. C.), 299, 301 (1852) (*quo war.* to test validity of defendant's election as mayor of Charleston). S. P. Johnston *v.* Charleston, 1 Bay (S. C.), 441 (1795). But the city council, in order to determine a contest for a municipal office, cannot swear the individual voters to compel them to declare for whom they voted. This is an inquisitorial power unknown to the principles of our government, and of dangerous tendency. *Ib.* See, also, People *v.* Pease, 27 N. Y. 81; People *v.* Thacher, 55 N. Y. 525 (1874); People *v.* Cicotte, 16 Mich. 283; Cooley, Const. Lim. 604–606. Election contests for office will not be determined on *habeas corpus* (Strahl, *In re*, 16 Iowa, 369), nor in general on *bill in equity*. Hagner *v.* Heyberger, 7 Watts & S. (Pa.) 104; but see Kerr *v.* Trego, 47 Pa. St. 292; *supra*, sec. 202, note; *post*, sec. 275; Hughes *v.* Parker, 20 N. H. 58; Cochran *v.* McCleary, 22 Iowa, 75 (1867); *Re* Sawyer, 124 U. S. 200, and chapter on Corporate Meetings, *post*, also chap. xxii. *post*. But as to county seat contest, where fraud is alleged, see Boren *v.* Smith, 47 Ill. 482.

§ 206 (145). **Power to create and appoint Municipal Officers.** — At *common law*, municipal corporations *may appoint officers*, but only such as the nature of their constitution requires. The right of electing such officers as they are authorized to have is incidental to every corporation, and need not be expressly conferred by charter. The power of appointing officers is, at common law, to be exercised by the corporation at large, and not by any select body, unless it is so provided in the charter. The powers of corporate officers proper at common law are very limited, extending only to the administration of the by-laws and charter regulations of the corporation.[1]

§ 207 (146). **Power to create Offices.** — In this country *the charter or constitution of the corporation* usually provides with care as to all the *principal officers*, such as mayor, aldermen, marshal, clerk, treasurer, and the like, and prescribes their general duties. This leaves but little necessity or room for the exercise of any *implied power* to create other offices and appoint other officers.[2] It is

[1] Wilc. 234, pl. 598; *Ib.* 297, pl. 767; *Ib.* 298, pl. 769; Glover, 220; Vintners *v.* Passey, 1 Burr. 237; Hastings' Case, 1 Mod. 24; Rex *v.* Barnard, Comb. 416.

[2] Where it was manifest, from the whole tenor of a city charter, that it was the intention of the legislature itself to specify therein *all* the offices, and designate all the officers to be elected or chosen,

supposed, however, when not in contravention of the charter, that municipal corporations may, to a limited extent, have *as incidental to express powers the right to create certain minor offices of a ministerial or executive nature.* Thus, if power be conferred to provide for the health of the inhabitants, this would give the corporation the right to pass ordinances to secure this end, and the execution of such ordinances might be committed to a health officer, although no such officer be specifically named in the organic act, if this course would not conflict with any of its provisions. But the power to create offices even of this character would be limited to such as the nature of the duties devolved by charter or statute on the corporation naturally and reasonably required. The *provisions of the charter* as to time and mode of election, the appointment, qualifications, and duration of the terms of officers, *must be strictly observed.*[1] Therefore,

and to regulate the mode of appointment, it was held that the city council could not, by virtue of an *inherent or implied power, create another officer*, fix his term, provide for his appointment, and clothe him with the powers of a municipal officer. Hoboken *v.* Harrison, 1 Vroom (30 N. J. L.), 73 (1862). It is said, in the opinion, that the power to create municipal officers should be *expressly* conferred. In *New Jersey, pound-keepers,* from a very early period, had been public *township* officers, elected in the same way as other officers of the township. Under these circumstances it was held that a municipal corporation other than, but situate within the township, could not, without *express* authority therefor, establish another public pound within the limits of the township, and prescribe regulations and fees variant from those prescribed by the general law; and it was further held, that the office of pound-keeper could not be considered as one essential to the business of the corporation; nor is a pound-keeper one of those subordinate officers which all municipal corporations may, as of course, appoint. It was, however, admitted by the court that where such a corporation has power to do an act, it has the incidental power to appoint persons to carry it into effect. White *v.* Tallman, 2 Dutch. (N. J.) 67 (1856). *Infra*, sec. 210, note. Construction of power to appoint *weigh-master.* Hoffman *v.* Jersey City, 5 Vroom (34 N. J. L.), 172. Power to appoint when office is vacated "by death or disability," held to authorize appointment where a vacancy is caused by *resignation.* State *v.* Newark, 3 Dutch. (N. J.) 185. Authority to a municipal corporation *to appoint an officer was inferred* from the frequent mention of the office and its duties in the charter. People *v.* Bedell, 2 Hill (N. Y.), 196; see, also, Field *v.* Girard College, 54 Pa. St. 233. Legislative prohibition to common council against *creating new offices* extends to *clerks*, but not to janitors and ordinary servants. Costello *v.* Mayor, &c. of N. Y., 63 N. Y. 48 (1875); Sullivan *v.* Mayor, &c. of N. Y., 53 N. Y. 652. Power to appoint *marshal* under charter of East St. Louis. See People *v.* Canty, 55 Ill. 33. A *police judge* is held to be a municipal officer in *California.* People *v.* Henry, 62 Cal. 557. Police officers and power to appoint. *Infra*, sec. 210, and note. Where an appointment is to be made by a city council, *if a quorum be present*, a person who receives a majority of the votes cast will be elected although a majority of the council may abstain from voting. Launtz *v.* People, 113 Ill. 137; *post*, sec. 278 *et seq.*

[1] Quoted with approval in Trowbridge *v.* Newark, 46 N. J. L. (17 Vroom) 140, where, by charter, the appointment of a prosecuting attorney was committed to a common council, but there was no direction as to the *mode of appointment*, held, by a divided court, that having chosen one person by ballot

an ordinance which makes eligible those who, by the charter, are not so,[1] or which abridges the term of officers, as fixed by the charter, is unauthorized and void.[2] Where provisions for the election of municipal officers are made by ordinance in pursuance of charter powers, they must also be strictly observed.[3]

§ 208 (147). **The Mayor.** — Every municipal corporation is provided with an *executive head*, usually styled the *mayor.* In the chapter on Corporate Meetings we will point out the difference, in some respects, between the mayor of an old corporation in England and the officer known by that name in this country.[4] In both countries the mayor is the head officer or executive magistrate of the corporation; but with us it is important to bear in mind that all his powers and duties depend entirely upon the provisions of the charter or constituent act of the corporation, and valid by-laws passed in pursuance thereof, and these vary, of course, in different municipalities. It is usually made his duty, however, to see that municipal ordinances are executed, and to preside at corporate meetings; and he is frequently expressly declared to be a member of the council or local legislative body. Properly and primarily his duties are executive and administrative, and not judicial or legislative. But judicial duties are often superadded to those which properly

the council had *exhausted its power*, and that a subsequent resolution declaring another person to be elected was of no effect. State, *ex rel. v.* Barbour, 53 Conn. 76.

[1] Rex *v.* Mayor of Weymouth, 7 Mod. 373; Rex *v.* Bumstead, 2 B. & Ad. 699; Rex *v.* Spencer, 3 Burr. 1827; Rex *v.* Chitty, 5 Ad. & E. 609. *Ante*, sec. 195. A city council cannot elect its own members when the law provides that they shall be elected by ballot by the electors of the city. Kearney *v.* Andrews, 2 Stockt. (N. J.) 70. Majority of council essential to valid appointment of city treasurer. State *v.* Patterson, 6 Vroom (35 N. J. L.), 190. See Douglass *v.* Essex, 9 Vroom (38 N. J. L.), 214; State *v.* Jersey City, 2 Dutch. (N. J.) 444, 447. The appointment of a person to a city office by a mayor under a law which requires confirmation by the council gives the appointee no right to the office without such confirmation by the proper and legal city council. People *v.* Weber, 89 Ill. 347.

[2] Stadler *v.* Detroit, 13 Mich. 346 (1865); Vason *v.* Augusta, 38 Ga. 542 (1868). Chapter on Ordinances, *post.* The office of *treasurer* of a municipal corporation is not a "civil office" within the meaning of the provision of the Constitution excluding the clergy from "holding any *civil office* in this State, or from being members of the legislature." State *v.* Wilmington, 3 Harring. (Del.) 294 (1840); see Commonwealth *v.* Dallas, 3 Yeates (Pa.), 300. "*Lucrative offices,*" in the constitutional sense, defined to embrace county recorder, commissioner, township trustee, and supervisor. Daily *v.* State, 8 Blackf. 329; Creighton *v.* Piper, 14 Ind. 182; Howard *v.* Shoemaker, 35 Ind. 111. The office of city councilman is not "lucrative" within the prohibition of the State Constitution against the same person holding more than one lucrative office at the same time. State *v.* Kirk, 44 Ind. 401 (1873); s. c. 15 Am. Rep. 239. As to office of *city clerk*, Mohan *v.* Jackson, 52 Ind. 599 (1876).

[3] Saunders *v.* Lawrence, 141 Mass. 380.

[4] *Post*, sec. 270 *et seq.*

appertain to the office of mayor, and he is invested by legislative enactment with the authority to administer not only the ordinances of the corporation, but also judicially to administer the laws of the State.[1]

§ 209 (148). **Same subject.** — The *office of mayor* has long existed in England,[2] and many of its general features have been adopted in

[1] Waldo *v.* Wallace, 12 Ind. 569 (1859), and growing out of it, see, also, Gulick *v.* New, 14 Ind. 93 (1860) ; Howard *v.* Shoemaker, 35 Ind. 111 (1871) ; Reynolds *v.* Baldwin, 1 La. An. 162 (1846) ; Muscatine *v.* Steck, 7 Iowa, 505 ; 2 Iowa, 220 ; Strahl, *In re*, 16 Iowa, 369 ; Shafer *v.* Mumma, 17 Md. 331 ; Luehrman *v.* Taxing District, 2 Lea (Tenn.), 425. Approving text. Slater *v.* Wood, 9 Bosw. (N. Y.) 15 ; *ante*, chap. iii. Morrison *v.* McDonald, 21 Me. 550 (1842) ; State *v.* Maynard, 14 Ill. 419 ; Commonwealth *v.* Dallas, 3 Yeates (Pa.), 300 (1801) ; State *v.* Wilmington, 3 Harring. (Del.) 294 (1839) ; Prell *v.* McDonald, 7 Kan. 426 (1871). This section of the text cited and followed. Martindale *v.* Palmer, 52 Ind. 411 (1876).

Power of mayor, in his official name, to bring *suit* to prevent or restrain violations of law by other municipal officers, declared. Genois, Mayor, &c. *v.* Lockett, 13 La. 545 (1838). But *quære*. The mayor of a city has no *incidental power* to execute an *appeal bond* for the corporation ; and such a bond was regarded as not even incidental to the power of taking an appeal, but must be authorized by the council. Baltimore *v.* Railroad Co., 21 Md. 50 (1863). A precept to collect a street assessment, signed by a member of the council acting temporarily as president thereof, is void, when the statute requires the *signature* of the mayor. Jeffersonville *v.* Patterson, 32 Ind. 140 (1869). Injunction will lie to restrain a sale on such a precept. *Ib.* See chapter on Remedies against Illegal Corporate Acts, *post*.

As to nature and extent of authority of mayors and other civil officers to employ force for the prevention or suppression of *mobs*, *riots*, &c., see Ela *v.* Smith, 5 Gray (Mass.), 121 (1855), arising out of the arrest of Anthony Burns as a fugitive slave. Power of mayor *to order demolition of works and buildings in public places*. Henderson *v.* Mayor, 3 La. 563. Mayor may sanction an ordinance passed by a common council, whose term has expired. Elmendorf *v.* Ewen, 2 N. Y. Leg. Obs. 85. *Notice to mayor*. Nichols *v.* Boston, 98 Mass. 39. *Police and executive power of mayor*. Shafer *v.* Mumma, 17 Md. 331 ; Slater *v.* Wood, 9 Bosw. (N. Y.) 15 ; Pedrick *v.* Bailey, 12 Gray (Mass.), 161 ; Nichols *v.* Boston, 98 Mass. 39. *Alderman acting as mayor*. State *v.* Buffalo, 2 Hill (N. Y.), 434. *Judicial power of mayor*. See Municipal Courts, *post;* Prell *v.* McDonald, 7 Kan. 426 ; Howard *v.* Shoemaker, 35 Ind. 111 (1871). Presence and functions of mayor at meetings of the council. See chapter on Corporate Meetings, *post*.

Liability of mayor in Upper Canada to private actions in respect to his official acts. Fair *v.* Moore, 3 Up. Can. C. P. 484 ; Moran *v.* Palmer, 13 Up. Can. C. P. 450, 528. *Fraud of mayor* restrained and relieved against. Patterson *v.* Bowes, 4 Grant, 170 ; *Ib.* 489 ; *post*, sec. 910, note.

[2] *History and nature of office of mayor.* Consult 4 Jacob's Law Dict. 264, 265 ; 2 Toml. Law Dict. 540 ; 2 Bouv. 150 ; Spelm. Gloss. "Mayor" ; Ela *v.* Smith, 5 Gray (Mass.), 121 (1855); Achley's Case, 4 Abb. Pr. Rep. 35 (1856) ; Cochran *v.* McCleary, 22 Iowa, 75, 82 (1867) ; Nichols *v.* Boston, 98 Mass. 39 ; Fletcher *v.* Lowell, 15 Gray (Mass.), 103 ; *ante*, secs. 13, 174 ; *post*, secs. 253, 260, 271, 331, 428. The office in England is quite ancient. In 1204 King John made the bailiff of King's Lynn a mayor, with administrative powers. The title was a common one as early as the time of Bracton.

Mr. Norton, in his valuable "Commentaries on the History, Constitution, and Chartered Franchises of the *City of London*," says, that the first *special* grant of the *mayoralty* to the city of London was made by King John in a charter dated on the ninth day of May, in the sixteenth year of his reign, A. D. 1215. This charter declares that the king has granted and confirmed to the barons of London the right of choosing a mayor every year, and at the end of the year of removing him and substituting another, if they will, or electing the same again. He is to be presented to the king, and swear to be faithful to him. The use of the word *confirmed*, in this charter, shows that the name and officer existed before. The first civic magistrate had begun to be called by the name of mayor toward the end of the reign of King Richard. The denomination of *mayor*, it is said on the authority of legal antiquaries, can be traced to a very far date among the German and French nations of Europe. The chief governor of the town communities which arose in France in the eleventh century was often styled the mayor. It is a matter of history that in France, the *mayor of the palace* was the governor of Paris, often holding sovereign power, and, indeed, in time usurping it, since it was from one of the mayors of the palace that the family of Charlemagne descended. And it is suggested by Mr. Norton that the term "mayor," familiar to the Normans, may have been originally, though remotely, derived from the same source. Norton's Com., pp. 90, 402, 403 ; see, also, Pulling's Laws, Customs, &c., of London, chap. ii. 16 *m*. The *powers and duties of mayor* are prescribed with particularity in the Municipal Corporations Act of 1882, secs. 15, 16, 53, 60, 61, 66, 67, 68, 148, 244, and elsewhere. He is *ex officio* "a justice for the borough," sec. 155. Mr. Shaw in describing the workings of the municipal system of Great Britain points out the great difference between the functions and duties of an English and American mayor. Pol. Science Quarterly, Vol. IV. p. 209, June, 1889.

this country. In a former page, suggestions have been made in favor of increasing the powers, dignity, and responsibility of this office as a means of ensuring, under existing conditions in this country, more satisfactory municipal rule ; but the subject is not sufficiently connected with practical law to warrant a more extended reference to it in a work of this character.[1]

§ 210 (149). **Police Officers ; Power to make Arrests upon View.** — The office of a *police officer* is not known to the common law ; it is created by statute, and such an officer has, and can exercise, only such powers as he is authorized to do by the legislature, expressly or derivatively.[2] He is an officer of the *State* rather than of the

[1] *Ante*, chap. i. sec. 13, and notes.

[2] Commonwealth *v.* Dugan, 12 Met. (Mass.) 233 (1847) ; Commonwealth *v.* Hastings, 9 Met. (Mass.) 259 ; *ante*, secs. 58, 60. Where a *policeman* is duly appointed under charter authority to organize and regulate a city watch and the general police of the city, the presumption is that he possesses the powers of ordinary peace officers at common law. Doering *v.* State, 49 Ind. 56 (1874). In *Massachusetts* policemen are peace officers, and a person who assaults or obstructs them in the discharge of their duties is indictable, though they have not been sworn, the statute not requiring this. Buttrick *v.* Lowell, 1 Allen (Mass.), 172 ; Mitchell *v.* Rockland, 52 Me. 118, 122. In The People *v.* Metropolitan Police Board, 19 N. Y. 188 (1859), growing out of the act to establish a *Metropolitan Police District*, it was decided by a majority of the Court of Appeals that, although the office was a new one, yet the mode of filling it not being provided by the Constitution, it was in the power of the legislature to confer it upon persons discharging substantially the same duties within a more limited territorial jurisdiction, and to dispense with an oath of office. See, also, People *v.* Draper, 15 N. Y. 532 (1857),