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),

municipality in which he exercises his office.[1] Where police officers are, by statute, invested with all the powers of constables, as conservators of the peace, this gives them authority to *arrest upon view* intoxicated persons while guilty of disorderly conduct, or other persons violating the laws, and to detain them until they can be brought before a magistrate.[2] If such an officer releases an intoxicated person, whom he had arrested while conducting himself in a disorderly manner, upon his promise to go directly home, he may lawfully retake him, on his going into a bar-room before he is out of the officer's sight; and such arrest is justified, whether it be regarded as a recaption for the original purpose, or as a new arrest for disorderly conduct still continuing.[1]

where the Court of Appeals held the "Act to establish a Metropolitan Police District" valid; approved, Metropolitan Board of Health *v.* Heister, 37 N. Y. 661 (1868); McDermott *v.* Metropolitan Police Board, 5 Abb. Pr. 422; Police Commissioners *v.* Louisville, 3 Bush (Ky.), 597 (1868); *ante*, sec. 58, and notes. See People *v.* Albertson, 55 N. Y. 50 (1873), where People *v.* Draper, *supra*, is limited, questioned, and distinguished. *Extent of legislative power* and control over appointment, powers, &c. of police, health, and other local officers. Baltimore *v.* Board of Police (Baltimore Police Act), 15 Md. 376 (1859); Metropolitan Board of Health *v.* Heister, 37 N. Y. 661 (1868); People *v.* Hurlbut, 24 Mich. 44 (1871); Police Comm'rs *v.* Louisville, above cited; *ante*, sec. 58, note. *Mode of compensation.* Worcester *v.* Walker, 9 Gray (Mass.), 78. Under authority to make rules necessary to good order and public peace, *the power to appoint* policemen is implied. State *v.* Sims, 16 S. C. 486; *ante*, sec. 207.

[1] Burch *v.* Hardwicke, 30 Gratt. 24. While a mayor under the Constitution may remove officers of a municipality, he cannot remove a State officer though elected or appointed by the people of the municipality and paid by them; if the mayor removes him from office he exceeds his authority and is responsible to the officer in a civil action for damages. *Ib.* A *police judge* held to be a municipal officer. People *v.* Henry, 62 Cal. 557. A *policeman of a city* is a public officer, holding his office as a trust from the State, and not as a matter of contract between himself and the city. Farrell *v.* Bridgeport, 45 Conn. 191.

[2] Taylor *v.* Strong, 3 Wend. (N. Y.) 384 (1829); Bacon, Ab. Constable, C.; Commonwealth *v.* Hastings, 9 Met. (Mass.) 259 (1843); Prell *v.* McDonald, 7 Kan. 426 (1871). As to power of constables in such cases, see 1 Hale P. C. 587; Hawkins P. C. Book II. chap. xiii. sec. 8.

Authority to arrest upon view, and without warrant. Where such a course is not repugnant to the general law of the State, the proper officers of a municipal corporation may be authorized *to arrest without warrant*, or upon view, offenders who violate ordinances in the presence of such officers. Bryan *v.* Bates, 15 Ill. 87 (1853); Main *v.* McCarty, 15 Ill. 442; State *v.* Lafferty, 5 Harring. (Del.) 491; State *v.* Sims, 16 S. C. 486, *post*, sec. 414, note. If an offence is committed in view of the officer, he may arrest immediately, or as soon thereafter as he can. Boaz *v.* Tate, 43 Ind. 60 (1873). See chapter on Municipal Courts, *post*.

Power to a city corporation to make ordinances for the security, or good order, or government of the place, and to appoint or elect officers to carry out ordinances, authorizes the appointment of city guards, or police officers, or peace officers; and such officers may arrest, without a warrant, persons engaged in breaches of the peace. City Council *v.* Payne, 2 Nott & McCord (S. C.), 475 (1820). A city council may authorize *arrests upon view*, without warrant, for violation of its by-laws, *when not inconsistent with the general statutes* or policy of the State (White *v.* Kent, 11 Ohio St. 550 (1860); Thomas *v.* Ashland, 12 Ohio St. 127), but not otherwise. Thus, where the city charter declared all by-laws inconsistent with the general law to be void, and where the general law did not allow an officer to arrest for a misdemeanor not committed in his presence, without a warrant, it was held that an ordinance authorizing police officers to make arrests, without a warrant, for violation of ordinances not committed in their presence, was void, and would not protect the officer against a suit for trespass. Pesterfield *v.* Vickers, 3 Coldw.

§ 211 (150). **The Subject illustrated.** — Charters authorizing municipal officers to make *arrests upon view* and *without process*, are to be viewed in connection with the general statutes of the State,[2] and being in derogation of liberty, are strictly construed; hence an officer making such an arrest, though on the Sabbath day, should, instead of imprisoning, take without unreasonable delay the person arrested before the proper tribunal and prefer a complaint against him, as provided by the statutes of the State.[3]

(Tenn.) 205 (1866). *Further as to arrests, on view*, without information, and the duty of the officer, see Doering *v.* State, 49 Ind. 56 (1874); Johnson *v.* Americus, 46 Ga. 80 (1872); Nealis *v.* Hayward, 48 Ind. 19 (1874); Boaz *v.* Tate, 43 Ind. 60 (1873); Smith *v.* Donelly, 66 Ill. 464 (1873); Scircle *v.* Nevis, 47 Ind. 289 (1874); Galliard *v.* Laxton, 2 B. & S. 363; Codd *v.* Cabe, L. R. 1 Ex. Div. 352; s. c. 13 Cox, 202; Regina *v.* Chapman, 12 Cox, 4. If a private individual state facts to an officer, who thereupon, on his own responsibility, arrests a person, or if a private person procure a magistrate to issue a warrant for taking a person, the imprisonment is not his act, and he may show this under the plea of not guilty. Barber *v.* Rollinson, 1 C. & M. 330; Stonehouse *v.* Elliott, 6 T. R. 315; Brandt *v.* Craddock, 27 L. J. Ex. 314; Grinham *v.* Willey, 4 H. & N. 496. An officer is justified in arresting without a warrant upon a *reasonable suspicion of a felony* having been committed, and of the person being guilty of it, although no felony has in fact been committed, and whether the reasonable grounds for suspicion are matters within his own knowledge or facts stated to him by another. Lawrence *v.* Hedger, 3 Taunt. 14; Davis *v.* Russell, 5 Bing. 355; Beckwith *v.* Philby, 6 B. & C. 635; Hogg *v.* Ward, 3 H. & N. 417. But an officer is not in general justified in arresting a person who frequents a highway with intent to commit a felony (Timson, *In re*, L. R. 5 Ex. 257; see, also, Jones, *In re*, 7 Ex. 586), or in arresting a person for a *misdemeanor* without a warrant (Mathews *v.* Biddulph, 3 M. & G. 390; Griffin *v.* Coleman, 4 H. & N. 265); unless there be a breach of the peace in his presence (Timothy *v.* Simpson, 1 C. M. & R. 757; Derecourt *v.* Corbishley, 5 El. & B. 188), or danger of a renewal of it. The Queen *v.* Light, 27 L. J. Mag. Cas. 1; The Queen *v.* Walker, 23 L. J. Mag. Cas. 123; Pesterfield *v.* Vickers, 3 Coldw. (Tenn.) 205. It would seem that a constable having a warrant to arrest is not bound to accept a tender of the fine and costs. See Arnott *v.* Bradley, 23 Upper Can. C. P. 1. Although police officers may arrest without warrant for crimes, it does not follow that they have the power to do so in the case of lesser offences. Galliard *v.* Laxton, 2 B. & S. 361; Regina *v.* Chapman, 12 Cox, 4; Codd *v.* Cabe, 13 Cox, 202; s. c. L. R. 1 Ex. Div. 352.

[1] Commonwealth *v.* Hastings, *supra*. It follows that an obstruction offered by a third person to the officer in making such an arrest would be unjustifiable. *Ib.*

[2] *Supra*, sec. 210, note.

[3] Low *v.* Evans, 16 Ind. 486 (1868), (action for false imprisonment); Pow *v.* Becker, 3 Ind. 475 (1852); Vandever *v.* Mattock, 3 Ind. 479. The *delay* in taking the person arrested before a magistrate must

§ 212 (151). **Mode of Election; Power over its own Officers.** — A city council authorized to *elect* certain officers, may, where no mode of election is prescribed, appoint them by *resolution*, and is not bound to elect them by ballot;[1] and the corporation has full control, unless specially restricted, over all offices and officers existing only under by-laws.[2] A vote of an authorized committee of a city, electing their clerk to be the city engineer for a year from a subsequent day, duly recorded, and signed by him as their clerk, is sufficient to take his appointment out of the statute of frauds.[3]

§ 213 (152). **Presumption of due Appointment.** — The same presumptions which are applicable to acts of individuals are, in general, applicable to acts of corporations. Thus, if a person acts notoriously as the officer of a corporation, and is recognized by it as such officer, a *regular appointment will be presumed*, and his acts will bind the corporation, although no written proof is or can be adduced of his appointment.[4]

not be unreasonable. Johnson *v.* Americus, 46 Ga. 80 (1872). In Low *v.* Evans, it was held that there was no authority in the officer making the arrest to imprison the party arrested for an indefinite time (*e. g.*, from Sunday until the next day) because he might be subject to a penalty, to be recovered in a suit in the nature of an action of debt. If the court is not in session the officer may confine the person arrested until he can be brought before the court, which should be done at the earliest period. Boaz *v.* Tate, 43 Ind. 60 (1873); State *v.* Freeman, 86 N. C. 683. An intoxicated person, arrested late at night, may be detained until the next day before being taken to the court. Scircle *v.* Nevis, 47 Ind. 289 (1874).

[1] Low *v.* Comm'rs of Pilotage, R. M. Charlt. (Ga.) 302 (1830), *per Law*, J.; *ante*, sec. 94. Power of *council to appoint*, and when it may delegate this power to a committee. People *v.* Bedell, 2 Hill (N. Y.), 196; Commonwealth *v.* Pittsburgh (police force), 14 Pa. St. 177 (1850); Wilder *v.* Chicago, 26 Ill. 182; Russell *v.* Chicago (collectors), 22 Ill. 285; Trowbridge *v.* Newark, 46 N. J. L. (17 Vroom) 140; *ante*, sec. 96.

[2] As to plenary power and control, when not restricted, of a municipal corporation over offices and officers existing only under ordinances, see People *v.* Conover, 17 N. Y. 64 (1858); Waldraven *v.* Memphis (right to abolish office), 4 Coldw. (Tenn.) 431 (1867); *infra*, sec. 231; Madison *v.* Korbly, 32 Ind. 74, 79 (1869); Samis *v.* King, 40 Conn. 298 (1873). The power to appoint implies, in general, the *power to remove* the appointees. People *v.* Hill, 7 Cal. 97. Thus a municipal corporation appointing commissioners in cases of local improvements, may *remove* them. People *v.* Mayor, &c. of New York, 5 Barb. (N. Y.) 43 (1848). *Post*, sec. 238 *et seq.* But in *South Carolina*, see Caulfield *v.* State, 1 S. C. 461 (1869), the exercise of the power to appoint to office is an executive, not a legislative act. Achley's Case, 4 Abb. Pr. 35 (1856). Power to *suspend* officer. *Post*, sec. 247, note. A provision that the city council "may" by ordinance provide for the election, by the qualified voters, of any of the officers named in the act, held *to leave it to the discretion* of the city council whether the office of city attorney should be elective or not. Ball *v.* Fagg, 67 Mo. 481.

[3] Chase *v.* Lowell, 7 Gray (Mass.), 33 (1856).

[4] Bank of United States *v.* Dandridge, 12 Wheat. (U. S.) 64, 70, where Mr. Justice *Story* cites many cases, establishing the principle "that the acts of artificial persons afford the same presumptions as

§ 214 (153). **Oath and Official Bond.** — Public officers are usually required *to take an oath of office*, and those entrusted with money or property are also generally required *to give bond and sureties* for the faithful performance of their duties. In England it is said that an oath of office cannot be required to be taken by a by-law when none is required by the charter.[1] But in this country the *oath of office* is, in substance, only that the officer will support the Constitution and faithfully perform his official duties. And such an oath may, doubtless, be required by ordinance, to be taken by every municipal officer before entering upon his office. Statutes requiring an oath of office and bond are usually directory in their nature; and unless the failure to take the oath or give the bond by the time prescribed is expressly declared, *ipso facto*, to vacate the office, the oath may be taken or the bond given afterwards, if no vacancy has been declared.[2]

the acts of natural persons." *Infra*, sec. 237, note and cases. The doctrine that not only the appointment, but the authority of an agent of a corporation may be implied from the adoption or recognition of his acts (Angell & Ames Corp. sec. 284), was applied in Killey *v.* Forsee, 57 Mo. 390 (1874), to municipal corporations; and it was held that the failure of a deputy city engineer to file a certificate of his appointment, as provided by the charter, did not vitiate his acts.

[1] Rex *v.* Dean, &c., 1 Str. 539; Glover, 305; Willc. 133; Grant, 76. It is the settled doctrine of the Supreme Court that *the United States*, being a body politic, with a capacity to enter into contracts, may within the sphere and in the execution of its appropriate powers, *take bonds and securities*, which are not prohibited by law, though such bonds and securities may not have been prescribed by any pre-existing legislative act. These, though voluntary, — that is, not extorted or coerced, — if taken for a lawful purpose and upon a good consideration, are valid. United States *v.* Tingey, 5 Pet. (U. S.) 114, 128 (1831); approved, Same *v.* Linn, 15 Pet. (U. S.) 290 (1841); and see Dugan *v.* United States, 3 Wheat. (U. S.) 172; United States *v.* Bradley, 10 Pet. (U. S.) 343. *Infra*, sec. 216. Right of *city to require* bond of indemnity from the owner, who proposes to excavate sidewalk to make cellars, vaults, or improvements. McCarthy *v.* Chicago, 53 Ill. 38 (1870). A prospective appointment to public office, made by a body which, as then constituted, is empowered to fill the vacancy when it arises, was held to be legal in the absence of any express statutory provision to the contrary, and to vest title to the office in the appointee. State *v.* Van Buskirk, 40 N. J. L. 463. The power of appointment to office, when executed by the performance of the last act made necessary in its execution, *is not revocable* without the consent of the appointee. *Ib.* In England the oath of allegiance and the judicial oath are imperative. The Mayor is required also to take an oath as Mayor. Munic. Corp. Act 1882, sec. 15; 31 and 32 Vict. chap. 72.

[2] Smith *v.* Cronkhite, 8 Ind. 134; State *v.* Findley, 10 Ohio, 51, 59, and cases cited; State *v.* Porter (failure to give bond by city marshal in time), 7 Ind. 204; Sprowl *v.* Laurence, 33 Ala. 674; Bank *v.* Dandridge, 12 Wheat. 64; United States *v.* Le Baron, 19 How. 73; s. c. 4 Wall. 642; Marbury *v.* Madison, 1 Cranch, 137; Launtz *v.* People, 113 Ill. 137; Cawley *v.* People (county treasurer's bond), 95 Ill. 249 (1880); Chicago *v.* Gage (city treasurer's bond), 95 Ill. 593 (1880); Caskey *v.* Greensborough, 78 Ind. 233; St. Helena *v.* Burton, 35 La. An. 521. It is no defence to an action upon an official bond that the oath required by law was not taken within the prescribed time.

§ 215 (154). **Oath when a Condition Precedent; Acts of de facto Officer.** — When the statute requires a prescribed oath of office *before* any person elected "*shall act therein*," a person cannot justify as such officer *unless he has taken an oath* in substantial, not necessarily literal, compliance with the law. Third parties, however, acting in good faith with him as such officer, are protected, notwithstanding his failure to take the requisite oath.[1]

Ib. Charter provision that oaths of office be taken and subscribed *within ten days is directory*, and may be complied with after that time. Kearney *v.* Andrews, 2 Stockt. (N. J.) 70. In *New York* it is held that a town collector elect, in order to qualify for the office, is required by the Constitution to take and subscribe an oath of office, and until he has thus qualified, the incumbent may hold over. People *v.* McKinney, 52 N. Y. 374 (1873). But as no time is limited for taking such oath it may be taken before the office is forfeited by the neglect to execute the required bond. *Ib.* A town *may lawfully require* a collector of taxes or other officer to *furnish sureties* for the faithful discharge of the duties of his office. This power is incidental, and need not be express. If the person chosen neglects, or is unable, to furnish sureties, this amounts to a non-acceptance of the trust, although he has taken the oath of office. Morrell *v.* Sylvester, 1 Greenl. (Me.) 248. While it is the duty of an officer to perfect his title to his office by complying with the *directions* of the law as to taking oath, depositing bonds, &c., yet his failure to do so is his own wrongful neglect, and is no defence to his sureties in an action on his official bond. State *v.* Toomer, 7 Rich. (S. C.) Law, 216 (1854); State *v.* Findley, 10 Ohio, 51 (1840). The giving of a bond and having it approved were held in the case in judgment to be *conditions precedent* to the right of occupying a municipal office. Howell *v.* Commonwealth, 97 Pa. St. 332; *post*, sec. 235, note. Rule in *Virginia*, see *infra*, sec. 220, note.

A city council, whose duty it is to *decide upon the sufficiency of the sureties of a city officer*, cannot refuse to do so or postpone its decision because the title to the office is elsewhere disputed; and a *mandamus* will lie to compel it to act upon the sufficiency of the securities offered. Commonwealth *v.* City Council of Philadelphia, 7 Am. Law Reg. (N. S.) 362. Effect of signing *official bonds in blank*, see Chicago *v.* Gage (bond of city treasurer), 95 Ill. 593 (1880). Mr. Justice *Sheldon* cites and reviews many of the cases on this subject. Butler *v.* United States, 21 Wall. 272; Dair *v.* United States, 16 Wall. 1. Murfree on Official Bonds, sec. 20 *et seq.*, sec. 42, and cases.

[1] Olney *v.* Pearce, 1 R. I. 292 (1850), and authorities cited by Mr. Angell in note; Riddle *v.* Bedford County, 7 Serg. & Rawle (Pa.), 392; Neale *v.* Overseers, 5 Watts (Pa.), 538. Where an officer, before acting, is required to qualify by taking an oath of office, *he has no legal right, until he qualifies*, to recover fees of an incumbent received after the plaintiff's appointment or election, and before he qualifies. Thompson *v.* Nicholson, 12 Rob. (La.) 326 (1845). See City *v.* Given, 60 Pa. St. 136; *supra*, sec. 214, note; *post*, sec. 235.

If members of a common council, who are required by the charter to be sworn before they enter on the duties of their office, are sworn before an officer not authorized to administer the oath, they are still officers *de facto*, and a tax levied by them is not invalid, and will not be set aside even in a direct proceeding. State *v.* Perkins, 4 Zabr. (24 N. J. L.) 409 (1854). *Infra*, secs. 216, note, 221, note, 230, note, 237, note. Bond of *de facto* officer binding upon him and his sureties. Green *v.* Wardwell, 17 Ill. 278; *infra*, sec. 216, note. Murfree, Official Bonds, secs. 70, 71. But this principle does not apply where there is no office *de jure*. Tinsley *v.* Kirby, 17 S. C. 1, 8. *Post*, sec. 276.

An act of Congress provided that paymasters should, "*previous to entering upon the duties of their office, give good and sufficient bonds*," &c. It was held that an appointment as paymaster was complete when made by the President and confirmed by the senate; that the giving of the bond was a mere ministerial act for the security of the government, and not a condition precedent to his authority to act as paymaster; and that a recital in the bond of the appointment estops the principal and sureties to deny the fact. United States *v.* Bradley, 10 Pet. (U. S.) 343 (1836); and see, also, United States Bank *v.* Dandridge, 12 Wheat. 64. Sureties of municipal treasurer *were estopped* to show that the election of the treasurer was unauthorized because the time of the election had not been fixed and the duties of the office prescribed by ordinance. Paducah *v.* Cully, 9 Bush (Ky.), 323 (1873); and see *post*, 216 note.

§ 216 (155). **Conditions of official Bond; Voluntary and Common-Law Obligations.** — The principle is well settled, that *official bonds* are valid if the *condition complies substantially* with the requirements of the statute. The exact form prescribed is not essential unless made so by the charter or act.[1] Duties of a nature and character similar to those belonging to the office may be added to it or imposed upon an officer; and these are held to be within the contemplation and the liability of obligors upon the bond.[2] As such bonds are

[1] Allegheny County *v.* Van Campen, 3 Wend. 49 (1829); People *v.* Holmes, 2 Wend. 281; *Ib.* 615; Fellows *v.* Gilman, 4 Wend. 414; Lawton *v.* Erwin, 9 Wend. 233; Cornell *v.* Barnes, 1 Denio, 35.

Bond *without seals* held valid as a common-law obligation. Board of Education *v.* Fonda, 77 N. Y. 350; S. P. U. S. *v.* Linn, 15 Pet. 290; U. S. *v.* Hodson, 10 Wall. 395; Skellinger *v.* Yendes, 12 Wend. 306; Morse *v.* Hodsden, 5 Mass. 318; Thomas *v.* White, 12 Mass. 369; Bank *v.* Smith, 5 Allen, 415. So a bond without any *specified obligee*. Fellows *v.* Gilman, 4 Wend. 414, 419.

[2] Board, &c. of Auburn *v.* Quick, 99 N. Y. 138; People *v.* Vilas, 36 N. Y. 459, and cases cited. Mayor, &c. of New York *v.* Kelly, 98 N. Y. 467. See, also, Board of Supervisors *v.* Clark, 92 N. Y. 391. It is competent for the legislature, in exacting official bonds and prescribing their conditions, to require that they shall be conditioned for the faithful performance of *all duties that may be imposed by subsequent statutes* during the officer's continuance in office; and this having been done by a general statute, the sureties on an official bond, conditioned as required by the statute, are liable for their principal's default in reference to additional duties subsequently imposed, unless the statute imposing such duties shows an intention that they shall not be so liable. Morrow *v.* Wood, 56 Ala. 1. *Infra*, secs. 230, 233.

In Orman *v.* Pueblo, 8 Col. 292, *Helm*, J., enumerated the following propositions concerning the liability of sureties upon official bonds as elementary: "*First*, that the sureties on such bonds enter into contract thereof with reference to existing statutes on the subject, and that therefore the law becomes a part of the contract. *Second*, that the engagement or the obligation of the surety cannot be extended beyond the *strict terms* of the bond. *Third*, that when a breach thereof is assigned and an attempt is made to hold the surety, such breach must be based upon some *official* misconduct on the part of the principal."

So under the laws of *Indiana*, — providing for the issuance and sale of bonds to complete *water-works*, — it is the duty of the common council, and not of the city treasurer, to negotiate and sell such bonds; but the city treasurer is liable on his official bond for moneys received by him from the sale thereof, by whomsoever made. Such duty cannot be delegated by the council, by ordinance or otherwise, to the treasurer or any other person. Under an ordinance designating the city treasurer by name as agent for the sale of such bonds, his acts in negotiating such sales are simply those of an agent of the common council; and he is not liable on his official bond for the mere sale, assignment, and delivery thereof by him pursuant to such agency. In an action on his official bond

intended to secure the public the *courts do not favor mere technical defences.* Accordingly, actions have been sustained on bonds not required by law, when *executed voluntarily,* and with proper conditions, to secure the performance of official duty.[1] And when required by law, bonds are good, *as common-law obligations,* though they do not conform to the statute, if they contain no condition contrary to law. In such case the obligor voluntarily agrees to make the obligee named a trustee for the persons interested in the due performance of the condition.[2] Thus, an action may be maintained on a bond given to the "selectmen" instead of to the "town," by a town treasurer, conditioned for the faithful performance of his duties.[3]

for moneys alleged to have been received by him as such treasurer, an answer that by the terms of the negotiation, which was approved by the common council, the proceeds remained in the hands of the purchaser, to be used only as needed in constructing the water-works, and that the purchaser had become insolvent while the funds yet remained in his hands, — *Held,* to be sufficient. In such case, a report by the treasurer to the council, as to the condition of the fund, charging himself with funds remaining in the hands of the purchaser, — *Held,* not to estop him to deny his liability. State *v.* Hauser, 63 Ind. 155; as to liability for misapplication of funds, see Robinson *v.* State, 60 Ind. 26.

[1] *Supra,* sec. 214, note; Postmaster-General *v.* Rice, Gilpin, 554; Montville *v.* Haughton, 7 Conn. 543; Commonwealth *v.* Wolbert, 6 Binney, 292; Baby *v.* Baby, 8 Upper Can. Q. B. 76.

[2] Thomas *v.* White, 12 Mass. 369; 5 Mass. 314; Kavanaugh *v.* Sanders, 8 Greenl. (Me.) 442; Sweetzer *v.* Hay, 2 Gray, 49, and cases there cited; Smith *v.* Wingate, 61 Tex. 54; Sutherland *v.* Carr, 85 N. Y. 105; Barnet *v.* Abbott, 53 Vt. 120 (bond executed near the close of an officer's term of office, but *antedated,* to cover the entire term, held good). See, also, Fond du Lac *v.* Moore, 58 Wis. 170.

[3] Sweetzer *v.* Hay, 2 Gray, 49; Horn *v.* Whittier, 6 N. H. 88. A bond given by the treasurer of a county for the faithful performance of his official duties, to the board of supervisors of the same county, is a good and valid bond, notwithstanding there *may be no statute requiring one.* Supervisors *v.* Coffinbury, 1 Mich. 355; People *v.* Johr, 22 Mich. 461 (1871); Platteville *v.* Hooper, 63 Wis. 381. The fact that there is already a valid official bond with solvent sureties does not preclude a county court from taking from a delinquent county officer, by way of security for his delinquency, a bond and mortgage on real estate. Turner *v.* Clark Co., 67 Mo. 243 (1878).

Municipal corporations *may sue on official bonds* of public officers when interested therein. State, &c. *v.* Norwood, 12 Md. 177 (1858). In an action on the official bond of an officer appointed by a municipal corporation, reciting the appointment of the principal as such officer, neither he nor his sureties can set up the invalidity of his appointment as a defence to an action for moneys collected. Hoboken *v.* Harrison, 1 Vroom (30 N. J. L.), 73; Seiple *v.* Elizabeth, 3 Dutch. (N. J.) 407; *supra,* sec. 215, note. Sureties on *official bond of de facto* municipal officer are liable for moneys collected by him; and this though he held an office which in point of fact, the corporation could not create. 1 Vroom (30 N. J. L.), 73, *supra. Supra,* sec. 215, note; *post,* secs. 221, note, 230, note. A surety in an official bond of an officer whose *term is limited to a year,* is not liable beyond the year, though the officer continues by law until a successor is provided. Dover *v.* Twombly, 42 N. H. 59 (1860); Chelmsford Co. *v.* Demorest 7 Gray (Mass.), 1 (1856); Mayor *v.* Horn, 2 Harring. (Del.) 190 (1833); Regina *v.* McRae, 5 Upper Can. P. R. 309; Montgomery *v.* Hughes, 65 Ala. 201. A change in a statute by which the time for the annual settlements of county collectors is fixed a month later, and additional time is allowed in which to pay after settlement, releases the sureties on a collector's bond executed before the change. The effect is to postpone the State's right of action against the collector. The rule that *an extension of time given the principal releases the surety* applies between the State and an individual. State *v.* Roberts, 68 Mo. 234. Sureties upon an official bond *are not liable* for a defalcation of their principal, occurring *during a term preceding that for which the bond was given.* Paducah *v.* Cully, 9 Bush (Ky), 323 (1872); Bissell *v.* Saxton, 77 N. Y. 191; Myers *v.* U. S. 1 McLean, 493; Mahaska *v.* Ingalls, 16 Iowa, 81; Townsend *v.* Everett, 4 Ala. 607; U. S. *v.* Boyd, 5 How. 50; Bruce *v.* U. S., 17 How. 437; McIntyre *v.* School Trustees, 3 Ill. App. 77; Arlington *v.* Merrick, 2 Saund. 403; Overacre *v.* Garrett, 5 Lans. 156; Rochester *v.* Randall, 105 Mass. 295; Bamford *v.* Iles, 3 Exch. 380; Austin *v.* French, 7 Met. 126; Kingston Ins. Co. *v.* Decker, 33 Barb. 196; Dedham Bank *v.* Chickering, 3 Pick. 335; Blake *v.* Buffalo, &c., 56 N. Y. 485; McClusky *v.* Cromwell, 11 N. Y. 598; Miller *v.* Stewart, 9 Wheat. 702; Stern *v.* People, 96 Ill. 475; Goodwine *v.* State, 81 Ind. 109, where a city treasurer served *two successive terms under bonds, with the same sureties on each bond,* it was presumed, in a suit upon the second bond, that, at the time it was given, he was in possession of all the money which he should have had, if an accounting had been had, and he and his sureties were held liable therefor. Bernhard *v.* Wyandotte, 33 Kan. 465; and see Hartford *v.* Francy, 47 Conn. 76. And where a collector, holding office for three successive years, and *giving a different bond each year,* was delinquent, and there was no evidence showing the time when the deficit occurred, it was held that the loss should be divided between the three bonds in proportion to the sums collected during the time for which each bond was given. Phipsburg *v.* Dickinson, 78 Me. 457. But in *California,* in a similar case, it was recently (1887) held that, in absence of evidence to the contrary, the presumption is that the misappropriation happened at the end of the last term, for which the sureties on the last bond are liable. Heppe *v.* Johnson, 73 Cal. 265. As to a breach of an official bond, see La Pointe *v.* O'Malley, 46 Wis. 35.

It is no objection to the bond that it *was executed before* the appointment to office was made. Essex *v.* Strong, 8 Upper Can. L. J. 15; s. c. 21 Upper Can. Q. B. 149. The imposition of additional taxes to those assessed at the time of taking the security and the increase of risk thereby has been held not to violate a bond given for the general performance of duties and payment of moneys. Beverley *v.* Barlow *et al.,* 10 Upper Can. C. P. 178; s. c. 7 Upper Can. L. J. 117. Nor is it a defence that the money received by the treasurer was not demanded by the government, which was entitled thereto. Essex *v.* Park, 11 Upper Can. C. P. 473. Nor are irregularities in the mode of appointment a defence. Whitby *v.* Harrison, 18 Upper Can. Q. B. 603; Whitby *v.* Flint, 9 Upper Can. C. P. 449; Todd *v.* Perry *et al.,* 20 Upper Can. Q. B. 649.

§ 217 (156). **Duration of Official Term; Power to hold over; English Statutes and Decisions.** — It was a settled rule of law respecting the old corporations in England that the office of the mayor or other head officer was *annual,* and absolutely expired at the end of the year; and that without an express clause in the charter, *he could not hold over* until his successor was provided. The right, in such case, to *hold over* did not exist by implication, and was not an incident to the office.[1] In some charters, however,

[1] Rex *v.* Atkins, 3 Mod. 12; Rex *v.* Hearle, 1 Str. 627; Mayor of Durham's Case, 1 Sid. 33; Rex *v.* Thornton, 4 East, 308; Foot *v.* Prowse, 1 Str. 625; s. c.