§ 236 (175). **Liability of the Officer to the Corporation and to Others.** — *Public officers* (as distinguished from *corporate officers*),

been removed without notice. Rex *v.* Mayor, &c., 2 Cowp. 523; The King *v.* The Mayor, &c., 2 Term R. 182." — *per McDonald*, J.; 25 Ga. 590, 592. See Hoboken *v.* Gear, 3 Dutch. (N. J.) 265. Aldermen held not to be individually liable for passing an unauthorized ordinance depriving a mayor of his office. Jones *v.* Loring, 55 Miss. 109; *infra*, sec. 237, note. An incumbent was appointed by the aldermen and removed by the mayor, who nominated a successor; the incumbent's salary did not cease until his successor was confirmed. White *v.* Mayor, &c. of New York, 4 E. D. Smith, 563 (1855). A person is not entitled to the salary of a public office unless he *both obtains and exercises the office.* Farrell *v.* Bridgeport, 45 Conn. 191. Thus, a city treasurer, being indicted for forgery, the mayor and council elected another in his stead for the balance of his term. Upon his acquittal, — *Held*, that he could not recover the salary for such balance of his term. If the prosecution was malicious, he could recover in tort from the wrongdoer. Brunswick *v.* Fahm, 60 Ga. 109. So a policeman who has been found guilty of immoral conduct and discharged from his office by a board of police commissioners having jurisdiction, cannot recover from the city his salary for the remainder of his term. It makes no difference that the commissioners may have erred in their judgment on the evidence, no appeal having been taken. Queen *v.* Atlanta, 59 Ga. 318. By charter, the power to appoint policemen was conferred on a board of police, composed of the mayor and recorders, and this board was authorized to discharge policemen, for cause, and to "decide on all police matters pertaining to appointments, dismissals, &c., *finally and without appeal.*" In an action for wages, brought against the city by a policeman, who claimed that he had been appointed for a year, and dismissed at the end of a month, without good cause, the Supreme Court decided that the board having dismissed the plaintiff for what it deemed sufficient cause, its decision was final, and the sufficiency of the cause of dismissal was not inquirable into in the action. Nolan *v.* New Orleans, 10 La. An. 106 (1855). *Ante*, sec. 200.

Declaring an office and the prospective fees of the officer not to be property, and that the right to fees grows out of *services performed*, it was decided by the Court of Appeals that a municipal officer who had been kept out of his office, and had not performed its duties, could not maintain an action against the city to recover the amount of fees accruing from the office. Smith *v.* New York, 37 N. Y. 518 (1868); Saline Co. *v.* Anderson, 20 Kan. 298; Dolan *v.* Mayor, 68 N. Y. 279; Hadley *v.* Mayor, 33 N. Y. 603, 607, *per Denio*, C. J. In a later New York case the court reviewed the previous decisions, and held that the payment of the fees or salary provided by law, to an officer *de facto* for services rendered before a judgment of *ouster*, will protect a municipality against the claim of the officer *de jure* for the same compensation; but after the judgment, the compensation for services rendered, which has not been paid, may be recovered by the officer *de jure*. McVeany *v.* New York, 80 N. Y. 185; Steubenville *v.* Culp, 38 Ohio St. 18. See Benoit *v.* Wayne County, 20 Mich. 176, *Cooley*, J., dissenting. It has, however, several times been decided in California that the *salary* annexed to a public office is *incident to the title* to the office, and not to its occupancy and exercise, and that the right to compensation is not affected by the fact that an usurper, officer *de facto*, has discharged the duties of the office. Dorsey *v.* Smith, 28 Cal. 21; Stratton *v.* Oulton, *Ib.* 44; Carroll *v.* Siebenthaler, 37 Cal. 193 (1869); approved, Meagher *v.* County, 5 Nev. 244 (1869); where a city physician, who was duly elected, but kept out of his office by the prior incumbent, who drew the salary for some months, was permitted to collect his back salary from the city. Memphis *v.* Woodward, 12 Heisk. 499. An *officer unlawfully deprived of his office* may maintain an action *against the intruder for damages;* in such case the measure of damages is generally the salary or fees re-

elected pursuant to statute by a municipal corporation, *are not the servants or agents of the corporation* in such a sense as will enable the *corporation*, in the absence of a statute giving the remedy, to

ceived by the intruder. Nichols *v.* McLean, 101 N. Y. 526; People *v.* Nolan, 102 N. Y. 539. "The salary follows the legal title." *Libbey*, J., in Andrews *v.* Portland, 79 Me. 484 (holding also that in an action by an officer *de jure* for his salary during the time of his unlawful removal from office, the city is not entitled to have deducted from the sum due the amount earned by him in other ways during that time. To same effect is Fitzsimmons *v.* Brooklyn, 102 N. Y. 536). See, further, *ante*, secs. 215, note; 230, note; People *v.* Miller, 24 Mich. 458 (1872); Benoit *v.* Wayne County, *supra;* Philadelphia *v.* Given, 60 Pa. St. 136, *per Thompson*, C. J. Right of municipal officer to *retain his salary in his own hands*, denied, where it was his duty to pay all sums received into the treasury. New Orleans *v.* Finnerty, 27 La. An. 681 (1875); s. c. 21 Am. Rep. 569, referred to *infra*, note.

The legal incumbent of a municipal office rendering service is entitled to compensation until he has actual notice of his removal. Jarvis *v.* Mayor, &c. of New York, 2 N. Y. Leg. Obs. 396. Equity will not *ordinarily enjoin* the payment of the salary to the incumbent pending a contest; the bill must show grounds for equitable relief. Colton *v.* Price, 50 Ala. 424 (1874); Bruner *v.* Bryan (against interloper), 50 Ala. 523 (1874); Field *v.* Commonwealth, 32 Pa. St. 478 (1849); Ramshay, *In re*, 83 Eng. C. L. 174 (1852); Hennen, *In re*, 13 Pet. 230; Queen *v.* Governors, &c., 8 Ad. & El. 632; Page *v.* Hardin, 8 B. Mon. (Ky.) 648; Bowerbank *v.* Morris, Wall. C. C. R. 118. In The City *v.* Given, 60 Pa. St. 136, the plaintiff acted as city commissioner for some months, when it was decided that he had not been duly elected, and in a suit brought for his salary, it was held that he could not recover, because he had not qualified by giving security. See, *ante*, sec. 214, note. In an action by the rightful officer on a *supersedeas bond* given in a *quo warranto* proceeding by an intruder, the measure of damages is the full amount of the salary (where the office has a fixed salary) received by the intruder pending the operation of the *supersedeas*. United States *v.* Addison, 6 Wall. 291. See People *v.* Miller, 24 Mich. 458 (1872).

"It is a grave question," says *Seymour*, C. J., "whether a merely *de facto* officer, even when he actually performs the whole duties of the office, can *enforce the payment of the salary.* The authorities seem to be that he cannot. State *v.* Carrol, 38 Conn. 471; Riddle *v.* Bedford County, 7 Serg. & Rawle (Pa.), 386; Bently *v.* Phelps, 27 Barb. (N. Y.) 524; People *v.* Tieman, 30 Barb. (N. Y.) 193. However this may be, it is clear, we think, that the salary of an officer is not due to parties who are neither officers *de jure*, nor *de facto.*" Samis *v.* King, 40 Conn. 298 (1873).

Respecting *liability of an intruder to the officer de jure for salary and fees received*, and when an action will lie for money had and received, Glascock *v.* Lyons, 20 Ind. 1; Douglas *v.* State, 31 Ind. 429; Dorsey *v.* Smythe, 28 Cal. 21; Stratton *v.* Oulton, *Ib.* 44; City *v.* Given, 60 Pa. St. 136; Allen *v.* McKean, 1 Sumn. 276; State *v.* Sherwood, 42 Mo. 179; Hunter *v.* Chandler, 45 Mo. 452; s. c. 10 Am. Law Reg. (N. S.) 440, and note; Boyter *v.* Dodsworth, 6 Term R. 681; Sadler *v.* Evans, 4 Burr. 1984; People *v.* Miller, 24 Mich. 458; Nichols *v.* McLean, 101 N. Y. 526; People *v.* Nolan, 102 N. Y. 539. The right of *set-off* in respect of his salary was denied to a municipal officer where it was the duty of the officer to deposit all moneys received in the treasury, and where it was provided his salary was to be paid in a specific manner. The decisions of the Supreme Court of the United States, allowing equitable *set-off* in such cases, were distinguished. New Orleans *v.* Finnerty, 27 La. An. 681 (1875); s. c. 21 Am. Rep. 569. If the city is liable at once to suit by the officer, why deny the right of *set-off?*

maintain *actions against such officers* for negligence in the discharge of their official duty. This principle does not, it is believed, apply where the corporation is injured by the negligence of *its own officers*; but even in such case the recovery in the absence of statute can only be for want of fidelity and integrity, not for honest mistakes.[1] To protect the public, however, *officers are usually required to give bonds*, in which case they are of course liable, as we have seen, according to the conditions thereof.[2] They are also liable on common-law principles to individuals who sustain special damage from the failure to perform imperative and ministerial duties.[3]

§ 237 (176). **Same subject.** — In this country the *officers of municipal corporations are*, in many respects, *public officers*, being charged by legislative enactment with duties which concern both the corporation and the public at large. The duties and liabilities of such officers to the corporation fall within the scope of this treatise, and have been considered. But their *individual rights and their duty and liability to others*, upon contracts and for torts, are not, strictly speaking, embraced in the plan of the work. They are, however, so germane to it, and reflect so much light upon the subjects which are herein treated, that it has been thought that a brief reference to some of the more important rules and adjudications was desirable, and this has accordingly been made in the note.[4]

[1] Parish in Sherburne *v.* Fiske, 8 Cush. (Mass.) 264, 266 (1851), opinion by *Dewey*, J.; cites White *v.* Philipson, 10 Met. (Mass.) 108; Trafton *v.* Alfred, 3 Shepl. (15 Me.) 258; Kendall *v.* Stokes, 3 How. 87; Commonwealth *v.* Genther, 17 Serg. & Rawle (Pa.), 135; Wilson *v.* Mayor, &c. of New York, 1 Denio (N. Y.), 595; Hancock *v.* Hazzard, 12 Cush. (Mass.) 112; Lincoln *v.* Chapin, 132 Mass. 470; Minor *v.* Bank, 1 Pet. (U. S.) 46, 69. Where a surveyor of highways has, by law, a discretion as to the kind of repairs, and exercises his best judgment and acts in good faith, the corporation for which he acts is bound, and cannot defeat his recovery for the price of materials furnished, by evidence to show that the repairs were not, in fact, necessary. But it would be otherwise if fraud or corruption were shown. Palmer *v.* Carroll, 4 Fost. (24 N. H.) 314 (1851). See, also, People *v.* Lewis, 7 Johns. (N. Y.) 73; Seaman *v.* Patten, 2 Caines (N. Y.), 312. In an action against county supervisors to recover money illegally allowed for claims, the complaint should aver the nature of the claims: it should be brought by the legal officer of the county, but if by a taxpayer, the complaint should allege facts showing the officer's neglect or refusal to act. Hedges *v.* Dam, 72 Cal. 520.

Personal liability of municipal councillors to the corporation for misappropriation of its funds; see Municipality of East Nissouri *v.* Horseman, 16 Upper Can. Q. B. 588; of treasurer for paying money on an illegal order or resolution. Daniels *v.* Burford, 10 Upper Can. Q. B. 481.

[2] *Supra*, secs. 214-216.

[3] *Infra*, sec. 237, note and cases; *post*, chap. xxiii.

[4] Suits by Public Officers. — *Public officers* have, in general, a *power to sue* commensurate with their duties. If officers of a corporate body, suit should be brought *in the name of the corporation*, unless the statute direct otherwise. Shook *v.* State, 6 Ind. 113; State *v.* Rush, 7 Ind. 221; Supervisors *v.* Stimpson, 4 Hill (N. Y.), 136, and cases cited; Todd *v.* Birdsall, 1 Cow. (N. Y.) 260, and cases cited in note; Jansen *v.* Ostrander, 1 Cow. (N. Y.) 670; Cornell *v.* Guilford, 1 Denio, (N. Y.) 510; compare Commissioners *v.* Perry, 5 Ohio, 57; Barney *v.* Bush, 9 Ala. 345; VanKeuren *v.* Johnson, 3 Denio, 182; Tecumseh *v.* Phillips, 5 Neb. 305 (1877); Regents of State University *v.* McConnell, 5 Neb. 423 (1877). But it has been held that *a public officer cannot*, without the aid of a statute, *maintain a suit in his own name*, although he may have taken a note or contract to himself individually, if the consideration for such a note or contract be a liability to the State. The ground of this rule is public policy, — to discourage public officers from transacting in their own name the business of the public. Hunter *v.* Field, 20 Ohio, 340 (1851); Irish *v.* Webster, 5 Greenl. (Me.) 171; Gilmore *v.* Pope, 5 Mass. 491. If the obligation is taken to the officer as agent, or in his official capacity, the action is properly brought in the name of the government beneficially interested. Dugan *v.* United States, 3 Wheat. 172; s. p. United States *v.* Boice, 2 McLean, 352; United States *v.* Barker, 2 Paine C. Ct. 152; 2 Parsons on Notes and Bills, 451, and other cases cited. An action by a public officer does not *abate* by the expiration of his term of office. The suit may be continued in his name until its termination, or, by the practice in many of the States, his successor may be substituted. Kellar *v.* Savage, 20 Me. 199 (1841); Todd *v.* Birdsall, 1 Cow. (N. Y.) 260; Haynes *v.* Covington, 13 Sm. & Mar. (21 Miss.) 408; Grant *v.* Fancher, 5 Cow. (N. Y.) 309; Colgrove *v.* Breed, 2 Denio (N. Y.), 125; Manchester *v.* Herrington, 10 N. Y. 164; Upton *v.* Starr, 3 Ind. 538; Denver *v.* Dean, 10 Col. 375. Officers cannot be impleaded as individuals for acts done in the exercise of their corporate powers. Smith *v.* Stephan, 66 Md. 381 (injunction against officers, as individuals, to restrain them from issuing funding bonds, as authorized by law, denied).

Evidence; Proof of Title or Official Character; Acts and Declarations; Res Gestae. — Where the authority of an officer of a public corporation comes incidentally in question in an action in which he is not a party, it is sufficient to show that he was an acting officer, and the regularity of his appointment or election cannot be made a question. *Proof that he is an acting officer is prima facie evidence* of his election or appointment, as well as of his having duly qualified. But if he relies alone on proof of a due election or appointment, such election or appointment must be legally established. Pierce *v.* Richardson, 37 N. H. 306 (1858); Tucker *v.* Aiken, 7 N. H. 113; Johnson *v.* Wilson, 2 N. H. 202; Baker *v.* Shephard, 4 Fost. (24 N. H.) 212 (1851), and cases cited; Bean *v.* Thompson, 19 N. H. 290; Blake *v.* Sturdevant, 12 N. H. 573; Burgess *v.* Pue, 2 Gill (Md.), 254. *Ante*, sec. 213. An officer, even *when justifying* may *prima facie* establish his official character *by proof of general reputation*, and that he acted as such officer. Johnson *v.* Steadman, 3 Ohio, 94; followed, Eldred *v.* Seaton, 5 Ohio, 215; Berryman *v.* Wise, 4 Term R. 366; Potter *v.* Luther, 3 Johns. 431; Wilcox *v.* Smith, 5 Wend. 233; People *v.* McKinney, 10 Mich. 54. But it is not enough to show that the officer was acting officially in the particular instance in controversy in the case upon trial, and in which his authority is questioned. Hall *v.* Manchester, 39 N. H. 295 (1859). "The *mere acting in a public capacity* is sufficient *prima facie* proof of proper appointment; but it is only *prima facie* presumption and is capable of being rebutted." *Per* Lord *Coleridge*, C. J., in Regina *v.* Roberts, 36 Law Times Rep. 690 (1878); s. c. 6 Am. Law Rep. 414. *Post*, sec. 276, note. An acting officer is estopped to dispute the validity of his own appointment and election. State *v.* Sellers, 7 Rich. Law, 368; State *v.* Mayberry, 3 Strob. 144.

Acts and Declarations of officers, when evidence for or against the corpo-

§ 238 (177). **Amotion and Disfranchisement; the two distinguished; English decisions as to Disfranchisement inapplicable in this country.** — The elementary works treat of Amotion and Dis-

franchisement together: indeed, formerly, the important distinction between the two was not observed. Amotion relates alone to *offi-*

ration. Mitchell *v.* Rockland, 41 Me. 363; Jordan *v.* School District, 38 Me. 164 (1864); Morrell *v.* Dixfield, 30 Me. 157; County *v.* Simmons, 5 Gilm. (10 Ill.) 516; Railroad Co. *v.* Ingles, 15 B. Mon. (Ky.) 637; Glidden *v.* Unity, 33 N. H. 577; Toll Co. *v.* Bettsworth, 30 Conn. 380; Barnes *v.* Pennell, 2 H. of L. Cas. 497; Curnen *v.* New York, 79 N. Y. 511. See chapter on Corporate Records and Documents, *post.* The *acts* of the officers of municipal corporations in the line of their official duty, and within the scope of their authority, are binding upon the body they represent; and *declarations* and *admissions* accompanying such acts as part of the *res gestæ*, calculated to explain and unfold their character, and not narrative of past transactions, are competent evidence against the corporation. To render such declarations and admissions evidence, they must acccompany acts, which acts must be of a nature to bind the corporate body. Glidden *v.* Unity, 33 N. H. 571 (1856); Perkins *v.* Railroad Co., 44 N. H. 223; Grimes *v.* Keene, 52 N. H. 330; Harpswell *v.* Phippsburg, 29 Me. 313; Coffin *v.* Plymouth, 49 N. H. 173; Hopkinton *v.* Springfield, 12 N. H. 328; Pittsfield *v.* Barnstead, 40 N. H. 477; Canaan *v.* Hanover, 49 N. H. 415; Gray *v.* Rollinsford, 58 N. H. 253 (1878); s. c. 21 Alb. L. Jour. 76. "A municipal corporation *may be estopped* by the action of its proper officers, when the corporation is acting in its private, as contradistinguished from its governmental, capacity, and has lawful power to do the act." *Per Scholfield*, J., Chicago *v.* Sexton, 115 Ill. 230.

Notice to Officers. — Where the officers or agents of a public corporation have no powers or duties with respect to a given matter, their individual knowledge, or the individual knowledge of the inhabitants or voters, does not bind or affect the corporation. Harrington *v.* School District, 30 Vt. 155 (1858); Angell & Ames Corp. sec. 239; Hayden *v.* Turnpike Co. 10 Mass. 397. The mayor is chief executive officer of the city, and notice to him of a nuisance is sufficient, when it would not be to the clerk, who is only a recording officer, not authorized to act upon the notice. Nichols *v.* Boston, 98 Mass. 39 (1867); *ante*, secs. 208, 209; *post*, chap. xxiii. Index, title *Notice.*

Indictment of Public and Corporate Officers. — "A public officer," it is declared in North Carolina, "entrusted with definite powers to be exercised for the benefit of the community, who wickedly abuses or fraudulently exceeds them, is punishable by indictment." State *v.* Glasgow, N. C. Conf. R. 186, 187 (indictment of Secretary of State); State *v.* Justices, &c., 4 Hawks (N. C.), 194 (when county authorities indictable for non-repair of jail); see Paris *v.* People, 27 Ill. 74; State *v.* Comm'rs of Fayetteville (non-repair of streets), 2 N. C. Law, 617; *Ib.* 633; 2 Murph. 371; State *v.* Fishblate, 83 N. C. 654; State *v.* Hall, 97 N. C. 474. But see as to street commissioner, Graffins *v.* Commonwealth, 3 Pa. (Penn. & W.) 502; State *v.* Comm'rs, Walk. (Miss.) 368. Indictment of municipal officers for violation of charter. People *v.* Wood, 4 Park. Cr. R. 144; Hammar *v.* Covington, 3 Met. (Ky.) 494; State *v.* Shelbyville, 4 Sneed (Tenn.), 176; State *v.* Shields, 8 Blackf. (Ind.) 151; Lathrop *v.* State, 6 Blackf. (Ind.) 502; State *v.* Burlington, 36 Vt. 521. *Requisites of indictment* for non-performance of official duty. Wattles *v.* People, 13 Mich. 446; State *v.* Mayor, 11 Humph. (Tenn.) 217; State *v.* Comm'rs, 4 Dev. (N. C.) 345; 3 Chitty Crim. Law, 586, 606, for precedents of indictments against corporations. *Criminal information* against municipal officers. Willc. Corp. 315–318; Rex *v.* Watson, 2 Term R. 204; *Ib.* 198. Indictment against *municipal corporations.* See chapter on Remedies against Illegal Corporate Acts, *post*, secs. 931, 933.

Liability of Officer for Moneys Received. — A public or municipal officer, who is required to account for and pay over money that comes into his hands, is liable though it be stolen without his fault, unless relieved from this responsibility by statute. Halbert *v.* State, 22 Ind. 125 (1864); Muzzy *v.* Shattuck, 1 Denio, 233; Morbeck *v.* State, 28 Ind.

cers; disfranchisement, to *corporators or members* of the corporation. Amotion, therefore, is the removal of an officer in a corporation from

86; Hancock *v.* Hazzard, 12 Cush. (Mass.) 112; Clay Co. *v.* Simonsen, 1 Dak. Ter. 403; affirmed, Clay County *v.* Simonsen, 2 Dak. Ter. 112; Egremont *v.* Benjamin, 125 Mass. 15; State *v.* Lewenthall, 55 Miss. 589; State *v.* Powell, 67 Mo. 395; State *v.* Gates, 67 Mo. 139; Inglis *v.* State, 61 Ind. 212; United States *v.* Prescott, 3 How. (U. S.) 578; Commonwealth *v.* Comly, 4 Pa. St. 372; State *v.* Harper, 6 Ohio St. 707; Henry *v.* State, 98 Ind. 381. And a direction to a public officer (*e. g.* a county treasurer) how and where to keep the money (*e. g.* in a safe provided by the county), if made by a board or authority having no legal control or power over the matter, will not be a defence to such officer if the money is stolen from the safe. Halbert *v.* State, *supra.* In a suit against a tax-collector to recover money received by him, it is no defence that he received the money on account of taxes which the legislature had no constitutional power to impose. Waters *v.* State, 1 Gill (Md.), 302 (1843); Thompson *v.* Stickney, 6 Ala. 579; Evans *v.* Trenton, 4 Zabr. (24 N. J. L.) 764. Treasurer held not entitled to credit for money paid contractors upon warrants not drawn according to the charter. McCormick *v.* Bay City, 23 Mich. 457.

Liability of Officer on Contracts. — Public and municipal officers are *not personally liable on contracts* within the scope of their authority and line of duty, unless it is very apparent that they intended to bind themselves personally. Macbeath *v.* Haldimand, 1 D. & E. Term. 172, and Hodgson *v.* Dexter, 1 Cranch, 345, are the leading cases. The question is, To whom was the credit given? Did the defendant contract in his public or private capacity? See Olney *v.* Wickes, 18 Johns. (N. Y.) 122, where the promise was held not personal. Compare King *v.* Butler, 15 Johns. (N. Y.) 281; Gill *v.* Brown, 12 Johns. (N. Y.) 385; Walker *v.* Swartout, *Ib.* 444; Mott *v.* Hicks, 1 Cow. (N. Y.) 513; Sheffield *v.* Watson, 3 Caines (N. Y.), 69; commented on, 12 Johns. 448; Brown *v.* Rundlett (full discussion), 15 N. H. 360 (1844), and cases cited and criticised; Belknap *v.* Rheinhart, 2 Wend. (N. Y.) 375; Adams *v.* Whittlessey, 3 Conn. 560; 8 Conn. 329; Hammarskold *v.* Bull, *et al.* ("State capitol commissioners") 11 Rich. (S. C.) Law, 493; Lesley *v.* White, 1 Speers, 31; Young *v.* Commissioners of Roads, 2 Nott & McC. 537; Miller *v.* Ford, 4 Rich. (S. C.) Law, 376; s. c. 4 Strob. 213; Copes *v.* Mathews, 10 Sm. & Marsh. (18 Miss.) 398; Tucker *v.* Shorter, 17 Ga. 620; Woodbridge *v.* Hall, 47 N. J. L. (18 Vroom) 388; Hall *v.* Cockrell, 28 Ala. 507 (1856); but *quære*, as to its correctness. In Nickerson *v.* Dyer, 105 Mass. 320, the *agents or committee of a town* were held not to be personally liable. A public officer contracting with a party who knows the extent of his authority is not personally liable, unless such intent is clearly expressed. Broadwell *v.* Chapin, 2 Ill. App. 511; *post*, chap. xiv. In the absence of a provision to the contrary, an officer of a municipal corporation is not disabled from entering into a contract with it. Municipality *v.* Caldwell, 3 Rob. (La.), 368 (1842). See on this point, *post*, sec. 292 and note. It is held that where the officers of a public or municipal corporation, acting officially and under an innocent mistake of the law, in which the other contracting party equally participated, with equal opportunities of knowledge, neither party at the time looking to personal liability, the officers *are not, in such case, personally liable*, nor is the corporation liable. Houston *v.* Clay County (unauthorized contract by township trustees for the erection of a bridge), 18 Ind. 396 (1862); Boardman *v.* Hayne, 29 Iowa, 339 (1870); Duncan *v.* Niles, 32 Ill. 532 (1863), and cases cited; Ogden *v.* Raymond, 22 Conn. 379 (1853); Dameron *v.* Irwin, 8 Ire. Law (N. C.), 421 (1848): Hite *v.* Goodman, 1 Dev. & Bat. Eq. (N. C.) 364 (1836); Ives *v.* Hulet, 12 Vt. 314 (1840); Stone *v.* Huggins, 28 Vt. 617; Tucker *v.* Justices, 13 Ire. Law (N. C.) 434; Dey *v.* Lee, 4 Jones (Law), 238; Tucker *v.* Shorter, 17 Ga. 620; Copes *v.* Mathews, 10 Sm. & Marsh. (18 Miss.) 398; Hall *v.* Cockrell, 28 Ala. 507; compare Potts *v.* Henderson, 2 Ind.

his office, but it leaves him still a member of the corporation. Disfranchisement is to destroy or take away the franchise or right of

(Carter) 327 (1850); Lyon *v.* Irish, 58 Mich. 518. Liability under statute of trustees or directors of public works who make unauthorized contracts. Higgins *v.* Livingstone, 4 Dow, 341; Parrott *v.* Eyre, 10 Bing. 283; Wilson *v.* Goodman, 4 Hare, 54.

TAX-COLLECTOR'S PERSONAL LIABILITY TO THIRD PERSONS. — Tax-collector liable in trespass who seizes without color of law for tax assessment, or under an unconstitutional law. McCoy *v.* Chillicothe, 3 Ohio, 370; Ragnet *v.* Wade, 4 Ohio, 107; Loomis *v.* Spencer, 2 Paige, 150. But a collector whose warrant is in due form, with nothing on its face to show the illegality of the tax or the want of authority in the assessors or previous officers, will be protected in executing it, even though the tax be not lawfully assessed. Chegary *v.* Jenkins, 1 Seld. (5 N. Y.) 376 (1861); affirming s. c. 3 Sandf. Sup. Ct. R. 409; Abbott *v.* Yost, 2 Denio (N. Y.), 86; Savacool *v.* Boughton, 5 Wend. (N. Y.) 170 (1830), leading case; Downing *v.* Rugar, 21 Wend. 178 (warrant of justice to overseers of poor); Alexander *v.* Hoyt, 7 Wend. (N. Y.) 89; Clark *v.* Halleck, 16 Wend. (N. Y.) 607; People *v.* Warren, 5 Hill (N. Y.), 440; Webber *v.* Gray, 24 Wend. (N. Y.) 485; Loomis *v.* Spencer, 2 Paige, 153; Little *v.* Merritt, 10 Pick. (Mass.) 547; see Suydam *v.* Keys, 13 Johns. (N. Y.) 444; Gale *v.* Mead, 2 Denio (N. Y.), 160; *Ib.* 232; Easton *v.* Callender, 11 Wend. (N. Y.) 90; Clark *v.* Norton, 49 N. Y. 243. Liability of assessor. Dorwin *v.* Strickland, 57 N. Y. 492 (1877); Harshman *v.* Winterbottom, 123 U. S. 215.

PERSONAL LIABILITY OF PUBLIC OFFICERS FOR ACTS OF SUBORDINATES; RESPONDEAT SUPERIOR. — Public officers are not liable for the misconduct or malfeasance of such persons as they are *obliged* to employ; the reason here being that the maxim of *respondeat superior* has no application, there being no freedom of choice as to the selection and control of agents. Bailey *v.* Mayor, &c., 3 Hill (N. Y.), 531 (1842); affirmed in error, 2 Denio, 433 (1845); Hall *v.* Smith, 2 Bing. 156; Pritchard *v.* Keefer, 53 Ill. 117; Humphreys *v.* Mears, 1 Man. & Ryl. 187; Bolton *v.* Crowther, 4 Dowl. & Ryl. 195; Harris *v.* Baker, 4 Maule & Selw. 27; Bacheller *v.* Pinkham, 68 Me. 253. See also Lane *v.* Cotton, 1 Salk. 17; Story on Agency, 320 *et seq.*; Story on Bail. 300, 302; Martin *v.* Mayor, &c., 1 Hill (N. Y.), 545, 551; Mayor, &c. *v.* Furze, 3 Hill (N. Y.), 612, 618. City liable for negligence in making public improvements, though it let the contract to a contractor who is to perform it under the supervision and direction of the city. Chicago *v.* Dermody, 61 Ill. 431; Chicago *v.* Joney, 60 Ill. 383. More fully on this point see *post*, chap. xxiii.; Wright *v.* Hoebrook (full discussion), 52 N. H. 120 (1872); s. c. 13 Am. Rep. 12.

LIABILITY OF PUBLIC OFFICERS FOR ACTS JUDICIAL IN THEIR NATURE. — Officers are *not liable* for honest errors or mistakes of judgment as to acts within the scope of their authority, *judicial* in their nature, in the absence of malice or corruption, or statute imposing the liability. *Post*, chaps. xxii. and xxiii.; Ramsey *v.* Riley, 13 Ohio, 157; Steward *v.* Southard, 17 Ohio, 402; Conwell *v.* Emrie (road supervisor), 4 Ind. 209; Bartlett *v.* Crozier (highway overseer), 17 Johns. (N. Y.) 439; Freeman *v.* Cornwall (highway overseer), 10 *Ib.* 470; McConnell *v.* Dewey (road supervisor), 5 Neb. 385 (1877); Johnson *v.* Stanley, 1 Root (Conn.), 245; Township *v.* Carey, 3 Dutch. (N. J. L.) 377; Waters *v.* Waterman, 2 Root, 214; Craig *v.* Burnett, 32 Ala. 728; State *v.* Dunnington, 12 Md. 340; Commissioners *v.* Nesbitt, 11 Gill & J. (Md.) 50; Woodruff *v.* Stewart, 63 Ala. 206 (action against *mayor acting as judge for false imprisonment*). East River Gas-Light Co. *v.* Donnelly, 93 N. Y. 557. Liability where the officer's function is *quasi* judicial. Wilkes *v.* Dinman, 7 How. 89 (where the subject is much considered, and malice or wilful wrong held to be essential), Waldron *v.* Berry, 51 N. H. 136; Perry *v.* Reynolds, 53 Conn. 527; Raymond *v.* Fish, 51 Conn. 80 (health officer not liable for *mere error of judgment*);

being any longer a *member* of the corporation.[1] American municipal corporations are, in many respects, essentially different in their con-

Matter of Isaacson, 36 La. An. 56 (failure to levy a tax for payment of judgment). The members of a city council are not individually liable, in a civil or criminal action, for acts involving the exercise of discretion, unless they act corruptly. Walker *v.* Hallock, 32 Ind. 239 (1869); Baker *v.* State, 27 Ind. 485. Liability of *ministerial officer*, charged by statute with an absolute and certain duty. Clark *v.* Miller, 54 N. Y. 528, and cases cited. But see reference to this case, cited by *Miller*, J., in Dow *v.* Humbert, 91 U. S. 294, 302 (1875). *Public duty*, not ordinarily enforceable by private action against the officer, unless given by statute. Foster *v.* McKibben, 14 Pa. St. 168; McConnell *v.* Dewey (road supervisor), 5 Neb. 385 (1877). *Misapplication of public funds by officer.* Township, &c. *v.* Linn, 36 Pa. St. 431. *Ante*, secs. 214–216, notes. Neglect to take a *bond* required by law. Boggs *v.* Hamilton, 2 Const. (S. C.) R. 381; State *v.* Dunnington, 12 Md. 340. A municipal officer misled into issuing order, not liable to the holder. Boardman *v.* Hayne, 29 Iowa, 339.

PERSONAL LIABILITY OF OFFICER FOR TORTS. — Alvord *v.* Barrett (town clerk), 16 Wis. 175; American Print Works *v.* Lawrence, 3 Zabr. (23 N. J. L) 590, 601. *No liability* for acts done by a public officer under lawful authority and in a proper manner. *Ib.* Full discussion and cases cited by *Carpenter*, J.; s. P. in s. c. 1 Zabr. (21 N. J. L.) 248, 260, *per Green*, C. J.; Calking *v.* Baldwin, 4 Wend. (N. Y.) 667; and cases cited. How far protected by an *unconstitutional* statute. *Ib.* But if *officers act maliciously, oppressively, corruptly, or without authority of law*, they may be held personally liable. Pruden *v.* Love, 67 Ga. 190 (declaring a building a nuisance and tearing it down without proper notice to the owner). McCarthy *v.* DeArmit, 99 Pa. St. 63 (unlawful arrest and imprisonment. See also as to measure of damages). Liability for *nonfeasance* or *misfeasance*, where the duty is specific, imperative, and not judicial, in its nature. Griffith *v.* Follett, 20 Barb. (N. Y.) 630 (1855); Weaver *v.* Devendorf, 3 Denio (N. Y.), 117; Harmon *v.* Brotherson, 1 Denio (N. Y.), 537; *Ib.* 595; Adsit *v.* Brady, 4 Hill (N. Y.), 630 (1843). "It is settled in this court that one who assumes the duties and is invested with the powers of a public officer *is liable to an individual who sustains special damage* by a neglect properly to perform such duties." *Finch*, J., in Bennett *v.* Whitney, 94 N. Y. 302 (leaving a temporary opening in a street unguarded and unlighted). Hover *v.* Barkhoof, 44 N. Y. 113 (failing to keep a bridge in repair). More fully, *post*, chap. xxiii. The principle on which a public officer is held personally liable for injuries resulting from improper execution of official duties is well stated in Nowell *v.* Wright, 3 Allen (Mass.), 166; Blair *v.* Langtry, 21 Neb. 247. In Amy *v.* Supervisors, 11 Wall. 136 (1870), where *county supervisors were held to be personally liable for failing to levy a tax, as commanded by the court*, to pay the plaintiff's judgment, Mr. Justice *Swayne*, stating the principle of the decision, says: "The rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct; mistake of duty and honest intentions will not excuse the offender." *Measure of damages.* Dow *v.* Humbert, 91 U. S. 294 (1875). Liability for *fraud*. Oakland *v.* Carpenter, 13 Cal. 540; *ante*, sec. 208, n.; *post*, sec. 910, n. A *ministerial officer*, acting in good faith, is liable for actual, but not for

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[1] 2 Kyd, 50–94; Willc. 245–276; Glover, chap. xvi. pp. 327, 328; Grant, 250, 263. And see 2 Kent, Com. 278, 297, where amotion and disfranchisement are used as convertible terms; Angell & Ames, Corp. chap. xii., where the earlier cases are quite fully collected, and the doctrine of the English decisions satisfactorily presented. Richards *v.* Clarksburg, 30 W. Va. 491 (1887), citing the text.

stitution from the old English municipal corporations, under which most of the cases on the subject of amotion and disfranchisement usually cited in the books arose. These cases, especially those relating to disfranchisement are, in general, inapplicable here, and should, it is believed by the author, be followed by our courts as precedents with unusual caution, and only when they rest upon or declare principles general in their nature, and which embrace in their operations municipal institutions possessing the distinctive characteristics of ours. Here, the inhabitants of the municipality are, by legislative enactment, the corporators; certain of those inhabitants (usually all of the adult male residents) have the constitutional or statutory right to elect the legislative or governing body, and also, frequently, the other more important officers of the corporation. It would seem that the English doctrine of *disfranchisement* of a corporator or member has no application to our municipal corporations, whether the corporator be considered the "inhabitant" or the "voter."

§ 239 (178). **Disfranchisement; English Doctrine not applicable here.** — Whether the power of disfranchisement be *incidental* to the corporation, or must be *expressly conferred*, respecting which there is in England some contrariety of view,[1] we need not inquire,

exemplary damages, for illegal acts injurious to private persons. Tracy *v.* Swartout, 10 Pet. (U. S.) 80 (1836) (action against collector of customs); *Ib.* 137; Jenner *v.* Joliffe, 9 Johns. 382. As no one is bound by an unauthorized ordinance, the municipal authorities enacting the same are not individually liable therefor. *So held*, in action by an ex-mayor against aldermen for depriving him of his office. Jones *v.* Loving, 55 Miss. 109; *supra*, sec. 235. A provision of law making a civil corporation liable "for the illegal doings and defaults" of its officers (there being no provision that the officers shall not also remain liable), does not deprive the party injured of his right to proceed personally against the officer or agent who committed the injury. Both are liable. Rounds *v.* Mansfield, 38 Me. (3 Heath) 586 (1854). *Election officers for refusing vote, when liable.* Gordon *v.* Farrer, 2 Doug. (Mich.) 411; Carter *v.* Harrison, 5 Blackf. 138; Jeffries *v.* Ankeny, 11 Ohio, 374; compare Ramsey *v.* Riley, 13 Ohio, 157. See Jenkins *v.* Waldron, 11 Johns. (N. Y.) 114; Lincoln *v.* Hapgood, 11 Mass. 350; Bridge *v.* Lincoln, 14 Mass. 367. *Collection and revenue officers* not liable to the party paying for money *voluntarily* paid to them. Elliott *v.* Swartout, 10 Pet. 137 (1836); Thompson *v.* Stickney, 6 Ala. 579. More fully, *post*, chap. xxiii. *When liable in trespass.* McCoy *v.* Chillicothe, 3 Ohio, 370; Loomis *v.* Spencer, 2 Paige, 153. *Recording officer.* Ramsey *v.* Riley, 13 Ohio, 157; approved, Stewart *v.* Southard, 17 Ohio, 402.

[1] Grant, 263. "This right [of disfranchisement] has been but sparingly exercised, though it is undoubtedly an *incident* to every corporation, with, perhaps, some exceptions in cases of trading and monetary bodies." *Ib.* Willcock (271, pl. 709) denies that it is an incidental right, and claims that the rule laid down in the second resolution (Bagg's Case) on this point, — that "no freeman of any corporation can be disfranchised by the corporation, unless they have authority to do so by the express words of the charter, or by prescription," — is the law. Mr. Glover simply adopts Mr. Willcock's language. Glover, 335. Mr. Kyd's exposition of the *second* resolution in Bagg's Case, 2 Kyd, 52. And see leading case of Rex *v.* Richardson, 1 Burr. 517, which was a case of amotion, but has been often taken as asserting an incidental power to disfranchise for cause as well as to amove. Angell & Ames, secs. 408, 409. See, generally, Commonwealth *v.* St. Patrick's Society, 2 Binn. (Pa.) 448 (1810); Evans *v.* Philadelphia Club, 50 Pa. St. 107; Hopkinson *v.* Marquis of Exeter, Law Rep. 5 Eq. 63; State *v.* Georgia Med. Soc., 38 Ga. 608; s. c. 8 Am. Law Reg. (N. S.) 533, Mr. Mitchell's note.

for here (were there no constitutional obstacles) the legislature never bestows upon the council, or governing body which represents the corporation, the right to disfranchise the citizen or corporator; and it is clear that such a formidable and extraordinary authority does not exist, and cannot be exercised by the council, as an incidental or implied right. To burn or destroy the charters of the corporation, or wilfully to falsify its books, were in England considered such breaches of duty on the part of a corporator as would work a forfeiture of the corporate character,[1] there being, according to Lord Coke, "a tacit condition annexed to the franchise, which, if he break, he may be disfranchised."[2] Surely, there is here no such tacit condition annexed to the constitutional or statutable right of a resident of a municipality to be and remain a corporator, though there may be a similar condition annexed to municipal offices. Wilfully to destroy or falsify the charter or books of a municipal corporation is an act which is punishable by the criminal codes of the different States; and if the offender is convicted and imprisoned, it may result as an incident of such conviction that he will cease, for the time, to be a resident, and hence will cease to be a member of the corporation; but the corporation itself has no power to disfranchise him, that is, to deprive him of the privileges and rights, without absolving him from the liabilities of other citizens, while he remains within the limits of the municipality.

§ 240 (179). **Amotion; Rex v. Richardson.** — The power *to amove a corporate officer* from his office, for reasonable and just cause, is one of the common-law incidents of all corporations.[3] This doctrine,

[1] Mayor *v.* Pilkinton, 1 Keb. 597; Rex *v.* Chalke, 5 Mod. 257; 1 Lord Raym. 226; Grant, Corp. 265.

[2] 13 Coke, 98 *a*.

[3] Rex *v.* Richardson, 1 Burr. 517; Rex *v.* Liverpool, 2 Burr. 723; Rex *v.* Doncaster, 2 Burr. 738 Jay's Case, 1 Vent. 302; Lord Bruce's Case, 2 Stra. 819; Rex *v.* Ponsonby, 1 Ves. Jr. 1; Rex *v.* Lyme Regis, Doug. 153; Rex *v.* Tidderley, 1 Sid. 14, *per Hale*, C. B.; Rex *v.* Taylor, 3 Salk. 231; 1 Roll. Rep. 409; s. c. 3 Bulst. 189; Rex *v.* Chalke, 1 Lord Raym. 225; Rex *v.* Heaven, 2 Term R. 772; Reg. *v.* Newbury, 1 Queen's Bench, 751; 2 Kyd, 50–94, where the old cases are digested; Glover, chap. xvi.; Willc. 246; Grant, 240; Angell & Ames, chap. xii.; 2 Kent, Com. 297; Richards *v.* Clarksburg, 30 W. Va. 491 (1887); State *v.* The Judges, 35 La. An. 1075; Ellison *v.* Raleigh, 89 N. C. 125; *ante*, sec. 212, note.