either on the same or to a future day, and, if fairly done, to another place within the corporate limits.[1]

§ 270 (208). **Constitution and Meetings of Councils or select Governing Bodies; and herein of Quorums and Majorities, of Integral Parts, and of stated, special, and adjourned Meetings.** — Unlike the towns of New England, in which all the qualified voters meet and act in their primary capacity, the *councils of cities and towns are representative bodies*, the number of whose members is fixed by law, and they are elected by the legal voters of the incorporated place. This council is the governing body of the municipal corporation, and the corporation, unless it is otherwise provided, can act and be bound only through the medium of the council.[2] The *charter or*

[1] Chamberlain *v.* Dover, 13 Me. (1 Shep.) 466 (1836); People *v.* Martin, 1 Seld. (5 N. Y.) 22 (1851); Hubbard *v.* Winsor, 15 Mich. 146; Kimball *v.* Marshall, 44 N. H. 465 (1863); Drisko *v.* Columbia, 75 Me. 73; *Ex parte* Wolf, 14 Neb. 24; Goodell *v.* Baker, 8 Cowen (N. Y.), 286; *infra*, secs. 285, 287. Electors exclusive judges of necessity of adjournment of town meeting; and such adjournment to next day, and at another place, in the town twenty miles distant, was considered lawful. *Ib.* The statute provided that if at any annual town meeting no place is fixed by the electors for the next annual town meeting, such town meeting shall be held at the place of the last annual town meeting. 1 Rev. Sts. N. Y. 340, sec. 3. *Held*, in People *v.* Martin, 1 Seld. (5 N. Y.) 22, that though the place of meeting was thus contingently fixed by *statute*, the electors, being duly assembled, might adjourn it for the residue of the day to *another* place in the town. Concluding his opinion in this case, *Paige*, J., well remarks: "I confess that I have had some difficulty in coming to this conclusion, and I think the power [which is decided to exist] of adjourning a town meeting to another time and place, may, under peculiar circumstances, be oppressively exercised, and lead to a defeat of the popular will. This power ought not to be exercised except in a case of extreme necessity." People *v.* Martin, 1 Seld. (5 N. Y.) 27.

After a valid adjournment, acts by a portion of the voters who remain are invalid. Kimball *v.* Lamprey, 19 N. H. 215. In *Massachusetts*, an *adjournment* of a meeting should appear *of record*, and parol evidence of an adjournment to another day is held to be inadmissible. Taylor *v.* Henry, 2 Pick. (Mass.) 397 (1824). See State *v.* Jersey City, 1 Dutch. (N. J.) 309, and chapter on Corporate Records and Documents, *post*, sec. 298. An adjourned meeting of a meeting not legally called cannot validate the former meeting, nor itself legally act. United States *v.* McKelden, Vol. VIII. Rep. 1879, McArthur & Mackey, 162; *ante*, sec. 268, note. The *statute of New York* (1 Rev. Sts. 342) only requires the town meeting to be kept open during the daytime, or some part thereof, but not that it shall be kept open during the whole and every part of the day, between the rising and setting of the sun. People *v.* Martin, 1 Seld. (5 N. Y.) 22 (1851).

[2] Central Bridge Corp. *v.* Lowell, 15 Gray (Mass.), 106, 116 (1860), where an act affecting a city was, by its terms, to take effect on acceptance by the city, it was held that the acceptance might be made by the governing body. The legislative and corporate powers of a municipality, whose exercise is, by the charter or constituent act, committed to the council or governing body, can be exercised only at a *corporate meeting duly held;* and the corporate will must be ascertained by vote and embodied in a definite form. The form which the corporate will assumes is usually either a resolution or ordinance, or something equivalent thereto.

constituent act of the place usually contains provisions as to the constitution of the council, its stated and special meetings, and the notice thereof requisite to be given, how many shall constitute a quorum, and an enumeration of its powers. The usual scheme of the organization of the council is to divide the territory of the incorporated place into districts or wards, the voters in each of which elect one or more representatives, annually, called aldermen or councilmen; and these, when duly convened, constitute the council, over which *the mayor or head executive officer of the corporation presides*, sometimes constituting a member of the council, and in other instances, having power to vote only when there is a tie or to give a second vote in case of a tie.[1]

§ 271 (209). **Mayor's Presence and Function.** — The doctrine of the English courts as to the old corporations in that country, that the *mayor was an integral part* of the corporation, whose presence, unless otherwise provided in the charter, was necessary to a valid corporate meeting; that, during a vacancy in the office of mayor, the corporation could do no valid act, unless expressly empowered, except to elect another and thus complete the body; and that the acts of the corporation under the presidency of any other than a mayor *de jure*, were voidable, has, it is believed, no application to the office of mayor in the corporations of this country.[2]

Schumm *v.* Seymour, 9 C. E. Green (24 N. J. Eq.), 143; State *v.* Jersey City, 6 Vroom (35 N. J. L.), 404. See chapter on Ordinances, *post*, sec. 307, note.

[1] Power to preside and give casting vote at meetings of a religious corporation construed. People *v.* Rector, &c., 48 Barb. (N. Y.) 603. A mayor of a city of the second class in *Kansas* may give the casting vote to confirm an officer appointed by him. Carroll *v.* Wall, 35 Kan. 36. *Post*, sec. 288, note.

[2] *Infra*, sec. 284. The text approved, Martindale *v.* Palmer, 52 Ind. 411 (1876); Welch *v.* Ste. Genevieve, 1 Dillon C. C. 130 (1871). And see *ante*, chap. ix., as to powers and duties of the mayor, secs. 208, 209. A provision in a charter that "the mayor, recorder and aldermen, when assembled together, shall constitute the common council," makes the mayor a member of the council. People *v.* Harshaw, 60 Mich. 200. *Infra*, sec. 273.

The presiding officer of a town meeting, with statute authority to maintain order, may make a valid order, though it be by parol only, for the *removal* of a *disorderly person* who disturbs the business of the meeting. Parsons *v.* Brainard, 17 Wend. (N. Y.) 522 (1837). Approval by the *mayor* of *proceedings* of the council may, by special requirement of charter, be essential to their validity. Graham *v.* Carondolet, 33 Mo. 262 (1862); Kepner *v.* Commmonwealth, 40 Pa. St. 124. A charter required every resolution of the council to be sent to the mayor, who should either approve it, in which case it would become operative and effectual, or disapprove it, in which case he should return it. It was held that his approval was to be made known by a written declaration attested by his signature. N. Y., &c. R. Co. *v.* Waterbury, 55 Conn. 19. *When approval by mayor not necessary.* State *v.* Jersey City, 1 Vroom (30 N. J. L.), 93, 148; see Dey *v.* Jersey City, 19 N. J. Eq. 412; Taylor *v.* Palmer, 31 Cal. 241; State *v.* Newark, 1 Dutch. (N. J.) 399; *post*, sec. 331, note.

§ 272 (210). **Same subject.** — The *right of the mayor* or other officer to *preside* over the meeting of the council is a *franchise,* and may be tested by an information in the nature of a *quo warranto,*[1] but cannot be determined, at least ordinarily, unless by statute provision, *on a bill in chancery* to enjoin, or in any other indirect or collateral proceeding.[2]

§ 273 (211). **Constitution of Council.** — Who shall *compose the council* or governing body of the corporation is in all cases prescribed by the charter or incorporation act, but the language used has been such as sometimes to lead to controversy.[3] The organic act of a city provided "that the intendant of police shall have a seat in the board of commissioners [the governing body of a city corporation], and when present shall preside therein; *in his absence,* the board shall appoint a chairman *pro tempore.*" It was held that the intendant was thereby constituted one of the commissioners, and had the right to participate in making ordinances.[4] Where the power to legislate

[1] Cochran *v.* McCleary, 22 Iowa, 75 (1867), and authorities there cited; *Re* Sawyer, 124 U. S. 200 (1887); Reynolds *v.* Baldwin, 1 La. An. 162 (1846); Rex *v.* Williams, 1 Burr. 402; Willc. 456, pl. 337; Rex *v.* Hertford, 1 Ld. Raym. 426; approved, Commonwealth *v.* Arrison, 15 Serg. & Rawle (Pa.), 130; *ante,* chap. ix. sec. 208. In Cochran *v.* McCleary, *supra,* it was held that the mayor, in cities of the second class, organized under the General Incorporation Act (Rev. of Iowa, 1860, chap. li.), is not *ex officio* a member of, nor has he any right to preside over, the city council; that the council was composed exclusively of trustees or aldermen, and elected its own presiding officer. The mayor of *New York* was held not to be a member of the common council; and the common council, having the power by statute to appoint to office, may exercise it without the concurrence of the mayor, who has no veto power upon the appointment. Achley's case, 4 Abb. Pr. Rep. 35 (1856). The burgess of a borough incorporated under the Pennsylvania General Borough Law of 1851 has no right to act as a member of the town council, and cannot refuse to sign ordinances regularly passed by the town council, on the ground that he was not present as a member when they were adopted. Commonwealth *v.* Kepner, 10 Phila. (Pa.) 510.

[2] Cochran *v.* McCleary, 22 Iowa, 75, 86 (1867); *Re* Sawyer, 124 U. S. 200 (1887); *post,* chap. xxii.; Topping *v.* Gray, 7 Hill (N. Y.), 259; affirming s. c. 9 Paige, 507; Markle *v.* Wright, 13 Ind. 548; Hullman *v.* Honcomp, 5 Ohio, 237; People *v.* Cook, 4 Seld. (9 N. Y.) 67; affirming s. c. 14 Barb. 257; Mayor *v.* Conner, 5 Ind. 171; Mozley *v.* Alston, 1 Phill. 790; Lord *v.* The Governor, &c., 2 Phill. 740; Peabody *v.* Flint, 6 Allen (Mass.), 52; Hagner *v.* Heyberger, 7 Watts & Serg. (Pa.) 104; People *v.* Carpenter, 24 N. Y. 86; People *v.* Draper, 15 N. Y. 532; People *v.* Insurance Co., 2 Johns. Ch. 371; People *v.* Same Co. (*quo warranto*), 15 Johns. 358; Demarest *v.* Wickham, Mayor, &c., 63 N. Y. 320 (1875); Commonwealth *v.* Bank (*quo warranto*), 28 Pa. St. 389; in chancery, *Ib.* 379; Hughes *v.* Parker, 20 N. H. 58; Strahl, *In re,* 16 Iowa, 369; Updegraff *v.* Crans, 47 Pa. St. 103; Facey *v.* Fuller, 13 Mich. 527; see Kerr *v.* Trego, 47 Pa. St. 292, cited *infra,* sec. 275.

[3] Cochran *v.* McCleary, 22 Iowa, 75 (1867).

[4] Raleigh *v.* Sorrell, 1 Jones (N. C.) Law, 49 (1853). In this case the Supreme Court of North Carolina admit (*arguendo*) that an officer — as, for example, the intendant — has no right, under the act of incorporation, to sit

for the corporation *is vested in "the mayor and councilmen,"* the council by itself cannot legislate, but must act in conjunction with the mayor. In deciding the point the court observes: "If a simple resolution [instead of an ordinance] would be sufficient, yet, before it would have any validity, it would necessarily have to be signed by the mayor as a part of the law-making power: the co-ordinate action of both is required."[1]

§ 274 (212). **Proper Corporate Body must act.** — It is undoubtedly true, as already stated, that *the corporate authority must be exercised by the proper body.* Thus, where a town was organized under a charter which vested the corporate powers of the place in a president and six trustees, and subsequently a general incorporation act was passed which was erroneously supposed to apply to the town, and under which the town elected different officers from those provided in the special charter, at a different time and constituting a different body, it was held, in the absence of legislative ratification, that this latter body could not exercise the authority of the corporation, since they were a body without any legal existence, and were not *the* body authorized to act for the corporation. The principle that *the acts of de facto officers are valid* was considered not to be applicable.[2]

with the legislative body of the corporation; but if he does so and acts with them, that an ordinance thus passed will be void, because the powers given to the corporation must be exercised in strict conformity to the special delegation of authority, and because, in the case supposed, the ordinance is not passed by the body to which the power is given; citing Rex *v.* Croke, Cowp. 26. The view of the court is in accordance with the rule of the English courts as applied to their corporations. Thus, Mr. Willcock says: "It may be unnecessary to add that whenever a particular business is delegated to a select body, *if others join in the performance of it, the act is void;* as if the mayor, aldermen, and commonalty join in making a by-law which is directed to be made by the mayor and aldermen. For if others are allowed to vote, a by-law might be established, although all those to whom the power is specifically delegated should be in the minority." Corp. 68, pl. 128; Parry *v.* Berry, Comyns, 269; Rex *v.* Head, 4 Burr. 2521; Hoblyn *v.* Regem, 2 Bro. P. C. 329; Rex *v.* Westwood, 4 B. & C. 799, 818; Green *v.* Durham, 1 Burr. 131; see *post,* sec. 276, and note. Whether the mere fact that a single unauthorized person is, by a mistaken construction of the charter, allowed to participate in the transactions of a meeting of the council, would, in this country, be held necessarily to avoid them, is a question which perhaps remains yet to be settled. It has been held, that if persons who are not qualified vote at a town, parish, or district meeting, without objection or challenge at the time, proof of that fact cannot afterwards be made with a view to invalidate the proceedings. Sutton *v.* Cole, 3 Pick. (Mass.) 232 (1825). So if such a meeting is called by persons acting under *color* of authority, it will be legal if no exception to their authority is taken at the time. *Ib.*

[1] Saxton *v.* Beach, 50 Mo. 488 (1872), *per Wagner,* J. Sequel of the case, Saxton *v.* St. Joseph, 60 Mo. 153 (1875). *Ante,* sec. 271, note.

[2] Decorah *v.* Bullis, 25 Iowa, 12 (1868);

§ 275 (213). **Injunction where two conflicting Municipal Bodies are concurrently acting.** — Where there are two bodies, *each of which claims to be the regularly organized municipal council and each is acting as such*, to the detriment and confusion of the public, the Supreme Court of Pennsylvania awarded to the body which was, *prima facie*, legally entitled to act, a provisional injunction to restrain the other body from interference with them. The bill in the case was filed by the body which, *prima facie*, had the written or legal title, as against the other and presumptively usurping body. Neither the Attorney-General nor any public officer was a party. To the defendants' objection that in such a case the Attorney-General alone can file a bill, the court replied: "We do not think so. It is right for those to whom public functions are entrusted to see that they are not to be usurped by others." [1]

Welch *v.* Ste. Genevieve, 1 Dillon C. C. 130 (1871); *infra*, sec. 276.

[1] Kerr *v.* Trego, 47 Pa. St. 292 (1864). *Author's Comments.* In reference to the important point decided in the case just cited it may be observed that, in the absence of statute, chancery has no jurisdiction over corporate elections, or to determine the title to corporate offices. In a case like that above mentioned, prompt and efficacious judicial intervention such as chancery only can afford is extremely convenient, or even needful, but the difficulty is to find, aside from statutory aid, an acknowledged head of equitable jurisdiction under which such a case can be brought. The general doctrine of our jurisprudence undoubtedly is that which is thus stated by *Gray*, J., *In re* Sawyer, 124 U. S. 212 (1887): "The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by *certiorari*, error, or appeal, or by *mandamus*, prohibition, *quo warranto*, or information in the nature of a writ of *quo warranto*, according to the circumstances of the case and the mode of procedure established by the common law or by statute. No English case has been found of a bill for an injunction to restrain the appointment or removal of a municipal officer. In the courts of the several States such a power in a court of equity has been denied in many well-considered cases," citing them.

In Kerr *v.* Trego, *supra*, the Supreme Court of Pennsylvania rested the right to grant a provisional injunction upon the ground, very broadly stated, that all corporate bodies and officers are *under law* and that "this remedy [by injunction] extends to all acts that are contrary to law and for which there is no adequate remedy at law; and we can hardly imagine any act that more clearly falls within this description than one that casts so deep a shade of doubt and confusion on the public affairs of a city as this does. In such a case no remedy is adequate that is not prompt and speedy." Similar views are expressed in the dissenting opinion of *Waite*, C. J., *In re* Sawyer, 124 U. S. 223. The stress of the question therefore is, whether the jurisdiction in equity is to be strictly limited by the existing landmarks and to the acknowledged heads of that jurisdiction, or whether, agreeably to the principles in which one source of equity jurisdiction has had its origin, namely, the inadequacy of common-law remedies, the jurisdiction of the court may, by a species of judicial legislation which, consciously or otherwise, is always in operation, be extended to a case of such an urgent and extraordinary nature as that which was presented by the facts in Kerr *v.* Trego. On the whole it seems to the author that Kerr *v.* Trego may be regarded as a sound, or at least an allowable, application of the principles of equity jurisdiction to a case of great public urgency, where, under the legislation of the State as it existed in Pennsylvania, the common-law remedies were not only inadequate, but wholly unsuited to the emergency in hand. The temptation to supply serious defects and *lacunae* which experience from time to time discloses in common-law remedies, by a judicial extension of the principles of equity jurisdiction, so as to secure justice or prevent its failure, is always strong, and on the whole resistless. A conservative chancellor may say here and there, "I have no power — the case is one for the legislature;" but the natural and general tendency when such a course is not contrary to existing legislation or policy, is to assert in the particular case a power felt to be necessary, and whose exercise promises to be beneficial. This, it is true, is judiciary law; but it is law which is necessarily evolved in the very process of legal administration. So it has been in the past, and so from the very nature of the case it must continue in the future. Law thus originating in actual experience, and limited by the judges in its application to the exigency which calls it into existence, must on the whole be excellent, though likely to be incomplete. It will be observed that the court did not undertake on the bill filed to adjudge the questions of title between the conflicting bodies. It disclaimed the right to do so. Its injunction, granted in the public interest, simply maintained the existing *prima facie* legal status until the question of title should be determined in the usual mode and by the proper tribunals. Demarest *v.* Wickham, Mayor, 63 N. Y. 320 (1875), was an action by two assistant aldermen in their own names to restrain the defendant, as mayor, from recognizing the board of aldermen, organized as the common council and usurping the rights of the board of assistant aldermen, of which the plaintiffs were members, on the ground that they had usurped the office in question, having been elected under an alleged unconstitutional act, and to restrain this alleged illegal and usurping body from the exercise of unauthorized powers. It was held that the action could not be maintained, and that the remedy under the legislation of New York was an information in the nature of a *quo warranto* by the Attorney-General in the name of the State. The case is distinguishable from Kerr *v.* Trego. Mode of organizing councils to which new members are to be admitted, and tests in case of conflicting councils, for determining which is the legal organization. Kerr *v.* Trego, 47 Pa. St. 292; *supra*, secs. 202, note, 204, 255, note, 272.

§ 276 (214). **Acts of de facto Councils and Officers.** — In this country the doctrine is everywhere declared, that the acts of *de facto officers*, as distinguished from the acts of mere usurpers, *are valid*, and the principle extends not only to municipal officers generally, but also to those composing the council, or legislative or governing body of a municipal corporation.[1] But in order that there may be,

[1] Scoville *v.* Cleveland, 1 Ohio St. 126 (1853); Decorah *v.* Bullis, 25 Iowa, 12 (1868); Cochran *v.* McCleary, 22 Iowa, 75, 84; Strahl, *In re*, 16 Iowa, 360; People *v.* Stevens, 5 Hill (N. Y.), 616; State *v.* Jacobs, 17 Ohio, 143; People *v.* Bartlett, 6 Wend. (N. Y.) 422; Pritchett *v.* People, 1 Gilm. (6 Ill.) 529; People *v.* Rankle, 9 Johns. (N. Y.) 147; Trustees, &c. *v.* Hill, 6 Cow. (N. Y.) 23; Williams *v.* School District, 21 Pick. 75; see Rex *v.* Mayor, &c., 8 Mod. 111; DeGrave *v.* Monmouth, 4 Car. & P. 111; Laver *v.* McGlachlin, 28 Wis. 364; *post*, sec. 892, note; Cushing *v.* Frankfort, 57 Me. 541; Lockhart *v.* Troy, 48 Ala. 579 (1872); Riddle *v.* Bedford, 7 S. & R. (Pa.) 386; People *v.* Hopson, 1 Denio (N. Y.), 574; Hamlin *v.* Dingman, 5 Lans. (N. Y.) 61; People *v.* Nostrand, 46 N. Y. 375; Olmsted *v.* Dennis, 77 N. Y. 378; Koontz *v.* Hancock, 64 Md. 134. As to *de facto* officers, *ante*, secs. 197 note, 221 note, 256, *post*, 763 note, 892 note. In a case in the House of Lords, decided in 1851, it was held that an act done by a definite body, under authority of parliament, *was not invalid because officers de facto joined with officers de jure* in the doing of it. The judges having unanimously declared this to be their opinion, the Lord Chancellor said: The opinion of the judges as to

within the meaning of the above rule, a *de facto officer*, there must be a *de jure office;* and the notion that there can be a *de facto* office has been characterized as a political solecism, without foundation in reason and without support in law; and, therefore, a person cannot claim to be a *de facto* officer of a municipal corporation when the corporation or people have, in law, no power, in any event, to elect or appoint such an officer.[1]

§ 277 (215). **Action by Indefinite Body; Majority present may act.** — The common-law principle, that if an *act is to be done by an indefinite body* it is valid if passed by a majority of those present at a legal meeting, no matter how small a portion they may constitute of the whole number entitled to be present, has been deemed *applicable to the towns of New England.* In those towns the corporate power resides, as we have seen, in the inhabitants, or citizens at large, and these form the constituent body. If the meeting has been duly called and warned, those who assemble, *though less than a majority of the whole,* have the power to act for and bind the whole, unless it is otherwise provided by law. Those who remain away are justly and conclusively presumed to assent to what may lawfully be done by those who attend.[2]

vestrymen *de facto* and *de jure* was of great importance. When it was considered that there were many persons who were charged with very important duties, and whose title to perform those duties or to exercise the powers necessary for their performance the public could not easily ascertain at the time, and when it was remembered what inconveniences would arise if the validity of their acts depended on the propriety of the election of the persons who had to perform them, the value of the clear enunciation of the principle thus made by the judges was very great, and in the correctness of it he begged to declare his entire concurrence. Scadding *v.* Lorant, 5 Eng. Law & Eq. 16, 30, *per* Lord Chancellor *Truro.* See *ante,* sec. 273, note. A person *acting in the capacity of a public officer is prima facie* taken to be so. Doe *v.* Barnes, 8 Q. B. 1043; Regina *v.* Roberts (crown cases reserved), 36 Law Times Rep. 690; s. c. 6 Am. Law Rep. 414. *Ante,* sec. 237, note, as to powers, duties, and liabilities of public officers.

[1] Decorah *v.* Bullis, 25 Iowa, 15, 18, (1868); Hildreth's Heirs *v.* McIntire's Devisees, 1 J. J. Marsh. (Ky.) 206; People *v.* White, 24 Wend. (N. Y.) 520, 540, 541; Carleton *v.* People, 10 Mich. 250; Welch *v.* Ste. Genevieve, 1 Dillon C. C. 130 (1871). In Norton *v.* Shelby Co., 118 U. S. 425 (1885), the doctrine of the text was asserted and enforced as sound. Mr. Justice *Field* reviews the cases, and distinguishes The State *v.* Carroll, 38 Conn. 449. See *post,* chap. xiv.; Burt *v.* Winona & St. Peter Ry. Co., 31 Minn. 472 (approving text). *De facto* officer's official bond not obligatory there being no such *de jure* office. Tinsley *v.* Kirby, 17 S. C. 1, 8; *supra,* sec. 274; *post,* chap. xxi.; sec. 892.

[2] Damon *v.* Granby, 2 Pick. (Mass.) 345, 355 (1824); Commonwealth *v.* Ipswich, 2 Pick. (Mass.) 70; Williams *v.* Lunenburg, 21 Pick. (Mass.) 75; Church Case, 5 Robt. (N. Y.) 649 (1867); First Parish *v.* Stearns, 21 Pick. (Mass.) 148 (1838); State *v.* Binder, 38 Mo. 450 (1866).

At a popular election, a candidate for a municipal office received a *plurality* of all the votes cast, but not a majority. There was no provision of the charter and no by-law on the subject. The usage in the corporation seemed to have been to consider the person having the highest number of votes, although not a majority of the whole, as duly elected. The statute in relation to *State* elections expressly provided that "plurality, or the highest number of votes, should make a choice." Under these circumstances, the majority of the court were of the opinion that the common-law rule, that a *majority* is necessary to a valid election, applied, and was not controlled by the terms or spirit of the general election law of the State. State *v.* Wilmington, 3 Harring. (Del.) 294 (1840). *Harrington,* J., dissented, holding (and, as it would seem, with reason) that the plurality principle had been the one "invariably adopted as most in consonance with our institutions in all cases where the law of election is silent in this respect." *Ib.,* p. 305. See First Parish *v.* Stearns, 21 Pick. (Mass.) 148. *As to municipal elections. Ante,* chap. ix. sec. 196.

§ 278 (216). **Quorum and Majority of Definite Body.** — The common-law rules as to *quorums* and *majorities,* established with reference to corporate bodies consisting of a *definite number* of corporators, have also, in general, been applied to the common council, or select governing body of our municipal corporations, where the matter is not specially regulated by the charter or statute.[1] Thus, to use Mr. Dane's illustration, if the body consists of twelve common councilmen, seven is the least number that can constitute a valid meeting, though four of the seven [the seven being duly assembled and present] may act.[2] Thus, where a council consisted of eighteen members, exclusive of the mayor, the election of a clerk by nine votes was held lawful and valid, the other members remaining present, though protesting against the method of electing and refusing to vote. It was held that the legal effect of their refusal to vote while remaining present, was an acquiescence in the action of those voting.[3] So, also, a statute in reference to a definite body, declaring that a "*majority of those present at any regular meeting* shall be competent" to transact business, leaves the number which may form a *quorum* to be determined by the common law; that is, there must be at least a majority present, and such a provision, it was considered, did not authorize a *minority of the whole body* to act.[4]

[1] Text approved in Heiskell *v.* Baltimore, 65 Md. 125, where *Stone,* J., said: "But when in the case, like the present, of a municipal corporation, the statute law creating it is silent as to what shall constitute a legal assembly, the common law both in England and in this country is well settled, that the *majority* of the members elect shall constitute the legal body." To same effect, Barnert *v.* Paterson, 48 N. J. L. (19 Vroom) 395; Cadmus *v.* Farr, 47 N. J. L. (18 Vroom) 208; McDermott *v.* Miller, 45 N. J. L. 251.

[2] 5 Dane, Abr. 150; Willcocks, *In re,* 7 Cow. (N. Y.) 402, 410 (1827), note *d,* and criticism on the rule stated, in 1 Kyd on Corp. 418, 425; 2 Kent Com. 293; Buell *v.* Buckingham, 16 Iowa, 284 (1864); Regents, &c. *v.* Williams, 9 Gill & Johns. (Md.) 365; Mills *v.* Gleason, 11 Wis. 470.

[3] State *v.* Green, 37 Ohio St. 227.

[4] Willcocks, *In re,* 7 Cow. (N. Y.) 402 (1827); *Ib.* 463, and note; *Ib.* 526,

§ 279 (217). **Same subject. Quorum.** — So, if a board of village trustees consists of *five members, and all, or four, are present, two* can do no valid act, even though the others are disqualified by interest from voting, and therefore omit or decline to vote; their assenting to the measure voted for by the two will not make it valid. If three only were present they would constitute a quorum; then the votes of two, being a majority of the quorum, would be valid;[1] certainly so where the three are all competent to act.[2]

§ 280 (218). **Legal Quorum defined.** — In another case, the power of amotion was conferred upon a city council to be exercised "*by a vote of two-thirds of that body*," and this was considered to give the power of removal to two-thirds of a legal quorum. Two-thirds of the whole number of members composing the council were held not to be required. The point was admitted to be close, and the French text of the charter was regarded as favoring the conclusion reached.[3]

§ 281 (219). **Quorum under Special Charter Provision.** — The charter of a city contained a provision that no ordinance should be passed by the common council, except by a *majority of all the members elected.* Eight were elected; and it was decided, under the above-mentioned requirement of the charter, that an ordinance could not be passed by a vote of *four* against three, since four did not constitute a majority of all the members elected, although it did constitute a majority of the legal quorum present at the meeting.[4]

§ 282 (220). **Majority of Quorum must concur.** — In the absence of special provision, the *major part of those present,* at a meeting of a select body, *must concur* in order to do any valid act. Therefore, when it appeared that thirteen ballots were cast when the members

and note; Heiskell *v.* Baltimore, 65 Md. 125; Barnert *v.* Paterson, 48 N. J. L. 395; *ante,* sec. 207, note; *infra,* secs. 282, 283. In *Iowa,* by statute "all ordinances and resolutions, or orders for the *appropriation or payment of money* shall require for their passage or adoption the concurrence of a majority of all the trustees of any municipal corporation," &c. A resolution for a change of the boundaries of a city does not require such majority concurrence. Strohm *v.* Iowa City, 47 Iowa, 42. Authorizing a city council to "settle their rules of procedure" held not to confer upon it the power of declaring what number shall constitute a quorum. Heiskell *v.* Baltimore, 65 Md. 125; Barnert *v.* Paterson, 48 N. J. L. 395.

[1] Coles *v.* Williamsburgh, 10 Wend. (N. Y.) 658 (1833); McDermott *v.* Miller, 45 N. J. L. (16 Vroom) 251.

[2] Buell *v.* Buckingham, 16 Iowa, 284 (1864), and cases cited. *Post,* sec. 292, n.

[3] Warnock *v.* Lafayette, 4 La. An. 419. See, on this point, Logansport *v.* Legg, 20 Ind. 315; State *v.* Porter, 113 Ind. 79.

[4] San Francisco *v.* Hazen, 5 Cal. 169 (1855). See, also, Oakland *v.* Carpentier, 13 Cal. 540; McCracken *v.* San Francisco, 16 Cal. 591; Pimental *v.* San Francisco, 21 Cal. 351.

present were only entitled to give twelve votes, of which seven were for one person and six for another, there was no election, and the council, though it had declared that the person receiving seven votes was duly elected, might subsequently rescind its action and proceed to a new election.[1] And in South Carolina the general rule is recognized, and a *majority* of the board of managers of elections — having power, by statute, to determine the validity of contested elections — is a quorum, and a majority of that quorum may act and decide.[2]

§ 283 (221). **Extent of the Majority Principle; application to Committees, Public Officers, &c.** — And, as a *general rule,* it may be stated that not only where the corporate power resides in a *select body,* as a city council, but where it has been *delegated to a committee or to agents,* then, in the absence of special provisions otherwise, a *minority* of the select body, or of the committee or agents, are powerless to bind the majority or do any valid act. If all the members of the select body or committee, or if all the agents are assembled, or if *all* have been duly notified, and the minority refuse or neglect to meet with the others, a majority of those present may act, provided those present constitute a majority of the whole number. In other words, in such case, a major part of the whole is necessary to constitute a quorum and a majority of the quorum may act. If the major part withdraw so as to leave no quorum, the power of the minority to act is, in general, considered to cease.[3] But where the *duties are purely ministerial, and not judicial,* or are of such a nature as *to exclude the idea of action as a body or board,* and where they are devolved on *public* officers or agents rather than on the agents of corporations, the rule above stated (as the cases

[1] Labourdette *v.* Municipality, 2 La. An. 527 (1847).

[2] State *v.* Delieseline, 1 McCord (S. C.), 52 (1821), where the subject is elaborately considered by *Nott,* J.; s. p. State *v.* Huggins, Harper (S. C.) Law, 94 (1824), further holding that where, of eighteen managers appointed by the legislature, two refused to qualify, one was disqualified, and one dead, the remaining fourteen (from necessity and public convenience) properly constituted the board, and might act by a majority of the fourteen. The decision rests upon the legislative intent, deduced from various provisions of the act, to commit the matter to the *acting* managers.

[3] Kingsbury *v.* School District, 12 Met. (Mass.) 99 (1846); Day *v.* Green, 4 Cush. (Mass.) 438, 439 (1849); Fisher *v.* School District, 4 Cush. (Mass.) 494 (1849); Coffin *v.* Nantucket, 5 Cush. (Mass.) 269 (1850); 11 Cush. 433; Damon *v.* Granby, 2 Pick. (Mass.) 345, 355 (1824); State *v.* Jersey City, 3 Dutch. (N. J.) 493; Charles *v.* Hoboken, 3 Dutch. (N. J.) 203; Dey *v.* Jersey City, 19 N. J. Eq. 412 (1869); Baltimore *v.* Poultney, 25 Md. 18 (1866). Text quoted and approved, Brown *v.* District of Columbia, 127 U. S. 579, 586 (1887).