given. See, also, as to form of judgment, Miner's Bank *v.* United States, 5 How. (U. S.) 213 (1847). If relators are successful, they are entitled to *costs*, and hence are entitled to a judgment of *ouster*, although the term of office in question has expired. People *v.* Loomis, 8 Wend. (N. Y.) 396 (1832); People *v.* Clute, 52 N. Y. 576 (1873). *Contra*, State *v.* Jacobs, 17 Ohio, 143. Angell & Ames Corp. sec. 745; *supra*, sec. 902. In *quo warranto* to try title to office, if the defendant is adjudged to have unlawfully intruded himself into the office, costs must be awarded to the relator, even if he fails to establish his own right to the office, the terms of the statute being express. State *v.* Jenkins, 46 Wis. 616. Judgment, under statute, of *ouster* against the defendant without passing upon the plaintiff's right. Gano *v.* State, 10 Ohio St. 237.

The refusal of the court to allow a claimant to a public office to file an information is a *final judgment*, reviewable on error, and this, notwithstanding the court has a discretion in granting or refusing leave. State *v.* Burnett, 2 Ala. 140 (1841); Ethridge *v.* Hill, 7 Port. (Ala.) 47.

CHAPTER XXII.

REMEDIES TO PREVENT, CORRECT, AND REDRESS UNAUTHORIZED OR ILLEGAL CORPORATE ACTS.

This subject will be considered in the following order: —

1. Of the Remedy in *Equity* — secs. 906–924.
2. Of the Remedy by *Certiorari* — secs. 925–929.
3. Of the Remedy by *Prohibition* — sec. 930.
4. Of the Remedy by *Indictment* — secs. 931–934.

The remedy by *mandamus* and *quo warranto* has already been considered. The remedy by *private or civil action* is treated in the next chapter.

Remedy in Equity.

§ 906 (727). **Equity Jurisdiction exceptional.** — Courts of equity will sometimes interfere to prevent the municipal authorities from transcending, or from making a wrongful use of, their powers, and will in proper cases relieve against their unauthorized or wrongful acts; but on a principle well known in our jurisprudence, there must, in the absence of controlling legislation, be *some distinct ground or head of equity* to justify a resort to this jurisdiction, such as the want of an adequate remedy at law,[1] multiplicity of suits, irreparable injury, fraud, breach of trust, or the like.[2]

§ 907. **Usual Remedy is at Law, not in Equity.** — Usually the question whether municipal and public corporations are acting, or have acted, within the limits of the authority which the law confers upon them, involves an examination of purely legal principles, unmixed with equity. Therefore, the Court of Chancery has no general jurisdiction to restrain, review, or set aside, even if irregular or illegal, the proceedings of such a corporation. Such jurisdiction belongs, except in special cases which will be mentioned, and which

[1] Stubenrauch *v.* Neyenesch, 54 Iowa, 567. If *mandamus* will lie to compel payment of municipal indebtedness or a levy of taxes for that purpose, there is an adequate remedy at law, and injunction will not be awarded. Hausmeister *v.* Porter, 21 Fed. Rep. 355; *ante*, secs. 826, 829, 849, 850.

[2] *Infra*, secs. 907, 907 *a*; *Re* Sawyer, 124 U. S. 200 (1887).

generally relate to the rights of property or other private rights of the citizen, *to the supervisory power and control of the common-law courts.*[1]

[1] Brooklyn *v.* Meserole, 26 Wend. 132 (1841), *per Nelson*, C. J. who admits only two classes of such cases in which equity has jurisdiction — (1) Irreparable injury, and (2) Multiplicity of suits — and approves Mooers *v.* Smedley, 6 Johns. Ch. 28 (1822). See, also, Heywood *v.* Buffalo, 14 N. Y. 534 (1856); Susquehanna Bank *v.* Broome Co. Sup., 25 N. Y. 312; Dows *v.* Chicago, 11 Wall. 108 (1870); Douglass *v.* Harrisonville, 9 W. Va. 162, applying doctrine of the text. Smith *v.* Oconomowoe, 49 Wis. 694; Butler *v.* Thomasville, 74 Ga. 570, where the building of a sewer, which endangered health, through private property was enjoined. In Heywood *v.* Buffalo, just cited, the court admits *three classes of cases in which equity has jurisdiction:* "(1) Where the proceedings of the subordinate tribunal will necessarily lead to a multiplicity of actions; (2) Where they lead in their execution to the commission of irreparable injury to the freehold; (3) Where the claim of the adverse party to the land is valid upon the face of the instrument, or of the proceedings sought to be set aside, and extrinsic facts are necessary to be proved, in order to establish the invalidity or illegality." *Per T. A. Johnson*, J., 15 N. Y. 534, 541, approved and followed. Minnesota Linseed Oil Co. *v.* Palmer, 20 Minn. 468, 474 (1877); Brehm *v.* New York (cloud on title), 104 N. Y. 186 (1887); Strusburgh *v.* New York (cloud on title), 87 N. Y. 452 (1882); Jex *v.* New York (action to recover back illegal assessment), 103 N. Y. 536 (1886); Guest *v.* Brooklyn (multiplicity of suits), 69 N. Y. 506 (1877), *Church*, C. J. states New York doctrine, *infra*, sec. 924, note. Boyle *v.* Brooklyn (cloud on title), 71 N. Y. 1 (1877). Injunction to prevent a municipal corporation from maintaining gratings over the entrance to sewers in the gutters of a street, because in cases of unusual storms or floods, leaves, &c., gathered therein and caused an overflow upon the adjoining sidewalk, refused. Paine *v.* Delhi, 116 N. Y. 224; s. c. 26 N. Y. State Rep. 620, distinguishing Seifert *v.* Brooklyn, 101 N. Y. 136; 1 Pomeroy Eq. Juris., sec. 259, and comments; Myall *v.* St. Paul, 30 Minn. 294; Miller *v.* Mobile, 47 Ala. 166 (1872). Where an attempt was made under an unconstitutional act to detach property from one town and annex it to another mostly within the limits of a city, if the city undertakes to exercise its powers over the property of the town, the town may, on the ground of trust and irreparable injury, have a bill in equity to restrain such interference and the attempt to exercise municipal jurisdiction within the territorial boundaries of the town. Hyde Park *v.* Chicago, 124 Ill. 156; Peoria *v.* Johnston, 56 Ill. 52; Smith *v.* Bangs, 15 Ill. 399; People *v.* Whitcomb, 55 Ill. 172; McCord *v.* Pike, 121 Ill. 288. In the *Federal courts* it is well known there can be no case of equitable cognizance where there is a plain and adequate remedy at law. Ewing *v.* St. Louis, 5 Wall. 413 (1866), citing with approval Brooklyn *v.* Meserole, and Heywood *v.* Buffalo, above-mentioned; Hannewinkle *v.* Georgetown, 15 Wall. 547 (1872); Dows *v.* Chicago, 11 Wall. 108; *ante*, sec. 611, and note; *post*, secs. 923, 924, and cases in notes.

So, in *New Jersey*, by a long-established practice, *courts of law are regarded as the proper tribunals* to review the irregularities or errors in the acts and proceedings of municipal corporations; but equity will, where the facts make a case for equitable interposition, entertain jurisdiction. Morris Canal & B. Co. *v.* Jersey City, 12 N. J. Eq. 252 (1859); s. c. in error, *Ib.* 547; State *v.* Jersey City, 29 N. J. L. 441; Carron *v.* Martin, 26 N. J. L. 594 (1857); State *v.* Newark, 25 N. J. L. 399; Holmes *v.* Jersey City, 12 N. J. Eq. 299; Attorney-General *v.* Paterson, 1 Stock. (N. J.) 624; State *v.* Jersey City, 30 N. J. L. 521; *Ib.* 247; Bond *v.* Newark, 19 N. J. Eq. 376; Cross *v.* Morristown, 18 N. J. Eq. 305. The right to interfere to protect the constitutional and plain legal rights of the citizen is recognized where the necessary elements and grounds of equity jurisdiction exist. Matthiessen & W. S. Ref. Co. *v.* Jersey City, 26 N. J. Eq. 247; Foley *v.* Passaic, 26 N. J. Eq. 216; Liebstein *v.* Newark, 24 N. J. Eq. 200; Jersey City *v.* Lembeck, 31 N. J. Eq. 255; Lewis *v.* Elizabeth, 25 N. J. Eq. 298; Bogert *v.* Elizabeth, 25 N. J. Eq. 426; Smith *v.* Newark, 32 N. J. Eq. 1; *infra*, sec. 927. As a general rule courts will not interfere with selectmen in the exercise of their judgment as to the mode of making a highway safe for public travel (*ante*, secs. 94, 475, chap. xviii.), but will do so where their object is merely to promote the comfort of travellers, and in so doing they invade private rights. Suffield *v.* Hathaway, 44 Conn. 521 (1877); *infra*, sec. 927. See, also, Gartside *v.* East St. Louis, 43 Ill. 47; Oakland *v.* Carpentier, 13 Cal. 540, 643; Intendant *v.* Pippin, 31 Ala. 542, 551, *per Stone*, J.; Baltimore *v.* B. & O. R. R. Co., 21 Md. 50 (1863). When the *abutter* who complains of proceedings in respect *to opening and improving streets* may resort to equity for relief in *Massachusetts*. See Whiting *v.* Boston, 106 Mass. 89 (1870); Jones *v.* Boston, 104 Mass. 461; *ante*, chap. xviii. on Streets. An *owner of a lot and building* cannot maintain a bill in equity to enjoin a city from *vacating part of a street three and one half blocks distant*, so as to permit it to be occupied by the Board of Trade with its building, one ground of this decision being that the plaintiff had no special property-right in the part of the street proposed to be vacated different from the public generally, and hence was not specially injured. Chicago *v.* Union Building Assoc., 102 Ill. 379, 399; *ante*, chap. xviii.; *post*, chap. xxiii. An injunction to restrain a city from *changing the grade of a street* upon the complaint of a railway company, who had purchased the right of way over the street, refused; ample remedy being given by statutory proceedings for the recovery of whatever damages may result to it. Ridge Av. Pass. Ry. Co. *v.* Philadelphia, 10 Phila. 37; *ante*, sec. 611; *post*, sec. 925. Where a city conveyed land for value to a railroad company, under a contract which provided that a street through such land shall be forever closed; and the company took possession, and expended large sums in improving the premises for railroad purposes; and the city then proceeded to open the street, proposing to pay damages as in other cases where land is taken, — it was held that a bill would lie in equity, in behalf of the company, for cancellation of the contract, or other proper relief. Atlanta *v.* Macon & W. R. R. Co., 59 Ga. 251; *infra*, sec. 908, note. In *Indiana*, in a case where a road was being laid out on a line other than the one established by the proper authorities, it was held that the land-owners could not join as plaintiffs in an action to enjoin the trespasser, because they had separate and distinct causes of action, Heazy *v.* Black, 90 Ind. 534; but this ruling was afterwards limited "to a case where the wrong to each property-owner is a distinct and independent trespass;" and the court ruled that owners of lots abutting upon a street, along which a town threatened to wrongfully construct a drain, might join in a suit for an injunction. Sullivan *v.* Phillips, 110 Ind. 320. *Ante*, sec. 661, note. More fully, see Index, tit. *Abutters*.

Where an act authorized the issue of municipal bonds to secure natural gas for public and private use, the payment whereof and of the interest thereon was to be met by the income to be received from such use, and from a tax to be levied to provide for any deficiency, it was held, in an action to enjoin the issue of the bonds, that the injunction should not be granted, because it did not appear but that the revenues would be sufficient to meet the payments without resort to taxation. *Per Jackson*, J.: "Injunctions are not granted in cases like the present except when complainant's rights are clear, and where an injury more or less irreparable is likely to result to complainants unless defendants are enjoined. In this case complainants' rights are not clear, and the injury likely to result to them is not shown to be irreparable or even serious. On the other hand, the allowance of an injunction would be attended with serious and possibly irreparable loss and damage to the city of Toledo." Fellows *v.* Walker, Auditor, &c., 39 Fed. Rep. 651.

§ 907 *a*. **Jurisdiction in Equity of the Federal Courts over Municipal Authorities.** — The Circuit Courts of the United States *sitting in*

equity have no jurisdiction to restrain the municipal authorities of a city from proceeding, no matter how wrongfully, *to remove a municipal officer* from his office contrary to or without authority of law. One ground of this doctrine is special; viz., that the appointment and removal of officers of a municipality are not subjects within the cognizance of the courts of the United States, and that the remedy of the party aggrieved must be found under the laws and in the tribunals of the State. Another ground of the doctrine is general; viz., that the jurisdiction of a court of equity, Federal or State, unless enlarged by statute, *is limited to the protection of the rights of property*, and does not extend to entertaining bills to restrain or to relieve against proceedings for the punishment of offences, or for the removal of public officers, these being matters within the jurisdiction of courts of common law, or of the executive and administrative departments of the government.[1]

As to relief in equity against *forfeitures* under municipal ordinances, see chap. xii. *ante*, sec. 352; chap. xv. sec. 580. Jurisdiction and relief in equity, see Index, tit. *Equity;* 2 Spence Eq. Jurisd. 32.

Injunction, when granted in matters concerning *Municipal Elections*. Brightly's Election Cases, 622, 573. And see chapters on Municipal Officers and *Mandamus, ante;* Index, tit. *Injunction*. Right of county, or the official body which represents it, to file bill in chancery to restrain an *illegal appropriation of a public highway*. Pike Co. Inf. Ct. Jus., &c., *v.* Griffin & W. Pt. Pl. R. Co., 9 Ga. 475; and compare 15 Ga. 39. In *Georgia* the court refused, on the case made, to enjoin extensive municipal improvements of grading streets, at the suit of a lot-owner whose property was threatened with damage by the work. Moore *v.* Atlanta, 70 Ga. 611. See *ante*, chapters on Dedication and Streets; Index, tit. *Equity*, *Injunction*. Varick *v.* New York, 4 Johns. Ch. 53. *Discretionary or legislative powers* will not be interfered with by a court of equity unless manifest oppression or abuse is shown. *Ante*, secs. 94, 475. *Infra*, sec. 908, note.

The subjects of *Mandamus* (*ante*, chap. xx.) and *Quo Warranto* (*ante*, chap. xxi.) are separately treated. The true rule undoubtedly is "that when no misapplication of funds held upon a public trust (*post*, sec. 909 *et seq.*), and no nuisance to the public are shown, the appropriate remedy to compel the performance of a duty imposed upon a corporation by statute is *not* by *decree in equity*, but by a writ of *mandamus* at common law." *Per Gray*, C. J., in Attorney-General *v.* Boston, 123 Mass. 460, 479 (1877), cited *post*, sec. 909, note; *Re* Sawyer, 124 U. S. 200 (1887). A municipal corporation *cannot be guilty of contempt* in disobeying an injunction; the contempt is that of individuals; as, for instance, the officers of a city. Bass *v.* Shakopee, 27 Minn. 250; Davis *v.* New York, 1 Duer (N. Y.), 451; London *v.* Lynn, 1 H. Bl. 206. *Ante*, chap. xx. But because a municipal corporation is not capable of looking after its interests with the same vigilance as a private person, it has a much stronger claim for relief, notwithstanding the laches and negligence of its officers and attorneys, than an individual, under like circumstances, acting in behalf of his own interests. Lewis *v.* Elizabeth, 25 N. J. Eq. 298.

[1] *Re* Sawyer, 124 U. S. 200 (1887). In this case the *police judge* of the city of Lincoln, *Nebraska*, filed his bill in equity against the mayor and councilmen of that city, charging that they were proceeding in a high-handed manner *to remove him from his office* by virtue of an *ex post facto* ordinance, thereby depriving him of the protection guaranteed to him by the Constitution of the United States, and particularly the Fourteenth Amendment, and obtained a temporary injunction from the Circuit Court to proceed no further with the charges until further order. The city council disregarded the injunction and justified their disobedience on the ground that the Circuit Court had no jurisdiction to make the restraining order. The Circuit Court committed the mayor and eleven members of the city council for contempt. *Re* Sawyer, *supra*, was their application for a writ of *habeas corpus*. The Supreme Court of the United States decided that the Circuit Court had no jurisdiction of such a cause, that its order for injunction was *absolutely void*, as well as its order punishing for contempt, based thereon, and that the relators were entitled to be discharged on the *habeas corpus*. The opinion of the majority of the court, delivered by Mr. Justice *Gray*, reviews many of the cases, English and American, as to the nature of the jurisdiction in equity where not enlarged by statute. He says: "It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is intrusted to a judicial tribunal. 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." He cites in support of the foregoing the following: Hagner *v.* Heyberger, 7 Watts & S. 104; Updegraff *v.* Crans, 47 Pa. St. 103; Cochran *v.* McCleary, 22 Iowa, 75; Delahanty *v.* Warner, 75 Ill. 185; Sheridan *v.* Colvin, 78 Ill. 237; Dickey *v.* Reed, 78 Ill. 261; Harris *v.* Schryock, 82 Ill. 119; Beebe *v.* Robinson, 52 Ala. 66; Moulton *v.* Reid, 54 Ala. 320. He concludes that whether the proceedings in question be considered as criminal or judicial or administrative, still their only object being the removal of a public officer from his office, they are equally beyond the jurisdiction and control of a court of equity. Mr. Justice *Field* concurred, but on the ground that such questions belong to the domain of State jurisprudence. *Waite*, C. J., and *Harlan*, J., dissented from the judgment of the court.

The *several States have power* to provide and regulate proceedings for the removal of a person from a State office, and such legislation is not in conflict with the Constitution of the United States where it provides for bringing the party into court, with notice of the case against him, gives opportunity to be heard, and provides for a judicial determination. Foster *v.* Kansas, 112 U. S. 201 (1884). Notice *ante*, chap. on Taxation.

§ 908 (728). **Remedies for Corporate Excess of Power.** — But since municipal corporations are invested with large powers to enable them to execute specific objects, or to promote the welfare of the people who are subjected to their rule; and since experience shows how frequently their officers abuse or transcend their rightful authority to the detriment or injury of the inhabitants, and how necessary it is that the latter should have easy and effectual remedies to restrain or correct municipal excesses of power; and perhaps because in the Code States the ancient line of separation between Law and Equity is not so distinctly maintained as formerly, — the general tendency of the later cases is to favor a relaxation, rather than a strict application of the rule adverted to in the preceding sections, which denies the right to resort to equity if there exists a

remedy at law.[1] The state of the law as moulded by the courts, on the subject of relief against unauthorized, wrongful, and illegal corporate acts, threatened or consummated, can only be satisfactorily ascertained by a general survey of the field of judicial judgments. Generally speaking, equity will interfere in favor of, or against, municipal corporations, on the same principles by which it is guided in cases between other suitors.[2] For the reason that these corpora-

[1] The courts profess loyalty to the rule mentioned in the text; but it seems to the author evident, upon a study of the course of decision, that the greater directness and superior efficiency of the equity jurisdiction have insensibly led the courts in these latter times, and especially in the Code States, to an extension of the equity jurisdiction on the ground of the inadequacy of the remedy at law, when such remedy would not formerly have been regarded as inadequate within the original meaning of the rule. This is a natural result of the situation in the Code States. It is, perhaps, one not to be regretted if the auxiliary writ of preliminary injunction had not come at the same time to be much abused by the ease, liberality, and even improvidence with which it has too commonly been granted, instead of being limited, as it ever ought to be, to cases where this writ is shown to be reasonably necessary to preserve *pendente lite*, a right which would be otherwise imperilled.

[2] Attorney-General *v.* Plymouth, 9 Beav. 67. Accordingly, it was held where the *owner conveyed property to a city for a public way*, in the confidence of receiving compensation, which the corporation failed to make, that he was entitled to relief. Walker *v.* Charleston Council, 1 Bailey Eq. (S. C.) 443 (1831); *ante*, sec. 907, note. Pittsburgh's Appeal, 118 Pa. St. 458. So, also, where a city, by ordinance, had granted to *a street railway company the right of way over streets and a public square*, it was enjoined, at the suit of the company, from closing the square against it. Springfield Ry. Co. *v.* Springfield, 85 Mo. 674. A town cannot enjoin a natural-gas company from using the streets on the ground that it had granted the exclusive right to use them to another company; but it is entitled to enjoin such a company when attempting to use the streets without its license. Citizens' Gas & M. Co. *v.* Elwood, 114 Ind. 332 (1887); *ante*, chap. xviii. The property of an incorporated village in *Illinois* is held by the corporate authorities as a trust for the use of the public: any unlawful interference with it calculated to inflict upon the community an irreparable injury presents a clear case for equitable relief. In this case, a city was enjoined from exercising municipal jurisdiction within the territory of a village, and from interfering with its property and effects. Hyde Park *v.* Chicago, 124 Ill. 156.

Bill by corporation to set aside *fraudulent grant* by its council. Oakland *v.* Carpentier, 13 Cal. 540. See, s. c. subsequently reported, 21 Cal. 642. See, also, O'Brien County *v.* Brown, 1 Dillon C. C. R. 588 (bill to set aside fraudulent judgment); Attorney-General *v.* Wilson (bill for relief against fraudulent alienation of corporate property), 9 Simons, 30 (1837); affirmed, 1 Cr. & Ph. 1 (1840); *infra*, secs. 909, 910. It seems that a municipal corporation, in its corporate character, where the alleged illegal action is not aimed at, and cannot affect the *corporate* rights or *corporate* property, cannot maintain an action to restrain or to be relieved against the levy of an illegal tax upon the taxpayers, as where the board of supervisors of the *county* are proceeding to levy and collect an illegal tax upon the taxable property of the citizens of one of the *towns* in the county. Guilford *v.* Chenango Co. Sup., 13 N. Y. 143 (1855), *per Denio*, J., who says: "The principles affirmed in this court by Lorillard *v.* Monroe, 11 N. Y. 392, seem to me hostile to this action." And see subsequent case of Doolittle *v.* Broome Co. Sup., &c., 18 N. Y. 155, and Roosevelt *v.* Draper, 23 N. Y. 318, below mentioned, *infra*, sec. 920; *infra*, chap. xxiii.

tions are intrusted for defined objects, or for public purposes, with large powers, the courts have evinced some anxiety not to allow

Where the *mayor is invested with the power* of seeing that the charter of the corporation is faithfully executed, this is a duty with which he is intrusted for the common benefit of all the corporators, and gives him the right to select the means best calculated to discharge it; and in the exercise of this right he may, according to the liberal, but somewhat questionable, view of the Supreme Court of *Louisiana*, in his official name and capacity *bring suit* to test the legality of the ordinances and to restrain the aldermen or officers of the corporation from issuing warrants or doing acts in violation of the laws of the State or the charter of the city. Genois, Mayor *v.* Lockett, 13 La. 545 (1838). In Pieri *v.* Shieldsboro', 42 Miss. 493 (1869), the town council passed an ordinance ordering the plaintiff, without showing any cause for the order, *to remove lumber from his private property*, and stating that, if he failed thus to remove it, the corporate officers would remove or destroy it. It not appearing that it was a nuisance, the court restrained the corporation from interference with the plaintiff's property. It will be observed that the property threatened to be disturbed was personal, and that the court makes no reference to the point whether an action at law for damages would not be an adequate remedy.

Injunction in favor of individuals to prevent the municipal authorities from encroaching upon private property. Ante, secs. 661, 708, and cases. Dudley *v.* Frankfort, 12 B. Mon. (Ky.) 610; Varick *v.* New York (streets), 4 Johns. Ch. 53; Boughner *v.* Clarksburgh, 15 W. Va. 394; Peoria *v.* Johnston, 56 Ill. 45 (1870); Carter *v.* Chicago, 57 Ill. 283, 170; Holmes *v.* Jersey City (streets), 12 N. J. Eq. 299; Tainter *v.* Morristown (streets), 19 N. J. 46; Clark *v.* Syracuse (destroying mill-dam), 13 Barb. 32; Emporia *v.* Soden, 25 Kan. 588 (noted *ante*, sec. 597, note); Mason City S. & M. Co. *v.* Mason (town of), 23 W. Va. 211 (an injunction restraining a town from opening a street through land without the owner's consent and without having condemned it). *Ante*, chap. xviii. on Streets. Where the power exercised is *legislative or discretionary*, a clear case must be made to justify judicial interference. Lane *v.* Schamp, 20 N. J. Eq. 82; *ante*, secs. 94, 475, 906, 907, 611, and note; *post*, sec. 958, note; Galloway *v.* London, L. R. 1 H. L. 34.

Multiplicity of suits. Where a city corporation had commenced in the Justices' Court *seventy-seven actions against the plaintiff* at the same time, to recover a separate and distinct penalty of $50 for running cars without a license, contrary to ordinance, the court awarded an injunction against the prosecution of more than one of such actions until that one could be finally determined, it appearing that the local court had no power to consolidate the actions or grant the relief sought, and that the concurrent prosecution of all would be unnecessarily oppressive. The ground of the injunction was the power of a court of equity, in a proper case, to restrain the prosecution of a multiplicity of suits. Third Av. R. R. Co. *v.* New York, 54 N. Y. 159 (1873), distinguishing West *v.* New York, 10 Paige, 539. The subject of granting an *injunction to restrain the enforcement of municipal ordinances* underwent consideration in a recent case in *Illinois* (Des Plaines *v.* Poyer, 123 Ill. 348). The municipality of Des Plaines adopted an ordinance prohibiting any person from renting or permitting the use of any yard, ground, &c., for any purpose whereby disorderly persons were congregated. It was not questioned that the general subject-matter of the ordinance was within the scope of the power conferred by the charter of the municipality. The municipality commenced seven distinct prosecutions against the same person for violation of this ordinance. One of them was brought to trial, and the defendant therein found guilty, whereupon he brought a bill in equity to enjoin the municipality and its officers from prosecuting the other suits, which were pending, and from instituting, as it threatened, other like prosecutions against him under the ordinance, alleging his innocence of the offence charged; the illegality of the

their authority to be used to oppress the inhabitants within their jurisdiction; and it may safely be affirmed that there is a remedy, according to the nature of the case, by *certiorari*, *mandamus*, *quo warranto*, prohibition, appeal, indictment, civil action, or in equity, for all injurious abuses of power and all invasions of the legal rights of persons subjected to municipal control or affected by municipal action. There can ordinarily be no judicial restraint or interference with the *bona fide* exercise of powers, legislative or discretionary in their nature, and which do not violate private rights.[1] We have had occasion already to some extent to state, in connection with special topics discussed, in what cases, and in what mode, corporate acts and proceedings may be judicially examined or reviewed,[2] but the subject is of sufficient importance to require some further separate consideration.[3]

ordinance under which he was prosecuted; that he had no adequate remedy at law to prevent irreparable injury of the prosecutions or the multiplicity of such prosecutions. The bill in equity was dismissed on demurrer. The Supreme Court of Illinois affirmed this decree, holding that the question of the legality or illegality of the ordinance was, on the case made, a question for the common-law court, and not a court of equity, to decide; that a court of equity would not determine the validity of an ordinance in any case where the defendant had an adequate remedy at law; and that this case did not come within the recognized head of equity jurisdiction, based on irreparable injury or multiplicity of suits. *Shope*, J., cites the leading adjudications, and distinguishes the case from Third Av. R. R. Co. *v.* New York, 54 N. Y. 159, and Wood *v.* Brooklyn, 14 Barb. 425, considering it rather to fall under the principle of Davis *v.* American Society, 75 N. Y. 362.

Where numerous warrants had been issued against an individual for violations of an ordinance which imposed a fine for each day's occupation of the public streets, — the amount of the fine not being sufficient to give him an appeal, — and the defendant claimed a right of property in the street, an injunction was granted to him restraining the prosecution of the warrants until the right of property could be determined. Shinkle *v.* Covington, 83 Ky. 420.

[1] *Ante*, sec. 94; *infra*, sec. 927; Hamerick *v.* Rouse (county-seat removal), 17 Ga. 56 (1855); State *v.* Woody, *Ib.* 612; Brodnax *v.* Groom, 64 N. C. 244 (1870); Jenkins *v.* Andover, 103 Mass. 94, 104 (1869); Cape May & S. L. R. R. Co. *v.* Cape May, 35 N. J. Eq. 419; Bacon *v.* Walker, 77 Ga. 336; Waterbury *v.* Laredo, 60 Tex. 519; Alpers *v.* San Francisco, 32 Fed. Rep. 503 (application to *restrain the passage of an ordinance* repealing an ordinance under which the city had contracted for the removal of dead animals, refused); Torpedo Co. *v.* Clarendon, 19 Fed. Rep. 231. Where a council was empowered to determine finally certain facts, as, in this case, whether real estate was rural or not, it was said that if "the discretion was abused, no doubt the power of a court of equity would be adequate to restrain the perpetration of a palpable wrong." Erie *v.* Reed, 113 Pa. St. 468. In Spring Valley Water Works *v.* Bartlett, 16 Fed. Rep. 615, it was held by *Sawyer*, J., that municipal corporations may be enjoined from passing an ordinance which is not within the scope of its powers, and which would work an *irreparable injury*, citing Davis *v.* New York, 1 Duer, 452; affirmed, 9 N. Y. 264. See Spring Valley W. W. *v.* Schottler, 110 U. S. 347; *post*, chap. xxiii.

[2] *Ante*, secs. 202, 275, 440, and note 611; *ante*, sec. 897. See also Richardson *v.* Baltimore, 8 Gill (Md.), 433 (1849); Alexander *v.* Baltimore, 5 Gill (Md.), 383; Dudley *v.* Frankfort, 12 B. Mon. (Ky.) 610, 615 (1851).

[3] Mr. High has collected and stated many of the American cases upon the subject of injunctions against municipal corporations. High on Injunctions, secs. 783–795. See also Joyce, Injunc. 716.

§ 909 (729). **Where Corporation is a Trustee of Property or Funds.** — In respect of *property* held by municipal corporations *in trust, or clothed with public duties*, equity has always asserted its jurisdiction to see that the trusts were observed and its public duties in respect of such property discharged.[1] In England, and probably also in this country, the bill may in such cases be filed against the municipal corporation and its officers by the Attorney-General, on his own motion or on behalf of the corporators or persons interested; or the latter may perhaps, in certain cases under the line of decisions in this country presently to be mentioned, exhibit the bill in their own names. The jurisdiction of chancery in such cases over municipal corporations is forcibly asserted by the House of Lords, in an interesting and important case in which the corporation of Dublin, under an Act of Parliament, was *the trustee of funds raised from water-rates*, to supply the city with water, and where the bill charging the corporation with breaches of trust and mismanagement was filed by the Attorney-General on behalf of the inhabitants of Dublin paying water-rates.[2] Here the public were interested in the proper administration of the authority which had been conferred upon the city corporation in respect to the supply of water to the city; it is obvi-

[1] Attorney-Gen. *v.* Liverpool, 13 Eng. Ch. (1 Mylne & Cr. 171) 343, 359 (1835); Attorney-Gen. *v.* Dublin, 1 Bligh N. R. 312 (1827); *ante*, secs. 64, 80, 169; chapter on Corporate Property, *ante*, secs. 567-571; chapter on Dedication, *ante*, sec. 653; Baltimore *v.* B. & O. R. R. Co., 21 Md. 50 (1863); Barnum *v.* Baltimore, 62 Md. 275. *Post*, sec. 920, note and cases.

It is "a distinctive characteristic of a *corporation* that it is accountable in equity for *misapplication of trust funds*, whereas any other body of men, as a parish, can only (where relief can be had at all) be touched through the individuals, or their representatives, who have committed the actual breach of trust." Grant on Corp. 138. Mr. Spence discusses the subject of the equity jurisdiction over corporations as trustees satisfactorily. 2 Spence Eq. Jurisd. 32–35.

[2] Attorney-Gen. *v.* Dublin, 1 Bligh N. R. 312 (1827). See also Attorney-Gen. *v.* Liverpool, 13 Eng. Ch. (1 Mylne & Cr. 171) 343 (1835). The doctrine of these cases was approved by *Gray*, C. J., in Attorney-Gen. *v.* Boston, 123 Mass. 460 (1877), who, referring to Attorney-Gen. *v.* Salem, 103 Mass. 138, says, "if the *water-rents* had been collected and misapplied by the city (of Salem), there would have been such a misappropriation of *trust funds* held by the city for a public charitable purpose as would have supported an information in equity in the name of the Attorney-General." Noticed more fully, *infra*, sec. 920, note.

The principles on which equity will enjoin the proceedings of *public officers* are stated by Lord *Cottenham*. Frewin *v.* Lewis, 18 Eng. Ch. (4 Mylne & Cr.) 249 (1838). See also Baltimore *v.* Horn, 26 Md. 194 (1866); Holland's Case, 11 Md. 186; Baltimore *v.* Porter, 18 Md. 284 (1861); Attorney-Gen. *v.* Heelis, 2 Sim. & Stu. 67; People *v.* Canal Board, 55 N. Y. 390 (1874), where the subject is discussed by *Allen*, J. Attorney-Gen. *v.* Boston, 123 Mass. 460 (1877); *infra*, sec. 920, note. Duties and liabilities of public officers. *Ante*, sec. 237, and note.

ous that there was no adequate remedy at law, and hence the propriety of a resort to equity by the ratepayers, in the name of the officer authorized to represent the king.[1]

§ 910 (730). **Fraudulent Dispositions of Corporate Property and Abuses of Powers relating thereto.** — So the Court of Chancery, in England, notwithstanding another remedy (which is considered to be cumulative) is given by statute, will relieve against *fraudulent dispositions of corporate property*. It will also interfere to prevent municipal councils from *abusing powers relating to property and funds* intrusted to them to be exercised in conformity with law for the benefit of the incorporated place or its inhabitants. The just and sound view is taken, that the powers conferred by the Municipal Corporations Act upon councils in respect to the *corporate funds and corporate property are public trusts*, and the property owned by the corporations is held by them in trust for the purposes specified or authorized in the act; and hence, if these powers are abused, — as, for example, the power of a council to award compensation to officers of the corporation, or if corporate property is collusively alienated, — this is a breach of trust of which equity will take cognizance.[2] The uniform and settled mode of proceeding in England in such cases is by information or by bill filed in the court of equity by the Attorney-General. The king as *parens patriæ* insti-

[1] In England it is settled that in cases such as those mentioned in the text, or where the corporation is a trustee of property or funds for public uses, it can be made to account to the *crown*, on an information, but not to *private persons* in a suit in equity. Grant on Corp. 138; Skinners' Co. *v.* Irish Soc., 12 Cl. & F. 487. See also 2 Spence Eq. Jurisd. 32–35.

[2] Attorney-Gen. *v.* Poole, 4 Mylne & Cr. 17, 30, and overruling 2 Keen, 190, 206; Parr *v.* Attorney-Gen. 8 Cl. & F. 409; Attorney-Gen. *v.* Aspinwall, 2 Mylne & Cr. 613, overruling Master of the Rolls, 1 Keen, 513; Attorney-Gen. *v.* Wilson, 9 Sim. 30; affirmed by the Lord Chancellor, 1 Cr. & Ph. 1, noted *infra*; Evan *v.* Avon, 29 Beav. 144. Text cited and approved. Place *v.* Providence, 12 R. I. 1; Roper *v.* McWhorter, 77 Va. 214 (lease of ferries enjoined).

In explanation of the English decisions referred to in this note, it may be observed that by sec. 92 of the Municipal Corporations Act of 1835 before mentioned (*ante*, secs. 8, 48), the income of all the property belonging or payable to any of the old corporations was to be paid to the treasurer of the new or remodelled corporation, and the fund so created was to be subject to the payment of the debts of the old corporation, to the payment of the salaries of municipal officers, of municipal election expenses, municipal court expenses, and all other expenses incident to carrying the act into effect; with a provision that any surplus should be applied, under the direction of the council, for the public benefit of the inhabitants and the improvement of the borough. In case the borough fund thus obtained should prove insufficient for the enumerated purposes, power is given to the council to raise the deficiency by taxation or a borough rate. The author does not see that property thus held, income thus derived, and public powers thus to be exercised, are in essence different from the property, income, and powers ordinarily appertaining to our American municipalities. If this be so, the English cases below cited are especially instructive.

Summary of leading English cases: In the leading case of the Attorney-Gen. *v.* Aspinwall, *supra*, Lord Chancellor *Cottenham* held that the property in question became, upon the enactment of the Municipal Corporations Act, subject to the public trusts declared by that act, and was not under the absolute control of the corporation; and that if any given appropriation of this fund or property be not consistent with the trust, but for purposes foreign to it, the Attorney-General has a right to file an information or bill in equity, asking "that the fund may be recalled, secured, and appropriated for the public, or in other words, charitable purposes, to which it is by the act devoted." 2 Mylne & Cr. 618. He says: "I cannot doubt that a clear trust was created by this act *for public, and therefore, in the legal sense of the term, charitable purposes*, of all the money belonging to the corporation at the time of the passing of the act." *Ib.* 623.

On the same principle Lord *Cottenham*, in the case of the Attorney-Gen. *v.* Poole, *supra*, held that chancery had jurisdiction on an information of the Attorney-General filed on the relation of certain ratepayers of the corporation, to *prevent the municipal council from awarding unauthorized compensation to the officers of the corporation out of the borough fund*, and that it was immaterial that the means of payment were to be raised by a *rate or tax* over the levy of which the court *might* not have any control. The ground of interference was that the *fund of the corporation, however acquired, is a trust fund*, to be used for, and only for, purposes consistent with the provisions of the Municipal Corporations Act, and that trustees may in equity be restrained from committing breaches of trust. To the objection that "the information did not impute fraud in the proceedings of the council" the Lord Chancellor said: "But a trustee may be guilty of a breach of trust from error or ignorance of his duty, and if it were necessary to impute fraud, the term itself need not be used; it is sufficient if the facts stated amount to a case of fraud." Conformably to these principles, where the municipal council, *without authority of law, gave a bond to secure compensation out of the corporate funds to an officer* of the corporation, this was held to be a breach of their trust, cognizable in chancery. Parr *v.* Attorney-Gen., 8 Cl. & F. 409.

So in the Attorney-Gen. *v.* Lichfield, 13 Simons, 547 (1843), the *corporation was enjoined* on an information by the Attorney-General from ordering their treasurer to pay out of the borough fund or any funds of the corporation the amount of a promissory note to one Mallett for £200 borrowed money, and the ground of the order was, in the language of Vice-Chancellor *Shadwell*, that, "taking all the Acts of Parliament together, it is quite clear that the corporation had no authority to give the promissory note to Mallett."

So, also, in Attorney-Gen. *v.* Norwich, 16 Simons, 225 (1848), the corporation was restrained, in a suit by the Attorney-General at the instance of ratepayers, from *using the borough fund for an unauthorized purpose*; viz., to pay the expenses of procuring an Act of Parliament to improve the navigation of a river flowing through the corporation. See Attorney-Gen. *v.* Wigan, 34 Eng. Ch. (5 De Gex, M. & G.) 52 (1854); Frost *v.* Belmont, 6 Allen (Mass.) 152 (1863).

So in this country, it has been held that a New England town cannot appropriate money to pay the expenses of a committee to petition the legislature for the annexation of the town to another town, thereby merging its own organization. Minot *v.* West Roxbury, 112 Mass. 1 (1873); s. c. 17 Am. Rep. 52; *ante*, sec. 479, note. In Sherlock *v.* Winnetka, 59 Ill. 389 (1871), a fraudulent and illegal exercise of the powers of the municipal council looking to the creation of unauthorized debt of the municipality was treated as a breach of trust and a fraud upon the law, against which equity would relieve at the instance of taxpayers and property-owners.

So in Canada the members of the council are not the corporation, but the agents of the corporation for the management of its affairs and funds. When these agents are shown so to misappropriate the