be possessed, by the party exacting or receiving the payment, over the person or property of another, from which the latter has no other means or reasonable means of immediate relief except by making payment.[1]

§ 944. **Voluntary Payment; Mistake of Law.** — Money voluntarily paid to a corporation under a claim of right, without fraud or imposition, for an illegal tax, license, or fine, cannot without statutory aid — there being no coercion, no ignorance or mistake of facts, but only ignorance or mistake of the law — be recovered back from the corporation, either at law or in equity, even though such tax, license fee, or fine could not have been legally demanded and enforced.[2]

Legalization of the illegal tax by the legislature before it is recovered back will defeat the action. Grim *v.* Weissenberg Sch. Dist., 57 Pa. St. 433 (1868); *ante*, chaps. iv., xix., as to extent of legislative power. Index, tit. *Curative Acts*.

Enjoining collection of illegal taxes. See, *ante*, secs. 923, 924; Coulson *v.* Portland, Deady, 481.

[1] Radich *v.* Hutchins, 95 U. S. 210; *infra*, sec. 947; Baltimore *v.* Lefferman, 4 Gill (Md.), 425; Brumagim *v.* Tillinghast, 18 Cal. 265; Mays *v.* Cincinnati, 1 Ohio St. 268; Westlake *v.* St. Louis, 77 Mo. 47 (payment of a water license under threat of turning off the water held compulsory); First Nat. Bank of A. *v.* Americus, 68 Ga. 119. In *Mississippi* if the tax is wholly unauthorized by law and void, and is paid to one having formal authority to collect it, the payment is treated as involuntary. Tuttle *v.* Everett, 51 Miss. 27 (1875); s. c. 24 Am. Rep. 622.

[2] *Ante*, secs. 942, 943, and cases; Robinson *v.* Charleston Council, 2 Rich. (S. C.) Law, 317 (1846); Smith *v.* Hutchinson, 8 Rich. (S. C.) Law, 260 (1855); Elston *v.* Chicago (void special assessment), 40 Ill. 514 (1866); Welch *v.* Marion, 48 Ala. 291; Churchman *v.* Indianapolis, 110 Ind. 259; Bailey *v.* Paulina, 69 Iowa, 463; Savannah *v.* Feeley, 66 Ga. 31.

In a case in *Massachusetts* it appeared that by resolutions of the board of mayor and aldermen of the city of Lowell, passed March 28, 1876, and May 2, 1876, the fee for a liquor license of the first class was established at $200; and on May 9, 1876, the board voted to grant the plaintiffs a license of the first class. On May 10, 1876, the plaintiffs called upon the city treasurer and made a tender of $200, and demanded of him a license. The treasurer informed him it would not be ready until the next day. On May 11, 1876, the plaintiffs again called on the treasurer, but were informed that since the aforesaid tender the said board had voted to change the fee to $1,000. The plaintiffs thereupon paid the treasurer $1,000, under protest in writing, and received their license. In an action to recover the excess ($800), it was *held*, that the payment was voluntary and could not be recovered. The license when granted is not a contract between the licensee and the city or town by the officers of which it is granted. Municipal officers, in acting under the statute, are merely exercising the police authority which the statute gives them as public officers. Emery *v.* Lowell, 127 Mass. 138.

The doctrine that in cases like those stated in the text *there is no implied assumpsit* is carefully examined and vindicated by *Carr*, J., and *Tucker*, Pres., in the opinions pronounced by them in Richmond *v.* Judah, 5 Leigh (Va.), 305 (1834), and which will repay perusal. Same principle, see, also, the full and able opinion of *Walker*, C. J., in Cahaba T. Council *v.* Burnett, 34 Ala. 400 (1859), and cases cited; Christy's Adm. *v.* St. Louis, 20 Mo. 143 (1854); Walker *v.* St. Louis, 15 Mo. 563; Smith *v.* Readfield, 27 Me. 145; Union Pac. R. R. Co. *v.* Dodge Co. Comm'rs, 98 U. S. 541 (1878); Emery *v.* Lowell, 127 Mass. 138; Dickinson Co. Comm'rs *v.* Nat. Land Co., 23 Kan. 196; Kan. Pac. R. R. Co. *v.* Wyandotte Co. Comm'rs, 16 Kan. 587 (1876); Cook *v.* Boston, 9 Allen (Mass.), 393; Muscatine *v.* Packet Co., 45 Iowa, 185 (1876); Delancey, *In re*, 52 N. Y. 80; Swift *v.* Poughkeepsie, 37 N. Y. 514; Bank of Commonwealth *v.* New York, 43 N. Y. 184; Wilkes *v.* Mayor, 21 Alb. L. J. 32; Moss *v.* Cummings, 44 Mich. 359; s. c. 22 Alb. L. J. 376; Gachet *v.* McCall, 50 Ala. 307 (1873); Falls *v.* Cairo, 58 Ill. 403 (1871); Sullivan *v.* McCammon, 51 Ind. 264 (1875); Stephenson Co. Sup. *v.* Manny, 56 Ill. 160 (1870).

§ 945. **Principle that Voluntary Payments without Mistake or Fraud are not recoverable back is a general one.** — In this connection

Money paid under a *mistake of fact* may be recovered back, if the defendant's position has not been changed in consequence thereof. Mayer *v.* New York, 63 N. Y. 455 (1875) *Mistake of law* not alone sufficient ground. Bucknall *v.* Story, 46 Cal. 589; s. c. 13 Am. Rep. 220.

The doctrine of non-liability has been applied to the case of money paid under an *unconstitutional act* of the legislature and ordinances passed in pursuance thereof, the court adopting the principle that money voluntarily paid under a mistake of legal right cannot be recovered back, and that *mere apprehension* of an impending distress warrant did not make the payment a compulsory one; Baltimore *v.* Lefferman, 4 Gill (Md.), 425 (1846), where *Martin*, J., adverts to the leading authorities, and deduces from them rules substantially the same as those stated in the text, secs. 939 *et seq.* Approved, Morris *v.* Baltimore, 5 Gill (Md.), 244; *supra*, sec. 942, note. See, also, Gordon *v.* Baltimore, *Ib.* 231; Detroit *v.* Martin, 34 Mich. 170 (1876); s. c. 22 Am. Rep. 512; s. p. Taylor *v.* Phila. Bd. of H., 31 Pa. St. 73, holding that a *threat to use legal remedies* to collect does not make the payment compulsory.

What constitutes COMPULSORY *payment; further illustrations.* Where a person, *on his own motion*, goes to the city clerk and *pays* money as a price of a *license*, under an ordinance afterwards judicially declared void, the payment is voluntary, and not upon compulsion, although the ordinance imposed a fine and imprisonment as a penalty for not obtaining a license; hence, in such cases, the money cannot be recovered back in an action against the corporation. Cahaba T. Council *v.* Burnett, 34 Ala. 400 (1859); Ligonier *v.* Ackerman, 46 Ind. 552 (1874). Where the action lies, the remedy to recover back illegal taxes paid is ordinarily *at law* and not in equity. Turner *v.* Althouse, 6 Neb. 54 (1877).

In *Ohio* the doctrine is judicially asserted that money *will be deemed to have been paid compulsorily* not only where the payment was made to release person or property from detention, but also in cases *where the parties do not stand on an equal footing*, and where the one party, before he would perform a duty enjoined on him by law, illegally compelled or required the other to pay a sum of money to induce or secure such performance. Baker *v.* Cincinnati, 11 Ohio St. 534 (1860), (action to recover money paid for theatre license "*under protest*"), qualifying and explaining Mays *v.* Cincinnati, 1 Ohio St. 268. This seems to be a just and reasonable modification or application of the general doctrine as to what will constitute a compulsory payment. So, where a county court gave notice that they would grant a certain ferry to the person who would donate the largest sum to the county, and in accordance therewith, the then holder of the franchise bid the sum of $500, in an action against the county he was allowed to recover it back, on the ground that the county authorities had, under the statute, no right to impose any such condition or restriction upon the grant. La Salle County *v.* Simmons, 10 Ill. 516. As to liability of *county* for a *fine* paid to it. Cook *v.* Middlesex Co. Freeh., 26 N. J. L. 326. So, also, it has been decided that a *payment is not voluntary if the collector has a warrant* by virtue of which he may levy and sell, and this is exhibited to the person paying by the collector; the party in that State not being entitled in such case to replevy personal property. Bradford *v.* Chicago, 25 Ill. 412 (1861).

Money compulsorily paid to a city on a void assessment for the purpose of open-

it may be stated that the principle is a general one applicable not only to taxes but, with perhaps not the same degree of strictness, to other claims, *that money voluntarily* paid to a municipal corporation under a claim of right, there being no fraud or mistake of *fact*, although the payor is mistaken in point of law as to his legal liability, is not, at least in general, recoverable back.[1] Such is un-

ing a street may be recovered back, the right to such recovery being especially clear if the improvement be abandoned by the corporation. Bradford *v.* Chicago, 25 Ill. 412 (1861). So, *it seems*, that if in such case the money is voluntarily paid, it may be recovered back, as on the *ground of a total failure of consideration*, when the scheme of *the improvement* for which the money was collected *has been abandoned*, or is unreasonably delayed by the corporate authorities. *Ib.* Godfrey *v.* Claflin, 21 Pick. 1, 9, 13, 14, as to effect of total failure of consideration. The case of Bradford *v.* Chicago, *supra*, distinguished in Falls *v.* Cairo, 58 Ill. 403 (1871), in which it was held that a party could not recover back money voluntarily paid upon a special assessment, where the only mode of collection was by a levy upon lands. *Ante*, secs. 608, 610, 942, and note. Right of recovery back where the assessment is set aside. Jersey City *v.* O'Callaghan, 41 N. J. L. 349; Jersey City *v.* Riker, 38 N. J. L. 225; Peyser *v.* New York, 70 N. Y. 497 (1877). Where plaintiff sought to recover of a city under an ordinance requiring the city to refund taxes erroneously levied, it was considered that the *mere fact that he saw the improvement for which the tax was levied being made without protesting against* it would not estop him from denying the validity of the assessment, it not appearing that he knew it was the intention to assess adjacent property for its cost; nor would the fact that he paid the first instalment of the tax without protest preclude a recovery, a protest not being required by the terms of the ordinance. Robinson *v.* Burlington, 50 Iowa, 240. See Weber *v.* San Francisco, 1 Cal. 455; Kellogg *v.* Ely, 15 Ohio St. 64, the cases on this question in Herman on Estoppel and Cooley on Taxation, *passim*. *Ante*, chap. xxii. In *Kentucky* it is held that an action lies to recover money paid under a clear and palpable *mistake of law or fact*, and when, in law, honor, or conscience, it was not due. Louisville *v.* Henning, 1 Bush (Ky.), 381 (1866). What is such a mistake? *Ib.;* Noble *v.* Bullis, 23 Iowa, 559; Ripon *v.* Joint Sch. Dist., 17 Wis. 83. In *Indiana* the question, What is necessary to make a payment of a license fee required by ordinance invalid? is discussed, and the leading authorities examined at length, by *Burdick*, J., in Ligonier *v.* Ackerman, 46 Ind. 552 (1874). *Rules of the civil law* and provisions of the *Louisiana* Code on this subject, which are not entirely coincident with the English and American jurisprudence. See Worsley *v.* Second Municipality, 9 Rob. (La.) 324 (1844), relating to *wharfage* illegally collected, and Cath. Soc. of Rel. & Lit. Ed. *v.* New Orleans, 10 La. An. 73, as to recovery back of taxes assessed upon *exempt property* and voluntarily paid. See, however, Campbell *v.* New Orleans, 2 La. An. 34; Factors & Tr. Ins. Co. *v.* New Orleans, 25 La. An. 454 (1873). The disbursement of money voluntarily paid for taxes under an illegal assessment cannot be enjoined at the suit of the *State*. Atchison *v.* State, 34 Kan. 379; *ante*, chap. xxii.

Remedy where illegal taxes have reached *State* treasury. Shoemaker *v.* Grant Co. Comm'rs, 36 Ind. 175 (1871). See, also, Cooley on Taxation (2d ed.), 804.

[1] Marriott *v.* Hampton, 2 Esp. 546; s. c. 2 Smith Leading Cases, 393; Clarke *v.* Dutcher, 9 Cow. (N. Y.) 674; Mowatt *v.* Wright, 1 Wend. 355; Onondaga Co. Sup. *v.* Briggs, 2 Denio (N. Y.), 26, and cases cited on p. 40.

Mistake, in order to be a ground to recover back taxes, must be a mistake of fact, and not mere mistake of law. Lamborn *v.* Dickinson Co. Comm'rs, 97 U. S. 181; Hunt *v.* Rousmaniere, 1 Pet. 15; Bilbie *v.* Lumley, 2 East, 469; 2 Smith's Lead. Cas. 398, 6th ed. 458; Marriott *v.* Hampton, *supra*. A voluntary payment,

doubtedly the general rule; and it is not intended to affirm more than that this rule applies to municipal corporations the same as, under like circumstances, it would apply to private corporations and individuals. It does not belong to this work to consider the limitations upon or exceptions to the general proposition that pure mistakes in law are not relievable, as exemplified in the more recent equity decisions in Great Britain and this country.[1] Where a board of supervisors acting for a county have power "to examine, settle, and allow" all accounts chargeable against the county, their allowance and settlement is, as a rule, binding upon the county so as to preclude it from recovering back money paid pursuant thereto.[2] But before payment, the county may, in the author's judgment, defend, notwithstanding the allowance, if not liable in law.[3]

§ 946. **Same subject. Payment must be compulsory.** — *Where there is no mistake of fact or fraud, a voluntary payment cannot be recovered back* on the *mere* ground that the one party was under no legal obligation to pay, and the other had no right to receive. Where a party would recover back taxes which he was under no legal obli-

made with a full knowledge of all the facts and circumstances of the case, though made under a mistaken view of the law, cannot be revoked, and the money so paid cannot be recovered back. Clarke *v.* Dutcher, 9 Cow. (N. Y.) 674; Ege *v.* Koontz, 3 Pa. St. 109; Boston & S. Glass Co. *v.* Boston, 4 Met. (Mass.) 187; Benson *v.* Monroe, 7 Cush. (Mass.) 125; Milnes *v.* Duncan, 6 B. & C. 671; Stewart *v.* Stewart, 6 Cl. & Fin. 968; and see cases cited in note to 2 Smith's Lead. Cas. 403, 404, 6th ed. 466; Marriott *v.* Hampton, *supra*. See on general subject *supra*, secs. 942, 945, and notes.

[1] There is a strong tendency in the later cases, both English and American, to give relief where justice requires it against a common mistake of law, although there may be no element of actual fraud. A principle applicable to all cases cannot be formulated. See on this subject, 1 Spence Equity, 632, 633; Bispham Equity, secs. 185–188; Story Equity Jurisp., sec. 212 *a*, written by Judge *Redfield;* Cooper *v.* Phibbs, L. R. 2 H. L. 149 (1867); s. c. below, 17 Irish Ch. R. 79; note luminous judgment of Lord *Westbury*, drawing a distinction between a mistake of the general law of the land and one relating to a matter of private right, the latter being considered as a matter of fact rather than of law. Stone *v.* Godfrey, 5 De G. M. & G. 76, opinion of Lord Justice *Turner;* Saxon Life Ass. Co., *In re*, 2 J. & H. 408, and note opinion of Vice Chancellor *Wood;* Condon, *In re*, L. R. 9 Ch. App. 609 (1874), and opinion of Lord Justice *James*, *Ib.* p. 614. The manner in which courts of equity deal with mistakes of law is well stated, and the cases reviewed, in Daniell *v.* Sinclair, L. R. 6 App. Cases, 181, 190 (1881). See Hunt *v.* Rousmanier's Admrs., 8 Wheat. 174; s. c. 1 Pet. 1; s. c. below, 2 Mason, 342; 3 Mason, 294; Mr. Justice *Story's* comments, Equity Jurisp., secs. 114, 115; Snell *v.* Ins. Co., 98 U. S. 85 (1878), opinion of *Harlan*, J.; Mutual Sav. Inst. *v.* Enstin, 46 Mo. 200, 203; Underwood *v.* Brockman, 4 Dana, 309; s. c. 29 Am. Decisions, 407; Northrop *v.* Graves, 19 Conn. 548.

[2] Onondaga Co. Sup. *v.* Briggs, 2 Denio (N. Y.), 26 (1846); s. c. 2 Hill (N. Y.), 135; followed, Snelson *v.* State, 16 Ind. 29.

[3] *Ante*, secs. 487, 502, and note, 504.

gation to pay, the payment must be compulsory.[1] The statute of limitations was held to apply to an action of this kind.[2]

§ 947. **The doctrine of the Supreme Court of the United States as to the Right to recover back Taxes, stated.** — The principles above stated in sections 939, 940, as those which govern the common-law right, in the absence of statutory regulations, to *recover back illegal taxes*, and the elements necessary to constitute a *compulsory payment*, have been sanctioned as correct by the Supreme Court of the United States.[3] The general or common-law doctrine on the subject is thus recognized: "Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed to be voluntary and cannot be recovered back. And the fact that the party at the time of making the payment files a written protest does not make the payment involuntary." But "when a party not liable to taxation is called upon peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress and not voluntarily, and by showing that he is not liable, recover it back as money had and received." Applying these principles in a case where it appeared that the lands of a railroad company were taxed, some of which were, and some of which were not taxable, and a tax warrant was out which authorized the seizure of personal property, but under which no demand had been made or special or active steps had been taken and no immediate seizure threatened, and the company presented itself and made payment of all of its taxes in the usual way, but *under a general protest*

[1] *Infra*, sec. 947; McCrickart *v.* Pittsburgh, 88 Pa. St. 133; Benson *v.* Monroe, 7 Cush. (Mass.) 125; Mays *v.* Cincinnati, 1 Ohio St. 268; Clarke *v.* Dutcher, 9 Conn. 674; Taylor *v.* Phila. Bd., 31 Pa. St. 73; Allentown Bor. *v.* Saeger, 20 Pa. St. 421; Wharton *v.* Birmingham Bor., 37 Pa. St. 371; Knibbs *v.* Hall, 1 Esp. 84; Robinson *v.* Charleston Council, 2 Rich. 317; Lester *v.* Baltimore, 29 Md. 415; Tupelo *v.* Beard, 56 Miss. 532; Cahaba T. Council *v.* Burnett, 34 Ala. 400; Raisler *v.* Athens, 66 Ala. 194. In State *v.* Butler, 11 Lea, 418, the court said "notwithstanding the voluntary payment of taxes illegally assessed does not constitute or confer a right of action to recover them back, yet it did create a moral obligation on the part of the city to repay them, and was a sufficient consideration to support a *subsequent promise* to do so."

[2] Brown *v.* Painter, 44 Iowa, 368 (1876); Hamilton *v.* Dubuque, 50 Iowa, 213 (1878); Callanan *v.* Madison County, 45 Iowa, 561; Commonwealth *v.* Philadelphia, 27 Pa. St. 497; and see generally, Cooley on Taxation, chap. xxiv.

[3] Lamborn *v.* Dickinson Co., 97 U. S. 181 (1877); Union Pac. R. R. Co. *v.* Dodge Co. Comm'rs, 98 U. S. 541 (1878); see also First Nat. Bank of A. *v.* Americus, 68 Ga. 119.

in writing "that the taxes were illegally assessed and levied, were wholly unauthorized by law, and that suit would be instituted to recover back the money paid," it was held that *the payment was not compulsory* in such a sense as to give the right to recover back taxes thus paid.[1]

[1] Union Pac. R. R. Co. *v.* Dodge Co. Comm'rs, *supra*. Mr. Chief Justice *Waite*, in giving the judgment of the court in the case last cited, accompanied the statement of the rules appearing in this section of the text (sec. 947) with the following observations upon several judgments of the Supreme Court which had been sometimes erroneously supposed to lay down a different doctrine: —

"There are, no doubt, cases to be found in which the language of the court, if separated from the facts of the particular case under consideration, would seem to imply that a *protest alone* was sufficient to show that the payment was not voluntary, but on examination it will be found that the protest was used to give effect to the other attending circumstances. Thus, in Elliott *v.* Swartwout, 10 Pet. 137, and Bond *v.* Hoyt, 13 Pet. 266, which were customs cases, the payments were made to release goods held for duties on imports, and the protest became necessary in order to show that the legality of the demand was not admitted when the payment was made. The recovery rested upon the fact that the payment was made to release property from detention, and the protest saved the rights which grew out of that fact. In Philadelphia *v.* Collector, 5 Wall. 730, and Collector *v.* Hubbard, 12 Wall. 13, which were internal revenue tax cases, the actions were sustained 'upon the ground that the several provisions in the internal revenue acts referred to warranted the conclusion as a necessary implication that Congress intended to give the taxpayer such remedy.' It is so expressly stated in the last case (p. 14). As the case of Erskine *v.* Van Arsdale, 15 Wall. 75, followed these, and was of the same general character, it is to be presumed that it was put upon the same ground. In such cases the protest plays the same part it does in customs cases, and gives notice that the payment is not to be considered as admitting the right to make the demand." Adverting to the case in judgment the chief justice, in the case from which the last extract was taken, thus proceeds to define and illustrate the subject of compulsory payments: "*The real question in this case is whether there was such an immediate and urgent necessity for the payment of the taxes in controversy as to imply that it was made upon compulsion.* The treasurer had a warrant in his hands which would have authorized him to seize the goods of the company to enforce the collection. This warrant was in the nature of an execution running against the property of the parties charged with taxes upon the lists it accompanied, and no opportunity had been afforded the parties of obtaining a judicial decision of the question of their liability. As to this class of cases Chief Justice *Shaw* states the rule in Preston *v.* Boston, 12 Pick. 14, as follows: 'When a party not liable to taxation is called upon peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by *duress*, and not voluntarily, and, by showing that he is not liable, recover it back as money had and received.' *This, we think, is the true rule, but it falls far short of what is required in this case.* No attempt had been made by the treasurer to serve his warrant. He had not even personally demanded the taxes from the company, and certainly nothing had been done from which his intent could be inferred to use the legal process he held to enforce the collection, if the alleged illegality of the claim was made known to him. All that appears is that the company was charged upon the tax-lists with taxes upon its real and personal property in the county. After all the taxes had become delinquent under the law, but before any active steps whatever had been taken to enforce their collection, the company presented itself at the treasurer's office, and in the usual course of business paid in full everything

Actions for Torts.

§ 948 (752). **Mode of Treatment.** — We find it impossible to state, by way of definition, any rule sufficiently exact to be of much practical value which will *precisely embrace the torts for which a civil action* will, in the absence of a statute declaring the liability, lie against a municipal corporation. The difficulty experienced by the courts on this subject has been often confessed, and, speaking of it, Mr. Justice Foote remarks: "All that can be done with safety is to determine each case as it arises." [1] It is justly observed in Mersey Dock cases (relating to the liability of a public corporation required to maintain suitable docks and harbor accommodations, for the use of which they were authorized to demand certain dues) "that in every case the liability of a body created by statute must be determined under a true interpretation of the statutes under which it is created." [2] While the powers and duties of our ordinary municipalities are more numerous and varied than those of a public corporation for a defined purpose, still the same general principle applies, viz., that liability must be determined (when not expressly declared) by the nature of the power and duty, and the charter and legislative provisions applicable thereto. We can, perhaps, most satisfactorily present the state of the law respecting the liability of municipal corporations in actions for torts, by referring to, and, as far as possible, classifying, the cases (which may be grouped according to the subject-matter) in which such liability has been judicially asserted or denied. And first, we will mention cases in which

that was charged against it, accompanying the payment, however, with a general protest against the legality of the charges, and a notice that suit would be commenced to recover back the full amount that was paid. No specification of alleged illegality was made, and no particular property designated as wrongfully included in the assessment of the taxes. The protest was in the most general terms, and evidently intended to cover every defect that might thereafter be discovered, either in the power to tax or the manner of executing the power. Three years afterwards, and after the case of Union Pac. R. R. Co. *v.* McShane, 22 Wall. 444, which was supposed to decide that the particular lands now in question were not subject to taxation, this suit was brought. Under such circumstances we cannot hold that the payment was compulsory in such a sense as to give a right to the present action."

[1] Lloyd *v.* New York, 5 N. Y. 369, 375 (1851); Cobb *v.* Dalton, 53 Ga. 426. "No rule on this subject can be so precisely stated as to embrace all the torts for which it has been held by some court or another that a private action will lie against a municipal corporation." *West*, J., in Conway *v.* Beaumont, 61 Tex. 10.

[2] Mersey Docks *v.* Gibbs; Same *v.* Penhallow, Law R. 1 H. L. Cases, 93; s. c. 1 H. & N. 439; 3 H. & N. 164, approved by *Rives*, J., in his learned opinion in Richmond *v.* Long's Adm., 17 Gratt. 375; s. p. Southampton, &c. Bridge Co. *v.* Southampton Local Board, 8 El. & Bl. 812; Winch *v.* Conservators of Thames, L. R. 9 C. P. C. 378.

these corporations are *not liable to civil actions*, unless the liability be expressly created by statute.

§ 949 (753). **Discretionary and Legislative Powers.** — A municipal corporation is not impliedly liable to an action for damages either for the non-exercise of, or for the manner in which in good faith it exercises, *discretionary powers of a public or legislative character*. Thus, where such a corporation has under its charter a *discretion as to the time and manner or plan of making public or corporate improvements*, as, for example, grading streets, constructing sewers, drains, vaults, &c., building market-houses, improving its harbor, and the like, neither *mandamus* nor a private action will lie against the corporation for *omitting or neglecting* to act; and the reason is that such powers are conferred to be exercised or not, as the public interest is deemed to require, and there is no implied liability for deciding either that the public interest does not require action, or that it requires action in a particular way.[1]

[1] Wilson *v.* New York, 1 Denio (N. Y.), 595 (1845). Followed, Cole *v.* Medina, 27 Barb. 218 (1858); Lacour *v.* New York, 3 Duer (N. Y.), 406 (1854); *post*, sec. 1046; Keating *v.* Kansas City, 84 Mo. 415; Tritz *v.* Same, *Ib.* 632; McDade *v.* Chester City, 117 Pa. St. 414; Trescott *v.* Waterloo, 26 Fed. Rep. 592; Trammell *v.* Russellville, 34 Ark. 105; Rivers *v.* Augusta Council, 65 Ga. 376; Horton *v.* Bristol, 4 Lea (Tenn.), 39; Collins *v.* Savannah (not opening a street), 77 Ga. 745; Williams *v.* Grand Rapids, 59 Mich. 51; Bauman *v.* Campau, 58 Mich. 444; McArthur *v.* Saginaw, 58 Mich. 357; Henkel *v.* Detroit, 49 Mich. 249; Urquhart *v.* Ogdensburg, 91 N. Y. 67; City of Anderson *v.* East, 117 Ind. 126 (1888); *infra*, sec. 950, and note. A limitation on the doctrine of the text is asserted in many cases, where it is held that a municipal corporation cannot so exercise its discretionary powers *in adopting a plan* for a public improvement as to *practically take private property for public use without compensation*. *Post*, secs. 1046–1051, and cases.

In a case where the plan of a sewer was proved to be defective, and being negligently maintained caused the inundation of plaintiff's property, *Ruger*, Ch. J., said: "We are also of the opinion that the exercise of a judicial or discretionary power, by a municipal corporation, which results in a direct and physical injury to the property of an individual, and which from its nature is liable to be repeated and continued, but is remediable by a change of plan or the adoption of prudential measures, renders the corporation liable for such damages as occur in consequence of its continuance of the original cause after notice, and an omission to adopt such remedial measures as experience has shown to be necessary and proper." Seifert *v.* Brooklyn, 101 N. Y. 136; *post*, secs. 1046–1051, and cases, where the subject is more fully considered. Shearm. & Red. Neg. (4th ed.) secs. 269–279; Thomps. Neg. chap. 16.

The text cited and the principle applied to a case in which it was unsuccessfully sought to make the corporation liable for *suspending the ordinance forbidding fireworks*, during which time the plaintiff's house was destroyed by fireworks negligently used by boys. Hill *v.* Charlotte, 72 N. C. 55 (1876); s. c. 21 Am. Rep. 451; Davis *v.* Montgomery Council, 51 Ala. 139; Campbell's Adm. *v.* Same, 53 Ala. 527; Ball *v.* Woodbine, 61 Iowa, 83; *post*, secs. 1043–1052; White *v.* Yazoo City, 27 Miss. 357 (1854); Griffin *v.* Mayor, 9 N. Y. 456 (1853), and cases

There may be, however, as elsewhere shown, an implied liability for the negligent or unskilful manner in which *strictly corporate powers*, as distinguished from *public powers*, are carried into execution, although there was no perfect duty resting on the corporation to enter upon the works or undertakings involving the exercise of such powers.[1] But the liability in such cases attaches only when the duties cease to be judicial in their nature, and become ministerial.[2] This is the principle; its application, as will be hereafter seen, is oftentimes extremely difficult.

cited. Followed, Dewey *v.* Detroit, 15 Mich. 307, where the council had a discretion as to the number of subordinate officers it would appoint; Western College *v.* Cleveland, 12 Ohio St. 375 (1861); Carr *v.* Northern Liberties (authority to construct sewers), 35 Pa. St. 324 (1860); followed in Lehigh Co. *v.* Hoffort, 116 Pa. St. 119 (erecting barrier between roadway and foot-path on a bridge). The passage of an ordinance *permitting the use of a street for coasting* held not to render the city liable for injuries to persons resulting from such use, because the adoption of such an ordinance is an exercise of legislative power and discretionary. Burford *v.* Grand Rapids, 53 Mich. 98; see on this point *infra*, secs. 951, note, 1013, and notes; Grant *v.* Erie (fire and damages from failure to repair reservoir), 69 Pa. St. 420 (1871); s. c. 8 Am. Rep. 272; McDade *v.* Chester (failure to prohibit dangerous occupation), 117 Pa. St. 414 (1887), citing text; Bennett *v.* New Orleans, 14 La. An. 120 (1849); Cooley Const. Lim. 208; *infra*, sec. 959; Kelly *v.* Milwaukee (damage by swine at large), 18 Wis. 83 (1864); Joliet *v.* Verley, 35 Ill. 58, *per Beckwith*, J.; Alton *v.* Hope, 68 Ill. 167 (1873); Goodrich *v.* Chicago, 20 Ill. 445 (1858), in which it was held, where a city corporation had, among other powers, express authority "*to remove all obstructions in the harbor*," that it was not liable to a party who received damages from a sunken hulk therein, if the city had never undertaken to exercise the power granted to it to clear out the harbor. *Caton*, J., says, in substance: If, however, the city had entered upon the work of removing the hulk, and in doing so had carelessly left it in an exposed situation, by reason of which a navigator's vessel was injured, it would be liable for such negligence. A city held not to be liable for damages by spiles in front of pier owned by it in a navigable river. Seaman *v.* New York, 80 N. Y. 239; s. c. 21 Alb. L. J. 275; Armstrong *v.* Brunswick, 79 Mo. 319 (failing to abate a nuisance). See *infra*, secs. 974, 980; New York *v.* Furze, 3 Hill (N. Y.), 612, explained in Wilson *v.* New York, 1 Denio (N. Y.), 595, 600, and in Mills *v.* Brooklyn, 32 N. Y. 489 (1865), cited *infra*, secs. 1046, 1047; these cases distinguished in Seifert *v.* Brooklyn (noted *supra*), 101 N. Y. 136; see *post*, secs. 1046–1051; Shearm. & Red. Neg. sec. 285, and cases cited; Dayton *v.* Pease, 4 Ohio St. 80 (1854). Corporation of Trinity House, having power to raise a fund by the levy of light duties, held liable for the negligence of its servant in leaving an iron stump standing under water on which the plaintiff's ship struck. Gilbert *v.* Trinity House, L. R. 17 Q. B. Div. 795, and cases cited.

As to mandatory and discretionary powers, see ante, secs. 98, 832, 857; *post*, secs. 1043–1052; Steines *v.* Franklin Co., 48 Mo. 167; Shearm. & Red. Neg. sec. 269 *et seq.* As to private action for damages for breach of duty imposed by statute or municipal ordinance. Heeney *v.* Sprague, 11 R. I. 456 (1877); s. c. 23 Am. Rep. 502; Flynn *v.* Canton Co., 40 Md. 312; s. c. 17 Am. Rep. 603, and note; Thomps. Neg. chaps. 14, 15, 16.

[1] *Post*, secs. 953, note, 980, 1017, 1024, 1048 *et seq.* The text cited, Clarence *v.* Auburn, 66 N. Y. 334, 341 (1876).

[2] *Post*, sec. 1048 *et seq;* 2 Thomps. Neg. chap. 16, pp. 625–806, and cases there cited.

§ 950 (754). **Failure to enforce By-laws.** — Unless there be a valid contract creating, or a statute declaring, the liability, a municipal corporation *is not bound to secure a perfect execution of its by-laws*, relating to its public powers, and it is not responsible civilly for neglect of duty on the part of its officers in respect to their enforcement, although such neglect results in injuries to private persons which would otherwise not have happened.[1] Conformably to the foregoing principles the Supreme Court of Georgia held that a municipal corporation is not liable for damages resulting from a failure on the part of its council to perform, or from an improper performance of those powers and duties which are legislative or judicial in their character. For damages resulting from their neglecting to perform, or negligence in the performance of corporate duties which are purely ministerial, the corporation, it was admitted, would be liable. There is no sound distinction, says the court, as to the liability of the corporation, between a failure to pass an ordinance, in the first instance, and its repeal or suspension after being passed. Therefore,

[1] Levy *v.* New York, 1 Sandf. (N. Y.) Sup. Ct. R. 465, relating to injury committed by *swine running at large* in the streets in violation of by-laws, referred to with approval, 11 N. Y. 396, and see cases there cited, and in Griffin *v.* New York, 9 N. Y. 456, 459, *per Denio*, J.; s. p. Peck *v.* Austin (market ordinance), 2 Tex. 162 (1858), in which the court, admitting that such a corporation may be liable for "the wrongful acts of its officers done under its authority, and pursuant to its will, express or implied," says that "such a rule cannot be enforced in this case, because the action, or non-action, of the officers complained of was contrary to the will of the corporation as expressed in the ordinance." See, also, observations (*arguendo*) of *Marshall*, C. J., in Fowle *v.* Alexandria, 3 Pet. 398, 409 (1830); Lorillard *v.* Monroe, 11 N. Y. 392, 396 (1854), affirming s. c. 12 Barb. 161; Chandler *v.* Bay St. Louis, 57 Miss. 327; Sutton *v.* Carroll Co. Pol. Bd., 41 Miss. 236; Sherman *v.* Granada, 51 Miss. 186; *ante*, sec. 949, note; McCrowell *v.* Bristol, 5 Lea (Tenn.), 685, approving text; Kiley *v.* Kansas City, 87 Mo. 103, where a city, having an ordinance against nuisances which would include an *insecure wall upon private property* but on the line of the street, was held not to be liable for the death of a child caused by the fall of such a wall upon an adjoining house. So in the City of Anderson *v.* East, 117 Ind. 126 (1888), a municipal corporation was held not to be liable to a citizen, whose building is situate on *his own ground*, for damages sustained by him by reason of the walls of a building, on the opposite side of the alley belonging to another citizen and negligently permitted by him to become dangerous, falling upon his building and destroying it. In such case if the owner of a building which has been burned negligently permits the ruined walls to become dangerous, he and not the city is liable to the adjacent owner for injury to his property caused by the walls falling upon it, although the city marshal volunteered to take charge of the ruins and have the walls torn down if necessary. *Infra*, secs. 951, 1013, and notes (as to injuries in streets and public places caused by awnings and falling substances); Howe *v.* New Orleans, 12 La. An. 481. A municipal corporation is not ordinarily liable for the illegal and unauthorized acts of its officers under an ordinance, nor is it made liable by the fact that its board of trustees are cognizant of the tortious act, or even participate therein. Odell Trs. *v.* Schroeder, 58 Ill. 353 (1871) (false imprisonment by town officer; no municipal liability).

where a city council passed an ordinance forbidding the running at large of cattle in its streets, but subsequently suspended its operation indefinitely, on the ground, among others, that the growth of weeds and grass was too luxuriant for comfort, health, and good appearance, *one who is gored by a cow running at large in the streets* has no cause of action against the city; and the principle is not altered by the fact that the owner paid a municipal tax on the cow.[1]

§ 951. **Failure to abate Nuisances.** — A failure by the corporation *to exercise its charter power to abate nuisances* not rendering its streets unsafe does not give a person who is injured by such failure a private action against the corporation; and therefore where a house in a city was destroyed by fire caused by sparks from an engine on the adjoining property, which was by ordinance a nuisance that the city might have abated, but which after notice and request it had neglected to abate, the city is not liable in damages for such non-action and neglect, to the owner of the house destroyed.[2]

§ 952. **Failure to observe By-laws.** — Nor is a city liable to the plaintiff for the value of his house destroyed by the taking fire of a *wooden building which the city permitted* to be erected in violation of its ordinances.[3] It has sometimes, indeed, been broadly declared that, in the absence of a statute giving it, an action at law for damages will not lie against a municipal corporation for failing to exercise its legislative functions or powers to the injury of private individuals, even where the duty of exercising them is imperative or mandatory.[4]

[1] Rivers *v.* Augusta Council, 67 Ga. 376; s. c. 23 Alb. L. J. 17 (1880); *ante*, sec. 949, note.

[2] Davis *v.* Montgomery Council, 51 Ala. 139 (1874); s. c. 23 Am. Rep. 545; s. p. Campbell's Adm. *v.* Same, 53 Ala. 527; *ante*, sec. 950, note; Kent *v.* Cheyenne, 2 Wy. 6; Hubbell *v.* Viroqua, 67 Wis. 343 (not liable for injury caused by a *bullet from a shooting gallery* licensed by the city but situated on private property, plaintiff being at the time on the sidewalk). A city is not liable to one who is injured in assisting in the extinguishment of a fire in a manufactory of fireworks upon the ground that it failed to exercise the power expressly committed to its council to prohibit such manufacture. McDade *v.* Chester, 117 Pa. St. 414 (1887); *infra*, sec. 976. In Taylor *v.* Cumberland, 64 Md. 68, a city was held responsible for injuries caused by coasting in violation of an ordinance. Compare Burford *v.* Grand Rapids, 53 Mich. 98; noted *supra*, sec. 949, note; *post*, secs. 953, note, 1021–1024; Shearm. & Red. Neg. (4th ed.) sec. 262, and cases.

[3] Forsyth *v.* Atlanta, 45 Ga. 152 (1872); s. c. 12 Am. Rep. 576.

[4] Reock *v.* Newark, 33 N. J. L. 129 (1868). The judgment in this case can, however, rest on other grounds. *Post*, sec. 991; *ante*, sec. 98, note.

As to who are *corporate officers*, and what are *corporate duties*, see *infra*, secs. 953, 957, 974, 980, 1043, 1052.

As to contract to enforce ordinances, see Le Claire *v.* Davenport, 13 Iowa, 210. *Ante*, sec. 385; Gale *v.* Kalamazoo, 23 Mich. 344 (1871).

§ 953 (755). **Mistake of Corporate Power by Corporation; Municipal Licensees.** — A municipal corporation is not liable to a private individual for losses caused by its having *misconstrued the extent of its powers, and issued a license* which it had no authority to grant.[1] The license in the case just cited from the United States Supreme Court[2] was granted by the corporation, without authority therefor, to a person to exercise the trade of auctioneer; and the plaintiff, having sustained losses from his fraudulent conduct, brought an action against the city, the injury alleged in the declaration being an omission by the city to take a bond, as required by law, and the corporation having no authority to require or take such a bond, it was held that the action could not be maintained. The court observed that the auctioneer was not "the officer or agent of the corporation, but acted for himself, as entirely as a tavern-keeper or other person who carries on any business under a license from the corporate body." The proposition may, we think, be affirmed as unquestionably sound, that the *licensees of a municipal corporation to exercise any independent trade or business* for their own profit are not the officers or agents of the corporation so as to make it impliedly

[1] Fowle *v.* Alexandria, 3 Pet. 398 (1830); s. c. below, 3 Cranch C. C. 70. *Ante*, secs. 457, 935; *infra*, sec. 968. Nor is a municipal corporation liable for the act of its council in *erroneously*, but without any corruption or malice, *refusing to grant a retail license*, by mistake supposing it had discretion over the subject when in fact it had none. The exemption from liability is placed by the court upon the ground that such functions are *substantially judicial in their nature*. Duke *v.* Rome, 20 Ga. 635 (1856); White *v.* Yazoo City, 27 Miss. 357 (1854); *supra*, sec. 949; *post*, secs. 1046, 1047. So a city is not liable for the acts of an abutting owner, in or upon the streets, to whom it has granted permission to connect his private drain with the sewers, unless it has been guilty of neglect in respect of its own duty to keep the streets in safe condition for travel. Masterson *v.* Mt. Vernon, 58 N. Y. 391; Shearm. & Red. Neg. (4th ed.) 263.

[2] Fowle *v.* Alexandria, *supra*. In Cole *v.* Nashville, 4 Sneed (Tenn.), 162 (1851), arising on demurrer to the declaration, it was properly held that as the *municipal corporation had no jurisdiction over lunatics*, and no power and no duty to arrest and confine them, or to take measures for this purpose, it could not be made liable for a *supposed omission of duty* for not doing so. *Post*, sec. 968. But in the same case it was also decided that if such a corporation, or its officers, *knowing that a person was a lunatic, granted him a license to carry on a dangerous avocation*, as that of a druggist, it was liable in damages to a party injured by such person while in pursuit of the business for which he was thus licensed. This decision was based upon the ground that the injury which happened was a natural and probable result of the power granted, and that such corporations are liable for the wrongful acts and neglect of their officers in the course, and within the scope, of their employment. But was the act of granting a license to a druggist a *corporate* act? Was it not rather a public power to be exercised by the corporation as a public agency of the State? And if so, the acts or neglect of the officers would impose no liability on the corporation. *Ante*, sec. 66; *post*, secs. 957, 970, 974–980.