in arresting disturbers of the public peace under a valid ordinance, has no remedy against the city.[1] The municipal corporation in all these and the like cases represents the State or the public; the police officers are not the servants of the corporation; the principle of *respondeat superior* does not apply, and the corporation is not liable unless by virtue of a statute expressly creating the liability.

§ 976 (774). **City not liable for Wrongful Acts of Firemen.** — So, although a municipal corporation has charter power to extinguish fires, to establish a fire department, to appoint and remove its officers, and to make regulations in respect to their government and the management of fires, *it is not liable for the negligence of firemen appointed and paid by it*, who, when engaged in their line of duty upon an alarm of fire, ran over the plaintiff, in drawing a hose-reel belonging to the city, on their way to the fire;[2] nor for injuries to the plaintiff, caused by the bursting of the hose of one of the engines of the corporation, through the negligence of a member of the fire depart-

[1] Cobb *v.* Portland, 55 Me. 381 (1868); Sutton *v.* Carroll Co. Pol. Bd., 41 Miss. 236. There is on the same principle no municipal liability for *negligence of inspectors of steam boilers appointed by a city* (Mead *v.* New Haven, 40 Conn. 72; s. c. 17 Am. Rep. 14); compare Lafayette *v.* Allen, 81 Ind. 166, cited *infra;* or for negligence of *ambulance driver*, the duty being public, not corporate. Maxmilian *v.* New York, 62 N. Y. 160 (1875); s. c. 20 Am. Rep. 468, and note; Ogg *v.* Lansing (negligence of *health-officers* of a city), 35 Iowa, 495; s. c. 14 Am. Rep. 499; Pollock *v.* Louisville, 13 Bush, 221; Haight *v.* New York, 24 Fed. Rep. 93 (1885). As to liability of the city, where it is the owner of a police station building, for the negligence of a policeman in leaving open trap-door leading from the sidewalk into the police station. Carrington *v.* St. Louis, 89 Mo. 208. Compare *post*, sec. 977, note; and see *post*, sec. 985, *et seq.*

[2] Hafford *v.* New Bedford, 16 Gray (Mass.), 297 (1860). In the absence of express statute creating the liability, municipal corporations are not liable to property owners to actions for injuries occasioned by reason of *negligence in using or keeping in repair the fire-engines* owned by them. 2 Thomps. Neg. 731, 735, and cases; Bigelow *v.* Randolph, 14 Gray, 541; Wheeler *v.* Cincinnati, 19 Ohio St. 19; s. c. 2 Am. Rep. 368; Howard *v.* San Francisco, 51 Cal. 52; Jewett *v.* New Haven, 38 Conn. 368; s. c. 9 Am. Rep. 382; Torbush *v.* Norwich, 38 Conn. 225; s. c. 9 Am. Rep. 395; Ogg *v.* Lansing, 35 Iowa, 495; s. c. 14 Am. Rep. 499; Hayes *v.* Oshkosh, 33 Wis. 314; s. c. 14 Am. Rep. 760; Burrill *v.* Augusta, 78 Me. 118; Elliott *v.* Philadelphia, 75 Pa. St. 347; s. c. 15 Am. Rep. 591; O'Meara *v.* New York, 1 Daly, 425. Text cited and approved. Smith *v.* Rochester, 76 N. Y. 506; Howard *v.* San Francisco, 51 Cal. 52; Wilcox *v.* Chicago, 107 Ill. 334 (quoting and approving the text); Edgerly *v.* Concord, 59 N. H. 78, 341; Wild *v.* Paterson, 47 N. J. L. 406. City held not to be liable for the negligence of officers of a fire department unless made so by express statute, or for an act directly ordered by the corporation. Burrill *v.* Augusta, 78 Me. 118; s. P. Grube *v.* St. Paul, 34 Minn. 402. For an instructive view of the principle involved in such cases, see Maxmilian *v.* New York, 62 N. Y. 160; s. c. 20 Am. Rep. 468, approved and followed by *Brown*, J., in Haight *v.* New York, 24 Fed. Rep. 93 (1885); Greenwood *v.* Louisville, 13 Bush, 226; Pollock *v.* Louisville, 13 Bush, 221; *ante*, secs. 58, 60; Shearm. & Red. Neg. sec. 265, and cases; 2 Thomps. Neg. 735.

ment;[1] nor for like negligence, whereby sparks from the fire-engine of the corporation caused the plaintiff's property to be burned.[2] The exemption from liability in these and the like cases is upon the ground that the service is performed by the corporation in obedience to an act of the legislature; is one in which the corporation, as such, has no particular interest, and from which it derives no special benefit in its corporate capacity; that the members of the fire department, although appointed, employed, and paid by the city corporation, are not the agents and servants of the city, for whose conduct it is liable; but they act rather as officers of the city, charged with a public service, for whose negligence in the discharge of official duty no action lies against the city, without being expressly given; the maxim of *respondeat superior* has, therefore, no application.[3] Nor is such a corporation liable to the owner of property destroyed or damaged by fire in consequence of its *neglect to provide suitable engines* or fire apparatus, or to provide and keep in repair public cisterns,[4] or for *failing to*

[1] Fisher *v.* Boston, 104 Mass. 87 (1860); s. c. 6 Am. Rep. 196, distinguished from Oliver *v.* Worcester, 102 Mass. 489; Maxmilian *v.* New York, 62 N. Y. 160 (1875); s. c. 20 Am. Rep. 468.

[2] Hayes *v.* Oshkosh, 33 Wis. 314 (1873); s. c. 14 Am. Rep. 760.

[3] *Per Bigelow*, C. J., in Hafford *v.* New Bedford, *supra;* Hayes *v.* Oshkosh, 33 Wis. 314 (1873); s. c. 14 Am. Rep. 760, *supra*, sec. 957; Maxmilian *v.* New York, 62 N. Y. 160 (1875); s. c. 20 Am. Rep. 468; McCrowell *v.* Bristol, 5 Lea (Tenn.), 685; Welsh *v.* Rutland, 56 Vt. 228 (negligence in thawing out a hydrant causing ice in a street, by a fall upon which plaintiff was injured); Burrill *v.* Augusta, 78 Me. 118 (horse frightened by steam from an engine negligently left in the street); Baltimore *v.* O'Neill, 63 Md. 336, where the rule was applied to a case in which a discharged employee of the fire department sued for his salary accruing thereafter, the court holding that the city was not responsible for the act of the Fire Commissioners in discharging him.

[4] Wheeler *v.* Cincinnati, 19 Ohio St. 19 (1869); s. c. 2 Am. Rep. 368; Heller *v.* Sedalia, 53 Mo. 159, 161 (1873), citing and approving text; s. c. 14 Am. Rep. 444; s. P. Patch *v.* Covington, 17 B. Mon. 722 (1856); Brinkmeyer *v.* Evansville, 29 Ind. 187; Turner *v.* Indianapolis, 96 Ind. 51; Robinson *v.* Evansville, 87 Ind. 334; Horn *v.* Des Moines, 63 Iowa, 447; Wild *v.* Paterson, 47 N. J. L. 406; Edgerly *v.* Concord, 59 N. H. 79; *supra*, secs. 949, 950; Weightman *v.* Washington, 1 Black (U. S.), 39, 49; Torbush *v.* Norwich, 38 Conn. 225 (1871); s. c. 9 Am. Rep. 395; Grant *v.* Erie (failure to repair reservoir), 69 Pa. St. 420 (1871); s. c. 8 Am. Rep. 272; Jewett *v.* New Haven, 38 Conn. 368; Robinson *v.* Evansville, 87 Ind. 334. Nor is the city liable for its neglect in cutting water off from a hydrant, but for which the fire might have been extinguished. Tainter *v.* Worcester, 123 Mass. 311 (1877); s. c. 25 Am. Rep. 90; Davis *v.* Montgomery Council, 51 Ala. 139; Hill *v.* Boston, 122 Mass. 344; *supra*, sec. 957. A city is not bound to indemnify its citizens for a loss by fire occasioned by the negligence of the fire department. New Orleans *v.* Crescent Mut. Ins. Co., 25 La. An. 390 (1873). But if a member of the fire department be injured on his way to a fire, by a street which the city has negligently left in an unsafe condition, he may have his action the same as any one else. Turner *v.* Indianapolis, 96 Ind. 51. Whether member of fire department can recover against a city for personal injuries caused by an unsafe engine, see Lafayette *v.* Allen, 81 Ind. 166, where such a recovery was had, the liability of the city seemingly being assumed; *post*, sec. 982.

provide an adequate supply of water to extinguish fires when it has undertaken to provide a water supply.[1] A liability on the part of the corporation was sought to be sustained, upon the ground of the neglect of a *corporate* duty, but the court considered that powers of this nature conferred upon municipal corporations were legislative and governmental, and excluded the notion of implied responsibility to individuals, based on neglect or nonfeasance, and distinguished such cases from those in which the duty is purely ministerial.[2]

§ 977 (775). **No implied Corporate Liability for faults of Health Officers, or its own neglect in respect of the Public Health.** — The power or even duty on part of a municipal corporation to make provision for the public health and for the care of the sick and destitute, appertains to it in its public and not corporate, or as it is sometimes called, private capacity. And therefore where a city, under its charter, and the general law of the State enacted to prevent the spread of contagious diseases, *establishes a hospital*, it is not responsible to persons injured by reason of the misconduct of its agents and employees therein; and, accordingly, the city of Richmond was held *not to be liable for the loss of a slave admitted to the hospital of the corporation* to be treated for the small-pox, and whom the servants of the city in charge of the hospital negligently suffered, when delirious, to escape, wander off, and die.[3] So where a

[1] Van Horn *v.* Des Moines, 63 Iowa, 447, holding also that a contract with a water-works company by which it agrees to protect the city against its own neglect and misfeasance does not aid the party injured by fire nor *create* municipal liability. Black *v.* Columbia, 19 S. C. 412. The fact that the *city owns the water-works* does not make it liable for a loss by fire when the pipes were inadequate or out of order. Mendel *v.* Wheeling, 28 W. Va. 233. *Post*, sec. 982.

[2] The text quoted and approved in a case where the plaintiff sought damages for the loss of his house by fire, resulting from an inadequate supply of water. Black *v.* Columbia, 19 S. C. 412. *Ante*, sec. 957, note.

[3] Richmond *v.* Long's Adm., 17 Gratt. 375 (1867); approves Dargan *v.* Mobile, 31 Ala. 469; Stewart *v.* New Orleans, 9 La. An. 461; and goes on the ground that the duty here was public, and not private, and hence the city not liable for acts and defaults of its officers; and it was itself approved and followed in a similar case in *Missouri*, Murtaugh *v.* St. Louis, 44 Mo. 479 (1869), in which it was held that the city was not liable to a non-paying patient in its hospital for injuries caused by the *neglect or misconduct of the hospital officers or servants*. Sherbourne *v.* Yuba County, 21 Cal. 113 (1862), holding that a *county* was not liable in damages to an inmate of its hospital for unskilful treatment of the *resident physician*. S. P. Summers *v.* Daviess County, 103 Ind. 262. In Ogg *v.* Lansing, decided by the Supreme Court of *Iowa*, 35 Iowa, 495 (1872); s. c. 14 Am. Rep. 499, on the principle that in discharging its legislative functions a city is not liable for defective execution of its ordinances or for the neglect or nonfeasance of its officers and agents (*ante*, secs. 949, 950), it was held that a city corporation was not liable to a civil action by a person injured by reason of *its neglect to take proper precautions to prevent the spread of the small-pox*, or for the failure of its officers to notify the plaintiff, who was requested by them to assist in removing the corpse of a person who had died of this disease, of the dangerous nature of the service required of him.

A nurse employed in a small-pox hospital established by the town was suffered to depart without being properly disinfected, whereby the plaintiff caught the disease; it was held that the town was not liable. Brown *v.* Vinalhaven, 65 Me. 402 (1876); s. c. 20 Am. Rep. 709; Barbour *v.* Ellsworth, 67 Me. 294, carrying a well person to a small-pox hospital, where he contracted the disease; no liability. *Powers in respect to health. Ante*, secs. 144, 369, 371. Liability for acts of *health officers*, see *ante*, sec. 371, note; Rudolphe *v.* New Orleans, 11 La. An. 242 (which was an action for damages for alleged illegal order of board of health in ordering a ship to leave the city); Mitchell *v.* Rockland (illegal taking possession of a vessel; no liability), 41 Me. 363; s. c. 45 Me. 496 (1858); reaffirmed, 52 Me. 118; Harrison *v.* Baltimore, 1 Gill (Md.), 264 (1843), cited *ante*, sec. 144. City held not to be liable for misfeasance of members of its board of health (Bryant *v.* St. Paul, 33 Minn. 289); or for the negligence of a servant of its board of public works in the course of his employment when engaged in removing garbage with a cart and horse belonging to the city. Condict *v.* Jersey City, 46 N. J. L. 157. The same principle of non-liability (in absence of statute giving an action) applies to trustees of public charities, and to incorporated charitable institutions maintained as public charities, and not for gain and profit. Heriot's Hospital Feoffees *v.* Ross, 12 Clark & Fin. 507; Shearm. & Red. Neg. sec. 266, and see sec. 331, note, where the learned authors suggest that this case may be impliedly overruled by the Mersey Docks Case (*post*, secs. 983, note, 987, note); but to our mind this result does not follow. McDonald *v.* Mass. Gen. Hosp., 120 Mass. 432, where the hospital, an incorporated charitable institution, was held not to be liable in damages to a patient for the negligence of the attending surgeon, the trustees having used due care in his selection. Benton *v.* City Hospital (accident to plaintiff from unsafe stairs in public hospital; no liability), 140 Mass. 13. Compare Carrington *v.* St. Louis, 89 Mo. 208.

city corporation was, by statute, required to appoint *commissioners of public charities* to take care of paupers, destitute children, &c., it was held that the duties thus devolved upon the city were public and not corporate; that the commissioners were not the agents or servants of the city, but of the public; and, consequently, that the city corporation was not liable, on the principle of *respondeat superior*, for a negligent injury caused by an employee of the commissioners in driving an ambulance-wagon belonging to the city.[1]

§ 978 (776). **Fault of City Engineer.** — A municipal corporation is not responsible for the mistake or the want of care or skill of the

[1] Maxmilian *v.* New York, 62 N. Y. 160 (1875), distinguishing Jones *v.* New Haven, 34 Conn. 1; approved in Haight *v.* New York, 24 Fed. Rep. 93 (1885), where *Brown*, J., held that an action in admiralty against the city could not be maintained for damages for a collision between a schooner and a steamboat owned by the city, but in the exclusive use and control of the Board of Commissioners of Charities and Correction, and while navigated by a pilot employed by the commissioners, the reason being that that is an independent board over which the city corporation has no control, and which does not act for the use or benefit of the city in the discharge of any of its corporate functions or duties. See, also, *supra*, sec. 974, note; Bailey *v.* New York, 2 Denio (N. Y.), 433; Conrad *v.* Ithaca Trs., 16 N. Y. 158; and citing with approval Oliver *v.* Worcester, 102 Mass. 489; Hafford *v.* New Bedford, 16 Gray, 297; Fisher *v.* Boston, 104 Mass. 87; Eastman *v.* Meredith, 36 N. H. 284.

city surveyor or engineer, whether appointed and removable by it or elected by the people, when he performs duties (though the performance thereof be regulated by ordinance) for or between *private individuals*, as, for example, fixing the boundary between their lots.[1] In such case, the principle of *respondeat superior* does not apply, as it does or may when this officer acts for the corporation, or under its direction, in making corporate improvements.[2]

§ 979 (777). **Wrongful acts and negligence of Highway and Street Officers.** — On the same principle, treating *surveyors of highways* elected by the town as public, rather than municipal officers, a New England town is not liable for an injury sustained by a person by reason of the negligence of a laborer, in the course of his employment by the highway surveyor to aid him in the discharge of his official duty. Nor is it liable for damages occasioned by *the wrongful acts of the surveyor himself* in performing his official duties.[3] But it would be otherwise where the working and repair

[1] Alcorn *v.* Philadelphia, 44 Pa. St. 348 (1863). *Thompson*, J., considered it as a case of first impression, and distinguished it from those asserting corporate liability for defective streets. Erie *v.* Schwingle, 22 Pa. St. 384 (1853); Dean *v.* Milford Township, 5 Watts & S. (Pa.) 545; Dayton *v.* Pease, 4 Ohio St. 80, 100 (1854), *per Ranney*, J., and see *Ib.* 416; *infra*, sec. 990, note. McCarty *v.* Bauer, 3 Kan. 237 (1865) (personal action against engineer for erroneous survey). Waller *v.* Dubuque, 69 Iowa, 541. *When personally liable. Ib. Ante*, sec. 237, note.

[2] Dayton *v.* Pease, 4 Ohio St. 80 (1854), where the city was held liable for injuries caused by the fall of a bridge, owing to the negligence and want of skill of the city engineer. McCarty *v.* Bauer, *supra;* Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463 (1850); *supra*, sec. 968; Kobs *v.* Minneapolis, 22 Minn. 159, 164 (1875). Liability for negligence of *city engineer* in the construction of city waterworks. Saylor *v.* Harrisburg, 87 Pa. St. 216 (1878).

[3] Walcott *v.* Swampscott, 1 Allen (Mass.), 101 (1861); Barney *v.* Lowell, 98 Mass. 570; *supra*, sec. 971, note; Judge *v.* Meriden, 38 Conn. 90 (1871); Shearm. & Red. Neg. sec. 259, 288. Compare Foreman *v.* Canterbury, Law Rep. 6 Q. B. 214. Limited powers of New England town. *Ante*, secs. 28, 29; *supra*, sec. 964, note. But if a town assumes to perform the duty by its own agents, whom it directs and controls, *respondeat superior* may apply. Waldron *v.* Haverhill, 143 Mass. 582 (1887), and cases cited. And the surveyor himself is only liable in damages for wanton, malicious, or improper acts in making or repairing the highways in his district. Rowe *v.* Addison, 34 N. H. 306, 312, and cases cited; *ante*, sec. 237, note, and cases.

Constables, though appointed by the town, are not its agents or servants, and the town is not liable for their default, the statute not having so provided. Hurlburt *v.* Litchfield, 1 Root (Conn.), 520 (1793). And so, in *New York, town assessors and collectors of taxes are independent public officers*, and not the agents or servants of the towns in their corporate capacity. Lorillard *v.* Monroe, 11 N. Y. 392 (1854). See Bank of Commonwealth *v.* New York, 43 N. Y. 184. Relator, an overseer of highways in a town, under direction of the commissioner of highways in that town, committed a trespass upon the premises of a person, it being believed at the time that the act was lawful. He brought action against relator for the trespass. Relator

of streets is treated (as in many of the States it is) as a municipal duty, and the officer in charge as a corporate, in distinction from an independent, public officer, or where the injury was negligently caused by such officer in the process of executing upon the streets an authorized *corporate* improvement or work, for then the doctrine of *respondeat superior* would apply.[1]

§ 980 (778). **Basis of implied Municipal Liability.** — The doctrine may be considered as established, *where a given duty is a corporate one*, that is, one which rests upon the municipality in respect of its special or local interests, and not as a public agency, and *is absolute and perfect*, and not discretionary or judicial in its nature, and *is one owing to the plaintiff*, or in the performance of which he is

gave no notice to the town authorities, or to the town, of the action, and made no application to the electors at any town meeting, or to any of the town officers for advice as to the action, but defended it on his own motion. Judgment was recovered against him in the first instance, and he took successive appeals until the case reached the Court of Appeals, in all of which he was defeated. It was held, under the legislation of New York, that, even if the trespass was committed by direction of the town authorities, plaintiff had no valid claim against the town for the expense he was subjected to by the litigation. It was further held, that the town would in no event be liable for a wrongful act committed by direction of the commissioner of highways, since no corporate duty, in *New York*, is imposed upon a town in respect to the care, superintendence, and regulation of highways within its limits, and it has in its corporate capacity no control over the highways, and highway officers are not agents of the town. People *v.* Esopus Aud., 74 N. Y. 310 (1878).

In *Vermont* towns are made liable by statute for "*default*" or "*neglect*" of *town clerks* in respect to *official* duties. Hunter *v.* Winsor ("index" or "alphabet" book), 24 Vt. 327; *Ib.* 338, 580. *What are official acts or defaults.* Lyman *v.* Edgerton, 29 Vt. 305; Jarvis *v.* Barnard, 30 Vt. 492.

[1] *Infra*, secs. 1017-1024, 1048 *et seq.;* Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463; Kobs *v.* Minneapolis, 22 Minn. 159, 164 (1875); Eastman *v.* Meredith, 36 N. H. 295, *per Perley*, C. J., *obiter;* Baker *v.* Boston, 12 Pick. (Mass.) 184; Thayer *v.* Boston, 19 Pick. (Mass.) 511, 516 (1837); *supra*, secs. 971, 972, note; *post*, sec. 1038. In Scott *v.* Manchester, 37 Eng. Law & Eq. 495 (1856) (s. c. 1 H. & N. 59), by the *negligence* of workmen employed by the *city in laying its own gas-pipes* in the streets, the plaintiff's eye was injured, and the city held liable on the principle of *respondeat superior*. Affirmed on appeal, 2 H. & N. 204. Same principle, Foreman *v.* Canterbury, Law Rep. 6 Q. B. 214 (1871). *Post*, sec. 983, note. So, in Delmonico *v.* New York, 1 Sandf. (N. Y. Sup'or Ct.) 222, the plaintiff recovered for damages occasioned by the negligence of the defendants in constructing a sewer. There was a recovery against the city in Lloyd *v.* Mayor, &c. of New York, 1 Seld. (5 N. Y.) 369 (1851), for the negligence of persons employed by the proper officers of a corporation in leaving a dangerous hole in the street over night, in the process of repairing the public sewers; s. p. Grimes *v.* Keene, 52 N. H. 330 (1872); Bathurst *v.* MacPherson, L. R. 4 App. Cases, 256 (1879); *infra*, secs. 1046–1052, as to sewers; *supra*, sec. 949. The adjudged cases differ, as elsewhere shown, as to what are public, and what corporate, undertakings; but the *principle* on which the liability turns is the one stated in the text.

specially interested, that *the corporation is liable in a civil action* for the damages resulting to individuals by its neglect to perform the duty, or for the want of proper care or want of reasonable skill of its officers or servants acting under its direction or authority in the execution of such a duty; and, with the qualifications stated, it is liable, on the same principles and to the same extent, as an individual or private corporation would be under like circumstances.[1] For illustration, if a city neglects its *ministerial duty to cause its sewers* to be kept free from obstructions, to the injury of a person who has an interest in the performance of that duty, it is liable, as we shall see, to an action for the damages thereby occasioned.[2] So, if a *city*

[1] Lloyd *v.* New York, 5 N. Y. 369 (1851); McCullough *v.* Brooklyn, 23 Wend. 458 (1840); Clayburg *v.* Chicago (refusal to collect assessment), 25 Ill. 535 (1861). Distinguished, Saxton *v.* St. Joseph, 60 Mo. 153 (1875); Sterrett *v.* Houston, 14 Tex. 153 (1855). But was the duty here a corporate one? McLaughlin *v.* Municipality No. 2, 5 La. An. 504 (1850); Walling *v.* Shreveport, *Ib.* 660; Richmond *v.* Long's Adm., 17 Gratt. 375 (1867); Sawyer *v.* Corse, 17 Gratt. 230; Lacour *v.* New York, 3 Duer (N. Y.), 406; Conrad *v.* Ithaca, 16 N. Y. 158 (1857); Barton *v.* Syracuse, 36 N. Y. 54. Text cited and applied. Helena *v.* Thompson, 29 Ark. 569, 574 (1874); Orme *v.* Richmond, 79 Va. 86; Denver *v.* Dunsmore, 7 Col. 328; Denver *v.* Dean, 10 Col. 375; Greencastle *v.* Martin, 74 Ind. 449 (animal injured in pound); Platz *v.* Cohoes, 89 N. Y. 219; Levy *v.* Salt Lake City, 3 Utah, 63; Orth *v.* Milwaukee, 59 Wis. 336; Spelman *v.* Portage, 41 Wis. 144. See especially Judge *Thompson's* collection of leading cases on Municipal Negligence, and his valuable notes. 2 Thomps. Neg. pp. 625 *et seq.*, 737. In City of Lafayette *v.* Allen, 81 Ind. 166 (noted *supra*, sec. 976, note), an action by an employee of the fire department for injuries caused by a defective fire-engine, it was held, on the point of notice, to be sufficient on demurrer, that complaint alleged notice to the city of the unsafe condition of the engine, and that it was not necessary to allege specifically that the defect was known to some proper officer of the city. The liability of the city seemed to be assumed. *Supra*, sec. 949; *infra*, secs. 983, 1043–1052. The rule stated in the text should not, perhaps, be extended to a case where the effect of a recovery would be to charge the corporate treasury with a burden which does not belong to it, and where the person injured by the neglect to perform the duty can compel an execution of it by *mandamus* to the proper officers of the corporation. But the cases on this point are not uniform. McCullough *v.* Brooklyn, *supra; ante*, secs. 482, 831, note; *post*, sec. 993. *When duty rests upon the corporation and when upon its officers in their individual capacity. Ante*, sec. 99; Martin *v.* Brooklyn, 1 Hill (N. Y.), 145. Were the trustees here *independent* corporate officers? See Conrad *v.* Ithaca Trs., 16 N. Y. 158; Hickok *v.* Plattsburgh, 16 N. Y. 161. Affirmed, Weed *v.* Ballston, 76 N. Y. 329; Hartford & N. Y. S. Co. *v.* New York, 78 N. Y. 1.

It is also held in Canada that a municipal corporation may be sued for negligence in the construction of a sewer, for wrongfully obstructing a drain or watercourse, or for diverting a stream of water on the plaintiff's land. Farrell *v.* London, 12 Up. Can. Q. B. 343; Reeves *v.* Toronto, 21 Up. Can. Q. B. 157; Perdue *v.* Chinguacousy Tp. Corp., 25 Up. Can. Q. B. 61. The corporation must be connected with the doing of the wrongful act. Farrell *v.* London, *supra; post*, secs. 1038–1052.

[2] *Infra*, secs. 986, and note, 1046–1051; Franklin Wharf Co. *v.* Portland, 67 Me. 46 (1877); s. c. 24 Am. Rep. 1, and note; Lloyd *v.* Mayor, &c. of New York, 1 Seld. (5 N. Y.) 369 (1851). Shearm. & Red. Neg. (4th ed.) sec. 287, and cases.

owns a wharf or pier and receives wharfage or profit therefrom, it is liable, like an individual or private corporation, for injuries caused by a failure to keep it in proper condition and repair.[1] So in respect to its failure to keep its *streets* in a safe condition for public use, where this is a duty resting upon it.[2]

§ 981. **Ground of Implied Liability.**—The liability of the corporation for its own negligence, or that of its servants, is especially clear and in fact indisputable, where it *has received a consideration* for the duty to be performed, or where, under permissive authority from the legislature, it voluntarily assumes and carries on a work or undertaking from which it receives tolls or derives a profit.[3]

[1] *Ante*, sec. 113; Skinkle *v.* Covington, 1 Bush, 617 (1866); Fennimore *v.* New Orleans, 20 La. An. 124; Seaman *v.* New York, 80 N. Y. 239; Radway *v.* Briggs, 37 N. Y. 256; Allegheny *v.* Campbell, 107 Pa. St. 530 (1884); Willey *v.* Allegheny, 118 Pa. St. 490. Liability for dangerous approach to, see Carleton *v.* Franconia Iron & S. Co., 99 Mass. 216; Pittsburg *v.* Grier, 22 Pa. St. 54; Erie *v.* Schwingle, 22 Pa. St. 388; Memphis *v.* Kimbrough, 12 Heisk. (Tenn.) 133. *Infra*, secs. 981, note, 983.

Plaintiff was backing up his cart to a dock owned by the city for the purpose of loading it; his horse became unmanageable and backed off the dock, and was lost. The loss was sustained by the negligence of the city in failing to have a string-piece on the dock. The absence of the string-piece was the proximate cause of the loss, and the city, being charged with the duty of keeping it there, is liable, although at the moment the horse was not obedient to the will of his owner. Kennedy *v.* New York, 73 N. Y. 365, s. p. Clark *v.* Union Ferry Co., 35 N. Y. 485; Radway *v.* Briggs, 37 N. Y. 256; McGuiness *v.* New York, 52 How. Pr. Rep. 450; Swords *v.* Edgar, 59 N. Y. 28; Shearm. & Red. Neg. (4th ed.) sec. 285, and cases.

[2] *Infra*, sec. 1017 *et seq.* A city held not to be liable in damages for injuries caused by the negligence of a *fellow-workman*. McDermott *v.* Boston, 133 Mass. 349. *Coasting on public streets.* For injuries suffered by one passing along or over a public street in a city, with persons "*bobbing or coasting*" on such street, the city is not liable. Schultz *v.* Milwaukee, 49 Wis. 254; s. c. 5 N. W. Rep. 342; Lafayette *v.* Timberlake, 88 Ind. 330; Burford *v.* Grand Rapids, 53 Mich. 98; Faulkner *v.* Aurora, 85 Ind. 130; Pierce *v.* New Bedford, 129 Mass. 534; Steele *v.* Boston, 128 Mass. 583. While this may be a *public nuisance*, its suppression is a *police duty*, and not a duty in which a corporation, as such, has a particular interest, or from which it derives any special benefit, in its corporate capacity, and for the non-performance of such duty by its officers and agents the corporation is not liable. Hayes *v.* Oshkosh, 33 Wis. 314; Schultz *v.* Milwaukee, 49 Wis. 254; s. c. 5 N. W. Rep. 342; Wallace *v.* Menasha, 48 Wis. 79; s. c. 4 N. W. Rep. 101. See Taylor *v.* Cumberland, 64 Md. 68.

[3] Scott *v.* Manchester (carrying on gasworks), 2 H. & N. 204 (1857), affirming s. c. 1 H. & N. 59; Cowley *v.* Sunderland, 6 H. & N. 565; Pittsburg *v.* Grier, 22 Pa. St. 54 (1853); Mersey Dock Cases, 11 H. Lds. Cases, 687; Henley *v.* Lyme Regis, 2 Cl. & F. 331; Milnes *v.* Huddersfield, L. R. 10 Q. B. Div. 124; Bathurst *v.* MacPherson (nuisance in highway), L. R. 4 Appeal Cases, 256 (1879). *Infra*, sec. 986, note. A town which accepts a statute authorizing it to lay and maintain *water pipes for the purpose of supplying the inhabitants with water*, at rates established by the town, is liable for an injury sustained by a traveller upon a highway of the town, which has been undermined by water escaping from the

§ 982. **Same subject.** — Thus, where a street was negligently rendered unsafe by a stream of water thrown across it from a hydrant of the water-works owned by the city, and from which the *city derived the rents and profits*, which stream of water caused the plaintiff's horse, while being driven in the street, to take fright, run away, and receive injuries from which it died, the city was held liable. The employees of the water commissioners guilty of the negligence were regarded as the agents or servants of the city, and it was not material that the public was entitled to the use of the water for the extinguishment of fires.[1]

pipes by reason of negligence in their construction, although the circumstances are such that no action lies for a defect in the highway. The neglect was in the construction of work which the town had been authorized by special statute, voluntarily accepted, to construct and to receive the profits thereof, just as a private corporation might. For negligence in the manner of constructing such works, by which injury is caused to person or property, a town is just as liable as a private corporation or an individual. Murphy *v.* Lowell, 124 Mass. 564 ; Hand *v.* Brookline, 126 Mass. 324 ; Wilson *v.* New Bedford, 108 Mass. 261 ; Aldrich *v.* Tripp, 11 R. I. 141 ; Levy *v.* Salt Lake City, 3 Utah, 63 ; Grimes *v.* Keene, 52 N. H. 335. See *ante*, sec. 980 ; *infra*, secs. 982, note, 983, and note, 984, 985 *a*, note, 986, note. *So where city supplies gas.* Scott *v.* Manchester, *supra ;* Western Sav. Soc. *v.* Philadelphia, 31 Pa. St. 175 ; Kibele *v.* Philadelphia, 105 Pa. St. 41. A municipality owning and controlling a *wharf and charging tolls for its use* is bound to use the same care to provide appliances that an individual owner would be bound to use under like circumstances. Willey *v.* Allegheny, 118 Pa. St. 490 ; Allegheny *v.* Campbell (measure of duty), 107 Pa. St. 530 (1884). *Ante*, secs. 113, 980.

The defendants, an incorporated local board, having charge of *both water supply and highways*, fixed the iron cover of a valve connected with the water main in the highway, in a proper manner. In consequence of the ordinary wear of the highway, the valve cover projected an inch above the highway. Plaintiff's horse stumbled and was injured. On the ground that it was the duty of the defendants to so manage the works under their care as not to create a nuisance to the highway, it was held that the plaintiff was entitled to recover. "The duty was cast upon the defendants to keep the artificial works which they had created [in the highway] in such a state as to prevent its causing a danger to passengers on the highway, which but for such artificial construction would not have existed." Kent *v.* Worthing Local Board, L. R. 10 Q. B. Div. 118 (1882), distinguishing Russell *v.* Men of Devon, 2 T. R. 667, and Gibson *v.* Preston, L. R. 5 Q. B. 218 ; and following and applying White *v.* Hindley, L. Bd. of H., L. R. 10 Q. B. 219, where accident caused by defective grate left in the highway, and Borough of Bathurst *v.* Macpherson, L. R. 4 App. Cases, 256, where accident caused by the defective state of a barrel drain in the highway, were held to be actionable. *Infra*, secs. 985, 986, note.

[1] Aldrich *v.* Tripp, Treas., 11 R. I. 141 (1875) ; s. c. 23 Am. Rep. 434. The water commissioners were elected under an act conferring upon the city of Providence (the real defendant) certain powers to enable it to bring into the city a supply of pure water. The only point of controversy was whether the *water commissioners were the agents or servants of the city*, it appearing that they were elected and paid by the city, but derived their authority from an act of the legislature, and after their election were not, in all respects, under the control of the city. It was held that they were the agents of the city, and the case was considered as falling within the principle of Bailey *v.* New York, 3 Hill (N. Y.), 531 (*post*, sec. 984, note), and the class of cases to which that case belongs ; and was distinguished from Buttrick *v.* Lowell, 1 Allen, 172 (1861) ; *ante*, sec. 975 ; Hafford *v.* New Bedford, 16 Gray, 297 (1861) ; *ante*, sec. 976 ; Wheeler *v.* Cincinnati, 19 Ohio St. 19 (1869) ; s. c. 2 Am. Rep. 368 ; *ante*, sec. 976, where it is held that members of the fire department were *public* and not *corporate* officers, although appointed and paid by the city corporation. See *ante*, sec. 974, note ; *post*, sec. 985 *a*, note.

§ 983. **Same subject. Author's Conclusions.** — The author is of the opinion that the American cases fully support the doctrine above laid down in section 980. Possibly, the English cases have not gone quite so far. It is certain, however, that the doctrine stated in section 981 has the uniform sanction of the American and of the English courts. It is maintained by a learned American judge that the English cases referred to in his instructive and useful opinion below given, go no further than to assert that there is an *implied* liability only where the duty imposed upon a municipality is of such a nature as is ordinarily performed by trading or private corporations, and does not exist where the duty is imposed solely for the benefit of the public, without any consideration or emolument received by the corporation.[1] However this may be, the American

[1] *Ante*, sec. 965 ; *post*, secs. 986, 987.

The leading *English decisions* on the subject of the *implied liability of municipal corporations for tortious injuries causing damage to others*, and the reasons on which they rest are thus stated by *Gray*, C. J., in Hill *v.* Boston, referred to, *ante*, sec. 965 : —

"A municipal corporation, empowered by act of Parliament *to construct gas-works*, and to supply the gas upon such terms as might be agreed upon with the persons supplied, and to sell and dispose of the coke, and to apply the surplus profits to the improvement of the town, was held liable for a personal injury caused by the negligence of a workman employed by the corporation to lay the gas-pipes. But the reason of that decision as declared by *Cockburn*, C. J., delivering the judgment in the Exchequer Chamber, was that 'the corporation and the township derive a profit from the carrying on of the works,' or, as he afterwards said, 'the defendants were thus in the nature of a trading corporation.' Scott *v.* Manchester, 1 H. & N. 59 ; s. c. 2 H. & N. 204 ; Coe *v.* Wise, 5 B. & S. 440, 475. [*Ante*, sec. 981.]

"In another case, the defendants were held liable for a personal injury suffered from the *negligent and dangerous construction of machines in wash-houses* which they had been authorized by statute to erect, and for the use of which the plaintiff and other persons using the same paid them compensation. Cowley *v.* Sunderland Bor., 6 H. & N. 565.

"The House of Lords, affirming the judgments in the Exchequer Chamber and reversing the judgment of the Court of Exchequer, held that the members of the town council of Liverpool and their successors, who had been formed by acts of Parliament into a corporation by the style of The Trustees of the Liverpool Docks (Mersey Docks *v.* Gibbs, L. R. 1 H. L. 93 ; s. c. 11 H. L. 686, given in full in 1 Thompson on Negligence, 581), were liable for *an injury to a vessel from a bank of mud* which had been negligently suffered to remain in the docks. That case has been so often relied on by American courts, as extending the liability of municipal corporations to private action, that it is important to consider the substance of the acts of Parliament by which the corporation was created, and the grounds upon which the decision proceeded.

"The effect of those acts of Parliament, as defined by *Blackburn*, J., in delivering the opinion of the judges, which was approved by the House of Lords, was that the dock trustees were empowered to

cases, especially those relating to liability in damages for defective streets, and for negligence in the performance of corporate duties of

make and maintain docks and warehouses which were to *be open to the use of the public, paying dock rates for the use of the docks, and warehouse rates* for the use of the warehouses; the same accommodation and the same services were to be supplied to those using the docks and the warehouses respectively that would have been supplied by any ordinary dock and warehouse proprietors to their customers; powers were given to the trustees from time to time to close the docks for the purpose of cleansing and repair; the revenues were to be applied in the first instance to making and maintaining the docks, and paying all the charges and expenses incurred in carrying into execution, or under or in consequence of, the acts of Parliament, and the interest, and ultimately the principal, of a large debt secured by the dock rates; and, when it was all paid off, the trustees were required to lower the rates as far as could be done, leaving sufficient for defraying all charges of management and other concerns of the docks, and of improving, repairing, and maintaining the same, and of carrying into execution the provisions of the acts of Parliament.

"In delivering judgment in the Exchequer Chamber, *Coleridge*, J., said: 'In the case of Lancaster Canal Co. *v.* Parnaby (11 A. & E. 222), the defendants would have been responsible under such circumstances if they had had a beneficial interest in the tolls when received; and we do not think the principle of that decision inapplicable because the defendants in the present case received the tolls as trustees. The duty, in our opinion, is equally cast on those who have the receipt of the tolls and the possession and management of the dock vested in them, to forbear from keeping it open for the public use of every one who chooses to navigate it on payment of the tolls, when they know it cannot be navigated without danger, whether the tolls are received for a beneficial or for a fiduciary purpose; and for the consequences of this breach of duty we think they are responsible in an action.'

"In the House of Lords, the grounds of the decision were that in every case the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created; that corporations formed for trading and other profitable purposes, though acting without reward to themselves, yet in their very nature are substitutions on a large scale for individual enterprise, and, in the absence of anything in the statutes which create such corporations showing a contrary intention in the legislature, the true rule of construction is that the legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be coextensive with that imposed by the general law on the owners of similar works; and the House of Lords had already decided (Jones *v.* Mersey Docks, 11 H. L. Cas. 443) that the trustees of the Liverpool Docks were liable to pay poor rates as occupiers of the docks, for the very reason that they did not occupy as servants of the public or government.

"Lord Chancellor *Cranworth*, after saying that the fact that those in whom the docks were vested did not collect tolls for their own profit, but merely as trustees for the benefit of the public, made no difference in principle in respect to their liability, added: 'It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising, not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed.'

"The earliest and the most important of the modern English cases on this subject is Henley *v.* Lyme Regis, — decided successively in the Court of Common Pleas, 5 Bing. 91; 3 Mo. & P. 278; in the King's Bench, 3 B. & Ad. 77; and in the House of Lords, 2 Cl. & Fin. 331; 8 Bligh N. R. 690; 1 Bing. N. C. 222; 1 Scott, 29. This is the case which has been most often cited in this country to establish the general doctrine that a municipal corporation, required by law to construct and keep in repair highways, buildings, or public works for the benefit of the public, is liable to an action for negligence in such construction or repair, whereby the plaintiff suffers special injury. But the decision affirmed no such general doctrine. The corporation of Lyme was held liable to a private action for damages suffered by reason of its neglect to repair certain sea-walls, upon the ground that the royal charter, which had been accepted by the corporation, manifested an intention to render the corporation liable to such suits; because the charter showed that the duty to make such repairs was the condition and consideration upon which the corporation was granted certain franchises and acquitted of certain rents. This is distinctly stated in the judgment of the Court of Common Pleas, delivered by *Best*, C. J.; in that of the King's Bench, delivered by Lord *Tenterden;* and in the opinion of the judges, delivered by *Park*, J., in the House of Lords, and affirmed by the judgment of that house."

an absolute or ministerial nature (as distinguished from State or public duties), have, as elsewhere shown in this work, declared and enforced against municipal corporations proper (in distinction from *quasi* corporations) a measure of liability greater than that which is thus claimed to be the limit of such liability so far as it is recognized by the existing judgments of the English courts.[1] The general result of the American cases is stated in the sections of the text above mentioned, and in those referred to in the notes to this section.

§ 984 (779). **Liability of City of New York as owner of Croton Water Works; New York v. Bailey.** — The city of New York, as the *owner of a dam on the Croton River*, situate upon lands the *title* to which was in the city, and being part of the works built to supply the city and its inhabitants with pure water, was, after great consideration, held liable, though the dam was constructed at the instance and expense of the city, by *water commissioners* appointed by the *State*, and not by or under the control of the city authorities, to an action for injuries sustained by a third person in consequence of the dam (which was negligently and unskilfully built) being carried away by a freshet.[2]

[1] *Ante*, secs. 66, 961–967, 974–982; *post*, secs. 998, 999, 1022–1023, and cases cited, and comments on Hill *v.* Boston; Index, tit. *County; Quasi Corporations.* Negligence of Quasi Corporations, 1 Thomps. Neg. chap. xv. pp. 575–624, where the cases of Russell *v.* The Men of Devon, 2 Term Rep. 667 and Mersey Docks Cases, L. R. 1 H. L. Cas. 93 are reprinted in full and annotated. Negligence of Municipal Corporations, 2 Thomps. Neg. chap. xvi., pp. 625–806, where several leading American cases are reprinted and usefully annotated.

[2] New York *v.* Bailey, in Court of Errors, 2 Denio (N. Y.), 433, (1845); same case, names reversed, in Supreme Court, 3 Hill (N. Y.), 531 (1842); reprinted 2 Thomps. Neg. 652. While there was no doubt in the opinion of the Supreme Court, and comparatively little in the Court of Errors, that the city was liable, there was much diversity of opinion as to the ground of the liability. The Supreme Court (3 Hill, *supra*) makes the case turn upon the question, "whether the water commissioners, charged with the immediate superintendence and execution of