even when the work of grading the streets has been entered upon, there is not ordinarily, if ever, any liability to the adjoining owner arising merely from the *non-action* of the corporation in not providing means for keeping surface-waters from property situate below the established grade of the street.[1] There are, indeed, cases which go further, and assert that there is no such liability where, in making improvements upon streets or elsewhere, *authorized by law*, surface-waters are purposely turned from one's own land to that of another, — from the street directly upon the adjacent property owner.[2]

N. Y. 489 (1865); the above cases explained and distinguished, Seifert *v.* Brooklyn, 101 N. Y. 36 ; *post*, sec. 1051, note ; Flagg *v.* Worcester, 13 Gray, 601 (1859) ; Roll *v.* Augusta, 34 Ga. 326 (1866) ; Carr *v.* Northern Liberties, 35 Pa. St. 324 (1860) ; Grant *v.* Erie, 69 Pa. St. 420 ; Allentown *v.* Kramer, 73 Pa. St. 406 ; Smith *v.* New York, 66 N. Y. 295 ; Fair *v.* Philadelphia, 88 Pa. St. 309 ; Montgomery Council *v.* Gilmer, 33 Ala. 116 (1858) ; s. c. 26 Ala. 665 ; Atchison *v.* Challiss, 9 Kan. 603, overruling Leavenworth *v.* Casey, McCahon (Kan. Ter.), 124 ; Bennett *v.* New Orleans (omission to repair draining machine), 14 La. An. 120 (1859) ; *supra*, sec. 753 ; Aurora *v.* Pulfer, 56 Ill. 270 (1870) ; Schattner *v.* Kansas City, 53 Mo. 162 (1873) ; Springfield *v.* Spence, 40 Ohio St. 665. Henderson *v.* Minneapolis, 32 Minn. 319, where a change of grade had rendered the old drains and sewers useless to carry off the water from plaintiff's land. It was held that the city was not liable for not providing a means of carrying off the water. Glossop *v.* Heston Local Board, L. R. 12 Ch. Div. 102 ; Att'y-Gen. *v.* Dorking Union, L. R. 20 Ch. Div. 595, construing acts of Parliament, and holding that the remedy for failure of the board to discharge an imperative duty in respect of drains and sewers was *mandamus* and not injunction.

[1] Same authorities ; *supra*, secs. 949, 990 ; Wilson *v.* New York, 1 Denio, 595 ; Lynch *v.* Mayor, &c., 76 N. Y. 60 ; Imler *v.* Springfield, 55 Mo. 119 (1874) ; Baxter *v.* Providence, 12 R. I. 310, approving text ; s. c. 17 Am. Rep. 645. Compare Aurora *v.* Reed, 57 Ill. 29 (1870), and *Illinois* cases there referred to. Stewart *v.* Clinton, 79 Mo. 603 ; Kehrer *v.* Richmond, 81 Va. 745, quoting text.

In Gould *v.* Booth, 66 N. Y. 62, 65 (1876), *Church*, C. J., says : "The authorities are uniform in *maintaining a distinction between an interference with a running stream, and the exercise of lawful dominion over one's own property which consequentially interferes with surface drainage.*" And in the case last cited, the Court of Appeals held that commissioners of highways were not liable (where no action was given by statute) to the owner of land adjoining a highway for damages caused by a culvert, in an embankment constructed by them, which was insufficient to carry off the surface-water. Moran *v.* McClearns, 63 Barb. 185, distinguished. *Supra*, secs. 1038, 1039.

[2] Turner *v.* Darmouth, 13 Allen (Mass.), 291 (1866) ; Franklin *v.* Fisk, *Ib.* 211 ; Greeley *v.* Me. Cent. R. R. Co., 53 Me. 200 (1865) ; Dickinson *v.* Worcester, 7 Allen, 19 (1863) ; Gannon *v.* Hargadon, 10 Allen, 106 ; Flagg *v.* Worcester, 13 Gray, 601; Barry *v.* Lowell, 8 Allen, 127 ; Parks *v.* Newburyport, 10 Gray, 28 ; Bangor *v.* Lansil, 51 Me. 521 (1863). Compare Brine *v.* Gt. West. Ry. Co., 110 Eng. Com. L. (2 B. & S.) 402 (1862) ; Pennoyer *v.* Saginaw, 8 Mich. 534 (1860) ; Pettigrew *v.* Evansville, 25 Wis. 223 (1870); Hoyt *v.* Hudson, 27 Wis. 656 (1871) ; s. c. 9 Am. Rep. 473 ; Lambar *v.* St. Louis, 15 Mo. 610 (1852) ; Adams *v.* Walker, 34 Conn. 466 (1867) ; Kensington Comm'rs *v.* Wood, 10 Pa. St. 93 (1848); Ellis *v.* Iowa City, 29 Iowa, 229 (1870) ; Nevins *v.* Peoria, 41 Ill. 502 ; Aurora *v.* Reed, 57 Ill. 21 ; s. c. 11 Am. Rep. 1 ; Aurora *v.* Gillett, 56 Ill. 132 ; Bloomington *v.* Brokaw, 77 Ill. 194 (1875) ; Alton *v.* Hope, 68 Ill. 167 (1873) ; O'Brien *v.* St. Paul, 25 Minn. 331 ; Stack *v.* East St. Louis, 85 Ill. 377 (1877) ; *supra*, sec. 1038, note ; Mootry *v.* Danbury, 45 Conn. 550 ; Young *v.* Leedom, 67 Pa. St. 351 (1871).

In Inman *v.* Tripp, 11 R. I. 520 (1877); s. c. 23 Am. Rep. 520, the city of Providence (the real defendant), in exercising its power to grade its streets, caused surface-water which formerly flowed in other streets, and other surface-water which had previously collected in a pond at some distance from the plaintiff's property, to be turned and carried into the street in front of the plaintiff's property, along which it flowed, running thence into the plaintiff's cellar and well, the plaintiff's property being situate at the lowest point on the street ; and it was held that the city was liable for damages, thus occasioned by what the court regarded as the invasion of the plaintiff's rights of property. *Durfee*, C. J., denies that the city "had the right to grade its streets so as to collect the water from a wide area, some of it from distant puddles or ponds, and bring it, charged with the filth of the streets, to the margin of the plaintiff's land, and then empty it upon his land, and into his cellar and well," and cites and approves Nevins *v.* Peoria, 41 Ill. 502 ; Pettigrew *v.* Evansville, 25 Wis. 223 ; s. c. 3 Am. Rep. 50 ; Ashley *v.* Port Huron, 35 Mich. 296 ; s. c. 20 Am. Rep. 628 ; s. c. 15 Alb. L. J. 81. Seifert *v.* Brooklyn, 101 N. Y. 36 ; Smith *v.* Tripp, 13 R. I. 152. If the necessity for the drainage is caused by the city, the doctrine of the text (sec. 1041) that it is not bound to supply drainage does not apply. *Ib.*, *per Cooley*, J. Shearm. & Red. Neg. (4th ed.) sec. 274 ; *infra*, secs. 1045, 1051, note. See, also, Shawneetown *v.* Mason, 82 Ill. 337 (1876); s. c. 25 Am. Rep. 321 ; *supra*, sec. 1038, note.

[1] See and compare on this point, in addition to the cases last referred to, Flagg *v.* Worcester, 13 Gray (Mass.), 601 (1859), and Livingston *v.* McDonald, 21 Iowa, 160 (1866); Bentz *v.* Armstrong, 8 Watts & S. (Pa.) 40 (1844), remarks of *Kennedy*, J. ; Brine *v.* Gt. Western Ry. Co., 110 Eng. Com. L. (2 B. & S.) 402 ; *infra*, secs. 1043–1046 ; Foot *v.* Bronson, 4 Lansing (N. Y.), 47 (1871). The author allows the last sentence in the text to stand as originally written. The many cases since decided, cited in the notes, have found and defined the "middle ground" therein referred to, and adjudged the law to be as stated in the text. Lynch *v.* New York, 76 N. Y. 60, approving text. If a municipal corporation "in constructing streets, sewers, drains, and gutters causes the surface-water of a large territory, which did not naturally flow in that direction, to be gathered into a body and precipitated on to the premises of an individual, occasioning damage thereto," it has been held

§ 1042. **Liability for Positive Acts.** — We agree to the doctrine that *the municipality is not bound to protect from surface-water* those who may be so unfortunate as to own property below the level of the street ; nor is the duty a perfect one, to adopt a system or mode of drainage which will have this effect ; and if one be adopted, there is *in general*, as hereafter shown, no liability except as to ministerial duties in connection therewith. It is possible there may be no middle ground ; but we are unable to assent to the doctrine that by reason of their control over streets, and the power to grade and improve them, the corporate authorities have the absolute and unconditional legal right intentionally to divert the water therefrom, as a mode of protecting the streets, and to discharge it, by artificial means, in increased quantities and with collected force and destructiveness, upon the property, perhaps improved and occupied, of the adjoining owner.[1]

§ 1043 (800). **Same subject.** — If, in consequence of filling streets and cross-streets to the established grade line, water is *collected in ponds or pools* upon the adjoining lots, which are thus brought below the level of the streets, the corporation is not liable for damages thereby occasioned,[1] — not even, it has been held, where it would have been practicable, in the judicial judgment, to have prevented it by the construction of tunnels, openings, or drains; but upon the last point the cases are conflicting.[2]

liable. Citing Byrnes *v.* Cohoes, 67 N. Y. 204 ; Bastable *v.* Syracuse, 8 Hun, 587 ; s. c. 72 N. Y. 64 ; Noonan *v.* Albany, 79 N. Y. 470, 475 ; Field *v.* West Orange, 36 N. J. Eq. 120 ; s. c. 29 Alb. L. J. 397. *Per Ruger*, C. J. Seifert *v.* Brooklyn, 101 N. Y. 136, 143 ; Herring *v.* Dist. of Columbia, 3 Mackey (Dist. Col.), 572; Blakely *v.* Devine, 36 Minn. 53 ; Pye *v.* Mankato, 36 Minn. 373 ; Peters *v.* Fergus Falls, 35 Minn. 549 ; Rutherford *v.* Holley, 105 N. Y. 632 ; Noble *v.* St. Albans, 56 Vt. 522 ; McClure *v.* Red Wing, 28 Minn. 186 ; Hitchins *v.* Frostburg, 68 Md. 100 (1888), approving text. It was held on general principles, and not as we understand it in virtue of any constitutional provision, to be the doctrine in *Missouri*, which was regarded as consistent with previous decisions, that a municipal corporation cannot, in the construction of its streets, collect surface-water, and then by means of drains and conduits discharge it in a body upon the lands of an adjoining proprietor, without being liable in damages. *Ray*, C. J., dissented, in an elaborate opinion reviewing the prior cases and the general subject. Rychlicke *v.* St. Louis, 11 Southwest. Rep. 1001 (1889); s. c. 29 Cent. Law J. 289; Davis *v.* Crawfordsville, 119 Ind. 1 (1889), and cases cited ; Cooley on Torts, 580 ; *ante*, secs. 995 *a*–995 *c*. In *Wisconsin* it is well settled that a lot-owner will not be permitted *to restrain a municipality* from constructing drains along streets or culverts across them, or from grading or otherwise improving the streets, merely because such acts when completed would increase the flow of surface-water upon his land. Heth *v.* Fond du Lac, 63 Wis. 228 ; Waters *v.* Bay View, 61 Wis. 642 ; Allen *v.* Chippewa Falls, 52 Wis. 430.

Under the Municipal Act of *Upper Canada*, which provides for "compensation to the owners of real property taken or used by the corporation in the exercise of its powers in respect to streets, drains, &c., for damages necessarily resulting from the exercise of such powers," it is not in the power of the municipal corporation to drain a highway upon the adjoining proprietor, without making compensation. Brown *v.* Sarnia, 11 Up. Can. Q. B. 87 ; *Ib.* 125 ; Perdue *v.* Chinguacousy Corp., 25 Up. Can. Q. B. 61 ; Harr. Munic. Man. (5th ed.) 359, 522. But there is no liability for *injuries from natural causes*, such as violent and unusual storms. Snook *v.* Brantford, 14 Up. Can. Q. B. 255. The power to repair highways must be reasonably exercised. Reed *v.* City of Hamilton, 5 Up. Can. C. P. 269 ; Croft *v.* Peterborough, *Ib.* 35. A municipal council has no right to bring down water in any quantity upon the land of an individual, and leave the water to stagnate there, without showing that it could not otherwise have been got rid of, and without showing that it was not in the power of the council to lead the water away from the plaintiff's land after the council had conducted it there. See Brown *v.* Sarnia, 11 Up. Can. Q. B. 87 ; Perdue *v.* Chinguacousy Corp., 25 Up. Can. Q. B. 61 ; Rowe *v.* Rochester, 29 Up. Can. Q. B. 590 ; Attorney-General *v.* Hackney Local Board, L. R. 20 Eq. 626.

A *corporation* has no greater right than an individual to collect the surface-water from its lands and streets, and discharge it upon the land of another. Byrnes *v.* Cohoes, 67 N. Y. 204 ; Seifert *v.* Brooklyn, 101 N. Y. 136, 143, *per Ruger*, C. J.; Attorney-General *v.* Leeds, L. R. 5 Ch. App. 583 ; Noonan *v.* Albany, 79 N. Y. 470 ; s. c. 21 Alb. L. J. 774 ; approved Hitchins *v.* Frostburg, 68 Md. 100 (1888). The principle of Noonan *v.* Albany has been adopted elsewhere. West Orange *v.* Field, 37 N. J. Eq. (10 Stew.) 600 ; Huddleston *v.* West Bellevue, 111 Pa. St. 110 ; Burton *v.* Chattanooga, 7 Lea, 739 ; Manning *v.* Lowell, 130 Mass. 21 ; Gillison *v.* Charleston, 16 W. Va. 282 ; Arn *v.* Kansas City, 15 Fed. Rep. 236 ; Addy *v.* Janesville, 70 Wis. 401 ; *post*, sec. 1045, and cases in note. A city may be enjoined from discharging water from gutters, &c., on private lands. Field *v.* West Orange, 36 N. J. Eq. 118. A city is liable for *negligent discharge of sewage on* private property. Seifert *v.* Brooklyn, 101 N. Y. 136 ; *post*, sec. 1051, note. A town in *Massachusetts* is not liable for damages caused by *surface-water which percolates* from catch-basins or gutters, constructed by its agents, through the soil into an adjoining cellar. Kennison *v.* Beverly, 146 Mass. 467 (1888).

Rights and liabilities as respects surface-water of the owners of higher and lower city lots, as between themselves. Vanderweile *v.* Taylor, 65 N. Y. 341 (1875); Bentley *v.* Armstrong, 8 Watts & S. 40. See Goodale *v.* Tuttle, 29 N. Y. 459 (1864); Washb. on Easements, 358. The owner of a higher lot is not bound to drain his lot or connect it with a sewer in order to protect the owner of a lower adjoining lot from the natural flow of surface-water. Vanderweile *v.* Taylor, 65 N. Y. 341 (1875). The case was distinguished from those where there has been an artificial increase of the flow of water to another's injury, as in Rylands *v.* Fletcher, 3 H. of L. Cas. (Eng. and I. App.) 330. Smith *v.* Fletcher, 3 Eng. R. 305 ; Livingston *v.* McDonald, 21 Iowa, 160 (1866), where the subject is fully discussed.

[1] Clark *v.* Wilmington, 5 Harring. (Del.) 243 (1849); followed in Magarity *v.* Wilmington, 5 Hous. (Del.) 530 ; Gilfeather *v.* Council Bluffs, 69 Iowa, 310 ; Morris *v.* Council Bluffs, 67 Iowa, 343 ; Hoard *v.* Des Moines, 62 Iowa, 326 ; Freburg *v.* Davenport, 63 Iowa, 119 ; *supra*, sec. 990. *Contra*, Weeks *v.* Milwaukee, 10 Wis. 242 (1860), modified in Smith *v.* Milwaukee, 18 Wis. 63 (1864), and resting on doubtful grounds. See, also, Nevins *v.* Peoria, 41 Ill. 503, and Aurora *v.* Reed, 57 Ill. 29 (1870). The case of Hoyt *v.* Hudson, 27 Wis. 656 (1871) ; s. c. 9 Am. Rep. 473, holds, in a carefully prepared opinion by *Dixon*, C. J., reviewing and classifying the cases, that where the passage of surface-water through a ravine or otherwise is obstructed by the corporation in the exercise of its power to grade and improve streets, the adjacent landowner, injured in consequence, has no action against the municipality. And such is undoubtedly the correct *general* rule, though it is suggested that there *may* be an exception in the case of a hilly region drained through a narrow gorge. Bowlsby *v.* Spear, 31 N. J. L. 351 ; Hoyt *v.* Hudson, *supra*. But this could at most, it is believed, make it the duty of the corporation to provide, if practicable, a culvert.

[2] Wilson *v.* New York, 1 Denio (N. Y.), 595, is the leading case holding this doctrine. It is expressly approved by *Denio*, C. J., in Mills *v.* Brooklyn, 32 N. Y. 489 (1865), who says that it has always been referred to (in that State) as an accurate exposition of the law ; distinguished, Seifert *v.* Brooklyn, 101 N. Y. 136 ; Gould *v.* Booth, 66 N. Y. 65 (1876); s. p. Clark *v.* Wilmington, 5 Harring. (Del.) 243 (1849); Baxter *v.* Providence, 12 R. I. 310, approving text ; *supra*, sec. 990. *Contra*. Cotes *v.* Davenport, 9 Iowa, 227 (1859). Approved, Templin *v.* Iowa City, 14 Iowa, 59 ; Weeks *v.* Milwaukee, cited in preceding note ; Nevins *v.* Peoria, 41 Ill. 502 (1866) (noted *ante*, secs. 990, note, 1037, note), where *Lawrence*, J., disapproves of Wilson *v.* New York, *supra*, but admits that the rule there declared has been quite generally adopted. Mears *v.* Wilmington, 9 Ired. L. 73, 82, also disapproves of Wilson *v.* New York, on the ground that it overlooks the implied condition that the work should be done properly. But who is to *judge* whether it would have been practicable to have provided for the drainage of the lots in making the improvement, — the city authorities, as maintained in the *New York* cases, or the judicial tribunals? Nevins *v.* Peoria, approved in Bloomington *v.* Brokaw, 77 Ill. 194 (1875); Jacksonville *v.* Lambert, 62 Ill. 519 (1872); Dixon *v.* Baker, 65 Ill. 518 (1872); s. c. 16 Am. Rep. 591, and the cases cited in Mr. Thompson's note. *Ib.* 593. See Brine *v.* Gt. Western

§ 1044. **Same subject.** — In Missouri the question distinctly arose, whether a municipal corporation in grading a street which was higher than the adjoining property was bound to keep *a drain or ditch open* while the work was in progress, so as *to prevent the surface-water on the street from flowing upon the adjoining improved property,* if this could be done by ordinary care on the part of the city and at a reasonable expense; and it was decided that the corporation owed no such duty to the abutting proprietor; that it was the duty of such proprietor to protect himself.[1]

§ 1045. **Same subject. Sewers.** — In a well-considered case in Michigan, while it is admitted that a municipal corporation is not impliedly liable for incidental injuries to private property, resulting from the exercise of its legislative powers, such as grading streets, where the property is in no way invaded, yet such a corporation is *responsible for direct injuries to private property caused by a corporate act in the nature of a trespass or nuisance.* And therefore a city is liable for an injury to the premises of the plaintiff by flooding it with water, not only where such injury is caused by neglect to keep a sewer in repair, but as well where it is the negligent or necessary result of the *constructing* of the sewer.[2]

Ry. Co., 110 Eng. Com. L. (2 B. & S.) 402 (1862); *supra*, secs. 988, note, 1041; Brown *v.* Sarnia, 11 Up. Can. Q. B. 87; *supra*, sec. 988, note; Perdue *v.* Chinguacousy Corp., 25 Up. Can. Q. B. 61; Harper *v.* Milwaukee, 30 Wis. 365 (1872); Hoyt *v.* Hudson, 27 Wis. 656; *infra*, sec. 1046. The doctrine of the courts contrary to that stated in the text is that where by *raising the grade of a street* (see *ante*, secs. 989 *et seq.*, 1040) the existing drainage is destroyed, and property adjoining is damaged by the collection of surface-water caused thereby, the city, being bound to provide a temporary escape for the water, is not relieved by the construction of a culvert which at once became stopped up. Ross *v.* Clinton, 46 Iowa, 606 (1877), approving Cotes *v.* Davenport, 9 Iowa, 227; Damour *v.* Lyons, 44 Iowa, 276 (1876); Wallace *v.* Muscatine, 4 G. Greene, 373; Aurora *v.* Gillett, 56 Ill. 132; Aurora *v.* Reed, 57 Ill. 30; Elgin *v.* Kimball, 90 Ill. 356; Pekin *v.* Brereton, 67 Ill. 467; Pumpelly *v.* Green Bay & Miss. Canal Co., 13 Wall. 166; Radcliff's Ex. *v.* Brooklyn, 4 N. Y. 195; Hay *v.* Cohoes, 2 N. Y. 159; Pettigrew *v.* Evansville, 25 Wis. 223; Pekin *v.* Winkle, 77 Ill. 56; Shawneetown *v.* Mason, 82 Ill. 337; *ante*, sec. 989 *et seq.* The confusion arising from the inaccurate use of the term "judicial," as applied to the legislative or discretionary duties of corporate bodies, is pointed out by *Campbell*, J., in People *v.* Bennett, 29 Mich. 451.

[1] Imler *v.* Springfield, 55 Mo. 119 (1874). The court in this case reaffirm St. Louis *v.* Gurno, 12 Mo. 414 (1849), approve of Wilson *v.* New York, 1 Denio, 595, and of the statement of the law in the text (secs. 1041, 1042), and disapprove New York *v.* Furze, 3 Hill (N. Y.), 612. Stewart *v.* Clinton, 79 Mo. 603. The prior cases in *Missouri* are reviewed in Rychlicke *v.* St. Louis (Mo.), 11 Southwest. Rep. 1001 (1889), noted *supra*, sec. 1042, note. Shearm. & Red. Neg. (4th ed.) sec. 283, and note.

[2] Ashley *v.* Port Huron, 35 Mich. 296 (1877), where the cases are classified and distinguished by *Cooley*, C. J., citing *inter alia*, Pumpelly *v.* Green Bay & Miss. Canal Co., 13 Wall. 166; Arimond *v.* Same, 31 Wis. 316; Eaton *v.* Boston, C. & M. R. R. Co., 51 N. H. 504; Dillon Munic. Corp. secs. 1039–1041, notes; Rowe *v.* Portsmouth, 56 N. H. 291; s. c. 3 Am. L. T., 482; Vale Mills *v.* Nashua, 63 N. H. 136 (a city held liable for discharging a public sewer upon private land and into a millpond). Same principle. Seifert *v.* Brooklyn, 101 N. Y. 136; *infra*, secs. 1046, note, 1051, note.

In delivering judgment in Ashley *v.* Port Huron, Mr. Chief Justice *Cooley* says, "It is very manifest from this reference to authorities, that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a *direct injury accomplished by a corporate act, which is in the nature of a trespass upon him.* The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it, without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flood must be a necessary result. The one is no more unjustifiable, and no more an actionable wrong, than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction. A municipal charter never gives and never could give authority to appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other. Pumpelly *v.* Green Bay & Miss. Canal Co., 13 Wall. 166; Arimond *v.* Same, 31 Wis. 316; Eaton *v.* Boston, C. & M. R. R. Co., 51 N. H. 504. A like excess of jurisdiction appears when in the exercise of its powers a municipal corporation creates a nuisance to the injury of an individual. The doctrine of liability in such cases is familiar, and was acted upon in Pennoyer *v.* Saginaw, 8 Mich. 534. The recent case of Rowe *v.* Portsmouth, decided by the Supreme Court of New Hampshire (56 N. H. 291; s. c. 22 Am. Rep. 464), is in accord with the views we have expressed. See Am. L. T. and Rep., vol. iii. p. 482." Cooley on Torts, chap. xix., on Nuisances, contains a classification of the cases and an instructive discussion of them. The decisions denying liability where the injury is caused by a defective *plan* of sewerage are referred to, *infra*, secs. 1046–1051 *a*.

[1] Mills *v.* Brooklyn, 32 N. Y. 489 (1865); s. c. 5 Am. Law Reg. (N. S.) 33, with note of Mr. (now Judge) *Mitchell;* Wilson *v.* New York, 1 Denio (N. Y.), 595; *supra*, secs. 949, 953, note; these cases distinguished, Seifert *v.* Brooklyn, 101 N. Y. 136, noted *ante*, sec. 948, note. Child *v.* Boston, 4 Allen (Mass.), 41, 52 (1862); Carr *v.* Northern Liberties, 35 Pa. St. 324 (1860); Montgomery Council *v.* Gilmer, 33 Ala. 116 (1858); s. c. 26 Ala. 665; Atchison *v.* Challiss, 9 Kan. 603 (1872), overruling Leavenworth *v.* Casey, McCahon (Kan. Ter.), 124; McCarthy *v.*

§ 1046 (801). **Non-action; Defective Drains and Sewers.** — Since the duty on the part of a municipality of *providing drainage for surface-water or constructing sewers* is in its nature *judicial or quasi judicial, or, more accurately speaking, legislative,* requiring the exercise of judgment as to the time when and the mode in which it shall be undertaken, the claims of respective localities as to order of commencement when it cannot all be effected at once, and the best plan which the means at the disposal of the corporation renders it practicable to adopt, it follows, upon legal principles, that the corporation is not liable to a civil action for *wholly failing to provide drainage or sewerage,*[1] nor, probably, for any *defect or want*

of efficiency in the PLAN of sewerage or drainage adopted;[1] nor, according to the prevailing view, for the *insufficient size or want of*

Syracuse, 46 N. Y. 194 (1871); St. Albans *v.* Noble, 56 Vt. 525; Henderson *v.* Minneapolis, 32 Minn. 319. For failure of a local board to *perform the mandatory duty* under an Act of Parliament to cause to be made such sewers as may be necessary for effectually draining their district, and to cause all sewers to be kept so as not to be a nuisance injurious to health, etc., *the remedy for non-action* was held to be *by mandamus and not injunction*, mandatory, or otherwise. It was admitted, however, that if the board by any act caused a nuisance which, independently of statute, would give a cause of action to any person, they would be liable in damages, or might be restrained by injunction, unless the board could justify the act under the powers given to it by the statute. Glossop *v.* Heston & I. Local Bd., L. R. 12 Ch. Div. 102 (1879); s. p. Att'y-Gen. *v.* Dorking Union, L. R. 20 Ch. Div. 595, distinguished; Charles *v.* Finchley Local Bd., L. R. 23 Ch. Div. 767 (1883); Att'y-Gen. *v.* Acton Local Bd., L. R. 22 Ch. Div. 221 (1882). Bill in equity by property owner against municipality sustained. Morse *v.* Worcester, 139 Mass. 389 (1885). "Sewer" and "drains," distinguished by Act of Parliament, construed in Bateman *v.* Poplar Dist. Bd. of W., L. R. 33 Ch. Div. 360 (1886). "Sewage works" defined. Wimbledon Local Bd. *v.* Croydon Rural San. Authority, L. R. 32 Ch. Div. 421. Executive officers of a city have no authority to convert a private drain into a public sewer, or to bind the city by promises in relation thereto; and although the city acquires property on which a private drain exists, this, without more, does not make the drain a public sewer so as to impose upon the city the duty to remove obstructions therein for the benefit of a licensee. Kosmak *v.* New York (Ct. of Appeals), 22 Northeast Rep. 945 (1889). Where an ordinance called for the construction of a dry retaining wall along a street the grade of which had been raised, but granted to the owners of abutting property the privilege of having the wall in front of their property built of masonry at their expense, an owner who refused to avail herself of the privilege was held to have no action against the city for damages caused by the escape of water through the dry wall upon her land. Watson *v.* Kingston, 114 N. Y. 88 (1889). *Ante*, secs. 826, 836.

[1] Same cases; Johnston *v.* Dist. of Columbia, 118 U. S. 19 (1885); Child *v.* Boston, 4 Allen (Mass.), 41 (1862), cited *infra*, secs. 1048 *et seq.*, which was three times argued. The admirable opinion of Mr. Justice *Hoar* illustrates several phases of the question of corporate liability. "Upon mature deliberation we are all of opinion that the defendants (the city of Boston) are not responsible for any defect or want of efficiency in the *plan* of drainage adopted." *Ib.* p. 51; Shearm. & Red. Neg. (4th ed.) sec. 274. In Child *v.* Boston, just cited, the plaintiff's property was repeatedly flooded by the failure of the city of Boston to extend the waste weir, part of its sewer system (which weir originally emptied into the basin of the Back Bay), through new made land, so as to keep an open place of discharge into the basin (the city having the power to extend it, and notice of the injury). It was held the plaintiff was entitled to recover, on the ground, as the court placed it, that the fault was not in the *plan*, but in the negligent failure of the city to construct the sewer according to the plan, which contemplated that the weir should be extended and kept open to the edge of the upland as changes on the shore might, from time to time, require. In Johnston *v.* Dist. of Columbia, above cited, the plaintiff's lot was overflowed with sewer water. The ground of complaint was that the city had "knowingly constructed and continued upon an unreasonable and defective plan a sewer of inadequate capacity for its purpose." Evidence to show that the sewer was insufficient in case of a freshet or great fall of rain, when it was avowedly offered to show that "the *plan* on which sewer had been constructed by the defendant had not been judiciously selected," was held to be incompetent and immaterial. This was the only point in judgment. The opinion refers to Child *v.* Boston and Mills

capacity of gutters or drains, for the purpose intended, that is, for carrying off surface-water, particularly if the adjoining property is not in any worse position than if no gutters or drains whatever had been constructed.[1] So the text substantially stood in the previous

v. Brooklyn, and approves, *arguendo*, the principles there laid down. Critically considered, the case is not, as we view it, an authority for or against the proposition that a city may be liable for negligence in continuing a sewer which creates a nuisance upon the adjacent or connected property, because its size is inadequate for its regular and normal requirements. Merrifield *v.* Worcester, 110 Mass. 216; s. c. 14 Am. Rep. 592; Daniels *v.* Denver, 2 Col. 669 (1875); Horton *v.* Nashville, 4 Lea (Tenn.), 47; Herring *v.* Dist. of Columbia, 2 Mackey, 87; Bannagan *v.* Dist. of Columbia, *Ib.* 285; Johnston *v.* Dist. of Columbia, 1 Mackey, 427; Savannah *v.* Spears, 66 Ga. 304; Wicks *v.* DeWitt, 54 Iowa, 130; Brewster *v.* Davenport, 51 Iowa, 427; Smith *v.* Gould, 61 Wis. 31. The corporation is not responsible for any error or want of judgment upon which its system of drainage was devised. *Per Denio*, C. J., in Mills *v.* Brooklyn, 32 N. Y. 489 (1865), who distinguishes such a case from one where there is a *want of skill* in constructing the work when entered upon. McCarthy *v.* Syracuse, 46 N. Y. 194 (1871). These cases and others in New York are reviewed, explained, and distinguished by *Ruger*, C. J., in Seifert *v.* Brooklyn, 101 N. Y. 136. See *supra*, sec. 988, note; *infra*, sec. 1048 *et seq.* Text approved by *Wagner*, J., Thurston *v.* St. Joseph, 50 Mo. 519 (1873); Saxton *v.* St. Joseph, 60 Mo. 153; Foster *v.* St. Louis, 71 Mo. 157.

A sewer which is so constructed that, during rains, it *throws filth upon private property*, is a nuisance for maintaining which a city is liable in damages to the lot-owner. Reid *v.* Atlanta, 73 Ga. 523; Smith *v.* Atlanta, 75 Ga. 110; *supra*, sec. 1045, note; *infra*, sec. 1051. Cooley on Torts, chap. xix. Where municipal authorities have adopted a plan for a sewer in good faith and within their authority, the courts will not interfere with it *by injunction*, if injury from it is doubtful, eventual, or contingent. Morgan *v.* Binghampton, 102 N. Y. 500. In *Indiana* a "municipal corporation is responsible for negligence in devising the plan of a sewer, as well as for negligence in carrying the plan into execution, but it is not responsible for mere errors of judgment. If the inadequacy in the size of a sewer is owing to the omission to exercise ordinary skill and care in planning and performing the work, the municipal corporation is liable; but if the inadequacy of the sewer is attributable to a mere error of judgment, there is no liability." *Elliott*, J., in Rice *v.* Evansville, 108 Ind. 7; *citing* North Vernon *v.* Voegler, 103 Ind. 314; Crawfordsville *v.* Bond, 96 Ind. 236; Evansville *v.* Decker, 84 Ind. 325; Cummins *v.* Seymour, 79 Ind. 491; Weis *v.* Madison, 75 Ind. 241; Indianapolis *v.* Huffer, 30 Ind. 235. The same judge in a later case, where he learnedly reviews the authorities, said, "While our cases have always held that municipal corporations are liable for negligence in devising a plan, they have from first to last declared that there is no liability unless there is negligence." Terre Haute *v.* Hudnut, 112 Ind. 542. It remains to be seen how far the proposition that actionable negligence can be predicated in respect of devising a plan of sewers, irrespective of negligence in maintaining a plan demonstrated to be insufficient, will be accepted elsewhere. See and compare secs. 1047–1051 *a*, *infra*; Shearm. & Red. Neg. (4th ed.) secs. 272, 273, 274, as to liability for sewers defectively planned.

[1] Same authorities, particularly Mills *v.* Brooklyn, which is the leading case on this point. Here the plaintiff's lot was below the level of the streets; the city built temporary drains and sewers; but these proved to be insufficient in size "to carry off the surface-water from the plaintiff's lot and house, which came down in rain storms," and they were several times inundated with surface water. The sewer as laid operated to relieve the plaintiff's lot; but it was not adequate, and it was

editions. We now add that the later cases tend strongly to establish, and may, we think, be said to establish, and in our judg-

"in no worse condition than it would have been if no sewer at all had been constructed." The court held that the city was not liable; and the reason was "that city would not have been liable if it had done nothing, and is of course not liable for the insufficient character of the work, which was constructed . . . to discharge all the water which it was intended to carry off." *New York* cases reviewed, 10 Alb. L. J. 401, and by *Ruger*, C. J., in Seifert *v.* Brooklyn, 101 N. Y. 136. See, also, Barry *v.* Lowell, 8 Allen, 127 (1864), distinguished from Child *v.* Boston, *supra;* Flagg *v.* Worcester, 13 Gray, 601 (1859); note to Mills *v.* Brooklyn, 32 N. Y. 489 (1865); s. c. 5 Am. Law Reg. (N. S.) 33, 44; Watson *v.* Kingston, 114 N. Y. 88 (establishing grade and adopting plans for improving a street), following Urquhart *v.* Ogdensburg, 91 N. Y. 67, and holding city not to be liable; Atchison *v.* Challiss, 9 Kan. 603; Dermont *v.* Detroit, 4 Mich. 435 (1857); Judge *v.* Meriden, 38 Conn. 90 (1871), (note dissent of the chief justice); McCarthy *v.* Syracuse, 46 N. Y. 194 (1871); s. P. Van Pelt *v.* Davenport, 42 Iowa, 308 (1875); *ante*, sec. 1038, note, where this case is referred to; Rozell *v.* Anderson, 91 Ind. 591; German Theol. School *v.* Dubuque, 64 Iowa, 736; Wright *v.* Wilmington, 92 N. C. 156; Collins *v.* Philadelphia, 93 Pa. St. 272. In Carr *v.* Northern Liberties, 35 Pa. St. 324 (1860), it was held that a municipal corporation was not liable for neglecting to provide a sufficient number of inlets to its sewers (constructed for drainage purposes), which were sufficient when constructed, but which have ceased to be so in consequence of the greater extent of territory since graded and built upon. Same principle, Grant *v.* Erie, 69 Pa. St. 420 (1871); s. c. 8 Am. Rep. 272; Fair *v.* Philadelphia, 88 Pa. St. 309. Text cited and followed. Daniels *v.* Denver, 2 Col. 669 (1875); Denver *v.* Capelli, 4 Col. 25; Bannagan *v.* Dist. of Columbia, 2 Mackey, 285. See, also, Ranlett *v.* Lowell, 126 Mass. 431; Steinmeyer *v.* St. Louis, 3 Mo. App. 256. But see and compare on this point, Seifert *v.* Brooklyn, 101 N. Y. 136; Fleming *v.* Manchester, 44 Law Times (N. S.), 517. In Americus *v.* Eldridge, 64 Ga. 524, the court decided that an adjacent property owner was *not entitled to an injunction* to prevent the construction of a sewer by the city, on the ground that as planned it was too small, and threatened, when completed, to flood his lot. A person cannot recover damages from a city for a nuisance caused by a sewer which was built by himself, or jointly by himself and others, on the ground that the city had acquiesced in its construction. Richards *v.* Waupun, 59 Wis. 45.

A municipal corporation, it has been observed, would act judiciously in insisting on having drains made under the direction of their officers and by their own workmen and contractors, instead of the private proprietors; for it would not do to allow all persons to break into a main sewer and make drains at their discretion. Besides the inconvenience, the health of the community would suffer from such a course, for the nuisance occasioned by defective drainage may often give rise to a widespread evil, injuring many more than the persons on whose premises the cause of the nuisance exists. It seems a necessary policy, therefore, for such a corporation to keep the matter in its own hands. But then, if the corporation does for such good purposes prevent proprietors from making the drains they require, and oblige them to have them done by the corporation engineer and contractors, it is manifestly just and necessary that the corporation should see that the work is done as it ought to be. Reeves *v.* Toronto, 21 Up. Can. Q. B. 160; Harris. Mun. Man. (5th ed.) 439. See on the general subject Stainton *v.* Metrop. Bd. of Works, 23 Beav. 225; 3 Jur. N. S. 257; Cator *v.* Lewisham Dist., 5 B. & S. 115; Darby *v.* Crowland, 38 Up. Can. Q. B. 338; Coghlan *v.* Ottawa, 1 App. (Can.) R. 54. Where a drain was so unskilfully constructed by the corporation contractors as not to carry off water, but to carry filth from the main sewer into plaintiff's cellar, which for months he had endured, it was held that he was entitled to sue the corporation for the recovery of substantial damages, though no by-law for the making of the drain was proved. Reeves *v.* Toronto, 21 Up. Can. Q. B. 160. So if, in the construction of a drain by corporation contractors, quantities of earth be thrown up and permitted to continue, so that, in times of rain, mud and water were driven on plaintiff's messuage, he was held entitled to sue the corporation for damages. Farrell *v.* London, 12 Up. Can. Q. B. 347. See, also, Perdue *v.* Chinguacousy Corp., 25 Up. Can. Q. B. 61; *post*, sec. 1048. As to power to compel drainage and assess cost thereof under Canadian Municipal Act, McCutchon, *In re*, 22 Up. Can. Q. B. 613; Morse *v.* Haynes, *Ib.* 107.

[1] See cases cited in notes to this section; also secs. 1047, 1051, and notes; Shearm. & Red. Neg. (4th ed.) secs. 273–275, 287.

[2] Ashley *v.* Port Huron, 35 Mich. 296 (1877); s. c. 24 Am. Rep. 552, and note, where the cases are reviewed and the subject instructively examined by *Cooley*, C. J. The facts are not very fully stated, but the case appears to be one where by means of a sewer cut by the city, water in increased quantities was collected, and discharged upon private property. In such cases, the municipal liability would seem to be much more clear than for liability for *surface-water* set back on private property below the level of the street *solely* by reason of culvert or drains built according to the plan adopted by the council, but which proved to be of insufficient capacity. *Cooley*, C. J., seems to admit that the judgment is in conflict with Wilson *v.* New York (*supra*, sec. 1045, note); but when the facts are regarded, this would seem not necessarily to be so. The late case of Seifert *v.* Brooklyn, 101 N. Y. 136, holds the city liable in cases falling within the principle stated in the text. *Post*, sec. 1051, note. Rowe *v.* Portsmouth (obstruction of sewer), 56 N. H. 291; s. c. 22 Am. Rep. 464; Thurston *v.* St. Joseph, 51 Mo. 510 (1873); s. c. 11 Am. Rep. 463; Pumpelly *v.* Green Bay & Miss. Canal Co., 13 Wall. 168, 181 (1871); *ante*, sec. 991, note; Nevins *v.* Peoria, 41 Ill. 502 (1866); Pettigrew *v.* Evansville, 25 Wis. 223, and cases; Weis *v.* Madison, 75 Ind. 241; Parker *v.* Nashua, 59 N. H. 402; North Vernon *v.* Voegler, 89 Ind. 77; Evansville *v.* Decker, 84 Ind. 325, and cases; Cooley on Torts, chap. xix.; *ante*, secs. 1043, note, 1045, note, 1046 and note, 1048, note. That the defects which cause damage are a part of a general *plan* of construction of sewers as adopted by a city, constitutes no defence to an action for damages caused by an overflow. See Lehn *v.* San Francisco, 66 Cal. 76; Taylor *v.* Austin, 32 Minn. 247.

ment rightly to establish, that a city may be liable on the ground of negligence in respect of public sewers, solely constructed and controlled by it, where by reason of their insufficient size, clearly demonstrated by experience, they result under ordinary conditions in overflowing the private property of adjoining or connecting owners with sewage, and that the principle of exemption from liability for defect or want of efficiency of plan does not, as more fully stated below (sections 1051, 1051 *a*), extend to such a case.[1]

§ 1047. **Same subject.** — It is, perhaps, impossible to reconcile all of the cases on this subject, and courts of the highest respectability have held that if the sewer, *whatever its plan*, is so constructed by the municipal authorities as to *cause a positive and direct invasion* of the plaintiff's private property, as by collecting and throwing upon it, to his damage, water or sewage which would not otherwise have flowed or found its way there, the corporation is liable.[2] This exception to the general doctrine, when

properly limited and applied, seems to be founded on sound principles, and will have a salutary effect in inducing care on the part of the municipality to prevent such injuries to private property, and will operate justly in giving redress to the sufferer if such injuries are inflicted. Accordingly, although a municipality having the power to construct drains and sewers may lawfully cause them to be built so as to discharge their refuse matter into the sea, or natural stream of water, yet this right must be so exercised as not to *create a nuisance public or private.* If a public nuisance is created, the public has a remedy by a public prosecution; and any individual who suffers special injury therefrom may recover therefor in a civil action. If, therefore, deposits from sewers constructed by a city cause a peculiar injury to the owner of a wharf or dock, by preventing or materially interfering with the approach of vessels and the accustomed and lawful use of the wharf or dock, the city is liable to the latter in damages.[1]

§ 1048 (802). **Liable for Neglect of Ministerial Duties.** — It is agreed that wherever the *duty as respects drains and sewers ceases to be legislative or judicial, or quasi judicial, and becomes ministerial,* then, although there be no statute giving the action, a municipal

Flooding lands by *neglect to keep sewer in repair* clearly imposes a liability on the corporation. See Barton *v.* Syracuse, 36 N. Y. 54 (1867), and cases cited *infra*, sec. 1048, note; Nims *v.* Troy, 59 N. Y. 500; Gilman *v.* Laconia, 55 N. H. 130 (1875); s. c. 20 Am. Rep. 175, where the previous cases in the State are reviewed, and Ball *v.* Winchester, 32 N. H. 435, explained and limited. Rowe *v.* Portsmouth, 56 N. H. 291; s. c. 22 Am. Rep. 464.

[1] Franklin Wharf Co. *v.* Portland, 67 Me. 46 (1877); s. c. 24 Am. Rep. 1, and note of Mr. Thompson; Emery *v.* Lowell, 104 Mass. 13; Haskell *v.* New Bedford, 108 Mass. 208; Brayton *v.* Fall River, 113 Mass. 218; s. c. 18 Am. Rep. 470; Morse *v.* Worcester, 139 Mass. 389; Gillery *v.* Madison, 63 Wis. 510; Barron *v.* Baltimore, 2 Am. Jour. 103, cited *ante*, sec. 74, note; Kranz *v.* Baltimore, 64 Md. 491; s. c. 2 Atl. Rep. 908; Richardson *v.* Boston, 19 How. (U. S.) 270. The opinion of the court in the Franklin Wharf case, *supra*, delivered by *Dickerson*, J., treats the public right of navigation as paramount to the right of sewerage, recognizes both the wharf and the sewer as lawful and authorized structures, and concludes by holding that the city, under the statute empowering it to construct sewers, "has the right to construct their opening into the public docks, and to use them in a reasonable manner for conducting and depositing therein refuse matters and impurities, but it is its duty to cause such docks to be cleared of such deposits whenever they become an obstruction to navigation or injurious to the public health." In Merrimac River Canal Prop. *v.* Lowell, 7 Gray, 223, the city was held liable in tort for draining water through sewers into the canal of a private corporation to the injury of the canal. Extent of liability in *Massachusetts* in such cases to a riparian proprietor for the pollution of the stream. Merrifield *v.* Worcester, 110 Mass. 216 (1872); s. c. 14 Am. Rep. 592.

Drainage of surface-water by ditches into a stream which is the natural outlet of such water gives no right of action to a riparian proprietor below. Waffle *v.* N. Y. Cent. R. R. Co., 53 N. Y. 11 (1873); s. c. 13 Am. Rep. 467; *infra*, sec. 1049, note.

corporation is liable to the same extent and on the same principles as a private person or corporation would be under like circumstances, for the negligent discharge or the negligent omission to discharge such duty, resulting in an injury to others.[1]

[1] Barton *v.* Syracuse, 36 N.Y. 54 (1867); 37 Barb. 392; Nims *v.* Troy, 59 N. Y. 500 (1875), cites and follows text; Kobs *v.* Minneapolis, 22 Minn. 159, 164 (1875); Henderson *v.* Minneapolis, 32 Minn. 319; Denver *v.* Capelli, 4 Col. 25; South Bend *v.* Paxon, 65 Ind. 228; Child *v.* Boston, 4 Allen, 41 (1862); Emery *v.* Lowell, 104 Mass. 13 (1870); Brayton *v.* Fall River, 113 Mass. 218; Washburn Manuf. Co. *v.* Worcester, 116 Mass. 458; Boston Rolling Mills *v.* Cambridge, 117 Mass. 396; McGregor (city of) *v.* Boyle, 34 Iowa, 268 (1872). Compare Dermont *v.* Detroit, 4 Mich. 435 (1857); Montgomery Council *v.* Gilmer, 33 Ala. 116 (1858); s. c. 26 Ala. 665; Jones *v.* New Haven, 34 Conn. 1; Logansport *v.* Wright, 25 Ind. 512; Hamilton *v.* Columbus, 52 Ga. 435 (1874); Harper *v.* Milwaukee, 30 Wis. 365; Waters *v.* Bay View, 61 Wis. 642; Dixon *v.* Baker, 65 Ill. 518 (1873); Kibele *v.* Philadelphia, 105 Pa. St. 41; Vanderslice *v.* Philadelphia, 103 Pa. St. 102; Savannah *v.* Cleary, 67 Ga. 153; Savannah *v.* Spears, 66 Ga. 304; Fink *v.* St. Louis, 71 Mo. 52; Hardy *v.* Brooklyn, 91 N. Y. 435; Winn *v.* Rutland, 52 Vt. 481; Smith *v.* Alexandria, 33 Gratt. 208. In Harper *v.* Milwaukee, *supra*, the court say: "In general a municipal corporation has no more right than a natural person *to create and maintain a nuisance*, and is liable for injuries occasioned thereby in any case where a private person would be liable under like circumstances." See, also, South Bend *v.* Paxon, 67 Ind. 228; North Vernon *v.* Voegler, 89 Ind. 77; Crawfordsville *v.* Bond, 96 Ind. 236; Quincy *v.* Jones, 76 Ill. 231; Imler *v.* Springfield, 55 Mo. 119; Farrell *v.* London, 12 Up. Can. Q. B. 343; Jones *v.* Bird, 5 B. & Al. 837; Drew *v.* New River Co., 6 C. & P. 754; Grocers' Co. *v.* Donne, 3 Bing. N. C. 34; Coe *v.* Wise, 7 B. &. S. 831; but see Ward *v.* Lee, 7 E. & B. 426; Clothier *v.* Webster, 12 C. B. (N. S.) 790; Perdue *v.* Chinguacousy Corp., 25 Up. Can. Q. B. 61, 65, 66; Meek *v.* Whitechapel Bd. of Works, 2 F. & F. 144; Scroggie *v.* Guelph, 36 Up. Can. Q. B. 534; *supra*, secs. 949, 1047.

Judicial or quasi-judicial and ministerial duties discriminated. Ministerial duties, as distinguished from those which are *discretionary or quasi judicial*, are such as are "absolute, certain, and imperative." *Per Denio*, C. J., in Mills *v.* Brooklyn, 32 N. Y. 489 (1865); Lewenthal *v.* New York, 5 Lans. (N. Y.) 532. See Donohue *v.* New York, 3 Daly (N. Y.) 165; McCarthy *v.* Syracuse, 46 N. Y. 194 (1871); Clemence *v.* Auburn, 66 N. Y. 334 (1876). All acts involved in the necessary performance of a duty prescribed by ordinance are ministerial. Danbury & N. R. R. Co. *v.* Norwalk, 37 Conn. 109 (1870); Amy *v.* Des Moines Co. Sup., 11 Wall. 136 (1870). *Ante*, sec. 237, note, as to *personal liability* of officers for torts. A corporation may be said to act *judicially in selecting and adopting a plan* on which a public work shall be constructed; yet *as soon as it begins to carry out that plan, it acts ministerially*, and is bound to see that the work is done in a reasonably safe and skilful manner. Rochester W. Lead Co. *v.* Rochester, 3 N. Y. 463; Barton *v.* Syracuse, 36 N. Y. 54; Lacour *v.* New York, 3 Duer (N. Y.), 406; Lloyd *v.* New York, 5 N. Y. 369; Jones *v.* New Haven, 34 Conn. 1; Parker *v.* Lowell, 11 Gray, 353; Wilson *v.* New York, 1 Denio (N. Y.), 595; Seifert *v.* Brooklyn, 101 N.Y. 136, reviewing and distinguishing previous New York cases. *Infra*, sec. 1051; Logansport *v.* Wright, 25 Ind. 512; Martin *v.* Brooklyn, 1 Hill (N. Y.), 545; Mellen *v.* Western R. R. Co., 4 Gray, 301; Mills *v.* Brooklyn, 32 N. Y. 489; Child *v.* Boston, 4 Allen, 41; Wheeler *v.* Worcester, 10 Allen, 591; Eastman *v.* Meredith, 36 N. H. 284; Mears *v.* Wilmington, 9 Ired. L. 73; Delmonico *v.* New York, 1 Sandf. (N. Y.) 222; Munn *v.* Pittsburgh, 40 Pa. St. 364; Memphis *v.* Lasser, 9 Humph. (Tenn.) 757; Detroit *v.* Corey, 9 Mich. 165; Grant *v.* Brooklyn, 41 Barb. 381. See, also, Holliday *v.* St.