A treatise on the law of municipal corporations

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A TREATISE

ON THE LAW OF

MUNICIPAL CORPORATIONS

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MUNICIPAL CORPORATIONS.

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1. LIABILITY IN GENERAL.

§ 2604. Liability ex delicto recognized.

The liability of municipal corporations to actions *ex delicto* is recognized, but in view of the sharp conflict of the decisions, on certain features, this liability cannot always be stated with precision. Notwithstanding certain important principles relating to the subject are well settled, it is clear that the particular circumstances of each case as it arises must largely determine. In the present condition of this special branch of the law it seems the liability or non-liability rests not so much on principle as from the life and development of the law of municipal corporations, which in many respects is more or less complex and abstruse. It may also be noted that municipal corporations are generally created by statute, and "that in every case the liability of a body created by statute must be determined under a true interpretation of the statutes under which it is created."[1] There seems to have been no time when such corporations were wholly free from responsibility for torts by the common law.[2]

1. Mercey Dock Cases, quoted in a clear opinion in Richmond v. Long's Adm'rs, 17 Gratt. (Va.) 375, 94 Am. Dec. 461.

2. Jones, Negligence of Mun. Corp., § 18.

From a statement of the law made in the latter half of the

The questions generally involved at the present time, are whether the duty is a governmental or a corporate one, and whether the officer or agent is really a servant of the municipality. No recovery can be had, as a general rule, in the following cases:

1. Where the power or duty involved is a governmental as distinguished from a corporate power or duty.

2. Where the board or person whose alleged wrongful act is the basis of the cause of action, (a) is not the servant of the municipality, or (b) the act was beyond the scope of authority of such board or person and has not been ratified, or (c) the act, or the work in which the board or person was engaged, was not only beyond the scope of the authority of such person or board but was also beyond the power of the municipality itself, i. e., *ultra vires* in the strict sense of the term.

§ 2605. Liability of quasi-municipal corporations.

It is not within the scope of this work to consider in detail the law relating to *quasi*-municipal corporations such as counties, towns, school districts, etc. However, it is proper to state here that there is a distinction between municipal corporations and *quasi*-municipal cor-

seventeenth century by Chief Justice Vaughan of the English Court of Common Pleas, it appears that liability was recognized on account of injuries resulting from defective highways, as follows: "If a particular person or body corporate be to repair a certain highway or portion of it, or a bridge, and a man is endamaged, particularly by the foundrousness of the way, or decay of the bridge, he may have his action against the person or body corporate who ought to repair, for his damage, because he can bring his action against them; but where there is no person against whom to bring his action it is as if a man be damaged by one that can not be known." A recent author points out that in 1774 a municipal corporation was held liable in damages for not keeping a creek in a condition for use; that in 1788 the duty to repair highways was acknowledged; and that in 1798 a Scotch case held the magistrates of the city of Edinburg liable for an injury to one falling into an excavation in a street because of the failure to keep the street in a safe condition for use. Jones, Neg. of Munic. Corp., § 18.

porations as to liability for torts, and that the general rule is that the latter are not liable for torts.[3] So, gen-

3. Hill v. Boston, 122 Mass. 344, 351, 23 Am. Rep. 332.

Counties, liability of for torts, see El Paso County v. Bish, 18 Colo. 474, 33 Pac. 184; Lefrois v. Monroe County, 162 N. Y. 563, 57 N. E. 185, 50 L. R. A. 206, rev'g 48 N. Y. S. 519, 24 App. Div. 421, 426, farm used to supply almshouse and other county buildings, nuisance.

Town, in Illinois, not liable for act of commissioner of highways in diverting from its course a stream of water, in constructing a highway, resulting in the water flowing upon the land of plaintiff. Cooney v. Hartland, 95 Ill. 516.

Common law liability of *towns* for torts in New Hampshire, see extensive and excellent opinion of Judge Peaslee in Rhobidas v. Concord, 70 N. H. 90, 47 Atl. 82, 51 L. R. A. 381, 85 Am. St. Rep. 604.

Charitable institutions, although *quasi* public corporations, are not liable for the torts of their officers or employees. § 2459, *ante*, vol. 5.

A board of education created by statute is not liable for negligence unless made so by statute. Kinnare v. Chicago, 171 Ill. 332, 49 N. E. 536, aff'g 70 Ill. App. 106; Whitehead v. Detroit Board of Education, 139 Mich. 490, 102 N W. 1028; Donovan v. New York Board of Education, 85 N. Y. 117; Ham v. New York, 70 N. Y. 459, and see §§ 2658, 2675, *post*.

Sometimes boards of education are instrumentalities of the municipal corporation and are incapable of being sued. Madden v. Kinney, 116 Wis. 561, 93 N. W. 535.

See §§ 111-114 *ante*, vol. 1; § 441 *ante*, vol. 2.

Board of education not liable for injury to pupil for negligence in the erection or maintenance of school building in its charge, in absence of statute creating liability. Finch v. Board of Education, 30 Ohio St. 37, 27 Am. Rep. 414.

Although the statute makes *school districts quasi* public corporations, with capacity to sue and be sued, they are not liable for trespasses committed by their officers. School District v. Williams, 38 Ark. 454.

Board of education, in New York, however, held liable for negligence on the theory that its acts are ministerial and not governmental. Wahrman v. Board of Education, 187 N. Y. 331, 80 N. E. 192, aff'g 97 N. Y. S. 1066, 111 App. Div. 345.

Public school corporation is not liable to respond in damages for the negligence of its officers or agents unless it has power to raise the money from the taxpayers to pay the same. Freel v. School City of Crawfordsville, 142 Ind. 27, 41 N. E. 312, 37 L. R. A. 301; Finch v. Toledo Board of Education, 30 Ohio St. 37, 27 Am. Rep. 414; Ford v. Kendall Borough School Dist., 121 Pa. 543, 15 Atl. 812, 1 L. R. A. 607.

Hospital. Where a hospital is created and exists for purely gov-

erally, as referred to in the following chapter, counties and towns are not liable for injuries from *defective highways*.[4]

It was said by Chief Justice Parsons, in Massachusetts, at an early day, that a private action cannot be maintained against a *quasi*-municipal corporation, for a neglect of corporate duty, unless authorized by statute.[5] This rule was subsequently limited, however, in that state, so far as unincorporated towns are concerned, "to the neglect or omission of a town to perform those duties which are imposed upon all towns, without their corporate assent, and exclusively for public purposes; and not to the neglect of those obligations which a town incurs when a special duty is cast upon it, with its consent, express or implied, or a special authority is conferred on it, at its request."[6]

The immunity from liability of *quasi*-public corporations is generally placed upon the ground of their involuntary and public character. They are usually treated as public or state agencies, and their duties are ordinarily wholly governmental. They exercise the greater part of their functions as agencies of the state merely, and are created for purposes of public policy, and hence the general rule that they are not responsible for the neglect of duties enjoined on them, unless the action is given by statute.[7]

The rule of non-liability also extends, ordinarily,

ernmental purposes, and is under the exclusive control and ownership of the state, it is not liable for torts. Mala's Adm'r v. Eastern State Hospital, 97 Va. 507, 34 S. E. 617, 47 L. R. A. 577.

See §§ 439, 442 *ante*, vol. 2.

In Hawaii, counties liable. Matsumura v. Hawaii County, 19 Hawaii, 18, 21 Am. & Eng. Ann. Cas. 1338.

4. § 2719, *post*.

5. Mower v. Leicester, 9 Mass. 247, 6 Am. Dec. 63; Riddle v. Locks & Canals, 7 Mass. 169.

6. Per Justice Metcalf in Bigelow v. Randolph, 14 Gray (Mass.) 541, 543.

This distinction is referred to in Tindley v. Salem, 137 Mass. 171, 50 Am. Rep. 289, and in Kincaid v. Hardin, 53 Iowa, 430, 5 N. W. 589, 36 Am. Rep. 236.

7. See Cassidy v. St. Joseph (Mo. 1912), 152 S. W. 306.

to boards in municipalities, where the board has the power to sue and be sued so as to be a *quasi*-municipal.[8]

Under some circumstances, however, at least in some states, counties, towns, etc., have been held liable for torts. Thus, towns have been held liable where the tort was connected with an undertaking conducted in part at least for *profit*.[9] Likewise, a county has been held liable for *trespasses* on private property by its officers in connection with the construction of highways.[10] So in Missouri, the question of the liability of a county as a *quasi*-municipality was discussed at an early day, and it was held that where a county is in the discharge of a self-imposed duty not enjoined by any law, as distinguished from a duty imposed by general law alike on all counties, the county is liable for negligence in connection

8. In Michigan it has been held that a fire and water board having no means of raising funds for payment, is not subject to suit for negligence. O'Leary v. Fire & Water Board, 79 Mich. 281, 4 Am. Rep. 450. But in that state cities are not usually responsible for neglect of persons in public office, unless made so by statute. Detroit v. Blackseby, 21 Mich. 84, 44 N. W. 608, 7 L. R. A. 170, 19 Am. St. Rep. 169, approved in 79 Mich. 285.

Commissioners of sewerage of Louisville, a corporation created to construct certain sewers in that city, acts in a governmental capacity, and is not liable for injuries to a laborer caused by the negligence of its superintending officers. Smith's Adm'r v. Louisville, 146 Ky. 562, 143 S. W. 3.

Board of park commissioners held not liable, their duties being governmental. Backer v. West Chicago Park Com'rs, 66 Ill. App. 507.

However, a zoological society whose purpose was to promote the study of zoology, furnish instruction and recreation to the people, and which occupied a building belonging to the city in which it was located and which was open to the public on certain days, was not a governmental agency, and was not relieved from liability for negligence of its employees. Gartland v. New York Zoological Society, 120 N. Y. S. 24, 135 App. Div. 163, aff'g 113 N. Y. S. 1087, 61 Misc. Rep. 643.

9 Moulton v. Scaborrough, 71 Me. 267, 36 Am. Rep. 308 (where a town was held liable for damages arising from the negligence of its officers in permitting a ram kept on its poor farm for the purpose of propagating sheep to run at large). Duggan v. Peabody, 187 Mass. 349, 73 N. E. 205; Neff v. Wellesley, 148 Mass. 487, 20 N. E. 111, 2 L. R. A. 500.

10 Coburn v. San Mateo County, 75 Fed. 520, 537-542.

with such duties.[11] So, in Minnesota, a property owner sued to recover damages from the construction and maintenance of a dam by a county, interrupting the flow of water in a stream so as to injure plaintiff's water power, and it was held that a county is liable where it expressly authorizes an unlawful act, "or, when done, adopts and ratifies it, and retains and enjoys its benefits, and persists in so doing."[12] Furthermore, in some states, there is an exception to the rule of non-liability of counties for torts in the case of defective *county bridges*.[13] And liability has been held to exist where the property of another has been wrongfully appropriated to the use and benefit of the *quasi*-municipality. Thus, a county has been held liable for a wrongful appropriation of another's *patent*.[14] So, at least in some states, it seems that *quasi*-municipalities are liable in damages for *nuisances* created by them.[15] And where the constitution or statutes create a liability for *consequential damages* from public improvements, counties are generally liable thereunder.[16]

§ 2606. Nature and cause of injury.

Injuries may result from (1) non-feasance, (2) negligent performance of an act, (3) necessary consequence

11. Hannon v. St. Louis, 62 Mo. 313, 317, where workman in trench was killed by caving in of trench being dug by a county under a contract for laying water-pipe to the county insane asylum.

12. Schussler v. Hennepin County, 67 Minn. 412, 417, 70 N. W. 6, 39 L. R. A. 75, 64 Am. St. Rep. 424.

13. Smith v. Allen County, 131 Ind. 116, 30 N. E. 949; House v. Montgomery County, 60 Ind. 580, 28 Am. Rep. 657; Wilson v. Jefferson County, 13 Ia. 181; Baltimore County v. Baker, 44 Md. 1.

In Indiana, however, the earlier cases have been overruled and the rule of non-liability is now established. Jasper County v. Allman, 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58.

14. May v. Logan County, 30 Fed. 250.

15. Watson v. New Milford, 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345; Bates v. Westborough, 151 Mass. 174, 23 N. E. 1070, 7 L. R. A. 156.

See also Elliott v. Mason (N. H. 1911), 81 Atl. 701.

In Haag v. Vanderburgh, 16 Ind. 511, 28 Am. Rep. 654, a county was held liable for a nuisance, resulting in injury, caused by a small pox hospital.

16. Barfield v. Macon County, 109 Ga. 386, 34 S. E. 596.

of the act, (4) intentional trespass, or (5) a nuisance.[17] Likewise, the injury may be to (a) property or it may be a (b) personal injury or (c) both.

§ 2607. Same—injury as necessary consequence of the act.

It is well settled that ordinarily a municipality is not liable for *consequential injuries* to property resulting from a public improvement duly authorized and constructed in pursuance of legal provisions, without negligence or want of skill, unless such liability is imposed by constitution, statute or charter.[18] However, as will be noticed hereafter, the fact that injury will necessarily or probably result from an act may have an important bearing, in certain cases, on municipal liability.[19]

§ 2608. Same—nonfeasance.

Failure to act, where there is no mandatory duty and where not constituting negligence, is no ground of recovery against a municipiality. This applies, for example, to the passage of ordinances, the exercise of the police power, etc.[20]

§ 2609. Same—injuries to property resulting from negligence.

Another class of cases is where the plaintiff is an owner of property, and an injury is done to his property by an act of the municipality which is *not the necessary result* of the public work authorized by the law but is caused by negligence in doing the work. In this class of cases, the municipality is ordinarily liable for its negligence,[21] provided of course the work is not con-

17. See Matsumura v. Hawaii County, 19 Hawaii, 18, 21 Am. & Eng. Ann. Cas. 1338.

18. **Liability for consequential damages from public improvments.** The law in regard to this question is set forth at length in a preceding volume. §§ 1967-1983, *ante*, vol. 4.

19. §§ 2633, 2693, *post*.

20. §§ 2630, 2631, *post*.

21. Boston Belting Co. v. Boston, 149 Mass. 44, 46, 20 N. E. 320.

§ 1968, note 66, *ante*, vol. 4. **Sewers**, etc., § 2695, *post*.

sidered as a governmental duty. The decisions so holding are numerous, especially in regard to negligence in repairing streets,[22] although the New England states generally hold that there is no common law liability for negligence in connection with the construction or repair of streets.[23]

The decisions wherein the damage was to property seem to be based, for the most part at least, on the same theory as where there was an injury to the person and hence all will be treated together in this chapter.[24]

§ 2610. Same—personal injuries resulting from negligence.

Most of the litigation involving the liability of municipalities for torts has related to personal injuries. In *this* class of cases, five questions must be answered in the affirmative in order to warrant a recovery, namely:

1. Was the duty violated connected with a private or corporate duty as distinguished from a governmental duty?[25]

2. Was the negligent person a servant of the municipality sought to be charged with the negligence?[26]

3. Was the act in connection with which the tort was committed within the corporate powers of the municipality, *i. e.*, not *ultra vires*?[27]

4. Was the offending officer or servant acting within the scope of his authority, or, if not, was his act subsequently ratified by the municipality?[28]

5. Was the municipality guilty of negligence, if the case is one where negligence must be shown,[29] and was the plaintiff free from contributory negligence and not precluded from recovery, if a servant of the municipality, by the *assumption of risk* or *fellow-servant* rule?[30]

22. See note in 21 Am. & Eng. Ann. Cas. 1346.

23. § 2635, *post*.

24. See next section as to general rules governing.

25. South Carolina is the only state holding the contrary. § 2622, *post*.

26. § 2653, *post*.

27. § 2637, *post*.

28. §§ 2656, 2657, *post*.

29. § 2616, *post*.

30. § 2620, *post*.

§ 2611. Same—trespass and conversion.

A municipality is liable for a trespass committed by its officers or servants in the course of their duties,[31] as where it is constructing a public improvement, and its officers or servants trespass upon abutting property,[32] *provided* the trespass is not wholly *ultra vires* or is not beyond the scope of the authority of the trespassing officer or servant and remains unratified.[33] Whether a tres-

31. *Connecticut.* Weed v. Greenwich, 45 Conn. 170.

Florida. Tallahasee v. Fortune, 3 Fla. 19, 52 Am. Dec. 358.

Illinois. Allen v. Decatur, 23 Ill. 332, 76 Am. Dec. 692.

Indiana. Ft. Wayne v. Hamilton, 132 Ind. 487, 32 N. E. 324, 32 Am. St. Rep. 263.

Louisiana. Baumgard v. New Orleans, 9 La. 119, 29 Am. Dec. 437.

Massachusetts. Gordon v. Taunton, 126 Mass. 349.

Michigan. Rogers v. Randall, 29 Mich. 41, removal of sidewalk.

Missouri. Dooley v. Kansas, 82 Mo. 444, 52 Am. Rep. 380 (seizing property for pesthouse); Allison v. Richmond, 51 Mo. App. 133 (removal of nuisance).

Nebraska. Omaha v. Croft, 60 Neb. 57, 82 N. W. 120.

New York. Sadlier v. New York, 93 N. Y. S. 579, 104 App. Div. 82, 84.

Pennsylvania. Brink v. Dunmore, 174 Pa. 395, 34 Atl. 598.

Porto Rico. St. John's Gas Co. v. San Juan, 1 Porto Rico Fed. Rep. 160.

Texas. San Antonio v. Mackey, 14 Tex. Civ. App. 210, 36 S. W. 760, deposit of refuse on plaintiff's property.

Wisconsin. Hollman v. Plattеville, 101 Wisc. 94, 76 N. W. 1119, 70 Am. St. Rep. 899.

Trespass. City has no more right to invade or cause the invasion of private property than an individual. Rice v. Flint, 67 Mich. 401, 34 N. W. 719.

Destruction of trees by municipality, action of trespass will lie. Simpson v. Gibson, 164 Ill. App. 147, 149.

32. Davis v. Silverton, 47 Ore. 171, 82 Pac. 16 (trespass in grading of street); Bunker v. Hudson, 122 Wisc. 43, 99 N. W. 448.

Municipality liable in trespass for act of its agents in entering upon private lands, by order of the council for the purpose of laying out a highway there. Hathaway v. Osborne, 25 R. I. 249, 55 Atl. 700.

Municipality is liable for trespass and damage to private property caused by it in constructing a viaduct where it disregards the statute conferring authority for the construction. Pabst Brewing Co. v. Milwaukee, 148 Wis. 582, 133 N. W. 1112.

33. See Roughton v. Atlanta, 113 Ga. 948, 39 S. E. 316; Worley v. Columbia, 88 Mo. 106, 113; Rowland v. Gallatin, 75 Mo. 134, 42 Am. Rep. 395; Manners v. Haverhill, 135 Mass. 165, 171; Sherman

pass can be said to be *ultra vires* or beyond the scope of the servants authority is a question which is oftentimes difficult of solution.[34]

It is well settled that a municipality may be held liable in damages for a *conversion,* in a proper case.[35]

§ 2612. Same—nuisance.

That a municipality which itself creates a nuisance is liable therefor in damages, the same as an individual, is settled.[36]

§ 2613. Same—liability for conspiracy.

It would seem that a municipality, as such, cannot be a party to a conspiracy so as to be liable in damages. It was so held in Oklahoma where recovery was sought because of a conspiracy alleged to exist, with the object of driving out of the municipality all its colored inhabitants.[37]

§ 2614. Actions "by" municipalities.

A municipality which has been injured may itself sue to recover damages in an action *ex delicto.* And where it so sues, the negligence of an employee of the municipality is not attributable to it, so as to bar recovery, where he was engaged in the performance of a governmental function so that the municpality would not be liable if the action had been one against it based on the negligence of such employee.[38]

v. Granada, 51 Miss. 186; O'Donnell v. White, 24 R. I. 483, 53 Atl. 633.

34. See textbooks on Negligence, the rule being largely the same where the master is a private corporation.

Trespass as *ultra vires,* see Hanvey v. Rochester, 35 Barb. (N. Y.) 177, 181, and §§ 2637-2640, *post.*

35. Methodist Church v. Vicksburg, 50 Miss. 601; Napier v. Brooklyn, 58 N. Y. S. 506, 41 App. Div. 274.

36. § 2641, *post.*

37. Wallace v. Norman, 9 Okla. 339, 346, 60 Pac. 108, 48 L. R. A. 620.

38. Paterson v. Erie R. Co., 78 N. J. L. 592, 75 Atl. 922, where city sued railroad company to recover for injury to fire engine by collision at a crossing, and contributory negligence of driver of fire wagon, was set up.

§ 2615. Same—action over by municipality.

Where the primary negligence is that of a contractor or abutting owner or other third person, and a judgment is recovered against the municipality alone, it may recover over against the person whose negligence was the cause of the injury.

§ 2616. Negligence as basis of recovery.

If the ground upon which a recovery is sought against a municipality is an act of commission or omission other than a trespass, nuisance, or a conversion, and consequential damages are not recoverable, it is necessary for plaintiff to plead and prove negligence on the part of the municipality.[39] It is not enough that an accident has happened but it must be shown that the municipality was actually guilty of negligence.

§ 2617. Liability as precluded by want of power to perform.

Negligence of a municipality cannot be predicated on an omission to do what there was no legal right to do.[40] Thus, where a railing on a wall would have prevented the accident, but the wall was on state land, a village had no right to put a railing on it, and hence was not liable for failure to erect one thereon.[41]

Want of funds, as precluding liability for failure to

39. Ettlinger v. New York, 109 N. Y. S. 44, 58 Misc. Rep. 229; Silverberg v. New York, 110 N. Y. S. 992, 59 Misc. Rep. 492; Jones v. Henderson, 147 N. C. 120, 60 S. E. 894; Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318; Belleville v. Hoffman, 74 Ill. App. 503 (act characterized as negligent by statute or charter); Harp v. Baraboo, 101 Wis. 368, 77 N. W. 744; Strawbridge v. Philadelphia, 13 Phila. (Pa.) 173.

In a doubtful case, recovery ought not to be allowed. Smith v. District of Columbia, 25 App. (D. C.) 370.

City not liable for failure to guard dumping place, which was overflowed during every freshet or high water. Dehanitz v. St. Paul, 73 Minn. 385, 76 N. W. 48.

40. Carpenter v. Cohoes, 81 N. Y. 21, 37 Am. Rep. 468; Veeder v. Little Falls, 100 N. Y. 343, 349, 3 N. E. 306.

41. Veeder v. Little Falls, 100 N. Y. 343, 349, 3 N. E. 306.

keep streets in good condition, is noticed in the next chapter.[42]

§ 2618. Municipal liability for death.

It would seem that if a municipality would not be liable for an injury not resulting in death, because involving the exercise of a governmental as distinguished from a corporate function, it is not liable under a general statute imposing liability for death by wrongful act.[43] On the other hand, if the municipality would have been liable if the injury had not resulted in death, there would seem to be no doubt that the death act applies.[44] However, in some states, statutes authorizing a recovery for wrongful death against "persons" have been held not to apply to municipal corporations,[45] but in Alabama and Minnesota a statute using the words "person or persons or corporation" was held to include municipal corporations,[46] while the contrary was held in Massachusetts.[47]

§ 2619. Who may sue.

The right to sue a municipality for torts is not limited to any particular class, and there is no doubt but that one of the corporators may be the plaintiff in a suit *ex delicto* against a municipality.[48]

42. § 2732, *post*.

43. See Smith v. Louisville, 146 Ky. 562, 143 S. W. 3, 38 L. R. A. (N. S.) 151; Tyman's Adm'rs v. Frankfort, 117 Ky. 518, 78 S. W. 446, 64 L. R. A. 572; Hughes v. Auburn, 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 636; Brown's Adm'r v. Guyandotte, 34 W. Va. 299, 12 S. E. 707, 11 L. R. A. 121; Gianfortone v. New Orleans, 61 Fed. 64, 24 L. R. A. 592.

44. See extensive note in 38 L. R. A. (N. S.) 151.

45. Ritz v. Austin, 1 Tex. Civ. App. 455, 20 S. W. 1029, followed in Searight v. Austin (Tex. Civ. App.), 42 S. W. 857.

46. Anniston v. Ivey, 151 Ala. 392, 44 So. 48.

"Corporation," as used in statute creating liability when death is caused by the wrongful act or omission "of any person or corporation" includes municipal corporations. Keever v. Mankato, 113 Minn. 55, 64, 129 N. W. 158, 775.

47. "A person or corporation" does not include cities and towns. O'Donnell v. North Attleborough, 212 Mass. 243, 98 N. E. 1084.

48. Savannah v. Cullens, 38 Ga. 334, 95 Am. Dec. 398.

Streets, who may sue, §§ 2753-2764, *post*.

§ 2620. Same—employees of municipality.

An employee of a municipality may sue a municipality for torts the same as any other person.[49] And this rule applies equally well where a recovery is sought because of the alleged defective condition of streets.[50] An employee may recover merely as an individual, on the ground of negligence, in a proper case, without in any way relying on the liability of a master for injuries to his servant,[51] in which case the defenses which a master may interpose as such, including assumption of risk, etc., will be no bar;[52] or, if he so desires, he may sue as a servant, relying on the common law or statutory liability of a master for negligence resulting in injury to his servant, in which latter case, however, the general rules as to *assumption of risk*,[53] and negligence of a *fellow-servant* [54] are applicable, and they are valid defenses.

49. **Firemen may sue.** Palmer v. Portsmouth, 43 N. H. 265, and see § 2756, *post*.

Pension as precluding right of firemen to sue, see Farley v. New York, 36 N. Y. S. 1115, 15 Misc. Rep. 33; Coots v. Detroit, 75 Mich. 628, 43 N. W. 17, 5 L. R. A. 315.

Workman on sewer may sue. Coan v. Marlborough, 164 Mass. 206, 41 N. E. 238; Donahoe v. Kansas City, 136 Mo. 657, 38 S. W. 571.

50. § 2756, *post*.

51. See Kennedy v. Savannah, 9 Ga. App. 760, 763, 72 S. E. 160.

52. *Id.*

53. Spalding v. Jefferson, 27 La. Ann. 159; Cobb v. Portland, 55 Me. 381, 92 Am. Dec. 598 (person assisting police in making arrest); Allen v. Logan City, 10 Utah, 279, 37 Pac. 496. See also Coan v. Marlborough, 164 Mass. 206, 41 N. E. 238.

Fireman does not assume risk of negligence of those in charge of city streets. Turner v. Indianapolis, 96 Ind. 51, followed in Valparaiso v. Chester (Ind. 1911), 96 N. E. 765.

54. **Fellow servants as defense** has been interposed and held to bar recovery, in a proper case, without in any way referring to the fact that the master was a municipality. Dube v. Lewiston, 83 Me. 211, 22 Atl. 112; Conley v. Portland, 78 Me. 217, 3 Atl. 658; Flynn v. Salem, 134 Mass. 351; McDermott v. Boston, 133 Mass. 349; McGough v. Bates, 21 R. I. 213, 42 Atl. 873; Allen v. Logan City, 10 Utah, 279, 37 Pac. 496. And the law of the state governing fellow servants in general, as to who are fellow servants, is undoubtedly applicable.

Legality of appointment of negligent fellow servant can not be attacked by municipality where it has acquiesced in his work and

Likewise it would seem that *statutes* governing the liability of a master for injuries to his servants are applicable where the master is a municipal corporation,[55] unless the statute otherwise provides.

There is no liability to employees of the municipality, however, it is generally held, where the tort is in connection with a *governmental function*,[56] such as the fire department;[57] although, in a few instances the courts have, at least to some extent, departed from this rule by holding that the particular act, although in connection with a governmental function, was itself a corporate duty, so as to render the municipality liable to employees for injuries received.[58]

taken the benefit of his labor. Sheffield v. Harris, 101 Ala. 564, 569, 14 So. 357.

Fireman not fellow servant of street commissioner or other officer having charge of streets. Turner v. Indianapolis, 96 Ind. 51; Coots v. Detroit, 75 Mich. 628, 43 N. W. 17, 5 L. R. A. 315.

55. Coughlan v. Cambridge, 166 Mass. 268, 276, 44 N. E. 218.

56. *Connecticut.* Colwell v. Waterbury, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218.

Illinois. Kinnare v. Chicago, 171 Ill. 332, 49 N. E. 536.

Michigan. Nicholson v. Detroit, 129 Mich. 246, 88 N. W. 695, 56 L. R. A. 601.

Massachusetts. Taggart v. Fall River, 170 Mass. 325, 49 N. E. 622.

Washington. Lynch v. North Yakima, 37 Wash. 657, 80 Pac. 79.

See also Winfield v. Peeden, 8 Kan. App. 671, 57 Pac. 131.

If an officer, such as a policeman, is a state rather than a municipal officer, the relation of master and servant does not exist, so as to make the municipality liable as a master. Cobb v. Portland, 55 Me. 381, 92 Am. Dec. 598.

In Connecticut, where the repair of streets is held to be governmental and there is no liability other than that imposed by statute, it is held that an employee engaged in such work can not recover for injuries resulting from defective machinery or from the negligence of the officials superintending the repairs. Colwell v. Waterbury, 74 Conn. 568, 51 Atl. 530, 52 L. R. A. 218.

57. Pettingell v. Chelsea, 161 Mass. 368, 37 N. E. 380, 24 L. R. A. 426; Wild v. Paterson, 47 N J. L. 406, 1 Atl. 490; Peterson v. Wilmington, 130 N. C. 76, 40 S. E. 853, 56 L. R. A. 959; Shanewerk v. Ft. Worth, 11 Tex. Civ. App. 271, 32 S. W. 918.

§ 2643, *post.*

Compare, however, Rhobidas v. Concord, 70 N. H. 90, 47 Atl. 82, 51 L. R. A. 381, 85 Am. St. Rep. 604.

58. § 2432, p. 5071, *ante*, vol. 5, and § 2643, *post.*

Whether the relation of master and servant exists between a person, not an officer, doing work for a municipality, and the municipality, where suit is brought by the workman against the municipality,—and the rules governing the liabilities of a master for injuries to his servant, are relied on,—is governed, it would seem, by the general rules relating to the existence of the relation as between masters and servants without regard to whether the master was an individual or private corporation or what not.[59]

§ 2621. Personal liability of officers for torts.

The individual liabilities of municipal officers have been considered at some length in a preceding volume, including personal liability for negligence.[60] Generally, where a tortious act is done by a public officer personally or by some one in his presence and under his personal direction, and it is ministerial, the officer is personally liable;[61] and this applies equally well to *de facto* offi-

59. A servant is in the employ of the municipality while going to report to his foreman, as required, before beginning his labor. Gorney v. New York, 92 N. Y. S. 451, 102 App. Div. 259.

Trainmen hired to city by railroad company held servants of city. Coughlan v. Cambridge, 166 Mass. 268, 277, 44 N. E. 218.

§ 2653, *post*.

60. §§ 536-540, *ante*, vol. 2.

61. Moynihan v. Todd, 188 Mass. 301, 74 N. E. 367, 108 Am. St. Rep. 473; Elder v. Bemis, 1 Met. (Mass.) 599; Barry v. Smith, 191 Mass. 78, 77 N. E. 1099, 5 L. R. A. (N. S.) 1028; Reed v. Peck, 163 Mo. 333, 63 S. W. 734; Batdorff v. Oregon City, 53 Ore. 402, 100 Pac. 937.

If the injury results, however, not from the wrongful plan or character of the work, but from the negligent or improper manner in which it is performed, the one so negligently acting will always be responsible, and the public corporation may or may not be responsible, depending upon the relationship which it may sustain to that agent. Perkins v. Blauth, 163 Cal. 782, 127 Pac. 50.

Changing grade of street. Where an officer of a municipality and a contractor proceed to bring a street to established grade without an ordinance authorizing the work, they are liable for all resulting damages, because they are mere trespassers. Faust v. Pope, 132 Mo. App. 287, 111 S. W. 878. It is held that the acts of borough officers in changing the grade of a street without an ordinance may be ratified by the borough. Deer v. Sheraden Borough, 220 Pa. St. 307, 69 Atl. 814.

cers.[62] However, negligence in the exercise of *discretionary powers* by a municipal officer will not render him individually liable,[63] unless such liability is imposed by statute or charter.[64] But where he abuses his discretion he is liable.[65]

If the act complained of is inherently wrong and was ordered by the municipality, both it and the person doing the work are liable.[66]

2. GOVERNMENTAL VS. CORPORATE FUNCTIONS.

§ 2622. Liability in regard to "corporate" duties.

While the municipal corporation in performing or omitting to perform a duty imposed upon it as an agent

62. Cole v. Black River Falls, 57 Wisc. 110, 14 N. W. 906.

63. Brown v. Bentonville, 94 Ark. 80, 126 S. W. 93; Gray v. Batesville, 74 Ark. 519, 86 S. W. 295; Taylor v. Mauson, 9 Cal. App. 382, 99 Pac. 410; Hodgdon v. Moulton, 207 Mass. 445, 93 N. E. 656.

Board of health not liable for alleged unjustifiable quarantining of plaintiff's premises, where they act in good faith. Valentine v. Englewood, 76 N. J. L. 509, 71 Atl. 344, 19 L. R. A. (N. S.) 262.

Trees. In determining whether growing trees constitute an obstruction to a street, municipal officers act with discretion. Remington v. Walthall, 82 Kan. 234, 108 Pac. 112; Maynard v. Walthall, 82 Kan. 856, 108 Pac. 114.

But where an officer acts arbitrarily and not in good faith and cuts down a tree which in fact is not an obstruction and there is no reason or public necessity for cutting it down, the officer is liable to the owner. Remington v. Walthall, 82 Kan. 234, 108 Pac. 112; Maynard v. Walthall, 82 Kan. 856, 108 Pac. 114.

64. Scott v. Saratoga Springs, 199 N. Y. 178, 92 N. E. 393, aff'g 115 N. Y. S. 796, 131 App. Div. 347.

Police court. Statute imposing personal liability on officers for torts held not to apply to a member of the town council when presiding in a police court. Calhoun v. Little, 106 Ga. 336, 32 S. E. 86, 43 L. R. A. 630, 71 Am. St. Rep. 254.

65. Remington v. Walthall, 82 Kan. 234, 108 Pac. 112; Maynard v. Walthall, 82 Kan. 856, 108 Pac. 114.

66. Perkins v. Blauth, 163 Cal. 782, 127 Pac. 50.

Where injury occurs from the negligent execution of work, the person whose negligence caused the injury is liable regardless of the liability of the municipality. Perkins v. Blauth, 163 Cal. 782, 127 Pac. 50.

of the state in the exercise of strictly governmental or state functions is not liable to private action on account of injuries resulting from the wrongful acts or negligence of its officers or agents,[67] yet, in every state except South Carolina,[68] it is the settled rule that a municipality is liable at common law for its torts in the performance or non-performance of municipal or corporate duties as distinguished from governmental duties. In other words, where its officers or servants are in the exercise of power conferred upon the municipality for its private benefit or pecuniary profit, and damage results from their negligence or misfeasance, the municipality is liable to the same extent as in the case of private corporations or individuals.[69]

67. § 2623, *post*.

68. Irvine v. Greenwood, 89 S. C. 511, 514-519, 72 S. E. 228 (where distinction between corporate and governmental duties is expressly rejected and the rule laid down by earlier cases in that state that there is no liability of municipalities for the torts of its officers or agents unless created by statute, is expressly approved). Parks v. Greenville, 44 S. C. 168, 172, 21 S. E. 540; Gibbes v. Beaufort, 20 S. C. 213, 218.

69. *Colorado*. Denver v. Maurer, 47 Colo. 209, 106 Pac. 875.

Connecticut. Dyer v. Danbury, 85 Conn. 128, 81 Atl. 958; Danbury, etc. R. Co. v. Norwalk, 37 Conn. 109.

Georgia. Macon v. Harris, 75 Ga. 761.

Illinois. Lehigh Valley Transp. Co. v. Chicago, 237 Ill. 581, 86 N. E. 1093; Nevins v. Peoria, 41 Ill. 502, 89 Am. Dec. 392.

Indiana. Logansport v. Dick, 70 Ind. 65, 36 Am. Rep. 166; Ross v. Madison, 1 Ind. 281, 48 Am. Dec. 361.

Iowa. Freeland v. Muscatine, 9 Ia. 461; Wallace v. Muscatine, 4 G. Greene (Ia.) 373, 61 Am. Dec. 131.

Kentucky. McGraw v. Marion, 98 Ky. 673, 17 Ky. L. Rep. 1254, 34 S. W. 18, 47 L. R. A. 593.

Louisiana. New Orleans v. Ker, 50 La. Ann. 413, 23 So. 384, 69 Am. St. Rep. 442; Baumgard v. New Orleans, 9 La. 119, 29 Am. Dec. 437; Wilde v. New Orleans, 12 La. Ann. 15.

Maine. Libby v. Portland, 105 Me. 370, 74 Atl. 805, 26 L. R. A. (N. S.) 141.

Maryland. County Com'rs v. Duckett, 20 Md. 468, 83 Am. Dec. 557.

Massachusetts. Hunt v. Boston, 183 Mass. 303, 67 N. E. 244; Deane v. Randolph, 132 Mass. 475; Thayer v. Boston, 19 Pick. 511, 31 Am. Dec. 157; Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332.

Michigan. Detroit v. Blackeby, 21 Mich. 84, 4 Am. Rep. 450.

In so far as municipal corporations exercise powers not of a governmental character, "voluntarily assumed

Minnesota. Boye v. Albert Lea, 74 Minn. 230, 76 N. W. 1131; Kobs v. Minneapolis, 22 Minn. 159.

Missouri. Armstrong v. Brunswick, 79 Mo. 319; Hunt v. Boonville, 65 Mo. 620, 27 Am. Rep. 299; Barree v. Cape Girardeau, 132 Mo. App. 182, 112 S. W. 724; Bullmaster v. St. Joseph, 70 Mo. App. 60; Murtaugh v. St. Louis, 44 Mo. 479; Keating v. Kansas City, 84 Mo. 415; Carrington v. St. Louis, 89 Mo. 208, 1 S. W. 240, 58 Am. Rep. 108; Ulrich v. St. Louis, 112 Mo. 138, 20 S. W. 446; Donahoe v. Kansas City, 136 Mo. 657, 38 S. W. 571.

New Hampshire. Rowe v. Portsmouth, 56 N. H. 291, 22 Am. Rep. 464.

New Jersey. Jersey City v. Kiernan, 50 N. J. L. 246, 13 Atl. 170.

New York. Re Board of Rapid Transit Com'rs, 197 N. Y. 81, 90 N. E. 456; Howell v. Buffalo, 15 N. Y. 512; Gartland v. New York Zoological Soc'y, 120 N. Y. S. 24, 135 App. Div. 163; Scott v. New York, 50 N. Y. S. 191, 27 App. Div. 240; Bailey v. New York, 3 Hill 531, 38 Am. Dec. 669.

North Carolina. Goodwin v. Reidsville (N. C. 1912), 76 S. E. 232; Moffitt v. Asheville, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810; Meares v. Wilmington, 31 N. C. 73, 49 Am. Dec. 412. Consult also, Metz v. Asheville, 150 N. C. 748, 64 S. E. 881.

Ohio. Toledo v. Cone, 41 Ohio St. 149.

Oklahoma. Oklahoma City v. Hill, 6 Okla. 114, 50 Pac. 242.

Oregon. Wagner v. Portland, 40 Ore. 389, 60 Pac. 985, 67 Pac. 300; Caspary v. Portland, 19 Ore. 496, 24 Pac. 1036, 20 Am. St. Rep. 842.

Rhode Island. Sprague v. Tripp, 13 R. I. 38, 43 Am. Rep. 11; Aldrich v. Tripp, 11 R. I. 141, 23 Am. Rep. 434.

South Dakota. O'Rourke v. Sioux Falls, 4 S. D. 47, 54 N. W. 1044, 19 L. R. A. 789, 46 Am. St. Rep. 760.

Tennessee. Memphis v. Lasser, 9 Humph. (Tenn.) 757.

Texas. Ostrom v. San Antonio, 94 Tex. 523, 62 S. W. 909; Greenville v. Branch (Tex. Civ. App. 1912), 152 S. W. 478.

Vermont. Welsh v. Rutland, 56 Vt. 228, 48 Am. Rep. 762.

Virginia. Richmond v. Long's Adm'rs, 17 Grat. (Va.) 375, 94 Am. Dec. 461; Orme v. Richmond, 79 Va. 86.

Washington. Sutton v. Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847; Simpson v. Whatcom, 33 Wash. 392, 74 Pac. 577, 63 L. R. A. 815, 99 Am. St. Rep. 951; Collins v. Spokane, 64 Wash. 153, 116 Pac. 663; Hutchinson v. Olympia, 2 Wash. Ter. 314, 5 Pac. 606; Hase v. Seattle, 51 Wash. 174, 98 Pac. 370, 20 L. R. A. (N. S.) 938.

Wisconsin. Hollman v. Platteville, 101 Wis. 94, 76 N. W. 1119, 70 Am. St. Rep. 899; Durkee v. Kenosha, 59 Wis. 123, 17 N. W. 677, 48 Am. Rep. 480.

powers intended for the private advantage and benefit of the locality and its inhabitants, there seems to be no sufficient reason why they should be relieved from that liability to suit and measure of actual damage to which an individual or private corporation exercising the same powers for purposes essentially private would be liable;"[70] and it is held that while acting in its private capacity, a municipality is liable for negligence to the same extent as a private corporation or individual,[71] and is liable to its *employees* to the same extent as other employers.[72] Furthermore, for torts committed by its agents and servants in the performance of corporate or private duties the municipality is liable, whether the tortious act was done negligently or *intentionally*.[73]

And a municipality will not be permitted to say whether or not it shall be held liable for personal injuries resulting from negligence in the performance of

United States. Barns v. District of Columbia, 91 U. S. 540, 23 L. Ed. 440; Winona v. Botzet, 169 Fed. 321, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204; Denver v. Porter, 126 Fed. 288, 61 C. C. A. 168.

Canada. Lewis v. Toronto, 39 U. Can. Q. B. 343.

It is liable for injuries caused by it in the exercise of powers and privileges peculiarly for its benefit. Smith v. Sewerage Com'rs, 146 Ky. 562, 143 S. W. 3.

It has been held that the special privileges of the power of taxation, supervision and local government are sufficient consideration for the liabilities assumed by municipal corporations for their torts. Goodrich v. University Place, 80 Neb. 774, 115 N. W. 538.

70. Per Stayton, J., in Galveston v. Posnainsky, 62 Tex. 118, 50 Am. Rep. 517.

71. Provine v. Seattle, 59 Wash. 681, 110 Pac. 619; Wood v. Tacoma, 66 Wash. 266, 119 Pac. 859.

In its private capacity a municipal corporation is governed by the same laws and subject to the same regulations and limitations as natural persons except so far as it may be exempt by express enactment. People v. Chicago, 256 Ill. 558, 100 N. E. 194.

Municipalities, where they act in a private as distinguished from a public capacity, like private corporations, are held to the same responsibility as private corporations. Toledo v. Cone, 41 Ohio St. 149, 161.

72. Terrell v. Washington, 158 N. C. 281, 73 S. E. 888.

§ 2620, *ante*.

73. Johnson v. Somerville, 195 Mass. 370, 81 N. E. 268, 10 L. R. A. (N. S.) 715.

such duties,[74] nor to impose unreasonable restrictions upon the right of injured persons to bring action against it for damages therefor.[75]

§ 2623. Liability in regard to "governmental" duties.

In the absence of statute, it has always been the law that no private action for tort will lie against the state, since negligence cannot be imputed to the sovereign.[76] So, in the various localities or local areas where the state agencies merely perform the governmental functions of the state and acquire no individual corporate existence, they stand as the state, and, therefore, to hold them responsible for negligence would be the same as holding the sovereign power answerable for its action. It is assumed that no private legal duty rests upon a city to perform governmental functions, and, moreover, "their character precludes the idea of the common law rule of responsibility, for there is no standard of reasonable care by which the acts of the government may be tested. The state, through its representatives, namely, the municipal corporation, acts in its sovereign capacity, and does not submit its actions to the judgment of the courts."[77] "The reason is that it is inconsistent with the nature of their powers that they should be compelled to respond to individuals in damages for the manner of their exercise. They are conferred for public purposes, to be exercised in their prescribed limits, at discretion, for the public good; and there can be no appeal from the judgment of the proper municipal authorities to the judgment of courts and juries."[78] But where a state agency

74. Durham v. Spokane, 27 Wash. 615, 68 Pac. 383.

75. Hose v. Seattle, 51 Wash. 174, 98 Pac. 370, 20 L. R. A. (N. S.) 938.

76. People v. Dennison, 84 N. Y. 272; Langford v. U. S., 101 U. S. 341, 25 L. Ed. 1010, 15 Ct. Cl. 632; Shearman & Redfield on Neg., § 251.

77. Jones, Neg. of Munic. Corp., § 27.

78. Cooley on Torts (2d ed.), p. 739; Perry v. Worcester, 6 Gray. (Mass.) 544, 66 Am. Dec. 431, note.

A leading case on this subject is *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; where the foundations of the rule are con-

becomes a corporation "it thereby acquires an identity distinct from the sovereign power, and the principle stated does not prevent the incorporated body from being held liable for its own negligence."[79]

The rule is firmly established in our law that where the municipal corporation is performing a duty imposed upon it as the agent of the state in the exercise of strictly governmental functions, there is no liability to private action on account of injuries resulting from the wrongful acts or negligence of its officers or agents thereunder, unless made liable by statute.[80] In other words, unless

sidered at length by Chief Justice Gray and both the English and American cases reviewed in detail, and the result thereof is summed up as follows: "There is no case, in which the neglect of a duty, imposed by general law upon all cities and towns alike, has been held to sustain an action by a person injured thereby against a city, when it would not against a town," the nonliability of towns being conceded.

79. Jones, Neg. of Munic. Corp., § 23.

80. *Alabama.* Dargan v. Mobile, 31 Ala. 469, 70 Am. Dec. 505; Bieker v. Cullman (Ala. 1912), 59 So. 625.

Arkansas. Browne v. Bentonville, 94 Ark. 80, 126 S. W. 93; Trammell v. Russellville, 34 Ark. 105, 36 Am. Rep. 1; Gregg v. Hatcher, 94 Ark. 54, 125 S. W. 1007, 1008; Franks v. Holly Grove, 93 Ark. 250, 124 S. W. 514; Helena v. Thompson, 29 Ark. 569; Arkadelphia v. Windham, 49 Ark. 139, 4 S. W. 450, 4 Am. St. Rep. 32; Fort Smith v. York, 52 Ark. 84, 12 S. W. 157; Collier v. Fort Smith, 73 Ark. 447, 84 S. W. 480, 68 L. R. A. 237; Gray v. Batesville, 74 Ark. 519, 86 S. W. 295; Dickerson v. Okolona, 98 Ark. 206, 135 S. W. 863.

California. Perkins v. Blauth, 163 Cal. 782, 127 Pac. 50; Sievers v. San Francisco, 115 Cal. 648, 47 Pac. 687, 56 Am. St. Rep. 153.

Colorado. Denver v. Maurer, 47 Colo. 209, 106 Pac. 875; Denver v. Davis, 37 Colo. 370, 86 Pac. 1027, 6 L. R. A. (N. S.) 1013, 119 Am. St. Rep. 293; Veraguth v. Denver, 19 Colo. App. 473, 76 Pac. 539; McAuliffe v. Victor, 15 Colo. App. 337, 62 Pac. 231.

Connecticut. Judson v. Winsted, 80 Conn. 384, 68 Atl. 999, 15 L. R. A. (N. S.) 91; Dyer v. Danbury, 85 Conn. 128, 81 Atl. 958; Hourigan v. Norwich, 77 Conn. 358, 59 Atl. 487; Colwell v. Waterbury, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218; Daly v. New Haven, 69 Conn. 644, 38 Atl. 397; Hewison v. New Haven, 37 Conn. 475, 9 Am. Rep. 342; Mead v. New Haven, 40 Conn. 72, 16 Am. Rep. 14 (inspector of steam boilers).

Georgia. Dalton v. Wilson, 118 Ga. 100, 44 S. E. 830, 98 Am. St.

a right of action is given by statute, municipal corporations may not be held civilly liable to individuals for

Rep. 101; Wyatt v. Rome, 105 Ga. 312, 31 S. E. 188, 42 L. R. A. 180, 70 Am. St. Rep. 41; Cook v. Macon, 54 Ga. 468.

Illinois. Evans v. Kankakee, 231 Ill. 223, 83 N. E. 223; Chicago v Williams, 182 Ill. 135, 55 N. E. 123; Kinnare v. Chicago, 171 Ill. 332, 49 N. E. 536; Hanrahan v. Chicago, 145 Ill. App. 38; Culver v. Streator, 130 Ill. 238, 22 N. E. 810, 6 L. R. A. 270; Craig v. Charleston, 180 Ill. 154, 54 N. E. 184; Robertson v. Marion, 97 Ill. App. 332; Blake v. Pontiac, 49 Ill. App. 543.

Indiana. Brinkmeyer v. Evansville, 29 Ind. 187.

Iowa. Saunders v. Ft. Madison, 111 Ia. 102, 82 N. W. 428; Calwell v. Boone, 51 Ia. 687, 2 N. W. 614, 33 Am. Rep. 154.

Kansas. Edson v. Olathe, 82 Kan. 4, 107 Pac. 539; Edson v. Olathe, 81 Kan. 328, 105 Pac. 521; La Clef v. Concordia, 41 Kan. 323, 21 Pac. 272, 13 Am. St. Rep. 285.

Kentucky. Board of Park Com'rs v. Prinz, 32 Ky. L. Rep. 359, 105 S. W. 948; Morgan v. Shelbyville (Ky.), 121 S. W. 617; Pratther v. Lexington, 13 B. Mon. 559, 56 Am. Dec. 585.

Louisiana. New Orleans v. Ker, 50 La. Ann. 413, 23 So. 384, 69 Am. St. Rep. 442; Rudolphe v. New Orleans, 11 La. Ann. 242.

Maine. Mitchell v. Rockland, 41 Me. 363, 66 Am. Dec. 252.

Maryland. County Com'rs v. Duckett, 20 Md. 468, 83 Am. Dec. 557.

Massachusetts. Johnson v. Somerville, 195 Mass. 370, 81 N. E 268, 10 L. R. A. (N. S.) 715; Manners v. Haverhill, 135 Mass. 165; Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; Fisher v. Boston, 104 Mass. 87, 6 Am. Rep. 196; Hafford v. New Bedford, 16 Gray (Mass.) 297; Barney v. Lowell, 98 Mass. 570; White v. Phil lipston, 10 Met. (Mass.) 108; Mower v. Leicester, 9 Mass. 247, 6 Am. Dec. 63; Bigelow v. Randolph, 14 Gray (Mass.) 541; Walcott v. Swampscott, 1 Allen (Mass.) 101; Buttrick v. Lowell, 1 Allen (Mass.) 172, 79 Am. Dec. 721.

Michigan. Nicholson v. Detroit, 129 Mich. 246, 88 N. W. 695, 56 L. R. A. 601; Corning v. Saginaw, 116 Mich. 74, 74 N. W. 307, 40 L. R. A. 526; Stevens v. Muskegon, 111 Mich. 72, 69 N. W. 227, 36 L. R. A. 777; Amperse v. Kalamazoo, 75 Mich. 228, 42 N. W. 821, 13 Am. St. Rep. 432; Hines v. Charlotte, 72 Mich. 278, 283, 40 N. W. 333, 1 L. R. A. 844; Webb v. Board of Health, 116 Mich. 516, 74 N. W. 434, 72 Am. St. Rep. 541; Gilboy v. Detroit, 115 Mich. 121, 73 N. W. 128; Detroit v. Blackeby, 21 Mich. 84, 4 Am. Rep. 450; Larkin v. Saginaw County, 11 Mich. 88, 82 Am. Dec. 63; Leoni Tp. v. Taylor, 20 Mich. 148; O'Leary v. Board of Fire & Water Com'rs, 79 Mich. 281, 44 N. W. 608, 7 L. R. A. 170, 19 Am. St. Rep. 169; Hodgins v. Bay City, 156 Mich. 687, 121 N. W. 274, 16 Det. Leg. N. 222.

Minnesota. Claussen v. Luverne, 103 Minn. 491, 115 N. W. 643, 15

"neglect to perform or negligence in performing" duties which are governmental in their nature, and including

L. R. A. (N. S.) 698; Miller v. Minneapolis, 75 Minn. 131, 77 N. W. 788; Snider v. St. Paul, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151.

Missouri. Ely v. St. Louis, 181 Mo. 723, 81 S. W. 168; Harman v. St. Louis, 137 Mo. 494, 38 S. W. 1102; Donahoe v. Kansas City, 136 Mo. 657, 664, 38 S. W. 571; Carrington v. St. Louis, 89 Mo. 208, 1 S. W. 108, 58 Am. Rep. 108; Kiley v. Kansas City, 87 Mo. 103, 56 Am. Rep. 443; Armstrong v. Brunswick, 79 Mo. 319; Murtaugh v. St. Louis, 44 Mo. 479; McKenna v. St. Louis, 6 Mo. App. 320; Barree v. Cape Girardeau, 132 Mo. App. 182, 112 S. W. 724; Butler v. Moberly, 131 Mo. App. 172, 110 S. W. 682; Ulrich v. St. Louis, 112 Mo. 138, 20 S. W. 466, 34 Am. St. Rep. 372.

New Hampshire. Lockwood v. Dover, 73 N. H. 209, 61 Atl. 32; Eastman v. Meredith, 36 N. H. 284, 298, 72 Am. Dec. 302.

New Jersey. Valentine v. Englewood, 76 N. J. L. 509, 71 Atl. 344; Tomlin v. Hildreth, 65 N. J. L. 438, 47 Atl. 649; Bisbing v. Asbury Park, 80 N. J. L 416, 78 Atl. 196; Wild v. Paterson, 47 N. J. L. 406, 1 Atl. 490; Sussex v. Strader, 18 N. J. L. 108, 121, 35 Am. Dec. 530.

New York. Maxmilian v. New York, 62 N. Y. 160, 20 Am. Rep. 468; Doty v. Port Jervis, 52 N. Y. S. 57, 23 N. Y. Misc. Rep. 313; Quill v. New York, 55 N. Y. S. 889, 36 App. Div. 476; Bailey v. New York, 3 Hill, 531, 38 Am. Dec. 669; Higbie v. Board of Education, 107 N. Y. S. 168, 122 App. Div. 483; Martin v. Brooklyn, 1 Hill (N. Y.), 545; Morey v. Newfane, 8 Barb. (N. Y.) 645; Lorillard v. Monroe, 11 N. Y. 392, 62 Am. Dec. 120.

North Carolina. Fisher v. New Bern, 140 N. C. 506, 53 S. E. 342, 5 L. R. A. (N. S.) 542, 111 Am. St. Rep. 857; Harrington v. Greenville (N. C. 1912), 75 S. E. 849; McIlhenney v. Wilmington, 127 N. C. 146, 37 S. E. 187, 50 L. R. A. 470; Moffitt v. Asheville, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810; Hill v. Charlotte, 72 N. C. 55, 21 Am. Rep. 751.

Ohio. Bell v. Cincinnati, 80 Ohio St. 1, 88 N. E. 128, 23 L. R. A. (N. S.) 910; Robinson v. Greenville, 42 Ohio St. 625, 51 Am. Rep. 857; Cincinnati v. Cameron, 33 Ohio St. 336; Wheeler v. Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368; Rose v. Toledo, 24 Ohio Cir. Ct. 540.

Oklahoma. Oklahoma City v. Hill, 6 Okl. 114, 50 Pac. 242; Lawton v. Harkins (Okla. 1912), 126 Pac. 727.

Oregon. Esberg-Gunst Cigar Co. v. Portland, 34 Oreg. 282, 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651; Caspary v. Portland, 19 Oreg. 496, 24 Pac. 1036, 20 Am. St. Rep. 842.

Pennsylvania. Elliott v. Philadelphia, 75 Pa. St. 347, 15 Am. Rep. 591. Compare Taylor v. Canton, 30 Pa. Super. Ct. 305.

Rhode Island. Wixon v. Newport, 13 R. I. 454, 43 Am. Rep. 35.

generally all duties existent or imposed upon them by law solely for the public benefit. Such liability may, however, be *imposed by statute or charter.*[81]

South Carolina. Heape v. Berkeley County, 80 S. C. 32, 61 S. E. 203; Gibbes v. Beaufort, 20 S. C. 213.

Tennessee. Conelly v. Nashville, 100 Tenn. 262, 46 S. W. 565; Davis v Knoxville, 90 Tenn. 599, 18 S. W. 254.

Texas. Rusher v. Dallas, 83 Tex. 151, 18 S. W. 333. Stinnett v. Sherman (Tex. Civ. App.), 43 S. W. 847; Galveston v. Posnainsky, 62 Tex. 118, 50 Am. Rep. 517; Bates v. Houston, 14 Tex. Civ. App. 287, 37 S. W. 383; Shanewerk v. Ft. Worth, 11 Tex. Civ. App. 271, 32 S. W. 918.

Utah. Sehy v. Salt Lake City (Utah, 1912), 126 Pac. 691.

Vermont. Stockwell v. Rutland, 75 Vt. 76, 53 Atl. 132; Welsh v. Rutland, 56 Vt. 228, 48 Am. Rep. 762; Hyde v. Jamaica, 27 Vt. 443.

Virginia. Richmond v. Long's Adm'r, 17 Gratt. 375, 94 Am. Dec. 461.

Washington. Seattle v. Stirrat, 55 Wash. 560, 104 Pac. 834; Russell v. Tacoma, 8 Wash. 156, 35 Pac. 605, 40 Am. St. Rep. 895; Simpson v. Whatcom, 33 Wash. 392, 74 Pac. 577, 63 L. R. A. 815, 99 Am. St. Rep. 951; Wheeler v. Aberdeen, 47 Wash. 405, 92 Pac. 135; Hewitt v. Seattle, 62 Wash. 377, 113 Pac. 1084.

West Virginia. Wood v. Hinton, 47 W. Va. 645, 35 S. E. 824, 826; Bartlett v. Clarksburg, 45 W. Va. 393, 31 S. E. 918, 43 L. R. A. 295, 72 Am. St. Rep. 817; Thomas v. Grafton, 34 W. Va. 282, 12 S. E. 478, 26 Am. St. Rep. 924; Gibson v. Huntington, 38 W. Va. 177, 18 S. E. 447, 22 L. R. A. 561, 45 Am. St. Rep. 853; Brown v. Guyandotte, 34 W. Va. 299, 12 S. E. 707, 11 L. R. A. 121; Mendel v. Wheeling, 28 W. Va. 233, 57 Am. Rep. 665.

Wisconsin. Hollman v. Platteville, 101 Wis. 94, 76 N. W. 1119, 70 Am. St. Rep. 899; Kuehn v. Milwaukee, 92 Wis. 263, 65 N. W. 1030.

United States. Winona v. Botzet. 169 Fed. 321, 94 C. C. A. 563; New Orleans v. Abbagnatio, 62 Fed. 240, 10 C. C. A. 361, 26 L. R. A. 329; Kansas City v. Lemen, 57 Fed. 905, 6 C. C. A. 627 (closing circus on ground claimed to have been dedicated as a graveyard); Hart v. Bridgeport, Fed. Cas. No. 6,149, 13 Blatchf. 289.

Canada. Woodford v. Chatham, 37 N. Brunsw. 21; McCleave v. Moncton, 35 N. Brunsw. 296; Butler v. Toronto, 10 Ont. Wkly. Rep. 876.

In reference to such matters "they should stand as does sovereignty, whose agents they are, subject to be sued only when the State by statute declares they may be." Per Stayton, J., in Galveston v. Posnainsky, 62 Tex. 118, 50 Am. Rep. 517.

81. Where statute imposes liability on a municipal corporation for its negligence, it is no defense that the negligent act was due in the exercise of a governmental duty. Giaconi v. Astoria, 60 Ore.

Municipal corporations proper "are upon the same footing as *quasi* corporations when acting in a purely governmental capacity."[82] The supreme court of Missouri has stated the doctrine as follows: "When the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, then the corporation is not liable for the consequences of such acts or omissions on the part of its officers and servants."[83] Among the *reasons* set forth for denying liability for breach of a governmental duty are the facts that the officers are usually the representatives of the injured person as well as of other taxpayers, and that it is as much his duty to select careful and prudent persons as it is that of the taxpayer who is called upon to help pay for his hurt.[84] However, the fact that a municipal officer is charged by statute with the performance of governmental duties does not relieve the municipality from liability for the negligence of such officer in the performance of duties which are not of a public, governmental character, and are purely corporate.[85]

In so far as the rule of nonliability for torts connected with the performance of governmental duties is concerned, it is immaterial that the wrongful act was intentional and not merely negligent,[86] or that the municipality may be indicted for the wrongful act.[87] This rule

12, 118 Pac. 180, rev'g 113 Pac. 855.

82. Nicholson v. Detroit, 129 Mich. 246, 259, 88 N. W. 695, 56 L. R. A. 601.

83. Murtaugh v. St. Louis, 44 Mo. 479; Donahoe v. Kansas City, 136 Mo. 657, 664, 38 S. W. 571; Kiley v. Kansas City, 87 Mo. 103, 56 Am. Rep. 443; Armstrong v. Brunswick, 79 Mo. 319, 321; McKenna v. St. Louis, 6 Mo. App. 320.

84. Nicholson v. Detroit, 129 Mich. 246, 249, 88 N. W. 695, 56 L. R. A. 601.

85. Denver v. Davis, 37 Colo. 370, 86 Pac. 1027, 6 L. R. A. (N. S.) 1013, 119 Am. St. Rep. 293.

86. Johnson v. Somerville, 195 Mass. 370, 81 N. E. 268, 10 L. R. A. (N. S.) 715.

87. See Kehoe v. Rutherford 74 N. J. L. 659, 65 Atl. 1046.

as to nonliability for negligence in connection with governmental functions applies equally well, it is generally held, where the injured person is an employee of the municipality and the duty violated is the failure to furnish a safe place to work or safe appliances.[88] So the question whether the statute under which governmental functions are exercised is permissive or mandatory, is immaterial, so far as the rule of nonliability is concerned.[89] Furthermore, the rule of nonliability applies notwithstanding the neglect charged relates to the control of real property the title to which is in the municipality.[90]

A distinction must be drawn, however, between injuries to property rights and other injuries, since if the officers of a municipality, in the discharge of its governmental functions and police powers invade property rights, the doctrine of *respondeat superior* applies, and the corporation is liable for their acts.[91]

§ 2624. Same—rule in admiralty.

This rule of nonliability for torts where the municipality is exercising a purely governmental function does not apply to admiralty courts. It was so held by the supreme court of the United States which decided that the city of New York was liable for the collision of a fire boat owned by it, with another boat, while running to

88. Nicholson v. Detroit, 129 Mich. 246, 249, 88 N. W. 695, 56 L. R. A. 601.

§ 2620, *ante*.

89. Nicholson v. Detroit, 129 Mich. 246, 254, 88 N. W. 695, 56 L. R. A. 601.

But see § 2628, *post*.

90. Nicholson v. Detroit, 129 Mich. 246, 88 N. W. 695, 56 L. R. A. 601.

§ 2672, *et seq.*, *post*.

91. Metz v. Asheville, 150 N. C. 748, 751, 64 S. E. 881, 22 L. R. A. (N. S.) 940.

One important principle, however, is to be noted in this connection. Wherever the injury complained of is the taking or damaging of private property for public use without compensation then under the guarantee of the federal Constitution against such invasion of the private rights of property, neither the state itself nor any of its agencies or mandatories may claim exemption from liability. Perkins v. Blauth, 163 Cal. 782, 127 Pac. 50.

put out a fire, and it was said by Mr. Justice White that, "in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction." [92]

§ 2625. Governmental duties distinguished from corporate duties.

These rules as to municipal liability for negligence in regard to corporate duties, and nonliability for negligence in regard to governmental duties, are elementary. The only difficulty is in their application, it often being difficult to determine in a particular case whether the duty involved is a governmental or corporate one, *i. e.*, whether the injury complained of is the result of the failure to exercise or the negligent exercise of a governmental and public power, or is due to negligence in the exercise or performance of a corporate ministerial and private power or duty.[93]

What are governmental powers and duties, and what are corporate duties, is not subject to precise definition further than to say this: The powers and duties of municipal corporations are of two-fold character; the

92. Workman v. New York, 179 U. S. 552, 570, 21 Sup. Ct. 212, 45 L. Ed. 314, Justices Gray, Brewer, Shiras and Peckham dissenting.

93. **Levy of executions** on property by officer is not a corporate function, and hence the doctrine of *respondeat superior* has no application. Thomas v. Grafton, 34 W. Va. 282, 12 S. E. 478, 26 Am. St. Rep. 924.

Building of docks, for the private and individual benefit of owners of land adjoining a canal. City not liable for failure to repair or rebuild, under particular statutes. New York & B. S. & L. Co. v. Brooklyn, 71 N. Y. 580, aff'g 8 Hun (N. Y.), 37.

Change of street grade, resulting in exposure of water service pipes so as to cause them to freeze. City not liable. Miller v. Kalamazoo, 140 Mich. 494, 103 N. W. 845.

Removal of encroachments held not a governmental duty. Weed v. Greenwich, 45 Conn. 170.

Automobile driven by superintendent of street department ran over a pedestrian. City held liable. Hewitt v. Seattle, 62 Wash. 377, 113 Pac. 1084.

one public as regards the state at large, in so far as they are its agents in government; the other private in so far as they provide the local necessities and conveniences for their own citizens. A municipal corporation "possesses two kinds of powers: one governmental and public, and to the extent they are held and exercised is clothed with sovereignty; the other private, and to the extent they are held and exercised is a legal individual. The former are given and used for public purposes; the latter for private purposes. While in the exercise of the former the corporation is a municipal government, and while in the exercise of the latter is a corporate legal individual."[94]

94. Per Foot, J., in Lloyd v. New York, 5 N. Y. 369, 55 Am. Dec. 347. See also Maximilian v. New York, 62 N. Y. 160, 164, 20 Am. Rep. 468; Edgerly v. Concord, 62 N. H. 8, 13 Am. St. Rep. 523; Springfield, etc. Ins. Co. v. Keeseville, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. Rep. 667; Caspary v. Portland, 19 Oreg. 496, 24 Pac. 1036, 20 Am. St. Rep. 842; State v. Miller, 194 Fed. 775.

Governmental vs. corporate functions. "In the discharge of its functions, a municipality is called upon to perform duties of two classes; the one political and governmental in its character, and the other private and corporate. The distinction between the two is thus stated by Judge Thompson, in Veraguth v. Denver, 19 Colo. App. 473, 477, 76 Pac. 539. 'One class of its powers is of a public and general character, to be exercised in virtue of certain attributes of sovereignty delegated to it for the welfare and protection of its inhabitants; the other relates only to special or private corporate purposes, for the accomplishment of which it acts, not through its public officers as such, but through agents or servants employed by it. In the former case its functions are political and governmental, and no liability attaches to it, either for non-user or misuser of power, while in the latter it stands upon the same footing with a private corporation and will be held to the same responsibility with a private corporation for injuries resulting from its negligence.'" Denver v. Davis, 37 Colo. 370, 373, 86 Pac. 1027, 6 L. R. A. (N. S.) 1013, 119 Am. St. Rep. 293.

"There are two kinds of duties which are imposed upon a municipal corporation: One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of which it is a sovereign. The former power is private, and is used for private purposes; the latter is public and is

There are some duties the nature of which as governmental is too well settled to be disputed, such as the establishment and maintenance of *schools*,[95] *hospitals*,[96] *poor houses*,[97] *fire* departments,[98] *police* departments.[99]

used for public purposes. * * * The former is not held by the municipality as one of the political divisions of the State; the latter is. In the exercise of the former power, and under the duty to the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for a failure to use its power well, or for an injury caused by using it badly. But where the power is entrusted to it as one of the political subdivisions of the State, and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for non-user, nor for misuser by the public agents." Per Justice Folger in Maximilian v. New York, 62 N. Y. 160, 164, 20 Am. Rep. 468.

"A municipal corporation has a dual character, the one public and the other private, and exercises correspondingly twofold functions, the one governmental and legislative, and the other private and ministerial. In its public character, it acts as an agency of the State, to enable it to better govern that portion of its people residing within the municipality, and to this end there is granted to or imposed upon it by the charter of its creation powers and duties to be exercised and performed exclusively for public governmental purposes. These powers are legislative and discretionary, and the municipality is exempt from liability for an injury resulting from the failure to exercise them, or from their improper or negligent exercise. In its corporate or private character there are granted to it privileges and powers to be exercised for its own private advantage, which are for public purposes in no other sense than that the public derives a common benefit from the proper discharge of the duties imposed or assumed in consideration of the privileges and powers conferred. This latter class of powers and duties are not discretionary, but ministerial and absolute; and, for an injury resulting from negligence in their exercise or performance, the municipality is liable in a civil action for damages, in the same manner as a private individual or corporation. The line of distinction between the two classes of powers and duties, is clearly drawn by the courts and text writers, and the exemption of the municipality from liability in the one case, and its liability in the other for an injury resulting from negligence, firmly established." Per Riley, J., in Jones v. Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294.

95. § 2675, *post*.
96. § 2669, *post*.
97. § 2668, *post*.
98. § 2643, *ante*.
99. § 2666, *post*.

jails, workhouses, and police stations,[1] and the like. In fact, duties connected with the preservation of the peace or health, or the prevention of the destruction of property by fire are all governmental duties, without question, and hence there is no municipal liability for torts in connection therewith, or at least not unless under peculiar circumstances.[2]

On the other hand, certain duties and functions are well settled as being corporate and not governmental, including the construction and maintenance of *municipal water and light plants,*[3] the construction and repair of *sewers,*[4] the management of private property owned by the municipality,[5] etc. Furthermore, any business conducted by the municipality for profit involves the exercise of corporate rather than governmental functions.[6] And even if a duty is primarily a governmental one, it is converted into a corporate one where it is being *conducted for profit.*[7]

There is considerable conflict in regard to whether certain duties are governmental or corporate. This includes the cleaning of streets,[8] the construction and maintenance of public improvements in general,[9] etc.[10]

1. § 2642, *post.*

2. Smith v. Sewerage Com'rs, 146 Ky. 562, 143 S. W. 3.

In controlling the work of elevating or depressing railroad tracks to abolish grade crossings, the municipality acts for the general public welfare and will not be held liable for negligence while so engaged. Liermann v. Milwaukee, 132 Wis. 628, 113 N. W. 65, 13 L. R. A. (N. S.) 253, and see Osburn v. Chicago, 105 Ill. App. 217.

3. §§ 2680-2684, *post.*

4. § 2695, *post.*

5. §§ 2672-2688, *post.*

6. § 2673, *post.*

7. §§ 2672-2674, *post.*

8. § 2636, *post.*

9. §§ 2634, 2635, *post.*

10. Imposed duties for the neglect of which a municipality is liable in damages, are defined in Kansas as such as are superadded to governmental functions, such as the duty to maintain its streets in a safe condition for public travel, or to furnish a reasonably safe condition for public travel, or to furnish a reasonably safe place in which its employees work. Edson v. Olathe, 81 Kan. 328, 105 Pac. 521, rehearing denied in 82 Kan. 4, 107 Pac. 539. But generally it is held in other states that there is no municipal liability for failure to furnish a safe

The liability for *defective streets*, and the nature of the duty as governmental or corporate, is the subject of the next chapter.

§ 2626. Same—imposed duties not distinguishable from those voluntarily assumed.

In determining the question of municipal liability for torts, it is immaterial whether the governmental duty was *expressly* imposed on the municipality by statute or charter provisions.[11] Thus, it has been said, in Massachusetts, that "towns *must* maintain pounds, guideposts, and burial grounds; and *may* establish and maintain hospitals, workhouses, or almshouses. * * * In all of these cases, the duty is imposed or the authority conferred for the general benefit. The motive and the object are the same, though in some instances, the legislature determines finally the necessity or expediency, and in others it leaves the necessity or expediency to be determined by the towns themselves. But when determined, and when the service has been entered upon, *there is no good reason why a liability to a private action should be imposed when a town voluntarily enters*

place to work where a governmental duty is involved. § 2600, *post*.

11. Curran v. Boston, 151 Mass. 505, 508, 24 N. E. 781, 8 L. R. A. 243, 21 Am. St. Rep. 465; Fisher v. Boston, 104 Mass. 87, 6 Am. Rep. 196.

The fact that the municipal corporation accepts a grant of governmental duties does not render it liable for an omission to perform, or a negligent performance, of them. Udkin v. New Haven, 80 Conn. 291, 296, 68 Atl. 253.

Duties imposed by charter. "We find it difficult to reconcile the view, that the mere acceptance of a municipal charter is to be considered as conferring such a benefit upon the corporation as will render it liable to private action for neglect of duties thereby imposed upon it, with the doctrine that the purpose of the creation of municipal corporations by the State is to exercise a part of its powers of government—a doctrine universally recognized, and which has nowhere been more strongly asserted than by the Supreme Court of the United States, in the opinions delivered by Mr. Justice Hunt in United States v. Railroad Co., 17 Wall. 322, 329 and by Mr. Justice Clifford in Laramie v. Albany, 92 U. S. 307, 308." Hill v. Boston, 122 Mass. 344, 380.

upon such a beneficial work, and withheld when it performs the service under the requirement of an imperative law." [12]

§ 2627. Same—border line cases.

There has been much contention where two duties are more or less involved, the one a governmental duty as to which there is no liability, and the other a corporate duty as to which there is municipal liability. Take this case, for example: Suppose a city hall is occupied in part by officers whose duties are strictly governmental and in part by officers whose duties relate entirely to the business management of private property of the municipality from which an income is received, and a person coming into the building in injured, while in the elevator, by the negligence of the elevator pilot or because of defects in the elevator. Is the municipality liable? No rule is laid down for the solution of such a legal question, although it would undoubtedly be held in those states where municipalities are held not liable for negligence connected with the city hall, that the municipality was not liable without regard to where the person injured was going or whether the building was used principally for governmental or for corporate purposes.[13] In Minnesota, the city of St. Paul was held not liable for the negligence of its elevator pilot, or for the negligent construction of the entrance to an elevator, where the elevator was in a courthouse and city hall, merely on the theory that the duty of providing and maintaining a city hall was a governmental one.[14] So, in New York, a city was held not liable for injuries in a police station caused wholly by the negligence of the elevator pilot in leaving the elevator door open when the car had been removed to another floor,[15] but there is much force in the dissenting opinion of Justice Haight in that case in which he con-

12. Tindley v. Salem, 137 Mass. 471, 50 Am. Rep. 289.

13. § 2674, *post*.

14. Snider v. St. Paul, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151.

15. § 2431, *ante*, vol. 5.

tended that the elevator pilot was not discharging a governmental function, although the elevator enabled the policeman to ride up and down, and that inasmuch as the pilot was not a policeman and had no duty to perform which pertained to a governmental function, the city should be held liable.[16]

In Pennsylvania, a comparatively recent decision holds a municipality liable for injuries resulting from the negligence of an elevator pilot, in a city hall, where the injured person was on his way to attend court in the building, without in any way considering the rule adopted in some states that courthouses and city halls are buildings for governmental functions so that the municipality is not liable for torts in connection therewith.[17] And in Wisconsin a municipality has been held liable for negligence in the course of construction of a cistern for the use of the fire department, for protection against fire, where it was being done through the municipality's own private agencies and not through the fire department or its officers, or other officers of the municipality whose duty it was to perform such work.[18] In Rhode Island, a municipality was held liable for negligence in the course of constructing a city hall, resulting in an injury to an employee working thereon, without in any way discussing whether the building of a city hall was or was not a governmental duty.[19]

Another illustration of mixed duties is afforded by a recent case in Colorado where a pedestrian tripped on a water hose at the intersection of streets in Denver where city employees were engaged in flushing a storm sewer. It was contended that the employees were engaged in a governmental act, the preservation of the public health. The court held, however, that the flushing of the

16. Dissenting opinion in Wilcox v. Rochester, 190 N. Y. 137, 82 N. E. 1119, 17 L. R. A. (N. S.) 741, rev'g 99 N. Y. S. 1020, 114 App. Div. 734.

17. Fox v. Philadelphia, 208 Pa. 127, 57 Atl. 356, 65 L. R. A. 214.

18. Mulcairns v. Jamesville, 67 Wis. 24, 32, 29 N. W. 565.

19. McCaughey v. Tripp, 12 R. I. 449.

sewer, "though done to preserve health and comfort, was not primarily in the performance of the public duty relating to the preservation of health, but was done in the discharge of the general duty of caring for the streets" and hence the city was liable.[20]

On the border line, also, the Court of Appeals of New York held that the city of New York was not liable for the act of a bridge policeman, also under the duty of closing doors on a city railway over the Brooklyn Bridge, in arresting one who had assaulted the officer in a mixup connected with getting into the car, on the theory that although the latter be conceded to have acted as a servant in closing the car door yet in putting the passenger under arrest he was acting in his character of policeman and not within the scope of any employment as an agent or servant of the municipality.[21]

Another interesting case arose in Minnesota where horses on a bridge were frightened by the blowing of the steam whistle on the city waterworks building, in order to notify union men and city employees that their workday was over. It was contended that the city was not liable because in locating and blowing the whistle the city was exercising one of its governmental powers in the establishment and maintenance of its fire department and fire alarm system, but the federal court, per Justice Sanborn, held (1) that if the whistle had been blown in the exercise of the power to protect against fires the city would not be exempt from liability because the blowing of it was a public nuisance, where within about a hundred feet from a bridge, and was unnecessary, and (2) that the blast of the whistle was not blown by the city in the exercise of its power to protect its inhabitants against fire.[22]

Other cases of this character are noted elsewhere,[23]

20. Per Justice Musser in Denver v. Maurer, 47 Colo. 209, 106 Pac. 875.

21. Woodhull v. New York, 150 N. Y. 450, 44 N. E. 1038, rev'g on this point 28 N. Y. S. 120, 76 Hun, 390.

22. Winona v. Botzet, 169 Fed. 321, 332-334, 94 C. C. A. 563.

23. §§ 2431, 2432, *ante*, vol. 5; § 2643, *post*.

including liability for defective *hydrants* or acts in connection therewith.[24]

§ 2628. Legislative, judicial and discretionary duties distinguished from ministerial duties.

As a branch of the rule of nonliability of municipalities for torts in connection with the exercise of *governmental* functions, is the rule which distinguishes (1) ministerial duties from (2) legislative, judicial and discretionary functions. Where the duty is not governmental, but ministerial and absolute, as distinguished from legislative, discretionary, judicial or *quasi* judicial, the municipal corporation is liable for damages arising because of omission to perform it, or, for negligence in its execution.[25] However, the line between ministerial and legislative or judicial duties, is sometimes difficult to draw.[26] "The distinction would seem to necessarily rest upon a discretion had by the city to discharge or not discharge the duty because where the duty is absolute and imperative and the city has no discretion, the duty is ministerial, its discharge not depending on the exercise of judgment, but being required by law. It is by force of this reason for the distinction between ministerial and judicial duties that a duty which is judicial before the municipality has entered upon the performance of it, frequently becomes, when its performance is entered upon, ministerial. The municipality has a discretion to do or not to do the work; the duty is, therefore,

24. § 2683, *post*.

25. Cummins v. Seymour, 79 Ind. 491, 41 Am. Rep. 618; Stackhouse v. Lafayette, 26 Ind. 17, 89 Am. Dec. 450; Roll v. Indianapolis, 52 Ind. 547; Kiley v. Kansas City, 87 Mo. 103, 56 Am. Rep. 443; Russell v. Columbia, 74 Mo. 480, 490, 41 Am. Rep. 325. Compare with Blumb v. Kansas City, 84 Mo. 112; Bassett v. St. Joseph, 53 Mo. 290, 14 Am. Rep. 446; Halpin v. Kansas City, 76 Mo. 335; Gibson v. Huntington, 38 W. Va. 177, 18 S. E. 447, 22 L. R. A. 561, 45 Am. St. Rep. 853.

When powers are imperative or discretionary. Leavenworth & D. M. R. R. v. Platte Co., 42 Mo. 171; St. J. & D. C. Ry. Co. v. Buchanan Co., 39 Mo. 485.

26. Steinmeyer v. St. Louis, 3 Mo. App. 256, 262.

judicial up to the time that it is determined to do the work; but when the work is ordered the law often requires that it be done in a particular manner, or that it be not done in a certain way, and, therefore, after the work is ordered, the duty of the municipality to do the work in the manner required and not to do it in the way forbidden, is ministerial. The municipality as to these two things has no discretion; as to them its judgment is superceded, controlled and directed by the requirements of the law, and its duty is to comply with these requirements."[27] And a municipal act is not necessarily legislative because it relates in a general way to a function of government, but if it substantially is of a local or corporate nature it will be classed as ministerial.[27a]

There is, however, a line of authorities which hold that municipalities are liable for the negligent performance only of such ministerial public duties as are imposed upon them by law,[28] but not for the negligent performance of assumed duties which are permissive only; but this rule is rejected in other states on the ground that the performance of both duties is for the same general purpose, *i. e.*, the general welfare of the community.[29]

As to the second class, *i. e.*, judicial, legislative and discretionary functions, the law is well settled, the only difficulty being, sometimes, in its application. Judicial and legislative functions are discretionary, and there is no liability for failure to exercise them or errors of

27. Per Hall, J., in Young v. Kansas City, 27 Mo. App. 101.

27a. Brightwell v. Kansas City, 153 Mo. App. 519, 134 S. W. 87.

28. The ministerial duty must be imposed by law. "There must, in every case, be a duty, since where there is no duty there can be no negligence." Thus, a municipality is under no duty "to protect the property of a citizen from injury from the walls of an adjacent building which the owner's negligence has permitted to become dangerous." Anderson v. East, 117 Ind. 126, 128, 129, 19 N. E. 726, 2 L. R. A. 712, 10 Am. St. Rep. 35.

29. Bowden v. Kansas City, 69 Kan. 587, 593, 77 Pac. 573, 66 L. R. A. 181, 105 Am. St. Rep. 187; Rhobidas v. Concord, 70 N. H. 90, 111, 47 Atl. 82, 51 L. R. A. 381, 85 Am. St. Rep. 604.

§ 2626, *ante*.

judgment in the exercise thereof.[30] When the municipal council acts in its legislative capacity for governmental purposes, the municipality is no more liable than the state would be for similar action taken by the legislature.[31] Likewise, a municipality is not liable for a failure to exercise powers intrusted to the judgment and *discretion* of its proper authorities, or for errors committed in their exercise.[32]

30. Local affairs are generally entrusted to local authorities while general affairs are left to the state legislature, although municipalities are given certain limited governmental powers, to be exercised on behalf of the state for the public welfare; and the manner and extent to which legislative and governmental powers so delegated for the public good are to be exercised, must rest, in a large measure, in their judgment and discretion, and, acting as state instrumentalities they cannot be held liable to individuals for a defect or negligence in the execution of such powers, unless a right of action is given by statute. Toledo v. Cone, 41 Ohio St. 149, 160.

"Legislative power, whether held by the law making authority of the state, or by municipal bodies, is in its nature governmental and discretionary" so that ordinarily no cause of action arises. Burford v. Grand Rapids, 53 Mich. 98, 100, 18 N. W. 571, 51 Am. Rep. 105.

31. Hershberg v. Barbourville, 142 Ky. 60, 133 S. W. 985.

32. *Alabama.* Dargan v. Mobile, 31 Ala. 469, 70 Am. Dec. 505.

Connecticut. Judd v. Hartford, 72 Conn. 350, 44 Atl. 510.

Indiana. Vaughtman v. Waterloo, 14 Ind. App. 649, 43 N. E. 476; Stackhouse v. Lafayette, 26 Ind. 17, 89 Am. Dec. 450; Brinkmeyer v. Evansville, 29 Ind. 187.

Maine. Kelley v. Portland, 100 Me. 260, 61 Atl. 180.

Minnesota. Claussen v. Luverne, 103 Minn. 491, 115 N. W. 643, 15 L. R. A. (N. S.) 698.

Missouri. Carroll v. St. Louis, 4 Mo. App. 191.

North Carolina. Rosenbaum v. Newbern, 118 N. C. 83, 24 S. E. 1, 32 L. R. A. 123; Hill v. Charlotte, 72 N. C. 55, 21 Am. Rep. 451.

But see Gordon v. Omaha, 71 Neb. 570, 99 N. W. 242, the authority of which is doubtful.

Failure of municipality to exercise discretionary powers will not render it liable. Wilcox v. Chicago, 107 Ill. 334, 47 Am. Rep. 434; Robinson v. Evansville, 87 Ind. 334, 44 Am. Rep. 770; Wheeler v. Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368.

City not liable to private action for damages resulting from a sunken hulk in the harbor because of failure to exercise the power conferred upon it, to clear out the harbor. Goodrich v. Chicago, 20 Ill. 445. In this case, Caton, C. J., observed (p. 448): "If the city authorities had undertaken

This applies, *inter alia,* to the enforcement of police regulations.[33] Thus, there is no municipal liability for omission to keep the peace or failure to exercise the police power generally; for neglect to make public improvements, such as to grade streets, construct sewers, drains, etc., improve harbors, maintain market houses, public baths, hospitals and eleemosynary institutions.[34] And a municipality may exercise its discretion to grade and prepare for use only the wagon roadway in part of a street, and it need not grade and improve the entire width of the street nor build sidewalks thereon, and therefore is not liable in damages for not having done so.[35]

Other examples of nonliability, based on this ground, besides the failure to order public improvements,[36] are the failure to abate nuisances,[37] the granting, refusal or revocation of licenses,[38] and the failure to enact or enforce ordinances.[39]

§ 2629. Same—judicial acts.

A municipality is not liable for imprisonment because of an irregular, erroneous or even void judgment, since errors in judgment on the part of officers exercising judi-

to remove this hulk, and in so doing had carelessly left it in an exposed position, by reason whereof the plaintiff's steamer had run against it and was injured, they might well have claimed damages for such negligence. But until they had assumed the responsibility of removing the wreck we cannot hold that they were bound to remove it, any more than to remove the sand bar at the mouth of the harbor, or to remove drift wood from the North Branch ten miles above the city."

Failure to properly maintain a reservoir "to supply water in case of fire," rule applied to. Grant v. Erie, 69 Pa. St. 420, 8 Am. Rep. 272.

33. Henkel v. Detroit, 49 Mich. 249, 13 N. W. 611, 43 Am. Rep. 464.

§§ 2630, 2631, *post.*

34. Woods v. Kansas City, 58 Mo. App. 272, 279; Young v. Kansas City, 27 Mo. App. 101; Hinds v. Marshall, 22 Mo. App. 208.

35. Ely v. St. Louis, 181 Mo. 723, 729, 730, 81 S. W. 168.

§ 2742, *post.*

36. §§ 2634, 2735, 2745, 2691, *post.*

37. § 2641, *post.*

38. § 2632, *post.*

39. § 2631, *post.*

cial functions do not render a municipality liable.[40] An *error of a court* in rendering judgment is an exercise of judicial power, for which a municipality is not liable, at least where no corruption or malice is imputed.[41]

§ 2630. Same—exercise of police power.

The law is well settled that the police regulations of a municipality are not made or enforced in the interests of the local corporation in its private capacity but in the interests of the public, and that a municipal corporation is not liable for the acts of its officers in *attempting to enforce police regulations.*[42] This applies not only to policemen but to any other officers, including health officers and the like, who may attempt to enforce police regulations. And police regulations include the making and enforcement of all such laws, ordinances and regulations as pertain to the comfort, safety, health, convenience, good order and welfare of the public, and all persons officially charged with the execution and enforcement of such police ordinances and regulations are, *quoad hoc,* police officers.[43]

40. Bartlett v. Columbus, 101 Ga. 300, 28 S. E. 599, 44 L. R. A. 795, and note.

41. Thus, where a police judge renders an erroneous judgment in the prosecution of a violation of a municipal ordinance in a case in which he has undoubted jurisdiction, the city is not liable. Crosdale v. Cynthiana, 21 Ky. L. Rep. 36, 50 S. W. 977; Bartlett v. Columbus, 101 Ga. 300, 28 S. E. 599, 44 L. R. A. 795.

42. *Alabama.* Dargan v. Mobile, 31 Ala. 469, 70 Am. Dec. 505.

Arkansas. Trammell v. Russellville, 34 Ark. 105, 36 Am. Rep. 1.

Georgia. Cook v. Macon, 54 Ga. 468; Harris v. Atlanta, 62 Ga. 290.

Illinois. Evans v. Kankakee, 231 Ill. 223, 227, 83 N. E. 101; Blake v. Pontiac, 49 Ill. App. 543; Culver v. Streator, 130 Ill. 238, 22 N. E. 810, 6 L. R. A. 270.

Iowa. Calwell v. Boone, 51 Ia. 687, 2 N. W. 614, 33 Am. Rep. 154.

Kansas. Peters v. Lindsborg, 40 Kan. 654, 20 Pac. 490.

Missouri. Worley v. Columbia, 88 Mo. 106.

Pennsylvania. Elliott v. Philadelphia, 75 Pa. 347, 15 Am. Rep. 591.

Negligence of officers in the exercise of police powers will not render the city liable. Stinnett v. Sherman (Tex. Civ. App.), 43 S. W. 847; Clarke v. Chicago, 159 Ill. App. 20.

43. Culver v. Streator, 130 Ill 238, 22 N. E. 810, 6 L. R. A. 270. § 889, *ante*, vol. 3.

If an officer or agent of a municipality is engaged in the execution of police powers or regulations,—the term police power being used in its broad sense as extending to all matters affecting the peace, order, health, morals, convenience, comfort and safety of its citizens,—[44] the municipality is not liable for their torts in connection therewith, unless such liability is imposed by statute.[45] For instance, where a municipality, in the exercise of its police power, employs a person to cut the weeds and grass in an alley, the municipality is not liable for his negligence in operating the mower, resulting in personal injuries.[46]

§ 2631. Same—failure to pass or to enforce ordinances.

The enactment of ordinances is a governmental function as is the enforcement thereof.[47] The "failure to pass a needful law or ordinance is plainly the omission by the state, or city as an agency thereof, of a public

44. § 889, *ante*, vol. 3.

45. Police power, not liable for improper or negligent exercise thereof.

Illinois. Robertson v. Marion, 97 Ill. App. 332.

Indiana. Cummins v. Seymour, 79 Ind. 491, 41 Am. Rep. 618.

Kansas. Caldwell v. Prunelle, 57 Kan. 511, 46 Pac. 949.

Michigan. Pontiac v. Carter, 32 Mich. 164.

Pennsylvania. Betham v. Philadelphia, 196 Pa. 302, 46 Atl. 448.

46. McFadden v. Jewell, 119 Ia. 321, 93 N. W. 302, 60 L. R. A. 401, 97 Am. St. Rep. 321.

47. "Making and enforcing ordinances regulating the use of streets brings into exercise governmental, and not corporate, powers, and the authorities are well agreed that for a failure to exercise legislative, judicial, or executive powers of government there is no liability." Failure to enforce ordinances as to the use of streets might be distinguished from the failure to enforce other ordinances in the exercise of police power, on the ground that the city is under obligation to maintain its streets in safe condition; yet, as seen above, even in cases of this sort the liability for failure to enforce ordinances is usually denied. When this element of the obligation to provide for the safety of its streets or other public premises is absent, the exemption of the city for failure to enforce ordinances, unless it is taken away by statute, seems to be established by the overwhelming weight of authority. Jones v. Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294.

governmental duty, for which no action lies."[48] And a municipality is not liable either for failure to enact ordinances or for failure to enforce ordinances which have been enacted,[49] although the Maryland courts hold

48. Jones v. Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294.

Horse racing on streets, not liable for failure to prohibit by ordinance. Marth v. Kingfisher, 22 Okla. 602, 98 Pac. 436, 18 L. R. A. (N. S.) 1238.

49. *Colorado.* Veraguth v. Denver, 19 Colo. App. 473, 76 Pac. 539.

Georgia. Tarbutton v. Tennille, 110 Ga. 90, 35 S. E. 282; Collins v. Savannah, 77 Ga. 745; Rivers v. Augusta, 65 Ga. 376, 38 Am. Rep. 787; Forsyth v. Atlanta, 45 Ga. 152, 12 Am. Rep. 576.

Illinois. Odell v. Schroeder, 58 Ill. 353.

Indiana. Wheeler v. Plymouth, 116 Ind. 158, 18 N. E. 532, 9 Am. St. Rep. 837; Fitch v. Seymour Water Co., 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258; Faulkner v. Aurora, 85 Ind. 130, 44 Am. Rep. 1; Lafayette v. Timberlake, 88 Ind. 330.

Iowa. Lahner v. Williams, 112 Ia. 428, 84 N. W. 507; Easterly v. Irwin, 99 Ia. 694, 68 N. W. 919; Ball v. Woodbine, 61 Ia. 83, 15 N. W. 846.

Kentucky. Arnold v. Stanford, 113 Ky. 852, 24 Ky. L. Rep. 626, 69 S. W. 726.

Louisiana. Compare New Orleans v. Peyroux, 6 Mart. (N. S. La.) 155.

Michigan. Henkel v. Detroit, 49 Mich. 249, 13 N. W. 611, 43 Am. Rep. 464.

Missouri. Ryan v. Kansas City, 232 Mo. 471, 483, 134 S. W. 566, 985; Moran v. Pullman Car Co., 134 Mo. 641, 651, 36 S. W. 659, 33 L. R. A. 755, 56 Am. St. Rep. 543; Sallee v. St. Louis, 152 Mo. 615, 54 S. W. 463; Butz v. Cavanagh, 137 Mo. 503, 38 S. W. 1104, 59 Am. St. Rep. 504; Harman v. St. Louis, 137 Mo. 494, 38 S. W. 1102; Moore v. Cape Girardeau, 103 Mo. 470, 476, 15 S. W. 755.

North Carolina. Hull v. Roxboro, 142 N. C. 453, 55 S. E. 351.

Ohio. Mansfield v. Brister, 76 Ohio St. 270, 81 N. E. 631, 10 L. R. A. (N. S.) 806; Custer v. New Philadelphia, 20 Ohio Cir. Ct. R. 177, 11 Ohio Cir. Dec. 9.

Oklahoma. Marth v. Kingfisher, 22 Okla. 602, 98 Pac. 436, 18 L. R. A. (N. S.) 1238.

Pennsylvania. Smith v. Selinsgrove, 199 Pa. 615, 49 Atl. 213.

Texas. Stephenville v. Bower, 29 Tex. Civ. App. 384, 68 S. W. 833.

United States. Fowle v. Alexandria, 3 Peters (U. S.) 398, 7 L. Ed. 719; Clark v. Atlantic City, 180 Fed. 598.

"Unless there be a valid contract creating, or a statute declaring, the liability, a municipal corporation is not bound to provide for and secure a perfect execution of its by-laws, and it is not responsible in a civil action for the neglect of duty on the part of its officers in respect to

the contrary.[50] But this general statement has been deemed misleading by that eminent law writer, the late Judge Thompson,[51] in so far as it applies to *corporate* as distinguished from *governmental* functions.

This rule of nonliability applies although the charter makes it the duty of the mayor, councilmen and chief of police to enforce diligently all ordinances the council may enact.[52] So it is also held that there is no liability

their enforcement, though such neglect results in injuries to private persons, which would otherwise not have happened." Municipalities "do not become insurers of the property within their corporate limits from destruction by reason of the neglect or refusal of their officers and agents to enforce their ordinances." Hines v. Charlotte, 72 Mich. 278, 283, 284, 40 N. W. 333, 1 L. R. A. 844.

No liability for failure to enforce ordinance as to storing inflammable oil. Roberts v. Cincinnati, 5 Ohio Dec. 361.

City not liable for failure to exercise its charter power to abate nuisances nor for failure to enforce ordinance forbidding nuisances unless by such failure a public nuisance is created, as by rendering streets unsafe and dangerous. Miller v. Newport News, 101 Va. 432, 44 S. E. 712, and see § 2641, *post*.

Duty imposed by statute. Baltimore v. Marriott, 9 Md. 160, 66 Am. Dec. 326; Pittsburgh v. Grier, 22 Pa. St. 54, 60 Am. Dec. 65.

Repeal of franchise ordinance. A municipality may repeal a street railroad franchise ordinance without becoming liable in any manner, where it is not concerned in its private capacity in such franchise. Edson v. Olathe, 81 Kan. 328, 105 Pac. 521, rehearing denied in 82 Kan. 4, 107 Pac. 539.

50. In Maryland, it is held that merely passing ordinances for the public good and to protect persons and property, is not sufficient, but the municipality must in addition make a vigorous attempt to enforce them. Hagerstown v. Klotz, 93 Md. 437, 49 Atl. 836, 54 L. R. A. 940, 86 Am. St. Rep. 437 (person knocked down by bicycle), and cases cited; State v. Miller, 194 Fed. 775, 781; Havre de Grace v. Fletcher, 112 Md. 562, 77 Atl. 114.

When a municipal corporation has powers conferred upon it to be exercised for the public good, the exercise of the powers is not merely discretionary, but imperative. The municipal corporation will be liable for a failure to enforce them to any one receiving damages therefrom, who is himself not in fault. Cochrane v. Frostburg, 81 Md. 54, 31 Atl. 703, 27 L. R. A. 728, 48 Am. St. Rep. 479. See also, Baltimore v. Merriott, 9 Md. 160, 66 Am. Dec. 326.

51. Thomp., Neg., vol. 5, § 5789.

52. Veraguth v. Denver, 19 Colo. App. 473, 76 Pac. 539.

arising from the fact that an ordinance has been suspended.[53] Likewise, there is generally no liability even though the ordinances relate to the use of streets, provided the failure to pass or enforce an ordinance does not result in an actionable defect in a street or the creation of a nuisance.[54]

To *illustrate,* municipal liability is denied for failure to enforce such ordinances as the following: ordinance forbidding the unlawful use of the streets, as by *coasting,* (unless such use amounts to the maintenance of a

53. Fifield v. Phoenix, 4 Ariz. 283, 36 Pac. 916, 24 L. R. A. 430 (ordinance forbidding discharge of fireworks); Hill v. Charlotte, 72 N. C. 55, 21 Am. Rep. 451 (ordinance forbidding firecrackers).

54. The rule that a municipal corporation is not liable for the non-exercise of its legislative powers, or for failure to enforce its ordinances, should be reasonably applied. If the city permits something to exist on its *streets* and *public ways*, by license or otherwise, which constitutes a nuisance and which may seriously interfere with a reasonable use of such ways by travelers in the ordinary modes, no sound reason can be advanced to excuse municipal liability in event of damage directly resulting from such nuisance. This would constitute a sound exception to the rule under consideration, which exception is recognized by the decisions. Thus, in a New York case, it was held that a city is liable for injury to property by an explosion of fireworks constituting a dangerous public nuisance, when the display was made under a permit given by the mayor of the city acting under authority of a city ordinance. Speir v. Brooklyn, 139 N. Y. 6, 34 N. E. 727, 21 L. R. A. 641, 36 Am. St. Rep. 664.

Prior to this decision the same court held that the granting of a license, even though authorized by ordinance, to an individual, permitting him to keep wagons on the highway, and a person passing under one of them was damaged by its falling upon him because of the collision of the wagon in question with an ice wagon properly passing along the street, would render the city liable. The court found that the wagons in the street constituted a public nuisance maintained by the city, and that the city could not thus make use of its legislative power. Cohen v. New York, 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506. Approved in Speir v. Brooklyn, *supra.* The theory is that the duty as to nuisances "never ceases and it can not be avoided by the passing of ordinances or the failure to pass them." Landau v. New York, 180 N. Y. 48, 72 N. E. 631, 105 Am. St. Rep. 709.

public nuisance);[55] ordinance prohibiting swine, cattle or other animals from running at large;[56] ordinance as to erection of wooden buildings within certain limits;[57] ordinance forbidding the use of *fire works* within the corporate limits;[58] ordinance directing the city to remove obstructions in a navigable river.[59] Likewise the same rule has been enforced with respect to failure to enact and enforce ordinances to prevent *riding of bicycles on sidewalks.*[60]

55. Lafayette v. Timberlake, 88 Ind. 330; Faulkner v. Aurora, 85 Ind. 130, 44 Am. Rep. 1; Burford v. Grand Rapids, 53 Mich. 98, 18 N. W. 571, 51 Am. Rep. 105.

§ 2771, *post.*

56. Collins v. Savannah, 77 Ga. 745; Rivers v. Augusta, 65 Ga. 376, 38 Am. Rep. 787; Levy v. New York, 1 Sandf. (N. Y.) 465; Kelley v. Milwaukee, 18 Wis. 83.

Killing vicious dogs. The adoption of an ordinance requiring the marshal and police officers of a municipality to take up or kill vicious dogs found running at large in the street is the exercise of a governmental power and in the absence of statute the municipality is not liable for failure to enforce such ordinance. Addington v. Littleton, 50 Colo. 623, 115 Pac. 896, 34 L. R. A. (N. S.) 1012.

57. Harman v. St. Louis, 137 Mo. 494, 38 S. W. 1102; Forsyth v. Atlanta, 45 Ga. 152, 12 Am. Rep. 576.

58. *Arizona.* Fifield v. Phoenix, 4 Ariz. 283, 36 Pac. 916, 24 L. R. A. 430.

Iowa. Ball v. Woodbine, 61 Ia. 83, 15 N. W. 846, 47 Am. Rep. 805.

Massachusetts. Morrison v. Lawrence, 98 Mass. 219.

North Carolina. Hill v. Charlotte, 72 N. C. 55, 21 Am. Rep. 451; Love v. Raleigh, 116 N. C. 296, 21 S. E. 503, 28 L. R. A. 192.

Ohio. Robinson v. Greenville, 42 Ohio St. 625, 630, 51 Am. Rep. 857.

Pennsylvania. McDade v. Chester, 117 Pa. St. 414, 12 Atl. 421, 2 Am. St. Rep. 681; Norristown v. Fitzpatrick, 94 Pa. St. 121, 39 Am. Rep. 771.

West Virginia. Bartlett v. Clarksburg, 45 W. Va. 393, 31 S. E. 918, 43 L. R. A. 295, 72 Am. St. Rep. 817.

Wisconsin. See Aron v. Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733.

§ 2660, *post.*

59. Coonley v. Albany, 10 N. Y. S. 512, 57 Hun, 327.

60. Tarbutton v. Tennille, 110 Ga. 90, 35 S. E. 282; Millett v. Princeton, 167 Ind. 582, 79 N. E. 909; Rogers v. Binghamton, 92 N. Y. S. 179, 101 N. Y. App. Div. 352, aff'd in 186 N. Y. 595, 79 N. E. 1115; Walker v. New York, 95 N. Y. S. 121, 107 N. Y. App. Div. 351; Bryant v. Orangeburg, 70 S. C. 137, 49 S. E. 229; Jones v.

§ 2632. Same—granting, refusing or revoking license.

A municipality is not liable in damages for the wrongful refusal of its officer to issue a license,[61] at least if the granting of a license is discretionary.[62] Likewise, a municipality is not liable "for losses consequent on it having misconstrued the extent of its powers in granting a license which it had not authority to grant" without taking a bond which "its own ordinances had been supposed to require, and which might protect those who transacted business with the person acting under the license."[63] So a municipality is not liable in damages for *revoking a license,* even where without any just cause,[64] especially where the revocation is void.[65] And where a municipality has granted a permit to erect a manufactory on a certain lot, with the knowledge that steam power would be necessary to run the machinery, the modification of such permit after the building was erected, by forbidding the use of a steam engine therein, does not make the municipality liable, since it may abate a nuisance.[66]

In granting a franchise to a street railway company to use the streets of a municipality, it acts in a purely governmental capacity,[67] and this is equally true as to the repealing of a franchise to use the streets.[68]

However, in an early case in Tennessee, a municipality

Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294.

61. Butler v. Moberly, 131 Mo. App. 172, 177, 110 S. W. 682.

62. Irving v. Highlands, 11 Colo. App. 363, 53 Pac. 234; Butler v. Moberly, 131 Mo. App. 172, 110 S. W. 682.

63. Per Chief Justice Marshall in Fowle v. Alexandria, 3 Pet. (U. S.) 398, 7 L. Ed. 719, license to auctioneer, no bond, plaintiff injured by fraudulent conduct of auctioneer.

64. Ison v. Griffin, 98 Ga. 623, 25 S. E. 611 (liquor license); Claussen v. Luverne, 103 Minn. 491, 496, 115 N. W. 491, 15 L. R. A. (N. S.) 698.

See § 1008, *ante*, vol. 3.

65 Lerch v. Duluth, 88 Minn. 295, 92 N. W. 1116.

66. Wood v. Hinton, 47 W. Va. 645, 35 S. E. 824.

67. Edson v. Olathe, 81 Kan. 328, 331, 105 Pac. 521.

68. Edson v. Olathe, 81 Kan. 328, 105 Pac. 521.

§ 1662, *ante*, vol. 4.

was held liable for the loss of property by an explosion of gunpowder which resulted from the lunacy of a druggist to whom the common council had granted a license with knowledge at the time that he was insane.[69]

In Massachusetts, it is held that a licensing board, "whether a special commission, or the mayor and aldermen or the selectmen, do not act as the agents of the city or town, but as public officers specially designated in that behalf, and, in the absence of any statute to the contrary, the city or town is not answerable for their acts as such officers."[70]

§ 2633. Defects in plan of construction.

There is a more or less apparent conflict in the decisions in regard to the liability of municipal corporations for injuries resulting from defective plans adopted by them in constructing public buildings or improvements, including streets, sidewalks, sewers, etc. The laws as to liability for defective plans for sewers is treated hereafter in another section.[71] Some of the decisions seem to hold flatly, without qualification, that there is no liability for defects in plans.[72] Immunity from liability

69. Cole v. Nashville, 4 Sneed (Tenn.) 162.

70. McGinnis v. Medway, 176 Mass. 67, 68, 57 N. E. 210.

71. §§ 2693, 2694, *post*.

72. Augusta v. Little, 115 Ga. 124, 41 S. E. 238; Urquhart v. Ogdensburg, 91 N. Y. 67, 71, 43 Am. Rep. 91, 97 N. Y. 238; Monk v. New Utrecht, 104 N. Y. 552, 11 N. E. 268; Owen v. New York, 126 N. Y. S. 38, 141 App. Div. 217, 221; Roch v. Ogdensburg, 30 N. Y. S. 450, 80 Hun, 467; Rhinelander v. Lockport, 14 N. Y. S. 850, 60 Hun, 582.

Plan for sidewalk. In deciding to construct a very smooth sidewalk, a municipality acts in a judicial capacity and is not liable to one injured by slipping on the sidewalk. Austin v. Dunkirk, 124 N. Y. S. 248, 140 App. Div. 44.

Comfort stations, rule applied to. Pitman v. New York, 125 N. Y. S. 941, 141 App. Div. 670.

In Connecticut, under the statute, the neglect on which an action is founded must be a neglect of *repair*; and a defect in the plan upon which the highway was constructed is not within the statute. Hoyt v. Danbury, 69 Conn. 341, 37 Atl. 1051.

In Michigan, the early cases denied municipal liability for defects in plans. Detroit v. Beckman, 34 Mich. 125, 22 Am. Rep. 507; Lansing v. Toolan, 37 Mich.

is sometimes placed on the ground that municipalities are in the exercise of legislative power in the adoption

152. See also Shippy v. Au Sable, 65 Mich. 494, 32 N. W. 741; Davis v. Jackson, 61 Mich. 530, 28 N. W. 526. But later decisions, rendered since the enactment of the statute making municipalities liable for defects in streets, seem to have overruled the earlier decisions. Malloy v. Walker Tp., 77 Mich. 448, 43 N. W. 1012, 6 L. R. A. 695, and see Sebert v. Alphena, 78 Mich. 165, 43 N. W. 1098. And it has been held that the statute applies to defect of plan. Schrader v. Port Huron, 106 Mich. 173, 175, 63 N. W. 964. In another case, a distinction was drawn between governmental and corporate functions, and it was held, as to the building of a market house, that a "city must be held to the same degree of care, not only in the construction, but in the plan of the construction itself, as would a private corporation or an individual." Barron v. Detroit, 94 Mich. 601, 606, 54 N. W. 273, 19 L. R. A. 452, 34 Am. St. Rep 366.

In Missouri, if "an injury results from a danger inherent in the plan adopted, the city is not liable. But if the danger has arisen from negligent construction or maintenance of the place, it is liable." Gallagher v. Tipton, 133 Mo. App. 557, 113 S. W. 674, followed in Hays v. Columbia, 159 Mo. App. 431, 141 S. W. 3. See also Jordan v. Hannibal, 87 Mo. 673, 675.

"There are, ordinarily, many preliminary questions to be settled before the details of any public work (whether it be of purely local or general interest) can be arranged. These are questions which call into force the governmental powers of the corporations. They concern, ordinarily, the expediency of doing the proposed work, and the general manner in which it shall be done. And upon these and similar questions municipal corporations act without responsibility. It is for them to decide in what manner they shall exercise their discretionary and judicial powers, and they incur no liability because of their decisions upon these questions. Thus, in regard to drains and sewers, it is ordinarily for the corporation to decide when it shall have a system of drainage and sewerage, how extensive the system shall be, and what amount of money the corporation shall expend on it. These are questions within the province of the municipality as a governmental agency, and the courts can not review its conclusions in regard to them. And, until they are settled, and some specific work is decided upon, the legal obligation to exercise care is not brought to life. But as soon as the corporation has determined to construct a public work it enters upon an undertaking which, in all its details, should be subordinated to the rule requiring the use of care, for the work is then ministerial." Jones, Neg. Munic. Corp., § 140, quoted with approval in Donahoe v. Kansas City, 136 Mo. 657, 666, 38 S.

of plans for local improvements,[73] and sometimes on the ground that the exercise of the power to make local improvements is judicial or *quasi*-judicial, and hence the municipality is not responsible for errors of judgment.[74] However, to be immune from liability, the plan must be one formally adopted by the municipality itself, since the rule should not be extended.[75]

The rule generally adopted, however, although there is some conflict even among the cases holding that there is a liability for defective plans,—and the one which is consonant with reason,—is that a municipality is not liable for mere *errors in judgment* in adopting plans,[76] but is liable if the municipality has been *negligent* in adopting defective plans, especially if the result is a dangerous condition in a street.[77]

W. 571, and Goodnow, Home Rule, pp. 127, 128.

The rule that when a city undertakes the execution of public work, it is liable for negligence in the performance of such work does not usually apply to defective legislation. Saxton v. St. Joseph, 60 Mo. 153.

73. Detroit v. Beckman, 34 Mich. 125, 22 Am. Rep. 507.

74. Urquhart v. Odensburg, 91 N. Y. 67, 43 Am. Rep. 91.

75. Collett v. New York, 64 N. Y. S. 693, 51 App Div. 394, 398; Urquhart v. Ogdensburgh, 97 N. Y. 238; Brown v. Syracuse, 28 N. Y. S. 792, 77 Hun, 411; Ford v. Des Moines, 106 Ia. 94, 75 N. W. 630.

No plan adopted where the design is left to the whim or fancy of a single individual. Hodges v. Waterloo, 109 Ia. 444, 449, 80 N. W. 523.

Necessary that board have the exact matter under consideration, and expressly order the thing to be done, after due deliberation. Gould v. Topeka, 32 Kan. 485, 4 Pac. 822, 49 Am. Rep. 496.

If no general plan of improvement has been presented to and adopted by the council, defect regarded as one of construction rather than plan. White v. Trinidad, 10 Colo. App. 327, 52 Pac. 214; Clark v. Chicago, Fed. Cas. No. 2,817, 4 Biss. 486.

76. Chicago v. Norton Milling Co., 97 Ill. App. 651; North Vernon v. Voegler, 103 Ind. 314, 2 N. E. 821; Giaconi v. Astoria, 60 Ore. 12, 113 Pac. 855, 118 Pac. 180, 37 L. R. A. (N. S.) 1150.

77. *Alabama.* Birmingham v. Lewis, 92 Ala. 352, 9 So. 243.

Illinois. Chicago v. Seben, 165 Ill. 371, 46 N. E. 244, 56 Am. St. Rep. 245.

Iowa. Ferguson v. Davis County, 57 Ia. 601, 608, 10 N. W. 906 (bridge); Kendall v. Albia, 73 Ia. 241, 34 N. W. 833.

This rule is also applied to defects in plans for the

Kentucky. Breckman v. Covington, 143 Ky. 444, 136 S. W. 865.

Minnesota. Blyhl v. Waterville, 57 Minn. 115, 58 N. W. 817, 47 Am. St. Rep. 596.

Missouri. Hinds v. Marshall, 22 Mo. App. 208.

Nebraska. Plainview v. Mendelson, 65 Neb. 85, 90 N. W. 956.

Ohio. Circleville v. Sohn, 59 Ohio St. 285, 52 N. E. 788, 69 Am. St. Rep. 777; Dayton v. Pease, 4 Ohio St. 80, 95.

Texas. Belton v. Turner (Tex. Civ. App.), 27 S. W. 831.

Washington. Stone v. Seattle, 30 Wash. 65, 70 Pac. 249, 67 L. R. A. 253.

See also Wilson v. Atlanta, 60 Ga. 473; White v. Ballard, 19 Wash. 284, 53 Pac. 159; Prideaux v Mineral Point, 43 Wisc. 513, 28 Am. Rep. 558.

Negligent plan of construction. "The authorities of a municipality may, free from interference, determine whether a public improvement such as the construction or repairing of a street or sidewalk is not necessary, and also exercise their discretion in the selection of a plan therefor, but if the plan adopted is palpably unsafe to travelers, or the work be so negligently performed as to make the street or sidewalk dangerous for use, the municipality would be liable for injuries resulting to persons therefrom." Covington v. Bollwinkle (Ky.), 121 S. W. 664.

"It is the duty of the municipal corporation to exercise reasonable care in providing a plan, as well as in doing the work." Per Elliott, C. J., in Terre Haute v. Hudnut, 112 Ind. 542, 544, 13 N. E. 686.

"Any particular plan that may be adopted must be a reasonable one," says the Court of Appeals of Maryland, "and the manner of its execution thence becomes, with respect to the right of the citizens, a mere ministerial duty." Hitchins v. Frostburg, 68 Md. 100, 11 Atl. 826, 6 Am. St. Rep. 422.

Custom. It is no defense that the sidewalk was constructed in the manner customarily adopted by the municipality. Weber v. Creston, 75 Ia. 16, 39 N. W. 126.

Ohio. "Liable for injuries caused by a dangerous defect or obstruction in a street or sidewalk which it suffers to remain after reasonable notice of its existence, although it arose in the construction or alteration of the street or sidewalk in accordance with a plan adopted by the municipal authorities." Circleville v. Sohn, 59 Ohio St. 285, 52 N. E. 788, 69 Am. St. Rep. 777. But compare Dayton v. Taylor, 62 Ohio St. 11, 56 N. E. 480.

Indiana rule, § 2693, *post*, relating to sewers.

In Pennsylvania. an early decision might be construed as holding the contrary. Perry v. John, 79 Pa. 412.

But the later cases in Pennsylvania all recognize the liability for a defective plan of construction but hold that the plan of construction need not be the best

construction of *bridges,* and the municipality is liable

that engineering skill might have devised. Robinson v. Norwood, 27 Pa. Super. Ct. 481. Need not be the best and safest plan, if reasonably safe. Red v. Tarentum, 213 Pa. 357, 62 Atl. 928.

A well paved street, forty feet wide in the center, with twenty-two feet on each side with a rise of from twelve to eighteen inches, is not unsafe so as to show negligence. Johnson v. Philadelphia, 139 Pa. 646, 21 Atl. 316.

In Illinois, it is held that a jury has no right "to review the discretion of the city authorities in adopting a plan of construction," and also that "a *negligent* plan of construction, where the court can not say as a matter of law that such plan of construction was negligent, does not present a case which should be submitted to a jury." Owens v. Chicago, 162 Ill. App. 196, 199, 200.

In Washington, "a city can not relieve itself from liability for defective streets because the defect may be part of an original plan of construction." Stone v. Seattle, 30 Wash. 65, 70 Pac. 249, 67 L. R. A. 253.

In Utah, it is held that "the execution of the plans adopted may not be arrested or the plans reviewed by either a court or a jury, unless it is made to appear that they are conceived in bad faith, or that they are oppressive or clearly unreasonable, or are arbitrary, or capricious, or that their execution would inflict great and needless injury." Per Justice Frick in Morris v. Salt Lake City, 35 Utah, 474, 486, 101 Pac. 373.

Nebraska rule. In planning a public work, municipal corporations are required to exercise reasonable care and judgment, and if the services of professional men or experts are needed, the municipality should employ those who have the necessary knowledge and skill. Diamond Match Co. v. New Haven, 55 Conn. 510, 13 Atl. 409, 3 Am. St. Rep. 70; Watters v. Omaha, 76 Neb. 855, 107 N. W. 1007. When that course has been pursued in good faith, and the work has been carried on and completed as planned, the municipality can not be held liable, unless the improvement is so manifestly dangerous or a nuisance that all reasonable minds must agree that it is so. Gould v. Topeka, 32 Kan. 485, 4 Pac. 822, 49 Am. Rep. 496; Watters v. Omaha, 76 Neb. 855, 107 N. W. 1007; Shannon v. Omaha, 73 Neb. 507, 103 N. W. 53.

Oregon. "A municipality ought not to be upheld by the courts in the heedless adoption, under the guise of legislation, of some crude scheme which can not be accomplished without the infliction of direct, as distinguished from consequential, injuries upon some of its citizens. To hold otherwise would be a long step towards sanctioning the ruthless exercise of arbitrary power. Immunity for mere error of judgment in matters of governmental cognizance ought not be overturned or impaired; but when public works are planned with such carelessness as to

where there is negligence in making defective plans.[78] Even under this rule, it is held in Minnesota that if reasonable minds might differ as to whether the plan adopted or some other plan is the better, the decision of the municipal authorities is not reviewable by the courts,[79] although the same decision holds that "if there is such gross error of judgment as to show that in fact the city authorities never exercised an intelligent judgment at all, the city may be liable for constructing or maintaining the improvement on the defective plan or

amount to absence of judgment, the reason of the rule falls, and the application thereof falls with it." Per Justice Barnett in Giaconi v. Astoria, 60 Ore. 12, 113 Pac. 855, 118 Pac. 180, 37 L. R. A. (N. S.) 1150.

78. **Bridge**, negligence in plan makes municipality liable. Ferguson v. Davis County, 57 Ia. 601, 608; McDonald v. Duluth, 93 Minn. 206, 100 N. W. 1102; Jordan v. Hannibal, 87 Mo. 673, 676; Dayton v. Pease, 4 Ohio St. 80, 95 (liable for defect in plan of bridge, arising from the carelessness or unskillfulness of city engineer).

Municipality must "adopt a plan approved by competent mechanics as suitable for the place at which the bridge was to be built, and * * * see that its construction was conducted by reasonably competent builers." Childs v. Crawford County, 176 Pa. St. 139, 149, 34 Atl. 1020.

79. Conlon v. St. Paul, 70 Minn. 216, 72 N. W. 1073; McDonald v. Duluth, 73 Minn. 206, 100 N. W. 1102.

Where plan, prepared by experts, is not so obviously defective that there could be no difference of opinion among reasonable men with respect to it, the municipality is not liable. Walters v. Omaha, 76 Neb. 855, 107 N. W. 1007.

Not negligence *per se* to construct a sidewalk thirty inches above the ground without any danger signal. Sumner v. Scaggs, 52 Ill. App. 551.

In Kansas, "where a street, as planned or ordered by the governing board of a city, is so manifestly dangerous that a court, upon the facts, can say as a matter of law that it was dangerous and unsafe, * * * the city should be held liable; but where, upon the facts, it would be so doubtful whether the street, as planned or ordered by the governing board of the city, was dangerous or unsafe or not—that different minds might entertain different opinions with respect thereto— * * * the city should be held not liable. Gould v. Topeka, 32 Kan. 485, 493, 4 Pac. 822, 49 Am. Rep. 496.

In Kentucky, if the plan adopted is one "palpably unsafe to travelers," the municipality is liable. Teager v. Flemingsburg, 109 Ky. 746, 60 S. W. 718, 53 L. R. A. 791, 95 Am. St. Rep. 400.

scheme adopted."[80] And in Oregon it is held that the employment of a competent engineer to draw plans and specifications does not necessarily show the exercise of ordinary care, but the municipality may nevertheless be liable for defective plans.[81]

Furthermore, liability for a defective plan resulting in injury to a traveler or other person, and not to his land, is not governed by the same rule applicable where one's premises are *directly damaged* because of the manner in which the municipality has planned and carried out its work;[82] since in the latter case a municipality cannot adopt a plan which will practically take private property for public use without compensation.[83]

80. Conlon v. St. Paul, 70 Minn. 216, 218, 72 N. W. 1073.

81. Giaconi v. Astoria, 60 Ore. 12, 113 Pac. 855, 118 Pac. 180, 37 L. R. A. (N. S.) 1150.

82. Jones, Neg. of Mun. Corp., § 142.

83. **Direct injury to property.** The whole superstructure of the liability of municipal corporations for negligence and trespasses upon property should be built upon the idea that private property can not be taken (nor damaged in some states) for public use without just compensation. In support of this view it is argued that "there can be no distinction on principle between the case where a municipal corporation—let us say in prosecuting some public work within its charter powers — unlawfully damages my property or injures my person, and where acting for its own purposes and within the general scope of its charter powers, it takes my property. Damaging is a smaller injury than taking, and any principle that will sustain a liability for damaging will sustain a liability for taking." Article by Judge Seymour D. Thompson 33 Am. L. Rev., p. 708. So far as the constitutional rights of the property owner are trespassed upon, it is immaterial whether this results from negligence in the doing of the work, or from a defective plan. In either case the city has violated the constitution, and no good reason is perceived why it should be permitted to protect itself because of a defective plan, however conscientiously it may have been conceived upon the part of the officers or agents who prepared it. Therefore, it appears logical to conclude that in all cases where there has been a damage to, or taking of, private property by the direct act of the city, liability to private action should lie. 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 such property than has a private individual or corporation. The discretion reposed in the au-

§ 2634. Construction or repair of public improvements or works.

Generally, there is no municipal liability for defective *plans* in constructing buildings or public improvements or other public works.[84] In addition, the questions arise (1) as to whether the act of ordering improvements, or the failure to act, is a ground of municipal liability, and further (2) whether a municipality is liable for its negligence in the course of carrying out the public improvement *i. e.*, executing the plan of improvement adopted.

As to the first proposition it seems to be well settled that it is discretionary with the municipality whether or not to order public improvements or work, and hence a municipality will not be held liable for its act or failure to act in the initiation of such an undertaking.[85] This includes, *inter alia*, the opening of streets,[86] the construction of sidewalks,[87] removal of overhanging

thorities by a municipal charter, and the general principles of law applicable, relating to the character of plans, 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.

§ 2693, *post*, as to sewers.

84. § 2633, *ante*.

85. Hines v. Nevada, 150 Ia. 620, 130 N. W. 181; Pitman v. New York, 125 N. Y. S. 941, 141 App. Div. 670.

Cities are under a political obligation to open such streets, construct such bridges, sewers and drains, market houses, and make such other urban improvements as the necessity and convenience of the community may require; but courts can not compel the performance of such duties, or hold them responsible for their non-performance. Joliet v. Verley, 35 Ill. 58, 85 Am. Dec. 342.

Failure to make public improvements. Municipality not liable unless they are made necessary by some act of its own. Stackhouse v. Lafayette, 26 Ind. 17, 89 Am. Dec. 450; Logansport v. Wright, 25 Ind. 512; Roll v. Indianapolis, 52 Ind. 547.

86. "No private action will lie either for failure to locate a street or for its mislocation." Cassidy v. St. Joseph (Mo. 1912), 152 S. W. 307.

87. Van Gorder v. Seneca Falls, 104 N. Y. S. 299.

§ 2745, *post*, next chapter.

limbs of trees,[88] etc.

As to the second question, except in a few states where a contrary rule is held,[89] it is equally well settled that a municipality acts ministerially in constructing and repairing public improvements or work, including streets, and hence is liable to persons injured by negligence in the performance of such duties,[90] and this is true not-

88. The failure of a city to remove a limb of a tree overhanging a sidewalk and constituting a danger to persons passing, is neglect of a governmental duty for which it is not liable. Dyer v. Danbury, 85 Conn. 128, 81 Atl. 958.

89. See next section.

90. *Illinois.* Chicago v. Norton Milling Co., 97 Ill. App. 651, aff'd in 196 Ill. 580, 63 N. E. 1043.

Indiana. Valparaiso v. Spaeth, 166 Ind. 14, 76 N. E. 514, rev'g on rehearing 74 N. E. 518 (improvement of county road in city by county officers—city liable); Greencastle v. Martin, 74 Ind. 449, 39 Am. Rep. 93.

Hawaii. Matsumura v. Hawaii County, 19 Hawaii, 18, 21 Am. & Eng. Ann. Cas. 1338.

Iowa. Hines v. Nevada, 150 Ia. 620, 130 N. W. 181; Hendershott v Ottumwa, 46 Ia. 658, 26 Am. Rep. 182; Templin v. Iowa City, 14 Ia. 59, 81 Am. Dec. 455; Cotes v Davenport, 9 Ia. 227.

Kansas. Leavenworth v. Casey, McMahon (Kan.) 124.

Maryland. Thillman v. Baltimore, 111 Md. 131, 73 Atl. 722.

Michigan. Lansing v. Toolan, 37 Mich. 152.

Missouri. Barree v. Cape Girardeau, 197 Mo. 382, 95 S. W. 330, 6 L. R. A. (N. S.) 1090, 114 Am. St. Rep. 763 (where city held liable for asault by employee engaged in repair of street); Ely v St. Louis, 181 Mo. 723, 81 S. W. 168.

Nebraska. Burke v. South Omaha, 79 Neb. 793, 113 N. W. 241; Tewksbury v. Lincoln, 84 Neb. 571, 121 N. W. 994.

New York. Rochester White Lead Co. v. Rochester, 3 N. Y. 463, 53 Am. Dec. 316; New York v. Bailey, 2 Denio (N. Y.) 433.

Ohio. Dayton v. Pease, 4 Ohio St. 80, 100.

Oregon. Giaconi v. Astoria, 60 Ore. 12, 113 Pac. 855, 118 Pac. 180, 37 L. R. A. (N. S.) 1150.

Washington. Engelking v. Spokane, 59 Wash. 446, 110 Pac. 25.

Wisconsin. Milwaukee v. Davis, 6 Wis. 377.

See also Johns v. Cincinnati, 45 Ohio St. 278, 12 N. E. 801, where cost of work was met by the county, and county commissioners constructed the road under the direction of the board of public works of the city.

Construction and repair of highways is the exercise of corporate power. Engelking v. Spokane, 59 Wash. 446, 110 Pac. 25.

City liable for negligently allowing gravel bank to cave and injure others. Winfield v. Peeden, 8 Kan. App. 671, 57 Pac. 131.

Municipal corporation held liable for negligence of its street

withstanding the improvements are a public benefit,[91] except perhaps where a building is being constructed for public use, such as a court house or the like.[92] So, it has been held in Missouri, a municipality is liable

commissioner and a foreman while acting within the scope of their employment causing injuries to a mule hired by the municipality, though the contract of hiring was invalid because not made in compliance with charter requirements. Houston v. Dupree (Tex. 1910), 126 S. W. 1115, 129 S. W. 173.

Duty to keep streets in repair is not a governmental duty. Hewitt v. Seattle, 62 Wash. 377, 113 Pac. 1084.

Improvement of park, however, where city has merely a license to occupy the land as a park, held a governmental function, and city held not liable. Russell v. Tacoma, 8 Wash. 156, 35 Pac. 605, 40 Am. St. Rep. 895.

Removal of obstructions from streets is a corporate and not a governmental duty. Scott v. New York, 50 N. Y. S. 191, 27 App. Div. 240.

Building of bridge is a corporate act. Conrad v. Ithaca, 16 N. Y. 158, 173.

Commissioners of public works, appointed by the mayor, are agents of the city. Niven v. Rochester, 76 N. Y. 619, 621.

Village trustees, who are by charter made commissioners of highways, are the agents of the municipality. Conrad v. Ithaca, 16 N. Y. 158.

Michigan. Notwithstanding the rule in Michigan has long obtained that municipalities are not usually responsible in damages for the neglect of persons in public office, unless made so by statute, (Detroit v. Blackeby, 21 Mich. 84, 4 Am. Rep. 450, approved in O'Leary v. Board of Fire & Water Com'rs, 79 Mich. 281, 285, 44 N. W. 608, 7 L. R. A. 170, 19 Am. St. Rep. 169), yet at an early day the supreme court of that state established the principle, in recognition of the private character of the municipal corporation, that where a city is engaged in making a work which is its private property as a municipality, and not a mere public easement, and done under city employment or contract, it is responsible for injuries caused by neglect in its process of construction, as it is for any such action as directly injures private property. Detroit v. Corey, 9 Mich. 165, 80 Am. Dec. 78, approved 79 Mich. 285; Ashley v. Port Huron, 35 Mich. 296, 24 Am. Rep. 552; Defer v. Detroit, 67 Mich. 346, 34 N. W. 680.

Massachusetts holds the contrary, as to the construction and repair of streets, under the regular highway officers (see next section) but has held city liable for negligence in widening and deepening a brook. Boston Belting Co. v. Boston, 149 Mass. 44, 46, 20 N. E. 320.

91. Cherryvale v. Studyvin, 76 Kan. 285, 91 Pac. 60, 11 L. R. A. (N. S.) 385.

92. § 2672 *et seq., post.*

for the acts of its servant, while repairing streets, in *assaulting a traveler,* in the line of his duty, on the theory that the repair of streets is not a *governmental* duty.[93]

This rule of liability applies, *inter alia,* to the construction of sewers,[94] waterworks,[95] grading of streets,[96] etc. So if the *negligent* use of a *steam roller* is the cause of the injury, the municipality is ordinarily held liable,[97] except in those states where the construction and maintenance of a street is held a public, rather than a corporate, duty.[98]

A municipal corporation however, "does not insure its citizens against damage from works of its construction and is only liable as other proprietors for negligence or willful misconduct."[99] And where municipal im-

93. Barree v. Cape Girardeau, 197 Mo. 382, 95 S. W. 330, 6 L. R. A. (N. S.) 1090, 114 Am. St. Rep. 763.

94. § 2695, *post.*

95. Logansport v. Dick, 70 Ind. 65, 36 Am. Rep. 166.

§ 2680, *post.*

96. Leavenworth v. Casey, McMahon (Kan.), 124.

97. **Steam roller.** City liable where horse frightened by. Denver v. Peterson, 5 Colo. App. 41, 36 Pac. 1111; Paine v. Rochester, 14 N. Y. S. 180, 59 Hun, 627.

Fire set by sparks from steam roller. City liable. McMahon v. Dubuque, 107 Ia. 62, 77 N. W. 517, 70 Am. St. Rep. 143.

In Kentucky, however, city held not liable for frightening horse through negligence in handling a steam roller on theory that improvement and construction of streets was a governmental duty. Danville v. Fox, 142 Ky. 476, 134 S. W. 883.

In Michigan, city held not liable for destruction of private property by fire caused by sparks from street roller being used in improving a street. Alberts v. Muskegon, 146 Mich. 210, 109 N. W. 262, 6 L. R. A. (N. S.) 1094.

Where no negligence. A municipal corporation possesses the right to use any proper implement run by steam for the purpose of constructing or repairing its streets, and, in the absence of carelessness or negligence in its management, it has been held not liable for damages occasioned by a horse becoming frightened thereat. Sparr v. St. Louis, 4 Mo. App. 573.

98. Hall v. Concord, 71 N. H. 367, 371, 52 Atl. 864, 58 L. R. A. 455; Bates v. Rutland, 62 Vt. 178, 20 Atl. 278, 9 L. R. A. 363, 22 Am. St. Rep. 95, stone crusher.

§ 2635, *post.*

99. Baltimore v. Schnitker, 84 Md. 34, 44, 34 Atl. 1132.

The care required of a municipal corporation in the execu-

provements are made with ordinary care and skill, the municipality will not be held liable for *injury resulting to adjacent property.*[1]

§ 2635. Same—minority rule.

In Connecticut, Maine, Massachusetts, New Hampshire, and Vermont, in which states there is no common law liability for defective streets, it is held that there is no common law liability of municipalities for negligence of the regular officers or their *employees* in constructing or repairing streets.[2] On just what theory these cases

tion of a public work is such as a reasonably prudent and careful man, under like circumstances, would use, if the responsibility for damages rested on him. Giaconi v. Astoria, 60 Ore. 12, 118 Pac. 180, rev'g 113 Pac. 855, 37 L. R. A. (N. S.) 1150.

1. § 1968, *ante*, vol. 4.

2. Salzman v. New Haven, 81 Conn. 389, 71 Atl. 500, 22 L. R. A. (N. S.) 333; Bowden v. Rockland, 96 Me. 129, 51 Atl. 815 (not liable for negligence of street commissioner in rebuilding a retaining wall); Gilpatrick v. Biddeford, 86 Me. 534, 30 Atl. 99 (not liable for trespass of street commissioner in building sewers); Bulger v. Eden, 82 Me. 352, 19 Atl. 829, 9 L. R. A. 205; Woodcock v. Calais, 66 Me. 234 (is liable where street commissioner acts under express authority of city); Smith v. Gloucester, 201 Mass. 329, 334, 87 N. E. 626; Murphy v. Needham, 176 Mass. 422, 57 N. E. 689; Taggart v. Fall River, 170 Mass. 325, 49 N. E. 622; McManus v. Weston, 164 Mass. 263, 41 N. E. 301, 31 L. R. A 174; Hennessey v. New Bedford, 153 Mass. 260, 26 N. E. 999; Barney v. Lowell, 98 Mass. 570; Haskell v. New Bedford, 108 Mass. 208, 211; Connor v. Manchester, 73 N. H. 233, 60 Atl. 436; Hall v. Concord, 71 N. H. 367, 52 Atl. 864, 58 L. R. A. 455; Wakefield v. Newport, 62 N. H. 624; Bates v. Rutland, 62 Vt. 178, 20 Atl. 278, 9 L. R. A. 363, 20 Am. St. Rep. 95.

See Kidson v. Bangor, 99 Me. 139, 58 Atl. 900, liability for failure to repair sewers.

Not liable for a trespass committed by its road commissioners while in the discharge of their public duties. Clark v. Easton, 146 Mass. 43, 14 N. E. 795.

Provision in ordinance that surveyor of highways should act under the direction of the mayor and aldermen does not make him the agent of the city. Butman v. Newton, 179 Mass. 1, 8, 60 N. E. 401, 88 Am. St. Rep. 349.

Repair of streets is a governmental duty, and village is not liable for acts of its trustees and street commissioner in locating a stone crusher too near the highway. Bates v. Rutland, 62 Vt. 178, 20 Atl. 278, 9 L. R. A. 363, 22 Am. St. Rep. 95.

Trespass. If street superintendent, in performing the duty

are decided, it is often difficult to determine. Some of the decisions would seem to be based on the ground that the municipality cannot control the officers, such as highway surveyors or street commissioners,[3] while other decisions are based apparently on the ground that the duty to construct and repair streets is governmental.[4]

In Massachusetts, it is well settled that if a municipality, in place of leaving the repair of its ways to the

of removing obstructions from the public ways, under the general laws of the state, enters upon the land of an individual, under the mistaken belief that the land is a public way, the city is not liable for the trespass. Manners v. Haverhill, 135 Mass. 165, 171.

Cutting down shade trees. Board of aldermen in performing such duties act as public officers and not as agents of the city. McCarthy v. Boston, 135 Mass. 197, 200.

Steam roller. Not liable for negligence of commissioner of highways of city in operating a steam roller. Hall v. Concord, 71 N. H. 367, 52 Atl. 864, 58 L. R. A. 455, Justice Remick dissenting.

Contra, Barksdale v. Lawrens, 58 S. C. 413, 36 S. E. 661, under South Carolina statute.

Stone crusher. Crushing stones at quarry, some ten miles away, for use to repair city streets, is a governmental duty, and city not liable for negligence of its servants in doing the work. Colwell v. Waterbury, 74 Conn. 568, 51 Atl. 520, 57 L. R. A. 218.

In Maine, "it is well settled, by decisions too numerous and familiar to require citation, that a highway surveyor or street commissioner in repairing ways is, and acts as, a public officer; and the municipality within whose limits he acts and which appointed him and furnished him funds for the work, is not liable for his torts, *unless it has interfered and itself assumed the control and direction of the work, and of the surveyor or commissioner.*" Bowden v. Rockland, 96 Me. 129, 133, 51 Atl. 815.

Failure to remedy defect—exception to rule. Regardless of who created a defect in a street, whether an agent of the municipality or not, a municipality is liable, after the lapse of a reasonable time, for failure to remedy it. Clair v. Manchester, 72 N. H. 231, 55 Atl. 935.

3. **Assistant superintendent of streets,** not under control of city except by general orders or ordinances passed. City not liable for his negligence. Jensen v. Waltham, 166 Mass. 344, 44 N. E. 339; McCann v. Waltham, 163 Mass. 344, 40 N. E. 20.

4. Exemption from liability does not rest on the ground that the municipality has no control over the highway surveyor or the road commissioner. Butman v. Newton, 179 Mass. 1, 6, 60 N. E 401, 88 Am. St. Rep. 349.

surveyor of highways, or to road commissioners, who are the public officers designated by the statutes to see that the streets are kept in safe condition, undertakes to make the repairs by its own agents, it is liable for injuries caused through their negligence.[5] So, in Massachusetts, it is held that if a city lights its streets as a matter of convenience and safety for those having occasion to use them, "*without being required by law to undertake the performance of such a duty,*" the superintendent of lamps for this purpose becomes its servant, for whose negligent conduct in their maintenance the city is responsible, at common law, for negligence in the management of its corporate property.[6]

Furthermore, the rule in Massachusetts does not extend to *sewers,* and municipalities in that state are liable for negligence in the work of constructing sewers,[7] and the same rule prevails in New Hampshire.[8]

§ 2636. Cleaning streets—dumping grounds.

The cleaning of streets by flushing them or otherwise, the removal of dirt and ashes by wagons, and the maintenance and care of dumps, is held a governmental duty in some jurisdictions so as to preclude a recovery against the municipality for negligence in connection therewith,[9]

5. Butman v. Newton, 179 Mass. 1, 5, 6, 60 N. E. 401, 88 Am. St. Rep. 349; Hawks v. Charlemont, 107 Mass. 414. See also Hunt v. Boston, 183 Mass. 303, 306, 67 N. E. 244; Prince v. Lynn, 149 Mass. 193, 21 N. E. 296; Waldron v. Haverhill, 143 Mass. 582, 10 N. E. 481; Sullivan v. Holyoke, 135 Mass. 273.

6. Dickinson v. Boston, 188 Mass. 595, 75 N. E. 68, 1 L. R. A. (N. S.) 664.

7. Norton v. New Bedford, 166 Mass. 48, 51, 43 N. E. 1034.

8. Lockwood v. Dover, 73 N. H. 209, 61 Atl. 32.

§ 2695, *post.*

9. Love v. Atlanta, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64; Kippes v. Louisville, 140 Ky. 423, 131 S. W. 184, 30 L. R. A. (N. S.) 1161; Condict v. Jersey City, 46 N. J. L. 157; Kuehn v. Milwaukee, 92 Wis. 263, 65 N. W. 1030.

Flushing streets. A municipality flushing its streets for the benefit of its inhabitants and the public generally, from which it derives no profit, exercises a governmental function, and is not liable to one injured by the negligence of its employees while so engaged, or from a defective hose used in such work. Kippes v.

where there has been no creation of a *nuisance*.[10] In other states, however, the contrary is held, on the theory that the duty is a *quasi*-private and corporate duty.[11]

Louisville, 140 Ky. 423, 131 S. W. 184, 30 L. R. A. (N. S.) 1161.

Not liable for the negligence of a driver of one of its sprinkling carts in colliding with and overturning another vehicle, thereby injuring the occupant. Conelly v. Nashvile, 101 Tenn. 262, 46 S. W. 565.

10. Liability where nuisance is created, § 2641, *post*.

11. Ostrom v. San Antonio, 94 Tex. 523, 62 S. W. 909, rev'g 60 S. W. 591. See also Stephenville v. Bower, 29 Tex. Civ. App. 384, 68 S. W. 833.

The hauling of trash and dirt by one in the service of a municipality is the exercise of a private or corporate duty. Pass Christian v. Fernandez (Miss. 1911), 56 So. 329.

Massachusetts. The removal of ashes by a city from the premises of private persons is a public duty and municipality is not liable for negligence. Haley v. Boston, 191 Mass. 291, 77 N. E. 888, 5 L. R. A. (N. S.) 1005; Johnson v. Somerville, 195 Mass. 370, 81 N. E. 268, 10 L. R. A. (N. S.) 715. Municipalities are not liable to one run over by an ash cart, through the negligence of the driver, while engaged in the removal of ashes. Haley v. Boston, 191 Mass. 291, 77 N. E. 888, 5 L. R. A. (N. S.) 1005. Not liable for the intentional act of a municipal servant in dumping ashes on the land of a third person, so as to result in stopping a water course and flooding a cellar. Johnson v. Somerville, 195 Mass. 370, 81 N. E. 268, 10 L. R. A. (N. S.) 715. Fact that charge was made for the removal of steam engine ashes is immaterial, where ashes removed at time of accident were not that kind. Haley v. Boston, 191 Mass. 291, 77 N. E. 888, 5 L. R. A. (N. S.) 1005.

New York. Municipality is liable for negligence of its employees in cleaning the streets. Missano v. New York, 160 N. Y. 123, 54 N. E. 744, where child was killed by horse attached to ash cart of street cleaning department. Is liable for negligence in connection with removing dirt from streets, and ashes and garbage from abutting residences. The duty is *quasi* private. Quill v. New York, 55 N. Y. S. 889, 36 App. Div. 476, overruling Bishop v. New York, 48 N. Y. S. 141, 21 Misc. Rep. 598, and Davidson v. New York, 54 N. Y. S. 51, 24 Misc. Rep. 560.

In Missouri, it is held that "the better rule is that a city is liable for the negligence of its servants in cleaning its streets." Young v. Metropolitan St. R. Co., 126 Mo. App. 1, 8, 103 S. W. 135. "In this case, the city was not acting in a governmental capacity for the general public good, in protecting the health of the community, as perhaps it might have been had the act complained of been the establishment of a pesthouse, or

The latter class of cases, regarding the duty as an essentially private one, resting originally on the individual property owner, and assumed by the municipality merely for the convenience and advantage of its citizens, would seem to be consistent with the historical development of the assumption of such duties by municipalities, and the result appears to be in accord with the general tendency shown by recent cases to broaden the liability of public corporations for the tortious acts of their agents. So, a federal court held the city of Denver liable for fire communicated by a public dump where the waste and refuse of the city was deposited, on the theory that the officers in control of the dump represented the local or corporate interests of the city rather than the state in its sovereign capacity.[12]

the enforcement of ordinances against contagious diseases, and the like. Here the servant of the city was engaged in removing dirt from the streets which, if left upon them, might make them unsafe, or at least, inconvenient for travel. Mud and dirt, in some situations, result in injury to travelers and render the city liable in damages. In this case, the servant was engaged in removing piles of dirt, which, as just intimated, if left remaining, would have rendered the city liable if damage had been caused by them. Thus considered, we believe that in holding the city liable, we are not opposing numerous cases in counsel's brief cited for the purpose of freeing the city from responsibility for the acts of its officers or servants in protecting the public health. But even in determining the general question, the fact that the act may be helpful to the general health, or may, in some remote degree, be referable to governmental regulation, ought not to control. Those features of the case should be considered more as incidental than as the sole purpose." Per Justice Ellison, in Young v. Metropolitan St. R. Co., 126 Mo. App. 1, 10, 103 S. W. 135. But where a street cleaner was killed by a runaway team employed in the street cleaning department, the city was held not liable. Cassidy v. St. Joseph (Mo. 1912), 152 S. W. 306, disapproving of Young v. Metropolitan St. R. Co., 126 Mo. App. 1, 103 S. W. 135.

In disposing of garbage, a municipality acts in its private capacity, and is therefore liable for injury caused adjacent property owners by a nuisance created by a deposit of garbage. Paris v. Jenkins, 57 Tex. Civ. App. 383, 122 S. W. 411.

12. Denver v. Porter, 126 Fed. 288, 61 C. C. A. 168.

§ 2637. Ultra vires acts.

The general rule is well settled that if the alleged tort is in connection with an act which is wholly *ultra vires*, *i. e.*, beyond the scope of the power of the municipality, no liability for damages arises, as against the municipality;[13] and an opinion of the Supreme Court of the

13. *California.* Dunbar v. Alcalde, etc. of San Francisco, 1 Cal. 355.

Colorado. Idaho Springs v. Woodward, 10 Colo. 104, 14 Pac. 49.

Florida. Scott v. Tampa, 62 Fla. 275, 55 So. 983, where municipal officers entered premises of labor union and ejected them from the building without any apparent reason therefor.

Georgia. Langley v. Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133; Roughton v. Atlanta, 113 Ga. 948, 39 S. E. 316; Augusta v. Mackey, 113 Ga. 64, 38 S. E. 339.

Illinois. Chicago v. Turner, 80 Ill. 419.

Indiana. Leeds v. Richmond, 102 Ind. 372, 1 N. E. 711; Shelby County v. Deprez, 87 Ind. 509; Cummins v. Seymour, 79 Ind. 491, 41 Am. Rep. 618, 622.

Kentucky. Arnold v. Stanford, 113 Ky. 852, 24 Ky. L. Rep. 626, 69 S. W. 726.

Louisiana. Faucheux v. St. Martinville, 120 La. 764, 45 So. 600; Walling v. Shreveport, 5 La. Ann. 660, 52 Am. Dec. 608; Hoggard v. Monroe, 51 La. Ann. 683, 25 So. 349, 44 L. R. A. 477.

Maine. Brunswick Gas Light Co. v. Brunswick, 92 Me. 493, 43 Atl. 104; Seele v. Dearing, 79 Me. 343, 10 Atl. 45, 1 Am. St. Rep. 314.

Maryland. Horn v. Baltimore, 30 Md. 218.

Massachusetts. Cavanaugh v. Boston, 139 Mass. 426, 1 N. E. 834, 52 Am. Rep. 716; McCarthy v. Boston, 135 Mass. 197; Anthony v. Adams, 1 Metc. (Mass.) 284.

Minnesota. Boye v. Albert Lea, 74 Minn. 230, 76 N. W. 1131.

Missouri. Stealey v. Kansas City, 179 Mo. 400, 78 S. W. 599; Hunt v. Boonville, 65 Mo. 620, 27 Am. Rep. 299.

New Hampshire. Wakefield v. Newport, 60 N. H. 374.

New Jersey. Wheeler v. Essex Public Road Board, 39 N. J. L. 291.

New York. O'Donnell v. Syracuse, 184 N. Y. 1, 76 N. E. 738, 3 L. R. A. (N. S.) 1053, 112 Am. St. Rep. 558; Smith v. Rochester, 76 N. Y. 506; Albany v. Cunliff, 2 N. Y. 165; Brennan v. Albany, 121 N. Y. S. 895, 67 Misc. Rep. 42. And compare, Stoddard v. Saratoga Springs, 127 N. Y. 261, 27 N. E. 1030.

North Carolina. Barger v. Hickory, 130 N. C. 550, 41 S. E. 708; Love v. Raleigh, 116 N. C. 296, 21 S. E. 503, 28 L. R. A. 192.

Oklahoma. Wallace v. Norman, 9 Okl. 339, 60 Pac. 108, 48 L. R. A. 620.

Pennsylvania. Betham v. Philadelphia, 196 Pa. St. 302, 46 Atl. 448.

United States in 1885, to the contrary, has not been followed and stands practically alone,[14] except possibly in Iowa,[15] in denying that *ultra vires* is a defense in ac-

South Dakota. Wilson v. Mitchell, 17 S. D. 515, 97 N. W. 741, 65 L. R. A. 158, 106 Am. St. Rep. 784.

Utah. Royce v. Salt Lake City, 15 Utah, 401, 49 Pac. 290.

United States. Fowle v. Alexandria, 3 Pet. (U. S.) 398, 7 L. Ed. 719; Kansas City v. Lemen, 57 Fed. 905, 6 C. C. A. 627.

Canada. Atchison v. Portage la Prairie, 10 Manitoba, 39; Pocock v Toronto, 27 Ont. 635.

Ultra vires. Even though the officers of the corporation, when transcending the power of the corporation act *colore officii*, and upon pretence of law, their acts can no more bind the corporation than can the unauthorized acts of any other agent bind his principal. Horn v. Baltimore, 30 Md. 218.

As to liability of the municipality for *ultra vires* acts of its officers there is no distinction between acts arising out of contract or in tort. Healdsburg Electric L. & P. Co. v. Healdsburg, 5 Cal. App. 558, 90 Pac. 955.

An ultra vires act by a municipal corporation cannot be made the basis of an action for damages, whether done at the express direction of its employees or agents or not. Bond v. Royston, 130 Ga. 646, 61 S. E. 491; Dilluvio v. New York, 132 N. Y. S. 531, 73 Misc. Rep. 122.

But if, in clearing the bank of a stream of trespassers in pursuance of directions from the town council, the mayor of a town does so in an irregular manner, the town is liable. Faucheux v. St. Martinville, 124 La. 959, 50 So. 809.

Failure to repair bridge outside corporate limits. Where a bridge was erected across a river by authority of a statute, but it was outside the corporate limits of the municipality, and there was no statutory or other authority of the municipality to maintain the bridge or to keep it in repair or to raise money for that purpose, the municipality was not liable for injuries resulting from allowing the bridge to get out of repair. Montezuma v. Law, 1 Ga. App. 579, 57 S. E. 1025.

Burden of proof. A municipality is *prima facie* liable for unlawfully demolishing a private building by its board of trustees, and the burden is on it to show that the act was *ultra vires*. Faucheux v. St. Martinville, 120 La. 764, 45 So. 600.

14. Salt Lake City v. Hollister, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176.

15. In Iowa, however, there are decisions which on their face would warrant the deduction that *ultra vires* is no defense in that state to an action against a municipality for a tort. Fitzgerald v. Sharon, 143 Ia. 730, 121 N. W. 523; Shinnick v. Marshalltown, 137 Ia. 72, 114 N. W. 542. And in Stanley v. Davenport, 54 Ia. 463, 2 N. W. 1064, 37 Am. Rep. 216, a municipality was held liable for

tions against municipalities based on torts. However, the rule does not apply, it seems, in courts of *admiralty*.[16]

In other words, if a municipality goes beyond the powers the legislature has expressly conferred upon it, and also beyond the powers necessarily incident to the powers expressly conferred, there is no municipal liability for torts in connection therewith.[17] However, the defense of *ultra vires* can be interposed only where the act complained of was wholly beyond the powers of the municipality. If the wrongful act in question is one which the municipality had the right to do under some circumstances or in some manner, then it is not *ultra vires*. Thus, since the laying out and construction of highways is within the general powers of a municipality, the act of the common council in wrongfully and without right directing the officers of the municipality to enter upon private land for that purpose is not *ultra vires*.[18] "If the act is committed outside of the authority and power of the corporation as conferred by statute, the corporation is not liable, whether its officers directed its performance, or it was done without any express direction or command." [19]

injuries resulting from the use of a steam motor in the streets, even though it was held that the municipality had no authority to grant a franchise to use the streets for that purpose. The general rule, however, was followed in Field v. Des Moines, 39 Ia. 575, 18 Am. Rep. 46. And it is doubtful whether the courts of that state would hold, at the present time, contrary to all the other states, that *ultra vires* (the term being used in its strict sense) is not a defense, in a case where a nuisance is not involved.

16. The Major Reybold, 111 Fed. 414.

17. What contracts are *ultra vires*, in general, § 1172, *ante*, vol. 3.

18. Hathaway v. Osborne, 25 R. I. 249, 55 Atl. 700.

19. Smith v. Rochester, 76 N. Y. 505, 506, quoted in Cummins v. Seymour, 79 Ind. 49, 41 Am. Rep. 618.

In order to render a municipal corporation liable, the acts complained of must have been in the exercise of some power conferred on it by its charter or other positive enactment. Radford v. Clark (Va. 1912), 73 S. E. 571.

For example, a municipality is not liable for the *maliciously suing out of an injunction* without probable cause, since such an act would be *ultra vires* and beyond the scope of authority of the municipal officers, and would become the personal and individual act of the officers so acting.[20] So, a municipality which grants a mining company the permission to build a flume in its streets, is not liable to adjoining property, it having no power to make the grant.[21] So there is no liability for injuries caused by the operation by it of an *electric light plant* which it had no power to operate,[22] nor for injuries due to the operation of a public *ferry* which the municipality has no power to operate,[23] nor for damages to private property caused by its *construction of a sewer* in such a way as to create a nuisance, where it had no power to construct the sewer.[24] Likewise, a city is not liable for injury caused by *blasting in a rock quarry,* whereby plaintiff's horse became frightened and injured plaintiff, if its operation of the quarry was unauthorized.[25] So the disinterment and removal of bodies from a *cemetery* by a municipal officer, where no authority therefor is conferred on the municipality, is a trespass, for which the municipality is not liable.[26]

This rule of nonliability is also the rule, it has been held, where the municipality is acting under an *unconstitutional statute.*[27]

20. Doyle v. Sandpoint, 18 Idaho, 654, 659, 112 Pac. 204.

21. Idaho Springs v. Filtean, 10 Colo. 104, 14 Pac. 49.

22. Posey v. North Birmingham, 154 Ala. 511, 45 So. 663, 15 L R. A. (N. S.) 711.

Not liable for negligence in operating electric light plant to furnish light for private use where it has no power to furnish electricity to private persons. Palestine v. Siler, 225 Ill. 630, 80 N. E. 345.

23. Hoggard v. Monroe, 51 La. Ann. 683, 25 So. 349, 44 L. R. A. 477.

24. Atwood v. Biddeford, 99 Me. 78, 58 Atl. 417.

25. Radford v. Clark (Va. 1912), 73 S. E. 571.

26. **Cemeteries.** City not liable for act of its officers in disinterring and removing the remains of a person buried in a cemetery owned by the city, where the act is *ultra vires.* McDonald v. Butler, 10 Ga. App. 845, 74 S. E. 573.

27. Albany v. Cunliff, 2 N. Y. 165.

§ 2638. Same—lawful acts unlawfully done, distinguished.

Where the act done by a municipal officer or agent is lawful and authorized, but performed in an unlawful manner, the municipality is liable for damages caused thereby, provided it is otherwise liable.[28] And where the servants and employees of a city act wrongfully in the performance of municipal work, the fact that the city had an ordinance prohibiting the act will not relieve it from liability for damages therefor.[29]

§ 2639. Same—wilful or malicious acts not necessarily ultra vires.

A municipality as a legal entity cannot commit a wilful or negligent act, but can only do so through its agents or servants.[30] And a municipality is liable for the wilful or malicious act of its agents, where done within the scope of their duties, although there is no ratification of the act by the municipality.[31]

§ 2640. Same—acts under, or enforcing, void ordinances.

No liability is created against a municipal corporation by acts of its officers done under an unconstitutional or void ordinance enacted in the exercise of governmental powers, and a municipality is not liable in damages to a person arrested under a void ordinance passed in the exercise of its governmental functions.[32] So the enforce-

28. Scott v. Tampa (Fla. 1911), 55 So. 983.

"It is the general rule in this state in this class of cases that the corporation is liable for the acts of its agents injurious to others, when the act is in its nature lawful and authorized, but done in an unlawful manner or unauthorized place, but it is not liable for injuries and tortious acts which are in their nature unlawful or prohibited." Worley v. Columbia, 88 Mo. 106.

29. Flannagan v. Bloomington, 156 Ill. App. 162.

30. Tomlin v. Hildreath, 65 N. J. L. 438, 47 Atl. 649.

31. Ysleta v. Babbitt, 8 Tex. Civ. App. 432, 436, 28 S. W. 702.

32. *Arkansas.* Franks v. Holly Grove, 93 Ark. 250, 124 S. W. 514; Trammell v. Russelville, 34 Ark. 105, 36 Am. Rep. 1, where the attempt was to enforce a void ordinance against retailing liquors, the court says municipal corporations are created by the state for

ment of a void ordinance by arrest is not actionable al-

political objects, and invested with a portion of governmental power to be exercised for local purposes connected with the public good. For acts done by them in their public capacity and in the discharge of the duties imposed upon them for the public benefit, cities and towns incur no liability to persons who may be affected or injured by them. So that, neither for the act of the council in passing a void ordinance nor of the mayor in issuing warrants, nor of the marshall in executing them and making the arrests, is the town liable.

Georgia. Bond v. Royston, 130 Ga. 646, 61 S. E. 491, 18 L. R. A. (N. S.) 409; Bartlett v. Columbus, 101 Ga. 300, 28 S. E. 599, 44 L. R. A. 795.

Illinois. Chicago v. Turner, 80 Ill. 419.

Indiana. All the laws and ordinances intended to secure the peace and good order, or to preserve the health and morals, of the public are in the nature of police regulations and are essentially governmental in character. Their enactment and enforcement are functions of the sovereignty, and they are designed for the benefit of the public. An officer whose duty it is in whole or in part to enforce observance of such ordinances while so engaged is acting for the public, and is not the agent of the municipal corporation in its corporate capacity. Laurel v. Blue, 1 Ind. App. 128, 27 N. E. 301. In this case the marshal was attempting to make an arrest without a warrant, under an ordinance alleged to be illegal, and the court said he was attempting to execute a public duty, and for this the town cannot be held responsible. The court also says that it is unnecessary to pass upon the question of the validity of the ordinance, thereby intimating that that question was immaterial as affecting the question of liability.

Iowa. Easterly v. Irwin, 99 Ia. 694, 68 N. W. 919.

Kansas. Caldwell v. Prunelle, 57 Kan. 511, 46 Pac. 949.

Kentucky. Herschberg v. Barbourville, 142 Ky. 60, 133 S. W. 985 (ordinance making it unlawful to smoke cigarettes); Board of Park Com'rs v. Prinz, 127 Ky. 460, 105 S. W. 948, 32 Ky. L. Rep. 359, in effect, overruling McGraw v. Marion, 98 Ky. 673, 34 S. W. 18, 17 Ky. L. Rep. 1254, 47 L. R. A. 593; Kippes v. Louisville, 140 Ky. 423, 131 S. W. 184; Twyman v. Frankfort, 117 Ky. 518, 78 S. W. 446, 25 Ky. L. Rep. 1620, 64 L. R. A. 572; Maydwell v. Louisville, 116 Ky. 885, 76 S. W. 1091, 25 Ky. L. Rep. 1062, 63 L. R. A. 655, 105 Am. St. Rep. 245; Taylor v. Owensboro, 98 Ky. 271, 32 S. W. 948, 17 Ky. L. Rep. 856, 56 Am. St. Rep. 361; Bean v. Middlesborough, 22 Ky. L. Rep. 415, 57 S. W. 478; Pollock v. Louisville, 13 Bush, 221, 26 Am. Rep. 260. In Taylor v. Owensboro, 98 Ky. 271, 32 S. W. 948, an arrest was made for a breach of the peace, and it appeared that the ordinance under which the arrest purported to be made was void, but the arrest

though the revenues arising from the enforcement of

was held to be authorized by a state statute. The court, however says that the absence of the statute would have made no difference, that municipal corporations are auxiliaries of the state government. The officers charged with keeping the peace are officers of the commonwealth and a breach of the peace is an offense against the commonwealth, so that the municipal corporation is not liable for the acts of its officers in making a wrongful arrest for such breach. The court further says that the case rests on the ground that municipal corporations represent the commonwealth, and municipal officers while engaged in duties relating to the public safety and maintenance of public order are the servants of the commonwealth.

Michigan. Stevens v. Muskegon, 111 Mich. 72, 69 N. W. 227, 36 L. R. A. 777.

Nebraska. See Verdon v. Bowman, 5 Neb. (Unof.) 38, 97 N. W. 229.

Oregon. Hall v. Dunn, 52 Ore. 475, 97 Pac. 811.

Texas. McFadin v. San Antonio, 22 Tex. Civ. App. 140, 54 S. W. 48. To the same effect, Harrison v Columbus, 44 Tex. 418.

United States. Clark v. Atlantic City, 180 Fed. 598; Masters v. Bowling Green, 101 Fed. 101; Trescott v. Waterloo, 26 Fed. 592, where an attempt was made to enforce a void ordinance regulating pedlers, the court held that a municipal corporation is not liable to action by one who served out his sentence for violating an unconstitutional municipal ordinance. The court says that in Iowa police regulations are not made and enforced in the interest of the city in its corporate capacity, but in the interest of the public, and that consequently the city is not liable for enforcing such regulations, and that the action of the city in adopting the ordinance was a legislative act, and the exercise of the right of sovereignty primarily belongs to the state. To the same effect is Easterly v. Irwin, 99 Ia. 694, 68 N. W. 919.

The enactment of an ordinance and the arrest of a person, and his trial and conviction, thereunder are the exercise of governmental functions, and if the odinance is void and the arrest consequently wrongful, the municipality is not liable. Clark v. Atlantic City, 180 Fed. 598.

Not liable for attempt to enforce void ordinance imposing a tax of $50 on every non-resident dealer selling fertilizers within the city. It was unsuccessfully contended that the city was merely acting to protect its own good by preventing competition of outsiders with its own local dealers in guano, and that it was merely furthering its private or pecuniary interests. Bond v. Royston, 130 Ga. 646, 61 S. E. 491.

Municipal corporation not liable for attempt of its police officers to enforce a void enactment. Hall v. Dunn, 52 Ore. 475, 97 Pac. 811.

such ordinance (license) go into the treasury of the municipality.[33] Likewise, a municipality is not ordinarily liable for an *illegal* enforcement of an ordinance, even if a valid one.[34]

§ 2641. Nuisances, maintenance of and failure to abate.

The duty of a municipal corporation to abate nuisances created or maintained on private property is governmental, and the municipality ordinarily will not be liable for failure to abate such a nuisance, unless the statutes so provide.[35] Especially is this true where the

33. Simpson v. Whatcom, 33 Wash. 392, 396, 74 Pac. 577, 63 L. R. A. 815, 99 Am. St. Rep. 951.

In Kentucky, however, it was held that a municipality is liable for the enforcement of a void ordinance enacted for the sole benefit of the corporation or its inhabitants, such as one requiring all transients to pay a license to sell goods at auction. McGraw v. Marion, 98 Ky. 673, 34 S. W. 18, 47 L R. A. 673. Later cases, however, reject the rule in the McGraw case as "contrary to both the previous and subsequent decisions of the court." Hershberg v. Barbourville, 142 Ky. 60, 133 S. W. 985, where city held not liable for arrest for violation of void ordinance prohibiting all cigarette smoking.

34. Odell v. Schroeder, 58 Ill. 353, false imprisonment by town officer.

35. *Alabama.* Florence v. Woodruff (Ala. 1912), 59 So. 435; Bieker v. Cullman (Ala. 1912), 59 So. 625; Davis v. Montgomery, 51 Ala. 139, 23 Am. Rep. 545.

Georgia. Dalton v. Wilson, 118 Ga. 100, 103, 44 S. E. 830, 98 Am. St. Rep. 101; Love v. Atlanta, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64.

Indiana. Anderson v. East, 117 Ind. 126, 19 N. E. 726, 2 L. R. A. 712, 10 Am. St. Rep. 35.

Kentucky. Frankfort v. Commonwealth, 25 Ky. L. Rep. 311, 75 S. W. 217; James' Adm'r v. Harrodsburg, 85 Ky. 191, 3 S. W. 135, 7 Am. St. Rep. 589.

Louisiana. Howe v. New Orleans, 12 La. Ann. 481.

Missouri. Armstrong v. Brunswick, 79 Mo. 319.

Oklahoma. Glenn v. Ardmore (Okla. 1912), 122 Pac. 658.

Tennessee. McCrowell v. Bristol, 5 Lea (Tenn.), 685, keeping of saloon near plaintiff's house.

Virginia. Radford v. Clark (Va. 1912), 73 S. E. 571.

Wisconsin. Kelley v. Milwaukee, 18 Wisc. 83.

Contra, in Maryland. Cochrane v. Frostburg, 81 Md. 54, 64, 31 Atl. 703, 27 L. R. A. 728, 48 Am. St. Rep. 479.

The general power to abate nuisances conferred on municipalities by statute, and the powers to regulate, inspect, and condemn buildings contained in a statute, are clearly governmental in char-

abatement of the nuisance is discretionary.[36] Applying this rule of nonliability for failure to abate a nuisance, it is held that there is no municipal liability for failure to remove an overhanging *limb of a tree* which by reason of its liability to fall upon the traveled part of a street constituted a nuisance.[37]

Where, however, the municipality itself creates, maintains or authorizes a nuisance, it will be liable for dam-

acter, and for negligent default on the part of the city and its officers and agents no action lies; none having been given by the law. Harrington v. Greenville (N. C. 1912), 75 S. E. 849.

"Failure of a city to exercise its charter power to abate nuisances not rendering its streets unsafe does not give persons injured by such failure a private action against the city, nor does a failure to make or enforce ordinances prohibiting nuisances give them such action against the city." Miller v. Newport News, 101 Va. 432, 44 S. E. 712.

Failure to enact or enforce ordinances for the prevention or abatement of a private nuisance will not render the municipality liable. Mansfield v. Brister, 76 Ohio St. 270, 81 N. E. 631, 10 L. R. A. (N. S.) 806; Arnold v. Stanford, 113 Ky. 852, 24 Ky. Law Rep. 626, 69 S. W. 726; Davis v. Montgomery, 51 Ala. 139, 23 Am. Rep. 545; Butz v. Cavanaugh, 137 Mo. 503, 38 S. W. 1104, 59 Am. St. Rep. 504; Kiley v. Kansas City, 87 Mo. 103, 56 Am. Rep. 443; Armstrong v. Brunswick, 79 Mo. 319.

Municipality is not liable for a failure to enforce its ordinances against the maintenance of nuisances on private property. Hull v. Roxboro, 142 N. C. 453, 55 S. E. 351.

Fire traps. Failure or refusal to condemn or remove old and worthless buildings, dangerous as a source of fire, does not make a municipality liable for loss of property by fire. Harrington v. Greenville (N. C. 1912), 75 S. E. 849.

Peanut roaster. Municipality not liable, on the theory of permitting a nuisance, for damages caused by the explosion of a peanut roaster maintained on a sidewalk by a private person. Frank v. Warsaw, 101 N. Y. S. 938, 116 App. Div. 618.

Obstruction in river. City not liable for failure to remove nuisance in navigable river, even under the Maryland law which is out of line with the other states, since a navigable river is not a way which the municipality must keep free from obstructions. Maryland v. Miller, 180 Fed. 796.

36. White v. Buffalo, 115 N. Y. S. 1021, 131 App. Div. 531; McDade v. Chester, 117 Pa. 414, 12 Atl. 421, 2 Am. St. Rep. 681.

37. Dyer v. Danbury, 85 Conn. 128, 81 Atl. 958.

Overhanging limbs as defects in street, § 2776, next chapter.

ages,[38] regardless of whether it was guilty of negli-

38. *Connecticut.* Mootry v. Danbury, 45 Conn. 550, 29 Am Rep. 703.

Illinois. Champaign v. Forrester, 29 Ill. App. 117.

Iowa. Fitzgerald v. Sharon, 143 Ia. 730, 121 N. W. 523. See also Hines v. Nevada, 150 Ia. 620, 130 N. W. 181.

Kentucky. Clayton v. Henderson, 103 Ky. 228, 44 S. W. 667, 44 L. R. A. 474.

Maryland. Baltimore v. Marriott, 9 Md. 160, 66 Am. Dec. 326.

Michigan. Pennoyer v. Saginaw, 8 Mich. 534.

Missouri. Roth v. St. Joseph, 164 Mo. App. 26, 147 S. W. 490; Hedwick v. St. Joseph, 138 Mo. App. 396, 122 S. W. 375; Martin v. St. Joseph, 136 Mo. App. 316, 117 S. W. 94; Sallee v. St. Louis, 152 Mo. 615, 54 S. W. 463; Torpey v. Independence, 24 Mo. App. 288; Brown v. Scruggs, 141 Mo. App. 632, 125 S. W. 537.

Montana. Murray v. Butte, 35 Mont. 161, 88 Pac. 789.

New Jersey. Hart v. Union County, 57 N. J. L. 90, 29 Atl. 490.

New York. Jackson v. Rochester, 43 Hun (N. Y.), 635; Hill v. New York, 139 N. Y. 495, 34 N. E. 1090; Bolton v. New Rochelle, 32 N. Y. S. 442, 84 Hun, 281.

North Carolina. Downs v. High Point, 115 N. C. 182, 20 S. E. 385, drain; Jones v. North Wilkesboro, 150 N. C. 646, 64 S. E. 866.

Pennsylvania. Vanderslice v. Philadelphia, 103 Pa. St. 102.

Texas Ft. Worth v. Crawford, 74 Tex. 404, 12 S. W. 52, 15 Am. St. Rep. 840 (deposit of garbage); San Antonio v. Mackey, 14 Tex. Civ. App. 210, 36 S. W. 760; Hillsboro v. Ivey, 1 Tex. Civ. App. 653, 20 S. W. 1012, dump for dead animals.

Virginia. Radford v. Clark (Va. 1912), 73 S. E. 571.

Wisconsin. Harper v. Milwaukee, 30 Wis. 365.

Maintaining a nuisance creates liability. A municipal corporation is liable for maintaining a nuisance to the same extent as an individual. Valparaiso v. Moffitt, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 522; New Albany v. Slider, 21 Ind. App. 392, 52 N. E. 626.

Nuisance in streets, extreme rule imposing liability, see Wheeler v. Fort Dodge, 131 Ia. 566, 108 N. W. 1057, 9 L. R. A. (N. S.) 146.

Flooding lands. A municipal corporation is liable for creating a nuisance by flooding the lands of an individual in providing a system of waterworks. Ennis v. Gilder, 32 Tex. Civ. App. 351, 74 S. W. 585.

Discharging sewage into a ditch, creating a nuisance, renders municipality liable. Phillips v. Armada, 155 Mich. 260, 118 N. W. 941, and see § 2697, *post.*

Nuisance beyond city limits, city liable. Coleman v. Price, 54 Tex. Civ. 39, 42, 117 S. W. 905.

Fire engine house not a nuisance. Van de Vere v. Kansas City, 107 Mo. 83, 17 S. W. 695, 28 Am. St. Rep. 396.

Standpipe held not a nuisance.

gence,[39] and it cannot escape liability therefor on the ground that in doing so it was exercising a governmental function.[40] But if the nuisance created is not within the scope of the powers of the municipality, there is no municipal liability.[41]

Furthermore, where the municipal corporation permits

Whitfield v. Carrollton, 50 Mo. App. 98.

Public market not nuisance *per se*. State v. Smith, 123 Ia. 654, 96 N. W. 899.

Construction of waterworks not a nuisance *per se*, although blasting is necessary. Logansport v. Dick, 70 Ind. 65, 36 Am. Rep. 166.

Notice of nuisance given to city clerk only is insufficient, where notice is necessary. Nichols v. Boston, 98 Mass. 39, 93 Am. Dec. 132.

City is not liable for failure to abate a nuisance which it did not create, except after notice and request to abate it. Martin v. St. Joseph, 136 Mo. App. 316, 117 S. W. 94.

39. Negligence is not an element to be considered in action for creating or maintaining nuisance. Roth v. St. Joseph, 164 Mo. App. 26, 147 S. W. 490; Frick v. Kansas City, 117 Mo. App. 488, 93 S. W. 351; Coleman v. Price, 54 Tex. Civ. App. 39, 117 S. W. 905.

40. Municipality is liable for a nuisance created by the operation of its sewer system, and is not relieved therefrom by the fact that it was exercising a governmental function in maintaining the sewer. Sammons v. Gloversville, 175 N. Y. 346, 67 N. E. 622.

See also Watson v. New Milford, 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345.

Smoke nuisance created by municipal pumping plant; question of governmental duty immaterial and municipality liable therefor. Gordon v. Silver Creek, 112 N. Y. S. 54, 127 App. Div. 888.

Where the municipal authorities suffer or cause streets to become unsafe by reason of failure to enforce police regulations designed to keep them free from obstructions and nuisances and damage results by reason thereof, responsibility can not be evaded on the ground that the omitted duty is legislative or governmental in character. Miller v. Newport News, 101 Va. 432, 44 S. E. 712.

Cleaning its streets, though a proper exercise of power delegated by the state to the municipality, does not give the municipality the right to do so in such a manner as to create a nuisance. New Albany v. Slider, 21 Ind. App. 392, 52 N. E. 626, and see § 2636, *ante*.

41. Seele v. Deering, 79 Me. 343, 10 Atl. 45, 1 Am. St. Rep. 314, and see § 2637, *ante*.

Contra, in Iowa. Fitzgerald v. Sharon, 143 Ia. 730, 733, 121 N. W. 523.

conditions in its *streets* and public ways which amount to a nuisance so as to interfere with the reasonable use of such streets or ways by the public, the corporations is ordinarily liable,[42] as will be more fully noticed in the succeeding chapter. Thus where a city by license authorized a use to be made of a street which rendered it dangerous or unsafe for travelers, *e. g.*, the exhibit of wild animals thereon, resulting in damage by reason of the team of a person properly using the street, taking fright, the city was held liable.[43]

42. Speir v. Brooklyn, 139 N. Y. 6, 34 N. E. 727, 21 L. R. A. 641, 36 Am. St. Rep 664.

A city having control over its streets and power to remove private nuisances erected thereon, is liable to property owner for failure to abate a private nuisance erected and maintained in the street opposite the property. Frick v. Kansas City, 117 Mo. App. 488, 93 S. W. 351.

Wagon kept in street. The granting of a license, even though authorized by ordinance, to an individual, permitting him to keep wagons on the highway, held a nuisance for which city is liable. Cohen v. New York, 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506.

Grant of street franchise without authority. In an Iowa case, in an action against a city to recover for personal injuries caused by the frightening of plaintiff's horse by a steam motor, used upon a street railway by permission of the city council, it was held that, in the absence of express statutory authority, a city has no power to authorize or permit the use of steam motors upon its streets, either upon ordinary railroads or street railways, and the grant of such authority or permission constitutes negligence which will render the city liable for damages caused thereby. The fact that the action of the city council in granting such right was without authority, in the opinion of the court, would not protect the city from liability, since the view advanced was that corporations are responsible for the acts of their officers and agents done within the apparent scope of their authority, and the streets of the city are under the control of the city council. Stanley v. Davenport, 54 Ia. 463, 2 N. W. 1064, 6 N. W. 706, 37 Am. Rep. 216.

43. Little v. Madison, 42 Wis. 643, 24 Am. Rep. 435, where a city licensed the exhibition of bears in one of its principal streets, thus authorizing a dangerous obstruction and nuisance.

See also the "Sacred Ox Case," Cole v. Newburyport, 129 Mass. 594, 37 Am. Rep. 394, where the city granted the right to erect a booth in one of its public squares for the use and exhibition of an animal. The city was held not liable.

§ 2660, *post*.

Applying the rules laid down above, municipalities are generally held liable where they use, or license the use of, a place as a *dump*, to the injury of others as to whom it is a nuisance.[44] So where *fireworks* are displayed by the municipality itself, or pursuant to its permit, the discharge thereof may, because of the place, be a nuisance so as to make the municipality liable,[45] especially where

44. **Dumping refuse** on lot adjoining plaintiff's premises is actionable where injurious to health and unreasonable under the circumstances. Lane v. Concord, 70 N. H. 485, 49 Atl. 687, 85 Am. St. Rep. 643, and see 2636, *ante*.

Dumping place for garbage. If garbage is dumped at a particular place, to the injury of nearby property, damages are recoverable. Flanagan v. Bloomington, 156 Ill. App. 162.

Municipality is liable, on the ground of creating a nuisance, where a city scavenger repeatedly deposits dead animals and other filth on ground near plaintiff's residence. Stephenville v. Bower, 29 Tex. Civ. App. 384, 68 S. W. 833.

Immaterial that land on which garbage was dumped did not belong to the city. Stephenville v. Bower, 29 Tex. Civ. App. 384, 68 S. W. 833.

Maintaining a dumping ground for the deposit of garbage is a corporate duty and municipality is liable for a nuisance caused thereby. Coleman v. Price, 54 Tex. Civ. App. 39, 117 S. W. 905; Haskell v. Webb (Tex. Civ. App. 1911), 140 S. W. 127.

Collecting garbage and filth from the streets and depositing it in a mass upon some other street, causing a nuisance, renders city liable. New Albany v. Slider, 21 Ind. App. 392, 52 N. E. 626.

Dump for refuse, maintenance on land of owner with his consent, not a nuisance. Denver v. Porter, 126 Fed. 288, 61 C. C. A. 168.

City not liable for act of marshal in depositing carcasses of dead animals so near a private residence as to create a nuisance. Hillsboro v. Ivey, 1 Tex. Civ. App. 653, 20 S. W. 1012.

Thomp., Neg., § 5853.

45. The fact that the exhibition of fireworks resulting in the injury to plaintiff was given by a church organization upon private property, at a point specifically designated, under the direction of the commissioner of police, upon property abutting a populated street, does not relieve the municipality from liability. Walker v. New York, 95 N. Y. S. 121, 107 App. Div. 351.

Fireworks on a public playground, shot off by a municipality on only one occasion, for the entertainment of the public, are not a nuisance. Kerr v. Brookline, 208 Mass. 190, 94 N. E. 257, 34 L. R. A. (N. S.) 464.

Fireworks as nuisance, in New York, see Landau v. New York, 180 N. Y. 48, 55, 72 N. E. 631, 105 Am. St. Rep. 709 (where it is

a street is the scene of the display.[46] Likewise, a *pest house* may be an actionable nuisance, although the question generally involved is whether property is "taken" or "damaged" by the maintenance thereof, within the provisions relating to condemnation proceedings.[47] And

said: "Fireworks exhibited on an extensive scale in a great thoroughfare, in the midst of a large city, where a vast multitude of people is assembled, if not a nuisance as matter of law, may properly be found to be such as a matter of fact"); Meiker v. New York, 190 N. Y. 481, 83 N. E. 565 (where exhibition of fireworks on evening of election day, on Madison avenue in New York City, was held, under the particular facts of the case, not a nuisance as a matter of law, and it was said: "An exhibition of fireworks is not *malum in se*, but is evil or innocent according to circumstances"); Speir v. Brooklyn, 139 N. Y. 6, 11, 34 N. E. 727, 21 L. R. A. 641, 36 Am. St. Rep. 664; DeAgramonte v. Mount Vernon, 98 N. Y. S. 454, 112 App. Div. 291 (where display was in *city park* and held not a nuisance *per se*).

Failure to prevent fireworks on streets. Injuries from discharge of fireworks by third persons. City not liable. Bartlett v. Clarksburg, 45 W. Va. 393, 31 S. E. 918, 43 L. R. A. 295, 72 Am. St. Rep. 817.

See Thomp., Neg., § 5851.

46. See next chapter, § 2752.

47. **Pest house is nuisance.** Anable v. Montgomery County, 34 Ind. App. 72, 71 N. E. 272, 107 Am. St. Rep. 173; Clayton v. Henderson, 103 Ky. 228, 44 S. W. 667, 44 L. R. A. 474; Henderson v. Clayton, 22 Ky. L. Rep. 283, 57 S. W. 1, 53 L. R. A. 145, where city was held liable where it located a pesthouse within one mile of its limits, which was forbidden by statute, resulting in plaintiff catching smallpox.

See, as denying right to recover damages. Barry v. Smith, 191 Mass. 78, 77 N. E. 1099, 5 L. R. A. (N. S.) 1028.

"Where a city or other municipality erects and maintains a public institution, which, by reason of its nature, endangers the lives or health of the occupants of adjacent premises, as by subjecting them to contagious or infectious diseases, it is not only a nuisance, but it is such an invasion of the property rights of such adjacent holders as amounts both to an injury and a taking of property under the section of our constitution. For this the city must make compensation." Paducah v. Allen, 111 Ky. 361, 23 Ky. L. Rep. 701, 63 S W. 981, 98 Am. St. Rep. 422. In Illinois, however, it is held that under legislative authority a municipal corporation may establish a smallpox hospital upon its own grounds, and if the hospital is properly located and conducted no action will lie for damages to the value of property in the neighborhood, for such act does not constitute a taking or damaging of private property for public use,

in Illinois the maintenance of an ordinary hospital has been enjoined, in a particular case, by adjoining owners as a nuisance.[48]

§ 2642. Jails, workhouses, and police stations.

In erecting, maintaining and managing jails, workhouses, and police stations, the municipality is exercising a purely governmental function.[49] Therefore, notwithstanding the manifest injustice of the rule, especially where a person is confined without good cause, it is well settled that municipalities are not liable, to persons confined therein, for injuries resulting from the improper construction or negligent maintenance or management of such a place,[50] nor for injuries received from fellow pris-

within the meaning of the constitution. Frazer v. Chicago, 186 Ill. 480, 57 N. E. 1055, 51 L. R. A. 306, 78 Am. St. Rep. 296. Compare L'Hote v. New Orleans, 177 U. S. 584, 20 Sup. Ct. 788, 44 L. Ed. 899.

The contraction of smallpox by a guest from an inmate of the house who is conceded to have contracted the disease because of the unlawful location of a pest hospital near by is held, in Henderson v. O'Haloran, 114 Ky. 186, 70 S. W. 662, 59 L. R. A. 718, 102 Am. St. Rep. 279, to be the proximate result of such unlawful location, so as to render the city liable for the injury thereby caused to the guest.

Ultra vires. Pest house near plaintiff's residence. Plaintiff held not entitled to recover damages where city had no authority to maintain pest houses. Arnold v. Stanford, 113 Ky. 852, 69 S. W. 726, dist'g Clayton v. Henderson, 103 Ky. 228, 44 S. W. 667, 44 L. R. A. 474, on ground that in earlier case city had legal right to establish pest house.

48. **Hospital as nuisance, injunction against,** see Deaconess Hospital v. Bontjes, 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215, aff'g 104 Ill. App. 484.

49. § 2431, p. 5067, *ante*, vol. 5.

50. *Georgia.* Gray v. Griffin, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131; Wilson v. Macon, 88 Ga. 455, 14 S. E. 710 (putting prisoner in cell with dangerous and intoxicated fellow prisoner).

Illinois. Evans v. Kankakee, 231 Ill. 223, 83 N. E. 223; Blake v. Pontiac, 49 Ill. App. 543.

Kansas. La Clef v. Concordia, 41 Kan. 323, 21 Pac. 272, 13 Am. St. Rep. 285; New Kiowa v. Craven, 46 Kan. 114, 26 Pac. 426.

Kentucky. Braunstein v. Louisville, 146 Ky. 777, 143 S. W. 372; Bowling Green v. Rogers, 142 Ky. 558, 134 S. W. 921.

Maine. Mains v. Ft. Fairchild, 99 Me. 177, 59 Atl. 87.

oners.[51] And a municipality is not liable to one con-

Massachusetts. Curran v. Boston, 151 Mass. 505, 24 N. E. 781, 8 L. R. A. 243, 21 Am. St. Rep. 465.

Minnesota. Gullikson v. McDonald, 62 Minn. 278, 64 N. W. 812.

West Virginia. Shaw v. Charleston, 57 W. Va. 433, 50 S. E. 527.

Vermont. Carty's Adm'r v. Winooski, 78 Vt. 104, 62 Atl. 45, 2 L. R. A. (N. S.) 95.

Municipal corporation is not liable for negligence in caring for one who is under arrest by the police, and this is true whether the arrest is lawful or unlawful, because in such case a public duty is being discharged for which the city derives no pecuniary benefit. Kelly v. Cook, 21 R. I. 29, 41 Atl. 571, 5 Am. Neg. Rep. 94.

City not liable to a prisoner in its work house for damage resulting from wrongful acts of the superintendent. Rose v. Toledo, 24 Ohio Cir. Ct. Rep. 540.

Street work by convicts. Not liable for death of convict, working on public street, caused by negligence of servant of city in charge of work. Nisbet v. Atlanta, 97 Ga. 650, 25 S. E. 173.

Police station. Maintenance of a police station, by a municipal corporation, used partly for the accommodation of its police force and partly as a jail, is in the exercise of governmental functions, and the municipality is not liable for the negligence of employees engaged in its maintenance. Wilcox v. Rochester, 190 N. Y. 137, 82 N. E. 1119, rev'g 99 N. Y. S. 1020, 114 App. Div. 734.

Negligence of officers in charge of rock pile for municipal offenders creates no liability against the municipality. Jackson v. Owingsville (Ky.), 121 S. W. 672.

Care of smallpox. Not liable for detaining in calaboose a person afflicted with smallpox whereby persons residing or working near by contracted the disease. Evans v. Kankakee, 231 Ill. 223, 83 N. E. 223, 13 L. R. A. (N. S.) 1190, aff'g 132 Ill. App. 488.

In North Carolina, statute creates limited liability by requiring jails to be kept clean, prescribing the food and blankets, etc. Moffitt v. Asheville, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810. See also Lewis v. Raleigh, 77 N. C. 229. But compare Shields v. Durham, 118 N. C. 450, 24 S. E. 794, 36 L. R. A. 293.

In Virginia, under statute, a city was held liable for the unhealthy condition of a jail established and maintained independently by the city. Edwards v. Pocahontas, 47 Fed. 268, 44 Alb. L. J. 363.

51. Wilson v. Macon, 88 Ga. 455, 14 S. E. 710; Morgan v. Shelbyville (Ky.), 121 S. W. 617; Davis v. Knoxville, 90 Tenn. 599, 18 S. W. 254.

Injury from fellow prisoner. Maintenance of a guard house of a prison is a governmental duty and municipality will not be held liable for injuries inflicted upon one confined therein by a fellow prisoner. Morgan v. Shelbyville (Ky.), 121 S. W. 617.

fined in jail, injured by the burning of the jail, caused by the negligence of municipal officers in the exercise of their official duties.[52] So there is no liability for defective machinery or appliances used in a prison or workhouse, or on a rockpile, injuring a convict working thereon,[53] nor for neglect to furnish convicts a safe place to work.[54] Likewise one imprisoned cannot recover for injuries to his health, or sickness, resulting from the *unhealthy condition* of the jail.[55] This exemption from liability also extends to *injuries in a quarry* some miles from the workhouse, where the quarry was being used

52. **Burning of jail.** Where a jail is destroyed by fire caused by the negligence of the officers in charge resulting in the death of inmates, the city is not liable. McAuliffe v. Victor, 15 Colo. App. 337, 62 Pac. 231; Brown's Adm'r v. Guyandotte, 34 W. Va. 299, 12 S. E. 707, 11 L. R. A. 121.

53. Alamango v. Albany County, 25 Hun (N. Y.), 551; Curran v. Boston, 151 Mass. 505, 24 N. E. 781, 8 L. R. A. 243, 21 Am. St. Rep. 465, 30 Am. & Eng. Corp. Cas. 506; Green v. Muskingum County Com'rs, 23 Ohio Cir. Ct. R. 43.

Rock pile. One forced to break rock on a municipal rock pile, in order to pay off and discharge a fine, cannot recover because of injuries resulting from a defective hammer in the hands of another rock breaker. Jackson v. Owingsville (Ky.), 121 S. W. 672, 25 L. R A. (N. S.) 180.

Vicious mule. So, in Missouri, where a prisoner is committed to the St. Louis workhouse in satisfaction of a fine imposed for the violation of an ordinance, and who, while at work, is kicked by a vicious mule which the workhouse superintendent ordered him to harness, there can be no recovery of the city for the injuries so received, even though the superintendent knew the mule was vicious. Ulrich v. St. Louis, 112 Mo. 138, 20 S. W. 466, 34 Am. St. Rep. 372.

54. Ulrich v. St. Louis, 112 Mo. 138, 20 S. W. 466, 34 Am. St. Rep. 372. Kicked by mule.

Notice to chief of police not notice to city of improper condition of prison, see Coley v. Statesville, 121 N. C. 301, 28 S. E. 482.

55. White v. Sullivan County, 129 Ind. 396, 28 N. E. 846; Jones v. Corbin, 30 Ky. L. Rep. 374, 98 S. W. 1002; Eddy v. Ellicottville, 54 N. Y. S. 800, 35 App. Div. 256; Shields v. Durham, 116 N. C. 394, 21 S. E. 402.

One confined by an officer in a town lockup over night without food or water, or protection from the cold, can not recover from the town for a consequent injury to him health. Lahner v. Williams, 112 Ia. 428, 84 N. W. 507.

for workhouse purposes;[56] and the fact that some revenue is derived from the quarry, where the revenue is applied in most part in payment of the expenses of the maintenance and operation of the workhouse, does not affect the rule, since the revenue is incidental to the main purpose.[57] Likewise, a municipality is not liable to a third person working on a street some distance from the quarries of a city workhouse, where injured by rocks thrown on him by blasting at the quarry.[58]

It has been held that a property owner cannot recover damages from a municipality for building a prison on adjoining property, although it would seem that if it is so maintained as to create a nuisance, one sustaining special injury may sue for such negligent maintenance, as distinguished from the erection.[59]

§ 2643. Fire stations, apparatus, etc.

It has already been noted that municipalities are not liable for the torts of their firemen.[60] Moreover, it is

56. Braunstein v. Louisville, 146 Ky. 777, 143 S. W. 372; Bell v. Cincinnati, 80 Ohio St. 1, 88 N. E. 128.

57. Bell v. Cincinnati, 80 Ohio St. 1, 20-24, 88 N. E. 128.

58. Braunstein v. Louisville, 146 Ky. 777, 143 S. W. 372.

59. Long v. Elberton, 109 Ga. 28, 34 S. E. 333, 46 L. R. A. 428, 77 Am. St. Rep. 363.

Nuisance. Prison not *per se* a nuisance. Bowling Green v. Rogers, 142 Ky. 558, 134 S. W. 921.

60. § 2432, *ante*, vol. 5.

Many powers of a municipal corporation are in their nature legislative, and some are judicial, while others are purely ministerial. These two classes of duties and obligations are sometimes so intimately connected that it is not always very easy to distinguish the one from the other. But reason and the soundest public policy forbid that liability for damage be held against a city for its manner of resisting fire, as human skill and ingenuity are not always competent to resist that destructive element and the best means reasonably used to guard persons and property is all that can be expected. Brinkmeyer v. Evansville, 29 Ind. 187.

Not liable for injuries received by a teamster in its fire department, while training horses, on account of the negligence of the chief of the fire department in representing a vicious horse to be gentle, and failing to supply a proper appliance for training such a horse. Lynch v. North Yakima, 37 Wash. 657, 80 Pac. 79.

Not liable for negligence of its

well settled that municipalities are not liable for injuries due to the defective condition of its fire apparatus,[61] or the negligent construction or management of fire houses,[62] or the failure to furnish an adequate supply of water for fire protection.[63] For instance, where cisterns constructed by a municipality for fire protection are allowed to get out of order, resulting in the burning of

fire department in responding to a call, resulting in loss of property by fire. Irvine v. Chattanooga, 101 Tenn. 291, 47 S. W. 419.

Members of fire department can not recover. In the absence of a staute, no individual has a right of action against a municipal corporation for injuries sustained while rendering services as a paid member of the fire department or as a volunteer. Wild v. Paterson, 47 N. J. L. 406, 1 Atl. 490; Peterson v. Wilmington, 130 N. C. 76, 40 S. E. 853, 56 L. R. A. 959.

Accident policy no defense. The fact that a fireman had an accident policy will not relieve the city from liability for negligence resulting in his death. Kansas City v. McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429, 6 Am. Neg. Rep. 67.

61. McKenna v. St. Louis, 6 Mo. App. 320; Lawson v. Seattle, 6 Wash. 184, 33 Pac. 347.

No liability exists for negligence in the care of such apparatus. Wild v. Paterson, 47 N. J. L. 406, 1 Atl. 490.

In Indiana, however, it has been held, without discussing this question, that a municipality is liable to an employee injured by defects in a fire engine of which he had charge. Lafayette v. Allen, 81 Ind. 166.

62. See Kies v. Erie, 135 Pa. 144, 19 Atl. 942, 20 Am. St. Rep. 867.

Safe place to work or safe tools need not be furnished firemen, since operating a fire department is a governmental duty. Long v. Birmingham, 161 Ala. 427, 49 So. 881, and see § 2643, *post*.

In Kansas, however, it is held that in the care and management of a fire station a city is performing a purely ministerial duty; and it is liable for failure to furnish its employees a reasonably safe place to work. Bowden v. Kansas City, 69 Kan. 587, 595, 77 Pac. 573, 66 L. R. A. 181, 105 Am. St. Rep. 187.

In Oregon, also, it is held that a city engaged in repairing its fire alarm system, *through the instrumentality of private or corporate agencies*, and through the fire department or its officers, or through officers of the city whose duty it was to perform such work, is liable to such employees where injured. Wagoner v. Portland, 40 Oreg. 389, 397, 60 Pac. 985.

Contra, § 2432, note 59, *ante*, vol. 5.

63. § 2430, *ante*, vol. 5.

one's buildings because of inability to get an adequate water supply, the municipality is not liable.[64]

So far as defective fire apparatus is concerned, an attempt has been made to establish an exception to the rule of nonliability for torts in connection with the fire department, by contending that, in so far as employees engaged in the use of such apparatus are affected, the duty to keep the apparatus in good order is a private duty owed to the employee and not the public. This contention was rejected in New Jersey.[65] In Wisconsin, however, a municipality has been held liable to an employee engaged in constructing a cistern for the fire department, for protection against fire, on the theory that the municipality was engaged in the attempted performance of a duty through its own private agencies and not through the fire department or its officers or other officers of the city whose duty it was to perform the work;[66] and in Massachusetts it was held that where a city owned a telegraph wire for the use of its fire department, and injury was caused while the wire was being removed for purposes not connected with the fire department, the municipality is liable.[67]

However, *in courts of admiralty,* under the maritime law, a municipality is liable for the negligence of its servants in charge of a fire boat, as in case of a collision.[68]

§ 2644. Collection of taxes or special assessments.

There is no doubt but that the collection of taxes is a governmental function.[69] On the other hand, a different

64. Terrell v. Louisville Water Co., 127 Ky. 77, 31 Ky. L. Rep. 1281, 105 S. W. 100.

65. Wild v. Paterson, 47 N. J. L. 406, 412, 1 Atl. 490.

66. Mulcairns v. Janesville, 67 Wisc. 24, 29 N. W. 565.

67. Neuert v. Boston, 120 Mass. 338.

68. Workman v. New York, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314, rev'g 67 Fed. 347, 14 C. C. A. 530; Thompson Nav. Co. v. Chicago, 79 Fed. 984; Henderson v. Cleveland, 93 Fed. 844.

69. See Liberty v. Hurd, 74 Me. 101; Lorillard v. Monroe, 11 N. Y. 392, 62 Am. Dec. 120; Muller v. Bayonne, 45 N. J. Eq. 237, 240, 19 Atl. 614; Tone v. New York,

rule applies as to *special assessments*. It is held that "the laying out and opening of streets in a city, the assessment of damages and benefits resulting therefrom, and the collection of the sums so assessed as benefits, are strictly municipal functions, and the officers of the city by whom these functions are performed thereby discharge municipal or corporate duties, as distinguished from public or governmental duties."[70] But in a recent case in Missouri a city was sued to recover damages for the failure of its treasurer to perform the purely ministerial act of issuing a certificate to a purchaser at a sale of property under an assessment levied for the maintenance of parks and boulevards. It was held that the city, in levying the assessment, was acting in a governmental capacity.[71]

§ 2645. Lighting streets.

Lighting the streets of a municipality is universally recognized as a public and governmental function, and this is so although the same plant which supplies the electricity for the street light also supplies the electricity for the lights in private dwellings and business houses.[72]

§ 2646. Infringement of patent.

A municipality is liable to a patentee for an infringe-

70 N. Y. 157, 165; Bank of Commonwealth v. New York, 43 N. Y. 184.

In Massachusetts, tax assessors and collectors, "although elected by the inhabitants of the town, are not the agents of the town, but are public officers whose duties are prescribed by law." Alger v. Easton, 119 Mass. 77, and see Dunbar v. Boston, 112 Mass. 75.

Assessors are public officers and not servants of the municipality, and the latter is not liable to a property owner for fraudulently overvaluing his property for the purpose of taxation. Hathaway v. Everett, 205 Mass. 246, 91 N. E. 296.

70. Durkee v. Kenosha, 59 Wisc. 123, 124, 17 N. W. 677, 48 Am. Rep. 480.

See § 174 *ante*, vol. 1.

71. Brightwell v. Kansas City, 153 Mo. App. 519, 134 S. W. 87.

72. Irvine v. Greenwood, 89 S. C. 511, 519, 72 S. E. 228, holding that there is no common law liability for death of one coming in contact with a wire supporting an arc light in a street.

§ 2806, *post*.

ment of his patent in the course of the execution of its corporate powers and duties.[73]

§ 2647. Exhibition conducted by municipality.

If a municipality has the power conferred on it to give any kind of an exhibition, and injuries result from negligence in connection therewith, usually the municipality will be held liable therefor. However, if entertainment is provided, exclusively for the *gratuitous* amusement of the public, the municipality is not liable for negligence in connection therewith.[74] To illustrate, where a municipality displays *fireworks* to entertain the public, one injured by being struck by some of the fireworks or otherwise in connection with the display, cannot recover, on the theory that the work in which the municipality is engaged is conducted solely in the public interest and for the general benefit.[75] But in some jurisdictions, fireworks, at least where discharged in a street, are held a public nuisance.[76]

Furthermore, nonliability is often predicated on the fact that the act of providing the entertainment is *ultra vires* and beyond the power of the municipality.[77]

However, if a municipality *permits* a public exhibition in a *street,* and it obstructs the street or renders it unsafe for travel, the municipality is generally held liable for resulting injuries.[78]

73. Asbestine Tiling Co. v. Hepp, 39 Fed. 324; Brickill v. New York, 7 Fed. 479; Munson v. New York, 3 Fed. 338; Allen v. New York, Fed. Cas. No. 232; Bliss v. Brooklyn, Fed. Cas. No. 1,544; Ransom v. New York, Fed. Cas. No. 11,573.

74. Tindley v. Salem, 137 Mass. 171, 50 Am. Rep. 289.

75. Tindley v. Salem, 137 Mass. 171, 50 Am. Rep. 289, followed in Kerr v. Brookline, 208 Mass. 190, 94 N. E. 257, 34 L. R. A. (N. S.) 464.

76. § 2641, *ante*, and § 2752, *post*.

77. Morrison v. Lawrence, 98 Mass. 219; Smith v. Rochester, 76 N. Y. 506; Love v. Raleigh, 116 N. C. 296, 21 S. E. 503, 28 L. R. A. 192; Blankenship v. Sherman, 33 Tex. Civ. App. 507, 76 S. W. 805.

§ 2637, *ante*.

78. See next chapter, § 2752.

§ 2648. Destruction of property by municipalities.

The police power extends to the destruction of property,[79] including the pulling down or blowing up of buildings to arrest the progress of a fire; the destruction of buildings within the fire limits which do not conform to the requirements; the destruction of bedding, clothing, etc., to prevent the spread of disease; the killing of animals to prevent the spread of disease among them; the throwing away of adulterated, unclean or diseased milk; etc.[80]

There is no municipal liability because of the destruction of property by the corporation, where the public necessity requires it, since the rights of private property are subordinate to the public welfare—*salus populi suprema est lex.* Thus, property may be destroyed to prevent the spread of fire or other great calamity, without municipal liability, in the absence of express statute or charter provision creating such liability.[81] This is equally true whether the building is destroyed under the direction of the officers of the municipality or by the bystanders of their own motion.[82] Likewise, buildings within the fire limits, where not meeting the necessary requirements for buildings within such limits, may be

79. § 892, *ante*, vol. 3.

80. See notes under § 892, *ante*, vol. 3.

81. **Destruction of property to stop fire: not liable.** Dunbar v. San Francisco, 1 Cal. 355; Cowens v. San Francisco, 1 Cal. 452; Keller v. Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613; Bowditch v. Boston, 101 U. S. 16, 25 L. Ed. 980.

The fact that the officers of a municipal corporation are authorized by ordinance to direct the destruction of private dwellings and other property to prevent the spread of fire, does not make the corporation liable, on the doctrine of *respondeat superior*, to the owners for the property thus destroyed, unless there is an express statute or provision in the charter creating such liability. Field v. Des Moines, 39 Ia. 575, 18 Am. Rep. 46.

Not liable though fire was extinguished before it reached plaintiff's house which was blown up. White v. Charleston, 2 Hill, Law (S. C.) 571.

82. McDonald v. Red Wing, 13 Minn. 38.

destroyed without incurring liability.[83] So where village trustees burned a mill and destroyed a dam to prevent a flood from damaging a highway and other property, the municipality was held not liable.[84] Likewise, property may be destroyed to prevent the spread of contagious disease, without the incurring of municipal liability;[85] and this includes the killing of diseased animals.[86] And there is no municipal liability for the destruction of damaged grain, where a nuisance or dangerous to the public health.[87] Furthermore, *for an additional* reason, if the destruction of property as a nuisance is *ultra vires,* no recovery can be had.[88]

However, it would seem that if there was *no necessity,* or at least what would seem to be a necessity from the standpoint of a reasonable person, for the destruction of the property, a recovery may be had therefore, independent of statute.[89] So if no fire is raging, and the

83. **Wooden building** erected within fire limits may be destroyed, without incurring liability. Miller v. Valparaiso, 10 Ind. App. 22, 37 N. E. 418.

See §§ 948, 949 and notes, *ante,* vol. 3.

Notice as necessary. If a statute or ordinance requires notice to be given before a building within the fire limits can be removed because it is a frame building, the municipality is liable where it destroys a building without giving such notice. Ward v. Murphysboro, 77 Ill. App. 549.

84. Atken v. Wells River, 70 Vt. 308, 40 Atl. 829, 41 L. R. A. 566, 67 Am. St. Rep. 672.

85. Savannah v. Mulligan, 95 Ga. 323, 22 S. E. 621, 29 L. R. A. 303, 51 Am. St. Rep. 86; Perry v. Oregon, 139 Ill. App. 606; Creier v. Fitzwilliam (N. H. 1912), 83 Atl. 128.

See also Adams v. Milwaukee, 144 Wis. 371, 378, 129 N. W. 518; §§ 892, 905, *ante,* vol. 3.

86. Livingston v. Ellis County, 30 Tex. Civ. App. 19, 68 S. W. 723.

87. Dunbar v. Augusta, 90 Ga. 590, 17 S. E. 907.

88. McCrillis v. Copp, 31 Fla. 100, 12 So. 643.

89. Savannah v. Mulligan, 95 Ga. 323, 325, 22 S. E. 621, 29 L. R. A. 303, 51 Am. St. Rep. 86; Dallas v. Allen (Tex. Civ. App.), 40 S. W. 324.

See also *dicta* in Adams v. Milwaukee, 144 Wis. 371, 129 N. W. 518.

Compare Lowe v. Conroy, 120 Wis. 151, 97 N. W. 942, 66 L. R. A. 907, 102 Am. St. Rep. 983.

Removal of trees. While a municipal corporation in constructing a sidewalk may remove trees standing in the way, it has

building is destroyed merely because it is within the fire limits and is not such a building as may be erected within such limits, the municipality is liable if it does unnecessary damage to the building and its contents, in demolishing it.[90]

Such a destruction of property does not violate the constitutional pledge that private property shall not be taken, damaged, or the like, for public use, *without just compensation.*[91] Such destruction is not the taking of property for public use by an exercise of the right of *eminent domain,* but instead "a destruction of it to avert an imminent public injury, which is a different thing from taking by the right of eminent domain, and is in no legal sense an exercise of that right but stands on entirely different ground, namely, on the ground of necessity, or, more, properly speaking, on the ground of the police power of the state, whereas the right of eminent domain stands on constitutional grounds."[92] The right of eminent domain can wait the forms and delay of the law, but this right to destroy property is governed by necessity which knows no law.[93]

§ 2649. Same—statutes creating liability.

In some states statutes or charters provide that where property is destroyed because of necessity to prevent the spread of fire, the municipality shall be liable in damages, or broader ones have been enacted, covering in addition other forms of loss from destruction of property because of necessity to safeguard the other prop-

no right to destroy trees where their removal is not required. Waterbury v. Morphew, 146 Ia. 313, 125 N. W. 205, and see § 1327, *ante*, vol. 3.

90. A municipal corporation exercising its right to destroy frame buildings within the fire limits will be liable for damage needlessly inflicted. Wheeler v. Aberdeen, 45 Wash. 63, 87 Pac. 1061.

91. Russell v. New York, 2 Denio (N. Y.), 461; Dallas v. Allen (Tex. Civ. App.), 40 S. W. 324.

92. Per Justice Rowell in Aitken v. Wells River, 70 Vt. 308, 309, 40 Atl. 829, 41 L. R. A. 566, 67 Am. St. Rep. 672.

§ 1454, p. 3074, *ante*, vol. 4.

93. Keller v. Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613.

ety or health of the municipality.[94] However, in order to warrant a recovery under such statutes, the case must be brought clearly within the terms thereof,[95] but it would seem that such statutes should be liberally construed in the interest of justice.

§ 2650. Injuries by mobs and rioters.

At common law a municipal corporation is not liable for injuries to property occasioned by mobs or riotous assemblages,[96] since the duty to preserve order and pre-

94. Russell v. New York, 2 Denio (N. Y.), 461 (holding statutory remedy must be adhered to); New York v. Lord, 17 Wend. (N. Y.), 285.

Statute not applicable when building pulled down was so far burnt that it would be impossible to save it from destruction by fire. Taylor v. Plymouth, 8 Metc. (Mass.) 462. Compare, however, Richmond v. Smith, 15 Wall. (U. S.) 429, 21 L. Ed. 200; and see New York v. Lord, 17 Wend. (N. Y.) 285.

Unsanitary. Metzger v. Markham, 36 App. Cas. (D. C.) 212.

Under Georgia and New York statutes, injury to personal as well as real property may be recovered. Dawson v. Kuttner, 48 Ga. 133, 136; New York v. Lord, 17 Wend. 285, 294. But the statute does not apply to the burning of bedding to prevent the spread of disease. Savannah v. Mulligan, 95 Ga. 323, 22 S. E. 621, 29 L. R. A. 303, 51 Am. St. Rep. 86.

Massachusetts statute, when recovery authorized for premises destroyed to block fire. Bowditch v. Boston, 101 U. S. 16, 25 L. Ed. 980; Ruggles v. Nantucket, 11 Cush. (Mass.) 433.

Factor or commission merchant, having lien for charges on goods destroyed, may recover damages to the amount of his lien. New York v. Stone, 20 Wend. (N. Y.) 139.

Existence of insurance on property destroyed, and receipt of money thereon for the loss, does not bar a recovery. New York v. Stone, 20 Wend. (N. Y.) 139.

Interest on value of goods lost is a proper item. New York v. Stone, 20 Wend. (N. Y.) 139.

95. Ruggles v. Nantucket, 11 Cush. (Mass.) 433, holding only owner can sue and that proof must show building was destroyed by order of three firewards.

96. Chicago League Ball Club v. Chicago, 77 Ill. App. 124, 135; Ward v. Louisville, 16 B. Mon. (Ky.) 184; Prather v. Lexington, 13 B. Mon. (Ky.) 559, 56 Am. Dec. 585; Baltimore v. Paultney, 25 Md. 107; Louisiana v. New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936; New Orleans v. Abbagnato, 62 Fed. 240, 10 C. C. A. 361, 26 L. R. A. 329.

Mobs. A provision in the charter requiring the council to regulate the police of the city, preserve the peace, prevent riots, disturb-

vent mob violence is a governmental one;[97] and this is so even though its officers participate therein.[98] Likewise, general statutes authorizing a recovery for death by wrongful act do not warrant a recovery.[99]

However, it is provided by statute in several states that municipalities shall be liable for injuries to property by mobs or riots within the corporate limits,[1] and

ances, and disorderly assemblages, had reference to the passage of ordinances to be enforced by officers appointed for the purpose, and did not make the city responsible for the riotous destruction of property, or the neglect of the officers of the city in not preventing such destruction. Western College, etc. v. Cleveland, 12 Ohio St. 375.

97. Chicago v. Chicago League Ball Club, 196 Ill. 54, 63 N. E. 695.

98. Wallace v. Norman, 9 Okla. 339, 60 Pac. 108, 48 L. R. A. 620.

99. New Orleans v. Abbagnato, 62 Fed. 240, 10 C. C. A. 361, 26 L. R. A. 329.

1. *Illinois.* Sturges v. Chicago, 237 Ill. 46, 86 N. E. 683.

Louisiana. Williams v. New Orleans, 23 La. Ann. 507.

Maryland. Baltimore v. Poultney, 25 Md. 107.

New York. Adamson v. New York, 188 N. Y. 255, 80 N. E. 937, 10 L. R. A. (N. S.) 925.

New Hampshire. Underhill v. Manchester, 45 N. H. 214.

Pennsylvania. Allegheny v. Gibson, 90 Pa. St. 397, 35 Am. Rep. 670.

United States. Louisiana v. New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936; Chicago v. Pennsylvania Ry. Co., 119 Fed. 497, 57 C. C. A. 509.

Rioters need not be citizens. Under statutes making a municipal corporation liable to the owner of property damaged by mobs, the municipality may be liable whether all of the rioters are citizens or not. Chadbourne v. New Castle, 48 N. H. 196.

Municipality may sue for injury from mob from neighboring city. Kensington Com'rs v. Philadelphia, 13 Pa. 76.

Railroad company as bailee—right to sue. Railroad cars held under a lease, or temporarily in possession of a railroad company as a bailee and common carrier. Title sufficient to warrant a recovery. Chicago v. Pennsylvania Co., 119 Ind. 497, 503, 57 C. C. A. 509; Pittsburg, C. C. & St. L. R. Co. v. Chicago, 242 Ill. 178, 89 N. E. 1022.

Towns included. Statute applying to "any city of this commonwealth" held to include incorporated towns. Higgins v. Crab Orchard, 8 Ky. L. Rep. 112.

Death. Statute of 1855 in Louisiana, creating liability for destruction of "property," does not include liability for death of person, since in 1855 no action would lie in that state for loss of

such statutes are valid and uniformly held to be within the power of the legislature to enact.[2] But statutory lia-

a human life. Glanfortone v. New Orleans, 61 Fed. 64, 67, 24 L. R. A. 592, construing Louisiana statute.

Mitigation of damages. In Kansas, it is expressly provided by statute that "the character, use or manner of occupancy of the property lost or destroyed, and the reputation and conduct of the person injured, may be given in evidence in mitigation of damages." Stevens v. Anthony, 82 Kan. 179, 107 Pac. 557.

Interest should be allowed. Greer v. New York, 3 Rob. (N. Y. Super. Ct.) 406. See Orr v. New York, 64 Barb. (N. Y.) 106.

In Kansas, damages not limited to those resulting in death or loss of limb. Iola v. Birnbaum, 71 Kan. 600, 81 Pac. 198.

2. Sturges v. Chicago, 237 Ill. 46, 50, 86 N. E. 683; Chicago v. Manhattan Cement Co., 178 Ill. 372, 53 N. E. 68, 45 L. R. A. 848, 69 Am. St. Rep. 321; Hagerstown v. Sehner, 37 Md. 180; Darlington v. New York, 31 N. Y. 164, 28 How. Prac. 352, 88 Am. Dec. 248; Luke v. Brooklyn, 43 Barb. (N. Y.) 54; Sarles v. New York, 47 Barb. (N. Y.) 447; Pennsylvania Co. v. Chicago, 81 Fed. 317.

Statutory liability for injuries from mobs. The underlying principle upon which laws of this character are founded is "that it is to the interest of everyone that property should be protected, and that it is for the general good that such laws should exist. When the importance of social order and the security of person and property resulting from it are impressed upon the public mind by the strong influence of pecuniary responsibility, a sharper vigilance is excited and a more efficient action aroused in regard to the prevention and suppression of riotous assemblages, by which in large cities property is so often damaged and destroyed. This usage it appears is of ancient origin. It prevailed among the Franks and the ancient Germans, and was adopted at a later day in other countries from nations of German descent. In England, in the districts called Hundreds, having formerly contained each one hundred families, it was introduced at a remote period. In many cases where an offense is committed within the Hundred, the inhabitants are civilly responsible to the party injured. In other states of the Union, laws have been passed making cities or counties responsible for the destruction of property by a mob." Williams v. New Orleans, 23 La. Ann. 507, 508.

The Illinois statute is not unconstitutional as depriving cities of their property without due process of law because liability is imposed irrespective of the power of the city to have prevented the violence, nor because it discriminates between cities and unincorporated subdivisions of a county. Chicago v. Sturges, 222 U. S. 313, 32 Sup. Ct. 92, 56 L. Ed. 215, aff'g 237 Ill. 46, 86 N. E. 683.

bility of a municipal corporation for damages caused by riots and mobs may be withdrawn or limited by the legislature at its pleasure.[3]

Under most of such statutes, the city is liable regardless of negligence,[4] although a few read to the contrary.[5] So it is generally no defense that the property injured or destroyed was that of a non-resident,[6] nor that the property was taken and carried away instead of destroyed or injured,[7] nor that the plaintiff was carrying on a business not authorized by the law of its incorporation,[8] nor that the mob was composed mostly of employees of the person whose property was injured.[9] But it would seem that the statutes do not apply where the mob or riot assembles or occurs outside of the limits of the municipality in which the property is destroyed or injured.[10]

Statutes imposing liability upon municipal corporations for damage done by mobs usually provide, however, that an owner of property cannot recover from the municipality for damages done thereto by a mob where his negligence or improper conduct contributes to the injury.[11] So they often provide that the municipality

Lynching. Fact that statute fixes amount of recovery is no objection. Champaign County v. Church, 62 Ohio St. 318, 345, 57 N. E. 50, 48 L. R. A. 738, 78 Am. St. Rep. 718.

3. Louisiana v. New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936.

4. Sturgis v. Chicago, 237 Ill. 46, 86 N. E. 683; Iola v. Birnbaum, 71 Kan. 600, 81 Pac. 198.

5. **Maryland statute** of 1835, construction of, see Duffy v. Baltimore, Fed. Cas. No. 4,118.

6. Williams v. New Orleans, 23 La. Ann. 507; Allegheny County v. Gibson, 90 Pa. 397, 35 Am. Rep. 670.

7. Spring Valley Coal Co. v. Spring Valley, 65 Ill. App. 571, 590; Sarles v. New York, 47 Barb. (N. Y.) 447.

Goods are "injured" where forcibly taken away. Baltimore v. Poultney, 25 Md. 107.

8. Spring Valley Coal Co. v. Spring Valley, 65 Ill. App. 571, 592, 72 Ill. App. 629, 633.

9. Spring Valley Coal Co. v. Spring Valley, 65 Ill. App. 571.

10. Sturges v. Chicago, 237 Ill. 46, 52, 86 N. E. 683.

11. Wing Chung v. Los Angeles, 47 Cal. 531; Paladino v. Westchester County, 47 Hun (N. Y.), 337; Wolfe v. Richmond County, 11 Abb. Pr. (N. Y.) 270; East-

shall not be liable where the owner, having knowledge of the intention or attempt to destroy his property, fails to give notice to the proper officers of the municipality.[12] The object of notice in such cases is to secure protection against the acts of the mob, and where notice would be useless for that purpose, one whose property is injured will not be deprived of his right against the municipal corporation for damages for failing to give notice.[13] The notice required must be given by or on behalf of the

man v. New York, 5 Robt. (N. Y.) 389; Moody v. Niagara County, 46 Barb. (N. Y.) 659; Underhill v. Manchester, 45 N. H. 214; Palmer v. Concord, 48 N. H. 211, 97 Am. Dec. 605; Chadbourne v. New Castle, 48 N. H. 196; Allegheny v. Gibson, 90 Pa. St. 397, 35 Am. Rep. 670.

See also Spring Valley Coal Co. v. Spring Valley, 65 Ill. App. 571, 96 Ill. App. 230; Brightman v. Bristol, 65 Me. 426, 20 Am. Rep. 711, evidence that factory destroyed was in fact a nuisance, not admissible.

Keeping of house of ill fame not "carelessness or negligence." Blodgett v. Syracuse, 36 Barb. (N. Y.) 526.

Where a business is lawful per se but the nuisance consists in the unsuitable place where it is carried on, it is no defense to an action for damages from destruction by a mob. Brightman v. Bristol, 65 Me. 426, 437, 20 Am. Rep. 711.

12. Wing Chung v. Los Angeles, 47 Cal. 531; Chadbourne v. New Castle, 48 N. H. 196; Moody v. Niagara County, 46 Barb. (N. Y.) 659; Schiellein v. Kings County, 43 Barb. (N. Y.) 490; Wolfe v. Richmond County, 11 Abb. Pr. (N. Y.) 270.

Written notice. It has been held in Pennsylvania that such a notice when required by statute, must be in writing. St. Michael's Church v. Philadelphia County, Brightly, N. P. (Pa.) 121. But see Alleghany County v. Gibson, 90 Pa. 397, 35 Am. Rep. 670, and Donoghue v. Philadelphia County, 2 Pa. 230.

Must be time to give notice. Statutes requiring notice to be given to municipal authorities after the owner of property has been apprised of a threat or attempt to destroy or injure it, by any mob or riot necessarily contemplate that a sufficient period of time shall intervene between the threat or attempt and the execution of it to admit of such notice being given. Moody v. Niagara County, 46 Barb. (N. Y.) 659.

13. Schiellein v. Kings County, 43 Barb. (N. Y.) 490.

If the proper officers knew of the attempt or intention of the mob, notice from the owner of the property is not required to entitle him to damages. Alleghany County v. Gibson, 90 Pa. 397, 35 Am. Rep. 670; Newberry v. New York, 31 N. Y. Super. Ct. 369.

person claiming damages. Notice given by an employer, but not on behalf of his employees, of the likelihood of mob violence on account of a strike, does not inure to the benefit of the employees.[14]

§ 2651. Same—what is a "mob" or "riot."

The mob and riot statutes differ considerably in phraseology.[15]

In New York, the statute merely provides that a city or county shall be liable to a person whose property is destroyed or injured therein "by a mob or riot," and it was held thereunder that where a few boys and young men, in gathering material for an election bonfire, partially demolished an unoccupied and dilapidated house, but dispersed whenever a policeman appeared, no recovery could be had, since there was no "mob" or "riot" but rather malicious mischief or trespass or larcency or some kindred offense.[16] In another decision in that state, where a crowd which had assembled at a fire broke into plaintiff's store and carried away his goods, it was held that there was a mob or riot even though the crowd assembled at first for a lawful purpose, and that it was not necessary that there should be a leader.[17] So where a crowd of people tore down buildings the statute was held applicable.[18]

In Ohio it is held that the fact that the assembly of

14. Long v. Neenah, 128 Wisc. 40, 44, 107 N. W. 10, 8 Am. and Eng. Ann. Cas. 463.

15. Not a mob where two conflicting state governments, in 1874, clashed in Louisiana. Street v. New Orleans, 32 La. Ann. 577.

16. Adamson v. New York, 188 N. Y. 255, 80 N. E. 937, 10 L. R. A. (N. S.) 925, approving Duryea v. New York, 10 Daly (N. Y.), 300, aff'd in 100 N. Y. 625 without opinion, where the facts were very similar.

17. Solomon v. Kingston, 24 Hun (N. Y.), 562, aff'd without opinion in 96 N. Y. 651.

18. From one to two hundred people, mostly Polish, came on to certain property one morning and commenced to slash down the buildings thereon, consisting of a slaughter house, an ice house, and a wagon shed and stable. They working some two or three days until nothing was left but the foundations. There were no previous threats. It was held held that the property was destroyed by a mob or riot within

persons is lawful does not preclude their uniting in unlawful conduct so as to become rioters,[19] and that is undoubtedly the rule in all jurisdictions.

In Kentucky, the statute applies to a "riotous and tumultous assemblage of people," and it was held thereunder that the purpose of the assemblage, or the aim that it had primarily in view, was not material, if it was in fact riotous and tumultous, and that an assemblage of a thousand merrymakers celebrating the advent of Christmas, where obstructing the use of the street and discharging fireworks loaded with powerful explosives, endangering life and preventing the use of the street for the purposes of business, was a riotous or tumultous assemblage.[20]

However, *in Wisconsin,* it has been held that the statute in that state did not apply where, on the night before the 4th of July, a crowd was in the street, unlawfully engaged in shooting off fireworks, and a passer-by was injured by some one throwing a cannon firecracker at him, for the reason that there was no common intent to injure the plaintiff or any other person by the explosion of the cannon cracker.[21]

In Kansas, an instruction that "a mob is an unorganized assemblage of many persons intent on unlawful violence, either to persons or property," was approved, under the statutory definition of riot in that state; and it was held that a recovery was authorized where shortly after a marriage a number of men drew in a wagon the newly married couple up and down the streets, introducing them in burlesque speeches, and attracting a large

the spirit of the statute. Marshall v. Buffalo, 64 N. Y. S. 411, 50 App. Div. 149, 156. On a second appeal, it was held that new evidence that there was no actual fighting or unnessary noise or rioting on the part of the persons who destroyed the property was immaterial. Mashall v. Buffalo, 71 N. Y. S. 719, 63 App. Div. 603.

19. Champaign County v. Church, 62 Ohio St. 318, 348, 57 N. E. 50, 48 L. R. A. 738, 78 Am. St. Rep. 718.

20. Madisonville v. Bishop, 113 Ky. 106, 67 S. W. 269, 57 L. R. A. 130.

21. Aron v. Wausau, 98 Wis. 592, 74 N. W. 354.

crowd and occasioning some disorder and tumult, resulting in injury by the wagon running over and breaking a boy's leg.[22]

3. RESPONDEAT SUPERIOR.

§ 2652. Respondeat superior doctrine in general.

In a proper case, the rule of *respondeat superior* applies to municipal corporations.[23] Municipalities are liable for the negligence or wrongful acts of their officers, agents or servants, under the rule of *respondeat superior,* provided (1) the relation of master and servant exists between the municipality and the tort feasor;[24] (2) the act is within the scope of the duties of the officer, agent or servant,[25] and not *ultra vires*;[26] and (3) the duty in which the tort feasor was engaged was a private corporate duty as distinguished from a governmental one.[27]

§ 2653. Necessity for relationship of master and servant.

In order to hold a municipality liable in damages because of the tort of one alleged to be its servant, it must appear that he was a servant of the municipality at the time of the alleged tort.[28] There is more or less *dicta*

22. Cherryvale v. Hawman, 80 Kan. 170, 101 Pac. 994.

23. Cummins v. Seymour, 79 Ind. 491, 41 Am. Rep. 618; Boye v. Albert Lea, 74 Minn. 230, 76 N. W. 1131; Hilsdorf v. St. Louis, 45 Mo. 94, 100 Am. Dec. 392; Higbie v. Board of Education, 107 N. Y. S. 168, 122 App. Div. 483; Dayton v. Pease, 4 Ohio St. 80, 95.

Leading case, see Bailey v. New York, 3 Hill (N. Y.), 531, 38 Am. Dec. 669.

24. § 2563, *post.*

25. § 2656, *post.*

26. § 2637, *ante.*

27. § 2623, *ante.*

28. If a municipal officer is temporarily acting as the servant of a third person, there is no municipal liability. Harvey v. Hillsdale, 86 Mich. 330, 49 N. W. 141; Butler v. Oxford, 69 Miss. 618, 13 So. 626; Palmer v. St. Albans, 60 Vt. 427, 13 Atl. 569, 6 Am. St. Rep. 125.

Plan of defective drain, by city engineer, for private persons who are about to construct a private drain. City not liable. Kansas City v. Brady, 52 Kan. 297, 34 Pac. 884, 39 Am. St. Rep. 349.

Surveys. Not liable where city engineer makes error in survey.

in the decisions as to when persons are, as a matter of fact, the agents or servants of the municipality [29] but no precise rule has been laid down as a test.[30] That the same rules do not apply, at least in full, as in case of other masters, as laid down in text books on the law of Master and Servant,[31] is doubtlessly true. Thus, where no municipality is involved, it is generally held that no one can be held responsible as master who has not the right to choose the servant from whose acts the injury flows,[32] while the contrary is held as to municipalities.[33] The test generally, however, narrows down to the *power to control.* The *right to control* the action of the person doing the alleged wrong, at the time of and with reference to the matter out of which the alleged wrong sprung, which is a general test of the relationship of

where he is required to make surveys for private individuals for a fee. McCarty v. Bauer, 3 Kan. 237.

Engineer. Not liable for incorrect information given by engineer, although he is required to give it for a fee. Waller v. Dubuque, 69 Ia. 541, 29 N. W. 456.

29. See Toledo v. Cone, 41 Ohio St. 149, 162.

30. **Contractor.** Where contractor is building a sidewalk for an abutter, and there is no duty imposed on the city to construct sidewalks, he is not the agent or servant of the city, nor engaged in performing a duty imposed by law upon it. Thompson v. West Bay City, 137 Mich. 94, 100, 100 N. W. 280, followed in Whealy v. Imlay City, 161 Mich. 499, 126 N. W. 714.

One working out a poll tax is a servant. Winfield v. Peeden, 8 Kan. App. 671, 674, 57 Pac. 131.

31. Bailey, Pers. Inj. (2nd Ed.), §§ 20-36.

The relation of master and servant exists only where the person who is sought to be charged as master either employed or controlled the alleged servant, or had the right of control over him at the time when the injury happened, or expressly or tacitly assented to the rendition of the particular service by him. He must at the time have had the right to direct the action of the servant and to accept or reject its rendition by him. Bailey, Pers. Inj. (2nd Ed.), vol. 1, § 19.

32. Bailey, Pers. Inj. (2nd Ed.), § 20.

The rule of *respondeat superior* applies, in cases other than where a municipal corporation is involved, only where (1) the employer has the right to select his servants, (2) to discharge them, and (3) to direct or control them while in his employment. Wakefield v. Newport, 62 N. H. 624, applying rule to municipalities.

33. § 2654, *post.*

master and servant, governs, at least to a very great extent in determining whether a municipality is liable under the rule of *respondeat superior*;[34] and the right to discharge or terminate the relationship is important.[35] Thus, if a board of water commissioners is established by *ordinance,* and the entire management of the waterworks is entrusted to them, they are nevertheless within the control of the municipality which may change the duties or take away the powers granted, at any time; and in this respect there is a difference between a board established by the municipality itself by ordinance and one established by the legislature by statute.[36]

On the other hand, where a commissioner of highways is provided for by statute, and the city is constituted one highway district, he is not the servant of the city so as to make it liable for his torts, where neither the city nor the council can direct or control him in the performance of the duties entrusted him by statute.[37] However, in regard to water boards and the like, exercising corporate as distinguished from governmental powers, the mu-

34. Sullivan v. Holyoke, 135 Mass. 273, 277; Hall v. Concord, 71 N. H. 367, 369, 52 Atl. 864, 58 L. R. A. 455; Moest v. Buffalo, 101 N. Y. S. 996, 116 App. Div. 657; Alcorn v. Philadelphia, 44 Pa. 348.

City not liable for acts of officers independent of the municipality as to their tenure of office and the manner of discharging their duties. Backer v. West Chicago Park Com'rs, 66 Ill. App. 507.

Where a street superintendent acts, for the time being, as the agent of the city and not as a public official, the city is liable for his wrongful removal and taking of gravel from private property. Hunt v. Boston, 183 Mass. 303, 67 N. E. 244, and see Collins v. Greenfield, 172 Mass. 78, 81, 51 N. E. 454.

City not liable for error of surveyor and superintendent of streets in fixing grade level for street, where, as to such duties, they were not subject to, or controlled by, the municipality. Sievers v. San Francisco, 115 Cal. 648, 47 Pac. 687, 56 Am. St. Rep. 153.

35. See Toledo v. Cone, 41 Ohio St. 149, 162, 163.

36. Rhobidas v. Concord, 70 N. H. 90, 117, 47 Atl. 82, 51 L. R. A. 381, 85 Am. St. Rep. 604.

37. Hall v. Concord, 71 N. H. 367, 52 Atl. 864, 58 L. R. A. 455, Judge Remick dissenting.

nicipality has sometimes been held liable, it would seem, with little or no regard for the question as to the right to control.[38]

The municipality which has placed an employee in charge of certain work cannot be heard to deny the legality of his appointment, when sued because of his negligence.[39]

§ 2654. Same—by whom appointed or paid immaterial.

So far as the question as to whether officers or agents are the officers or agents of the municipality, so as to render it liable for their misdeeds, is concerned, it is not "of the slightest consequence by what means these several officers are placed in their position,—whether they are elected by the people of the municipality, or appointed by the President or a governor."[40] Furthermore, "it is equally unimportant from what source he receives compensation, or whether he serves without it."[41] On the other hand, the fact that an officer or the members of a board are appointed by the governing board of the municipality does not necessarily make them the servants or agents of the municipality.[42]

38. § 2658, *post.*

39. Sheffield v. Harris, 101 Ala. 564, 14 So. 357.

40. Per Mr. Justice Hunt, in Barnes v. District of Columbia, 91 U. S. 540, 545, 23 L. Ed. 440; Denver v. Peterson, 5 Colo. App. 41, 36 Pac. 1111.

See also Fox v. Philadelphia, 208 Pa. 127, 132, 57 Atl. 356, 65 L. R. A. 214.

Need not be appointed by municipality. Anne Arundel County Com'rs v. Duckett, 20 Md. 468, 83 Am. Dec. 557.

Whether officer elected by people or by common council is immaterial. Furnell v. St. Paul, 20 Minn. 117, 124.

41. Barnes v. District of Columbia, 91 U. S. 540, 546, 23 L. Ed. 440.

Payment by city does not make superintendent of streets, and those under him, the servant of the city. Manners v. Haverhill, 135 Mass. 165, 171.

42. Valentine v. Englewood, 76 N. J. L. 509, 71 Atl. 344, 19 L. R. A. (N. S.) 262; Maxmilian v New York, 62 N. Y. 160, 20 Am. Rep. 468; Aldrich v. Tripp, 11 R. I. 141, 23 Am. Rep. 434.

"Where a municipal corporation elects or appoints an officer, in obedience to an act of the legislature, to perform a public service, in which the corporation has

§ 2655. Same—duties directly imposed by statute on officer.

Some cases draw a distinction between a duty imposed on a municipality directly and one imposed on an officer thereof. Thus, there is *dicta* that "if the act of the officer * * * is done in the attempted performance of a duty laid by the law upon him and not upon the municipality, then the municipality is not liable for his negligence therein."[43] But in some states this distinction has been expressly repudiated,[44] and it is difficult to see why a municipality should be liable any more in the one case than the other. However, there is no doubt that the liability of a municipality for the acts or omissions of an officer elected or appointed by it, does not extend to a duty specially imposed on the officer, which is not connected with his duties as agent of the corporation and in which it has no private interest, and from the

no private interest and from which it derives no special benefit or advantage in its corporate capacity, such officer cannot be regarded as a servant or agent of the municipality, for whose negligence or want of skill it can be held liable." Maxmilian v. New York, 62 N. Y. 160, 165, 20 Am. Rep. 468.

43. Maxmilian v. New York, 62 N. Y. 160, 164, 20 Am. Rep. 468, and see Martin v. Brooklyn, 1 Hill (N. Y.), 545.

Municipal corporations are not liable for dereliction or remissness of municipal officers or agents in the performance of public or governmental functions of the city, or in the performance of duties imposed upon those officers which are prescribed and limited by express law; and, when an injury results from the wrongful act or omission of a municipal officer charged with duty prescribed and limited by law, the doctrine of *respondeat superior* is inapplicable. The officer is not treated as the agent or servant of the corporation in the performance of such duty, but is held to be the servant and agent of and controlled by the law, and, while for his tortious acts he will be held responsible, the municipality will not. Upon the other hand, if the act is one commanded by the municipality itself, if inherently wrong, the municipality and the agent who performed will both be liable. Perkins v. Blauth, 163 Cal. 782, 127 Pac. 50.

44. Nicholson v. Detroit, 129 Mich. 246, 255-258, 88 N. W. 695, 56 L. R. A. 601.

performance of which it derives no special or corporate benefit.[45]

§ 2656. Acts beyond scope of agent's authority.

To render a municipal corporation liable for tortious acts of its officers and servants, the act must have been authorized or ratified, *i. e.*, within the scope of the powers of the officer or agent, by the municipality. The act is within the scope of the officer's or agent's duties where it is expressly authorized, as where done in pursuance of a vote of the inhabitants of a town in town meeting,[46] or in pursuance of a vote of the council of a city;[47] but it is not necessary that the act be *expressly* authorized but it is sufficient that it is within the scope of the general duties of the officer or agent.[48]

If the wrongful or negligent act is outside the scope of his duties, and is not ratified by the municipality, it is not liable.[49] However, the municipality is liable al-

45. New York & B. S. & L. Co. v. Brooklyn, 71 N. Y. 580, 584.

46. Lawrence v. Fairhaven, 5 Gray (Mass.), 110; Johnson v. Somerville, 195 Mass. 370, 81 N. E. 268, 10 L. R. A. (N. S.) 715.

47. Perry v. Worcester, 6 Gray (Mass.), 544, 66 Am. Dec. 431; Johnson v. Somerville, 195 Mass. 370, 81 N. E. 268, 10 L. R. A. (N. S.) 715.

48. Colorado City v. Llafe, 28 Colo. 468, 65 Pac. 630, implied authority of street commissioner to secure gravel to repair streets. See also Woodcock v. Calais, 68 Me. 244.

If employees of a city are authorized to perform certain work, it is not necessary, to create liability of the city for their negligence to show that the specific act causing the injury was expressly authorized by the city. Provine v Seattle, 59 Wash. 681, 110 Pac. 619.

49. *California.* Dunbar v. San Francisco, 1 Cal. 355.

Florida. Scott v. Tampa (Fla. 1911), 55 So. 983.

Illinois. Chicago v. Hannon, 115 Ill. App. 183; Chicago v. McGraw, 75 Ill. App. 566.

Maine. Snow v. Brunswick, 71 Me. 580.

Maryland. Cumberland v. Willison, 50 Md. 138, 33 Am. Rep. 304.

Massachusetts. Johnson v. Somerville, 195 Mass. 370, 81 N. E. 268, 10 L. R. A. (N. S.) 715; Morrison v. Lawrence, 98 Mass. 219; Barney v. Lowell, 98 Mass. 570; McCarthy v. Boston, 135 Mass. 197; Manners v. Haverhill, 135 Mass. 165; Curran v. Boston, 151 Mass. 505, 24 N. E. 781, 8 L. R. A. 243, 21 Am.

though the officer or agent may be acting without the express orders of the municipality or even contrary to

St. Rep. 465; Jensen v. Waltham, 166 Mass. 344, 44 N. E. 339.

Michigan. Detroit v. Blackeby, 21 Mich. 84, 4 Am. Rep. 450.

Missouri. Rowland v. Gallatin, 75 Mo. 134, 42 Am. Rep. 395 (entering on private property and removing earth to improve street); Hilsdorf v. St. Louis, 45 Mo. 94, 100 Am. Dec. 352 (agreement to remove carcasses of animals).

Nebraska. Wabasha Electric Co. v. Wymore, 60 Neb. 199, 82 N. W. 626.

New Jersey. Howard v. Waters, (N. J. L. 1909), 73 Atl. 50.

New York. Lee v. Sandy Hill, 40 N. Y. 442; Tilford v. New York, 37 N. Y. S. 185, 1 App. Div. 199 (arrest or quarantine of persons, by commissioner in charge of water supply); Reynolds v. Board of Education, 53 N. Y. S. 75, 33 App. Div. 88, 97 (act of truant officer in arresting a pupil); Hanvey v. Rochester, 35 Barb. (N. Y.) 177.

Pennsylvania. Alcorn v. Philadelphia, 44 Pa. 348.

Rhode Island. Donnelly v. Tripp, 12 R. I. 97. See Willoughby v. Allen, 25 R. I. 531, 56 Atl. 1109, may show authority conferred by verbal instructions.

Texas. Houston v. Dupree, 103 Tex. 292, 126 S. W. 1115; Galveston v. Brown, 28 Tex. Civ. App. 274, 67 S. W. 156.

Utah. Royce v. Salt Lake City, 15 Utah, 401, 49 Pac. 290; Acts of chief of police requiring one to break stones, where not sentenced to hard labor.

Virginia. Robinson v. Danville, 101 Va. 213, 43 S. E. 337.

West Virginia. Rutherford v. Williamson, 70 W. Va. 402, 74 S. E. 682.

United States. Clark v. Atlantic City, 180 Fed. 598; Winona v. Botzet, 169 Fed. 321, 94 C. C. A. 563; Hart v. Bridgeport, Fed. Cas. No. 6,149, 13 Blatchf. 289.

Acts outside scope of authority. "As a general rule a municipal corporation is not responsible for the unauthorized and unlawful acts of its officers, although done *colore officii*; it must further appear that the officers were expressly authorized to do the acts, by the corporation, or that they were done *bona fide* in pursuance of a general authority to act for the corporation, on the subject to which they relate, or that, in either case, they were adopted and ratified by the corporation." Thayer v. Boston, 19 Pick. (Mass.) 511, 31 Am. Dec. 157, quoted in Worley v. Columbia, 88 Mo. 106, 113.

Malicious prosecution. City not liable for act of tax collector in bringing a malicious suit, unless it was authorized or ratified by the municipality. Horton v. Newell, 17 R. I. 571, 23 Atl. 910. And it is doubtful if a suit lies in any case, against a municipality, for malicious prosecution. See § 2637, *ante*.

City not liable for tort of common council in maliciously encouraging the attempt to oust an official from office because of al-

them, where engaged in the work for which he was employed.[50] And if the officer or agent is acting within the scope of his authority, it is immaterial that the contract which he made for the thing in connection with which the alleged negligence existed, was not binding on the municipality because not executed as required by statute or charter provision.[51] So, in the absence of a showing to the contrary, it will ordinarily be presumed that a properly appointed or elected officer acted within the scope of his authority.[52] Sometimes, however, there is difficulty in determining whether the alleged negligent officer or agent was acting within the scope of his duties,[53] but there is no good reason apparent why the rules governing this branch of the law as to master and servant, and principal and agent, in general, should not be applicable, and reference should be made to textbooks on such subjects.[54]

leged misconduct. Kempster v. Milwaukee, 103 Wis. 421, 79 N. W. 411.

Where appropriation for 4th of July celebration was illegal because of failure to take the yeas and nays as required by statute, and hence the mayor had no power to procure fireworks at the expense of the city, the municipality is not liable for injuries from the fireworks. Morrison v. Lawrence, 98 Mass. 219.

Representations of town clerk, or omission to disclose information, not official acts for which municipality liable, under statute. Lyman v. Edgerton, 29 Vt. 305, 70 Am. Dec. 415.

Removal of a flag staff not alleged to be the property of the municipality, and there being no duty on the town to remove it, held not within the authority of the selectmen. Wakefield v. Newport, 60 N. H. 374.

50. Hooe v. Alexandria, Fed. Cas. No. 6,667, 1 Cranch, C. C. 98.

Act need not have been ordered by a by-law or by any written order to the agent. Pritchard v. Georgetown, Fed. Cas. No. 11,437.

51. Houston v. Dupree, 103 Tex. 292, 126 S. W. 1115.

52. Elgin v. Goff, 38 Ill. App. 362; Kobs v. Minneapolis, 22 Minn. 159.

53. Immaterial that negligence was that of officer whose general duty was to attend to another department of the public business, where he was permitted by the municipality to do the act in question. Stoddard v. Winchester, 157 Mass. 567, 574, 32 N. E. 948.

Authority may be given by parol. Akron v. McComb, 18 Ohio, 229, 51 Am. Dec. 453.

54. See 3 Bailey, Pers. Inj. (2nd ed.), §§ 738-758.

§ 2657. Same—ratification.

A municipal corporation is liable for the torts of its officers, beyond the scope of their authority, if it ratifies them, unless the act is *ultra vires*, or illegal because forbidden.[55] However, the fact that a municipality authorizes its attorney to appear and defend a suit against one of its officers does not constitute a ratification of the acts of the officer.[56] And if there is no municipal power to do the act in the first instance, then of course there can be no ratification so as to bind the municipality.[57]

§ 2658. Independent boards as municipal agents.

Whether a board, provided for by statute or charter, is or is not an agent of the municipality so as to make the latter liable for the torts of the board is a troublesome question, as to which the courts are more or less at variance, but at the same time refusing to lay down any general test to determine when the relationship exists.[58] Much depends on the wording of the statute, charter or ordinance under which they are appointed, as fixing the extent of the control, if any, of the munici-

55. *Louisiana.* McGary v. Lafayette, 4 La. Ann. 440.

Nebraska. Omaha v. Croft, 60 Neb. 57, 82 N. W. 120.

Oklahoma. Oklahoma City v. Hill, 6 Okla. 114, 50 Pac. 242 (trespass in acquiring possession of real estate).

Porto Rico. St. Johns Gas Co. v. San Juan, 1 Porto Rico, Fed. Rep. 160.

Rhode Island. Willoughby v. Allen, 25 R. I. 531, 534, 56 Atl. 1109.

Washington. Commercial Electric L. & P. Co. v. Tacoma, 20 Wash. 288, 55 Pac. 219, 72 Am. St. Rep. 103.

Construction of ditch or drain, in irregular way. Ratified by city by its use thereof. Langley v. Augusta, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133, 138.

56. Buttrick v. Lowell, 1 Allen (Mass.) 172, 79 Am. Dec. 721.

57. Peters v. Lindsburg, 40 Kan. 654, 20 Pac. 490; Murray v. Omaha, 66 Neb. 279, 92 N. W. 299, 103 Am. St. Rep. 702.

58. Fire board held agents of city. Wagner v. Portland, 40 Ore. 389, 393, 60 Pac. 985.

Trustees of Brooklyn bridge held agents of the municipality. Walsh v. Trustees of New York & Brooklyn Bridge, 96 N. Y. 427, followed in Walsh v. New York, 107 N. Y. 220, 13 N. E. 911.

Canal commissioners. City not liable for negligence of commis-

pality over the board.[59] Furthermore, the nature of the duties performed by the board, *i. e.*, whether governmental or corporate, often is referred to as controlling although it would seem that the nature of the duties is an entirely separate matter. For example, if a board of water commissioners is not the agent of a municipality because the latter has no control over the board, it would seem, on principle, to be immaterial that the board was engaged in a corporate duty, but the courts often seem to take a different view and hold the municipality for the negligence of such a board.[60] Thus, in New York, it has been held that, in order to determine whether there

sioners appointed to improve canal in Brooklyn, since state agents. New York & B. S. Mill & L. Co. v. Brooklyn, 71 N. Y. 580.

59. **Board for inspection of buildings.** Where a board is created by statute, and the execution of laws and ordinances as to buildings was expressly given to such board and not to the city, and the board was not under the control of the city government but exercised its own discretion, the municipality is not liable for the torts of such board. Murray v. Omaha, 66 Neb. 279, 92 N. W. 299, 103 Am. St. Rep. 702.

Board of public charities held beyond control of city so as not to be agents. Zollikoffer v. Havemeyer, 2 Hun (N. Y.), 300, 4 Thomp. & C. 478.

Sewer commissioners, where powers obtained from city charter, held agents for whose negligence city is liable. Platt v. Waterbury, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335. In any event, nuisance created by such commissioners must be abated by city. Waycross v. Houk, 113 Ga. 963, 39 S. E. 577.

Subway officers. It is held in Massachusetts that a servant injured while at work in the construction of the subway in Boston cannot recover damages from the city, because the work was in charge of transit commissioners established by the legislature and over which the city had no control; and that it was immaterial that the subway was to be the property of the city which was to receive all rents therefor, where the city had no voice in fixing the terms and rates for the use of the subway when completed, or any part thereof, and the statute requires the municipality to use any surplus for the support of the public parks, since the element of commercial advantage or pecuniary benefit to the city is a mere incident of the undertaking. Mahoney v. Boston, 171 Mass. 427, 50 N. E. 939.

60. Lockwood v. Dover, 73 N. H. 209, 214, 61 Atl. 32, overruling Gross v. Portsmouth, 68 N. H. 266, 33 Atl. 256, 73 Am. St. Rep. 586.

is municipal responsibility for the acts of a board, "the inquiry must be whether the department whose misfeasance or nonfeasance is complained of is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty, or charged with a duty primarily resting upon the municipality."[61] However, the legislature may provide for the appointment of sewer, water and street commissioners, make them a body corporate, and provide that all actions for their wrongful conduct shall be brought against them and that no such action shall be brought against the municipality in its corporate name.[62]

Generally, municipalities are held liable for the torts of such boards as the *board of public works*;[63] *board of*

61. If the board is a part of the machinery for carrying on the municipal government, the municipality is generally liable for its acts. Pettingill v. Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442.

62. Scott v. Saratoga Springs, 199 N. Y. 178, 92 N. E. 393, holding village not liable for defective streets.

63. Norton v. New Bedford, 166 Mass. 48, 44 N. E. 1034; Niven v. Rochester, 76 N. Y. 619.

Board of public works was appointed by governor. It had full and exclusive power to govern and manage all parks, boulevards and pleasure ways in the city. It appointed and employed superintendents, inspectors, etc. The city paid the board and all its employees their salaries and furnished them with offices, etc. It was held that the board was "one of the agencies for carrying out the objects and purposes of the municipality. It is not an independent body, but is a part of the corporation. Its duties are purely municipal and corporate, and in the performance of these duties it acts for the city," and that the city was liable for negligence of the board in charge of a steam roller. Denver v. Peterson, 5 Colo. App. 41, 43, 44, 36 Pac. 1111.

So a board of public works for the District of Columbia has been held to be such a component part of the municipality as to make the latter responsible for the torts of such board, in a proper case. Barnes v. District of Columbia, 91 U. S. 540, 552-557, 23 L. Ed. 440, approving Bailey v. New York, 3 Hill (N. Y.), 531, 38 Am. Dec. 669, aff'd in 2 Den. (N. Y.) 433.

In Maine, statute makes towns and cities liable for injuries caused by the want of proper maintenance or repair of public sewers. It was held that the fact that all the powers and duties in regard to sewers is vested by statute in a board of public works to be appointed by the council

water commissioners;[64] board of *park commissioners*,[65] unless entirely beyond municipal control;[66] and other

does not relieve the municipality from liability. Googin v. Lewiston, 103 Me. 119, 125-127, 68 Atl. 894.

64. Hourigan v. Norwich, 77 Conn. 358, 363, 59 Atl. 487; Deyoe v. Saratoga Springs, 1 Hun (N. Y.) 341, 3 Thomp. & C. 504; St. Germain v. Fall River, 177 Mass. 550, 554, 59 N. E. 447; Rhobidas v. Concord, 70 N. H. 90, 47 Atl. 82, 51 L. R. A. 381, 85 Am. St. Rep. 604; Aldrich v. Tripp, 11 R. I. 141, 23 Am. Rep. 434.

See also Reed v. Syracuse, 83 Neb. 713, 716, 120 N. W. 180.

Board of water commissioners, although created by special statute, where existing solely for the benefit of the city, are agents of the city; and the city is liable for its negligence in digging a trench to lay water pipe. Pettingill v. Yonkers, 116 N. Y. 558, 565, 22 N. E. 1095, 15 Am. St. Rep. 442.

Fact that water board was created a body corporate does not affect the question of its agency, and city is liable for its misfeasance. Seeley v. Amsterdam, 66 N. Y. S. 221, 54 App. Div. 9.

But where waterworks are managed by a separate board, not in any way under the control of the municipality, and the duty violated was imposed by statute upon the board itself, the municipality was held not liable, in Pennsylvania. Ashby v. Erie, 85 Pa. St. 286.

In New Hampshire, it was held that where the municipality can not direct or control the water commissioners in the discharge of their duties, and they have exclusive authority to determine where and in what manner water pipes shall be laid, and to do all other things touching the construction, maintenance and management of the waterworks, they are not the servants of the municipality and hence it is not liable for their acts. Gross v. Portsmouth, 68 N. H. 266, 33 Atl. 256, 73 Am. St. Rep. 586. However, in a later case, this rule of nonliability is disapproved. Lockwood v. Dover, 73 N. H. 209, 213, 61 Atl. 32.

65. Napier v. Brooklyn, 58 N. Y S. 506, 41 App. Div. 274; Mahon v. New York, 31 N. Y. S. 676, 10 Misc. Rep. 664.

Parks, care of as governmental or corporate function, § 2678, *post*.

Commissioners of parks and boulevards, having control of boulevards. City liable for negligence of board. Burridge v. Detroit, 117 Mich. 557, 559, 76 N. W. 84, 42 L. R. A. 684, 72 Am. St. Rep. 582.

That street is under control of park board instead of the city council is immaterial. Kleopfert v. Minneapolis, 90 Minn. 158, 95 N. W. 908.

66. **Board of park commissioners** appointed by the state, was responsible to and removable by the governor alone. City, although paying the expense of the work, had no voice as to what should be done or who should do

like boards.[67]

On the other hand, there is no municipal liability for the acts of a *board of health,*[68] a *board of education,*[69] or the like, but the reason has nothing to do with the power of control or the like but is merely because the duty involved is a governmental one.

§ 2659. De facto officers.

It has been held in Maine that a municipality is not liable for the torts of an officer who has never qualified by giving bonds as required by law.[70] *A fortiori,* where the municipality is not liable for the torts of certain officers, it is not liable for the torts of *de facto* incumbents of the office.[71]

§ 2660. Licensees.

On principle, if a municipality licenses a person to commit a nuisance or a trespass, or otherwise to do an unlawful or inherently dangerous act within the corporate limits, it will become liable therefor together with its licensee as a joint tortfeasor. But if the act which the city licenses a person to commit within its limits is not unlawful in itself, or inherently dangerous, so as to become a public nuisance, and injury flows therefrom merely in consequence of the manner in which the act is performed, then the city will not be liable.[72]

Generally, a licensee, under a license or permit granted by a municipality, is not an officer or agent of the municipality, for whose acts the municipality is liable;[73]

it. City not liable for acts of board. Backer v. West Chicago Park Com'rs, 66 Ill. App. 507, 515.

67. Fact that a municipal lighting plant is managed by a board of commissioners appointed by the municipality will not, it has been held, relieve the municipality from liability for negligence in the operation of such plant. Richmond v. Lincoln, 167 Ind. 468, 79 N. E. 445.

68. § 2669, *post.*

69. § 2675, *post.*

70. Rounds v. Bangor, 46 Me. 541, 74 Am. Dec. 469.

71. Clark v. Easton, 146 Mass. 43, 46, 14 N. E. 795.

72. Thompson, Neg., § 5805.

73. Lincoln v. Boston, 148 Mass. 578, 20 N. E. 329, 3 L. R. A. 257, 12 Am. St. Rep. 601; Masterton v. Mt. Vernon, 58 N. Y. 391; Dorlan v. Brooklyn, 46 Barb. (N.

and the fact that a municipality has granted a license to a third person does not of itself make it liable for his negligence or other wrongful acts,[74] although if the granting of the license and acts thereunder will naturally result in an *unsafe condition of the streets*, the municipality will be liable for failure to use ordinary care to keep the streets in reasonably safe condition.[75]

Whether the granting of a permit for an exhibition of *fireworks* within the municipal limits renders the municipality liable for injuries resulting therefrom, is decided differently in the various states. In some states, the municipality is not liable,[76] while in New York the contrary is held where the permit amounts to the right to use streets for an unlawful purpose or to create a nuisance on public property.[77]

Y.) 604 (plumber); Fowle v. Alexandria, 3 Pet. (U. S.) 398, 7 L. Ed. 719 (auctioneer).

The grant of a right of way to a railway company to use a street is the exercise of a governmental function and the municipality can not be held liable for a tort committed by the railway company in exercising such right. Trueman v. St. Maries, 21 Ida. 632, 123 Pac. 508; Michigan City v. Boeckling, 122 Ind. 39, 23 N. E. 518.

74. Schnurr v. Huntington County, 22 Ind. App. 188, 53 N. E. 425; Tatman v. Benton Harbor, 115 Mich. 695, 74 N. W. 187 (not liable for negligence of street railroad company to whom city has granted franchise); Terry v. Richmond, 94 Va. 537, 27 S. E. 429, 38 L. R. A. 834; Copeland v. Seattle, 33 Wash. 415, 74 Pac. 582, 65 L. R. A. 333.

75. § 2751, *post*, next chapter.

See also Decatur v. Hamilton, 89 Ill. App. 561; Bennett v. Everett, 191 Mass. 364, 77 N. E. 886; Lindsay v. Kansas City, 195 Mo. 166, 93 S. W. 273; Rommeney v, New York, 63 N. Y. S. 186, 49 App. Div. 64; Dillon v. Raleigh, 124 N. C. 184, 32 S. E. 548; McCoull v. Manchester, 85 Va. 579, 586, 8 S E. 379, 2 L. R. A. 691.

76. Fifield v. Phoenix, 4 Ariz. 283, 36 Pac. 916, 24 L. R. A. 430; Hill v. Charlotte, 72 N. C. 55, 21 Am. Rep. 451.

77. Speir v. Brooklyn, 139 N. Y 6; Landau v. New York, 180 N. Y. 48, 72 N. E. 631, 105 Am. St. Rep. 709.

§ 2752, *post*.

Fireworks in city park. But where a permit was issued to exhibit a display of fireworks in a city park, the permit is in effect a license to do an act not unlawful and not *per se* dangerous, and the city is not liable. De Agramonte v. Mount Vernon, 98 N. Y. S. 454, 112 App. Div. 291, 293.

In Indiana, it is held that a permit to fire gunpowder on a certain occasion, where lawful, does not make the municipality liable for the negligence of the licensees, where there is nothing to show that the act was necessarily dangerous.[78]

Whether *notice* to the municipality of the defect in a street, caused by the act of a licensee, is necessary, is the subject of a conflict in the decisions.[79]

§ 2661. City engineer.

The *negligence* of a city engineer in making plans for a public improvement makes the municipality liable in some states, but it is not liable for his mere *error of judgment.*[80] It is generally liable for his negligence in connection with the actual construction of public buildings or the making of public improvements,[81] but is not liable where he acts in behalf of private individuals.[82]

§ 2662. Independent contractors.

Liability for the acts of independent contractors is a subject as to which there is much conflict in applying the rules of law which have been laid down by the courts. The subject has been made the title of a text-book,[83] and is treated at length in well known works on the law of Negligence. There is no doubt but what the general rules governing the liability for the negligence or other wrongful acts of an independent contractor or his employees apply equally well whether the contractee is a municipal corporation or is an individual or private corporation. Therefore, to supplement the rules laid down herein, reference should be made to the law governing

78. Wheeler v. Plymouth, 116 Ind. 158, 18 N. E. 532, 9 Am. St. Rep. 837.

79. § 2751, *post,* next chapter.

80. § 2633, *ante.*

81. Dayton v. Pease, 4 Ohio St. 80.

See also Normile v. Ballard, 33 Wash. 369, 74 Pac. 566, negligence in making estimates, to injury of contractor.

82. Alcorn v. Philadelphia, 44 Pa. St. 348; Waller v. Dubuque, 69 Ia. 541, 29 N. W. 456.

§ 2653, *ante.*

83. Moll, Indep. Cont.

independent contractors as laid down in general treatises.[84]

The general rule of non-liability of a master for the acts of an independent contractor applies to the liability of a municipality for the acts of a contractor. The contractor is liable but not the municipality,[85] unless the

84. See Thompson, Neg.; Bailey, Pers. Inj. (2nd ed.), vol. 1.

85. *California.* Krause v. Sacramento, 48 Cal. 221; O'Hale v. Sacramento, 48 Cal. 212.

Illinois. Fields v. Johnson City, 143 Ill. App. 485; East St. Louis v. Giblin, 3 Ill. App. 219.

Indiana. Leeds v. Richmond, 102 Ind. 372, 1 N. E. 711.

Iowa. Bennett v. Mt. Vernon, 124 Ia. 537, 100 N. W. 349; Prowell v. Waterloo, 144 Ia. 689, 123 N. W. 346.

Louisiana. La Groue v. New Orleans, 114 La. 253, 38 So. 160.

Massachusetts. Cabot v. Kingman, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45; Harding v. Boston, 163 Mass. 14, 39 N. E. 411.

Michigan. Whealy v. Imlay City, 161 Mich. 499, 126 N. W. 714.

Missouri. Ege v. Phoenix Brick, etc. Co., 118 Mo. App. 630, 94 S. W. 999; Barry v. St. Louis, 17 Mo. 121; McGrath v. St. Louis, 215 Mo. 191, 114 S. W. 611.

New Jersey. Jansen v. Jersey City, 61 N. J. L. 243, 39 Atl. 1025.

New York. Uppington v. New York, 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550; Herrington v. Lansingburgh, 110 N. Y. 145, 17 N. E. 728, 6 Am. St. Rep. 348; Kelly v. New York, 11 N. Y. 432; Pack v. New York, 8 N. Y. 222; Kelly v. New York, 94 N. Y. S. 872, 106 App. Div. 576; Haefelin v. McDonald, 89 N. Y. S. 395, 96 App. Div. 213; Jewell v. Mt. Vernon, 87 N. Y. S. 120, 91 App. Div. 578; White v. New York, 44 N. Y. S. 454, 15 App. Div. 440.

Ohio. Circleville v. Neuding, 41 Ohio St. 465.

Pennsylvania. White v. Philadelphia, 201 Pa. 512, 51 Atl. 332; Reed v. Allegheny City, 79 Pa. 300.

Wisconsin. Kuehn v. Milwaukee, 92 Wis. 263, 65 N. W. 1030; Harper v. Milwaukee, 30 Wis. 365.

Utah. Callahan v. Salt Lake City (Utah, 1912), 125 Pac. 863.

Municipality is under no duty or obligation to protect private property against the negligence of its contractor when the plan of the work is reasonable and not likely to cause injury if properly carried out. McGrath v. St. Louis, 215 Mo. 191, 114 S. W. 611; Sappington v. Centralia, 162 Mo. App. 418, 144 S. W. 1112.

Where a sidewalk is built under a contract with adjoining property owners, the municipality will not be liable for negligence of the contractor. Thompson v. West Bay City, 137 Mich. 94, 100 N. W. 280; Whealy v. Imlay City, 161 Mich. 499, 126 N. W. 714.

City not liable for negligence of contractors who undertake to

case comes within one of the numerous exceptions to the rule which will now be briefly noted.

§ 2663. Same—exceptions to rule of non-liability.

The exceptions to this general rule are the same ones that govern where the master is not a municipality but instead a private person or corporation. It is generally, if not universally, conceded that the municipality is liable even though the negligence or wrongful act was that of an independent contractor or of persons in his employ, in the following cases:

1. *If control of the work is reserved by the municipality,* it is liable for the torts of the independent contractor or his employees. This is well settled. But just how extensive the control reserved must be is the subject of some conflict in the decisions. Generally mere supervision over the place where the work is done and the right to inspect the work to see if it conforms with the contract does not make the municipality responsible for the contractor's negligence.[86] On the other hand, if

clean the city streets, in failing promptly to turn off the water from a broken hydrant, where it was overflowing plaintiff's premises. Frank v. Rome, 109 N. Y. S. 247, 125 App. Div. 141.

Liability to servants of contractor. A city owes no duty to the servants of an independent contractor to provide them a competent and skillful employer. Salmon v. Kansas City, 241 Mo. 14, 145 S. W. 16.

86. *Illinois.* Foster v. Chicago, 197 Ill. 264, 64 N. E. 322; Nevins v Peoria, 41 Ill. 502, 89 Am. Dec. 392; Foster v. Chicago, 96 Ill. App. 4; Cary v. Chicago, 60 Ill. App. 341.

Indiana. Staldter v. Huntington, 153 Ind. 354, 55 N. E. 88.

Massachusetts. Harding v. Boston, 163 Mass. 14, 39 N. E. 411.

Michigan. Lenderink v. Rockford, 135 Mich. 531, 98 N. W. 4.

Missouri. McGrath v. St. Louis, 215 Mo. 191, 211, 114 S. W. 611; Blumb v. Kansas City, 84 Mo. 112, 54 Am. Rep. 87; Ege v. Phoenix B. & C. Co., 118 Mo. App. 630, 94 S. W. 999.

New York. Uppington v. New York, 165 N. Y. 222, 52 N. E. 91, 53 L. R. A. 550; Kelly v. New York, 11 N. Y. 432; Pack v. New York, 8 N. Y. 222.

North Carolina. Denny v. Burlington, 155 N. C. 33, 70 S. E. 1085.

Utah. Callahan v. Salt Lake City (Utah, 1912), 125 Pac. 863.

But see Thillman v. Baltimore

the municipality retains control over the manner of doing the work or over the employees, it is liable.[87] It

City, 111 Md. 131, 139, 73 Atl. 722; Hanrahan v. Baltimore City, 114 Md. 517, 532, 80 Atl. 312.

The granting of a permit by a city to construct a tunnel under a street, and requiring the work to be done under the direction of the city's chief engineer of sewers was held not to obligate the city to see that due care was used in the prosecution of the work, nor to render it liable for negligence of the constructor. Von Lengerke v. New York, 134 N. Y. S. 832, 150 App. Div. 98.

Rule as stated in New York. Municipality not liable although the municipality reserves "the right to change, supervise and inspect to the extent necessary to produce the result intended by the contract, provided the plan is reasonably safe, the work is lawful, is not a nuisance when completed, and there is no interference therewith by municipal officers which results in injury." Froelich v. New York, 199 N. Y. 466, 93 N. E. 79.

Right to discharge employees. That city engineer had the right to discharge employees of the contractor does not preclude the relation of independent contractors so as to relieve the municipality from liability. Engler v. Seattle, 40 Wash. 72, 80, 82 Pac. 136. In some other states, however, it would seem that this rule is not followed.

87. *Illinois.* Chicago v. Murdock, 212 Ill. 9, 13, 72 N. E. 46, 103 Am. St. Rep. 221; Chicago v Dermody, 61 Ill. 431; Chicago v. Joney, 60 Ill. 383.

Kentucky. See Frankfort v. Allen, 26 Ky. L. Rep. 581, 82 S. W. 292.

Missouri. Scott v. Springfield, 81 Mo. App. 312, dist'g Blumb v. Kansas City, 84 Mo. 112, 54 Am. Rep. 87.

New York. Schumacher v. New York, 57 N. Y. S. 968, 40 App. Div. 320; Goldschmid v. New York, 43 N. Y. S. 447, 14 App. Div. 135.

North Carolina. Denny v. Burlington, 155 N. C. 33, 70 S. E. 1085.

Ohio. Cincinnati v. Stone, 5 Ohio St. 38.

Pennsylvania. Stork v. Philadelphia, 199 Pa. 462, 49 Atl. 236.

Washington. Cooper v. Seattle, 16 Wash. 462, 47 Pac. 887, 58 Am. St. Rep. 46; Seattle v. Busby, 2 Wash. T. 25, 3 Pac. 180.

Wisconsin. Harper v. Milwaukee, 30 Wisc. 365.

See Bragg v. Rutland, 70 Vt. 606, 41 Atl. 578.

To make a city liable for the negligence of its contractor it is essential that it shall have reserved supervisory control of the work or discretionary power over the contract. Giaconi v. Astoria, 60 Ore. 12, 113 Pac. 855, 118 Pac. 180, 37 L. R. A. (N. S.) 1150.

Where the work performed by a municipal contractor under the contract is a mere ministerial duty, the municipality will be liable for his negligence. Flannagan v. Bloomington, 156 Ill. App. 162.

must be confessed, however, that the line of demarcation between these two classes of cases is not always strictly adhered to, and is sometimes rejected, to some extent at least.[88]

2. The person upon whom a statutory or positive duty is imposed *cannot delegate* in any manner the performance of that duty, so as to relieve himself from the responsibility for the performance of that duty.[89] This applies equally well where the contractee is a municipality.[90] For instance, the duty rests upon municipalities as such to exercise *ordinary care to keep the streets*

To render the municipality liable for the acts of a municipal contractor, its control over the work must be general as to the manner and method of execution of the work and must extend to the particular act by which the injuries were caused. Foster v. Chicago, 197 Ill. 264, 64 N. E. 322; Salmon v. Kansas City, 241 Mo. 14, 145 S. W. 16; Norwalk Gas Co. v. Norwalk, 63 Conn. 495. 28 Atl. 32.

"The difference between an independent contractor and a mere servant is not determined solely by the retention of a certain kind or degree of supervision by the employer. It is to be determined by the contract as a whole—by its spirit and essence—and not by the phraseology of a single sentence or paragraph." Foster v. Chicago, 197 Ill. 264, 64 N. E. 322.

Nuisance. Where a municipal corporation retains supervision and control of work let out by contract, it will be held liable for a nuisance created by the contractor in the performance of the contract. Thillman v. Baltimore, 111 Md. 131, 73 Atl. 722; McCarthy v. Clarke, 115 Md. 454, 81 Atl. 12; Baltimore v. O'Donnell, 53 Md. 110, 36 Am. Rep. 395.

88. See Moll, Indep. Cont., §§ 19-26.

89. 1 Bailey Pers. Inj. (2nd Ed.), § 42, p. 125.

90. Chapman v. Litchfield, 158 Ill. App. 200; McCarthy v. Clark, 115 Md. 454, 81 Atl. 12; Thillman v. Baltimore, 111 Md. 131, 73 Atl. 722 (duty to pave streets without inflicting unnecessary injury on abutters); Hughes v. Detroit, 161 Mich. 23, 126 N. W. 214, 17 Det. Leg. N. 322; Bailey v. Winston, 157 N. C. 252, 72 S. E. 966.

Sewers. Since the duty of a municipal corporation to care for its streets can not be delegated, it can not relieve itself from liability for the construction of a sewer which creates a nuisance in a street, by showing that the sewer had been constructed by an independent contractor. Chapman v. Litchfield, 158 Ill. App. 200.

Bridge, rule applied to. Great Lakes Towing Co. v. Kelley Island L. & T. Co., 176 Fed. 492, 496, 100 C. C. A. 108.

in reasonable repair, and this duty cannot be shifted to an independent contractor so as to relieve the municipality from liability therefor,[91] and hence if a contractor

91. *Illinois.* Cole v. East St. Louis, 158 Ill. App. 494, 500.

Michigan. Detroit v. Corey, 9 Mich. 165, 80 Am. Dec. 78; Southwell v. Detroit, 74 Mich. 438, 42 N. W. 118; Hughes v. Detroit, 161 Mich. 283, 126 N. W. 214.

Massachusetts. Stoliker v. Boston, 204 Mass. 522, 537, 90 N. E. 927.

Minnesota. Moore v. Townsend, 76 Minn. 64, 78 N. W. 880.

New York. Brady v. New York, 134 N. Y. S. 305, 149 App. Div. 816; Wendell v. Troy, 39 Barb. (N. Y.) 329.

North Carolina. Bailey v. Winston, 157 N. C. 252, 258, 72 S. E. 966.

§ 2728, *post.*

Where the absolute duty of keeping its streets in repair and free from nuisance is imposed upon a municipal corporation, it can not escape liability for damages caused by its failure to do so on the plea that the condition of the street was brought about by an independent contractor. Pace v. Webster City, 138 Ia. 107, 115 N. W. 888.

A city contracting for the excavation of a street is not relieved of the duty of maintaining the surface of the street, so far as use thereof is permitted, in a reasonably safe condition, but it is not bound to watch each detail of the work. Brady v. New York, 134 N. Y. S. 305, 149 App. Div. 816.

Erection of barriers in sidewalk involving danger to passers at night, unless warning lights are put out, is necessarily incident to the reasonable and proper performance of the work of constructing a cement sidewalk, and is not a purely collateral matter as to which the city may rely upon an independent contractor. Prowell v. Waterloo, 144 Ia. 689, 123 N. W. 346.

Cutting tree roots. City liable where sidewalk contractor cut roots of trees standing in street, so as to leave them without support, resulting in blowing down of trees. Morris v. Salt Lake City, 35 Utah, 474, 486-489, 101 Pac. 373.

Rule limited to streets. A city is under no duty or obligation to protect adjoining property against the negligence of a contractor when the plan of the work is reasonable and not liable to work injury if properly carried out. Sappington v. Centralia, 162 Mo. App. 418, 421, 144 S. W. 1112, following McGrath v. St. Louis, 215 Mo. 191, 114 S. W. 611.

Where street has been withdrawn from the possession and control of a municipality, pending the construction of a subway, it is not liable for the acts of its contractor on the theory that it has suffered a nuisance to be maintained in the street. Smyth v. New York, 203 N. Y. 106, 111, 96 N. E. 409, modf'g 112 N. Y. S. 807, 128 App. Div. 463.

Distinction between duty owed to public and duty to public

undertakes the improvement of a street, and in doing so creates obstructions or excavations in the street, the municipality is liable for the negligence of the contractor in failing to properly guard such obstructions or excavations.[92] But in considering this question of *non-delegable duties,* it must always be kept in mind that the existence of the duty varies with the class to which the plaintiff belongs, *i. e.,* whether plaintiff is merely an abutting owner, a traveler upon the street or an employee of the contractor.[93] However, in Pennsylvania, a municipality is not liable for the negligence of an independent contractor while engaged in the construction or repair of a street of which he has the exclusive control, *i. e.,* the power to prohibit the use of it by the public.[94]

utility company. As to latter, the duty is not of a public nature, and municipality is not liable for injuries to gas pipes by independent contractor in improving a street. Seattle Lighting Co. v. Hawley, 54 Wash. 137, 103 Pac. 6.

92. *Georgia.* Savannah v. Waldner, 49 Ga. 316.

Illinois. Jefferson v. Chapman, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136; Springfield v. Le Claire, 49 Ill. 476; Sterling v. Schiffmacher, 47 Ill. App. 141.

Indiana. Indianapolis v. Marold, 25 Ind. App. 428, 58 N. E. 512.

Kentucky. Glasgow v. Gillenwaters, 113 Ky. 140, 67 S. W. 381.

Michigan. Baker v. Grand Rapids, 111 Mich. 447, 69 N. W. 740.

Minnesota. St. Paul v. Seitz, 3 Minn. 297, 74 Am. Dec. 753.

Missouri. Welsh v. St. Louis, 73 Mo. 71; Blake v. St. Louis, 40 Mo. 569.

Nebraska. Omaha v. Jensen, 35 Neb. 68, 52 N. W. 833, 37 Am. St. Rep. 432.

Ohio. Circleville v. Neuding, 41 Ohio St. 465.

Tennessee. Nashville v. Brown, 9 Heisk. (Tenn.) 1, 24 Am. Rep. 289.

West Virginia. Wilson v. Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

§ 2750, *post,* next chapter.

Bridge, rule applied to. Hawxhurst v. New York, 43 Hun (N. Y.), 588.

Pennsylvania seems to hold the contrary. Susquehanna Depot v. Simmons, 112 Pa. 384, 5 Atl. 434, 56 Am. Rep. 317; Painter v. Pittsburg, 46 Pa. 213.

93. See Salmon v. Kansas City, 241 Mo. 14, 145 S. W. 16, 24, where it is said: "There is no parallel between the relation of the city to plaintiff (a servant) and its relation to the public and adjoining owners."

94. Norbeck v. Philadelphia, 224 Pa. 30, 34, 73 Atl. 179; Painter v. Pittsburg, 46 Pa. 213.

3. Where the work is *inherently or intrinsically dangerous* in itself and will necessarily or probably result in injury to third persons, unless methods are adopted by which such consequences may be prevented, the municipality is liable.[95] In other words, the municipality is liable where the act which causes the injury is one which the contractor is employed to perform, and the injury

95. *Alabama.* Birmingham v. McCrary, 84 Ala. 469, 4 So. 630.

Illinois. Joliet v. Harwood, 86 Ill. 110, 29 Am. Rep. 17 (blasting); East St. Louis v. Murphy, 89 Ill. App. 22.

Iowa. Bennett v. Mt. Vernon, 124 Ia. 537, 100 N. W. 349.

Kentucky. Louisville v. Shanahan, 22 Ky. L. Rep. 163, 56 S. W. 808.

Minnesota. Sewall v. St. Paul, 20 Minn. 511, and see Rich v. Minneapolis, 37 Minn. 423, 35 N. W. 2, 5 Am. St. Rep. 861.

Missouri. Broadwell v. Kansas City, 75 Mo. 213, 42 Am. Rep. 406.

North Carolina. Carrick v. Southern Power Co., 157 N. C. 378, 72 S. E. 1065.

City not relieved from liability where damage is caused by the work itself and not by negligence. Norbeck v. Philadelphia, 224 Pa. 30, 73 Atl. 179; Carrick v. Southern Power Co., 157 N. C. 378, 72 S. E. 1065.

"The liability of the municipality and that of a private owner rest upon the same fundamental proposition, namely, that one must not authorize acts upon his property which in themselves constitute a nuisance or a menace to the lives or property of others; and it is no defense to show that the performance of the inhibited act is delegated to an independent contractor." Salmon v. Kansas City, 241 Mo. 14, 145 S. W. 16.

"Private owners, and municipalities as well, have been held liable for the consequences of acts which they have authorized and which are intrinsically dangerous to others, no matter how carefully performed, where the danger arises from the act itself and not from the manner in which it is done." Salmon v. Kansas City, 241 Mo. 14, 145 S. W. 16.

Where the work let by a municipality is unlawful or involves a trespass or nuisance, the municipality will be liable for injuries caused thereby whether it reserves control of the work or not. Ege v. Phoenix Brick, etc. Co., 118 Mo. App. 630, 94 S. W. 999.

Grading and improving street is not necessarily or inherently dangerous to gas pipes located within the street. Seattle Lighting Co. v. Hawley, 54 Wash. 137, 103 Pac. 6.

Liability to servants of contractor. The fact that the work let out by a city on contract is intrinsically dangerous will not render the city liable to servants of the contractor who are injured thereby. Salmon v. Kansas City, 241 Mo. 14, 145 S. W. 16.

results from the act of performance and not from the manner of performance.[96] For example, the municipality is liable where the injury is due to *defective plans* or methods pursuant to which the work is done,[97] subject to the general rules as to liability for defective plans.[98]

4. Where the contractor is employed to do an act *unlawful in itself or which of itself involves a trespass,* the municipality is liable.[99]

5. Conceding that, in a particular case, the municipality is not liable for the negligence of its contractor or his employees, yet the municipality is liable for its *failure to take precautions within a reasonable time* after notice of the defect caused by an act of the contractor.[1]

All these exceptions are easy to state but sometimes difficult to apply. Take, for instance, injuries resulting from *blasting* done in the course of improvements being put in by contractors. In New York, where a horse being driven in a street was frightened by blasting done by a sewer contractor, it was held that the negligence, if any, was that of the contractors, where they were in entire control of the work, and the municipality was held not liable.[2] The municipality was also held not liable in another case in that state where a blast threw a stone which

96. **Converse of rule.** The rule is often stated that a municipality is not liable for the negligence of an independent contractor in carrying on the work, if such negligence consists in some fault or omission *wholly collateral to the performance of the work to be done,* and not necessarily involved in doing it. Prowell v. Waterloo, 144 Ia. 689, 123 N. W. 346; Hanrahan v. Baltimore City, 114 Md. 517, 532, 80 Atl. 312; McNamara v. New York, 129 N. Y. S. 230, 144 App. Div. 504.

97. If the injury is due to a defect in the plans of the work, and not to defective workmanship, liability can not be evaded by intrusting the work to an independent contractor. Potter v. Spokane, 63 Wash. 267, 270, 115 Pac. 176.

98. § 2633, *ante.*

99. Ege v. Phoenix Brick & C. Co., 118 Mo. App. 630, 635, 94 S. W. 999.

1. Dunston v. New York, 86 N. Y. S. 562, 91 App. Div. 355.

2. Herrington v. Lansingburgh, 110 N. Y. 145, 17 N. E. 728, 6 Am. St. Rep. 348.

struck plaintiff's horse.[3] So in Missouri it was held a municipality is not liable for an injury to a pedestrian in a street, caused by the negligence of a contractor in blasting.[4] In Indiana, however, a city was held liable for injuries from blasting, resulting in killing a passer-by, on the theory that the duty to keep the streets in reasonably safe condition had been neglected.[5] And in Illinois a recovery against the municipality is held authorized on the theory that the work is intrinsically dangerous.[6]

§ 2664. Same—agreements with contractor as to liability.

If a municipality would otherwise be liable for the acts of an independent contractor, it cannot evade liability by stipulating in the contract that the contractor should protect the public and that he should be liable for damages from his wrongful acts.[7]

§ 2665. Duty as to employing "competent" servants.

A municipality is not liable for the negligence of its officers in appointing incompetents for the police force or other positions,[8] even though known by the appointing officer to be incompetent.[9] However, a municipality can-

3. Kelly v. New York, 11 N. Y. 432.

4. Blumb v. Kansas City, 84 Mo. 112, 54 Am. Rep. 87.

5. Logansport v. Dick, 70 Ind. 65, 36 Am. Rep. 166.

6. Chicago v. Murdock, 212 Ill. 9, 72 N. E. 46, 103 Am. St. Rep. 221.

Blasting as intrinsically dangerous, see extensive discussion in Salmon v. Kansas City, 241 Mo. 14, 145 S. W. 16.

7. *Indiana.* Staldter v. Huntington, 153 Ind. 354, 55 N. E. 88.

Michigan. Detroit v. Corey, 9 Mich. 165, 80 Am. Dec. 78.

Oregon. McAllister v. Albany, 18 Ore. 426, 23 Pac. 845.

West Virginia. Wilson v. Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

United States. St. Paul Water Co. v. Ware, 16 Wall. (U. S.) 566, 21 L. Ed. 485.

8. Doty v. Port Jervis, 52 N. Y. S. 57, 23 Misc. Rep. 313.

9. Craig v. Charleston, 180 Ill. 154, 54 N. E. 184, aff'g 78 Ill. App. 312; McElhenney v. Wilmington, 127 N. C. 146, 37 S. E. 187, 50 L. R. A. 470; Higgins v. Superior, 134 Wisc. 264, 114 N. W. 490, 13 L. R. A. (N. S.) 994.

not select an incompetent agent, and then shield itself from the consequences of his injudicious acts, by justifying under his advice.[10] Furthermore, it would seem that if the municipality sets up the *fellow servant rule* as a defense, the exception where the master has been negligent in employing or retaining in his employ an incompetent co-servant is applicable.[11]

4. LIABILITY FOR ACTS OF PARTICULAR OFFICERS.

§ 2666. Police officers.

Municipalities are not liable for the torts of policemen,[12] except under peculiar circumstances, under the decisions in particular cases.[13] So where a city "dog killer" is a police officer, the municipal corporation is

10. Rochester White Lead Co. v. Rochester, 3 N. Y. 463, 466, 53 Am. Dec. 316.

11. General rule, see Bailey, Pers. Inj. (2nd ed.), § 334, *et seq.*

12. § 2431, *ante*, vol. 5.

In addition, see the following cases:

Arkansas. Trammell v. Russellville, 34 Ark. 105, 36 Am. Rep. 1.

Connecticut. Perkins v. New Haven, 53 Conn. 214, 1 Atl. 825.

Iowa. Easterly v. Irwin, 99 Ia. 694, 68 N. W. 919.

Louisiana. Howe v. New Orleans, 12 La. Ann. 481.

Pennsylvania. Betham v. Philadelphia, 196 Pa. St. 302, 46 Atl. 448; Elliott v. Philadelphia, 75 Pa. 347, 15 Am. Rep. 591.

Tennessee. Davis v. Knoxville, 90 Tenn. 599, 18 S. W. 254.

Texas. Peck v. Austin, 22 Tex. 261, 73 Am. Dec. 261; Galveston v. Brown, 28 Tex. Civ. App. 274, 67 S. W. 156; McFadin v. San Antonio, 22 Tex. Civ. App. 140, 54 S. W. 48.

Utah. Royce v. Salt Lake City, 15 Utah, 401, 49 Pac. 290.

West Virginia. Bartlett v. Clarksburg, 45 W. Va. 393, 31 S. E. 918, 43 L. R. A. 295, 72 Am. St. Rep. 817.

United States. Trescott v. Waterloo, 26 Fed. 592.

Municipal corporation not liable for the acts of police officers in attempting to enforce police regulations. Grumbine v. Washington, 2 McArthur (D. C.), 578, 29 Am. Rep. 626, and see § 2630, *ante.*

City can not pay expenses of defending a police officer in an action for damages for false imprisonment, since it is not liable for such act. Chicago v. Williams, 182 Ill. 135, 55 N. E. 123.

Failure of an officer to take care of property of a person under arrest. Elliott v. Philadelphia, 7 Phila. (Pa.) 128.

13. § 2431, notes 13, 14, 28-31, 33, *ante*, vol. 5.

not liable for his unlawful and malicious killing of a dog.[14]

§ 2667. Pound officers.

The keeping of a pound conserves the public good by removing from the streets what might otherwise become a nuisance. Hence, a municipality is not liable for the negligence of its pound keeper which causes the death or injury of an animal which he had taken up.[15]

§ 2668. Poor house officers.

Municipalities are not liable for the torts of commissioners of charities, a board created by the legislature, or the employees of such commissioners, under ordinary circumstances, since the care of the poor is a governmental duty rather than a corporate one.[16] But where a municipality carries on a poor farm for purposes of gain, it is liable to one injured in connection with the management of the farm.[17]

§ 2669. Health officers.

The duty of a municipal corporation to conserve the public health is governmental, and it is not liable for injuries inflicted while performing such duty.[18] The decisions are practically unanimous in holding that a mu-

14. Moss v. Augusta, 93 Ga. 797, 20 S. E. 653.

15. Gregg v. Hatcher, 94 Ark. 54, 125 S. W. 1007; Wilks v. Caruthersville, 162 Mo. App. 492, 142 S. W. 800.

Contra, see Greencastle v. Martin, 74 Ind. 449, 39 Am. Rep. 93.

Authority to prevent animals from running at large is referable to the police power, and acts done thereunder are not for the benefit of the municipality in its corporate capacity, but for the interest of the public at large. Wilks v. Caruthersville, 162 Mo. App. 492, 142 S. W. 800.

16. Maxmilian v. New York, 62 N. Y. 160, 20 Am. Rep. 468, holding city not liable where person run over by ambulance driven by employee of board of public charities.

17. Moulton v. Scarborough, 71 Me. 267, 36 Am. Rep. 308, where keeping of ram held not *ultra vires*.

18. Denver v. Maurer, 47 Colo. 209, 106 Pac. 875.

Police power as to health, § 899, *et seq.*, *ante*, vol. 3.

nicipality is not liable for the torts of its board of health [19] or other health officers,[20] on the theory that the duty in regard to preventing sickness or caring for sick people is strictly a governmental or public function.

Accordingly a municipal corporation is not liable for the negligence of its officers and employees in conducting a *municipal hospital,* or in the treatment of patients therein,[21] whether the purpose of the hospital be charitable [22] or to provide for the general health and welfare by preventing and suppressing the spread of disease.[23] In the latter case, the authority to maintain the hospital must be regarded as an exercise of the police power, within the rule that a municipality is not liable for the negligent act of its agents or servants engaged in enforcing, executing or giving effect to its police ordinances and regulations.[24]

19. *Michigan.* Webb v. Detroit Board of Health, 116 Mich. 516, 74 N. W. 734, 72 Am. St. Rep. 541.

Minnesota. Bryant v. St. Paul, 33 Minn. 289, 23 N. W. 220, 53 Am. Rep. 31.

New Jersey. Valentine v. [redacted]e-wood, 76 N. J. L. 509, 71 Atl. 344, 19 L. R. A. (N. S.) 262.

New York. Prime v. Yonkers, 192 N. Y. 105, 84 N. E. 571, rev'g on other grounds 102 N. Y. S. 118, 116 App. Div. 699; Bamber v. Rochester, 26 Hun (N. Y.), 587, 63 How. Pr. 103; Jones v. New York, 44 Hun (N. Y.), 629. But see Tormey v. New York, 12 Hun (N. Y.), 542.

Pennsylvania. Lentz v. Philadelphia, 3 Pa. Co. Ct. Rep. 136.

Council invested with powers of board of health. City not liable. Murray v. Grass Lake, 125 Mich. 2 83 N. W. 995.

20. Benton v. Trustees of Boston Hospital, 140 Mass. 13, 1 N. E. 836, 54 Am. Rep. 436; Bodewig v. Port Huron, 141 Mich. 564, 104 N. W. 769, using private house as a pesthouse.

Compare, however, *dicta* in Portsmouth v. Lee, 112 Va. 419, 71 S. E. 630.

21. Murtaugh v. St. Louis, 44 Mo. 479; Richmond v. Long's Adm'r, 17 Grat. (Va.) 375, 94 Am. Dec. 461.

Not liable for unskilled treatment by physician. Sherbourne v. Yuba County, 21 Cal. 113, 81 Am. Dec. 151; Williams v. Indianapolis, 26 Ind. App. 628, 60 N. E. 367.

22. Tollefson v. Ottawa, 228 Ill. 134, 81 N. E. 823, aff'g 129 Ill. App. 139.

23. Tollefson v. Ottawa, 228 Ill. 134, 81 N. E. 823, aff'g 129 Ill. App. 139; Richmond v. Long's Adm'r, 17 Gratt. (Va.) 375, 94 Am. Dec. 461.

24. § 2630, *ante.*

On the other hand, if a municipality has power to, and does, maintain a hospital for revenue, there is no doubt but that it would be liable for the torts of persons employed about the hospital; but if it conducts the hospital for revenue, but without power to do so, it is not liable.[25] However, the fact that fees are charged some patients in a city hospital, where it does not charge fees of all patients, does not render the municipality liable for negligence in connection therewith.[26] It has been held that the *operation of an ambulance* is an incident to the maintenance and operation of a city hospital, and hence is a governmental function for negligence in regard to which the municipality is not liable.[27]

Contagious diseases. A municipality is not liable for the negligence of its officers or agents in executing sanitary regulations, adopted for the purpose of preventing the spread of contagious diseases, or in taking the care and custody of persons afflicted with such disease, or in the care of the houses in which such persons are kept.[28] Under this rule, there is no municipal liability for negligence or misconduct in creating a *quarantine* and enforcing it;[29] for negligence in failing to take proper steps

25. Tollefson v. Ottawa, 228 Ill. 134, 136, 81 N. E. 823, aff'g 129 Ill. App. 139.

26. Watson v. Atlanta, 136 Ga. 370, 71 S. E. 664.

27. Watson v. Atlanta, 136 Ga. 370, 71 S. E. 664.

28. Ogg v. Lansing, 35 Ia. 495, 14 Am. Rep. 499.

See also White v. Marshfield, 48 Vt. 20.

29. White v. San Antonio, 94 Tex. 313, 60 S. W. 426, aff'g 57 S. W. 858; Bates v. Houston, 14 Tex. Civ. App. 287, 37 S. W. 383.

Quarantine. Where premises are ordered quarantined by the board of health, no municipal liability exists for injury to property caused thereby. Webb v. Detroit, 116 Mich. 516, 74 N. W. 734, 72 Am. St. Rep. 541.

Not liable for wrongful quarantine. Beeks v. Dickinson County, 131 Ia. 244, 108 N. W. 311, 6 L. R. A. (N. S.) 831.

Municipality is not liable for damages arising from the act of its health officers in *quarantining* a house or place of business. Turner v. Toledo, 15 Ohio Cir. Ct. Rep. 627.

Not liable for negligence of officers in enforcing ordinances for removal to pesthouse of persons having contagious diseases. Twyman's Adm'r v. Frankfort, 117 Ky. 518, 25 Ky. L. Rep. 1620, 78 S. W. 446, 64 L. R. A. 572.

Not liable for wrongful arrest

to prevent the spreading of infectious diseases;[30] for unlawful acts of municipal officers in taking possession of a house and using it for a smallpox hospital without the consent of the owner;[31] for the unhealthy condition of the pest house;[32] or for negligence or misconduct in the treatment of patients confined therein.[33] However, the location of a pest house near one's residence may constitute a *nuisance* for which damages may be recovered.[34]

§ 2670. Bridge tenders.

The better rule seems to be that a municipality, in operating a drawbridge, is acting in its private, instead of its governmental capacity, and therefore is liable for the negligence of a bridge tender in charge of the

on ground of exposure to smallpox. Levin v. Burlington, 129 N. C. 184, 39 S. E. 822, 55 L. R. A. 396.

Vaccination. Municipality is not liable for injury to one *vaccinated* by a municipal officer because of the use of impure vaccine matter. Wyatt v. Rome, 105 Ga. 312, 31 S. E. 188, 42 L. R. A. 180, 70 Am. St. Rep. 41.

Ship in quarantine. Not liable for unauthorized act of taking exclusive control of ship in quarantine. Mitchell v. Rockland, 41 Me. 363, 66 Am. Dec. 252, and see s. c. 52 Me. 118.

30. Brown v. Vinalhaven, 65 Me. 402, 20 Am. Rep. 709.

Not liable in allowing one exposed to smallpox to enter plaintiff's boarding house as a guest. Gilboy v. Detroit, 115 Mich. 121, 72 N. W. 128.

City is not liable for the wrongful or negligent acts of its police officers or board of health in the management of a city jail or the detention of persons therein, even though such persons be afflicted with smallpox and persons who work or reside near the jail contract said disease. Evans v. Kankakee, 231 Ill. 223, 83 N. E. 223.

Duty to servant to warn him of hidden dangers held not to make city liable to its servants employed to tear down a building which had been used as a smallpox hospital, he not being warned of the danger of infection. Nicholson v. Detroit, 129 Mich. 246, 88 N. W. 695, 56 L. R. A. 601.

31. Lynde v. Rockland, 66 Me. 309.

32. Having v. Covington, 25 Ky. L. Rep. 1617, 78 S. W. 431; Twyman's Adm'r v. Frankfort, 117 Ky. 518, 78 S. W. 446, 64 L. R. A. 572.

33. Lexington v. Batson's Adm'r, 118 Ky. 489, 81 S. W. 264; Barbour v. Ellsworth, 67 Me. 294.

34. § 2641, *post*.

bridge.[35] So, in those states so holding, a municipality is liable for the negligence of persons employed by the regularly appointed representative of the municipality in charge of a drawbridge, where the employment was with the consent and acquiescence of the municipality, and although such employees were paid by the bridge tender and not by the municipality.[36] However, in some state, it is held that the maintenance of a bridge is a governmental duty, where no income is received therefrom, and therefore there is no common law liability for the negligence of its bridge tender.[37] In Wisconsin, the state courts have held that where the duty to keep a bridge in repair "and attended" was imposed by statute, the municipality is liable,[38] and in the federal courts a municipality has been held liable for the negligence of a bridge tender where he was by statute declared to be a city officer;[39] but there is *dicta* to the contrary in the decisions of the state courts.[40]

If the bridge is a toll bridge, then there is no question

35. Lehigh Valley Tr. Co. v. Chicago, 237 Ill. 581, 86 N. E. 1093; Chicago v. O'Malley, 196 Ill. 197, 63 N. E. 652; Chicago v. Mullen, 116 Fed. 292, 54 C. C. A. 94; Edgerton v. New York, 27 Fed. 230, where, however, bridge was declared a public highway by statute.

36. Gathman v. Chicago, 236 Ill. 9, 86 N. E. 152, 19 L. R. A. (N. S.) 1178.

37. Daly v. New Haven, 69 Conn. 644, 38 Atl. 397; Butterfield v. Boston, 148 Mass. 544, 20 N. E. 113, 2 L. R. A. 447; French v. Boston, 129 Mass. 592, 37 Am. Rep. 393; Corning v. Saginaw, 116 Mich. 74, 74 N. W. 307, 40 L. R. A. 526.

Where the duty of maintaining a bridge as a public highway was imposed by statute on a city, the duty was held, in Massachusetts, a public duty, within the rule that no private action can be maintained against a city for the neglect to perform a public duty, unless expressly authorized by statute; and hence there is no liability for failure to provide a draw of proper width or for the carelessness of the superintendent of the bridge in delaying vessels which seek to pass through the draw. French v. Boston, 129 Mass. 592, 37 Am. Rep. 393.

38. Weisenberg v. Winneconne, 56 Wisc. 667, 14 N. W. 871.

39. Naumburg v. Milwaukee, 146 Fed. 641, 77 C. C. A. 67.

40. Stephani v. Manitowoc, 89 Wisc. 467, 62 N. W. 176.

but that the municipality which owns and operates it is liable for its negligence in connection therewith.[41]

§ 2671. Officers of building department.

A municipality is not liable for the negligence of its building department which is created by statute to perform a public service and in which the municipality itself has no private interest, and from which it receives no special benefit or advantage in its corporate capacity.[42] So a municipality is not liable for the alleged wrongful act of building inspectors in tearing down frame buildings within the fire limits.[43]

5. PROPERTY OWNED BY MUNICIPALITY.

§ 2672. In general.

The law in regard to liability for torts connected with public property, other than streets and sewers, may be briefly summarized as follows:

1. If an *income* is derived by a municipality from particular property owned or managed by it, it is liable for negligence in the care and management thereof.[44] This

41. Hoppe v. Winona, 113 Minn. 252, 261, 129 N. W. 577.

42. McGuinness v. Allison Realty Co., 93 N. Y. S. 267, 46 Misc. Rep. 8; Connors v. New York, 11 Hun (N. Y.), 439.

A municipality is not liable for injuries caused by the collapse of a private building in the course of erection on the ground that its officers approved the plans for the building. Stubley v. Allison Realty Co., 108 N. Y. S. 759, 124 App. Div. 162.

43. Murray v. Omaha, 66 Neb. 279, 92 N. W. 299, 103 Am. St. Rep. 702.

§ 2648, *ante*.

44. Cowloy v. Sunderland, 6 H. & N. 565, injury resulting from negligence in managing a wringing machine kept in a public wash house.

Where a business is lawfully conducted by a municipality for profit, at least partly or incidentally, the municipality is liable at common law for negligence in operating the same. Duggan v. Peabody, 187 Mass. 349, 73 N. E. 206; Haley v. Boston, 191 Mass. 291, 77 N. E. 888, 7 L. R. A. (N. S.) 1005; O'Donnell v. North Attleborough (Mass.), 98 N. E. 1084.

"Where the authority (of the municipal corporation) though for the accomplishment of objects of a public nature and for the benefit of the public, is one from the exercise of which the (munici-

is well settled and there are no conflicting decisions. Moreover, the amount of income is generally held to be immaterial as is, generally, the fact that the income is merely incidental.[45]

2. There is some conflict in regard to liability for torts in connection with municipal property from which it receives no income. Such liability exists in case of defective streets,[46] and the negligent care of drains and

pal) corporation derives a profit, or where the duty, though a public nature and for the public benefit, may fairly be presumed to have been enjoined upon the corporation in consideration of privileges granted to and accepted by it, the exemption does not apply." Sawyer v. Corse, 17 Grat. (Va.) 230, 94 Am. Dec. 445. See also, Scott v. Manchester, 2 Hurl. & N. 204.

Towing vessels. If a municipality engages in the business of towing vessels for profit, it is liable for negligence in connection therewith. Philadelphia v. Gavagnin, 62 Fed. 617, 10 C. C. A. 552.

Iceboats. Municipalities have been held liable where the negligence was the acts of those in charge of a city iceboat maintained to free the harbor from obstructions. Vasey v. Baltimore, 28 Fed. 377; Guthrie v. Philadelphia, 73 Fed. 688.

Bridge was the private property of a city, and was not constructed with reference to a street laid out by public authority. Toll was paid to the city. City held liable, where it granted a power company permit to string its wires over the bridge, for injury to employee of city who was painting the bridge, and who was injured by contact with the wire. Hoppe v Winona, 113 Minn. 252, 129 N. W. 577.

Brooklyn bridge, owned by New York City. Facts held not to show negligence where window sash fell, in an approach to the bridge. McPherson v. New York, 204 N. Y. 430, 97 N. E. 876.

45. § 2673, *post*.

By almost unanimity of decision the principle is sustained that municipal corporations must respond in damages for injuries resulting from their negligent management of property under their control if such property is held for pecuniary profit, although it may be used principally for governmental purposes. Thus, if, in repairing a building belonging to the city, and used in part for municipal purposes, and in considerable part also as a source of revenue to the corporation, the agents and servants of the city dig a hole in the ground adjoining, and negligently leave it open and unguarded, so that a person rightfully walking on a path leading by the building, although not a public highway, falls into such hole, and is injured, the city will be liable to an action at common law for the injury. Oliver v. Worcester, 102 Mass. 489, 3 Am. Rep. 485.

46. See next chapter.

sewers,[47] even though no income is derived therefrom by the municipality. However, streets are not, strictly speaking, "property" of the municipality; and sewers and drains, although property, are entirely different, as a class, from buildings and other property of the municipality.

The general rule, except in regard to streets and sewers, especially in New England, is that there is no municipal liability for negligence in connection with public buildings or other property *used exclusively for public purposes* and from which no income is received.[48] However, in several states, municipalities have been held liable for injuries from defects in or around public buildings used exclusively for public purposes and from which no income was received, without in any way considering the question as to whether in any instance a municipality is liable therefor.[49] Furthermore, the fact that defects in a sidewalk are in front of a municipal building does not exonerate the municipality from liability.[50] And a city has been held liable for the death of a servant employed in building a city hall.[51]

However, a municipality "holding property as a *private owner* is chargeable with the same duties and ob-

47. § 2695, *post*.

48. Worden v. New Bedford, 131 Mass. 23; Eastman v. Meredith, 36 N. H. 284, 296.

But see Sullivan v. Holyoke, 135 Mass. 273, where city was held liable for injuries from an explosion of naptha stored in a municipal building.

49. See Vincent v. Brooklyn, 31 Hun (N. Y.), 122; Galvin v. New York, 112 N. Y. 223; Briegel v. Philadelphia, 135 Pa. 451, 458, 19 Atl. 1038, where city was held liable for injuries to adjoining houses caused by negligence in not properly constructing the plumbing and draining connected with the privy well of a school building, the action being one for nuisance, however, instead of negligence.

50. See Carrington v. St. Louis, 89 Mo. 208.

51. McCaughey v. Iriff, 12 R. I. 449.

In Illinois, in Chicago v. Dermody, 61 Ill. 431, 434, it was held that a city, erecting a public building, is liable for resulting injury. The building being erected was a city hall. Nothing is said in the opinion as to the nature of the building or the purpose for which it was being erected.

ligations which devolve on individuals."[52] And liability exists for negligent management of real estate producing revenue to the city.[53] And finally it is generally

52. Pekin v. McMahon, 154 Ill. 141, 154, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114.

See also Gibson v. Huntington, 38 W. Va. 177, 18 S. E. 447, 22 L. R. A. 561, 45 Am. St. Rep. 853.

Where land once used for a reservoir was being filled up, and had not been used for any public purpose for nearly a year, and the municipality is dealing with and managing the land the same as a private owner deals with and manages his property, it is liable for negligence in connection therewith. Clark v. Manchester, 62 N. H. 577, holding, however, in the particular case that city was not liable where four-year-old child fell into part not filled up, the child going there without license or invitation.

53. Worden v. New Bedford, 131 Mass. 23, 41 Am. Rep. 185; Bailey v. New York, 3 Hill (N. Y.), 531; Durkin v. New York, 131 N. Y. S. 275, 146 App. Div. 472.

Liable for injuries on common land owned by the municipality and leased to third persons. "The principles upon which the question of the liability of the municipality turns were set forth in the last case above cited, in the following language (131 Mass. 24, 41 Am. Rep. 185): 'A city or town is not liable to a private citizen for an injury caused by any defect or want of repair in a city or town hall or other public building erected and used solely for municipal purposes, or for negligence of its agents in the management of such buildings. This is because it is not liable to private actions for omission or neglect to perform a corporate duty imposed by general laws upon all towns or cities alike, from the performance of which it derives no compensation. But when a city or town does not devote such building exclusively to municipal uses, but lets it or a part of it for its own advantage and emolument, by receiving rents, or otherwise, it is liable while it is so let in the same manner as a private owner would be.' It can make no difference that the portion let is a part of a building or of land. The principle upon which in each of these two cases the defendant was held is applicable here; and it may thus be stated in a general form. A municipality has the power to let for profit real estate held for public purposes and not needed for the present for such a purpose. It is not compelled to let the property lie idle. While it may not expend money to go into business, it may lease the property on reasonable terms and receive the rents. If some minor expense is needed to make the property rentable, such for instance as for a new key, a new blind or new steps in the case of a building; or for suitable ways in the case of vacant land either by leveling the land or making plank walks, such expense within reasonable limits may be legally

held that when a special power or privilege is conferred upon or granted to a municipal corporation, to be exercised for its own advantage or emoluments, and not as a mere governmental agency, it is liable to the same extent as an individual or a private corporation for negligence in managing or dealing with the property rights or franchises held by it under such grant.[54]

§ 2673. Conducting business for profit.

Where a business is lawfully conducted by a municipality, partly and incidentally at least for profit, the municipality is liable at common law for negligence in its management thereof.[55] It has been held that it is sufficient to render the municipality liable that the business is conducted in part for profit, although principally for public purposes,[56] but as to this there is some conflict of opinion.[57] The *increase of the value of the*

incurred." Davis v. Rockport (Mass. 1913), 100 N. E. 612.

Poor farm, conducted for profit. Liable for injury from vicious ram. Moulton v. Scarborough, 71 Me. 267.

54. Esberg Gunst Cigar Co. v. Portland, 34 Oreg. 282, 55 Pac. 961, 43 L. R. A. 435. The mere happening of an accident causing injury is evidence of negligence whenever the thing causing the injury is under the control of defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care. Esberg Gunst Cigar Co. v. Portland, *supra*.

55. O'Donnell v. North Attleborough (Mass. 1912), 98 N. E. 1084. See also Bodge v. Philadelphia, 167 Pa. 492, 31 Atl. 728.

That proper diligence was observed, "in the opinion of the city officers," is no defense. Augusta v. Lombard, 99 Ga. 282, 25 S. E. 772.

When works may be said to be conducted for profit. "A corporation uses works constructed for its public benefit for its corporate profit, when the profits are to be applied to the maintenance of the works and the reduction of the debt incurred by the corporation in their construction." Hourigan v. Norwich, 77 Conn. 358, 365, 59 Atl. 487.

Municipal ownership carries the same responsibility as attaches to private owners of similar enterprises. Eaton v. Weiser, 12 Idaho, 544, 86 Pac. 541, 118 Am. St. Rep. 225.

56. Chicago v. Selz, Schwab & Co., 104 Ill. App. 376, 381, aff'd in 202 Ill. 545, 67 N. E. 386.

57. See §§ 2642, 2669, *ante*; §§ 2674, 2678, *post*.

land in the neighborhood, in which benefit the municipality shares with other owners, does not, it has been held, change the character of public work or impose liability on the municipality, as showing that it was a work carried on as a business for profit.[58]

This rule of liability applies, *inter alia,* where a municipality deals with property bought or used in connection with a governmental duty, for its own benefit, as by renting it.[59]

§ 2674. Municipal buildings.

It is indisputable that if a building owned or leased by a municipality is used for profit or for a private purpose, the municipality is liable for its negligence in connection therewith, where resulting in injuries to others.[60] However, it is held in Massachusetts that the fact that a municipality derives some incidental gain and advantage from the use of a public building does not make it responsible for its negligence in connection therewith.[61] Thus, it has been held in that state that a city is not liable for personal injuries occasioned to an inmate of its house of industry, by the negligence of the officers in charge thereof, although at the time such inmate was engaged in labor from which the city derived a profit.[62]

This liability includes municipal buildings in so far as *leased* to third persons, and also waterworks build-

58. Taggart v. Fall River, 170 Mass. 325, 49 N. E. 622, opening of street through unimproved land of city.

59. § 2674, *post.*

60. Chicago v. O'Brennan, 65 Ill. 160; Worden v. New Bedford, 131 Mass. 23, 41 Am. Rep. 185 (liable to person invited by lessee); Oliver v. Worcester, 102 Mass. 489, 3 Am. Rep. 485; Vincent v. Brooklyn, 31 Hun (N. Y.), 122.

Farm buildings, where farm conducted for the profits accruing therefrom, city liable. Libby v. Portland, 105 Me. 370, 376, 74 Atl. 805.

Part ownership. Municipal ownership of the upper part of a building does not create liability for injuries caused by defective condition of basement steps. El Paso v. Causey, 1 Ill. App. 531.

61. Kelley v. Boston, 186 Mass. 165, 71 N. E. 299, 66 L. R. A. 429.

62. Curran v. Boston, 151 Mass. 505, 24 N. E. 781.

ings.[63] On the other hand, it is generally held that if the building is used exclusively for a public purpose, the municipality is not liable for injuries resulting from defects therein or other negligence connected therewith.[64] For instance, it is held in most jurisdictions that there is no municipal liability where the negligence in in connection with a *prison or jail*,[65] a city court house,[66] the city hall,[67]

63. Glase v. Philadelphia, 169 Pa. 488, 32 Atl. 600.

§ 2680, *post*.

64. § 2672, *ante*.

In Pennsylvania, however, it has been held that a municipality is liable where the doors of a fire engine house were negligently constructed, injuring a passer-by. Kies v. Erie, 169 Pa. 598, 32 Atl. 621.

65. § 2642, *ante*.

66. Court house in St. Louis, city not liable to one falling into pit connected therewith, the court house being a city building. Cunningham v. St. Louis, 96 Mo. 53, 8 S. W. 787.

67. Schwalk's Adm'r v. Louisville, 135 Ky. 570, 122 S. W. 860, 25 L. R. A. (N. S.) 88; Snider v. St. Paul, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151.

City hall. "A city or town is not liable to a private citizen for an injury caused by any defect or want of repair in a city or town hall or other public building erected and used solely for municipal purposes, or for negligence of its agents in the management of such buildings. This is because it is not liable to private actions for omission or neglect to perform a corporate duty imposed by general laws upon all towns or cities alike from the performance of which it derives no compensation. But when a city or town does not devote such building exclusively to municipal uses, but lets it or a part of it for its own advantage or emolument, by receiving rents, or otherwise, it is liable while it is so let in the same manner as a private owner would be." Worden v. New Bedford, 131 Mass. 23, 24, 41 Am. Rep. 185. Quoted with approval in Davis v. Rockport (Mass. 1913), 100 N. E. 612, 614.

Not liable to a person for injuries caused by the negligence of an operator of an elevator in its city hall. Snider v. St. Paul, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151.

An elevator operator in a building occupied by a city and county jointly, who was employed by trustees appointed by the Superior Court pursuant to statute, was held not an employee of the city so as to make the city liable for his negligence in the operation of the elevator. Moest v. Buffalo, 101 N. Y. S. 996, 116 App. Div. 657, aff'd in 193 N. Y. 615, 86 N. E. 1128.

Compare as contra. Liability held to extend to injury from negligent operation of elevator in city hall, without discussing question of private or governmental

or school buildings.[68] However, if a municipality lets a portion of a city hall for hire, and a person attending an entertainment therein is injured by a defect in the building, the municipality is liable where it has been negligent.[69] But the mere fact that a portion of a city hall is occupied by the water department, the city collector, and the superintendent of streets, none of which departments pay any rent, does not make the municipality liable for negligence in connection therewith.[70]

§ 2675. Same—schools.

A municipality is not liable for the negligence or other wrongful act of school officers, since education is a governmental function.[71] Likewise, for the same reason it is not liable for injuries arising in connection with its ownership of school buildings or grounds.[72] *A fortiori,*

capacity. Fox v. Philadelphia, 208 Pa. 127, 57 Atl. 356, 65 L. R. A. 214.

A municipality has been held liable, without discussing the question of governmental or corporate function, where the injury occurred in the back yard of a city hall. Lowe v. Salt Lake City, 13 Utah, 91, 44 Pac. 1050, 57 Am. St. Rep. 740.

68. § 2675, *post.*

69. Little v. Holyoke, 177 Mass. 114, 58 N. E. 170, 52 L. R. A. 41 (holding it immaterial that amount of rent was insufficient to pay the expense of maintaining the hall); Buchanan v. Barre, 66 Vt. 129, 28 Atl. 878, 23 L. R. A. 488, 44 Am. St. Rep. 829.

70. Kelley v. Boston, 186 Mass. 165, 71 N. E. 299, 66 L. R. A. 429.

71. Not liable for death of pupil in public school, caused by negligently allowing the sewer of the school building to become clogged up. Folk v. Milwaukee, 108 Wis. 359, 84 N. W. 420.

72. *Kentucky.* Ernst v. West Covington, 116 Ky. 850, 76 S. W. 1089, 63 L. R. A. 652, 105 Am. St. Rep. 241.

Massachusetts. Sullivan v. Boston, 126 Mass. 540; Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; Bigelow v. Randolph, 14 Gray (Mass.), 541.

New York. Ham v. New York, 70 N. Y. 459.

Rhode Island. Wixon v. Newport, 13 R. I. 454, 43 Am. Rep. 35.

Wisconsin. Folk v. Milwaukee, 108 Wis. 359, 84 N. W. 420.

Contra, Powers v. Philadelphia, 18 Pa. Super. Ct. 621.

Not liable for negligence of servant in blasting rock, in excavating for the foundations of a schoolhouse. Howard v. Worcester, 153 Mass. 426, 27 N. E. 11, 12 L. R. A. 160.

where the care and control of school property is given by statute to a *board of education* having capacity to sue and be sued, a municipal corporation will not be liable for injuries resulting from the negligence of the board in maintaining school property or for nuisances thereon.[73] So it has even been held that where school buildings are erected by the board of education, with the concurrence of the city council, the city is not liable to one injured in the construction of a school building, through the negligence of the board of education.[74]

Likewise, a board of education or other *quasi*-municipality, in control of the school, is ordinarily not liable.[75] In New York City, however, where the care and control of public school buildings are given to the board of education, and the duty of keeping them in repair is imposed by statute on the board, the latter is liable where one rightfully on school premises is injured, provided the board has been negligent.[76]

§ 2676. Public market places and buildings.

Municipalities are liable for defects in market buildings or places, owned by it, where injury results to a third person because of the negligence of the municipal-

Voter going down steps of schoolouse to vote, injured by defect in steps, city not liable. McNeil v. Boston, 178 Mass. 326, 59 N. E. 810.

However, if a wall built by a municipality encroaches on private property so as to be *a private nuisance*, an action lies as against the objection that the wall was built and maintained solely for the public use (in connection with schoolhouse). Miles v. Worcester, 154 Mass. 511, 28 N. E. 676, 13 L. R. A. 841, 26 Am. St. Rep. 264.

Injuries to pupils. City not liable for injuries to pupils caused by unsafe condition of schoolhouse. Clark v. Nicholasville, 27 Ky. L. Rep. 974, 87 S. W. 300; Diehm v. Cincinnati, 25 Ohio St. 305.

73. McCarton v. New York, 133 N. Y. S. 939, 149 App. Div. 516; Wahrman v. Board of Education, 187 N. Y. 331, 80 N. E. 192; McCullough v. Philadelphia, 32 Pa. Super. Ct. 109.

74. Kinnare v. Chicago, 171 Ill. 332, 49 N. E. 536.

75. § 2605, *ante*, and see § 2434, *ante*, vol. 5.

76. McCarton v. New York, 133 N. Y. S. 939, 149 App. Div. 516.

ity, on the theory that the erection of market places is a private or corporate function and not a governmental one.[77] And in Michigan this rule of liability has been extended to defects in plans for market houses.[78] However, a city is not liable in damages for injuries inflicted upon a person by the fall of a market house caused by a wind storm of unprecedented force and violence, in the absence of negligence.[79]

§ 2677. Wharves, piers, etc.

If a municipality owns public landings such as wharves, piers or the like, with a right to charge wharfage, it is liable for negligence in failing to keep the water nearby safe from artificial obstructions, so as to protect boats stopping or tied up at the wharf, or for failure to keep the landing in proper repair, so as to protect persons using the floor thereof as a way,[80] or

77. Savannah v. Cullens, 38 Ga. 334, 95 Am. Dec. 398; Suffolk v. Parker, 79 Va. 660, 52 Am. Rep. 640.

See also Littlefield v. Norwich, 40 Conn. 406; Weymouth v. New Orleans, 40 La. Ann. 344, 4 So. 218.

78. Barron v. Detroit, 94 Mich. 601, 54 N. W. 273, 19 L. R. A. 452, 34 Am. St. Rep. 366.

79. Flori v. St. Louis, 69 Mo. 341, 33 Am. Rep. 504.

80. *Indiana.* Jeffersonville v. Gray, 165 Ind. 26, 74 N. E. 611; Jeffersonville v. Louisville & J. S. Ferry Co., 27 Ind. 100, 89 Am. Dec. 495; Jeffersonville v. The John Shallcross, 35 Ind. 19.

New York. Macauley v. New York, 67 N. Y. 602.

Pennsylvania. Alleghany v. Campbell, 107 Pa. 533, 52 Am. Rep. 478; Pittsburg v. Grier, 22 Pa. 54, 60 Am. Dec. 65.

Tennessee. Memphis v. Kimbrough, 12 Heisk. (Tenn.) 133.

Virginia. Petersburg v. Applegarth's Adm'r, 28 Grattan, 321, 26 Am. Rep. 357.

United States. The Dave & Mose v. New York, 49 Fed. 389; Philadelphia & R. R. Co. v. New York, 38 Fed. 159; Schoonmaker v. New York, 167 Fed. 975, 93 C. C. A. 227.

Municipality owning a pier and permitting the use thereof by the public is bound to maintain it in a reasonably safe condition. Birch v. New York, 190 N. Y. 397, 83 N. E. 51, rev'g on other grounds, 106 N. Y. S. 104, 121 App. Div. 395.

Liable for damage to steamer wrecked by striking an iron cylinder negligently permitted to lie on the wharf concealed by the water. Memphis v. Kimbrough, 12 Heisk. (Tenn.) 133.

for failure to provide proper fastenings.[81] The municipality is bound the same as a private individual to use ordinary care and diligence in keeping the wharf free and safe from obstructions, and is liable in an action at common law for damages done to a vessel, or person on the wharf, by reason of neglect of such duty.[82] So ordinary care must be exercised to keep wharves and docks in condition for use, in favor of those approaching by land as well as by water.[83] Furthermore, the municipality is liable where a vessel is injured, although it had not in fact paid wharfage and was not expected to do so,[84] but no liability exists to persons coming on the pier where the pier has not been opened for public use.[85]

§ 2678. Parks.

In some states, the courts have refused to hold municipalities liable in damages for injuries received in public parks, on the theory that parks are not held for profit or emolument but that the municipality, in maintaining parks, is discharging a public governmental duty and not a private corporate function.[86] In other states, munici-

Lease. Where wharf and wharf boat leased to an individual city not liable. Carrollton Furniture Mfg. Co. v. Carrollton, 20 Ky. L. Rep. 818, 47 S. W. 439, 885.

81. Shinkle v. Covington, 1 Bush. (Ky.) 617.

82. Petersburg v. Applegrath, 28 Gratt. (Va.) 321, 26 Am. Rep. 357; Pittsburg v. Grier, 22 Pa. 54, 60 Am. Dec. 65; Mersey Docks & Harbour Board v. Gibbs, 11 H. L. Cas. 686; Seaman v. New York, 80 N. Y. 239; Kennedy v. New York, 73 N. Y. 365, 29 Am. Rep. 169.

83. See Kennedy v. New York, 73 N. Y. 365, 29 Am. Rep. 169, horse backed off of dock because of absence of string piece.

84. Petersburg v. Applegarth, 28 Grat. (Va.) 321, 26 Am. Rep. 357.

85. **Pier, owned by city but not opened to public use. City not liable where one ties up thereto and then falls through a hole in the floor of the pier.** Birch v. New York, 190 N. Y. 397, 83 N. E. 51.

86. *Kentucky.* Park Com'rs v. Prinz, 127 Ky. 460, 105 S. W. 948.

Massachusetts. Clark v. Waltham, 128 Mass. 567; Steele v. Boston, 128 Mass. 583. See also Sheehan v. Boston, 171 Mass. 296, 50 N. E. 543.

New Jersey. Bisbing v. Asbury Park, 80 N. J. L. 416, 78 Atl. 196, 33 L. R. A. (N. S.) 523.

Rhode Island. Blair v. Granger, 24 R. I. 17, 51 Atl. 1042.

Washington. Russell v. Tacoma,

palities have been held liable on the ground that the duty involved was a corporate one.[87] However, even in states denying liability for injuries in parks, it is held that if the negligence arises, directly from the control of property actually in use by the municipality in its private capacity (as where a part of a park or buildings thereon are lawfully rented to third persons) the municipality is liable;[88] but it is held in Rhode Island that the fact that a purely incidental profit results to the municipality from the maintenance of the park does not render the municipality liable.[89]

In another line of decisions a recovery has been held improper in case of injuries in parks, on other grounds, without referring to whether the municipality would be liable under any conditions.[90]

8 Wash. 156, 35 Pac. 605, 40 Am. St. Rep. 895.

87. Denver v. Spencer, 34 Colo. 270, 82 Pac. 590, 2 L. R. A. (N. S.) 147, 114 Am. St. Rep. 158, 7 Am. & Eng. Ann. Cas. 1042; Pennell v. Wilmington, 7 Penn. (Del.) 229, 78 Atl. 915; Silverman v. New York, 114 N. Y. S. 59; Bloom v. Newark, 3 Ohio N. P. (N. S.) 480.

See also Kleopfert v. Minneapolis, 90 Minn. 158, 95 N. W. 908; Ehrgott v. New York, 96 N. Y. 264; Weber v. Harrisburg, 216 Pa. 117, 64 Atl. 905; Barthold v. Philadelphia, 154 Pa. 109, 26 Atl. 304.

There is no governmental duty put upon municipalities to provide parks and pleasure grounds and collections of wild animals or fish, or paintaings or books, except in the large sense that a great city may with propriety consider the aesthetic, and not be confined to the practical. Gartland v. New York Zoological Society, 120 N. Y. S. 24, 135 App. Div. 163, 171, aff'g 113 N. Y. S. 1087, 61 Misc. Rep. 643.

Walking on grass in park, where forbidden, precludes a recovery. Sheehan v. Boston, 171 Mass. 296, 50 N. E. 543.

88. Oliver v. Worcester, 102 Mass. 489, 3 Am. Rep. 485, and see Bisbing v. Asbury Park, 80 N. J. L. 416, 78 Atl. 196, 33 L. R. A. (N. S.) 523.

89. Blair v. Granger, 24 R. I. 17, 51 Atl. 1042.

90. Carey v. Kansas City, 187 Mo. 715, 86 S. W. 438, 70 L. R. A. 65.

Child fell into pond in commons. Pond was not enclosed. City held not liable. Schauf's Adm'r v. Paducah, 106 Ky. 228, 50 S. W. 42, 90 Am. St. Rep. 220.

Mere licensee, injured by a visible danger in unfinished part of park, no recovery. Albert v. New York, 78 N. Y. S. 355, 75 App Div. 553.

§ 2679. Quarry.

It would seem also that if a municipality owns a quarry, and has authority to operate it, it is liable for negligence in connection therewith, provided the quarry is being at least incidentally operated for profit.[91]

§ 2680. Public ownership of water or light plant.

Municipal ownership, in the usual and common acceptation of that term, must of necessity carry with it the same duty, responsibility and liability on account of negligence that is imposed upon and attaches to private owners of similar enterprises.[92] For example, it is set-

91. See Radford v. Clark (Va. 1912), 73 S. E. 571, 38 L. R. A. (N. S.) 281, with note.

Quarry connected with workhouse, see § 2642, *ante*.

In Georgia, operation of quarry by city held purely ministerial, and city liable. Augusta v. Owens, 111 Ga. 464, 477, 36 S. E. 830.

Mere licensee, passing through quarry, can not recover. Williams v. Nashville, 106 Tenn. 533, 62 S. W. 231.

92. Eaton v. Weiser, 12 Ida. 544, 86 Pac. 541.

"In this day, when the doctrine of public ownership by municipalities of public utilities is rapidly gaining ground, so that nearly all public utilities, so called, which have heretofore been supplied by those who have been granted franchises therefor, are now overtaken by the municipalities themselves, it occurs to us that private rights may be jeopardized unless it be held that in overtaking such utilities the municipality must exercise the same care towards the person and property of the individual that was required of one having obtained a franchise to maintain the same utility. Brantman v. Canby (Minn. 1912), 138 N. W. 671.

"The city here conducted its plant precisely as would one to whom it might have granted a franchise, with perhaps this difference: that a municipality does not expect much profit, if any at all, from its ventures to serve the public and private convenience. The facts in this case do not sustain the contention that the city, in operating this lighting plant, was performing a purely governmental function, even if it be conceded that a distinction may here be made between that part of the equipment which served the public and that which served private consumers. Such a separation or distinction we regard unimportant. In this state a city, in maintaining a board of health, a police or a fire department, discharges a governmental function pure and simple, and we believe, as to these or similar functions, it has no power to escape the burden imposed by granting a fran-

tled beyond dispute that a municipality which operates its own water, electric light, or gas plant acts in a private and not a governmental capacity and is liable for its negligence in connection therewith.

Water. The furnishing of water to private citizens is a corporate rather than a governmental function, and hence it is liable to its customers for negligence in furnishing water the same as a proprietor of a private waterworks would be,[93] except that where the property of a customer is destroyed by fire because of an inadequate supply of water no recovery can be had, the theory being that the negligence is in connection with the fire department, and that in maintaining a fire department the municipality is discharging a governmental function.[94] But with this exception, where the water system of a municipal corporation is conducted by the municipality in part for profit, even if principally used for public purposes, the municipality acts in its corporate or private capacity and is liable for damages caused by its negligent construction or management,[95] to its

chise to any one to perform in its place. But as to furnishing water, light, etc., for private consumers and public purposes combined, the furnishing of which is not imposed by law as a governmental duty, the city, if it undertakes so to do, assumes a position to those injured through its negligence therein which is not different from what would be the position of one to whom it had granted the right to furnish water or light." Brantman v. Canby (Minn. 1912), 138 N. W. 671.

93. Oakes Mfg. Co. v. New York, 206 N. Y. 221, 99 N. E. 540.

94. § 2682, *post*.

95. *Georgia.* Augusta v. Mackey, 113 Ga. 64, 38 S. E. 339; Augusta v. Lombard, 99 Ga. 282, 25 S. E. 772; Huey v. Atlanta, 8 Ga. App. 597, 70 S. E. 71.

Illinois. Chicago v. Selz, Schwab & Co., 202 Ill. 545, 67 N. E. 386, aff'g 104 Ill. App. 376.

Indiana. Aschoff v. Evansville, 34 Ind. App. 25, 72 N. E. 279.

Massachusetts. St. Germain v. Fall River, 177 Mass. 550, 59 N. E. 447; Lynch v. Springfield, 174 Mass. 430, 54 N. E. 871; Fox v. Chelsea, 171 Mass. 297, 50 N. E. 622; Stodard v. Winchester, 157 Mass. 367, 32 N. E. 948.

Minnesota. Keener v. Mankato, 113 Minn. 55, 129 N. W. 158, 775; Wiltse v. Red Wing, 99 Minn. 255, 109 N. W. 114.

Missouri. Dammann v. St. Louis, 152 Mo. 186, 53 S. W. 932.

New Hampshire. Lockwood v.

employees or the public generally, to the same extent as a private individual or corporation would be under like

Dover, 73 N. H. 209, 61 Atl. 32.

New York. Bailey v. New York, 3 Hill (N. Y.), 531, 38 Am. Dec. 669; Oakes Mfg. Co. v. New York, 206 N. Y. 221, 99 N. E. 540; Messersmith v. Buffalo, 122 N. Y. S. 918, 138 App. Div. 427; Dunstan v. New York, 86 N. Y. S. 562, 91 App. Div. 355; Jenney v. Brooklyn, 120 N. Y. 164, 24 N. E. 274; Rider v. Amsterdam, 65 N. Y. S. 579, 31 Misc. Rep. 375. See also Southeast v. New York, 89 N. Y. S. 630, 96 App. Div. 598.

Oklahoma. Norman v. Ince, 8 Okla. 412, 58 Pac. 632.

Oregon. Esberg-Gunst Cigar Co. v. Portland, 34 Ore. 282, 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651.

Washington. See also Collensworth v. New Whatcom, 16 Wash. 224, 47 Pac. 439.

Utah. Brown v. Salt Lake City, 33 Utah, 222, 93 Pac. 570.

Wisconsin. State Journal Printing Co. v. Madison (Wis. 1912), 134 N. W. 909; Piper v. Madison, 140 Wis. 311, 122 N. W. 730, 25 L. R. A. (N. S.) 239.

United States. Winona v. Botzet, 169 Fed. 321, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204.

Injury from smoke. A municipality is liable for injury to property caused by smoke from its pumping plant. Gordon v. Silver Creek, 197 N. Y. 509, 90 N. E. 1159, aff'g 112 N. Y. S. 54, 127 App. Div. 888.

Flooding lands. Municipal corporation held liable for flooding the land of a private citizen in providing a reservoir for a system of water works. Ennis v. Gilder, 32 Tex. Civ. App. 357, 74 S. W. 585.

Overflow from standpipe, frightening horses, city liable. Woodie v. North Wilkesboro (N. C 1912), 74 S. E. 924.

Amount of care required. Where a city selects a reasonably safe route in the relocation of a water main, it is not liable for failure to select the best possible route. Kelsey v. New York, 107 N. Y. S. 1089, 123 App. Div. 381.

Reservoir contained large amount of water. It broke and destroyed plaintiff's home. The city was held liable, without regard to its negligence, on the doctrine of the much quoted case of *Rylands v. Fletcher*, L. R., 3 H. L. 330, that a party who, for his own profit, keeps on his premises anything not naturally belonging there, the natural tendency of which is to become a nuisance and to do mischief if it escapes, is liable if it escapes, without proof of negligence, for all damages directly resulting therefrom. Wiltse v. Red Wing, 99 Minn. 255, 109 N. W. 114.

Water committee appointed by legislature. City liable for the negligent maintenance of city water works although the water committee is appointed by the legislature, and is independent of the control of any other department of the city government. Esberg-Gunst Cigar Co. v. Portland, 34 Ore. 282, 55 Pac. 961, 43

circumstances.[96] But, there is a distinction between furnishing water to individuals for compensation and furnishing it for fire purposes. The former is the exercise of a private, and the latter a governmental, function;[97] and there is no liability if the negligent act was done in the extinguishment of fire,[98] or in connection with flushing hydrants solely to better fire protection,[99] or the like.

On the other hand, a municipality which supplies water

L. R. A. 435, 75 Am. St. Rep. 651; and see § 2658, *ante*.

Lateral service pipes put in by water consumers, municipality not liable for defects in. Terry v. New York, 8 Bosw. (N. Y. Super. Ct.) 504. At least not until after notice of the defect to the municipality. Cincinnati v. Jacob, 10 Ohio Dec. 27, 18 Wkly L. Bul. 65.

Irrigation. Liable where water furnished for irrigation. Ysleta v. Babbitt, 8 Tex. Civ. App. 432, 28 S. W. 702. And see Levy v. Salt Lake City, 3 Utah, 63, 1 Pac. 160.

96. Woodie v. North Wilkesboro (N. C. 1912), 74 S. E. 924.

Liability to employees on water works. There is a common law liability to employees in municipal water works, injured in the course of their duty. So held in a lengthy and exhaustive opinion in Rhobidas v. Concord, 70 N. H. 90, 47 Atl. 82, 51 L. R. A. 381, 85 Am. St. Rep. 604.

Safe place to work. In the maintenance of a well, windmill, and pump to furnish its inhabitants with water, a municipal corporation is under the same obligations as other employers of labor to furnish their employees a safe place in which to work. Roberts v. St. Marys, 86 Kan. 403, 121 Pac. 367.

Injury to water supply of adjoining owners. If the water supply of adjoining owners is affected by the use of wells and pumps for supplying water to citizens, damages are recoverable from the municipality. Westphal v. New York, 70 N. Y. S. 1021, 34 Misc. Rep. 684.

Who may sue. A water commissioner who engaged in the construction of a water works system for a city which diverted the natural flow of a stream from certain land, can not sue the city for such injury on subsequently becoming the purchaser of the land. Fischer v. Clifton Springs, 121 N. Y. S. 163, aff'd in 125 N. Y. S. 1119, 140 App. Div. 918.

97. Brown v. Salt Lake City, 33 Utah, 222, 93 Pac. 570; Brink v. Grand Rapids, 144 Mich. 472, 108 N. W. 430.

98. Piper v. Madison, 140 Wis. 311, 122 N. W. 730, 25 L. R. A. (N. S.) 239.

99. **Flushing hydrants** is so incident to fire service alone that the municipality is not liable where injury results therefrom. Judson v. Winsted, 80 Conn. 384, 68 Atl. 999, 15 L. R. A. (N. S.) 91, and see § 2683, *post*.

to its citizens, and charges therefor, is liable for negligence although its waterworks system is also used for the extinguishment of fires.[1] Furthermore, a municipality owning its water plant is liable for injuries resulting from its negligence in connection with a water box in a street, even in states where there is no common liability for injuries from defective streets.[2] But, although a municipal corporation is liable for its negligence in the operation of its waterworks system, it will not be held liable for the negligence of persons to whom it has granted a franchise for the construction and maintenance of a waterworks.[3]

Light. *The maintenance and operation of an electric light system* by a municipality and the selling of electricity to private consumers is not a governmental power, but is a proprietary and private right and duty, for the negligent exercise of which the municipality will be held liable in damages the same as a private corporation or individual exercising like rights,[4] provided power to

1. Aschoff v. Evansville, 34 Ind. App. 25, 72 N. E. 279.

2. Wilkins v. Rutland, 61 Vt. 336, 17 Atl. 735.

3. Hines v. Nevada, 150 Iowa, 620, 130 N. W. 181; Huey v. Atlanta, 8 Ga. App. 597, 70 S. E. 71.

4. *Alabama.* Posey v. North Birmingham, 154 Ala. 511, 45 So. 663, 15 L. R. A. (N. S.) 711.

California. Davoust v. Alameda, 149 Cal. 69, 84 Pac. 760, 5 L. R. A. (N. S.) 536.

Georgia. Adepe v. Thomasville, 9 Ga. App. 880, 72 S. E. 478.

Idaho. Eaton v. Weiser, 12 Ida. 544, 86 Pac. 541, 118 Am. St. Rep. 225.

Illinois. Palestine v. Siler, 128 Ill. App. 309, affirmed in 225 Ill. 630, 80 N. E. 345.

Indiana. Aiken v. Columbus, 167 Ind. 139, 78 N. E. 657; Richmond v. Lincoln, 167 Ind. 468, 79 N. E. 445.

Kansas. Emporia v. Burns, 67 Kan. 523, 73 Pac. 94.

Kentucky. Owensboro v. Knox's Administrator, 116 Ky. 451, 76 S. W. 191.

Massachusetts. Dickinson v. Boston, 188 Mass. 595, 75 N. E. 68, 1 L. R. A. (N. S.) 664.

Missouri. Bullmaster v. St. Joseph, 70 Mo. App. 60; Boothe v Fulton, 85 Mo. App. 16.

Nebraska. Todd v. Crete, 79 Neb. 671, 113 N. W. 172, aff'd on rehearing, 79 Neb. 677, 115 N. W. 307.

New Jersey. Karpenski v. South River (N. J. L. 1912), 83 Atl. 639.

New York. See Twist v. Rochester, 55 N. Y. S. 850, aff'd in 165 N. Y. 619, 59 N. E. 1131.

North Carolina. Harrington v.

operate and conduct the same is conferred upon the municipality by statute or charter; and its liability is to be determined by the same rules applicable to private corporations or persons in the same kind of business.[5] But a municipality is not liable for injuries negligently

Commissioners, 153 N. C. 437, 69 S E. 399; Terrell v. Washington, 158 N. C. 281, 73 S. E. 888; Fisher v. New Bern, 140 N. C. 506, 53 S. E. 342, 5 L. R. A. (N. S.) 542, 111 Am. St. Rep. 857.

Pennsylvania. Emery v. Philadelphia, 208 Pa. 492, 57 Atl. 977; Herron v. Pittsburg, 204 Pa. 509, 54 Atl. 311, 93 Am. St. Rep. 798.

Virginia. See Danville v. Thornton, 110 Va. 541, 66 S. E. 839.

"It seems to be settled as authority, where a municipal corporation, acting within its charter powers, maintains and operates an electric lighting plant, the corporation may be held for the negligence of its servants or agents as any other person." Posey v. North Birmingham, 154 Ala. 511, 513, 45 So. 663, 15 L. R. A. (N. S.) 711. Quoted with approval in Darby v. Union Springs, 173 Ala. 709, 55 So. 889.

Lighting streets is public duty. Supplying private customers with light is corporate duty and city is liable for negligent exercise thereof. Hodgins v. Bay City, 156 Mich. 687, 121 N. W. 274.

Where a city operates an electric light plant for both public and private purposes it will be liable for injuries caused by its negligence. Greenville v. Branch, (Tex. Civ. App. 1912), 152 S. W. 478; Brantman v. Canby, 119 Minn. 396, 138 N. W. 671.

Degree of care. In furnishing a consumer with electric current, a municipality is required to exercise the highest degree of care and diligence in selecting and maintaining its devices and appliances to protect the consumer in the use of the current. Abrams v. Seattle, 60 Wash. 356, 111 Pac. 168.

Care not required as to trespassers. A municipality owes no duty to keep its electric light wires, strung along the roof of a building, in safe condition to one who has no right to go on the roof. Greenville v. Pitts, 102 Tex. 1, 107 S. W. 50, rev'g (Tex. Civ. App. 1907), 102 S. W. 451.

In Massachusetts, statute reiterates common law rule. O'Donnell v. North Attleborough, 212 Mass. 243, 98 N. E. 1084.

5. Yazoo v. Birchett, 89 Miss. 700, 42 So. 569.

Recovery by employee. Municipality is liable to an employee of an electric company for injuries incurred on account of an insufficiently insulated and heavily charged wire belonging to the municipality. Danville v. Thornton, 110 Va. 541, 66 S. E. 839.

In the operation of an electric light plant, the duty and liability of a municipality towards its employees are the same as those of an individual in like circum-

caused by the operation of an electric light plant where the operation of the plant is *ultra vires*.[6] The *degree of care* required of a municipality in the operation of an electric light plant is the same as if it were operated by an individual; and a greater amount of care is required as to its live wires than is necessary in keeping streets in condition.[7]

Gas. Municipal corporations are also liable for the negligent management of their gas works.[8]

§ 2681. Same—public wells.

A municipality owning a public well, or assuming control thereof, is liable for failure to repair the cover to the well.[9]

§ 2682. Same—liability where inadequate supply of water to extinguish fire.

In a previous volume, it was stated that "where a municipality owns its own plant, it is liable for injuries sustained by a consumer by reason of an insufficient supply."[10] This statement is incorrect, however, in so far as it may be construed as imposing liability on municipalities, possessing their own water plant, for their negli-

stances. Terrell v. Washington, 158 N. C. 281, 73 S. E. 888.

6. Posey v. North Birmingham, 154 Ala. 511, 45 So. 663, 15 L. R. A. (N. S.) 711.

§ 2637, *ante*.

7. Owensboro v. Knox's Adm'r, 116 Ky. 451, 76 S. W. 191.

To same effect, Wilhite v. Huntsville (Mo. App. 1912), 151 S. W. 232.

8. Western Savings Society v. Philadelphia, 31 Pa. St. 175, 72 Am. Dec. 730; Kibele v. Philadelphia, 105 Pa. St. 41; San Francisco Gas Works v. San Francisco, 9 Cal. 453.

Where a city undertakes to serve both public and private convenience by maintaining a municipal lighting plant to light its streets and also furnish gas to private consumers, it is not exercising a governmental function, so as to escape responsibility for negligence in the management of such plant, whereby an injury has been caused to the person or property of an individual. Brantman v. Canby, 119 Minn. 396, 138 N. W. 671.

9. Sherwood v. District of Columbia, 3 Mackey (D. C.) 276, 51 Am. Rep. 776.

10. § 1801, *ante*, vol. 4.

gence in not furnishing sufficient water or pressure to extinguish fires, or in not keeping the mains, hydrants, etc., in repair, which results in loss by fire, since it is well settled that in such a case the municipality is engaged in the performance of a governmental as distinguished from a corporate duty.[11] And it has been held that such a liability cannot be created by contract by municipal officers.[12] However, in same states, where the injury is not a loss by fire but is other loss occasioned by the negligence of the municipality in connection with its *hydrants or attachments*, the municipality has been held liable notwithstanding such hydrants or attachments are used solely for public and governmental purposes.[13]

§ 2683. Same—injuries in connection with hydrants.

Hydrants are principally for fire protection. At the

11. *Massachusetts.* Tainter v. Worcester, 123 Mass. 311, 25 Am. Rep. 90.

Minnesota. Miller v. Minneapolis, 75 Minn. 131, 77 N. W. 788, 5 Am. Neg. Rep. 183.

New York. Springfield F. & M. Ins. Co. v. Keeseville, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. Rep. 667, rev'g on this point 80 Hun (N. Y.) 162, 29 N. Y. S. 1130.

Texas. Greenville Water Co. v. Beckham, 55 Tex. Civ. App. 87, 118 S. W. 889 (dicta); Butterworth v. Henrietta, 25 Tex. Civ. App. 467, 61 S. W. 975.

West Virginia. Mendel v. Wheeling, 28 W. Va. 233, 57 Am. Rep. 664.

United States. United States v. Sault Ste. Marie, 137 Fed. 258.

Contra, Lenzen v. New Braunfels, 13 Tex. Civ. App. 335, 35 S. W. 341.

"The question whether and where public hydrants should be erected was within the exclusive discretion and control of the municipal authorities, as the public interest might seem to them from time to time to require. The city did not, by accepting the statute and holding its works under it, enter into any contract with, or assume any liability to, the owners of property to furnish means or water for the extinguishment of fires, upon which an action can be maintained." Per Gray, C. J., in Tainter v. Worcester, 123 Mass. 311, 316, 317, 25 Am. Rep. 90; distinguishing Atkinson v. New Castle Waterworks, L. R. 6 Eq. 404, and Metallic Compression Co. v. Fitchburg R. R. Co., 109 Mass. 277, 12 Am. Rep. 689.

12. United States v. Sault Ste. Marie, 137 Fed. 258.

13. § 2683, *post*.

same time they are used, to some extent, to clean streets and to furnish water to sprinkle streets. In so far as injury results from their use in connection with the fire department there is no question but that the municipality is not liable,[14] and this is so although the hydrants are the property of and belong to the municipal water plant; but municipalities have been held liable where the defect was in the hydrant or pipes connecting it with the main, although the hydrant was used solely for fire purposes.[15] In so far as the injury results from defects in, or the use of, hydrants, wholly disconnected from any use by the fire department, municipalities are generally held liable.[16] Thus in Illinois, it was recently held that where

14. Miller v. Minneapolis, 75 Minn. 131, 77 N. W. 788.

§ 2680, *ante*.

Horse taking fright at stream of water thrown from a hydrant by firemen testing the capacity of the hydrant, city not liable. Brink v. Grand Rapids, 144 Mich. 472, 108 N. W. 430; Edgerly v. Concord, 62 N. H. 8, 22, 13 Am. St. Rep. 533.

15. Where a lateral water pipe which burst was used solely to connect the main line of pipes with a hydrant used exclusively for fire purposes, it was nevertheless held in New York that the municipality was liable. Dunstan v. New York, 86 N. Y. S. 562, 91 App. Div. 355.

In Indiana, it has been held that a municipality is liable where a consumer's buildings are flooded by the breaking of pipes connecting the main pipe with hydrants, where such pipes are corroded and out of repair. It was unsuccessfully argued that inasmuch as the defective pipe was a connection of the hydrant, it was an appliance used in extinguishing the fire, and therefore the municipality was not liable. But it was held that the waterworks system was an entire thing and that the duty to use reasonable care in its construction and maintenance applies to the system and not to detached portions thereof. It was also contended that there was no liability because the pipes burst under fire pressure and that they would not have burst except for such increased pressure, but it was held that reasonable care in constructing and maintaining the waterplant required that the water pipes be reasonably sufficient to resist any pressure that they were likely to be subjected to, without regard to the reason for the pressure. Aschoff v. Evansville, 34 Ind. App. 25, 34, 72 N. E. 279.

16. Negligence with regard to hydrants, where not connected with any use of them by the fire department, is actionable. Aldrich v. Tripp, 11 R. I. 141, 147, 23 Am. Rep. 434.

there was a leak at the bottom of a hydrant, which was connected with the water main by a pipe, resulting in flooding the basement of a nearby building, and the hydrant was made a source of income to the city by selling water from it to contractors for street sprinkling, the hydrant cannot be said to be constructed or used merely for public protection by putting out fires, and inasmuch as the injury did not arise from negligence in the use of the hydrant for the purpose of extinguishing fire, the city is liable.[17] The true rule would seem to be that municipalities are liable for injury caused by the negligence of an employee in flushing hydrants, if the flushing is an incident of its regular water service, but not if incident to its fire department service.[18]

§ 2684. Same—liability for impure water.

In determining and choosing the source of water supply, a municipality possessing its own waterworks acts in its discretion, and for error in judgment there is no municipal liability.[19] And a consumer which is a manufacturer cannot recover damages because of impure water furnished his plant where he knew of the quality of water being furnished, and used it without objection, especially where the water was reasonably satisfactory for all purposes except the peculiar use (manufacture of logwood extracts or dyes) to which it was put in the business of such manufacture.[20] On the other hand, it has been held, in a case of first impression, that municipalities are liable for *disease contracted from drinking water* supplied by the municipal waterworks, where the municipality has negligently allowed the water supply to become polluted with filth, sewage and poisonous sub-

17. Chicago v. Selz, Schwab & Co., 202 Ill. 545, 550, 67 N. E. 386, aff'g 104 Ill. App. 376.

18. Judson v. Winstead, 80 Conn. 384, 68 Atl. 999, 15 L. R. A. (N. S.) 91.

19. Oakes Mfg. Co. v. New York, 125 N. Y. S. 1030, 141 App. Div. 130, aff'g 120 N. Y. S. 796, 65 Misc. Rep. 97.

20. Oakes Mfg. Co. v. New York, 206 N. Y. 221, 99 N. E. 540, 100 N. E. 414.

stances.[21] In New York, however, a public well existed in the city of Brooklyn, and a person who drank the water died because of its impurity. The well was for public gratuitous use, and there was no claim that the well or pump was improperly constructed or out of repair or that the water became unwholesome from any defect in the well or pump, or from any external exposure which could have been avoided by reasonable care. It was held that the city was not an insurer of the quality of the water, and was not liable where it had no notice that the water was not wholesome.[22]

§ 2685. Ownership of railroads: subways.

If a municipality owns a railroad, and operates it for gain, there is no question but that it is liable for negligence in connection therewith, and this applies equally well to subways.[23] However, this question does not seem to have ever been expressly decided.

§ 2686. Ownership of ferry.

A municipality which maintains and operates a ferry, in part for profit, is subject to all the liabilities of a common carrier.[24]

§ 2687. Bathing beaches.

Where a free bathing *beach* is established and maintained by a municipality, it seems that the duty to keep safe is not as extensive as in case of streets; and there

21. Keever v. Mankato, 113 Minn. 55, 129 N. W. 158.

See extensive note in 1 N. C. C. A. (Negligence and Compensation Cases Annotated), 187, on "Liability of Municipal Corporation or Water Company for Sickness or Death Caused by Impure Water Supply."

22. Danaher v. Brooklyn, 119 N. Y. 241, 23 N. E. 745, 7 L. R. A. 592.

23. Construction of subway by a city is a business undertaking by the city as a proprietor and not as a sovereign. Re Board of Rapid Transit Com'rs, 197 N. Y. 81, 96, 90 N. E. 456.

24. Municipal ferry, city liable for negligence. Davies v. Boston, 190 Mass. 194, 76 N. E. 663; Townsend v. Boston, 187 Mass. 283, 72 N. E. 991.

is *dicta* that there is no duty imposed upon it to mark in any way the depth or relative depth of the water, so as to guard the ignorant bather from venturing too far.[25]

§ 2688. Liability as owner of cemetery.

If a municipality owns or controls a cemetery, it has been held that the municipality is liable for the acts of its officers which it has ratified, in an exercise of its statutory powers, in an unlawful manner, in connection with such cemetery.[26] And where a municipality owns a cemetery within its limits, under lawful authority, especially where it sells lots therein for burial purposes, it must exercise the same degree of care in preventing damage to others as would be required of natural persons, and it is liable for its negligence in connection therewith.[27]

6. SEWERS, DRAINS, WATERCOURSES, AND SURFACE WATERS.

§ 2689. In General.

In a previous chapter,[28] the general rules relating to sewers and drains, the power to construct them, etc., have been considered at some length. What is herein considered is the liability of municipalities in connection with the disposal, or failure to provide for the disposal, of sewage and surface waters, and also the municipal liability connected with the throwing of water on private lands, including both surface water and watercourses.

§ 2690. Sewers as to which liability exists.

There is no municipal liability for sewers or drains constructed by third persons for their own use and not controlled by the municipality.[29] But if sewers, drains

25. McGraw v. District of Columbia, 3 App. (D. C.) 405, 25 L. R. A. 691.

26. Hollman v. Platteville, 101 Wis. 94, 76 N. Y. 1119, 70 Am. St. Rep. 899.

27. Toledo v. Cone, 41 Ohio St. 149, 163-166, where city held liable to employee engaged in cemetery in improving a vault owned by the city.

28. Ch. 31, *ante*, vol. 4.

Municipal power to control and regulate, § 1447, *ante*, vol. 4.

29. Crawfordsville v. Bond, 96 Ind. 236; Levasseur v. Berlin, 75 N. H. 146, 71 Atl. 628.

City not liable for sewer nui-

or culverts constructed by third persons are adopted by the municipality as a part of its sewerage or drainage system,[30] or the municipality assumes control and management thereof,[31] the municipality becomes liable for

sance on private property where it is of such character that it does not obstruct the public street or imperil the safety of travelers thereon, notwithstanding the corporate authorities allowed the sewer to be constructed. Dalton v. Wilson, 118 Ga. 100, 44 S. E. 830, 98 Am. St. Rep. 101.

Private sewers and drains, and private rights therein, § 1427, *ante*, vol. 4.

Railroad drains or culverts. City not liable. Crawfordsville v. Bond, 96 Ind. 236; Lander v. Bath, 85 Me. 141, 26 Atl. 1091; Robinson v. Danville, 101 Va. 213, 43 S. E. 337. Compare, however, Kelly v. Pittsburgh, etc., R. Co., 28 Ind. App. 457, 63 N. E. 233, 91 Am. St. Rep. 134.

Private extension of culvert. City not liable. Lynch v. Clarke, 25 R. I. 495, 56 Atl. 779.

Massachusetts, construction of statutory provisions as to "main drains," etc., see Smith v. Gloucester, 201 Mass. 329, 87 N. E. 626.

30. **Indianapolis** v. Lawyer, 38 Ind. 348; Goff v. Hutchinson, 38 Ind. 141. See also Central Covington v. Beiser, 122 Ky. 715, 92 S. W. 973.

Original constructor may sue, in such a case. Emery v. Lowell, 104 Mass. 13.

Making of occasional repairs, by city, not adoption of it. Munn & Barton v. Pittsburg, 40 Pa. 364.

What constitutes adoption. Act of city supervisor in connecting with extension held not an adoption. Dasher v. Harrisburg, 20 Pa. Super. Ct. 79.

If a city merely assumes permissive control over a private sewer without condemning it and without the actual consent of the owners, the ownership does not change, and it is not liable for damages occasioned by its being out of repair. Maysville v. Brooks, 145 Ky. 526, 140 S. W. 665.

Where a city required property owners to connect their premises with a sewer system of a private corporation, it was held liable for damages caused by emptying the sewage into a creek, although the corporation might also be liable. Thompson v. Winona, 96 Miss. 591, 51 So. 129, in which case the court said: "The sewerage system, as such, without connection therewith being made by the citizens of the municipality, was harmless. It became harmful only when the city acted in the matter, and adopted it as its vehicle to carry away the filth of the city and empty it upon the property of the appellant. When the city did this, the system became as much its own system of sewerage, in so far as to make the city liable for the damage caused by its adoption, as it would have been had it actually owned it."

31. Taylor v. Austin, 32 Minn. 247, 20 N. W. 157; Nims v. Troy,

injuries resulting therefrom, since in such cases it is immaterial by whom the sewer, drain or culvert was constructed.[32] However, the mere acquisition by a municipality of property on which is a private drain does not make the drain a public sewer.[33] A sewer is a public one, on the other hand, so as to make the municipality liable, although it is situated wholly or partly on private property,[34] or though a natural watercourse is utilized as a sewer.[35] However, it has been held that a municipality may connect its sewers with any natural channel for the flow of water, without incurring liability to keep that channel open to its mouth.[36] And irregularity in the proceedings in directing the construction of a sewer disconnected from a system does not relieve the municipality from liability.[37] But a municipality is not relieved from liability for obstructions in its sewers, by

3 Thomp. & C. (N. Y.) 5, aff'd in 59 N. Y. 500.

See also Hines v. Nevada, 150 Iowa, 620, 626, 130 N. W. 181.

Obstruction in sewer, placed there under supervision of city engineer. City liable. Kiesel v. Ogden City, 8 Utah 237, 30 Pac. 758.

32. Fact that the state originally constructed the sewer does not relieve the municipality from liability. Chalkley v. Richmond, 88 Va. 402, 14 S. E. 339, 29 Am. St. Rep. 730.

A city is liable for negligence in maintaining a culvert used as a part of its sewerage system, regardless of whether it constructed the culvert. Vaccarini v New York, 104 N. Y. S. 928, 54 Misc. Rep. 600.

33. Kosmak v. New York, 117 N Y. 361, 22 N. E. 945.

34. Netzer v. Crookston, 59 Minn. 244, 61 N. W. 21; Hughes v. Auburn, 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 636; Stoddard v. Saratoga Springs, 4 N. Y. S. 745, 52 Hun, 610; Levy v. Salt Lake City, 5 Utah, 302, 16 Pac. 598. But see McCaffrey v. Albany, 11 Hun (N. Y.) 613.

35. Kranz v. Baltimore, 64 Md. 291, 2 Atl. 908; Owens v. Lancaster, 182 Pa. 257, 37 Atl. 858; Blizzard v. Danville, 175 Pa. 479, 34 Atl. 846.

The fact that a natural stream is enclosed and converted into a sewer by a city, does not make the city's liability for damages caused by lack of repairs any less than if the sewer had been entirely artificial. Fox v. Joliet, 150 Ill. App. 491, 495.

36. Munn & Barton v. Pittsburg, 40 Pa. 364. But see Pennsylvania cases cited in preceding note.

37. Foncannon v. Kirksville, 88 Mo. App. 279.

the fact that injury would not have occurred if the person damaged had not connected his property with the main sewer by a private drain, as he had a right to do.[38]

Under the New Hampshire statute, creating liability for defects in "culverts," a covered drain from the gutter to a point under the sidewalk has been held a "culvert."[39]

§ 2691. Duty to provide sewers and drains.

The establishment of sewers and drains by a municipal corporation is the exercise of a legislative[40] or *quasi*-judicial[41] power, and the legislative body of the municipality is the sole judge of the necessity therefor.[42] At common law, a municipal corporation is under no obligation to provide drainage or sewerage for its inhabitants, unless rendered necessary by its own act, and its omission to do so will not render it liable in damages.[43]

38. Hart v. Neillsville, 125 Wis. 546, 104 N. W. 699, 1 L. R. A. (N. S.) 952.

Sewer connections by abutters, §§ 1448-1450, *ante*, vol. 4.

39. Boyd v. Derry, 68 N. H. 272, 38 Atl. 1005.

40. Montgomery v. Gilmer, 33 Ala. 116, 131, 70 Am. Dec. 562; Maysville v. Brooks, 145 Ky. 526, 140 S. W. 665.

41. Mills v. Brooklyn, 32 N. Y. 489, 495.

42. Roll v. Indianapolis, 52 Ind. 547, 562; Michener v. Philadelphia, 118 Pa. St. 535, 540, 12 Atl. 174.

Power to construct as discretionary, § 1435, *ante*, vol. 4.

43. *Alabama.* Birmingham v. Crane (Ala. 1911), 56 So. 723.

Colorado. Daniels v. Denver, 2 Colo. 669.

Illinois. Chicago v. Rustin, 99 Ill App. 47.

Indiana. Evansville v. Decker, 84 Ind. 325, 43 Am. Rep. 86.

Kentucky. Harney v. Lexington, 130 Ky. 251, 254, 113 S. W. 115.

Maryland. Kurrle v. Baltimore, 113 Md. 63, 77 Atl. 373.

Minnesota. McClure v. Red Wing, 28 Minn. 186, 9 N. W. 767; Pye v. Mankato, 36 Minn. 373, 31 N. W. 863, 1 Am. St. Rep. 671; Henderson v. Minneapolis, 32 Minn. 319, 20 N. W. 322; St. Paul & D. R. Co. v. Duluth, 56 Minn. 494, 58 N. W. 159, 23 L. R. A. 88, 45 Am. St. Rep. 491.

Missouri. Woods v. Kansas City, 58 Mo. App. 272.

New York. Wilson v. New York, 1 Denio (N. Y.) 595, 43 Am. Dec. 719; Barton v. Syracuse, 37 Barb. (N. Y.) 292; Mills v. Brooklyn, 32 N. Y. 489.

Pennsylvania. Carr v. The Northern Liberties, 35 Pa. St.

And the fact that it constructs sewers in a portion of a sewer district will not render it liable for not constructing them throughout the entire district at the same time.[44] So the fact that a municipality has adopted a plan of sewerage does not make it liable in damages arising from its failure to execute part of the plan, since the municipality, in such a case, is at liberty to carry out the plan in whole or in part as such times as it sees fit.[45] For the same reason, a municipal corporation will not be held liable for omitting or refusing to reconstruct its drainage system to take in outlying property added to the corporation.[46]

However, the rule that a municipal corporation is not liable for an omission to supply drainage or sewerage does not apply to a case where the necessity therefor is caused by the act of the municipality.[47]

§ 2692. Abandonment of sewer or drain.

The abandonment or discontinuance of a sewer or drain constructed by a municipal corporation will not render the municipality liable for injuries to property resulting from the abandonment, if the property was not left

324, 78 Am. Dec. 342; Cooper v. Scranton, 21 Pa. Super. Ct. 17.

Rhode Island. Wakefield v. Newell, 12 R. I. 75, 34 Am. Rep. 598.

Tennessee. Chattanooga v. Reid, 103 Tenn. 616, 53 S. W. 937.

Virginia. Miller v. Newport News, 101 Va. 432, 44 S. E. 712.

Washington. Wood v. Tacoma, 66 Wash. 266, 119 Pac. 859; Ronkosky v. Tacoma (Wash. 1912), 128 Pac. 2.

West Virginia. Jordan v. Benwood, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859.

If sewers rendered useless by change of grade of street, the city is not liable for failure to provide new sewers. Henderson v. Minneapolis, 32 Minn. 319, 324, 20 N. W. 322.

44. St. Joseph v. Owen, 110 Mo. 445, 19 S. W. 713.

45. Wilson v. Waterbury, 73 Conn. 416, 421, 47 Atl. 687.

46. Campbell v. Vanceburg, 30 Ky. L. Rep. 1340, 101 S. W. 343.

47. Terre Haute v. Hudnut, 112 Ind. 542, 13 N. E. 686; Evansville v. Decker, 84 Ind. 325, 43 Am. Rep. 86; Cotes v. Davenport, 9 Ia. 227; Damour v. Lyons City, 44 Ia. 276; Ross v. Clinton, 46 Ia. 606, 26 Am. Rep. 169; Carson v. Springfield, 53 Mo. App. 289; Byrnes v. Cohoes, 67 N. Y. 204; Carll v. Northport, 42 N. Y. S. 576, 11 App. Div. 120.

in any worse condition than it was before the sewer or drain was constructed.[48] However, if the lot owner is left in a worse condition than he would have been if no sewer had ever been constructed, damages are recoverable because of the abandonment.[49]

§ 2693. Liability for defective "plans."

The *general rule* is well settled that where a municipal corporation, duly authorized by charter, adopts a plan for a sewerage or drainage system, and executes the same, it will not be liable for injuries to property not involving an unconstitutional taking, which are referable to defects in the plan itself.[50] The Supreme Court of

48. Waters v. Bay View, 61 Wis. 642, 21 N. W. 811; Peck v. Baraboo, 141 Wis. 48, 53, 122 N. W. 740; Finley v. Kendallville, 45 Ind. App. 430, 433, 90 N. E. 1036; Henderson v. Minneapolis, 32 Minn. 319, 20 N. W. 322.

See Atchison v. Challiss, 9 Kan. 603, where the court said: "The proposition of abandoning or discontinuing a drain, or filling it up (as in this case) with the intention never to use it again, is a very different proposition from the one of negligently allowing a drain to become obstructed. For the first, the city is not liable; for the second, it generally is. The first is the exercise of that discretionary, or *quasi* judicial power, possessed by cities; the second is the neglect to perform a ministerial duty."

49. McAdams v. McCook, 71 Neb. 789, 99 N. W. 656; Schroeder v. Baraboo, 93 Wis. 95, 67 N. W. 27, and see Sandy v. St. Joseph, 142 Mo. App. 330, 126 S. W. 989.

Where the city discontinues a sewer and negligently walls up the outlet so as to cause water gathering therein to escape in large quantities on adjacent premises, it will be liable. O'Brien v. Worcester, 172 Mass. 348, 353, 52 N. E. 385; Schroeder v. Baraboo, 93 Wis. 95, 67 N. W. 27.

50. *Arkansas.* Little Rock v. Willis, 27 Ark. 572.

Colorado. Denver v. Capelli, 4 Colo. 25, 34 Am. Rep. 62.

District of Columbia. Bannagan v. District of Columbia, 2 Mackey (D. C.), 285 (holding that negligence in choice of its agents or instrumentalities must be shown); District of Columbia v. Cropley, 23 App. (D. C.) 232.

Iowa. Knostman & P. Furniture Co. v. Davenport, 99 Ia. 589, 68 N. W. 887, valuable discussion of rule.

Kansas. King v. Kansas City, 58 Kan. 334, 49 Pac. 88.

Maine. Keeley v. Portland, 100 Me. 260, 61 Atl. 180; Darling v. Bangor, 68 Me. 108.

Massachusetts. Manning v Springfield, 184 Mass. 245, 68 N. E. 202; Whitten v. Haverhill, 204

the United States announces the doctrine as follows: "The duties of the municipal authorities in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what

Mass. 95, 90 N. E. 409; Robinson v. Everett, 191 Mass. 587, 77 N. E. 1151.

New Jersey. Harrington v. Woodbridge Tp., 70 N. J. L. 28, 56 Atl. 141.

New York. Garratt v. Canandaigua, 135 N. Y. 436, 32 N. E. 142, aff'g 16 N. Y. S. 717; Schreiber v. New York, 32 N. Y. S. 744, 11 Misc. Rep. 551.

Pennsylvania. Collins v. Philadelphia, 93 Pa. St. 272; Fair v. Philadelphia, 88 Pa. 309, 32 Am. Rep. 455; Bear v. Allentown, 148 Pa. 80, 23 Atl. 1062.

Porto Rico. Wilson v. Arecibo, 2 Porto Rico Fed. 278, 288.

Vermont. Willett v. St. Albans, 69 Vt. 330, 38 Atl. 72.

Wisconsin. Hart v. Neillsville, 125 Wis. 546, 104 N. W. 699, 1 L. R. A. (N. S.) 952; Peck v. Baraboo, 145 Wis. 48, 122 N. W. 740.

Compare § 2633, *ante*.

Plans for sewers. "Acts of municipal officers in adopting drainage plans and in determining when and where sewers are to be constructed are recognized as *quasi* judicial, as they involve an exercise of deliberate judgment and discretion. It has frequently been held that, in exercising such judgment and discretion or in adopting sewer systems and plans, municipalities will incur no liability for such acts, as it will ordinarily be presumed, in the absence of any showing of actual negligence, that reasonable care has been used." Lennon v. Seattle, 69 Wash. 447, 125 Pac. 770.

Changing course of sewer. Municipality not liable for injuries resulting from plans. District of Columbia v. Cropley, 23 App. Cas. (D. C.) 232.

Best possible method of putting in sewer need not be adopted. Uppington v. New York, 58 N. Y. S. 533, 41 App. Div. 370, 376.

Missouri. The Supreme Court of Missouri has laid down the rule as follows: "The established doctrine in reference to sewers is this: that where they require the exercise of judgment as to the time when and the mode in which they shall be undertaken, and the best plan which the means at the disposal of the corporation renders it practicable to adopt, then their construction is in the nature of a judicial or *quasi* judicial proceeding, and the corporation is not responsible for a defect or want of efficiency in the plan adopted. But when the duty as respects sewers ceases to be judicial or *quasi* judicial, and becomes ministerial, then the corporation will be liable for the negligent discharge or the negligent omission to discharge such duty, resulting in an injury to others." Per Wagner, J., in Thurston v. St. Joseph, 51 Mo. 510, 519, 11 Am. Rep. 463, approved in Steinmeyer v. St. Louis, 3 Mo. App. 256, 261, adopted in Donahoe v. Kansas

level, are of a *quasi*-judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extended territory; and the exercise of such judgment and discretion in the selection and adoption of the general plan or system of drainage is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land."[51] The *basic principle* of this rule is that, discretionary authority being vested in the governing body of a city to adopt such plans, defects therein are referable to mere errors in judgment.[52] There

City, 136 Mo. 657, 667, 38 S. W. 571.

Wisconsin. The Wisconsin Supreme Court has laid down the following rules relating to the obligations of a municipal corporation in the adoption and execution of plans of sewerage: (1) A municipality is not responsible for mistakes in a duly adopted plan of sewerage. (2) It is reponsible for a defective original construction of a system of sewerage; but this means negligent execution of the plan, not defective original construction inhering in the plan itself. Proper construction according to the adopted plan can never be a defective original construction, within the rule mentioned. (3) If a duly adopted and executed plan of sewerage does not prove defective in operation while in a proper state of repair, but becomes out of repair to the knowledge, actual or constructive, of the municipality, the duty devolves upon it to remedy the matter, and it is liable for failure to exercise ordinary care in respect thereto. Geuder, etc. Co. v. Milwaukee, 147 Wis. 491, 133 N. W. 835.

51. Johnston v. Dist. of Columbia, 118 U. S. 198, 6 Sup. Ct. 923, 30 L. Ed. 75, 1 Mackey, 437. See also Barnes v. Dist. of Columbia, 91 U. S. 540, 23 L. Ed. 440; Collins v. Waltham, 151 Mass. 196, 24 N. E. 327; Leeds v. Richmond, 102 Ind. 372; Kokomo v. Mahan, 100 Ind. 242.

52. "It is not the mere construction of a sewage system by a city which exempts the corporation from liability for injuries caused by its operation growing out of defects in the plan thereof, but such construction according to a plan stamped with judicial approval, so to speak, of the proper governing body." Hart v. Neillsville, 125 Wis. 546, 104 N. W. 699, 1 L. R. A. (N. S.) 952, 956; Johnston v. District of Columbia, 118 U. S. 19, 6 Sup. Ct. 923, 30 L. Ed. 75.

"The municipality is not liable for damages resulting from an error of judgment on its part with respect to the location or direction of a sewer or its suffi-

are, however, certain exceptions to this general rule which will now be noticed, but it should be observed that these so-called exceptions do not, at least in their entirety, prevail in all the states.

Exception No. 1. In Indiana, and a few other states, it is held that if there is actual *negligence* (something more than mere error of judgment) in adopting the plan, the municipality is liable.[53] This rule does not seem to be distinctly repudiated in states not so holding, although the broad statements used in many decisions not so holding, seem to preclude liability even for *negligence* in making plans. It is believed that this Indiana rule is based on common sense principles and should be fol-

ciency for the purpose designed. Its liability is confined to injuries due to interference with the natural flow of water, faulty construction, and failure to maintain the sewer in proper condition, and free from obstructions that materially affect its use; and the rule is the same whether a natural water course is adopted for drainage purposes or an artificial channel is built." Siegfried v. Bethlehem, 27 Pa. Super. Ct. 456.

53. Birmingham v. Crane (Ala. 1911), 56 So. 723; North Vernon v. Voegler, 103 Ind. 314 (collates the authorities and holds that "the doctrine is not only sustained by authority but is sound in principle. Suppose that the common council * * * determines to build a sewer and cover it with reeds, can it be possible that the corporation can escape liability on the ground that it erred in devising a plan?").

See also Cummins v. Seymour, 79 Ind. 491, 41 Am. Rep. 618; Weis v. Madison, 75 Ind. 241, 39 Am. Rep. 135; Indianapolis v. Huffer, 30 Ind. 235; Evansville v. Decker, 84 Ind. 325, 43 Am. Rep. 86; Seymour v. Cummins, 119 Ind. 148, 21 N. E. 549, 5 L. R. A. 126; New Albany v. Ray, 3 Ind. App. 321, 29 N. E. 611.

"Of course as long as no work is done under the plan no liability can arise, nor can any liability exist where there is nothing more than a failure to adopt a plan. But where a plan is adopted and carried into execution, then there is liability, if there was negligence in devising the plan. It is the duty of the municipal corporation to exercise reasonable care in providing a plan as well as in doing the work." Terre Haute v. Hudnut, 112 Ind. 542, 544, 13 N. E. 686. Compare Roll v. Indianapolis, 52 Ind. 547, Rozell v. Anderson, 91 Ind. 591, holding city not liable for mere error in judgment in devising plan though execution results in injury.

Carelessness in selection of plan is actionable. Herring v. District of Columbia, 2 Mackey (D. C.), 87.

lowed. It should apply, it would seem, and it has been so held in Wisconsin, where there has not been sufficient care used by the municipality in adopting the plan to warrant the belief that any legal discretion was actually exercised in the matter.[54] So, where a city in reckless disregard of consequences, adopts a palpably defective plan, or adopts one without the aid of some skilled person when such aid would be reasonably required, defects in the plan will not be attributed to mere error of judgment so as to exempt the municipality from liability for injuries caused thereby.[55]

Exception No. 2. If the consequences of the plan of sewerage or drainage planned are unlawful, *i. e., result in direct and physical injury to private property,* the municipality cannot take refuge behind the rule that there is no liability for a defective plan. If the plan must necessarily cause an injury to private property equivalent to some appropriation of the enjoyment thereof to which the owner is entitled, the municipality will be liable.[56] Thus, if defects in the plan of sewerage or

54. Hart v. Neillsville, 125 Wis. 546, 104 N. W. 699, 1 L. R. A. (N. S.) 952.

55. Terre Haute v. Hudnut, 112 Ind. 542, 13 N. E. 686; Louisville v. Norris, 111 Ky. 903, 64 S. W. 958, 98 Am. St. Rep. 437.

"An infallible judgment is not required to avoid liability, but the erection of a sewer (rendered necessary by street improvements) of such incapacity that every sane man knows in advance that it will not afford relief from the consequences of obstruction to the natural drainage caused by the filling of the street, would be dispensing with the use of common sense, and by no means consistent with that reasonable care which the law requires. It would, indeed, be carelessness most gross and wanton—not merely an error of judgment, but a failure to exercise judgment at all." Indianapolis v. Huffer, 30 Ind. 235.

56. Defer v. Detroit, 67 Mich. 340, 34 N. W. 680; King v. Kansas City, 58 Kan. 334, 338, 49 Pac. 88.

Farnham, Waters & Water Rights, § 254.

The Supreme Court of Michigan (per Cooley, C. J.), in an early case refused to apply the rule of non-liability for plans where the defect in the plan resulted in an invasion of the rights of an individual, in the following language: "It is very manifest from this reference to authorities that they recognize in municipal corpora-

drainage result in the discharge of drainage or sewage upon the lands of private persons, so as to amount to a positive trespass, the municipality will be liable.[57] As said in a Kansas decision, a municipality cannot collect "sewage and filth and precipitate it upon the property of a citizen, even if the plan is devised in good faith and the best material is used in the construction. It is immaterial from which end of the sewer the discharge is made; the consequence and liability are necessarily the same."[58] So where a sewer was built so as to discharge sewage in tide water so as to destroy a *bed of oysters* rightfully planted there, the municipality is liable, regardless of negligence, on the theory of a direct injury invading a private right, and that the deposit of sewage was a *taking* of property within the meaning of the constitutional provision.[59] So if a *nuisance* is created

tions no exemption from responsibility where the injury the individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon his property. * * * If the corporation send people with picks and spades to cut a street through it (the private property) 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 a land a flood of water by a public sewer so constructed that the flooding 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." The case points out the distinction usually applied between incidental injuries resulting from imperfect legislation and direct injury accomplished by a corporate act in the nature of a trespass. Ashley v. Port Huron, 35 Mich. 296, 301, 24 Am. Rep. 552.

57. § 2699, *post*.

Likewise, in Minnesota, it has been held that where the acts of the corporation constitute a positive trespass, although resulting from defective plans, they are actionable, and it is actionable trespass for the city to intercept the natural flow of surface water, and gather it up and conduct it in another direction by means of a gutter or other artificial channel, and construct the gutter of inadequate capacity, in consequence of which the water is cast in large and injurious quantities upon the premises of property owners. Pye v. Mankato, 36 Minn. 373, 375, 31 N. W. 863.

58. King v. Kansas City, 58 Kan. 334, 338, 49 Pac. 88.

59. Huffmire v. Brooklyn, 162

which is injurious to private property the nonliability for defective plans is no defense.[60]

Exception No. 3. If a sewer, as planned, proves to be insufficient or defective, by actual experience, then, it is held in some states, a duty devolves on the municipality to remedy the situation, if possible. The leading case so holding is a New York one,[61] and it has been followed in that state and in some others,[62] although the exception has been repudiated in other states.[63] This rule, as

N. Y. 584, 57 N. E. 176, 48 L. R. A. 421, aff'g 48 N. Y. S. 132, 22 App. Div. 406.

60. § 2697, *post.*

61. **Omission to adopt remedial measures** is actionable negligence. Seifert v. Brooklyn, 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664.

62. Richards v. Ann Arbor, 152 Mich. 15, 115 N. W. 1047 (duty to enlarge culvert); Ahrens v. Rochester, 90 N. Y. S. 744, 97 App. Div. 480; Munk v. Watertown, 22 N. Y. S. 227, 67 Hun, 261.

A mistake of judgment in the adoption of a sewerage system is one thing, while "inexcusable omission to *remedy demonstrated defects* in one, liable, in view of the manner in which such system is designed to be used, to directly invade and injure private property, is quite another thing. The former involves mere error of judgment, the latter failure to perform a duty which the city owes to the person whose property is liable to be so injured." Per Justice Marshall in Hart v. Neillsville, 125 Wis. 546, 104 N. W. 699, 1 L. R. A. (N. S.) 952, 4 Am. & Eng. Ann. Cas. 1035.

Thomp., Neg., vol. 5, § 5876.

Alabama. If it appears that an accident would not have happened but for the palpable lack of skill in constructing a sewer, which should have been appreciated by men of ordinary understanding, or where the unfitness of the sewer had been demonstrated by previous experience, the municipality cannot escape liability on the ground that the accident resulted from defective plans. Birmingham v. Crane (Ala. 1911), 56 So. 723.

Defenses. A city sued for damages caused by the inadequacy of its sewers can not relieve itself from liability by showing there was a faulty connection between the damaged premises and the sewer and an absence of proper check valves to prevent the water backing up from the sewers. Karfiol v. New York, 103 N. Y. S. 1036, 119 App. Div. 70.

63. Hession v. Wilmington, 1 Marv. (Del.) 122, 133-137, 40 Atl. 749, in which it is argued that inasmuch as the plans of sewers, in the first instance, are *quasi* judicial and discretionary, the municipality should not be held liable when it acts in good faith and within like discretion in the plans for and the time of alteration and enlargement of such sewers.

Compare Knostman & Petersen

stated in Minnesota, is as follows: If a sewer, "as the same was originally planned and constructed, is found to result in direct and physical injury to the property of another, that would not otherwise have happened, and which, from its nature, is *liable to be repeated and continuous,* but *is remediable by a change of plan or the adoption of prudent measures,* the corporation is liable for such damages as occur in consequence of the original cause, after notice and an omission to use ordinary care to remedy the evil."[64] However, knowledge of the inadequacy of a sewer will not be imputed to a municipality from mere implied knowledge of the plan.[65]

Exception No. 4. The general rule does not apply "where a sewerage system is constructed without the judgment of the proper body being exercised in the matter in the adoption of a plan for the work, though the system is in fact constructed according to some plan."[66]

§ 2694. Same—liability for inadequate sewers or drains.

The liability for *inadequate* sewers or drains involves liability for defective plans although the law governing is not always harmonious, even in the same state. In some jurisdictions it is held that the determination of the *size or capacity* of sewers rests within the discretion of the municipality, and it will not be liable for damages caused by the construction of a sewer of insufficient capacity to carry off ordinary surface water, rainfalls and sewage.[67] These cases are decided on the theory that in-

Furniture Co. v. Davenport, 99 Ia. 589, 68 N. W. 887.

64. Tate v. St. Paul, 56 Minn. 527, 530, 58 N. W. 158, 45 Am. St. Rep. 501.

65. Geuder, P. & F. Co. v. Milwaukee, 147 Wis. 491, 504, 133 N. W. 835.

66. Hart v. Neillsville, 125 Wis. 546, 104 N. W. 699, 1 L. R. A. (N. S.) 952, 4 Am. & Eng. Ann. Cas. 1085.

67. *Arkansas.* Little Rock v. Willis, 27 Ark. 572.

Delaware. Hession v. Wilmington (Del. 1893), 27 Atl. 830.

Maine. Keeley v. Portland, 100 Me. 260, 267, 60 Atl. 180.

Massachusetts. Manning v. Springfield, 184 Mass. 245, 68 N. E 202.

New Jersey. See Harrington v. Woodbridge, 70 N. J. L. 28, 56 Atl. 141.

asmuch as there is no municipal liability for a *total* failure to construct sewers, it necessarily follows that mu-

New York. Mills v. Brooklyn, 32 N. Y. 489.

Pennsylvania. Fair v. Philadelphia, 88 Pa. 309, 32 Am. Rep. 445; Bealafeld v. Verona, 188 Pa. St. 627, 41 Atl. 651; Cooper v. Scranton, 21 Pa. Super. Ct. 17; Pressman v. Dickson City, 13 Pa. Super. Ct. 236; Sullivan v. Pittsburg, 5 Pa. Super. Ct. 357, 28 Pittsb. Leg. J. (N. S.) 36; Costello v. Conshohocken, 8 Pa. Co. Ct. R. 639.

Wisconsin. Geuder, P. & F. Co. v. Milwaukee, 147 Wis. 491, 503, 133 N. W. 835.

Inadequate sewers. "For the construction of a sewer which has not the capacity to carry off the ordinary or extraordinary rain falls, the city cannot be made responsible, and the reason for this is that a city cannot be held to answer for an error of judgment committed by a body created by law and clothed with discretion to determine the width and depth of drains and sewers; to hold a city responsible under such circumstances, would be to vest the power of judging of the proper grade of streets and the width and depth of sewers in the judiciary, instead of the city council where the legislature placed it." Little Rock v. Willis, 27 Ark. 572, 576.

"Now, if a city is not bound to construct a drain of any kind, by what system of reasoning can it be made to appear that if it shall construct a drain, it must construct one that will be sufficient in all cases and for every emergency? Any drain is better than no drain. Any drain, instead of being an injury to a party is, so far as it operates, a positive benefit. If it carries off half the water that falls upon his premises, instead of the whole, how can that be said to be an injury? Is it not an actual benefit to the extent that it operates? And if a benefit, upon what principle can the city be made liable? A city in exercising its discretionary or *quasi* judicial powers acts not merely for a private individual or individuals but for the general welfare of all its citizens; and in constructing drains it may construct them so as to drain the street or alleys only, or so as also to drain the property of its citizens; and in draining the property of its citizens the drains may be so constructed as to carry off all the water that may accumulate on the premises of an individual, or only a portion thereof; and they may also be constructed as to carry off all the water that may fall or accumulate on the premises of one person, and only a portion of what may fall or accumulate on the premises of some other persons." Atchison v. Challiss, 9 Kan. 603.

City not liable for damage resulting from the incapacity of a sewer to carry off increased volume of water caused by the grading of a street. Steinmeyer v. St. Louis, 3 Mo. App. 256. See also Stewart v. Clinton, 79 Mo. 603.

nicipalities will not be liable for having *partially* executed the alleged obligation.[68] In other states, however, it is held that if a sewerage system is not *reasonably sufficient* to take care of the sewage and water reasonably expected to accumulate under ordinary circumstances the municipality will be liable for resultant injury.[69] In

In one case where property was flooded by reason of the incapacity of the sewer, the Missouri Court of Appeals held the city liable, but found that the authority conferred by ordinance upon the city engineer to determine the dimensions of a culvert was ministerial and not *quasi* judicial in character. Under the Kansas City charter, it was held that the common council is not required to prescribe the dimensions of a culvert and that the ordinance properly conferred this authority upon the city engineer. Young v. Kansas City, 27 Mo. App. 101.

Knowledge of plaintiff as barring recovery. One who having knowledge of the incapacity of a sewer to carry off surface water and sewerage, who made a connection with the sewer, is not entitled to recover from the city for the flooding of his property by back water coming through the connection. Sheriff v. Oskaloosa, 120 Ia. 442, 94 N. W. 904.

Limitations of rule where municipality fails to act after sewer or drain proves itself to be insufficient. § 2693, *ante*.

68. Thomp., Neg., § 5871.

69. *Alabama*. Birmingham v. Crane (Ala. 1911), 56 So. 723; Arndt v. Cullman, 132 Ala. 540, 31 So. 478, 90 Am. St. Rep. 922.

California. Spangler v. San Francisco, 84 Cal. 12, 17, 23 Pac. 109, 18 Am. St. Rep. 158; Lehn v. San Francisco, 66 Cal. 76, 4 Pac. 965.

Illinois. Dixon v. Baker, 65 Ill. 518, 521, 16 Am. Rep. 591.

Indiana. Weis v. Madison, 75 Ind. 241, 251. But see Rozell v. Anderson, 91 Ind. 591; Terre Haute v. Hudnut, 112 Ind. 542, 13 N. E. 686.

Iowa. Damour v. Lyons City, 44 Iowa, 276, 282; Powers v. Council Bluffs, 50 Iowa, 197, 202. But see Van Pelt v. Davenport, 42 Ia. 308, 20 Am. Rep. 622.

Michigan. Seaman v. Marshall, 116 Mich. 327, 330, 74 N. W. 484. See also Louisville v. Leezer, 143 Ky. 244, 136 S. W. 223; Richards v. Ann Arbor, 152 Mich. 15, 115 N. W. 1047, 15 Det. Leg. N. 142.

In Illinois it has been held that if the sewer is "wholly insufficient" to carry off surface waters, and that fact might have been known to the proper authorities had they exercised reasonable care and judgment, the municipality is liable. Dixon v. Baker, 65 Ill. 518; Peoria v. Eisler, 62 Ill. App. 26.

"If, in case of the *ordinary annual* rainfalls, the sewer proved to be insufficient, it might be inferred that there was negligence in the construction therof." Litchfield v. Southworth, 67 Ill. App. 398, 400.

the former class of states, it has been held that if a sewer is adequate when constructed, the municipality is not liable because of subsequent inadequacy occasioned by the growth of the municipality and the increased demands thereby made on the sewer;[70] but in Kentucky the contrary is held.[71]

In any event, if a municipality itself changes the natural flow of water and constructs ditches or drains to carry it off which are inadequate for the purposes, it will be liable for damages thereby created.[72]

Since the duty of a municipal corporation in respect to sewers and drains constructed by it is not performed until it has given them an *outlet*,[73] it has been held that it

Kentucky. Where the construction of streets renders sewers necessary, the city will be liable to the owner of premises injured by overflows for failure to construct sewers sufficient to carry off ordinary rain fall, though the premises were subject to overflows before the streets and sewers had been made. Louisville v. Knighton, 30 Ky. L. Rep. 1037, 100 S. W. 228, 8 L. R. A. (N. S.) 478.

70. Carr v. Northern Liberties, 35 Pa. 324, 78 Am. Dec. 342.

71. Louisville v. Leezer, 143 Ky. 244, 245, 136 S. W. 223.

72. Evansville v. Decker, 84 Ind. 325, 43 Am. Rep. 86; Davis v. Crawfordsville, 119 Ind. 1, 21 N. E. 449, 12 Am. St. Rep. 361; Valparaiso v. Spaeth, 166 Ind. 14, 76 N. E. 514; Weis v. Madison, 75 Ind. 241, 39 Am. Rep. 135; Garrett v Winterich, 44 Ind. App. 322, 87 N. E. 161, 88 N. E. 308; Fewell v. Meridian, 90 Miss. 380, 43 So. 438, 9 L. R. A. (N. S.) 775; Kehoe v. Rutherford, 74 N. J. L. 659, 65 Atl. 1046.

Where a municipality in grading a street changed the natural flow of surface water and dug a ditch in the street to carry it off, and allowed the ditch to become and remain filled and back up on adjoining property creating a pond thereon, it was held liable. Harris v. Rome, 10 Ga. App. 409, 73 S. E. 532.

But the fact that a city accelerates the flow of surface water into a sewer by the construction of drains will not render it liable for the overflow of a private sewer if it does not divert the water from a natural course which would not have emptied in some place other than the sewer. Brooks v. Maysville (Ky. 1913), 152 S. W. 788.

73. South Highland Land & Imp. Co. v. Kansas City, 172 Mo. 523, 72 S. W. 944.

Floodgates. Where a sewer empties into a river, the failure of the municipality to place flood gates at the mouth of the sewer sufficient to guard against such floods as have occasionally occurred and which may reasonably

will be liable for damages caused by the insufficient capacity of an outlet to permit the escape of such water as may reasonably be expected to come to it,[74] but it will not be liable for the insufficiency of the outlet to carry off extraordinary and excessive rainfalls.[75]

Extraordinary floods or rains. Whatever the rule may be as to ordinary surface water or rainfalls, it is settled that a municipal corporation is not liable for damages caused by an overflow of its sewers occasioned by extraordinary rains or floods.[76] However, although

be expected to occur again will render it liable for damages caused by a flood which, though unusual, had occasionally occurred. Kansas v. King, 65 Kan. 64, 68 Pac. 1093.

74. Chicago v. Rustin, 99 Ill. App. 47.

Where a city constructs drains or culverts and causes the flow of water in a place in which it did not run before, it is bound to provide a sufficient outlet to prevent overflows. Boston Belting Co. v. Boston, 149 Mass. 44, 20 N. E. 320.

75. Chicago v. Rustin, 99 Ill. App. 47.

76. *California.* Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461, 37 Pac. 375, culverts.

Delaware. Hession v. Wilmington, 1 Marv. (Del.) 122, 132, 40 Atl. 749; Harrigan v. Wilmington, 8 Houst. (Del.) 140, 12 Atl. 779.

District of Columbia. District of Columbia v. Gray, 1 App. (D. C.) 500.

Illinois. Peoria v. Adams, 72 Ill. App. 662; Litchfield v. Southworth, 67 Ill. App. 398.

Indiana. Valparaiso v. Spaeth, 166 Ind. 14, 23, 76 N. E. 514; Evansville v. Decker, 84 Ind. 325, 43 Am. Rep. 86.

Kentucky. Maysville v. Brooks, 145 Ky. 526, 530, 140 S. W. 665.

Michigan. Richards v. Ann Arbor, 152 Mich. 15, 115 N. W. 1047, 15 Det. Leg. N. 142.

New York. Holzhausen v. New York, 102 N. Y. S. 145, 116 App. Div. 812.

North Carolina. Wright v. Wilmington, 92 N. C. 156.

Pennsylvania. Fairlawn Coal Co. v. Scranton, 148 Pa. 231, 23 Atl. 1069, following Collins v. Philadelphia, 93 Pa. 272.

Wisconsin. Allen v. Chippewa Falls, 52 Wis. 430, 9 N. W. 284, 83 Am. Rep. 748.

In Wisconsin, rainfalls are classified as [1] ordinary, [2] extraordinary (such as occur sometimes but are not unprecedented), and [3] unprecedented (such as have never been known to have occurred before). It is only the first class that the municipality, in maintaining its sewer system, must use ordinary care to provide for. Geuder, P. & F. Co. v. Milwaukee, 147 Wis. 491, 499, 133 N. W. 835.

The word "extraordinary," as

the rain doing the damage be of an extraordinary character, yet if the negligence of the city in failing to keep its sewers open concurred and contributed to the damage, then the city has been held liable.[77] And if drains are so inadequate that they cannot take care of the water in case of an ordinary storm, the municipality is not relieved from responsibility because the rainfall was extraordinary.[78]

§ 2695. Liability for negligence in construction or failure to repair.

It is said in an early case that "the law is firmly established that in constructing sewers and keeping them in repair, a municipal corporation acts ministerially, and having the authority to do the act, is bound to the exer-

used in stating the rule that a municipality is not liable for damages occasioned by an overflow of its sewers caused by an "extraordinary" rainfall, is not synonymous with "unprecedented," but with unusual; that which is rare or uncommon; happening sometimes, but not so often as to be regarded a common occurrence. Geuder, P. & F. Co. v. Milwaukee, 147 Wis. 491, 133 N. W. 835.

Extraordinary flood is one such as could not "reasonably be expected in this locality and climate." Richmond v. Wood, 109 Va. 75, 81, 63 S. E. 449.

Sewers constructed by a municipality need only be of such capacity as is sufficient to carry off such surface waters and sewage as ordinarily accumulate and the municipality might reasonably anticipate. Kurrle v. Baltimore, 113 Md. 63, 77 Atl. 373; Richards v. Ann Arbor, 152 Mich. 15, 115 N. W. 1047, 15 Det. Leg. N. 142; Geuder, etc. Co. v. Milwaukee, 147 Wis. 491, 133 N. W. 835.

77. Woods v. Kansas City, 58 Mo. App. 272. See Chicago & W. Ind. R. R. Co. v. Ayers, 106 Ill. 511.

Compare Savannah v. Cleary, 67 Ga. 153; Siegfried v. South Bethlehem, 27 Pa. Super. Ct. 456.

Proximate cause. Where breaking of sewer merely added to a flood already existing, and the water from the sewer united with an existing flow in the street in which that from the sewer lost its identity, all of which subsequently reached plaintiff's basement, the breaking of the sewer was not the proximate cause except in so far injury would not otherwise have occurred. Geuder, P. & F. Co. v. Milwaukee, 147 Wis. 491, 501, 133 N. W. 835.

78. Richards v. Ann Arbor, 152 Mich. 15, 22, 115 N. W. 1047.

See § 2002 *ante*, vol. 4.

cise of needful prudence, watchfulness and care."[79] Other authorities, to the same effect, holding municipalities liable for negligence in the *construction or failure to repair* sewers and drains are very numerous.[80] The

79. Barton v. Syracuse, 36 N. Y. 54.

Consequential damages resulting from the construction of sewers and drains, § 1982, *ante*, vol. 4.

Where streets were being overflowed by a natural watercourse, and the municipality decided to change the course of the stream by building an artificial channel sufficient to carry the waters of the stream, acts in carrying out the plan were ministerial, and it was the duty of the municipality to construct the artificial channel of sufficient permanency, strength and size to carry all of the waters of the stream. Wilson v. Boise City, 6 Idaho, 391, 402, 55 Pac. 887.

80. *Alabama.* Montgomery v. Gilmer, 33 Ala. 116, 70 Am. Dec. 562; Bieker v. Cullman (Ala. 1912), 59 So. 625.

California. Spangler v. San Francisco, 84 Cal. 12, 23 Pac. 1091, 18 Am. St. Rep. 158; Kramer v. Los Angeles, 147 Cal. 668, 82 Pac. 334.

Colorado. Denver v. Rhodes, 9 Colo. 554, 13 Pac. 729; Boulder v. Fowler, 11 Colo. 396.

Connecticutt. Judd v. Hartford, 72 Conn. 350, 44 Atl. 510, 77 Am. St. Rep. 312.

Delaware. Hession v. Wilmington, 1 Marv. (Del.) 122, 40 Atl. 749.

District of Columbia. Koontz v District of Columbia, 24 App. (D. C.) 59,

Georgia. Savannah v. Spears, 66 Ga. 304.

Illinois. Dixon v. Baker, 65 Ill. 518, 16 Am. Rep. 591; Alton v. Hope, 68 Ill. 67.

Indiana. Murphy v. Indianapolis, 158 Ind. 238, 63 N. E. 469; Roll v. Indianapolis, 52 Ind. 547; South Bend v. Paxon, 67 Ind. 228; Evansville v. Decker, 84 Ind. 325, 43 Am. Rep. 86; Logansport v. Newby (Ind. App. 1912), 98 N. E. 4; Seymour v. Cummins, 119 Ind. 148, 21 N. E. 549, 5 L. R. A. 126; Fort Wayne v. Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82; Logansport v. Wright, 25 Ind. 512.

Iowa. Van Pelt v. Davenport, 42 Ia. 308, 20 Am. Rep. 622; Hines v. Nevada, 150 Ia. 620, 130 N. W. 181, 32 L. R. A. (N. S.) 797.

Kansas. King v. Kansas City, 58 Kan. 334, 49 Pac. 88; Leavenworth v. Casey, McCahon (Kan.), 124.

Kentucky. Lexington v. Finn, 149 Ky. 146, 147 S. W. 960; Toebbe v. Covington, 145 Ky. 763, 141 S. W. 421.

Maine. Hamlin v. Biddeford, 95 Me. 308, 49 Atl. 1100.

Maryland. Frostburg v. Dufty, 70 Md. 47, 16 Atl. 642; Hitchins v. Frostburg, 68 Md. 100, 11 Atl. 826, 6 Am. St. Rep. 422; Hanrahan v. Baltimore, 114 Md. 517, 80 Atl. 312.

Massachusetts. Stock v. Boston, 149 Mass. 410, 21 N. E. 871, 14 Am. St. Rep. 430; Norton v. New

liability extends to negligence in *failure to repair* to the same extent, it would seem, as in case of negligence in

Bedford, 166 Mass. 48, 43 N. E. 1034 (no defense that sewer was not legally established). Murphy v. Lewell, 124 Mass. 564. But see Rome v. Worcester, 188 Mass. 307, 74 N. E. 370, decided under a special statute.

Michigan. Defer v. Detroit, 67 Mich. 346, 34 N. W. 680; Ostrander v. Lansing, 111 Mich. 693, 70 N. W. 332.

Minnesota. Simmer v. St. Paul, 23 Minn. 408.

Mississippi. Semple v. Vicksburg, 62 Miss. 63, 52 Am. Rep. 181.

Missouri. Reeves v. Larkin, 19 Mo. 192; Thurston v. St. Joseph, 51 Mo. 510, 11 Am. Rep. 463; Sandy v. Joseph, 142 Mo. App. 330, 126 S. W. 989; Woods v. Kansas City, 58 Mo. App. 272; Donahew v. Kansas City, 136 Mo. 657, 38 S. W. 571; Fink v. St. Louis, 71 Mo. 52 (work done by underground railway company).

New Hampshire. Rowe v. Portsmouth, 56 N. H. 291, 22 Am. Rep. 464; Lockwood v. Dover, 73 N. H. 209, 61 Atl. 32.

New York. Barton v. Syracuse, 36 N. Y. 54, aff'g 37 Barb. 292; Lewenthal v. New York, 61 Barb. (N. Y.) 511; Butler v. Edgewater, 6 N. Y. S. 174, 53 Hun, 633, aff'd in 134 N. Y. 594, 31 N. E. 628; Evers v. Long Island City, 28 N. Y. S. 825, 78 Hun, 242.

North Carolina. Willis v. New Berne, 118 N. C. 132, 24 S. E. 706.

Pennsylvania. Allentown v. Kramer, 73 Pa. 406; Briegel v. Philadelphia, 135 Pa. 451, 19 Atl. 1038, 20 Am. St. Rep. 885.

South Dakota. Dell Rapids Mercantile Co. v. Dell Rapids, 11 S. D. 116, 75 N. W. 898, 74 Am. St. Rep. 783, 4 Am. Neg. Rep. 459.

Texas. Stamford Sewerage Co. v Austin (Tex. Civ. App. 1912), 143 S. W. 649.

Vermont. Winn v. Rutland, 52 Vt. 481.

Virginia. Chalkeley v. Richmond, 88 Va. 402, 14 S. E. 339, 29 Am. St. Rep. 730; Miller & Meyers v. Newport News, 101 Va. 432, 44 S. E. 712.

Wisconsin. Geuder, etc. Co. v. Milwaukee, 147 Wis. 491, 133 N. W. 835; Hart v. Neillsville, 125 Wis. 546, 104 N. W. 699, 1 L. R. A. (N. S.) 952.

Contra, Chope v. Eureka, 78 Cal. 588, 21 Pac. 364, 4 L. R. A. 325, 12 Am. St. Rep. 113.

"It has long been settled" that "a municipality is liable to a private action for negligence in building or maintaining" sewers. Coan v. Marlborough, 164 Mass. 206, 41 N. E. 238.

Negligent construction of sewers. "When the plaintiff proves that the city has undertaken to provide for the surface water, and has done it negligently and improperly, whereby he has sustained damages he makes out a prima facie case." Damour v. Lyons City, 44 Ia. 276.

City held liable for damages to building resulting from its negligence in constructing a sewer near the building. Cherryvale v.

the construction of sewers,[81] and likewise in case of failure to keep sewers *free from obstructions.*[82] Further-

Studyvin, 76 Kan. 285, 91 Pac. 60, 11 L. R. A. (N. S.) 385; Cummings v. Toledo, 12 Ohio Cir. Ct. R. 650, 5 O. C. D. 495.

In the construction and maintenance of a sewerage system a municipality is bound to take due precautions against nuisances resulting from occurrences naturally and reasonably to be anticpated. State v. Concordia, 78 Kan. 250, 96 Pac. 487.

Independent contractors. If a city adopts a proper plan of drainage, and lets a contract for the construction of the drain, allowing the contractor to use his own method and means of construction, it will not be liable for the negligence of the contractor in doing the work. Seymour v. Cummins, 119 Ind. 148, 21 N. E. 549, 5 L. R. A. 126. And see § 2662, *ante.*

81. *Indiana.* Fort Wayne v. Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82; South Bend v. Paxon, 67 Ind. 228. See Valparaiso v. Cartwright, 8 Ind. App. 429, 35 N. E. 1051; Cannelton v. Bush, 45 Ind. App. 638, 91 N. E. 359.

Iowa. Wallace v. Muscatine, 4 G. Greene (Iowa), 373, 61 Am. Dec. 131; Ross v. Clinton, 46 Ia. 606, 26 Am. Rep. 169; Powers v. Council Bluffs, 50 Ia. 197.

Maryland. Frostburg v. Dufty, 70 Ind. 47, 16 Atl. 642.

Massachusetts. Child v. Boston, 4 Allen (Mass.), 41, 81 Am. Dec. 680.

New York. New York v. Furze, 3 Hill. (N. Y.) 612.

Pennsylvania. Cairns v. Chester, 34 Pa. Super. Ct. 51; Markle v. Berwick, 142 Pa. 84, 21 Atl. 794.

Texas. Lindsay v. Sherman (Tex. Civ. App.), 36 S. W. 1019.

Washington. Ronkosky v. Tacoma (Wash. 1912), 128 Pac. 2.

Reasonable care must be used by municipal corporation to keep sewers and drains in suitable repair. Weidman v. New York, 82 N. Y. S. 771, 84 App. Div. 321.

Municipality is not an insurer of the condition of its sewers and is liable only for negligence. Fort Wayne v. Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82.

Outlet on private property. Where a city so constructs a sewer as to place its outlet on private property it can not urge as a defense to an action for damages for failure to repair that it had no right to go on the property to make repairs. Netzer v. Crookston City, 59 Minn. 244, 61 N. W. 21.

Statutory right of action against municipal corporation for failure to maintain and keep in repair a public sewer held to be limited to those who have a right to enter the sewer. Evans v. Portland, 97 Me. 509, 54 Atl. 1107. Liability of municipality with respect to proper maintenance of its sewers held to be equivalent, under a statute, to that of insurer. Blood v. Bangor, 66 Me. 154.

82. *California.* Spangler v. San Francisco, 84 Cal. 12, 23 Pac. 1091, 18 Am. St. Rep. 158.

Colorado. Denver v. Rhodes, 9

more, a city authorized by its charter to establish sewers cannot escape liability for its negligence on the ground that it did the work directly through the superintendent of its streets when its charter provided that it should be done by contract to the lowest bidder.[83]

It will be noticed that this liability in regard to the construction and maintenance of sewers is one of the most widely admitted of any liability for municipal tort, and this is so even in such jurisdictions as the New England states which deny common law liability for injury from defective streets;[84] and it seems that *New Jersey*

Colo. 555, 13 Pac. 729.

Connecticut. Judd v. Hartford, 72 Conn. 350, 44 Atl. 510, 77 Am. St. Rep. 312.

Delaware. Hession v. Wilmington (Del. 1893), 27 Atl. 830; Hession v. Wilmington, 1 Marv. (Del.) 122, 40 Atl. 749.

Georgia. Savannah v. Cleary, 67 Ga. 153.

Iowa. Hines v. Nevada, 150 Ia. 620, 130 N. W. 181.

Kentucky. Louisville v. O'Malley, 21 Ky. L. Rep. 873, 53 S. W. 287; Central Covington v. Beiser, 122 Ky. 715, 29 Ky. L. Rep. 261, 92 S. W. 973.

Maine. Hamlin v. Biddleford, 95 Me. 308, 49 Atl. 1100.

Missouri. Woods v. Kansas City, 58 Mo. App. 272, 279; Stewart v. Clinton, 79 Mo. 603, 612; Foster v. St. Louis, 71 Mo. 157; Taylor v. St. Louis, 14 Mo. 20; Thurston v. St. Joseph, 51 Mo. 510, 11 Am. Rep. 463.

Flood. Where a sewer becomes obstructed through negligence of the municipality, the fact that there has also been a flood will not relieve the municipality from liability. Richmond v. Wood, 109 Va. 75, 63 S. E. 449.

Negligence in cleaning drain. Where a city is authorized to maintain a drain, it is liable for damages caused by its employees throwing refuse on adjoining land in cleaning out the drain. Bailey v Osborn, 80 N. J. L. 333, 78 Atl. 9.

Where a sewer obstruction for which the city was not responsible caused an overflow into adjacent cellars, the act of one of the city's servants in turning water into the sewer to remove the obstruction, and thereby adding to the overflow is negligence for which the city is liable. Frankfort v. Buttimer, 146 Ky. 815, 143 S. W. 410.

Although the duty of a municipality to conserve the public health is governmental, if the flushing of a sewer is but a necessary act to keeping the streets in a reasonably fit condition, it is liable for the negligence of its employees in the performance of such act even though the work was also done to remove a menace to public health. Denver v. Maurer, 47 Colo. 209, 106 Pac. 875.

83. Donahoe v. Kansas City, 136 Mo. 657, 38 S. W. 571.

84. § 2721, *post*, next chapter.

is the only state where this doctrine of liability is not recognized.[85]

Of course, if the party whose property has been damaged is guilty of *contributory negligence,* no recovery can be had.[86] Likewise, if the cause of injury is an *act of God* the municipality is not liable.[87]

§ 2696. Same—notice of defects or obstructions.

The question as to the necessity and sufficiency of notice of defects or obstructions, before the accident, to render the municipality liable, generally arises in connection with liability for defective streets.[88] However, the question occasionally arises in connection with defective sewers, but the same rules apply, it seems, as in case of defective streets. Thus, notice is unnecessary where the negligence is that of the municipality in con-

85. Waters v. Newark, 56 N. J. L. 361, 28 Atl. 717.

In New Jersey, the rule laid down is that a municipality is not liable for faulty construction of, or failure to repair, sewers; but if a sewer becomes obstructed or out of repair, "occasioning a *private* nuisance exclusively, and the public authorities have been notified of the accident," failure to put the sewer in a proper condition is actionable. Jersey City v. Kiernan, 50 N. J. L. 246, 251, 13 Atl. 170, followed in Murphy v. Atlantic Highlands, 77 N. J. L. 452, 76 Atl. 1073.

86. Burnside v. Everett, 186 Mass. 4, 71 N. E. 82; Parker v. Laredo, 9 Tex. Civ. App. 221, 28 S. W. 1048.

Where the danger from backflow in connecting with a sewer was as apparent to a property owner who made such connection, leaving an open end in his basement, as it was to the municipality, he can not recover for damages caused by a backflow of sewage. Hart v. Neillsville, 141 Wis. 3, 123 N. W. 125.

87. **Act of God must be sole cause.** A city is only liable for the want of ordinary care in providing and maintaining sufficient curbing, guttering and sidewalks. If, "by reason of the want of such care and prudence, the curbing and guttering become defective and out of repair, and this defective condition of the curbing and guttering becomes an active agency with the act of God in producing the damage, then the city will be liable. The commingling negligence of the city must amount to the want of ordinary care." Haney v. Kansas, 94 Mo. 334, 336, 7 S. W. 417.

88. §§ 2807-2818, *post,* next chapter, where subject is fully treated.

structing the sewers.[89] Under other circumstances, however, as in case of failure to make necessary repairs, notice is ordinarily necessary.[90]

§ 2697. Nuisances.

Specific examples of nuisances in connection with sewers and drains, such as create municipality liability, are noticed in subsequent sections,[91] they being merely illustrations of the general rule that a municipality is liable, the same as an individual, where it constructs or maintains a sewer or drain in such a way as to amount to a nuisance.[92]

89. Jasper v. Barton (Ala. App. 1911), 56 So. 42.

"The rule applies as in case of imperfect original construction of a highway." Hart v. Neilsville, 141 Wis. 3, 9, 123 N. W. 125.

90. Tate v. St. Paul, 56 Minn. 527, 58 N. W. 158, 45 Am. St. Rep. 501; Schreiber v. New York, 32 N. Y. S. 744, 11 Misc. Rep. 551; Daggett v. Cohoes, 7 N. Y. S. 882, 54 Hun, 639; Harper v. Milwaukee, 30 Wis. 365.

However, must use reasonable diligence to discover and remedy defects in sewers. Gravey v. New York, 102 N. Y. S. 1010, 117 App. Div. 773; Quinlan v. New York, 102 N. Y. S. 1012, 118 App. Div. 897.

Notice of facts may be inferred from lapse of time when they are of such a nature as to attract general public attention. Fuchs v. St. Louis, 133 Mo. 168, 31 S. W. 115, 34 L. R. A. 118.

Where damages are caused by an overflow from an unusual flood, the municipality will not be liable for defects in the sewer, in the absence of a showing that it had notice thereof. Judas v. New York, 105 N. Y. S. 96, 55 Misc. Rep. 259.

Where a sewer overflow was caused by an obstruction of sticks used by children playing in the street, a municipality is not liable for damages caused thereby, in the absence of evidence of the length of time of the existence of the obstruction. Beyer v. New York, 126 N. Y. S. 455, 141 App. Div. 679.

Constructive notice sufficient. Woods v. Kansas City, 58 Mo. App. 272; Lindsay v. Sherman (Tex. Civ. App.), 36 S. W. 1019. And see § 2813, *post*.

91. §§ 2698-2700, 2706, 2711, *post*.

Nuisances in general, § 2641, *ante*.

92. Holmes v. Atlanta, 113 Ga. 961, 39 S. E. 458; Carmichael v. Texarkana, 94 Fed. 561.

Sewers and drains as nuisance, § 1440, *ante*, vol. 4.

Open drain, carrying filth, near plaintiff's dwelling, is a nuisance, and damages are recoverable.

§ 2698. Same—liability for death or sickness.

The damages for which a municipal corporation is liable due to its neglect to observe proper sanitary precautions in the care and maintenance of its sewers are those arising from injuries to property, and do not, it is generally held, extend to death, sickness and physical discomfort caused by such neglect.[93] Thus, where sickness or death is caused, independent of any injury to property rights, by the pollution of a stream by sewage, the municipality is generally held not liable, on the theory that the establishment of a public sewer system is an exercise of a governmental function;[94] although the contrary has been held in New Hampshire[95] and Vermont.[96] And it is held, in several jurisdictions, that where there is an injury to property rights and also to health, damages for the latter may be included.[97]

Madisonville v. Hardman (Ky.), 92 S. W. 930.

Storm sewer, where a nuisance because of abutters connecting their waste and closet pipes therewith, makes city liable, where it had knowledge thereof although it had not granted abutters leave to do so. Demby v. Kingston, 14 N. Y. S. 601, 60 Hun, 294.

Conditions precedent. Knowledge of the nuisance and a request to abate it, is necessary, where the nuisance is not created by the municipality. Martin v. St. Joseph, 136 Mo. App. 316, 320, 117 S. W. 94.

No defense that refuse dumped in sewer, constituting a nuisance, was put there by a third person, where the city had licensed him to so use the sewer. Kolb v. Knoxville, 111 Tenn. 311, 76 S. W. 823.

Ultra vires no defense, in Iowa. Frances v. Sharon, 143 Ia. 730, 733, 121 N. W. 523.

93. Hughes v. Auburn, 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 636; Metz v. Asheville, 150 N. C. 748, 64 S. E. 881, 22 L. R. A. (N. S.) 940. See also Wharton v. Bradford City, 209 Pa. 319, 58 Atl. 621.

Contra, Willett v. St. Albans, 69 Vt. 330, 38 Atl. 72.

94. See cases cited in preceding note.

95. Lockwood v. Dover, 73 N. H. 209, 61 Atl. 32.

96. Willett v. St. Albans, 69 Vt. 330, 38 Atl. 72.

97. Loughran v. Des Moines, 72 Ia. 382, 34 N. W. 172; Allen v. Boston, 159 Mass. 324, 34 N. E. 519, 38 Am. St. Rep. 423.

A plaintiff entitled to recover damages from a city for its negligence in depositing sewage in a stream flowing through his land

§ 2699. Discharge of sewage upon private property.

A municipality has no more right to create a nuisance to the injury of another than has an individual,[98] and hence where a sewer outlet is a private nuisance damages are recoverable.[99] Where a sewer is maintained by a municipal corporation so as to *discharge sewage and filth upon private property*,[1] or to emit *offensive odors*

could also recover expenses incurred for medicines and medical attention in being cured of sickness caused by the deposit of such sewage. Paris v. Allred, 17 Tex. Civ. App. 125, 43 S. W. 62.

Contra. "Where a drain constructed by a municipal corporation, through its negligence becomes choked with refuse, and overflows the premises of an adjacent land owner, the corporation is liable only for damages to the property, not for bills of physicians, medicines, increase in expenses of his family, loss of time or mental anguish, the result of illness caused by the condition of the drain." Williams v. Greenville, 130 N. C. 93, 40 S. E. 977, 57 L. R. A. 207, 89 Am. St. Rep. 860.

98. Hines v. Nevada, 150 Ia. 620, 130 N. W. 181, 32 L. R. A. (N. S.) 797.

§ 2697, *ante*.

99. Hines v. Nevada, 150 Ia. 620, 130 N. W. 181, 32 L. R. A. (N. S.) 797.

1. *Georgia*. Holmes v. Atlanta, 113 Ga. 961, 39 S. E. 458; Macon v. Small, 108 Ga. 309, 34 S. E. 152; Massengale v. Atlanta, 113 Ga. 966, 39 S. E. 578.

Illinois. Terre Haute v. Hudnut, 112 Ind. 542, 13 N. E. 686.

Iowa. Fitzgerald v. Sharon, 143 Ia. 730, 121 N. W. 523.

Kentucky. Madisonville v. Hardman, 29 Ky. L. Rep. 253, 92 S. W. 930; Louisville v. Gimpeel, 22 Ky. L. Rep. 1110, 59 S. W. 1096; Louisville v. O'Malley, 21 Ky. L. Rep. 873, 53 S. W. 287.

Massachusetts. Haskell v. New Bedford, 108 Mass. 208; Woodward v. Worcester, 121 Mass. 245.

Michigan. Seaman v. Marshall, 116 Mich. 327, 74 N. W. 484; Rice v. Flint, 67 Mich. 401, 34 N. W. 719.

Minnesota. Tate v. St. Paul, 56 Minn. 527, 58 N. W. 158.

New York. Stoddard v. Saratoga Springs, 127 N. Y. 261, 27 N. E. 1030; Butler v. Edgewater, 6 N. Y. S. 174, 53 Hun, 633, aff'd in 134 N. Y. 594, 31 N. E. 628; Evers v. Long Island City, 28 N. Y. S. 825, 78 Hun, 242; Beach v. Elmira, 11 N. Y. S. 913, 58 Hun, 606; Barton v. Syracuse, 37 Barb. (N. Y.) 292, aff'd in 36 N. Y. 54; Van Rensselaer v. Albany, 2 How. Pr. N. S. (N. Y.) 42; Moody v. Saratoga Springs, 45 N. Y. S. 365, 17 App. Div. 207.

Wisconsin. See Schroeder v. Baraboo, 93 Wis. 95, 67 N. W. 27.

United States. Carmichael v. Texarkana, 94 Fed. 561.

To same effect. Bloom v. San

creating an unsanitary and dangerous condition interfering with the safe and comfortable enjoyment of such property so as to impair its value,[2] the municipality will be liable. So the municipality is liable where the sewage flows on one's land and thus pollutes a watercourse thereon.[3] So it is not necessary that the sewage be deposited directly on one's property, to authorize a recovery of damages, but it is sufficient that it percolates into

Francisco, 64 Cal. 503, 3 Pac. 129.

Contra, see Washburn & M. Mfg. Co. v. Worcester, 116 Mass. 458.

Sewer emptying on one's land. "A city is liable for constructing a sewer which is designed to and does empty on to the plaintiff's land." Whitten v. Haverhill, 204 Mass. 95, 104, 90 N. E. 409.

If the municipality permits connection of private sewerage with its gutters, it will be liable for a nuisance resulting therefrom, to people living at the end of the gutter. Vicksburg v. Richardson, 90 Miss. 1, 42 So. 234.

Nuisance is a continuing one. Reid v. Atlanta, 73 Ga. 523.

Trespass. Such an act is also a trespass. Magee v. Brooklyn, 45 N. Y. S. 473, 18 App. Div. 22.

Negligence unnecessary. In an action against a city for damages for discharging sewage on private lands the complaint need not state that the defendant negligently discharged such sewage on the land. Butcher v. Staples (Minn. 1912), 139 N. W. 140.

2. *Georgia.* Smith v. Atlanta, 75 Ga. 110.

Illinois. Jacksonville v. Doan, 145 Ill. 23, 33 N. E. 878; Litchfield v. Whitenack, 78 Ill. App. 364; Bloomington v. Murnin, 36 Ill. App. 647.

Iowa. Loughran v. Des Moines, 72 Ia. 382, 34 N. W. 172.

Massachusetts. Allen v. Boston, 159 Mass. 324, 34 N. E. 519, 38 Am. St. Rep. 423.

New York. Hardy v. Brooklyn, 90 N. Y. 435, 43 Am. Rep. 182; Hughes v. Auburn, 47 N. Y. S. 235, 21 App. Div. 311.

North Carolina. Williams v. Greenville, 130 N. C. 93, 40 S. E. 977, 57 L. R. A. 207, 89 Am. St. Rep. 860.

Pennsylvania. Owens v. Lancaster, 182 Pa. 257, 37 Atl. 858.

Texas. Lindsay v. Sherman (Tex. Civ. App.), 36 S. W. 1019.

Sewage dumped into open ditch near a residence gave forth offensive odors. City liable. Phillips v. Armada, 155 Mich. 260, 118 N. W. 941.

Explosion. Since a city would be liable for permitting the escape of poisonous gases from its sewers it can not be held liable for not opening the vents on a sewer to prevent an explosion of gases therein. Fuchs v. St. Louis, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136.

3. Carmichael v. Texarkana, 94 Fed. 561.

§ 2706, *post.*

and through his land.[4] However, there is no municipal liability for sewage cast on one's land by a culvert made solely to conduct surface water, where the municipality never gave permission nor knew that sewage of a certain person flowed into it, and had no knowledge of facts such as would charge it with knowledge.[5]

§ 2700. Same—surface water.

It is to be noted, however, that the law regulating the rights in respect to surface water "is quite a different thing from that governing the disposal of house drainage," so far as its discharge is concerned.[6] Thus as to the latter, if a culvert does not cause water to flow in *increased* quantities over one's land, but only to the same extent as before the culvert was put in, there is no liability.[7] So the owner of a swamp which is the natural place of deposit of the surface waters from the higher adjoining territory cannot complain because the municipality continues to deposit such waters on such swamp by means of mere storm sewers after such swamp has been improved.[8] On the other hand, if surface water is cast in a body on one's land, he ordinarily may recover,[9] as well as in case of a discharge of surface water drained from the gutters on private lands in such quantities as to impair their value.[10] Likewise, if surface water is contaminated by filth so as to be offensive to the smell or a cause of pollution of other water, and it is conducted on the plaintiff's premises by a pipe or

4. Bacon v. Boston, 154 Mass. 100, 28 N. E. 9.

5. Noble v. St. Albans, 56 Vt. 522, 524.

6. Winn v. Rutland, 52 Vt. 481, 495.

7. Noble v. St. Albans, 56 Vt. 522.

8. St. Paul & D. R. Co. v. Duluth, 56 Minn. 494, 58 N. W. 159, 23 L. R. A. 88, 45 Am. St. Rep. 491.

9. § 2002, *ante*, vol. 4; § 2711, *post*.

10. Field v. West Orange Tp., 36 N. J. Eq. 118; Seifert v. Brooklyn, 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664.

See also Bradt v. Albany, 5 Hun (N. Y.), 591.

License, effect of. New York C. & H. R. R. Co. v. Rochester, 127 N. Y. 591, 28 N. E. 416.

drain, it would seem that it occupies the same position as sewage.[11]

§ 2701. Watercourses, liability in regard to.

Where a watercourse passes through the boundaries of a municipality, there is no duty on its part to keep the stream in a safe condition or free from obstructions;[12] and this is so although the stream has been declared a public highway by statute.[13] So a municipal corporation is not liable at common law for failure to abate the natural and ordinary flooding of lands on the bank of a navigable stream.[14] Furthermore, the fact

11. See Holmes v. Atlanta, 113 Ga. 961, 39 S. E. 458.

12. Seaman v. New York, 80 N. Y. 239, 36 Am. Rep. 612; Coonley v. Albany, 132 N. Y. 145, 30 N. E. 382; O'Donnell v. Syracuse, 184 N. Y. 1, 76 N. E. 738, 3 L. R. A. (N. S.) 1053; Maryland v. Miller, 180 Fed. 796, 810.

Need not keep safe for navigation. [Coonley v. Albany, 132 N. Y 145, 150, 30 N. E. 382, aff'g 10 N. Y. S. 512, 57 Hun, 327, unless it is so provided by statute. Winpenny v. Philadelphia, 65 Pa. 135.]

Removal of obstructions: Unless required by statute, a municipal corporation is not bound to remove obstructions from a stream running through its boundaries, placed therein by others. Sehy v. Salt Lake City (Utah, 1912), 126 Pac. 691; Zehe's Adm'r v. Louisville, 29 Ky. L. Rep. 1107, 96 S. W. 918.

Municipality is not liable for obstructions in a stream not used by it as an outlet for its sewer which are caused by the accumulation of sand and mud washed into it by water from streets and buildings. A. L. Lakey Co. v. Kalamazoo, 138 Mich. 644, 101 N. W. 841, 67 L. R. A. 931, 110 Am. St. Rep. 338; Sprague v. Worcester, 79 Mass. 193.

Negligence in the work of removing obstructions may, however, be actionable. Goodrich v. Chicago, 20 Ill. 445.

Grant of authority to remove obstructions does not impose duty to do so. Goodrich v. Chicago, 20 Ill. 445.

Hudson river, rule applied to obstructions in. Coonly v. Albany, 132 N. Y. 145, 30 N. E. 382, aff'g 10 N. Y. S. 512, 57 Hun, 327; Seaman v. New York, 80 N. Y. 239, 36 Am. Rep. 612.

Natural watercourses, public control, § 1437, *ante*, vol. 4.

13. O'Donnell v. Syracuse, 184 N. Y. 1, 76 N. E. 738, 3 L. R. A. (N. S.) 1053, 112 Am. St. Rep. 558.

14. O'Donnell v. Syracuse, 184 N. Y. 1, 76 N. E. 738, 3 L. R. A. (N. S.) 1053, 112 Am. St. Rep. 558; Hamilton v. Ashbrook, 62 Ohio St. 511, 57 N. E. 239 (not

that a municipality undertakes to remove obstructions, it being under no legal obligation to remove them, does not create any new liability.[15]

There is no *liability for consequential damages* resulting from improvements made in watercourses, where authorized and where there is no negligence,[16] the same rule applying as in case of other public improvements,[17] although there is liability where a public improvement obstructs a watercourse.[18]

§ 2702. Same—public improvement obstructing watercourse.

It is hereafter noticed that there is no liability, ordinarily, in most states, for consequential injuries resulting from interference with *surface waters* by public improvements.[19] In this connection, it is highly important to distinguish between surface water and watercourses,[20] since as to the latter it is generally held that there is liability if the channel of a watercourse is interfered with so as to injure property.[21]

liable because of inadequacy of provisions to prevent overflows).

Fact that city owns bed of stream and right to sell water from it is immaterial. Moore v. Los Angeles, 72 Cal. 287, 13 Pac. 855.

Statutory provisions. But where the periodical overflow of a river is declared a nuisance by statute and the duty is imposed upon the municipality to abate all nuisances, it has been held, the municipality will be liable for its refusal to abate such overflow. White v. Buffalo, 112 N. Y. S. 485, 60 Misc. Rep. 611.

15. Goodrich v. Chicago, Fed. Cas. No. 5,542, 4 Biss. 18, aff'd in 5 Wall. (U. S.) 566.

16. Alexander v. Milwaukee, 16 Wis. 247.

17. §§ 1968, 2002, *ante*, vol. 4.

18. § 2702, *post*.

19. § 2708, *post*.

20. Gregory v. Bush, 64 Mich. 37, 31 N. W. 90; Young v. Kansas City, 27 Mo. App. 101; Hoyt v. Hudson, 27 Wis. 656, 9 Am. Rep. 473.

21. If permanent improvement is made by city on bank of water course, so as to narrow the channel, and injure private property on the other side, the municipality is liable. Parker v. Atchison, 58 Kan. 29, 48 Pac. 631.

But municipality is not liable for the flooding of lands of a lower riparian owner, caused by the erection of embankments in the improvement of its streets, to confine flood water of a stream to its channel, unless the quantity

Surface water, it has been held, "is that which is diffused over the surface of the ground derived from falling rains and melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to, and does, flow with other waters, whether derived from the surface or springs; and it then becomes the running water of a stream and ceases to be surface water."[22] To constitute a watercourse, it is necessary that there should be a stream of water flowing through a well-defined bed or channel with sides or banks and a permanent source of supply. It is not essential that it should be uniform or uninterrupted. It is sufficient if it is usually a stream of running water.[23] As to the latter, a municipality is liable for the damages caused by damming up a watercourse in the grading and filling of certain streets.[24]

of water upon the lands has been "materially and unduly" increased thereby. Walters v. Marshalltown, 145 Ia. 457, 120 N. W. 1046, 26 L. R. A. (N. S.) 199.

Obstruction in bed of stream, resulting in accelerated flow of water which was thrown with unnatural and great force against foundation of plaintiff's buildings. City held not liable, under particular facts. Prime v. Yonkers, 192 N. Y. 105, 84 N. E. 571, rev'g on this point, 102 N. Y. S. 118, 116 App. Div. 699.

22. Crawford v. Rambo, 44 Ohio St. 279, 282, 7 N. E. 429.

23. Stanchfield v. Newton, 142 Mass. 110, 7 N. E. 703; Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519; Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241; Eulrich v. Richter, 37 Wis. 226.

24. Conniff v. San Francisco, 67 Cal. 45, 7 Pac. 41; Princeton v. Gieske, 93 Ind. 102; Rose v. St. Charles, 49 Mo. 509; Beatrice v. Leary, 45 Neb. 149, 63 N. W. 370, 50 Am. St. Rep. 546.

Where a city in grading its streets erects an embankment without a culvert or waterway, so as to obstruct the flow of a watercourse having a well defined channel, it will be liable. Los Angeles Cem. Ass'n, v. Los Angeles, 103 Cal. 461, 37 Pac. 375.

In approving and applying this doctrine it is said: "In making the culvert in the present case it was the duty of the defendant, absolute and imperative, to so make the culvert as not to obstruct the water of the running stream, to the injury of others. As to that duty the defendant had no discretion. The defendant did not have to build a culvert at all, but in building a culvert, when it was determined to build one, the defendant had to build one in accordance with the requirement named, i. e., so as not to obstruct the water of the

Likewise, if a highway is constructed over a stream, by a bridge or culvert, the municipality is liable if the ministerial duty of constructing sufficient ways under the road or bridge to allow the water to pass under, is neglected or improperly performed, to the special damage of the complaining party;[25] but if the bridge is sufficient, except in case of extraordinary freshets, there is no liability.[26]

§ 2703. Same—culverts.

Where a municipal corporation constructs a culvert for the passage of the waters of a watercourse or natural drain, it will be liable for damage caused by the escape of water therefrom to adjacent lands due to a negligent construction of the culvert,[27] or its inadequacy (according to the rule in many states) to carry away water ordinarily coming into it,[28] or for failure of the

stream, to the injury of others. The defendant had to build a sufficient culvert; the defendant had not the right in building a culvert to create a nuisance. Hence, the act of determining the dimensions of the culvert was a ministerial, and not a judicial act, and defendant was liable for all damages caused by the insufficient of the said dimensions." Per Hall, J., in Young v. Kansas City, 27 Mo. App. 116.

25. Stone v. Augusta, 46 Me. 127; Parker v. Lowell, 11 Gray (Mass.), 353; Krug v. St. Mary's, 152 Pa. 30, 25 Atl. 162, 34 Am. St. Rep. 616; Spelman v. Portage, 41 Wis. 144.

See also Wheeler v. Worcester, 10 Allen (Mass.), 591.

§ 2703, *post*.

Narrowing a stream, in constructing a bridge, so as to cause damage in time of freshet, creates municipal liability. Perry v. Worcester, 6 Gray (Mass.), 544, 66 Am. Dec. 431.

26. Sprague v. Worcester, 13 Gray (Mass.), 193.

27. Ross v. Madison, 1 Ind. 281, 48 Am. Dec. 361.

28. Evansville v. Decker, 84 Ind. 325, 43 Am. Rep. 86.

§ 2694, *ante*, shows there is a conflict as to effect of inadequacy of sewers.

If a culvert maintained by a city is not sufficient to pass all the water coming to it in an ordinary rainfall, and such a rainfall would have flooded and damaged plaintiff's property, the fact that the rainfall and consequent volume of water which flooded plaintiff's premises were larger than usual does not relieve the municipality from liability. Richards v. Ann Arbor, 152 Mich. 15, 115 N. W. 1047, 15 Det. Leg. N. 142.

municipality to remove obstructions therein;[29] and a culvert obstructing a watercourse, to the injury of riparian owners, is a nuisance, and damages are recoverable.[30]

Where an insufficient culvert is constructed by the municipality and a private company, they are jointly and severally liable for injuries to property caused thereby.[31] But the municipality is not liable for the insufficiency of a culvert under a highway constructed by a railroad company for its own use,[32] or one acquired by a railroad company with the grant of a right of way over a street.[33]

§ 2704. Same—rights of riparian owners.

In case of natural watercourses, riparian owners have certain rights which municipalities cannot interfere with, without becoming liable in damages, as already noted in the preceding section. Moreover, "it would seem that an *artificial watercourse* may be made under such circumstances as to confer all such rights as a riparian owner could have had in the case of a natural stream."[34] Owners of lands bordering on a stream have a legal right

Culvert need not be sufficient to carry away water from extraordinary storms. Madison v. Ross, 3 Ind. 236, 54 Am. Dec. 481; Evansville v. Decker, 84 Ind. 325, 43 Am. Rep. 86.

Construction of insufficent culvert is ministerial act for which municipality is liable. Young v. Kansas City, 27 Mo. App. 101. *Contra, under statute*, Barber v. Scotland, 34 N. Y. S. 968, 88 Hun, 522.

Municipality held not liable for the insufficiency of a culvert constructed by it, where it employed competent engineers to plan and construct same who exercised their honest judgment in the matter. Taubert v. St. Paul, 68 Minn. 519, 71 N. W. 664.

29. Parker v. Lowell, 11 Gray (Mass.), 353; Voligny v. Stillwater Water Co., 73 Minn. 181, 75 N. W. 1132; Haynes v. Burlington, 38 Vt. 350.

30. Martin v. St. Joseph, 136 Mo. App. 316, 117 S. W. 94.

§ 2704, *post*.

31. Kansas City v. Slangstrom, 53 Kan. 431, 36 Pac. 706.

32. Stackhouse v. Lafayette, 26 Ind. 17, 89 Am. Dec. 450.

33. Lauder v. Bath, 85 Me. 141, 26 Atl. 1091.

34. Weatherby v. Meiklejohn, 56 Wis. 73, 13 N. W. 697. But see Drew v. Westfield, 124 Mass. 461.

to the natural flow of the waters of such stream,[35] and a municipal corporation will be liable for *diverting the waters* of a stream or water course and depriving lower riparian owners of the use thereof,[36] or for diverting water from a natural watercourse and causing it to flow upon private property, to its injury.[37]

35. Sumner v. Gloversville, 71 N. Y. S. 1088, 35 Misc. Rep. 523; New York v. Pine, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820.

"The power of a city to divert a stream passing through its limits from the natural course and to confine it to a narrower channel is undoubted, but in doing so it must use reasonable care to prevent injury to others." Kansas City v. Slangstrom, 53 Kan. 431, 36 Pac. 706.

36. Kansas City v. Slangstrom, 53 Kan. 431, 36 Pac. 706; Pine v. New York, 103 Fed. 337, aff'd in 112 Fed. 98, 50 C. C. A. 145, and rev'd on another point in 185 U. S. 93, 46 L. Ed. 820, 22 Sup. Ct. 592.

See also Irvings Ex'rs v. Media, 194 Pa. 648, 45 Atl. 482.

A city has no right to change the channel of a stream so as to divert the water from one side of the stream to the injury of riparian owners entitled to the use thereof, even though the water so diverted would abate a nuisance, especially when there is another practicable way of abating such nuisance without injury. McKee v. Grand Rapids, 137 Mich. 200, 100 N. W. 580, 11 Det. Leg. N. 259.

The diversion of water by a city from a stream at a point above a mill and discharging it into the stream below the mill entitles the mill owner to damages for being deprived of the use of the natural flow of water; and in an action therefor the city is not entitled to an allowance by way of set off on account of the fact that water, wasted by the city's reservoirs, passed into the river above the mill. Stevens v. Worcester, 196 Mass. 45, 81 N. E. 907.

Waterworks system. A municipality is liable for diverting water of a natural stream from the land of another, in the operation of a waterworks system. Fischer v. Clifton Springs, 121 N. Y. S. 163, aff'd in 125 N. Y. S. 1119, 140 App. Div. 918; Smith v. Brooklyn, 160 N. Y. 357, 54 N. E. 787, 45 L. R. A. 664.

37. Durkes v. Union, 38 N. J. L. 21; Field v. West Orange Tp., 46 N. J. Eq. 183, 2 Atl. 236; Ordway v. Canisteo, 21 N. Y. S. 835, 66 Hun, 569; Byrnes v. Cohoes, 67 N. Y. 204; Noonan v. Albany, 79 N. Y. 470, 35 Am. Rep. 540; Butler v. Edgewater, 6 N. Y. S. 174, 53 Hun, 633, aff'd in 134 N. Y. 594, 31 N. E. 628; Barden v. Portage, 79 Wis. 126, 48 N. W. 210.

Missouri. In an early Missouri case it was held that a municipal corporation was not liable for damage to property caused by the turning of water from a natural gully thereon in grading

Municipalities are liable for their acts in increasing [38]

a street; the theory being that such damages are consequential and impose no liability on the municipality in the absence of negligence. St. Louis v. Gurno, 12 Mo. 414. But this is not now the rule in that state. Thurston v. St. Joseph, 51 Mo. 510, 11 Am. Rep. 463; Barns v. Hannibal, 71 Mo. 449. See also dissenting opinion in St. Louis v. Gurno, 12 Mo. 414.

Likewise, a city was held liable for damages caused by it in changing the channel of a natural stream under the authority of its charter to a width and depth insufficient to afford a passageway for the water of the stream equal in capacity to the old channel. Imler v. Springfield, 55 Mo. 119, where it was said, at page 126: "A liability would exist against a city for filling up or damming back a stream of running water, so that it would overflow its banks and flow upon the land of another; but a very different rule exists with reference to surface water." The doctrine of this case was approved and applied in Barns v. Hannibal, 71 Mo. 449, 451.

Extraordinary rains. Where a city diverts a stream from its natural channel and undertakes to convey the water by means of an artificial channel, it is bound to provide a channel large enough to carry off, not only the water caused by ordinary rainfalls, but also the floods caused by extraordinary rainfalls or cloud bursts which are known to have occurred in that locality on rare occasions and which might reasonably be expected to occur again. Willson v. Boise City, 20 Ida. 133, 117 Pac. 115, 36 L. R. A. (N. S.) 1158. But a heavy rainfall or cloud burst causing floods unprecedented and so extraordinary as to have been beyond reasonable anticipation, and such as had not been known to occur in the locality, is an "act of God" and the municipality will not be liable for damages caused thereby. Willson v. Boise City, 20 Ida. 133, 117 Pac. 115, 36 L. R. A (N. S.) 1158.

38. McBride v. Akron, 12 Ohio Cir. Ct. R. 610, 6 O. C. D. 739.

City is liable where it changes the natural course of a creek, thereby causing the water to flow along a public street so as to interfere with access to property abutting thereon. Geurkink v. Petaluma, 112 Cal. 306, 44 Pac. 570.

Municipality held liable for damage from a freshet caused by the narrowing of a stream. Perry v. Worcester, 6 Gray (Mass.), 544, 66 Am. Dec. 431.

Where a municipality raised the bank of a stream to protect its own property and thereby caused injury to an individual's property by overflow, which it did not exercise ordinary care to prevent, it was liable therefor. Brown v. Ithica, 132 N. Y. S. 1041; 148 App. Div. 477.

Dam, though constructed under legislative authority, where causing overflow of plaintiff's farm situated above the dam, is ground

or diminishing[39] the natural flow or volume of water to the injury of owners of lands bordering thereon;[40] or for placing obstructions in streams so as to cause the water to flow upon the lands of owners to their injury.[41] But a municipality is not liable for damages resulting from obstructions in a stream flowing through the municipality, not placed there by the municipality.[42]

§ 2705. Same—use of streams by sewers.

Since a municipal corporation has the right to empty its sewers into a natural stream, it will not be liable for

of liability, where city is negligent in allowing obstructions to accumulate in the stream. Baltimore v. Merryman, 86 Md. 584, 39 Atl. 98.

Not insurer against unprecedented floods or cloud bursts. Keithsburg v. Simpson, 70 Ill. App. 467.

39. Sparks Mfg. Co. v. Newton, 60 N. J. Eq. 399, 45 Atl. 596; Lonsdale Co. v. Woonsocket, 25 R. I. 428, 56 Atl. 448 (city as riparian owner cannot diminish amount of water in stream for purpose of municipal water supply); New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190 (city as riparian owner cannot divert water for municipal purposes, as against lower riparian owner, without compensation).

City is liable for drawing the water from a brook by suction pumps for water supply. Smith v. Brooklyn, 46 N. Y. S. 141, 18 App. Div. 340.

In supplying water from a stream, to private persons the municipality is liable if it takes more than a reasonable share of the water. Canton v. Shock, 66 Ohio St. 19, 63 N. E. 600, 58 L. R. A. 637, 90 Am. St. Rep. 557.

Where the diminution of water is small and inappreciable, the municipality will not be held liable therefor; the rule *damnum absque injuria* being applicable in such cases. "The necessity that municipalities be supplied with water, which can ordinarily only be obtained by taking it from some large stream or some tributary to it, makes it incumbent upon the courts to refuse to give damages for a mere technical injury." Sumner v. Gloversville, 71 N. Y. S. 1088, 35 Misc. Rep. 523.

40. Diversion of streams, see also § 1444, *ante*, vol. 4.

41. Parker v. Lowell, 11 Gray (Mass.), 353.

Obstruction outside city limits. A city will be liable for the flooding of land within its limits when caused by its obstruction of a stream, though the obstruction is outside the city limits. Martin v. St. Joseph, 136 Mo. App. 316, 117 S. W. 94.

42. Maysville v. Brooks, 145 Ky. 526, 140 S. W. 665.

the flooding of lands thereby unless it discharges more water into the stream than can be accommodated by it in its natural condition;[43] but where the discharge of drainage or sewage into a stream increases the volume of water in the stream to the damage of owners of lands bordering thereon, the municipality is liable.[44] Where a municipality uses a stream as an open sewer, it is bound to keep open the channel of the stream, and to remove accumulations of filth and refuse therein,[45] and it cannot acquire by prescription the right to relieve it-

§ 2701, *ante*.

Mere failure to compel restoration of stream to its natural channel is not a ratification of diversion by third person. Allebraud v Duquesne, 11 Pa. Super. Ct. 218.

43. Smith v. Auburn, 84 N. Y. S. 725, 88 App. Div. 396; Penfield v. New York, 101 N. Y. S. 442, 115 App. Div. 502.

But see Bloomington v. Costello, 65 Ill. App. 407; Wheeler v. Worcester, 10 Allen (Mass.), 591, 603.

A city using a stream as an outlet for its sewers is not liable for damage to property owners caused by an extraordinary freshet on the ground that it contributed to it by discharging its sewage into the stream. O'Donnell v. Syracuse, 184 N. Y. 1, 76 N. E. 738, 3 L. R. A. (N. S.) 1053, 112 Am. St. Rep. 558.

44. Bloomington v. Costello, 65 Ill. App. 407; O'Brien v. St. Paul, 18 Minn. 176; Noonan v. Albany, 79 N. Y. 470, 35 Am. Rep. 540.

Where a municipal sewer emptying into a water course causes a body of water to flow upon private lands greater than the natural drainage and flow through the water course, the construction and maintenance of such sewer is *prima facie* wrongful and is a nuisance for which the municipality is liable. O'Brien v. St. Paul, 18 Minn. 176.

Municipality held liable for overflowing of pond caused by diversion of drainage water therein. Daley v. Watertown, 192 Mass. 116, 78 N. E. 143.

But the fact that a city empties its sewer into a stream will not render it liable for damage caused by the flooding of lands thereon where the land owner unduly narrowed and obstructed the stream. Smith v. Auburn, 34 N. Y. S. 725, 88 App. Div. 396.

45. Bloomington v. Costello, 65 Ill. App. 407; Owens v. Lancaster, 182 Pa. 257, 37 Atl. 858.

Stream used as sewer. Municipality will be liable for damage caused by its failure to remove obstructions in a stream used by it as an open sewer. Blizzard v. Danville, 175 Pa. 479, 34 Atl. 846; Glasgow v. Altoona, 27 Pa. Super. Ct. 55; Owens v. Lancaster, 182 Pa. 257, 37 Atl. 858, 193 Pa. 436, 44 Atl. 559.

self of its duty to do so.[46] However, if a culvert inclosing a diverted stream is not used by the city for sewage, but an abutter connects with it, unbeknown to the city, the city is not liable where the water backs up into said abutter's cellar, by reason of obstructions in the culvert.[47]

§ 2706. Same—discharge of sewage into—polluting streams.

A municipality may discharge its sewers into watercourses,[48] and since the maintenance of a sewer system by a municipal corporation is for the public benefit, the municipality will not be liable for discharging its sewage into a stream if no nuisance is thereby created.[49] Where, however, the discharge of sewage into waters creates a *nuisance,* the municipality is generally liable.

In some jurisdictions, however, it is held that inasmuch as the construction of sewers and outlets is sanctioned by law, and because what the law grants will not constitute a nuisance *per se,* a municipal corporation will not be liable for the fouling of a stream resulting from its discharge of sewage therein, in the absence of negligence or unskillfullness in the construction of the sewer;[50] but this is denied in most states, on the theory that the statutes, even if expressly authorizing the deposit of sewage in a natural stream or lake, do not authorize the creation of a nuisance.[51]

46. Owens v. Lancaster, 182 Pa. 257, 37 Atl. 858; Bloomington v. Costello, 65 Ill. App. 407.

Prescriptive right to pollute waters of stream, § 1441, *ante,* vol. 4.

47. Levasseur v. Berlin, 75 N. H. 146, 71 Atl. 628.

48. § 1445, *ante,* vol. 4.

49. Metz v. Asheville, 150 N. C. 748, 64 S. E. 881, 22 L. R. A. (N. S.) 940.

A municipal corporation may discharge sewage and drainage into a stream, provided it does not thereby create a nuisance or cast its sewage on the lands of lower owners. Crane v. Roselle, 236 Ill. 97, 86 N. E. 181.

50. Valparaiso v. Hagen, 153 Ind. 337, 54 N. E. 1062, 48 L. R. A. 707, 74 Am. St. Rep. 305; Richmond v. Test, 18 Ind. App. 482, 48 N. E. 610.

51. *Kansas.* State v. Concordia, 78 Kan. 250, 96 Pac. 487, re-

In some other cases, not supported by reason or other authority, it has been held that in locating sewers and their outlets the municipal authorities act judicially and that a municipality is therefore not liable for polluting the waters of a stream, where the injury is not due to negligence or unskilfullness in the construction of the sewer.[52]

The *general rule,* however, is that if a *nuisance* is created, the municipality is liable,[53] subject to certain

viewing authorities at length.

Massachusetts. Brayton v. Fall River, 113 Mass. 218, 18 Am. Rep. 470. See Haskell v. New Bedford, 108 Mass. 208. Compare Merrifield v. Worcester, 110 Mass. 216, 14 Am. Rep. 592.

New Jersey. Beach v. Sterling Iron, etc. Co., 54 N. J. Eq. 65, 33 Atl. 286, criticizing Merrifield v. Worcester, 110 Mass. 216. But see Simmons ex rel. v. Paterson, 60 N. J. Eq. 385, 45 Atl. 995, 48 L. R. A. 642, 83 Am. St. Rep. 642; Sayre v. Newark, 60 N. J. Eq. 361, 45 Atl. 985, 48 L. R. A. 722, 83 Am. St. Rep. 629.

New York. Sammons v. Gloversville, 175 N. Y. 346, 67 N. E. 622; Hooker v. Rochester, 37 Hun (N. Y.), 181, aff'd in 107 N. Y. 676, 14 N. E. 610; Butler v. White Plains, 69 N. Y. S. 193, 59 App. Div. 30.

Texas. Donovan v. Royal, 26 Tex. Civ. App. 248, 63 S. W. 1054.

Wisconsin. Winchell v. Waukesha, 110 Wis. 101, 85 N. W. 668, 84 Am. St. Rep. 902.

United States. Carmichael v. Texarkana, 94 Fed. 561.

England. Attorney General v. Leeds Corp., 5 L. R. Ch. 583, 594.

"When the legislature authorizes a city or town to construct sewers or to use a natural stream as a sewer, it is not to be assumed that it intends to authorize the city or town so to construct its sewers, or so to use the stream as to create a nuisance unless this is the necessary result of the powers granted." Morse v. Worcester, 139 Mass. 389, 2 N. E. 694.

A statute authorizing cities to connect sewers with rivers, creeks and ravines as outlets does not authorize the commission of a nuisance in so doing. State v. Concordia, 78 Kan. 250, 96 Pac. 487.

52. Attwood v. Bangor, 83 Me. 582, 22 Atl. 466; Merrifield v. Worcester, 110 Mass. 216, 14 Am. Rep. 592.

53. No defense, that the construction and operation of sewers is a governmental duty. San Antonio v. Pizzini (Tex. Civ. App. 1900), 58 S. W. 635; San Antonio v. Diaz (Tex. Civ. App. 1901), 62 S. W. 549.

Construction of sewer at expense of property owners is no defense to an action against the municipality for fouling the waters of a stream by discharging its sewage therein. Stoddard v. Saratoga Springs, 4 N. Y. S. 745, 52 Hun, 610, aff'd in 127 N. Y. 261, 27 N. E. 1030.

exceptions as to the right to pollute as acquired by *prescription*;[54] and this applies equally well whether the sewage is discharged into a running stream, an abandoned channel of a river,[55] an artificial *canal*,[56] or a *pond*.[57] Furthermore, a municipality is liable where the discharge impedes, or causes an *obstruction to navigation*.[58] And, in a proper case, the polluting waters by discharging sewage therein may be prevented by *injunction*.[59] But where the statute authorizing the construction of sewers provides for the payment of damages to persons whose property shall be injured thereby, it is held that an action in tort against the municipality for the pollution of a stream will not lie; the proper remedy being by *proceedings under the statute*.[60]

The nuisance may consist in (1) the *pollution of the waters*, to the injury of a reparian owner.[61] However,

54. § 1441, *ante*, vol. 4.

The right to pollute a stream to a greater extent than is permissible of common right may be acquired by prescription. Masonic Temple v. Harris, 79 Me. 250, 9 Atl. 737; Nolan v. New Britain, 69 Conn. 668, 38 Atl. 703.

A municipal corporation cannot acquire by prescription the right to create a nuisance by discharging sewage into a stream as against the right of the state to prohibit it from doing so. Miles v. State Board of Health, 39 Mont. 405, 102 Pac. 696.

55. See State v. Concordia, 78 Kan. 250, 96 Pac. 487.

56. Boston Rolling Mills v. Cambridge, 117 Mass. 396; Merrimack River Locks v. Lowell, 7 Gray (Mass.), 223.

57. Vale Mills v. Nashua, 63 N. H. 136; Schriver v. Johnstown, 24 N. Y. S. 1083, 71 Hun (N. Y.), 232, aff'd without opinion in 148 N. Y. 758, 43 N. E. 989.

58. *Indiana.* Peck v. Michigan City, 149 Ind. 670, 49 N. E. 800.

Maine. Franklin Wharf Co. v. Portland, 67 Me. 46, 24 Am. Rep. 1.

Massachusetts. Brayton v. Fall River, 113 Mass. 218, 18 Am. Rep. 470; Haskell v. New Bedford, 108 Mass. 208.

New York. Sleight v. Kingston, 11 Hun (N. Y.), 594.

Pennsylvania. Butchers Ice & Coal Co. v. Philadelphia, 156 Pa. 54, 27 Atl. 376.

59. § 1446, *ante*, vol. 4.

60. Matheny v. Aiken, 68 S. C. 163, 47 S. E. 56.

61. *Alabama.* Birmingham v. Land, 137 Ala. 538, 34 So. 613; Birmingham v. Durham, 139 Ala. 662, 35 So. 1024.

California. Peterson v. Santa Rosa, 119 Cal. 387, 51 Pac. 557.

Connecticut. Waterbury v. Platt, 76 Conn. 435, 56 Atl. 856; Platt v. Waterbury, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335; Watson v. New

"the proprietor of land through which a stream flows cannot insist that water shall come to him in the *natural*

Milford, 72 Conn. 561, 45 Atl. 167; Nolan v. New Britain, 69 Conn. 668, 38 Atl. 703.

Illinois. Jacksonville v. Doan, 145 Ill. 23, 33 N. E. 878; Robb v. La Grange, 158 Ill. 21, 42 N. E. 77; Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388.

Iowa. Bennett v. Marion, 119 Ia. 473, 93 N. W. 558; Hollenbeck v. Marion, 116 Ia. 69, 89 N. W. 210.

Kentucky. See also Georgetown v. Kelly (Ky.), 123 S. W. 251.

Massachusetts. Compare, as to effect of statutes, Harrington v. Worcester, 186 Mass. 594, 72 N. E. 326; Morse v. Worcester, 139 Mass. 389, 2 N. E. 694.

Missouri. Smith v. Sedalia, 152 Mo. 283, 53 S. W. 907, 182 Mo. 1, 81 S. W. 165; Joplin Consol. Min. Co. v. Joplin, 124 Mo. 129, 27 S. W. 406; Kellogg v. Kirksville, 132 Mo. App. 519, 112 S. W. 296; Foncannon v. Kirksville, 88 Mo. App. 279.

Nebraska. Todd v. York (Neb. 1912), 92 N. W. 1040.

New Hampshire. Vale Mills v. Nashua, 63 N. H. 136.

New Jersey. Doremus v. Paterson, 63 N. J. Eq. 605, 52 Atl. 1107, 65 N. J. Eq. 711, 55 Atl. 304; Grey v. Paterson, 58 N. J. Eq. 1, 42 Atl. 749, 60 N. J. Eq. 385.

New York. Sammons v. Gloversville, 175 N. Y. 346, 67 N. E. 622; Hooker v. Rochester, 37 Hun, 181; Chapman v. Rochester, 110 N. Y. 273, 18 N. E. 88, 1 L. R. A. 296, 6 Am. St. Rep. 366; Lewatsch v. Kingston, 124 N. Y. S. 578, 68 Misc. Rep. 236.

Ohio. Mansfield v. Bristor, 76 Ohio St. 270, 81 N. E. 631, 10 L. R. A. (N. S.) 806. Compare Mansfield v. Balliett, 65 Ohio St. 451, 63 N. E. 86, 58 L. R. A. 628.

Oklahoma. Colbert v. Ardmore, 31 Okl. 537, 122 Pac. 508; Markwardt v. Guthrie, 18 Okl. 32, 90 Pac. 26, 9 L. R. A. (N. S.) 1150.

Pennsylvania. Good v. Altoona, 162 Pa. 493, 29 Atl. 741, 42 Am. St. Rep. 833.

Pollution. Is liable to the same extent as an individual for polluting the waters of a stream by depositing sewage therein. Little v. Lenoir, 151 N. C. 415, 66 S. E. 337.

In one case the city of Rochester, New York, constructed certain sewers, and through them, discharged, not only surface water, but the sewage from houses, and the contents from a large number of water closets, in Thomas Creek, above plaintiff's lands, so as to render its water unfit for use, and covered its banks with filthy and unwholesome sediment. "These and other facts," said the court, "well warranted the conclusion of the trial court that the act of the defendant in thus emptying its sewers constituted an offensive and dangerous nuisance. The filth of the city does not flow naturally to the lands of the plaintiff, as surface water finds its level, but is carried thither by artificial arrangements prepared by the city, and for which it is

pure state. He must submit, and that, too, without compensation, to the reasonable use of it by the upper propreitors; and he must submit to the natural wash and drainage coming from towns and cities."[62] And in some states a distinction between "pollution" and "harmful pollution" has been recognized.[63]

responsible. The case comes within the general rule which gives to a person injured by the pollution of air or water, to the use of which, in its natural condition, he is entitled, an action against the party, whether it be a natural person or a corporation who causes the pollution." Chapman v. Rochester, 110 N. Y. 273, 18 N. E. 88, 1 L. R. A. 296, 6 Am. St. Rep. 366.

"The pollution of the water by artificial drainage, which causes sewage to flow into a stream, spring, or well, whether done by a municipal corporation or an individual, constitutes a nuisance which entitles the owner to damages therefor; the rule being that a municipal corporation has no more right to injure the waters of a stream or the premises of an individual than a natural person." 1 Wood, Nuisances (3rd Ed.), §§ 427, 579.

Ultra vires act. But a city is not liable for the creation of a nuisance caused by operating a rock quarry outside of the city limits, causing the pollution of water to the damage of one living below the quarry, where the city has no power under its charter to operate such quarry. Duncan v. Lynchburg (Va.), 34 S. E. 964, 48 L. R. A. 331. But see Stoddard v. Saratoga Springs, 4 N. Y. S. 745, 52 Hun, 610, aff'd in 127 N. Y. 261, 27 N. E. 1030.

Estoppel to complain. Fact that plaintiff had made connections with the sewer, where required by ordinance affixing a penalty for failure to do so, does not bar an action, nor does mere acquiescence in the construction of the sewer. Donovan v. Royal, 26 Tex. Civ. App. 248, 63 S. W. 1054.

Nuisance a continuing one. A nuisance created by a municipality in discharging sewage into a stream is a continuing rather than a permanent one and a judgment at law is held to afford compensation only for the injury sustained at the time the judgment is rendered and subsequent actions may be maintained for a continuance of the nuisance. Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388.

Who may sue. A right of action against a municipal corporation for polluting the water of a stream with sewage is not confined to riparian owners but extends to other land owners near enough to the stream to be injuriously affected thereby. Schoen v. Kansas City, 65 Mo. App. 134.

62. Per Chief Justice Black in Joplin C. M. Co. v. Joplin, 124 Mo. 129, 135, 27 S. W. 406.

63. The pollution of a stream

The nuisance may also consist of (2) the pollution of the air by creating noxious *odors*,[64] or (3) the deposit of *filth on the banks* of the stream or pond.[65]

Some decisions holding municipalities liable for the harmful pollution of waters of a stream proceed on the theory that it constitutes a *taking of private property* which the legislature cannot authorize except upon just compensation to riparian owners injured thereby.[66]

A municipality cannot escape liability for a nuisance

may be entirely different from a harmful pollution of it. Pollution may consist of inconsiderable quantities of mineral substances. Doremus v. Paterson (N. J. Eq. 1908), 69 Atl. 225, valuable discussion of what is harmful pollution.

In Michigan, it would seem that the fact that sewage makes the water of a stream unfit for man or beast to drink is not such a pollution as warrants a recovery of damages. *Dicta* in Phillips v. Armada, 155 Mich. 260, 118 N. W. 941.

64. *Alabama.* Birmingham v. Land, 137 Ala. 538, 34 So. 613.

Illinois. Jacksonville v. Doan, 145 Ill. 23, 33 N. E. 878.

New York. Butler v. White Plains, 69 N. Y. S. 193, 59 App. Div. 30; Moody v. Saratoga Springs, 45 N. Y. S. 365, 17 App. Div. 207.

Oklahoma. Colbert v. Ardmore, 31 Okla. 537, 122 Pac. 508.

Pennsylvania. Owens v. Lancaster, 182 Pa. 257, 37 Atl. 858.

Wisconsin. Winchell v. Waukesha, 110 Wis. 101, 85 N. W. 668, 84 Am. St. Rep. 902.

65. Chapman v. Rochester, 110 N. Y. 273, 18 N. E. 88, 1 L. R. A. 296, 6 Am. St. Rep. 366; Owens v. Lancaster, 182 Pa. 257, 37 Atl. 858.

66. *Connecticut.* Nolan v. New Britain, 69 Conn. 668, 38 Atl. 703.

Mississippi. Thompson v. Winona, 96 Miss. 591, 596, 51 So. 129.

New Jersey. Grey ex rel. v. Paterson, 60 N. J. Eq. 385, 45 Atl. 995, 48 L. R. A. 717, 83 Am. St. Rep. 642.

New York. Huffmire v. Brooklyn, 162 N. Y. 584, 57 N. E. 176, 48 L. R. A. 421; Moody v. Saratoga Springs, 45 N. Y. S. 365, 17 App. Div. 207, aff'd in 163 N. Y. 581, 57 N. E. 1118; Sammons v. Gloversville, 70 N. Y. S. 284, 34 Misc. Rep. 459.

Ohio. Mansfield v. Balliett, 65 Ohio St. 451, 63 N. E. 86, 58 L. R. A. 628.

Texas. New Odorless Sewerage Co. v. Wisdom, 30 Tex. Civ. App. 224, 70 S. W. 354.

The fact that sewers are necessary and are required by statute to follow the natural course of drainage, does not justify the discharge of sewage to the damage of a riparian proprietor without just compensation. Smith v. Sedalia, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711.

created by it in discharging sewage into a stream on the plea that others also contributed to the nuisance,[67] unless the other person is the complaining party.[68] So it is no defense that the municipality might have condemned the land injured, where in fact it has not done so.[69] And the fact that sewage is discharged some distance from a watercourse is immaterial where it is deposited near a creek which flows into such watercourse, and down which the sewage is carried.[70]

The court cannot deduct from the damages a sum representing such injury as would have been inflicted by the city had it been entirely without sewers.[71]

§ 2707. Surface water.

Surface water must be distinguished from water flowing in a channel.[72] The rights and duties of a municipality are often different in the one case from the other, as already stated and as will be hereafter noticed. There is no duty to construct sewers to take care of surface water,[73] and it follows that ordinarily the failure to protect citizens from surface water is not actionable.[74] But

67. Watson v. New Milford, 72 Conn. 561, 45 Atl. 167; Morgan v. Danbury, 67 Conn. 484, 35 Atl. 499; Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388; Mansfield v. Hunt, 10 Ohio Cir. Dec. 567.

Apportionment of liability. Where the pollution of a stream is caused by both the municipality and others not acting in concert with the municipality, the municipality will be held liable only for the *quantum* of pollution caused by itself. Standard Bag & Paper Co. v. Cleveland. 25 Ohio Cir. Ct. R. 380.

68. Where person complaining of the pollution of a stream by a municipality, himself contributed thereto by placing obstructions in the stream, he cannot recover damages from the municipality. Jacksonville v. Doan, 145 Ill. 23. 33 N. E. 878, aff'g 48 Ill. App. 247.

69. Birmingham v. Land, 137 Ala. 538, 34 So. 613.

70. San Antonio v. Pizzini (Tex. Civ. App. 1900), 58 S. W. 635.

71. Doremus v. Paterson, 73 N. J. Eq. 474, 488, 69 Atl. 225.

72. § 2702, *ante*..

See § 2002, *ante*, vol. 4.

73. § 2691, *ante*.

74. A municipality is not liable for damages caused solely by the flooding of a cellar from the natural flow of water over a street during an excessive rainfall.

if sewers are constructed and damages result from negligence in their construction, or the failure to repair or remove obstructions,[75] or from the inadequacy of the sewer to take care of ordinary amounts of surface water,[76] the municipality is ordinarily liable.

§ 2708. Same—liability for injuries from public improvements.

It has been well said that as to "the old, yet ever new, question of the liability of a city or municipal corporation for damming up or otherwise obstructing the flow of surface water to the injury and damage of abutting property, especially where that property is below the established grade," there is "a *hopeless conflict in the cases.*"[77] In some states, however, where prevails the common law rule that as to surface water pure and simple there is no such thing as dominant and servient estates, it is pretty generally held that, inasmuch as surface water is a common enemy, a municipality, in making public improvements, is not liable, in the absence of negligence, where it obstructs or impedes the flow of surface water, thereby causing it to collect on abutting property, unless made so by constitutional provision or statute. In other states, where the civil law rule governs, the municipality is held liable.[78]

Punsky v. New York, 114 N. Y. S. 66, 129 App. Div. 558, 660.

§ 1442, *ante*, vol. 4.

75. § 2695, *ante*.

76. But as to this the authorities are conflicting. § 2694, *ante*.

77. Hume v. Des Moines, 146 Ia. 624, 628, 125 N. W. 846, 29 L. R. A. (N. S.) 126.

78. Bowman v. New Orleans, 27 La Ann. 501, statute reiterates rule.

The civil law rule is expressed in the Code of Napoleon, § 640, thus: "The owner of the lower ground is bound to receive from the higher ground the water which naturally flows down without the human hand contributing to its course. The owner of the lower ground is not permitted to make a dike to prevent such flowing. The owner of the higher ground can do nothing to aggravate the servitude or easement of the lower owner."

But in California an exception is made as to cities and towns, holding them not liable for casting surface water on adjacent

The differences between the so-called civil law rule and the so-called "common enemy" common law rule, have resulted in much confusion, and it is not at all clear in just what states the civil law rule of liability exists, so far as liability of municipalities is concerned.[79] This question is too large a one to be considered exhaustively in a treatise on municipal corporations. Back of it all are the variant rules governing surface waters in the particular state, without regard to municipalities, as to which reference should be made to standard works on the law of waters.[80] And furthermore, a careful study of the decisions in one's own state is necessary to determine the precise rule which governs in that particular state, there being more or less variations of the rule, in particular states, and at the same time more or less conflicting cases, oftentimes, in the same state in regard to surface waters.[81]

Suffice it to state, in this connection that, where there is no constitutional or statutory provision involved, and there is no negligence, and the water is not *cast in a body* on lands of another,[82] although the precise rule is difficult to ascertain in some states,[83] yet *the general rule*

lots in the construction of street or other improvements. "The doctrine of the civil law, in reference to a servitude in the lower tenement in favor of the upper or dominant tenement for the flow of surface water, has no application to lots held in cities and towns, where changes and alterations in the surface are essential to the enjoyment of such lots, and this rule has been very generally adopted in this country." Los Angeles Cem. Ass'n v. Los Angeles, 103 Cal. 461, 467, 37 Pac. 375; Corcoran v. Benicia, 96 Cal. 1, 30 Pac. 798, 31 Am. St. Rep. 171.

79. See Farnham, Waters and Water Rights, vol. 3, § 889.

80. Gould, Waters; Farnham, Waters and Water Courses.

81. See extensive note in 65 L. R. A. 271.

City not liable where it discharged surface water, by means of gutter openings, into a river, for damages resulting from the accelerated flow of the river because thereof, in time of violent storm. Prime v. Yonkers, 192 N. Y. 105, 84 N. E. 571, rev'g on other grounds 102 N. Y. S. 118, 116 App. Div. 699.

82. § 2002, *ante*, vol. 4; § 2711, *post*.

83. In Minnesota, it is held that it is the duty of a municipality to take care of accumulated

is that municipalities are not liable for *consequential injuries* from public improvements, causing surface water to flow upon adjacent private property or preventing it from flowing off such property.[84] Especially is

surface waters, caused by public improvements, if "reasonably practicable." O'Brien v. St. Paul, 25 Minn. 331, 33 Am. Rep. 470, followed in Schuett v. Stillwater, 80 Minn. 287, 83 N. W. 180.

In Alabama, in Eufaula v. Simmons, 86 Ala. 515, 6 So. 47, liability for consequential injuries was recognized. This case was approved in Arndt v. Cullman, 132 Ala. 540, 31 So. 478, 90 Am. St. Rep. 922.

Michigan, rule in, see Rice v. Flint, 67 Mich. 401, 34 N. W. 719; Defer v. Detroit, 67 Mich. 346, 34 N. W. 680; Morley v. Buchanan, 124 Mich. 128, 82 N. W. 802.

84. *California.* Corcoran v. Benicia, 96 Cal. 1, 30 Pac. 798, 31 Am. St. Rep. 171; Lampe v. San Francisco, 124 Cal. 546, 57 Pac. 461.

Connecticut. Salzman v. New Haven, 81 Conn. 389, 392, 71 Atl. 500; Downs v. Ansonia, 73 Conn. 33, 46 Atl. 243.

Delaware. Benson v. Wilmington, 9 Houst. (Del.) 359, 32 Atl. 1047; Clark v. Wilmington, 5 Har. (Del.) 243.

Georgia. See Phinizy v. Augusta, 47 Ga. 260; Roll v. Augusta, 34 Ga. 326. But see Maguire v. Cartersville, 76 Ga. 84.

Indiana. Valparaiso v. Spaeth, 166 Ind. 14, 20, 74 N. E. 518; Evansville v. Decker, 84 Ind. 325, 43 Am. Rep. 86; Stein v. Lafayette, 6 Ind. App. 414, 33 N. E. 912; Hirth v. Indianapolis, 18 Ind. App. 673, 48 N. E. 876.

Massachusetts. Daley v. Watertown, 192 Mass. 116, 78 N. E. 143 (must not cause unreasonable damage); Dickinson v. Worcester, 7 Allen (Mass.) 19; Flagg v. Worcester, 13 Gray (Mass.), 601.

Minnesota. See Henderson v. Minneapolis, 32 Minn. 319, 20 N. W. 322; O'Neill v. St. Paul, 104 Minn. 491, 116 N. W. 1114.

Mississippi. Chidsey v. Pascagoula (Mass. 1912), 59 So. 879.

Missouri. Payne v. Kansas City, St. J. & C. B. R. Co., 112 Mo. 6, 20 S. W. 322, 17 L. R. A. 628; Foster v. St. Louis, 71 Mo. 157, aff'g 4 Mo. App. 564; Rychlicki v. St. Louis, 98 Mo. 497, 11 S. W. 1001, 4 L. R. A. 594, 14 Am. St. Rep. 651; Stewart v. Clinton, 79 Mo. 603.

New Jersey. Bowlsby v. Speer, 31 N. J. L. 351, 86 Am. Dec. 216; Durkes v. Union, 38 N. J. L. 21; Miller v. Morristown, 47 N. J. Eq. 62, 20 Atl. 61.

New York. Wilson v. New York, 1 Denio, 595, 43 Am. Dec. 719; Lynch v. New York, 76 N. Y. 60, 32 Am. Rep. 271; Punsky v. New York, 114 N. Y. S. 66, 129 App. Div. 558; Jung v. New York, 116 N. Y. S. 368, 132 App. Div. 18.

Rhode Island. See Murray v. Allen, 20 R. I. 263, 38 Atl. 497; O'Donnell v. White, 24 R. I. 483, 53 Atl. 633; Wakefield v. Newell, 12 R. I. 75, 34 Am. Rep. 598.

this true, according to the general rule, where the grading of a street causes the abutting lands to be below the level of the street.[85] *A fortiori*, a municipality is not

Texas. Wallace v. Dallas, 2 Posey Unrep. Cas. (Tex.) 424.

Vermont. Chatfield v. Wilson, 28 Vt. 49.

West Virginia. Jordan v. Benwood, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859.

Wisconsin. Waters v. Bay View, 61 Wis. 642, 21 N. W. 811; Harp v. Baraboo, 101 Wis. 368, 77 N. W. 744; Pettigrew v. Evansville, 25 Wis. 223, 3 Am. Rep. 50; Hoyt v. Hudson, 27 Wis. 656, 9 Am. Rep. 473.

Gould, Waters (3rd Ed.), § 269, *et seq.*

Surface water. "A municipal corporation is entitled to exercise dominion over the public highways, and is not liable for so exercising this right as to change or divert the flow of surface water." Weis v. Madison, 75 Ind. 241, 39 Am. Rep. 135, 146.

Where abutter permitted to lay a drain pipe across a street, to drain his lands, city not liable where it destroys pipe in putting in a sewerage system in the street. Ivey Bros. v. Macon, 102 Ga. 141, 28 S. E. 151.

General rule not applicable where conduit laid to drain a large body of land mostly in private ownership. Westcott v. Boston, 186 Mass. 540, 542, 72 N. E. 89.

Public improvements, liability for consequential damages in general, § 1968, *ante*, vol. 4; surface water, § 2002, *ante*, vol. 4.

85. *Arkansas.* Little Rock v. Willis, 27 Ark. 572.

California. Corcoran v. Benicia, 96 Cal. 1, 30 Pac. 798, 31 Am. St. Rep. 171.

Delaware. Clark v. Wilmington, 5 Harr. (Del.) 243; Magarity v. Wilmington, 5 Houst. (Del.) 530.

District of Columbia. Herring v. District of Columbia, 3 Mackey (D. C.) 572.

Indiana. Weis v. Madison, 75 Ind. 241, 39 Am. Rep. 135.

Iowa. Creal v. Keokuk, 4 Greene (Ia.) 47.

Minnesota. Alden v. Minneapolis, 24 Minn. 254; Lee v. Minneapolis, 22 Minn. 13.

Missouri. Foster v. St. Louis, 4 Mo. App. 564, aff'd in 71 Mo. 157.

Nebraska. Kearney v. Themanson, 48 Neb. 74, 66 N. W. 996.

New Jersey. West Orange Tp. v. Field, 37 N. J. Eq. 600, 45 Am. Rep. 670.

New York. Lynch v. New York, 76 N. Y. 60, 32 Am. Rep. 271; Miles v. Brooklyn, 90 N. Y. S. 702, 98 App. Div. 195; Hentz v. Mount Vernon, 79 N. Y. S. 774, 78 App. Div. 515; Carll v. Northport, 42 N. Y. S. 576, 11 App. Div. 120.

Wisconsin. Champion v. Crandon, 84 Wis. 405, 54 N. W. 775, 19 L. R. A. 856.

"The collection of water on lots which are below the grades of new streets is inevitable, and, *excepting the case of a running stream*, the city would have no power, and it is not legally

liable to a property owner for the increased flow of surface water over or onto his property, arising wholly from the changes in the character of the surface produced by the opening of streets, building of houses, etc., in the *ordinary and regular course of the expansion of the municipality.*[86]

In *Illinois,* however, this general rule is not followed or is at least materially modified;[87] and the rule in

bound, to draw off the water. * * * The nuisance is not in the street, but on the lot and the remedy is by raising the lot to a level with the street, which the city is not bound to do." Corcoran v. Benicia, 96 Cal. 1, 30 Pac. 798, 31 Am. St. Rep. 171.

City liable for *unlawfully* raising grade of a street causing surface water to be cast upon abutting property. Addy v. Janesville, 70 Wis. 401, 35 N. W. 931.

86. Strauss v. Allentown, 215 Pa. 96, 63 Atl. 1073, 7 Am. & Eng. Ann. Cas. 686.

87. In Illinois, in 1866, it was held that "a city may elevate or depress its streets, as it thinks proper, but if, in so doing it turns a stream of mud and water upon the grounds and into the cellars of one of its citizens, or creates in his neighborhood a stagnant pond that brings disease upon his household," the city is liable. Nevins v. Peoria, 41 Ill. 502, 510, 89 Am. Dec. 392. This decision was approved in Aurora v. Gillett, 56 Ill. 132, 137. It was afterwards cited as authority for holding that where a city, through its proper officer, fixes the grade of a street, and property owners improve the street under the direction of the officer, and the improvement of the street is so made that water from rains and melting snows runs to and discharges itself over a lot owned by an individual, the city is liable for damages. Aurora v. Reed, 57 Ill. 29, 11 Am. Rep. 1. It was further followed in 1872 by holding that where a building was above grade so that the gutters carried off all the surface water, before the grade was changed, but thereafter the water ran over the sidewalk and into plaintiff's cellar, which might have been prevented by proper sewerage, the city was liable. Dixon v. Baker, 65 Ill. 518, 16 Am. Rep. 591. If a municipality, in grading a street, flows water on a lot, that did not naturally flow off, it is liable therefor. Bloomington v. Brokaw, 77 Ill. 194.

"If municipal corporations can raise the grade of streets at discretion and not provide suitable gutters to carry off the surface waters, and thus overflow the lands abutting upon the streets, with impunity, then the owner of lots in our towns and cities are entirely at the mercy of the authorities of the municipality." Dixon v. Baker, 65 Ill. 518, 16 Am. Rep. 591.

Iowa leans in favor of the property owner[88] by adopting what has been called the "modified common law rule" which also prevails in some other states.[89]

88. In Iowa, in a very recent decision, valuable for its thorough and learned discussion of the subject, it is held that a municipality, in bringing streets to an established grade, must exercise ordinary care and prudence, and if it "*unnecessarily* or negligently" fills ditches or drains in the street, and thus casts surface water back upon abutters, without giving abutters a reasonable time to bring their lots to grade, the municipality is liable, "not because of defective plans, but by reason of negligence in doing a purely ministerial act; that is, of bringing the streets to the established grade, and in so doing filling the ditches and drains for the escape of surface water, without providing an escape either temporary or permanent for the surface water." Per Chief Justice Deemer in Hume v. Des Moines, 146 Ia. 624, 645, 125 N. W. 846, 29 L. R. A. (N. S.) 126, reviewing Iowa cases at length.

89. The common law rule that surface water is a common enemy which every land owner may repel at pleasure and refuse to receive on his land has been modified in some jurisdiction by the application of the maxim *sic utere tuo ut alienum laedas*, and the right to throw surface water back upon higher ground it is held can not be exercised *unnecessarily or carelessly*. Hume v. Des Moines, 146 Ia. 624, 125 N. W. 846, 29 L. R. A. (N. S.) 126.

"This right in regard to surface water may not be exercised wantonly, unnecessarily, or carelessly but is modified by that golden maxim of the law that one must so use his own property as not to injure the rights of another. It must be a reasonable use of the land for its improvement or better enjoyment; and the right must be exercised in good faith, with no purpose to abridge or interfere with the rights of others, and with such care with respect to the property that may be affected by the use or improvement as not to inflict injury beyond what is necessary." Norfolk, etc. R. Co. v. Carter, 91 Va. 587, 592, 22 S. E. 517.

This "modified common law doctrine" has been applied to actions against municipal corporations for the damming back on private lands of surface waters by grading, guttering or otherwise improving streets or alleys. Hume v. Des Moines, 146 Ia. 624, 125 N. W. 846, 29 L. R. A. (N. S.) 126; Beatrice v. Leary, 45 Neb. 149, 63 N. W. 370, 50 Am. St. Rep. 546.

The fact that a city has acted under a grade ordinance in grading a street will not relieve it from liability if it destroys the natural drainage without providing adequate means for the escape of surface water. Wilber v. Fort Dodge, 120 Ia. 555, 95 N. W. 186; Morris v. Council Bluffs, 67 Ia. 343, 25 N. W. 274, 56 Am.

In accord with the general rule, it has been held that the arrangement of gutters and ditches, by a municipality, "in the course of grading and adjusting its streets, whereby the course of surface water is changed and its flow in certain directions or at a certain place increased, is not actionable." [90] So it is generally held, where the common law rule prevails, that a municipality is not liable for surface water which its work for the first time brings on plaintiff's lot from other premises, *i. e.,* if a municipality, in changing a grade or making other public improvements, causes water collecting on its streets, flowing therefrom merely as surface water (not collected in artificial channel), to go on adjoining land, it is not liable for damages.[91]

This general rule as to surface waters, however, has no application where the real cause of complaint is the failure of the municipality to repair, or keep free from obstructions, an existing sewer built, in part, to carry off surface waters.[92] So it is held in at least one state that a municipality is liable where it injures property, in making public improvements, by obstructing the flow of surface water which has formed for itself a definite

Rep. 343; Ellis v. Iowa City, 29 Ia. 229.

90. Harp v. Baraboo, 101 Wis. 368, 77 N. W. 744, reviewing Wisconsin decisions at length.

91. Jordan v. Benwood, 42 W. Va. 312, 316-319, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859.

92. Where water accumulating on the street by reason of obstruction to the catch basins of sewers, overflows and damages private property, the rule that surface water is a common enemy which everyone may fight off his own premises, has no application, since the property owner had a right to assume that sewers built at the expense of the property owner for the purpose, among others, of conveying off such surface water, would be properly maintained. Woods v. Kansas City, 58 Mo. App. 272, 279.

Obstruction of gutters with wagon loads of stones is actionable; the rule that surface water may be turned upon the servient land without liability having no application. McInery v. St. Joseph, 45 Mo. App. 296.

Where a village gutter carrying off surface water from plaintiff's property is destroyed in changing a street grade, resulting in precipitating the waters against plaintiff's building, the village is liable. Morley v. Buchanan, 124 Mich. 128, 82 N. W. 802.

channel in which it is accustomed to flow, although not within the definition of a water course.[93]

§ 2709. Same—liability under statute or constitutional provision.

If the constitution or a statute so provides, a recovery may be had for injuries resulting from surface waters, as where a recovery of damages is provided for in case of consequential damages caused by public improvements.[94] Whether causing surface water to go upon private lands, because of grading the street or other public improvements, is a *taking* or *damaging* for public use, so as to authorize the recovery of damages under constitutional and statutory provisions, is the subject of some conflict in the decisions. In some states, such an injury is within such provisions so as to authorize a recovery, on the ground that there is a "*taking*,"[95] or at

93. Conniff v. San Francisco, 67 Cal. 45, 7 Pac. 41; Los Angeles Ass'n v. Los Angeles, 103 Cal. 461, 37 Pac. 375.

"There is in some of the books an apparent exception to the general rule in that class of cases where the surface water owing to the conformation of the country, has found for itself a definite channel in which it is accustomed to flow, in which class of cases it is said that the municipal corporation, in making an embankment while grading its streets, should erect a culvert or water way so as not to obstruct the flow of the surface waters in their well defined channel, but the case under discussion is not one of that class." Lampe v. San Francisco, 124 Cal. 546, 57 Pac. 461.

But where grading dammed a well defined channel through which surface water was wont to flow, and backed the water upon plaintiff's land, the city was held not liable, where the grade was eight feet above the official grade due to the acts of officers in their governmental capacity. Sievers v. San Francisco, 115 Cal. 648, 47 Pac. 687, 56 Am. St. Rep. 153.

94. Albany v. Sikes, 94 Ga. 30, 20 S. E. 257.

95. Nevins v. Peoria, 41 Ill. 502, 508, 89 Am. Dec. 392; Inman v. Tripp, 11 R. I. 520, 23 Am. Rep. 520, and see Lewis, Eminent Domain (3d ed.), § 141.

An interference by a municipal corporation with the natural drainage of property is an unconstitutional taking. Philadelphia's Appeal, 191 Pa. 604, 43 Atl. 365; Cooper v. Scranton, 21 Pa. Super. Ct. 17, 21.

Flooding private lands is a taking of such lands without compensation for which municipality will be liable in damages. Reeves v. Wood County, 8 Ohio St. 333,

least within provisions expressly requiring municipalities to make just compensation for injuries resulting from the construction of public improvements;[96] and in such a case damages can be recovered only in the manner provided by statute and not in an action of tort.[97]

§ 2710. Same—liability in case of "negligence."

If a municipality is *negligent* in the construction or improvement of its streets, thereby causing injury from surface waters, the municipality is undoubtedly liable.[98] As to just when a public improvement, such as grading a street, is negligently done, no rule can be laid down, although in some states the courts seem inclined to evade the rule of non-liability by ascribing the injury to negligence whenever there is a shadow of a reason for declaring the municipality negligent.

§ 2711. Same—collecting surface water and casting it in body on private land.

One rule in regard to surface waters may be said to be well settled. It is an exception to the general rule of non-liability, in that municipalities are held liable where they collect surface water by an artificial channel,

346; Inman v. Tripp, 11 R. I. 520, 23 Am. Rep. 520; Winn v. Rutland, 52 Vt. 481.

96. Avondale v. McFarland, 101 Ala. 381, 13 So. 504; Hoffman v. Muscatine, 113 Ia. 332, 85 N. W. 17; Mount Sterling v. Jephson, 21 Ky. L. Rep. 1028, 53 S. W. 1046.

97. § 1997, *ante*, vol. 4.

Where statutes provide for the payment of consequential damages resulting from street, sewer or other improvements lawfully made by the municipality such remedy is exclusive and no action in tort will lie. Boston Belting Co. v. Boston, 149 Mass. 44, 20 N. E. 320; Heiser v. New York, 104 N. Y. 68, 9 N. E. 866; Power v. Ridgway Boro., 149 Pa. St. 317, 24 Atl. 307; Beltzhoover v. Gollings, 101 Pa. St. 293; Benton v. Milwaukee, 50 Wis. 368, 7 N. W. 241.

98. Lewis v. Springfield, 142 Mo. App. 84, 125 S. W. 824; Powell v. Wytheville, 95 Va. 73, 27 S E. 805; Smith v. Alexandria, 33 Gratt (Va.), 208, 215, 36 Am. Rep. 788.

Damming of gutters along streets by embankments, in grading streets, without providing egress for water that anyone would know would collect there, is negligence. North Judson v. Lightcaf, 41 Ind. App. 565, 569, 84 N. E. 519.

or in large quantities, and pour it, in a body, upon the land of a private person, to his injury.[99]

99. *California.* Shaw v. Sebastapool, 159 Cal. 623, 624, 115 Pac. 213; Larrabee v. Cloverdale, 131 Cal. 96, 63 Pac. 143; Stanford v. San Francisco, 111 Cal. 198, 43 Pac. 605; Conniff v. San Francisco, 67 Cal. 45, 7 Pac. 41.

Connecticut. Danbury, etc. R. Co. v. Norwalk, 37 Conn. 109.

Georgia. Maguire v. Cartersville, 76 Ga. 84.

Illinois. Elgin v. Kimball, 90 Ill. 356; Shawneetown v. Mason, 82 Ill. 337, 25 Am. Rep. 321; Aurora v. Reed, 57 Ill. 29, 11 Am. Rep. 1; Effingham v. Surrells, 77 Ill. App. 460; Nevins v. Peoria, 41 Ill. 502, 89 Am. Dec. 392.

Indiana. North Vernon v. Voegler, 89 Ind. 77; Weis v. Madison, 75 Ind. 241, 39 Am. Rep. 135; Rice v. Evansville, 108 Ind. 7, 9 N. E. 139; Sullivan v. Phillips, 110 Ind. 320, 11 N. E. 300; Crawfordsville v. Bond, 96 Ind. 236; Valparaiso v. Spaeth, 166 Ind. 14, 21, 76 N. E. 518; Patoka Tp. v. Hopkins, 131 Ind. 142, 30 N. E. 896, 31 Am. St. Rep. 361; Davis v. Crawfordsville, 119 Ind. 1, 21 N. E. 449, 12 Am. St. Rep. 361; Thorntown v. Fugate, 21 Ind. App. 537, 52 N. E. 763; New Albany v. Ray, 3 Ind. App. 321, 29 N. E. 611; New Albany v. Lines, 21 Ind. App. 380, 51 N. E. 346; Lebanon v. Twiford, 13 Ind. App. 384, 41 N. E. 844; Cromer v. Logansport, 38 Ind. App. 661, 78 N. E. 1045.

Iowa. Hume v. Des Moines, 146 Ia. 624, 125 N. W. 846, 29 L. R. A. (N. S.) 126.

Kansas. King v. Kansas City, 58 Kan. 334, 49 Pac. 88.

Maryland. Hitchins v. Frostburg, 68 Md. 100, 11 Atl. 826, 6 Am. St. Rep. 422.

Massachusetts. Manning v. Lowell, 130 Mass. 21.

Michigan. McAskill v. Hancock Tp., 129 Mich. 74, 88 N. W. 78, 55 L. R. A. 738; Rice v. Flint City, 67 Mich. 401, 34 N. W. 719; Ashley v. Port Huron, 35 Mich. 296, 24 Am. Rep. 552.

Minnesota. Robbins v. Willmar, 71 Minn. 403, 73 N. W. 1097; Follmann v. Mankato, 45 Minn. 457, 48 N. W. 192; Pye v. Mankato, 36 Minn. 373, 31 N. W. 863, 1 Am. St. Rep. 671; Boye v. Albert Lea, 74 Minn. 230, 76 N. W. 1131; Kobs v. Minneapolis, 22 Minn. 159; Follman v. Mankato, 45 Minn. 457, 48 N. W. 192; O'Brien v. St. Paul, 25 Minn. 331, 33 Am. Rep. 470.

Missouri. Cannon v. St. Joseph, 67 Mo. App. 367; Sandy v. St. Joseph, 142 Mo. App. 330, 126 S. W. 989; Payne v. Kansas City, etc. R. Co., 112 Mo. 6, 20 S. W. 322, 17 L. R. A. 628; Rychlicki v. St. Louis, 98 Mo. 497, 11 S. W. 1001, 4 L. R. A. 594, 14 Am. St. Rep. 651.

Nebraska. Andrews v. Steele City, 2 Neb. (Unoff.) 676, 89 N. W. 739.

New Hampshire. Flanders v. Franklin, 70 N. H. 168, 47 Atl. 88.

New Jersey. Soule v. Passaic, 47 N. J. Eq. 28, 20 Atl. 346; West Orange Tp. v. Field, 37 N. J. Eq. 600, 45 Am. Rep. 670; Miller v. Morristown, 47 N. J. Eq. 62, 20 Atl. 61.

New York. Prime v. Yonkers, 192 N. Y. 105, 110, 84 N. E. 571;

The rule exempting municipal corporations from liability for consequential damages for grading its streets

Byrnes v. Cohoes, 67 N. Y. 204; Seifert v. Brooklyn, 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664; Anchor Brewing Co. v. Dobbs Ferry, 32 N. Y. S. 371, 84 Hun, 274; Clark v. Rochester, 43 Hun, 271.

Oklahoma. Chickasha v. Looney (Okla. 1912), 128 Pac. 136; Norman v. Ince, 8 Okla. 412, 58 Pac. 632.

Pennsylvania. Elliott v. Oil City, 129 Pa. 570, 18 Atl. 553; Bohan v. Avoca, 154 Pa. 404, 26 Atl. 604.

Tennessee. Burton v. Chattanooga, 75 Tenn. 739.

Texas. Houston v. Bryan, 2 Tex. Civ. App. 553, 22 S. W. 231.

Virginia. Chalkley v. Richmond, 88 Va. 402, 14 S. E. 339, 29 Am. St. Rep. 730.

West Virginia. McHenry v. Parkersburg, 66 W. Va. 533, 66 S. E. 750 (may recover temporary but not permanent damages; Gillison v. Charleston, 16 W. Va. 282, 37 Am. Rep. 763; Jordan v. Benwood, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859; Clay v. St. Albans, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883.

Throwing surface water in body on land. "It is the undoubted right of a municipal corporation to grade its streets or change the grade when it deems it necessary so to do and property owners have no ground of complaint, even though the consequence be that surface water is thrown upon the land, or caused to flow thereon, in larger quantity than formerly, or is prevented from flowing therefrom, and is ponded thereon. But no right exists to collect a material body of water by diverting it from from its natural flow, or by other means gather it together and when thus collected, conduct it by any artificial channel and discharge it in a body upon private property." Carll v. Northport, 42 N. Y. S. 576, 577, 11 App. Div. 120.

"Cities and towns have no greater rights than individuals to collect in artificial channels upon their streets and highways mere surface waters, distributed in rain and snow over large districts, and precipitate it upon the premises of a private owner, or construct ditches upon private lands for public use, without compensation." Field v. West Orange Tp., 36 N. J Eq. 118.

The same rule applies to the collection of surface water of a street "into a catch basin and the simultaneous elevation of the street grade so as to cause the contents of the catch basin to flood the plaintiff's property." Miles v. Brooklyn, 90 N. Y. S. 702, 98 App. Div. 195.

So where paving causes large quantity of water to accumulate at one end of a street, and it broke over the curbing and ran into plaintiff's basement, the city is liable. Stanford v. San Francisco, 111 Cal. 198, 43 Pac. 605.

However, a private owner cannot recover from the municipality for the overflowing of street gut-

does not relieve it from liability for damages caused by its act in turning water on adjacent lands in a body,[1] and the municipality is liable whether or not the work was negligently done,[2] the municipality being liable in this respect the same as private persons.[3]

This rule has been applied where, in constructing a street, surface water was collected in holes left in the street opposite an abutting lot, and the water flowed under the soil which was soft and porous, causing the soil to slip and destroy the buildings thereon.[4]

Furthermore, the rule that a municipal corporation is not liable for an omission to supply drainage or sewerage does not apply in such a case, because the necessity for the drainage or outlet is due to the act of the corporation itself in causing surface water to run on private land.[5]

7. NOTICE OF THE "ACCIDENT."

§ 2712. Scope of subdivision.

It is not within the scope of this work to review the decisions, based on statutes or charter provisions, differing more or less in phraseology, as to the necessity for, and sufficiency of, a notice of injury which some statutes or charter provisions require before bringing

ters onto his land in the absence of a showing that the water would not have come upon his land to the same extent if there had been no street there. Collins v. Waltham, 151 Mass. 196, 24 N. E. 327.

Where the damage is due partly to the fact that the property is on a lower level than the street the municipality is not liable. Weis v. Madison, 75 Ind. 241, 39 Am. Rep. 135.

In South Carolina, however, it seems that that is no municipal liability unless the injury was due to the negligence or mismanagement of the municipality, as required by the statute. Mayrant v. Columbia, 82 S. C. 273, 376, 64 S E. 416.

1. §§ 1968, 2002, *ante*, vol. 4.

2. Eufaula v. Simmons, 86 Ala. 515, 6 So. 47; Arndt v. Cullman, 132 Ala. 540, 31 So. 478, 90 Am. St. Rep. 922; Jasper v. Barton (Ala. 1912), 56 So. 42; Houston v. Richardson, 42 Tex. Civ. App. 147, 149, 94 S. W. 454.

3. Arndt v. Cullman, 132 Ala. 540, 31 So. 478, 90 Am. St. Rep. 922.

4. Kunst v. Grafton, 67 W. Va. 20, 24, 67 S. E. 74, 26 L. R. A. (N. S.) 1201.

5. Byrnes v. Cohoes, 67 N. Y. 204.

suit. The particular provisions of the controlling statute should be carefully studied, to determine (1) whether a notice is necessary, (2) what it must contain, and (3) how and when it shall be served. Without attempting to give a complete citation of authorities, suffice it to refer to a few general rules on the subject.

§ 2713. Notice of defect distinguished from notice of accident.

It is necessary to keep in mind that *notice of the defect before the accident* is one thing, and *notice of the accident* is another and entirely different thing.[6]

§ 2714. Statutory and charter provisions.

In the absence of a statute or charter provision so requiring, no notice of the accident need be given the municipality before suit is brought to recover damages for the injuries.[7] However, such a requirement is generally found in the statutes or charter,[8] and such provi-

6. Notice of defect, in case of defective streets, §§ 2807-2818, *post*.

7. Galesburg v. Benedict, 22 Ill. App. 111; Green v. Spencer, 67 Ia. 410, 25 N. W. 681.

8. *Florida.* High v. Jacksonville, 51 Fla. 207, 40 So. 1032.

Iowa. Harvey v. Clarinda, 111 Ia. 528, 82 N. W. 994; Kennedy v. Des Moines, 84 Ia. 187, 50 N. W. 880.

Massachusetts. D'Amico v. Boston, 176 Mass. 599, 58 N. E. 158; Shallow v. Salem, 136 Mass. 136.

Michigan. Broffee v. Grand Rapids, 127 Mich. 89, 86 N. W. 401; Angell v. West Bay City, 117 Mich. 685, 76 N. W. 128.

Minnesota. Nicol v. St. Paul, 80 Minn. 415, 83 N. W. 375; Moran v. St. Paul, 54 Minn. 279, 56 N. W. 80; Ray v. St. Paul, 44 Minn. 340, 46 N. W. 675; Nichols v. Minneapolis, 30 Minn. 545, 16 N. W. 410.

New York. McIntee v. Middletown, 81 N. Y. S. 124, 80 App. Div. 434; De Vore v. Auburn, 64 App. Div. 84, 71 N. Y. S. 747.

Rhode Island. Fugere v. Cook, 27 R. I. 134, 60 Atl. 1067.

Washington. Short v. Spokane, 41 Wash. 257, 83 Pac. 183; Mulligan v. Seattle, 42 Wash. 264, 84 Pac. 721.

Wisconsin. Harris v. Fond du Lac, 104 Wis. 44, 80 N. W. 66; Ziegler v. West Bend, 102 Wis. 17, 78 N. W. 164; Daniels v. Racine, 98 Wis. 649, 74 N. W. 553; Gutkind v. Elroy, 97 Wis. 649, 73 N. W. 325; Hughes v. Fond du Lac, 73 Wis. 380, 41 N. W. 407; Reed v. Madison, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733; Plum v. Fond du Lac, 51 Wis. 393, 8 N. W. 283.

sions construed as mandatory [9] and a condition precedent to the right to sue,[10] are universally upheld,[11] and the general rule is that even the municipality itself cannot *waive* a compliance with such a requirement,[12] although as to the latter the authorities are conflicting.[13]

See Warren v. Davis, 43 Ohio St. 447, 3 N. E. 301.

Bridges, statute applies to. Sachs v. Sioux City, 109 Ia. 224, 80 N. W. 336.

Construction. Provisions should receive a reasonably strict construction. Tattan v. Detroit, 128 Mich. 650, 87 N. W. 894.

9. Starling v. Bedford, 94 Ia. 194, 62 N. W. 674; Trost v. Casselton, 8 N. D. 534, 79 N. W. 1071.

10. *Massachusetts.* Mitchell v. Worcester, 129 Mass. 525.

Nebraska. Schmidt v. Fremont, 70 Neb. 577, 97 N. W. 830.

New York. Forseyth v. Oswego, 95 N. Y. S. 33, 107 App. Div. 187.

Texas. Ft. Worth v. Shero, 16 Tex. Civ. App. 487, 41 S. W. 704; Luke v. El Paso (Tex. Civ. App.), 60 S. W. 363.

Wisconsin. Hay v. Baraboo, 127 Wis. 1, 105 N. W. 654, 3 L. R. A. (N. S.) 84, 115 Am. St. Rep. 977.

"The statute (section 1275) makes filing the claim a prerequisite to recovery in any suit for personal injuries, and virtually the right to sue without first filing the claim in the manner provided is taken away by the statute." New Decatur v. Chappell (Ala. 1911), 56 So. 764.

11. Van Vranken v. Schenectady, 31 Hun (N. Y.), 516; Hay v. Baraboo, 127 Wis. 1, 105 N. W. 654, 3 L. R. A. (N. S.) 84, 115 Am. St. Rep. 977.

Requiring notice of injury not class legislation. Tonn v. Helena, 42 Mont. 127, 111 Pac. 715.

12. Blair v. Ft. Wayne (Ind. App. 1912), 98 N. E. 736; Walters v. Ottawa, 240 Ill. 259, 88 N. E. 651; Starling v. Bedford, 94 Ia. 194, 62 N. W. 674.

13. See Sharp v. Manston, 92 Wis. 629, 66 N. W. 803, and local digests.

"On the question as to whether or not a city can waive the provisions of a statute requiring notice before suit can be maintained, the authorities are in irreconcilable conflict." New Decatur v. Chappell (Ala. 1911), 56 So. 764.

"The governing board of a municipality is charged with the duty of acting for the corporation, and when, acting in the line and scope of their authority, they take final action on the matter they in effect announce that they require no further notice; and the statute having been enacted for the benefit of the corporation represented by them, and the purposes and ultimate end in view by the enactment having been accomplished, a waiver of its benefits would seem to follow as a natural consequence of the act." New Decatur v. Chappell (Ala. 1911), 56 So. 764.

"We therefore hold that a compliance with the reasonable terms of the charter provision can not be waived by statements or acts of any officer or employee of the

In some states, the statute is not applicable where the plaintiff is a servant of the municipality.[14] And, generally, these statutes do not apply where the person injured dies, and a suit is brought by the personal representatives to recover damages for death by wrongful act.[15]

Generally, statutes requiring "claims" to be presented before suit brought apply only to those based on contract.[16]

§ 2715. Same—object and purpose.

Such requirements are enacted in furtherance of a public policy, and their *object and purpose* is to protect the municipality from the expense of needless litigation, give it an opportunity for investigation, and allow it to adjust differences and settle claims without suit.[17] It therefore follows that if the person injured or his representatives remove the alleged defective condition and

city other than the city council, and that to establish a waiver by the council some affirmative cognizance of the claim other than rejection by the council must be pleaded and proved." Cole v. Seattle (Wash. 1911), 116 Pac. 257, 34 L. R. A. (N. S.) 1166.

Mayor can not waive. Veazie v. Rockland, 68 Me. 511.

14. Quackenbush v. Slayton (Minn. 1913), 139 N. W. 716; Gaughan v. St. Paul (Minn. 1912), 137 N. W. 199.

15. Nesbit v. Topeka, 87 Kan. 394, 124 Pac. 166; Orth v. Belgrade, 87 Minn. 237, 91 N. W. 843; Senecal v. West St. Paul, 111 Minn. 253, 126 N. W. 826; Brown v. Salt Lake City (Utah), 93 Pac. 570.

16. § 2465, p. 5126, *ante*, vol. 5.

Statutes requiring any "claim or demand" to be presented to the council before suing thereon does not apply to claims for injuries from defective streets. Jung v. Stevens Point, 74 Wis. 547, 43 N. W. 513; Sommers v. Marshfield, 90 Wis. 59, 62 N. W. 937.

17. New Decatur v. Chappell (Ala. 1911), 56 So. 764.

"The purpose of the statute, requiring notice of claims for damages against a municipality for personal injuries sustained by reason of defects in a public street to be given to the municipality within 30 days after the injury, is to enable the authorities to make timely investigation into the time, place, and circumstances of the accident, to the end that the claim may be settled, if found to be a valid one, or, if not, then intelligently to answer and defend any action brought to enforce the claim." Wornecka v. St. Paul (Minn. 1912), 136 N. W. 561.

substitute something safe, before serving the notice, the notice is of no effect, since no investigation could then be made of the condition causing the accident.[18]

§ 2716. Same—excuses for failure to give notice.

Mental or physical incapacity to give the notice required by statute or charter provision is generally a good excuse,[19] but in such a case the claim must be filed within a reasonable time after the removal of the incapacity.[20]

§ 2717. Same—time for filing notice.

The notice must be served within the time fixed by the statute or charter provision.[21]

§ 2718. Same—sufficiency of notice.

Generally, the notice must set forth the time, place, cause, and character of the injuries sustained. But a substantial compliance with the statute is all that is required,[22] and the notice need not be drawn with the technical nicety necessary in pleading.[23]

18. "It logically follows that, if the plaintiff by her agent wilfully removed the defective plank and put in its place a new one before serving the required notice, whereby the purpose of the statute was defeated and the defendant deprived of the benefit and protection thereof, a notice served after such changes, although it complied with the letter of the statute as to substance and time of service, is not a good-faith compliance with the statute, and she is not entitled to recover." Wornecka v. St. Paul (Minn. 1912), 136 N. W. 561.

19. Stoliker v. Boston, 204 Mass. 522, 90 N. E. 927; Terrell v. Washington, 158 N. C. 281, 73 S. E. 288, and see digests.

Contra, Ellis v. Kearney, 80 Neb. 51, 113 N. W. 803.

20. Forsyth v. Oswego, 191 N. Y. 441, 84 N. E. 392.

21. In Illinois, notice filed after commencement of action by filing of praecipe and service of summons, is a nullity. Langguth v. Glencoe, 253 Ill. 505, 97 N. E. 1052.

In Alabama, under statute requiring that claims for torts shall be "presented" within six months, the commencement of suit is a sufficient presentation. Anderson v. Birmingham (Ala. 1912), 58 So. 256.

Infancy does not suspend running of time. Winter v. Niagara Falls, 190 N. Y. 198, 82 N. E. 1101.

22. Smith v. Elberton, 5 Ga. App. 286, and see local digests.

23. Smith v. Elberton, 5 Ga. App. 286.

Waiver. Defects in claim as presented may be waived. Bowman v. Ogden City, 33 Utah, 341, 93 Pac. 561.

Carbon copy, filing of held sufficient. Scheer v. Perry, 103 N. Y. S. 1048, 119 App. Div. 606.

CHAPTER 54.

MUNICIPAL LIABILITY FOR DEFECTIVE STREETS.

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3. Particular parts of streets to which liability extends.
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7. Duty to guard and warn against danger.
8. Notice of defects.
9. Contributory negligence.
10. Proximate cause.
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2757. Children.
2758. Automobilists.
2759. Bicycle and tricycle riders.
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11. NOTICE OF ACCIDENT.

Secs.
2855. In general.

1. GENERAL RULES.

§ 2719. Liability in general.

As mentioned in a prior volume, during the early periods of English history highways were laid out and constructed directly by the government. The government assumed the immediate and sole management of them, and this was recognized as an essential governmental function. In this country the control of highways is primarily a state duty. They are everywhere maintained for the use of the public at large.[1] The construction, maintenance and repair, and almost exclusive control of highways, has been delegated by the state to its municipal corporations, and ordinarily they are invested with adequate power to perform properly such duties;[2] and municipal corporations proper are liable, at common law, for injuries resulting from their negligence in regard to the construction and care of streets, in most states,[3] although the contrary rule prevails in the New England states and a few others.[4] However, statutes now impose liability in most of the latter class of states,[5] although in a few states there is no liability of any kind for defective streets.[6]

But a distinction is drawn between the liability of municipal corporations and that of *quasi*-municipal corporations. The latter, such as counties, towns, and the like, are held not liable, at common law, for injuries resulting from defective highways, even in those states which hold that there is a

1. § 227, *ante*, vol. 1.
2. § 228, *ante*, vol. 1.
3. § 2720, *post*.
4. § 2721, *post*.
5. § 2722, *post*.
6. § 2723, *post*.

common law liability imposed on municipal corporations proper, with a few exceptions. The reason for the distinction between municipal corporations and *quasi*-municipal corporations, in this respect, has never been satisfactorily explained.[7] However, even as to such *quasi*-corporations, liability is now generally imposed by statute on counties and towns.

§ 2720. Same—general rule applicable to cities, villages and incorporated municipalities.

Usually cities, villages and other incorporated municipalities, have conferred upon them extensive powers in the management of their highways, streets, bridges, alleys and sidewalks, and adequate means to keep them in a reasonably safe condition for use in the usual mode by travelers; and hence, in most states, independent of statute, they are held liable to private action for special injuries resulting from defects or obstructions in the streets or sidewalks.[8] The liability exists

7. What are *quasi*-municipalities, § 111, *et seq.*, *ante*, vol. 1.

New England town contrasted with municipal corporation, § 115, *ante*, vol. 1.

In Maryland and Pennsylvania towns are liable, at common law, and also to a very limited extent in Iowa.

8. *Alabama.* Birmingham v. Gordon, 167 Ala. 334, 52 So. 430; Albrittin v. Huntsville, 60 Ala. 486, 31 Am. Rep. 46; Smoot v. Wetumpka, 24 Ala. 112.

Alaska. Krause v. Juneau, 2 Alaska, 633.

Colorado. Boulder v. Niles, 9 Colo. 415, 12 Pac. 632; Denver v. Dunsmore, 7 Colo. 328, 3 Pac. 705.

Delaware. Anderson v. Wilmington, 6 Penew (Del.), 485, 70 Atl. 204; Seward v. Wilmington, 2 Marv. (Del.) 189, 42 Atl. 451.

Florida. Tallahassee v. Fortune, 3 Fla. 19, 52 Am. Dec. 538.

Georgia. Greensboro v. McGibbony, 93 Ga. 672, 20 S. E. 37 (bridge); Parker v. Macon, 39 Ga. 725, 99 Am. Dec. 486; Cedartown v. Brooks, 2 Ga. App. 583, 59 S. E. 836.

Idaho. Moreton v. St. Anthony, 9 Idaho, 532, 75 Pac. 262.

Illinois. Sterling v. Thomas, 60 Ill. 264; Springfield v. LeClaire, 49 Ill. 476; Browning v. Springfield, 17 Ill. 143, 63 Am. Dec. 345; Decatur v. Hamilton, 89 Ill. App. 561.

Indiana. Newcastle v. Grubbs, 171 Ind. 482, 86 N. E. 757; Shreve v. Ft. Wayne (Ind. 1911), 96 N. E. 7; Boswell v. Wakley, 149 Ind. 64, 48 N. E. 637; Indianapolis v. Doherty, 71 Ind. 5; Indianapolis v. Shoenig (Ind. App. 1911), 95 N. E. 324; Evansville v. Frazer, 24 Ind. App. 628, 56 N. E. 729 (defense that, under statute, city lacked power to make repairs).

Iowa. Lamb v. Cedar Rapids, 108 Ia. 629, 79 N. W. 366; Collins v. Council Bluffs, 32 Ia. 324, 327, 7 Am. Rep. 200.

Kansas. Eudora v. Miller, 30 Kan. 494, 2 Pac. 685; Ft. Scott v. Brothers, 20 Kan. 455; Jansen v. Atchison, 16 Kan. 358.

Kentucky. Louisville v. Arrowsmith, 145 Ky. 498, 140 S. W. 1022; Covington v. Bollwinkle (Ky.), 121 S. W. 664.

Louisiana. McCormack v. Robin, 126 La. 594, 52 So. 779; Aucoin v. New Orleans, 105 La. 271, 29 So. 502; Cline v. Crescent City R. Co., 41 La. Ann. 1031, 6 So. 851.

Maryland. Havre De Grace v. Fletcher, 112 Md. 562, 77 Atl. 114 (in which it is said: "There is no difference between the liability of a municipal corporation, with such a charter as the defendant has, and that of an individual,"). Anne Arundel County Com'rs v. Duckett, 20 Md. 468.

Minnesota. Young v. Waterville, 39

regardless of the size of the municipality, and applies even though the population is only a few hundred.[9] However, there

Minn. 196, 39 N. W. 97; Kellogg v. Janesville, 34 Minn. 132, 24 N. W. 359; Shartle v. Minneapolis, 17 Minn. 308.

Missouri. Carthage v. Garner, 209 Mo. 688, 108 S. W. 521; Warren v. Independence, 153 Mo. 593, 55 S. W. 227; Vogelgesang v. St. Louis, 139 Mo. 127, 40 S. W. 653; Franke v. St. Louis, 110 Mo. 516, 19 S. W. 938; Bowie v. Kansas City, 51 Mo. 454; Smith v. St. Joseph, 45 Mo. 449; Turner v. Southwest Missouri R. Co., 138 Mo. App. 143, 120 S. W. 128.

Montana. May v. Anaconda, 26 Mont. 140, 66 Pac. 759; Snook v. Anaconda, 26 Mont. 128, 66 Pac. 756.

Nebraska. Goodrich v. University Place, 80 Neb. 774, 115 N. W. 538 (reviewing and explaining, at length, earlier cases, including Goddard v. Lincoln, 69 Neb. 594, 96 N. W. 273); Lincoln v. O'Brien, 56 Neb. 761, 77 N. W. 76; Omaha v. Olmstead, 5 Neb. 446.

Nevada. See Barnes v. Carson (Nev. 1910), 110 Pac. 3; McDonough v. Virginia City, 6 Nev. 90.

New York. Pomfrey v. Saratoga Springs, 104 N. Y. 459, 11 N. E. 43 (same rule applies to incorporated villages as to cities). Hines v. Lockport, 50 N. Y. 236; Requa v. Rochester, 45 N. Y. 129, 6 Am. Rep. 52; Davenport v. Ruckman, 37 N. Y. 568; Barton v. Syracuse, 36 N. Y. 54; Conrad v. Ithaca, 16 N. Y. 158; Hutson v. New York, 9 N. Y. 163, 59 Am. Dec. 526.

North Carolina. Neal v. Marion, 129 N. C. 345, 40 S. E. 116; Meares v. Wilmington, 9 Ired. (31 N. C.) 73, 49 Am. Dec. 412.

North Dakota. Ludlow v. Fargo, 3 N. D. 485, 57 N. W. 506.

Ohio. Dayton v. Taylor's Adm'r, 62 Ohio St. 11, 56 N. E. 480; Farrelly v. Cincinnati, 3 Ohio Dec. 115.

Oklahoma. Guthrie v. Swan, 5 Okla. 779, 51 Pac. 562.

Oregon. Batdorff v. Oregon City, 100 Ore. 402, 100 Pac. 937; Sheridan v. Salem, 14 Ore. 328, 12 Pac. 925, influenced, in part at least, by statute.

Pennsylvania. Norbeck v. Philadelphia, 224 Pa. 30, 73 Atl. 179; Bucher v. Sunbury Borough, 216 Pa. 89, 64 Atl. 906; Erie v. Schwingle, 22 Pa. 384, 60 Am. Dec. 87; Brown v. Towanda, 24 Pa. Super. Ct. 378.

Tennessee. See Williams v. Taxing Dist., 16 Lea (84 Tenn.), 531 (taxing district held not liable).

Texas. Baugus v. Atlanta, 74 Tex. 629, 12 S. W. 750; Klein v. Dallas, 71 Tex. 280, 8 S. W. 90; Galveston v. Posnainsky, 62 Tex. 118; Galveston v. Barbour, 62 Tex. 172; Haskell v. Barker (Tex. Civ. App.), 134 S. W. 833.

Contra, Navasota v. Pearce, 46 Tex. 525, 26 Am. Rep. 279.

Utah. Morris v. Salt Lake City, 35 Utah, 474, 101 Pac. 373. See also Herndon v. Salt Lake City, 34 Utah, 65, 95 Pac. 646.

Virginia. Gordon v. Richmond, 83 Va. 436, 2 S. E. 727; Clark v. Richmond, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281; Richmond v. Long's Adm'r, 17 Grat. 375, 94 Am. Dec. 461.

Washington. Hewitt v. Seattle, 62 Wash. 377, 113 Pac. 1084; Shearer v. Buckley, 31 Wash. 370, 72 Pac. 76; Peterson v. Seattle, 40 Wash. 33, 82 Pac. 141; Lorence v. Ellensburgh, 13 Wash. 341, 43 Pac. 20, 52 Am. St. Rep. 42; Sutton v. Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847; Saylor v. Montesano, 11 Wash. 328, 39 Pac. 653.

West Virginia. Gibson v. Huntington, 38 W. Va. 177, 18 S. E. 447, 22 L. R. A. 561, 45 Am. St. Rep. 853; Wilson v. Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

United States. New York City v. Sheffield, 71 U. S. 189, 18 L. Ed. 416; Chicago v. Robbins, 67 U. S. 418, 17 L. Ed. 298; Jacksonville v. Smith, 78 Fed. 292, 24 C. C. A. 97; Delger v. St. Paul, 14 Fed. 567; Weightman v. Washington, 1 Black (U. S.), 39, 17 L. Ed. 52.

The fact that a municipality cannot enforce penalties against abutters failing to remove dangerous obstructions to travel does not absolve it from the performance of its duty to keep the streets reasonably safe for travel. Barker v. Jefferson, 155 Mo. App. 390, 137 S. W. 10.

9. Eudora v. Miller, 30 Kan. 494, 2 Pac. 685.

is no legal liability for failure to *furnish* streets for use.[10]

This rule is said to be founded upon an "illogical exception" to the general rule of the common law prohibiting actions against municipalities for negligence in the discharge of duties imposed upon them for the sole benefit of the public and from which they derive no compensation or benefit in their corporate capacity.[11] It is obvious that the obligation, so far as travelers are concerned, is one of a public character, fulfilled, not for pecuniary profit or private corporate advantage, but exercised as a purely governmental function. "The liability," remarked the supreme court of Missouri, "it is generally said, arises by implication from the nature of the subject and the vast powers conferred upon such corporations, including the exclusive control of the streets."[12] But the additional reason is presented in Missouri and some other states that the making and improving of the streets by a city and keeping them in repair is a *ministerial* function and relates to *corporate interests only*.[13] Further, the ground set

Villages are liable the same as cities. Wahoo v. Reeder, 27 Neb. 770, 43 N. W. 1145.

What constitutes actionable defects in sidewalks in a *small village* containing only a few hundred people is a question of fact for the jury; and it cannot be said as a matter of law, that a municipality, because of its small population is not liable for defects. Graham v. Oxford, 105 Ia. 705, 707, 75 N. W. 473.

10. "It is argued that the way used by appellant was the only practical way for wagons to reach the depot. Be that as it may, the city was not legally bound to provide a roadway for wagons to the railroad depot, and is not liable for a failure to do so. If the driver of the wagon saw proper to use ways not provided for such vehicles, he has no legal complaint against the city that they were not fit for the use to which he was putting them. A city's legal *duty is not to furnish streets*, even where they may be needed; but it is to keep such as it does furnish in a reasonably safe condition for purposes for which they are provided—sidewalks for pedestrians; roadways for vehicles and horses." Webster v. Vanceburg, 130 Ky. 320, 113 S. W. 140.

11. Lane v. Minnesota Agr. Soc., 62 Minn. 175, 64 N. W. 382, 29 L. R. A. 708.

12. Kiley v. Kansas City, 87 Mo. 103, 107; Halpin v. Kansas City, 76 Mo. 335; Russell v. Columbia, 74 Mo. 480; Welch v. St. Louis, 73 Mo. 71; Bassett v. St. Joseph, 53 Mo. 290, 14 Am. Rep. 446.

"Various theories have been advanced to support this liability. Thus it has been often said that when a municipal corporation accepts a charter, by which it acquires special powers and privileges in return for its assumption of some of the duties which rest primarily upon the Legislature, its relation to the Legislature becomes in that respect contractual, and for the violation of the duty which it has contracted to perform it is liable for damages thereby resulting to individuals. This theory is not very satisfactory, and probably the liability might better be said to arise out of the fact that the municipality has the exclusive control of the streets and highways within its limits, with power to provide means for the proper performance of the duty of keeping them in safe condition." Schigley v. Waseca, 106 Minn. 94, 118 N. W. 259.

13. Barree v. Cape Girardeau, 197 Mo. 382, 389, 95 S. W. 330, 6 L. R. A. (N. S.) 1090, 114 Am. St. Rep. 763; Hewitt v. Seattle, 62 Wash. 377, 113 Pac. 1084.

forth for holding the municipality liable, in many cases, is that the duty to repair the streets was specially imposed on the municipality by statute or charter,[14] but in those states which deny municipal liability the fact that the municipality is expressly required to repair its streets is deemed immaterial;[15] and it is expressly held in some states that in order to make a municipality liable for failure to repair streets, it is not necessary that the duty to repair streets be expressly imposed on the municipality but it is sufficient that permissive power over the streets be granted.[16] So liability for damages is sometimes placed on the ground that *exclusive control* of the streets is granted the municipality by the legislature,[17] or that the statutory duty of keeping streets in repair and free from obstructions is a mandatory and not a discretionary duty.[18] And in New York, it is said that the ground is that the municipality is acting in the discharge of a special power granted to it by the legislature, in the exercise of which it is a legal individual, as distinguished from the exercise of governmental functions.[19]

One learned author contends that the reason is found in the fact that "the duty to keep the streets in repair is a municipal duty in regard to property rights which rests upon the corporation as an independent member of society, and the rights of others are infringed if their action for damage for its breach is taken from them by the courts."[20] This reason can hardly be accepted. Courts everywhere decline to recognize that the city possesses any property rights in the streets, although they may be a source of profit to the municipality. The interest is exclusively *publici juris,* and is in any respect wholly unlike property of the private corporation

14. *Alabama.* Selma v. Perkins, 68 Ala. 145.

Indiana. Gribben v. Franklin (Ind. 1911), 94 N. E. 757; Touhey v. Decatur (Ind. 1911), 93 N. E. 540.

Louisiana. O'Neill v. New Orleans, 30 La. Ann. 220, 31 Am. Rep. 221.

Missouri. Maus v. Springfield, 101 Mo. 613, 14 S. W. 630, 20 Am. St. Rep. 634.

Ohio. Evans v. Cincinnati, 1 Ohio Dec. 462.

Oregon. Farquar v. Roseburg, 18 Ore. 271, 22 Pac. 1103, 17 Am. St. Rep. 732.

West Virginia. Griffin v. Williamstown, 6 W. Va. 312.

United States. Cleveland v. King, 132 U. S. 295, 10 Sup. Ct. 90, 33 L. Ed. 334.

15. Arnold v. San Jose, 81 Cal. 618, 22 Pac. 877; Roberts v. Detroit, 102 Mich. 64, 60 N. W. 450, 27 L. R. A. 572.

16. Bessemer v. Carroll, 154 Ala. 506, 45 So. 419.

17. Carson v. Genesee, 9 Idaho, 244, 74 Pac. 862, 108 Am. St. Rep. 127; Schigley v. Waseca, 106 Minn. 94, 118 N. W. 259.

18. Parmenter v. Marion, 113 Ia. 297, 85 N. W. 90.

19. Missano v. New York, 160 N. Y. 123, 129, 54 N. E. 744.

20. Jones, Neg. Munic. Corp., § 58.

which is held for its own benefit and used for its private gain and advantage.[21]

In many states the fee of the street is in the abutting property owner, the public only possessing a mere easement therein, which is committed to the guardianship of the city as a public trust.[22] Where, as in some states, the fee is vested in the municipality, it is so vested in trust for the public. If the control and preservation of the rights of the public in the street on the part of the municipal corporation is to be regarded as in the nature of managing property, municipal liability logically follows where damages result because of negligence in this respect. Although the courts have experienced much difficulty in ascertaining a logical ground upon which to base the doctrine of implied liability of chartered cities, when at the same time it is denied as respect counties, townships and towns without charters, and also denied in other matters wherein the municipal corporation proper is charged with duties relating to governmental affairs, yet whatever may be the true ground the law in most states establishes the liability. The fact alone that the doctrine may be conceded to be exceptional does not prove that it is unjust. *It is fully vindicated by the decisions and has found a firm place as a sound and wholesome rule of law in American jurisprudence.*

§ 2721. Same—minority rule.

The New England commonwealths and a few other states deny all liability, unless imposed by statute, because it is regarded as merely "the neglect of a public duty imposed upon it (the town or city) by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage." This view is ably supported by Chief Justice Gray in the leading case of Hill v. Boston,[23] where the cases are critically reviewed and the conclusion is adopted that at common law no private action would lie for injuries inflicted on account of failure to repair a highway or bridge, unless the right to such action was given by statute. But the decisive question involved in this case related to the liability of the municipal corporation for maintaining what was claimed to be a defectively constructed public school building, although the case is always cited to support the common-law doctrine of non-liability. On the theory that the repair and regulation of streets is a *governmental duty,* it is expressly

21. People v. Kerr, 27 N. Y. 188, 192, 197-200; § 229, *ante*, vol. 1.
22. § 1305, *ante*, vol. 3.
23. 122 Mass. 344, 23 Am. Rep. 332, 6 Am. & Eng. Cor. Cas. 54.

held that the municipality is not liable for defective streets, at common law, in Arkansas,[24] California,[25] Connecticut,[26] Maine,[27] Massachusetts,[28] Michigan,[29] New Jersey,[30] Rhode Island,[31] South Carolina,[32] and Vermont.[33] In New Hampshire, this rule of non-liability was recognized at an early day, as to towns,[34] but was afterwards denied even as to towns,[35] although it has been held many times since, in that state, that the only liability of municipalities for injuries from defective highways is that imposed by statute.[36] In *Wisconsin* the rule of non-liability also prevails.[37] But even in some of these states denying liability, it has been held that if the "sole and exclusive authority" to "repair" and "maintain" the highways in a municipality is given to a board therein, although the statute does not in express terms impose on the municipality a liability for defective highways, the municipality is liable for such defects, especially where the statute has been practically construed in that way for many years.[38]

24. Ft. Smith v. York, 52 Ark. 84, 12 S. W. 157; Arkadelphia v. Windham, 49 Ark. 139, 4 S. W. 450, 4 Am. St. Rep. 32.

25. Arnold v. San Jose, 81 Cal. 618, 22 Pac. 877; Tranter v. Sacramento, 61 Cal. 271; Winbigler v. Los Angeles, 45 Cal. 36; Taylor v. Manson, 9 Cal. App. 382, 99 Pac. 410.

26. Colwell v. Waterbury, 74 Conn. 568, 573, 51 Atl. 530, 57 L. R. A. 218; Hewison v. New Haven, 37 Conn. 475.

Compare, however, Jones v. New Haven, 34 Conn. 1, 13, where the court distinguishes between public duties imposed upon a *quasi* corporation without its consent, and where such a corporation voluntarily contracts for a consideration to discharge the duty in question.

27. Huntington v. Calais, 105 Me. 144, 73 Atl. 829.

28. Re Opinion of Justices, 208 Mass. 625, 95 N. E. 930; Hill v. Boston, 122 Mass. 344, 379, 23 Am. Rep. 332, 6 Am. & Eng. Cor. Cas. 54; Oliver v. Worcester, 102 Mass. 499; Barry v. Lowell, 8 Allen (Mass.), 127.

29. McEvoy v. Sault Ste. Marie, 136 Mich. 172, 98 N. W. 1006; Lynch v. Hubbard, 101 Mich. 43, 59 N. W. 443; Roberts v. Detroit, 102 Mich. 64, 60 N. W. 450, 27 L. R. A. 572; Face v Ionia, 90 Mich. 104, 51 N. W. 184; McCutcheon v. Homer, 43 Mich. 483, 5 N. W. 668, 38 Am. Rep. 212; Detroit v. Blackebey, 21 Mich. 84, 4 Am. Rep. 450.

30. Carter v. Rahway, 55 N. J. L. 177, 26 Atl. 96, aff'd in 57 N. J. L. 196; Pray v. Jersey City, 32 N. J. L. 394.

31. Taylor v. Peckham, 8 R. I. 349, 5 Am. Rep. 578, where it is said: "This liability is one created by statute and can not be enlarged by courts beyond the scope and intention of the statute."

32. Young v. Charleston, 20 S. C. 116, 47 Am. Rep. 827.

33. Hyde v. Jamaica, 27 Vt. 443, 457.

At any event, in Vermont, an incorporated village is not liable for an injury from a defective street where the duty of keeping the streets in repair is not imposed upon the municipality. Parker v. Rutland, 56 Vt. 224.

34. Farnum v. Concord, 2 N. H. 392.

35. Wheeler v. Troy, 20 N. H. 77.

36. Wilder v. Concord, 72 N. H. 259, 56 Atl. 193.

37. Morrison v. Eau Claire, 115 Wis. 538, 542, 92 N. W. 280; Daniels v. Racine, 98 Wis. 649, 651, 74 N. W. 553.

Compare Cook v. Milwaukee, 24 Wis. 270, 1 Am. Rep. 183.

38. Hall v. Norwalk, 65 Conn. 310, 315, 32 Atl. 400.

However, in nearly all of these states, *liability is now imposed by statute*, and hence there can be no recovery except as provided for by statute.[39]

§ 2722. Same—liability as imposed, limited or precluded by statutes.

Statutes relating to liability for defective streets are of two classes, the one class imposing liability in states where no liability exists at common law, and the other class being merely a reiteration, extension or limitation of the common law liability in states where it is held that there is a common law liability. Taking up the former class first, the situation is that in Connecticut, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, Rhode Island, South Carolina, Vermont, and Wisconsin, no liability exists except in so far as imposed by statute [40] or charter provision.[41] It will be noticed that in this list of states the New England states are unanimous in their opposition to the general rule that a common law liability exists for defective streets, and that only six other states so hold, including Arkansas and California.

These statutes *creating* liability differ more or less in phraseology, and generally are not quite as comprehensive as the common law liability is construed to be in other states. Moreover, these statutes are strictly construed,[42] and the liability cannot be assumed by contract.[43] On the other hand, the liability created by statute cannot be limited by implication.[44]

39. § 2722, *post*.

40. Hoyt v. Danbury, 69 Conn. 341, 351, 37 Atl. 1051; Huntington v. Calais, 105 Me. 144, 73 Atl. 829; Byington v. Merrill, 112 Wis. 211, 88 N. W. 26.

§ 2721, *ante*.

But even in those states where municipal liability for defective streets is denied, and the statute is not applicable to the particular case, recovery may be had for neglect in the construction of water pipes under a street, where the municipality owns its water works. Hand v. Brookline, 126 Mass. 324.

41. **Repeal of statute by charter provision.** A statute conferring the right to sue municipalities for injuries resulting from defective streets will not be held to have been repealed by implication by a charter provision making the wrongdoer other than the municipality primarily liable and providing that the city shall not be liable until all legal remedies to enforce the private liability have been exhausted, since such a charter provision will be deemed to be grounded on common law principles. Hay v. Baraboo, 127 Wis. 1, 105 N. W. 654, 3 L. R. A. (N. S.) 84, 115 Am. St. Rep. 977.

42. Bartram v. Sharon, 71 Conn. 686, 694, 43 Atl. 143; Detroit v. Putnam, 45 Mich. 263, 7 N. W. 815.

"Statute is in its nature penal, as well as remedial, and ought to be construed strictly." Moulton v. Sanford, 51 Me. 127, 129, and see Perkins v. Fayette, 68 Me. 152; Brown v. Skowhegan, 82 Me. 273, 276, 19 Atl. 399.

"Liability * * * can not be enlarged by courts beyond the scope and intention of the statute." Taylor v. Peckham, 8 R. I. 349, 5 Am. Rep. 575.

43. Rouse v. Somerville, 130 Mass. 361, 362.

44. Davis v. Leominster, 1 Allen (Mass.), 182; Noyes v. Gardner, 147 Mass. 505, 509, 18 N. E. 423.

In Connecticut, the statute reads: "Any person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair."[45]

In Maine, the statute creates liability for injuries received "through any defect or want of repair or sufficient railing, in any highway, townway, causeway or bridge," provided the municipality had twenty-four hours actual notice of the defect or want of repair, and provided the person injured, if he had prior notice of the defect or want of repair, had notified one of the municipal officers thereof.[46]

In Massachusetts, liability is imposed for injuries by reason "of a defect or a want of repair or a want of a sufficient railing in or upon a way, causeway or bridge."[47]

The Michigan statute imposes liability for injuries from failure to keep highways, streets, bridges, sidewalks, crosswalks and culverts "in reasonable repair, and in condition reasonably safe and fit for travel."[48]

45. Gen. St. Conn. 1902, § 2020; Hillyer v. Winsted, 77 Conn. 304, 308, 59 Atl. 40; Hall v. Norwalk, 65 Conn. 310, 32 Atl. 400.

Defect in plan not within statute. Hoyt v. Danbury, 69 Conn. 341, 351, 37 Atl. 1051.

46. Rev. St. Me. 1903, c. 23, § 76.

Maine statutes are held to apply both to obstructions placed upon highways and to defects inherent in the structure of the highway. Davis v. Bangor, 42 Me. 522, 527.

But since the statute imposes liability for injuries resulting from any "*defect or want of repair,*" it is held that a tree on a wagon, standing in a street in charge of a driver, is not within the statute. Davis v. Bangor, 42 Me. 522.

47. Rev. Laws Mass. 1902, c. 51, §§ 17, 18.

Massachusetts statute relates only to ways "opened and dedicated to public use;" and does not include road laid out by park commissioners across private land. Jones v. Boston, 201 Mass. 267, 87 N. E. 589.

Narrowness and crookedness of highway, where cause of injury, is not actionable. Smith v. Wakefield, 105 Mass. 473.

48. Comp. Laws Mich. 1897, §§ 3441-3445; Campbell v. Kalamazoo, 80 Mich. 655, 45 N. W. 652; Alexander v. Big Rapids, 70 Mich. 224, 38 N. W. 227; Grand Rapids v. Wyman, 46 Mich. 516, 9 N. W. 833; Burnham v. Byron Tp., 46 Mich. 555, 9 N. W. 851.

Michigan statutes apply only to streets open for public travel, and not to streets which are in course of being graded and paved, and from which the public are excluded. Southwell v. Detroit, 74 Mich. 438, 443, 42 N. W. 118.

Statute in Michigan imposes no liability for injuries to abutting lands. Tatman v. Benton Harbor, 115 Mich. 695, 74 N. W. 187.

Michigan statute, under rule of strict construction, does not confer right to recover for an injury resulting from the falling of a dead limb from a live tree in the street. Miller v. Detroit, 156 Mich. 630, 121 N. W. 490.

Statute authorizing a recovery of damages for injuries to horses or other animals or any cart, carriage or vehicle or "*other property*" is not inclusive, but the words "other property" mean things of a like kind as those specifically enumerated. Roberts v. Detroit, 102 Mich. 64, 60 N. W. 450, 27 L. R. A. 572.

Charter provisions expressly providing that the municipality shall not be liable for certain defects relating to its streets prevail over a general statute imposing liability in such cases. Maclam v. Marquette, 148 Mich. 480, 111 N. W. 1079.

In New Hampshire, towns are liable for "damages to any person, his team or carriage, traveling upon a bridge, culvert, or sluiceway, or dangerous embankments and defective railings, upon any highway, by reason of any obstruction, defect, insufficiency or want of repair, of such bridge, culvert, or sluiceway, or dangerous embankments and defective railways, which renders it unsuitable for the travel thereon."[49] This statute, it would seem,—execept as to bridges, culverts and sluiceways,—limits liability to "dangerous embankments and defective railings;" and the word towns is used as applicable to all municipal corporations as well.

In New Jersey, it is held that there is no common law liability, and a statute imposing liability for injuries on roads "in any of the *townships* of this state" has been held not applicable to streets in a municipality,[50] and no other or later statute has been found, after careful search, imposing any liability on muncipalities for defective streets.

In Rhode Island, the statute creates liability to all persons who may in any wise suffer injury to their persons or property" by reason of the neglect to keep highways and bridges in good repair.[51]

The South Carolina statute[52] is very broad in its scope, applies to damages to property as well as to person, and includes not only defects in any public way but also makes the municipality liable for injuries received "by reason of defect or mismanagement of *anything under control of the corporation"* within the limits of the municipality. This latter clause has been held broad enough to include mismanagement of a *steam roller* under control of the municipality and while being used in repairing its streets.[53]

The statute, although construed at one time as limited to misfeasance or nonfeasance connected with the keeping of streets in proper repair,[54] is also construed so as to give the word "repair" a very broad meaning.[55]

49. Pub. St. N. H. 1901, c. 76, § 1. **Statutes in New Hampshire** making towns liable for injuries resulting from defective highways, impose liability without regard to whether the muncipality was negligent. Johnson v. Haverhill, 35 N. H. 74.

50. Carter v. Rahway, 57 N. J. L. 196, 30 Atl. 863, aff'g 55 N. J. L. 157, 26 Atl. 96

51. Gen. Laws R. I. 1909, c. 83, § 12; Taylor v. Peckham, 8 R. I. 349, 5 Am. Rep. 578 (not applicable to fall of object from an adjacent building).

52. Code S. C. 1902, § 2023, as am'd in 1901.

53. Barksdale v. Laurens, 58 S. C. 413, 416, 36 S. E. 661, and see Dunn v. Barnwell, 43 S. C. 398, 21 S. E. 315, 49 Am. St. Rep. 843.

54. Dunn v. Barnwell, 43 S. C. 398, 21 S. E. 315, 49 Am. St. Rep. 843.

55. To keep a street in repair means to keep it in such physical condition that it will be reasonably safe for street purposes. It is not enough that its surface should be safe; a street is not in repair when poles

In Vermont, municipalities are made liable only in case of "the insufficiency or want of repair of a *bridge or culvert,*" [56] and hence there is no other liability in that state at present for defective streets although such a liability existed under earlier statutes.

The Wisconsin statute imposes liability for injuries to person or property "by reason of the insufficiency or want of repairs of any bridge, sluiceway or road," [57] and a city was held to come within an earlier statute making "towns" liable.[58]

The second class of statutes include those statutes in states where a liability exists at common law, reiterating or enlarging the rule.[59] Statutes in other states, where there is a common law liability, *limit or wholly abolish* the liability of the municipality. And it is well settled that the *legislature has power* to limit the liability of municipalities as to defective highways,[60] or even to *wholly exempt municipalities from any liability* for injuries resulting from defective streets; [61] but a statute will not be construed as exempting a municipality from liability where the language is not clear.[62] So a charter provision which limits, or entirely takes away the liability of the municipality, is not objectionable as *class legislation.*[63] However, it is held in New York, that a statute exempting a city from liability for any misfeasance or non-

or wires or other structures are so placed in or over it as to be dangerouse to those making a proper use of the street. Irvine v. Greenwood, 89 S. C. 511, 72 S. E. 228.

56. Pub. St. Vt. 1906, § 4029.

57. St. Wis. 1899-1906, § 1339.

58. Kittredge v. Milwaukee, 26 Wis. 46.

59. Rusch v. Davenport, 6 Ia. 443, 449 (road district co-extensive with city limits).

In West Virginia, the statute embraces injuries to person or property where the way is "out of repair," provided the charter of the municipality requires it to keep the way in repair at the place where the injury is sustained. Code W. Va. 1909, § 1515a, 49 (Acts, 1909, c. 52).

Statute does not authorize a recovery by one who, in common with the community, suffers in his business relations because of the bad conditions of the streets. Hale v. Weston, 40 W. Va. 313, 322, 21 S. E. 742.

Statute imposes liability without regard to existence of negligence. Stanton v. Parkersburg, 66 W. Va. 393, 66 S. E. 514.

60. Colorado Springs v. Neville, 42 Colo. 219, 93 Pac. 1096; Wilmington v. Ewing, 2 Pennew. (Del.) 66, 43 Atl. 305, 45 L. R. A. 79; Touhey v. Decatur (Ind. 1911), 93 N. E. 540.

See also Lentz v. Dallas, 96 Tex. 258, 72 S. W. 59, rev'g 69 S. W. 166; Block v. Fond du Lac, 141 Wis. 85, 123 N. W. 654.

61. Parsons v. San Francisco, 23 Cal. 462; Touhey v. Decatur (Ind. 1911), 93 N. E. 540.

However, if there is a constitutional provision guaranteeing to every person a remedy by due course of law for injury done him in person or property, and there is a common law liability for defective streets, the legislature can not entirely take away the remedy. Mattson v. Astoria, 39 Ore. 577, 65 Pac. 1066, 87 Am. St. Rep. 687.

62. Birmingham v. Starr, 112 Ala. 98, 20 So. 424; Denver v. Williams, 12 Colo. 475, 21 Pac. 617.

63. Maclam v. Marquette, 148 Mich. 480, 111 N. W. 1079.

feasance of the common council or of any of the city officials in the discharge of any duty imposed upon them as officers, does not relieve the municipality of liability for failure to perform a corporate function, such as the keeping of streets in repair.[64]

Having the power to deny to individuals a right of action against municipalities for injuries resulting from defective streets, the legislature may impose any *conditions* which it chooses to prescribe.[65] So *home rule charters* may require ten days written notice to the municipality, prior to the accident, of the existence of a defect in a street or sidewalk, as a condition precedent to liability for damages caused thereby to individuals.[66] And it is well settled that the legislature may require *notice of the injury* to be served on a certain municipal officer or officers, within a specified time after the injury, under penalty of being deprived of the right to sue.[67]

§ 2723. Same—states in which there is no liability, common law or statutory.

In *Arkansas,* "it is settled * * * that a city is not liable for *nonfeasance* in failing to put the streets in repair,[68] or in failing to keep them in repair,"[69] although it seems that there is liability for *misfeasance* of municipal officers or agents;[70] and the same rule applies to bridges.[71] And in that state there is no statute imposing liability.

In California, there is no common law liability,[72] no general statute imposing liability, and the only liability is that imposed by charter provisions. It seems, also, that there is no statutory liability in *New Jersey* as to cities although there is statutory liability as to townships.[73] So in Vermont the only liability is for defects in bridges.[74]

§ 2724. Extent of liability, and essentials of cause of action.

The rule of law which imposes the obligation upon municipal corporations to keep their streets and public ways reasonably safe for travel in the ordinary modes, by night as well as by day, is a comprehensive one. Municipal liability may arise for any wrongful act which makes the use of the

64. Bieling v. Brooklyn, 120 N. Y. 98, 24 N. E. 389.
65. Schligley v. Waseca, 106 Minn. 94, 118 N. W. 259.
66. Schigley v. Waseca, 106 Minn. 94, 118 N. W. 259.
§ 2812, *post.*
67. § 2714, *ante.*
68. Arkadelphia v. Windham, 49 Ark. 139.
69. Collier v. Ft. Smith, 73 Ark. 447, 448, 84 S. W. 480; Fort Smith v. York, 52 Ark. 84.
70. Collier v. Ft. Smith, 73 Ark. 447, 84 S. W. 480.
71. Gray v. Batesville, 74 Ark. 519.
72. § 2721, *ante.*
73. § 2722, *ante.*
74. § 2722, *ante.*

way unsafe, *first*, whether it is done by the municipality itself, its officers or servants, or by others under its authority, which would constitute misfeasance on the part of the corporation, or *second*, by third persons, which would constitute neglect of the corporation in omitting to put streets in repair or failure to remedy the causes of danger occasioned by the wrongful acts of others, as by removing obstructions therefrom, or dangerous excavations therein. In either case the proximate cause of the injury, in the language of the law, would be the want of due care or skill on the part of the corporation.

In order to recover for injuries sustained because of the defective condition of a street, the following facts must be shown:

1. A *defective condition* such as to create liability, provided the other necessary elements are present. This condition may be one created by the municipality or by third persons.[75]

2. *Actual or constructive notice* to the municipality of the defective condition of the street, before the accident.[76] The exceptions, when notice is not necessary, are (1) where the defect is created by municipality,[77] (2) where the defect is caused by a licensee, under a permit granted by the municipality,[78] or (3) where a statute or charter provision other wise provides.

3. *Time to put the street in a reasonably safe condition,* after notice (where notice is necessary) of the defect.[79]

4. It must appear that the defective condition of the street was the *proximate cause* of the injury.[80]

5. No recovery can be had if the person injured was guilty of *contributory negligence*.[81]

6. *Notice of the injury* and the cause thereof must be given, within a certain time after the accident, as provided for by statutes or charter provisions, in most states.[82]

§ 2725. Purposes for which street must be kept in condition.

Ordinary care must be exercised to keep a street in safe condition for the purposes for which streets are intended to be used *and for no other purpose*. Furthermore, particular parts of the street are ordinarily set apart for particular purposes. Thus, the *sidewalk* is for pedestrians, the *driveway* is primarily for horses and vehicles, the *cross-walks* are for

75. § 2750, *post*.
76. §§ 2807-2818, *post*.
77. § 2808, *post*.
78. Some conflict in decisions, however, § 2751, *post*.
79. § 2729, *post*.
80. §§ 2842-2854, *post*.
81. §§ 2819-2839, *post*.
82. § 2714, *ante*.

both pedestrians, horses and vehicles, *boulevards* are sometimes for pleasure vehicles or light teaming only, and the space between the sidewalk and the curb is often set apart for grass, trees, etc. It seems to necessarily follow that the sidewalk need not be kept in such condition that teams can drive on and along it,[83] although the driveway is used so much by pedestrians in crossing over it at points other than the regular crossings that it would seem that ordinary care must be exercised to keep it safe for pedestrians, but the latter must exercise a greater amount of care than when walking on a sidewalk.[84] It has been contended that a municipality is under no legal obligation to keep the driveway of its street longitudinally in a fit condition for *pedestrians,* but it was held that even "if this must be accepted as the general rule of law, * * * there are exceptions to the rule;" and that if the municipality has impliedly designated a particular portion of a driveway for the use of pedestrians, as for instance at a point used by passengers to alight from street cars, such portion of the street must be kept reasonably safe for pedestrians.[85] Moreover streets need be kept in such condition as to be safe for *runaway horses*[86] or the like. And it seems that if the street is reasonably safe for traffic in general the municipality is not liable because the street is not reasonably safe for bicycles,[87] roller skates,[88] or the like. So the duty to keep streets in repair does not extend to keeping the highway in such condition that the *blind,*[89] the *infirm,*[90] and *intoxicated persons*[91] can use it with safety, provided reasonable diligence has been exercised to make the highway safe for persons in normal condition. The same rule applies to the safety of the street for *runaway horses.*[92]

§ 2726. Not liable unless negligent: "reasonable" care necessary.

Unless it is otherwise provided by statute;[93] in the ab-

83. §§ 2743, 2755, *post.*

84. § 2831, *post.*

85. Maxey v. East St. Louis, 158 Ill. App. 627, 630.

86. See § 2854, *post.*

87. § 2759, *post.*

88. § 2753, *post.*

89. Foy v. Winston, 135 N. C. 439, 47 S. E. 466.

§ 2835, *post.*

90. Where a sidewalk is reasonably safe for pedestrians not compelled to use *canes,* the municipality is not liable for injuries caused by a cane going through a crack between two decayed boards. Hardon v. Jackson, 137 Mich. 271, 100 N. W. 389, 66 L. R. A. 986.

§ 2835, *post.*

Compare, however, Short v. Spokane, 41 Wash. 257, 83 Pac. 183, where real point was as to measure of damages.

91. Covington v. Lee, 28 Ky. L. Rep. 492, 89 S. W. 493, 2 L. R. A. (N. S.) 481.

§ 2836, *post.*

92. Hungerman v. Wheeling, 46 W. Va. 761, 34 S. E. 778.

§ 2854, *post.*

93. § 2722, *ante.*

sence of negligence on its part, a municipality is not liable for injuries occuring on its streets.[94] Thus, if the defective condition was caused by an *act of God,* such as an extraordinary rainfall which could not have been foreseen by ordinary care, the municipality is not liable.[95] In brief, the municipality is never an *insurer against accidents,*[96] nor a *guarantor* of the safety of travelers on its streets.[97] Moreover, the doctrine of *res ipsa loquitur* is usually held not applicable.[98] And

94. Streator v. Liebendorfer, 71 Ill. App. 625; Indianapolis v. Slider (Ind. App. 1911), 95 N. E. 334; Huntington v. Bartrom (Ind. App. 1911), 95 N. E. 544; Holbert v. Philadelphia, 221 Pa. 266, 70 Atl. 746.

Explosion. Not liable where traveler was injured by an explosion at a manhole in a street, where steam pipes were laid so near gas pipes that the latter leaked, there being no showing of negligence on the part of the municipality. Hunt v. New York, 109 N. Y. 134, 16 N. E. 320.

95. Schelich v. Wilmington, 7 Pennew. (Del.), 74 Atl. 367.

Act of God is defense. Beattie v. Detroit, 137 Mich. 319, 100 N. W. 574.

96. *Colorado.* Denver v. Maurer, 47 Colo. 209, 106 Pac. 875.

Delaware. Colbourn v. Wilmington, 4 Pennew. (Del.) 443, 56 Atl. 605; Stidham v. Delaware City, 6 Pennew. (Del.) 359, 67 Atl. 175.

Idaho. Miller v. Mullan, 17 Idaho, 28, 104 Pac. 660.

Illinois. Boender v. Harvey, 251 Ill. 228, 95 N. E. 1084; Nokomis v. Farley, 113 Ill. App. 161.

Kentucky. Lexington v. Cooper, (Ky. 1912), 145 S. W. 1127; Louisville v. Uebelhor, 142 Ky. 151, 134 S. W. 152; Elam v. Mt. Sterling, 132 Ky. 657, 117 S. W. 250, 20 L. R. A. (N. S.) 512.

Missouri. Carvin v. St. Louis, 151 Mo. 334, 347, 52 S. W. 210.

Montana. Martin v. Butte, 34 Mont. 281, 86 Pac. 264.

Nebraska. Walters v. Exeter, 87 Neb. 125, 126 N. W. 868.

New York. Hartnet v. New York, 127 N. Y. S. 295.

Ohio. Dayton v. Glaser, 76 Ohio St. 471, 81 N. E. 991.

Virginia. Portsmouth v. Lee (Va. 1911), 71 S. E. 630.

West Virginia. Van Pelt v. Clarksburg, 42 W. Va. 218, 24 S. E. 878.

A municipal corporation is not under the obligation to keep its streets absolutely safe for persons passing over any part of them. Its duty is only to exercise ordinary care to keep its streets and sidewalks reasonably safe for persons using them who are themselves exercising ordinary care. Brennan v. Streator (Ill. 1913), 100 N. E. 266.

Meaning of "absolute duty" as used in decisions, in West Virginia. "When we are told, as in Chapman v. Milton, 31 W. Va. 384, 7 S. E. 22, and Gibson v. City of Huntington, 38 W. Va. 177, 18 S. E. 447, that the liability of cities and towns for injuries by reason of streets being out of repair *is absolute,* we must not be misled. It is meant that, when the basis or cause of the liability exists, that liability is absolute, in the sense that no want of notice or other excuse for the defect in the street will exonerate the town. But this idea of absoluteness does not refer at all to the cause of liability, but only to the liability when it exists. It does not mean that the state of the street must be perfect." Yeager v. Bluefield, 40 W. Va. 484, 21 S. E. 752.

97. Lexington v. Cooper (Ky. 1912), 145 S. W. 1127.

98. **Res ipsa loquitur.** "While a city may construct, reconstruct, and repair its streets, and may in other ways exercise control over its streets, yet there is no such management or control on its part as will justify the application of the doctrine of *res ipsa loquitur.* Streets are not only built and maintained for the use of, but are in constant use by, the traveling public. Being in constant use by the traveling public, streets which are properly constructed and are in every respect suitable for public travel may immediately become defective or dangerous from such constant use. Indeed, in the majority of cases the

inasmuch as municipalities are liable for injuries upon highways only when negligent in regard to the condition of the way, the mere fact that an injury happened, from a condition which reasonable men in general would not consider unsafe, is not enough to create a liability. A plaintiff must show, in order to recover, not that an injury has happened which no one would have anticipated, but that there were conditions such that the authorities, in the exercise of proper care, ought to have realized that there was danger of an injury, and to have taken precautions to prevent it.[99]

The basis of recovery being negligence, the next question is what is negligence in so for as the condition of streets is concerned? How careful and painstaking must the municipality be? The answer to all of this, so far as to the rule as to *degree of care* is concerned, is without dissent, unless perhaps indirectly. *Reasonable, i. e. ordinary, care* is required.[1]

It should always be kept in mind that the *degree* of care never changes, but that the *amount* of care which must be used to constitute ordinary or reasonable care varies according to the circumstances of the particular case, unless otherwise provided by statute.[2] Many cases contain the

probability of their becoming defective or dangerous from their continuous use by the public is much greater than that growing out of their defective or dangerous construction, reconstruction, or repair. To say, therefore, that the breaking or slipping of a stone, shown to be in every way sufficient for the purpose of covering a culvert, is of itself evidence of its insufficiency or negligent placement, when, as a matter of fact, its condition or improper position may have been due to its being struck by a vehicle a few minutes before the accident occurred, would often impose upon a city a liability for an accident when the city was not only free from negligence, but had used the utmost care to maintain its streets in a reasonably safe condition for public travel. For this reason, we conclude that the doctrine of *res ipsa loquitur* should not be applied in cases of personal injury growing out of the dangerous and defective condition of the streets of a city." Corbin v. Benton (Ky. 1913), 152 S. W. 241.

99. Cammett v. Haverhill, 197 Mass. 76, 83 N. E. 331.

1. *Connecticut.* Landolt v. Norwich, 37 Conn. 615.

Illinois. Salem v. Webster, 192 Ill. 369, 61 N. E. 323.

Minesota. Sumner v. Northfield, 96 Minn. 107, 104 N. W. 686.

Missouri. Howard v. Madrid, 148 Mo. App. 57, 127 S. W. 630.

Nebraska. Strubble v. De Witt, 81 Neb. 504, 116 N. W. 154.

South Carolina. Corry v. Columbia, 88 S. C. 553, 71 S. E. 49; Berry v. Greenville, 84 S. C. 122, 65 S. E. 1030.

Utah. Bills v. Salt Lake City, 37 Utah, 507, 109 Pac. 745.

Virginia. Richmond v. Mason, 109 Va. 546, 65 S. E. 8.

Many other cases stating this elementary proposition are to be found in the digests.

Must use "reasonable care and prudence in detecting and remedying any defect which it might be fairly anticipated would be dangerous and liable to cause an accident." Butler v. Oxford, 186 N. Y. 444, 79 N. E. 712.

Putting a light at the place of the accident does not bear on the question of negligence but only on that of contributory negligence. Giffen v. Lewiston, 6 Idaho, 231, 55 Pac. 545.

2. The degree of safety is sometimes fixed by statute as by requiring sidewalks to be kept in "reasonable"

statement that a municipality must keep its streets and sidewalks in a *reasonably safe condition*,[3] but these statements are erroneous, independent of statute, if they are to be construed as requiring anything more than *reasonable care* to keep the street and sidewalk *safe*.[4] However, the statement is true in so far as it is construed as limiting the liability of the municipality and preventing it from being liable for all injuries on the streets.

The question is then presented, *what is reasonable care?* It is held that the ordinary care required of a municipality as to its streets means that degree of care which might reasonably be expected from an ordinarily prudent person under the circumstances surrounding the party at the time of the injury,[5] and a municipal officer cannot himself establish a standard of care by his previous work.[6] Plaintiff need not show that the way was "unreasonably dangerous."[7] Little satisfaction can be obtained, however, from the general definition; but whether the street was reasonably safe, at the

repair. Phalen v. Detroit, 126 Mich. 683, 86 N. W. 126.

3. Covington v. Belser, 137 Ky. 125, 123 S. W. 249; Kawiecka v. Superior, 136 Wis. 613, 118 N. W. 192.

Must be reasonably safe for the purposes for which the portion of the street is intended. Boender v. Harvey, 251 Ill. 228, 95 N. E. 1084.

4. It is not the duty of a municipality to keep its highway in a *reasonably* safe condition, but the only duty is to exercise *reasonable or ordinary care* to keep it reasonably safe. Beardstown v. Clark, 104 Ill. App. 568, aff'd in 204 Ill. 524, 68 N. E. 378.

However, where a municipality has, by its own positive and affirmative act, placed a dangerous obstruction in a street, the duty exists, at least as to such obstruction, to have the streets in a reasonably safe condition. Yearance v. Salt Lake City, 6 Utah, 398, 24 Pac. 254.

5. Norman v. Teel, 12 Okla. 69, 69 Pac. 791.

Ordinary diligence is that care which every prudent municipality takes to put its streets in safe order and keep them so. Wilson v. Atlanta, 63 Ga. 291.

Definitions of ordinary care, see Rockwall v. Heath (Tex. Civ. App.), 90 S. W. 514; Cordele v. Jeter (Ga. App. 1911), 71 S. E. 589.

Must use reasonable care proportionate to the damage liable to result from its failure to do so. Schelich v. Wilmington, 1 Boyce (24 Del.), 74 Atl. 367.

Question for jury. The law fixes the standard of duty as reasonable care, and it can not be left to the judgment or caprice of a jury to establish any other standard. The necessity for and the plan of municipal improvements are matters within the discretion of the municipal authorities. The question of necessity is never for a jury, and the question as to the plan is not whether the best and safest plan has been adopted, but whether that adopted is reasonably safe; and reasonable safety, as in the case of machinery and methods, is to be determined by the *standard of ordinary usage*. Reed v. Tarentum, 213 Pa. 357, 62 Atl. 928.

6. "As to the contention that the city street commissioner was guilty of no negligence because this was the way he filled all such holes, we can not give our approval. The jury were at liberty to find that he had been negligent in filling all of them. He could not establish a standard of care and safety by his own conduct in that regard." Heberling v. Warrensburg, 204 Mo. 604, 103 S. W. 36.

7. Brown v. Pierce, 78 Neb. 623, 111 N. W. 366; Fisher v. Geneseo, 154 Ill. App. 288.

time of the injury, is to be determined by the *particular circumstances of each case,*[8] and the question is a practical one, not calling for expert testimony.[9]

In the application of the rule requiring reasonable care, to particular sets of facts, it is held that if the street has once been constructed in a safe condition, the only duty of the municipality is to exercise reasonable care in the discovery and repair of defects;[10] that the duty to observe the condition of its streets, according to most of the decisions, is a greater one than the duty of the traveler.[11]

The duty extends to reasonable care to keep the streets reasonably safe for travel in the ordinary modes *by night* as well as by day,[12] and *in winter* as well as summer,[13] and the *degree* of care does not vary with the *size of the street,*[14] nor with the *number of miles of streets* and sidewalks in the municipality,[15] nor with the size of the city.[16] On the other hand, the same *amount* of care is not required as to an alley as is required on streets, unless the alley has by its use in fact become a public street.[17] Thus, *ordinary care* is required in all cases, whether the street or sidewalk is in a populous or sparsely inhabited part;[18] but a greater *amount* (not *degree*) of care is required as to driveways and sidewalks in populous and much traveled parts of the

8. Wilson v. Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

9. Warren v. Independence, 153 Mo. 593, 55 S. W. 227; Goble v. Kansas City, 148 Mo. 470, 50 S. W. 84.

10. Peake v. Superior, 106 Wis. 403, 82 N. W. 306.

11. § 2815, *post.*

12. Rome v. Dodd, 58 Ga. 238; Milledgeville v. Cooley, 55 Ga. 17; Styles v. Decatur, 131 Mich. 443, 91 N. W. 622; Ord v. Nash, 50 Neb. 335, 69 N. W. 964.

§ 2829, *post.*

13. Short v. Spokane, 41 Wash. 257, 83 Pac. 183.

14. The amount of care requisite to guard excavations may also depend upon atmospheric conditions—greater care being required in a snowy, dark or stormy night than in a clear moonlight night. Wells v. Lisbon, 21 N. D. 34, 128 N. W. 308.

§ 2822, *post.*

15. *Iowa.* Lindsay v. Des Moines, 68 Ia. 368, 27 N. W. 283.

Kansas. Wichita v. Coggshall, 3 Kan. App. 540, 43 Pac. 842.

Michigan. Moore v. Kalamazoo, 109 Mich. 176, 66 N. W. 1089.

Missouri. Barr v. Kansas City, 105 Mo. 550, 16 S. W. 483.

Nebraska. Lincoln v. Smith, 28 Neb. 762, 45 N. W. 41.

Ohio. Cincinnati v. Frazier, 19 Ohio Cir. Ct. Rep. 604.

Compare O'Brien v. Woburn, 184 Mass. 598, 69 N. E. 350; Crawford v. New York, 74 N. Y. S. 261, 68 App. Div. 107.

16. Barr v. Kansas City, 105 Mo. 550, 16 S. W. 483; Barr v. Fairfax, 156 Mo. App. 295, 137 S. W. 631.

17. See Musick v. Latrobe, 184 Pa. St. 375, 39 Atl. 226, where the statement is that the same degree of care is not necessary. This is not strictly true. The same degree of care, *i. e.*, ordinary or reasonable care, is necessary in all cases in regard to highways, whether the driveway, sidewalk or an alley, or whether it is in a populous portion of the municipality.

18. Bunker Hill v. Pearson, 46 Ill. App. 47.

§ 2737, *post.*

See also McLeansboro v. Lay, 29 Ill. App. 478; Vandalia v. Ropp, 39 Ill. App. 344.

municipality than with reference to such ways in parts of the municipality where the way is used less frequently.[19] So a greater *amount* of care may be necessary where a thing in the street was erected by the municipality itself than when erected by others.[20]

§ 2727. Prior accidents at same place as sufficient to show negligence.

Prior accidents at the precise place where plaintiff was injured, and caused by the same defect or obstruction, do not necessarily show negligence on the part of the municipality. The rule in regard to this matter is well stated by Justice Hiscock of the New York Court of Appeals in a recent decision as follows: "When an alleged defect or obstruction is of such a character that it possibly may be made the basis of an action for negligence and the question is debatable which way the decision shall go, evidence of prior accidents very well may be received and utilized for the purpose of showing that, tested by actual experience, it has proved dangerous and naturally calculated to cause accidents. *This evidence of prior accidents cannot, however, be sufficient of*

19. *Delaware.* Seward v. Wilmington, 2 Marv. (Del.) 189, 42 Atl. 451.
Idaho. Miller v. Mullan, 17 Idaho, 28, 104 Pac. 660.
Illinois. Rockford v. Hollenbeck, 34 Ill. App. 40.
Indiana. Huntington v. Boston (Ind. App. 1911), 95 N. E. 544.
Minnesota. Sundell v. Tintah, 117 Minn. 170, 134 N. W. 639; Neidhardt v. Minneapolis, 112 Minn. 149, 127 N. W. 484.
Mississippi. Whitfield v. Meridian, 66 Miss. 570, 6 So. 244, 4 L. R. A. 834, 14 Am. St. Rep. 596 (but drop of six feet in sidewalk held negligence).
Missouri. Miller v. Canton, 112 Mo. App. 322, 87 S. W. 96.
Greater care may be required to keep sidewalks free from obstructions where the street is much traveled than where it is little used. Shreve v. Ft. Wayne (Ind. 1911), 96 N. E. 7.
It was sensibly observed in the case of Glasier v. Town of Hebron, 131 N. Y. 452, 30 N. E. 240, that "a thronged thoroughfare in a populous city would require much more attention in regard to its condition as to safety on the part of the officers of the corporation, than would any ordinary highway running through a sparsely settled district of a town." McKone v. Warsaw, 187 N. Y. 336, 80 N. E. 212.
Bypaths in unimproved and untraveled parts of streets need not be kept in good sidewalk condition. Colton v. Kansas City (Mo. App. 1912), 145 S. W. 494.

20. "It was competent for the defendant to show that the pole was not unlawfully upon the street, but had been erected by a corporation that had a legal right to erect it and upon whom the duty to maintain it in a safe condition primarily rested. This fact would not have relieved the defendant from the duty of supervision and inspection, but its duty would have been secondary and the rule in relation thereto is less stringent than that which would apply if the pole had been unlawfully upon the street or had been erected by it and was under its sole management." Per Chief Justice Fell in Kost v. Ashland (Pa. 1912), 84 Atl. 691. But what is "reasonable or ordinary" care, in a particular case, will depend to a large extent on the nature and location of the way, and this is what is really meant by this decision.

itself to sustain a charge of negligence and to lay the foundation for damages because of the maintenance of some particular construction of pavements, sidewalks, or buildings. There must be evidence of such a fundamental condition of the thing under scrutiny as will at least permit the inference that the party complained of has failed to discharge the duties reasonably and fairly imposed on him by law. If the full description of the alleged defect in a municipal case shows that it was not naturally dangerous, and must almost inevitably occur in the many street miles of city unless a grievously burdensome degree of care and expense is to be exacted, a recovery will not be allowed even though witnesses do testify to prior accidents. The familiar rule of *damnum absque injuria* will be applied, and travelers' mishaps will be charged to their own carelessness or to unavoidable mischance rather than to the treasury of the city."[21]

§ 2728. Duty cannot be delegated so as to shift liability.

A municipal corporation cannot delegate the construction and care of its streets and sidewalks to a private individual or corporation, or even to a *quasi* public corporation, and thereby evade its responsibility for such care and supervision, and thus escape liability for any damage resulting from the failure of the person or corporation, to whom such care and supervision are delegated, to use that reasonable care and diligence to keep such streets or sidewalks in a reasonably safe condition for travel, which devolves primarily upon the municipal corporation itself.[22] The obligation of keeping the streets in proper condition belongs to the municipality itself, and is a continuous one which cannot be shifted to another.[23] "A city owns and controls its street as a trustee for the public. It, therefore, stands charged by the law with the primary and bounden duty of keeping them free from nuisances, defects, and obstructions caused by itself or third parties if it (in the latter instance) has actual or constructive notice

21. Gastel v. New York, 194 N. Y. 15, 86 N. E. 833, per Justice Hiscock.

Evidence of similar injury to another at the same place, held inadmissible. Goble v. Kansas City, 148 Mo. 470, 50 S. W. 84.

22. Severa v. Battle Creek (Mich.), 129 N. W. 186.

23. St. Louis v. Conn. Mut. Life Ins. Co., 107 Mo. 92, 17 S. W. 637; Norton v. St. Louis, 97 Mo. 537, 11 S. W. 242; Franke v. St. Louis, 110 Mo. 516, 19 S. W. 938.

If the duty to repair streets has accrued, it can not be avoided because auxiliary powers and duties are afterwards conferred by the legislature upon the police department. Kunz v. Troy, 104 N. Y. 344, 10 N. E. 442, 58 Am. Rep. 508.

No defense that the abutting property was in charge of police commissioners appointed by the governor. Osborne v. Detroit, 32 Fed. 36, 41.

Contract with another to repair the streets no defense. Jacksonville, v. Drew, 19 Fla. 106, 45 Am. Rep. 5.

thereof in time to abate the nuisance, remove the obstruction, or repair the defect. *It cannot shirk that duty, or shift it over to, or halve it with, others.*"[24] Thus, delegation by the city of control of a street to a *contractor* is no defense.[25] So the act of a municipality in simply ordering a sidewalk repaired by one of its officers, does not, of itself, relieve the municipality from liability.[26] And a city cannot relieve itself of the duty to put up sufficient barriers to warn or guard persons passing upon its streets by showing an *agreement with an independent contractor* to protect and guard an excavation made in its streets.[27] Likewise, a municipality cannot avoid the legal responsibility of keeping its streets in a reasonable safe condition by inserting a clause in the agreement with the contractor, making him liable for all injuries occasioned by his neglect in making repairs,[28] and hence it is no defense that the accident occurred before the termination of the period of years a city contractor was required to keep the street in repair.[29] It is immaterial, as respects the primary liability of the city in such case, whether it is or is not inserted in its agreement with the contractor, for in no instance can the city surrender or abdicate the duty imposed upon it of keeping its streets and sidewalks in a proper condition.[30] So where a city was excavating under a street car track, the duty to guard and warn the public of the danger cannot be delegated to employees of the street railway company so as to relieve the municipality from liability.[31]

From what has been said it follows that municipal liability for defective *sidewalks arises without regard as to who constructed them or whether the city ordered their construction.* Thus, if instead of providing sidewalks as the public convenience may require, and putting them in a reasonably safe condition, the city permits the proprietors of adjoining property to construct sidewalks of their own in the street, it will be liable for all damages resulting from their unsafe condition.[32]

24. Benton v. St. Louis, 217 Mo. 687, 700, 118 S. W. 418.
In accordance with the principle stated the city can not evade, suspend, or cast upon others, by any act of its own, even by ordinance, this duty to properly care for its streets and sidewalks. Grogan v. Broadway Foundry Co., 87 Mo. 321.

25. Patterson v. Austin (Tex. Civ. App.), 29 S. W. 1139.

26. Atherton v. Bancroft, 114 Mich. 241, 246, 72 N. W. 208.

27. Welch v. St. Louis, 73 Mo. 71; Russell v. Columbia, 74 Mo. 480; Britton v. St. Louis, 120 Mo. 437, 25 S. W. 366.
§ 2796, *post.*

28. Blake v. St. Louis, 40 Mo. 569.

29. Harvey v. Chester, 211 Pa. 563, 61 Atl. 118.

30. See Blumb v. Kansas City, 84 Mo. 112.

31. O'Neil v. Chelsea, 208 Mass. 307, 94 N. E. 279.

32. Hill v. Sedalia, 64 Mo. App. 494; Oliver v. Kansas City, 69 Mo. App. 79; Haine v. Kansas City, 76 Mo. 438, § 2743, *post.*

Street required to be kept in repair by grantee of franchies. Under some statutes, as to portions of a street required to be kept in repair by a railroad company, the municipality is not liable.[33] However, unless it is otherwise provided by statute, the fact that a railway company, by statute,[34] its charter,[35] or contract,[36] is required to keep a part of the street in repair, does not absolve the municipality from liability for injuries caused by defects in such portions. So an ordinance providing that the *receiver* of a street railway company should keep a portion of the street in repair does not release the municipality from liability.[37] *A fortiori,* a municipality is not absolved from liability by permitting railroad tracks along the street.[38] On the other hand, a municipality is not liable because its license to a street railway company to use the streets required the company to lay and maintain its track in a specified manner, and the company has not conformed to the ordinance, since a municipality is not liable for a failure to enforce its ordinances.[39]

33. Scanlan v. Boston, 140 Mass. 84, 2 N. E. 787; Whitcher v. Somerville, 138 Mass. 454.

Statute applies only to the tracks and not to the located limits. Noyes v. Gardner, 147 Mass. 505, 18 N. E. 423, 1 L. R. A. 354.

Not apply to street railroads. Hyde v. Boston, 186 Mass. 115, 71 N. E. 118.

In Massachusetts, statute as to street railways required repair of streets, so far as occupied by street railways, by them. It was held nevertheless that city was liable where the construction and condition of the rail and grating at the place of the accident were improper and unnecessary. Cammett v. Haverhill, 197 Mass. 76, 83 N. E. 331.

34. *Indiana.* Indianapolis T. & T. Co. v. Springer (Ind. App. 1911), 93 N. E. 707.

Massachusetts. Hawks v. Northampton, 116 Mass. 420; Bailey v. Boston, 116 Mass. 423.

New York. Binninger v. New York, 81 N. Y. S. 226, 80 App. Div. 438.

Rhode Island. Warren Bros. Co. v. Taylor, 29 R. I. 96, 69 Atl. 303.

Texas. Galveston, H. & S. A. R. Co. v. White (Tex. Civ. App.), 32 S. W. 186.

"The liability of a municipal corporation can not be evaded because of the statutory duty of a railroad company to keep its crossings in safe condition for travel. The duty of a city to exercise reasonable care to keep its streets in proper condition, or compel a railroad company to do so, is a primary duty and can not be delegated or avoided by any act of the city. The statute only gives the city power to compel a railroad company to repair its crossings without expense to the municipality, and the failure to exercise this power imposes the liability for any injuries arising therefrom upon the city." Hammond v. Jahnke (Ind. 1912), 99 N. E. 39.

35. Watson v. Tripp, 11 R. I. 98, 23 Am. Rep. 420.

36. Chicago v. Kubler, 133 Ill. App. 520, 524; Kansas City v. Orr, 62 Kan. 61, 61 Pac. 397, 50 L. R. A. 783; Union St. R. Co. v Stone, 54 Kan 83, 37 Pac 1012; People v. Brooklyn, 65 N. Y. 349; Philadelphia v. Weller, 4 Brewst. (Pa.) 24; Aiken v. Philadelphia, 9 Pa. Super. Ct. 502; Louisville v. Bott's Adm'x (Ky. 1913), 152 S. W. 529.

See also Steubenville v. McGill, 41 Ohio St. 235.

37. Bober v. Chicago, 155 Ill. App. 561, 566.

38. Campbell v. Stillwater, 32 Minn. 308, 20 N. W. 320, 50 Am. Rep. 567.

39. Michigan City v. Boeckling, 122 Ind. 39, 23 N. E. 518, where, however, city was held liable on

Shifting liability on abutters. The municipality is not relieved from liability for defects in sidewalks by the fact that it has imposed the duty on abutters to keep their sidewalks in repair, nor because the primary liability for injuries resulting from defective sidewalks is otherwise imposed on abutting owners.[40] So serving a notice on adjoining owners to repair sidewalks does not preclude liability.[41] So a promise of the abutter to repair, after ordered to do so, is no defense.[42]

§ 2729. Necessity for lapse of time between notice of defect and time of accident.

One of the elements going to make up a cause of action for damages for injuries from a defective street is the *lapse of sufficient time before the injury, after actual or constructive notice of the defect or obstruction, to afford the municipal corporation a reasonable opportunity to make the repair or guard or remove the obstruction.* A reasonable time to make repairs or remove obstructions, after the municipality has, or should have, knowledge of the defect or obstruction, must elapse before it can be held liable for injuries resulting from such defect or obstruction.[43] *What is a reasonable time*

ground of defect in street where car rails in streets projected four inches above the planked surface.

40. *Alabama.* Lord v. Mobile, 113 Ala. 360, 21 So. 366.

Florida. Authority conferred on city to require abutters to construct sidewalks and keep them in repair does not relieve the city of liability for injuries from defective sidewalks. Pensacola v. Jones, 58 Fla. 208, 50 So. 874.

Massachusetts. Negligence of an abutting owner does not relieve the municipality of liability for injuries received from defective streets or sidewalks. Campbell v. Boston, 189 Mass. 7, 75 N. E. 96.

Nebraska. Lincoln v. Pirner, 59 Neb. 634, 81 N. W. 846; Lincoln v. O'Brien, 56 Neb. 761, 77 N. W. 76.

New York. Niven v. Rochester, 76 N. Y. 619; Wallace v. New York, 18 How. Pr. (N. Y.) 169.

United States. Webster v. Beaver Dam, 84 Fed. 280.

Municipality can not escape liability on the ground that it can only repair sidewalks when the property owner fails to do it within the time fixed by the council. Dallas v. Myers (Tex. Civ. App.), 55 S. W. 742; Dallas v. Jones (Tex. Civ. App.), 54 S. W. 606.

Power to require the construction of sidewalks by abutters is no defense. Manchester v. Hartford, 30 Conn. 118.

No defense that sidewalk was built and repaired by assessment on the adjacent property. Shippy v. Au-Sable, 85 Mich. 280, 48 N. W. 584.

Statutory provisions for payment of expenses of repairs of sidewalks by abutters no defense. Cuthbert v. Appleton, 22 Wis. 642.

41. Heath v. Manson, 147 Cal. 694, 82 Pac. 331; Russell v. Canastota, 98 N. Y. 496; Fleming v. Wilmerding Borough, 223 Pa. 295, 298, 72 Atl. 624.

No defense that notice to remove obstruction has been served on abutter. Wyman v. Philadelphia, 175 Pa. 117, 34 Atl. 621.

42. Smalley v. Appleton, 75 Wis. 18, 43 N. W. 826.

43. *Delaware.* Seward v. Wilmington, 2 Marv. (Del.) 189, 42 Atl. 451.

Louisiana. Weinhardt v. New Orleans, 125 La. 351, 51 So. 286.

Michigan. Fuller v. Jackson, 82 Mich. 480, 46 N. W. 721.

is not susceptible of definition but ordinarily depends upon the circumstances of the particular case so as to be a question of fact for the jury. But in determining how speedily a municipality should be required to act to avert accidents, "a limit must some time be reached, where the period between discovery of the defect and the accident is so short that a jury should not be allowed to say, as a question of fact, that due diligence had been lacking."[44] Thus, it has been held that a municipality should not be held liable because it failed within about four hours to remedy a defect, not extraordinarily dangerous, caused by a storm of almost unprecedented se-

Missouri. Baustian v. Young, 152 Mo. 317, 52 S. W. 921, 75 Am. St. Rep. 462; Gerber v. Kansas City, 105 Mo. App. 191, 79 S. W. 717; Richardson v. Marceline, 73 Mo. App. 360; Pearce v. Kansas City, 156 Mo. App. 230, 137 S. W. 629; Hitchings v. Maryville, 134 Mo. App. 712, 115 S. W. 473.

Virginia. Lynchburg v. Wallace, 95 Va. 640, 29 S. E. 675.

See also Lombar v. East Tawas, 86 Mich. 14, 48 N. W. 947.

The rule where the defect arises *without fault on the part of the city*, is that it will not be charged with negligence until lapse of a considerable time in which to communicate knowledge and notice of the defect, and of a reasonable time after such notice and knowledge within which to repair or guard against the same. Cohen v. New York, 204 N. Y. 424, 97 N. E. 866.

44. Per Justice Hiscock in Cohen v. New York, 204 N. Y. 424, 97 N. E. 866.

"It is not an arbitrary right of the jury to say what is a reasonable time within which repairs to a street should have been made, although they may from the facts and circumstances which the evidence in a particular case tends to prove be warranted in finding that the street or sidewalk was in a defective condition, and that the accident was due to such defect. The city only becomes negligent after a reasonable time has elapsed within which its duty to make its streets and sidewalks reasonably safe could have been performed. Then it becomes a fact to be ascertained by the jury upon proper evidence and proper instructions as to law bearing upon the evidence. Still, if the jury upon insufficient evidence finds the city liable for an injury, the verdict can not be sustained." Portsmouth v. Houseman, 109 Va. 554, 65 S. E. 11.

Where big hole was washed in an embankment constituting an approach to a bridge, and municipality knew of it at 9 a. m., it was liable for an injury at 1 p. m. where no notice of the danger was posted, and there was nothing to show that the defect could not have been remedied before the accident. Bradford v. Anniston, 92 Ala. 349, 8 So. 683, 25 Am. St. Rep. 60.

The degree of celerity required in making repairs, depnds on attendant circumstances, such as the location of the street, the amount of travel, etc. Denver v. Moewes, 15 Colo. App. 28, 60 Pac. 986.

Morning before accident, hole discovered in culvert in outlying residence street, municipality not liable. Reed v. Detroit, 99 Mich. 204, 58 N. W. 44.

Eight days, neglect to remove from principal business street telegraph wires embedded in ice, creates liability. Nichols v. Minneapolis, 33 Minn. 430, 23 N. W. 868, 53 Am. Rep. 56.

Sunday. The duty to repair or guard a street where a bridge is destroyed on a Saturday is not affected by the fact that the next day is Sunday. Snook p. Anaconda, 26 Mont. 128, 66 Pac. 756.

Under Massachusetts statute, in force at one time, defect must have existed for at least twenty-four hours. Brady v. Lowell, 3 Cush. (57 Mass.) 121, and see Winn v. Lowell, 1 Allen (83 Mass.), 177.

verity in a locality not appearing to have been either central or much traveled at that time.[45]

§ 2730. Miscellaneous matters held not defenses.

It is no defense that the land was not necessary as a street;[46] that like defects exist in many other places in the municipality;[47] that a municipal officer had been ordered to make the repairs, since the municipality cannot rest on the presumption that they have been made;[48] that there has never been any other accident at the place;[49] or that the obstruction existed at the time the municipality was incorporated.[50]

§ 2731. Same—lack of power to remedy conditions.

Where the municipality has no right to go upon land adjoining a street, to prevent the running of water on a street, the condition not being a nuisance *per se*, it seems that no recovery can be had on the ground of a defect in a highway, where not susceptible to protective or remedial measures which could be reasonably employed within the street.[51]

§ 2732. Same—lack of funds to repair.

Ordinarily, lack of funds to repair the streets is no defense to an action against a municipality to recover for injuries resulting from defective streets,[52] at least if an available tax

45. Cohen v. New York, 204 N. Y. 424, 97 N. E. 866.

46. Henderson v. Sandefur, 74 Ky. 550.

47. McLeod v. Spokane, 26 Wash. 346, 67 Pac. 74.

No defense that crossing was no more dangerous than other crossings of a similar character in the city. Bauer v. Indianapolis, 99 Ind. 56.

48. Lorf v. Detroit, 145 Mich. 265, 108 N. W. 661.

Futile attempt by street commissioner to remedy defect, three days before the accident, is no defense. Moon v. Ionia, 81 Mich. 635, 46 N. W. 25.

49. Brush v. New York, 69 N. Y. S. 51, 59 App. Div. 12.

50. Nelson v. Canisteo, 100 N. Y. 89, 2 N. E. 473.

51. Udkin v. New Haven, 80 Conn. 291, 68 Atl. 253.

52. *Alabama.* Lord v. Mobile, 113 Ala. 360, 21 So. 366; Birmingham v. Lewis, 92 Ala. 352, 9 So. 243.

Georgia. Columbus v. Ogletree, 102 Ga. 293, 29 S. E. 749.

Indiana. New Albany v. McCulloch, 127 Ind. 500, 26 N. E. 1074.

New York. Hyatt v. Rondout, 44 Barb. (N. Y.) 385.

Oklahoma. Fairfax v. Girand (Okla. 1913), 131 Pac. 159.

Pennsylvania. Erie v. Schwingle, 22 Pa. 384, 60 Am. Dec. 87.

Texas. McKinney v. Brown (Tex. Civ. App.), 81 S. W. 88; Dallas v. Strayer (Tex. Civ. App.), 73 S. W. 980.

Wisconsin. Prideaux v. Mineral Point, 43 Wis. 513, 28 Am. Rep. 558.

See also Heath v. Manson, 147 Cal. 694, 82 Pac. 331.

See Pomfrey v. Saratoga Springs, 104 N. Y. 459, 11 N. E. 43 (evidence held not to show want of funds in treasury of village).

If funds are used, the fact that they were borrowed on the credit of the members of the ways and means committee is immaterial. Moon v. Ionia, 81 Mich. 635, 46 N. W. 25.

Failure of the council to pass an appropriation ordinance for the removal and abatement of obstructions is no defense. Bohen v. Waseca, 32 Minn. 176, 19 N. W. 730, 50 Am. Rep. 564.

levy is already made,[53] or the cost could have been charged against abutters.[54] However, on the theory that the liability of a municipality for injuries from defective highways "springs from its negligence in the performance of corporate duties, *and that cannot be said to be a duty which the municipality has no power or agency to perform,*" a want of funds and an *absence of power* to raise money by taxation or otherwise, or to enforce contributions of labor from the residents to repair the streets, frees the municipality from liability for injuries resulting from defective highways.[55]

2. PARTICULAR STREETS TO WHICH LIABILITY EXTENDS.

§ 2733. Streets must be public highways.

Where an injury occurs on a road or sidewalk, and it is sought to hold the municipality liable in damages, the first question which presents itself is whether the place of the accident was a public highway under the control of the municipality. *If not a public highway,* the municipality is not liable.[56] However, if the municipality has exercised control over the way and improved or recognized it as a public street, that is ordinarily sufficient.[57] and the municipality will then be *estopped* to deny that the way was a public street.[58]

The *mode* in which the street was established is immate-

53. Mt. Vernon v. Brooks, 39 Ill. App. 426.

54. Mayfield v. Hughley, 135 Ky. 532, 122 S. W. 838; Shelby v. Clagett, 46 Ohio St. 549, 22 N. E. 407, 5 L. R. A. 606; Belton v. Turner (Tex. Civ. App.), 27 S. W. 831.

55. Whitefield v. Meridian, 66 Miss. 570, 6 So. 244, 4 L. R. A. 834, 14 Am. St. Rep. 596.

56. Burgin v. Lowell, 3 Allen (Mass.), 398.

Street must be a public one and opened as such. Briggs v. Huntington, 32 W. Va. 55, 9 S. E. 51.

57. If a portion of a street is improved to induce public travel thereon, the municipality must keep such portion in repair. Ord v. Nash, 50 Neb. 335, 69 N. W. 964.

If one of the original streets taken in by the charter incorporating the municipality, it is liable unless the street has been abandoned. Hanley v Huntington, 37 W. Va. 578, 16 S. E. 807.

Twenty years use of sidewalk by public under claim of right to use it as part of a public street, municipality liable for defects therein. Veale v. Boston, 135 Mass. 187.

Sometimes city charters limit the liability of the city to streets which it has established itself or upon which it has done one or all of certain enumerated acts, by limiting the duty to repair to such streets. Bessemer v. Carroll, 154 Ala. 506, 45 So. 419.

58. If the municipality has exercised control over the street, it is estopped to deny that it was ever legally laid out or dedicated as a street. Leavenworth v. Laing, 6 Kan. 274.

Municipality may be estopped by its conduct in recognizing a way as a street, to deny that such street was in fact a highway. Gilbert v. Manchester, 55 N. H. 298.

Dumping stones which were blasted, by municipality, on a private way, merely to get rid of them, is not a repair thereof so as to estop city to deny existence of street. Gilpatrick v. Biddleford, 51 Me. 182, 186.

rial,[59] unless otherwise provided by statute;[60] and the duty of a municipality to keep its streets and bridges in a safe condition for public travel is not confined to streets which have been *formally ordained and opened.*[61] Furthermore, the question whether the *title to the street* is in the municipality is immaterial.[62]

The material thing which must exist is the act of the municipality inducing the people to believe that the way is a public one. As said by the supreme court of the United States in a leading case:[63] "If the authorities of a city or town have treated a place as a public street, taking charge of it and regulating it as they do other streets, and an individual is injured in consequence of the negligent and careless manner in which this is done, the corporation cannot, when it is sued for such injury, throw the party upon an inquiry into the *regularity of the proceedings by which the land became a street* or into the authority by which the street was originally established."[64] If the way was dedicated as a street,—and this subject of *dedication* has already been the subject of a separate chapter,—[65] the dedication must have

59. If the municipality had assumed the duty of constructing and keeping in repair the sidewalk on which plaintiff was injured, for a considerable length of time before the accident, it is immaterial whether title to the street has ever been legally acquired by condemnation, prescription or dedication. Wikel v. Decatur, 146 Ill. App. 51.

Formal dedication of the land on which the sidewalk is constructed is not necessary. O'Malley v. Lexington, 99 Mo. App. 695, 74 S. W. 890.

If the land is used as a street, and the municipality recognizes it as such, proof of dedication is not necessary. Hollein v. St. Louis, 130 Mo. 287, 32 S. W. 640; Meiners v. St. Louis, 130 Mo. 274, 32 S. W. 637.

Thus, grading or improving any portion of a street, by a municipality, creates the duty to at least keep such portion in repair. Triese v. St. Paul, 36 Minn. 526, 32 N. W. 857.

In Connecticut, statutes apply to "all existing highways, whether established through proceedings in court, or municipal authorities, or through dedication." Makepeace v. Waterbury, 74 Conn. 360, 364, 50 Atl. 876.

60. **In Massachusetts,** the statute creating liability for defective highways applies only to ways "opened and dedicated to the public use." Sullivan v. Boston, 126 Mass. 540.

Paths crossing common grounds and serving as communication between streets held not within statute. Oliver v. Worcester, 102 Mass. 489, 3 Am. Rep. 485.

61. Ackerman v. Williamsport, 227 Pa. 591, 594, 76 Atl. 421.

62. Still v. Houston, 27 Tex. Civ. App. 447, 66 S. W. 76.

63. Mayor v. Sheffield, 4 Wall. (U. S.) 189, 194, 18 L. Ed. 416 (quoted from in Gilbreath v. Greensboro, 153 N. C. 396, 69 S. E. 268).

64. **Same rule** laid down in Seymour v. Salamanca, 137 N. Y. 364, 33 N. E. 304.

That a way has not been legally laid out as a street is immaterial where the municipality has treated it as a street by paving it, etc. Sewell v. Cohoes, 75 N. Y. 45, 31 Am. Rep. 418.

Illegality in proceedings to open the street, where the public has been invited to use it, is immaterial. Taake v. Seattle, 16 Wash. 90, 47 Pac. 220.

65. Chap. 33, *ante*, vol. 4.

been accepted.[66] But it is well settled that the acceptance, in order to render the municipality liable, need not be formal,[67] unless so required by statute, charter or ordinance. But if the acceptance of the dedication is required to be in a particular way, as by ordinance, no liability arises until so accepted.[68] Whether *acceptance of dedication by public user only* creates liability for injuries from defective streets, is the subject of more or less conflict in the decisions.[69]

§ 2734. Same—streets outside municipal limits.

There is no municipal liability for injuries from defective ways or sidewalks located outside the boundaries of the municipality.[70]

§ 2735. Streets not opened or improved.

For injuries on streets not yet opened for public use, the municipality is not liable.[71] All the streets of a municipality

66. *Alabama.* Lipscomb v. Bessemer, 161 Ala. 173, 49 So. 872 (alley).
Illinois. Krisch v. Chicago, 150 Ill. App. 197, 201.
Kentucky. Cochran v. Shepherdsville, 19 Ky. L. Rep. 1192, 43 S. W. 250.
Maryland. Ogle v. Cumberland, 90 Md. 59, 44 Atl. 1015.
Missouri. Downend v. Kansas City, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170.
Minnesota. St. Paul v. Seitz, 3 Minn. 297, 74 Am. Dec. 753.
Pennsylvania. Downing v. Coatesville Borough, 214 Pa. 291, 63 Atl. 696.
Virginia. Winchester v. Carroll, 99 Va. 727, 40 S. E. 37.
Evidence held to show acceptance so as to render municipality liable. Conner v. Nevada, 188 Mo. 148, 86 S. W. 256, 107 Am. St. Rep. 314; Sheff v. Huntington, 16 W. Va. 307.
Statutory dedication. The mere dedication of a city street to public use by means of a recorded plat does not of itself render the municipality liable for negligent failure to keep the street in repair. It must further be shown that the dedication has been accepted by the municipality. Baldwin v. Springfield, 141 Mo. 205, 212, 42 S. W. 717.

67. Dunn v. Oelwein, 140 Ia. 423, 118 N. W. 704; Snickles v. St. Joseph, 155 Mo. App. 308, 136 S. W. 752; Pittston v. Duffy, 1 Lack. Leg. Rec. (Pa.) 370.
See also Curran v. St. Joseph, 143 Mo. App. 618, 128 S. W. 203.

68. Imperial v. Wright, 34 Neb. 732, 52 N. W. 374.
But see Byerly v. Anamosa, 79 Ia. 204, 44 N. W. 359.

69. § 1582, p. 3293, *ante*, vol. 4.
Public user for many years is sufficient. Hemphill v. Morehouse, 162 Mo. App. 566, 142 S. W. 817; Ballew v. St. Joseph, 163 Mo. App. 297, 146 S. W. 454.
Contra. Michaelson v. Charleston (W. Va. 1912), 75 S. E. 151.

70. Stealey v. Kansas City, 179 Mo. 400, 404, 78 S. W. 599; McCook v. Parsons, 77 Neb. 132, 108 N. W. 167.
§ 2741, *post.*

71. Blaisdell v. Portland, 39 Me. 113; Hunter v. Weston, 111 Mo. 176, 19 S. W. 1098, 17 L. R. A. 633.
See also Henderson v. Sandefur, 11 Bush. (Ky.) 550.
Even the acceptance of the dedication of a street does not impose upon the municipality a liability to keep the dedicated land in repair as a street, and such obligation does not attach until the municipality in "some official and appropriate manner has invited or sanctioned its use as a street by the public. But such sanction may be given by acts of its proper officers as well as by acts

need not be opened and put in condition for travel, and it is not liable for the condition of a street which exists merely on paper.[72] However, the street need not have been *improved,* in order to hold the municipality liable.[73] For instance, it is immaterial that the street has never been *graded,* if the municipality has recognized it as a public street and permitted its use as such.[74]

§ 2736. What included within term "street."

The term street, as generally used, includes sidewalks[75] and public alleys.[76] And in those states where municipalities are liable for negligence in maintaining streets, they are liable for negligence in regard to sidewalks,[77] alleys,[78] and

in the form of ordinances." Baldwin v. Springfield, 141 Mo. 212, 42 S. W. 719 (overruled, however, by later cases in Missouri, so far as it may be construed as holding that a dedication can not be accepted by public user only).

"But, though a city has accepted a street, in whatever way that will make a valid acceptance, it is not obliged to put any part of it in repair for travel by vehicle or pedestrian. That is a matter of governmental discretion, for the non-exercise of which it is not liable. Conner v. Nevada, 188 Mo. 148, 86 S. W. 256, 107 Am. St. Rep. 314. And if the city improves a part of the street, it is not obliged to improve all of it. Downend v. Kansas City, 71 Mo. App. 529, and authorities there cited. Thus it may open up a roadway, say near the center, and yet not be obliged to establish sidewalks on either side; and it may put down a sidewalk on one side, and not be liable for not putting one down on the other side. Ely v. St. Louis, 181 Mo. 723, 81 S. W. 168." Curran v. St. Joseph, 143 Mo. App. 618, 128 S. W. 203.

72. Hunter v. Weston, 111 Mo. 176, 19 S. W. 1098, 17 L. R. A. 633.

Improvement in streets in the sparsely inhabited portions of the municipality is discretionary, and the decision of the council in regard thereto is binding on the courts. Henderson v. Sandefur, 11 Bush. (Ky.) 550.

"The city must determine when and in what manner its streets shall be improved, and, while it is responsible to the property owner for the damages done by insufficient improvements which it makes, it is not liable merely for failing to improve the street or for suffering it to remain in the condition in which it found it." Harney v. Lexington, 130 Ky. 247, 113 S. W. 115.

73. Immaterial whether the municipality has changed the natural grade of the street so as to comply with an ordinance. Meiners v. St. Louis, 130 Mo. 274, 32 S. W. 637.

A street partially improved—is liable. Lafayette v. Larson, 73 Ind. 367; Lindholm v. St. Paul, 19 Minn. 245 (partially graded).

Where a street is dedicated, the dedication accepted, the street in daily use by numbers of people, lit by city, sewer pipes laid by city, the city is liable for negligence in keeping the street in repair, although the street was not otherwise improved and there were no sidewalks. Newport News v. Scott's Adm'r, 103 Va. 794, 808, 50 S. E. 266.

Mowing weeds off a street and filling holes in it constitutes such an improvement as to render city liable for want of repair. Henderson v. White, 20 Ky. L. Rep. 1525, 49 S. W. 764.

74. James v. Seattle, 68 Wash. 359, 123 Pac. 472; Brabon v. Seattle, 29 Wash. 6, 69 Pac. 365.

75. § 1286, *ante,* vol. 3; § 1829, *ante,* vol. 4, and see § 2743, *post.*

76. § 1285, *ante,* vol. 3, and see § 2748, *post.*

77. § 2743, *post.*

78. § 2748, *post.*

bridges.[79] So the liability extends to boulevards[80] and parkways.[81] Such liability also extends to a *viaduct* over the tracks of a railroad;[82] a *tunnel* under a river, used as a highway;[83] *apron or platform* forming part of a thoroughfare;[84] *deposits* by a city and its licensees of *refuse* in a river adjoining the end of a public street, and appearing to be a prolongation and part of the street;[85] *bicycle path* constructed by a municipality at its option;[86] intersection of a railroad right of way and a street.[87]

However, the *seashore* is not a highway for public travel so as to render a city liable for injuries from falling into an excavation.[88] And the liability does not extend to *mere private ways* not recognized as streets by the municipality.[89]

In Massachusetts, it is held that a road, not a public highway, opening into a street at right angles and laid out as a parkway running for some distance through private land, is not a way "opened and dedicated to public use," so as to be within the statute in that state.[90]

§ 2737. Streets and walks in outlying districts.

Subject only to the qualification that the *same amount* of care is not required with respect to streets and sidewalks in outlying districts where the travel is comparatively small, it is well settled that the duty to exercise reasonable care to keep streets and sidewalks in safe condition for public use applies as well to streets and sidewalks in the suburbs as to

79. § 2749, *post.*

Causeway erected within city limits by an incorported bridge company, as a street, see Manchester v. Ericsson, 105 U. S. 347, 26 L. Ed. 1099, rev'd Fed. Cas. No. 4,511.

80. Burridge v. Detroit, 117 Mich. 557, 76 N. W. 84, 42 L. R. A. 684, 72 Am. St. Rep. 582.

81. "Parkway" is essentially a boulevard, and city is liable for defective condition thereof as a street. Kleopfert v. Minneapolis, 90 Minn. 158, 95 N. W. 908, 93 Minn. 118, 100 N. W. 669.

82. Denver v. Baldasari, 15 Colo. App. 157, 61 Pac. 190.

83. Chicago v. Hislop, 61 Ill. 86.

84. Johnson v. Milwaukee, 46 Wis. 568, 1 N. W. 187.

85. Ray v. St. Paul, 40 Minn. 458, 42 N. W. 297.

86. Prather v. Spokane, 29 Wash. 549, 70 Pac. 55, 59 L. R. A. 346, 92 Am. St. Rep. 923.

87. Taake v. Seattle, 18 Wash. 178, 51 Pac. 362.

88. Murphy v. Brooklyn, 98 N. Y. 642.

89. Ottolengui v. Seattle, 59 Wash. 37, 109 Pac. 206.

§ 2733, *ante.*

City is under no duty to see that a path or driveway made upon *private property* by the public in walking or driving across it is safe from an obstruction existing upon the private land, but so near to the path or driveway as to constitute a source of possible danger. Sweet v. Poughkeepsie, 78 N. Y. S. 60, 75 App. Div. 274, 277.

Does not include an approach over private property to a circus, although the municipality has licensed the exhibition. Morgan v. Hallowell, 57 Me. 375.

90. Jones v. Boston, 201 Mass. 267, 87 N. E. 589.

those in the down town portion of the municipality.[91] How far improvements shall be extended on a street maintained as a county road in a municipality must necessary depend upon municipal discretion, but, as has been well said, "this discretion does not amount to permission to omit the maintenance of the way *already in existence* to the extent necessary to keep it reasonably safe for public use."[92]

§ 2738. Streets in property annexed.

If property is annexed to a city, public highways therein become streets of the municipality,[93] for the condition of which the municipality is liable in case of negligence.[94] But the municipality is allowed a reasonable time in which to discover and remedy unsafe conditions.[95]

§ 2739. Injury outside street limits where street obstructed.

If a street is so obstructed as to require travelers to go on adjoining land for the purpose of travel, the municipality assumes responsibility for reasonable care as to such way over the adjoining land, where a way has been worn there by travel for some time.[96] But if a traveler unnecessarily departs from the used part of the highway, and is injured while attempting to regain the highway, the municipality, it is generally held, is not liable.[97]

§ 2740. Abandonment of street as precluding liability.

A municipality may abandon a public street so as to preclude further liability for failure to keep it in repair.[98] Or it

91. *Delaware.* Seward v. Wilmington, 2 Mar. (Del.) 189, 42 Atl. 451.
Illinois. Decatur v. Besten, 169 Ill. 340, 48 N. E. 186; Flora v. Naney, 136 Ill. 45, 26 N. E. 645; Mt. Morris v. Kanodo, 98 Ill. App. 373; Lusch v. Odin, 158 Ill. App. 657.
Iowa. Thomas v. Brooklyn, 58 Ia. 438, 10 N. W. 849.
Minnesota. Sundell v. Tintah, 117 Minn. 170, 134 N. W. 639, 38 L. R. A. (N. S.) 1127.
Nebraska. South Omaha v. Powell, 50 Neb. 798, 70 N. W. 391; O'Laughlin v. Pawnee City, 88 Neb. 244, 129 N. W. 271.
Pennsylvania. Wall v. Pittsburg, 205 Pa. 48, 54 Atl. 497.
Amount of care different, § 2726, *ante.*
Applies to a street on a hillside near the outskirts. Wall v. Pittsburg, 205 Pa. 48, 54 Atl. 497.

92. Chambers v. Braddock Borough, 34 Pa. Super. Ct. 407, 410.
93. § 1287, *ante*, vol. 3.
94. Georgia R. & E. Co. v. Tompkins (Ga. 1912), 75 S. E. 664; Macon v. Morris (Ga. 1912), 73 S. E. 539; Frankfort v. Coleman, 19 Ind. App. 368, 371, 49 N. E. 474, 65 Am. St. Rep. 412; Foster v. Kansas City, 114 Mo. App. 728, 90 S. W. 751.
95. Richmond v. Mason, 109 Va. 546, 65 S. E. 8.
96. Finkle v. Valatie, 99 N. Y. S. 715, 114 App. Div. 251; Batty v. Duxbury, 24 Vt. 155.
97. Hannibal v. Campbell, 86 Fed. 297, 30 C. C. A. 63.
§ 2772, *post.*
98. Anderson v. Turbeville, 6 Cold. (Tenn.) 150.
But if a street is being repaired, and the municipality requires it to be kept open for use by the public while the repairs are being made,

may close a street for travel temporarily and thereby suspend for the time being the duty to keep it in reasonably safe condition.[99] So statutes in some states provide that if a street is not opened and worked within a certain number of years after being laid out, it shall cease to be a street;[1] and after such period it is held that the municipality is not liable for injuries from defects therein.[2] However, if a public way is closed to travel, notice thereof must be given, in order to escape liability.[3] Thus, where a city street had been discontinued but was continually being used by the public, and no other road was substituted and no notice posted not to use the road, the city is liable for an injury caused by a defect or obstruction in the old way.[4] So where a sidewalk is permitted to remain and to be used as it was before the street was vacated, the duty of the municipality to repair it is the same as it is with respect to other walks under its control.[5] If the municipality has the right to close a street temporarily, it can prevent liability in the meantime by giving notice to the public, by *signs or a barrier*, that the street has been closed.[6]

§ 2741. Highways built and maintained ultra vires.

If there is no municipal authority, under any circumstances, to construct or maintain a street, so that the construction or maintenance is *ultra vires*, damages are not recoverable.[7] For instance, in a leading case, the city of La Crosse, in Wisconsin, built and maintained a road across the Mississippi River and in the state of Minnesota, without any charter or legislative authority except from the state of Minnesota. It was held that the city had no power to accept the privilege from a sister state, subject to the condition that it should be

its duty remains as to keeping it in condition, and it is immaterial, in such a case, that the street is being repaired by an independent contractor. Charles Eneu Johnson Co. v. Philadelphia, 236 Pa. 510, 84 Atl. 1014.

Streets, although not used for ten years, are within Michigan statute. Fuller v. Jackson, 92 Mich. 197, 52 N. W. 1075, overruling Clark v. North Muskegon, 88 Mich. 308, 50 N. W. 254.

99. Jones v. Collins, 177 Mass. 444, 59 N. E. 64.

1. § 1611, *ante*, vol. 4.

2. Hovey v. Haverstraw, 124 N. Y. 273, 26 N. E. 532.

3. Jones v. Boston, 188 Mass. 53, 74 N. E. 295.

In Massachusetts, order must be made by the proper authorities of the city formally closing the street to public travel. Hurley v. Boston, 202 Mass. 68, 88 N. E. 586.

4. D'Amico v. Boston, 176 Mass. 599, 58 N. E. 158.

5. Fritz v. Watertown, 21 S. D. 280, 111 N. W. 630.

Foot path cannot be abandoned by the municipality, so as to put pedestrians on notice not to use it, without some affirmative action of the municipality, where it continues to be used and has the appearance of being safe. Neal v. Marion, 129 N. C. 345, 40 S. E. 116.

6. Torphy v. Fall River, 188 Mass. 310, 74 N. E. 465.

7. § 2637, *ante*.

liable for injuries received from defects in such road, and hence was not liable for injuries occurring thereon.[8]

3. PARTICULAR PARTS OF STREETS TO WHICH LIABILITY EXTENDS.

§ 2742. "Width" of way as to which duty extends.

There is some apparent conflict in the decisions as to the width of the highway as to which the duty of the municipality, to use reasonable care to keep safe, extends. The rule undoubtedly is that a municipality need not open a street for travel to its entire width,[9] and if only part of the width has been opened for travel, then of course only that part is required to be kept in condition.[10] But if the street has been opened to its entire width or any lesser part, and then the traveled way is confined to a narrower limit, the decisions are not altogether harmonious in some instances, even in the same state. It is sometimes held that municipalities are required to exercise reasonable care only as to the *traveled portions* of a street,[11] but there is authority directly holding

8. Becker v. LaCrosse, 99 Wis. 414, 75 N. W. 84, 40 L. R. A. 829, 67 Am. St. Rep. 874.

9. Hannibal v. Campbell, 86 Fed. 297, 30 C. C. A. 63.

The municipality may, without incurring liability, leave certain streets entirely unopened, and in others put only a portion of the width in condition for use. Wellington v. Gregson, 31 Kan. 99, 1 Pac. 253, 47 Am. Rep. 482.

10. § 2735, *ante;* and see Herndon v. Salt Lake City, 34 Utah, 65, 95 Pac. 646.

But if the municipality determines to devote less than the full located width of the street to travel, the portion lying between such part and the remainder should in some way be so indicated as to be prominent to a person using the street. Birch v. Charleston Light, H. & P. Co., 113 Ill. App. 229.

Limitation on rule. While a municipality need not prepare and maintain the full located width of the street for travel, yet if a hole is so near the traveled path that it is liable to result in injury to passers-by, the municipality is liable for injuries therefrom. Birch v. Charleston Light, H. & P. Co., 113 Ill. App. 229, and see § 2774, *post.*

11. Howard v. North Bridgewater, 16 Pick. (Mass.) 189; Tritz v. Kansas City, 84 Mo. 632; Craig v. Sedalia, 63 Mo. 417; Brown v. Glasgow, 57 Mo. 156; Bassett v. St. Joseph, 53 Mo. 290, 14 Am. Rep. 446; Rhyner v. Menasha, 97 Wis. 523, 73 N. W. 41. See also McArthur v. Saginaw, 58 Mich. 357, 25 N. W. 313, 55 Am. Rep. 687.

Liable for defects in traveled part exists although municipality had left street in its natural condition as when opened to public use. Lamb v. Cedar Rapids, 108 Ia. 629, 79 N. W. 366.

It is not the duty of a municipality to keep every street in proper condition throughout its entire width, without regard to location, amount of travel and other circumstances. Fulliam v. Muscatine, 70 Ia. 436, 30 N. W. 861.

Hole beside a stump, on side of but within road which was practically a country highway. Not liable where traveled part of road was safe. Keyes v. Marcellus, 50 Mich. 439, 15 N. W. 542, 45 Am. Rep. 52.

Where only a portion of a street was wrought for travel, but houses had been moved back to widen the street to make a boulevard although the new portion was still in the rough, an occupant of one of such houses injured while passing over

the contrary,[12] and it is expressly held in other cases that all of the street, *so far as opened,* must be kept in proper condition.[13] And it is held by all the decisions that as to *sidewalks* the duty extends to their entire width,[14] at least in the settled part of the municipality.[15]

such rough ground to reach the sidewalk, cannot recover. Lynch v. Boston, 186 Mass. 148, 71 N. E. 301.

"It is in general the duty of a traveler to remain in the traveled track of the road, or that part of the highway which, to a reasonable width, has been graded or prepared for that purpose; and if he voluntarily deviates from the roadway thus prepared, and meets with an accident from some cause outside of the traveled track, the municipality ought not to be responsible for any damage or injury he may thus sustain. If the law were otherwise, it would follow that a municipality would be liable for all accidents occurring in consequence of the voluntary act or mistake of a traveler in leaving the roadway to travel upon that part not intended for his use." King v. Ft. Ann, 180 N. Y. 496, 73 N. E. 481.

As to rural ways, although within the limits of the municipality, the duty does not extend to all parts of the road. Rankin v. Smith, 63 Ill. App. 522; Keyes v. Marcellas, 50 Mich. 439, 15 N. W. 542, 45 Am. Rep. 52.

Bridge, rule applied to. Goeltz v. Ashland, 75 Wis. 642, 44 N. W. 770.

In Michigan, it has been held that whether the duty as to the *roadway* extends to the entire width of the *street* depends entirely on the necessities of travel in a given case. Sebert v. Alpena, 78 Mich. 165, 43 N. W. 1098.

12. Thuis v. Vincennes (Ind. App.), 73 N. E. 141, rev'd on rehearing on other grounds in 35 Ind. App. 350, 73 N. E. 1098.

13. *Alabama.* McLemore v. West End, 159 Ala. 235, 48 So. 663; Mobile v. Shaw, 149 Ala. 599, 43 So. 94.

Indiana. Odon v. Dobbs, 25 Ind. App. 522, 58 N. E. 562 (from curb to curb).

Iowa. Crystal v. Des Moines, 65 Ia. 502, 22 N. W. 646; Stafford v. Oskaloosa, 64 Ia. 251, 20 N. W. 174.

Kentucky. Maysville v. Guilfoyle, 110 Ky. 670, 62 S. W. 493.

Missouri. Kossman v. St. Louis, 153 Mo. 293, 54 S. W. 513.

Pennsylvania. McLaughlin v. Kelly, 230 Pa. 251, 79 Atl. 552.

See also Herrington v. Macon, 125 Ga. 58, 54 S. E. 71 (dangerous ditch across sidewalk).

So where there was no part of the street appropriated to sidewalks, the municipality was held liable where a wagon was driven into an unguarded hydrant eleven feet within the street line, although the wagon was being driven between the street line and the hydrant. Burnes v. St. Joseph, 91 Mo. App. 489.

Alleys, rule applied to. Niblett v. Nashville, 12 Heisk. (Tenn.) 684, 27 Am. Rep. 755.

Bridge, whole width must be kept in repair. Rusch v. Davenport, 6 Ia. 443.

Statute applies to all portions of street. Lincoln v. Detroit, 101 Mich. 245, 59 N. W. 617.

14. Wilmette v. Brachie, 110 Ill. App. 356; Springfield v. Burns, 51 Ill. App. 595; Bacon v. Boston, 3 Cush. (Mass.) 174; Norton v. Kramer, 180 Mo. 536, 79 S. W. 699; Goins v. Moberly, 127 Mo. 116, 29 S. W. 985; Roe v. Kansas City, 100 Mo. 190, 13 S. W. 404.

Applies to all of sidewalk intended for travel. Atlanta v. Milam, 95 Ga. 135, 22 S. E. 43.

It is not the exercise of reasonable care to merely keep reasonably safe that part of the sidewalk only which is most generally used. Augusta v. Tharpe, 113 Ga. 152, 38 S. E. 389.

15. While there is a conflict in the decisions as to whether a municipality is bound to keep in repair its *suburban* streets and sidewalks to their entire width, yet it is well settled that as to sidewalks in populous portions of the municipality, and such as are constantly used by the public, reasonable care must be exercised to keep them in repair and free from defects to their entire width. Denver v. Stein, 25 Colo. 125, 127, 53 Pac. 283.

The general doctrine to be deduced from the cases has been stated as follows: "That in opening a street for travel, whatever may be its nominal or platted width, it is primarily a matter within the discretion of the city to say whether it will prepare the whole or only a portion of the width of the street for travel; that in the business portions of the city, or where travel and the convenience of the public require it, the whole width of the street must generally be made and maintained passable and in a reasonably safe condition; that where the whole width of the street has been prepared and opened for travel, whether primarily necessary or not, the city must thereafter maintain the whole street in a reasonably safe condition throughout its entire width; that in some places, and especially in the outlying portions of the city, it may ordinarily determine what portions of the streets it will prepare for travel, and in such places it need only maintain that portion which is opened and set apart for travel in a reasonably safe condition; that whether the city has prepared a sufficient width for passage to respond to the needs of the public may be a question of fact for the jury, and as to whether the streets are maintained in a reasonably safe condition for travel (whether throughout their entire width where the whole width is opened, or over that portion which is opened and prepared for travel), is always a question of fact to be determined by the jury from all the facts and circumstances in the particular case." [16]

16. Herndon v. Salt Lake City, 34 Utah, 65, 95 Pac. 645, per Justice Frick.

"In 15 A. & E. Ency. L. (2d Ed.) at page 452, after stating the law applicable to country roads to be that such roads need not be opened up nor maintained in a reasonably safe condition for travel throughout their entire width, the author proceeds as follows: 'In regard to city streets it would seem that the rule might well be different from that prevailing in the case of country roads, and accordingly it is stated in some cases that there is an absolute duty to keep in repair the whole width of the street. These statements, may, however, be viewed with reference to the particular circumstances under which they are made, and in the best-considered cases it is stated that even in the case of city streets the width which must be kept in repair is a matter dependent on particular circumstances, among which, apparently to be considered, are the amount of travel and the question whether the city has ever opened the whole street for travel by doing work thereon, so as to induce persons to use the whole width thereof.' Upon an examination of the cases it will be found that what the author says with regard to the statements contained in the cases, and that such statements must be reconciled with the particular facts before the courts in making them, is not overdrawn. In fact it will be found that cases emanating from the same courts are not infrequently cited upon both sides of the proposition; namely, that it is the duty of the city to make its streets passable and to maintain them in a reasonably safe condition throughout their entire width, and also that no such duty is imposed. This apparent conflict is due to the fact that in those cases where the evidence was to the effect that the city had

Furthermore, the duty of the municipality extends to the *space between the sidewalk and the curb.*[17]

§ 2743. Sidewalks.

Wherever it is held that there is a common law liability imposed on municipalities for negligence in maintaining its streets, the like rule is held as to sidewalks,[18] which are, as a matter of law, generally held to be included within the term streets.[19] So *statutes* imposing such liability for defective highways are generally held to include sidewalks.[20]

opened, worked, and prepared for travel and public use the whole width of the street the court simply stated that it was the duty of the city to maintain such streets reasonably safe for travel throughout their entire width, and that a failure to do this constituted negligence. In those cases, therefore, the question involved here, as a general rule, is not discussed; but the duty upon the part of the city to maintain the whole street safe is assumed." Herndon v. Salt Lake City, 34 Utah, 65, 95 Pac. 646.

17. § 2746, *post.*

18. *Illinois.* Bloomington v. Bay, 42 Ill. 503.

Indiana. Dooley v. Sullivan, 112 Ind. 451, 14 N. E. 566, 2 Am. St. Rep. 209.

Iowa. Brown v. Chillicothe, 122 Ia. 640, 98 N. W. 502.

Kansas. Osborne v. Hamilton, 29 Kan. 1.

Kentucky. Madisonville v. Pemberton's Adm'r, 25 Ky. L. Rep. 347, 75 S. W. 229.

Minnesota. Furnell v. St. Paul, 20 Minn. 117.

New York. Pomfrey v. Saratoga Springs, 104 N. Y. 459, 11 N. E. 43.

Pennsylvania. Miller v. Bradford, 186 Pa. 164, 40 Atl. 409.

Texas. Galveston v. Barbour, 62 Tex. 172, 50 Am. Rep. 519.

Virginia. Gordon v. Richmond, 83 Va. 436, 2 S. E. 727.

Washington. Hutchinson v. Olympia, 2 Wash. T. 314, 5 Pac. 606.

If a sidewalk adjoining a market house is permitted to be used for market purposes, it must nevertheless be kept reasonably safe for pedestrians. O'Dwyer v. Northern Market Co., 24 App. (D. C.) 81.

Sidewalk not intended as such. Defects in sections of old sidewalk placed in front of vacant lots by the municipality, where used for foot travel, renders the municipality liable, although they were not put there for public travel. Rusher v. Aurora, 71 Mo. App. 418.

Sidewalk need not be formally adopted by recorded resolution or vote. Cronin v. Delavan, 50 Wis. 375, 7 N. W. 249.

Includes platform. So the municipality is liable for the defective condition of a *platform* over a gutter in the street, erected by a business firm by permission to receive and deliver goods from their storehouse, where it was liable to be used by pedestrians. Bell v. Henderson, 24 Ky. L. Rep. 2434, 74 S. W. 206.

Does not include approach to a sidewalk (such as a platform) on private property. Leggett v. Watertown, 86 N. Y. S. 982, 93 App. Div. 80, 85.

19. § 1286, *ante*, vol. 3; § 1829, *ante*, vol. 4.

20. McLean v. Lewistown, 8 Idaho, 472, 69 Pac. 478; Giffen v. Lewiston, 6 Idaho, 231, 55 Pac. 545; Gould v. Boston, 120 Mass. 300; Weare v. Fitchburg, 110 Mass. 334, and see § 1286, note 79, *ante*, vol. 3.

See also Manchester v. Hartford, 30 Conn. 118; Hall v. Manchester, 40 N. H. 410.

In Michigan, however, under a statute in force at one time, injuries from defective sidewalks were held not within the statute relating to "highways, streets, bridges, crosswalks and culverts." Detroit v. Putnam, 45 Mich. 263, 7 N. W. 815.

Where a plank walk was laid on stringers for foot passengers, on the dirt approach to a bridge, such walk was a sidewalk and not a part of

In fact, the duty to repair a sidewalks is as binding as is the duty to keep the driveway in proper condition.[21] Hence, the fact that a sidewalk is originally properly constructed does not affect municipal liability for its subsequently becoming defective.[22]

In order to render the municipality liable, the sidewalk must be a *public one;*[23] although it is immaterial that a sidewalk, at the place of the injury, is on private property, where the municipality has held it out as a public thoroughfare.[24]

On the other hand, the municipality cannot escape liability on any of the following grounds: sidewalk *not built by the municipality,*[25] as where built by an abutting owner;[26] *side-*

the bridge, and hence not within the Michigan statute. Saunders v. Gun Plains, 76 Mich. 182, 42 N. W. 1088.

Maine statute that repair of a way within six years before the cause of action accrued, estops the town to deny the location, applies to sidewalks. McCann v. Bangor, 58 Me. 348.

21. Gillard v. Chester, 212 Pa. 338, 61 Atl. 929.

22. Muncie v. Hey, 164 Ind. 570, 74 N. E. 250.

23. Sidewalk must be controlled and treated by the authorities as a public sidewalk, and opened as such. Chapman v. Milton, 31 W. Va. 384, 7 S. E. 22.

Space between the line of the sidewalk and a building, used by the owner for his own purposes and over which the municipality never exercised any control is not part of the sidewalk. Temby v. Ishpeming, 140 Mich. 146, 103 N. W. 588, 69 L. R. A. 618.

Foot path worn along the part of a street which had never been improved by the municipality, not liable. Ely v. St. Louis, 181 Mo. 723, 81 S. W. 168.

Repairs after accident. The fact that after the accident the municipality caused the sidewalk to be repaired is material to show assumption of control of the sidewalk by the municipality. Benton v. St. Louis, 217 Mo. 687, 118 S. W. 418, 129 Am. St. Rep. 561, followed in Hemphill v. Morehouse, 162 Mo. App. 566, 142 S. W. 817.

24. Chicago v. Baker, 95 Ill. App. 413, aff'd in 195 Ill. 54, 62 N. E. 892.

If a municipality has had a sidewalk built at its direction, and it has been used as such for several years, although the land was not dedicated to public use or used so as to make it a public street, the municipality is liable for negligence in maintaining the walk. Harrison v. Ayrshire, 123 Ia. 528, 99 N. W. 132.

25. *Connecticut.* Hillyer v. Winsted, 77 Conn. 304, 308, 59 Atl. 40.

Illinois. Mt. Carmel v. Blackburn, 53 Ill. App. 658; Champaign v. McInnis, 26 Ill. App. 338.

Indiana. Aurora v. Bitner, 100 Ind. 396.

Minnesota. Furnell v. St. Paul, 20 Minn. 117.

Missouri. Hill v. Sedalia, 64 Mo. App. 494; Streeter v. Breckenridge, 23 Mo. App. 244.

Texas. Klein v. Dallas, 71 Tex. 280, 8 S. W. 90.

§ 2728, *ante.*

26. *Colorado.* Denver v. Hickey, 9 Colo. App. 137, 47 Pac. 908 (federal government abutting owner).

Illinois. Flora v. Naney, 31 Ill. App. 493, aff'd in 136 Ill. 45, 26 N. E. 645.

Indiana. Huntington v. Breen, 77 Ind. 29; Huntington v. McClurg, 22 Ind. App. 261, 53 N. E. 658 (walk constructed by county).

Kentucky. Bromley v. Bodkin, 25 Ky. L. Rep. 1245, 77 S. W. 696.

Maine. Hutchings v. Sullivan, 90 Me. 131, 37 Atl. 883.

Michigan. Lombar v. East Tewas, 86 Mich. 14, 48 N. W. 947; Shippy v. Au Sable, 85 Mich. 280, 48 N. W. 584; Fuller v. Jackson, 82 Mich. 480, 46 N. W. 721.

Missouri. Oliver v. Kansas, 69 Mo. 79.

Nebraska. Plattsmouth v. Mitchell, 20 Neb. 228, 29 N. W. 593.

walk constructed without authority from the municipality;[27] sidewalk located on the *outskirts of the city* and infrequently used by the public;[28] *driveway* of the street in an *unfinished condition*;[29] plank used as a means of descent from the end of a sidewalk, put there by an unknown person;[30] loose boards placed at an alley crossing *by third persons*;[31] municipality under *no obligation to build sidewalks;*[32] *other parts of the street sufficient* for public convenience;[33] *no curb or dividing line* between the sidewalk and the driveway, where in fact used as a footpath;[34] *fee of the soil* on which the sidewalk is built, in the abutter;[35] *nonliability of the abutting owner* for the defect in the sidewalk;[36] fact that *another was also negligent.*[37]

Furthermore, the liability extends to injuries from a defect in a path used by pedestrians, although no *artificial sidewalk* has been constructed.[38] And so far as municipal liability is concerned, a walk is a sidewalk although *constructed of cinders.* "It was a sidewalk no matter whether constructed of cinders, plank, stone, concrete, or any or all of them combined."[39]

New Hampshire. Lambert v. Pembroke, 66 N. H. 280, 23 Atl. 81.

New York. Saulsbury v. Ithaca, 94 N. Y. 27, 46 Am. Rep. 122, aff'g 24 Hun, 12.

Washington. McKnight v. Seattle, 39 Wash. 516, 81 Pac. 998.

Wisconsin. Hill v. Fond du Lac, 56 Wis. 242, 14 N. W. 25.

But see Ruppenthal v. St. Louis, 190 Mo. 213, 88 S. W. 612.

27. Higert v. Greencastle, 43 Ind. 574; Barnes v. Newton, 46 Ia. 567.

28. § 2737, *ante.*

29. Seymour v. Salamanaca, 137 N. Y. 364, 33 N. E. 304.

30. Hogan v. Chicago, 168 Ill. 551, 48 N. E. 210.

§ 2750, *post.*

31. Springfield v. Tomlinson, 79 Ill. App. 399.

32. Beazan v. Mason City, 58 Ia. 233, 12 N. W. 279.

If part of a sidewalk is permitted to be torn up, and an injury results, it is no defense that the municipality was not bound to construct a walk at that point. Belyea v. Port Huron, 136 Mich. 504, 99 N. W. 740.

33. Streeter v. Breckenridge, 23 Mo. App. 244.

It is not sufficient that the part of the highway prepared for and used by vehicles is in safe condition for the use of pedestrians. James v. Portage, 48 Wis. 677, 5 N. W. 31.

34. Hillyer v. Winsted, 77 Conn. 304, 59 Atl. 40.

35. Will v. Mendon, 108 Mich. 251, 66 N. W. 58.

36. Bucher v. Sunbury Borough, 216 Pa. 89, 64 Atl. 906.

37. Even where the board of education of a city is a corporation independent of the city corporation, the city is liable for defective sidewalks in front of a building occupied by the board of education for school purposes, the defect being due to ice from water negligently allowed to flow from school buildings. Pymm v. New York, 97 N. Y. S. 1108, 111 App. Div. 330.

38. Atchison v. Mayhood, 69 Kan. 672, 77 Pac. 549.

But where no sidewalk has been built along one side of a street, and there is merely a narrow path with cinders over its surface a part of the way, the municipality is not liable, it is held in Missouri, to one injured by stepping into a shallow ditch washed out across the pathway. Curran v. St. Joseph, 143 Mo. App. 618, 128 S. W. 203, and see Ely v. St. Louis, 181 Mo. 723, 81 S. W. 168.

39. Lusch v. Odin, 158 Ill. App. 657, 661.

Keeping up a good sidewalk on one side of the street does not relieve a municipality from liability for defects in a pathway (not a sidewalk) on the other side of the street over which people generally passed on foot.[40]

§ 2744. Same—sidewalks partly or wholly outside limits of street.

A municipality is liable, in case of negligence, for injuries resulting from defects in a sidewalk or driveway, within the municipal limits but wholly or partly outside the street limits, where it has constructed or controlled such way, or it is used as a part of the street to the knowledge of the municipality and without objection.[41] However, if the sidewalk

It is immaterial that sidewalk is built of earth instead of the usual materials. Graham v. Albert Lea, 48 Minn. 201, 50 N. W. 1108.

40. Neal v. Marion, 129 N. C. 345, 40 S. E. 116.

Construction of a sidewalk on one side of a street is not notice to pedestrians not to walk on the other side. Neal v. Marion, 129 N. C. 345, 40 S. E. 116.

§ 2838, *post*.

41. Mansfield v. Moore, 124 Ill. 133, 16 N. E. 246; Roodhouse v. Christian, 55 Ill. App. 107, aff'd in 158 Ill. 137, 41 N. E. 748; Worrell v. Bloomfield, 148 Ia. 691, 127 N. W. 1082; O'Neil v. West Branch, 81 Mich. 544, 45 N. W. 1023; Chadron v. Glover, 43 Neb. 732, 62 N. W. 62; Foxworthy v. Hastings, 25 Neb. 133, 41 N. W. 132.

Contra, see Stone v. Attleborough, 140 Mass. 328, 4 N. E. 570.

Jewhurst v. Syracuse, 108 N. Y. 303, 15 N. E. 409, is the leading case in New York upon the subject. There the owner of land adjoining one of defendant's streets had built a sidewalk along the line thereof, consisting of two strips of 12-inch plank laid lengthwise of the street one foot apart, one strip inside and one outside of the limits of the street; and the plaintiff was injured by the breaking of the plank on which he was walking outside of the street limits. The sidewalk had been out of repair for a year, to the knowledge of defendant. A judgment recovered by plaintiff was affirmed by the court of appeals upon the theory that, where there is no visible boundary to the line of a city street, and a portion of the roadway traveled on is so near the line as to induce the belief in any one passing upon the street and exercising reasonable care that he is witin the line thereof, if such portion is for any reason rendered dangerous for travel, and the city has notice thereof, and such danger can be remedied by the exercise of reasonable care, either by the erection of a guard or railing along the line of the street or in some other way, and the city neglects to do this, it is liable to one injured because of such defect while traveling upon such portion of the roadway, if he himself is free from any contributory negligence. The fact that the city in such a case would have no right to go upon the private property and repair the defect was fully recognized by the court; but the defect, because of its propinquity to the highway and its apparent connection with it, was treated as a defect in the highway itself.

Immaterial that sidewalk used by the public and recognized as such by the municipality is in fact on private property. O'Malley v. Lexington, 99 Mo. App. 695, 74 S. W. 890. See also Deland v. Cameron, 112 Mo. App. 704, 87 S. W. 597.

The fact that a sidewalk, on which the injury occurred, is not within the limits of the street as laid out, where within the limits of the municipality, is immaterial, where the sidewalk runs along the street in the usual place in front of abutting lots, and has been under the control of the

is beyond the limits of the street and has not been recognized by the municipality as a public way, the municipal liability would not, it is clear, extend thereto; and mere acquiescence in the use of a sidewalk outside the street limits, by the public for several years, has been held not of itself to create liability.[42]

§ 2745. Same—failure to construct sidewalks as distinguished from failure to repair.

Failure to construct any sidewalks at all is not actionable negligence.[43] And for failure of an abutter to construct a walk in front of his premises, as ordered, there being no sidewalk there, the municipality is not liable.[44]

§ 2746. Space between driveway and sidewalk.

Space between the sidewalk and the roadway is a part of the street, although not intended for actual travel, and the municipality must protect pedestrians and other travelers from injury from defects in such part of the street.[45] So where a sidewalk has become unsuitable as a walk and pe-

municipality and used by the public for several years. O'Laughlin v. Pawnee City, 88 Neb. 244, 129 N. W. 271.

Walks on railroad right of way. Includes sidewalks built by municipality on a railroad right of way, where necessary for the use of the public. Mansfield v. Moore, 21 Ill. App. 326, aff'd in 124 Ill. 133, 16 N. E. 246.

42. Bishop v. Centralia, 49 Wis. 669, 6 N. W. 353.

But see § 1582, *ante*, vol. 4.

43. Neal v. Marion, 129 N. C. 345, 40 S. E. 116.

§ 2634, *ante*.

"It must be taken as a sound rule that the physical opening of the roadway or bed of a highway by a municipality does not render the municipality liable for its failure to build sidewalks simultaneously. There was nothing in the general circumstances of the locality, and nothing in the physical condition of the sides of the roadway, which might be construed by any one as indicating a sidewalk for the travel of pedestrians. The conclusion must be that the plaintiff should be held to have used it for just what it appeared to be, namely, ground in more or less rough condition at the sides of a highway whose bed afforded safe means for travel." Stadelmann v. New York, 110 N. Y. S. 682, 126 App. Div. 352.

44. Shietart v. Detroit, 108 Mich. 309, 66 N. W. 221 (Montgomery, J., dissenting).

45. Coffey v. Carthage, 186 Mo. 573, 85 S. W. 532; Fockler v. Kansas City, 94 Mo. App. 464, 68 S. W. 363 (falling over pile of stones); Townley v. Huntington, 68 W. Va. 574, 70 S. E. 368.

See extensive note in 39 L. R. A. (N. S.) 94.

Must keep that part between the carriageway and the sidewalk in such repair that foot passengers may cross any part thereof with a reasonable degree of safety. Raymond v. Lowell, 6 Cush. (Mass.) 524, 53 Am. Dec. 57.

Space between curb and property line must be kept in reasonably safe condition. Riley v. Kansas City, 161 Mo. App. 290, 143 S. W. 541.

Ornamental grass plot, between the sidewalk and the curb line,—not a trespass for citizens to go upon or over it. Johnson v. Bay City, 164 Mich. 251, 129 N. W. 29.

Obstructions on such space, § 2768, *post*.

destrians constantly use another portion of the street between the curb and the lot line, the portion thus used is a sidewalk within the rule as to liability for defective sidewalks.[46] If the sidewalk, by ordinance, embraces a grass plot ten feet wide between the curbstone and lot line, the entire space must be kept reasonably safe for pedestrians who have occasion to use it.[47]

§ 2747. Crosswalks.

The liability for defective streets extends to defects in crosswalks for the accommodation of pedestrians in crossing from one side of a street to another.[48] And liability does not

46. Rea v. Sioux City, 127 Ia. 615, 103 N. W. 949.

Includes traveled path between a street and a sidewalk, where generally used as a path of convenience with the knowledge of the municipality. Aston v. Newton, 134 Mass. 507, 45 Am. Rep. 347.

47. Coffey v. Carthage, 200 Mo. 616, 626-628, 98 S. W. 562.

48. *Georgia.* Atlanta v. Champe, 66 Ga. 659.

Illinois. McLeansboro v. Trammel, 109 Ill. App. 524.

Michigan. Bigelow v. Kalamazoo, 97 Mich. 121, 56 N. W. 339.

Missouri. Gallagher v. Tipton, 133 Mo. App. 557, 113 S. W. 674.

New York. Walker v. Lockport, 43 How. Pr. (N. Y.) 366.

Wisconsin. Johnson v. Milwaukee, 46 Wis. 568, 1 N. W. 187.

See also Aston v. Newton, 134 Mass. 507, 45 Am. Rep. 347; Whitney v. Milwaukee, 57 Wis. 639, 16 N. W. 12.

§§ 2790-2794, *post.*

Rule extends to a public place, not technically a street or a sidewalk, over which people walk in crossing from one street to another. Graham v. Rockford, 238 Ill. 214, 216, 87 N. E. 361.

Includes path worn across a street by pedestrians accustomed to cross at that place although there was no walk there. Baker v. Grand Rapids, 111 Mich. 447, 69 N. W. 740.

Walk crossing a public alley is a crosswalk, within statute, as distinguished from a sidewalk. Pequignot v. Detroit, 16 Fed. 211.

Street need not be in such condition, it would seem, that pedestrians may be able to cross with a reasonable degree of safety "at any and all times." Magaha v. Hagerstown, 95 Md. 62, 51 Atl. 832, 93 Am. St. Rep. 317.

Bridge over a drain, where a walk crosses a street, is a part of the walk. Atlanta v. Champe, 66 Ga. 659.

Covering for a drain, where an unusual street crossing, is included. Champaign v. Patterson, 50 Ill. 61.

In Bigelow v. Kalamazoo, 97 Mich. 121, 56 N. W. 339, it is said: "Even in our most prominent thoroughfares, paved in the most approved manner, curbs must be carried, and at crossings they are from 2 to 6 inches higher than the pavement. The curb must be left bare, and inattentive people be liable to stumble, or, as is frequently done, a plank is placed upon an incline, upon which pedestrians carelessly advancing are liable to slip. In either case there is the minimum of danger. The walk is not absolutely safe, but it cannot be said that it is not in a reasonably safe condition. The same is true of nearly all of our alley crossings. Gutters are necessarily left for the passage of water. These crossings are not absolutely safe, but they may be reasonably so. Neither streets, sidewalks, not crosswalks can be constructed upon a dead level. People are liable to stumble over a Persian rug upon a parlor floor, and streets cannot be made less dangerous than drawing rooms. * * * Cities are not required to keep streets in a condition absolutely safe for travel. A crosswalk must be reasonably safe—reasonably safe in view of the purpose for which it is constructed, the necessary uses of the streets and all the varying conditions."

depend upon the construction of an *artificial* crossing over the street; and after a street crossing has been established *de facto* by public use, the municipality is not at liberty, merely because no artificial crossing has been constructed, to intersect the crossing which the public have established for themselves, with dangerous ditches and pit-falls.[49] So a city is liable for defects in a street crossing at a corner where there is a beaten footpath, notwithstanding the municipality has constructed a crosswalk on the opposite side of the street.[50]

On the other hand, a municipality is ordinarily not liable for an injury caused by the *absence* of a crosswalk.[51] But if a municipality has built and maintained a crosswalk, it cannot tear it up and leave unguarded a deep excavation caused thereby.[52]

§ 2748. Alleys.

The duty to exercise reasonable care in regard to streets, and the corresponding liability for failing to fulfill the duty, includes alleys.[53] However, the same amount of care need not be exercised in regard to alleys as in case of streets.[54] And in Michigan a public *alley* has been held not a public *highway or street* within the statute authorizing a recovery for injuries sustained upon defective streets and highways.[55]

§ 2749. Bridges.

In those states where it is held that municipalities are liable at common law for injuries resulting from defective streets, in case of negligence, the same rule is applied to bridges under the control of the municipality and for the upkeep of which municipal funds may be used, where a part

49. Beardstown v. Smith, 150 Ill. 169, 174, 37 N. E. 211.

50. Comiskie v. Ypsilanti, 116 Mich. 321, 74 N. W. 487.

51. Williams v. Grand Rapids, 59 Mich. 51, 26 N. W. 279.

52. Alexander v. Big Rapids, 76 Mich. 282, 284, 42 N. W. 1071.

53. Topeka v. Cook, 72 Kan. 795, 84 Pac. 376; Gould v. Boston, 120 Mass. 300; Asbury v. Kansas City, 161 Mo. App. 496, 144 S. W. 127; Osage City v. Larkin, 40 Kan. 206, 19 Pac. 658, 2 L. R. A. 56, 10 Am. St. Rep. 186 (immaterial that lots on both sides are owned by one person and that alley is impassible because of intersecting railroad).

It is no defense that there had been no work done to invite the public over an alley which was entirely smooth ground and passable. Osage City v. Larkin, 40 Kan. 206, 19 Pac. 658, 2 L. R. A. 56, 10 Am. St. Rep. 186.

Alley. Cellarway or opening on side of but within alley, unguarded. Liable where pedestrian walks into it at night. Fletcher v. Ellsworth, 53 Kan. 751, 37 Pac. 115.

Liable for permitting a deep cellarway to remain unguarded at night in a public alley a few feet from a principal street. Dallas v. Concordia, 84 Kan. 734, 115 Pac. 558.

54. Musick v. Latrobe, 184 Pa. 375, 39 Atl. 226.

§ 2726, *ante*.

55. Face v. Ionia, 90 Mich. 104, 51 N. W. 184.

of the street.[56] This is so because a bridge connecting two ends of a street is a part of such street.[57] But where a bridge *outside the city limits* was built by the city, and maintained by the city, it was nevertheless held that where it was built by permission of the county on its public highway, it became the property of the county, and the city was not liable for injuries from defects therein.[58] So if the bridge, although within the corporate limits of the municipality, is not a part of a public street but instead on a private way and not controlled by the municipality, it is not liable for defects therein.[59] So it has been held that no liability existed where a

56. *Alabama.* Smoot v. Wetumpka, 24 Ala. 112.

Colorado. Denver v. Dunsmore, 7 Colo. 328, 3 Pac. 705.

Florida. Jacksonville v. Drew, 19 Fla. 106, 45 Am. Rep. 5.

Illinois. Transp. Co. v. Chicago, 237 Ill. 581, 86 N. E. 1093; Marseilles v. Howland, 124 Ill. 547, 16 N. E. 883; Mechanicsburg v. Meredith, 54 Ill. 84; Caddagan v. Chicago, 130 Ill. App. 472.

Indiana. Goshen v. Myers, 119 Ind. 196, 21 N. E. 657; Lowrey v. Delphi, 55 Ind. 250; Connersville v. Snider, 31 Ind. App. 218, 67 N. E. 555.

Iowa. Freeman v. Independence, 123 Ia. 1, 97 N. W. 1083.

Kansas. Rosedale v. Golding, 55 Kan. 167, 40 Pac. 284.

Kentucky. Campbellsville v. Morgan (Ky. 1912), 150 S. W. 521.

Louisiana. Buechner v. New Orleans, 112 La. 599, 36 So. 603, 66 L. R. A. 334, 104 Am. St. Rep. 455.

Minnesota. Grant v. Brainard, 86 Minn. 126, 90 N. W. 307; Altnow v. Sibley, 30 Minn. 186, 14 N. W. 877, 44 Am. Rep. 191. See also O'Leary v. Mankato, 21 Minn. 65.

Missouri. Jordan v. Hannibal, 87 Mo. 673.

North Carolina. White v. Chowan, 90 N. C. 437, 47 Am. Rep. 534.

Utah. Mackay v. Salt Lake City, 29 Utah, 247, 81 Pac. 81.

West Virginia. Cavender v. Charleston, 62 W. Va. 654, 59 S. E. 732.

United States. Weightman v. Washington, 66 U. S. 39. 17 L. Ed. 52; Nebraska City v. Campbell, 2 Black (U. S.), 590, 17 L. Ed. 271; Great Lakes Towing Co. v. Kelley Island L. & T. Co., 176 Fed. 492, 100 C. C. A. 108.

Bridges. So defects in a bridge built by mill owners by the side of a public bridge are actionable, where the public are allowed to use both indiscriminately. Detwiler v. Lansing, 95 Mich. 484, 55 N. W. 361.

Applies to bridge built by a private citizen, where a part of the sidewalk. McDonald v. Ashland, 78 Wis. 251, 47 N. W. 434.

Bridge first built by county no defense. Eudora v. Miller, 30 Kan. 494, 2 Pac. 685.

Where county owned bridge, and one end abutted on a city, *approach to bridge* on city side held not a city highway, under particular facts. Bishop v. Centralia, 49 Wis. 669, 6 N. W. 353.

However, if the authority to build a bridge was based on an unconstitutional statute, the municipality is not liable for defects therein. Albany v. Cunliff, 2 N. Y. 165, and see § 2637, *ante*.

In Wisconsin. statute expressly makes cities liable for an "insufficiency or want of repair" of a bridge. Johnson v. Eau Claire, 149 Wis. 194, 135 N. W. 481, holding three-inch plank nailed diagonally across bridge, so that front wheels of wagon would not strike the plank at the same time, within the statute.

Want of funds to repair bridge is no defense, since the municipality can close the bridge if it is unsafe. Carney v. Marseilles, 136 Ill. 401, 26 N. E. 491, and see § 2732, *ante*.

57. § 1282, *ante*, vol. 3.

58. Montezuma v. Law, 1 Ga. App. 579, 57 S. E. 1025.

59. Sandersville v. Hurst, 111 Ga. 453, 36 S. E. 757.

Bridge built by a land company on a street on its plan of lots, where no

bridge and its approaches were not constructed by the municipality, and it had not appropriated or taken charge of them, but instead they were *constructed by the state* and continued under its control, although permitted to be used by the public as a highway.[60] In Illinois, however, it is held that a village cannot escape liability on the ground that the bridge was built and owned by the state, and that the village did not accept it when tendered to it, where it allowed the bridge to be used by the public as a highway and also gravelled and repaired it.[61]

If the duty to repair a particular bridge rests upon a municipality, the fact that a corporation or individual is also under the same duty, does not absolve the municipality from liability for injuries from failure to repair.[62]

There is little, if any, difference between the law relating to liability for defective bridges and that relating to liability for defective highways other than bridges. For instance, the same rules apply as to the necessity for notice of the defective condition,[63] the duty to inspect to discover defects,[64] the duty to provide railings and guards,[65] the liability for defective plans,[66] the rules governing contributory negligence,[67] etc. And most of the law relating to liability for defective bridges concerns the liability of *counties* which is not within the scope of this work.

acceptance of the street by the municipality, is not within municipal liability, where defective. Grant v. Dickson City Borough, 235 Pa. 536, 84 Atl. 454.

60. Carpenter v. Cohoes, 81 N. Y. 21, 37 Am. Rep. 468.

61. Lawrence v. Channahon, 157 Ill. App. 560, 562.

62. Fowler v. Strawberry Hill, 74 Ia. 644, 38 N. W. 521; Eyler v. Allegheny County, 49 Md. 257, 272, 33 Am. Rep. 249.

In Massachusetts, there is a statute to the contrary as to railroads. Wilson v. Boston, 117 Mass. 509; White v. Quincy, 97 Mass. 430.

63. See §§ 2807-2818, *post.*

64. § 2815, *post.*

65. §§ 2705-2804, *post.*

Duty to guard approaches to bridge, see Reinhardt v. South Easton (Pa.), 4 Atl. 532.

Absence of siderails on bridge only 34 feet long, in a small country village, some 3 or 4 feet above a creek, the walk being little used, held not negligence. Foraker v. Sandy Lane, 130 Pa. 123, 18 Atl. 609.

Absence of light at night on footbridge as negligence, held question for jury. Loewer v. Sedalia, 77 Mo. 431.

If a bridge is narrower than the street, it is generally negligence not to guard by a railing the approach to the bridge from the street. Chicago v. Gallagher, 44 Ill. 295.

Drawbridge. Where a municipality maintains a drawbridge as a part of a street, it is liable to one who falls into the water when the draw is open, where there are no barriers or lights. Stephani v. Manitowoc, 89 Wis. 467, 62 N. W. 176, and see § 2670, *ante.*

When the draw of a bridge is open, it is negligence for a municipality, where the bridge is a part of the street, to fail to guard it by preventing the approach of pedestrians and vehicles. Chicago v. Thomas, 141 Ill. App. 122.

66. § 2766, *post.*

67. §§ 2819-2841, *post.*

Contributory negligence of child, see Cusimano v. New Orleans, 123 La. 565, 49 So. 195.

Generally, towns are held *jointly liable* for injuries resulting from a defective *boundary* bridge;[68] but, under statutes or particular agreements, municipalities have been held liable only for accidents on their side of the line dividing the bridge.[69]

In Pennsylvania, it has been held that a city, a borough and a township, cannot be held jointly liable for personal injuries occurring at a point where the three meet, where the bridge was being reconstructed, where the accident happened at a point wholly within the borough, and neither the city nor the township were negligent in failing to erect barriers.[70]

4. LIABILITY FOR ACTS OF OTHERS.

§ 2750. May be liable for acts of third persons.

The fact that the defect or obstruction in a street is the result of an act of a third person, other than representatives or employees of the municipality, does not relieve the municipality from liability therefor,[71] provided the municipality had

68. Tolland v. Willington, 26 Conn. 578; Shaw v. Potsdam, 42 N. Y. S. 779, 11 App. Div. 508; Clapp v. Ellington, 34 N. Y. S. 283, 87 Hun, 542.

69. Perkins v. Oxford, 66 Me. 545; Sheridan v. Palmyra Tp., 180 Pa. St. 439, 36 Atl. 868.

70. Skadra v. Plains Township, 45 Pa. Super. Ct. 87.

71. *Delaware.* Colburn v. Wilmington, 4 Penn. (Del.) 443, 56 Atl. 605 (electric wire).

Indiana. Senhem v. Evansville, 140 Ind. 675, 40 N. E. 69; Huntington v. Breen, 77 Ind. 29; Indianapolis & C. R. Co. v. State, 37 Ind. 489; Vincennes v. Spees (Ind. App.), 72 N. E. 531, 35 Ind. App. 389, 74 N. E. 277.

Iowa. Pace v. Webster, 138 Ia. 107, 115 N. W. 888.

Kansas. Holitza v. Kansas City, 68 Kan. 157, 74 Pac. 594.

Kentucky. Mayfield v. Hughley, 135 Ky. 532, 122 S. W. 538; West Kentucky Tel. Co. v. Pharis, 25 Ky. L. Rep. 1838, 78 S. W. 917.

Massachusetts. Bacon v. Boston, 3 Cush. (Mass.) 174; Loan v. Boston, 106 Mass. 450 (gas company).

Michigan. Bonneville v. Alpena, 158 Mich. 279, 122 N. W. 618; Davis v. Adrian, 147 Mich. 300, 110 N. W. 1084.

Missouri. Benton v. St. Louis, 217 Mo. 687, 118 S. W. 418; Brown v. Scruggs, 141 Mo. App. 632, 125 S. W. 537.

New York. Pettengill v. Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442; Hume v. New York, 74 N. Y. 264.

North Carolina. Foy v. Winston, 126 N. C. 381, 35 S. E. 609.

Pennsylvania. Fleming v. Wilmerding, 223 Pa. 295, 72 Atl. 624; Koch v. Williamsport, 195 Pa. 488, 46 Atl. 67 (*pile of rocks* in street put there by builder); Mooney v. Luzerne, 186 Pa. 161, 40 Atl. 311, 40 L. R. A. 811 (electric wires).

Texas. San Antonio v. Wildenstein, 49 Tex. Civ. App. 514, 109 S. W. 231.

West Virginia. Curry v. Mannington, 23 W. Va. 14.

Compare, however, where negligence was that of contractors engaged in putting in the New York subway. Morris v. Interurban St. R. Co., 91 N. Y. S. 479, 100 App. Div. 295.

The generally accepted doctrine in this country is said to be "that a municipality which is charged with the duty of keeping certain highways in safe condition for public travel, and which has either au-

actual knowledge of the defective condition, or was chargeable with notice thereof by lapse of time or otherwise, before the accident;[72] and this is so regardless of the want of con-

thorized, or has been constrained by the operation of statute to permit, the performance of the work which, in the absence of certain precautions, will necessarily render one of these highways abnormally dangerous for the time being, is liable for the injuries caused by the absence of these precautions, whatever may be its relation to the party who is actually engaged in doing the work. The municipality lies in this regard under a primary, absolute, or nondelegable duty, in the performance of which it is bound to use reasonable care and diligence. Moll Ind. Contractors, p. 243, note 71." Bailey v. Winston, 157 N. C. 252, 72 S. E. 966.

The duty of the municipality is to remove all dangers, defects and obstructions, *from whatever cause arising*, where brought to its notice. Circleville v. Sohn, 59 Ohio St. 285, 52 N. E. 788, 69 Am. St. Rep. 777. See also Dalton v. Albion, 50 Mich. 129, 15 N. W. 46.

Immaterial who constructed approach to a street curb, where used for many years, with knowledge of the municipality. Chicago v. Loebel, 228 Ill. 52, 81 N. E. 796, aff'g 130 Ill. App. 487.

A municipality is liable for not abating a defect or nuisance in a street, although created by a third person. Magaha v. Hagerstown, 95 Md. 62, 51 Atl. 832, 93 Am. St. Rep. 317; Griffin v. Boston, 182 Mass. 409, 65 N. E. 811 (gravel heater); Bourget v. Cambridge, 159 Mass. 388, 34 N. E. 455.

Negligence of contractor no defense. Cole v. East St. Louis, 158 Ill. App. 494.

Municipal liability for defects in streets exists although the defect was caused by the transit commission which acted independently under direct legislative authority, where the municipality had actual or constructive notice of the defect. Connelly v. Boston, 206 Mass. 4, 91 N. E. 998.

Trespassers tore up part of a board sidewalk and replaced it with cement. City can not escape liability for failure to repair connecting walk on theory that temporary barriers erected by such trespassers to protect cement until it solidified were removed without the consent of city. Robinson v. Omaha, 84 Neb. 642, 121 N. W. 969.

So where a city built a sidewalk ending abruptly several feet from the ground, and a loose plank was put there by third persons as a means of descent, and it fell while plaintiff was walking thereon, the municipality was liable, where it had notice of the public use of such plank. Hogan v. Chicago, 168 Ill. 551, 48 N. E. 210, rev'g 59 Ill. App. 446.

However, failure of a municipality to abate as a nuisance a water station erected on a street by an individual, without permission, resulting in injury from flowing water to abutting property, does not make the municipality liable therefor. Greenville v. Britton, 19 Tex. Civ. App. 79, 45 S. W. 970. Suppose, however, *traveler* had been injured by running into it or by his horse becoming frightened thereat?

Building in street. Where an individual constructs a building in a street, and it has been there for some months, the municipality is liable for injuries from a horse becoming frightened, although sufficient space was left for the passage of vehicles and persons. McDowell v. Preston, 104 Minn. 263, 116 N. W. 470, 18 L. R. A. (N. S.) 190.

If a *building in a street* is a nuisance *per se*, one injured thereby may recover from the municipality although built by a street fair company. Richmond v. Smith, 101 Va. 161, 43 S. E. 345.

Bobsled in street. If an obstruction is left in a street, such as a bodsled which has broken down, and a reasonable time for its removal has elapsed, the municipality is liable for injuries resulting from a horse becoming frightened. Cutler v. Des Moines, 137 Ia. 643, 113 N. W. 1081.

72. §§ 2807-2818, *post*.

Notice necessary. Lewisville v. Batson, 29 Ind. App. 21, 63 N. E.

sent of the municipality.[73] Thus where a municipality permits a cellarway to be constructed in the sidewalk of a principal street, guarded only by a trapdoor which it permits the occupant of the adjoining premises to open at his option, it is liable for injuries resulting therefrom.[74] It is no defense that third persons may themselves be liable.[75] But where the defect is caused by a third person, the negligence for which the municipality is liable is not the creation of the defect but instead the negligence in failing to remove or guard the defect after actual or constructive notice thereof.[76]

Thus, the fact that the municipality itself did not construct the sidewalk which was the cause of injury does not exonerate it.[77] So a municipality is not relieved from liability for failure to light its streets because of the fact that it had a contract with an electric light company and the latter let the lights go out.[78]

This rule applies, *inter alia,* to defects or obstructions caused by the acts of *abutting owners,*[79] *independent public*

861; Caton v. Sedalia, 62 Mo. App. 227; Davis v. Omaha, 47 Neb. 836, 66 N. W. 859; Requa v. Rochester, 45 N. Y. 129, 6 Am. Rep. 52; Birmingham v. Dover, 3 Brewst. (Pa.) 69; Gibson v. Huntington, 38 W. Va. 177, 18 S. E. 447, 22 L. R. A. 561, 45 Am. St. Rep. 853; Cook v. Milwaukee, 24 Wis. 270, 1 Am. Rep. 183.

So it has been held that where a city knew that a boiler was being placed under a sidewalk, and the basement was not constructed as required by ordinance, which should have been known to a city officer whose duty it was to supervise such matters, and the *boiler exploded* and injured a pedestrian, negligence will be presumed from the fact of the explosion, under the rule of *res ipsa loquitur.* Beall v. Seattle, 28 Wash. 593, 69 Pac. 12, 61 L. R. A. 583, 92 Am. St. Rep. 892.

Obstruction in a street, placed there by a third person, does not create a cause of action against the municipality unless it has been there for a sufficiently long time to make it the duty of the municipality to remove it. Farley v. New York, 41 N. Y. S. 622, 9 App. Div. 536 (truck in street).

If erections in a street in violation of an ordinance are permitted by the municipality to remain there after knowledge thereof and that they were dangerous, the municipality is liable. Farrell v. Dubuque, 129 Ia. 447, 105 N. W. 696.

73. Elkhart v. Ritter, 66 Ind. 136; Centerville v. Woods, 57 Ind. 192; McEvoy v. Sault Ste Marie, 136 Mich. 172, 98 N. W. 1006.

Failure to at once stop excavations in a street by third persons is not a consent thereto. McNaughton v. Elkhart, 85 Ind. 384.

74. Smith v. Leavenworth, 15 Kan. 81.

75. Indianapolis v. Doherty, 71 Ind. 5.

76. Brown v. Louisburg, 126 N. C. 701, 36 S. E. 166, 78 Am. St. Rep. 677.

77. Hillyer v. Winsted, 77 Conn. 304, 59 Atl. 40.

§ 2743, *ante.*

78. Baltimore v. Beck, 96 Md. 183, 53 Atl. 976.

79. *Kentucky.* Covington v. Johnson, 24 Ky. L. Rep. 602, 69 S. W. 703.

Missouri. Drake v. Kansas City, 190 Mo. 370, 88 S. W. 689, 109 Am. St. Rep. 759 (raising covering of coal hole each day for six to eight weeks).

New York. Urquhart v. Ogdensburgh, 97 N. Y. 238.

officers,[80] *a railroad company,*[81] or a *water company* or company engaged in constructing waterworks for the municipality.[82]

On the other hand, a municipality is not liable where it did not cause the obstruction and *is powerless to remove it.* Thus, where a judge of a state court ordered a rope put across a public street to prevent travel and the resulting noise, the municipality is not liable to a traveler injured thereby.[83]

Liability of a municipality for defects in streets, where the negligence is that of an independent contractor, is generally denied.[84] However, a municipality is liable for the negligence of a contractor *when he is engaged in performing a duty imposed by law upon the municipality,* such as the repair of streets.[85]

Pennsylvania. Trego v. Honeybrook, 160 Pa. 76, 28 Atl. 639.

West Virginia. Bowen v. Huntington, 35 W. Va. 682, 14 S. E. 217.

Must see to it that abutter, in constructing sidewalks, uses suitable precautions to avoid acidents. Boucher v. New Haven, 40 Conn. 456.

In Michigan, however, under the statute and charter provisions of a city authorizing the city to build after notice, the city is not liable for injuries resulting from falling over the sidewalk built by a contractor employed by the abutter, to guard a newly constructed cement walk, since the contractor can not be said to have been performing a duty imposed by law on the city. Thompson v. West Bay City, 137 Mich. 94, 100 N. W. 280.

In New Hamphire, however, under the statute, municipality is not liable where person falls into a ditch across a street, dug by a third person to gain access to a drain pipe, since not resulting from an "obstruction, defect, insufficiency or want of repair" of a "bridge, culvert, or sluiceway, or dangerous embankments and defective railings." Wilder v. Concord, 72 N. H. 259, 56 Atl. 193.

80. Municipality is liable for where a ditch in a street is left open and unguarded by commisioners appointed by the legislature to have control of the municipal water works. Deyoe v. Saratoga Springs, 3 Thomp. & C. (N. Y.) 504, 1 Hun, 341.

81. *Georgia.* Bentley v. Atlanta, 92 Ga. 623, 18 S. E. 1013.

Massachusetts. Hawks v. Northampton, 116 Mass. 420.

Missouri. McCarroll v. Kansas City, 64 Mo. App. 283.

New York. Byrne v. Syracuse, 29 N. Y. S. 912, 79 Hun, 555.

Vermont. Willard v. Newbury, 22 Vt. 458.

If track illegally laid across highway, however, municipality not liable. Vinal v. Dorchester, 7 Gray (Mass.) 421.

Contra. If an excavation or obstruction is created in a street by a railroad company while relaying tracks, and plaintiff is injured before the abandonment of the work, the municipality is not liable. Long v. Philadelphia, 212 Pa. 125, 61 Atl. 810.

82. Butler v. Bangor, 67 Me. 385; Sherman v. Oneonta, 21 N. Y. S. 137, 66 Hun, 629; Scranton v. Catterson, 94 Pa. 202.

So if a pedestrian stumbles over a hydrant owned by a private company, the municipality is liable where it has allowed the hydrant to be maintained on the sidewalk in a position dangerous to travelers. King v. Oshkosh, 75 Wisc. 517, 44 N. W. 745.

83. Belvin v. Richmond, 85 Va. 574, 8 S. E. 378, 1 L. R. A. 807.

84. § 2662, *ante.*

85. § 2663, *ante.*

§ 2751. Liability for negligence of licensee.

There is no dispute that the granting of a license to a private person to make excavations in, or place obstructions on, a street, does not necessarily relieve the municipality from liability to travelers for injuries resulting from such excavations or obstructions;[86] and this is so although the permit was unauthorized or for an unlawful use of its streets,[87] or where a permit is necessary but was not obtained.[88] On the

86. Springfield v. Scheevers, 21 Ill. App. 203; Hayes v. West Bay City, 91 Mich. 418, 51 N. W. 1067. § 2660, *ante*.

Issuance of permit to place building materials in a street does not relieve the municipality of liability. Senhenn v. Evansville, 140 Ind. 675, 40 N. E. 69.

Where city gave a permit to a licensed plumber to open a street to make a sewer connection, and he failed to guard the trench at night, the city can not escape liability on the ground that the negligence was that of the plumber. Bonneville v. Alpena, 158 Mich. 279, 122 N. W. 618.

Where village *licensed* the construction of a drain in one of its most important streets, "it was bound to exercise ordinary care not only as to the construction of the drain but also as to its use within the streets." Svendsen v. Alden, 101 Minn. 158, 112 N. W. 10.

Municipality can not relieve itself of duty to see that sidewalks are in reasonably safe condition by permitting an abutter to have a coal hole in the walk. Chicago v. Jarvis, 226 Ill. 614, 80 N. E. 1079.

Where the municipality consents to the creation of a nuisance in its streets, it is liable the same as if it had erected the nuisance itself. Landau v. New York, 180 N. Y. 48, 58, 72 N. E. 631, 105 Am. St. Rep. 709.

But permit to erect a building is not a permit to use the street; and the municipality dies not thereby render itself liable for the negligent acts of the person constructing the building. Copeland v. Seattle, 33 Wash. 415, 74 Pac. 582, 65 L. R. A. 333.

In Pennsylvania, however, it has been held, contrary to the general trend of the decisions in other states, that a municipality is not liable to one falling in a trench dug in a street by a private individual, under a permit from the municipality, to make a connection with the water pipes, on the theory such right to make connections is superior to the right of travel. West Chester v. Apple, 35 Pa. 284, 78 Am. Dec. 336; Levenite v. Lancaster, 215 Pa. 576, 64 Atl. 782; Susquehanna Depot v. Simmons, 112 Pa. 384, 5 Atl. 434.

87. Cohen v. New York, 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506.

In an Iowa case, in an action against a city to recover for personal injuries caused by the frightening of plaintiff's horse by a steam motor, used upon a street railway by permission of the city council, it was held that in the absence of express statutory authority a city has *no power to authorize or permit* the use of steam motors upon its streets, either upon ordinary railroads or street railways, and the grant of such authority or permission constitutes negligence which will render the city liable for damages caused thereby. The fact that the action of the city council in granting such right was without authority would not protect the city from liability, corporations being responsible for the acts of their officers and agents done within the apparent scope of their authority, and the streets of the city being under the control of the city council. Stanley v. Davenport, 54 Ia. 463, 2 N. W. 1064, 6 N. W. 706, 37 Am. Rep. 216. But see § 2737, *ante*.

88. If an excavation is made without a permit, where an ordinance requires a permit, and the municipality has actual or constructive notice of the dangerous condition, thereby created, it is liable to a traveler injured because thereof. Boyle v. Hazelton, 171 Pa. 167, 33 Atl. 142.

other hand, where the act for which the municipality gives a permit is, in itself, entirely proper and safe, and from which no injury could result except for the negligence of the person doing it, the municipality is not liable, at least in some states,[89] unless it is negligent, after notice that the licensee has rendered the street unsafe for use, in taking proper precautions to prevent injury.

The question as to which the authorities are conflicting, however, is whether *notice to the municipality* of the defective condition is necessary, or whether the granting of the permit is of itself sufficient notice to impose liability on the municipality for defects resulting from the exercise of the permit. Many of the decisions in regard to this matter are not clear, and in some states conflicting decisions are found, without attempt at reconciliation, and in some instances without reference in the opinion to the conflict in the same state.[90] It is also difficult to determine, in some states, just what, if any, importance is to be attributed to the fact that the work for which the permit is granted is intrinsically dangerous unless safeguarded. In some states, however, the rule is apparently well settled that if a municipality, empowered to do so, grants a license or a permit to third persons to use the streets, it is not liable for the negligence of the licensee in connection with the permit but only for its own negligence in not correcting the evil after notice, actual or constructive, at least if the permit does not authorize the doing of a thing intrinsically dangerous;[91] but if supervision is reserved by

89. Von Longerke v. New York, 134 N. Y. S. 832, 837, 150 App. Div. 98, 103.

In Pennsylvania, it is held, it seems that a municipality is not liable for the negligence of a licensee, although resulting in a defect in a street, where the permit is granted for a proper and lawful purpose. Levenite v. Lancaster, 215 Pa. 576, 64 Atl. 782; Susquehanna Depot v. Simmons, 112 Pa. 384, 5 Atl. 434. But in a later case the effect of early decisions is somewhat modified by holding that while a municipality may not be responsible for the negligence of an owner of property engaged in work on a street done on notice from it, where the negligence is in the manner of doing the work on the part of the street necessarily occupied for that purpose, yet "its duty to exercise reasonable supervision of streets thrown open for travel always continues." Meyers v. Philadelphia, 217 Pa. 159, 66 Atl. 251, 10 L. R. A. (N. S.) 678.

90. See Domer v. District of Columbia, 21 App. (D. C.) 284; McPherson v. District of Columbia, 7 Mackey (D. C.), 564, 567-569; Herfurth v. Washington, 6 D. C. 288.

91. *Indiana.* Warsaw v. Dunlap, 112 Ind. 576, 11 N. E. 623, 14 N. E. 568; Kenyon v. Indianapolis, Wils. (Ind.) 129.

New York. Morgan v. Penn Yan, 59 N. Y. S. 504, 42 App. Div. 582; Friedman v. New York, 116 N. Y. S. 750, 63 Misc. Rep. 310. See also New York v. Conn., 117 N. Y. S. 514, 133 App. Div. 1, Von Longerke v. New York, 134 N. Y. S. 832, 150 App. Div. 98. But see as contra, Tabor v. Buffalo, 120 N. Y. S. 1089, 1091, 136 App. Div. 258; Buckley v. New York, 120 N. Y. S. 423, 135 App. Div. 512.

Ohio. Columbus v. Penrod, 73

the municipality, it would seem that the negligence of the licensee is attributable to the municipality without actual

Ohio St. 209, 76 N. E. 826, 3 L. R. A. (N. S.) 386, 112 Am. St. Rep. 716.

Tennessee. Franklin v. House, 104 Tenn. 1, 55 S. W. 153.

Texas. Browne v. Bachman, 31 Tex. Civ. App. 430, 72 S. W. 622. Compare San Antonio v. Ashton (Tex, Civ. App. 1911), 135 S. W. 757.

United States. Denver v. Sherret, 88 Fed. 226, 31 C. C. A. 499.

Cases at least tending to support this rule, see Thompson v. West Bay City, 137 Mich. 94, 100, 100 N. W. 280; Wright v. Muskegon, 140 Mich. 215, 103 N. W. 588; Davis v. Omaha, 47 Neb. 836, 66 N. W. 859.

Where a municipality ordered an abutter to build a sidewalk, as it had power to do, according to a fixed grade, and in doing so a pile of dirt was left on the the walk over night, without barriers or lights, the municipality is not liable, without notice of the defect, on the theory that the abutter or his contractor was the agent of the municipality. Frost v. Port Chester. 123 N. Y. S. 768, 139 App. Div. 197.

Where a company granted a permit to excavate in the streets, regularly put out lights to guard the excavation, failure of its employees to do so on one particular night is not notice to the municipality. Morgan v. Penn Yan, 59 N. Y. S. 504, 42 App. Div. 582.

In Indiana, it is held that that municipalities are not liable, without notice, for the acts of persons licensed to use its streets, *unless the thing authorized is intrinsically dangerous.* Warsaw v. Dunlap, 112 Ind. 576, 580, 11 N. E. 623. And a permit to excavate is evidently deemed "intrinsically dangerous" since it is held that if the municipality grants a *permit* to excavate in its streets, it is liable for failure to guard the excavation, although it had no notice that the excavation was not properly guarded. Evansville v. Behme (Ind. App. 1912), 97 N. E. 565. The Indiana rule is further elucidated as follows: "If a person, without the knowledge of the city and without license or authority from it, makes an excavation in a street or places an obstruction therein, whereby the condition of the street is made dangerous, the city is not liable for injury resulting from such dangerous condition, unless it appears that the city had either actual or constructive notice of such condition in time to have taken precautions to prevent the injury. In such a case, the only negligence that can be charged against the city is that it failed to take proper precaution to prevent injury after notice of the dangerous condition of the street. On the other hand, if the city *by contract or license* authorizes an excavation to be made in a street, or an obstruction to be placed therein, which from its character and location will *necessarily or probably produce injury* to those using the street unless precautionary measures are taken to prevent it, such city will be liable in damages to a person injured by reason of the want of necessary precautionary measures to make it safe. To render the city liable in such a case, it is *not necessary to show that it had notice* that the person who had placed the obstruction or made the excavation in its street pursuant to such authority or license had failed to guard it or to light it, or to take other precautions necessary to make it safe, and that after such notice the city had time to have taken such precautions before the injury occurred. The duty to see that such precautions are taken rests primarily upon the city, and it can not absolve itself by delegating it to another." Per Chief Justice Lairy in Moore v. Bloomington (Ind. App 1911), 95 N. E. 374.

New York rule. "For any obstruction or defect created by the city, for its own purposes, in its streets or its sidewalks, whereby persons are injured, the city will be liable, if the injury be due to the negligence of the city officials or employees. The same result follows if the work on the streets or sidewalks be done by others by the consent and under the supervision of the city authorities. * * * But if the work be done by the consent only of the city, and not under its immediate supervision, the

notice.[92] However, in several states, the contrary rule is settled, and it is held that the municipality is *liable without notice,* where it has granted a permit to excavate or obstruct a street,[93] while in other states there is more or less *dicta*

city will not be liable for the negligence of those doing the work, but only for its own negligence in not correcting the evil after notice, actual or constructive." McDermott v. Kingston, 19 Hun (N. Y.), 198.

92. Schumacher v. New York, 57 N. Y. S. 968, 40 App. Div. 320. See also Augusta v. Cone, 91 Ga. 714, 17 S. E. 1005; Hayes v. West Bay City, 91 Mich. 418, 51 N. W. 1067; McClammy v. Spokane, 36 Wash. 339, 78 Pac. 912.

93. *Colorado.* Denver v. Aaron, 6 Colo. App. 232, 40 Pac. 587.

Georgia. Augusta v. Cone, 91 Ga. 714, 17 S. E. 1005; Savannah v. Donnelly, 71 Ga. 258; Rome v. Davis, 9 Ga. App. 62, 70 S. E. 594.

Illinois. Lau v. Chicago, 153 Ill. App. 50, 53.

Kentucky. DeGarmo v. Vogt (Ky. 1913), 152 S. W. 969; Grider v. Jefferson Realty Co. (Ky.), 116 S. W. 691; Louisville v. Keher, 117 Ky. 841, 79 S. W. 270.

Minnesota. Cleveland v. St. Paul, 18 Minn. 279.

Missouri. Mehan v. St. Louis, 217 Mo. 35, 116 S. W. 514; Merritt v. Kinlock Tel. Co., 215 Mo. 299, 115 S. W. 19; Lindsay v. Kansas City, 195 Mo. 166, 93 S. W. 273; Drake v. Kansas City, 190 Mo. 370, 88 S. W. 689, 109 Am. St. Rep. 759; Stephens v. Macon, 83 Mo. 345; Haniford v. Kansas, 103 Mo. 172, 15 S. W. 753; Golden v. Clinton, 54 Mo. App. 100; Russell v. Columbia, 74 Mo. 480, 41 Am. Rep. 325.

Oklahoma. Oklahoma City v. Welsh, 3 Okla. 288, 291, 41 Pac. 598.

Washington. Lasityr v. Olympia, 61 Wash. 651, 112 Pac. 752; McClammy v. Spokane, 36 Wash. 339, 78 Pac. 912; Sutton v. Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847. But compare Apker v. Hoquiam, 51 Wash. 567, 99 Pac. 746.

United States. District of Columbia v. Woodbury, 136 U. S. 450, 10 Sup. Ct. 990, 34 L. Ed. 472.

Granting of permit is notice. "If a private individual fails to protect an excavation in the street, then it is the duty of the city authorities to se that it is protected, and they are held responsible that he should do so, for they were notified that he is going on with the work when he obtains the permit. The city is liable for negligence in failing to exercise supervision and inspection if injury results by such excavation made by an individual under such permit or license issued by it." Kinsey v. Kinston, 145 N. C. 106, 58 S. E. 912.

"The granting of the permit brought home to the city the knowledge for which the pit was to be used, as well as the knowledge of the natural and usual dangers incident to that use, namely, that it would be used for the purpose of slacking lime, which would produce a boiling mass; and that it would be dangerous to children playing around it, and to other pedestrians and travelers upon the street who should happen to come in contact with it. Under the circumstances, the city was entitled to no notice." Buttron v. Bridell, 228 Mo. 622, 129 S. W. 12.

Excavations. The act of a person making an excavation in the street by permission of the city is the act of the city, and no notice to the latter of such excavation is necessary to render it liable to the person sustaining injuries therefrom. Stephens v. Macon, 83 Mo. 345; Haniford v. Kansas City, 103 Mo. 172, 15 S. W. 753.

Permit for show in street. "The permission thus impliedly or expressly given, by which the city for the time being undertook to suspend or withhold the exercise of its statutory duty to keep its streets 'open and free from nuisance,' and allow them to be converted into a stage or theatre for a dangerous performance having no relation to the use for which a public way is designed, it became not only chargeable with notice of the nuisance and moment of its erection, but became in legal effect the creator of the nuisance substantially the same as if the struc-

or the like supporting the rule that no notice is necessary.[94] However, a permit to do one thing cannot be construed as equivalent to notice of the doing of another and different thing.[95] In still other states, notice has been held unnecessary in cases where the permit was for an excavation which would be dangerous unless guarded, without commenting on the importance of the element of danger, so that it is a matter of doubt what would be the holding if the work was not intrinsically dangerous.[96] The rule that no notice is necessary, it is submitted, is the better one, on the theory that the granting of the permit is itself in the nature of notice to the municipality, especially if the work is inherently dangerous if not properly safeguarded.

In Iowa, it has been held that if the power does not exist to permit a certain use of a city street, the permission is negligence for which the city is liable,[97] and it is undoubtedly true that the fact that the permit is *ultra vires* and void does not exonerate the municipality.[98]

§ 2752. Same—licenses for amusements, shows or fireworks in streets.

It has been held that a municipality is not liable where it grants permission to use its streets for particular purposes of sport or amusement and injury results therefrom, such as a permit to *coast* on certain streets,[99] or a permit for *horse*

ture were one of its own making." Wheeler v. Ft. Dodge, 131 Ia. 566, 108 N. W. 1057.

License to build sidewalk—traveler injured by falling through concrete while in course of construction, the barriers having been taken down temporarily—city liable. Lau v. Chicago, 153 Ill. App. 50.

Permission to close a street to change the grade between a street and a railroad is notice of its dangerous condition. Torphy v. Fall River, 188 Mass. 310, 74 N. E. 465.

But defects existing at a point beyond the street line need not be investigated and remedied by the municipality. Hoffman v. Mayville, 123 Ky. 707, 29 Ky. L. Rep. 1245, 97 S. W. 360.

94. See Carstesen v. Stratford, 67 Conn. 428, 434, 35 Atl. 276; Baltimore v. Pendleton, 15 Md. 12; Bennett v. Everett, 191 Mass. 364, 77 N. E. 886.

95. Bellevue v. Rentz (Ky. 1913), 153 S. W. 732.

96. Kinsey v. Kinston, 145 N. C. 106, 58 S. E. 912.

97. Stanley v. Davenport, 54 Ia. 463, 467, 2 N. W. 1064, 37 Am. Rep. 216.

98. Richmond v. Smith, 101 Va. 161, 43 S. E. 345.

99. **Coasting permit.** The city may lawfully permit the use of its strets for coasting, but it can not do so if such use amounts to the maintenance of a public nuisance, the determination of which question is controlled by the surrounding circumstances. In a Michigan case a city had set apart a particular street for coasting, and one making proper use of the street was injured by a coasting sled running into him. The court found that the use of the street for coasting was not necessarily a nuisance, therefore the city was held not liable. The court further found that the action of the council in setting aside the street for this use was within its discretionary and legislative powers, and however unwise it may have been exercised in the particular instance the courts should not interfere. Burford v. Grand Rapids,

racing on a street,[1] or a permit for a *bear show* other than on the streets.[2] On the other hand, it is held in some jurisdictions that if the permit is to use the streets for an unlawful purpose and one which is a nuisance, the municipality is liable where the streets are thereby made dangerous,[3] and it has been held that the same rule applies as in case of a license of an act resulting in an excavation or obstruction in a street.[4] Thus, in Indiana, it is held that if a municipality

53 Mich. 98, 18 N. W. 571, 51 Am. Rep. 105.

1. **Allowing horse racing** in a street in proper condition for travel does not make the municipality liable where one of the horses runs into a traveler. McCarthy v. Munising, 136 Mich. 622, 99 N. W. 865; Marth v. Kingfisher, 22 Okla. 602, 98 Pac. 436, in which it is said: "Our attention has been called by plaintiff to the case of Little, Adm'r, v. City of Madison, 42 Wis. 643, 24 Am. Rep. 435, as holding the contrary to this doctrine. The aleged facts which the court held in that case constituted a cause of action were that the officers of the defendant city had knowingly, negligently, and carelessly allowed one of the streets to become incumbered and obstructed by an exhibition of wild animals upon the same by granting to the owners of the wild animals a license to exhibit the same upon the street, and plaintiff's team was frightened by said animals and ran away and thereby injured plaintiff's wife; but the same court, in commenting upon this case in Schultz v. City of Milwaukee, 49 Wis. 254, 5 N. W. 342, 35 Am. Rep. 779, limits very much the expressions of the court in Little v. City of Madison, *supra*, in the following language: 'Although reference is made in the opinion by Mr. Justice Cole to the fact that it was alleged in the complaint that the agent of the city knowingly and carelessly allowed one of its principal streets to become obstructed by the exhibition, *yet the precise ground of the judgment in that case is that of a municipal corporation, in the attempted exercise of any power conferred upon it by law, as to license shows, amusements, and the like, exceeds its authority, and licenses the placing of a public nuisance in a street, or the unlawful and dangerous use of a street for any purpose, and an injury results therefrom, without negligence on the part of the person injured, the municipality is liable to respond in damages for such injury.* The case goes no further, and could not without violating well settled principles of law.'"

2. Where a city granted a license for a bear show within the city limits, without specifying the place, it is not liable for injuries received from a bear show in the streets, since it will be presumed that the license was for a show on a private lot, and the municipality is not liable for failure of its police officers to prevent the show in the streets. Little v. Madison, 49 Wis. 605, 6 N. W. 249, 35 Am. Rep. 793.

3. Richmond v. Smith, 101 Va. 161, 43 S. E. 345.

Not liable unless shown that the act licensed was dangerous in itself. Wheeler v. Plymouth, 116 Ind. 158, 18 N. E. 532, 9 Am. St. Rep. 837.

4. **License other than for excavation or obstruction.** "We can see no reason why the principle announced and applied in these cases should not apply to a case where a city expressly grants a permission or license authorizing the use of a street for a purpose which, in its nature, is intrinsically dangerous, and which necessarily or ordinarily renders the use of the street unsafe unless precautions are taken to prevent the danger ordinarily incident to such use, especially where the use authorized is an extraordinary and unusual use and one that is foreign to the purpose for which the street was dedicated. Counsel for appellee concedes that these principles apply where the act authorized results in an excavation or obstruction in the street or any other change in its physical condition which makes it unsafe for use; but it is urged that

grants a license to use a street or streets for an *exhibition of fireworks,* and one is injured while in the streets watching such exhibition, by being struck by a skyrocket, the municipality may be held liable if proper precautions are not taken.[5] So it is held in New York that where a permit is granted in a large city, such as New York City, to display *fireworks* in a street, such permit, though beyond the power of the city, binds it because relating to the subject of fireworks which is within its jurisdiction; and that the city was liable for injuries resulting therefrom to third persons on the theory that it had *consented to the creation of a nuisance.*[6] So it is held in Illinois that where a city affirmatively authorizes the use of its streets for a *carnival,* with the necessary structures, and pursuant thereto a platform is erected in the streets for use of patrons of a show, and a patron is injured because the platform was erected in an unsafe manner, the municipality is liable and cannot defend on the ground that the streets were intended for other uses.[7]

they should not apply when the act authorized or licensed does not change or affect the physical condition of the street, and which amounts only to a temporary use of the street, which may or may not be dangerous, according to the amount of care used. No court has recognized such a distinction so far as we have been able to learn from our investigation of the question, and we know of no sound reason upon which such a distinction could rest. There may be uses to which a street might be appropriated or subjected which would make it more unsafe for travel than it could be made by by any obstruction or change in its physical condition." Per Chief Justice Lairy in Moore v. Bloomington (Ind. App. 1911), 95 N. E. 374, in which case the license was for a public exhibition of *fireworks* in the street.

5. Moore v. Bloomington (Ind. App. 1911), 95 N. E. 374, dist'g Wheeler v. Plymouth, 116 Ind. 158, 18 N. E. 532, 9 Am. St. Rep. 837, on the ground that the act authorized to be done in that case was not to be done in a street.

In Arizona, however, city held not liable for injuries from fireworks licensed by city. Fifield v. Phoenix, 4 Ariz. 283, 36 Pac. 916, 24 L. R. A. 430.

In West Virginia, city not liable for injuries received from fireworks shot off with consent of city officers. Bartlett v. Clarksburg, 45 W. Va. 393, 31 S. E. 918, 43 L. R. A. 295, 72 Am. St. Rep. 817.

6. Landau v. New York, 180 N. Y. 48, 72 N. E. 631, 105 Am. St. Rep. 709.

Where the mayor of Brooklyn, New York, acting under an ordinance, granted a permit for a display of fireworks at the junction of two narrow streets, and a sky rocket set fire to plaintiff's building, the municipality was held liable, and could not escape liability either on the ground that the ordinance transcended the power of the common council, or that the ordinance did not authorize the mayor to grant such a permit, where the ordinance is somewhat ambiguous and the construction adopted had the sanction of like action for several years. Spier v. Brooklyn, 139 N. Y. 6, 34 N. E. 727, 21 L. R. A. 641, 36 Am. St. Rep. 664, aff'g 19 N. Y. S. 665.

7. Van Cleef v. Chicago, 240 Ill. 318, 88 N. E. 815.

5. WHO MAY SUE.

§ 2753. In general.

The duty of a municipality to use reasonable care to keep its streets and sidewalks safe inures to the benefit of every person lawfully using the street,[8] whether he be in a horse-driven vehicle, an automobile, on horseback, on a tricycle, bicycle, or motorcycle, or a pedestrian; and whether the person is an adult or a child.[9] But liability for defective streets does not extend, it would seem, to *one not in the street* at the time when injured.[10]

In early days, one *traveling on Sunday* could not recover, in some states, unless traveling from necessity or charity.[11]

§ 2754. Right to sue as limited to "travelers."

In some states, in nearly if not all where the liability is statutory and the ruling is influenced by the particular word-

8. An obstruction in a street, to be actionable, need not endanger all modes of public travel, but it is sufficient that it makes dangerous any mode which the public has a right to use. Powers v. Boston, 154 Mass. 60, 27 N. E. 995.

"If a street be used for purposes wholly foreign to its legitimate objects, and injury results from a defective adaptation, or a non-adaptation to such purposes, there can be no responsibility. Thus if a circusman or a juggler monopolizes a space in a public street for exhibiting his show, and while so doing suffers an injury resulting from a defective construction of the highway, he cannot therefore have redress against the municipality. But the principle here involved must have reasonable interpretation. The street is for travel. * * * In Missouri the liability, if any, rests upon general principles, applying to the municipal dereliction of a legal duty. The duty is inferred from the grant of an exclusive power to 'construct and keep in repair all bridges, streets, sewers, and drains, and to regulate the use thereof,' etc. The use of the streets to be so constructed and kept in repair is not limited by a particular word or words. The purposes for which streets are made, however, are sufficiently understood. They embrace the general convenience of the public in out-of-door locomotion and intercommunication, according to the well-known habits of the community. It would shock the understanding of any citizen to be told that when on the street he must be perpetually moving, and that he cannot stop an instant to greet a friend without becoming a trespasser." Donoho v. Vulcan Iron Works, 7 Mo. App. 447.

Lessee. Of course, a lessee from the municipality, where the lease is void, cannot recover damages accruing to him as lessee because of failure to repair a street. Lord v. Oconto, 47 Wis. 386, 2 N. W. 785.

9. § 2757, *post*.

Roller skater. While a municipality is under no obligation to provide ways safe for *roller skating*, yet where the defect was more or less dangerous to all persons passing on the sidewalk, whether walking or on skates, and the fall was not due to the fact that the injured person was on skates, the municipality is liable. Collins v. Philadelphia, 227 Pa. 121, 75 Atl. 1028, 27 L. R. A. (N. S.) 909.

10. Stubley v. Allison Realty Co., 108 N. Y. S. 759, 124 App. Div. 162. See also Dorsett v. Greencastle, 141 Ind. 38, 40 N. E. 131.

Does not include persons not in the street but on adjoining property. Kiley v. Kansas City, 87 Mo. 103, 56 Am. Rep. 443.

11. Gorman v. Lowell, 117 Mass. 65.

ing of the statute, it is held that the person injured must have been using the street, at the time of the accident, for the purpose of travel;[12] and one gives up his position as a traveler when he abandons the use of the street for travel, and passes from the surface thereof into a catch-basin below, to rescue a child who had fallen into it.[13]

In most states, however, the liability is *not confined to travelers,* but extends to a person stopping on the street to converse with another, or stopping to see a procession pass, or using the street for convenience or pleasure, and there are liabilities to abutting owners and to children playing upon the street.[14] So the duty extends to a traveler crossing a sidewalk as well as to those traveling lengthwise thereon.[15] And

12. Reed v. Madison, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733.

Persons sitting on or leaning against railings do so at their own risk. Stickney v. Salem, 3 Allen (Mass.), 374.

But where one went into a street to see a procession form, and was injured after standing there from three to five minutes, it cannot be said as a matter of law that he was not "traveling upon a highway," within the statute. Varney v. Manchester, 58 N. H. 430, 40 Am. Rep. 592.

An abutter is a *traveler* although he retraced his steps from the entrance door to his apartments to a point near a side entrance where he was injured. Strack v. Milwaukee, 121 Wis. 91, 98 N. W. 947.

In Maine, it has been held that one injured while passing to a private way over a gutter planking within the limits of the street but outside of the traveled portion thereof was not a "traveler," within the meaning of the statute. Philbrick v. Pittston, 63 Me. 477.

Spectator at road race of automobiles cannot recover. Bogart v. New York, 200 N. Y. 379, 93 N. E. 937; Johnson v. New York, 186 N. Y. 139, 78 N. E. 715.

13. Kelley v. Boston, 180 Mass. 233, 62 N. E. 259.

14. Van Cleef v. Chicago, 240 Ill. 318, 88 N. E. 815.

Party injured need not be using the sidewalk for travel. Columbus v. Anglin, 120 Ga. 785, 789, 48 S. E. 318.

The mere stopping of one passing along a street, "to converse with some other person, and leaning against the railing of a bridge that forms a part of the highway," does not of itself preclude recovery. Whitewright v. Taylor, 23 Tex. Civ. App. 486, 57 S. W. 311. *Contra,* Stickney v. Salem, 3 Allen (Mass.), 374.

A person may sue where the injury was received while making a brief stop to rest. Kessler v. Berger, 205 Pa. 289, 54 Atl. 887, 61 L. R. A. 611.

Carnivals—booths. Where a city granted permission to use a street for a carnival, and a platform was erected thereon for a show, and a patron was injured because of its unsafe condition, the municipality cannot escape liability on the ground that when the patron started up the stairway leading to the platform the duty of the city ceased and could not come into being again until he was again on the street. Van Cleef v. Chicago, 240 Ill. 318, 88 N. E. 815.

Recovery for injury from fireworks cannot be defeated by the fact that plaintiff was not using the street for travel at the time of his injury but had come to the place solely for the purpose of watching the fireworks. Moore v. Bloomington (Ind. App. 1911), 95 N. E. 374; Dowell v. Guthrie, 99 Mo. 653, 12 S. W. 900, 17 Am. St. Rep. 598; Bradley v. Andrews, 51 Vt. 530. *Contra,* Scanlon v. Wedger, 156 Mass. 462, 31 N. E. 642.

15. Powers v. Penn. Mut. Life Ins. Co., 91 Mo. App. 55.

Compare Dallas v. Webb, 22 Tex. Civ. App. 48, 54 S. W. 398.

in no case should the term "traveler," if the liability be confined thereto, be given a narrow and restricted meaning.[16] Thus, a traveler pausing for a brief time to watch what is going on in the street may recover, even in states where only travelers can recover.[17]

Among injured persons held entitled to sue are the following: *one unloading a wagon* in a street, in a reasonable and proper manner;[18] persons crossing street to board a street car;[19] one injured in street although while returning from a bawdy house.[20]

§ 2755. Person using wrong part of street or for improper purpose.

If a person is using a part of the street for a purpose not intended as a proper use thereof, it seems that he cannot recover for defects therein, at least unless it was so defective that the municipality would be liable to one injured while using it for the purpose intended. To illustrate, if a wagon should be driven onto and along a sidewalk, used solely by pedestrians, the municipality would undoubtedly be held not liable for injuries resulting therefrom. So if one is using a sidewalk to *move a heavy safe* thereon, the municipality is not liable, where it breaks, provided the walk was reasonably safe for use in an ordinary manner.[21] So where a sidewalk was reasonably safe for ordinary travel, the municipality is not liable where it broke under the weight of some fifty or more people packed together and attending a municipal auction, where the municipality did not invite the people to so

16. Kansas City v. Orr, 62 Kan. 61, 61 Pac. 397, 50 L. R. A. 783.

The term "traveler," as used to designate persons for whose use and benefit highways and streets must be kept in proper condition, has no technical, legal signification; and, under proper instructions, it is for the jury to say whether a person receiving an injury was traveling upon the highway or street within the meaning of the law. Hardy v. Keene, 52 N. H. 370.

17. Donahue v. Newburyport, 211 Mass. 561, 98 N. E. 1081.

In Britton v. Cummington, 107 Mass. 347, the plaintiff recovered for damages to his carriage and horses, although he had left his carriage, and was engaged in picking berries by the side of the road. The court says: "There can be no doubt that a traveler on the highway may stop his horse, alight from his carriage, and employ himself, while out of his carriage, in acts that have no connection with his journey or his purpose. Such a position, and such employment, for the reasonable time, would not of itself deprive him of his rights as a traveler."

18. Smethurst v. Barton Square, etc. Church, 148 Mass. 261, 19 N. E. 387, 2 L. R. A. 695, 12 Am. St. Rep. 550.

19. Fox v. Chelsea, 171 Mass. 397, 50 N. E. 622.

20. McVoy v. Knoxville, 85 Tenn. 19, 1 S. W. 498.

21. Kohlhof v. Chicago, 192 Ill. 249, 61 N. E. 446, 85 Am. St. Rep. 335.

Not liable where injury to horse on footway. Hemphill v. Boston, 8 Cush. (Mass.) 195, 54 Am. Dec. 749.

pack themselves together.[22] So a city is not liable where one driving a truck of extreme width on a driveway over a sidewalk, is injured by striking the side of the driveway, where it was sufficiently wide for ordinary wagons.[23] However, a municipality has been held liable for an injury to a person *driving a vehicle on a sidewalk* where it was devoted to the common use of both teams and pedestrians.[24]

§ 2756. Officers or employees of municipality.

This duty to exercise ordinary care to keep the streets in reasonably safe condition extends to and includes as a beneficiary all officers and employees of the municipality;[25] and the fact that the *relation of master and servant exists,* and that a recovery would be precluded under the rules governing the liability of a master for injuries to his servant, does not preclude a recovery, since such persons may recover merely as a traveler upon the street, without regard to their relationship to the municipality.[26] This rule has been applied so as to authorize a recovery by *policemen,*[27] *firemen* in the employ of the municipality,[28] and the like. So a *councilman* may recover notwithstanding a law prohibiting such officers from contracting with the municipality.[29] Furthermore, the fact that the person injured was a member of the council from the time that the defects were first brought to the notice of the council until after the accident to him does not of itself preclude a recovery,[30] although if the person injured

22. Zipkie v. Chicago, 117 Ill. App. 418.

23. Jordan v. New York, 66 N. Y. S. 696, 44 App. Div. 149, aff'd without opinion in 165 N. Y. 657, 59 N. E. 1124.

24. Lacon v. Page, 48 Ill. 499.

Contra. "The sidewalks of a city are intended solely for the use of pedestrians. While they must be kept in reasonably safe repair for such use, the city is not bound to keep them fit for the use of vehicles also. If drivers of vehicles nevertheless use them for passage of their wagons, they must do so at their peril. Nor does the fact that the pavements have been so used by the acquiescence of the city for many years affect its liability in the matter so far as vehicle drivers are concerned." Webster v. Vanceburg, 130 Ky. 320, 113 S. W. 140.

25. Employees of municipality may sue. Josupeet v. Niagara Falls, 127 N. Y. S. 527, 70 Misc. Rep. 638.

§ 2620, *ante.*

26. Kennedy v. Savannah, 9 Ga. App. 760, 72 S. E. 160.

27. Kennedy v. Savannah, 9 Ga. App. 760, 72 S. E. 160.

Policeman does not, by reason of his employment, assume risks incident to defective streets. Galveston v. Hemmis, 72 Tex. 558, 11 S. W. 29, 13 Am. St. Rep. 828.

28. Valparaiso v. Chester (Ind. 1911), 96 N. E. 765; Turner v. Indianapolis, 96 Ind. 51; Kansas City v. McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429; Coots v. Detroit, 75 Mich. 628, 43 N. W. 17, 5 L. R. A. 315; Palmer v. Portsmouth, 43 N. H. 265. See also Wilson v. Great Southern Tel. & Tel. Co., 41 La. Ann. 1041, 6. So. 781.

29. Danville v. Robinson, 99 Va. 448, 39 S. E. 122, 55 L. R. A. 162.

30. Danville v. Robinson, 99 Va. 448, 39 S. E. 122, 55 L. R. A. 162

is an officer whose duty it is to repair the streets and who has the means so to do, he cannot recover where he is injured by reason of his neglect of duty to repair.[31]

§ 2757. Children.

Children are entitled to the benefit of the rule requiring the exercise of ordinary care to keep streets in a reasonably safe condition;[32] and a recovery may be had, it is generally held, although the child when injured was using the street as a *playground*.[33] "A city owes substantially the same duties

31. Wood v. Waterville, 4 Mass. 422, 5 Mass. 294.

32. Indianapolis v. Emmelman, 108 Ind. 530, 9 N. E. 155, 58 Am. Rep. 65; Covington v. Bollwinkle (Ky.), 121 S. W. 664; Omaha v. Richards, 49 Neb. 244, 68 N. W. 528.

Compare Shippey v. AuSable, 65 Mich. 494, 32 N. W. 741.

33. *District of Columbia.* District of Columbia v. Boswell, 6 App. (D. C.) 402.

Georgia. Augusta v. Tharpe, 113 Ga. 152, 38 S. E. 389.

Illinois. Chicago v. Keefe, 114 Ill. 222, 2 N. E. 267, 55 Am. Rep. 860, explaining Chicago v. Starr, 42 Ill. 177, 89 Am. Dec. 422; Bath v. Blake, 97 Ill. App. 35; Waverly v. Reesor, 93 Ill. App. 649.

Kentucky. Covington Saw Mill & Mfg. Co. v. Drexilius, 120 Ky. 493, 27 Ky. L. Rep. 903, 87 S. W. 266, 117 Am. St. Rep. 593.

Missouri. Straub v. St. Louis, 175 Mo. 413, 75 S. W. 100; Donoho v. Vulcan Iron Works, 75 Mo. 401.

New York. McGarry v. Loomis, 63 N. Y. 104, 20 Am. Rep. 510; McGuire v. Spence, 91 N. Y. 303, 43 Am. Rep. 668; Kelly v. Hudson Cos., 120 N. Y. S. 768, 65 Misc. Rep. 574.

West Virginia. Gibson v. Huntington, 38 W. Va. 177, 18 S. E. 477, 22 L. R. A. 561, 45 Am. St. Rep. 853.

See also Indianapolis v. Emmelman, 108 Ind. 530, 9 N. E. 155, 58 Am. Rep. 65.

"Children and youths have always used streets for their sports, subject to the regulation of municipal ordinance, and subject to the use of the streets for the other purposes above set out. The necessity for reasonable use of this kind becomes constantly more pressing with the increase in the size of towns and cities, and the decrease of home space. To vast numbers of boys and girls the street affords the only place of sport and the only outlook from a pent-up home. The interest of the state is no less vital that these boys and girls should have a place for development of body and spirit by out of door sport, than its interest that they should have the public school as a place for mental training. Indeed, it is not to be doubted that arrested and abnormal development of men and women, which results in the great burden of crime borne by society, is due largely to the lack of parks and playgrounds, where the joy of activity in the fresh air may be found. It is no doubt true that the primary duty of the municipal authorities is to keep the streets safe and in good condition for travel, and if in doing that it becomes necessary to make them unfit and dangerous for the play of boys and girls no responsibility falls on the municipality; and it is also true that the police power extends to forbidding play in streets dangerous or unfit for that purpose from any cause; nevertheless, municipal authorities are bound to take notice of and have a reasonable regard for the fact that many streets are used for the play of boys and girls, and that they may be properly so used, without material interference with the main uses above set out. Viewing the general use of the street by boys and girls for play, and the long acquaintance by the public in such use, when it has not interfered with the other uses mentioned, and considering the growing scope of the duties of the state, and especially of municipal corporations, to the individual, it seems clear that the court should not

to children, properly on the streets, although engaged in play, as it does to travelers on business."[34] *In Massachusetts,* however, a municipality has been held not liable for injuries received by a child while playing in a street;[35] but even in that state a child does not cease to be a traveler when he steps aside for an instant to clasp, in play, a post in the highway, and almost in his path.[36] The same rule of nonliability prevails in *Maine.*[37] In *Michigan*[38] and *Wisconsin,*[39] the municipality is not liable to children using the street exclusively for play, but is liable where children, going from one place to another, stop to gratify their curiosity or to indulge their natural tendency to sportiveness, on the theory that such diversion or play is a mere incident of the travel and to be expected of children using streets for travel; and there is at least *dicta* in the Massachusetts decisions to support this distinction as the proper one.[40] In *Mississippi,* a child of tender years, playing upon a street, may recover, although an adult playing thereon cannot recover.[41] On the other hand, a child, the same as an adult, cannot recover where he had no right to be where he was at the time of the accident, and the cause of the injury was his wantonly reckless act.[42]

§ 2758. Automobilists.

If the street is not in proper condition for ordinary vehi-

lay it down, as a proposition of law applicable to all cases, that playing by boys and girls while they are still of the age of youthful sportiveness is an illegitimate use of a street, not to be anticipated by the authorities whose duty it is to keep highways in a reasonably safe condition." Irvine v. Greenwood, 89 S. C. 511, 72 S. E. 228.

34. Townley v. Huntington, 68 W. Va. 574, 70 S. E. 368.

35. Per Chief Justice Bigelow in Blodgett v. Boston, 8 Allen (Mass.), 237.

It is also held in that state that a child playing in a street is not a "traveler" within the meaning of the statute creating liability (Hunt v. Salem, 121 Mass. 294; Tighe v. Lowell, 119 Mass. 472), although the fact that just before the injury the child had been using the street for play does not preclude a recovery where at the time of the injury he was walking along the street as a traveler. Graham v. Boston, 156 Mass. 75, 30 N. E. 17.

36. Gulline v. Lowell, 144 Mass. 491, 11 N. E. 723, 59 Am. Rep. 102.

37. Stinson v. Gardiner, 42 Me. 248, 66 Am. Dec. 281.

38. Beaudin v. Bay City, 136 Mich. 333, 99 N. W. 285. See Hamilton v. Detroit, 105 Mich. 514, 63 N. W. 511.

39. Reed v. Madison, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733; Collins v. Janesville, 111 Wis. 348, 87 N. W. 241; Busse v. Rogers, 120 Wis. 443, 98 N. W. 219, 64 L. R. A. 183.

40. Blodgett v. Boston, 8 Allen (Mass.), 237; Gulline v. Lowell, 144 Mass. 491, 11 N. E. 723, 59 Am. Rep. 102.

41. Jackson v. Greenville, 72 Miss. 220, 16 So. 382, 27 L. R. A. 527, 48 Am. St. Rep. 553.

Boy seventeen years old not, as matter of law, so old as to exclude him from rule requiring cities to exercise reasonable care to make streets safe for children playing therein. Irvine v. Greenwood, 89 S. C. 511, 72 S. E. 228.

42. Gaughan v. Philadelphia, 119 Pac. 503, 13 Atl. 300.

cles, an *automobilist* may recover for injuries resulting therefrom.[43] And it is no defense that the automobile is unregistered and unnumbered, where the statute merely prescribes a penalty therefor, since not thereby made a trespasser on the street.[44] But if the statute forbids the operation of an unregistered automobile upon a public highway, as in Massachusetts, no recovery can be had for injuries from defects in the highway, if the car is unregistered, since in such a case the automobile is unlawfully on the highway and hence is a trespasser.[45]

§ 2759. Bicycle and tricycle riders.

The rules applying to *bicycles*[46] and *tricycles*[47] ridden on

43. Baker v. Fall River, 187 Mass. 53, 72 N. E. 336.

See also Berry, Automobiles, § 117.

"We think the sounder rule is laid down by one of these courts in the recent decision of Doherty v. Town of Ayer, 197 Mass. 241, 83 N. E. 677, 14 L. R. A. (N. S.) 816, where that court held that: 'Persons may lawfully ride in automobiles, as they may lawfully ride on bicycles, and cities and towns are bound to keep their ways reasonably safe and convenient for travel generally, including that properly undertaken upon such vehicles. * * * But if their ways are reasonably safe and convenient for travel generally, they are not liable for a failure to make special provisions, required only for the safety and convenience of persons using automobiles or bicycles.'" Molway v. Chicago, 239 Ill. 486, 88 N. E. 485.

44. Hemming v. New Haven, 82 Conn. 661, 74 Atl. 892, 25 L. R. A. (N. S.) 734.

45. Feeley v. Melrose, 205 Mass. 329, 91 N. E. 306, 27 L. R. A. (N. S.) 1156, 137 Am. St. Rep. 445.

Automobiles. "The fact that the plaintiff was operating his machine over the highway and that he had no license under the statute then in force (St. 1903, c. 473, §§ 4, 5, as amended by St. 1905, c. 311) was not necessarily fatal to his right to recover. It was merely evidence of his negligence in the management of his machine, to be considered by the jury in connection with the other evidence bearing upon that question. Bourne v. Whitman, 209 Mass. 155, 171, 95 N. E. 404, 35 L. R. A. (N. S.) 701. But if his machine was not registered or to be regarded as required by other sections of the statute, then his conduct in running it upon the highway and against the rope, the stretching of which across the street constituted the defect complained of, was the act of a mere trespasser, who had no other right than to be exempt from reckless, wanton or willful injury." Holland v. Boston (Mass. 1913), 100 N. E. 1009.

46. *Illinois.* Molway v. Chicago, 239 Ill. 486, 88 N. E. 485, aff'g 144 Ill. App. 509.

Massachusetts. Clinton v. Revere, 195 Mass. 151, 80 N. W. 813.

Michigan. Lee v. Port Huron, 128 Mich. 533, 87 N. W. 637, 55 L. R. A. 308; Leslie v. Grand Rapids, 120 Mich. 28, 78 N. W. 885.

New York. Morrison v. Syracuse, 61 N. Y. S. 313, 45 App. Div. 421.

Rhode Island. Fox v. Clarke, 25 R. I. 515, 57 Atl. 305, 65 L. R. A. 234.

Texas. Laredo E. & R. Co. v. Hamilton, 23 Tex. Civ. App. 480, 56 S. W. 998.

See also, as to effect of failure to maintain guard rail, Smith v. Henderson, 66 N. Y. S. 347, 54 App. Div. 26.

Bicyclist may recover. Kokomo R. & L. Co. v. Studebaker, 41 Ind. App. 11, 83 N. E. 260.

Municipality owes no greater duty to bicyclists than to persons riding or driving a horse on the street. Bills v. Salt Lake City, 37 Utah, 507, 109 Pac. 745.

47. Wheeler v. Boone, 108 Ia. 235, 78 N. W. 909, 44 L. R. A. 821.

a street or sidewalk is that the rider cannot recover for injuries resulting from defects in the street or sidewalk if it was in proper condition for pedestrians (in case of a sidewalk) or ordinary vehicles (in case of the driveway).[48] On the other hand, one rightfully riding a bicycle on a sidewalk is entitled to recover if the walk was not in proper condition even for pedestrians.[49]

§ 2760. Owner of animal running at large.

In one case, a horse in a stable slipped its halter, ran out into the street, and stepped into a hole in the street and was injured. It was held by the Iowa Supreme Court that the municipal duty in regard to the safety of streets applied to "a horse not a trespasser, but which has escaped momentarily from the control of its owner, and which accident occurs while the animal is running over and upon a public street."[50]

§ 2761. Person injured in front of own premises.

The fact that one is injured upon a defective sidewalk in front of the premises occupied by him does not necessarily preclude a recovery against the municipality. Thus, if the occupant is a mere tenant, and the defect which caused the injury was not due to any of his acts, he may recover.[51]

A *lessee* may recover for injuries resulting from a fall on a sidewalk in front of the premises which he occupies, where no duty to repair rests upon him and he himself had not erected or maintained anything which might cause the injuries complained off.[52] *A fortiori,* a sub-lessee of two rooms in a house, and under no duty to repair the sidewalk, may recover.[53]

§ 2762. Person injured while violating the law.

The fact that the injury occurred while the person injured was violating an ordinance does not preclude a recovery un-

48. "The law does not require that a road shall be absolutely safe for bicycling purposes any more than that it shall be absolutely safe for other methods of travel. The defect which renders municipalities liable must be such as would make the street or highway unsafe for the use of vehicles in general. * * * The authorities are not required to provide a street or highway equal in smoothness to a driving or racing track for either horses, bicycles or automobiles. A sharp stone, a tack, a bit of glass, or coal in a road might puncture a bicycle tire or cause an injury to the rider; but the authorities are not ordinarily liable for or required to insure against such accidents." Per Justice Carter in Molway v. Chicago, 239 Ill. 486, 88 N. E. 485.

49. Gagnier v. Fargo, 11 N. D. 73, 88 N. W. 1030, 95 Am. St. Rep. 705.

50. Nocks v. Whiting, 126 Ia. 405, 102 N. W. 109, 106 Am. St. Rep. 371.

51. Hendershott v. Grand Rapids, 142 Mich. 140, 105 N. W. 140.

52. Avery v. Syracuse, 29 Hun (N. Y.), 537.

53. Burt v. Boston, 122 Mass. 223, 227.

less injury was the proximate cause of the violation,[54] or, as held in some states, "caused or contributed" to the injuries complained of.[55] Thus, one injured by a defect in a street but who was driving faster than allowed by ordinance at the time of the accident, cannot recover.[56] But the fast driving in violation of an ordinance must have, at least in some degree, contributed to the accident, to be a defense.[57] So where an ordinance forbad driving on sidewalks, if one intentionally drove on a sidewalk and this was a contributing cause of the injury, he cannot recover.[58]

§ 2763. Servants of third persons working on streets.

The duty to keep streets reasonably safe also extends to a railroad employee necessarily engaged in the performance of his duties upon the street.[59]

§ 2764. Necessity for special damage—rights of abutters.

It seems almost unnecessary to state that one cannot sue to recover damages for injuries from a defective highway unless he has suffered a special injury not such as shared by the public generally.[60] No recovery can be had where the injury is one common to all persons traveling on the road and those whose property abuts thereon, although the annoyance and inconvenience to some is much greater than to others, since it is not sufficient that the injury be different in degree if of

54. Atchison v. Acheson, 9 Kan. App. 33, 57 Pac. 248.

"It is asserted by plaintiff, and admitted by defendant, that plaintiff was riding his bicycle in a pathway used as such by the public. The ordinance in question prohibits its use as such and provides a penalty for its violation. The plaintiff was a trespasser, and not entitled to recover." Williams v. St. Joseph, 166 Mo. App. 229, 148 S. W. 459.

55. Herries v. Waterloo, 114 Ia. 374, 86 N. W. 306.

56. Tuttle v. Lawrence, 119 Mass. 276; Heland v. Lowell, 3 Allen (Mass.), 407, 81 Am. Dec. 670; Luke v. El Paso (Tex. Civ. App.), 60 S. W. 363 (if rate of speed caused the disaster).

Evidence admissible to show speed. Herries v. Waterloo, 114 Ia. 374, 86 N. W. 306, driving at greater speed than six miles an hour.

57. Baker v. Portland, 58 Me. 199, 4 Am. Dec. 274. followed in Pueblo v. Smith, 3 Colo. App. 386, 33 Pac. 685.

See also Mullen v. Owosso, 100 Mich. 103, 58 N. W. 663, 23 L. R. A. 693, 43 Am. St. Rep. 436.

58. Arey v. Newton, 148 Mass. 598, 20 N. E. 327, 12 Am. St. Rep. 604.

59. Kansas City v. Orr. 62 Kan. 61, 61 Pac. 397, 50 L. R. A. 783.

60. §§ 1382-1389, *ante*, vol. 3.

Compare, § 1408, *et seq.*, *ante*, vol. 3, as to what are special damages such as to entitle abutter to sue on vacation of street.

Can not recover for loss of wife's services and society. Lounsbury v. Bridgeport, 64 Conn. 360, 34 Atl. 93.

Injury to adjacent lots from the natural flow of water from streets is not actionable. Montogomery v. Gilmer, 33 Ala. 116, 70 Am. Dec. 562.

Consequental damages resulting indirectly from the defect in the street, to the buildings of an abutter, are generally not recoverable. Ball v. Winchester, 32 N. H. 435, where statute limited recovery to injuries resulting directly from the defect.

the same kind.[61] So *abutting owners* are not entitled to sue, as such, to protect their rights, since there is no liability for consequential injuries to persons or property, not resulting from the use of the highway for travel,[62] unless in exceptional cases.[63]

Injury to the business of an abutter may be a special injury, under some circumstances, especially where the wrongdoer is a private person,[64] but some cases hold that *a municipality* is not liable to the owner or occupier of property fronting on a street for the loss to his business resulting from its neglect to keep the street in repair, whereby travel is, to some extent at least, diverted.[65] So, in West Virginia, it is held

61. See § 1382, *ante*, vol. 3.

"He, and he only, can maintain an action for a defect in a highway who has sustained some damage peculiar to himself, his trade or calling. A private action will not lie for an injury caused by the nonrepair of a highway, if all other persons passing suffer in the same kind, even though in far less degree. * * * Thus the mere fact that one is delayed by an obstruction, and is obliged, in common with every one else who attempts to use the highway, either to pursue his journey by a less direct road, or else to remove the obstruction will not entitle him to maintain an action for damages. And although an obstruction in a highway may make it difficult, or indeed impossible, for a merchant to deliver goods at his store, or for a farmer to gather his crops, or for a landlord to rent his houses, yet if the whole neighborhood suffer damages from the same cause, similar in kind, even if less in degree, no damages are recoverable. Upon this principle, no one can recover damages for being deprived, with the rest of the community, for the use of a highway by its total obstruction, as, for example, by a great fall of snow." 2 Shear. & Red. Neg., § 371.

62. Florence v. Woodruff (Ala. 1912), 59 So. 435.

63. "These cases are authority for the rule that the duty of a city in exercising control and supervision over its streets to an abutting property owner is analogous to the duty which an individual landowner owes to the premises of his neighbor. This view also finds support in other jurisdictions where the question has been raised and we find nothing in our own cases to the contrary. This rule seems to be sound, and we see no reason why it should not be followed. Under this rule, the city in the case at bar would only be liable for damages to an abutting owner if the facts warranted the interference that it had permitted large quantities of inflammable materials to be placed in the street in such close proximity to the property of appellee as to amount to a wilful, or wanton, or negligent disregard of the rights of such abutting owner. The city would not be liable to the adjoining property owner for injuries caused by the ordinary use of the street, or for damages indirectly resulting from the ordinary and usual accumulation of waste materials upon the street. To permit a recovery in this case, it must be shown that the accumulation of inflammable materials were unusual, extraordinary, and dangerous, and that the city should have anticipated the danger to the property of appellee as a consequence of a fire breaking out in the rubbish deposited so close to its property." Charles Eneu Johnson Co. v. Philadelphia, 236 Pa. 510, 84 Atl. 1014.

64. § 1385, *ante*, vol. 3.

65. Gold v. Philadelphia, 115 Pa. 184, 8 Atl. 386.

No action lies to recover damages for the obstruction of a highway, against a city which is bound to keep it in repair, by an individual whose place of business thereby becomes more difficult to reach, his business injured, the delivery of articles which he has sold and the gathering of his crops more expensive, his

that a person who, in common with the community, suffers in his business relations by reason of the bad condition of the streets, cannot recover damages from the municipality because of such injury.[66] And in Iowa, it is held there can be no recovery for failure to keep a street in repair which results in diverting public travel from a ferry owned by plaintiff.[67]

There must be a *special damage in kind and not merely in amount,* and hence where the injury is the wear and tear in using a street in bad condition, no recovery can be had, since all who use the street are subject to the same kind of damage. Thus, where an alley was paved with cobble stones, and thereafter an abutter turned two buildings on the alley into a warehouse and at once commenced what was wholly unsuited to cobble stone, *i. e.,* the heavy hauling incident to warehousing, whereupon the surface gave way and the street got in bad condition, no recovery can be had for depreciation in the value of horses and truck caused by the condition of the street.[68]

As to whether recovery can be had where plaintiff must pursue a longer and less direct route, as the result of obstructions in a street, the decisions are somewhat conflicting.[69]

6. PARTICULAR CONDITION AS CAUSE OF INJURY.

A. *In General.*

§ 2765. Introductory.

No precise statement can be made which will determine what particular condition in a street is such as to show neg-

houses less desirable for tenants, and his rents diminished in value, if other persons suffer damages from the same cause, similar in kind, though less in degree. Willard v. Cambridge, 3 Allen (Mass.), 574.

Contra. Abutter may sue where street obstructed an unreasonable time, resulting in loss in his business as a grocer. Williams v. Tripp, 11 R. I. 447, 453, where statute makes municipalities liable to persons who may "in any wise" suffer injury because of the neglect.

66. Hale v. Weston, 40 W. Va. 313, 21 S. E. 742, in which state a statute makes municipalities liable for injuries to person and property, even more extensive than the common law liability.

67. Prosser v. Ottumwa, 42 Ia. 509.

68. Megargee v. Philadelphia, 153 Pa. 340, 25 Atl. 1130, 19 L. R. A. 221.

To same effect, Farrelly v. Cincinnati, 3 Ohio Dec. 115.

69. § 1383, pp. 2956, 2957, *ante,* vol. 3.

Requiring plaintiff omnibus company, which had been granted a route through a street, to select a more circuituous route, resulting in a loss of profits, see Farrelly v. Cincinnati, 13 Ohio Dec. 318, 2 Disn. (Ohio), 516.

In Missouri, a recovery has been held authorized where a street was so obstructed as to prevent its use, and plaintiff was thereby compelled to use a circuitous route to reach his place of business. Beaudeau v. Cape Girardeau, 71 Mo. 392.

ligence of the municipality so as to render it liable for injuries resulting therefrom. It has been well said that "in general the question whether a road is or is not defective must be one of fact and not of law. It depends on a great variety of circumstances, which it is impracticable to group together into a legal proposition. A better and safe condition of roads may reasonably be expected and required *in the summer* than in spring or winter, in *populous cities* than in unfrequented districts. Much may depend upon the means at command, upon *general usage,* upon the question whether the defect is the result of a *sudden* accident or has been long neglected."[70] And it may be added that it is of some importance whether there has been any *prior accidents* resulting from the same defect.[71]

The cause of the injury may be a *defect in the plan of construction,*[72] or an unevenèss in the street,[73] or unguarded or defective openings,[74] or *excavations,*[75] or *obstructions,*[76] or a defective condition above the surface of the street,[77] or a condition outside of the street but so near as to be dangerous,[78] or the defective *condition of a sewer,*[79] or a *water pipe* along the highway,[80] or a *pool of water,*[81] or a culvert across a highway.[82]

Of course, a municipality is not responsible for particular defects unless it had actual or constructive *notice of the defects,*[83] and this applies equally well to ice and snow on the street.[84]

§ 2766. Defects in plans.

While it is generally held that there is no municipal liability for defective plans, as already noticed at some length,[85]

70. Congdon v. Norwich, 37 Conn. 414, 418.

71. See § 2627, *ante.*

72. § 2766, *post.*

73. § 2779, *post.*

74. §§ 2769, 2780, 2788, 2793, 2795-2805, *post.*

75. *Id.*

76. §§ 2767, 2781, 2787, *post.*

77. §§ 2775-2778, *post.*

78. § 2774, *post.*

79. Chicago v. Seben, 165 Ill. 371, 46 N. E. 244, 56 Am. St. Rep. 245.

§ 2695, *ante.*

80. Baker v. North East Borough, 151 Pa. 234, 24 Atl. 1079.

81. Defect may consist of surface water in street. Murphy v. Indianapolis, 83 Ind. 76.

Pool of hot water in sag hole in street—liable. Svendsen v. Alden, 101 Minn. 158, 112 N. W. 10.

Pool of water sufficiently deep to drown child—liable. Chicago v. Hesing, 83 Ill. 204, 25 Am. Rep. 378; Omaha v. Richards, 49 Neb. 244, 68 N. W. 528.

82. Neidhardt v. Minneapolis, 112 Minn. 149, 127 N. W. 484.

§ 2703, *ante.*

83. §§ 2807-2818, *post.*

84. § 2770, *post.*

85. § 2633, *ante,* where cases involving defective plans for streets, sidewalks, etc., are collected, without regard to what the plan was for, as illustrating the general rules relating to liability for defective plans.

Sewers, defects in plan, § 2693, *ante.*

yet this generally means merely that there is no liability for *errors in judgment*. The duty to exercise ordinary care to keep the streets in a safe condition includes, according to the weight of authority, the duty to use care in making the plans therefor, so that if a street is in fact unsafe the municipality may be liable even though its only negligence was in regard to the construction plans.[86]

Under this rule, in building *sidewalks* and approaches thereto, municipalities must take into consideration climatic conditions,[87] and if the walk is on an incline so that it can be anticipated that persons will slip thereon because of water, snow, or ice, the municipality may be liable although the walk would be perfectly safe in the absence of snow or freezing.[88] For instance, if an approach from a sidewalk to a crosswalk is on a considerable incline, in a country where there is much frost and snow, and such a walk will necessarily be dangerous when covered by smooth snow or ice, the municipality will be held liable to persons injured by slipping thereon,

86. § 2633, *ante*.

"But as the further and imperative duty rests on the corporation to protect its streets and sidewalks from dangerous nuisances and obstructions, and to keep them in a reasonably safe condition for use by the public, by day and by night, it would be an absurd contradiction to say that it might determine upon a plan for the improvement of its streets, which would expose the public to perils and dangers of life and limb by digging yawning ditches along and about its highways, and leave them unprotected and unguarded, and without any danger, signals, to entrap the unwary, and often the most vigilant, at night." Per Phillips, P. J., in Hinds v. Marshall, 22 Mo. App. 208, approved in Young v. Kansas City, 27 Mo. App. 101, 114.

Compare Foster v. St. Louis, 71 Mo. 157.

Where a street is rendered unsafe for travel by the direct act of the city, the corporation wil be held liable where the doctrine of implied municipal responsibility is recognized for unsafe streets, irrespective of the plan itself. Hinds v. Marshall, 22 Mo. App. 208.

"After a careful consideration of this entire question, we have come to the conclusion that where a street, as planned or ordered by the governing board of the city, is so manifestly dangerous that a court upon the facts can say, as a matter of law, that it was dangerous and unsafe, * * * the city should be held liable." Gould v. Topeka, 32 Kan. 485, 493, 4 Pac. 822, 49 Am. Rep. 496.

The Supreme Court of Michigan has held that a township can not construct an unsafe and dangerous road—one not safe and convenient for public travel—and shield itself behind its legislative power to adopt a plan and method of building and constructing in accordance therewith. The court refused to construe the statute requiring townships to keep highways in repair so as to relieve them from liability on the ground that the township had adopted a method of construction, and had built according to the plan. Malloy v. Walker Tp., 77 Mich. 448, 43 N. W. 1072, 6 L. R. A. 695.

Bridge. In Ohio, a city was held liable for damages caused by the fall of a bridge built upon a defective plan, furnished by the city engineer. Dayton v. Pease, 4 Ohio St. 80. See also Bailey v. New York, 3 Hill (N. Y.), 531, 38 Am. Dec. 669.

87. Smith v. Yankton, 23 S. D. 352, 121 N. W. 848.

88. Shumway v. Burlington, 108 Ia. 424, 79 N. W. 123; Ford v. Des Moines, 106 Ia. 94, 75 N. W. 630; Hill v. Fond du Lac, 56 Wis. 242, 14 N. W. 25.

where there are no cleats or boards nailed across the approach.[89] So the mere fact that the material of which a part of a sidewalk is constructed is so slippery as to be dangerous may render the municipality liable to one slipping thereon,[90] but only, it seems, where the plan is inherently dangerous.[91]

§ 2767. Obstructions.

Obstructions in a street, where dangerous and resulting in injury, make the municipality liable, whether the obstruction be on the driveway,[92] the sidewalk,[93] or crosswalks.[94] Obstructions are *defects* for which a recovery may be had,[95] except where the *obstruction* was *authorized by the legislature.*[96] In other words, defects in a street, to be actionable, need not be structural but may consist of obstructions put there by the municipality or by third persons.[97] However,

89. Smith v. Yankton, 23 S. D. 352, 121 N. W. 848.

90. "If a walk is constucted of material so smooth and hard that travelers shod in the ordinary way are defeated or obstructed in their attempts to pass over it, by inability to get the hold upon it with their feet, which is necessary to their walking forward, or the want of which causes them to lose their balance and fall, such walk can not be said, as matter of law, to be safe and convenient. And if a sidewalk, the chief part of which is in proper condition for travel, a small part of the surface is constructed of material different from the remainder, and so smooth and slippery that a foot traveler, stepping suddenly upon it from the portion otherwise constructed, necessarily or probably slips and is likely to fall, it can not be said, as a matter of law, that such walk is not defective." Cromarty v. Boston, 127 Mass. 329, 34 Am. Rep. 381.

Contra. Construction of sidewalks with surface as smooth as glass, by municipality, is a judicial act and no liability attaches to municipal corporaton for injuries caused by one falling thereon. Austin v. Dunkirk, 124 N. Y. S. 248, 140 App. Div. 44. This rule seems unreasonable.

91. The material of which coverings for catch basins shall be made, like the construction of street crossings, sidewalks, etc., is a matter left to the sound discretion of the municipal authorities, and when they adopt a plan for the construction of catch basins and the coverings thereof, which is not inherently dangerous, and maintain them in a reasonably safe condition for travel, they have discharged their duty to the traveling public. McCourt v. Covington, 143 Ky. 484, 136 S. W. 910.

92. § 2781, *post.*

93. § 2787, *post.*

94. § 2791, *post.*

95. Chicago City R. Co. v. Kenyon, 137 Ill. App. 126; Wallace v. New Haven, 82 Conn. 527, 74 Atl. 886.

Maine. "Defects," as used in statute, includes obstructions placed on or over the streets. Davis v. Bangor, 42 Me. 522. But a team temporarily standing in a street attached to a wagon with trees therein for sale, is not a "defect or want of repair" for which the municipality may be liable. Davis v. Bangor, 42 Me. 522.

That Michigan statute does not cover obstructions, see McArthur v. Saginaw, 58 Mich. 357, 25 N. W. 313, 55 Am. Rep. 687 (Chief Justice Morse dissenting on this ground in a separate opinion).

96. Redford v. Coggeshall, 19 R. I. 313, 36 Atl. 89; Cushing v. Boston, 122 Mass. 173.

Doorsteps not projecting more than the distance allowed by statute —not liable. Cushing v. Boston, 128 Mass. 330, 35 Am. Rep. 383.

Power of legislature to permit encroachments, § 1310, *ante*, vol. 3.

97. Griffin v. Boston, 182 Mass. 409, 65 N. E. 811.

structural defects, where constituting obstructions, are actionable.[98] Moreover, an obstruction in a street, where an actionable wrong cannot be rendered lawful by lapse of time, however great.[99]

But every obstruction, however slight, even though resulting in injury, does not make the municipality liable. The obstruction must be a dangerous one, and the danger such as ought to be anticipated. The right to recover because of obstructions depends on many things, such as their extent, the time the obstruction has existed, the presence or absence of guards and lights, etc. Some obstructions, within reason and more or less temporary, are not unlawful and do not make the municipality liable where injury results therefrom to one using the streets. This has been well stated in a recent case, as follows: "While it is the general rule that a city is under a duty to keep the streets and public ways accessible for travel and free from obstructions that might cause injury, this general rule is not without exceptions. In the safe, convenient, and orderly conduct of its affairs, every city frequently finds it necessary to obstruct, or to permit others to obstruct, its streets and public ways, and to make them unfit and dangerous for use, and to partially or completely close parts of them to public travel. Frequent and daily illustrations of this are seen when streets and other public improvements are being constructed or reconstructed, and when buildings abutting on streets are being erected or repaired. But no one would contend that the city was liable for thus temporarily closing or obstructing, or permitting others to temporarily obstruct or close, its streets, if reasonable barriers or lights were placed to give notice of the obstruction or the unsafe condition of the streets. It has also been held permissible for a city to erect barriers across the streets during fires, or when a parade is in progress, or when it is necessary to prevent the noise of passing vehicles from endangering the life of a sick person in a house adjacent to the street, or to protect grass plots."[1] And it has already

In Washington, it is held that the liability for injuries from defective streets is not limited to injuries caused by structural defects or obstructions but includes, it seems, damages arising from operations of any kind upon the street. Hewitt v. Seattle, 62 Wash. 377, 113 Pac. 1084 (pedestrian run over by automobile driven by superintendent of street department).

98. House v. Covington, 26 Ky. L. Rep. 660, 82 S. W. 374.

99. White v. New Bern, 146 N. C. 447, 59 S. E. 992, 13 L. R. A. (N. S.) 1166.

1. Lawrenceburg v. Lay, 149 Ky. 490, 149 S. W. 862, citing Anderson v. Mayor, 2 Penn. (Del.) 28, 43 Atl. 841; Paducah v. Simmons, 144 Ky. 640, 139 S. W. 851; Simon v. Atlanta, 67 Ga. 618, 44 Am. Rep. 739. In this last-mentioned case, the court said: "The right temporarily to obstruct a street springs from reasonable necessity, and is limited by it,

been stated in a preceding volume, that certain useful, and more or less necessary, articles, properly constructed and located in the street, are not unlawful, as between the person responsible for their construction and the municipality; and this includes *hitching posts and stepping stones*,[2] temporary obstructions such as *building materials* while constructing a building;[3] and temporary obstructions resulting from *loading and unloading goods* from wagons.[4] It is also true that such things, lawfully in the street, where properly constructed and guarded (if necessary) are not such obstructions as will render the municipality liable to third persons injured thereby.

It is no defense, however, to an action to recover damages for injuries resulting from obstructions, that the *obstruction was necessary*,[5] or that no cause of action exists against the person causing the obstruction.[6]

§ 2768. Same—obstructions between driveway and sidewalk.

Between the driveway and the sidewalk, are found, in many streets, various objects which are more or less obstructions but because they interfere little if any with public travel it is generally held that persons injured by colliding therewith cannot ordinarily recover from the municipality.[7] Included

and those who exercise the right must so conduct themselves as to discommode others as little as is reasonably practicable, and remove the obstruction or impediment within a reasonable time, having regard to the necessities and circumstances of the case; and when they have done this the law holds them harmless. * * * It is, however, a safe and reasonable rule to declare that so long as the alleged obstruction is temporary and reasonable in its character, and is intended for the public safety and convenience, it is no cause of complaint."

2. § 1358, *ante*, vol. 3.

3. § 1340, *ante*, vol. 3.

4. § 1339, *ante*, vol. 3.

Further as to obstruction, see §§ 924-926, *ante*, vol. 3.

5. "It is not sufficient, however, that an obstruction is necessary with reference to the business for which it was erected and maintained. It must also be reasonable with reference to the rights of the public, which should not be sacrificed or disregarded. The fact that these timbers were necessary and serving a useful purpose did not justify the defendant in maintaining them in such a condition as to render the highway defective and unsafe." Wallace v. New Haven, 82 Conn. 527, 74 Atl. 886.

6. Hall v. St. Joseph, 163 Mo. App. 214, 146 S. W. 458.

7. "Not all parts of all streets are needed for public passage, and it is customary and lawful for cities to improve certain parts of the streets for the use of vehicles, certain parts for foot passengers, and to permit other parts of some streets not required for these uses to be occupied by trees, hitching posts, hydrants, flower beds, stepping stones, poles for telephone or telegraph wires, or wires for the transmission of electricity for light or power. Such obstructions do not constitute a violation of the duty of the city toward the public if the street still remains reasonably safe for those using it in vehicles or on foot and exercising ordinary care. But the question arises in each case whether the obstruction is of such a character that the passenger using the street or the

within the class of objects are *shade trees*,[8] *grass plats*,[9] proper barriers to prevent travel on grass and flower plats,[10] hitching posts, stepping stones, hydrants, poles for

sidewalk in the ordinary way and using ordinary care for his own safety is exposed to an unnecessary and unreasonable risk. This is usually a question of fact, but it may become a question of law where the obstruction is of such a character that reasonable minds can not differ about it." Brennen v. Streator, 256 Ill. 468, 100 N. E. 266.

§ 2746, *ante*.

8. See next note.

9. **"Grass plats** are ornaments, and shade trees along the sidewalk give protection from the heat in summer. While they may be obstructions, yet, when ample width is left to answer the demands of travel, they are such obstructions as serve a useful purpose, and are not inconsistent with the object for which streets are made and maintained. Like a fence, a hydrant, a hitching post, telephone or telegraph poles, they are lawful obstructions." Teague v. Bloomington, 40 Ind. App. 68, 81 N. E. 103.

10. **Barriers around parking—Not actionable obstruction unless danegrous.** "Where a street is sufficently wide that enough will remain unobstructed to meet the needs of public travel, a municipality may maintain, or permit to be maintained, park strips between the curbing and the paved street and the pavement of the sidewalk in which strip grass, flowers, and trees may be grown for the purpose of beautifying and ornamenting the streets of the city and contributing to the pleasure and comfort of its citizens, and may, if it be deemed necessary, construct, or permit to be constructed, proper barriers around the same to prevent travel thereon, and such trees, grass and flowers growing upon such park strip and the proper barriers placed around the same to protect them are not obstructions or nuisances within the meaning of the statute requiring the city council to keep the streets of the municipality in repair, open for travel, and free from nuisances. This construction of the law would not authorize a municipality to maintain, or permit to be maintained, a fence, wire, or other barrier around such park strip in such condition as to become dangerous to life, or the safety, of any traveler who undertakes to pass over the same, and, if a pedestrian in the exercise of due care for his own safety is injured by reason of the dangerous or defective condition of the barrier, the municipality is liable in damages for such injury if it be shown that it knew, or in the exercise of ordinary care should have known, the dangerous condition thereof." Barnesville v. Ward, 85 Ohio 1, 96 N. E. 937.

"The right of a municipality to determine within reasonable limits what part of a street in a residence district shall be set apart for the roadway for travel of all kinds, what part for sidewalks for the exclusive use of pedestrians, and what part for boulevards with grass, trees, and flowers planted thereon, is now undoubted. There are adjudged cases, decided in the early history of municipalities, when the stern taste and asceticism of the times could see no other use for a public street except as a means of getting from one place to another, which are not in harmony with the rule we have stated. But in this state streets are laid out or dedicated for many purposes other than the accommodation of public travel in the ordinary way. They are intended for the purpose of furnishing light and air, and in the residence districts for boulevarding portions of them, thereby adding to the beauty of the city, and contributing to the health and happiness of its citizens. Of course, the primary purpose of a street is to accommodate public travel, but whenever any portion of a street not used for business purposes can be set apart for park or boulevard purposes without any substantial impairment of such primary purpose, the municipality may set apart such portion for boulevards and other simliar public purposes. Having such right, and the marking out and improving of the boulevard being notice to pedestrians that it is not

electric wires, etc. However, if a wire is stretched across or around the grass plat to keep persons from walking thereon, it must be of such size and so strung as not to be dangerous to passersby.[11]

§ 2769. Openings, excavations, holes and the like.

A hole in a street may be the result of wear and tear, of an excavation more or less uncompleted, of filling in a part of the street, of the natural contour of the street, or of permanent excavations leading to basements of buildings.[12] So it may be one constructed for use, with a cover, such as coal holes, trap doors, and the like. A municipality may make openings and excavations in streets,[13] and abutters also generally have certain more or less limited rights in the land underneath streets.[14] Generally, if a traveler is injured by falling in an opening or excavation or the like, it is not the existence of the hole that is the gist of the right to recover damages but instead the failure to guard properly the hole. Furthermore, a municipality is not liable where an opening or excavation is so guarded as to be safe under all ordinary circumstances, as to travelers, and hence is not liable for some unforeseen injury resulting from some fortuitous circumstance, which could not in the ordinary course of events be expected or anticipated as likely to occur.[15] The fact that the excavation was made by a third person is immaterial,[16] provided the municipality knew or should have known of the danger, and liability ordinarily cannot be evaded on the ground that the municipality licensed the excavation by a

intended for the purposes of travel, it logically follows that the municipality is *not bound to use due care to keep such portion of the street free from all obvious obstructions which are necessarily incident to its use as a boulevard*, although they may endanger the safety of travelers thereon, even conceding, without so deciding, that a pedestrian, in the absence of a law or ordinance prohibiting it, has the technical legal right to travel wherever he pleases in the street. While this is true, yet the municipality has no right to maintain, or permit others to do so, on its boulevards, and especially on those at the street corners, anything in the nature of a dangerous pitfall or trap, or snare, or like obstruction, whereby the traveler, yielding to the impulse of the average person to cut across the corner when in a hurry, may be injured." McDonald v. St. Paul, 82 Minn. 308, 84 N. W. 1022.

11. Liable for stretching small dark wire on stakes about a foot from the ground, to protect grass plat along sidewalk. Paducah v. Simmons, 144 Ky. 640, 139 S. W. 851.

But where a municipality provided for a *grass plat* for the planting of trees along the sidewalk and adjacent to the street, and an abutter stretched a *wire* to prevent pedestrians passing over the grass plat, and the place was well lit, one tripping on such wire can not recover. Teague v. Bloomington, 40 Ind. App. 68, 81 N. E. 103.

12. Compare, § 1343, *ante*, vol. 3.

13. § 1314, *ante*, vol. 3.

14. §§ 1343-1348, *ante*, vol. 3.

15. Smith v. Leavenworth, 15 Kan. 81, 86.

16. § 2750, *ante*.

third person.[17] Openings in the driveway,[18] sidewalks,[19] or crosswalks,[20] are hereafter considered more in detail, they being classified according to the place in the street where the opening was.

§ 2770. Snow and ice.

In northern states, and wherever there is snow and freezing weather, many persons are injured by slipping on the ice or snow either on the sidewalk, the driveway or a crosswalk. In determining the liability of the municipality, it is generally important to distinguish according to the place of the injury, *i. e.*, as to whether it was on the driveway,[21] the sidewalk,[22] or a crosswalk,[23] and therefore the decisions have been so classified and will be found collected in other sections of this work. At the same time, certain general principles govern all ice and snow injuries, and in some states the matter is regulated by statute, at least to some extent, without regard to the precise place of the accident. Thus, in *Massachusetts,* it is provided by statute that municipalities shall not be liable for injuries sustained upon a highway "by reason of snow or ice thereon, if the place at which the injury or damage was sustained was at the time of the accident otherwise reasonably safe and convenient for travelers."[24] It is held thereunder that it is entirely immaterial what agencies intervened to produce the condition in which the snow and ice was found at the time of the accident; and the court has gone so far, in liberally construing the statute, as to hold that no recovery can be had where a horse is frightened by two large piles of snow on the street, one built to represent an Esquimo house and the other to represent a fort.[25] So it has been held that an artificial opening for the purpose of drainage, made through the snow or ice in a street near the curb, but not extending below the surface of the soil, does not constitute a "defect" in the roadway, within the Massachusetts statute creating liability, but comes within the statute relieving municipalities from liability for injuries caused by snow or ice on the highway.[26] And it has

17. § 2751, *ante.*
18. § 2780, *post.*
19. § 2788, *post.*
20. § 2793, *post.*
21. § 2784, *post.*
22. § 2789, *post.*
23. § 2794, *post.*
24. Newton v. Worcester, 169 Mass. 516, 48 N. E. 274.
Under Massachusetts statute, municipality is not relieved from liability if the place at the time of the accident was not otherwise reasonably safe. McCabe v. Whitman, 187 Mass. 484, 73 N. E. 535; McGowan v. Boston, 170 Mass. 384, 49 N. E. 633.
25. Hitchcock v. Boston, 201 Mass. 299, 87 N. E. 470.
26. Hadden v. Somerville, 197 Mass. 480, 83 N. E. 1105.

been stated that "whenever ice or snow is the sole proximate cause of the accident, there shall be no liability, but where at the time of the accident there is any other defect to which as a proximate cause the accident is in part attributable, there may be a liability notwithstanding the fact that it may also be attributable in part to the ice or snow."[27]

So *in Rhode Island* there is a statute exempting municipalities from liability for injuries caused by snow or ice unless notice in writing of the particular obstruction shall have been given to the surveyor of highways twenty-four hours before the injury.[28]

In Wisconsin, a statute at one time provided that no action based on the negligent accumulation of ice or snow upon a street shall be maintained unless it has existed for three weeks.[29]

Time to remove snow and ice. If ice and snow is on the street in such quantities or shape as to constitute a dangerous obstruction for which the municipality would be liable, whether on the driveway, sidewalk or crosswalk, no liability exists unless a reasonable time to remove the snow or ice has elapsed since actual or constructive notice thereof.[30] In considering what is a reasonable time, the fact that the duty is imposed by the municipality upon abutters may be considered, in which case the municipality may await the action of the abutter for a reasonable period.[31] If an ordinance

27. Newton v. Worcester, 174 Mass. 181, 54 N. E. 521, followed in Bailey v. Cambridge, 174 Mass. 188, 54 N. E. 523.

28. McCloskey v. Moies, 19 R. I. 297, 33 Atl. 225; Allen v. Cook, 21 R. I. 525, 45 Atl. 148.

Rhode Island statute as to giving notice of particular obstruction applies to snow and ice produced by artificial causes as well as to those produced by natural causes. Winsor v. Tripp, 12 R. I. 454.

29. Mueller v. Milwaukee, 110 Wis. 623, 86 N. W. 162.

30. Landolt v. Norwich, 37 Conn. 615; Harrington v. Buffalo, 121 N. Y. 147, 24 N. E. 186, rev'g 2 N. Y. S. 333, 50 Hun, 601; Owen v. New York, 126 N. Y. S. 38, 141 App. Div. 217; Brennan v. New York, 114 N. Y. S. 578, 130 App. Div. 267, aff'd without opinion in 197 N. Y. 544, 91 N. E. 1110; Smith v. Chicago, 38 Fed. 388.

Reasonable time to remove. Where, in New York City, scarcely twenty-four hours had elapsed since an eight inch fall of snow, and during a rain the next day the temperature dropped below the freezing point and so continued until after the accident, a reasonable time to remove the snow and ice had not elapsed. Schneider v. New York, 128 N. Y. S. 45, 143 App. Div. 216.

Municipality is not liable where the cause of the accident was a sudden freeze the night before the accident at noon the next day. Vonkey v. St. Louis, 219 Mo. 37, 43, 117 S. W. 733.

Forty eight hours. Failure to remove snow from a sidewalk within forty-eight hours after it ceases to fall has been held not negligence O'Connor v. New York, 16 Daly (N. Y.), 58, 8 N. Y. S. 530.

The number of miles of sidewalk in the municipality has some bearing on the question of what is a reasonable time to remove snow and ice. Crawford v. New York, 74 N. Y. S. 261, 68 App. Div. 107.

31. Taylor v. Yonkers, 105 N. Y. 202, 11 N. E. 642, 59 Am. Rep. 492.

requires all snow and ice to be removed from sidewalks within four hours after falling, it has been held that a neglect of that duty is actionable, where resulting in injury to an individual.[32]

§ 2771. Moving objects.

"An illegal use of a highway by men, animals, vehicles, engines, or any other object, while movable and actually being moved by human will and direction, and neither fixed to, nor resting on, nor remaining in one position within the traveled part of the highway, is not a defect or want of repair for which the municipality is liable."[33] No recovery can be had, on the theory of defective streets or other theory, for injuries from dogs[34] or other domestic animals[35] running at

32. O'Hara v. Brooklyn, 68 N. Y. S. 210, 57 App. Div. 176.

33. Barber v. Roxbury, 11 Allen (Mass.), 318.

"The condition of the street or walk, however, is one thing, and the manner of its use by the public is quite a different thing. For its safe condition the city is responsible, but for its unlawful and improper use it is not. * * * The government does not guarantee its citizens against all casualties incident to humanity, and can not be called upon to compensate, by way of damages, its inability to protect against such accidents and misfortune." Jones v. Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294.

The reason for this distinction is pointed out in a note found in 1 Am. & Eng. Ann. Cas., p. 961, in the following language: "The obvious reason for this distinction is that the prevention of the improper use of streets by objects in motion and subject to human control involves the direct control of persons and the regulation by the municipality of the conduct of its citizens, and this requires an exercise of the public and governmental powers of the municipality in respect to which no liability can arise. It is a well-settled rule that a municipalty is not liable for tortious injuries to persons or property when engaged in the performance of governmental functions, while in the exercise of private or corporate powers it is liable." This doctrine of the exemption of a municipal corporation from liability for injuries occasioned by unlawful or improper use of its streets, and not from any defect in their condition, has been applied in various kinds of cases, such as coasting, bicycle riding, animals running at large, the use of fireworks, and fast driving. Goodwin v. Reidsville (N. C. 1912), 76 S. E. 232.

34. "The duty imposed by the ordinance upon the marshal and police officers to take up or kill vicious dogs found running at large in the streets was imposed under the governmental powers of the town, and not in its private capacity. This being so, it is not liable for the failure of its officers to enforce the ordinance. The plaintiff argues that the town is liable for injuries caused by a failure to keep its streets in a safe condition for travel. The manner in which a street is used is a different thing from its condition as a street. The construction and maintenance of a street in a reasonably safe condition for travel is a corporate duty, and for a breach of such duty an action will lie; but making and enforcing ordinances regulating the use of streets brings into exercise governmental and not corporate powers, and for any act or omission of duty in regard to the enforcement of such ordinances there is no liability in the absence of a statute imposing one." Addington v. Littleton, 50 Colo. 623, 115 Pac. 896, 34 L. R. A. (N. S.) 1012, 24 Am. & Eng. Ann. Cas. 753.

35. Rivers v. Augusta, 65 Ga. 376, 38 Am. Rep. 787; Cochrane v. Frost-

large; *runaway* horses;[36] bicycles;[37] *baseball thrown* by boys playing in the street;[38] *horse racing* on a street;[39] person falling against a pedestrian.[40] But where a municipality permitted a wire to be strung across a street for a "*slide for life*" exhibition on the Fourth of July, and while the performer was sliding down the wire he fell to the sidewalk, striking and injuring one on the sidewalk, it was held that the municipality was liable, but on the theory that the wire stretched across the street was the proximate cause of the injury, and that it was a defective condition in the street.[41]

The fact that the municipality takes no steps to *prevent the firing of a cannon* on a public street does not render it liable to one injured thereby;[42] nor does the failure to prevent a *bear show* in a street.[43] Likewise, a municipality is not liable for injuries resulting from not preventing *coasting* on a public street,[44] and this is equally true in those

burgh, 81 Md. 54, 31 Atl. 703, 27 L. R. A. 728, 48 Am. St. Rep. 479; Kelley v. Milwaukee, 18 Wis. 83.

36. Ritger v. Milwaukee, 99 Wis. 190, 74 N. W. 815.

37. Custer v. New Philadelphia, 20 Ohio Cir. Ct. Rep. 177; Bryant v. Orangeburg, 70 S. C. 137, 49 S. E. 299; Jones v. Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294.

Bicycles. Assent to, without expressly authorizing, the riding of bicycles upon sidewalks, does not render the municipality liable to pedestrians injured thereby. Howard v. Brooklyn, 51 N. Y. S. 1058, 30 App. Div. 217.

38. Municipality is not liable for injuries resulting to a traveler on a street from not preventing boys from playing baseball on the streets. Goodwin v. Reidsville (N. C. 1912), 76 S. E. 232, holding it immaterial whether claim founded upon failure to enact an ordinance prohibiting baseball on the streets, or upon the failure to enforce such an ordinance.

39. McCarthy v. Munising, 136 Mich. 622, 99 N. W. 865.

Horse race upon a street of a city is not a defect or want of repair or a dangerous condition for which the municipality is liable to one struck by one of the horses in the race. Marth v. Kingfisher, 22 Okla. 602, 98 Pac. 436, 18 L. R. A. (N. S.) 1238.

40. Brennan v. St. Louis, 92 Mo. 482, 2 S. W. 481.

41. Wheeler v. Ft. Dodge, 131 Ia. 566, 108 N. W. 1057, 9 L. R. A. (N. S.) 146.

42. Arms v. Knoxville, 32 Ill. App. 604; Robinson v. Greenville, 42 Ohio St. 625, 51 Am. Rep. 857; Norristown v. Fitzpatrick, 94 Pa. 121, 39 Am. Rep. 771; O'Rourke v. Sioux Falls, 4 S. D. 97, 54 N. W. 1044, 19 L. R. A. 789, 46 Am. St. Rep. 760.

43. Little v. Madison, 49 Wis. 605, 6 N. W. 249, 35 Am. Rep. 793.

44. *Delaware.* Wilmington v. Vandegrift, 1 Marv. (Del.) 5, 29 Atl. 1047, 25 L. R. A. 538, 65 Am. St. Rep. 256.

Indiana. Lafayette v. Rose, 88 Ind. 471; Faulkner v. Aurora, 85 Ind. 130, 44 Am. Rep. 1.

Kentucky. Dudley v. Flemingsburg, 115 Ky. 5, 24 Ky. L. Rep. 1804, 72 S. W. 327, 60 L. R. A. 575, 103 Am. St. Rep. 253.

Maryland. Altwater v. Baltimore, 31 Md. 462.

New York. Toomey v. Albany, 14 N. Y. S. 572, 60 Hun, 580.

Pennsylvania. Brumbaugh v. Bedford, 23 Pittsb. Leg. J. (N. S.) 462.

Contra, Taylor v. Cumberland, 64 Md. 68, 20 Atl. 1027, 54 Am. Rep. 759.

Coasting. Not liable although city gave express permission for use of certain street for coasting, on the theory that coasting upon a public highway is not necessarily a nuisance. Burford v. Grand Rapids, 53 Mich. 98, 18 N. W. 571, 51 Am. Rep. 105.

states where the liability for defective streets is imposed by statute.[45] So the liability does not extend to injuries from disorderly conduct of individuals in the street.[46]

§ 2772. Defects outside limits of street.

If the injury occurs outside the limits of the street, and the question of failure to guard where obstructions or excavations are close to the street is not involved,[47] and the going outside the limits of the street is not a matter of necessity which has resulted in a beaten path outside the street limits,[48] the municipality is not liable.[49] If all of the street is safe, the municipality is not liable where one goes outside an unfenced street.[50] But where there is no mark to indicate the line of the street, and a person drives into a stump outside the lines of the street, the muncipality may be liable where the public has turned in on the premises inside the stump and made a beaten path.[51]

§ 2773. Same—noises or acts outside limits of highway.

Noises outside the limits of the highway amounting to a public nuisance are not a *defect* in the street,[52] and this is so within the Massachusetts statute.[53] Where a traveler was injured by the firing of a gun inside a shooting gallery close to the street, and the gallery was licensed by the municipality, such licensing was not an "insufficiency or want of repair" of the street so as to be within the governing statute.[54] And the sending up of a rocket from a highway or across a

45. Pierce v. New Bedford, 129 Mass. 534, 37 Am. Rep. 387 (not "a defect or want of repair" in a highway); Burford v. Grand Rapids, 53 Mich. 98, 18 N. W. 571, 51 Am. St. Rep. 105; Weller v. Burlington, 60 Vt. 28, 12 Atl. 215; Schultz v. Milwaukee, 49 Wis. 254, 5 N. W. 342, 35 Am. Rep. 779 (not "insufficiency or want of repair" of street).

46. Campbell's Adm'x v. Montgomery, 53 Ala. 527, 25 Am. Rep. 656.

47. § 2774, *post*.

48. § 2739, *ante*.

49. Sparhawk v. Salem, 1 Allen (Mass.), 30, 7 Am. Dec. 700; Kelly v. Columbus, 41 Ohio St. 263.

If one intentionally leaves the street to take a path and follow it homeward, but by mistake turns off the street too soon, the city is not liable for a fall from the end of a culvert beyond the limits of the street. Scranton v. Hill, 102 Pa. 378, 48 Am. Rep. 211.

Where two roads about nine feet apart, in the outskirts of a city, were formed by common travel, the municipality is not liable for injuries caused by a wagon overturning while atempting to turn from the upper to the lower road, where the intervening strip had never been used as a highway and the road on which the wagon was traveling was safe. Nelson v. Spokane, 45 Wash. 31, 87 Pac. 1048.

50. McHugh v. St. Paul, 67 Minn. 441, 70 N. W. 5.

51. Sweet v. Poughkeepsie, 89 N. Y. S. 618, 97 App. Div. 82.

52. Radford v. Clark (Va. 1912), 73 S. E. 571.

53. Lincoln v. Boston, 148 Mass. 578, 582, 20 N. E. 329, 3 L. R. A. 257, 12 Am. St. Rep. 601.

54. Hubbell v. Viroqua, 67 Wis. 343, 30 N. W. 847, 58 Am. Rep. 866.

highway is not a "defect or want of repair in the way" within the Massachusetts statute.[55]

But in a federal case, it was held that the act of a municipality in blowing a whistle within a little over a hundred feet from a street made it unsafe for travelers so as to be a public nuisance within the Minnesota statute, and the municipality was liable for injuries sustained by a traveler by his horses becoming frightened at the whistle.[56] However, it is going to far, to say as was said in that case, that the duty to care for a street or bridge "extends to the prevention of any act outside its limits, the danger from which to travelers thereon may be reasonably anticipated by the city," since the liability of the municipality in such a case depends entirely on other considerations, where there is an isolated act done outside the limits of the street causing an injury to one in the street. In such a case, the test of liability is whether the act outside the street was a governmental one or a corporate one. If the former, there is no liability, without regard to the question of municipal liability for defective streets.

§ 2774. Openings or obstructions close to street.

In order to make a municipality liable, it is not necessary that the dangerous place be within the limits of the street. It is sufficient to make the municipality liable that the dangerous place is outside the street limits but so near thereto that it endangers travel thereon because of the want of protecting barriers and the probability of injury in case of an accidental misstep.[57] It is the duty of the municipality to

55. Kerr v. Brookline, 208 Mass. 190, 94 N. E. 257.

56. "The general duties were imposed upon the city to exercise ordinary care to keep the roadway of this bridge reasonably safe for travel, and to so use its waterworks building and the whistle thereon as to inflict no unnecessary injury upon the rights or property of persons or corporations. These duties were not limited to care to prevent injuries arising from acts and omissions *within the limits of the highway or bridge itself*. The duty to care for the bridge and driveway extends to the prevention of any act outside its limits, the danger from which to travelers thereon may be reasonably anticipated by the city." Winona v. Botzet, 169 Fed. 321, 330, 94 C. C. A. 563, 573.

57. *Connecticut.* Beardsley v. Hartford, 50 Conn. 529, 538, 47 Am. Rep. 677.

Iowa. Duffy v. Dubuque, 63 Ia. 171, 18 N. W. 900, 50 Am. Rep. 743.

Missouri. Baldwin v. Springfield, 141 Mo. 205, 42 S. W. 717; Wiggin v. St. Louis, 135 Mo. 558, 37 S. W. 528; Halpin v. Kansas City, 76 Mo. 335.

Nebraska. South Omaha v. Cunningham, 31 Neb. 316, 47 N. W. 930; Lincoln v. Beckman, 23 Neb. 677, 37 N. W. 593.

New Hampshire. See Sweeney v. Newport, 65 N. H. 86, 18 Atl. 86.

North Carolina. Bunch v. Edenton, 90 N. C. 431.

Virginia. Clark v. Richmond, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281.

Washington. Prather v. Spokane, 29 Wash. 549, 70 Pac. 55, 59 L. R. A. 346, 92 Am. St. Rep. 923.

guard and protect excavations made in the streets and sidewalks, *or in such close proximity thereto as to endanger persons traveling on the street.* This rule applies equally well to *obstructions* outside the street,[58] and also to unsafe struc-

West Virginia. Biggs v. Huntington, 32 W. Va. 55, 9 S. E. 51.

United States. Nichols v. Brunswick, Fed Cas. No. 10,238 (cellar, with no building on, which has existed for years).

But see Young v. District of Columbia, 3 MacArthur (D. C.), 137.

Compare Taylor v. Mount Vernon, 12 N. Y. S. 25, 58 Hun, 384, aff'd without opinion in 129 N. Y. 651, 29 N. E. 1032.

The duty of municipalities to maintain streets in a reasonably safe condition for travel thereon extends not only to the traveled part of the highway, but requires that such measures be taken as ordinary prudence suggests to prevent persons using ordinary care from falling into dangerous places along the sides or in close proximity to streets. Monticello v. Condo, 47 Ind. App. 490, 94 N. E. 893.

"It is abundantly established by the authorities heretofore cited that, if there are dangerous pits, excavations, precipices, walls, stones, or other obstructions situated without the limits of the located highway or traveled track, but so near to it and so situated that they would, without barriers or guards, endanger the safety of passengers using the traveled or made part of the road, in the exercise of ordinary care and diligence to avoid exposure to injury, it is the duty of the city or town to guard against such defects or obstructions by means of a railing or some other proper mode." Higert v. Greencastle, 43 Ind. 574, 600.

In Alger v. Lowell, 3 Allen (Mass.), 402, the court says: "The true test, on the contrary, is not whether the dangerous place is outside of the way, or whether some small strip of ground not included in the way must be traversed in reaching the danger, but whether there is such a risk of the traveler, using ordinary care, in passing along the street, being thrown or falling into the dangerous place, that a railing is requisite to make the way itself safe and convenient."

Duty of city where the owner of abutting property on which is a lake, see Augusta v. Dozier, 126 Ga. 524, 55 S. E. 234.

Defects adjacent to sidewalk, where dangerous to passers-by, are actionable. Rea v. Sioux City, 127 Ia. 615, 103 N. W. 949.

Where the defect is so near the traveled portion of the walk as to endanger travel thereon, the municipality is liable. Pittenger v. Hamilton, 85 Wis. 356, 55 N. W. 423.

Liable for falling of an embankment situated upon private property, where it had been undermined next to the sidewalk for some time. Nichols v. St. Paul, 44 Minn. 494, 47 N. W. 168.

Where street was graded and filled level with top of high wall erected by and on the land of an abutter, failure to erect guards or rails is negligence of the city. Aurora v. Colshire, 55 Ind. 484.

Barrier across sand pit. City held not liable for failure to erect. Talty v. Atlantic, 92 Ia. 135, 60 N. W. 519. But compare Hawley v. Atlantic, 92 Ia. 172, 60 N. W. 519.

"The want of a sufficient railing for the protection of travelers using due care is a defect and want of repair." Alger v. Lowell, 3 Allen (Mass.), 402, 405.

May erect such a railing though it may obstruct the entrance to the passage way of an abutter; and the fact that plaintiff fell into the passageway from the open space by the side of the street, and not directly from the street itself, is not decisive against the right to recover. Alger v. Lowell, 3 Allen (Mass.), 402, 405.

Crosswalks. Timbers near crossing, negligently left there, where cause of accident, city liable. Fairgrieve v. Moberly, 39 Mo. App. 31.

Liability to persons coming on street from private property or way, § 2801, *post.*

58. In Davis v. Hill, 41 N. H. 329, the court says: "It seems entirely clear, upon the authorities, that the want of a sufficient railing, barrier, and protection to prevent

tures standing by the side of the street, or in such close proximity as to be dangerous to those who are properly on the street.[59] If, "by reason of the condition of the adjoining premises, the way itself is rendered substantially unsafe, and the public authorities may reasonably protect travelers from the danger, then it is their duty to do so."[60] Here, it is well to remark, however, that there is no municipal liability for mere failure to enforce regulations, designed to safely guard the highways, as ordinances requiring depressions and excavations adjacent to the streets to be filed and fenced, unless, as above stated, such dangerous places are in such close proximity to the highway as to endanger the safety of travelers thereon.

In some cases it does not clearly appear whether the hole, opening or excavation was at the side of but within the limits of the street, or whether it was entirely outside the street limits, but this is immaterial provided the dangerous condition is not too far away from the street. The duty, if the excavation renders the street dangerous, is the same as if the excavation was in the street itself.[61] However, in order that municipal liability may exist, the hole or obstruction must be so close to the street as to make the highway dangerous;[62] and the rule has been held not applicable where the excavation was at least fifty feet from the street.[63] It follows that a municipality is not liable for the death of a child from *drowning in a pond,* on private property, not in dangerous proximity to the highway.[64] But it has been properly held that it is negligence for a city to leave a ditch filled with water five feet deep, bordering on a sidewalk in a public

travelers passing upon a highway from running into some dangerous excavation or pond, or against a wall, stones, or other dangerous obstructions without the limits of the road, but in the general direction of the traveler thereon, may properly be alleged as a defect in the highway itself."

Even if obstructions complained of are not located upon the bicycle path but are outside thereof, the municipality is liable where there is no barrier or light at a sharp turn in the path about four feet from a gutter and sidewalk. Prather v. Spokane, 29 Wash. 549, 70 Pac. 55, 59 L. R. A. 346, 92 Am. St. Rep. 923.

59. § 2777, *post.*

60. Newcastle v. Grubbs, 171 Ind. 482, 86 N. E. 757.

61. Wiggin v. St. Louis, 135 Mo. 558, 37 S. W. 528.

62. Murphy v. Brooklyn, 118 N. Y. 575, 23 N. E. 887.

Not liable where excavation so far from the street "it could have caused no injury, except where the person passing along the sidewalk turned out of his way * * * and went to it." Kelly v. Columbus, 41 Ohio St. 263, 268.

63. Murphy v. Brooklyn, 98 N. Y. 642.

64. Moran v. Pullman Pal. Co., 134 Mo. 641, 36 S. W. 659, 33 L. R. A. 755, 56 Am. St. Rep. 543, and cases cited. There is no liability although the city created the pond. Omaha v. Bowman, 52 Neb. 293, 72 N. W. 316, 40 L. R. A. 531, 66 Am. St. Rep. 506.

street without any guards; and where a child five years old left the house of its parents, and fell into the ditch and was drowned, the city was held liable.[65]

It has been held that the excavation need not necessarily be so close to the street that a person passing along the sidewalk would fall from the street into the excavation without passing over any intermediate ground;[66] but in Virginia it is held that it is necessary, to create liability, that the person injured should not, in order to reach the place of danger, be an intruder or trespasser on the premises of the private owner.[67]

There is some authority for holding that where the cause of complaint is outside the limits of the street and on private property, if the danger cannot be remedied by acts inside the street limits, the municipality is not liable;[68] but this would not apply to unsafe *structures* outside the street limits but so close as to be dangerous to travelers.[69]

§ 2775. Overhanging and falling objects.

The control of the municipality over streets extends *above* the surface of the street,[70] and the reasonable care which must be exercised by a municipality to keep its streets and its sidewalks in safe condition extends to structures overhead as well as the condition underfoot.[71] This applies to *poles*,

65. Chicago v. Hesing, 83 Ill. 204, 25 Am. Rep. 378. See Chicago v. Mayor, 18 Ill. 349; Omaha v. Richards, 49 Neb. 244, 68 N. W. 528; Niblett v. Nashville, 12 Heisk. (Tenn.) 684.

66. Oklahoma City v. Meyers, 4 Okla. 686, 46 Pac. 552.

67. Clark v. Richmond, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281.

68. Where the cause of complaint (leader pipe from a building discharging water into an areaway whence it runs onto a sidewalk and freezes) is not of itself a direct source of danger, or, being such a source of danger, is not susceptible to protective or remedial measures by the municipality which can reasonably be employed within the highway, it is not such a defect as renders the municipality liable. Udkin v. New Haven, 80 Conn. 291, 68 Atl. 253.

69. § 2777, *post*.

70. § 1341, *ante*, vol. 3.

71. **Overhead dangers.** "There is no sound reason why the duty of a municipal corporation to keep its streets 'in safe condition' should not require it to take reasonable precautions against dangers from overhead as well as underfoot. If an awning, in a condition dangerous and unsafe to passers beneath it, is permitted to overhang a public street, it cannot be said that the street is in a safe condition. The danger and unsafety may be as great, and the consequences as injurious, as in the case of a defect in the surface of the street; and the liability of cities for injuries occasioned by the fall of dangerous and insufficiently supported structures, which have negligently been permitted to overhang a street, has been accordingly maintained in many decided cases." Bohen v. Waseca, 32 Minn. 176, 19 N. W. 730, 50 Am. Rep. 564.

The falling of an *electric light sign* projecting over the sidewalk but so high above it as not to interfere with pedestrians, where not unlawful, does not make the municipality liable, where no negligence on its part is shown and the sign had never fallen before while being

whether owned by the municipality or a public service company,[72] and also to *wires*, especially where charged with electricity.[73] So, if an *awning* is dangerous to pedestrians using the sidewalk, the municipality may be held liable for negligence in failing to cause its removal;[74] but if the awning

raised or lowered. Loth v. Columbia Theater Co., 197 Mo. 328, 94 S. W. 847.

Overhanging shed, fall of. Liable. Columbus v. Anglin, 120 Ga. 785, 795, 48 S. E. 318.

Window screens left on sidewalk by abutter, fell on child. In daytime, such screens were habitually kept standing on the walk against the wall. There was nothing to show the cause of the fall. City held not liable. McLoughlin v. Philadelphia, 142 Pa. 80, 21 Atl. 754, mem. decision.

72. **Poles.** Injuries from the falling of a pole of a telegraph company, where known by the municipality to be in a defective condition, renders the municipality liable. American Dist. Tel. Co. v. Oldham (Ky. 1912), 146 S. W. 764.

Rotten pole in street, liable where it falls on traveler. Norristown v. Moyer, 67 Pa. 355.

73. See Irvine v. Greenwood, 89 S. C. 511, 72 S. E. 228.

Where uninsulated electric wires are allowed to obstruct a street so as to render it dangerous to travelers, the municipality is liable to one injured by contact with such wire, on the theory of an obstruction in a street; and the fact that the wire belonged to the municipal electric plant which was being maintained in a public municipal capacity is immaterial. Palestine v. Siler, 225 Ill. 630, 80 N. E. 345.

"The defendant (city) was conveying along a public alley of the city a deadly current of electricty for lighting and power purposes. It had permitted the telephone company to maintain its poles and wires upon the same public alley and in close proximity to the electric light wires and directly above them, and it must be held to have known, and to have anticipated, that the telephone wires might break and fall upon or near to its light wires, that employees of the telephone company would be required to examine and inspect its wires to keep them in a proper condition of repair, and that others would be upon its public streets; and it was its duty through its proper officers to exercise reasonable care, commensurate with the dangers incident to the transmitting or conveying of such current, to prevent injury to third parties rightly upon the street by the escape thereof from its control. This duty is a continuing one so long as it conveys such current along the alley; and the safety of the public permits of no intermission in its performance." Finch v. Ottawa, 190 Fed. 299, 301, 111 C. C. A. 199.

"**The fact that the wires are owned or used by the city as part of its police instruments** does not alter the rule, or exempt the city from liability under it. Mooney v. Luzerne Borough, 186 Pa. 161, 40 Atl. 311, 40 L. R. A. 811: Heron v. Pittsburg, 204 Pa. 509, 54 Atl. 311, 93 Am. St. Rep. 798." Emery v. Philadelphia, 208 Pa. 492, 57 Atl. 977.

74. Larson v. Grand Forks, 3 Dak. 307, 19 N. E. 414; Drake v. Lowell, 13 Metc. (Mass.) 292; Day v. Milford, 5 Allen (Mass.), 98; Bohen v. Waseca, 32 Minn. 176, 19 N. W. 730, 50 Am. Rep. 564; Hume v. New York, 74 N. Y. 264.

Awning. Where awning was placed so near the traveled portion of the driveway that it was knocked down by a passing truck, so as to injure a pedestrian, the municipality was liable without regard to whether it was constructed with the permission of the municipality. Mansfield v. New York, 104 N. Y. S. 386, 119 App. Div. 199.

In Illinois, however, it is held that failure of the municipality to remove a weak and dangerous awning not resting upon or attached to the street does not make the municipality liable for injuries received by the fall thereof, on the theory that the failure relates to acts which the municipality is empowered to do as a governing agency and in

is not unlawful and danger could not reasonably be apprehended from the particular awning, the municipality is not liable.[75]

In Massachusetts, a municipality has been held liable for an injury received by reason of a defective *awning,* projecting over and across a sidewalk, and supported upon posts at the curbstone,[76] but has been held not liable for an injury from the *fall of snow and ice* from the roof of a building overhanging the sidewalk,[77] nor for an injury from the *falling of a sign* suspended over the sidewalk by the abutter on an iron rod insecurely fastened to the building;[78] but the precise question as to the *falling of a sign* has been determined to the contrary *in New York.*[79]

A show case permanent in character, on the sidewalk, where no permission to maintain it has been granted, is a nuisance; and the municipality is liable to a pedestrian injured by the falling thereof, although the accident would not have happened if the brace holding the case had not been broken by a collision with a wagon the day before.[80]

§ 2776. Same—falling of tree or limb.

A municipality is liable, in case of negligence, to persons in a street injured by the falling of a tree being cut down by its employees;[81] or, according to the more prevalent rule,

discharge of duties imposed for the public welfare. Hanrahan v. Chicago, 145 Ill. App. 38.

75. Harman v. New York, 131 N. Y. S. 1032, 148 App. Div. 61.

Awnings. Where there was an awning on driveway, and it was lawful to use the portion covered for sale of peaches, and a stand was there, the municipality is not liable to a pedestrian injured by the throwing down of the awning by a passing wagon, where the awning was not dangerous. Jarrell v. Wilmington, 4 Penn. (Del.) 454. 56 Atl. 379.

Defects in awnings, where acquiesced in but not expressly authorized by the municipality, and where *not dangerous* to pedestrians, do not create a cause of action against the municipality, on the theory of nuisance, where it has power to authorize their maintenance. Harman v. New York, 131 N. Y. S. 1032, 148 App. Div. 61.

76. Drake v. Lowell, 13 Metc. (Mass.) 292; Day v. Milford, 5 Allen (Mass.), 98.

77. Hixon v. Lowell, 13 Gray (Mass.), 59, 62.

78. Jones v. Bostin, 104 Mass. 75, 6 Am. Rep. 194.

79. The duty is not limited to cases where the insecure projection is sustained by supports resting upon the surface of the street itself, but extends to the case of an unsafe sign suspended from the front of a building and so far above the street as not to constitute an obstruction to ordinary travel. Leary v. Yonkers, 88 N. Y. S. 829, 95 App. Div. 126.

80. Wells v. Brooklyn, 41 N. Y. S. 143, 9 App. Div. 61. Rule followed on appeal after case was retried. Wells v. New York, 60 N. Y. S. 802, 45 App. Div. 623.

81. Immaterial whether horse struck by falling tree, being cut down by municipal employees, was ordinarily gentle. Colorado Springs v. May, 20 Colo. App. 204, 77 Pac. 1093.

Compare, however, East St. Louis v. Giblin, 3 Ill. App. 219, where contrary was held where negligence was that of assistants of independent contractor.

by the falling of a decayed tree or limb thereof, where it had notice of the dangerous condition a sufficient length of time.[82] In some states, however, liability is denied on the theory that the duty to remove dead trees or limbs is a governmental duty,[83] but it is to be noticed that the states in which liability is denied are those where it is held that there is no common law liability for defective streets, and the only liability is that imposed by statute. However, in any case, there is no liability unless the municipality had actual or constructive notice of the condition of the tree.[84]

§ 2777. Same—structures adjacent to streets.

If a municipality has the power to declare and abate nuisances, and it has actual or constructive notice of the dangerous condition of a structure on private property but so near the street as to threaten the safety of persons traveling thereon, it is liable to persons in the street injured by the fall of such structure, the negligence being the failure to remove the structure after knowledge of its condition and the apparent danger.[85] This is the general and better rule al-

82. Henderson v. Schlamp, 14 Ky. L. Rep. (abstract) 575; Chase v. Lowell, 151 Mass. 422, 24 N. E. 212; McGarey v. New York, 85 N. Y. S. 861, 89 App. Div. 500.

See also Morris v. Salt Lake City, 35 Utah, 474, 101 Pac. 373.

But compare Gubasko v. New York, 14 Daly (N. Y.) 559, 1 N. Y. S. 215; Watkins v. County Court, 30 W. Va. 657, 5 S. E. 654.

Control of municipality over trees, § 1327, *ante*, vol. 3.

In Massachusetts, under certain statutes relating to removal of trees, a municipality is liable for injuries resulting from the falling of a limb of a shade tree in the street, where the limb was known to be decayed so as to be dangerous because of liability to fall. Wright v. Chelsea, 207 Mass. 460, 93 N. E. 840.

83. In Michigan, it was recently held that a city was not liable for injuries to a pedestrian on a sidewalk from the falling of a dead limb from a tree in the highway. The fact that there was no common law liability for defective streets was commented upon, and that the statute should be strictly construed. Miller v. Detroit, 156 Mich. 630, 121 N. W. 490, 132 Am. St. Rep. 537, 16 Am. & Eng. Ann. Cas. 832.

In Connecticut, the fall of an overhanging limb, although a nuisance because of its liability to fall, does not make the municipality liable, because the duty to remove the limb was a governmental duty; and the statute authorizing recovery for defects in streets does not apply thereto, since an overhanging limb is not a defect. Dyer v. Danbury, 85 Conn. 128, 81 Atl. 958, 39 L. R. A. (N. S.) 405, it being remembered that Connecticut is one of the states holding that there is no common law liability for injuries from defective streets.

84. Jones v. Greenboro, 124 N. C. 310, 32 S. E. 675.

Question of constructive notice held one for jury. Lundy v. Sedalia, 162 Mo. App. 218, 144 S. W. 889.

85. Grogan v. Broadway Foundry Co., 87 Mo. 321, 328.

But see Kiley v. Kansas City, 87 Mo. 103, 56 Am. Rep. 443, overruling s. c. in 69 Mo. 102, 33 Am. Rep. 491.

"But we are not prepared to hold that a city is responsible for the existence of a private structure made by a lot-owner on his own land entirely outside of the traveled portion of the sidewalk, and not connected therewith in such a way as to endanger the safety of those traveling

though in Michigan the rule seems to be the contrary,[86] and in Rhode Island it has been held that the statute does not authorize an action to recover damages for injuries resulting from a show board on adjacent land falling upon a traveler.[87]

This general rule imposing liability has been applied to the fall of a burned or *decayed brick wall*,[88] *billboards*,[89] and the like.

thereon, even though such structure happens to be within the line of the street as originally surveyed. To so hold would subject cities, villages, and towns to liability for defects in private walks leading from the public sidewalk to private buildings in every case where such defect happened to be within the line of the original survey. It frequently happens that streets and highways are not laid out upon nor opened up to the exact lines of the original survey. It is only such portions of the street or highways as have been used by the public for travel thereon which are required to be kept free from defects. Matthews v. Baraboo, 39 Wis. 677. Where the defect complained of is wholly outside of the traveled track or sidewalk used by the public for travel, and not connected therewith so as to endanger the safety of such public travel thereon, there can be no recovery, notwithstanding the same was within the lines of the original survey of the street or highway, and in a private walk leading from such traveled track or sidewalk to a private building or private place of business." Fitzgerald v. Berlin, 64 Wis. 203, 24 N. W. 879.

Falling of brick from projecting cornice—municipality liable. Grove v. Ft. Wayne, 45 Ind. 429, 15 Am. Rep. 262, limited in Anderson v. East, 117 Ind. 126, 129, 19 N. E. 726, 2 L. R. A. 712, 10 Am. St. Rep. 35, where city held not liable for injury to *property* caused by falling of wall of burned building.

Where beer kegs are negligently stacked on or near the line of a street, one injured while passing by, by the fall of one of said kegs, may recover from the municipality. Havre de Grace v. Fletcher, 112 Md. 562, 77 Atl. 114.

Must have had notice of danger. If a billboard near a street is blown down by a heavy wind and injures a pedestrian, the municipality is not liable unless the dangerous character of the billboard was known or should have been known. Fremont v. Dunlap, 69 Ohio St. 286, 69 N. E. 561.

Where the danger arises from the condition of an adjacent building or structure, the municipality is not liable where it has neither actual nor constructive knowledge of the danger. Mitchell's Adm'r v. Brady 30 Ky. L. Rep. 258, 99 S. W. 266; Henderson v. Weisenberger, 7 Ky. L. Rep. (abstract), 448, billboard.

Equity may abate such a nuisance. Pearson v. Birmingham, 155 Ala. 631, 47 So. 80, and see § 1371, *ante*, vol. 3.

86. Temby v. Ishpeming, 140 Mich. 146, 103 N. W. 588. 69 L. R. A. 618, and, on second appeal, see 146 Mich. 20, 108 N. W. 1114.

87. Taylor v. Peckham, 8 R. I. 349, 5 Am. Rep. 578.

88. Parker v. Macon, 39 Ga. 725, 99 Am. Dec. 486; Kiley v. Kansas City, 69 Mo. 102, 33 Am. Rep. 491, holding it immaterial that person injured was not in street but in a building a foot outside the sidewalk, but the decision was overruled at least as to the latter point and probably *in toto* on a second appeal in 87 Mo. 103, 56 Am. Rep. 443.

Contra, it seems, where wall was not near street and threatened only adjoining private property and the lives of the adjoining owners. Cain v. Syracuse, 95 N. Y. 83, aff'g 29 Hun (N. Y.), 105.

89. Langan v. Atchison, 35 Kan. 218, 11 Pac. 38, 57 Am. Rep. 165.

Falling of billboard does not create liability where caused by an extraordinary or unprecedented wind storm. Oak Harbor v. Kallagher, 52 Ohio St. 183, 39 N. E. 144.

§ 2778. Same—falling objects caused by negligence of others.

If objects are thrown or dropped into a street and the municipality is in no way legally responsible for the act causing them to be so thrown or dropped, it is not liable for injuries therefrom to travelers. Thus, a municipality, where not liable for negligence of its officers in setting off blasts at a quarry, is not liable because rocks are thereby thrown into a street so as to injure a traveler.[90]

b. *Driveway.*

§ 2779. In general.

For what particular defects in the driveway is a municipality liable where injury results therefrom to a person using the street, is largely a matter to be determined by the facts of the particular case, and is generally a *question for the jury.* As already stated,[91] the municipality is not liable for injuries unless it has been negligent. And a municipality is not negligent because the driveway is not in the best of condition in every part thereof, since there are bound to be some depressions and the like. What is an actionable defect in the driveway depends upon all the circumstances of the particular case, taking into consideration the physical structure and nature of the country, its climate,[92] the location of the road as to whether it is in a congested part of the municipality or is a rural way,[93] etc.

Injuries resulting from minor defects in a street are not actionable, and the defect often is so small and insignificant that it will be held as a matter of law not to constitute negligence.[94] For instance, municipalities have been held not lia-

90. "The city is no more liable to plaintiff when he was struck in the street than it would have been if he had been struck in his own yard adjoining the street. If the city is not responsible for the negligence of the person who set the rock in motion, it is hard to understand how it can be responsible because the rock happened to fall in the street. Whether the city is responsible for an injury suffered by an object falling in the street must depend whether or not the city is liable for the object being in the air above the street. To illustrate, if the operator of an *aeroplane* should lose control of it, and it should fall in the street of a city and hurt someone, the city would be no more responsible for this than for an object falling into the street from any other cause over which it had no control; and the city, not being responsible for the negligence of the person who set the rocks in motion, can not be held liable, simply because the rocks happened to fall in the street, or hit a person in the street." Braunstein v. Louisville, 146 Ky. 777, 143 S. W. 372.

91. § 2726, *ante.*

92. Van Pelt v. Clarksburg, 42 W. Va. 218, 24 S. E. 878.

93. § 2726, *ante.*

94. Not liable for electric light poles in street, near the curb, where horse hitched to pole is hurt by raising foot clear over the raised curbstone and putting it into the space between the curb and the pole

ble where the only defect was *cobblestones* in the street,[95] or *loose bricks*,[96] or slight *depressions*.[97] So falls upon *slippery asphalt* pavement are not ordinarily actionable.[98] And a *shallow gutter* across a street is not a defect.[99]

§ 2780. Openings, holes, excavations, etc.

If there are deep holes in the driveway of a street, whatever the cause, whether made by digging or otherwise, and such holes are dangerous to travelers, the municipality is liable for injuries resulting therefrom, if it has failed to properly guard the hole, provided of course the municipality has actual or constructive notice of the hole, where notice is necessary.[1] Likewise if excavations are made in a street, and

on the opposite or further side. Ryther v. Austin, 72 Minn. 24, 74 N. W. 1017.

Curbstone. Not liable where plaintiff, stepping off of crosswalk, put his foot into a V-shaped opening in the curbstone where the curbs had not come together, the opening being several feet away from the crosswalk and made to carry the water from the street. Harrigan v. Brooklyn, 67 Hun (N. Y.), 85, 22 N. Y. S. 39, aff'd without opinion in 143 N. Y. 661, 39 N. E. 21.

95. McCool v. Grand Rapids, 58 Mich. 41, 24 N. W. 631, 55 Am. Rep. 655.

Notwithstanding the removal of loose stones from highways is required by statute, it has been held that a village is not liable for an injury to a horse as the result of *stepping on a loose stone* on a dirt road leading over a steep hill which was traveled but *very little*. McKone v. Warsaw, 187 N. Y. 336, 80 N. E. 212, rev'g 84 N. Y. S. 1134 (mem.), 89 App. Div. 616.

96. Loose bricks in the pavements, where not of itself dangerous, and which can readily be discovered and avoided. Gosport v. Evans, 112 Ind. 133, 13 N. E. 256, 2 Am. St. Rep. 164.

97. Grissinger v. International R. Co., 128 N. Y. S. 63, 143 App. Div. 631.

Depression of an inch and a half held not actionable. Burroughs v. Milwaukee, 110 Wis. 478, 86 N. W. 159.

Slight depression in street, not suggesting to an ordinarily prudent man that it is dangerous, is not actionable. Decker v. New York, 132 N. Y. S. 558, 147 App. Div. 691.

Depression in asphalt surface of street, about three inches deep, saucer-shaped, and as large as a wash tub—not liable. Jones v. Detroit (Mich. 1912), 137 N. W. 513.

98. Vaccarini v. New York, 104 N. Y. S. 928, 54 Misc. Rep. 600.

§ 2784, *post*.

99. Baker v. Madison, 56 Wis. 374, 14 N. W. 289.

Gutter across suburban street, to pass water across the road, 16 to 18 inches deep and 2½ feet across—not liable. Van Pelt v. Clarksburg, 42 W. Va. 218, 24 S. E. 878.

1. *Alabama.* Birmingham v. Lewis, 92 Ala. 352, 9 So. 243.

Iowa. Case v. Waverly, 36 Ia. 545.

Kentucky. Madisonville v. Stewart (Ky.), 121 S. W. 421.

Louisiana. Allen v. Minden, 127 La. 403, 53 So. 666.

New York. Grant v. Brooklyn, 41 Barb. (N. Y.) 381.

Unguarded ends of platform. Estelle v. Lake Crystal, 27 Minn. 243, 6 N. W. 775.

It is actionable negligence, after knowledge of a dangerous *hole* in a street, to fail to guard it or to repair the street. Newport News v. Scott's Adm'x, 103 Va. 794, 50 S. E. 266.

Hole seven inches deep, in pavement. Liable. Miller v. New York, 93 N. Y. S. 227, 104 App. Div. 33.

Hole in street near sidewalk, uncovered and unguarded. City liable without regard to how long it had been there. Corinth v. Lawrence (Ky.), 127 S. W. 1009.

Deep hole between railway

a cover put over their top, the municipality is liable if the top is out of order or unfit for use, or if the top is taken off or tips when a person is walking thereon.[2] This rule applies to *manholes*.[3] So a municipality may be liable in case of *unguared ditches* across a street.[4] So liability may exist where a trench in a street has been *filled* up but in a negligent manner.[5] So while the street must not be so high in the center and *slope* at such a sharp grade to the sides as to be danger-

tracks, to remove earth from sewer being constructed. Unguarded. Liable. Block v. Worcester, 186 Mass. 526, 72 N. E. 77.

Sewer excavation eight feet deep, unguarded and without lights except at head of excavation. City liable. Crowther v. Yonkers, 60 Hun (N. Y.), 586 (mem.), 15 N. Y. S. 588 (full opinion).

Catch-basin. Covington v. Bollwinkle (Ky.), 121 S. W. 664.

Openings in sewers must be guarded. Chicago v. Seben, 62 Ill. App. 248, aff'd in 165 Ill. 371, 46 N. E. 244, 56 Am. St. Rep. 245.

An open trench in a street is not a nuisance where it is a necessary part of lawful work in the street, but reasonable care must be exercised to guard it. McDonald v. Degnon-McLean Cont. Co., 109 N. Y. S. 519, 124 App. Div. 824.

2. **Cesspool** in street with cover having a space in it big enough to receive a horse's foot. Liable. Buck v. Biddeford, 82 Me. 433. 19 Atl. 912.

3. **Manhole** open at night. Kankakee v. Linden, 38 Ill. App. 657.

Manhole at intersection of street must be so that travelers stepping on it will not be thrown into the hole. Lincoln v. Detroit, 101 Mich. 245, 59 N. W. 617.

But error to instruct that city is required to keep manhole as safe as sidewalk. Lincoln v. Detroit, 101 Mich. 245, 59 N. W. 617.

Uncovered manhole, plaintiff stepped into it. City held not liable where it is not shown who uncovered the hole or how long it had been uncovered. Thomas v. New York, 131 N. Y. S. 697, 146 App. Div. 512.

4. Americus v. Chapman, 94 Ga. 711, 20 S. E. 3; Lemont v. Rood, 18 Ill. App. 245; Galveston v. Posnainsky, 62 Tex. 118, 50 Am. Rep. 517; White v. San Antonio (Tex. Civ. App.), 25 S. W. 1131.

Ditch four feet deep, unguarded at night. City liable. Iola v. Farmer, 72 Kan. 620, 84 Pac. 386.

Ditch in street, within the limits of travel, containing water. Not shown to be safe because no accident for forty years. Bradner v. Warwick, 86 N. Y. S. 935, 91 App. Div. 408.

Liable for negligence in failing to properly cover culvert across street. O'Gorman v. Morris, 26 Minn. 267, 3 N. W. 349.

Uncovered drain across street—not liable where street not improved or graded at place of accident. Hughes v. Baltimore, Fed Cas. No. 6,844.

5. Heberling v. Warrensburg, 133 Mo. App. 544, 113 S. W. 673.

Negligent filling of trench, which settled during a heavy rainstorm. Liable. Johnson v. Worcester, 172 Mass. 122, 51 N. E. 519.

Negligence in packing earth around manhole. City liable. Wilkins v. Wilmington, 2 Marv. (Del.) 132, 42 Atl. 418.

Culverts as sidewalks. Covering of ditch running along the side of a street, used as a sidewalk, not a culvert but a sidewalk, and hence municipality not liable under old Michigan statute. Kowalka v. St. Joseph, 73 Mich. 322, 41 N. W. 416.

Compare. Where a municipality has opened a street for travel over its entire width, reasonable care must be exercised to keep the whole street safe; and it is liable where thereafter a ditch is dug across the street and a bridge is built sufficiently wide to accommodate the usual travel but leaving a space unbridged on both sides. Smith v. Hayti, 130 Mo. App. 321, 109 S. W. 817.

ous, yet a cross grade of less than six inches in ten feet has been held not dangerous.[6]

On the other hand, municipalities have been held liable where the cause of the injury was due to such defective conditions[7] as *glass* on the street;[8] raised *water box*;[9] *post* across street;[10] live *electric wire* hanging or laying on side of road;[11] *electric lights*;[12] failure to properly *fill trench* dug *for water pipes;*[13] *hole* in street;[14] piles or *ridges* of dirt;[15] *rubbish and brickbats* in streets.[16]

So a municipality is liable where a railway bridge is built over a highway and the grade of the street is raised so that travelers cannot pass under it safely.[17] Likewise, *ruts* in a street may be of such a size and character as to make the municipality liable where injury results therefrom;[18] but a municipality is not liable for failure to keep dirt roads free from *ruts* such as are ordinarily made by heavy wagons in soft ground.[19] Where a *commercial or street railroad track* crosses a street, defects in the crossing, although attributable to the railroad company, are actionable.[20] So the municipal-

6. Kaiser v. St. Louis, 185 Mo. 366, 84 S. W. 19.

7. Cover to cesspool, not fastened down, floated off in heavy rain, and plaintiff fell into it on crossing street. Verdict for plaintiff sustained. Post v. Boston, 141 Mass. 189, 4 N. E. 815.

8. El Paso v. Dolan (Tex. Civ. App.), 25 S. W. 669; Galveston v. Reagan (Tex. Civ. App.), 43 S. W. 48.

9. Wilkins v. Rutland, 61 Vt. 336, 17 Atl. 735.

10. Recovery held proper where a *post* is allowed to remain in the street, where the wheels of a carriage can not pass over it safely. Pueblo v. Smith, 3 Colo. App. 386, 33 Pac. 685.

11. Where a rural road in a city was 45 feet wide and macadamized in the center for 16 feet, with a smooth surface of sod or earth on both sides at the same level, and a traveler is killed by contact with a broken fire-alarm wire, the municipality is liable, although the wire was not lying on the macadamized portion. Emery v. Philadelphia, 208 Pa. 492, 57 Atl. 977.

12. Schmidt v. Chicago, 107 Ill. App. 64.

13. Stoddard v. Winchester, 157 Mass. 567, 32 N. E. 948.

14. Pierce v. Wilmington, 2 Marv. (Del.) 306, 43 Atl. 162; Robinson v. Wilmington, 8 Houst. (Del.) 409, 32 Atl. 347.

Liable for, in particular case where hole made by culvert being taken out and filled with loose dirt rounded up. Heberling v. Warrensburg, 204 Mo. 604, 103 S. W. 36.

15. Ridge of dirt 16 inches high and 4 to 5 feet wide, in center of well traveled street, without warnings. Streeter v. Marshalltown, 123 Ia. 449, 99 N. W. 114.

16. Rubbish in street, including brickbats, washed there by culvert in street. Hazzard v. Council Bluffs, 87 Ia. 51, 53 N. W. 1083.

17. Talbot v. Taunton, 140 Mass. 552, 5 N. E. 616.

18. Brush v. New York, 69 N. Y. S. 51, 59 App. Div. 12; Eckert v. New York, 69 N. Y. S. 124, 59 App. Div. 611 (holes in pavement close to street car tracks and along the rails).

19. Clifton v. Philadelphia, 217 Pa. 102, 66 Atl. 159, 9 L. R. A. (N. S.) 1266, where it is said: "The same degree of smoothness is not to be expected upon a dirt road as is to be looked for upon an asphalt street."

20. Cunningham v. Thief River Falls, 84 Minn. 21, 86 N. W. 763 (ditches on either side of grade).

ity is liable to one injured while driving along the street because of the unsafety of a *crosswalk*.[21]

§ 2781. Obstructions.

Unless it has used reasonable care to protect the public from the obstruction,[22] a municipality is liable if obstructions permitted to remain in a street result in injury to third persons,[23] provided the obstruction is a dangerous one, and the municipality had actual or constructive notice thereof a sufficient length of time before the injury to have remedied the unsafe condition, where notice is necessary. Furthermore, no *custom or usage* can justify the placing of obstructions in a street.[24]

However, the necessities of modern life demand the location of many obstacles in the highway,[25] and the municipality may permit minor encroachments on the streets.[26] So *temporary* encroachments on the street, as with building materials while constructing a building,[27] or with teams and vehicles while loading or unloading goods,[28] are not unlawful, and a municipality is not liable, ordinarily, in case of injury to travelers therefrom,[29] unless permitted to remain an unreasonable time.[30] So a municipality may temporarily place obstructions in a street for the purpose of making repairs. Likewise, there are certain useful and more or less necessary articles in streets such as *shade trees*,[31] *hitching posts*,[32]

§ 2750, *ante*.

Liable for loose street car rail, laid on timbers which would not support the spikes, at crossings. Natchez v. Shields, 74 Miss. 871, 21 So. 797.

Iron rails projecting four inches above the planked surface of the street—liable. Michigan City v. Boeckling, 122 Ind. 39, 23 N. E. 518.

21. Cross walk, one side raised eight inches above the roadway, planks warped and loose. Vandalia v. Ropp, 39 Ill. App. 344.

22. Jones v. Boston, 188 Mass. 53, 74 N. E. 295.

23. Louisville v. Keher, 117 Ky. 841, 79 S. W. 270; McEvoy v. Sault Ste Marie, 136 Mich. 172, 98 N. W. 1006; Knoxville v. Bell, 80 Tenn. (12 Lea), 157; Saylor v. Montesano, 11 Wash. 328, 39 Pac. 653.

Loose plank—liability held question for jury. Grand Forks v. Allman, 153 Fed. 532, 83 C. C. A. 554.

24. Wright v. Hildreth, 69 Ill. App. 588.

25. § 1314, *ante*, vol. 3.

26. § 1317, *ante*, vol. 3.

27. § 1340, *ante*, vol. 3.

28. § 1339, *ante*, vol. 3.

29. **Temporary obstructions.** Under the rule permitting temporary obstructions, a hose pipe may be placed in the street to clean out a sewer, and it may be allowed to remain there all night in use, where necessity requires, with such precautions against injury as the circumstances require. Portsmouth v. Lee (Va. 1911), 71 S. E. 630.

30. *Piling of lumber* in a street and keeping it there for an unreasonable time. Smith v. Davis, 22 App. (D. C.) 298.

31. Wellington v. Gregson, 31 Kan. 99, 1 Pac. 253.

§§ 1326-1328, *ante*, vol. 3.

See also Washburn v. Easton, 172 Mass. 525, 52 N. E. 1070.

32. Weinstein v. Terre Haute, 147 Ind. 556, 46 N. E. 1004.

§ 1358, *ante*, vol. 3.

stepping stones,[33] etc.,[34] which, although to some extent obstructions, are not such as to make the municipality liable for injuries resulting from colliding therewith, provided they are properly constructed and located. However, if they are not properly constructed or are not properly located the municipality is ordinarily liable. This exception making the municipality liable in case of improper construction or location has been applied to *poles*,[35] *hitching posts*,[36] *stepping blocks*,[37] *hydrants*,[38] *fire plugs*,[39] etc.

Among the obstructions in the driveway which, under the circumstances of the particular case, have been held such as to make the municipality liable for injuries resulting therefrom, are the following:[40] *rubbish*;[41] *fallen wire*;[42] *pile of lumber*;[43] *abandoned street railway side track*;[44] *bowlder*;[45] *old curbing* left in street;[46] mortar boxes;[47] unguarded

33. Dubois v. Kingston, 102 N. Y. 219, 6 N. E. 273, 55 Am. Rep. 804; Robert v. Powell, 52 N. Y. S. 918, 24 Misc. Rep. 241.

§ 1358, *ante*, vol. 3.

Carriage block of ordinary size and placed in the usual position near the curb. Wolf v. District of Columbia, 21 App. (D. C.) 464, 69 L. R. A. 83; Cincinnati v. Fleischer, 63 Ohio St. 229, 58 N. E. 568.

34. **Telegraph pole** in street is not an unlawful obstruction. Gaudin v. Carthage, 12 N. Y. S. 796.

Lamp post near curb not unlawful obstruction. Van Wie v. Mt. Vernon, 49 N. Y. S. 779, 26 App. Div. 330.

35. **Electric railway poles** in a street, although placed there pursuant to the consent of the legislature and the municipality, may be such an obstruction as to make the municipality liable for injuries received therefrom, as where they are in the middle of the street and not visible on a dark night. McKim v. Philadelphia, 217 Pa. 243, 66 Atl. 340.

Telephone pole placed in such a position as to be a public nuisance. Norwalk v. Jacobs, 27 Ohio Cir. Ct. Rep. 691.

36. **Hitching post**—liable where so near to the carriageway as to make traveling unsafe. Arey v. Newton, 148 Mass. 598, 20 N. E. 327, 12 Am. St. Rep. 604.

37. Stone block about three feet square and eight or ten inches thick lying on the banquette, which had formerly occupied a position extending from the curbstone across the gutters and served as a stepping stone, is an actionable obstruction, where after the paving of the street the stone was moved out into the street and its use as a stepping stone ceased. McCormack v. Robin, 126 La. 594, 52 So. 779.

38. St. Germain v. Fall River, 177 Mass. 550, 59 N. E. 447.

39. **Fire plug** close to traveled path and concealed by vegetation. Thunborg v. Pueblo, 18 Colo. App. 80, 70 Pac. 148.

40. **Table on sidewalk**, liable for permitting without objection for some time. Palestine v. Hassell, 15 Tex. Civ. App. 519, 40 S. W. 147.

Peanut roaster, supported by wheels and operated by steam, in street for many weeks, is an unlawful obstruction, and municipality is liable where it explodes and injures passer-by. Frank v. Warsaw, 198 N. Y. 463, 92 N. E. 17.

41. King v. Cleveland, 28 Fed. 835.

42. West Kentucky Tel. Co. v. Pharis, 25 Ky. L. Rep. 1838, 78 S. W. 917.

43. Senhenn v. Evansville, 140 Ind. 675, 40 N. E. 69.

44. Cutcher v. Detroit, 139 Mich. 186, 102 N. W. 629.

45. May v. Anaconda, 26 Mont. 140, 66 Pac. 759.

46. Collett v. New York, 64 N. Y. S. 693, 51 App. Div. 394.

Pile of curbstones in street, left there by contractor after resetting curb. City liable. Meyers v. Phila-

building materials in a street, although ordinance authorized such obstructions and though builder was himself personally liable for such injuries;[48] *limb of tree* projecting into street dangerously low;[49] *polling booth* in street;[50] *paving material*;[51] *stretched wire* at street corner;[52] *electric light* close to ground;[53] *beam* used as runway;[54] pile of sand or dirt;[55] *wagon standing* in street night and day.[56]

delphia, 217 Pa. 159, 66 Atl. 251, 10 L. R. A. (N. S.) 678.

"The city seeks to relieve itself of liability, on the ground that a municipal corporation is not responsible for an injury caused by the negligence of an independent contractor. But this principle has no application to the case. Property owners, engaged in work on a city or borough street in front of their properties, in obedience to the requirements of an ordinance, are not contractors exercising an independent employment, over whom the municipal authorities have no control. Trego v. Honeybrook Borough, 160 Pa. 76, 28 Atl. 639. A municipality may not be responsible for the negligence of an owner of property engaged in work on a street, done on notice from it, where the negligence is in the manner of doing the work on the part of the street necessarily occupied for that purpose, but its duty to exercise reasonable supervision of streets thrown open for travel always continues. The placing of the rejected curbstones in the street was not a part of the work of resetting the curb, but the unauthorized use of the street as a place of storage for material that should have been placed elsewhere or at once removed. It was allowed to remain there, a menace to travel, during the progress of the work and after its completion, and the question of constructive notice to the city was for the jury." Meyers v. Philadelphia, 217 Pa. 159, 66 Atl. 251, 10 L. R. A. (N. S.) 678.

47. Munley v. Sugar Notch, 215 Pa. 228, 64 Atl. 377.

48. La Porte v. Henry, 41 Ind. App. 197, 83 N. E. 655.

49. Louisville v. Michels, 114 Ky. 551, 71 S. W. 511; Embler v. Wallkill, 132 N. Y. 222, 30 N. E. 404.

50. Haberlil v. Boston, 190 Mass. 358, 76 N. E. 907, 4 L. R. A. (N. S.) 571.

51. **Paving material** in street, to be used in improvement of another street, is an actionable obstruction, though it would be otherwise if to be used in the improvement of the street on which it was located. Louisville v. Tompkins (Ky.), 122 S. W. 174.

52. Wire stretched along boulevard at street corner—liable to pedestrian injured while atempting to cross the street diagonally. McDonald v. St. Paul, 82 Minn. 308, 84 N. W. 1022, 83 Am. St. Rep. 428.

53. **Electric light** in street, let down to within a few feet of the ground, left there after cleaning it —city liable. Mickey v. Indianola (Ia.), 114 N. W. 1072.

54. **Beam used as runway** across street, to convey meat, being lowered for use, driver of wagon collided with it. Verdict for plaintiff sustained. Wynn v. Yonkers, 80 N. Y. S. 257, 80 App. Div. 277.

55. Joslyn v. Detroit, 74 Mich. 458, 42 N. W. 50; Chicago v. Brophy, 79 Ill. 277; Stafford v. Oskaloosa, 64 Ia. 251, 20 N. W. 174; Tiers v. New York, 74 Hun (N. Y.) 452, 26 N. Y. S. 688.

Pile of ashes in driveway, five or six inches high held not actionable. Kelchner v. Nanticoke Borough, 209 Pa. 412, 58 Atl. 851.

56. Cohen v. New York, 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506.

Leaving vehicles in street. It is well settled that a street may be rendered unsafe for public use, so as to charge a municipality with the consequences, by the long continued use thereof for such a purpose as the *leaving of vehicles* therein. Radichell v. Kendall, 121 Wis. 560, 99 N. W. 348.

And in such a case it is immaterial that the particular vehicle which obstructed the street had not been left there on previous occasions, or that the street had not been custo-

On the other hand, it has been held, in particular cases, that a recovery cannot be had where the injury resulted from obstructions[57] such as *doorsteps*;[58] *fence* across a street;[59] *rope* across street;[60] *public pump* in street;[61] slight *mound of dirt; sleigh standing in street* a few minutes to unload goods;[63] use of streets or alleys by railway company, pursuant to a franchise;[64] *crosswalk*;[65] *fire engine* standing in street;[66] two by four scantling in driveway;[67] *embankment of earth* in constructing a street railway track, where room was left for safe travel;[68] *goats*.[69] So a municipality has been held not liable to a passenger on a street car injured by coming in contact with a trolley pole, where the municipality did not fix or direct the precise location of the tracks or the poles, or determine the width of the cars.[70]

§ 2782. Embankments.

If the driveway is elevated and there are steep banks on one or both sides, the municipality must, if necessary to pro-

marily obstructed by vehicles at the precise place where the accident occurred. Radichell v. Kendall, 121 Wis. 560, 99 N. W. 348.

But it is not negligence for a small village to permit two wagons to stand in front of a wagon shop for two or three days in violation of a village by-law. Studeor v. Gouverneur, 44 N. Y. S. 122, 15 App. Div. 229.

57. **Stone in driveway** near sidewalk, put there to protect sidewalk, is not an actionable obstruction where there is ample space in the street for passing teams. Bureau Junction v. Long, 56 Ill. App. 458.

Steam roller in a street under course of repair is not an unlawful obstruction, and if a horse becomes frightened thereat, no recovery can be had. District of Columbia v. Moulton, 182 U. S. 576, 21 Sup. Ct. 840, 45 L. Ed. 1237.

Barrier as a guard, necessary to protect public, see Powers v. Boston, 154 Mass. 60, 27 N. E. 995.

58. Cushing v. Boston, 124 Mass. 434.

59. Aurora v. Pulfer, 56 Ill. 270.

60. Simon v. Atlanta, 67 Ga. 618, 44 Am. Rep. 739 (to allow parade); Barber v. Roxbury, 11 Allen (Mass.), 318.

Roping off alley to prevent disorderly crowds therein. Runaway horse broke rope and it struck a pedestrian. City not liable. Lawrenceburg v. Lay (Ky. 1912), 149 S. W. 862.

61. Lostutter v. Aurora, 126 Ind. 436, 26 N. E. 184, 12 L. R. A. 259.

§ 1345, *ante*, vol. 3.

62. Stafford v. Oskaloosa, 57 Ia. 748, 11 N. W. 668.

63. Sikes v. Manchester, 59 Ia. 65, 12 N. W. 755.

§ 1339, *ante*, vol. 3.

64. Heath v. Des Moines & St. L. R. Co., 61 Ia. 11, 15 N. W. 573.

65. Loberg v. Amherst, 87 Wis. 634, 58 N. W. 1048, 41 Am. St. Rep. 69.

66. **Fire engine in street.** Where street was plenty wide for travel notwithstanding unused fire engine in street, and horse became frightened by something for which the municipality was not responsible, and collided with the engine in daylight, the municipality was not liable. Harrodsburg v. Abram, 138 Ky. 157, 127 S. W. 758.

67. Brown v. Chicago, 135 Ill. App. 126.

68. Lockport v. Licht, 221 Ill. 35, 77 N. E. 581.

69. Pearce v. Lancaster, 1 Ky. L. Rep. (abstract) 412.

70. Kennedy v. Lansing, 99 Mich. 518, 58 N. W. 470.

tect travelers, erect guards or railings to prevent persons falling over the embankment.[71]

§ 2783. Objects frightening horses.

Except in Massachusetts,[72] Michigan,[73] and South Carolina,[74] where the liability for defective streets is statutory, and the rule of non-liability is asserted in case of objects frightening horses, it is well settled that municipalities are liable for injuries resulting from the existence of objects in the street calculated to, and which in fact do, frighten horses and cause injury,[75] although neither the horse nor the vehicle come in actual contact with the object of fright,[76] and without regard to whether the fright is caused by the appearance of the object or the sound made by it,[77] and generally without regard to whether the object is in the traveled part of the way.[78] However, the object must be of such a character as to be calculated to frighten *horses of ordinary gentleness*,[79] and furthermore no recovery can be had where the object is properly in the street, as where placed in the street or continued there by a third person in connection with a proper temporary use of the street. Thus, if the objects

71. § 2800, *post*.

72. Cook v. Charlestown, 13 Allen (Mass.), 190, note, 98 Mass. 80.

See also Bowes v. Boston, 155 Mass. 344, 29 N. E. 633, 15 L. R. A. 365; Howard v. Worcester, 153 Mass. 426, 27 N. E. 11, 12 L. R. A. 160, 25 Am. St. Rep. 651; Cole v. Newburyport, 129 Mass. 594, 37 Am. Rep. 394; Keith v. Easton, 2 Allen (Mass.), 552.

Compare Butman v. Newton, 179 Mass. 1, 60 N. E. 401, 88 Am. St. Rep. 349, where negligence was in connection with construction of street in dumping stone.

No liability where fright is from sound and not sight. Bowes v. Boston, 155 Mass. 344, 29 N. E. 633, 15 L. R. A. 365.

73. Agnew v. Corunna, 55 Mich. 428, 21 N. W. 873, 54 Am. Rep. 383.

See also Brink v. Grand Rapids, 144 Mich. 472, 108 N. W. 430.

74. Dunn v. Barnwell, 43 S. C. 398, 21 S. E. 315, 49 Am. St. Rep. 843.

75. *Illinois*. Chicago v. Hoy, 75 Ill. 530, dead animal.

Indiana. Rushville v. Adams, 107 Ind. 475, 8 N. E. 292, 57 Am. Rep. 124.

Iowa. Frazee v. Cedar Rapids, 151 Ia. 251, 131 N. W. 33.

New York. Barr v. Bainbridge, 59 N. Y. S. 132, 42 App. Div. 628 (rubbish); Champlain v. Penn Yan, 34 Hun (N. Y.), 33, aff'd in 102 N. Y. 680, advertising banner.

Texas. Weatherford v. Lowery (Tex. Civ. App.), 47 S. W. 34, scraper with bright side exposed.

Washington. See Taylor v. Ballard, 24 Wash. 191, 64 Pac. 143.

Wisconsin. Little v. Madison, 42 Wis. 643, 24 Am. Rep. 345, wild animals exhibited pursuant to license.

But see Kent v. Cheyenne, 2 Wyo. 6.

76. District of Columbia v. Moulton, 15 App. (D. C.) 363; Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676.

77. Falmouth v. Woods, 16 Ky. L. Rep. (abstract), 317, where fright was caused by noise from canvas sign.

78. District of Columbia v. Moulton, 15 App. (D. C.) 363.

79. Frazee v. Cedar Rapids (Ia.), 131 N. W. 33; Elam v. Mt. Sterling, 132 Ky. 657, 117 S. W. 250, 20 L. R. A. (N. S.) 512.

causing the fright are mortar boxes and building material, put in the street by an abutter while constructing a building, without objection from the municipality, and the obstruction is merely temporary and is reasonable, the municipality is not liable although the objects were likely to frighten a horse of ordinary gentleness.[80] So if the object is one necessarily used by the municipality while improving the street, and it is not negligently used, no recovery can ordinarily be had where a horse becomes frightened thereat;[81] and the same rule applies to ordinary objects placed on the side of a street while improving it.[82] *Steam rollers* may be temporarily left in a street while the work of improving the street is progressing,[83] but the municipality is liable where they are merely stored there until wanted elsewhere.[84] Where a municipality is excavating its streets to lay pipes, it is not required in the day time to place barriers to prevent the use of the street, where sufficient room is left for the passage of vehicles; and one who drives past the excavations in daylight assumes the risk of fright to his horse.[85] Of course, no liability exists, where a statute limits the right to recover to a case of "obstructions," where the cause of fright is boys sliding on sleds on the street.[86]

80. Loberg v. Amherst, 87 Wis. 634, 58 N. W. 1048, 41 Am. St. Rep. 69.

81. **Steam instruments,** while being used in constructing or repairing street, where not negligently managed, are not such objects that a recovery may be had where a horse becomes frightened thereat. McMulkin v. Chicago, 92 Ill. App. 331; Sparr v. St. Louis, 4 Mo. App. 573.

82. As a matter of law, a municipality is "not liable in damages because of injuries sustained by the fright of an ordinarily gentle horse at objects, not of an unusual character, placed upon the side of a street, and of the traveled way, for the purpose of constructing, improving or repairing the same, although they may be permitted to remain a longer time than is necessary before being used." Elam v. Mt. Sterling, 132 Ky. 657, 117 S. W. 250, 20 L. R. A. (N. S.) 512.

In Texas, however, it is held that, while the duty to maintain and repair streets involves the incidental right to place in the street proper material for the accomplishment of such purposes, yet "when such material is naturally calculated to frighten horses of ordinary gentleness, * * * it becomes the duty of the municipality either to so place the material as that it can not be seen by such animals, or to temporarily close the street." Patterson v. Austin, 15 Tex. Civ. App. 201, 39 S. W. 976.

83. Lane v. Lewiston, 91 Me. 292, 39 Atl. 999.

84. Elgin v. Thompson, 98 Ill. App. 358.

That steam roller being used in improving a street should be removed from the street when the work is completed for the day, see Holstead v. Warsaw, 59 N. Y. S. 518, 43 App. Div. 39.

If sole negligence alleged is the careless operation of the steam roller, and those operating it were not the servants of the city, it is not liable to one injured by his horse becoming frightened. Hall v. Concord, 71 N. H. 367, 52 Atl. 864, 58 L. R. A. 455.

85. O'Rourke v. Monroe, 98 Mich. 520, 57 N. W. 738.

86. Ray v. Manchester, 46 N. H. 59, 88 Am. Dec. 192.

§ 2784. Snow and ice.

In those sections where a greater or less amount of snow falls in the winter season, there is generally, from the first snow fall until a general thaw in the spring, more or less snow and ice on all the streets in every municipality, except in a few cities such as New York City where the snow is carted away as soon as possible after a storm. *So far as the driveway is concerned,* in those municipalities where sleighs are used, it is necessary to allow the snow to remain on the street to accomodate persons using sleighs, and of course if the snow is allowed to remain it necessarily follows that the changes in the weather will result in slush and ice, producing a slippery condition. And it is not true that *whatever a municipality must do relative to snow and ice on a sidewalk* it must also be required to do with reference to snow and ice in the driveway.[87] So it is hardly necessary to state that it is not the duty of municipalities to keep the driveway of its streets, from curb to curb, free from snow and ice;[88] and if persons or animals *slip* thereon the municipality is ordinarily not liable, where the snow or ice results from natural causes.[89] At the same time, a municiality may be liable for its negligence in allowing a dangerous accumulation of ice and snow in the roadway of its streets, in consequence of which one driving thereon is injured,[90] or even where a pedestrian walking on the driveway is injured at a

87. Cloughessey v. Waterbury, 51 Conn. 405, 416, 50 Am. Rep. 38; Lichenstein v. New York, 159 N. Y. 500, 504, 54 N. E. 67.

Statutes governing, and general rules, § 2770, *ante.*

88. Not liable where vehicle collides with stone covered with snow, in space between sidewalk and driveway, put there at the edge of a private driveway to protect the grass plot and a tree thereon from being driven upon. Dougherty v. Househeads, 159 N. Y. 154, 53 N. E. 799, rev'g 39 N. Y. S. 447, 5 App. Div. 625.

Obstruction in street caused by snow thrown from the sidewalk and also from the street car tracks—city not liable. Hutchinson v. Ypsilanti, 103 Mich. 12, 61 N. W. 279.

Not liable where snow and ice accumulated from snow thrown from sidewalk and from railroad tracks, where it had become a solid mass of ice and practically no opportunity to remove it. Peard v. Mt. Vernon, 31 N. Y. S. 395, 83 Hun, 250, aff'd without opinion in 158 N. Y. 681, 52 N. E. 1125.

Failure to remove a four foot fall of snow from streets for seven days, it being piled up by street car company in clearing its tracks, is not negligence *per se.* McDonald v. Toledo, 63 Fed. 60.

89. Kannenberg v. Alpena, 96 Mich. 53, 55 N. W. 614; Mueller v. Milwaukee, 110 Wis. 623, 86 N. W. 162.

Not liable for "general slippery condition of the street which occurs in all cities in winter time." Hendrickson v. Chester City, 221 Pa. 120, 70 Atl. 552.

90. Haight v. Elmira, 59 N. Y. S. 193, 42 App. Div. 391.

Rut where rail of horse-railroad ran, and shoulders of ice on each side, left when the street was ploughed out after a storm, catching runner of sleigh and turning it over. Verdict for plaintiff sustained. Ellis v. Lewiston, 89 Me. 60, 35 Atl. 1016.

place other than a crosswalk,[91] although undoubtedly one using the roadway which is covered more or less with snow and ice, to walk on, would be chargeable with greater care than one using it as a driveway or one using a sidewalk or crosswalk to walk on.

The distinction between *smooth and rough* ice, in case of injuries on sidewalks,[92] is undoubtedly applicable, at least to the extent that if the snow or ice amounts to a *dangerous obstruction* and it is not remedied within a reasonable time after actual or constructive notice thereof, the municipality is liable.[93] Furthermore, *the municipality is liable,* where the injury is the result in part of *other negligence* of its officers for which it is liable.[94] Thus, if the ice is caused by the freezing of water emptied into the street, through a pipe or by buckets, by an abutter, for a long period of time and with the knowledge if not the express permission of the municipality, it is liable without regard to whether the ice was rough or smooth.[95] So if ice forms on the driveway from water which the municipality negligently allowed to *flow from a broken hydrant,* the municipality is liable to one injured thereby, although the ice has not so accumulated in hills and ridges as to form an obvious physical obstruction to travel.[96] So a *highway may be defective by being so improperly constructed* as to induce a special or constant deposit of ice in a particular locality.[97]

c. *Sidewalk.*

§ 2785. Particular defects in general.

The municipality need not keep sidewalks absolutely safe, and is not responsible for every accident thereon. The municipality must have been negligent in order to be liable for injuries thereon. What is a defect or obstruction in or on a sidewalk which will constitute negligence on the part of the municipality is governed by no fixed rule, but is to be deter-

91. Magaha v. Hagerstown, 95 Me. 62, 51 Atl. 832, 93 Am. St. Rep. 317.

92. § 2789, *post.*

93. Distinction between smooth and rough ice, as repudiated in Maryland, see Magaha v. Hagerstown, 95 Md. 62, 73, 51 Atl. 832, 93 Am. St. Rep. 317.

94. Liable where layers of ice in street were caused by act of municipal contractors in using an engine on the street to find rock bottom, where it discharged large quantities of water on the street which froze from day to day until the street became a mass of ice from curb to curb. Loretz v. New York, 132 N. Y. S. 988.

95. Magaha v. Hagerstown, 95 Md. 62, 74, 51 Atl. 832, 93 Am. St. Rep. 317.

96. Decker v. Scranton, 151 Pa. 241, 25 Atl. 36, 31 Am. St. Rep. 757.

97. Stanton v. Springfield, 12 Allen (Mass.), 566.

mined by the facts of the particular case and surrounding circumstances, such as those noted above in connection with the discussion of particular defects in general.[98]

To keep all the sidewalks in perfect condition at all times is practically a municipal impossibility. For instance, slight inequalities are nearly always found, at one place or another, especially where there is much travel. *Minor defects or obstructions* are generally not actionable.[99] This includes *slight depressions* in sidewalks,[1] slight *differences in the level* of a sidewalk,[2] *sagging planks*;[3] *brick* slightly loosened;[4] *mere slipperiness* of walk;[5] *bricks* projecting above other bricks;[6] *flagstones* projecting above other stones;[7]

98. § 2765, *ante*.

99. Parrish v. Huntington, 57 W. Va. 286, 50 S. E. 416.

Apron over cement sidewalk to prevent pedestrians from slipping, less than two inches in thickness, but not angled down at the end—not liable. Kleiner v. Madison, 104 Wis. 339, 80 N. W. 453.

Ordinary curbstone is no defect; and it follows that if cobblestones are made a part of and in the edge of a concrete sidewalk, and such stones are about six inches high above the soil of an intersecting street which has no sidewalk, and the upper surfaces of the stones are even and necessitate a step only six inches high, they are no more dangerous than the ordinary curbstone. Burke v. Haverhill, 187 Mass. 65, 72 N. E. 256.

Cellar door not necessarily a nuisance. Fehlhauer v. St. Louis, 178 Mo. 635, 77 S. W. 843.

1. *Illinois*. Chicago v. Norton, 116 Ill. App. 570.

Kentucky. Lexington v. Cooper, 148 Ky. 17, 145 S. W. 1127.

Maine. Haggerty v. Lewiston, 95 Me. 374, 50 Atl. 55.

Massachusetts. Isaacson v. Boston, 195 Mass. 114, 80 N. E. 809; Newton v. Worcester, 174 Mass. 181, 54 N. E. 521.

Michigan. Jackson v. Lansing, 121 Mich. 279, 80 N. W. 8.

New York. Terry v. Perry, 199 N. Y. 79, 92 N. E. 91; Hamilton v. Buffalo, 173 N. Y. 72, 65 N. E. 944 rev'g 66 N. Y. S. 990, 55 App. Div. 423; Beltz v. Yonkers, 148 N. Y. 67, 42 N. E. 401; Duffy v. New York, 133 N. Y. S. 974, 144 App. Div. 478 (depression of three or four inches); McCoy v. Utica, 128 N. Y. S. 60, 143 App. Div. 634; Fitzgerald v. Degnon Cont. Co., 110 N. Y. S. 857, 126 App. Div. 363; Powers v. New York, 106 N. Y. S. 166, 121 App. Div. 433; Henry v. New York, 104 N. Y. S. 440, 119 App. Div. 432; Schall v. New York, 84 N. Y. S. 737, 88 App. Div. 64; Getzoff v. New York, 64 N. Y. S. 636, 51 App. Div. 450; Morrison v. Syracuse, 65 N. Y. S. 939, 53 App. Div. 490, aff'd in 175 N. Y. 523, 67 N. E. 1085.

Wisconsin. Koepke v. Milwaukee, 112 Wis. 475, 88 N. W. 238.

Depression 1⅞ inches deep in center of walk not actionable. Bennett v. St. Joseph, 146 Mich. 382, 109 N. W. 604.

Smooth worn place, about two inches deep, in stone sidewalk—not liable. Louisville v. Uebelhor, 142 Ky. 151, 134 S. W. 152.

2. Gastel v. New York, 194 N. Y. 15, 86 N. E. 833.

Two inches inequality in sidewalk not actionable. Baker v. Detroit, 166 Mich. 597, 132 N. W. 462.

3. Rock Island v. Littig, 118 Ill. App. 643.

4. Morris v. Philadelphia, 195 Pa. 372, 45 Atl. 1068.

5. Smith v. Yankton, 23 S. D. 352, 121 N. W. 848.

Sewer catch basins, with smooth iron on top, more slippery than wood or corrugated iron, and located in sidewalk. McCourt v. Covington, 143 Ky. 484, 136 S. W. 910.

6. Brick sidewalk, pedestrian stubbed toe on brick projecting upwards three quarters of an inch. Covington v. Belser, 137 Ky. 125, 123 S. W. 249.

7. Flagstone projecting 2½ inches

stones projecting above surface of crushed stone walk;[8] slight *projections above the surface* of the walk, of boxes or the like inserted in the sidewalk;[9] *grating* projecting above walk;[10] added thickness of *plank nailed to walk* but not at all places;[11] *root across path*,[12] protruding *spike*.[13]

On the other hand, the following defects or obstructions have been held actionable, in particular cases:[14] *holes* in sidewalk;[15] hole caused by *absence of glass disk*;[16] huge hole in grating;[17] *loose bricks*;[18] three feet *abrupt drop* from

above other stones, at one place. Davidson v. New York, 117 N. Y. S. 185, 133 App. Div. 352.

8. Rounded stone 2½ inches in diameter protruding ¾ of an inch above general surface of crushed stone sidewalk—not actionable. Huntington v. Bartrom, 49 Ind. App. —, 95 N. E. 544.

9. Movable grating of a culvert projecting one to two inches above the level of the edge of the sidewalk—not liable. Raymond v. Lowell, 6 Cush. (60 Mass.), 524, 53 Am. Dec. 57.

Water box in brick sidewalk, cap projecting ¾ of an inch above the surface of the walk. Powers v. Mechanicville, 125 N. Y. S. 801, 140 App. Div. 835.

10. **Grating** projecting about two inches above sidewalk. Northrup v. Pontiac, 159 Mich. 250, 123 N. W. 1107.

11. Nailing two inch planks to the upper side of a walk and permitting the other portion of the walk to remain unchanged — pedestrian tripped—defect too slight to be actionable. Kawiecka v. Superior, 136 Wis. 613, 118 N. W. 192.

12. **Root across path**, in outlying district. City not liable. Quinn v. New York, 129 N. Y. S. 1028, 145 App. Div. 195.

Bricks raised by roots of tree—not liable. Covington v. Manwaring, 113 Ky. 592, 68 S. W. 625.

But root of tree, where loose and rotten, may be a defect. Nestor v. Fall River, 183 Mass. 265, 67 N. E. 248.

13. Doulon v. Clinton, 33 Ia. 397.

14. **Must drain off** accumulated surface water, if it can reasonably be done. Denver v. Cochran, 17 Colo. App. 72, 67 Pac. 23.

Elevated platform held a part of the sidewalk for the condition of which the municipality was liable. Leggett v. Watertown, 66 N. Y. S. 910, 55 App. Div. 321.

Iron rod protruding from sidewalk, instruction as to. Denver v. Stein, 25 Colo. 125, 53 Pac. 283.

Where a surface of rock, naturally fitted for a sidewalk, has been used by the public for years as such, the municipality is liable for injuries resulting from small irregularities on the surface whch made the walk unsafe. Higgins v. Glen Falls, 57 Hun (N. Y.), 594, 11 N. Y. S. 289.

Duty to repair exists although put out of repair by teams or wagons. Munger v. Marshalltown, 59 Ia. 763, 13 N. W. 642.

Sidewalk inequalities of six inches or more in the height of various portions of a sidewalk on a principal business street held not safe as a matter of law. Hartford v. Graves, 8 Kan. App. 677, 57 Pac. 133, following Osage City v. Brown, 27 Kan. 74.

15. Seward v. Wilmington, 2 Marv. (Del.) 189, 42 Atl. 451; Platts v. Ottumwa, 148 Ia. 636, 127 N. W. 990; Lawrence v. Davis, 8 Kan. App. 225, 55 Pac. 492.

Hole in flagging in sidewalk — liable. Marvin v. New Bedford, 158 Mass. 464, 33 N. E. 605.

Holes in sidewalk, ordinary care must be exercised to keep walk free from. San Antonio v. Wildenstein, 49 Tex. Civ. App. 514, 109 S. W. 231.

Missing boards: liable. Lincoln v. Staley, 32 Neb. 63, 48 N. W. 887.

16. Circular opening 2⅝ inches in diameter, in sidewalk, caused by absence of a glass disk, is actionable. Upham v. Boston, 187 Mass. 220, 72 N. E. 946.

17. Henderson v. Reed, 23 Ky. L. Rep. 463, 62 S. W. 1039.

18. Loose bricks, some three or four inches higher than others, some

end of sidewalk;[19] *water box* under surface of walk;[20] rotten, broken or *unsound boards* in sidewalk;[21] *loose planks*;[22] *rotten stringers* under board walk;[23] *insufficient planks* across gutter;[24] *flagstones* projecting above other stones;[25] *cover* made partly of iron and partly of glass, worn smooth;[26] tipping *cover of coal hole* in sidewalk;[27] *partially invisible cracks* in flagstones;[28] *spike* two inches high;[29] *live electric wire* on walk.[30]

Of course, a *depression* may be so deep and of such a nature as to be actionable.[31] And it is no defense that the open-

standing edgeways, and some entirely gone. Terre Haute v. Constans, 26 Ind. App. 421, 59 N. E. 1078.

19. Dunn v. Oelwein, 140 Ia. 423, 118 N. W. 764.

20. **Water box, top if it, being** three inches under the surface of the walk, causing a depression, busy street—liable. Denver v. Magivney, 44 Colo. 157, 96 Pac. 1002.

Water shut-off box in sidewalk, if rendering the sidewalk unsafe, is actionable *although it was the usual contrivance* used in cities. Redford v. Woburn, 176 Mass. 520, 57 N. E. 1008.

21. Bloomington v. Mueller, 71 Ill. App. 268; Chicago v. Chase, 33 Ill. App. 551.

Board so unsound as to give way under the weight of a pedestrian. Campbell v. Elkins, 58 W. Va. 308, 52 S. E. 220.

Wooden sidewalk, cross planks missing and others loosened—actionable. Robertson v. Jennings, 128 La. 795, 55 So. 375.

22. McKinney v. Brown (Tex. Civ. App.), 81 S. W. 88.

23. *Illinois.* Joliet v. Weston, 22 Ill. App. 225, aff'd in 123 Ill. 641, 14 N. E. 665.

Missouri. Williams v. Hannibal, 94 Mo. App. 549, 68 S. W. 380.

Minnesota. Burrows v. Lake Crystal, 61 Minn. 357, 63 N. W. 745; Hall v. Austin, 73 Minn. 134, 75 N. W. 1121.

New York. Walden v. Jamestown, 80 N. Y. S. 65, 79 App. Div. 433.

Washington. Billings v. Snohomish, 51 Wash. 135, 98 Pac. 107.

24. **One plank** only across gutter intersecting sidewalk — negligence. Weinhardt v. New Orleans, 125 La. 351, 51 So. 286.

Planks across ditch, not made as wide as the sidewalk, verdict for plaintiff sustained. Gibbs v. Monett, 163 Mo. App. 105, 145 S. W. 841.

25. Flagstone about two inches higher than adjoining stone. Toe caught in hole. City liable. Moroney v. New York, 97 N. Y. S. 642, aff'd without opinion in 190 N. Y. 560, 83 N. E. 1128.

26. Cromarty v. Boston, 127 Mass. 329, 34 Am. Rep. 381.

Iron gutter covering worn smooth. Liable. Lyon v. Logansport, 9 Ind. App. 21, 35 N. E. 128.

27. L'Herault v. Minneapolis, 69 Minn. 261, 72 N. W. 73.

28. Burt v. Boston, 122 Mass. 223.

29. Wile v. Los Angeles Ice & Cold Storage Co., 2 Cal. App. 190, 83 Pac. 271.

30. Kansas City v. Gilbert, 65 Kan. 469, 70 Pac. 350 (that policeman moved wire so as to make it a conductor of a current is immaterial).

31. Birmingham v. Starr, 112 Ala. 98, 20 So. 424; Bieber v. St. Paul, 87 Minn. 35, 91 N. W. 20; Corson v. New York, 79 N. Y. S. 604, 78 App. Div. 481; Kellow v. Scranton, 195 Pa. 134, 45 Atl. 676.

Depressions may be actionable. "While we might not hold that a depression of a stone in a walk of only an inch and a quarter below its ordinary level at all places would require attention and repair by the city, or that the municipality would be liable in damages for permitting such a depression to continue after notice, where the probability of accident would not be apparent to those having charge of the duty to remedy the imperfection,—as in places where such walk is not extensively used by travelers,—yet it is reasonably conceivable that such a defect might

ing in a sidewalk was necessary to dispose of surface water.[32]

§ 2786. Steps or abrupt slopes.

Sidewalks need not always be on a *level grade.* It is not negligence to construct them on a *slight incline,*[33] although an action lies by one injured thereby if the incline is so steep as to be dangerous.[34] So it is not negligence *per se* that a sidewalk slopes toward the street.[35]

If *connecting sidewalks are of different height,* it is generally necessary to build an approach from the one walk to the other, consisting either of steps or a gradual incline;[36] and the municipality is ordinarily liable where there is an abrupt decent of considerable height at the junction of two sidewalks, and there are no steps,[37] or if the incline from the one to the other is so steep as to be dangerous.[38] But the mere existence of a descent or step in the sidewalks of a municipality is not an actionable defect.[39] Furthermore, it

in certain instances be the proximate cause of the injury. The depression of the hexagonal block occasioning this accident was upon a sidewalk very extensively traveled. It was below a raised step at the entrance of a store, over which patrons of both sexes were accustomed to pass. In doing so a person would naturally turn from the stream of travel outside, and be likely, in entering, to place one foot upon the defective part of the walk while transferring the other to the step above, which was the course pursued by plaintiff. Hence the accident which happened to her does not seem to us to be so improbable in the ordinary course of utilizing the walk by the public as to justify the city in entirely disregarding the sunken block which caused the injury to plaintiff. In other words, the characteristic use of the walk at this place indicated an unusual danger from the defect, and upon the ordinary relation of cause and effect might reasonably have been anticipated by the city and should have been remedied." Bieber v. St. Paul, 87 Minn. 35, 91 N. W. 20.

32. Stone v. Seattle, 33 Wash. 644, 74 Pac. 808.

33. Inclination of 3¾ inches in a distance of 2½ feet in a plank sidewalk in an 800 population village is not an actionable defect. Schroth v. Prescott, 63 Wis. 652, 24 N. W. 405.

§ 2766, *ante.*

34. Slope of five feet within a distance of forty feet, with no cleats or hand rails. Ford v. Des Moines, 106 Ia. 94, 75 N. W. 630.

Slope of eighteen inches in six feet, where grade of street does not render such incline necessary, is actionable negligence. White v. Trinidad, 10 Colo. App. 327, 52 Pac. 214.

35. While a sidewalk may slope toward the street without being actionable negligence, yet this must be considered in determining whether leaving thereon earth which becomes slippery when wet, is negligence. Milledge v. Kansas City, 100 Mo. App. 490, 74 S. W. 892.

36. Plainview v. Mendelson, 65 Neb. 85, 90 N. W. 956.

37. Blume v. New Orleans, 104 La. 345, 29 So. 106 (five inches).

Six to nine inches difference in height of sidewalks at their intersection. Tabor v. St. Paul, 36 Minn. 188, 30 N. W. 765.

38. Connecting stone sloping six inches in about 3½ feet. Clemence v. Auburn, 66 N. Y. 334.

39. Clark v. Chicago, 5 Fed. Cas. No. 2,817.

Difference in level of connecting walks—joined by cement apron raising over an inch the level of the higher walk—not actionable. Mc-

is not actionable negligence that such walks are not exactly on the same level, and that there are no steps or incline, provided the difference is slight and there is no apparent danger.[40]

§ 2787. Obstructions.

A municipality is ordinarily not liable in case of *slight, temporary or necessary* obstructions on the sidewalk.[41] Thus, necessary obstructions, such as water hydrants, gas plugs, etc., where the cause of injuries, do not make the municipality liable,[42] provided they are not negligently constructed or in an improper place.[43] Generally, the question whether an obstruction is such as to show negligence on the part of the municipality is a *question for the jury.*[44]

Among the obstructions on a *sidewalk* which have been held actionable when injury resulted to a pedestrian therefrom

Intyre v. Kalamazoo, 154 Mich. 301, 117 N. W. 729.

Not negligence to connect walks of different height with steps with a suitable railing. Hoyt v. Danbury, 69 Conn. 341, 37 Atl. 1051.

40. **At junctions of rectangular streets,** sidewalks need not meet upon exactly the same level; and a few inches difference in height is not negligence per se. Morgan v. Lewiston, 91 Me. 566, 40 Atl. 545.

Surface of stone sidewalk, where it connected with dirt sidewalk, was about 2½ inches higher in the center and about 5 inches higher on the outer edge. The place was lighted and no one else had ever been injured there. Defect held too slight to be actionable. Butler v. Oxford, 186 N. Y. 444, 79 N. E. 712.

41. **Right of abutter** to encroach temporarily, §§ 1338-1340, *ante*, vol. 3.

Fences, gates and doors, rights of abutters, § 1352, *ante*, vol. 3.

Goods on sidewalk, rights of abutters, § 1335, *ante*, vol. 3.

Platforms over sidewalks, § 1361, *ante*, vol. 3.

Temporary obstructions on a sidewalk, such as paving blocks, put there by a contractor in improving the street, do not render the city liable, especially where not necessarily dangerous. Hesselbach v. St. Louis, 179 Mo. 505, 78 S. W. 1009.

42. Bellevue v. Genoway, 14 Ky. L. Rep. (abstract) 304.

43. See §§ 2767, 2781, *ante*.

44. *District of Columbia.* District of Columbia v. Boswell. 6 App. (D. C.) 402.

Georgia. Augusta v. Tharpe, 113 Ga. 152, 38 S. E. 389 (wire along outer edge of sidewalk).

Michigan. Wedderburn v. Detroit, 144 Mich. 684, 108 N. W. 102 (flagstone 3½ inches thick, on sidewalk).

Missouri. Perrigo v. St. Louis, 185 Mo. 274, 84 S. W. 30 (cellar door); Burnes v. St. Joseph, 91 Mo. App. 489.

North Dakota. Johnson v. Fargo, 15 N. D. 525, 108 N. W. 243 (wire at outer edge of sidewalk).

Obstruction two inches high in sidewalk cannot be said, as a matter of law, not actionable. Baxter v. Cedar Rapids, 103 Ia. 599, 72 N. W. 790.

Large stone, unguarded, at edge of sidewalk, as an obstruction. Vincennes v. Spees (Ind. App.), 72 N. E. 531, rev'd on rehearing in 35 Ind. App. 389, 74 N. E. 277.

Iron cap on water pipe, the pipe being between the flagging and the curb, and about four inches above the ground. Verdict for plaintiff sustained. Archer v. Mt. Vernon, 67 N. Y. S. 1040, 57 App. Div. 32.

Top of sewer manhole, from four to six inches above sidewalk. Liability held question for jury. Corr v. New York, 106 N. Y. S. 280, 121 App. Div. 578.

Rope across sidewalk, obstruction as actionable held question for jury. Arthur v. Charleston, 46 W. Va. 88, 32 S. E. 1024.

are the following: plank two or three inches high;[45] heavy *machine;*[46] big *box*;[47] *water plugs* projecting above walk;[48] *wooden peg,* projecting above planks;[49] *grade stake*;[50] *stump*;[51] *pole*;[52] *large billboard,* weighing 140 pounds, not fastened in any way, with top resting on side wall and the foot on the sidewalk;[53] *pile of flagstones*;[54] *wire netting*;[55] discarded fruit *rinds and decayed vegetables.*[56]

On the other hand, the following have been held not actionable: *railing* erected by abutter at outer edge of a sidewalk;[57] *step* close to building.[58]

45. Brown v. Ohio & M. R. Co., 138 Ind. 648, 37 N. E. 717; Moriarity v. Lewiston, 98 Me. 482, 57 Atl. 790.

Question for jury. "There is no doubt that this board constituted an obstruction to the sidewalk, but whether the obstruction so created was of such a character as to render the contractor and the city liable on the ground of negligence depends upon its character, location, and surroundings. If its character, location, and surroundings were of such a nature as to indicate to a person of ordinary prudence that the condition created by its presence was likely to produce or cause some injury to some one in the use of the sidewalk, then the plank described is to be regarded as a negligent obstruction of the sidewalk. Upon the trial of the case it was for the jury to say from a consideration of the evidence whether the plank in question was or was not a negligent or dangerous obstruction; but as a matter of pleading it is sufficient to allege that the board described was negligently placed and permitted to remain on the sidewalk. If the condition created by the presence of the board on the sidewalk was not of such a character as to indicate to a person of ordinary prudence that it was likely to cause injury to some one, then no negligence in connection therewith could be imputed to any one. The averment that appellants negligently permitted and allowed said board to remain upon the sidewalk amounts to a charge that it was left there under such circumstances and conditions as to render the sidewalk unsafe and dangerous for use." Evansville v. Pifer (Ind. App. 1912), 100 N. E. 110.

46. McKee v. Peters, 142 Mo. App. 286, 126 S. W. 255.

47. Birmingham v. Tayloe, 105 Ala. 170, 16 So. 576; Galesburg v. Higley, 61 Ill. 287.

48. **Water plugs,** one projecting 2¾ inches and the other 1¾ inches, above the sidewalk and near the center thereof, held actionable obstructions. Parrish v. Huntington, 57 W. Va. 286, 291, 50 S. E. 416.

49. Rea v. Sioux City, 127 Ia. 615, 103 N. W. 949.

50. **Grade stake,** four inches high, at edge of sidewalk, necessary for construction of sidewalk, was allowed to remain there after its necessary purpose had been accomplished. City liable where pedestrian stepped thereon. Jones v. Dearing, 94 Me. 165, 47 Atl. 140.

51. Newport v. Miller, 12 Ky. L. Rep. (abstract) 422.

52. West v. Lynn, 110 Mass. 514.

53. Cason v. Ottumwa, 102 Ia. 99, 71 N. W. 192.

54. **Flagstones,** three deep, and extending over eleven inches of a three foot walk, held negligence. Graham v. New Rochelle, 104 N. Y. S. 939, 120 App. Div. 414.

55. **Wire netting** three feet in height, across a newly constructed sidewalk, with no lights or other warnings to protect pedestrians. Lasityr v. Olympia, 61 Wash. 651, 112 Pac. 752.

56. Archer v. Johnson City (Tenn.), 64 S. W. 474.

Green vegetable matter, on sidewalk adjoining a market house, where the refuse has existed for months, is actionable where a pedestrian slips thereon. O'Dwyer v. Northern Market Co., 24 App. (D. C.) 81, 88.

57. Oliver v. Denver, 13 Colo. App. 345, 57 Pac. 729.

58. **Step** 4½ inches high and 10½ inches wide, close up to the building

§ 2788. Excavations and openings.

For unguarded excavations in sidewalks,[59] and *ditches* across a walk,[60] where resulting in injury to a traveler, the municipality is liable, in a proper case, the same as in case of excavations or ditches in the driveway.[61]

Areaways, coal holes, and the like are generally proper constructions by abutters.[62] When municipal liability for injuries to travelers resulting therefrom is in issue, the only questions which arise ordinarily are want of repair and failure to protect by railings or the like.[63] *Areaways with stairs, cellarways* with hinge door top or the like,[65] *light*

in front of which it was placed, and used as a means of access to it, not an actionable obstruction. Richmond v. Lambert, 111 Va. 174, 68 S. E. 276.

59. McGrath v. Bloomer, 73 Wis. 29, 40 N. W. 585.

Guards and warning, §§ 2795-2805, *post*.

Excavation in sidewalk, unguarded at night. City liable. Walker v. Springfield, 3 Ohio Dec. (reprint) 567.

60. **Trench** across walk. Not liable if ordinary care is used to protect public by sufficient barriers. Bennett v. Everett, 191 Mass. 364, 77 N. E. 886.

If there is no sidewalk, a ditch across the side of the highway in a sparsely settled locality, where a sidewalk might have been built, is not such an excavation as to make a city liable. Sladelmann v. New York, 110 N. Y. S. 682, 126 App. Div. 352.

61. § 2780, *ante*.

62. § 1343, *ante*, vol. 3.

63. **Water meter box** in sidewalk. Cover slid to one side when stepped on and pedestrian dropped into hole. Whatever defect there was was latent. City not liable. Carvin v. St Louis, 151 Mo. 334, 52 S. W. 210.

64. **Areaways** in sidewalk must be protected regardless of whether there is ample room for pedestrians between the opening and the edge of the walk. Denver v. Soloman, 2 Colo. App. 534, 31 Pac. 507.

65. **Cellar doors** opening out on the sidewalk and frequently and negligently left open. Liable. Chapman v. Macon, 55 Ga. 566.

Cellarway at times left open without railing or guard—liable. Earl v. Cedar Rapids, 126 Ia, 361, 102 N. W. 140, 106 Am. St. Rep. 361, in which it is said: "Whether or not the city was negligent was a question of fact for the jury, depending, of course, upon the method of construction and use made of the premises, and the number of times the door has been left open and unguarded, and all other relevant facts and circumstances in the case."

Where a cellarway and doors in a sidewalk are maintained by authority of law, the municipality is liable for defects therein. Lewiston v. Isaman, 19 Idaho, 653, 115 Pac. 494.

Private cellarway, although unauthorized by law, so guarded as to be safe under ordinary circumstances. City not liable for unforseen injury. Smith v. Leavenworth, 15 Kan. 81, 86.

Trapdoors. Where a trapdoor in a sidewalk was not in good repair, and it either sank with the weight of a pedestrian or someone beneath raised the other door without warning, the municipality is liable, the door being on a prominent street in constant use by pedestrians. Connolly v. Spokane (Wash. 1912), 126 Pac. 407.

Where the trap door on the side from which a pedestrian approached was down, and he walked over such door and into the opening caused by the other door being open and unguarded, the municipality is liable, although it does not appear how long the door had been open, where it was on a busy street. Hayes v. Seattle, 43 Wash. 500, 86 Pac. 852, 7 L. R. A. (N. S.) 424. This case appears to go to the extreme limit.

Where passageway to basement was protected by removable iron grating covered with boards, and the iron

areas,[66] and *coal holes*[67] are all proper, it is generally held, but must be constructed and kept in repair so as to be reasonably safe, and must be properly protected.[68] However, *areaways* with steps leading to a basement are sufficiently guarded by a rail parallel with the length of the walk.[69]

§ 2789. Ice and snow.

Sidewalks in more or less dangerous condition for the use of pedestrians because of snow and ice thereon, resulting in personal injuries, are the subject of much litigation, and the tendency of the later decisions is to restrict liability more and more, except in clear cases, on the theory that the municipality is not an insurer against accidents. The rule is that a municipality is not bound, under all circumstances, to keep sidewalks free from ice;[70] and that the mere fact that a side-

work was such that the way could not be left insecure except by gross carelessness, city is not liable where stranger failed to properly replace the grating. Littlefield v. Norwich, 40 Conn. 406.

If an *unauthorized* opening is guarded only by a trap door necessarily opened at times, and the way is dangerous when the door is open, the municipality has been held liable, it seems, without regard to how long the door was open, whether previous accidents had occurred, and whether the municipality had any notice that the door was left open for any unreasonable time. Smith v. Leavenworth, 15 Kan. 81, 87.

66. Light areas must be guarded. Lombard v. Chicago, 15 Fed. Cas. No. 8,470, 4 Biss. 460; Galesburg v. Higley, 61 Ill. 287.

67. **Coal vaults** under sidewalks are common and lawful; and so are coal holes in the sidewalk, so that the municipality is not liable to one falling into such a hole while coal is being put in, where it had no notice the hole was uncovered. Lafayette v. Blood, 40 Ind. 62.

Coal hole propped open for several weeks, for ventilation. Liable. Stege v. Milwaukee, 110 Wis. 484, 86 N. W. 161.

Tipping of cover of coal hole. No prior injuries or complaints. Only negligence offered to be shown was that cover was sunk half an inch on one side and raised half an inch on the other, and a small piece was broken off the frame. City held not liable. Rushton v. Allegheny, 192 Pa. 574, 44 Atl. 249.

68. A municipality is not guilty of any negligence, at least in most states, by permitting abutters to use the space under the sidewalk, with an opening thereto in the walk; but it is liable if it gnowingly permits without objecton for a long time the frequent and customary use of the hatchway in an entirely unguarded condition. Whitley v. Oshkosh, 106 Wis. 87, 81 N. W. 992.

69. It is not negligence to permit a stairway leading to a basement and next to and parallel with a building, where the entire length of it is protected by a substantial iron railing, although both ends are open with steps to the basement, where the place is lighted and there is six feet and a half width of sidewalk in addition the opening. Edwards v. Raleigh, 150 N. C. 276, 63 S. E. 1040.

Not negligence to maintain a basement stairway opening upon and extending into a street, although unprotected upon one side thereof. Geary v. Chicago, 161 Ill. App. 461.

§ 2804, *post*.

70. Clark v. Chicago, 5 Fed. Cas. 2,817.

Statutes and general rules, § 2770, *ante*.

No duty to keep sidewalks free from ice. "Upon such a state of facts, there can be no recovery against the city, unless it is the duty of such municipalities to keep their sidewalks clear of ice. In this climate such a thing would be a

walk is dangerous because of the presence of ice and snow is not sufficient to establish negligence on the part of the municipality, even though the snow and ice are not removed within a reasonable time.[71] Moreover, *local climatic conditions* should always be considered in determining the liability for failure to remove snow and ice from a sidewalk.[72]

There is no specific duty on the part of a municipality to *sand its sidewalks*,[73] and it is not negligence to fail to

physical impossibility, and an attempt to do it would involve an amount of expense that would bankrupt any city. No court has ever held that reasonable care required an attempt to do any such thing. An unbroken line of authorities hold that mere slipperiness of a sidewalk by either ice or snow is not a defect for which cities are liable; that their obligation to keep their streets in a safe condition does not extend to the removal of ice, which constitutes no other defect than slipperiness." Per Justice Mitchell in Henkes v. Minneapolis, 42 Minn. 530, 44 N. W. 1026.

Not required under all circumstances to keep streets free from ice and snow, but only when dangerous. McEnaney v. Butte, 43 Mont. 526, 117 Pac. 893.

Ice on a sidewalk does not necessarily establish that it is dangerous. Evans v. Utica, 69 N. Y. 166, 25 Am. Rep. 165.

Need not remove snow and ice immediately after a snowfall. Foley v. New York, 88 N. Y. S. 690, 95 App. Div. 374.

Footprints frozen in the ice on a sidewalk need not be removed. Hyer v. Janesville, 101 Wis. 371, 77 N. W. 729

See article on "Law of Icy Sidewalks in New York State," by Loran L. Lewis, Jr., in 6 Yale Law J. 258, and see note on "Icy Sidewalks" in 27 Alb. Law J. 227, 261.

71. Templin v. Boone, 127 Ia. 91, 93, 102 N. W. 789.

"**Snow and ice on sidewalks** have been the occasion of many injuries to persons, and the law books are full of instances where the duty of a municipality in respect to such conditions has been discussed. Running through all the cases to which our attention has been called on this subject, we find the general proposition that ice or snow upon a sidewalk or in a street is *not to be classed with dangerous obstructions*, such as a city is required to remove. It would be more accurate to say that it is a dangerous obstruction, but that it is excepted from the category of obstructions for which the city is liable upon the ground of the impracticability of requiring the city to remove it. There are for example, in this city, many hundred of miles of sidewalks upon which snow falls and ice forms when the weather suits, and immediately upon its fall the snow is beaten down by the feet of thousands walking over it. To some extent the sidewalks and streets may be and are cleared of such obstruction, but to remove it entirely or to a degree that would render it not dangerous is impracticable, and therefore not embraced in the law's reasonable requirements. There is another reason for making snow or ice on the sidewalks and in the streets an exception to that dangerous condition for which a city is liable; that is, when that condition exists generally it is obvious, and every one is on his guard. Any pedestrian on the sidewalk or traveler in the street is warned by all his surroundings that ice and snow abound, and consequently danger of slipping and falling is to be apprehended at every step. The law is reasonable in this, as in all things." Reedy v. St. Louis Brewing Ass'n, 161 Mo. 523, 61 S. W. 859.

72. Scoville v. Salt Lake City, 11 Utah, 60, 39 Pac. 481.

Failure to remove ice is not negligence where the severity of the weather, and the sudden and frequent changes, make it practically impossible. Kleng v. Buffalo, 25 N. Y. S. 445, 72 Hun, 541, aff'd in 156 N. Y. 700, 51 N. E. 1091.

73. McGuinness v. Worcester, 160 Mass. 272, 35 N. E. 1068.

remove ice caused by a sudden fall of temperature, nor to fail to compel citizens to sprinkle such ice with ashes or sand.[74] And it is settled, except in a few states where there are some decisions to the contrary,[75] that a municipality is not liable for injuries resulting merely from the *slippery condition* of a sidewalk, caused by *smooth* ice or snow or water;[76] and it is generally held that the rule of non-liability applies equally well where the ice or snow causing the slippery condition is due to *artificial instead of natural*

74. Taylor v. Yonkers, 105 N. Y. 202, 11 N. E. 642, 59 Am. Rep. 492.

75. District of Columbia v. Frazer, 21 App. (D. C.) 154, 159; Baltimore v. Marriott, 9 Md. 160, 66 Am. Dec. 326.

In Connecticut, it is held that a municipality which allows a sidewalk to remain dangerous after notice of its icy condition and an opportunity to remove it, is liable for injuries resulting from slipping thereon, although the ice is smooth, the court refusing to recognize the difference between rough and smooth ice which is recognized in most states. Cloughessey v. Waterbury, 51 Conn. 405, 50 Am. Rep. 38; Dooley v. Meriden, 44 Conn. 117, 26 Am. Rep. 433.

In Nebraska, it seems to have been held that if snow on sidewalks is not removed within a reasonable time the municipality is liable for injuries resulting therefrom. Foxworthy v. Hastings, 25 Neb. 133, 41 N. W. 132. This statement of law is too broad, measured by the prevailing rule, unless confined to injuries from rough ice which constitute obstructions dangerous to pedestrians using due care.

76. *Idaho.* Wilson v. Idaho Falls, 17 Idaho, 425, 105 Pac. 1057.

Illinois. Chicago v. McGiven, 78 Ill. 347; East Dubuque v. Brugger, 118 Ill. App. 421; Chicago v. McDonald, 111 Ill. App. 436; Metzger v. Chicago, 103 Ill. App. 605; Aurora v. Parks, 21 Ill. App. 459; Gibson v. Johnson, 4 Ill. App. 288.

Iowa. Broburg v. Des Moines, 63 Ia. 523, 19 N. W. 340, 50 Am. Rep. 756, limiting, in effect, Collins v. Council Bluffs, 32 Ia. 324, 7 Am. Rep. 200.

Kansas. Evans v. Concordia, 74 Kan. 70, 85 Pac. 813, 7 L. R. A. (N. S.) 933.

Maine. Smyth v. Bangor, 72 Me. 249.

Massachusetts. Nason v. Boston, 14 Allen (Mass.), 508; Stanton v. Springfield, 12 Allen (Mass.), 566; Hutchins v. Boston, 12 Allen (Mass.), 571, note; Gilbert v. Roxbury, 100 Mass. 185; Stone v. Hubbardston, 100 Mass. 49, 57; Billings v. Worcester, 102 Mass. 329, 3 Am. Rep. 460.

Minnesota. Henkes v. Minneapolis, 42 Minn. 530, 44 N. W. 1026.

New York. Kinney v. Troy, 108 N. Y. 567, 15 N. E. 728; Ballard v. Hamburg, 128 N. Y. S. 325, 143 App. Div. 719; Cupp v. Elmira, 110 N. Y. S. 742, 126 App. Div. 539; Moran v. New York, 90 N. Y. S. 596, 98 App. Div. 301.

North Carolina. Cresler v. Asheville, 134 N. C. 311, 46 S. E. 738.

Ohio. Snow and ice need not be removed. Vandyke v. Cincinnati, 1 Disn. (Ohio), 532.

Pennsylvania. Fry v. Mercer, 4 Pa. Co. Ct. Rep. 406.

Virginia. Charlottesville v. Falles, 103 Va. 53, 48 S. E. 511; Lynchburg v. Wallace, 95 Va. 640, 29 S. E. 675.

Washington. Calder v. Walla Walla, 6 Wash. 377, 33 Pac. 1054.

Wisconsin. Keopke v. Milwaukee, 112 Wis. 475, 88 N. W. 238; Beaton v. Milwaukee, 97 Wis. 416, 73 N. W. 53; Grossenbach v. Milwaukee, 65 Wis. 31, 26 N. W. 182, 56 Am. Rep. 614; Cook v. Milwaukee, 24 Wis. 270, 1 Am. Rep. 183.

Mere slipperiness produced by natural causes not actionable. Griswold v. Camp, 149 Wis. 399, 135 N. W. 754.

"None of the cases seem to go to the length that mere slipperiness, resulting wholly from natural causes, constitutes a defect." Grossenbach v. Milwaukee, 65 Wis. 31, 34, 26 N. W. 182, 56 Am. Rep. 614.

causes,[77] although some decisions tend to the contrary.[78]

This rule as to non-liability for slippery sidewalks is subject to this exception: *If the danger from the snow or ice*

77. The fact that ice on a sidewalk was in part the result of an artificial cause and not wholly of natural causes such as the fall of rain or snow, is immaterial, since municipal liability must rest on some ground of fault or neglect on the part of its officers who have charge of the streets, and such fault or neglect is no more involved in removing ice formed by water from hose than ice formed by rain from the clouds. Henkes v. Minneapolis, 42 Minn. 530, 44 N. W. 1026.

Compare Blake v. Lowell, 143 Mass. 296, 9 N. E. 627; Billings v. Worcester, 102 Mass. 329, 3 Am. Rep. 460.

The fact that the water from which the ice was formed fell or came from an adjoining building, through eaves troughs or the like, is immaterial and does not render the municipality liable. Gavett v. Jackson, 109 Mich. 408, 67 N. W. 517, 32 L. R. A. 861 (Montgomery, J., dissenting).

Not liable though ice was formed by water dripping from a roof. Kaveny v. Troy, 108 N. Y. 571, 15 N. E. 726.

City may be liable although ice on sidewalk was caused by water dripping from the eaves of an adjoining building and freezing. Miller v. Bradford, 186 Pa. 164, 40 Atl. 409.

Hydrant on private property, water escaped therefrom and froze on sidewalk. Municipality held not liable unless it had notice of the ice and time to remedy the condition. Cresler v. Asheville, 134 N. C. 311, 46 S. E. 738.

Not negligence to allow water and melting snow to trickle across a sidewalk, in freezing weather where coming from a *vacant lot* elevated above the walk, although the contrary would be held if the water had come from a drain. Kortlang v. Mt. Vernon, 114 N. Y. S. 252, 129 App. Div. 535.

No defense that the water from which the ice formed flowed from an adjoining lot. Keith v. Brockton, 136 Mass. 119.

City not liable merely because ice on which plaintiff slipped was caused by pumping of water upon street by a fire engine, where the engine was being used for a lawful purpose. Cook v. Milwaukee, 27 Wis. 191.

Not liable though water comes from melting snow on a building. Hausmann v. Madison, 85 Wis. 187, 55 N. W. 167, 21 L. R. A. 263, 39 Am. St. Rep. 834.

78. District of Columbia v. Frazer, 21 App. (D. C.) 154, 159; Muncie v. Hey, 164 Ind. 570, 574, 74 N. E. 250.

If the ice is caused by a leak in the water pipe on the roof of an abutting building, and it is dangerous because smooth and slippery, and there is no other ice or snow on the streets, the municipality is liable for injuries resulting from defects therein, where a reasonable time has elapsed after notice of the defect. Reedy v. St. Louis Brewing Ass'n, 161 Mo. 523, 61 S. W. 859, 53 L. R. A. 805.

Where ice was caused from water discharged on the sidewalk by means of a defective conductor used to carry water from the roof of a building, and from a waste pipe, the municipality is liable on the ground that its own wrongdoing has contributed to the accumulation of the dangerous ice. Scoville v. Salt Lake City, 11 Utah, 60, 39 Pac. 481.

If the ice (1) was produced by artificial causes, (2) was dangerous to pedestrians, and (3) the municipality had notice thereof, actual or constructive, (4) in time to have removed the ice before the accident, the municipality is liable. Hofacre v. Monticello, 128 Ia. 239, 103 N. W. 488.

In New York, it was held that recovery was authorized where plaintiff slipped on snow and ice on a sidewalk where such snow and ice had fallen from time to time from the roof of a building standing near the sidewalk, and had been there for at least two weeks. Pomfrey v. Saratoga Springs, 104 N. Y. 459, 11 N. E. 43.

on the sidewalk was due to other negligence of the muniripality, it is liable; and this exception is equally applicable where the non-liability for injuries resulting from snow and ice is based on other grounds. Thus, it may be that if the *sidewalk had been properly constructed* in the first place or had been kept in repair, the ice would not have formed, and if this be true and the municipality was negligent in regard to the construction or failure to repair, it is liable.[79] However, in such a case, it is necessary to show clearly the negligence in regard to the defect in the sidewalk,[80] and also that the injury would not have occurred merely because of the snow or ice, without regard

79. Adams v. Chicopee, 147 Mass. 440, 18 N. E. 231; Ayres v. Hammondsport, 7 N. Y. S. 174, 54 Hun, 635.

When a sidewalk is so constructed as to be, with the ice and snow that would ordinarily accumulate upon it in winter, unsafe to travel thereon with ordinary care, then it is defective. Hill v. Fond du Lac, 56 Wis. 248, 14 N. W. 25; Stilling v. Thorp, 54 Wis. 528, 537, 11 N. W. 906.

The rule that the municipality is not liable for the slippery condition of its sidewalks caused by the recent falling or freezing of rain or snow does not extend so far, however, as to protect the municipality from liability for injuries caused by slipping on ice on a sidewalk *where it has accumulated by reason of a defect in the walk.* Holbert v. Philadelphia, 221 Pa. 266, 271, 70 Atl. 746.

If the condition of the walk, independent of the ice, is a concurring cause of the accident, without which it would not have happened, the municipality is liable. Taylor v. Yonkers, 105 N. Y. 202, 11 N. E. 642, 59 Am. Rep. 492.

Where one slips on ice on a sidewalk, a recovery may be had, although the ice is smooth and not accumulated in ridges, if the sidewalk was defectively constructed so as to cause dangerous ice to be formed which would not otherwise form. Hughes v. Lawrence, 160 Mass. 474, 36 N. E. 485 (gutter extending across sidewalk).

Sloping walk. Generally if the slope of a sidewalk is built so abrupt as to make it dangerous in winter weather, in those states which have a real winter, the municipality is liable. Hodges v. Waterloo, 109 Ia. 444, 80 N. W. 523.

Plan of construction. However, in those states where the municipality is not liable for negligence in the plan of construction, the fact that a sidewalk is slippery because of the plan of construction does not render the municipality liable. Rehrey v. Newburgh, 28 N. Y. S. 916, 78 Hun, 611.

In Michigan, however, it is held that "all inclined sidewalks become dangerous for pedestrians when covered with ice" and that if an incline is not unsafe in its original condition but is made unsafe solely by the accumulaton of ice and snow, the municipality is not liable. Wesley v. Detroit, 117 Mich. 658, 76 N. W. 104 (Justice Moore dissenting). This case is not in accordance with the general trend of the decisions and it is submitted that it is not supported by the better reasoning.

80. Where the municipality has not been negligent in establishing a grade on a street with the sidewalk twelve inches higher than the street, so that where the sidewalk intersects another walk there is an abrupt drop of twelve inches, the mere fact of snow falling thereon and melting, and then freezing so as to make the intersection slippery, does not make the municipality liable. McQueen v. Elkhart, 14 Ind. App. 671, 43 N. E. 460.

Ice at crossing of two sidewalks, although not covered or guarded, is not negligence even where caused by a slight difference in the grades of the sidewalks. Chamberlain v. Oshkosh, 84 Wis. 289, 54 N. W. 618, 19 L. R. A. 513, 36 Am. St. Rep. 928.

to the defect in the sidewalk.[81] Furthermore, the municipality is liable where the cause of the ice being upon the sidewalk is not the fall of snow or rain and subsequent freezing but results from *water coming onto the sidewalk through the negligence of the municipality*,[82] as where the cause is *failure to clean out a gutter*,[83] or allowing a broken gutter stone to obstruct the flow of water along a gutter,[84] or allowing a *leaky hydrant* to exist,[85] or the *neglect to construct and maintain drains* to carry off the water.[86]

The municipality is liable where ice or snow has formed *in drifts or ridges*, in a rough or uneven condition, *so as to constitute an obstruction.*[87] This qualification of the rule

81. Where plaintiff fell upon new ice lying on a sloping sidewalk, the slope of the walk could not be held a concurring cause, since mere guess and speculation that he would not have fallen if the new ice had spread over a level. Ayres v. Hammondsport, 130 N. Y. 665, 29 N. E. 265, rev'g 7 N. Y. S. 174, and following Taylor v. Yonkers, 105 N. Y. 202, 11 N. E. 642.

82. If there is other negligence in connection with the sidewalk, the municipality is liable. Walsh v. New York, 96 N. Y. S. 540, 109 App. Div. 541; Conklin v. Elmira, 42 N. Y. S. 518, 11 App. Div. 402 (tree roots covered with ice and snow).

83. Gaylord v. New Britian, 58 Conn. 398, 20 Atl. 365, 8 L. R. A. 752.

84. Gillrie v. Lockport, 122 N. Y. 403, 25 N. E. 357.

85. Walsh v. New York, 96 N. Y. S. 540, 109 App. Div. 541; Corbett v. Troy, 6 N. Y. S. 381, 53 Hun, 228. Liable where cause was leaking water main in street, it having sprung a leak some months previous. Belleview v. England (Ky.), 118 S. W. 994.

86. Woolsey v. Ellenville, 15 N. Y. S. 647, 61 Hun, 136; Holbert v. Philadelphia, 221 Pa. 266, 271, 70 Atl. 746.

87. *Illinois.* Mereck v. Chicago, 89 Ill. App. 358; Virginia v. Plummer, 65 Ill. App. 419.

Iowa. Tobin v. Waterloo, 131 Ia. 75, 107 N. W. 1031; Hodges v. Waterloo, 109 Ia. 444, 80 N. W. 523; Templin v. Boone, 127 Ia. 91, 102 N. W. 789; Huston v. Council Bluffs, 101 Ia. 33, 69 N. W. 1130, 36 L. R. A. 211.

Massachusetts. McAuley v. Boston, 113 Mass. 503; Hutchins v. Boston, 97 Mass. 272, note.

Missouri. Reno v. St. Joseph, 169 Mo. 642, 70 S. W. 123; Barr v. Fairfax, 156 Mo. App. 295, 137 S. W. 631 (quantity of ice held immaterial); Canterbury v. Kansas City, 149 Mo. App. 520, 131 S. W. 120; Quarles v. Kansas City, 138 Mo. App. 45, 119 S. W. 1019.

Montana. Townsend v. Butte, 41 Mont. 410, 109 Pac. 969 (slanting surface from outside of walk to inside).

New York. Keane v. Waterford, 130 N. Y. 188, 29 N. E. 130.

North Dakota. Jackson v. Grand Forks (N. D. 1913), 140 N. W. 718 (where it is said: "The liability should be based upon negligence and upon what is reasonable under the circumstances, paying attention to the climatic conditions. What would be reasonable, for instance, in Southern Illinois might not be reasonable in North Dakota or Montana").

Pennsylvania. Wyman v. Philadelphia, 175 Pa. 117, 34 Atl. 621.

Washington. Bull v. Spokane, 46 Wash. 237, 89 Pac. 555.

Wisconsin. Salzer v. Milwaukee, 97 Wis. 471, 73 N. W. 20. Compare Dapper v. Milwaukee, 107 Wis. 88, 82 N. W. 725.

Compare Cloughessey v. Waterbury, 51 Conn. 405, 50 Am. Rep. 38.

"It is well settled that the mere fact that snow and ice were on the sidewalk and it was dangerous does not render the city liable. It is only when the ice or snow is suffered to remain upon the sidewalk until,

is well settled but it is difficult to see any good reason for this distinction between smooth ice and ice formed in ridges. If the former is dangerous, and has existed for such a length of time as to impute notice to the municipality, ordinary care, it would seem, would require the removal of such ice or at least the sprinkling of sand or ashes thereon. The danger from smooth ice is often greater than that resulting from ice in ridges, and the municipality may protect travelers from injuries from the former as easily as from the latter.

Under this rule as to ice in ridges, a municipality is liable where the real cause of the injury was ridges of ice, although augmented by a recent fall of snow for which the municipality was not liable, making the walk slippery.[88] However, no precise limit can be established to determine

by tramping of pedestrians, freezing and thawing or other cause, the surface has become rough, rigid, rounded or slanting so that a person, in the exercise of ordinary care, can not pass over it without danger of falling, that the defect is such as to render the city liable." Dempsey v. Dubuque, 150 Ia. 260, 132 N. W. 758.

"It is well settled by the authorities that mere slipperiness of streets and sidewalks, caused by an accumulation of ice and snow, creates no liability for injuries to persons in consequence of that condition. It is equally well settled that, where ice and snow are permitted to accumulate and remain upon the streets and walks to such an extent and for such a time that slippery and dangerous ridges, irregularities, and depressions are formed therein from travel or other causes, thus rendering travel thereon unsafe, the municipality may be liable, if that condition is brought about by its neglect. Smith v. Cloquet (Minn. 1912), 139 N. W. 141.

Snow and ice frozen in a ridge on walk—dangerous to pedestrians, remaining long enough for city to know of conditions and remove danger—city liable. Barker v. Jefferson, 155 Mo. App. 390, 137 S. W. 10.

Liable where snow or ice so *uneven or rounded* as to render it dangerous to persons using due care. Luther v. Worcester, 97 Mass. 268.

Must be removed within reasonable time. Koch v. Ashland, 88 Wis. 603, 60 N. W. 990.

Must be not only rough and uneven but also an obstruction rendering the walk unsafe for travelers. Quinlan v. Kansas City, 104 Mo. App. 616, 78 S. W. 660.

In Ohio, however, it would seem that a municipality is not liable, in any event, for injuries received from falling on an icy sidewalk, unless there is a structural defect in the walk or the municipality has in some way caused or contributed to accumulation of the ice. Norwalk v. Tuttle, 73 Ohio St. 242, 76 N. E. 617.

88. Kopper v. Yonkers, 97 N. Y. S. 425, 110 App. Div. 747, aff'd without opinion in 188 N. Y. 592, 81 N. E. 1168, and dist'g Taylor v. Yonkers, 105 N. Y. 202, 11 N. E. 642; Piper v. Spokane, 22 Wash. 147, 60 Pac. 138.

Where snow not removed and it melted somewhat and was worn into ruts and ridges, and a later storm covered such ruts and ridges with ice, city was liable. Larson v. New York, 130 N. Y. S. 257, 145 App. Div. 619.

In other words, if "the accident would not have happened but for the previous rough, uneven, and rounded condition of the walk, due to the presence of ice and snow thereon, then the city may be liable, although there is another irresponsible condition concurring with defendant's fault in producing the injury." Templin v. Boone, 127 Ia. 91, 93, 102 N. W. 789.

what height and extent an icy ridge must reach, in order to be actionable as a defect;[89] but there is some merit in the suggestion that, under this rule, the ice, in order to constitute a defect must, while adhering to the walk, assume a form which would be a structural defect if the walk was itself so constructed.[90]

d. *Crosswalks.*

§ 2790. Crosswalks compared with sidewalks.

A crosswalk is separate and distinct from a sidewalk. And the term "crosswalk," as used in a statute making municipalities liable for defects in highways, streets, "crosswalks," etc., has been held not to include sidewalks.[91] Crosswalks extend the whole distance between the extended boundary lines of intersecting streets, where they meet the sidewalks,[92] and the duty to use ordinary care to keep the streets safe includes crosswalks.[93]

§ 2791. What defects actionable in general.

Just what defects or obstructions in crosswalks amount to negligence of the municipality it is impossible to state.[94] Generally, where the streets are paved, there is an abrupt rise of a few inches on stepping from the curb to the pavement, or a slanting walk is laid from the curb to the pavement, and then the pavement stepped on in crossing the street is in no way distinguished or laid off from the rest of the pavement. In smaller municipalities, and in the suburban portions of larger municipalities, where the streets are not paved, planks or flagstones are often laid across the street for a crosswalk.

89. Street v. Holyoke, 105 Mass. 82, 7 Am. Rep. 500.

City not liable for injuries from slipping on icy sidewalk caused by snow plow leaving ridge in center of walk, as it must do after snow has been tramped down more or less, and such ridge becoming icy by water dropping on it from an adjacent building. Jefferson v. Sault Ste. Marie, 165 Mich. 172, 130 N. W. 610, reviewing all snow and ice decisions in Michigan.

Two inch hummock is not a ridge. Hatch v. Elmira, 126 N. Y. S. 863, 142 App. Div. 174.

90. See criticism of this rule in Cloughessey v. Waterbury, 51 Conn. 405, 413, 50 Am. Rep. 38, which rejects the "rough ice" rule.

91. Pequignot v. Detroit, 16 Fed. 211.

92. O'Neil v. Detroit, 50 Mich. 133, 15 N. W. 48.

93. § 2747, *ante*.

94. Crosswalks held sufficient. Gallagher v. Tipton, 133 Mo. App. 557, 113 S. W. 674.

Crosswalk over alley held sufficient. Snyder v. Superior, 146 Wis. 671, 132 N. W. 541.

Loose stone projecting two inches above the level in space filled with pieces of stone between two parallel paths of flagstones. City not liable. Richmond v. Schonberger, 111 Va. 168, 68 S. E. 284.

The following defects, in particular cases, have been held not actionable: *slippery approach* from pavement to sidewalk;[95] mud on crossings;[96] boards at crossing over unpaved streets, to avoid mud;[97] loose plank incline.[98]

§ 2792. Same—defects in construction.

Where crosswalks are constructed, they should be built in such a way as not to be dangerous to pedestrians or others.[99] For instance, it is negligence to construct a walk so steep in any part as to be dangerous, although a *slight grade* is not negligence,[1] and crosswalks may be placed on more or less of a slant where, because of the topography of the place, it would be impossible to construct them in any other way.[2] So the walk must be *firm and secure* or at least not so insecure that danger can be apprehended therefrom.[3] However a step from the sidewalk to the street crossing is

95. Concrete construction about six feet long, sloping from the top of the curb to the pavement, the sloping surface being about 18 inches wide and not over six inches high at any point. Plaintiff slipped on it. City is held not liable. Stratton v. New York, 190 N. Y. 294, 83 N. E. 40, rev'g 103 N. Y. S. 358, 117 App. Div. 887.

96. Yeager v. Bluefield, 40 W. Va. 484, 2 S. E. 752.

97. McConway v. Philadelphia, 209 Pa. 236, 58 Atl. 358.

98. Plank a foot wide and sixteen to twenty feet long which rested loosely at one end upon the wall of a sidewalk about four feet high, placed there by some third person, was used while the street was being improved. Plank rocked with pedestrian and threw him off. City was held not liable on the ground of contributory negligence. Rome v. Baker, 107 Ga. 347, 33 S. E. 406.

99. Crosswalk held not negligently constructed because ends of plank bevelled where they meet street car rails. Bigelow v. Kalamazoo, 97 Mich. 121, 56 N. W. 339.

Crosswalk held not unsafe because of very wide aprons, where width of top part was ample to accomodate pedestrians. Fairgrieve v. Moberly, 39 Mo. App. 31.

Crosswalk consisting of two inch planks over sidewalk, the ends of the planks being raised two inches above the walk, is reasonably safe. Yotter v. Detroit, 107 Mich. 4, 64 N. W. 743.

Plank crossing raised fourteen inches above sidewalk level is a dangerous obstruction. Indianapolis v. Mitchell, 27 Ind. App. 589, 61 N. E. 947.

1. Slight slope to stone leading across a gutter from the sidewalk into the street—city not liable. Cook v. Milwaukee, 27 Wis. 191.

Not liable because crosswalk is a few inches higher, near intersection with sidewalk, than at another point. Shippey v. Au Sable, 65 Mich. 494, 32 N. W. 741.

Slight ascent of one inch or so to the foot, in a crosswalk, or a gutter crossing a street, not a defect. Baker v. Madison, 56 Wis. 374, 14 N. W. 289.

Approach from street to sidewalk, at a slope of one foot in seven, is not negligence *per se*. Lush v. Parkersburg, 127 Ia. 701, 104 N. W. 336.

Apron with slope of 1¾ inches to the foot from the curb into the street is not defective *per se* although without cleats or railings. Morrison v. Madison, 96 Wis. 452, 71 N. W. 882. To same effect, Depere v. Hibbard, 104 Wis. 666, 80 N. W. 933.

2. Smith v. Yankton, 23 S. D. 352, 121 N. W. 848.

3. But loose plank in, and raising the end two inches above the level of the walk—not liable. Weisse v. Detroit, 105 Mich. 482, 63 N. W. 423.

not a defect,[4] and an *open gutter* between the end of the crosswalk and the sidewalk is not necessarily negligence.[5]

§ 2793. Holes and excavations.

If there are holes or excavations under or close to a crosswalk, it is the duty of the municipality to use ordinary care to protect travelers from injury therefrom.[6]

§ 2794. Snow and ice.

The duty of a municipality in regard to snow and ice on sidewalks does not apply to the same extent to *crosswalks*.[7] "In a municipality, particularly a village, where it is not required by charter that snow and ice be removed

4. Miller v. St. Paul, 38 Minn. 134, 36 N. W. 271.

§ 2786, *ante*.

Eight inch step at intersection of crosswalk and sidewalk not actionable. Gilliland v. Omaha, 89 Neb. 668, 131 N. W. 1055.

5. Open gutter eight inches wide and six inches deep, between sidewalk and street crossing, is not actionable negligence. Wright v. Lancaster, 203 Pa. 276, 52 Atl. 245.

Maintaining open gutters of suitable size, at street crossings, is not negligence, where a common and approved method of construction. Canavan v. Oil City, 183 Pa. 611, 38 Atl. 1096.

6. Crosswalk torn up—liable. Alexander v. Big Rapids, 76 Mich. 282, 42 N. W. 1071.

Where excavations for a new pavement were being made, and in the center a new railway track had been laid, and over it a temporary crosswalk had been constructed from curb to curb, the municipality is liable where the crosswalk was unsafe and a pedestrian was injured by the tipping of a loose board. Barker v. Kalamazoo, 146 Mich. 257, 109 N. W. 427.

7. "There is a difference in the duty of a municipality regarding the care of sidewalks, used wholly by pedestrians, and crosswalks or places where people cross over streets which are used in winter with teams attached to sleighs. Where a street in a village is traveled by the public with sleighs in the usual way when there is an accumulation of snow thereon, particularly in streets without specially formed crosswalks, the removal of all snow and ice at every crossing would materially interfere with the convenient and practical use of the street for trucking and driving. Even if the entire removal of snow from a crosswalk is desirable for its use by pedestrians, the ordinary travel upon a street necessarily carries more or less snow upon the crosswalk and when it thaws and freezes with the varying temperature it would be quite impossible, except by continuous effort, to keep crosswalks or crossings wholly free from snow and ice. We repeat that the obligation resting upon a municipality to keep its sidewalks free from snow and ice does not, in the absence of express provision of statute, apply to the same extent to a crosswalk or crossing on a public street." Dupont v. Port Chester, 204 N. Y. 351, 97 N. E. 735.

Statutes and general rules, § 2770, *ante*.

See also Brennan v. New York, 114 N. Y. S. 578, 130 App. Div. 267; Comstock v. Schuylerville, 124 N. Y. S. 92, 139 App. Div. 378; Smith v. Yankton, 23 S. D. 352, 121 N. W. 848.

Where there was a break between the end of the crosswalk and the sidewalk of about 10½ inches over a gutter, and pedestrians were required to step over the gutter to reach the sidewalk, the city was not liable where one stepped into the gutter under the belief that it was frozen over, on the ground that there was no negligence in allowing the gutter to fill up with snow, ice, water, etc., not solid enough to hold up people. O'Connor v. Dunkirk, 128 N. Y. S. 358, 143 App. Div. 696.

from the entire street, the duty as to crosswalks and crossings is performed when they are kept free from dangerous formations or obstacles. A temporary condition, caused by storms, that, for the time being, cover the roadway with snow from curb to curb, does not of itself create a dangerous condition of the street, and if it is left to facilitate the use of the street for driving or otherwise it is not negligence on the part of the municipality, unless there is something in the way in which the snow is left, or the form which it subsequently takes, as to thereby create an incumbrance, obstruction, or special danger."[8] *Mere slipperiness* of the walk does not make the municipality liable,[9] nor does *small ridges* of ice in the walk.[10] In no event need the walk be cleared of ice and snow at once,[11] and the municipality is

8. Dupont v. Port Chester, 204 N. Y. 351, 97 N. E. 735.

Failure to remove snow from crosswalks, where such removal would make streets practically impassable —not liable. O'Shaughnessey v. Middleport, 86 N. Y. S. 944, 93 App. Div. 93.

9. Mauchchunk v. Kline, 100 Pa. 119, 45 Am. Rep. 364; Depere v. Hibbard, 104 Wis. 666, 80 N. W. 933.

Not liable where snow is thrown each side of crosswalk, and pedestrian slipped in stepping on a bank of snow to avoid a pool of water resulting from the melting snow. Lichtenstein v. New York, 159 N. Y. 500, 54 N. E. 67, rev'g 51 N. Y. S. 642, 29 App. Div. 542.

No liability where pedestrian slipped on smooth ice filling a slight depression in the walk. Chamberlain v. Oshkosh, 84 Wis. 289, 54 N. W. 618, 19 L. R. A. 513, 36 Am. St. Rep. 928.

Not liable where snow and water stood in street up to the level of the sidewalk, and plaintiff stepped off the corner of the sidewalk, mistaking the water for concrete, slipped on an iron plate and fell. Spillane v. Fitchburg, 177 Mass. 87, 58 N. E. 176, 83 Am. St. Rep. 262, in which Chief Justice Holmes says: "The possibility of there being too much snow and water in the streets for a few days in the winter time is like the possibility of smooth ice, an incident of the climate which it would be unreasonable to require the city to guard against except under circumstances of greater danger than the present."

10. **Small ridge** of ice formed by trampling of snow and freezing—city not liable. McKellar v. Detroit, 57 Mich. 158, 23 N. W. 621, 58 Am. Rep. 357, followed in Rolf v. Greenville, 102 Mich. 544, 61 N. W. 3, in which latter case, however, the ridge was in the center of the sidewalk.

"Upon a crosswalk, * * * lumps and ridges are necessarily formed, which will harden when frozen, and for which the municipality will not be responsible. * * * The difficulties of keeping clear of ice a crosswalk at the foot of a steep descent is a factor which the jury might well consider." Comstock v. Schuylerville, 124 N. Y. S. 92, 139 App. Div. 378.

Michigan statute does not include liability for ridges in crosswalks. McKellar v. Detroit, 57 Mich. 158, 23 N. W. 621, 58 Am. Rep. 357.

11. Crosswalks need not be cleared of ice and snow at once. Brennan v. New York, 103 N. Y. S. 266, 117 App. Div. 849.

Failure to remove snow and ice within four days, it being frozen fast, not negligence. Staley v. New York, 56 N. Y. S. 237, 37 App. Div. 598.

But if waterworks company floods the streets, the municipality is liable for allowing the ice to remain longer than a reasonable time. Waltemeyer v. Kansas City, 71 Mo. App. 354.

not liable where the defect or obstruction has not existed a sufficient time to impute notice to it, in the absence of actual notice.[12]

7. DUTY TO GUARD AND WARN AGAINST DANGER.

§ 2795. General rule.

Given a condition in or close to a street, such as to be dangerous to travelers thereon, the municipality becomes burdened with a certain duty, provided, if notice is necessary,[13] it has notice, or ought to have had notice, thereof; and this is so even though the cause of the danger is lawful or the dangerous condition was wholly the act of a third person. This duty is to *warn* travelers of the danger so that they may turn back, pass around, or proceed with eyes open and watching for danger. In addition to the duty to repair, the duty of a municipality to use ordinary care to keep its streets in condition for use includes the duty[14] where there are *dangerous obstructions, declivities, or excavations* in or near the street, whether created by the municipality itself or by third persons, where it has notice thereof or notice is unnecessary, to take proper precautions to guard against accidents by the use of railings, barriers, lights or the like, especially at night.[15] But fences or barriers need not be

12. Not liable—hard or packed ice and snow, not there long enough to impute notice to the city. Brennan v. New York, 114 N. Y. S. 578, 130 App. Div. 267.

13. §§ 2807, 2809, *ante*.

14. The absence of a railing, where the public travel is endangered by the want of it, constitutes a defect in the highway. Beardsley v. Hartford, 50 Conn. 529, 538, 47 Am. Rep. 677.

Statutory duty, in Michigan not limited to repairs. Joslyn v. Detroit, 74 Mich. 458, 42 N. W. 50.

15. *Illinois.* Chicago v. Brophy, 79 Ill. 277; La Salle v. Evans, 111 Ill. App. 69; Salem v. Webster, 95 Ill. App. 120; Canton v. Dewey, 71 Ill. App. 346; Mt. Carmel v. Guthridge, 52 Ill. App. 632; Aurora v. Seidelman, 34 Ill. App. 285.

Kansas. Kansas City v. McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429.

Kentucky. Louisville v. Keher, 117 Ky. 841, 79 S. W. 270; Covington v. Bryant, 7 Bush (Ky.), 248.

Maine. Kimball v. Bath, 38 Me. 219, 61 Am. Dec. 243.

Massachusetts. Igo v. Cambridge, 208 Mass. 571, 575, 95 N. E. 557; Winship v. Boston, 201 Mass. 273, 87 N. E. 600; Torphy v. Fall River, 188 Mass. 310, 74 N. E. 465; Hyde v. Boston, 186 Mass. 115, 71 N. E. 118; Fox v. Chelsea, 171 Mass. 297, 50 N. E. 622; Prentiss v. Boston, 112 Mass. 43.

New York. Andrews v. Elmira, 113 N. Y. S. 711, 128 App. Div. 699.

North Carolina. Revis v. Raleigh, 150 N. C. 348, 63 S. E. 1049.

Oklahoma. Guthrie v. Swan, 3 Okla. 116, 41 Pac. 84.

West Virginia. Wilson v. Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

Wisconsin. Milwaukee v. Davis, 6 Wis. 377.

United States. Central Union Tel. Co. v. Conneaut, 167 Fed. 274.

See also Wallace v. New Haven, 82 Conn. 527, 74 Atl. 886; Blakeslee v. Geneva, 69 N. Y. S. 1122, 61 App. Div. 42.

Guards and warnings. Existence

erected merely because a traveler *may* meet with an accident.[16] They are necessary only when required to make the street reasonably safe for travelers who are themselves exercising ordinary care,[17] and are not necessary in a part of a street not prepared for use.[18] If the dangerous place is outside the limits of the street, the true test as to the necessity of a barrier is not the distance from the street of the dangerous object or place, but whether a traveler in passing along the street and exercising ordinary care would be

of dangerous obstruction, unguarded by any signal light or other warning, is negligence *per se*. Stanton v. Parkersburg, 66 W. Va. 393, 66 S. E. 514.

Must guard pit in street. Montgomery v. Bradley & Edwards, 159 Ala. 230, 48 So. 809.

Duty applies to that portion of the street occupied by street railway tracks. Hyde v. Boston, 186 Mass. 115, 71 N. E. 118.

Building in street. Municipality liable where no lights or danger signals. Hayes v. West Bay City, 91 Mich. 418, 51 N. W. 1067.

16. Logan v. New Bedford, 157 Mass. 534, 32 N. E. 910.

"It is not the *possibility*, however, that a traveler may get hurt if there is no railing or barrier that settles the question as to whether one should be put up, but whether one is required for the reasonable security of the public. * * * And that again depends on whether the danger to be guarded against is of such an unusual character as to expose the traveler to unusual hazard unless a railing or barrier is put up." Richardson v. Boston, 156 Mass. 145, 30 N. E. 478, holding archway in front of wall of brick block which was built up to and formed the line of the highway, need not be protected by railing.

"The danger which requires a railing must be of an unusual character, such as bridges, declivities, excavations, steep banks, or deep water. Spaces adjoining roads, streets and sidewalks, and unsuitable for travel, are often left open in both country and city; and a town or city is not bound to fence against them, unless their condition is such as to expose travelers to unusual hazard." Damon v. Boston, 149 Mass. 147, 21 N. E. 235.

17. Enders v. Chicago, 147 Ill. App. 406.

Guards held not necessary where open space is left within the angle at the junction of a street corner of a wide and a narrow sidewalk, elevated several feet. Bohl v. Dell Rapids, 15 S. D. 619, 625, 91 N. W. 315.

Protection of children. "The obligation of municipal corporations to erect barriers around areas adjoining or extending into its sidewalks or highways grows out of the duty which rests upon municipal corporations to maintain their streets and sidewalks in safe condition for those who may be rightfully using them, whether they be grown persons or children, but this duty cannot be held to extend to the protection of children against every sudden freak that may possess them. Corporations have indeed been held, in some instances, liable for a failure to adopt suitable precautions and safeguards to *protect children* against turn-tables and dangerous machines which they have permitted to demain sufficiently near their streets and sidewalks to allure and entice children into using them to their hurt; but no case, as far as we are aware, has gone to the extent of holding a municipal corporation liable in damages to a child who had left the street or highway, and suffered an injury as a consequence of his having climbed upon a structure entirely without its traveled limits, and fallen therefrom." Clarke v. Richmond, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281, and see § 2834, *post*.

18. Herndon v. Salt Lake City, 34 Utah, 65, 95 Pac. 646.

subjected to such imminent danger that it would require a barrier to make the street safe.[19]

Barriers are not necessary to mark or *define the limits of a street*,[20] although they may be necessary where a street is maintained on two levels, divided by an abrupt declivity.[21] Likewise, since the object of a barrier is to give warning of a danger in using the street, it is not necessary where the condition of the street itself is a danger signal;[22] and if an excavation in a street is plainly visible, guards are not necessary in the daytime.[23] So hydrants properly located need not be fenced in.[24]

This duty exists without regard to whether the defect is a *nuisance*,[25] although the necessity for guards is generally a *question for the jury*.[26]

In this class of cases, the theory generally is that the obstruction, embankment, excavation, or the like is lawful and that there is no negligence on the part of the municipality merely because of the existence thereof, but that the negligence consists wholly in the failure to protect or warn travelers of the danger resulting therefrom.

§ 2796. Same—dangers created by third persons.

This duty to guard, so as to warn of danger, exists although the obstruction or excavation is the act of a third

19. Mineral City v. Gilbow, 81 Ohio St. 263, 277, 90 N. E. 800.
§ 2774, *ante*.

20. Herndon v. Salt Lake City, 34 Utah, 65, 95 Pac. 646.
Even though there is nothing to mark the line of the highway, a railing need not be constructed at the side of the street where the ground is level, merely because of slippery ice outside the street limits. Damon v. Boston, 149 Mass. 147, 21 N. E. 235.
Municipality is not bound to erect barriers or railings to prevent travelers from straying from the highway, although there is a dangerous place, at some distance from the highway, which they may reach by so straying. Puffer v. Orange, 122 Mass. 389, followed in Daily v. Worcester, 131 Mass. 452.
Municipalities "are not required to fence their roads for the purpose of keeping travelers out of all private grounds that are unfit for public travel. The lack of a visible boundary of a highway, and the existence of an unsafe private path in the general direction of the public travel, are not the test of the duty of a town to maintain a railing in a public way." Knowlton v. Pittsfield, 62 N. H. 535.

21. Herndon v. Salt Lake City, 34 Utah, 65, 95 Pac. 646.

22. Compton v. Revere, 179 Mass. 413, 60 N. E. 931; O'Rourke v. Monroe, 98 Mich. 520, 522, 57 N. W. 738.
If piles of dirt are on each side of the trenches, and there is a driveway of seven or eight feet between the piles, no guards or barriers are necessary. Swart v. District of Columbia, 17 App. (D. C.) 407.

23. Rock Island v. Gingles, 217 Ill. 185, 75 N. E. 468.

24. Vincennes v. Thuis, 28 Ind. App. 523, 63 N. E. 315.

25. Garnetz v. Carroll, 136 Ia. 569, 114 N. W. 57.

26. Newcastle v. Grubbs, 171 Ind. 482, 86 N. E. 757.

person,[27] such as an abutter,[28] or independent contractor,[29] although if done without the permission of the municipality notice of the obstruction or excavation must first be brought home to the municipality,[30] while if the municipality has licensed the obstruction or excavation the authorities are in conflict as to the necessity for notice.[31]

Where sidewalks are built by abutters, it has been held that the municipality is liable for failure to guard the place while the walk is being constructed, the same as if the walk was being constructed by the municipality.[32]

§ 2797. Same—guards required by ordinance.

Especially is it negligence *per se* to fail to maintain barriers and danger signals where required by ordinance,[33] but it is otherwise where the ordinance applies merely to third persons and not to the municipality.[34] However, it has been held in Michigan that the violation of an ordinance requiring the city to guard excavations by barriers and lights is not negligence *per se* but only evidence of negligence.[35]

§ 2798. Same—statutory provisions.

In some states, the statute expressly authorizes recovery for failure to erect barriers, at least to some extent. Thus, in Massachusetts, the statute authorizes a recovery where the injury results from "a want of a sufficient railing in or upon a way, causeway or bridge."[36] There is a like

27. Blocher v. Dieco, 30 Ky. L. Rep. 689, 99 S. W. 606; Monje v. Grand Rapids, 122 Mich. 645, 81 N. W. 574; Joslyn v. Detroit, 74 Mich. 458, 42 N. W. 50.

§ 2750, *ante.*

28. McCoull v. Manchester, 88 Va. 579, 8 S. E. 379, 2 L. R. A. 691.

Building materials placed there by an abutter, rule applies. Seneca Falls v. Zalinski, 8 Hun (N. Y.) 571.

29. Ray v. Poplar Bluff, 70 Mo. App. 252.

§§ 2662-2663, *ante.*

Rule applies where the obstruction is made by contractors who contract with the municipality to do the work. Wilson v. Wheeling, 19 W. Va. 323, 347, 348, 42 Am. Rep. 780; Drake v. Seattle, 30 Wash. 81, 70 Pac. 231, 94 Am. St. Rep. 844.

30. § 2807, *post.*

31. § 2751. *ante.*

32. Lancaster v. Walter, 25 Ky. L. Rep. 2189, 80 S. W. 189. See also Boucher v. New Haven, 40 Conn. 456.

Contra. Not liable for failure to guard where sidewalk is being constructed by abutter, where the municipality has no notice of danger, the work not being intrinsically dangerous. Dooley v. Sullivan, 112 Ind. 451, 14 N. E. 566, 2 Am. St. Rep. 209.

33. Corsicana v. Tobin, 23 Tex. Civ. App. 492, 57 S. W. 319.

34. Browne v. Bachman, 31 Tex. Civ. App. 430, 72 S. W. 622.

35. Sterling v. Detroit, 134 Mich. 22, 25, 95 N. W. 986.

36. Thompson v. Boston, 212 Mass. 211, 98 N. E. 700.

Under this statute, however, the danger must be of an unusual character, such as declivities, excavations, steep banks or deep water. Thompson v. Boston, 212 Mass. 211, 98 N. E. 700; Shea v. Whitman, 197 Mass. 374, 83 N. E. 1096, 20 L. R. A. (N. S.) 980; Damon v. Boston, 149 Mass. 147, 151, 21 N. E. 235.

In Massachusetts, by another stat-

statute in New Hampshire[37] and a few other states.[38]

§ 2799. Application of rule to particular dangers.

The rules laid down in the preceding paragraphs apply equally well where the condition of the street is due to the fact that it is being improved. Where a defect in a way is caused by necessary street improvements, and the street is not closed to travel, reasonable care and diligence must be exercised to protect travelers from danger;[39] and whether such duty has been performed may depend "upon the character of the street, the amount and nature of travel upon it, the hour of the day, the degree of light, the extent of the danger, the kinds of barriers, safeguards and warnings provided, and all the other attendant conditions."[40]

Other classes of cases in which guards or warnings of some kind may be required may be roughly classified as follows: (1) openings in sidewalks, such as *areaways*;[41] (2)

ute, municipalities are liable where *private ways* open into public highways, for defects in the former, unless the entrances are closed up or other notice is given that such way is dangerous. Smith v. Lowell, 139 Mass. 336, 1 N. E. 412.

37. In New Hampshire, the statute imposing liability for "defective railings," has been held to mean railings necessary to guard travelers from going over dangerous embankments, and not railings merely useful as hand rails. Wentworth v. Pittsfield, 73 N. H. 358, 62 Atl. 218, holding no hand rail necessary on steps leading from crosswalk to sidewalk.

38. § 2722, *ante*.

39. Elgin v. Thompson, 98 Ill. App. 358; O'Neil v. Chelsea, 208 Mass. 307, 94 N. E. 279.

If improvements are being made in a street, the municipality need not close the street to travel, and may temporarily place material therein and dig holes so as to make it dangerous, without incurring liability, provided reasonable care is exercised to give warning of the dangers. Elam v. Mt. Sterling, 132 Ky. 657, 117 S. W. 250, 20 L. R. A. (N. S.) 512, with extensive note.

"A part of the sidewalk was being repaired, while the entire street had not been closed to public travel. While the public ways can not properly be maintained without frequent repairs, which can not be classed as defects, yet ordinarily when in process they may renuer the way defective, and unsafe if left open to travelers. Pratt v. Cohasset, 177 Mass. 488, 59 N. E. 79. In undertaking the work without closing the street, it became the defendant's duty, by either erecting, and maintaining a sufficient barrier, or posting notices, or providing some other suitable means, to warn travelers that this part of the sidewalk had been withdrawn from the use of the public." Winship v. Boston, 201 Mass. 273, 87 N. E. 600.

40. O'Neil v. Chelsea, 208 Mass. 307, 94 N. E. 279.

41. If openings in sidewalks covered by iron doors on hinges are allowed to remain open, while in use, precautions must be taken to protect the hole. Dehaven v. Danville Gaslight Co. (Ky. 1912), 150 S. W. 322.

However, a municipality is not bound to maintain a railing in front of the numerous basements and basement steps that line its business streets. Beardsley v. Hartford, 50 Conn. 529, 540-546, 47 Am. Rep. 677.

The mere fact that travel is endangered by basement openings without a railing is not sufficient to show a duty to erect such railing. Beardsley v. Hartford, 50 Conn. 529, 546, 47 Am. Rep. 677.

Stairway, where on opening in sidewalk, must be made safe by

holes in sidewalks caused by sidewalk being under course of construction; (3) *steep banks* or dangerous places adjoining or close to the sidewalk;[42] (4) steep *embankment* on side of driveway;[43] (5) obstructions or excavations in driveway, caused or put there by third persons;[44] (6) obstructions or excavations on or in, or close to, *crosswalks*;[45] (7) dangers in or near *bicycle paths*;[46] (8) *pool of water* in or near street.[47]

§ 2800. Same—declivities and embankments.

If a sidewalk or the driveway is so near a steep declivity as to be dangerous, it is generally the duty of the municipality to erect railings on the side to protect, or at least warn, travelers.[48] This applies equally well where the way

lights or other precautions. Wilson v. Syracuse, 21 Hun (N. Y.), 411.

Outside cellarway. So where an *outside cellarway* extends some distance into the sidewalk, a trapdoor should not be left open without a railing or guard. Earl v. Cedar Rapids, 126 Ia. 361, 102 N. W. 140, 106 Am. St. Rep. 361.

42. § 2800, *post*.

43. § 2800, *post*.

44. *Post*, this section.

45. **Crosswalks.** Execavation close to crosswalk, guards necessary. Hall v. Manson, 99 Ia. 698, 68 N. W. 922, 34 L. R. A. 207.

Where narrow crossing is over a deep hole, and there are no guard rails or lights, it is negligence. Gallagher v. Tipton, 152 Mo. App. 412 133 S. W. 135.

46. **Bicycle path.** Guards necessary at sharp turn in bicycle path a few feet from a gutter and sidewalk. Prather v. Spokane. 29 Wash. 549, 70 Pac. 55, 59 L. R. A. 346, 92 Am. St. Rep. 923.

Where the boundary between curbing and a bicycle path, in a large city, was not easily distinguishable, and the path was used by a large number of cyclists, it is negligence not to light the place or in some way warn those using the path of the danger. Collett v. New York, 64 N. Y. S. 693, 51 App. Div. 394.

47. If water is accumulated partly on a street and in part on abutting lots, by the negligence of the municipality in filling in the street with earth, and no barrier is erected, the municipality is liable for the death of a child drowned in the pond after entering the pond from the street. Bowman v. Omaha, 59 Neb. 84, 80 N. W. 259.

So if water is collected on the side of a street, so as to be attractive and dangerous to children, suitable safeguards should be provided, if practicable. Elwood v. Addison, 26 Ind. App. 28, 59 N. E. 47.

Pool of water impregnated with acids: must guard. Weida v. Hanover Tp., 30 Pa. Super. Ct. 424.

48. Necessity for guard rail on driveway, where embankment, held for jury. White v. Ballard, 19 Wash. 284, 53 Pac. 159.

High and steep embankment, negligence to leave without guard or light. Wyandotte v. Gibson, 25 Kan. 236.

Failure to guard embankment with railings held not negligence where roadway was in first class condition its entire width. was bounded on each side by a curb eight inches high, and there was ten feet in width of sidewalk before coming to the embankment. Hubbell v. Yonkers, 104 N. Y. 434, 10 N. E. 858, 58 Am. Rep. 522.

If the embankment is along side railway tracks at the bottom thereof, there is all the more reason why barriers should be erected on the side of the road. Wellman v. Susquehanna Depot, 167 Pa. 239, 31 Atl. 566.

Making a cut in grading a street Bluff became dangerous afterwards to knowledge of city although safe when work ceased. City held liable

terminates at the edge of a steep declivity.[49] But where it is claimed that a fence or railing should have been placed on the side of a driveway, where there was a steep bank, the facts that the roadway on the top of the embankment is wide and that there is nothing along the road calculated to frighten horses are material; and it may be negligence to leave the steep or precipitous sides of a driveway unguarded in the populous portion of a municipality, and not negligence to leave them unguarded in a less populous portion.[50]

If a sidewalk is so near an excavation, steep embankment, or other dangerous place, as to render it unsafe, it is the duty of the municipality to guard the walk by railings or barriers so as either to prevent accidents or at least to warn passers-by of the danger;[51] and this is also true where the sidewalk is several feet above the ground.[52]

where portion of bluff fell. Vicksburg v. McLain, 67 Miss. 4, 6 So. 774.

Fills in the middle of a street, if of considerable height, with spaces on each side left in its natural state, where the embankment is precipitous, must be protected by railing or barrier. Prideaux v. Mineral Point, 43 Wis. 513, 28 Am. Rep. 558.

The lack of barriers on the sides of approaches to a bridge will not make a municipality liable for injuries caused by a team going off the bank when the roadway was wide enough for two teams to pass without difficulty, and the proximate cause of the accident was the fact that the horse became frightened and so unmanageable that the driver could not keep him within the limits of the road. Bell v. Wayne, 123 Mich. 386, 82 N. W. 215, 48 L. R. A. 644, 81 Am. St. Rep. 204.

49. Safeguards necessary at ditch at end of sidewalk. Hutchison v. Summerville, 66 S. C. 442, 45 S. E. 8.

Barrier necessary at end of walk, near deep creek. Kinney v. Tekemah, 30 Neb. 605, 46 N. W. 835.

Must protect unguarded embankment at end of street. Bean v. Portland (Me. 1912), 84 Atl. 981.

50. Tarras v. Winona, 71 Minn. 22, 73 N. W. 505.

Failure to fence an embankment is not negligence, where necessary only to protect persons driving unmanageable horses. Hubbell v. Yonkers, 104 N. Y. 434, 10 N. E. 858, 58 Am. Rep. 522.

51. Mt. Vernon v. Brooks, 39 Ill. App. 426; Chicago v. Baker, 95 Ill. App. 413.

§ 2774, *ante*.

Must guard trench in space between curb and sidewalk. Townley v. Huntington, 69 W. Va. 574, 70 S. E. 368.

Want of railing to protect from open ditch held not negligence, under facts of particular case. Spencer v. Mayfield, 43 Ind. App. 134, 85 N. E. 23.

A municipality is under no duty to cover an ordinary drainage ditch next to the sidewalk, nor to place a guard rail at the side of the walk, where the sidewalk was not more than two feet above the bottom of the ditch. Braatz v. Fargo, 19 N. D. 538, 125 N. W. 1042, 27 L. R. A. (N. S.) 1169.

Electric light a few feet above the sidewalk and fourteen inches outside a railing, must be covered and properly insulated. Schmidt v. Chicago, 107 Ill. App. 64.

52. Normal v. Webb, 91 Ill. App. 183; Bennett v. Sing Sing, 14 N. Y. S. 463, 60 Hun, 579.

Sidewalk was seven to nine inches above the ground, and at place of accident there was a maple tree on the inside of the walk, the shadow from which darkened the walk. There was no light of any kind. Absence of barrier held negligence. Sellersburg v. Ford, 39 Ind. App. 94, 79 N. E. 220.

§ 2801. Same—persons coming on street from private property or way.

The measure of duty resting upon a municipal corporation in regard to people coming upon the street from a private way or a road not recognized as a public highway is not altogether clear. The following statement is made in an early Maine case: "It is well settled that even though there be a defect or obstruction within the limits of the highway as located, if it is not in the traveled part of the road, nor so connected with it as to affect the safety or convenience of those using the traveled path, the town is not responsible for an injury sustained by one using the road *for the purpose of passing to or from a private way, or his own land.*"[53]

The rule is thus stated *in New York*: "If a road apparently, though not in fact, a public highway, is commonly used by the public, and a municipality, in the exercise of its right in improving an intersecting street, leaves the approach from the road in a dangerous condition, the duty of the municipality to the public requires the exercise by it of reasonable care to the prevention of such accidents as may reasonably be anticipated to happen to those travelling upon the road with due care and in ignorance of the danger."[54]

In Massachusetts, it has been held that one who was injured by reason of an excavation in the street which had been sufficiently barricaded to protect travelers coming along the road but not those coming in from the traveled way, could recover.[55] So *in Nebraska,*[56] *Pennsylvania,*[57] and *Virginia,*[58] persons injured while entering upon a street from a private way, because of the absence of barriers at the side of the road in addition to those crosswise to the street, were held to be entitled to recover. On the other hand, in *Iowa,* it has been held that a municipality is not liable for a failure to guard its streets from approach by private ways at points where such approach has been made dangerous by recent excavations by the municipality.[59] And there is

53. Morgan v. Hallowell, 57 Me. 375.

54. Dennis v. Elmira Heights, 70 N. Y. S. 312, 59 App. Div. 404, 409, Justice Kellogg dissenting.

55. Burnham v. Boston, 10 Allen (Mass.), 290.

56. Omaha v. Randolph, 30 Neb. 699, 46 N. W. 1013.
Municipality is not liable for injuries from a defective crossing from private property into a public street. McCook v. Parsons, 77 Neb. 132, 108 N. W. 167.

57. O'Malley v. Parsons Borough, 191 Pa. 612, 43 Atl. 384, 71 Am. St. Rep. 778.

58. Orme v. Richmond, 79 Va. 86.

59. Goodin v. Des Moines, 55 Ia. 67, 7 N. W. 411.

a like holding in *Kansas*[60] and in *New Hampshire*.[61] So liability has been denied in *Canada*.[62]

However, without regard to this conflict in the cases, it is clear that a municipality cannot be held liable for failure to erect barriers or to maintain lights to prevent injury to persons seeking to enter a street from private land at a point at which there is no traveled way, either public or private, and at which there is nothing to put the municipality on notice that an entrance is likely to be attempted.[63]

§ 2802. Guards erected by third persons.

Of course, if a suitable barrier or warning has been erected by a third person in the performance of the work, it relieves the municipality from the necessity of taking like precaution, and it may avail itself, in its defense, of the barriers or warnings suitable in themselves and properly placed by the author of the danger or others.[64] It is no defense, however, that the municipality has contracted with the persons doing the excavation to adopt proper guards, if they are in fact omitted.[65]

§ 2803. Guards closing street for travel.

A municipality may entirely close a street while repairs are going on,[66] and if a street is so closed, there is no liability for injuries,[67] provided of course it is properly closed, *i. e.*, the barriers are sufficient to warn travelers and to impart notice that the street is closed. Moreover, if necessary to prevent accidents, a municipality not only may, but it is its duty to, close the street to the public, by some barrier.[68] So a municipality may block off a portion of a street, in its discretion, for the comfort and well being of

60. Mulvane v. South Topeka, 45 Kan. 45, 25 Pac. 217, 23 Am. St. Rep. 706.

61. Elliott v. Mason, 76 N. H. 229, 81 Atl. 701, 37 L. R. A. (N. S.) 357 (with note on this subject).

62. McCarthy v. Oshawa, 19 U. C. Q. B. 245.

63. Ivester v. Atlanta, 115 Ga. 853, 42 S. E. 220.

See also Clark v. Richmond, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281.

64. Stockton Automobile Co. v. Confer 154 Cal. 402, 97 Pac. 881; Kansas City v. Bermingham, 45 Kan. 212, 25 Pac. 569; Walker v. Ann Arbor, 111 Mich. 1, 69 N. W. 87.

65. Storrs v. Utica, 17 N. Y. 104, 72 Am. Dec. 437.

§ 2728, *ante*.

If the municipality relies on third persons to guard an excavation, it is liable for any failure on their part. O'Neil v. Chelsea, 208 Mass. 307, 94 N. E. 279.

No defense that street commissioner instructed his employees to put up barricades and danger signals but that they neglected to do so. Armstrong v. Auburn, 84 Neb. 842, 122 N. W. 43.

66. Peterson v. Seattle, 40 Wash. 33, 82 Pac. 141.

67. White v. Boston, 122 Mass. 491.

§ 2740, *ante*.

68. Pettingill v. Yonkers, 116 N. Y. 558, 564, 22 N. E. 1095, 15 Am. St. Rep. 442.

sick residents therein, provided the obstruction for that purpose is such as to give reasonable notice of the closing of part of the street.[69]

However, the barrier must be a reasonable one and not such as to endanger the safety of travelers using ordinary care. Thus, if a wire should be stretched across a street, without more, the barrier might well be considered insufficient,[70] while a heavy rope might be held sufficient.[71]

Whether shutting off only part of the width of a street, with a notice that the street is closed for travel, is sufficient to close the entire width, depends on circumstances.[72]

§ 2804. Sufficiency of guards or warning.

In a case where some kind of a guard or warning is conceded to be necessary, the question arises as to what is sufficient for such purpose. This is not susceptible of a precise

69. Anderson v. Wilmington, 2 Penn. (Del.) 28, 43 Atl. 841.

70. On closing a street for travel while making improvements, must provide adequate danger signals to warn travelers of the danger; and where a wire was stretched diagonally across a street with a red lantern at one end thereof, the question was held one for the jury. Ahlfeldt v. Mexico, 129 Mo. App. 193, 108 S. W. 122.

A barbed wire across a street to prevent travel is actionable where there are no lights or other warning, and one runs into it in the nighttime. Glasgow v. Gillenwaters, 113 Ky. 140, 67 S. W. 381.

If obstructions are put in a street, to close it for travel, they must be such as to protect from danger persons attempting to use the street. Holliday v. Athens, 10 Ga. App. 709, 74 S. E. 67.

71. Stretching two-inch rope across street as sufficient held question for jury. Holliday v. Athens, 10 Ga. App. 709, 74 S. E. 67.

72. "It recently has been held by this court that a traveler on a city street in many cases may be justified in thinking that a notice placed upon a barrier in the street that the street is closed to public travel is no broader in its scope than the barrier itself, and that only that part of the street which is actually shut off by the barrier is intended to be closed to public travel. Hurley v. Boston, 202 Mass. 68, 88 N. E. 586. This applies to cases in which the whole of the road is worked for public travel, but only a part of its width is shut off; and it must apply more forcibly in a busy and crowded street and in cases where upon the apparent indications a part of the width of the street is not only not shut off, but according to the indications on the surface of the ground has purposely been left open for travel." Stoliker v. Boston, 204 Mass. 522, 90 N. E. 927.

"If they put up signs and barriers which showed that one side of the street was withdrawn from public travel by reason of the repairs being made upon it, which rendered it for the time unfit for use, they performed their duty. On receiving notice of this kind, it was the duty of a traveler to use only that part of the way which was left open for use. Such a notice was equivalent to a statement that the way was dangerous, was not to be used, and that the defendants would not be responsible for any accident that might happen from the use of it. One who should pass over it, after receiving such a notice, would be bound to know that he was traveling at his own risk, and that the city and the railway company owed him no duty to make further provision for his safety." McFarlane v. Boston Elev. Co., 194 Mass. 183, 80 N. E. 447, holding bicyclist could not recover.

answer.[73] About all that can be said is that reasonable care to protect travelers is the test;[74] and that the sufficiency is generally a *question for the jury*,[75] although in particular cases barriers may be held sufficient as a matter of law.[76] However, it is clear that the street need not be so barricaded as to absolutely preclude the possibility of injury but it is sufficient that a plain warning of danger in traveling a street is given.[77]

73. See Martin v. Chelsea, 175 Mass. 516, 56 N. E. 703, dist'g Blessington v. Boston, 153 Mass. 409, 26 N. E. 1113.

Plank laid on barels, completely fencing in a shallow excavation in sidewalk, sufficient. Welsh v. Lansing, 111 Mich. 589, 70 N. W. 129.

Loose plank, resting at one end on a barrel, held insufficient. Sutton v. Snohomish. 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847.

Warning as to steam roller. Need not warn travelers that steam roller is about to start. McMulkin v. Chicago, 92 Ill. App. 331.

Keeping the crowd moving over a bridge, where gathered to witness a parade, held sufficient care where bridge collapsed because of extraordinary strain placed on it. Coolidge v. New York, 90 N. Y. S. 1078, 99 App. Div. 175, 180.

74. O'Rourke v. Monroe, 98 Mich. 520, 57 N. W. 738.

75. Stockton Automobile Co. v. Confer, 154 Cal. 402, 97 Pac. 881; Baltimore v. Maryland, 166 Fed. 641, 647, 92 C. C. A. 335.

Whether the city had discharged its duty to the public in thus warning it against the use of the bridge, so that as a matter of law it would be exempt from liability generally for injuries to persons attempting to cross while it was in that condition, we need not stop to inquire, for while the city owes a duty to the public to keep its bridges and highways in a reasonably safe condition for travel, yet, when liability is sought to be enforced, the question is as to the duty owed to the plaintiff under the attending facts and circumstances when the injury was received. Craine v. Metropolitan St. R. Co., 246 Mo. 393, 152 S. W. 24.

Sign on one side of street to look out for steam roller. Question for jury whether reasonable warning to persons driving on the other side. Mulligan v. New Britain, 69 Conn. 96, 36 Atl. 1005.

Ropes around open trench in street. Sufficiency as barrier a question for the jury. Norwood v. Somerville, 159 Mass. 105, 33 N. E. 1108.

Wire or string around a grass plot between curb and sidewalk, in business district, negligence held question for jury. Shreve v. Ft. Wayne (Ind. 1911), 96 N. E. 7.

Sufficiency of railing held question for jury. St. Paul v. Kuby, 8 Minn. 154.

76. See Tagge v. Roslyn, 51 Wash. 258, 98 Pac. 668.

At any event, where basement steps are on private property adjoining the sidewalk, a barrier between the steps and the parallel sidewalk is sufficient without a gate or barrier at the entrance to the stairway. Fitzgerald v. Berlin, 51 Wis. 81, 7 N. W. 836, 37 Am. Rep. 814, reaffirmed on second appeal in 64 Wis. 203, 24 N. W. 879.

77. Hunter v. Montesano, 60 Wash. 489, 111 Pac. 571.

"The learned justice who tried the case intimates in his opinion denying the motion for a new trial that the defendants could have absolutely assured foot passengers from accidents such as plaintiff met by placing some sort of a barrier along the curb so as to fence off the roadway from the sidewalk, and thus render it impossible for a pedestrian to attempt to cross; and the chief proof of negligence dwelt upon [by] the respondent is the failure to erect such barrier. Undoubtedly such a barrier might have been erected in such a way as to make such an accident well-nigh impossible, but we do not consider that either of the defendants was bound to go to this length, for neither of them was in the position of an insurer against possible accident. All

The rule is well summed up as follows: It is the duty of the municipality, when the obstructions are placed in the street, to use such means as are reasonably necessary to warn those using the street of the presence of the obstruction, and it is generally a question for the jury, "under the particular facts in each case, to determine whether or not the means used for this purpose were reasonably sufficient. Guard rails, lights, or watchmen, any or all, might be required, according to the local conditions. In some instances guard rails might be amply sufficient, in others, lights, while in still others additional means might be required. No hard and fast rule can be laid down fixing the means that shall be employed in each particular case, further than to say that they shall be such as are reasonably sufficient to warn the traveling public of the presence of the obstruction."[78] Generally, a plain warning by the use of a *red light* is sufficient, without barricading a street so as to preclude injury,[79] but

that either could be held to under any view of the case was to exercise reasonable care to guard against accidents, and, in determining what would be reasonable care, they were both entitled to take into account the desirability of interfering as little as possible with the traffic and the improbability of any one attempting to cross the street at a point other than the usual crossing." McDonald v. Degnon-McLean Cont. Co., 109 N. Y. S. 519, 124 App. Div. 824.

"The defendants were not bound to, and could not reasonably have been expected to, so guard the trench as to insure the safety of every heedless foot passenger who sought to cross the street at an unusual and unaccustomed place, and under conditions which would render all precautions, short of actual barriers, futile and ineffective. There is even less reason for holding the City of New York liable than for holding the contractor." McDonald v. Degnon-McLean Cont. Co., 109 N. Y. S. 519, 124 App. Div. 424.

Width of barriers. Barriers need not necessarily extend across the entire street. Jones v. Collins, 177 Mass. 444, 59 N. E. 64. See also Leonard v. Boston, 183 Mass. 68, 66 N. E. 596.

Children. A fence need not be such a one that children cannot surmount it or crawl through. Lineburg v. St. Paul, 71 Minn. 245, 73 N. W. 723.

78. Per Justice Carroll in Grider v. Jefferson Realty Co. (Ky.), 116 S. W. 691, approved in Georgetown v. Groff, 136 Ky. 662, 124 S. W. 888.

"In one case a light might be sufficient warning, and in another case a barrier, and in still another case both might be required, or in some extreme cases both and a watchman in addition. The sufficiency of the warning in the particular case is left to the jury, and at all times it must be sufficient to warn the public of the dangerous obstruction, whatever means may be required." De Garmo v. Vogt (Ky. 1913), 152 S. W. 969.

Railings on each side of a walk may be unnecessary where access thereto is guarded by barricades and red lights. Chicago v. McKenna, 114 Ill. App. 270.

Barricade sufficient without danger signals. Collier v. Ft. Smith, 73 Ark. 447, 84 S. W. 480, 68 L. R. A. 237.

79. Karrer v. Detroit, 142 Mich. 331, 106 N. W. 64.

A red lantern at each end of a pile of sand is sufficient. Carlson v. New York, 134 N. Y. S. 661, 150 App. Div. 264.

Need not both rail and light an open ditch in a street. Campbell v. Stanberry, 85 Mo. App. 159.

The lights may be upon or near the obstruction. Georgetown v. Groff, 136 Ky. 662, 124 S. W. 888.

an electric light upon a street cannot ordinarily take the place of red lanterns.[80]

A *watch* need not be kept during the night over an excavation, unless there are circumstances peculiar to the particular case making it necessary.[81]

§ 2805. Duty as a continuing one: effect of removal of guards.

The duty to keep the place guarded, if it exists, is a continuing one,[82] but the municipality is not liable where proper warnings, such as barriers or lights or the like, have been put out but are removed by a third person or by accident before the injury, and the municipality has no actual notice of the removal and such a time has not elapsed thereafter as to charge the municipality with notice thereof and afford opportunity to replace them.[83] Having performed its duty, in the first instance, the municipality is ordinarily not required to keep a man on guard to see that the barriers or lights are not removed;[84] but if guards are liable to be

80. "It will not do to say that an electric light upon a street, however bright, can always take the place of danger signals, where temporary obstructions are placed upon them. The object of a danger signal is to direct the attention to a particular object, and warn those approaching of something unusual. The electric light may enable those passing over the streets to see the way, and avoid others, and things generally found on the street, but they give no special warning whatever, and, as is well known from experience, are often deceptive and bewildering." Aurora v. Rockabrand, 149 Ill. 399, 402, 36 N. E. 1004.

But absence of red light on big pile of bricks at night, not actionable where street well lit and pile could be seen plainly for fifteen feet. Pinnix v. Durham, 130 N. C. 360, 41 S. E. 932.

81. Dooley v. Sullivan, 112 Ind. 451, 452, 14 N. E. 566, 2 Am. St. Rep. 209.

See also Portsmouth v. Lee, 112 Va. 419, 71 S. E. 630.

Necessity for watchman. "There may be such undertakings, where the crowded character of travel, the peculiar uses of the highway at the particular point, and various other conditions, would make the familiar method of warning by the use of red lanterns utterly inadequate as a safeguard, and might even require the constant presence of watchmen by night to constitute the exercise of reasonable care." McFeeters v. New York, 92 N. Y. S. 79, 81, 102 App. Div. 32.

If both ends of a sidewalk over a bridge are barred, it is not negligent in not having some one at each end of the bridge to warn passers-by. Heidenwag v. Philadelphia, 168 Pa. 72, 31 Atl. 1063.

82. Hesselbach v. St. Louis, 179 Mo. 505, 522, 78 S. W. 1009.

83. Myers v. Kansas, 108 Mo. 480, 18 S. W. 914; Pyburn v. Kansas City, 166 Mo. App. 150, 148 S. W. 193; Ball v. Independence, 41 Mo. App. 469; Gedroice v. New York, 95 N. Y. S. 645, 109 App. Div. 176; McFeeters v. New York, 92 N. Y. S. 79, 102 App. Div. 32; Parker v. Cohoes, 10 Hun (N. Y.), 531; Mullen v. Rutland, 55 Vt. 77.

Removal of barriers. Of course, if barriers are erected and a watchman employed, and unknown persons remove the barrier while the watchman is at the other end of the excavation in the performance of his duty, and the injury occurs in the meantime, the municipality is not liable. O'Neil v. Bates, 20 R. I. 793, 40 Atl. 236.

84. Garnetz v. Carroll, 136 Ia. 569, 114 N. W. 57.

§ 2804, *ante*.

thrown down by boys, it has been held that it is the duty of the municipality to station a man to see that the guards are kept up.[85]

This exception, if it may be so called, applies equally well where lights are placed to warn travelers and they are extinguished without any known cause.[86] But if there is a duty to light an excavation with lanterns, it is not performed by leaving a lantern with so little oil that it will not remain lighted during the night.[87] But where lights are put out every night by independent contractors, this rule does not apply, so as to absolve the municipality from liability, where they fail to place the lights on a particular night, although the municipality had no notice that the contractors had neglected their duty on the particular night.[88] Furthermore, the municipality must take proper precautions to prevent the removal of lights or barriers, or to ascertain the fact and replace them speedily if they are removed.[89] So where barriers to protect an excavation must be removed every time a street car passes, and this is done by employees of the street car company, failure of such employees to replace the barriers is the negligence of the municipality.[90]

§ 2806. Duty to light streets.

It is necessary to distinguish clearly between the duty of a municipality to light its streets which are safe for travel and its duty to protect travelers from running into or falling in obstructions or excavations by the use of lights. In the former case, it is settled beyond dispute that the failure of a municipality to maintain lights in its streets is not, of itself, negligence, unless the duty so to do is imposed by statute or charter;[91] and mere *power* to light the streets, con-

85. Crawford v. Wilson & Baillie Mfg. Co., 28 N. Y. S. 514, 8 Misc. Rep. 48.

86. Blocher v. Dieco, 30 Ky. L Rep. 689, 99 S. W. 606; Mills v. Philadelphia, 187 Pa. 287, 40 Atl. 821.

No difference between a light which goes out and a light which has been removed by a third person. Buckley v. New York, 120 N. Y. S. 423, 135 App. Div. 512.

87. Baker v. Grand Rapids, 111 Mich. 447, 449, 69 N. W. 740.

88. Drake v. Seattle, 30 Wash. 81, 70 Pac. 231, 94 Am. St. Rep. 844.

89. Fox v. Chelsea, 171 Mass. 297, 50 N. E. 622.

90. Prentiss v. Boston, 112 Mass. 43, 48.

Momentary negligence of street car employees, in not replacing a guard after street cars have passed, resulting in injury to a traveler, is chargeable to the municipality. Blessington v. Boston, 153 Mass. 409, 26 N. E. 1113.

91. *Colorado.* Oliver v. Denver, 13 Colo. App. 345, 57 Pac. 729.

Georgia. Gaskins v. Atlanta, 73 Ga. 746.

Indiana. Spencer v. Mayfield, 43 Ind. App. 134, 85 N. E. 23; Mitchell v. Tell City, 41 Ind. App. 294, 81 N. E. 594, 83 N. E. 735; Vincennes v. Spees, 35 Ind. App. 389, 74 N. E. 277.

Massachusetts. Lyon v. Cambridge, 136 Mass 419; Randall v. Eastern R. Co., 106 Mass. 276, 8 Am. Rep. 327.

ferred upon a municipality, does not create the *duty* to light them.[92] So it is not negligence to fail to light the streets where the question whether the streets shall be lighted is left to the discretion of the municipality.[93] Neither the absence of lights nor defective lights is, in itself, negligence,[94] according to what seems to be the better rule,[95] although

Minnesota. McHugh v. St. Paul, 67 Minn. 441, 70 N. W. 5; Miller v. St. Paul, 38 Minn. 134, 36 N. W. 271.

North Carolina. Brady v. Randleman (N. C. 1912), 74 S. E. 811.

Pennsylvania. Horner v. Philadelphia, 194 Pa. 542, 45 Atl. 330; Canavan v. Oil City, 183 Pa. 611, 38 Atl. 1096.

South Dakota. Bohl v. Dell Rapids, 15 S. D. 619, 91 N. W. 315.

Utah. Herndon v. Salt Lake City, 34 Utah, 65, 95 Pac. 646.

See O'Rourke v. Sioux Falls, 4 S. D. 47, 54 N. W. 1044, 19 L. R. A. 789, 46 Am. St. Rep. 760.

Compare Baltimore City v. Beck, 96 Md. 183, 53 Atl. 976.

Fact that city ordinance requires lights to be provided under certain circumstances is immaterial. Lyon v. Cambridge, 136 Mass. 419.

Trees along the side of streets or the shadows cast by them into the streets, making intervals of comparative darkness between the street lights, are not nuisances which must be abated by the municipality. Blain v. Montezuma, 150 Ia. 141, 129 N. W. 808.

Walks in parks. "The walks in the park are not generally used in the nighttime for pleasure travel, and we do not think it should be held that the city has the legal duty imposed upon it to light up its walks in the park so that the attention of people will necessarily be called to irregularities like these steps that are found in different parts of the park." O'Rourke v. New York, 45 N. Y. S. 261, 17 App. Div. 349, which related to unlit steps in Central Park in New York City.

92. White v. New Bern, 146 N. C. 447, 59 S. E. 992, 13 L. R. A. (N. S.) 1166; Daytona v. Edson, 46 Fla. 463, 34 So. 954; Chicago v. Apel, 50 Ill. App. 132; Vincennes v. Thuis, 28 Ind. App. 523, 63 N. E. 315.

93. Freeport v. Isbell, 83 Ill. 440, 25 Am. Rep. 407.

94. White v. New Bern, 146 N. C. 447, 59 S. E. 992, 13 L. R. A. (N. S.) 1166.

95. "A city which is under no statutory obligation to light its streets is not, as matter of law, bound, when lighting them voluntarily, to do it in such a manner as to enable persons using them to see any obstruction that the city may have placed in the street, irrespective of whether the obstruction, such as a water plug, was a reasonable and proper one or not." Official syllabus in Columbus v. Sims, 94 Ga. 483, 20 S. E. 332.

Fact that a municipality has undertaken to light a street, does not make it liable because the system of lighting is inefficient. Blain v. Montezuma, 150 Ia. 141, 129 N. W. 808.

Discretion. Where a municipality has undertaken the duty to light its streets the placing and character of the lights rests largely in the discretion of the authorities. White v. New Bern, 146 N. C. 447, 59 S. E. 992, 13 L. R. A. (N. S.) 1166.

Courts cannot determine "how the lights shall be distributed through the city; or how any particular street or section of a street shall be lighted, whether by few or many lights, or whether by gas or electricity." Wolf v. District of Columbia, 21 App. (D. C.) 464, 474, 69 L. R. A. 83.

"As to whether sufficient light was provided by the city on the night of the accident, we may briefly say there was no legal obligation on a municipality to light its streets when their construction is reasonably safe for travel. That is solely a question for the municipal legislature. It may do many things not enjoined by the law to promote the general well-being and comfort of the citizen; but, in not doing that which no statute commands, negligence cannot be imputed to it. This,

there is some authority to the effect that if a municipality undertakes to light its streets, it is liable where the lights furnished are insufficient.[96] In any event, even if it is the duty of a municipality to light its streets, it is only required to do so in the manner that will make them reasonably safe for travel.[97]

As to the second branch of this question concerning lighting, while it is true, as already stated, that, in the absence of statute, a municipality is not liable for not lighting its streets, yet the fact that a street was not lighted may be material as showing lack of care during the time that the street was obstructed or was in process of repair.[98] In other words, if there are dangerous excavations, holes or obstructions in a street, the failure of the municipality to light the street is material in determining whether it has exercised reasonable care to keep the street in a safe condition.[99]

Whether excavations or obstructions are sufficiently guarded by barriers without lanterns, and whether lanterns alone are a sufficient warning thereof, has already been noticed.[1]

8. NOTICE OF DEFECTS.

§ 2807. Necessity for.

Except in West Virginia where the contrary rule is in

however, in no sense relieves it from the duty of that ordinary care which requires that temporary excavations for building purposes should be exposed by proper light, or that tempofary obstruction of the streets by building material should be made conspicuous in the same way." Canavan v. Oil City, 183 Pa. 611, 38 Atl. 1096.

96. Chicago v. Powers, 42 Ill. 169, 89 Am. Dec. 418, distg'd in Freeport v. Isbell, 83 Ill. 440, 442, 24 Am. Rep. 407, and in effect approved in Chicago v. Baker, 195 Ill. 54, 61, 62 N. E. 892.

If power to light is granted by statute, and the municipalty assumes such power, negligence in exercising it is actionable. Winchester v. Carroll, 99 Va. 727, 40 S. E. 37.

97. Chicago v. Apel, 50 Ill. App. 132; Chicago v. McDonald, 57 Ill. App. 250.

98. Wallace v. New Haven, 82 Conn. 527, 74 Atl. 886; Shreve v. Ft. Wayne (Ind. 1911). 96 N. E. 7; Indianapolis v. Scott, 72 Ind. 196, 202.

Lights. If a way is dangerous because of obstructions or excavations therein, and it cannot be made reasonably safe for travel at night simply by the erection of barriers, ordinary care requires the municipality to keep sufficient lights burning to properly warn travelers of the danger. Williams, Munic. Liability for Tort, § 120.

99. Griswold v. Ludington, 116 Mich. 401, 74 N. W. 663; Miller v. St. Paul, 38 Minn. 134, 36 N. W. 271; Davenport v. Hannibal, 108 Mo. 471, 477, 18 S. W. 1122; Norfolk v. Johnakin, 94 Va. 285, 26 S. E. 830.

Compare Jefferson v. Chapman, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136, aff'g 27 Ill. App. 43; Baltimore City v. Beck, 96 Md. 183, 53 Atl. 976.

1. § 2804, *ante*.

force,[2] it is settled beyond dispute that if a defect in the street is caused (1) by the act of a third person or (2) the failure of the municipality to repair in general, it is not liable, unless it (a) has actual notice of the defect, or (b) of such facts and circumstances as would by the exercise of reasonable diligence lead a prudent person to such knowledge.[3] This proposition is so well settled that it is needless to cite the authorities so holding.

The reason for this rule is clearly apparent, it being based on the rule that municipalities are not insurers against accidents. If the defective condition is caused by a third person, *i. e.*, the original negligence is that of a third person, the only negligence which can be attributed to the municipality is failure to act, and there certainly can be no obligation to act if the defective condition is neither known, nor should have been known, by the municipality. The same reasoning applies where there was no neglect in the original construction but the only neglect charged is that of failure to repair.

Furthermore, if repairs have been made and subsequently the street becomes defective, the notice inducing the repairs is not a continuing one but a new notice is ordinarily necessary.[4] But if repairs are made in a negligent manner, it will be presumed that the municipality knew that the defect existed after the repair was made; and this is also true where the abutter is ordered to and does, but negligently, re-

2. Arthur v. Charleston, 51 W. Va. 132, 41 S. E. 171; Sheff v. Huntington, 16 W. Va. 307; Chapman v. Milton, 31 W. Va. 384, 7 S. E. 22.

3. Boender v. Harvey, 251 Ill. 228, 95 N. E. 1084.

The rule is well established that, in order to charge a municipality for an injury happening to a third person using a street therein from an unlawful obstruction placed therein by a stranger without authority, it must appear that it had notice, express or implied, of the existence of the obstruction before the accident, and that a reasonable time had elapsed subsequent to the notice and before the injury, during which it could have abated the nuisance; and it is likewise the general rule that the municipality is not bound to anticipate infractions by third persons of the law or ordinance relating to its streets, enacted to secure their safety and an unobstructed right of passage. Thomas v. New York, 131 N. Y. S. 697, 146 App. Div. 512.

Warnings—removal—not liable unless notice. Stockton Automobile Co. v. Confer, 154 Cal. 402, 97 Pac. 881.

Under earlier statutes in Massachusetts, if a defect in a highway existed for twenty-four hours before the accident the municipality was liable without regard to its diligence (George v. Haverhill, 110 Mass. 506); but a later statute repealed this absolute liability. (Post v. Boston, 141 Mass. 189, 4 N. E. 815).

4. Hutchins v. Littleton, 124 Mass. 289; Bonine v. Richmond, 75 Mo. 437.

After the defect is repaired, notice of a new defect, although connected with the former defect or directly related to or affected by it, is necessary. Hutchins v. Littleton, 124 Mass. 289.

paid the sidewalk, since the duty to repair is primarily on the municipality.[5]

§ 2808. Same—notice not necessary where original negligence that of municipality.

If the defective condition is due to the act of the municipality itself or of its contractors or employees, no notice of any kind, either actual or constructive, is necessary.[6] Thus, the duty to guard excavations made by a contractor is not dependent on notice of the excavation.[7]

This exception, of course, includes *defects in original construction,* in which case no notice is necessary,[8] where lia-

5. Wheaton v. Hadley, 131 Ill. 640, 23 N. E. 422, aff'g 30 Ill. App. 564; Woodard v. Boscobel, 84 Wis. 226, 54 N. W. 332.

6. *Illinois.* Jefferson v. Chapman, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136, aff'g 27 Ill. App. 43; Chicago v. Brophy, 79 Ill. 277; Chicago v. Johnson, 53 Ill. 91.

Maine. Buck v. Biddeford, 82 Me. 433, 19 Atl. 912.

Massachusetts. Burditt v. Winchester, 205 Mass. 493, 91 N. E. 880.

Michigan. Boker v. Grand Rapids, 111 Mich. 447, 69 N. W. 740.

Minnesota. Kleopfert v. Minneapolis, 93 Minn. 118, 100 N. W. 669; Furnell v. St. Paul, 20 Minn. 117.

Missouri. Heberling v. Warrensburg, 204 Mo. 604, 103 S. W. 36; Smith v. St. Joseph, 42 Mo. App. 392.

Mississippi. Jackson v. Carver, 82 Miss. 583, 35 So. 157.

Nebraska. Lincoln v. Calvert, 39 Neb. 305, 58 N. W. 115; Omaha v. Jensen, 35 Neb. 68, 52 N. W. 833, 37 Am. St. Rep. 432.

North Dakota. Ludlow v. Fargo, 3 N. D. 485, 57 N. W. 506.

Oklahoma. Oklahoma City v. Welsh, 3 Okla. 288, 41 Pac. 598.

Pennsylvania. Rowland v. Philadelphia, 202 Pa. 50, 51 Atl. 589; Burger v. Philadelphia, 196 Pa. 41, 46 Atl. 262.

Texas. Ringelstein v. San Antonio (Tex. Civ. App.), 21 S. W. 634.

"The doctrine of express notice is not relevant to the question when the very danger is created by the city itself or by some one under its direction, for there notice is necessarily implied." Bailey v. Winston, 157 N. C. 252, 72 S. E. 966.

Notice is not necessary where work is being done under its authority and supervision. Birmingham v. McCary, 84 Ala. 469, 4 So. 630.

Act of purchaser from city, of fences, in failing to fill post hole, held act of city, so as not to require notice. Still v. Houston, 27 Tex. Civ. App. 447, 66 S. W. 76.

Act of seller. But notice is necessary where lumber is negligently piled in a street, although the person that piled the lumber had sold it to the municipality. Evansville v. Senhenn, 151 Ind. 42, 47 N. E. 634, 41 L. R. A. 728, 68 Am. St. Rep. 218.

7. Wilson v. Troy, 135 N. Y. 96, 32 N. E. 44, 18 L. R. A. 449, 31 Am. St. Rep. 817; Brusso v. Buffalo, 90 N. Y. 679.

8. *Illinois.* Alexander v. Mt. Sterling, 71 Ill. 366; Paxton v. Frew, 52 Ill. App. 393.

Iowa. Roney v. Des Moines, 150 Ia. 447, 130 N. W. 396; Achey v. Marion, 126 Ia. 47, 101 N. W. 435; Evans v. Iowa City, 125 Ia. 202, 100 N. W. 1112.

Minnesota. McDonald v. Duluth, 93 Minn. 206, 100 N. W. 1102 (where defects are not latent).

Missouri. Barr v. Kansas City, 105 Mo. 550, 16 S. W. 483; Brake v. Kansas City, 100 Mo. App. 611, 75 S. W. 191.

Ohio. Alliance v. Campbell, 6 O. C. D. 762, 17 Ohio Cir. Ct. R. 605.

Tennessee. Poole v. Jackson, 93 Tenn. 62, 23 S. W. 57.

Texas. Austin v. Ritz, 72 Tex. 391, 9 S. W. 884.

Failure to properly refill a sewer trench dug in the street—notice not necessary. Hutchinson v. Clarke, 26 R. I. 307, 58 Atl. 948.

bility therefor otherwise exists;[9] and this is so where the plan of construction is prescribed by the municipality, and followed by the actual constructor,[10] or where the walk was constructed by others.[11]

Furthermore, notice is not necessary in such cases as those herein noticed, where the original negligence is that of the municipality, *although actual notice is expressly required* by statute or charter provisions.[12]

§ 2809. Same—where original negligence that of licensee.

This matter has already been considered.[13]

§ 2810. Notice to particular persons as imputed to municipality.

The rule is that the knowledge or means of knowledge of an officer of a municipality will be imputed to the municipality where such officer is in charge of the streets or is charged with the duty to make repairs or remedy defects,[14] or it is

9. Liability for defects in plans, §§ 2633, 2766, *ante*.

10. Carroll's Adm'r v. Louisville, 117 Ky. 758, 78 S. W. 1117.

11. If a sidewalk *as originally constructed* was defective and unsafe, the city is liable, although it had no knowledge of the defective condition, and although it *did not construct the walk itself*. Roney v. Des Moines, 150 Ia. 447, 130 N. W. 396.

12. *Maine*. Jones v. Deering, 94 Me. 165, 47 Atl. 140.

Nebraska. Updike v. Omaha, 87 Neb. 228, 127 N. W. 229.

New York. Twist v. Rochester, 55 N. Y. S. 850, 37 App. Div. 307; Stedman v. Rome, 34 N. Y. S. 737, 88 Hun, 279.

Texas. Houston v. Isaacs, 68 Tex. 116, 3 S. W. 693.

Wisconsin. Adams v. Oshkosh, 71 Wis. 49, 36 N. W. 614.

Exception applies where charter requires actual notice. Houston v. Owen (Tex. Civ. App.), 67 S. W. 788. But not where proximate cause is failure to keep in repair. Houston v. Vatter, 32 Tex. Civ. App. 298, 74 S. W. 806.

"To hold that five days' notice should be given for a wrong committed by the city itself one hour, or one day, before the occurrence of the accident, and of which the city already has absolute knowledge, would be in the highest degree ludicrous and attribute to the lawmaker a want of foresight, insight, and comprehension which we cannot do. It is true that the statute provides that the city shall be 'absolutely exempt from liability' unless such notice is given, but we must give a reasonable construction to the language of the act. The law never requires an impossible thing. The section presupposes that the defect in the public way must have existed at least five days; otherwise the notice would be impossible. But, even if the notice should be held necessary where the defect is caused by the elements, or the unauthorized act of third parties, it could not with any degree of reason be said that it could be required where the danger was created by the negligent act of the city itself." Tewksbury v. Lincoln, 84 Neb. 571, 121 N. W. 994.

13. § 2751, *ante*.

14. *Illinois*. Lifschitz v. Chicago, 150 Ill. App. 201.

Minnesota. Cunningham v. Thief River, 84 Minn. 21, 86 N. W. 763.

Missouri. Miller v. Canton, 112 Mo. App. 322, 87 S. W. 96.

Virginia. Lynchburg v. Wallace, 95 Va. 640, 29 S. E. 675.

Wisconsin. Mauch v. Hartford, 112 Wis. 40, 87 N. W. 816.

Officer or agent whose duty it was to keep or see the streets were kept

his duty to report the matter to some officer with authority to act.[15] So notice to an officer charged with the duty of keeping the streets in safe condition, of the unsafe condition of a tree in the street, is notice to the municipality although he had no power to remove the tree except by order of the mayor and aldermen.[16]

But notice to a municipal officer whose duties in no way relate to the care of streets is not notice to the municipality.[17] So notice to an officer as an individual, before he became an officer, is not imputed to the municipality.[18] However, notice to a *de facto officer* is sufficient,[19] but notice to a subordinate employee is generally insufficient.[20]

The particular officers or employees whose knowledge is imputed to the municipality cannot be enumerated with precision. It all depends on the duties of the particular officer in the particular municipality. Thus, it may well be held that notice to a certain officer in one municipality is notice to the municipality and it may also properly be held that notice to one holding the same office in another municipality is not notice to the municipality, since the scope of the duties of such officer may be different in the two municipalities.

Notice to a *policeman* is ordinarily not notice to the municipality,[21] except where he is charged with the duty of remedying or reporting defects.[22]

in repair. Poole v. Jackson, 93 Tenn. 62, 23 S. W. 67.

Notice to one employed to repair is sufficient. Smith v. Des Moines, 84 Ia. 685, 51 N. W. 77.

15. Dallas v. Meyers (Tex. Civ. App.), 55 S. W. 742.

16. Chase v. Lowell, 151 Mass. 422, 24 N. E. 212.

17. Savanna v. Trusty, 98 Ill. App. 277; Edwards v. Cedar Rapids, 138 Ia. 421, 116 N. W. 323.

18. Lohr v. Philipsburg, 156 Pa. 246, 27 Atl. 133.

19. McSherry v. Canandaigua, 129 N. Y. 612, 29 N. E. 821, aff'g 59 Hun, 616, 12 N. Y. S. 751.

20. Sprague v. Rochester, 34 N. Y. S. 1126, 88 Hun (N. Y.), 613; Owen v. Seattle, 64 Wash. 10, 116 Pac. 261.

21. Columbus v. Ogletree, 96 Ga. 177, 22 S. E. 709; Reid v. Chicago, 83 Ill. App. 554; Atwater v. Baltimore, 31 Md. 462; Corey v. Ann Arbor, 134 Mich. 376, 96 N. W. 477. Compare Cleveland v. St. Paul, 18 Minn. 279.

City marshal. Rule applied to. Cook v. Anamosa, 66 Ia. 427, 23 N. W. 907; Norman v. Teel, 12 Okla. 69, 69 Pac. 791. But see Hayes v. West Bay City, 91 Mich. 418, 51 N. W. 1067 (moving of building).

22. *Connecticut.* Cummings v. Hartford, 70 Conn. 115, 38 Atl. 916.

Georgia. Columbus v. Ogletree, 102 Ga. 293, 29 S. E. 749; Macon v. Morris (Ga. App. 1912), 73 S. E. 539.

Illinois. Joliet v. Looney, 159 Ill. 471, 42 N. E. 854; Lundon v. Chicago, 83 Ill. App. 208.

Kentucky. Louisville v. Lenehan, 149 Ky. 537, 149 S. W. 932.

Missouri. Carrington v. St. Louis, 89 Mo. 208, 1 S. W. 240, 58 Am. Rep. 108, distinguishing Atwater v. Baltimore, 31 Md. 462.

New York. Rehberg v. New York, 91 N. Y. 137, 43 Am. Rep. 657.

Texas. San Antonio v. Talerico (Tex. Civ. App.), 78 S. W. 28.

But mere rule of police department requiring policemen to note defects in streets and remove them when practicable, and to report any

Notice to the following officers has been held sufficient in particular municipalities: *chief executive* of city;[23] *chief of police*;[24] city *electrician*;[25] city *engineer*;[26] *council committee* on streets;[27] member of common *council*;[28] sidewalk *inspector*;[29] *specially appointed* inspector;[30] street commissioner;[31] village trustees;[32] assistant building inspector.[33]

On the other hand, knowledge of the following persons, it has been held, in particular cases, will not be imputed to the municipality: city clerk;[34] *foreman* employed by road commissioners;[35] school officers;[36] *janitor* of school house in front of which defect is;[37] lamplighter.[38]

Knowledge of *two or more citizens* is not knowledge of the municipality,[39] although if many citizens had knowledge of

complaint of a citizen, does not at least in Ohio, make a policeman's knowledge of a defect the knowledge of the municipality. Cleveland v. Payne, 72 Ohio St. 347, 74 N. E. 177, 70 L. R. A. 841.

23. Shinnick v. Marshalltown, 137 Ia. 72, 114 N. W. 542.

24. Denver v. Deane, 10 Colo. 375, 16 Pac. 30, 3 Am. St. Rep. 594.

25. Decatur v. Hamilton, 89 Ill. App. 561.

26. Patterson v. Austin (Tex. Civ. App.), 29 S. W. 1139.

27. Pittsburg v. Broderson, 10 Kan. App. 430, 62 Pac. 5.

28. *Illinois.* Mattoon v. Russell, 91 Ill. App. 252.

Indiana. Columbus v. Strassner, 124 Ind. 482, 25 N. E. 65; Logansport v. Justice, 74 Ind. 378, 39 Am. Rep. 79.

Iowa. Keyes v. Cedar Falls, 107 Ia. 509, 78 N. W. 227 (and this is so although defect is caused by the councilman himself); Owen v. Ft. Dodge, 98 Ia. 281, 67 N. W. 281.

Louisiana. Weinhardt v. New Orleans, 125 La. 351, 51 So. 286.

Michigan. Dundas v. Lansing, 75 Mich. 499, 42 N. W. 1011, 5 L. R. A. 143, 13 Am. St. Rep. 457.

Missouri. Cropper v. Mexico, 62 Mo. App. 385.

Wisconsin. Fife v. Oshkosh, 89 Wis. 540, 62 N. W. 541; McKeigue v. Janesville, 68 Wis. 50, 31 N. W. 298.

Contra, see Frazier v. Butler, 172 Pa. 407, 33 Atl. 691, 51 Am. St. Rep. 739 (borough council); Jordan v. Peckham, 19 R. I. 28, 31 Atl. 305 (town council).

Notice to alderman while engaged in his private affairs is insufficient. Gaffney v. Dixon, 157 Ill. App. 589.

29. Small v. Kansas City, 185 Mo. 291, 84 S. W. 901, 110 Mo. App. 721, 85 S. W. 627.

30. Schumacher v. New York, 166 N. Y. 103, 59 N. E. 773.

31. *Connecticut.* Wood v. Stafford Springs, 74 Conn. 437, 51 Atl. 129.

Iowa. Padelford v. Eagle Grove, 117 Ia. 616, 91 N. W. 899.

Indiana. Hammond v. Jahnke (Ind. 1912), 99 N. E. 39.

Massachusetts. Mason v. Winthrop, 196 Mass. 18, 81 N. E. 644.

Michigan. Weitzel v. Fowler, 143 Mich. 700, 107 N. W. 451 (his failure to inform council immaterial); McEvoy v. Sault Ste. Marie, 136 Mich. 172, 98 N. W. 1006; Fuller v. Jackson, 82 Mich. 480, 46 N. W. 721; Dewey v. Detroit, 15 Mich. 307.

Washington. Saylor v. Montesano, 11 Wash. 328, 39 Pac. 653.

Wisconsin. Maunch v. Hartford, 112 Wis. 40, 87 N. W. 816.

32. Weed v. Ballston Spa, 76 N. Y. 329.

33. See Beall v. Seattle, 28 Wash. 593, 69 Pac. 12, 61 L. R. A. 583, 92 Am. St. Rep. 892.

34. Corey v. Ann Arbor, 134 Mich. 376, 96 N. W. 477.

35. Rich v. Rockland, 87 Me. 188, 32 Atl. 872.

36. Owen v. New York, 126 N. Y. S. 38, 141 App. Div. 217.

37. Foster v. Boston, 127 Mass. 290.

38. Monies v. Lynn, 119 Mass. 273.

39. Kenyon v. Indianapolis, Wils (Ind.), 129; Cramer v. Burlington, 39 Ia. 512; Donaldson v. Boston, 16 Gray (Mass.), 508.

the defect, that fact furnishes strong evidence of knowledge on the part of the municipality.[40]

Charters in some cities require that a certain officer or officers must have had a certain number of hours actual notice before the accident.[41] Thus, actual notice is required to be given, under some charters, to "a city officer having charge of highways," and thereunder it has been held that notice to a foreman of sidewalks appointed by the executive board who are commissioners of highways, was sufficient;[42] and also that notice left with the clerk of the executive board at its office was sufficient.[43]

Where notice is required by statute to be given to a particular officer, notice given to a deputy in his office, during business hours, especially where communicated to the officer, is sufficient.[44]

§ 2811. Actual notice.

Notice to a municipality is of two kinds, actual and constructive. Actual knowledge is "simply knowledge on the part of the corporation, acquired either by personal observation or by communication from third persons, of that condition of things which is alleged to constitute the defect."[45] Such notice is no more potent or effective, however, than constructive notice. The effect of actual knowledge of an unlawful obstruction in a street, which might occasion injury to persons lawfully therein, is not lessened because the municipality may not have known that the obstruction was in fact dangerous.[46]

§ 2812. Same—statutes requiring "actual" notice.

Actual notice, as distinguished from constructive, is expressly required by some statutes and charter provisions,[47]

40. Bill v. Norwich, 39 Conn. 222.

41. Casey v. Auburn Tel. Co., 131 N. Y. S. 1.

42. Sprague v. Rochester, 159 N. Y. 20, 53 N. E. 697. But see Touhey v. Rochester, 71 N. Y. S. 661, 64 App. Div. 56.

43. Elias v. Rochester, 63 N. Y. S. 712, 49 App. Div. 597.

44. Stockton Automobile Co. v. Confer, 154 Cal. 42, 97 Pac. 881.

45. Williams, Munic. Liability for Tort, § 125.

Knowledge gained by an officer in his individual capacity must be imputed to the municipality. Canfield v. East Stroudsburg, 19 Pa. Super. Ct. 649. But knowledge of the previous presence of a stone near a telegraph pole where it was not dangerous to travelers does not impute notice where the stone was subsequently removed into the driveway. Orser v. New York, 193 N. Y. 537, 86 N. E. 523.

46. Rehberg v. New York, 91 N. Y. 137, 144, 43 Am. Rep. 657.

47. Gregorious v. Corning, 125 N. Y. S. 534, 140 App. Div. 701.

California statute requires twenty-four hours or more notice to superintendent of streets. Stockton Automobile Co. v. Confer, 154 Cal. 402, 97 Pac. 881.

especially as applied to defects caused by snow and ice.[48] And such provisions have been almost universally upheld as valid.[49] Thus, *in Maine,* twenty-four hours actual notice of the defect or want of repair, before the accident, is necessary;[50] and under such statute, knowledge of a *cause likely to produce* defective ways, such as a storm, is not knowledge of the condition of the way at the place of the accident.[51]

However, such provisions as these do not require notice where the original negligence is that of the municipality.[52]

If a statute provides that *actual* notice must be given to one of certain designated officers, it is not sufficient to show that one of such officers knew or should have known of the defect by personal observation.[53]

48. McNally v. Cohoes, 127 N. Y. 350, 27 N. E. 1043; Sayfaus v. Rochester, 113 N. Y. S. 840; Kleyle v. Oswego, 95 N. Y. S. 879, 109 App. Div. 330; Tarba v. Rochester, 58 N. Y. S. 755, 41 App. Div. 188.

49. **Legislature may require** ten days' written notice prior to accident as a condition precedent to right of recovery. Schigley v. Waseca, 106 Minn. 94, 118 N. W. 259, reviewing cases at length, and holding such a provision could be put in a home rule charter.

Statute requiring written notice of the defect is not unconstitutional as depriving a person injured of a legal remedy for a wrong. MacMullen v. Middletown, 187 N. Y. 37, 79 N. E. 863.

Charter provisions barring the right to recover if there has not been written notice of the defect a certain number of days before the injury, are valid. Forsyth v. Saginaw, 158 Mich. 201, 122 N. W. 523.

However, a charter provision requiring actual notice "twenty-four hours before such injury is sustained" has been held to be unreasonable and void in a state where the right to sue for injuries from defective streets is a common law right. Born v. Spokane, 27 Wash. 719, 68 Pac. 386.

50. Knowlton v. Augusta, 84 Me. 572, 24 Atl. 1039; Haines v. Lewiston, 84 Me. 18, 24 Atl. 430; Bradbury v. Lewiston, 95 Me. 216, 49 Atl. 1041.

Under the Maine statute, the fact that a street commissioner directed a subordinate to construct a walk does not of itself charge the commissioner with "actual notice" of defective construction. Emery v. Waterville, 90 Me. 485, 38 Atl. 534.

51. Gurney v. Rockport, 93 Me. 360, 45 Atl. 310.

Maine. "One of the officers named must now receive 24 hours' actual, not constructive, notice, and it must be of the identical defect which caused the injury. Such actual notice may be proved by direct or circumstantial evidence; that is, by information of the existing facts conveyed to the party to be notified, or by circumstances showing personal knowledge on his part. Being a conclusion of fact, it may be established by all grades of competent evidence; but established it must be before the injured party can maintain his action." Abbott v. Rockland, 105 Me. 147, 73 Atl. 865.

Notice of a cause which might produce a defect is insufficient. Bradbury v. Lewiston, 95 Me. 216, 49 Atl. 1041.

To same effect, under Massachusetts statute not now in force, see Billings v. Worcester, 102 Mass. 329, 3 Am. Rep. 460.

Question for jury. When the testimony is oral or the proof of actual notice is circumstantial, the question whether there has been actual notice is for the jury; and the jury may properly find that notice of a steam engine and boiler in the street used to hoist material into a building included the common knowledge that the engine would emit steam and thereby produce noise. Ham v. Lewiston, 94 Me. 265, 47 Atl. 548.

52. § 2808, *ante.*

53. McNally v. Cohoes, 6 N. Y. S. 842, 53 Hun, 202.

§ 2813. Constructive notice.

Notice such as to bind the municipality need not be actual notice but may be constructive notice.[54] And if actual notice is pleaded, constructive notice may nevertheless be shown.[55] Furthermore, if a statute makes liability depend on "knowledge by or notice to" the municipality of the defect, it includes constructive as well as actual notice.[56]

Constructive notice means notice which the law imputes from the circumstances of the case, and is based on the theory that negligent ignorance is no less a breach of duty than wilful neglect,[57] and that negligence in not knowing of the dangerous condition may be shown by circumstances.[58] The municipality is chargeable with notice of such defects as ordinary care and reasonable diligence would discover,[59] and the fact that the defect is open to common observation is constructive notice.[60] Stated in another way, if facts exist with which ignorance is not compatible, except on the assumption of failure to exercise reasonable official care, notice will be presumed.[61]

The circumstances of each case must determine whether constructive notice of the defect is to be attributed to the municipality,[62] and hence constructive notice is ordinarily a question of fact for the jury.[63]

§ 2814. Same—constructive notice based on length of time.

If the defect has existed for such a length of time that the municipality, in the exercise of ordinary care, ought to have discovered and remedied it, notice of the defect will be imputed to the municipality.[64] Notice will be imputed where the defect has existed a long time. This is elementary and undisputed.[65] The question is what is a "*long time?*" This

If actual notice is required by charter, mere opportunity of an officer to discover the defect while passing along, without evidence that he was on a tour of inspection or actually noticed the defect, is insufficient. McManus v. Watertown, 84 N. Y. S. 638, 88 App. Div. 361.

54. McEnaney v. Butte, 43 Mont. 526, 117 Pac. 893.

55. Maki v. Cloquet, 116 Minn. 17, 133 N. W. 80.

56. Campbell v. Kalamazoo, 80 Mich. 655, 45 N. W. 652.

57. Whitfield v. Meridian, 66 Miss. 570, 576, 6 So. 244, 4 L. R. A. 834, 14 Am. St. Rep. 596.

58. Carrington v. St. Louis, 89 Mo. 208, 213, 1 S. W. 240, 58 Am. Rep. 108.

59. Nesbitt v. Greenville, 69 Miss. 22, 10 So. 452, 30 Am. St. Rep. 521.

Continuing acts of children—chargeable with notice thereof. Sutter v. Kansas City, 138 Mo. App. 105, 119 S. W. 1084.

60. Balls v. Woodward, 51 Fed. 646.

61. Dotton v. Albion, 50 Mich. 129, 15 N. W. 46.

62. Whitfield v. Meridian, 66 Miss. 570, 576, 6 So. 244, 4 L. R. A. 834, 14 Am. St. Rep. 596.

63. Decatur v. Besten, 169 Ill. 340, 48 N. E. 186.

64. Utmost diligence is not required. Abbott v. Mobile, 119 Ala. 595, 24 So. 565.

65. See local digests.

cannot be answered except to state that it is largely governed by the facts and circumstances of the particular case.[66] Usually, if the defect has existed long enough to be known by the people generally, it will be presumed that the municipal authorities knew thereof.[67] In determining what length of time will impute notice, regard should be had to the place where the defect is, whether much traveled or suburban;[68] the nature of the defect, whether it is one which cannot but be seen by all passers-by, or one so small as to be noticeable by a few only;[69] the apparent danger—whether very dangerous as apparent to every one or merely a possible but not probable source of danger; etc. For example, if one should dig a deep ditch across a sidewalk and in no way guard the excavation, so that every person would be obliged to go around the ditch or step over it, the danger is so great that a very few days time would impute notice to the municipality. So notice has been imputed in case of a coal hole open from early in the morning until noon,[70] although in case of most defects that length of time would not impute notice.

If the defect or obstruction is more or less continuous from day to day, notice thereof is sufficient to create liability although the *particular* defect or obstruction had existed only a short time. For instance, where the occupant of a building had been in the custom of raising the cover of a coal hole to let air into the cellar, every day for several weeks, the

66. Ottawa v. Hayne, 114 Ill. App. 21; Young v. Webb City, 150 Mo. 333, 51 S. W. 709; Miller v. Canton, 112 Mo. App. 322, 87 S. W. 96.

"On the question of notice implied from the continued existence of a defect, no definite or fixed rule can be laid down as to the time required, and it is usually a question for the jury on the facts and circumstances of each particular case, giving proper consideration to the character of the structure, its material, the time it has been in existence and use, the nature of the defect, its placing, and other considerations not necessary to be stated." Bailey v. Winston, 157 N. C. 252, 72 S. E. 966.

67. Albrittin v. Huntsville, 60 Ala. 486, 31 Am. Rep. 46; Evansville v. Wilter, 86 Ind. 414.

68. Carrington v. St. Louis, 89 Mo. 208, 1 S. W. 240, 58 Am. Rep. 108; Jones v. Ogden City, 32 Utah, 221, 89 Pac. 1006.

In Scoville v. Salt Lake City, 11 Utah, 60, 39 Pac. 481, it was said: "The question of notice is not alone determined from the length of time a defect has existed, but also from the nature and character of the defect, the extent of the travel, and whether it is a populous or sparsely settled part of the city."

69. "It is plain that a much shorter period of time would be required where the obstruction is, as here, prominently plain and visible, in a much frequented and public place, than if it were some slight defect half hidden from view and readily and easily overlooked both by the authorities and passers-by." Monticello v. Kennard, 7 Ind. App. 135, 140, 34 N. E. 454, and see Reed v. Mexico, 101 Mo. App. 155, 76 S. W. 53.

§ 2815, *post*.

70. Harriman v. Boston, 114 Mass. 241.

municipality is chargeable with notice of such continuing act, and cannot claim that the cover had not been raised long enough on the day of the accident to impute notice.[71] So where the particular stones over which plaintiff fell had been placed there only a few hours before the accident, notice is imputed where other loads of stones had been left unguarded at the same place for several days.[72] Furthermore, if the municipality has knowledge that a dangerous condition exists if a certain intended use is made, it need not have notice that such use was being made at the time of the accident.[73]

In particular cases, governed largely by the circumstances of the case at bar, notice has been imputed where the defect has existed the following periods: three years;[74] two and a half years;[75] two years;[76] one year;[77] sixteen months;[78] six months;[79] four months;[80] three months;[81] two months;[82]

71. Drake v. Kansas City, 190 Mo. 370, 88 S. W. 689, 109 Am. St. Rep. 759.

72. Vance v. Kansas City, 123 Mo. App. 644, 100 S. W. 1101.

73. "Another matter presented by the appellant is that the city authorities had no notice that the trapdoors were opened at the time the accident occurred. This is true, as noted in the statement of the evidence which we have made above. The question, therefore, is this: If the city has knowledge of, and permits to exist, an opening and trapdoors in the sidewalk, which the city knows are dangerous whenever they are used in the manner for which they were built to be used, and ordinarily are used, then, in order ao hold the city liable for injuries occurring by such use of such a dangerous opening, must it be shown that the city has knowledge that the dangerous thing is used at the particular time when the accident occurs? We think not. We are of the opinion that to so hold would be wholly unreasonable and illogical. If the dangerous thing exists for a given use, the city permitting it to so exist for such use, the city must presume that it will be so used. These trapdoors and this opening, in this case, were for a given use, and the city knew of that use; and the city certainly can not avoid liability by demanding that it be notified every time the dangerous thing is put to the use intended and contemplated by its existence and construction." Sweeney v. Butte, 15 Mont. 274, 39 Pac. 286.

74. Louisville v. Brewer's Adm'r, 24 Ky. L. Rep. 1671, 72 S. W. 9.

75. Cutcher v. Detroit, 139 Mich. 186, 102 N. W. 629.

76. Hitt v. Kansas City, 110 Mo. App. 713, 85 S. W. 669.

77. *Colorado.* Denver v. Murray, 18 Colo. App. 142, 70 Pac. 440.

District of Columbia. Larmon v. District of Columbia, 5 Mackey (D. C.), 330.

Indiana. Evansville v. Wilter, 86 Ind. 414.

Nebraska. O'Loughlin v. Pawnee City, 88 Neb. 244, 129 N. W. 271.

Wisconsin. Crites v. New Richmond, 98 Wis. 55, 73 N. W. 322.

78. Newport v. Miller, 93 Ky. 22, 18 S. W. 835.

79. Michigan City v. Boeckling, 122 Ind. 39, 23 N. E. 518; Brown v. Chillicothe, 122 Ia. 640, 98 N. W. 502; Knight v. Kansas City, 113 Mo. App. 561, 87 S. W. 1192; West v. Eau Claire, 89 Wis. 31, 61 N. W. 313.

80. Belvidere v. Crichton, 81 Ill. App. 595.

81. Mayfield v. Houghley, 135 Ky. 532, 122 S. W. 838; Lorence v. Ellensburgh, 13 Wash. 341, 43 Pac. 20, 52 Am. St. Rep. 42.

82. *Colorado.* Denver v. Hyatt, 28 Colo. 129, 63 Pac. 403.

Indiana. Valparaiso v. Chester (Ind. 1911), 96 N. E. 765.

one to four months;[83] one month;[84] six weeks;[85] five weeks;[86] two weeks;[87] ten days;[88] eight days;[89] four days;[90] three to twelve days;[91] three days;[92] two days;[93] ten hours.[94]

On the other hand, defects which have existed for the following periods have been held not to have been in existence a sufficient time to impute notice in the particular case: four weeks;[95] four days;[96] one day and a half;[97] one day;[98] nine hours;[99] six hours;[1] three hours;[2] two hours and a half;[3] one hour;[4] thirty minutes.[5]

§ 2815. Same—latent defects.

If a defect in a street is a latent one, notice thereof will not be imputed to the municipality, provided the defect could not have been discovered by the exercise of ordinary care.[6]

Michigan. Hunter v. Durand, 137 Mich. 53, 100 N. W. 191.

Missouri. Market v. St. Louis, 56 Mo. 189.

Washington. Sutton v. Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847; Austin v. Bellingham, 45 Wash. 460, 88 Pac. 834.

83. Devenish v. Spokane, 21 Wash. 77, 57 Pac. 340.

84. Chicago v. Major, 18 Ill. 349, 68 Am. Dec. 553; Apker v. Hoquiam, 51 Wash. 567, 99 Pac. 746.

85. Young v. Webb City, 150 Mo. 333, 51 S. W. 709; Warner v. Randolph, 45 N. Y. S. 1112, 18 App. Div. 458.

86. Philadelphia v. Smith, 23 Wkly. Notes Cas. (Pa.) 242, 16 Atl. 493.

87. Moriarty v. New York, 116 N. Y. S. 323, 132 App. Div. 10; Sweet v. Poughkeepsie, 78 N. Y. S. 60, 75 App. Div. 274; Foels v. Tonawanda, 27 N. Y. S. 113, 75 Hun, 363 (hole in sidewalk); Palestine v. Hassell, 15 Tex. Civ. App. 519, 40 S. W. 147.

88. Baxter v. Cedar Rapids, 103 Ia. 599, 72 N. W. 790; Straub v. St. Louis, 175 Mo. 413, 75 S. W. 100.

89. O'Hara v. Buffalo, 57 N. Y. S. 367, 39 App. Div. 443.

90. Ft. Wayne v. Duryee, 9 Ind. App. 620, 37 N. E. 299.

91. Naylor v. Salt Lake City, 9 Utah, 491, 35 Pac. 509.

92. Monticello v. Kennard, 7 Ind. App. 135, 34 N. E. 454; Briel v. Buffalo, 35 N. Y. S. 359, 90 Hun 93 (much used street).

93. See Cutter v. Des Moines, 137 Ia. 643, 113 N. W. 1081, where it was held a question for the jury.

94. Parsons v. Manchester, 67 N. H. 163, 27 Atl. 88 (pile of dirt in much traveled street).

95. Williams v. Carterville, 97 Ill. App. 160.

96. Corey v. Ann Arbor, 134 Mich. 376, 96 N. W. 477.

97. Brennan v. New York, 114 N. Y. S. 578, 130 App. Div. 267.

98. Warsaw v. Dunlap, 112 Ind. 576, 11 N. E. 623, 14 N. E. 568; McKee v. New York, 120 N. Y. S. 149, 135 App. Div. 829.

99. Portsmouth v. Houseman, 109 Va. 554, 65 S. E. 11.

1. Lewisville v. Batson, 29 Ind. App. 21, 63 N. E. 861.

Five hours as sufficient, see Klatt v. Milwaukee, 53 Wis. 196, 10 N. W. 162, 40 Am. Rep. 759.

2. Hazelrigg v. Frankfort, 29 Ky. L. Rep. 207, 92 S. W. 584; Portsmouth v. Lee, 112 Va. 419, 71 S. E. 630.

3. McFeeters v. New York, 92 N. Y. S. 79, 102 App. Div. 32.

4. Butler v. Oxford, 69 Miss. 618, 13 So. 626.

5. Miller v. Kansas City, 157 Mo. App. 533, 137 S. W. 998.

6. *Georgia.* Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318.

Illinois. Powell v. Bowen, 92 Ill. App. 453.

Indiana. Bucher v. South Bend, 20 Ind. App. 177, 50 N. E. 412. See Kenyon v. Indianapolis, Wils. (Ind.) 129.

Kentucky. See Bell v. Henderson, 24 Ky. L. Rep. 2434, 74 S. W. 206.

While ordinary care must be exercised both as to patent defects and also as to latent defects,[7] yet if there is no rea-

Massachusetts. See Tilton v. Haverhill, 203 Mass. 580, 89 N. E. 1040; Brummett v. Boston, 179 Mass. 26, 60 N. E. 388.

Missouri. See Carvin v. St. Louis, 151 Mo. 334, 52 S. W. 210.

New York. Fox v. Manchester, 183 N. Y. 141, 75 N. E. 1116, 2 L. R. A. (N. S.) 474; Farrell v. New York, 99 N. Y. S. 947, 113 App. Div. 687.

Pennsylvania. Fitzpatrick v. Darby, 184 Pa. 645, 39 Atl. 545.

Tennessee. Jackson v. Pool, 91 Tenn. 448, 19 S. W. 324.

"Where the defect is latent, not visible to ordinary inspection, implied notice of the defect will not be presumed and will not be charged against the city until something occurs from which notice may be presumed or implied." Omaha v. Kochem, 74 Neb. 718, 105 N. W. 182.

Notice should not be imputed where the defects are of recent origin, and particularly where they are concealed in any way. Corbin v. Benton (Ky. 1913), 152 S. W. 241.

In West Virginia, however, municipalities are liable even for latent defects. Campbell v. Elkins, 58 W. Va. 308, 52 S. E. 220, 2 L. R. A. (N. S.) 159.

7. Anders v. West Union, 131 Ia. 192, 108 N. W. 226.

Must use ordinary care to inspect, though defects are not open and notorious. Chicago v. Gillett, 108 Ill. App. 455.

Must examine sidewalks from time to time, and look after latent as well as patent defects. Matthews v. Toledo, 21 Ohio Cir. Ct. Rep. 69.

"This requires a reasonable vigilance in view of all the surroundings, and does not exact that which is impracticable. When the authorities have done that which is reasonable in this regard, they have discharged the entire obligation imposed by law. They are not bound to use all possible vigilance in inspection or in obtaining information." Fremont v. Dunlap, 69 Ohio, 286, 69 N. E. 561.

Latent defects make the municipality liable where there is neglect to make sufficiently frequent examinations of particular structures. Chicago v. Gillett, 91 Ill. App. 287.

In Illinois, the municipality is not relieved of the duty of inspection underneath a sidewalk of defects not apparent from the surface of the walk, where the sidewalk is not laid on the ground. In the very recent case of Sherwin v. Aurora (Ill. 1913), 100 N. E. 938, it is said: "In the case at bar the proof tended to show that under favorable climatic conditions the construction was of such a character as might be reasonably expected to last for 50 years. Yet the city was bound to take notice of the method of construction and the surrounding conditions and to anticipate the natural and ordinary result of climatic influences, and it was incumbent upon it to make sufficiently frequent examinations to ascertain whether the structure was becoming so deteriorated, through climatic or other natural influences, as to endanger the safety of the public. The space underneath this areaway was not used for any purpose except to afford light to the basement of the store building and to provide space for the steam pipes to pass through from the street to connect with the heating apparatus of the building. The owner was bound to afford access to the proper officer for the purpose of making an inspection, and there was no obstruction to prevent an examination from below. The jury were fully warranted in believing, from the evidence, that the defective condition had existed for a long time, and that the most casual examination would have disclosed the dangerous condition of the structure. Appellant cites and relies upon the case of Buckley v. Kansas City, 156 Mo. 16, 56 S. W. 319, a case in which the facts are almost identical with those here and in which the court held the city was not liable. The holding in that case is contrary to the rule in this state, and we decline to follow it."

The duty to keep sidewalks in ordinary repair includes the duty to examine not only the surface but also the supports of the walk. Hammock v. Tacoma, 44 Wash. 623, 87 Pac. 924.

son to suppose the existence of latent defects, they need not be searched for.[8] The question is whether ordinary care, under the circumstances of the particular case, require the municipality to inspect, and if so how extensive must the inspection be? As to this matter, the courts are not entirely in harmony, and it is difficult, if not impossible, to say to what extent and when it is the duty of a municipality to look for defects.[9] Thus, it cannot be said, as matter of law, that inspection of sidewalks once in every two weeks, by the street commissioner, followed by repairs found necessary by him, is reasonable care, since *no inflexible rule can be laid down in such a case,* because "the conditions are liable to be so different in relation to different walks, or different portions of the same walk, and so many contingencies are likely to arise, that it can only be determined from the situation and circumstances of each case whether reasonable care has been exercised in the premises."[10]

It is sometimes held that notice of defects will not be imputed unless so notorious as to be evident to all passers-by,[11]

8. Omaha v. Kochem, 74 Neb. 718, 105 N. W. 182; Lincoln v. Pirner, 59 Neb. 634, 81 N. W. 846.

Need not search for latent defects but should be careful to observe them by the exercise of reasonable supervision. Murdaugh v. Oxford Borough, 214 Pa. 384, 63 Atl. 696.

Need not "seek for defects." Yeager v. Berwick Borough, 218 Pa. 265, 67 Atl. 347.

"Respecting the ordinary sidewalks, there is no such duty of substructure inspection as is imposed in case of bridges or other elevated ways. In the absence of actual notice, municipalities are only liable for such defects in sidewalks as are apparent, or are suggested by the appearances, or which are disclosed by a test in the nature of the ordinary use of such walks." Hembling v. Grand Rapids, 99 Mich. 292, 58 N. W. 310.

Loose sidewalk, where close investigation is required to discover defect. City not liable. Cook v. Anamosa, 66 Ia. 427, 23 N. W. 907.

Failure to examine the timbers of a culvert for twenty years not negligence. Miller v. North Adams, 182 Mass. 569, 66 N. E. 197.

9. **As to wooden sidewalks,** it is held, in Washington, that it is not enough that "the surface of the walk appears sound. The walk as an entirety must be examined and kept in repair, if the city is to escape the charge of negligence. Billings v. Snohomish, 51 Wash. 135, 98 Pac. 107.

10. Kellogg v. Janesville, 34 Minn. 132, 24 N. W. 359.

11. Hart v. Brooklyn, 36 Barb. (N. Y.) 226; Ralpho v. Moore, 68 Pa. St. 404, 408, 8 Am. Rep. 202. See also Otto Tp. v. Wolf, 106 Pa. St. 608.

If the defect is one which escaped the observation of persons continually using the street, notice can not be imputed to the municipality. Byrne v. Philadelphia, 211 Pa. 598, 61 Atl. 80.

If not noticed by those constantly using the street, it may be presumed that the municipality had no notice of it. Broburg v. Des Moines, 63 Ia. 523, 19 N. W. 340, 50 Am. Rep. 756.

Only an ordinary inspection is required. Indianapolis v. Ray (Ind. App. 1912), 97 N. E. 795.

Defect must be so obvious that the municipal officers, in the exercise of a reasonable supervision, ought to have seen it. The officers need not make an examination of the walk by going upon and testing it to discover, if by the eye they could do so,

but if this is the true rule, then ordinary care imposes only a comparatively slight burden on the municipality. The better rule, it is believed, is that a greater duty to discover defects is imposed on the municipality than on passers-by.[12] However, if a municipality is put on notice as to patent defects, it is the duty of the municipality to investigate latent defects which an inspection or repair of the former would show.[13] Likewise, attending conditions may be such as to call for special vigilance in attempting to ascertain if any latent dangers exist,[14] as may the nature of the particular

whether it was defective. Lohr v. Philipsburg, 165 Pa. 109, 30 Atl. 822.

"The city was only chargeable with such knowledge of the method of construction of this coal hole, cover, and attachments as would be acquired by properly inspecting the same from the street. Smith v. Mayor, etc., 15 Wkly. Dig. 103; Hanscom v. City of Boston, 141 Mass. 242, 5 N. E. 249. It was under no obligation, as a matter of law, to inspect the under side of the cover or attachments for fastening it below." Matthews v. New York, 80 N. Y. S. 360, 78 App. Div. 422.

12. Joliet v. McCraney, 49 Ill. App. 381; Drake v. Kansas City, 190 Mo. 370, 385, 88 S. W. 689, 109 Am. St. Rep. 759; Squires v. Chillicothe, 89 Mo. 226, 231, 1 S. W. 23; Miller v. Canton, 112 Mo. App. 322, 87 S. W. 96; Short v. Spokane, 41 Wash. 257, 83 Pac. 183.

"It certainly is not true that the city is charged with no greater duty or obligation to observe the condition of its walks, or to know of the existence of dangerous defects therein, than the ordinary citizen or traveler who has occasion to use them. On the contrary, these municipalities are under some measure of active duty in the matter of inspection, and of taking care to know that the streets, the care of which is imposed upon them by statute, do not become sources of danger to the traveling public. The traveler has the right to assume that the city has done its duty, and while he is himself subject to the rule which requires the exercise of reasonable care and watchfulness for his own safety, he is not required at his peril and as a matter of law to keep his eye glued to the sidewalk or to constantly watch his footsteps to avoid stepping into holes or depressions therein, the existence of which has not come to his notice. He has a right to assume that the city has done its duty." Platts v. Ottumwa, 148 Ia. 636, 127 N. W. 990.

There is no duty, in Michigan, to inspect the substructure of sidewalks, in the absence of actual notice; but if the municipality has its attention called to a sidewalk as defective, a casual examination of the walk by an officer passing over it in the ordinary way that people go over sidewalks is insufficient. Hunter v. Ithaca, 141 Mich. 539, 105 N. W. 9.

13. § 2816, *post*.

14. "In the exercise of reasonable diligence, for want of which the liability of cities and towns is made to depend under Rev. Laws, c. 51, §§ 1, 18, where it appears that natural causes are known, or from information ought to be recognized as in operation from the method of construction, and which probably will render the way unsafe, the duty devolves upon the municipality to take every suitable precaution to guard against the danger." If however, where neither from the method of original construction, nor the length of time during which a public way has been in use, there are no superficial indications of any defect, or any reasonable ground to apprehend that, through structural changes beneath the surface due to the subsidence of culvert, bridges, drains, or sewers, which may have become out of repair, the roadbed may suddenly give way, causing injuries to travelers, the duty of reasonable supervision is not as matter of law shown to have been neglected, and the city or town is not legally chargeable with

place.[15] Moreover, the municipality must take notice of the certain tendency of wooden sidewalks or crosswalks too *decay*,[16] although it is impossible to state just when the duty to inspect comes into being.[17] Thus, in Missouri, it has been

notice of concealed conditions which may render the way unsafe." Bleistine v. Chelsea, 204 Mass. 105, 90 N. E. 526.

Subway. "The known fact that excavation was going on underneath called for special vigilance on the part of the representatives of the city to ascertain whether the irregularities in the surface of the pavement were such as would expose travelers to danger." Connelley v. Boston, 206 Mass. 4, 91 N. E. 998.

15. "This kind of a case is clearly distinguishable from cases involving the duty to inspect and keep in safe condition coal holes and trapdoors in sidewalks and bridges and culverts within the city limits. In these latter cases the nature of the place demands a higher degree of care and vigilance, and more frequent inspection, than is required for the ordinary walk or street crossing." Miller v. Mulhan, 17 Idaho, 28, 104 Pac. 660.

16. *Alabama.* Montgomery v. Comer, 155 Ala. 422, 46 So. 761.

District of Columbia. Sherwood v. District of Columbia, 3 Mackey (D. C.), 276, 51 Am. Rep. 776.

Illinois. Wheaton v. Hadley, 30 Ill. App. 564, aff'd in 131 Ill. 640, 23 N. E. 422; Farmington v. Wallace, 134 Ill. App. 366, 369.

Indiana. Indianapolis v. Scott, 72 Ind. 196.

Kentucky. Louisville v. Lambert (Ky.), 116 S. W. 261.

Minnesota. Furnell v. St. Paul, 20 Minn. 117.

See also Chenoa v. Kramer, 109 Ill. App. 85; Mattoon v. Worland, 97 Ill. App. 13; Aslen v. Charlotte, 54 N. Y. S. 754, 35 App. Div. 625.

Well in street, covered with wooden platform on which brick sidewalk was laid. No repairs or examination were made for nine years. The platform gave way when plaintiff was using the pump. Municipality held liable. Sherwood v. District of Columbia, 3 Mackey (D. C.), 276, 51 Am. Rep. 776.

17. "It is common knowledge that the board sidewalks used in the villages and most of the cities of this state will rot and decay in course of time, but the length of time in which they will become dangerous and unsafe is so indefinite and uncertain, and subject to so many influences, either advancing or retarding the process of decay, that no reasonable estimate can be made as to the specific time at and after which a walk will become unsafe. Climatic conditions are so different at different localities, and also different walks are constructed in different ways." Miller v. Mulhan, 17 Idaho, 28, 104 Pac. 660.

Decayed sidewalks. "If this court should hold that the municipalities of this state are chargeable with notice of the time when and conditions under which a woden sidewalk or cross-walk ceases to be safe for pedestrians on account of age and use where no patent or obvious defect is apparent, it would subject them to a hazard, care, and expense that but few of them could afford. Weisse v. Detroit, 105 Mich. 482, 63 N. W. 423; Bucker v. South Bend, 20 Ind. App. 177, 50 N. E. 412. If, on the contrary, a walk has been used for so long that it is in a general state and condition of decay and disrepair, and is allowed to remain in such condition, notice of such condition will be imputed to the municipality, and if so bad as to be dangerous, such failure to repair or improve it will become negligence. In order to impose liability in such cases as this the condition of the walk must be such that danger may reasonably be apprehended at any time, and therefore reasonable diligence and prudence would require that it be guarded against." Miller v. Mulhan, 17 Idaho, 28, 104 Pac. 660.

"The learned judge, calling the jury's attention to the testimony that a pavement of hemlock boards, such as this was, would not last, ordinarily, over four to six years, said that the chairman of the street committee and the chief of police (whose duty it was, by ordinance, to look after

held that where the usual or natural life or period of duration or safety of glass sidewalks, set in iron frames, is not shown, it cannot be said as matter of law that notice should be imputed of the unsafety of such a walk after it has been in existence ten years.[18]

§ 2816. Same—notice of one or general defect as notice of other or special defects.

If the municipality has notice, actual or constructive, of general defects in a particular sidewalk,[19] its liability does

the sidewalks), were presumed to know this fact, and 'it was their duty to exercise proper supervision or make proper examination of this pavement, by going upon and testing it, to discover, if by the eye they could do so, whether the pavement was defective or not.' This was holding the borough to too stringent a rule of responsibility. It was in fact applying to it the measure of duty laid down for an employer, in not only furnishing safe tools to his workmen, but in knowing their liability to decay, and in replacing them at the proper time. Baker v. Railroad Co., 95 Pa. St. 211. But there is a clear distinction to be taken between the duties in the two cases. That of the master is primary and absolute—to know and to do—while that of the borough or any municipality, as to sidewalks, is secondary and supplemental—to see that the property owner makes and maintains a safe pavement; and its breach of duty is not in failing to do the work, but in failing to compel the owner to do it. It is entitled, therefore, to notice, actual or implied, of the existence of the defect. This is the settled rule, even as to defects in the street, where the duty to keep in repair is primary and mandatory. The charge of the learned judge would require the borough to know how long every pavement had been laid, and to keep informed of what repairs the owner had made upon it; in short, to seek for defects. The law only requires that it shall be vigilant to observe them when they become observable to an officer exercising reasonable supervision. The difference is not one of mere words, but one of great practical importance, for it is always easy to show after an accident how the defect might have been found if it had been sought for; and to tell a jury that it is the *duty of the municipality to seek* is to give them opportunity, which few hesitate to take, to make municipalities insurers against accidents of all kinds in the streets." Lohr v. Philipsburg, 156 Pa. 246, 27 Atl. 133.

18. Buckley v. Kansas City, 156 Mo. 16, 56 S. W. 319, which is disapproved in Sherwin v. Aurora (Ill. 1913), 100 N. E. 938.

19. *California.* Heath v. Manson, 147 Cal. 694, 82 Pac. 331.

Illinois. Aurora v. Hillman, 90 Ill. 61.

Iowa. Evans v. Iowa City, 125 Ia. 202, 100 N. W. 1112. See Carter v. Monticello, 68 Ia. 178, 26 N. W. 129.

Masachusetts. Noyes v. Gardner, 147 Mass. 505, 18 N. E. 423, 1 L. R. A. 354.

Michigan. Strudgeon v. Sand Beach, 107 Mich. 496, 65 N. W. 616; Fuller v. Jackson, 92 Mich. 197, 52 N. W. 1075.

Nebraska. Northdruft v. Lincoln, 66 Neb. 430, 92 N. W. 628, 96 N. W. 163.

Wisconsin. Vielleese v. Green Bay, 110 Wis. 160, 85 N. W. 665; Ripon v. Bittel, 30 Wis. 614; Weisenberg v. Appleton, 26 Wis. 56, 7 Am. Rep. 89.

But compare Ruggles v. Nevada, 63 Ia. 185, 18 N. W. 866, where question whether the witness "noticed the walk was out of repair in that locality, near where she got hurt, prior to the time of her injury," was held improper.

Notice of condition at particular point where accident occurred need not be shown where notice of condition of all the walk on which the accident occurred is shown. Wood v. Omaha, 87 Neb. 213, 127 N. W. 174.

Knowledge of municipality that

not depend on notice of the particular defect which caused the injury. But it has been well said that "in order to charge, as matter of law, a corporation with notice of a particular defect from its knowledge of the existence of a general one, the first should be of the same character with the latter or, at least, so related to it that the particular defect is a usual concomitant of the general one. * * * If, however, the general defect known to the village was not of a character to make the walk unsafe, or was of a character totally unlike that which caused the injury, so that the existence of one afforded no presumption of the existence of the other, there is no sound principle which requires notice of one to constitute, as matter of law, notice of the other."[20] Notice of a particular defect different in kind and in no way related to the one that produced the injury, and not contributing thereto, is insufficient.[21] And it has been properly held that notice of the general slippery condition of all the walks in the municipality, due to snow and rain, is not notice of the unsafe condition at a particular point.[22]

The theory of this general rule is that if the municipality has notice, actual or constructive, of a defect in a street, and it neglects to repair it within a reasonable time, the municipality is charged with notice of what other defects would have been discovered if ordinary care had been exercised in making the repairs,[23] although there is some authority to the contrary.[24]

entire walk is in a dangerous condition is notice of absence of plank, where cause of injury. Grattan v. Williamston, 116 Mich. 462, 74 N. W. 668.

Need not have notice of defect in the very board in the walk that caused the acident. Huff v. Marshall, 97 Mo. App. 542, 71 S. W. 477; Plattsmouth v. Mitchell, 20 Neb. 228, 29 N. W. 593.

Notice of condition arising from particular rain need not be shown where unsafety resulted from all rains. Milledge v. Kansas City, 100 Mo. App. 490, 74 S. W. 892.

But notice of bad condition of nearby sidewalks held not notice of bad condition of cross-walk. Dundas v. Lansing, 75 Mich. 499, 42 N. W. 1011, 5 L. R. A. 143, 13 Am. St. Rep. 457, Justice Morse dissenting.

20. Shelby v. Clagett, 46 Ohio St. 549, 22 N. E. 407, 5 L. R. A. 606.

21. Northdruft v. Lincoln, 66 Neb. 430, 92 N. W. 628, 96 N. W. 163; Omaho v. Kochem, 74 Neb. 718, 105 N. W. 182.

22. Clark v. District of Columbia, 3 Mackey (D. C.), 79.

Notice of a loose plank in a sidewalk, without specifying the location, is not notice. Rogers v. Orion, 116 Mich. 324, 74 N. W. 463.

23. Constructive notice, from length of time, of the existence of a dangerous depression caused by a sewer caving in, includes notice of defects in other parts of the sewer which would have been discovered if ordinary care had been used in repairing the original break. Dallas v. McAllister (Tex. Civ. App.), 39 S. W. 173.

24. "Knowledge of one defect is not to be inferred by neglect to repair another." Fuller v. Jackson, 82 Mich. 480, 46 N. W. 721, where it was held that notice of a hole in a sidewalk was not notice of a defect in the board in the sidewalk.

"If there are apparent and obvious defects so near and closely related to a condition which is apparently safe, but in fact defective, that an investigation of the former would lead to a knowledge of the latter, then it may be said that the city should take notice of such latter defect. Whether such conditions do or do not exist, and what effect they would have in determining that knowledge of one defect would necessarily lead to knowledge of another, are ordinarily questions of fact to be submitted to the jury."[25]

Under the Maine statute requiring *actual* notice, the notice, must be of the identical defect which caused the injury, and notice of another defect or of the existence of a cause likely to produce the defect is insufficient.[26]

§ 2817. Rules as to notice applied to snow and ice.

Where the cause of injury is snow or ice, the rule that there must be actual or constructive notice of the dangerous condition applies the same as in case of other obstructions or defects,[27] with the same exception that no notice is necessary where the accumulation is caused by acts of municipal officers.[28] But the mere fact that the municipality knows of a heavy fall of snow, or a freeze after a thaw, does not ordinarily include notice of particular danger at any point. In such case it seems there must be actual or constructive notice of the particular defect or obstruction.[29] However, if a cause over which the municipality has control, and likely to pro-

25. Dallas v. Moore, 32 Tex. Civ. App. 230, 74 S. W. 95.

"The degree of diligence required of officers of a town or city in watching the way, and guarding against defects, depends, in some measure, upon the character of the way. If there are known causes in operation likely to produce defect in the way, the diligence required is greater than might be sufficient under other conditions. It is reasonable that the officers should keep a more watchful eye over such a way in order to guard against danger. When, therefore, a defect is produced by some known permanent cause which would naturally create the defect, the existence of such cause may properly be considered by the jury in determining whether the officers of the town or city might have had notice of the defect by the exercise of proper care and diligence." Olson v. Worcester, 142 Mass. 536, 8 N. E. 441.

Thus, if the pavement is in such condition that ice and snow thereon will make it dangerous, and the municipality has notice of such condition, a fall of snow is immediate notice that the pavement at that point is in a dangerous condition. Corts v. District of Columbia, 7 Mackey (D. C.), 277.

26. Smyth v. Bangor, 72 Me. 249. § 2812, *ante*.

27. Ransom v. Belvidere, 87 Ill. App. 167; Stanke v. St. Paul, 71 Minn. 51, 73 N. W. 629. See also District of Columbia v. Frazer, 21 App. (D. C.) 154.

28. Muncie v. Hey, 164 Ind. 570, 74 N. E. 250.

29. Notice of a cause likely to produce injury, such as a great fall of snow likely to produce drifts, is not actual notice of the particular defect (a drift of snow at a particular place) which caused the injury. Gurney v. Rockport, 93 Me. 360, 45 Atl. 310.

duce injury, is known to the municipality, it is generally held that it includes notice of natural and probable consequences thereof.[30]

Some statutes and charters require *actual* notice to the municipality of dangerous obstructions or defects resulting from snow and ice,[31] but if there is no such provision, actual, as distinguished from constructive, notice is not necessary; and if an accumulation of snow and ice on sidewalks such as to constitute a dangerous obstruction is allowed to remain an unreasonable length of time, notice is imputed to the municipality.[32] If an ordinance makes it the duty of municipal officers to remove snow that has remained on the sidewalk a certain number of hours, notice cannot be imputed until after the expiration of such number of hours.[33]

Where not regulated by charter or statutes, notice has been imputed where the defective condition had existed a week to ten days,[34] and nine days;[35] but the time has been held insufficient where only five days,[36] three days,[37] a day or two;[38] afternoon to seven o'clock at night,[39] or less elapse.[40] Statutes in Wisconsin preclude liability for injuries from snow and ice unless the accumulation has existed for three weeks.[41]

§ 2818. Question of fact.

While generally the jury should determine, as a question of fact, whether a municipality has notice, yet where the facts are undisputed, and but one reasonable inference can be drawn from them, the question is one for the court to decide.[42]

30. Munice v. Hey, 164 Ind. 570, 74 N. E. 250 (notice of water conductor throwing water on sidewalk includes notice of ice which would naturally form on the sidewalk in freezing weather).

31. § 2812, *ante*.

32. Todd v. Troy, 61 N. Y. 506.

33. McAllister v. Bridgeport, 72 Conn. 733, 46 Atl. 552.

34. Masters v. Troy, 3 N. Y. S. 450, 50 Hun, 485.

35. Fortin v. Easthampton, 145 Mass. 196, 13 N. E. 599.

36. Corey v. Ann Arbor, 134 Mich. 376, 96 N. W. 477.

37. Smith v. Brooklyn, 36 Hun (N. Y.), 224.

38. Davis v. Kingston, 5 N. Y. S. 506, 52 Hun, 615.

39. Springer v. Philadelphia (Pa.), 12 Atl. 490.

40. As a matter of law, notice of the icy condition of a sidewalk will not be imputed to a municipality where the ice was due to a freeze at night and the injury occurred before eight o'clock the next morning. Leipsic v. Gerdeman, 68 Ohio St. 1, 67 N. E. 87.

41. Byington v. Merrill, 112 Wis. 211, 88 N. W. 26.

42. Bell v. Henderson, 24 Ky. L. Rep. 2434, 74 S. W. 206; Hazelrigg v. Frankfort, 89 Ky. L. Rep. 207, 92 S. W. 584; Harrodsburg v. Sallee, 142 Ky. 829, 135 S. W. 405; Boender v. Harvey, 251 Ill. 228, 95 N. E. 1084; Corbin v. Benton (Ky. 1913), 152 S. W. 241.

9. CONTRIBUTORY NEGLIGENCE.

§ 2819. Scope of subdivision.

Lack of space, the fact of the great number of decisions supporting rules of law as to which there is no dispute at present, and the existence of a large number of decisions where the only question was whether the evidence as to contributory negligence was sufficient to go to the jury, induces the curtailing of this subdivision by omitting long lists of decisions supporting well settled rules, and also to some extent fact cases which would be of very little value, if any, as authorities, because limited to the set of facts in the particular case.

§ 2820. Contributory negligence is defense.

Like other actions based on negligence, contributory negligence of the plaintiff is a defense whether the right to sue is based on common law or statutory provisions.[43] To constitute contributory negligence there must be a want of ordinary care on the part of the plaintiff, and a proximate connection between that and the injury.[44] The contributory negligence is a defense whether it occurred before or after the beginning of the series of events resulting in the injury.[45] However, the right of one injured because of the defective condi-

43. Dehaven v. Danville Gaslight Co. (Ky. 1912), 150 S. W. 322; Owings v. Jones, 9 Md. 108; Fallon v. Boston, 3 Allen (Mass.), 38; Beatty v. Gilmore, 16 Pa. 463, 55 Am. Dec. 514.

Charter provision imposing liability does not preclude defense. Giffen v. Lewiston, 6 Idaho, 231, 55 Pac. 545.

"As was well said by Lord Ellenborough, C. J.: 'A party can not cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be right. * * * One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action—an obstruction in the road by the fault of the defendant. and no want of ordinary care to avoid it on the part of the plaintiff.'" Wheat v. St. Louis, 179 Mo. 572, 78 S. W. 790, 64 L. R. A. 292.

Loading of wagon. The contributory negligence may consist in the careless loading of a wagon. Lockport v. Licht, 221 Ill. 35, 77 N. E. 581.

Shying of horse. There is no contributory negligence in case of a horse reasonably safe and gentle, momentarily shying at some object, where the loss of control is only momentary. Rucker v. Huntington, 66 W. Va. 104, 66 S. E. 91, and see § 2854, *post*.

Scuffling. Injured while scuffling. City not liable. Swords v. West Brownsville, 233 Pa. 533, 82 Atl. 780.

Acquiescence in careless driving. If the owner and occupant of a rig driven by another, knows that the horse is being driven in a negligent manner, but nevertheless acquiesces therein, he is guilty of negligence. Canter v. St. Joseph, 126 Mo. App. 629, 105 S. W. 1.

44. Beach, Contributory Neg., § 7.

45. Driver of horse was bound "to use ordinary care as well after as before the horse began to run, in consequence of the defect in the road." Brooks v. Petersham, 16 Gray (Mass.), 181, 184.

tion of a street, to recover, is in nowise affected by the fact that his own conduct contributed to the injury, unless *some fault* could be imputed to such conduct.[46]

This question of what is contributory negligence is affected, to some extent at least, by statute in some states. Thus, in South Carolina, one injured cannot recover if he has "in any way brought about any such injury or damage by his or her negligent act *or negligently contributed to.*"[47] Under this statute, contributory negligence need not be the proximate cause of the injury, in order to bar a recovery.[48]

§ 2821. Ordinary care is test.

The degree of care which one must use on the highways, to preclude the defense of contributory negligence, is ordinary or reasonable care.[49] Such care is that which an ordinarily intelligent and prudent man would exercise under like circumstances,[50] and consequently the determination of the question

46. Western Union Tel. Co. v. Eyser, 2 Colo. 141; Rome v. Dodd, 58 Ga. 238; Centerville v. Woods, 57 Ind. 192; Wyandotte v. White, 13 Kan. 191, 195.

47. Code, S. C. 1902, § 2023.

48. McFail v. Barnwell County, 57 S. C. 294, 35 S. E. 562, construing an identical provision relating to liability of counties.

49. *Alabama.* Lord v. Mobile, 113 Ala. 360, 21 So. 366.

Colorado. Denver v. Monroe (Colo. App. 1912), 121 Pac. 684.

Kentucky. Burnside v. Smith (Ky.), 119 S. W. 744; Belleview v. England (Ky.), 118 S. W. 994.

Missouri. Ryan v. Kansas City, 232 Mo. 471, 134 S. W. 566, 985; Combs v. Kirksville, 134 Mo. App. 645, 114 S. W. 1153.

South Carolina. Corry v. Columbia, 88 S. C. 553, 71 S. E. 49.

Virginia. Bedford City v. Sitwell, 110 Va. 296, 65 S. E. 471.

"The same standard of care is required of both the traveler and the municipality, and is such as the surrounding circumstances seem to require, and not such as men usually exercise in their daily affairs." Rhyner v. Menasha, 107 Wis. 201, 83 N. W. 303.

"The law does not require the plaintiff in an action for personal injuries to be absolutely free from any negligence whatever in order to recover, for such a requirement would impose upon him a duty of exercising extraordinary care and prudence, which is not the standard by which his negligence is measured. All the law requires of the plaintiff in such cases is the exercise of ordinary care under the circumstances surrounding him, and this he may do although he may be guilty of some slight negligence in the broadest sense of that term." Cowie v. Seattle, 22 Wash. 659, 62 Pac. 121.

"Due" care not same as "ordinary" care. San Antonio v. Talerico (Tex. Civ. App.), 78 S. W. 28.

Degree of negligence. So far as contributory negligence is concerned, there are no degrees of negligence, and hence it is error to instruct that "slight negligence" will not bar a recovery. Valparaiso v. Schwerdt, 40 Ind. App. 608, 613, 82 N. E. 923.

Driver of a fire engine is subject to the same rules as to avoiding danger, as other individuals, except that he is entitled to the right of way. Carswell v. Wilmington, 2 Marv. (Del.) 360, 43 Atl. 169, and see § 2823, *post.*

50. Wood v. Bridgeport, 143 Pa. 167, 22 Atl. 752; Ft. Worth v. Johnson, 84 Tex. 137, 19 S. W. 361.

"This charge instructed the jury in effect that the city would not be liable unless a person of ordinary prudence and diligence would reasonably believe that the loose plank would trip and injure a traveler ex-

all depends on attending circumstances.[51] "More than ordinary care" need not be used.[52]

Generally, it is held that the *amount* of care to be used by travelers to ascertain the existence of defects is not as great as is required of the municipality to ascertain the same defects.[53]

§ 2822. Same—amount of care distinguished from degree of care.

In no case is a traveler required to exercise a "higher degree of care" than in other cases, since ordinary, *i. e.*, reasonable, care is always the test.[54] This degree of care never changes. Statements in the decisions that greater care is required under certain circumstances than under others simply mean that an ordinarily prudent person, under such circumstances, would exercise a greater *amount* of care, and in no way affect the rule that ordinary or reasonable care is always the *degree* of care required. The *degree* of care re-

ercising ordinary care in passing over the same. In this respect the charge was too restrictive. The test is not whether such a person would reasonably believe the loose plank would produce this particular injury, but some such injury as alleged." Rockwall v. Heath (Tex. Civ. App.), 90 S. W. 514.

51. Yeager v. Spirit Lake, 115 Ia. 593, 88 N. W. 1095.

"A person using the streets of a city is only required to exercise ordinary care to avoid accident. But 'ordinary care' is not an absolute, but a relative term, the standard of which is necessarily variable, and is influenced and controlled by the extraneous circumstances surrounding the particular transaction. No fixed rule can be formulated for all cases. What might be regarded as the exercise of ordinary care under some circumstances would under others constitute gross negligence. Newport News, etc. Ry. Co. v. Bradford, 99 Va. 117, 37 S. E. 807." Winchester v. Carroll, 99 Va. 727, 40 S. E. 37.

52. Beardstown v. Smith, 150 Ill. 169, 37 N. E. 211; Langhammer v. Manchester, 99 Ia. 295, 68 N. W. 688; Chicago v. Gillett, 108 Ill. App. 455; Moore v. Richmond, 85 Va. 538, 8 S. E. 387.

53. "It was proper for the court to tell the jury that, while a traveler upon the highway must use ordinary care and diligence, still this duty upon him might not in all cases require him to be actively alert to see whether the city had left the highway in a dangerous condition, especially where the danger was not patent; but the duty of exercising this same degree of diligence might require the city to be actively alert to discover and remedy such a defect." Cordele v. Jeter, 9 Ga. App. 348, 71 S. E. 589.

While the city and the passer are both required to exercise ordinary diligence, the duty of keeping its streets and sidewalks in repair rests upon the city, and therefore ordinary diligence on the part of one who passes along a sidewalk does not imply a like degree of vigilance in foreseeing danger and guarding against it. The argument, therefore, that if the city could have known of the danger of this defective sidewalk, the plaintiff also could have known of it, is not sound. Wilson v. Atlanta, 63 Ga. 291, followed in Idlett v. Atlanta, 123 Ga. 821, 51 S. E. 709.

§ 2815, *ante*.

54. Kelley v. Kansas City, 153 Mo. App. 484, 133 S. W. 670.

Contra, see Henry v. New York, 104 N. Y. S. 440, 119 App. Div. 432.

quired of persons using the street never changes while the *amount* of care required may depend on circumstances.[55]

§ 2823. Same—amount of care as dependent on circumstances.

The amount of care which a traveler must use to avoid being guilty of contributory negligence depends largely on circumstances. It is self-evident that more care is necessary under certain circumstances than under other circumstances, *i. e.*, that an ordinarily prudent man would be more careful at one time than another.[56] For instance, an ordinarily prudent person exercises more care if he has *knowledge* of a dangerous defect in the street than if he has no such knowledge, and hence ordinary care in such cases requires more care than if the traveler had no knowledge.[57] Likewise, more care is required at night time than in the day;[58] on a crosswalk than on a sidewalk;[59] on an icy or slippery walk or pavement than on others;[60] in walking on the driveway as compared with the sidewalk;[61] etc. So a greater amount of care is necessary where the traveler is blind, aged so as to be infirm, crippled, or the like.[62] So it has been held that greater care is necessary where the sidewalk is a temporary one constructed while building operations are going on.[63] But it has been held that the fact that excavations are being made in a street, in the course of improving it, does not necessarily require a traveler crossing the street to use greater care than when walking on the sidewalk, since he has a right to assume that if the street was not safe for travel it would not be

55. Schindler v. Scroth, 146 Cal. 433, 80 Pac. 624; Hanlon v. Keokuk, 7 Ia. 488, 74 Am. Dec. 276; Keith v. Worcester & B. V. St. R. Co., 196 Mass. 478, 82 N. E. 680.

56. "The driver of a loaded wagon going down grade upon a sleety pavement, and with brakes coated with ice, should proceed at a more moderate speed and with more caution than would be required under ordinary circumstances." Colbourn v. Wilmington, 4 Penn. (Del.) 443, 56 Atl. 605.

57. § 2826, *post.*

58. § 2829, *post.*

The absence of lights may be important on the question of contributory negligence. Herndon v. Salt Lake City, 34 Utah, 65, 95 Pac. 646.

59. Richmond v. Schonberger, 111 Va. 168, 68 S. E. 284.

Contra. No greater care need be used by a pedestrian on a crosswalk than upon any other walk. Cochran v. Springfield, 139 Mo. App. 673, 124 S. W. 53.

60. If ice is on a sidewalk, a greater amount of care must be exercised by pedestrians to avoid falling down (Denver v. Hubbard, 29 Colo. 529, 69 Pac. 508), but ordinary care is still the test, i. e., the action of an ordinarily prudent person under like circumstances.

Greater care should be exercised when walks are wet and slippery, especially at intersections between sidewalks and crosswalks. Gilliland v. Omaha, 89 Neb. 668, 131 N. W. 1055.

61. § 2831, *post.*

62. §§ 2833-2835, *post.*

63. Purcell v. Riebe, 227 Pa. 503, 76 Atl. 212.

open.[64] So where, on account of the sidewalk being out of repair, much of the travel passed over that portion of the street between the driveway and the sidewalk, no greater care is required while passing over such space in the business portion of the municipality.[65] And no greater care is required in passing over a sidewalk than in passing along it.[66]

A fireman is not held to that amount of care and caution in driving along a public street required of a common traveler proceeding at an ordinary gait.[67]

§ 2824. Right to assume that street is safe.

One using a street, who has no knowledge of its defective condition, has the right to assume that it is in a reasonably safe condition,[68] and need not constantly keep his eyes on the

64. Turner v. Newburgh, 109 N. Y. 301, 307, 16 N. E. 344, 4 Am. St. Rep. 453.

65. South Omaha v. Meyers, 3 Neb. (unof.) 669, 92 N. W. 743.

66. "The court distinguishes between the use of sidewalks for 'ordinary pedestrianism' and its use for other purposes, and instructs the jury that in the latter case—to avoid the imputation of contributory negligence—'a higher degree of care' is required than in the former. But we do not think this distinction can be maintained. The use of a sidewalk by the owner of a lot for purposes of communication with the street is equally legitimate, and equally an ordinary use, as that of passing longtitudinally along it." Schindler v. Schroth, 146 Cal. 433, 80 Pac. 624.

67. Coots v. Detroit, 75 Mich. 628, 43 N. W. 17, 5 L. R. A. 315.

See also Kansas City v. McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429.

Firemen—contributory negligence. "The plaintiff in error urges that the court erred in refusing to permit it to show the rules of the fire department requiring that firemen drive in the middle of the street. If there was such a rule, its object was to insure safety to the men, teams, and vehicles when going at a rapid rate of speed in answer to an alarm of fire. A violation of any precaution affecting safety would have been equally negligent on the part of the driver, whether the exercise of such precaution was demanded by the rules or not. The condition of the street would largely determine the course to be taken, and what part of the street to be avoided, whatever the rule might be. To drive a hook and ladder wagon in the middle of those streets upon which cable-car tracks are in use, with rough stone blocks between the rails, would be exceedingly dangerous to the driver and vehicle, and render collision with street cars probable. The fact of the existence of a rule as claimed, which McDonald violated, would not demand of him greater care. The condition of the street, as it appeared to him, should determine his course in driving, whether there was a rule on the subject or not." Kansas City v. McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429.

68. *Iowa.* Ryan v. Foster (Ia.), 109 N. W. 1108.

Louisiana. McCormack v. Robin, 126 La. 594, 52 So. 779; Rock v. American Const. Co., 120 La. 831, 45 So. 741.

Missouri. Kelley v. Kansas City, 153 Mo. App. 484, 133 S. W. 670; Canterbury v. Kansas City, 149 Mo. App. 520, 131 S. W. 120; Knight v. Kansas City, 138 Mo. App. 153, 119 S. W. 990.

Montana. McCabe v. Butte (Mont. 1912), 125 Pac. 133; O'Flynn v. Butte, 36 Mont. 493, 93 Pac. 643.

New York. Corcoran v. New York, 188 N. Y. 131, 80 N. E. 660; Lalor v. New York, 132 N. Y. S. 539, 147 App. Div. 649; Moser v. Legniti, 134 N. Y. S. 606, 76 Misc. Rep. 216.

ground to discover defects.[69] Thus, if a street is being improved, but it is not closed, a traveler may assume that it is sufficiently lighted or guarded to be reasonably safe.[70] This rule applies equally well where one is on the streets *at night.*[71] But where one has notice of the defective condition of the street or sidewalk, and *especially where he is using them not in the manner in which they are ordinarily used or intended to be used,* he cannot, of course, assume that they are in an ordinarily good condition and act upon that assumption. In such a case he must exercise care and prudence in proportion to the danger from the known defect and the different use to which he is putting the street or sidewalk.[72] Furthermore, although the defect or obstruction is obvious and could not help but be seen if the traveler was looking where he was going, yet if his *attention is momentarily diverted,* it is generally held that there is no contributory negligence.[73]

§ 2825. Duty to observe patent defects.

One traveling along a street may presume that it is safe.[74] Therefore, it would be wholly unreasonable to compel him to keep his eyes underfoot or looking ahead, to avoid injury. A traveler need not keep his eyes fastened on the ground,[75] nor look far ahead for defects or obstructions.[76] nor make an

Oregon. Webb v. Heintz, 52 Ore. 444, 97 Pac. 753.

Utah. Bills v. Salt Lake City, 37 Utah 507, 109 Pac. 745.

Virginia. Portsmouth v. Houseman, 109 Va. 554, 65 S. E. 11.

Washington. Lindquist v. Seattle, 67 Wash. 230, 121 Pac. 449; Hammock v. Tacoma, 44 Wash. 623, 87 Pac. 924.

69. § 2825, *post.*

70. Knight v. Kansas City, 138 Mo. App. 153, 119 S. W. 990.

71. § 2829, *post.*

72. Bedford City v. Sitwell, 110 Va. 296, 65 S. E. 471.

73. § 2827, *post.*

74. § 2824, *ante.*

75. *Colorado.* Denver v. Maurer, 47 Colo. 209, 106 Pac. 875.

Illinois. Upper Alton v. Green, 112 Ill. App. 439; Centralia v. Baker, 36 Ill. App. 46.

Kansas. Topeka Water Co. v. Whiting, 58 Kan. 639, 50 Pac. 877, 39 L. R. A. 90.

Michigan. Baker v. Kalamazoo, 146 Mich. 257, 109 N. W. 427.

Pennsylvania. Pagnacco v. Faber, 221 Pa. 326, 70 Atl. 754.

West Virginia. Osborne v. Pulaski L. & W. Co., 95 Va. 16, 27 S. E. 812.

Need not constantly watch for holes in the walk or obstructions thereon. Bentley v. Rothschild Bros. Hat Co., 144 Mo. App. 612, 129 S. W. 249.

The fact that the injured person was not looking at the sidewalk at the time when injured does not preclude a recovery. Nokomis v. Salter, 61 Ill. App. 150.

But while pedestrians on a sidewalk need not keep their eyes on the pavement yet if they walk a considerable distance without looking in front, which results in a fall into a ditch, no recovery can be had. Osborne v. Pulaski L. & W. Co., 95 Va. 16, 27 S. E. 812.

76. Thompson v. Bridgewater, 7 Pick. (Mass.) 188.

Need not look far ahead. District of Columbia v. Haller, 4 App. (D. C.) 405.

active search for defects,[77] nor look for danger at every step.[78] At the same time, defects may be so obvious that a traveler must see them if he is paying any attention to where he is going, and in such a case the failure to observe the defect is generally held to be contributory negligence, on the theory that it is not the act of an ordinarily prudent person;[79] and *Pennsylvania* applies this rule with greater strictness, it would seem, than other states.[80]

One traveling on horseback and leading several mules attached to a halter, need not look forward and ahead of him all the time. Montgomery v. Bradley & Edwards, 159 Ala. 230, 48 So. 809.

77. Lord v. Mobile, 113 Ala. 360, 21 So. 366.

Travelers need not critically inspect sidewalks before using them. Robertson v. Waukon, 138 Ia. 25, 115 N. W. 482.

Driver of fire wagon, on going to a fire, need not inspect streets, but may assume that they are safe. Valparaiso v. Chester (Ind. 1911), 96 N. E. 765.

78. Cummings v. New Rochelle, 56 N. Y. S. 701, 38 App. Div. 583.

79. Holliday v. Athens, 10 Ga. App. 709, 74 S. E. 67; Bender v. Minden, 124 Ia. 685, 100 N. W. 352; Yahn v. Ottumwa, 60 Ia. 429, 433, 15 N. W. 257; Woodson v. Metropolitan St. R. Co., 224 Mo. 685, 123 S. W. 820, 30 L. R. A. (N. S.) 931, 20 Am. & Eng. Ann. Cas. 1039; Jackson v. Kansas City, 106 Mo. App. 52, 79 S. W. 1174; Moore v. Richmond, 85 Va. 538, 8 S. E. 387.

Driving into hole in street in daytime. Pierce v. Wilmington, 2 Mar. (Del.) 306, 43 Atl. 162.

It is undoubtedly the law that one is required to keep a reasonable lookout for defects and dangers which are known to attend particular places, and that one is bound to make such use of his faculties as will enable him to discover obvious dangers in a highway or sidewalk. Bowman v. Ogden City, 33 Utah 196, 93 Pac. 561.

Bicyclist riding at an unlawful rate of speed with head down held contributory negligence. Anderson v. Wilmington, 2 Penn. (Del.) 28, 43 Atl. 841.

Chuck hole in street. Failure to observe in daylight held contributory negligence. Hysell v. Central City, 68 W. Va. 769, 70 S. E. 767.

80. McIlhenny v. Philadelphia, 214 Pa. 44, 63 Atl. 368; Becker v. Philadelphia, 212 Pa. 379, 61 Atl. 942; Benton v. Philadelphia, 198 Pa. 396, 48 Atl. 267; Shallcross v. Philadelphia, 187 Pa. 143, 40 Atl. 818; Stackhouse v. Vendig, 166 Pa. 582, 31 Atl. 349; Robb v. Connellsville, 137 Pa. 42, 20 Atl. 564.

"Irregularities in grade, unevenness in surface, sharp depressions at crossings, accidental displacement of brick or stone, and many other things which may or may not be defects, but yet sufficient in themselves to cause accident to the unwary, are so common and usual that it is the duty of the pedestrian to be observant of such fact, and not to walk blindly. If through no fault of his he is prevented from seeing the defect, obstruction, or whatever it may be, which it was the duty of the municipality to have corrected, and injury results to him, he is entitled to claim compensation. When the accident occurs in broad daylight, in consequence of an open and exposed defect in the sidewalk, the burden rests upon the party complaining to show conditions outside of himself which prevented him seeing the defect, or which would excuse his failure to observe it. If such conditions exist, there is excuse for walking by faith. When they do not exist, the law charges the party with failure to do what was required of him." Lerner v. Philadelphia, 221 Pa. 294, 70 Atl. 755.

Stumbling over block on sidewalk, five inches high, in board daylight, is contributory negligence. Kennedy v. Pittsburg, 230 Pa. 244, 79 Atl. 550.

Stumbling over root of tree four inches above the sidewalk, well

The prevailing rule is well stated by Justice Lamm of the Supreme Court of Missouri in a separate concurring opinion in a recent decision, as follows: "While a footman may presume a city has done its duty in keeping its sidewalks in a reasonably safe condition for travel by pedestrians, by night as well as by day, yet that presumption runs with a condition. It goes hand in hand with another vital proposition, viz., that a footman must use ordinary, that is, due care to avoid injuring himself. Such care is the care of an ordinary person under like circumstances. Such care is broad enough to create the duty to look and see where one is going as well as the duty to avoid danger when actually discovered. That does not mean a pedestrian is an inspector of sidewalks or cannot take a step without looking down to see that his feet do not carry him into a pit, nor does it mean that an ordinary prudent person might not be deceived into taking an excavation full of water as part of the sidewalk at night in the glimmer of electric lights or during a storm. He need not be watching at every footfall for defects, but he should act like a prudent person, who makes reasonable use of his eyes while walking. He cannot shut his eyes, or blindfold himself, or walk backward, or not look about him at all, or, under the assumption no defects exist, walk heedlessly into obvious ones." [81]

On the other hand, it is difficult to reconcile with this rule some of the decisions holding that in the particular case there was no contributory negligence as matter of law where a traveler failed to notice a defect which could easily be seen if he had looked; [82] and it has been held that while a traveler

known to the traveler, and where the view is unobstructed, is contributory negligence. Kennedy v. Philadelphia, 220 Pa. 273, 69 Atl. 748.

81. Ryan v. Kansas City, 232 Mo. 471, 487, 134 S. W. 653.

In Missouri, the supreme court now holds that one using the streets must use ordinary care to *discover* defects in a sidewalk. Ryan v. Kansas City, 232 Mo. 471, 131 S. W. 566, 985, overruling, so far as to the contrary, Heberling v. Warrensburg, 204 Mo. 604, 103 S. W. 36.

82. Machacek v. Hall, 131 Ia. 412, 105 N. W. 690; Kaiser v. Hahn Bros., 126 Ia. 561, 102 N. W. 504.

The mere fact that one walking along a sidewalk in the daytime steps into an artificial opening in the walk does not necessarily show contributory negligence. Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271.

Attempting to drive a bus on a bridge too low to permit it to enter has been held not necessarily contributory negligence. Talbot v. Taunton, 140 Mass. 552, 5 N. E. 616.

Failure of driver to discover sticks on side of street until horse stepped on them held not, as matter of law, contributory negligence. Saylor v. Montesano, 11 Wash. 328, 333, 39 Pac. 653.

Driver need not be on lookout for holes in street. Houston v. Isaacks, 68 Tex. 116, 3 S. W. 693.

"Mere abstraction or lack of attention to the condition of a sidewalk by a pedestrian passing over it" is not contributory negligence. Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 103 Pac. 190.

must use his senses, and the care and caution common to persons of ordinary prudence, in passing over a walk, he is not bound at his peril to discover every defect, even though it may be an open one.[83] In brief, a person is not, as a matter of law, guilty of contributory negligence, under all circumstances, in failing to discover even an open defect.[84]

Furthermore, it is generally held that the failure to observe an obvious defect is not contributory negligence as a matter of law, where due to the *attention of the traveler being momentarily diverted*,[85] as where one runs out of a store to catch a street car,[86] although the contrary is held in Pennsylvania.[87] It may be suggested, however, that a distinction should be drawn between defects in a sidewalk, and lawful obstructions thereon or artificial openings therein; and that while a traveler may assume that there are no defects in a

Stop, look and listen. The rule requiring one to stop, look and listen before crossing a railroad track does not apply in case of excavations. Karrer v. Detroit, 142 Mich. 331, 106 N. W. 64.

Falling into open coal hole. Not contributory negligence. Jennings v. Van Schaick, 108 N. Y. 530, 15 N. E. 424, 2 Am. St. Rep. 459; Pecor v. Oconto, 125 Wis. 335, 104 N. W. 88.

83. Barnes v. Marcus, 96 Ia. 675, 681, 65 N. W. 984.

84. Valparaiso v. Schwerdt, 40 Ind. App. 608, 82 N. E. 923.

Fire driver. "While the duty of vigilance is obligatory on every one in the use of city streets, a driver who is unable to give undivided attention to the roadbed, because of the care required in managing his horses and in avoiding other vehicles, cannot be held to have seen, or to have been reckless in not seeing, defects in a roadbed that would have been obvious to a pedestrian." McClay v. Philadelphia, 224 Pa. 174, 73 Atl. 188.

85. *California*. Barry v. Terkildsen, 72 Cal. 254, 13 Pac. 657, 1 Am. St. Rep. 55.

Michigan. Le Beau v. Telephone & T. Const. Co., 109 Mich. 302, 67 N. W. 339.

New Jersey. Houston v. Traphagen, 47 N. J. L. 23.

Wisconsin. West v. Eau Claire, 89 Wisc. 31, 61 N. W. 313.

Contra, see Tuffree v. State Center, 57 Ia. 538, 11 N. W. 1 (driver looking and talking to persons in opposite direction).

The fact that one's attention is momentarily attracted in another direction does not show contributory negligence *per se*. Bolen-Darnall Coal Co., v. Rogers, 99 Ark. 254, 138 S. W. 465.

"Even if plaintiff had casually glanced aside, his attention having been attracted to the foundation of defendant's building, or to some other object, it would not follow that he was guilty of negligence as a legal conclusion. A foot passenger on a sidewalk in a city may place more reliance on the security of the walk than would be indicated by such extreme care. People constantly divert their attention from their footsteps when on sidewalks, and to pronounce such an act necessarily one of negligence, would amount to denouncing the entire public as careless." Lattimore v. Union Electric L. & P. Co., 128 Mo. App. 37, 106 S. W. 543.

What is a sufficient diverting cause. Diversion due to inattention or forgetfulness, or caused by the presence of other persons with whom one is talking, is not a sufficient diverting cause. Bender v. Minden, 124 Ia. 685, 690, 100 N. W. 352.

86 Keith v. Worcester & B. V. St. R. Co., 196 Mass. 478, 82 N. E. 680.

87. Barnes v. Sowden, 119 Pa. 53, 12 Atl. 804.

sidewalk, his knowledge of every day affairs compels him to take notice and observe caution to avoid stumbling over temporary and lawful obstructions on the walk, such as those used in delivering and sending out goods, etc., and to avoid falling in areaways, coal holes, trap door openings, and the like.[88]

It has been held that if one proceeds on a street, carrying bundles, so that he cannot see ahead, it is contributory negligence.[89] But it is not necessarily negligence to run into a barrier which is not plainly discernible,[90] and it has been held not necessarily negligence to walk into open trap doors or the like.[91]

§ 2826. Effect of knowledge of defects or dangers.

It is now settled beyond dispute that mere knowledge of a defect in a street, at the time of or before using a street, is not *per se contributory negligence*.[92] The injured party is

88. "Streets and sidewalks may be temporarily obstructed, and the traveler must be on the lookout for such obstructions. In this respect the case differs from one where there is a defect in the sidewalk itself. For this a traveler need not be on the lookout; for he may assume that no defects exist. But as to proper obstructions the rule is different. If this were not so, one might blindly walk into an obstruction, and say that he was not obliged to look out for it, and therefore was not negligent." Ryan v. Foster, 137 Ia. 737, 115 N. W. 595.

"Those walking in the city are bound to take notice of the existence of such constructions as the necessities of commerce and the convenient occupation of residences render common, and if injured by them must blame themselves." Buesching v. St. Louis Gas Light Co., 6 Mo. App. 85, 93.

89. Carrying couch on head so as to obstruct view ahead is contributory negligence. Lautenbacher v. Philadelphia, 217 Pa. 318, 66 Atl. 549.

90. Not negligence *per se* to run into a wire stretched across sidewalk. Winslow v. Glendale L. & P. Co., 12 Cal. App. 530, 107 Pac. 1020.

91. It has been held that where a pedestrian walked into an open and unguarded hatchway at night, which he could have seen if he had looked, he is not guilty of contributory negligence *per se*, since while he knew of the hatchway he had a right to presume that it would be guarded when open. Murphy v. Herold Co., 137 Wisc. 609, 119 N. W. 294.

92. *Illinois.* Streator v. Chrisman, 182 Ill. 215, 54 N. E. 997.

Indiana. Huntington v. Folk, 154 Ind. 91, 54 N. E. 759.

Iowa. Rea v. Sioux City, 127 Ia. 615, 103 N. W. 949.

Kansas. McCoy v. Wichita, 86 Kan. 943, 122 Pac. 894.

Kentucky. Maysville v. Guilfoyle, 110 Ky. 670, 62 S. W. 493.

Louisiana. Robertson v. Jennings, 128 La. 795, 55 So. 375.

Maryland. Baltimore v. Holmes, 39 Md. 243.

Massachusetts. St. Germain v. Fall River, 177 Mass. 550, 59 N. E. 447.

Michigan. Belyea v. Port Huron, 136 Mich. 504, 99 N. W. 740.

Minnesota. Maki v. Cloquet, 116 Minn. 17, 133 N. W. 80.

Missouri. Chilton v. St. Joseph, 143 Mo. 192, 44 S. W. 766.

New York. Ott v. Buffalo, 131 N. Y. 594, 30 N. E. 67.

Pennsylvania. March v. Phoenixville, 221 Pa. 64, 70 Atl. 274.

Washington. Cowie v. Seattle, 22 Wash. 659, 62 Pac. 121.

Knowledge of defect not contributory negligence. "When analyzed, the proposition comes to this, that no person can as a matter of law,

not negligent unless he knew both of the defect and also of the danger,[93] since there must be knowledge *plus* want of ordinary care to constitute contributory negligence.[94] To illustrate, if a pedestrian, although he knows of a defective condition in a sidewalk, has passed over it many times in safety, and believes he can do so again, he is not guilty of negligence *per se,* since in such case there cannot be said, as a matter of law, to be a want of ordinary care.[95] So it is not

without assuming all the risk, use the streets of a municipality where he knows of a defect therein, even although it be that in the exercise of a sound judgment it might be deemed that, with ordinary care and prudence, the street could be used with safety. The result of admitting the doctrine would be to hold that all persons in making use of the public streets assume all risks possibly to arise from every known defect or danger. * * * Indeed, the proposition would imply that every one who used the public streets with the knowledge of a defect existing therein would be guilty, if an injury was by them suffered as a result of such defect, of contributory negligence without the existence of any neglect whatever; for this would necessarily result from saying that one who had made a careful use of the streets was yet guilty of neglect in doing so. * * * Reduced to its last analysis, the principle contended for but aserts that the ordinary rules by which negligence is to be determined do not apply to the use of the public streets, since those who use such streets with knowelge of a possible danger to arise from a defect therein must as a matter of law have negligence imputed to them, although in choosing to make use of the streets and in the mode of use the fullest degree of judgment and care was exercised. The result of this would be to relieve the municipality of all duty and consequent responsibility concerning defects in highways, provided only it choose to give notice of the existence of the defects." Per Mr. Justice White in Mosheuvel v. District of Columbia, 191 U. S. 258, 24 Sup. Ct. 57, 48 L. Ed. 174.

Knowledge cannot be inferred from the fact of having lived in the vicinity for some years Roberts v. Piedmont, 166 Mo. App. 1, 148 S. W. 119.

93. Huntington v. Folk, 154 Ind. 91, 54 N. E. 759; Cook v. Hedrick, 135 Ia. 23, 112 N. W. 157.

Knowledge of danger coupled with knowledge of defect. "It is well settled that the mere knowledge of the general unsafe condition of an unbarricaded defective street or walk is not in itself sufficient to establish contributory negligence on the part of one who has the right to use such street or sidewalk. So long as the streets remain unbarricaded and open to public travel, there is an implied invitation for their use, and a person using them under such conditions is not guilty of contributory negligence, *unless he has knowledge of the dangers incident* to the proper use thereof." Scurlock v. Boone, 142 Ia. 684, 121 N. W. 369.

Knowledge of a trench being dug in a street, and progressing in the direction of street railway tracks, does not include knowledge although a matter of reason, that the trench would cross the track if the digging was continued on the day of the accident with the same expedition as before. O'Neil v. Chelsea, 208 Mass. 307, 94 N. E. 279.

94. *Alabama.* Mobile v. Shaw, 149 Ala. 599, 43 So. 94.

Illinois. Wallace v. Farmington, 231 Ill. 232, 83 N. E. 180.

Missouri. Swails v. Caruthersville, 158 Mo. App. 589, 138 S. W. 948; Loftis v. Kansas City, 156 Mo. App. 683, 137 S. W. 993; Tockstein v. Bimmerle, 150 Mo. App. 491, 131 S. W. 126; Howard v. New Madrid, 148 Mo. App. 57, 127 S. W. 630.

South Carolina. Kennedy v. Greenville, 78 S. C. 124, 58 S. E. 989.

Utah. Bowman v. Ogden City, 33 Utah 196, 93 Pac. 561.

95. Neeley v. Mapleton, 139 Ia. 582, 117 N. W. 981.

necessarily contributory negligence to use an icy sidewalk.[96] In other words, it is not the knowledge of a defect on the part of the person injured that precludes his recovery but his want of the care a prudent man would exercise in view of the danger.[97] However, one who knows of defects or obstructions in a street must use reasonable care to avoid them, and that care must increase in proportion to his knowledge of the risk.[98] Thus, where one knows a street is closed to traffic and there are barriers indicating danger, his walking thereon at night is negligent where not exercising any particular care;[99] and knowledge is always an important circumstance to be considered in determining whether, under the circumstances of the particular case, the party injured exercised ordinary care.[1] And if the known danger is of such a nature as to

96. Holbert v. Philadelphia, 221 Pa. 266, 70 Atl. 746; Hynes v. Brewer, 194 Mass. 435, 80 N. E. 503.

"It is not necessarily negligence to attempt to pass over even a noticeable accumulation of ice on the pavements; that may depend on the size and shape of the accumulation, the obviousness and magnitude of the danger, the means at hand of avoiding it, and other circumstances." Brown v. White, 206 Pa. 106, 55 Atl. 848; Green v. Hollidaysburg, 236 Pa. 430, 84 Atl. 785.

"Whether the plaintiff exercised proper care in passing along the sidewalk, and whether she fell from any want of care on her part, were for the jury. It has been argued that as she approached the bridge she saw ice on the pavement, both in and outside the tunnel, and that therefore it was negligent for her to attempt to pass through the tunnel. That position, however, is wholly untenable. There was nothing there to admonish her that by the exercise of care she could not pass with safety through the tunnel. She had done so on a previous occasion when the same or similar conditions existed. The danger was not immediate or imminent. The sidewalk was in constant use by the people of that vicinity. Of course, other persons had fallen on the ice there, but many others had passed over it with safety. In fact, just as the plaintiff was entering the tunnel, another person came out of it, and passed her. There were spots or places in the pavement where there was no ice, which the plaintiff attempted to use to avoid the ice. Under the circumstances, therefore, it was not negligence, to be declared by the court, for the plaintiff to use the sidewalk." Holbert v. Philadelphia, 221 Pa. 266, 70 Atl. 746.

97. Nicholson v. South Omaha, 77 Neb. 710, 110 N. W. 558.

98. Wheat v. St. Louis, 179 Mo. 572, 78 S. W. 790, 64 L. R. A. 292; Knight v. Kansas City, 138 Mo. App. 153, 119 S. W. 990.

The care which a traveler is bound to exercise must be proportioned to the visible dangers and "to whatever notice or warning was given to him by barriers, signs or otherwise." Stoliker v. Boston, 204 Mass. 522, 534, 90 N. E. 927.

99. Steinbrenner v. M. W. Forney Co., 127 N. Y. S. 620, 143 App. Div. 73.

If barriers are sufficient, one who nevertheless uses the street assumes the risk. Stainback v. Meridian, 79 Miss. 447, 30 So. 607.

If one walking on a sidewalk knows of transverse openings several inches wide therein, but proceeds at night at his ordinary gait, and without taking hold of a handrail at the side of the walk, he can not recover. Diamond v. Kansas City, 120 Mo. App. 185, 96 S. W. 492.

If a traveler has knowledge that a sidewalk is torn up or littered, he must "pick his steps." McHaugh v. Inter-State Pav. Co., 106 N. Y. S. 165, 121 App. Div. 517.

1. Elkhart v. Witman, 122 Ind. 538, 23 N. E. 796; West Kentucky

threaten a traveler with injury, if he attempts to use the way, especially at night, *despite the care he might exercise,* his use of such way is contributory negligence *per se.*[2]

Furthermore, defects previously noticed may be presumed to have been repaired, after the lapse of a reasonable time to make the repairs.[3]

§ 2827. Same—forgetfulness.

A mere failure to remember a known defect in a way, or temporary forgetfulness, does not necessarily constitute contributory negligence, if it results in injury,[4] but it is a matter to be considered by the jury.[5] So knowledge of a defect in a

Tel. Co. v. Pharis, 25 Ky. L. Rep. 1838, 78 S. W. 917; Hodge v. St. Louis, 146 Mich. 173, 109 N. W. 252.

So if a street is plainly in bad condition, and one walks straight ahead without looking where he is going, he can not recover. Suchovalsky v. New York, 130 N. Y. S. 112.

If timely warning is given just before the accident, no recovery can be had. Stidham v. Delaware City, 6 Penn. (Del.) 359, 67 Atl. 175.

Swing bridge. A foot passenger who enters on the approach of a swing bridge which he knows to be without guards and also knows may be open is bound to look and listen before attempting to step in the draw, and is guilty of contributory negligence if he does not do so, and for that reason steps into the open draw. Stephani v. Manitowoc, 101 Wisc. 59, 76 N. W. 1110, distinguished in Moyer v. Oshkosh, 151 Wis. 586, 139 N. W. 378.

Where one, from motives of curiosity, goes to a place known to be dangerous, and is injured when in close proximity thereto, he can not recover. Heffern v. Haverstraw, 128 N. Y. S. 399, 143 App. Div. 527.

2. Border v. Sedalia, 161 Mo. App. 633, 144 S. W. 161.

3. Deland v. Cameron, 112 Mo. App. 704, 87 S. W. 597.

4. *Kentucky.* Corinth v. Lawrence, 138 Ky. 323, 127 S. W. 1009; Brownsville v. Arbuckle, 30 Ky. L. Rep. 414, 99 S. W. 239; Lancaster v. Walter, 25 Ky. L. Rep. 2189, 80 S. W. 189; Louisville v. Brewer's Adm'r, 24 Ky. L. Rep. 1671, 72 S. W. 9.

Michigan. Vergin v. Saginaw, 125 Mich. 499, 84 N. W. 1075.

Mississippi. Natchez v. Lewis, 90 Miss. 310, 43 So. 471.

New York. Delaney v. Mt. Vernon, 85 N. Y. S. 799, 89 App. Div. 209.

Tennessee. Knoxville v. Cox, 103 Tenn. 368, 53 S. W. 734.

Utah. Bowman v. Ogden City, 33 Utah, 196, 93 Pac. 561.

Washington. Cowie v. Seattle, 22 Wash. 659, 62 Pac. 121.

But see King v. Colon, 125 Mich. 511, 84 N. W. 1077; Wheat v. St. Louis, 179 Mo. 572, 78 S. W. 790, 64 L. R. A. 292; Neal v. Marion, 126 N. C. 412, 35 S. E. 812.

That satisfactory excuse for forgetting the defect must be shown, see Lyon v. Grand Rapids, 121 Wis. 609, 99 N. W. 311.

5. "The fact that a footman forgets the existence of a defect in a sidewalk he is accustomed to travel and is injured by the defect is a circumstance to be considered by the jury in solving the question of contributory negligence, but is not always conclusive evidence of such negligence. The controlling question in such case is whether or not the pedestrian was making the use of his senses of sight and hearing to be expected of an ordinarily careful and prudent person in his situation. Graney v. St. Louis, 141 Mo. 180, 42 S. W. 941; Barr v. City of Kansas, 105 Mo. 550, 16 S. W. 483. Individuals differ widely in memory. A person's memory changes as he grows older and varies in strength and clearness with variations in health, condition in life, and environment. At best, memory is uncertain, even treacherous. It would be a harsh rule, indeed, that would denounce as careless in law a person who failed

street some weeks or months before the injury does not necessarily charge one with knowledge thereof at the time of the injury.[6] The rule seems to be that if there is a sufficient cause for the temporary forgetfulness, or the attention of the traveler is diverted for the moment,[7] the failure to take notice of the defect is not contributory negligence.

§ 2828. Same—choice of ways.

It is well settled that a traveler who knows, or, as an ordinarily cautions person, ought to know, that it is dangerous to pass over a defective driveway, crosswalk or sidewalk, and does so, although he might have taken another safe and convenient path or course, in the same direction, is guilty of such negligence as will defeat recovery for damages in event of injury, caused by the dangerous condition of the way.[8]

to remember every defect observed by him in his numerous ways of travel. The law expects no such phenomenal exhibition of memory, but it does expect a person to make a reasonable use of his faculties to protect his own safety." Chase v. Atchison, T. & S. F. R. Co., 134 Mo. App. 655, 114 S. W. 1141.

6. Valparaiso v. Schwerdt, 40 Ind. App. 608, 612, 82 N. E. 923.

7. § 2825, *post*.

In Lyon v. Grand Rapids, 121 Wis. 609, 99 N. W. 311, the plaintiff knew of the hole in the sidewalk into which she stepped, and this court held that, having knowledge of the defective condition, she must show some excuse for having forgotten it. It appears from the evidence that plaintiff was carrying several things which somewhat occupied her attention, and, when near the hole, her husband, who was a short distance ahead, called to her to hurry, that this drew her attention to him and almost instantly thereafter she stepped into the hole. It was held that these facts were sufficient to warrant the jury in finding that the plaintiff was excused for not remembering the defect.

8. *Iowa.* Gibson v. Denison, 153 Ia. 320, 133 N. W. 712.

Kentucky. Belleview v. England (Ky.), 118 S. W. 994; Glasgow v. Crisp, 33 Ky. L. Rep. 766, 111 S. W. 279.

Missouri. Woodson v. Metropolitan St. R. Co., 224 Mo. 685, 123 S. W. 820.

New York. Griffin v. New York, 9 N. Y. 456; McGinnis v. Hyman, 117 N. Y. S. 202, 63 Misc. Rep. 316. See also Whalen v. Citizens' Gas Light Co., 151 N. Y. 70, 45 N. E. 363.

Pennsylvania. Purcell v. Riebe, 227 Pa. 503, 76 Atl. 212; Rothacker v. Philadelphia, 42 Pa. Super. Ct. 408.

Texas. Cleburne v. Elder, 46 Tex. Civ. App. 399, 102 S. W. 464.

Virginia. Portsmouth v. Houseman, 109 Va. 554, 65 S. E. 11.

Washington. Hunter v. Montesano, 60 Wash. 489, 111 Pac. 571.

Wisconsin. Devine v. Fond du Lac, 113 Wis. 61, 88 N. W. 913.

If a traveler has knowledge of a defective condition of such a character as renders the walk so unsafe that it cannot be prudently used, he is guilty of negligence in voluntarily attempting to travel upon it, if the defect could easily and without substantial inconvenience be avoided by going around it or taking a safer way. Bowman v. Ogden City, 33 Utah, 196, 93 Pac. 561.

This applies to a fall over a doorstep where there was a safe footway over six feet wide. White v. Philadelphia, 223 Pa. 563, 72 Atl. 856.

On the same theory, if the source of danger is ice on a sidewalk, which is plainly visible, and a traveler can easily avoid stepping on the ice, it is negligence to step on the ice. Conneaut v. Naef, 54 Ohio St. 529, 44 N. E. 236; Hausman v. Madison, 85 Wis. 187, 191, 55 N. W. 167, 21 L. R. A. 263, 39 Am. St. Rep. 834.

Thus, if the walk on the other side of the street is known to be in good condition, and it is not necessary to go upon the unsafe sidewalk, there can be no recovery.[9] On the other hand, the fact that one has a choice of ways and nevertheless chooses the one which is in a defective condition does not show contributory negligence if by the exercise of care proportioned to the known danger he may reasonably expect to avoid the defect.[10] The rule has been well stated as follows: "Where the traveler has knowledge of a defect in the highway, it does not follow, as a legal consequence, that he must, under all circumstances, avoid the use of it, and reach his destination in some other way. It is a question of the character and imminency of the danger, and the difficulty or inconvenience of avoiding it. If the danger was serious and imminent it might be the traveler's duty, as a matter of law, to avoid it at any inconvenience. If, however, the danger was trifling, and the inconvenience of taking another way was so great that an ordinarily prudent man would not subject himself to it, it would not be negligence not to do so. Between these extremes are the countless gradations of danger and ways of avoiding it, depending on the circumstances."[11] Thus, a person need not go on the driveway to avoid a defect or obstruction in or on a sidewalk, unless the danger is so great that a person of ordinary prudence would have changed his course.[12] Moreover, the rule that there is contributory negligence where one chooses an unsafe instead of a safe way has been limited by at least one decision to cases where an unusual condition exists.[13]

9. Lovenguth v. Bloomington, 71 Ill. 238; Cohn v. Kansas, 108 Mo. 387, 18 S. W. 973; Lynch v. Erie, 151 Pa. 380, 25 Atl. 43; Ingram v. Philadelphia, 35 Pa. Super. Ct. 305.

10. Birmingham v. Gordon, 167 Ala. 334, 52 So. 430; Normal v. Bright, 125 Ill. App. 478; Jackson v. Grinnell, 144 Ia. 232, 122 N. W. 911.

Not negligence to make a bee line for nearest sidewalk on getting off street car. Canterbury v. Kansas City, 149 Mo. App. 520, 131 S. W. 120.

"Sidewalks are constructed for people to walk on, and they have a right to walk thereon in the most convenient route to reach their destination, and, while they cannot recklessly place themselves in danger of accident, yet, on the other hand, they are not driven to forsake such walks merely because there may be some danger in passing over the same, and especially when there is no safer route reasonably convenient." Smith v. Yankton, 23 S. D. 352, 121 N. W. 848.

11. March v. Phoenixville, 221 Pa. 64, 70 Atl. 274.

12. Combs v. Kirksville, 134 Mo. App. 645, 114 S. W. 1153.

13. This rule should not, however, be extended "to cover a case like the one at bar. As originally announced and properly applied, it governs only those cases where an unusual condition exists, as, for instance, icy or slippery sidewalks, sidewalks or streets in course of repair, or unusual obstructions in the way of pedestrians. Here we have a known condition, a walk made by the city along a bulkhead without guard rail or light to secure the pedestrian, itself an invitation to travel by night as well as by day." Stock v. Tacoma, 53 Wash. 226, 101 Pac. 830.

§ 2829. Traveling at night.

Clearly it is not contributory negligence *per se* to travel at night,[14] since one has a right to presume that the street is safe by night as well as by day,[15] and is not bound to anticipate that he will encounter excavations or the like, without some notice thereof by lights or other precautions taken for his protection.[16] However, greater caution may be, and generally is, necessary than in the daytime,[17] although only ordinary care is required.[18] even where one has notice of the defect causing the injury.[19]

This rule as to the right to travel at night without negligence being imputed because thereof is true even though the traveler has knowledge of the defect in the street,[20] but obviously a greater amount of care is necessary where a traveler at night has knowledge of the defective condition of the

14. *Iowa.* Keyes v. Cedar Falls, 107 Ia. 509, 78 N. W. 227.

Michigan. Belyea v. Port Huron, 136 Mich. 504, 99 N. W. 740.

Missouri. Dinsmore v. St. Louis, 192 Mo. 255, 91 S. W. 95; Holloway v. Kansas City, 184 Mo. 19, 82 S. W. 89.

Montana. May v. Anaconda, 26 Mont. 140, 66 Pac. 759.

New York. Manney v. Curtiss, 99 N. Y. S. 288, 113 App. Div. 421.

See also Wallace v. New Haven, 82 Conn. 527, 74 Atl. 886.

Stranger may pass along street to his destination at night, without being guilty of negligence. Conner v. Nevada, 188 Mo. 148, 86 S. W. 256, 107 Am. St. Rep. 314.

Need not examine every step of the way at night, on an ordinary sidewalk. Chicago v. Harris, 113 Ill. App. 633.

Bicyclist. See Walsh v. Central New York T. & T. Co., 176 N. Y. 163, 68 N. E. 146; Pinnix v. Durham, 130 N. C. 360, 41 S. E. 932. Riding bicycle into wooden horse at night. Burditt v. Winchester, 205 Mass. 493, 91 N. E. 880.

15. Heckman v. Evenson, 7 N. D. 173, 73 N. W. 427; Stillwater v. Swisher, 16 Okla. 585, 85 Pac. 1110; Gillard v. Chester, 212 Pa. 338, 61 Atl. 929.

Need not search for holes. Robinson v. Wilmington, 8 Houst. (Del.) 409, 32 Atl. 347.

16. Wright v. Saunders, 65 Barb. (N. Y.) 214; Durant v. Palmer, 29 N. J. L. 544, 548.

17. Bedford v. Neal, 143 Ind. 425, 41 N. E. 1029, 42 N. E. 815; Hall v. Manson, 90 Ia. 585, 58 N. W. 881; Stier v. Oskaloosa, 41 Ia. 353.

The amount of care must be proportioned to the increased danger from darkness and other atmospheric conditions. Wells v. Lisbon, 21 N. D. 34, 128 N. W. 308.

18. Owen v. Fort Dodge, 98 Ia. 281, 67 N. W. 281.

19. Jefferson v. Chapman, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136.

20. *Idaho.* Carson v. Genesee, 9 Idaho, 244, 74 Pac. 862, 108 Am. St. Rep. 127.

Iowa. Tuttle v. Clear Lake (Ia.), 102 N. W. 136.

Kansas. Maultby *v.* Leavenworth, 28 Kan. 745.

Massachusetts. George v. Haverhill, 110 Mass. 506.

Michigan. Finch v. Bangor, 133 Mich. 149, 94 N. W. 738; Finn v. Adrian, 93 Mich. 504, 53 N. W. 614.

Missouri. Flynn v. Neosho, 114 Mo. 567, 21 S. W. 903.

Montana. Cannon v. Lewis, 18 Mont. 402, 45 Pac. 572.

Utah. Dwyer v. Salt Lake City, 19 Utah, 521, 57 Pac. 535.

Not negligence *per se* to attempt to cross ridge about eight inches above the level of the walk, in the dark. Bowman v. Ogden City, 33 Utah, 196, 93 Pac. 561.

way;[21] and such knowledge, although not negligence *per se*, may be a circumstance tending to show negligence;[22] and if there is both knowledge of the defect and of the danger, there is contributory negligence if one passes over the dangerous place at night, without using proper care,[23] or, generally, where there is another safe and convenient way.[24]

The traveler need not, at night, under ordinary circumstances, keep his eyes on the ground,[25] nor take any extraordinary precautions, unless he has knowledge both of the defect and of the attendant danger, in which latter case he must either go around the defect, take another route, or proceed slowly and with great care.

It has been held that it is not negligence *per se* to run or *trot a horse* at night,[26] or to drive a blind horse.[27] So running along the sidewalk, close to the building line, with head down, on a rainy night, has been held not necessarily contributory negligence.[28] Likewise, running on a dark night, on a street, to assist in extinguishing a fire, is not negligence.[29] So using an *icy sidewalk*, or stepping on ice, at night, with knowledge of the ice, is not necessarily contributory negligence.[30] And a *bicyclist* is not guilty of negligence

21. Bedford v. Neal, 143 Ind. 425, 41 N. E. 1029, 42 N. E. 815.

22. Clayton v. Brooks, 150 Ill. 97, 37 N. E. 574; Flynn v. Neosho, 114 Mo. 567, 21 S. W. 903; Pitman v. El Reno, 2 Okla. 414, 37 Pac. 851.

23. Boswell v. Wakely, 149 Ind. 64, 48 N. E. 637; Indianapolis v. Cook, 99 Ind. 10; Corlett v. Leavenworth, 27 Kan. 673; Walker v. Reidsville, 96 N. C. 382, 2 S. E. 74; Hesser v. Grafton, 33 W. Va. 548, 11 S. E. 211.

Knowledge of defect, coupled with the fact of darkness, held contributory negligence, in particular cases, see McGraw v. Friend & Terry Lumber Co., 120 Cal. 574, 52 Pac. 1004; Columbus v. Griggs, 113 Ga. 597, 38 S. E. 953, 84 Am. St. Rep. 257; Rogers v. Bloomington, 22 Ind. App. 601, 52 N E. 242; Trout v. Elkhart, 12 Ind. App. 343, 39 N. E. 1048; Casey v. Fitchburg, 162 Mass. 321, 38 N. E. 499; Church v. Howard City, 111 Mich. 298, 69 N. W. 651, 66 Am. St. Rep. 396; O'Neil v. Bates, 20 R. I. 793, 40 Atl. 236; Bohl v. Dell Rapids, 15 S. D. 619, 91 N. W. 315; Swift & Co. v. Langbein, 127 Fed. 111, 62 C. C. A. 111.

Driving where it was so dark the driver could not see, held negligence. Perry v. Cedar Rapids, 87 Ia. 315, 54 N. W. 225.

Forgetting. One who forgets existence of hole is guilty of negligence. Bruker v. Covington, 69 Ind. 33, 35 Am. Rep. 202. But see § 2827, *ante*.

24. Parkhill v. Brighten, 61 Ia. 103, 15 N. W. 853; McGinty v. Keokuk, 66 Ia. 725, 24 N. W. 506.

§ 2828, *ante*.

25. Manney v. Curtiss, 99 N. Y. S. 288, 113 App. Div. 421; Dallas v. Webb, 22 Tex. Civ. App. 48, 54 S. W. 398.

26. Sweet v. Poughkeepsie, 82 N. Y. S. 618, 97 App. Div. 82; Tompert v. Hastings Pavement Co., 55 N. Y. S. 177, 35 App. Div. 578.

27. Brackenridge v. Fitchburg, 145 Mass. 160, 13 N. E. 457.

Compare, however, Whitman v. Lewiston, 97 Me. 519, 55 Atl. 414.

28. Ottawa v. Hayne, 114 Ill. App. 21.

29. Noblesville G. & I. Co. v. Loehr, 124 Ind. 79, 24 N. E. 579.

30. McGuinness v. Worcester, 160 Mass. 272, 35 N. E. 1068; Evans v. Utica, 69 N. Y. 166, 25 Am. Rep. 165.

Ice and snow in middle of sidewalk, duty of pedestrian, see Rogers v. Rome, 89 N. Y. S. 130, 96 App. Div. 427.

per se in failing to carry a lamp on his wheel.[31] So it is not negligence for a pedestrian to turn into an unimproved street at night at a place other than the regular crossing,[32] nor to cross a park strip between the curb and sidewalk at night.[33] On the other hand, clearly it is contributory negligence to drive at a reckless speed at night.[34]

§ 2830. Pedestrian not on sidewalk or crosswalk.

It is the safer practice for pedestrians to keep to the sidewalks and crosswalks. But it is not necessarily negligence to step off the sidewalk to avoid a crowd or defects or obstructions in the walk.[35] So a pedestrian is not required to confine himself to the sidewalks. He may, through caprice or for pleasure, use the driveway as well.[36] However, one using the driveway to walk on, instead of the sidewalk, should usually exercise greater care than when walking on the sidewalk.[37] So it is not negligence to walk over a path on one side of a street instead of on a regular constructed sidewalk on the other side.[38] And it is not contributory negligence to walk along the side of a street instead of on the macadamized portion in the middle of the road,[39] since a traveler is not bound to keep to that portion of the street which is usually traveled.[40] But where one leaves a sidewalk without sufficient reason, and uses the gutter as a place to walk, without taking any precautions, and slips into a sewer inlet, he cannot recover.[41]

31. Christman v. Meierhoffer, 116 Mo. App. 46, 92 S. W. 141; Dunkin v. Hoquiam, 56 Wash. 47, 105 Pac. 149.

32. Collins v. Dodge, 37 Minn. 503, 35 N. W. 368.

33. Barnesville v. Ward, 85 Ohio St. 1, 96 N. E. 937.

34. Vincennes v. Thuis, 28 Ind. App. 523, 63 N. E. 315.

35. Not necessarily negligence, where there is a crowd on the sidewalk, to step off the sidewalk onto the top of a catch basin which appeared to be safe. Mattoon v. Worland, 97 Ill. App. 13, 14. See also Kansas City v. Manning, 50 Kan. 373, 31 Pac. 1104.

But where one steps off a wide and safe sidewalk, into a ditch, in the daytime, because of inadvertence or want of attention, and thereby receives an injury, he cannot recover. McLaury v. McGregor, 54 Ia. 717, 7 N. W. 91.

Not negligence *per se* to walk over park strip of street between curbing and sidewalk, where sidewalk obstructed. Larson v. Sedro-Woolley, 49 Wash. 134, 94 Pac. 938.

36. Junction City v. Blades, 59 Kan. 774, 52 Pac. 444.

It is not contributory negligence *per se* for one, knowing the only sidewalk on a narrow street of a city is in a dangerous condition, to walk on the street in a dark night. East St. Louis v. Dougherty, 74 Ill. App. 490, 494.

37. Brown v. Chicago, 135 Ill. App. 126.

38. Neal v. Marion, 129 N. C. 345, 40 S. E. 116.

39. Emery v. Philadelphia, 208 Pa. 492, 57 Atl. 977.

40. Austin v. Ritz, 72 Tex. 391, 9 S. W. 884; Ringelstein v. San Antonio (Tex. Civ. App.), 21 S. W. 634. But see Burr v. Plymouth, 48 Conn. 460.

41. Mitchel v. Richmond, 107 Va. 193, 57 S. E. 570, 11 L. R. A. (N. S.) 1114.

§ 2831. Same—crossing street other than on crosswalk.

It is not negligence *per se* to cross a street at a place other than the regular crossing.[42] This is so even where the crossing is made on a dark night.[43] So it is not negligence, in crossing at a street intersection, to travel outside of a direct line across the street.[44] However, ordinarily, greater care is required of a pedestrian, where he crosses the street other than at a regular crossing.[45] And if one crosses other than at the regular crossing, and there is a plain and known obstruction at such place over which he stumbles, he is guilty of contributory negligence.[46] Obviously, knowledge of the defect is an important element in such cases.[47]

42. *Georgia.* Augusta v. Tharpe, 113 Ga. 152, 38 S. E. 389.

Indiana. Indianapolis v. Shoenig, 48 Ind. App. 76, 95 N. E. 324.

Iowa. Rea v. Sioux City, 127 Ia. 615, 103 N. W. 949; Bell v. Clarion, 113 Ia. 126, 84 N. W. 962, 115 Ia. 357, 88 N. W. 824. But see O'Laughlin v. Dubuque, 42 Ia. 539, s. c., 52 Ia. 746, 3 N. W. 655.

Kansas. Olathe v. Mizee, 48 Kan. 435, 29 Pac. 754, 30 Am. St. Rep. 308.

Kentucky. Glasgow v. Gillenwaters, 113 Ky. 140, 67 S. W. 381.

Louisiana. Weber v. Union Dev. & Const. Co., 118 La. 77, 42 So. 652.

Massachusetts. Keith v. Worcester & B. V. St. R. Co., 196 Mass. 478, 82 N. E. 680; Raymond v. Lowell, 6 Cush. (Mass.) 524, 53 Am. Dec. 57.

New York. Brusso v. Buffalo, 90 N. Y. 679; Bennett v. Sing Sing, 14 N. Y. S. 463, 60 Hun, 579.

Only ordinary care required. Covington v. Whitney, 30 Ky. L. Rep. 659, 99 S. W. 337.

In Ohio, it has been held that where there was no necessity for crossing at a place other than the regular crossing, no recovery can be had. Dayton v. Taylor's Adm'r, 62 Ohio St. 11, 56 N. E. 480.

"A person who attempted to cross a street at a place other than the crossing provided for that purpose is bound to use care proportionate with the known danger; but, if he knows of no dangerous excavation or obstruction, he has a right to assume that all parts of the street intended for travel are reasonably safe for that purpose." Indianapolis v. Shoenig, 48 Ind. App. 76, 95 N. E. 324.

43. Baker v. Grand Rapids, 111 Mich. 447, 69 N. W. 740.

44. Hall v. St. Joseph, 163 Mo. App. 214, 146 S. W. 458.

45. Magaha v. Hagerstown, 95 Md. 62, 69, 51 Atl. 832, 93 Am. St. Rep. 317.

If one walks into a hole in the pavement while looking ahead, there is contributory negligence. Tolan v. Philadelphia, 35 Pa. Super. Ct. 311.

46. Woodson v. Metropolitan St. R. Co., 224 Mo. 685, 123 S. W. 820, 30 L. R. A. (N. S.) 931, 20 Am. & Eng. Ann. Cas. 1039.

47. Enders v. Chicago, 147 Ill. App. 406, and see Holding v. St. Joseph, 92 Mo. App. 143.

An instruction that "crossing a road or street or walking from a sidewalk into the street, either at right angles or diagonally, at a point where there is no regular crossing, does not in itself constitute contributory negligence on the part of a pedestrian, but is a circumstance to be weighed by the jury in view of all the circumstances of the case," is bad because of "its failure to differentiate a case in which a pedestrian has knowledge of the defect which renders the crossing dangerous from one in which he is ignorant of that fact. The weight of authority sustains the proposition that one who does not know that there is a material inequality between the sidewalk and street, or other conditions rendering an attempt to pass from the one to the other dangerous, in the exercise of ordinary care, is not guilty of negligence in leaving the former at a point other than a regular crossing, and in going into the street." Winchester v. Carroll, 99 Va. 727, 40 S. E. 37.

§ 2832. Pedestrian outside limits of street.

If a pedestrian unnecessarily, for his own convenience, leaves the street limits and thereafter is injured outside the limits of the street, ordinarily he cannot recover.[48]

§ 2833. Negligence as attributable to persons under disability.

Persons under disability may nevertheless be guilty of contributory negligence, in a proper case.

§ 2834. Same—children as negligent.

Children may be guilty of contributory negligence which will bar a recovery,[49] but only where they fail to exercise such an amount of care as, under like circumstances, could reasonably be expected of one of their years, capacity and experience.[50] The same *amount* of care is not required of a child as of an adult,[51] and a child may be so young that contributory negligence cannot be attributed to him.[52]

The general rule is that it is not contributory negligence for children to play on the streets or sidewalks,[53] but chil-

48. Zettler v. Atlanta, 66 Ga. 195; Monmouth v. Sullivan, 8 Ill. App. 50; Biggs v. Huntington, 32 W. Va. 55, 9 S. E. 51.

So where a traveler knew a street was excavated, and left it to cross some vacant lots to his destination, he cannot recover where injured by his mistake in wandering back into the street at a point where he thought there was a sidewalk. Austin v. Charlotte, 146 N. C. 336, 59 S. E. 701.

So a person is guilty of contributory negligence where he knowingly and carelessly departs from a known safe way and goes heedlessly across the street and beyond its limits and upon the land of an abutter, and is there injured by falling into an excavation. Mineral City v. Gilbow, 81 Ohio St. 263, 90 N. E. 800.

49. Brennan v. New York, 22 N. Y. S. 304, 67 Hun, 648; Miller v. Pennsylvania R. Co. (Pa.) 8 Atl. 209.

The act of a sixteen-year-old boy in running to a fire, with the fire engine, as contributory negligence has been held a question for the jury. Oakland R. Co. v. Fielding, 48 Pa. 320.

Children held not guilty of contributory negligence, in particular cases, see Denver v. Murray, 18 Colo. App. 142, 70 Pac. 440; Lorenz v. New Orleans, 114 La. 802, 38 So. 566.

Negligence of child four and a half years old not shown. St. Paul v. Kuby, 8 Minn. 154.

Rolling of hoop on sidewalk is not *per se* negligence. Reed v. Madison, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733.

Minor servant as chargeable with contributory negligence, see Bailey, Pers. Inj. (2d Ed.), § 444, p. 1338.

50. Strudgeon v. Sand Beach, 107 Mich. 496, 65 N. W. 616; Dowd v. Chicopee, 116 Mass. 93; Stern v. St. Louis, 161 Mo. 146, 150, 61 S. W. 594 (not such care as a child of his age "was individually capable of").

See Kerr v. Forgue, 54 Ill. 482, 5 Am. Rep. 146, keeping in mind, however, that rule of comparative negligence is now abolished even in Illinois.

The degree of care required for a child of ten in crossing a city street is that of an ordinarily prudent boy of his age. Lucarelli v. Boston Elevated Ry. Co. (Mass. 1913), 100 N. E. 632.

51. Parrish v. Huntington, 57 W. Va. 286, 50 S. E. 416; Reed v. Madison, 83 Wis. 171, 176, 53 N. W. 547, 17 L. R. A. 733.

52. A child of twenty months cannot be charged with contributory negligence. Covington v. Bollwinkle (Ky.), 121 S. W. 664.

53. District of Columbia v. Boswell, 6 App. (D. C.) 402; Caskey v.

dren in their teens have been held guilty of contributory negligence where they knew of defects but forgot them,[54] and a boy nine or ten years old has been held guilty of contributory negligence in walking backward on a sidewalk, where he fell into a manhole in plain sight.[55] On the other hand, in Illinois, it has been held that the fact that a twelve year old child was walking backward and talking to other children with her, at the time of the accident, is not contributory negligence *per se*.[56]

Whether the negligence of parents or guardians is imputable to infants is governed by the rules relating to contributory negligence in general, and the decisions are conflicting.[57]

§ 2835. Same—blind or infirm persons.

It is not negligence *per se* for a *blind person* to walk the streets,[58] even where unattended;[59] and a blind person may assume, the same as other persons, that a sidewalk is reasonably safe.[60] So *old age and defective eyesight*, even where coupled with a knowledge of the defect, do not necessarily show contributory negligence.[61] and the fact that a traveler was subject to *dizzy spells* does not show negligence in using the streets.[62] But if the injured should be blind, or have impaired vision, or be decrepit with age, or crippled, or deaf, or otherwise infirm so as to affect the sight, hearing, or ability to move, he should exercise greater care than would be required of him in case none of such disabilities existed.[63]

La Belle, 101 Mo. App. 590, 74 S. W. 113 (stepping into hole while playing not contributory negligence).

§ 2757, *ante*.

"A large majority of children living in cities depend upon the daily labor of both parents for subsistence. * * * We cannot hold, as a matter of law, that every time a child, four years of age, steps into the street unattended, the mother is guilty of * * * negligence. * * * Such a rule ought to depopulate a city of all its laboring inhabitants." Chicago v. Major, 18 Ill. 349, 361, 68 Am. Dec. 553, holding negligence of parents to be question for jury.

54. King v. Colon, 125 Mich. 511, 84 N. W. 1077.

55. Casey v. Malden, 163 Mass. 507, 40 N. E. 849, 47 Am. St. Rep. 473.

56. Chicago v. McCrudden, 92 Ill. App. 257.

57. See Beach, Contrib. Neg., c. 6; Thompson, Neg., vol. 5, § 6310.

58. Franklin v. Harter, 127 Ind. 446, 26 N. E. 882; Salem v. Goller, 76 Ind. 291.

59. Smith v. Wildes, 143 Mass. 556, 10 N. E. 446; Foy v. Winston, 126 N. C. 381, 35 S. E. 609.

60. Carter v. Nunda, 66 N. Y. S. 1059, 55 App. Div. 501; Davenport v. Ruckman, 37 N. Y. 568, 573.

61. Yeager v. Spirit Lake, 115 Ia. 593, 88 N. W. 1095.

Compare, Garbanti v. Durango, 30 Colo. 358, 70 Pac. 686.

62. Normal v. Webb, 91 Ill. App. 183.

63. Winn v. Lowell, 1 Allen (Mass.), 177; Foy v. Winston, 126 N. C. 381, 35 S. E. 609; Dunkin v. Hoquiam, 56 Wash. 47, 105 Pac. 149.

For instance, if a blind man, unattended, crosses a street at a place other than a crossing, it would seem that there would be little doubt of his contributory negligence. Foy v. Winston, 135 N. C. 439, 47 S. E. 466.

Cripple using crutches has same

However, it cannot be said that the mere fact that a traveler is "in a diseased condition," without specifying the disease or the nature thereof, requires him to use more care than is required of ordinarily healthy persons.[64]

If a person is blind or has defective eyesight,[65] or is otherwise physically infirm,[66] he is bound to use ordinary care when using the streets,[67] but in determining what ordinary care is, due consideration should be given to blindness or other infirmities,[68] and one who is infirm in any way must take more care and employ keener watchfulness in walking upon the streets and avoiding obstructions than other persons not infirm, in order to reach the standard of ordinary care established by the law for all persons alike, whether weak or strong, sound or deficient.[69]

§ 2836. Same—intoxicated persons.

Even an intoxicated person has the right to presume that the streets are safe for travelers;[70] and intoxication of the person injured, at the time of the accident, is no defense unless the intoxication contributed to the injury.[71] If one exercises ordinary care notwithstanding his more or less intoxicated condition, such condition is no defense;[72] but if he is so intoxicated as to be unable to use the usual care which an ordinarily sober person would exercise, he cannot recover.[73] But no higher *degree* of care is required of an intoxicated person than of one in his sober senses.[74] However, the intoxication of the injured person, *in any degree,* at the time

right to use street as others, but must use more care. Mt. Vernon v. Brooks, 39 Ill. App. 426. *Contra,* Swails v. Caruthersville, 158 Mo. App. 589, 138 S. W. 948.

Astigmatism, and crippled by rheumatism. Must use more care than others. Smith v. Cairo, 48 Ill. App. 166.

Nearsightedness is not of itself evidence of contributory negligence. Sweeney v. Butte, 15 Mont. 274, 284, 39 Pac. 286.

64. Edwards v. Three Rivers, 102 Mich. 153, 157, 60 N. W. 454.

65. Hill v. Glenwood, 124 Ia. 479, 100 N. W. 522; Keith v. Worcester & B. V. St. R. Co., 196 Mass. 478, 82 N. E. 680.

Compare Ham v. Lewiston, 94 Me. 265, 47 Atl. 548.

66. **Same person** should use more care than person not lame, where defect would be more likely to cause injury to the former than the latter. Smart v. Kansas City, 91 Mo. App. 586.

67. § 2822, *ante.*

68. Hill v. Glenwood, 124 Ia. 479, 100 N. W. 522.

69. Keith v. Worcester & B. V. St. R. Co., 196 Mass. 478, 82 N. E. 680.

70. Lexington v. Auger, 4 Ky. L. Rep. 23.

71. Healy v. New York, 3 Hun (N. Y.), 708, 6 Thomp. & C. 92; Clarke v. Philadelphia & R. C. & I. Co., 92 Minn. 418, 100 N. W. 231; Robinson v. Pioche, 5 Cal. 460.

72. Stout v. Columbia, 118 Mo. App. 439, 94 S. W. 307.

73. Covington v. Lee, 28 Ky. L. Rep. 492, 89 S. W. 493, 2 L. R. A. (N. S.) 481.

Must use ordinary care even if intoxicated. Madisonville v. Stewart (Ky.), 121 S. W. 421.

74. Epelett v. Sault Ste Marie, 144 Mich. 392, 108 N. W. 360.

of the accident, is a circumstance proper to be considered by the jury on the question whether he was in the exercise of ordinary care.[75] Generally, the question whether the person was so intoxicated as to be unable to exercise ordinary care is one of fact for the jury.[76]

§ 2837. Same—women.

At an early day, it was unsuccessfully contended that it was contributory negligence for a woman to drive a horse,[77] and in this day and age of "women's rights" and suffrage such a defense is all the more insignificant and unworthy. And no reason appears why a woman should not be chargeable with contributory negligence exactly the same as a man.

§ 2838. Particular acts as contributory negligence.

The following acts, *inter alia,* have been held, in particular cases, to be contributory negligence; *driving* at furious speed;[78] driving at a rapid gait in violation of an ordinance;[79] *running automobile into rope* stretched across a street;[80] *driving too close* to defective culvert while attempting to drive around;[81] driving carriage against stump near edge of driveway, at night, where driver knew of the stump and would not have struck it if he had not been driving at the extreme side;[82] leaving horse unhitched;[83] leaving limits of highway;[84] walking on edge of ditch;[85] walking on end of planks, beyond the stringers in wooden sidewalks, with knowledge that planks were loose;[86] and in *moving a fourteen hundred pound safe* over a wooden sidewalk raised several feet from the ground.[87] Failure to comply with the *law of the road* may also be considered, in determining whether a traveler was guilty of contributory negligence.[88]

The following acts, *inter alia,* have been held not to neces-

75. Rhyner v. Menasha, 97 Wis. 523, 73 N. W. 41, and see Aurora v. Hillman, 90 Ill. 61; Anderson v. Wilmington, 6 Penn. (Del.) 485, 70 Atl. 204.

76. Arthur v. Charleston, 51 W. Va. 132, 41 S. E. 171.

77. Cobb v. Standish, 14 Me. 198.

78. Buckley v. New York, 120 N. Y. S. 423, 135 App. Div. 512.

79. Carswell v. Wilmington, 2 Marv. (Del.) 360, 43 Atl. 169.

80. See Holliday v. Athens, 10 Ga. App. 709, 74 S. E. 67.

81. Alton v. English, 69 Ill. App. 197.

82. Ovens v. Charlotte (N. C. 1912), 74 S. E. 748.

83. Denver v. Utzler, 38 Colo. 300, 88 Pac. 143.

84. Nelson v. Spokane, 45 Wash. 31, 87 Pac. 1048.
§ 2832, *ante.*

85. Louisville Gas Co. v. Hammer, 32 Ky. L. Rep. 631, 106 S. W. 826.

86. Hudon v. Little Falls, 68 Minn. 463, 71 N. W. 678.

87. Chicago v. Kohlhof, 64 Ill. App. 349.

88. See Baker v. Fall River, 187 Mass. 53, 57, 72 N. E. 336.

sarily constitute contributory negligence:[89] *rapid driving*;[90] driving in a violent storm;[91] driving through a pool of water;[92] driving obliquely across a railroad track, to cross a street;[93] *driving upon platform scales* in a street, where the scales were used by the public as a part of the street;[94] *jumping from carriage* to assist one's horse which had fallen;[95] failure to alight and take frightened horse by the head;[96] failure of *driver of fire wagon* to strap himself into his seat, where it would be dangerous to do so;[97] *walking rapidly*;[98] *stopping* on street;[99] *conversing* with companions while walking along sidewalk;[1] *walking backward* while at work;[2] using either of outside of three planks;[3] going into driveway of street to place an article in a conveyance;[4] *stepping near hole* and slipping into hole because of wet condition of walk;[5] *stepping on trap doors* in sidewalk, where they had not started to open;[6] *picking up loose electric wire*;[7] omission to obey orders of one not a municpal or other officer.[8]

89. It can not be said, as a matter of law, to show a want of ordinary care for a person desiring to pass a party of walkers taking up the whole walk to step on the sod a few inches to one side of the brick or stone or concrete sidewalk. It is not an unusual thing, and what is not unusual is to be anticipated. Brennen v. Streator (Ill. 1913), 100 N. E. 266.

90. Chicago City R. Co. v. Kenyon, 137 Ill. App. 126.

91. Milwaukee v. Davis, 6 Wis. 377.

92. Hedges v. Kansas City, 18 Mo. App. 62.

93. Lynch v. New Rochelle, 28 N. Y. S. 962, 78 Hun, 207.

94. Kokomo v. Boring, 24 Ind. App. 552, 57 N. E. 202.

95. Sears v. Dennis, 105 Mass. 310.

96. White v. Ballard, 19 Wash. 284, 53 Pac. 159.

97. Valparaiso v. Chester (Ind. 1911), 96 N. E. 765.

98. Gaston v. Bailey, 24 Ind. App. 24, 53 N. E. 1021.

99. Hussey v. Ryan, 64 Md. 426, 2 Atl. 729, 54 Am. Rep. 772.

1. Kelley v. Kansas City, 153 Mo. App. 484, 133 S. W. 670; Butcher v. Philadelphia, 202 Pa. 1, 51 Atl. 330.

2. Stege v. Milwaukee, 110 Wis. 484, 86 N. W. 161.

3. Pecor v. Oconto, 125 Wis. 335, 104 N. W. 88.

4. Finnegan v. Sioux City, 112 Ia. 232, 83 N. W. 907.

5. Burrell v. Greenville, 133 Mich. 235, 94 N. W. 732.

6. Bowley v. Mangrum & Otter, 3 Cal. App. 229, 84 Pac. 996.

7. "One who is traveling along a highway and sees a loose electric wire upon the street, with nothing to show that it is a live or dangerous wire, may voluntarily pick it up and throw it out of the highway, and if the wire is a live wire, and he is injured thereby, he can recover damages; for picking up the wire and throwing it out of the way is an incident of travel along the highway and is not contributory negligence on the part of the traveler. He may recover either from the electric company or the city." Croswell, The Law Relating to Electricity, § 251. It may be stated as a general rule that whether or not the plaintiff is guilty of contributory negligence in picking up a live wire off the sidewalk and throwing it out of his way is a question of fact, to be determined by the jury according to the particulars of each case. Southern Bell Tel. & T. Co. v. Davis (Ga. App.), 76 S. E. 786.

8. Marrioneaux v. Brugier, 35 La. Ann. 13.

Running on a sidewalk is not negligence *per se*;[9] and one has a right to run upon the streets and sidewalks to escape from the assaults of others or for other good reasons.[10]

§ 2839. Imputed negligence.

Whether the negligence of a third person can be imputed to persons injured is the subject of conflicting decisions,[11] and in no way peculiar to municipal liability for defective streets.

§ 2840. Burden of proof.

In some states the burden of proving contributory negligence is on defendant, while in other states the burden is held to be on plaintiff to show freedom from contributory negligence.[12]

§ 2841. Question of law or fact.

Generally the question of contributory negligence of one injured in a street is a question of fact for a jury; but where, although the evidence may be consistent with more than one conclusion of fact, all the circumstances shown by the evidence are such that fair minded men could not disagree upon the conclusion that the person injured assisted in bringing about his injury through his own negligence, then the question is one of law for the court.[13]

10. PROXIMATE CAUSE.

§ 2842. Introductory.

It is not within the scope of this treatise to go into details in regard to the law of proximate cause, which affects every branch of negligence. For an extended discussion and treatment of the general question, reference should be made to standard treatises on the law of "Torts" and "Negligence."[14]

"Proximate cause" has been defined to be that cause which, in natural and continued sequence, unbroken by any efficient

9. Penrose v. Fehr, 113 Mich. 517, 71 N. W. 862, 67 Am. St. Rep. 479.

10. Penrose v. Fehr, 113 Mich. 517, 71 N. W. 862, 67 Am. St. Rep. 479 (running to escape snowballs).

11. Beach, Contributory Negligence, § 100 *et seq.*

12. See Beach, Contributory Negligence, §§ 422-443, where there is a full treatment of the question which is in no way peculiar to contributory negligence in actions against municipalities.

13. Thompson, Negligence, vol. 5, § 6252.

Falling into trench in street. Contributory negligence generally a question for the jury. O'Neil v. Chelsea, 208 Mass. 307, 94 N. E. 279, and cases cited.

14. See Cooley, Torts (3d ed.), pp. 99-138; Thompson, Neg., §§ 43-164; Shearman & Redfield, Neg., pp. 26-44.

intervening cause, produced the result complained of, and without which that result would not have occurred."[15]

§ 2843. Defect in street must be proximate cause.

In all negligence suits, no matter who is the defendant, no recovery can be had unless the negligence of the defendant was the proximate cause of the accident. The rule applies with equal force where the defendant is a municipal corporation and the alleged negligence relates to the condition of its streets. The defect in the street, *i. e.*, the negligence in connection therewith, must be the proximate cause of the injury complained of.[16] If the negligence of the municipality in regard to the condition of its streets did not cause, or help to cause, the injury complained of, such negligence is not actionable.[17] Furthermore it is not sufficient to warrant a recovery, where the precise cause of the injury is in doubt, to show that a defect in a street *might* have been the cause of the injury.[18]

The injury must be "the *natural and probable consequence*, of the negligence, such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer and likely to flow from the act."[19]

15. Lyons v. Watt, 43 Colo. 238, 95 Pac. 949. For other definitions, see text books on Negligence.

Reckless driving of automobile. Where a pedestrian walking on a driveway is forced off to the side of the street by an automobile going at a high rate of speed, the reckless driving of the automobile can not be said to be the proximate cause where it was rightfully on the street and the pedestrian would have been compelled to step aside even if the automobile had been going slow. Neidhardt v. Minneapolis, 112 Minn. 149, 127 N. W. 484.

16. Parmenter v. Marion, 113 Ia. 297, 85 N. W. 90; Butler v. Oxford, 69 Miss. 618, 13 So. 626; Stanley v. Union Depot R. Co., 114 Mo. 606, 620, 21 S. W. 832; Marsh v. Giles, 211 Pa. 17, 60 Atl. 315. See also Carlisle v. Secrest, 25 Ky. L. Rep. 336, 75 S. W. 268.

To be a proximate cause, it must appear that the injury would not have happened but for the defect in the street. Gaudin v. Carthage, 12 N. Y. S. 796, 59 Hun, 619.

Defeat held proximate cause, see Cunningham v. Thief River Falls, 84 Minn. 21, 86 N. W. 763.

Platform projecting from second floor of building not a nuisance nor an obstruction—municipality not liable where pedestrian injured by being struck by a bale of hay thrown out of the second story—throwing out being the proximate cause. Parmenter v. Marion, 113 Ia. 297, 85 N. W. 90.

Absence of cover of catchbasin not proximate cause where one voluntarily descends into the basin to rescue a child. Kelley v. Boston, 180 Mass. 233, 62 N. E. 259.

Bomb in alley, though taken to an adjacent yard before being exploded, held proximate cause. Wells v. Gallagher, 144 Ala. 363, 39 So. 747, 3 L. R. A. (N. S.) 759, 113 Am. St. Rep. 50.

17. Chicago v. Boston, 117 Ill. App. 430; Crawfordsville v. Van Cleave, 39 Ind. App. 574, 77 N. E. 1149; Vincennes v. Thuis, 28 Ind. App. 523, 63 N. E. 315.

18. Southworth v. Shea, 131 Ala. 419, 30 So. 774.

19. Bitting v. Maxatawney Tp., 177 Pa. 213, 215, 35 Atl. 715.

See also Rockford v. Tripp, 83 Ill. 247, 25 Am. Rep. 381.

See Bailey, Pers. Inj. (2d Ed.), vol. 1, § 47.

Thus, the fact that streets are in a defective condition cannot be said to be the proximate cause of the loss by fire of one's buildings, on the ground that the fire apparatus was slow in getting to the fire because of such condition of the streets.[20] Likewise, when an accident happens by reason of some slight defect from which danger was not reasonably to be anticipated, and which, according to common experience, was not likely to happen, the municipality is not chargeable with negligence.[21] But it is not necessary that the *particular* injury could reasonably have been foreseen and apprehended as a result of the defect.[22]

§ 2844. Same—obstruction as proximate cause where obstructive character not cause.

If an obstruction in a street is unlawful, but the obstructive character thereof is not in fact the cause of the injury but instead its explosive character,[23] or, in one case, negligence

If a result is of such a character that reasonable prudence and foresight would not forecast its happening as a consequence of the act, then it may not be considered as a proximate cause. Beetz v. Brooklyn, 41 N. Y. S. 1009, 10 App. Div. 382, 384 (putting lime in street, boys took some of it and mixed it with water, causing an explosion).

"It is true that plaintiff would not have been injured had the excavation been guarded, but it is also true that she would not have fallen into it had she not mistaken the lot where it was located for Fifth avenue. The omission of the town to guard the excavation was only a condition upon which a new, independent, and unforeseen cause operated which was the cause of plaintiff's injuries; i. e., her mistake in thinking the vacant lot where the excavation existed was the road which she intended to take on leaving Main street. This error of plaintiff was in no manner induced by any act or omission of the defendant. It was not naturally and reasonably to be expected as the result or the natural and probable consequence of defendant's negligence; and therefore, as to it, plaintiff's injuries resulted from an inevitable accident." Lyons v. Watt, 43 Colo. 238, 95 Pac. 949.

Liberty pole in street not a nuisance, and municipality not liable for injuries where broken by a wind of unusual violence. Allegheny v. Zimmerman, 95 Pa. 287, 40 Am. Rep. 649.

Runaway horses, frightened by defect in street. Injury to driver, occurred in another place. Injury held not too remote. Topeka v. Tuttle, 5 Kan. 311, 323, 425.

20. "So that the question is, could or would the fire have been extinguished if the street had been in good condition for public travel, or, to put it in another way, was the destruction of her house caused by the negligent condition of the street? This is altogether problematical. Certain it is that the city was in no wise responsible for the fire, and in this particular it committed no breach of duty. Nor can it be said that it could reasonably be anticipated by the city that any loss by fire would result from the condition of the street. This being true, it is difficult to perceive upon what ground the city can be asked to respond in damages because its street was out of repair. The connection between the condition of the street and the fire is too remote; in fact there is none." Hazel v. Owenboro, 30 Ky L. Rep. 627, 99 S. W. 315.

21. Braatz v. Fargo, 19 N. D. 538, 125 N. W. 1042, 27 L. R. A. (N. S.) 1169.

22. Hazzard v. Council Bluffs, 79 Ia. 106, 44 N. W. 219.

23. Frank v. Warsaw, 198 N. Y. 463, 92 N. E. 17.

in tieing up the thills of a wagon stored in the street,[24] nevertheless the presence of the object in the street must be held the proximate cause of the injury.

§ 2845. Concurring and intervening causes: defect in street need not be sole cause.

Except in Maine,[25] Massachusetts,[26] Connecticut,[27] and perhaps one or two other states,[28] it is well settled that the defect in the street need not be the sole cause of the injury but that the municipality is liable although there is another concurring cause, provided (1) such concurring cause is not due to the negligence of the injured person, and (2) the injury would not have been sustained except for the defect in the street.[29] The same rule applies where the concurring cause

24. Cohen v. New York, 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506.

25. Moore v. Abbott, 32 Me. 46, followed in Moulton v. Sanford, 51 Me. 127, and in Aldrich v. Gorham, 77 Me. 287, 289.

See Merrill v. Portland, Fed. Cas. No. 9,470, construing Maine law.

26. Clinton v. Revere, 195 Mass. 151, 80 N. E. 813; Rowell v. Lowell, 7 Gray (Mass.) 100, 66 Am. Dec. 464.

27. Bartram v. Sharon, 71 Conn. 686, 691, 43 Atl. 143, 46 L. R. A. 144, 71 Am. St. Rep. 225.

"If the culpable negligence of one traveling with the plaintiff was a proximate cause of the injury, there is no cause of action." Hinkley v. Danbury, 81 Conn. 241, 70 Atl. 590.

28. Schaeffer v. Jackson Tp., 150 Pa. 145, 24 Atl. 629, 18 L. R. A. 100, 30 Am. St. Rep. 792; Chartiers Tp. v. Phillips, 122 Pa. 601.

29. *Georgia.* Barrett v. Savannah, 9 Ga. App. 642, 72 S. E. 49.

Illinois. Lacon v. Page, 48 Ill. 499; Belleville v. Hoffman, 74 Ill. App. 503.

Indiana. Indianapolis T. & T. Co. v. Springer, 47 Ind. App. 35, 93 N. E. 707.

Iowa. Wheeler v. Ft. Dodge, 131 Ia. 566, 108 N. W. 1057, 9 L. R. A. (N. S.) 146.

Kansas. Atchison v. King, 9 Kan. 550.

Missouri. Vogelgesang v. St. Louis, 139 Mo. 127, 40 S. W. 653; Brennan v. St. Louis, 92 Mo. 482, 2 S. W. 481; Hull v. Kansas, 54 Mo. 598, 14 Am. Rep. 487; Bassett v. St. Joseph, 53 Mo. 290, 14 Am. Rep. 446; Vogel v. West Plains, 73 Mo. App. 588.

New York. Ehrgott v. New York, 96 N. Y. 264, 283, 48 Am. Rep. 622; Ring v. Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; Kennedy v. New York, 73 N. Y. 365, 29 Am. Rep. 169.

North Dakota. Ouverson v. Grafton, 5 N. D. 281, 289-291, 65 N. W. 676.

Texas. San Antonio v. Porter, 24 Tex. Civ. App. 444, 447, 59 S. W. 992.

Washington. Brabon v. Seattle, 29 Wash. 6, 9, 69 Pac. 365.

United States. Gallagher v. St. Paul, 28 Fed. 305.

"The doctrine of concurrent negligence is firmly rooted in the jurisprudence of this state. A defendant may be liable even if the accident was not caused by his sole negligence. He is liable if his negligence concurred with that of another, or with the act of God, or with an inanimate cause, and became a part of the direct and proximate cause of the injury, although not the sole cause." Townsend v. Joplin, 139 Mo. App. 394, 123 S. W. 474.

"It seems to be well settled in law that if the injury is the result of concurring causes for one of which only the defendant is responsible he must answer, or where the injury is the combined result of negligence and accident, the negligent party must answer unless the injury would have happened if it had not been negligent." Louisville v. Bridwell (Ky. 1912), 150 S. W. 672.

"We have no hesitancy in holding that a municipality is liable for dam-

for which the municipality is not liable is the *act of a third person.*[30]

Applying this rule it is held that where a fall on a sidewalk would not have happened but for the presence of *rough and uneven ice* on the walk, the municipality is liable although another irresponsible condition concurred with the fault of the muncipality in producing the injury.[31] So where one cause of the injury is a defect in the street, and the other cause a runaway horse of a third person for which neither the injured person nor the municipality is responsible, the municipality is liable, provided the injury would not have occurred but for the defect in the street.[32] In another case, a traveler was driving along a street on the side of which was an unprotected ditch several feet wide and with precipitate sides. To avoid the projections of a street car, the driver pulled his team away from the track and in doing so one of the horses fell into the ditch, bringing the wagon into such a position that it was struck by the street car. It was contended that the proximate cause was the rapidly approaching car striking the rear end of the wagon, but it was held that the unguarded ditch was the proximate cause.[33]

§ 2846. Same—Massachusetts rule.

As already stated,[34] the courts of Massachusetts hold that the defect in the street must be the sole cause of the injury. However, the courts of that state have materially limited the rule by holding that it does not mean that there must be no other *innocent or accidental* contributing cause.[35] It means

ages from an accident the result of two concurrent causes, though one of them is a cause over which the municipality has no control, providing, however, it is a cause which it should have anticipated and have guarded against." Smith v. Yankton, 23 S. D. 352, 121 N. W. 848.

"But in the situation disclosed her fall could have been due to catching her heel on the end of the sidewalk, an accident for which defendant would not be liable, and still the injury would not have resulted except for the co-operation of defendant's negligence in offering a deep hole for her to fall into, an act of omission for which defendant would be liable. Ballentine v. Kansas City, 126 Mo. App. 130, 103 S. W. 564; Bassett v. St. Joseph, 53 Mo. 290, 14 Am. Rep. 446. Where an injury is the joint product of accident and negligence and would not have occurred in the absence of negligence, the wrongdoer can not escape liability on the ground that his tort was not the sole producing cause of the injury." Pearce v. Kansas City, 156 Mo. App. 230, 137 S. W. 629.

Previous accident as proximate cause of subsequent accident, see Watters v. Waterloo, 126 Ia. 199, 101 N. W. 871.

30. § 2849, *post.*

31. Templin v. Boone, 127 Ia. 91, 102 N. W. 789.

32. Rock Falls v. Wells, 65 Ill. App. 557.

33. Denver v. Johnson, 8 Colo. App. 384, 46 Pac. 621.

34. § 2845, *ante.*

35. Rowell v. Lowell, 7 Gray (Mass.), 100, 66 Am. Dec. 464.

The only exception to the rule, in Massachusetts, that the defect in the

that there must be no other *culpable* cause.[36] If the wrongful or negligent act of a third person contributes to the injury, there can be no recovery against the municipality;[37] but if the defect is a direct and proximate cause of the accident, other concurring conditions which *do not involve negligence or culpability,* even if they come into a casual relation to the accident, do not relieve the municipality from liability.[38]

§ 2847. Same—proximate cause not always immediate cause.

The proximate cause is not always the immediate cause, *i. e.,* the cause or condition nearest in time or space to the result.[39] Thus, if a horse is frightened by defects or objects in a highway, under such circumstances that the municipality would be liable if injury resulted to the driver, such negligence is held the proximate cause of an injury to another by the runaway horse running into him in the street.[40]

§ 2848. Same—act of injured person as concurring cause.

If the injury is caused in part by the act of the injured party, but he is in no way in fault, *i. e.,* not guilty of contributory negligence, he may recover where the municipality has

street must be the sole cause of the injury, is where the contributing cause is a pure accident, and one which common prudence could not have foreseen and guarded against. Rowell v. Lowell, 7 Gray (Mass.), 100, 66 Am. Dec. 464, where city was held not liable where injury was caused by the combined effect of slipping upon post office steps outside of the street and then continued to slip on the sidewalk, both the steps and the walk being out of repair and unsafe.

If a traveler is pushed down because of the pressure of a crowd in which he is, the municipality is liable, since a crowd is not unlawful; but if he is pushed down, through the *wilful act or negligence* of the crowd or any person therein, he can not recover. Alger v. Lowell, 3 Allen (Mass.), 402.

36. Hayes v. Hyde Park, 153 Mass. 514, 27 N. E. 522, 12 L. R. A. 249.

It is only where the concurring act of a wrongdoer contributes to the injury that the municipality is relieved by the Massachusetts exception to the general rule that in actions for wrongs suffered from negligence, the act causing the injury, is to be treated as the proximate cause, without regard to intervening acts by which it is precipitated. Clinton v. Revere, 195 Mass. 151, 80 N. E. 813.

37. Block v. Worcester, 186 Mass. 526, 72 N. E. 77.

38. Block v. Worcester, 186 Mass. 526, 72 N. E. 77.

39. 1 Thompson, Neg., vol. 1, § 48.

See also Gonzales v. Galveston, 84 Tex. 3, 19 S. W. 284, 31 Am. St. Rep. 17; Eads v. Marshall (Tex. Civ. App.), 29 S. W. 170.

40. Merrill v. Claremont, 58 N. H. 468.

If a horse is frightened by a defect in a street and one walking on a sidewalk is knocked down and injured by the frightened horse, the defect in the street is the proximate cause of the injury. Lee v. Union R. Co., 12 R. I. 383, 34 Am. Rep. 668.

In Massachusetts, however, it has been held that where a horse became frightened by a defect in the highway, and knocked down a pedestrian after running some fifty rods, the defect in the street was not the proximate cause. Marble v. Worcester, 4 Gray (Mass.), 395, Justice Thomas dissenting.

been negligent.[41] Thus, it has uniformly been held that municipalities are liable to one rightfully upon the street, injured by contact with some defect therein, although *while attempting to escape danger by flight.*[42]

§ 2849. Same—where concurring cause act of third person.

The general rule is that if the negligence of the municipality combines with the act or negligence of a third person, the municipality is liable.[43] Thus, where a place is unsafe, the municipality is liable although the immediate cause was the *negligence* of a third person in pushing off the sidewalk the person injured.[44] On the other hand, if the concurring act of a third person is not mere negligence, but is a *wilful act,*

41. § 2840, *ante.*

"A man, blinded by vertigo, or suffering from some other similar condition, can not be said to be negligent if he grasps for support a little tree planted by the city in a portion of the sidewalk. The proximate cause of his injury could consist of two acts, one coming from him in a dazed condition, and not negligent, and one coming from the city, in permitting an obstruction upon the sidewalk, which act was negligence. It oftentimes occurs that the proximate cause of an injury is of double character. In other words, there may be two or more causes uniting to produce the injury. In such case, if the act of the plaintiff, which is one of the causes, is not negligent, and the act of the defendant, which is the other of such causes, is negligent, then there can be a recovery by the injured party or the one to whom the cause of action goes, if death results from the injury." Woodson v. Metropolitan St. R. Co., 224 Mo. 685, 123 S. W. 820.

42. Dondono v. Indianapolis, 44 Ind. App. 366, 89 N. E. 421.

43. *Illinois.* Rock Falls v. Wells, 169 Ill. 224, 48 N. E. 440, aff'g 65 Ill. App. 557; Aurora v. Hillman, 90 Ill. 61.

Indiana. Knouff v. Logansport, 26 Ind. App. 202, 59 N. E. 347, 84 Am. St. Rep. 292.

Iowa. Van Camp v. Keokuk, 130 Ia. 716, 107 N. W. 933.

Kansas. Olathe v. Mizee, 48 Kan. 435, 29 Pac. 754, 30 Am. St. Rep. 308 (persons on walk refusing to step aside to let others pass).

Missouri. Benjamin v. Metropolitan St. Ry., 133 Mo. 274, 34 S. W. 590.

New York. Twist v. Rochester, 55 N. Y. S. 850, 37 App. Div. 307, 319, aff'd without opinion in 165 N. Y. 619, 59 N. E. 1131.

Washington. Eskildsen v. Seattle, 29 Wash. 583, 70 Pac. 64.

Wisconsin. McClure v. Sparta, 84 Wis. 269, 54 N. W. 337, 36 Am. St. Rep. 924; Papworth v. Milwaukee, 64 Wis. 389, 25 N. W. 431.

Contra in Massachusetts. Shepherd v. Chelsea, 4 Allen (Mass.), 113; Bourget v. Cambridge, 159 Mass. 388, 34 N. E. 455, and see § 2846, *ante.*

"The existence of concurrent causes does not relieve the appellant from liability, although one of the causes was the act of a third person. The fact that another cause operated in connection with the negligence of a municipal corporation and brings about the injury of appellee, such negligence is the proximate cause of the injury. It was the duty of appellant city to compel the railroad company to repair said crossing. Its failure so to do was the negligence which caused the injury. Where there is an intervening event and a defective crossing, they form concurrent causes; both being present and acting at the same time to produce the injury. The negligence of the city is responsible for one of them, yet the city can not avoid liability because it was not responsible for the other." Hammond v. Jahnke (Ind. 1912), 99 N. E. 39.

44. Carterville v. Cook, 29 Ill. App. 495, aff'd in 129 Ill. 152, 22 N. E. 14, 4 L. R. A. 721, 16 Am. St. Rep. 248.

such as pushing or throwing one into a pit, the negligence of the municipality in failing to guard the pit is not the proximate cause.[45]

Then we have a condition such as this: There is an actionable defect in a street but the initial and immediate cause is the act of a third person, just before the injury, which makes the place more dangerous and causes the injury. In such a case, the defect in the street is generally held to be the proximate cause,[46] although some cases seem to hold the contrary, influenced perhaps to some extent by the facts of the particular case.[47] Thus, it has been held that the negligence of a municipality, where combined with the act of a third person, is not the proximate cause, where the obstruction in the street could not alone have caused the injury but the act of the third person intervened as an independent force and caused the injury.[48] So it has been held in Iowa that where a vehicle was struck by another vehicle being driven at a dangerous speed along a street car track, but the injury could have been avoided if the municipality had not negligently allowed the car tracks to become out of repair, the reckless driving was the proximate cause of the injury.[49] But if a wagon is allowed to stay in a street for days, and the accident happens because of the presence of the obstruction, it is held in a leading case in New York that the obstruction is the proximate cause notwithstanding the accident would not have happened if the thills of the wagon had not been negligently tied by a third person.[50]

45. Alexander v. New Castle, 115 Ind. 51, 17 N. E. 200.

Where there is an unguarded excavation in a street into which one is thrown by the wilful act of another, the negligence of the municipality is not the proximate cause of the injury. Milostan v. Chicago, 148 Ill. App. 540.

46. Louisville v. Johnson, 24 Ky. L. Rep. 685, 69 S. W. 803.

Loose plank in sidewalk, displaced by passing bicycle just as pedestrian was about to pass, he stepping into the hole. Loose plank held proximate cause. Chacey v. Fargo, 5 N. D. 173, 64 N. W. 932.

Contra, see Hembling v. Grand Rapids, 99 Mich. 292, 58 N. W. 310, where horse was hitched to plank which he suddenly jerked from its place.

47. Debris on side of street, obstructing vision. Plaintiff, while walking along path, was killed by street car. Negligence of city held not proximate cause. Setter's Adm'r v. Maysville, 114 Ky. 60, 69 S. W. 1074.

48. "We must be careful to avoid confusing two things which are separate and distinct, namely, that which causes the injury and that without which the injury would not have happened. For the former a defendant may be liable; for the latter he will not." Storey v. New York, 51 N. Y. S. 850, 29 App. Div. 316, 322, holding city not liable where wagon ran into boy in street, neither the boy nor the driver being able to see each other because of mound of earth in street.

49. DeCamp v. Sioux City, 74 Ia. 392, 37 N. W. 971.

50. Cohen v. New York, 113 N. Y. 532, 538, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506.

§ 2850. Same—where exact cause in doubt.

"If an injury *may* have resulted from one or two causes, for one of which the party charged would be liable, but not for the other, then no recovery can be had. That this is a fixed principle of law there can be no doubt; but * * * it can have no application * * * unless there is uncertainty and doubt between two distinct causes separately initiated. But where one suffers an injury, and it appears that the acts of negligence are concurring, but one is remote and the other immediate, or in other words, the actual injury complained of would not have occurred but for the cause initiated by the defendant, that is held to be the proximate cause, and recovery is allowed." [51]

§ 2851. Same—application of rule where concurring cause is slippery condition, snow, ice, etc.

The municipality is liable where the concurring causes are an actionable defect in the street and the slippery condition of the way,—for the latter of which alone the municipality is not liable—[52] or where it is due to a defect in a street and the fact that it was hidden by snow at the time.[53] So where one is injured because of the negligent construction of a sidewalk and because of the slipperiness of the ice thereon, the municipality being liable for the former but not for the latter, the rule as to concurring causes applies and renders the municipality liable.[54] Thus, if there is actionable negligence in putting an iron cover in a sidewalk which is naturally so smooth and slippery as to be dangerous, the municipality is liable, although rain thereon for which the municipality was not liable contributed to the injury.[55] So the fact that a side-

51. Keane v. Seattle, 55 Wash. 622, 104 Pac. 819.

52. *Indiana.* Lyon v. Longansport, 9 Ind. App. 21, 35 N. E. 128.

Kentucky. Covington v. Billiter, 30 Ky. L. Rep. 650, 99 S. W. 318.

Kansas. Atchison v. King, 9 Kan. 550.

New York. Hamilton v. Buffalo, 66 N. Y. S. 990, 55 App. Div. 423; Lehmann v. Brooklyn, 51 N. Y. S. 524, 30 App. Div. 305, 308.

Rhode Island. Hampson v. Taylor, 15 R. I. 83, 23 Atl. 732.

If snow and ice on a street, a cause for which the municipality is not liable, combined with a defect or obstruction in the street for which the municipality is liable, and the accident would not have happened but for the defect or obstruction in the street, the municipality is liable. Lehmann v. Brooklyn, 51 N. Y. S. 524, 30 App. Div. 305.

Where pedestrian would not have fallen if his foot had not slipped on the snow, but the injury was occasioned by his foot slipping into a defective portion of the sidewalk, the municipality is liable although not liable because of the snow on the walk. Forney v. Melvin, 130 Ill. App. 203.

53. Street v. Holyoke, 105 Mass. 82, 7 Am. Rep. 500; Lincoln v. Smith, 28 Neb. 762, 45 N. W. 41.

54. Snickles v. St. Joseph, 139 Mo. App. 187, 122 S. W. 1122; Smith v. Yankton, 23 S. D. 352, 121 N. W. 848.

55. Smith v. Tacoma, 51 Wash. 101, 98 Pac. 91.

walk was rendered more dangerous by being wet and slippery does not affect the liability of the municipality for allowing a hole or other defect to exist in the street,[56] since the slipping is not the proximate cause of the injury.[57] But where the causes of slipping on a sidewalk were the plan of construction and a coating of smooth ice, the municipality being responsible for the former but not for the latter, no recovery can be had where the accident would have happened without regard to the negligent plan of construction or where it is equally as probable that the injury came from the one cause as the other.[58]

§ 2852. Same—intervening causes.

Intervening causes are not always clearly distinguishable from concurring causes, although the former must be subsequent in time and a new or independent force or power.[59] *The general rule* is that if the negligence of a municipality would not have produced the catastrophe but for the subsequent intervening negligence of a third person, *which latter negligence is not a result which the municipality might reasonably anticipate,* nor one against which it was its duty to guard, the negligence of the municipality is not the proximate cause, provided the injury would not have happened but for the intervening negligence.[60] The intervention of a third

56. **Columbus** v. Neise, 63 Kan. 885, 65 Pac. 643.

57. **Burrell** v. Greenville, 133 Mich. 235, 94 N. W. 732.

To same effect, Alexander v. Big Rapids, 76 Mich. 282, 42 N. W. 1071; Porcella v. Mutual Reserve Fund Life Ass'n, 63 N. Y. S. 599, 50 App. Div. 158.

58. **Langhammer** v. Manchester, 99 Ia. 295, 68 N. W. 688.

59. **Aetna Ins.** Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395.

60. **Thompson,** Neg., vol. 1, §§ 55, 56.

"Damages are not properly chargeable to any alleged act of negligence, when it appears that subsequently an independent and unexpected factor intervened which in itself was the real cause of the mischief. Legal responsibility in such a case rests upon the intervening cause, and, unless that was the fault of the original wrongdoer, the latter is relieved from responsibility." Quinn v. Philadelphia, 225 Pa. 176, 73 Atl. 318.

"A defendant is not liable for acts of negligence where an injury is occasioned by an independent, intervening act which he could not have reasonably anticipated would be the result of his negligence, although the injury for which it is sought to hold him responsible would not have occurred except for his negligence. In this respect the law is so well settled that citation of authority is not necessary." Lyons v. Watt, 43 Colo. 238, 95 Pac. 949.

So where the negligence of a municipality in allowing a hole to be in a street caused a horse to run away, and in running he collided with a carriage so as to overturn the vehicle drawn by the runaway, the defect in the street is the proximate cause, since there was no break in the natural sequence of events. Quinlan v. Philadelphia, 205 Pa. 309, 54 Atl. 1026.

"Each count of the complaint charges negligence to the defendant for permitting an accumulation of water in the road, while the injury sustained is averred to have been caused by the action of the horse while plaintiff was assisting him to

person, or of other new and direct causes, does not preclude a recovery *if the injury was the natural or probable result of the original wrong.*[61] "The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise."[62] The true rule "is that when the intervening act, whether that of a third person or otherwise, is one which should have been foreseen or reasonably anticipated, and which in an incidental or subordinate way works out the natural and probable consequence of the antecedent negligence, the latter is deemed the proximate cause of the injury, although it would not have occurred but for the intervening act."[63] If the initial cause is the act of a third person, but the injury would not have resulted but for the intervening defective condition of the streets, the latter is the proximate cause.[64] Thus, if a traveler on a sidewalk is thrown into a hole therein by a bicycle striking a companion who was thrown against him, the hole is the proximate cause, where but for that he would not have been injured.[65]

§ 2853. Same—injury as result of negligence as test.

It is sometimes held that if the injury would not have happened but for the cause for which the municipality is not responsible, the municipality is not liable because its negligence is not the proximate cause,[66] although many decisions, while

get up, and which occurred after plaintiff had safely alighted from the wagon, and was the result of a subsequent independent act of the plaintiff," and hence the alleged negligence is not the proximate cause. Crowley v. West End, 149 Ala. 613, 43 So. 359, 10 L. R. A. (N. S.) 801.

61. Eskildsen v. Seattle, 29 Wash. 583, 585, 70 Pac. 64.

62. Lane v. Atlantic Works, 111 Mass. 136.

63. Citizens' Gas & E. Co. v. Nicholson, 152 Fed. 389, 81 C. C. A. 515.

64. Fright of child, by other children who were playing, is not proximate cause where because thereof he slips into vat of hot water in the street. Korpi v. Oliver Iron M. Co., 114 Minn. 525, 131 N. W. 372.

65. Keane v. Seattle, 55 Wash. 622, 104 Pac. 819.

66. If injury would not have happened but for the initial cause for which the municipality was not responsible (breaking of line when driving horse), no recovery can be had, the defect in the way being a subsequent and remote cause. Macfarlane v. Sullivan, 99 Wis. 361, 75 N. W. 71, 74 N. W. 559.

Where injury was occasioned by struggle between a policeman and one who was trying to pull away from him, the officer stepping into a hole in the sidewalk, hole held not proximate cause. Childrey v. Huntington, 34 W. Va. 457, 465, 12 S. E. 536, 11 L. R. A. 313.

"Although the defect in the street

not expressly holding a contrary rule, do so in effect.[67] Thus, it is held that if a traveler on a street is thrown into the street by a hole therein, for which the municipality is responsible, but is not injured until a street car comes along and runs over him while lying on the track, the intervening agent, *i. e.*, the negligence of the street car company, is not the proximate cause.[68]

§ 2854. Same—runaway horse as proximate cause.

Where a horse becomes frightened and the driver loses control, and thereafter the horse runs into some defect in the street or over an embankment, the general rule is that the defect in the street is the proximate cause although the injury would not have happened if the horse had not been unmanageable, provided of course the driver has not been guilty of contributory negligence.[69] However, this rule does not pre-

may have contributed to the collision between appellant's fire engine and the wagon resulting in appellee's injury, if at the time the horses attached to fire engine were from fright running away and beyond the control of the driver, whether such fright resulted from the negligence of the driver or other cause, and appellee's injuries would have been sustained, in the absence of the defect in the street, by the running away of the horses alone, then the defect in the street can not be regarded as the proximate cause of the injury." Louisville v. Bridwell, (Ky. 1912), 150 S. W. 672.

So where the alleged negligence was allowing an areaway to remain uncovered, but the cause of the injury in the first place was the hinge of an adjacent cellar door over which the pedestrian tripped and fell into the cellar; the existence of the cellar door and hinge not being a defect in the streets, the projecting hinge is the proximate one, and hence the municipality is not liable. Quinn v. Philadelphia, 224 Pa. 176, 73 Atl. 318.

67. "If a municipality has been negligent in the discharge of such a duty, and the person injured is not at fault, it is liable (according to the weight of authority) where the injury would not have occurred but for the obstruction or defect. It can not excuse its culpability by saying that the injury possibly, or even probably, would not have happened but for the intervention of a concurring cause, such as a horse becoming unmanageable through fright, for which neither party is responsible." McLemore v. West End, 159 Ala. 235, 48 So. 663.

Where there were broken bottles in a ditch, without which the injury, notwithstanding the falling into the ditch, would not have resulted, the fall due to the defective condition of the sidewalk is nevertheless the proximate cause. Galveston v. Posnainsky, 62 Tex. 118, 134, 50 Am. Rep. 517.

So where a hole in a street caused the tongue of a wagon to strike a street car rail, throwing the driver out, such hole was the proximate cause. Dallas v. McCullough (Tex. Civ. App.), 95 S. W. 1121.

68. Chicago v. Schmidt, 107 Ill. 186; Indianapolis, T. & T. Co. v. Springer, 47 Ind. App. 35, 93 N. E. 707; Louisville v. Hart's Adm'r, 143 Ky. 171, 136 S. W. 212 (rule same but facts a little different); Eskildsen v. Seattle, 29 Wash. 583, 70 Pac. 64.

If a person falls because of a defect in a street, and is run over by a train of cars before he can arise, the defect is the proximate cause. Schmidt v. Chicago & N. W. R. Co., 83 Ill. 405.

69. *Alabama.* McLemore v. West End, 159 Ala. 235, 48 So. 663.

Colorado. Denver v. Utzler, 38 Colo. 300, 88 Pac. 143.

vail in some states. *The Massachusetts* rule is thus set forth: "When a horse, by reason of fright, disease or viciousness,

Florida. Janes v. Tampa, 52 Fla. 292, 42 So. 729.

Georgia. Augusta v. Hudson, 94 Ga. 135, 21 S. E. 289; Atlanta v. Wilson, 59 Ga. 544, 27 Am. Rep. 396.

Illinois. Joliet v. Shufeldt, 144 Ill. 403, 32 N. E. 969, 18 L. R. A. 750, 36 Am. St. Rep. 453, aff'g 42 Ill. App. 208; Lannon v. Chicago, 159 Ill. App. 595.

Indiana. Fowler v. Linquist, 138 Ind. 566, 37 N. E. 133; Crawfordsville v. Smith, 79 Ind. 308, 41 Am. Rep. 612; Mt. Vernon v. Hoehn, 22 Ind. App. 282, 53 N. E. 654.

Iowa. Harvey v. Clarinda, 111 Ia. 528, 82 N. W. 994; Byerly v. Anamosa, 79 Ia. 204, 44 N. W. 359; Manderschid v. Dubuque, 25 Ia. 108.

Kansas. Emporia v. White, 74 Kan. 864, 86 Pac. 295; Union St. R. Co. v. Stone, 54 Kan. 83, 37 Pac. 1012.

Louisiana. See Mayronne v. Keegan, 117 La. 661, 42 So. 212.

Minnesota. Campbell v. Stillwater, 32 Minn. 208, 20 N. W. 320, 50 Am. Rep. 567. But see La Londe v. Peake, 82 Minn. 124, 84 N. W. 726.

Missouri. Townsend v. Joplin, 139 Mo. App. 394, 123 S. W. 474. See also Turner v. Southwest Missouri R. Co., 138 Mo. App. 143, 120 S. W. 128. But see Brown v. Glasgow, 57 Mo. 156, 159.

Montana. Meisner v. Dillon, 29 Mont. 116, 74 Pac. 130.

New York. Ring v. Cohoes, 77 N. Y. 83, 33 Am. Rep. 574, and see Kennedy v. New York, 73 N. Y. 365, 29 Am. Rep. 169.

North Carolina. Dillon v. Raleigh, 124 N. C. 184, 32 S. E. 548.

Pennsylvania. Wellman v. Susquehanna Depot, 167 Pa. 239, 31 Atl. 566; Pittston v. Hart, 89 Pa. 389; Hey v. Philadelphia, 81 Pa. 44, 22 Am. Rep. 733.

Texas. San Antonio v. Porter, 24 Tex. Civ. App. 444, 59 S. W. 922.

Need not keep streets safe for extraordinary emergencies, such as riding behind a runaway horse. Norwalk v. Jacobs, 29 Ohio Cir. Ct. R. 123.

Runaway horse: law restated. "Where a horse by reason of fright, disease, or viciousness, becomes actually uncontrollable so that his driver can not stop him, or direct his course, or regain control over his horse, and in this condition comes upon a defect in the highway by which an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been uncontrollable." This is the law in Massachusetts, Maine, Wisconsin, West Virginia, and perhaps some other states. It would seem, however, upon principle and the weight of judicial authority, that, where a horse takes fright, without fault of the driver, at something for which the municipality is not responsible, and gets beyond the control of the driver, runs away, and comes in contact with some obstruction or defect in the street, which is there by the negligence of the municipality, it is liable for the resulting injury if it would not have been sustained except for such negligence. City of Denver v. Utzler, 38 Colo. 300, 88 Pac. 143, 8 L. R. A. (N. S.) 77, and notes. Such is the law in this state, whatever may be the rule elsewhere. It is based upon the principle that, where several concurring acts or condition of things, one of them a wrongful act or omission, produce an injury, such wrongful act or omission is to be regarded as the proximate cause of the injury, if it be one which might reasonably have been anticipated from such act or omission, and which would not have occurred without it." McDowell v. Preston, 104 Minn. 263, 116 N. W. 470.

"The rule would, of course, be different, if the fright of the horse *was due to the negligence of the municipal authorities;* likewise it would be different *if the highway where the injury occurred was in a dangerous condition for ordinary travel. In either of these cases the city would be liable, because the negligence of its officers would be the proximate cause of the injury;* but, where the municipal authorities are in no wise responsible for the fright of the horse, the city is not responsible in damages for its subsequently injuring itself in unnecessarily running against

becomes actually uncontrollable, so that his driver cannot stop him, or direct his course, or exercise or regain control over his movements, and in this condition comes upon a defect in the highway, or upon a place which is defective for want of a railing, by which an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable. But a horse is not to be considered uncontrollable that merely shies or starts, or is momentarily not controlled by his driver."[70] This Massachusetts rule is followed in Maine[71] and Wisconsin;[72] and it would seem, although it is not entirely clear, that the Massachusetts rule is followed in Michigan,[73] Pennsylvania,[74] South Carolina,[75] West Virginia,[76] and Washington.[77] However, the rule is universal, including those states adopting the Massachusetts rule, that where a horse is safe, but suddenly swerves or shys, or backs up, but the loss of control of the driver is only momentary, and a defect in the street is encountered by the horse so acting, the proximate cause is such defect.[78] Where a horse becomes temporarily uncontrollable and backs up the wagon a short distance to a dangerous place which the municipality has negligently failed to protect by railings or the like, the failure to guard is generally held to be the proximate cause rather than the fright of the horse.[79]

On the other hand, where a horse fell upon a street which was in good condition, without any fault on the part of the

an obstruction in the highway, if there be ample space for the use of the traveling public." Harrodsburg v. Abraham, 138 Ky. 157, 127 S. W. 758, 29 L. R. A. (N. S.) 199.

70. Titus v. Northbridge, 97 Mass. 258, 265.

This rule is followed in later cases. Igo v. Cambridge, 208 Mass. 571, 575, 95 N. E. 557; Scannal v. Cambridge, 163 Mass. 91, 39 N. E. 790; Higgins v. Boston, 148 Mass. 484, 20 N. E. 105; Horton v. Taunton, 97 Mass. 266, note; Cook v. Charleston, 13 Allen (Mass.), 190, note.

71. Coombs v. Topsham, 38 Me. 204.

72. Ritger v. Milwaukee, 99 Wis. 190, 74 N. W. 815; Schillinger v. Verona, 96 Wis. 456, 71 N. W. 888.

73. Bell v. Wayne, 123 Mich. 386, 82 N. W. 215, 48 L. R. A. 644, 81 Am. St. Rep. 204; Bleil v. Detroit St. R. Co., 98 Mich. 228, 57 N. W. 117.

74. Schaeffer v. Jackson Tp., 150 Pa. 145, 24 Atl. 629, 18 L. R. A. 100, 30 Am. St. Rep. 792. But see Pittston v. Hart, 89 Pa. 389. Compare Wellman v. Susquehanna Depot, 167 Pa. 239, 31 Atl. 566.

75. Mason v. Spartanburg, 40 S. C. 390, 19 S. E. 15, 42 Am. St. Rep. 887; Brown v. Laurens County, 38 S. C. 282, 17 S. E. 21.

76. Hungerman v. Wheeling, 46 W. Va. 761, 34 S. E. 778, in which case, however, the horse was a vicious one and in the habit of balking and backing.

77. Teater v. Seattle, 10 Wash. 327, 38 Pac. 1006.

78. Rucker v. Huntington, 66 W. Va. 104, 66 S. E. 91; Morsman v. Rockland, 91 Me. 264, 39 Atl. 995; Vogelgesang v. St. Louis, 139 Mo. 127, 40 S. W. 653; Olson v. Chippewa Falls, 71 Wis. 558, 37 N. W. 575.

79. Kennedy v. New York, 73 N. Y. 365, 29 Am. Rep. 169; San Antonio v. Porter, 24 Tex. Civ. App. 444, 59 S. W. 992; Olson v. Chippewa Falls, 71 Wis. 558, 37 N. W. 575.

municipality, and in its struggles to get up, went over an unguarded declivity on one side of the street, the fall of the horse was held the proximate cause, and the municipality was held not liable.[80] So where horses became frightened by a cause for which the municipality was in no way responsible, and fell upon a stone pile in the road which was not a dangerous obstruction, the fright was held the proximate cause.[81] And where a horse dropped dead on a bridge and fell of, drawing the vehicle and occupants with him, the want of a sufficient railing was held not the proximate cause, on the theory that the injury was not the natural result of a railing only two and a half feet high, and that it was not the duty to provide a railing which could successfully resist the sudden weight of a horse.[82] In a rather peculiar case in Iowa, a horse tied to a post on the side of a street, became frightened, broke his fastenings, and ran over an embankment and was killed. The negligence alleged was the failure to erect barriers. It was held that no recovery could be had because, if the horse had been driven over the embankment by his owner, a recovery would be denied on the ground of his contributory negligence, and that the same rule applies.[83]

Another class of runaway injuries is where the horse becomes frightened at some defect in the street. In such a case, if the viciousness of the horse is the proximate cause, and not the negligence of the municipality, no recovery can be had.[84]

11. NOTICE OF ACCIDENT.

§ 2855. In general.

Notice of the accident is generally required to be given within a certain time after the accident.[85] This notice of accident should not be confused, however, with *notice of the defect before* the accident.[86]

80. Herr v. Lebanon, 149 Pa. 222, 24 Atl. 207, 16 L. R. A. 106, 34 Am. St. Rep. 603, refusing to follow Wagner v. Jackson Tp., 133 Pa. 61, 19 Atl. 312.

81. Kieffer v. Hummelstown, 151 Pa. 304, 24 Atl. 1060, 17 L. R. A. 217.

82. McClain v. Garden Grove, 83 Ia. 235, 48 N. W. 1031, 12 L. R. A. 482.

83. Moss v. Burlington, 60 Ia. 438, 15 N. W. 267, 46 Am. Rep. 82.

84. Macon v. Dykes, 103 Ga. 847, 31 S. E. 443, where negligence of municipality was in allowing rails of street car track to be above the level of the street and horse was frightened by scraping noise made by contact of wheels with the iron rails, it not being likely that a gentle horse would be frightened thereby.

85. §§ 2712-2718, *ante*.

86. §§ 2807-2818, *ante*.

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(References are to sections, except as otherwise indicated. Vol. 1, §§ 1-410; Vol. 2, §§ 411-888; Vol. 3, §§ 889-1420; Vol. 4, §§ 1421-2016; Vol. 5, §§ 2017-2603; Vol. 6, §§ 2604-2855.)

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(References are to sections, except as otherwise indicated. Vol. 1, §§ 1-410; Vol. 2, §§ 411-888; Vol. 3, §§ 889-1420; Vol. 4, §§ 1421-2016; Vol. 5, §§ 2017-2603; Vol. 6, §§ 2604-2855.)

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