DEPARTMENT OF MUNICIPAL CORPORATIONS AND PUBLIC LAW.

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BREEN *v.* FIELD.[1] SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Negligence—Personal Liability of Selectmen of a Town.

In an action for negligence by a man employed in constructing a sewer against the selectmen of a town by whom he was *directly* hired, it was said: "In building the sewer the selectmen were performing a ministerial duty, belonging to them by virtue of their office. While the sewer when built belonged to the town, its construction was not the performance of a duty imposed by general laws upon it for general benefit, but a construction authorized by a town for its benefit and that of its inhabitants. The defendants employed the plaintiff, not a competent superintendent, to employ him, and whether they were acting as public officers or agents or not, did not alter their duty to him. The fact that the town might also be liable did not relieve them, nor can the case be compared to an agent following the directions of his principal as to hiring and setting a person to work without any control or direction himself in relation to the matter, as the defendants had full control over the work."

Abstract from opinion of MORTON, J.

STATEMENT OF THE CASE.

This case was, as stated in the opinion, an action of tort brought against the defendants, individually, as selectmen of the town of Greenfield, Mass., for negligently failing to provide suitable means of support for the sides of a trench in which they had employed the plaintiff to lay pipe for the purpose of building a public sewer in one of the streets of the town. The injury occurred not from a defect in the plan of the sewer, but through a failure to support the sides of the trench in the course of its construction. "The building of the sewer was in the control of the defendants. . . . In

[1] 31 N. E. Rep., 1075; 31 AMER. LAW REG. AND REV.

building the sewer they were performing a ministerial duty for the benefit of the town. This duty belonged to them by virtue of their office, but was, nevertheless, ministerial. . . . The defendants were not bound to hire the plaintiff, and set him to work in the bottom of the trench; but, having done so, they are liable to him for any injury which occurred to him in the course of his employment through any negligence on their part. Whether they were acting as public officers or agents or not, could, under the circumstances, make no difference as to their duty to the plaintiff. . . . The fact that the town may also be liable does not relieve them. . . . It is not the case of an agent, following the directions of his principal as to hiring and setting a person to work without any control or direction himself in relation to the matter, and acting only within the strict line of his authority. The defendants had full control over the work, over the hiring of the men to do it, and, if they chose to exercise it, over the manner in which it should be done; and they hired and set the plaintiff to work in a place where he was injured. It is a question for the jury whether his injury was due to any neglect on their part to take proper precautions for his safety."

INDIVIDUAL RESPONSIBILITY OF PUBLIC OFFICIALS FOR ACTS OF NEGLIGENCE.

Public officers whose tenure of office is dependent upon *political* considerations owe no duties, in the performance of their official trust, to individuals, but exclusively to the public. For non-performance or negligent performance of these duties, the citizen who suffers in consequence has no individual right of redress. The functions of the sovereignty of necessity must be exercised by executive, legislative and judicial officers, and subordinate agents in their departments. Such officials are representatives of the State, performing the governmental powers specially assigned to them. As such, the privileges of sovereignty attach to them. For their actions within the limits of their powers, or for a neglect to perform their duties, they are responsible to the public, and no liability exists towards individuals who may suffer special injury: Shearman & Redfield on Negligence, 4th ed., §§ 252, 253, 302. Thus, the motives inducing a Governor's official action are not the subject of inquiry by an individual: Cooley on Torts, 2d ed., *377. Nor can members of the legislature personally be held civilly liable for their legislative action, and the doctrine applies as well to municipal councils: Baker *v.* State, Ind., 27

485; Walker *v.* Hallock, 32 Id., 239; Jones *v.* Loving, 55 Miss., 109; Borough of Freeport *v.* Marks, 59 Pa., 253; Cooley on Torts, 2d ed., *377.

The exemption from responsibility to individuals for official acts also extends to *judicial* officers; but a distinction is made between judges of courts of record and judges of inferior jurisdiction. The latter must not act beyond their limited jurisdiction. If it is shown that an inferior magistrate acted in bad faith, or with fraud or malice, he is liable to the injured suitor, though acting within his jurisdiction; but though a suitor in a court of record suffer by a violation of the judge's duty, by his corruption or oppression, he has no personal redress, since the wrong committed by the judge is done the public; the complainant's legal controversy is considered as being merely the occasion for the wrong, and impeachment is the only punishment: Shearman & Redfield on Negligence, 4th ed., §§ 303, *et seq.* Thus in Yates *v.* Lansing, 5 Johnson, 282, 291, Chancellor KENT (then Chief Justice) said: "The doctrine which holds a judge exempt from civil suit or indictment for any act done or omitted to be done by him, sitting as judge, has a deep root in the common law. It is to be found in the earliest judicial records, and it has been steadily maintained by an undisturbed current of decisions in the English courts, amidst every change of policy and through every revolution of their government." Serjean HAWKINS has said: "That the law has freed the judges of all courts of record from all prosecutions whatsoever, except in the Parliament, for anything done by them openly in such courts as judges. For the authority of government cannot be maintained unless the greatest credit be given to those who are so highly entrusted with the administration of public justice, and that if they should be exposed to the prosecution of those whose partiality to their own causes would induce them to think themselves injured, it would be impossible for them to keep in the people that veneration of their persons and submission to their judgments without which it is impossible to execute the laws with vigor and success:" see Yates *v.* Lansing, 9 Johnson, 395. "If by any mistake in the exercise of his office a judge should injure an individual, hard would be his condition if he were to be responsible therefor for damages. The rules and principles which govern, in the exercise of judicial power are not, in all cases, obvious; they are often complex and appear under different aspects to different persons. No man would accept the office of judge if his estate were to answer for every error in judgment, or if his time and property were to be wasted in litigations with every man whom his decisions might offend. It is, therefore, a settled principle that however erroneous his judgment may be, either by positive acts, neglect, or refusal to do certain acts, or however injurious to a suitor, a judge is never liable in any civil action for damages arising from his mistake": Phelps *v.* Sill, 1 Day (Conn.), 315, 329; 1 Shearman & Redfield on Negligence, 4th ed., § 303, and notes; Cooley on Torts, 2d ed., ch. 14; 12 Am. and Eng. Ency. of Law, 32; 19 Id., 486. In Bradley *v.* Fisher, 13 Wallace, 335, 351, FIELD, J., held "that judges

of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. . . . Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible." See also Lange *v.* Benedict, 73 N. Y., 12; S. C., 8 Hun, 362; 18 Wallace, 163; 99 U. S., 68; Houlden *v.* Smith, 14 Q. B., 841. Inferior magistrates are relieved of responsibility to suitors before them when they have acted honestly and in good faith in a judicial matter within their jurisdiction: 1 Shearman & Redfield on Negligence, 4th ed., § 307, and notes.

But, as was said by BEARDSLEY, J., in Wilson *v.* New York, 1 Denio, 595, 599, "duties which are purely *ministerial* in their nature are sometimes cast upon officers whose chief functions are *judicial*. Where this occurs, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct." See Cooley on Torts, 2d ed., *378.

In Waldo *v.* Wallace, 12 Ind., 569, 572, a ministerial office was defined to be one which gave the officer no power to judge of the matter to be done, and requires him to obey the mandates of a superior; a ministerial office may be exercised by a deputy, while a judicial office cannot be so exercised. In Pennington *v.* Streight, 54 Ind., 376, 377 (following Flournoy *v.* Jeffersonville, 17 Id., 169), a ministerial act was defined "to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done." A ministerial act is that which is done under the orders of a superior: SNEED, J., in Friedman *v.* Mathes, 8 Heiskell (Tenn.), 488, 502. Where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial; but where the act to be done involves the exercise of discretion or judgment, it is not to be deemed merely ministerial: BONNER, J., in Rains *v.* Simpson, 50 Texas, 495, 501. A ministerial duty is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law: CHASE, C. J., in State of Mississippi *v.* Johnson, 4 Wallace, 475, 498.

It may be stated as a broad proposition that for negligently performing ministerial duties, or for omission to perform them, or for acting without authority, or in excess of it, a public official is responsible, at the suit of a private individual, for damages suffered by him as a consequence: Shearman & Redfield on Negligence, 4th ed., § 313; 19 Am. and Eng. Ency. of Law, 490, *et seq.* Discretionary duties concern the public primarily and specially; they concern individuals only incidentally: therefore the individual cannot hold the officer responsible for his negligent performance of such duties. Judge COOLEY thus

states the rule: "If the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual, injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages:" Cooley on Torts, 2d ed., *379. But a duty owing an individual must have a definite origin, and be more or less explicit in its scope.

Thus in Robinson *v.* Chamberlain, 34 N. Y., 389, a superintendent employed by the State canal commissioners, pursuant to law, to keep a portion of the canals in proper condition and repair, was held liable to the plaintiff, who was specially damaged by a neglect of his duty. PECKHAM, J., acquiesced in the rule laid down by BRONSON, J., in Adsit *v.* Brady, 4 Hill, 630, 632, that "when an individual sustains an injury by the misfeasance or nonfeasance of a public officer, who acts, or omits to act, contrary to his duty, the law gives redress to the injured party by an action adapted to the nature of the case." SMITH, J., said: "The defendant by his contract assumed the absolute duty of repairing a public thoroughfare, and is therefore liable in a civil action in behalf of any individual who has sustained special damage as the immediate consequence of his neglect to repair. . . . His duty being absolute, unconditional and fixed, differs from that of commissioners of highways, upon whom no duty to repair attaches until funds are provided for that purpose by the public:" 34 N. Y., 402–3; Garlinghouse *v.* Jacobs, 29 Id., 297. In Adsit *v.* Brady, 4 Hill, 630, a superintendent of repairs on the Erie Canal was held individually responsible for allowing a sunken boat to obstruct navigation to the injury of the plaintiff's passing boat. It was his duty to remove the obstruction without waiting for orders from the commissioners. Likewise in Shepherd *v.* Lincoln, 17 Wendell, 250, it was held that a superintendent of repairs on the canals of the State was personally liable for damages sustained by an individual through the negligence of his workmen, and the fact that he was the agent of the State was immaterial, since his duties were definite.

In Garlinghouse *v.* Jacobs, 29 N. Y., 297, the plaintiff sued the commissioners of highways for damages caused by the fall of a bridge while his stage coach was crossing it. A recovery was denied, because the commissioners had neglected no duty, inasmuch as they were repairing bridges, and insufficiency of funds prevented them from improving all under their care. It was said by JOHNSON, J. (p. 304): "They owed no duty to any one to undertake more than the funds in their hands would complete and pay for; and they necessarily had a discretion to exercise as to which of the bridges in the town they would undertake to repair. This discretion, for aught that appears, they exercised in good faith." As WRIGHT, J., said (p. 312): "For the exercise of that discretion they cannot be made responsible in a civil action." The same judge also said "that town commissioners of highways are, in no event, liable

to a private action for a mere neglect or omission to keep the highways of their towns in repair," and he repudiated the rule enunciated by BRONSON, J., in Adsit *v.* Brady, *supra*. But this view was not that of the majority of the court, and the contrary has since been well established: Robinson *v.* Chamberlain, 34 N. Y., 389; Hover *v.* Barkhoof, 44 Id., 113; Clark *v.* Miller, 54 Id., 528; Bennett *v.* Whitney, 94 Id., 302; Cooley on Torts, 2d ed., *399, *400.

In Hover *v.* Barkhoof, 44 N. Y., 113, the commissioners of highways were held liable for damages resulting from the unsafe condition of a bridge which it was their duty to keep in repair. The commissioners had the power to obtain the means for rebuilding, but they did not exercise it, preferring to make temporary repairs, and postpone rebuilding until spring. LEONARD, Com., said (p. 116): "One who assumes the duties, and is invested with the powers of a public officer, is liable to an individual who sustains special damage by a neglect properly to perform such duties." EARL, Com., said (p. 125): "Commissioners of highways, having the requisite funds in hand, or under their control, are bound to repair bridges which are out of repair, they having notice of their condition; and they are bound to repair them with reasonable and ordinary care and diligence, and if they omit this duty they are liable to individuals who sustain special damage from such neglect." See Cooley on Torts, 2d ed., *399, *400.

In Clark *v.* Miller, 54 N. Y., 528, a town supervisor was held responsible in damages for neglecting to present to the board of supervisors the plaintiff's claim for damages as reassessed, occasioned by the laying out of a highway through his lands; the supervisor presented the first assessment, alleging the second to have been unconstitutional. It was held that as he was a ministerial officer, whose duties were made absolute and certain by statute, he was responsible to the plaintiff; and the fact that his conduct was prompted by an honest (though erroneous) belief in the unconstitutionality of the reassessment, would not relieve him from the consequences of his disobedience.

In Bennett *v.* Whitney, 94 N. Y., 302, the mayor, members of common council and the street commissioner of Binghamton were sued in their individual names, with the title of their respective offices added, for negligently leaving unguarded and unlighted an opening temporarily made in a street of the city. By the city charter the defendants were made commissioners of highways. It was held that the defendants were individually responsible. FINCH, J., said (p. 306): "One who assumes the duties and is invested with the powers of a public officer is liable to an individual who sustains special damage by a neglect properly to perform such duties." (P. 308): "It was not a case of nonfeasance or omission to act at all, where in some cases as to the repair of highways it may be necessary to show adequate means in the hands of the officer, but a case of misfeasance, where the officer had acted, but conducted himself negligently, to the special injury of an individual."

In Piercy *v.* Averill, 37 Hun. 360, suit was brought against the mayor and aldermen, constituting the common council of the city of

Ogdensburg, who were invested by law with the powers of commissioners of highways, for negligently permitting the accumulation of snow and ice on a sidewalk, and suffering it to remain in a dangerous condition, in consequence of which the plaintiff was personally injured. It was held that the duty of keeping the sidewalks and streets in repair was ministerial, and for its negligent performance the defendants were liable for the plaintiff's injuries. The fact that the municipality was exempt will not relieve its agents of personal liability for individual wrongful acts in violation of their public duties. See also, Robinson *v.* Chamberlain, 34 N. Y., 389; Bennett *v.* Whitney, 94 Id., 302.

In McCord *v.* High, 24 Iowa, 336, a road supervisor was held responsible for damages suffered by a land-owner in consequence of the construction of a crossing over a stream having diverted the water from his land. The plaintiff had no remedy against the road district, township or county. BECK, J., said (p. 343): "The fact of an officer being clothed with discretion in the discharge of a duty as to the *manner* of its performance, or as to the control of circumstances and attendant acts necessarily arising in the discharge of such duty, will not give to it a judicial character. It is impossible to conceive of any ministerial duty to be performed by an officer that may not be, that *is* not, accompanied by circumstances which require the exercise of judgment and discretion." (P. 342): "It surely cannot be claimed that a road supervisor is clothed with such discretion, with such judicial duties and powers, that he may divest or diminish the water of a stream without rendering to the owner of the property compensation therefor." DILLON, C. J., said (p. 350): "Where a public officer, other than a judicial one, does an act directly invasive of the private rights of others, and there is otherwise no remedy for the injury, such officer is personally liable without proof of malice and an intent to injure." In McOsker *v.* Burrell, 55 Ind., 425, in obedience to a statute a supervisor constructed a dam which caused the water in the stream to overflow the plaintiff's land. It was held he was not personally responsible because he acted in good faith, and it was not shown that he acted without reasonable care, corruptly or maliciously." PERKINS, J., said (p. 428): "A supervisor, acting within the scope of his authority in good faith, should not be liable to an action in his natural capacity for acts so done in his official capacity."

In Nowell *v.* Wright, 3 Allen, 166, the tender of a drawbridge, appointed by the governor, whose duty was to permit no unnecessary detention of vessels, having due regard and caution for the public travel, was held liable to a person injured by falling into the river through his failure to hang out a lantern at night while opening the draw.

In Morse *v.* Sweenie, 15 Bradwell (Ill. App.), 486, the fire marshal of the city of Chicago was held liable for negligently colliding with the plaintiff's team while going to a fire.

In Jones *v.* Bird, 5 Barn. & Ald., 837, the commissioners of sewers were held responsible for negli-

gently repairing a sewer, whereby the plaintiff's house was injured. See, also, Murphy *v.* City of Lowell, 124 Mass., 564; Breen *v.* Field, 31 N. E. Rep., 1075.

In Hall *v.* Smith, 2 Bingham, 156, 159, BEST, C. J., said: "If commissioners, under an Act of Parliament, order something to be done which is not within the scope of their authority, or are themselves guilty of negligence in doing that which they are empowered to do, they render themselves liable to an action, but they are not answerable for the misconduct of such as they are obliged to employ."

In Schinotti *v.* Bumsted, 6 T. R., 646, commissioners of a lottery authorized by law were held liable for neglecting to award a prize to the holder of a ticket entitled to receive it. Lord KENYON, C. J., said (p. 649): "The commissioners of the lottery are mere ministerial officers."

In Hayes *v.* Porter, 22 Maine, 371, a deputy inspector of meats was held liable for negligently inspecting certain meat of the plaintiff, which thereby became worthless. While the public depend upon the inspection of provisions as a sanitary regulation, yet it is at least equally important to individuals who in reliance upon it are induced to purchase: Cooley on Torts, 2d ed., *390.

In Kennedy *v.* Ryall, 67 N. Y., 379, the captain of a steamship at quarantine was held liable for damages by reason of the plaintiff's child having died from the effects of drinking poison which had been used in fumigation but had not been removed from the steerage when the steward ordered the passengers to re-enter it. It was within the line of the captain's duty to see that the poison was removed.

Officers in the army and navy are responsible to individuals injured as a consequence of the negligent performance of their duties. Thus in Castle *v.* Duryee, 32 Barb., 480, it was held that a colonel, who in accordance with official orders was drilling his regiment, could be held liable for omitting a precaution he should have taken, or improperly giving an order to discharge musketry, whereby the plaintiff was hurt. His official position exempted him from liability for authorized acts if he used reasonable care and caution. See, also, Nicholson *v.* Mouncey, 15 East, 384; Scott *v.* United States, 18 Ct. of Cl. Rep., 1.

The same liability attaches to postmasters. In Keenan *v.* Southworth, 110 Mass., 474, GRAY, J., said: "The law is well settled in England and America that the postmaster-general, the deputy postmasters and their assistants and clerks, appointed and sworn as required by law, are public officers, each of whom is responsible for his own negligence." But if a postmaster-general while acting in the line of duty is required to exercise discretion, he cannot be held liable for error of judgment: Kendall *v.* Stokes, 3 Howard, 87; Cooley on Torts, 2d ed., *391. As was said by GREENE, J., in Griffith *v.* Follett, 20 Barb., 620, "when the law confides a discretion to its officers it will not allow their acts done in good faith, and within the limits of that discretion, to be questioned." When by common law or statute the trust or duty is specific, the officer entrusted therewith is liable for its negligent performance. Thus in Jenner *v.* Joliffe, 9 Johnson, 381, an officer with authority to attach certain goods, who keeps them in an unsafe place or exposes