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# PERSONAL TORT LIABILITY OF ADMINISTRATIVE OFFICIALS

EUGENE J. KEEFE†

THE rapid increase of our administrative agencies, both numerically<sup>1</sup> and in scope of subject matter covered,<sup>2</sup> brings expanding interest to the question of the personal liability of the lone administrator or the individual members of an administrative board. It is proposed in this paper to discuss their personal liability from a tortious point of view. The questions arising out of the problem of the liability of the state or municipality and the question of personal contractual liability are outside the purview of this paper.

The courts have established certain principles which seem simple when applied to ordinary factual set-ups which come to mind immediately upon the statement of the principles themselves. But when life itself casts up situations less tailor-made for enclosure within these principles, difficult problems are presented and the application of the principles seems to have been dictated by unstated realistic considerations.

It might be well to start with judicial officers. By judicial officers is meant judges sitting in the actual judicial courts as distinguished from quasi-judicial officers functioning as administrative agencies. Judicial officers are immune from personal liability for acts done in their judicial capacity, even though malice or corruption be shown.<sup>3</sup> This rule has been generally<sup>4</sup> accepted<sup>5</sup> and it carries its absolute immunity from the court of last resort to the inferior courts.<sup>6</sup> At an early stage in the development of the law on the liability of quasi-judicial officers there appeared a ten-

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1. The Office of Price Administration; the Office of War Information; the Food Administrator.

2. The increase in the scope of activities in the Office of Price Administration and in the Securities Exchange Commission is typical of the new fields covered by new administrative agencies.

3. Chancellor Kent in *Yates v. Lansing*, 5 Johns. 282, 291 and 298 (N. Y. 1810) refers to the "doctrine which holds a judge exempt from civil suit or indictment, for any act done, or omitted to be done, by him".

4. But see *Murray v. Brancato*, 290 N. Y. 52 (1943) discussed *infra* 193.

5. Chancellor Kent (*supra* note 3) referred to the rule as a "sacred principle" with a "deep root in the common law."

6. In *Weaver v. Devendorf*, 3 Denio 117, 120 (N. Y. 1846) the court wrote: "The rule extends to judges from the highest to the lowest, to jurors, and to all public officers, whatever name they may bear, in the exercise of judicial power."

dency to grant to them the same absolute immunity.<sup>7</sup> This has been manifested in comparatively recent cases.<sup>8</sup> But the later trend<sup>9</sup> has been to impose liability upon quasi-judicial officers where malice or corruption has been shown.<sup>10</sup>

Should our quasi-judicial officers enjoy absolute immunity despite negligence,<sup>11</sup> despite malice or corruption?<sup>12</sup> This paper contemplates the breaking down of this problem by segregating the cases into groups and comparing these groups. But before this analysis is started a brief statement of the considerations material to liability or immunity might be helpful. The arguments in favor of absolute immunity are (1) the need of independent officers who can make decisions unhampered by the threat of law suits,<sup>13</sup> (2) the fear that responsible, capable men would not accept public office because of the threat of personal liability,<sup>14</sup> (3) the fear that constant suits would greatly hamper the officer's efficiency,<sup>15</sup> in that he would spend more time in the court room than he would attending to his administrative duties, (4) the unfairness of imposing liability because of the practical inability of officers to supervise all work in detail, and a necessary reliance on subordinates,<sup>16</sup> (5) the contention that a quasi-judicial officer owes a duty to the public only and not to any individual,<sup>17</sup> (6) the unfairness of asking a quasi-judicial officer to decide an issue between contestants and then to hold him liable for mistake of judgment<sup>18</sup> and (7) the delay involved in giving such an action, necessitating the retrial of issues. The arguments in favor of imposing conditional liability upon quasi-judicial officers would seem to be (1) the dangerous

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7. See Jennings, *Tort Liability of Administrative Officers* (1937) 21 MINN. L. REV. 263.

8. *Fidelity & Casualty Co. v. Brightman*, 53 F. (2d) 161, 165-6 (1931); *Keifer v. Smith*, 103 Neb. 675, 677, 173 N. W. 685 (1919); *Stevens v. North States Motor, Inc.*, 161 Minn. 345, 348, 201 N. W. 435, 436 (1925).

9. See Jennings, *loc. cit. supra*, note 7.

10. This rule in its first development seems to have been in *dicta* form. See *Logan City v. Allen*, 86 Utah, 375, 380, 44 Pac. (2d) 1085, 1087 (1935) where the court denied liability in the absence of corrupt or malicious motives; *State ex rel. Robertson v. Farmers State Bank*, 162 Tenn. 499, 505, 39 S. W. (2d) 281, 282 (1931).

11. *Dunbar v. Faut*, 170 S. C. 414, 170 S. E. 460 (1913).

12. *Cooper v. O'Connor*, 99 F. (2d) 135 (App. D. C. 1938).

13. *Bradley v. Fisher*, 13 Wall. 335 (U. S. 1871); (1940) 38 Mich. L. Rev. 1344.

14. *Mellon v. Brewer*, 18 F. (2d) 168 (App. D. C. 1927).

15. *Spaulding v. Vilas*, 161 U. S. 483 (1895).

16. *Malewicke v. Svale*, 198 Fed. 301 (C. C. A. 8th, 1924). See *Trapani, Liability of Public Officials for the Defaults of Their Subordinates* (1939) 13 ST. JOHNS L. REV. 351.

17. See Jennings, *loc. cit. supra* note 7.

18. *Ibid.*

possibilities inherent in absolute immunity, (2) the unfavorable public reaction to an application of the rule of absolute immunity in cases, not where the liability depended upon negligence alone, but where malice, corruption or dishonesty could be shown and (3) the injustice to the private citizen or corporation adversely affected. A reasonably careful reading of the arguments in favor of absolute immunity will indicate that the rule should be applied in the face of dishonesty, corruption or malice. Even the above stated argument that the quasi-judicial officer owes no duty to individuals would seem to permit of immunity where dishonesty, corruption or malice is shown. For this reason it is the general rule today that the quasi-judicial officer enjoys only qualified immunity, which does not excuse him where dishonesty, corruption or malice is shown.<sup>19</sup> But in some instances liability is not imposed even if malice is shown.<sup>20</sup> The cases cited together with several others will be discussed in the first part of this article.<sup>21</sup> The related problem of the liability of ministerial officers will also be referred to in this part. The second part will be devoted to a brief discussion of the liability of administrative officers for the acts of their subordinates.

## I.

### *Ministerial and quasi-judicial functions—non-existence of jurisdictional fact—negligent mistake—malice—absolute liability.*

There would seem to be four possible stages of liability of administrative officers (1) absolute liability,<sup>22</sup> (2) liability dependent upon negligence alone,<sup>23</sup> (3) liability requiring dishonesty or malice and<sup>24</sup> (4) absolute immunity.<sup>25</sup> The last stage is primarily extended to actual judges

19. *Morrill County v. Bliss*, 125 Nev. 97, 249 N. W. 98 (1933); *Deatsch v. Fairfield*, 37 Ariz. 387, 233 Pac. 887 (1925).

20. *Sweeney v. Young*, 82 N. H. 160, 131 Atl. 155 (1925); *Cooper v. O'Connor*, 99 F. (2d) 135 (App. D. C. 1938).

21. In England the liability has been limited to some extent by statute. See The Public Authorities Protection Act (1893) 5, 6 & 7 VICT. c. 61, which provides that any action commenced "against any person for any act done in pursuance, or execution . . . of any Act of Parliament or of any public duty or authority" must be commenced within six months next after the act charged.

22. *Bird v. McGoldrick*, 277 N. Y. 492, 14 N. E. (2d) 805 (1938); *Stanelevitz v. City of New York*, 173 Misc. 5, 15 N. Y. S. (2d) 837 (City Ct. 1929).

23. *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463 (1850); *National Bank v. Filer*, 107 Fla. 526, 145 So. 204 (1933); *Fidelity Deposit Co. v. Cone, et al.*, 138 Fla. 804, 190 So. 268 (1939).

24. *Deatsch v. Fairfield*, 27 Ariz. 387, 233 Pac. 887 (1925).

25. *Yates v. Lansing*, 5 Johns. 282 (N. Y. 1810).

in the exercise of judicial functions; and in so far as it relates to them the discussion will be confined to that appearing in the above introductory statement.

(1) *Absolute liability*. There are some instances wherein the law has imposed absolute liability against administrative officers. In *Bird v. McGoldrick*,<sup>26</sup> a chief clerk of a court was held liable for the loss of public funds received in his office where no fault, negligence or dishonesty on his part was shown.<sup>27</sup> In *Stanelevitz v. City of New York, et al*,<sup>28</sup> a city chamberlain was held liable for the improper investment of funds received in his office, where the actual investing was done by a subordinate in the office, without the knowledge or fault of the defendant.<sup>29</sup> This rule of absolute liability against a public officer for public funds *received* by him is based upon three reasons (1) public policy, (2) construction of the statute creating his office and (3) the provision of his bond.<sup>30</sup> The majority rule is carried to the extent of imposing liability against the officer where he deposits public funds in a bank which subsequently fails,<sup>31</sup> although there are some states, namely Iowa,<sup>32</sup> Kentucky,<sup>33</sup> Montana,<sup>34</sup> Pennsylvania,<sup>35</sup> South Carolina,<sup>36</sup> Tennessee<sup>37</sup> and Wyoming<sup>38</sup> which reject the majority rule and refuse to impose absolute liability where there is no evidence of negligence in the selection of the bank. In other states the matter is covered by "depository laws", which relieve officers from liability if they have complied with certain

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26. Note 23, *supra*.

27. In this case, *Bird v. McGoldrick*, 277 N. Y. 492, 14 N. E. (2d) 805, the court wrote at 499, 14 N. E. (2d) at 807: "The judicial rule of liability, without fault, for loss of public funds received by an officer, even if unduly harsh, is too well established to be changed by the courts."

28. Note 23, *supra*.

29. In *Stanelevitz v. City of New York*, 173 Misc. 5, 13, 15 N. Y. S. (2d) 837, 844-845, the court wrote, "Yet the rule of strict liability for moneys *received* by public officials seems strongly ingrained in our law."

30. See cases collected and discussed in note (1943) A. L. R. 819.

31. *Tillinghost v. Merrill*, 151 N. Y. 135, 45 N. E. 375 (1896).

32. *Danbury v. Reidmiller*, 208 Iowa 879, 226 N. W. 159 (1929).

33. *Jordan v. Baker*, 252 Ky. 40, 66 S. W. (2d) 84 (1933).

34. *Livingston v. Woods*, 20 Mont. 91, 49 Pac. 437 (1897).

35. *Comm. v. Bailey*, 129 Pa. St. Rep. 480, 10 Atl. 764 (1887), but see *School District v. Stoner*, 16 Montg. Co. Law Rep. 107 (Pa. 1900).

36. *York County v. Watson*, 15 S. C. 1 (1880).

37. *Overton County v. Copeland*, 96 Tenn. 296, 34 S. W. 427 (1896).

38. *State v. Gramm*, 7 Wyo. 329, 52 Pac. 533 (1898).

statutory specifications in making the deposit.<sup>39</sup> In some states such statutes have been held unconstitutional sometimes upon the fundamental ground that they took away a vested property right without due process of law,<sup>40</sup> but more frequently because of some special provision in state constitutions.<sup>41</sup>

(2) *Liability dependent upon negligence alone.* Those cases wherein liability is imposed for negligence of the officer alone are instances wherein he was performing a ministerial function as distinguished from a discretionary or quasi-judicial function.<sup>42</sup> The rule seems to be well settled that mere negligence as distinguished from dishonesty or malice is sufficient to impose liability in cases involving a ministerial duty only,<sup>43</sup> but it is difficult to foretell from decided cases whether a court will hold a particular function ministerial or discretionary<sup>44</sup> under certain situations. In most states a finding by state bank department officers that a bank is insolvent or that there is dishonesty in the conducting of the affairs of the bank is a discretionary matter.<sup>45</sup> But in Idaho this function has been held ministerial and liability imposed for mere negligence.<sup>46</sup> The Idaho cases may be explained by (a) the courts' recognition of the importance of public confidence in the state banks or (b) the wording of the Idaho statute on this matter: "The Bank Commissioner is hereby authorized, *and it is his duty* to take charge of such [insolvent] bank or trust company. . . ."<sup>47</sup> The affirmative imposition of a duty in this direct language was considered by the court<sup>48</sup> a sufficient basis for holding that

39. See *Pearson v. State*, 56 Ark. 148, 19 S. W. 499 (1892), wherein such a statute was held constitutional.

40. For example, see *Bauer v. North Arkansas Highway*, 168 Ark. 220, 270 S. W. 533 (1925).

41. *Bristol v. Johnson*, 34 Mich. 123 (1876).

42. *Luckie v. Goddard*, 171 Misc. 774, 13 N. Y. S. (2d) 808 (Sup. Ct. 1939).

43. See Comment, *Tort Liability, Ministerial Duty* (1933) 8 INDIANA L. J. 333; *Garff v. Smith*, 31 Utah 102, 86 Pac. 772 (1906); *State v. American Surety Co. of N. Y.*, 26 Idaho 652, 145 Pac. 1097 (1914); *State v. T. G. & S. Co.*, 27 Idaho 752, 152 Pac. 189 (1915); *Walker v. Broderick*, 141 Misc. 391, 252 N. Y. Supp. 559 (Sup. Ct. 1931); *Fidelity & Deposit Co. of Maryland v. Cone*, 138 Fla. 804, 190 So. 268 (1939); *Bankhead v. Howe*, 56 Ariz. 257, 107 Pac. (2d) 198 (1940); See note (1941) 131 A. L. R. 275 and 22 R. C. L. 483.

44. See note 43 *supra*.

45. *Deatsch v. Fairfield*, 27 Ariz. 387, 233 Pac. 887 (1925); *Dunbar v. Fant*, 170 S. C. 414, 170 S. E. 460 (1933).

46. *State v. American Surety Co. of New York*, 26 Idaho 652, 145 Pac. (1914); *State v. Title Guaranty & Surety Co. of Scranton, Pa.*, 27 Idaho 752, 152 Pac. 189 (1915).

47. Idaho Laws 1911, c. 124, § 74.

48. See note 46 *supra*.

the banking commissioner was performing a ministerial duty in spite of the obvious discretionary area in first deciding whether the bank was insolvent. The mere fact that permissive, as distinguished from mandatory, language is used in the statute does not change the function to a discretionary one where it is of a ministerial kind.<sup>49</sup> Of course where the duty to see that certain non-discretionary statutory prerequisites, such as the duty to prevent the issuance of permission to float securities or evidence of indebtedness until certain financial safeguards have been taken is affirmatively imposed, the officer's failure to enforce compliance through neglect renders him personally liable.<sup>50</sup>

The distinction between discretionary and ministerial functions is not similar to the distinction between acts which are quasi-judicial and those which are executive.<sup>51</sup> Several executive acts require discretion, cannot be classified as ministerial and hence mere negligence in their performance would not impose liability. Probably the best test in detecting the discretionary function is: Must the officer consider and arrive at a conclusion? In other words, is he called upon to "pass upon evidence and decide"?<sup>52</sup> There are numerous statements attempting to define that which is merely ministerial, but probably the best appears in *Kendall v. United States*,<sup>53</sup> wherein the court wrote:<sup>54</sup> ". . . he [Postmaster Gen-

49. *Ables v. State*, 79 Okla. 282, 193 Pac. 969 (1920) wherein the court held that the "usual rule" that permissive language appearing in a statute imposing duty upon a public officer is construed as imposing an absolute duty is merely a rule of construction deemed in accord with legislative intent. Where the legislative intent is contrary, as where the legislature uses "must" where it means to be mandatory in one section of a statute, the use of "may" in the same section would indicate a merely permissive intent and it should be so construed.

50. *First Nat. Bank of Key West v. Filer*, 107 Fla. 526, 145 So. 204 (1933); *In Fidelity & Deposit Co. of Maryland v. Cone*, 138 Fla. 804, 808, 190 So. 268, 271-2, the court wrote, "The rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages" [*Amy v. Supervisors*, 16 Wall. 136]. . . . The duty to comply with the indispensable legal formalities required to be observed in the issuance of public securities and evidences of indebtedness in order to make them valid and bind the corporate body . . . so issuing is ministerial and non-discretionary in character."

51. The generally accepted test as to whether the administrative order follows a quasi-judicial function is—Does the order bind only those who are parties to the proceedings—if so it is a quasi-judicial act. However, if the order is binding upon all within its purview it is executive or quasi-legislative.

52. *Sweeney v. Young*, 82 N. H. 160, 131 Atl. 155 (1925) where the court applied the test,—did the administrative officer "pass upon evidence and decide".

53. 12 Pet. 524 (U. S. 1838).

54. *Kendall v. United States*, 12 Pet. 524, 614 (U. S. 1838).

eral] was simply required to give the credit. . . . there is no room for the exercise of any discretion, official or otherwise; all that is shut out by the direct or positive command of the law, and the act required to be done is, in every just sense, a mere ministerial act."<sup>55</sup> In some cases the courts have looked not so much to the character of the immediate act as to the scope of the general duties of the officer in question.<sup>56</sup> Under this approach the mere necessity on the part of a ministerial officer to use some judgment or discretion does not convert him into a judicial officer.<sup>57</sup> The following officers have been held to be ministerial officers, more from the general character of their duties than from an analytic consideration of the particular acts involved in the immediate cases, constables,<sup>58</sup> sheriffs,<sup>59</sup> county attorneys,<sup>60</sup> county auditors,<sup>61</sup> county treasurers,<sup>62</sup> election officers,<sup>63</sup> members of a school board,<sup>64</sup> superintendents of schools,<sup>65</sup> treasurers of school districts,<sup>66</sup> registrars of deeds<sup>67</sup> and officers directed to issue patents in the said Office of the United States.<sup>68</sup> It is somewhat difficult to reconcile the application of this rule in the cases involving county attorneys and superintendents of schools. The nature of their work generally involves some discretion, but these decisions while mentioning this approach actually involved only ministerial acts in the particular cases.

(3) *Liability requiring dishonesty or malice.* In the cases involving discretionary or quasi-judicial administrative functions are contained

55. Tennyson may have given us the ultimate test:

"Theirs not to make reply,  
Theirs not to reason why,  
Theirs but to do or die."

TENNYSON, *The Charge of the Light Brigade.*

56. *State v. Loechner*, 65 Neb. 814, 91 N. W. 874 (1902); *People v. Joyce*, 246 Ill. 124, 92 N. E. 607 (1910).

57. See note 56 *supra*.

58. *Commonwealth for Lee v. O'Cull*, 7 J. J. Marshall 149; 23 Am. Dec. 393 (1832).

59. See authorities collected in 24 R. C. L. 912.

60. See note 56 *supra*.

61. *Bloomfield Democrat Inc. v. Board of Commissioners of Greene County*, 93 Ind. App. 226, 177 N. E. 361 (1931).

62. *State ex rel. Jordan v. Quible*, 86 Neb. 417, 125 N. W. 619 (1910).

63. See 18 Am. Juris. 204 for discussion and collection of authorities.

64. See note 57 *supra*.

65. *Elmore v. Overton*, 104 Ind. 548, 4 N. E. 197 (1886).

66. *School Dist. v. Shinn*, 61 N. D. 160, 237 N. W. 693 (1931).

67. *Rising v. Dickinson*, 18 N. D. 478, 121 N. W. 616 (1909).

68. *Mullan v. United States*, 118 U. S. 271 (1886).



statements of generally accepted principles, but in the application of these principles the ultimate decisions seem to be in chaotic confusion. This type of statement appears: "Where an officer is vested with discretion and is empowered to exercise his judgment . . . he is sometimes called a quasi-judicial officer and . . . he is usually given immunity . . . provided the acts complained of are done *within the scope of the officer's authority and without wilfulness; malice or corruption.*"<sup>69</sup> Not infrequently, the sweeping type of statement is made, such as: "*All the authorities agree that a public officer, acting judicially or in a quasi judicial capacity, cannot be made personally liable in a civil action, unless the act complained of be wilful, corrupt or malicious, or without the jurisdiction of the officer.*"<sup>70</sup> Any attempt to sustain these statements as universally true major premises would be chauvinistic. The courts have either ingenuously<sup>71</sup> avoided them or disingenuously ignored<sup>72</sup> them and in so doing have by and large arrived at sagacious decisions.<sup>73</sup> The decisions have in most instances been founded upon broad range considerations<sup>74</sup> rather than concerning themselves with justice in the immediate case. In many instances the courts seem to have been influenced by unstated realistic approaches,<sup>75</sup> such as the effect of their decision upon an officer's conduct in protecting public health,<sup>76</sup> in enforcing the criminal law,<sup>77</sup> in sustaining public confidence in the soundness of financial institutions<sup>78</sup> and in the trustworthiness of public officials.<sup>79</sup>

The two predominant antithetical considerations are the right to compensatory damages of the citizen or corporation for the wrong done and the interest of the public in having its protective laws enforced. In some instances the courts have gone to the extent of holding that a mere mistake of fact is sufficient to impose liability<sup>80</sup> and in other decisions there appear

69. *Morrill County v. Bliss*, 125 Neb. 97, 108, 249 N. W. 98, 104 (1933). Italics added.

70. *Garff v. Smith*, 31 Utah 102, 105, 86 Pac. 772, 773 (1906). Italics added.

71. *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100 (1891); *State ex rel. Davern v. Rose*, 140 Wis. 360, 122 N. W. 751 (1909).

72. *Pearson v. Zehr*, 138 Ill. 48, 29 N. E. 854 (1891).

73. *Morrill County v. Bliss*, 125 Neb. 97, 249 N. W. 98 (1933).

74. *Sweeney v. Young*, 82 N. H. 159, 131 Atl. 155 (1925).

75. *Ibid.*; *Rehmann v. City of Des Moines*, 204 Iowa 798, 215 N. W. 957 (1927).

76. *Garff v. Smith*, 31 Utah 102, 86 Pac. 772 (1906).

77. *Cooper v. O'Connor*, 99 F. (2d) 135 (App. D. C., 1938).

78. *Dunbar v. Faut*, 170 S. C. 414, 170 S. E. 460 (1933).

79. *Bird v. McGoldrick*, 277 N. Y. 492, 14 N. E. (2d) 805 (1938).

80. *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100; *Newark & S. O. H. R. Co. v. Hunt*, 50 N. J. Law 308, 12 Atl. 697 (1888); *Houston v. State*, 98 Wis. 481, 74 N. W. 111 (1898); *Lowe v. Conroy*, 120 Wis. 151, 97 N. W. 942 (1904).

directly contrary holdings, even to the extent of taking the position that the citizen or corporation has no right against the public officer, since the officer owes a duty only to the public.<sup>81</sup> Other courts have refused to find a cause of action even where malice is alleged upon the ground that to hamper the public officer with the fear of civil liability would cool his zeal in the performance of his duty. The court denied the plaintiff a cause of action expressly upon this ground in *Cooper v. O'Connor*<sup>82</sup> when it wrote:<sup>83</sup> "Hence the officer is entitled to the protection which the law throws about him, not because the law is concerned with his personal immunity, but because such immunity tends to insure zealous and fearless administration of the law." In writing this statement the court recognized the existence of malice in the case,<sup>84</sup> and expressly referred to "the fact that an overzealous or unprincipled officer may get a personal pleasure out of the suffering of a criminal is not sufficient to offset the interest of all the people in having the criminal brought to justice."<sup>85</sup>

The difference in results obtained under the stated rule that a quasi-judicial officer is not liable where he acts within his jurisdiction, unless malice or corruption is shown, is interesting. Can the apparently conflicting decisions be explained upon the basis of immediate action by the officer, being necessary in *some* cases for the protection of the general public, and consequent immunity to the officer in order to encourage zeal? Or is liability imposed because action was taken by the officer without a hearing? Or is liability imposed against the officer because this is the only remedy available to the party suffering the loss?

It is apparent from this brief discussion of general excerpts taken from the cases that a more satisfactory treatment might result from dividing the cases into groups according to the type of work done by the administrative agent involved. It is therefore proposed to take some illustra-

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81. *Sweeney v. Young*, 82 N. H. 159, 131 Atl. 155; *Rehrman v. City of Des Moines*, 204 Iowa 798, 215 N. W. 957. In *Sweeney v. Young*, the court wrote, 82 N. H. at 165, 131 Atl. at 157: "The duty is public in character and the parties affected ordinarily have no personal rights against the members composing the judicial body." Again the court wrote, *id.* at 167, 131 Atl. at 158: "Since the plaintiff's dismissal is to be here treated as violating none of his rights, it follows that the manner or means by which the dismissal was brought and the reasons for it were not injurious."

82. 99 F. (2d) 135 (App. D. C., 1938).

83. *Id.* at 140.

84. *Id.* at 140: ". . . it is now generally recognized that, as applied to some officers at least, even the absence of probable cause and the presence of malice or other bad motive are not sufficient to impose liability upon such an officer who acts within the general scope of his authority."

85. *Id.* at 140.

tions from each of the following types of cases and attempt to canalize through the approaches which will be suggested: (1) Control over diseased animals; (2) Banking control; (3) School supervision; (4) Enforcement of criminal law.

1. *Control over diseased animals.* In *Miller v. Horton*,<sup>86</sup> the officer was held liable for killing a horse under the mistaken idea that the animal was suffering from glanders. The mistake was honestly made. The defendant acted under a Massachusetts statute which provided that "in all cases of farcy or glanders, the commissioners having condemned the animal infected therewith, shall cause such animal to be killed." In *Houston v. State*,<sup>87</sup> the court in holding the state not liable wrote,<sup>88</sup> "The statute only authorized the destruction of animals in case they were affected with some 'contagious or infectious disease of malignant or very fatal nature' . . . Unless the animals were so diseased in fact, their slaughter was without authority of law, and hence tortious." The animals destroyed were cows, mistakenly supposed to be tubercular. In *Lowe v. Conroy*<sup>89</sup> a health officer was held liable for destroying the hide and beef of a dead steer which he supposed had died of anthrax. It had not been afflicted with any dangerous or infectious disease. In *Pearson v. Zehr*,<sup>90</sup> the defendants, live stock commissioners, were held liable for killing horses, believed to be suffering from a contagious or infectious disease, under a statute authorizing destruction when such a disease existed. The horses destroyed were not afflicted with any disease.

In each of these cases liability was imposed without proof of malice or corruption and despite the fact that the mistake was honestly made. These cases exemplify the application of the "jurisdictional fact" doctrine, under which the officer is found liable if the fundamental fact required by the terminology of the statute is non-existent, even though he honestly believed it to exist. The animals destroyed were not in fact afflicted with the disease referred to in the authorizing statute. In *Stevens v. Black*,<sup>91</sup> a member of a veterinary board was held liable for causing the death of a heavy stallion by recklessly exercising it. The empowering

86. 152 Mass. 540, 26 N. E. 100 (1891). See *Crayton v. Larabee*, 220 N. Y. 493, 116 N. E. 355 (1917).

87. 98 Wis. 481, 74 N. W. 111 (1898).

88. *Houston v. State*, 98 Wis. 481, 483, 74 N. W. 111, 113 (1898).

89. 120 Wis. 151, 97 N. W. 942 (1904). But see *Garff v. Smith*, 31 Utah 102, 86 Pac. 772 (1906).

90. 138 Ill. 48, 29 N. E. 854 (1891); See *Barret v. City of Mobile*, 129 Ala. 179, 30 So. 36 (1900).

91. 212 Mich. 281, 180 N. W. 503 (1920).

statute provided that "every stallion brought into the state . . . for sale or public service shall be examined by the state veterinary board." The officer was acting beyond his jurisdiction in examining the horse because there was no indication that it had been brought into the state for "sale or public service". A fundamental jurisdictional fact was lacking when the officer acted. Suppose the stallion had been brought into the state for the purpose of "sale or public service", would the officer have been liable for so negligently exercising it as to cause its death? Since in that case the officer had jurisdiction and had acted without malice or corruption, it would seem that no liability would be imposed, the officer being a quasi-judicial one.

The "jurisdictional fact" rule seems harsh when it results in personal liability being visited upon a conscientious officer acting under an honest mistake. Yet the citizen has been deprived of his property summarily<sup>92</sup> and without fault upon his part. As between the two immediate parties, the equities are with the citizen, since the culpability, however slight, rests upon the officer. However, broad considerations of policy place some doubt upon the wisdom of a sweeping acceptance of the rule. When the statute creating the office in which the officer functions has the protection of the public health as its main objective, it certainly is not in furtherance of that purpose for our courts to hamper the protective activities of the officer with the fear of personal liability based upon a mistake of judgment, however honestly made. When the statute relates to the destruction of a diseased cow, sheep or pig or other source of food for *human consumption* the zeal of the officer should be encouraged. When the statute relates to animals, offering no common satiation of the carnivorous appetites in humans, the danger to public health is present in a much lesser degree. Such statutes, for instance, as those authorizing the destruction of horses afflicted with farcy, glanders or anthrax, seem to have for their main purpose the protection of horses from the further spread of the disease. Zeal on the part of the officer would seem less important in these cases. This distinction has been recognized.<sup>93</sup> Where food for human consumption is involved, the officer, in the performance of his duty, should be unhampered by fears of possible civil liability.<sup>94</sup> In the food cases, the comparable damage caused by mistaken action is so infinitesimally small compared with mistaken inaction by the officer, it would seem that one of three things might be done: (1) Change the rule by statutorily

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92. *North American Cold Storage v. Chicago*, 211 U. S. 306 (1908).

93. *Beeks v. Dickinson County*, 131 Iowa 244, 108 N. W. 311 (1906).

94. *Ibid.*

granting immunity; but that remedy opens the door to possible corrupt, unscrupulous or arbitrary action. (2) Amend existing statutes, so that immunity will be granted if the officer honestly believes<sup>95</sup> the disease existed, instead of requiring the actual presence of the disease for immunity. (3) A statute might guarantee reimbursement by the state to the officer where he acted under an honest mistake, as has been provided in the Federal income tax law.<sup>96</sup> If healthy animals are to be destroyed under mistaken statutory jurisdiction for the protection of public health, the state should reimburse the citizen as it does in eminent domain matters, rather than cast liability upon conscientious officers. The statute in prescribing the "honest belief" test might distinguish between diseases which are clearly symptomatic and those which are not. Let us now proceed to the banking cases and note quite a different result.

(2) *Banking control.* In the control over diseased animals, the immunity to an officer exercising a discretionary or quasi-judicial function is not extended to his erroneous decisions upon the existence of a "jurisdictional fact." Is such a restriction upon this immunity to be found in the banking control cases? In *Deatsch v. Fairfield*,<sup>97</sup> the action was brought by depositors and their assignees of a bank against the state bank comptroller for allegedly permitting a bank to remain open after insolvency. The court, in holding the defendant not liable, wrote: "Unquestionably officers guilty of doing such a thing (permitting a bank to continue to transact business, knowing it to be insolvent) would be liable . . . but officers who honestly and in good faith examine a bank's assets and arrive at the conclusion that it is not insolvent and permit it to continue to transact business are not liable . . . if it later develops that such institution was in fact insolvent." In *Dunbar v. Faut*,<sup>98</sup> the court held the defendant, bank examiner, not liable under a statute which provided that he should take over a bank and put in a receiver, wherever he might "find" insolvency, and after he had complied with other statutory requisites. The court held that he was not liable for mere negligence

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95. *State ex rel. Davern v. Rose*, 140 Wis. 360, 363, 122 N. W. 751, 753 (1909), wherein the court wrote: ". . . no wrong in the legal sense results when one receives all that the law accords him. So, when the only right of an individual or the public which the law gives is that which a designated officer deems best, the honest decision of that officer is the measure of the right, . . ."

96. 53 Stat. 464 (1940), 26 U. S. C. A. § 3770 (b 1 and 2); N. Y. Agriculture and Markets Law §§ 87-88.

97. 27 Ariz. 387, 394, 233 Pac. 887, 894 (1925); See *Sanders State Bank v. Hawkins*, 142 S. W. 84 (Tex. 1911).

98. 170 S. C. 414, 170 S. E. 460 (1913).

in failing to act, that it must be shown that "he was guilty of corruption, or bad faith, or was influenced by malicious motives." These two cases illustrate the great weight of authority<sup>99</sup> in the matter of banking control. Under this class of cases, the rule of immunity enjoyed by public officials charged with the supervision of banks embraces findings by him on the "jurisdictional fact" of insolvency, unless malice or corruption is shown. If he was honestly mistaken he is clothed with judicial protection.<sup>100</sup>

How are these banking cases to be distinguished from the diseased animal cases? Is there less administrative discretion involved in finding the jurisdictional facts in the diseased animal cases? It would seem just as difficult to ascertain the existence of symptoms of a disease without the benefits of verbal responses as it is to ascertain symptoms of insolvency. Does the fact that liability is imposed because of *commission* in the animal cases and for *omission* in the banking cases form a basis of distinction? Where this distinction between acts of commission and omission is recognized in the law of negligence and liability against a defendant is denied for mere omission, it is because no duty to act is present. But in the administrative situations the statutes, at least impliedly, create a duty on the officials to act where the required facts are present. Is this immunity in the banking cases where good faith is present granted to discourage hasty action by the public officer because of the dangerous public reaction to one bank's seizure? It might cause a "run" upon banks generally in the district. This is undeniably a practical consideration. Probably the soundest basis for the difference in the decisions is that in the animal cases the party suffering the loss consequent upon the mistaken action of the officer had no hearing and much worse had no opportunity for a hearing either at his own instigation or one instituted

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99. Idaho is not in accord with the weight of authority. *State v. American Surety Co.*, 26 Idaho 652, 145 Pac. 1097 (1914) and *State v. T. G. & S. Co.*, 27 Idaho 752, 152 Pac. 189 (1915) where liability was imposed against the bank commissioners. This is probably due to the wording of the statute in Idaho which makes it the "duty" of the banking commissioner ". . . to take charge of such bank or trust company. . . ." Also, New York *seems* not to be in accord with general rule. See *Walker v. Broderick*, 141 Misc. 391, 52 N. Y. Supp. 559 (Sup. Ct. 1931) and *Veatch v. Broderick*, 146 Misc. 848, 262 N. Y. Supp. 295 (Sup. Ct. 1932). In the *Walker* case the complaint charged negligence in omission and commission. As to the former, the court indicated that a duty was owed *only* to the public, but as to the latter, the court recognized an action might lie. These decisions were not appealed.

100. Other banking control cases are: *Gormley v. State*, 54 Ga. App. 843, 189 S. E. 288 (1936); *State v. Turner*, 328 Mo. 604, 42 S. W. (2d) 594 (1931). *Morrill County v. Bliss*, 125 Neb. 97, 249 N. W. 98 (1933); *State ex rel. Robinson v. Farmer's State Bank*, 162 Tenn. 499, 39 S. W. (2d) 281 (1931).

by the officer.<sup>101</sup> The action is sudden and summary. However, in the banking cases if the depositor or creditor of the bank desires seizure of the bank he may institute proceedings to obtain it. It may be argued in the animal cases, that the citizen can obtain an injunction against the act of the officer. But the rapid action, necessary and proper on the part of the officer, defeats this possibility. To deny the citizen a cause of action in these cases is to take property without any due process, judicial or administrative.<sup>102</sup>

(3) *School supervision.* In the banking cases almost all of the states<sup>103</sup> impose liability upon the officer if malice is shown. Are the officers charged with school supervision liable for erroneous action, even if malice or improper motive is shown? There is a conflict on this question, but the weight of authority seems to deny liability, even though malice or lack of proper motive is shown.<sup>104</sup>

In *Sweeney v. Young*,<sup>105</sup> the plaintiff was dismissed from school for bringing cider to a school function under a statute giving the school board power to dismiss a pupil for gross misconduct. The defendants were members of the school board together with other officials. The court did not find gross misconduct, malice or improper motive and held the defendant members of the board not liable. But the court stated that the existence of malice or improper motive is not material on the issue of liability of the school officials. The following principle appears in the opinion: "The public interest that public officers shall be free and fearless in the exercise of their judicial duties makes it of immaterial bearing on their liability for their judicial acts whether or not they act from good motives."<sup>106</sup>

101. *Fausler v. Parsons*, 6 W. Va. 486, 20 Am. Rep. 431 (1873); *Hanlon v. Partridge*, 69 N. H. 88, 44 Atl. 807 (1897). The foregoing cases are voting cases, wherein the refusal of the right to vote, occurring, as it does, at the very last minute, will not permit of any judicial remedy. In some states judges are assigned for active duty and available to immediately pass upon these questions.

102. *Sweeney v. Young*, 82 N. H. 159, 165, 131 Atl. 155, 159 (1925) wherein the court referred to there being "no opportunity to right the wrong by legal proceedings in season."

103. Note 99, *supra*.

104. *Sweeney v. Young*, 82 N. H. 159, 131 Atl. 155 (1925); *Speyer v. Denver*, 82 Colo. 534, 261 Pac. 859 (1927). But see *Dritt v. Snodgrass*, 66 Mo. 286, 27 Amer. Rep. 343 (1877); *Stewart v. Southard*, 17 Ohio 402, 49 Am. Dec. 463 (1848); *Dawkins v. Billingsley*, 69 Okla. 257, 172 Pac. 69 (1918).

105. 82 N. H. 159, 131 Atl. 155.

106. *Id.* at 165, 131 Atl. at 158.

However, in *Speyer v. Denver*,<sup>107</sup> the court, in overruling the defendant's (school official's) demurrer to a complaint alleging malice in the making of a regulation requiring students to eat all lunches upon the school premises, wrote:

"It may be conceded . . . that a public officer hates a person and may be glad to see him suffer, as a consequence of that officer's official act, is not enough to justify interference by the courts, and that if the rule is a reasonable one and is made in good faith for the good of the schools and pupils it is no consequence that it injures the plaintiff's enterprises or that defendants are glad that it does so; but when, as is here alleged, the officers act in bad faith, with malice, and from no purpose or motive except to injure another, the case is different."<sup>108</sup> Thus this court recognized a cause of action where an act lacked inherent merit and was based entirely upon improper motives. In the *Sweeney* case, the absolute immunity granted to the judiciary was extended to quasi-judicial officers.<sup>109</sup> In the *Speyer* case the court refused to extend the absolute immunity to quasi-judicial officers.<sup>110</sup>

The school-control cases are to be distinguished from the diseased-animal cases in that in the former group there is an opportunity to right the wrong before any great harm is done. The court recognized this in the *Sweeney* case mentioning that malice might be material in cases where there would be "no opportunity to right the wrong in season."<sup>111</sup>

(4) *Enforcement of criminal law.* In these cases absolute immunity is usually<sup>112</sup> granted,<sup>113</sup> for acts done in the furtherance of the prosecution.<sup>114</sup> In *Cooper v. O'Connor*<sup>115</sup> the court refused to impose liability

107. 82 Colo. 534, 261 Pac. 859 (1927).

108. *Speyer v. Denver*, 82 Colo. 534, 538, 261 Pac. 859, at 861.

109. *Sweeney v. Young*, 82 N. H. 159, 165, 131 Atl. 158 wherein the court wrote: "Judicial acts do not lose their character as such because malice induces them, . . ."

110. See *Speyer v. Denver*, 82 Colo. 534, 538, 261 Pac. 859, 861.

111. *Sweeney v. Young*, 82 N. H. 159, 131 Atl. 155, 159 (1925).

112. The federal rule grants absolute immunity. *Cooper v. O'Connor*, 99 F. (2d) 135 and most of the states give the prosecutor complete immunity, even though malice is shown. See Note, *The Civil Liability of a District Attorney for Quasi-Judicial Acts*, 275, 73 U. PA. LAW REV. 300.

113. *Yaselli v. Goff*, 12 F. (2d) 396 (C. C. A. 2d, 1926); *Anderson v. Rohrer*, 3 Fed. Supp. 367 (D. C. S. D. Fla., 1933).

114. *Cooper v. O'Connor*, 99 F. (2d) 135, 141. Blackstone wrote: ". . . it would be a very great discouragement to public justice of the kingdom, if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictment miscarried." 3 BL. COMM. (13th ed. 1800) 126.

115. 99 F. (2d) 135.



against the prosecutor even though malice was present.<sup>116</sup> In these cases a very liberal test is applied in determining whether the officer was acting within his jurisdiction at the time of the performance of the acts forming the gravamen of the complaint.<sup>117</sup> This immunity has been carried over into cases where complainants press charges before administrative quasi-judicial bodies.<sup>118</sup> This grant of immunity to prosecutors rests soundly upon the necessity that they, above all officers, must be free and fearless in the exercise of their duties. This absolute immunity granted to actual judges and prosecutors has, in our federal courts, been extended to the heads of the federal executive departments, such as the Postmaster General,<sup>119</sup> the Secretary of the Treasury<sup>120</sup> and an Assistant Secretary of the Treasury,<sup>121</sup> the members of the U. S. Parole Board<sup>122</sup> the Warden of the Federal Penitentiary<sup>123</sup> and the Director of the Bureau of Prisons,<sup>124</sup> the Commissioners of the District of Columbia,<sup>125</sup> the chairman of the Tariff Commission,<sup>126</sup> the U. S. Commissioner of Indian Affairs,<sup>127</sup> and the Chief of Record and Pension Office of the War Department.<sup>128</sup> The immunity has now been extended to subordinates in the federal departments.<sup>129</sup> This would seem necessary if the immunity is to have any appreciable application,<sup>130</sup> since the great bulk of the work of each department must be delegated to subordinates.

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116. In the *Cooper v. O'Connor*, 99 F. (2d) 135, 140, the court wrote, in dealing with the question of liability of prosecuting officers: ". . . it is now generally recognized that, as applied to some officers, at least, even the absence of probable cause and the presence of malice or other bad motive are not sufficient to impose liability upon such an officer who acts within the general scope of his authority."

117. *United States v. Birdsall*, 233 U. S. 223 (1914); *Cooper v. O'Connor*, 99 F. (2d) 135 (App. D. C. 1938); *Standard Nut Margarine Co. v. Mellon*, 72 F. (2d) 557 (App. D. C. 1934); *Spalding v. Vilas*, 161 U. S. 483 (1896).

118. *Sweeney v. Young*, 82 N. H. 159, 131 Atl. 155 (1925) the court extended absolute immunity to superintendent and head master of the school who preferred charges against the plaintiff which resulted in his dismissal.

119. *Spalding v. Vilas*, 161 U. S. 483 (1896).

120. *Mellon v. Brewer*, 18 F. (2d) 168 (App. D. C., 1927).

121. *Standard Nut Margarine Co. v. Mellon*, 72 F. (2d) 557.

122. *Lang v. Wood*, 92 F. (2d) 211 (App. D. C., 1937).

123. *Ibid.*

124. *Ibid.*

125. *Brown v. Rudolph*, 25 F. (2d) 540 (App. D. C., 1928).

126. *Smith v. O'Brien*, 88 F. (2d) 769 (App. D. C., 1937).

127. *Farr v. Valentine*, 38 App. D. C. 413 (1912).

128. *De Armand v. Ainsworth*, 24 App. D. C. 167, *app. dismissed* 199 U. S. 616 (1905).

129. *Ibid.*

130. *Ibid.*

## II.

*Respondeat Superior*

In text books<sup>131</sup> and in judicial opinions<sup>132</sup> upon the subject, there appears the broad all-inclusive statement, that the doctrine of *respondeat superior* has no application to public officers in the performance of public duties. It has been written that "Public officers of the government, in the performance of their public functions, are not liable to third persons for the misconduct, negligence or omissions of their official subordinates."<sup>133</sup> Seemingly, the most cogent reason for the rule of non-derivative liability rests upon the lack of that control exercised by a master over his servant or a principal over his agent, which is fundamentally required, in order that the principle of *respondeat superior* be properly applied. The subordinates in government offices are frequently appointed directly by one, having the appointing power, who is not their immediate superior. They are also usually removable at the pleasure of the appointing power. Civil Service Acts impinge upon the control a superior officer might otherwise have over his subordinates. But it has been held that no derivative liability will be imposed even though the superior officer has the power of appointment and removal.<sup>134</sup> The power of appointment and removal when it is given to the immediate superior is sometimes merely ostensible.

Damage caused by the negligence of subordinates during the construction of a highway and death or injury caused by the maintenance of defective conditions upon school premises are typical cases wherein the general rule denying liability is applied. In *Strickfaden v. Green Creek Highway District*,<sup>135</sup> the court relieved a highway commissioner of derivative liability when it was not shown that he was careless in selecting the subordinate and when it was not shown that he had participated in the negligence. In *Antin v. Union High School District*,<sup>136</sup> the court held that the principle of *respondeat superior* has no application where school officers used reasonable care in selecting the subordinates and had no actual knowledge of the negligent condition themselves. Knowledge of defec-

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131. 1 MECEM, AGENCY (2d ed. 1914) § 1502.

132. *Robertson v. Sichel*, 127 U. S. 507, 515 (1887).

133. 1 MECEM, *loc. cit. supra* note 131.

134. *Keenan v. Southworth*, 110 Mass. 474 (1872).

135. 42 Idaho 738, 248 Pac. 456 (1926).

136. 130 Ore. 461, 280 Pac. 664 (1929).

tive conditions, existing upon public premises, on the part of subordinates is not imputed to their superiors.<sup>137</sup>

The general rule, that a public officer is not liable for the misconduct, negligence or omissions of his subordinates in the performance of their public duties has several exceptions: (1) Where the acts of the subordinate cause the loss of public money received into the actual or constructive custody of the superior officer;<sup>138</sup> (2) where the superior has merely ministerial duties;<sup>139</sup> (3) where negligence is shown in the selection of a subordinate;<sup>140</sup> (4) where the act done by the subordinate which is the basis of the complaint is not done in the performance of a public duty;<sup>141</sup> (5) where the officer had knowledge of, encouraged, or participated in the negligence.<sup>142</sup>

The second exception set out above is the only genuine exception; the others are much more apparent than real. A brief consideration of them, will, it is submitted, reveal this. The liability imposed upon a superior officer for public money received in his office is an insurer's liability;<sup>143</sup> it is not a derivative liability. It is imposed even though the loss was not caused by the fault of any subordinate. The rigidity of this rule has been relieved to some extent by statute.<sup>144</sup> So also an officer is not liable for losses occurring during the term of his predecessor.<sup>145</sup>

The second exception imposes liability upon an officer, charged with merely ministerial duties, for the negligence of his subordinates. In *Fisher v. Levy*,<sup>146</sup> a recording officer was held liable derivatively for the negligence of a subordinate, in failing to detect forgery in an instrument purporting to be a cancellation of an existing mortgage. The plaintiff purchased it as unencumbered property, as the record showed, when in

137. *Strickfaden v. Green Creek Highway District*, 42 Idaho 738, 248 Pac. 456 (1926).

138. *Bird v. McGoldrick*, 277 N. Y. 492, 14 N. E. (2d) 805 (1938).

139. *Fisher v. Levy*, 180 La. 195, 156 So. 220 (1934).

140. *Strickfaden v. Green Creek Highway Dist.*, 42 Idaho 738, 248 Pac. 456 (1926); *Hilton v. Oliver*, 204 Cal. 535, 269 Pac. 425 (1928).

141. *Ely v. Parsons*, 55 Conn. 83, 10 Atl. 499 (1886).

142. *Herman v. Board of Education*, 234 N. Y. 196, 137 N. E. 24 (1922); *Mokovick v. Independent School Dist.*, 177 Minn. 446, 225 N. W. 292 (1929).

143. Under the English rule the public officer who suffers the loss of public funds received by him has only "bailee" liability, which requires proof of negligence before it is imposed. *Lane v. Cotton*, 1 Ld. Raym. 646, 91 Eng. Rep. R. 1332 (K. B. 1701).

144. See such statutes applied in *Bristol v. Johnson*, 34 Mich. 123 (1876); *Imp. Dist. v. North Arkansas Highway*, 168 Ark. 220, 270 S. W. 533 (1925).

145. *Gerschon v. Travelers Ins. Co.*, 276 N. Y. 53, 11 N. E. (2d) 349 (1937); *Pfeffer v. Lehmann*, 255 App. Div. 220, 7 N. Y. S. (2d) 275 (2d Dep't 1938).

146. 180 La. 195, 156 So. 220 (1934).

fact it was subject to a mortgage.<sup>147</sup> This matter is sometimes covered by statute.<sup>148</sup> It is a genuine exception and these recording cases are sometimes cited as holding that derivative liability will be imposed where a mere ministerial duty is present.<sup>149</sup> Included with the recording cases in establishing this exception to the general rule are cases wherein derivative liability was imposed upon court clerks and sheriffs.<sup>150</sup>

The liability based upon negligence in selection<sup>151</sup> of subordinates is not derivative. It is based upon the actual negligence of the superior officer himself, rather than upon the negligence of the subordinate.

The fourth named exception<sup>152</sup> is really excluded by the rule itself, since the rule is limited to the performance of a public duty, either expressly<sup>153</sup> or impliedly, as distinguished from this group of cases, where the negligent act is done by a subordinate in the performance of a private duty. The last division, wherein liability is imposed if the officer had knowledge of, encouraged, or participated in the negligence,<sup>154</sup> is an example of direct rather than of vicarious liability. It is based upon the commission or omission of the superior officer himself. This is not a genuine exception to the general rule, which refuses to impose derivative liability upon the public officer. While this rule is just because of the superior officer's lack of control, public service might be improved if liability was imposed.

147. See *Whalen v. Reynolds*, 101 Minn. 290, 112 N. W. 223 (1907); *Watkins v. Simonds*, 202 N. C. 746, 164 S. E. 363 (1932).

148. In *Maxwell v. Stuart*, 99 Tenn. 409, 42 S. W. 34 (1897) a statute, rendering the clerk liable only where a wilful violation could be shown was involved. See also *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533 (1870).

149. See 1 *MECHEM*, *op. cit. supra* note 131 § 1505.

150. *Harrington v. Fuller*, 18 Me. 277, 36 Am. Dec. 719 (1841); *Norton v. Nye*, 56 Me. 211 (1868); *Prosser v. Coots*, 50 Mich. 262, 15 N. W. 448 (1883).

151. *Hilton v. Oliver*, 204 Cal. 535, 269 Pac. 425 (1928); *Antin v. Union High School Dist.*, 130 Ore. 461, 280 Pac. 664 (1929), note (1930) 66 A. L. R. 1271, 1281.

152. *Ely v. Parsons*, 55 Conn. 83, 10 Atl. 499 (1886); *Central R. R. & Banking Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334 (1884).

153. See *Strickfaden v. Green Creek Highway District*, 42 Idaho 738, 248 Pac. 456 (1926).

154. *Antin v. Union High School Dist.*, 130 Ore. 461, 280 Pac. 664 (1929); *Veatch v. Broderick*, 146 Misc. 848, 262 N. Y. Supp. 295 (1932).

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