A TREATISE

ON THE

LAW OF AGENCY

IN

CONTRACT AND TORT

INCLUDING SPECIAL CHAPTERS ON

ATTORNEYS AT LAW
AUCTIONEERS, BANK OFFICERS, BROKERS, FACTORS
INSURANCE AGENTS, TRAVELING SALESMEN
PUBLIC AGENTS AND OFFICERS
MASTER AND SERVANT

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CHAPTER XVIII.

PUBLIC AGENTS AND OFFICERS.

§ 466. Definitions and classifications.—Public agents are those persons who are chosen to perform the duties of the public,—that is, the government or municipality. They may be divided into two principal classes; namely, employes and officers. It is true the term "employe," in a sense, applies also to officers, for it may be said that every officer is an employe; but, on the other hand, a public employe is not necessarily a public officer; thus, a mere janitor of county or state buildings, a county physician, and other employes who do not take an official oath nor file an official bond, are not officers but employes.[1] An employe of the government usually owes his position to some officer whose duty it is to make the employment, and it is based entirely upon contract.[2] On the other hand, an officer owes his selection to a source fixed by the constitution or statute,[3] and not by contract.[4] Moreover, the term "public office" embraces the idea of tenure and duration, while a mere public employment may involve only transient or incidental duties.[5] An office is an entity which may continue even after the death or withdrawal of

[1] Trainor v. Board of County Auditors, 89 Mich. 162, 15 L. R. A. 95; Hall v. Wisconsin, 103 U. S. 5; Opinion of Judges, 3 Maine 481.

[2] See Hall v. Wisconsin, *supra*.

[3] Herrington v. State, 103 Ga. 318, 68 Am. St. 95.

[4] State v. Hocker, 39 Fla. 477, 63 Am. St. 174; Water Commissioners v. Cramer, 61 N. J. L. 270.

[5] In re Oaths, 20 Johns. (N. Y.) 492; Olmstead v. Mayor, 42 N. Y. Supr. 481; United States v. Hartwell, 6 Wall. (U. S.) 385.

the incumbent.[6] A public office involves the delegation to the incumbent of a portion of the sovereign power of the state, either to make, administer, or execute the laws; and it signifies that the incumbent is to exercise some functions of that nature, and take the fees and emoluments belonging to the position.[6a] On the other hand, there may be and are many employments by the national, state, city or town government which do not constitute the employe a public officer. "The work of the commonwealth," said the supreme judicial court of Massachusetts, "and of the cities and towns must be done by agents or servants, and much of it is of the nature of an employment. It is sometimes difficult to make the distinction between a public office and an employment, yet the title of 'public officer' is one well known to the law, and it is often necessary to determine what constitutes a public office. Every copying-clerk or janitor of a building is not necessarily a public officer."[7] A mere employe may, of course, be engaged by the appointing power for a definite time, or to accomplish a definite purpose, and in that sense his position may involve the nature of duration also; while, on the other hand, his employment may be altogether for an indefinite period, and he be subject to removal at any time. An employe under contract may be discharged without cause, unless the statute or constitution directs otherwise, but a public officer can not generally be removed without cause, although the power of removal is inherent in the appointing power: the reason being that the power of removal is generally restricted by constitutional or statutory provisions.[8] The English notion that an office is hereditary does not obtain in this country, though it is true that the rights and privileges of an officer are the rights and privileges of the incumbent; in this country both the power of appointment and that of removal inhere in the people and are subject to their control by constitutions and statutes.[9] An office not being the creature of a contract, but simply a delegation of a portion of the sovereign power, it follows, according to the

[6] State v. Wilson, 29 Ohio St. 347; People v. Stratton, 28 Cal. 382.

[6a] See the opinion of Marshall, C. J., in United States v. Maurice, 2 Brock. 96, 102; State v. Jennings, 57 Ohio St. 415.

[7] Brown v. Russell, 166 Mass. 14.

[8] Trainor v. Board of County Auditors, 89 Mich. 162, 15 L. R. A. 95; State v. Hewitt, 3 S. D. 187, 16 L. R. A. 413; Jacques v. Little, 51 Kan. 300; Board of Com'rs v. Johnson, 124 Ind. 145, 19 Am. St. 88; State v. Walbridge, 119 Mo. 383, 41 Am. St. 788; State v. Johnson, 57 Ohio St. 429.

[9] State v. Davis, 44 Mo. 129.

weight of authority, that the incumbent has no right of property in the office.[10]

§ 467. Classification of officers according to nature of duties.—For the purposes of our presentation public officers may be divided into ministerial, executive, legislative, and judicial officers. Those public servants of the government who have only or mainly ministerial duties to perform are denominated "ministerial officers." Ministerial duties and functions are those performed in obedience to the dictates or directions of superiors, and which involve the exercise of no discretion on the part of those charged with their performance or execution.[11] An executive officer is one whose chief duties consist in the execution of the laws,[12]—such as the president of the United States, the governors of the states and territories, sheriffs, constables, marshals and police officers. Legislative officers are those who enact the laws,—such as members of congress, of the state legislatures, councilmen, etc., of cities, etc. Judicial officers are intrusted with the duties of hearing and deciding private judicial controversies in litigated cases called lawsuits, and in public controversies where accusations are preferred and tried for the commission of public offenses.[13] It is not within the scope of this work to enter upon any discussion as to the mode of selection of these various officers, or their tenures and the duration and termination thereof: what we are chiefly concerned with is in respect of their duties and the performance thereof, and the effect upon the officers themselves and upon others.

§ 468. Right of officer to compensation.—An office may or may not be accompanied by emolument, though it is a usual element thereof.[14] The compensation of an officer is usually provided for by statute or city ordinance. When no compensation is fixed the office may be a merely honorary one and the officer will not be entitled to receive any. When the statute fixes the compensation, it is usually by way of fees or a specified salary, and when that is the case the compensation laid down in the statute will, of course,

[10] State v. Hawkins, 44 Ohio St. 98.

[11] Pennington v. Streight, 54 Ind. 376.

[12] Bouvier Law Dic.

[13] See Bouvier Law Dic.; People v. Keeler, 99 N. Y. 463.

[14] State v. Hocker, 39 Fla. 477, 63 Am. St. 174; State v. Kennon, 7 Ohio St. 546; State v. Stanley, 66 N. C. 59, 8 Am. Rep. 488.

govern.[15] If there is no dispute as to the title of the incumbent to the particular office, and the fees or salary is fixed by statute, no difficulty can occur with regard to the officer's compensation; but when a controversy arises over the right to hold an office, the question as to who is entitled to the salary may also become involved. In this connection it may be well to point out a distinction between a *de jure* and a *de facto* officer. An officer is said to be *de jure* when he is legally entitled to hold the office although some other claimant of the office may be actually in possession thereof; while a *de facto* officer is one actually in the exercise of the power and functions of the office under color of right, without having the legal title thereto.[16] Whether a *de facto* officer who has in good faith and without fraud or dishonesty in connection with the title and possession of the office discharged some of the duties thereof is entitled to its fees and emoluments, is a question as to which the decisions are not in entire harmony. In some of the states it is held than an officer *de facto* who is not tainted with fraud or dishonesty is entitled to the emoluments of the office as long as he actually discharges the duties thereof;[17] and that if during the incumbency of the *de facto* officer his salary is paid to him, before any judgment of ouster has been rendered against him, the officer *de jure* has lost his right to such compensation: the reasons given being that the right to compensation depends, not upon the title to the office, but upon the performance of the services, and that while the *de facto* officer is in possession the officer making payment can not be expected to determine who has the actual title to the office, but has a right to assume the legality of the title of the occupant.[18] But, on the other hand, it has been repeatedly decided that an officer *de facto* can not maintain an action for the salary of the office;[19] that if the salary is actually paid to such officer, such payment constitutes no defense to a claim for the same by the officer *de jure*;[20] and that

[15] Hall v. Wisconsin, 103 U. S. 5.

[16] Hamlin v. Kassafer, 15 Or. 456, 3 Am. St. 176; Wilcox v. Smith, 5 Wend. (N. Y.) 231.

[17] Erwin v. Jersey City, 60 N. J. L. 141, 64 Am. St. 584.

[18] Auditors of Wayne Co. v. Benoit, 20 Mich. 176, 4 Am. Rep. 382; McVeany v. Mayor, 80 N. Y. 185, 36 Am. Rep. 600; Steubenville v. Culp, 38 Ohio St. 18; State v. Milne, 36 Neb. 301.

[19] McCue v. Wapello Co., 56 Iowa 698, 41 Am. Rep. 134; Dolan v. Mayor, 68 N. Y. 274, 36 Am. Rep. 168.

[20] State v. Carr, 129 Ind. 44, 13 L. R. A. 177; McVeany v. Mayor, 80 N. Y. 185, 36 Am. Rep. 600.

the officer *de jure* may recover of the officer *de facto* the fees and salaries collected by the latter, after it has been determined judicially that the former is the party entitled to the office.[21] These cases proceed upon the theory that an office is property, and that the right to enjoy the proceeds thereof is not dependent upon the performance of its duties, but upon the title to the office. The difficulty arises from the variety of judicial views as to the nature of the right enjoyed by one who has been chosen to fill a public office,—whether such right is one of property which he has a right to secure to himself as in other cases where property rights are invaded, or whether it is a mere inchoate right which does not become absolute until he has actually performed the services. The latter view would seem to be the better one, or at least the one more in harmony with the theory upon which the right to hold office in this country rests.[22]

§ 469. **Ministerial officers.**—Many public officers have duties to perform which are of a mixed nature, having the elements of ministerial, judicial, executive and legislative duties; but in the main the separation of the various functions and powers into departments is one of the distinguishing features of our American form of government. Nevertheless, it is often the case even in this country, that the duties of a public officer are so near the dividing line that it is very difficult to determine upon which side to place them. Where the duties are prescribed and defined by law or by the mandate of a superior officer, leaving no room for the exercise of judgment or discretion, they are ministerial; and so it is held that if the time, mode and occasion of the performance of the act or acts are prescribed with such certainty that nothing remains for judgment or discretion, the act is ministerial.[23] As we have several times pointed out, duties which are strictly ministerial, as well as those which are mechanical, may be delegated to be performed by some one else than the person selected to perform them;[24] hence, a ministerial

[21] Mayfield v. Moore, 53 Ill. 428, 4 Am. Rep. 52; Douglas v. State, 31 Ind. 429; Hunter v. Chandler, 45 Mo. 452.

[22] See also, Romero v. United States, 24 Ct. of Cl. 331, 5 L. R. A. 69; Andrews v. Portland, 79 Maine 484, 10 Am. St. 280, and note on p. 284.

[23] Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65.

[24] See Birdsell v. Clark, 73 N. Y. 73, 29 Am. Rep. 105; Hope v. Sawyer, 14 Ill. 254; Williams v. Woods, 16 Md. 220.

officer may, without express authority to do so, appoint a deputy to perform any or all of the functions of the office.[25] Powers and functions not in themselves ministerial may, however, be delegated by legislative authority; thus, legislative and judicial duties are frequently conferred upon the subordinate branches of government by laws enacted by the state and national legislatures,—thus conferring upon municipal and other public corporations such powers as the general legislative body can not conveniently execute itself.[26] Where the implied power of an officer exists to appoint a deputy, the latter must perform all acts as such in the name of his principal; otherwise the performance is by some courts held to be a nullity;[27] as in such case the authority rests nominally in the principal officer, and must therefore be executed in his name.[28] If, however, the office of deputy is created by express provision of law, the deputy may act in his own name, and use his own official signature, and designation, instead of that of his principal officer.[29] The better view would seem to be, however, that the use of the deputy's name is a mere matter of form; and whether the act is done in the name of the principal or agent, it will in neither event, perhaps, vitiate the act.[30] A ministerial officer, like any other, must perform his duties with fidelity to his principal (the government or municipality); and he can not, as a general rule, lawfully act at all, if he is adversely interested.[31] When an office is purely ministerial its duties may be enforced by *mandamus*.[32] Any violation of duty on the part of a ministerial officer resulting in injury to the public, as such, may be redressed only by a public prosecution, either at common law or under statutory provisions;[33] but if the officer owes a duty to some person individually, which he neglects to perform, he is liable for any injury proximately resulting from such negli-

[25] Abrams v. Ervin, 9 Iowa 87; Hope v. Sawyer; *supra;* Attorney-General v. Detroit, 58 Mich. 213, 55 Am. Rep. 675; Roberts v. People, 9 Colo. 458.

[26] Tilley v. Savannah, etc., R. Co., 5 Fed. 641; Richland Co. v. Lawrence Co., 12 Ill. 1; Cincinnati, etc., R. Co. v. Clinton Co., 1 Ohio St. 77.

[27] Glencoe v. Owen, 78 Ill. 382; Arnold v. Scott, 39 Tex. 378.

[28] Talbot v. Hooser, 12 Bush (Ky.) 408.

[29] Westbrook v. Miller, 56 Mich. 148; Eastman v. Curtis, 4 Vt. 616.

[30] Westbrook v. Miller, *supra.*

[31] Woods v. Gilson, 17 Ill. 218; Mills v. Young, 23 Wend. (N. Y.) 314; Boykin v. Edwards, 21 Ala. 261.

[32] Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65.

[33] Bartlett v. Crozier, 17 Johns. (N. Y.) 439, 8 Am. Dec. 428.

gence.[34] If, however, the officer acts with due care, and within the scope of his authority, he is not liable to an individual for any resulting injury.[35] If a ministerial officer execute the process of a court, regular on its face, he will be protected although it was issued without jurisdiction as to person and place;[36] but if the want of jurisdiction is of the subject-matter,[37] or even of parties, but apparent on the face of the process,[38] or if the process was based on an unconstitutional statute,[39]—it furnishes no protection. The officer is not liable for the acts of his subordinates where they are appointed by virtue of a statute and are thus created independent public officers.[40] The office of sheriff seems to be an exception to this rule; and that officer is liable for the official acts of his deputies, as at common law the deputy was considered the private servant of the officer, and officers were liable for the acts of such servants.[41] We have already seen that a public officer is not generally liable individually on contracts entered into on behalf of his principal, unless it be the intention to bind him individually;[42] this exemption, of course, includes ministerial offices as well as others. A ministerial officer may, in the commission of some wrongful act, so far depart from the line of his office as to be entirely outside of any official relation; and where this is the case, while he will doubtless be individually liable for the consequences of such act, he can not be said to be officially responsible, and therefore the sureties on his official bond will not be answerable therefor.[43] If the negligent act or failure occurred in the line of the officer's employment, the officer may be liable civilly, notwithstanding the same act or omission also constituted a criminal offense for which he may be indicted and prosecuted criminally.[44] A public officer is generally indictable as for a crime for any omission or failure in the performance

[34] Bennett v. Whitney, 94 N. Y. 302; State v. Harris, 89 Ind. 363, 46 Am. Rep. 169; Hayes v. Porter, 22 Maine 371.

[35] Mechem Pub. Off., § 661.

[36] Young v. Wise, 7 Wis. 128; Cannon v. Sipples, 39 Conn. 505; Taylor v. Alexander, 6 Ohio 144.

[37] Smith v. Shaw, 12 Johns. (N. Y.) 257; Wilmarth v. Burt, 7 Met. (Mass.) 257; Griffin v. Wilcox, 21 Ind. 370.

[38] Davis v. Wilson, 65 Ill. 525; Parker v. Walrod, 16 Wend. (N. Y.) 514, 30 Am. Dec. 124.

[39] Sumner v. Beeler, 50 Ind. 341, 19 Am. Rep. 718.

[40] Foster v. Metts, 55 Miss. 77, 30 Am. Rep. 504.

[41] 1 Bl. Com. 344, 346; 3 Minor's Inst. (3d ed.) 254.

[42] *Ante*, § 299.

[43] McLendon v. State, 92 Tenn. 520, 21 L. R. A. 738.

[44] Raynsford v. Phelps, 43 Mich. 342, 38 Am. Rep. 198.

of his duties,—particularly those duties which are purely ministerial and leave the officer no discretion in their performance.[45] If the officer has the privilege of exercising judgment or discretion in the case, and he follows such judgment or discretion honestly, and does not act maliciously or wantonly or corruptly,[46] he is not indictable.

§ 470. Judicial and quasi-judicial officers.—Judicial officers represent that division in our governmental system known and designated as the judicial department of government of the state or nation. Judicial officers necessarily have the largest share of discretionary powers confided to them. Such an officer necessarily has other powers also, as executive and legislative, but he is called a judicial officer because his main functions are judicial. Such officers have many privileges and immunities not common to other officers, varying with the degrees of importance of the courts which they respectively represent. Thus, a justice of the supreme court of the United States is entitled to the protection of the government from personal violence, not only while on the bench or holding court, but while traveling through the country to and from the place where his court may be in session.[46a] Such functionaries, like legislative and executive officers, are privileged from arrest and from civil process while holding their courts and traveling to and from the same.[47] At common law a judicial officer may excuse himself from testifying as a witness in a case in which he is the presiding judge.[48] He can not be arrested on common-law process issued out of his own court, but must be proceeded against by bill, if at all.[49] But while they are entitled to many privileges, as such officers, they are also placed by the law under certain restraints and disabilities in consequence of their official positions; thus, a judge who has ordered the sale of a piece of land, subject to his confirmation or disapproval, can not become a purchaser at such sale, as he comes within the reason of the rule that trustees and other fiduciaries can not purchase at a sale

[45] State v. Glasgow, Cam. & N. (N. C.) 38, 2 Am. Dec. 628; Stone v. Graves, 8 Mo. 148, 40 Am. Dec. 131.

[46] State v. Williams, 12 Ired. (N. C.) 172; People v. Coon, 15 Wend. (N. Y.) 277.

[46a] In re Nagle, 135 U. S. 1.

[47] Lyell v. Goodwin, 4 McLean (U. S.) 44.

[48] Welcome v. Batchelder, 23 Maine 85; People v. Miller, 2 Parker Cr. (N. Y.) 197.

[49] In re Livingston, 8 Johns. (N. Y.) 351.

in connection with which they have official duties to perform.[50] Judges and judicial officers are generally prohibited by statute or constitutional provisions from acting as attorneys during their terms of office or from holding any other office, though this inhibition is limited in some states to other than judicial offices. Constitutional provisions are also made by which the compensation of judges may not be reduced during their terms of office; and in the federal courts and in the courts of Massachusetts the tenure of office is for life or during good behavior. As to their liabilities, it may be laid down as the general rule that such an officer is not liable to any individual for damages for any erroneous decision or judgment he may render, if at the time he was within the jurisdiction as to person and subject-matter.[51] The officer may go far astray in the exercise of his functions and not render himself liable, for the law has a tender regard for the imperfections of men's judgments and decisions. Public policy forbids that any one should be punished for every mistake, as in that event no one could be secured who would be willing to fill such places.[52] A judge or justice of the peace may innocently commit an injury upon some individual without being liable; thus, where such an officer wrongfully but innocently orders a person ejected from the court-room, which order is obeyed, there can be no liability on the part of the judge, if he acted under the erroneous belief that the case was one in which he had a right to sit with closed doors.[53] If the officer is actually within his jurisdiction when the act is committed there can be no doubt that he is exempt from liability; but it does not necessarily follow that when a judicial officer acts without jurisdiction, he is always liable, as is seen by the case last cited. Much depends upon the intention of the officer, and if he believes in good faith that he has jurisdiction, having reasonable grounds for so believing, he is exempt from liability.[54] The act, however, must be a judicial one; for if it be ministerial only, the good faith of the officer will not protect him; thus, if a police officer order the arrest of a person for an act which does not constitute a crime at

[50] Tracy v. Colby, 55 Cal. 67. See also, Hopkinson v. Jacquess, 54 Ill. App. 59.

[51] Chickering v. Robinson, 3 Cush. (Mass.) 543; Walker v. Hallock, 32 Ind. 239; Jordan v. Hanson, 49 N. H. 199, 6 Am. Rep. 508; Cooley Torts 408.

[52] See opinion of Lord Tenterden, in Garnett v. Ferrand, 6 B. & C. 611.

[53] Williamson v. Lacey, 86 Maine 80, 25 L. R. A. 506.

[54] Thompson v. Jackson, 93 Iowa 376; Scott v. Fishplate, 117 N. C. 265.

law, or is not punishable by arrest and imprisonment, he is liable to the party arrested for damages sustained, his motives being immaterial.[55] If he were a judicial officer he would not be liable in such a case if he believed he was acting within his jurisdiction and had reasonable grounds for such belief; for the mere assertion of good faith without reasonable grounds therefor is no defense to an act committed even by a judicial officer who is palpably without jurisdiction; thus, if the judge of a court should, without any color or semblance of jurisdiction, sentence a person to imprisonment for an offense which he had never committed, such officer would doubtless be liable. Courts do not always discriminate between judicial and non-judicial acts in determining an officer's liability; hence, an elective officer who refuses to receive an elector's vote is in some states held liable regardless of his motive;[56] but in other courts the act has been regarded as purely judicial and the officer exempt.[57] An officer who is guilty of corruption while in office, or who acts from any unlawful motives, may be held accountable by the state or other government in a proceeding to impeach him, or in a public prosecution for such an offense; but even in that case he would not necessarily be liable to an individual who suffered by reason of his infamy. An officer having quasi-judicial powers is entitled to the same immunity as those exercising purely judicial functions, if the act complained of was done within the limits of authority conferred upon the officer.[57a] And if a judicial officer himself has to determine whether or not he has jurisdiction, and in determining the facts relied upon to give jurisdiction he makes an erroneous decision in reference thereto, an action will not lie against him.[58] But it has been held that this rule does not apply to a judicial officer of an inferior court.[59] Where a judicial officer also has ministerial duties to perform, he may render himself liable for a wrongful exercise of the latter.[60] Thus, a county judge whose duty it is to appoint guardians, administrators, etc., and approve their bonds, while not liable for erroneously determining that an insolvent bond is good, when such determination is made after a judicial investiga-

[55] Bolton v. Vellires, 94 Va. 393, 64 Am. St. 737.

[56] Larned v. Wheeler, 140 Mass. 390, 51 Am. Rep. 43; Jeffreys v. Ankeny, 11 Ohio 372.

[57] Chrisman v. Bruce, 1 Duv. (Ky.) 63, 85 Am. Dec. 603.

[57a] East River Gaslight Co. v. Donnelly, 93 N. Y. 557.

[58] Busteed v. Parsons, 54 Ala. 393, 25 Am. Rep. 688.

[59] Craig v. Burnett, 32 Ala. 728.

[60] Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65.

tion of the facts as to solvency, is liable civilly to the injured party, where he has accepted such a bond without first properly determining its sufficiency, unless he knows the bond to be sufficient without investigation.[61] A probate judge upon whom devolves the duty of accepting such a bond can not escape liability for any omission of a ministerial duty,—such as requiring a bond to be filed when the law enjoins that he shall have this done;[62] or the ordering of a renewal of such bonds every two years, when the failure to order a renewal is the result of willful or malicious negligence.[63]

§ 471. Executive and legislative officers.—Many of the privileges and immunities granted by law to judicial officers are also accorded to executive and legislative officers; such, for instance, as freedom from arrest or from service of civil process while actively engaged in the discharge of their duties are common to all public officers.[64] As to the liabilities of such officers for injury caused by their official acts it may be truly stated that they are not generally liable if the act performed was within the scope of the official business. Such officers have a large discretion in determining whether their acts are wise or unwise, proper or improper; and when exercised within the limits mentioned the officer is not liable, nor even subject to have his motives questioned, in a suit by an individual for damages, although it be asserted that he acted corruptly or maliciously.[65] And a legislator can not be held accountable in a civil action for what he does or says on the floor of the legislative hall,—such immunity being guaranteed to him upon grounds of public policy.[66] "It would be a doctrine fraught with consequences of incalculable mischief," said Frazer, C. J., in the case cited in the last note, "if a public officer could be held personally responsible, either civilly or criminally, for his judgment upon such questions." If that were the rule men of character and responsibility would refuse to serve as members of public deliberative bodies, and the public business of the community would fall into the hands of irresponsible administrators.

§ 472. Liability of the public for the acts of its officers and agents.—No contract executed by a public officer or agent will bind

[61] Colter v. McIntyre, 74 Ky. 565; McIntyre v. Gritton, 5 Ky. L. Rep. 686.

[62] State Bank v. Davenport, 19 N. C. 45; Boggs v. Hamilton, 2 Mill Const. (S. C.) 382.

[63] Boyd v. Ferris, 29 Tenn. 406.

[64] Miner v. Markham, 28 Fed. 387; Secor v. Bell, 18 Johns. (N. Y.) 52.

[65] Cooley Torts 376.

[66] Walker v. Hallock, 32 Ind. 239.

his principal unless it is within the scope of his actual authority;[67] the government can only be bound in the manner it has agreed to be bound, and its agents must follow the prescribed formalities to make it liable;[68] hence, where the law requires a contract for government supplies to be in writing, the requirement is mandatory, and there can be no recovery on such contract if it is oral.[69] If the supplies have been furnished, however, in whole or in part, the claimant may recover their fair value upon the implied contract.[70] A private agent might render his principal liable upon mere appearances, or the principal might estop himself from denying the agent's authority by acts *in pais;* but this is not true of public agents; and the state or government can not be bound by an estoppel *in pais* or by laches.[71] The state or federal government can not be sued without its consent, as we learned in a former place;[72] but when it permits itself to be brought into court by legislative enactment, or voluntarily appears to an action against it, it will be subject to the same rules as other defendants and will be bound by the judgment, although the orders of a court may not be enforced by execution against it. A public principal, such as a state or municipality, or the general government, may ratify the act of its agent and thus render itself liable the same as if it had authorized it in the first instance.[73] The government, whether national or state, can not be held liable, however, for the torts of its agents.[74] Municipal corporations are not generally liable for the acts of their servants except when they were committed in connection with some ministerial duty, in which case they stand upon the same footing as private corporations or individuals.[75]

[67] Brady v. Mayor, etc., 20 N. Y. 312; Clark v. Des Moines, 19 Iowa 199, 87 Am. Dec. 423; Sutro v. Pettit, 74 Cal. 332, 5 Am. St. 442; McCaslin v. State, 99 Ind. 428. See also, *ante*, §§ 299, 348.

[68] Camp v. United States, 113 U. S. 648.

[69] Clark v. United States, 95 U. S. 539.

[70] *Ibid.*

[71] Bishop Conts., § 993; United States v. Kirkpatrick, 9 Wheat. (U. S.) 720.

[72] *Ante*, § 348.

[73] Cook Co. v. Harms, 108 Ill. 151; Rock Creek v. Strong, 96 U. S. 271.

[74] Story Ag., § 319; Gibbons v. United States, 8 Wall. (U. S.) 269.

[75] See Richmond v. Long, 17 Gratt. (Va.) 375, 94 Am. Dec. 461; Cooley Torts 122.