PERSONAL RESPONSIBILITY OF MEMBERS OF MUNICIPAL LEGISLATIVE BODIES

ALVIN E. EVANS†

In an interesting article in the Georgetown Law Journal[1] Professor Charles M. Kneier discussed the matter of judicial review of the motives of city councils. He suggests that in general such councils are in a position similar to that of superior legislative bodies, although, in many states their activities are reviewable for fraud and the scope of review is broader than in the case of higher legislatures. Only in a few instances is it held that such ordinances may be reviewed when improper motives of councilmen are charged as affecting their votes. He observes that while the legislation of superior legislative bodies cannot be invalidated for fraud and corruption,[2] ordinances, on the other hand, are commonly set aside for that reason.[3] Ordinances involving franchises and contracts, being administrative, are declared to be subject to different considerations, being of a temporary character as distinguished from the more permanent character of legislation.

PERSONAL LIABILITY OF COUNCIL MEMBERS

Professor Kneier does not take up the matter of the individual liability of council members for unauthorized acts, a subject nowhere discussed at length, so far as this writer knows.[4] In a number of cases a question has arisen as to the individual liability of members of municipal legislative bodies for their conduct of municipal affairs when their acts were done under a misapprehension of authority. It may be well to start the discussion with a case from the United States Supreme Court

† Dean, St. Louis University Law School.

1. Kneier, *Judicial Review of the Motives of City Councils*, 19 GEO. L. J. 148 (1931).

2. Wright v. Defrees, 8 Ind. 398 (1856); Sunbury & Erie Ry. Co. v. Cooper, 33 Pa. St. 278 (1859).

3 People *ex rel.* Lockwood v. Grand Trunk & Western Ry. Co., 232 Ill. 292, 93 N.E. 839 (1908); Shinkle v. Covington, 83 Ky. 420 (1885) (dictum); State *ex rel.* Abel v. Gates, 190 Mo. 540, 89 S.W. 881 (1905).

4. There are brief references to this subject in MECHEM, PUBLIC OFFICERS 644-6 (1890); THROOP, PUBLIC OFFICERS § 709 (1892); 1 DILLON, MUNICIPAL CORPORATIONS 762 (5th ed. 1911); 4 MCQUILLIN, MUNICIPAL CORPORATIONS § 12.222 (3d. ed. 1949); 37 AM. JUR., MUNICIPAL CORPORATIONS § 71, p. 684; Note, 22 A.L.R. 125 (1923).

where a considerable history of the matter may be found. In *Kilbourn v. Thompson*[5] a certain person had been called as a witness before a committee of the congress. Proving recalcitrant he was arrested by the sergeant at arms of the House and thereafter brought an action against the latter for damages for false imprisonment and a judgment in his favor in the lower court was sustained on appeal.

The action caused the court to review the history of legislative procedure in this regard. It first noted the constitutional provision for privileges and immunities: "For any speech or debate in either house the members shall not be questioned in any other place." This result would seem to follow from our form of government alone. Since each branch is independent neither could the courts pass upon the good faith of legislators as to their legislative acts. Even the power of judicial review as to the constitutionality of statutes is questioned by many American political scientists. It appears that in the early history of the English Parliament such privileges and immunities of members were questioned and especially in the earlier period before the separate organization of the two houses. However, such immunity later seemed to be indispensable to the proper working of that body and neither judicial review was asserted nor was legislative freedom later questioned.

The officer who executes an illegal order is liable to the injured person. Thus in *Stockdale v. Hansard*[6] a report of a Parliamentary committee contained a libel. It was not thought that the members incurred civil liability therefor, but the printer was cast in damages. In *Coffin v. Coffin*[7] where slander was spoken on the floor of the house at a time when three members were present it was held that the slanderer was not answerable. Thus it seems that members of the legislative bodies of the states are not civilly answerable for acts done as legislators even where there may be no specific constitutional provision applicable.

How far such immunity is to be carried in the case of subordinate legislators is an important issue. The types of municipal bodies which have legislative functions are almost legion. Thus

5. 103 U.S. 168 (1881).
6. 9 Ad. & E. 1, 112 Eng. Rep. 1 (K. B. 1839).
7. 4 Mass. 1 (1808).

the question has been raised respecting town and city councilmen and other persons possessing equivalent titles such as aldermen, burgesses, fiscal court magistrates and other county commissioners or supervisors, school board directors, village directors and town supervisors of the New England type of local organization, and even pilot commissioners.

Even granting for the moment that such members may not be liable for mistaken legislative acts, the question arises as to what acts are legislative.[8] For example, how may one categorize the auditing and paying of bills or the appropriation of money by ordinance, or the purchase of lands or supplies, or the passing of ordinances authorizing or granting contracts and franchises?[9]

MUNICIPAL LEGISLATORS ARE NOT LIABLE

There is a line of cases which apparently extends to members of subordinate bodies like municipal legislatures the same immunity as is enjoyed by members of superior bodies such as state legislatures, though this may not be completely true where bad faith is attributable to the actors. Thus in *Klauder v. Cox*[10] where the city council of Philadelphia had appropriated and paid a large sum of money for the support of the Philharmonic Civic Opera, a private corporation, liability of the members of the council for sums already paid was denied though an injunction issued against further payment. They were likened to members of the state legislature and of the congress. Observation was made of the practice relating to the immunity of judges, mayors and executive officers of various kinds:

> It may be stated as a general rule that members of the council and the mayor, when acting in a legislative capacity are not personally liable for acts done or their results, although such acts are void as in excess of jurisdiction or otherwise without the authority of law.

The court notes that Wisconsin and some Canadian cases are

8. Wimbish v. Hamilton, 47 La. Ann. 246, 16 So. 856 (1895).

9. Campbell v. Eugene, 116 Ore. 264, 240 Pac. 418 (1925); Wood v. Seattle, 23 Wash. 1, 62 Pac. 135 (1900).

10. 295 Pa. 323, 145 Atl. 290 (1929); *Cf. also*, Freeport v. Marks, 59 Pa. 253 (1868) (Burgesses passed an illegal bounty tax for each man necessary to fill the borough war quota). However, *In re:* Financial Statement of School District, 75 Pa. Super. 434 (1920), a school board having paid out funds without taking an official vote, the members were personally liable. *See also*, Commissioners v. Co. of Lycoming, 46 Pa. 496 (1864) (Co. commissioners are liable for costs where the preliminaries have not been followed).

contra. Other cases are distinguishable because either (a) the action was against some particular officer or (b) an express statute was applicable or (c) the act done was not legislative or (d) certain formalities were not complied with or (e) the act was done in bad faith.

So in Kentucky[11] even the magistrates of a county who constitute the so-called fiscal court are considered to be a legislative body and not personally liable for damages arising from a tax levy in excess of the constitutional limit. Their performance, it is urged, is due to the public and not to individuals. It is emphasized that the act of appropriating money involves the legislative function. Neither are they liable for a diversion from the sinking fund to the general fund.[12] Thus a councilman who bona fide votes for or against a proposed ordinance is not liable to the village whose councilman he is though the act authorized was illegal.[13] In Nebraska[14] a town council authorized an order to be drawn on a certain fund but had made no preliminary appropriation therefor as required by statute and the money was paid out (for land to extend the cemetery) by the hands of the mayor and clerk. The councilmen were held free of liability but the mayor and clerk were charged, as officers, with funds so illegally paid out.

So aldermen are not liable in a taxpayer's suit when charged with selling for $1800 municipal light plant equipment alleged to be worth $5000 where no fraud is shown although the sale was void in that there had been no ordinance previously passed authorizing the disposition.[15] In New York it has been declared

11. Com. v. Kenneday, 118 Ky. 618, 82 S.W. 237 (1904).

12. Newport v. McLane, 256 Ky. 803, 77 S.W.2d. 27 (1934); *see* Note, 96 A.L.R. 664 (1935); *see also*, McCord v. Jackson, 135 Ga. 176, 69 S.E. 23 (1910); Little v. Ayres, 2 N.Y. Supp. 691 (Cir. Ct. 1888); King v. Matthews, 5 Ont. L. Rep. 228 (1903) (they acted reasonably and in good faith, not liable).

13. Incorporated Village of Hicksville v. Blakeslee, 103 Ohio 508, 134 N.E. 445 (1921); *see also*, Jones v. Loving, 55 Miss. 109 (1877) (the former aldermen were sued by the former mayor for maliciously [as asserted] depriving him of certain fees by ordinance). *Cf.* McHenry v. Sneer, 56 Iowa 649, 10 N.W. 234 (1881) (similar and same holding); Amperse v. Winslow, 75 Mich. 234, 42 N.W. 823 (1889) (member who refused to vote for approval of ordinance although advised by city attorney that it was his duty to do so was sued by aggrieved plaintiff who claimed that the defendant had prevented the issuance of a liquor license to which he was entitled).

14. Blair v. Lantry, 21 Neb. 247, 31 N.W. 790 (1887).

15. Russell v. Bell, 224 Ky. 218, 6 S.W.2d. 236 (1928); Baker v. State,

that although public officers (probably including aldermen) may be impeached or indicted for official misconduct, the civil remedy is more restricted.[16]

THE CONTRARY VIEW IS TAKEN

Wisconsin was noted above as holding contra. Thus in a taxpayer's suit in *Neacy v. Drew*[17] where a contract calling for the use of a patented process was made illegally, it was held that the members were liable and a later curative act passed to protect them was held invalid. There was no discussion whether the act was legislative but their good faith was questioned.

Minnesota has gone equally far in holding council members to civil liability for their acts. Thus in *Burns v. Essling*[18] the council appropriated funds to subsidize baseball and hockey, to pay for the board and lodging of the teams and for lumber for a rink. It was held that they were individually liable; that the appropriation was not a legislative act and that they did not act in good faith. In *Bailey v. Stracham*[19] which involved a member contracting with himself, recovery was had against all in a taxpayer's action for the illegal payment of commissions. So in *Stone v. Bevans*[20] the members were held liable for sums paid to the president of the council to secure his aid in extending and developing the water works system. There was no lack of good faith. In *Burns v. Essling*[21] two members who were not present and did not vote were held liable with the others. They were, however, members of the association which received the money.

---

27 Ind. 485 (1867); *see also*, Lough v. Estherville, 122 Iowa 479, 98 N.W. 308 (1904) (no liability for debts contracted above the constitutional limit).

16. Wilson v. New York, 1 Denio 595 (N. Y. 1845); *see also*, Little v. Ayres, 2 N.Y. Supp. 691 (Cir. Ct. 1888).

17. 176 Wis. 348, 187 N.W. 218 (1922); *see also*, Wilcox v. Porth, 154 Wis. 422, 143 N.W. 165 (1913) (liable for illegal payment of interest); similar result in Russell v. Tate, 52 Ark. 541, 13 S.W. 130 (1889) (not liable for the voting but those were liable who later received and applied the funds).

18. 163 Minn. 57, 203 N.W. 605 (1925).

19. 77 Minn. 526, 80 N.W. 694 (1899); *see also*, Town of Martinsburg v. Butler, 112 Minn. 1, 127 N.W. 420 (1910) (members of town board liable for funds spent for drains constructed upon the premises of one of them. The act was performed in good faith, in the belief that this was the most economical method).

20. 88 Minn. 127, 92 N.W. 520 (1902).

21. 163 Minn. 57, 203 N.W. 605 (1925).

The rule in California[22] is similar to that in Wisconsin and Minnesota. To the objection that members could not be sued in their private capacity it was replied that their powers were well defined by statute, that they had available legal counsel and hence that there was no reason for them ever to make an illegal expenditure. Under the relevant statute before street work could properly be undertaken, the body was required to pass a resolution of intention, file notice, afford a hearing, let to the lowest bidder and make the proper adjustments between assessments on the adjoining property and charges to the city. Such a resolution was regarded as jurisdictional. Gross favoritism was charged, good faith was not clear[23] and it was difficult to believe that the members had acted as reasonable men. So apparently they may be held liable for claims erroneously but not fraudulently allowed if the claims are properly pleaded. A similar rule was applied in Indiana in an action by a contractor against council members for the value of work performed in improving a street outside the city. The work was done under a mutual mistake as to the location. There was no lack of bona fides, but the members were held liable for the value of work so done "in obedience to their authority and direction."[24]

Other actions have been maintained against members which involve non-legislative activity. Thus they might be held liable for maintaining a nuisance.[25] An action to compel the performance of a ministerial duty such as compelling owners to clean snow and dirt from sidewalks will lie[26] as will one for the fraudulent alienation of municipal property.[27] It seems to be a matter of course that they would be liable individually for misappro-

22. Osburn v. Stone, 170 Cal. 480, 150 Pac. 367 (1915); (Yet in *Downer v. Lunt*, 6 Cal. 94 [1856], a board of pilot commissioners was held not liable to a pilot for revoking his license as a pilot. This was held to be a quasi-judicial rather than a ministerial act. Does such a board have any of the characteristics of a governmental authority?).

23. *Cf.* State *ex rel.* Morrison v. Muskogee, 70 Okla. 19, 172 Pac. 796 (1918) (members illegally paid out funds to Ry. Co. to induce it to establish shops there).

24. Sylvester v. McCauley, 1 Wilson 19 (Ind. Sup. Ct. 1871).

25. Baker v. State, 27 Ind. 485 (1867) (here the maintenance of a market house and hay scales in the street was held to be discretionary). *See*, Co. Commissioners v. Duckett, 20 Md. 468 (1864).

26. Piercy v. Avrill, 37 Hun. 360 (N.Y. 1885).

27. Atty. Gen. v. Wilson, Craig & Ph. 1, 41 Eng. Rep. 389 (1840).

priations, especially those made in cases where they may have had a personal interest.[28]

Many of the cases are taxpayers' suits. The municipality is often likened to a private corporation. Under appropriate circumstances a shareholder may bring action for the benefit of the corporation. So it is conceived that a taxpayer has a similar interest and may sue not merely to enjoin wrongful conduct but in several states to recover damages on behalf of the municipality for the wrongful act already done.[29] The motive of the plaintiff as prosecutor is held to have no significance[30] but it should be shown why suit is brought in the taxpayer's name.[31]

This is not the place to develop the issues as to liability of officers who carry out illegal orders of the council, save to observe some interesting situations. First it is not always clear whether courts include council members when they speak of officers. They are indeed officers in a sense though, in general, not administrative officers. Thus in Oklahoma[32] they were held liable under a statute which declares that "every officer . . . who shall order or direct the payment of money in pursuance of any unlawful conduct shall be liable, etc." So council members may as members vote an illegal appropriation for which in their jurisdiction they are not liable but as officers in carrying out the order they may be held.[33]

The federal pattern has had a wide influence not merely in state but in local government. Thus the maxim controlling in federal and state matters that "The king can do no wrong" undoubtedly is the basis for the doctrine that a municipality is not

28. East Nissouri Twp. v. Horseman, 9 U.C.C.P. 189 (1858).

29. Osburn v. Stone, 170 Cal. 480, 150 Pac. 367 (1915); Lough v. Estherville, 122 Iowa 497, 98 N.W. 308 (1904); Wilcox v. Porth, 154 Wis. 422, 143 N.W. 165 (1913); Land, Log & Lumber Co. v. McIntyre, 100 Wis. 245, 75 N.W. 964 (1898); Burns v. Essling, 163 Minn. 57, 203 N.W. 605 (1925); Citizens' Loan Assn. v. Lyon, 29 N.J.Eq. 110 (Ch. 1878); and STEVENS, CORPORATIONS 714-723 (2d. ed. 1949).

30. Burns v. Essling, 163 Minn. 57, 203 N.W. 605 (1925).

31. Hodges v. Dam, 72 Cal. 520, 14 Pac. 133 (1887).

32. State *ex rel.* Morrison v. Muskogee, 70 Okla. 19, 172 Pac. 796 (1918); *see also,* Neacy v. Drew, 176 Wis. 348, 187 N.W. 219 (1922).

33. Russell v. Tate, 52 Ark. 541, 13 S.W. 130 (1890); Blair v. Lantry, 21 Neb. 247, 31 N.W. 790 (1887). For liability of administrative agents, *see,* Kilbourn v. Thompson, 103 U.S. 168 (1881); Buyck v. Buyck, 112 Minn. 1, 127 N.W. 420 (1910); Piercy v. Avrill, 37 Hun. 360 (N.Y. 1885). For liability of aldermen for punishment for breach of injunction, *see,* Quackenbush v. Van Riper, 3 N.J.Eq. 350 (Ch. 1835); People v. Sturtevant, 8 N.Y. 263 (1853) (even though the injunction may turn out to have been erroneous).

liable in damages for torts committed by its servants in its governmental capacity. Most writers agree that this slavish imitation of the rule relating to the personal sovereign should be abandoned. Here it may be noted also that the bicameral legislative system, developed from the English pattern and enshrined in the United States Constitution, is followed in all states but one. It was also adopted by many municipalities and still exists sporadically.[34]

So the theory of immunity of the members of municipal legislative bodies is an imitation of the practice of the Congress and of sovereign state governments. The municipal legislative body is not sovereign in any sense save possibly that it represents or is a substitute for the state government. The question then may well be raised whether there are important considerations which make it imperative or desirable that councilmen individually have somewhat similar immunity. Good faith is important and most commentators would agree that the rule applicable to members of legislatures of sovereignties, should not apply where good faith is lacking; in court decisions there is some dissent. Good faith can scarcely be present where these minor legislators act knowingly and willfully beyond legal bounds, nor when they act corruptly or to their own advantage.

Should there be immunity beyond that of any administrative officer? It is argued that to impose liability for honest mistakes would cause councils to be overcautious and unresponsive to actual municipal needs. It seems harsh to hold them personally liable where their conduct has not been blameworthy and the same may be said of administrative officers. Perhaps the standard of reasonable care would adequately protect both the community and the individual. It may be that if they should be held to the same obligations to which municipal officers are held, it would be necessary to relax the stringency of the rules relating to such officers. Thus the personal liability of a treasurer who deposits funds in a bank without authorization therefor but acting in good faith and with due care seems unduly harsh.[35]

There are also certain well recognized distinctions between superior and inferior legislatures in addition to the fact that the

34. *See*, Henrico Co. v. Richmond, 177 Va. 754, 15 S.E.2d. 309 (1941).
35. Tillinghast v. Merrill, 151 N.Y. 135, 45 N.E. 375 (1896) (result approved in 10 HARV. L. REV. 386 [1897]).

former has general while the latter has local authority. First mandamus will lie to compel councilmen to levy a special tax in appropriate circumstances[36] and in some other situations also. Then too, the finding of a fact by a superior legislative body is generally deemed conclusive and binding on the courts. Such is not the rule respecting findings of a municipal legislative body. Thus in *San Christina v. City & Co. of San Francisco*[37] the defendant board had found as a fact that an emergency existed which warranted emergency legislation. The court, however, held that this question of fact was subject to court review. This indicates that, in general, municipal legislators are as near to the position of officers generally as they are to that of legislators.

There is at least another distinction. So far as the writer knows, it has never been urged by a court or by a commentator that the traditional separation of governmental power, legislative, executive and judicial, is at all applicable to the government of municipal corporations. To suggest the possibility is to show the total ineptness of such a concept. That fact indicates that a far greater measure of power exists in the courts to control municipal legislatures than exists toward a superior body of legislators. It tends to support the proposition that, after all, the former are merely officers for most practical purposes. As pointed out above, numerous decisions do not make any clear distinction in that regard and the same may be said of statutes in several states.[38]

---

36. McCrary Co. v. Brunson, 204 Ala. 85, 85 So. 396 (1920).

37. 167 Cal. 767, 141 Pac. 384 (1914); *see also*, Spring Val. Waterworks v. City and Co. of San Francisco, 82 Cal. 286, 22 Pac. 910 (1890).

38. *See, e.g.*, the application of statutes in Duncan v. Combs, 131 Ky. 330, 115 S.W. 222 (1909); *see*, KY. REV. STAT. § 92.330 (1948); State *ex. rel.* Morrison v. Muskogee, 70 Okla. 19, 172 Pac. 796 (1918).

CONTRIBUTORS TO THIS ISSUE

ARTHUR LENHOFF—Professor of Law, The University of Buffalo, D.U.J. (Doctor Utriusque Juris) 1908, University of Vienna. Practiced in Vienna 1915-1938; member of the law faculty, University of Vienna, 1918-1938; judge of the Austrian Court for Constitutional Matters, 1930-1934; draftsman for the codification of an Austrian Labor Code, 1937-1938. Member of the New York Bar. Author of: Comments, Cases and Materials on Legislation; Labor Law: Cases and Materials (the comparative law part thereof); several books on legal subjects in Europe; numerous articles in American and European legal periodicals.

STEPHEN GOROVE—Lecturer in Political Science and International Law, Albertus Magnus College, New Haven; Sterling Fellow, Yale Law School, since 1949. J.D. (Juris Doctor) 1939, Royal Hungarian "Peter Pazmany" University of Budapest; LL.M. 1950, Yale Law School. One time Judge, the High Court of Budapest. Former British Council Fellow, at Oxford, 1948; Carnegie Fellow, Academy of International Law, The Hague, 1949.

JOHN J. CZYZAK—Assistant Professor of Law, Washington University. Sterling Fellow, Yale Law School, 1949-1950. Ph.B. 1936, A.M. 1939, John Carroll U.; LL.B. 1942, Western Reserve U.; Associated with Spieth, Spring & Bell, Cleveland, 1942-1948. Lecturer in Business Law, School of Business Economics and Government, John Carroll U., 1945-1948. Member of the Ohio Bar.

ALVIN E. EVANS—Dean and Prof. of Law, St. Louis University School of Law. A.B. 1898, Cotner Univ.; A.M. 1898 Univ. of Neb.; Ph.D. 1908, J.D. 1918, Univ. of Mich. Prof. of Law, Univ. of Idaho, 1917-22; Prof. of law, George Washington Univ., 1922-27; Univ. of Kentucky College of Law, Dean and Prof. of law, 1927-48; Emeritus since 1948; Professor of Law, Stetson Law School, 1949; Prof. of Law, St. Louis Univ. Law School, 1949-50; Dean since June 1950. Pub. Roman Law Studies in Livy; articles in various law reviews. Member of the bars of Nebraska, Michigan, Idaho, Kentucky, and of the U.S. Supreme Court.

WASHINGTON UNIVERSITY
LAW QUARTERLY

Member, National Conference of Law Reviews

Volume 1951 April, 1951 Number 2

Edited by the Undergraduates of Washington University School of Law, St. Louis. Published in the Winter, Spring, Summer and Fall at Washington University, St. Louis, Mo.

Subscription Price $4.00 Single Copies, $1.25