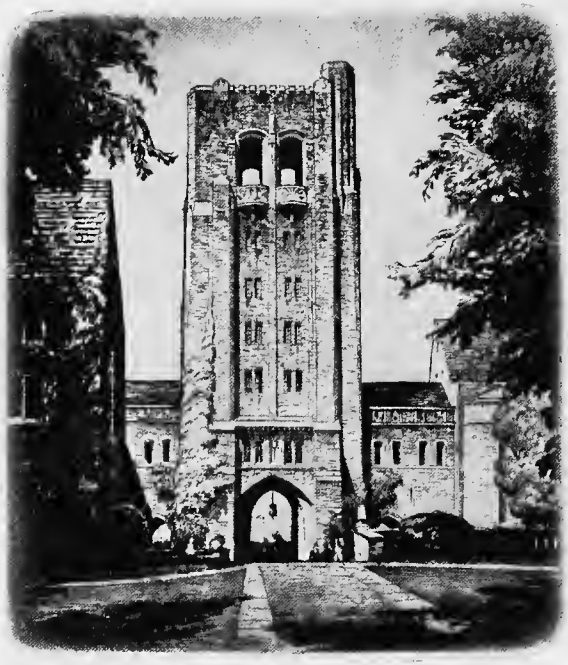

A TREATISE

ON

THE LAW OF

MUNICIPAL CORPORATIONS

IN THE

UNITED STATES.

BY

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PREFACE.

The writing of a preface to a work like the present is rather a perfunctory performance, where the author and the merits and peculiar features of his work are known. The reader and critic will find, by an examination of these pages, that the present volume, like the other works of the author, is designed to present within the confines of one volume a succinct and clear statement of the law of Municipal Corporations, by an inclusion of everything material, and exclusion of everything immaterial, to the clear comprehension of the general principles and rules of law, bearing upon, or involved in, the subject.

The author desires to make a public acknowledgment of his indebtedness to Mr. H. C. Underhill, LL. B. of Brooklyn, N. Y., for his active and efficient assistance in the preparation of the manuscript for the press.

C. G. T.

University of the City of New York,
January, 1894.

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MUNICIPAL CORPORATIONS.

CHAPTER I.

CORPORATIONS DEFINED, CLASSIFIED AND DISTINGUISHED.

§ 1. **Corporation defined.** — A corporation is, according to most authorities, defined to be a legal personality, created by law into a body corporate for the purpose of carrying on some joint effort, which but for such creation of the legal personality could not be attained with the same facility by the ordinary co-operation of individuals. The general element of distinction between co-operations, in the nature of partnership and joint stock companies, on the one hand, and corporations on the other, is the fact that a legal personality stands between the co-operators and parties dealing with them, as the possessor of the joint rights and the obligor of the joint liabilities in which they are mutually interested. This legal personality, thus created, remains unchanged and immutable throughout the entire period of time during which it was intended to exist, unaffected by the constant change of the individuals, who composed the stockholders, and who are recognized in the corporation. This element of stability in the corporation itself is the chief value of incorporation.

Chief Justice Marshall's description of a corporation has been frequently cited and quoted, and the happiness of his language makes it always of value in this connection. He describes a corporation as follows:—"A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the law, it

possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed to be best calculated to effect the object for which it is created. Among the most important are immortality (in the legal sense that it may be made capable of indefinite duration), and, if the expression may be allowed, individuality,—properties by which a perpetual succession of many persons are considered as the same, and may act as a single, individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacy, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities that corporations were invented and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object like one immortal being."[1] The ordinary description of a corporation, as in Chief Justice Marshall's definition, as a legal person has been more than once criticised as chimerical and unfounded;[2] but it seems to me that the objection to such a description of a corporation will be altogether removed, if instead of legal person we read legal personality. For while no *person* has been created by the act of incorporation, distinct and separate from the incorporators, yet there can be no doubt that the persons who compose the corporation have by the act of incorporation had given to their union a distinct *legal personality*, which the law does recognize as having a legal existence, separate and apart from the legal status of the members of such corporation.

§ 2. **Public and private corporations distinguished.**—The

[1] Dartmouth College v. Woodward, 4 Wheat. 636; 4 Black. Com. 37; 7 Vin. Abr. 358, 363. Blackstone describes the peculiar feature of incorporation as the ability to continue unchanged by the kaleidoscopic changes in the persons composing the corporation. "All of the individual members," present and future, "are but one person in law,—a person that never dies, in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant." 1 Black. Com. 468; Proprietors, etc. v. Inhabitants of Ipswich, (Mass. 91) 26 N. E. R. 239; see also Heller v. Stremmel, 52 Mo. 309; State v. Leffingwell, 54 Mo. 458, 471; Downing v. Board, 129 Ind. 43; Mills v. Williams, 11 Ired. L. 558.

[2] Morawetz Private Corp. § 1, 227.

fundamental division of corporations is into *public* and *private*. Before distinguishing the two, it may be well to observe, that the terms *public* and *private* are used in the comparative sense, in describing the character of the interest created by the act of incorporation in the parties composing such corporation, and also the character of the parties who do compose it. In one sense, it may be said that all corporations are public, inasmuch as no actual incorporation is ever made without presumptively considering the incidental promotion of the public welfare or the public good. The very act of incorporation, even of a strictly private corporation, is alleged to rest for its justification upon the public good, which is promoted in the creation of it, it matters not how strictly private the interests in such corporation may be. But this is not the sense in which the terms *public* and *private* are employed in this connection. Here, as already stated, they distinguish corporations from each other, in the first instance, by the difference in the character of the persons who compose the corporation and the nature of the rights created by such incorporation.[1] A private corporation is one which is created for the purpose of enabling private persons in their private capacity to attain some end which cannot be conveniently attained without incorporation, and for their own benefit; although in connection with such private benefit there may be, and usually is likewise some public benefit flowing from the proposed incorporation. In the case of private corporations, the consent of the incorporators is necessary to its creation, but when assented to, according to the decision of the Supreme Court of the United States in the Dartmouth College case, a contract is created between the legislature representing the government, and the incorporators, which is protected by the provisions of the constitution of the United States, which declares that "no state shall pass any law impairing the obligation of a contract;" and that therefore such contract can in no wise be interfered with or repealed by subsequent legislation, unless the power to so interfere with the franchise thus created is expressly reserved, except in the exercise of the right of eminent domain.[2]

[1] Guest v. Water Co., (Pa. 91) 21 Atl. R. 1001; Downing v. Board, 129 Ind. 443.

[2] Dartmouth Col. v. Woodward, 4 Wheat. 518. See Tiedeman, Private Corporations.

Public corporations, on the other hand, include municipal corporations, and are not the result of any contract between the incorporators and the state, and are not created for the purpose of vesting in the incorporators, as private individuals, any peculiar rights or privileges. The object is invariably and solely the provision for the satisfaction of some peculiar want, and the rendition of some peculiar service to the community, which is included within the so called public corporation. The public corporation is created for the purpose of receiving a share in the management or conduct of the local government, or in the undertaking of measures that are needed for the promotion of the public welfare or the satisfaction of public wants. And while the state may, and in the case of municipal corporations usually does, obtain the consent of the community, which is to be included within the proposed public corporation, yet such consent is not necessary, and the corporation may be imposed upon such people against their will. There is no compact or contract between the incorporators and the government, which falls within the protection of the constitutional provisions, prohibiting the passing of laws by the State impairing the obligation of a contract. On the contrary, the charters of public corporations are subject in very large measure to the almost unrestricted control of the legislature, and may be modified, enlarged or diminished, as to powers and extent of territory, according to the pleasure of the legislature.[1] This, of

[1] Columbus v. Columbus, (Wis. 92) 52 N. W. R. 425; Penobscot B. Cor. v. Lawson, 16 Me. 224; Yarmouth v. North Yarmouth, 34 Ib. 411; State v. Kolsen, (Ind. 92) 29 N. E. R. 595; Merriwether v. Garrett, 102 U. S. 472; Berlin v. Gorham, 34 N. H. 266; Philadelphia v. Field, 58 Pa. St. 320; Savings Society v. Philadelphia, 31 Ib. 175, 185; Sinton v. Carter, 23 Fed. R. 535; Philadelphia v. Fox, 64 Pa. St. 169; State v. Atkinson, 107 N. C. 317; State v. Denny, (Wash. 92) 29 Pac. R. 991; North Yarmouth v. Skillings, 45 Me. 133; Pickles v. Dry Dock Co., 38 La. An. 412; Grogan v. San Francisco, 18 Cal. 590; Girard v. Philadelphia, 7 Wall. 1; Richmond v. Richmond etc. Co., 21 Gratt. (Va.) 604; United States v. Railroad Co., 17 Wall. 322; Darlington v. Mayor, 31 N. Y. 164; *In re* Millville Bor., 10 Pa. Co. Ct. R. 321; Philadelphia v. Fox, 64 Pa. St. 169; Cheaney v. Hooser, 9 B. Mon. 330; Mobile v. Watson, 116 U. S. 289; Patterson v. Society etc., 24 N. J. L. 385; Jersey City v. Railroad Co., 24 N. J. Eq. 360; Allen v. McKean, 1 Sumner, 276; Dartmouth Col. v. Woodward, 4 Wheat. 518; Erie v. Flint, 8 Pa. Co. Ct. R. 482; State v. Wall, 47 Ohio St. 499; Board v. Davises, 1 Wash. St. 290; *In re* Malone's Estate, 21 S. C. 435; Morris v. State, 62 Tex. 728, 174; Blanding v. Burr, 13 Cal. 343; David

course, is only a general statement in regard to the legislative control of public corporations, which will be more fully and more explicitly explained in the next chapter.[1]

§ 3. **Public and municipal corporations distinguished.**— The term *public corporation* is used here and properly as a term of generic signification, and may be classed as synonymous with

v. Portland Water Comm'rs, 14 Oreg. 98; Portland & W. V. R. R. Co. v. Portland, 14 Oreg. 188; Nichol v. Mayor, etc., 9 Humph. 252; Creighton v. San Francisco, 42 Cal. 446; Lutz v. Crawfordsville, 109 Ind. 466; Wood v. Oxford, 97 N. C. 227; Lucas v. Tippecanoe Co., 44 Ind. 524; Snook v. Georgia Co., (Ga. 88) 9 S. E. R. 1104; Demarest v. New York, 74 N. Y. 161; Cornell v. People, 107 Ill. 372; Burns v. Clarion County, 62 Pa. St. 351; Durach's Appeal, 62 Pa. St. 491; Clinton v. Railroad Co., 24 Iowa, 455; San Francisco v. Canavan, 42 Cal. 541; New Orleans v. Hoyle, 23 La. An. 740; Amite City v. Clements, 24 La. An. 27; 21 Am. Law Review, 14; Jersey City v. Railroad Co., 20 N. J. Eq. 360; State v. Fuller, 5 Vroom (34 N. J. L.) 227; Patterson v. Society, etc., 4 Zabr. (24 N. J. L.) 385; Montclair v. Railroad Co., 18 Atl. R. 242; 45 N. J. E. 436; Lloyd v. Mayor etc. of New York, 5 N. Y. (1 Seld.) 369; Lowber v. Same, 7 Abb. Pr. R. 248; Green v. Same, 5 Abb. Pr. R. 503; Rundle v. Del. etc. Canal Co., 1 Wall. Jr. 275; s. c., 14 How. 80; Tinsman v. Railroad Co., 2 Dutch. (N. J.) 148; Brooks v. Fisher, 21 Pac. R. 652; 79 Cal. 173; Aurora v. West, 9 Ind. 74; Plymouth v. Jackson, 15 Pa. St. 44; Louisville v. Commonwealth, 1 Duvall (Ky.) 295; People v. Morris, 13 Wend. 325; Armstrong v. Comm., 4 Blackf. (Ind.) 208; Murphy v. Louisville, 9 Bush (Ky.) 189; O'Hara v. Portland, 3 Oreg. 425; Purdy v. People, 4 Hill (N. Y.) 385; Morey v. Newfane, 8 Barb. 645; State, etc. v. St. Louis Co. Ct., 34 Mo. 546; Gray v. Brooklyn, 10 Abb. (N. Y.) Pr. Rep., N. S. 186; State v. Hundelhausen, 26 Wis. 432; Sangamon Co. v. Springfield, 63 Ill. 66; State v. Mayor, R. M. Charlt. (Ga.) 250; Richmond County v. Lawrence, 12 Ill. 8; Tinsman v. Railroad Company, 2 Dutch. (N. J.) 148; Marietta v. Fearing, 4 Ohio, 427; School Dist., *In re*, 10 Pa. Co. Ct. R. 588 (92 Pa.); see, also, People v. Wren, 4 Scam. (Ill.) 273; Martin v. Dix, 52 Miss. 53; Bush v. Shipman, 4 Scam. (5 Ill.) 190; Holliday v. People, 5 Gilm. (10 Ill.) 216; State v. Brannin, 3 Zabr. (23 N. J. L.) 485; Rader v. Road Dist., 7 Vroom (36 N. J. L.) 273; Coles v. Madison County, Breese (Ill.) 120; C. & A. R. R. Co. v. Adler, 56 Ill. 344; People v. Detroit, 28 Mich. 228; s. c., 15 Am. Rep. 202; New Orleans, etc. Co. v. New Orleans, 26 La. An. 517; Laramie County v. Albany County, 92 U. S. 307; State Bank v. Knoop, 16 How. (U. S.) 369; Dunsmore's Appeal, 52 Pa. St. 374; People v. Hill, 7 Cal. 97; United States v. Baltimore & Ohio Railroad Co., 17 Wall. 322; State v. St. Louis County Court, 34 Mo. 546; Hagerstown v. Schuer, 37 Md. 180; Barnes v. District of Columbia, 91 U. S. 540; State v. Jennings, 27 Ark. 419; People v. Tweed, 63 N. Y. 202; Langworthy v. Dubuque, 16 Iowa, 271; Blessing v. Galveston, 42 Tex. 641. Notwithstanding this lengthy list of citations, it is not exhaustive; this proposition of constitutional law has been confirmed by every court in the country, and needs no further corroboration.

[1] See *post*, chap. II.

civil corporation. It is also, however improperly, used as synonymous with municipal corporations.[1] But there is unquestionably a just ground for distinguishing between municipal corporations on the one hand, and other public corporations on the other. The municipal corporation is, as its name implies, an incorporation, or body politic, created by the act of law as an instrument of government over a particular community, and over the people located there. A municipal corporation is, in the first instance, charged with the exercise of all the powers and the performance of all the duties which are strictly local or municipal in their nature, and which are of peculiar interest to the local community. They are incorporated for the purpose of giving to such a community the peculiar facilities, for carrying on or conducting its local affairs, which a private corporation acquires by incorporation over the voluntary union or combination of individuals.[2] We may, therefore, define a municipal corporation, in its historical and strict sense, to be the incorporation, by the authority of the government, of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation, with respect to their local and internal concerns. This power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper.[3] As thus defined, the municipal corporation is to be distinguished from other public corporations, like counties on the one hand, and school districts on the other. The municipal corporation is to be distinguished from counties and other subdivisions of the state, in that the county is not a legal personality in whose hands is intrusted a share of the administration of the government, but simply a territorial subdivision of the state government and subject to the essential control of such state government, in the administration of all of its affairs. Thus, for example, a court will declare that a county is not liable, independently of modern statutory modifications, in damages to one who has suffered an injury from the wrongful official conduct of the county officers. Even independently of any

[1] Curry v. District Township, 62 Iowa. 102; Dowlan v. County of Sibley, 36 Minn. 430; Downing v. Board, 129 Ind. 443.

[2] 2 Bouv. Dict. 21; People v. Morris, 13 Wend. 325.

[3] Dillon's Commentaries on the Law of Municipal Corporations, § 20.

special statutory provision, the municipal corporation is held liable.[1] In one case, a distinction has been made between counties and other subdivisions of the state government, and the municipal corporation strictly so called, on the ground that the municipal corporation proper rests upon the consent of the incorporators: "Municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the persons composing them, for the promotion of their own local and private advantage and convenience." On the other hand, "Counties are at most but local organizations, which, for the purposes of civil administration, are invested with a few functions characteristic of a corporate existence. They are local subdivisions of the state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former (municipal) organization is asked for, or at least assented to, by the people it embraces; the latter organization (counties) is superimposed by a sovereign and paramount authority."[2] But, as has already been explained, the municipal corporation does not always rest upon such consent; and may be created in the face of the opposition of the people occupying the territory, which is included within its limits. Unquestionably, it is the fact, that, ordinarily, municipal corporations are formed, only when the people living in the community desire such incorporation. And this is particularly the case, where cities and towns secure incorporation under general laws, instead of by special charter. But the main distinction, and the only reliable one, between public corporations, like counties, and municipal corporations proper, is the absence in the one case of an incorporation and its presence in the other. Indeed, counties are not properly denominated corporations. They are at the most only *quasi* corporations, with considerable emphasis on the prefix.

[1] Flora v. Naney, 31 Ill. App. 493; Hamilton v. Mighels, 7 Ohio St. 109; Pulaski Co. v. Reeve, 42 Ark. 55; Wehn v. Gage Co., 5 Neb. 494; McDonald v. Ashland, (Wis. 92) 47 N. W. R. 434; Treadwell v. Com'rs, 11 Ohio St. 190; Soper Co. v. Henry Co., 26 Iowa, 264; Haniford v. Kansas City, 103 Mo. 172; Askew v. Hale Co., 54 Ala. 139; State v. Leffingwell, 54 Mo. 458; see *post*, §§ 314, 315.

[2] Hamilton Co. v. Mighels, 7 Ohio St. 109; see also Tolbot v. Queen Anne Co., 50 Md. 245.

On the other hand, municipal corporations may be distinguished from school districts and other like corporations, in the fact that the act of incorporation, in the latter cases, only involves the creation of corporations with limited powers. The school district in most of the states is incorporated, and is given some of the powers and characteristics of corporations in general; but inasmuch as the ordinary powers of a corporation are not given to such incorporations, they are called *quasi* corporations, for the purpose of indicating the limited character of the body corporate. School districts have only the public powers which are expressly granted to them in the statutes under which they are created. On account of the limited character of the powers of these so-called *quasi* corporations, it is necessary to distinguish them from municipal corporations. It is also for this reason that, as a general rule, school districts are not included within the provisions of statutes, which provide for the control of municipal corporations.[1]

There is still another distinction between municipal corporations and these *quasi* corporations, in regard to their liability to persons injured by the negligence of the officers. Thus, a school district is held to be free from liability for the trespass committed by its officers.[2] But in the case of a municipal corporation, the courts have held that the individuals, who compose the community within the jurisdiction of the municipal corporation, enter into and become parties to all the acts of the municipal government, or of the officers of such municipal corporation, and are liable to all parties who may be injured or wronged by the wrongful acts of these officers. The same element is found to enter into the characterization of the private corporation.[3] Indeed, in respect to more than one feature of the municipal corporation, it may be declared to have both a public and a private character; and in respect to some rights and some privileges, such corporation does have the protection against legislative interference, as in the case of rights of prop-

[1] *In re* School District, 10 Pa. Co. Ct. R. 588 (Pa. 92); School District v. Williams, 38 Ark. 454; Norton v. Peck, 3 Wis. 714; Eaton v. Manitowoc, 44 Wis. 489.

[2] Bank v. Brainerd, (Minn. 92) 51 N. W. R. 814; Enfield v. Jordan, 119 U. S. 680; Martin v. People, 87 Ill. 524.

[3] Union Township v. Gibboney, 94 Pa. St. 534; Heller v. Stremmel, 52 Mo. 309; Hannon v. St. Louis County, 62 Mo. 313, 316; State v. Leffingwell, 54 Ib. 458, 471.

erty, which the private corporation fully enjoys.[1] In conclusion, it may be stated that the distinctions, which have just been made between counties and other subdivisions of the state, and municipal corporations on the one hand, and between *quasi* corporations, like school districts, and municipal corporations, on the other, generally remain in force, unaffected by statutory modification; but they may be, and in fact are often materially changed by the provisions of state statutes. Thus, for example, in determining whether a county is liable in damages for the wrongful acts of its officials, the general rule is abolished in some of the states, and the counter rule established by statute, as in the state of Pennsylvania. But in so much as these characteristics of the municipal corporation are given by statute to counties and other territorial subdivisions of a state, these subdivisions of the state are essentially converted by such legislation into municipal corporations, and would therefore fall strictly within the provisions of this book. It is really a confusion of ideas and principles to give the name of corporation to a county or other territorial subdivision of the state, which is not in any sense a municipal corporation.

§ 4. **The New England town.**—In this connection a special reference should be made, for the purpose of distinguishing them from municipal corporations in general, to the New England town, which is a peculiar institution of government, partaking somewhat of the characteristics of counties and other subdivisions of the state government, and, at the same time, having some of the characteristics of the municipal corporation. As it originally obtained, the New England town differs very little in its legal character from the county. But in the course of the development of public affairs in New England, statutes have been passed, regulating the character of the New England town, and giving to such town certain powers and duties, approximating in many ways to the character of an incorporated city. But, still, the New England towns are not strictly municipal corporations even under the regulating statutes; they are more like the school districts, resembling them in the fact that their powers are limited, and that they do not possess all

[1] People v. Detroit, 28 Mich. 228; s. c., 15 Am. Rep. 202, ch. II. secs. 11-15.

the powers which are generally vested in a municipal corporation, or incorporated cities.[1]

Of course, there are peculiar characteristics of the New England town, such as the town meeting, which distinguish such a town from municipal corporations in general, but that feature is not a legal distinction, and therefore no attempt is made here to give an explanation of it. In concluding this reference to the New England town, a quotation will be added from an opinion of Chief Justice Perley of the Supreme Court of New Hampshire: "It is to be observed that municipal corporations in England are broadly distinguished in many important respects from towns in this and the other New England states. There is no uniformity in the powers and duties of English municipal corporations. They were not created and established under any general public law, but the powers and duties of each municipality depended upon its own individual grant or prescription. Their corporate franchises were held of the crown by the tenure of performing the conditions upon which they had been granted, and were liable to forfeiture for breaches of the condition. They indeed answered certain public purposes, as private corporations do which have public duties to perform, and some of them exercised political rights. But they are not like towns (with us), general political and territorial divisions of the county, with uniform powers and duties, defined and varied, from time to time, by general legislation. Towns (in New England) do not hold their powers ordinarily under any grant from the government to the individual corporation; or by virtue of any contract with the government, or upon any condition express or implied. They give assent in their corporate capacity to the laws which

[1] "Towns in Connecticut, as in the other New England states, differ from trading companies, and even from municipal corporations elsewhere. They are territorial corporations, into which the state is divided by the legislature, from time to time, at its discretion, for political purposes and the convenient administration of government; they have those powers only which have been expressly conferred upon them by statute, or which are necessary for conducting municipal affairs; and all the inhabitants of the town are members of the quasi corporation." *Per* Gray, J., Bloomfield v. Charter Oak Bank, 121 U. S. 121; citing 1 Swift's System, 116, 117; Granby v. Thurston, 23 Conn. 416; Webster v. Harwinton, 32 Conn. 131; Dillon, Mun. Corp., secs. 28-30.

impose their public duties or fix their territorial limits." And referring to the case then before the court, the chief justice added: "In all that is material to the present inquiry, municipal corporations in England bear much less resemblance to towns in this country than to private corporations which are charged with the performance of public duties; and for these reasons, the English authorities on the subject are but remotely applicable to the present case." [1]

§ 5. **The state and federal government as a quasi corporation.**—It is undeniable that the government of a state is a body politic, inasmuch as it constitutes the representative of an organic body or community. It has some of the characteristics of a corporation, such as the right to make contracts, but under the provision of the eleventh amendment of the constitution of the United States, a state cannot be sued without its consent; [2] and although it is becoming a very common custom for states, as well as the United States, to provide for suits against themselves often in a specially constituted court; yet the permission, thus granted to others to institute suits against such a state, may itself be withdrawn at the pleasure of the state.[3] But the state is, however, so far treated by the courts as a body politic or *quasi* corporation, as that such state may sue as plaintiff in all courts, both state and federal.[4] So, also, may suits be instituted between states; but in that case the Supreme Court of the United States has alone original jurisdiction.[5] In this same limited sense, the governor may be treated as a *quasi* corpora-

[1] Eastman v. Meredith, 36 N. H. 284, 290; see Hill v. Boston, 122 Mass. 344; Dill v. Wareham, 3 Met. 438; Norton v. Mansfield, 16 Mass. 48; Stetson v. Kempton, 13 Ib. 272; Minot v. West Roxbury, 112 Ib. 1; 17 Am. Rep. 52; Vincent v. Nantucket, 12 Cush. 105; Parsons v. Goshen, 11 Pick. 396; Anthony v. Adams, 1 Met. 284; Granby v. Thurston, 23 Conn. 416; Bloomfield v. Bank, 121 U. S. 121.

[2] Galbes v. Girard, 46 Fed. R. 500; People v. Carner, 59 Hun, 299; Penneyer v. McConnaughey, 140 U. S. 1; Briscoe v. Bank, 11 Pet. 257, 321; see article by A. H. Wintersteen in 30 Am. L. Reg. (N. S.) 1.

[3] People v. Carner, 59 Hun, 299; Beers v. Arkansas, 20 How. 527; Kentucky v. Dennison, 24 Ib. 66; State v. Trustees, 5 Ind. 77; Dodd v. Miller, 14 Ib. 433; Wisconsin v. Duluth, 2 Dillon C. C. 406.

[4] Murdock v. Com., 152 Mass. 28; State v. Evans, 33 S. C. 184; Indiana v. Woram, 6 Hill (N. Y.) 33; People v. Assessors, 1 Hill (N. Y.) 620; State v. Delesdenier, 7 Tex. 76.

[5] Kentucky v. Dennison, 24 How. 66; Wisconsin v. Duluth, 2 Dillon C. C. 406.

tion sole, and become party as such to contracts made with him in his official capacity, for the benefit of others, as where bonds have been made payable to him for the benefit of other parties.[1]

[1] Governor v. Allen, 8 Humph. 176; Governor v. Plummer, 2 Humph. 500.

CHAPTER II.

LEGISLATIVE CONTROL OVER MUNICIPAL CORPORATIONS, HOW FAR LIMITED.

§ 8. **General statement as to legislative power.**—In a previous paragraph, it has been explained, as one of the principal distinctions between public and private corporations, that the charter of a private corporation constitutes a contract between the state and the incorporators, which is protected by the constitutional provision which prohibits the passing of laws by states impairing the obligation of a contract.[1] Where, as in the case of a public or municipal corporation, the charter or act of incorporation is not such a contract between the state and the community which has thus been created, as that it would fall within the protection of this constitutional provision, such charter and charter rights remain still subject to the unlimited control of the state government; and may be repealed, enlarged, or diminished, as to the scope of its powers and its rights, or of its territory, without the consent of the parties who compose the community.[2] And the extent of this legislative control over

[1] See *ante*, sec. 2.

[2] New Orleans v. New Orleans W. W. Co., 142 U. S. 79; State v. Kolsem, 29 N. E. 595; Smith v. People, 29 N. E. 676; *In re* Strand, 21 Pac. R. 654; State v. Babcock, 25 Neb. 709; Quincy v. O'Brien, 24 Ill. App. 591; Essex Pub. Road v. Skinkle, 140 U. S. 334; Maddrey v. Cox, 73 Tex. 538; *In re* Canal St., (R. I. 93) 25 Atl. R. 975; Richmond v. Ry. Co., 21 Gratt. 604; Muskegon v. Dow, (Mich. 93) 54 N. W. R. 170; Com. v. MacFerron, (Pa. 93) 25 Atl. R. 556; Tillotson v. East Sagi-

public or municipal corporations is in no wise affected by the fact, that the charter of the municipal corporation is created by the same legislative act which creates a private corporation.[1]

§ 9. **Legislative power not unlimited—Public and private character of municipal corporations distinguished.**—Notwithstanding the general proposition, and popular belief, that a municipal corporation is subject to the uncontrolled and unlimited exercise of power by the state, that is not the case. A municipal corporation certainly occupies a very different position from the private corporation, in respect to the power of the legislative control over such corporation, at least in regard to a large part of its powers. But in order to determine how far the state government may interfere with the municipal corporation, either as to its existence as a body corporate, or as to its

naw, 54 N. W. R. 162; Murphy v. Louisville, 9 Bush. 189; Lloyd v. Mayor, etc. of New York, 5 N. Y. 369; People v. Detroit, 28 Mich. 228; State Bank v. Knoop, 16 How. (U. S.) 369; State v. Mayor, 24 Ala. 701; State v. Mayor, R. M. Charlt. (Ga.) 250; Dunsmore's Appeal, 52 Pa. St. 374; Sangamon Co. v. Springfield, 63 Ill. 66; Darlington v. Mayor etc. of New York, 31 N. Y. 164; Savings Fund Society v. Philadelphia, 31 Pa. St. 175, 185; Philadelphia v. Fox, 64 Pa. St. 169; Lowber v. N. Y., 7 Abb. Pr. R. 248; Green v. N. Y., 5 Abb. Pr. R. 503; Gleason v. Cleveland, (Ohio 93) 31 N. E. 802; Buford v. State, 72 Tex. 182; *In re* House Bill, 12 Colo. 289; Aurora v. West, 9 Ind. 74; Plymouth v. Jackson, 15 Pa. St. 44; Louisville v. Com., 1 Duvall (Ky.) 295; Emporia v. Smith, 22 Pac. R. 616 (Kan. 88); Davies v. Los Angeles, 86 Cal. 37; Greensburg v. Laird, 8 Pa. Co. Ct. 608; O'Hara v. Portland, 3 Oreg. 525; Gray v. Brooklyn, 10 Abb. (N. Y.) Pr. Rep., N. S. 186; Nalle v. Austin, (Tex. 93) 21 S. W. R. 375; Platte Co. v. Dowell, 30 Pac. R. 68; Jackson v. Walsh, (Md. 92) 23 Atl. R. 778; Morey v. Newfane, 8 Barb. 645; Philadelphia v. Field, 58 Pa. St. 320; Erie v. Canal, 59 Pa. St. 174; Smith v. People, 29 N. E. R. 676; New Orleans v. Hoyle, 23 La. An. 740; Amite City v. Clements, 24 La. An. 27; State v. Forrest Co., 43 N. W. R. 551; Com. v. Brenham, 22 N. E. R. 628; Tinsman v. Railroad Company, 2 Dutch. (N. J.) 148; Atty. Gen. v. Hatch, 60 Mich. 229; Ruohs v. Athens, (Tenn. 92) 18 S. W. R. 400; Downing v. Indiana etc. Co., 129 Ind. 443; C. & A. R. R. Co. v. Adler, 56 Ill. 344; Richland Co. v. Lawrence, 12 Ill. 8; State etc. v. St. Louis County Court, 34 Mo. 546; Purdy v. People, 4 Hill (N. Y.) 385; Creighton v. San Francisco, 42 Cal. 446; Lucas v. Tippecanoe Co., 44 Ind. 524; Burns v. Clarion County, 62 Pa. St. 351; see also Martin v. Dix, 52 Miss. 58; People v. Wren, 4 Scam. (Ill.) 273; New Orleans etc. Co. v. New Orleans, 26 La. An. 517; People v. Detroit, 28 Mich. 228; Coles v. Madison, Breese (Ill.) 120.

[1] Patterson v. Society etc., 24 N. J. L. 385; see Baltimore v. Board of Police, 15 Md. 376; Luehrman v. Taxing District, 2 Lea (Tenn.) 425.

rights, a closer investigation is required into the actual condition of things which lead up to the incorporation of a municipality. What the legislator does in the way of the creation of a body corporate, is certainly subject to change and modification by the same power which creates it. But what the legislator does not create by such act of incorporation, and which exists independently of the legislative action, is something which the legislator by no act can dispose of or destroy. The legislator does not create the community which is incorporated by the legislative act, he simply gives to a community already existent a legal personality, which it cannot have independently of such legislative act. This legal personality is the sole creation of the legislator. Under the decisions of the courts heretofore cited, there can be no question that this act of incorporation of a city or town may at any time be repealed, or the corporation dissolved. But what is the effect of a repeal of a municipal charter upon the substantial possession and rights of the municipality or community is an altogether different question. Subject to some criticism and objection on the part of a few authorities,[1] a limitation upon the legislative power of control has been adopted by the current decisions, which is made to rest upon the recognized dual character of a municipal corporation. If a municipal corporation had in every particular the same public character, which belongs to the township or county, and it constituted simply a subdivision of the state government, as such counties and townships do, no distinction would be possible between these classes of governmental organizations and the municipal corporation. But the existence of a municipal corporation is called forth by the peculiar needs of a compactly settled community, and the development, under the peculiar conditions of such community, of local rights and in-

[1] Darlington v. Mayor, etc., 31 N. Y. 164 (1865); Philadelphia v. Fox, 64 Pa. St. 160, 180, 181, *per* Sharswood, J., who giving the judgment of the court says: "A municipal corporation is merely an agency of government fully subject to the control of the legislature, who may enlarge or diminish its territorial extent, or its functions, may change or modify its internal arrangement, or destroy its very existence, with the mere breath of arbitrary discretion. . . The sovereign may continue its (the city's) corporate existence, and yet assume and resume the appointments of all of its officers and agents into its own hands; for the power which can create and destroy can modify and change."

terests, in which the state at large has no special concern, and which are of strictly local value.[1] On the other hand, the municipality is likewise vested with the right, and the duty is imposed upon it, of carrying on the local administration of public powers, which otherwise would be intrusted to the county or town organization. Its public duties can be performed quite as readily by a local organization which is not incorporated; and the powers are conferred upon the municipal corporation simply as a matter of public convenience, and not as one of necessity. In fact, the incorporation of a city or town is called forth by the local needs of the community, and its existence depends upon such incorporation to satisfy such local wants. "The proposition which asserts the amplitude of legislative control over municipal corporations, when confined, as it should be, to such corporations as agencies of the state in its government, is entirely sound. They are not created exclusively for that purpose, but have other objects and purposes peculiarly local, and in which the state at large, except in conferring the power and regulating its exercise, is legally no more concerned than it is in the individual and private concerns of its several citizens. Indeed, it would be easy to show that it is not from the standpoint of state interest, but from that of local interest, that the necessity of incorporating cities and villages most distinctly appears. State duties of a local nature can for the most part be very well performed through the usual township and county organizations. It is because, where an urban population is collected, many things are necessary for their comfort and protection which are not needed in the country, that the state is then called upon to confer large powers and to make the locality a subordinate commonwealth."[2] In regard to the powers and property which are vested in a municipal corporation in its public character, as a branch of the state government, there can be no limit to the control of such corporation by the state. But where the municipal corporation, as it always does, by virtue of its existence as a legal personality, acquires the rights of property of a private character for the benefit of the community which has been

[1] For example Public Parks: State v. Schweickardt, 19 S. W. R. 47.

[2] Opinion of Judge Cooley in People v. Detroit, 28 Mich. 228. See also Underhill v. Essex, (Vt.) 23 Atl. Rep. 617; State v. Lamoureux, 30 Pac. Rep. 243.

incorporated, and in the enjoyment of which the state at large is not concerned, these propriety rights constitute in the constitutional sense vested rights, if not of the municipal corporation itself, yet of the community which has been incorporated, which cannot be diverted or taken away by legislative action. In respect to these semi-private rights the legislative control is not unlimited.[1]

§ 10. **Effect of repeal or dissolution.**—In order to properly appreciate the difficulty and importance of this distinction between the public and private character of a municipal corporation, reference should be made to the effect of a repeal or dissolution of the charter of a municipal corporation. That the state may repeal or otherwise materially change the charter of the municipal corporation, there can be no question. Not only is it possible for the state or law-making power to simply modify or change the charter by enlargement or diminution of the powers or the territory of the corporation; but it may also destroy the corporation altogether, substitute another in its place, or provide for the government of the community in some other way than by a municipal corporation. The United

[1] Downing v. Indianapolis, etc., Co., 151 Mass. 364; Cary Library v. Bliss, 151 Mass. 364; Wellington v. Wellington, 26 Pac. Rep. 415; Louisville v. Commonwealth, 1 Duvall (Ky.) 295; Weightman v. Washington, 1 Black. (U. S.) 39; Franklin Co. Gram. Sch. v. Bailey, 62 Vt. 467; Reading v. Commonwealth, 11 Pa. St. 196; People v. Briggs, 50 N. Y. 553, 560; People v. Field, 58 N. Y. 491; People v. Ingersoll, 58 N. Y. 1; Nichol v. Nashville, 9 Humph. 252; Small v. Danville, 51 Me. 359; West Sav. Fund Soc. v. Philadelphia, 31 Pa. St. 175; Ib. 185; Bailey v. Mayor, etc., of New York, 3 Hill, 531; Richmond v. Long's Admr., 17 Gratt. (Va.) 375; De Voss v. Richmond, 18 Gratt. 338; s. c., 7 Am. Law Reg., N. S. 589; People v. Hurlbut, 24 Mich. 44; s. c., 9 Am. Rep. 103; People v. Detroit, 28 Mich. 228; s. c., 15 Am. Rep. 202; Martin v. Mayor, etc., 1 Hill, 545; Buttrick v. Lowell, 1 Allen, 172; Oliver v. Worcester, 102 Mass. 489; Askweth v. Hale Co., 54 Ala. 639; Detroit v. Corey, 9 Mich. 165, 184; New Orleans, etc., R. R. Co. v. New Orleans, 26 La. An. 478, 517; Jones v. New Haven, 34 Conn. 1; United States v. Baltimore & Ohio Railroad Company, 17 Wall. 332; *In re* Malone's Estate, 21 S. C. 435; Niles Water Works v. Niles, 59 Mich. 311; Western College v. Cleveland, 12 Ohio St. 375; State v. Schweeckart, 19 S. W. R. 47; Weet v. Brockport, 16 N. Y. 161; Louisville v. University of Louisville, 15 B. Mon. 642; Touchard v. Touchard, 5 Cal. 306; Gas Co. v. San Francisco, 9 Cal. 453; Commissioners v. Duckett, 20 Md. 468; Cummings v. City of St. Louis, 2 S. W. R. 130; 90 Mo. 259; Scranton v. White, 23 Atl. R. 1043; 30 W. N. C. 74.

States government has exercised this power for many years past in regard to the city of Washington, the capital of the country. But, as just stated, the legislature, or law-making power simply creates this legal personality which we call the municipal corporation; but it neither creates nor can destroy the community which goes to make up the city or town, and which continues to exist independently of all legislative action whatever. The legislature of New York has done nothing by enactment to create the metropolis which occupies the Island of Manhattan; and, on the other hand, it can do nothing to destroy such a community, even though the present government may be taken away altogether. Now, in order to appreciate the effect of a repeal or dissolution of a municipal charter, reference by analogy should be made to the effect of a repeal or dissolution of a private corporation, where the power to repeal such charter or dissolve the corporation has been reserved by special provision in the charter, or by the general laws under which private corporations are made. The doctrine is well established in regard to private corporations, that when the power to repeal the private charter has been reserved, the power of the legislature over such private corporation thus reserved is nevertheless not unlimited. While the corporation, as a legal entity, depends for its continued existence upon the legislative discretion; yet where the power of dissolution of such corporation is exercised by the state legislature, the dissolution of such corporation cannot in any way affect or impair the property or rights of property which the incorporators have created under their charter, or the rights of its creditors.[1] And the same rule has been applied to the rights of property of private corporations, which have been created through valid municipal grants.[2] The explanation of these cases is, that the individuals who com-

[1] Downing v. Indiana etc. Co., 129 Ind. 443; Mumma v. Potomac, 8 Pet. 285; People v. O'Brien Rec., 111 N. Y. 1; Schlieder v. Dielman, 10 So. R. 934; Fletcher v. Peck, 6 Cranch, 135; Detroit v. Plank Road, 43 Mich. 140; Sinking Fund Cases, 99 U. S. 700; Greenwood v. Freight Co., 105 Ib. 13.

[2] *In re* Brooklyn El. Ry. Co., 11 N. Y. S. 161; 57 Hun, 590; Sixth etc. Co. v. Kerr, 72 N. Y. 330; R. R. Co. v. Delaware, 114 U. S. 501; People v. O'Brien, *supra;* Langdon v. Mayor, 93 N. Y. 129; Davis v. Mayor, 14 Ib. 506; Mayor v. Second Ave. R. R. Co., 32 Ib. 261; Milhau v. Sharp, 327 Ib. 611; Western Pas. Co. v. R. R. Co., 26 N. E. R. 188; Cary Libr. v. Bliss, 151 Mass. 364.

pose the private corporation became the successors to all the rights, which the private corporation acquires upon the dissolution of such corporation. And no other theory can be properly applied to the rights of a municipal corporation, upon the dissolution of such municipal corporation.[1]

§ 11. **Legislative power over property of municipal corporations.**—In application of the distinction, heretofore made, between the public and private character of a municipal corporation, and the corresponding rights of the same, one is prepared to meet with the statement, that the legislature, as the trustee or representative of the public in general, has, or may assume, full control over the public property and the public rights of a municipal corporation. But without qualification, that statement cannot be taken without some possibility of error. It has, thus, for example, been held that the state may authorize a railroad company to occupy the street of a city, without the consent of such city, or without payment of any compensation to the city.[2] But such power is only one of control and regulation of the uses of such property, and the state cannot by any act divest the city of the use of its property or transfer such property to some nonmunicipal use.[3] But, in view of the distinction between public and private rights of municipal corporations, nothing can be done in the way of taking the private property of the city, for public use, without payment of compensation.[4] And, except in the case of the appropriation of private property of the said municipal corporation to public

[1] Brooklyn R. R. Co. v. Brooklyn City R. R. Co., 32 Barb. 264; Mayor etc. v. Second Ave. R. R. Co., 32 N. Y. 261; New Orleans W. W. Co. v. Rivers, 115 U. S. 674.

[2] *Post*, § 302.

[3] State v. Schweickart, 19 S. W. R. 47; State v. Wallace, 52 N. W. R. 213; Darlington v. Mayor, 31 N. Y. 164, 193, 205; People v. Ingersoll, 58 N. Y. 1; People v. O'Brien, 111 Ib. 1; N. O. W. W. Co. v. Rivers, 115 U. S. 674; Sinking Fund Cases, Ib. 700; Detroit v. Howell P. R. Co., 43 Mich. 140.

[4] Southampton v. Mecox Co., 116 N. Y. 1; Mayor etc. v. Hopkins, 13 La. An. 326; New Orleans etc. Co. v. New Orleans, 26 Ib. 517; Ib. 478; Mercer v. Railroad Co., 36 Pa. St. 99; People v. Kerr, 27 N. Y. 188; Louisville v. University of Louisville, 15 B. Mon. 642; Portland etc. Co. v. Portland, 14 Oreg. 188; Darlington v. Mayor, 31 N. Y. 164; Clinton v. R. R. Co., 24 Iowa, 455; Reynolds v. Stark Co., 5 Ohio, 204; 5 Ohio St. 113; Wellington v. Township, (Kan. 90) 26 Pac. R. 415; Reading v. Commonwealth, 11 Pa. St. 196; Cummings v. City of St. Louis, 2 S. W. R. 180; 90 Mo. 250; Mount Hope Cemetery v. Boston, (Mass. 93) 33 N. E. R. 695.

use, in the exercise of the right of eminent domain, there can never be any application or appropriation of such property to any other but a municipal use. Thus, for example, lands which have been acquired by a municipal corporation, by gift or purchase, are not subject to legislative appropriation.[1] And even in the regulation of the use of the property, the power of the legislator is not unlimited. Thus, it has been held in New York, that real estate which the city of New York owns in fee simple, is no more subject to legislative control than similar property rights of private individuals. And that an act of the legislature, which orders the destruction of a reservoir of the city, and the conversion of the ground upon which the reservoir is located into a park, without the consent of the city thereto, is an unlawful exercise of legislative authority, and cannot be permitted, except in accordance with the right of eminent domain; and, therefore, full compensation must be made to the city for such an appropriation of its property.[2]

§ 12. **Legislative power over revenues, including penalties and franchises.**—But a distinction is to be made between the property rights of a municipal corporation, either public or private, and the provisions made by state laws for the collection of revenue by the corporation. While the property, which a municipal corporation acquires in the exercise of its

[1] State v. Patterson, (N. J. 90) 20 Atl. R. 828; State v. Schweickert, 19 S. W. R. 47; People v. Vanderbilt, 26 N. Y. 324; Richmond Co. v. Lawrence, 12 Ill. 1; Bass v. Fontleroy, 11 Tex. 698-708; Hampshire v. Franklin, 16 Mass. 76; Cary v. Bliss, 151 Mass. 564.

[2] Webb v. Mayor etc. of New York, 64 How. Pr. Rep. 10. "I perceive," said Macomber, J., "no difference between the tenure of property thus held by the city and the proprietary rights of natural persons or private corporations. The privilege, however, is peculiar in this state to the city of New York. Nor is this property, with other real estate owned by the city, held in trust for any person; nor is it stamped with any mere political trust of which the city may be deprived, and thus its claim to the right to the possession of the property destroyed. The title to the land rests somewhere, and, as has been shown above, so far as the records extend, no one claims it except the city itself." The court did not hold that the protection here conceded to municipal property in New York city was not granted elsewhere. See also Dartmouth College Case, 4 Wheat. 694; Terret v. Taylor, 9 Cranch, 52; People v. Detroit, 28 Mich. 228; People v. Fields, 58 N. Y. 591; Bailey v. Mayor, 3 Hill, 531; People v. Ingersoll, 58 N. Y. 1; Cincinnati S. & C. R. Co. v. Village of Belle Centre, (Ohio, 9) 27 N. E. Rep. 464.

corporate powers, is protected from legislative interference as vested rights; yet in provisions of the law for the revenue of the city, in whatever form such provision may take, the city has no vested rights; and the legislature may at any time, as far as the municipal corporation itself is concerned, change and modify, or altogether take away the particular source of revenue.[1] The legislature's power over the revenue of the city is in no wise affected by the fact, that a particular purpose is mentioned for which the revenue in question has to be appropriated. Thus, for example, the legislature may repeal the power it gives to cities to grant licenses for the sale of intoxicating liquors, notwithstanding the fact that the money, collected from such licenses, is to be donated to the support of the paupers of the town.[2] So, also, may the legislature repeal a law, which gives to a municipal corporation the power to levy and collect wharfage from the private wharfs within its territorial limits, although there is no power in the legislature to divert or remit the proceeds accruing to the city from any wharf, which it may have created in the exercise of a franchise granted to it for the establishment of wharfs.[3] On the other hand, a franchise granted to a town to establish a ferry or a wharf, as long as it has not been exercised in the establishment or creation of either of them, does not constitute a vested right which will come within the protection of the constitutional provision. Such executory rights or franchises may be repealed

[1] Taylor v. Robinson, 72 Tex. 364; Anderson v. Mayfield, 19 S. W. Rep. 598; Tile v. Mayfield, 19 Ib. 598; McGee v. Salem, 149 Mass. 238; Board v. Com'rs, 107 N. C. 110; Northampton Co. v. Eastern etc. Ry. Co., 23 Atl. Rep. 895; Lucas v. Board, etc., 44 Ind. 524; Indianapolis v. Indianapolis, etc., 59 Ind. 215; Tyrrell v. Wheeler, 123 N. Y. 76; Youngs v. Hall, 9 Nev. 212; People v. Ingersoll, 58 N. Y. 1; Darst v. Griffin, (Neb. 90) 48 N. W. R. 819; Essex Board v. Skinkle, 140 U. S. 334; Carondelet Co. v. New Orleans, 10 So. R. 871; County v. State, 11 Ill. 202; County v. County, 12 Ill. 1; People v. Pratt, 129 N. Y. 68; Love v. Schenck, 12 Ired. Law, 304; People v. Fields, 58 N. Y. 491; Home Ins. Co. v. City Council, 93 U. S. 116.

[2] People v. Meyer, 5 N. Y. S. 69; Mendocino Co. v. Bank, 24 Pac. R. 1002; 86 Cal. 255; People v. Supervisors, 50 Cal. 361; Grantham v. State, 14 S. E. Rep. 892; Richland Co. v. Lawrence Co., 12 Ill. 1; People v. Power, 25 Ill. 187; Richmond v. Richmond, etc., Railroad Co., 21 Gratt. (Va.) 604; Spaulding v. Andover, 54 N. H. 38; Home Ins. Co. v. City Council, 93 U. S. 116; Sangamon Co. v. Springfield, 63 Ill. 71; Gutzweller v. People, 14 Ill. 142.

[3] St. Louis v. Shields, 52 Mo. 351.

by the legislature.[1] So, also, where a legislative grant directs a donation of lands to a city for certain public purpose, as long as such grant has not been performed or acted upon by the municipal corporation, it is not a contract which is inviolable; but it is an unexecuted donation, which may at any time be repealed by the legislature, prior to the actual purchase or transfer of such land to the city.[2] So, likewise, an authority, which is given to a municipal corporation, or to a county, to take the stock of railroad corporations and issue bonds therefor, upon the assent of the majority of the voters, does not constitute such a binding contract that the legislature cannot repeal such a law and prevent such a subscription of stock and issue of bonds, before an affirmative vote has been taken by the people of the county or town, or the subscription has been agreed to be made.[3]

It has also been held that laws, providing for the acquisition by a municipal corporation or county of penalties for the violation of law or the breach of a contract, do not constitute in any way a vested right in such county or town, which cannot be repealed or taken away, before the enforcement of such penalties, by legislative action. Thus, for example, in Maryland, a railroad company agreed to locate its road through three towns named, subject to a provision, that if it failed to perform that obligation it should forfeit $1,000,000 to the state of Maryland for the use of Washington county. It was held that a legislative act, which repealed that portion of the charter which imposed this penalty in favor of Washington county, took away from Washington county its right to enforce such penalty, and released the railroad company from its per-

[1] East Hartford v. Hartford Bridge Co., 10 How. 511; s. c., 16 Conn. 149; 17 Conn. 79; Sioux City R. R. Co. v. Sioux City, 43 N. W. R. 224; New Orleans v. Wolmot, 31 La. An. 65; Ellerman v. McNains, 30 La. An. 65; Darlington v. Mayor, 31 N. Y. 164, 202; Railroad Co. v. Ellerman, 105 U. S. 166; Trustees v. Tatman, 13 Ill. 30; Police Jury v. Shreveport, 5 La. An. 661.

[2] Richland Co. v. Lawrence Co., 12 Ill. 1; People v. Vanderbilt, 26 N. Y. 287; Hampshire v. Franklin, 16 Mass. 76; Bass v. Fontleroy, 26 N. Y. 287.

[3] State v. Meller, 67 Mo. 604; Shelby Co. v. Cumberland & C. R. R. Co., 8 Bush (Ky.) 299; People v. Coon, 25 Cal. 635; Union Pacific Railroad Co. v. Davis County, 6 Kan. 256; C. O. R. R. Co. v. Barren Co., 10 Bush (Ky.) 604; Concord v. Portsmouth Bank, 92 U. S. 625; Aspinwall v. County of Jo Daviess, 22 How. 364; Baltimore & D. P. Railroad Co. v. Pumphrey, (Md. 1891) 21 Atl. Rep. 559.

formance. The general rule is, that fines and penalties which are directed to be paid to public corporations in general are not vested rights of such corporation; but the law may at any time be repealed, or the fines and penalties released by the legislature, without the consent of the municipal corporation.[1] It has also been held that the same result is attained, where the executive officer exercises his power and releases the fines or penalties, which have been imposed by the courts for the commission of some crime.[2]

§ 13. **Legislative power over property held in trust.**—The fact, that a municipal corporation is charged with the administration of a trust for a public charity, or one involving private interests and rights, will not of itself be any obstacle in the way of any limitation or abolition of a municipal corporation, if such administration by the corporation is deemed to be for the public benefit. When the corporation has been dissolved, the Court of Chancery will assume the execution of the public trust, and appoint new trustees to take charge of such property and carry the trust into effect. This is not only the case, where a corporation has been destroyed, or its municipal character materially modified; but, also, whenever there is any fear of maladministration of the trust, or whenever the interest of the trust and its beneficiaries requires a change of trustees.[3] Not only has the Court of Chancery this extraordinary power in cases of great danger of loss, and for the protection of the interests of the beneficiaries; but even in other cases it has been held that the legislature has the power to divest a municipal corporation of its control of a public charity or trust, and to place it in a different body of trustees. This was done in a case of great public interest, where the legislature of Pennsylvania under-

[1] State v. Railroad Company, 12 Gill & Johns. (Md.) 399; 3 How. (U. S.) 534; Union etc. Co. v. Proctor, 12 Colo. 194; *Ex parte* Christensen, 24 Pac. R. 747; 85 Cal. 208; Rankin v. Baird, Breeze (Ill.) 123; C. & A. R. R. Co. v. Adler, 56 Ill. 344; Conner v. Bent, 1 Mo. 235; Coles v. Madison County, Breese (Ill.) 115; Holliday v. People, 5 Gilm. (10 Ill.) 216.

[2] Portland W. V. R. Co. v. Portland, 12 Pac. R. 265; 14 Oreg. 188: Holliday v. People, 5 Gilm. (10 Ill.) 216.

[3] Meriwether v. Garrett, 102 U. S. 472, 528; Montpelier v. East Montpelier, 29 Vt. 12; Ellerman v. McMains, 30 La. An. 190; Girard v. Phila., 7 Wall. 1; Philadelphia v. Fox, 64 Pa. St. 169; Cincinnati v. Cameron, 33 Ohio St. 336; Luchrman v. Tax Dist., 2 Lea, Tenn. 425.

took to deprive the city of Philadelphia, of the right to administer the charitable trust which was confided to its care under the will of Girard and others, and to transfer the administration of these trusts to a corporate body, called the "Directors of City Trusts," who were to be appointed by certain state judges. It was held that this was a lawful exercise of legislative authority.[1] But this power of the legislature has been denied in one case, in the Supreme Court of Maine, where certain lands were held as the property of a town, and the legislature authorized the sale of such lands and the investment of the proceeds of sale, as a fund in the hands of certain trustees to devote to buildings for the use of the public schools. A subsequent act of the legislature authorized the town to select a new board of trustees, and directed the original board to deliver over to the new board all the trust property held by it. The legislature held that, in accordance with the principle laid down in the Dartmouth College Case, such interference with the trust property was unconstitutional and void.[2] The distinction is made in the Pennsylvania case between private trustees being charged with the performance of a charitable trust, and the administration of such a trust being vested in the municipal corporation. In the first case, the legislature has no power of interference, except to prevent maladministration of the trust; but in the second case, the interference by the legislature is subject to no limitation in respect to the change of administrators.[3]

But the legislature did not in this case attempt to divert the trust funds and apply them to purposes foreign to the provisions of the trust; and it is extremely doubtful whether the legislature would in any case have the power to make such a diversion of trust funds. Such a power has been denied to the legislature in two cases.[4] In the New Hampshire case, the trust fund for the support of public schools was given to the town of M.,

[1] Philadelphia v. Fox, 94 Pa. St. 169; Penn. Const. 1874, art. 3, § 20.

[2] Trustees v. Bradbury, 11 Me. 118; see also to same effect, Cary v. Bliss, 151 Mass. 364; 25 N. E. R. 92; Yarmouth v. N. Yarm., 34 Me. 411; Norris v. Academy, 79 Johns. (Md.) 7; Louisville v. University, 15 B. Mon. 642; Bass v. Fontleroy, 11 Tex. 698.

[3] This power of control over city trusts has since been taken away from the legislature by a subsequent constitutional provision. Const. Pa. 1874, art. 3, sec. 20.

[4] State v. Springfield, 6 Ind. 83; Greenville v. Mason, 53 N. H. 515.

on the express condition that the fund should be applied solely to the support of the public schools in the town of M. At a subsequent period, the town of G. was created by the legislature out of a part of the territory and inhabitants of M.; and the statute which created this new corporation provided, that this trust fund should be divided between the original town of M. and the new town of G. in the proportion of seven to M. and thirteen to G. The Supreme Court of New Hampshire held that the legislature had no power to direct the appropriation of the trust fund in question to any other purpose than that which was prescribed by the donor. And, in the exercise of the legislative power of cutting down the territory of the town of M., it had no power to transfer any proportionate share of the trust fund to the new corporation, which had been formed out of a part of the territory of M. It has, however, been held in Maine, that where a public corporation holds property in trust for the use of its inhabitants, the legislature can, upon the division of such corporation into two or more towns, provide that the original town shall continue to hold such property in trust for the inhabitants of both towns.[1] Certainly, the municipal corporation has no power, in the absence of legislative authority, to make any other use of the trust fund, but for the purpose provided for in the trust.[2]

§ 14. **Legislative power over municipal contracts.**—The contract of a municipal corporation certainly constitutes a species of private property of such corporation, and would, therefore, under the general rule of discrimination between the public and private character of a municipal corporation, be protected from legislative interference. And a contract between two municipal corporations would apparently be as much protected from legislative interference or abridgment, as contracts made by the municipal corporation with a private person or a

[1] North Yarmouth v. Skillings, 45 Me. 133.

[2] Aberdeen v. Sanderson, 8 Sm. & M. 670; Cary v. Bliss, 151 Mass. 364; White v. Fuller, 39 Vt. 193; Montpelier v. East Montpelier, 27 Vt. 704; 29 Vt. 12; Chambers v. St. Louis, 29 Mo. 543; Holland v. San Francisco, 7 Cal. 361; Daniel v. Memphis, 11 Humph. (Tenn.) 582; Trustees of Academy v. Aberdeen, 13 Sm. & M. 645; Kingman v. Brockton, (Mass. 90) 26 N. E. R. 968; Bonham v. Taylor, (Tex. 90) 16 S. W. R. 555; East St. Louis v. Flannigan, 34 Ill. App. 596; Poultney v. Wells, 1 Ark. (Vt.) 180; Trustees v. Bradbury, 2 Fairf. (Me.) 118; Harrison v. Bridgewater, 16

private corporation. There has not been any adjudication on this particular question, but there can be very little doubt that those courts will deny to the legislature the power to abridge or impair contracts made between two municipal corporations, which deny to the legislature the power of interference with the private property of such a corporation. And there is certainly no doubt that a contract, made by the municipal corporation with private individuals, should come within the constitutional prohibition, of the enactment of laws impairing the obligation of a contract. Whatever the legislature may do in respect to the continued existence of the municipal corporation as a body politic, it can do nothing that would in any way impair the obligation of the municipal corporation or its contract to third persons.[1] Not only can there be no direct abolition of the contract or destruction of the contractual rights of the municipal creditors; but even indirectly is it impossible for the legislative act to impair such a contract. Thus, for example, where at the date of execution of the contract in question, the power of the municipal corporation to levy taxes was subject to a particular limitation, the scope and extent of the power of taxation of the municipal corporation constitutes a part of the contract, which the corporation has made with third persons, and the legislature cannot by subsequent enactments further curtail or limit the power of taxation, to the detriment of the creditors. This is true, in whatever way the subsequent legislation curtails the power of taxation, either by reducing the rate or amount of taxation;[2] or by a repeal of a provision of the law for com-

Mass. 16; Plymouth v. Jackson, 15 Pa. 44.

[1] Koonce v. Russel, 103 N. C. 179; Lansing v. County Treasurer, 1 Dillon Cir. C. R. 522; Meriwether v. Garrett, 102 U. S. 472; Furmau v. Nichol, 8 Wall. 44; Underhill v. Essex, 23 Atl. R. 617; State v. Milwaukee, 25 Wis. 122; Brooklyn Park Comm'rs v. Armstrong, 45 N. Y. 234; Wolff v. New Orleans, 103 U. S. 358; Galena v. Amy, 5 Wall. 705; Goodale v. Fennell, 27 Ohio St. 426; s. c., 22 Am. Rep. 321; Von Hoffman v. Quincy, 4 Wall. 535; Houston v. R. R. Co., (Tex. 92) 19 O. W. R. 127; Woodruff v. Trapnall, 10 How. 206; Binghamton v. R. R. Co., 61 Hun, 479; Western Savings Fund Society v. Philadelphia, 31 Pa. St. 175, 185; San Francisco v. Canavan, 42 Cal. 541; Lee County v. Rogers, 7 Wall. 185; *contra*, New Orleans v. N. O. W. Co., 142 U. S. 79.

[2] United States v. Mobile, 12 Fed. R. 768; Mobile v. Watson, 116 U. S. 768; State v. New Orleans, 37 La. An. 528; Stewart v. Police Jury, 34 La. An. 673; State *ex rel.* Carriers v. New Orleans, 36 Ib. 687; Morris v. State, 62 Tex. 728; State *ex rel.* Marchand v. New Orleans, 37 La. An. 13.

pulsory taxation;[1] or by any provision, which operates as a reduction or limitation of the present power of the corporation to provide by taxation for the payment of its debts.[2]

But, on the other hand, the power of the legislature to modify the rules of taxation, as applied to municipal corporations, is not completely taken away by the existence of corporate debts, provided the modification or other change in the mode of taxation produces no material impairment of the rights of the creditors. Thus, for example, it is possible for a state to provide by law for the release of certain property from taxation by a municipal corporation.[3] For the limited amount of such property, which is thus exempted, makes it impossible that the change in the law of taxation of such corporation should operate as a material impairment of the rights of the city's creditors.[4] And so, also, may the legislature repeal a statutory authority to the city or county, to subscribe for the stock of a railroad corporation and issue bonds therefor, as long as the subscription, or the binding contract for it, has not been made with the railroad corporation.[5] The act of the legislature, which provides for the creation of a sinking fund for the payment of the debts of a municipal corporation, cannot be repealed by a subsequent legislature, or such sinking fund be devoted to a different purpose, or the rights of the parties in and to such sinking fund in any other way interfered with.[6] So, also, where the legislature authorizes a city to fund its

[1] Sawyer v. Concordia, 12 Fed. Rep. 754.

[2] Seibert v. Lewis, 122 U. S. 284; Nelson v. St. Martin's Parish, 111 U. S. 716; Louisiana v. Pillsbury, 105 U. S. 278.

[3] House of Refuge v. Smith, (Pa. 90) 21 Atl. R. 353; State v. University, (Minn. '90) 48 N. W. R. 1119; Roaring Creek Co. v. Girton, (Pa. 90) 21 Atl. 780; Northampton Co. v. Lafayette College, 18 Atl. Rep. 516; Detroit Home v. Detroit, 76 Mich. 521; Bannon v. Byrnes, 39 Fed. Rep. 892; People v. Assessors, 111 N. Y. 505.

[4] Muscatine v. Railroad Co., 1 Dillon, C. C. 536; Gilman v. Sheboygan, 2 Black, 510; Seibert v. Lewis, 122 U. S. 284; Goodale v. Fennell, 27 Ohio St. 426; 22 Am. Rep. 321.

[5] Binghamton v. Railroad Co., 61 Hun, 479; People v. Coon, 25 Cal. 635; Aspinwall v. County of Jo Daviess, 22 How. 364; Shelby Co. v. Cumberland & C. R. R. Co., 8 Bush. (Ky.) 299; State v. Meller, 67 Mo. 604; Union Pacific Railroad Co. v. Davis County, 6 Kan. 256; People v. Morse, 43 Cal. 534; C. & O. R. R. Co. v. Barren Co., 10 Bush. (Ky.) 604; Town of Concord v. Portsmouth Sav. Bank, 92 U. S. 625.

[6] Terry v. Banks, 18 Wis. 87; Liquidators v. Municipality, 6 La. An. 21; Smith v. Morse, 2 Cal. 524.

floating debt; and in reliance upon that act, the creditors surrender their claims, and receive new obligations, this final transaction operates as a pledge of the city's revenues and property, which could not be materially altered by subsequent legislation, without the consent of the creditors.[1] It has also been held that, where the legislature, in authorizing a municipal corporation to issue bonds to a specific amount in settlement of its indebtedness, makes provision against the further increase of the municipal debt, which was evidently intended to influence the negotiation of the bonds thus authorized to be issued, the city would not thereafter be permitted to issue further bonds, except in payment of its bonded debt. That provision was held to constitute a contract with the creditors, which could not be repealed or impaired by subsequent legislation, authorizing a further issue of bonds by such corporation.[2]

§ 15. **Compulsory contracts.**—Another difficult question, in determining the legislative power of control over municipal corporations, is the extent to which the legislature can, without the consent of a municipal corporation, compel such corporation to assume contractual obligations. The general proposition has been maintained by the authorities that, while a legislature may authorize corporations to make contracts, it is impossible for the legislature to make contracts for the corporation without its consent. This has been the rule of the great majority of the courts in this country.[3] In Michigan an act of

[1] Brooklyn Park Comrs. v. Armstrong, 45 N. Y. 234; People v. Bond, 10 Cal. 563; People v. Wood, 7 Ib. 579.

[2] Atkins v. Randolph, 31 Vt. 226; Darlington v. Mayor, etc., of N. Y., 31 N. Y. 164, 205; Hasbrouck v. Milwaukee, 13 Wis. 37; Mills v. Charlton, 29 Wis. 400; Philadelphia v. Field, 58 Pa. St. 320; State v. Tappan, 29 Wis. 664; s. c., 9 Am. Rep. 662. See further, as to rights of creditors, *post*, chapters on Contracts and Mandamus.

[3] Darlington v. Mayor, 31 N. Y. 164, 205; Cairo & St. Louis R. R. Co. v. City of Sparta, 77 Ill. 505; Atkins v. Randolph, 31 Vt. 226; White v. Fuller, 31 Ib. 226; People v. Chicago, (Lincoln Pk. case,) 51 Ill. 17; People v. Salman, 51 Ib. 37; Harard v. Drainage Co., 51 Ib. 130; *In re* Union Col., 29 N. E. R. 460; 129 N. Y. 308; Brunswick v. Litchfield, 2 Me. (2 Greenl.) 28, 32; Louisville v. The University, 15 B. Mon. 642; Western Sav. Fund Soc. v. Philadelphia, 30 Pa. St. 175, 185; Regents of University v. Williams, 9 Gill & Johns. 365; Montpelier v. East Montpelier, 29 Vt. 12; Norris v. Trustees Abingdon Academy, 7 Gill & Johns. (Md.) 7; Trustees v. Winston, 5 Stew. & Port. (Ala.) 17; Winn v. Comrs., (Ky. 90) 14 I. W. R. 421; Philadelphia v. Field, 58 Pa. St. 30; State v. Tappen, 29

the legislature directed a board of park commissioners to be created, and such board were authorized to acquire sufficient lands by purchase for the establishment of a public park in the city of Detroit, and directed the city council, to whom was given no control whatever over the commissioners or the purchase of the land, or the establishment of the park, to provide the necessary funds by the issue and sale of city bonds. The Supreme Court of Michigan held that a municipal corporation cannot be compelled by legislative act to contract debts for purely local purposes, and declared that, in this particular case, a park was purely a matter of local concern, in which the state at large had no interest; and the legislative act, which undertook to compel the establishment of such a park, against or without the consent of the municipal corporation, was unconstitutional.[1]

But if the purpose for which the debt is to be contracted is of a strictly public character, it would then seem that the

Wis. 664; Hasbrouck v. Milwaukee, 13 Ib. 37; Mills v. Charlton, 29 Wis. 400; Cf. *contra*, West Chicago Com'rs v. McMullen, (Ill. 90) 25 N. E. R. 676.

[1] People *ex rel.* Park Commissioners v. Common Council of Detroit, 28 Mich. 228; s. c., 15 Am. Rep. 202. "It is a fundamental principle in this state, recognized and perpetuated by express provision of the constitution, that the people of every hamlet, town, and city of the state, are entitled to the benefits of local self-government. But authority in the legislature, to determine what shall be the extent of the capacity in the city to acquire and hold property, is not equivalent to, and does not contain within itself, authority to deprive the city of property actually acquired by legislative permission. As to property it thus holds for its own private purposes, a city is to be regarded as a constituent of the state government, and is entitled to the like protection in its property rights as any natural person who is also a constituent. The right of the state is a right of regulation, not of appropriation. It cannot be deprived of such property without due process of law. And when a local convenience or need is to be supplied in which the people of the state at large, or any portion thereof outside the city limits, are not concerned, the state can no more by process of taxation take from the individual citizens the money to purchase it, than they could, if it had been procured, appropriate it to the state use. From the very dawn of our liberties the principle most unquestionable of all has been this: that the people shall vote the taxes they are to pay, or be permitted to choose representatives for the purpose." It has on the same ground been held that city gas works is a matter, private and distinct from public concerns. Western Sav. Fund Soc. v. Philadelphia, 31 Pa. St. 183.

legislature has the power to compel the creation of the indebtedness, against or without the consent of the municipal corporation. Thus, it has been held to be competent for the legislature to compel a municipal corporation to build a bridge over a navigable stream within its limits. Or, in case it is deemed expedient, the state may appoint its own agents for the construction of such a bridge, and even authorize such commissioners to provide for the payment of the cost of the bridge, by negotiating a loan on the credit of the corporation.[1] So, also, may municipal corporations, in their character as local instruments of government, be required by the legislature to keep the streets and highways and bridges, connected with such corporation, in repair.[2] But corporations cannot be compelled by state statute to create a debt in aid of the construction of a railway.[3] In the case of the Brooklyn and New York bridge, the court of appeals decided that the erection of the bridge between the two cities was a purpose for which an indebtedness may be incurred by these cities, and did not come in conflict with the constitutional provision, which declares that no city, county, or town shall give money, or loan its credit to any individual or corporation, or become an owner of corporate stock or bonds. It is held that, in that particular case, the contract was clearly within the authority of the two cities.[4]

It is also possible for a legislature to provide, in its acts for incorporation of one city out of two or more, that the debts of the two cities should become one indebtedness upon both, or to provide for a separate mainteuance of the two debts, and

[1] Pac. Bridge Co. v. Clackamas, 4 Fed. R. 217; Carter v. Bridge Proprietors, 104 Mass. 236; Haverhill v. Groveland, (Mass.) 25 N. E. R. 976; Erie v. Canal, 59 Pa. St. 174; Kirkwood v. Newbury, 125 N. Y. 571; Guilder v. Otsego, 20 Minn. 74; United States v. B. & O. R. R. Co., 17 Wall. 322.

[2] See *post*, §§ 315, 316; County v. People, 5 Neb. 136; Shadler v. Blair, 136 Pa. St. 488; Fountain v. Warren, Co., (Ind. 90) 27 N. E. R. 125. By a constitutional amendment of 1874 in New York state, it is provided that the legislature may compel a municipal corporation to improve its highways and keep them in repair, but the power must, before its exercise, be delegated to the local authority under general laws. People v. Supervisors, 112 N. Y. 585.

[3] People v. Batcheller, 53 N. Y. 128; 13 Am. R. 480; Cf. Berlin Bridge Co. v. Wagner, (N. Y. 90) 57 Hun, 346.

[4] People v. Kelly, 5 Abbott's New Cases (N. Y.) 383; 76 N. Y. 475.

impose the liability in respect to each debt upon that part of the new corporation, which constituted the original debtor. All provisions of that sort are purely questions of governmental policy, and neither the existing creditors, nor the people of the new municipal corporation, can object to any such subsequent change in its affairs by the legislature, as long as the original obligation is not impaired.[1] Thus, for example, by act of the legislature the city of Lafayette was added to and incorporated with the city of New Orleans, and a provision was inserted in the act, that the added district, whose indebtedness was proportionately less than the old city of New Orleans, should be charged only with the payment of its own debts. A subsequent act of the legislature required that taxes should be levied uniformly throughout the entire city, the effect of which was to increase the burden of taxation of the addition to the city. But it was held that this subsequent legislation did not interfere with the vested rights, either of the citizens of the added district, or of their creditors.[2] But it is not lawful for a legislature to impose in whole or in part upon one independent municipal corporation the obligation to pay the debt contracted by another corporation; as where the legislature undertook to assess lands in the town of Flatbush to pay debts previously incurred by the adjoining city of Brooklyn, in the establishment of a park, notwithstanding that a portion of the land in the park was taken from the limits of the town of Flatbush. This case is to be distinguished from the case, where the indebtedness of one town is made the common indebtedness of a new corporation, formed by the consolidation of two or more.[3]

[1] Columbus v. Town, (Wis. 92) 52 N. W. R. 425; Maddrey v. Cox, 73 Tex. 538; Saunders v. Municipality, 24 Fla. 226.

[2] Eschenburg v. Com'rs, 28 N. E. R. 865, (Ind. 92); Maltby v. Tantges, (Minn. 92) 52 N. W. R. 858; Little v. Union Township Com., 40 N. J. L. 397; Layton v. New Orleans, 12 La. An. 515; Brown v. Memphis, 97 U. S. 300; People v. Hill, 7 Cal. 97; Vance v. Little Rock, 30 Ark. 435, 439; State v. Flanders, 24 La. An. 57; Hawkins v. Jonesboro, 63 Ga. 527; San Francisco v. Canavan, 42 Cal. 541; Sedgwick v. Bark, 11 Kan. 631; New Orleans v. Clark, 95 U. S. 644.

[3] Town of Flatbush, *In re*, 60 N. Y. 398. In rendering this opinion, the court through Judge Miller says: "But such is not this case. . . There is no principle that I am aware of which sanctions the doctrine that it

In regard to the general proposition that the city corporation cannot be compelled by the legislature to incur debts for the attainment of a strictly local interest, there is but one really dissenting opinion, and that comes from Pennsylvania. It was held by the Supreme Court of Pennsylvania that the legislature has the power to provide for the erection of a city hall, and thereby to provide for the accommodation of the courts for municipal purposes within the city of Philadelphia, and to determine the extent of the indebtedness thus incurred, and to compel such city to pay the debt.[1] In consequence of the public feeling created by this extraordinary act of the legislature, and the great burden imposed upon the city thereby, an amendment was made to the constitution of 1874, which declared "That the general assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise, or interfere with any municipal improvement, money, property, or effects, whether held in trust or otherwise; or to levy taxes, or to perform any municipal function whatever."[2] Directly contrary to this Pennsylvania case, the Supreme Court of Michigan held, that the legislature cannot compel an incorporated city to erect a court house in the county, in which the town or city is situated.[3]

§ 16. **Compulsory satisfaction of non-legal claims against cities.**—In a great variety of cases, the legislatures of the different states have assumed the right to compel the municipal corporation to recognize as a legal obligation, and to perform, all such obligations which have no binding force in law, but

is within the taxing power of the legislature to compel one town, city, or locality to contribute to the payment of the debts of another. The government has no such authority, and this case is entirely without a precedent. If such assessments were authorized they might not be limited to adjoining towns, cities, or villages, but applied to those located at great distances from each other. Such legislation would be unjust, mischievous, and oppressive, and cannot be tolerated." But see, *contra*, Carter v. Bridge Proprietors, 104 Mass. 236.

[1] Perkins v. Slack, 86 Pa. St. 283; 1 Hale's Am. Const. Law, 630.

[2] Art. 3, sec. 20, Constitution of 1874. A further provision was added that "no debt shall be contracted or liability incurred by any municipal commission, except in pursuance of appropriations previously made by the municipal government." Art. 15, sec. 2, Constitution of 1874.

[3] Callam v. Saginaw, 50 Mich. 7.

which have a moral claim for satisfaction. And it has been held that the legislature, in thus recognizing a moral claim against a city, and in compelling such city to pay such a claim, is not exceeding its power of control over such corporation.[1] It is held, however, that the legislature cannot undertake to compel a municipal corporation to pay every debt or claim, which is not a legal obligation. Thus, the legislature is not authorized to provide by legislation for the payment of a debt, which is unconstitutional, because it exceeded the limit of municipal indebtedness, which is fixed by the constitution.[2] But whenever the limitations or conditions, which are imposed upon the contractual power of the corporation, are found in state statutes, the same authority, which imposed the limitation or conditions, may waive such conditions, and ratify or validate the debt of a corporation, which otherwise would be invalid.[3]

§ 17. **Ratifying void local assessments.**—For the same reason, and on the same general principle, as laid down in the previous paragraph, it has been frequently held to be within the power of the legislature to ratify an assessment, made by a municipal corporation for local improvements in front of abutting property, and compel the abutting owner to pay such assessments, notwithstanding the original invalidity of the as-

[1] People v. Squire, 145 U. S. 175; *In re* Cullen, 53 Hun, 534; People v. Dayton, 55 N. Y. 367; Shelby Co. v. Railroad Co., 5 Bush. (Ky.) 225; Smith v. Morse, 2 Cal. 524; Grogan v. San Francisco, 18 Cal. 590; Brewster v. Syracuse, 19 N. Y. 116; Devers v. York, 150 Pa. St. 208; 30 W. N. C. 390; New Orleans v. Clark, 95 U. S. 644; People v. Lynch, 51 Cal. 15; United States v. Baltimore & Ohio Railroad Co., 17 Wall. 322; Creighton v. San Francisco, 42 Cal. 446; People v. Supervisors, 70 N. Y. 228; Baker v. Seattle, 2 Wash. St. 576; New Orleans v. Clark, 95 U. S. 654; Guilford v. Supervisors, etc., 13 N. Y. 143; Philadelphia v. Field, 53 Pa. St. 320; Lycoming v. Union, 15 Pa. St. 166; Blanding v. Burr, 13 Cal. 343; North Mo. R. R. Co. v. Maguire, 49 Mo. 490, 500; Nevada v. Hampton, 13 Nev. 441; Mayor, etc., of New York v. Tenth National Bank, 111 N. Y. 440; People v. Mayor, etc., of Brooklyn, 4 Comst. (N. Y.) 419; Thomas v. Leland, 24 Wend. 65; but see *contra*, State v. Tappan, 29 Wis. 664; s. c., 9 Am. Rep. 622; Hoagland v. Sacramento, 52 Cal. 142; comp. also Waupaca County v. Town of Matteson, (Wis. 91) 48 N. W. R. 213; Bouknight v. Davis, 33 S. C. 410; 12 S. E. R. 96.

[2] *In re* Flower, 29 N. E. R. 463; *In re* Union College, 29 Ib. 460; 129 N. Y. 308; Mosher v. Sch. District, 44 Iowa, 122.

[3] Creighton v. San Francisco, 42 Cal. 446; New Orleans v. Clark, 95 U. S. 644; Sinton v. Ashbury, 41 Cal. 525.

sessment.[1] In these cases, it is simply a failure on the part of the corporation to comply with some special requirement of the state statutes; and the substantial obligations of the abutting owners have not been materially affected thereby. It is a general rule of construction of legislative authority, that whatever the legislature could have permitted to be done, it may subsequently ratify and give it legal effect.[2] And the fact, that such legislative acts of ratification have a retrospective operation, does not constitute any serious objection to such legislation, as long as the retrospective operation of the act does not effect an impairment of vested rights.[3] But where the invalidity of the assessment, or other municipal act, was due to a failure to observe a constitutional provision, the illegality of the assessment or other municipal act is beyond the curative effect of a legislative enactment. Thus, for example, where a constitution requires that all taxation should be uniform and imposed equally upon the taxpayers, and the assessment provides for the payment of a local improvement by the abutting owners, with the exception of one lot which was equally benefited by such improvement; a subsequent act of the legislature, ratifying such assessment law, would be inoperative as long as the omission and exception of the lot in question was retained;

[1] Baltimore v. Horn, 26 Md. 194; Great Falls Ice Co. v. District of Columbia, 19 D. C. 327; Lennon v. N. Y., 55 N. Y. 361.

[2] Marion Co. v. Louisville Co., (Ky. 92) 15 S. W. R. 1061; Lockhart v. Troy, 48 Ala. 579; McMillen v. Boyles, 6 Iowa, 304; Ib. 391; Emporia v. Norton, 13 Kan. 560; Mason v. Spencer, 35 Kan. 512; Otoe County v. Baldwin, 111 U. S. 1; Grenada Co. v. Brogden, 112 U. S. 261, 262; *In re* East Ave. Bap. Church, 11 N. Y. S. 113; Anderson v. Santa Anna, 116 U. S. 364; Bolles v. Bromfield, 120 S. U. 759; San Francisco v. Certain Real Estate, 42 Cal. 517; Marshall v. Silliman, 61 Ill. 218; *In re* Byrnes, 57 Hun, 590; Katzenberger v. Aberdeen, 121 U. S. 172; Atchison, etc., R. R. Co. v. Maquillon, 12 Kan. 301; Citizens' Water Co. v. Bridgeport Hydraulic Co., 55 Conn. 1; Tifft v. Buffalo, 82 N. Y. 205; Atchison v. Butcher, 3 Kan. 104; Frederick v. Augusta, 5 Ga. 561; Great Falls Ice Co. v. District, 19 D. C. 327; Winn v. Macon, 21 Ga. 275; Mattenly v. District of Col., 97 U. S. 687; New Orleans v. Poutz, 14 La. An. 853; Allison v. R. W. Co., 9 Bush. (Ky.) 247; Truchelut v. City Council, 1 Nott & McCord (S. C.) 227.

[3] Cromwell v. McLean, 123 N. Y. 474; Municipality v. Theater Co., 2 Rob. (La.) 209; Danielly v. Cabaniss, 52 Ga. 211; New Orleans v. Clark, 95 U. S. 644; Pompton v. Cooper Union, 101 Ib. 196; Bridgeport v. R. R., 15 Conn. 475, 497; see also, Pardridge v. Village of Hyde Park, 131 Ill. 537; 23 N. E. R. 345; State v. Village of South Orange, 6 Alt. 312; 49 N. J. L. 104.

the ground being, that such omission and exemption was in violation of the provisions of the constitution.[1]

§ 18. **Legislative control of offices and officers in municipal corporations.**—The power of a legislature over municipal offices and officers has always been the subject of discussion. And here, as elsewhere, in determining the limitations of the legislative control, the distinction is to be made between those officers of the municipal corporation, who are charged with the performance of duties of a strictly public character and in which the state at large has a concern,—such as judges, and all parties who are engaged in the administration of justice, or the preservation of the public peace;—and on the other hand, the strictly municipal officers, whose duties are of strictly municipal concern, such as the establishment and management of gas works, water works, sewers, and the like. It is held that the state has the authority to regulate, if it desires, the appointment of public officers as just described, but it cannot interfere with the control of matters of local concern, or direct the appointment of the officers who are charged with their management.[2]

While an extensive and very comprehensive discretion is vested in the legislative power of the state, in shaping the general features and outlines of local municipal government, subject

[1] *In re* Flower, 29 N. E. R. 463; *In re* Union College, 29 Ib. 460; 129 N. Y. 308; People v. Lynch, 51 Cal. 15; Schumacher v. Toberman, 56 Ib. 508.

[2] Lloyd v. Silver B. Co., (Mont. 92) 28 Pac. R. 453; Greene v. Fresno, (Cal. 92) 30 Pac. R. 544; State v. Canavan, 30 Pac. Rep. 1079; 17 Nev. 422; State v. O'Conner, (N. J. 92) 22 Atl. R. 1091; State v. Adams, 90 Tenn. 722; Chicago v. Wright, 69 Ill. 326; Burch v. Hardwick, 30 Gratt. 24; U. S. v. Memphis, 97 U. S. 284; State v. Hine, 59 Conn. 50; State v. Stanfield, (Tex. 92) 18 S. W. R. 577; State v. Hunter, 38 Kan. 578; Hathaway v. New Baltimore, 48 Mich. 251; State v. George, 23 Fla. 585; State v. Bogard, (Ind. 92) 27 N. E. R. 252; Evansville v. State, 118 Ind. 426; Davies v. Saginaw Co., 89 Mich. 295; Britton v. Steber, 62 Mo. 370; People v. Mahaney, 13 Mich. 481; People v. Shepherd, 36 N. Y. 285; Speed v. Crawford, 3 Met. (Ky.) 207; Police Commissioners v. Louisville, 3 Bush (Ky.) 597; People v. Bull, 46 N. Y. 57; People v. McKinney, 52 Ib. 374; People v. Lynch, 51 Cal. 15; People v. Curley, 5 Col. 412; People v. Clute, 50 N. Y. 451; Richmond Mayoralty Case, 19 Gratt. (Va.) 673; People v. Batchellor, 22 N. Y. 128; People v. Palmer, 52 N. Y. 83; People v. Albertson, 55 N. Y. 50; State v. Denny, 118 Ind. 382; s. c., 21 N. E. R. 252, 274.

only to the existing constitutional limitations and restraints,[1] it is, nevertheless, a deeply rooted principle of American and English law that the ultimate control of purely local affairs must be vested in the local governments of towns, cities and counties, and should be administered by officers chosen by their inhabitants.[2] And so, also, while the legislature has no power to appoint, it has the power to prescribe how the act of appointment shall be performed[3] and, generally, to create new offices, abolish those already existing and regulate by re-distribution that portion of the sovereign power which is administered by executive public officials;[4] and, in exchanging an old system of administration for a new one, or in creating a system of local government, the legislature may make provisional appointments.[5] Where the officers are charged with the performance of duties of a strictly public character, which are transferred to the municipal corporation, as a legal franchise from the state government; the state legislature may, in the absence of express constitutional limitations, exercise an unlimited power of control, and determine how the office shall be filled, and take away from municipal corporations the power of appointing such officers. It has thus become a common practice, in a great many of the states to provide for the establishment of what is known as a metropolitan police, controlled by the state government, through appointment of police commissioners by the governor or legislature of the state; to take away from

[1] Atty. Gen. v. Detroit, 29 Mich. 108; People v. Hurlbut, 24 Ib. 44; People v. Draper, 15 N. Y. 532.

[2] State v. Gouldey, (N. J. 88) 18 Atl. R. 695; Atty. Gen. v. Twombley, 89 Mich. 50; 50 N. W. R. 744; People v. Morgan, 90 Ill. 558; People v. Mayor, 91 Ib. 17; State v. Swift, 11 Nev. 128; People v. Albertson, 55 N. Y. 50; Naumann v. Board, (Mich. 88) 41 N. W. R. 267; Evansville v. State, 118 Ind. 426; People v. Highland Pk., 88 Mich. 653; State v. Wright, (N. J. 92) 23 Atl. 116; Taylor v. Palmer, 31 Cal. 252; *In re* Scranton, 113 Pa. St. 176; Atkins v. Randolph, 31 Vt. 226; Com. v. Denworth, 145 Pa. St. 172; 22 Atl. R. 820.

[3] State v. Hoagland, (N. J.) 16 Atl. R. 166; Brady v. West, 50 Miss. 68; People v. Draper, 15 N. Y. 532; State v. Covington, 29 Ohio St. 102; Bridges v. Shallcross, 6 W. Va. 562; People v. Board, (N. Y. 93) 20 N. Y. S. 51; McCormick v. People, (92 Ill.) 28 N. E. R. 1106.

[4] State v. Smith, (Neb. 92) 52 N. W. R. 700; State v. Becker, (S. D. 92) 51 Ib. 1018; Dougherty v. Austin, 94 Cal. 601; Board v. Hiester, 87 N. Y. 661; State v. Field, 17 Mo. 529; People v. Porter, 90 N. Y. 68.

[5] Mayor v. State, 15 Md. 376; State v. Benedict, 15 Minn. 198; State v. Swift, 11 Nev. 128; Sabin v. Curtis, (Idaho 93) 32 Pac. 1130.

the municipal corporation the charge of the police force, and intrust it to the board of commissioners; and, in pursuance of this transfer of control, to turn over to the commissioners the use of the station houses, the wagons, books, police telegraph, and other property of the city, which are used for police purposes.[1] But in Indiana, it has been lately held, that the act for the establishment of a metropolitan police and fire board for the larger cities is unconstitutional, as being an unwarrantable interference with the constitutional principle of local self government.[2]

It is not always easy, however, to determine what offices are of a public character and involve the performance of duties of general public concern, and distinguish them from those in which the duties involve matters of local concern, and which should for that reason be administered by appointees of the municipal corporation. As already stated, with one exception, that of Indiana, police boards are deemed to be public or state offices, and therefore fall within the legislative control, And while, on the other hand, the general rule is that other officials, such as park commissioners and water commissioners are city officials, yet it is not always the case; and there are authorities which hold that even water commissioners, and park commissioners, and highway commissioners, are state officials, who may be subjected to legislative control.[3] Wherever the legislature has the right to assume control of a municipal office, it has likewise the right to compel the city to provide for defraying the expenses of such an office.[4] And not only is that

[1] McInerney v. Denver, (Col. 92) 29 Pac. 516; Com. v. Plaisted, 148 Mass. 375; 19 N. E. R. 224; Pruice v. Boston, 148 Mass. 370; 19 N. E. R. 218; People v. McDonald, 69 N. Y. 362; People v. Detroit, 28 Mich. 228; Francis v. Blair, 96 Mo. 515; People v. Chicago, 51 Ill. 17; Burch v. Hardwick, 30 Gratt. 24; Columbus v. Town, (Wis. 92) 52 N. W. R. 425; Comm'rs v. Louisville, 3 Bush, 597; Diamond v. Cain, 21 La. An. 309; State v. Hunter, 38 Kan. 578; State v. Kolsem, (Ind. 92) 29 N. E. R. 595.

[2] Evansville v. State, 118 Ind. 426.

[3] Hudson etc. Co. v. Seymour, 6 Vroom, 35 N. J. L. 47; County v. Griswold, 58 Mo. 175; People v. Draper, 15 N. Y. 532; Daily v. St. Paul, 7 Minn. 390; State v. Valle, 41 Mo. 29; State v. St. Louis County Court, 34 Mo. 546; People v. Detroit, 28 Mich. 228; Payne v. Washington Co., (Fla. 90) 6 So. R. 881.

[4] Railroad Co. v. Adler, 56 Ill. 344; Durach's App., 62 Pa. St. 491; People v. Commissioners of Police, 8 N. Y. S. 725; Gadsden v. Greene, 22 Fla. 102.

the case, but the legislature may likewise provide that, where a county, adjoining a city, or in which a city is located, receives the benefits of the presence of a police force, such county shall be called upon to defray in part the expenses of such police force.[1]

[1] Sangamon v. Springfield, 63 Ill. 66; St. Louis v. Shields, 52 Mo. 351; Weymouth etc. Fire Dis. v. County Com'rs, 108 Mass. 142; State *ex rel.* St. Louis Police Com'rs v. St. Louis Co. Ct., 34 Mo. 546; People v. Morris, 13 Wend. 325; Stitz v. Indianapolis, 55 Ind. 515; *contra*, Mayor v. Tows, 5 Sneed, 186.

CHAPTER III.

THE INCORPORATION OF MUNICIPALITIES.

§ 21. **Modes of creating municipal corporations in England.**—Under the early English law there were strictly but two ways of creating municipal corporations; viz., *first*, by the king's charter; *secondly*, by act of parliament. But, in addition thereto, there were a great many corporations, whose existence and power were derived from immemorial usage, or which had existed for so long a time, that the claim could be made, under the doctrine of prescription, of an original incorporation. The result was, that municipal corporations in England were very irregular, not only as to the mode of their creation, but also as to the extent of their power. This condition continued up to 1835, when parliament passed the "Municipal Corporation Act" of that year, which was designed, not only to provide for the creation of municipal corporations in the future by act of parliament, but also to give a uniform character to the powers and nature of all the existing municipal corporations. And the act with its amendments was finally incorporated in the Municipal Corporation Act of 1882. Under these acts, the English municipal corporation has a uniform character, and its power and mode of administration are regulated by the general law so

enacted. A great many abuses have, by this municipal corporation act, been abolished.

§ 22. **Creation of municipal corporations in the United States.**—In the United States, a municipal corporation can only be created by a legislative act. Although, as will be seen in a subsequent connection,[1] it is possible for the municipal corporation to claim by prescription the right to corporate powers, in the absence of positive proof of the legislative act of incorporation, resulting from a long enjoyment of the corporate powers; yet the instances of prescriptive incorporation are very rare; so much so that no general account of the mode of creating corporations by prescription need be considered.

The legislative branch of the government, under the constitutional laws of this country, can alone exercise the power of creating a corporation. In consequence of confining the exercise of this power to the legislative department, and the greater demand of American civilization for the creation of corporations, acts of incorporation by the legislature have increased to great proportions, far beyond what has ever been known in the history of jurisprudence. As a general rule, corporations, both municipal and private, within the territorial limits of the states, can only be created by acts of the state legislature; and while Congress has been held by the courts to have the power of creating all sorts of corporations, both public and private, whenever such acts of incorporation become necessary or appropriate to the effectual exercise of any of the constitutional powers of the United States Government; or whenever such acts of incorporation are in any way an aid to the exercise of the jurisdiction over the States and Territories;[2] yet, in the creation of municipal corporations within state limits, the United States Government or Congress cannot interfere. Municipal corporations, within the states can alone be created, or their powers modified, enlarged or restricted, by the legislative action of the State. But Congress has the power, outside of state boundaries, not only of creating municipal corporations by direct legislative act; but it may likewise pass, and it is in the habit of passing, acts

[1] See *post*, § 25, 31.

[2] McCullough v. Maryland, 4 Wheat. 316; Osborne v. Bank, 9 Ib. 738; Thompson v. R. R., 9 Wall. 579; Guthrie v. Territory, 31 Pac. R. 190; Alger v. Hill, (Wash. 92) 27 Ib. 922; see Boyd v. Nebraska, 143 U. S. 145; Tiedeman on Private Corporations § 20, Morawetz, § 9.

vesting in the territorial governments the power of creating both public and private corporations in the respective territories. Objection was at first made to this grant of power to the territorial government, on the ground that the act conferring such power was a delegation of authority by the sovereign power to a subordinate political organization. But this objection has been overruled and the general rule laid down, that a territorial legislature, which is vested with general legislative power by grant from Congress, acquires by such general grant, and independently of any special grant, the power to create both public and private corporations.[1]

§ 23. **Who composes the corporation.**—Under the early municipal corporation law of England, the corporation is not confined to territorial limits; nor could one determine, by a reference to such territorial limits, who composed the municipality. The ancient municipal corporation was not the town or place, at which such corporation was located, nor was it composed of all the people who inhabited such town or place; it was rather a grant by the crown generally, and sometimes by the parliament, to certain persons or classes of persons, living within such town or place, and sometimes residing elsewhere, [as in the case of many of the American colonies,] vesting in such persons the franchise of governmental control of the place or community. The corporation, therefore, was not the people who composed the community; but consisted generally of three distinct classes or parties: *First*, the mayor; *secondly*, the aldermen; *thirdly*, the commonalty, who consisted of the freemen who fell within the description of the persons entitled to participate in the management of the corporation, and whose rights were from time to time curtailed or enlarged. Under the English municipal corporation act of 1835 and the subsequent amendments thereto, as well as generally in the United States, the municipal corporation is not composed of the city council or the mayor, but of the people who constitute the com-

[1] Alger v. Hill, 27 Pac. R. 922; 2 Wash. 344; Board v. Davies, 24 Pac. R. 540; Elk Point v. Vaughan, 1 Dak. 113; 46 N. W. R. 577; Seattle v. Tyler, Wash. Terr'y, 1877; Vance v. Bank, 1 Blackf. 80; Deitz v. City of Central, 1 Col. 323; Myers v. Bank, 20 Ohio, 283; State v. Young, 3 Kan. 445; Reddick v. Amelia, 1 Mo. 5; People v. Butte, 4 Mont. 174; Act of Mar. 2, 1867; 14 Stats. at Large, 426, § 1; Rev. S. of U. S. § 1889.

munity, which has by the act of incorporation been created into a legal personality. The mayor and the councils, instead of being the corporation itself, are not even a constituent part of such corporation; they are nothing more than the servants or agents of the incorporators, who are the inhabitants of the community in general.[1]

§ 24. **Acceptance of municipal corporations, when necessary.**—It seems that under the early English law, in respect to municipal corporations, where the crown undertook to confer a charter upon a community, the assent on the part of the community was necessary to the creation of a corporation, or to the modification of the powers of the existing corporation, if there be one. But where the parliament undertook to control or limit the powers of the existing municipal corporation, or to create a municipal corporation, where one had not theretofore existed, the assent of the incorporators, or of the community, was not necessary; parliament having this power, without the consent or co-operation of the people of the community. But in the United States, where all acts of incorporation are legislative acts, the acceptance of a charter by a community is not necessary to the creation of a municipal corporation. And, unless the act of incorporation is made by the legislature conditional upon such acceptance,[2] it is binding upon all who live within the limits of the incorporated district, and nothing can prevent the taking effect of the act of incorporation. The public or municipal corporation comes into existence, as soon as the legislature passes the act of incorporation.[3]

But while the legislature is not bound to obtain the consent

[1] *Ante*, § 21; Lowber v. Mayor, 5 Ab. Pr. R. 325; Baumgartner v. Hasty, 100 Ind. 575.

[2] Clarke v. Rogers, 81 Ky. 43; State v. Lamoureux, 30 Pac. R. 243.

[3] State v. Babcock, 41 N. W. R. 654; 23 Neb. 709; People v. Butte, 4 Mont. 174; Bristol v. New Chester, 3 N. H. 524, 532; State v. Canterbury, 28 N. H. 218; Buford v. State, 72 Tex. 182; Smith v. Crutcher, (Ky. 92) 18 S. W. R. 521; State v. Curran, (12 Ark. 321; Fire Department v. Kip, 10 Wend. 267; People v. Morris, 13 Wend. 325; Millville Bor., *In re*, 10 Pa. Co. Ct. R. 321; Brouwer v. Appleby, 1 Sandf. 158; Gorham v. Springfield, 21 Maine, 58; People v. Stout, 23 Barb. 349; Warren v. Charlestown, 2 Gray, 104; Mills v. Williams, 11 Ire. 558; Berlin v. Gorham, 34 N. H. 266; People v. Wren, 4 Scam. (5 Ill.) 269; People v. Oakland, 92 Cal. 611.

of the community which it is proposed to incorporate, before a municipal corporation can be set up; yet it is possible for the legislature, instead of providing for the unconditional incorporation of the municipality, to make the creation of such a corporation dependent upon the consent of the community to the act of incorporation.[1] Where no particular mode is prescribed for procuring an expression of assent, on the part of the people, such expression may be implied from circumstances, and from the conduct of the people, as in the case of private corporations.[2] So, also, is it possible for the legislature to provide, that the continued existence of an existing township should be determined by a vote of the qualified electors.[3] So, also, may the question be submitted to the people, whether a portion of an adjoining county shall be annexed; or whether certain improvements should be made; or whether certain liabilities should be incurred.[4] The power of a legislature to provide for the local regulation of the sale of intoxicating liquors by the so called local option laws has been disputed. These acts have been de-

[1] *Ex parte* Schlomberg, (Miss. 93) 11 So. R. 721; *In re* Vacation of Henry St., 123 Pa. St. 646; *In re* Edgewood, 18 Atl. R. 646; Ford v. Des Moines, 45 N. W. R. 1031; People v. City of Butte, 4 Mont. 174; Lafayette, etc., R. R. Co. v. Geiger, 34 Ind. 185; Bank v. Brown, 26 N. Y. 467; Call v. Chadbourne, 46 Maine, 206; People v. Riverside, 70 Cal. 461; 11 Pac. R. 759; Gueble v. Epply, (Col. 92) 28 Pac. R. 89; Patterson v. Society, etc., 4 Zabr. 385; Smith v. McCarthy, 56 Pa. St. 359; People v. Salmon, 51 Ill. 53; Alcorn v. Horner, 38 Miss. 652; *In re* Tullytown, 11 Pa. Co. Ct. R. 97; Lum v. Bowie, (Tex. 92) 18 S. W. R. 142; State v. Scott, 17 Mo. 521; Hudson Co. v. State, 4 Zabr. (24 N. J. L.) 718; Bull v. Read, 13 Gratt. (Va.) 18; *In re* Wintergreen Alley, 11 Pa. Co. Ct. R. 126; State v. Wilcox, 45 Mo. 458.

[2] Taylor v. Newberne, 2 Jones Eq. N. C. 141; see Zabriskie v. Railroad Co., 23 How. U. S. 381, 397.

[3] Lum v. Bowie, (Tex. 92) 18 S. W. R. 142; People v. Wiant, 48 Ill. 263; Railroad v. Davidson County, 1 Sneed (Tenn.) 692; Talbot v. Dent, 9 B. Mon. 526; State v. Winkelmeier, 35 Mo. 103; Smith v. McCarthy, 56 Pa. St. 359; St. Joseph v. Rogers, 16 Wall. 644; People v. Warfield, 20 Ill. 163.

[4] State v. Waxahachie. 81 Tex. 628; Lum v. Bowie, *supra*; North Springfield v. Springfield, (Ill. 92) 29 N. E. R. 849; Bank of Rome v. Rome, 18 N. Y. 38; Trustees v. Cherry, 8 Ohio St. 564; Railroad Co. v. Com., 1 Ohio St. 77; Foote v. Cincinnati, 11 Ohio, 408; Bank v. Brow, 26 N. Y. 467; Hammond v. Haines, 25 Md. 541; Barto v. Himrod, 8 N. Y. 483; Clarke v. Rochester, 28 N. Y. 605; St. Louis v. Alexander, 23 Mo. 483; Blanding v. Burr, 13 Cal. 343; Burnes v. Atchison, 2 Kan. 454.

clared to be constitutional by some of the cases,[1] although their invalidity has been likewise denied.[2]

§ 25. **How far precise forms of words are required for incorporation—Creation by implication.**—In the creation of a municipal corporation it has been generally held, whenever the question has been raised, that no particular form of words is required to be used, in the act of incorporation of a municipality. While formal expressions are generally employed, the absence of them will in no case interfere with the creation of a municipal corporation, provided sufficient words are employed to indicate the intention to create a municipal corporation. Hence, where the intention to create a body politic or corporate is manifest in the words employed in the legislative act, the failure to insert, in such charter or act, words conferring the necessary powers of a corporation, such as that the organization shall have the power to plead and be impleaded, or to have a seal, or to make contracts and by-laws, and the like; if the intention to create a corporation was clearly manifested, its necessary powers would be implied.[3] And so, also, would it not be absolutely defective, if the name of the corporation were omitted, provided such name could be ascertained indirectly from the terms of the act, or from the nature of the

[1] State v. Morris, 36 N. J. L. 72; State v. Dugan, (Mo. 92) 19 I. W. R. 195; Friesner v. Charlotte, (Mich. 92) 52 N. W. R. 18; State v. Moore, (Mo.) 16 S. W. R. 937; *Ex parte* Swann, 96 Mo. 44; Lemon v. Peyton, 64 Miss. 161; see also Howe v. Plainfield, 37 N. J. L. 146; Donovan v. County, 60 Conn. 339; Hudson Co. v. State, 24 N. J. L. 718; State v. Pond, 6 S. W. R. 469; 93 Mo. 617; State v. Watts, 20 S. W. R. 237; 111 Mo. 553.

[2] Prentiss v. Davis, 22 Atl. R. 246; 33 Me. 365; Locke's Appeal, 72 Pa. St. 491; Gloversville v. Howell, 70 N. Y. 287; State v. Wilcox, 42 Conn. 364; 19 Am. Rep. 536.

[3] Duncan v. State, (Fla. 92) 10 So. R. 815; Wells v. Burbank, 17 N. H. 393; Society, etc., v. Pawlet, 4 Pet. (U. S.) 480, 502; Newport Trustees, *In re*, 16 Sim. 346; Thomas v. Dakin, 22 Wend. 9, 84; Stebbins v. Jennings, 10 Pick. 172; Medical Institute v. Patterson, 1 Denio, 61; Lewis v. Comanche Co., 35 Fed. R. 343; Inhabitants, etc., v. Wood, 13 Mass. 193; Lord v. Bigelow, 6 Vt. 465; Bow v. Allentown, 34 N. H. 351, 372; Benton v. Jackson, 2 Johns. Ch. 325, 326; Jeffreys & Gurr, 2 B. & Adol. 841; Mahoney v. The Bank of the State, 4 Ark. 620; Myers v. Irwin, 2 Serg. & Rawle, 368; Conservators v. Ash, 10 Barn. & Cress. 349 (12 Eq. C. L. 97); Overseers v. Sears, 22 Pick. 122, 130; Cf. People v. Harvey, (Ill. 93) 32 N. E. R. 295; Freligh v. Saugerties Village, 24 N. Y. S. 182.

powers granted.[1] But where the charter or act, which is presumed to operate as an incorporation of the municipality, expressly denies to the organization, which is presumed to have been incorporated, powers which are necessary to its existence as a corporation, it would be plain in such a case that there had not been an effective incorporation of the community.[2]

§ 26. **Creation by special act, when permitted.**—In the absence of constitutional limitations, the common, in fact the only, method of creating a municipal corporation is by a special act of the legislature, calling into being the particular corporation in question. But in consequence of constitutional provisions, looking to the incorporation of both public and private corporations under general laws, instead of by special acts, the power to create corporations by special act has in some cases been expressly reserved; as for example, in New York, Illinois, Michigan, Minnesota, Oregon, Louisiana, Nevada. And in Missouri it was provided that no municipal corporation shall be created by special act, except in cities of at least 5,000 inhabitants, and in that case the special act is to be provided by the vote of the inhabitants on the matter.[3] In some of the states, it is also provided by the constitution, that in all cases where a general law can be made applicable, no special law shall be permitted. And the question is raised under that constitutional provision, whether it is a legislative or judicial question, whether in the particular case under inquiry a general law can or cannot be made applicable. It has finally been determined that it is a question for the legislature, and not for the courts.[4]

[1] School Com. v. Dean, 2 Stew. & P. (Ala.) 190; Trustees v. Parks, 10 Me. 141.

[2] 1 Dillon Mun. Corp. § 42.

[3] Const. 1865 of Mo., art. VIII, sec. 5; New York Const. 1846, art. VIII, sec. 1; names of the states which appear in this connection are not intended to be a complete enumeration of the states in which this constitutional provision has been adopted. It is very probable that the same provision will be found elsewhere. Tierney v. Dodge, 9 Minn. 171; Virginia City v. Mining Co., 2 Nev. 86; State v. Simon, 22 Atl. R. 120; Straub v. Pittsburgh, 138 Pa. St. 356; Com. v. Reynolds, 137 Ib. 389; Nev. Sch. Dist. v. Shoecraft, 88 Cal. 372.

[4] Edmonds v. Herbrandson, (N. D. 92) 50 N. W. R. 970; State v. Kolsem, (Ind. 92) 29 N. E. R. 495; McCormick v. West Duluth, 50 N. W. R. 128; 47 Minn. 272; Richman v. Muscatine Co., 77 Iowa, 513; Hughes v. Mulligan, (Kan. 88) 22 Pac. R. 313; Fellows v. Walkers, 39 Fed. R. 651; Gen-

§ 27. **Creation by general laws required.**—In many of the states, however, it is expressly required that all corporations, both public and private, should be created under general laws, and special acts of incorporation are prohibited to all. Such is the rule in Iowa, Florida, Nebraska, and under the new constitution of Illinois, Wisconsin, Kansas, Ohio. In Missouri and New York, provision is made for general incorporation acts, as well as special. The object of these constitutional provisions, in requiring the exercise of the legislative power in the creation of corporations by general act, instead of by special, is to avoid and prevent, as far as possible, any interference by the legislature in the affairs of a local community, and the further concentration in the community, of the principle of local civil government. As already stated, in some of these constitutional provisions there is an express requirement that the legislature shall not pass any special act of incorporation, either of public or private corporations. But in some of them, as for example in Kansas and Ohio, the constitution only provides that the legislature shall pass no special act, conferring corporate powers. In these states, the Supreme Courts have held that the provisions applied to municipal, as well as to private, corporations.[1] In New York where there is a constitutional provision that two

tile v. State, 29 Ind. 409; Murdock v. Woodson, 2 Dillon C. C. 188; Board v. Shields, 62 Mo. 247; Evans v. Job, 8 Nev. 322; *contra*, *In re* House Bill, 48 N. W. R. 275; Ayer's App., 122 Pa. St. 366; Von Phul v. Hammer, 29 Iowa, 222; Pritz, *In re*, 9 Iowa, 30.

[1] State v. Toledo, (Ohio, 90) 26 N. E. R. 1061; Cook v. Portland, 20 Or. 580; Sch. Dist. v. Ins. Co., 103 U. S. 707; State v. Cincinnati, 20 Ohio St. 18; Atkinson v. Railroad Co., 15 Ohio St. 21; Savings Assoc. v. Topeka, 3 Dillon, 376; Atchison v. Bartholow, 4 Kan. 124; State v. Pugh, 43 Ohio St. 98; Butz v. Muscatine, 8 Wall. 574; Olcott v. Supervisors, 16 Wall. 678; 20 Wall. 655; Logan v. Western, 87 Ga. 533; Merrill v. Toledo, 6 Ohio Cir. Ct. 430; Lodi v. State, 18 Atl. R. 749; State v. Mullica, 17 Ib. 941 (N. J. 88); *In re* Denver, (Colo. 93) 32 Pac. R. 615; Metcalf v. State, 49 Ohio St. 586; 31 N. E. R. 1076; see *post*, chap. x., on Contracts, and chap. xvi., on Streets. In New Jersey, it has been held to apply exclusively to private corporations; State v. Newark, 40 N. J. L. 550, 558; so in Tennessee; Williams v. Nashville, 15 S. W. R. 364. A similar provision is likewise found in Nebraska, and perhaps in many other states. Clegg v. Richardson Co., 8 Neb. 178; Dundy v. Richardson Co., 8 Neb. 508. But it has been held in Kansas that, while the provision of the constitution referred to includes municipal corporations proper, it does not include *quasi* corporations, such as school districts. Beach v. Leahy, 11 Kan. 23.

thirds of the general assembly shall be requisite to every bill creating, continuing, altering, or renewing any body politic or corporate, such provision was held by the court of appeals to extend to public and municipal, as well as to private, corporations.[1] The constitutions of some of the states also contain a provision, that corporations shall not be created by special acts, except for municipal purposes. And in determining the scope of this provision, it is necessary to ascertain what is a municipal purpose. It has been held, for example, that a board of commissioners, charged with filling in certain slough ponds in the city of St. Louis, was an incorporation for municipal purposes which could be created by special act, without violating the constitutional provision against special legislation.[2] It has likewise been held to be the creation of a municipal corporation, where a board of park commissioners has been created with corporate authority.[3] So, also, a board of school commissioners.[4] But it is questionable, whether this is a strictly proper use of the word "municipal."[5]

§ 28. **Only one object, which shall be expressed in the title.**—Many of the state constitutions contain a provision, requiring that any legislative act shall not contain more than one object, which shall be expressed in the title, and thus prohibiting the inclusion, in the one act, of more than one object. The purpose of this constitutional prohibition is plainly to prevent what is known as log-rolling legislation, whereby members of a legislature may combine in securing the passage of one act containing the individual desires of each other, not upon the consideration of the merits of each proposed bill, but by way of combination of their forces. The requirement that the object of the bill should be expressed in the title, is to prevent the practice of deception upon the legislator, and to furnish him with the means of determining, upon reading the title of the

[1] Smith v. Helmer, 7 Barb. 416; Norris v. People, 3 Denio, 331; Southworth v. Railroad Co., 2 Mich. 287; Purdy v. People, 4 Hill (N. Y.) 384, reversing 2 Hill, 31; Corning v. Green, 23 Barb. 33.

[2] St. Louis v. Shields, 62 Mo. 257; State *ex rel.* Choteau v. Leffingwell, 54 Mo. 458; Cook v. Portland, 20 Or. 580; San Francisco v. S. V. W. W., 48 Cal. 493.

[3] People v. Solomon, 51 Ill. 37.

[4] Horton v. Mobile School Com'rs, 43 Ala. 596.

[5] St. Louis v. Shields, 62 Mo. 251; Cf. Wilson v. Sanitary Dist., (Ill. 90) 27 N. E. R. 203.

bill, what is its object and the scope of its operation.[1] The fact, that a bill contains more than one object, will only invalidate the bill, so far as it incorporates objects not expressed in the title; and if a bill contains more than one object in the operating clause, but only one object is expressed in the title, the bill will be valid as to the subject expressed in the title, although invalid as to any subject not so expressed.[2] In some of the state constitutions, this prohibition against inserting in one bill more than one object, and requiring one object to be expressed in the title, is limited to local and private acts. But in a great many of the states, however, no limitation is imposed, and the prohibition is declared to have a general application. And the general ruling of the courts is that, in the absence of an express limitation on the operation of the constitutional prohibition in question, it applies to acts of the legislature, which are designed to create or regulate municipal corporations, as well as to acts applying to private individuals.

But it is not required that all of the details of a bill should be set forth in the title; as for example, where the act purports to incorporate a city or town, it is not necessary to proceed to the enumeration in the title of the bill, of all the powers which are intended to be conferred upon such a corporation. In determining, whether a law be in conflict with these provisions or not, the unity of the object, which appears to be the scope of the act of legislation, is alone to be stated in the title, and the details will be included by implication, within the general object so expressed.[3] But where a statute is described in

[1] Com. v. Reynolds, 8 Pa. Co. Ct. R. 568; People v. Whitlock, 92 N. Y. 191; Matter of Knaust, 101 N. Y. 188; Glenn v. Lynn, 89 Ala. 608; People v. Wilber, 15 N. Y. S. 435; Matter of Department of Public Parks, 86 N. Y. 439; Jonesboro v. Cairo R. R. Co., 110 U. S. 192; Auditor v. Stiles, 83 Mich. 460; Mahomet v. Quackenbush, 117 U. S. 509; Astor v. Railway Co., 113 N. Y. 93; Philadelphia v. Ry. Co., 28 W. N. C. 106; Carter County v. Sinton, 120 U. S. 517; Montclair v. Remsdell, 107 U. S. 147; State v. Jackson Co., 102 Mo. 531; *In re* Rafferty, 1 Wash. St. 382; Ackley School Dist. v. Hall, 113 U. S. 136; *Re* Phœnixville, 109 Pa. St. 44; *Re* Airy Street, 113 Pa. St. 281.

[2] *Ex parte* Covert, (Ala. 90) 9 So. R. 225; Van Antwerp, *In re*, 56 N. Y. 261, 267; McGee's Appeal, 114 Pa. St. 470, 478; Dewhurst v. Allegheny City, 95 Pa. St. 437.

[3] State v. Mortland, 52 N. J. E. 521; Auditor v. Stile, 83 Mich. 460; Lockhart v. Troy, 48 Ala. 581; St. Paul v. Coulter, 12 Minn. 41, 50; Powell v. Suprs., (Va. 92) 14 S. E. R. 543; State v. New Whatcom, 3

the title to be an amendment to a city charter, and it embraces objects which are foreign to the charter; so far as these foreign objects are concerned, the act is in conflict with the constitution of the state, and for that reason is void.[1] It has also been held that the object of the act has not been specially expressed, where it is entitled, "An act to legalize and authorize the assessments of street improvements and assessments," because the city or locality, to which the act is to be applied, has not been expressed in the title.[2] It seems that here, as well as elsewhere, all doubts in respect to the conditions of the legislative acts, because of these provisions of the constitution, should be solved ultimately in favor of the constitutionality of the act, in the absence of overwhelming conviction, as to its violation of the constitutional provision.[3]

Wash. St. 7; Holtin v. State, 28 Fla. 303; Hubert v. People, 49 N. Y. 132; State v. Union, 33 N. J. L. 350 (4 Vroom); Annapolis v. State, 30 Md. 212; Kathman v. New Orleans, 11 La. An. 145; People v. Mellen, 32 Ill. 181; Stockman v. Brooks, (Col. 92) 29 Pac. 746; Sullivan v. New York, 53 N. Y. 652; Airy Street, 113 Pa. St. 281; *Re* Phœnixville, 109 Pa. St. 44; Pierce v. Smith, (Kan. 92) 29 Pac. R. 565; Ottawa v. People, 48 Ill. 233; Miles v. Charleton, 29 Wis. 400; Astor, *In re*, 50 N. Y. 363; Columbus Co. v. Wright, (Ga. 92) 15 S. E. R. 293; Murdock v. Woodson, 2 Dillon C. C. R. 188; *Ex parte* Liddell, 29 Pac. R. 251; 93 Cal. 633; Atty. Gen. v. Bradley, 36 Mich. 447; People v. Hurlbut, 24 Mich. 44; s. c., 9 Am. Rep. 103; People v. Mahaney, 13 Mich. 481; White v. Lincoln, 5 Neb. 505; People v. Briggs, 50 N. Y. 553; Butler v. State, 15 S. E. R. 763; 89 Ga. 821; State v. Lewelling, (Kan. 93) 33 Pac. 425; State v. Blackstone, (Mo. 93) 22 S. W. R. 370; Kelly v. Township of Mayberry, 26 Atl. 595; 154 Pa. St. 440; 32 W. N. C. 224; Fox v. McDonald, (Ala. 93) 13 So. 416; State v. Orange, (N. J. 93) 26 Atl. 790.

[1] Williamson v. Keokuk, 44 Iowa, 88 (1876).

[2] Durkee v. Janesville, 26 Wis. 697.

[3] Mr. Justice Harlan, in Mt. Clair v. Remsdell, 107 U. S. 147, says: "The objections should be grave, and the conflict between the statute and the constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraces more than one object, or if but one object, that it was not sufficiently expressed by the title." State v. Story Co., 17 Nev. 96; La Plume v. Gardner, (Pa. 92) 23 Atl. R. 899; State v. Harrub, (Ala. 92) 10 So. R. 752; State v. Shaw, (Or. 92) 29 Pac. R. 1028; State v. Burlington, 88 Mich. 438; State v. La Vague, 49 N. W. R. 525; 47 Minn. 106; State v. Elvino, 32 N. J. L. 362; State v. Newark, 34 Ib. 236; Dows v. Elmwood, 34 Fed. R. 114; R. R. Co. v. Jefferson, 29 Ib. 305; Marion v. Harvey Co., 26 Kan. 181; People v. Wilsea, 60 N. Y. 507; Devlin v. New York, 63 Ib. 8; State v. Bronson, (Mo. 93) 21 S. W. R. 1125; Board v. Aspen M. & S. Co., (Col. 93) 32 Pac. 717; Blair v. State, (Ga. 93) 17 S. E. R. 96; Walters v. Richardson, (Ky. 93) 20 S. W. R. 279; *In re* Comrs. Johnson Co., (Wyo. 93) 32 Pac. 850.

It has also been held, that this constitutional provision is limited in its application to state legislation, and does not apply to the ordinances of municipal corporations.[1]

§ 29. **Corporate existence not open to collateral attack.**—Where a municipal corporation is exercising the powers of a body politic, and its existence as a municipal corporation is not questioned by the state, the legality of its corporate existence cannot be inquired into collaterally by private parties, in suits brought against them, in which the municipal corporation is a party. And this is the rule, even where the constitution of the state prescribes a particular mode of incorporation.[2] Thus, for example, in an action by a municipal court to recover penalties imposed by its ordinances, it is not a good defence to set up, that the plaintiff is not a corporation.

§ 30. **Judicial notice of charters and acts of municipal corporations.**—The courts will take judicial notice of the legislative act of incorporation of a municipality, without such act being specially pleaded, it matters not whether such act is declared to be a public statute, as long as it is in fact an act of creation of a municipal corporation.[3] And so, also, will the act of the legislature, supplementing and amending a city charter, be likewise judicially noticed.[4] But it has been held that, where the city is incorporated under a general act, the fact of its corporate character must be averred and proved.[5] But in Indiana, it is held to be sufficient, if a city has been incorporated under a general law, to be called a corporation in the

[1] Humboldt v. McCoy, 23 Kan. 249; Green v. Indianapolis, 52 Ind. 490.

[2] St. Louis v. Shields, 62 Mo. 247; *In re* Short, 47 Kan. 250; State v. Leatherman, 38 Ark. 81; Henderson v. Davis, 106 N. C. 88; Mendenhall v. Burton, (Kan. 89) 22 Pac. R. 558; State v. Fuller, 9 S. W. R. 583; see *post*, ch. XVIII.

[3] Savannah v. Dickey, 33 Mo. App. 522; Rock Island v. Crinely, 26 Ill. App. 173; Wetumpka v. Wetumpka Wharf Co., 63 Ala. 611; Potwin v. Johnson, 108 Ill. 70; Dwyer v. Brenham, 65 Tex. 526; Ellsworth v. Nelson, (Iowa, 90) 46 N. W. R. 740; Berfenning v. Chi. etc. Co., (Minn. 90) 48 N. W. R. 444; Solomon v. Hughes, 24 Kan. 211; State v. Tosney, 26 Minn. 262; Durch v. Chippewa Co., 60 Wis. 227; Smith v. Janesville, 52 Wis. 680; Perryman v. Greenville, 51 Ala. 510.

[4] Railroad Co. v. Plumas, 37 Cal. 354; Arapahoe v. Albee, (Neb. 88) 38 N. W. R. 737; Jameson v. People, 16 Ill. 257; Swain v. Comstock, 18 Wis. 463; Virginia City v. Mining Co., 2 Nev. 86; Newark Bank v. Assessors, 30 N. J. L. 22; State v. Bergen, 34 N. J. L. 439; New Jersey v. Yard, 95 U. S. 112; Society, etc., v. Pawlet, 4 Pet. 480; Railroad Co. v. Chenoa, 43 Ill. 209; People v. Farnham, 35 Ill. 562; Bow v. Allentown, 34 N. H. 351.

[5] Ingle v. Jones, 43 Iowa, 286; Morgan v. Atlanta, 77 Ga. 662.

pleadings of the suit; and from that fact the presumption in favor of its proper incorporation will arise.[1] But the acts and ordinances of a municipal corporation are not held to be public laws, and hence must be both pleaded and proved, unless otherwise provided by statute.[2]

§ 31. **Proof of corporate existence.**—Of course, the primary evidence of a special charter or act of incorporation would, in this country, be the original or an authenticated copy of the act; and under statutory provisions in some states, a printed copy, which is published by the authority of the state. But where such primary evidence cannot be had, because it has been lost, parol or secondary evidence of the existence of the municipal corporation would be admissible.[3] Thus, where a public corporation had existed for a long space of time, and the original act of incorporation cannot be found or a copy thereof, the court will permit the introduction of evidence to show by general reputation, that the community had been incorporated, and what its corporate privileges were.[4] It is competent to go to the jury on circumstantial evidence, showing a long user of corporate powers by the community, in support of the averment of the existence of the corporation, and to claim from this circumstantial evidence the presumption of a charter from the legislature,[5] or the establishment and existence of a corporation

[1] Clark v. No. Muskegon, 50 N. W. R. 254; 88 Mich. 308; House v. Greensburg, 93 Ind. 533; Smith v. Warrior, (Ala. 93) 10 So. R. 418.

[2] Moundsville v. Velton, (W. Va. 89) 13 S. E. R. 373; Prell v. McDonald, 7 Kan. 426; 7 Am. Rep. 423; Vance v. Bank, 1 Blackf. (Ind.) 80, and note (2); Young v. Bank, etc., 4 Cranch, 384; Garland v. Denver, 19 Pac. R. 460; Anderson v. Donnell, 7 S. E. R. 523; Beatty v. Knowles, 4 Pet. (U. S.) 152, 157; Stier v. Oskaloosa, 41 Iowa, 353; Ingle v. Jones, 43 Iowa, 286; Clarke v. Bank, (10 Ark.) 516; State v. Mayor, 11 Humph. (Tenn.) 217; Western R. Co. v. Young, (Ga. 92) 7 S. E. R. 912; Portsmouth, etc., Co. v. Watson, 10 Mass. 91; Clapp v. Hartford, 35 Conn. 66; Briggs v. Whipple, 7 Vt. 15, 18; Case v. Mobile, 30 Ala. 538; People v. Potter, 35 Cal. 110; Fauntleroy v. Hannibal, 1 Dillon, C. C. 118; City of McPherson v. Nichols, 48 Kan. 430.

[3] Stockbridge v. West Stockbridge, 12 Mass. 400; Braintree v. Battles, 6 Vt. 395; Blackstone v. White, 41 Pa. St. 330.

[4] Sherwin v. Bugbee, 16 Vt. 439; Bow v. Allentown, 34 N. H. 351; Bassett v. Porter, 4 Cush. 487; People v. Maynard, 15 Md. 463; Londonderry v. Andover, 28 Vt. 416; Jameson v. People, 16 Ill. 257; People v. Farnham, 35 Ill. 562.

[5] New Boston v. Dumbarton, 15 N. H. 201; Mayor b. Kingston v. Horner, Cowp. 102; Worly v. Harris, 82 Ind. 493.

under some general act.[1] Where the fact of incorporation arises as a collateral question, it is only necessary that it be proven, that the city is a corporation *de facto*.[2]

Proof of the existence of a *quasi* public corporation, such as school and road districts, by circumstantial evidence, is commonly the only possible method, inasmuch as the officials of these *quasi* corporations are very negligent in the keeping of the records.[3]

Where a corporation is created or declared to exist by a direct act of the legislature, its existence as a corporation does not require any special proof, either as to organization or user of its powers.[4] And so also will the existence of the corporation be inferred from the fact that the corporation has been recognized by subsequent legislation.[5]

§ 32. **Power to repeal and amend city charter—Effect of exercise of such power.**—The powers and privileges, conferred upon a municipal corporation by act of the legislature, may at any time be repealed or amended by the legislature, either by a general law, applicable to all municipal corporations throughout the state; or, in absence of constitutional limitations, by a special act applying to the particular corporation.[6] But a char-

[1] Bassett v. Porter, 4 Cush. 487; New Boston v. Dumbarton, 12 N. H. 409, 412; s. c., 15 N. H. 201; Robie v. Sedgwick, 35 Barb. 319.

[2] Duncan v. State, (Fla. 92) 10 So. R. 815; Hill v. Koboka, 35 Fed. R. 32; Crowder v. Sullivan, (Ind. 91) 28 N. E. R. 94; State v. Fuller, 9 S. W. R. 583; Louisville etc. Co. v. Shires, 108 Ill. 617.

[3] Lathrop v. Sunderland, (Vt. 92) 23 Atl. R. 619; Highland v. McKean, 11 Johns. 154; Mendenhall v. Burton, (Kan. 89) 22 Pac. R. 558; Londonderry v. Andover, 28 Vt. 416; Owings v. Spew, 5 Wheat. 420.

[4] McVicker v. Cone, 21 Or. 353; Pasadena v. Stimson, (Col. 89) 27 Pac. R. 604; Proprietors etc. v. Horton, 6 Hill (N. Y.) 501; Wood v. Bank, 9 Cowen, 194; People v. President, 9 Wend. 351; Cahill v. Insurance Co., 2 Doug. (Mich.) 124; Fire Department v. Kip, 10 Wend. 266.

[5] Arapahoe v. Albee, 38 N. W. R. 737; Bow v. Allentown, 34 N. H. 351; Railroad Co. v. Chenoa, 43 Ill. 209; Virginia City v. Mining Co., 2 Nev. 86; Boykin v. State, (Ala. 92) 11 So. R. 66; Swain v. Comstock, 18 Wis. 463; People v. Farnham, 35 Ill. 562; Railroad Co. v. Plumas County, 37 Cal. 354.

[6] Essex Pub. etc. Board v. Skinkle, 140 U. S. 334; Wallace v. Trustees, 84 N. C. 164; State v. Palmer, 4 N. W. Rep. 966; Churchill v. Walker, 68 Ga. 681; State v. Toledo, 26 N. E. R. 1061; Indianapolis v. Indianapolis Gas. Co., 66 Ind. 396; Crook v. People, 106 Ill. 237; Rose v. Hardee, 98 N. C. 44; State v. Troth, 34 N. J. L. 379; Worthley v. Steen, 43 N. J. L. 542; People v. Morris, 13 Wend. 325; Daniel v. Mayor, etc., 11 Humph. (Tenn.) 582.

ter may be amended, and even the name of the place and the governing body of such corporation changed, and its boundaries extended or cut down, while the corporation remains in law the same legal personality.[1] Nor does any change in the charter, or in the territorial limits of the corporation, operate to extinguish the indebtedness of the old corporation.[2] And where an amended charter is granted to a corporation in the place of the old one, containing the same provisions as are found in the old charter, such legislative amendments of the old charter, or substitution of the new charter for the old, do not operate to annul the rights and powers of the corporation which were acquired by it under the former charter, and under its former name; nor does such a substitution of an amended charter operate to abrogate or repeal ordinances passed by the corporation under its old charter, provided such ordinances are not inconsistent with the provisions of the new charter. So far as such ordinances are in harmony with the provisions of the new charter they will continue to be in force, until repealed by the legislative power of the corporation.[3] Where an original

[1] State v. Hedlund, 16 Neb. 566; Wood v. Board of Election, 58 Cal. 561; State *ex rel.* v. White, 20 Neb. 37; Dillon Mun. Corp. § 85.

[2] Fluellen v. Proetzel, *post;* Fowle v. Alexandria, 3 Pet. 398, 408; Municipality v. Commissioners, 1 Rob. (La.) 279; East St. Louis v. Rhein, 139 Ill. 116; Olney v. Harvey, 50 Ill. 453; Frank v. San Francisco, 21 Cal. 668; Girard v. Philadelphia, 7 Wall. 1; Savannah v. Steamboat Company, R. M. Charlt. (Ga.) 342.

[3] Birford v. State, 72 Tex. 182; Fluellen v. Proetzel, (Tex. 90) 15 S. W. R. 1043; *In re* House Bill, 12 Colo. 337; Indianapolis v. Indianapolis Gas Co., 66 Ind. 296; Stewart v. Schoomaker, 32 Pac. R. 122; 50 Kan. 560; Commonwealth v. Worcester, 3 Pick. (Mass.) 474; Broughton v. Pensacola, 93 U. S. 266; Milner's Admx. v. Pensacola, 2 Woods, 632; Laird v. De Soto, 22 Fed. Rep. 421; St. Louis v. Alexander, 23 Mo. 483; State etc. v. Mobile, 24 Ala. 701: "There is no doctrine better settled than that a change in the form of government of a community does not *ipso facto* abrogate pre-existing law, either written or unwritten. This is true in regard to what is strictly municipal law, even when the change is by conquest. The act of a general assembly, converting a borough into a city, did not, therefore, of itself, and in the absence of express provisions to that effect, either repeal the former acts of assembly relative to the borough, or annul existing ordinances. It was solely a change in the organic law for the future, and left unaffected the existing ordinances, precisely as a change of a state constitution leaves undisturbed all prior acts of assembly." Mr. Justice Strong in Trustees of Academy v. Erie, 31 Pa. St. 515, 517.

charter of a city contains provisions, which are retained in an amended charter, with the omission of some qualifying clause which appears in the original charter, the general rule is laid down by the authorities, that the amended charter is intended to operate as a substitute for the old charter, and an implied repeal of the provisions of the old charter so far as such provisions have not been incorporated in the amended charter.[1] But it has been held that where the original charter of a city, in prescribing the qualifications of the persons who are eligible to the office of mayor, contains a proviso that certain facts disqualify a person; an amended charter, which contains the original act in respect to the qualification of candidates for the office of mayor, with the exception of the proviso referred to, does not by implication abrogate the excluded provisions of the original charter, particularly since all provisions of the old charter were expressed to be in force, which were not inconsistent with the provisions of the amended charter.[2] But this is altogether a question of intention of the legislature; and the conclusion in this particular case is no very reliable guide, except in the light of the peculiar circumstances of that case. And so where a later statute apparently undertakes a complete revision of the prior law, the omission of a clause or proviso of the old law must be presumed to be an intentional repeal.[3] It has also been held that where the provisions of the amendatory act of the legislature reduce the number of councilmen and do not provide any special time for a new election, the amendment does not take effect until the regular time for holding the municipal election; and until that time arrives, the existing council remains unaffected by the amendment.[4]

§ 33. **Special powers, when repealed by general laws.**— It is a rule of very general application that statutes, having a

[1] Cartright v. Crow, 44 Mo. App. 563; Murdock v. Memphis, 20 Wall. 590, 617; Barton v. Sch. Dist., (Id. 92) 29 Pac. R. 43; Goodenow v. Butterick, 7 Mass. 140, 143; Industrial School v. Whitehead, 2 Beasley, N. J. 290; State v. Kelly, 5 Vroom (34 N. J. L.) 75.

[2] State v. Merry, 3 Mo. 278.

[3] Murdock v. Memphis, 20 Wall. 590; School v. Whitehead, 2 Beasley, 290; *In re* Wheelock, 3 N. Y. S. 890; Little v. Cogswell, 25 Pac. R. 727; State v. Townsby, 23 Atl. R. 666; Wood v. State, 47 Ark. 488; *In re* Primes' Est., 32 N. E. R. 1091; 136 N. Y. 347; *contra*, State v. Young, 30 S. C. 399.

[4] Reading v. Keppleman, 61 Pa. St. 233; Scoville v. Cleveland, 1 Ohio St. 126.

general operation, will not repeal by implication special statutes, or statutes which are passed for the benefit of particular municipalities, unless they are absolutely antagonistic, and, therefore, cannot stand together. But the fact, that they are inconsistent, does not of itself cause the special law to be repealed by the general law; the court will hold, as a general rule, that the legislature had no intention of interfering with the continued enforcement of the special law, and that the general law was intended to be enforced only in those parts of the state, where the special law did not apply.[1] But in all these cases, it might be said, it is a question of legislative intent, whether the special law should remain unchanged or should be repealed; and, in determining this question, it is necessary to read the particular provisions of the charter in the light of all the circumstances of the case, and the consequence and effect of repealing such special act by implication, or of leaving such laws in force, notwithstanding their inconsistency with the general laws of the state.[2] Thus, for example, where there was a charter provision, in reference to bribery committed by a municipal officer, and by subsequent legislation the same act was made an offence punishable in the state courts by a greater penalty, it was held that the charter provision was repealed.[3] So, also, a general railroad tax law was held to repeal by implication all prior special laws, conferring charter privileges upon municipalities.[4] Where a general statute is declared to repeal all acts contrary to its provisions, it is held that this declaration does

[1] State v. Kirk, 53 Ark. 337; State v. Howe, 28 Neb. 618; State v. Branin, 3 Zabr. (23 N. J. L.) 484; State v. Morristown, 33 N. J. Law, 57; Pavey v. Utter, 132 Ill. 489; State v. Trenton, 7 Vroom (36 N. J. L.) 198, 201; Ottawa v. County, 12 Ill. 339; Egypt Street, 2 Grant (Pa.) 455; Harrisburg v. Seck, 104 Pa. St. 53; Rushville v. Town, 32 Ill. App. 320; Goddard, *In re*, 16 Pick. 504; Railroad Co. v. Alexandria, 17 Gratt. (Va.) 176.

[2] State v. Young, 30 S. C. 399; Canal Company v. Railroad Company, 4 Gill & Johns. 1; Smith v. Kernochen, 7 How. 198; Eichels v. Evansville S. Ry. Co., 78 Ind. 261; Chicago D. Co. v. Garrity, 115 Ill. 155; Thomason v. Ashworth, 73 Cal. 73; Babcock v. Helena, 34 Ark. 499; People v. Page, 23 Pac. R. 761; Janesville v. Markoe, 18 Wis. 350; Powell v. Parkersburg, 28 W. Va. 698; Holland v. Baltimore, 11 Md. 186; New Bedford Ry. Co. v. Acushnet Co., 143 Mass. 200; Moran v. Long Island City, 101 N. Y. 439.

[3] People v. Jaehne, 103 N. Y. 182; People v. O'Neil, 109 N. Y. 251.

State v. Severance, 55 Mo. 378; Union Pacific Ry. Co. v. Cheyenne, 113 U. S. 516.

not apply to the special laws, contained in the charter of a municipal corporation upon the same subject.[1] But if the general law is declared to repeal all inconsistent *local* or *special* acts, the special laws would in that case be repealed by this express and comprehensive declaration of the statute.[2]

The adoption of a new state constitution does not repeal special charter powers, unless they are in conflict with some provision of the new constitution.[3] And where a new constitution expressly continues all existing charters in force, this special recognition of the existence of the charter of the municipal corporation does not impliedly take away from the legislature its existing powers of amendment of the charter.[4]

§ 34. **Implied repeal of general laws by special laws.**— While it is possible for a legislature to repeal general laws by the subsequent enactment of special laws, the presumption, in favor of such repeal by implication, is not recognized or indulged, as long as such presumption is not necessary to avoid an inconsistency of a serious nature. It is only permitted for such a repeal to take place by implication, when the two provisions are absolutely irreconcilable.[5] Thus, for example, a general law, which prohibits the opening of streets through a cemetery, is not repealed by implication by a subsequent act, which extends the limits of a municipal corporation, so as to include the cemetery, and gives such corporation the power to open up and lay out streets, alleys, etc.; for the two acts are not absolutely and necessarily irreconcilable. They may be reconciled by limiting the application of the general power of the

[1] State v. Branin, 23 N. J. L. 484; Rushville v. Township, 32 Ill. App. 320.

[2] Adam v. Wright, 84 Ga. 720; State v. Miller, 30 N. J. L. 368; Bank v. Bridges, Ib. 368; Tierney v. Dodge, 9 Minn. 166; Clintonville v. Keeting, 4 Denio, 341.

[3] People v. Jones, 7 Col. 475; Trustees v. Taylor, 30 N. J. Eq. 618; Chidsey v. Scranton, (Miss. 93) 12 So. 545.

[4] Wiley v. Bluffton, 111 Ind. 152.

[5] People v. Henshaw, (Cal. 88) 18 Pac. R. 413; Com. v. Wetzel, 84 Ky. 537; 2 S. W. R. 123; Com. v. Duff, 87 Ky. 586; State v. De Bar, 58 Mo. 395; State v. Mills, 5 Vroom (34 N. J. L.) 177, 180; Montezuma v. Minor, 70 Ga. 191; St. Johnsbury v. Thompson, 59 Vt. 300; Eaton v. Burke, (N. H. 92) 22 Atl. R. 452; State v. Young, 17 Kan. 414; Wooley v. Watkins, 22 Pac. R. 102; Givens v. Van Studdiford, 86 Mo. 149; State v. Clark, 54 Mo. 17; State v. Clark, 1 Dutch. (N. J.) 54; Kern v. People, 44 Ill. Ap. 181; Mersereau v. Mersereau Co., (N. J. 93) 26 Atl. R. 682; *In re* Prime's Est., 32 N. E. R. 1091; 136 N. Y. 347.

corporation to the new land, which is taken within its border, outside of the cemetery.[1] So, also, where a state statute requires auctioneers to take out a state license, and a subsequent act authorized a municipal corporation to require a similar license of such persons, it was held that the two laws were not inconsistent with each other, and that the special law, granting to the corporation the power to impose the license, did not operate as a repeal by implication of a state law imposing a similar license; but that both licenses might be exacted.[2] So, likewise, where a general law prohibits a municipal corporation from denying to its citizens the right to sell goods at wholesale at the city market, there is no implied repeal of the same by the general grant to a city of the power to pass "such ordinances as appear to them necessary for the security, welfare, etc., of the city."[3]

[1] Egypt Street, 2 Grant (Pa.) Cas. 455.

[2] Simpson v. Savage, 1 Mo. 359; Siebenhauer, *In re*, 14 Nev. 365.

[3] Haywood v. Savannah, 12 Ga. 404.

CHAPTER IV.

DISSOLUTION OF MUNICIPAL CORPORATIONS.

§ 37. **How dissolved in England.**—It is said that, in England, a municipal corporation may be dissolved in one of four ways: *First*, by act of Parliament. Inasmuch as the powers of Parliament are unrestricted by constitutional limitations, there can be no doubt that an act of Parliament, dissolving a corporation, whether it be public or private, will have the effect of destroying such corporation as a legal personality.[1] The King may, in the exercise of his prerogative, create a corporation, but he cannot destroy one already existing. He may grant to such corporation a variety of franchises, but he cannot take away or annul one, which is already vested in the corporation.[2] *Secondly*, the municipal corporation may in England be dissolved by the loss of an integral part of such corporation, or by a loss of all, or a majority, of the members of an integral part, without whose co-operation it is impossible for the municipal corporation to transact its business. It will, however, be remembered that, in the preceding chapter, in explaining the difference in municipal corporations in England and in this country, it was stated that, prior to the Municipal Corporation Act of 1835, the municipal corporation in England was in the nature of a political franchise granted to individuals, falling within the descrip-

[1] State v. Trustees etc., 5 Ind. 77; Com'rs v. Cox, 6 Ib. 403; 2 Kent, 305; Co. Litt. 176, note; Rex v. Amory, 2 T. R. 515; Eastman v. Meredith, 36 N. H. 284; St. Louis v. Allen, 13 Mo. 400.

[2] Rex v. Amory, 2 T. R. 515; University v. Williams, 9 G. & Johns. 365, 409.

tion employed, separate and apart from the population and community in general, and not necessarily a part of the community itself; that the corporation, so called, was composed of distinct integral parts, usually described as the mayor, aldermen, and commonalty of the corporation. It is upon this conception of a municipal corporation, as composed of its separate integral parts, instead of being in the American sense the incorporation of the community in general, that this doctrine of a dissolution of the corporation by a loss of an integral part rests. It seems to be a definite and well established rule of the English law.[1]

Thirdly, a municipal corporation may in England be destroyed or dissolved by a surrender of the franchise of such corporation to the crown, and its acceptance by the crown.[2] This power of surrender has been very considerably limited, and it is now held to apply only to those corporations which receive their charter from the crown. It is not permitted to apply to corporations which have been created or confirmed by act of Parliament. These corporations cannot dissolve themselves by any surrender of its charter or franchise, except upon the consent, or with the co-operation, of Parliament, which would make this case one of dissolution by act of Parliament.

Fourthly, a municipal corporation can also be dissolved or annulled in England by a forfeiture of its charter, on account of negligence or abuse of the franchise; such forfeiture resulting from a judgment in a proceeding in *quo warranto*, or *scire facias*. This mode of dissolution of franchises is very commonly applied, both in England and in this country, to private

[1] Smith's Case, 4 Mod. 53; Smith v. Smith, 3 Desaus. (S. C.) 557; Banbury's Case, 10 Mod. 346; Rex v. Tregony, 8 Mod. 129; Bacon v. Robertson, 18 How. (U. S.) 480; Welch v. Ste. Genevieve, 1 Dillon C. C. 130; Rol. Abr. 514; Regina v. Bewdley, 1 P. Wms. 207; People v. Wren, 4 Scam. (5 Ill.) 275; Colchester v. Seaber, 3 Burr. 1870; s. c., 1 Wm. Bl. 591. In Rex v. Passmore, 3 Term R. 421, Lord Kenyon said, in delivering the opinion of the court, "When an integral part of a corporation is gone, without whose existence the functions of the corporation cannot be exercised, and the corporation has no manner of supplying the integral part, the corporation is dissolved as to certain purposes. But the king may renovate, either with the old or new corporators."

[2] Dillon Mun. Corp. § 165; Rex v. Osborne, 4 East. 326; Rex v. Miller, 6 Term R. 277; Willc. 332, pl. 861; Howard's Case, Hutt. 87; Thicknesse v. Canal Co., 4 M. & W. 472.

corporations. In England, it has also been applied to municipal corporations, where misuse, or failure to exercise the rights of the franchise, have resulted in a judgment of forfeiture. And in the time of Charles II., it was held that a municipal corporation might forfeit its franchise, in consequence of the negligence or misconduct of its officers.[1]

§ 38. **How dissolved in the United States.**—As has been already stated in the preceding paragraph, in explanation of the modes of dissolution of corporations in England, the second mode, which is possible in England by a loss of an integral part of the corporation, would not be possible in this country, because here the municipal corporation is not a franchise, possessed and enjoyed by a few persons of the community, but is an act of incorporation of the community. Each individual citizen of the corporation is an integral part, but the officers of the corporation do not in any sense of the term constitute an integral part of the corporation; they are merely the agents of the corporation, for whose wrongful acts the corporation may be liable to parties injured thereby. The corporation itself does not depend for its existence upon the continuance or existence of such officers. It is, of course, possible that a municipal corporation may practically become nonexistent, in consequence of the desertion of a locality by the entire people. If a community should in one body remove from that locality, abandon the territory which has been assigned for the municipal corporation, it would be impossible for such a municipal corporation still to exist; but the mere neglect or failure of the community to elect officers to practically carry on the administration of the

[1] See Tiedeman's Private Corporations, chapter on Dissolution; Rex v. Nicholson, 1 Str. 299; People v. O'Brien, 111 N. Y. 1; Attorney General v. Shrewsbury, 6 Beav. 220; Whalen v. Macomb, 76 Ill. 49; Mumma v. Potomac Co., 8 Pet. (U. S.) 281; Boston Glass Manuf. v. Langdon, 24 Pick. 49, 52; Rex v. Kent, 13 East, 220; Priestly v. Foulds, 2 Scott, N. R. 205, 225; Commonwealth v. Union Ins. Co., 5 Mass. 230, 232; Riddle v. Locks and Canals, 7 Mass. 169; School v. Canal, etc., Co., 9 Ohio, 203; Canal Co. v. Railroad Co., 4 Gill & Johns. 1; Vincennes University v. Indiana, 14 How. 268; Rex v. Saunders, 3 East, 119; Mayor, etc., of Lyme v. Henley, 2 Cl. & F. 331; Smith's Case, 4 Mod. 55, 58; s. c., 12 Mod. 17; Skin. 311; 1 Show. 278; Black. Com. 485; Taylors of Ipswich, 1 Rol. 5; Rex v. Grosvenor, 7 Mod. 199. See Butler v. Walker, (Ala. 93) 13 So. 261; Swamp Land District No. 170 v. Silva, (Cal. 93) 32 Pac. R. 866.

municipal government would certainly not dissolve the franchise, as long as the right or capacity to elect such officers, and to place the municipal corporation on a working basis, still continues.[1]

So, also, would it not be proper to consider it possible, in this country, to secure a dissolution of a corporation by virtue of a surrender of the franchise. Such a surrender would not be possible, except in conjunction with an acceptance of the surrender by the legislature which created the corporation; and when the acceptance has been given, the entire transaction would be equivalent in its effect, and in its real character, to an act of dissolution of the municipal corporation.[2] But it has been held by the Supreme Court of Missouri, and it is probably a sound conclusion of law, that, where municipal corporations are incorporated under a general act, which contains provisions for the dissolution of such a corporation, by compliance with this provision the town may be dissolved, without the direct interference of the legislature.[3]

§ 39. **Forfeiture of corporate existence.**—For the same reason, the English doctrine, that a municipal corporation may forfeit its existence as a corporation, in consequence of the neglect or abuse of its franchise, cannot find application in this country to municipal corporations.[4] If there is any neglect or abuse of the powers and privileges of the municipal corporation, appropriate remedies are provided for the redress of the injuries

[1] Butler v. Walker, (Ala. 93) 13 So. 261; Largen v. State, 13 S. W. R. 161; 76 Tex. 323; State v. Dunson, (Tex. 88) 9 S. W. R. 203; People v. Wren, 4 Scam. (5 Ill.) 275; U. S. El. Light Co. v. Leiter, 19 D. C. 575; Com. v. Cullen, 1 Harris (Pa.) 133; President v. Thomas, 20 Ill. 197; Welch v. Ste. Genevieve, 1 Dillon C. C. 130; Green Township, 9 Watts & S. (Pa.) 22; Schriber v. Langdale, 66 Wis. 616; Vincennes University v. Indiana, 14 How. 268; Muscatine v. Funck, 18 Iowa, 469; see Lea v. Hernandez, 10 Tex. 137, in which it is held that where a Texas town, incorporated prior to 1848, for three years and over had failed to elect officers or to provide any other governmental organization, and did not even possess officers *de facto*, the failure of the community to elect officers to carry on the government of the town operated as a dissolution of the corporation. But the court reaches this conclusion without citing any authority in support, and without giving any reason for its judgment.

[2] Brennan v. Bradshaw, 53 Tex. 330; Morris v. State, 65 Tex. 53.

[3] Hambleton v. Dexter, 89 Mo. 188; Largen v. State, *supra*.

[4] See Welch v. Ste. Genevieve, 1 Dillon C. C. 130; Butler v. Walker, (Ala. 93) 13 So. 261.

which may be sustained thereby by private individuals. Or, if public rights are suffering from a neglect of the performance of the duties of a municipal corporation, the court may, by *mandamus*, secure the performance of such duties. It would be a matter of very great surprise to a municipal community in the United States, to learn that its charter had been forfeited in a proceeding of *quo warranto*, because of the failure of its officers to perform the duties intrusted to them. The conclusion of the entire discussion is, that in this country there is but one way, whereby corporations may be destroyed or annulled; and that is, by an act of the legislature, which has created the municipal corporation, and which has the sole power of control over it.[1] It seems that in Missouri the city of Kahoka was in 1886 deprived of its charter by forfeiture for nonuser, in a proceeding of *quo warranto*, and subsequently the community was reincorporated under the general laws of the state as a city of the fourth class. It is doubtful what was the effect of the judicial proceeding in the case; certainly, under the general laws of the state, the reincorporation operated as a surrender of the old charter.[2]

§ 40. **Effect of dissolution of corporation.**—At common law a corporation, whether public or private, upon dissolution, was held to be civilly dead. Nothing remained in the character of a legal personality in the place of such corporation, and its rights of property and lands, for example, reverted to the grantor or his heirs, while the choses in action of the corporation, whether owned by them or due to it by others, became extinct. Leases of lands by such corporation were also terminated with its dissolution.[3] But, in this country, if not in England, an entirely different view has been taken of the act of incorporation, and the effect of dissolution. Instead of recognizing that,

[1] Dillon Mun. Corp. § 168; People v. Bancroft, 29 Pac. R. 112; (Ida. 92); Meriwether v. Garrett, 102 U. S. 472; Mobile v. Watson, 116 Ib. 289; State v. Hamilton, (Kan. 87), 19 Pac. 723; State v. Board of Education, 7 Ohio Cir. Ct. R. 152 (Ohio 93.)

[2] Hill v. Kahoka, 35 Fed. Rep. 321; see also, Meyer v. Porter, 65 Cal. 67; Hambleton v. Town of Dexter, 89 Mo. 188.

[3] Commonwealth v. Roxbury, 9 Gray, 510, note; Attorney General v. Gower, 9 Mod. 226; 1 Rol. Abr. 816; Rex v. Passmore, 3 Term R. 247; Grant Corp. 305; Colchester v. Brooke, 7 Queen's B. 383; Co. Litt. 13; 1 Lev. 237; Knight v. Wells, 1 Lut. 519; Rex v. Saunders, 3 East, 119.

in the dissolution of a corporation, a complete extinction of the legal personality, created by the act of incorporation, took place, leaving nothing in its place as the inheritor of its rights and obligations; the American courts recognize in the dissolution only a termination of its franchises, as forfeiture of the right to transact business in its corporate capacity, and hold that its rights and duties remain intact and unaffected by the dissolution of such a corporation. The property of the corporation, upon its dissolution, would be retained and taken charge of by a Court of Equity or placed in the hands of trustees appointed for that purpose, to be administered by them for the benefit of the creditors of the defunct corporation, in the first place, and to secure a subsequent distribution of the remaining property among the incorporators. There is, therefore, no reversion of the lands held by a corporation in fee to the grantor or his heirs, or a loss or termination of leases held by the corporation, or a termination of charitable trusts, which were vested in the dissolved corporation. In all these cases, a Court of Equity will direct a distribution of the property among the incorporators; or, in the case of charitable trusts, appoint other trustees to administer the trusts, and thus prevent their destruction. This is certainly the rule in America, in regard to private corporations, and the same rule has been applied equally to municipal corporations.[1]

§ 41. **Rights of creditors on a dissolution of a municipal corporation.**—It is explained in a subsequent chapter, that the property which a corporation holds for public use, such as public buildings and fire engines, wharves and the like, cannot be subjected to execution for the payment of the debts of the city.[2] It is likewise held that, upon the dissolution of a corporation, such property continues to be exempt from liability for the debts of the corporation, and it passes into the immediate control of the state.[3] So, also, has it been decided that the private

[1] *In re* Board, 48 Fed. R. 350; Mumma v. Potomac Co., 8 Pet. 281; Curran v. Arkansas, 15 How. (U. S.) 312; Vincennes v. Indiana, 14 How. 268; Owen v. Smith, 31 Barb. 641; Schlieder v. Dielman, 10 So. R. 934; Coulter v. Robertson, 24 Miss. 278; County v. Cox, 6 Ind. 403; Bacon v. Robertson, 18 How. (U. S.) 480; People v. O'Brien, 111 N. Y. 1; Com. v. Roxbury, 9 Gray, 510, note; Girard v. Philadelphia, 7 Wall. 1; Ewing v. Dallas, (Tex. 92) 19 S. W. R. 380.

[2] See *post*, § 212.

[3] Broughton v. Pensacola, 93 U. S. 266, 268, 269.

property of individuals, living within the municipality, cannot be subjected to liability for the payment of the debts of the city, except through taxation; and that the power of taxation can only be exercised by the corporation, under the authority of the Legislature.[1] But, granting that these two propositions are sound law, it still remains an important question what remedies the creditors of a dissolved municipal corporation may employ to secure the payment of its just debts? There are two cases that require special consideration in this inquiry; *One*, where the particular municipal corporation is dissolved, and a new and distinctly separate corporation is created by the state to take its place, and in whom are vested the ordinary powers of a municipal corporation; *Secondly*, where the corporation is dissolved, and no other municipal corporation is created to take its place. These two cases will be discussed separately; but prior to the discussion of them, it is necessary to remember, that the rights of creditors are protected by the provision of the Federal Constitution, which prohibits the passing of laws which impair the obligation of contracts; and it has been decided that where a municipal corporation has agreed with its creditors that a special levy of taxes should be made for the payment of its debts, or the interest on such debts, such an agreement with the corporation for a special levy of taxes constitutes a part of the obligation of the contract with the creditors, which is protected by this constitutional prohibition.[2]

§ 42. **The rights of creditors where a second corporation has been established in its place.**—Mere changes in the name of a corporation, or of its boundaries or mode of government, which fall short of a dissolution of the corporation, cannot have any effect whatever upon its rights of property, or upon its obligations to creditors. It still continues to be the same corporation under a changed form or name, and therefore the rights of creditors can in no wise be thereby affected.[3] So, also, would it be impossible to effect a dissolution of a municipal corporation, as to its creditors, by the substitution of a new municipal

[1] Meriwether v. Garrett, 102 U. S. 472.

[2] Seibert v. Lewis, 122 U. S. 284; see *post*, § 196.

[3] People v. Bagley, 85 Cal. 343; Broughton v. Pensacola, 93 U. S. 266; Girard v. Philadelphia, 7 Wall. 1.

charter in the place of one, under which the corporation was operated, at the time when the debts were contracted; even though the powers and privileges under the new charter are essentially different from those which were enjoyed under the old charter.[1] And in determining the rights of creditors, the presumption is very strong that the same corporation continues to exist, notwithstanding different powers are given to the corporation, and different officers provided for the administration of its affairs.[2] In a number of cases, for the purpose of avoiding the liability for their debts, Legislatures have dissolved municipal corporations—in the vernacular of the day, legislated them out of existence altogether—and have established in their place, with some modification of their boundaries and powers, and with the substitution of some entirely different name, some other body politic or local government, which it was claimed could not be treated as the old municipal corporation under a changed form. Thus, in Tennessee, the city of Memphis, and other municipal corporations, were abolished by legislative act, and in their place a public *quasi*-corporation was established, called "taxing districts," in which were vested most of the original powers of the dissolved municipal corporations. But, at the instance of creditors, it was held that these "taxing districts" were municipal corporations, and as such they inherited both the liabilities and the rights of property of the defunct corporation, whose place they were created to take.[3] So, also, the city of Mobile was dissolved by the act of the legislature of Alabama, and on the same day, with a diminution of the territory of the old corporation, the *Port of Mobile* was incorporated; and in that port was vested all the public property of the old city and most of its taxable property, while fourteen-fifteenths of the population of the old city were included in the Port. It was held by the United States Supreme Court, that the Port of Mobile was a municipal corporation, and as such

[1] State v. Natal, 39 La. An. 439; Girard v. Philadelphia, 7 Wall. 1.

[2] Walnut Township v. Jordan, 38 Kan. 562; Broughton v. Pensacola, 93 U. S. 266; Milner's Admx. v. Pensacola, 2 Woods, 632; Barkley v. Levee Com'rs, 93 U. S. 258.

[3] Lea v. State, 10 Lea (Tenn.) 478; Luehrman v. Taxing District, 2 Lea (Tenn.) 425; Devereaux v. City of Brownsville, 29 Fed. Rep. 742; O'Connor v. Memphis, 6 Lea (Tenn.) 730; Uhl v. Taxing District, 6 Lea (Tenn.) 610; Meriwether v. Garrett, 102 U. S. 472; State v. Taxing District of Shelby Co., 16 Lea (Tenn.) 240.

was the successor of the old city, and became liable as such for the debts of the old city.[1] In this case the Supreme Court said: "When the Legislature of a state has given a local community, living within designated boundaries, a municipal organization, and by a subsequent act, or series of acts, repeals its charter and dissolves the corporation, and incorporates substantially the same people as a municipal body under a new name for the same general purpose, and the general mass of the taxable property of the old corporation is included within the limits of the new, and the property of the old corporation used for public purposes is transferred without consideration to the new corporation for the same public uses, the latter, notwithstanding a great reduction of its corporate limits, is the successor in law of the former, and liable for its debts; and if any part of the creditors of the old corporation are left without provision for the payment of their claims, they can enforce satisfaction out of the new." Similar judgments have been rendered in cases of the same sort in other states.[2] It has also been held, that if, in the change from the old corporation to the new, the powers of the new corporation have been restricted to a greater degree than the powers of the old corporation, any such new limitation of the corporate powers, so far as the rights of existing creditors are thereby affected, is in violation of the constitutional provision, which protects the obligation of contracts from impairment by subsequent legislation.[3]

[1] Mobile v. Watson, 116 U. S. 289.

[2] Broughton v. Pensacola, 93 U. S. 266; Devereaux v. City of Brownsville, 29 Fed. Rep. 742; Laird v. De Soto, 22 Fed. Rep. 421; People v. Murray, 73 N. Y. 535.

[3] Owen v. Smith, 31 Barb. 641; Welsh v. Ste. Genevieve, 1 Dillon C. C. 130; Beckwith v. Racine, 7 Biss. 142; Mount Pleasant v. Beckwith, 100 U. S. 514; Meriwether v. Garrett, 102 U. S. 472; Brooklyn v. Smith, 104 Ill. 429; Memphis v. Bethel, 17 S. W. R. 191; Louisville Bridge Co. v. Louisville, 81 Ky. 189; Barkley v. Levee Commissioners, 93 U. S. 266; Robinson v. Lane, 19 Ga. 337; Muscatine Turnverein v. Funck, 18 Iowa, 469; Thompson v. Allen County, 115 U. S. 550; Amy v. Watertown, 130 U. S. 301; Hopkins v. Whitesides, 1 Head (Tenn.) 31; Bank v. Lockwood, 2 Harring. (Del.) 8; Thompson v. Abbott, 61 Mo. 176; St. Louis Bridge Co. v. East St. Louis, 121 Ill. 238; State *ex re.* Bridge Co. v. Columbia, 27 S. C. 137. There appears to be one case in contradiction with this line of authorities, an old case in Mississippi, in which it was held that the repeal of the charter of a municipal corporation extinguished the debts due it from such corporation. Port Gibson v. Moore, 13 Sm. & Marsh, 157.

§ 43. **Effect of dissolution of corporation, where no other corporation has been substituted therefor.**—If the Legislature repeals the charter of a municipal corporation, while it is in debt, and makes no provision for the payment of its debts, and does not create any other corporation to take its place, and to exercise the powers of local government, and the administration of the public affairs of the community is assumed by the state government itself, so far as the adjudications up to the present time carry one to any conclusion, it would seem that the courts are practically powerless to protect creditors of the defunct corporation against a total loss of their claims, as long as they find it impossible to secure relief at the hands of the Legislature, which has dissolved the corporation. That is, since the corporation has been extinguished, and in view of the fact, that the creditors of the corporation can only look to the exercise, by the municipal corporation or its successors, of the power of taxation for payment of its debts; and have no claim of satisfaction against the public property of such corporation, or against the private property of its citizens, either before or after dissolution of the corporation; the assumption of the powers of the local government by the state, in consequence of the dissolution of the corporation, would seem to bring the exercise of such powers necessarily within the discretion of the state Legislature; and the state government is protected from judicial interference by another provision of the United States Constitution.[1] For this reason, it would seem that there is no judicial remedy open to the creditors under these extraordinary circumstances.[2] But Judge Dillon ventures the suggestion, that the true solution of these difficulties may possibly be found in the consideration that the power of a municipality to levy taxes to pay its debts, as the power existed at the time when the debts were created, is in its essence not the grant of a power to the incorporated body, but to the inhabitants of the incorporated territory, which cannot be taken away by subsequent leg-

[1] Art. XI. amendment to the Constitution.

[2] Barkley v. Levee Com'rs, 93 U. S. 258; Heine v. Levee Com'rs, 19 Wall. 655; Thompson v. Allen Co., 115 U. S. 550; Rees v. Watertown, 19 Wall. 107; Amy v. Watertown, 130 U. S. 301; Meriwether v. Garrett, 102 U. S. 472.

islation, as against existing creditors.[1] This suggestion of the distinguished author is strictly in line with the fundamental conception of the character and origin of a municipal corporation, viz., that such corporation does not rest for its fundamental existence upon the act of incorporation, but upon its natural existence as a community; and that the act of incorporation was simply a legislative investment of the community with the franchise of acting as a legal personality and of exercising the powers of local government. It is believed that the adoption of this theory would certainly work no harm to the true interests of the community which has been incorporated, while at the same time it would furnish the means of escaping from the outrageous consequence of a mere technicality of the law. It is, however, so seldom the case that a municipal corporation can be legislated out of existence, without some sort of public corporation being created by the Legislature to take its place, that it is not likely that the case can become a common one.

§ 44. **Revival by a new charter.**—It was a rule of the English law that, where the charters of an old corporation have been suspended or even dissolved by its loss of members or the loss of an integral part, such dissolved or defunct corporation may be revived by a new charter, and the rights and obligations of the old corporation transferred to a new corporation thus created; so that, in effect, the new corporation would be nothing more than a continuation of the old corporation.[2]

Inasmuch as the existence of a municipal corporation in this country can only be interfered with by a dissolution of the corporation, the doctrine of revival by the new charter can only be applied here to municipal corporations, in a modified form, in the case where there has been a dissolution of the old corporation and the creation of a new corporation to take its place, which has been already explained in a preceding paragraph. Certainly, under these circumstances the new corporation is properly described as being no more than a changed form of the old corporation.[3]

[1] Dillon Mun. Corp. § 173.

[2] Bellows v. Bank, etc., 2 Mason C. C. 43; Hoffman v. Van Nostrand, 42 Barb. 174; Girard v. Philadelphia, 7 Wall. 1; Olney v. Harvey, 50 Ill. 453; Neely v. Yorkville, 10 S. C. 141; Rex v. Passmore, 3 Term R. 119, 247; Regina v. Bewdley, 1 P. Wms. 207; Colchester v. Brooke, 7 Queen's Bench, 383; Colchester v. Seaber, 3 Burr. 1866.

[3] See *ante*, § 42.

CHAPTER V.

CORPORATE NAME, SEAL AND BOUNDARIES.

§ 47. **Corporate name, how obtained.**—Inasmuch as a corporation is an intangible personality, a creature of the law, it, probably more than the natural person, requires a name. Without a name, the corporation could hardly identify itself, or give any form whatever to its legal personality.[1] Ordinarily, the power which creates a corporation gives its name, and where it is created by special charter, the charter contains or prescribes the name. Under the English Municipal Corporation Act of 1838, it is provided that the names of all municipal corporations in England shall assume a common form, the proper corporate name for boroughs being "mayor, aldermen and burgesses of ——," and for cities "mayor, aldermen and citizens of ——."[2]

[1] Smith v. Tallahassee Branch of Central Planks Road Co., 30 Ala. 65; Atty. Gen. v. Worcester, 2 Phillips, 3; Lancaster Co. v. Rush, 52 N. W. R. 837; Middlesex H. & M. Soc. v. Davis, 3 Metc. (Mass.) 138; Knight v. Wells, 1 Lord Raym. (Eng.) 80; Physicians v. Salmon, 3 Salk. (Eng.) 102; No. Pac. Ry. Co. v. Walker, 47 Fed. R. 681; Dutchess Mfg. Co. v. Davis, 14 Johns. (N. Y.) 238; 7 Am. Dec. 459; Gostin v. State, (Ga. 92) 15 S. E. R. 361; Trustees v. Peaslee, 15 N. H. 317.

[2] Atty. Gen. v. Worcester, 2 Phil. 3; Rochester v. Lee, 15 Sim. 376.

In this country, where municipal corporations are very often created under general acts, provision is made under these corporation acts for the adoption by the municipality itself of a name; but all are required, as in the English corporation act, to conform to the general form, as the city or town of ——. The form prescribed by these general acts is noted to be different from the English form, in that it is the city or town which is incorporated, and not the mayor, aldermen and citizens, forming integral parts of the corporation; the community is incorporated, and not any particular individuals of that community. The corporate name of a city, which appears in a special act or charter, will with the charter itself be judicially noticed by the courts, and special proof of the same would not be required in any suit, where that fact was required to be established. But where the city is organized under a general act, and the name is selected by the community, it would have to be expressly proven; for the court would not take judicial notice of the selection of a name by the community.[1]

§ 48. **Change of corporate name—Name acquired by reputation.**—While it is unquestionably the rule of law, notwithstanding the popular or general impression to the contrary,[2] that a natural person has the right at any time, without the consent or ratification of the Legislature, to adopt any name he pleases, and to be known by such name, instead of by the baptismal name, as long as the change of name has not been made for fraudulent or illegal purposes;[3] it seems that the same princi-

[1] Douglas v. Bank, 19 Ala. 659; Stroudsburg v. Brown, (Pa. 92) 11 Pa. Co. Ct. 272; Linck v. Litchfield, 31 N. E. R. 123 (Mass. 92); Johnson v. Indianapolis, 16 Ind. 227; Kansas etc. Co. v. Burge, 40 Kan. 736; Marx v. Croison, 17 Or. 393; Pittsburgh v. Craft, 1 Pitts. (Pa.) 158; Pendleton v. Bank of Kentucky, 1 Mon. 177; Medway v. Adams, 10 Mass. 360; Trammell v. State, 93 Ala. 388; Bower v. State Bank, 5 Ark. 234; Pierce v. Somerworth, 10 N. H. 369; Neely v. Yorkville, 10 S. C. 141; State v. Cooper, 101 N. C. 684; Kentucky Seminary v. Wallace, 15 B. Mon. 35; People v. Love, 19 Cal. 676; African Society v. Varick, 13 Johns. 38.

[2] Even Judge Dillon appears to entertain the contrary impression, as is manifest by the following quotation: "If a particular name be given to a corporation in its charter, the corporation can no more change it at its pleasure than a man can at pleasure change his baptismal name." Dillon Mun. Corp., vol. 1, sec. 175.

[3] England v. New York Publishing Co., 8 Daly (N. Y.) 375; Hygeia W. I. Co. v. N. Y. Hyg. I. Co., 19 N. Y. 602; Bell v. Sun Printing Co., 42 N. Y.

ple cannot be applied to municipal corporations, if it is possible to apply it to any kind of corporation. From the fact that a corporation is a creature of a legislative act, and has no tangible existence as a legal personality, outside of the act of incorporation, the legal name acquired by the act of the Legislature is deemed to be beyond the power of change by the municipal corporation without legislative action.[1] And even where the Legislature, in a subsequent act, applies a second or different name to the corporation, it is held that there is necessarily a repeal of the first name given to it by the Legislature; it is said that a corporation cannot have two legal names.[2] But, notwithstanding this general doctrine, it has been held, that where *quasi public* corporations are created by legislative act, without any provision for giving to the particular corporation a distinct or formal name, such corporation may acquire a name by reputation, as in the case of natural persons, and sue and be sued by such name.[3]

Super. Ct. 567; Snook, 2 Hilt. (N. Y.) 566. In Doe v. Yates, 5 Barn. & Ald. 544, Abbott, C. J., said: "A name assumed by the voluntary act of a young man at his outset in life, adopted by all who know him, and by which he is constantly called, becomes, for all the purposes that occur to my friend, as much and effectually his name as if he had obtained an act of Parliament to confer it on him." "No person is bound to accept his patronymic as a surname, nor his Christian name as a given name, though the custom to do so is almost universal among English speaking people, who have inherited the common law." Biddle, J., in Scofield v. Jennings, 68 Ind. 233.

[1] *In re* Mer. Rep. Co., 115 N. Y. 176; Episcopal etc. Society v. Episcopal Church, 1 Pick. 372; Girard v. Philadelphia, 7 Wall. 1; *In re*, East Stroudsburg, 9 Pa. Co. Ct. 529.

[2] Rees v. Newport etc. Co., 32 W. Va. 164; Physicians v. Salmon, 3 Salk. (Eng.) 102; Atty. Gen. v. Worcester, 2 Phillips, 25; Smith v. Tallahassee Branch, 30 Ala. 650; Manufacturing Co. v. Davis, 14 Johns. 238; Society etc. v. Young, 2 N. H. 310; Trustees v. Peaslee; 15 N. H. 317; Dutchess Mfg. Co. v. Davis, 14 Johns. (N. Y.) 238; 7 Am. Dec. 450; Haselton B. Co. v. Hazelton T. B. Co., 30 N. E. R. 339; Atty. Gen. v. Corporation of Leicester, 9 Beav. (Eng.) 546; Middlesex, etc., v. Davis, 3 Met. (Mass.) 133; Trustees v. Peaslee, 15 N. H. 317; State v. Cooper, 101 N. C. 684; Society of Middlesex H. & M. Soc. v. Davis, Met. (Mass.) 133; All Saints Church v. Lovett, 1 Hall (N. Y.) 191; Knight v. Wells, 1 Ld. Raym. 80.

[3] King v. Norris, 1 Ld. Raym. 337; The Queen v. Bailiffs of Ipswich, 2 Ld. Raym. 1232, 1238, 1239; School District v. Blakeslee, 13 Conn. 227. Use of names by corporations, see 32 Am. & Eng. Corp. Cases, 22; Episcopal Society v. Episcopal Church, 1 Pick. 372.

§ 49. **Effect of misnomer in general.**—While it has been generally held that a name is necessary to the existence of a corporation, as a means of identifying the corporation, and distinguishing it from other persons in the various relations of life ;[1] yet the identification of the corporation is the important element of the requirement.[2] Hence it is that, as a general rule, any variation from the true legal name of a corporation in grants and bequests to such corporation, will not have the effect of vitiating or invalidating such grant or bequest, on account of the uncertainty of the grantee or donee, as long as the variation or misnomer is not so pronounced as to make it impossible to identify the corporation.[3] Thus, it has been held that, where in a

[1] Middlesex H. & M. Soc. v. Davis, 3 Metc. (Mass.) 133; Knight v. Wells, 1 Lord Ryan. (Eng.) 80; Corp. of Rochester v. Lee, 15 Sim. (Eng.) 376; Dillon, Mun. Corp., secs. 175–6; Dutchess Mfg. Co. v. Davis, 14 Johns. (N. Y.) 238; 7 Am. Dec. 459; Physicians v. Salmon, 3 Salk. (Eng.) 102; Atty. Gen. v. Worcester, 2 Philips, 3.

[2] Wetmore v. Institution, 3 N. Y. S. 179; Neely v. Yorkville, 10 S. Car. 141; Pierce v. Somerworth, 10 N. H. 369; Atty. Gen. v. Kerr, 2 Beav. 420; St. Louis Hospital v. Williams, 19 Mo. 609; Andrews v. Dyer, 81 Me. 104; Bristol v. Ontario, 60 Conn. 472; *In re* Pepper, 11 Pa. Co. Ct. 257; People v. Love, 19 Cal. 676; Kentucky Seminary v. Wallace, 15 B. Mon. (Ky.) 35; Milford etc. Co. v. Brush, 10 Ohio, 111; 36 Am. Dec. 78; Medway Mfg. Co. v. Adams, 10 Mass. 360; Inhabitants v. String, 10 N. J. L. 323; Kimball v. Chapel, 27 Ab. N. C. 437; Faulkner v. Home, 29 N. E. 645 (Mass. 92); Bellows v. Hallowell etc. Bank, 2 Mason (U. S.) 43; Hoffman v. Van Nostrand, 42 Barb. (N. Y.) 174; Whitby v. Harrison, 18 Up. Can. Q. B. 603; Bruce v. Cromar, 22 Up. Can. Q. B. 321; Douglas v. Branch Bank, 19 Ala. 659; Bower v. State Bank, 5 Ark. 234.

[3] Wakefield v. Brown, 38 Minn. 361; 37 N. W. R. 788; Morris v. State, 84 Ala. 446; 4 So. R. 628; Wood v. Hammond, (R. I. 88) 17 Atl. R. 324; *In re* Look, 1 Con. Sur. 403; Neely v. Yorkville, 10 S. Car. 141; Berks Co. Turnpike Road Co. v. Myers, 6 S. & R. (Pa.) 12; 9 Am. Dec. 402; People v. Love, 19 Cal. 676; African Society v. Varick, 13 Johns. 38; Chapin v. School District in Winchester, 35 N. H. 445; People v. Runkle, 9 Johns. (N. Y.) 147; Riker v. Leo, 115 N. Y. 93; Pittsburgh v. Craft, 1 Pitts. (Pa.) 158; Douglass v. Branch Bank etc., 19 Ala. 659; Sutton v. Cole, 3 Pick. (Mass.) 232; New York Institute v. How, 10 N. Y. 84; Centenary M. E. Ch. v. Parker, 43 N. J. Eq. 307; 12 Atl. R. 142; Vausant v. Roberts, 3 Md. 119; Minot v. Boston Asylum, 7 Metc. (Mass.) 416; Bodman v. American Soc., 9 Allen (Mass.) 447; Neely v. Yorkville, 10 S. C. 141; Kentucky Seminary v. Wallace, 15 B. Mon. 35; Pendleton v. Bank, 1 Mon. 177; Faulkner v. Nat. Sailors' Home, (Mass. 92) 29 N. E. R. 645; N. Y. Conference v. Clarkson, 4 Halst. Ch. (N. J.) 541; Preacher's Aid Soc. v. Rich, 45 Me. 552; Chappell v. Missionary Society, (Ind. 92) 29 N. E. R. 624; Pierce v. Somerworth, 10 N. H. 369; Camden v. Clerke, Hobart (Eng.) 32; Atty.

devise to a town the popular name of "South Parish in Sutton" was used instead of the lawful name "The first Parish in Sutton," notwithstanding the variation, the devise was valid.[1] And so, likewise, a devise was sustained, which was made to the "Right Worshipful Jurats and General Council of the Town of Rye;" whereas its legal corporate name was "the Mayor, Jurats and Commonalty of the Town of Rye."[2] A devise has often been held to be valid, although it be made to a corporation which is described instead of being named, as long as the description is sufficient to identify which corporation was intended to be the recipient of the gift.[3]

§ 50. **Use of corporate name in suits.**—But the requirement of a strict conformity with the legal provision for a name is more strictly enforced, and the necessity for it is greater, in the case of suits, than where the name is employed in grants to, or contracts with, the corporation. A misnomer of a substantial character in the pleadings would be the subject for demurrer; but, in these days, the opportunity for frequent amendments of the pleadings would deprive the misnomer in a suit of its important consequences. But a misnomer in a suit is fatal to the suit, as long as it is not corrected.[4] Where a corporation's

Gen. v. Mayor of Rye, 7 Taunt. (Eng.) 546; St. Louis Hospital v. Williams, 19 Mo. 609; Kimball v. Chappell, 18 N. Y. S. 30; 27 A. N. C. 437; Crydon Hospital v. Farley, 6 Taunt. (Eng.) 467; The King v. Croke, Cowp. (Eng.) 29; Goodwyn and Railway Co., *In re*, 13 U. C. C. P. 254; Bristol v. Ontario Orph. Asylum, 60 Conn. 472; Bower v. State Bank, 5 Ark. 234; Milford etc. Co. v. Brush, 10 Ohio, 111; 36 Am. Dec. 78; *In re* Pepper's Estate, 1 Pa. Dist. 148; Beverly v. Barlow, 10 U. C. C. P. 178; Mayor and Burgesses etc., 10 Coke, 120. Chancellor Kent says: "The general rule to be collected from the cases is, that a variation from the precise name of the corporation, when the true name is necessarily to be collected from the instrument, or is shown by proper averments, will not invalidate a grant by or to a corporation, or a contract with it, and the modern cases show an increased liberality on this subject." 2 Kent Com. 292.

[1] First Parish in Sutton v. Cole, 3 Pick. 232.

[2] Attorney General v. Mayor of Rye, 7 Taunton, 546; 2 Eng. Com. Law, 213.

[3] Trustees v. Peaslee, 15 N. H. 317; Bodman v. American Tract Society, 9 Allen, 447; Vansant v. Roberts, 3 Md. 119; Preacher's Aid Society, 45 Me. 552; New York Institute v. How, 10 N. Y. (6 Seld.) 84. See Tiedeman on Wills, chapter XVI.

[4] Seminary v. Wallace, 15 B. Mon. 35; County v. Griswold, 58 Mo. 175; Romeo v. Chapman, 2 Mich. 179; Carder v. Com'rs, 16 Ohio St. 353; Insane Asylum v. Higgins, 15 Ill. 185; Porter v. Blakely, 1 Root (Conn.) 440; Trustees v. Campbell, 16 Ohio

name has been changed by law, without any change in the identity of the corporation, suits should ordinarily be instituted in the new name, although the subject-matter of the suit, the contract or grant, was made in the old name, provided the change from the old name to the new one is proven in the proper form in the suit, in order to connect the corporation suing or sued with the corporation named in the grant or contract.[1] And this is likewise the rule, where, in a grant or contract, a different name has been employed to designate the corporation. The corporation would be compelled to sue in its lawful name on such a contract or conveyance, and would establish its right to maintain the suit, by proving that it was intended under the name employed in the contract or conveyance.[2]

§ 51. **Requirement of a corporate seal.**—The charter of municipal corporations, and, likewise, the general corporation act, usually provides that the corporation shall have and use a common seal; and the authority is ordinarily given to the corporation to select its own seal, and to change it at pleasure. But the express grant of the authority to have a seal is not necessary; the power would be implied, in the absence of such an express grant. But, in any case, the corporation need not have a formal seal, which they must use on all occasions. Any seal, in the absence of a formal seal, would be a good seal for the corporation, which is authoritatively affixed to the instrument and declared to be a corporate seal, although it has not been formally or regularly adopted as the seal of the corporation.[3]

St. 11; Cambridge University v. Crofts, 10 Mod. 208; Berks Co. etc. v. Myers, 6 Serg. & Rawle (Pa.) 12; Brittan v. Newland, 2 Dev. & Bat. (N. C.) 363.

[1] Fort Wayne v. Jackson, 7 Blackf. (Ind.) 36; Colchester v. Seaber, 3 Burr. 1866; Regina v. Ipswich, 2 Ld. Raym. 1232, 1238.

[2] 10 Co. 125 *b*; Underhill v. Santa Barbara etc. Co., 93 Cal. 300; Trustees v. Reneau, 2 Swan (Tenn.); Fort Wayne v. Jackson, 7 Blackf. (Ind.) 36; Young v. Com'rs, 53 Fed. 895.

Armfield v. Solon, 19 N. Y. S. 44; Solon v. Williamsburg Bank, 114 N. Y. 122; Koehler v. Black R. Falls Iron Co., 2 Black (U. S.) 715; Stockton v. Powell, (Fla. 92) 10 So. R. 688; City Council v. Moorehead, 2 Rich. Law, 430; Porter v. Railroad Co., 37 Me. 349; Ruffner v. Welton C. & S. Co., (W. Va. 92) 15 S. E. R. 48; Bank of Middlesex v. Rutland R. Co., 30 Vt. 159; Tenney v. East Warren Lumber Co., 43 N. H. 343; Mill Dam Foundry v. Hovey, 21 Pick. 417; Stebbins v. Merritt, 10 Cush. 27; Porter v. Androscoggin etc. R. Co., 37 Me. 349; Gordon v. Diego, (Cal. 93) 35 Pac. 885; Cary Lumber Co. v. Cain, (Miss. 93) 13 So. 239; Tetig v. Rossman, 12 Mont. 404.

The common law seal required an impression to be made in wax upon the paper; but it is probably true everywhere in this country, that corporations like private individuals are not required to employ the common law seals, where seals are required at all; but that any impression upon the paper, either by a stamp or by a pen, would be a sufficient seal. Certainly, this is the rule in regard to private individuals; and it is unquestionably the law in regard to municipal corporations, that the employment of wax is not required, but that the impression stamped into the paper is sufficient corporate seal.[1] But in order that any sealing of the instrument may be binding upon a corporation, whether the regular or temporary seal is employed, the seal must have been affixed by an officer, who is legally authorized to bind the corporation by such act.[2]

The common law rule was, that a corporation could not perform any legal binding act, except under seal; and that a parol contract, entered into in the name of the corporation, would not be binding upon the corporation, but only upon the officers, who executed or made such a contract. The modern rule is, however, very different from this. Instead of holding that a parol contract is not binding upon a corporation, the contrary rule has been established almost everywhere, relating both to municipal, as well as private, corporations, that the corporation is required to make use of its seal, in the execution of legal instruments, only where the natural person would likewise be required to do so. As Judge Story has said: "Where a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action lies."[3] But it has been held in some in-

[1] Hendee v. Pinkerton, 14 Allen, 381; comp. Solon v. Williamsburg, 114 N. Y. 122.

[2] Koehler v. Iron Co., 2 Black, 715; Bank of Ireland v. Evans, 32 Eng. Law & Eq. 23. See Tiedeman's Private Corporations for a fuller citation of cases.

[3] Bank of Columbia v. Patterson 7 Cranch, 299; Over v. Greenfield, 107 Ind. 231; Bank of United States v. Danbridge, First N. Bk. v. Salem etc. Co., 39 Fed. 89; Clark v. Farmers' etc. Co., 15 Wend. 256; Ib. 265; Cicotte v. Church, 60 Mich. 552; Bernardin v. No. Dufferni, 19 Can. S. C. R. 581; Sturtevant v. Alton, 3 McLean, 393; Davenport v. Insurance Co., 17

stances, as in Iowa and Illinois, that a corporate seal is essential to the validity of a legal instrument when executed by the municipal or public corporation.[1]

It has also been held that a corporation can appoint its agents by a parol act, and the appointment need not be made under seal.[2]

§ 52. **Seal, how proved.**—A seal of a private corporation unquestionably does not prove itself; but the fact, that it is the seal of a particular corporation, must be proven by proper evidence.[3] In this country, this is probably the case, likewise, with municipal corporations, except where the laws of the state provide otherwise. But it seems that, in England, the corporate seals of old cities, like London or Edinburgh, have been declared to be the subject of judicial notice of the courts, on account of their great antiquity.[4] But where a legal instrument contains what purports to be a corporate seal, and the corporate character of the seal and conveyance is confirmed by the signatures of proper officers, it is held that the presence of

Iowa, 276; Lesesne v. White, 1 Spears (S. Car.) 31; State Board of Education v. Aberdeen, 56 Miss. 518; Shrewsbury v. Brown, 25 Vt. 197; Gassett v. Andover, 21 Vt. 342; Adams v. Farnsworth, 15 Gray (Mass.) 423; Mott v. Hicks, 1 Cow. (N. Y.) 513; 13 Am. Rep. 550; Randall v. Van Vechten, 19 Johns. (N. Y.) 60; 10 Am. Dec. 193; Wayne County v. Detroit, 17 Mich. 390; American Ins. Co. v. Oakley, 9 Paige (N. Y.) 49; 38 Am. Dec. 561; Canaan v. Derush, 47 N. H. 211; Lebanon v. Heath, 47 N. H. 353; Magill v. Kauffman, 4 S. & R. (Pa.) 317; 8 Am. Dec. 713; Dunn v. Rector etc. of St. Andrews Church, 14 Johns. (N. Y.) 118; Danforth v. Schoharie etc. Turnpike Co., 12 Johns. ; Perkins v. Washington Ins. Co., 4 Cow. (N. Y.) 645; Sanford v. Tremlett, 42 Mo. 384; Legrand v. Sidney College, 5 Munf. (Va.) 324; Peterson v. Mayor etc. of N. Y., 17 N. Y. 449; Maher v. Chicago, 38 Ill. 266; Frankfort Bridge Co. v. Frankfort, 18 B. Mon. (Ky.) 41; Kenzie v. Chicago, 2 Scam. (Ill.) 188; 33 Am. Dec. 443; Bryan v. Page, 51 Tex. 532; 32 Am. Rep. 637; Dunlap v. Water Com'rs of Erie, 25 Atl. R. 60; 151 Pa. St. 477; 31 W. N. C. 231.

[1] In the Iowa case it is the county warrant; Smeltzer v. White, 92 U. S. 390; Prescott v. Gouser, 34 Iowa, 178; Springer v. Clay Co., 35 Iowa, 243; and in Illinois it is a lease; Kinzie v. Chicago, 2 Scam. (Ill.) 188.

[2] See Tiedeman on Private Corporations for citations of authorities.

[3] Moises v. Thornton, 8 Term R. 303; City Council v. Moorehead, 2 Rich. (S. C.) Law, 430; Gilbert Ev. 19; Jackson v. Pratt, 10 Johns. 381; Foster v. Shaw, 7 Serg. & Rawle (Pa.) 163; Id. 318; Den v. Vreelandt, 2 Halst. (N. J.) 352; Mann v. Pentz, 2 Sandf. Ch. 257; Com. v. Dunlop, (Va. 93) 16 S. E. R. 273, (state seal.)

[4] Den v. Vreelandt, 2 Halst. (N. J.) 352.

the corporate seal is thereby established by *prima facie* evidence, although it is insufficient to support the conclusion that the seal was lawfully placed there, and that the instrument is an act binding upon the corporation.[1]

§ 53. **Boundaries, how defined.**—It is required, in order to make a valid municipal corporation, that its boundaries should be definite and certain. Uncertainty in regard to the boundary has so many important consequences in its train, that there cannot be a valid incorporation, as long as this uncertainty has not been cured.[2] Thus, for example, the boundaries of a town were held to be uncertain and insufficient, where it was described in these words: "Commencing with Samuel Hall, thence to William Scales, also including John W. Dana, Jason and Warren Britt, and Thomas Lyford."[3] But where the state laws provide that boards of supervisors should lay out the town, in accord with the general description of the proposed town which is contained in the certificate, the subsequent establishment of the boundaries by the supervisors would cure the uncertainty arising in the description of the town, as contained in the certificate.[4] Whenever there is a dispute in regard to boundaries, a subsequent acquiescence on the part of the people of the community, and of the state authorities, in the adoption of a particular boundary as a settlement of the dispute, will be binding upon the parties concerned, and would operate to cure the original defect in the boundary.[5] These boundaries are originally described or set out in the charter of the corporation in connection with some method, which is prescribed in the charter, or in the general incorporation act, for subsequently setting out and ascertaining such boundaries. The Legislature has invested in itself as a matter of course, in the first instance,

[1] Fidelity etc. Co. v. Shenandoah etc. Co., 32 W. Va. 244; Brennan v. Weatherford, 53 Tex. 330; 37 Am. Rep. 758; Levering v. Mayor, 7 Humph. (Tenn.) 553; Memphis v. Adams, 9 Heisk. (Tenn.) 518; Musser v. Johnson, 42 Mo. 74; 97 Am. Dec. 316.

[2] Enterprize v. State, 10 So. R. 740; House v. Greenburg, 94 Ind. 533; San Diego v. Granniss, 77 Cal. 510; Plantation No. 9 v. Bean, 40 Me. 218; Guebelle v. Epley, 28 Pac. 89; Pierce v. Carpenter, 10 Vt. 480; Douglas v. Town of Harrisville, 9 W. Va. 162.

[3] Cutting v. Stone, 7 Vt. 471.

[4] People v. Carpenter, 24 N. Y. 86.

[5] Omaha v. So. Omaha, 47 N. W. R. 1113; Strosser v. Ft. Wayne, 100 Ind. 443; Hamilton v. McNeil, 13 Gratt. 389; People v. Farnham, 35 Ill. 562; Milne v. Mayor, 13 La. An. 69.

the power to determine the geographical limits of a municipal corporation; and in the absence of any constitutional limitations, the power of the Legislature in this regard is unlimited, and no objection can be made to any actual setting out of boundaries by the Legislature.[1] The fact, that the existing cities and towns are mentioned by name in a constitution subsequently adopted, does not give to the boundaries of such corporations such a fixity, as would deny to the Legislature the power to subsequently change them.[2] It is a legislative question, and not a judicial question, where the boundaries of a municipal corporation should be fixed by the Legislature. The legislative discretion can in no wise be interfered with or controlled by the courts.[3] In the general incorporation acts, provision is made for the boundaries being set out by some one, other than the Legislature, and the constitutional question is raised whether the Legislature has the power to delegate its authority to fix the boundaries of a proposed municipal corporation, the authorities reaching conflicting conclusions. Thus, it has been held that the power to fix and determine upon the boundaries of a municipal corporation may be delegated to a court, a County Court, for example.[4] On the other hand, it has been held, that a Legislature has not the power to delegate

[1] Rome v. Anderson, 89 Tenn. 259; Norris v. Mayor etc. of Smythville, 1 Swan (Tenn.) 164; McCollie v. Mayor of Chattanooga, 3 Head. (Tenn.) 317; *In re* Boundary (Pa. 92), 23 Atl. R. 1041; Pool v. Brown, 98 Mo. 675; Washburn v. Oshkosh, 60 Wis. 453; Suffield v. Town of East Granby, 52 Conn. 175; Union v. Knox Co., 90 Tenn. 541; People v. Nevada, 6 Col. 143; People v. Bennett, 29 Mich. 451; 18 Am. Rep. 107; St. Louis v. Russel, 9 Mo. 507; Atchison etc. R. Co. v. Maquilkin, 12 Kan. 301; St. Louis v. Allen, 13 Mo. 400; Stone v. Flournoy, 28 La. An. 850; Little Rock v. Parish, 36 Ark. 166; Stilz v. Indianapolis, 55 Ind. 515; Wiley v. Bluffton, 111 Ind. 152; Martin v. Dix, 52 Miss. 53; 24 Am. Rep. 661; Galesburg v. Hawkinson, 75 Ill. 152; Wade v. Richmond, 18 Gratt. (Va.) 583.

[2] Wade v. Richmond, *supra*.

[3] Little Rock v. Parish, 36 Ark. 166; Galesburg v. Hawkinson, 75 Ill. 152; Wiley v. Bluffton, 111 Ind. 152.

[4] State v. Pocaletto, 28 Pac. R. 411; People v. Bennett, 29 Mich. 451; 29 Am. Rep. 107; *In re* Boundary Line of Townships (Pa. 92), 23 Atl. 1041; Appeal of Singer (Pa.), 18 Atl. Rep. 931; Burlington v. Leebrick, 43 Iowa, 252; Board of Education v. Board of Education, 30 W. Va. 424; 20 Am. & Eng. Corp. Cas. 11 (division of school district); Town of Suffield v. Town of East Granby, 52 Conn. 175; 9 Am. & Eng. Corp. Cas. 1; Kayser v. Trustees etc. of Brenen, 16 Mo. 88.

its right to affix boundaries to any court whatever, on the ground that it is a legislative authority, and not a branch of the judicial power.[1] It is clearly impossible for the Legislature to delegate the power of fixing boundaries to private citizens, or to a private board.[2] But it is, on the other hand, very generally held that the power of fixing and determining upon the boundaries of a municipal corporation may be delegated to local bodies or boards, representing the municipal corporation.[3]

§ 54. **Corporate boundaries by reference to streams and highways.**—Generally, where reasonable care is employed in the fixing of boundaries, no difficulty is experienced in their actual location, because the reference is made to well known objects or monuments, or the boundary is described by metes and bounds.[4] But where a city or town is described as being bounded by a river, it is often difficult to ascertain, apart from the actual inquiry into facts of the particular case, where the boundary line is; *i. e.*, whether it is at the center of the stream, or at the high-water or low-water mark, on the one side or the other of the stream. In all such cases, either the description contained in the charter, or act of incorporation, would determine the answer in the particular case, or it is determined by the local usage or custom. The general rule is that, where towns are bounded by rivers which are not navigable, the center of the stream will be the boundary line.[5] And the same rule determines the boundary line, where the town is bounded

[1] Willett v. Belville, 11 Lea (Tenn.) 1; City of Galesburg v. Hawkinson, 75 Ill. 152.

[2] Town of Suffield v. Town of East Granby, 52 Conn. 175; Eulis v. McAdams, 7 S. E. R. 725; People v. Bennett, 29 Mich. 451; 18 Am. Rep. 107.

[3] Ewing v. State, (Tex. 91) 16 S. W. R. 872; Fisher v. San Diego, 86 Cal. 158; 24 Pac. R. 1000; People v. Carpenter, 24 N. Y. 86; Osgood v. Clark, 6 Frost (N. H.) 307; People v. Bennett, 29 Mich. 451; Blanchard v. Bissell, 11 Ohio St. 96; Borough of Blooming Valley, Ib. 66; Kelly v. Meeks, 87 Mo. 396; Stilz v. Indianapolis, 55 Ind. 515; Devore's Appeal, 56 Pa. St. 163; People v. Bennett, 29 Mich. 451.

[4] Elmendorf v. Mayor, etc., 25 Wend. 693; Hamilton v. McNeil, 13 Gratt. (Va.) 389; Raab v. Maryland, 7 Md. 483; Gray v. Sheldon, 8 Vt. 402; Pierce v. Carpenter, 10 Vt. 480; Hollenbeck v. Sykes, 29 Pac. 380; People v. Carpenter, 24 N. Y. 86.

[5] Smith v. Skagit Co., 45 Fed. R. 725; *In re* Spier, 3 N. Y. S. 438; Cold Spring etc. v. Tolland, 9 Cush. 492; State v. Canterbury, 8 Fost. (28 N. H.) 195; State v. Gilmanton, 14 N. H. 467; Flynn v. Boston, (Mass. 92) 26 N. E. R. 868; Galesburg v. Hawkinson, 75 Ill. 156; Kelly v. Pittsburgh, 104 U. S. 78; People v. Supervisors,

by a road; the center line being the boundary.[1] This is, ordinarily, the rule also, where the monument of boundary is a navigable stream. The boundary line would ordinarily be the center line of the river. But in particular cases, this general rule is controlled by local settlements of boundary, in opposition to its principle. Thus, the boundary line of the city of Brooklyn extends, for police purposes, to the low-water line on its own side of the East river; and the boundary line of New York city covers the entire East river up to the low-water line on the Long Island and Brooklyn shore.[2] The boundary of the city of Philadelphia extends to the high-water mark on the New Jersey shore of the Delaware river, in accordance with the agreement entered into by the States of Pennsylvania and New Jersey.[3] On the other hand, the city of St. Louis is decided to have jurisdiction over the Mississippi river to the middle of the stream, and not merely to the western shore.[4] Generally, in Pennsylvania, it is held that, where a municipal corporation is bounded by a navigable stream, its jurisdiction will extend to the low-water mark.[5] Inasmuch as the stream is constantly changing its channel, the boundary line of a town which is bounded by such stream, is necessarily shifting with the natural and artificial changes, which are made in the shore, and in the movement of such stream.[6] But the fact that the jurisdiction of a town extends over navigable waters, does not give to the city any title to the land, which is covered by such water. It simply confers upon the corporation the governmental control of such territory.[7]

17 N. E. R. 147; Hoyt v. Mayor, 9 Wend. 602; Granger v. Avery, 64 Me. 292; Coldwater v. Tucker, 36 Mich. 474; 24 Am. Rep. 601; Gould v. Rochester, 105 N. Y. 46; Bechtel v. Village of Edgewater, 45 Hun (N. Y.) 245; Pleasant v. Kost, 29 Ill. 490; Neal v. Com., 17 S. & R. (Pa.) 67; Gouverneur v. National Ice Co., 134 N. Y. 355.

[1] State v. Thomaston, 74 Me. 198; *In re* Flick, (Pa. 92) 6 Culp. 329.

[2] Palmer v. Hicks, 6 Johns. 133; Furman Street, 17 Wend. 649, 661; Udall v. Trustees, 19 Johns. 179; Luke v. Brooklyn, 43 Barb. (N. Y.) 54.

[3] Neal v. Com., 17 S. & R. 67; Gould v. Rochester, 105 N. Y. 46; Coldwater v. Tucker, 36 Mich. 474.

[4] Jones v. Souland, 24 How. 41.

[5] Gilchrist's App., 109 Pa. St. 600.

[6] Pleasant v. Kost, 29 Ill. 490.

[7] Palmer v. Hicks, 6 Johns, 133. As to the statutory duty of municipal corporations, in the control and support of bridges constructed between the towns on opposite banks of the stream, see Brookline v. Westminster, 4 Vt. 224; Granby v. Thurston, 23 Conn. 416, and *post*, § 316; Tebo v. City of Brooklyn, 31 N. E. R. 984; 134 N. Y. 341.

§ 55. **Enlargement of boundaries—Annexation of territory.**—Not only may the Legislature, in the act of incorporation, fix and determine upon the territorial limits of such corporation, but unless the power is restrained in any way through special constitutional limitations, the Legislature may, likewise, after a creation of the corporation, extend its boundaries, and thereby annex land contiguous to the original territory, but which prior thereto was outside of the municipal corporation.[1] In some of the states, constitutional provisions have been adopted, looking towards the limitation of the power of the Legislature, and intended in most instances to avoid the arbitrary and injurious exercise of the power, but not in any case taking away the power altogether. Thus, while, independently of limitations or statutes requiring the same, the enlargement of the territory of a corporation, and the annexation of contiguous land, can be done, notwithstanding the remonstrance of such contiguous territory; yet, in some cases, the constitution of the state requires that the consent of the inhabitants of such contiguous territory should first be obtained.[2] The consent of the inhabitants of the contiguous territory is frequently required by statute, as a condition precedent to the annexation of this territory.[3] The Missouri Act of 1841, which extended the limits of the city

[1] Emporia v. Smith (Kan. 92), 22 Pac. R. 616; Warren v. Mayor etc. of Charlestown, 2 Gray (Mass.) 84; Omaha v. So. Omaha, 47 N. W. R. 1113; Maddrey v. Cox, 73 Tex. 538; Glover v. Terre Haute, 129 Ind. 593; State v. Waxahachie, 81 Tex. 626; Smith v. McCarthy, 56 Pa. St. 359; Chandler v. Boston, 112 Mass. 200; Giboney v. Cape Girardeau Co., 58 Mo. 141; Woods v. Henry, 55 Mo. 560; Gunter v. Fayetteville, 19 S. W. R. 577; People v. Oakland, 92 Cal. 611; State v. New Whatcom, 3 Wash. St. 7; Gottschalk v. Becher, 32 Neb. 653; Powers v. Wood Co., 8 Ohio St. 286; United States v. Memphis, 97 U. S. 284; Stoner v. Flournoy, 28 La. An. 850; People v. Bradley, 36 Mich. 447; Covington v. East St. Louis, 78 Ill. 548; Daly v. Morgan, 69 Md. 460; 23 Am. & Eng. Corp. Cas. 554; Smith v. Mayor etc. of Saginaw (Mich. 1890), 45 N. W. Rep. 964; Blanchard v. Bissell, 11 Ohio St. 96; Succession of Teaulet, 28 La. An. 42; Martin v. Dix, 52 Miss. 53; 24 Am. Rep. 661.

[2] Hartington v. Luge, 50 N. W. R. 957; Opinion of Justices, 6 Cush. 580; Wahoo v. Dickinson, 36 N. W. R. 813; Daly v. Morgan, 69 Md. 460; 23 Am. & Eng. Corp. Cas. 454; Chandler v. Boston, 112 Mass. 200.

[3] Sum v. Bowie, (Tex. 92) 18 S. W. R. 142; Daly v. Morgan, 69 Md. 460; 23 Am. & Eng. Corp. Cas. 454; North Springfield v. Village (Ill. 92), 29 N. E. R. 849; Strosser v. Fort Wayne, 100 Ind. 443; *In re* Sadler (Pa. 90), 23 Atl. R. 978; Stone v. Charlestown, 114 Mass. 214; East Dannas v. State, 73 Tex. 371; Topeka v. Gillett, 32 Kan. 431; Hyde Park v. Chicago, 16 N. E. 222.

of St. Louis, provided that the act should become absolute, upon an acceptance of the same by a majority of the citizens of the territory, which was included in the charter as amended. And it was held that this provision of the statute required that the majority of the people, living within the extended boundaries of the city, should consent to the extension of the city limits; and that the act would under those circumstances take effect, even though the parties living outside of the existing city limits were more or less unanimous in their opposition to the extension of the city boundaries, and the inclosure of their territory within such boundaries.[1]

It is also a constitutional requirement, in some of the states, that the extension of the boundaries of the city or town, by the annexation of contiguous territory, should not be done, so as to interfere with the boundaries of elective representative districts, at a time when it is impossible for a change to be made, under the provisions of the constitution, in the boundaries of these representative districts.[2]

But it has been held that the Illinois constitutional provision, which limits the extent of municipal indebtedness, does not make the union of two municipalities into one invalid, because the joint indebtedness of the two corporations would exceed the constitutional limit of indebtedness.[3] And it is no constitutional objection to the exercise of the power of compulsory annexation of territory to an already existing corporation, and the consequent enlargement of its boundaries, that the existing corporation has a large indebtedness hanging over it, which would necessitate the increase of the rate of taxation upon the territory, which has thus been added to the city limits. In the absence of a special constitutional provision prohibiting, or otherwise providing for, the exercise of this power, the discretion of the Legislature is unlimited.[4]

[1] St. Louis v. Russell, 9 Mo. 507.

[2] People v. Holihan, 29 Mich. 116; People v. Bradley, 36 Mich. 447; Smith v. Saginaw (Mich. 1890), 45 N. W. Rep. 964; Com. v. Brenham, 22 N. E. R. 628.

[3] True v. Davis (Ill. 89), 22 N. E. 410.

[4] Blanchard v. Bissell, 11 Ohio St. 96; Powers v. Wood Co., 8 Ohio St. 286; Smith v. McCarthy, 56 Pa. St. 359; Indianapolis v. Patterson, 14 N. E. R. 551; St. Louis v. Allen, 13 Mo. 400; Daly v. Morgan, 69 Md. 454; 23 Am. & Eng. Corp. Cas. 462; Wade v. Richmond, 18 Gratt. (Va.) 583; Wahoo v. Dickinson, (Neb. 88) 36 N. W. R. 813; Prince George's Co.

The Legislature may delegate to local boards the power of determining the extent to which the boundary shall be enlarged, and what territory shall be annexed to the city limits.[1] But it has been held that while such acts, which confer on cities the power of determining the extent to which their boundaries shall be enlarged, are constitutional and valid, in the absence of constitutional provisions to the contrary, yet it is subject to the constitutional limitation that the power must be reason-

Comm'rs v. Bladensburg, 51 Md. 465; Chandler v. Boston, 112 Mass. 200; United States v. Memphis, 97 U. S. 284; Railroad Co. v. Spearman, 12 Iowa, 112; Norris v. Mayor etc., 1 Swan (Tenn.) 164; Gorham v. Springfield, 21 Me. 59; Girard v. Philadelphia, 7 Wall. 1; Covington v. East St. Louis, 78 Ill. 548; Cheany v. Hooser, 9 B. Mon. 330; Elston v. Crawfordsville, 20 Ind. 272; Edmunds v. Gookins, Ib. 477; Arnoult v. New Orleans, 11 La. An. 54; Graham v. Greenville, 67 Tex. 62; Board etc. of Chickasaw Co. v. Board etc. of Sumner Co., 58 Miss. 610; Morford v. Unger, 8 Iowa, 82; Washburn v. Oshkosh, 60 Wis. 453; Laramie County v. Albany County, 92 U. S. 307; Giboney v. Girardeau, 58 Mo. 141; Queen v. Local Governing Board, L. R. 8 Q. B. 227; Woods v. Henry, 55 Mo. 560; State v. McReynolds, 61 Mo. 203; Layton v. New Orleans, 12 La. An. 515. In Powers v. Wood Co., 8 Ohio St. 286, the court said: "That injustice may be, and has, sometimes been done by the annexation of territory to a town, which has contracted an improvident debt, is, no doubt, true; and, sometimes, and perhaps more frequently, the owners of contiguous territory have had the benefit, by reflected value and convenience, of expenditures for which they have not contributed anything. The question is one beyond the reach of practical consideration, in the absence of any statute; and it would require a very artificial and unsound mode of reasoning to hold that territory could not be annexed to a town which owed debts, until the owners of such territory were paid a compensation in money for a proportional part of such debts, on the ground that the property annexed was condemned for public use."

[1] State v. Forrest, 74 Wis. 610; Wahoe v. Dickinson, (Neb.) 36 N. W. R. 813; Graham v. Greenville, 67 Tex. 62; Callen v. Junction City, 41 Kans. 466; Collins v. New Albany, 59 Ind. 396; State v. Picatello, (Idaho, 92) 28 Pac. R. 411; East Dallas v. State, 73 Tex. 371; Kellog v. Meeks, 87 Mo. 396; Dodson v. Ft. Smith, 33 Ark. 508; Smith v. McCarthy, 56 Pa. St. 359; Jacksonville v. L'Engle, 20 Fla. 344; Covington v. East St. Louis, 78 Ill. 548; Murray v. Virginia, 91 Ill. 558; City of Pensacola v. Louisville etc. R. Co., 21 Fla. 492; Sanders v. Provisional Municipality, 24 Fla. 226; Strosser v. Fort Wayne, 100 Ind. 443; 8 Am. & Eng. Corp. Cas. 636; Emporia v. Smith, 42 Kan. 431; Indianapolis v. Patterson, 14 N. E. R. 451; Topeka v. Gillett, 32 Kan. 431; Logansport v. La Rose, 99 Ind. 117; Millikin v. Bloomington, 72 Ind. 161; Hewitt's Appeal, 88 Pa. St. 55; Elston v. Board of Trustees of Crawfordsville, 20 Ind. 272; Mendenhall v. Burton, (Kan. 89) 22 Pac. 558.

able and properly exercised.[1] But the corporation can never exercise the power of enlarging or changing its boundaries without the consent of the Legislature, either given in the particular case or under general laws.[2]

§ 56. **What territory can be annexed—Farm lands.**— Where the Legislature exercises the power of annexation of contiguous territory, in the enlargement of the boundaries of a city, the extent to which the power is exercised, in the absence of constitutional limitations, cannot be limited or controlled in any way whatever; and it matters not how extensive the enlargement of the boundaries may be, if done directly by the Legislature, there is no redress, or no way in which the act of the Legislature may be subjected to judicial review.[3] But where the power is delegated to a local body representing the municipal corporation, then it is customary to subject the exercise of the power to certain restrictions. Thus, for example, it is generally required that the territory to be attached must be contiguous to the present territory of the city.[4] But where the pieces of property which are annexed, in the exercise of its power to en-

[1] Kellog v. Meeks, 87 Mo. 396; Hartington v. Lnge, 50 N. W. R. 957; Indianapolis v. Patterson, 14 N. E. R. 551.

[2] Commissioners of Shawnee Co. v. Carter, 2 Kan. 115; McCallie v. Mayor of Chattanooga, 3 Head. (Tenn.) 318; Atchison, etc. R. Co. v. Maquilkin, 12 Kan. 301; Norris v. Mayor, etc. of Smithville, 1 Swan (Tenn.) 164; Walnut Township v. Jordon, 38 Kan. 562; 20 Am. & Eng. Corp. Cas. 1. But see Delphi v. Startzman, 104 Ind. 343; 11 Am. & Eng. Corp. Cas. 37, where it has been held that the corporate boundaries may be extended, without direct limitation, or express agreement, operating under particular circumstances as an estoppel.

[3] State v. Waxahachie, 81 Tex. 626; Saunder v. Pensacola, 4 So. R. 801; State v. Baird, 79 Tex. 63; Laramie Co. v. Albany Co., 92 U. S. 307; Smith v. McCarthy, 56 Pa. St. 359; Daly v. Morgan, 69 Md. 460; 23 Am. & Eng. Corp. Cas. 454; Louis v. Allen, 13 Mo. 400; Giboney Cape v. Girardeau Co., 58 Mo. 141; Tilford v. Olathe, 44 Kan. 721; Powers v. Wood Co., 8 Ohio St. 286; United States v. Memphis, 97 U. S. 284; Woods v. Henry, 55 Mo. 560; Santa Rosa v. Coulter, 50 Cal. 537; People v. Bradley, 36 Mich. 447; Blanchard v. Bissell, 11 Ohio St. 96; Martin v. Dix, 52 Miss. 53; 24 Am. Rep. 661; Smith v. Mayor etc. of Saginaw, (Mich. 1890) 45 N. W. Rep. 964; Stoner v. Flournoy, 28 La. An. 850; Chandler v. Boston, 112 Mass. 200; Covington v. East St. Louis, 78 Ill. 548.

[4] Evansville v. Page, 23 Ind. 525; Smith v. Sherry, 50 Wis. 210; Truax v. Pool, 46 Iowa, 256; Enterprize v. State, 10 So. R. 740; Woodruff v. Enverce, 55 Ark. 618; Murray v. Virginia, 91 Ill. 558; Blanchard v. Bissell, 11 Ohio St. 96.

large the city boundaries, are contiguous to each other, the fact that they are not all contiguous to the city will not make the annexation of all of them invalid. In the constitutional sense, such territory would be properly considered to be adjoining the city.[1] So, also, has it been held that land, on the opposite bank of a stream, will be contiguous territory in this statutory or constitutional sense, where it is proposed to annex such lands, and bring them within the limits of a city located on the opposite bank of the river.[2]

The most difficult question, in regard to the power of annexing contiguous territory, is raised in the case of the annexation of farm lands to the city limits, thus increasing the rate of taxation upon such lands, while at the same time the territory so annexed derives no special benefit from the municipal improvements, which are the occasion of the increased taxation. This circumstance does not generally interfere with the power of annexing such farm lands to the city limits, as long as the constitution or statute, under which the municipal corporation acts, does not prohibit it.[3] But the courts have frequently held, even in the absence of statute, that, where the power to annex contiguous territory and to enlarge city boundaries is exercised under, and is authorized by, general incorporation acts, the consent of the people living within the territory, which is proposed to be annexed to the city, must first be obtained.[4] In some states, it is also provided that the municipal corporation cannot exercise the power of annexing contiguous territory, unless

[1] State v. Waxahachie, 81 Tex. 626; 17 S. W. R. 348; Evansville v. Page, 23 Ind. 525; Smith v. Sherry, 50 Wis. 210; Hurla v. Kansas City, (Kan. 91) 27 Pac. R. 143; *In re* Sadlier, 21 Atl. Rep. 978.

[2] Vestal v. Little Rock, 15 S. W. R. 891; Vogel v. Little Rock, 15 Ib. 836; Blanchard v. Bissell, 11 Ohio St. 96.

[3] *In re* Tullytown, 11 Pa. Co. Ct. R. 97; State v. Baird, 15 S. W. R. 98; 79 Tex. 63; McClay v. Lincoln (Neb. 91) 49 N. W. R. 282; Vestal v. Little Rock, *supra;* Kelly v. Pittsburgh, 85 Pa. St. 170; 27 Am. Rep. 633; 104 U. S. 78; St. Louis v. Allen, 13 Mo. 400; St. Louis v. Russell, 9 Mo. 507; Lee v. Thomas, 49 Mo. 112; State v. Waxahachie, *supra;* State v. Reynolds, 61 Mo. 203; Municipality No. 3 v. Michoud, 6 La. An. 605; Barker v. State, 18 Ohio, 514; Gillette v. Hartford, 31 Conn. 351; Hewitt's Appeal, 88 Pa. St. 55; Eureka Springs v. Woodruff, 55 Ark. 618; Kountze v. Omaha, 5 Dillon (C. C.) 443; 88 Ill. 154; 30 Am. Rep. 543; Walden v. Dudley, 49 Mo. 421.

[4] *In re* Lutte Meadows, 28 Pa. St. 256; *In re* West Philadelphia, 5 W. & S. (Pa.) 281; People v. Bennett, 29 Mich. 451; *In re* Blooming Valley, 56 Pa. St. 66; Ib. 163.

such land has been laid off in lots and platted, or unless the consent of the owner has been obtained.[1] And in order that the platting of land, and laying out into town lots, may have the effect of authorizing the city to annex such territory, it must have been done by one having a legal title to the property.[2] In Indiana, it is also provided by statute, that contiguous territory may be annexed to city limits, even without the consent of the owners of property, and without such land having been plotted or laid off into lots by the county commissioners, upon the petition of the common council of the city, praying for such annexation of territory.[3] But in Kentucky and Iowa, it has been held, independently of statute, that, while the power of the corporation to extend its boundaries will not be interfered with or limited by the fact that the rate of taxation inside the city limits is greater than what prevails over the territory which is proposed to be annexed, yet, in the exercise of such power, it is required that the city must establish a special rate of taxation for the territory so annexed, in order to avoid any unjust increase of the burden of taxation, disproportionate to the benefits received.[4] Whether the Legislature has or has not substantially complied with these require-

[1] Tilford v. Olathe, 44 Kan. 721; Pittsburgh v. Riley, 42 Mo. Ap. 18; Ewing v. State, 16 S. W. R. 872; Vestal v. Little Rock, 15 Ib. 891; Lum v. Bowie, 18 Ib. 142; Strosser v. Fort Wayne, 100 Ind. 443; 8 Am. & Eng. Corp. Cas. 636; Union Pac. R. Co. v. Kansas City, 42 Kan. 497; Tayler v. Fort Wayne, 47 Ind. 274; Peru v. Bearss, 55 Ind. 576; Town of Cicero v. Williamson, 91 Ind. 541; Collins v. New Albany, 59 Ind. 396; Logansport v. La Rose, 99 Ind. 117.

[2] Glover v. Terre Haute, 129 Ind. 593; 29 N. E. R. 412; Indianapolis v. Patterson, 112 Ind. 344.

[3] Strosser v. Fort Wayne, 100 Ind. 443; Glover v. Terre Haute, 129 Ind. 593; see Pensacola v. Louisville, etc. R. Co., 21 Fla. 492; Logansport v. La Rose, 99 Ill. 117.

[4] Maltus v. Shields, 2 Metc. (Ky.) 553; Louisville Bridge Co. v. Louisville, 81 Ky. 189; 3 Am. & Eng. Corp. Cas. 503; Covington v. Southgate, 15 B. Mon. (Ky.) 491; Sharp v. Dunavan, 17 B. Mon. (Ky.) 223; Arbegust v. Louisville, 2 Bush (Ky.) 271; Deiman v. Fort Madison, 30 Iowa, 542; Lancaster v. Rush, 52 N. W. R. 837; Davis v. Dubuque, 20 Iowa, 458; Butler v. Muscatine, 11 Iowa, 433; Fulton v. Davenport, 17 Iowa, 404; Swift v. Newport, 7 Bush (Ky.) 37; Lum v. Bowie, 18 S. W. R. 142; Courtney v. Louisville, 12 Bush (Ky.) 419; Langworthy v. Dubuque, 13 Iowa, 86; s. c., 16 Iowa, 371; Buell v. Ball, 20 Iowa, 282; Hurla v. Kansas City, 46 Kan. 738; Durant v. Kauffman, 34 Iowa, 194; Brooks v. Polk Co., 52 Iowa, 460; Cheaney v. Hooser, 9 B. Mon. (Ky.) 330; Winzer v. Burlington, 68 Iowa, 279; 12 Am. & Eng. Corp. Cas. 505.

ments, is a judicial question, although the presumption is in favor of the validity of the legislative or municipal act of annexation;[1] and in the light of this distinction, it has been held that adjoining property, which is laid off in lots for town purposes, is taxable like any other property within the municipality.[2] In some of the states the same result is now attained by statutes providing that, when rural property is brought within the limits of municipal corporations, a lower rate of taxation should be imposed upon such lands.[3] The power of the Legislature to prescribe a different rate of taxation for city purposes, between the property included within the old boundaries of the city, and the rural property which becomes a part of the city limits by subsequent enlargement of the boundaries, cannot be successfully contested.[4]

§ 57. **Effect of extension of city boundaries.**—As long as the identity of the corporation has not been lost or changed by the enlargement of the boundaries of the city, and the charter of the original corporation has not been surrendered or the corporation dissolved, its claim or title to property remains unaffected.[5] On the other hand, the annexation of territory, in consequence of the enlargement of the boundaries, will not re-

[1] Sharp v. Dunavan, 17 B. Mon. (Ky.) 223.

[2] Maltus v. Shields, 2 Metc. (Ky.) 553; Arbegust v. Louisville, 2 Bush (Ky.) 271; Swift v. Newport, 7 Bush (Ky.) 37.

[3] Gillette v. Hartford, 31 Conn. 351; United States v. Memphis, 97 U. S. 284; Washington Avenue, 69 Pa. St. 353; 8 Am. Rep. 255; Seely v. Pittsburgh, 82 Pa. St. 360; 22 Am. Rep. 760; Kaiser v. Weise, 85 Pa. St. 366; Craig v. Philadelphia, 89 Pa. St. 265; Keith v. Philadelphia, (Pa. 1889) 27 Am. & Eng. Corp. Cas. 93; Pittsburgh's Appeal, 118 Pa. St. 458.

[4] United States v. Memphis, 97 U. S. 292; Daly v. Morgan, 69 Md. 460; 23 Am. & Eng. Corp. Cas. 454; Gillette v. Hartford, 31 Conn. 357; Powell v. Parkersburg, 28 W. Va. 698; Serrill v. Philadelphia, 38 Pa. St. 355; McCallie v. Mayor etc. of Chattanooga, 3 Head (Tenn.) 317; Carriger v. Morristown, 1 Lea (Tenn.) 116; Henderson v. Lambert, 8 Bush (Ky.) 607; Benoist v. St. Louis, 19 Mo. 179. Cf. *contra*, Smith v. City of Americus, 15 S. E. R. 752; 89 Ga. 810.

[5] Heizer v. Yohn, 37 Ind. 415; Town of Milwaukee v. Milwaukee, 12 Wis. 93; Springwells v. Wayne Co. Treasurer, 58 Mich. 240; Norris v. Mayor etc. of Smithville, 1 Swan (Tenn.) 164; Girard v. Philadelphia, 7 Wall. (U. S.) 1; Serrill v. Philadelphia, 38 Pa. St. 355; Kalbrier v. Leonard, 34 Ind. 497; Barker v. State, 18 Ohio, 514; Municipality No. 3 v. Michoud, 6 La. An. 605; Third Municipality of N. O. v. Ursuline Nuns, 2 La. An. 611; Carrigan v. Morristown, 1 Lea (Tenn.) 116; New Orleans v. Michoud, 10 La. An. 763; East St. Louis v. Rhein, 139 Ill. 116.

move such territory from the judicial jurisdiction, in which it was previously placed; that is, the jurisdiction of State courts is never affected by changes in the boundaries of the municipal corporation.[1] With the enlargement of the corporation limits, however, the city assumes toward the annexed territory the same duties and liabilities, in respect to the streets laid out in such annexed district, as are imposed upon it in respect to the streets within the original territory.[2] But if there is a turnpike road in the annexed district, the annexation of such territory cannot impair the private rights of the turnpike company.[3] And where the general law prohibits the opening of streets through a cemetery, the fact, that the cemetery is brought within the limits of the municipal corporation by the extension of its boundaries, does not operate as a repeal of this prohibitive law, in consequence of the grant to the corporation of a general power to lay out streets in the territory thus brought within the city limits.[4]

All laws or ordinances of the city apply to the added district after annexation, as well as to the original territory.[5] But where two cities are consolidated, each having its own set of ordinances, it has been held that each set of ordinances will prevail over the territory of the old town which enacted them, until the common council of the consolidated city takes action for the adoption of a code of ordinances which may be applicable to the entire city as consolidated.[6] It has, on the other hand, been held that, where a county seat is located within the boundaries of a municipal corporation, the boundaries of the county seat will not be extended with the increase of territory of the municipal corporation, unless that fact is expressly provided for by statute.[7]

Where homesteads have been created in territory, outside

[1] Harrison v. Hernsheim, 28 La. An. 881.

[2] Ehrgott v. Mayor etc. of New York, 96 N. Y. 264; 6 Am. & Eng. Corp. Cas. 31; 48 Am. Rep. 622.

[3] Turnpike Co. v. Cincinnati, 4 Am. L. Rec. (Ohio) 325.

[4] Egypt Street, 2 Grant Cas. (Pa.) 455.

[5] St. Louis G. L. Co. v. St. Louis, 46 Mo. 121; Town of Toledo v. Edens, 59 Iowa, 352; Town of Milwaukee v. Milwaukee, 12 Wis. 93; McCannie v. Mayor etc. of Chattanooga, 3 Head (Tenn.) 317.

[6] Camp v. Minneapolis, 33 Minn. 461.

[7] State v. Board etc. of Atchison Co. (Kan. 1890), 24 Pac. Rep. 87.

of the city limits, under a homestead law which contains different provisions for homestead claims against country property, the annexation of such territory to the city limits will not have the effect of changing the claim of homestead, or of cutting down the amount of the land which may be claimed under the homestead law, in order to bring this particular claim of homestead into conformity with the law, as a claim of homestead over city property.[1] So, likewise, any other difference of law, in respect to the regulation or enjoyment of private rights, between city and country property, will not be permitted to affect private rights, which were created in the annexed district under the law, which applies to country property.[2]

§ 58. **Effect of annexation of one town to another.**—In the absence of any express constitutional limitations, the legal existence of a municipal corporation is subject to the absolute will of the Legislature; and such Legislature, as has already been explained,[3] may legislate such corporation out of existence, and either annex such territory to some other corporation, or reserve to itself the power of administering the public affairs of the dissolved corporation. Where the corporation has been extinguished, and the community and the territory have been annexed to an adjoining corporation, the general rule of law is plain that, by such annexation, the rights of property, as well as the liabilities of the corporation which has thus been annexed, are acquired by the corporation to which it is annexed. And the consolidated corporation, thus formed, will enjoy the benefits of the property of both, and at the same time assume the liabilities and debts of both.[4] But, in such a case, the ordinances of the two corporations will continue to operate upon the territory, originally included within each corporation, until the

[1] State v. Waxahachie, 81 Tex. 626; Finley v. District, 12 Iowa, 516; Truax v. Pool, 46 Iowa, 256.

[2] Williams v. Nashville, 15 S. W. R. 364; Chilton v. Brooks, 69 Md. 584. Cf. Gottschalk v. Becher, 32 Neb. 653; 49 N. W. R. 715.

[3] *Ante*, § 11, *et seq.*

[4] Demattos v. New Whatcom (Wash. 92), 29 Pac. R. 933; Watson v. Pamlico Co. Com'rs, 82 N. Car. 17; Gorham v. Springfield, 21 Me. 61; North Yarmouth v. Skillings, 45 Me. 133; 71 Am. Dec. 530; Winters v. George, 21 Oregon, 251; Town of Mount Pleasant v. Beckwith, 100 U. S. 514; Neilson v. Newark, 49 N. J. L. 246; Thompson v. Abbott, 61 Mo. 176; Smith v. Mayor etc. of Saginaw (Mich. 1890), 45 N. W. Rep. 964; Stone v. Charlestown, 114 Mass. 214; Donsman v. Milwaukee, 1 Pinn. (Wis.) 81; Harrison v. Bridgton, 16 Mass. 16.

common council of the consolidated corporation has adopted one code of ordinance for the government of all the territory included within the new boundaries.[1]

§ 59. **Effect of division of one town into two.**—Not only does the Legislature have the power of consolidating two municipal corporations into one, but it may likewise divide an existing corporation, and thereby create two new corporations out of the territory of the old, or transfer a part of the territory of the old corporation, and annex the same to some other existing and adjoining corporation. In either case, the division of the old corporation has a material effect upon the property rights of the old corporation; and the effect will vary according to the presence or absence of express legislative regulation of the same. In the absence of such legislative regulation, as a general proposition, all the rights, as well as debts, of the old corporation will remain with that part of the old territory which retains its legal identity with the old corporation. This part of the old town or community will be able to claim all the property, and must answer for all the debts and liabilities, of the old corporation.[2] But it has been held that property of a cor-

[1] North Springfield v. Springfield (Ill. 91), 29 N. E. R. 849; Vogel v. Little Rock, 55 Ark. 609; Camp v. Minneapolis, 33 Minn. 461.

[2] Graham v. Greenville, 67 Tex. 62; Cooke v. Sch. District, 21 Pac. R. 496; 12 Colo. 453; Board of Education of Barlor Dist. v. Board etc. of Valley Dist., 30 W. Va. 424; Brewis v. Duluth, 3 McCrary (U. S.) 219; Pierson v. Reynolds, 49 Mich. 224; Mobile v. Watson, 116 U. S. 289; Town of De Pere v. Town of Bellevue, 31 Wis. 120; 11 Am. Rep. 602; Hartford Bridge Co. v. East Hartford, 16 Conn. 149; affirmed, 10 How. (U. S.) 511; Sill v. Corning, 15 N. Y. 297; Mayor etc. of Baltimore v. State, 15 Md. 376; North Hempstead v. Hempstead, 2 Wend. (N. Y.) 109; Cobb v. Kingman, 15 Mass. 197; Greenville v. Mason, 53 N. H. 515; Chickesaw Co. v. Sumner Co., 58 Miss. 619; West Carroll Parish v. Gaddis, 34 La. An. 928; Laramie Co. v. Albany Co., 92 U. S. 307; Morgan v. Beloit, 7 Wall. (U. S.) 615; Ackley v. Vilas, 79 Wis. 157; Knight v. Town of Ashland, 61 Wis. 233; Town of Le Pointe v. O'Malley, 47 Miss. 332; People v. Trustees of Schools, 86 Ill. 613; Richland Co. v. Lawrence, 12 Ill. 1; Mount Pleasant v. Beckwith, 100 U. S. 532; Fendor v. Neosho Falls, 22 Kan. 305; State v. Lake City, 25 Minn. 404; Montgomery Co. v. Menefee (Ky. 92), 18 S. W. 102; Richards v. Daggett, 4 Mass. 539; Goodhue v. Beloit, 21 Wis. 636; Butternut v. O'Malley, 50 Wis. 333; Mills Co. v. Brown (Tex. 92), 20 S. W. 81; 10 How. (U. S.) 511, 541; Richland Co. v. Lawrence, 12 Ill. 1 (1850); 74 Am. Dec. 572; Olney v. Harvey, 50 Ill. 453; 99 Am. Dec. 530; Blackstone v. Taft, 4 Gray, 250 (1855).

poreal nature, which is actually situated within the limits of the territory, which is taken away from the old corporation, to be formed into a new corporation or annexed to some adjoining corporation, will become the property of the new corporation or the corporation to which such territory is annexed; and the corporation, which previously included this territory within its limits, can make no claim to such public property.[1] But the contrary proposition has been maintained, that the old corporation, upon separation of a part of its territory, retains its control over all its public property, including that which is found within the limits of the other corporation, which is created out of the detached territory, or to which such territory has been annexed.[2]

§ 60. **Legislative power to apportion property and debts in cases of annexation and division.**—But the power of the Legislature, in dividing towns or annexing other territory to the boundaries of such towns, and thereby diminishing or increasing the same, has invariably been held to include the power to apportion the common property and the common burdens of the old municipality, so as to make an equitable division of the same between the corporation which has been benefited by the change in the boundaries of such a corporation and the corpora-

[1] North Hempstead v. Hempstead, 2 Wend. 109. C. J. Savage said: "The State to be divided into two States: without some special agreement, each would own the public property within its limits. So of counties: the public buildings are as much public property as public lands. So as to the plains, meadows, and marshes which are the subject of this suit. A bill filed by a new county for the partition of the gaol and courthouse, which had been common property, would be the same in principle as the bill in this suit. Would not such a suit be considered preposterous? Suppose a religious corporation possessed of a church and parsonage; it becomes expedient to erect part into a new corporation: would not the old corporation retain the property, unless an agreement was made as to the partition of it?" See, to the same general effect, Laramie Co. v. Albany, 92 U. S. 307; West Carroll v. Gaddis, 34 La. An. 928; Milwaukee v. Milwaukee, 12 Wis. 93; Burgess v. Darby, 21 Atl. R. 394; 140 Pa. St. 250; Land etc. Co. v. Oneida Co., 53 N. W. R. 491; 83 Wis. 649; Dematos v. City of New Whatcom, 4 Wash. St. 127.

[2] School Dist. v. Richardson, 25 Pick. (Mass.) 62; Winona v. School Dist. No. 82, 40 Minn. 13; 24 Am. & Eng. Corp. Cas. 121; Union Baptist Society v. Town of Candia, 2 N. H. 20; Town of Milwaukee v. Milwaukee, 12 Wis. 93; North Yarmouth v. Skillings, 45 Me. 133; 81 Am. Dec. 530; Board of Health of Buena Vista v. East Saginaw, 45 Mich. 257.

tion whose territory has been cut down. And it is a very common practice for the Legislature to make such an apportionment of the property and debts, whenever territory is taken from one corporation and added to another, or established as a new corporation.[1] It has, however, been held in Maine, that, upon the division of a town into two corporations, and the apportionment of its debts, the old town is the agent of the new town in defraying such debts; and where the old town acts in good faith and pays such debts, the new town is liable on a claim of con-

[1] Burgess v. Darby, 21 Atl. R. 394; 140 Pa. St. 250; *In re* House Bill, 9 Colo. 624, 639; Dunsmore's Appeal, 52 Pa. St. 374; Barkley v. Levee Comm'rs, 93 U. S. 258; Lakin v. Ames, 10 Cush. 198; Gorham v. Springfield, 21 Me. 61; North Yarmouth v. Skillings, 45 Me. 133; Harrison v. Bridgton, 16 Mass. 16; Ib. 76; Hempstead v. Howard, 51 Ark. 344; State v. Harshaw, 73 Wis. 211; 40 N. W. R. 641; Broughton v. Pensacola, 93 U. S. 266; County Court v. County Court, 2 Bush (Ky.) 93; Granby v. Thurston, 23 Conn. 416, 419; Willimantic Society v. School Society, 14 Conn. 457; State v. Hordey, 41 Kan. 630; Sierra v. Dona Ana (N. M. 88), 21 Pac. R. 83; Territory v. Com'rs, 8 Mont. 396; Demattos v. New Whatcom, 29 Pac. R. 933; Pelican v. Rock Falls (Wis. 92), 51 N. W. R. 871; Olney v. Harvey, 50 Ill. 453; Sedgwick Co. v. Bailey, 11 Kan. 631; Laramie County v. Albany County, 92 U. S. 307; Londonderry v. Derry, 8 N. H. 320; Waring v. Mobile, 24 Ala. 701; Mayor v. State, 15 Md. 376; Sill v. Corning, 15 N. Y. 297; People v. Draper, 15 N. Y. 532; Schriber v. Langdale, 66 Wis. 616; Knight v. Town of Ashland, 61 Wis. 233; Waldron v. Lee, 5 Pick. 323; New London v. Montville, 1 Root (Conn.) 184; Hughes v. School District, 72 Mo. 643; Board etc. v. Board etc., 30 W. Va. 424; Tileson v. Newman, 23 Vt. 421; Richards v. Daggett, 4 Mass. 534; Love v. Schenck, 12 Ired. Law, 304; Sangamon County v. Springfield, 63 Ill. 66; School Dist. v. Richardson, 23 Pick. (Mass.) 62; North Hempstead v. Hempstead, 2 Wend. (N. Y.) 100; People v. Town of Oran, 121 Ill. 650; Sanbornton v. Tilton, 55 N. H. 603; Canovo v. State, 18 Fla. 512; State v. Lake City, 25 Minn. 405; Neilson v. Newark, 49 N. J. L. 426; Town of Milwaukee v. Milwaukee, 12 Wis. 93; Tileson v. Newman, 23 Vt. 421; Waldron v. Lee, 5 Pick. (Mass.) 323; Comm'rs of Ottawa v. Nelson, 19 Kan. 234; Eagle v. Beard, 33 Ark. 497; Perry Co. v. Conway Co. (Ark. 1890), 12 S. W. Rep. 877; Craft v. Lofinck, 34 Kan. 365; Hunt v. Hamilton, 25 Kan. 82; Com'rs of Marion Co. v. Harvey Co., 26 Kan. 181; Richland Co. v. Lawrence Co., 12 Ill. 1; Morrow Co. v. Hendryx, 14 Oreg. 397; Chickasaw Co. v. Clay Co., 62 Miss. 325; Mills v. Brown, 20 S. W. R. 81. In Bristol v. New Chester, 3 N. H. 524, Richardson, C. J., said: "The power to divide towns is strictly legislative, and the power to prescribe the rule, by which a division of the property of the old town shall be made, is incident to the power to divide the territory, and in its nature purely legislative. No general rule can be prescribed by which an equal and just division in such

tribution to the old town for its proportionate share of such debts, which has been apportioned to it by the Legislature.[1]

A legislative discretion, in determining the rule of apportionment, is in no wise subject to the supervisory control of the courts; the judgment of the Legislature is final, and cannot be reviewed in any judicial proceeding.[2]

It has been held that, in order that this apportionment may be made, it should be contemporaneous with the partition of the territory of the old corporation, and a subsequent act of the Legislature is an unconstitutional exercise of power.[3] But this proposition is not generally recognized; and the better rule, perhaps, is that, in the absence of constitutional limitations, specially restricting the power of the Legislature, the Legislature is able after, as well as contemporaneously with, the division of the town, to provide by legislation for apportionment, between the two new towns, of the property and debts of the old town.[4] It has also been held in Kansas, that, in the apportionment of the debts of an old town between the two towns, which obtain a part of the territory of the old town, bonds cannot be included which have been declared void before the separation, where the improvements, on which the bonds were founded, were not begun until after the separation, and the benefit of it accrued solely to the territory retained by the old corporation.[5]

cases can be made. Such a division must be founded upon the circumstances of each particular case."

[1] Mt. Desert v. Monmouth, 72 Me. 348.

[2] Bristol v. New Chester, 3 N. H. 524; St. Louis v. Russell, 9 Mo. 507; Sedgwick Co. v. Bunker, 16 Kan. 498; Board of Education of Barker District v. Board of Education of Valley Dist., 30 W. Va. 424; Overseers of Norwich v. Overseers of New Berlin, 18 Johns. (N. Y.) 382; Walters v. Richardson (Ky. 93), 20 S. W. R. 279; Land, Log & Lumber Co. v. Oneida Co., 53 N. W. R. 491; 83 Wis. 649; Nez Perces County v. Latah Co., 31 Pac. R. 300; 2 Idaho, 1131; Los Angeles Co. v. Orange Co., 32 Pac. R. 316.

[3] Bowdoinham v. Richmond, 6 Greenl. (Me.) 112; Windham v. Portland, 4 Mass. 390; Hampshire v. Franklin, 16 Mass. 76.

[4] Montgomery Co. v. Menifee (Ky. 92), 18 S. W. R. 1021; Mills Co. v. Brown Co. (Tex. 92), 20 S. W. R. 81; Sedgwick Co. v. Bunker, 16 Kan. 498; Creighton v. San Francisco, 42 Cal. 446; Laramie County v. Albany County, 92 U. S. 307; Town of Guilford v. Supervisors of Chenango Co., 13 N. Y. 143; New Orleans v. Clark, 95 U. S. 654; Layton v. New Orleans, 12 La. An. 515; Lycoming v. Union, 15 Pa. St. 166; 53 Am. Dec. 575; Perry Co. v. Conway Co. (Ark. 1890), 12 S. W. Rep. 877; Dunmore's Appeal, 52 Pa. St. 374.

[5] Craft v. Lofinck, 34 Kan. 365.

§ 61. **Procedure in case of annexation—When annexation legal.**—The proceedings for the annexation of contiguous territory to the limits of a municipal corporation, rest altogether upon statute; and in order that such annexation may be valid, all the requirements of the statute, as to the method of procedure and the method of exercise of the power, must be complied with. Any material deviation from these requirements will have the effect of invalidating the annexation.[1] It is, however, presumed in every case that the annexation has been in compliance with the statutory requirements, and hence legal.[2]

The statute usually provides that notice of the intended annexation shall be given.[3] But this requirement of notice is complied with, if there is a publication of such intention, and accompanying such publication an accurate description is given of the land, which is to be included within the addition to the town. It is not necessary that the notice should contain the names of all the persons whose property is to be brought by such annexation within the city limits.[4]

In Tennessee, it has been held that the application for annexation cannot be made in court, where the court has the authority to grant such annexation, by private citizens, but must be made by the authorities of the town.[5] In Pennsylvania, on the other hand, it is required that, before a town council may annex adjoining territory to the city limits, a petition therefor must be signed by twenty freeholders of lands, located in the territory which is proposed to be annexed; and such freeholders must be residents of the territory.[6] In Texas and Iowa the consent of a majority of the inhabitants of the annexed district seems to be required;[7] and the wish of the majority may be manifested by signing the petition, instead of by a formal elec-

[1] Seward v. Cowroy, 50 N. W. R. 329; Woodruff v. Eureka, 19 S. W. R. 15; 55 Ark. 618; Windman v. Vincennes, 58 Ind. 180; Smith v. Sherry, 54 Wis. 114.

[2] State v. Waxahachie, 81 Tex. 626; Huff v. Lafayette, 108 Ind. 14; Mulikin v. Bloomington, 72 Ind. 161; State v. Westport, (Mo. 93) 22 S. W. R. 888.

[3] Gunter v. Fayetteville, 19 S. W. R. 577; Stilz v. Indianapolis, 55 Ind. 515; Village of Franklin v. Croll, 31 Ohio St. 647.

[4] Woodfil v. Town of Greensburg, 18 Ind. 203; 45 N. W. R. 1031; Elsten v. Crawfordsville, 18 Ind. 203.

[5] Mason v. London, 3 Baxt. (Tenn.) 94; Stilz v. Indianapolis, 55 Ind. 515; Huff v. Lafayette, 108 Ib. 14.

[6] Devore's App., 56 Pa. St. 163.

[7] Ford v. No. Des Moines, 80 Iowa, 626; Graham v. Greenville, 67 Tex. 62.

tion. In Indiana, where the county commissioners have the power of authorizing the annexation of adjoining territory of a municipal corporation, the proceedings are instituted by a petition from the city council; and two thirds of the members of the council are required to sign such petition.[1] Where the county commissioners or county court are authorized to make the annexation, while a judicial inquiry can be made into the legality of the proceedings, and the jurisdiction of the court or county commissioners or city council, yet the merits of the case cannot be again inquired into. The interference of a court can only be permitted for the purpose of correcting errors or irregularity in the proceedings, or inaccuracy in the description of the territory to be annexed.[2]

Where there has been an illegal annexation, it is held that taxpayers of the territory, which is sought to be annexed, may ordinarily maintain suits for the purpose of avoiding such illegal annexation in their own behalf, and in behalf of the other citizens or residents of the territory.[3] It has, however, been held that a private citizen who has no other interest but that of a resident and a taxpayer of the proposed addition to the town, cannot maintain a petition for *mandamus*, for the purpose of determining the constitutionality of an act of the Legislature providing for the consolidation of two cities.[4]

The long continued acquiescence in an illegal annexation will very often preclude a subsequent avoidance of such annexation; inexcusable delay, in resorting to the courts for relief, will operate as an estoppel against such parties, whenever the public interests require the application of the doctrine of estoppel.[5] But the individual property owner is not estopped from instituting an action for determining the validity of the annexation,

[1] Stilz v. Indianapolis, 55 Ind. 515; Huff v. Lafayette, 108 Ind. 14; Mason v. London, 8 Baxt. (Tenn.) 94.

[2] Peru v. Bearss, 55 Ind. 576; Indianapolis v. Sturm, 39 Ind. 159; Hulbert v. Mason, 29 Ohio St. 562; Windman v. Vincennes, 58 Ind. 480; Trustees, etc. of Princeton v. Manck, 35 Ind. 51; Church v. Town of Knightstown, 35 Ind. 177; *contra*, Vestal v. Little Rock, (Ark. 90) 15 S. W. R. 891.

[3] Delphi v. Stratzman, 104 Ind. 343; 11 Am. & Eng. Corp. Cas. 37; Topeka v. Gillett, 32 Kan. 431; 5 Am. & Eng. Corp. Cas. 290; Morris v. Nashville, 6 Lea (Tenn.) 337.

[4] Smith v. Saginaw, 45 N. W. R. 964; 81 Mich. 123.

[5] Black v. Brinkley, (Ark. 90) 15 S. W. R. 1030; Sherry v. Gilmore, 58 Wis. 324; Logansport v. La Rosa, 99 Ind. 117.

by his participation in the rights and duties of a citizen of the territory, to which the property has been illegally annexed.[1]

On the other hand, when a municipality unlawfully attempts to annex territory to its limits, when it has no power to do so, the unlawful annexation cannot be validated by a subsequent statute, ratifying the unlawful annexation.[2]

§ 62. **Exercise of power beyond city limits—Only one corporation over same area.**—While, ordinarily, a municipal corporation cannot exercise any governmental powers beyond the city limits, in the absence of an express authority to do so, there can be no claim whatever to such an authority; and such authority, if it existed at all, must rest upon the express provision of a statute.[3] Yet it is not so very uncommon a thing for a municipal corporation to be given such a power. In a subsequent section, reference is made to the power to purchase property beyond corporate limits.[4] And, in the exercise of this power, it is held to be valid for the municipal corporation to be authorized to acquire lands, and confiscate them for the purpose of establishing a system of sewerage,[5] or for the establishment of hospitals, or water works.[6] So, also, has it been held to be valid for a municipal corporation to be authorized to require a license for the sale of goods beyond city limits, in order that the legitimate trade of the corporation within its limits may be protected against the unlicensed business outside.[7] And

[1] Strosser v. Fort Wayne, 100 Ind. 443; 8 Am. & Eng. Corp. Cas. 636; Buell v. Ball, 20 Iowa, 282; Langworthy v. Dubuque, 13 Iowa, 86; Greencastle Township v. Black, 3 Ind. 587.

[2] Comm'rs of Shawnee Co. v. Carter, 2 Kan. 115; Atchison, etc., N. Co. v. Naquilkin, 12 Kan. 301. In the case last cited, the court said: "Both the annexation of said property and the taxing of it were void for the want of jurisdiction over the subject-matter thereof. Retrospective statutes of a remedial nature, curing the defective execution of some power really possessed by the person, tribunal, or officer attempting to exercise it, have often been held valid. But a retrospective statute attempting to create a power, or to cure a defect of jurisdiction, we believe, has never been held valid."

[3] Begein v. Anderson, 28 Ind. 79; Strauss v. Pontiac, 40 Ill. 301; State v. Franklin, 40 Kan. 410; Coldwater v. Tucker, 36 Mich. 474; 24 Am. Rep. 601.

[4] See *post*, § 201.

[5] Neal v. Commonwealth, 17 Serg. & R. (Pa.) 67; Coldwater v. Tucker, 36 Mich. 474; 24 Am. Rep. 601; Gould v. Rochester, 105 N. Y. 46.

[6] State v. Franklin, 40 Kan. 410.

[7] Van Hook v. Selma, 70 Ala. 361; 45 Am. Rep. 85.

this rule has been particularly applied to the case of the sale of intoxicating liquors.[1] So, also, has it been held possible for the Legislature to authorize a city to expend money in the improvement of roads outside of the city limits, and to levy a tax therefor.[2] But the general rule is, that there cannot be two municipal corporations, for the same purpose and with equal powers including the same territory; the existence of one would necessarily preclude the possible legal existence of the other.[3] But where there is only one legal corporation, and the other, which actually has control of the affairs of the territory, is not legal, simply a *de facto* corporation; upon the suppression of the *de facto* corporation, the only legal corporation will at once assume control, the functions of the legal corporation being only temporarily suspended.[4]

But while this legal axiom, that two municipal corporations cannot include the same territory, as a general rule, is subject to no serious exception; yet it has in a comparatively late case been held, that two corporations may at the same time exercise a limited governmental control over the same territory. In order that the city of Chicago may successfully regulate the management and construction of packing houses, it was given the power to exercise its regulation over packing hosues located beyond its limits within a distance of one mile; and the fact, that within this distance of one mile a different and independent municipal corporation, viz., the town of Lake, was located, did not interfere with the power of the city of Chicago to require of the packing houses, located within this town, a license similar to what it was generally authorized to require of packing houses, which were located within the distance of one mile from the city limits. The person, or the corporation, carrying

[1] Kaufle v. Delaney, 25 W. Va. 410; Flack v. Fry, 32 Ib. 364; Emerich v. Indianapolis, 118 Ind. 279.

[2] Skinner v. Hutton, 33 Mo. 347.

[3] Enterprise v. State (Fla. 91), 10 So. R. 740; Rex v. Passmore, 3 Term R. 243; Rex v. Amery, 2 Bro. P. C. 336; Ashley v. Calliope, 71 Iowa, 466; Paterson v. Society etc., 24 N. J. L. 385; Martin v. Aston, 60 Cal. 65; Strosser v. Fort Wayne, 100 Ind. 443; 8 Am. & Eng. Corp. Cas. 636; State v. Town of Winter Park, 25 Fla. 371; Drain Commissioners v. Baxter, 57 Mich. 127. "The proposition that two independent governments cannot exercise the same power, within the same district, at the same time, is a self-evident one." Cf. Peoria & A. P. U. Ry. Co. v. People (Ill. 93), 33 N. E. R. 873.

[4] Taylor v. Fort Wayne, 47 Ind. 274, 281.

on the business of packing meats, would be subject to the license charged by both the city of Chicago and the town of Lake.[1]

§ 63. **Division of municipal territory into wards.**—For the purpose of convenience, in arranging for the local government of a city, it is customary for the territory of a municipal corporation to be divided into wards, and to provide for a representation of each ward in the city council. In providing for this division of the city into wards, the Legislature is required to observe the constitutional limitation of the equality of representation, and to make the wards as nearly as possible equal, either in size or in population, and apportion to each ward the number of representatives, according to the population of each ward. Any violation of these principles would make the apportionment void under the constitutional provision referred to.[2] The procedure, whereby a city may be divided into wards, is, of course, purely statutory, and the provisions of the statute must be complied with.[3] It has been held, that where the authority is given by the Legislature to the city council to effect a division of the city into a given number of wards, it is not permitted of the Legislature in the exercise of its delegated power, to increase or diminish the number of such wards.[4]

[1] Chicago Pack'g Co. v. Chicago, 88 Ill. 221; see State v. Franklin, 40 Kan. 410.

[2] People v. Canoday, 73 N. C. 193; State v. Bayonne, 22 Atl. R. 1006.

[3] *In re* Gettysburg, 90 Pa. St. 355; *In re* Fifteenth Ward, 11 Phila. (Pa.) 466; see cases on alteration of wards, 33 Amer. & Eng. Corp. Cases, 661.

[4] Schroeder v. City Council of Charleston, 3 Brev. (S. C.) 533; People v. Young, 38 Ill. 490.

CHAPTER VI.

MUNICIPAL ELECTIONS AND OFFICERS.

§ 65. **Time and place of holding elections.**—The time and place of holding elections in municipalities are sometimes regulated by the general statutes of the state; but in the absence of any general election law, applicable to the whole state, municipal elections are held at such times and places, as may be designated in the charter or in some special act passed for the purpose. When the law requires the time and place of holding such elections to be determined by some officer or select board, it is essential to the validity of such election that the deliberation be participated in by all those, who are empowered or directed to do so.[1] Any determination of the time and place of

[1] Peo. v. Harvey, 58 Cal. 337; Juker v. Commonwealth, 20 Pa. St. 484; Chadwick v. Melvin, 68 Pa. St. 333; Stephens v. Peo., 89 Ill. 337; Glencoe v. Peo., 78 Ib. 382; Dickey v. Hurlbut, 5 Cal. 343; Peo. v. Murray, 15 Ib. 221;

election by a meeting, composed of only a part of those who were required by law to participate,—certainly, where only a part of them were duly summoned—would invalidate the ensuing election. So, also, if it be within the discretion of municipal officials whether an election shall be held or not, and they neglect to fix the time and place ; any election, which might be held under such circumstances, would necessarily be void.[1] But where the time and place of the election is definitely fixed by law, any failure of the municipal officers to give the proper notice of the time and place of such election will not invalidate the election, which is actually held by the qualified voters of the city, unless the statute makes the notice a necessary condition precedent, when it cannot be dispensed with.[2] And in that case, *mandamus* will lie to compel a compliance with the statutory requirements on the part of the officers, whose duty it is to issue the notices.[3]

But elections are not to be declared invalid, because of slight irregularities which do not affect the result of such election.[4] The courts are disposed to sustain the will of the people as evinced at an election, if it is possible ;[5] and a municipal election will not be vitiated, because of a verbal inaccuracy in the ballots, whether it be a misnomer of the office or of the candi-

State v. Carroll (R. I. 91), 24 Atl. R. 106; Miller v. English, 21 N. J. L. 317; Marshall v. Cook, 38 Ill. 44; Force v. Batavia, 61 Ill. 99; Foster v. Scarf, 15 Ohio St. 535; Clarke v. Board, 27 Ill. 310; Marshall v. Kerns, 2 Swan. (Tenn.) 68.

[1] Opinions of Judges, 7 Mass. 525; 15 Ib. 537; Cook v. Mock, 40 Kan. 472; People v. Santa Anna, 67 Ill. 57; George v. Oxford, 16 Kan. 72, 80; People v. Mathewson, 47 Cal. 442.

[2] State v. Carroll, *supra;* People v. Cressey, 91 N. Y. 616; *In re* Narraganset (R. I. 88), 16 Atl. R. 907; Queen v. Justices, 8 Ad. & El. 173; People v. North, 72 N. Y. 124; Warson v. Hastings, 22 Minn. 437; People v. Fairburg, 51 Ill. 149.

[3] See *post*, § 371.

[4] Howard v. Shields, 16 Ohio St. 184; Peo. v. Shaw, 19 N. Y. S. 302; Kinney v. O'Conner, 26 Tex. 5; Peo. v. Cook, 14 Barb. 259; Com. v. Smith, 132 Mass. 289; Walker v. W. Boylston, 128 Ib. 550; State v. Russell (Neb. 92), 5 N. W. R. 465; Peo. v. Higgins, 3 Mich. 233; Dishon v. Smith, 10 Iowa, 212; Truehcart v. Addicks, 2 Tex. 217; Ewing v. Filley, 43 Pa. St. 384; Shields v. Jacobs, 88 Mich. 164; Sprague v. Norway, 31 Cal. 173; Bourland v. Hildreth, 26 Ib. 161; Day v. Kent, 1 Oreg. 123; Taylor v. Taylor, 10 Minn. 112; State v. Jones, 19 Ind. 356; Rutledge v. Crawford, 91 Cal. 526.

[5] Rogers v. Jacobs (Ky. 88), 11 S. W. R. 513; Brown v. McCollum, 76 Iowa, 479; Fenton v. Scott, 17 Orc. 189; Gun v. Hubbard, 97 Mo. 311; Russell v. Wellington (Mass. 91), 31 N. E. R. 630; State v. Barbour, 53 Conn. 76; State v. Quinly, 17 Atl. R. 952.

date;[1] or because of illegal voting, provided the illegal act or irregularity does not change the result.[2] A ballot will, however, be rejected which contains the names of more officers than there are offices to be filled; as, for example, where two offices of the same kind are to be filled, a vote for three or more persons for these offices would be void, and would not be counted at all, in the absence of statutory regulation to the contrary.[3] So, also, any departure from the requirements of the election law, which tends in any material way to affect the result of the election, will invalidate the election. Thus, an election will be invalidated by the closing of the polls at an earlier hour than what was provided by the law,[4] or by an adjournment of the election to some other time or place than what was designated in the notice, or what was provided for by law.[5] An election will also be invalid at common law, where "rioting takes place (*i. e.*, at or near the polls,) to such an extent that ordinary men, having the ordinary nerve and courage of men, are thereby prevented from recording their votes."[6]

§ 66. **Qualification of voters—Residence.**—The qualifications of voters are regulated by the state constitutions, and by the general election laws of the several states; and these qualifications cannot be limited or enlarged by municipal ordinances.[7] And where the constitution of the state sets forth the qualifications of voters in all elections within the state, without any restrictive clause in favor of electors of a municipality, or express grant of power to the Legislature to establish substitutionary regulations, it is beyond the power of the Legislature or municipal council to require additional or different qualifi-

[1] People v. Loomis, 8 Wend. 396; People v. Seaman, 5 Denio, 409; State v. Griffey, 5 Neb. 161; People v. Matterson, 17 Ill. 167.

[2] Judkins v. Hill, 50 N. H. 140; First Par. v. Stearns, 21 Pick. 148; People v. Cicotte, 16 Mich. 283; *In re* Murphy, 7 Cow. (N. Y.) 153; Johnston v. Charleston, 1 Bay (S. C.) 441.

[3] People v. Loomis, 8 Wend. 396; State v. Griffey, 5 Neb. 161; Rex v. Mayor of Leeds, 7 Ad. E. 963; People v. Seaman, 5 Denio, 409.

[4] Pennsylvania Dist. Election, 2 Par. (Pa.) 526; Clark's Case, 2 Par. (Pa.) 521.

[5] Commonwealth v. Commissioners, 5 Rawle, 75; Coles Co. v. Allison, 23 Ill. 437; People v. Keeling, 4 Col. 129.

[6] Nottingham, *In re*, 1 O'M. & H. 245; Drogheda, *In re*, 1 O'M & H. 252.

[7] Petty v. Tooker, 21 N. Y. 267; People v. Phillips, 1 Denio (N. Y.) 388; Rex v. Bumstead, 2 B. & Ad. 699.

cations, than those which are set forth in the constitution. Thus, a legislative act or charter, which requires a special qualification as to length of residence in the case of voters in a municipality, was held unconstitutional, where by the constitution another period was fixed upon by implication.[1] So, also, when, as is now the rule in most if not all the states, laws have been passed the object of which is to guarantee an absolutely secret ballot, no law or ordinance can be of any force which will in the slightest degree impair or violate this secrecy.[2] But where the state constitution is silent as to qualifications of voters, and the regulation of the matter of elections, both state and municipal, is left to the control and discretion of the Legislature, the Legislature may prescribe for municipal electors different qualifications from those which are required of voters in general state elections. And this discrimination is not uncommon, particularly in requiring the voters in a city or town to be registered before they are entitled to vote. The constitutionality of such a local regulation cannot be successfully contested.[3] But in the absence of special regulations, municipal elections are governed by the general election laws of the state, both as to the manner in which they should be conducted, and as to the rules by which the results are ascertained and announced.[4]

Residence in the municipality is almost invariably stated in express terms to be a necessary qualification for the voter; but what will constitute a residence is a much controverted question.[5] In ases arising out of the exercise of the elective franchise, it is safe to say that a man's residence is where his home or family is located.[6] And this general rule is a reliable guide in determining the location of one's domicile and place of voting, where one has but one residence, and actually has one perma-

[1] People v. Canaday, 73 N. C. 198.

[2] Williams v. Stern, 38 Ind. 89.

[3] McMahan v. Savannah, 66 Ga. 217.

[4] See Cooley Cons. Limitations, p. 598.

[5] Story Conf. of Laws, sec. 53, *et seq.*

[6] Topsham v. Lewiston, 74 Me. 236; Grant v. Dalliber, 11 Conn. 234; Nugent v. Bates, 51 Iowa, 77; Keough v. Holyoke, (Mass. 91) 31 N. E. R. 387; Colburn v. Holland, 14 Rich. Eq. 176; Yonkey v. State, 27 Ind. 236; Gilmer v. Gilmer, 32 Ga. 685; Rumney v. Camptown, 10 N. H. 567; Keith v. Letter, 25 Kans. 100; Sherwood v. Judd, 3 Bradf. 167; Blucher v. Milsted, 31 Tex. 621; Ames v. Duryea, 6 Lans. 155; Kellogg v. Hickman, 12 Colo. 256.

nent residence. But where one has more than one residence, or has no permanent residence at all, other tests must be resorted to for the purpose of determining where one's domicile is.[1] And it is a question of fact, on the evidence of each case, where one's domicile is. Where the party in question has exercised the right of suffrage in prior elections, the place where he voted is presumptively his domicile, and such evidence is ordinarily controlling in the determination of one's present domicile, where there has been no abandonment of the residence at that place.[2] And so, likewise, is the question of domicile very strongly controlled by the negative evidence, that one's vote had been offered, but refused, at a prior election, on the ground of want of residence.[3] Among other facts, which may be proven for the purpose of locating one's domicile, is the place of naturalization,[4] payment of taxes on personal property,[5] jury service,[6]

[1] Thorndike v. Boston, 1 Met. (Mass.) 245; Atty. General v. Parker, 3 Atk. 576; Cohen v. Wigfall, 8 Rich. Law, 237; 2 Ib. 489; People v. Barker, 63 Hun, 630; Fry's Election, 71 Pa. St. 302; Gildersleeve v. Alexander, 2 Speer (S. C.) 298; Mobile etc. Co. v. Barnhill, 19 S. W. R. 21; Seay v. Hunt, 55 Tex. 545; Hinds v. Hinds, 1 Iowa, 36: Etherington v. Wilson, L. R. 1 Ch. Div. 160; Taylor v. Caesar, 11 Upp. Can. Q. B. 461; Putnam v. Johnson, 10 Mass. 488.

[2] United States v. Thorpe, 2 Bond U. S. 340; Smith v. Croom, 7 Fla. 81; Woodworth v. St. Paul etc. R. R., 18 Fed. Rep. 282; Kellogg v. Oshkosh, 14 Wis. 678; Sanderson v. Ralston, 21 La. An. 312; Shelton v. Tiffin, 6 How. 185; Fiske v. Chicago etc. Co., 13 Barb. 472; East Liverpool v. Farmington, 74 Me. 154; Hairsten v. Hairsten, 27 Miss. 704; Brunel v. Brunel, L. R. 12 Eq. 298; Carey's App., 75 Pa. St. 201; Easterly v. Goodwin, 35 Conn. 279; Follweiler v. Lutz, 112 Pa. St. 107; Weld v. Boston, 126 Mass. 166.

[3] Hindman's Appeal, 85 Pa. St. 466; Guier v. O'Daniel, 1 Binn. (Pa.) 349; New Orleans v. Shepherd, 10 La. Ann. 268; Shelton v. Tiffin, 6 How. 163; Heirs of Holliman v. Peebles, 1 Tex. 673.

[4] Drevon v. Drevon, 34 L. J. Ch. 129; Hood's Estate, 21 Pa. St. 106; Ennis v. Smith, 14 How. 400.

[5] Hulett v. Hulett, 37 Vt. 518; Weld v. Boston, 126 Mass. 166; Yonkey v. State, 27 Ind. 236; Harvard College v. Gore, 5 Pick. 370; State v. Steele, 33 La. Ann. 910; Carey's Appeal, 75 Pa. St. 201; Mitchell v. United States, 21 Wall. 350. The omission or refusal to pay taxes is not a very important circumstance in the determination of the domicile, unless the refusal was caused by a denial of a domicile in the place where taxes were demanded. Hallett v. Bassett, 100 Mass. 167; Moar v. Harvey, 128 Mass. 219; Hindman's Appeal, 85 Pa. St. 396; Guier v. O'Daniel, 1 Binn. (Pa.) 349.

[6] Sanderson v. Ralston, 20 La. Ann. 312; Villere v. Butman, 23 La. Ann. 515.

the holding of office,[1] and any other official act, which recognizes one as an inhabitant of a particular place.[2] So, also, in the absence of positive proof of a permanent residence, evidence is admissible, as tending to prove the location of one's domicile, of one's presence in a place,[3] the hiring of lodgings,[4] the purchase of a burying-ground,[5] the deposit of valuables,[6] and the absence of proof that a domicile once acquired has been changed.[7]

§ 67. **Who are municipal officers?**—It sometimes becomes both necessary and important to ascertain what elements are essential to constitute a public officer, and to distinguish official *status* from that of an agent, employee or contractor.[8] The word *office* implies a more or less permanent delegation of a portion of governmental power,[9] coupled with legally defined duties[10] and privileges,[11] continuous in their nature;[12] and which upon the death, resignation or removal of the incumbent, devolves upon his successor.[13] A person who occupies a position

[1] Drevon v. Drevon, 34 L. J. Ch. 198; Butler v. Hopper, 1 Wash. C. C. 449; Cole v. Cheshire, 1 Gray, 441; Harvard College v. Gore, 5 Pick. 370.

[2] West Boylston v. Sterling, 17 Pick. 126. See, also, Mead v. Boxborough, 11 Cush. 362; Fisk v. Chester, 9 Gray, 506; Sewall v. Sewall, 122 Mass. 156.

[3] Bruce v. Bruce, 2 B. & P. 229; Stanley v. Burnes, 3 Hagg. Eccl. 373; Bempde v. Johnstone, 3 Vesey Jr. 198.

[4] Craige v. Lewin, 3 Curt. 435.

[5] Succession of Franklyn, 7 La. Ann. 395; Haldane v. Eckford, L. R. 8 Eq. Cas. 631; *In re* Capdevielle, 33 L. J. Exch. 306.

[6] Curling v. Thornton, 2 Add. 219; Hodgson v. De Beauchesne, 12 Moore P. C. 285.

[7] Munro v. Munro, 7 Cl. & F. 842.

[8] Sawyer v. Corse, 17 Grat. 230; Olmstead v. Mayor, 42 N. Y. Super. Ct. 289; Peo. v. Pinckney, 32 N. Y. 377.

[9] Miller v. Sacramento, 25 Cal. 98; Peo. v. Middleton, 28 Ib. 603; Bunn v. Peo., 45 Ill. 397; State v. Kirk, 44 Ind. 401; Olmstead v. Mayor, *supra;* Doyle v. Raleigh, 89 N. C. 133; Sheboygan v. Parker, 3 Wall. 93; Atty. Gen. v. Barstow, 4 Wis. 567.

[10] Where there are no duties, there is no office. Com. v. Gamble, 62 Pa. St. 343.

[11] State v. Valle, 41 Mo. 29; State v. Anderson, 45 Ohio St. 196; Hill v. Boylan, 40 Miss. 618; Peo. v. Comptr., 20 Wend. 595; Moser v. Mayor, 21 Hun, 163; Prather v. Lexington, 13 B. Mon. 539; Ellis v. State, 4 Ind. 1; Bunn v. Peo., 45 Ill. 397; Bradf. v. Just, 33 Ga. 332; Ogden v. Raymond, 22 Conn. 379.

[12] State v. Board, etc., 51 N. J. L. 240; Shelby v. Alcorn, 36 Miss. 273; State v. Wilson, 29 Ohio, 347.

[13] Bunn v. Peo., 45 Ill. 397; State v. Wilson, 29 Ohio, 347; U. S. v. Maurice, 2 Brock. (U. S.) 103; Peo. v. Jobs, 7 Colo. 589;

the duties of which are not defined by law,[1] or whose duties are contractual merely,[2] and are not performed in the execution of any statute or standing rule of law,[3] is not an officer, but an employee or agent.[4] The powers, rights and privileges, conferred upon an individual by an appointment or election to a public office, are not property and confer no proprietary rights in the office,[5] but create a public trust; which it is absolutely incumbent upon him to execute honestly, and to the best of his ability, with the object of promoting the interests of the community within his jurisdiction.[6] Applying these and analogous principles to municipalities, we find that a board, deriving their powers from the act creating them, are officers.[7] So, treasurers and all persons receiving, disbursing or acting as custodians of public funds are always officers,[8] including collectors and assessors of taxes.[9] It has been held that trustees, directors and other officials of the state benevolent and penal institutions are public officers; and the same rule would hold in similar institutions

[1] Peo. v. Langdon, 40 Mich. 673; Kavanaugh v. State, 41 Ala. 399; Smith v. Mayor, 67 Barb. 223; U. S. v. Smith, 124 U. S. 525.

[2] Shelby v. Alcorn, 36 Miss. 273; Detroit F. P. Co. v. State, 47 Mich. 135; Eliason v. Coleman, 86 N. C. 235; Butler v. Regents, 32 Wis. 124; U. S. v. Hartwell, 6 Wall. 358; Vaughn v. English, 8 Cal. 39; Sandford v. Boyd, 2 Cranch. 79.

[3] State v. Gardner, 43 Ala. 234; State v. Platt, 4 Harr. 154; McArthur v. Nelson, 81 Ky. 67; Doyle v. Raleigh, 89 N. C. 133; Walker v. Cincin., 21 Ohio, 14

[4] Shelby v. Alcorn, 36 Miss. 273; and see cases above cited.

[5] Peo. v. Stratton, 28 Cal. 382; Com. v. Gamble, 62 Pa. St. 343; State v. Dews, R. M. Charlt. (Ga.) 397; Beebe v. Robinson, 52 Ala. 67; Peo. v. Murray, 70 N. Y. 521; State v. Douglas, 26 Wis. 428; State v. Hawkins, 44 Ohio St. 109; Prince v. Skillin, 71 Me. 361; State v. Davis, 44 Mo. 129; Conner v. Mayor, 5 N. Y. 285; Smith v. N. Y., 37 Ib. 578; *In re* Corliss, 11 R. I. 638; Peo. v. Nostrand, 46 N. Y. 375; see *contra*, King v. Hunter, 65 N. C. 203; Vaun v. Pipkin, 77 N. C. 408; Brown v. Turner, 70 Ib. 93; Hoke v. Henderson, 4 Dev. (N. C.) 1.

[6] Peo. v. Stratton, 28 Cal. 382; Com. v. Gamble, 62 Pa. St. 343; Bowers v. Bowers, 26 Pa. St. 74; Atty. Gen. v. Barstow, 4 Wis. 567; Rowland v. Mayor, 83 N. Y. 372; Smith v. Moore, 90 Ind. 294.

[7] State v. Valle, 41 Mo. 29.

[8] State v. Brandt, 41 Iowa, 493; Peo. v. McKinney, 10 Mich. 54; Com. v. Morrissey, 86 Pa. St. 416; Com. v. Evans, 74 Ib. 124; Brown v. Turner, 70 N. C. 93; U. S. v. Bloomgart, 2 Ben. (N. J.) 356; State v. Boody, 53 N. H. 610.

[9] State v. Walton, 62 Me. 106; Morse v. Lowell, 7 Met. 152; Peo. v. Bedell, 2 Hill, 199; Lorillard v. Monroe, 11 N. Y. 392; Houseman v. Com., 100 Pa. St. 222.

connected with a municipal corporation.[1] So, likewise, are county commissioners [2] and school trustees.[3]

It may be laid down as a general rule that a city policeman is a public officer, deriving his power, not from the municipality, but from the state, whose laws it is his duty to enforce;[4] but it has been held in one instance that *police patrolmen* are not public officers.[5] So, fireman, and officers of the fire department, are not public municipal officers, but agents of the municipality;[6] and this is also true of road supervisors,[7] police jurymen,[8] bridge tenders,[9] and a medical superintendent of a municipal insane asylum.[10] On the other hand, it is now well settled that a court crier [11] and court attendants in general, are public officers;[12] and that a clergyman acts as a public officer, in solemnizing and certifying to a marriage.[13] This ruling of the Connecticut court would presumably be sound, only where the clergyman, in connection with the act of solemnizing a marriage, is required by statute to do some official act, such as an indorsement and return of the marriage license. Deputies of officers, who hold their positions under statutory provisions, and whose duties are prescribed by law, are likewise, public officers, and not employees.[14] But it is otherwise, when a special deputy is appointed for a particular purpose.[15] He acts rather in the capacity of a personal representative of the officer, whose deputy he is.

§ 68. **Legislative control over offices.**—In a preceding paragraph,[16] the limitations upon the legislative control of mu-

[1] Peo. v. Nichols, 68 N. C. 429; Peo. v. Bledsoe, 68 Ib. 457; Peo. v. Sanderson, 30 Cal. Porter v. Pillsbury, 11 How. Pr. 240.

[2] Hummells Case, 9 Watts (Pa.) 416.

[3] Ogden v. Raymond, 22 Conn. 379.

[4] Farrell v. Bridgeport, 45 Conn. 191.

[5] Shanley v. Brooklyn, 30 Hun, 396.

[6] People v. Pinckney, 32 N. Y. 377.

[7] State v. Putnam, 35 Iowa, 561.

[8] State v. Montg., 25 La. Am. 138.

[9] State v. Board, 51 N. J. L. 240.

[10] MacDonald v. Mayor, 32 Hun, 89.

[11] Ricketts v. Mayor, 67 How. Pr. 320.

[12] Moser v. Mayoret, 21 Hun, 163; Sweeney v. Mayor, etc., 5 Daly, 274; Rowland v. Mayor, etc., 83 N. Y. 372.

[13] Goshen v. Stonington, 4 Conn. 209.

[14] Dayton v. Lynes, 30 Conn. 351; White v. State, 44 Ala. 409; Conwell v. Voorhies, 13 Ohio, 523; Towns v. Harris, 13 Tex. 507; Eastman v. Curtis, 4 Vt. 616.

[15] Kavanaugh v. State, 41 Ala. 399; Armstrong v. U. S., Gilp. (U. S.) 399.

[16] § 18.

nicipal offices and officers are fully set forth, and nothing need be added in the present connection.

§ 69. Qualifications for municipal office—Women when eligible.—These are usually the same as are required of candidates for state offices. In general, aliens are not eligible; although, if all inhabitants are declared to be eligible, they need not be citizens.[1]

A certain period of residence prior to election is generally required in express terms, to render one eligible for any municipal office of a political or executive character.[2] But if there be no such statutory provision, nonresidents are eligible;[3] especially, if the office be one which requires professional skill, and does not involve the exercise of strictly governmental power.[4] Where residence within the municipal district is a prerequisite for holding office, a permanent removal therefrom will be treated as an abandonment or implied resignation of the office.[5] But a temporary change of residence, or absence, coupled with the intention to return, will have no such effect.[6]

It is a well nigh universal rule, founded upon the incapacity of minors to do any act which will be legally binding on themselves, that no one under age is eligible to office;[7] although exceptions have been made by the courts in respect to those offices, whose duties are clerical and administrative in character, and do not involve the exercise of official discretion.[8]

The lack of legal recognition, which woman received at common law, had as one of its effects the creation of a condition of ineligibility on her part for the holding of public office.[9] Under our constitutions, read in the light of that condition, and by necessary implication therefrom, women, although citizens, are not by that fact, in the absence of statute, vested with any

[1] State v. Kilroy, 86 Ind. 118.

[2] People v. Platt, 115 N. Y. 159; State v. Williams, 99 Mo. 291; Scoville v. Cleveland, 1 Ohio St. 126.

[3] Com. v. Jones, 12 Pa. St. 365; State v. Swearingen, 12 Ga. 23.

[4] State v. Blanchard, 6 La. Ann. 572; State v. George, 23 Fla. 585.

[5] Rumsey v. Campton, 16 N. H. 567; Giles v. Sch. Dis., 31 Ib. 304; Barre v. Greenwich, 1 Pick. 120.

[6] People v. Met. Pol., Brd., 19 N. Y. 201; Lyon v. Com., 3 Bibb. (Ky.) 430; Van Osdall v. Hazzard, 3 Hill (N. Y.) 243; Hanner v. Grizzard, 89 N. C. 115.

[7] Tyler v. Tyler, 2 Root, 419; Moore v. Graves, 3 N. H. 308; Barrett v. Seward, 22 Vt. 176.

[8] U. S. v. Bixby, 9 Fed. Rep. 78; *Ex parte*, Dewey, 11 Pick. (Mass.) 265.

[9] Robinson's Case, 131 Mass. 376; Schuchards v. People, 99 Ill. 501.

absolute right to hold office;[1] but the state Legislatures can make, and frequently have made, women eligible to certain subordinate official positions; among which are those relating to public instruction, and the care of the sick and insane.[2]

Women have in some cases been declared eligible, where the constitution was silent or its language general in character; and appointments of women to office are more and more meeting with the approval of public opinion,[3] and favorable consideration from the courts. Indeed, as a question of legal right or qualification, the conclusion, that a woman is ineligible to office, notwithstanding the silence of the constitution and statutes of the state on that subject, can justly be charged to be the result of sexual prejudice. The claim, that there is a fundamental difference in the mental, as well as in the physical, characteristics of men and women, may be a profound philosophical truth; but the determination of the question of qualification for holding public office is not so rigidly answered in connection with the candidacy of males, in order to justify, on the ground of personal disqualifications, the general denial of eligibleness to women on account of their sex. In the absence of express restrictions, women are eligible to any office, on the same terms and under the same conditions with men.

Constitutional provisions have been adopted in a few of the Southern and Western States[4] forbidding the requirement of any property qualification for office; but in the absence of such provisions, reasonable property qualifications can be imposed, such as that the municipal or other official shall be a freeholder or taxpayer.[5]

§ 70. **Civil service examinations.**—In many of the states, laws have been enacted, providing that applicants for appointment to public office, municipal and state, must pass an exami-

[1] Bradwell v. Illinois, 16 Wall. 130; Robinson's Case, 131 Mass. 376; Atchison v. Lucas, 83 Ky. 451; Wheeler v. Hall, 6 Allen, 558; Jackson v. Phillips, 14 Ib. 539.

[2] Huff v. Cook, 44 Iowa, 639; Atchison Co. v. Lucas, 83 Ky. 451; State v. Gorton, 33 Minn. 345. As to school officers, see Wright v. Noell, 16 Kan. 601; Opinions of Judges, 115 Mass. 602; Hoff v. Cook, 44 Iowa, 639; State v. Gorton, 33 Minn. 345.

[3] Jeffries v. Harington, 11 Colo. 191; Schuchardt v. People, 90 Ill. 501; Wright v. Noell, 16 Kan. 601; *In re* Hall, 50 Conn. 131.

[4] Stimson Am. Stat. L. 222.

[5] Darrow v. People, 8 Colo. 417; People v. Sheffield, 47 Hun, 481.

nation, with a view of ascertaining their capacity, knowledge and fitness, both mental and physical, for the positions they seek. At the same time, it is provided that appointments must be made from the names on a list of those who have passed such examinations, the persons to be selected from those grades highest thereon; and, generally, also, that all promotions shall be made upon the same basis.[1] Such laws are constitutional and valid;[2] and include generally, within the operation of its provisions, not only officers strictly so called, but all of the persons in the civil service of the government,[3] except laborers or unskilled workmen on the one hand; and on the other hand, confidential subordinates, and those for whose official misconduct the appointing officer would be financially responsible.[4]

It has been held that the civil service reform laws are so far derogatory of common law right, that the burden of proof is on him, who seeks to prevent the appointment of any one, who is alleged to be within a prohibited class.[5] But it is clear, under the general rules of statutory construction, by which the courts are guided in their determinations, that the laws for the regulations of the civil service should receive such a construction as will carry out the legislative intention, and effectuate the dominant principle of the law relating to public officers, viz.; that they are public trusts, to be administered for the common welfare, and not as reward for party and political services.

Any appointment, made in violation of these laws, is illegal and void; and no appropriation is valid, which is made to pay for services rendered under such an illegal appointment.[6]

§ 71. **Preference to veterans.**—It is sometimes provided that, in making appointments to office, state or municipal, preference shall be given by the appointing power to honorably discharged Union soldiers and sailors; and advanced age, loss of limb or other physical impairment, which does not in fact render them incapable, shall not disqualify them.[7] This pref-

[1] New York, 1883, ch. 354; 1848, ch. 357, 410; 86, ch. 9; Massachusetts, 1884, ch. 320; Opinion of Justices, 145 Mass. 587; Peck v. Rochester, 3 N. Y. Supp. 872; Rogers v. Buffalo, 123 N. Y. 173.

[2] Rogers v. Buffalo, 3 N. Y. Supp. 674; People v. Angle, 109 N. Y. 564; Rogers v. Buffalo, 51 Hun, 637.

[3] Peo. v. Civ. Ser. Brd., 41 Hun, 287.

[4] Rogers v. Buffalo, 51 Hun, 637.

[5] Peck v. Belknap, 55 Hun, 91.

[6] Rogers v. Buffalo, 2 N. Y. Supp. 327; Peck v. Rochester, 3 Ib. 852.

[7] New York Laws, 1884, ch. 312, § 1; Amended Laws, 1887, ch. 464;

erence is to be given in the employment of ordinary laborers,[1] and applies to veterans in office, when the statute was passed, as well as to those who are appointed subsequently.[2] The Legislature having the constitutional power to provide for the doing of public work by such means as to it may seem proper, the constitutionality of laws, creating such a preference, may be said to be beyond reasonable doubt;[3] but the failure of the officer, to whom the power of appointment was given, to respect the preference so required to be shown to veterans, was held not to be a misdemeanor.[4] But in New York it is now provided by statute, that the failure to observe these provisions for the preference to veterans is a misdemeanor.[5]

§ 72. **Official bonds.**—Municipal officials, intrusted with public money or property, are invariably required to give bonds for the safe custody of what is committed to their charge; but, unless the failure to furnish the proper surety promptly is expressly declared to vacate the office, the bond may be given after the officer has begun the performance of his duties.[6] So, too, it has been held that a town may lawfully require a receiving or disbursing officer to give bonds without having an express power to do so.[7] Unless some precise form is prescribed by charter or statute and an exact compliance therewith made essential to their validity, official bonds will be valid, so long as their conditions conform in a substantial manner to the general statutory requirements.[8] So bonds, without seals, or without

State v. Board of Public Works, 51 N. J. L. 240; Sullivan v. Gilroy, 55 Hun, 585; Peo. v. French, 51 Hun. 345; Peo. v. Wallace, 55 Hun, 585; Opinion of Justices, 145 Mass. 587.

[1] Sullivan v. Gilroy, 55 Hun, 285.

[2] People v. French, 52 Hun, 464; See generally State v. Boughner, (N. J. 93) 26 Atl. R. 808; People v. Com'rs, 65 Hun, 169; State v. Delany, (N. J. 93) 25 Atl. R. 936; but held in New York not to apply to promotions; *In re* McGuire, 50 Hun, 203.

[3] Morris v. Newark, (N. J. 93) 26 Atl. R. 82; *In re* Wardman, 2 N. Y. S. 324; 22 Ab. N. C. 137; People v. Bardin, 7 Ib. 123; People v. Wallace, 55 Hun, 149.

[4] People v. Dustin, 3 N. Y. S. 522.

[5] N. Y. Laws, 1884, ch. 312, § 312, as amended by Laws 1887, ch. 464.

[6] Cawley v. Peo., 95 Ill. 249; Caskey v. Greensb. 78 Ind. 233; State v. Barnes, 33 Pac. R. 621; Launtz v. Peo., 113 Ill. 137; U. S. v. LeBaron, 19 How. 73; s. c., 4 Wall. 642; Sproul v. Lawrence, 33 Ala. 674; State v. Findley, 10 Ohio, 51; Smith v. Cronkhite, 8 Ind. 134.

[7] Morrell v. Sylvester, 1 Greenl. (Me.) 248; Lynn v. Cumberland, (Md. 93) 26 Atl. R. 1061.

[8] People v. Benfield, 80 Mich. 265; State v. Barnes, (Kan. 93) 33 Pac. R. 621; Herd v. Cist, (Ky. 89) 12 S. W. R. 466.

designation of the obligee,[1] are nevertheless valid. Additional duties, analogous to those already appertaining to the office, may be imposed upon the official, without releasing the sureties or affecting their liability, unless the bond contains express restriction against liability for additional duties of any sort.[2]

If bonds be given voluntarily, and not in pursuance of any statute or ordinance requiring them, they are nevertheless good as common law obligations, and the municipality can recover on them from the obligors.[3] The bond being conditioned for the faithful performance of the duties of an official during his term of office, the obligors are not liable for malfeasance or nonfeasance by the officer, which has occurred during a term, either prior[4] or subsequent[5] to that for which the bond was executed.

§ 73. **Official oath.**—It is the custom to require municipal officers to take an oath before entering upon the performance of the duties of their office;[6] and statutes requiring such oath are generally mandatory in their nature. But such oath of office is by no means indispensable and its requisition depends upon usage and positive statutory direction.[7]

The oath is generally to the effect, that the official will faithfully discharge the duties of his office; and sometimes, that he will support the constitution of the United States and of the state.[8] But no oath can be required which imposes any test of

[1] State v. Wood, 51 Ark. 205; Fellows v. Gilman, 4 Wend. 414.

[2] Morrow v. Wood, 56 Ala. 1; Orman v. Pueblo, 8 Col. 292; Board etc. v. Quick, 99 N. Y. 138; Mayor v. Kelly, 98 Ib. 467; Board v. Clark, 92 Ib. 467.

[3] Com. v. Wolbert, 6 Binn. 292; Supervisors v. Coffinbury, 1 Mich. 355; Peo. v. John, 22 Ib. 461; Platteville v. Hopper, 63 Wis. 381; Turner v. Clark, 67 Mo. 243; Montville v. Houghton, 7 Conn. 543; but see *contra*, State v. Hersey, 56 Iowa, 404; State v. Bartlett, 30 Miss. 624; U. S. v. Humason, 6 Sawy. 199.

[4] State v. Finn, 98 Mo. 532; Paducah v. Cully, 9 Bush (Ky.) 323; Bissell v. Saxton, 77 N. Y. 191; Myers v. U. S., 1 McLean, 493; Overacre v. Garrett, 5 Lans. 156; Rochester v. Randall, 105 Mass. 295; Manaska v. Ingalls, 16 Iowa, 81; Townsend v. Everett, 4 Ala. 607; Miller v. Stewart, 9 Wheat. 702; Stern v. Peo., 96 Ill. 475; McIntire v. Sch. Trustees, 3 Ill. App. 77; Austin v. French, 7 Met. 126; Kingston I. Co. v. Decker, 33 Barb. 196; U. S. v. Boyd, 5 How. 50.

[5] Dover v. Twombly, 42 N. H. 59; Chelmsford Co. v. Demarest, 7 Gray (Mass.) 1; Mayor v. Horn, 2 Harr. (Del.) 190.

[6] State v. Stanley, 66 N. C. 59; Fox v. McDonald (Ala. 93), 13 So. R. 416.

[7] Johnson v. Wilson, 2 N. H. 202; State v. Stanley, *supra*.

[8] Stimson's Am. Stat. L. §§ 224, 225.

a religious nature,[1] or which renders an individual ineligible for any previous act, which was not a crime when committed.[2]

If the taking of an official oath is by statute or usage a condition precedent to admittance into office, a person elected or appointed thereto cannot justify; nor does he possess any rights, as such officer, before he shall have complied with this requirement of the law.[3] But a substantial compliance with the law is all that is required;[4] and, although when a form is prescribed it should be followed,[5] if the oath taken is equivalent in substance to that prescribed, it has been held to be sufficient.[6]

§ 74. **Disqualification on account of prior official position.**—In many of the United States, statutes exist which prohibit the holding of more than one lucrative office[7] of any sort, and the appointment or election of members of the Legislature to offices which have been created, or the compensation of which has been increased during their terms, or the election to the Legislature of a person holding a federal office.[8]

These statutes receive a strict, if not literal construction;[9] and appointments made in contravention of their terms are void.[10] It has been held, however, that these statutes do not apply to a merely *de facto* incumbency, as when a coroner is authorized

[1] Con. U. S., art. 6, § 3.

[2] Cummings v. Missouri, 4 Wall. 277. See Tiedeman's Limitations of Police Power, pp. 72–74.

[3] Thompson v. Nicholson, 12 Rob. La. 326; Peo. v. McKinney, 52 N. Y. 374; City v. Given, 60 Pa. St. 136.

[4] Olney v. Pearee, 1 R. I. 292; Riddle v. Bedford Co., 7 Serg. & Rawle, 392; Neale v. Overseers, 5 Watts. 538; State v. Perkins, 24 N. J. L. 409; Davis v. Berger, 54 Mich. 692; Hoagland v. Culvert, 20 N. J. L. 387; Tide Water v. Archer, 9 Gill & J. (Md.) 479.

[5] Bassett v. Den, 17 N. J. L. 432; State v. Ayres, 15 Ib. 479; Hankins v. Culloway, 88 Ill. 485; Young v. State, 7 Gill & J. (Md.) 253.

[6] State v. Trenton, 35 N. J. L. 485.

[7] County recorder, commissioner, township trustee and supervisor are lucrative offices in the constitutional sense, Daily v. State, 8 Blackf. 329; Creighton v. Piper, 14 Ind. 182; but not city councilman. State v. Kirk, 44 Ind. 401.

[8] Stimson's Am. Stat. L. § 220; Darley v. State, 8 Blackf. 329; *In re* Carlis, 11 R. I. 638; State v. Degress, 53 Tex. 387; Davenport v. Mayor, 67 N. Y. 456; State v. Valle, 41 Mo. 29; Peo. v. Leonard, 73 Cal. 230; Foltz v. Kerlin, 105 Ind. 221.

[9] Goal v. Townsend, 77 Tex. 404; Troy v. Wooten, 10 Ind. 377; State v. Harrison, 116 Ind. 300; Heller v. Stremmel, 52 Mo. 309; State v. Weston, 4 Neb. 234; De Turk v. Com., 129 Pa. St. 151; Carpenter v. Peo., 8 Colo. 116; State v. McCollister, 11 Ohio, 46.

[10] State v. Taylor, 12 Ohio St. 130; Brady v. Howe, 50 Miss. 625; Shelby v. Alcorn, 36 Ib. 273; McGregor v. Balch, 14 Vt. 428.

by statute, in certain contingencies, to perform part of the duties of a sheriff;[1] nor, if the term of the prior office has expired, and the incumbent be occupied only with the settlement of his affairs, in preparation for a surrender of the office to his successor.[2]

So, also, if the provision against holding incompatible offices be found in the constitution, it has been held that the prohibition is applicable only to offices which are established or provided for by the body of the constitution, and would not prevent the incumbent of such an office from holding a municipal office.[3] When the constitution forbids the holding of an office for more than a certain specified number of consecutive terms, any period of time, intervening between the terms, could prevent the attachment of such disqualification.[4]

§ 75. **Appointments to office.**—At common law, every corporation has an inherent power to appoint or elect such officers as may be necessary to enable it to carry out the purposes for which it was created.[5] And municipal corporations have the power, in the absence of statutory regulations, to appoint or elect officers, whose sphere of activity is limited to the exercise of the charter powers and the enforcement of the municipal by-laws.[6] In this country, it is the universal practice for the charter or municipal constitution to provide for the creation of all the principal officers, in such a way as to leave very little opportunity for the exercise of this common law power.[7] These statutory provisions must be strictly observed;[8] and the choice of

[1] Powell v. Wilson, 16 Tex. 59; Crawford v. Dunbar, 52 Cal. 36.

[2] State v. Sommers, 96 N. C. 467; Peo. v. Duane, 55 Hun, 315.

[3] Justices' Opinions, 68 Me. 594; Peo. v. Whitman, 10 Cal. 38; State v. Somnier, 33 La. An. 237; Peo. v. Duane, 55 Hun, 315; State v. Montgomery, 25 La. An. 138; State v. Kirk, 44 Ind. 401; Mohan v. Jackson, 52 Ind. 599; De Turk v. Com., 129 Pa. St. 151.

[4] Horton v. Watson, 23 Kan. 229; State v. Derbes, 11 La. An. 50; Griebel v. State, 111 Ind. 369; Davis v. Patten, 41 Kan. 480.

[5] Vintners v. Passey, 1 Burr, 237; Dillon's Mun. Corp. § 206; Lafayette v. State, 69 Ind. 218; Peo. v. Stevens, 51 How. Pr. 103.

[6] Dillon's Mun. Corp. 206.

[7] People v. Bedell, 2 Hill (N. Y.) 196; Hoffman v. Jersey City, 34 N. J. L. 172; Hoboken v. Harrison, 30 Ib. 73; People v. Pinckney, 32 N. Y. 377; People v. Canly, 44 Ill. 33.

[8] State v. Dillon, 125 Ind. 65; Jones v. Parkhurst, 22 N. E. R. 899; 150 Mass. 243; Jacksonville v. Allen, 25 Ill. Ap. 54; Bellows v. Cincinnati, 11 Ohio St. 544; Monroe v. Hoffman, 29 La. An. 651.

an officer, in any way not prescribed by law, is void.[1] In one case, however, authority to appoint was inferred from the frequent mention which was made in the charter of the officer and his duties.[2]

§ 76. **Exercise of the appointing power.**—The appointing power must exercise its functions in the manner prescribed by law.[3] Thus, when a city council is empowered to elect or appoint officials, but the mode, in which the power is to be exercised, is not specifically pointed out, it may elect or appoint either by resolution or by ballot;[4] and it may in certain contingencies delegate the power of appointment to a committee.[5] It has been held that an appointment can be made by parol, only when such a method is sanctioned by the terms of the statute, from which the power is derived;[6] while it is the rule in states, where the mode is not prescribed, that no writing is required.[7]

Until the act of appointment is legally completed, it may be recalled; but when the act of appointment is consummated, it is irrevocable, provided the appointee cannot be removed by the appointing power. In such cases, the power of appointment to that office cannot be again exercised, until the office becomes vacant by voluntary resignation or death of the appointee.[8] But when an appointment is illegally made, or fraud-

[1] Hoboken v. Harrison, 30 N. J. L. 73; Hoffman v. Jer. City, 34 Ib. 172; State v. Michellon, 42 N. J. L. 405; Stone v. Small, 54 Vt. 498; Clarendon v. Phila., 13 Phila. 54; Baker v. Pt. Huron Police Com'rs, 62 Mich. 327; State v. Hudson, 29 N. J. L. 104; State v. Bryson, 44 Ohio St. 457; Saunders v. Lawrence, 141 Mass. 380.

[2] Peo. v. Bedell, 2 Hill (N. Y.) 196; see Field v. Gir. Col., 14 Pa. St. 233.

[3] Launtz v. Peo., 113 Ill. 137; State v. Curry, (93 Ind.) 33 N. E. R. 685; State v. Guiney, 26 Minn. 313; State v. Peele, 124 Ind. 515; State v. Dillon, 125 Ind. 65; State v. Kenny, 45 N. J. L. 251; Peo. v. Murray, 70 N. Y. 521; State v. Michellon, 42 N. J. L. 405; Com. v. Crezer, (93 Pa.) 26 Atl. R. 697; Commonwealth v. Crogan, 26 Atl. R. 697; 155 Pa. St. 448.

[4] Low v. Commissioners, R. M. Charlt. (Ga.) 302.

[5] Trowbridge v. Newark, 46 N. J. L. 140; Com. v. Pittsburgh, 14 Pa. St. 177; Peo. v. Bedell, 2 Hill (N. Y.) 196; Com. v. Fitler, 147 Pa. St. 288.

[6] Peo. v. Murray, 70 N. Y. 521 (excise commissioners); Peo. v. Murray, 5 Hun, 42, citing Peo. v. Molineaux, 53 Barb. 9; Peo. v. Willard, 44 Hun, 580; Peo. v. Fitzsimmons, 68 N. Y. 514.

[7] Hoke v. Field, 10 Bush (Ky.) 144; Peo. v. Murray, 5 Hun, 42; Saunders v. Owen, 2 Salk. (Eng.) 247.

[8] Peo. v. Woodruff, 32 N. Y. 355; Peo. v. Stowell, 9 Abb. N. C. 456; State v. Wilson, 2 N. H. 456.

ulently obtained, it is void, and a subsequent appointment will be valid.[1] Failure to appoint, at a date prescribed by law, does not cause a forfeiture of the power; its exercise being essential to the public welfare.[2] But the reverse of this is the case when, from the nature of the appointment, the character of the office to be filled, or from the language employed by the statute conferring the power, it is evident that the requirement as to the specific time, at which it is to be exercised, was intended as a limitation or restraint upon the power.[3]

§ 77. **Legality of appointment presumed.**—When a municipal or other public official has acted notoriously as such, and has been continuously recognized as such by the corporation, a regular legal appointment will be presumed, and his authority to bind the corporation may be implied; nor need any written proof of his appointment be produced.[4] But such presumption may be rebutted,[5] although not by the officer himself;[6] he being estopped upon general principles, in order to protect innocent third persons. The inquiry into the validity of his appointment can only be had at the instance of the public or of citizens, by a proceeding in *quo warranto*.[7]

§ 78. **Acceptance of office.**—If no special provision of the law requires it, acceptance need not be couched in express terms; but may be, and usually is, implied from the acts of qualifying and entering upon the performance of official duty.[8] It has, however, been held that an acceptance is always neces-

State v. Chapman, 44 Conn. 495; Peo. v. Reid, 11 Colo. 138; Peo. v. Cazneau, 20 Cal. 503; Thomas v. Burnes, 23 Miss. 550; State v. McNeely, 24 La. Ann. 19.

[1] Com. v. Phila. Comrs., 5 Binn. (Pa.) 534; Com. v. Douglas, 1 Ib. 77; Peo. v. Reid, 11 Colo. 138.

[2] Dyer v. Bayne, 54 Mich. 87; Peo. v. Allen, 6 Wend. 486; Peo. v. Wheeler, 18 Hun, 540; Peo. v. Board, 46 Ib. 296.

[3] Peo. v. Allen, 6 Wend. 486; Peo. v. Board, 46 Hun, 296.

[4] Bank etc. v. Dandridge, 12 Wheat. (U. S.) 64, 70; Killey v. Forsee, 57 Mo. 390; Johnston v. Wilson, 2 N. H. 202; 9 Am. Dec. 50; Jones v. Gibson, 1 N. H. 266; Carter v. Sympson, 8 B. Mon. 155; Peo. v. Clingan, 5 Cal. 389; State v. Ferguson, 31 N. J. L. 107; State v. Skrine, 3 Brev. (S. C.) 516; Fenwick v. Sears, 2 Cranch. 150.

[5] Johnson v. Wilson, 2 N. H. 202; Regina v. Roberts, 36 Law Times Rep. 690; s. c., 6 Am. Law Rep. 414.

[6] State v. Sellers, 7 Rich. Law, 368; State v. Mayberry, 3 Strob. 144.

[7] *Post*, § 381.

[8] Written acceptance. See Winnegar v. Rowe, 1 Cow. 258; State v. Weatherby, 17 Neb. 553; Johnson v. Wilson, 2 N. H. .202; Hartford v. Bennett, 10 Ohio St. 441.

sary, and passive acquiescence in election or appointment will not be permitted to take its place.[1] By the common law, office was regarded as a burden in the nature of a public duty, and a citizen elected thereto, under a municipal corporation, was obliged to accept or render himself indictable by his refusal.[2] Although this common law rule has almost wholly fallen into desuetude in America by reason of the avidity with which public office is sought after, it has been found necessary in some localities to render the holding of certain offices, which are more onerous than lucrative, obligatory upon those appointed or elected to them.[3]

But an individual, holding one office, cannot be compelled to accept another, which is legally incompatible with the former.[4] And it has been held that no one is under the necessity of accepting an official position, to which no compensation is attached.[5] This is certainly not a sound conclusion, and is not followed by the authorities, administrative or judicial. It is not uncommon to require official duty of one, without providing adequate compensation, as in the case of duty as a juror; and sometimes, without any provision for personal compensation whatever, as in the case of military service. Such laws have never been declared to be unconstitutional.[6]

§ 79. **Compensation.**—The transcendent authority, which the Legislature possesses over public officers within its jurisdiction, can be, and is ordinarily, transferred to the municipalities themselves; and thus they are given complete control over their own officials.[7] But municipal officers are created, and exist, wholly for the benefit of the public; and the legislative power may, unless hampered by constitutional restraints, abridge or increase their terms, add to or diminish official duties, regulate, increase or diminish official compensation in any way;

[1] Smith v. Moore, 90 Ind. 294.

[2] Edwards v. U. S., 103 U. S. 471; State v. Ferguson, 31 N. J. L. 107; Vanackers Case, 1 Ld. Raym. 496.

[3] London v. Headen, 76 N. C. 72; Edwards v. U. S., *supra;* Brooklyn v. Scholes, 31 Hun, 110; Haywood v. Bleecker, 11 Johns. 432; Winnegar v. Poe, *supra;* Bentley v. Phelps, 27 Barb. 524; State v. McIntyre, 3 Ired. 171; Conner v. Mayor, 2 Sandf. 355; Hake v. Henderson, 4 Dev. (S. C.) 1.

[4] Hartf. v. Bennett, 10 Ohio St. 441; Smith v. Moore, 90 Ind. 294; see *contra*, Goettman v. Mayor, 6 Hun, 132.

[5] Hinze v. People, 92 Ill. 406.

[6] Dillon Mun. Corp. § 223.

[7] Dil. Mun. Corp., § 229; State v. Douglas, 26 Wis. 428; Love v. Jer. City, 40 N. J. L. 456.

and if the public interest demand it, abolish the office altogether.[1] This wide-reaching control over the duration of municipal officers may be delegated to the municipal corporation; and it has been held that when a department, a board of officers, or a single official, is invested with a discretionary authority to create an office, the power to abolish such office at pleasure follows as an incident of the creative power.[2] Constitutional restrictions upon the power to increase or diminish official compensation will receive liberal construction and rigid enforcement;[3] and the legislative power of control is further qualified by the rule that subsequent legislation should not be permitted to affect already established rates of compensation, so far as incumbents are concerned, unless it is *plainly* intended to apply thereto.[4]

There is no implied promise or liability on the part of municipal corporations to pay salaries to those officials, whom it is

[1] State v. Starkey, (Minn. 92) 52 N. W. R. 24; Stanfield v. State, (Tex. 92) 18 S. W. R. 577; State v. Raw, (Iowa, 92) 46 N. W. R. 872; Swann v. Buck, 40 Miss. 268; Bryan v. Cattell, 15 Iowa, 538, 553; Butler v. Penn., 10 How. 402; Smith v. New York, 37 N. Y. 518; Peo. v. Mahaney, 13 Mich. 481; Douglas v. Timme, (Neb. 90) 49 N. W. R. 266.

[2] Baldwin v. Phila., 99 Pa. St. 164; Cox v. Newark, 103 N. Y. 519; Ford v. Har. Comrs., 81 Cal. 19; Peo. v. Kings Co., 105 N. Y.; State v. Mayor, 15 Lea. 697; Harvey v. Rush Co., 32 Kan. 159; Bird v. Wasco, 3 Ib. 282; Cowdin v. Huff, 10 Ind. 83; Prince v. Skillen, 71 Me. 361; Conner v. Mayor, 5 N. Y. 285; Warner v. Peo., 7 Hill (N. Y.) 81; 2 Denio, 272; Marden v. Portsmouth, 59 N. H. 18; State v. Gales, 77 N. C. 283; Castle v. Wintah, 2 Wyom. 126; Perkins v. Corbin, 45 Ala. 103; Hennepin Co. v. Jones, 18 Minn. 199; Kendall v. Canton, 53 Miss. 526; Robinson v. White, 26 Ark. 139; Augusta v. Sweeney, 44 Ga. 463; Riley v. Mayor, 96 N. Y. 331; Crawf. Co. v. Nash, 99 Pa. St. 253; Field v. Marge, 83 Va. 882; Peo. v. Lippincott, 67 Ill. 333; Iowa City v. Foster, 10 Iowa, 189; Rucker v. Supervisor, 7 W. Va. 661; U. S. v. Mitchell, 109 U. S. 146; Williams v. Newport, 12 Bush (Ky.) 438; Evans v. Populus, 22 La. An. 121.

[3] State v. Raine, (Ohio 92) 31 N. E. R. 741; Lloyd v. Silver Bow Co., (Mont. 92) 28 Pac. R. 453; Weeks v. Texarkana, 50 Ark. 81; Hall v. Beveridge, 81 Ill. 128; Green v. Fresno, (Cal. 92) 30 Pac. R. 544; Wheelock v. Peo., 84 Ill. 551; Apple v. Crawford Co., 105 Pa. St. 300; Doe v. Wash'n Co., 30 Minn. 392; Merriwether v. U. S., 22 Ct. of Claims, 332; Cherokee Co. v. Chew, 44 Kan. 162; Garvie v. Hartf., 54 Conn. 440; Cox v. Burlington, 43 Iowa, 612.

[4] Council Bluffs v. Waterman, (Iowa, 92) 53 N. W. R. 289; Tacoma v. Lillis, (Wash. 93) 31 Pac. 321; Kirkwood v. De Soto, 87 Cal. 394; Wren v. Luzerne Co., 9 Pa. Co. Ct. 22; State v. Raine, *supra;* Woodruff v. Imperial, etc., 90 N. Y. 521; State v. Steele, 57 Tex. 200; Cox v. New York, 103 N. Y. 519.

necessary for them to appoint;[1] and compensation for official service should be, and almost universally is, fixed, either by charter, general law or by ordinance, or by a special contract.[2] Municipal officials are always considered to have accepted office, with full knowledge on their part of all such existing provisions, referring to their own compensation or duties.[3] So, likewise and for the same reasons, a municipal official cannot recover compensation for services rendered under a statute, which is in violation of some provision of the constitution.[4]

The authorities seem to hold that an officer *de facto* cannot recover the salary of the office;[5] such salary being dependent on the legal title to the office.[6] And it has been held that the officer *de jure* may recover his compensation from the municipality, although such compensation has already been made to the officer *de facto*.[7] This question is however far from being settled.[8] And, if the payment was made prior to a determination of the legal title to the office, it is held to be a good

[1] Blackburne v. Oklahoma, 31 Pac. R. 782; Talbot v. E. Machias, 76 Me. 416; Haswell v. New York, 81 N. Y. 255; Perry v. Cheboygan, 55 Mich. 250; Drott v. Riverside, 4 Ohio Cir. Ct. 312; Walker v. Cook, 129 Mass. 578; State v. Brewer, 59 Ala. 130; White v. Levant, 78 Me. 568; Rowe v. Kern, 75 Cal. 553; Riley v. Kansas City, 31 Mo. App. 439; Barnes v. Bakersfield, 5 Vt. 375; Carlyle v. Sharp, 51 Ill. 71; Garnier v. St. Louis, 37 Mo. 554; Barton v. N. O., 16 La. An. 317; Posey v. Mobile Co., 50 Ala. 6; Crittenden Co. v. Crump, 25 Ark. 235; Worthen v. Grayson Co. Ct., 13 Bush, 53.

[2] Smith v. Com., 41 Pa. St. 335; Devoy v. New York, 39 Barb. 169; Bladen v. Phila., 60 Pa. St. 464; Bosworth v. New Orl., 26 La. 464.

[3] Locke v. Cen. City, 4 Col. 65. And he cannot claim any other compensation for services rendered, on any theory of an implied contract, or a *quantum meruit*. Dil. Mun. Corp. § 230; Coyne v. Rennie, (Cal. 93) 32 Pac. R. 578; Barnes v. Williams, 13 S. W. R. 845.

[4] Meagher v. County, 5 Nev. 244; City v. Sears, 2 Col. 588; Lancaster v. Fulton, 24 W. N. C. 401.

[5] Sammis v. King, 40 Conn. 298; Bentley v. Phillips, 27 Barb. 524; Peo. v. Tieman, 30 Ib. 193; State v. Carrol, 38 Conn. 471; Riddle v. Bedf. Co., 7 S. & R. (Pa.) 386.

[6] Burke v. Edgar, 67 Cal. 182; Mechan v. Hudson, 46 N. J. L. 276; Dorsey v. Smith, 28 Cal. 21; Carroll v. Silbenthaler, 37 Ib. 193; Meagher v. Co., 5 Nev. 244.

[7] State v. Carr, (Ind. 92) 28 N. E. R. 88; State v. Holmes, 43 La. An. 1185; Andrews v. Portland, 79 Me. 484; Williams v. Clayton, 21 Pa. Rep. 398.

[8] See cases *contra* to text, Farrel v. Bridgeport, 45 Conn. 191; Brunswick v. Fahm, 60 Ga. 109; Smith v. New York, 37 N. Y. 518; Dolan v. Mayor, 68 N. Y. 279; Hadley v. Mayor, 33 N. Y. 603; Cf. McVeany v. New York, 80 N. Y. 135; and sec. 85 on Illegal Removal and cases there cited. See, also, § 88.

defence to an action by the officer *de jure*.[1] But in such a case the officer *de facto* is liable for the amount so received to the officer *de jure*.[2]

Where the holding of a municipal office does not create any contractual relation[3] a municipality parallel with a similar authority of the state, has, unless restrained by an express rule of constitutional or statute law, the power to increase or diminish the official compensation during the official term, or at any other time.[4] But it has been held that the employment of a person, in a *professional or semi-private* capacity; as, for example, that of engineer or attorney at law, for a fixed period at a sum agreed on (even though under an ordinance), constitutes a contract, the obligation of which cannot be impaired. But in such cases, there must be a coincidence on both sides of all the elements which constitute a contract. The services should be of a professional, rather than of an official character; and the party entitled to compensation should be precluded from withdrawing at his pleasure, a privilege which is almost universally an incident of official positions.[5] These cases are, however, not

[1] Hannon v. Grizzard, 96 N. C. 293; Selby v. Portland, 14 Oreg. 243; Luzerne Co. v. Trimmer, 95 Pa. St. 97; Peo. v. Brennan, 1 Abb. Pr. N. I. 184; *In re* Haviird (Idaho), 24 Pac. Rep. 542; Wheatley v. Covington, 11 Bush 18; Wayne Co. v. Benvit, 20 Mich. 176; 4 Am. Rep. 382; Parker v. Dak. Co., 4 Minn. 59; Andrews v. Portland, 79 Me. 484; McVeany v. Mayor, 80 N. Y. 185; Saline v. Anderson, 20 Kan. 298; Schlass v. Hewlett, 81 Ala. 266; Shaw v. Pima Co. (Ariz. 1888), 18 Pac. Rep. 272; Steubenville v. Culp, 38 Ohio St. 18.

[2] Mayfield v. Moore, 53 Ill. 428; Glasscock v. Lyons, 20 Ind. 1; Andrews v. Portland, 79 Me. 484; Nichols v. McLean, 101 N. Y. 526; Saline Co. v. Anderson, 20 Kan. 298; Peo. v. Miller, 24 Mich. 458; Wayne Co. v. Benort, 20 Ib. 176; Dolan v. Mayor, 68 N. Y. 274; Rule v. Tait, 38 Kan. 765; Bier v. Garrell, 30 W. Va. 95; Hunter v. Chandler, 45 Mo. 452.

[3] Com. v. Bacon, 6 Serg. & R. 322; Baker v. Pittsburgh, 4 Pa. St. 49; Univ. v. Walden, 15 Ala. 655; Fitzsimmons v. B'klyn, 102 N. Y. 536.

[4] Doolan v. Manitowoc, 48 Wis. 312; Barrett v. New Orls., 38 La. An. 101; Devoy v. Mayor, 39 Barb. 169; Green v. Mayor, 5 Ab. Pr. 503; Butcher v. Camden, 29 N. J. Eq. 478; Mayor v. Gear, 27 N. J. L. 265; Crane v. Des Moines, 47 Iowa, 105; Augusta v. Sweeney, 44 Ga. 463; Madison v. Kelso, 32 Ind. 79; Carr v. St. Louis, 9 Mo. 191; Iowa City v. Foster, 10 Iowa, 189; Cox v. Burlington, 43 Ib. 612; Gillespie v. Mayor, 6 Daly, 286; Conner v. Mayor, 5 N. Y. 285; Haswell v. Mayor, 81 N. Y. 255; Ib. 425; Waldraven v. Memphis, 4 Coldw. 431.

[5] Dil. Munc. Corp. § 232; Chase v. Lowell, 7 Gray, 33; Caverly v. Lowell, 1 Allen, 289; *contra*, Chicago v. Edwards, 58 Ill. 252: Hiestand v. N. O., 14 La. An. 330.

very safe guides in determining the extent of the exception to the general rule, if there be any well-founded exception at all. The qualification, that the official must not have the privilege of resigning his position, prior to the expiration of his term, is undoubtedly indispensable, but the privilege of resignation seems to be rather a result, than a cause, of the governmental power to abolish or interfere with the duties and perquisites of the office. Thus, it is held that the appointment of a police officer for one year does not constitute a binding contract, which cannot be abrogated or altered by the city.[1] But if, as is not unusual, the constitution of the state forbids any diminution or increase of the salary of an officer during his incumbency, such officer may make a contract with the government for a change in the terms of his service, which, if based upon a sufficient consideration, will be binding upon both parties.[2] But, *after* official services have been fully rendered, an executed contract exists between the city and the official, the obligation of which is always beyond impairment or change by State or municipal authorities.[3] For, at this stage of the transaction, the relation of debtor and creditor is created, with an executed consideration on the part of the official, and the rights of the latter may be enforced by *mandamus*.[4] Such a judicial proceeding would be necessary, as a means of recovery of salary already earned, even where the claimant, as treasurer or collector, has charge of the public funds. He cannot pay himself out of these funds, or offset a legal demand made on him for such money, by his claim for compensation.[5]

An official cannot claim an extra allowance of salary for the discharge of incidental duties, even though his compensation be grossly inadequate ;[6] or the duties pertaining to his office be

[1] Chicago v. Edwards, 58 Ill. 252.

[2] Crane v. Des Moines, 47 Iowa, 105; Iowa City v. Foster, 10 Iowa, 189.

[3] Fisk v. Jef. Pol. Jury, 116 U. S. 131; Stewart v. Jef. Pol. Jury, 116 Ib. 135.

[4] See § 375.

[5] New Orleans v. Fimerty, 27 La. Am. 681; *In re* Clarke's Fees, 25 Hun, 593; Del. Co. v. Griffen, 17 Iowa, 166; State v. Boyd, 19 Nev. 356; Cullom v. Dulloff, 94 Ill. 330.

[6] Beard v. Decatur, 64 Tex. 7; Hobbs v. Yonkers, 32 Hun, 454; Beckwell v. Amador Co., 30 Cal. 237; Cowen v. Mayor, 3 Hun, 632; Stockwell v. Genesee Co., 16 Mich. 221; Kernion, 1 La. An. 419; Bartch v. Cutler (Utah, 1890), 24 Pac. Rep. 526; Nowles v. Jasper Co., 86 Ind. 179; Stropes v. Green Co., 84 Ib. 560; *In re* Parsons, 54 N. Y. Super. Ct. 451; Bubb v. Lycoming, 134 Pa. St. 112; Shephard v. Lawrence, 141 Mass. 479;

materially increased after his acceptance of the office, and his entrance upon the performance of his duties. His only remedy in such a case is resignation.[1] A promise to reward an officer, to pay him an extra sum beyond his legal compensation, for a faithful performance of that which it was his official duty to do, is void as without consideration, and cannot be enforced by the official.[2]

If, however, the officer be employed or compelled by law to render services altogether unofficial which are not merely an extension of his official duties and incidental thereto, and which could as well be performed by any other person, he may, especially if such service entail upon him extra trouble and expense, recover additional compensation therefor.[3]

Upton v. U. S., 19 Ct. of Cl. 46; Bartlett v. U. S., 25 Ct. Cl. 389; Decatur v. Vermillion, 77 Ill. 315; Stiffler v. Delaware, (Ind. 91) 27 N. E. R. 641; Sidway v. Com'rs, 120 Ill. 456; Bunn v. People, 32 Ill. App. 410; Hand v. Tippecanoe, 26 Ind. 179; Rowe v. Kern Co., 72 Cal. 353; Gilbert v. Marshall, 18 B. Mon. 427; Riggs v. Brewer, 64 Ala. 282; Gordon Co. v. Harris, 81 Ga. 220; Board v. Johnson, (Ind. 91) 26 N. E. R. 821.

[1] Bussier v. Pray, 7 S. & R. (Pa.) 447; Robinson v. Dunn, 77 Cal. 473; Wendell v. Brooklyn, 29 Barbour, 204; Warner v. Trenton, 24 N. J. L. 764; Miami Co. v. Blake, 21 Ind. 32; Jay Co. v. Templer, 34 Ib. 322; Turpen v. Tyston Co., 7 Ib. 172; Palmer v. New York, 2 Sandf. 318; Peo. v. Edmonds, 19 Barb. 468; Territory v. Carson, 7 Mont. 412; Bayha v. Webster Co., 18 Neb. 131; State v. Bloxham, (Fla. 1890) 7 So. Rep. 873; Billings v. Mayor, 68 N. Y. 413; Lanc. Co. v. Fulton, (Pa. 89) 18 Atl. Rep. 384; Haynes v. State, 3 Humph. 480; State v. Holliday, 67 Mo. 64; Woodruff v. State, 3 Ark. 285; Peo. v. Drolin, 33 N. Y. 269; Andrews v. Pratt, 44 Cal. 309; Peo. v. Calhoun Co., 36 Mich. 10; *In re* New York etc., 7 Abb. N. C. 408; Erie Co. v. Jones, 119 N. Y. 337; State v. Kelsey, 44 N. J. L. 1; LaGrange v. Cutler, 6 Ind. 354.

[2] Pilie v. New Orleans, 19 La. An. 274; Decatur v. Vermillion, 77 Ill. 315; Gilmore v. Lewis, 12 Ohio, 281; Pool v. Boston, 5 Cush. 519; Davies v. Burns, 5 Allen, 349; Palmer v. Mayor, 2 Sandf. 318; Callahan v. Hallett, 1 Caines, 104; Rea v. Smith, 2 Handy (Ohio) 193; Robinson v. Dunn, 77 Cal. 473; Smith v. Smith, 1 Bailey (S. C.) 70; Debolt v. Cincinnati, 7 Ohio St. 237; Heslep v. Sacramento, 2 Cal. 580; Hatch v. Mann, 15 Wend. 44; Preston v. Bacon, 4 Conn. 471; Shattuck v. Woods, 1 Pick. 175.

[3] United States v. Ripley, 7 Pet. 18; United States v. Brindle, 110 U. S. 688; Evans v. Trenton, 24 N. J. L. 764; Burroughs v. Norton Co., 29 Kan. 196; Love v. Baehr, 47 Cal. 364; Lang v. Board, (Ind. 89) 22 N. E. R. 667; McBride v. Gr. Rap., 47 Mich. 236; Mayor v. Muzzy, 33 Mich. 61; Collier v. U. S., 22 Ct. of Cl. 125; Long v. U. S., 8 Ib. 398; Peo. v. Haws, 34 Barb. 69; Peo. v. Super's, 12 Wend. 257; Bright v. Super's, 18 Johns. 242; Mallory v. Super's, 2 Cowen, 531; Detroit v. Redfield, 19 Mich. 376; McBride v. De-

§ 80. **Assignment of salary.**—For the purpose of protecting the interests of the public service and increasing its efficiency, by securing to those engaged therein the full benefit of all such compensation, which they may be by law entitled to receive, it has become a universally accepted principle of law and of public policy, that the salary of an official is not assignable.[1] Money, due to officials, and remaining in the hands of the municipality or its disbursing agents, upon the same principle, is not subject to attachment or garnishment at the instance of creditors of the officials.[2]

§ 81. **Holding over after expiration of term of office.**—It is an almost universal rule in the United States that municipal officers, particularly those of a high grade, as the mayor and the officers or commissioners, who are placed at the head of the various municipal departments, shall be elected or appointed for a certain fixed and definite term. But, in the absence of any express constitutional or statutory prohibition, it is nevertheless the law, that all public officers, whose terms are fixed as to duration by law, are entitled to continue in office until a successor is legally chosen and qualified.[3] To prevent unavoida-

troit, 47 Ib. 236; Huffman v. Greenwood, 23 Kan. 281; White v. Polk Co., 9 Kan. 307; Reif v. Paige, 55 Wis. 496.

[1] Bliss v. Lawrence, 58 N. Y. 442; Bangs v. Dunn, 66 Cal. 72; Schlass v. Hewlett, 81 Ala. 266; King v. Hawkius, Arizona (1888), 16 Pac. Rep. 434; Field v. Chipley, 79 Ky. 260; Beal v. McVicker, 8 Mo. App. 202; Billings v. O'Brien, 45 How. Pr. 392; Shannon v. Bruner, 36 Fed. Rep. 147; Brackett v. Blake, 7 Met. 335; Conway v. Cutting, 51 N. H. 407; State v. Hastings, 15 Wis. 78; Mulhall v. Quinn, 1 Gray, 105; Macomber v. Duane, 2 Allen, 541.

[2] Ladd v. Sale, 57 N. H. 210; Bulkley v. Eckert, 3 Pa. St. 368; Memphis v. Laski, 9 Heisk, 511; Bank v. Dibrell, 3 Sneed, 379; Dewey v. Garvey, 130 Mass. 89; Troy, etc. v. Com., 127 Ib. 43; Hawthorn v. St. Louis, 11 Mo. 59; Sch. Dis. No. 4 v. Gage, 39 Mich. 484; Tracy v. Hornbuckle, 8 Bush. 336; Merrell v. Campbell, 49 Wis. 535; Buchanan v. Alexander, 4 How. 20; Hodgson v. Dexter, 1 Cranch, 345; Mayor etc. v. Root, 8 Md. 95; Mayor etc. v. Rowland, 26 Ala. 498; Clark v. Mobile Com'rs, 36 Ib. 621; McMeekin v. State, 9 Ark. 553; Ward v. Hartf. Co., 12 Conn. 404; Merwin v. Chicago, 45 Ill. 133; Triebel v. Colburn, 64 Ill. 376; Hightower v. Slaton, 54 Ga. 108; Caiaker v. Mathews, 25 Ga. 571; Divine v. Harvey, 7 B. Mon. 439.

[3] Chandler v. Bradish, 23 Vt. 416; Sch. Dis. v. Atherton, 12 Met. 105; Dow v. Bullock, 13 Gray, 136; Peo. v. Fairbury, 51 Ill. 149; State v. Fagan, 42 Conn. 32; Wier v. Bush, 4 Litt. 433; Stratton v. Oulton, 28 Cal. 44; Central v. Sears, 2 Colo. 588; Walker v. Ferrill, 58 Ga. 512; State v. Harrison, 113 Ind. 440; Thomas v. Owens, 4 Mo. 188; Robb v. Carter, 65

ble lapses, and to give certainty and permanence to this reasonable rule of the American common law, it has in most of the States been incorporated into a statute.[1] An official's right to hold over, which terminates with the election and qualification of a successor, is not revived by the death or disability of the successor, where such death or disability occurs after qualification, although it may happen before the successor has begun to serve. This, at least, is the conclusion of the cases cited in the note below.[2] But inasmuch as the enforcement of this rule would bring about the same evil consequences, which attend any delay in the election or qualification of the successor after the expiration of the incumbent's term of office, and which the provision for holding over was intended to prevent, it would seem to be reasonable to extend the provision for holding over, until the successor has actually entered upon the performance of his official duties, and such has been the ruling in one case.[3]

When a municipal corporation has been legislated out of existence;[4] or when the official has for some cause forfeited his office,[5] the rule, enabling officers to hold over, has no application whatever. Upon the principle that no one shall profit by his own wrong, where it is made the express duty of officials to give notice for and to hold an election, at which their successor shall be chosen, and they, even though inadvertently, neg-

Ib. 329; Overseers v. Sears, 22 Pick. 130; People v. Ferris, 16 Hun, 219; Cordiell v. Frizell, 1 Nev. 130; State v. Wells, 8 Ib. 105; York County v. Small, 1 W. & S. (Pa.) 315.

[1] Peo. v. Whitman, 10 Cal. 38; Peo. v. Tilton, 37 Ib. 614; State v. Fagan, 42 Conn. 32; Peo. v. Reid, 11 Cal. 138; Bonner v. State, 7 Ga. 473; Peo. v. Fairbury, 51 Ill. 149; State v. Berg, 50 Ind. 149; Elam v. State, 75 Ind. 518; Gosman v. State, 106 Ind. 203; State v. Harrison, 113 Ind. 440; Wapello v. Bigham, 10 Iowa, 39; Killion v. Herman, 43 Kan. 37; Marshall v. Harwood, 5 Md. 423; Dow v. Bullock, 13 Gray (Mass.) 156; People v. Lord, 9 Mich. 227; State v. Thomas, 102 Mo. 85; State v. Smith, 87 Mo. 158; Tappan v. Gray, 9 Paige, 507; State v. Howe, 28 Ohio St. 588; State v. Brewster, 44 Ib. 589; Com. v. Hanley, 9 Pa. St. 513; Macoy v. Curtis, 14 S. C. 367; James v. Jefferson, 66 Tex. 578; Vaughan v. Johnson, 77 Va. 300; State v. Washburn, 17 Wis. 658; Tuley v. State, 1 Ind. 500, 502; Wheeling v. Black, 25 W. Va. 266; Peo. v. Runkel, 9 John. 147; Vernon Soc. v. Hills, 6 Cow. 23; Slee v. Bloom, 5 Johns. Ch. 366; Bank v. Petway, 3 Humph. (Tenn.) 522.

[2] State v. Seay, 64 Mo. 89; State v. Hopkins, 10 Ohio St. 509.

[3] Com. v. Hanley, 9 Pa. St. 513.

[4] Beckwith v. Racine, 7 Biss. 142; State v. Bailey, 37 Ohio St.; Barkley v. Levee Com'rs, 93 U. S. 258.

[5] Hyde v. State, 52 Miss. 655.

lect to do so, they cannot hold over as against the public, although they are entitled by the charter to remain in office until their successors are elected and qualified.[1]

§ 82. **Vacancies.**—An office may be defined to be vacant, in contemplation of law, when it is not occupied by one who is lawfully entitled to its incumbency until the happening of some future contingency. An office is vacant, even though there be an incumbent *de facto*, whether his title to the office was originally defective, or his lawful title to the same has since expired.[2]

An appointment, made to fill a supposed vacancy which does not in fact exist, is void *ab initio*, and cannot be validated subsequently.[3] And, although an officer's resignation, tendered to take effect in the future, will create a vacancy in the office, when the time of taking effect arrives, the fact that it may be withdrawn prior thereto, makes it impossible for a new appointment to be made to such an office, until the resignation has actually taken effect and a vacancy actually created.[4] It has, however, been held that, if there is no express prohibition of the law, a present exercise of the power of appointment, anticipatory of a future vacancy, or to fill a newly created office, is valid;[5] but no officer, whose own term is to expire, before the vacancy occurs, will be allowed thereby to unjustly deprive his successor of his official privilege.[6] And it may be stated, as a general rule, that a vacancy in an office already existing occurs only when the official term fixed by law has expired,[7] or upon the death, resignation or removal of the *de jure* incumbent,[8]

[1] Peo. v. Bartlett, 6 Wend. (N. Y.) 422; Lynch v. Lafland, 4 Colder (Tenn.) 96.

[2] State v. Harrison, 113 Ind. 434; Peo. v. Van Horne, 18 Wend. 518; State v. Howe, 25 Ohio St. 588; State v. McNeely, 24 La. An. 19; Com. v. Hanley, 9 Pa. St. 513; Peo. v. Lacombe, 34 Hun, 409; State v. Hadley, 64 N. H. 473; State v. Seay, 64 Mo. 89; Peo. v. Whitman, 10 Cal. 38; Stocking v. State, 7 Ind. 326; Collins v. State, 8 Ib. 344.

[3] State v. Peele, 124 Ind. 515; see Lindsey v. Luckett, 20 Tex. 516; People v. Witherell, 14 Mich. 48.

[4] Biddle v. Willard, 10 Ind. 63.

[5] State v. Van Buskirk, 40 N. J. L. 463; Haight v. Love, 39 Ib. 14.

[6] State v. Meehan, 45 N. J. L. 189; Haight v. Love, *supra;* Ivy v. Lusk, 11 La. An. 486.

[7] State v. Harrison, 113 Ind. 434.

[8] States v. Johns, 3 Oregon, 533; State v. Newark, 27 N. J. L. ; Johnston v. Wilson, 2 N. H. 202; Peo. v. Langdon, 8 Cal. 1; Peo. v. Bissell, 49 Cal. 407.

or through the occurrence of some event, by which the duties cease to be legally discharged by any one.[1] The insanity of the incumbent does not necessarily create a vacancy,[2] nor will a judgment of *ouster* in a *quo warranto* proceeding.[3]

If an enumeration is made by statute of the events which will create a vacancy, all others must be presumed to be excluded; the law favoring the continuity of official service, rather than its cessation or interruption.[4] There is nothing peculiar in the legal meaning of the term "vacancy," when applied to official positions; and there is no reasonable ground for the distinction, which is sometimes made, between offices newly created, and those to which others had already been appointed or elected. An office will be vacant, in either case, where there is no lawful incumbent.[5] No vacancy is created if, upon the expiration of the term of an elective officer, he holds over until his successor shall have been elected; and there is a failure to fill the position by election or the duly elected successor dies, or neglects to qualify.[6] The incumbent continues to hold over, as officer *de jure*.[7] But the reverse of the rule, above given, obtains, when it is expressly declared that failure of the successor to qualify, on or before a certain date, shall create a vacancy.[8]

In the absence of any authority to hold over, the office, of course, becomes vacant, immediately upon a failure to elect or qualify.[9]

[1] Peo. v. Bissell, 49 Cal. 407; State v. Howe, 25 Ohio St. 588; States v. Jones, 19 Ind. 356.

[2] State v. Pidgeon, 8 Blackf. 132.

[3] State v. Ralls etc., 45 Mo. 58.

[4] Rosborough v. Boardman, 67 Cal. 116; Peo. v. Whitman, 10 Cal. 38.

[5] Stocking v. State, 7 Ind. 326; Collins v. State, 8 Ind. 344.

[6] Com. v. Hanley, 7 Pa. St. 513; Peo. v. Mizner, 7 Cal. 19; Cordille v. Frizell, 1 Nev. 130; *Ex parte* Lawthorne, 18 Gratt. 85; Tappan v. Gray, 9 Paige, 507; State v. Lusk, 18 Mo. 333; Gosman v. State, 106 Ind. 203; State v. Harrison, 113 Ind. 434; Stewart v. State, 4 Ib. 396; State v. McMullen, 46 Ib. 307; Peo. v. Bissell, 49 Cal. 407; People v. Tilton, 47 Ib. 614.

[7] Walker v. Ferrill, 58 Ga. 512; Elam v. State, 75 Ind. 518; Brady v. Howe, 50 Miss. 607; Sappington v. Scott, 14 Md. 40; Smoot v. Somerville, 59 Ib. 88; *contra*, State v. Cooke, 54 Tex. 482.

[8] Peo. v. Crissey, 91 N. Y. 613; Peo. v. Wilson, 72 N. C. 155; State v. Washburn, 17 Wis. 658; Adv. Opin., 5 So. Rep. 613; Win. Co. v. Maynard, 44 Iowa, 15; State v. Matheney, 7 Kan. 327; State v. Hunt, 54 N. H. 431.

[9] Peo. v. Curtis, 1 Idaho N. S. 753; Peo. v. Baine, 6 Cal. 509; King v. McLure, 84 N. C. 153; Mayoralty Case, 19 Gratt. 673.

§ 83. **Removals—When for cause.**—Where there are no constitutional or statutory restraints, and where the duration of the official term is not fixed by law, the power of removal is an incident of the power to appoint; and it may be exercised at the pleasure of the appointing officer.[1]

Such a power of removal at pleasure while it is discretionary, is not judicial, and the officer exercising it has the sole and exclusive right to pronounce upon the propriety of using it.[2] And no notice or hearing need be accorded to the official before being removed.[3] But such arbitrary power of removal does not exist, when the official tenure is fixed by law,[4] or when the right to remove can be exercised for cause only.[5] So, if the officer be appointed to hold during the pleasure of some third officer, the appointing officer cannot remove him arbitrarily, nor can an officer, holding office at the pleasure of the appointing power, be removed by any other person, except it be for malfeasance in office, by judicial decree.[6]

The power of removal for cause is strictly construed, and its exercise should be restrained within the limits assigned to it

[1] Newsome v. Cocke, 44 Miss. 352; Williams v. Gloucester, 148 Mass. 256; Hudson v. Denver, 12 Colo. 157; 20 Pac. R. 329; State v. Alt 26 Mo. App. 673; State v. Pol. Com'rs, 88 Mo. 144; People v. Whitlock, 92 N. Y. 191; Peo. v. Robb, 126 Ib. 180; Peo. v. Thompson, 94 N. Y. 451; People v. Robb, 27 N. E. R. 267 (N. Y. 91); People v. Cain, 47 N. W. R. 484; 84 Mich. 223; State v. Somers, (Neb. 93) 53 N. W. R. 146; People v Purroy, 10 N. Y. Sup. 181; Avery v. Tyringham, 3 Mass. 277; Blake v. U. S., 103 U. S. 227; Evans v. Jus., 3 Hayw. (Tenn.) 26; Madison v. Kelso, 32 Ind. 79; State v. Kiichli, (Minn. 93) 54 N. W. R. 1069; Carter v. Durango, 27 Pac. R. 1057; 16 Colo. 534; State v. Common, 6 Atl. R. 518; 49 N. J. L. 177; People v. Fire Com'rs, 73 N. Y. 437; Peo. v. Mayor, 16 Hun, 309; Ford v. Board etc., 81 Cal. 19; Williams v. Boughner, 6 Coldw. 486; Com. v. Sutherland, 3 So. R. 145; Houseman v. Com., 100 Pa. St. 222; Cincin. v. Sloane, 31 Ohio St. 1; State v. Barrow, 29 La. An. 243; Smith v. Brown, 59 Cal. 672; State v. St. Louis, 90 Mo. 672.

[2] People v. Mayor, 82 N. Y. 491.

[3] Field v. Com., 32 Pa. St. 478; State v. St. Louis, 90 Mo. 19; State v. Stevens, 46 N. J. L. 344; State v. McGarry, 21 Wis. 496; Smith v. Brown, 59 Cal. 672.

[4] Dil. Mun. Corp. § 250; People v. Flynn, 62 N. Y. 375; People v. Hill, 7 Cal. 79; People v. Jewett, 6 Ib. 291; State v. Chatburn, 63 Iowa, 659; Keenan v. Perry, 24 Tex. 253; Collins v. Tracy, 36 Ib. 546.

[5] Foster v. Kansas, 112 U. S. 201; Kennard v. Louisiana, 92 Ib. 480; People v. Hayden, 133 N. Y. 198; Field v. Com., 32 Pa. St. 478; Duer v. Board, (N. J. 93) 26 Atl. 144; Wilson v. Dullam, 53 Mich. 392; Com. v. McReak, 20 S. W. R. 220 (Ky. 91).

[6] Carr v. State, 111 Ind. 101.

by the enabling statute.[1] Where removals are authorized for causes named in the statute, removals can be made only for such causes, and others of a similar nature.[2] The power to remove subordinates, for the purpose of reducing the number of officials employed, cannot be exercised to create vacancies to be filled by the appointing power;[3] but it should in this connection be observed that the Legislature may confer upon a municipal official the authority to make removals for cause, and to make him the sole judge of the sufficiency of the cause.[4]

The power to remove for cause is judicial in its nature; and when conferred upon superior officers, it must be exercised reasonably; not capriciously or arbitrarily, but in the spirit of impartiality and fairness; and must be guarded by proper precautions against favoritism and injustice.[5] For this reason, the exercise of the power is always subject to judicial review.[6] If the cause of removal be misconduct on the part of the official it must, in order to justify his removal, be of such a character as to affect his performance of official duty,[7] and not merely such

[1] Duerr v. Board, (N. J. 93) 26 Atl. R. 144; People v. McLean, 21 N. Y. Supp. 625; Cleary v. Trenton, 20 N. J. L. 331; Clark v. Cape May, 50 Ib. 558; Clark v. Peo., 15 Ill. 213; Hawkins v. Kercheval, 10 Lea (Tenn.) 535; State v. Chamber, 20 Wis. 63; Mead v. Dreas, 36 Mich. 416; State v. Lingo, 26 Mo. 496; People v. Albany M. Col., 62 How. Pr. 220; State v. Jer. City, 1 Dutch. (N. J.) 536; Mayor etc. v. Shaw, 16 Ga. 172; Com. v. Slifer, 25 Pa. St. 23; Crawford v. Township, 24 Mich. 248; McGregor v. Gladwine Co., 37 Ib. 388.

[2] Wellman v. Board, 84 Mich. 558; 47 N. W. R. 558; Peo. v. Higgins, 15 Ill. 110; Dubrie v. Voss, 10 La. An. 210; State v. McGarry, 21 Wis. 496; Com. v. Williams, 79 Ky. 42.

[3] Lincoln v. Yeoman, (Neb. 92) 51 N. W. R. 844; State v. Schumaker, 27 La. An. 332.

[4] Patton v. Vaughan, 39 Ark. 211; Wilson v. People, 90 Ill. 186; People v. New York, 82 N. Y. 491; Keenan v. Perry, 24 Tex. 253; State v. Doherty, 25 La. An. 119; Nolan v. New Orleans, 10 Ib. 106; State v. Register, 59 Md. 283; Peo. v. Whitlock, 92 N. Y. 191; State v. Stevens, 46 N. J. L. 344; People v. Board etc., 73 N. Y. 437; State v. Board etc., 26 Ohio St. 24; State v. McGarry, 21 Wis. 496.

[5] Duerr v. Board, *supra;* Madison v. Korbley, 32 Ind. 74; Stadler v. Detroit, 32 Mich. 346; Stockwell v. Township, 22 Mich. 341; Dullam v. Wilson, 53 Ib. 392; *In re* Eaves, 30 Fed. Rep. 21; Randall v. State, 16 Wis. 340; Larkin v. Noonan, 19 Ib. 82.

[6] People v. McLean, 57 Hun, 587; Foster v. Kansas, 112 Ib. 201; Willard's App., 4 R. I. 601; Field v. Com., 32 Pa. St. 478; State v. Bryce, 7 Ohio, pt. 1, 282; *In re* Nichols, 57 How. Pr. 395; Page v. Hardin, 8 B. Mon. (Ky.) 672; see also 58 Hun, 603; 59 Ib. 623; 58 Ib. 654; 63 Ib. 633.

[7] Clapp v. Board of Pol., 72 N. Y. 415; Com. v. Williams, 79 Ky. 42; People v. Board, 55 Hun, 445; Com. v. Chambers, 1 J. J. Marsh, 160;

moral delinquencies, which only affect his character as an individual member of the community; unless the offence be of such an infamous character as to render him unfit to exercise any public office, because it would shock the public sense of decency, to permit him to retain his office. Such a state of affairs would make it impossible for the offending official to perform the duties of the office in an acceptable manner.[1] While the foregoing statement is a reasonably correct statement of the existing law, it must, however, be remembered that a most radical change in public opinion on this question is taking place, particularly in regard to the effect of unchastity on the fitness of a candidate for public office, which will probably effect a more or less serious modification of the existing law.[2] If the offence be criminal, but it does not constitute a breach of official duty, it is held by many cases, in consonance with the legal principle that every man must be presumed to be innocent until his guilt be proven, that the officer should not be deprived of his office, until his guilt has been judicially established in a court of competent jurisdiction.[3] If the official be accused of an offence which is a breach of duty, but which is not at the same time a crime, he is triable by the official in whom the power of removal is vested.[4] And when the offence is both a breach of duty and a criminal or infamous offence, the offending official may be tried and removed for the breach of duty, before trial for the public delinquency.[5] When misconduct or malfeasance is

Com. v. Barry, Hard. (Ky.) 229; McComas v. Krug, 81 Ind. 327; State v. Savage, 89 Ala. 1.

[1] Com. v. St. Patricks, 9 Binn. (Pa.) 441; Com. v. Guardians, etc., 6 S. & R. (Pa.) 469; Society v. Com., 52 Pa. St. 125; Evans v. Phila. Club, 50 Ib. 107; Peo. v. Board, etc., 72 N. Y. 445; Com. v. Shaver, 3 W. & S. (Pa.) 338; Breckinridge v. State, 27 Tex. App. 513; Peo. v. Cooper, 57 How. Pr. 416; Mayor v. Shaw, 16 Ga. 172.

[2] See Tiedeman's Limitations of Police Power, § 17 *c*.

[3] Com. v. Jones, 10 Bush, 725; State v. Humphries, 74 Tex. 466; Cummings v. Missouri, 4 Wall. (U. S.) 277; Peo. v. Board, 9 Hun, 222; 20 Hun, 333; Rex v. Richardson, 1 Burr. 517, 538 (1758), is a leading case; Barker v. Peo., 3 Cow. 686; Mayor, etc., v. Shaw, 16 Ga. 172; *In re* Dorsey, 7 Port. (Ala.) 293; Cort v. State, 28 Ark. 417; Com. v. Chambers, 1 J. J. Marsh. (Ky.) 160; see *contra*, Peo. v. French, 32 Hun, 112; 60 How. Pr. 377; Peo. v. Board, 11 Hun, 403; Oliver v. City Council, 69 Ga. 165.

[4] Rex v. Richardson, 1 Burr. 517; Com. v. St. Patricks, etc., 2 Binn. 441.

[5] Rex v. Chalke, 6 Comb. 397; Donohue v. Will Co., 100 Ill. 94; Peo. v. French, 32 Hun, 112; 60 How. Pr. 377; Rex v. Wells, 4 Burr. 1999; Dil. Mun. Corp. § 251.

named as the cause for removal, the words have reference to the official conduct of the officer, and signify a willful or negligent breach of his duty, or a perversion of his official authority, by which some one is unjustly injured.[1] The elements of illegality, neglect, omission of duty or corruption must be present, in order to constitute official misconduct or malfeasance.[2]

§ 84. **Proceedings to remove for cause.**—When it is provided that the official tenure shall continue during good behavior, or when the power of removal can only be exercised upon the occurrence of certain specified causes, there must be a notice to the accused official, a formulated charge, a hearing of the evidence in its support, and an opportunity granted to the party defendant of making a defence.[3] The accused official is entitled to a personal notice of the charges which have been made against him, and of the time when the trial will take place.[4] The body, which is empowered to conduct the trial, should be composed of all those officials, in whom the power of removal is vested.[5] It is not necessary that the citation should set out all the charges in detail;[6] but it is a well settled rule, that the basis of the proceedings must be specific charges, sufficient, if proven, to furnish a cause for removal.[7] It is the right

[1] Wellman v. Board, 51 N. W. R. 1070; O'Neill v. Register, (Md. 92) 23 Atl. 960; Peo. v. Mays, 117 Ill. 257; Peo. v. Jordan, 90 N. Y. 53; State v. Hixon, 41 Mo. 210; State v. Teasdale, 21 Fla. 652; Minkler v. State, 14 Neb. 181; Hughes v. Court, 42 N. W. R. 984; 75 Mich. 574; Taggart v. Detroit, 38 N. W. R. 714; State v. Hawkins, 44 Ohio St. 98; People v. Com'rs, 49 N. Y. Super. Ct. 369; Woods v. Varnum, 83 Cal. 46; Runnels v. State, Walk. (Miss.) 146; State v. Jersey City, 25 N. J. L. 536; Mayor v. Shaw, 16 Ga. 172.

[2] Peo. v. Board, 55 Hun, 445; State v. Council, (Minn. 93) 55 N. W. R. 118; Coit v. Lyons, 33 Conn. 109; Milliken v. Council, 54 Tex. 388; Oliver v. Council, 69 Ga. 165.

[3] State v. Smith, 52 N. W. R. 700 (Neb. 92); Duerr v. Board, 26 Atl. R. 144 (N. J. 93); Field v. Com. 32 Pa. St. 478; Hoboken v. Gear, 3 Dutch. 265; Madison v. Korbley, 32 Ind. 74; Stadler v. Detroit, 13 Mich. 346.

[4] The accused may waive notice by appearance and answer, or by a total desertion of the place; as, for example, where he has removed from his former residence, and changed his domicile permanently. Dil. Mun. Corp. § 254; Rex v. Ipswich, 2 Ld. Ray. 1240; Rex v. Grimes, 5 Burr. 2601.

[5] Charles v. Mayor, etc., 27 N. J. L. 203; Jacksonville v. Allen, 25 Ill. Ap. 54; Andrews v. King, 77 Me. 224; Peo. v. Board, 23 Hun, 351.

[6] Peo. v. Benev. Soc., 24 How. Pr. 216; Society v. Van Dyke, 2 Whart. (Pa.) 309; *In re* Nichols, 6 Abb. New Cas. 474; Peo. v. Com'rs, etc., 106 N. Y. 64.

[7] Woods v. Varnum, 85 Cal. 639; Peo. v. Mayor, etc., 19 Hun, 441; Peo-

of the accused to have reasonable time and opportunity, in which to prepare his defence, to employ and be represented at the hearing by counsel, to call witnesses in his defence, and to cross-examine the witnesses and take exception to the testimony offered against him.[1] Although the rules governing judicial procedure are substantially applicable,[2] yet the proceedings are not required to be carried on with that degree of preciseness, which is usual in common law pleading and practice.[3] In every case, the truth of the charges must if not admitted be proven.[4] If an officer refuses to surrender his office, after he has been removed by the lawful authority and in a lawful manner, he may be ousted by a proceeding in *quo warranto*.[5]

§ 85. **Proceedings in case of illegal removal—Right to salary when wrongfully deprived of his office.**—The courts of general jurisdiction exercise a supervisory power over removals for cause;[6] and will grant a *mandamus* to restore an official who has been erroneously or illegally removed.[7]

An official of a municipal corporation, who has been illegally removed, can also recover the amount of compensation due him from the date of his removal to that of his reinstatement, or to the expiration of his term.[8] But in determining, whether the

ple v. Carroll, 42 Hun, 438; Peo. v. French, 102 N. Y. 583; Peo. v. Nichols, 79 Ib. 582; Peo. v. Starks, 33 Hun, 384; Peo. v. Therrien, 80 Mich. 187; *In re* Nichols, 57 How. Pr. 397; Peo. v. Fire Com'rs, 77 N. Y. 153.

[1] Duerr v. Board, 26 Atl. 144; People v. Hannan, 56 Hun, 469; State v. Bryce, 7 Ohio, pt. 2, 414; Murdock v. Academy, 12 Pick. 244; *In re* Nichols, 6 Abb. N. C. 474; *In re* Emmett, 65 How. Pr. 266; Ledbetter v. State, 10 Ala. 241; Peo. v. Nichols, 79 N. Y. 582.

[2] Peo. v. Doolittle, 44 Hun, 293; Peo. v. Therrien, 80 Mich. 187; Peo. v. Starks, 33 Hun, 384.

[3] People v. McClave, 123 N. Y. 512; 25 N. E. R. 1047; McAulliffe v. New Bedford, (Mass. 92) 29 N. E. R. 517; People v. Com'rs, 98 N. Y. 332.

[4] People v. Robb, 6 N. Y. S. 831; State v. Board, 6 Atl. R. 659; 49 N. J. L. 170; Peo. v. Cooper, 58 How. Pr. 358; Callahan v. State, 2 Stew. & P. (Ala.) 379; Com. v. Arnold, 3 Litt. (Ky.) 309.

[5] Rex v. Doncaster, 2 Ld. Raym. 1566; Cushing v. Frankfort, 57 Me. 541; Jay's Case, 1 Vent. 302. See *post*, §§ 381, 382.

[6] Woods v. Varnum, 83 Cal. 46; Mayor v. Brown, 54 Ga. 229; Peo. v. French, 60 How. Pr. 377; Storer v. Washington, Peck (Tenn.) 334.

[7] People v. Campbell, 82 N. Y. 247; Com. v. German Soc., 15 Pa. St. 251; State v. Jersey City, 1 Dutch. 536; Donnelly v. Teasdale, 21 Fla. 652. See *post*, § 372.

[8] Stadler v. Detroit, 13 Mich. 346; Shaw v. Mayor, 19 Ga. 468; Riley v. Kansas City, 31 Mo. Ap. 439; Hoboken v. Gear, 3 Dutch. (N. J.) 275; White v. Mayor, 4 E. D. Smith, 563.

removal was unlawful, the reviewing court will not be confined to the consideration of the grounds which were assigned for the removal, but may and should consider all the facts and circumstances of the case which affect the question of legality of the removal, and find for the city, whenever there is sufficient justification for the removal, whether the authorities made the removal on that ground or on some other untenable ground.[1] Where, however, there is no legal justification for the removal, either assigned or not referred to, the officer may be reinstated, and be given a judgment for back salary, even though the authorities, who made the removal, acted in a judicial capacity, and in pursuance of judicial power, vested in them by law;[2] unless the statute, which vests this judicial power of removal in the municipal authorities, expressly declares that their judgment is final and denies the right of appeal to the courts of general jurisdiction; when the latter courts in that case have no jurisdiction over the case.[3] And so, also, where a municipal official is under arrest to answer a charge of crime, brought by the state, and he is removed and his successor appointed; his acquittal from the criminal charge does not give him an action against the city for the salary, of which he had been deprived.[4] The incumbent of an office is, however, entitled to compensation until he receives actual notice of his removal;[5] and, so it has been held, until his successor has been appointed.[6]

But whether the municipality is liable to its officer *de jure* for salary for any period, during which the officer was not actually in office, even though he was prevented wrongfully from occupying the position, has been decided both in the negative[7] and

[1] Mayor etc. v. Shaw's Adm'r, 25 Ga. 590; Rex v. Mayor, 2 Cowp. 523; King v. Mayor, 12 T. R. 182.

[2] Shaw v. Mayor etc., 19 Ga. 468; Shaw v. Mayor etc., 21 Ga. 280; s. c., Mayor etc. v. Shaw, 25 Ga. 590.

[3] Nolan v. New Orleans, 10 La. An. 106. See Queen v. Atlanta, 59 Ga. 318.

[4] Brunswick v. Fahn, 60 Ga. 109.

[5] Jarvis v. Mayor, etc., of New York, 2 N. Y. Leg. Obs. 396.

[6] White v. Mayor of New York, 4 E. D. Smith, 563.

[7] Brunswick v. Fahn, 60 Ga. 109; State v. Milne, (Neb. 93) 54 N. W. R. 521; Newtonville v. Culp, 38 Ohio St. 13; Farrell v. Bridgeport, 45 Conn. 191; State v. Davis, 44 Mo. 131; Smith v. New York, 37 N. Y. 518; Wayne v. Benoit, 20 Mich. 176; Saline v. Anderson, 20 Kan. 298; Webster v. Kansas City, 64 Mo. 493; Dolan v. Mayor, 68 N. Y. 279; Queen v. Atlanta, 59 Ga. 318; Hadley v. Mayor, 33 N. Y. 603.

the affirmative ;[1] according to whether the courts consider the matter of official salary, as a question of compensation for services rendered, or as one of personal right, as a perquisite or appurtenant to one's lawful title to the office, something in the nature of a private franchise. And while it is generally held that the officer *de facto* is not entitled to the salary attached to the office, although he may perform his official duties satisfactorily ;[2] it seems to be generally settled everywhere, that the courts will not ordinarily interfere to restrain the payment of official salary, pending a contest over the possession of the office by the opposing claimants, unless the bill shows special grounds for equitable relief.[3] But where the liability of the city for back salary to an officer, who is unlawfully kept out of office by an intruder, is denied, the officer *de jure*, upon establishment of his right to the office, may maintain an action for damages against the usurper for the salary which he had drawn for the time during which he had been the officer *de facto*.[4] And where the usurping official had received only a part of such salary, the balance may be recovered of the city by the officer *de jure*, upon his installation in office.[5]

§ 86. **Resignations — Incompatible offices—Change of residence.**—"An office must be resigned either expressly or by

[1] Phila. v. Given, 60 Pa. St. 136; Memphis v. Woodward, 12 Heisk. 499; People v. Miller, 24 Mich. 458; Savage v. Pickard, 14 Lea, 46; Fitzsimons v. Brooklyn, 102 N. Y. 536; Williams v. Clayton, 21 Pac. R. 398; Andrews v. Portland, 79 Me. 484; Dorsey v. Smith, 28 Cal. 21; Meagher v. County, 5 Nev. 244; Carroll v. Siebenthale, 37 Cal. 193.

[2] State v. Carroll, 38 Conn. 471; Bentley v. Phelps, 27 Barb. 524; Samis v. King, 40 Conn. 298; People v. Tieman, 30 Barb. 193; Riddle v. Bedford Co., 7 Serg. & R. 386. Cf. *contra*, Behan v. Board of Com'rs, (Ariz. 93) 31 Pac. 521; Blackburn v. Oklahoma, 31 Pac. 382.

[3] Field v. Commonwealth, 32 Pa. St. 478; Colton v. Price, 50 Ala. 424; Queen v. Governors, etc., 8 Ad. & El. 632; Bruner v. Bryan, 50 Ala. 523; Bowerbank v. Morris, Wall. C. C. R. 118; *In re* Ramsay, 83 Eng. C. L. 174; Page v. Hardin, 8 B. Mon. 648; *In re* Henner, 13 Pet. 230; *post*, §§ 392, 393.

[4] Dorsey v. Smythe, 28 Cal. 21; Nichols v. McLean, 101 N. Y. 526; City v. Given, 60 Pa. St. 136; People v. Nolan, 102 N. Y. 539; Douglas v. State, 31 Ind. 429; Stratton v. Sulton, 28 Cal. 44; State v. Sherwood, 42 Mo. 179; Allen v. McKean, 1 Sumn. 276; Beyter v. Dodsworth, 6 T. R. 681; Hunter v. Chandler, 45 Mo. 452; 10 Am. L. Reg. 440; People v. Miller, 24 Mich. 458; Sadler v. Evans, 4 Burr. 1984.

[5] McVeany v. New York, 80 N. Y. 185; Benoit v. Wayne Co., 20 Mich. 176, Cooley, J., dissenting.

implication.[1] At common law, a tender or offer of one's resignation is revocable until accepted; and the act is not a resignation until the offer shall have been accepted by the proper authority.[2] This English rule has been commonly followed in America, wherever it has not been changed by statute,[3] although it cannot be said to be definitely settled. There are many American decisions, which hold that a resignation creates a vacancy, as soon as it comes to the hands of the proper authority, without any acceptance, express or implied.[4] And this is invariably so, if the statute provides that the officer may resign at pleasure.[5]

Unless prescribed by statute, no particular form of words are required in a resignation;[6] and the acceptance may be implied as well as express.[7] It is a well settled rule at common law, that the acceptance by an officer of a second office, which is incompatible with the first, is equivalent to and implies his resignation of the first, and that the first office is vacant without any other act on his part, and without a proceeding for removal or *quo warranto*.[8] If the first office be one, from which

[1] Dillon's Mun. Corp. § 224; Reg. of University, 9 Gill & J. (Md.) 365, 422.

[2] Rex v. Lane, 2 Ld. Raymond, 1304.

[3] Thompson v. U. S., 103 U. S. 471; Edwards v. U. S., 103 Ib. 471; Oregon v. Jennings, 119 U. S. 74; State v. Newark, 27 N. J. L. 198; State v. Ferguson, 31 N. J. L. 120; Greene v. Hudson Co., 44 N. J. L. 388; Hoke v. Henderson, 4 Dev. (N. C.) 1; 25 Am. Dec. 677; London v. Headon, 76 N. C. 72; Jones v. Jefferson, 66 Tex. 576; Waycross v. Youmans, 85 Ga. 708; Hetherington v. Sterry, 28 Kan. 429; Rogers v. Slonaker, 32 Ib. 193.

[4] U. S. v. Wright, 1 McLean, 509; Gilbert v. Luce, 11 Barb. 91; Olmstead v. Dennis, 77 N. Y. 378; Bunting v. Willis, 27 Gratt. 144; 21 Am. Rep. 338; Smith v. Dyer, 1 Cull. (Va.) 562; Gates v. Del. Co., 12 Iowa, 405; State v. Mayor, 4 Neb. 260; State v. Clark, 3 Nev. 566; State v. Fitts, 49 Ala. 402; People v. Porter, 6 Cal. 26.

[5] Amy v. Watertown, 130 U. S. 302; Reese v. Watertown, 19 Wall. 107 (resignation to avoid *mandamus*), and Leav. Co. v. Sellew, 99 U. S. 624; Leav. v. Kinney, 99 U. S. 623; Dillon Mun. Corp. § 861 *b*.

[6] Van Orsdale v. Hazard, 3 Hill (N. Y.) 243, 248; State v. Allen, 21 Ind. 516; Peo. v. Pol. Board, 26 N. Y. 316; Edwards v. U. S., 103 U. S. 471; Peo. v. Brooklyn, 77 N. Y. 503.

[7] Edwards v. United States, 103 U. S. Rep. 471; Gates v. Del. Co., 12 Iowa, 405; Pace v. People, 50 Ill. 432.

[8] Com. v. Hawkes, 123 Mass. 525; Magie v. Stoddard, 25 Conn. 565; Peo. v. Hanifan, 96 Ill. 420; Dailey v. State, 8 Blackf. (Ind.) 329; Lucas v. Shepherd, 16 Ind. 368; State v. Butz, 9 S. C. 156; State v. Hutt, 2 Ark. 282; Wilson v. King, 3 Litt. (Ky.) 457; State v. Newhouse, 29 La.

the officer cannot resign without the concurrence of superior authority, the acceptance of an incompatible office does not work an absolute vacancy of the first office, unless the superior authority be privy to the incompatible appointment.[1] But in this country, where an official can usually resign at pleasure, it has been held that the superior authority cannot refuse the resignation,[2] or compel the officer to retain the first office against his will.[3]

Something more than the mere physical impossibility to perform the duties of the two offices is required, to constitute this incompatibility. Offices may properly be said to be incompatible, when for reasons, arising out of an enlightened public policy, it would be wrong for one person to retain both.[4] In every case, it is a question of fact for judicial determination, whether the public interests require the abandonment of one or the other of the two alleged incompatible offices; and it is also very likely, that the inordinate demand for public office leads to the determination that the offices are incompatible, when in fact there would be no difficulty in the acceptable performance of the duties of both offices by the same person. It is surprising to what extent this question has been raised before the courts, and the citations are very numerous.

It has thus been held that the office of alderman, of a town or city, is incompatible with that of county treasurer,[5] town clerk,[6] capital burgess[7] and city chamberlain.[8] The office of town

An. 824; Stubbs v. Lee, 64 Me. 195; *Ex parte* Call, 2 Tex. App. 497; Pooler v. Reed, 73 Me. 129; State v. Draper, 45 Mo. 355; Shell v. Cousins, 77 Va. 328; State v. Brown, 5 R. I. 1; State v. Goff, 15 R. I. 505; Peo. v. Nostrand, 46 N. Y. 375; Biencourt v. Parker, 27 Tex. 558; State v. Brinkerhoff, 66 Ib. 45; Davenport v. Mayor, 67 N. Y. 456; Peo. v. Carrique, 2 Hill (N. Y.) 93; Van Orsdell v. Hazard, 3 Ib. 248.

[1] Rex v. Patterson, 4 B. & A. 9; Gates v. Del. Co., 12 Iowa, 405; *contra*, U. S. v. Board, 53 Fed. 739.

[2] U. S. v. Wright, 1 McLean, 509.

[3] State v. Mayor of Lincoln, 4 Neb. 260. Cf. State v. Ferguson, 2 Vroom, 31 N. J. L. 107, 129; People v. McLean, 62 Hun, 42; Peo. v. Porter, 6 Cal. 26; see § 78 on Acceptance; and see People v. Williams, (Ill. 93) 33 N. E. R. 849.

[4] Preston v. U. S., 37 Fed. Rep. 417; State v. Feibleman, 28 Ark. 424; State v. Brinkerhoff, 66 Tex. 45; Stubbs v. Lee, 64 Me. 195; People v. Green, 5 Daly, 254; 58 N. Y. 295.

[5] Rex v. Patterson, 4 B. & Ad. 9; 24 E. C. L. 11.

[6] Rex v. Tizzard, 9 B. & C. 418; 17 E. C. L. 411.

[7] Rex v. Hughes, 5 B. & C. 886; 12 E. C. L. 399.

[8] Throop's Public Officers, § 35.

marshal is incompatible with that of bailiff,[1] city councilman;[2] and the city councilman with that of director of state prison,[3] although compatible with a town clerk.[4] The office of mayor is held to be incompatible with that of town clerk,[5] director of state prison,[6] retired U. S. army officer;[7] although a retired army officer may be also an aqueduct commissioner.[8] The offices of chief supervisor of elections, and of counsel to the health department of a city, are incompatible;[9] and so are a jury commissioner and a police commissioner.[10] On the other hand, it is held that there is no incompatibility in the case of the inspector of elections and an interpreter of a Municipal Court,[11] deputy clerk of municipal court and legislator,[12] county clerk and clerk of Circuit Court,[13] clerk and collector of school district.[14] Other illustrations may be added, where the question of incompatibility was raised between offices, not municipal; but they are not needed for the purpose of illustrating the principle.[15]

Resignation may be implied from other circumstances than the acceptance of an incompatible office, as in a case where residence within the municipality is a prerequisite to eligibility for office, permanent removal from the city would have the effect of resignation, on account of incidental disqualification for the office.[16] But if the subsequent residence beyond the limits of the election district is due to a change in the boundaries of the district, and not to a change of residence, the officer's title to his office is not affected thereby, and there is no implied res-

[1] Lewis v. Wall, 70 Ga. 646.

[2] State v. Hoyt, 2 Oregon, 246.

[3] State v. Kirk, 44 Ind. 401; 15 Am. Rep. 239.

[4] Rex v. Jones, 1 B. & Ad. 677.

[5] Com. Dig. 7, tit. Officer B. 6.

[6] Howard v. Shoemaker, 35 Ind. 111.

[7] State v. De Gress, 53 Tex. 387.

[8] People v. Duane, 121 N. Y. 367.

[9] Davenport v. Mayor, etc. of N. Y., 67 N. Y. 456.

[10] State v. Newhouse, 29 La. An. 824.

[11] Goettman v. Mayor, etc. of N. Y., 6 Hun, 132.

[12] People v. Green, 58 N. Y. 295, reversing 5 Daly 254; 46 How. Pr. 169; People v. Murray, 73 N. Y. 535, reversing 8 Daly, 347.

[13] State v. Lusk, 48 Mo. 242.

[14] Howland v. Luce, 16 Johns. 135.

[15] For a rather full citation of compatible and incompatible officers in general, see 19 Am. & Eng. Enc. of Law, 562 *w.*, and Throop's Public officers, § 35, *et. seq.*

[16] Curry v. Stewart, 8 Bush. 560; State v. Graham, 26 La. Ann. 568; 21 Am. Rep. 551; People v. Parker, 3 Neb. 409; 19 Am. Rep. 634; McGregor v. Allen, 33 La. Am. 870; Yonkey v. State, 27 Ind. 236.

ignation.[1] And so, also, there is no implied resignation, where the absence or change of residence of the official is only temporary.[2]

§ 87. **General powers and duties of officers.**—The powers and duties of municipal officials are purely statutory;[3] or in the absence of statute, such as may be necessarily implied for the proper exercise of municipal functions.[4]

Statutory provisions, conferring powers upon municipal officials, must be strictly construed and followed;[5] and the statutory powers, with which they are invested, should by no means be extended beyond the limits marked out for their exercise, by the declarations of the legislative intention.[6]

[1] State v. Milwaukee, 21 Wis. 433; *contra*, People v. Highland Park, 50 N. W. R. 660; 88 Mich. 653.

[2] Rex v. Harris, 1 B. & Ad. 936; 20 E. C. L. 509; Page v. Hardin, 8 B. Mon. 648; Hedley v. Franklin Co., 4 Blackf. 116; State v. Allen, 21 Ind. 516; 83 Am. Dec. 367.

[3] Condron v. New Orleans, 43 La. An. 1202; Wilson v. Shreveport, 29 La. An. 673; Nelson v. Mayor, 5 Hun, 190; Graves v. Otis, 2 Hill (N. Y.) 466; Smith v. Deweese, 41 Tex. 594; Peo. v. Ransom, 56 Barb. 514; Gage v. Hornellsville, 41 Ib. 87; Gale v. Mayor, 8 Hun, 370; Jane v. Alley, 64 Miss. 446; Greathouse v. Dunn, 60 Cal. 311; Indianapolis v. Wasson, 74 Ind. 133; Robertson v. Groves, 4 Oreg. 210.

[4] Connett v. Chicago, 29 N. E. R. 280; 114 Ill. 233; *In re* Eckstein, 24 Atl. R. 63; 30 W. N. C. 59; Perry v. Cheboygan, 55 Ib. 250; Mayor v. Sands, 105 N. Y. 210; Schwarz v. Barry, (Mich. 92) 51 N. W. R. 279; Fagan v. Mayor etc., 84 N. Y. 348; Larned v. Briscoe, 62 Mich. 393; Geary v. Kansas, 61 Mo. 378; Labrie v. Manchester, 59 N. H. 120; Sherlock v. Winnelka, 68 Ill. 530.

[5] Bellaire Co. v. Findlay, 5 Ohio Cir. Ct. 418; Keeler v. Milledge, 24 N. J. L. 142; Galveston v. Devlin, 19 S. W. R. 395; Larned v. Briscoe, 62 Mich. 393; Logansport v. Legg, 20 Ind. 315; Jeffersonville v. Patterson, 32 Ib. 140; Cen. Bridge v. Lowell, 15 Gray, 106; Andrews v. King, 77 Me. 224; Gurnee v. Chicago, 40 Ill. 165; Glass v. Ashburg, 49 Cal. 571; Mayor etc. v. State Bk., 8 Ark. 227; Dalzell etc. Co. v. Findlay, 5 Ohio Cir. Ct. 435; Foster v. Findlay, 5 Ib. 455; Tower v. Walker, (Iowa, 93) 53 N. W. R. 289.

[6] Advertiser etc. v. Detroit, 43 Mich. 116; Mudge v. Williamsport, 78 Pa. St. 158. See as to powers, duties and jurisdiction of municipal officers under particular charters, Board v. Glennon, 21 Hun, 244; *In re* Wright, 29 Ib. 357; 65 How. Pr. 119; Lyth v. Buffalo, 48 Hun, 175; Weeks v. Forman, 16 N. J. L. 237; *In re* 11th Ave., 49 How. Pr. 208; Charles v. Stewart, 49 Mo. 132; Campbell v. St. Louis, 71 Ib. 106; Barber v. Sag. City, 34 Mich. 52; Miller v. State, 106 Ind. 415; McGarry v. N. Y. Co., 7 Robt. 464; Pedrick v. Baily, 12 Gray, 161; Tyng v. Boston, 133 Mass. 372; Peo. v. East Sag., 33 Mich. 164; State v. Heath, 20 La. 518; St. Peter v. Bauer, 19 Minn. 327; Planters etc. v. Hanes, 52 Miss. 469; Miller v. Mayor etc., 5 T. & C. (N. Y.) 219; Yard's Case, 10 Pa. Co. Ct. R. 41;

A municipal or other public official can perform no official act, and exercise no function, either outside of or within the municipal jurisdiction, after the close of his term of office;[1] except that, where an executive officer has begun an official act and carried its performance so far as to render himself liable therefor, he is authorized to consummate the performance of that particular official act, notwithstanding he has been removed, or his term has expired.[2]

§ 88. **De facto officers.**—An officer *de facto* is one who, without lawful title to the office, successfully, and against all opposition, obtains the possession of the office under some color of title, and performs its duties and enjoy its privileges. He is to be distinguished, on the one hand, from the officer *de jure*, who has the paramount title to the office, but who is deprived of its enjoyment; and on the other hand from the mere usurper, who has neither title nor color of title. The acts of officers *de facto*, as distinguished from mere usurpers, are universally held to be valid; and this rule applies, not only to municipal executive officials, but to the legislative or governing municipal council.[3]

Schwartz v. Barry, 51 N. W. R. 279; Keenan v. Goodwin, (R. I. 92) 24 Atl. R. 148; *In re* Passaic, (N. J. 92) 20 Ib. 517; Peo. v. Flagg, 16 Barb. 503; Mayor etc. v. Tucker, 1 Daly, 107; Buckwell v. Hamele, 57 Ib. 490; Board v. Gurrin, 6 Daly, 349; Harris v. Peo., 64 N. Y. 148; Peo. v. Dunlap, 66 N. Y. 162; Pinney v. Brown, 60 Conn. 164; Peoria etc. Co. v. People, 31 N. E. R. 113; Twogood v. Mayor, 11 Daly, 167; Muller v. Mayor etc., 63 N. Y. 355; Hogan v. Mayor, 68 N. Y. 17; Peo. v. Fire Com'rs, 49 N. Y. Super. 369; Peo. v. Connally, 4 Abb. Pr. N. S. 375; Peo. v. Civ. Ser. Brd., 17 Abb. N. C. 64.

[1] Page v. Staples, 13 R. I. 306; Jackson v. Humphrey, 1 Johns. 498; Carr v. Phillips, 39 Mich. 319; Mitchell v. Malone, 77 Ga. 301; Ingerson v. Berry, 14 Ohio St. 315; Guillard v. Analine, 10 Martine (La.) 479.

[2] Clark v. Pratt, 55 Me. 546; State v. Roberts, 12 N. J. L. 114; Tuttle v. Jackson, 6 Wend. 224; Doolittle v. Bryan, 14 How. (U. S.) 563.

[3] Hallgreave v. Campbell, 82 Mich. 255; Riddee v. Bedford, 7 S. & R. (Pa.) 386; People v. Hopson, 1 Denio, 574; People v. Runkle, 9 Johns. 147; Trustees v. Hill, 6 Cow. 23; State v. Lane, 16 R. I. 620; Kirker v. Cincinnati, (Ohio 92) 27 N. E. R. 898; Koontz v. Hancock, 64 Md. 134; Pritchett v. Peo., 1 Gilm. 529; Williams v. School Dis., 21 Pick. 75; Laver v. McGlachlin, 28 Wis. 364; Cushing v. Frankf., 57 Me. 541; Lockhart v. Troy, 48 Ala. 579; Koontz v. Burgess, 64 Md. 134; Hamlin v. Dingman, 5 Lans. 61; People v. Nostrand, 46 N. Y. 375; Olmstead v. Dennis, 77 Ib. 378; People v. Stevens, 5 Hill. 616; State v. Jacobs, 17 Ohio, 143; People v. Bartlett, 6 Wend. 422; Cochran v. McCleary, 22 Iowa, 75, 84; Scoville v. Cleveland, 1 Ohio St. 126; Decorah v. Bullis, 25 Iowa, 12.

This rule should be taken with the qualification, that, as it is intended to protect the public interests and innocent third persons,[1] it is no protection to the officer himself. His acts are invalid, so far as they constitute an usurpation of another's rights, and for the unlawful act he is liable to the officer *de jure*.[2]

It must also be borne in mind that, where there is no office, there can be no officer *de facto*.[3]

§ 89. **Police officials—Power to arrest.**—The duties of police officials are now wholly regulated by statute; and the police officers can exercise such powers only as have been expressly conferred upon them by the Legislature, or which under a strict construction of the statutory grant may be said to have been created by necessary implication.[4]

Although the duties executed by police officials are confined usually to some certain limited municipal district, the police officials are regarded as state, rather than as municipal, officers.[5] Nor does it alter this view, that the property, under the charge of the police, such as station houses, patrol wagons, etc., is owned by the municipality.[6]

When the common law powers of constables are conferred upon police officers, and they act as public conservators of the peace, they are authorized to arrest upon view and without

[1] People v. Sassovich, 29 Cal. 480; Hooper v. Goodwin, 48 Me. 79; Petersiler v. Stone, 119 Mass. 465; State v. Carroll, 38 Conn. 449; Morton v. Lee, 28 Kan. 287; Quinn v. Com., 25 Gratt. 31; McInstry v. Tanner, 9 Johns. 135; Phillips v. Payne, 92 U. S. 132; Hussey v. Smith, 99 Ib. 24; Wilcox v. Smith, 5 Wend. 231; Burgess v. Koontz, 64 Md. 134.

[2] Patterson v. Caldwell, 1 Metc. (Ky.) 493; Gourley v. Hawkins, 2 Iowa, 75; Green v. Burke, 23 Wend. 490; Keyser v. McKissan, 2 Rawle, 139; Neale v. Overseers, 5 Watts, 539; Conover v. Devlin, 15 How. Pr. 477; Blake v. Sturtevant, 12 N. H. 567; Peo. v. Hopson, 1 Denio, 574.

[3] Winona v. St. Peter R. Co., 31 Minn. 472; Decorah v. Bullis, 25 Iowa, 15, 18; Carleton v. Peo., 10 Mich. 250; Norton v. Shelby Co., 118 U. S. 425; People v. White, 24 Wend. 520, 540.

[4] Com. v. Dugan, 12 Met. 233; Peo. v. Police Board, 19 N. Y. 188; State v. Blend, 23 N. E. R. 511; 121 Ind. 514.

[5] Baltimore v. Board of Pol., 15 Md. 376; Dillon's Mun. Corp. §§ 60, 61; Farrell v. Bridgeport, 45 Conn. 191; Burch v. Hardwick, 35 Gratt. 34; Peo. v. Draper, 15 N. Y. 532; Metro. Brd. of Health v. Heister, 37 Ib. 661; McDermott v. Met. Pol. Brd., 5 Abb. Pr. 422; Pol. Com'rs v. Louisville, 3 Bush, 597; see *ante*, § 18, as to legislative control of the police department of a city.

warrant, all disorderly persons and other violators of the law of the state,[1] as well as of municipal ordinances,[2] either immediately, or as soon as possible, after the commission of the offence.[3]

The general rule of constitutional law requires that a warrant be obtained for the arrest of one, who is charged with a breach of the criminal law.[4] But there are cases, in which the requirement of a warrant is dispensed with, in order to attain an enforcement of the law and a due protection of persons and property against violence. The exceptions to the general rule are limited, however, to the following cases:

1. When a felony is being committed, an arrest may be made without a warrant to prevent any further violation of the law.[5]

2. When the felony has been committed, and the officer or private person is justified, by the facts within his knowledge, in believing that the person arrested has committed the crime.[6]

3. All breaches of the peace, in assaults and batteries, affrays, riots, etc., for the purpose of restoring order immediately.[7]

4. The arrest of all disorderly and other persons who may be violating the ordinary police regulations for the preservation

[1] Taylor v. Strong, 3 Wend. 384; Com. v. Hastings, 9 Met. 259; Prell v. McDonald, 7 Kan. 426; Mitchell v. Lemon, 34 Md. 176: Griffin v. Flock, 11 Daly (N. Y.) 274; Taylor v. Strong, 3 Wend. 384.

[2] Bryan v. Bates, 15 Ill. 87; Main v. McCarty, 15 Ill. 442; State v. Lafferty, 5 Harring., 491; State v. Sims, 16 S. C. 486.

[3] Boaz v. Tate, 43 Ind. 60.

[4] Tiedeman's Limitations of Police Power, §§ 33, 33*a*.

[5] Ruloff v. People, 45 N. Y. 213; Keenan v. State, 8 Wis. 132; but see Somerville v. Richards, 37 Mich. 299.

[6] But the belief must be a reasonable one. If the facts within his knowledge do not warrant his belief in the guilt of the innocent party whom he has arrested, he will be liable in an action for false imprisonment. State v. Holmes, 48 N. H. 377; Hally v. Mix, 3 Wend. 350; Renck v. McGregor, 32 N. J. 70; Commonwealth v. Deacon, 8 Berg. & R. 47; State v. Roane, 2 Dev. 58; Long v. State, 12 Ga. 233; Eames v. State, 6 Humph. 53. Less particularity, in respect to the reasonableness of the suspicions against an individual, is required of an officer who makes an arrest without warrant, than of a private person; the suspicions must be altogether groundless, in order to make the officer liable for the wrongful arrest. See Marsh v. Loader, 14 C. B. (N. S.) 535; Lawrence v. Hedger, 3 Taunt. 14; Rohan v. Sawin, 5 Cush. 281; Halley v. Mix, 3 Wend. 350; Burns v. Erben, 40 N. Y. 463; Drennan v. People, 10 Mich. 169.

[7] Phillips v. Trull, 11 Johns. 477; Respublica v. Montgomery, 1 Yeates, 419; City Council v. Payne, 2 Nott & McCord, 475; Vandeveer v. Mattocks, 3 Ind. 479.

of public order and health, such as vagrants, gamblers, beggars, who are found violating the law in the public thoroughfares.[1]

5. It may be added, all similar offences against the ordinances of the municipality.[2]

The statutory grants of authority to police officials are very strictly construed, in order to prevent the abuse of the power, to the serious infringement of the personal liberty of the citizen, and the requirements of the statute must be strictly obeyed.[3]

A police officer must without unreasonable delay[4] take his prisoner before the proper tribunal and prefer a complaint against him, as by statute provided.[5] But if no tribunal be in session, the prisoner can legally be detained, for a reasonable time, at the police station.[6]

§ 90. **The mayor—Nature of his duties.**—At the head of every municipal corporation is the mayor, whose duties are chiefly executive in their nature, although at times, also, both legislative and judicial; and for their scope and force depending upon the charter of the corporation, and upon the ordinances and by-laws made in pursuance thereof.[7]

It is his duty in general to see that the municipal ordinances are obeyed and to preside at corporate meetings.[8]

As part of the executive power to enforce municipal ordinances, as well as by express statutory provisions, the mayor

[1] See Mitchell v. Lemon, 34 Mo. 176, where it was held that one may be arrested without a warrant, who was found violating the rules prescribed by the city board of health for the preservation of the public health.

[2] White v. Kent, 11 Ohio St. 550; Thomas v. Ashland, 12 Ib. 127. Cf. Pesterfield v. Vickers, 3 Coldw. (Tenn.) 205.

[3] Com. v. Hastings, *supra;* Main v. McCarty, 15 Ill. 441; Pow v. Beckner, 3 Ind. 475; Roddy v. Finnegan, 43 Md. 490; Com. v. Carey, 12 Cush. 246; Com. v. McLaughlin, 12 Ib. 615; Quinn v. Heisel, 40 Mich. 576; Roberts v. Morse, 14 Mo. 138; Stage Horse Cases, 15 Abb. Pr. N. S. (N. Y.) 51; White v. Kent, 11 Ohio St. 550; Low v. Evans, 16 Ind. 486; Ramsey v. Foy, 10 Ind. 479.

[4] Johnson v. Americus, 46 Ga. 80.

[5] Dillon's Mun. Corp. §§ 210, 211; Low v. Evans, 16 Ind. 486; Pow v. Becker, 3 Ib. 475; Vandever v. Mattock, 3 Ib. 479.

[6] Boaz v. Tate, 43 Ind. 60; State v. Freeman, 86 N. C. 683; Scircle v. Nevis, 47 Ind. 289.

[7] State v. Jer. City, 30 N. J. L. 93; North v. Crary, 4 Thomp. & C. (N. Y.) 357; North Lawrence v. Hoysradt, 6 Kan. 170; Test v. Com., 4 Dana, 522; Hatch v. Cincinnati, 17 Ohio St. 48; State v. Hudson, 44 Ib. 137; Morley v. Weakley, 86 Mo. 451; Barnes v. Gottschalk, 3 Mo. Ap. 111; Daniel v. Mayor, 11 Humph. 582.

[8] Dillon Mun. Corp. § 208.

in our larger municipalities is invested with the power of appointing the heads of the various departments, by which such ordinances are enforced or put into operation.

In addition to those executive and administrative duties, which properly appertain to the office, others of a judicial nature, involving the exercise of a very wide discretion, are sometimes imposed upon him; and it frequently becomes his duty, under such circumstances, to administer and enforce, not only the municipal charter and ordinances, but, likewise, the general laws of the state.[1]

The preservation of public order being of paramount importance, and the municipality being responsible for injury to property by mob violence, it is within the authority of the mayor to suppress riots or similar manifestations of a disorderly character.[2] As public morals should be the concern of every officer sworn to support the law, the mayor, it has been held, may arrest and fine disorderly and lewd women.[3] But when, as in most municipalities, the preservation of public order, and the protection of public morality, is committed to a police department, established by statute; particularly, when it is placed under the control of state commissioners, it would seem that these police powers of the mayor are seriously curtailed, if not altogether abrogated.

Where the mayor is clothed with judicial power and while acting as a justice of the peace, he has the power to convict offenders summarily, such power is strictly construed; and the record must show the legality of the conviction, and point out the offence with the utmost precision.[4]

In many of the cities of the country, the mayor is, *ex officio*, a member of the city council, having the power to vote; and,

[1] Henderson v. Davis, 106 N. C. 88; State v. Wood, 9 Bosw. (N. Y.) 15; Luehrman v. Shelby Co. etc., 2 La. 425; Robinson v. Benton, 49 Ark. 49; Bain v. Mitchell, 82 Ala. 304; Pressel v. Bice, 21 Atl. R. 813; Louisiana v. Hardin, 11 Mo. 551; *Ex parte* Smith, Hempst. (U. S.) 200; Sellers v. Corvallis, 5 Oreg. 237; Martindale v. Palmer, 52 Ind. 411; Prell v. McDonald, 7 Kan. 426; Starr v. Wilm. Counc., 3 Har. (Del.) 294; Com. v. Leight, 1 B. Mon. 107; Cluggish v. Rogers, 13 Ind. 538; People v. Maynard, 14 Ill. 419; Morrison v. McDonald, 21 Me. 550; Warwick v. Mayo, 15 Gratt. 528; Maguire v. Hughes, 13 La. An. 281; Muscatine v. Steck, 7 Iowa, 505.

[2] Ela v. Smith, 5 Gray, 121.

[3] Shafer v. Mumma, 17 Md. 331; 79 Am. Dec. 656.

[4] Keeler v. Milledge, 24 N. J. L. 142.

in other municipalities, particularly in the larger ones, he is given the power of vetoing all legislation of the city council. In either case, he belongs to the legislative branch of the city government, and exercises legislative powers.[1]

§ 91. **Liability of the officer to the corporation.**—When a municipal corporation sustains injury through the negligent act of its own officer, the officer is liable therefor; but, in the absence of a special statutory rule, the recovery can only be had for damages caused by faithlessness in the performance of duty, or for lack of individual integrity, and not for those arising from an honest mistake.[2] But it is now an almost universal custom for municipal officials, occupying positions of responsibility, to give bonds, or furnish sureties, for the faithful performance of these duties; and in such cases, the corporation can of course recover, if the condition of the bond be not performed.[3]

§ 92. **Municipal liability for official acts.**—In determining the scope of the liability of the municipality for the tortious acts of its officers, we must recur to the distinction already drawn[4] between the *public* and *semi-private* character of the municipal corporation. So far as the official tort-feasor is charged with the performance of the strictly public duties of the municipal corporation, which are imposed upon it as a local branch of the state government, and the performance of which concern the whole state, more or less, as well as the local community, he is rather to be considered as the agent and servant of the public, than of the municipality, even though he may be appointed by the municipality.[5] Under this rule municipal corpo-

[1] See *post*, chap. VII. on Municipal Councils, etc.

[2] Boutte v. Emmer, 9 So. 921; Kendall v. Stokes, 3 How. 87; Lincoln v. Chapin, 132 Mass. 470; Minor v. Bauk, 1 Pet. (U. S.) 46, 69; McCrea v. Chahoen, 54 Hun, 577; Peo. v. Lewis, 7 Johns. 73; Palmer v. Carroll, 24 N. H. 314; State v. Chamber of Com., 20 Wis. 63; State v. Nevin, 19 Neb. 162; Seaman v. Patten, 2 Caines, 312; Rollins v. Board, 15 Colo. 103; Wilson v. Mayor, 1 Denio, 595; Com. v. Genther, 17 S. & R. 135; Trafton v. Alfred, 15 Me. 258.

[3] See *ante*, § 72.

[4] § 9.

[5] Bates v. Rutland, 62 Vt. 178; 20 Atl. R. 278; Bulger v. Eden, 82 Me. 352; Culver v. Streator, 34 Ill. App. 77; 22 N. E. R. 810; Laurel (Ind. 91) 27 N. E. R. 301; Atwater v. Canandaigua, 124 N. Y. 602; Van Valkenbergh v. Mayor, 43 Barb. 109; Rogers v. Buffalo, 51 Hun, 637; Thompson v. Mayor, 52 N. Y. Super. 427; O'Leary v. Board, (Mich. 93) 44 N. W. R. 608; Terhune v. Mayor, 88 N. Y. 47; Larned v. Briscoe, 29 N. W. R. 22; 62 Mich. 393; Haskell v. New Bedf., 108 Mass. 208; Schultz v. Milwaukee, 49 Wis. 254; Doster v. Atlanta, 72

rations are not liable for the acts of the officers of their police,[1] or fire department,[2] or firemen,[3] or collectors and health officers.[4]

But where the officers, agents or servants of the municipality are charged with carrying out the special and strictly local purposes of corporate existence, in the attainment of which the corporation assumes its semi-private character, and from which the local community receives the overwhelming, if not sole benefit, the corporation is liable to the same extent, as would any individual or private corporation under the same circumstances.[5]

Thus, the municipal corporation is held to be liable in dam-

Ga. 233; La Clef v. Concordia, 41 Kan. 423; 21 Pac. R. 272; Sherbourne v. Yuba Co., 21 Cal. 113; Jewett v. New Haven, 38 Conn. 368; Bryant v. St. Paul, 33 Minn. 289; Forbush v. Norwich, 38 Conn. 225; Moffit v. Asheville, 103 N. C. 237; Gibbes v. Beaufort, 20 S. C. 213; Rowland v. Gallatin, 75 Mo. 134; Bamber v. Rochester, 26 Hun, 587; Barney v. Lowell, 98 Mass. 570; Brown's Adm. v. Guyandotte, 34 W. Va. 299; Peters v. Lundsborg, 40 Kan. 654; 20 Pac. R. 490; Dannaher v. Brooklyn, 51 Hun, 563; Caspary v. Portland, 19 Or. 496; 24 Pac. R. 1036; Tindley v. Salem, 137 Mass. 171; Fisher v. Boston, 104 Ib. 87; Bladen v. Phila., 60 Pa. St. 464; Kies v. Erie, 26 W. N. C. 112; Bennett v. New Orleans, 14 La. An. 120; Brown v. Vinalhaven, 65 Me. 402; Wild v. Paterson, 47 N. J. L. 406; Richmond v. Long, 17 Gratt. 375; Wallace v. Menacha, 48 Wis. 79; Lumber Co. v. Brooklyn, 71 N. Y. 580; Diehm v. Cincinnati, 15 Ohio St. 305; Robinson v. Rohr, 73 Wis. 436; Dargan v. Mobile, 31 Ala. 469; Sch. Dist. v. Williams, 38 Ark. 454; Waller v. Dubuque, 69 Iowa, 541; Wilcox v. Chicago, 107 Ill. 334; Freeman v. Phila., 13 Phila. 154; Thomas v. Graffton, 34 W. Va. 282; Elliott v. Phila., 75 Pa. St. 347; Ashby v. Erie, 85 Ib. 286; Robinson v. Evansville, 87 Ind. 334; Summers v. Dav. Co., 103 Ib. 262; Wheeler v. Cin., 18 Ohio St. 19; Prince v. Lynn, 149 Mass. 193; McElroy v. Albany, 65 Ga. 387; Greenwood v. Louisville, 13 Bush (Ky.) 221.

[1] Campbell v. Montgomery, 53 Ala. 527; Thomas v. Grafton, 34 W. Va. 282; Attaway v. Mayor, 68 Ib. 740; Calwell v. Boone, 51 Iowa, 687; Odell v. Schroeder, 58 Ill. 353; Whitfield v. Paris, (Tex. 92) 19 S. W. R. 566; Corsicana v. White, 57 Tex. 382; Little v. Madison, 49 Wis. 605; Hart v. Bridgeport, 13 Blatchf. 289.

[2] Heller v. Mayor, 53 Mo. 159; McKenna v. St. Louis, 6 Mo. App. 320; Robinson v. Evansville, 87 Ind. 334; Kies v. Erie, 26 W. N. C. 112; Wilcox v. Chicago, 107 Ill. 334; Welch v. Rutland, 56 Vt. 228; Hayes v. Oshkosh, 33 Wis. 314; Fisher v. Boston, 104 Mass. 87; Burrill v. Augusta, 78 Me. 118; Hafford v. New Bedf., 16 Gray, 297.

[3] Alexander v. Vicksburg, 68 Miss. 564; Gillespie v. Lincoln, (Neb. 92) 52 N. W. R. 811; Dodge v. Granger, (R. I. 92) 24 Atl. R. 100; Jewett v. New Haven, 38 Conn. 368; Tarbush v. Norwich, 38 Ib. 225.

[4] Dannaher v. Brooklyn, 51 Hun, 563; Spring v. Hyde Park, 137 Mass. 554; Ogg v. Lansing, 35 Iowa, 495; Dunbar v. Boston, 112 Mass. 75; Liberty v. Hurd, 74 Me. 101; Alger v. Easton, 119 Mass. 77; Bryant v. St. Paul, 33 Minn. 289.

[5] Stock v. Boston, 149 Mass. 410; Welter v. St. Paul, 40 Minn. 460; 42

ages for the torts of the waterworks officials, although appointed by the governor and state senate,[1] of the highway commissioners,[2] the public administrator;[3] of its agents in laying its own gas pipes,[4] of the janitor of a municipal building, in which rooms are let to private persons;[5] of the City Council, acting as commissioners for the improvement of a canal;[6] and in every other case, where a mandatory duty of local concern is imposed upon the corporation, and where all discretion in respect to its performance is taken away.[7] But the municipal corporation is not liable, where the particular duty is imposed upon the officer, and not in the first instance upon the corporation.[8] And so, also, is the municipal corporation not liable for

N. W. R. 392; Teall v. Syracuse, 120 N. Y. 184; Caspary v. Portland, 19 Or. 496; 24 Pac. R. 1036; Lloyd v. Mayor, etc., 5 N. Y.; Mayor, etc., v. Lasser, 9 Humph. (Tenn.) 757; Sheldon v. Kalamazoo, 24 Mich. 383; Sharp v. Mayor, 40 Barb. 256; Hunt v. Boonville, 65 Mo. 620; Hecker v. Mayor, 18 Abb. Pr. 369; White Ld. Works v. Rochester, 3 N. Y. 467; Semple v. Mayor, etc., 62 Miss. 63; Lewis v. Elizabeth, 25 N. J. Eq. 298; Masterson v. Mt. Vernon, 58 N. Y. 391; Bailey v. Mayor, 3 Hill, 531; Byrnes v. Cohoes, 67 N. Y. 204; Dayton v. Pease, 4 Ohio St. 80; Boston v. Simmons, 150 Mass. 461; Perry v. Worcester, 6 Gray, 544; Cotes v. Davenport, 9 Iowa, 227; Williams v. Dunkirk, 3 Lan. 44; Ironton v. Kelly, 38 Ohio St. 50; Walsh v. Mayor, 41 Hun, 299; Vincent v. Brooklyn, 31 Ib. 122; Aldrich v. Tripp, 11 R. I. 141; Durkee v. Kenosha, 59 Wis. 122; Wilde v. New Orleans, 12 La. An. 15; Hool v. U. S., 1 Cranch, 98; Harrisburg v. Taylor, 87 Pa. St. 216; Thayer v. Boston, 19 Pick. 511; Hildredth v. Lowell, 11 Gray, 345.

[1] Connolly v. Waltham, (Mass. 92) 31 N. E. R. 202; Bailey v. Mayor, etc., of N. Y., 3 Hill, 531; 38 Am. Dec. 669; Clark v. Mayor, etc., of N. Y., 3 Barb. 290; Stoddard v. Winchester, 32 N. E. R. 948; Aldrich v. Tripp, 11 R. I. 141; 23 Am. Rep. 434.

[2] Inman v. Tripp, 11 R. I. 520; see § 341, *et seq.*

[3] Glover v. Mayor, etc., of N. Y., 7 Hun, 232; Matthews v. Mayor, etc., of N. Y., 1 Sandf. 132.

[4] Scott v. Mayor, 1 H. & W. 59; Stock v. Boston, 149 Mass. 410.

[5] Worden v. New Bedford, 131 Mass. 23; 41 Am. Rep. 185.

[6] New York, etc., Lumber Co. v. Brooklyn, 71 N. Y. 580.

[7] Lehn v. Brooklyn, 19 N. Y. S. 668; McSherry v. Canandaigua, 129 N. Y. 612; Davenport v. Hannibal, 18 S. W. R. 1122; Frostburg v. Hitchins, (Md. 90) 16 Atl. R. 380; Barney, etc., Co. v. New York, 40 Fed. 50; Mayor, etc., of Helena v. Thompson, 29 Ark. 569; Clayburgh v. Chicago, 25 Ill. 535; McCullough v. Mayor, etc., of Brooklyn, 23 Wend. 458; Elgin v. Goff, 38 Ill. App. 362; Fitz Patrick v. Slocum, 89 N. Y. 358; Kankakee v. Linden, 38 Ill. App. 657; Sawyer v. Corse, 17 Gratt. 230; Walling v. Mayor, etc., 5 La. An. 660; Barton v. Syracuse, 36 N. Y. 54; Lacour v. Mayor, etc., of N. Y., 3 Duer, 406. McLaughlin v. Municipality No. 2, 5 La. An. 504.

[8] Maximilian v. Mayor, etc., of N. Y., 62 N. Y. 160; 20 Am. Rep. 196;

the torts of independent contractors, employed by such corporation,[1] unless the necessary effect of the work contracted for would be the infliction of injury on others,[2] or the city reserved to itself a supervisory control over the work, and the power to dismiss persons, who were employed by the contractors;[3] or unless the act of the contractor be a failure to remove an existing nuisance, for which the city incurs a continuing liability.[4]

A municipal corporation is not liable, however, for the acts of its officers, if wholly *ultra vires* and not within the power vested in the corporation by charter; nor for any illegal acts of an official, unless they were previously authorized or subsequently ratified by the corporation.[5] The subject of municipal liability for tort is more fully discussed in a subsequent chapter,[6] to which the reader is referred for further information.

Haw v. Mayor, etc., of N. Y., 37 N. Y. Super. 456; Gray v. Brooklyn, 2 Abb. Ap. Cas. 267.

[1] Pritchard v. Keeper, 53 Ill. 117; Hennington v. Lansingburgh, 36 Hun, 598; East St. Louis v. Giblin, 3 Ill. App. 219; Kelly v. Mayor, etc. of N. Y., 11 N. Y. 432; Reed v. Allegheny, 79 Pa. St. 300; Pack v. Mayor, etc. of N. Y., 8 N. Y. 222; Painter v. Pittsburgh, 46 Pa. St. 213; Kelley v. Mayor, etc. of N. Y., 4 E. D. Smith, 291; Treadwell v. Mayor, etc. of N. Y., 1 Daly, 123; McCarty v. Bauer, 3 Kan. 237; Barry v. St. Louis, 17 Mo. 121. See also, *post*, § 347, for a full discussion of this subject.

[2] Pearson v. Zahle, 78 Ky. 170; Sullivan v. Holyoke, 135 Mass. 273; Logansport v. Dicle, 70 Ind. 65; 36 Am. Rep. 166; Broadwell v. Kansas City, 75 Mo. 213; 42 Am. Rep. 406; Sewall v. St. Paul, 20 Minn. 511.

[3] Chicago v. Joney, 60 Ill. 383; Chicago v. Deomody, 61 Ill. 431; but see Erie v. Caulkins, 85 Pa. St. 24.

[4] Vanderslice v. Philadelphia, 103 Pa. St. 102.

[5] Walling v. Shreveport, 5 La. An. 660; Horton v. Newell, (R. I. 92) 23 Atl. R. 610; Herzo v. San Francisco, 33 Cal. 134; Browning v. Owen Co., 44 Ind. 11; Ball v. Woodbine, 61 Iowa, 83; Cumberland v. Willison, 50 Md. 128; O'Dell v. Schroeder, 58 Ill. 353; Barnes v. Phila., 3 Phila. 409; Small v. Danville, 51 Me. 350; Cheeney v. Brookfield, 60 Mo. 53; Worley v. Columbia, 88 Mo. 106; McCarthy v Boston, 135 Mass. 197; Smith v. Rochester, 76 N. Y. 510; Chicago v. McGraw, 75 Ill. 566; Trammell v. Russellville, 34 Ark. 105; Emmert v. DeLong, 16 La. An. 317; Elliott v. Phila., 75 Pa. St. 347; Haag v. Vanderburgh Co., 60 Ind. 511; Shelby Co. v. Deprez, 87 Ib. 509; Mayor, etc. v. Cunliff, 2 N. Y. 165; Cuyler v. Rochester, 12 Wend. 165; Wakefield v. Newport, 60 N. H. 374; Ross v. Phila., 115 Pa. St. 222; Ready v. Tuskaloosa, 6 Ala. 227; Chicago v. Shober, etc., 6 Ill. App. 560; Hilsorp v. St. Louis, 45 Mo. 94; Hunt v. Boonville, 65 Ib. 620; Rowland v. Gallatin, 75 Ib. 134; Manley v. Atchison, 9 Kan. 358; Brown v. Vinalhaven, 65 Me. 402; Woodcock v. Calcio, 66 Ib. 234; Seele v. Deering, 79 Ib. 343; Morrison v. Lawrence, 98 Mass. 219. See *post*, § 338.

[6] Chap. XVII.

§ 93. **Jurisdiction of courts over elections.**—The question of jurisdiction of courts over contested elections, as well as the whole matter of judicial remedies in such cases, is fully discussed and explained in connection with an exposition of the extraordinary remedy, *quo warranto*, to which the reader is referred.[1]

[1] Chap. XIX. § 361.

CHAPTER VII.

MUNICIPAL COUNCILS, MEETINGS, RECORDS AND COURTS.

§ 95. **Notice of corporate meetings—New England town meetings—Adjournment.**—All citizens are presumed to know, as part of the general law, the days prescribed by the charter, statute, by-law or usage, for the transaction of the ordinary municipal affairs by the governing body; and, ordinarily, notice is not required to be given. But the common law has established certain rules, regarding notice, which have been made the basis of the statutory law, and which have been followed by the courts in this country.

The importance of the principles considered is evident, when the meetings called are composed of the inhabitants of the town, as in New England, and not of a definite and limited class of duly elected officials. At common law, when notice of such a meeting is required to be given, it may be deemed to be dispensed with or waived, from the presence of those entitled to the notice;[1] but this rule of the common law is not applicable to the New England town meeting.

[1] Beaver Creek v. Hastings, 52 Mich. 528; Lord v. Anoka, 36 Minn. 176; State v. Smith, 22 Ib. 218.

At common law the notice should give the time, and place of meeting if the latter is unusual. If the meeting relates to the ordinary corporate affairs it is not necessary that its object should be specified; but when the proposed business is the election or removal of officials, or the passing of ordinances, the fact should be stated in the call.

In the absence of charter provisions, if all, who are present at a legal and valid meeting of a select body, consent to transact business, it may be done, although no notice, or an insufficient notice, was given; but such unanimity should appear from their recorded declarations or acts.

In England, the guild hall is the proper place for the meeting; and acts done at an unusual place will be closely scrutinized.[1] But the whole subject is now regulated by statute;[2] and such is also the case in New England, where it is required that the inhabitants are to be notified or warned of town meetings. The object of the meeting, or the matters to be acted upon, must be stated in the notice; and town meetings, for which the proper legal notice was not given, are invalid; and the acts done at the meeting are void.[3] A tax voted at a meeting which was illegally warned, is illegal.[4] The object of the town meeting should be stated in the warning, but it is sufficient if this can fairly be understood.[5] Where the statute, as in Vermont, requires the notice "to specify the business to be done," a notice stating that the meeting was called "to do any proper business" is insufficient;[6] and all contracts

[1] Dillon Mun. Cor. § 264, citing Rex v. Hill, 4 B. & C. 441; Rex v. Liverpool, 2 Burr. 734; Rex v. Doncaster, 2 Ib. 744; Rex v. May, 5 Ib. 2682; Rex v. Grimes, 5 Ib. 2601; Kynaston v. Shrewsbury, 2 Stra. 1051; Musgrove v. Nairson, 1 Ib. 584; Rex v. Theodorick, 8 East, 545; Rex v. Shrewsbury, cases temp. Hardwicke, 147; Smyth v. Darley, 2 House of Lords Cases, 789. The rule as to necessary notice is applicable to both select and indefinite bodies. Rex v. Langhorne, 4 Ad. & El. 538.

[2] English Municipal Act, 5 and 6 Wm. IV. ch. 71, sec. 69.

[3] Brewster v. Hyde, 7 N. H. 206; Reynolds v. New Salem, 6 Met. 340; Cong. Society v. Sperry, 16 Conn. 200; Hayward v. Sch. Dis., 2 Cush. 419; Moor v. Newfield, 4 Greenl. 44; Lander v. Sch. Dis., 33 Me. 239; Bloomfield v. Charter Oak Bank, 121 U. S. 129; School Dis. v. Atherton, 12 Met. 105; Little v. Merrill, 10 Pick. 543; Sherwin v. Bugbee, 17 Vt. 337; Pratt v. Swanton, 15 Ib. 147; Rand v. Wilder, 11 Cush. 294; Stone v. Sch. Dis., 8 Ib. 592.

[4] Rideout v. Sch. Dist., 1 Allen, 232.

[5] School District v. Blakeslee, 13 Conn. 227.

[6] Hunt v. School District, 14 Vt. 300; Sherwin v. Bugbee, *supra*.

made, or laws enacted,[1] or other acts done at such a meeting, which are not specified in the call, are invalid;[2] and a participant in an illegal meeting is not estopped to deny its legality.[3]

When the statute requires the time and place to be named in the notice, they are material; and there can be no legal meeting, except at the time and place named;[4] and the meeting must be opened within a reasonable time after the hour named.[5] So, when the place named is the schoolhouse, a gathering near the schoolhouse, with an adjournment to another place, is illegal.[6] If the subject of the town meeting is mentioned in the warning, it is no objection, that it is considered when the majority of the voters have retired;[7] and action, taken at a meeting not duly noticed, can be ratified by a subsequent legal meeting.[8]

Authority in the clerk, to call annual town meetings, does not empower him to call "special" meetings;[9] nor does power to "warn" a meeting imply power to call one.[10] If the town meeting has been validly warned and called, those who attend, though less than a majority of the whole, have full power to act for and to bind the whole; and the absence of the others will be presumed to be equivalent to an assent to any action taken.[11] A majority of the members of the town meeting have the power, in the absence of any statutory provision upon this point, to adjourn any legal meeting to another time; and, if done in good

[1] Hayden v. Noyes, 5 Conn. 391; Willard v. Killingworth, 8 Conn. 247; Bloomfield v. Char. O. Bk., 121 U. S. 121, 130.

[2] St. Louis v. Withans, 90 Mo. 646; Cornish v. Pease, 19 Me. 184; Spear v. Robinson, 29 Ib. 531; Little v. Merrill, 10 Pick. 543; Blackburn v. Walpole, 9 Ib. 97; Torrey v. Milbury, 21 Ib. 64; Hadsell v. Hancock, 3 Gray, 526; Jones v. Andover, 9 Pick. 146; Kingsbury v. School Dis., 12 Met. 99.

[3] Sch. Dis. v. Atherton, 12 Met. 105.

[4] Sherwin v. Bugbee, 16 Vt. 439, 444.

[5] Sch. Dis. v. Blakeslee, 13 Conn. 227.

[6] Chamberlain v. Dover, 13 Me. 466; Haines v. Sch. Dis., 41 Ib. 246; Kingsbury v. Sch. Dis., 12 Met. 99; compare, Brown v. Winterport, 79 Me. 305.

[7] Bean v. Jay, 23 Me. 117.

[8] Jordan v. School District, 38 Me. 164.

[9] School District v. Atherton, 12 Met. 105.

[10] Stone v. Sch. District, 8 Cush. 592.

[11] Damon v. Granby, 2 Pick. 345, 355; Com. v. Ipswich, 2 Ib. 70; Williams v. Lunenberg, 21 Ib. 75; First Parish v. Stearns, 21 Ib. 148; State v. Binder, 38 Mo. 350; Church Case, 5 Robt. 649.

faith, to another place within the corporate limits.[1] But such a power must be exercised, only when absolutely necessary;[2] and the adjournment can only be proved by the record.[3] After an adjournment, no valid action can be taken by a town meeting.[4]

§ 96. **Town councils—Presiding officers.**—Outside of New England, the councils of cities and towns are representative bodies, whose members are limited by law, and are elected by the legal voters of the incorporated place. The constitution of the council, its powers, its regular and special meetings, what notice is required, and how many shall constitute a *quorum*, are usually prescribed in the municipal charter. Usually, the city's territory is divided into districts or wards, the voters in each of which elect annually an alderman or councilman.[5]

When the mayor is the presiding officer of the board or council, he can vote only when he is also a member of the council; while, in other cases, he either has no power to vote, or has the power only, when there is a tie vote in the council.[6] The English rule, that the presence of the mayor at a corporate meeting was absolutely necessary, in the absence of special provisions, has no application in this country; and the mayor is not a member of the council, nor has he any right to preside over it, if these privileges are not given him by the law.[7] The mayor's approval may by the charter be essential to the validity of the proceedings of the council;[8] and, when required, should be in writing, attested by the mayor's signature.[9] A writ of *quo warranto* will lie to test the right of the recorder *ex officio* to be the presiding officer, although not a member

[1] Chamberlain v. Dover, 13 Me. 466; Hubbard v. Windsor, 15 Mich. 146; Kimball v. Marshall, 44 N. H. 465; Drisko v. Columbia, 75 Me. 73; Goodell v. Baker, 8 Cowen, 286.

[2] People v. Martin, 5 N. Y. 27.

[3] Taylor v. Henry, 2 Pick. 397.

[4] Kimball v. Lamprey, 19 N. H. 215.

[5] N. Y. Con. Act, § 29.

[6] Lamb v. People, 113 Ill. 137; Carroll v. Wall, 35 Kan. 36; Green v. Durham, 1 Burr. 131; Rex v. Head, 4 Ib. 2513; Carleton v. People, 10 Mich. 250; Decorah v. Bullis, 25 Iowa, 12; Hildreth v. McIntyre, 1 J. J. Marsh, 206; People v. White, 24 Wend. 520; Carrolltown v. Clark, 21 Ill. App. 74; State v. Gray, 23 Neb. 365.

[7] Cochran v. McCleary, 22 Iowa, 75; *In re* Sawyer, 124 U. S. 200; Ashley's Case, 4 Abb. Pr. Rep. 35; Com. v. Kepner, 10 Phila. 510.

[8] Graham v. Carondolet, 33 Mo. 262; Kepner v. Com., 40 Pa. St. 124.

[9] N. Y. etc. Co. v. Waterbury, 55 Conn. 19.

of a council, and to vote in case of a tie vote, such right being a franchise.[1] When there are no charter requirements as to the number of votes which are necessary to elect a presiding officer, the votes of the majority of a quorum will suffice.[2] The relation of the mayor, or of the presiding officer, to the council, and the position which he occupies, are to so great an extent the subject of special charter provisions,[3] that few general rules can be laid down, which will apply in all cases.[4]

The *status* of members of the city council, or of the council itself, is usually regulated by a court of law; but where there is a conflict of authority between two boards, each claiming to be, and acting as, the legal board, either may obtain an injunction to prevent the usurpation of power by the other, to which it has no title;[5] although disputes as to the title to public office and the validity of elections, are exclusively within the jurisdiction of the courts of law.[6]

When, for any reason, the acting city authorities are not those, in whom by its charter the power of municipal legislation is lodged, ordinances enacted by them are invalid.[7] The principles, applicable to *de facto* officers, are also applied to *de facto* municipal councils; and the acts and ordinances of such governing bodies are valid, provided the right to elect such a council or governing board is vested in the city.[8]

[1] Reynolds v. Baldwin, 1 La. An. 162; see also Rex v. Williams, 1 Burr. 402; Com. v. Arrison, 15 S. & R. (Pa.) 130.

[2] State v. Farr, 47 N. J. L. 208.

[3] As to the powers of the president of the board of aldermen in New York city, see People v. Lacombe, 99 N. Y. 43.

[4] Where it was provided in a charter that the intendant shall have a seat in the board of commissioners (the governing council), and shall preside; but if he were absent the board could elect a presiding officer *pro tempore;* it was held that he was a commissioner, and had the right to participate in municipal legislation. Raleigh v. Sorrell, 1 Jones (N. C.) Law, 49. So when the power to legislate is conferred on "the mayor and councilmen," the co-ordinate action of both is required, in order to give validity to a by-law, or other municipal act. Saxton v. Beach, 50 Mo. 488; Saxton v. St. Joseph, 60 Ib. 153.

[5] Kerr v. Trego, 47 Pa. St. 292.

[6] *In re* Sawyer, 124 U. S. 212, 223; see *post*, ch. XIX. § 371 *et seq.*

[7] Decorah v. Bullis, 25 Iowa, 12.

[8] Winona v. St. Peter Ry. Co., 31 Minn. 472; Hildreth's Heirs v. McIntire, 1 J. J. Marsh. 206; Welch v. St. Genevieve, 1 Dillon C. C. 130; Decorah v. Bullis, 25 Iowa, 12; People v. White, 24 Wend. (N. Y.) 520; Norton v. Sheely Co., 118 U. S. 425; Carleton v. People, 10 Mich. 250.

§ 97. **Regular, special and adjourned meetings.**—Members of the council are presumed to know the times, which are appointed in the charter for holding its stated meetings;[1] and if a member fails to attend, he neglects his duty, and waives his right to participate therein. But he is not presumed to know all that is done at a regular meeting. So, if at such meeting, a special meeting is called to take action at some future time, the action taken at the subsequent meeting will be void, unless actual notice of the special meeting is given to those members, who were absent from the regular meeting.[2] In a case where the charter fails to provide, how the time for holding stated meetings shall be fixed, the council may itself on motion change or fix the time; although it has previously been fixed by a formal resolution.[3] Special meetings, properly called according to the rules laid down in the charter, are legal, and the proceedings valid, if all the members entitled to be present are properly notified;[4] but notice, it has been held, is not necessary, where every one entitled to it is present at the special meeting of the council.[5]

An adjourned meeting is simply a continuation of the original special or regular meeting; and, at an adjourned meeting, not only may items of unfinished business be completed; but any act may be performed, which could have been legally done, had there been no adjournment.[6] The courts will, when a question arises as to the regularity of the meeting, and of the adjournment, presume them to have been regular.[7] But when an ordinance must be introduced at a meeting previous to the one, at which it is to be acted upon, it cannot be passed at an adjourned meeting.[8]

[1] Smith v. Law, 21 N. Y. 296; Insurance Co. v. Sandars, 36 N. H. 352.

[2] People v. Batchelor, 22 N. Y. 129.

[3] State v. Kantler, 33 Minn. 69.

[4] State v. Smith, 22 Minn, 218; *In re* Rogers, 7 Cow. 526; Downing v. Rugar, 21 Wend. 178.

[5] Lord v. Anoka, 36 Minn. 176; Beaver Creek v. Hastings, 52 Mich. 528.

[6] Staates v. Washington, 45 N. J. L. 318; *Ex parte* Wolf, 14 Neb. 24; Smith v. Law, 21 N. Y. 296; Warner v. Mower, 11 Vt. 385; People v. Batchelor, 22 N. Y. 128; Rex v. Harris, 1 B. & A. 936; Scadding v. Lorant, 5 Eng. L. & E. 16; People v. Martin, 5 N. Y. 22; Street Case, 1 La. An. 412; New Orleans v. Brooks, 36 Ib. 641; *Ex parte* Mirande, 73 Cal. 365.

[7] Hudson Co. v. State, 24 N. J. L. 718; Rutherford v. Hamilton, 97 Mo. 543; Tierney v. Brown, 65 Miss. 563; State v. Smith, 22 Minn. 218; Insurance Co. v. Sortwell, 8 Allen, 217.

[8] Staates v. Washington, *supra.*

When a special meeting is held, the business transacted must be exclusively that named in the call;[1] and any act of the meeting, wholly outside of the special purpose of the meeting, is void.[2] When at a regular meeting the council can act only upon a specific matter, or at a special meeting upon such matters as have been mentioned in the notice; in either case, it seems that an adjourned meeting would be limited to those specific matters, which could have been attended to at the original meeting.[3]

§ 98. **Methods of proceeding—Ayes and nays.**—When the charter provides that the municipal legislative body shall consist of two branches; the rules, applicable generally to legislative bodies similarly composed, are considered to be adopted by necessary implication. Hence, one branch has no power to bind the city, without the concurrence of the other, elected at the same time.[4] Although in this case it was held, that the concurrence must be by simultaneously existing bodies; yet, it has been held that knowledge communicated to a council is binding on its successors.[5] But general parliamentary rules may, in the case of municipal councils, be limited and modified by the charter, and by other statutory provisions. And an ordinance is not invalid, if it is passed in accordance with statutory rules, even though some general parliamentary law was violated in its passage.[6] It is well settled that a city council can act,[7] or obtain information, by means of a select committee to which a matter is referred;[8] and the members of the council may act, without further inquiry, upon facts within their own personal knowledge.

A notice, to appear before a committee, is equivalent to a notice to appear before the council;[9] and, the committee being but

[1] St. Louis v. Withans, 90 Mo. 646.

[2] Bergen v. Clarkson, 1 Halst. 352; Rex v. Liverpool, 2 Burr, 735; Rex v. Doncaster, Ib. 738; King v. Mayor, 1 Str. 385.

[3] Scadding v. Larant, 5 Eng. L. & E. 16; 17 Law J. 225.

[4] Wetmore v. Story, 22 Barb. 414.

[5] Bank v. Seton, 1 Peters. 299.

[6] McGraw v. Whitson, 69 Iowa, 348.

[7] Collins v. Holyoke, 146 Mass. 298; Dorey v. Boston, 146 Ib. 336, 339; Burlington v. Dennison, 42 N. J. L. 165; Gillett v. Logan Co., 67 Ill. 256; Klamrath v. Albany, 53 Hun, 206; Edwards v. Watertown, 61 How. Pr. 463.

[8] Bissell v. Jeffersonville, 24 How. 287, 296; Com. v. Pittsburgh, 14 Pa. St. 177; Main v. Ft. Smith, 49 Ark. 480.

[9] Preble v. Portland, 45 Me. 241.

the agent of the council, its powers are revocable at any time.[1] Every municipal council has the inherent power to reconsider its action, at any time during its session, and adopt lost motions, or revoke those adopted.[2] So, also, action, taken at a previous meeting, may at a subsequent regular meeting be rescinded, provided private rights have not been acquired under such act.[3] Thus, it was held that, so long as public funds remained in the hands of a disbursing official, the council may rescind an order, drawn on him to pay the same over;[4] and the same principle has been applied to the rescission of the action of a town council, authorizing a subscription in aid of a railroad, when the rights of third parties had not already become vested therein.[5] Under similar circumstances, and for the same general reasons, a simple resolution, providing for the levy of a tax, so long as it has not been acted on, may be rescinded; and after rescission, the collection of the tax cannot be legally enforced.[6]

A resolution or ordinance, which was passed by the council, under circumstances when, or in a mode by which, it was not authorized to act, may be subsequently ratified and validated by the council at a regular meeting, acting in the mode prescribed by law.[7]

Municipal councils are usually required by law to keep a record of their proceedings; and this has also been required of other municipal bodies, such as a board of public works, although no record had been expressly provided for.[8]

The general rule is, that when a city charter requires the ayes and noes [9] to be called and recorded, upon a vote in the city council, such requirement is important and material, and cannot

[1] Damon v. Granby, 2 Pick. 345; Accomp. Salmon v. Haynes, 50 N. J. L. 97.

[2] State v. Foster, 2 Hulst. 101, 107; Jersey City v. State, 30 N. J. L. 521, 529; State v. Jersey City, 3 Dutch. 536.

[3] State v. Barbour, 53 Conn. 76; State v. Chapman, 44 Ib. 595; Bigelow v. Hillman, 37 Me. 58; Reiff v. Conner, 5 Eng. (Ark.) 241; State v. Hoyt, 2 Oreg. 246; Road Case, 17 Pa. St. 71, 75; New Orleans v. St. Louis Ch., 11 La. An. 244; Locke v. Rochester, 5 Lansing, 11; Saak v. Philadelphia, 1 Pa. Leg. Gaz. Rep. 259; Baker v. Cushman, 127 Mass. 105.

[4] Tucker v. Justices, 13 Ire. (N. C.) 434; Dey v. Lee, 4 Jones (N. C.) Law, 238.

[5] Estey v. Starr, 56 Vt. 690.

[6] Stoddard v. Gilman, 22 Ut. 568; Pond v. Negus, 3 Mass. 230.

[7] State v. Hennepin Co., 33 Minn. 235.

[8] Larned v. Briscoe, 62 Mich. 393.

[9] And even when it does not. McCormick v. Bay City, 23 Mich. 457.

be dispensed with.[1] The object of this regulation is to make the members realize their responsibility, and to compel each to bear his share of the praise or blame, by the creation of a record which cannot be disputed.[2] So, when the ayes and nays are taken, this fact can only be shown by the production of the journal;[3] and where the journal does not show a vote by ayes and nays, there is no presumption that such a vote was taken.[4]

It has been held that, although the ayes and noes were required by the charter to be *called in all cases*, the clause did not apply to a motion to adjourn;[5] and in New York a provision, that the ayes and noes shall be called, was held to be directory, notwithstanding the use of the word "shall."[6] In a case, where the calling and recording of the ayes and noes was required, and the record of the same is omitted, it is proper for the council to cause an entry of the same to be made *nunc pro tunc*,[7] at a subsequent legal meeting of the council.

§ 99. **Quorum of the council—Joint bodies—Action of the majority binding.**—When the incorporating statute, or the charter, is silent as to what shall constitute a quorum, common law principles apply, and a majority of the members elect constitute the legal quorum.[8] When the board has a definite number of members, it does not legally exist until all are chosen, and have qualified; and, consequently, the majority cannot proceed to transact business, until the minority have been chosen and qualified.[9] So, if the council consists of twelve mem-

[1] Sullivan v. Leadville, 11 Colo. 483; Spangler v. Jacoby, 14 Ill. 297; Sup'rs v. People, 25 Ib. 297; Rich v. Chicago, 59 Ib. 286; Delphi v. Evans, 36 Ind. 90; Tracy v. People, 6 Colo. 151; *In re* Mt. Morris Sq., 2 Hill, 20; Elmendorf v. Mayor, 25 Wend. 693; Cutler v. Russellville, 40 Ark. 105; Morrison v. Lawrence, 98 Mass. 219; Indianola v. Jones, 29 Iowa, 282.

[2] Stecker v. East Saginaw, 22 Mich. 104.

[3] *In re* Carlton, 16 Hun, 497; Solomon City v. Hughes, 24 Kan. 411; St. Louis v. Foster, 52 Mo. 513; People v. Adams, 9 Wend. 333; Denning v. Rome, 6 Ib. 651, and cases cited *supra*, note 1.

[4] Tracy v. People, 6 Colo. 151.

[5] Green Bay v. Brauns, 50 Wis. 204.

[6] Striker v. Kelly, 3 Denio, 322.

[7] Delphi v. Evans, 36 Ind. 90; Musselman v. Manly, 42 Ib. 462; Vawter v. Franklin College, 53 Ib. 88; Logansport v. Crockett, 64 Ib. 319; Mayhew v. Gay Head, 13 Allen, 129; Com'rs v. Hearn, 59 Ala. 371; Steckert v. East Saginaw, 22 Mich. 104.

[8] Heiskill v. Baltimore, 65 Md. 125; Barnert v. Paterson, 48 N. J. L. 395; Cadmus v. Farr, 47 Ib. 208; McDermott v. Miller, 45 Ib. 251.

[9] Schenck v. Play, 1 Woolw. 175; *contra*, Hartshorn v. Schoff, 58 N. H. 197*a*.

bers, seven is the smallest number that can hold a legal meeting; although, if this number be present, four of them may act.[1] In a council having a membership of eighteen, an election of a clerk, who received the votes of nine members, was held valid; the presence of the others, who refused to vote, implying an acquiescence in the action of the majority.[2] So, also, when a statute declares that a majority of those present at any regular meeting shall be competent to transact business, the common law requirement as to the quorum applies; and it was held that this provision did not allow a minority of the whole body to act as the council.[3]

It has also been held that a charter, which allowed a council to settle its rules of procedure, did not authorize it to declare what number should constitute a quorum;[4] and the common law rule governed in that case, in defining what a legal quorum is. A provision, that an officer might be removed by a two-thirds vote of the city council, was construed to mean a two-thirds vote of a legal quorum, and not a two-thirds vote of all the members composing the council.[5] Acts which are done when less than a legal quorum is present, are of course void.[6] Of course, when the charter contains a special provision[7] as to what number of the council can transact business, such provision is mandatory, and exclusive of the common law principle, governing a quorum. Thus when a charter prescribed, that the council could pass no ordinance, except by a majority of the eight members elected, it was decided that an ordinance could not be passed by a vote of four against three, although four constituted a majority of the legal quorum present.[8] Not only may the majority of those present at a legal meeting of the

[1] *In re* Willcock, 7 Cow. 402, 410; Buell v. Buckingham, 16 Iowa, 284; Regents v. Williams, 9 G. & J. (Md.) 365; Mills v. Gleason, 11 Wis. 470.

[2] State v. Green, 37 Ohio St. 227.

[3] *In re* Willcocks, 7 Cow. 402, 463, 526.

[4] Heiskell v. Baltimore, 65 Md. 125; Barnert v. Paterson, 48 N. J. L. 395.

[5] Warnock v. Lafayette, 4 La. An. 419; Logansport v. Legg, 20 Ind. 315; State v. Porter, 113 Ib. 79.

[6] Logansport v. Legg, 20 Ind. 315; Ferguson v. Chittenden, 6 Ark. 479; Price v. Railroad Co., 13 Ind. 58; Pimental v. San Francisco, 21 Cal. 351.

[7] N. Y. Consol. Act, § 46.

[8] San Francisco v. Hazen, 5 Cal. 169; Oakland v. Carpenter, 13 Ib. 540; McCracken v. San Francisco, 21 Ib. 351.

council or other body,[1] acting judicially, bind all,[2] whether present or absent; but it is necessary, in the absence of special enactment, that the majority of those present should concur, in order to do any valid act.[3] The general rule as to actions by majorities may be concisely stated, as follows: no minority of a city council or other governing body, exercising the corporate power, or of any committee appointed by the same, through or by which the corporation acts, can bind the majority or the corporation, or do any valid act.[4] If, at a regular meeting of the council, a majority of those present withdraw, the power of those remaining is nullified, and the meeting is dissolved.[5]

But where the action to be taken, in place of being legislative and discretionary, is ministerial, and of such a character as not to require the deliberative consideration of the whole body, the rule requiring the majority to act,[6] in order to bind the council, has been somewhat modified. When a majority is authorized to act for a town council or committee, it may enter into a contract with another member of the council or committee, as an individual; and if such a contract is fairly made, and free from fraud, it will bind the corporation;[7] although members of councils are disqualified from voting upon a matter, in which they are financially interested, adversely to the city.[8]

[1] Action by a majority of police commissioners in New York: People v. Board, 99 N. Y. 676.

[2] *In re* Rogers, 7 Cow. 526; Charles v. Hoboken, 3 Dutch. 203; Martin v. Lemon, 26 Conn. 192; Astor v. New York, 62 N. Y. 567, 580; People v. Palmer, 52 Ib. 83; People v. Syracuse, 63 Ib. 291.

[3] Labourdette v. Municipality, 2 La. An. 527; State v. Deliesseline, 1 McCord (S. C.) 52; State v. Huggins, Harper (S. C.) Law, 94.

[4] Adams v. Hill, 16 Me. 215; Kupfer v. So. Parish, 12 Mass. 185; Allen v. Cooper, 22 Me. 133; Damon v. Granby, 2 Pick. 345; Walcott v. Walcott, 19 Vt. 37, 39; Jones v. Andover, 9 Pick. 146.

[5] Kingsbury v. School Dist., 12 Met. 99; Day v. Green, 4 Cush. 438, 439; Rushville G. Co. v. Rushville, 23 N. E. R. 72; 121 Ind. 206; State v. Jersey City, 3 Dutch. 493; Charles v. Hoboken, 3 Ib. 203; State v. Priester, 43 Minn. 373; 45 N. W. R. 712; Dey v. Jersey City, 19 N. J. Eq. 412; Baltimore v. Poultney, 25 Md. 18; Atkius v. Phillips, (Fla. 91) 8 So. R. 429; Brown v. District, 127 U. S. 579, 586.

[6] Downing v. Rugar, 21 Wend. 178; Com'rs v. Leckey, 6 S. & R. (Pa.) 166; Curtis v. Butler Co., 24 How. 435; Jefferson Co. v. Slagle, 66 Pa. St. 202; Martin v. Lemon, 26 Conn. 192; Shea v. Milford, 145 Mass. 528.

[7] Niles v. Muzzy, 33 Mich. 61; Junkins v. Union Sch. Dis., 39 Me. 220; Buell v. Buckingham, 16 Iowa, 284.

[8] Oconto Co. v. Hall, 47 Wis. 208; Pickett v. Sch. Dis., 25 Ib. 551; Coles

It has been held, that when the functions of a municipal board are discretionary, the entire board must meet, although a majority can take final action.[1] But if the whole board have convened, the majority will not be hindered from acting, because of the withdrawal of the minority, before any action is taken.[2] The common law rule,—that in a joint body all the constituent parts must be present, until the municipal action is completed, or the act would be invalid,—being subject to abuses by one of the parts withdrawing, in order to defeat the joint action, is applied with caution in this country, if it is not denied altogether.[3] So, to constitute a valid meeting of a joint body, a majority of each of the separate bodies must be present when the meeting is opened; but after it is organized, the identity of each part is lost, and a majority of all those present can act for all, even though one of the separate bodies has withdrawn, before action is had.[4]

§ 100. **Municipal affairs must be transacted by the council as a body—Meetings.**—The affairs of municipal corporations proper are usually administered by a select council, which is chosen by the qualified voters. The council is not only not the municipal corporation; it is, ordinarily, not even a corporation.[5] Its acts are the acts of the corporation, whose agent it is for the accomplishment of municipal purposes.[6] Whether the affairs of the public are transacted in an assemblage of all the citizens, as in the New England town meeting; or whether they are carried on by a council, as in most municipal corpora-

v. Williamsburgh, 10 Wend. 659; Walworth Bank v. F. L. & I. Co., 16 Wis. 629; United Br. Church v. Vanducan, 37 Ib. 54.

[1] People v. Walker, 23 Barb. 304; Ballard v. Davis, 31 Miss. 525; Gridley v. Barker, 1 B. & P. 236.

[2] *Ex parte* Rogers, 7 Cow. 526; but compare *In re* Beekman, 31 How. Pr. 16.

[3] King v. Williams, 2 Maule & Sel. 141; King v. Buller, 8 East. 389; King v. Miller, 7 Term R. 278; Humphrey, *In re*, 10 Wend. 612; People v. Batchellor, 22 N. Y. 128, 146; First Parish v. Stearns, 21 Pick. 148; Coles Co. v. Allison, 23 Ill. 437. In Beck v. Hanscom, 20 N. H. 213, 226, the court, citing Whiteside v. People, 26 Wend. 634, and *In re* Humphrey, 10 Ib. 612, the court refused to follow the common law rule; and this case was followed in Kimball v. Marshall, 44 N. H. 465.

[4] Gildersleeve v. Board, 17 Abb. Pr. 201; King v. Bower, 1 Barn. & Cr. 492; Whiteside v. People, 26 Wend. 634.

[5] Dil. Mun. Corp. § 259; Reg. v. Paramore, 10 Ad. & El. 286; Reg. v. York, 2 Queens B. 850; Mayor v. Simpson, 8 Ib. 73.

[6] Richards v. Clarksburg, 30 W. Va. 491.

tions, the corporate affairs can only be legally administered at regularly called meetings, unless some other provision is made by law.[1]

The council must act as a unit, and only at its regular meetings;[2] and individual members cannot bind the council, even though their action is ratified by the majority, if such ratification is not the deliberative action of the board, evidenced by some ordinance or resolution, or some similar act of the board, as such.[3]

At common law, the presence of the mayor was necessary to constitute a legal meeting of the council, he being considered an integral part of the corporation. If there were, beside the select or definite class which composed the council, any indefinite class called the commonalty, it was necessary that some of them should be present; and in any event, it was necessary that a majority of the select class, which constituted the governing body, should attend the meeting, in order that any valid municipal action may be had.[4] Though the presence of a majority of the actual members of the select class, or definite governing part of the municipality, was required to be present, yet it was well settled that the majority of those present at a valid corporate meeting could bind all.[5]

§ 101. **Municipal courts at common law.**—Among the franchises, which were possessed by municipal corporations at

[1] State v. Haynes, 72 Mo. 377; Central Bridge v. Lowell, 15 Gray, 106; State v. Jersey City, 35 N. J. Eq. 404; Dey v. Jersey City, 19 Ib. 412.

[2] Dey v. Jersey City, *supra;* Baltimore v. Poultney, 25 Md. 18.

[3] Schumm v. Seymour, 24 N. J. Eq. 143; Strong v. District, 4 Mackey (D. C.) 242; 9 Am. & Eng. Cor. Cases, 568. In McCortle v. Bates, 29 Ohio St. 419, the court said: "The members composing the board have no power to act as a board except when together in session. They act as a body or a unit." Comp. Jefferson Co. v. Slagle, 66 Pa. St. 202.

[4] Rex v. Smart, 4 Burr. 2143; Rex v. Morris, 4 East. 87; Rex v. Atkyns, 3 Mod. 23; Rex v. Bellringer, 4 Term R. 823; Rex v. Miller, 6 Ib. 278.

[5] Launtz v. People, 113 Ill. 137; Coles v. Trustees, 10 Wend. 658; Booker v. Young, 12 Gratt. 303; Labourdette v. Municipality, 2 La. An. 527; *In re* Willcocks, 7 Cow. 402, 462, 463; Young v. Buckingham, 5 Ohio, 489; The Queen v. Barnhart, 7 Up. Can. L. J. 126; The Queen v. Murray, 1 Ib. N. S. 604; Kingsbury v. Sch. Dist., 12 Met. (Mass.) 99; Damon v. Granby, 2 Pick. 355; Buell v. Buckingham, 16 Iowa, 284; State v. Huggins, Harper, 94; Rex v. Bower, 1 B. & C. 492; Rex v. May, 4 Ib. 843; Rex v. Headley, 7 Ib. 496; Rex v. Greet, 8 Barn. & C. 363; Rex v. Devonshire, 1 Ib. 609.

common law, was that of holding courts for the judicial determination of matters of limited and local importance, or involving the recovery of judgments for limited amounts. Inasmuch as any provision, by which justice can be cheaply and expeditiously administered, was considered to be of great benefit to the community, the charter or common law prescriptive right of holding court was usually considered as imposing upon the city, who was the donee of such right, a corresponding municipal duty to the public, to hold and maintain such a court, which was imperative, even though the charter only provided, that the municipality *may* hold a court;[1] and a nonuser of the right, although lasting for two hundred years, or the lack of sufficient funds, was held to be no defence to a *mandamus*, to compel a municipal corporation to do its duty in respect to holding a court.[2]

In consequence of the maxim, that no one can be a judge in his own cause, it was the rule at common law, that a borough could not bring an action against a stranger in its own court, by which it sought to obtain a benefit to itself; nor could the corporators act as jurors in such cases.[3]

§ 102. **Municipal Courts—Power to establish.**—The state Legislature may[4] establish certain inferior and local judicial tribunals; and may clothe them with such a measure of jurisdiction and power, as it may deem expedient; provided there exist no constitutional prohibition. Usually the matters, which are brought within the jurisdiction of such minor courts, relate to the enforcement of municipal ordinances, the recovery of

[1] Rex v. Mayor etc. Hastings, 5 B. & Ald. 692; see also Haddock's Case, T. Raym. 435.

[2] Rex v. Mayor etc. Wells, 4 Dowl. P. C. 562; Rex v. Hastings, 1 B. & A. 148; 5 B. & A. 692; Rex v. Havering, 5 Ib. 291.

[3] London v. Wood, 12 Mod. 674; 1 Salk. 398; Hesketh v. Braddock, 3 Burr. 1856–1868; Bosworth v. Budgen, 7 Mod. 461; Reg. v. Rogers, 2 Ld. Raym. 778. In England, the Municipal Corporation Act of 1835 defines the jurisdiction of municipal courts, authorizes boroughs to establish them, and expressly provides that the citizens or burgesses shall be competent to serve as jurors, or magistrates, or testify as witnesses, notwithstanding the fact, that they are liable to contribute to the funds in the treasury of the municipality. 5 and 6 Wm. IV. ch. LXXXVI. §§ 90, 91, 118–134, 270–341.

[4] In New Hampshire, Massachusetts, Connecticut, New York and California, there are express constitutional provisions, empowering the Legislature to erect inferior courts, civil and criminal.

the penalties for the breach thereof, minor misdemeanors, and trifling infractions of the peace and good order of the community, and suits between individuals when the amount involved is within a certain specified limit.[1] It has been held that Municipal Courts, unless created by express provision of the constitution, may be abolished at any time by the Legislature.[2]

The Legislature, in exercising its power to establish inferior municipal or other courts and to mark out their jurisdiction, must act within constitutional limits, and subject to constitutional restraint.[3] Thus, it has been held that, when the judicial power is in terms vested by the constitution in district[4] or other courts,[5] the Legislature cannot constitutionally pass an act, conferring judicial power upon the mayor of a city; but that for violations of its ordinances, the municipality must resort to the constitutional tribunals.

[1] Rohland v. St. Louis etc. Co., 1 S. W. R. 747; 89 Mo. 180; People v. Lawrence, 22 Pac. 1120; 82 Cal. 182; People v. Provines, 34 Cal. 520; *In re* Stratman, 39 Ib. 517; Baker v. Steamboat Milwaukee, 14 Iowa, 214; Brandou v. Avery, 29 N. Y. 469; McCrea v. Jacobs, 19 Abb. N. C. 188; Charleston v. Ashley Phosphate Co., (S. C. 90) 11 S. E. R. 386; Hunt v. Genet, 14 Daly, 225; Northern Indiana v. Milliken, 7 Ohio St. 382; Com. v. Browden, Thach. (Mass.) Cr. Cas. 9; People v. Evans, 18 Ill. 361; Fesh v. Com., 4 Dana, 522; Nugent v. State, 18 Ala. 521; N. Y. Consol. Act, § 1519; State v. Judge etc., 6 So. 784; 41 La. An. 953; Fox v. Ellison, 44 N. W. R. 671; 43 Minn. 41; Burns v. La Grange, 17 Tex. 415; *In re* Slattery, 3 Ark. 484; Ib. 561; Holmes v. Fihlenburg, 54 Ib. 203; Van Swartier v. Com., 24 Pa. St. 131; Henderson v. Davis, 11 S. E. 573; 106 N. C. 88; *In re* Clorherty, 2 Wash. St. 137; State v. Wright, 80 Wis. 648; Ferre v. Ellsworth, 19 N. Y. S. 659; Myers v. People, 26 Ill. 173; Davis v. Woolnough, 9 Iowa, 104; People v. Wilson, 15 Ill. 389; State v. Helfrid, 2 N. & McC. (S. C.) 233; Callahan v. New York, 66 N. Y. 656; People v. Curley, 5 Cal. 412; Brown v. Jerome, 102 Ill. 371; Montrose v. State, 61 Miss. 429; People v. Stott, (Mich. 92) 51 N. W. R. 509; Egleston v. City Council, 1 Mill. Const. 45; Recorder, see Schroder v. City Council, 2 Const. Rep. 726; Vassault v. Austin, 36 Ib. 691; People v. Nyland, 41 Cal. 129; Muscatine v. Steck, 7 Iowa, 505; Richmond Mayoralty Case, 19 Gratt. 673; Floyd v. Eatonton Com'rs, 14 Ga. 354; Hill v. Dalton, 72 Ib. 314.

[2] Boyd v. Chambers, 78 Ky. 140.

[3] Zylstra v. Charleston, 1 Bay (S. C.) 382: Slaughter v. People, 2 Doug. (Mich.) 334; State v. Theard, (La. 93) 12 So. R. 892; Daniel v. Hutcheson, (Tex. 93) 22 S. W. R. 278. For full details regarding the constitutional and statutory regulations respecting inferior courts, see Stimson Statutes, §§ 558, 559.

[4] Lafon v. Dufrocq, 9 La. An. 350.

[5] State v. Maynard, 14 Ill. 420; Beesman v. Peoria, 16 Ib. 484.

Upon this question, however, the cases are not harmonious; and there are decisions, which hold that a plain and explicit constitutional provision, that the judicial power shall be vested exclusively in a Supreme Court, District, Probate and Justice Courts, will not render void or unconstitutional a statute, erecting Municipal Courts for the trial of offenders against ordinances.[1] Although by the constitutions of a majority of the states, it is provided that justices of the peace shall be elected by the citizens of their respective districts,[2] it has been held that the Legislature may confer upon the mayor the powers and jurisdiction of a justice of the peace.[3] And where this is done, he may be deemed with fairness to be a judicial officer, within the meaning of these words, as used in a state constitution.[4] Municipal Courts are not designed to supersede the Superior State Courts; but rather to aid the latter, by relieving them of a portion of the litigation which is occasioned by the growth of large and populous municipal communities.[5] And when they are established for municipal purposes, under a special power which is conferred upon the Legislature by the Constitution of the State, their territorial jurisdiction should be confined within the municipal boundaries; and the action of their magistrates, in committing persons for public criminal offences against the laws of the commonwealth, will be unconstitutional.[6] But such

[1] State v. Young, 3 Kan. 445; Shafer v. Mumma, 17 Md. 331; Hutchings v. Scott, 4 Halst. 218.

[2] Stimson Stat. § 560, p. 127.

[3] State v. Perkins, 24 N. J. L. 409; 1 Harr. N. J. 237; Hawe v. Plainfield, 37 N. J. L. 145; State v. Zeigler, 32 Ib. 262; McConrill v. Jersey City, 39 Ib. 38, 42; Bain v. Mitchell, 82 Ala. 304; Robinson v. Benton Co., 49 Ark. 49; Baton Rouge v. Dearing, 15 La. An. 208; *contra*, Edenton v. Wool, 65 N. C. 379.

[4] Waldo v. Wallace, 12 Ind. 569; Gulick v. New, 14 Ib. 93; Howard v. Shoemaker, 35 Ib. 111; Morrison v. McDonald, 21 Me. 550; State v. Maynard, 14 Ill. 419; Com. v. Dallas, 3 Yeates, 300; State v. Wilmington, 3 Harr. (Del.) 294.

[5] Grand Rapids etc. Co. v. Gray, 38 Mich. 461. "These Municipal Courts, so far as they act under city by-laws, are not designed to decide between man and man, or to administer general laws. They are ordained to prevent disorder in matters of local convenience, and to regulate the use of public and *quasi* public easements so as to prevent confusion. If, in exercising this power, they can incidentally decide upon the rights of private property, so as to determine its enjoyment without review, there would seem to be a practical annihilation of the right to resort to the general tribunal and the common law." Jackson v. People, 9 Mich. 111, 117.

[6] Meagher v Storey Co., 5 Nev. 244. Municipal Court cannot sit outside city limits. Hershoff v. Beverly, 43 N. J. L. 139.

a prohibition of the exercise of general judicial powers will not be construed to prevent the exercise of the police power by a municipality, by the infliction by its courts of fines and other penalties upon disorderly persons and offenders against public morality, within the limits of the corporation;[1] provided, always, that an offender, convicted by a Municipal Court in a summary proceeding, is not deprived of his constitutional right to a jury trial, to which he would be entitled, in a prosecution by the state for the offence charged.[2]

§ 103. **Competency of corporators as jurors, judges and witnesses.**—We have seen that, at common law, a municipal corporation could not be a suitor in its own courts; nor could a corporator act upon a jury, whose duty it was to decide a question, to which the municipality was a party. This rule has no application to the courts of municipalities in the United States. On the other hand, it is not only allowable, but in fact quite customary, for the mayor to act as a judicial officer, in the trial of offenders against ordinances, and the evidence of citizens is freely received.[3] Whatever may have been the justice or reason of the common law rule—manifestly, the only plausible reason was the technical one, that the incorporated municipality was to be distinguished from the community at large, and was held by a comparatively few persons as a franchise, more or less personal in character—the rule itself has been universally considered to be superseded, in respect to the competency of judges, jurors or witnesses in strictly Municipal Courts.[4] A

[1] Shafer v. Mumma, 17 Md. 331; judicial power of Mayor under Maryland Const., Hagerstown v. Dechert, 32 Ib. 369. In Massachusetts, a Municipal Police Court was held to be a "Court of the Commonwealth." Com. v. Hawkes, 123 Mass. 525.

[2] See, as to conflict between the judicial power of the municipality and that of the state, Jeukins v. Thomasville, 35 Ga. 145; Vason v. Augusta, 38 Ib. 542; Savannah v. Hussey, 21 Ib. 80; Slaughter v. People, 2 Doug. 334; *contra*, Williamson v. Com., 4 B. Mon. 146.

[3] Thomas v. Mt. Vernon, 9 Ohio, 290; Com. v. Read, 1 Gray, 475; Lexington v. Long, 31 Mo. 369; Wheeling v. Black, 25 W. Va. 266; Com. v. Ryan, 5 Mass. 90; State v. Wells, 46 Iowa, 662.

[4] City Council v. King, 4 McCord. (S. C.) 487; Carwein v. Hames, 11 Johns. 76. In City Council v. Pepper, 1 Rich. (S. C.) Law, 364, the court said: "The statutory authority given to the City Court to try all offenders against city ordinances, impliedly declares that, notwithstanding the common law objection, it was right and proper to give it the power to enforce the city laws against all offenders. The interest is too minute, too slight to excite prejudice against

distinction is made, in respect to the competency of a taxpayer to serve as a juror, between the Municipal Courts and the general courts of the State. In actions, brought in the latter class of courts, when a municipal corporation is a party, it has been held that a resident taxpayer is incompetent to serve as a juror, except where his common law incapacity has been either expressly or impliedly removed by statute; it being considered that his interest as a taxpayer, in the verdict to be rendered by the jury, will justify his challenge for cause.[1]

An owner of a lot upon a street, about to be widened, is not disqualified from presiding over the commission, when he is the mayor;[2] or from taking part as a juror, in the proceedings for the appropriation of private property upon that street, for street purposes.[3]

§ 104. **Summary proceedings—Jury trials.**—In respect to Municipal Courts, two principles should be borne in mind: *First.* These courts have only such powers and such jurisdiction as are expressly conferred by statute, or necessarily implied therefrom.[4] In all cases, where any ambiguity exists, that construction of the statute is to be favored, which will tend to restrict the jurisdiction and power of the court. *Secondly.* In all proceedings, which are had in such courts, due care must be exercised, to secure and protect the personal liberty and the rights of the accused. In nearly all of the States of the Union, express constitutional provisions exist, securing to a person accused of a crime a trial by an impartial jury, or providing that a person shall not be deprived of life, liberty or property,

a defendant; for the judge, sheriff and jurors are members of a corporation of many thousand members. What interest of value have they in a fine of twenty dollars? It would put a most eminent calculator to great trouble to ascertain the very minute grain of interest, which each of these gentlemen might have. To remove so shadowy and slight an objection, the Legislature thought proper to clothe the City Court, consisting of its judge, clerk, sheriff and jurors, with authority to try the defendant, and he cannot object to it." See, also, cases cited in last note.

[1] Diveney v. Elmira, 51 N. Y. 506; see, also, Johnson v. Americus, 46 Ga. 80; Cartersville v. Lyon, 69 Ga. 577; Rose v. St. Charles, 49 Mo. 509; Fulweiler v. St. Louis, 61 Mo. 479; Montezuma v. Minor, 73 Ga. 484.

[2] Lexington v. Long, 31 Mo. 369.

[3] Kundinger v. Saginaw, 59 Mich. 355; Kemper v. Louisville, 14 Bush (Ky.) 87; Boston v. Baldwin, 139 Mass. 315.

[4] Municipal Courts in the city of New York. N. Y. Con. Act, §§ 1279, 1440.

without due process of law.[1] How far the State Legislatures are restrained by these constitutional provisions in respect to trial by jury, in adopting summary methods for punishing offenders, either against the statute law or against municipal ordinances, can be ascertained in any particular instance, only by an actual inspection of the constitution or statutes of the state, in which the question is raised.[2]

It has been generally considered, that as offences against municipal ordinances, as, for example, those relating to markets, streets, the use of water and the construction of buildings, etc., which in the exercise of the express or implied powers of the municipal corporation, have been adopted as municipal police regulations, are not of a criminal nature; they may be prosecuted summarily, and need not be prosecuted by indictment or tried by a jury.[3] Such offences are not crimes or misdemeanors, to which the constitutional right of a jury trial attaches.[4] The same principle of constitutional interpretation and construction is adopted here, which is followed, when it is held that the constitutional provision for trial by jury, does not apply to cases falling within the equity jurisdiction,[5] viz.: that the peculiar

[1] In Delaware, North Carolina, South Carolina and Iowa, the Legislature is authorized by the constitution to provide summary modes of trial for petty offences. For the constitutional rights of trial by jury, etc., see Stimson Statutes, §§ 72, 73, 130, 131, 132.

[2] Cases construing statutes and constitutions. Thomas v. Ashland, 12 Ohio St. 124; Work v. State, 2 Ib. 296; Law v. Com'rs, R. M. Charlton, 302; Green v. Savannah, Ib. 368, 371; Frigally v. Memphis, 6 Coldw. 382; Anderson v. O'Donnell, 7 S. E. Rep. 524; Alexander v. Bennett, 60 N. Y. 204; *In re* Penn. Hall, 5 Pa. St. 204; Goodrich v. Brown, 30 Iowa, 291; Sill v. Corning, 15 N. Y. 297; Fayette v. Shafrath, 25 Mo. 445; Willis v. Boonville, 28 Ib. 543; Markle v. Akron, 14 Ohio, 586; Cincinnati v. Gwynne, 10 Ohio, 192; Hutchings v. Scott, 4 Halst. 218; Malone v. Murphy, 2 Kan. 250; Com. v. Pindar, 11 Met. (Mass.) 539; Com. v. Roark, 8 Cush. 210; Com. v. Emery, 11 Ib. 406; Elder v. Dwight Mfg. Co., 4 Gray, 201; State v. Ricker, 32 N. H. 179; Myers v. People, 26 Ill. 173; Rice v. State, 3 Kan. 141. Territorial Jurisdiction. State v. Clegg, 27 Conn. 593; Covill v. Phy., 26 Ill. 432; State v. McArthur, 13 Wis. 383; Hoag v. Lamont, 60 N. Y. 96.

[3] State v. Gutierrez, 15 La. Au. 190; Tierney v. Dodge, 9 Minn. 166, 169; St. Peter v. Bauer, 19 Ib. 327, 332; *Ex parte* Hollwedel, 74 Mo. 395; Williams v. Augusta, 4 Ga. 509; Floyd v. Com'rs, 14 Ga. 358; Vason v. Augusta, 38 Ib. 542; Byers v. Com., 42 Pa. St. 89; 1 Bish. Cr. Pr., sec 758; State v. Conlin, 27 Vt. 318.

[4] Callan v. Wilson, 127 U. S. 540; State v. Powell, 97 N. C. 417.

[5] Tiedeman's Limitations of Police Power, § 34*f*.

necessities of the case made it impossible to obey the constitutional injunction.[1] Hence, the authority, which may be conferred by charter upon Municipal Courts to punish violators of ordinances, and other petty offenders, by a slight fine or limited term of imprisonment without a trial by a jury, is valid; and does not conflict with a constitutional provision, which declares that the right of trial by jury shall remain inviolate.[2]

So, it was held in Pennsylvania, that the arrest by the city, under statutory authority, of professional thieves and other wrongdoers, frequenting any railroad depot or other public place, and their summary commitment by the mayor without a jury trial, was not in conflict with constitutional guaranties that the right of trial by jury should not be infringed.[3] Whatever may be one's opinion of the merits of the jury trial, as a means of doing exact justice between man and man, one cannot escape the conclusion, that this elastic rule of constitutional construction,—whereby summary proceedings for the trial of offenders against municipal ordinances are permitted without the aid of a jury, and are held not to conflict with the constitutional requirement of a jury—is sometimes carried to a point, where it is extremely difficult to discover why in any case the State may not abolish trial by jury, without infringing this constitutional provision.[4] And, in the light of this fear, that this provision of the constitution may ultimately become valueless, as a protection against governmental tyranny, the courts are disposed to hold that the constitutional guaranty of trial by jury must be strictly obeyed in every case of criminal prosecu-

[1] See Tiedeman's Lim. of Police Power, § 47, where the vagrant laws are criticized from the standpoint of constitutional limitations in protection of personal liberty.

[2] Johnson v. Barclay, 1 Harr. (N. J.) 1; Howe v. Plainfield, 37 N. J. L. 145; People v. Justices, 74 N. Y. 406; 18 Abb. L. J. 254; McAlar v. Woodruff, 33 N. J. L. 213; State v. Lee, 29 Minn. 445; Mankato v. Arnold, 36 Minn. 62; *Ex parte* Schmidt, 24 S. C. 363; Hill v. Mayor of Dalton, 72 Ga. 314; Moundsville v. Fountain, 27 W. Va. 182, 204; Dively v. Cedar Falls, 21 Iowa, 565; Davenport, etc. Co. v. Davenport, 13 Ib. 229; Monroe v. Meuer, 35 La. An. 1192; Stebbins v. Mayor, 18 Pac. Rep. 745; State v. Topeka, 36 Kan. 76; Hollenbeck v. Marshalltown, 62 Iowa, 21; *In re* Rolfs, 30 Kan. 758; see also cases cited in last note.

[3] Byers v. Com., 42 Pa. St. 89; see also Dunmares App., 52 Pa. St. 374; Ewing v. Jilley, 43 Ib. 384; Van Swarton v. Com., 24 Ib. 131; Barter v. Com., 3 Pa. (Pen. & W.) 253; Rhines v. Clark, 51 Pa. St. 96.

[4] Plimpton v. Somerset, 33 Vt. 283.

tion, except where the offence is of a trivial character, and constitutes a breach of some ordinance of the city.[1] In pursuance of this trend of judicial opinion, it has been repeatedly decided, that it is not within the constitutional powers of a State Legislature, to confer upon Municipal Courts a summary jurisdiction to try persons for the commission of acts, which, being against the public at large, are indictable by the state, or which are essentially criminal offences against the common or statute law. Under a clause of a constitution, providing that no one shall be called upon to answer a criminal charge, except by indictment etc., and requiring a unanimous conviction by a jury, an act of the Legislature, empowering a town official or court to try summarily assaults, batteries and other crimes, would be unconstitutional, as violating one or both of the above provisions.[2] It has been held that an act, providing for a summary conviction of a new offence by a court of inferior jurisdiction without a jury trial, does not violate a constitutional provision, that trial by jury shall be as heretofore, or that the right thereof shall remain inviolate.[3]

It is not always easy to ascertain, whether any given offence is a crime, for which a jury trial may of right be demanded. The fact, that a term of imprisonment may be imposed, as part of the sentence, does not necessarily render the prosecution a criminal one, in which a jury trial may be required or demanded; and, after all, the most that can be said is, that the question depends almost wholly upon the nature of the offence and

[1] State v. Lockwood, 43 Wis. 463; Neales v. State, 10 Mo. 498; State v. Mansfield, 41 Mo. 470; Com. v. Shaw, 1 Pitts. (Pa.) 492, see also Cooley's Const. Lim. §§ 319, 410; Proffatt's Jury Trials, § 113, see ch. VIII. § 129, Municipal power to legislate on subjects, etc.

[2] State v. Mass., 2 Jones (N. C.) Law, 66; Tierney v. Dodge, 9 Minn. 166; Rector v. State, 6 Ark. 187; Durr v. Howard, 6 Ib. 461; Lewis v. State, 21 Ib. 211. When the provision is, that no one should be compelled to answer criminal offences, except upon indictment, the keeping of a house of ill fame, being such by common and statute law, cannot be punished summarily in a Municipal Court: People v. Slaughter, 2 Doug. (Mich.) 334; Welch v. People, Ib. 332; *In re* Sic, 73 Cal. 142; Burns v. La Grange, 17 Tex. 415; Smith v. San Antonio, Ib. 643; Barter v. Com., 3 Pa. (P. & W.) 253. But see *contra*, *Re* Johnson, 73 Cal. 228.

[3] Van Swarton v. Commonwealth, 24 Pa. St. 131; Rhines v. Clark, 51 Pa. St. 96, see also Boring v. Williams, 17 Ala. 510; Times v. State, 26 Ib. 165; *In re* Powers, 25 Vt. 261; Murphy v. People, 2 Cow. 815; Shirley v. Lunenberg, 11 Mass. 379.

the public need of a summary proceeding, in order to maintain an effective restraint upon evildoers.

Aside from the minor offences, upon which there has always been, both in England and the United States, a substantial agreement as to the legality of summary proceedings, there is a class of cases approaching near the boundary of crimes, in respect to which a difference of opinion has existed, which is in many instances irreconcilable. An extended discussion being impracticable here, the reader is referred to the cases cited for a further elucidation of the matter.[1]

§ 105. **Review by Superior Courts—Jury trial.**—The decisions of the courts of several of the States cannot be reconciled with the views which are held by the Supreme Court of the United States upon the question, whether, if a person, accused of crime, is tried by a summary proceeding in a municipal or inferior court without a jury, he is thereby deprived of his constitutional right to a trial by an impartial jury, if he can by an appeal from the judgment of the court obtain as a matter of right a second trial in the appellate tribunal. The State courts have held that one, who is accused of a crime in an inferior court, and therein convicted by a summary proceeding, is deprived of no constitutional privilege or right, if, upon an appeal hampered by no unreasonable restrictions, he can obtain a trial by jury of the accusation against him.[2] This doctrine was repudiated by the Supreme Court of the United States, when an application was made for a writ of *Habeas Corpus*, to release a person who had been summarily convicted of the crime of conspiracy in a Police Court of the District of Columbia, where a jury trial

[1] 1 Steph. Hist. Cr. Law, ch. IV. p. 122; Atty. General v. Bowman, 2 B. & P. 532; Same v. Siddon, 1 C. & J. 220; Herne v. Gaston, 2 E. & E. 66; *In re* Lucas v. McGlashau, 20 Up. Can. Q. B. 81; Atty. Gen. v. Sullivan, 32 L. J. Ex. 92; Easton's Case, 12 A. & E. 645; Cobbett v. Slowman, 9 Exch. 633; Egington, *In re*, 2 E. & B. 717; Huntley v. Luscombe, 2 B. & P. 530; Rackham v. Bluck, 9 Q. B. 691; Sweeney v. Spooner, 3 B. & S. 329; Reeve v. Wood, 5 Ib. 334; Cattell v. Ireson, E. B. & E. 91; Marden v. Potter, 7 C. B. N. S. 641.

[2] Maxwell v. Board, 119 Ind. 20; Woodward v. Cabanirs, 77 Ala. 328; Sedgwick Stat. and Const. Law, 549; Beers v. Beers, 4 Conn. 535; Jones v. Robbins, 8 Gray, 329; Stewart v. Mayor, 7 Md. 501; Dargan v. Boston, 12 Allen, 223; Morford v. Barnes, 8 Yerger (Tenn.) 444; McDonald v. Schell, 6 Serg. & Rawle (Pa.) 240; Cameron v. United States, 13 S. Ct. R. 595; 148 U. S. 301; McInerney v. Denver, 17 Colo. 302; State v. Foucade, (La. 93) 13 So. R. 187.

had been denied him, although it had been demanded.[1] The power of the Superior Courts, to review the proceedings of inferior tribunals, will not be deemed to be taken away, unless the legislative intent to do so is clear, and free from doubt or ambiguity. The need of an opportunity for a judicial review of a case determined in Municipal Courts, becomes strikingly apparent, when their character and methods of procedure are considered in connection with the fact, that justice is so frequently administered there by men without professional knowledge, or judicial experience.

So, also, the jurisdiction of the Superior Courts, to review by *certiorari* or otherwise, and control the subordinate tribunal, cannot be considered as taken away by mere negative enactments, or by implication of law,[2] or by a statutory declaration that the

[1] Callan v. Wilson, 127 U. S. 540. In this case, the court said: "It (conspiracy) is an offence of a grave character, affecting the public at large, and we are unable to hold that a person, charged with having committed it in this district, is not entitled to a jury when put upon his trial. The jurisdiction of the Police Court, as defined by existing statutes, does not extend to the trial of infamous crimes or offences, punishable by imprisonment in the penitentiary. But the argument, made in behalf of the government, implies that if Congress should provide the Police Court with a grand jury, and authorize that court to try, without a petit jury, all persons indicted,—even for crimes punishable by confinement in the penitentiary—such legislation would not be an invasion of the constitutional right of trial by jury, provided the accused, after being tried and sentenced in the Police Court, is given an unobstructed right of appeal to, and trial by jury in, another court, to which the case may be taken. We cannot assent to that interpretation of the constitution. Except in that class or grade of offences, called petty offences, which according to the common law may be proceeded against summarily in any tribunal legally constituted for that purpose, the guaranty of an impartial jury to the accused in a criminal prosecution, conducted either in the name of, or by or under the authority of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court he is put on trial for the offence charged. In such cases, a judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury, in an Appellate Court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the constitution." See also *In re* Fry, 3 Mackey, 135; *In re* Dana, 7 Benedict, 1.

[2] State v. Fitzgerald, 44 Mo. 425; Com. v. McCloskey, 2 Rawle (Pa.) 369; *In re* Strahl, 16 Iowa, 369; State v. Funk, 17 Ib. 365; Wammack v. Holloway, 2 Ala. 31; Bateman v.

judgment of the inferior tribunal shall be "final and conclusive," or "without appeal."[1] But a provision of the charter, however, that appeals and writs of error from the decisions of the mayor should be allowed, only where the fine imposed by him exceeded the sum of five dollars, was construed as showing the intention of the Legislature, that judgment should be final and conclusive in all cases, where the fine did not exceed that sum. Hence, a writ of *certiorari* was denied.[2]

It is well settled that, while a writ of *certiorari*, to review the findings of an inferior tribunal, will lie unless plainly and explicitly denied, or superseded by some other specific remedy;[3] a right to an appeal to a Superior Court does not exist, unless expressly given.[4]

With respect to courts having an original jurisdiction of a general and superior nature, as, for example, the Supreme Court of the State of New York, a provision, that their decisions shall be final and conclusive upon the parties interested, and upon all other persons, takes away the right of appeal, which would ordinarily be allowed.[5] It has been held that, if a question arises as to the ownership of real property, in an action brought in a Municipal Court to enforce an ordinance, the mayor or justice cannot decide it, as upon common law principles these inferior courts have no jurisdiction to determine the title to real property, hereditaments or franchises.[6]

Magowan, 1 Met. 533; Bernstein v. Clark, (Ga. 90) 13 S. E. R. 336; Greenwood v. Boyd & B. Furn. Factory, 13 S. E. R. 128; 88 Ga. 582; State v. Ellis (La. 90) 9 So. R. 639; Heep v. Burr, 34 Ill. App. 470; Fox v. Peninsular White Lead & Color Works, 48 N. W. R. 203; 84 Mich. 676; Blair v. Sennott, 35 Ill. App. 368; 24 N. E. R. 969; Com. v. Meeser, 44 Pa. St. 341; Davidson v. Woodruff, 68 Ala. 356; State v. Gates, 35 Minn. 385; Garvin v. Gaman, 63 Mich. 221; Ducheneau v. House, 4 Utah, 463; Lees v. Drainage Com'rs, 24 Ill. App. 487; Callahan v. Lewis, 44 N. W. R. 892; Boyer v. Teague, 106 N. C. 571.

[1] See cases cited in last note. Ewing v. Filley, 44 Pa. St. 384; Rex v. Morelcy, 2 Burr. 1040; Lawton v. Com'rs, 2 Caines, 179, 181; Starr v. Trustees, 6 Wend. 564; *In re* Heath, 3 Hill, 42; People v. Mayor, 2 Hill (N. Y.) 9; Tierney v. Dodge, 9 Minn. 166; Camden v. Block, 65 Ala. 236.

[2] Wertheimer v. Boonville, 29 Mo. 254.

[3] Cunningham v. Squires, 2 W. Va. 611. See § 398 on scope of *certiorari* in respect to municipal corporations.

[4] Conboy v. Iowa City, 2 Iowa, 90; People v. Pol. Justice, 7 Mich. 456; Dubuque v. Redman, 1 Ia. 444; McGarty v. Deming, 51 Conn. 422.

[5] *In re* Canal v. Walker Street, 12 N. Y. 406; N. Y. Cen. R. Co. v. Marvin, 11 Ib. 276.

[6] Warwick v. Mayo, 15 Gratt. 528; Jackson v. People, 9 Mich. 111; Grand Rapids v. Hughes, 15 Mich. 54.

§ 106. **Custody of municipal records—Power to amend.** —The records of a municipal corporation should remain in the hands of the town clerk, or other official, whose legal duty is to care for them. And if they are kept out of his possession, it has been held that an action of replevin will lie to recover possession of them in the name of the corporation.[1] The possession of the clerk is the possession of the corporation, in a case of disputed possession between him and a stranger.[2]

It is now the general rule, however, to employ the writ of *mandamus*, as the most appropriate and effective remedy, for the recovery of the possession of municipal records from a predecessor in, or usurper of, an office.[3] So, also, *mandamus*, and not replevin, is generally the proper remedy for the recovery by the owner of possession of papers filed in a public office.[4] It was held in Indiana,[5] that the proper party, to bring an action to recover records, was the board succeeding that in whose possession the records were; and that a mere citizen, although acting for all the citizens of the town, could not compel their surrender.

The right to inspect municipal records, under proper circumstances, is possessed by the corporations, inhabitants, or rate payers; and this right is enforceable by *mandamus*.[6]

Corporations have the power to appoint a clerk *pro tempore*, whenever the regular clerk is absent from a corporate meeting; and his entries, or the entries made by the regular clerk from his memoranda,[7] are competent evidence of the proceedings;[8] and they will not be invalidated by a failure of the clerk *pro tempore* to take the oath of office.[9]

[1] Sudbury v. Stearns, 21 Pick. 148.

[2] School Dis. v. Lord, 44 Me. 374.

[3] Rex v. Nottingham, 1 Sid. 31; 1 Barnard, 402; Proprietors v. Slack, 7 Cush. 226; Rex v. Ingram, 1 W. Bl. 50; see § 373.

[4] Desmond v. McCarty, 17 Iowa, 525; La Grange v. State Treas., 24 Mich. 468.

[5] Carr v. McCampbell, 61 Ind. 97.

[6] King v. Sargent, 5 Term R. 466; King v. Richmond, 6 Ib. 560; Cockburn v. Bank, 13 La. An. 289; People v. Walker, 9 Mich. 328; People v. Cornell, 47 Barb. 329; People v. Mott, 1 How. Pr. 247; Bruce v. Bruce, 2 B. & P. 229; King v. Mitchell, 10 East, 511; see chapter XIX on *Mandamus*, where the subject of *mandamus* is very fully set forth.

[7] Louisville v. McKerney, 7 Bush, 651.

[8] Hutchinson v. Pratt, 11 Vt. 402; Rex v. Mothersell, 1 Stra. 93.

[9] Stebbins v. Merrit, 10 Cush. 27.

Under a statutory requirement, that the minutes should be signed by a chairman, they will not be impaired by the fact, that they were signed on a day subsequent to the date of the meeting.[1]

In the very numerous municipal and *quasi* municipal corporations, by which the local affairs of communities are controlled, it is apparently impossible that persons should be selected by the corporations to act as municipal officials, without the choice of some who are totally unfit to perform the clerical services required of them. On this account, it has long been the law to permit the clerk of the New England town, who has made an incorrect record, to amend the same during his incumbency of the office, he being held liable for any abuse of the privilege.[2] If, however, he makes a fraudulent or untruthful amendment, the town will not be bound by the altered record, unless it shall be estopped by having ratified it after it has been made.[3] The courts are favorably disposed towards upholding town records which are, however irregular, free from dishonest or willful error; and for this reason they will not be too strict, when amendments come before them for consideration.[4] A town clerk has no authority to amend the town records after he is out of office.[5] Nor can a town clerk, or similar municipal officer, amend records kept by his predecessor,[6] unless in a proper case, the municipality empowers him to correct the erroneous, or insert the omitted, matter.[7]

[1] Miles v. Bough, 3 Gale & D. 119; Inglis v. Railway Co., 16 Eng. L. & Eq. 55; Logansport v. Crockett, 64 Ind. 319.

[2] Bishop v. Cone, 3 N. H. 513; Hoag v. Durfey, 1 Aiken (Vt.) 286; Chamberlain v. Dover, 13 Me. 466.

[3] Whittier v. Varney, 10 N. H. 291; Gibson v. Bailey, 9 Ib. 168; Harris v. School Dis., 28 Ib. 58, 66; Cass v. Bellows, 31 Ib. 501; Law v. Pettengill, 12 Ib. 340; Pierce v. Richardson, 37 Ib. 306; Scammon v. Scammon, 28 Ib. 429; Boston T. Co. v. Pomfret, 20 Conn. 590; New Haven etc. Co. v. Chatham, 42 Ib. 465; President etc. v. O'Malley, 18 Ill. 407; Mott v. Reynolds, 27 Vt. 206; Samis v. King, 40 Conn. 298.

[4] Welles v. Battelle, 11 Mass. 477, 481; Keller v. Savage, 17 Me. 444; St. Charles v. O'Malley, 18 Ill. 408; Williams v. School District, 21 Pick. 75; Bishop v. Cone, 3 N. H. 513; Hoag v. Durfey, 1 Aiken (Vt.) 286.

[5] School Dist. v. Atherton, 12 Met. (Mass.) 105; Hartwell v. Littleton, 13 Pick. 229, 232; *contra*, Gibson v. Bailey, 9 N. H. 168; Kiley v. Cranar, 51 Mo. 541, 543.

[6] State v. Williams, 25 Me. 555, 561; 29 Ib. 523; Taylor v. Henry, 2 Pick. 397.

[7] Hutchinson v. Pratt, 11 Vt. 402, 419.

A municipal corporation, like courts of record, possesses the power of amending its records *nunc pro tunc*.[1] This rule has been applied in case of assessments, where some essential action, preliminary thereto, had been properly taken, but mention of it had been omitted from the council minutes.[2] So, also, a town council may at any time instruct its clerk to correct its official journal, even after the minutes contained therein have been approved. But it has been held that a council cannot correct errors or omissions in the minutes of meetings, which were held by their predecessors, in order to make it appear therein that an ordinance had passed, when it appeared from the minutes that it had only been reported.[3]

As the validity of municipal records should be supported when possible, if an order, to which unanimous consent is required in order to give it legal force, is found entered in the minutes, it will be presumed to have received unanimous consent, unless the contrary plainly appears.[4]

The question sometimes arises, in respect to the amendment of a record, *pending a trial*, in which it is to be used as evidence. It was held that this could be done even by a town clerk, who had been out of office, but had been reinstated.[5] In a somewhat similar instance, where the amendment was made pending the trial of a suit, brought against the town six years subsequent to the original entry, the court sustained the competency of the clerk, to make an alteration in the record, by which the plaintiff's cause of action was wholly annulled.[6] In

[1] Musselman v. Manly, 42 Ind. 462; Vawter v. Franklin College, 53 Ib. 88; Com'rs v. Hearne, 59 Ala. 371; Mayhew v. Gay Head, 13 Allen, 129; Steckert v. East Saginaw, 22 Mich. 104; Chamberlain v. Evansville, 77 Ind. 542; Pontiac v. Axford, 29 Mich. 69; Delphi v. Evans, 36 Ind. 90.

[2] City v. Blakemore, 17 Ind. 318; Stadler v. Roth, 59 Mo. 400; Kily v. Cranor, 51 Ib. 541; Halleck v. Boyleston, 117 Mass. 469; Parish v. Golden, 35 N. Y. 462.

[3] Covington v. Ludlow, 1 Met. (Ky.) 295; Dexington v. Headley, 5 Bush, 508; Graham v. Carondelet, 33 Mo. 262; State v. Jersey City, 30 N. J. L. 93, 148.

[4] Lexington v. Headley, 5 Bush, 508; Covington v. Boyle, 6 Ib. 204; McCormick v. Bay City, 23 Mich. 457.

[5] Mott v. Reynolds, 27 Vt. 206, 208. The court cautiously saying: "But even an officer could alter or amend a record upon the testimony of third persons ordinarily, and ought not to do it upon his own recollection, unless in very obvious cases of omission or error, of which the present might fairly be regarded as one, probably." Comp. Hadley v. Chamberlain, 11 Vt. 618.

[6] Boston T. Co. v. Pomfret, 20 Conn. 590.

this case, two out of five judges dissented, and held that in special cases, where there had been such a lapse of time, the clerk had no authority to amend *ex parte*, without memoranda or any personal recollection; and the proper remedy was an application for a *mandamus* to correct the mistake, thus giving the opposite party an opportunity to show that the record was correct.[1]

The records or reports of commissioners, appointed by the court to assess damages for property taken in opening streets and highways, will, if defective, be recommitted for amendment.[2]

§ 107. **Municipal records as evidence—Admissions.**—Not only are public or municipal records competent evidence in the trial of an action, to which the corporation is not a party;[3] but the municipality may itself offer its records in evidence, in suits to which it is a party.[4] But the records or the compared or certified copy must be properly authenticated, according to the rules which obtain in the jurisdiction,[5] where it is to be used; and the public character of the record, together with the official character of the entry, or of the certified copy or transcript, if they do not appear *prima facie*, must be shown, unless the statute provides for a presumption in favor of their genuineness.[6] In consequence of the great inconvenience which attends the production in court of original municipal records, which are commonly bulky, and often in constant use, it has become the general rule to receive duly certified, sworn, or compared transcripts or copies of them, as of equal force with the original.[7]

[1] See further on this subject, Sammis v. King, 40 Conn. 298; Farrell v. King, 41 Ib. 448; Logansport v. Crockett, 64 Ind. 319.

[2] *In re* Kings Co. El. R. Co., 12 N. Y. S. 198; Long v. Talley, 91 Mo. 505; Spring Brook Road, 64 Pa. St. 451; Green v. East Haddam, 51 Conn. 547; *In re* Bryan, 58 Hun, 608; Conwell v. State, 107 Ind. 571; Crawford v. Valley R. R. Co., 25 Gratt. 467; Chicago M. & St. P. R. Co. v. Randolph Townsite Co., (Mo. 90) 15 S. W. R. 437; People v. White, 59 Barb. 666.

[3] Rex v. Smith, 1 Stra. 126.

[4] Metro. S. R. Co. v. Johnson, (Ga. 93) 16 S. E. R. 49; McFarland v. Triton Ins. Co., 4 Denio, 392; Highland Turn. Co. v. McKean, 11 Johns. 154; Graffton v. Read, 34 W. Va. 172; Wood v. Jefferson Co. Bk., 9 Cow. 205; *contra*, Mayor v. Wright, 2 Port. (Ala.) 230.

[5] Adams v. Mack, 3 N. H. 493, 499; see cases cited *supra;* Rex v. Thetford, 12 Vin. Abr. 90, p. 16.

[6] Rex v. Debenham, 2 B. & Ald. 87; Marriage v. Lawrence, 3 B. & Ald. 144; Regina v. Thomas, 8 A. & E. 183.

[7] People v. Minck, 21 N. Y. 539;

This rule in many of the states is the product of statutory enactment.[1] It has been held, however,—although the rule would not seem applicable to municipalities,—that the by-laws of a corporation must be proved by the production of the original by-laws;[2] and the votes must be proved by the production of the record itself.[3]

The rule, that a party's admission is competent evidence against him, is of course applicable to municipal corporations. But the acceptance of the report of a committee of inquiry by a municipal corporation is not an admission of its truth; nor does it render the report admissible as evidence.[4]

Verbal or written admissions, to be binding upon a municipal corporation, must be made by its agent, acting in the line of his duty, and within the powers delegated to him by the corporation.[5] The admission of incorporation is not binding on the corporation in this country.[6] So, also, declarations, not against interest, but which accompany official acts, and form a part of the *res gestæ*, are admissible for or against the corporation.[7] It has been held that there is no presumption, that the officials of a city or town are acquainted with the entries contained in the municipal records; nor are they liable personally for libelous matter contained in their annual reports, when made in good faith.[8]

Hickok v. Shelburne, 4 Vt. 409; Com. v. Chase, 6 Cush. 248; Best, Prin. of Ev. 456; Mortimer v. McCollan, 6 M. & W. 67.

[1] Rex v. Lord Geo. Gordon, Doug. 193; 1 Phillips Evidence, 405; Denning v. Rome, 6 Wend. 651; People v. Adams, 9 Ib. 333; Turnp. Co. v. McKean, 11 Johns. 154; People v. Murray, 57 Mich. 396; O'Mally v. McGinn, 53 Wis. 353.

[2] Lumbard v. Aldrich, 8 N. H. 31; Hollowell Bk. v. Hamlin, 14 Mass. 178; see ch. Ordinance, manner of proof.

[3] Haven v. Asylum, 13 N. H. 532; Manning v. Parrish, 6 Pick. 6; Green v. Indianapolis, 25 Ind. 490.

[4] Dudley v. Weston, 1 Met. 477; Collins v. Dorchester, 6 Cush. 396.

[5] Jordan v. Sch. Dis., 38 Me. 164; County v. Simmons, 10 Ill. 516; Railroad v. Ingles, 15 B. Mon. 637; Glidden v. Unity, 33 N. H. 577; Toll Co. v. Bettsworth, 30 Conn. 380; Barnes v. Pennell, 2 H. of L. Cas. 497; Peyton v. Hospital, 3 C. & P. 363; Curnen v. New York, 79 N. Y. 511.

[6] Hartford Bank v. Hart, 3 Day (Conn.) 493, denying King v. Hardwick, 11 East, 578; Osgood v. Manhattan Co., 3 Cow. 612, 623.

[7] Perkins v. Railroad, Co., 44 N. H. 223; Grimes v. Keene, 52 Ib. 330; Harpswell v. Phipps, 29 Me. 313; Coffin v. Plymouth, 49 Ib. 173.

[8] Lancey v. Bryant, 30 Me. 466.

§ 108. **Admissibility of parol evidence to explain municipal records.**—The record itself is the best or primary evidence of its contents; and, until its absence or nonexistence is sufficiently accounted for, parol or secondary evidence is not allowed to be substituted.[1] But parol evidence is admissible to identify the subject, to which an entry in the town records was intended to apply; and evidence may be given of such facts, which were before the town council at the time of the municipal action, as will explain the meaning of the entry, and the effect of the action of the council upon the rights of a party, who has acted in good faith upon a recorded ordinance or resolution.[2] But, in respect to matters of a routine nature, which fall within the jurisdiction of the municipality because of its public character; as, for example, the laying out or abandonment[3] of a highway; and, particularly, if the entry is made in pursuance of a statute, parol evidence is not admissible to explain, vary or contradict the record.[4] When an owner has dedicated a portion of his land to public purposes, as set forth in a plat, which has been placed on record, parol evidence to explain such reward or dedication is only admissible, where the plat is not complete, and where its terms are ambiguous or uncertain.[5]

Respecting municipal meetings, it has been decided that parol evidence may be given in explanation of the minutes, to show the time and place of holding the meeting, the number

[1] Isley v. Boom, 13 S. E. R. 795; 109 N. C. 555; Smith v. Lawrence, 12 Mich. 431; United States v. Kuhn, 4 Cranch C. C. 401; Leavitt v. Eastman, 77 Me. 117; Long v. Battle Creek, 39 Mich. 323; Oliphant v. Com'rs, 18 Kan. 386; Kohlhapp v. W. Roxbury, 120 Mass. 596; Township of Corwin v. Morehead, 49 N. W. R. 1052; 51 Iowa, 99; Gurnsey v. Edwards, 26 N. H. 224; Anderson v. Com'rs, 12 Ohio St. 365; Austin v. Allen, 6 Wis. 134; Aurora v. Fox, 78 Ind. 1; Monaghan v. Sch. Dis., 38 Wis. 101. If the requirement that a record of a fact be kept is directory, it has been held that parol evidence is admissible to show the fact: Keller v. Savage, 17 Me. 444.

[2] Baker v. Windham, 13 Me. 74.

[3] Lathrop v. Cent. La. R. R. Co., 69 Iowa, 105.

[4] Satterlee v. Hickman, 38 Ill. App. 139; Galbraith v. Luttrech, 73 Ill. 209; Wild v. Deig, 43 Ind. 455; Danim v. Gow, 50 N. W. R. 140; 88 Mich. 99; Pittsburgh v. Cluley, 74 Pa. St. 262; Leavitt v. Eastman, 77 Me. 117; Weaver v. Lammon, 28 N. W. R. 905; 62 Mich. 366; Hedges v. Bugg, 45 N. W. R. 841; Stevenson v. Flournoy, 13 S. W. R. 810.

[5] Grandville v. Jennison, 86 Mich. 567; 49 N. W. R. 544; Princeville v. Anten, 77 Ill. 325; Darlington v. Com., 41 Pa. St. 63.

present, and how many, coming later and finding no meeting, went home.[1] But when it is sought to validate acts done at an adjourned meeting, the adjournment, not appearing upon the minutes, cannot be shown by extrinsic evidence.[2]

While it is not allowable to contradict the record by parol evidence, such evidence has often been admitted to show facts omitted from the record, in cases where the law does not imperatively require them to appear of record, and does not make the record the only evidence.[3] If, however, the record, or a certified copy, is by statute made the only competent evidence, then its production is indispensable; and parol evidence of the facts contained in it cannot be admitted.[4] The reason and justice of the admissibility of parol evidence are manifest, where the rights of third persons or of creditors are likely to be prejudiced by the negligence of municipal officers in making proper entries in the record; and it seems that both the corporation and third parties may avail themselves of parol evidence in all such cases, for the purpose of supplying the defects or omissions of the record.[5] Thus, where the records of the council were negligently kept, and failed to show the adoption of a resolution, parol evidence was admitted to prove that certain work was authorized by the city. In this case, the plaintiff was permitted to prove the passage of the resolution, the appointment of a committee to have charge of the expenditure, their report, and its adoption by the council.[6]

Although there is some lack of agreement in the decisions, in

[1] Chamberlain v. Dover, 13 Me. 466.

[2] Taylor v. Henry, 2 Pick. 397.

[3] People v. Bussey, 46 N. W. R. 97; People v. Fairfield, (Cal. 90) 27 Pac. R. 199; Troy v. Atchison etc. Co., 13 Kan. 70; 11 Ib. 519; Downing v. Diaz, (Tex. 90) 16 S. W. R. 49; Stephens v. St. Louis & S. F. Co., 47 Fed. R. 530; Danim v. Gow, 88 Mich. 99; Bank v. Dandridge, 12 Wheat. (U. S.) 64; United States v. Fillebrown, 7 Pet. 28; Slate v. Mason, 33 La. An. 590; School Dist. No. 2 v. Clark, 51 N. W. R. 529; Satterlee v. Hickman, 38 Ill. App. 139; Meeker v. Van Rensselaer, 15 Wend. 397; Darlington v. Com., 41 Pa. St. 68.

[4] See cases cited in last note; Morrison v. Lawrence, 98 Mass. 219; Spencer v. Credle, 102 N. C. 68; Bridgford v. Tuscumbia, 4 Woods, 611; 16 Fed. R. 910; Indianapolis v. Imberry, 17 Ind. 175, 179; Haney v. McClure, 10 S. W. R. 427; Delphi v. Evans, 36 Ind. 90; Lowell v. Wheelock, 11 Cush. 391; Harris v. Whitcomb, 4 Gray, 433; County Com'rs v. Chitwood, 8 Ind. 504, 507.

[5] Hutchinson v. Pratt, 11 U. S. 402, 411; Sch. Dist. No. 2 v. Clark, *supra*; San Antonio v. Lewis, 9 Tex. 69; Stevens v. Eden etc., 12 Vt. 688; Satterlee v. Hickman, 38 Ill. App. 139.

[6] Ross v. Madison, 1 Ind. 281.

regard to the admissibility of evidence to impeach public records in collateral actions, the weight of authority supports the rule, that such records are conclusive, and cannot be contradicted or shown to be erroneous by parol evidence. In such cases, the proper remedy is for the party interested to compel a correction of the mistakes in the record, if any exist, by a writ of *mandamus*.[1]

[1] Durfey v. Hoag, 1 Aiken (Vt.) 286; School District v. Atherton, 12 Met. (Mass.) 105; Morrison v. Lawrence, 98 Mass. 219; Mayhew v. Gay Head, 13 Allen (Mass.) 129; Eldora v. Burlingame, 62 Iowa, 32; Boston Turnp. Co. v. Pomfret, 20 Conn. 590; Gilbert v. New Haven, 40 Ib. 102; Nichols v. Bridgeport, 23 Ib. 189; Bissell v. Jeffersonville, 24 How. U. S. 287, 298.

CHAPTER VIII.

CHARTER POWERS, THEIR NATURE, CONSTRUCTION AND LIMITATIONS.

§ 110. **Classification and construction of charter powers.**—The powers, which are ordinarily conferred by its charter upon a municipal corporation, may be classified as follows: *First*, those granted in express terms; *Secondly*, those necessarily or fairly implied in, or incident to, the express powers; *Thirdly*, those which are indispensable to the accomplishment of the purpose of corporate existence.[1] Any act done, or contract entered into, by the corporation, in the exercise of power claimed to be possessed by it, but which cannot be reasonably included in one of these classes, is illegal and void *ab initio;* and the corporation incurs no liability thereby;[2] and if there exist a fair and reasonable doubt as to the possession of any particular power by a municipal corporation, the inclination of the courts is to decide against its existence; and its possession by the corporation.[3]

"In this country,[4] all corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given, or may not be reasonably inferred. But if we say that they can do nothing for which a warrant could not be found in the language of their charters, we should deny them in some cases the power of self-preservation, as well as many of the means which are necessary to effect the essential object of their incorporation; and, therefore, it has long been an established principle in the law of corporations that they may exercise all the powers, within the fair

[1] Dillon Mun. Corp. § 89; Corrington & M. R. Co. v. Athens, (Ga. 90) 11 S. E. R. 663; Richmond v. McGirr, 78 Ind. 192, 197; Cook Co. v. McCrea, 93 Ill. 236; Ottawa v. Carey, 108 U. S. 110; Greenville W. Co. v. Greenville, 7 So. R. 409; Ravenna v. Pennsylvania Co., 45 Ohio St. 118; Haynes v. Cape May, 52 N. J. L. 180; Scott v. Shreveport, 20 La. An. 714; Desmond v. Jefferson, 19 Ib. 483; Eufaula v. McNab, 67 Ala. 588; Michigan City v. Boeckling, 23 N. E. R. 518; 122 Ind. 39; Danville v. Shelton, 76 Va. 325; Bell v. Platteville, 71 Wis. 139; Linkenhenner v. Com., 23 W. L. Bul. 433; Blake v. Walker, 23 S. C. 517; Kansas City v. Swope, 79 Mo. 446; Portland v. Schmidt, 13 Oreg. 17.

[2] See § 169 on *Ultra Vires* Contracts; Birmingham v. P. M. Ry. Co., 79 Ala. 465; Spengler v. Trowbridge, 62 Miss. 46; Gas Co. v. Parkersburg, 30 W. Va. 435; St. Johnsbury v. Thompson, 59 Vt. 300; Christie v. Malden, 23 W. Va. 667; Dwyer v. City of Brenham, 65 Tex. 526; Davenport v. Kleinschmidt, 6 Mont. 502; Heiskell v. Baltimore, 65 Md. 125.

[3] Kirkham v. Russell, 76 Va. 956; Tax Collector v. Dendinger, 38 La. An. 261; Hanger v. Des Moines, 54 Ia. 193; Williams v. Davidson, 43 Tex. 33; Brenham v. Water Co., 67 Tex. 542.

[4] Bridgeport v. Railroad Co., 15 Conn. 475, 501.

intent and purpose of their creation, which are reasonably proper to give effect to powers expressly granted. In doing this,[1] they must have a choice of means adapted to ends, and are not to be confined to any one mode of operation." [2]

Since municipal powers are wholly of legislative origin, the citizens cannot by any act of theirs ratify or confer upon the municipal council any power, which is not expressly or impliedly granted in the charter.[3] The question as to the existence, limitation or extent of charter powers, is one of construction. The intent of the Legislature should be sought for in every instance, and carried out, if possible; but the courts have generally favored the common law rule, that municipal charters, like all grants of power from the State, are to be construed in favor of the State, and against the grantee, whenever a reasonable doubt exists.[4] The powers, granted to municipal corporations, are so extensive and far-reaching, and their abuse so likely to result in the imposition of grievous burdens on the individual citizens, that a strict construction of charter powers is absolutely necessary, and has been the almost uniform practice of the courts.

[1] The power may be limited.

[2] Corvallis v. Carlile, 10 Oreg. 139; Petersburg v. Metzger, 21 Ill. 205; New London v. Brainard, 22 Conn. 552; Hodges v. Buffalo, 2 Denio, 110; Gilman v. Milwaukee, 61 Wis. 588; Com. v. Turner, 1 Cush. 493, 495; Cooley v. Granville, 10 Ib. 57; Hiestand v. New Orleans, 14 La. An. 330; Leconteulx v. Buffalo, 33 N. Y. 333; Levy v. Salt Lake City, 3 Utah, 63; Gallia Co. v. Holcomb, 7 Ohio, pt. 1, 232; Com'rs v. Mighels, 7 Ohio St. 100; Merriam v. Moody, 25 Iowa, 163; Minton v. Larne, 23 How. 435; Kelly v. Milan, 21 Fed. R. 842; Louisiana State Bk. v. N. O. Nav. Co., 3 La. An. 294; State v. Mayor, 5 Port. 279; Head v. Ins. Co., 2 Cranch, 168; Smith v. Newbern, 70 N. C. 14; Corsicana v. Carr, 75 Tex. 207; De Russey v. Davis, 13 La. An. 468; People v. Bank, 1 Doug. 282; City Council v. Plank Road, 31 Ala. 76; *In re* Burnett, 30 Ib. 461; Richards v. Clarksburg, 30 W. Va. 491; Ottawa v. Carey, 108 U. S. 110; Bell v. Platteville, 71 Wis. 142; Roodhouse v. Jennings, 29 Ill. App. 50; Conery v. N. O. W. Co., 41 La. An. 910; Bangs v. Snow, 1 Mass. 181; Stetson v. Kempton, 13 Ib. 272; Willard v. Newburyport, 12 Pick. 227; State v. Natal, 41 La. An. 700; 6 So. 722; Hansen v. Hunter, 53 N. W. R. 84; Hayes v. Appleton, 24 Wis. 544; People v. Railroad, 12 Mich. 389; Vance v. Little Rock, 30 Ark. 435; State v. Sharkey, (Minn. 92) 52 N. W. R. 24; Logan v. Buck, 3 Utah, 301; Ravenna v. Penna. Co., 45 Ohio St. 118; Noyes v. Mason, 5 N. W. R. 595; *In re* Frank, 52 Cal. 606; Green v. Cape May, 41 N. J. L. 45.

[3] Torrent v. Muskegon, 47 Mich. 115.

[4] "It is a well settled rule of construction of grants by the Legisla-

Although the courts have, in view of the above considerations, and because any other course would frequently result in imposing unjust burdens upon the inhabitants of the community, or in abridging their natural or common law rights of liberty and property, adopted the principle of strict construction of charter powers;[1] it should not for a moment be understood that an unreasonable construction, which is calculated to defeat the object of the legislative enactment, will be sustained. There must exist a fair and reasonable doubt as to the legislative intent to confer the disputed power, before the courts will deny its possession by the municipality.[2]

The incidental powers of a municipal corporation must be germane to the purpose, for which it was created;[3] and, when it is conceded that any particular power, as, for example, the power of levying taxes or erecting buildings, is possessed by the corporation, it will, if the statute be silent, be allowed to construct and employ the usual and proper machinery,[4] or to select an appropriate and suitable place,[5] for the exercise of the power.

§ 111. **Imperative and discretionary powers distinguished.**—The differentiation of charter powers, which are imperative, from those which are discretionary, is at times a very

ture to corporations, whether public or private, that only such powers and rights can be exercised under them, as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the object of the grant. Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public." Minturn v. Larue, 23 How. 435, 436; see cases cited *supra;* Logan v. Pye, 43 Iowa, 524; Bloom v. Xenia, 32 Ohio St. 461; Carr v. Dooley, 122 Mass. 257; Pye v. Peterson, 45 Tex. 312; Winooski v. Gokey, 48 Vt. 282; Dalrymple v. Wilkes-Barre, 11 Luz. L. R. (Pa.) 41; Thompson v. Schermerhorn, 6 N. Y. 92; Parker v. Barker, 1 Clark, 223; Weel v. Ricord, 24 N. J. Eq. 169; Schakelton v. Guttenberg, 39 N. J. L. 660; Wheatley v. Covington, 11 Ib. 18; Kniper v. Louisville, 7 Bush, 599.

[1] Bank v. Chillicothe, 7 Ohio, pt. 2, 31, 35.

[2] Thomson v. Lee Co., 3 Wall. 320; Thomas v. Richmond, Ib. 349; Willard v. Killingworth, 8 Conn. 247; Clark v. Davenport, 14 Iowa, 495; Merriam v. Moody, 25 Ib. 163; Kyle v. Malin, 8 Ind. 34; Memphis v. Adams, 9 Heisk. 518; Nicol v. Mayor, etc., 9 Humph. 252; Leonard v. Canton, 35 Miss. 189; Lafayette v. Cox, 5 Ind. 38; Collins v. Hatch, 18 Ohio, 523; Pt. Huron v. McCall, 46 Mich. 565; Douglas v. Placerville, 18 Cal. 643, 647.

[3] Mayor v. Yule, 3 Ala. 137; Harris v. Intendant, 28 Ala. 577; Intendant v. Chandler, 6 Ib. 899.

[4] Union Pac. R. Co. v. Ryan, 2 Wyo. 408; s. c., 113 U. S. 516.

[5] Poillon v. Brooklyn, 101 N. Y. 432.

difficult question of construction. In every case, of course, it is presumed that the legislative intent is ascertained.[1] But no positive and unyielding rule can be enunciated, which will be of real or undoubted value. For, under peculiar circumstances, permissive words, like "may," or "it shall be lawful," will be held to impose an imperative duty, in connection with which there is no grant of discretion. Thus, when an individual, or the public, has a special interest in having an act done, and the municipality is vested with power to do this act, and adequate means are at its disposal for the purpose of promptly and properly performing it, the duty will be held to be mandatory, despite the fact that the word "may," and not "must," is employed in the statute.[2] On the contrary, when the act to be performed will not confer any great benefit upon third persons, or upon the public; and, particularly, when the means for its performance are not supplied to the municipal authorities, the words "may" or "it is lawful" will be held to have the natural and ordinary effect of granting a discretionary power, and not to create an imperative duty, for the breach of which an action in damages, or a *mandamus*, will lie by an injured party against the corporation.[3] But the expression "hereby authorized" has been held to create a mandatory duty.[4] And the same is generally true of the word "shall."[5] On the other hand, there are cases which hold that the word "must," when employed in a statute, does not necessarily make a duty enjoined thereby absolutely imperative, but may under peculiar circumstances be held to be the

[1] Mason v. Fearson, 9 How. 248; Hurford v. Omaha, 4 Neb. 336; Veazie v. China, 50 Me. 518; St. Joseph etc. R. Co. v. Buchanan Co. Court, 39 Mo. 485.

[2] Cases in last note. Phelps v. Hawley, 52 N. Y. 53; Blake v. Portsmouth etc. Co., 39 N. H. 435; Steines v. Franklin Co., 48 Mo. 167; Seiple v. Elizabeth, 27 N. J. L. 407; State v. Newark, 3 Dutch. 491; Vason v. Augusta, 38 Ga. 542; Mayor v. Furze, 3 Hill, 612; 16 N. Y. 162; Reed v. Bainbridge, 1 Southard, 351, 358.

[3] Atty. General v. Lock, 3 Atk. 164; Rex v. Mayor of Chester, 1 Maule & S. 101; Rex v. Bailiffs, 1 B. & C. 86; Minor v. Mechanics' Bank, 1 Pet. 46; Goodrich v. Chicago, 20 Ill. 445; Railroad v. Platte, 42 Mo. 171; Joliet v. Verley, 35 Ill. 58; Railroad Co. v. Buchanan, 39 Mo. 485; Ottawa v. People, 48 Ill. 233; Grant v. Erie, 69 Pa. St. 429; see also State v. Shakespeare, 41 La. An. 156; *In re* Whitney, 3 N. Y. S. 838; and § 362 in chapter on *Mandamus*.

[4] Vason v. Augusta, 38 Ga. 542.

[5] People v. French, 13 N. Y. St. R.; People *ex rel.* Satterlee, 75 N. Y. 38.

grant of a discretionary power.[1] In every case, it is presumptively a question of legislative intent, but really a judicial consideration of the public interests, and the best mode of promoting them. The reliance upon the supposed legislative intent is a harmless fiction, and constitutes no serious obstacle to the due and intelligent consideration of the public interests; at least, in the special case under inquiry.[2]

§ 112. **Discretionary powers.**—When the power to do an act is conferred upon a municipal corporation, but the language conferring the power is such that no imperative duty is imposed upon the corporation, that the act shall be done at all events, the power is said to be discretionary, as distinct from mandatory and imperative. In the exercise of such powers, the municipality is exempted from judicial supervision, and from liability in damages, except in cases where fraud, or a plain abuse of the power, is shown.[3] As this subject is treated at length in other parts of this work[4] to which the reader is referred, any minute discussion in this place is deemed unnecessary.

§ 113. **Delegated powers cannot be delegated.**—The principle, elsewhere adverted to, that a municipal corporation cannot shift responsibility for the execution of the public discretionary powers, delegated to it, by delegating the exercise of the discretion to others, is a plain corollary of the proposition, that such powers are held and to be exercised in trust for the public.[5] The city council is the governing body of the corporation, and

[1] Spears v. Mayor, 72 N. Y. 442; Hemmer v. Hustace, 51 Hun, 457; Merrill v. Shaw, 5 Minn. 148. Cf. Wallace v. Feeley, 88 N. Y. 646.

[2] For a general criticism of this cardinal rule of interpretation, see Tiedeman's Unwritten Constitution of the United States, p. 145 *et seq.*

[3] Bush v. Carbondale, 87 Ill. 74; Conery v. W. Co., 41 La. An. 910; 7 So. R. 8; Dodd v. Hartford, 25 Conn. 232; Deane v. Todd, 22 Mo. 90.

[4] See chapter on *Streets*, § 289; *Mandamus*, § 362; *Injunction*, § 393; *Liability for Torts*, §§ 327, 328.

[5] See ch. XVI. on *Streets*, also State v. Hauser, 63 Ind. 155; Dougherty v. Austin, 29 Pac. R. 1092; 94 Cal. 601; Thompson v. Schermerhorn, 6 N. Y. 92; Minn. G. L. Co. v. Minneapolis, 36 Minn. 159; Meuser v. Risdon, 36 Cal. 239; Davis v. Read, 65 N. Y. 566; People v. Riordan, (Mich. 89) 41 N. W. 482; Clark v. Washington, 12 Wheat. 40, 54; State v. Fiske, 9 R. I. 94; Hydes v. Jones, 4 Bush, 464; Birdsall v. Clark, 73 N. Y. 73; *In re* Trustees, 50 How. Pr. 500; State v. Freeholders, (N. J. 89) 18 Atl. 117; Baltimore v. Scharf, 54 Md. 499; Lyon v. Jerome, 26 Wend. 485; Stanfield v. State, (Tex. 92) 18 S. W. 577; Railway Co. v. Baltimore, 21 Md. 93; Bibel v. People, 67 Ill. 175; Lyth v. Buffalo, 48 Hun, 175; State v. Trenton, 51 N. J. L. 498; Mullar-

by it the discretion of the municipality is properly exercised. When, therefore, the necessity or expediency of initiating some local improvement is left by statute to the discretion of the council, that body cannot delegate this duty, which belongs to it as the legislative department of the municipal government, to an administrative official.[1] So, also, where a city council was authorized to prescribe the dimensions of sewers, it was held that the council could not by ordinance delegate the power of fixing these dimensions to the city's engineer.[2] So, also, powers, which involve the exercise of deliberation and discretion, and which should therefore be carried out by the enactment of an ordinance by the municipal Legislature, cannot legally be delegated to a subordinate committee of the council.[3]

Generally, when a municipal council is empowered to fix rates, for which some service is to be rendered, as in cases of license fees or assessments,[4] or to appoint a time when persons, having business with the corporation, may be heard,[5] it cannot delegate its discretion. This principle was applied, where the city was authorized to fix and collect tolls for the use of a pier owned by it, but which it had leased. In an action brought by the lessee for damages, which were caused by the city's failure to keep the pier in repair, the lease was declared void, as attempting to delegate to the lessee a power, which could legally be exercised by the city alone.[6] Whether in the particular case, the mayor is under the provisions of the charter, a member of the council in general, or the mayor and aldermen together are by charter constituted one body for the doing of some particular legislative act; in either case, there cannot be a delegation of a discretionary power to the mayor. In such a case, it was held,

key v. Cedar Falls, 19 Iowa, 21; Schenley v. Com., 36 Pa. St. 62; Darling v. St. Paul, 19 Minn. 389.

[1] State v. Faribald, 11 So. Rep. 36; Ruggles v. Collier, 43 Mo. 359; Shehan v. Gleason, 46 Ib. 100; E. St. Louis v. Wehrung, 50 Ill. 28; State v. Bell, 34 Ohio St. 194.

[2] St. Louis v. Clemens, 43 Mo. 395.

[3] Minneapolis G.L. Co. v. Minneapolis, 36 Minn. 159; Whyte v. Mayor, 2 Swan. 364; Smith v. Morse, 2 Cal. 524; Oakland v. Carpenter, 13 Cal. 540; Cf. State v. Atlantic City, 34 N. J. L. 99, 108.

[4] Mathews v. Alexandria, 68 Mo. 115.

[5] State v. Jersey City, 1 Dutch. 309; State v. Patterson, 34 N. J. L. 163.

[6] Lord v. Oconto, 47 Wis. 386; see also Lanenstein v. Fond du Lac, 28 Ib. 336; Mullarty v. Cedar Falls, 19 Iowa, 21; Gale v. Kalamazoo, 23 Mich. 344; Milhau v. Sharp, 19 Barb. 435; Oakland v. Carpenter, 13 Cal. 540.

where the power to license was under discussion, that the aldermen could not by a vote delegate their share of the licensing power to the mayor;[1] or, *a fortiori*, to third persons.[2]

So, the powers, to construct and control wharves,[3] to grant permission to a railroad company to lay its track in the streets,[4] to issue bonds,[5] to make local improvements,[6] to appoint attorneys,[7] to establish pounds and appoint keepers,[8] and to provide for lighting the streets,[9] have been held by the courts to be beyond the power of delegation. A valid delegation of legislative or discretionary public power can be made, however, by the municipal council, when it is permitted, or so directed by express legislative provision.[10]

The rule, forbidding the delegation of corporate power, does not apply to the delegation of ministerial or administrative powers to a subordinate official or committee; nor does it prevent the performance of ministerial and routine duties by agents appointed by the council.[11] Thus, when the charter gives the council the power to pass by-laws, relating to wharves, and to appoint the necessary officers to carry the same into effect; and the council created the office of wharf superintendent; it was held that the power, to regulate the moving of vessels, under the ordinances of the city, might be delegated to him by the council.[12] The power of the municipality, to protect the public health, cannot be surrendered, or the resultant duty shifted; but the city may contract with a party to execute a portion of this power in its stead, by giving him the exclusive right to remove the bodies of dead animals, offal or refuse matter.[13] Also, if a

[1] Day v. Green, 4 Cush. 433.

[2] State v. Patterson, 34 N. J. L. 163.

[3] Oakland v. Carpenter, 13 Cal. 540.

[4] State v. Bell, 34 Ohio. St. 194.

[5] State v. Hauser, 63 Ind. 155.

[6] Thompson v. Schermerhorn, 6 N. Y. 92.

[7] St. Louis v. Thomas, 11 Ill. App. 283.

[8] Dillard v. Webb, 55 Ala. 468.

[9] Minn. Gas L. Co. v. Minneapolis, 36 Minn. 159.

[1] State v. Patterson, 34 N. J. L. 163; Brooklyn v. Breslin, 57 N. Y. 591.

[11] Gillett v. Logan Co., 67 Ill. 256; Hitchcock v. City, 96 U. S. 341; McClaughey v. Hancock Co., 46 Ill. 356; Hannibal, etc., R. Co. v. Marion Co., 36 Mo. 294; Edwards v. Watertown, 61 How. (N. Y.) Pr. 463; Schenley v. Com., 36 Pa. St. 62; Stewart v. Council Bluffs, 58 Iowa, 642; Gregory v. Bridgeport, 41 Conn. 76.

[12] Gregory v. Bridgeport, 41 Conn. 76.

[13] Louisville v. Wible, 84 Ky. 290; N. Y. Con. Act, § 280.

contract should be invalid when made, because of an illegal delegation of power, it may be validated by a subsequent ratification by the governing body.[1]

Municipal corporations cannot, without legislative permission, either express or by implication, barter away or surrender their public powers. They cannot legally enter into a contract, or make by-laws, by which they shall agree to cede or impair their delegated governmental powers, or to incapacitate themselves from performing their public duties.[2]

§ 114. **Usage in construing charter powers—Prescription.** —Under the rule that prescription, or the long continued exercise of a right, presupposes an original valid grant, upon which the right is founded, municipal corporations in England are admitted to possess and exercise certain powers, which did not originate in, and as a matter of fact never could have lawfully been granted to them by, a royal grant or charter.[3]

But in the United States, prescription has no effect in con-

[1] Hitchcock v. Galveston, 96 U. S. 341.

[2] Dingman v. People, 51 Ill. 277; Roberts v. Chicago, 26 Ib. 249; Quincy v. Janes, 76 Ib. 231; Nevins v. Peoria, 41 Ib. 502; Peru v. Gleason, 91 Ind. 566; Minn. G. L. Co. v. Minneapolis, 36 Minn. 159; Matthews v. Alexandria, 68 Mo. 115; Weyman v. Jefferson, 61 Mo. 55; Davis v. Mayor etc., 14 N. Y. 506; New York v. Sec. Ave. R. Co., 32 Ib. 261; State v. Freeholders, (N. J. 89) 18 Atl. R. 117; Shinner v. Hartf. B. Co., 29 Conn. 523; State v. New Brunswick, 31 N. J. L. 395; Martin v. Mayor etc. of B'klyn, 1 Hill, 545; Britton v. Mayor etc., 21 How. Pr. 251; Lyth v. Buffalo, 48 Hun, 175; Stanfield v. State, (Tex. 92) 18 S. W. R. 577; Jackson v. Bowman, 39 Miss. 671; White v. Yazoo City, 27 Ib. 357; Pontiac v. Carter, 32 Mich. 164; Costar v. Bush, 25 Wend. 628; East Hartford v. Hartford Bridge Co., 10 How. (U. S.) 545; Lippelmann v. Cincinnati, 40 Ohio Cir. Ct. 327; Rounds v. Mumford, 2 R. I. 154; Roll v. Augusta, 32 Ga. 326; Ill. etc. R. & C. Co. v. St. Louis etc. Co., 2 Dill. 70; Karst v. St. Paul, 22 Minn. 118; Bodine v. Trenton, 36 N. J. L. 198; Milhau v. Sharp, 27 N. Y. 611; State v. Trenton, (N. J. 89) 18 Atl. R. 116; City of Nevada v. Morris, 43 Mo. App. 586; Reading v. Keppleman, 61 Pa. St. 233; Brimmer v. Boston, 102 Mass. 19; Blount v. Janesville, 31 Wis. 640; State v. Graves, 19 Md. 351, 373; Bryson v. Philadelphia, 47 Pa. St. 329; Gulf Co. & S. R. Co. v. Riordan, (Tex. 93) 22 S. W. R. 519; McCrowell v. Bristol, (Va. 93) 16 S. E. R. 867; Atty. Gen'l v. Mayor etc., 3 Duer, 119; Richmond etc. Co. v. Middletown, 59 N. Y. 228; Peoples R. R. v. Memphis, 10 Wall. 38, 50; Lehigh Water Co.'s App., 102 Pa. St. 515.

[3] Clark v. Denton, 1 B. & A. 92; Rex v. Mashiter, 6 A. & E. 153; Rex v. Salway, 9 B. & C. 424; Clark v. Le Crew, 9 Ib. 52; Atty. Gen. v. Foster, 10 Ves. 335; Chad v. Tilsed, 5 J. B. Moore, 185. But see Stockbridge v. West Stockbridge, 12 Mass. 399.

ferring powers upon municipal or private corporations; and custom is only an element to be considered in construing municipal charters, or interpreting the significance of the words or phrases contained in them.[1] If the meaning of the charter be uncertain or ambiguous, a well established, ancient and uniform usage will be considered by the courts as important in determining the mode, in which the charter powers may be exercised; but usage does not enter as an element, into construction and interpretation, when the language of the charter is clear, and its grammatical and literal meaning free from doubt.[2]

Where the statute provides for the exercise of power in a particular place, it is held that only the usage of such place must be kept in view, in construing the meaning of the statute. Thus, when an inspector was empowered to carefully weigh and determine the weight of all grain, it was held that this might be legally done by weighing one bushel in sixty, according to a long established local custom.[3]

The acquiescence of the municipal authorities in a certain construction of a charter may, if this construction is acted upon by third persons in good faith in the acquisition of vested rights, constitute such a usage, or establish such a precedent, as will, in a case where the question is simply one of an irregular exercise of power, estop the municipality from denying that this construction was the true one.[4]

§ 115. **Indemnity for officers acting in good faith.**—A municipal corporation can indemnify its officials against any

[1] In Hood v. Lynn, 1 Allen, 103, C. J. Bigelow said: "An unlawful expenditure of money by a town cannot be rendered valid by usage, however long continued. Abuses of power and violations of right derive no sanction from time or custom. A casual or occasional exercise of a power by one or a few towns will not constitute usage. It must not only be general and of long continuance, but, what is more important, it must also be a custom necessary to the exercise of some corporate power or the enjoyment of some corporate right, or which contributes essentially to the necessity and conveniences of the inhabitants. See Willard v. Newburyport, 12 Pict. 227; Spaulding v. Lowell, 23 Ib. 71; Smith v. Cheshire, 13 Gray, 308; Butler v. Charlestown, 7 Ib. 12, 16; Benoit v. Conway, 10 Allen, 528.

[2] Sherwin v. Bugbee, 16 Vt. 439, 444; Smith v. Cheshire, 13 Gray, 308; Butler v. Charlestown, *supra*.

[3] Frazier v. Warfield, 13 Md. 279, 303; Love v. Hinkley Abt. Adm. 436; see also Rex v. Chester, 1 Maule & S. 101; Rex v. Salway, 9 B. & C. 424.

[4] Van Hastrap v. Madison City, 1 Wall. 291.

liability, which they may incur in a *bona fide* performance of their duties, even though they may have exceeded their legal authority;[1] and this may be effected by a vote to employ counsel, to defend a suit pending against municipal officers,[2] or by a by-law, providing that all municipal officials shall be indemnified for their unlawful acts, when done in an official capacity.[3] The official indemnified must have been acting for the town when he became liable; for, if the corporation has no interest in the matter involved in the action, and the judgment will in nowise affect municipal property or rights, it has no legal power to defend the suit, or to appropriate funds to pay the judgment;[4] or to indemnify the officer, after the judgment shall have been satisfied by him.[5] If payment to the official of costs incurred by him, in a case in which the city has no interest, is contemplated, an injunction will lie to restrain it.[6]

The tax assessors of a town, having levied an illegal assessment, were compelled to refund to the taxpayers the amount which had been illegally collected. It was held that a legal consideration had been created by the vote of the council, to provide an indemnity, which was sufficient to support an irrevocable promise, although without such a vote the town would not have been liable.[7] As a general rule, however, a municipal

[1] Brown v. Melrose, (Mass. 92) 30 N. E. R. 87; Sherman v. Carr, 8 R. I. 431; Bancroft v. Lynnfield, 18 Pick. 566; Bloomington v. Lilliard, 39 Ill. Ap. 616; Fuller v. Groton, 14 Gray, 340; Pike v. Middleton, 12 N. H. 278; Hart v. Newell, 23 Atl. R. 610; East Hampton v. Bowman, 14 N. Y. S. 668; Babbitt v. Savoy, 3 Cush. 530; Hadsell v. Hancock, 3 Gray, 526; Ropin v. Laurinburg, 90 N. C. 427; Lewis v. Rochester, 9 C. B. 401; Kempor v. Burlington, (Iowa, 90) 47 N. W. R. 72; Holdswarth v. Dartmouth, 11 A. & E. 490.

[2] Baker v. Windham, 13 Me. 74; Cullen v. Carthage, 103 Ind. 196.

[3] Irwin v. Mariposa, 22 Up. Can. C. P. 367.

[4] Halstead v. Mayor, 3 Comst. (3 N. Y.) 430; Leinkenheimer v. Comp., 23 W. L. Bul. 433; People v. Lawrence, 6 Hill, 244; Bank v. Supervisors, 5 Denio, 517, 521; Merrill v. Plainfield, 45 N. H. 126; Reg. v. Leeds, 4 Q. B. 796; Reg. v. Bridgewater, 2 P. & D. 558; *In re* Bell & Manvers, 2 Up. Can. C. P. 507.

[5] Vincent v. Nantucket, 12 Cush. 105; Gregory v. Bridgeport, 41 Conn. 76.

[6] Gregory v. Bridgeport, *supra*. By the Consol. Act, § 211, the city of New York is authorized to reimburse the successful officer in a contested election case.

[7] Nelson v. Milford, 7 Pick. 18. The conclusion of the court in this case is probably sound, but it can be better sustained on the ground that the vote for indemnity was an executed gift or grant than that such vote constituted a valid consideration for a strictly executory

corporation has no power to reimburse its official for a loss or expense, which was incurred by him on account of an act of an unlawful character.[1]

Persons, who are intrusted with the control and expenditure of a fund, have a right to retain out of it the proper and legitimate expenses, which were incurred by their administration of the trust.[2]

§ 116. **The police power of municipal corporations—Its scope and limitations.**—It is not an unfrequent occurrence, but is in fact, the almost universal custom, for the State to delegate to the municipal corporation, within its limits, and sometimes without its limits,[3] the general exercise of the police power of the State, for the preservation of the public peace, order and health, and for the promotion of the general welfare of the community.[4] Whenever a municipal corporation undertakes the enforcement of a particular police regulation, its power in the premises may be resisted on one of two grounds, viz.: *First*, that the particular regulation is in violation of the general constitutional limitations upon the power of the State government; and *Secondly*, that although the State government may exercise such a power, without violating any provision of the Federal and State Constitutions, it either cannot or did not, under the provisions of the municipal charter, or of the general laws under which the municipality was incorporated, confer upon such municipal corporation the right to exercise such a power. To

contract. The latter construction offends a fundamental principle of the law of consideration.

[1] Irwin v. Mariposa, 22 Up. Can. C. P. 367.

[2] Attorney Gen'l v. Mayor of Norwich, 2 M. & C. 406; Regina v. The Mayor etc. of Sheffield, L. R. 6 Q. B. 652.

[3] See *post*, § 116 *a*.

[4] Ogden v. McLaughlin, 5 Utah, 387; Lawrence v. Monroe, 44 Kan. 607; Kellar v. Corpus Christi, 50 Tex. 614; State v. St. Louis Court, 34 Mo. 546; Jacksonville v. Ledurth, 7 So. R. 885; People v. Pratt, 14 N. Y. S. 551; Carthage v. Rhodes, (Mo. 90) 14 S. W. R. 181; City Council v. Payne, 2 Nott & McCord, 475; People v. Hurlbut, 24 Mich. 44; 9 Am. Rep. 103; generally, Vanderbilt v. Adams, 7 Cow. 349; Com. v. Tewksbury, 11 Met. 551; Rush v. New Orleans, 43 La. An. 275; People v. Bennett, 83 Mich. 457; Com. v. Parks, 30 N. E. R. 174; Mitchell v. Rockland, 51 Me. 118, 122; 52 Ib. 118; Brown v. Vinalhaven, 65 Ib. 402; Dingley v. Boston, 100 Mass. 544; Cobb v. Boston, 122 Ib. 181; Bancroft v. Cambridge, 126 Ib. 438; Burdett v. Allen, 35 W. Va. 347; Kosciusko v. Sternberg, 68 Miss. 469; Humphrey v. Church, 109 N. C. 132; Welch v. Boston, 126 Mass. 442; Little Rock v. Barton, 33 Ark. 436.

undertake the explanation in detail of the first of these grounds for resisting enforcement of a municipal police regulation, would require a full and complete discussion of the whole subject of constitutional limitations, as it bears upon the question of the police power of the government. This is not only impossible to do, for the want of space; but it is likewise unnecessary, as that subject can be found fully and elaborately, and more appropriately, discussed elsewhere.[1] We will, for these reasons, limit the present discussion of the subject of municipal police power to the second subdivision, as given above, with a special reference to those phases of police power, which are commonly brought into inquiry by the ordinary municipal regulations.

§ 116 *a*. **Territorial limits of police regulations.**—It is a manifest proposition that, ordinarily, the police powers of the municipal corporation can be exercised only within the territorial limits of the municipality, and not beyond or outside of the same. But, as an instrument of local government, or local branch of the state government, it is not beyond the power of the State to grant to the municipal corporation the exercise of governmental control over territory outside of the city limits; and, in many extraordinary cases, even over territory, which falls within the boundaries of some other municipality. This subject, however, has a sufficient treatment elsewhere,[2] and it is only necessary, in the present connection, to state the fact, for the purpose of accentuation.

§ 117. **Municipal power to legislate upon subjects covered by the statute law.**—Reference is made elsewhere to the requirement, that municipal ordinances shall be consistent with the State Constitution, the statute law and the charter of the town or city.[3] Thus, a town cannot by licensing legalize an occupation, such as gaming, the prosecution of which is a crime under the statute law of the state.[4] Nor will the power to suppress gambling confer the power to license houses, in which it is car-

[1] Tiedeman's Limitations of Police Power; Cooley's Constitutional Limitations.

[2] § 62.

[3] See ch. IX. on Ordinances, § 146. For constitutional provisions, relating to the enactment of general laws, and those prohibiting local or private laws, see Stimson Statutes, § 391 to § 396 inclusive.

[4] State v. Lindsay, 34 Ark. 372; Schuster v. State, 48 Ala. 199.

ried on.[1] The general laws of the state operate within municipal limits as elsewhere, except as to those matters upon which the State Legislature has deemed it proper to delegate to the municipal corporation the exclusive power of legislation.[2]

When the exclusive power of legislation over any subject is possessed either by the State, or by the municipality, no difficulty can exist; but when, as is frequently the case, power is granted to a municipality to pass ordinances regulating a subject, which is already regulated by the law of the State, it may very easily happen, that an accused person will be placed in a position, where he will be amenable to a double prosecution, and, it would seem logically, to a double punishment. Upon the question, whether the offender can be punished for the same offence, under the statute and under the ordinance, the cases are irreconcilable.[3] It is held by some of the decisions, that the same act may constitute a crime, both against the State, and the municipality, and be the occasion of two separate and independent prosecutions.[4] Others hold that the act is but a single offence, punishable once only, by whichever court first acquires jurisdiction. So, where gambling is a public offence, and the city at the same time has the charter power to suppress gambling houses, either the State or the city may prosecute, according to the priority of obtaining jurisdiction of the accused.[5] A general grant of power, to make by-laws, has been held to confer no authority upon the corporation to make punishable, by ordinance, an act which is already punishable as an offence against the State. The power of the municipality to legislate by ordinance, concurrently with, or in supersession of, the State, cannot be implied; nor is it incidental to the municipal purpose.[6] And a statute for restraining towns from punishing

[1] Goetler v. State, 45 Ark. 454; Society of Arts etc. v. Musgrove, 44 Miss. 820; Moore v. State, 48 Ib. 147.

[2] Thus, the Legislature can confer the power to suppress bawdy houses upon a city; and a municipal ordinance in such a case, has been held to supersede the state law upon the subject. Rogers v. The People, 9 Col. 450; State v. Clarke, 54 Mo. 17; State v. Debar, 58 Ib. 395.

[3] Plattsburgh v. Trimble, 46 Mo. App. 459; De Soto v. Brown, 44 Ib. 148; McInerney v. Denver, 29 Pa. Rep. 576.

[4] See *post*, same section.

[5] Rice v. State, 3 Kan. 141; State v. Crummey, 17 Minn. 72; State v. Cowan, 29 Mo. 330.

[6] Washington v. Hammond, 76 N. C. 33; State v. Langston, 88 Ib. 692; State v. Britain, 89 Ib. 574; Centerville v. Miller, 57 Iowa, 56; People v. Brown, 2 Utah, 462; State v. Keith.

offences which are cognizable by the State, is constitutional.[1] But if the act is one which, by its intrinsic nature, constitutes at the same time an offence both against the State and the city, the latter may constitutionally provide by ordinance a penalty for its commission, if by a reasonable interpretation of the charter, it is evident that it was the intention of the Legislature to permit or authorize the city to do so.[2] Accordingly, it has been held that a city, having power to enact ordinances "for the *good government of the place* not contravening the laws of the State," may by ordinance provide for the punishment of an assault and battery committed upon its streets; and a previous penalty, imposed by the State for the same act, is not a bar to the prosecution by the corporation.[3]

The power of the municipal corporation, to provide for the punishment of a particular offence, will be more readily inferred from the general grant of legislative power to such a corporation, if the offence, to be prohibited and punished, is peculiarly the concern of the local community, and does not necessarily, or vitally, affect the public interests of the State at large.[4]

[1] Jett v. Richmond, 78 Ind. 316; Indianapolis v. Huegle, 18 N. E. R. 172.

[2] Grand Rapids v. Bateman, (Mich. 93) 53 N. W. R. 6; Howe v. Plainfield Treas., 37 N. J. L. 145; Brownville v. Cook, 4 Neb. 101; State v. Grimes, 52 N. W. R. 42; *Ex parte* Tuttle, 91 Cal. 589; *In re* Cheney, 27 Pac. R. 436; 90 Cal. 617; Cooley Const. Lim. 199; March v. Com., 12 B. Mon. 25, 29.

[3] Mayor v. Allaire, 14 Ala. 400. In this case, Collier, P. J., says: "The object of the power conferred by the charter, and the purpose of the ordinance itself was not to punish an offence against the criminal justice of the country, but to provide a mere police regulation for the enforcement of good order and quiet within the limits of the corporation. The offence against the corporation and the State are distinguishable, and wholly disconnected, and the prosecution at the suit of each proceeds upon different hypotheses: the one contemplates the observance of the peace and good order of the city; the other has a more enlarged object in view,—the maintenance of the peace and dignity of the State." See also Mayor etc. v. Rouse, 8 Ala. 515; Moore v. State, 16 Ib. 411; Greensboro v. Mullins, 13 Ib. 341; Van Buren v. Wells, 14 S. W. R. 38; Pittsburgh v. Trimble, 46 Mo. App. 459; De Soto v. Brown, 46 Mo. App. 148; McPherson v. Chebouse, 114 Ill. 46; City of Madison v. Hatcher, 8 Blackf. (Ind.) 341; Waldo v. Wallace, 12 Ind. 582.

[4] Barter v. Com., 3 Pa. St. 253; State v. Clark, 1 Dutch. 54; State v. Pollard, 6 R. I. 290; People v. Jackson, 8 Mich. 110; State v. Topeka, 36 Kan. 76; *In re* Sic., 73 Cal. 142; *Ex parte* Bourgeois, 60 Miss. 663;

It is, of course, always competent for the Legislature, in the absence of constitutional prohibition, to authorize a municipality by express statute to impose new and additional penalties, and to create new remedies for acts already punishable by the State.[1]

§ 118. **Sanitary regulations—Slaughter houses—Cemeteries—Unwholesome provisions.**—There is no dispute as to the right of the State to delegate to municipal corporations that portion of its police power, by which the health of the community is protected.[2] And quarantine ordinances, passed in the exercise of such delegated power, are not in contravention of the clause of the Federal Constitution, relating to the national control of foreign and interstate commerce.[3] By virtue of the power thus delegated to them, municipal corporations have attempted to regulate the occupations of their citizens and the

State v. Lahatnt, 2 So. 550 (La. 87); Dairs v. Anita, 35 N. W. R. 244; 73 Iowa, 325; Diamond State Iron Co., 8 Atl. R. 368; McLaughlin v. Stephens, 2 Cranch C. C. 148; St. Louis v. Bentz, 11 Mo. 61; United States v. Holly, 3 Cranch C. C. 656; Brophy v. Hyatt, 15 Pac. R. 399; 10 Col. 223; State v. Cowan, 29 Mo. 330; Amboy v. Sleeper, 31 Ill. 499; Chillicothe v. Brown, 38 Mo. App. 608; State v. Ledford, 3 Mo. 102; St. Louis v. Cafferata, 24 Ib. 94; Independence v. Moore, 32 Ib. 392; State v. Heidenhin, 7 So. 621 (smoking in street cars); Lancaster v. Elec. Co., 8 Pa. Co. Ct. R. 178; Brooklyn v. Toynbee, 31 Barb. 282; Davenport v. Bird, 34 Iowa, 524; St. Charles v. Meyer, 58 Mo. 86; New Orleans v. Miller, 7 La. An. 651.

[1] State v. Ludwig, 21 Minn. 202; State v. Charles, 16 Ib. 474; Lowenstein v. Myers, 20 N. Y. S. 761; State v. Tryon, 39 Conn. 183; Com'rs v. Harris, 7 Jones (Law) 281; State v. Grimes, 52 N. W. R. 42.

[2] People v. Wagner, 86 Mich. 594; Com. v. Parks, (Mass. 92) 30 N. E. R. 174; Com. v. Cutter, (Mass. 92) 29 N. E. R. 1146; *In re* Shrader, 33 Cal. 279; Ashbrook v. Com., 1 Bush, 139; State v. Schlemmer, 42 La. An. 1166 (ordinance requiring the filling up of wells); Kansas City v. Cook, 38 Mo. App. 660; People v. Gordon, (Mich. 90) 45 N. W. R. 658; State v. Cowan, 29 Mo. 330; Monroe v. Gerspach, 33 La. An. 1011; Wreford v. People, 14 Mich. 41; Harrison v. Baltimore, 1 Gill, 264; Boehn v. Same, 61 Md. 259; Summerville v. Pressley (S. C. 90) 11 S. E. R. 545; City & S. R. Co. v. Savannah, 77 Ga. 731; Tucker v. Virginia City, 4 Nev. 20; Johnson v. Simonton, 43 Cal. 242; *In re* Lineham, 72 Cal. 114; Huesing v. Rock Island, 128 Ill. 465; Gregory v. Mayor, 40 N. Y. 293; People v. Mulholland, 82 N. Y. 324; State v. Wordin, 56 Conn. 216; Train v. Boston Dis. Co., 144 Mass. 523; O'Donovan v. Wilkins, 24 Fla. 281; Polinsky v. People, 73 N. Y. 35; Health Dep. N. Y. v. Knoll, 70 N. Y. 530.

[3] St. Louis v. McCoy, 18 Mo. 238; St. Louis v. Boffinger, 19 Ib. 13; Metcalf v. St. Louis, 11 Ib. 103. Cf. *contra*, New Decatur v. Berry, 90 Ala. 432.

use of their property, both real and personal, their customs and manner of living; and, in fact, have endeavored to control to a certain extent the life of the citizen from the moment that he is sent[1] into the world, until his corpse is deposited in the grave.[2]

It is very evident that a comprehensive power like this, touching the social and business life of the community at so many points, is subject to abuse, and may, by conferring exclusive privileges or unduly interfering with private rights, be so exerted as to prove tyrannous instead of beneficial, and a public burden, in place of a public protection.[3] For the exercise of such delegated discretionary powers, the municipality will not be liable;[4] but it should always be remembered that even discretionary and public police powers must be exercised by a municipality in good faith,[5] without malicious intent, and in conformity with the paramount authority of the Federal and State Constitution, and the general law of the land.[6]

Under the general charter power, to establish regulations for the preservation of the public health, slaughter-houses may be regulated, and confined within specified territorial limits;[7] and ordinances may be adopted, imposing a fine for the sale of stale or unwholesome provisions.[8] In the larger municipalities, this power is often expressly conferred.[9] But when the destruction of putrid or unsound provisions is ordered, the health officials,

[1] Record of birth. N. Y. Con. Act, §§ 603-607; *In re* Lauteryung, 48 N. Y. Super. 308.

[2] N. Y. Con. Act, § 569.

[3] See the very able and instructive dissenting opinions of C. J. Chase, and JJ. Field, Swayne and Bradley, in the well known Slaughter House cases, 16 Wall. 36.

[4] People v. Board of Health, 33 Barbour, 344.

[5] Powers of boards of health construed. See Barton v. New Orleans, 16 La. An. 317; Hutton v. Camden, 39 N. J. L. 122; Ferguson v. Selma, 43 Ala. 398; Belcher v. Farrar, 8 Allen, 325; Hazen v. Strong, 2 Vt. 427; Comrs. v. Powe, 6 Jones Law, 134; Wilkinson v. Albany, 28 N. H. 9; State v. Trenton, 36 N. J. L. 283; Weil v. Record, 24 N. J. Eq. 169.

[6] See this subject, Tiedeman Limitation of Police Power, § 2, *et seq.*

[7] Watertown v. Mayo, 109 Mass. 315; Metro. Board v. Heister, 37 N. Y. 661; St. Paul v. Burnes, 38 Minn. 176; Cronin v. People, 82 N. Y. 318; Wreford v. People, 14 Mich. 41; *Ex parte* Heilbron, 65 Cal. 609; *Ex parte* Shrader, *supra*; Jugman v. Chicago, 78 Ill. 405; Butchers Union S. House v. Cres. City L. S. Landing, 111 U. S. 746; s. c., 16 Wall. 13.

[8] Rochester v. Collins, 12 Barb. 559; Johnson v. Simonton, 43 Cal. 242.

[9] N. Y. Consol. Act, ch. 12, p. 268, *et seq.* (ed. 1891.)

in order to escape personal liability, must show that the property was in some way dangerous to the public health.[1]

Under the well settled rule that municipal corporations may by ordinances, or otherwise, make proper and reasonable regulations for the burial of the dead,[2] the relatives of the deceased will not be allowed to create a nuisance by the manner in which the corpse is disposed of. So a by-law is valid, which requires that the body must be interred at a certain place, and in a grave having a specified depth.[3] But the power, vested in a municipality to establish cemeteries, within or without city limits, does not give it the right to prohibit the establishment of private cemeteries outside the city limits; or the privilege of controlling or supervising the use, which is made of them.[4]

In New York it was held that a municipal grant of land for cemetery purposes, with covenants for quiet enjoyment, or a license permitting interments in private grounds, would not prevent the passage of an ordinance, prohibiting interments in that part of the city.[5] Whether cemeteries in cities are nuisances *per se*, or can only be made so by special circumstances, is a question, upon which the authorities are not agreed;[6] although the fact, that their existence reduces the value of property near by, does not necessarily constitute them a nuisance.[7]

It is very evident that land and buildings in agricultural districts, or sparsely settled rural villages, may be put to far different uses by their owners, than in thickly populated and commercial cities. For this reason, under the power to pass necessary ordinances for the preservation of the public health,

[1] Underwood v. Green, 42 N. Y. 140.

[2] Coates v. Mayor, 7 Cow. 585; Brick Pres. Ch. v. New York, 5 Ib. 538; Mayor of N. Y. v. Slack, 3 Wheel. Cr. Cas. 237; Austin v. Murray, 16 Pick. 121; New Orleans v. St. Louis Ch., 11 La. An. 244; Musgrove v. St. Louis, 10 Ib. 431; City Council v. Bapt. Church, 4 Strob. (S. C.) 306; Kincaid's App., 66 Pa. St. 411; Com. v. Fahey, 5 Cush. 408; Com. v. Goodrich, 13 Allen, 546.

[3] Bogert v. Indianapolis, 13 Ind. 134; City Council v. Church, *supra*; New Orleans v. St. Louis Church, *supra*.

[4] Begein v. Anderson, 28 Ind. 79.

[5] Brick Pres. Ch. v. Mayor, 5 Cow. 538; People v. Pratt, 14 N. Y. S. 551; compare *contra*, Lake View v. Rose Hill Cem. Co., 70 Ill. 192.

[6] See Tiedemau's Limitations of Police Power, § 122 *d*; Lake View v. Rose Hill Cem. Co., 70 Ill. 192; Brick Pres. Ch. v. Mayor, 5 Cow. 538, and other cases cited in Police Power.

[7] New Orleans v. St. Louis Church, 11 La. An. 244; Musgrove v. Same, 10 Ib. 431; Lake View v. Letz, 44 Ill. 81.

it was held to be valid for a city to forbid the growing of rice within the municipal limits;[1] or for the council to limit the amount of land, which can be cultivated within its limits by any one person or family.[2]

§ 119. **Sanitary regulations—Contagious diseases—Removal of refuse—Water supply.**—Perhaps the most important power, which is exercised by a municipal corporation in the protection of the health of the city, is the power to remove to a place of detention all persons, who are sick with contagious or infectious diseases, and to prevent communication with houses, where such diseases have broken out.[3] The power and right of the state to place those unfortunate persons, who are suffering from a disorder which is likely to become epidemic, in a place of confinement, exercised directly or delegated to a municipal corporation, is too well settled to need much discussion.[4]

When the city was authorized "to enact all ordinances necessary . . . . to prevent the introduction of contagious diseases within the city and within three miles of the same," the Court said:[5] "The transfer of this salutary and essential power is given in terms as explicit and comprehensive, as could have been used for such a purpose. To accomplish, within the specified territorial limits, the objects enumerated, the corporate authorities were clothed with all the legislative powers which the General Assembly could have exercised. Of the degree of necessity for such municipal legislation, the mayor and city council were the exclusive judges. To their sound discretion is committed the selection of the means and manner (contributory to the end) of exercising the powers which they might deem requisite to the accomplishment of the objects of which they were made the guardians. 'To prevent the introduction of contagious diseases within the city,' etc., they might impose heavy penalties on the captain, owner or consignee of any ship or other vessel entering the port, on board of which small-pox or other contagious

[1] Green v. Savannah, 6 Ga. 1.

[2] Summerville v. Pressley, 11 S. E. Rep. 545.

[3] N. Y. Consol Act. § 549, etc., p. 275 (ed. 1891). See Brown v. Purdy, 6 N. Y. St. Rep. 143; Gregory v. Mayor, 49 N. Y. 273, for Powers of the Board of Health of New York City.

[4] See Tiedeman's Limitations of Police Power, § 42; Harrison v. Baltimore, 1 Gill, 264.

[5] In Harrison v. Baltimore, 1 Gill, 264.

disease might prevail, or they might seek the accomplishment of their object by causing the vessel and all persons to be taken possession of and controlled, until their purification and disinfection were effected, and impose on the captain, owner or consignee, the payment or reimbursement of all the expenses incurred by such proceedings; or they might adopt, at the same time, both suggested remedies, if for the successful and faithful execution of their powers they deemed it necessary to do so."[1] When its charter confers upon a city the express or implied power to employ means for the protection of the public against the ravages of a pestilential disease, the power to hire or erect buildings, for the confinement and care of infected and sick persons, will be included.[2]

The time, manner and necessity of cleaning sinks, cesspools and other receptacles for refuse, are legitimate objects of municipal regulation;[3] and it is competent for the corporation in the same connection to forbid the removal of house dust, or offal of any kind, through the streets by anyone, not holding a license from the city; the object to be accomplished being the exercise of a stricter municipal control over the matter, by limiting the number of those who may be employed to do this work.[4]

The power to contract for a municipal water supply will be found treated at some length in another section of this work;[5] and it need only be said in this connection, that, on the ground that plenty of water is necessary to the preservation of the public health, it was held that a city, under its power to pass police ordinances, and ordinances to preserve health, could contract for an artesian well, to be bored on its own land.[6] But the

[1] Cf. Dubois v. Augusta, Dudley (Ga.) 30.

[2] Anderson v. O'Conner, 98 Ind. 168; Boom v. Utica, 2 Barb. 104; Vionet v. Municipality No. 1, 4 La. An. 42; Bozant v. Campbell, 9 Rob. (La.) 411; City Council v. Boyd, 1 Const. Rep., A. D. 1817 (S. C.) 352; Richmond v. Henrico Co., 83 Va. 204; Hull v. Lexington, 18 Mo. 401.

[3] Com. v. Cutler, (Mass.) 29 N. E. R. 1146; Nicoulin v. Lowery, 49 N. J. L. 391.

[4] *In re* Vandine, 6 Pick. 187; Com. v. Stodder, 2 Cush. 562, 575, 576; N. Y. Con. Act, §§ 566, 567.

[5] §§ 144, 144 *a*, and ch. x, Contracts, § 175.

[6] Livingston v. Peppin, 31 Ala. 542; Hale v. Houghton, 8 Mich. 458; McKnight v. New Orleans, 24 La. An. 412; Rome v. Cabot, 28 Ga. 50; People v. McClintock, 45 Cal. 11; Suffield v. Hathaway, 44 Conn. 521; further, as to water supply, see Springfield v. Fulmer, (Utah) 27 Pac. Rep. 577; Dutton v. Aurora, 114 Ill. 1; Long v. Duluth, 51 N. W. Rep. 913 (exclusive franchise).

power to protect the health of the public must be exercised in a reasonable manner; and, on this ground, an ordinance forbidding any person from bringing second hand clothing into a town, or exposing it for sale therein, without furnishing proof that it did not come from an infected district, is not, in the absence of an epidemic, a valid exercise of a charter power, to establish quarantine regulations, but is an unreasonable restraint of trade.[1]

§ 120. **Regulation and abatement of nuisances in general.**—For the better security and promotion of the health of the community, municipalities are, commonly, most liberally endowed with power to prevent the creation and maintenance of nuisances; and it has been said that the power to abate nuisances is inherent in municipal corporations, so absolutely essential is it to the proper exercise of the police power;[2] especially in large and crowded commercial, and manufacturing, cities.[3]

Such power is peculiarly subject to abuse, and its exercise may become unlawful, either because the thing or act complained of is not in fact a nuisance, or because the remedy provided goes beyond the abatement of the nuisance, and restrains the enjoyment of personal rights or of property, which is in no legal sense a nuisance. In all these cases, it is a judicial question, whether the regulation for abatement is unconstitutional, on these grounds.[4] For example, a municipality may cause a house, which has fallen into decay or is irretrievably unhealthy, to be destroyed;[5] but when the nuisance consists merely in the use which is made of property, and the property is not in itself a nuisance *per se*, such an act would be illegal, because the remedy went beyond the abatement of the nuisance.[6] It follows, as a result of the first proposition above set

[1] Koseinsko v. Slomberg, 9 So. Rep. 297.

[2] Baker v. Boston, 12 Pick. 184; Kennedy v. Phelps, 10 La. An. 227; State v. Heidenhain, 42 Ib. ; Hellen v. Noe, 3 Ired. (N. C.) 493.

[3] Hart v. Mayor etc., 9 Wend. 571.

[4] Tiedeman's Limitations of Police Power, § 122 *a*.

[5] Theilan v. Porter, 14 Lea, 622; Meeker v. Van Rensselaer, 15 Wend. 397; Manhattan Co. v. Van Keuren, 23 N. J. Eq. 251; Green v. Lake, 60 Miss. 451.

[6] Welch v. Stowell, 2 Dough. (Mich.) 332; Clark v. Syracuse, 13 Barb. 32; see, also, Tiedeman's Limitations of Police Power, § 122 *g*; Earp v. Lee, 71 Ill. 193; Miller v. Burch, 32 Tex. 209; Brightman v. Bristol, 65 Me. 426; Shepard v. People, 40 Mich. 487; Czarniecki's App. (Pa. 1887), 11 Atl. Rep. 660; Elias v. Nightingale, 8 E. & B. 698; Anthony

forth, that a general power to abate nuisances can only be validly exercised upon that which has been judicially determined to be a nuisance, either by reason of its nature, location, or use.[1] In some of the States, the use of real property for certain purposes, is declared a nuisance by statute. Thus, in Maine and Rhode Island, keeping a house of ill fame or for lewd purposes, for gambling or for the illegal sale of liquor, is a statutory nuisance; and the same statute obtains in some other States.[2]

The State may confer upon a municipal corporation the express power to deal summarily with a nuisance, without requiring a resort to a formal legal proceeding [3] or a jury trial.[4] But

v. Brecon M. Co., L. R. 2 Ex. 167; Ib., 7 Ex. 399; Saltonstall v. Bancker, 8 Gray, 195; Hudson v. Thorne, 7 Paige (N. Y.) 261; Chicago v. Laflin, 49 Ill. 172; North W. Fer. Co., 97 U. S. 659; comp. Ridgeway v. West, 60 Ind. 371.

[1] Roberts v. Ogle, 30 Ill. 459; Salem v. Eastern R. Co., 98 Mass. 431; Dingley v. Boston, 100 Mass. 544; Van Dyke v. Cincinnati, 1 Disney (Ohio) 532; Crosby v. Warren, 1 Rich. (S. C.) 385; Ward v. Little Rock, 41 Ark. 526; Denver v. Mullen, 7 Col. 345; McKibbin v. Fort Smith, 35 Ark. 352; St. Paul v. Gilfillan, 36 Minn. 298. In Yates v. Milwaukee, 10 Wall. 497, the court said: "The mere declaration by the city that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance, unless in fact it had that character. It is a doctrine, not to be tolerated in this country, that a municipal corporation, without any general law, either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by the mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property in the city, at the uncontrolled will of the temporary local authorities." Des Plaines v. Poyer, 123 Ill. 348; State v. Newark, 38 N. J. L. 264; Everett v. Council Bluffs, 46 Iowa, 66; Cole v. Kegler, 64 Ib. 59; Pieri v. Shieldsboro, 42 Miss. 493; Compton v. Waco B. Co., 62 Tex. 715; Underwood v. Green, 42 N. Y. 140; Miller v. Burch, 32 Tex. 208; Vogt v. Mayor etc., (Md.) 4 Am. & Eng. Cor. Cas. 329; River Rendering Co. v. Behr, 77 Mo. 91; State v. Mott, 61 Md. 297; Hennessy v. St. Paul, 37 Fed. Rep. 565; Arkadelphia v. Clark, (Ark. 1889) 27 Am. & Eng. Cor. Cas. 586; Evansville v. Martin, 41 Ind. 145; Green v. Savannah, 6 Ga. 1; State v. Jer. City, 29 N. J. L. 170; Glenn v. Baltimore, 5 Gill & J. 429; Alpers v. Brown, 60 Cal. 447; Everett v. Marquette, 53 Mich. 450; Joyce v. Woods, 78 Ky. 386; Babcock v. Buffalo, 56 N. Y. 268; Darst v. People, 62 Ill. 306; Pye v. Peterson, 45 Tex. 312; McCrowell v. Bristol, 5 Lea, 685; Ison v. Manley, 76 Ga. 804.

[2] Stimpson Amer. Stat. Law, § 2059.

[3] Baumgartner v. Hasty, 100 Ind. 575.

[4] See article of John B. Uhle, 30 Am. Law R. (N. S.) 157; King v. Davenport, 98 Ill. 305.

when the injury caused by the existence of the nuisance is general, and public rights are affected, an indictment or other public prosecution is the proper remedy, both to abate the nuisance, and to punish the person who is responsible for its existence.[1] When, however, as it frequently happens, the nuisance is both public and private, its abatement may be obtained by a private individual, who suffers special damage, if the municipal authorities should neglect to prosecute the person maintaining it.[2]

In addition to the remedy at law by indictment, a municipal corporation may invoke the assistance of a Court of Equity, to restrain or forbid the erection or maintenance of a public nuisance by the issue of an injunction; particularly, where the nuisance is likely to be permanent and continuous.[3] And the same remedy is available to private individuals, who suffer special damage from the public nuisance.[4]

A municipal corporation has no more right to maintain a nuisance, or allow others to maintain one, than has an individual; and, for a nuisance upon its property, created or permitted by it, it will be subject to the same remedy by injunction, or a suit

[1] State v. Bell, 5 Port. (Ala.) 365; Rex v. White, 5 Burr. 333; State v. Munzenmaier, 24 Iowa, 87; State v. Anwerda, 40 Ib. 151; Syracuse etc. Co. v. People, 66 Barb. 25; State v. Noyes, 30 N. H. 279; Maxwell v. Bryne, 36 Ind. 120; Taggart v. Com., 21 Pa. St. 527; State v. Haines, 30 Me. 65; School Dis. v. Neil, 36 Kan. 617; Billard v. Erhart, 35 Ib. 611; Blanc v. Murray, 36 La. An. 162; King v. Sadler, 4 C. & P. 218; Holmes v. Wilson, 10 A. & E. 503; *In re* Douglas, 3 Q. B. 825; Thompson v. Gibson, 7 M. & W. 456; Queen v. Chorley, 12 Q. B. 515; Queen v. Liscombe, 2 Chit. 214.

[2] Lutterloh v. Cedar Keys, 15 Fla. 506; Henkel v. Detroit, 49 Mich. 249; Fritz v. Hobson, 19 Am. Law Reg. 615; Bushnell v. Robeson, 62 Iowa, 540; Irwin v. Telephone Co., 37 La. An. 63; McDonald v. Newark, 42 N. J. Eq. 136; Harley v. Merrill B. Co., 48 N. W. Rep. 1000. Definition of Nuisance. King v. Lloyd, 4 Esp. 200; King v. White, 1 Burr. 333; King v. Davey, 5 Esp. 217; Burditt v. Swenson, 17 Tex. 489.

[3] Hoole v. Atty. General, 22 Ala. 190; Atty. General v. Gas Co., 19 Eng. L. & Eq. 639; Aldrich v. Howard, 7 R. I. 87; Zabriskie v. Jersey City, etc., 13 N. J. Eq. 314; Jersey City v. Hudson, Ib. 420; People v. St. Louis, 10 Ill. 372; Attorney General v. Brown, 24 N. J. Eq. 89; Moore v. Walla Walla, 2 Wash. Ter. 184; Metro. City R. R. v. Chicago, 96 Ill. 620; Dumesnil v. Dupont, 18 B. Mon. 800; Stearns Co. v. St. Cloud, etc. Co., 36 Minn. 425; Earl of Ripon v. Hobart, 3 Mylne & Keen, 169, 179; Flint v. Russell, 5 Dillon, 151; Pine City v. Munich, 27 Am. & Eng. Cor. Cas. 572; Ottumwa v. Chinn, 75 Iowa, 405; Newark Aq. Brd. v. Passaic, 45 N. J. Eq. 393; see New York Consol. Act, § 646, and Health Dep. v. Purdon, 99 N. Y. 237.

[4] Tiedeman Equity Jurisprudence, § 484.

for damages.[1] So, a license from the municipality will be no defence, in an action against an individual to abate a public nuisance.[2]

Subject to the qualifications and restrictions above stated, it may be said generally that, when a municipal corporation has under its charter the authority to remove nuisances, or to prevent their creation, in order to render the exercise of the power legal, it must be shown that what is being done is in the interest of the public health, safety and convenience; or, in other words, that the thing or act prohibited is a nuisance.[3] Where the property or act is a nuisance *per se*, the power of the municipality is unquestioned,[4] even though its exercise may involve the destruction of private property.[5] But when the municipality assumes to pronounce property to be a nuisance, which is not a nuisance, either by statute,[6] by the nature of the property, or by its use or location, it will be held liable to the owner for all damages which may be caused by its action, in the abatement of the alleged nuisance,[7] to the same extent as a private person would be, under similar circumstances.[8]

[1] Judge v. Meriden, 38 Conn. Mootry v. Danbury, 45 Ib. 450; Ft. Worth v. Crawford, 74 Tex. 404; Suffolk v. Parker, 79 Va. 660; Pennoyer v. Saginaw, 8 Mich. 534; Haskell v. New Bedford, 108 Mass. 208; Boston Roll. Mills v. Cambridge, 117 Ib. 396; State v. Mayor, 12 Lea, 146; Chapman v. Rochester, 110 N. Y. 273; Sherman v. Langham, 30 Am. & Eng. Cor. Cas. 539; Niblett v. Nashville, 12 Hersk. 684; Hannibal v. Richards, 82 Mo. 330; Harper v. Milwaukee, 30 Wis. 365; Brayton v. Fall River, 143 Mass. 218; Petersburg v. Applegarth, 28 Gratt. 321; Haag v. Com'rs, 60 Ind. 511.

[2] King v. Cross, 2 C. & P. 483; Pettis v. Johnson, 56 Ind. 139; Ryan v. Copes, 11 Rich. (S. C.) Law, 217; Garrett v. State, 49 N. J. L. 94*a*.

[3] *Ex parte* Robinson, (Tex.) 17 S. W. 1057; May v. People, 27 Pac. Rep. 1010; Dingley v. Boston, 100 Mass. 544; Lake View v. Letz, 44 Ill. 81; Com. v. Worcester, 13 Pick. 462; Dubuque v. Maloney, 9 Iowa, 450; Com'rs v. Northern Lib. G. Co., 12 Pa. St. 318; People v. Albany, 11 Wend. 539; St. Louis v. Bentz, 11 Mo. 61; Collins v. Hatch, 18 Ohio, 523; New Orleans v. Phillipi, 9 La. An. 44; Taylor v. Griswold, 14 N. J. 222; Peck v. Lockwood, 5 Day (Conn.) 22; Baltimore v. Radecke, 49 Md. 217.

[4] Ferguson v. Selma, 43 Ala. 398; Nolin v. Franklin, 4 Yerg. 163; North Chicago, etc., Co. v. Lakeview, 105 Ill. 207; Hart v. Albany, 9 Wend. 571.

[5] See Kiley v. Kansas, 69 Mo. 102; Parker v. Macon, 39 Ga. 729; Bissett v. St. Joseph, 53 Ib. 290; Cain v. Syracuse, 95 N. Y. 83; as to liability of the city for a failure to exercise the power to abate nuisance created by others.

[6] Nuisance as applicable to New York city defined. Con. Act, § 636.

[7] Cole v. Kegler, 64 Iowa, 59.

[8] Welch v. Stowell, 2 Doug. 332; Clark v. Mayor of Syracuse, 13 Barb.

It is no defence, in an action to abate a public nuisance, that the defendant was too poor to abate it himself;[1] that the public derived some advantage from it;[2] that the municipality had not assigned a separate place for the obnoxious business;[3] that similar nuisances have been allowed or acquiesced in by the authorities;[4] that the defendant has leased the premises, and cannot lawfully enter to abate the nuisance,[5] or that he has used the utmost possible care to prevent the nuisance from injuring others.[6] What combination of annoyances will constitute a public nuisance in any particular instance, usually depends on the circumstances of each case, as it arises.[7] No particular sorts of annoyance are necessary to make a nuisance; and the Courts have not laid down any definition of nuisances which is at all exhaustive or inclusive.

Aside from those things, which are prejudicial to the public welfare or morals, or injurious to private rights wherever they may be located, much latitude has been allowed in modern times in the doing of what, by the earlier decisions, had been pronounced to be nuisances; and this is to be accounted for, and justified by the rapid advance in population of the towns and cities of this country[8] and England, coupled with the necessity for

32; Church v. Milwaukee, 31 Wis. 512; Kennedy v. Board of Health, 2 Pa. St. 366; Green v. Savannah, 6 Ga. 1; Underwood v. Green, 42 N. Y. 140; Yates v. Milwaukee, 10 Wall. 497; Wreford v. People, 14 Mich. 41; Everett v. Council Bluffs, 46 Iowa, 66; Salem v. Eastern R. Co., 98 Mass. 431. In a few of the states, provision has been made in certain cases for remuneration of those whose property is injured through the abatement of nuisances. Leavitt v. Cambridge, 120 Mass. 157; Farnsworth v. Boston, 126 Ib. 1; Barnstable Sav. Bk. v. Boston, 127 Ib. 254; Cavanaugh v. Boston, 139 Mass. 426; *In re* Chessborough, 17 Hun, 561; Read v. Cambridge, 126 Mass. 427; Nickerson v. Boston, 131 Ib. 306; Bush v. Dubuque, 69 Iowa, 233.

[1] Baltimore etc. T. Co. v. State, 63 Md. 573.

[2] Respublica v. Caldwell, 1 Dall. 150; State v. Kaster, 35 Iowa, 221; Works v. Junction R. Co., 5 McLean, 425; Duluth v. Mallet, 43 Minn. 204.

[3] State v. Hart, 34 Me. 36.

[4] People v. Mallory, 4 Thompson & C. (N. Y.) 567.

[5] Thompson v. Gibson, 7 M. & W. 455; Smith v. Elliott, 9 Pa. St. 345.

[6] McAndrews v. Collard, 42 N. J. L. 189; Cogswell v. New York, etc. Co., 103 N. Y. 10; People v. Lead Works, 82 Mich. 471.

[7] See remarks of Pollock, J., in Bamford v. Turnley, 113 Eng. C. L. 66, upon the impossibility of laying down any clear or certain rule as to what will constitute a nuisance.

[8] See this branch of the subject discussed in Galbraith v. Olivet, 3 Pitts. (Pa.) 79, and Huckenstine's App., 70 Pa. St. 102.

the location in large centers of population of mills, factories and shops, in which the wage-earners of the locality may find employment, and by which the inhabitants of the cities are supplied with the necessities of life. In the light of these profound changes in the material, economic and municipal life of the modern world, there is a necessary revision of the conception of what constitutes an unlawful nuisance.[1] "If one lives in a city he must expect to suffer the dirt, smoke, noisome odors, noise and confusion incident to city life. As Lord Justice James beautifully said, in Salvin v. North Brancepeth Coal Co.,[2] 'If some picturesque haven opens its arms to invite the commerce of the world, it is not for this Court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and shipbuilding town, which would drive the Dryads and their masters from their ancient solitude.'"[3] In another case,[4] it was said that "the people who live in such a city, *i. e.* where the principal industry consists of manufactures, do so of choice, and they voluntarily subject themselves to its peculiarities and its discomforts for the greater benefits they think they derive from their residence or business there."

The application of steam to manufacturing purposes, the use of gas and electricity for illuminating streets and buildings, the running of horse cars and railroad trains in city streets, and similar modern innovations, have created annoyances which, by their magnitude and injurious character, have caused the minor evils, with which the earlier English cases deal, to dwindle into insignificance. Under such changed conditions, the principles of the earlier decisions are not always applicable, and many trades, which were at one time declared nuisances *per se*, would now not be deemed nuisances at all, unless they should become so by the manner, or the locality, in which they are conducted.[5]

It is impossible in a work of this nature, to treat the subject

[1] Harrison v. Good, L. R. 11 Eq. 338; Salvin v. North Brancepeth C. Co., L. R. 8 Ch. Ap. 467; Broder v. Saillard, L. R. 2 Ch. Div. 692; Bamford v. Turnley, 3 B. & D. 62, 66; Tipping v. St. Helen's Smelting Co., 4 Ib. 608; 11 H. L. Cas. 642; Gaunt v. Fynney, L. R. 8 Ch. Ap. 8.

[2] L. R. 9 Ch. App. 705.

[3] Campbell v. Seaman, 63 N. Y. 568.

[4] Huckenstein's Appeal, 70 Pa. St. 102; 10 Am. Rep. 669.

[5] In Toyhales Case, Cro. Car. 510, a candle factory, and in Jones v. Powell, Palm. 537, a tobacco factory and brewery, were declared nuisances *per se*.

of nuisances in detail, or to enumerate more than a small proportion of the things, which have at various times been regarded as nuisances by the courts of law. So far as trades and occupations of an offensive character are concerned, it may be said that it is not necessary that the disagreeable smell produced should be injurious to health,[1] provided the neighborhood is materially deprived of fresh and pure air.

A dense smoke has been judicially declared to be a nuisance,[2] and a noise, such as the ringing of bells, has been enjoined.[3] But whether smoke, noise or smell would constitute a nuisance, within the limits of a municipal corporation, would depend to a great extent upon their character, and upon the location and surroundings of the source of the annoyance.[4] So, the noise made by a tinsmith,[5] a circus,[6] a rolling mill,[7] a shooting gallery,[8] in working stone quarries,[9] by the stamping of horses in a stable,[10] or cattle in a pen,[11] by a gold beater,[12] a blacksmith,[13] or a printing press,[14] have been held sufficient to constitute such occupations a nuisance; particularly, when carried on in quiet localities.

But a livery stable, tannery,[15] or brick kiln,[16] is not even in a populous city a nuisance *per se;* and whether it shall be regarded as a nuisance at all, depends upon its location, and the mode in which it is built and used.[17]

Many things, such as cemeteries, factories, or lime kilns are

[1] The King v. White, 1 Burr, 337; The King v. Neil, 2 C. & P. 485; St. Helens Chem. Co. v. St. Helens, L. R. 1 Ex. Div. 196.

[2] Harmon v. Chicago, 110 Ill. 400; Louisville & N. R. Co. v. Orr, (Ky.) 15 S. W. Rep. 8; comp. *contra*, St. Paul v. Gilfillan, 36 Minn. 298.

[3] Harrison v. St. Marks Church, 12 Phila. (Pa.) 259; Leete v. Pilgrim etc. Church, 14 Mo. App. 590; Davis v. Sawyer, 133 Mass. 289.

[4] See Peo. v. Lewis, 49 N. W. 140.

[5] The King v. Lloyd, 4 Esp. 200.

[6] Inchbold v. Robinson, L. R. 4 Ch. App. 388.

[7] Scott v. Firth, 4 F. & F. 349.

[8] King v. Moore, 3 B. & Ad. 184.

[9] Queen v. Matters, 10 Cox, 6.

[10] Dargan v. Waddell, 9 Ired. (N. C.) 244.

[11] Bishop v. Banks, 33 Conn. 121.

[12] Wallace v. Ames, 10 Phila. 356.

[13] Fish v. Dodge, 4 Den. 311.

[14] Roberson v. Campbell, 13 F. C. (S. C.) 61.

[15] State v. Cadwalader, 36 N. J. L. 283.

[16] Wanslead etc. v. Hill, 13 C. B. 479; State v. Mott, 61 Md. 297.

[17] Aldrich v. Howard, 7 R. I. 87; s. c., 8 Ib. 246; Morris v. Brower, Anthons N. P. (N. Y.) 368; Flint v. Russell, 5 Dillon, 151; Harrison v. Brooks, 20 Ga. 537; Packard v. Collins, 23 Barb. 444; Shiras v. Olinger, 50 Iowa, 571.

The following have been in recent

not in themselves nuisances, when established remote from dwelling houses, but may become so by the increase of urban population, and the extension of the city's area into the surrounding country. In such a case, the length of time, during which the objectionable object existed, will not eliminate its illegal character as a nuisance; and the fact, that the complainant approaches it, does not make the person maintaining the nuisance the less liable for his wrongdoing.[1]

times declared nuisances by the courts on account of the nature of the thing itself, or of the mode or location in which it existed: A pig sty (Com. v. Van Sickle, Bright. (Pa.) 69), steam whistle (Parker v. Union W. Wks., 42 Conn. 309), bowling alley (State v. Haynes, 30 Me. 65), sawing of marble (McKeon v. See, 51 N. Y. 300), pigeon match (Rex v. Moore, 3 B. & A. 184), skating rink (Snyder v. Cabell, 29 W. Va. 48), an electric light engine (Yocum v. Hotel St. George, 18 Abb. N. C. 340), blacksmith shop (Brown v. Muzzy, 117 Ind. 258), brick burning (Walter v. Seefe, 15 Jur. 416; 4 Eng. L. & Eq. 18), tallow factories (Blunt v. Hay, 4 Sandf. Ch. 363), soap works (Howard v. Lee, 3 Sandf. Ch. 281), fat boiling (State v. Neidt, 19 Atl. Rep. 318), bone boiling (Meigs v. Lister, 23 N. J. Eq. 320), gas works (People v. N. Y. Gas L. Co., 64 Barb. 55; Bohan v. Pt. Jervis G. L. Co., 25 N. E. R. 246; 122 N. Y. 18), a carpet cleaning establishment (Craven v. Rodenhausen, 21 Atl. Rep. 774), cattle yards (Com. v. Alden, 143 Mass. 113), barns (Gifford v. Hulett, (Vt.) 19 Atl. Rep. 230), pools of stagnant water (Com. v. Read, 34 Pa. St. 275; Lockett v. Ft. Worth etc. Co., 78 Tex. 211; Busch v. N. Y. L. & W. R. Co., 12 N. Y. S. 85), oil factory (Com. v. Brown, 13 Met. 365), guano warehouse (Ruff v. Phillips, 50 Ga. 130), manure deposit (People v. Board of Health, 33 Barb. 344), a dairy (State v. Ball, 59 Mo. 321), a fertilizer factory (State v. Luce, (Del.) 6 Cent. Rep. 862; Susquehanna F. Co. v. Malone, 73 Md. 268), varnish works (Rex v. Neil, 2 C. & P. 485), chemical works (Rex v. White, 1 Burrows, 333), a distillery (Smith v. McConathy, 11 Mo. 517), privies (Wahle v. Reinback, 76 Ill. 322), a cooking range (Grady v. Walsner, 46 Ala. 381), powder magazine (Laflin, Rand etc. Co. v. Tearney, 23 N. E. Rep. 389; Chicago W. & V. Coal Co v. Glass, 34 Ill. App. 364), coal shed (Wiley v. Elwood, 25 N. E. Rep. 570), blasting rocks (Hunter v. Farren, 127 Mass. 381), any object which collects a crowd (Boston v. North Staf. R. Co., 5 De G. & S. 584), gambling house (McClean v. State, 49 N. J. L. 471), a saloon where liquor is sold illegally (Meyer v. State, 42 N. J. L. 145), crying aloud on a public street (Com. v. Harris, 101 Mass. 29; State v. Earnhardt, 107 N. C. 789).

[1] Coates v. Mayor, 7 Cow. 585; Brady v. Weeks, 3 Barb. 157; Cemetery Ass. v. Railroad Co., 121 Ill. 199. See on "coming to a nuisance," Howell v. McCoy, 3 Rawle (Pa.) 256; Smith v. Phillips, 8 Phila. (Pa.) 10; Ladies Dec. Art Club, 25 W. N. C. (Pa.) 75; Hillegass v. Helley, 5 Pa. St. 97; Alexander v. Kerr, 2 Rawle, 83; 19 Am. Rep. 616; Com. v. Upton, 6 Gray (Mass.) 473; Boston Roll. Mill v. Cambridge, 117 Mass. 396; Mulligan v. Ellis, 12 Abb. Pr.

§ 121. **Harbor and navigable waters.**—Very extensive powers are usually committed to maritime municipal corporations, by the exercise of which the use of navigable waters within municipal boundaries may be regulated.[1] Under such powers, the municipality may establish pier head lines, remove obstructions in the harbor, and regulate the use of the water by fishermen and others.[2] But the power of the municipality, to rid the harbor of obstructions, does not, it has been held, take away the right of the State authorities to have the same declared a *purpresture* or nuisance.[3] The dumping of ashes and refuse in the harbor may be prohibited by the city under a penalty;[4] but it has been held that an action *in rem*, to enforce these penalties, cannot be maintained.[5]

The duty of a municipality, having the control of an open and public harbor, is to keep it reasonably safe for those using it, whether it receives tolls or harbor dues for its use, or not.[6]

It has been held that an embankment,[7] a line[8] or a wire cable stretched across a river,[9] a gas pipe[10] or oil pipe line,[11] a telegraph cable,[12] a weir,[13] deposits of sewage,[14] or of sediment

N. S. 259; Campbell v. Seaman, 63 N. Y. 568; Vedder v. Vedder, 1 Den. 257; Barwell v. Brooks, 1 L. T. N. S. 454; Cooley on Torts, 612, 613.

[1] See Culbertson v. Southern Belle, 1 Newb. (U. S.) 461; Remy v. New Orleans, 15 La. An. 657.

[2] N. Y. Consol. Act, p. 353, (2d ed. 1891); People v. Bryan, 46 Barb. 355.

[3] People v. N. Y. & S. I. Ferry Co., 68 N. Y. 71; People v. Vanderbilt, 31 Ib. 265; People v. Supervisors, 73 N. Y. 393.

[4] Com'rs v. Frost, 4 Daly, 353.

[5] Com'rs v. Dick, 5 Daly, 391; Com'rs v. Pidgeon, 23 Hun, 346.

[6] Ligare v. Chicago, (Ill. Sup.) 28 N. E. R. 934; Parnaby v. Lan. Can. Co., 11 A. & E. 223; Metcalf v. Hetherington, 11 Ex. 257; Gibbs v. Liverpool Docks, 3 H. & N. 164; s. c., L. R., 1 H. L. 93, 104, 122; Loagmore v. G. W. R. Co., 35 L. J. C. P. 135; Francis v. Cockrell, L. R. 5 Q. B. 184; Webb v. Pt. Bruce Harbor Co., 19 Up. Can. Q. B. 626; Coe v. Wise, L. R. 1 Q. B. 711; Winch v. Conservators, etc., L. R. 7 C. P. 471; Sweeney v. Pt. Burwell H. Co., 17 Up. Can. C. P. 574; 19 Ib. 376; Berryman v. Same, 24 Up. Can. Q. B. 34.

[7] Rex v. Ward, 6 N. & M. 38.

[8] McCord v. Tiger, 6 Biss. 409.

[9] The Vancouver, 2 Sawyer, 381. Ladd v. Foster, 31 Fed. Rep. 827.

[10] Omslaer v. Philadelphia Co., 31 Fed. Rep. 354.

[11] Buffalo etc. Co. v. New York etc. R. Co., 10 Ab. N. C. 107.

[12] S. & C. Trans. Co. v. West. Union T. Co., 8 Ben. 502.

[13] Williams v. Wilcox, 3 N. & P. 606.

[14] Brayton v. Fall River, 113 Mass. 218; Washburn etc. Co. v. Worcester, 116 Ib. 458; Boston Rolling Mills v. Cambridge, 117 Ib. 396; Clark v. Peckham, 10 R. I. 35.

and débris,[1] are serious obstructions, which constitute public nuisances and should be abated by the municipal authorities, who have control of the navigable waters.

§ 122. **Regulation of occupations and amusements.**—The State, in the exercise of the police power, may subject all occupations to a reasonable regulation, when this is required for the protection of public interests or of the public welfare.[2] But such a power is by no means arbitrary or unlimited, so that the State, either directly or by the agency of a municipality, can prohibit the prosecution of a harmless business.[3]

It is comparatively easy to lay down general rules upon this subject; but much more difficult to apply them to the multifarious occupations, which, it has been claimed, may be regulated and restricted. To dictate to the individual what method he shall or shall not adopt to procure the means of livelihood, seems a most serious invasion of his right to life, liberty and the pursuit of happiness, guaranteed him by the constitution.[4] When, however, a particular calling threatens damage to the public health or welfare, or to private individuals, it is a proper subject for municipal police regulation. But such power must be exercised with caution so as not to unnecessarily infringe individual rights; and, as in the analogous cases of the suppression of nuisances, whether in any case the trade or occupation requires, or justifies police regulation, is a judicial and not a municipal question.[5] The courts will not permit an oc-

[1] Garitee v. Baltimore, 53 Md. 422; People v. Gold Run Ditch Min. Co., 56 Am. Rep. 80.

[2] Boston Beer Co. v. Massachusetts, 97 U. S. 25; N. O. Gas Co. v. Louisiana L. Co., 115 Ib. 650, 661; Bartemeyer v. Iowa, 18 Wall. 129; Foster v. Kansas, 112 U. S. 291; Kidd v. Pearson, 128 U. S. 1; Mugler v. Kansas, 123 Ib. 623; State v. Holcomb, 68 Iowa, 107; Com. v. Patch, 97 Mass. 221.

[3] For a full and exhaustive treatment of the subject of police regulation of trades and professions, see Tiedeman's Limitations of Police Power, chapter IX.

[4] Slaughterhouse Cases, 16 Wall. 106; Corfield v. Coryell, 4 Wash. C. C. 38; *In re* Jacobs, 98 N. Y. 98; Opinion of Andrews, J., in Bertholf v. O'Reilly, 74 N. Y. 509; People v. Marx, 99 N. Y. 377, 386; Miller, J., *In re* John Brosnahan, Jr., 4 McCrary, 1. That the power of a municipal corporation to regulate does not imply the power to prohibit, see Taylor v. Griswold, 2 Green (N. J.) 222; State v. Mott, 61 Md. 297; Milliken v. Weatherford, 54 Tex. 388; Hayden v. Noyes, 5 Conn. 391; Peck v. Lockwood, 5 Day (Conn.) 22; Willard v. Killingworth, 8 Conn. 247; Clason v. Milwaukee, 30 Wis. 316.

[5] Beebe v. State, 26 Ind. 501.

cupation to be interfered with, or property rights to be invaded, by a municipality, under the guise of a police regulation, when it is clear that the promotion of the public health, welfare or morals is not the end sought.[1]

The means, chosen by a municipality, in regulating occupations should not go beyond the prevention of the evil, and prohibit what is not an evil.[2] Thus, the keeping of a gambling house is a public evil, and a municipality may place it under whatever regulations it may see fit, even to the extent of prohibiting the keeping of one altogether.[3] But a laundry is not *per se* a nuisance; nor is that business anywhere unlawful. For this reason, a municipality has no power to arbitrarily give or withhold consent for the carrying on of such a lawful business, without regard to the discretion or competency of the person seeking a license.[4] On the other hand, an ordinance, prohibiting the carrying on of this business in certain localities during specified hours, was sustained as a valid and constitutional exercise of the police power.[5] The municipality cannot, by passing a regulative ordinance forbid others from engaging in that business in the same locality, while those already established are allowed to remain there.[6] When the business, which is sought to be regulated, is one which, from the manner in which it is being conducted, is very likely to become a nuisance, and to seriously injure the health of the community, the delegated police power of the municipal corporation can be exercised to a much wider extent to avert the threatened evil, even to the

[1] Austin v. Murray, 16 Pick. 126; Green v. Savannah, 6 Ga. 1; People v. Hawley, 3 Mich. 330; Ames v. P. H. L. Co., 11 Ib. 139; State v. Bean, 91 N. C. 554; *Ex parte* Mirande, 73 Cal. 365; O'Maley v. Freeport, 96 Pa. St. 24; Vansans v. Harlem Stage Co., 59 Md. 330; Muhlenbrinck v. Com'rs, 42 N. J. L. 364; Flanagan v. Plainfield, 44 Ib. 118; Clark v. New Brunswick, 43 Ib. 175.

[2] *In re* Frank, 52 Cal. 606; District v. Saville, 1 McArthur, 581; St. Louis v. Fitz, 53 Mo. 582; Long v. Taxing Dis., 7 Lea, 134.

[3] N. Y. Con. Act, § 285.

[4] Yick Wo. v. Hopkins, 118 U. S. 356, rev'g *In re* Yick Wo, 68 Cal. 294; see *In re* Tie Loy, 26 Fed. Rep. 611.

[5] Barbier v. Connolly, 118 U. S. 27; Soon Hing v. Crowley, 118 Ib. 703; *Ex parte* Maynier, 65 Col. 33; *In re* Hong Kie, 69 Cal. 149; *In re* Quong Wo, 7 Sawyer, 526.

[6] Tugman v. Chicago, 78 Ill. 405; Brooks v. Mongam, 86 Mich. 576; 49 N. W. R. 633; Sayre v. Phillips, 24 Atl. Rep. 76; 30 W. N. C. 196; Cf. Martin v. Rosedale, 29 N. E. Rep. 410; *Ex parte* Heyle, 92 Cal. 492; Richmond v. Dudley, 129 Ind. 112; 28 N. E. R. 312.

interference with valuable rights which had become vested.[1]

In the early system of English municipal government, certain prescriptive rights had been exercised by the borough, to grant exclusive privileges of trading, or of carrying on other vocations. These customary rights, which were considered to have their foundation in charters long since lost, do not exist in the United States; and, for this reason, the English decisions, discussing and enforcing them, are out of place in American jurisprudence.

The maxim of the law, enunciated in several of the earlier American decisions,[2] that ordinances must not be in restraint of trade, must be taken with the proviso, as pointed out in this section, that the municipality may regulate the occupation of all those coming within its jurisdiction, as far as it is necessary for the protection and advancement of the public health, welfare and morals.[3]

By virtue of a "power relative to nuisances" it has been held that a city may prohibit the keeping of bowling alleys for gain;[4] or may prescribe that they shall be closed at a certain hour.[5] But a statute, authorizing the police to suppress gambling by seizing gambling implements and publicly destroying the same, without any notice to the owner or any form of investigation, was declared unconstitutional, as depriving the owner of his property without due process of law.[6] Nor will the power to suppress gambling houses authorize the municipality to destroy the houses, in which the gambling is carried on.[7]

The charter power, to suppress or restrain bawdy or disorderly houses, confers by implication the power to adopt measures conducive to the accomplishment of that end. Thus, the municipal authorities may forbid house owners from leasing their premises for this purpose,[8] and may impose penalties

[1] See § 120, Nuisances, State v. Fisher, 52 Mo. 174; Elec. Imp. Co. v. San Francisco, 45 Fed. Rep. 593.

[2] Com. v. Stodder, 2 Cush. 562, 568.

[3] Mays v. Cincinnati, 1 Ohio St. 268.

[4] Tanner v. Albion, 5 Hill, 121; Updike v. Campbell, 4 E. D. Smith, 570; People v. Sergeant, 8 Cow. 139.

[5] State v. Hay, 29 Me. 457; State v. Freeman, 38 N. H. 426.

[6] Lowry v. Rainwater, 70 Mo. 152; 35 Am. Rep. 420; Fisher v. McGirr, 1 Gray, 1; Hibbard v. People, 4 Mich. 126; Lincoln v. Smith, 27 Vt. 354.

[7] Bosley v. Davis, L. R. 1 Q. B. Div. 84; Brodie v. Bowmanville, 38 Up. Can. Q. B. 580.

[8] Childress v. Mayor etc., 3 Sneed, 347; Shreveport v. Roos, 35 La. An. 1010; State v. Williams, 11 S. Car. 288; Ogden v. McLaughlin, 16 Pac. Rep. 72.

on the keepers of disreputable houses, or on persons owning houses used for such purposes,[1] on persons soliciting[2] or visiting, or being in houses of this character.[3] And this, it has been held, may be done, although the offences are punishable under the law of the state.[4] But it is not constitutional for a municipality to forbid the leasing of premises to one, who is, or has been a prostitute, where the premises are not to be used for the purposes of prostitution.[5] So the municipal authorities cannot arbitrarily order the destruction of such houses;[6] or, under a power to pass by-laws, which are deemed expedient for the suppression of houses of ill fame, enact an ordinance making it a misdemeanor for a prostitute to live or to be found within municipal limits[7] or to return to the city after a departure from it.[8] In an Iowa case,[9] it was held that the power to suppress bawdy houses did not include the power to declare the keeping of one a misdemeanor, punishable by fine and imprisonment. It would seem, however, that this is a refinement of distinction, not warranted by the authorities in general.

§ 123. **Licenses, when a police regulation, and when a tax.**—It is very common for a municipal corporation, and not unusual for the state, and even the national government, to require the procurement of a license, and the payment of a fee therefor, as a condition precedent to the prosecution of a certain trade or business, and to enforce the payment of such fee by the imposition of heavy penalties. Although the courts are not always clear in their statements of the grounds upon which they have sustained the legality of these licenses, the constitutional objections to them have been very generally denied on one ground or another.[10] The cases are very numerous, and the

[1] McAlister v. Clark, 33 Conn. 91; Ely v. Supervisors, 36 N. Y. 297; Shaffer v. Mumma, 17 Md. 331; People v. Erwin, 4 Den. 129; Territory v. Dakota, 2 Dak. 155; Tiedeman Police Powers, § 126; Cf. *contra*, State v. Webster, 107 N. C. 962.

[2] Thomas v. Hot Spgs, 34 Ark. 553.

[3] State v. Botkin, 71 Iowa, 87; *In re* Johnson, 73 Cal. 228.

[4] Wong v. Astoria, 13 Oreg. 538; People v. Hanrahan, 75 Mich. 611; State v. Wisten, 62 Mo. 592.

[5] Milliken v. City Council, 54 Tex. 388 (38 Am. Rep). 629.

[6] See *ante*, § 129.

[7] Buell v. State, 45 Ark. 336; Milliken v. City Council, 54 Tex. 388 (38 Am. Rep. 629).

[8] Parmlee v. Camden, 49 Ark. 165.

[9] Chariton v. Barber, 54 Iowa, 360 (37 Am. Rep. 209).

[10] Carroll v. Tuskaloosa, 12 Ala. 173; Merriam v. New Orleans, 14 La. An. 314; Wynne v. Wright, 1 Dev. &

license has been required in a great variety of trades and professions. Among those, which the courts have held to have been legally subjected to a license, may be mentioned the vending of merchandise by hucksters,[1] the practice of law and medicine,[2] bankers,[3] telegraph companies,[4] natural gas companies,[5] the selling of bread,[6] amusements of a public character,[7] driving of cabs, stages and drays,[8] the sale of milk,[9] junk shops,[10] auctions,[11] livery stables,[12] and the liquor traffic.[13]

B. (N. C.) Law, 19; Savannah v. Hartridge, 8 Ga. 23; Collins v. Louisville, 2 B. Mon. 134; The Germania v. State, 7 Md. 1; Lucas v. Lat. Com'rs, 11 G. & J. (Md.) 506; Sears v. West, 1 Murph. (N. C.) 291; E. St. Louis v. Trustees, 102 Ill. 489; Wiggins F. Co. v. East St. Louis, 102 Ib. 560; State v. Hayne, 4 S. C. 403; State v. Columbia, 6 Ib. 1; United States D. Co. v. Chicago, 112 Ill. 19; Van Hook v. Selma, 70 Ala. 361. See cases *infra*.

[1] Huntington v. Cheesbro, 57 Ind. 74; *Ex parte* ah Foy, 57 Cal. 92; Temple v. Sumner, 51 Miss. 13.

[2] Simmons v. State, 12 Mo. 268; State v. Hibbard, 3 Ohio, 33; State v. Proudfit, 3 Ib. 33; State v. Gazley, 5 Ib. 21; Savannah v. Charton, 36 Ga. 460; Young v. Thomas, 17 Fla. 169; Longville v. State, 4 Tex. App. 312; Girard v. Bissell, 45 Kan. 56; 25 Pac. Rep. 232.

[3] Oil City v. Trust Co., 11 Pa. Co. Ct. R. 350.

[4] W. U. Tel. Co. v. Philadelphia, 12 Atl. Rep. 144; Allentown v. W. U. Tel. Co., 23 Ib. 1070.

[5] Rushville v. Gas. Co., 28 N. E. Rep. 853.

[6] Mayor etc. v. Yuille, 3 Ala. 137; People v. Wagner, 49 N. W. 609; 86 Mich. 594.

[7] Charity Hos. v. Stickney, 3 La. An. 550; Seers et al. v. West, 1 Murphy, 291; Germania v. State, 7 Md. 1; Mabey v. Tarver, 1 Hump. 94.

[8] Brooklin v. Breslin, 57 N. Y. 591; Frankfort etc. Co. v. Philadelphia, 58 Pa. St. 119; Council v. Pepper, 1 Rich. L. 364; St. Louis v. Green, 70 Mo. 562; Cincinnati v. Bryson, 15 Ohio, 625; Com. v. Mathews, 122 Mass. 60; St. Paul v. Smith, 27 Minn. 164.

[9] People v. Mulholland, 19 Hun, 548; s. c., 82 N. Y. 324; Chicago v. Bartree, 100 Ill. 57.

[10] City Council v. Goldsmith, 12 Rich. (S. C.) Law, 470.

[11] Wiggins v. Chicago, 63 Ill. 372; Decorah v. Dunston, 38 Iowa, 96; Fretwell v. Troy, 18 Kan. 271; New Orleans v. Turpin, 13 La. An. 56.

[12] Municipality v. Dubois, 10 La. An. 56.

[13] State v. Cassidy, 22 Minn. 312; Bancroft v. Dumas, 21 Vt. 456; State v. Brown, 19 Fla. 563; Lewellen v. Lockhardts, 21 Gratt. 570; Hirsh v. State, 21 Ib. 785; Wiley v. Owens, 39 Ind. 429; Pleuler v. State, 11 Neb. 547; State v. Harris, 10 Iowa, 441; Hammond v. Hames, 25 Md. 541; Trustees v. Keeting, 4 Denio, 341; Town Council v. Harbors, 6 Rich. L. 96; State v. Plunkett, 3 Harr. (N. J.) 5; Burckhatter v. McConnellsville, 20 Ohio St. 308; State v. Sherman, 20 Mo. 265; State *ex rel.* Troll v. Hudson, 78 Mo. 302; Gunnarssohn v. Sterling, 92 Ill. 669; East St. Louis v. Wehrung, 45 Ib. 382; Hill v. Decatur, 22 Ga. 203; Young Blood v. Sexton, 32 Mich. 406. Licensing of hucksters has been held unreasonable in Dunham v. Rochester, 5 Cow. 462;

But out of the confusion, occasioned by the judicial uncertainty in this connection, as to the character of the license, and the grounds upon which its imposition may be justified, the following conclusions may be drawn.[1] The license can only take one of two forms: either it is a tax upon the trade or business, and then its legality or illegality is determined by its compliance with the constitutional restrictions upon the power of taxation;[2] or it is a police regulation, which finds its justification and limitations in the prevention of some threatened evil. Where the license is imposed as a tax, the amount is to be determined according to the general discretion of the legislative power, under the constitutional rules as to equality and uniformity of taxation. If it is a police regulation, it must be limited in amount to what would cover the expense of issuing the license certificate, and maintaining the police supervision. And, although it is a judicial question, whether the sum exacted is a reasonable one, a wide latitude is given to the exercise of legislative discretion, in the determination of the amount of the license fee.[3] The license may be required as a police regulation, for the purpose of insuring the proper police supervision, whenever the character of the trade or business is such, that the absence of the police supervision would occasion injury to the public, dealing with those engaged therein, either because the trade requires a certain degree of skill and professional qualifications, or because it furnishes abundant opportunities for the perpetration of frauds, which without police supervision will very likely prove successful. On these general grounds, it is competent for a municipality to require licenses, and subjection to police supervision, of plumbers, pharmacists,[4] keepers of boarding houses, cartmen, truckmen, cabmen, car drivers, junk dealers, keepers of intelligence offices, dealers in second-hand articles,

Muhlenbrink v. Com'rs, 42 N. J. L. 364; Frammer v. Richmond, 31 Gratt. 646; Barling v. West, 29 Wis. 307; St. Paul v. Traeger, 25 Minn. 248; Mays v. Cincinnati, 1 Ohio St. 268; see § 122.

[1] See Tiedeman's Limitations of Police Power, § 101, where this matter is more elaborately presented.

[2] See *post*, § 261.

[3] Boston v. Schaffer, 9 Pick. 415; Welch v. Hotchkiss, 39 Conn. 140; Johnson v. Philadelphia, 60 Pa. St. 445; State v. Hoboken, 41 N. J. L. 71; Ash v. People, 11 Mich. 347; Van Baalen v. People, 40 Ib. 458; Burlington v. Putnam Ins. Co., 31 Iowa, 102.

[4] People v. Rontey, 21 N. Y. State Rep. 173; 4 N. Y. Supp. 235; 51 Hun 640.

peddlers and itinerant venders,[1] and others, upon whose honesty and care the public have to depend, often without previous acquaintance with them, and usually without opportunities for investigation.[2] Where the character of the business is such that the due protection of the public would require the restriction of the number who are engaged in its prosecution, then the license fee may be placed at such an amount that it would secure a reduction of the number who would apply for the license. Such would be the case with the sale of intoxicating liquors, which is more fully treated in a subsequent connection.[3] In fixing the amount of the license fee, the following items have been held to be properly taken into consideration: "*First*, the value of the labor and material, in merely allowing and issuing the license; *second*, the value of the benefit of the license to the person obtaining the same; *third*, the value of the convenience and cost to the public in protecting such business; and in permitting it to be carried on in the community; *fourth*, and in some cases an additional amount imposed as a restraint upon the number of persons who might otherwise engage in the business."[4]

§ 124. **The licensing power of municipal corporations, construed.**—Here, as elsewhere, in determining the scope of the

[1] State Center v. Barenstein, 66 Iowa, 259.

[2] People v. Fulda, 52 Hun, 65 (Physician); Com. v. Mathews, 122 Mass. 60; Com. v. Robertson, 5 Cush. 438; Com. v. Brooks, 99 Mass. 434; Veneman v. Jones, 118 Ind. 41; State v. Yopp, 97 N. C. 477; see, also, cases in preceding notes. "Huckster" defined, Mayo v. Cincinnati, 1 Ohio St. 268, 272. "Hawker and peddler" defined, Cerro Gordo v. Rawlings, 25 N. E. R. 1006, following Emmons v. Lewiston, 24 N. E. R. 58; see 32 Ill. App. 215; see further, Com. v. Eichenburg, 21 Atl. Rep. 258; Duboistown v. Roch. Brew. Co., 9 Pa. Co. Ct. R. 442; Duluth v. Krupp, 49 N. W. Rep. 235; Com. v. Gardner, 133 Pa. St. 284; Spanish Fork City v. Mortensen, 24 Pac. R. 620; Com. v. Rosencrans, 9 Pa. Co. Ct. 399; "Butcher" defined, Henback v. State, 53 Ala. 523; 25 Am. Rep. 650. "Auctioneer" defined, Goshen v. Kern, 63 Ind. 468.

[3] See *post*, § 125.

[4] Leavenworth v. Booth, 15 Kans. 627. See, generally, to the same effect, Youngblood v. Sexton, 32 Mich. 406 (20 Am. Rep. 554); Carter v. Dow, 16 Wis. 299; Tenny v. Lanz, 16 Wis. 566; Mt. Carmel v. Wabash, 50 Ill. 69; Emporia v. Volmer, 12 Kans. 622; Adler v. Whitbeck, (Ohio) 9 N. E. Rep. 672; Portwood v. Baskett, (Miss.) 1 So. Rep. 105; Atkins v. Phillips, 8 So. R. 429; Jacksonville v. Ledwith, (Fla.) 7 So. Rep. 885; City of Duluth v. Krupp, (Minn.) 49 N. W. Rep. 235; Pigeon v. Recorder's Ct., 17 Can. S. C. R. 495; Haefling v. San Antonio, 20 S. W. Rep. 85.

power of the municipal corporation to require licenses of those, who are engaged in the prosecution of a business within the city's limits, or in close proximity thereto, the supreme test is, whether the charter contains any grant of the power to impose the license. If the power cannot, by the rules of interpretation and construction, applicable thereto, be included within the charter grant of powers, the city cannot exact the license. The general rule is, that the power to require a license must be plainly conferred upon a municipal corporation, and will not be implied from a general power to enact by-laws for the good government of the city.[1] But, although it is the general rule that a power to license must be expressly[2] conferred by the Legislature, there are a few decisions construing charter powers, which maintain that the power to issue licenses may be implied, where the express power to regulate has been granted, as a proper, effective and reasonable mode of exercising the latter power.[3]

The power to license, and the power to regulate occupations, are usually coupled together in charter grants; and where this is the case, the corporation may require a license and charge a reasonable fee for granting it, but cannot levy a tax upon the occupation itself. So, also, the power to regulate will authorize the city to enact all proper and reasonable ordinances, respecting the mode in which the occupation shall be regulated.[4]

It has been held that a general power to license certain enumerated occupations, will impliedly prevent a municipality from requiring the payment of a license by those who are engaged in occupations, which are not included in the list;[5] but one, who carries on business as a wholesale and retail dealer, may be required to take out a license in each capacity.[6]

[1] Dunham v. Rochester, 5 Cow. 462; St. Paul v. Trueger, 25 Minn. 248; Com. v. Stodder, 2 Cush. 562; Mays v. Cincinnati, 1 Ohio St. 268; Gale v. Kalamazoo, 23 Mich. 344; St. Paul v. Stoltz, 33 Minn. 233; see Napman v. People, 19 Mich. 352; Barling v. West, 29 Wis. 307; 9 Am. Rep. 576; Hayes v. Appleton, 24 Wis. 542; Taylor v. Pine Bluff, 34 Ark. 603; Shuman v. City of Ft. Wayne, (Ind.) 26 N. E. Rep. 560.

[2] See Newton v. Atchison, 31 Kan. 131.

[3] Kinsley v. Chicago, 124 Ill. 359; Smith v. Madison, 7 Ind. 86; St. Johnsbury v. Thompson, 59 Vt. 300; Boston v. Shaffer, 9 Pick. 415; City Council v. Pepper, 1 Rich. (S. C.) Law, 364; St. Louis v. Woodruff, 4 Mo. App. 169.

[4] Cincinnati v. Boyson, 15 Ohio, 625; Compare Mays v. Cincinnati, 1 Ohio St. 268; Cincinnati v. Buckingham, 10 Ohio, 261.

[5] Cairo v. Bross, 101 Ill. 475.

[6] New Orleans v. Koen, 38 La. An. 328.

The power to regulate or to license, when conferred upon a municipal corporation, seems to have been regarded by the courts as more extensive and inclusive in its applications to amusements, exhibitions, etc., than in relation to trades, professions or occupations.[1]

A charter provided that in granting licenses the fee charged should be proportioned to the amount of business transacted by the licensee. Under this provision an ordinance, providing for license fees according to the number of employees, was held to be lawful.[2]

When the power to license is granted in general terms, coupled with the further grant of power to suppress and to prohibit, the corporation may license, and impose any restrictive burdens or conditions it may deem necessary.[3] So, also, where the power to license implies the power to fix a reasonable rate of license fee,[4] and where discretion to fix the license fee was lodged in the mayor, he was permitted to include in the fee charged a reasonable amount, as compensation for the police supervision which was exercised over the licensed occupation.[5] Where the power was conferred, to compel all owners of wagons using them in the town to procure a license, it was construed to include both residents and nonresidents, and taxpayers in other towns.[6] The power to license or regulate vehicles used for public travel and traffic, such as horse cars, cabs, express wagons, etc., will *not* suffice to authorize the imposition of a license or tax upon private vehicles, which are used by merchants or storekeepers;[7] or the grant by the municipality, by

[1] N. Y. Con. Act. § 1998 *et seq.*; Mayor v. Eden Musee, 102 N. Y. 593; Society v. Diers, 10 Abb. Pr. N. S. 216; Wallack v. Society, etc., 67 N. Y. 23; People v. Worth, 58 Hun, 455; St. Paul v. Treager, 25 Minn. 248; Bennett v. People, 30 Ill. 389; East St. Louis v. Wehrung, 36 Ib. 392; Ash v. People, 11 Mich. 347; Freeholders v. Barber, 2 Halst. 64; Carroll v. Tuscaloosa, 12 Ala. 173; Greensboro v. Mullins, 13 Ib. 341; City Council v. Ahrens, 4 Strobh (S. C.) 241; Kip v. Paterson, 2 Dutch. 298; Portland v. O'Neill, 1 Oreg. 218; Bennett v. Bermingham, 31 Pa. St. 15; Day v. Green, 4 Cush. 433; Dunham v. Rochester, 5 Cow. 462; Cheny v. Shelbyville, 19 Ib. 84.

[2] *Ex parte* Sisto Li Protti, 68 Cal. 635.

[3] Launder v. Chicago, 111 Ill. 291.

[4] Welch v. Hotchkiss, 39 Conn. 140; Chilvers v. People, 11 Mich. 43; State v. Herod, 29 Iowa, 123.

[5] Ash v. People, 11 Mich. 347.

[6] Frommer v. Richmond, 31 Gratt. 646.

[7] St. Louis v. Grove, 46 Mo. 574.

means of the issue of a license, of an exclusive privilege to run an omnibus line within the city limits,[1] or the creation of any other monopoly or exclusive privilege.[2]

In the absence of express provisions to the contrary, licenses are usually regarded as personal, non-transferable, and terminable by the death of the licensee.[3] And the fact, that a license may be revoked without notice to the licensee or a hearing, does not make the ordinance providing for such license void.[4]

§ 125. **Licenses for the sale of intoxicating liquors.**—A very common exercise of the licensing power of a municipal corporation occurs in connection with the traffic in intoxicating liquors.[5] Although the enactment of a general license law will not necessarily prevent the Legislature from granting to cities the power to regulate this traffic still further by requiring retail licenses;[6] it has been deemed advisable, in some instances, to expressly provide, that municipal corporations should be exempt from the operation of the general laws of the State, in relation to the liquor trade. This result has been accomplished by the adoption, either of a general license law, applicable to towns and cities[7] within certain limits[8] as to population; or by permitting the town or city, in any given instance, to regulate the liquor traffic in the exercise of some charter power, which has been conferred upon it.[9] But where there is a gen-

[1] Logan v. Pyne, 43 Iowa, 524; Snyder v. North Lawrence, 8 Kan. 82.

[2] Chicago v. Rumpf, 45 Ill. 90; Gale v. Kalamazoo, 23 Mich. 344; Tuckahoe Can. Co. v. Railroad Co., 11 Leigh (Va.) 42; Brenham v. Water Co., 67 Tex. 542.

[3] Brunette v. New Orleans, 9 La. 430; Munsell v. Temple, 8 Ill. 96; Lewis v. United States, Morris (Iowa) 199; Lombard v. Cheever, Ib. 473; Towns v. Tallahassee, 11 Fla. 190.

[4] Child v. Bemus, (R. I.) 21 Atl. Rep. 539.

[5] In some of the States constitutional provisions exist, expressly regulating or prohibiting the liquor traffic. Stimson's Statutes, § 510.

[6] Wolf v. Lansing, 53 Mich. 367. Cf. Grantham v. State, 14 S. E. R. 892; State v. Kaufman, 45 Mo. App. 656; State v. Harris, 52 N. W. Rep. 387.

[7] Moundsville v. Fountain, 27 W. Va. 182.

[8] Township trustees are not authorized by such a law to grant liquor licenses. Walter v. Columbia City, 61 Ind. 24; Cowley v. Rushville, 60 Ib. 327; McFee v. Greenfield, 62 Ib. 21.

[9] *Ex parte* Russellville, 11 So. 18; State v. Plunkett, 3 Harr. 5; Burkhalter v. McConnell, 20 Ohio St. 308; People v. Cregier, (Ill. 92) 28 N. E. R. 812; Louisville v. McKean, 18 B. Mon. 9; *Ex parte* Cowert, 92 Ala. 94; Dyers v. Olney, 16 Ill. 35; Ginnochio v. State, (Tex. 92) 18 S. W. R. 82; Page v. State, 11 Ala. 849;

eral State law, regulating the trade in intoxicating liquors, the municipal power to make by-laws relating to the peace, good order, and general welfare of the community, will not authorize the corporation to require a license for their sale,[1] or by ordinance to prohibit the traffic altogether.[2]

On the other hand, it has been held, that where there is no general State law, the charter power, "to pass every other by-law or regulation that shall appear to the city council requisite and necessary for the security, welfare and convenience of the city, or for preserving the peace, order and good government of the same," would authorize a city to compel shopkeepers to take out a license for the sale of liquors at retail.[3]

Construing special charter provisions, it has been held that a power, "to prohibit or regulate the sale of liquors," will permit of a partial [4] as well as of a total prohibition. When a comprehensive power of this character is granted, an ordinance, forbidding the sale of liquors in less quantities than five gallons, was held valid; it being considered that the Legislature had left it to the discretion of the city, whether to license and regulate or wholly or partially to prohibit.[5]

Clinton v. Grusendorf, (Iowa, 90) 45 N. W. 407; Trustees v. Keeting, 2 Denio, 341; Phillips v. Tecumseh, 5 Neb. 305; State v. Topeka, 30 Kan. 553; *In re* Bickerstaff, 70 Cal. 35; Woods v. Primeville, (Or. 90) 23 Pac. R. 880; Town Council v. Harbers, 6 Rich. (S. C.) Law, 96; State v. Estabrook, 6 Ala. 653; Territory v. McPherson, 50 N. W. R. 351; 6 Dak. 27; State v. Preester, 43 Minn. 373; Robinson v. Mayor, 1 Humph. 156; Mount Pleasant v. Vansice, 43 Mich. 361; State v. Harper, (La. 90) 7 So. R. 446; Cuthbert v. Conley, 32 Ga. 211; Harris v. Intendant, 28 Ala. 577; Youngblood v. Sexton, 32 Mich. 416; Kansas v. Topeka, 31 Kan. 452; State v. Garlock, 14 Iowa, 444; Salt Lake City v. Wagner, 2 Utah, 400.

[1] Com. v. Turner, 1 Cush. 493; Ginochio v. State, 18 S. W. R. 82; Loeb v. Attica, 82 Ind. 17; Com. v. Dow, 10 Met. (Mass.) 382.

[2] *In re* Burnett, 30 Ala. 461; *contra*, *Ex parte* Russellville, (Ala.) 11 So. Rep. 18.

[3] Heisenbuttle v. City Council, 2 McMullan (S. C.) Law, 233; City Council v. Ahrens, 4 Strobh. (S. C.) Law, 241; City Council v. Baptist Church, Ib. 306, 308.

[4] The sale of intoxicants may be licensed in one part of the town and not elsewhere: People v. Cregier, 28 N. E. Rep. 812.

[5] Foster v. Duneau, (Ky. 91) 15 S. W. R. 55; Gunnarssohn v. Sterling, 92 Ill. 569; Goddard v. Jacksonville, 15 Ib. 588; Perry v. Salt Lake City, 25 Pac. 739; Sprayberry v. Atlanta, (Ga. 91) 13 S. E. R. 197; Woods v. Primeville, 19 Or. 108; Baldwin v. Murphy, 82 Ill. 485; Byers v. Olney, 16 Ib. 35; Martin v. People, 88 Ib. 390; Dennehy v. Chicago, 120 Ib. 627. See United States Distilling Company v. Chicago, 112 Ill. 19.

A power "to regulate the liquor traffic," or "to regulate places where liquor" is sold, will authorize the city to prohibit the employment of women in them,[1] and to confine the places themselves to designated parts of the city.[2] So, the charter power "to regulate and suppress shops and places for the sale of ardent spirits," amounts to an authority to forbid their sale, for the reason that a suppression of the shops or places must necessarily suppress the sale.[3]

A fee, paid for a license to sell liquors, is not taxation,[4] and creates no contractual or vested rights in favor of the licensee. Such licenses are always subject to police control, and are revocable at the discretion of the State.[5] So, also, the payment of a license to a city does not create an exemption from the imposition of a license fee by the county.[6] And the fact, that a druggist has obtained a license as such, will not exempt him from the necessity of taking out a license for the sale of liquors, if he use intoxicating liquors in compounding his prescriptions.[7]

Prohibiting by ordinance the sale of liquors on Sunday, is not in violation of any constitutional provision, against the establishment of religion.[8] But forbidding their sale during the continuance of divine service, was invalid because vague, uncertain and discriminating.[9]

A power to require a license is incidental to a power "to restrain or prohibit saloons."[10] But it is held in such a case, that the licensing power applies to retail establishments only, and does not include manufacturers.[11]

When a charter was silent as to the amount which could, under the existing power to require licenses, be charged, the sum of $500 was held to be reasonable;[12] and where the power

[1] Bergman v. Cleveland, 40 Ohio St. 651.

[2] *In re* Wilson, 32 Minn. 145.

[3] Clintonville v. Keeting, 4 Denio, 341; Thomas v. Mt. Vernon, 9 Ohio, 290; comp. Hill v. Decatur, 22 Ga. 203.

[4] East St. Louis v. Wehrung, 46 Ill. 392.

[5] Columbus City v. Cutcomp, 61 Iowa, 672; Metropolitan Board of Excise v. Barrie, 34 N. Y. 657; Calder v. Kurby, 5 Gray, 597; Com. v. Brennan, 103 Mass. 70.

[6] *In re* Lawrence, 69 Col. 608.

[7] State v. Gray, 22 Atl. Rep. 675.

[8] Minden v. Silverstein, 36 La. An. 912.

[9] Gilham v. Wells, 21 Alb. Law Jour. 319; 64 Ga. 192.

[10] Mt. Carmel v. Wabash Co., 50 Ill. 69; Schweitzer v. Liberty, 82 Mo. 309; Portland v. Smith, 13 Oreg. 17.

[11] Strauss v. Pontiac, 40 Ill. 301; St. Paul v. Troyer, 3 Minn. 291.

[12] Perdue v. Ellis, 19 Ga. 586; *In re* Burnett, 30 Ala. 461.

to thus fix the fee is committed to a municipality, its discretion will not be reviewed by the courts;[1] nor will they presume, that the amount of the license fee is unreasonable or oppressive.[2] These statements of the law, in respect to the reasonableness of the license fee, must be considered in the light of what is stated elsewhere,[3] in respect to the difference between those trades and professions, which require only a general police supervision, and those which, like the liquor trade, must and can constitutionally be suppressed, or restricted more or less, in the interest of the public.

When a petition for a license, signed by a certain number of citizens, is required as a prerequisite to the issue of the license, one, which is granted without this requirement being fully observed, is void.[4] In a case of this character, the issue of the license is not a mandatory duty of the city,[5] and cannot be compelled by *mandamus*.[6]

§ 126. **Supervision and care of paupers, vagrants and indigent insane and sick persons.**—In the larger municipal corporations, the care of these classes of persons is usually within the jurisdiction of a department, for which, although belonging to the city government, there is no municipal liability.[7]

It has been held that such a department has the powers of the common law overseers of the poor;[8] but can neither sue nor be sued,[9] nor borrow money and create a debt against the city.[10] Nor has such a department the power to hire out to a contractor the prisoners in the workhouse, although by the charter they may be compelled to work out their fines.[11]

§ 127. **Inspection of foods and other commodities.**—In order to afford to private persons increased facilities for the

[1] Goldsmith v. New Orleans, 31 La. 646; State v. Doherty, (Idaho) 29 Pac. Rep. 855; Wolf v. Lansing, 53 Mich. 367.

[2] *In re* Guerrero, 69 Cal. 88; *Ex parte* McNally, 73 Ib. 632; comp. Zanone v. Mound City, 103 Ill. 552.

[3] See § 133.

[4] State v. Moniteau Co., 45 Mo. App. 387; Eureka v. Davis, 21 Kan. 578.

[5] Welsford v. Weidlein, 23 Kan. 601; State v. Young, 17 Ib. 414; Ius. Co. v. State, 9 Ib. 210; Wabaunsee Co. v. Muhlenbacker, 18 Ib. 129; Bouldin v. Baltimore, 15 Md. 18.

[6] State v. Stevens, 23 Kan. 456.

[7] N. Y. Con. Act. § 385 *et seq.*

[8] Board v. McGurrin, 6 Daly, 349; People v. Weissenbach, 60 N. Y. 385.

[9] N. Y. Bal. D. D. v. Mayor, 8 Hun, 247.

[10] Tenth Nat. Bk. v. Mayor, 80 N. Y. 660.

[11] St. Louis v. Davidson, 102 Mo. 149.

detection of fraud, and the adulteration of foods and other commodities, the courts have frequently sustained legislative enactments, generally enforced by municipal officials, providing for the inspection of flour, and tobacco,[1] the inspection and regulation of weights and measures,[2] the regulation of the weight of bread,[3] requiring all lumber to be surveyed by a public surveyor,[4] and providing for the weighing of coal and other articles of great bulk on public scales.[5] They have uniformly been held to be lawful regulations.

At common law, the offering of tainted meat at public sale was a nuisance,[6] and indictable;[7] and each separate exposure or offer for sale was a distinct offence.[8] But in the United States, the power, which a city possesses over the sale of provisions, must be expressly granted to it by the Legislature, or implied, because it is absolutely required for the accomplishment of corporate ends and purposes.[9]

When "all the powers, incident to municipal corporations and necessary to the proper government of the same" were conferred upon a city council, it was held that, while the city could provide for the inspection of flour and prevent the sale of unwholesome bread, it could not regulate the weight or size

[1] Turner v. Maryland, 107 U. S. 38.

[2] Ritchie v. Boynton, 114 Mass. 431; Eaton v. Keagan, Ib. 433; Durgin v. Dyer, 68 Me. 143; Woods v. Armstrong, 34 Ala. 150.

[3] Mobile v. Guille, 3 Ala. (N. S.) 140.

[4] Pierce v. Kimball, 9 Me. 54.

[5] City Council v. Rogers, 2 McCord, 495. See Tiedeman's Limitation of Police Powers, § 89, pp. 208, 209; Hoffman v. Jersey City, 34 N. J. L. 172.

[6] Shillito v. Thompson, L. R. 1 Q. B. Dw. 12.

[7] Regina v. Stevenson, 3 F. & F. 106.

[8] Queen v. Jarvis, 3 F. & F. 108; Reg. v. Crawley, 3 Ib. 109; *In re* Hartley, 31 L. J. M. 232; Emmerton v. Mathews, 7 H. & N. 586.

[9] Stokes v. New York, 14 Wend. 87; Raleigh v. Sorrell, 1 Jones Law, 49; Chicago v. Quimby, 38 Ill. 274; Howe v. Norris, 12 Allen, 82; Libby v. Downey, 5 Ib. 299; Collins v. Louisville, 2 B. Mon. 134; People v. Harper, 91 Ill. 357; Paige v. Fazackerly, 36 Barb. 392; Mayor etc. v. Nichols, 4 Hill, 209; Mayor v. Hyatt, 3 E. D. Smith (N. Y.) 156; Rogers v. Jones, 1 Wend. 237; Yates v. Milwaukee, 12 Wis. 673; People v. Rochester, 45 Hun, 102; Huesing v. Rock Island, 128 Ill. 465; Briggs v. Boat, 7 Allen, 287; Davis v. Anita, 75 Iowa, 325; Guillotte v. New Orleans, 12 La. An. 432; Taylor v. Pine Bluff, 34 Ark. 603; Gass v. Greenville, 4 Sneed. 62; St. Louis v. Shands, 20 Mo. 149; *In re* Snell, 30 N. C. Q. B. 81. In New York, Pennsylvania, California and Alabama, the creation of state officers for weighing, gauging or inspection of merchandise or produce is forbidden by the constitution of these states.

of the loaf; such power not being necessary for the proper government of the city. But where there was an express grant of power "to regulate everything which relates to bakers," an ordinance, fixing the weight, size and price of bread, was held to be valid and constitutional.[1]

The power "to regulate the public market and to pass such other ordinances, as shall seem meet for the improvement and good government of the city" will empower the enactment of an ordinance which prescribes that coal,[2] oats, hay, etc., shall be weighed by a public weigher before sale.[3] But an ordinance, requiring all persons to have their cotton weighed by a public weigher has been held void;[4] nor can a city, without legislative authorization, compel cotton merchants to keep open for inspection a record of their daily transactions in loose cotton.[5]

§ 128. **Establishment and regulation of public markets.**— In England, the municipal regulation of markets has been customary from very early times;[6] and by-laws, designed to control their operation in the interest of health and good government, have, when reasonable and not oppressive, been sustained. "A market is a franchise or liberty derived from the crown, by grant or by prescription which presupposes a grant."[7] In the United States, a market is defined as "a designated place in a town or city, under municipal police supervision, to which all persons can repair who wish to buy or sell articles there exposed for sale."[8] "A municipal market consists: 1. In a place for the sale of provisions and articles of daily consumption. 2. Convenient fixtures. 3. A system of police regulations, fixing market hours, making provisions for lighting, watching, cleaning, detecting false weights and unwholesome food, and other arrangements calculated to facilitate and ensure the hon-

[1] Guillotte v. New Orleans, 12 La. An. 432; Mobile v. Yuille, 3 Ala. 139; Paige v. Fazackerly, 36 Barb. 392; Cf. Phillips v. Allen, 41 Pa. St. 481.

[2] O'Maley v. Freeport, 96 Pa. St. 24.

[3] Raleigh v. Sorrell, 1 Jones (N. C.) Law, 49; Stokes v. Mayor etc., 14 Wend. 87; see Gass v. Greenville, 4 Sneed. 62; and cases *supra*. In the city of New York the power to pass inspection ordinances and regulate weights and measures is vested in the Board of Aldermen, Consol. Act. § 87 (ed. 1891).

[4] Sumter v. Deschamps, 4 S. C. 297.

[5] Long v. Shelby Co., 7 Lea, 134.

[6] Dillon Mun. Corp., § 380, citing Player v. Jenkins, 1 Sid. 284; Rex v. Cottrell, 1 B. & Ald. 67; Mosley v. Walker, 7 Barn. & C. 40; Macclesfield v. Pedley, 4 Barn. & A. 397.

[7] 2 Blackstone, 37.

[8] Caldwell v. Alton, 33 Ill. 416.

esty of buyer and seller. 4. Proper officers to preserve order and enforce obedience to the rules." [1]

The State may [2] and usually does, delegate to municipal corporations the power to establish public markets, or to authorize others to establish them; and although this power is, in the majority of instances, conferred by the charter in express terms, it may, it has been held, be implied [3] from a grant of power to a municipal corporation "to make by-laws for managing and ordering its prudential affairs;" the court looking somewhat to usage, in order to ascertain to what description of municipal affairs the adjective "prudential" was applicable.

Grants to municipalities of authority to establish or regulate markets, and to supervise the business transacted therein, are said not to be construed as strictly, as others of more unusual character; except in cases where it is attempted, by means of such powers, to confer exclusive privileges, or to create monopolies.[4] Although much litigated, it is now admitted, according to the weight of the decisions, that it is within the police power of the State, whether delegated to the municipality or exercised by the State government, to restrict to a particular place the vending of fresh meat, vegetables, and other provisions, and to forbid any trading in such articles at any other place than the market thus established. The preservation of the public health, by the strict supervision of the sale of perishable foods, and the prevention of the sale of those which are unwholesome, are the justification for this restraint upon trade.[5]

[1] Cincinnati v. Buckingham, 10 Ohio, 257.

[2] Munic. v. Cutting, 4 La. An. 355.

[3] Spaulding v. Lowell, 23 Pick. 171.

[4] Wartman v. Philadelphia, 33 Pa. St. 202, 209; White v. Kent, 11 Ohio St. 550; St. John v. Mayor, 6 Duer (N. Y.) 315; St. Louis v. Jackson, 25 Mo. 37; *In re* Nightingale, 11 Pick. 168; Cougot v. New Orleans, 16 La. An. 21; Yates v. Milwaukee, 12 Wis. 673; Badkins v. Robinson, 53 Ga. 613; Ketchum v. Buffalo, 14 N. Y. 356; Municipality v. Cutting, 4 La. An. 336; New Orleans v. Guillotte, 12 La. An. 818; State v. Lieber, 11 Iowa, 407; Dubuque v. Miller, 11 Iowa, 583; Morano v. New Orleans, 2 La. An. 217; Atlanta v. White, 33 Ga. 229; Paul v. Coulter, 12 Minn. 41.

[5] Buffalo v. Webster, 10 Wend. 99; Natal v. State, 11 S. Ct. 636; 139 U. S. 621; City of Jacksonville v. Ledwith, (Fla.) 7 So. R. 885; *Ex parte* Canto, 21 Tex. App. 61; Vidalat v. New Orleans, 10 So. R. 175; 43 La. An. 1121; Bush v. Seabury, 8 Johns. 418; Winnsboro v. Smart, 11 Rich. L. 551; Bowling Green v. Carson, 10 Bush. 64; New Orleans v. Stafford, 27 La. An. 417; Wartman v. Philadelphia, 33 Pa. St. 202; St. Louis v. Weber, 14 Mo. 547; Ash v. People, 11 Mich. 347; Le Claire v. Davenport,

The municipal power to regulate markets, being a continuing one, markets once established may be abandoned or changed, at the pleasure of the corporation. When this is done, whatever may be the rights of the stall owners [1] in the market, it is well settled that the taxpayers or property owners cannot restrain the municipal action.[2]

As incidental to the power to erect a market building, may be mentioned the power to determine its form, dimensions and architectural style, and to employ an architect to prepare plans and specifications,[3] as well as to purchase the land upon which the market building is to be erected.[4] But no use of land for market purposes, however long continued and uninterrupt-

13 Iowa, 210; *contra*, Bethune v. Hayes, 28 Ga. 560; Caldwell v. Alton, 34 Ill. 416; Bloomington v. Wahl, 46 Ill. 489. In New Orleans v. Stafford, 27 La. An. 217, the court said: "The power arises from the nature of things and is what is termed a police power. It springs from the great principle, *salus populi suprema est lex*. There is in the defendant's case no room for any well grounded complaint of the violation of a vested private right; for the privilege, if he really possessed it, of keeping a private market was acquired, subordinately to the right existing in the sovereign, to exercise the police power to regulate the peace and good order of the city, and to provide for and maintain its cleanliness and salubrity. By way of illustrating this necessarily existing power to regulate the number, location and management of markets, take the city of New Orleans, in a warm climate, located in a low district of country, surrounded by marshes and swamps, which in the hot season under favorable conditions envelopes its large population in a malarious atmosphere. Under such circumstances, the danger of epidemics becomes imminent. It behooves the city at such periods to obviate local causes of disease within the limits of the city. Among such causes the decay of animal and vegetable matter is a prominent one. The markets must on that account be strictly attended to, and such measures adopted in regard to them, as in the judgment of the proper authorities the public health may require." See Tiedeman's Limitations of Police Power, § 104.

[1] It has been held that a municipality may delegate to an individual the franchise of establishing a public market and of charging rent for the use of the same; and that having covenanted to protect its grantee in this exclusive privilege, the city cannot abolish such a market, without compensating the holder of the franchise. Le Claire v. Davenport, 13 Iowa, 210, overruling Davenport v. Kelly, 7 Ib. 102; Cf. Gale v. Kalamazoo, 23 Mich. 344.

[2] Gall v. Cincinnati, 18 Ohio St. 563.

[3] Peterson v. Mayor etc. of New York, 17 N. Y. 449.

[4] Caldwell v. Alton, 33 Ill. 416; Ketchum v. Buffalo, 14 N. Y. 356, People v. Lowber, 28 Barb. 65; 7 Ab. Pr. 158; Gale v. Kalamazoo, 23 Mich. 344.

ed, will operate impliedly as a dedication of it for use as a market exclusively, even when it is purchased with public funds and the fee is vested in the corporation.[1] But it is within the power of the Legislature to dedicate land for a market by express provision in a municipal charter, or by some other statute.[2] The municipal power to establish and build markets will not authorize a city, without statutory authority, to build them in a public street. If so erected, they constitute a public nuisance, and the municipality may be proceeded against criminally, or otherwise, even though sufficient space be left unobstructed for the use of vehicles and foot passengers.[3]

Having erected a market house, the city may let the stalls in it, or license persons to expose and vend merchandise there. By such action, however, although it may do so expressly,[4] the city does not agree by implication to protect its lessee from competition; nor can such an agreement be implied from the existence of an ordinance, forbidding sales by unlicensed persons.[5] So, also, a city owning a market house does not by leasing the same, impliedly engage that it will refrain from erecting other market houses, and leasing them to others.[6]

§ 129. **Impounding animals—Ordinances respecting dogs.** —A municipality, by virtue of the power delegated to it in the general welfare clause, may prohibit the running at large of domestic animals,[7] and provide as a penalty, to insure the enforcement of such a regulation, that the animals may be sold, after due notice to their owner, and time allowed for their redemption, and paying to him the proceeds of the sale, after deducting what is due to the city as a penalty.[8] But laws, impos-

[1] Gall v. Cincinnati, 18 Ohio St. 563; Cooper v. Detroit, 42 Mich. 584. Control of market property in New York City, Con. Act. § 170.

[2] New York Consol. Act. § 129; *In re* Cooper, 28 Hun, 515.

[3] See chapter XVI. Streets, §§ 293, 300; St. John v. New York, 3 Bosw. 483; McDonald v. Newark, 42 N. J. Eq. 136; Wartman v. Philadelphia, 33 Pa. St. 202, 210; State v. Mobile, 5 Port. 279; Com. v. Rush, 14 Pa. St. 186; Com. v. Bowman, 3 Ib. 202, 206; State v. Laverack, 34 N. J. L. 201; Higgins v. Princeton, 4 Halst. Ch. 309, 320.

[4] Vidalat v. New Orlerns, 43 La. An. 1121.

[5] Peck v. Austin, 22 Texas, 261.

[6] Congot v. New Orleans, 16 La. An. 21.

[7] Running at large defined. Kinder v. Gillespie, 63 Ill. 88; Case v. Hall, 21 Ib. 632; Spitler v. Young, 63 Mo. 42; Quincy v. O'Brien, 24 Ill. App. 591.

[8] Campen v. Langley, 39 Mich. 451; Wilcox v. Hemming, 58 Wis.

ing a penalty, should be strictly construed; and when ambiguous or uncertain, the courts will lean towards that construction, by which a forfeiture may be fairly avoided.[1] Power "to impose penalties" upon the owner of the animal has been held to exclude by implication the power to enforce the by-law by a sale of the animal;[2] and so, likewise, under authority to impose a fine only, an ordinance, authorizing a city marshal to kill hogs running at large, and to appropriate their bodies to his own use, is invalid.[3]

It is in conformity with a general principle of law, that a municipality cannot by ordinance forfeit the animals of an individual, and, without notice to him or due process of law, transfer the ownership in them to another. So, where it is the general policy of the State to suffer animals to run at large;[4] or where towns are forbidden to subject non-residents to their ordinances;[5] a municipal corporation, it has been held, possesses no implied power to restrain cattle from running at large, if this is permissible by the statute law of the State. Under authority to enact ordinances for the removal of nuisances, the following was enacted: "Every hog at large in the said town shall be taken up and penned and advertised to be sold on the third day; and unless the owner should pay the charges for taking up, and keeping such hog, and a sale is effected, the money arising therefrom, after paying the charges, shall be paid over to the owner of the said hog." This ordinance was considered reasonable, and the power exercised over stray animals was justified by the terms of the charter.[6] The period of notice was also deemed sufficient, and it was added that personal notice was

144; Faribault v. Wilson, 34 Minn. 254; Rockwell v. Nearing, 33 N. Y. 302; Com. v. Patch, 97 Mass. 221; Campbell v. Evans, 45 N. Y. 356; Cook v. Gregg, 46 Ib. 439; Varden v. Mount, 78 Ky. 86; Roberts v. Ogle, 38 Ill. 459; Waco v. Powell, 32 Tex. 258; Collinsville v. Scanland, 58 Ill. 221; Fritz v. First Div. etc. Co., 22 Minn. 404; Brophy v. Hyatt, 10 Col. 223; Amyx v. Taber, 23 Cal. 370; Pettit v. May, 34 Wis. 666.

[1] Donovan v. Vicksburg, 29 Miss. 247; Willis v. Legris, 45 Ill. 289; Rounds v. Stetson, 45 Me. 596; Gilmore v. Holt, 4 Pick. 258; Rounds v. Mansfield, 38 Me. 586; see Smith v. Gates, 21 Pick. 55; Coffin v. Cohn, 7 Cush. 355; and Clark v. Lewis, 35 Ill. 417, for the notice which must be given to the owner of the animal before a valid sale can be made.

[2] Miles v. Chamberlain, 17 Wis. 446; Brophy v. Hyatt, 10 Col. 223; Cartersville v. Lanham, 67 Ga. 753.

[3] McRae v. O'Lain, 1 McMullan, (S. C.) Law, 328. See ch. IX. on Ordinances, § 155, Forfeitures.

[4] Collins v. Hatch, 18 Ohio, 523.

[5] Marietta v. Fearings, 3 Ib. 427.

[6] But see *contra*, Spitler v. Young, 63 Mo. 42.

not necessary. To an objection, that the ordinance did not provide for a judicial determination of the question, the court said: "The owner may if he choose, have a full investigation of the case by bringing an action of replevin, as in any other case of distress." [1]

In several of the States, not only may the town or city impound animals found running at large; but the private owner, whose lawful fence is broken by stray cattle, may seize them, and have them placed in the public pound,[2] and maintain an action for trespass against their owner, as at common law.[3] While a pound marshal cannot delegate his authority, he may employ necessary assistants; [4] and replevin will not lie against him at common law, while the animals are in his legal custody.[5] But replevin will lie, if the pound keeper parts with his legal control, or keeps the animals elsewhere than in the pound.[6]

Municipal ordinances for the regulation of the keeping of dogs are very common. No one, independent of statutory authority, has a right to kill a dog who was not doing harm.[7] But a dog, or any animal *damage feasant*, may be killed, if necessary; and the same rule applies to a ferocious dog running at large, unmuzzled, if addicted to biting, irrespective of what the dog is doing, and whether the owner had notice of its bad disposition or not.[8]

[1] Shaw v. Kennedy, (N. C.) Term R. 158 (1817); Whitefield v. Longest, 6 Ire. L. § 268; Hellen v. Noe, 3 Ib. L. 493; Gasselink v. Campbell, 4 Iowa, 296; Gilchrist v. Schmidling, 12 Kan. 263; Moore v. State, 11 La. 35. But see, *contra*, Donovan v. Vicksburg, 29 Miss. 247.

[2] Stimpson, Amer. Stat. Law, § 2189. See Northcott v. Smith, 4 Ohio Cir. Ct. 565; Irwin v. Mattax, 138 Pa. St. 466; Atkinson v. Mott, 102 Ind. 431.

[3] Stewart v. Benninger, 138 Pa. St. 437.

[4] Jackson v. Morris, 1 Denio, 199; Friday v. Floyd, 63 Ill. 50.

[5] Pritchard v. Stevens, 6 Durn. & E. 522; Ilsley v. Stubbs, 5 Mass. 283; Smith v. Huntington, 3 N. H. 76; King v. Ford, 70 Ga. 628.

[6] Bills v. Kinson, 1 Foster (N. H.) 448; comp. Osgood v. Green, 33 N. H. 318.

[7] Brent v. Kimball, 60 Ill. 21; Ranson v. Kitner, 31 Ill. App. 241; Mathew v. Fiestel, 3 E. D. Smith, 90; Dodson v. Moch, 4 Dev. & B. L. 146.

[8] Hubbard v. Preston, 51 N. W. Rep. 209; Simmonds v. Holmes, 23 Atl. Rep. 702; Aldrich v. Wright, 53 N. H. 398; Putnam v. Payne, 13 Johns. 312; Maxwell v. Palmerton, 21 Wend. 407; Dunlap v. Snyder, 17 Barb. 561; People v. Board of Police, 15 Abb. Pr. 167; Brown v. Carpenter, 26 Vt. 638; Woolf v. Chalked, 31 Conn. 121; Spaight v. McGovern, 16 R. I. 658.

In most of the States, the subject has been regulated by statute; by which, in some instances, it has been provided that police or other officials may, during a prescribed period in each year, kill unlicensed dogs;[1] and, in some cases, the dog's owner is made responsible for damages caused by the dog to persons or domestic animals. Such legislation, as well as the grant to a municipal corporation of the power to require a license for the keeping of dogs, is a reasonable and valid exercise of the police power; and is not open to judicial objection, upon the ground of unconstitutionality,[2] as violating the requirements of uniformity of taxation;[3] or for any other reason, such as operating as a restriction upon the keeping of those animals.[4]

But an act, by which it was sought to make the owner answerable for the amount of damage caused by his dog, as fixed by the selectmen, without giving him any opportunity to be heard, is unconstitutional in New Hampshire,[5] and probably in every other State.

§ 130. **Prevention of fires — Fire limits — Purchase of apparatus.** — Among the useful regulations, which may be made by a chartered city or town, under its implied police power—although, usually, the power is expressly conferred,—are those having for their object the prevention or extinguishing of fires.[6] So, also, although it is usually the subject of an express grant of power,[7] a municipal corporation may, under

[1] Blair v. Forehand, 100 Mass. 136; Mowery v. Salisbury, 82 N. C. 175; State v. Topeka, 36 Kan. 76.

[2] See cases cited in last note. Com. v. Chase, 6 Cush. 248; Com. v. Steffee, 7 Bush. 161; Culver v. Streator, 27 Am. & Eng. Cor. Cas. 602; *Ex parte* Cooper, 3 Tex. App. 489; Mayor, etc., of Washington v. Meigs, 1 McArthur (D. C.) 53; Harrington v. Miles, 11 Kan. 480; Tower v. Tower, 18 Pick. 262; Cummings v. Perham, 1 Met. 555; Morey v. Brown, 42 N. H. 373; Cranston v. Augusta, 61 Ga. 572; Cf. Mitchell v. Williams, 27 Ind. 62; State v. Cornwall, 27 Ind. 62.

[3] Carthage v. Rhoads, 14 S. W. 181.

[4] Carter v. Dow, 16 Wis. 298; Tenney v. Lenz, Ib. 566; Fire Dept. v. Helfenstein, 16 Ib. 136.

[5] East Kingston v. Towle, 48 N. H. 57.

[6] The rule, that a municipality has the inherent power to adopt means to protect the property of its citizens from fire, is of ancient origin. 2 Bacon's Abr. 147; 2 Kent's Com. 339; Filby v. Combe, 2 M. & W. 677; Law v. Dodd, 1 Ex. 845; Gay v. Cadby, L. R. 2 C. P. Div. 891; Fertilizer Co. v. Hyde Park, 97 U. S. 659; Baumgartner v. Hasty, 100 Ind. 375.

[7] N. Y. Consol. Act, §§ 495, 496. See, construing these sections, Tucker v. D'Oluch, 44 Hun, 33; Fire Dept. v. Atlas S. S. Co., 106 N. Y. 566.

the general welfare clause alone, coupled with the implied power inherent in all corporations to make fit and appropriate by-laws, and without any express legislative grant of power, establish limits, within which the erection of wooden buildings shall be absolutely prohibited, and make other regulations which are deemed necessary to prevent fires.[1] It has been held that the exercise of the power, to forbid the erection of wooden buildings within specified limits, does not "impair the obligation of a contract" where a contract to build was made prior thereto.[2] But it is held that, where it is proposed to remove from the fire limits wooden buildings, already constructed when the fire limits were established, the charter power in the premises should be strictly construed against the city, and in favor of the property owner.[3] But such regulations do not violate any provision of the State or National Constitutions.[4] Under the same general powers, a city may prohibit the storing of more than five tons of hay on one block, unless protected by a fire proof structure;[5] and remove a dangerous forge and the building in which it is located.[6] The authorities are, however, not uniform on the question of an implied power to establish fire limits. And so, it has been held that this power could not be inferred from a charter power to make regulations against danger from fires,[7] or from the power contained in the general welfare clause,[8] or from a power to abate nuisances.[9]

[1] Com. v. Tewksbury, 11 Met. 55, 58; King v. Davenport, 98 Ill. 505; Monroe v. Hoffman, 29 La. An. 651; Ford v. Thrailkill, 84 Ga. 169; Charleston v. Reed, 27 W. Va. 681; Vanderbilt v. Adams, 7 Cow. 349; Richmond v. Dudley, 26 N. E. R. 184; *Ex parte* Fiske, 72 Cal. 125; McCloskey v. Krelling, (Cal. 88) 18 Pac. R. 433; Klinger v. Bickel, 117 Pa. St. 326; Douglas v. Com., 2 Rawle (Pa.) 262; Troy v. Winters, 4 T. & C. (N. Y.) 256; Williams v. Augusta, 4 Ga. 509; Baumgartner v. Hasty, 100 Ind. 575; Clark v. South Bend, 85 Ib. 276; Hine v. New Haven, 40 Conn. 478; Welch v. Hotchkiss, 39 Ib. 140; Wadleigh v. Gilman, 12 Me. 403; City Council v. Elford, 1 McMullan (S. C.) Law, 234; *contra*, State v. Schuchardt, 70 So. R. 67; Pratt v. Litchfield, 25 Atl. 461; 62 Conn. 112.

[2] Knoxville v. Bird, 12 Lea, 121.

[3] Louisville v. Webster, 108 Ill. 414; Buffalo v. Chadcayne, 31 N. E. Rep. 443 (1892).

[4] *Ex parte* Fiske, 72 Cal. 125; Klinger v. Bickel, 117 Pa. St. 326; Eichenlaub v. St. Joseph, (Mo. 93) 21 S. W. R. 8.

[5] Clark v. South Bend, 85 Ind. 276.

[6] Dupree v. Brunswick, 85 Ga. 727.

[7] Des Moines v. Gilchrist, 67 Iowa, 210; *contra*, Hubbard v. Medford, (Or.) 25 Pac. Rep. 640; City of Olympia v. Mann, 1 Wash. St. 389.

[8] Knoedler v. Norristown, 100 Pa. St. 368; Respublica v. Duquet, 2 Yeates, 493.

[9] Pye v. Peterson, 45 Tex. 312.

While the weight of the decisions favors the view that a city may, without express statutory authority, prohibit the erection of frame structures within certain limits, it seems that there is no inherent power to forbid the repair of those already erected.[1]

It has been held, in construing ordinances creating fire limits, that enlarging or raising[2] a wooden building, so as to alter its character,[3] or the removal of a frame building to a location within the limits, whether from without or not,[4] is an erection of a building.

In a case, where a city is empowered to forbid the erection of wooden structures, and has passed an ordinance to that effect, it may remove them without proceeding against their owner.[5] The abatement of a nuisance of this sort is not considered a forfeiture of property.[6]

But if the building was erected, before the ordinance went into effect, and is subsequently damaged by fire to such an extent, that its re-erection is necessary, it is held that the city cannot remove it, but must direct the owner to do so.[7]

A Court of Equity will not restrain by injunction the erection of wooden buildings within fire limits; because the act complained of is made unlawful by an ordinance, which presumably supplies an adequate remedy for its enforcement.[8] On the other hand, the wrongdoer cannot secure the aid of equity to enjoin the tearing down by the city of a building, the erection

[1] Brown v. Hutton, 27 Conn. 332; Reg. v. Howard, 4 Ont. Rep. 377; Brady v. Northwestern Ins. Co., 11 Mich. 425. But see Knoxville v. Bird, 12 Lea, 121, in respect to avoidance of existing contracts to build frame houses. See Pye v. Peterson, 45 Tex. 312; Des Moines v. Gilchrist, 67 Iowa, 210.

[2] Brady v. N. W. Ins. Co., 11 Mich. 425, 449; Louisville v. Webster, 108 Ill. 414; Booth v. State, 4 Conn. 65; Stamford v. Stowell, 21 Atl. Rep. 101.

[3] Douglas v. Com., 2 Rawle (Pa.) 262.

[4] Wadleigh v. Gilman, 12 Me. 403. In Connecticut a removal within the limits is not an erection. Brown v. Hunn, 27 Conn. 334; see also State v. Kearney, 25 Neb. 262; Cleveland v. Lenz, 27 Ohio St. 383.

[5] McKibben v. Fort Smith, 35 Ark. 352; Aronheimer v. Stokley, 11 Phila. 283; Klingler v. Bickel, 117 Pa. St. 326; King v. Davenport, 98 Ill. 305.

[6] Baumgartner v. Hasty, 100 Ind. 575.

[7] Louisville v. Webster, 108 Ill. 414.

[8] Waupun v. Moore, 34 Wis. 450; Mayor v. Thorne, 7 Paige, 261; Phillips v. Allen, 41 Pa. St. 481; St. John v. McFarlan, 33 Mich. 72, the court saying: "A court of chancery has no jurisdiction to restrain the threatened violation of a village ordinance, unless the act threatened to be done, if carried out will be a nuisance."

of which was in violation of its by-laws;[1] even though he has made it fire proof, *pendente lite*.[2]

Charter provisions, conferring the power to prescribe fire limits, and to remove all buildings therein damaged by fire, should be strictly construed in favor of the private owner.[3]

Under the implied power to protect property within the city's jurisdiction against damage by fire, a municipality may appropriate funds for the purchase or repair of apparatus used for the extinguishment of fire,[4] or for the repair of an engine house.[5] Money may legitimately be appropriated for the benefit of hook and ladder, and engine companies;[6] but the fact, that a volunteer company renders services in extinguishing fires, does not necessarily impose upon the city an obligation to pay its members.[7]

As incidental to the power to adopt measures for the prevention of fires, the municipality may also regulate the manner in which ashes shall be removed, and prescribe that metal receptacles shall be employed for the purpose.[8]

A board of fire commissioners and their employees, are not agents of the city, at least so far as to make the municipality responsible for their wrongful acts of commission or omission.[9]

§ 131. **Regulation of buildings, and their construction.** —A reasonable regulation of the use, which may be made of land in populous cities, is absolutely essential; and is justified

[1] Aronheimer v. Stokley, 11 Phila. 283.

[2] Hine v. New Haven, 40 Conn. 478.

[3] Louisville v. Webster, 108 Ill. 414; Reg. v. Howard, 4 Ont. 577; State v. Tennant, 110 N. C. 609.

[4] Clark v. South Bend, 85 Ind. 276; Baumgartner v. Hasty, 100 Ib. 575; Van Sickler v. Burlington, 27 Vt. 70; Hardy v. Waltham, 3 Metc. (Mass.) 163; Fisher v. Boston, 104 Mass. 89; Witheril v. Mosher, 9 Hun, 412; Bermingham v. Rumsey, 63 Ala. 352; Burlington v. Dennison, 42 N. J. L. 165; Allen v. Taunton, 19 Pick. 485; Hunneman v. Fire Dis., 37 Vt. 40; Wadleigh v. Gilman, 12 Me. 403; Vanderbilt v. Adams, 7 Cow. 349, 352; Green v. Cape May, 41 N. J. L. 45; Bluffton v. Studabaker, 106 Ind. 129; Carleton v. Washington, 38 Kan. 728; Bridgford v. Tuscumbia, 16 Fed. Rep. 910.

[5] Robinson v. St. Louis, 28 Mo. 488.

[6] Van Sicklen v. Burlington, 127 Vt. 70; Cf. Miller v. Savannah Fire Co., 26 Ga. 678.

[7] Jacksonville v. Ætna F. Eng. Co., 20 Fla. 100.

[8] Filbey v. Combe, 2 M. & W. 677; Law v. Dodd, 1 Ex. 845; The Queen v. Wood, 5 E. & B. 49; Guardians v. Vestry of St. Leonard Shoreditch, L. R. 2 Q. B. Div. 145; Gay v. Cadby, L. R. 2 C. P. Div. 391; Lyndon v. Stadbridge, 2 H. & N. 45.

[9] Wooldridge v. Mayor, 49 How. Pr. 67; Terhune v. Same, 88 N. Y. 24.

by the protection thus afforded to the health and safety of the community. The power to regulate the erection, maintenance and repair [1] of private buildings, and to prescribe their height,[2] the materials and manner of their construction, is frequently conferred on municipalities by their charters; and sometimes with a fulness of detail, which is at once stringent and confusing.[3] The fee, which is charged for a building permit issued by the city, under the power just mentioned, is a license,[4] not a tax: and yet, it is held that its amount may be graduated according to the cost of the edifice.[5]

The common law relations of adjoining landowners, in respect to the lateral support, which they are bound to afford to one another, have been, in some instances, materially modified by charter provisions. Thus, in New York City, any landowner, making an excavation ten feet or more in depth below the curb line, is required, (if given the necessary license to enter on his neighbor's land,) to take proper precautions at his own expense, for preserving any wall, standing wholly or partly thereon, from injury by reason of a lack of lateral support, which is caused by his excavations.[6]

A general power to regulate building operations must be reasonably and fairly exercised. Thus, a city council cannot, under such a general power, prohibit the erection of other buildings than dwelling houses,[7] or require the outer walls of a building to be of any specified thickness.[8] So, too, a charter power, to make rules for the regulation of bay windows, does not impliedly authorize an ordinance, which gives permission to construct a bay window projecting beyond the boundary line of the lot.[9]

[1] Donohue v. Kendall, 50 N. Y. Super. 386; Brennan v. Lachat, 14 Daly, 197; Willy v. Mulledy, 78 N. Y. 310; N. Y. Consol. Act, § 652.

[2] People v. D'Oluch, 111 N. Y. 359.

[3] See New York Consol. Act, § 471-518 inc.; Fire Dept. v. Wendell, 13 Daly, 430; St. Paul v. Dow, 37 Minn. 20; Philadelphia v. Coulston, 13 Phila. 182; *Ex parte* White, 67 Cal. 102; Hennessy v. St. Paul, 37 Fed. Rep. 565. See article by W. S. Gordon, 43 Alb. L. J. 349.

[4] See Comrs. of Easton v. Covey, 22 Atl. Rep. 266.

[5] St Paul v. Dow, *supra;* Philada. v. Coulston, 13 Phila. (Pa.) 182; Welch v. Hotchkiss, 39, Conn. 140.

[6] N. Y. Consol. Act, p. 220; Dorrity v. Rapp, 72 N. Y. 307, 310; Sherman v. Seaman, 2 Bosw. 127; Ketchum v. Newman, 116 N. Y. 422; Johnson v. Oppenheimer, 55 Ib. 286; Bernheimer v. Kilpatrick, 53 Hun, 316.

[7] Newton v. Belger, 143 Mass. 598.

[8] State v. Patterson, 45 N. J. L. 310.

[9] Reimer's App., 100 Pa. St. 182.

The power conferred upon a municipal department, to require the construction of fire escapes by owners of buildings, is not unconstitutional, and does not deprive the owner of his property without due process of law;[1] and the fact, that the owner has provided fire escapes of an approved pattern, does not exempt him from providing additional fire escapes, when called upon to do so by the proper authorities.[2]

In consequence of the manifest danger of the occurrence of fires, and the consequent panics, in places of amusement, very extensive powers are committed to municipal corporations, for the regulation of the construction and the use of theaters and halls.[3] Provisions, requiring that the aisles and passageways of churches and theaters shall be kept clear of persons or chairs, should be literally construed; and do not give the manager of a theater discretion to allow any persons to occupy the passageways, even though the number be not so great as to prevent free exit in case of danger.[4]

The charter power, to regulate the erection of party walls and fences, includes the power to authorize their erection, on the application of either owner, without the other's consent; and such action is not unconstitutional, because compensation is not made to the opposing or unwilling abutter for the land occupied in part by the wall.[5] But such regulations must be strictly construed, so that individuals shall not, under color thereof, be permitted to injure the property of their neighbors.[6]

A regulation, requiring that hoistways shall be guarded by a sufficient railing and trap doors, is a reasonable police regulation for a municipality, and may be enforced by the infliction of an appropriate penalty.[7] Such an ordinance does not unnecessarily interfere with private rights. On the other hand,

As to bay windows, Livingston v. Wolf, 136 Ib. 519.

[1] Fire Dept. v. Sturtevant, 33 Hun, 407.

[2] Fire Dept. v. Chapman, 10 Daly, 377. A receiver, *pendente lite*, is not responsible as an owner. Wyckoff v. Scofield, 53 N. Y. Super. Ct. 237; 103 N. Y. 630; N. Y. Con. Act, § 499.

[3] N. Y. Consol. Acts, § 500, Construction of Theaters.

[4] Fire Dept. v. Stetson, 14 Daly, 125; 6 N. Y. State R. 255; Same v. Hill, 14 N. Y. Supp. 158.

[5] Hunt v. Armbruster, 17 N. J. Eq. 208.

[6] Pratt v. Hillman, 4 B. & C. 269; Reg. v. Ponsford, 1 D. & L. 116; Barlow v. Newman, 2 W. Bl. 959; Sims v. Estate Co., 14 L. T. N. S. 55; Matts v. Hawkins, 5 Taunt. 20.

[7] N. Y. Con. Act, § 453; Mayor of N. Y. v. Williams, 16 N. Y. 502.

when a city forbade a roof already existing, from being relaid, except in a manner prescribed, the ordinance was held to be *ultra vires*, as a wrong and needless interference with private property rights.[1] The variance of the judicial opinion in these cases is due to difference in the character and necessity of the regulations in the several cases. Where the regulation is not needed for, or does not actually serve as, a protection against some threatened injury, it is unreasonable and may be resisted.

§ 132. **Regulation of private wharves.** — Wharves and landing places may be either public or private. If private, the public have no right to use the wharf without the owner's consent; while public wharves may be used by all persons, upon payment of a reasonable compensation. It is held in many of the States, that the riparian owner may without legislative authority, erect wharves or landing places on his land, provided they are built and maintained in conformity with the regulations of the State; and are not impediments to the navigation of the stream or other body of water.[2] Such structures, if confined to the shore, are lawful, provided no positive existing enactment is violated.[3]

But the grant by the State of land under water, below low-water mark, does not necessarily convey the right of collecting wharfage to the grantee. The right depends usually upon the express terms of the grant; or upon its intent as evinced by its declared purpose, or by the fair inference, which may be drawn from it or from surrounding circumstances.[4]

[1] Reg. v. Howard, 4 Ont. 377; comp. Jordan v. Helwig, 1 Wilson (Ind.) 447.

[2] In Vermont, New Jersey, Iowa, Maryland, West Virginia, North Carolina, Oregon, Washington and Florida, the sole right of making improvements in water fronting his land is secured to the riparian proprietor by statute.

[3] Gruy v. Aiken, 40 La. An. 798; Potomac S. Co. v. Upper Pot. etc. Co., 109 U. S. 672; Hoboken v. Penn. R. R. Co., 124 Ib. 656; Mayville v. Wilcox, 61 Hun, 223; Mayor v. Hart, 95 N. Y. 443, 457; Heeney v. Heeney, 2 Denio, 625; Grand Rapids v. Powers, 89 Mich. 94; Myers v. St. Louis, 82 Mo. 367; Union Depot Co. v. Brunswick, 31 Minn. 297; De Bary, etc. Line v. Jacksonville, 40 Fed. R. 392; Tharnton v. Grant, 10 R. I. 477; Ladies Sea. Friends Soc. v. Halstead, 58 Conn. 144; Sherlock v. Bainbridge, 41 Ind. 35; Wilhelm v. Burleyson, 106 N. C. 381; Bond v. Wool, 107 Ib. 139; Illinois v. Ill. Cen. R. R. Co., 33 Fed. Rep. 730; State v. Jersey City, 1 Dutch. 526, 530; Miller v. Mendenhall, 43 Minn. 95; Wetmore v. Brooklyn Gas Co., 42 N. Y. 384; Galveston v. Menard, 23 Tex. 349.

[4] Weber v. Com'rs, 18 Wall. 57; Potomac S. Co. v. Upper Potomac Co.,

Where the vested right to take wharfage exists, the city will be liable in damage to private owners for its destruction or impairment, by reason of the construction of a dock system;[1] or for special injury, caused by the construction by the city, or by a third person, to whom the city has delegated the power, of a dock not in accordance with the statutory plan.[2]

The Legislature may by law establish a pier-head line, or delegate the same power to a municipal corporation.

In the exercise of this power, to establish a pier-head line, the riparian owners may be forbidden to extend wharves on their own land beyond the line, even though such wharves, if extended, would not prove materially injurious to navigation.[3]

The right of the riparian owner to build wharves or piers in front of his land, as long as they do not interfere with the public easement of navigation in the stream, is an absolute property right growing out of his title to his land. If, therefore, this right is impaired by the appropriation of the land under water, to public use, private property has been taken, under the right of eminent domain, for which due compensation must be made to the owner.[4] So, also, where a city possessed the power to enlarge slips by building piers, or extending them into the river, it was held that it could not under this power sink piers against a bulkhead or wharf opposite private property, without the consent of the owner. When this was done, however, and the owner acquiesced and co-operated in the extension at the expense of the

109 U. S. 672; Turner v. People's Ferry Co., 21 Fed. Rep. 90; Langdon v. Mayor, 93 N. Y. 129, 144, 145; Ingraham v. R. R. Co., 34 Iowa, 249; Gould v. Hudson R. etc. Co., 6 N. Y. 522; Tomlin v. R. R. Co., 32 Iowa, 106; Hoboken v. Penn. R. R. Co., 124 U. S. 656; Lehigh Valley v. Trone, 28 Pa. St. 206.

[1] Langdon v. Mayor, 93 N. Y. 120; Williams v. Same, 105 Ib. 419; Kingsland v. Same, 100 Ib. 569; Whitney v. Same, 6 Abb. N. C. 329; Bedlow v. N. Y. Floating D. D. Co., 112 N. Y. 263.

[2] N. Y. City Consol. Act, p. 345 (ed. 1891); Cunard S. S. Co. v. Voorhies, 50 N. Y. Super. (J. & S.) 253.

[3] Com. v. Alger, 7 Cush. 53; Grand T. R. Co. v. Backus, 46 Fed. Rep. 211; Hagan v. Campbell, 8 Port. (Ala.) 9; Mobile v. Eslava, 9 Ib. 577; Barney v. Keokuk, 94 U. S. 324; Chicago Lake Ft. Case, 33 Fed. Rep. 730; Hart v. Mayor, 7 Wend. 571; Wetmore v. Brooklyn Gas Co., 42 N. Y. 384; Railroad v. Winthrop, 5 La. An. 36; Yates v. Milwaukee, 10 Wall. 497; Lyon v. Fishmongers Co., L. R. 1 App. Cas. 662.

[4] Delaplaine v. C. & N. W. Ry. Co., 42 Wis. 214; Railroad Co. v. Renwick, 102 U. S. 180; Backus v. Detroit, 49 Mich. 110, 114. *Contra*, Langdon v. Mayor, 93 N. Y. 129; Watson v. Turnbull, 34 La. An. 856.

city, the rights of the city over the structure and the slip were the same as over its public piers.[1]

When a charter confers upon a municipal corporation the power to lease docks, the use which the lessee is authorized to make of the dock is subject to such restrictions, as Congress may make, under its power to regulate interstate commerce.[2] The lease of a dock, although protected against appropriation without compensation,[3] does not vest in the lessee any right of property in the wharf of the nature of a corporeal hereditament, but merely creates a franchise of wharfage.[4]

The municipal powers of control over, and regulation of, private wharves, depend upon the provisions of each charter, which must be construed strictly against the municipal corporation, whenever the exercise of the charter power will be likely to operate injuriously against the rights of private property. The proprietors of the private wharves, under such circumstances, possess the same remedy for a wrongful taking, or for injury to, their property, when committed by the municipality, as do the owners of any kind of property within the municipal limits, which have been subjected to trespass by private persons.[5]

The opening of a wharf to general public use creates a general license to vessels to use it for lawful purposes, under reasonable regulations of the municipality or of the wharf owners, as the case may be, which license is, however, terminated by notice to remove the vessel.[6] Municipalities[7] and private individuals owning or leasing[8] docks or wharves are impliedly liable, to those lawfully using them, for negligence in not keeping them in a state of good repair, and safe and convenient for public use.

[1] Verplanck v. Mayor, 2 Edw. 220; comp. Marshall v. Guion, 11 N. Y. 461; Thompson v. The Mayor, 11 N. Y. 115; Marshall v. Vultee, 1 E. D. Smith, 294; Murray v. Sharp, 1 Bosw. 539.

[2] Hoeft v. Seaman, 46 How. Pr. 24.

[3] Williams v. Mayor, 105 N. Y. 419.

[4] Taylor v. Beebe, 3 Rob. 262. The lessee will be estopped from denying the validity of such a lease, when he has received the full benefit of it in the use of the pier, and the collection of wharfage. Mayor v. Sonneborn, 113 N. Y. 423; Mayor v. Huntington, 114 Ib. 631.

[5] Grant v. Davenport, 18 Iowa, 179.

[6] Heeney v. Heeney, 2 Denio, 625; Nicoll v. Gardner, 13 Wend. 289; Lansing v. Smith, 4 Wend. 9; Dutton v. Strong, 1 Black, 23; Chicago Dock v. Garrity, 115 Ill. 155.

[7] Wiley v. Allegheny, 118 Pa. St. 490.

[8] Radway v. Briggs, 37 N. Y. 256.

The wharf owner, upon proof of negligence, is liable for any special injury to vessels or other property which may result therefrom; it matters not, whether the city has by ordinance undertaken to regulate the use of the wharf, or the matter has been left under the provisions of the common law.[1]

It is no defence to an action for wharfage, that the dock was not well built, or needed improvement or repairs.[2] The statutes of several States give the wharf owner a lien upon the ship and tackle for wharfage, anchorage or dock charges.[3]

§ 133. **Public wharves.**—While the private riparian owner may erect a wharf for private use, which, without his consent, cannot be used by the public for any purpose whatever, the privilege or right to erect public wharves, or docks, and to charge wharfage for the use of the same, when claimed or possessed by a public owner, is a franchise, which must be granted by the Legislature.[4] But where a city is the owner of land upon the water front, it will by analogy to a private owner, and in the absence of a charter provision, restraining it or authorizing it to do so, have implied authority to erect wharves, together with the incidental power of charging tolls or wharfage for their use. Such a right in this case is not a franchise, but a vested right of property.[5] That compensation is received for the use

[1] Mersey Docks v. Gibbs, 1 H. L. 93; Seamen v. New York, 3 Daly, 147; People v. Albany, 11 Wend. 539, 543; Buckbee v. Brown, 21 Ib. 110; Pittsburgh v. Grier, 22 Pa. St. 54; Eastman v. Meredith, 36 N. H. 284; Shinkle v. Covington, 1 Bush, 617; Allegheny v. Campbell, 107 Pa. St. 530.

[2] Prescott v. Duquesne, 48 Pa. St. 118; Jeffersonville v. Ferry Co., 27 Ind. 100; Winpenny v. Philadelphia, 65 Pa. St. 135.

[3] Stimson Statutes, § 4643.

[4] Wiswall v. Hall, 3 Paige Ch. 313; Thompson v. Mayor, 11 N. Y. 115; Railroad Co. v. Ellerman, 105 U. S. 166; Christie v. Malden, 23 W. Va. 667; The Geneva, 16 Fed. Rep. 874.

[5] People v. Wharf Co., 31 Cal. 34; Boston v. Lecraw, 17 How. (U. S.) 426; 19 Ib. 263; 24 Ib. 188; Railroad Co. v. Ellerman, 105 U. S. 166; comp. Snyder v. Rockport, 6 Ind. 237; Langdon v. Mayor, 93 N. Y. 129; State v. Jersey City, 34 N. J. L. 31; Hoboken v. Pa. R. R., 124 U. S. 656; Railroad Co. v. Winthrop, 5 La. An. 36. In Horn v. People, 26 Mich. 224, the court thus defines a public wharf: "There is no instance in which the term 'public wharf' has been used in our legislation to indicate anything analogous to a dedication to any public use, like that of highways. Such a public right is unknown to the common law. Wharfage involves exclusive use, for longer or shorter periods, by each vessel, depending on the nature of its business and the extent of its cargo. All that is meant in the charter by a public wharf, is a wharf belonging to the city, and to be used like other

of a wharf, does not of itself deprive it of its public character.[1] So, also, a paved street, extending far enough into the water to be used by vessels as a landing place, is a wharf, for the use of which wharfage may be charged.[2]

Those municipal corporations, which are situated upon navigable waters, are generally empowered by their charters to erect docks and wharves, and charge a compensation for the use of the same.[3] The possession or exercise of such powers is not necessarily in violation of the Federal Constitution,[4] although all State and municipal regulations of navigable streams must, in order to be constitutional and valid, conform to and keep within the limitations of the provisions of the United States Constitution, which give to the Federal Government supreme control over matters, relating to interstate and foreign commerce.[5] The money collected for wharfage, it has been held, is paid as compensation or rent for the actual use of the docks or wharves, and is not taxation,[6] or a tonnage duty.[7] Wharfage, however,

wharf property. The term is applied, as well to wharves on city property away from streets, as to wharves at the end of streets."

[1] Galveston W. Co. v. Galveston, 63 Tex. 14.

[2] Keokuk v. Keokuk P. Co., 45 Iowa, 196, 206.

[3] N. Y. City Consol. Act, p. 379 (ed. 1891); Turner v. People's Ferry, 21 Fed. Rep. 90; Brooklyn v. N. Y. Ferry Co., 87 N. Y. 204; Williams v. Same, 105 Ib. 419; Langdon v. Mayor etc., 93 Ib. 139; Kingsland v. New York, 110 N. Y. 569; New Orleans v. U. S., 10 Pet. 662, 737; Pollard v. Hagan, 3 How. (U. S.) 212; Packet Co. v. Keokuk, 95 U. S. 80; Barney v. Keokuk, 94 U. S. 324; Weber v. Com'rs, 18 Wall. 57; The Lizzie E., 30 Fed. Rep. 876; Silver v. Tobin, 28 Ib. 545; The Shadyside, 23 Ib. 731; Wharf Case, 3 Bland, Ch. (Md.) 383; Ill. etc. Co. v. St. Louis, 2 Dillon, C. C. R. 70; Municipality v. Pease, 2 La. An. 538; The Virginia Rulon, 13 Blatchf. 519; Com. v. Alger, 7 Cush. 53, 82; Railroad Co. v. Ellerman, 105 U. S. 166; Mobile v. Mood, 53 Ala. 561; Packet Co. v. St. Louis, 100 U. S. 423; Vicksburg v. Tobin, 100 Ib. 430; The Geneva, 16 Fed. Rep. 874; Leathers v. Aiken, 9 Ib. 679; Baldwin v. Franks, 120 U. S. 688; Mayor of St. Martinsville v. Mary Lewis, 32 La. An. 1293.

[4] Packet Co. v. Catlettsburg, 105 U. S. 559.

[5] Cooley v. Board of Wardens, 12 How. 296; Pollard's Lessee v. Hagan, 3 How. 212; Steamship Co. v. Joliffe, 2 Wall. 450; Ouachita P. Co. v. Aiken, 121 U. S. 444; Cisco v. Roberts, 36 N. Y. 292; Jeffersonville v. Ferryboat, 35 Ind. 19; Harbormaster v. Southerland, 47 Ala. 511; Transportation Co. v. Parkersburg, 107 U. S. 691; Chapman v. Miller, 2 Speers (S. C.) Law, 769; Alexander v. Railroad Co., 3 Strob. (S. C.) Law, 594; State v. City Council, 4 Rich. (S. C.) Law, 286.

[6] Railroad v. Ellerman, 105 U. S. 166.

[7] Trans. Co. v. Parkersburg, 107 U. S. 691; Ouachita Packet Co. v. Aiken, 121 U. S. 444; N. W. Packet Co. v. St. Louis, 4 Dillon, 10.

must be reasonable;[1] and although it has been held that its rates cannot be graduated according to the tonnage of the vessel, for the reason that wharfage, rated according to tonnage, would be a tonnage duty, and as such would be unconstitutional and void, under the provisions of the United States Constitution,[2] the later opinion is that it would nevertheless be a lawful charge.[3] It has also been held that a grant of exclusive power to erect wharves is so far beneficial to the public generally, that it is not in violation of a constitutional provision, that no set of men shall be entitled to a grant of public privileges from the community;[4] and it is a well recognized rule, that the Legislature may in its discretion confer the power to erect wharves and collect wharfage upon municipal corporations, to whatever extent it may be deemed expedient.[5] Powers, so granted by the Legislature, are, however, subject to legislative repeal, restriction and modification at pleasure, provided no municipal rights of property[6] or the rights of municipal creditors are thereby impaired.[7]

Public wharves are in legal contemplation highways, or of the nature of highways; and, in the absence of express statutory authority, cannot be leased by a city to private persons.[8] But there is no constitutional objection to charter provisions, by which the public wharves may be leased to private persons, and such lessees be allowed to erect sheds over them; for it is competent for the Legislature to grant to a municipality the power to place public wharves under semi-private supervision

[1] De Bary etc. Co. v. Jacksonville, 40 Fed. 392; Ouachita P. Co. v. Aiken, 121 U. S. 444; Heron v. The Marchioness, 40 Fed. 173; Packet Co. v. St. Louis, 100 U. S. 423; Lincoln v. Penn. Warehouse Co., 8 Pa. Co. Ct. 195; Ellerman v. McMonies, 30 La. An. 190; Muller v. Spreckels, 48 Fed. R. 574; Bain v. The Minnie L. Gerow, 48 Fed. 836; People v. Roberts, 92 Cal. 659 (wharfage defined).

[2] Cannon v. New Orleans, 20 Wall. 577; Peete v. Morgan, 19 Wall. 581; Packet Co. v. St. Paul, 3 Dill. 454.

[3] See cases in n. 1, *supra*, and p. 238, n. 7.

[4] Fuller v. Edings, 11 Rich. (S. C.) Law, 739; Martin v. O'Brien, 34 Miss. 21; Geiger v. Filor, 8 Fla. 325.

[5] Waddington v. St. Louis, 14 Mo. 190; Weber v. Harbor Com'rs, 18 Wall. 57; Ravenswood v. Flemings, 22 W. Va. 52.

[6] Railroad v. Ellerman, 105 U. S. 166.

[7] St. Louis v. Shields, 52 Mo. 361.

[8] Baleman v. City of Covington, 14 S. W. 361; see also Belcher S. R. Co. v. St. Louis Grain El. Co., 101 Mo. 192.

and control, provided the substantial rights and benefits of the public in such wharves are promoted thereby, rather than impaired.[1] A lease of a wharf gives the right to wharfage only;[2] and it remains a public wharf, from which the municipality has power to remove all obstructions, which tend to interfere with its free use.[3] And when a penalty is imposed upon the occupants of a pier, for failure to keep it unobstructed, the fact, that the obstruction was originally caused by another person, is immaterial.[4]

Regulations, by which particular wharves and contiguous water are set apart for the exclusive use of certain classes of ships, boats or barges, are not unconstitutional, as depriving the owner of the wharves of any rights or privileges, or of his property, without due process of law. They are police regulations, adopted for the purpose of rendering more convenient the transaction of business in the harbor.[5] The municipal authorities may, under a statutory power to construct wharves, cause them to be constructed at the end of streets running to the river; or at right angles to or along the front of streets, or of a park or common;[6] or bordering on and running parallel to the water, without being liable to the abutting owner or the riparian proprietor, unless his own property is taken for such use.[7] And this is true, irrespective of the fact that the fee of the street may be in the abutting owner.[8]

The power of the municipality, to erect a wharf upon private property, upon making due compensation to the owner, cannot be restrained by an offer of the private proprietor to erect a wharf there, of which the public shall have the use.[9]

[1] People v. Baltimore & Ohio R. R. Co., 117 N. Y. 150.

[2] Com'rs of Pilots v. Clark, 33 N. Y. 251.

[3] People v. Mallory, 46 How. Pr. 281.

[4] Com'rs v. Erie R. R. Co., 5 Robt. 366; 41 N. Y. 619.

[5] Cushing v. The John Frazer, 21 How. (U. S.) 184; Hecker v. N. Y. Balance Dock Co., 24 Barb. 215; Roosevelt v. Goddard, 52 Barb. 533; Vanderbilt v. Adams, 7 Cow. 349.

[6] Newport v. Taylor, 16 Barb. 700.

[7] Bond v. Wool, 107 N. C. 139; Potomac S. Co. v. Upper Potomac etc. Co., 109 U. S. 672, 682, 683; Doe v. Jones, 11 Ala. 63; McMurray v. Mayor etc., 54 Md. 104; Dugan v. Mayor, 5 Gill & J. 375; Eisenbach v. Hatfield, 26 Pac. R. 539; Louisville v. Bank, 3 B. Mon. 144; Kennedy v. Covington, 8 Daua, 61; Barney v. Keokuk, 94 U. S. 324; Baltimore v. White, 2 Gill (Md.) 444; Rowan's Ex'r v. Portland, 8 B. Mon. 253.

[8] Backus v. Detroit, 49 Mich. 110.

[9] Iron Railroad Co. v. Trenton, 19

§ 134. **Ferries and Ferriage.**—The grant to the municipal corporation of the power, to confer ferry franchises upon private persons and corporations, is not in its nature a contract, which cannot be impaired or avoided.[1] It may at any time be taken away from the municipality, or modified in any way, that the public interests may, in the judgment of the Legislature, require.[2]

If the Legislature has delegated to the city the exclusive power to establish or regulate [3] ferries within municipal limits, the municipal authorities may likewise grant a franchise, conferring an exclusive privilege to operate ferries.[4] But this cannot be done, unless it is clear from the express language of the charter, or by necessary implication, that it was the intention of the Legislature to delegate to the municipal corporation the power to grant exclusive franchises of this kind.[5] And although the general power to license or grant franchises does authorize the city to limit the number of franchises, which it will create under the power, it does not, necessarily imply that the city may under this general power create in any one person or corporation, a monopoly or exclusive right to the establishment and conduct of ferries, at any and every point upon the waters within municipal limits. An express grant of such a power seems to be necessary.[6] The power, to establish ferries and regulate rates of ferriage, will authorize the city to lease a ferry owned by it; but it cannot wholly surrender its control and

Ohio St. 299; Page v. Baltimore, 34 Ind. 558; State v. Jersey City, 34 N. J. L. 390.

[1] Duckworth v. New Albany, 25 Ind. 283.

[2] East Hartford v. Hartford Bridge Co., 10 How. U. S. 511; Roper v. McWharter, 77 Va. 214. The city of New York has an exclusive, but not an irrepealable, power to grant ferry franchises: Mayor v. N. Y. & S. I. Ferry Co., 40 N. Y. Super. 232; Same v. Longstreet, 64 How. Pr. 30; Benson v. Mayor, 10 Barb. 223; People v. Mayor, 32 Ib. 102; In Pennsylvania, Illinois, Wisconsin, Minnesota, Nebraska, West Virginia, Missouri, Texas, California, Colorado and Louisiana the constitution expressly prohibits special or local laws licensing or chartering ferries.

[3] Under this power, ferries may be regulated, though one bank only of the river, on which they are operated, is within the municipal territory: Arkadelphia L. Co. v. Arkadelphia, 19 S. W. Rep. 1053.

[4] Costar v. Brush, 25 Wend. 628; Mayor v. Starin, 106 N. Y. 1; Mayor v. N. Y. & N. J. S. N. Co., 106 Ib. 28.

[5] Minturn v. Larue, 23 How. 435; Harrison v. State, 9 Mo. 526; McEwen v. Taylor, 4 G. Greene, 532.

[6] Chicago v. Rumph, 45 Ill. 90; Logan v. Pyne, 43 Iowa, 524; B. & H. Ferry Co. v. Davis, 48 Ib. 133.

supervision to the lessee.[1] So, if the municipal corporation leases a ferry, owned by it, with a covenant for quiet enjoyment, it will not be restrained thereby from exercising the public powers, delegated to it by statute, to license another ferry, if in its judgment the public convenience demands it, unless the municipality is given the express power to grant exclusive privileges. The city would be impliedly liable on its covenants to its lessee, if it had undertaken the unauthorized grant of an exclusive franchise, where, relying upon the possession of an exclusive privilege, the lessee had made improvements, incurred expenses, and acquired proprietary rights, which receive actual damage through the municipal breach of covenant.[2]

§ 135. **Regulations providing for the public welfare, peace, safety and convenience.**—In most municipal charters, and general laws providing for municipal incorporation, after special grants of powers to the municipality, an additional general authority is granted, to provide by ordinance for the preservation and promotion of the public welfare, peace, safety, convenience, etc. With a view to recognize in the city sufficient authority to provide and enforce all needful regulations of the acts and doings of its citizens, which serve to promote the general welfare, and the need of which cannot be foreseen or anticipated, and which cannot ordinarily be the subject of a special grant of power, the courts have been inclined to hold that they find in this so-called *general welfare* clause sufficient municipal authority for the enactment and enforcement of any reasonable regulation, which does actually promote the general welfare, by preventing or reducing some public evil. Thus, it has been held that, under this general grant of power, a city may regulate the

[1] McDonell v. International & G. N. Co., 60 Tex. 590. And it has been held that, inasmuch as the municipal corporation takes the power, to establish and regulate ferries, as a trust for the public, it must be performed by it, and cannot, without legislative sanction, be delegated to another by a lease or otherwise. Roper v. McWharter, 77 Va. 214; Waterbury v. Laredo, 68 Texas, 565.

[2] *In re* Fay, 15 Pick, 243; see generally, Fanning v. Gregoire, 16 How. 524; Equity may annul ferry lease. Phillips v. Bloomington, 1 G. Greene, 498; Chilvers v. People, 11 Mich. 43; O'Neill v. Police Jury, 21 La. An. 586; Aiken v. Railroad Co., 20 N. Y. 370; Harris v. Nesbit, 24 Ala. 398; Conner v. Albany, 1 Blackf. 43; City v. Ferry Co., 27 Ind. 100; Shallcross v. Jeffersonville, 26 Ind. 196.

more or less religious observance of Sunday,[1] enact ordinances for the protection of trees in public places,[2] prohibit domestic animals from running at large,[3] compel the closing of saloons and restaurants at a certain hour,[4] arrest and fine vagrants,[5] prevent cruelty to animals,[6] regulate the keeping of gunpowder,[7] prohibit the blasting of rocks,[8] prohibit the carrying of concealed weapons,[9] prohibit gambling,[10] appoint policemen,[11] provide for the arrest and punishment of intoxicated persons,[12] or of those addicted to profane swearing,[13] prohibit street preaching,[14] or enact any other proper regulation, not repugnant to the State Constitution or laws, which is adapted to preserve the peace and quiet of the community.[15]

§ 135 *a*. **Regulation of railroads within city limits.**— Under the general welfare clause, as well as, sometimes, by special grant of power, the courts have held that the municipal regulation of the speed of railroad trains within the city limits, when reasonable, is generally admitted to be a valid exercise of the police power.[16] Such a regulation applies to all

[1] Mayor v. Luick, 12 Lea, 499; Van Buren v. Wells, 14 S. W. Rep. 38; Gabell v. Houston, 29 Tex. 335; City Conn. of Charleston v. Benjamin, 2 Strobh. (S. C.) Law, 508; St. Louis v. Cafferata, 24 Mo. 94; Cincinnati v. Rice, 15 Ohio, 225; State v. Ludwig, 21 Minn. 202; Shreveport v. Levy, 26 La. An. 671; Karwisch v. Atlanta, 44 Ga. 404; Megowan v. Com., 2 Metc. (Ky.) 3; Frolickstein v. Mobile, 40 Ala. 725; State v. Welch, 36 Conn. 215; Cf. State v. Langsten, 88 N. C. 692. On the question of constitutionality of Sunday laws in general, because of their religious partiality, see Tiedeman's Limitations of Police Power, § 76.

[2] State v. Merrill, 37 Me. 329; comp. Goshen v. Cravy, 58 Ind. 268.

[3] See § 129.

[4] State v. Welch, 36 Conn. 215; Morris v. City of Rome, 10 Ga. 532; Staats v. Washington, 45 N. J. L. 318; Hudson v. Geary, 4 R. I. 485; State v. Freeman, 38 N. H. 426.

[5] See § 126.

[6] St. Louis v. Schoenbusch, 95 Mo. 618.

[7] Frederick v. Augusta, 5 Ga. 561; Davenport v. Richmond, 81 Va. 636.

[8] Com. v. Parks, 30 N. E. Rep. 174.

[9] *In re* Cheney, 90 Cal. 617.

[10] *Ex parte* Tuttle, 91 Cal. 589; Van Buren v. Wells, 14 S. W. R. 38.

[11] State v. Sims, 16 S. C. 486.

[12] Bloomfield v. Trimble, 54 Iowa, 399; Homer v. Blackburn, 27 La. An. 544.

[13] *Ex parte* DeLaney, 43 Cal. 478; State v. Debnam, 98 N. C. 712.

[14] Com. v. Davis, 140 Mass. 485; Mankato v. Fowler, 32 Minn. 364; Washburn v. City of Bloomington, 32 Ill. App. 245; Bloomington v. Richardson, 38 Ib. 60.

[15] Mobile v. Barton, 47 Ala. 84; Cottonwood v. Smith, 36 Kan. 401; State v. Bills, 13 Ind. 373; Com. v. Cutter, 29 N. E. Rep. 1146.

[16] Massoth v. Delaware etc. Co., 64 N. Y. 524; Baltimore C. P. Ry. Co. v. McDonnell, 43 Md. 534; Fletcher

the municipal territory, including inclosed lands owned by the railroad company; and the fact, that the company was engaged in carrying the mail, is immaterial.[1] Municipal ordinances, restricting the running of trains to four miles an hour,[2] requiring railroads to keep flagmen at crossings,[3] requiring a horse railway company to keep an agent on each of its cars, to aid the driver in controlling the car and to prevent accident;[4] to keep its tracks watered to allay dust,[5] and forbidding the railroad company from allowing a car to stand longer than ten minutes at a street crossing,[6] are valid and reasonable, and not in unlawful restraint of traffic. But a city has no right to make an unjust and unwarranted discrimination between competing roads, by dividing the city into two districts, and limiting the speed of trains passing through one district only.[7]

§ 136. **Power to appropriate funds for lobbying purposes.**—A municipality has no incidental or inherent right to appropriate its funds to the liquidation of expenses, which have been incurred in obtaining an increase of its charter powers.[8]

v. Atlantic etc. Co., 64 Mo. 484; Richmond etc. Co. v. Richmond, 96 U. S. 521; St. Louis etc. Co. v. Mathias, 50 Ind. 65; Haas v. Chicago R. etc. Co., 41 Wis. 44; Hooker v. Chicago etc. Co., 76 Ib. 542; Faber v. St. Paul etc. Co., 29 Minn. 465; Evison v. Chicago etc. Co., 45 Minn. 370; Donnaher v. State, 8 S. & M. (Miss.) 649; Taylor v. Lake Shore etc. Ry. Co., 45 Mich. 74; Meyers v. Chicago etc. Co., 57 Iowa, 555; Frick v. St. Louis etc. Co., 75 Mo. 595; Merz v. Mo. Pac. R. Co., 88 Mo. 672; Grube v. Same, 98 Ib. 330; St. Louis etc. Co. v. Dunn, 78 Ill. 197; Weyl v. Chicago etc. Co., 40 Minn. 350; State v. Mayor of Jersey City, 47 N. J. L. 286; Chicago etc. Co. v. Haggerty, 67 Ill. 113; Same v. Reid, 66 Ib. 43.

[1] Whitson v. Franklin, 34 Ind. 392.

[2] Knolbloch v. Chicago etc. Co., 31 Minn. 402. See, *contra*, where the attempted regulation was in a town of 1500 inhabitants, thinly settled, White v. St. Louis & S. F. Ry. Co., 44 Mo. App. 540.

[3] State v. East Orange, 41 N. J. L. 127; Toledo etc. Co. v. Jacksonville, 67 Ill. 37; Chicago & Alton Ry. Co., 67 Ill. 11; Erie v. Erie Canal Co., 59 Pa. St. 174; Phila. etc. Co. v. Bowers, 4 Houst. 506; Ladd v. Southern C. P. & M. Co., 53 Tex. 172; Green v. Eastern Ry. Co. (Minn. 93), 53 N. W. R. 808; Sloan v. Pac. R. R. Co., 61 Mo. 24.

[4] State v. Trenton, 20 Atl. Rep. 1076; So. Cov. etc. Ry. Co. v. Berry, 18 S. W. Rep. 1026; Penna. Co. v. Stegemeier, 118 Ind. 305.

[5] City v. Suburban Ry. Co. of Savannah, 77 Ga. 731.

[6] McCoy v. Phila. etc. Co., 5 Del. 599; Burger v. Miss. Ry. Co., 112 Mo. 238; 20 S. W. 349.

[7] Lake View v. Tate, 130 Ill. 247. For a full consideration of the police power of the state, so far as railroads are concerned, see Police Powers, § 194, and Tiedeman on Railroads, chapter on Police Regulations.

[8] Henderson v. Covington, 14 Bush, 312.

Nor can a town raise money by taxation, or pledge its credit, for the purpose of meeting the expenses, incurred in opposing before the Legislature a division of its territory,[1] or procuring its annexation to another town.[2] So, also, it has been held that a municipal corporation has no power to pay the expenses of individuals, which are incurred before its incorporation in obtaining a charter for it from the Legislature;[3] and, *a fortiori*, of persons, employed by it, to obtain from the Legislature the enactment of an unconstitutional law.[4] In all these cases, the act, in which the expense was incurred in behalf of the municipality, was a case of "lobbying," which is generally pronounced to be reprehensible, and an insufficient consideration for any contract, whether made by public or private parties.[5]

§ 137. **Power to borrow money.**—Since taxation is legitimately presumed to be the most natural, and the most just, mode of providing the means of satisfying the debts of a municipality, much discussion and litigation have arisen out of the frequent resort of municipal corporations to the power to borrow money, in order to meet maturing obligations, without having an express charter grant of such power. A full discussion of this subject, together with the collateral question of the municipal power to emit negotiable paper, and the general constitutional limitations on municipal indebtedness, will be found in another part of this work.[6]

§ 138. **Payment of bounties.**—It was held to be competent for the Legislature to authorize municipal corporations to raise and appropriate money for the payment of bounties to persons, as an inducement for them to enlist in the armies of the United States during the War of the Rebellion; or for the repayment of money advanced for such purposes.[7] But without special legislative authority, appropriations made by municipalities for such purposes are illegal and *ultra vires*;[8] but, although they

[1] Westbrook v. Dearing, 63 Me. 231; Frankfort v. Winterport, 54 Ib. 250.

[2] Minot v. West Roxbury, 112 Mass. 1; Coolidge v. Brookline, 114 Ib. 592.

[3] Front v. Belmont, 6 Allen, 152.

[4] Mead v. Acton, 139 Mass. 341.

[5] Tiedeman, Com. Paper, § 187.

[6] Chap. x. on Municipal Contracts, and chap. xi. on Municipal Securities.

[7] Lowell Sav. Bk. v. Oliver, 8 Allen, 247; Freeland v. Hastings, 10 Ib. 570; Mead v. Acton, 139 Mass. 341; Hilbish v. Catherman, 64 Pa. St. 154; Speer v. School Directors, 50 Ib. 150.

[8] Kunkler v. Franklin, 13 Minn.

may have been illegally made, it was held that their illegality or invalidity may be cured by subsequent legislative action.[1] So, also, cities have no implied or incidental power to raise money by taxation for the purpose of paying the commutation of citizens who may have been drafted to serve in the armies of the United States.[2] The same conclusion has been reached in respect to the power of a city to provide for the families of enlisted soldiers.[3]

§ 139. **Celebrations or entertainments.**—The furnishing of amusement or entertainment to the public is not within the purposes for which municipal corporations are created by the Legislature. For this reason, it is well settled that such corporations, unless they are expressly authorized by statute, have no power to furnish entertainments for their citizens, official visitors, or others;[4] or to arrange for celebrations of any kind, at the expense of the corporation;[5] not even when the proposed celebration is of a strictly public character, and of national importance; as, for example, the celebration of Independence day.[6] And an action cannot be maintained against them upon a contract, which was made with them to furnish such celebrations.[7] So, also, a city has no authority to appropriate city funds for the expense attendant upon a ball and banquet; and an injunction will be granted in such a case, to prevent the payment by the city treasurer of money thus illegally appropriated.[8] In the absence of express constitutional restrictions, the Legislature may always by express grant, vest in the municipal corporation the power to provide for such public celebrations, and to con-

127; Shackford v. Newington, 46 N. H. 415; Fiske v. Hazard, 7 R. I. 438; State v. Tappin, 29 Wis. 664; Parker v. Saratoga Co., 106 N. Y. 392; Thompson v. Pittston, 59 Me. 545; Russell v. Providence, 7 R. I. 566; Tyson v. Halifax Sch. Dis., 51 Pa. St. 9; Grim v. Weissenberg Sch. D., 57 Pa. St. 433; Brodhead v. Milwaukee 19 Wis. 624; Comer v. Folsom, 13 Minn. 219; Sperry v. Harr, 32 Iowa, 184.

[1] Booth v. Woodbury, 32 Conn. 118; Kunkle v. Franklin, 13 Minn. 127; State v. Richland, 20 Ohio St. 362.

[2] Barbour v. Camden, 51 Me. 608.

[3] Veazie v. China, 50 Me. 518.

[4] Law v. People, 87 Ill. 385.

[5] Cornell v. Guilford, 1 Denio, 510; Hale v. People, 87 Ill. 72.

[6] Hood v. Lynn, 1 Allen, 103. But see Hill v. East Hampton, 140 Mass. 381.

[7] Hodges v. Buffalo, 2 Denio, 110.

[8] Austin v. Coggeshall, 12 R. I. 329; Greenough v. Wakefield, 127 Mass. 275. In Claflin v. Hopkins, 4 Gray, 502, the same principle was applied to the unlawful purchase of uniforms for a military company by a town.

tract debts for the same, as well as to appropriate the funds of the city therefor.[1]

§ 140. **Rewards.**—The authorities are not agreed upon the power of a municipality, to offer rewards for the detection and punishment of crimes, in the absence of an express statute, empowering it to do so.[2] The weight of the decisions is against the existence of any such power in municipal corporations, unless, of course, the Legislature has deemed it expedient to confer it upon them by statute.[3] And a power, to pass all needful by-laws for the administration of justice, will not authorize the appropriation of money to enforce the laws of the commonwealth, in which every community has the same interest.[4] If the city has power to offer a reward, and an offer is to be made by the mayor and ratified by the council, it is binding although not ratified until after the service, for which the reward is to be paid, has been rendered.[5]

§ 141. **Erecting, furnishing and repairing public buildings.**—The express power, to repair or alter public buildings, will not confer upon the municipal corporation the authority to erect a new building.[6] The municipal corporation, as a general rule, has no implied authority to erect buildings for municipal purposes, and to incur debts therefor; certainly, not beyond what is absolutely necessary houseroom for carrying on the city government.[7] But municipal charters and the gen-

[1] Hill v. East Hampton, 140 Mass. 381; where it has been held that, where a general statute authorizes towns to appropriate money for the purpose of celebrating the centennial of their incorporation, the town may date its incorporation from the time of its incorporation as a district.

[2] By N. Y. Con. Act, § 259, the Police Board is expressly authorized to offer rewards for arrest and conviction of persons guilty of homicide, arson and receiving stolen goods.

[3] Huthsing v. Bosuquet, 3 McCrary, 152; Patton v. Stephens, 14 Bush, 324; Murphy v. Jacksonville, 18 Fla. 318; Grant Co. v. Bradford, 72 Ind. 455; Gale v. South Berwick, 51 Me. 174; Hanger v. Des Moines, 52 Iowa, 193; Loveland v. Detroit, 41 Mich. 367. *Contra*, York v. Forscht, 23 Pa. St. 391; Crawshaw v. Roxbury, 7 Gray, 374; Abel v. Pembroke, 61 N. H. 357.

[4] Patton v. Stephens, 14 Bush (Ky.) 324.

[5] Janvrin v. Exeter, 48 N. H. 83.

[6] Peterson v. Mayor etc., 17 N. Y. 449, 455.

[7] Reynolds v. Albany, 8 Barb. 597; People v. Harris, 4 Cal. 9; Vanover v. Davis, 27 Ga. 357. It has, however, been held in one instance, that the erection of a schoolhouse is within the scope of the municipal authority, and such a building may be erected without express charter authority, in the absence of a statutory prohibition: Cartersville v. Baker, 73 Ga. 686.

eral statutes, under which the municipal communities are incorporated, generally contain express grants of power to erect the necessary municipal buildings, and to determine the cost thereof. Unrestricted authority, to purchase real estate, will imply that the expediency and necessity of the purchase are to be determined upon by the city council;[1] and the powers, to build and to repair, are so far discretionary that the determination of the plan and mode of their exercise is impliedly incidental thereto.[2] A city council, it is admitted, has the power to furnish its meeting room in a suitable manner, of which they are to be the sole judges, in the absence of statute; and an injunction, to prevent a city council from decorating the council chamber with certain portraits, was refused.[3]

It has been held that, although a Legislature cannot compel a municipality to bear more than its share of the expense of conducting the State government, the city itself may, in the absence of express statute forbidding such action, erect buildings, at its own expense, for the use of the county officials.[4]

§ 142. **Compromise and arbitration.**—Municipal corporations have been repeatedly held to have the incidental power to compromise claims, which may exist in their favor or against them.[5] Accordingly, town trustees may compromise a judgment obtained in a suit against them to recover a penalty;[6] and, on the other hand, a city council,[7] an overseer of the poor,[8] or a board of supervisors,[9] may compromise judgments, which are held by the corporation against individuals. A town may accept a note, in payment of a fine due it,[10] and enforce notes which are taken by it, as security for claims against private persons.[11]

[1] Richmond v. McGirr, 78 Ind. 192; French v. Quincy, 3 Allen, 9.

[2] Ely v. Rochester, 26 Barb. 133; Bell v. Platteville, 71 Wis. 139; Galveston v. Devlin, 84 Tex. 319.

[3] Reynolds v. Albany, 8 Barb. 597; People v. Harris, 4 Cal. 9. Cf. Hodges v. Buffalo, 2 Denio, 110; Stetson v. Kempton, 13 Mass. 272.

[4] Callam v. Saginaw, 50 Mich. 7.

[5] Bean v. Jay, 23 Me. 117; Bailyville v. Lowell, 20 Ib. 178; Grimes v. Hamilton Co., 37 Iowa, 290; Mills Co. v. Bur. etc. Co., 47 Ib. 66; People v. San Francisco, 27 Cal. 655; Agnew v. Brall, 124 Ill. 312; So. Boston Iron Co. v. U. S., 118 U. S. 37; State v. Martin, (Neb.) 43 N. W. R. 244; Tuttle v. Weston, 59 Wis. 151; as to the power of New York city, see Consol. Act, § 1788.

[6] Petersburg v. Mappin, 14 Ill. 193.

[7] Agnew v. Brall, 124 Ill. 312.

[8] Olp v. Leddick, 59 Hun, 627.

[9] Collins v. Welch, 58 Ia. 72; Shanklin v. Madison Co., 21 Ohio St. 575.

[10] Caldwell v. Wright, 25 Ill. Ap. 74.

[11] Buffalo v. Bettinger, 76 N. Y. 393.

A municipal corporation may, when it ascertains that it has become a party to a contract, which will act oppressively upon the other party, release him therefrom; certainly, where a court of equity would relieve him from the contract.[1] But while a town council can legally release a doubtful debt,[2] it cannot vote a gratuity to a person, having a claim against it for injuries sustained, on account of his indigency, where the claim has no legal basis.[3]

Unless forbidden to do so by its charter, a municipal corporation may submit a disputed claim against it to arbitration.[4] The award will be binding upon the city,[5] and the remedy, by which its payment by the city may be compelled, is an action on the award, and not by a *mandamus*.[6]

§ 143. **Power of municipalities to sue and be sued.**—A municipal corporation may, unless expressly prohibited, or unless some special provision or exemption is made by statute, protect its property, enforce its contracts, collect its debts, and redress its wrongs,[7] by the same remedies which are open to individuals.[8] And it has been held that one municipal corporation can sue another.[9] And so, likewise, municipalities may be sued for the breach of express contracts, and for many kinds of torts.[10]

But a department of the city government of New York city cannot be sued;[11] nor can a recovery be had in the United States

[1] Bean v. Jay, 23 Me. 117, 121; Meech v. Buffalo, 29 N. Y. 210.

[2] Ford v. Clough, 8 Me. 334.

[3] Mathews v. Inhabitants, 134 Mass. 355; *contra*, McGinness v. New York, 26 Hun, 142.

[4] Alexander Canal Co. v. Swann, 5 How. U. S. 83; Dix v. Dummerston, 19 Vt. 263; Buckland v. Conway, 16 Mass. 390; Paret v. Bayonne, 39 N. J. L. 559; Remington v. Harrison Co. Ct., 12 Bush, 148; Springfield v. Walker, 42 Ohio St. 543; Kane v. Fond du Lac, 40 Wis. 495; Township v. Rankin, 70 Iowa, 65; Shawneetown v. Baker, 85 Ill. 563.

[5] Smith v. Philadelphia, 13 Phila. (Pa.) 177.

[6] State v. Jersey City, 41 N. J. L. 135.

[7] Union Coal Co. v. La Salle, (Ill.) 26 N. E. R. 506.

[8] Ottawa D. C. v. Law, 6 Can. Q. B. 546; First Nat. Bk. etc. v. Nat. Ex. Bank, 92 U. S. 122; Augusta v. Leadbetter, 16 Me. 45; Detroit v. Carey, 9 Mich. 165; Oliver v. Worcester, 102 Mass. 489; Buffalo v. Bettinger, 76 N. Y. 393. *Contra*, as to counties, Whittaker v. Tuolumne Co., 30 Pac. 1016; 96 Cal. 100.

[9] Huron D. C. v. London D. C., 4 Up. Can. Q. B. 302.

[10] See *post*, ch. x. and XVII.

[11] Swift v. New York, 83 N. Y. 528.

Courts, upon bonds or coupons, held by the citizens of a State, in which the city owing them is located, but which are transferred to a resident of another State for the sole purpose of giving the Federal Courts jurisdiction.[1]

§ 144. **Power to create private monopolies.**—As a general proposition, it may be conceded that the creation of a monopoly out of an ordinary calling is an unconstitutional interference with private property and personal liberty. But it will not do to say that all monopolies are void. Every man has, under reasonable regulations, a right to pursue any one of the ordinary callings of life, as long as its pursuit does not involve evil or danger to society. And a law, which granted to one man, or to a few individuals, the exclusive privilege of prosecuting the trade or business, would violate the constitutional rights of those who are prohibited from pursuing the same calling. On the other hand, when the State bestows upon one or more the privilege of pursuing a calling or trade, the prosecution of which is not a common natural right,—either because it cannot be carried on without special franchise powers, or because the general prosecution of the business has been lawfully prohibited, in the constitutional exercise of the police power,—a monopoly is created, without, however, violating the rights of anyone; for, with the abolition of the monopoly thus created, would disappear all right to carry on the trade. The trade never existed before as a lawful calling.[2]

Thus, although it has been held to be an unconstitutional and void creation of a monopoly, to give to one private corporation or company the exclusive privilege of supplying the city, or certain parts of a city, with illuminating gas,[3] yet there can be no doubt that the grant of such an exclusive franchise is lawful, on the ground that the public interests must be protected against the indiscriminate allowance of excavations in the streets for the purpose of laying down the conducting pipes.[4] The same

[1] New Providence v. Halsey, 117 U. S. 336; Farmington v. Pillsburg, 114 Ib. 138.

[2] For a more full and general discussion of the constitutionality of private monopolies, see Tiedeman's Limitations of Police Power, § 105.

[3] Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19; State v. Cincinnati etc. Gas Co., 18 Ohio St. 292.

[4] State v. Milwaukee Gaslight Co., 29 Wis. 454; Indianapolis v. Indianapolis Gas Co., 66 Ind. 396; Parkersburg Gas Co. v. Parkersburg, 30 W. Va. 435; Grant v. City of Davenport,

ruling has been sustained in, and applied to, the grant of an exclusive privilege to establish an electric light plant,[1] waterworks,[2] and to construct a street railway.[3] But while in all of these cases of a grant of an exclusive monopoly, the grant is properly to be considered a contract, which cannot be impaired or abrogated by subsequent legislation;[4] yet, the grant does not interfere with the exercise of the police power in regard to the public health, safety and general welfare, wherever the two conflict.[5] Nor does the grant of such an exclusive franchise restrict the exercise of the power of taxation,[6] the right of eminent domain,[7] or the charter power of a city to establish a municipal monopoly of the same kind.[8]

But in order that a municipal corporation may grant an ex-

36 Iowa, 396; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; People's Gaslight Co. v. Jersey City, 40 N. J. L. 297; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683, reversing s. c., 81 Ky. 263; Newport v. Newport Light Co., 84 Ky. 167.

[1] Grand Rapids Electric etc. Co. v. Grand Rapids Edison etc. Co., 33 Fed. Rep. 659.

[2] Atlantic City Waterworks v. Atlantic City, 39 N. J. Eq. 367; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674. But see Brenham v. Brenham Water Co., 67 Tex. 542; New Orleans Water Co. v. Louisiana Sugar Refinery Co., 35 La. An. 1111; Citizens' Water Co. v. Bridgeport Hydraulic Co., 55 Conn. 1.

[3] Citizens' Street R'y Co. v. Jones, 34 Fed. Rep. 579; Davies v. New York, 14 N. Y. 506; Birmingham & P. M. St. R'y v. Birmingham St. R'y Co., 79 Ala. 465; Newell v. Minn. etc. R'y Co., 35 Minn. 112; N. Y. Elevated R.R. Co., *In re*, 70 N. Y. 327; Gilbert Elevated R'y Co., *In re*, Ib. 361; Fort Worth St. R'y Co. v. Rosedale St. R'y Co., 68 Tex. 169; Des Moines Street R. R. Co. v. Des Moines Broad-guage St. R'y Co., 73 Iowa, 513.

[4] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Louisville Gas Co. v. Citizens' Gas Co., Ib. 683; New Orleans Waterworks Co. v. Rivers, Ib. 674.

[5] Same cases as in preceding note, and Stein v. Bienville Water Supply Co., 34 Fed. Rep. 145; National Waterworks v. Kansas City, 28 Fed. Rep. 921.

[6] State v. Herod, 29 Iowa, 123; Los Angeles v. So. Pac. R. R. Co., 67 Cal. 433; Columbus v. Street R. R. Co., 45 Ohio St. 98. But see Des Moines v. Chicago, R. I. & P. R. R. Co., 41 Iowa, 569.

[7] West River Bridge v. Dix, 6 How. 507; Charles River Bridge v. Warren River Bridge, 11 Pet. 420; Central Bridge Co. v. Lowell, 4 Gray, 474; *In re* Rochester Water Commissioners, 66 N. Y. 413; *In re* Towanda Bridge, 91 Pa. St. 216; Central City Horse R'y Co. v. Fort Clark etc. R'y Co., 87 Ill. 523; Lake Shore etc. R. R. Co. v. Chicago etc. R. R. Co., 97 Ill. 506; N. C. R. R. Co. v. Carolina Cent. R. R. Co., 83 N. C. 489.

[8] Long v. Duluth, 51 N. W. Rep. 913; Altgelt v. San Antonio, 81 Tex. 436; Brenham v. Brenham Water Co., 67 Tex. 143; Parkersburg Gas Co. v. Parkersburg, 30 W. Va. 435; 4 S. E. Rep. 650.

clusive privilege of the character, which has just been explained and pronounced to be within the constitutional powers of the State, the power to do so must have been granted to the corporation, either expressly or by necessary implication. The power cannot ordinarily be implied.[1] It has thus been held that the grant to the municipality of the power to *establish and regulate ferries*, does not give the city the exclusive power of regulation, and, much less, the power to create exclusive franchises.[2] The same has been held to be true of the charter power to *license*, or to *license and regulate* certain trades and occupations.[3] And it is true, also, that, although the power to license be made exclusive, it does not give the power to grant an exclusive franchise, unless the city is authorized "to grant or *refuse*" a license.[4] The city cannot grant an exclusive right to furnish gas for the inhabitants, under a charter power to "cause the streets to be lighted," and to provide "reasonable regulations" therefor;[5] or to furnish water, under a charter power to make "ordinances, rules," etc., "to supply the city with water."[6] On the other hand, where the charter authorized the city to maintain gas works or waterworks of its own, it impliedly granted to the city the power to create a private monopoly of it.[7]

The grant to a street railway company of the power to lay down its tracks and operate its road in certain streets, does not constitute an exclusive franchise, which would enable the street railway to resist the use of the same street by another competing company, unless the grant was expressly declared to be a monopoly.[8] But the track of the first railway is its private

[1] People v. Benson, 34 Barb. 24; State v. Cincinnati Gas Light Co., 18 Ohio St. 262; Stein v. Bienville Water Supply Co., 34 Fed. Rep. 145; Davenport v. Kleinschmidt, 6 Mont. 502.

[2] Minturn v. Larue, 23 How. 435; McEwen v. Taylor, 49 Greene (Iowa) 532; Harrison v. State, 9 Mo. 526.

[3] Chicago v. Rumph, 45 Ill. 90; B. & H. Ferry Co. v. Davis, 48 Iowa, 133; Logan v. R. Pyne, 43 Iowa, 524; Snyder v. North Lawrence, 8 Kans. 82; Tuckahoe Canal Co. v. Railroad R. R. Co., 11 Leigh, 42; Gale v. Kalamazoo, 23 Mich. 344 (9 Am. Rep. 80), opinion of Cooley, J.

[4] B. & H. Ferry Co. v. Davis, 48 Iowa, 133.

[5] Saginaw Gasl. Co. v. Saginaw, 28 Fed. Rep. 529.

[6] Syracuse Water Co. v. Syracuse, 116 N. Y. 167.

[7] Newport v. Newport Light Co., 84 Ky. 167; Atlantic City Water Works v. Atlantic City, 39 N. J. Eq. 387; Saginaw Gaslight Co. v. Saginaw, 28 Fed. Rep. 535; but see *contra*, Brenham v. Brenham Water Co., 67 Tex. 542.

[8] Gulf City Street Ry. Co. v. Gal-

property, whether its franchise be exclusive or otherwise; and it has been held, that in no case can the second railway, which obtains the authority to operate a railway in the same streets, make use of the track of the first railway, without making compensation for what is a taking of private property, in the exercise of the right of eminent domain.[1]

§ 144 *a*. **Power to create and operate municipal monopolies—Municipal ownership of gas, electric light and waterworks.**—If the question had been raised fifty years ago, whether a municipal corporation could, within the provisions and the spirit of the State Constitutions, under authority from the State Legislature, undertake the establishment and operation of municipal monopolies, in the place of private monopolies,—especially in the case of gas, electric light and waterworks,—it is very likely that the question would have been answered in the negative. The popular opinion of that day opposed the assumption, by any part of government, of powers beyond what were necessary to the preservation of peace and good order, the enforcement and protection of private rights, and the alleviation of individual distress through the medium of public hospitals, asylums and almshouses; and the same public opinion would have controlled the judgment of the courts, if such a monopoly had by some accident or oversight been created, in pronouncing upon its validity. But, since then, the popular sense of right, under the influence of modern socialism, has manifested a decided socialistic tendency in favor of the intervention of the State in many instances, which would not have been seriously considered in times past. It is true that for more than a century, we have had in this country, as well as elsewhere in the civilized world, a government monopoly, in the transportation and distribution of the mail. But that monopoly had been created by an express provision of the United States Constitution, and had thereby been placed far above the reach of judicial criticism. Nor have we had since then, in the

veston City Ry. Co., 65 Tex. 502; Jackson Co. Horse Ry. Co. v. Interstate Rapid Transit Ry. Co., 24 Fed. Rep. 306.

[1] Jersey City & B. R. R. Co. v. J. C. & Hob. H. R. R. Co., 20 N. J. Eq. 61; Gulf City Ry. Co. v. Galveston City Ry. Co., 65 Tex. 502; State v. Corrigan St. Ry. Co., 85 Mo. 263; Jackson Co. Horse Ry. Co. v. Interstate Rapid Transit Co., 24 Fed. Rep. 306; Eichels v. Evansville St. Ry. Co., 78 Ind. 261.

United States, any other instance of a State or National government monopoly, except the recent establishment, in South Carolina, of a State monopoly in the sale of intoxicating liquors; and the results of the pending judicial contests over its constitutionality must remain for the present a matter of conjecture.

But in determining the constitutionality of government monopolies, a very important distinction must be made between the monopolies, which may be established and operated by the State government, and those which may, under legislative authority, be erected by a municipal corporation. The distinction rests upon the generally accepted doctrine, that a municipal corporation has a *quasi* private character, as well as a strictly public character. The grant by the State to a municipal corporation of the power to establish and operate gas, electric light or waterworks, is a grant to the corporation in its semi-private character, as the corporate representative of the local community, and not to it as the public representative of the State government.[1]

Involved in the question of the constitutionality of municipal ownership of gas, electric light and waterworks, are two distinct queries: *first*, can the municipal corporation supply itself with the light and water which it may need for lighting and cleansing the streets and other strictly municipal property; and, *secondly*, can it vend to private consumers the light and water they may need? In regard to the first query, there is little room for doubt, and the cases are unanimous, that the municipal corporation may, if the State Legislature grants the power, supply itself, for public needs, with light and water, by the establishment and operation of its own works, as well as by contract with private manufacturers of the same.[2]

Where the municipality undertakes, as it always does when it establishes and operates its own lighting or waterworks, to

[1] See *ante*, § 9.

[2] Brenham v. Brenham Water Co., 67 Tex. 542; Atlantic City Water Works v. Atlantic City, 39 N. J. Eq. 367; Parkersburg Gas Co. v. Parkersburg, 30 W. Va. 435; 4 S. E. Rep. 650; Saginaw Gaslight Co. v. Saginaw, 28 Fed. Rep. 535; Garrison v. Chicago, 7 Biss. 480; Long v. Duluth, 51 N. W. Rep. 913; Altgelt v. San Antonio, 81 Tex. 436; State v. City of Hamilton, (Ohio) 23 N. E. Rep. 935; Hamilton Gaslight & Coke Co. v. City of Hamilton, 37 Fed. Rep. 832; Mauldin v. City Council of Greenville, 33 S. C. 1; 11 S. E. Rep. 134; see, also, State v. Town of Columbia, (Mo.) 20 S. W. Rep. 90.

supply private consumers in their private houses, the municipal government is without doubt engaged in a private business, which fifty years ago would very likely have been conceded to be beyond the legitimate sphere, even of a municipal corporation, and this has been the judgment of the Supreme Court of South Carolina in a very late case.[1] But in every other case, where the question has been raised, the courts have held that the vending of light and water to private consumers was but an incident of the supply of these elements for strictly public use, and was within the constitutional limitations.[2]

But the attempt of a city government, to establish and operate its own gas, electric light and waterworks, will not be lawful in any case, unless the State Legislature has granted, expressly or by plain implication, the power to do so. It has thus been decided very lately by the Massachusetts Supreme Court, that, under existing statutes, towns in the State of Massachusetts have not the power to maintain electric light plants.[3] On the other hand, it has been held that the authority for mu-

[1] Mauldin v. City Council of Greenville, 33 S. C. 1 (11 S. E. Rep. 434).

[2] Atlantic City Waterworks v. Atlantic City, 39 N. J. Eq. 367; Dayton v. Quigley, 29 N. J. Eq. 77; Hale v. Houghton, 8 Mich. 451; Rochester Water Co., *In re*, 66 N. Y. 413; Wayland v. Com'rs, 4 Gray, 500; Crawfordsville v. Braden, (Ind.) 28 N. E. 849; Springfield v. Fullmer, (Utah) 27 Pac. Rep. 577; Thompson Houston Electric Co. v. Newton, 42 Fed. Rep. 723; Smith v. Mayor, 88 Tenn. 464 (12 S. W. 924); in the last case, the court saying: "Nothing should be of greater concern to a municipal corporation than the preservation of the good health of the inhabitants. Nothing can be more conducive to that end than a regular and sufficient supply of wholesome water, which common observation teaches all can be furnished in populous cities only through the instrumentality of well-equipped waterworks. Hence, for a city to meet such a demand is to perform *a public act and confer a public blessing* . . . . It cannot be held that the city in doing so is engaging in a private enterprise, *or performing a municipal function for a private end.*" "Municipal corporations constitute a part of the civil government of the State, and their streets are highways, which it is the province of government, by appropriate means, to render safe. To that end the lighting of streets is a matter of which the public may assume control, ... the manufacture of gas, and its distribution for public and *private* use . . . . is a business of a public nature, and meets a public necessity for which the State may make provision. It is one which so far from affecting the public injuriously has become one of the *most important agencies of civilization* for the promotion of the public convenience and safety." New Orleans Gaslight Co. v. Louisiana Light Co., 115 U. S. 658.

[3] Spaulding v. Peabody, (Mass.) 26 N. E. Rep. 421.

nicipal ownership will be implied from the charter power "to provide for lighting" the streets, and other public places.[1] In one case,[2] it was held that this was an inherent power of municipal corporations. The power to establish and operate waterworks has also been conceded to municipal corporations, under the grant of power "to provide the city with water;[3] and even under the power "to provide for the general welfare."[4]

[1] Parkersburg Gas Co. v. Parkersburg, 30 W. Va. 435; Garrison v. Chicago, 7 Biss. 480; Crawfordsville v. Braden, (Ind.) 28 N. E. 849, power "to light streets with electricity, to contract for the same, to permit poles," etc.; Saginaw Gaslight Co. v. Saginaw, 28 Fed. Rep. 535, "to cause its streets to be lighted."

[2] Crawfordsville v. Braden, *supra*.

[3] Atlantic City Water Works v. Atlantic City, 39 N. J. Eq. 367; Hale v. Houghton, 8 Mich. 451; Smith v. Mayor, 88 Tenn. 464 (12 S. W. 924); Hackensack Water Co. v. Hoboken, (N. J.) 17 Atl. 307; Putnam v. Grand Rapids, 58 Mich. 417; Atty. Gen. v. Detroit, 55 Mich. 181.

[4] Springfield v. Fullmer, (Utah) 27 Pac. 577; Mauldin v. Greenville, 33 S. C. 1 (11 S. E. 434). Judge Brown, in the case of Harlan Gas Light Co. v. New York, 33 N. Y. 309, says: "The power and *duty* of municipal government to furnish light for the streets and avenues of the city is not disputed or put in controversy in this action. Indeed it could not be, with any show of reason or good sense. In our northern latitude, when darkness prevails over half the twenty-four hours for a large part of the year, light diffused through the public streets and avenues is a *predominant* and *urgent necessity* which *no well-governed city can do without.* This beneficent application of artificial light is one of the distinguishing characteristics between the city of modern times and those of the middle ages, when darkness reigned supreme for no inconsiderable portion of the time, broken only to become more visible by the occasional torch of the link boy, or the lantern of the solitary watchman. That modern gas light diffuses its rays over every part of the public thoroughfare, is a source of pleasure and comfort and convenience, as well as a security against crime and disorder, which no other agency can supply. It is indispensable at all times, and no municipality can be said to be well governed, which is not able to command its presence under all circumstances."

CHAPTER IX.

ORDINANCES.

§ 145. **Definition — Ordinances and resolutions distinguished.**—Among the common law incidents of the grant of power to corporations, both public and private, was the general implied right to make such by-laws, not inconsistent with the charter of the corporation, as would enable it to carry on most effectually the business for which it had been created.[1] In the case of municipal corporations, especially, the *implied* power to enact by-laws is very largely supplemented, if not superseded altogether, by express grants of power. These by-laws of a municipal corporation are in this country given the name of *ordinances*, although in England they are called *by-laws*, the term *by* or *bye* meaning a place of habitation, or local community.[2]

[1] Coal Float v. Jeffersonville, 112 Ind. 15; Chamberlain v. Evansville, 76 Ib. 542.

[2] Com. v. Turner, 1 Cusb. 493; Taylor v. Lambertville, 43 N. J. Eq. 107; Citizens Gas etc. v. Elwood, 114 Ind. 332. In Gosling v. Veley, 19 L. J. (N. S.) Q. B. it was said by Baron Parke "that a municipal by-law (*i. e.* ordinance) is a rule binding on a particular district, not being at variance with the general law of the

Ordinances are to be discriminated from resolutions,[1] in that the former are of the nature of a local law, prescribing a general, uniform and permanent rule of conduct; while the latter are special, temporary and limited in their creation or application.[2] This distinction is important; for, when a charter prescribes that by-laws and ordinances were to be submitted to the mayor for approval, resolutions need not be.[3] This distinction acquires further importance when, by express provisions of the charter, or by necessary implication, an act of a legislative municipal body is required to be done or manifested by ordinance. In such a case, a resolution is neither proper nor sufficient.[4] If an act is to be done by a council, and the charter is silent as to the mode, it may be done by a resolution, duly signed and executed.[5] It has been held, too, that ordinarily the effects of the ordinance and the resolution are the same, both being legislative acts; and that, under a general power to make ordinances and by-laws, any enactment is valid, whether it purports to be an ordinance or resolution, the form being immaterial.[6]

§ 146. **Power to pass ordinances.**—The charter of a city holds the same relative position to the municipal ordinances, which are subordinate to it, that the State Constitution does to the statutes of the Commonwealth; and the rules of construction are to some extent the same in both classes of laws.[7]

realm, and being reasonable and adapted to the purposes of the corporation, and any rule or *ordinance of a permanent* character, which the corporation is empowered to make, is a by-law." Hopkins v. Swansea, 4 M. & W. 621; Queen v. Osler, 32 Up. Can. Q. B. 324.

[1] Expression of corporate power by resolutions. State v. Jersey City, 30 N. J. L. 148; State v. Elizabeth, 37 Ib. 432.

[2] Citizens' Gas etc. v. Elwood, 114 Ind. 332; Blanchard v. Bissell, 11 Ohio St. 103.

[3] Kepner v. Com., 40 Pa. St. 124.

[4] Paterson v. Barnet, 46 N. J. L. 62; Springfield v. Knott, 49 Mo. Ap. 612; State v. Bayonne, 35 N. J. L. 335; Anderson v. O'Conner, 98 Ind. 168; Newman v. Emporia, 32 Kan. 456; Hunt v. Lambertville, 45 N. J. L. 279; Central v. Sears, 2 Col. 588; Daniels v. Burford, 10 Up. Can. Q. B. 478; Bearden v. Madison, 73 Ga. 187; State v. Tryon, 39 Conn. 183; Starr v. Burlington, 45 Iowa, 87; Burmeister v. Howard, 1 Wash. T. 207.

[5] State v. Jersey City, 3 Dutch. 493; Merch. etc. v. Chicago, 70 Iowa, 105; Butler v. Passaic, 44 N. J. L. 171; Board v. DeKay, 148 U. S. 591; 13 S. Ct. 706.

[6] Sower v. Phila., 35 Pa. St. 231; Green v. Cape May, 41 N. J. L. 45; Green Bay v. Brauns, 50 Wis. 204.

[7] Quinette v. St. Louis, 76 Mo. 402; *In re* Tickno, 68 Cal. 294.

The powers of a corporation are conferred upon it by its charter and the laws of the State; and they cannot be enlarged, diminished or varied in any way, by the enactment of ordinances, which are either inconsistent with, or repugnant to, the charter provisions, or the general law of the land. Such ordinances will be *ultra vires* of the corporation.[1] But the Legislature may grant to the municipal corporation the express power to pass an ordinance which will conflict with, and supersede within the city's jurisdiction, the State law upon the same subject.[2] The power of a municipality, to make ordinances for the government of the community, its scope and limitations, can therefore only be determined by the provisions of the city's charter, or of the general laws of the State, under which municipalities are incorporated, or which are intended to control or relate to the powers of municipal corporations in general. Specific powers are usually enumerated in the grant of power to the municipal corporation; followed generally, by a general authority to pass all ordinances which may be necessary for the promotion of the general welfare, good order, etc., and which are not inconsistent with the constitution and general laws. Occasionally, however, there is no enumeration[3] of the subjects upon which the corporation may legislate; but it is generally empowered, to pass all ordinances, which are necessary to the well-being and good order of the local community.

In a charter of the character first mentioned, the general welfare clause confers no power to abrogate, impair, or enlarge the powers which are conferred by the special grants of power; but it can only be construed to confer authority to pass ordinances upon all other matters, which are excluded from the specific grants of power, yet within the ordinary scope of the municipal authority,[4] or which are absolutely necessary for the

[1] Weber v. Johnson, 37 Mo. App. 601; Com. v. Roy, 140 Mass. 432; Garden City v. Abbott, 34 Kan. 283; Bergman v. St. Louis etc. Co. 1 S. W. R. 384; Breninger v. Belvidere, 44 N. J. L. 350; Mays v. Cincinnati, 1 Ohio St. 268, 272; State v. Nashville, 15 Lea, 697; State v. Munic. Ct. etc., 32 Minn. 329; Missouri etc. Co. v. Wyandotte (Kan. 90), 20 Pac. R. 950; Thompson v. Carroll, 22 How. 422; Thomas v. Richmond, 12 Wall. 349; Andrews v. Ins. Co., 37 Me. 256.

[2] State v. Binder, 38 Mo. 450.

[3] For an enumeration of almost every subject upon which ordinances can, under any possible combination of circumstances, be enacted by a municipal corporation, see N. Y. Consol. Act, §§ 85, 86, *et seq.*

[4] Dil. Mun. Corp. §§ 315, 316; State v. Ferguson, 33 N. H. 424, 430; see

fulfillment of municipal purposes. The specific enumeration should, however, not be considered to exclude the inherent power of every corporation to make needful by-laws, on subjects not enumerated, unless the intent to exclude them is plain and manifest.[1] It has, therefore, been held that, when an act is to be done, or an ordinance is to be passed, and no precise mode is prescribed, any mode is valid, which does not violate the charter, or the general law.[2]

§ 147. **Delegation of power of legislation—Official non-liability.**—As an exception to the rule, forbidding the delegation of the power to make laws,[3] it is held that it is competent for the Legislature to delegate this power to municipal corporations, so far as is necessary to enable them to pass ordinances, which will have the force and effect of laws, within the jurisdiction of the municipality.[4]

cases cited in next note; see also Angell & Ames on Corp. 177; Child v. Hudson Bay Co., 2 P. Wms. 207; Barling v. West, 29 Wis. 307.

[1] Com'rs v. Covey (Md. 90), 22 Atl. 266; Collins v. Hatch, 18 Ohio, 523; New Orls. v. Philippi, 9 La. An. 44; State v. Schlemmer, 42 La. An. 1166 (bakers); Richmond v. Dudley (Ind. 90), 26 N. E. R. 184; State v. Freeman, 38 N. H. 426; Com. v. Turner, 1 Cush. 493; Lawrence v. Monroe, 44 Kan. 607; State v. Webber, 107 N. C. 962 (prostitution); Indianapolis v. Gas Co., 66 Ind. 396; Laundry etc., 22 Fed. Rep. 701; Clark v. South Bend, 85 Ind. 276; State v. Sharkey, (Minn. 92) 52 N. W. R. 24; Com. v. Cutler, (Mass. 92) 29 N. E. R. 1146; McPherson v. Chebanse, 114 Ill. 46 (Sunday closing). "The city council is restrained to such matters, whether specially enumerated or included under general grant, as are indifferent in themselves, free from constitutional objection, and have not been the subject of general legislation, or, as it is expressed in the charter, are not repugnant to the constitution or laws of the land." Dubois v. Augusta, Dudley (Ga.) Rep. 30; Williams v. Augusta, 4 Ga. 509, 514.

[2] Tyler v. Columbus, 6 Ohio Cir. Ct. R. 224; Larkin v. Burl. C. R. & N. Ry. Co., (Iowa 92) 52 N. W. R. 480; Crawfordsville v. Braden, (Ind. 92) 28 N. E. R. 849; People v. Wagner, 86 Mich. 594 (title of ordinance).

[3] State v. Hayes, 61 N. H. 314.

[4] Duluth v. Krupp, (Minn. 91) 49 N. W. R. 235; Batsel v. Blaine, 15 S. W. R. 283; State v. Clark, 28 N. H. 176; Milne v. Davidson, 5 Martin, N. S. (La.) 586; Covington v. East St. Louis, 78 Ill. 548; Strauss v. Pontiac, 40 Ib. 301; New York v. D. D. E. B. & B. R. Co., 15 N. Y. 297; State v. Anderson, 8 So. 1; Markle v. Akron, 14 Ohio, 586, 590; Mayor v. Morgan, 7 Martin, N. S. (La.) 1; Bowles v. Landaff, 59 N. H. 164; Gould v. Raymond, 59 Ib. 260; State v. Trenton, (N. J. 91) 20 Atl. 1076; State v. Tryon, 39 Conn. 183; Indianapolis v. Gas Co., 66 Ind. 396; Mason v. Shawneetown, 77 Ill. 533; Gas Co. v. Des Moines, 44 Iowa, 508; *Ex parte* Christensen, 85 Cal. 208; State v. Cozzens, 8 So. R. 268; *In re* Wall, 48 Cal. 279; Gloversville v. Howell, 70 N. Y. 287.

As the charter is analogous to the State Constitution, so the law-making power, the council or governing body, of a municipality is, so far as its jurisdiction extends, and in relation to the subjects upon which it has the power to legislate, similar in character to the State Legislature.[1] And this analogy has been observed and applied, in declaring contracts unlawful, which are in contravention of a municipal ordinance;[2] and in the general rule, that a penalty imposed by ordinance amounts to a prohibition, and renders the prohibited act illegal.[3]

Municipal officers, invested with power to make ordinances or laws for the government of the affairs of the municipality, are not liable personally for the enactment of any ordinances, either within their authority, or unauthorized by the powers which they possess.[4] This exemption from liability for their acts, as members of the law-making branch of the municipal government, is another analogy between the city council and the State Legislature.

§ 148. **Method of enactment—Mode, time and proof of publication—Mayor's approval.**—It is absolutely essential to the validity of municipal legislation, as expressed in ordinances, that it should be enacted by the proper body, duly assembled, and in the precise form and manner, if any be prescribed by the municipal constitution and general law, from which it derives its authority.[5]

So, where a charter forbade the passage of ordinances, unless they were introduced at a previous regular meeting, an ordinance was declared void, where the rule had not been literally complied with.[6] A requirement, that a proposed ordinance shall

[1] Taylor v. Carondelet, 22 Mo. 105; St. Louis v. Foster, 52 Ib. 513; Hopkins v. Mayor, 4 M. & W. (Eng.) 621, 640; Milne v. Davidson, 5 Martin, N. S. (La.) 586.

[2] Milne v. Davidson (*supra*); Heland v. Lowell, 3 Allen, 407; Cf. Heeny v. Sprague, 58 Me. 199.

[3] Johnson v. Simonton, 43 Cal. 242.

[4] Paine v. Boston, 124 Mass. 486; Jones v. Looing, 55 Miss. 109; Freeport v. Marks, 59 Pa. St. 257; Baker v. State, 27 Ind. 485; Com'rs v. Ducket, 20 Md. 468; Weaver v. Defendorf, 3 Denio, 117; Pike v. Magoun, 44 Mo. 491.

[5] Cantril v. Sainer, 59 Iowa, 26; Dempsey v. Burlington, 66 Ib. 687; Smith v. Emporia, 27 Kan. 528; Stebbins v. Mayor, 38 Ib. 473; but see *contra*, as to the ordinary clause, St. Louis v. Foster, 52 Mo. 513; Pacific, etc., v. Governor, 23 Ib. 353; Cape Girardeau, 52 Ib. 424; see Peo. v. Murray, 57 Mich. 396, when a statute or ordinance is well authenticated.

[6] State v. Bergen, 33 N. J. L. 39; New Orleans v. Brooks, 36 La. An. 64; Danville v. Shelton, 76 Va. 325; Cooley Const. Lim. § 139.

be read on three different days, is fulfilled if it be so read, even when the final reading takes place after the election and induction into office of a new mayor, and of several new members of the municipal council.[1] The prescribed readings may also be had at adjourned meetings.[2]

The necessity for the attachment of the signature of the mayor to an ordinance usually depends upon the provisions of the charter.[3] When examination and approval by him are required, this duty must be exercised by him in person, and cannot be delegated to a subordinate.[4] If the charter requires the concurrence of the mayor, as a part of the lawmaking power, a resolution or ordinance which is vetoed by him, or which lacks his approval, as manifested by signature or in some other proper manner, is a nullity.[5] But, unless the mayor's approval of an ordinance is absolutely required, the provision for his signature may be considered as directory; and the absence of the signature will not affect the validity of the ordinance, if it has been enacted otherwise in strict conformity to charter requirements.[6] So, also, mere informalities in the signing of an ordinance by the mayor will not be regarded, when all substantial requirements have been otherwise observed in enacting it.[7] An injunction will not be granted to prevent the mayor from approving an ordinance, even when the effect of such action on his part would be to impair a valid contract, previously made by the city.[8]

[1] Brown v. Lutz, (Neb. 93) 54 N. W. R. 860; McGraw v. Whitson, 69 Iowa, 348.

[2] Outcamp v. Utt, 60 Iowa, 156.

[3] N. Y. Consol. Act, § 75.

[4] Lyth v. Buffalo, 48 Hun, 175.

[5] Saxton v. St. Joseph, 60 Mo. 153; Irving v. Devors, 65 Ib. 625; Charlton v. Holliday, 60 Iowa, 391; Whitney v. Pt. Huron, 88 Mich. 268.

[6] Terre Haute v. Voelker, (Ill. 89) 22 N. E. R. 20; Fisher v. Graham, 1 Cin. (Ohio) 113; Martindale v. Palmer, 52 Ind. 411; Toledo Con. S. R. Co. v. Toledo Elec. St. Ry. Co., 6 Ohio Cir. Ct. 362; Pennsylvania Globe G. L. Co. v. Scranton, 97 Pa. St. 538; Sullivan v. Pausch, 5 Ohio Cir. Ct. R. 196; Blanchard v. Bitsell, 11 Ohio St. 96; Elmendorf v. Mayor of N. Y., 25 Wend. 693; State v. Newark, 1 Dutch. 399; Magneau v. Fremont, (Neb. 91) 47 N. W. R. 280; State v. Jersey City, 30 N. J. L. 93; Kepner v. Com., 40 Pa. St. 124; Com. v. Fitler, 136 Pa. St. 129; Weinicke v. R. R. Co., 61 Hun, 619; Whitney v. Pt. Huron, 88 Mich. 268; Opelousa v. Andrus, 37 La. An. 699; State v. Henderson, 38 Ohio St. 644; Hall v. Racine, (Wis. 92) 50 N. W. R. 1094.

[7] Becker v. Washington, (Mo. 88) 7 S. W. R. 291; Allentown v. Grim, 109 Pa. St. 113.

[8] New Orleans El. Ry. Co. v. New Orleans, 39 La. An. 127.

When the charter requires publication of an ordinance before it will be effective, no penalty can be enforced for its infraction, until proper publication has been made, in the manner prescribed by law.[1] An assessment based upon an ordinance, which has not been legally published, if publication be required, is void and cannot be collected.[2] And so, also, it has been held that, where no provision is made for publication, the ordinance must be promulgated for a reasonably sufficient length of time, in order to enable parties interested to become informed as to its requirements.[3] But the presumption is not only in favor of the reasonableness of whatever provision has been actually adopted for the promulgation of the new ordinance; but, likewise, it would seem that the better rule is, that publication is not necessary, if it is not expressly prescribed.[4] And it is held in Massachusetts that even where publication is prescribed, it is directory, and not a necessary condition precedent to the validity of the ordinance.[5] The method of publication will depend wholly upon statutory requirements, which should be consulted in every instance.[6] It has been held that the duty of publishing ordinances and resolutions which are adopted by the board of aldermen of New York city, is mandatory.[7]

If a choice of modes of publication is permissible under the regulating statute, and the statute delegates the power of selection to the corporation, a publication by a clerk, without any selection on the part of the corporation, is not sufficient to give validity to the ordinance.[8] Publication for five successive

[1] People v. Keir, (Mich.) 43 N. W. 1039; Meyer v. Fromm, 108 Ind. 208; Napa v. Easterby, 61 Cal. 509; National Bank v. Grenada, 41 Fed. 87; 48 Ib. 278; Waln v. Philadelphia, 99 Pa. St. 330; Schwartz v. Oshkosh, 55 Wis. 490; O'Hare v. Park River, (N. D.) 47 N. W. R. 380; Amey v. Allegheny City, 24 How. 364; Clark v. Janesville, 10 Wis. 136; Smith v. Eau Claire, (Wis.) 47 N. W. R. 830; Chicago v. McCoy, 26 N. E. R. 363; *Ex parte* Christensen, 85 Cal. 49; State v. Orange (N. J. 92), 22 Atl. 1004; Pittsburgh v. Reynolds, 29 Pac. 757.

[2] *In re* Smith, 52 N. Y. 526; *In re* Phillips, 60 Ib. 16; *In re* Douglas, 46 Ib. 42; State v. Hoboken, 38 N. J. L. 110; State v. Smith, 22 Minn. 218.

[3] Pitts v. Opelika, 79 Ala. 527.

[4] *In re* Guerrero, 69 Cal. 88; Washburn v. Lyons, 32 Pac. R. 310.

[5] Com. v. Davis, 140 Mass. 485.

[6] New York Consol. Act, § 80; *In re* Phillips, 60 N. Y. 16; *In re* Bassford, 50 Ib. 509; Napa v. Easterby, 18 Pac. R. 253.

[7] *In re* Douglas, 46 N. Y. 42, rev'g 58 Barb. 174; 12 Ab. Pr. (N. S.) 161; Moore v. Mayor, 73 Ib. 238; *In re* Burmeister, 76 N. Y. 174.

[8] Higley v. Bunce, 10 Conn. 435; Byars v. Mt. Vernon, 77 Ill. 467; R. R. Co. v. Engle, 76 Ib. 317.

week days, a Sunday intervening, will fulfill a statutory requirement, that an ordinance must be published for five successive days.[1] So, where publication for twenty days, before the ordinance would go into effect, was required, it was held that an ordinance would go into effect twenty days after its first publication, and that it would be sufficient if it was published in each number of the paper which was issued during the period mentioned.[2] When publication is required, and no newspaper is specified, the newspaper in which ordinances have been usually published, will suffice, although it is not the only newspaper which is published in the city.[3]

After an ordinance has been properly enacted and duly published, no republication will be required, when it is afterwards included in a digest or revision of municipal legislation.[4] A printed copy of an ordinance, or a newspaper, printed pamphlet or book, in which the same has been published, if purporting to have been so published by authority, is *prima facie* evidence of the existence, adoption and publication of the ordinance.[5] In an action brought against a municipal corporation, the plaintiff need not prove publication, when it appears that the city had acted under the ordinance for several years, and enforced or recognized it as a valid law.[6] It has been held that a provision, that existing ordinances shall remain in force, provided they shall be recorded within four months, is directory merely, and does not invalidate ordinances not so recorded.[7] Nor is it a valid objection to the record of an ordinance under such a regulation, that a printed copy is pasted upon the record, and that it was not recorded in manuscript.[8] An ordinance need

[1] *Ex parte* Fiske, 72 Cal. 125.

[2] Hoboken v. Gear, 3 Dutch. 265.

[3] Truchelut v. City Council, 1 Nott & McC. S. C. 227; publication in Sunday newspaper, Hastings v. Columbus, 42 Ohio St. 585.

[4] St. Louis v. Foster, 52 Mo. 513; St. Louis v. Alexander, 23 Ib. 509; comp. Emporia v. Norton, 16 Kan. 236.

[5] St. Louis v. Foster, 52 Mo. 513; Lindsay v. Chicago, 115 Ill. 120; Downing v. Milltonvale, 26 Kan. 740; Block v. Jacksonville, 36 Ill. 301; Prell v. McDonald, 7 Kan. 426; Pendergast v. Peru, 20 Ill. 51; comp. St. Charles v. O'Malley, 18 Ill. 407; Moss v. Oakland, 88 Ill. 109. Method of proving local laws under N. Y. Consol. Act, see § 1107.

[6] Atchison v. King, 9 Kan. 550; State v. Atlantic City, 34 N. J. L. 99, 106;

[7] Trustees of Academy v. Erie, 31 Pa. St. 515; Amey v. Allegheny City, 24 How. 364; Tipton v. Norman, 72 Mo. 380.

[8] Ewbanks v. Ashley, 36 Ill. 177.

not, in order to be valid, expressly designate the charter power, in execution of which it has been enacted,[1] nor the reasons for its adoption.[2] It will, if silent in this respect, be referred to that charter power, which would most reasonably warrant its passage; or, where it is authorized by either of two powers, it will be treated as coming within that power with which, by its character and provisions, it seems to be most in conformity.[3]

When it is stated in the charter that the power to pass a certain ordinance is only to be exercised, when it is necessary, the necessity need not be recited or declared in the ordinance, unless that is imperatively required by the charter,[4] but it will be implied from the fact of its enactment.[5]

§ 149. **Ordinances must be enacted in good faith.**—It can never be made the subject of judicial investigation, whether the Legislature has, in the exercise of the law-making power, been moved by laudable and authorized motives and considerations, as long as the power has been exercised in conformity with the provisions of the constitution. For improper motives, and for injudicious exercise of its power, the Legislature is answerable to the people alone.[6]

This principle is applicable by analogy to municipal legislation.[7] But it is not to be understood thereby, that the courts cannot inquire into the consideration for the legislative action of a municipal corporation, so far as to discover and prevent fraud or bribery. The municipal officials will not be allowed to exercise this legislative power, in pursuit of their own self-aggrandizement.[8] This question has been discussed by the courts to but a limited extent. But there are decisions, which directly sustain the principle above stated. Thus, where a company was chartered for the manufacture of gas, and the Legis-

[1] Rex v. Harrison, 3 Burr, 1328.

[2] Grierson v. Ontario, 3 Up. Can. Q. B. 623; Fisher v. Vaughan, 10 Ib. 492.

[3] Methodist Church v. Baltimore, 6 Gill, 391.

[4] Hoyt v. East Saginaw, 19 Mich. 39.

[5] Stuyvesant v. Mayor etc. N. Y., 7 Cow. 588; Young v. St. Louis, 47 Mo. 492; Kiley v. Forsee, 57 Ib. 390; Platter v. Elkhart Co., 103 Ind. 360.

[6] Cooley Const. Lim. §§ 186, 187, 208.

[7] McCulloch v. State, 11 Ind. 424, 431; Sunbury etc. v. Cooper, 7 Am. Law Reg. 158; Wright v. Defrees, 8 Ind. 398.

[8] Dil. Mun. Corp. §§ 311, 312; Buell v. Ball, 20 Iowa, 282; Freeport v. Marks, 59 Pa. St. 253.

lature delegated its control over the company to a municipal council, authorizing it to regulate the price of gas, it was held that the council must fix a reasonable and fair price. The action of a majority of the members in fixing the price, at a rate they well knew the gas could not be made and sold at, without loss to the company, being actuated by fraudulent motives, was not binding on the company; and the good faith of the council could properly be inquired into.[1] It is, of course, also a ground for declaring void such an unreasonable regulation, apart from the existence of fraudulent motives, that the council had only the power to prescribe a reasonable price for the gas, and that the prescription of an unreasonable rate, one which did not admit of a reasonable profit, was *ultra vires*, and therefore void.[2]

§ 150. **Ordinances must be lawful and reasonable.**—Under the common law doctrine, that every corporation has an incidental power to make by-laws, taken in connection with the fact that in the royal charters the subject-matters, which could be regulated by by-laws, were seldom specified, the English courts at an early day required that all municipal ordinances must be reasonable, and must not conflict with the statutes passed by Parliament, or with the principles of the common law.[3] That such a rule was imperatively required to protect the liberty of the individual, and the rights of private property, is evident from the history of municipal corporations in England, prior to the enactment of the municipal corporations act.[4]

Following the English doctrine, the courts of the United States have always held that all municipal by-laws, particularly those which are passed under the implied power to make by-laws, or under a general charter power to enact such laws as are necessary, must be reasonable in their character and effect,[5]

[1] State v. Cincinnati Gas Co., 18 Ohio St. 262; Bank v. United States, 1 G. Greene (Iowa) 553.

[2] See *post*, § 150.

[3] Dillon's Mun. Corp. § 319, citing Rex v. Maidstone, 3 Burr. 1837; Feltmakers v. Davis, 1 Bos. & P. 98, 100; Sutton's Hosp. Case, 10 Rep. 31; London v. Vanacre, 1 Ld. Raym. 496.

[4] 5 & 6 Wm. IV. ch. LXXVI. § 90.

[5] Com. v. Steffee, 7 Bush, 191; Kip v. Paterson, 2 Dutch. 298; Dayton v. Quigley, 29 N. J. Eq. 77; Birmingham v. Ry. Co., (Ala. 93) 13 So. R. 141; Mayor v. Beasley, 1 Humph. 232; State v. Freeman, 38 N. H. 426; McInerney v. Denver, (Colo. 92) 29 Pac. 516; Waters v. Leech, 3 Ark. 110; Mayor v. Winfield, 8 Humph. 107; Davis v. Anita, 73 Iowa, 325; *In re* Frank, 52 Cal. 506; Read v. Camden, (N. J. 92) 24 Atl. R. 549; Fisher v. Harrisburg, 2 Grant Cases, 291; Gilham v. Wells, 64 Ga. 192;

consonant with the objects and purposes of the charter; and not repugnant to the fundamental rights of citizens, as guaranteed by the constitution and laws.[1] Accordingly, it has been held that an ordinance, by which the purchaser of land at a tax sale was empowered to call upon the police to aid him in securing possession, was unconstitutional, as depriving the owner of his property without "due process of law."[2] And the same objection may be made to an ordinance, which imposes a license upon the towboats engaged in interstate commerce.[3] So, although it is of course competent for a municipality to regulate the sale of intoxicating liquors, an ordinance, requiring the furnishing quarterly by every druggist of a verified statement of the quantity and kinds of intoxicating liquors sold, to whom, etc., was held to be void as unreasonable and unjust.[4] An ordinance, designed to prevent petty peculation of cotton, and providing that every dealer in that commodity must keep a record of all loose cotton purchased by him, giving the name of the seller and quantity sold, was held to be unreasonable, and an unlawful infringement of one's personal liberty.[5] So, also, although the preservation of the public health is an object of paramount importance, and likely to be advanced by the prompt removal of dead animals, an ordinance giving a person a right to remove and convert to his own use the bodies of

Crawford v. Topeka, (Kan. 93) 32 Pac. R. 476; Clason v. Milwaukee, 30 Wis. 316; Seymour v. Tacoma, (Wash. 93) 32 Pac. R. 1077; Kirkham v. Russell, 76 Va. 956; Atkinson v. Goodrich etc., 60 Wis. 141; Collins v. Hall, (Ga. 93) 17 S. E. R. 622; Sipe v. Murphy, 31 N. E. R. 884; Cape Girardeau v. Riley, 72 Mo. 220; White v. Mayor etc., 2 Swan, 364; Pedrick v. Bailey, 12 Gray, 161; Brown v. Lutz, (Neb. 93) 54 N. W. R. 526.

[1] McCormick v. Calhoun, 30 S. Ct. (93); Carr v. St. Louis, 9 Mo. 191; Marietta v. Fearing, 4 Ohio, 427; Collins v. Hatch, 18 Ib. 523; Heisenbuttle v. Council, 2 McMul. 233; City etc. v. Goldsmith, 2 Speers, (S. C.) 435; Bills v. Goshen, 117 Ind. 221; Williams v. Augusta, 4 Ga. 509; Adams v. Mayor, 29 Ib. 56; St. Louis v. Bentz, 11 Mo. 61; Mayor etc. v. Nichols, 4 Hill, 209; Com. v. Turner, 1 Cush. 493; *Ex parte* Solomon, 91 Cal. 440; State v. Brittain, 89 N. C. 574; Perdue v. Ellis, 18 Ga. 586; Council v. Benjamin, 2 Strob. 508; Landis v. Vineland, (N. J. 92) 23 Atl. R. 357; Haywood v. Mayor, 12 Ga. 404; Paris v. Graham, 33 Md. 94; Newton v. Bilger, 143 Mass. 598; White v. Bayonne, 49 N. J. L. 311; Lozier v. Newark, 48 Ib. 452; Volk v. Newark, 47 Ib. 117.

[2] Calhoun v. Fletcher, 63 Ala. 574.

[3] Moran v. New Orleans, 112 U. S. 69; U. S. Cons., art. I. § 8, par. 3; *Ex parte* Holmquist, (Cal. 92) 27 Pac. R. 1099; *Ex parte* Christensen, 85 Cal. 208.

[4] Clinton v. Phillips, 58 Ill. 102.

[5] Long v. Taxing Dis., 7 Lea, 134.

dead animals, to the exclusion of the owner's right thereto, was held unconstitutional as a taking of private property without compensation.[1] Where the municipality has, and exercises, the power to regulate the price of commodities, it must so regulate the prices which one may be permitted to ask for things or services, as that the party engaged in the business may be enabled to make a reasonable profit. If the regulating ordinance places the maximum price at such a figure that there is no opportunity for obtaining a profit,—and *a fortiori*, where it entails a loss,—the regulation is unreasonable, and for that reason is unconstitutional and void.[2]

But all rules, concerning the reasonableness of ordinances, must be considered in the light of the facts of each particular case; and it may well be that a general ordinance may be both reasonable and unreasonable, under varying circumstances.[3]

§ 151. **Ordinances must not be oppressive.**—It is a still more serious objection to an ordinance that it is oppressive in its operation, beyond what is necessary to prevent the threatened evil. The oppressiveness and inequality, with which an ordinance is charged, must be shown to the court,[4] and when this is manifest, the ordinance will be declared void. Thus, when a city had enacted that all free negroes, found out after ten o'clock at night, should be subject to arrest, imprisonment and fine, the court declared it to be void, as an oppressive regulation.[5] In a case, where a municipality, owning waterworks, refused to furnish one of its citizens with water, because his tenant already owed a bill for water supplied him elsewhere, the ordinance was declared to be oppressive, and hence void.[6]

Any ordinance, which commits to the will of a single official, unrestrained by charter or otherwise, the practically absolute power of prohibiting the use of some well known means

[1] River Rendering Co. v. Behr, 77 Mo. 91; see also Greensboro v. Ehrenreich, 80 Ala. 579.

[2] See Chicago, etc. Co. v. Becker, 35 Fed. Rep. 883; Chicago, etc. N. W. Co. v. Dey, 35 Fed. Rep. 866; Pensacola & A. Ry. Co. v. State, 5 So. Rep. 833; 25 Fla. 310; Stone v. Trust Co., 116 U. S. 307; Railway Co. v. Minnesota, 134 U. S. 418; Chicago, etc. Co. v. Wellman, 143 U. S. 339.

[3] Nicolin v. Lowrey, 49 N. J. L. 391; Penn. R. R. Co. v. Jersey City, 47 Ib., 286.

[4] Mayor v. Beasly, 1 Humph. 232; St. Louis v. Weber, 44 Mo. 547; Corrigan v. Gage, 68 Mo. 541.

[5] Mayor v. Winfield, 8 Humph. 707.

[6] Dayton v. Quigley, 29 N. J. Eq. 77.

of commercial or social activity, not a nuisance—as, for example, a steam engine, or street processions,—is *prima facie* unreasonable and oppressive, and hence unconstitutional and void.[1]

§ 152. **Ordinances must be impartial and general.**—In conformity with the well recognized repugnance of the law and of public policy to discriminating legislation, all statutes, and particularly those of a penal nature, are required to be general in their scope and application. The same principle is applied to the local legislation of the municipality. Municipal ordinances must, so far as it is practical, be general in their nature, and impartial in their operation.[2]

Upon this principle, it has been held that a resolution, passed under an authority, which was conferred on a water board by a charter, requiring certain consumers of water to put in expensive meters, under a penalty of having the supply cut off, was void as being discriminative in its character.[3]

Ordinances must be general in their application, and there must be no intention manifest therein to discriminate against [4] or in favor of individuals; but this principle does not render an ordinance discriminating, because it affects a certain class, or is applicable only to a certain designated district, or to a certain street. The general or special character of an ordinance must be determined by the facts of each case, and not by any fixed iron-cast rule. According to the change of point of view, everything is both special and general. And because the ordinance by its terms prescribes a regulation for a particular class of persons, it does not, for that reason, necessarily come within the objection that it is discriminating, and special.[5] And where the ordinance is general in its terms and scope of operation, the fact, that it peculiarly affects a particular person, cre-

[1] *In re* Frazee, 63 Mich. 396; s. c., 30 N. W. Rep. 72 (Salvation Army); Baltimore v. Radeke, 49 Md. 217.

[2] Tugman v. Chicago, 78 Ill. 405; Russ v. Mayor etc., 12 N. Y. Leg. Obs. 38; White v. Mayor, 2 Swan. (Tenn.) 364; De Ben v. Gerard, 4 La. An. 30; Citizens Gas Co. v. Elwood, 114 Ind. 332; Zanone v. Mound City, 103 Ill. 552; *Ex parte* Chin Yan, 60 Cal. 78; Council v. Cremonini, 36 La. An. 247; Hudson v. Thorne, 7 Paige, 261; Chicago v. Rumpff, 45 Ill. 90.

[3] Red Star Steamship Co. v. Jersey City, 45 N. J. L. 246.

[4] White v. Nashville, 2 Swan, 364.

[5] Bozant v. Campbell, 9 Rob. (La.) 411; Com. v. Goodrich, 13 Allen, 545; Covington v. East St. Louis, 78 Ill. 548.

ates no presumption, that it was enacted for the purpose of discriminating against him, or of annoying him.[1]

§ 153. **Those on whom ordinances are binding—Notice to such persons—Evidence.**—By the common law, ordinances of a general nature and purpose bound not only the members of the municipal corporation, but all persons whatever, coming within the municipal limits or jurisdiction.[2] This rule of the English common law has been affirmed in the United States, and general ordinances in American cities and towns are binding, not only upon their inhabitants, but upon nonresidents and strangers, temporarily within the municipal limits, where such ordinances do not impose a strictly civil duty.[3] On the other hand, municipal ordinances have no extra territorial efficacy or force, unless this power is expressly created or conferred upon the city by the Legislature of the State.[4] It was held in one instance that a city has no power to require by an ordinance a license from nonresident owner of wagons using the city streets.[5] But a person resident without the boundaries of the corporation, who permits his cattle to run at large within the corporation, is amenable to city ordinances, so far as the power of forfeiture of his property within city limits is concerned.[6] But the power to impose a personal penalty upon a nonresident owner under such circumstances, must, we think, be expressly

[1] Wagner v. City of Rock Island, 34 N. E. R. 545; Shinkle v. Covington, 83 Ky. 420; Richmond etc. v. Richmond, 96 U. S. 521.

[2] London v. Vanacre, 1 Ld. Raym. 498; Salk. 143; Fazakerly v. Wiltshire, 1 Stra. 462.

[3] Swift v. Topeka, 43 Kan. 671; Pierce v. Bartram, Cowp. 269; Heland v. Lowell, 3 Allen, 407; Knoxville v. King, 7 Lea, 441; Bott v. Pratt, 33 Minn. 323; Merz v. Missouri P. R. Co., (Mo. 89) 1 S. W. R. 382; Com'rs of Plymouth v. Pettijohn, 4 Dev. (Law) 591; Strauss v. Pontiac, 40 Ill. 306; City of Buffalo v. Schleifer, 21 N. Y. S. 913; Horney v. Sloan, 1 Smith (Ind.) 136; Dodge v. Gridley, 10 Ohio, 173.

[4] Scudder v. Henshaw, (Ind. 93) 33 N. E. R. 791; Chicago Packing Co. v. Chicago, 88 Ill. 221; Reed v. People, 1 Park Cr. Rep. 481. "But within city limits a valid by-law or ordinance has the same effect with respect to the persons upon whom it lawfully operates, as an act of Parliament upon the subject at large." Lord Abingdon in Hopkins v. Mayor of Swansea, 4 M. & W. 621, 640; Milne v. Davidson, 5 Martin (La.) 586.

[5] St. Charles v. Nolle, 51 Mo. 122. So nonresidents cannot be discriminated against by the imposition of a license not required of residents. State v. Ocean Grove Assn., (N. J. 93) 26 Atl. R. 798; Cohen v. Plymouth, 7 Kulp. 101; Radebaugh v. Plain City, 28 Wkly. L. Bul. 107.

[6] Spitler v. Young, 63 Mo. 42; Rose v. Hardie, 98 N. C. 44; Nehr v. State, 53 N. W. R. 589; 35 Neb. 638.

conferred or clearly implied by strict judicial construction from the charter or general statutes from which the city derives its power.[1] Persons upon whom ordinances are binding, are bound to take notice of them.[2] If the corporation allows without objection the erection within its limits by a railroad or other company of large and expensive warehouses, for the storage of fertilizing material, it will be estopped from enforcing an ordinance forbidding the storage of fertilizers, which was enacted some time prior to the erection of the prohibited structures.[3] Where one is required to perform a duty, upon receiving notice from the municipality, a more specific notice is required than notice by publication in a newspaper, in order to impose upon the delinquent the statutory penalty, unless the statute or ordinance makes such a notice sufficient.[4]

§ 154. **Power to enforce ordinances by fines or imprisonment.**—As a by-law or ordinance, without any penalty provided for its infraction, would be futile[5] and inoperative, the inherent or conferred power to enact by-laws will imply a power in a city or town to impose a reasonable and proper fine upon all persons breaking them, in the absence of any statutory regulation of the sanction.[6] At common law, it was held that, in accordance with the provisions of *Magna Charta*, no municipal corporation could, without express authority, conferred by Parliament, enforce its by-laws by disfranchisement, by imprisonment or by forfeiture of goods. Without such statutory authority municipal corporations are at common law limited to the imposition of pecuniary penalties or fines, which must be certain, definite and reasonable.[7]

[1] Plymouth v. Pettijohn, 4 Dev. 591; Foster v. Roads, 19 Johns. 191; (power to make ordinances governing those who hold certain common lands); People v. Works, 7 Wend. 486; Holladay v. Marsh, 3 Ib. 142.

[2] Palmyra v. Morton, 25 Mo. 593; Buffalo v. Webster, 10 Wend. 99; Knoxville v. King, 7 Lea, 441; Faribault v. Wilson, 34 Minn. 254.

[3] Mayor of Athens v. Georgia R. R., 72 Ga. 800; Atlanta v. Gate City Gas Light Company, 71 Ga. 106.

[4] Keckley v. Commissioners, 4 McCord (S. C.) 257.

[5] State v. Cleveland, 3 R. I. 117.

[6] *In re* O'Keefe, 19 N. Y. S. 676; Fisher v. Harrisburg, 2 Grant Cas. 291; *In re* Cameron, 13 U. C. Q. B. 190; State v. Carpenter, 60 Conn. 97; Trigally v. Memphis, 6 Coldw. 382; Hooksett v. Amoskeag etc. Co., 44 N. H. 105; Conley v. Albany, 132 N. Y. 145; Zylsta v. Charleston, 1 Bay (S. C.) 382; *contra*, Knoxville v. R. R., (Iowa, 92) 50 N. W. R. 61; Eyerman v. Blakesly, 78 Mo. 145.

[7] In State v. Bright, 38 La. An. 1,

The rule of the common law has been adopted and recognized in the United States; and in the constitutions of all the States, provisions have been incorporated, by which excessive fines are expressly forbidden. So, also in most municipal charters, an amount is fixed, beyond which the power of the municipality to inflict pecuniary fines is not permitted to extend.[1]

Where the charter prescribes the mode of enforcing an ordinance, and the penalties which may be imposed for infractions, the municipal corporation is excluded from a resort to any other mode of enforcement, which would otherwise by implication be within the power of the corporation; the city is confined to the modes and penalties, expressly prescribed by the charter.[2]

When the charter of a municipality does not prescribe the precise pecuniary penalty, which may be imposed upon the wrongdoers, or when it mentions a maximum sum, which is not to be exceeded in imposing a fine, it is competent for the city in the former case to make the fine discretionary within reasonable limits, as "not more than $50;" and in the latter case, within the limits prescribed by the charter.[3]

But the cases are not harmonious, and there are decisions by which ordinances, imposing fines stated as "not more than" or "not exceeding" a certain sum, have been held to be invalid

the court said: "A municipal corporation has no right to enforce obedience to the ordinances, which it has the power to pass, by fine or imprisonment or other penalty, unless that right has been unquestionably given by the lawgiver." See also Slessman v. Crozier, 80 Ind. 487; Peters v. London, 2 Up. Can. Q. B. 543; *In re* Snell, 30 Ib. 81; State v. Rice, (N. C.) 2 S. E. R. 180.

[1] N. Y. Consol. Act, § 85. Limit $100, or imprisonment not more than 10 days. Mayor v. Ordrenau, 12 Johns. 122.

[2] Kirk v. Nowill, 1 Term R. 118, 124. In this case it was held that when a charter provided for a fine or amercement, as a punishment for a breach of a by-law, forfeiture could not be substituted. Grand Rapids v. Hughes, 15 Mich. 54; Charleston v. Oliver, 16 S. C. 47; New Orleans v. Costello, 14 La. An. 7; Amite City v. Clements, 24 Ib. 27; Columbia v. Hunt, 5 Rich. (S. C.) 550, 558; McMullen v. City Council, 1 Bay (S. C.) 46; Hart v. Mayor etc., 9 Wend. 571, 588, 606; Cotter v. Doty, 5 Ohio, 393; Heise v. Town Council, 6 Rich. Law, 404; Miles v. Chamberlain, 17 Wis. 446; *Ex parte* Hollwedell, 74 Mo. 395.

[3] Mayor v. Phelps, 27 Ala. 55; State v. Cainan, 94 N. C. 883; State v. Crenshaw, Ib. 877; State v. Cantieny, 34 Minn. 1; McConville v. Jersey City, 39 N. J. L. 38; Haynes v. Cape May, 50 Ib. 55; State v. Zeigler, 32 Ib. 262; Melick v. Washington, 47 Ib. 254.

for vagueness, and for attempting to evade the exercise of municipal discretionary powers.[1]

In England, when the statute or ordinance gives a discretion, either as to the amount of the fine, or as to any other matter, and this discretion is accepted and exercised by the court, the conviction must show on its face, in what manner the discretion has been exercised.[2]

While on the one hand, an ordinance fixing a fine at "not more" than a certain sum specified may be void for vagueness, so, an ordinance fixing a minimum fine will be invalid, when the amount imposed is less than the minimum prescribed by law.[3]

A municipal corporation must exercise its power, to punish violations of its regulations, in a reasonable manner; and cannot multiply one offence into many, and fine or imprison for each. So, when the ordinance forbade the cutting of cedar trees, and the complaint charged that defendant had cut down a tree and continued to do so from time to time, until he had committed one hundred violations of this ordinance; the court held that this was but a trespass with a *continuendo* and constituted but a single offence.[4] This policy cannot be pursued by the municipal corporation for the purpose of imposing a heavier penalty than what is allowed by the charter. In all such cases, the acts constitute but one offence, where they constitute in fact but one transaction.[5] But it is not beyond the power of the municipality to grade the amount of the fine according to the number of the prohibited acts, even though these acts constitute in law but one criminal offence, provided the legal limit of the fine be not exceeded by the aggregate of fines imposed.

A power to impose fines to the extent of one hundred dol-

[1] *In re* Frazee, 63 Mich. 396; State v. Worth, 95 N. C. 615; Same v. Crenshaw, 94 Ib. 877; Same v. Cainan, 94 Ib. 883. "A by-law to be reasonable should be certain. If it affixes a penalty for its violation, it would seem that such penalty should be fixed in a certain amount, not left to the officer or court, which is to impose it upon conviction; though a by-law imposing a penalty not exceeding a certain sum has been held not to be void for uncertainty." Cooley Const. Lim. 202.

[2] Dillon Mun. Corp. § 337, citing King v. Priest, 6 T. R. 538, and other English cases.

[3] Petersburg v. Metzker, 21 Ill. 205.

[4] State v. Moultrieville, Rice (Law) 158.

[5] Mayor, etc., of N. Y. v. Ordrenau, 12 Johns. 122; Marshall v. Smith, L. R. 8 C. P. 416.

lars, coupled with the power to regulate the sale of and inspection of flour, was conferred upon a city by its charter. By virtue of the latter power, an ordinance was passed imposing a fine of five dollars a barrel for each barrel sold, upon all who should sell flour without inspection. The court held that the penalty of this ordinance could be imposed to the extent that it did not exceed the charter limit of one hundred dollars; that if a single sale exceeded twenty barrels the penalty of one hundred dollars would be the maximum, while if the quantity sold were less, the fine would be at the rate of five dollars a barrel.[1]

When a charter contained a specific enumeration of powers, which by express authorization the council could enforce under a penalty of one hundred dollars fine, and the council was at the same time empowered to remove obstructions upon the streets, but with no provisions as to the imposition of penalties, an ordinance imposing a continuing fine of ten dollars a day for every day such an obstruction was permitted to remain after notice, was held invalid, upon the ground that the powers enumerated excluded the right to enforce any non-enumerated power by a fine or other penalty.[2]

The power to imprison the violator of an ordinance or by-law, either in the first instance, or upon the nonpayment of a pecuniary fine or penalty imposed upon him, cannot be inferred, but must be plainly conferred upon a municipal corporation by the lawmaking power of the State; and when thus granted its exercise must be preceded by a judicial determination of the guilt of the accused.[3] Thus, where the charter gave the power to punish "by fines, imprisonment, labor or other penalty prescribed by ordinance," the city council could impose either a fine or imprisonment; but in no event could the offender be punished by both. So, also, under such a grant, so strictly is

[1] Chicago v. Quimby, 38 Ill. 274.

[2] Grand Rapids v. Hughes, 15 Mich. 54.

[3] Burlington v. Keller, 18 Iowa, 59; New Orleans v. Costello, 14 La. An. 37; *In re* Burnett, 35 La. An. 461; Mayor v. Herdt, 40 N. J. L. 264; Inwood v. State, 42 Ohio St. 186; Sheffield v. O'Day, 7 Ill. App. 339; State v. Ruff, 30 La. An. 497; Board of Trustees v. Schroeder, 58 Ill. 353. It has also been held that an ordinance may require hard labor of one who is imprisoned for refusal to pay a license tax, which had been lawfully assessed against those who were engaged in a certain occupation. *Ex parte* City Council of Montgomery, 64 Ala. 463. For constitutional guaranties see Stimson Amer. Stat. §§ 70–78 inc.

it construed, that it was held that there existed no power to imprison for the nonpayment of a fine.[1]

An ordinance, which provides that a person, violating its provisions, shall be fined and imprisoned, or either, will not justify a sentence imposing a fine, *or* a stated period of labor on the public streets. Such a sentence, being vague, uncertain and in the alternative, will for that reason be illegal and void.[2]

A municipal ordinance, prescribing a term of imprisonment, the duration of which is to be fixed by the magistrate upon conviction, and which may, but need not necessarily, exceed the limitation authorized by the constitution, may be enforced as long as the magistrate does not exceed the constitutional limits, as to duration of the imprisonment.[3]

§ 155. **Forfeitures.**—At common law, no municipal corporation could, by virtue of its inherent power to make by-laws, impose the penalty of forfeiture for any infraction of its code.[4] The rule both in England and in the United States, is that, in order to possess and exercise such a power, it must be by clear implication, if not expressly, conferred by the Legislature.[5] The power of punishing by a forfeiture of property, even when expressly and positively conferred, cannot be exercised by the municipal authorities in an arbitrary or summary manner. Thus, no one can be deprived of his property by forfeiture, merely by the enactment of an ordinance, and without notice of a legal investigation, at which he may have an opportunity to be heard. Such a method of procedure is not only contrary to

[1] Brieswick v. Brunswick, 51 Ga. 639; comp. Huddleson v. Ruffin, 6 Ohio St. 604.

[2] *Ex parte* Martini, 23 Fla. 343.

[3] Dressel v. Keokuk, 47 Iowa, 597.

[4] In England municipal corporations sometimes possessed the power to decree forfeiture, by usage or prescription, which by a fiction of law presupposed an express grant, the record of which had been lost.

[5] Kirk v. Nowill, 1 Term R. 118, 124; Hart v. Mayor etc. of New York, 9 Wend. 571, 588, 605; Wilcox v. Hemming, 58 Wis. 144; Cincinnati v. Buckingham, 10 Ohio, 257; Mayor etc. of Mobile v. Yuille, 3 Ala. 137; Taylor v. Carondelet, 22 Mo. 105, 112; Bergen v. Clarkson, 1 Halst. (N. J.) 352; White v. Tallman, 26 N. J. L. 67; Baxter v. Com., 3 Pa. (Pen. & W.) 253; Kneedler v. Norristown, 100 Pa. St. 368; Narden v. Mount, 78 Ky. 86; Dunham v. Rochester, 5 Cow. 462; Mayor etc. v. Ordrenau, 12 Johns. (N. Y.) 122; Phillips v. Allen, 41 Pa. St. 481; Adley v. Reeves, 2 M. & S. 60; Henke v. McCord, 55 Iowa, 378; Donovan v. Vicksburg, 23 Miss. 247; Miles v. Chamberlain, 17 Wis. 446; Lee v. Wallis, 1 Ky. 292; Clerk v. Tucket, 3 Lev. 281; Cotter v. Doty, 5 Ohio, 394; Ridgeway v. West, 60 Ind. 371.

the genius of our laws and institutions,[1] but is explicitly condemned and forbidden in all the States of the Union by constitutional provisions, which guarantee the right of the individual to hold and enjoy his property until deprived of it by due process of law.[2] But the city is not compelled to establish its case beyond a reasonable doubt; it being sufficient to legalize a forfeiture, that the evidence preponderates in favor of the plaintiff.[3] Corporations have no more right than private persons to constitute themselves judges in their own cause. So, when a city by ordinance authorized a forfeiture, and sale of all the property, which had been allowed by its owner to remain in a public place longer than a period specified, the ordinance was declared void, as inflicting a forfeiture and divesting the owner of his property, without a legal trial of any sort. Such an arbitrary exercise of municipal power will not be countenanced, unless in extreme cases; as, for example, when it becomes necessary to destroy property, which is a nuisance *per se*, in order to protect the health and welfare of the community.[4] In conformity with the rule that statutes or ordinances inflicting a penalty must be strictly construed, a city under charter power to fine will not be permitted to impose a forfeiture upon delinquents.

A town council having power to fine, in a sum not exceeding fifty dollars, had special authority conferred upon it to grant licenses to retail liquor dealers. An ordinance having been passed regulating the liquor traffic for the violations of which "a fine of not more than fifty dollars for each offence, and also a forfeiture of the license was imposed," it was held that the license having been granted and paid for was, as respects the municipality, private property; and that as the council could only impose a fine, it had no power to arbitrarily deprive the licensee of that which was his private property.[5]

[1] Cotter v. Doty, 5 Ohio, 393, 398; Rosebaugh v. Saffin, 10 Ib. 32; Slessman v. Crozier, 80 Ind. 487.

[2] Tiedeman's Limitations of Police Power, §§ 34–34*f*.

[3] People v. Briggs, 114 N. Y. 56.

[4] Lanfear v. Mayor, 4 La. An. 97; see Tiedeman's Limitations of Police Power, §§ 139, 141.

[5] Heise v. Town Council, 6 Rich. (S. C.) 404. In this connection it may be noted that the forfeiture of a license by a municipality for a breach of a condition contained in it, (Huber v. Baugh, 43 Iowa, 514) or its termination by the repeal of the State law under which it was granted, is valid. State v. Bonnell, 21 N. E. Rep. 1101.

The courts frequently have occasion to consider the right of municipalities to exercise a power of forfeiture in the case of domestic animals running at large. The right to pronounce a forfeiture must be plainly conferred, and notice must be given before they can be sold or otherwise disposed of by the city.[1] Unless the power to pass such is plainly conferred by the Legislature, all ordinances, by which it is provided that domestic animals, such as horses, cows or hogs, shall not be allowed by their owners to run at large, upon penalty of having the same forfeited and sold, and the proceeds paid into the city treasury, or divided between the city and the person finding the estray, are invalid and unconstitutional, unless some notice be given so that the owner may have an opportunity of being heard at some stage of the proceeding, and afforded a chance to redeem his property.[2]

The general rule, that a court of equity will not interfere to give relief against a statutory forfeiture, although it may in the case of a forfeiture imposed by contract, is applicable to municipal forfeitures. As between individual parties to a contract, compensation can be awarded by the chancellor to the party entitled to the forfeiture, where the breach is due to some unforeseen accident, and where it constitutes the nonpayment of a sum of money, which can be fully compensated for in

[1] Varden v. Mount, 78 Ky. 86; Wilcox v. Hemming, 58 Wis. 144; Knoxville v. King, 7 Lea, 441.

[2] See ch. VIII. § 129; Donovan v. Vicksburg, 29 Miss. 247; Spitler v. Young, 63 Mo. 42; Cincinnati v. Buckingham, 10 Ohio, 247; Moore v. State, 11 Lea, 35; Poppen v. Holmes, 44 Ill. 362; White v. Tallman, 2 Dutch. 67; Darst v. People, 51 Ill. 286; Bullock v. Glomple, 45 Ib. 360; Heise v. Columbia, 6 Rich. 404; Willis v. Legris, 45 Ill. 289; McKee v. McKee, 8 B. Mon. (Ky.) 433; Gilchrist v. Schmidling, 12 Kan. 263; Wilson v. Bryers, 5 Wash. St. 303; 32 Pac. R. 90; Hanscom v. Bermod, 53 N. W. R. 371; 35 Neb. 504; White v. Brimim, 48 Mo. App. 111; Bowers v. Horan, 93 Mich. 420; 53 N. W. R. 535; Jarman v. Patterson, 7 B. Mon. 647; Gosselinck v. Campbell, 4 Iowa, 296; Fort Smith v. Dodson, 46 Ark. 296; Whitfield v. Longest, 6 Ire. Law, 268; Rose v. Hardie, 98 N. C. 44; Hellen v. Noe, 3 Ire. Law, 493. "The ordinance commands the marshal to seize and impound the hogs, and then, without any reserve, without any notice, by means of which the owner might be able to exculpate himself, directs them to be sold and the proceeds placed in the city treasury. Such an ordinance is as contrary to the spirit of the charter (Cincinnati) as it is alien from the general genius of our institutions." Grimke, J., in Rosebaugh v. Saffin, 10 Ohio, 33, 37.

money.[1] But not even under such circumstances will a court of equity grant relief from a valid forfeiture, incurred through the infraction of a penal statute.[2]

§ 156. **Procedure to enforce ordinances — Arrest.** — In England, prior to the Corporation Act of 1835, the authority of the municipal corporation to enact by-laws, always rested upon implication of law. By that act, the municipal council was empowered to make such by-laws as were necessary for the prevention and suppression of all nuisances, not punishable by act of Parliament. The corporation was also given the power to impose fines in a sum not to exceed five pounds. The act also prescribes that prosecution for the breach of any ordinance shall be begun within three months after the offence has occurred; and that the charge shall be made on oath; summons also must be served, but the magistrate may proceed without the appearance of the defendant, and may issue a warrant for his arrest. Upon conviction, the fine must be paid at once, unless the magistrate shall consider it proper to extend the time. If the fine is not paid, its payment may be enforced by a distress and sale; and for want of sufficient goods to distrain, the offender may be imprisoned for a period not to exceed one month, but which may be terminated upon the payment of the sum due. At the common law, the method of enforcing an ordinance was by an action by the municipal corporation or proper official against the offender, to recover the penalty imposed for the violation of the ordinance. This action was, in form, either *debt* or *assumpsit*.

The action of *assumpsit* was employed in the recovery of penalties, upon the theory that there had been a breach of the duty which, by a fiction of law, the defendant had promised the plaintiff to perform. The action of debt could be employed because the penalty was a sum certain, and in the nature of liquidated damages. And when it was expressly provided, that the penalty should be recovered by an action of debt, that form was exclusive, and no other could be employed.

Unless permitted by custom or statute, a city or town could

[1] Tiedeman on Equity Jur. § 180.

[2] Taylor v. Carondelet, 22 Mo. 105; Peachey v. Somerset, 1 Str. 447; Gorman v. Low, 2 Edw. Ch. 324; Keating v. Sparrow, 1 Ball & Beat. 367; State v. Railroad Co., 3 How. (U. S.) 534.

not, by a by-law, prescribe that the penalty should be recovered by distress and sale.[1] Where the mode of procedure to enforce ordinances is prescribed by statute or charter, that mode must be pursued.[2] But when no statutory method is prescribed, the common law remedy by an action of debt or *assumpsit* as above outlined, may be adopted; or where the common law forms have been abolished, the statutory civil action is the proper remedy.[3] Unless expressly forbidden by statute, municipal corporations have the inherent power to provide for an action of debt, to recover a penalty in their own courts.[4]

In every case where it is sought to recover the amount of a fine or penalty by the method above described, the proceeding is civil rather than criminal; and the rules of civil procedure are generally applicable.[5] When the method of procedure to enforce the payment of a fine or penalty is not by a suit at law, but by complaint before a municipal magistrate, who is to determine the matter and impose a fine, the proceedings have been sometimes deemed to be of a criminal or *quasi* criminal nature. In such proceedings, if the statute designates with certainty the purpose to which the fine is to be appropriated, it is enough for the magistrate to impose a fine, to be paid and applied according to the statute.[6] But if the magistrate in his

[1] Adley v. Reeves, 2 M. & S. 61. See White v. Tallman, (N. J.) 2 Dutch. 67; and Berger v. Clarkson, (N. J.) 1 Halst. 352; Bodwic v. Fennell, 1 Wils. 233. As to common law procedure to recover fines in United States, see Jacksonville v. Holland, 19 Ill. 271; Columbia v. Harrison, 2 Mills Const. (S. C.) 213; Brookville v. Gagle, 73 Ind. 117.

[2] Coonley v. Albany, 132 N. Y. 145; State v. Zeigler, 32 N. J. L. 262; Lansing v. Chicago, etc., Co., 52 N. W. R. 195; Bolter v. New Orleans, 10 La. An. 321; Ewbanks v. Ashley, 36 Ill. 177; Israel v. Jacksonville, 2 Ib. 290; Earnhart v. Lebanon, 5 Ohio Cir. Ct. 578; Williamson v. Com., 4 B. Mon. 146, 151; Charleston v. Ashley P. Co., 34 S. C. 541.

[3] N. Y. Consol. Act, §§ 216, 1290; Coates v. Mayor, 7 Cow. 585, 608; Ewbanks v. Ashley, *supra*; Israel v. Jacksonville, *supra*; N. Y. Code Civ. Pro. § 3215.

[4] Hesketh v. Braddock, 3 Burr. 1858; Barter v. Com., 3 Pa. 353.

[5] De Soto v. Brown, 40 Mo. App. 148; St. Louis v. Vert, 84 Mo. 204; Miller v. O'Reilly, 84 Ind. 168; Brophy v. Perth Amboy, 44 N. J. L. 217; *In re* Miller, 44 Mo. App. 125; Williamson v. Commonwealth, 4 B. Mon. 146, 151; Lewiston v. Procter, 27 Ill. 414; Quincy v. Ballance, 30 Ib. 185; Davenport v. Bird, 34 Iowa, 524.

[6] The King v. Thompson, 2 T. R. 18; The King v. Hyde, 21 L. J. May. Cas. 94; *In re* Boothroyd, 15 M. & W. 1; State v. Keenan, 57 Conn. 286; Queen v. Cridland, 7 E. & B. 853; King v. Glassop, 4 B. & A. 616; Seamen's Hospital v. Liverpool, 4 Ex. 180.

judgment of conviction appropriates the fine to some purpose different from what the statute prescribed, which amounts to a material variance between it and the statutory appropriation, the conviction will be bad.[1]

The question of the civil or criminal nature of the judicial proceeding to collect a fine, becomes of some importance, when the right of a trial by a jury is contended for. In all of the States there is a constitutional provision, guaranteeing to the accused a trial by jury; although in several of them, qualifications are made, in the case of suits to recover small sums, and of prosecutions for petty offences.[2] In a case, where the guaranty of the inviolability of the right of trial by jury in criminal prosecutions was absolute, the court held that a prosecution to recover a fine incurred by the infraction of an ordinance, not being in the nature of a criminal prosecution, was not within the constitution.[3] So, too, it has been held that the requirement of security for costs in a prosecution under a penal statute has no application to prosecutions for violations of municipal by-laws.[4]

On the other hand, in many of the States such prosecutions are not regarded as civil actions, brought by the city to enforce a private right;[5] but as substantially public prosecu-

[1] Griffiths v. Harries, 2 M. & W. 335; Chaddock v. Wilbraham, 5 C. B. 645.

[2] See Stimpson Amer. Statutes, §§ 72, 132.

[3] Williams v. Augusta, 4 Ga. 509. In this case, the court said: "Inasmuch as the right of trial by jury existed in England, and was secured by Magna Charta, and municipal corporations in that country enforced their by-laws by pecuniary penalties in a summary manner, and the same right being conferred upon similar corporations in this State, anterior to the adoption of the constitution, and constantly exercised; the right of trial by jury, as heretofore used in this State was not violated by the city council of Augusta by the imposition of the penalty for the breach of the local police regulations of the city." See, also, to same effect, Byers v. Com., 42 Pa. St. 89, 94; Low v. Com'rs etc., R. M. Charlt. (Ga.) 316; Flint R. S. Co. v. Foster, 5 Ib. 194; Floyd v. Com'rs etc., 14 Ib. 354; Kip v. Paterson, 2 Dutch. 298; Keeler v. Milledge, 24 N. J. L. 142; Shafer v. Mumma, 17 Md. 331; Dunmore's App., 52 Pa. St. 96; Com. v. Borden, 61 Ib. 272; Plimpton v. Somerset, 33 Vt. 283; Wayne Co. v. Detroit, 17 Mich. 390; People v. Same, 18 Ib. 445; Charleston v. Oliver, 16 S. C. 47; Goshen v. Croxton, 34 Ind. 239.

[4] Lewiston v. Proctor, 27 Ill. 414; Quincy v. Ballaus, 30 Ib. 185; Alton v. Kirsch, 68 Ib. 261.

[5] *In re* Goddard, 16 Pick. 504; Paxson v. Sweet, 1 J. S. Green (N. J.) 200.

tions or criminal proceedings,[1] in which it is authorized to disallow the defendant costs.[2] And the fact, that the defendant does not receive costs upon his acquittal, does not render unconstitutional a statute, providing for prosecutions in the name of the commonwealth of those who violate municipal ordinances.[3]

Police officers, city marshals, or other municipal officials, may be empowered by ordinances to arrest without warrant, offenders against city ordinances or regulations (unless expressly forbidden to do so by the constitution or the statutory law) for an offence committed in their presence, when such an arrest is preliminary to a judicial determination of the guilt or innocence of the accused.[4] But an ordinance, empowering an officer to arrest any person refusing to obey an order given at a fire, and to detain such person until the fire is extinguished, was unconstitutional, as depriving him of his liberty without due process of law.[5] The general power to make arrests, with or without warrant, is more fully presented elsewhere.[6]

§ 157. **Action in name of corporation.**—At common law, when the clause imposing the penalty was couched in general terms, the suit or prosecution to enforce the ordinance was as a general rule required to be brought in the name of the municipality. But it very frequently happened, that the ordinance or by-law conferred the right or privilege, of bringing an action for the purpose of recovering the fine incurred for its breach, upon some particular officer of the corporation, who was thereby empowered to recover the same and appropriate it to some designated official purpose. And, although the power of recovering the penalty could not be conferred by the city upon a stranger, yet the penalty itself might be given by the ordinance, wholly or in part, to an informer.[7]

[1] State v. Stearns, 31 N. H. 306; Mobile v. Jones, 42 Ala. 630; Fink v. Milwaukee, 17 Wis. 26.

[2] Com. v. Gay, 5 Pick. 44; Com. v. Fahey, 5 Cush. 408.

[3] *In re* Goddard, 16 Pick. 504.

[4] Bryan v. Bates, 15 Ill. 87; Main v. McCarthy, 15 Ill. 442; State v. Lafferty, 5 Harring. 491; Newark v. Murphy, 40 N. J. L. 145; Mitchell v. Lemon, 34 Md. 176; Butolph v. Blust, 5 Lans. 84.

[5] Johnson v. Reardon, 16 Minn. 431.

[6] Sec. 89.

[7] Feltmakers Co. v. Davis, 1 B. & P. 101; Boduri v. Fennell, 1 Wils. 233; Totterdell v. Glazby, 2 Ib. 226; Hesketh v. Braddock, 3 Burr, 1348; Wood v. Searl, Bridg. 141; Graves v. Colby, 9 Ad. & El. 356; Vintners v. Passey, 1 Burr, 235; Williamson v. Com., 4 B. Mon. 146, 151.

If a municipal official is authorized to bring an action in his own name, it will not be necessary for him to plead his election or appointment. It is sufficient for him to aver, that he is the official who is authorized by the ordinance to sue.[1]

§ 158. **Pleading ordinances.**—Judicial tribunals, other than municipal courts,[2] do not take judicial notice of municipal ordinances.[3] For this reason, when it is sought to enforce an ordinance, or when one is relied upon by the defendant as a justification, it is necessary that it should be specially pleaded.

It is ordinarily sufficient under the liberal modern rules, applicable to pleading, to set forth plainly and concisely the legal substance of that part of the ordinance, which it is desired to enforce, or which is relied upon for justification; adding, for purposes of identification, the title, date of passage, and section.[4]

In an action to enforce a by-law, it is necessary to allege facts, showing a breach thereof,[5] and to set forth the offence charged with reasonable clearness and certainty,[6] so that de-

[1] Harris v. Wakeman, Say. 254; Exeter v. Starre, 2 Show. 159; Watts v. Scott, 1 Dev. (N. C.) 291; Com. v. Fahey, 5 Cush. 408.

[2] Western R. Co. v. Young, 7 S. E. R. 912; Garland v. Denver, (Col. 90) 19 Pac. R. 460; Conboy v. Iowa City, 2 Iowa, 90; Anderson v. Donnell, 7 S. E. R. 523.

[3] See cases cited in last note, and Austin v. Walton, 68 Tex. 507; Wheeling v. Black, 25 W. Va. 266; People v. Buchanan, 1 Idaho, 681; People v. Mayor, etc., 7 How. Pr. 81; Cox v. St. Louis, 11 Mo. 431; Garvin v. Wells, 8 Iowa, 286; Mooney v. Kennett, 19 Mo. 551; New Orleans v. Boudro, 14 La. An. 303; Case v. Mobile, 30 Ala. 538.

[4] Com. v. Odenweller, (Mass. 92) 30 N. E. R. 1022; Mooney v. Kenneth, 19 Mo. 551; Austin v. Walton, 68 Tex. 507; Case v. Mobile, 30 Ala. 538; Charleston v. Chur, 2 Bailey (S. C.) 164; Miles v. Kern, (Mont. 92) 29 Pac. R. 720; Emporia v. Volmer, 12 Kan. 622, 628; Stokes v. Corporation of N. Y., 14 Wend. 87; Cox v. St. Louis, 11 Mo. 431; Harker v. New York, 17 Wend. 199; Kip v. Paterson, 2 Dutch. 298.

[5] Time and manner of violation essential: State v. Trenton, 36 N. J. L. 283; Hendersonville v. McMinn, 82 N. C. 532. Ordinance need not be recited in full: Emporia v. Volmer, 12 Kan. 622; Goldthwaite v. Montgomery, 50 Ala. 486; St. Louis v. Smith, 10 Mo. 438; nor section: Meyer v. Bridgeton, 37 N. J. L. 160.

[6] State v. Baker, (La. 92) 10 So. 405; State v. Camden, (N. J. 92) 19 Atl. R. 539; Com. v. Bean, Thach. (Mass. Crim. Cas.) 85; Fink v. Milwaukee, 17 Wis. 26; Johnson v. Winfield, 48 Kan. 129; Frankfort v. Anghe, 15 N. E. Rep. 802; Whiston v. Franklin, 34 Ind. 392; State v. Cainan, 94 N. C. 880; Woods v. Primeville, (Or. 92) 23 Pac. R. 880; Napman v. People, 19 Mich. 352; Goshen v. Croxton, 34 Ind. 239; Carr v. Conyers, 10 S. E. R. 630; 84 Ga. 287; Keeler v. Milledge, 4 Zabr. (24 N. J. L.) 142; Van Buren v. Wells, (Ark. 92) 14 S. W. R. 38.

fendant's liability may clearly appear.[1] But no such degree of strictness is required in forming a complaint for the violation of an ordinance, as is required in the case of an information or indictment. But a charge, that defendant committed an offence contrary to an ordinance of the town,[2] or that he knowingly associated with thieves, no names of persons or places being given,[3] will be dismissed for vagueness. It is not necessary to aver that defendant had notice of the ordinance, such notice being conclusively presumed,[4] nor that a demand of obedience to the ordinance has been made, unless a previous demand is absolutely and positively required.[5] It has been held, however, that a defective complaint, in an action to enforce a municipal ordinance, will be cured by the defendaut pleading not guilty, and proceeding to a trial on the merits.[6]

Penalties for several breaches of one ordinance may be sued for in the same action, provided the total amount of the judgment asked for will not take the cause out of the magistrate's jurisdiction.[7]

§ 159. **Validity of ordinances a question of law—Construction.**—The reasonableness, fairness and justice of a municipal ordinance, are questions of law for the judge, and not the jury, to determine. But in deciding these questions the judge must take into consideration all the circumstances of the case, including the condition of the municipality, the necessity for the by-law, the object sought by its enactment, and its relation to the State and Federal Constitutions and laws. It is very evident that ordinances and regulations, admirably adapted to a large commercial city or populous manufacturing town, would be very unreasonable and out of place in sparsely populated rural villages and towns.[8] Hence, the rule of construction has

[1] State v. Carpenter, 22 Atl. R. 497; 60 Conn. 97; Case v. Mobile, 30 Ala. 538; Coates v. Mayor, 7 Cow. 585, 608; State v. Baker, 10 So. R. 405; Com. v. Cutter, (Mass. 92) 29 N. E. R. 1146; Johnson v. Winfield, 48 Kan. 129; 29 Pac. R. 559.

[2] Memphis v. O'Conner, 53 Mo. 468.

[3] St. Louis v. Fitz, 53 Mo. 582.

[4] London v. Bernardiston, 1 Lev. 16.

[5] Butchers' Co. v. Bullock, 3 Bos. & P. 434, 437.

[6] State v. Welch, 21 Minn. 22.

[7] Hensoldt v. Petersburgh, 63 Ill. 111.

[8] Kuhn v. Chicago, 30 Ill. App. 203; State v. Miller, 41 La. An. 53; Frazee's Case, 30 N. W. R. 72; 63 Mich. 396; State v. Heidenhain, 7 So. R. 621; Heller v. Alvaredo, (Tex. 93) 20 S. W. R. 1003; Dunham v. Rochester, 5 Cow. N. Y. 462; Woodward v. Boscobel, (Wis. 93) 54 N. W. R. 332; Kneedler v. Norristown, 100 Pa.

been adopted that, when a municipality has enacted an ordinance in the exercise of a valid power, the court will be slow to pronounce such an ordinance to be oppressive, and will give the municipality the benefit of any insoluble doubt.[1] And it has been held that, where the Legislature expressly grants to a municipal corporation the power to do a particular act, the courts are not permitted to inquire into the reasonableness of the authorized act, although that would be a legitimate inquiry, if the act were attempted, not in pursuance of an express legislative authority, but under the general authority to enact all needful ordinances and regulations.[2] It is not believed that this can now be considered as sound law, in the light of the fact that the courts unhesitatingly pronounce acts of the Legislature to be unconstitutional and void, on account of their unreasonableness; as, for example, where the maximum tariff of railroad charges does not admit of a reasonable profit.[3] Neither public nor judicial opinion now agree with Judge Napton, in the Missouri case, quoted in the note below, that it would be an unwarrantable affront to the Legislature to declare their official act to be against public policy. In consequence of the extension of governmental powers, now occasioned by the spread of socialistic doctrines, the courts are compelled, in the interests of vested rights, to pronounce unreasonable regulations to be for that reason unconstitutional and void. It is, therefore,

St. 368; Com. v. Worcester, 3 Pick. 462; Paxson v. Sweet, 1 Green (N. J.) 196; *In re* Vandine, 6 Pick. 187; Boston v. Shaw, 1 Met. 130, 135; Austin v. Murray, 16 Pick. 121, 125; Hudson v. Thorne, 7 Paige Ch. (N. Y.) 261. But see Clausen v. Milwaukee, 30 Wis. 316.

[1] Fisher v. Harrisburg, 2 Grant, 291; St. Louis v. Weber, 44 Mo. 547; Com. v. Robinson, 5 Cush. 438, 442; Poulters Co. v. Phillips, 6 Bing. N. C. 314; St. Paul v. Colter, 12 Minn. 41; Com. v. Patch, 97 Mass. 221.

[2] St. Paul v. Colter, 12 Minn. 41; Brooklyn v. Breslin, 57 N. Y. 591, 596; A Coal Float v. Jeffersonville, 112 Ind. 15; Breninger v. Belvedere, 44 N. J. L. 350; Peoria v. Calhoun, 29 Ill. 317; State v. Clarke, 54 Mo. 17, 36; Haynes v. Cape May, 50 N. J. L. 55; District v. Waggaman, 4 Mackey, 328. In State v. Clarke, 54 Mo. 17, 36, Judge Napton said: "It is naked assumption to say that any matter allowed by the Legislature is against public policy. The best indications of public policy are to be found in the enactments of the Legislature. To say that such a law is of unusual tendency is disrespectful to the Legislature, who, no doubt, designed to promote the morals and health of the citizens. Whether the ordinance in question is calculated to promote the object is a question with which the courts have no concern."

[3] See cases cited in § 150.

not safe, in the present connection, to go beyond the statement that the courts would not be so readily inclined to pronounce an ordinance to be unreasonable, which had been enacted in pursuance of an express delegation of power, as where the ordinance had been enacted under the "general welfare" clause of the charter. Ordinances are not ordinarily considered to be of the character of penal statutes; for the penalty imposed is but liquidated damages, which may be and usually is, recovered in a civil action, brought against the wrongdoer. For this reason, the same degree of strictness and technicality is not observed in the construction of ordinances, which the courts have uniformly employed in the construction of penal statutes.[1] When it is remembered that the by-laws of corporations of all kinds, and particularly the ordinances of towns and villages, are frequently drawn up by men having little acquaintance with the niceties of legal phraseology, the necessity for a reasonable, rather than a technical construction, becomes apparent.[2]

As with statutes, the title and the body of the ordinance may be construed together, in order to ascertain its meaning.[3] And contemporary opinion of the meaning of the ordinance is of the highest value.[4] If, however, the ordinance, by reason of its general character and purpose, and the largeness of the fine imposed, assimilates to a penal statute, it ought to be, and usually will be, construed, especially when enforced by a criminal proceeding, with the same degree of strictness as a statutory enactment imposing a penalty.[5]

§ 160. **Evidence—Defences.**—The rules of evidence, applicable in all judicial proceedings, are employed in prosecutions to enforce ordinances, except to the extent that they have been modified by statutory enactment;[6] and the corporation will be estopped by the same acts and upon the same grounds, as would a private individual be under similar circumstances.

[1] See, in support of the general propositions of the text, Municipality v. Cutting, 4 La. An. 335; Merriam v. New Orleans, 14 Ib. 318; Loze v. Mayor etc., 2 Ib. 427; Baltimore v. Clunet, 23 Md. 449.

[2] Whitlock v. West, 26 Conn. 406.

[3] Martindale v. Palmer, 52 Ind. 411.

[4] State v. Severance, 49 Mo. 401.

[5] Krickle v. Com., 1 B. Mon. 261; State v. Paris Ry. Co., 55 Tex. 76; Pacific v. Seifert, 79 Mo. 210.

[6] City Council v. Dunn, 1 McCord (S. C.) 333; Fitch v. Pinckard, 4 Scam. (5 Ill.) 78.

Thus, when a city had received the fee paid for a liquor license, which had been granted by its *de facto* official, and had retained and used the same, it was estopped by that fact from maintaining an action to recover a penalty for selling liquor without a license.[1] And it may be said that, as a general rule, any action on the part of municipal officials, which is within the power of the municipal corporation, and which has induced another party to act to his own disadvantage, with a corresponding gain to the corporation, will estop the municipality from retracting or denying what its officers have done.[2]

In a civil proceeding, the defendant's admission that he has violated the ordinance is admissible in evidence against him.[3] As an exception to the well known rule, it has been held that the granting of a license, after a suit has been commenced to recover a penalty for acting without it, even though the license is worded so as to take effect previous to the commission of the offence, does not legalize it or waive the city's right to recover the penalty.[4] The illegality of the municipal charter cannot be given in evidence, as a matter of defence, in an action to enforce a penalty; such a question cannot be raised in a collateral proceeding.[5]

§ 161. **Repealing ordinances.**—Although a valid municipal ordinance will never become obsolete because it is not enforced, it may at any time be repealed directly or inferentially by the corporation, or by the Legislature. The power to enact implies the power to repeal.[6] And the repeal need not be express; for a clause in an ordinance, which is repugnant to previous munic-

[1] Martel v. East St. Louis, 94 Ill. 67; 21 Alb. L. J. 195.

[2] Roby v. Chicago, 64 Ill. 447; Chicago, R. I. & P. R. Co. v. Joliet, 79 Ib. 39; Logan Co. v. Lincoln, 81 Ib. 156; see *post*, §§ 169, 195.

[3] Columbia v. Harrison, 2 Const. R. (S. C.) 213.

[4] City Council v. Feldman, 3 Rich. (S. C.) Law, 385; City Council v. Schmidt, 11 Rich. (S. C.) Law, 343.

[5] Decorah v. Gillis, 10 Iowa, 234; Kettering v. Jacksonville, 50 Ill. 39; Tisdale v. Minonk, 46 Ib. 9; Hardenbrook v. Ligonier, 95 Ind. 70; Coles Co. v. Allison, 23 Ill. 437.

[6] Waukesha Hy. M. S. Co. v. Waukesha, (Wis. 93) 53 N. W. R. 675; Greeley v. Jacksonville, 17 Fla. 174; *In re* Mollie Hall, 10 Neb. 537; Kansas City v. White, 69 Mo. 261; Santo v. State, 2 Iowa, 165; East St. Louis etc. Co. v. E. St. Louis, 31 Ill. App. 398; *In re* Great West. Ry. Co. etc., 23 Up. Can. C. P. 28; Bloomer v. Stolley, 5 McLean, 158; Gormley v. Day, 114 Ill. 185; 28 N. E. R. 693; Bank of Chenango v. Brown, 26 N. Y. 467; Rice v. Foster, 4 Harring. (Del.) 470; People v. Collins, 3 Mich. 347; Welch v. Bowen, 103 Ind. 552.

ipal legislation, will repeal the prior ordinance so far as it may be inconsistent therewith.[1]

But the repeal of an ordinance cannot act retrospectively, so as to divest a person of a vested right which he had already acquired under the ordinance, which violated no constitutional restriction upon the power of the State or municipality, to create vested rights in derogation of public interests.[2]

While subsequent constitutional or statutory enactments will, if inconsistent with it, repeal by inference an existing ordinance,[3] an act changing an incorporated town into a city will not, it has been held, necessarily have this effect.[4]

The rule, that the repeal of a statute does not put an end to a pending prosecution for a past infraction of it does not apply to municipal ordinances.[5] The repeal of the ordinance puts an end to a pending prosecution under it, unless a saving clause be inserted in the repealing ordinance or statute.

§ 162. **Ratification of invalid ordinances by Legislature.** —The State Legislature may validate ordinances which are not in conflict with the constitution, but which for any reason are not binding. But when the invalidity of an ordinance is thus cured, a prosecution for an infraction should be brought under the ordinance, and not under the curative act.[6]

[1] *Ex parte* Wolf, 14 Neb. 24; Burlington v. Est. Law, 43 N. J. L. 13.

[2] Ashton v. Rochester, 14 N. Y. S. 855; Cape May etc. Co. v. Cape May, 35 N. J. Eq. 419; People v. O'Brien, 111 N. Y. 1; Cunningham v. Almonte, 21 Up. Can. C. P. 459; Stoddard v. Gilman, 22 Vt. 568; Pond v. Negus, 3 Mass. 230; Pardridge v. Hyde Park, 23 N. E. R. 345; 131 Ill. 537; Terre Haute v. Lake, 43 Ind. 480; State v. City Clerk, 7 Ohio St. 355; State v. Graves, 19 Md. 351; Bigelow v. Hillman, 37 Me. 521; Hyde Park v. Corwith, 12 N. E. R. 238; Nelson v. St. Martin's Parish, 111 U. S. 716; Louisiana v. Pillsbury, 105 Ib. 278. The rule in the text is subject to the limitation, incumbent upon municipalities, that they cannot bargain away by ordinance their responsibility for the suppression of nuisances and for the protection of the health and safety of the community.

[3] Mobile v. Dargan, 45 Ala. 310. On this general subject, see *ante*, §§ 33, 34.

[4] Erie Academy Trus. v. Erie, 31 Pa. St. 515; see *ante*, §§ 32, 58, 59.

[5] Naylor v. Galesburg, 56 Ill. 285; Earnhart v. Lebanon, 5 Ohio Cir. 578; Junction v. Webb, (Kan. 91) 23 Pac. R. 1073; Kansas City v. Clark, 68 Mo. 588; Barton v. Gadsden, 79 Ala. 495.

[6] Devers v. York, 150 Pa. St. 208; 30 W. N. C. 390; Schenley v. Com., 36 Pa. St. 29; Mattingly v. District, 97 U. S. 687; McMillen v. Boyles, 6 Iowa, 304; Frederick v. Augusta, 5 Ga. 561; Winn v. Macon, 21 Ga. 275; Logansport v. Crockett, 64 Ind. 319.

CHAPTER X.

MUNICIPAL CONTRACTS.

§ 163. **Inherent or implied power to contract.**—A municipal corporation may, unless restricted by charter or State statute, enter into any contract which may be necessary to the execution of the powers and functions conferred upon it by its charter, and may sue or be sued upon the same.[1] The general power to contract, in furtherance of corporate purposes, is inherent in all classes of corporations, both public and private.[2] Under a general power to contract, liquidated damages may be

[1] Galveston v. Loonie, 54 Tex. 517; Smith v. Stephan, 66 Md. 381; Montg. Co. v. Barber, 45 Ala. 237; Indianapolis v. Gas Co., 66 Ind. 396; Bateman v. Ashton, 3 H. & N. 322; Siebrecht v. New Orleans, 12 La. An. 496; Bank v. Patterson, 7 Cranch, 299; Goodrich v. Detroit, 12 Mich. 279; Chaffee v. Granger, 6 Ib. 51; Douglass v. Virginia City, 5 Nev. 147; Galena v. Corinth, 48 Ill. 423; Strauss v. Eagle I. Co., 5 Ohio St. 59; Rae v. Mayor, 51 Mich. 526; Albright v. Council, 9 Rich. L. (S. C.) 399; Williamsport v. Com., 84 Pa. St. 487; Wells v. Atlanta, 43 Ga. 67; Jones v. Richmond, 18 Gratt. 517; Brenham v. Brenham W. P. Co., 67 Tex. 542; Robinson v. St. Louis, 28 Mo. 488; Gregory v. Bridgeport, 41 Conn. 76.

[2] Pullman v. Mayor, 54 Barb. 169; Portland L. etc. Co. v. East Portland, (Oreg.) 22 Pac. Rep. 536.

agreed on and the sum inserted in the contract.[1] Usually, the power to contract is conferred in general terms in the charter; leaving the extent of the power, and the mode in which it is to be exercised, to be ascertained by a consideration of the corporate needs in that direction, and the limitations and restrictions, if any, to be found in the general statutes of the State. Express provisions of charter or statute modify the inherent or conferred general power to contract, and consequently deserve the carefulest consideration, in determining the scope of the general powers. And, furthermore, too much emphasis cannot be given to the rule, that any power to contract, whether conferred upon or inherent in a corporation, does not authorize the making of every sort of contract; but of such only as are fit, usual and necessary, to enable the corporation to carry into effect the purposes for which it was chartered. Under a general authority to make all contracts necessary for its welfare,[2] and to pass ordinances necessary for the security and welfare of its inhabitants, a city may contract for a water supply,[3] the furnishing of pure water being the duty of the city and a direct corporate purpose.[4] But a municipality has no power, by virtue of any mere general grant, to contract for a *permanent and exclusive* water supply,[5] although if by *express* statutory authority it has power "*to* provide a supply of water," it has been held that this may be done.[6] As further illustrations of the classes of contracts, to which a municipal corporation may become a party, under a general authority to make necessary contracts for its welfare, may be cited, contracts for lighting[7] and grading streets;[8] for building sidewalks,[9] and a breakwater, to protect city streets.[10] The question has arisen whether a city can make a contract with a private person, by which public property, designed and generally employed for public

[1] Parr v. Greenbush, 42 Hun, 232.

[2] Cabot v. Rome, 28 Ga. 50; Wells v. Atlanta, 43 Ib. 67; Livingston v. Pippin, 31 Ala. 542; Hale v. Houghton, 8 Mich. 458.

[3] Indianapolis Gas Co., 66 Ind. 396.

[4] Nichol v. Mayor, 9 Hun, 268; Grant v. Davenport, 36 Iowa, 402.

[5] Greenville W. Works v. Greenville, (Miss.) 7 So. Rep. 409.

[6] Atl. City Water Wks. v. Atlantic City, 39 N. J. Eq. 367.

[7] Indianapolis v. Gas Co., 66 Ind. 396.

[8] Sturtevant v. Atton, 3 McLean. 393.

[9] Wyandotte v. Zeitz, 21 Kan. 649; Lawrence v. Killam, 11 Ib. 512.

[10] Miller v. Milw., 14 Wis. 642; Clason v. Milw., 30 Ib. 316, 322.

purposes, can be employed for the private advantage of an individual. It has been held that, although a city can make no contract with a private person or corporation for the discharge of its public duty, it may when in possession of instrumentalities for this purpose, hire them out for use in private service, when the public use does not require them.[1] Municipal corporations have all the powers of ordinary persons in regard to the contracts they are authorized to make, except when specially restricted. Hence, it follows that they may be sued, or sue thereon, in the same manner as individuals.[2]

§ 164. **Implied contracts.**—Municipal corporations may be held liable upon implied contracts, where the subject-matter is within their powers; and these contracts may arise from the performance of certain corporate acts, without vote, deed or writing.[3]

The theory of an implied contract, here as at common law, rests upon the legal fiction that there had been an indefinite promise to answer for a certain class of obligations, which are considered to be equitable and just claims against the implied obligor. The promise was implied, because the common law authorities declared that all actions must arise *ex contractu* and *ex delicto;* and when in the absence of a *delictum*, which they construed as a synonym of a trespass, and of any express agree-

[1] The Maggie P., 25 Fed. Rep. 202.

[2] Agnew v. Brall, 124 Ill. 312; Western Sav. Fd. v. Philadelphia, 31 Pa. St. 175; Strauss v. Eagle Ins. Co., 5 Ohio St. 59; Semmes v. Columbus, 19 Ga. 471; New Orleans v. St. Louis Church, 11 La. An. 244; Sebrecht v. New Orleans, 12 Ib. 496; Hight v. Monroe Co., 68 Ind. 576; Jackson Co. v. Applewhite, 62 Ib. 464; Cullen v. Carthage, 103 Ib. 196.

[3] Dil. Mun. Corp. § 459; Bank v. Patterson, 7 Cranch, 299; Seagreaves v. Alton, 13 Ill. 366; Call Pub. Co. v. Lincoln, (Neb.) 45 N. W. Rep. 245; Adams v. Farnsworth, 15 Gray, 423; Crowder v. Sullivan, (Ind.) 28 N. E. Rep. 94; Roodhouse v. Jennings, 29 Ill. App. 50; Peterson v. Mayor, 17 N. Y. 449; Maher v. Chicago, 38 Ill. 266; Frankfort B. Co. v. Frankfort, 18 B. Mon. 41; Railroad Co. v. Athens (Ga.) 11 S. E. Rep. 663; Bryan v. Page, 51 Tex. 532; Canaan v. Derush, 47 N. H. 212; Ellsworth v. Rossiter, (Kan. 90) 26 Pac. Rep. 274; Michigan City v. Boeckling, 122 Ind. 39; Davis v. Jackson, 61 Mich. 530; Bank v. Dandridge, 12 Wheat. 74; Bissell v. R. R., 22 N. Y. 268; Backman v. Charlestown, 42 N. H. 125; St. Louis v. Gas Co., 98 Ill. 415; Brown v. Belleville, 30 Up. Can. Q. B. 373; Wentworth v. Hamilton, 34 Ib. 585; Brown v. Lindsey, 35 Ib. 509; East St. Louis v. Gas Co., 98 Ill. 415; State Brd. v. Aberdeen, 56 Miss. 518. But see Schell City v. Rumsey, 39 Mo. App. 264; Spitzer v. Blanchard, 82 Mich. 234.

ment to do anything, a party was in equity and conscience bound to compensate another for services rendered, or favors bestowed, the proper action was declared to be *ex contractu*, and the necessary contract or promise was implied. The more correct and plainer statement is that the implied contract is an obligation or duty imposed by law; and the only occasion for the implication of a contract, is the false statement, that all actions must arise *ex contractu* or *ex delicto*.

"The doctrine of implied municipal liability applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain money of another by mistake, or without authority of law it is her duty to refund, *not from any contract entered into by her on the subject*, but from the general obligation to do justice which binds all persons whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it; or if used by her, to render an equivalent to the true owner, from the like general obligation; the law, which always intends justice, implies a promise. In reference to money or other property it is not difficult to determine in any particular case whether a liability with respect to the same has attached to the city. The money must have gone into the treasury, or been appropriated by her; and when it is property, other than money, it must have been used by her, or be under her control. But with respect to services the case is different. Their acceptance must be evidenced by ordinance (or other express action) to that effect. If not originally authorized, no liability can attach upon any ground of implied contract. The acceptance, upon which alone the obligation to pay could arise, would be wanting." [1]

Whether the obligation rests in contract or not, it is one which is constantly recognized; and which has been applied to the purchase of real estate,[2] to the use of a bridge for laying pipes,[3] to work done in widening and deepening a river,[4] to

[1] Chief Justice Field in Argente v. San Francisco, 16 Cal. 255, 282.

[2] Chapman v. Douglas Co., 107 U. S. 348.

[3] Frankf. B. Co. v. Frankfort, 18 B. Mon. 41.

[4] Maher v. Chicago, 38 Ill. 266.

work upon plans for a market,[1] for a survey,[2] and to many other similar cases, where there is no express contract.[3]

A distinction has been made between money or property obtained by the city, and service rendered in local improvements. It has been held that a city cannot be required to compensate the voluntary performance of a municipal duty by a person who was not requested by the city to perform it;[4] and the fact that the city authorities saw him at work and received the benefit, does not alter the case.[5] Another exception to the rule of implied liability occurs in the case of local improvements, for which the abutters are ultimately liable. If the contract is not made in the legally prescribed manner, the city is not impliedly liable unless it has collected the amounts from the adjoining owners.[6]

Care should be exercised in the application of the doctrine

[1] Peterson v. Mayor, 17 N. Y. 450.

[2] Randall v. VanVechten, 19 Johns. 60.

[3] Thomas v. Pt. Hudson, 27 Mich. 323; Ellsworth v. Rossiter, 26 Pac. R. 674; 46 Kan. 237; Nicholson v. Guardians, L. R. 1 Q. B. 620; Allegheny City v. McClurkin, 14 Pa. St. 31; Armstrong Co. v. Clarion Co., 66 Ib. 318; Hitchcock v. Galveston, 96 U. S. 341; Morville v. Tract Soc., 123 Mass. 129; Crowder v. Sullivan, (Ind. 91) 28 N. E. R. 94; Louisiana v. Wood, 102 U. S. 294; Chapman v. Douglas Co., 107 Ib. 348; Mayor v. Ray, 19 Wall. 468; Bangor S. Bk. v. Stillwater, 49 Fed. 721; Brewer v. Otoe, 1 Neb. 373; Sangamon Co. v. Springfield, 63 Ill. 66; Marsh v. Fulton, 10 Wall. 676, 684; Herzo v. San Francisco, 33 Cal. 140; Montgomery v. M. Water Works, 79 Ala. 233; New Haven v. New Haven & D. R. Co., (Conn. 93) 25 Atl. 316; Paul v. Kenosha, 22 Wis. 266; Lemington v. Blodgett, 37 Vt. 215; Searcy v. Yarnell, 47 Ark. 269; Carey v. East Saginaw, (Mich.) 44 N. W. R. 168; State Board v. Aberdeen, 56 Miss. 518; Moore v. Mayor, 73 N. Y. 238; Ryan v. Coldwater, (Kan. 91) 26 Pac. R. 675; Nelson v. Mayor, 63 N. Y. 535; Oneida Bank v. Ontario Bank, 21 Ib. 495; McDonald v. Mayor, 68 Ib. 23; North Pac. L. & M. Co. v. East Portland, 12 Pac. R. 4; 14 Oregon, 3; Shrewsbury v. Brown, 25 Vt. 197; Gassett v. Andover, 21 Ib. 342. *Contra*, Seibrecht v. New Orleans, 12 La. An. 496; Jones v. Lancaster, 4 Pick. 149; Loker v. Brookline, 13 Ib. 343; Wood v. Waterville, 5 Mass. 294; Bentley v. Com'rs, 25 Minn. 259.

[4] Salsbury v. Phila., 44 Pa. St. 303; Huntington v. Boyle, 9 Ind. 296; Jeffersonville v. The J. Shallcross, 35 Ib. 19.

[5] Nelson v. City, 29 N. E. R. 814; 131 N. Y. 4; Alton v. Mulledy, 21 Ill. 76; Elizabeth v. White, 48 Ohio St. 577; 29 N. E. R. 47; Brown v. Melrose, (Mass. 92) 30 N. E. R. 87.

[6] Argenti v. San Francisco, 16 Cal. 255; Craycraft v. Selvage, 10 Bush, 696; Ib. 549; Saxton v. St. Joseph, 60 Mo. 153. The same where the assessment has been declared void. Polk Co. Savings Bk. v. State, 69 Iowa, 24; Schofield v. Council Bluffs, 68 Ib. 695.

of implied contracts;[1] for, although a city may be liable for money or property received, it will not be liable when the money or property is received and used in disregard of positive legal prohibitions.[2] The law will never impose an obligation to do an act contrary to duty or to law; and a promise to carry out a contract can never be implied, where the city has no legal power to do it.[3] So, when a city charter prescribes, that all municipal contracts shall be made in a certain way,[4] as in writing,[5] or when a city attempts to make a contract, by which it agrees not to exercise part of the franchise committed to it for public purposes,[6] there is no room for saying that there is an implied contract. This exception to the general rule has been frequently recognized, where there has been a neglect to observe the charter requirement, that contracts should be awarded to the lowest bidder. Inasmuch as the contract in this case is void and illegal, the courts will not imply a promise to pay, because a plain statutory requirement has been disregarded.[7]

§ 165. **Mode of contracting—Use of writing or of seal—Statute of Frauds.**—It is well settled that when the mode of making municipal contracts is plainly prescribed by law, such mode is exclusive and must be closely adhered to, in order that the contract may be valid.[8] A party dealing with a corpora-

[1] Peterson v. Mayor, 17 N. Y. 449, 453; Poultney v. Wells, 1 Aiken, 180.

[2] State Board v. Cit. S. R. Co., 47 Ind. 407; Schell v. L. M. Rumsey Co., 39 Mo. App. 264; McDonald v. New York, 68 N. Y. 23.

[3] Burrill v. Boston, 2 Cliff. C. C. 590; Collector v. Hubbard, 12 Wall. 1, 12; Spitzer v. Blanchard, 82 Mich. 234; Murphy v. Louisville, 9 Bush, 189; Bryan v. Page, 51 Tex. 532; Meyer v. Keyser, (Md. 91) 19 Atl. 706.

[4] Pimental v. San Francisco, 21 Cal. 351; Starkey v. Minneapolis, 19 Minn. 203; Dickenson v. Poughkeepsie, 74 N. Y. 65.

[5] McDonald v. Mayor, 68 N. Y. 23.

[6] Cornell v. Guilford, 1 Denio, 510; St. Louis v. Gas Co., 5 Mo. App. 484, 529; Thomas v. Richmond, 12 Wall. 349; Morgan v. Menzies, 60 Cal. 341.

[7] Ryce v. Osage, (Iowa, 93) 45 N. W. R. 532; Hodges v. Buffalo, 2 Denio, 110; McBrien v. Grand Rapids, 56 Mich. 95; see cases under § 165, Mode of Contracting, and § 172, Advertising for Bids; Parr v. Greenbush, 72 N. Y. 463; Brady v. New York, 20 Ib. 312.

[8] Beers v. Dalles, 18 Pac. 835; Littlefield v. Boston etc. Co., 146 Mass. 268; 15 N. E. R. 268; Mayor v. Keyser, (Md. 91) 19 Atl. 706; Crutchfield v. Warrensburg, 30 Mo. App. 456; Prince v. City of Quincy, 28 Ill. App. 490; 21 N. E. R. 768; 128 Ill. 443; Spilman v. Parkersburg, 35 W. Va. 605; Goldsboro v. Moffatt, 49 Fed. R. 213; Cartersville Imp. Gas & W. Co. v. Cartersville, (Ga. 93) 16 S. E.

tion is under the necessity of observing all the mandatory provisions of the law himself, and of seeing that the municipal corporation does the same, or suffer the consequences of his neglect.[1] The act creating the corporation is the source from which it derives its power to contract; and if in this act, or in the charter, a mode is prescribed in which the power is to be exercised, any contract not so made will be as invalid as though the city had never been incorporated at all.[2] If, for example, the charter requires that a certain class of contracts must be authorized by a vote of the municipal taxpayers, a contract not so sanctioned is void.[3] It is not only in making a contract, but likewise in annulling or altering it, that the proper statutory regulations must be strictly complied with.[4] Thus, it has been

R. 25; State v. Passaic, 41 N. J. L. 90; Perrine v. Farr, 22 Ib. 356; Carron v. Martin, 2 Dutch. (N. J.) 594; Athens v. Hemerick, (Ga. 93) 16 S. E. R. 72; State v. Marion Co., 21 Kan. 419; Reis v. Graff, 51 Cal. 86; Addis v. Pittsburgh, 85 Pa. St. 379; McBean v. San Bernardino, (Cal. 93) 31 Pac. R. 49; McDonald v. Mayor, 68 N. Y. 23; McCoy v. Brant, 53 Cal. 247; Mt. Adams & Inclined Ry. Co. v. Cincinnati, 25 Wkly. Law Bul. 91; Baltimore v. Reynolds, 20 Md. 1; Durango v. Pennington, 8 Cal. 257; Worthington v. Covington, 82 Ky. 265; Schell City v. Rumsey, 39 Mo. App. 264; Laycock v. Baton Rouge, 36 La. An. 475; North Pac. etc. Co. v. E. Portland, 14 Oreg. 3; Spitzer v. Blanchard, 46 N. W. R. 400; 82 Mich. 234; Los Angeles G. Co. v. Toberman, 61 Cal. 199; Terre Haute v. Lake, 43 Ind. 480; Butler v. Charlestown, 7 Gray, 12; Trustees v. Cherry, 8 Ohio St. 564; McCracken v. San Francisco, 16 Cal. 591; Dey v. Jersey City, 19 N. J. Eq. 412; Bank v. Dandridge, 12 Wheat. 64, 68; Diggle v. Railway Co., 5 Exch. 442.

[1] New Decatur v. Berry, 7 So. R. 838; 90 Ala. 432; Sullivan v. Leadville, 11 Colo. 483; McBrien v. Grand Rapids, 56 Mich. 95; Kansas City v. Flanagan, 69 Mo. 22; Reilly v. Philadelphia, 60 Pa. St. 467; St. Louis v. Davidson, 14 S. W. R. 825; 102 Mo. 149; Murphy v. Louisville, 9 Bush, 189; Crutchfield v. Warrensburg, 30 Mo. App. 456; People's R. R. v. Mem. R. R., 10 Wall. 38; Ziegler v. Chapin, 13 N. Y. S. 783; 59 Hun, 214; 27 N. E. R. 471; Steckert v. E. Saginaw, 22 Mich. 104; Niles W. Wks. v. Niles, 59 Ib. 311; Bonesteel v. Mayor, 22 N. Y. 162; Starkey v. Minneapolis, 19 Minn. 203; Heidelberg v. St. Francois Co., 100 Mo. 69; Jones v. Town of Lind, (Wis. 90) 48 N. W. R. 247; Hunt v. Wimbledon Loc. Board, 4 Ont. Rep. C. P. D. 48; Kenney v. Jersey City, 47 N. J. L. 449; Henderson v. Marietta, 64 Ga. 286; Wilhelm v. Cedar Co., 50 Iowa, 254; Gates v. Hancock, 45 N. H. 528; Dey v. Jersey City, 19 N. J. Eq. 412; Bentley v. Com'rs, 25 Minn. 259; People v. Weber, 89 Ill. 347; Butler v. Nevin, 88 Ib. 575; Mathewson v. Grand Rapids, 50 N. W. R. 651; 88 Mich. 558; Driftwood V. T. Co. v. Com'rs, 72 Ind. 226.

[2] Bank v. Dandridge, 12 Wheat. 64, 68.

[3] Niles W. Wks. v. Niles, 59 Mich. 311.

[4] Terre Haute v. Lake, 43 Ind. 480.

held that a contract, authorized by ordinance, can only be canceled or altered by a similarly authenticated act.[1] But if the charter mode of dealing is not absolutely mandatory, the contract may be upheld, although the details of the prescribed mode are not strictly complied with.[2] So, when a charter prescribed that money should be drawn from the treasury upon an order of the council, signed by the mayor, an order founded upon a memorandum, without a formal order being entered, was considered a sufficient compliance with the statute.[3] And so, also, when the statute requires a specific condition in a municipal contract, the precise words of the statute need not be used; but if the contract by a reasonable construction can be said to substantially contain the condition, it will suffice.[4] General provisions of a mandatory nature, that no contract will bind the city unless an appropriation has been made therefor, are impliedly repealed *pro tanto* by a subsequent special act, requiring a certain official or department to purchase supplies, but making no appropriation to pay for them.[5] If no mode be prescribed, valid contracts, within the limits of the corporate powers, may be entered into in the same manner that natural persons make contracts.[6] Any prescribed mode of contracting will be strictly confined to that sort of contracts, or the particular class of officials, to which it is applicable; and, it has been held, will not prevent the making of other valid contracts by the corporation through its officers and agents, according to the ordinary custom and usage of the business world.[7] When no bad faith or fraud is shown to exist, the State is precluded from interfering, through its attorney-general, to enjoin the corporation from executing a contract; merely because charter formalities, preliminary thereto, have not been followed.[8]

[1] Sacramento v. Kirk, 7 Cal. 449.

[2] Kelly v. Mayor, 4 Hill (N. Y.) 263; Moqre v. Mayor, 73 N. Y. 238; Neiffer v. Bank, 1 Head (Tenn.) 162; Pennington v. Taniere, 12 Q. B. 998, 1013; Maddox v. Graham, 2 Met. (Ky.) 56; People v. Yonkers, 39 Barb. 266.

[3] Kelley v. Mayor, etc., 4 Hill (N. Y.) 263.

[4] Taylor v. Palmer, 31 Cal. 240.

[5] Assessors, etc, v. Commissioners, 3 Brews. (Pa.) 333.

[6] Booth v. Shreveport, 29 La. An. 581; Indianola v. Jones, 29 Iowa, 282; Duncombe v. Ft. Dodge, 38 Ib. 281; Burrill v. Boston, 2 Cliff. (U. S.) 590; Selma v. Mullen, 46 Ala. 411. Montgomery v. Barber, 45 Ala. 237.

[7] Indianola v. Jones, *supra;* Baker v. Johnson, 33 Iowa, 151.

[8] Atty. Gen. v. Detroit, 55 Mich. 181; 5 Am. & Eng. Cor. Cas. 497; Attorney General v. Detroit, 26 Mich. 263.

Municipal corporations may, unless expressly prohibited, enter into parol contracts through their duly authorized agents.[1] But if the statutes provide that a contract of a municipality shall be in writing, the provision must be observed, or the contract will be void.[2]

So, a municipal contract, not to be performed within a year, is within the Statute of Frauds; and a resolution or ordinance, approving a contract of this sort, does not constitute a signing, as required by that statute.[3] Generally, however, a municipal corporation may contract by ordinance, and a regularly enacted ordinance or resolution duly passed by the governing body, accepting a proposition made to the city, constitutes an assent, and fulfills the requirement of a note or memorandum in writing.[4]

The ancient common law rule required all contracts of corporations to be under seal. But that rule is no longer observed, and it is now well settled that the contract of a municipal corporation, in the absence of express legislative enactment, need not be under seal.[5]

But when a contract is executed under the seals of officials,

[1] Baker v. Johnson Co., 33 Iowa, 151; Duncombe v. Ft. Dodge, 38 Iowa, 281; Selma v. Mulleu, 46 Ala. 411; Logansport v. Dykeman, 116 Ind. 15.

[2] McDonald v. Mayor etc., 68 N. Y. 23; 23 Am. Rep. 144; Maupin v. Franklin Co., 67 Mo. 327; Condon v. Jersey City, 43 N. J. L. 412; Stewart v. Cambridge, 125 Mass. 102; Starkey v. Minueapolis, 19 Minn. 203; Logansport v. Blackmore, 17 Ind. 318; Carey v. East Saginaw, (Mich.) 44 N. W. Rep. 168.

[3] Wade v. Newbern, 77 N. C. 460.

[4] Draper v. Springport, 104 U. S. 501; Montgomery v. Barber, 45 Ala. 237; Clark v. Washington, 12 Wheat. 524; Halbut v. Forrest City, 34 Ark. 246; Wiles v. Hoss, 114 Ind. 371; Alton v. Mulledy, 21 Ill. 76; Ross v. Madison, 1 Ind. 281; Bellmyer v. Marshalltown, 44 Iowa, 564; Fanning v. Gregoire, 16 How. (U. S.) 524; Abby v. Billups, 35 Miss. 618; Sacramento v. Kirk, 7 Cal. 419; People v. Supervisors, 27 Cal. 655; Argus Co. v. Mayor etc., 55 N. Y. 495; Logansport v. Blackmore, 17 Ind. 318; San Antonio v. Lewis, 9 Tex. 69; Detroit v. Jackson, 1 Doug. (Mich.) 106.

[5] Beers v. Dalles, 18 Pac. R. 835; Trustees v. Moody, 62 Ala. 389; Burlington v. Plank Rd., 11 Iowa, 75; Sheffield Sch. Township v. Andress, 56 Ind. 157; Crutchfield v. Warrensburg, 30 Mo. App. 456; Buckley v. Briggs, 30 Mo. 452; McCullough v. Talladega etc., 46 Ala. 376; Gadsboro v. Moffatt, 49 Fed. R. 213; Watson v. Bennett, 12 Barb. 196; Fleckner v. U. S. Bank, 8 Wheat. 338, 357; Detroit v. Davis, 1 Doug. (Mich.) 106; Christian Church v. Johnson, 53 Ind. 273; Missouri etc. Co. v. Com'rs, 12 Kan. 482; Bernardin v. N. Dufferin, 19 Can. S. C. R. 581; McPherson v. Nichols (Kan. 91), 29 Pac. R. 679.

or of committeemen authorized to act for the town, it cannot be considered the deed of the town; but the paper will be regarded as a simple contract and binding as such on the municipal corporation, while the seals will be rejected as surplusage.

If the corporation have a seal, which is affixed to the instrument by the proper official, it may then be the deed of the corporation;[1] although the affixing of a seal to an instrument by a corporation is not conclusive of an intent to create a specialty.[2]

When a contract is legally made by a municipal corporation, its assent to a variation or modification thereof may be implied from acts relating to the work done under the contract, subsequent to the date of its making;[3] but such implied assent must emanate from the corporate officials who are legally authorized to give it.[4] So, it has been held that a renewal of a contract, which is legal in its inception, will be conclusively presumed from the municipal acquiescence and tacit acceptance of benefits thereunder.[5]

The form of action, in such cases, where common law principles of pleading obtain, is not *covenant or debt*, but for damages, or *in assumpsit*.[6]

§ 166. **Municipal contracts with its agents.**—It is a well founded principle of law and of equity, the justice and fairness of which is evident, that he who acts as agent or trustee cannot be allowed to make profit out of the transaction in which he acts, over and above the compensation which has been agreed upon between him and his principal or the beneficiary of the trust. The agent of the buyer cannot act at the same time as an agent for the vendor; nor can an agent to buy be himself the vendor.

The opportunities to defraud, and the judicial conviction, that one cannot act justly towards his principal, when he is

[1] Damon v. Granby, 2 Pick. 345, 352; Randall v. Van Vechten, 19 Johns. 60, 65.

[2] Bank v. Charlotteville etc. Co., 5 S. C. 156; Rand v. Dovey, 83 Pa. St. 280.

[3] Messenger v. Buffalo, 21 N. Y. 196.

[4] Bonesteel v. Mayor, 22 N. Y. 162; Hague v. Philada., 48 Pa. St. 527; O'Hara v. New Orleans, 30 La. An., pt. 1, 152; Hasbrouck v. Milwaukee, 21 Wis. 217.

[5] Taylor v. Lambertville, 43 N. J. Eq. 107.

[6] Randall v. Van Vechten, 19 Johns; 60, 65; Damon v. Granby, 2 Pick. 345; Fullam v. Brookfield, 9 Allen, 1; Bank v. Patterson's Adm., 7 Cranch, 299. Clark v. Cuckfield Union, 11 Eng. L. & Eq. 442; Pennington v. Taniere, 12 Q. B. 1011.

himself interested adversely in the transaction, are the grounds for holding all such transactions to be tainted with fraud, either actual or constructive, and for that reason to be voidable at the instance of the principal or beneficiary of the trust, as the case may be.[1] However much this rule may be violated by municipal and other public officials, there is no doubt of the application of the rule to them, and the decisions are numerous, in which contracts with municipalities, in which officials were financially interested, have been set aside.[2] Thus, when the mayor secretly contracted to purchase at a discount a large amount of municipal debentures, which were afterwards issued by ordinance, in the enactment of which he was actively engaged, he was held to be a trustee for the city, to the amount derived by him from the transaction.[3] A city official cannot, while in office, become a landlord to the corporation; and a lease establishing such a relation has been held void[4] as against public policy, which prohibits a trustee from contracting with himself. So, it has been held that a plaintiff could not recover a livery bill for horses and carriages, used in a celebration, the appropriation for which was voted by a council of which he was a member, even though the appropriation was valid.[5] In Canada, an action at law brought by a trading partnership against a city can be resisted upon the ground that a member of the firm is also a city councilman.[6]

§ 167. **Form of contracts made by municipal agents.**— In contracts made by agents of private corporations, where the only evidence in the contract that the agent does not intend to bind himself is the affixing to his signature of some designation of agency, as where he signs himself as treasurer or president, without stating for what company he is acting, it is

[1] Tiedeman's Equity Jur. § 233.

[2] Stott v. Franey, 20 Or. 410; Case v. Johnson, 91 Ind. 477; Macon v. Huff, 60 Ga. 221; Grand Is. etc. Co. v. West, (Neb. 89) 45 N. W. R. 242; Com'rs v. Reynolds, 44 Ind. 509; Dalzell etc. Co. v. Findlay, 5 Ohio Cir. Ct. 418; Emigrant Co. v. Wright Co., 97 U. S. 339; Call Pub. Co. v. Lincoln, 29 Neb. 149; McGregor v. Logansport, 79 Ind. 166; Bellaire etc. Co. v. Findlay, 5 Ohio Cir. Ct. 418; Milford v. Milf. W. Co., 124 Pa. St. 610; 17 Atl. R. 185; Fort Wayne v. Rosenthal, 75 Ind. 156; Butts v. Wood, 37 N. Y. 317.

[3] Torouto v. Bowes, 4 Grant (Can.) 504. Cf. Collins v. Swindle, 6 Ib. 282; Cummings v. Saux, 30 La. An. 207; Doll v. State, 45 Ohio St. 445.

[4] Macon v. Huff, 60 Ga. 221.

[5] Smith v. Albany, 61 N. Y. 444.

[6] Brown v. Lindsay, 35 Up. Can. Q. B. 509.

nevertheless the individual obligation of the agents and the company is not bound.[1] This harsh and technical rule is being very materially modified by later adjudications, in order to avoid the infliction of wrong, and to carry out the real intentions of the parties. And the rule is almost completely abrogated in reference to the contracts of municipal and other public corporations. It is now a well settled rule of law that a contract in writing, made by municipal agents, duly and legally appointed and acting within their authority, is regarded as the contract of the corporation, although signed by the agents in their own name, and sealed with their own seals. But, of course, it must be reasonably clear upon the face of the paper, that the purpose of the agent was to act for the municipality; and that he did not intend to assume a personal liability.[2]

The contrary doctrine has been held however, in certain cases, where the contractual liability of school districts was involved.[3]

[1] Tiedeman on Commercial Paper, p. 202; Tucker v. Fairbanks, 98 Mass. 101.

[2] Hatch v. Barr, 1 Ham. (Ohio) 390; Baker v. Chambles, 4 G. Greene, (Iowa) 428; (individual signatures.) Lyon v. Adamson, 7 Iowa, 509; Mott v. Hicks, 1 Cow. (N. Y.) 513, 534; Blanchard v. Blackstone, 102 Mass. 343; Stanton v. Camp, (individual signatures with "committee" added.) 4 Barb. 274, Mechanics' Bk. v. Bk. of Columbia, 5 Wheat. 326; Regents v. Detroit, 12 Mich. 138; Hopkins v. Mahoffy, 11 Serg. & Rawle (Pa.) 126; Gale v. Kalamazoo, 23 Mich. 344; Burrill v. Boston, 2 Cliff. 590; (signed by mayor.) Sweetzer v. Mead, 5 Mich. 107; Bank v. Gottschalk, 14 Pet. 19; Compare Dugan v. United States, 3 Wheat. 172, where it was held that the United States could sue "when it appeared not only on the face of the instrument but from all the evidence that it alone was interested, although the bill was payable to "Tucker, Treasurer of the U. S." Parr v. Greenbush, 72 N. Y. 463; see also Bowen v. Morris, 2 Taunt. 374, 387; Balcombe v. Northrup, 9 Minn. 173; (note payable to I. E. F. U. S. Indian Agent, his successors in office or order.) Irish v. Webster, 5 Greenl. 171; (to "James Irish, Land Agent of Maine.") United States v. Boyce, 2 McLean, 352; State v. Boise, 2 Fairf. 474; School I. of Monticello v. Kendall, 72 Ind. 208; Andrews v. Estes, 11 Me. 267; (we, the undersigned committee for the First School Dis. signed A. B. C. Committee.) Hodges v. Runyon, 30 Mo. 491; McGee v. Larramore, 50 Ib. 425; (signed "A. B. Director.") Heidelberg v. Horst, 62 Pa. St. 301; Dubois v. Canal Co., 4 Wend. 285; Worrell v. Munn, 1 Seld. (N. Y.) 229; Ford v. Williams, 13 N. Y. 577, 585; Richardson v. Scott, etc., Co., 22 Cal. 150; Robinson v. St. Louis, 28 Mo. 488; (contract signed "G. N. S. Inspector.")

[3] Cahokia S. Trustees v. Rantenberg, 88 Ill. 219; Bayliss v. Peterson, 15 Iowa, 279; Fowler v. Atkinson, 6 Minn. 579; Bingham v. Stewart, 13 Minn. 106.

When a contract was made, involving subject-matter exclusively pertaining to the corporation between "T. Van V., J. W., C. D. C., a committee appointed by the corporation of the city of Albany for that purpose, of the first part, and J. R. of the second part," in which the parties of the first part promised to make certain payments and signed and sealed the same individually, it was decided that the corporation, and not they, were liable.[1] Of course, the contract must be one which the agent was authorized to make; and when such is the case, the contract is valid and binding, although there has been no formal acceptance by a vote; or even if it be rejected by the corporation.[2] It must also be remembered that the corporation is not bound by contracts which are made by its officials, while acting in their individual capacity. So, a town in New England is not bound by the individual action of its selectmen,[3] as where a contract is signed by one for all the selectmen.[4] Nor is a city liable upon a contract which is made by a majority of its aldermen without the required legal and official action of the city council.[5] But a contract, entered into by supervisors, for and in behalf of the board and signed by the chairman of the board, was held to be binding on the county.[6]

§ 168. **Non-liability of public official, acting within his authority.**—Except when public officials act beyond their authority, or fail to evince in the written instruments, executed by them, the intention to act for and in the name of the municipality,[7] they cannot be held personally liable on contracts made by them in their official and representative capacity.[8]

[1] Randall v. Van Vechten, 19 Johns. 60; Cf. Fullam v. Brookfield, 9 Allen (Mass.) 1; Bank v. Patterson, 7 Cranch, 299; but compare, *contra*, Alam v. Boyd, 87 Pa. St. 477, (where contract was signed by committee.) and Providence v. Miller, 11 R. I. 272.

[2] Davenport v. Hallowell, 10 Me. 317; Junkins v. Sch. Dis., 39 Ib. 220; Willard v. Newburyport, 12 Pick. 227; Kingsbury v. Sch. Dis., 12 Met. 99.

[3] Haliburton v. Frankford, 14 Mass. 214; Butler v. Charlestown, 7 Gray, 12; Stetson v. Kempton, 13 Mass. 272.

[4] Andover v. Grafton, 7 N. H. 298, 305.

[5] Butler v. Charlestown, 7 Gray, 12; Sikes v. Hatfield, 13 Ib. 347.

[6] Babcock v. Goodrich, 47 Cal. 488.

[7] See *ante*, § 167.

[8] Macbeath v. Haldimond, 1 D. & E. Term, 172; Hodgson v. Dexter, 1 Cranch, 34; Olney v. Wickes, 18 Johns. 122; King v. Butler, 15 Johns. 281; Mott v. Hicks, 1 Cow. (N. Y.)

Where the other contracting party knows the extent of the official's authority he cannot hold the official personally liable, unless the intention to be personally bound is plainly expressed.[1] So, also, when the officers of a municipal corporation, acting in good faith, perform an official act, or attempt to enter into a municipal contract, under an innocent mistake of law that they have legal authority to do so, in which mistaken impression the other party shares, no liability attaches, either to the officials personally, or to the corporation.[2]

This rule of nonliability is justified by the fact, that the scope of the authority of a municipal or other public official is easily ascertained by any one, who is concerned in the matter, by an examination of the laws, from which alone the official can derive his authority, and to which every one has equal access. One of the necessary elements of an estoppel would be absent in that case. It is different with the agents of private individuals and private corporations.[3]

§ 169. **Authority of municipal officers to contract—Contracts ultra vires.**—Municipal corporations can contract only by their officers, and other properly authorized agents; and the authority of all such agents is limited to the making of such contracts as are within the corporate purpose. Public officers and agents are held more strictly within the express limitations of their authority, than are officers of private corporations; and all contracts made by them, though within the apparent scope of their authority, are void, unless they possess actual authority, express or implied.[4] Nor will the official's false rep-

Remington v. Ward, (Wis. 91) 47 N. W. R. 659; Adams v. Whittlesey, 3 Conn. 560; Copes v. Mathews, 18 Miss. 398; Miller v. Ford, 4 Rich. (S. C.) L. 376; Young v. Com'rs etc., 2 Nott & McC. 537.

[1] Broadwell v. Chapin, 2 Ill. App. 511.

[2] Willett v. Young, (Iowa 91) 47 N. W. R. 990; Stone v. Huggins, 28 Vt. 617; Ives v. Hulet, 12 Ib. 314; Houston v. Clay Co., 18 Ind. 396; Lyon v. Irish, 58 Mich. 518; Powell v. Heisler, 48 N. W. R. 411; 45 Minn. 549; Hall v. Cockrell, 28 Ala. 507; Whyte v. Mills, 8 So. 171; 64 Miss. 158; Dameron v. Irwin, 8 Ire. L. (N. C.) 421; Ogden v. Raymond, 22 Conn. 379; Wheeler v. Wayne Co., 31 Ill. App. 299; 24 N. E. 625; Duncan v. Niles, 32 Ill. 532; Boardman v. Hayne, 29 Iowa, 339; Breen v. Kelly, 47 N. W. R. 1067; 45 Minn. 352; Tucker v. Shorter, 17 Ga. 620; Dey v. Lee, 4 Jones, 238; Tucker v. Justices, 13 Ire. L. (N. C.) 434.

[3] See Tiedeman's Private Corporations, chapter on the Authority of Agents and Officers.

[4] Parsel v. Barnes, 25 Ark. 261, Williams v. Peyton's Lessee, 4 Wheat. 77.

resentations as to his authority fix a liability upon the corporation for a contract which he had no authority to make.[1] Thus, a municipal corporation is not liable for *extra work*, ordered by its agent without authority.[2] In order to render a corporation liable upon a contract, the contract must be one which it possessed authority to enter into. Municipal corporations like other corporate bodies are created for certain specific purposes, and to accomplish certain well defined objects. It follows logically that the only legal powers which the corporation possesses are such as will effectuate the purposes for which the corporation was given existence, and any act or contract which is unconnected with these purposes, or which will cause an application of the corporation funds to foreign purposes, is *ultra vires* and therefore void.[3] And the question as to whether any act is

[1] Chemung Can. Bk. v. Sup'rs, 5 Denio, 517; Albany v. Cunliff, 2 Const. 178; Delafield v. State, 2 Hill (N. Y.) 159, 174; 26 Wend. 192; Hodges v. Buffalo, 2 Denio, 110; 3 Const. 430; 2 Barb. 104; Farnsworth v. Pawtucket, 13 R. I. 82; Belleview v. Hohn, 82 Ky. 1; Sup'rs v. Bates, 17 N. Y. 242; Norwich v. Pharsalia, 15 Ib. 341; Tippecanoe v. Cox, 6 Ind. 403; Inhabitants v. Weir, 9 Ib. 224.

[2] Hague v. Phila., 48 Pa. St. 527; O'Hara v. New Orleans, 30 La. An. 152; Bonesteel v. Mayor, 22 N. Y. 162; Stuart v. Cambridge, 125 Mass. 102.

[3] Dorsey v. Whitehead, 47 Ark. 205; Bass etc. Co. v. Parke Co., 115 Ind. 234; Seibrecht v. New Orleans, 12 La. An. 496; Loker v. Brookline, 13 Pick. 343, 348; Standley v. Perry, 23 Grant (U. C.) 507; Campbell v. Elma, 13 Up. Can. 296; Western College v. Cleveland, 12 Ohio, 375; Bateman v. Covington,(Ky. 91) 14 S. W. R. 361; New Decatur v. Berry, 90 Ala. 432; 7 So. R. 838; Smead v. Indianapolis etc. Co., 11 Ind. 104; Brady v. New York, 20 N. Y. 312; Pa. etc. Co. v. Dandridge, 8 Gill & J. (Md.) 248, 319; Hodges v. Buffalo, 2 Denio (N. Y.) 210; St. Louis v. Davidson, 102 Mo. 149; Carlyle W. etc. Co. v. Carlyle, 31 Ill. App. 325; Philadelphia v. Flanigan, 47 Pa. St. 21; Halstead v. New York, 3 N. Y. 430; Martin v. Mayor, 1 Hill (N. Y.) 545; Marsh v. Fulton Co., 10 Wall. 676; Leavenworth v. Rankin, 2 Kan. 357; Zeigler v. Chapin, 27 N. E. R. 471; Altgelt v. San Antonio, 81 Tex. 436; Overseers v. New Berlin etc., 18 Johns. 382; Donovan v. New York, 33 N. Y. 291; Horn v. Baltimore, 30 Md. 218; Bridgeport v. Housa. R. Co., 15 Conn. 475, 493; Mathewson v. Grand Rapids, 88 Mich. 558; Ryce v. Osage, (Iowa, 93) 55 N. W. R. 532; Bateman v. Ashton, 3 Hurl. & Nor. 323; Montgomery C. C. v. M. W. P. R. Co., 1 Ala. 76; Dill v. Wareham, 7 Met. (Mass.) 438; Branham v. San Jose, 24 Cal. 585, 602; McCoy v. Brant, 53 Cal. 247; Grafton v. Ellwood, 32 Pac. R. 1026; Hamilton v. Shelbyville,(Ind. 93) 33 N. E. R. 1007; State v. Bayonne, (N. J. 93) 26 Atl. R. 81; Treadway v. Schnauber, 1 Dak. Ter. 236; Craycraft v. Selvage, 10 Bush, 696; Baltimore v. Musgrave, 48 Md. 472; State v. Haskell, 20 Iowa, 276; Bryan v. Page, 51 Tex. 532; Neely v. Yorkville, 10 S. C. 141; People v. Baraga, 39 Mich. 534; Richmond v. Munic., 8 Up. Can. Q. B

ultra vires, is to be decided only upon a careful consideration of the charter and collateral legislation, affecting or controlling the powers of municipal corporations in general, or of the particular corporation under inquiry.[1]

It does not affect the application of the principle of *ultra vires* to municipal contracts, that they were acquiesced in or known to the majority of the citizens.[2] So, also, payment for a portion of the work done under a contract, coupled with a denial of corporate liability as to the balance, will not estop the city from setting up the plea of *ultra vires* as a bar to a recovery of the residue of the claim on the contract.[3] When the consideration, which is received by the city under an *ultra vires* contract, can be restored, equity will order this to be done before relieving the corporation from liability.[4]

If, in dealing with individuals, a municipal corporation makes contracts in the exercise of a power which it does not possess, it will not be excused from its obligations thus assumed, if they can be performed by means of other powers which it does possess.[5] Thus, if a contract be entered into by a municipal corporation, which as such is not invalid, because against public

567; Baby v. Baby, 5 Ib. 510; Earley's App., 103 Pa. St. 273; Lincoln v. Stockton, 75 Me. 141; Jackson v. Bowman, 39 Miss. 671; Salt Lake City v. Hollister, 118 U. S. 256; Bateman v. Covington, (Ky. 91) 14 S. W. R. 361; Stetson v. Kempton, 13 Mass. 272; Parsons v. Goshen, 11 Pick. 396; New Jersey v. Fire Com'rs, 34 N. J. Eq. 117; Maupin v. Franklin Co., 67 Mo. 327; Montgomery v. Water Co., (Ala. 91) 9 So. R. 339; Clark v. Polk Co., 19 Iowa, 248; Perry v. Superior City, 23 Wis. 64; Boom v. Utica, 2 Barb. 104; Cornell v. Guilford, 1 Denio, 510; Spitzer v. Blanchard, 46 N. W. R. 400; 82 Mich. 234; Mitchell v. Rockland, 45 Me. 496; Estep v. Keokuk Co., 18 Iowa, 199; Boyland v. Mayor, 1 Sandf. 27; Vincent v. Nantucket, 12 Cush. (Mass.) 103, 105; Wood v. Lynn, 1 Allen, 108; Spalding v. Lowell, 23 Pick. 71.

[1] Vaile v. Independence, 22 S. W. R. 695; Pearce v. Madison etc. Co., 21 How. 441; Moore v. New York, 73 N. Y. 238; Cheeney v. Brookfield, 60 Mo. 53; Philadelphia v. Jewell, 21 Atl. R. 239; 140 Pa. St. 9. Contracts surrendering legislative discretion (Martin v. Mayor, 1 Hill, 545), against public policy (Indianapolis v. Gas Co., 66 Ind. 396), or partiug with inherent governmental power (Gas Co. v. Middletown, 59 N. Y. 228; Lord v. Oconto, 47 Wis. 386; State v. New Brunswick, 30 N. J. L. 395), are of course invalid.

[2] Allegheny City v. McClurkin, 14 Pa. St. 81; Loker v. Brookline, 13 Pick. 343.

[3] People v. New York, 1 Hill, 362.

[4] Turner v. Cruzen, 70 Iowa, 202; Pratt v. Short, 53 How. Pr. 506; Moore v. Mayor, 73 N. Y. 238; Leonard v. Canton, 35 Miss. 189; Lucas Co. v. Hunt, 5 Ohio St. 488.

[5] Maher v. Chicago, 38 Ill. 267.

policy, or beyond the scope of the corporate power, it will be still binding upon the corporation, even though the corporation has no authority to issue the bonds, or other municipal paper, by which it has agreed to pay for the same. The contract, being valid, creates an obligation to pay; and it is no defence, to an action instituted to recover payment, to say that the method provided in the contract was illegal, when there were other lawful methods of raising the necessary funds. The suit would be on the original indebtedness, and not on the bonds.[1]

Not only is the defence of *ultra vires* good when it is sought to fix a contractual liability upon a municipality, but it may be interposed by a party against whom the city is seeking to recover damages in tort.[2] An illustration of this may be found in a case, where the city loaned its securities to a party who was to raise money thereon, and pay for a road which the city had no authority, either to construct, or to assist in constructing. A penal bond, taken by the city to secure the proper application of this money, was held to be invalid, and in order

[1] In a case, in which this question was decided in the Supreme Court of the United States, Mr. Justice Strong said: "If payments cannot be made in bonds, because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment cannot be made at all. Such is not the law. The contract between the parties is in force so far as it is lawful. There may be a difference between the case of an engagement made by a corporation to do an act expressly prohibited by its charter, or some other law, and a case where legislative power to do the act has not been granted. Such a distinction is asserted in some decisions. But the present is not a case in which the issue of the bonds was prohibited by statute. At most the issue was unauthorized; at most there was a defect of power. The promise to give bonds to the plaintiff, in payment of what they undertook to do, was therefore at farthest *ultra vires;* and in such a case, though specific performance of an engagement to do a thing, transgressive of its corporate power, may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised to perform in the mode in which it promised to perform." Hitchcock v. Galveston, 96 U. S. 341; see also, Board v. Citizens etc. Co., 47 Ind. 407; Allegheny City v. McClurkin, 14 Pa. St. 81; Maher v. Chicago, 38 Ill. 266; Oneida Bk. v. Ontario Bank, 21 N. Y. 495; Argenti v. San Francisco, 16 Cal. 256; Silver Lake Bk. v. North, 4 Johns. Ch. 373.

[2] Montgomery C. Council v. R. R. Co., 31 Ala. 76; Penn. etc. Co. v. Dandridge, 8 Gill & J. 248, 319; Hodges v. Buffalo, 2 Denio, 110.

that the city may recover, it had to bring its action in some other mode than upon the contract.[1]

But when a city, having without charter power guaranteed the bonds of a railroad, became their owner by being compelled to pay them, it was held that, while the liability of the city might have been successfully disputed in an action to enforce the guaranty, the want of authority did not defeat its lien on the railroad, as against other creditors of the road.[2]

§ 170. **Ratification, what constitutes.**—A municipal corporation is not bound by a contract made by its agent or officer, which the agent or officer had no authority to make. But if the contract is for a corporate purpose, and within the powers conferred upon the municipality by its charter, or by the general law, it may be ratified by the corporation and become binding upon it.[3] So, also, contracts, made in the name of a corpo-

[1] City Council v. Plank Road Co., 31 Ala. 76; Wetumpka v. Winter, 29 Ib. 651; Halstead v. New York, 3 N. Y. 430; Bridgeport v. Housatonic R. Co., 15 Conn. 475, 493.

[2] Hay v. Alexandria etc. Co., 20 Fed. Rep. 15.

[3] Fort Wayne v. Lake Shore & M. S. Ry. Co., 32 N. E. R. 215; 132 Ind. 558; East Hampton v. Bowman, 136 N. Y. 521; Emerson v. Newbury, 13 Pick. 377; People v. Detroit, 28 Mich. 228; 15 Am. Rep. 202; Burrill v. Boston, 2 Cliff. 590; Silsbry M. Co. v. Allentown, (Pa. 93) 26 Atl. R. 646; Moore v. Allen, 98 N. Y. 396; City Bank v. Albany, 92 Ib. 363; Hotchin v. Kent, 8 Mich. 526; Estey v. Westminster, 97 Mass. 324; Marshall Co. v. Schenck, 5 Wall. 772; People v. Swift, 31 Cal. 26; Kinsley v. Norris, 60 N. H. 131; Marsh v. Fulton Co., 10 Wall. 676; Episcopal C. So. v. Episcopal Church, 1 Pick. 372; Davis v. Mayor, 61 Mich. 530; Crawshaw v. Roxbury, 8 Gray, 374; Gifford v. White Plains, 25 Hun, 606; Topsham v. Rogers, 42 Vt. 189; Murphy v. Louisville, 9 Bush, 189; Cory v. Freeholders, 44 N. J. L. 445; San Francisco Gas Co. v. San Francisco, 9 Cal. 453; Bleu v. Bear River etc. Co., 20 Ib. 602; 81 Am. Dec. 132; Harris v. School District, 28 N. H. 65; Bruce v. Dickey, 116 Ill. 527; Schmidt v. Stearns, 34 Minn. 112; People v. Lathrop, 24 Mich. 235; Strong v. District, 1 Mackey, 265; Wilson v. School District, 32 N. H. 118; Backman v. Charlestown, 42 Ib. 125; Brown v. Winterport, 79 Me. 305; Chouteau v. Allen, 70 Mo. 290; Clarke v. Lyon Co., 8 Nev. 181; Mills v. Gleason, 11 Wis. 470; 78 Am. Dec. 721; Lamm v. Port Deposit etc., 49 Md. 233; N. O. v. Southern Bank., 31 La. An. 560; Howe v. Keeler, 27 Conn. 538; St. Louis v. Armstrong, 56 Mo. 298; Trott v. Warren, 11 Me. 227; Sullivan v. School District, 39 Kan. 347; Shawneetown v. Baker, 85 Ill. 563; Peterson v. Mayor, 17 N. Y. 449; Hoyt v. Thompson, 19 Ib. 207, 218; Squire v. Cartwright, 22 N. Y. S. 899; Brady v. Mayor, 20 N. Y. 312; Dubuque F. Col. v. Township etc., 13 Iowa, 555; Merrick v. Burlington etc. Co., 11 Ib. 74; Galveston v. Morton, 53 Tex. 409; Strong v. District, 1 Mackey, 265.

ration, before it has been chartered,[1] or before it has received legislative authority to contract,[2] may be ratified by the corporation after it has been incorporated, or authorized to contract.

The distinction between contracts which are illegal, because beyond the corporate power, or against public policy, and those which are merely unauthorized by the corporation, is important. The unauthorized action of the officer, if within the corporate power, can be ratified by the corporation. But a contract *ultra vires* cannot be ratified, unless the power to do so is expressly conferred by the Legislature.[3] It is well settled that the Legislature may within constitutional limits ratify or authorize the ratification of a municipal contract.[4]

When the statutes prescribe a special mode in which alone a valid contract can be made by the municipality, and the contract is invalid, because of non-compliance with the statutory requirement, it must be observed in any act of ratification. Thus, where a corporation could only make a valid contract by ordinance, the ratification is required to be by ordinance,[5] and cannot be ratified by a subsequent resolution.[6] So, also, a ratification by one board, in a case where two boards should have concurred originally,[7] or the approval of the bill by a

[1] Dubuque Fem. Col. v. Dis. Towns, 13 Iowa, 555.

[2] Mills v. Gleason, 11 Wis. 470.

[3] Peterson v. Mayor, 17 N. Y. 449, 454; Nash v. St. Paul, 11 Minn. 174; Bryan v. Page, 51 Tex. 532; Parsons v. Monmouth, 70 Me. 262; Jefferson Co. v. Arrighi, 54 Miss. 668; Wilhelm v. Cedar Co., 50 Iowa, 254; Buttrick v. Lowell, 1 Allen, 172; 19 Am. Dec. 721; Shawneetown v. Baker, 85 Ill. 563; Cory v. Freeholders, 44 N. J. L. 445; Green v. Cape May, 41 Ib. 45; Hague v. Philadelphia, 48 Pa. St. 528; Union Township v. Gibboney, 94 Ib. 534; Reilly v. Phila., 60 Pa. St. 467; Sault St. Marie Co. v. Dusen, 40 Mich. 429; Taymouth v. Koehler, 35 Ib. 22; Brady v. Mayor, 20 N. Y. 312; McDonald v. Mayor, 68 Ib. 23; Smith v. Newberg, 77 Ib. 130; Horton v. Thompson, 71 Ib. 513; Brown v. Mayor, 63 Ib. 239; Cowen v. W. Troy, 43 Barb. 48; Lewis v. Shreveport, 108 U. S. 282; Water Co. v. San Diego, 59 Cal. 517; Bank v. Statesville, 84 N. C. 169; Laredo v. Macdonnell, 52 Tex. 511.

[4] Campbell v. Kenosha, 5 Wall. 194; Supervisors v. Schenck, Ib. 772; Keithsburg v. Frick, 34 Ill. 405; Winn v. Macon, 21 Ga. 275; Grogan v. San Francisco, 18 Cal. 590; Hasbrouck v. Milwaukee, 21 Wis. 217.

[5] Cory v. Freeholders, 44 N. J. L. 445; People v. Swift, 31 Cal. 28; Zottman v. San Francisco, 20 Cal. 96; McCracken v. San Francisco, 16 Cal. 623; Durango v. Pennington, 81 Colo. 257.

[6] Cross v. Morristown, 18 N. J. Eq. 305; Newman v. Emporia, 32 Kan. 456; and see *ante*, § 145.

[7] State v. Jersey City, 47 N. J. L. 449.

board, a subcommittee of which had given the order through its chairman,[1] will not suffice.[2]

It has been held that a city may ratify an unauthorized contract for the erection of a building, by using it when completed.[3] But this is not ordinarily the rule.[4] So, the voting of an additional tax, to be applied to building, does not ratify expenditures beyond the amount already appropriated.[5]

Part payment will not constitute a ratification of either an illegal or unauthorized contract, entered into by municipal officials.[6] But it has been held that a ratification may be inferred from the presentation and credit of bills for materials which are furnished by officials, having the authority to contract for them originally.[7]

§ 171. Contracts for public works—Contractor's bonds—Payment.—When a contract for a public work has been made, in which the price payable is the full sum authorized to be expended, alterations increasing the cost are illegal and void.[8] But when a legal contract has been made, the amount payable thereon cannot be reduced by a resolution limiting the expenditure, which is passed after the work had been completed, and of which the other contracting party had no notice.[9] If a limited fund be provided by legislative authority for special purposes, a contract within the limit is not invalidated by the fact, that subsequent contracts were made which exhausted the ap-

[1] Keeney v. Jersey City, 47 N. J. L. 449.

[2] Wilhelm v. Cedar Co., 50 Iowa, 254.

[3] Fisher v. Sch. Dis. No. 17, 4 Cush. 494; Abbott v. Hermon, 7 Me. 118; Hayden v. Madison, 7 Me. 76; Hayward v. Sch. Dis. No. 13, 2 Cush. 419; Moor v. Cornville, 13 Me. 293; People v. Swift, 31 Cal. 26; Keyser v. Sch. Dis., 35 N. H. 477.

[4] Davis v. Sch. Dis. No. 2, 24 Me. 349; Wilson v. Sch. Dis., 32 N. H. 118; Pratt v. Swanton, 15 Vt. 147; Dullanty v. Town of Vaughn, (Wis.) 45 N. W. Rep. 1128; Loker v. Brookline, 13 Pick. 343; Knowlton v. Plantation No. 4, 14 Me. 20; Springfield Co. v. Lane Co., 5 Oreg. 265; Sceery v. Springfield, 112 Mass. 512; Hayden v. Madison, 7 Greenl. 79; Morris v. Dixfield, 30 Me. 157, 160.

[5] Turney v. Bridgeport, 55 Conn. 412; King v. Mahaska, 75 Iowa, 329.

[6] Durango v. Pennington, 8 Colo. 257; Milford v. Mil. Water Co., 124 Pa. St. 610.

[7] Albany City Nat. Bk. v. Albany, 92 N. Y. 363; 2 Am. & Eng. Cor. Cas. 61.

[8] King v. Mahaska Co., 75 Iowa, 329; 24 Am. & Eng. Cor. Cas. 577; Kingsley v. Brooklyn, 78 N. Y. 200; Turney v. Bridgeport, 55 Com. 412; Pim. v. Mun. Cor. of Ontario, Ont. Rep. 9 C. P. D. 304.

[9] Duncombe v. Fort Dodge, 38 Iowa, 281.

propriation.[1] Generally, where the expenditure is not limited, the contractor may recover for extra work done, although it may not have been formally contracted for;[2] particularly, if the extra work done, or material furnished, was rendered necessary by the action of the municipality.[3] Estimates must always be adhered to, in contracting for public works;[4] but a discrepancy, due to clerical error, between the plans and the ordinance, will not necessarily render the whole contract invalid.[5]

Bonds are usually required of contractors, doing work for a municipality, conditioned that the contractor will pay all just claims against him for labor or material as the same shall mature.[6] And the city may maintain an action thereon for all damages sustained by it, because of the contractor's default in meeting his obligations.[7] This, however, is only a right of the city; and it has been held that the creditors of the defaulting contractors could not maintain an action on such a bond in their own names.[8] In Michigan, when the city's interest is such that, if it were a private individual, no mechanic's lien could attach, it is not the duty of the city to require a bond of the contractor;[9] nor is the validity of a contract affected by failure to do so.[10] When several persons as contractors give a bond for the faithful performance of a contract with the city, a surety thereon is not released from liability for breach of the bond, by a notice, given under a clause in the contract, to discontinue work, followed by a subsequent reletting of the work to another contractor, and the completion of the work by the city.[11]

A municipal corporation may stipulate, that no payments shall be made to a contractor, while any claims are outstand-

[1] Cincinnati v. Cameron, 33 Ohio St. 336.

[2] Green v. Orford, 15 Ont. 506; 24 Am. & Eng. Cor. Cas. 617.

[3] Messenger v. Buffalo, 21 N. Y. 196.

[4] Ireland v. Rochester, 51 Barb. 414.

[5] Eyerman v. Provenchere, 15 Mo. App. 256.

[6] St. Paul v. Butler, 39 Minn. 459.

[7] Mayor, etc. v. Crawford, 111 N. Y. 638.

[8] State Bk. etc. v. Heney, 40 Minn. 145.

[9] Eaton v. Monroe, 63 Mich. 525.

[10] Carey v. East Saginaw, 44 N. W. Rep. 168.

[11] Newton v. Devlin, 134 Mass. 490; see this case also for the extent of surety's liability upon his principal's default.

ing against him,[1] and a court can order the payment, from money so withheld, of valid claims against the contractor;[2] and where a certain portion of the sum, for which a contractor had agreed to erect a building, was to be retained until its completion, he cannot recover the sum retained if he fail to complete the building.[3] If improvidently,[4] by mistake,[5] or as an allowance for his losses,[6] a contractor has been overpaid, the corporation may recover the amount so paid. On the other hand, if he is to be paid out of a particular fund, the corporation is liable, though the fund may have been misappropriated.[7]

The assignment of a contract for municipal work is not against public policy; and, unless prohibited by statute, such assignment is valid, and does not authorize the municipal corporation to terminate or repudiate the contract.[8]

§ 172. **Advertising and letting to lowest bidder—Patented articles.**—When the municipal authorities are required by statute to award contracts to the lowest bidder, a contract not so awarded is illegal; and its illegality may be pleaded by the city in an action brought thereon.[9] Although, when not

[1] Knapp v. Swaney, 56 Mich. 345.

[2] Merch. Bk. v. New York, 97 N. Y. 355.

[3] King v. Mahaska, 75 Iowa, 329.

[4] State v. Flood, 26 Mo. App. 500.

[5] Betts v. District, 20 Ct. of Cl. 445; Barnard v. District, Ib. 257.

[6] Murdock v. District, 22 Ct. of Claims, 464.

[7] Lansing v. Van Garder, 24 Mich. 456; Chaffee v. Granger, 6 Ib. 51.

[8] Devlin v. Mayor, 63 N. Y. 8; Philadelphia v. Lockhardt, 73 Pa. St. 211; McCubbin v. Atchison, 12 Kan. 166; Deffenbaugh v. Foster, 10 Ind. 382.

[9] Mayor v. Keyser, 19 Atl. R. 706; Smith v. Mayor, 21 How. Pr. 1; Greene v. Mayor, 60 N. Y. 303; Yarnold v. Lawrence, 15 Kan. 126; Dickinson v. Poughkeepsie, 75 N. Y. 65; Burchfield v. New Orleans, (La. 93) 7 So. R. 448; Mappa v. Los Angeles, 61 Cal. 309; Carter v. Kalloch, 56 Ib. 335; Maxwell v. Stanislaus Co., 53 Ib. 389; Hasbrouck v. Milwaukee, 21 Wis. 217; People v. Detroit, 41 Mich. 224; Bank v. Portland, 33 Pac. R. 532; Worthington v. Boston, 41 Fed. Rep. 23; Bigler v. Mayor, 5 Abb. New Cas. 51; *In re* Eager, 46 N. Y. 100; Nash v. St. Paul, 8 Minn. 172; White v. New Orleans, 15 La. An. 667; State v. Barlow, 48 Mo. 17; Twiss v. Port Huron, 63 Mich. 528; Gutta Percha Co. v. Starkley, 11 Phila. 219; Fulton v. Lincoln, 9 Neb. 358; Reilly v. N. Y. City, 54 N. Y. Super. Ct. 463; Brady v. Mayor, 20 N. Y. 312; 2 Bosw. 173; 7 Abb. Pr. R. 432; People v. Flagg, 17 N. Y. 584; *In re* Anderson, 47 Hun, 203; Trenton v. Shaw, 10 Atl. Rep. 273; Davenport v. Kleinschmidt, 10 Pac. Rep. 249; Mazet v. Pittsburgh, 20 Atl. 693; 137 Pa. St. 548; *In re* Manhattan R. Co., 162 N. Y. 301; People v. Gleason, 25 N. E. R. 4; 121 N. Y. 631; McEwen v. Gilker, 38 Ind. 233; Burchfield v. New Orleans, (La. 90) 7 So. Rep. 448; American etc. Co. v. Wagner, 139 Pa. St. 625.

expressly required to do so, municipalities may contract without calling for bids;[1] yet if notice, advertising and similar preliminaries are required by statute, neither the corporation nor any of its officials can make a valid contract, which shall bind the corporation, unless the statute is rigidly complied with.[2] So, if there be any informality or irregularity in giving the notice, in writing proposals,[3] or in selecting the proper newspaper in which to advertise for bids,[4] or in the substitution of advertising, when the posting of a printed notice is required,[5] the contract may be avoided. But a mere typographical error, the notice in other respects being sufficient, by which no one was misled, is not material.[6]

In fairness to bidders, it has been held that they must be supplied with such information as will enable them to act intelligently;[7] and the bidder should not be compelled to furnish his own plans and specifications;[8] which the notice must provide for.[9] So, if the specifications be indefinite as to the quantity and quality of the materials required, the contract based thereon will be void.[10] Nor can a public officer, required to advertise for bids, fix therein an arbitrary price for certain specified work.[11]

In some instances, it is provided that contracts, involving the expenditure of more than a certain specified sum, in New York $1,000, can be awarded only to the lowest bidder, and after advertising for bids.[12] In New York it has been held that such statutory provisions do not apply to contracts which are not for the completion of one particular job, and which do not necessarily involve the expenditure of more than $1,000.[13]

[1] Kingsley v. Brooklyn, 5 Abb. N. Cas. 1; Cummings v. Seymour, 79 Ind. 491; 41 Am. Rep. 618.

[2] Addis v. Pittsburgh, 85 Pa. St. 379.

[3] Himmelman v. Cahn, 49 Cal. 285; Brooks v. Satterlee, 49 Ib. 289.

[4] Taylor v. Lambertville, 42 N. J. Eq. 107.

[5] Kretsch v. Helme, 45 Ind. 438.

[6] Case v. Fowler, 65 Ind. 29.

[7] Detroit v. Hosmer, (Mich.) 44 N. W. Rep. 622.

[8] People v. Com'rs, 4 Neb. 150.

[9] Wilkins v. Detroit, 46 Mich. 120.

[10] Bigler v. New York, 5 Abb. N. Cas. 51.

[11] *In re* Mahan, 20 Hun (N. Y.) 301.

[12] See Phelps v. New York, 112 N. Y. 216; 23 Am. & Eng. Cor. Cas. 479; Cf. People v. Van Nort, 64 Barb. 205.

[13] Swift v. Mayor, 83 N. Y. 528; see also, Brady v. New York, 55 N. Y. Super. Ct. 45; Greene v. Mayor, 60 N. Y. 303.

If security is required from the lowest bidder, and the law requires notice to be given of proposals, noncompliance with these requirements will invalidate the contract.[1] On the same grounds, a council has no authority, after the bids have been opened, to alter the contract in a material respect, and award it to one of the bidders, without again advertising for bids upon what is substantially a new contract.[2]

If, however, a contract has been properly awarded to the lowest bidder, who has defaulted and abandoned it, a new advertisement and award is not necessary, the original contractor having made himself liable for the extra expense incurred.[3] But the rule is otherwise, where the charter requires that the same preliminaries of notice and award to the lowest bidder shall apply to a reletting, as well as to the original letting.[4] The same strictness is employed in construing charter provisions, by which the sale of municipal franchises,[5] or of property, real or personal, belonging to the corporation, or the leasing of municipal real estate, is regulated.[6] It is generally provided that the highest bidder shall be preferred, and the statutes must be followed, or the sale or lease will be void.[7]

It has been held that when the work or material contracted for by the corporation is patented, and owned or controlled by a single firm or individual, that a statutory requirement of advertisement and letting to the lowest bidder is not applicable.[8] But many decisions hold that the statutory provisions apply in such cases.[9] In one instance, construing a provision that all contracts should be made after advertisement, it was held that an assessment was void, which had been levied to meet the expenses incurred by the laying of a pavement, which con-

[1] Dickinson v. Poughkeepsie, 74 N. Y. 65; Maxwell v. Stanislaus, 46 N. Y. 100.

[2] Dickinson v. Poughkeepsie, 74 N. Y. 65.

[3] *In re* Leeds, 53 N. Y. 400.

[4] Mitchell v. Milwaukee, 18 Wis. 92; Hasbrouck v. Milwaukee, 21 Ib. 217.

[5] People v. Barnard, 110 N. Y. 548.

[6] San Francisco etc. v. Oakland, 43 Cal. 502.

[7] Kerr v. Philadelphia, 8 Phila. (Pa.) 292.

[8] Hobart v. Detroit, 17 Mich. 246; 97 Am. Dec. 185; *In re* Dugro, 50 N. Y. 513; People v. Van Nort, 65 Barb. 331; Cf. Dolan v. Mayor, 4 Abb. Pr. N. S. 397; see also, Yarwold v. Lawrence, 15 Kan. 126.

[9] Nicholson P. Co. v. Painter, 35 Cal. 699; Burgess v. Jefferson City, 21 La. An. 143; Dean v. Charlton, 23 Wis. 590; Dean v. Berchsennis, 30 Ib. 236; Barber etc. Co. v. Hunt, 100 Mo. 22.

sisted partly of a patented, and partly of an unpatented article, upon the ground that under those circumstances, a separate contract should have been made for each portion of the work, so that there might be bids on the part which did not call for a patented article.[1] So, also, if there is but one person or firm manufacturing a certain article, such as illuminating gas, of the delivery and sale of which they have exclusive control, any law requiring competitive bidding is inapplicable, as under the circumstances it is clear that there can be no competition.[2] So, too, professional services,[3] and articles requiring the personal skill of the manufacturer to give them their value,[4] are not within this statutory requirement.

§ 173. **Bids — Sealed proposals — Taxpayer's remedy — Fraud in bidding.**—When bids are advertised for, and are filed in compliance with the advertisement, their merits, both actual and relative, must be determined solely by a consideration of the terms and conditions set forth in the advertisement or other public notice; and an award on other grounds and considerations will be invalid. Thus, if the notice required that the bidders must warrant the article they furnish for six years, an award to one who is not the lowest bidder, but who gives a warranty for a longer period than the others, will not stand.[5] Favoritism in any degree, however slight, is directly opposed to the principle underlying the award of public contracts, so that no requirements in a notice, which are made imperative by an ordinance, can be dispensed with;[6] nor can the lowest bidder be allowed to withdraw his bid, and the official then proceed to let the contract to the next lowest.[7]

Bidders should be informed in detail as to the quality and character of the work, or material required;[8] and he, whose bid is the lowest upon the amount of work which is required by the estimate, is entitled to the contract and does not lose it, because the estimate is erroneous.[9] When the right is renewed to reject any and all bids, if deemed for the interest of the cor-

[1] *In re* Eager, 46 N. Y. 100.

[2] Harlem G. Co. v. Mayor, 33 N. Y. 309.

[3] People v. Flagg, 5 Abb. Pr. 232.

[4] Detwiller v. Mayor, 1 Thomp. & C. (N. Y.) 657; 46 How. (N. Y.) Pr. 218.

[5] State v. Trenton, 49 N. J. L. 339.

[6] Smith v. Mayor, 10 N. Y. 504; Mayor v. Keyser, (Md.) 19 Att. Rep. 706.

[7] Twiss v. Pt. Huron, 63 Mich. 528.

[8] Kneeland v. Furlong, 20 Wis. 437.

[9] Reilly v. Mayor, 111 N. Y. 473.

poration, but not otherwise, all may be rejected and a re-advertisement ordered.[1] But the rejection may be reconsidered, and an award made, if it is done before re-advertisement.[2]

The action of municipal officials, in accepting or rejecting bids, is judicial and discretionary, and the corporation will not be liable in damages, even though the lowest bid has been rejected;[3] nor does a bidder acquire any legal right which can be enforced by a mandamus, until a contract has been formed by the acceptance of his bid.[4] But the acceptance of a bid in a proper and legal manner constitutes a contract[5] and vests in the bidder a property, of which he cannot be deprived without compensation. For this reason, an act of the Legislature, subsequently passed, will not be permitted to impair the obligation of the contract, already completed by the acceptance of the bid.[6] If the statute or ordinance under which proposals are received, requires that bidders must furnish good and sufficient security for the faithful performance of their contracts, the corporation is under no compulsion to accept the lowest bidder, where the security offered is not sufficient or satisfactory.[7]

Bids must not be indefinite in any material respects, as to price or quantity; but the omission of one or two insignificant items,[8] the reference to "plans, specifications," etc., without a detailed description of such plans and specifications,[9] or the failure to name any particular system to be used, in a contract to furnish light,[10] will not invalidate the bids.

When a municipal corporation is required by law to award its contracts to the lowest bidder after advertisement, an injunction will lie, at the suit of a taxpayer, to restrain the authorities from making an award without advertising;[11] or from

[1] Walsh v. Mayor, 113 N. Y. 143; 24 Am. & Eng. Cor. Cas. 530; State v. Directors, etc., 5 Ohio St. 234; Kelly v. Chicago, 62 Ill. 279; Keogh v. Wilmington, 4 Del. Ch. 491.

[2] Ross v. Stackhouse, 114 Ind. 200.

[3] East Riv., etc., Co. v. Donnelly, 93 N. Y. 557; 2 Am. & Eng. Cor. Cas. 322.

[4] People v. Croton Aqueduct Brd., 26 Barb. (N. Y.) 240; Kelly v. Chicago, 62 Ill. 279; Weed v. Beach, 56 How. Pr. 470.

[5] Argent v. San Fran., 16 Cal. 256.

[6] *In re* Protestant, etc., Sch., 58 Barb. (N. Y.) 161; 40 How. Pr. (N. Y.) 19.

[7] Smith v. Mayor, 10 N. Y. 504; State v. Board, 42 Ohio St. 374; May v. Detroit, 2 Mich. N. P. 235.

[8] State v. Com'rs, 13 Neb. 57.

[9] Sexton v. Chicago, 107 Ill. 323.

[10] Detroit v. Hosmer, (Mich.) 44 N. W. Rep. 622.

[11] Com'rs v. Templeton, 51 Ind. 266.

carrying into execution any contract illegally entered into.[1] It has been held, however, in Connecticut, that in such a case an injunction could not be maintained; the court basing its decision upon the fact, that any contract, not awarded to the lowest bidder, being illegal, the corporation would not be bound. Hence, no taxpayer was in danger of any loss; and, therefore, there was no occasion for judicial interference by an injunction.[2]

It need hardly be said that any unlawful combination to prevent bidding, or any element of fraud in the bid itself,[3] by which competition is prevented; or which results in the letting of the contract to any but the lowest bidder, will authorize a rejection of the proposals, or a repudiation of the contract.[4]

§ 174. **Annulment of contracts — Corporate control of work.**—When a contract reserves to the city the right to cancel it, upon the failure to complete the work in the specified time, the agreement may be annulled upon failure or abandonment by the contractor.[5] But it is held that the right of the contractor, to recover for work already done, was not destroyed by such an annulment, when his failure to complete the contract was caused by circumstances not within his control.[6]

Notice to a contractor by the city, that it will no longer pay or proceed under the contract, is not an annulment.[7] If the penalty for noncompletion be the forfeiture of a sum of money, the city may waive the forfeiture although forbidden to make any extra allowance;[8] but provisions, requiring a reletting of a contract, are mandatory, and an extension of time is invalid.[9] If the work must be done under the suspervision, and to the satisfaction, of some municipal official, the city cannot complain if, though varying from the contract, the work was done as he

[1] Follmer v. Nuckolls Co., 6 Neb. 204; Schumm v. Seymour, 24 N. J. Eq. 143.

[2] Dibble v. New Haven, 56 Conn. 199; 20 Am. & Eng. Corp. Cas. 174.

[3] Brady v. Bartlett, 56 Cal. 350.

[4] Peoples v. Stephens, 71 N. Y. 557; Jennings Co. Com'rs v. Verbarg, 63 Ind. 107; Nelson v. New York, 5 N. Y. Sup. 688; *In re* Delaware etc. Co., 8 Ib. 352; compare *In re* Anderson, 109 N. Y. 554.

[5] Bietry v. New Orleans, 24 La. An. 21; Powers v. Yonkers, 114 N. Y. 145; Farmers L. & I. Co. v. Galesburg, 133 U. S. 156; Rittenhouse v. Mayor etc., 25 Md. 336.

[6] Bietry v. New Orleans, 22 La. An. 149.

[7] Davenport etc. Co. v. Davenport, 13 Iowa, 229.

[8] People v. Brennan, 18 Abb. Pr. 100.

[9] Beveridge v. Livingstone, 54 Cal. 54.

directed;[1] nor can the contractor's right to collect payment be defeated or impaired by the neglect or refusal of the municipal official to examine or inspect the work;[2] or by any unauthorized alteration of the contract by the city official supervising it.[3] General direction and supervision of a public work, when intrusted to a municipal committee, are not limited to the quality of materials and manner of working, but extend to the time as well.[4]

A satisfactory performance is held to mean a performance in accordance with the specifications.[5] The acceptance by the municipality of work done is only *prima facie* evidence that the terms and specifications of the contract are being complied with;[6] but when payments are made, as the work progresses, upon the certificates of the supervising officials, their certificates are conclusive, so far as the payments are concerned.[7] So, when the municipal board is made an arbiter, to determine all questions as to amount earned on city contracts, their award upon a contract within their jurisdiction is binding.[8]

§ 175. **Contracts for a water supply.**[9]—Under the authority commonly conferred by charter to make such ordinances and by-laws as shall be necessary for the security and welfare of the inhabitants, and for preserving health, order and good government, a city may contract for a water supply.[10] Sometimes such contracts are authorized by special laws,[11] or by spe-

[1] Kingsley v. Brooklyn, 78 N. Y. 200; Omaha v. Hammond, 94 U. S. 98.

[2] Neenan v. Donoghue, 50 Mo. 593; Phelan v. New York, 119 N. Y. 86.

[3] Drew v. Altoona, 121 Pa. St. 401; Dillon v. Syracuse, 9 N. Y. Sup. 98.

[4] Chapman v. Lowell, 4 Cush. 378.

[5] Kinsley v. Monongahela Co., 31 W. Va. 464.

[6] Bulick v. Connely, 42 Ind. 134; Omaha v. Hammond, 94 U. S. 98; Despard v. Pleasants Co., 23 W. Va. 318.

[7] Malone v. Philadelphia, 12 Phila. 270; McGuire v. Rapid City, (Dak.) 43 N. W. Rep. 706; Reilly v. Albany, 112 N. Y. 30.

[8] Forristal v. Milwaukee, 57 Wis. 628.

[9] See *ante*, §§ 144, 144 *a*, power to establish private and municipal monopolies.

[10] Indianapolis v. Gas Co., 66 Ind. 396.

[11] Rome v. Cabot, 28 Ga. 50; Burlington W. W. Co. v. Burlington, 43 Kan. 725; Hackensack W. Co. v. Hoboken, 51 N. J. L. 220; Atl. City W. W. Co. v. Read, 50 Ib. 665; State v. Harrison, 46 Ib. 79. But the power to contract for water supply held not to include power to purchase a site for works: People v. McClintock, 45 Cal. 11.

cific provisions of the charter,[1] or by the general authority to make contracts, which are deemed necessary for the municipal welfare.[2] The large discretion which municipal corporations possess, in providing a water supply, under the comprehensive powers usually conferred by the Legislature, will not, unless abused, be interfered with by the courts.[3] Of course, such discretionary power, being equivalent to a power to levy taxes, must be exercised in a conservative manner;[4] it having been held in one case, that a waterworks committee, without special authority, could not bind a city by contracting for a new and expensive improvement in the existing system.[5]

If the contract for the construction of waterworks be illegal,[6] or if it will increase the city's debt beyond the legal limit,[7] an injunction will lie to prevent the carrying out of the contract.[8]

§ 176. **Municipal contracts with attorneys at law.**—A municipal corporation has the implied authority to employ an attorney to attend to its corporate interests, and to prosecute and defend actions in its behalf,[9] even though the charter provides for a city attorney.[10] But it has been held that a city contract with another person, for services which the law requires to be performed by the city attorney, is void.[11] Nor can

[1] Conery v. N. O. W. W. Co., 41 La. An. 910; Atl. City W. W. Co. v. Atl. City, 48 N. J. L. 378.

[2] Wells v. Atlanta, 43 Ga. 67; Hale v. Houghton, 8 Mich. 458; Grant v. Davenport, 36 Iowa, 402; Livingston v. Pippin, 31 Ala. 542.

[3] Atl. C. W. W. Co. v. Atl. City, 48 N. J. L. 378; Memphis v. Mem. W. Co., 5 Heisk. 528; Warren v. Chicago, 118 Ill. 329.

[4] Morton v. Power, 33 Minn. 521.

[5] Mayor of Nashville v. Hogan, 9 Baxter, 495.

[6] Davenport v. Kleinschmidt, 6 Mont. 502.

[7] Valparaiso v. Gardner, 97 Ind. 1.

[8] See *post*, § 397, and Dibble v. New Haven, 56 Conn. 199; Sackett v. New Albany, 88 Ind. 473; Madison v. Smith, 83 Ib. 502; Noble v. Vincennes, 42 Ib. 125; Pedrick v. Ripon, 73 Wis. 622.

[9] Clarke v. Lyon Co., 8 Nev. 181; Thacher v. Com'rs, 13 Kan. 182; Shirts v. Noblesville, 122 Ind. 580; 24 N. E. R. 167; Hornblower v. Duden, 35 Cal. 664; Sherman v. Carr, 8 R. I. 431; Wilhelm v. Cedar Co., 50 Iowa, 254; Mt. Vernon v. Patton, 94 Ill. 65; People v. Warren, 14 Ill. App. 296; Roodhouse v. Jennings, 29 Ill. App. 50; Memphis v. Adams, 9 Heisk. 518; State v. Heath, 20 La. An. 172; 96 Am. Dec. 390; Bruce v. Dickey, 116 Ill. 527; Connolly v. Beverley (Mass. 90), 24 N. E. Rep. 404.

[10] Smith v. Mayor, 13 Cal. 531; Hugg v. Camden, 20 N. J. Eq. 6; comp. Ransom v. Mayor, 24 Barb. 226.

[11] Clough v. Hart, 8 Kan. 487.

the municipal authorities take any particular class of cases out of his hands and confide them to others.[1] When an attorney for a municipal corporation is chosen by the people, he cannot be ignored or superseded by authority, derived from the same source as his own.[2] Municipal corporations also, are not exceptions to the general rule that a substitution of attorneys in a pending action must be made by order duly entered in the minutes.[3] It has also been decided, where a municipal corporation possesses the "general common law power of such corporations," that no action would lie against it by counsel, whom it had employed to assist the State in a criminal prosecution of former city officers.[4] But, apart from these special cases, it is held that where it is incumbent upon a municipal corporation to indemnify its officials who, in the legitimate performance of their duties, incur liabilities to others, the corporation may employ counsel to defend such officials.[5] And where a legal contract has been made with an attorney, who has rendered service thereon, the municipality is bound to compensate him,[6] even though the contract may not have been evidenced by an express vote or ordinance.[7] But if an attorney is employed on a *quantum meruit*, and during the rendition of his services he is appointed as the regular solicitor of the municipal corporation, it has been held that he could not recover special compensation for the services he subsequently rendered in the pending suit.[8]

[1] State v. Paterson, 40 N. J. L. 186.

[2] Clough v. Hart, 8 Kan. 487.

[3] Parker v. Williamsburgh, 13 How. Pr. 250.

[4] Butler v. Milwaukee, 15 Wis. 498.

[5] Sherman v. Carr, 8 R. I. 431; Roper v. Laurienberg, 90 N. C. 429. When a county causes a resident to refuse to pay a tax upon its bonds for the purpose of testing their validity in a suit to recover the tax, the county may pay an attorney to aid the taxpayer, where it has authority to "do all acts necessary to the exercise of its corporate powers." Franklin Co. v. Laymon, 33 N. E. R. 1094; 43 Ill. App. 163; Cullen v. Carthage, 103 Ind. 196. Cf. City of New Haven v. New Haven & D. R. Co., (Conn. 93) 25 Atl. R. 316; Holman v. Robbins, (Ind. 93) 31 N. E. R. 863; Butler v. Sullivan Co., 108 Mo. 630.

[6] Baker v. Inhabitants, 13 Me. 74; Thacher v. Jefferson Co., 13 Kan. 182; State v. Hammontown, 38 N. J. L. 430; Barnett v. Mayor, 48 Ib. 395; Ellis v. Washoe Co., 7 Nev. 291; Knight v. Ashland, 61 Wis. 233; Butternut v. O'Malley, 50 Ib. 333; Kinnie v. Waverly, 42 Iowa, 437.

[7] Kinnie v. Waverly, 42 Iowa, 437; Langdon v. Castleton, 30 Vt. 285; Wallace v. Mayor etc., 29 Cal. 180.

[8] Detroit v. Whittemore, 27 Mich. 281.

CHAPTER XI.

MUNICIPAL SECURITIES.

§ 177. **Municipal warrants—Negotiability—Form and effect—Presentment—Payment.**—The power to issue warrants or orders, by which the payment of money is directed by the financial officers of a corporation, to a person named, to his order, or to the bearer, is not, as a general rule, expressly conferred upon corporations, but is generally inferred as absolutely necessary to the corporate existence, and the exercise of its express powers.[1] They must be drawn and signed by the proper municipal official; or they will be void in whosesoever hands they may be.[2] The duty to issue a warrant is ministerial, and the officer, on whom it is imposed, may be compelled to perform it by *mandamus*.[3]

It is held, as a general rule, that these warrants or orders, having for their main object the furnishing of the disbursing officer with vouchers, are not negotiable.[4] The law does not

[1] Mayor of Nashville v. Ray, 19 Wall. 468, 477; Shawnee Co. v. Carter, 2 Kan. 115; Tiedeman, Commercial Paper, § 138.

[2] Newgass v. City of New Orleans, 42 La. An. 165; s. c., 43 Ib. 78; Bangor Sav. Bk. v. City of Stillwater, 45 Fed. 544; Flagg v. St. Charles, 27 La. An. 319; Capmartin v. Pol. Jury, 19 Ib. 448; Cook v. Lowe, 25 Ill. App. 649; Clark Co. v. Lawrence, 63 Ill. 32; Hubbard v. Lyndon, 28 Wis. 674; Grimmett v. Askew, 48 Ark. 171; Saline v. Wilson, 61 Mo. 237; Keller v. Hyde, 20 Cal. 593; Conner v. Morris, 23 Cal. 447.

[3] See *post*, § 373, and Campbell v. Polk Co., 3 Iowa, 467; Merkle v. Berks, 81 Pa. St. 505; Babcock v. Goodrich, 47 Cal. 488.

[4] Tiedeman, Coml. Paper, § 138; District of Columbia v. Cornell, 130 U. S. 655; United States v. Miller Co., 4 Dill. 233; Carroll Co. v. U. S., 18 Wall. 71; Mayor of Nashville v. Ray, 19 Wall. 478; Wall v. Monroe, 103 U. S. 74; Ouachita v. Wolcott, 103 Ib. 559; Claiborne Co. v. Brooks, 111 Ib. 400; Talty v. Freedman T. Co., 1 McArthur, 522; Sturtevant v. Liberty, 46 Me. 457; Emery v. Mariaville, 56 Me. 315; Smith v. Cheshire, 13 Gray, 318; Andover v. Grafton, 7 N. H. 298; Eaton v. Berlin, 49 N. H. 219; Hyde v. Franklin Co., 27 Vt. 155; Read v. Buffalo, 67 Barb. 526; Fairchild v. Ogdensburg etc. Co., 15 N. Y. 338; Bull v. Sims, 23 Ib. 570; Oatman v. Taylor, 29 Ib. 657; Hackettstown v. Swackhammer, 37 N. J. L. 191; Knapp v. Mayor, 39 N. J. L. 394; East Union v. Ryan, 86 Pa. St. 459; State v. Debuclet, 23 La. An. 267; State v. Liberty, 22 Ohio St. 144; Inhabitants etc. v. Weir, 9 Ind. 224; Hubbard v. Lyndon, 28 Wis. 674; Goodnow v. Ramseyles, 11 Minn. 31; Sch. Dis. v. Fogleman, 76 Ill. 189; People v. Johnson, 100 Ib. 537; 39 Am. Rep. 63; Scb. Dis. v. Stough, 4 Neb. 357; State v. Huff, 63 Mo. 288; Matthis v. Cameron, 62 Mo. 504; Burlington R. Co. v. Clay Co., 13 Neb. 367; Clark v. Des Moines Co., 19 Iowa, 199, 211–214; Bayerque v. San Francisco, 1 McAll. 175; Dana v. San Francisco, 19 Cal. 486; People v. El Dorado, 11 Cal. 170; Fox v. Shipman, 19 Mich. 312; Second Nat. Bank v. Lansing, 1 Mich. (N. P.)

regard them as of the nature of bills of exchange, inasmuch as they are drawn by one officer of a corporation upon another, and, therefore, the drawer and drawee are the same person, viz.: the corporation itself.[1]

It is the general rule that public officials, or municipalities, have the implied power to issue negotiable paper, only when such power is absolutely essential to effectuate some other power expressly conferred.[2] And it has been held that, should the officer issuing the warrant give it a negotiable character and form, he exceeds his powers, and to this extent does not bind the corporation.[3] But there are some decisions, in which the negotiability of these instruments has been affirmed, when from their form it was evident that the parties had regarded them, or had treated them, as possessing the character of commercial paper.[4]

Where the warrants are held to be vouchers, they do not bear interest, even after demand and refusal of payment.[5] The warrants are then like open accounts, and do not entitle him to more than the principal sum;[6] but if negotiable, they will bear interest from the day payment is refused.[7] No mere technical

181; Chemung C. Co. v. Chemung Co., 5 Denio, 517; O'Donnell v. Philadelphia, 2 Brewst. 481; Dalrymple v. Whittingham, 26 Vt. 345. Statutory power to issue orders, it has been held, does not confer power to issue bonds. Goodnow v. Com'rs, 11 Minn. 31; Hull v. County, 12 Iowa, 142.

[1] Miller v. Thompson, 3 Man. & Gr. 576; Fairchild v. Odgensburg, 15 N. Y. 337; Hasey v. White Pig B. S. Co., 1 Doug. (Mich.) 193; Dyer v. Covington, 19 Pa. St. 200; Walwyn v. St. Quentin, 1 Bos. & P. 652 (Eng.); Allen v. Sea, etc., Assn., 9 C. B. 574; Chandler v. Bay St. Louis, 57 Miss. 526, and cases cited in last note.

[2] Tiedeman Coml. Paper, § 132, p. 214; Floyd Acceptances, 7 Wall. 667; Police Jury v. Britton, 15 Ib. 566; Clark v. Des Moines, 19 Iowa, 199.

[3] Tiedeman Coml. Paper, § 138; Camp v. Knox Co., 3 Lea, 199; Smith v. Cheshire, 13 Gray, 318.

[4] Sweet v. Com'rs, 16 Minn. 107; Talby v. Freedman's Trust Co., 1 MacArthur, 522; Kelley v. Mayor, etc., 4 Hill N. Y. 265; Moss v. Oakley, 2 Ib. 265; Crawford v. Wilson, 7 Ark. 219; Guilfont v. Parish, 28 La. An. 413; Garvin v. Wiswell, 83 Ill. 215; Craig v. Richmond, 1 Phila. (Pa.) 33.

[5] Allison v. Juniata Co., 50 Pa. St. 353; Langdon v. Castleton, 30 Vt. 285; Warren Co. v. Kern, 51 Miss. 807; Leavenworth v. Klein, 6 Kan. 510; Camp v. Knox Co., 3 Lea, 199; Hall v. Jackson Co., 95 Ill. 353; Scranton v. Hyde Pk. Company, 102 Pa. St. 382.

[6] Dyer v. Covington, 19 Pa. St. 200.

[7] Com'rs v. Keller, 6 Kansas, 518; State v. Pacific, 61 Mo. 155. As to interest on coupons and warrants, see Rogers v. Lee Co., 1 Dillon, 529; Evansville v. Evansville, 15 Ind. 395; Pruyn v. Milwaukee, 18 Wis. 367; Quincy v. Warfield, 25 Ill. 317; Danville v. Sutherlin, 20 Gratt. 555.

informality in their form should be permitted to invalidate the warrants as against a party who has received them in payment of a legal claim against the city,[1] since their effect, particularly where there is money in the treasury, is not to create a new indebtedness, but to furnish a means of paying a debt already in existence.[2] But, of course, in estimating the amount of municipal indebtedness outstanding, warrants should be included.[3]

A municipal creditor may refuse to accept a warrant, and demand and sue for payment in legal currency.[4] But, in California, it has been held that a debt, payable in warrants, is in effect payable in money.[5] And, it has also been held that if the creditor accepts a warrant, such action is a satisfaction of the original debt, and he can no longer sue upon it.[6] But the general rule is that a warrant does not ordinarily work an extinguishment of the debt, so that the holder may, if payment of the warrant is refused, sue upon his original cause of action.[7]

In California, under statute, a party who registers his warrant becomes a preferred creditor;[8] and when warrants are unregistered, the order of payment cannot be changed,[9] or postponed, in favor of others for current expenses.[10] Money, paid on warrants out of their order, on the false representations of the holder, may be recovered by the disbursing officer.[11]

A new warrant may be issued in the place of one lost or destroyed;[12] but if the lost warrant be found, the issue of the duplicate is not necessarily an admission of the validity of the original.[13]

Without express legislative authority, a city has no power to discount its warrants, or to issue warrants for a larger sum than

[1] Burrton v. Harvey, etc. Bank, 28 Kan. 390; Young v. Camden Co., 19 Mo. 309.

[2] Dively v. Ced. Falls, 27 Iowa, 227; Dana v. San Francisco, 19 Cal. 486; Bayerque v. Same, 1 McAll. 175.

[3] Lake Co. v. Rollins, 130 U. S. 662; 26 Am. Eng. Cor. Cas. 465.

[4] Benson v. Carmel, 8 Me. 110; Willey v. Greenfield, 30 Ib. 452; State v. Pillsbury, 30 La. An. 705.

[5] Babcock v. Goodrich, 47 Cal. 488.

[6] Dalrymple v. Whittington, 26 Vt. 345.

[7] Paddocks v. Symonds, 11 Barb. 112; Dyer v. Covington Tp., 19 Pa. St. 200; Benson v. Carmel, 8 Me. 110, 112; Goldschmidt v. New Orleans, 5 La. An. 436; Allison v. Juniata Co., 50 Pa. St. 351.

[8] Taylor v. Brooks, 5 Cal. 332.

[9] Lafargo v. Magee, 6 Cal. 285.

[10] People v. Austin, 11 Col. 134.

[11] Morrow v. Surber, 97 Mo. 155; comp. McCall v. Harris, 6 Cal. 281.

[12] Craig v. Chicot, 40 Ark. 233.

[13] Royster v. Granville, 98 N. C. 148.

is due; such warrants are void as to the excess, even in the hands of a *bona fide* holder, for such holder will be considered only as an equitable assignee of the payee, and as acquiring only the rights of the original payee.[1] So, when the payee sold the city's warrants, at a discount, the corporation is not liable for the loss to the holder.[2]

Warrants once paid cannot be reissued. And if they are again put in circulation, they will not bind the municipality, even in the hands of an innocent holder.[3] Payment, once made in good faith, releases the corporation;[4] but receiving an order in payment of taxes is not sufficient evidence of the payment and extinguishment of the order.[5]

Nor is the city liable for the increased amount of a warrant, which has been fraudulently raised after its issuance.[6] So, also, the sureties on the bond of an official, forbidden by law to deal in warrants, were not liable, even to an innocent purchaser for value, where the warrant had been reissued by the official after payment.[7]

§ 178. **Warrants payable out of a particular fund.**—When by law a claim is payable only out of a particular fund, the warrant for its payment should be drawn on this fund; for, if drawn on the treasury generally, it is invalid; the corporation not being bound by this illegal act of its officials, is only liable to the extent of the fund in question, and cannot be compelled to pay such claims out of its general funds.[8] But a distinction should be observed between the class of warrants above described, and those which are evidences of general corporate indebtedness, but which are to be charged to a particular account.

[1] Shirk v. Pulaski, 4 Dill. 209; Goyne v. Ashley Co., 31 Ark. 552; Baver v. Franklin Co., 51 Mo. 205; Foster v. Coleman, 10 Cal. 278; Danville v. Sutherlin, 20 Gratt. 255; Lynchberg v. Norvell, 20 Ib. 601.

[2] Morgan v. District, 10 Ct. of Cl. 156; Looney v. District, 19 Ib. 230; State v. Wilson, 71 Tex. 291.

[3] Chemung Bk. v. Sup'rs, 5 Denio, 517; District v. Cornell, 130 U. S. 655; Nashville v. Ray, 19 Wall. 468; Halstead v. Mayor, 3 Comst. 430.

[4] Sweet v. Carver Co., 16 Minn. 106.

[5] Wiley v. Greenfield, 30 Me. 452.

[6] Chandler v. Bay St. Louis, 57 Mich. 327.

[7] McConnell v. Simpson, 36 Fed. Rep. 750.

[8] Baker v. Seattle, 2 Wash. St. 576; Bates v. Porter, 15 Pac. Rep. 732; 74 Cal. 224; Priet v. Reis, 28 Pac. Rep. 798; 93 Cal. 85; Campbell v. Polk Co., 76 Mo. 57; Boro. v. Phillips Co., 4 Dill. 216, 223; McCullough v. Mayor, etc., 23 Wend. 458; Tippecanoe Co. v. Cox, 6 Ind. 403; People v. Wood, 71 N. Y. 371.

In the latter case, the liability of the municipal corporation is general and absolute, and not at all dependent upon the existence of the particular fund, out of which it is directed to be paid. This direction for the payment of the general indebtedness out of a particular fund, is only a provision for the convenience of the city. Therefore, where the particular fund, out of which the warrant for such a debt was directed to be paid, had never existed or had been exhausted before presentation of the warrant, the holder could sue generally on the warrant; or if not on the warrant, on the original indebtedness, and obtain a general judgment against the city.[1] Each case depends upon the conditional or absolute character of the original indebtedness. A warrant, containing the words "charge the same to account of Union avenue," was payable out of a particular fund, which had never existed, and it was held that no action could be maintained on the warrant.[2] On the other hand, an order, made payable out of the fund "for jail purposes,"[3] or out of the Bedford road assessment,[4] has been held to be payable out of the general treasury; and the words "out of any money not otherwise appropriated" mean that the warrant is payable unconditionally, and not out of any special fund.[5] The words "it being for the appropriate part of the surplus revenue fund" indicate the purpose, and not the particular fund from which the warrant is alone payable.[6]

As the law will not compel the doing of an illegal act, *mandamus* will not lie to compel the payment of more money than what is in the fund.[7] But, unless the law requires a claim to be paid only out of a certain fund, the warrant will not be invalid, if drawn on an improper fund.[8] In Missouri, under special statutory provisions, no county warrant issued for any extraordinary expenditure can be paid, until the usual and or-

[1] Clark v. Des Moines, 19 Iowa, 199; Pease v. Cornish, 19 Me. 191; Union Co. v. Mason, 9 Ind. 97; Bayerque v. San Francisco, 1 McAll. 175; Bull v. Sims, 23 N. Y. 570.

[2] Lake v. Williamsburgh, 4 Den. 520, distinguished from Kelly v. Mayor, 4 Hill, 263.

[3] Montague v. Horton, 12 Wis. 597.

[4] Kelley v. Brooklyn, 4 Hill, 263; Steele v. Davis Co., 2 G. Greene, 469.

[5] Campbell v. Polk Co., 3 Iowa, 467.

[6] Pease v. Cornish, 19 Me. 191.

[7] Bates v. Porter, 74 Cal. 224; Priet v. Reis, 93 Ib. 85; Day v. Callow, 39 Cal. 593.

[8] Warren Co. v. Klein, 51 Miss. 807.

dinary expenses for the year have been provided for by the treasury.[1]

§ 179. **Presentment of warrants—Indorsement—Actions on and by whom brought.**—In compliance with established usage, the holder of a warrant is bound to present it for payment;[2] and until the payment of the warrant has been demanded, the corporation cannot be said to be in default.[3] This requirement seems to be just and reasonable, on account of the extensive operations, conducted by municipal corporations, in order that the disbursing officials can make the proper arrangements for payment. But in the case of private corporations presentment or notice of nonpayment is generally considered unnecessary;[4] and there are decisions, in which the same rule has been applied to municipal warrants.[5] And even when presentment has been deemed necessary, the corporation will not be discharged from liability. The failure to make demand only has the effect of preventing the recovery of damages and costs.[6]

Whenever a warrant is held to be negotiable, it may be transferred by indorsement, and the indorser is subject to the same liability as though it were a bill or note;[7] and when *in form*, though not in fact, negotiable, they must be indorsed to give the assignee a good title.[8] But when the negotiability of a warrant is denied, one who transfers it does not become liable as an indorser; except, perhaps, that he may be made to return the consideration he received, if the warrant proves to be invalid or illegal.[9]

Although it is the rule that warrants are not negotiable, it

[1] Rev. St. Mo. § 5370; Mo. Act, 1865, p. 86, § 13; State v. Trammel, 11 S. W. Rep. 748.

[2] Varner v. Nobleborough, 2 Me. 126; Pease v. Cornish, 19 Ib. 193; East Union v. Ryan, 86 Pa. St. 459; Dalrymple v. Whittingham, 26 Vt. 346; Central v. Willcoxen, 3 Col. 566; Kelly v. Mayor, 4 Hill, 265.

[3] Pekin v. Reynolds, 31 Ill. 529; 82 Am. Dec. 244.

[4] Tiedeman's Commercial Paper, § 128; Tiedeman's Private Corp. §

[5] Steele v. Davis Co., 2 G. Greene, (Iowa) 469; see Miller v. Thompson, 3 Man. & G. 576; Fairchild v. R. Co., 15 N. Y. 337; Justices v. Orr, 12 Ga. 137; Harvey v. W. P. S. Co., 1 Doug. 193; Clark v. Polk Co., 19 Iowa, 247; Dana v. San Francisco, 19 Cal. 486.

[6] Kelly v. Mayor, 4 Hill, 263; Commercial Bank v. Hughes, 17 Wend. 94, 97; Harker v. Anderson, 21 Ib. 375; Lusk v. Perkins, 48 Ark. 238.

[7] Bull v. Sims, 23 N. Y. 571; Fairchild v. Ogdensburg, 15 N. Y. 337; Hodges v. Schuler, 22 Ib. 114.

[8] Garvin v. Wiswell, 83 Ill. 390.

[9] Keller v. Hicks, 22 Cal. 460; see Smeltzer v. White, 92 U. S. 390.

is universally conceded that they can, in the absence of express restriction, be assigned; and the assignee may recover in an appropriate action against the corporation. But whether the action should be brought in the name of the assignee, or in that of the assignor, is differently decided. If the warrant is negotiable, the indorsee can sue in his own name.[1]

Since non-negotiable contracts were not assignable at common law, the law courts did not recognize the assignee; and if suit was brought in such a court, it had to be brought in the assignor's name, permission to use which, in maintaining a suit, would be compelled by a court of equity. This is still the law wherever it has not been changed by statute.[2] But in most of the States, the assignee can now sue in his own name; but cannot claim any privileges or exemptions from defences to which the assignor is not entitled.[3] In California, there must be an assignment of the original debt;[4] while, in Minnesota, the assignee must prove the consideration, if suing in his own name.[5]

Municipal warrants, signed by the proper officials are binding; and impeachment must come from the defendant, as it is a legal presumption that public officials have done their duty.[6]

§ 180. **When action may be brought—Defences—Statute of Limitations.**—A warrant, not paid upon presentation, may be sued on at once;[7] for a general warrant, which is not payable out of a special fund,[8] is a written acknowledgment of in-

[1] Kelly v. Mayor, 4 Hill, 263; Dalrymple v. Whittingham, 26 Vt. 345; Clark v. School Dist., 3 R. I. 199; Moss v. Dadley, 2 Hill, 255; Justice v. Orr, 12 Ga. 137; Leavenworth v. Keller, 6 Kans. 510; Commissioners v. Day, 19 Ind. 450; Crawford Co. v. Wilson, 7 Ark. 219; See Dively v. Cedar Falls, 21 Iowa, 565.

[2] Hyde v. Franklin, 27 Vt. 185; Allison v. Juniata Co., 50 Pa. St. 353; Dalrymple v. Whittingham, 26 Vt. 345; Klein v. Supervisors, 54 Miss. 878; Smith v. Cheshire, 13 Gray, 318.

[3] Sturtevant v. Liberty, 46 Me. 459; Emery v. Mariaville, 56 Ib. 316; Campbell v. Polk Co., 3 Iowa, 467; Clark v. Same, 19 Ib. 248; Bank v. Franklin Co., 65 Mo. 105; Mathis v. Cameron, 62 Ib. 504; Bank v. Farmington, 41 N. H. 32; Leavenworth v. Keller, 6 Kan. 510; Beals v. Evans, 10 Cal. 459; Kelly v. Mayor, 4 Hill, 263; Clark v. Sch. Dis., 3 R. I. 199; Com'rs v. Day, 19 Ind. 450; Dively v. Cedar Falls, 21 Iowa, 365; Andover v. Grafton, 7 N. H. 298.

[4] People v. Gray, 23 Cal. 125; Dana v. San Francisco, 19 Ib. 486.

[5] Goodnow v. Ramsey, 11 Minn. 31.

[6] Floyd Co. v. Day, 19 Ind. 450; Hamilton v. Newcastle, etc., Co., 9 Ind. 359; Clark v. Des Moines, 19 Iowa, 211.

[7] Inter. Nat. Bk. v. Franklin, 65 Mo. 105; Beals v. Evans, 10 Cal. 459.

[8] Brown v. Johnson Co., 1 Green, 486.

debtedness, which, if not paid upon presentation, may be sued on by the holder, although there may be no money in the treasury.[1]

The holder is not bound to request before suit that a tax be levied to replenish the treasury,[2] it being the clear duty of the municipality to raise money to pay these orders, as well as any other indebtedness.[3] An exception to the general rule prevailed in Nebraska, where it was held that one receiving a warrant, in which no time of payment is fixed, takes it with the expectation, if there are no available funds in the treasury, of waiting until the money can be raised in the ordinary way.[4]

Lack of consideration, or usury,[5] is a good defence to an action upon a warrant; and in all cases the consideration must be a valid one.[6] When the warrant has been legally issued, validity and sufficiency of consideration will be presumed.[7]

The fact, that an account has been audited by a board or official, does not constitute, in the case of claims against counties, such a judicial settlement as will conclude either party in an action upon a county warrant; and the same principle applies to a city or other public corporation.[8]

Payment is always a good defence; but if the warrant be negotiable, its transfer discharges the city's liability to the payee for the debt.[9]

The Statute of Limitations begins to run on warrants from the date upon which their payment was refused by the corporation,[10]

[1] Natl. Lumber Co. v. City of Wymore, (Neb.) 46 N. W. Rep. 622; Mills Co. N. Bk.v. Mills Co., 67 Iowa, 697; Floyd Co. v. Day, 19 Iowa, 450; Lyell v. Lapeer Co., 6 McLean, 446; International Bank v. Franklin Co., 65 Mo. 105; Packard v. Bovina, 24 Wis. 382.

[2] Mills Co. Bk. v. Mills Co., 67 Iowa, 697.

[3] Terry v. Milwaukee, 15 Wis. 490.

[4] Brewer v. Otoe Co., 1 Neb. 373.

[5] Clark v. Des Moines, 19 Iowa, 199; Danville v. Sutherlin, 20 Gratt. 555; Lynchburg v. Narvell, 20 Ib. 601.

[6] Gray v. Latham, 84 Ala. 546; see Clayton v. McWilliams, 49 Miss. 311.

[7] Floyd v. Day, 19 Ind. 451.

[8] Shirk v. Pulaski Co., 4 Dill. 209; Nashville v. Ray, 19 Wall. 468; Webster Co. v. Taylor, 19 Iowa, 117, 120; Cheeny v. Brookfield, 60 Mo. 53; Goodnow v. Ramsay, 11 Minn. 31. But see Carroll v. Board etc., 28 Miss. 38.

[9] Crawford Co. v. Wilson, 7 Ark. 214.

[10] Kenosha v. Lamson, 9 Wall. 478; Clark v. Iowa City, 20 Wall. (U. S.) 583; Carroll v. Tishomingo Co., 28 Miss. 38; Decordova v. Galveston, 4 Tex. 470; Leach v. Wilson Co., 68 Ib. 353; Baker v. Johnson Co., 33 Iowa, 151; and Belleville S. Bk. v. Winslow, 30 Fed. Rep. 488.

although it has been held that warrants are not within the statute.[1]

Though a warrant, properly signed, imports *prima facie* a valid and subsisting cause of action, it is always competent for a municipal corporation even after the issue of a warrant, which is simply a means of payment, and not the creation of a new debt, to set up the defence of *ultra vires*.[2] Under this rule, the plaintiff in suing upon a warrant must show, that the law has been strictly complied with,[3] the authority of the official, by whom it was issued, being always open for examination.[4] No purchaser can recover on a warrant which is known by the original holder to have been issued *ultra vires*.[5] A bill in chancery may be filed by a municipal corporation to have illegal warrants delivered up and canceled.[6]

§ 181. **Municipal scrip—Illegal obligation as circulating medium.**—Inasmuch as the right to coin money and regulate the value thereof was limited to the national government, and the States were prohibited from emitting bills of credit, or making anything but gold or silver a legal tender,[7] scrip, or warrants, intended to circulate as money, are unconstitutional and void, so far as they are given the character of currency.[8] The city, however, is not released from its liability on the original debt, although there may exist no liability upon the scrip; either by the fact that the city expected that the warrants

[1] Brewer v. Otoe Co., 1 Neb. 373.

[2] Cheeney v. Town of Brookfield, 60 Mo. 53; Thomas v. Richmond, 12 Wall. 349; Marsh v. Fulton Co., 10 Ib. 776; Boom v. Utica, 2 Barb. 104; Leavenworth Co. v. Keller, 6 Kan. 510; Hall v. Jackson, 95 Ill. 352; see Allegheny v. McClurkan, 14 Pa. St. 81; Underwood v. Newport Lyc., 5 B. Mon. 129.

[3] East Union v. Ryan, 86 Pa. St. 459.

[4] Taft v. Pittsford, 28 Vt. 286; People v. Klokke, 92 Ill. 134.

[5] Salamanca v. Jasper Co. Bk., 22 Kan. 696.

[6] Pulaski Co. v. Lincoln, 9 Ark. 320; Webster Co. v. Taylor, 19 Iowa, 117; Paris v. Cherry, 8 Ohio St. 564; Glastonbury v. McDonald, 44 Vt. 450.

[7] Craig v. Missouri, 4 Pet. 35, 453; Briscoe v. Bank, 11 Ib. 257, 313, 334, 336; Legal Tender Cases, 12 Wall. 557, 558, 622.

[8] Cheeney v. Brookfield, 60 Mo. 53; Lindsay v. Rottaken, 32 Ark. 619; Jones v. Little Rock, 25 Ib. 301; Merchants Bank v. Little Rock, 5 Dill. 299; s.c. 98 U.S. 308; Thomas v. Richmond, 12 Wall. 349; Allegheny v. McClurkan, 14 Pa. St. 81; Miller v. Lynchburg, 20 Gratt. 330; State Board v. Aberdeen, 56 Miss. 518; Brown v. Belleville, 30 Up. Can. Q. B. 373; Wentworth v. Hamilton, 35 Ib. 509; Parsons v. Monmouth, 70 Me. 262; Bangor Sav. Bk. v. Stillwater, 46 Fed. Rep. 899.

would furnish a convenient circulating medium, or that they have become such.[1] So, when a city had issued illegal scrip, with which it paid its creditors, but afterward called it in, and issued new and valid obligations, it was held liable upon the latter.[2]

§ 182. **Implied power to borrow money, and to emit negotiable paper.**—The question whether a municipal corporation can borrow money and become a party to commercial paper, is only difficult to answer, where there is no express grant of such a power or powers in a charter, or other statute, which affects or controls the powers of municipal corporations. In the absence of constitutional prohibition, the State Legislature may undoubtedly grant such a power to any municipal or public corporation. Two questions are involved in this discussion: *First*, whether a municipal corporation has the implied power to borrow money, and bind the corporation by the obligation thus assumed; or whether such a corporation can only obtain funds by taxation. *Secondly*, whether, if the implied power to borrow money be conceded, it includes the power to give in evidence of the debt so created a negotiable note or bill.

On the first question the authorities are divided. It is urged in behalf of the denial to municipal corporations of any implied power to borrow money, that they are established for the purpose of local government, and the means of carrying on and effectuating such purposes are ordinarily attainable by taxation. That being ordinarily a sufficient source of revenue, there is no reason why the power to borrow money should be implied. If an extraordinary benefit is proposed which can only be secured by the exercise of the power to borrow, the Legislature can

[1] Dively v. Cedar Falls, 21 Iowa, 565.

[2] Little Rock v. Merchant's Nat. Bk., 98 U. S. 308, 5 Dil. 299. In this case, the court said: "By taking up the illegal obligations, the city in effect said, we will purge the transaction of its illegality. We had the authority to accept from you, . . . the sums in question. We did so receive and expend for legitimate purposes. We erred in making a payment to you in objectionable form. We now pay our just and lawful debts by canceling the bank notes issued by us, and delivering to you obligations in the form of bonds, to which form there is no legal objection." See, also, Hitchcock v. Galveston, 96 U. S. 350; Nashville v. Ray, 19 Wall. 468; Pal. Jury v. Button, 15 Ib. 570; Mullarkey v. Cedar Falls, 19 Iowa, 24; Sykes v. Laffery, 27 Ark. 407; Wright v. Hughes, 13 Ind. 113.

be asked for a special grant of the power.[1] But the position above taken is not supported by the majority of the cases; the current of decisions is running in favor of the view, that a municipal corporation may exercise any power, that is suitable or needful to effectuate the objects, for which it is created, whether the power be expressly granted or must be implied: and that in the implied powers of a municipal corporation should be included the power to borrow money.[2] The power

[1] Hackettstown v. Swackhamer, 37 N. J. L. 191. Dissenting opinion of Agnew, C. J., in Williamsport v. Com., 74 Pa. St. 488, 505; Knapp v. Hoboken, 39 N. J. L. 394; Gause v. Clarksville, 5 Dillon, C. C. 165; Bradley, J., opinion in Mayor of Nashville v. Ray, 19 Wall. 475. For a strong presentation of the arguments against the impolicy of permitting or conceding to the municipality the implied power to borrow money and to issue commercial paper, see Dillon Mun. Cor. §§ 507, 507 *a*, 508, *et seq.* (ed. 1892).

[2] Bank of Chillicothe v. Mayor, 7 Ohio, pt. 2, p. 31; Douglas v. Virginia City, 5 Nev. 147; Sturtevant v. Alton, 3 McLean, 393; Mullarkey v. Cedar Falls, 19 Iowa, 21; New Albany Bk. v. Danville, 60 Ind. 504; Sheffield v. Andress, 56 Ind. 157; Galena v. Corwith, 48 Ill. 423; Board v. Day, 19 Ind. 450; Mells v. Gleason, 11 Wis. 470; Ketchum v. Buffalo, 14 N. Y. 356; Kelley v. Mayor, 4 Hill, 263; Clarke v. Sch. Dis., 3 R. I. 199; First Municipality v. McDonough, 2 Robinson, 244; Clarke v. Des Moines, 19 Iowa, 199; Adams v. R. R., 2 Coldw. 645. In England, Pallister v. Mayor, 67 Eng. C. L. (9 C. B.) 744; Payne v. Mayor, etc., 3 Hurl. F. 372; Kendall v. King, 84 Eng. C. L. (17 C. B.) 483; Nowell v. Mayor, 9 Exch. 457, but compare as to promissory notes issued, Reg. v. Litchfield, 4 Q. B. 893; see further, State v. Madison, 7 Wis. 688; Clark v. Janesville, 10 Ib. 136; State v. Babcock, 22 Neb. 614; Kenosha v. Lamson, 9 Wall. 477, 486; Mass. v. Harpeth, 7 Heisk. 283; Com. v. Pittsburgh, 34 Pa. St. 486; Folsom v. Sch. Dis., 91 Ill. 404; Clark v. Sch. Dis., 78 Ib. 474; Desmond v. Jefferson, 19 Fed. Rep. 483; Danielly v. Cabanis, 52 Ga. 111; Iviuson v. Hance, 1 Wyom. Ter. 270; Merrill v. Monticello, 138 N. S. 673. In Williamsport v. Com., 84 Pa. St. 487, the court said: "In its broad sense the power to borrow money and issue bonds therefor cannot be said to be among the implied powers of a municipal corporation. For general purposes, such power does not exist for the reason that it is not necessary for the objects for which it was created. Thus it has never been contended that a municipality may borrow and issue bonds or notes for objects having no necessary relation to the performance of municipal duties. To admit such a principle would be destructive of such organizations and place the taxpayers of a city at the mercy of the first band of plunderers who should happen to obtain the temporary control of its affairs. The question for our consideration is, whether the power to issue bonds is one of the inherent powers of a municipal corporation in a limited sense; that is to say for the purpose of providing for such expenditure as is strictly germane to the objects for which such corpo-

to borrow is held to be implied, not only when there has been no express grant of such a power, but also when this power has, with limitations, been expressly granted, and it seems to be necessary to use it beyond the limits imposed in the express grant; as when a city charter expressly grants to the corporation the power to borrow whatever money it may need, not exceeding a certain sum *per year*, and to issue bonds for the same. It was held in Illinois that under the implied power to borrow, the city may lawfully borrow more money than what is stated in the charter.[1]

This is certainly carrying the doctrine of implied powers to the extreme limits, and in violation of the general rule of construction, that the express grant of a power with limitations excludes any implication of such a power beyond the limitation.

It may be well to state that the implied power to borrow money was exercised by municipal corporations in this country for many years without question; and it is very probable that the implication of the power would not have been disputed, if

rations are created, we are not without authorities that question if they do not deny this power. Judge Dillon, one of the ablest writers upon this branch of the law, says in his treatise on the Law of Municipal Bonds: 'We regard as alike unsound and dangerous that a public or municipal corporation possesses the implied power to borrow money for its ordinary purposes and as incidental to that the power to issue commercial securities.' The ground relied upon by the learned author and others, who take this view of the question, is that the power is a dangerous one. But showing that the power is dangerous does not prove that it does not exist. Power is always dangerous. . . . The dangerous nature of a power might be a persuasive argument with the Legislature, why it should be denied to a municipal corporation, but cannot be accepted as a conclusive reason that it does not exist. I am willing to concede that the power to issue municipal bonds is dangerous. It affords opportunity to unscrupulous men hungering for the spoils of rich municipalities, to enter into extravagant contracts, at ruinous prices, by mortgaging the resources of the people in advance. The facility of placing municipal bonds at high rates of interest and having many years to run is certainly a great inducement in many cases to unwise and lavish expenditure. It might have been better for the Legislature in the first instance to have applied the principle 'pay as you go' to such corporations, and to have required them to seek legislative action, whenever they sought to incur obligations. . . This, however, is a question with which we have no present concern."

[1] Galena v. Corwith, 48 Ill. 423.

American municipalities had not entered upon a career of reckless expenditure.

§ 183. **Power to issue negotiable securities.**—Conceding that municipalities generally possess the implied power to borrow, when such power is essential to the attainment of the ends contemplated in the grant of some express power; it follows, according to the weight of decisions, that the implied power to borrow money includes by implication the power to arrange for the payment of the debt so contracted by the issue of negotiable bonds,[1] which shall possess the same characteristics as other commercial paper.[2] That is, the municipal bond has all the qualities of negotiability, and is subject to only those defences, which are the incidents of commercial paper in general, provided all the requisites of negotiability are present in the bond. The absence of a requisite [3] or the presence of an inconsistent

[1] Bangor Savings Bk. v. Stillwater, 46 Fed. 899; Goodnow v. Ramsey Co., 11 Minn. 31; Carlton v. Washington, 28 Kan. 390; Little Rock v. Bank, 98 U. S. 308; Galena v. Corwith, 48 Ill. 423; Rogers v. Burlington, 3 Wall. 654; Chittenden Co. v. Shanks, (Ky. 89) 11 S. W. R. 468; Seybert v. Pittsburgh, 1 Wall. 372; Meyer v. Muscatine, 1 Ib. 387; R. R. v. Evansville, 15 Ind. 395; De Voss v. Richmond, 18 Gratt. 338; Newgass v. New Orleans, (La. 92) 7 So. R. 565; Police Jury v. Britton, 15 Wall. 572; Mayor v. Inman, 57 Ga. 370; Tucker v. Raleigh, 75 N. C. 267; Mayor v. Lombard, 57 Miss. 125; Williamsport v. Com., 84 Pa. St. 500; Middletown v. Allegheny Co., 37 Ib. 241. In two recent decisions the Supreme Court of the United States has denied to municipalities the implied power to issue negotiable securities where the express power to borrow money had been conferred. Merrill v. Monticello, 138 U. S. 673 (1891); and see Brenham v. Germ. Am. Bk., 12 S. Ct. 559; 144 U. S. 173; Ib., 12 S. Ct. 975; 144 U. S. 549; reversing 35 Fed. Rep. 185; overruling Rogers v. Burlington, 3 Wall. 654; Mitchell v. Burlington, 4 Ib. 270; and distinguishing Dwyer v. Mackworth, 57 Tex. 245; Harlan, Brewer and Brown, JJ., dissenting.

[2] Moran v. Miami Co., 2 Black, 722; White v. Verm. R. R. Co., 21 How. 575; Marshall Co. v. Schenk, 5 Wall. 784; Lexington v. Butler, 14 Ib. 282; Hotchkiss v. Bk., 21 Ib. 354; Burleigh v. Rochester, 5 Fed. Rep. 667; United States v. U. P. R. R. Co., 91 U. S. 72; Humboldt v. Long, 92 Ib. 642; Cromwell v. Lac. Co., 96 U. S. 51; Macon Co. v. Shares, 97 Ib. 272; Com'rs v. Block, 99 Ib. 686; New Providence v. Halsey, 117 Ib. 336; Ottawa v. First N. Bk., 105 Ib. 342; Wilson Co. v. Bank, 103 Ib. 770; Ackley Sch. Dis. v. Hall, 113 U. S. 135; Gorgier v. Millville, 3 B. & C. (Aug.) 45; Brooks v. Mitchell, 9 M. & W. 15; Goodwin v. Roberts, L. R. 1 App. Cas. 476; Boss v. Hewett, 20 Wis. 460. And see in New York, Starin v. Genoa, 23 N. Y. 454; Gould v. Sterling, 23 Ib. 458.

[3] See Tiedeman Commercial Paper, §§ 10–35, for a full discussion of the requisites of commercial paper.

element, will destroy the negotiability of the bond, as it would that of a bill, check or promissory note. Thus, a bond in the usual form is not made non-negotiable, because payable at the pleasure of the obligor at any time;[1] but when bonds are payable to bearer upon completion of a road, they will be non-negotiable, because payable on a contingency.[2] The chief ground of objection to the validity of a municipal bond is the character of the purpose, for which the money was borrowed, and the bonds negotiated. Inasmuch as the payment of the bonds will ultimately have to be provided for by the exercise of the power of taxation, the Legislature can only authorize the issue of municipal bonds for some municipal or public purpose;[3] and if the bonds are issued to secure some private end, they are void, even though authorized by the Legislature.[4] What are public purposes, in the light of the present inquiry, will be more fully set forth in the succeeding paragraphs.

§ 184. **Public purposes—Railroad aid.**—Every purpose is public which involves the construction and improvement of the public buildings, works and grounds.[5] And where power is given to issue bonds for *internal improvements*, those public works are referred to, from which the public derive a direct

[1] Ackley S. D. v. Hall, 113 U. S. 135.

[2] Blackman v. Layman, 63 Ala. 547.

[3] See ch. xv. on Taxation, § 254, and Sweet v. Hulbert, 51 Barb. 312; Loan Ass'n v. Topeka, 20 Wall. 655; Curtis v. Whipple, 24 Wis. 350; Whiting v. Fond du Lac, 25 Ib. 167; Allen v. Jay, 60 Me. 124; Jenkins v. Andover, 103 Mass. 94; Pray v. No. Liberties, 31 Pa. St. 69; *In re* Mayor of New York, 11 Johns. 77; Camden v. Allen, 26 N. J. L. 398; Sharpless v. Mayor, 21 Pa. St. 147; Hanson v. Vernon, 27 Iowa, 28.

[4] See cases in last note. Brenham v. German Am. Bank, 144 U. S. 173; Ib. 549; Davidson v. Ramsey, 18 Minn. 482; Burlington v. Beasley, 94 U. S. 310; Coml. Bank v. Iola, 9 Dill. 353; State v. Osawkee, 14 Kan. 418; such unlawful issue of bonds may be enjoined by a taxpayer. Crampton v. Zabriskie, 101 U. S. 601; see *post*, § 373.

[5] Com'rs v. Chandler, 96 U. S. 205 (bridge); Burlington v. Beasley, 94 Ib. 314; Aurora v. West, 9 Ind. 74 (gas works); Rome v. Cabot, 28 Ga. 50 (waterworks); Stein v. Mobile, 24 Ala. 591; Hale v. Houghton, 8 Mich. 458; Greeley v. People, 60 Ill. 19 (town hall); Rogers v. Burlington, 3 Wall. 362; Sturtevant v. Alton, 3 McLean 393; State v. Madison, 7 Wis. 688 (markets); Robinson v. St. Louis, 28 Mo. 488 (fire engines); Fellows v. Walker, 39 Fed. Rep. 651; Cf. Weisner v. Douglas, 64 N. Y. 91.

benefit, such as roads, highways,[1] public bridges,[2] toll bridges,[3] and water power for a public mill;[4] but, *semble*, not a court house.[5] But a municipal corporation has no power to appropriate money to erect a building to be used in part by a Grand Army post, it being held that this is not a public use.[6]

According to the weight of decisions, it is a public purpose for the municipality to aid in the construction of railroads. The ground, upon which these decisions rest their conclusion, is that the grant of the franchise to build a railroad and manage it, is confessedly and actually justified by its promotion of the public welfare, although provision is made for compensation to the private corporation which advances the necessary capital. If the State or city can lawfully grant a valuable franchise to a private corporation, because the public welfare will be promoted thereby, it may lawfully add to the franchise a sum of money, or the credit of the State or municipality, as an additional inducement to construct a railroad which promises to develop the resources of the community.[7] "The public has an

[1] Wetumpka v. Winter, 29 Ala. 660.

[2] Union etc. Co. v. Colfax Co., 4 Neb. 450; Wilcox v. Deer Lodge Co., 2 Mont. T. 574.

[3] Dodge Co. v. Chandler, 96 U. S. 205; see, also, internal improvements defined, Fremont etc. v. Sherwin, 6 Neb. 48; Getchell v. Benton, 47 N. W. R. 468; Burlington v. Beasley, 94 U. S. 310; Guernsey v. Burlington, 4 Dill. 372; Lewis v. Sherman Co., 5 Fed. Rep. 269.

[4] Blair v. Cuming Co., 111 U. S. 373.

[5] Dawson Co. v. McNamar, 10 Neb. 276; 4 N. W. R. 991.

[6] Kingman v. Brockton, 26 N. E. R. 998.

[7] Hill v. Memphis, 10 S. Ct. 562; 134 U. S. 198; Com. v. Williamstown, (Mass. 92) 30 N. E. R. 472; (implied power to issue bonds;) Casey v. People, (Ill.) 24 N. E. R. 570; Manchester etc. Co. v. Keene, 62 N. H. 81; State v. Hannibal etc. Co., 13 S. W. R. 505; Strickland v. R. R. Co., 27 Miss. 209; Leavenworth Co. v. Miller, 7 Kan. 479; Taylor v. Board, (Va.) 10 S. E. R. 438; Kluse v. Galusha, 78 Iowa, 310; Sheboygan Co. v. Parker, 3 Wall. 96; Havemeyer v. Iowa Co., 3 Ib. 294; Thomson v. Lee Co., 3 Ib. 330; Rogers v. Burlington, 3 Ib. 362; Northern Pac. Ry. v. Roberts, 42 Fed. Rep. 734; Bouknight v. Davis, 12 S. E. R. 96; 33 S. C. 410; Gibbons v. R. R. Co., 36 Ala. 410; Augusta Bk. v. Augusta, 49 Me. 507; Hallenback v. Hahn, 2 Neb. 377; City v. Alexander, 23 Mo. 483; Iola v. Merriman, 46 Kan. 49; 26 Pac. 485; Gillim v. Daviess Co., (Ky. 91) 14 S. W. R. 838; Shelby Co. v. Jernagin, (Tenn. 91) 16 S. W. R. 1040; Nicol v. Magee, 9 Hump. 252; Com. v. McWilliams, 11 Pa. St. 61; Sharpless v. Mayor, 21 Ib. 147; Moses v. Reading, 21 Ib. 178; Starin v. Genoa, 23 N. Y. 439; Gould v. Sterling, 23 Ib. 439; San Antonio v. Lane, 32 Tex. 405; Scotland Co. v. U. S., 140 U. S. 41; Samson v. People, (Ill. 92) 30 N. E. 781; State v. Trammel, 106 Mo. 510; Post v. Pulaski Co., 49 Fed. Rep. 628; 9 U. S. Ap. 1; 1 C. C. A. 405; (power

interest in such a road, when it belongs to a corporation, as clearly as they would have if it was free, or as if the tolls were payable to the State, because travel and transportation are cheapened to a degree, far exceeding all tolls and charges of every kind, and this advantage the public has over and above those of rapidity, comfort, convenience, increase of trade, opening of markets, and other means of rewarding labor and promoting wealth."[1] But the power, to aid a railroad in any manner, must be expressly conferred by statute, as in no case will it be implied;[2] and when in connection with it, the power to levy and collect taxes for the purpose is conferred, the issue of bonds is not only not permitted, but by implication excluded.[3]

If it be once settled that the construction of a railroad is a public purpose, to which municipal funds or credit may be devoted, it is of no importance, so far as legislative power is concerned, whether the money raised is given or loaned to the company, or used in paying for stock in it;[4] although in one instance it was held, that, although the Legislature could authorize a subscription, it could not empower a donation to be made.[5] So, also, power to subscribe for stock will not authorize a donation.[6] But the word *aid* has been deemed to authorize a donation;[7] and the power to donate land purchased or owned by the city, in aid of a railroad, will authorize the city to donate its bonds

to subscribe will not authorize a gift;) Simpson Co. v. Louisville etc. Co., (Ky. 92) 19 S. W. R. 665; Hutchinson etc. Co. v. Fox, 48 Kan. 70; Duanesburg v. Jenkins, 49 Barb. 579; Winn v. Macon, 21 Ga. 275; Randolph v. Post, 93 U. S. 502; Clarke v. Rochester, 24 Barb. 446; Bank v. Rome, 18 N. Y. 38; Society v. New London, 29 Conn. 174; Douglas v. Chatham, 41 Ib. 211; Powers v. Sup. Ct., 23 Ga. 65; R. R. v. Otoe Co., 16 Wall. 667; Queensburg v. Culver, 19 Ib. 84; Maddox v. Graham, 2 Met. 56; Com. v. Perkins, 43 Pa. St. 410.

[1] C. J. Black in Sharpless v. Philadelphia, 21 Pa. St. 147, 169.

[2] Kelly v. Milan, 127 U. S. 139; Norton v. Dyersberg, 127 Ib. 160; Concord v. Robinson, 121 Ib. 165; Welch v. Post, 99 Ill. 471.

[3] Wells v. Pontotoc Co. Sup., 102 U. S. 631, 632; Ogden v. Daviess Co., 102 Ib. 634, 639; Clairborne Co. v. Brooks, 111 Ib. 400, 406.

[4] Queensburg v. Culver, 19 Wall. 82; Davidson v. Ramsey Co., 18 Minn. 482; Union Pac. R. Co. v. Com'rs, 4 Neb. 450; Stewart v. Polk Co., 30 Iowa, 9; New Orleans v. McDonald, 53 Miss. 240; Samson v. People, (Ill. 92) 30 N. E. R. 689.

[5] Whiting v. Sheboygan, etc., Co., 25 Wis. 167, 196; Sweet v. Hulbert, 51 Barb. 312.

[6] Hamlin v. Meadville, 6 Neb. 227, Post v. Pulaski Co., 9 U. S. Ap. 1; 1 C. C. A. 405.

[7] State v. Babcock, 19 Neb. 230; Northern Pac. R. R. Co. v. Roberts, 42 Fed. 734; comp. Ellis v. Railroad Co., 71 Wis. 114.

to the company, in place of the land, where the city has the express and unlimited power to borrow money, and to issue bonds to fund its indebtedness.[1] It has been held that, when the municipal corporation has the power to aid in the construction of a road, the road to be aided need not be in the same State in which the city is located, but may be wholly within another State.[2]

§ 185. **Construction, completion and location of road, as affecting the validity of bonds issued in its aid.**—Where the construction and completion of the road by a certain date, is a condition precedent to the issue of bonds,—and whether it is a condition, or not, is a question of statutory construction,[3]—it will be rigidly enforced.[4] And if the condition is not complied with, the delivery of the bonds to the railroad company may be suspended;[5] and in any event, the company cannot by *mandamus* compel the issue of bonds, as long as the conditions as to location have not been complied with.[6]

But it is held that where a railroad company has constructed its line to within a quarter of a mile of the town, from which point it enters the town upon the track of another road, it has complied with the requirement that it should complete its road between the two termini.[7] But running trains over the track of another company for five miles, under a lease terminable at one year's notice, is not a compliance with such a condition.[8] Nor is the completion of the road to within three quarters of a mile of the opposite bank of the river, on which the terminal town is located.[9] In a case of this character, however, it is not ab-

[1] Converse v. Fort Scott, 92 U. S. 503.

[2] Bell v. Mobile etc. Co., 4 Wall. 598; Chicago etc. Co. v. Otoe Co., 16 Wall. 677; State v. Dallas Co., 72 Mo. 329; Walker v. Cincinnati, 21 Ohio St. 14; see Woods v. Lawrence Co., 1 Black (U. S.) 386.

[3] Kansas etc. Co. v. Alderman, 47 Mo. 349.

[4] Buffalo etc. Co. v. Falconer, 103 U. S. 821; German Sav. Bk. v. Franklin Co., 128 U. S. 526; Portland etc. Co. v. Hartford, 58 Me. 23; Woonsocket etc. Co. v. Sherman, 8 R. I. 564; Memphis etc. Co. v. Thompson, 24 Kan. 170.

[5] Cooper v. Sullivan Co., 65 Mo. 542.

[6] State v. Minneapolis, 32 Minn. 501.

[7] State v. Clark, 23 Minn. 422; Missouri Pac. R. Co. v. Tygard, 84 Mo. 263; Stockton v. Stockton etc Co., 51 Cal. 328; see Sykes v. Columbia, 55 Miss. 115.

[8] People v. Clayton, 88 Ill. 45.

[9] Hodgman v. St. Paul etc. Co., 20 Minn. 48; Winona v. Cowdrey, 93 U. S. 612.

solutely necessary that a bridge should be built; but such means of crossing the river should be provided by the company, as at the time are usual and customary, as well as adequate and convenient.[1]

Construing a promise on the part of a municipal corporation to pay to the railroad $4,000 for each mile of track constructed, the court held that the computation should be based upon the main line and side tracks "to and into the city;"[2] and that a "road of standard gauge and completed as first class," and in operation by lease or otherwise, meant a road completed and operated in such a manner, that it could be regularly and properly used by the public.[3]

If the time, when the road is to be finished, is not a condition precedent, the municipality will not be released, if it has received the benefit sought by the subscription;[4] and the railroad company may collect the part earned, although it has not spent enough in the town to entitle it to all the aid promised.[5] It has also been held that, when the power to subscribe is conferred by the charter of the road, the right to subscribe is not destroyed by the expiration of the period, within which the charter of the road prescribes it shall be completed; and when the Legislature extends the time for the completion of the road, the time to subscribe is also extended.[6] Nor is the municipality released from its liability for aid promised, to be rendered when a certain part of the road is completed, where the time for its completion is extended by act of the Legislature.[7]

It may be required of the company that their road shall be located, before the question of subscription is submitted to a popular vote,[8] and a breach of such a condition will work a forfeiture of the promised aid, and invalidate the bonds which may be issued in pursuance thereof.[9] But it is held that in all cases, where there is a breach of a condition of this sort, the objection

[1] Hodgman v. Chicago etc. Co., 23 Minn. 153.

[2] Atkinson etc. Co. v. Phillips Co., 25 Kan. 261.

[3] Southern etc. Co. v. Towner, 26 Am. & Eng. Corp. Cas. 667.

[4] Kansas City etc. Co. v. Alderman, 47 Mo. 349.

[5] Cassaday v. Lowry, 49 Iowa, 523.

[6] Com. v. Pittsburgh, 41 Pa. St. 279.

[7] Jacks v. Helena, 41 Ark. 213.

[8] Cass Co. v. Jordan, 95 U. S. 373; Treadwell v. Hancock Co., 11 Ohio St. 183.

[9] Virginia etc. Co. v. Lyon Co., 6 Nev. 68; State v. Davis Co., 64 Mo. 30; Parker v. Smith, 3 Ill. App. 356.

must be raised by the municipal corporation, before the bonds have reached the hands of *bona fide* holders, without notice.[1] So great is the disposition to protect this class, that it has been held by the Supreme Court of the United States that a statutory provision, conferring authority to aid a railroad "*to the said city*," would authorize aid to a road, which by its charter and in fact terminated forty-six miles distant, whence its cars could only enter the city on the track of another company.[2]

What shall in such cases constitute a sufficient compliance with a requirement, that the road shall be located along a certain route, or between two terminal points, is not decided uniformly on the same lines. Most of the cases hold that the company must adopt and locate its whole route, before the proposition to lend the city's credit or contribute its funds, can be lawfully submitted to the popular vote, and it is not enough that the location should be made in a single county.[3] But it has been held that the validity of the election was not dependent on the entire location of the line, provided the *termini* and general direction of the road had been definitely determined and described.[4] Under these circumstances, there cannot be a material divergence from the projected route, after it has been announced, and the city or county had taken action on the proposition to subscribe to the stock of the railroad, or to lend its credit, etc. It is often difficult to determine whether a particular divergence is material. Thus, it was held in one case that a difference of 800 feet was a noncompliance with the condition,[5] while in another case a much larger divergence was disregarded.[6] If the divergence is material, the delivery of the bonds will be restrained;[7] but the municipality,[8] or the Legis-

[1] Missouri etc. Co. v. Fort Scott, 15 Kan. 435; State v. Van Horne, 7 Ohio St. 327.

[2] Van Hostrup v. Madison City, 1 Wall. 291; see Aurora v. West, 22 Ind. 88, 96, 503; Kirkbride v. Lafayette Co., 108 U. S. 208.

[3] Purdy v. Lansing, 128 U. S. 557; s. c., 20 Blatchf. 278, 286; People v. Morgan, 55 N. Y. 587; Mellon v. Lansing, 19 Blatchf. 512; 11 Fed. Rep. 829; Thomas v. Lansing, 21 Blatchf. 119; Winston v. Tenn. R. Co., 1 Baxt. 60.

[4] Wilson Co. v. First Nat. Bank, 103 U. S. 770; Johnson Co. v. Thayer, 94 Ib. 631; Callaway Co. v. Foster, 93 Ib. 567.

[5] Virginia etc. Co. v. Lyon Co., 6 Nev. 68; Aurora v. West, 22 Ind. 88.

[6] Johnson v. Thayer, 94 U. S. 631.

[7] Allen v. Adams Co., 76 Ill. 101.

[8] Coleman v. Martin, 50 Cal. 493.

lature,[1] may authorize a divergence, after the aid is given or voted to the railroad.

It is competent, in a charter to a railroad company, to authorize counties to subscribe for stock, before the road is organized, or its route located.[2] But a subscription by a city or county to a railroad, before the filing of its articles of incorporation, would be void.[3] So, a failure to comply with a statutory requirement, that certain plans be filed before the bonds are issued, is fatal to an application to compel their issue.[4]

§ 186. **Subscriptions for stock—Conditions precedent.**— It is a very common statutory requirement that, before a municipality can bind itself by a subscription to the stock of a railroad company, it must be submitted to the vote of the people. Sometimes the matter is regulated by a special provision of the constitution; and in that case, any material variation of the statute from the constitutional requirement would be fatal. Thus, a statute empowering *resident taxpayers* to authorize the issue of railroad aid bonds, is unconstitutional in the face of a constitutional provision that questions of local taxation should be submitted to the *electors*.[5] But the vote of the people does not of itself constitute a valid subscription,[6] unless it was the intention of the Legislature to make it equivalent to one.[7] The vote merely empowers the proper officials to bind the city by a formal subscription;[8] and until the subscription is completed by a manual signing, or by some binding act, such as the pass-

[1] Com. v. Pittsburgh, 41 Pa. St. 278.

[2] Woods v. Lawrence Co., 1 Black, 386.

[3] Rubey v. Shain, 54 Mo. 207.

[4] *In re* Stratford etc. Co., 38 Up. Can. Q. B. 112.

[5] Harrington v. Plainview, 27 Minn. 224; Plainview v. Winona etc. Co., 36 Ib. 505.

[6] Gunn v. Barry, 15 Wall. 610, 623; U. S. v. Jefferson Co., 1 McCrary, 356; Aspinwall v. Daviess Co., 22 How. 364; Land Grant etc. Co. v. Davis Co., 6 Kan. 256; Cumberland etc. Co. v. Barren Co., 10 Bush, 604; Harshman v. Bates Co., 92 U. S. 569; Fairfield v. Gallatin Co., 100 Ib. 47; Wadsworth v. Eau Claire, 102 Ib. 534; German S. Bk. v. Franklin Co., 102 Ib. 526; Jeffries v. Lawrence, 42 Iowa, 498; State v. Saline Co., 48 Mo. 390; Limestone v. Racher, 48 Ala. 433; Board v. Wis. etc. Co., 45 Wis. 543.

[7] E. Lincoln v. Davenport, 94 U. S. 801; People v. Pueblo Co., 2 Colo. 360. Actual subscription on the company's books held unnecessary. Cass Co. v. Gillett, 100 U. S. 585; Bates v. Winters, 112 U. S. 325; Nugent v. Putnam Co., 19 Wall. 241.

[8] People v. Batchellor, 53 N. Y. 128; People v. Tazewell Co., 22 Ill. 147; Crawford v. Louisville etc. Co., 39 Ind. 192.

ing of an ordinance or resolution, which, as expressive of the municipal interest, is equivalent thereto,[1] no contract exists, which can be enforced by *mandamus*,[2] or which may not be impaired or destroyed by subsequent legislation or constitutional amendments.[3] While the conferred authority to subscribe remains unexecuted, the extinction of the railroad company or its consolidation with another company, will revoke it, as no vested rights are impaired by such revocation.[4] And the authority, while executory, is always subject to constitutional repeal or limitation.[5]

The subscription is not binding, at least between the original parties, unless it is strictly in accordance with statutory requirements,[6] and all conditions precedent must have been complied with;[7] as, for example, that the company has secured a certain amount of private subscriptions to its stock.[8] But when a subscription is once made by a municipal corporation to the stock of a railroad company, it vests a right in the railroad company, and creates a contract which is not only protected by constitutional guaranties against legislative interference or annullment, but which may be transferred to a new corporation, formed by the consolidation of the road, in which the right is vested, with another;[9] and the subscription may, likewise, be enforced by the creditors of the railroad.[10]

[1] Moultrie v. Rockingham etc. Bk., 92 U. S. 631; Clark Co. v. Paris etc. Co., 11 B. Mon. 143; Paolo etc. Co. v. Anderson Co., 16 Kan. 332; Concord v. Portsmouth, 92 U. S. 625; Livingstone Co. v. Bank, 128 Ib. 102; Scott v. Hansheer, 94 Ind. 1; Sacramento v. Kirk, 7 Cal. 419; Western Sav. Fd. v. Philada., 31 Pa. St. 174.

[2] People v. Ohio Grove, 51 Ill. 192; Com'rs v. Sharter, 50 Ga. 489; Napa etc. Co. v. Napa Co., 30 Cal. 435; Oroville etc. Co. v. Plumas Co., 37 Ib. 354.

[3] U. P. R. R. Co. v. Davis Co., 6 Kan. 256; State v. Saline Co., 45 Mo. 242; Concord v. Portsmouth, *supra*.

[4] Harshman v. Bates Co., 92 U. S. 569; Bates Co. v. Winters, 97 Ib. 83; s. c., 112 U. S. 325; McClure v. Oxford, 94 U. S. 429; State v. Garroutte, 67 Mo. 455.

[5] Cases cited, *supra*.

[6] Louisville v. Shreveport, 27 La. An. 623.

[7] Louisville etc. Co. v. Davidson Co., 1 Sneed, 637; Chambers Co. v. Clews, 21 Wall. 317.

[8] Chicago D. & V. R. R. Co. v. St. Anne, 101 Ill. 151.

[9] Nugent v. Putnam, 19 Wall. 241; Ray Co. v. Vansycle, 96 U. S. 675; County of Scotland v. Thomas, 94 Ib. 682; Scotland Co. v. Hill, 132 U. S. 107; East Lincoln v. Davenport, 94 Ib. 801; Wilson v. Salamanca, 99 Ib. 499; Menasha v. Hazard, 102 Ib. 81; Harter v. Kernochan, 103 Ib. 562.

[10] Morgan Co. v. Thomas, 76 Ill. 120.

If no conditions are prescribed by law, a municipal corporation may subscribe for stock upon such conditions as may be necessary to protect its interests.[1] Power to subscribe for stock implies power to make a conditional subscription;[2] and the voters may agree to subscribe upon any conditions they consider proper,[3] provided they are not in contravention of any statutory provision or rule of public policy.[4] Without legislative authority, a railroad company cannot agree to treat the municipality better than other stockholders, as by paying a fixed rate of interest on the stock, equivalent to the rate on the bonds.[5] And it seems that there is one necessary condition, without which there is no contract, although the subscription has been voted for, and has been accepted by the company, viz.: the condition which makes it obligatory on the company to build the road through the town which subscribes to the stock.[6] Conditions made by the municipality may subsequently be waived by it;[7] but not after they have been submitted to, and approved by, the electors.[8] And so, likewise, when a condition precedent to the subscription is adopted by the popular vote, the power of the voters being exhausted by their first exercise, it cannot be altered by a new election,[9] and it certainly cannot by the municipal government,[10] unless, perhaps,

[1] People v. Holden, 91 Ill. 446; Falconer v. Buff. etc. Co., 69 N. Y. 491; Portland etc. Co. v. Horsford, 58 Me. 23; Townsend v. Lamb, 14 Neb. 324; California etc. Co. v. Butte Co., 18 Cal. 671; Coe v. California etc. Co., 27 Minn. 197; Atchison etc. Co. v. Jefferson, 21 Kan. 309.

[2] Jacks v. Helena, 41 Ark. 213; Atchison etc. Co. v. Jefferson Co., *supra;* Brocaw v. Gibson Co., 73 Ind. 543.

[3] People v. Logan Co., 45 Ill. 162; People v. Dutcher, 56 Ib. 144; Veeder v. Lima, 19 Wis. 280; Chicago etc. Co. v. Aurora, 99 Ill. 205; Memphis Ketc. Co. v. Thompson, 24 Kan. 170.

[4] Coe v. Caledonia & M. Ry. Co., 27 Minn. 197.

[5] Pittsburgh etc. Co. v. Allegheny Co., 79 Pa. St. 210; see also, 63 Pa. St. 127.

[6] Concord v. Portsmouth Sav. Bank, 92 U. S. 625; Burges v. Mabin, 70 Iowa, 633; Barthol v. Meader, 72 Ib. 125.

[7] Randolph v. Post, 93 U. S. 502; Grand Chute v. Winegar, 15 Wall. 373; Moultrie v. Rockingham etc. Bank, 92 U. S. 631; Converse v. Fort Scott, 92 Ib. 503; Cooper v. Sullivan Co., 65 Mo. 542.

[8] Hodgman v. Chicago Ry. Co., 20 Minn. 48.

[9] State v. Daviess Co., 64 Mo. 30; People v. Waynesville, 88 Ill. 469.

[10] Platteville etc. Co. v. Galena, 43 Wis. 493; State v. Daviess Co., 64 Mo. 30; Douglas Co. v. Walbridge, 38 Wis. 179.

where the city has the power to, and does actually, consent to a slight divergence of the road.[1] Conditions, when imposed by the popular vote, are part of the authority for the subscription.[2] But it has been held that, when the statute provides that the county shall have power to subscribe after an affirmative popular vote, the power is nevertheless discretionary.[3]

The terms of the conditions must be construed according to their ordinary meaning.[4] When it appears that the funds subscribed by the municipality are in danger of being misapplied, proper security can be demanded of the company.[5]

§ 187. **Legislative power to compel the issue of bonds for public purposes.**—Not only may the Legislature authorize a municipal corporation to aid in the construction of works for public purposes, but it may in certain cases compel municipal corporations to make such contracts.[6] And, thus, when a municipality is legally indebted, the Legislature may compel it to issue its bonds for the settlement of the indebtedness,[7] upon the same principle that a tax may be imposed, and the payment of a claim against a city directed to be paid with the proceeds.[8] But there is no power in the Legislature to compel a municipality to incur a debt for a private purpose, or to issue bonds and exchange them, or the money arising from their sale, for the stock of a private corporation.[9]

§ 187 *a*. **Curative statutes, validating irregular subscriptions and invalid securities.**—Elsewhere, it is shown how far

[1] Coleman v. Marion Co., 50 Cal. 493.

[2] German Sav. Bk. v. Franklin, 128 U. S. 526.

[3] St. Joseph etc. Co. v. Buchanan Co., 39 Mo. 485.

[4] People v. Clayton, 88 Ill. 45. As to power to subscribe without a popular vote, see Hawkins v. Carroll Co., 50 Miss. 735; State v. Sch. Dis., 10 Neb. 544; State v. Green Co., 54 Mo. 540.

[5] Cumberland etc. Co. v. Washington Co., 10 Bush, 564.

[6] U. S. v. Baltimore, etc., Co., 17 Wall. 322; Carter v. Propes, 104 Mass. 236; Guilder v. Otsego. 20 Minn. 74; Thomas v. Leland, 24 Wend. 65; Philadelphia v. Field, 58 Pa. St. 320; see *ante*, § 15, for a fuller discussion of this proposition.

[7] Jefferson Co. v. People, 5 Neb. 136.

[8] Guilford v. Chenango Co., 13 N. Y. 143; New Orleans v. Clark, 95 U. S. 62; Brewster v. Syracuse, 19 N. Y. 116; *contra*, State v. Tappau, 29 Wis. 664.

[9] People v. Batchellor, 53 N. Y. 128; (Railroad aid,) Cooley Const. Lim. 230–1; Thompson v. Park Com'rs, 44 Mich. 602; Detroit v. Detroit, etc., Co., 43 Ib. 140; People v. Com'rs, 28 Ib. 228; Pompton v. Cooper Union, 101 U. S. 196.

the Legislature may go in general, in compelling municipalities to pay claims against them, which cannot be legally enforced.[1] And on the same grounds, it is held that, in the absence of constitutional restrictions, the State Legislature has the power to enact statutes, by which the irregular or defective execution of a power by a municipal corporation can be cured and validated.[2] In accordance with this general rule, the Legislature may legalize a municipal subscription to the stock of a railroad company, made without authority, provided no constitutional limit of power has been transgressed.[3] And laws of this character, acting retrospectively to obviate the objections which might be caused by irregular exercise of powers, are favored by the courts, as long as no rights of third persons are unjustly affected.[4] But such validating acts should be considered in the light of the principles contained in the Constitution of the State; and they will not be approved by the courts, when their effect would be to render valid that, which is constitutionally void. So, where the constitution limited the power to assess taxes to the *corporate authorities*, it was decided that the Legislature could not confer it elsewhere by an act validating a town election, illegally called and notified, at which assent had been given to a subscription to railroad stock. Such an act would enable persons, who were not the *corporate authorities*, to exercise the power of taxation, and coerce the corporation into incurring a debt to which it had not given its assent.[5]

It has been said that the rights of *bona fide* holders of mu-

[1] See *ante*, §§ 16, 17.

[2] Osborn v. Hide, 68 Miss. 45; Baker v. Seattle, 2 Wash. St. 576; Keithsburg v. Frick, 34 Ill. 405; Gage v. Nichols, 135 Ill. 128; Bradley v. Franklin Co., 65 Mo. 638; Louis v. Shreveport, 3 Woods, 205; Louisville & N. W. R. Co. v. Bullitt Co., (Ky. 92) 17 S. W. R. 632; Otoe Co. v. Baldwin, 111 U. S. 1; Thompson v. Perrine, 103 Ib. 806; 106 Ib. 589; Vandeventer v. Long Island City, 10 N. Y. S. 801; 57 Hun, 590; *In re* East Ave. Baptist Church, 11 N. Y. S. 113; 57 Hun, 590; Campbell v. Kenosha, 5 Wall. 194; Steines v. Franklin Co., 48 Mo. 166; *In re* Byrnes, 11 N. Y. S. 113; 57 Hun, 590; Bass v. Columbus, 30 Ga. 845; Bolles v. Brimfield, 120 U. S. 759; Dows v. Elmwood, 34 Fed. 114; Knapp v. Grant, 27 Wis. 147; Black v. Cohen, 52 Ga. 621; Kimball v. Rosendale, 42 Wis. 407.

[3] Grenada Co. v. Brogden, 112 U. S. 261; Otoe Co. v. Baldwin, 111 Ib. 1; Grannis v. Cherokee, 47 Fed. 427; Williams v. People, 132 Ill. 574; Deyo v. Otoe Co., 37 F. 246.

[4] St. Joseph v. Rogers, 16 Wall. 666.

[5] Elmwood v. Marcy, 92 U. S. 289; Marshall v. Silliman, 61 Ill. 218; Quincy v. Cooke, 107 U. S. 549; People v. Mayor etc., 51 Ill. 17.

nicipal bonds are "to be determined by the law as it was judicially construed, when the bonds were put on the market as commercial paper;"[1] but subsequent legislative sanction is equivalent to the possession of the original legal authority,[2] provided the legislative intention, to validate the invalid act, be clear, and is in no way vague or doubtful.[3]

§ 188. **Bonds issued in aid of private purposes—Constitutional prohibition.**—The incidental benefits to the public, derived from the pursuit of ordinary business by individuals or corporations, do not constitute a public purpose in the legal sense, for which bonds may be issued. Although some might find no fundamental distinction between pecuniary aid in favor of railroads, and similar aid in support of other enterprises of private persons, in the furtherance of which the public may be more or less interested, the courts recognize such a distinction; and while it is generally held that municipal bonds are valid, which are issued in aid of the construction of railroads,[4] the authorities are equally decided in holding that the city has no power, and the Legislature cannot grant to a city the power, to issue bonds in aid of any enterprise of a private character, however interested the public may be. It matters not that the object to be accomplished is to relieve and aid a large number of citizens, who have been perhaps irretrievably ruined by a far-reaching and overwhelming disaster, such as a conflagration or an epidemic;[5] or to enable individuals to erect mills or other buildings, which will be of great service in advancing the city's commercial prosperity;[6] or to aid in securing water power which would be of great benefit to the health of the city.[7]

The policy of our law is against any species of paternalism by

[1] Ralls v. Douglas, 105 U. S. 728; Green Co. v. Couness, 109 Ib. 104; Sawyer v. Concordia Parish, 12 Fed. Rep. 754; Marshall v. Elgin, 8 Ib. 783.

[2] Wilson v. Hardesby, 1 Md. Ch. 66; Jasper v. Ballou, 103 U. S. 745; Shaw v. Norfolk, etc., Co., 5 Gray, 180; Satterlee v. Matthewson, 2 Pet. 380; Wilkinson v. Leland, 2 Ib. 627; Watson v. Mercer, 8 Ib. 88; Croxall v. Sherrerd, 5 Wall. 268.

[3] Hayes v. Holly Springs, 114 U. S. 120; distinguishing Grenada Co. v. Brogden, 112 Ib. 261.

[4] See § 184.

[5] Lowell v. Boston, 111 Mass. 463; 15 Am. Rep. 59; State v. Osawkee, 14 Kan. 418; Feldman v. Charleston, 23 S. C. 57.

[6] Allen v. Jay, 60 Me. 124; Bissell v. Kankakee, 64 Ill. 249; Mather v. Ottawa, 114 Ib. 659; Bank v. Iola, 20 Wall. 655; Weismer v. Douglass, 64 N. Y. 61.

[7] Coates v. Campbell, 37 Minn. 498.

which the State, or any of its compouent parts, shall become a partner in any private industry, however important or beneficial that business may be;[1] and bonds issued for such purposes are *ipso facto* void,[2] and neither the payment of interest nor the acts of the city officials operate, by way of estoppel, to render the corporation liable on such obligations.[3]

The constitutions of many of the States prohibit counties, towns and municipal corporations, from giving money or other property to any individual or private corporation whatever,[4] or from loaning money or credit to private corporations,[5] or to a railroad company,[6] or from becoming a surety,[7] or from becoming stockholders in private corporations.[8] If these prohibitions are directed against the power of the Legislature to authorize the city to do these things, their effect is prospective, and existing statutes relating to municipalities are not repealed.[9] But

[1] See *ante*, § 144.

[2] Comstock v. Syracuse, 5 N. Y. S. 874; Loan Assn. v. Topeka, 20 Wall. 655; *In re* Eureka Basin, 96 N. Y. 42; *In re* Mayor, 11 Johns. 77; Hanson v. Vernon, 27 Iowa, 47; Eufaula v. McNab, 67 Ala. 588; Frantz v. Jacob, (Ky. 89) 11 S. W. R. 654; Ohio Val. I. Wks. v. Moundsville, 11 W. Va. 1; People's Bank v. Pomona, 28 Pac. 1089; 48 Kan. 55; People v. Parks, 58 Cal. 624; McConnell v. Hammond, 16 Kan. 228; Cen. Branch Un. P. R. Co. v. Smith, 23 Ib. 745; Brenham v. Germ. Sav. Bank, 12 Sup. Ct. 559, 975; 144 U. S. 173, 549; Cole v. Le Grange, 113 U. S. 1; Blair v. Cuming Co., 111 Am. & Eng. Cor. Cas. 363; Wasson v. Com'rs, 27 W'kly L. Bul. 134; Getchell v. Benton, (Neb. 90) 47 N. W. R. 468; Parkersburg v. Brown, 106 U. S. 487; Curtis v. Whipple, 24 Wis. 350; Jenkins v. Andover, 111 Mass. 354.

[3] Parkersburg v. Brown, 106 U. S. 487.

[4] This prohibition will be found in the Constitutions of New York, New Jersey, New Hampshire, Pennsylvania, Ohio, Indiana, Illinois, Wisconsin, Missouri, Arkansas, Texas, California, Oregon, Colorado, Georgia, Alabama, Florida and Louisiana.

[5] In Tennessee and Nevada and in all States cited in last note except Wisconsin.

[6] In Connecticut and Nebraska.

[7] In New Hampshire, New Jersey, California, Colorado, and Louisiana.

[8] In New Hampshire, Connecticut, New York, New Jersey, Pennsylvania, Ohio, Indiana, Illinois, Nebraska, Tennessee, Missouri, Arkansas, Texas, Oregon, Nevada, Colorado, Georgia, Alabama, Florida, Louisiana, Nebraska.

[9] Gillim v. Davis Co., (Ky. 92) 14 S. W. R. 838; Callaway Co. v. Foster, 93 U. S. 567; Randolph Co. v. Post, 93 Ib. 502; Moultrie v. Fairfield, 104 Ib. 370; Red Rock v. Henry, 106 Ib. 596; Sweet v. Syracuse, (N. Y. 92) 27 N. E. R. 1081; Ralls Co. v. Douglas, 105 U. S. 728; Louisiana v. Taylor, 105 Ib. 454; Cass v. Gillett, 100 Ib. 585, 592; Fairfield v. Gallatin Co., 100 Ib. 47; Louisville v. Portsmouth Sav. Bk., 104 Ib. 469; Calhoun Co. v. Galbraith, 99 Ib. 214; Schuyler Co. v. Thomas, 98 Ib. 169; Smith v. Clark Co., 54 Mo. 58; Fosdick v. Perryville, 14 Ohio St. 472.

when the constitutional provision prohibits a municipal corporation from employing its funds or its credit in aid of the prohibited purposes, all existing statutes, which authorized such aid, will be thereby repealed, and the power of the city to aid the private or semi-public enterprises which fall under the constitutional ban, is thereby taken away, unless rights have become vested thereunder.[1]

§ 189. **Consent of taxpayers or voters as a condition precedent to issue of municipal bonds.**—In nearly all the States the constitutions require that, before a municipal corporation can create a bonded indebtedness, the consent of a certain proportion of the taxpayers or voters shall be obtained. But a popular vote cannot give a municipality a power, which it does not otherwise possess. If, for example, a city cannot claim, by express provisions of a statute or constitutional provision, or by necessary implication therefrom, the power to issue bonds for a particular purpose, or to create any other indebtedness, a popular vote is not enough to invest a city with such a power.[2] The popular vote is only required as a condition precedent to the exercise of a power conferred by the State. In a previous paragraph,[3] the submission to a popular vote of the proposition, to subscribe to stock of a railroad, is fully explained. Here, the general subject is explained in connection with the general creation of municipal indebtedness.

All the statutory requirements as to the preliminaries and details of the election are mandatory;[4] and here the word *may* generally means *must*.[5] But a mere informality, or a slight irregularity, not affecting the result, will not invalidate the bonds in the hands of a *bona fide* holder.[6] In some States a petition,

[1] Aspinwall v. Com'rs, 22 How. 464; Concord v. Port. Sav. Bk., 92 U. S. 625; Buff. etc. R. Co. v. Falconer, 103 Ib. 821; Jarrolt v. Moberly, 103 U. S. 508; Kelly v. Milan, 127 U. S. 139, 154; Norton v. Brownsville, 129 U. S. 479; Pulaski v. Gilmore, 21 Fed. Rep. 870; List v. Wheeling, 7 W. Va. 501.

[2] Allen v. Louisiana, 103 U. S. 80; Hayes v. Holly Springs, 114 U. S. 120.

[3] § 186.

[4] Bogart v. Lamotte, (Mich. 92) 44 N. W. Rep. 612; Lewis v. Bourbon Co., 12 Kan. 186; Bowen v. Greensboro, (Ga.) 4 S. E. Rep. 159. Cf. Natl. Bk. of Commerce v. Town of Grenada, 44 Fed. Rep. 262.

[5] Leavenworth etc. R. R. Co. v. Platte Co., 42 Mo. 171; Steines v. Franklin Co., 48 Ib. 167.

[6] National Bank v. Grenada, 41 Fed. 87; Ranney v. Baeder, 50 Mo. 600; Irwin v. Lowe, 89 Ind. 540; Madison v. Priestley, 42 Fed. R. 817; Pana

signed by a majority of the taxpayers, is required by statute as a preliminary to an election, or to action by a county judge, in determining whether bonds shall be issued in aid of railroads; and in the State of New York it has been repeatedly held that these details shall be strictly pursued, before the election can be had, or the county judge exercise jurisdiction.[1] But it has been held that, where a statute provided that stock could be subscribed for on a petition of two thirds of the citizens,—upon the principle, that slight irregularities would not vitiate the exercise of the power,—the municipality was deemed to be concluded, as to the fact of a petition by the required number, by a declaration upon the minutes of the council that "the freeholders with great unanimity had petitioned," coupled with the recitals in the bonds that they were issued by virtue of a city ordinance.[2]

Reasonable care should be observed in the manner of voting;[3] and if more than one proposition is submitted at the same time,[4] they should be stated separately, and distinctly announced as being two or more independent propositions.[5] For, if two propositions are to be voted on, and they are so blended that the voters cannot give their assent to one, without dissenting at the same time to the other, the election is void.[6] When the statute requires the authorized amount of the indebtedness to be specified, a vote not specifying it is void, as between the immediate parties,[7] in an application for *mandamus*, but does not invalidate the bonds in the hands of a *bona fide* holder.[8] When the required notice of the election is not given[9] or when the elec-

v. Bowles, 107 U. S. 529; Johnson City v. Thayer, 94 Ib. 631; Baker v. Seattle, 2 Wash. St. 576; State v. Hardey, 18 Pac. Rep. 942.

[1] Craig v. Andes, 93 N. Y. 405; People v. Spencer, 55 Ib. 1; People v. Smith, 55 Ib. 135; Wellsborough v. New York etc. Co., 76 Ib. 182; Metzger v. Attica R. Co., 79 N. Y. 171; Town of Solon v. Williamsburg Sav. Bk., 35 Hun, 1; Rich v. Mentz Tp., 134 U. S. 632; 18 Fed. Rep. 52.

[2] Van Hostrup v. Madison City, 1 Wall. 291; Meyer v. Muscatine, 1 Wall. 384.

[3] Ranney v. Baeder, 50 Mo. 600.

[4] Thompson Hous. Co. v. Newton, 42 Fed. R. 723; Fulton Co. v. Miss. etc. Co., 21 Ill. 338.

[5] Thompson H. E. Co. v. Newton, 42 Fed. Rep. 723; San Luis Obispo v. Haskin, 91 Cal. 549; Baker v. Seattle, 2 Wash. St. 576.

[6] Gray v. Mount, 45 Iowa, 591; Metcalf v. Seattle, 1 Wash. St. 305; Yesler v. Seattle, 1 Ib. 308.

[7] State v. Saline Co., 45 Mo. 242; People Nat. Bank v. Pomona, 48 Kan. 55; Mercer Co. v. Pittsburgh etc. Co., 27 Pa. St. 389.

[8] State v. Saline Co., 48 Mo. 390.

[9] George v. Oxford, 16 Kan. 72; Harding v. Rockford etc Co., 65 Ill. 90.

tion is not called by those officials, who are empowered by law to call it, the entire proceedings are void as between the original parties, and the issue of the bonds may be enjoined.[1]

The law does not require such a degree of technical accuracy in the notice of or warrant issued for an election or town meeting,[2] and equity will not cancel bonds for a mere irregularity in calling a town meeting, at which their issue was ordered.[3] But a notice which fails to state the amount, rate of interest and the time and place of payment, is insufficient.[4] When a notice is required to be given by the supervisors, as by posting it in some conspicuous place, the manual act of posting may be performed by others, authorized by them.[5] When a statute requires that consent be given to the issue of bonds by a majority of the legal voters, a majority of the legal voters who vote at the election is held to be sufficient;[6] and the proper method to ascertain whether such consent has been given, is by a count of the ballots cast.[7] In Missouri, however, it has been held that the expression, "two thirds of the qualified voters" meant, *not two thirds of the number actually voting*, but two thirds of the whole number of qualified voters who are resident in the town, according to the registration lists.[8]

In construing statutes requiring consent of this kind, the "inhabitants" mean *legal voters*,[9] and a majority of such voters is sufficient, when the consent of a majority of the taxpayers is required;[10] but in Missouri a distinction is made between

[1] Jacksonville etc. R. Co. v. Virden, 104 Ill. 339; McVichie v. Knight, (Wis. 92) 51 N. W. Rep. 1094; Winamae v. Huddleston, (Ind. 92) 31 N. E. R. 561; National Bank v. Grenada, 44 Fed. R. 262.

[2] Belfast etc. Co. v. Brooks, 60 Me. 568.

[3] Sauerhering v. Iron Ridge etc. Co., 25 Wis. 447.

[4] Bowen v. Mayor, 79 Ga. 709; Chicago R. Co. v. Pinckney, 74 Ill. 277; Woodward v. Reynolds, (Conn.) 19 Atl. Rep. 511. See as to requisites of notice when railroad is to be aided: Marshall v. Silliman, 61 Ill. 218; State v. Roggen, 22 Neb. 118.

[5] Phillips v. Town of Albany, 58 Wis. 340.

[6] Metcalf v. Seattle, 25 Pac. Rep. 1010; 1 Wash. St. 297; State v. Snodgrass, 25 Pac. Rep. 1014; 1 Wash. St. 305; Day v. Austin, (Tex. 93) 22 S. W. Rep. 757.

[7] St. Joseph v. Rogers, 16 Wall. 644; Carroll Co. v. Smith, 111 U. S. 556; People v. Winant, 48 Ill. 263; Cass Co. v. Johnston, 95 U. S. 560.

[8] State v. Harris, 96 Mo. 29; Cass Co. v. Johnston, 95 U. S. 360; Bell v. Americus, 3 S. E. Rep. 612; but compare State v. Mayor of St. Joseph, 37 Mo. 270.

[9] Walnut Tp. v. Wade, 103 U. S. 683.

[10] Hannibal v. Fauntleroy, 105 U. S. 408; Day v. Austin (Tex. 93), 22 S. W. Rep. 757.

"qualified electors" and "legal voters."[1] In the State of North Carolina, it has been repeatedly held that a "majority of the qualified electors" means a majority of the registered voters of the previous election, and the municipal authorities have no power under such circumstances to order a new registration.[2] This seems the most reasonable construction that can be placed upon this expression. A statute, which permitted bonds to be issued if "two thirds of the qualified voters voting at such election" should assent, was held by the Supreme Court of the United States to be unconstitutional, because repugnant to a clause in a State Constitution which prohibited such subscription, unless assented to by two thirds of the qualified voters of the municipality.[3]

It is well settled that municipal authorities may rescind any action taken by them, by means of resolution or ordinance, by a subsequent ordinance or resolution regularly enacted, wherever the vested rights of third parties have not intervened. And this principle applies to their action, in voting to issue bonds, or to enter into any contract, provided the rescission occurs before the rights of third persons have become vested.[4] So also, when a taxpayer had given his written consent, it was held that he might revoke it by a writing executed with the proper formalities, before it had been acted upon.[5] So, likewise, a signer of a petition to a county judge may withdraw his name,[6] if he do so before the judge has acquired jurisdiction by the petition being submitted to him.[7] On the other hand, a proposition, once voted down, may on resubmission be adopted, unless the enabling act shows a contrary legislative intent.[8]

§ 189 *a*. **Limitations upon municipal indebtedness.**—In consequence of the hasty and injudicious manner in which mu-

[1] Sanford v. Prentice, 28 Mo. 358; comp. Taylor v. Taylor, 10 Minn. 107.

[2] Smith v. Wilmington, 98 N. C. 343; Southerland v. Goldsborough, 96 N. C. 49; McDonald v. Mass. etc. Co., 96 Ib. 517; Simpson v. Mecklinburg Co., 84 N. C. 158.

[3] Harshman v. Bates Co., 92 U. S. 569.

[4] § 146.

[5] Springport v. Teutonia Sav. Bk., 84 N. Y. 403; People v. Allen, 52 N. Y. 538.

[6] People v. Sawyer, 52 N. Y. 296; *In re* Taxpayers of Greene, 38 How. Pr. 515.

[7] People v. Henshaw, 61 Barb. 409.

[8] Soc. for Sav. v. New London, 29 Conn. 174; Smith v. Clark Co., 54 Mo. 58; Woodward v. Calhoun Co., 2 Cent. Law Jour. 396.

nicipal debts have been contracted, limitations have in some instances been imposed upon the power of the Legislature, or of the municipal corporation, to incur indebtedness.[1] Limitations upon the power of municipal corporations to contract debts should be construed according to the terms of the constitution or statute in question, with reference to existing facts; and any construction which would defeat their object should not be favored.[2]

If this limitation is imposed upon the Legislature, it will not repeal any existing power which has been vested in a municipality by prior statute.[3] But if the limitation or restriction is applicable to a municipality, it repeals at once *pro tanto* any charter provision by which unlimited power to contract debts could previously have been exercised.[4] But this prohibition will not affect the prior indebtedness of the municipality, even though that exceeds the limit prescribed.[5] Nor will it affect contracts already made,[6] or invalidate bonds when the authority to issue them was legally conferred, prior to the adoption of the constitutional or statutory limitation.[7] The person who is about to enter into a contract, by which he will become a municipal creditor, must ascertain at his peril the legal limits of municipal indebtedness, and determine for himself whether the

[1] In the Constitutions of Maine, Illinois, Wisconsin, Iowa, West Virginia and Missouri, municipal corporations are forbidden to become indebted to an amount exceeding 5 per cent of the assessed valuation. In Georgia and Pennsylvania the limit is 7 per cent, in New York 10 per cent, in Colorado 3 per cent, in Indiana 2 per cent, and South Carolina 8 per cent. In Oregon no county can incur debts to exceed $5,000, except to repel invasion or suppress insurrection. In Indiana, the limit may be exceeded, in order to provide for the people in time of great public calamity; in Missouri, to erect a courthouse; in New York, a gaol; and in Colorado, to supply water. No municipality can contract any except a temporary debt in Missouri, California and Georgia, without the assent of two thirds of its voters, in West Virginia without three fifths, and, in Colorado, a majority.

[2] Law v. People, 87 Ill. 385; French v. Burlington, 42 Iowa, 614, 619.

[3] Cass v. Dillon, 2 Ohio St. 607; Leavenworth v. Miller, 7 Kan. 499; Patterson v. Yubaco, 13 Cal. 175.

[4] East St. Louis v. People, 124 Ill. 655; 23 Am. & Eng. Cor. Cas. 408; Gould v. Paris, 68 Tex. 511; 17 Am. & Eng. Cor. Cas. 350; List v. Wheeling, 7 W. Va. 501.

[5] Scott v. Davenport, 34 Iowa, 208.

[6] Moultrie v. Rockingham, etc. Bank, 92 U. S. 631; Davenport G. L. etc. Co., 13 Iowa, 229; Bound v. Wisc. etc. Co., 45 Wis. 543.

[7] Board v. Bolton, 104 Ill. 220.

proposed contract will cause this limit to be exceeded.[1] In such cases, he cannot enforce payment of the debt due him.[2] It is well settled that any prohibition of indebtedness, beyond a specified limit, will apply in all cases, no matter what form the debt may assume, whether express or implied [3] or for what purpose incurred,[4] and if it is couched in general terms the limitation is not applicable to bonds alone.[5] There is a conflict in the decisions as to whether such constitutional or statutory prohibitions apply to an indebtedness arising out of duties, which are by law imposed upon municipal corporations, as where salaries must be paid. The Supreme Court of the United States has held [6] that a clause in a State Constitution which provided that the indebtedness of any county for all purposes should not exceed a specified limit, applied to warrants for fees, salaries and other current expenses.[7] But there are other cases which hold, that a municipality has the right, as a matter of necessity, to incur debts for its ordinary running expenses after the constitutional limit has been reached; and that such prohibitions do not apply to indebtedness which a municipality is by law compelled to assume.[8] So, when the prohibition is aimed against the incurring of indebtedness *for general purposes*, it has been held that the laying of a sidewalk, being a special purpose, was not within the rule.[9]

Liabilities, *ex delicto* which are cast upon it by law, cannot be shifted from a municipal corporation by a plea, that its in-

[1] Buchanan v. Litchfield, 102 U. S. 278; Doon v. Cummins, 142 U. S. 366; French v. Burlington, 42 Iowa, 614; Brown v. Point Pleasant, 15 S. E. Rep. 209; Bank v. Grenada, 48 Fed. R. 278; Nesbit v. Riverside, 144 U. S. 610; Spilman v. Parkersburg, 35 W. Va. 605.

[2] Law v. People, 87 Ill. 385.

[3] Litchfield v. Ballou, 114 U. S. 190.

[4] Davenport v. Kleinschmidt, 6 Mont. 502; Council Bluffs v. Stewart, 51 Iowa, 385; Lake v. Rollins, 130 U. S. 662.

[5] Prince v. Quincy, 105 Ill. 138; Erie's App., 91 Pa. St. 398; Wisc. etc. Co. v. Taylor Co., 52 Wis. 37.

[6] Lake Co. v. Rollins, 130 U. S. 662.

[7] Followed in Springfield v. Edwards, 84 Ill. 626; Law v. People, 87 Ib. 385; Fuller v. Chicago, 89 Ib. 282; Fuller v. Heath, 89 Ill. 297; Princes v. Quincy, 105 Ill. 138; 128 Ill. 443; Sackett v. New Albany, 88 Ind. 473.

[8] Potter v. Douglas, 87 Mo. 239; Laycock v. Baton Rouge, 35 La. An. 475; Grant v. Davenport, 36 Iowa, 396; Grant v. Lake Co., 17 Oreg. 453; Corpus Christi v. Woessner, 58 Texas, 462; Terrell v. Dissaint, 71 Tex. 770; Hoppikus v. Com'rs, 16 Cal. 249; People v. Pacheco Co., 27 Ib. 207.

[9] Hitchcock v. Galveston, 96 U. S. 341; Byrne v. Covington, (Ky. 93) 21 S. W. Rep. 1050.

debtedness has reached the legal limit.[1] This doctrine has been applied in an action to recover damages for personal injuries,[2] in an action upon a liability arising out of the want of fidelity of a municipal officer,[3] in actions for damages caused by injuries received from negligently constructed streets, gutters and sidewalks,[4] and to recover money paid illegally,[5] or by mistake,[6] and without consideration.

An adequate water supply is a prime necessity of municipal life; but this cannot be contracted for and a debt incurred to be paid in fixed annual sums, if the limit of indebtedness has been reached, unless steps are taken to raise by taxation the funds needed to meet the accruing debt.[7] But it is held in Iowa and New York that, as the money paid for water is part of the ordinary expenses of the city, such contracts are not within the prohibition;[8] and in other States, the future liability for the payments upon such a contract is not considered as increasing the debt, the contract being deemed a continuing provision for the liquidation of current expenses,[9] although payable in installments. Although there is some fluctuation in the decisions, the majority of the cases favor the view that, where the contract is one which is to be performed during a long period, and the city is only bound to pay as this performance takes place, the contract is not prohibited, although the amount payable on the whole contract may exceed the limits of the authorized indebtedness.[10] But a debt payable in the future is no less a debt than one payable presently; and hence, as a general rule, when a debt is incurred which the city is bound to pay, the date

[1] People v. May, 9 Colo. 404, 410.

[2] Bloomington v. Perdue, 99 Ill. 329.

[3] Chicago v. Sexton, 115 Ill. 230.

[4] Bartle v. Des Moines, 38 Iowa, 414; Rice v. Same, 40 Ib. 638.

[5] Thomas v. Burlington, 69 Iowa, 140.

[6] McCracken v. San Francisco, 16 Cal. 591, 632.

[7] Salem W. Co. v. Salem, 5 Oreg. 30; Buchanan v. Litchfield, 102 U. S. 278; Fuller v. Chicago, 89 Ill. 282; State v. Atlantic City, 49 N. J. L. 558; Prince v. Quincy, 105 Ill. 138.

[8] Grant v. Davenport, 36 Iowa, 396; Utica Water Co. v. Utica, 31 Hun, 431.

[9] Smith v. Dedham, 144 Mass. 177; Valparaiso v. Gardner, 97 Ind. 1; Burl. W. Co. v. Woodward, 49 Iowa, 58.

[10] East St. Louis v. E. St. Louis, etc., Co., 98 Ill. 415; 38 Am. Rep. 97; Dively v. Cedar Falls, 27 Iowa, 233; East St. Louis v. Flanigan, 26 Ill. App. 449. No debt is created until the contract has been performed. Weston v. Syracuse, 17 N. Y. 110; Cf. Burl. W. Co. v. Woodward, 49 Iowa, 58, 62.

upon which it will have to be paid is not an element to be considered, in construing the application to the case under inquiry of a constitutional limitation of indebtedness.[1] "But if the fact of the indebtedness depends upon some act of the city, or upon its volition to be exercised or determined at some future date, then no indebtedness is incurred and none will be until the period arrives."[2]

If the contract does not fix any liability upon the corporation, as when a contractor agrees to build a sewer, and accept as pay certificates, assessing the benefits against property owners, it is not invalidated, because at the time the limit of municipal indebtedness had been reached.[3] There is in such a case no increase in the municipal indebtedness. It has been held that these constitutional restraints are not intended to prohibit the issue of bonds to pay off an already existing debt, or the issue of coupons to provide for the payment of interest on the same, neither being the creation of a debt.[4]

The fact that by incurring the debt the city will acquire valuable property, from which a revenue will be derived, does not remove the constitutional objection.[5] As examples of contracts, which were invalid, because the municipal indebtedness was exceeded, may be instanced, contracts to pay an annual rent for a market house,[6] for grading streets,[7] and for building a court house.[8]

The expenses, incidental to the protection or assertion of the disputed rights and liabilities of the city, by a resort to a legal action or otherwise, do not come within the constitutional limitation of the amount of the municipal indebtedness. So, if the limit has been actually or nominally reached, a city will not be prohibited from contracting, upon a contingent fee with

[1] Niles W. Wks. v. Niles, 59 Mich. 311; Law v. People, 84 Ill. 385; Culbertson v. Fulton, 127 Ill. 30; Prince v. Quincy, 128 Ill. 443; Coulson v. Portland, Deady (U. S.) 481; Terrill v. Dessaint, (Tex.) 9 S. W. 593; Davenport v. Kleinschmidt, 6 Mont. 502; Wallace v. San Jose, 29 Cal. 180. Indebtedness defined. Sackett v. New Albany, 88 Ind. 473.

[2] Burlington W. Co. v. Woodward, 49 Iowa, 62.

[3] Davis v. Des Moines, 75 Iowa, 500.

[4] Powell v. Madison, 107 Ind. 106.

[5] Scott v. Davenport, 34 Iowa, 208.

[6] Erie Appeal, 91 Pa. St. 398.

[7] French v. Burlington, 42 Iowa, 614; Dbrew v. Altoona, (Pa.) 15 Atl. 636.

[8] Hebard v. Ashland Co., 55 Wis. 145; People v. Johnson, 6 Cal. 499; Book v. Earl, 87 Mo. 246.

an agent, to contest the validity of a certain indebtedness, and thereby reduce the amount of the city debt.[1]

In computing the amount of a city's indebtedness, railroad aid bonds should be included; and money in the treasury which is applicable to the payment of such bonds cannot properly be deducted, in order to bring the amount of indebtedness within the permitted limit.[2] Nor are uncollected taxes, or the levy for the current year, to be deducted.[3] On the other hand, coupons, which are attached to the bonds, are not to be included.[4] The date of the assessed valuation is important, in the consideration of this question. The assessments, which are made by the local assessors, are to furnish the basis for computation;[5] and the assessment for the year, immediately preceding that in which the indebtedness is incurred, must be selected;[6] and if, when the indebtedness was incurred, the limit was not exceeded, the debt will not be invalidated by a subsequent reduction of the value of the assessed property.[7]

Even though the limits of municipal indebtedness may have been reached, it is held that the appropriation of anticipated income does not create an indebtedness,[8] and is valid.[9] But the warrant, order or other instrument, which is issued after the limit is passed, by which taxes, levied but not collected, are appropriated, must not be general in form, but must be specifically drawn against the uncollected taxes of the particular year, or against the fund to which the money was advanced;[10] and it must have the legal effect of an assignment of the anticipated income, and impose on the proper officers the duty of

[1] Williams v. Louisana, 103 U. S. 637; Logansport v. Dykeman, 116 Ind. 15; Talbot v. Iberville, 24 La. An. 135.

[2] Waxahachie v. Brown, 67 Tex. 519.

[3] Jones v. Hurlbut, 13 Neb. 125; Council Bluffs v. Stewart, 51 Iowa, 385.

[4] Durant v. Iowa Co., Woolw. (U. S.) 69.

[5] People v. Hammill, 22 Am. v. Eng. Cor. Cas. 39.

[6] Culbertson v. Fulton, 127 Ill. 30; Wilkinson v. Van Orman, 70 Iowa, 230.

[7] State v. Babcock, 24 Neb. 640.

[8] State v. Parkinson, 5 Nev. 17; Koppikus, Com'rs, 16 Cal. 248; People v. Pacheco, 27 Ib. 175.

[9] East St. Louis v. Flanigan, 26 Ill. App. 449; State v. McCauley, 15 Cal. 430; People v. Brooks, 16 Ib. 1; Grant v. Davenport, 36 Iowa, 396; People v. May, 9 Col. 404, 411; Springfield v. Edwards, 84 Ill. 626; Fuller v. Heath, 89 Ib. 296.

[10] Fuller v. Chicago, 89 Ill. 282; Fuller v. Heath, 89 Ib. 296.

collecting the tax, and paying it to the assignee. But any liability thereby imposed must rest on these officers, and not upon the city, in order to escape the characterization of a municipal indebtedness.[1]

If the debt is severable, without the violation of any principle of law or equity, so that part may be within the constitutional limit, the invalidity will attach to that portion only, which constitutes the excess.[2] But if the debt is entire and indivisible, as when a county contracted to issue bonds as a donation of a specified sum, to aid a railroad, the whole transaction is *ultra vires*, and all the bonds are void; and the aid of equity cannot be secured to scale down the donation so far as it is in excess of the limit.[3] Any provision, by which a municipal corporation is forbidden to exceed a certain limit of debt, will operate to prevent money, loaned in violation of its terms, from becoming a lien upon the works which are constructed with the money, so illegally borrowed;[4] and any statute creating such a lien is invalid.[5]

Not only will contracts, entered into by a municipal corporation in disregard of the constitutional prohibition, be invalid, but a taxpayer may enjoin the city from entering into such a contract,[6] from carrying it out,[7] from issuing bonds in excess of the limit, in payment of the debt so contracted,[8] and from levying and collecting taxes to pay such a debt.[9] So, also, if the city neglect to defend itself, when an action is brought to compel it to levy a tax for the payment of an indebtedness beyond the limit, a taxpayer is entitled to intervene, and set

[1] Springfield v. Edwards, 84 Ill. 626; Law v. People, 87 Ib. 385, 399, 400; People v. May, 9 Col. 404, 412, 413.

[2] Culbertson v. Fulton, 127 Ill. 30; McPherson v. Foster, 43 Iowa, 48; 22 Am. Rep. 215; Stockdale v. Wayland, 47 Mich. 226; Daviess Co. v. Dickinson, 117 U. S. 657. In this case the court says: "Which of the bonds are valid and which invalid? We can have no doubt that the test is: Which were first delivered?"

[3] Hedges v. Dixon Co., 37 Fed. Rep. 304; Millerton v. Frederick, 114 Pa. St. 435.

[4] Litchfield v. Ballou, 114 U. S. 190.

[5] Mosher v. Sch. Dis., 44 Iowa, 122.

[6] Springfield v. Edwards, 84 Ill. 626; Valparaiso v. Gardner, 97 Ind. 1.

[7] Davenport v. Kleinschmidt, 6 Mont. 502.

[8] Wilkinson v. Van Ormon, 70 Iowa, 230.

[9] Howell v. Peoria, 90 Ill. 104.

up this violation of constitutional or statutory limitation as a defence.[1]

A limitation of this sort does not invalidate the legal consolidation of two or more municipalities, although the indebtedness of one or of all exceeds the limit.[2]

If the excess is caused by an order, which in the payee's hands is invalid, his assignee will take it subject to this defence, existing against the assignor, where such an instrument is not deemed to be negotiable paper;[3] but if bonds are issued to satisfy a judgment against a municipality, and are held by an innocent holder, without notice, their validity cannot be attacked on the ground that the judgment was rendered on warrants, drawn in excess of the limitation of an indebtedness.[4]

§ 190. **The municipal coupon bond, its nature and definition.**—When a municipal corporation undertakes to create an indebtedness, and to issue negotiable paper in settlement of the same, the obligation takes the form of a coupon bond, as it is called, which is commonly used, not only by municipal corporations, but likewise by the State and National Governments,[5] the Territorial Governments,[6] and all sorts of private corporations,[7] and even, under extraordinary circumstances, by private individuals.[8] The coupon bond is a primary obligation, in the nature of a promissory note, promising to pay a sum of money on a day certain in the future, to which are attached certain other obligations called coupons,[9] which call for the payment of the installments of interest on the principal debt, as they fall due; each coupon representing an installment of interest, and payable when the installment of interest falls due. The coupon may be severed from the bond at or before its maturity, and when severed may and does pass as a separate and independ-

[1] Richards v. Supervisors, 69 Iowa, 612.

[2] True v. Davis, (Ill.) 29 Am. & Eng. Corp. Cas. 12. See *ante*, § 58.

[3] Nat. St. Bank v. Marshall, 39 Iowa, 490.

[4] Sioux Co. v. Osceola Co., 45 Iowa, 168.

[5] Tiedeman's Commercial Paper, § 132.

[6] National Bank v. County of Yankton, 101 U. S. 133.

[7] Tiedeman's Commercial Paper, § 117.

[8] Simeon Leland in Bankruptcy, 6 Ben. 175.

[9] They are called coupons from the French verb, *couper*, to cut, because they are so attached that they may be cut off, whenever they fall due. 2 Daniel's Negot. Inst. § 1489.

ent security.[1] It matters very little what the form of the coupon is, it practically amounts to nothing more than a promissory note, essentially differing from the ordinary promissory note only in being payable without grace.[2] Sometimes the coupon is in the form of a draft or order on a bank; but in that case it differs from a bill of exchange in that it need not be presented for acceptance.[3] When it is payable to bearer or order, the coupon is of course negotiable,[4] and may be sued on by the holder, though the bonds are in possession of some one else.[5]

Notwithstanding the possibility of the severance of the coupon from the bond, the relation between the two is so intimate that the power to issue the coupons is implied from the legislative authority to issue bonds.[6] And the mortgage, which is given to secure the payment of the bond, will cover each and every coupon, whether attached or detached, together with interest on the coupon.[7]

[1] Clark v. Iowa City, 20 Wall. 584; Thompson v. Lee County, 3 Wall. 327; City v. Lamson, 9 Wall. 477; Clarke v. Janesville, 10 Wis. 136; Rose v. City of Bridgeport, 17 Conn. 243; Railway v. Cleneay, 13 Ind. 161; Commonwealth v. Industrial Assn., 98 Mass. 12; Spooner v. Holmes, 102 Mass. 503; Arents v. Commonwealth, 18 Gratt. 776; Com'rs of Knox Co. v. Aspinwall, 21 How. 539; Town v. Culver, 19 Wall. 84; Beaver County v. Armstrong, 44 Pa. St. 63; Maddox v. Graham, 2 Metc. (Ky.) 56; Brainard v. N. Y. & H. R. R. Co., 25 N. Y. 496; Evertsen v. Nat. Bank of Newport, 11 N. Y. S. C. (4 Hun) 694; Langston v. S. C. R. R. Co., 2 S. C. 249; Nat. Ex. Bank v. Hartford R. R. Co., 8 R. I. 375.

[2] 2 Daniel's Negot. Inst. § 1490 *a*; Arents v. Commonwealth, 18 Gratt. 773. But it has been held lately in New York that coupons are entitled to days of grace. Eversten v. Nat. Bank of Newport, 66 N. Y. 22. See Cooper v. Town of Thompson, 13 Blatchf. 434.

[3] Va. & Tenn. R. R. Co. v. Clay, cited from MSS. Special Court of Appeals of Va. in 2 Daniel's Negot. Inst. § 1489.

[4] Aurora v. West, 7 Wall. 82.

[5] Thomson v. Lee Co., 3 Wall. 327.

[6] Arents v. Commonwealth, 18 Gratt. 773.

[7] Beaver County v. Armstrong, 44 Pa. St. 63; Union Trust Co. v. Monticello etc. R. R. Co., 63 N. Y. 314; Miller v. Rutland etc. R. R., 4 Vt. 399; Gilbert v. W. C. V. M. etc. R. R. Co., 33 Gratt. 599; Haven v. Grand Junction R. R. Co., 109 Mass. 88. The mortgage proceeds of sale in case of insufficiency are distributed *pro rata* according to the face value, among all the holders of the bonds and coupons, covered by the mortgage. Stanton v. A. & C. R. R. Co., 2 Woods C. C. 523; Ketchum v. Duncan, 96 U. S. 671; Pennock v. Coe, 23 How. 130; *In re* Regent's Canal Iron Works Co., 3 Ch. Div. 43; Hodge's Appeal, 84 Pa. St. 359. But the coupons cannot share with the *bona fide* bondholders, where the coupons have been taken up and paid by certain persons, who advanced the

§ 190 *a*. **Execution of the municipal bond—By what officials must it be signed.**—All questions concerning the sufficiency of execution should, in every instance, be tested and decided strictly in conformity with the terms of the enabling statute, from the material requirements of which no departure is allowed [1] or excused by the fact, that full value has been received for the bonds.[2]

Unless otherwise provided, bonds should be signed by the municipal officers,[3] as, for example, the supervisors and clerk of a town.[4] But if a council or other municipal governing body is authorized to sign, the signatures of the majority will generally be held to be sufficient.[5]

An officer will be presumed to have signed a bond during his term;[6] and a statute which prescribes that a certain officer shall sign bonds, means the officer who is actually holding office *when they are signed*.[7] And an otherwise invalid signature cannot be made valid and binding upon the corporation, by ante-dating or post-dating the bonds, in order to make them appear to have been signed when the officer signing was in office, and was therefore authorized to sign for the corporation. A false date is equivalent to a forgery under such circumstances, and it can be shown, even against *bona fide* holders of the bonds.[8] Purchasers must always take the risk of the genuineness of the signatures. For if a statute requires that a particular officer should sign bonds, they are not valid without his signature.[9]

No municipal officer has the implied power to bind the cor-

money for that purpose to the corporation which issued the bonds. Union Trust Co. v. Monticello & P. R. R. Co., 63 N. Y. 311. See Harbeck v. Vanderbilt, 20 N. Y. 398; Miller v. Rutland etc. R. R. Co., 40 Vt. 399; Haven v. Grand Junction R. R. Co., 109 Mass. 88; James v. Johnson, 6 Johns. Ch. 423; Robinson v. Leavitt, 7 N. H. 100.

[1] Anthony v. Jasper Co., 101 U. S. 693; Coler v. Cleburne, 131 Ib. 162; Young v. Clarendon, 132 Ib. 340.

[2] Aroma v. Auditor, 15 Fed. Rep. 843; Bank v. Statesville, 84 N. C. 169; Melvin v. Lisenby, 72 Ill. 63.

[3] Lane v. Embden, 72 Me. 354; Middleton v. Mullica, 112 N. Y. 433.

[4] Walnut v. Wade, 103 U. S. 683.

[5] First N. Bk. v. Arlington, 16 Blatch. 57; Burleigh v. Rochester, 5 Fed. Rep. 667; Marion v. Clark, 94 U. S. 278; Bissell v. Spring Val. Tp., 110 Ib. 162; Blair v. Cumming Co., 111 Ib. 363.

[6] Sch. Dis. v. Xenia Bank, 19 Neb. 89.

[7] Coler v. Cleburne, 131 U. S. 162.

[8] Anthony v. Jasper Co., 101 U. S. 693; Weyauwega v. Ayling, 99 Ib. 112.

[9] Bissell v. Sp. Valley, 110 U. S.

poration by signing negotiable securities in its name. The mayor cannot,[1] nor the trustees and selectmen,[2] nor the mayor and recorder, nor the city auditor.[3] Nor is there any such implied power in the judges or supervisors,[4] or in the clerk of the County Court, and county boards of supervisors,[5] or in the police jury of a parish.[6] In all these cases, the legislative power of the city or county, in whomever such power is lodged, must designate and empower the officers, who are intended to execute the bonds for such city or county.

A signing in blank, the blanks being filled in afterwards,[7] does not invalidate the bonds; and the omission to countersign bonds is a defect of execution, which a court of equity will remedy.[8] Although drawn and signed, municipal bonds take effect only *by* and *on* delivery.[9]

§ 191. **Negotiability of coupon bonds—Rights of holder of the same.**—Although it was a rigid rule of the old law merchant that a seal destroyed the negotiability of commercial paper,[10] the modern demands of the commercial world for corporate securities,—accompanied by the highest evidence of its execution by the proper officers, viz., the seal of the corporation, —and the further fact that it was once held that a corporation could not act, except by and under its seal,[11] broke in upon the

162; Northern Bank v. Porter, 110 Ib. 608; Merchant's etc. Bank v. Bergen Co., 115 U. S. 384; see also Brown v. Bon Homme Co., 46 W. W. Rep. 173. A lithograph or printed fac simile signature is sufficient, if adopted by the maker. McKee v. Vernon Co., 3 Dill. 210; Pennington v. Baehr, 48 Cal. 565; Lyde v. County, 16 Wall. 6; Neely v. Yorkville, 10 S. C. 141.

[1] Little Rock v. State Bk., 3 Eng. (Ark.) 227; Goldschmidt v. New Orleans, 5 La. An. 436.

[2] Rich v. Errol, 51 N. H. 350; Hubbard v. Lyndon, 28 Wis. 674.

[3] Clark v. Des Moines, 19 Iowa, 200; People v. Gray, 23 Cal. 125; Keller v. Weeks, 22 Ib. 460.

[4] Hyde v. Franklin, 27 Vt. 186; Daviess Co. v. Howard, 13 Bush. 102; People v. Suprs. El Dorado Co., 11 Cal. 175; Chemung Bk. v. Sup'rs, 5 Den. 517.

[5] Parcel v. Barnes, 25 Ark. 261; Clark v. Polk Co., 19 Iowa, 248.

[6] Pol. Jury v. Britton, 15 Wall. 566.

[7] Niantic Sav. Bank v. Douglas, 5 Ill. 579.

[8] Melvin v. Lisenby, 72 Ill. 63. The act of countersigning bonds by a town clerk is ministerial. Houghton v. People, 55 Ib. 398.

[9] Young v. Clarendon, 132 U. S. 340; Bayley v. Taber, 5 Mass. 285; Marvin v. McCullom, 20 John. 288; Ward v. Churn, 18 Gratt. 801; Lovejoy v. Whipple, 18 Vt. 379.

[10] See Tiedeman, Commercial Paper, § 32.

[11] See Tiedeman, Commercial Paper, § 117.

force of this rule, and created an exception in favor of the negotiability of corporate securities, notwithstanding they are under seal. It is now the law, in the United States, supported by an almost unbroken line of authorities,[1] that the coupon bond, when it contains the usual or equivalent words of negotiability, is for every purpose as negotiable as bills of exchange and promissory notes.[2]

In England in 1811, the bonds of the East India company were declared to be non-negotiable.[3] Immediately thereafter, Parliament enacted that such bonds were assignable and transferable by delivery.[4] Following the example thus set them by Parliament, the English courts applied the doctrine of negotiability to all sorts of coupon bonds.[5]

The fact that provision is made in the bond for its being

[1] See *contra*, Diamond v. Lawrence Co., 37 Pa. St. 353: "We will not treat these bonds as negotiable securities. On this ground we stand alone. All the courts, American and English, are against us."

[2] White v. Vt. & Mass. R. R. Co., 21 How. 575; Moran v. Com'rs of Miami Co., 2 Black, 722; Mercer County v. Hackett, 1 Wall. 83; Gelpcke v. City of Dubuque, 1 Wall. 175; Meyer v. Muscatine, 1 Wall. 382; Murray v. Lardner, 2 Wall. 110; Thompson v. Lee Co., 3 Wall. 227; Supervisors v. Schenck, 5 Wall. 772; Aurora City v. West, 7 Wall. 82; Com'rs of Manor v. Clark, 94 U. S. 279; First Nat. Bank v. Mt. Tabor, 52 Vt. 87; Railway v. Cleneay, 13 Ind. 161; Clapp v. Cedar County, 5 Clarke, 16; Ringling v. Kohn, 4 Mo. App. 63; Lafayette Sav. Bank v. Stoneware Co., 4 Mo. App. 276; Barrett v. County Court, 44 Mo. 197; Craig v. City of Vicksburg, 31 Miss. 216; Society for Savings v. City of New London, 29 Conn. 174; Virginia v. Chesapeake & Ohio Canal Co., 32 Md. 501; Spooner v. Holmes, 102 Mass. 503; Hinckley v. Union Pac. R. R., 129 Mass. 52; Langston v. S. C. R. R. Co., 2 S. C. 248; San Antonio v. Lane, 32 Tex. 405; Consolidated Association v. Avegno, 28 La. 552; Durant v. Iowa County, 1 Woolworth C. C. 72; Blackman v. Lehman, 63 Ala. 519; State *ex rel.* Plock v. Cobb, 64 Ala. 128; Arents v. Commonwealth, 18 Gratt. 773; Clark v. Janesville, 10 Wis. 136; Mills v. Jefferson, 20 Wis. 50; Johnson v. County of Stark, 24 Ill. 75; Chapin v. Vt. & Mass. R. R. Co., 8 Gray, 575; Nat. Exch. Bank v. Hartford, etc., R. R. Co., 8 R. I. 379; Conn. Mut. Life Ins. Co. v. Cleveland, etc., R. R. Co., 41 Barb. 9; Bank of Rome v. Village of Rome, 19 N. Y. 24; Seybel v. Nat. Currency Bank, 54 N. Y. 288; Evertson v. Nat. Bank of Newport, 4 Hun (11 N. Y. S. C.) 695; 66 N. Y. 15; Morris Canal, etc., Co. v. Fisher, 1 Stock. 667; City of Elizabeth v. Force, 29 N. J. Eq. 587; Weith v. City of Wilmington, 68 N. C. 341.

[3] Glynn v. Baker, 1 East, 510.

[4] 51 Geo. III. ch. 64.

[5] Wookey v. Pole, 4 B. & Ald. 1; Gorgier v. Melville, 3 B. & C. 45; Lang v. Smith, 7 Bing. 284; Rumball v. Metropolitan Bank, 2 Q. B. Div. 194; Goodwin v. Roberts, L. R. 10 Exch. 76, 337.

"registered and made payable by transfer only on the books of the company," will not of itself destroy the negotiability of the bond.[1] But actual registration does.

The holder or purchaser of the coupon bond takes it, with all the rights and privileges of the purchaser of a bill of exchange or a promissory note; and he will be a *bona fide* holder, under the same circumstances, and be subject to the same defences, as if his bond had been an unsealed bill or note.[2] Fraud in the election, upon which the issue of bonds was based, should be set up before the rights of *bona fide* holders have accrued.[3]

If the coupon is overdue when it is transferred, the purchaser takes it subject to all the equities.[4] But the fact that overdue coupons are attached to a bond, when the bond is sold and transferred, will not of itself affect the negotiability of the bond, if it was itself not yet due.[5] But the overdue coupon may, in connection with other facts or circumstances in the knowledge of the purchaser, be sufficient to put the purchaser on his inquiry.[6] And, of course, this would be the case, where it was stipulated in the bond that, on default in the payment of any coupon, the bond itself will be due and payable.[7]

§ 191 *a*. **To whom payable—Transfer by indorsement or delivery.**—Coupon bonds are usually made payable to bearer, and are transferable by delivery,[8] although they may be made

[1] Savannah & Memphis R. R. Co. v. Lancaster, 62 Ala. 563.

[2] 2 Daniel Negot. Inst. §§ 1502, 1503. See *ante*, chapter on rights of *Bona Fide* Holder.

[3] Butler v. Dunham, 27 Ill. 474; People v. San F. Sups., 27 Cal. 655.

[4] Arents v. Commonwealth, 18 Gratt. 773; First Nat. Bank v. County Com'rs, 14 Minn. 79; Ashurst v. Bank of Australia, 37 Eng. L. & Eq. 195; Evertsen v. National Bank, 66 N. Y. 22, 23, *semble*. See Bank of La. v. City of N. O., 5 Am. Law Reg. (N. S.) 555; Brown v. Davies, 3 T. R. 80; Rothschild v. Carney, 9 B. & C. 391; Hinckley v. Union Pac. R. R. Co., 129 Mass. 52. The presumption of law is, however, that the holder acquired the coupon *bona fide* and before maturity. City of Lexington v. Butler, 141 Wall. 295.

[5] Railway Co. v. Sprague, 103 U. S. 762, distinguishing the case of Parsons v. Jackson, 99 U. S. 434, and Cromwell v. County of Sac, 96 U. S. 58. See also Nat. Bank v. Kirby, 108 Mass. 497; Gilbough v. Norfolk, etc., Co., 1 Hughes, 410; Boss v. Hewitt, 15 Wis. 260; State *ex rel.* Plock v. Cobb, 64 Ala. 158. See *contra*, 14 Minn. 77.

[6] Parsons v. Jackson, 99 U. S. 434.

[7] Mayor, etc., of Griffin v. City Bank, 58 Ga. 584; Walnut v. Wade, 103 U. S. 695.

[8] Brookman v. Metcalf, 32 N. Y. 591; Conn. Ins. Co. v. C. C. & C. R.

payable to the order of the person to whom they are issued, and in that case they could be transferred only by indorsement.[1] Statutory directions, as to whom municipal bonds shall be payable, are not mandatory,[2] and when the statute directed that the bonds should be payable "to the president and directors of the railroad company, their successors and assigns," making them payable "to the railroad company or bearer" was held to be sufficient.[3]

Bonds may be delivered to a third person, who may be empowered to decide when, if at all, they shall issue, and his decision is binding upon all who are cognizant or chargeable with notice.[4]

Although it is necessary in ordinary commercial paper to give the name of the payee, or to describe him in some other way;[5] this is not necessary to the validity or to the negotiable character of a coupon bond. The coupon bond is designed to pass from hand to hand indefinitely, and it does not matter to know to whom it was first issued.[6]

But in order that the coupon bond may be transferable at all,

R. Co., 41 Barb. 9; Mercer County v. Hackett, 1 Wall. 83; City of Kenosha v. Lamson, 9 Wall. 478; Roberts v. Bolles, 101 U. S. 122; Morris Banking & Canal Co. v. Lewis, 1 Beas, 323; Eaton & H. R. R. Co. v. Hunt, 20 Ind. 457; Carr v. Le Fevre, 27 Pa. St. 413; Johnson v. County of Stark, 24 Ill. 75; Supervisors of Mercer County v. Hubbard, 45 Ill. 139; Town of Eagle v. Kohn, 84 Ill. 292.

[1] City of Lexington v. Butler, 15 Wall. 295. The party transferring by indorsement assumes the customary liabilities of indorsers of commercial paper. Bonner v. City of New Orleans, 2 Woods C. C. 135; Jones on R. R. Securities, § 348. And whether the transfer be by delivery or by indorsement, the transferrer guarantees the genuineness of the bond, and is obliged to refund the consideration, if the bond should prove to be a forgery. Smith v. McNair, 19 Kan. 330; First Nat. Bank v. Peck, 8 Kan. 660. See chapters on Transfer in General, and Transfer by Indorsement in Tiedeman's Commercial Paper.

[2] Calhoun Co. v. Galbraith, 99 U. S. 214. A bond made payable to bearer is a sufficient compliance with the direction, that title to it shall pass by delivery. Com. v. Allegheny, 37 Pa. St. 237; Thomas v. Morgan Co., 39 Ill. 496; Com'rs v. Nichols, 14 Ohio St. 260.

[3] Woodward v. Calhoun Co., U. S. Dis. Ct. for Miss., 2 Cent. Law Jour. 396.

[4] Young v. Clarendon, 132 U. S. 340.

[5] See Tiedeman Commercial Paper, § 17.

[6] Woods v. Lawrence Co., 1 Black, 360; White v. Vermont, etc., R. R., 21 How. 575; Preston v. Hull, 23 Gratt. 613. See Eversten v. Nat. Bk. of Newport, 66 N. Y. 19, 20.

it must contain words of negotiability. It is not necessary to employ the usual words, *or order or bearer*, but any other word which indicates the intention to permit its transfer will suffice, such as to the "holder;"[1] or to A. and his assigns, when the transfer must be by indorsement.[2] Delivery is as essential to passing the title of coupon bonds, as of any other kind of commercial paper; and if possession is procured without a delivery, the rights of a *bona fide* holder will be the same as if it had been a bill or note.[3]

§ 191 *b*. **The formal parts of bond and coupon—Seal not necessary.**—The bond and coupons are generally printed on paper of very fine texture, more or less beautifully engraved. But in other respects, the bond differs in form very little from a promissory note. The coupon may take on any form: Sometimes it is a promissory note;[4] at other times, a bill of exchange on the treasury of the corporation;[5] a draft or order, without naming any drawee;[6] a check,[7] and a mere duebill or acknowledgment of indebtedness.[8]

It has been sometimes doubted whether a coupon bond would be unaffected by the absence of a seal.[9] But inasmuch as the seal was originally the only objection to the application to these bonds of the character and incidents of negotiability, it is difficult to see any reason why the absence of the seal would now change their character in any essential respect, and this is now the ruling of the courts.[10] It has been held that, where the authority is simply "to issue bonds," a seal is necessary;[11] but

[1] Arents v. Commonwealth, 18 Gratt. 750; County of Wilson v. National Bank, 103 U. S. 776; Porter v. City of Janesville, 3 Fed. Rep. 619.

[2] Brainard v. New York, etc., R. R. Co., 25 N. Y. 496; 10 Bosw. 832.

[3] Ledwick v. McKim, 53 N. Y. 315; Redlick v. Doll, 54 N. Y. 236. If coupons refer to bonds to which they were attached, the purchaser of a severed coupon is chargeable with notice of all that the bond contains. McClure v. Oxford Township, 94 U. S. 429; Selliman v. Railroad Co., 27 Gratt. 119.

[4] Thompson v. Lee County, 3 Wall. 327.

[5] Moran v. Com'rs of Miami County, 2 Black, 722.

[6] Mercer County v. Hubbard, 45 Ill. 140.

[7] Arents v. Commonwealth, 18 Gratt. 753.

[8] Woods v. Lawrence County, 1 Black, 360.

[9] Mercer County v. Hackett, 1 Wall. 83.

[10] The People v. Mead, 24 N. Y. 124; Conn. Mut. Life Ins. Co. v. Cleveland, etc., R. R. Co., 41 Barb. 22; Augusta v. Augusta Bank, 56 Me. 176; San Antonio v. Meharty, 96 U. S. 315; Draper v. Springport, 104 U. S. 501.

[11] Avery v. Springport, 14 Blatch. 272.

its omission, through misunderstanding or mistake, may be relieved in equity.[1]

Where it is the legislative intent that the municipality shall be bound, regardless of seal, the bonds are valid without it; as where the statute empowered a city "to issue bonds bearing interest, or otherwise pledge the faith of the city to pay."[2] In New York, where a statute required bonds to be under seal a scroll was held to be insufficient.[3] But where the bonds were to be issued "under the official signature of the supervisors" no seal was required, notwithstanding the statutory provision, the court holding that any implication arising from the word *bonds* is overcome by the explicit direction as to their execution.[4]

Like other commercial paper, it is necessary to the negotiability of the bond, that the amount to be paid is certain. Any uncertainty in respect to the amount will destroy the negotiability of the bond.[5]

The parties to commercial paper have generally the unrestricted power to stipulate a place of payment in the paper; and, according to the weight of authority, the parties to coupon bonds are not hampered by any restrictions in that regard.[6] Any place within or without the State may be chosen by the municipal corporation as a place of payment.[7] But it has been held in Illinois that a municipal corporation cannot, without express authority from the Legislature, provide for the payment

[1] Wiser v. Blackly, 1 John. Ch. 607; Bernards v. Stebbins, 109 U. S. 341; Cockerel v. Cholmondely, 1 Russ. & Myl. 418.

[2] San Antonio v. Mehaffy, 96 U. S. 312; Augusta Bk. v. Augusta, 56 Me. 176; Conn. Ins. Co. v. Cleveland, etc., Co., 41 Barb. 9; Bernards Tp. v. Stebbins, 109 U. S. 341; Draper v. Springport, 104 Ib. 501. Coupons need no seal. Ring v. Johnson, 6 Ia. 265; see *ante*, § 51.

[3] Solon v. Williamsburg Sav. Bk., 112 N. Y. 122, changed by statute.

[4] People v. Mead, 24 N. Y. 114; Kelley v. McCormick, 28 Ib. 318; Board v. Fonda, 77 Ib. 350.

[5] Parson v. Jackson, 99 U. S. 434; also Jackson v. Vicksburg, etc., R. R. M. Co., 2 Woods C. C. 141.

[6] Gelpcke v. Dubuque, 1 Wall. 178; Thompson v. Lee County, 3 Wall. 338; City of Kenosha v. Lamson, 8 Wall. 478; City of Lexington v. Butler, 14 Wall. 289; Lynde v. County of Winnebago, 16 Wall. 13; Cenn. Mut. Ins. Co. v. Cleveland, etc., R. R. Co., 41 Barb. 9.

[7] Meyers v. Muscatine, 1 Wall. 384; Thomson v. Lee Co., 3 Ib. 327; Gelpcke v. Dubuque, 1 Ib. 175; Lexington v. Butler, 14 Ib. 282; Lynde v. Winnebago, 16 Ib. 6; Calhoun v. Galbraith, 99 U. S. 214; Mygalt v. Green Bay, 1 Biss. 292.

of its bonds and coupons at any other place than its treasury.[1]

The figures, denoting the number of the bond in a series, constitute no essential part of it, and an alteration of them will not affect the rights of a *bona fide* holder of the bond.[2] Nor does the dating of a bond after the date of the ordinance providing for its issue affect its validity.[3]

Where the coupon bonds of a corporation are guaranteed by the State, any agreement entered into and indorsed on the bonds by the corporation, subsequent to their execution by the State, will bind only the corporation, and not the State, as guarantor.[4]

§ 191 *c*. **Registration of municipal securities by State officials.**—To so great an extent have the conditions of requiring popular consent been evaded, that in some of the States acts have been passed, requiring all bonds to be registered by the State authorities, before they can be legally issued. These enactments were designed to prevent the improvident issue of bonds; and bonds are not duly issued unless these provisions are complied with.[5] In the State of Missouri, the act provided that "before any bond hereafter issued shall obtain validity or be negotiated," it should be registered by the auditor, who was to certify thereon that all conditions precedent had been complied with. In a case,[6] arising out of the construction of this statute the rule was applied that when a statute, declares that a contract, bond or note is *absolutely void*, it is so into whosesoever hands it may come.[7] This rule has been held to rest upon the ground that such statutes, as component parts of the existing law, are notice of limitations upon the powers of municipal corporations, which affect all the world,[8] so that a purchaser of

[1] Prettyman v. Tazewell County, 19 Ill. 406; People *ex rel.*, etc., v. Tazewell County, 22 Ill. 151; Johnson v. County of Stark, 24 Ill. 91; Pekin v. Reynolds, 31 Ill. 530.

[2] City of Elizabeth v. Force, 29 N. J. Eq. 591, overruling 28 N. J. Eq. 587; Commonwealth v. Emigration Sav. Bank, 98 Mass. 12; Birdsall v. Russell, 29 N. Y. 220.

[3] Flagg v. Elmira, 33 Mo. 440.

[4] Wallace v. Loomis, 97 U. S. 147.

[5] Douglas v. Lincoln Co., 2 McCrary, 449.

[6] Anthony v. Jasper Co., 101 U. S. 693.

[7] Bayley v. Taber, 5 Mass. 286; see Tiedeman Commercial Paper, § 178.

[8] Hoff v. Jasper Co., 110 U. S. 53; Northern Bank v. Porter Towns., 110 U. S. 608; Lewis v. Com'rs, 105 Ib. 739; Menasha v. Hazard, 102 Ib. 81; January v. Johnson Co., 3 Dill. C. C. 392; Bissell v. Spring V. Tp., 124 U. S. 225; Crow v. Oxford, 119 Ib. 215;

unregistered bonds, who takes them thus incomplete, cannot claim protection in his character as an innocent holder without notice.[1] If the State statute makes the certificate of the registering official conclusive upon the municipality as to the facts contained therein, the effect is the same as if the recitals of the certificate were the recitals of the municipal officials; and they are estopped from asserting their own lack of power. But where the certificate is not expressly conclusive, the municipality may deny the facts certified to.[2]

A municipal corporation, having the power to borrow money, issued bonds valid on their face, but antedated them in order to avoid the registration act. The proceeds of the bonds went into the city treasury, and were used for lawful purposes. In this case, the court made the distinction that, while the city was not liable on the bonds, the actual amount of money, which was paid to the corporation, could be recovered in an action for money had and received.[3]

§ 192. **Presentment of coupons for payment.**—The coupons need not be presented for payment on the day of maturity, in order to hold the principal obligors liable, even when they are in the form of a draft or order on a bank.[4] But it would be necessary to present at maturity, in order to hold an indorser, if there be one;[5] and within a reasonable time after maturity, in order to hold a guarantor.[6] Nor is a prior presentment for payment necessary to the recovery of interest on coupons,[7] even when the coupons are made payable at a par-

Lewis v. Com'rs, 105 Ib. 739; Dixon Co. v. Field, 111 Ib. 83.

[1] DeVass v. Richmond, 18 Gratt. 338; State v. Roggen, 22 Neb. 118; State v. Babcock, 19 Ib. 223, 230.

[2] Dixon Co. v. Field, 111 U. S. 83; German Sav. Bank v. Franklin Co., 128 Ib. 526, 540; Crow v. Oxford, 119 Ib. 215; Lewis v. Barbour Co., 105 U. S. 739; comp. Pana v. Bowler, 107 Ib. 529; Oregon v. Jennings, 119 Ib. 74; Randolph Co. v. Post, 93 Ib. 502.

[3] Wood v. Louisiana, 102 U. S. 294; see § 193 *a*.

[4] Mayor, etc., v. Potomac Ins. Co., 58 Tenn. 296; County of Greene v. Daniel and County of Pickens v. Daniel, 102 U. S. 187; Arents v. Commonwealth, 18 Gratt. 773; Langston v. S. C. R. R. Co., 2 S. C. 248; Jeffersonville v. Patterson, 26 Ind. 16.

[5] Bonner v. New Orleans, 2 Woods C. C. 135.

[6] Arents v. Commonwealth, 18 Gratt. 773.

[7] Walnut v. Wade, 103 U. S. 683; Ohio v. Frank, 103 U. S. 697; North Pa. R. R. Co. v. Adams, 54 Pa. St. 97; Mills v. Jefferson, 20 Wis. 50; Jeffersonville v. Pattersonville, 26 Ind. 16; Langston v. S. C. R. R. Co., 2 S. C. 248; San Antonio v. Lane, 32 Texas, 405; Virginia v. Chesapeake, etc.,

ticular bank in another State.[1] But if the municipal or other corporation, which issued the bond and coupon, can show that it was ready at the stipulated place, or at its treasury, to pay the coupon on the day of maturity, no interest could then be recovered on the coupon.[2]

§ 192 *a*. **Time of payment.**—When the statute is silent as to the time when bonds must be paid, this matter may be arranged, and the date fixed, by agreement between the corporation and the purchasers;[3] but if the statute fixes the date, bonds issued in disregard thereof are void;[4] at least, where they are made to fall due at a later date. It seems that bonds may be issued to mature before, but not after, the date fixed by the statute, without affecting their validity.[5] On the other hand, it is held that the fact that municipal bonds which are regular in all other respects violate a statutory provision, that no more than ten per cent of the loan shall be paid in any one year, does not invalidate them.[6] In Pennsylvania, where bonds were payable "in twenty-five years after date" with a proviso, that they "will be redeemed if desired, twelve years after date," it was held that the bonds were not payable until twenty-five years had elapsed; that the proviso gave the obligee, and not the obligor, an option to enforce payment at the earlier date, so that the holder could not against his wishes be compelled to accept the amount due at the expiration of twelve years.[7]

§ 192 *b*. **Interest and exchange on bond and coupon.**—During the time that the bond is running, the interest collectible upon the bond is represented by the coupon, and it can only

Canal Co., 32 Md. 501. See *contra*, Whittaker v. Hartford, etc., R. R. Co., 8 R. I. 47; Pekin v. Reynolds, 31 Ill. 531; Johnson v. Stark County, 24 Ill. 75; Chicago v. People, 56 Ill. 327.

[1] Gelpcke v. Dubuque, 1 Wall. 175; Thomson v. Lee County, 3 Wall. 327. See also Aurora City v. Welt, 7 Wall. 82; Clark v. Iowa City, 20 Wall. 583; Genoa v. Woodruff, 92 U. S. 502.

[2] Walnut v. Wade, 103 U. S. 697; North Penn. R. R. Co. v. Adams, 54 Pa. St. 97.

[3] Chicago etc. Co. v. Aurora, 99 Ill. 205.

[4] Woodruff v. Okolona, 57 Miss. 806; Davis v. Yuba Co., 75 Cal. 452; Cairo etc. Co. v. Sparta, 77 Ill. 505: Green v. Dyersburg, 2 Flip. 477; Brownell v. Greenwich, 114 N. Y. 518.

[5] Potter v. Greenwich, 26 Hun, 326; Singer Mfg. Co. v. Elizabeth, 42 N. J. L. 249.

[6] Hoag v. Greenwich, 133 N. Y. 152.

[7] Allentown Sch. Dis. v. Derr, 115 Pa. St. 439.

be recovered by a presentment of the coupon.[1] After maturity of the bond, interest may be recovered by the holder of the bond for any delay in payment.

Since coupons are separate and independent securities, they bear interest themselves after their maturity; and the interest is recoverable by the holder of the coupon.[2] And so, also, may exchange be recovered on coupons, whenever it could be recovered on bills and notes.[3]

§ 193. **Actions on bonds and coupons.**—The holder of both the bond and the coupons may sue on them in his own name;[4] and although it has been denied,[5] it is now generally held to be the law, that the holder of the coupon may in any case maintain a separate action on the coupon, and need not join with the holder of the bond; nor need the bond be produced in evidence.[6]

[1] City of Kenosha v. Lamson, 9 Wall. 482; Williamson v. New Albany, etc., R. R. Co., 9 Am. Ry. Times, 37, U. S. C. C.

[2] Aurora City v. West, 7 Wall. 105; Gelpcke v. Dubuque, 1 Wall. 206; Thomson v. Lee Co., 3 Wall. 332; Genoa v. Woodruff, 92 U. S. 502; Amy v. Dubuque, 98 U. S. 471; Koshkonong v. Burton, 104 U. S. 668; Mills v. Jefferson, 20 Wis. 50; San Antonio v. Lane, 32 Texas, 405; Nat. Exch. Bank v. Hartford, etc. R. R. Co., 8 R. I. 375; Beaver County v. Armstrong, 6 Wright, 63; North Penn. R. R. Co. v. Adams, 54 Pa. St. 94; Welsh v. St. Paul, etc., R. R. Co., 25 Minn. 320; Arents v. Commonwealth, 18 Gratt. 776; Gilbert v. W. C. V. M., etc., R. R. Co., 33 Gratt. 599; Hollingsworth v. City of Detroit, 3 McLean, 472; Virginia v. Chesapeake, etc., Canal Co., 32 Md. 591; Langston v. S. C. R. R., 2 S. C. 248; Conn. Mut. Ins. Co. v. Cleveland, etc., R. R. Co., 41 Barb. 9.

[3] Gelpcke v. Dubuque, 1 Wall. 20; Koshkonong v. Burton, 104 U. S. 668; Jeffersonville v. Paterson, 26 Ind. 16. In Gelpcke v. Dubuque, the Court said: "municipal bonds with coupons payable to bearer, having by universal usage and consent all the qualities of commercial paper, a party recovering on the coupons is entitled to the amount of them, with interest and exchange at the place where by their terms they were made payable."

[4] Society for Savings v. City of New London, 29 Conn. 175; Carr v. Le Fevre, 27 Pa. St. 413; Johnson v. County of Stark, 22 Ill. 75.

[5] In Jackson v. Y. & C. R. R. Co., 2 Am. Law Reg. (N. S.) 585; Crosby v. New London, etc., R. R. Co., 26 Conn. 121, it was held that no separate action can be maintained on the coupon, unless the coupon contained a distinct promise to pay.

[6] Com'rs of Knox Co. v. Aspinwall, 21 How. 54; Beaver Co. v. Armstrong, 44 Pa. St. 63; Kennard v. Cass Co., U. S. C. C., 3 Dillon C. C. 147; Town of Cicero v. Clifford, 53 Ind. 191; First Nat. Bank v. Mt. Tabor, 52 Vt. 87; Thompson v. Lee County, 3 Wall. 327; Walnut v. Wade, 103 U. S. 695; Nat. Exch. Bank v. Hartford, etc., R. R. Co., 8 R. I. 375; Mayor, etc., v. Potomac Ins. Co., 58 Tenn. 296; Welch v. First Div. St. Paul, etc., R. R. Co., 25 Minn. 320. The coupons may be sued on, not-

The recovery on the bonds is so independent of the recovery on the coupons, that a judgment, that one is a *bona fide* owner of certain coupons, does not prove that he is also a *bona fide* owner of the bonds, from which the coupons were detached.[1]

The same provision of the Statute of Limitation applies to both bond and coupon; and in order that action may be brought on the coupon, it must be begun within the statutory period after its maturity, although the bond is not yet due.[2]

§ 193 *a*. **When consideration paid to corporation for invalid bond may be recovered.**—When the transaction, in which the bonds were issued, is not a *malum in se*, and the parties paying for the bonds are not participants in the violation of the law, the consideration paid to the corporation for the illegal bonds can be recovered back, with interest from the time that the corporation denied its liability and refused to pay.[3]

§ 194. **Legislative control of the remedies to enforce payment of municipal debts.**—The general rule of constitutional law is that the Legislature of a State has not the power to destroy or impair the obligation of a contract, by taking away all remedies for the enforcement of the contract. A denial of all remedy would be as unconstitutional, as a legislative declaration against the validity of the contract.[4] But as long as a substantial remedy is provided for the enforcement of the contract, the character of the remedy may be changed at the pleasure of the Legislature; and such a change, however material, will not be considered to impair the obligation of the contract, in the con-

withstanding the bonds have been already paid and surrendered. Nat. Exch. Bank v. Hartford, etc., R. R. Co., *supra;* and although the bonds need not be produced in evidence, the coupons in suit should ordinarily be identified in the declaration by a statement of the number of the bond, date, sum and time of payment. Kennard v. Cass Co., *supra*.

[1] Stewart v. Lansing, 104 U. S. 505.

[2] City of Kenosha v. Lamson, 9 Wall. 483, 484; City of Lexington v. Butler, 15 Wall. 296; Clark v. Iowa City, 20 Wall. 586; Amy v. Dubuque, 98 U. S. 471; Koshkonong v. Burton, 104 U. S. 668.

[3] Louisiana v. Wood, 102 U. S. 294, affirming s. c. in 5 Dillon C. C. 122. See also Thomas v. City of Richmond, 12 Wall. 354; Draper v. Springport, 104 U. S. 501; Oneida Bank v. Ontario Bank, 21 N. Y. 496; Jackson County v. Hall, 55 Ill. 444.

[4] Osborne v. Nicholson, 13 Wall. 662; Call v. Hagger, 8 Mass. 430; Penrose v. Erie Canal Co., 56 Pa. St. 46; Thompson v. Commonwealth, 81 Pa. St. 314; West v. Sansom, 44 Ga. 295; Rison v. Farr, 24 Ark. 161; Griffin v. Wilcox, 21 Ind. 370; McFarland v. Butler, 8 Minn. 116; Jackson v. Butler, 8 Minn. 117.

stitutional sense, although the change is to a less desirable and a more inconvenient remedy.[1] The most radical changes are permissible, as long as a substantial remedy remains. Thus, a law may take away from existing contracts the right to confine the debtor in prison, and yet not impair the obligation of the contracts.[2] And so may a judgment lien on real property be taken away by a repeal of the statute, authorizing it.[3]

But, inasmuch as the creditors of a municipal corporation are ordinarily limited to one or more special remedies for the enforcement of their claims, and cannot resort to the general remedies for the enforcement of contracts, a different rule is recognized in relation to such debts, viz.: that laws, in force when the bonds are issued, which authorize the levy of taxes for the payment of the principal and interest thereof, are a part of the contract between a municipality and its creditors; and to repeal such laws is to impair the obligation of the contract.[4] And it is no answer to claim that the subsequent legislation, in curtailment of the municipal power of taxation, does not utterly destroy the rights of the creditors or bondholders.[5] The same rule applies to all other remedies which are specially provided for the liquidation of a municipal or county indebtedness,[6] and any subsequent State legislation, which affects these reme-

[1] Ogden v. Saunders, 12 Wheat. 213; Beers v. Houghton, 9 Pet. 329; Tennessee v. Sneed, 96 U. S. 69; Simpson v. Savings Bank, 56 N. H. 466; Danks v. Quackenbush, 1 N. Y. 129; Morse v. Goold, 11 N. Y. 281; Baldwin v. Newark, 38 N. J. 158; Moore v. State, 43 N. J. 203.

[2] Marshall, C. J., in Sturges v. Crowninshield, 4 Wheat. 122; see Mason v. Haile, 12 Wheat. 370; Penniman's Case, 103 U. S. 714; Matter of Nichols, 8 R. I. 50; Sommers v. Johnson, 4 Vt. 278 (24 Am. Dec. 604); Ware v. Miller, 9 S. C. 13; Maxey v. Loyal, 38 Ga. 531; Bronson v. Newberry, 2 Dougl. (Mich.) 38.

[3] Watson v. N. Y. Central R. R. Co., 47 N. Y. 157; Woodbury v. Grimes, 1 Col. 100; *contra*, Gunn v. Barry, 15 Wall. 610.

[4] United States v. Jefferson Co., 1 McCrary C. C. 356; Von Hoffman v. Quincy, 4 Wall. 535; Galena v. Amy, 5 Ib. 705, 709; Ralls Co. v. United States, 105 U. S. 733; Wolff v. New Orleans, 103 Ib. 358; Quincy v. Jackson, 113 Ib. 332; Riggs v. Johnson Co., 6 Wall. 166, 194; Rees v. Watertown, 19 Ib. 107, 120; Lansing v. County Treasurer, 1 Dill. 523; State v. Milwaukee, 25 Wis. 122; Vance v. Little Rock, 30 Ark. 435, 440; see *ante*, § 14.

[5] United States v. Jefferson Co., 6 Fed. Rep. 486.

[6] Edwards v. Kearzey, 96 U. S. 595; Ralls Co. v. United States, 105 U. S. 733; Louisiana v. Pilsbury, 105 Ib. 278; State v. Mayor of N. O., 109 Ib. 285.

dies, so as to lessen their adequacy or which destroys them altogether without substituting another, is unconstitutional.[1]

Carrying out this rule, the Supreme Court of the United States has decided that a law, by which certain bondholders possessed the right to have a special county tax levied for their benefit, was still in force, although subsequently repealed by a State Legislature, in favor of judgments recovered on debts which were incurred prior to the repeal.[2] So, also, the law of the State, with the construction placed upon it by the highest State court, is part of the obligation of the contract, and that construction will be recognized and enforced by the Federal courts, in all suits on contracts arising thereunder.[3] So, likewise, a sinking fund, which is pledged by the statute creating the debt, cannot be diverted by the Legislature to other purposes;[4] and an injunction will lie to prevent the municipal corporation from carrying out such a law.[5] So, also, when an ordinance, authorizing the issue of bonds, devotes the income of certain property to their payment, the municipal authorities cannot subsequently appropriate the income to other purposes.[6]

§ 194 *a*. **Remedies for enforcement of municipal indebtedness.**—As a general rule, municipal corporations seldom possess any pecuniary resources, except those furnished by taxation. For this reason, coupled with the fact that property held by the city for public purposes cannot be sold under execution,[7] the power of levying taxes is by inference deemed to be conferred by the Legislature, as an appurtenant of the power to contract an indebtedness; and an express power to issue bonds implies a power to raise the money necessary for their payment by taxation.[8] For

[1] Siebert v. Lewis, 122 U. S. 284.

[2] Cape Girardeau v. Hill, 118 U. S. 68; Edwards v. Kearzey, 96 U. S. 595; Von Hoffman v. Quincy, 4 Wall. 535; Bronson v. McKinzie, 1 How. 311, 317; Louisiana v. New Orleans, 102 U. S. 203, 206; Poindexter v. Greenhow, 114 Ib. 270; Royall v. Virginia, 116 Ib. 572.

[3] German Sav. Bank v. Franklin Co., 128 U. S. 526; see *post*, § 195.

[4] Liquidators v. Municipality, 6 La. An. 21; Terry v. Wisconsin M. & F. Ins., 18 Wis. 87.

[5] Fazende v. Houston, 34 Fed. Rep. 95.

[6] State v. Police Jury, 111 U. S. 716; Bates v. Porter, 74 Cal. 224; New Orleans v. United States, 49 Fed. Rep. 40; 2 U. S. App. 125.

[7] Meriwether v. Garrett, 102 U. S 472. See *post*, § 212.

[8] Quiucy v. Jackson, 113 U. S. 333; Feldman v. Charleston, 23 S. C. 57; Loan Assn. v. Topeka, 20 Wall. 655, 660; United States v. New Orleans, 98 U. S. 381, 393; Ralls Co. v. United States, 105 Ib. 733, 735; United States

this reason, also, when a special tax is provided for, the bondholder is not limited for his remedy to this special tax; but he is entitled to payment of principal and interest out of the general fund of the municipality, unless he is expressly limited to the special fund.[1]

To enforce a lawful stock subscription made by a municipality;[2] to compel the delivery of bonds, or the appropriation of money to pay them;[3] or to require the levy of a tax to raise the necessary amount; a *mandamus* is the appropriate remedy.[4] And, although there is some conflict of the decisions, it seems to be the rule, according to the weight of the decisions, that when it is the duty of an officer to levy the tax he may be compelled to do so by a *mandamus*, after a judgment had been obtained.[5] The taxes so raised should be set aside as a special fund for the creditors who procured the *mandamus*.[6]

Where the municipal official does not possess the power to execute the act, which the *mandamus* seeks to compel him to do, it is a good defence,[7] and a Federal *mandamus* cannot require an official to violate the law of his own State.[8] On the other hand, a city official, who refuses to obey a *mandamus* rightfully issued, is subject to punishment for contempt and to a suit for damages.[9]

Generally, throughout the country, private property is exempt from execution for public debt. But in the New England States, by common law and ancient usage, the property of all the citizens is liable on execution,[10] and all the inhabitants are regarded as defendants in an action against the corporation.[11]

In considering the remedies open to a municipal creditor, a

v. Macon Co., 99 Ib. 582; Parkersburg v. Brown, 106 Ib. 487, 501.

[1] United States v. Clark Co., 95 U. S. 769; United States v. Knox Co., 2 McCrary, 625; Macon Co. v. Huidekoper, 99 U. S. 592; Knox Co. v. Harshman, 109 Ib. 229.

[2] *Ex parte* Selma, 45 Ala. 696.

[3] Cherokee Co. v. Wilson, 109 U. S. 621.

[4] See § 375 in chapter on *Mandamus* and *Quo Warranto*.

[5] See § 375 on *Mandamus;* comp. Heine v. Levee Com'rs, 19 Wall. 655, 657; Queensbury v. Culver, 19 Ib. 83, 92; Riggs v. Johnson Co., 6 Wall. 166.

[6] Galena v. Amy, 5 Wall. 705; Coy v. Lyons, 17 Iowa, 1; Santee v. Allegheny, 10 Pitts. Leg. J. 241; Vance v. Little Rock, 30 Ark. 435.

[7] United States v. Clark Co., 95 U. S. 769.

[8] United States v. Knox Co., 2 McCrary C. C. 625.

[9] Dow v. Humbert, 91 U. S. 294.

[10] Sec. 212.

[11] See § 375 on *Mandamus*.

clear distinction should be drawn between a total absence of remedy, and the fact that the remedy is ineffectual under the circumstances of the case. Where the remedy at law is adequate under ordinary circumstances, and the only difficulty is in its inapplicability or ineffectiveness, in the particular case, equity will not interfere.[1] For example, if, upon a *mandamus* being granted to compel the levy of a tax, it is found that the corporation has no power to levy such a tax, no court of law, however great its power, can compel the municipality to exercise a power it does not legally possess; .or confer upon it the power to tax. In such a case, the last and only resort of the disappointed creditor is the Legislature of the State, where the municipal corporation is located.[2]

But I am inclined to hold, in one very extraordinary case, that a court of equity could interfere for the enforcement of a levy of the tax, where the *mandamus* might not lie, viz.: where the municipality had the power to levy the tax, but the Legislature revoked the charter of the municipality, and did not substitute any other incorporation. Under those circumstances it is claimed that the community, whose incorporation has been taken away, is still liable for the debts of the dissolved municipal corporation.[3] And, certainly, that claim cannot be made a practical reality, if the court of equity could not, in the assumption of an extraordinary power, as trustee of the powers of the dissolved municipality, order a levy of the taxes, which could have been levied, had it not been for the dissolution of the corporation. This is practically holding, that, for the purpose of providing for its indebtedness, a dissolved municipal corporation still exists.

§ 195. **Defences to bonds—Conflict of decisions—Want of power.**—Coupon bonds possess in general the nature of negotiable paper, and confer upon the *bona fide* holder the rights and privileges which are enjoyed by *bona fide* holders of ordinary commercial paper, with the exception that, as all men are presumed to know the law, any bonds, which are illegally or . . .

[1] Reese v. Watertown, 19 Wall. 107, 124; State v. McCrillin, 4 Kan. 250; Humphreys Co. v. McAdoo, 7 Heisk. 585.

[2] Heine v. Levee Com'rs, 19 Wall. 655, 658; Meriwether v. Garrett, 102 U. S. 472, 518.

[3] Sec. 43.

unconstitutionally issued,[1] or issued in excess of, or without legal authority, are void.

The Supreme Court of the United States has, in the interest of *bona fide* holders, opposed a narrow construction of statutes regulating bonded indebtedness; and against such holders it has not favored defences based on technicalities, and not involving the question of power. It is useless, however, to seek a constant uniformity of the decisions in the minor principles, which from time to time have been enunciated by this court, or to expect to find the decisions of the State courts always in harmony with its rulings;[2] and these facts must not be lost sight of, in comparing the line of decisions in the Federal and State courts. Thus, it is the general rule of the State courts, that even when the bonds are in the hands of *bona fide* holders, the noncompliance with some requirement of the statute, as the omission to hold a prior election, or an irregularity in conducting such an election;[3] or the lack of assent by a certain proportion of the resident taxpayers;[4] or the non-location of the road,[5] when these are conditions precedent, is a good defence.

The Supreme Court of the United States has held that, unless it be perhaps in cases where the question is one of rights arising under the State Constitution or law,[6] it is not bound by a decision of the State court, which is rendered *after* the bonds have reached the hands of *bona fide* holders;[7] but where the bonds are issued after a State statute has been construed by the highest court of the State, such construction becomes a part

[1] Harshman v. Bates Co., 92 U. S. 569; Lamville etc. Co. v. Fairfield, 51 Vt. 257; Grant v. Cooke, 7 D. C. 165.

[2] Dillon Mun. Cor. §§ 515, 550, 551.

[3] Marshall Co. v. Cook, 38 Ill. 44; Shoemaker v. Goshen, 14 Ohio St. 569; Berliner v. Waterloo, 14 Wis. 378; Dunnovan v. Green, 57 Ill. 63; Hancock v. Chicot Co., 32 Ark. 575.

[4] Starin v. Genoa, 23 N. Y. 439; Gould v. Sterling, Ib. 439, 456; People v. Mead, 36 N. Y. 224.

[5] Treadwell v. Hancock Co. Com'rs, 11 Ohio St. 183; Veeder v. Lima, 19 Wis. 280; State v. Van Horne, 7 Ohio St. 327.

[6] In such cases the Federal courts accept the decisions of the highest State courts. Bolles v. Brimfield, 120 U. S. 759; Carroll Co. v. Smith, 111 Ib. 566; Elmwood v. Maxcy, 92 Ib. 289; Claiborne Co. v. Brooks, 111 Ib. 400, 410.

[7] Gelpcke v. Dubuque, 1 Wall. 175; Havenmeyer v. Iowa Co., 3 Ib. 294; Olcott v. Fond du Lac, 16 Ib. 678; Carroll Co. v. United States, 18 Wall. 71; Pine Grove v. Talcott, 19 Ib. 666; Douglas v. Pike Co., 101 U. S. 677.

of the statute, and is respected by the Federal courts.[1] And the statute thus construed forms a part of all contracts entered into under it, and with which the *bona fide* holder is bound to be acquainted.[2]

§ 195 *a*. **Nonperformance of conditions as a defence.**—A very frequent defence to bonds, issued in aid of railroads, is a denial that some condition precedent, such as a popular vote, has been complied with, and hence the power to issue the bonds did not exist.[3] As between the original parties, there may be a full inquiry whether the conditions,[4] from which the

[1] Douglas Co. v. Pike, 101 U. S. 677.

[2] Warren v. Marcy, 97 U. S. 96; Knox Co. v. Ninth Nat'l Bank, 13 S. Ct. 267; 147 U. S. 91; Phelps v. Lewiston, 15 Blatchf. 131; German Bk. v. Franklin, 128 U. S. 526; Caloma v. Eaves, 92 U. S. 484; Bergess v. Seligman, 107 Ib. 20; Anderson v. Beal, 113 Ib. 227; Green Co. v. Conness, 109 Ib. 154; Dixon v. Field, 111 Ib. 83; Douglas v. Pike Co., 101 Ib. 677; Northern Bank v. Porter, 110 Ib. 608; Parmlee v. Chicago, 60 Ill. 267; Buchanan v. Litchfield, 102 U. S. 278; Elmwood v. Maxcy, 92 U. S. 289; Lane v. Embden, 72 Me. 354; Anderson v. Santa Anna, 116 U. S. 356; Anderson v. Houston etc. Co., 52 Tex. 228; Taylor v. Ipsilanti, 105 U. S. 60; Irwin v. Ontario, 3 Fed. 49; Hopper v. Covington, 8 Ib. 777; Carrier v. Shawangunk, 10 Ib. 220; Grande Chute v. Winegar, 15 Wall. 377; Lynde v. County, 16 Ib. 6; Beecher v. Cheshire, 125 U. S. 555; Bissell v. Jeffersonville, 24 How. 287; Smith v. Tallapoosa Co., 2 Woods, 574; Kenosha v. Lamson, 9 Wall. 477; Foster v. Kenosha, 12 Wis. 615; Columbia Co. v. King, 13 Fla. 421; Mayor v. Lombard, 57 Miss. 208; Cutler v. Masen, 56 Ib. 115. "Bonds payable to bearer issued by a municipal corporation —if issued in pursuance of a power conferred by the Legislature, are valid commercial instruments, but if issued by such a corporation which possessed no power from the Legislature to grant such aid, they are invalid, even in the hands of innocent holders. Such a power is frequently conferred to be exercised in a special manner, or subject to certain regulations, conditions or qualifications; but if it appears that the bonds issued show by their recitals that the power was exercised in the manner required by the Legislature, and that the bonds were issued in conformity with those regulations and pursuant to those conditions and qualifications, proof that any or all of those recitals are incorrect, will not constitute a defence in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulations, conditions or qualifications which it is alleged were not fulfilled." Clifford, J., in St. Joseph Township v. Rogers, 16 Wall. 644.

[3] See §§ 184, 186. See also McManus v. Duluth etc. R. Co., (Minn. 93) 52 N. W. R. 980.

[4] If the conditions precedent have not been performed the issue may be enjoined. Chambers Co. v. Clews, 21 Wall. 317; Union P. Co. v. Lincoln Co., 3 Dill. 300; Union P. Co. v.

lawful existence of the power was to arise, had been complied with.[1] And in a suit by the payee, no recital will conclude the question, whether the conditions precedent have been performed.[2] And, so, likewise, the municipal corporation may recover the amount which it has had to pay to a *bona fide* holder of unconstitutional bonds, to whom the railroad company had wrongfully transferred them.[3]

§ 195 *b*. **Defences not appearing on face of bond.**—But the purchaser of bonds, who takes them for value, is protected from many defences which do not appear upon the face of the bond, but which might prevail as between the original parties.

One who, without notice, and for value, comes into possession of municipal bonds is entitled to all the rights of a *bona fide* holder, even though they were stolen.[4] But the forgery or alteration of a material part of the bond is a good defence, in an action by a *bona fide* holder. Thus, if the instrument, when stolen, is incomplete in any essential respect; and this is supplied by the thief or the holder, no recovery can be had; as for example, when the place of payment is left blank;[5] but such a result will not be brought about by an alteration of the number of the bond.[6] And as a bond takes effect on delivery, a blank in the date will not affect a recovery; but when bonds were stolen, upon which both the corporate seal and the indorsement of the trustees were wanting, and these were forged, no recovery could be had.[7] The insertion of the name of the payee in a stolen bond is not such an alteration as will avoid the bonds in the hands of a *bona fide* holder.[8] Where the bonds or cou-

Merrick Co., 3 Ib. 359; Packard v. Jefferson Co., 2 Col. 338; Cairo, etc., Co. v. Sparta, 77 Ill. 505; or if issued may be declared void and canceled in the hands of a *holder with notice* of the defect. Belo v. Forsythe Co., 76 N. C. 489.

[1] See § 189 *a*.

[2] Chambers Co. v. Clews, 21 Wall. 317, 321; Madison v. Smith, 83 Ind. 502; Lamoille v. Fairfield, 51 Vt. 257; Jackson v. Brush, 77 Ill. 59; Harding v. Rockford, etc., Co., 65 Ill. 90; and cases cited by Thornton, J., in his opinion. Portland, etc., Co. v. Hartford, 58 Me. 23.

[3] Plainview v. Winona, etc., Co., 36 Minn. 505.

[4] Tiedeman Coml. Paper, § 282; Gilbraugh v. Norfolk, etc., R. Co., 1 Hughes (U. S.) 410; Planters' Assn. v. Avigno, 28 La. An. 552; Elizabeth v. Force, 29 N. J. L. 587; Battles v. Landenslager, 84 Pa. St. 446.

[5] Ledwich v. McKim, 53 N. Y. 307.

[6] Birdsall v. Russell, 29 N. Y. 220; Diamond v. Lawrence Co., 37 Pa. St. 353; Crosby v. New London, etc., Co., 26 Conn. 121.

[7] Maas v. Miss., K. & T. Ry. Co., 11 Hun, 8.

[8] Boyd v. Kennelly, 9 Vroom, 146,

pons were overdue when stolen, they cannot be recovered on even in the hands of *bona fide* holders for value.[1]

§ 195 *c*. **Who are bona fide holders.**—But in order to constitute one a *bona fide* holder, he must have parted with value, and be without notice of irregularities actual or constructive, or be himself the successive grantee of a holder, who is a *bona fide* holder.[2] A pledgee[3] or one who takes bonds in payment of a debt,[4] or who gives a note for them,[5] is entitled to all the rights of a *bona fide* holder, and may recover the face value of the bonds, although he paid less than par for them.[6] But one who purchases municipal bonds from a railroad company is not, upon their being pronounced invalid, subrogated to the rights of the railroad company if it had any.[7]

§ 195 *d*. **Effect of notice on rights of bona fide holders.**—In considering what a bondholder is bound to take notice of, or what is sufficient to put him on his guard, it should be said that the doctrine of *lis pendens* is not applicable, and a purchaser is not bound to know that an action is pending to decide upon the validity of the bonds which he is about to buy,[8] or that an injunction had been granted to restrain the issue.[9] But a purchaser of overdue bonds, after such bonds have been adjudged void, is bound by the judgment.[10]

Every one purchasing bonds is chargeable with notice of whatever facts appear stated on their face;[11] and if reference is there made to a statute, the buyer is presumed to have knowledge of all the statutory requirements.[12] Thus, if on the face

[1] Arents v. Com., 18 Gratt. 750; Vermilyea v. Adams Ex. Co., 21 Wall. 138.

[2] McClure v. Township, 94 U. S. 429; Cromwell v. Sac Co., 96 Ib. 51; Scotland Co. v. Hill, 132 Ib. 107; Suffolk Sav. Bk. v. Boston, 149 Mass. 364.

[3] Allen v. Dallas etc. Co., 3 Woods, 316.

[4] Foote v. Hancock, 15 Blatchf. 343; Mobile Sav. Bank v. Oklibbeha Co., 24 Fed. Rep. 110.

[5] Orleans v. Platt, 99 U. S. 676.

[6] Cromwell v. Sac Co., 96 U. S. 51; Chicopee Bank v. Chapin, 8 Metc. (Mass.) 40; Fowler v. Strickland, 107 Mass. 552; Nat. Bank of Mich. v. Greene, 33 Iowa, 140.

[7] Ætna L. I. Co. v. Middleport, 124 U. S. 534.

[8] Scotland Co. v. Hill, 132 U. S. 107; 10 S. Ct. Rep. 26; Olcott v. Fond du Lac, 16 Wall. 678; Nat'l Bank of Wash. v. Texas, 20 Ib. 72; Warren Co. v. Marcy, 97 U. S. 96; Orleans v. Platt, 99 U. S. 676; Cass Co. v. Gillett, 100 Ib. 585; Letch v. Wells, 48 N. Y. 586.

[9] Carroll v. Smith, 111 U. S. 556.

[10] Louis v. Brown Tp., 109 U. S. 162.

[11] Brown v. Bon Homme Co., 46 N. W. Rep. 173, 176.

[12] McClure v. Oxford, 94 U. S. 429;

of the bond it is provided that nonpayment of interest renders the bond itself due, unpaid coupons are notice to the purchaser that the whole bond is due and payable.[1] But where the bond does not contain a provision that, upon default of interest, the bond shall become due, the presence of overdue coupons is not enough to charge the *bona fide* purchaser with notice of existing defences.[2] And the statutory requirement that an affidavit should be on file renders the absence of the affidavit sufficient to put a purchaser on his guard.[3] And, furthermore, if the facts recited in the bond are such as to put the holder on his guard, he is presumed to have notice of whatever he should subsequently have discovered by reasonable inquiry.[4]

All bondholders are affected with constructive notice of whatever may be of public record, but they need not go behind the record; and whatever is found therein is conclusive on the corporation, as well as on a purchaser.[5] But a purchaser of municipal bonds is not bound to take notice of private records.[6]

As limitations upon municipal power, and the scope of the authority possessed by public and municipal agents and officials, are matters of public law and record, the *bona fide* purchaser of municipal bonds is properly charged with constructive notice of them.[7] Thus, when the Legislature has made the negotiability of bonds to depend upon their delivery by a State official, a purchaser is not a *bona fide* purchaser without notice, if the bonds are fraudulently issued and delivered by some one other than the authorized official.[8]

Bank etc. v. St. Joseph, 31 Fed. Rep. 216.

[1] Mayor v. City Bank of Macon, 58 Ga. 584.

[2] Miller v. Berlen, 13 Blatchf. 245; Rouede v. Jersey City, 18 Fed. Rep. 719; Gilbrough v. Norfolk Co., 1 Hughes, 410; State v. Cobb, 64 Ala. 127; Nat'l Bank v. Kirby, 108 Mass. 497; Boss v. Hewitt, 15 Wis. 260.

[3] Veeder v. Lima, 19 Wis. 280.

[4] Bates Co. v. Winters, 97 U. S. 85; McClure v. Oxford, *supra*; Harshman v. Bates Co., 92 U. S. 569; Mygatt v. Green Bay, 1 Biss. 292.

[5] First Nat. Bk. v. Concord, 50 Vt. 257. County records. See Lewis v. Bourbon Co., 12 Kan. 186; State v. Commissioners, 37 Ohio St. 526.

[6] Town of Eagle v. Kohn, 84 Ill. 292.

[7] Johnson Co. v. January, 94 U. S. 202; Ogden v. Daviess Co., 102 Ib. 634; Northern Bank v. Porter, 110 Ib. 608; Hayes v. Holly Springs, 114 Ib. 120; Marsh v. Fulton Co., 10 Wall. 676; United States v. City Bank of Columbus, 21 How. 356.

[8] Lewis v. Barbour Co. Com'rs, 3 Fed. Rep. 191.

§ 195*e*. **Effect of inserting unauthorized terms and conditions.**—The officers of the municipality cannot make any different agreements, affecting the liability of the municipality, from those which are required by the statute, under which the bonds were issued. So, when the bonds were unconditional promises to pay in thirty years; and their form was in strict conformity with the authority conferred, as it appeared from the record; it was held that purchasers and *bona fide* holders were not affected by a private arrangement as to the redemption of the bonds, which was made by the city with the banker, who put them on the market,[1] or by the fact that the funds, the payment of which is secured by the bonds, had been misapplied[2] or used for an unlawful purpose.

No person can be a *de facto* officer, where no office exists; and for this reason, bonds issued by persons who purported to be county commissioners are invalid even in the hands of *bona fide* holders, when the statute, by which the office had been created, was unconstitutional.[3]

If bonds have been issued without legislative authority, or in disregard of the limitations which were imposed by such authority,[4] or by the State or Federal Constitution,[5] upon the expressly conferred power to issue them, the bonds are invalid in whosesoever hands they may be found.[6]

§ 195*f*. **Burden of proof.**—In the case of coupon bonds, payable to bearer, possession is *prima facie* evidence of ownership;[7] but strong evidence of fraud in the creation of the se-

[1] Suffolk Sav. Bank v. Boston, 149 Mass. 364.

[2] Lynchburg v. Slaughter, 75 Va. 57.

[3] Norton v. Shelby Co., 118 U. S. 425.

[4] Milan v. Tenn. etc. Co., 11 Lea, 329; Norton v. Dyersburg, 127 U. S. 160.

[5] Wells v. Pontotoc Co., 102 U. S. 625; Ogden v. Daviess Co., 102 Ib. 634; Allen v. Louisiana, 103 Ib. 580; Lamculle etc. Co. v. Fairfield, 51 Vt. 257.

[6] Force v. Batavia, 61 Ill. 100; Williams v. Roberts, 88 Ib. 13; Lippincott v. Pana, 93 Ib. 24; Nesbitt v. Riverside, 144 U. S. 610; Eddy v. People, 127 Ill. 428; Memphis v. Bethel, 17 S. W. R. 191; Agawam N. Bk. v. South Hadley, 128 Mass. 503; Barnes v. Lacon, 84 Ill. 461; Williams v. People, 132 Ill. 574; Frick v. Mercer, 138 Pa. St. 523; Aspinwall v. Daviess Co., 22 How. 364; Marsh v. Fulton Co., 10 Wall. 655; Duke v. Brown, 96 N. C. 127; Merrill v. Monticello, 138 U. S. 673; Getchell v. Benton, 47 N. W. R. 468 (Neb. 90); Ottawa v. Carey, 108 U. S. 110; Purdy v. Lansing, 128 U. S. 557.

[7] Tiedeman Coml. Paper, § 312, where the burden of proof is more fully explained.

curities would throw upon the holder the burden of proving affirmatively that he paid value;[1] where, however, the authority to issue bonds is limited as to the amount which can be issued, the burden of proving that the limit had been reached is on the corporation.[2]

§ 196. **Doctrine of estoppel as applicable to bona fide holders—Effect of recitals in the bonds.**—In discussing to what extent a municipal corporation may be estopped, in actions brought against it on its bonds, it should be noticed that the doctrine applies only after the bonds have been issued.[3] In cases where the alleged want of power is predicated upon an omission to give legal notice of the election, or upon other irregularities, it is held that the decision of the board, who were the public agents of the corporation issuing the bonds, is conclusive as to the facts occurring previous to their issue, and that the municipality is thereby estopped[4] in an action brought by a *bona fide* holder. But in order that the recitals in bonds of compliance with conditions precedent may bind the corporation, they must purport to come from some officer, who is charged by the law with the duty of ascertaining the fact, that the conditions precedent have been fully performed,[5] as, for example, from the officials signing the bonds on behalf of the corporation;[6] or, as express directions on this point are so frequently omitted from the statute, from those officials to whom full control is given.[7] The power, to determine whether the conditions precedent have been complied with, cannot be delegated

[1] Marion Co. v. Clark, 94 U. S. 278; Macon Co. v. Shares, 97 Ib. 272; Stuart v. Lansing, 104 Ib. 505.

[2] Neely v. Yorkville, 10 S. C. 141.

[3] Union Pac. R. Co. v. Lincoln Co., 3 Dill. 300. See Travellers v. Oswego, 55 Fed. Rep. 361; Nesbitt v. Riverside, 144 U. S. 610.

[4] Bernards v. Morrison, 133 U. S. 523; National Bank v. Grenada, 41 Fed. Rep. 87; Brown v. Pt. Pleasant, (W. Va. 92) 15 S. E. 209; Brown v. Milliken, 42 Kan. 769; Fulton v. Riverton, 42 Minn. 395; Bissell v. Jeffersonville, 24 How. 287; Menasha v. Hazard, 102 U. S. 81; Town of Prairie v. Lloyd, 97 Ill. 170; Hannibal v. Fauntleroy, 105 U. S. 408; Pana v. Bowler, 107 Ib. 529; Moran v. Miami, 2 Black, 722; McCall v. Hancock, 10 Fed. Rep. 80.

[5] Humboldt v. Long, 92 U. S. 642; Marcy v. Oswego, Ib. 638; Venice v. Murdock, Ib. 194; Rock Creek v. Strong, 96 Ib. 271; Montclair v. Ramsdell, 107 Ib. 147; Anderson Co. v. Beal, 113 Ib. 227; Lincoln v. Cambria Co., 113 Ib. 412.

[6] Oregon v. Jennings, 119 U. S. 74, 92.

[7] Bernards Tp. v. Morrison, 133 U. S. 523.

by the corporation [1] to others than its own officers. And when all the facts are exclusively within the knowledge of the board by whom the bonds are authorized to be issued, it will be implied that it was the legislative intent to make this body the judge, whether the conditions had been complied with.[2] But the rule is decisively laid down that in no case is a municipal corporation estopped by recitals or declarations made by agents or officials who are not authorized to make them.[3]

A municipal corporation is never estopped, by conduct or by recitals, from setting up as a defence a total lack of power to issue the bonds.[4] A *bona fide* holder is always obliged to determine at his peril, whether the municipal corporation was authorized to issue the bonds under any terms or conditions.[5] So, also, it must be observed that, when the condition requires that the assent of the people shall be given prior to an issue of bonds, no subsequent acts of the municipal officers, aside from recitals of the bonds, will estop the city from showing that such assent was not given.[6] When the question is as to an irregular exercise of the power, or a failure to comply with the conditions, the corporation may be estopped, as against a *bona fide* holder, by its course of dealing; as, for example, by payment of interest on the bonds,[7] or by retaining and using for municipal purposes

[1] Jackson Co. v. Brush, 77 Ill. 59.

[2] Evansville, etc., Co. v. Evansville, 15 Ind. 395; Mutual Ben. L. I. Co. v. Elizabeth, 42 N. J. L. 235.

[3] Chisolm v. Montgomery, 2 Woods, 584; Brown v. Bon Homme Co., 46 N. W. Rep. 173; Bank v. Bergen Co., 115 U. S. 334; Whiteside v. United States, 93 Ib. 247; Daviess Co. v. Dickinson, 117 Ib. 657; Cagwin v. Hancock, 84 N. Y. 532; Concord v. Robinson, 121 U. S. 165; Williams v. Roberts, 88 Ill. 11; Hudson v. Winslow, 35 N. J. L. 437; Gould v. Sterling, 23 N. Y. 464; Stariu v. Genoa, 23 Ib. 452; People v. Mead, 36 Ib. 224; Buchanan v. Litchfield, 102 U. S. 278; Northern Bank v. Porter Tp., 110 Ib. 608; Dixon v. Field, 111 Ib. 83.

[4] Sherrard v. Lafayette Co., 3 Dillon, 236; Bissell v. Kankakee, 64 Ill. 249; Middleport v. Ætna, etc., Co., 82 Ib. 562; Gaddis v. Richmond, 92 Ib. 119; Douglas v. Niantic Sav. Bk., 97 Ib. 228; Lewis v. Bourbon Co., 12 Kan. 186; Belo v. Forsyth Co., 76 N. C. 489; State v. Green Co., 54 Mo. 540.

[5] Lexington v. Butler, 14 Wall. 283; Flagg v. Palmyra, 33 Mo. 440; Kennicott v. Wayne Co., 16 Wall. 452; Burr v. Chariton Co., 2 McCray, 604.

[6] Norton v. Shelby Co., 118 U. S. 425; Marsh v. Fulton Co., 10 Wall. 684.

[7] Alvord v. Syracuse Sav. Bk., 98 N. Y. 599.

the money received for them,[1] by provision for funding,[2] or by receiving an outstanding bond and issuing another in its place.[3] When the bonds were issued in payment of a subscription to the stock of a railroad, the municipal corporation was held to be estopped if it retained the company's stock,[4] although the bonds contained no recital of a compliance with the conditions, and although the interest had never been paid.[5]

Delay in resorting to legal remedies for voiding the bonds, or for restraining their negotiation, is also a circumstance from which the municipality may be estopped. Thus, where the issue of the bonds had not been enjoined for more than two years after the election and the placing of the bonds in the market, this delay was held to be material as bearing on the question of the estoppel.[6] Payment of one year's interest is not sufficient, in the absence of other acts, to constitute an estoppel.[7] Misconduct on the part of municipal officers, such as fraud or embezzlement, not involving the question of the legal power of the municipality to issue the bonds, cannot be set up as a defence against a *bona fide* holder without notice.[8] And although laches on the part of the town may estop it, when defending a suit brought by a *bona fide* holder,[9] yet, if it seeks the aid of a court of equity to have a bond reformed, which had been, through the negligence of its own officers, erroneously executed, the town will be entitled to relief, as against a

[1] Bennington v. Park, 50 Vt. 178; Shoemaker v. Goshen, 14 Ohio St. 569; State v. Van Horne, 7 Ib. 327, 331; Steines v. Franklin Co., 48 Mo. 167; New Haven, etc., Co. v. Chatham, 42 Conn. 465; People v. Cline, 63 Ill. 394; Marshall Co. v. Schenck, 5 Wall. 772, 781; Rogers v. Burlington, 3 Ib. 654, 667; Portsmouth Bk. v. Springfield, 4 Fed. Rep. 276; Moulton v. Evansville, 25 Fed. Rep. 382; Ray Co. v. Van Sycle, 96 U. S. 675; McKee v. Vernon Co., 3 Dill. 210; Munson v. Lyons, 12 Blatchf. 539; Luling v. Racine, 1 Biss. 314.

[2] State v. Wilkinson, 20 Neb. 610.

[3] Johnson v. Stark Co., 24 Ill. 75.

[4] Third Nat. Bk. v. Seneca Falls, 15 Fed. Rep. 783; Whiting v. Potter, 2 Fed. Rep. 517.

[5] Pendleton Co. v. Amy, 13 Wall. 297.

[6] Anderson Co. v. Beal, 113 U. S. 227.

[7] Mertz v. Cook, 108 N. Y. 505; Loan Ass'n v. Topeka, 20 Wall. 655.

[8] Butler v. Dunham, 27 Ill. 474; East Lincoln v. Davenport, 94 U. S. 801; Johnson Co. v. Thayer, 94 Ib. 631; Grand Chute v. Winegar, 15 Wall. 355; Railroad Co. v. Otoe Co., 1 Dill. 338; Belo v. Forsythe Co., 76 N. C. 489; Black v. Cohen, 52 Ga. 621; Lane v. Schomp, 20 N. J. Eq. 982.

[9] Marshall Co. v. Schenk, 5 Wall. 781; Meyers v. Muscatine, 1 Ib. 384.

holder having notice of the error, although suit was not brought until several years after the mistake had been discovered.[1]

When the bonds, the ordinance which authorizes their issue,[2] or the corporation minutes,[3] import by recitals a compliance with the requirements of the law, a *bona fide* holder is not obliged to look further for the proof of the performance or observance of the conditions required.[4] But wherever a statute expressly declares bonds to be absolutely void, unless the conditions under which they are issued are performed, recitals have no binding force as estoppels.[5] A recital in a bond, that it is issued under authority of an act, has been held to estop the municipality from showing, as against a *bona fide* holder, that the road was not completed in time ;[6] and this is the effect of such a recital, even when the statute expressly says the bonds shall not be valid until all conditions are complied with.[7] Bonds, which appear by their recitals to have been issued under a law, which had been repealed, will be valid if they have been issued in substantial compliance with other statutory provisions then in force.[8] The recitals in such a case furnish no aid to the holder,

[1] Essex v. Day, 52 Conn. 483.

[2] Gause v. Clarksville, 1 McCrary, 78.

[3] Aberdeen v. Sykes, 59 Miss. 236.

[4] Barnett v. Denison, 145 U. S. 135; National Bank v. Grenada, 41 Fed. 87; 48 Fed. 278; Knox Co. v. Aspinwall, 21 How. 545; Moran v. Miami, 2 Black, 722; Gelpcke v. Dubuque, 1 Wall. 175, 203; Rogers v. Burlington, 3 Ib. 354; Brown v. Milliken, 23 Pac. 167; 42 Kan. 769; Lexington v. Butler, 14 Wall. 284; Grand Chute v. Winegar, 15 Ib. 372; Township v. Bernards, 133 U. S. 523; Moultrie v. Savings Bank, 92 Ib. 631; Randolph Co. v. Post, 93 Ib. 502; Cass Co. v. Johnston, 95 Ib. 360; Hacket v. Ottawa, 99 Ib. 86; Schuyler Co. v. Thomas, 93 Ib. 169; Fulton v. Riverton, 44 N. W. R. 257; 42 Minn. 395; Leavenworth Co. v. Barnes, 94 U. S. 70; Douglas Co. v. Bolles, 94 Ib. 154; Coler v. Richland, (N. D. 93) 55 N. W. R. 587; Pendleton v. Amy, 13 Wall. 305; Rock Creek v. Strong, 96 U. S. 227; San Antonio v. Mehaffy, 96 Ib. 313; Pompton v. Cooper Un., 101 Ib. 204; Harter v. Kenochan, 103 Ib. 562; Bonham v. Needles, 103 Ib. 648; Buchanan v. Litchfield, 102 Ib. 278; Am. L. I. Co. v. Bruce, 105 Ib. 328; Nor. Bank v. Porter, 110 Ib. 608; Walnut v. Wade, 103 Ib. 683; Clay Co. v. Savings Society, 104 Ib. 579; Meyer v. Brown, 65 Cal. 583; Lane v. Embden, 72 Me. 354; Moulton v. Evansville, 25 Fed. Rep. 382; Smith v. Clark Co., 54 Mo. 58; Narment v. Charlotte Co., 85 N. C. 387; Belo v. Forsythe Co., 76 Ib. 489; *contra*, Comm. Bank of Commerce v. Grenada, 44 Fed. 262; Spitzer v. Blanchard, 46 N. W. R. 400; 82 Mich. 234.

[5] German Sav. Bk. v. Franklin, 128 U. S. 526; Anthony v. Jasper Co., 4 Dill. 136.

[6] Oregon v. Jennings, 119 U. S. 74.

[7] Am. L. Ins. Co. v. Bruce, 105 U. S. 328.

[8] Johnson Co. v. January, 94 U. S. 202; Anderson Co. v. Beal, 113 U. S. 237.

and he must show that the provisions of the law which were enacted for his protection have been observed;[1] but he is not estopped by a recital, that a bond was issued under a special act, from showing that it was voted for and issued under a general law.[2] The particular form, which the recitals assume, is not material provided they are couched in terms that will give the holder to understand that the bonds have been issued legally.[3]

But a statement, that a subscription was authorized by statute and that the sum mentioned in the bonds was part of it, does not constitute a recital that the bonds were issued in pursuance of the statute.[4] So, a recital that bonds were issued in pursuance of law will not estop the municipal corporation from showing that it did not have the necessary population required by the act, as a condition precedent to the creation of the debt.[5]

A recital, that the consent of the taxpayers, as expressed by written assent or petition filed, was properly obtained,—when made by the proper officials,—is conclusive, as against the *bona fide* holders of the bonds.[6]

It has been held that municipal corporations may be estopped by recitals in bonds, that the amount of the bonds issued is not in excess of the statutory limit of indebtedness.[7] But where

[1] Crow v. Oxford Tp., 119 U. S. 215; Gilson v. Dayton, 123 Ib. 59.

[2] Ninth Nat. Bk. v. Knox Co., 37 Fed. Rep. 75.

[3] Sch. Dis. v. Stone, 106 U. S. 183. "It is not necessary that the recital should enumerate each particular fact essential to the existence of the obligation. A general statement, that the bonds have been issued in conformity with the law, will suffice so as to embrace every fact which the officers making the statement are authorized to determine and satisfy." Dixon Co. v. Field, 111 U. S. 83; Marcy v. Oswego Tp., 92 Ib. 637; Douglas Co. v. Bolles, 94 Ib. 104; Marion Co. v. Clark, 94 Ib. 278; Pana v. Bowler, 107 Ib. 529; Liebman v. San Francisco, 24 Fed. Rep. 705; Shurtleff v. Wiscasset, 74 Me. 130; *contra*, Bk. of Commerce v. Grenada, 44 Fed. Rep. 262.

[4] Carroll Co. v. Smith, 111 U. S. 556; Bolton v. Board, 1 Bradw. 193; Woodruff v. Okalona, 57 Miss. 806.

[5] Kelly v. Milan, 21 Fed. Rep. 842.

[6] Venice v. Murdock, 92 U. S. 494; Society for Savings v. New London, 29 Conn. 174; Evansville etc. Co. v. Evansville, 15 Ind. 395; Knox Co. v. Nichols, 14 Ohio St. 260. The New York cases *contra* of Starin v. Genoa, 23 N. Y. 439, and Gould v. Sterling, 23 Ib. 456, are in conflict with all the decisions of the Federal courts and with decisions in other State courts upon this point.

[7] Humboldt v. Long, 92 U. S. 642; Concord v. Portsmouth Sav. Bank, 92 Ib. 625; Marcy v. Oswego, 92 Ib. 637; Wilson v. Salamanca, 99 Ib. 499; Dallas Co. v. McKensie, 110 Ib. 686; New Providence v. Halsey, 117 Ib. 336; Darlington v. La Clede, 4 Dill. 200.

limitations upon municipal indebtedness exist, the question is often a mixed one of law and fact, so complicated that it is difficult to give any rule, which will be universally applicable. Since such limitations are imposed by statute, they are constructively known to *bona fide* holders, and no mere acquiescence or assent, aside from recitals in the bonds, will estop the city.[1] But when the facts are in question, they are not presumed to be within the knowledge of all; and particularly, when the limit is of legislative creation and the Legislature has constituted a board to determine if its limit has been exceeded, its findings as to facts are conclusive.[2]

The views, above enunciated, hardly represent the condition of the law now; as, although not perhaps overruled, there has been a departure from these principles by the Supreme Courts of the United States and of the States, and a distinction is made between cases where the limitation is of a constitutional, as distinct from a statutory, character.[3] In a recent case, where the recitals showed the amount of the indebtedness, and that all the provisions of the law had been complied with, the municipality was not estopped to question their truth, when the bonds caused a constitutional limit of indebtedness to be exceeded.[4]

[1] Daviess Co. v. Dickinson, 117 U. S. 657; McPherson v. Foster, 43 Iowa, 48; Masher v. Ind. Sch. Dis., 44 Iowa, 122; comp. Mer. Bk. v. Bergen Co., 115 U. S. 384.

[2] Oregon Co. v. Jennings, 119 U. S. 74; Sherman Co. v. Simons, 109 Ib. 735. In the latter case the court said: "Every prerequisite fact to the execution and issue of the bonds was of a nature that required examination and decision. The existence of sufficient taxable property to warrant the amount of the subscription and issue was no more essential to the exercise of the authority conferred upon the board of county commissioners than was the petition for the election, or the fact that fifty freeholders had signed, or that three fifths of the legal voters had voted for the subscription. These are all extrinsic facts bearing not so much upon the authority vested in the board to issue the bonds, as upon the question whether it should be exercised. They are all by the statute referred to the inquiry and determination of the board, and they were all determined before the bonds and coupons came into the hands of the plaintiff." Affirming Marcy v. Oswego Tp., 92 U. S. 637; Buchanan v. Litchfield, 102 U. S. 278.

[3] Cummins v. Lawrence Co., 46 N. W. Rep. 184.

[4] Lake Co. v. Graham, 130 U. S. 674; Dixon v. Field, 111 U. S. 83; distinguishing Marcy v. Oswego, 92 U. S. 637; and holding public record of assessment notice to all parties; Buchanan v. Litchfield, 192 U. S. 278; Northern Bk. v. Porter, 110 U. S. 608; Potter v. Chaffee Co., 33 Fed. Rep. 614; Lake Co. v. Rollins, 130 U. S. 662; Lake Co. v. Graham, 130 Ib.

Constitutional limitations of this character have been regarded as so necessary to the protection of public interests, that in many States the courts have felt a great hesitancy in taking a position which would have the effect of nullifying these safeguards. And here, too, where the recital is that the bonds are issued in pursuance of law or in conformity with law, the facts involved in the question, whether the constitutional or statutory limitation has been exceeded, are usually matter of record of which all have constructive notice, and which is conclusive on all.

It should also be observed that the amount of municipal indebtedness as well as the amount of assessed valuation is easy of ascertainment, the bonds frequently showing on their face the total amount of the whole issue, making the calculation of the ratio it bears to the valuation a comparatively easy matter.[1]

§ 197. **Renewal—Funding.**—When a municipal corporation has, for its own advantage, issued new bonds, and recalled its old bonds which are outstanding, it is estopped from urging the defences, which could have been interposed in suits on the original obligations; unless, of course, they have been actually declared invalid by a court of competent jurisdiction. If bonds have been judicially declared invalid, the corporation has no general authority to issue others in their stead; but if new bonds are specially authorized in order to fund the city debt, the obligation on the prior invalid bonds will be a sufficient consideration for the new bonds.[2]

The creditor, who has accepted a less valuable security in place of his original bond, has a right to assume that his debtor has waived all defences which he might have originally made, in consideration of the benefit conferred in the exchange.[3] The power to issue bonds implies the power to issue other bonds in renewal or redemption of the old bonds,[4] and it has been held

674; Wheeler v. Philadelphia, 77 Pa. St. 338; East St. Louis v. People, 124 Ill. 655.

[1] Dixon Co. v. Field, 111 U. S. 83.

[2] Hill v. Peekskill, 101 N. Y. 490.

[3] Chandler v. Attica, 18 Fed. Rep. 299; Jasper Co. v. Ballou, 103 U. S. 745; Little Rock v. Mer. N. Bank, 98 Ib. 308; Aroma v. Auditor, 15 Fed. Rep. 843; Moultrie v. Rockingham etc. Bank, 92 U. S. 631; Marcy v. Oswego, 92 Ib. 637; Warren Co. v. Marcy, 97 Ib. 97.

[4] Sullivan v. Walton, 20 Fla. 552; Portland Sav. Bk. v. Evansville, 25 Fed. Rep. 389; Galena v. Corwith, 48 Ill. 423; Lynde v. Winnebago, 16 Wall. 6; McKee v. Vernon Co., 3 Dill. 210.

that, since such issue does not create any new debt, it need not be submitted to a popular vote, where such vote is required.[1]

The holder of the new bonds may avail himself of the same remedies as the holder of the old;[2] and should they prove invalid, he may sue on the original bonds although they have been canceled.[3]

§ 198. **Disposal and sale of bonds.**—Municipal bonds may be disposed of through an agent;[4] but a prohibition against selling bonds below par will prevent the allowance of any rebate or commission to the purchaser.[5] When the authority to dispose of bonds to the best advantage is conferred, and the proceeds are to be invested in stock, the bonds may be delivered to the company in exchange for stock.[6]

It has been held that a donation of the bonds, issued to aid a railroad, may be made to the company where the city was empowered "to dispose of bonds to the best advantage but not for less than par;"[7] but if the company sells the bonds below par, when the statute forbade their sale on such terms, the subscription may be rescinded, and the bonds unsold and the par value of those sold may be recovered.[8] Such a condition is usually a condition precedent.[9] But if the city or county, which issued the bonds, received their par value, it cannot defend against a *bona fide* holder, by showing that the company to which they were delivered, sold them below par.[10] Under an authority to issue bonds at six per cent, bonds may be issued at five per cent and sold below par,[11] although the requirement of the statute, authorizing the issue, is that they be sold at par.

§ 199. **Statute of Limitations.**—The Statute of Limitations applies to municipal bonds; and since the bond and coupon are contracts of equal dignity and of the same legal character,

[1] Blanton v. McDowell Co., 101 N. C. 532.

[2] People v. Lippincott, 91 Ill. 193.

[3] Dego v. Otoe Co., 37 Fed. Rep. 247; Gause v. Clarksville, 1 McCrary 78; Plattsmouth v. Fitzgerald, 10 Neb. 401.

[4] Cushman v. Carver, 19 Minn. 295.

[5] Whelen's App., 108 Pa. St. 162.

[6] Foote v. Hancock, 15 Blatchf. 343.

[7] Queensbury v. Culver, 19 Wall. 83.

[8] Lawrence Co. App., 67 Pa. St. 87; Same v. N. W. R. R. Co., 32 Ib. 144.

[9] Adams v. Lawrence Co., 2 Pitts. R. 60; Com. v. Allegheny Co., 32 Pa. St. 218; Armstrong Co. v. Brinton, 47 Ib. 367; Omaha Nat. Bank v. Omaha, 15 Neb. 333; Newark v. Elliott, 5 Ohio St. 114.

[10] Woods v. Lawrence Co., 1 Black. 386.

[11] Omaha Bank v. Omaha, 15 Neb. 333.

the same period will apply to both. So, it has been held that, when a suit for the interest cannot be maintained on the coupon because of the lapse of the statutory time, it cannot be recovered by suing for the same interest on the bond.[1] When a note or bond is payable in instalments, the statute begins to run against each instalment from the time the instalment matures; and, although it has been held that interest is a mere incident of the debt, is inseparable from it and may be recovered in the same suit with the debt;[2] yet, in the case of coupon bonds, since the promise to pay interest takes the form of a distinct negotiable instrument; and such coupon may, and often is, separated from the bond, the statute runs against each coupon, as it matures.[3] The statute may be prevented from running by a legislative recognition of the debt.[4]

A railroad company, suing to obtain possession of bonds issued in its aid, but which has been returned to the municipality by the State official who was authorized to deliver them to the railroad company, is barred by laches which extends over a period of thirteen years.[5]

[1] Griffin v. Macon Co., 36 Fed. Rep. 885.

[2] Grafton Bk. v. Doe, 19 Vt. 463; Ferry v. Ferry, 2 Cush. 92.

[3] Kenosha v. Lamson, 9 Wall. 477; Lexington v. Butler, 14 Ib. 282; Clark v. Iowa City, 20 Ib. 583.

[4] Underhill v. Sonora, 17 Cal. 172; Fort Scott v. Hickman, 112 U. S. 150.

[5] Young v. Clarendon Tp., 26 Fed. Rep. 895.

NOTE.—It is manifest that, in this chapter, the attempt is not made to include a full and complete discussion of the law of commercial paper, particularly, in setting forth what defences can avail against a *bona fide* holder, or when one can claim the protection of a *bona fide* holder. Nothing more is attempted here than to give a statement of those cases, in which the defences have particular reference to municipal and coupon bonds, and refer the reader to the special works on commercial paper for a discussion of the whole subject.

CHAPTER XII.

RIGHT OF MUNICIPAL CORPORATIONS TO OWN AND CONTROL PROPERTY.

§ 200. **Right of municipal corporations to acquire property.**—The English statute of mortmain was primarily enacted for the purpose of restraining private civil and eleemosynary corporations from acquiring lands; and, at first, the statutes were not made applicable to cities; presumably, on the ground that the same objection to the acquisition of lands did not obtain to cities, as to religious and other private corporations. A century later, there was a direct prohibition of the acquisition of such lands by municipal corporations.[1] But, independently of the statutes of mortmain and at the common law, corporations, both public and private, are authorized to take, hold or dispose of lands for any purposes which are not inconsistent with the object of their creation.[2] The English statute of mortmain will not be enforced in this country, except in pursuance of some express legislation.[3] And hence the municipal corporation has in

[1] Mereweth. & Steph. Hist. Corp. 389, 702; *per* Justice Campbell, McDonough Will Case, 15 How. 404–407.

[2] 1 Wash. Real Prop. (4th ed.) 50, pl. 26; Sutton v. Cole, 3 Mass. 239; 1 Blacks. Com. 475, 478; 1 Kyd. 108.

[3] Perin v. Carey, 24 How. 465 (1860); Davidson College v. Chamber's Executors, 3 Jones Eq. (N. C.) 253 (1857); 2 Kent Com. 282, 283

this country the implied power, in the absence of restrictions of charter or statute, to purchase and hold all such real estate as may be necessary or reasonably subservient to the attainment of the objects which are intrusted to such corporation.[1] It is not necessary, therefore, that there should be any express grant of power to the municipal corporation, in order to hold or acquire lands, for the purposes for which the corporation was created, or to enable it to carry out some express power. As, for example, where a municipal corporation is given the power to establish a market, it has the implied power to purchase the land that may be needed for the erection and maintenance of such a market.[2] The charter, or the general laws under which the municipal corporation has been created, are the source of power of such corporations in every case; and while the implied power exists, as just explained, in the absence of any express provisions of the charter, or of the general law under which municipal corporations are formed; yet, where there are special provisions governing the matter, either in restraining or enlarging or specifying the scope of the powers of such corporation, then these limitations or express provisions will supersede the implied powers of acquisition, and control the determination of the scope of power of the municipal corporation in such mat-

Chambers v. St. Louis, 29 Mo. 543, 575; Dodge v. Williams, 46 Wis. 70; Jackson v. Phillips, 14 Allen, 591; Gould v. Taylor Orphan Asylum, Ib. 106; Downing v. Marshall, 23 N. Y. 392; Page v. Heineberg, 40 Vt. 81.

[1] West Chi. Park Com'rs v. McMullen, 25 N. E. R. 676; Proprietors of Jeffries Neck v. Inhabitants, (Mass. 90) 26 N. E. R. 239; Reynold's Heirs v. Stark County Com'rs etc., 5 Ohio, 204; Corinth v. Locke, 62 Vt. 411; Coleman v. San Rafael Turnpike Co., 49 Cal. 517; Root v. Shields, Woolw. C. C. 340; McCartee v. Orphan Soc. of N. Y., 9 Cow. 437; Peru Iron Co., *In re*, 7 Cow. 540, 552; Leeds v. Richmond, 102 Ind. 372; Ketchum v. Buffalo, 14 N. Y. 356, 360; Chambers v. St. Louis, 29 Mo. 543, 573, 576; State v. Mansfield Com'rs, 23 N. J. L. 510; Nicoll v. N. Y. & E. R. R. Co., 12 N. Y. (2 Kern.) 121; Rensselaer etc. R. R. Co. v. Davis, 43 N. Y. 137; State v. Brown, 27 N. J. L. 13; Davidson College v. Chambers' Executors, 3 Jones Eq. (N. C.) 253; Lester v. Jackson, 11 So. 114; 69 Miss. 887. Cf. Young v. Board of Commissioners, 51 Fed. R. 580.

[2] Ketchum v. Buffalo, 14 N. Y. 356; Le Couteulx v. Buffalo, 33 N. Y. 333; Paterson v. Mayor, 17 N. Y. 449. But, on the other hand, if the power be given to the corporation to enter into a contract for the supply of water to the city, it has been held in California that there is no implied power to purchase a site upon which to erect the waterworks. People v. McClintock, 45 Cal. 11.

ters.[1] But in every case, in the absence of express provisions in such charter, or in the general laws of the State, a general authority to purchase and hold property is invariably construed to mean for purposes authorized by the charter, and to prohibit the purchase of lands merely for the purpose of investment or speculation.[2]

Municipal corporations may likewise claim the right of a proprietor, in regard to alluvium which may be formed within corporate limits and on land, the title to which is in the city.[3] So, likewise, where the municipal corporation has the title to a water front, it has the same powers in regard to the grant of wharf privileges, as a private owner would have.[4]

§ 201. **Real estate beyond corporate limits.**—Inasmuch as a municipal corporation is a governmental institution, designed to create a local government over a limited territory, it is laid down as the general rule, that a municipal corporation cannot purchase and hold real estate, located beyond its territorial limits, unless such power is expressly conferred by the Legislature.[5] And while this is the general rule, yet there are some purposes, promoting the public welfare, which are intrusted to a municipal corporation, and which cannot be attained except by

[1] Bouham v. Taylor, 16 S. W. R. 555; Kingman v. Brockton, (Mass.) 26 N. E. R. 998; Lauenstein v. Fond du Lac, 28 Wis. 336; State v. Nashville Univ., 4 Hump. 157; State v. Madison, 7 Wisc. 688; Heyward v. Mayor, etc. of New York, 7 N. Y. 314; Beaver Dam v. Frings, 17 Wis. 398.

[2] State v. Natal, 41 La. Ann. 887; Crawfordsville v. Braden, 28 N. E. R. 389; Springfield v. Fulmer, (Utah) 27 Pac. R. 577; Keller v. Wilson, (Ky.) 14 S. W. R. 332; McCartee v. Orphan Asylum, 9 Cow. (N. Y.) 437; Bank v. Niles, 1 Doug. (Mich.) 401; Davidson College v. Chambers' Executors, 3 Jones Eq. (N. C.) 253; Champaign v. Harmon, 98 Ill. 491; Cf. *contra*, Municipality v. McDonough, 2 Rob. (La.) 244; Corinth v. Locke, 62 Vt. 411.

[3] Clarke v. Providence, (R. I.) 15 Atl. R. 763; Leonard's Heirs v. Baton Rouge, 4 So. R. 241; Beaufort v. Duncan, 1 Jones (N. C.) Law, 234; Remy v. Municipality, 11 La. An. 148; St. Louis v. Lemp, 93 Mo. 477; Carrollton K. R. Co. v. Winthrop, 5 La. An. 36; Richardson v. Boston, 24 How. (U. S.) 188; Kennedy v. Municipality, 10 La. An. 54; see *post*, § 225.

[4] Leonard's Heirs v. Baton Rouge, *supra*; Illinois v. Illinois etc. Co., 33 Fed. R. 730; Dana v. Jackson, etc. Co., 31 Cal. 118; Bell v. Gough, 23 N. J. L. 624.

[5] Bullock v. Curry, 2 Met. (Ky.) 171; Riley v. Rochester, 9 N. Y. (5 Seld.) 64; Denton v. Jackson, 2 Johns. Ch. (N. Y.) 320; Girard v. New Orleans, 2 La. An. 897; Chambers v. St. Louis, 29 Mo. 543; Concord v. Boscawen, 17 N. H. 465.

the acquisition and ownership of lands beyond the city limits; as, for example, where it is desired to establish a pest-house or cemetery; and, in some cases, waterworks. In these cases, it has been held that it is possible for the municipal corporation, for such purposes, to purchase lands beyond the city limits, without any express authority therefor from the Legislature. And not only is it held that they may purchase lands beyond the city limits, within the same State in which the city is situated; but even in other adjacent States, provided the laws of the State, in which the land is situated, did not restrain such a purchase or acquisition of the land by a foreign municipal corporation.[1] Where foreign territory, or land beyond the city limits, has been acquired by a municipal corporation, Judge Cooley states that the city will hold such land without its limits for a park, "not in its public capacity as an agency of the government, and subject to the unrestricted control of the State, but as a corporate individual, having private rights of its own, which it is at liberty to enjoy undisturbed by the State, and in the enjoyment of which the constitution will protect its people."[2]

§ 202. **Donations of land to a municipal corporation.**— Municipal corporations may, like any other class of legal personalities, be the object of both public and private bounty. The duties of a municipal corporation are varied in character; in carrying such purposes into effect, means are needed, and, in order to attain such purposes, they are authorized to receive such means not only by taxation and the incurment of debt, but may, likewise, receive legacies of personal property, grants and devises of lands, as long as special restrictions upon the power of such a corporation are not imposed by statute.[3] In

[1] Lester v. Jackson, 11 So. 114; 69 Miss. 887; McDonough Will Case, 15 How. (U. S.) 567; Bank of Augusta v. Earle, 13 Pet. 519, 584; Runyan v. Coster's Lessee, 14 Pet. 122; Chambers v. St. Louis, 29 Mo. 542, 574, 575; Seebold v. Shitler, 34 Pa. St. 133.

[2] Thompson v. Moran, 44 Mich. 602; Lester v. Jackson, (Miss. 92) 11 So. R. 114.

[3] Chambers v. St. Louis, 29 Mo. 543, 574; Franklin's Admr. v. Philadelphia, 13 Pa. Co. Ct. R. 241; 2 Pa. Dist. R. 435; Sears v. Chapman, (Mass. 93) 33 N. E. R. 604; Perin v. Carey, 24 How. 465; *In re* Gehrig Est., 27 N. E. R. 784 (N. Y.); Skinner v. Harrison Tp., (Ind.) 18 N. E. R. 529; Brown v. Brown, 7 Oreg. 285; Dunbar v. Soule, 129 Mass. 284; Green v. Hogan, (Mass.) 27 N. E. R. 413; Sargent v. Cornish, 54 N. H. 18; Hamden v. Rice, 24 Conn. 350; Coggeshall v. Pelton, 7 Johns. (N. Y.) Ch. 292; Davis v. Barnstable, (Mass.) 28 N. E. R. 165.

New York, the Statute of Wills does prohibit bodies politic and corporate from taking the real estate directly. And in order that such bodies may acquire any benefit from such a devise, it must be made a trust for their benefit,[1] except where a special statute has authorized such direct acquisition of lands. But where the statute authorizes a corporation to take lands "by direct purchase or otherwise," it is held that such a corporation has the authority to take lands by will.[2] Municipal corporations, however, seem to be generally authorized to accept donations of lands both by grant and by devise. It is thus a very common occurrence for private individuals to make donations of lands by grant or by will for the service of public and charitable purposes, for the establishment of schoolhouses, city halls, libraries, and the like; and no objection is raised to the acceptance by the corporation of such donations.[3] It has been held that a city may take and receive real and personal property, in order to provide for the development of a coal mine located near the city limits.[4]

In this case of special donations to the city for special purposes, the property is taken by the city in trust for the purpose for which the donations have been made, and it is impossible for the land so conveyed to be devoted to any other use but that for which it was intended. It is very different where corporations purchase the land for specific purpose, and when the power of alienation has not been interfered with.[5]

§ 203. **Power of municipal corporations to serve as trustee of a charitable use.**—The general rule has already been stated in a previous paragraph, in respect to the power of a

[1] McCartee v. Orphan Asylum Society, 9 Cow. (N. Y.) 437; Auburn Theol. Sem. v. Childs, 4 Paige (N. Y.) Ch. 418.

[2] *In re* Huss, 27 N. E. R. 781, 784; Fosdick v. Hempstead, 125 N. Y. 581; 26 N. E. R. 801; Fox's Will, 52 N. Y. 530; s. c., 94 U. S. 315; Downing v. Marshall, 23 N. Y. 366; Kerr v. Dougherty, 79 N. Y. 327.

[3] Succession of Vance, (La. 90) 2 So. R. 54; Skinner v. Harrison, (Ind.) 18 N. E. R. 529; Piper v. Moulton, 72 Me. 155; Heyward v. Mayor etc. of New York, 7 N. Y. 314; Nicoll v. N. Y. & E. R. R. Co., 12 N. Y. 121; Le Couteulx v. Buffalo, 33 N. Y. 333; People v. Mauran, 5 Denio (N. Y.) 389; Davis v. Barnstable, (Mass.) 28 N. E. R. 165; Page v. Heineberg, 40 Vt. 81; Fernch v. Quincy, 3 Allen (Mass.) 9; Green v. Hogan, 27 N. E. R. 413; Kelly v. Kennard, 60 N. H. 1; Jackson v. Pike, 9 Cow. (N. Y.) 61; State v. Atkison, 24 Vt. 448.

[4] Delaney v. Salina, 34 Kan. 532.

[5] Beach v. Haynes, 12 Vt. 15; State v. Woodward, 23 Vt. 92.

municipal corporation to acquire and hold property of any sort; viz., for purposes, which were in contemplation in the establishment of a municipal corporation, and which are not foreign to the object of such incorporation. Or, to use the language of Judge Dillon, "municipal corporations are capable, unless specially restrained, of taking property for any purpose which is germane to the objects of the corporation."[1] Not only is this the case, where the property is directly granted to the municipal corporation for its own special benefit, but also where such property, both real and personal, is devised or granted to a municipal corporation in trust for some public charity or eleemosynary object, of such a character as would involve aid to the corporation in the performance of its own public duties. A municipal corporation cannot serve as a trustee of a private trust, however worthy such trust may be. But a trust, established for the benefit of the poor in general, or for the people of a community included in the municipality, is held to be within the powers of a municipal corporation, and a court will not interfere with the performance of such a trust by the municipal corporation.[2] In illustration of the power of a municipal cor-

[1] 2 Dillon's Mun. Corp. § 567.

[2] Succession of Vance, 2 So. R. 54; Miller v. Lerch, 1 Wall. Jr. (U. S. C. C.) 210; Webb v. Neal, 5 Allen (Mass.) 575; Philadelphia v. Elliott, 3 Rawle, 170; Girard's Will, 2 La. An. 898; Vidal v. Philadelphia, 2 How. 127; Jackson v. Hartwell, 8 Johns. (N. Y.) 422; Bell County v. Alexander, 22 Texas, 350; Barkley v. Donnelly, (Mo. 92) 19 S. W. R. 305; Girard v. Philadelphia, 7 Wall. 1; Chambers v. St. Louis, 29 Mo. 543; Orford Union Cong. Soc. v. West Cong. Soc., 55 N. H. 463; Phillips Acad. Trs. v. King, 12 Mass. 546; Pickering v. Shotwell, 10 Pa. 27; McDonough Will Case, 15 How. 367. But see Fosdick v. Hempstead, 125 N. Y. 581; 26 N. E. R. 801; Gillespie's Appeal, 30 W. N. C. 337; Franklin's Trust, 24 Atl. R. 626; Daily v. New Haven, 60 Conn. 314; Mr. Justice Sharswood, in the leading case, involving a construction of the grant by Mr. Girard of a trust to the city of Philadelphia, describes the powers of municipal corporations, to serve as trustees in public or charitable trusts, as follows: "It could hardly be pretended, I think, in this country, that it could be a trustee for the separate use of a married woman, to educate the children of a donor or testator, or to accumulate for the benefit of particular persons. It certainly is not compellable to execute such trusts, nor does it seem competent to accept and administer them. The trusts held by the city of Philadelphia, which are enumerated in the bill before us, are germane in their objects. They are charities, and all charities are in some sense public. If the trust is for any particular persons, it is not a charity. Indefiniteness is of its essence. The objects to be benefit-

poration to serve as trustee of a public trust, it may be further stated that it has been held that a city has such a power to accept property, both real and personal, for the education and support of the orphans of a city,[1] and for the purpose of educating the poor, without cost to them, in the city of New Orleans and Baltimore.[2] A similiar donation was sustained in Cincinnati for the establishment and maintenance of two colleges for the education of boys and girls; and further, for the support of the orphans of the poor.[3] So, also, did the courts sustain a devise of property to St. Louis, in trust for furthering relief for the poor emigrant travelers coming to St. Louis, on their way *bona fide* to settle in the west.[4] In this last case, most of the land composing the trust fund was situated in St. Louis county, outside of the city limits; and it was held that such property could be taken and held by the city for the purpose of the trust. So, also, was a bequest upheld by the city of Philadelphia to purchase or establish and maintain an hospital for the indigent, blind and lame.[5] So, likewise, have been upheld bequests to the citizens of the municipality for the purchase of a fire engine;[6] to a

ed are strangers to the donor or testator. The widening and improvement of streets and avenues; planting them with ornamental and shade trees; the education of orphans; the building of schoolhouses; the assistance and encouragement of young mechanics; rewarding ingenuity in the useful arts; the establishment and support of hospitals; the distribution of soup, bread or fuel to the necessitous, are objects within the general scope and purpose of the municipality." Philadelphia v. Fox, 64 Pa. St. 169.

[1] Vidal v. Girard's Executors, 2 How. 127; Perin v. Carey, 24 How. 465; Girard v. Philadelphia, 7 Wall. 1.

[2] McDonough Will Case, 15 How. (U. S.) 367; 8 La. An. 171; Girard Heirs v. New Orleans, 2 La. An. 898.

[3] Succession of Vance, 2 So. R. 54; Green v. Hogan, 27 N. E. R. 413; Le Couteulx v. Buffalo, 33 N. Y. 333; Dashiell v. Attorney General, 5 Har. & Johns. (Md.) 392; 6 Har. & Johns. (Md.) 1; Castleton v. Langdon, 19 Vt. 210; Reynolds' Heirs v. Stark County Comm'rs, 5 Ohio, 204; Kelley v. Kennard, 60 N. H. 1; Jackson v. Pike, 9 Cow. (N. Y.) 61; State v. Atkinson, 24 Vt. 448; Nicoll v. N. Y. & E. R. R. Co., 12 N. Y. 121; French v. Quincy, 3 Allen (Mass.) 9; Piper v. Moulton, 72 Me. 155; Heyward v. Mayor etc. of New York, 7 N. Y. 314; Perin v. Carey, 24 How. 645; Tripp v. Frazier, 4 Har. & Johns. (Md.) 446; People v. Mauran, 5 Denio (N. Y.) 389.

[4] Chambers v. St. Louis, 29 Mo. 543.

[5] Philadelphia v. Elliott, 3 Rawle, (Pa.) 170.

[6] Wright v. Linn, 9 Pa. 433; see Kirk v. King, 3 Pa. 436; Tyrone Tp. School Directors v. Denkleberger, 6 Pa. 31.

county for the benefit of the public schools,[1] and other bequests of a similar nature.[2]

§ 204. **Devises and grants for objects foreign to corporate purposes.**—But if the devise or grant is for a purpose, which is foreign to the powers of a municipal corporation, the grant or devise cannot be sustained or enforced by the municipal corporation. And such attempted devises will be administered by the court of equity, if it is possible for it to do so, and the provisions of the donor carried out by the appointment of a trustee.[3] Not only would this rule of limitation, of the power of a municipal corporation to serve as a trustee, apply to cases of purely a private trust; but, likewise, to a devise or gift to a city, for the purpose of maintaining or establishing some charitable trust, outside the city limits, for the benefit of people having no residence permanent, or temporary, within the city; as, for example, for the erection of a court house or jail for county purposes, or for building a church or schoolhouse. On the other hand, it has been held that the county cannot be charged with the administration of a trust for the erection of a schoolhouse, for the use of the inhabitants of a particular town in that county.[4] So, also, has it been held that a city is not per-

[1] Bell County v. Alexander, 22 Tex. 350.

[2] Southington First Cong. Soc. v. Atwater, 23 Conn. 34.

[3] Davis v. Barnstable, 28 N. E. R. 165 (Mass. 91); Sloane v. McConahy, 4 Ohio, 157; Bullard v. Shirley, 153 Mass. 559; So. Newmarket Meth. Sem. Trs. v. Peaslee, 15 N. H. 317, 331; North Hempstead v. Hempstead, 2 Wend. 109; Farmers' Loan & T. Co. v. Carroll, 5 Barb. 613; Coggeshall *et al.*, New Rochelle Trs. v. Pelton, 7 Johns. Ch. 292; National Bank v. Grenada, 41 Fed. Rep. 87.

[4] Jackson v. Hartwell, 8 Johns. (N. Y.) 422; Jackson v. Cory, 8 Johns. (N. Y.) 385. "Our laws are full of instances of persons clothed with corporate powers for certain special purposes. The loan officers of a county are a corporation; and could they, as such, receive a grant of land for the use of the town or for a church? Certainly not. Nor can the supervisors of Oneida county take a grant of land for the use of the town of Rome. Such a grant must be deemed void upon every principle, whether we consider the special and definite objects of the corporate capacity in the board of supervisors; whether we consider the power given them by statute to take conveyances of land for the use of the county; or, lastly, whether we refer to the incapacity of all corporations to hold lands in trust for any other object, than that for which the corporation was created. Whether the court of equity would or would not prevent the trust as to the inhabitants of Rome from failing for want of a trustee is not a question

mitted to receive as a trustee a fund for the promotion or support of missionaries.[1]

§ 205. **Gifts or grants to unincorporated communities.**— It is a well settled rule of the common law, which remains to this day unless modified by statute, that a grant is not valid unless it is made to a definite grantee, who may be identified beyond reasonable doubt by the description of such grantee, contained in the instrument of conveyance. Hence it is necessary to the validity of a grant, that it be made either to the natural person, or to the corporation, who is capacitated to take such property either in his or its own right, or as trustee.[2] A grant, therefore, to an unincorporated community or body of people, as for example, to the people of a specific county, which has not been incorporated, is void.[3] So, likewise, would a reservation, in a conveyance to inhabitants of an unincorporated community, be likewise invalid.[4] And for the same reason it has been held, that a bequest to school commissioners was void, because there was no corporation to whom the bequest was made.[5] But the fact, that a bequest is made to the citizens of an incorporated place, would not of itself affect the validity of the grant, because by that description the court, under the usual liberal rule of construction, would presume that the grantor intended thereby the municipal corporation itself, instead of the individual citizens of such corporation, and the form of the devise would have no greater effect than a case of mere misnomer of the corporation.[6] Where the estate is granted for an unincorporated community, by the State government itself to two

for a court of law (in an action of ejectment) to decide." *Per curiam*, in Jackson v. Hartwell, 8 Johns. (N. Y.) 422.

[1] So. Newmarket M. P. T. v. Peaslee, 15 N. H. 317. But in New Hampshire it has been held that the town may be trustee of a fund for the promotion and support of religion within its limits. *Contra*, Bullard v. Shirley, 27 N. E. R. 766.

[2] Jackson v. Cory, 8 Johns. (N. Y.) 385; Jackson v. Hartwell, Ib. 422.

[3] Boston Overseers v. Seers, 22 Pick. (Mass.) 122.

[4] Mason v. Muncaster, 9 Wheat. 445; Terrett v. Taylor, 9 Cranch, 43, 52; Jackson v. Cory, 8 Johns. (N. Y.) 385; Hornbeck v. Westbrook, 9 Johns. (N. Y.) 73; North Hempstead v. Hempstead, 2 Wend. (N. Y.) 109, 133.

[5] Janey's Executors v. Latene, 4 Leigh, (Va.) 327.

[6] Kirk v. King, 3 Pa. St. 436; Wright v. Linn, 9 Pa. 433; Tyrone Tp. School Directors v. Dunkleberger, 6 Pa. 3. As to name and misnomer see *ante*, §§ 49, 50.

or more persons, who are named as trustees for the benefit of themselves and the inhabitants of the unincorporated town, the grant is nevertheless valid; because, coming from the supreme power of the State, there would be an implied incorporation of such persons for the purpose of the grant, which without this implication would prove inoperative.[1]

§ 206. **Interference by State courts in the performance of trusts by municipal corporations.**—A municipal corporation, when acting as a trustee of a fund placed in its charge by a grant or devise, is acting in a fiduciary relation, and thereby takes on a semi-private character, and comes in that relation within the general authority of the court of equity to supervise and inquire into the due administration of the trust. The court of equity has the authority to interfere for the protection of the trust fund in the administration of such trust, whether the trustee be a private person or a municipality. Thus, it has been held in the case of Girard's will, that an act of the Legislature, depriving the city of Philadelphia of the power to administer the trust, and vesting such power in an independent and separate board of trustees, appointed by the court or otherwise than by the city, was valid and constitutionally unobjectionable. In pronouncing the opinion of the court in favor of the constitutionality of such interference, Mr. Justice Sharswood says: "When, therefore, the donors or testators of these charitable funds granted or devised them in trust to the municipality, they must be held to have done so with full knowledge that their trustee so selected was a mere creature of the State, and an agent acting under a revocable power. Substantially, they trusted the good faith of the sovereign. It is plain—too plain, indeed, for argument—that the corporation, by accepting such trusts, could not thereby invest itself with any immunity from legislative action. Such an act could not change its essential nature. It is surely not competent for a mere municipal organization, which is made a trustee of a charity, to set up a vested right in that character to maintain such organization in

[1] North Hempstead v. Hempstead, 2 Wend. (N. Y.) 109, 133 (1828); and see also, Denton v. Jackson, 2 Johns. Ch. (N. Y.) 320; People v. Schermerhorn, 19 Barb. 540, 555; Goodell v. Jackson, 20 Johns. (N. Y.) 706; Jackson v. Leroy, 5 Cow. (N. Y.) 397; Bow v. Allentown, 34 N. H. 351, 372; Girard v. Philadelphia, 7 Wall. 1; Clark v. Brookfield, 81 Mo. 503.

the form in which it exists when the trust was created, and thereby prevent the State from changing it as the public interest may require." [1]

§ 207. **Invalid grants to municipal corporations how invalidated.**—Where a municipal corporation has taken real estate, in cases where it has no authority to acquire and hold such real estate, it is an important inquiry as to the effect of such unauthorized extension of the power of the corporation, not only upon its own title to such property, but also as to the person or persons, who may take advantage of such defect of title, or want of authority, and secure a forfeiture of the real estate, so unlawfully acquired by the corporation. In this connection, a distinction is made between the cases in which the city has the power to acquire real estate in general or for certain specific objects, and those in which the corporation is denied altogether the power to acquire real estate. Where the corporation is generally forbidden by its charter to purchase as well as to hold land, the deed made to it is then absolutely void. The distinction is made by the court between the prohibition to take lands on the one hand, and the prohibition to hold them. And where the prohibition is both against the purchase and the taking of the lands, then, presumably in all such cases, the grantor's title to such lands remains unaffected by the conveyance, and the city acquires no title to it whatever.[2]

But where the municipal corporation has the power to acquire land for purposes germane to its institution, and there is a conveyance or grant of land to such corporation for some purpose not authorized by the charter, either expressly or impliedly, then the title of the grantor is completely transferred, but the municipal corporation, as grantee, takes the title to such property subject to its being divested at the instance of the State. The State alone can interfere with the enjoyment of the property so acquired by the municipal corporation.[3] This explanation of

[1] Philadelphia v. Fox, 64 Pa. St. 169; see, to same effect, Montpelier v. East Montpelier, 29 Vt. 21; Girard v. Philadelphia, 7 Wall. 14.

[2] Leazure v. Hillegas, 7 Serg. & Rawle (Pa.) 313; see Bank v. Niles, 1 Doug. (Mich.) 401; Bank v. Poitiaux, 3 Rand. (Va.) 136.

[3] See Bank of Mich. v. Niles, 1 Doug. (Mich.) 401; Bank of Va. v. Poitiaux, 3 Rand. 136; Martin v. Br. Bank, 15 Ala. 587; Baird v. Bank of Wash., 11 Serg. & R. 411; Goudie v. North Water Co., 7 Pa. St. 233; Angell & Ames Corp., secs. 152, 153; Chambers v. St. Louis, 29 Mo. 543,

the authority of the grantor, or of the State, to avoid conveyances or grants of land to the municipal corporation, in cases in which the municipal corporation is not authorized to acquire or to hold such lands, must necessarily be applied only to actual purchases of the land.

Where there has been a donation of the lands by the private owner or grantor, in trust for purposes which cannot be carried out or performed by the municipal corporation, because such performance is beyond the limitations of its power as a corporation, the consideration for the gift or grant failing, there would necessarily be vested in the grantor the power of avoiding the conveyance; unless, possibly, where the court of equity takes charge of the trust so created, and which cannot be performed by the corporation, and appoints other trustees in the place of the corporation, who are charged with the duty of carrying out such trust in accordance with the intentions of the donor. Thus, for example, where the gift was made of real estate to the town of Worcester, in consideration of the agreement of the town to support the grantor or donor during the rest of her life, the conveyance was invalid, because of the want of power in the municipal corporation to assume such an obligation; and for that reason, the grantor was authorized to avoid such conveyance, and it was held that the deed would remain good, until so avoided by the grantor, or by some one in privity with her.[1]

§ 208. **Power of alienation.**—In determining the limitation of the power of a municipal corporation, to dispose absolutely of

Alexander v. Tolleston Club of Chicago, 110 Ill. 65; Land v. Coffman, 50 Mo. 243; s. c., 12 Am. Law Reg. (N. S.) March (1873), p. 143; Hough v. Cook County Land Co., 73 Ill. 23; Smith v. Seeley, 12 Wall. 35; Barnes v. Suddard, 117 Ill. 237; Davidson Col. v. Chambers' Executors, 3 Jones Eq. (N. C.) 253, 258; Myers v. Croft, 13 Wall. 291; Baker v. Neff, 73 Ind. 68; Union Nat. Bk. v. Matthews, 98 U. S. 628; Goudie v. Water Company, 7 Pa. St. 233; Eufaula v. McNab, 67 Ala. 588; Raley v. Umatilla County, 15 Oreg. 172; Barrow v. Nashville & C. Turnp. Co., 9 Humph. 304; Leazure v. Hillegas, 7 Serg. & Rawle (Pa.) 313, 320; Hayward v. Davidson, 41 Ind. 214.

[1] Inhabitants of Worcester v. Eaton, 13 Mass. 371; Parish of Plaquemines v. Fulhouze, 30 La. An. 64; Matthews v. Alexandria, 68 Mo. 115; Commonwealth v. Wilder, 127 Mass. 1; Kennedy v. McElroy, (Ky. 90) 17 S. W. R. 202; Wood v. Hammond, 16 R. I. 89. See also Sears v. Chapman, (Mass. 93) 33 N. E. R. 604.

the property, which it has acquired by purchase or by donation, a distinction is made between the property which such corporation acquires or holds in its semi-private capacity, and that which it holds as trustee for some public charity, or which has been donated to some public use. Where the property is of the latter character, *i. e.*, where it is held in trust for some public benefit, or has been donated to public use, such as for public squares and streets, the corporation cannot, without legislative authority, make alienation of the same. In the case of property held in trust, no other disposition can be made whatever; but in respect to the property which the city owns and which has been donated to public use, alienation can be made only under special legislative authority.[1] But the fact, that the corporation has purchased land for a public use, does not in itself make it impossible for the same land to be disposed of by such a corporation. It is not the purchase for a public purpose, but its dedication to the public use, which makes such property inalienable; so that, if the corporation has purchased such property, and before its dedication to the public use should determine to sell such property, there is no limitation upon the power of the corporation in respect to its sale.[2]

Where lands are donated to the city in trust for some general or special purpose, or where the land so conveyed is granted subject to a condition, restraining the use or disposition of such property, the grantor in such cases has the right of securing a forfeiture of the grant for the breach of the condition, or

[1] Alve v. Henderson, 16 B. Mon. (Ky.) 131, 168; Macon v. Dasher, (Ga. 93) 16 S. E. R. 75; Mowry v. Providence, (R. I. 91) 16 Atl. R. 511; Dubach v. Hannibal, etc. Co., 1 S. W. R. 86; 89 Mo. 483; Lord v. Oconto, 47 Wis. 386; Warren Co. Sup. v. Patterson, 56 Ill. 111; Augusta v. Perkins, 3 B. Mon. (Ky.) 437; Hoadley's Admrs. v. San Francisco, 124 U. S. 639; San Francisco v. Itzell, 80 Cal. 57; Shannon v. O'Boyle, 51 Ind. 565; Matthews v. Alexandria, 68 Mo. 115; Meriwether v. Garrett, 102 U. S. 472; Kings County Fire Ins. Co. v. Stevens, 101 N. Y. 411; Roper v. McWhorter, 77 Va. 214; Cummings v. St. Louis, 20 W. R. 130; 90 Mo. 259; Still v. Lansingburgh, 16 Barb. (N. Y.) 107; Reynolds v. Stark County, 5 Ohio, 204; Knox County v. McComb, 19 Ohio St. 320; Newark v. Elliott, 5 Ohio St. 113; Bowlin v. Furman, 28 Mo. 427; Clark v. Providence, 16 Atl. R. 763; Ransom v. Boal, 29 Iowa, 68; Kennedy v. Covington, 8 Dana (Ky.) 50.

[2] Fort Wayne v. Lake Shore, etc. Co., (Ind. 93) 32 N. E. R. 215; Warren v. Patterson, 56 Ill. 111; Bushel v. Whitlock, 77 Iowa, 285; 42 N. W. R. 186; State v. Woodward, 23 Vt. 92; Beach v. Haynes, 12 Ib. 15; Konrad v. Rogers, 70 Wis. 492.

the violation of the trust. In all such cases, if the grantor waives the performance of the condition, the breach of it is excused, and the title of the purchaser becomes absolute.[1] It has been held in Vermont that, where the selectmen of a town are empowered by statute to lease certain glebe lands, the express authority is an implied denial of the power to make an absolute sale of such land, and hence such an absolute conveyance would be void, conveying no title to the purchaser.[2]

§ 209. **Power to mortgage.**—Where the property held by a corporation is not charged with a trust, or has not been donated to public use, in the absence of statutory restrictions, the municipal corporation may mortgage it to secure any debt or obligation, which the corporation may have the power to create.[3] And so, also, it may receive as payee a mortgage of property, to secure the payment of any indebtedness due to it, and in turn assign such mortgage and note, payable to it, to secure its own lawful indebtedness to another, instead of making a mortgage of its own property.[4] Not only is this power to mortgage conceded, in regard to the strictly private property of such corporation; but it has been held that a corporation has the power to mortgage its waterworks, in order to secure the payment of the bonds that were issued for the payment of the cost of their construction.[5] And so, also, has it been held that, where property is purchased for any purpose by a municipal corporation, in the exercise of a lawful power, such corporation has the power to secure the payment of the purchase money by a mortgage of the property so purchased.[6]

§ 210. **Power to lease corporate property.**—The municipal corporation has also the power to lease the property of a private nature which it holds, wherever that is deemed more expedient than an absolute sale of it.[7] And the lease will be valid,

[1] See Sharon Iron Company v. Erie, 41 Pa. St. 341.

[2] Bush v. Whitney, 1 Chip. (Vt.) 389.

[3] Knox Co. v. Goggin, (Mo. 91) 16 S. W. R. 684; Grant v. Huston, (Mo. 91) 16 Ib. 680; Gordon v. Preston, 1 Watts (Pa.) 385; Braham v. San Jose, 24 Cal. 585; Goodwin v. McGehee, 15 Ala. 233; Middleton Bank v. Dubuque, 15 Iowa, 394.

[4] Floyd Co. Com'rs v. Day, 19 Ind. 450; Vanarsdall v. State, 65 Ind. 176; Sturgeon v. Daviess Co. Com'rs, 65 Ind. 302.

[5] Adams v. Rome, 59 Ga. 765.

[6] Edey v. Shreveport, 26 La. An. 636.

[7] Belchers S. R. Co. v. Grain El., (Mo. 90) 13 S. W. R. 822; Taylor v. Carondelet, 22 Mo. 105; Hand v. Newton, 92 N. Y. 88.

although there is irregularity in the form, or in the use, of the corporate name.[1] Where the property is donated to a public use, such as waterworks, or a railway franchise, it is doubtful whether the municipal corporation has the power, in the absence of express statutory authority, to lease it.[2] But, certainly, if the power to lease is conceded, the municipal corporation cannot make such a lease, in point of duration or absolute character, so as to deprive the corporation of its power of control of the management of such property, to the detriment of the public.[3]

It is quite a common occurrence for municipal corporations, having municipal property donated to a public use, such as a city hall, to rent the hall to private persons for unobjectionable purposes, such as concerts and other entertainments; and this has been held to be no violation of the rights of the public.[4] So, also, where a building, which had formerly been donated to public uses, has been abandoned, the town has the right to repair such building for leasing purposes.[5]

Not only has the municipal corporation the right to lease its own property, but it has also the power to rent the property of others, whenever the public needs require it, and it is deemed more expedient to rent than to buy.[6]

§ 211. **Requisites of conveyances by municipal corporations.**—It is a general rule of the law of corporations, that the same formalities are required, in the absence of express legislative authority, for a valid conveyance of lands by such a corporation, as in the case of natural persons; and the municipal corporation is no exception to this rule. Hence the conveyance by municipal corporations, in the absence of express statutory authority, must be by deed, executed in the corporate name, and under the corporate seal.[7] And the offi-

[1] New York v. Kent, 5 N. Y. S. 567; McDonald v. Schneider, 27 Mo. 405; St. Louis v. Merton, 6 Mo. 476.

[2] Pennsylvania R. R. Co. v. St. Louis, A. & T. H. R. R. Co., 118 U. S. 290; Marine I. Co. v. Railroad, 41 Fed. R. 643; Thomas v. West Jersey R. R. Co., 101 U. S. 70.

[3] Mahon v. Columbus, 58 Miss. 310.

[4] Bell v. Platteville, 70 Wis. 139; Stone v. Oconomowoc, 71 Wis. 155.

[5] Bates v. Bassett, 60 Vt. 530.

[6] Davies v. Mayor etc. of N. Y., 83 N. Y. 207.

[7] Noyce v. Jones, 25 Neb. 643; Macon v. Dasher, 16 S. E. R. 75; Props. v. Ipswich, 153 Mass. 42; Barrow v. Wilson, 39 La. An. 403; Young v. De Putren, 37 Fed. 46; Osborne v. Tunis, 25 N. J. L. 633; Remillard v. Blackmar, 52 N. W. R. 133; Bank v. Dubuque, 19 Iowa, 467.

cers, who affixed the corporate name and seal to the conveyance, as representatives of the corporation, can only do so by virtue of the authority conferred upon them under the general laws of the State, or by the municipal ordinances.[1] This being the rule, that a conveyance by a municipal corporation must, in the absence of special authority, be by deed in the corporation's name and under the corporate seal, it is clear that no conveyance can be made by the corporation, vesting in the purchaser the legal title to lands, by a vote of the city council to that effect.[2] The only effect of such transaction is to create in the purchaser an equitable claim to a formal conveyance, or an executory contract of sale, the specific performance of which can be enforced in equity.[3]

On the other hand, if the charter or ordinance prescribes a particular method of transfer, or imposes certain conditions, upon which the conveyance shall be made, in every case the general rule thus explained has been superseded or modified, as the case may be; and no valid conveyance can be made by such corporation, in violation or disregard of the express provisions of the law. Thus, where the city charter requires sales of property to be made by ordinances, after advertisement of the same, the sale in ordinary form or in disregard of these requirements, if it should be made by ordinances, would be void, and the expenditure by the city of the proceeds of sale would not prevent the invalidation of such a sale, but only impose upon the city the obligation to refund the money so received.[4] So, also, where a condition is imposed, as where the previous consent of the majority of the legal voters is required, the conveyance without such consent is void.[5]

In the absence of any special provisions, in respect to the character of the vote of the city council, or other corporate

[1] Merrill v. Burbank, 23 Me. 538; Clark v. Pratt, 47 Me. 55; Mensen v. Tripp, 81 Me. 24; Cf. New York v. Kent, 5 N. Y. S. 567.

[2] Copp v. Neal, 7 N. H. 275, 278; Beaufort v. Duncan, 1 Jones (N. C.) Law, 239; Cofran v. Cockran, 5 N. H. 458; Coburn v. Ellenwood, 4 N. H. 99, 102.

[3] Grant v. Davenport, 18 Iowa, 179.

[4] McCracken v. San Francisco, 16 Cal. 591; Mensen v. Tripp, 81 Me. 24; Pimental v. San Francisco, 21 Cal. 351; Salterlee v. Same, 23 Ib. 214; Herzo v. Same, 33 Ib. 134.

[5] Still v. Lansingburgh, 16 Barb. 107; Middleton Bank v. Dubuque, 15 Iowa, 394.

board, which is required to make the sale of the land valid, the majority of the members of such board are impliedly authorized to direct the sale.[1]

§ 212. **Sale of corporate property on execution—Liability for debts.**—The general rule in most of the States is, that a judgment obtained against a municipal corporation cannot be enforced by ordinary writs of execution ; and that the only remedy of the creditor is by *mandamus*, to compel payment out of the general funds of such municipal corporation, or to levy a tax for that purpose.[2] But in the absence of statutory regulations, it is elsewhere held that while *mandamus* is the ordinary remedy,[3] where the corporation is possessed of strictly private property, which is not held in trust, or which is not donated to public uses, such property may be sold on execution to satisfy the judgments obtained against the city.[4] Thus, for example, in New Orleans a market bazaar, which was leased out to private individuals, was held to be subject to sale on execution.[5] But where property is owned by the corporation for any public use, or in trust, such as public buildings, fire engines, waterworks, hospitals and sanitariums, the property cannot be reached by the writ of execution, and, as a necessary consequence of that conclusion, the judgment lien will not attach to such property.[6]

It seems that in New England the creditors of a municipal

[1] San Diego v. S. D. & L. A. R. R. Co., 44 Cal. 106.

[2] Sherman v. Williams, (Tex. 92) 19 S. W. R. 606; Overton Bridge Co. v. Taylor, (Neb. 92) 51 N. W. R. 240; Elrod v. Bernadotte, 53 Ill. 368; Bloomington v. Brokaw, 77 Ill. 194, 197; Commonwealth v. Allegheny County, 37 Pa. St. 277, 290; Commonwealth v. Perkins, 43 Pa. St. 400; Klein v. New Orleans, 99 U. S. 149; Curry v. Savannah, 64 Ga. 290; Cairo v. Allen, 3 Ill. App. 398; Morrison v. Hinkson, 87 Ill. 587; State v. Milwaukee, 20 Wis. 87; State v. Beloit, Ib. 70; Crane v. Fond du Lac, 16 Wis. 196; Chicago v. Halsey, 25 Ill. 595; Olney v. Harvey, 50 Ill. 453.

[3] Winslow v. Perquimans Co. Com'rs, 64 N. C. 218; Gooch v. Gregory, 65 N. C. 142.

[4] Brown v. Gates, 15 W. Va. 131; Birmingham v. Rumsey, 63 Ala. 352; Hart v. New Orleans, 12 Fed. Rep. 292; Holliday v. Frisbie, 15 Cal. 630; Davenport v. Peoria Ins. Co., 17 Iowa, 276.

[5] New Orleans v. Homes Ins. Co., 23 La. An. 61. But in New Orleans v. Louisiana Co., 140 U. S. 654, it was held that a public square leased for private purposes was exempt.

[6] Brown v. Gates, 15 W. Va. 131; Cole v. Green, 25 Ill. 104; State v. Tiedeman, 69 Mo. 306; President, etc. v. Indianapolis, 12 Ind. 620; Green v. Marks, 25 Ill. 221; Meriwether v. Garrett, 102 U. S. 472; Lowe v. Howard County, 94 Ind. 553; Mariner v. Mackey, 25 Kan. 669; New Orleans v. Morris, 105 U. S. 600; Foster v. Fowler, 60 Pa. St. 27; Darling v. Balti-

corporation may resort to the private property of individual citizens of the town, for the purpose of securing payment of the municipal debt.[1] But, elsewhere, in those States where a writ of execution will not lie for the enforcement of a judgment against a municipal corporation, it cannot be employed for attaching the private property of a citizen.[2]

One of the results of the general rule here laid down, that the public property of a municipal corporation cannot be made liable for the debts of the corporation on a writ of execution, is that the mechanic's lien cannot be enforced against such property. Thus, it has been held that the mechanic's lien cannot be enforced against public property, such as public buildings of all sorts, bridges and the like. The only remedy of the mechanic in such cases is to obtain judgment against the municipal corporation, and to enforce the payment of such judgment by a *mandamus*.[3] A contrary conclusion has been reached in Louisiana, where a mechanic was permitted to file a suit for foreclosure of a lien on a building, which had been constructed for use as a jail.[4] And in New York, it is provided by statute that contractors for public municipal buildings may secure a lien upon any money in the control of the city.[5]

more, 51 Md. 1; Lilly v. Taylor, 88 N. C. 489; Wallace v. Trustees, 84 N. C. 164.

[1] Beardsley v. Smith, 16 Conn. 368.

[2] Miller v. McWilliams, 50 Ala. 427; 20 Am. Rep. 297; Horner v. Coffey, 25 Miss. 434; Meriwether v. Garrett, 102 U. S. 472.

[3] McNeal etc. Co. v. Bullock, 38 Fed. R. 565; Guest v. Lower M. W. Co., 21 Atl. R. 1001; Front etc. Co. v. Johnston, (Wash. 91) 25 Pac. R. 1084; Mayrhafer v. Board, (Cal. 91) 26 Pac. R. 646; Loring v. Small, 50 Iowa, 271; Board etc. v. Neidenberger, 78 Ill. 58; Morrison v. Hinkson, 87 Ill. 587; Curry v. Savannah, 64 Ga. 290; Charnock v. Colfax, 51 Iowa, 70; Parke Co. Com'rs v. O'Conner, 86 Ind. 531; Winslow v. Com'rs, 64 N. C. 218; Jordan v. Board, 39 Minn. 298; Leonard v. Brooklyn, 71 N. Y. 498; Portland Lumbering etc. Co. v. School District, 13 Oreg. 283; County v. Angus, 18 S. W. R. 563; New Orleans v. Morris, 3 Woods, C. C. 103; Foster v. Fowler, 60 Pa. St. 27; Schwartz v. Saiter, 40 La. An. 264; Elrod v. Bernadotte, 53 Ill. 368; Bloomington v. Brokaw, 77 Ill. 194; Bouton v. Supervisors, 5 C. L. J. 105; Klein v. New Orleans, 99 U. S. 149; Dallas v. Loone, (Tex. 92) 18 S. W. R. 726. Where a city brought an action against its collector of taxes and his sureties to recover taxes assessed to meet railroad aid bonds, it was held that the money paid to compromise the action, standing in lieu of the taxes themselves, was exempted from execution, and that a levy upon it would be enjoined. Sherman v. Williams, (Tex. 92) 16 S. W. R. 606.

[4] McKnight v. Grant, 30 La. An. 361.

[5] Bell v. New York, 105 N. Y. 139.

CHAPTER XIII.

DEDICATION OF PROPERTY TO PUBLIC USE.

§ 214. **General statement.**—Probably the most common method of acquiring property, and especially real property, on the part of a municipal corporation, is that of dedication by the private owner to public use. There are two kinds of dedication to public use, one known as the statutory dedication; and the other, as the common-law dedication. As their names imply, their principal distinction is in the fact, that one rests upon common law rules, and the other depends upon the express provisions of the statute, which either authorized or provided for the dedication. There are, however, other important distinctions between the two methods of dedication, which will receive special illustration in the succeeding paragraphs.

§ 215. **General requisites of statutory dedications.**—The statutory dedication finds its authority in the statute, which provides for such dedication. If, therefore, a statutory dedication is intended to be made, it will be effectual as a statutory dedication, only when it has been made in conformity with the requirements of the statute. Thus, for example, where the statute requires, in order that lands may be dedicated to the public use, as streets, or squares, or commons, that the plat or

map describing the same must be recorded,[1] or that such map or plat should be acknowledged before it is recorded,[2] a failure to comply with these requirements of the statute would have the effect of invalidating such dedication under the statute.[3] It is also another effect of the statutory provisions for dedication, that under the statute the assent or acceptance on the part of the public is dispensed with, and the statutory dedication becomes complete, effectually transferring to the public the right to use such property, without any express or implied acceptance on the part of the public, beyond what is implied from the compliance with the provisions of the statute.[4] The statutory dedication, also, is in fact a conveyance or grant, and differs from the common law dedication in that respect, inasmuch as a common law dedication is not in fact any express grant, but rather creates or vests in the public certain rights, in respect to the property, by means of an estoppel *in pais* of the owner of the land.[5]

[1] Board v. Wilqus, (Kan. 90) 22 Pac. R. 615; Strong v. Darling, 9 Ohio, 201; Pangborn v. Westlake, 36 Iowa, 546.

[2] Archer v. Saliuas, 93 Cal. 43; State v. Logue, 73 Wis. 598; Gosselin v. Chicago, 103 Ill. 623; Detroit v. Det. & Milw. R. R. Co., 23 Mich. 173; Lake View v. Lebahn, 9 N. E. R. 269; 120 Ill. 92; Chicago etc. Co. v. Ellithorpe, (Iowa, 90) 43 N. W. R. 277; Grandville v. Jenison, 86 Mich. 567; Stewart v. Perkins, (Mo. 92) 19 S. W. R. 989; Buffalo v. Harling, (Minn. 92) 52 N. W. R. 931; Wisby v. Bonte, 19 Ohio St. 238; Fulton v. Mehrenfeld, 8 Ib. 440; Winona v. Huff, 11 Minn. 119; Heitz v. St. Louis, (Mo. 92) 19 S. W. R. 735; Powell v. Gilman, 38 Ill. App. 611; Auburn v. Goodwin, 21 N. E. R. 212; Des Moines v. Hall, 24 Iowa, 234; Schurmeier v. St. Paul & Pac. R. R. Co., 10 Minn. 82; State v. Hill, 10 Ind. 219; Hays v. State, 8 Ind. 425.

[3] Woodruff v. Douglass Co., 17 Or. 314; Baird v. Rice, 63 Pa. St. 489; Ragan v. McCoy, 29 Mo. 356; United States v. Chicago, 7 How. 185; Biddle's Lessee v. Shippen, 1 Dallas, 19; Commonwealth v. Wood, 10 Pa. St. 93; Chicago B. & Q. R. R. Co. v. Banker, 44 Ill. 26; Gebhardt v. Reeves, 75 Ill. 301.

[4] Archer v. Salinas, 93 Cal. 43; Taylor v. Phillippi, 35 W. Va. 554; Baker v. St. Paul, 8 Minn. 491, 493; Regan v. McCoy, 29 Mo. 356; Wisby v. Bonte, 19 Ohio St. 238; Harrison v. Seal, (Miss. 90) 5 So. R. 622; Pierce v. Roberts, 17 Atl. R. 275; 57 Conn. 31; People v. Jones, 6 Mich. 176; Jacksonville v. Jacksonville Ry. Co., 67 Ill. 540.

[5] Demopolis v. Webb, 87 Ala. 659; Forney v. Calhoun Co., 86 Ib. 463; Schurmeier v. St. Paul & Pac. R. R. Co., 10 Minn. 82, 104; Cincinnati v. White, 6 Pet. (U. S.) 431; Pawlet v. Clark, 9 Cranch, 292; Dobson v. Hohenadel, 30 W. N. C. 54; Miller v. Schenck, 43 N. W. R. 225; Cook v. Harris, 61 N. Y. 448; Zinc Co. v. La Salle, 117 Ill. 411; Reid v. Board, 73 Mo. 295; Brown v. Manning, 6 Ohio, 298, 303; Cincinnati's Lessee v. Hamilton Co. Comm'rs etc., 7 Ohio, pt. 1,

It needs to be stated finally, that where an attempt is made to provide for a statutory dedication, but on account of a failure to comply with the provisions of the statute, such dedication is invalid under the statute; if such ineffective dedication has been accepted by the public, or rights under such dedication have been acquired by third persons, and the other requirements of the common law dedication have been satisfied, then what would be an impossible statutory dedication, would operate as a common law dedication, in favor of both the public and third persons, whose rights have been thereby affected.[1]

§ 216. **Extent of statutory dedication.**—It is also explained to be the fact, that in the statutory dedications the statute operates as a conveyance to the public, not only of an easement over the lands, but of a title to the land; so that the dedicator has thereafter no interest or claim in such land, subject simply to the public easement.[2] But it has been held in Minnesota that under a statutory dedication, the fee simple title to the land, which has been dedicated for streets and squares, does not pass, and that the public acquires only an easement therein for the purpose of the trust.[3] But while the general rule is as thus stated, that the title in fee in the land dedicated to public use passes to the public, unless the statute prohibits an express reservation, the dedicator may by express provision limit his dedication to the grant of an easement, and reserve to himself the title to the soil.[4] So, also, may the dedication be in other

88; Ib. 217; Fulton v. Mehrenfeld, 8 Ohio St. p. 444.

[1] Hurley v. Boom Co., 34 Minn. 143; Field v. Carr, 59 Ill. 198; Waugh v. Leech, 28 Ill. 488; Belleville v. Stookey, 23 Ill. 441; Fulton v. Mehrenfeld, 8 Ohio St. 440; Baker v. Johnston, 21 Mich. 319; Cf. State v. Adkins, 42 Kan. 203. But see Taylor v. Fort Wayne, 47 Ind. 274, in which it is held that a failure to comply with the provisions of the statute in respect to the record of the plat of the land dedicated makes the record a nullity.

[2] Maywood Co. v. Maywood, 118 Ill. 61; Zinc Co. v. La Salle, 117 Ill. 411; Wood v. Natl. W. Works Co., 33 Kan. 590; Gosselin v. Chicago, 103 Ill. 623.

[3] Penn. Ry. Co. v. Ayres, 14 Atl. R. 901; Rutherford v. Taylor, 38 Mo. 315; Price v. Thompson, 48 Mo. 363; Cox v. Louisville N. A. & C. R. R. Co., 48 Ind. 178; Schurmeier v. St. Paul & Pacific R. R. Co., 10 Minn. 104.

[4] Stevens v. Shannon, 6 Ohio Cir. 142; Dubuque v. Benson, 23 Iowa, 248; Noblesville v. Lake Erie etc. Co., (Ind. 92) 29 N. E. R. 484; Manly v. Gibson. 13 Ill. 312; Peck v. Prov. Steam Engine Co., 8 R. I. 353; Noyes v. Ward, 19 Conn. 250 (1848).

ways qualified; as, for example, as to the nature and extent of the use to which the land shall be put, as for a common or a market place, or public square.[1] A dedication may be made presently to operate in the future,[2] and may be made, in the absence of legislation, subject to express conditions.[3] The only limitation, of the power of an owner of property to make a dedication of his property to public use, is to be found in the fact that he is not able to confer upon any county, or other extraneous corporation the control of the streets in a city, which he opens up for the public use. The governmental control by the municipal corporation, over the streets within its limits, cannot in this way be interfered with by the term of the dedication.[4]

§ 217. **General requisites of common law dedication.**— The power to make a common law dedication of lands to public use is not ordinarily taken away by statutory provisions for dedication of lands, where the statute does not expressly repeal the prior common law method;[5] so, that everywhere, as a general rule, the common law dedication still exists, side by side with any statutory dedication, which might be provided for by the statutes of the State. Although, in explaining the general requisites of a statutory dedication, and the points of distinction between such dedication and the common law dedication, a somewhat indirect explanation has been given of the requisites of the common law dedication, it is necessary for the matter to be presented directly.

Succinctly stated, it may be declared, that the validity of the common law dedication does not depend upon the transfer of the legal title of the owner of the land. The general rule is, that the public acquires by the common law dedication nothing

[1] Arkansas etc. Co. v. Sarrells, (Ark.) 8 S. W. R. 683; Cummings v. St. Louis, 90 Mo. 259; Hoboken v. Pa. R. R. Co., 124 U. S. 656, 681; Niagara Falls Susp. Br. Co. v. Bachman, 66 N. Y. 261; Tyler v. Sturdy, 108 Mass. 196; Hoboken Imp. Co. v. Hoboken, 36 N. J. L. 340.

[2] Forney v. Calhoun Co., 84 Ala. 215; 4 So. R. 153; Des Moines v. Hall, 24 Iowa, 234.

[3] Frederick Co. v. Winchester, (Va. 88) 4 S. E. R. 844; Port Huron v. Chadwick, 52 Mich. 320; Boughner v. Clarksburg, 15 W. Va. 394; St. Louis v. Meier, 77 Mo. 13; Los Angeles etc. Co. v. Los Angeles, (Cal. 92) 30 Pac. 523.

[4] Derby v. Alling, 40 Conn. 400; Noblesville v. R. R. Co., (Ind. 92) 29 N. E. R. 484.

[5] Penin I. & L. Co. v. Crystal Falls, 60 Mich. 510; Abbott v. Cottage City, 143 Mass. 521; Sanborn v.

more than an easement.[1] It is also not necessary to the validity of a common law dedication, that there should be at the time of the dedication any body corporate or other well defined grantee in being.[2] If there is a dedication to the public, such as lands for use as streets or commons, or the like, before a municipal corporation has been created, such public easement will pass to the corporation whenever it is created by operation of law.[3] And even where the donee or transferee of the public use has been named by the dedicator, trustees may be appointed for the administration of the trust for the benefit of the public, either by the action of the Legislature or by interference of a court of equity.[4] But the dedication must be for a public use. Although a dedication for the use of certain specific persons may involve some indirect benefit to the public, as in the case of a dedication to the use of a railroad, there is not such a dedication to the public, as would enable it to come within the operation of the rules here laid down.[5]

To make a valid dedication, no deed or writing is required; a parol dedication is sufficient.[6] But while a formal convey-

Minneapolis, 35 Min. 314; McClarley v. Lemeunier, 40 La. An. 253; Wakeman v. Wilber, 4 N. Y. S. 938; Browne v. Bowdoinham, 71 Me. 144.

[1] Meier v. Portland, 19 Pac. R. 610; Ellsworth v. Lord, 40 Minn. 337; People v. Moore, 50 Hun, 356; Dubuque v. Maloney, 9 Iowa, 450; Kelsey v. King, 33 How. (N. Y.) Pr. 39; Lahr v. Metrop. El. Ry. Co., 104 N. Y. 268; Ib., p. 291; Backus v. Detroit, 49 Mich. 110; Scheimer v. Price, 65 Mich. 638; Beatty v. Kurtz, 2 Pet. (U. S.) 566; New Orleans v. United States, 10 Pet. 662.

[2] Winona v. Huff, 11 Minn. 119; Pawlet v. Clark, 9 Cranch, 292; Doe v. Jones, 11 Ala. 63; McConnell v. Lexington Trs., 12 Wheat. 582; Duluth v. R. R. Co., (Minn. 92) 51 N. W. 1163; New Orleans v. United States, 10 Pet. 661, 713; Atty. Gen. v. Abbott, 154 Mass. 323.

[3] Waugh v. Leech, 28 Ill. 488; San Leandro v. Le Berton, 72 Cal. 170; Doe v. Jones, 11 Ala. 63; Klinkener v. M'Keesport Sch. Dir., 11 Pa. St. 444; Savannah v. Steamboat Co. of Ga., R. M. Charlt. (Ga.) R. 242; Taylor v. Phillipi, 35 W. Va. 554.

[4] Bryant's Lessee v. McCandless, 7 Ohio, pt. 2, 135.

[5] Talbott v. Richmond & D. R. R. Co., 31 Gratt. 685; Illinois Ins. Co. v. Littlefield, 67 Ill. 368.

[6] Hargro v. Hodgdou, 26 Pac. 1106; Forney v. Calhoun Co., 84 Ala. 215; Burnett v. Harrington, 7 S. W. R. 812; Singleton v. Sch. District, 10 Ib. 793; Vick v. Vicksburg, 1 How. (Miss.) 379 (1837); State v. Catlin, 3 Vt. 530; Post v. Pearsall, 22 Wend. (N. Y.) 425, 454; Barclay v. Howell's Lessee, 6 Pet. 498; Smith v. Navasota, 72 Tex. 422; Dummer v. Jersey City, Spencer (20 N. J. L.) 86; Starr v. People, (Col. 92) 30 Pac. 64; Hunter v. Sandy Hill Trs., 6 Hill (N. Y.) 407; Cook v. Harris, 61 N. Y. 448; Denver v. Jacobsen, (Col. 92) 30 Pac. 246.

ance is not required to effect a common law dedication, yet there must be a definite and certain description of the lands, which are dedicated, and of the intention of the owner to dedicate them.[1] Nor is it necessary that the public should have possession of the lands so dedicated to them for any special length of time. All that is required is the dedication of land by its owner, which may be manifested not only by direct proof of the same, but also by proof of his assent to the use of the property by the public, and the actual enjoyment of the same by the public for a length of time, sufficient to have created on the part of the public such reliance upon the enjoyment of such easement, as that the denial of such rights would now interfere materially with the public convenience and with private rights.[2] The common law dedication does not operate so much as a conveyance as an estoppel *in pais*, which prevents the original owner from interfering with the continued enjoyment by the public of the lands dedicated.[3]

§ 218. **Who may dedicate.**—The dedication of land to the public use can only be made by the owner of the land, or by the owner of an estate in such land.[4] It is not necessary that the party dedicating the lands should have the legal title;

[1] Cummings v. St. Louis, 90 Mo. 259; Shreveport v. Dronin, (La.) 6 So. R. 656; Boughner v. Clarksburg, 15 W. Va. 394; Winnetka v. Trouty, 107 Ill. 218; Littler v. Lincoln, 106 Ill. 353.

[2] Forney v. Calhoun Co., 86 Ala. 463; Cohocs v. D. & H. Can. Co., 31 N. E. R. 887; Jarvis v. Dean, 3 Bing. 447; State v. Catlin, 3 Vt. 530; Barclay v. Howell's Lessee, 6 Pet. 498; Topeka v. Cowee, 29 Pac. 560; Demopolis v. Webb, 87 Ala. 659; Yolo v. Barney, 79 Cal. 375; Weisbrod v. Railroad Co., 18 Wis. 35; Chicago v. Wright, 69 Ill. 328; Field v. Carr, 59 Ill. 197; Ragan v. McCoy, 29 Mo. 356; Evansville v. Evans, 37 Ind. 229; Fisher v. Beard, 32 Iowa, 346; Haynes v. Thomas, 7 Ind. 38; Columbus v. Dahn, 36 Ind. 330; Saulet v. New Orleans, 10 La. An. 81; Boughner v. Clarksburg, 15 W. Va. 394; Macon v. Franklin, 12 Ga. 239; Smith v. Flora, 64 Ill. 93; Arrowsmith v. New Orleans, 24 La. An. 194; Peoria v. Johnston, 56 Ill. 45; Mason v. City, 51 N. W. R. 770; Noyes v. Ward, 19 Conn. 250, 268; Commonwealth v. Alburger, 1 Whart. (Pa.) 469; Lee v. Lake 14 Mich. 12; Baker v. Johnson, 21 Mich. 319.

[3] Leonard's Heirs v. Baton Rouge, (La.) 40 So. R. 241; Cincinnati v. White's Lessee, 6 Pet. 431; Morgan v. Chicago etc. Co., 96 U. S. 716; Denver v. Jacobsen, 30 Pac. R. 246.

[4] Forney v. Calhoun Co., 84 Ala. 215; 4 So. 153; St. Louis v. Laclede etc. Co., (Mo.) 9 S. W. R. 581; Edenville v. C. Metc. Co., 77 Iowa, 69; Warren v. Brown, 47 N. W. 632; Baugan v. Mann, 59 Ill. 492; Lawe v. Kaukauna, 70 Wis. 306; 35 N. W. Rep. 561; Brunswick etc. Co. v. Waycross, (Ga. 92) 13 S. E. R. 835.

the owner of the equitable estate may exercise the right to dedicate it, and the trustee, who merely owns the naked legal title, cannot interfere with such dedication, but would be required to maintain it; and would, if he retained the legal title, serve as a trustee of such land for the public use, in the place of the original *cestui que trust*. If the party dedicating the land is the owner only of a particular estate, such dedication cannot interfere with the rights of the remainderman.[1] So, also, will the donation of land by the owner in no way affect the title of a mortgagee, or of purchasers at a sale under the mortgage;[2] or, as a general rule, with the wife's dower, although in New York, Louisiana and elsewhere, it is held that a certificate of renunciation by the wife of the dedicator is not necessary to bar her dower right.[3]

A married woman can make a dedication of her land to public use.[4] And the presumption of a dedication by long user wil operate as well against a married woman.[5] But she alone can make an effective dedication of her own property. The husband's dedication of her property is not binding upon her.[6]

The dedication may be made by an agent when duly authorized.[7] And even where the dedication of the property by the agent to public use has been without authority, the owner may ratify such dedication by accepting its results, as where he adopts the numbers of the lots as made by the agent in the platting accepted by him, and by reference in the conveyance of these lots to the recorded town plat and the public square.[8]

Where the will authorized the dedication of land to public use, such dedication must be made by the executor or adminis-

[1] Smith Lead. Cas. 95; Detroit v. Det. & Milw. R. R. Co., 23 Mich. 173 (1871).

[2] Moore v. Little Rock, 42 Ark. 66; McShane v. Moberly, 79 Mo. 41; Smith v. Heath, 102 Ill. 130; People v. Herbel, 96 Ill. 384.

[3] Lawrence v. Jeff. Par. Pol. Jury, 35 La. An. 601; see Menkato v. Meagher, 17 Minn. 265; see also, Gwynne v. Cincinnati, 3 Ohio, 25 (1827); Moore v. New York, 8 N. Y. 110.

[4] Todd v. Pittsburgh, Ft. W. & C. R. R. Co., 19 Ohio St. 514.

[5] Schenley v. Commonwealth, 36 Pa. St. 29.

[6] Indianapolis v. Patterson, 112 Ind. 344; Marshall v. Anderson, 78 Mo. 85.

[7] United States v. Chicago, 7 How. (U. S.) 185; Barclay v. Howell's Lessee, 6 Pet. 498; Niagara Falls Susp. Br. Co. v. Bachman, 66 N. Y. 261 (1876).

[8] Brown v. Manning, 6 Ohio, 298 (1834).

trator.[1] And so, likewise, may there be dedications of lands by the State government,[2] or by the United States government.[3] And there may also be a dedication of lands to public use by railroad companies,[4] and by any other corporation, such as a canal company.[5]

§ 219. **Intention to dedicate, how established.**—In order, however, that any dedication of public lands might prove effective, the intention on the part of the owner to so dedicate his land must be established beyond reasonable doubt. And unless such intention is established by competent evidence, there is no valid dedication, and the public have nothing which it can claim.[6] It is not necessary to establish the intention to dedicate by formal declarations of the owner; but such intention may be as well established by parol evidence, proving declarations or acts on the part of the owner of the lands, which

[1] Earle v. New Brunswick, 38 N. J. L. 47; Kaime v. Harty, 73 Mo. 316; Logansport v. Dunn, 8 Ind. 378.

[2] Terre Haute & I. R. R. Co. v. Scott, 74 Ind. 29; May v. City, 17 N. Y. S. 348; Matthiessen & H. Zinc Co. v. La Salle, 117 Ill. 411; Reilly v. Racine, 51 Wis. 526.

[3] State v. Woodward, 23 Vt. 92; Macon v. Franklin, 12 Ga. 239; Wells v. Pennington, (S. D.) 48 N. W. 305; Boston v. Lecraw, 17 How. (U. S.) 426.

[4] Williams v. N. Y. & N. H. R. R. Co., 39 Conn. 509; Brunswick etc. Co. v. Waycross, (Ga. 92) 13 S. E. R. 835.

[5] Niagara Falls Susp. Br. Co. v. Bachman, 66 N. Y. 261; Green v. Canaan, 29 Conn. 157; San Francisco v. Calderwood, 31 Cal. 585; Grand Surrey Canal Co. v. Hall, 1 M. & Gr. 392; Lamar County v. Clements, 49 Tex. 347.

[6] State v. Adkins, 42 Kan. 203; Campbell v. Karr, 20 Ill. App. 305; State v. McCabe, 43 N. W. R. 322, 74 Wis. 481; Fisk v. Havana, 88 Ill. 208; Grube v. Nichols, 36 Ill. 92; Chicago v. Drexel, (Ill. 92) 30 N. E. R. 774; Harding v. Hale, 61 Ill. 192; Ill. Ins. Co. v. Littlefield, 67 Ill. 368; Wragg v. Penn. Tp., 94 Ill. 11; Shellhouse v. State, 110 Ind. 509, 513; Brooks v. Topeka, 34 Kan. 277; Irwin v. Dixion, 9 How. 10; St. Louis City v. Wetmore, (Mo. 92) 19 S. W. R. 534; Turner v. People's Ferry Co., 21 Fed. Rep. 91; Logansport v. Dunn, 8 Ind. 378; San Francisco v. Canavan, 42 Cal. 541; People v. Reed, (Cal.) 20 Pac. Rep. 708; Columbus v. Dahn, 36 Ind. 330; Lamar County v. Clements, 49 Tex. 347; Longworth v. Cincinnati, 48 Ohio St. 637; Manderschid v. Dubuque, 29 Iowa, 73; Detroit v. Det. & Milw. R. R. Co., 23 Mich. 173; Cincinnati v. White's Lessee, 6 Pet. 435; Wilson v. Sexton, 27 Iowa, 15; Shreveport v. Dronin, (La.) 6 So. Rep. 656; McGehee v. Woodville, 59 Miss. 648; Talbott v. Richmond Co., 31 Gratt. 685; Vaughn v. Lewis, (Va. 92) 15 S. E. R. 525; Pennington v. Willard, 1 R. I. 93; Westfall v. Hunter, 8 Ind. 174; Chicago v. Johnson, 98 Ill. 618; Collins v. Macon, 69 Ga. 542; Marion v. Skillman, 127 Ind. 130; Glenn v. Baltimore, 67 Md. 390; Price v. Breckenridge, 92 Mo. 378.

are inconsistent with any other presumption than that he had intended to make a dedication to public use. Thus, for example, informal declarations of the owner of the soil will be admissible to show a dedication.[1] And very often the declaration of a deceased surveyor, who had been employed to make the survey, will be admissible to establish the intention to dedicate the land to public use.[2] On the other hand, parol evidence is admissible to prove acts and circumstances surrounding the land, and the parties, which tend to establish the intention to dedicate the land to the public use.[3] Parol evidence is always admissible to prove those facts which tend to establish such intention. Where, however, there is a formal declaration on the part of the owner of the land that the property has been dedicated to a public use, then parol evidence is not receivable for the purpose of proving or establishing some counter intention of the donor, or to modify or qualify in any way the declared intention of the donor.[4] But where the statements and declarations are ambiguous, then parol evidence is admissible to explain or establish more plainly, what the intention of the donor was.[5]

§ 220. **Presumption of intention from long user.**—The intent to dedicate property to public use will also be presumed against the owner of the land, from the fact that the public have for a long time had the use of such land, and that the owner of the land had acquiesced in its public use for a

[1] Denver v. Jacobsen, (Col. 92) 30 Pac. 246; Starr v. People, (Col. 92) 30 Pac. R. 64; Evans v. Evansville, 37 Ind. 229; McKee v. Perchment, 69 Pa. St. 342; Nixon v. Bilaxi, 5 So. R. 621; McKee v. St. Louis, 17 Mo. 184; Buchanan v. Curtis, 25 Wis. 99.

[2] Birmingham v. Anderson, 40 Pa. St. 506; Barclay v. Howell's Lessee, 6 Pet. 498.

[3] Denver v. Jacobsen, (Col. 92) 30 Pac. R. 246; State v. Woodward, 23 Vt. 92; Smith v. State, 23 N. J. L. 712, 725; Ill. Ins. Co. v. Littlefield, 67 Ill. 368; Quinn v. Anderson, 70 Cal. 454; Lee v. Lake, 14 Mich. 12; Stuyvesant v. Woodruff, 21 N. J. L. 145; Mayo v. Murchie, 3 Munf. (Va.) 358; Abbott v. Mills, 3 Vt. 521; Niagara Falls Susp. Br. v. Buchanan, 66 N. Y. 261; Aiken T. C. v. Lythgoe, 7 Rich. Law. 435; Princeville v. Auten, 77 Ill. 325; Shreeveport v. Dronin, (La.) 6 So. R. 656; Commonwealth v. Alburger, 1 Whart. (Pa.) 469; State v. Wilkinson, 2 Vt. 480.

[4] Smith v. Navasota, 72 Tex. 222; Lebanon v. Warren Co. Com'rs, 9 Ohio, 80; Princeville v. Auten, 77 Ill. 325; Indianapolis v. Cross, 7 Ind. 9.

[5] Shreeveport v. Dronin, *supra;* Fassion v. Landrey, (Ind. 90) 24 N. E. R. 96; Harris County v. Taylor, 58 Tex. 690; Hickerson v. Mexico, 58 Mo. 61; Grandville v. Jennison, 86 Mich. 567; San Francisco v. Holliday, 76 Cal. 18.

certain length of time. That presumption will not ordinarily arise simply from the fact of long user; additional facts would, as a rule, be required to establish from long user the intention to dedicate.[1] But where the evidence simply establishes a long user without the accompanying circumstances, which are needed to support the presumption of an intention to dedicate; then, in order that the public may claim the right to such easement over the land in question, the public use must have been maintained without interruption for the period of time which the Statute of Limitations requires in ordinary actions, and which by analogy is required for the creation of a prescriptive right. For, under these circumstances, the public can only claim the right to such public use of the land by prescription.[2] But where the facts of the case, in addition to long user, are sufficiently strong, with the long user, to support the presumption of an intention to dedicate the land for public use, then the intent to so dedicate the land will be proven by a public use of such land, for a period less than that which is required to support the claim as a prescriptive right. Under these circumstances, the intention to dedicate is established without proof of a prescription.[3] No particular time, during which the

[1] *In re* Hand, 52 Hun, 206; Smith v. State, 23 N. J. L. 130; Shawangunk Kill Br., *In re*, 100 N. Y. 642; Talbot v. King, 32 W. Va. 6; 9 S. E. R. 48; Thayer v. Boston, 19 Pick. (Mass.) 511; Talbott v. Grace, 30 Ind. 389; Hope v. Barnett, 78 Cal. 9; Cohoes v. D. & H. Co., 31 N. E. R. 887; McHey v. Hyde Park, 37 Fed. 389; Smith v. Gardner, 12 Oreg. 221; Onstott v. Murray, 22 Iowa, 457; People v. Davidsou, 21 Pac. R. 538; 79 Cal. 166; Keyes v. Tait, 19 Iowa, 123; Detroit v. Det. & Milw. R. R. Co., 23 Mich. 173; Manderschid v. Dubuque, 29 Iowa, 73.

[2] Penin etc. Co. v. Crystal Falls, 60 Mich. 510; Perry v. New Orleans, M. & C. R. R. Co., 55 Ala. 413; Kranz v. Baltimore, 64 Md. 491; Oelet v. Newport Bd. of Ald., 14 R. I. 295; Ellsworth v. Lord, 40 Minn. 337; Bush v. Johnson, 23 Pa. St. 209; Childs v. Nelson, 69 Wis. 125; Sherman v. Kane, 86 N. Y. 57; Ruland v. South Newmarket, 59 N. H. 291; McAllister v. Pickup, (Iowa, 92) 50 N. W. R. 556; Smith v. Inge, 80 Ala. 283; People v. Blake, 60 Cal. 497; Getchell v. Benedict, 57 Iowa, 121; Bales v. Pigeon, 129 Ind. 548; Visalia v. Jacobs, 65 Cal. 434; Stewart v. Frick, 94 N. C. 487; see San Francisco v. Canavan, 42 Cal. 541; Ely v. Parsons, 55 Conn. 83; Steele v. Sullivan, 70 Ala. 589.

[3] New Orleans v. United States, 10 Pet. 661, 722; Weisbrod v. Chicago & N. W. Ry. Co., 18 Wis. 35; Pella v. Scholte, 24 Iowa, 283; City Cem. Assoc. v. Meninger, 14 Kans. 312; Mason v. City, 51 N. W. R. 770; Smith v. Inge, 80 Ala. 283; Faust v. Huntington, 91 Ind. 493; Grandville v. Jennison, 86 Mich. 567; Shea v. Ottumwa, 67 Iowa, 39; McKenna v. Boston, 131 Mass. 143; Irwin v. Dix-

land is used by the public, is necessary to establish the fact of dedication; and the fact may be established independently of any user by the public in every respect, except so far as such use is needed to indicate the acceptance of such a dedication. But, for that purpose, the actual occupation of the land in the enjoyment of the public purpose or public use even for an instant of time is deemed to be sufficient.[1] The user by the public must also be shown to have been had with the owner's knowledge.[2] On the other hand, while user is a very strong circumstance in support of the intention to dedicate, nonuser is not conclusive, although very important evidence against the rights of the public.[3]

In line with the general principles here laid down, it has been held that the actual widening of the street by the abutting owner and the removal of the fence so as to secure the addition to the width of the street sufficiently establishes the intention to dedicate; and the owner of the property cannot thereafter restore the old boundary of the street, upon showing that the original survey of the street made the boundary line different from what had been long regarded as the true line.[4]

§ 221. **Platting and sale of lots as evidence of intention.** —While a survey of the land into lots and the preparation of

ion, 9 How. 10; Cincinnati Trs. v. White's Lessee, 6 Pet. 431; Griffin's Appeal, 109 Pa. St. 150; State v. Wilkinson, 2 Vt. 480; Marcy v. Taylor, 19 Ill. 634; Grube v. Nichols, 36 Ill. 93; Hoole v. Attorney General, 22 Ala. 190; Evansville v. Paige, 23 Ind. 525.

[1] Woodyer v. Hadden, 5 Taunt. 126, *per* Chambre, J.; 2 Smith Lead. Cas. 176.

[2] Durgin v. Lowell, 3 Allen, 398; Kleurs v. Town of Walnut Lake, (Minn. 93) 53 M. V. R. 703; Gerberling v. Wunnenberg, 51 Iowa, 125; McHey v. Hyde Park, 37 Fed. 389; Wilson v. Sexon, 27 Iowa, 15; State v. Kan. City, St. J. & C. B. R. R. Co., 45 Iowa, 139; Topeka v. Cowee, 29 Pac. R. 560; Roberts v. Karr, 1 Campb. 262; Schoonmaker v. Ref. Prot. Dutch Church, 5 How. (N. Y.) Pr. 265; People v. O'Keefe, 79 Cal. 171; Skeen v. Lynch, 1 Rob. (Va.) 186, 194.

[3] Barclay v. Howell's Lessee, 6 Pet. 498; Grandville v. Jennison, 86 Mich. 567; 84 Ib. 54; Travis Co. v. Christian, (Tex. 93) 21 S. W. R. 119.

[4] Hart v. Bloomfield Tp., Trs., 15 Ind. 226; Barlington v. Commonwealth, 41 Pa. St. 63; Ellsworth v. Lord, 40 Minn. 337; State v. Jersey City, 40 N. J. L. 483. But see Baltimore v. White, 62 Md. 362; Rozell v. Andrews, 103 N. Y. 150, which hold that the mere removal of the fence, without the acceptance by the public, does not constitute a dedication. See also Smith v. State, 26 N. J. L. 705.

a map, describing or setting out streets and squares and the like, will not of itself constitute a dedication, binding upon the donor;[1] yet, if after such a survey and platting of the land, lots are sold and described as bounded by those streets and squares, the facts, thus described as existing, will be sufficient, certainly as between the grantor and grantee of the lots, to amount to an immediate and absolute dedication of the streets.[2] And where the platting, as a whole, is considered as indicating the condition of the town and of the adjoining lots, as an inducement to a purchaser of a particular lot, the purchaser's right

[1] People v. Reed, 81 Cal. 70; 22 Pac. R. 474; United States v. Chicago, 7 How. (U. S.) 185, 196; but see Moore v. Little Rock, 42 Ark. 66.

[2] Gormley v. Clark, 134 U. S. 338; Taylor v. Phillipi, 35 W. Va. 554; San Leandro v. Le Breton, 72 Cal. 170; Duluth v. St. Paul etc. Co., 51 N. W. R. 1163; Hurley v. Miss. & Rum River B. Co., 34 Minn. 143; Hobson v. Monteith, 15 Oreg. 251; Campbell Co. Court v. Newport, 12 B. Mon. (Ky.) 538; Dobson v. Hohenadel, 30 W. N. C. 54; Dubuque v. Maloney, 9 Iowa, 450; Pope v. Union, 18 N. J. Eq. 282; Middleton v. Wharton, 41 Minn. 266; White Bear v. Stewart, 40 Minn. 284; McKenna v. Lancaster Dist. R. Comm'rs, Harper (S. C.) Law, 381; Wolf v. Brass, 72 Tex. 133; White v. Cower, 4 Paige (N. Y.) 510; Memphis & St. L. Packet Co. v. Grey, 9 Bush (Ky.) 137, 146 (1872); Schneider v. Jacob, (Ky.) 5 South West. Rep. 350; Giffen v. Olathe, 24 Pac. R. 470; Wickliffe v. Magruder, (Ky. 90) 13 S. W. R. 523; Heitz v. St. Louis, 19 S. W. R. 735; Campbell v. Kansas City, (Mo. 90) 13 S. W. R. 897; Aiken T. C. v. Lythgoe, 7 Rich. (Law) 435; Cook v. Burlington, 30 Iowa, 94; Furman Street, *In re*, 17 Wend. 649; Livingston v. New York, 8 Wend. 85; Arrowsmith v. New Orleans, 24 La. An. 194; Hicklin v. McLear, 18 Or. 126; Eureka v. Armstrong, 83 Cal. 623; *In re* North 3d Ave., 3 N. Y. S. 641; Lake View v. Lebahn, 120 Ill. 92; Preston v. Navasota, 34 Tex. 684; Hannibal v. Drop, 15 Mo. 634; Doe v. Attica, 7 Ind. 641, 644; Tinges v. Baltimore, 51 Md. 600; Vicksburg v. Marshall, 59 Miss. 563; Meth. E. Ch. v. Hoboken, 33 N. J. L. 13; State v. Elizabeth, 37 Ib. 434; Lamar v. Clements, 49 Tex. 347; Harrison v. Seal, (Miss.) 5 So. Rep. 622; Shea v. Ottumwa, 67 Iowa, 39; Stephenson v. Chattanooga, 20 Fed. Rep. 586; Smith v. Portland, 30 Ib. 734; Pearl Street, *In re*, 111 Pa. St. 565; Chapin v. Brown, 15 R. I. 579; Fisher v. Beard, 32 Iowa, 346; Wiggius v. McCleary, 49 N. Y. 346; Brown v. Manning, 6 Ohio, 298; Smith v. Lock, 18 Mich. 56; Union Co. v. Peckham, (R. I.) 12 At. Rep. 130; Steele v. Sullivan, 70 Ala. 589; Kittle v. Pfeiffer, 22 Cal. 490; McKee v. Perchment, 69 Pa. St. 342; State v. Ill. Cent. R. R. Co., 33 Fed. Rep. 730, 752; Fession v. Landrey, 24 N. E. R. 96; Willoughby v. Jenks, 20 Wend. 96; Oswego v. Osw. Canal Co., 6 N. Y. 257; Davis v. Sabita, 63 Pa. St. 90; Lamar v. Clements, 49 Tex. 347; Heselton v. Harmon, (Me.) 18 Atl. R. 286; People v. Lamblier, 5 Denio, 9, 19; Wyman v. New York, 11 Wend. 487; Livingston v. New York, 8 Wend. 85.

to the existence and use of the street extends to the entire land, which has been platted; and he has a right to insist upon having all the streets, set out upon such plat, remain open for the use of the public.[1] Of course, where the plat shows an alley to be a private one, while the rights of the purchasers of lots are practically the same, yet there will in this case be no dedication of the alley to public use.[2] But, generally, the platting of land, and the sale of lots with reference to such plat, will operate as a binding dedication to the public use, not only in favor of the purchaser of the lots, but, likewise, in favor of the public; the right of the public in the land so dedicated to public use is irrevocable.[3]

In order to raise the implication, and to support the intention, to dedicate lands to public use by platting the same, there must be affirmative evidence, upon the face of the plat, of an intention to make such dedication, in order that the mere platting of the land may serve such a purpose. The mere fact, that there is a blank space, without any mark indicating the use to which such land may be put, will not indicate any intention of dedicating such blank space, to a public use as a public square.[4] It is also held that there has been no dedication, where there is simply a water street, with an open space on the riverside unmarked.[5]

[1] White v. Flannigan, 1 Md. 525, 540; Griffiths v. Galindo, 86 Cal. 192; Rowan v. Portland, 8 B. Mon. (Ky.) 232; Winona v. Huff, 11 Minn. 119; Dubuque v. Maloney, 9 Iowa, 450; Hitchcock v. Oberlin, (Kan. 90) 26 Pac. 466; Huber v. Gazley, 18 Ohio, 18; Thomson v. McCormick, 26 N. E. R. 373; Logansport v. Dunn, 8 Ind. 378; Underwood v. Stuyvesant, 19 Johns. 186.

[2] Dexter v. Tree, 117 Ill. 532.

[3] Arrowsmith v. New Orleans, 24 La. An. 194; Parsons v. Atlanta Univ. Trs., 44 Ga. 529; Sherer v. Jasper, 9 So. 584; Darker v. Beck, 11 N. Y. S. 94; Heselton v. Hannon, 14 Atl. R. 286; Hawley v. Baltimore, 33 Md. 270; Detroit v. Det. & Milw. R. R. Co., 23 Mich. 173; Evans v. Evansville, 37 Ind. 229; Hall v. Baltimore, 56 Md. 187; West Cov. v. Freking, 8 Bush (Ky.) 121; State v. Chase, 42 Mo. App. 343. But see Gilder v. Brenham, 67 Tex. 345; Galveston v. Williams, (Tex.) 6 S. W. Rep. 860; where it is held that the city cannot acquire any rights until acceptance; see, also, *post*, § 222, 223.

[4] New York v. Stuyvesant, 17 N. Y. 34; Oswald v. Grenet, 15 Tex. 118. See generally, Yates v. Judd, 18 Wis. 118; Hogue v. Albina, (Or. 90) 25 Pac. 386; Saulet v. New Orleans, 10 La. An. 81; Municipality v. Palfrey, 7 La. An. 497; Hauson v. Eastman, 1 Minn. 509; Barclay v. Howell's Lessee, 6 Pet. 498.

[5] Reid v. Edina Bd. of Ed., 73 Mo. 295; New Albany v. Williams, 126 Ind. 1; Burbach v. Schweinler, 56 Wis. 386; Central Land Co. v. Providence, 15 R. I. 246.

On the other hand, a different ruling is maintained, where both lines of the water street are defined and the width indicated.[1] Of course, where the parties expressly reserve on the map certain spaces from public use, or mark such space by the word "reserved," as in the case of a landing on the water front, the intention to dedicate such landing to the public use is completely rebutted.[2]

The construction of the legal effect of a plat is also a question for the court.[3] And if erasures are discovered upon such map or plat, parol evidence is admissible for the purpose of explaining it.[4]

§ 222. **A dedication irrevocable when accepted.**—As long as a dedication of land to public use has not been accepted, either by the public or by private individuals, through the purchase of lots described as bound by such streets, such dedication may be revoked by the dedicator.[5] But this is not a uniform rule; for it has been held that, if the dedication has been made by a map and platting of the ground, the dedication is complete and cannot be thereafter revoked, although it has not been accepted.[6] Where, however, there has been an acceptance or actual user of the land dedicated, then the dedication becomes

[1] Barclay v. Howell's Lessee, 6 Pet. 498; United States v. Chicago, 7 How. 185; Columbus v. Dahn, 36 Ind. 330; People v. Klumpke, 41 Cal. 263; Commonwealth v. Alburger, 1 Whart. (Pa.) 469; Commonwealth v. McDonald, 16 Serg. & Rawle, 390; Penny Pot Landing Case, 16 Pa. St. 79; Penin. v. N. Y. Central R. R. Co., 36 N. Y. 120; Grant v. Davenport, 18 Iowa, 179; Cowles v. Gray, 14 Iowa, 1; Newport v. Taylor's Ex., 16 B. Mon. (Ky.) 699; Cook v. Hillsdale, 7 Mich. 115; Baker v. Johnston, 21 Mich. 319; Van Valkenburgh v. Milwaukee, 30 Wis. 338; Field v. Carr, 59 Ill. 198; McLaughlin v. Stevens, 18 Ohio, 94.

[2] Grant v. Davenport, 18 Iowa, 179; Cowles v. Gray, 14 Iowa, 1.

[3] Hanson v. Eastman, 21 Minn. 509; State Hist. Assoc. v. Lincoln, 14 Neb. 336.

[4] Smith v. Portland, 30 Fed. Rep. 734.

[5] Trustees of First Ev. Church v. Walsh, 57 Ill. 370; Schmitz v. Germantown, 31 Ill. App. 284; Winnetka v. Prouty, 107 Ill. 218; Littler v. Lincoln, 106 Ill. 353; San Francisco v. Canavan, 42 Cal. 541; Warren v. Brown, 47 N. W. R. 633; Baker v. Johnston, 21 Mich. 319; Cass Co. v. Banks, 44 Mich. 467; Perry v. New Orleans, M. &. C. R. R. Co., 55 Ala. 413; Tillman v. People, 12 Mich. 401; Logan v. Rose, 88 Cal. 263; Stone v. Brooks, 35 Cal. 489; Hanson v. Eastman, 21 Minn. 509; Holdane v. Cold Springs, 21 N. Y. 474.

[6] Meth. E. Ch. v. Hoboken, 33 N. J. L. 13; Cook v. Burlington, 30 Iowa, 94; Stone v. Brooks, 35 Cal. 489.

irrevocable.[1] But a dedication of a tract of land is not affected by the fact, that only a part of such land has been devoted to the intended public use, while the rest of such land is temporarily leased to private individuals.[2] So, on the other hand, will the claim of the public to lands, which have been dedicated, be effected by proceedings begun by the corporation for the condemnation of the land, or for taxing the land for city or county purposes, under the mistaken impression that the city had no claim to such land.[3] But if the corporation has accepted a dedication of property to public use, the dedicator and the city may combine to revoke such dedication and acceptance, provided third persons have not acquired vested rights therein, through the purchase of lots bound by the land dedicated to public use.[4]

§ 223. **Effect of acceptance.**—Apart from the effect of acceptance in making a dedication irrevocable, the further consequence of the existence or absence of the act of acceptance, is that in order that the municipality may be charged with the duty of repairing and keeping in proper condition the lands so dedicated to public use, and be liable to injuries incurred by individuals, while making use of such land, there must be an acceptance of the dedication by the duly authorized agents or officers of the corporation. It is not necessary that this acceptance should appear as a matter of record, or be made by an ordinance; but it may be implied from the making or ordering of repairs by the proper officers.[5] Or it may be implied, where such repairs

[1] Crockett v. Boston, 5 Cush. (Mass.) 182; Baker v. Johnston, 21 Mich. 319; Long v. Battle Creek, 39 Mich. 323.

[2] Plaquemines Par. Pol. Jury v. Foulhouze, 30 La. An., part I. 64.

[3] Lemon v. Hayden, 13 Wis. 159; Chicago v. Wright, 69 Ill. 328.

[4] Municipality v. Levee, S. C. P. Co., 7 La. An. 270.

[5] *In re* Com'rs of Parks, 53 Hun, 556; Hobbs v. Lowell, 19 Pick. (Mass.) 415; Teagarden v. McBean, 33 Miss. 283; Gedge v. Commonwealth, 9 Bush (Ky.) 61; Cohoes v. D. & H. Can. Co., 31 N. E. R. 887; Dayton v. Rutland, 84 Ill. 279; s. c., 25 Am. Rep. 457; Com. v. Moorhead, 118 Pa. St. 344; Osage v. Larkins, 19 Pac. R. 658; Atty. Gen. v. Tarr, 148 Mass. 309; State v. Bradbury, 40 Me. 154; State v. Wilson, 42 Me. 9; Illinois Ins. Co. v. Littlefield, 67 Ill. 368; Jersey City v. State, 30 N. J. L. 531; Holmes v. Jersey City, 12 N. J. Eq. 299; Mass. v. Springfield, 14 S. W. R. 630; Booraem v. North Hudson County Ry. Co., 39 N. J. Eq. 465; Tower v. Rutland, 56 Vt. 28; Oswego v. Osw. Canal Co., 6 N. Y. 257; Niagara Falls Susp. Br. Co. v. Bachman, 66 N. Y. 261; Gilder v. Brenham, 67 Tex. 345; Kennedy v. Cumberland, 65 Md. 514; Bartlett v. Beardmore, 77 Wis. 356; Parsons v. Atlanta Univ.

have been made and subsequently paid for by the authorities, which had the legal power to accept such street or highway.[1] The fact, that a dedication of land to the public is a beneficial one, will support the presumption of an acceptance, and dispense with any further direct or other proof of such acceptance.[2] The acceptance of a plat, describing streets, etc., when done by the proper authorities, was held a sufficient acceptance of the dedication to bind a corporation.[3] So, also, has it been held to be sufficient proof of acceptance of a street for a town council to direct a well to be dug therein.[4] Other similar acts on the part of the corporation would be equivalent to an acceptance of the dedication.[5] But, in order that the acceptance may be proven by implication from dealings with the property dedicated, the officer so using or dealing with the property dedicated must have the power, under the municipal charter, to accept the dedication. Thus, it was held that a surveyor, who had no power to accept a dedication, could not by the repairs of the land so dedicated, bind the corporation to the legal effect of an acceptance.[6]

Where the State dedicates lands to city purposes, there is never any occasion for proof of acceptance by the city; for the act of dedication is likewise an acceptance of the same by

Trs., 44 Ga. 529; Wilson v. Hull, 24 Pac. R. 799; Commonwealth v. Belden, 13 Met. (Mass.) 10; Jennings v. Tisbury, 5 Gray (Mass.) 73; Folsom v. Underhill, 36 Vt. 580; Gardner v. Johnston, (R. I.) 12 Atl. Rep. 888; Kelly's Case, 8 Gratt. 632; State v. Carver, 5 Strob. (S. C.) 217; Abbott v. Cottage City, 143 Mass. 521; Bowman v. Boston, 5 Cush. 1; Hyde v. Jamaica, 27 Vt. 443.

[1] Jennings v. Tisbury, 5 Gray, 73; Hayden v. Attleborough, 7 Gray, 338; State v. New Boston, 11 N. H. 413; Commonwealth v. Belden, 13 Met. 10; Hemphill v. Boston, 8 Cush. 195; Manderschid v. Dubuque, 29 Iowa, 73.

[2] Abbott v. Cottage City, 143 Mass. 521; Guthrie v. New Haven, 31 Conn. 308.

[3] Requa v. Rochester, 45 N. Y. 129; Niagara Falls Susp. Br. Co. v. Bachman, 66 N. Y. 261; Lake View v. Le Bahn, 120 Ill. 92; Baker v. Johnston, 21 Mich. 319; People v. Jones, 6 Mich. 467; Tillman v. People, 12 Mich. 401; Cass County v. Banks, 44 Mich. 467; State v. Chase, 42 Mo. App. 343; Griffiths v. Galindo, 86 Cal. 192.

[4] Pope v. Union, 18 N. J. Eq. 282; Aiken T. C. v. Lythgoe, 7 Rich. (S. C.) Law, 435.

[5] Wayne etc. Bk. v. Stockwell, 84 Mich. 586; Baker v. Johnson, 21 Ib. 319; Click v. Lamar Co., 79 Tex. 217; Detroit v. Det. & Milw. R. R. Co., 23 Mich. 173; Shortle v. Minneapolis, 17 Minn. 308; Emery v. Washington, 1 Brayton (Vt.) 128; Rose v. St. Charles, 49 Mo. 509; Blodgett v. Royalton, 17 Vt. 40.

[6] State v. Bradbury, 40 Me. 154.

the public. Or, rather, it would be better stated that, by the act of dedication by the State, there was an overruling command for acceptance of such dedication, and of the obligations dependent thereupon, by the city.[1]

In Iowa, the statute requires that the acceptance of lands dedicated to the public, can only be made by ordinance expressly passed for that purpose.[2]

In accepting lands dedicated to public uses, it is not necessary for the city to accept all or reject all; part of the land dedicated may be accepted and part rejected.[3] In Michigan, it has been held that there must be an acceptance within a reasonable time, or otherwise the dedication will be presumed to have been withdrawn.[4]

§ 224. **Extent of common law dedication as respects donor's title.** — As a general proposition, in the absence of statutes requiring the contrary, where lands are donated by the owner for the public use by the common law dedication, the donor is presumed to have intended to give a mere easement in favor of the public, and not the title in fee. In such a case, the owner is presumed to have intended to retain the title to such land, the right to employ and make use of the land, in every other way which does not conflict with the public easement thus created. As, for example, if there are minerals in the soil, he has a right to mine such minerals, in the absence of statutes controlling the same.[5] This question, so far as it

[1] Reilly v. Racine, 51 Wis. 526.

[2] Laughlin v. Washington, 63 Iowa, 652.

[3] Bell v. Burlington, 68 Iowa, 296.

[4] Cass Co. v. Banks, 44 Mich. 467, citing Baker v. Johnston, 21 Mich. 319; Wayne Co. v. Miller, 31 Mich. 447; White v. Smith, 37 Mich. 291. But see Price v. Breckenridge, 92 Mo. 378; Barclay v. Howell's Lessee, 6 Pet. 512; Borrowman v. Mitchell, 2 Up. Can. Q. B. 135.

[5] Hobson v. Monteith, 14 Pac. R. 740; Pomeroy v. Mills, 3 Vt. 279; Abbott v. Mills, Ib. 521; Des Moines v. Hall, 24 Iowa, 234; White v. Godfrey, 97 Mass. 472; Bliss v. Ball, 99 Mass. 597; Brakken v. Minneapolis & St. L. Ry. Co., 29 Minn. 41; Baker v. St. Louis, 75 Mo. 671; Turner v. Holland, (Mich.) 33 N. W. R. 383; Perley v. Chandler, 6 Mass. 454; Boston v. Richardson, 13 Allen, 152, 153; Newington v. Jacobs, 25 L. T. (N. S.) 800; Indianapolis v. Kingsbury, 101 Ind. 200; Lade v. Shepherd, 2 Stra. 1004; Dubuque v. Maloney, 9 Iowa, 450; Every v. Smith, 26 L. J. Exch. 344; Perry v. New Orleans, M. & C. R. R. Co., 55 Ala. 413; Stephenson v. Chattanooga, 20 Fed. Rep. 586; Harrison v. Parker, 6 East, 154; Jackson v. Hathaway, 15 Johns. (N. Y.) 447; Dawes v. Hawkins, 4 L. T. (N. S.) 288; Queen v. Plunkett, 21 Up. Can. Q. B. 536.

relates to streets will be more fully discussed in the chapter on streets.[1] Suffice it to say, that where there is a simple easement granted in the public streets, while the fee is retained by the dedicator, lots which are bound by such streets extend their boundary line to the middle of the street; the grantee of the abutting land takes to the center of the street subject to the public easement.[2] But where the dedication of the property operates to pass the fee to the streets and alleys, the abutting owner owns the edge of the street and cannot claim any proprietary rights in the soil under the street.[3] Although, in the State in which the question arises, a dedication under statute, or in other words, a statutory dedication, provides that the fee shall pass to the streets and alleys; yet, if the dedication in the particular case is in some other way than that which is prescribed by the statute, and can therefore only operate as a common law dedicator, the fee will in that case remain in the dedicator or his grantees, and the easement for public use will alone be created by the public.[4]

§ 225. **Public right to alluvium and accretions.**—If land which is bounded by a river, is dedicated to the city for public use, the city acquires by such dedication to the public use, the rights and privileges of a riparian proprietor in respect to the alluvium and accretions to such land.[5] If, in such a case, a street or public common lies along the stream, any accretion to

[1] § 301.

[2] John and Cherry Streets, *In re*, 19 Wend. 659; *In re* Flick, (Pa. 92) 6 Culp. 329; Lotz v. Reading I. Co., 10 Pa. Ct. R. 497; Holloway v. Southmayd, 18 N. Y. S. (92) 707; Holloway v. Delano, 28 Ab. N. C. 190; Stiles v. Curtis, 4 Day (Conn.) 328; Bissell v. Railroad Co., *supra*; Sherman v. McKeon, 38 N. Y. 266; Bissell v. N. Y. Central R. R. Co., 23 N. Y. 61; Columbus & W. Ry. Co. v. Witherow, 82 Ala. 190; Watkins v. Lynch, 71 Cal. 21; 11 Pac. R. 808; Ayres Penn. R. Co., 20 Atl. R. 54; Penn. R. R. Co. v. Pittsburgh Gr. Elev. Co., 50 Pa. St. 499; Willoughby v. Jenks, 20 Wend. (N. Y.) 96; Wager v. Troy Union, etc., R. R. Co., 25 N. Y. 526.

[3] People v. Kerr, 27 N. Y. 188; Duyckruck v. New York, 125 N. Y. 164; Clinton v. Cedar R. R. Co., 24 Iowa, 455; Lindsay v. Omaha, 46 N. W. 627; Moliter v. Sheldon, 37 Kan. 246.

[4] Warburton v. Demorett, 27 N. E. R. 730; San Francisco v. Spring V. W. W., 48 Cal. 493; Gebhardt v. Reeves, 75 Ill. 301; Silvey v. McCool, 86 Ga. 1; Dubuque v. Benson, 23 Iowa, 248.

[5] New Orleans v. United States, 10 Pet. 662; Hoboken v. Penn. R. R. Co., 124 U. S. 656, 690; Trustees v. School, 12 N. E. R. 243; St. Louis v. Lemp, 6 S. W. R. 344; Turner v. Holland, (Mich.) 33 N. W. R. 383; Cox v. Louisville, N.

the shore, resulting from the operation of the water, will go to the public; and the private owners of lands, abutting on the opposite side of the stream, will have no right to claim the benefit of such accretions.[1] Of course, in making a dedication of lands fronting on a stream, the right to the soil under the water may be reserved by the owner thereof.[2] And so, also, where the State is the owner of the land under water, the street or public use in such lands cannot be dedicated by the riparian proprietor, because he has not the title to it; and in case of the filling up of such lands by natural accretion or deposit of garbage and soil, the title to the land, thus formed, remains in the State, in which it is already vested.[3] But where the riparian proprietor and not the State owns the submerged land, and such riparian proprietor proceeds to fill in the land thus submerged, with the extension of the water front and shore will the public right to extend the street be recognized *i. e.*, the public easement over such land, by virtue of the dedication of the land for the use of a street, will continue to extend indefinitely out into the stream, in proportion to formation of any land on the shore by accretions.[4] So, also, where streets terminate or border on navigable waters, whether they have been

A. & C. R. R. Co., 48 Ind. 178; Clarke v. Providence, (R. I.) 15 Atl. R. 763; Manley v. Gibson, 13 Ill. 312; Leonard Heirs v. Baton Rouge, 4 So. R. 240; Cook v. Burlington, 30 Iowa, 94; St. Paul & Pac. R. R. Co. v. Schurmeir, 7 Wall. 272, 289; Yates v. Milwaukee, 10 Wall. 497, 504; Ruch v. New Orleans, 43 La. An. 275; Yates v. Judd, 18 Wis. 118; Elgin v. Beckwith, 119 Ill. 367; Turner v. People's Ferry Co., 21 Fed. Rep. 90; Illinois v. Illinois Central R. R. Co., 33 Fed. Rep. 730; Martin v. Evansville, 32 Ind. 85.

[1] Potomac Steamboat Co. v. Upper Pot. etc. Co., 109 U. S. 672.

[2] New York v. Hart, 95 N. Y. 443, 452, 456.

[3] Hoboken v. Pennsylvania R. R. Co., 124 U. S. 656.

[4] Illinois v. Illinois Cen. R. R. Co., 33 Fed. 730; Barney v. Keokuk, 94 U. S. 324; Potomac Steamboat Co. v. Up. Pot. Steamboat Co., 109 U. S. 672; Clarke v. Providence, (R. I.) 15 Atl. R. 763; Morris Canal & B. Co. v. Jersey City, 12 N. J. Eq. 252; Lockwood & N. Y. & N. H. R. R. Co., 37 Conn. 391; Campbell v. Laclede Gasl. Co., 84 Mo. 352, 372; St. Louis v. Rutz, 138 U. S. 226; Jersey City v. Dummer, Spencer, 20 N. J. L. 106; Louisiana Ice Co. v. New Orleans, 43 La. An. 217; The Hoboken Land & Imp. Co. v. Hoboken, 36 N. J. Law, 540; Jersey City v. Morris Canal & B. Co., 12 N. J. Eq. 547; New York, L. E. & W. R. R. Co. v. Yard, 43 N. J. L. 121; s. c., Ib. 632; Rutz v. Seeger, 35 Fed. 188; Cook v. Burlington, 30 Iowa, 94; Morris Canal & B. Co. v. Central R. R. Co., 16 N. J. Eq. 419, 431; Jeremy v. Elwell, 5 Ohio Cir. 379; Steers v. Brooklyn, 101 N. Y. 51; Hoboken v. Pennsylvania R. R. Co., 124 U. S. 656.

established by condemnation, or by dedication, and whether the fee to the land was acquired for public use in the city or in the original proprietor; in either case, the city has the power of establishing on the water front, adjoining such streets, public wharfs to be regulated by them; and for the use of which they may charge a reasonable wharfage.[1] There exists, however, under the adjudications, some doubt whether the public can acquire land for a public landing, by way of implication or by a common law dedication. While there can be no doubt that there may be an express dedication of lands for such a purpose; yet, some of the cases maintain that there cannot be any implied dedication of land for such a purpose, which is established only by long user or acquiescence.[2] But this is not generally agreed to, and the contrary proposition is maintained by many cases,[3] which hold that there may be a prescribed right, or a common law implied dedication to use land as a public landing.

§ 226. **Dedication to use as public squares.**—Not only may land be dedicated to public use as streets, which is the more common case of dedication; but, likewise, there may be an effective dedication by the landowner of a part of his land for use as a public square. And the fact of dedication for such use may be established by the same evidence, and in the same manner, as in the case of streets and highways. Thus, for example, parties who buy lots which are marked out on a plat

[1] Adams v. Ohio Falls Co., (Ind. 92) 31 N. E. R. 57; Barney v. Keokuk, 94 U. S. 324; Newport v. Taylor's Ex., 16 B. Mon. (Ky.) 699; McMurray v. Baltimore, 54 Md. 104; Dugan v. Baltimore, 5 Gill & J. 375; Godfrey v. Alton, 12 Ill. 29; Alton v. Ill. Transp. Co., 12 Ill. 60; Haight v. Keokuk, 4 Iowa, 199; Rowan's Ex. v. Portland, 8 B. Mon. 253; Portland & W. V. R. R. Co. v. Portland, 14 Oreg. 188; Newport v. Taylor's Ex., 16 B. Mon. 700; Barney v. Baltimore, 1 Hughes C. C. 118; Coffin v. Portland, 11 Saw. C. C. R. 600; s. c., 27 Fed. Rep. 412.

[2] State v. Wilson, 42 Me. 9; Pearsall v. Post, 20 Wend. 111; Littlefield v. Maxwell, 31 Me. 134; Bethurse v. Turner, 1 Me. 111.

[3] Abbott v. Cottage City, 143 Mass. 521; Municipality v. Kirk, 5 La. An. 34; Penny Pot Landing Case, 16 Pa. St. 79; Coolidge v. Learned, 8 Pick. 505.

[4] Lee v. Mound Station, 118 Ill. 304; Plumb v. Grand Rapids, (Mich.) 45 N. W. R. 1024; Huber v. Gazley, 18 Ohio, 18; Brown v. Manning, 6 Ohio, 298; Atty. Gen. v. Abbott, 154 Mass. 323; Daniels v. Wilson, 27 Wis. 492; San Leandro v. Le Breton, 72 Cal. 170; Archer v. Salimas City, 93 Cal. 43; Kelly v. West Seattle, etc. Co., 29 Pac. R. 1054; Baker v. Johnston, 21 Mich. 319; Smith v. Houston, 6 Ohio, 101; Abbott v. Cottage City, 143 Mass. 521; Abbott v. Mills, 3 Vt.

as bordering on a public square, and who purchase such lots in reliance upon their proximity to the public square, acquire the right to have such square opened and maintained; and the owner of the land which was described as being dedicated to use as a public square or common, cannot inclose or take away such land from the use of the public and of the purchasers of these lots.[1] It has also been held that simply writing the word "park" upon a block or map of the city, indicates a dedication to public use for such a purpose; and purchasers of adjoining lots in reliance upon, or with reference to, such plat, will have the power of compelling the donation of the land so described to the use of the public as a park.[2]

To what use a public square may be put, will vary according to the understanding of various communities, as to what was the public intention, and what is proper. According to some authorities, it is impossible for a public square to be used for any purpose but as a place of public or common amusement; and it has been held that the courts may enjoin the erection upon such public square or commons of any public buildings.[3] But the general rule seems to be, that while it would be impossible for the town to authorize the erection of private buildings upon a public square or common, and if so authorized they may be revoked as nuisances;[4] yet, it is deemed generally to be admissible for a public square to be used for the erection of a coun-

521; State v. Catlin, Ib. 530; Pearsall v. Post, 20 Wend. 111, 117; s. c., 22 Wend. 425, 433; Commonwealth v. Rush, 14 Pa. St. 186; State v. Wilkinson, 2 Vt. 480; State v. Trask, 6 Vt. 355; Watertown v. Cowen, 4 Paige Ch. (N. Y.) 510; Winona v. Huff, 11 Minn. 119; Reynolds' Heirs v. Stark Co. Com'rs, 5 Ohio, 204.

[1] Laughlin v. Washington, 63 Iowa, 652; Cf. Clarke v. Providence, 15 Atl. R. 763.

[2] Price v. Plainfield, 40 N. J. L. 608; Archer v. Salinas, 93 Cal. 43; Maywood Co. v. Maywood, 118 Ill. 61. But see Hennepin County Com'rs v. Dayton, 17 Minn. 260, where it is held that the words "county block," marked across a block on a town plat, were not a sufficient dedication under the statute of Minnesota.

[3] Princeville v. Auten, 77 Ill. 325; Cf. State v. Schweiekert, (Mo. 92) 195 S. W. R. 47.

[4] New Orleans v. United States, 10 Pet. 661, 725; State v. Woodward, 23 Vt. 92; Columbus v. Jaques, 30 Ga. 506; State v. Atkinson, 24 Vt. 448; Archer v. Salinas, 93 Cal. 43; Hutchinson v. Pratt, 11 Vt. 402, 423; Pomeroy v. Mills, 3 Vt. 279; People v. Carpenter, 1 Mich. 273; State v. Mobile, 5 Port. (Ala.) 279; Commonwealth v. Rush, 14 Pa. St. 186; New Orleans v. United States, 10 Pet. 661, 725, 735; Cooper v. Alden, Harring. Ch. (Mich.) 72.

ty or State public building, because the practice has been more or less universal to locate the public buildings upon the public squares.[1] It has thus been held to be permissible for a public square to be used for the location of a county court house and jail; and, also, for the maintenance of hitching-posts and standing room on such square for farmers' horses.[2] It has also been questioned to what extent the county has any inherent right to appropriate the use of a public square to county uses. The establishment of a custom to permit such use of a public square is of course evidence of an original dedication to county as well as to municipal uses; but, in the absence of such established practice or custom, the county has no more right than a private individual to encroach upon the lands dedicated to the city for public use as a square.[3] In all cases, it is a question dependent upon the laws and customs of the local community or State, in which the question arises.[4] It has been held that a city has the right to erect a public library building upon the said square, it being held that such an appropriation of the public square would still be for a public use and included in the purposes of the dedication.[5]

The street or highway cannot be inclosed by the local authorities, but a public square or common may be so inclosed, where such inclosure is designed to provide for the better enjoyment of the square as a place of amusement or recreation for the public.[6] It has also been held that it is possible for a municipality to authorize the establishment of a street or highway through a park; and that by so doing there has not been any interference with the donation of that part of

[1] San Antonio v. Steinberg, (Tex.) 7 S. W. R. 754; Langley v. Gallipolis, 2 Ohio St. 107, 110; Commonwealth v. Bowman, 3 Pa. St. 202, 203.

[2] Frederick Co. v. Winchester, (Va.) 5 So. E. Rep. 884. But see *contra*, Samuel v. Nashville, 3 Sneed (Tenn.) 298.

[3] McCullough v. San Francisco Board of Education, 51 Cal. 418; Princeville v. Auten, 77 Ill. 325.

[4] Baker v. Johnston, 21 Mich. 319; Baird v. Rice, 63 Pa. St. 489; State v. Waddell, 52 N. W. R. 213; Commonwealth v. Bowman, 3 Pa. St. 202; Commonwealth v. Alburger, 1 Whart. 469.

[5] Riggs v. Detroit Board of Education, 27 Mich. 262.

[6] Commonwealth v. Bowman, 3 Pa. St. 202; Baird v. Rice, 63 Pa. St. 489; Hutchinson v. Pratt, 11 Vt. 402, 423; Leftwich v. Placquemine, 14 La. An. 152; Baker v. Johnston, 21 Mich. 319; Seguin v. Ireland, 58 Tex. 183; Langley v. Gallipolis, 2 Ohio St. 107.

the park for the public use as such.[1] But this is not accepted as a general doctrine; on the contrary, it has been held elsewhere that, without the consent of the adjoining lot owner, the town could not lay out streets through the public park or square, without being guilty of a diversion of the land from the use to which the land was dedicated.[2] The public may acquire, however, a highway across a park or public square, either by dedication, or by a user for the statutory period of limitation.[3] And if a street runs through the land when it was dedicated to public use as a square, it is impossible for the city council to direct such street to be closed up.[4]

It has also been held that a town may grant to a railroad corporation the right of establishing upon the commons of the town a railroad depot.[5]

§ 227. **Dedication to other public uses.**—The dedication of lands by private owners is not confined simply to use as a public street or square; but lands may be dedicated in writing or parol to any other municipal, public, or charitable use; and be equally effective; as, for example, dedication to the public use for the erection of public buildings,[6] for school purposes,[7] for church squares or lots,[8] for a burying ground,[9] and for a

[1] Cohn v. Parcels, 72 Cal. 367.

[2] Price v. Thompson, 38 Mo. 363; Jacksonville v. Jacks. Ry. Co., 67 Ill. 540. In the latter case, Thornton, J., says: "What were the uses and purposes intended? Streets and public squares are donated. Each has a well-known and well-defined meaning. The one was designed for the purpose of travel, and the right of passage over the streets in any mode not to destroy their usefulness was given by the plat. The square was intended for beauty and adornment, and for the health and recreation of the public. A dedication must always be construed with reference to the object with which it was made. The donors never could have intended that this ground should be used as a street."

[3] Cohn v. Parcels, 72 Cal. 367; Greene County v. Huff, 91 Ind. 333.

[4] Portland v. Whittle, 3 Oreg. 126; see, also, Brooklyn Park Comm'rs v. Armstrong, 45 N. Y. 234, 240.

[5] Crawford v. Mobile & G. R. R. Co., 67 Ga. 405. But see Barney v. Keokuk, 94 U. S. 324; State v. Waddell, (Minn. 92) 52 N. W. R. 213.

[6] Smith v. Heuston, 6 Ohio, 101; Ib. 298, 305; Reynold's Heirs v. Stark Co. Comm'rs, 5 Ohio, 204.

[7] Klinkener v. School District, 11 Pa. St. 444.

[8] Lennig v. Ocean City Assoc., 41 N. J. Eq. 24; Antones v. Eslava, 9 Port. (Ala.) 527; Hannibal v. Draper, 15 Mo. 634; Gumbert's App., 110 Pa. St. 496.

[9] Post v. Pearsall, 22 Wend. (N. Y.) 425, 454; Campbell v. Kansas City, (Mo. 92) 13 S. W. R. 896; Weisenberg v. Truman, 58 Cal. 63; Wood v. Macon & B. R. R. Co., 68 Ga. 539.

public market.[1] But in order that there may be a dedication by any other means, except by a formal grant, it must be a dedication to some public use; otherwise the dedication is invalid.[2]

§ 228. **Effect of misuser or abandonment of dedicated lands.**—Property which is unconditionally dedicated to the public use in general, or to some particular use of the public, will not revert to the original owner, except when the execution of such a use becomes impossible; and when the city or State makes an improper use of the land which has been dedicated to the public, equity will, upon the interference by the proper parties, prohibit such diversion of the land and compel its devotion to the intended use.[3] But whenever the application of the land to the use, for which it was dedicated, becomes impossible; as, for example, where land had been dedicated for a county-seat, and the county-seat was afterwards removed to some other place, the right to the soil would necessarily revert to the dedicator and his heirs and assigns.[4] In the case of the vacation of a street, the general rule of law provides that the title to the abutting owners, extending to the center of the street subject to the easement, such abutting owner will at once acquire the absolute title to the land covered by the easement of the public.[5] But, in Illinois, it has been held that, on the vacation of a street, the land covered by such street reverts to the original proprietor instead of the present owner of the adjacent lots.[6]

[1] President etc. v. Indianapolis, 12 Ind. 620; Dummer v. City, 1 N. J. L. 86.

[2] Todd v. Pittsburgh Ft. W. & C. R. R. Co., 19 Ohio St. 514; Ayres v. Pa. R. R. Co., 48 N. J. L. 44; 57 Am. Rep. 538; McWilliams v. Morgan, 61 Ill. 89.

[3] Warren v. Lyons City, 22 Iowa, 351; Price v. Thompson, 48 Mo. 363; Price v. Meth. E. Church, 4 Ohio, 514; Williams v. First Presbyterian Soc., 1 Ohio St. 478; Webb v. Moler, 8 Ohio, 552; Campbell Co. Court v. Newport, 12 B. Mon. (Ky.) 538; Augusta v. Perkins, 8 B. Mon. (Ky.) 107; Brown v. Manning, 6 Ohio, 298; Church v. Portland, 13 Oregon, 73; Van Wert Board of Education v. Edson, 18 Ohio St. 221; Coffin v. Portland, 11 Sawy. C. C. R. 600; s. c., 27 Fed. Rep. 412; Harris v. Elliott, 10 Pet. 25; Barclay v. Howell's Lessee, 6 Pet. 498, 507; Portland & W. V. R. R. Co. v. Portland, 14 Oreg. 188.

[4] County of Kent v. Grand Rapids, 61 Mich. 144. But see *contra*, Seebold v. Shitler, 34 Pa. St. 133.

[5] Banks v. Ogden, 2 Wall. 57, 69; Wallace v. Fee, 50 N. Y. 694; Weisbod v. Railroad Co., 18 Wis. 43.

[6] Gebhardt v. Reeves, 75 Ill. 301; Zinc Co. v. La Salle, 117 Ill. 411. But see *contra*, Day v. Schroeder, 46 Iowa, 546.

§ 229. **Alienation of dedicated lands.**—It is manifest that a municipal corporation has no implied authority to dispose of lands which have been dedicated to it for the public benefit; nor would such property be subject to sale for the payment of the debts of the municipal corporation.[1] Lands, which are dedicated to the public use, are not even alienable, when on account of the surrounding circumstances they become unsuitable for the use to which they were dedicated. A sale of such property by the municipal corporation can only be effected by and with the consent of the dedicator or his representatives; for, otherwise, the fact that it becomes impossible to apply the lands to the use for which they were dedicated, would cause a reversion of the title of such land to the dedicator or his heirs.[2] Lands are not even liable for the debts of a municipal corporation, where such lands are donated to use, as a market, even where it has been granted to the corporation in fee, in exchange for a square, by legislative authority, and which was originally dedicated for use as a market place.[3]

This is the statement in regard to the power of a municipal corporation to alien or dispose of property dedicated to public use through some implied power of such corporation. It is a different and more difficult question to determine, how far and when the Legislature of a State may authorize a municipal corporation to dispose of property, which has been dedicated to it for some public use. The general rule of constitutional limitations will of course apply here, viz., to direct or authorize the

[1] New Orleans v. United States, 10 Pet. 734; Haberman v. Baker, 128 N. Y. 253; Branham v. San Jose, 24 Cal. 585; Los Angeles etc. Co. v. Los Angeles, (Cal. 92) 30 Pac. R. 523; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234; Cummings v. St. Louis, 90 Mo. 259; Price v. Thompson, 48 Mo. 363; Hamilton v. Chicago etc. Co., (Ill. 88) 15 N. E. R. 854; Mathews v. Alexandria, 68 Mo. 115; Cromwell v. Conn. Brown Stone Q. Co., 50 Conn. 470; Arkansas R. P. Co. v. Sarrells, (Ark.) 8 S. W. Rep. 683; West Carroll Par. v. Gladdis, 34 La. An. 928; Pickett v. Hastings, 47 Cal. 269; Rutherford v. Taylor, 38 Mo. 315; Commonwealth v. Alburger, 1 Whart. (Pa.) 469; San Francisco v. Canavan, 42 Cal. 541; Frederick Co. v. Winchester, (Va.) 4 S. E. R. 844; Alves' Ex. v. Henderson, 16 B. Mon. (Ky.) 131, 168; Louisville v. Liebfriend, 17 S. W. R. 870; Police Jury v. McCormack, 32 La. An. 624; Ransom v. Boal, 29 Iowa, 68; San Antonio v. Lewis, 15 Tex. 388; School Dist. No. 2 v. Hart, (Wyo. 92) 29 Pac. Rep. 741.

[2] Van Wert Bd. of Ed. v. Edson, 18 Ohio St. 221; Sch. Dist. No. 2 v. Hart, *supra*.

[3] Indianapolis & B. R. R. Co. v. Indianapolis, 12 Ind. 620.

exercise of any power which is not prohibited by the constitution of the State or of the United States, expressly or by necessary implication. Hence, wherever the municipal corporation holds the full title to the ground which has been dedicated to public use, instead of merely having the easement therein, the Legislature may directly authorize the sale of such land.[1] But where the dedication has been made of simply an easement therein;[2] and, also, for a specific and limited purpose, as, for example, a public square; then it is impossible, at least as held by some of the courts, for any Legislature to authorize such municipality to sell the land so dedicated; because such a sale would be a violation of the special trust, which has been created in favor of the public by the dedication of the land to the specific purpose.[3]

In Louisiana, by the Civil Law, in the case of land dedicated to public use, the public acquire the title to the soil.[4] But notwithstanding that fact, it is held that such land did not constitute a part of the public domain, and therefore cannot be aliened or devoted to any other than the use to which it was dedicated, except in the exercise of the right of eminent domain.[5] But where public places or squares have been established by public authority, then the power to control the dis-

[1] Van Ness v. Washington, 4 Pet. (U. S.) 232 (1830); Potomac Steam Boat Co. v. Upper Potomac Co., 109 U. S. 672 (1883); Indianapolis & B. R. R. Co. v. Indianapolis, 12 Ind. 620; Brooklyn Park Com'rs v. Armstrong, 3 Lans. (N. Y.) 429 (1871); s. c., 45 N. Y. 234 (1871); Woodson v. Skinner, 22 Mo. 13 (1855); Carondelet v. McPherson, 20 Mo. 192; Swartz v. Page, 13 Mo. 610; Les Bois v. Bramell, 4 How. (U. S.) 449, 458.

[2] John and Cherry Streets, *In re*, 19 Wend. 659; Woodruff v. Neal, 28 Conn. 168 (1859).

[3] Warren v. Lyons City, 22 Iowa, 351; Gilman v. Milwaukee, 55 Wis. 328; Jacksonville v. Jacks. Ry. Co., 67 Ill. 540; Stockton v. Newark, 42 N. J. Eq. (15 Stew.) 531. But the last case was subsequently overruled by Newark v. Stockton, 44 N. J. Eq. 179, in which it was held that a Legislature did have the right to authorize the prohibition of the use of land as a burial ground, and devotion of such land to other municipal uses, although the title to such land had been conveyed to the city for the purpose of maintaining a burial ground. Perhaps, in this case, the judgment of the court had been mainly influenced by the consideration of the necessity of stopping or putting an end to the use of the ground as a burial ground, as an exercise of police power for the preservation of public health.

[4] Renthrop v. Bourg, 4 Martin (La.) 97; Doe v. Jones, 11 Ala. 63, 83.

[5] New Orleans v. United States, 10 Pet. 661, 725, 835; 3 Kent Com. 451.

position of such lands to other purposes of a public character is in no wise limited by the consideration of the rights of owners of the property abutting, or in the vicinity.[1]

[1] New Orleans v. Hopkins, 13 La. 326; New Orleans v. United States, 10 Pet. 662; New Orleans v. Leverich, Ib. 332; De Armas v. New Orleans, 5 La. 132.

CHAPTER XIV.

EMINENT DOMAIN.

§ 230. **Eminent domain defined.**—I have elsewhere more fully explained [1] how all lands were originally the common property of the human race; and necessarily so, since land is the free gift of nature, and not the product of man's labor. It was also demonstrated that, under the present law of real property, the private owner of lands acquires only a tenancy of more or less limited duration, under the absolute and ultimate proprietorship of the State, as the representative of organized society, subject to certain conditions, one of which is that the State may at any time, on payment of its value, reclaim the tenancy so granted to private individuals, whenever the public exigencies require such confiscation. The right of confiscation of private lands for public purposes is called the right of eminent domain. Mr. Cooley speaks of eminent domain as referring, not only to those superior rights of the State in the private lands of the individual, but also to any lands which the State

[1] See Tiedeman's Police Power, § 115.

may own absolutely, such as public buildings, forts, navigable rivers, etc.[1] It seems to me that this more comprehensive use of the term unnecessarily confounds it with "public domain," and deprives it of its technical and special signification. Mr. Cooley also defines the term to mean "that superior right of property pertaining to the sovereignty, by which the private property acquired by its citizens under its protection may be taken, or its use controlled, for the public benefit, without regard to the wishes of its owners,"[2] including personal as well as real property, except money and rights of action.[3] There is some foundation for this use of the term in the writings of political economists and publicists, and in the *dicta* of judges.[4] It is also true that personal property may be forcibly taken from private owners for public uses, whenever an extreme necessity requires it, as in the case of war or of a general famine.[5] But, inasmuch as the grounds for the justification of this involuntary appropriation of private property to public purposes are different, according as the property is real or personal, the former resting upon the claim of a superior property in lands, the other upon the illogical plea of urgent and overruling necessity, it is wise to confine the term "eminent domain" to the cases of land appropriated, and employ some other term to signify the official appropriation of personal property. *Eminent domain*, therefore, is the superior right of the State to appropriate for public purposes the private lands within its borders, upon payment of a proper compensation for the property so taken.

§ 231. **Constitutional limitations.**—Both in the Constitu-

[1] Cooley on Const. Lim. 647, 648.

[2] Cooley on Const. Lim. 649.

[3] Cooley on Const. Lim. 652, 653. "Generally it may be said, legal and equitable rights of every description are liable to be thus appropriated. From this statement, however, must be excepted money, or that which in ordinary use passes as such, and which the government may reach by taxation, and also rights in action, which can only be available when made to produce money; neither of which can it be needful to take under this power."

[4] "The right which belongs to the society or to the sovereign of disposing, in case of necessity, and for the public safety, of all the wealth contained in the State, is called the eminent domain." McKinley, J., in Pollard's Lessee v. Hagan, 3 How. 212, 223. In this case, as probably, in all other actual cases of the exercise of the right of eminent domain, the thing appropriated was land.

[5] See Tiedeman's Police Power, § 137.

tion of the United States, and in the constitutions of the respective States composing the Union, there is a limitation upon the power of the Legislature, either directly or indirectly, to exercise the right of eminent domain, which is usually expressed as follows: Private property shall not be taken for public use without just compensation, or in words of similar import. It is probable that some provision of that kind, expressly controlling and limiting the right of eminent domain, is in every State constitution; but, in the absence of such an express provision, the protection of private property against confiscation without compensation would be amply secured under the ordinary construction placed upon the general constitutional provision, that "no man shall be deprived of life, liberty or property, except by due process of law." For the words "due process of law," or their constitutional synonym, "the law of the land," are construed to mean that private property cannot be taken from its owner in any arbitrary manner, but only in conformity with the just principles of equity. In the United States Constitution, the fifth article of the amendments contains a provision, like the kind just described, prohibiting the appropriation of private property to public use without just compensation; but this provision, like all of the provisions curtailing the powers of government, which are found in the first twelve amendments of the United States Constitution, has been held to apply to, and to limit only, the United States government in its exercise of the right of eminent domain; and is not intended to serve as a limitation upon the similar power of the State government.[1] The fourteenth amendment of the constitution contains the provision that "No State shall make or enforce any laws which shall deprive any person of life, liberty or property, without due process of law." This provision, in common with the provisions in the thirteenth, fourteenth and fifteenth amendments, is held to have been intended to operate as a restraint upon State action; and the courts would, in conformity with this general declaration of the operation of this amendment, conclude that it brings the private property of individuals within the protection of the United States government and constitution against

[1] Barron v. Baltimore, 7 Pet. 243 (1833); Withers v. Buckley, 20 How. (U. S.) 84 (1857); Mills Em. Dom., sec. 348, and cases.

any improper or unlawful exercise, by or through the State government, and certainly that is the case in regard to ordinary interference with the rights of property. And the presumption would, of course, be that the improper exercise of the right of eminent domain by a State would furnish ground for the intervention of the courts of the United States, and justify a transfer of the case to such court.[1] Mr. Justice Miller has intimated in one case that the provisions of the fourteenth amendment as to due process of law can only be made to apply to cases of eminent domain.[2] But Mr. Justice Bradley dissents from this view.[3] Probably it must still be considered a doubtful question, how far the disposition of the United States courts, to minimize the consequences of the fourteenth amendment, under the influence of Mr. Justice Miller,[4] may tend in future litigation to exclude cases of eminent domain from the protection of this amendment.

In consequence of a disposition of many of the courts to consider the term "appropriate," in these constitutional provisions, to mean the *corpus* of land itself, rather than any rights of an incorporeal character issuing out of the land, in determining when there has been a taking of property in the constitutional sense, which calls for compensation; in many of the States, amendments have been made to this constitutional provision, requiring that compensation shall be made, whenever private property has been taken or "damaged or destroyed or injured" for public use. The object of these provisions is to insure the claim for compensation where the *corpus* of the land may not have been taken for public use; but incorporeal rights issuing out of the land have been taken away, and thus the damage inflicted upon the private property; as for example, in the case of a use of the adjoining street in ways, which would materially affect the enjoyment of the abutting property, by the construction of surface or elevated railroads, as will be more fully explained in subsequent connections.[5] But the object of this amendment, inserting the words "injured or damaged" in the

[1] Patterson v. Miss. & R. R. Boom Co., 3 Dillon, 465 (1875), affirmed by the Supreme Court, 98 U. S. 103 (1878); Warren v. Wisconsin etc. R. R. Co., 6 Biss. C. C. 425.

[2] See Davidson v. New Orleans, 96 U. S. 97, 105 (1887).

[3] See Mugler v. Kansas, 123 U. S. 623.

[4] See Tiedeman's Unwritten Constitution, p. 97, *et seq.*

[5] See *post*, ch. XVI. on Streets.

provision calling for the payment of compensation where private property is taken for public use, is not to open up claims for all the consequential damages, which property might suffer from a public improvement, but only to include the damage to those special incorporeal rights which the individual property owner can claim as his own, and as appurtenant to the land. It is held that the purpose of the amendment is not to enable property owners to claim damage for a depreciation in the value of property, which arises from any special use to which the streets or adjoining lands might be put.[1] The same conclusion has been reached in the English courts, in construing statutes which provide for the payment of compensation, where property has been injuriously affected by public improvements.[2]

§ 232. **Exercise of power regulated by Legislature.**—The exercise of this right is in the first instance reposed in the Legislature. Until the Legislature determines by enactment the occasions when, and the conditions under which, and the agencies by which, the power of appropriation may be exercised, there can be no lawful appropriation of lands to public purposes. The exercise of the right is a legislative act, and requires no judicial confiscation of the land, in order to divest the private owner of his title.[3] Except so far as the exercise of the power may be limited and controlled by provisions of the constitution, the necessity for its exercise is left to the legislative discretion. The courts cannot question the necessity for the taking, provided the land is taken for a public purpose. The legislative determination of the necessity is final, and is not

[1] Columbia Del. Bridge Co. v. Geisse, 35 N. J. L. 558 (1871); Ashby v. White, 1 Smith's L. Cas. 264; Rigney v. Chicago, 102 Ill. 64; Chicago v. Taylor, 125 U. S. 161.

[2] Hall v. Bristol, L. R. 2 C. P. C. 322; East & West India Docks Co. v. Gattke, 3 MacN. & G. 155; Chamberlain v. West End of London & C. P. R. Co., 2 Best & Smith, 605; 110 E. C. L. R. 604; Ib. 617; Beckett v. Midland R. Co., L. R. 1 C. P. C. 241; on appeal, 3 C. P. C. 82; McCarthy v. Metropolitan Board of Works, L. R. 7 C. P. C. 508.

[3] "It requires no judicial condemnation to subject private property to public uses. Like the power to tax, it resides with the legislative department to whom the delegation is made. It may be exercised directly or indirectly by that body; and it can only be restrained by the judiciary when its limits have been exceeded, or its authority has been abused or perverted." Kramer v. Cleveland & Pittsburgh R. R. Co., 5 Ohio St. 140, 146.

subject to review by the courts.[1] But the question, whether the appropriation shall be made, may be submitted by the Leg-

[1] The following quotation, from an opinion of Judge Denio, of the New York Court of Appeals, (People v. Smith, 21 N. Y. 595,) will be sufficient to explain the reasons by which the exclusion of this question from judicial investigation, and the consequent denial to the property owner of the right to be heard in his behalf, may be justified. The learned judge says: "The question then is, whether the State, in the exercise of the power to appropriate the property of individuals to a public use, where the duty of judging of the expediency of making the appropriation, in a class of cases, is committed to public officers, is obliged to afford to the owners of the property an opportunity to be heard before those officers when they sit for the purpose of making the determination. I do not speak of the process of arriving at the amount of compensation to be paid to the owners, but of the determination whether, under the circumstances of a particular case, the property required for the purpose shall be taken or not; and I am of the opinion that the State is not under any obligation to make provision for a judicial contest upon that question. The only part of the constitution which refers to the subject is that which forbids private property to be taken for public use without compensation, and that which prescribes the manner in which the compensation shall be ascertained. It is not pretended that the statute under consideration violates either of these provisions. There is, therefore, no constitutional injunction on the point under consideration. The necessity for appropriating private property for the use of the public or of the government is not a judicial question. The power resides in the Legislature. It may be exercised by means of a statute which shall at once designate the property to be appropriated and the purpose of the appropriation; or it may be delegated to public officers; or, as it has been repeatedly held, to private corporations, established to carry on enterprises in which the public are interested. There is no restraint upon the power, except that requiring compensation to be made. And where the power is committed to public officers, it is a subject of legislative discretion to determine what prudential regulations shall be established to secure a discreet and judicious exercise of the authority. The constitutional provisions, securing a trial by jury in certain cases, and that which declares that no citizen shall be deprived of his property without due process of law, have no application to this case. The jury trial can only be claimed as a constitutional right where the subject is judicial in its character. The exercise of the right of eminent domain stands on the same ground with the power of taxation. Both are emanations of the lawmaking power. They are the attributes of political sovereignty, for the exercise of which the Legislature is under no necessity to address itself to the courts. In imposing a tax, or in appropriating the property of a citizen, or of a class of citizens, for a public purpose, with a proper provision for compensation, the legislative act is itself due process of law; though it would not be if it should undertake to appropriate the property of one citizen for the use of another, or to confiscate the property of one person or a class of

islature to a vote of the people, or to some court or jury.[1] And in Michigan, the submission of the question of necessity to a jury, is made by the constitution an indispensable requirement.[2]

But while the power of the Legislature to determine the mode and occasion of the exercise of the right of eminent domain is not restricted by constitutional limitations, when the Legislature has prescribed the conditions, and established the regulations for the exercise of the right, the performance of the conditions, and the observance of the regulations, become an indispensable condition precedent to the exercise of the right; and any failure to comply with the requirements of the statute, will invalidate the confiscation of property. There must be a most scrupulous observance of all those provisions, which were designed to serve as a protection to the interests of the landowners.[3] It is also recognized, as an invariable corollary to this

persons, or a particular description of property upon some view of public policy, where it could not be said to be taken for a public use. It follows from these views, that it is not necessary for the Legislature, in the exercise of the right of eminent domain, either directly, or indirectly through public officers or agents, to invest the proceedings with the forms or substance of judicial process. It may allow the owner to intervene and participate in the discussion before the officer or board, to whom the power is given to determine, whether the appropriation shall be made in a particular case; or it may provide that the officers shall act upon their own views of propriety and duty, without the aid of a forensic contest. The appropriation of the property is an act of public administration, and the form and manner of its performance is such as the Legislature in its discretion may prescribe." See also United States v. Harris, 1 Sumn. 21; Spring v. Russell, 3 Watts, 294; Varick v. Smith, 5 Paige Ch. 137; (28 Am. Dec. 417); People v. Smith, 21 N. Y. 595; Cooper v. Williams, 7 Me. 273; Perry v. Wilson, 7 Mass. 395; Aldridge v. Railroad Company, 2 Stew. & Port. 199 (23 Am. Dec. 307); O'Hara v. Lexington, etc., R. R. Co., 1 Dana, 232; Henry v. Underwood, 1 Dana, 247; Waterworks Co. v. Burkhardt, 41 Ind. 364; Ford v. Chicago, etc., R. R. Co., 14 Wis. 609; Scudder v. Trenton Del. Falls Co., 1 Saxt. (N. J.) 694; St. Louis Co. Court v. Griswold, 58 Mo. 175 (1874), (Forest Park Case); Tide Water Co. v. Coster, 18 N. J. Eq. (3 C. E. Green) 518; Mills Em. Dom. § 11; Chicago v. Wright, 69 Ill. 327 (1873); People v. Smith, 21 N. Y. 597; Giesy v. Cinc., W. & Z. R. R. Co., 4 Ohio St. 308; Brooklyn Park Comm'rs v. Armstrong, 45 N. Y. 234 (1871); Fowler, *In re*, 53 N. Y. 60 (1873).

[1] Iron R. R. Co. v. Ironton, 19 Ohio St. 299.

[2] Mansfield, etc., R. R. Co. v. Clark, 23 Mich. 519; Arnold v. Decatur, 29 Mich. 11.

[3] "The statute says that, after a certain other act shall have been passed, the company may then proceed to take private property for the

rule, that the grants of the right of eminent domain are to be strictly construed, and the powers delegated are not to be extended by construction beyond the express limitations of the statute.[1]

But there are two constitutional limitations, which are imposed very generally upon the exercise of the right of eminent domain; and it is also a judicial question whether the Legislature, in the exercise of the right, has fully complied with their

use of its road; that is equivalent to saying that the right shall not be exercised without such subsequent act. The right to take private property for public use is one of the highest prerogatives of the sovereign power; and here the Legislature has, in language not to be mistaken, expressed an intention to reserve that power, until it could judge for itself whether the proposed road would be of sufficient public utility to justify the use of this high prerogative. It did not intend to cast this power away, to be gathered up and used by any who might choose to exercise it." Gillinwater v. Miss. etc. R. R. Co., 13 Ill. 1, 4; Johnson v. Freeport etc. Co., 111 Ill. 413; *In re* Niagara etc. Co., 46 Hun, 94; Owasso v. Richfield, (Mich. 89) 45 N. W. R. 129; Fort Ridge etc. Assn. v. Redd, 33 W. Va. 262; Swan v. Chi. etc. Co., 38 Mo. App. 588; *In re* Cedar Rapids, (Iowa, 92) 51 N. W. R. 1142; Toledo etc. Co. v. Toledo El. S. R. Co., 6 Ohio Civ. Ct. R. 362; Simpson v. Kansas City, (Mo. 92) 20 S. W. R. 38; Santa Cruz v. Enright, (Cal. 92) 30 Pac. R. 197; Farmers M. Co. v. R. R. Co., 10 Pa. Co. Ct. R. 25; Cheany v. Board, 52 N. J. L. 544; Bass v. Fort Wayne, 121 Ind. 389; Amoskeag Co. v. Goodale, 62 N. H. 66; Moore v. Sanford, (Mass. 90) 24 N. E. R. 423; Anderson v. Pemberton, 89 Mo. 61; Turner v. Nye, 154 Mass. 579; Kroop v. Forman, 31 Mich. 144; Bohlman v. Green Bay etc. R. R. Co., 40 Wis. 157; Judson v. Bridgeport, 25 Conn. 426; Bloodgood v. Mohawk etc. R. R. Co., 18 Wend. 9; Decatur Co. v. Humphreys, 47 Ga. 565; Cameron v. Supervisors etc., 47 Miss. 264; St. Brady v. Bronson, 45 Cal. 640; Maris v. Mason, 37 Texas, 447; Chicago etc. R. R. Co. v. Smith, 78 Ill. 96; State v. Seymour, 35 N. J. L. 47; W. Va. Transportation Co. v. Volcanic Oil & Coal Co., 5 W. Va. 382; Wamesit Power Co. v. Allen, 120 Mass. 352; Lund v. New Bedford, 121 Ib. 286; see Baltimore etc. R. R. Co. v. Nesbit, 10 How. 395; United States v. Reed, 56 Mo. 565; Commissioners v. Beckwith, 10 Kan. 603; St. Joseph etc. R. R. Co. v. Callender, 13 Kan. 496; Allen v. Jones, 47 Ind. 442; Watson v. South Kingston, Ib. 563.

[1] "There is no rule more familiar or better settled than this; that grants of corporate powers, being in derogation of common right, are to be strictly construed; and this is especially the case where the power claimed is a delegation of the right of eminent domain, one of the highest powers of sovereignty pertaining to the State itself, and interfering most seriously and often vexatiously with the ordinary rights of property." Currier v. Marietta, etc. R. R. Co., 11 Ohio St. 228, 231; but see Lamborn v. Bell, (Col. 93) 32 Pac. 989; St. Louis & S. F. R. Co. v. Foltz, 52 Fed. 627; Shake v. Frazer, (Ky. 93) 21 S. W. 583; Los Angeles v. Reyes, (Cal. 93) 32 Pac. 233.

requirements. One has reference to the ascertainment and payment of the compensation to the landowner for the loss of his lands, which will be discussed subsequently; [1] and the second provides that the private lands of the individual shall not be taken, in the exercise of the right of eminent domain, except for public purposes. It is a legislative question, whether the public exigencies require the appropriation, but it is clearly a judicial question, whether a particular confiscation of land has been made for a public purpose, or to serve some private end.[2]

§ 233. **Delegation of power to municipal corporations.**— While the exercise of the right of eminent domain belongs primarily to the Legislature, it is not necessary for it directly to make the appropriation to the public use. Since the exercise of the power is only permissible in the advancement of the public interests, if that requirement is complied with, it is also within the Legislative discretion to determine whether the confiscation shall be made by it, or by some other corporate body or individual, to whom the power is delegated. If the public interests are subserved best, when the right is exercised by a municipal corporation or a railroad company, there can be no constitutional objection to the delegation of the power, for the burden upon private property is not thereby increased. The grant of the power to a town, city, county or school district, needs no special defence, because the delegate of the power is in each instance only a local branch of the general State government. It is the government in every case which makes the confiscation. No cases are needed to support this proposition. But when the power is granted to a corporation, composed of private persons, who procure a grant of the power for the purpose of making a profit out of it; although the use to which the land is put may serve to satisfy a public want, there is more or less disposition to question the constitutional propriety of the delegation of the power. But the constitutional objec-

[1] See *post*, §§ 243-250.

[2] Tyler v. Beacher, 44 Vt. 648; Olmstead v. Camp, 33 Conn. 551; Beckman v. Railroad Company, 3 Paige, 45 (22 Am. Dec. 679); Matter of Deansville Cemetery Association, 66 N. Y. 569 (23 Am. Rep. 86); Scudder v. Trenton, etc., Co., 1 N. J. Eq. 694 (23 Am. Dec. 756); Loughbridge v. Harris, 42 Ga. 500; Harding v. Goodlett, 3 Yerg. 40 (24 Am. Dec. 546); Chicago, etc., R. R. Co. v. Lake, 71 Ill. 333; Water Works Co. v. Burkhardt, 41 Ind. 364; Ryerson v. Brown, 35 Mich. 333 (24 Am. Rep. 564); Bankhead v. Brown, 25 Iowa, 540.

tion is deemed to be untenable. In granting to a private corporation the right of eminent domain, the State does not consider the benefit to the stockholders of the corporation, but rather the public benefit derived from the construction and maintenance of a turnpike, a railroad, etc. It is true the government may undertake these public improvements, but it is the prevailing opinion that the best interests of the public are subserved by granting the right to a private corporation which assumes, in return for the right of eminent domain and the private gain to be gotten out of the business, to satisfy the public want; and the Legislature has uniformly been held to hold within its discretion the power of exercising this right or of delegating it, according as the one course or the other seems best to promote the public welfare.[1] Not only is this permissible, but it is also held to be constitutionally unobjectionable to delegate to corporation or individual, along with the exercise of the right of eminent domain, the power to determine finally upon the necessity for the taking, without any judicial investigation.[2]

§ 234. **What is a public purpose.**—As long as the government exercises the right directly and for the State's immediate benefit, no difficulty is experienced in determining what is a public use. There can be no doubt that land is devoted to a public use, when it is taken for the purpose of laying out parks, and public gardens,[3] for the construction of public buildings of

[1] Wilson v. Blackbird Creek Marsh Co., 2 Pet. 245; Stevens v. Middlesex Canal, 12 Mass. 466; Boston Mill Dam v. Newman, 12 Pick. 467; Lebanon v. Olcott, 1 N. H. 339; Petition of Mt. Washington Road Co., 35 N. H. 134: Eaton v. Boston C. & M. R. R. Co., 51 N. H. 504; Armington v. Barnet, 15 Vt. 745; White River Turnpike v. Central R. R. Co., 21 Vt. 590; Bradley v. N. Y. & N. H. R. R. Co., 21 Conn. 294; Olmstead v. Camp, 33 Conn. 532; Beekman v. Saratoga & Schenectady R. R. Co., 3 Paige, 73 (22 Am. Dec. 679); Bloodgood v. Mohawk & Hudson R. R. Co., 18 Wend. 9; Whiteman's Ex'rs v. Wilmington etc. R. R. Co., 2 Harr. 514; Raleigh, etc., R. R. Co. v. Davis, 2 Dev. & Bat. 451; Swan v. Williams, 3 Mich. 427; Pratt v. Brown, 3 Wis. 603; Gilmer v. Lime Point, 18 Cal. 229.

[2] People v. Smith, 21 N. Y. 595; Lyon v. Jerome, 26 Wend. 484; Matter of Fowler, 53 N. Y. 60; N. Y. Central, etc., R. R. Co. v. Met. Gas Co., 63 N. Y. 326; Hays v. Risher, 32 Pa. St. 169; Chicago, etc., R. R. Co. v. Lake, 71 Ill. 333; North Missouri R. R. Co. v. Lackland, 25 Mo. 515; North Mo. R. R. Co. v. Gott, 25 Mo. 540; Bankhead v. Browny, 25 Iowa, 540; Warren v. St. Paul, etc., R. R. Co., 18 Minn. 384.

[3] Owners of Ground v. Mayor, etc., of Albany, 15 Wend. 374; Matter of Central Park Extension, 16 Abb. Pr.

all kinds,[1] waterworks,[2] adqueducts, drains and sewers,[3] and the building of levees on the banks of the Mississippi.[4] It is, likewise, freely admitted that the State may appropriate lands without limitation for the purpose of laying out streets and highways. In all these cases of the right of eminent domain, the land is taken for the general use of the public, and therefore is devoted to a public use. If, in any one of these cases, the land was to be used by a few private individuals, and not by the public generally, it would not be a taking for a public use, and consequently it would be unlawful.

§ 234 *a*. **Power to take land for a private road.**—There has been considerable doubt felt and expressed concerning the constitutionality of State statutes, providing for the opening and maintenance of so-called private roads, at the expense of the person or persons who may be benefited thereby. These statutes usually provide that some local officer or officers, usually the county court, shall in all cases, where the public necessity will not justify the opening of a public road, to be constructed and maintained at the expense of the county, authorize, under

56; Brooklyn Park Commissioners v. Armstrong, 45 N. Y. 244 (6 Am. Rep. 70); Mayor v. Park Com'rs, 44 Mich. 602; Matter of Mayor of New York, 99 N. Y. 569; Philadelphia v. Germantown Pass. R. Co., 10 Phila. (Pa.) 165; South Park Com'rs v. Williams, 51 Ill. 57; County Court v. Griswold, 58 Mo. 175; State v. Leffingwell, 54 Ib.. 458.

[1] Richardson v. Com'rs, (Miss. 91) 9 So. R. 351; Williams v. School District, 33 Vt. 271; Long v. Fuller, 68 Pa. St. 170; Hooper v. Bridgewater, 102 Mass. 512.

[2] State v. Newark, (N. J. 92) 23 Atl. R. 129; Reddall v. Bryan, 14 Md. 444; Spring Valley W. Co. v. Drinkhonse, 92 Cal. 528; Wayland v. Middlesex Co. Com'rs, 4 Gray (Mass.) 500; Rochester Water Com'rs, *In re*, 66 N. Y. 413; Umatilla v. Barnhart, 30 Pac. 37; Martin v. Gleason, 139 Mass. 183; Tyler v. Hudson, 147 Ib. 609; *In re* Com'rs of Public Works, 10 N. Y. S. 705; Bailey v. Woburn, 126 Mass. 416; Lake etc. Water Co. v. Contra Costa Co., 67 Cal. 669: Spring Valley Water Works v. San Mateo Water Works, 64 Ib. 123; Hurden v. Stein, 27 Ala. 104; Edgewood Water Co. v. Troy W. Co., 7 Pa. Co. Ct. R. 476.

[3] Passadena v. Simpson, 91 Cal. 238; Anderson v. Kerns Draining Co., 14 Ind. 199; Gardner v. Newburg, 2 Johns. Ch. 162 (7 Am. Dec. 526); Matter of Drainage of Lands, 54 N. J. L. 497; People v. Nearing, 27 N. Y. 306; Ham v. Salem, 100 Mass. 350; French v. White, 24 Conn. 174; Kane v. Baltimore, 15 Md. 240; Burden v. Stein, 27 Ala. 104; Reeves v. Treasurer of Wood Co., 8 Ohio St. 333; Chaplin v. Com'rs, 129 Ill. 651.

[4] Mithoff v. Carrollton, 12 La. An. 185; Cash v. Whitworth, 13 La. 401; Inge v. Police Jury, 14 La. An. 117.

certain limitations, those persons who will be benefited by the opening of such a road, to construct and maintain it at their own expense, and to appropriate whatever land is needful. The constitutionality of these statutes has been attacked on the ground that the roads, thus established, were private and not for the benefit of the general public.[1] The difficulty in the way of a clear understanding of the matter is increased by a failure to appreciate the intrinsic difference between a public and private road. If one or more individuals have the power to appropriate land for the opening of a road for their exclusive use or benefit, from which they may shut out the general public, and which they may maintain or discontinue at their pleasure, without any supervisory control on the part of the State or municipal authorities, the road is most certainly a private one, and the forcible appropriation of land for it is a taking of private property without due process of law. But if the road is open to the general public, and the persons, for whose special benefit the road was established, have not the power of closing it up at will, but upon them the expenses of constructing it and maintaining it is imposed, the road is a public one, even though they may at will discontinue the repairs, and notwithstanding it is called by the statute authorizing it a private road, and it is opened for the special benefit of those who assume the expense of its construction and maintenance. It being open to the public, the need for the road is not open to judicial investigation. The Legislature is the sole judge of the necessity for the appropriation of private lands to a public use.[2]

[1] Taylor v. Porter, 4 Hill, 140; Buffalo & N. Y. R. R. Co. v. Brainard. 9 N. Y. 100; Tyler v. Beacher, 44 Vt. 648 (8 Am. Rep. 398); Bradley v. N. Y., etc. R. R. Co., 21 Conn. 294; Pittsburgh v. Scott, 1 Pa. St. 809; Varner v. Martin, 21 W. Va. 534; Young v. McKeuzie, 3 Ga. 31; Hickman's Case, 4 Harr, 580; Sadler v. Laugham, 34 Ala. 311; Reeves v. Treasurer of Wood Co., 8 Ohio St. 333; Wild v. Deig, 43 Ind. 45 (13 Am. Rep. 399); Stewart v. Hartman, 46 Ind. 331; Blackman v. Halves, 72 Ind. 515; Osborn v. Hart, 24 Wis. 89 (1 Am. Rep. 161); Nesbit v. Trumbo, 39 Ill. 110; Dickey v. Tennison, 27 Mo. 373; Bankhead v. Brown, 25 Iowa, 540; Witham v. Osburn, 4 Ore. 318 (18 Am. Rep. 287); but see Whittingham v. Bowen, 22 Vt. 317; Bell v. Prouty, 43 Vt. 279; Proctor v. Andover, 42 N. H. 348; Pocopson Road, 16 Pa. St. 15; Harvey v. Thomas, 10 Watts, 63; Ferris v. Bramble, 5 Ohio St. 109; Robinson v. Swope, 12 Bush, 21; Sherman v. Brick, 32 Cal. 241, in which the constitutionality of such appropriations is more or less sustained.

[2] The following quotation from an opinion of the Supreme Court of

§ 235. **Power to take land for ornamental purposes.**— In determining what is a public use, which would justify the appropriation of private property without the consent of its owner, it has been explained, at least in general terms, that the purpose must be a useful one, and in some sense or other necessary to the public welfare. And, based upon this doctrine that the purpose must be a useful one, it has been held by some authorities that private property cannot be taken for the public use, where the use does not serve to supply some public need, but only to ornament or embellish the city. And, in fact, Mr. Justice Woodbury, in a case before the United States Su-

Iowa will amply illustrate the limitations upon the power of establishing "private" roads over private lands: "The State may properly provide for the establishment of a public road or highway to enable every citizen to discharge his duties. The State is not bound to allow its citizens to be walled in, insulated, imprisoned, but may provide them a way of deliverance. The State may provide a public highway to a man's house, or a public highway to coal or other mines. If the road now in question has been established as a public road under the general road law, as we confess we do not see why it might not have been, there would be in our minds no doubt of its validity, although it does not exceed a half a mile in length, and traverses the land of but a single person. For the right to take land for a public road, that is, a road demanded by public convenience, as an outlet to a neighborhood, or it may be, as I think, for a single farmer, without other means of communication, cannot depend upon the length of the road, or the number of persons through whose property it may pass. With respect to the act of 1866, we are of the opinion that the roads thereunder established are essentially private, that is, the private property of the applicant therefor, because: First, the statute denominates them private roads. If these roads are not private and different from ordinary and public roads, there was no necessity for these provisions. Secondly, such a road may be established upon the petition of the applicant alone; and he must pay the costs and damages occasioned thereby, and perform such other conditions as to fence, etc., as the board may require. Thirdly, the public are not bound to keep such roads in repair, and this is a satisfactory test as to whether a road is public or private. (The second and third reasons for holding the road to be a private one here stated, rather establish a rebuttal than a conclusive presumption in favor of its private character. The establishment of the road upon the petition of the applicant, and its construction and maintenance at his expense, are not necessarily inconsistent with its being a public road, if the public have the use of it, and cannot be excluded from it.) Fourthly, we see no reason when such a road is established, why the person at whose instance it was done might not lock the gates opening into it or fence it up, or otherwise debar the public of any right thereto. Could not the plaintiffs, in this case, having procured the road in question, abandon it at their pleas-

preme Court,[1] lays down the doctrine that private property can be compulsorily taken only for the establishment of highways, streets and railroad beds, where the land stands between the two termini of the road or street. And he holds that it is not even possible to take lands from the owner, without his consent, for the erection of public buildings; on the ground that any plot of land may be selected for that purpose, and a particular locality is not necessary to the usefulness of the public building, and that the matter of beauty of location is not properly considered in determining the right of confiscation for public use. In the course of his opinion, Judge Woodbury says: "When we go to other public uses, not so urgent, not connected with precise localities, not difficult to be provided for without the power of eminent domain, and in places where it would be only convenient, but not necessary, I entertain strong doubts of its applicability. Who ever heard of laws to condemn private property for public use, for a marine hospital or State prison? So a custom house is a public use for the general

ure? Could they not relinquish it to the defendants without consulting the board of supervisors? If this is so, does it not incontestably establish the fact, that it is essentially private? For it must be private if it is of such a nature, that the plaintiffs can at their pleasure use or forbid its use, abandon or refuse to abandon it, relinquish or refuse to relinquish it? If the act of 1866 is valid, might not the plaintiffs, having procured the road, use it for laying down a horse or tramway, and forbid everybody from using the road, and even exclude all persons therefrom? Who could prevent it? These conditions make a great difference between such a road and a public highway, and demonstrate the essentially private character of the road." Dillon, Ch. J., in Bankhead v. Brown, 25 Iowa. 545. "The use, convenience and advantage of the public, contemplated by the law, are benefits arising out of the aggregate of such improvements, to which a particular road so established contributes to a greater or less degree. But no limitation upon the power of the court, in regard to any proposed road, is to be found in the degree of accommodation, which it may extend to the public at large. That is a matter which addresses itself not to the authority, but the discretion of the court. It cannot be predicated of any road that it will be of direct utility to all citizens of the county. It may accommodate in travel and transportation but a small neighborhood, or only a few individuals. Still, when established, it may be used at pleasure by all the citizens of the county or country; and the public is interested in the accommodation of all the members of the community." Lewis v. Washington, 5 Gratt. 265. See Varner v. Martin, 21 W. Va. 534, for a more exhaustive review of the law and authorities on this subject.

[1] West River Bridge v. Dix, 6 How. 545.

government, and a court house or jail for a State. But it would be difficult to find precedent or argument to justify taking private property, without consent, to erect them on, though appropriate for the purpose. No necessity seems to exist which is sufficient to justify so strong a measure. A particular locality as to a few rods in respect to their site is usually of no consequence, while as to lighthouse, or fort, or wharf, or highway between certain termini, it may be very important and imperative. I am aware of no precedents abroad for such seizures of private property, for objects like the former, though some such doctrines appear to have been advanced in this country."[1] But while it is barely possible that in a case, where mere purposes of ornament are to be satisfied by the appropriation of private property to a public use, such an attempted appropriation would be declared to be beyond the power of eminent domain; yet, where the property is taken for a useful purpose, and serves to satisfy some public want, the fact that, incidentally to the selection of the land, which is to be taken for public use, the element of beauty or ornament is considered, is no justification for interfering with the appropriation, or for declaring it to be unconstitutional. "The passing from place to place," says Mr. Justice Hoar,[2] "is a rightful object of public provision in itself; and the occasions of it are as extensive as the pursuits of life. Pleasure travel may be accommodated, as well as business travel. If the doctrine for which the plaintiffs contend were supported, it would also follow that the Legislature would not have the constitutional right to take private property for a public park or pleasure ground, making full compensation to the owner,—a conclusion which we should hesitate to arrive at

[1] See, also, Boston Mill Corp. v. Newman, 12 Pick. (Mass.) 476; Cooley Const. Lim. 531, 533; Dunn v. Charleston, Harper (S. C.) Law, 189 (1824); Bankhead v. Brown, 25 Iowa, 540; Eldridge v. Smith, 34 Vt. 484; Wild v. Beig, 43 Ind. 455 (1873); s. c., 13 Am. Rep. 399. Chancellor Kent, Gardner v. Newburgh Trs., 2 Johns. (N. Y.) Ch. 162, 166 (1816), lays down the same proposition, and says that Bynkershoeck "insists that private property cannot be taken, on any terms, without the consent of the owner, for purpose of public ornament or pleasure; and he mentions an instance in which the Roman Senate refuses to allow the prætors to carry an aqueduct through the farm of an individual, against his consent, when intended merely for ornament."

[2] Who gave the opinion of the court in Higginson v. Nahant, 11 Allen, 530.

without much further consideration, in view of the important relations which air, exercise, and recreation bear to the general health and welfare of the community."[1]

§ 236. **Power to take lands for purpose of draining them.** —The power of eminent domain has also been exercised, under authority from the Legislature, to purchase or appropriate swamp lands, contiguous to the city, for the purpose of raising and draining them and thus abate a nuisance which is prejudicial to the health of the community.[2] And so, also, is it possible for the municipal authority to be authorized to enter upon private property and construct drains which are necessary to the preservation of the public health.[3] But it is not possible for the lands of one person to be drained against the will of the owner for the benefit of some private landowner, where the public welfare does not require it.[4] In all these cases of draining lands, or the construction of drains upon private property for public welfare, it is held to be a case of taking private property for public use, which can only be justified by the making of compensation to the owner of the land.[5]

§ 237. **Power to take land beyond city limits.**—In order to carry out or effect certain municipal improvements, such as the construction of public parks and waterworks, it is impossible for the municipal corporation to be confined to its own limits in the confiscation of private property. It is also the invariable rule, in the case of the construction of waterworks, that the city must go beyond its limits and appropriate property located outside.[6] It is only a difference of degree as to

[1] *Re* Mt. Washington Road Co., 35 N. H. 134; Gardner v. Newburgh Trs., 2 Johns. (N. Y.) Ch. 162, 166; Blodgett v. Boston, 8 Allen (Mass.) 237; Woodstock v. Gallup, 28 Vt. 587; Balch v. Essex Co. Com'rs, 103 Mass. 106.

[2] New Orleans Draining Co., *In re*, 11 La. An. 338; Dingley v. Boston, 100 Mass. 544.

[3] Rice v. Wellman, 5 Ohio Cir. Ct. R. 334; People v. Nearing, 27 N. Y. 306; Doyle v. Baughman, 24 Ill. Ap. 614; Albany Streets, *In re*, 11 Wend. (N. Y.) 149; Varick v. Smith, 5 Paige, 13; Bloodgood v. Mohawk & H. R. R. Co., 18 Wend. (N. Y.) 9, 59; Chaplin v. Com'rs, 126 Ill. 264; Anderson v. Kerns Draining Co., 14 Ind. 199; Talbot v. Hudson, 16 Gray (Mass.) 417; Rutherford's Case, 72 Pa. St. 82; s. c., 13 Am. Rep. 655; *contra*, Ward v. Peck, 49 N. J. L. 42.

[4] Reeves v. Wood County Treasurer, 8 Ohio St. 333, 345; Norfleet v. Cromwell, 70 N. C. 634; s. c., 16 Am. Rep. 787.

[5] See Cheesborough, *In re*, 17 Hun, (N. Y.) 561; Chronic v. Pugh, 27 N. E. R. 415.

[6] See *ante*, § 201.

the necessity to go outside of the city limits in the construction of a park. But, whatever doubt may have been felt and expressed by the authorities at an early day, it has since been held that the power of eminent domain, when delegated to the municipal corporation, extends to the appropriation of lands beyond the city limits, whenever it is impossible to carry out the express or implied powers of government by an appropriation of lands within its limits. It has thus been held uniformly, that a city has the power to appropriate private property beyond the city limits, for the establishment of a system of waterworks.[1] So, also, has it been held that a city corporation may appropriate lands outside of the corporate limits for the purpose of laying out public parks.[2] And the same power has been held to be vested in a county for the benefit of a city within its limits.[3]

§ 238. **What property may be taken.**—Every species of real property may be taken in the exercise of the right of eminent domain. Not only may the land itself be taken, but also anything which may actually, or in legal contemplation, be considered a part of the land: All buildings and other structures that may be in the way of the public use of the condemned lands,[4] streams of water,[5] the stone, gravel and wood, that may be needed for the promotion of the public improvement.[6] Apart from the land itself, an easement may be acquired over the land, while the land remained private property; and so, also, may franchises be condemned.[7] But in all these cases,

[1] New York v. Bailey, 2 Denio, (N. Y.) 433, 446 (1845); Dwight Printing Co. v. Boston, 122 Mass. 583 (1877).

[2] Mayor v. Park Com'rs, 44 Mich. 602; Matter of Mayor of New York, 99 N. Y. 569; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234 (1871).

[3] State v. Leffingwell, 54 Mo. 458 (1873); St. Louis Co. Court v. Griswold, 58 Mo. 175 (1874).

[4] Wells v. Somerset, etc., R. R. Co., 47 Me. 345.

[5] Gardner v. Newburg, 2 Johns. Ch. 162 (7 Am. Dec. 526); Johnson v. Atlantic, etc., R. R. Co., 35 N. H. 569; Baltimore, etc., R. R. Co. v. Magruder, 35 Md. 79 (6 Am. Rep. 310).

[6] Jerome v. Ross, 7 Johns. Ch. 315 (11 Am. Dec. 484); Wheelock v. Young, 4 Wend. 647; Lyon v. Jerome, 15 Wend. 569; Bliss v. Hosmer, 15 Ohio, 44; Watkins v. Walker Co., 18 Tex. 585.

[7] West River Bridge v. Dix, 6 How. 507; Richmond R. R. Co. v. Louisa. R. R. Co., 13 How. 71; State v. Noyes, 47 Me. 189; Arlington v. Barnet, 15 Vt. 745; White River Turnpike Co. v. Vt. Cent. R. R. Co., 21 Vt. 590; Pistaque Bridge Co. v. New Hampshire Bridge, 7 N. H. 35; Boston Water Power Co. v. Boston, etc., R. R. Co., 23 Pick. 360; Central Bridge Co. v. Lowell, 4 Gray, 474; *In re* Rochester Water Commissioners, 66

no more of the property can be taken than what is necessary to serve the public purpose for which it is condemned. No other considerations will justify the taking of the whole of a man's property, when only a part is needed; and the excessive appropriation must under all circumstances be held to be unconstitutional. This limitation is best explained by a reference to the facts of a case, which arose in the State of New York.[1] By a statute, municipal corporations were authorized, in condemning a part of a city lot, for the purpose of extending or widening the streets, to appropriate the whole, if it was deemed advisable, and to sell or otherwise dispose of the part not needed for the improvement of the street. The statute was pronounced unconstitutional. In delivering the opinion of the court, Chief Justice Savage, said: "If this provision was intended merely to give to the corporation capacity to take property under such circumstances with consent of the owner, and then to dispose of the same, there can be no objection to it; but if it is to be taken literally, that the commissioners may, against the consent of the owner, take the whole lot, when only a part is required for the public use, and the residue to be applied to private use, it assumes a power which, with all respect, the Legislature did not possess. The constitution, by authorizing the appropriation of private property to public use, impliedly declares that for any other use private property shall not be taken from one and applied to the private use of another. It is in violation of natural rights; and if it is not in violation of the letter of the constitution, it is of its spirit, and cannot be supported. This power has been supposed to be convenient when the greater part of a lot is taken, and only a small part left, not required for public use, and that small part of but little value in the hands of the owner. In such case the corpo-

N. Y. 413; Commonwealth v. Pa. Canal Co., 66 Pa. St. 41 (5 Am. Rep. 329); *In re* Towanda Bridge, 91 Pa. St. 216; Tuckahoe Canal Co. v. R. R. Co., 11 Leigh, 42 (36 Am. Dec. 374); Chesapeake, etc., Canal Co. v. Baltimore, etc., R. R. Co., 4 Gill & J. 5; No. Ca., etc., R. R. Co. v. Carolina Cent., etc., R. R. Co., 83 N. C. 489; New Orleans, etc., R. R. Co. v. Southern, etc., Tel. Co., 53 Ala. 211; Little Miamia, etc., R. R. Co. v. Darton, 23 Ohio St. 510; New Castle, etc., R. R. Co. v. Pern, etc., R. R. Co., 3 Ind. 464; Lake Shore, etc., R. R. Co. v. Chicago, etc., R. R. Co., 97 Ill. 506; Central City Horse Railway Co. v. Fort Clark, etc., R'y Co., 87 Ill. 523.

[1] Matter of Albany St., 11 Wend. 151 (25 Am. Dec. 618).

ration has been supposed best qualified to take and dispose of such parcels, or gores, as they have sometimes been called; and probably this assumption of power has been acquiesced in by the proprietors. I know of no case where the power has been questioned, and where it has received the deliberate sanction of the court. Suppose a case where only a few feet, or even inches, are wanted, from one end of a lot to widen a street, and a valuable building stands upon the other end of such lot; would the power be conceded to exist to take the whole lot, whether the owner consented or not? The quality of the residue of any lot cannot vary the principle. The owner may be very unwilling to part with only a few feet; and I hold it equally incompetent for the Legislature thus to dispose of private property, whether feet or acres are the subject of this assumed power."[1] It has also been held, that in establishing a public improvement, it is the duty of those, who are exercising the right of eminent domain, to avoid as much as possible the diversion of streams, and to construct whatever culverts and bridges may be necessary to keep the streams in their regular channels.[2]

Another application of the same principle would lead to the conclusion, that where the fee simple estate in the land was not needed, only a less estate, or an easement, should be taken; and that the taking of the fee under such circumstances would be an unlawful appropriation. In the absence of statutory regulations to the contrary, it is certainly a conclusive presumption, that where less than a fee is needed for the public use, and a joint occupation of the land by the public and by the private individual was possible, as in the case of a highway, the fee is not taken for a public use; and if there should be at

[1] See to the same effect, Dunn v. City Council, Harp. 129; Baltimore, etc., R. R. Co. v. Pittsburgh, etc., R. R. Co., 17 W. Va. 812; Paul v. Detroit, 32 Mich. 108. In Embury v. Conner, 3 N. Y. 511, it was held that this excessive appropriation of land beyond what is needed for the public use was permissible, provided it was not done against the consent of the owner.

[2] See Proprietors, etc., v. Nashua R. R. Co., 10 Cush. 388; March v. Portsmouth, etc., R. R. Co., 19 N. H. 372; Rowe v. Addison, 34 N. H. 306; Haynes v. Burlington, 38 Vt. 350; Boughton v. Carter, 18 Johns. 405; Stein v. Burden, 24 Ala. 130; Pettigrew v. Evansville, 25 Wis. 223; Arimoud v. Greeu Bay Co., 31 Wis. 316.

any time a discontinuance of the public use, the land would be relieved of the public easement, and become again the absolute property of the original owner.[1] But, in some of the States, it is now provided by statute that, in appropriating lands for highways, the fee shall be held to be condemned, and not simply a public easement acquired.[2] And it would seem plausible that, in the case of an ordinary highway, the fee might be needed for use as a highway, since the demands of modern civilization require the soil of a street of a city to contain imbedded in it the gas, water and sewer pipes, the telephone, telegraph, and electric light wires, etc., as well as to be used as a highway; thus rendering a joint occupation of the land by the public and by the private owner impossible. It is by no means unreasonable, therefore, to provide for the condemnation of a fee in the beginning, instead of allowing successive condemnations of the soil, as the public demands each particular use to which it can be put. But it is hard to see the reason why in the condemnations of land, for other purposes, for railroad purposes, for example, the fee should be taken; and, unless the necessity of taking the fee is proven, the taking would be an unlawful condemnation of private property.[3] But if the fee is necessary, the taking of the fee for any purpose is lawful; and it seems to be the prevailing opinion that the question, whether it is necessary, is a legisla-

[1] Rust v. Lowe, 6 Mass. 90; Barclay v. Howell's Lessee, 6 Pet. 493; Weston v. Foster, 7 Met. 297; Dean v. Sullivan R. R. Co., 22 N. H. 316; Blake v. Rich, 34 N. H. 282; Jackson v. Rutland etc. R. R. Co., 25 Vt. 150; Giesy v. Cincinnati etc. R. R. Co., 4 Ohio St. 308; Jackson v. Hathaway, 15 Johns. 447; Henry v. Dubuque & Pacific R. R. Co., 2 Iowa, 288; Elliott v. Fairhaven etc. R. R. Co., 32 Conn. 579, 586; Imlay v. Union Branch R. R. Co., 26 Conn. 249; State v. Laverack, 34 N. J. 201; Railroad Co. v. Shurmeir, 7 Wall. 272.

[2] People v. Kerr, 37 Barb. 357; s. c., 27 N. Y. 183; Brooklyn Central etc. R. R. Co. v. Brooklyn City R. R. Co., 33 Barb. 420; Brooklyn & Newton R. R. Co. v. Coney Islaud R. R. Co., 35 Barb. 364; Protzman v. Indianapolis etc. R. R. Co., 9 Ind. 467; New Albany & Salem R. R. Co. v. O'Dailey, 13 Ind. 353; Street Railway v. Cummingsville, 14 Ohio St. 523; State v. Cincinnati Gas Co., 18 Ohio St. 262; Millburne v. Cedar Rapids etc. R. R. Co., 12 Iowa, 246; Franz v. Railroad Co., 55 Iowa, 107; Moses v. Pittsburgh, etc., R. R., 21 Ill. 516.

[3] See New Orleans etc. R. R. Co. v. Gay, 32 La. An. 471. In Illinois the condemnation of the fee for railroad purposes is expressly forbidden. Const. Ill. 1870, art. 2, sec. 13.

tive, and not a judicial one. The declaration of the Legislature, that the fee is necessary, is, therefore, final and conclusive.[1]

§ 239. **What constitutes a taking.**—In order to lay the foundation of a claim for compensation for the taking of property in the exercise of the right of eminent domain, it is not necessary that there should be an actual or physical taking of the land. Whenever the use of the land is restricted in any way, or some incorporeal hereditament is taken away, which was appurtenant thereto, it constitutes as much a taking, as if the land itself had been appropriated.[2] The flowing of lands,[3] the diversion of streams,[4] the appropriation of water fronts, on streams where the tide does not ebb and flow,[5] and, likewise, in navigable streams, the condemnation of an exclusive wharfage,[6] are only a few instances of the exercise of the right of

[1] In Heyward v. Mayor etc. of New York, 7 N. Y. 314, 325, it is said that the power of deciding upon the need of the fee, "must of necessity rest in the Legislature, in order to secure the useful exercise and enjoyment of the right in question. A case might arise where a temporary use would be all that the public interest would require. Another case might require the permanent, and, apparently, the perpetual, occupation and enjoyment of the property by the public, and the right to take it must be coextensive with the necessity of the case, and the measure of compensation should, of course, be graduated by the nature and the duration of the estate or interest of which the owner is deprived." In this case the land was appropriated for the purpose of extending the almshouse. See, also, Brooklyn Park Commisioners v. Armstrong, 45 N. Y. 234 (6 An. Rep. 70); Dingley v. Boston, 100 Mass. 544; Baker v. Johnson, 2 Hill, 343; Munger v. Tonawanda R. R. Co., 4 N. Y. 349; Rexford v. Knight, 11 N. Y. 308; Coster v. N. J. R. R. Co., 22 N. Y. 227; Plitt v. Cox, 43 Pa. St. 486; Waterworks Co. v. Burkhart, 41 Ind. 364.

[2] Pampelly v. Green Bay, etc., Co., 13 Wall. 166; Hooker v. New Haven, etc., R. R. Co., 14 Conn. 146; Eaton v. Boston, C. & N. R. R. Co., 51 N. H. 504; Glover v. Powell, 10 N. J. Eq. 211; Ashley v. Port Huron, 35 Mich. 296; Arimond v. Green Bay, etc., Co., 31 Wis. 316.

[3] Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308; Eaton v. Boston, etc., R. R. Co., 51 N. H. 504; Brown v. Cayuga, etc., R. R. Co., 12 N. Y. 486; Norris v. Vt. Cent. R. R. Co., 28 Vt. 99.

[4] Harding v. Stamford Water Co., 41 Conn. 87; Proprietors, etc., v. Nashua & Lowell R. R. Co., 10 Cush. 388; March v. Portsmouth, etc., R. R. Co., 19 N. H. 372; Rome v. Addison, 34 N. H. 306; Johnson v. Atlantic, etc., R. R. Co., 35 N. H. 569; Haynes v. Burlington, 38 Vt. 350; Boughton v. Carter, 18 Johns. 405; Baltimore, etc., R. R. Co, v. Magruder, 34 Md. 79 (6 Am. Rep. 310); Stein v. Burden, 24 Ala. 130; Pettigrew v. Evansville, 25 Wis. 223.

[5] Varick v. Smith, 9 Paige, 547.

[6] Murray v. Sharp, 1 Bosw. 539.

eminent domain, in which the property taken is incorporeal. In respect to the appropriation of water fronts, according to the older authorities, if the stream was a navigable one, that is, one in which the tide ebbed and flowed, the title to the bed of which was in the State, the appropriation to public uses of the water front was held not to involve any taking of property for which compensation had to be made.[1] And this has also been held to be the rule in reference to those fresh water streams, which are practically navigable, and the title to whose beds is in the State.[2] But these cases have not been followed by later adjudications, as far as they assert the right to take away from the riparian proprietor all access to the navigable stream by and over his land. The right of access to the stream is declared to be an incorporeal hereditament, appurtenant to the abutting land, which cannot be taken away without proper compensation.[3]

The diversion of navigable streams is also a taking of property, for which compensation must be made to the riparian owner. Although the riparian owner has no property in the water, or in the bed of the stream, he has a right to make a reasonable use of it, and since a diversion of the stream will interfere with this reasonable use, perhaps deprive him altogether of its use, compensation must be made to him for this loss, as being a taking of property.[4]

It frequently happens, in the experience of municipal life, that in order to prevent an accidental fire from becoming a general conflagration, or to check an actual conflagration, one or more houses which stand in the path of the fire will be destroyed by means of explosion or otherwise. It is never done, except in cases where the destroyed houses would have inevitably been consumed by the fire. The owners of these houses,

[1] Gould v. Hudson River R. R. Co., 6 N. Y. 522; Pennsylvania R. R. Co. v. N. Y., etc., R. R. Co., 23 N. J. Eq. 157; Stevens v. Patterson, etc., R. R. Co., 34 N. J. 532.

[2] Tomlin v. Dubuque, etc., R. R. Co., 32 Iowa, 106 (7 Am. Rep. 176).

[3] Railway v. Renwick, 102 U. S. 180; Yates v. Milwaukee, 10 Wall. 497; Chicago, etc., R. R. Co. v. Stein, 75 Ill. 41. As to rights of property in highways, see *post*, chapter XVI. on Streets.

[4] People v. Canal Appraisers, 13 Wend. 355; Gardner v. Newburg, 2 Johns. Ch. 162; Bellinger v. N. Y. Central R. R. Co., 23 N. Y. 42; Morgan v. King, 35 N. Y. 454; Hatch v. Vermont Cent. R. R. Co., 25 Vt. 49; Thunder Bay, etc., Co. v. Speechly, 31 Mich. 332; Emporia v. Soden, 25 Kan. 588 (37 Am. Rep. 265).

therefore, have not suffered any loss by their destruction ; and, on this ground, and on the plea of overruling necessity, such destruction of buildings has been held not to be an appropriation under the right of eminent domain, and no claim for compensation can be made by the owners. And where a municipal officer orders the destruction, the municipal corporation is not liable for damages, in the absence of a statute to that effect.[1]

The consequential or incidental injury to property, resulting from the lawful exercise of an independent right, is never held to be a taking of property in the constitutional sense, where the enjoyment of the right or privilege does not involve an actual interference or disturbance of property rights. "In the absence of all statutory provisions to that effect, no case, and certainly no principle, seems to justify the subjecting a person, natural or artificial, in the prudent pursuit of his own lawful business, to the payment of consequential damage to others in their property or business. This always happens more or less in all rival pursuits, and often where there is nothing of that kind. One mill, or one store, or one school, injures another. One's dwelling is undermined, or its lights darkened, or its prospect obscured, and thus materially lessened in value, by the erection of other buildings upon lands of other proprietors. One is beset with noise or dust or other inconveniences by the alteration of a street, or more especially by the introduction of a railway, but there is no redress in any of these cases. The thing is lawful in the railroad, as much as in the other cases reported. These public works came too near some and too remote from others. They benefit many and injure some. It is not possible to equalize the advantages and disadvantages. It is so with everything, and always will be. Those most skilled in these matters, even empirics of the most sanguine pretensions, soon find their philosophy at fault in all attempts at equalizing the ills of life. The advantage and disadvantage of a single railway could not be satisfactorily balanced by all

[1] Taylor v. Plymouth, 8 Met. 462; Ruggles v. Nantucket, 11 Cush. 433; Stone v. Mayor etc. of N. Y., 25 Wend. 157; Russell v. Mayor etc. of N. Y., 2 Denio, 461; American Print Works v. Lawrence, 21 N. J. 248; s. c., 23 N. J. 590; White v. Charleston, 1 Hill (S. C.) 571; Keller v. Corpus Christi, 50 Tex. 614 (32 Am. Rep. 513); Conwell v. Emrie, 2 Ind. 35; Field v. Des Moines, 39 Iowa, 575; McDonald v. Redwing, 13 Minn. 38; Sirocco v. Geary, 3 Cal. 69. See *post*, sec. 335.

of the courts in forty years; hence they would be left, as all other consequential damage and gain are left, to balance and counterbalance themselves as they best can."[1] Thus, there is no taking of property, if the owner of a fishery finds it reduced in value, in consequence of improvements in the navigation of the river;[2] when a spring is destroyed, or other damage done to riparian land by the same or similar causes;[3] or when the value of adjoining property is affected by a change in the grade of the street.[4] In reference to this general subject,

[1] Hatch v. Vt. Central R. R. Co., 25 Vt. 49; Richardson v. Vermont Central R. R. Co., 25 Vt. 465; Railroad Company v. Richmond, 96 U. S. 521; Davidson v. Boston & Maine R. R. Co., 3 Cush. 91; Kennett's Petition, 24 N. H. 135; Hooker v. New Haven etc. R. R. Co., 14 Conn. 146; Gould v. Hudson River R. R. Co., 6 N. Y. 522; People v. Kerr, 27 N. Y. 188; Zimmerman v. Union Canal Co., 1 Watts & S. 846; Monongahela Navigation Co. v. Coons, 6 Watts & S. 101; Shrunk v. Schuylkill Navigation Co., 14 Serg. & R. 71; Harvey v. Lackawanna etc. R. R. Co., 47 Pa. St. 428; Tinicum Fishing Co. v. Carter, 61 Pa. St. 21; Fuller v. Edings, 11 Rich. L. 239; Edings v. Seabrook, 12 Rich. L. 504; Alexander v. Milwaukee, 16 Wis. 247; Murray v. Menefee, 20 Ark. 561.

[2] Shrunk v. Schuylkill Navigation Co., 14 Serg. & R. 71; see Parker v. Mildam Co., 20 Me. 353 (37 Am. Dec. 56); Commonwealth v. Chaplin, 5 Pick. 199 (16 Am. Dec.) 386; Commonwealth v. Look, 108 Mass. 452; Carson v. Blazer, 2 Binn. 475 (4 Am. Dec. 463).

[3] Commonwealth v. Richter, 1 Pa. St. 467; Green v. Swift, 47 Cal. 536; Brown v. Cayuga etc. R. R. Co., 12 N. Y. 486; Davidson v. Boston & Maine R. R. Co., 3 Cush. 91; Sprague v. Worcester, 13 Gray, 193; Transportation Co. v. Chicago, 99 U. S. 635.

[4] Gozzler v. Georgetown, 6 Wheat. 593; Smith v. Washington, 20 How. (U. S.) 135; Callendar v. Marsh, 1 Pick. 418; Bender v. Nashua, 17 N. H. 477; Skinner v. Hartford Bridge Co., 29 Conn. 523; Green v. Reading, 9 Watts, 382; O'Conner v. Pittsburgh, 18 Pa. St. 187; *In re* Ridge Street, 29 Pa. St. 391; Matter of Furman Street, 17 Wend. 649; Wilson v. Mayor etc. of New York, 1 Denio, 595; Graves v. Otis, 2 Hill, 466; Radcliffe's Ex'rs v. Mayor etc., Brooklyn, 4 N. Y. 195; Pontiac v. Carter, 32 Mich. 164; Lafayette v. Bush, 19 Ind. 326; Macy v. Indianapolis, 17 Ind. 267; Vincennes v. Richards, 23 Ind. 381; Roberts v. Chicago, 26 Ill. 249; Murphy v. Chicago, 29 Ill. 279; Creal v. Keokuk, 4 Greene (Iowa) 47; but, see, *contra*, Atlanta v. Green, 67 Ga. 386; Johnson v. City of Parkersburg, 16 W. Va. 402 (37 Am. Rep. 779); McComb v. Akron, 15 Ohio, 474 (18 Ohio, 229); Crawford v. Delaware, 7 Ohio St. 459. In the last two cases it is held that when the grade of streets is first established, the consequential injury to adjoining property does not constitute a taking of property; but when the grade has once been established, and the adjoining property improved with reference to the existing grade, a change in the grade, causing damage, would give rise to a claim for compensation. In O'Brien v. St. Paul, 25 Minn. 331, it is held that if the change in the

Mr. Justice Miller has said,[1] that the decisions, which have denied the right of compensation "for the consequential injury to the property of an individual for the prosecution of improvements of roads, streets, rivers, and other highways," "have gone to the extreme limit of sound judicial construction in favor of this principle, and in some cases beyond it; and it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as effectually to destroy or impair its usefulness, it is a taking within the meaning of the Constitution."[2]

§ 240. **Exercise of eminent domain by municipal corporations.**—The Legislature, as has already been explained,[3] has in the first instance the sole power of exercising the right of eminent domain, in confiscating private property to public use. It has also been explained in the same connection, that the Legislature has the authority to delegate the exercise of this power to other organizations, either of a public or *quasi*-public character, provided the use to which the land is to be devoted is a public one. Thus, for example, the power to exercise the right of eminent domain may be delegated to the municipal corporation, and in delegating that power, the Legislature may also confer upon the corporation the power of determining the necessity for the exercise of the right. So, for example, a municipal corporation may, in strict conformity with the constitutional limitation, be vested with the power to open up and lay out streets and parks, whenever the city council may judge such action to be necessary or expedient.[4] Generally, the determination of the neces-

grade of the street deprives the abutting land of its lateral support, it is a taking of property in the exercise of the right of eminent domain.

[1] Pumpelly v. Green Bay etc. Co., 13 Wall. 166, 180.

[2] The application of this question to the effect of municipal control of streets on the right of abutting owners receives further discussion in the chapter on Streets. See *post*, chap. XVI. secs. 303, 304.

[3] Sec. 232.

[4] Commonwealth v. Charlestown, 1 Pick. (Mass.) 180; *In re* Piscataway Towns, 54 N. J. L. 559; Harbeck v. Toledo, 11 Ohio St. 219; Shaffner v. St. Louis, 31 Mo. 264; *In re* Locust St., 153 Pa. St. 276; Rhine v. McKinney, 53 Tex. 354; Alexander v. Baltimore, 5 Gill (Md.) 383; Van Husan v. Heames, (Mich. 92) 52 N. W. R. 18; People v. Smith, 21 N. Y. 595; Bloodgood v. Mohawk & H. R. R. Co., 18 Wend. 9; Cherokee v. Sioux City etc. Co., 52 Iowa, 279; Swan v. Williams, 2 Mich. 427; Willson v. Bl. Cr. Marsh Co., 2 Pet. 251;

sity of exercising the power in the given case is left solely to the judgment of the city council.[1] But it may also be specially delegated by the Legislature to some other body, representative of the municipal corporation, such as the park commissioners.[2]

The motives of the council or other body, having the power to exercise the right of eminent domain, are presumed to be in strict conformity with the public need; and it is not necessary that there should be any express declaration of such need, in order to make the appropriation to public use constitutional; unless, possibly, where by express provisions of the statute, under which the municipal corporation exercises the power, the jurisdiction over the case is dependent upon a judicial finding that such an appropriation to the public use was necessary.[3]

While the Legislature usually leaves to the municipal corporation the exercise of the right of eminent domain, in behalf of municipal purposes, including the laying out of the needed streets and highways; yet, it is possible for the same results to be attained by the direct action of the Legislature; as where the Legislature orders a survey of the town in which certain streets are laid out and the map declared by a legislative act to be a public record. The streets laid out on that map are public highways, even before they have been formally opened for use.[4]

But, in the exercise of the power of eminent domain, the municipal corporation is not permitted to go beyond the limitations imposed by the Legislature upon its exercise of the power; and, as a general proposition, it is necessary, in the grant to the municipal corporation of this power, that the purpose or use for which it may take private property should be specified by the Legislature; and the municipal corporation can in that case not go beyond the express grant of power, or enjoy

Simpson v. Kansas City, 20 S. W. R. 38; Mercer v. Pittsburgh, Ft. W. & C. Railroad Co., 36 Pa. St. 99; Toledo etc. Co. v. Toledo Elec. Co., 6 Ohio Cir. Ct. R. 362; Commonwealth v. Charlestown, 1 Pick. (Mass.) 180.

[1] Methodist Prot. Church v. Baltimore, 6 Gill, 391; *In re* Cedar Rapids, (Iowa, 92) 51 N. W. R. 1142; Curry v. Mt. Sterling, 15 Ill. 320.

[2] West Chicago Park Commissioners v. Western Union Tel. Co., 103 Ill. 33.

[3] Hunter v. Newport, 5 R. I. 325; Com'rs of Parks v. Moesta, (Mich. 92) 51 N. W. R. 903; O'Hare v. Chicago etc. Co., (Ill. 92) 28 N. E. R. 923; Allen v. Jones, 47 Ind. 442.

[4] West v. Blake, 4 Blackf. (Ind.) 234.

such power by doubtful or extravagant construction.[1] Thus, for example, where a city corporation has been authorized to appropriate private property for the construction of streets and other public highways, and public squares and grounds; it cannot exercise the right of eminent domain for the purpose of establishing a prison for city use.[2]

§ 241. **Conditions precedent to the exercise of the power.** —Not only can a municipal corporation not extend its power by doubtful construction beyond the express limitations imposed by the Legislature, but the exercise of the power in any case will only be lawful, when in doing so all the requirements either of the constitution, or of the State statutes, under which the power is exercised, have been strictly observed. If there is any material or substantial deviation from the requirements of constitution or statute, as to the mode or measure of exercising the power, the appropriation of the private property would in that case not be lawful; and it would be subject to avoidance by the owner of the land by an appropriate action.[3] Hence, in order that any exercise of the power of eminent domain may be valid, a strict compliance with all the conditions precedent laid down by the statute will be required; a failure to perform any one of the conditions precedent will operate to

[1] Philip Street, *In re*, 10 La. An. 313; Sinton v. Ashbury, 41 Cal. 525; Morris v. Chicago, 11 Ill. 650; S. P., Ill. & Mich. Canal Trs. v. Chicago, 12 Ill. 403; Kane v. Baltimore, 15 Md. 240; Claiborne Street, *In re*, 4 La. An. 7; Exchange Alley, *In re*, 4 La. An. 4.

[2] East St. Louis v. St. John, 47 Ill. 463; Davis v. Nichols, 39 Ill. App. 610; West River Br. Co. v. Dix, 6 How. (U. S.) 545.

[3] State v. Hudson City, 27 N. J. L. 214; Cincinnati v. Coombs, 16 Ohio, 181; State v. Heppenheimer, (N. J. 92) 23 Atl. R. 664; Baltimore v. Hook, 62 Md. 371; Dyckman v. New York, 55 N. Y. 439; People v. Kniskern, 54 N. Y. 52; Thompson v. Schermerhorn, 6 N. Y. 92; Hunt v. Utica, 18 N. Y. 442; Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 82 Mo. 121; Specht v. Detroit, 20 Mich. 168; Nichols v. Bridgeport, 23 Conn. 189, 208; Shaffner v. St. Louis, 31 Mo. 264; Owosso v. Richfield, 45 N. W. R. 129; Barteson v. Minneapolis, 33 Minn. 468; Harbeck v. Toledo, 11 Ohio St. 219; State v. Jersey City, 25 N. J. L. 309; State v. Jersey City, 26 N. J. L. 444; Godchaux v. Carpenter, 19 Nev. 415; State v. Tacoma, (Wash. 92) 29 Pac. Rep. 847; Northern Pacific Terminal Co. v. Portland, 14 Oreg. 24; Buffalo, *In re*, 78 N. Y. 362; Ventura County v. Thompson, 51 Cal. 577; Leslie v. St. Louis, 47 Mo. 474; *In re* Consolidated Gas Co., 63 Hun, 632; Hudson v. Bridgeport, 25 Conn. 426; People v. Brighton, 20 Mich. 57; Kidder v. Peoria, 29 Ill. 77; Exchange Alley, *In re*, 4 La. An. 4; Burnett v. Buffalo, 17 N. Y. 383.

invalidate the proceeding and prevent it from divesting the owner of his property.[1] And, the municipal corporation must show affirmatively that these requirements of the statute have been complied with. Thus, it has been held, where the statute requires that the owner of the land must be given an opportunity to sell the land, it is required that an effort be made to effect a private purchase of the land before the condemnatory proceedings can be instituted; and, in order that the proceedings may be instituted and a lawful condemnation be obtained, it must be shown that the parties failed to agree between them as to the amount of compensation that was due to the owner for the taking of his land for a public use.[2] So also, has it been held that, if a charter requires of a city council a previous effort to make a private purchase of the land, an honest effort to secure it by private purchase is necessary; and that a mere formal and perfunctory compliance with that requirement would not be sufficient.[3]

It has also been held very generally, that notice of the proceeding should be given to the property owner, and a failure to give such notice would invalidate the entire proceeding;[4] and the record must show proof of service.[5] But it is competent, however, for the Legislature, in the absence of any special constitutional limitation, to provide for a simple constructive notice, and to dispense with an actual notification of the property owner.[6] Thus, for example, it has been held that

[1] Com'rs v. Newby, 31 Ill. App. 378; Anderson v. Pemberton, 89 Mo. 61; Zeigler v. Hopkins, 117 U. S. 683; Mulligan v. Smith, 59 Cal. 206.

[2] *In re* New York City, 63 Hun, 632; Moses v. St. Louis Co., 84 Mo. 242; Dyckman v. New York, 5 N. Y. 434; *Re* Middleton, 82 N. Y. 196; *In re* Metro. E. R. R. Co., 12 N. Y. S. 502; Nichols v. Bridgeport, 23 Conn. 189; Pennsylvania R. R. Co. v. Porter, 29 Pa. St. 165; Grand Rapids v. Grand Rapids & Ind. R. R. Co., 58 Mich. 641; Doughty v. Somerville & E. R. R. Co., 21 N. J. L. 442; Toledo etc. Co. v. Detroit etc. Co., 62 Mich. 564, 578.

[3] Fort St. etc. Co. v. Jones, 83 Mich. 415; Lane v. Saginaw, 53 Mich. 442; Wookler v. Chicago, 61 Ill. 142.

[4] St. Joseph, etc. Co. v. Shambaugh, 106 Mo. 557; Owasso v. Richfield, 45 N. W. R. 129; Kearney v. Ballentine, 23 Atl. R. 821; Trester v. Mo. R. R. Co., 49 N. W. R. 1110; Nichols v. Bridgeport, 23 Conn. 189.

[5] Nielsen v. Wakefield, 43 Mich. 434.

[6] State v. Heppenheimer, (N. J. 92) 23 Atl. R. 664; Chicago etc. Co. v. Grierson, (Kan. 92) 29 Pac. R. 1082; State v. Jersey City, 24 N. J. L. 662; State v. Plainfield, 38 N. J. L. 95; Baltimore, etc. Co. v. Baltzell, 23 Atl. R. 74; Wilkin v. St. Paul & Pac. R. R. Co., 16 Minn. 271; Winnebago

the publication of the ordinance, in the absence of a special constitutional requirement, may be made by the Legislature to be a sufficient notice to the property owner that his property is to be taken for a public use.[1] But, in every case, it has been held that a charter which did not provide for personal service of notice upon the property owner, was defective.[2] But all these questions must finally depend upon the terms and provisions of the constitution, and the legislative act, by and under which the power is conferred upon the municipal corporation.[3]

§ 242. **Effect of discontinuance of proceedings.**—It frequently happens that a municipal corporation will proceed to a condemnation of private property for public use, up to the point when the damages for such condemnation will be assessed; and the amount of the damages having thus been ascertained, the corporation deems it expedient to abandon the further prosecution of the case, on account of the amount of damages for the condemnation. The question has been raised, at what time in the course of the proceeding is the corporation still permitted to withdraw; or when has the proceeding gone so far as to create in behalf of the property owner the right to a completion of the proceeding, and a recovery by him of the damages, which have been assessed against the municipal corporation for the proposed taking of his property for a public use. It has been held by a great preponderance of authority that, before the property has been taken possession of, and before the final confirmation of the report of the commissioners, or other referees, in regard to the assessment of damages, the corporation may recede from or abandon the proceeding, without any claim against it on the part of the property owner for damages for such discontinuance of the proceedings.[4] And where such

F. Co. v. Ry. Co., (Wis. 92) 51 N. W. R. 576; Owners, etc., v. Albany, 15 Wend. 374; Methodist Prot. Church v. Baltimore, 6 Gill (Md.) 391; Stewart v. Hinds Co. Bd. of Police, etc., 25 Miss. 479; Dubuque v. Wooton, 28 Iowa, 571.

[1] Winnebago, etc. Co. v. R. R. Co., (Wis. 92) 51 N. W. R. 576; Curry v. Mt. Sterling, 15 Ill. 320; Johnson v. Joliet & C. R. R. Co., 23 Ill. 202.

[2] Kundizer v. Saginaw, 59 Mich. 355, 363; Charlestown, etc. Co. v. Comstock, (Va. 92) 15 S. E. R. 69; St. Paul, Minneapolis & M. Ry. Co. v. Minneapolis, 35 Minn. 141; State v. Fond du Lac, 42 Wis. 298.

[3] Carey v. Chicago, etc. Co., 100 Mo. 282; Swan v. Williams, 2 Mich. 427; Palmyra v. Morton, 25 Mo. 593, 597.

[4] Hawersley v. New York, 56 N. Y. 533; Williamsport, etc. Co. v. P. & E. R. Co., 27 W. N. C. 576; 21 Atl. R.

discontinuance is allowable, the city will only be required to pay the taxable costs and expenses of the city, and is not called upon to pay the attorney's fee and other expenses, which the private owner might have incurred, which are not included in the actual costs.[1]

It is, however, doubtful under the authorities, what acts constitute such a conclusion of the proceedings as to bind the municipal corporation and compel it to go on with the condemnation, and take away the power to withdraw. According to the authorities in New York and other States, it has been held that where proceedings to condemn lands to public use have progressed so far, as that the amount of damages has been finally and definitely assessed, and the report which finds the amount of damages has been filed and confirmed, the private property owner has, at that point in the proceedings, acquired the vested right to damages thus assessed in his favor, and the city cannot escape the obligation to pay them.[2] But it has been held in other cases that, as long as possession has not been taken under the judgment of the court of condemnation, the city may still withdraw from the transaction and abandon the proceedings, without payment of the damages which have been assessed to the owner, even though the report assessing the damages has been presented and confirmed by the court. In these cases it is held, that the confirmation of the report, in which the damages have been assessed, is simply a determination of the value of the land, if the city should finally conclude to take such land for

645; Rhinebeck R. R., *In re*, 67 N. Y. 242; Simpson v. Kansas City, (Mo. 92) 20 S. W. R. 38; State v. Hug, 44 Mo. 116; Carson v. Hartford, 48 Conn. 68; Stevens v. Danbury, 53 Conn. 9; Hullin v. Second Municipality, 11 Rob. 97; Jersey City Water Com'rs, 31 N. J. L. 72; Clough v. Unity, 18 N. H. 75; Municipality v. Levee, S. C. P. Co., 7 La. An. 270; Com'rs of Washington Park, *In re*, 56 N. Y. 144; Military Parade Ground, *In re*, 60 N. Y. 319; Millard v. Lafayette, 5 La. An. 112; Canal Street, *In re*, 11 Wend. 155.

[1] Waverly W. Works Co., *In re*, 16 Hun, 57; St. Louis v. Meintz, (Mo. 92) 18 S. W. R. 30; Mattlage v. N. Y. El. R. Co., 17 N. Y. S. 536.

[2] Harrington v. Berkshire Co. Com'rs, 22 Pick. 263; Dolores No. 2 Land & Canal Co. v. Hartman, (Col. 92) 29 Pack. 378; Funk's Admr. v. Waynesboro, (Pa.) 10 Atl. R. 427; O'Neill v. Hudson County, 41 N. J. L. 161; Fort Street etc. Co. v. Backus, (Mich. 92) 52 N. W. R. 790; Garrison v. New York, 21 Wall. 196; Dover Street, *In re*, 18 Johns. 506; Duncan v. Louisville, 8 Bush (Ky.) 98; People v. Syracuse, Com. Council, 78 N. Y. 57; Consumers' G. T. Co. v. Harless, (Ind. 92) 29 N. E. R. 1062; Rhinebeck R. R., *In re*, 67 N. Y. 242.

public use.[1] In some of the cases, the language of the act or charter of the city settles this question beyond dispute, as where it is provided "that after the value and damages shall have been ascertained, the amount with interest shall be paid to the person interested, on demand."[2]

It has also been held that, as long as the assessment of damages has not been determined upon as a finality, the taking of possession of the lands would not so far bind the municipal corporation as to take away the power of discontinuing the proceedings. The taking of possession is presumed to be with the consent of the landowner, and it serves in no way whatever as evidence of a contract to buy the lands.[3] But in all of these cases of a discontinuance of the proceedings by the municipal corporation, while it is true that there cannot be any recovery of the sum, which might have been established as the true measure of damages for the confiscation of the property for a public use, yet, the landowner has a special action for damages for any wrongful or injurious acts of the municipal corporation in respect to the land, and for injuries which the landowner has suffered by the detention or use of the land by the corporation.[4] It needs to be stated finally, that this entire doctrine in respect to the right of discontinuing proceedings for condemnation of lands is opposed and rejected by the English cases.[5]

[1] Baltimore & Susq. R. R. Co. v. Nesbit, 10 How. 395; Garrison v. New York, 21 Wall. 196; Graff v. Baltimore, 10 Md. 544; State v. Graves, 19 Md. 351; Baltimore v. Musgrave, 48 Md. 272; Merrick v. Baltimore, 43 Md. 219; Norris v. Baltimore, 44 Md. 598; Black v. Baltimore, 50 Md. 236; Baltimore v. Black, 56 Md. 333.

[2] Devlin v. City of New York, 131 N. Y. 123; Longworth v. Cincinnati, 48 Ohio St. 637; Trustees Brooklyn Bridge v. Church, 63 Hun, 632; Garrison v. New York, 21 Wall. 196; Farnsworth v. Boston, 121 Mass. 173; Lafayette v. Schultz, 44 Ind. 97; Stafford v. Albany, 7 Johns. (N. Y.) 541; Higgins v. Chicago, 18 Ill. 276; Chicago v. Wheeler, 25 Ill. 478.

[3] Brokaw v. Terre Haute, 97 Ind. 176; Feiten v. Milwaukee, 47 Wis. 494; Hullin v. Munici'y, 11 Rob. (La.) 97; Norris v. Baltimore, 44 Md. 606; Baltimore v. Musgrave, 48 Md. 272.

[4] Roffignac Street, *In re*, 4 Rob. (La.) 357; Stevens v. Danbury, 53 Conn. 9; State v. Graves, 19 Md. 351; Graff v. Baltimore, 10 Md. 544; Whiting v. Boston, 106 Mass. 89; McLaughlin v. Municipality, 5 La. An. 504; Simpson v. Kansas City, (Mo. 92) 20 S. W. R. 38; Baltimore v. Musgrave, 48 Md. 272; Anthony Street, *In re*, 20 Wend. (N. Y.) 618; Walling v. Shreveport, 5 La. An. 660.

[5] King v. Market St. Com'rs, 4 B. & Ad. 335; Stone v. Commercial Ry. Co., 4 M. & C. 122; Walker v. Eastern Counties Ry. Co., 6 Hare 544.

§ 243. **Compensation required.**—The general provision of the constitutions, limiting and controlling the exercise of the right of eminent domain, requires the payment of compensation for the appropriation of private property to a public use. Some of the constitutional provisions enter into an express stipulation, that the compensation should be made in money; but, even in the absence of an express provision of that kind, the compensation would necessarily be presumed to be pecuniary in character. In determining what is the compensation, the laws of the State, and sometimes the provisions of the constitution, require certain methods and modes of proceeding to be followed. And in order that the compensation agreed upon may be binding upon both parties, the provisions of the constitution and of the statute, under which the municipal corporation exercises the power must be strictly pursued, and any material deviations from these requirements would invalidate the condemnation.[1] If the act of the Legislature or charter, which authorized the taking of property for public use by the municipal corporation, provided a specific remedy for the ascertainment of the damages, it is necessary that that remedy should be resorted to; because, if it is complete and adequate, it is regarded as exclusive.[2] Where the owner's right to damages has become vested,

[1] State v. City, (N. J. 92) 22 Atl. R. 1052; Union etc. Co. v. Slee, (Ill. 88) 12 N. E. R. 543; 13 N. E. R. 222; Croft v. Bennington, etc. Co., (Vt. 92) 23 Atl. R. 922; Thompson v. Chi. etc. Co., (Mo. 82) 19 S. W. R. 77; Underhill v. Manhattan Ry. Co., (N. Y. 92) 27 Abb. N. C. 478; 21 Civ. Pro. R. 441; Cushman v. Smith, 34 Me. 247; Sower v. Philadelphia, 35 Pa. St. 231; Cairo & F. R. R. Co. v. Turner, 31 Ark. 495; Memphis & C. R. R. Co. v. Payne, 37 Miss. 700; Foster v. Scott, 17 N. Y. S. 479; Cairo & F. R. R. Co. v. Turner, 31 Ark. 459; Jamison v. Springfield, 53 Mo. 224; Daniels v. Railroad Co., 25 Iowa, 129; Chaffee's Appeal, 56 Mich. 244; St. Louis v. Franks, 78 Mo. 41; Butte v. Boydston, 64 Cal. 110; Floyd v. Turner, 23 Tex. 293; Kankaman v. Canallo, 142 U. S. 254; Boston v. Robbins, 126 Mass. 384.

[2] State v. Engelman, 106 Mo. 628; Wamesit P. Co. v. Lowell etc. Co., 139 Mass. 173; Hanes v. N. C. R. R. Co. 109 N. C. 490; Baltimore B. R. Co. v. Baltzell, (Md. 92) 23 Atl. R. 74; *In re* Opening of 163d St., 61 Hun, 365; State v. Heffenheimer, (N. J. 92) 23 Atl. R. 664; Dodge v. Essex Co. Comm'rs, 3 Met. (Mass.) 380; Reinhart v. Buffalo, 15 N. Y. S. 844; Rankin & Great Western Ry. Co., 4 Up. Can. C. P. 463; Grimshaw v. Grand Trunk R'y Co., 19 Up. Can. Q. B. 493; Mitchell v. Franklin & C. Turnp. Co., 3 Humph. (Tenn.) 456; Brown v. Beatty, 34 Miss. 227; Brown v. Calumet, (Ill. 92) 26 N. E. R. 501; Calking v. Baldwin, 4 Wend. (N. Y.) 667; Baltimore B. R. Co. v. Baltzell, (Md. 92) 23 Atl. Rep. 74; Lafayette & I. R. R. Co. v. Smith, 6 Ind. 249.

and the municipal corporation has failed to make payment of the same, the private owner whose property has been taken may sue the corporation therefor; and, in an appropriate case, obtain a *mandamus* to compel such corporation to provide for the payment of the compensation, or to collect the assessments, out of which such compensation is to be paid.[1] But this is possible only when the proceedings for assessment have been made final. As long as these proceedings are only provisional, there is no right of action on the part of the private owner to compel such payment.[2]

§ 244. **Who entitled to receive compensation.**—The general rule is that the owner or owners of the property will be entitled to receive the compensation, and it matters not who or how many they are, or what their interests in the property are, whether joint owners, or parties having separate interests in the estate, each will be able to claim a share in the compensation.[3] Not only is that the rule, in respect to the more or less permanent interests in the property; but it is likewise the case, where the party claiming the interest is simply a tenant for years, or where he has a more or less temporary interest in the land. His dispossession, in the exercise of the right of eminent domain, does not constitute an act of eviction, so as to relieve him from liability on his covenant for rent; nor is he subject to a loss of his estate in the land by this exercise of eminent domain, without satisfying his claim for compensation. He has, along with the landlord, an act for damages against the public, or against the private corporation, in whose behalf the land has been confiscated.[4]

[1] Hollingsworth v. Tensas Parish, 17 Fed. Rep. 109; Wrought Iron Bridge Co. v. Utica, 17 Ib. 316; Higgins v. Chicago, 18 Ill. 276; Rome v. Jenkins, 30 Ga. 154; State v. Keokuk, 9 Iowa, 438; Philadelphia v. Dyer, 41 Pa. St. 463; Philadelphia v. Dickson, 38 Pa. St. 247; McCormack v. Brooklyn, 108 N. Y. 49; State v. Hugg, 44 Mo. 116; Mobile v. Richardson, 1 Stew. & Port. (Ala.) 12.

[2] Carson v. Hartford, 48 Conn. 68.

[3] Devlin v. New York, 131 N. Y. 123; Shaaber v. Reading, (Pa. 92) 24 Atl. R. 692; Mortimer v. Metro. El. R. Co., 129 N. Y. 81; 29 N. E. R. 5; Board v. Levee Com'rs, 66 Miss. 248; Pittsburgh etc. Co. v. Oliver, 19 Atl. R. 47; 131 Pa. St. 408; Thompson v. Chicago & Ch. etc. Co., (Mo. 92) 19 S. W. R. 77; Kearney v. Metro. E. R. Co., 129 N. Y. 76; Missouri etc. Co. v. Wilson, 45 Mo. App. 1; Chicago etc. Co. v. Easley, 26 Pac. R. 731; Korn v. Metro. Ry. Co., 59 Hun, 505; Brown v. Chicago etc. Co., 101 Mo. 484.

[4] Biddle v. Hussman, 23 Mo. 597; Kingland v. Clark, 24 Mo. 24; Leiter v. Pike, 127 Ill. 287; see Gillespie v.

A different conclusion is reached in regard to the effect of the exercise of eminent domain on a wife's dower. It is well settled, that the dower right of the wife or widow is defeated by the exercise of eminent domain over the land, out of which the dower issues. But it is a matter of considerable doubt, whether the right before assignment, during the life of the husband, or after his death, partakes so much of the nature of an interest or estate in the land, as to entitle her to compensation separate from her husband, and his heirs and assignees. It has been held that she cannot claim such compensation, but the question cannot be considered as definitely settled.[1]

§ 245. **Who assesses the damage.**—The body or tribunal, to whom the assessment of damages for confiscation of land to public use must be referred, will depend upon the express provisions of the law of the State. And the provisions of that law, whatever they may be, must be strictly followed.[2] But little difficulty is experienced, under this heading, except where the law requires that the assessment of damages should be made by a jury, in determining what is the sense in which the word *jury* is here employed.

It has been held, that where that statement is made, *jury* means a *common law jury;* and no other proceeding will supply the place of an assessment by the jury.[3] In Minnesota, it has been held that the constitutional provision, reserving the right of trial by jury, is not extended by implication to proceedings

Thomas, 15 Wend. 468; Parks v. Boston, 15 Pick. 198; Patterson v. Boston, 20 Pick. 159; Folts v. Huntley, 7 Wend. 210.

[1] 1 Washb. on Real Prop. 270; Moore v. New York, 4 Sandf. 450; s. c., 8 N. Y. 110; Gwynne v. Cincinnati, 3 Ohio, 24. See, *contra*, recognizing the widow's claim to compensation, Ebey v. Ebey, 1 Wash. Ter. 185; Venable v. Wabash etc. Co., (Mo. 92) 19 S. W. R. 45.

[2] McClure v. Red Wing, 28 Minn. 186; Allen v. Jones, 47 Ind. 442; Rhine v. McKinney, 53 Tex. 354; Minneapolis v. Wilkin, 30 Minn. 140.

[3] St. Joseph etc. Co. v. Shambaugh, 106 Mo. 557; Chicago etc. Co. v. Bates, (Mo. 92) 18 S. W. R. 1133; Chicago etc. v. Elliott, (Mo. 92) 18 S. W. R. 901; Alexander v. Baltimore, 5 Gill (Md.) 383; Meth. Prot. Church v. Baltimore, 6 Gill. (Md.) 391; Ala. etc. Co. v. Newton, (Ala. 92) 10 So. Rep. 89; People v. Stuart, 97 Ill. 123; Postal Tel. Co. v. Railroad, 92 Ala. 331; Lamb v. Lane, 4 Ohio St. 167; Beers v. Beers, 4 Conn. 535; Railroad Co. v. Miller, 17 S. W. R. 499; 106 Mo. 458; Sharpless v. West Chester, 1 Grant Cas. (Pa.) 257; Charlestown etc. Co. v. Comstock, (W. Va.) 15 S. E. R. 69; State v. Graves, 19 Md. 351; Lumsden v. Milwaukee, 8 Wis. 485; *contra*, Col. etc. Co. v. Humphrey, 26 Pac. R. 165.

in the exercise of the right of eminent domain.[1] It is very likely that constitutional provisions, like the one in Minnesota, do not apply to the proceedings for an assessment of damages in exercise of eminent domain, so as to bind the Legislature to prescribe that method of assessment. It is believed that the authorities will agree that the Legislature is competent to prescribe some other method or mode of assessing damages in such cases, notwithstanding the general constitutional provision preserving the right of trial by jury, as long as the constitution contains no special provision, requiring such a trial in the special case of proceedings in eminent domain.[2] But the fact, that the law of the State requires a resort to a jury, will not make it necessary for the first assessment of damages to be made by the jury, provided that the private owner has the opportunity, if he desires it, of appealing to a court and jury for the review of the assessment which is previously made by some other body or tribunal. As long as he has this right of appeal from the preliminary and otherwise unauthorized assessments by commissioners or otherwise, there is no violation of the rule of law, which requires that the assessment should be made by the jury.[3]

[1] Ames v. Lake Superior & Miss. R. R. Co., 21 Minn. 241, 293; Weir v. St. Paul S. & T. F. R. R. Co., 18 Minn. 155.

[2] Petition of Mt. Washington Road Co., 35 N. H. 134; State v. Heppenheimer, (N. J. 92) 23 Atl. R. 664; United States v. Engerman, 46 Fed. R. 176; Weir v. St. Paul S. & T. F. R. R. Co., 18 Minn. 155; Heyneman v. Blake, 19 Cal. 579; Koppikus v. Commissioners, 16 Cal. 248; Dalton v. Northampton, 19 N. H. 362; Ames v. Lake Superior & Miss. R. R. Co., 21 Minn. 241, 293; Beekman v. Saratoga & S. R. R. Co., 3 Paige (N. Y.) 45; Lake Erie, W. & St. L. R. R. Co. v. Heath, 9 Ind. 558; Hymes v. Aydelott, 26 Ind. 431; Livingston v. New York, 8 Wend. (N. Y.) 85; State v. Jersey City, 26 N. J. L. 444.

[3] Callen v. Wilson, 127 U. S. 540; Postal etc. Co. v. Ala. etc. Co., (Ala. 92) 9 So. R. 555; Port Huron etc. Co. v. Callmain, 61 Mich. 12; Alexander v. Baltimore, 5 Gill (Md.) 383; Meth. Prot. Church v. Baltimore, 6 Gill (Md.) 391; Morford v. Barnes, 8 Yerg. (Tenn.) 444; Beers v. Beers, 4 Conn. 535; St. Joseph etc. Co. v. Cudmore, 15 S. W. Rep. 535; Kendall v. Post, 8 Oreg. 14; Evansville & C. R. R. Co. v. Miller, 30 Ind. 209; People v. McRoberts, 62 Ill. 38; Upper Coos R. Co. v. Parsons, 18 Atl. Rep. 10; Minneapolis v. Wilkin, 30 Minn. 140; Stewart v. Baltimore, 7 Md. 500; Lumsden v. Milwaukee, 8 Wis. 485; Chicago etc. Co. v. Eubanks, 18 S. W. Rep. 1134; Kine v. Defenbaugh, 64 Ill. 291; People v. Stuart, 97 Ill. 123; Warren v. St. Paul & Pac. R. R. Co., 18 Minn. 384; Weir v. St. Paul S. & T. F. R. R. Co., 18 Minn. 155; Connelly v. Griswold, 7 Iowa, 416; Wells Co. Road, *In re*, 7 Ohio St. 16; Cairo & F. R. R. Co. v. Trout, 32 Ark. 17 (1877).

But, in any case, the owner of private property, which is taken in the exercise of the right of eminent domain, may waive his claim to an assessment by jury, and consent to any other mode of assessment. The provision is for his benefit, if he desires to avail himself of it; but it is not obligatory upon the public authorities, if the private owner does not require it.[1] In New York, the constitution provides that the compensation "shall be ascertained by a jury, or by no less than three commissioners appointed by a court of record." This provision requires the jury, in the absence of the appointment of commissioners; but it is left to the discretion of the court, whether a jury or three commissioners should be selected. But the commissioners can only be appointed by the court; and no method of selection of appraisers or commissioners by lot would be lawful, and a subsequent appointment of them by the court would be an evasion of the constitutional provision, which would make the assessment by them invalid.[2] It has also been decided that, under this constitutional provision, the Legislature is not authorized to give to the city council the power to appoint the appraisers.[3]

When the constitutional requirement is, that damages should be assessed by a jury, the common law jury of twelve men is what is presumptively intended by the provision; and no other body will satisfy the requirement.[4] But it has been held in New York, under the constitutional provision just referred to, and in the light of a legislative usage, that the term *jury*, as used in this constitutional provision, did not necessarily require a body of twelve men, whose judgment depends upon their unanimous agreement; but that the provision would be satisfied by any body of a different number of jurors, and whether they reached a unanimous verdict or decided the matter by a majority vote. The court, however, proceeds to state that in the absence of such a usage, modifying and controlling the interpretation of such a constitutional provision, the common law jury must be presumed to have been alone intended by the

[1] People v. Stuart, 97 Ill. 123; Williamson v. Cass County, 84 Ill. 361 (1877); Lamb v. Lane, 4 Ohio St. 167 (1854).

[2] Cruger v. Hudson R. R. R. Co., 12 N. Y. 190 (1854); Roanoke City v. Berkowitz, 80 Va. 616.

[3] Clark v. Utica, 18 Barb. (N. Y.) 451.

[4] Lumsden v. Milwaukee, 8 Wis. 485; People v. Kimball, 4 Mich. 95; Campau v. Detroit, 14 Mich. 276; Horton v. Grand Haven, 24 Mich. 465; Des Moines v. Layman, 21 Iowa, 158.

constitutional provision referred to.[1] Although the charter of a city provides that damages should be assessed by a jury, it has been held that a city corporation would have the power to lay aside the assessment made by the jury, and pay to the owner of the property a larger sum than that which the jury had declared to be a proper compensation. It could not force the payment of a smaller sum without the consent of the owner of the property; but the amount may be increased, where the city council came to the conclusion that there had been an improper assessment by the jury.[2]

It has been held in Massachusetts, that a city has not the power to enter into an agreement, binding upon itself, to submit to arbitration the assessment of damages for the confiscation of private property to public use.[3]

§ 246. **The measure of value or damages.**—The court, or other tribunal, to which is assigned the duty of assessing the amount of damages, to be paid to the owner of private property which has been taken for public use, is required to ascertain what is the exact loss to the owner of property by such a confiscation of his property to public use. And while the sentimental appreciation of the property by its owner cannot be taken into consideration;[4] yet, whatever is the value of the property on the market, which is determined by the use to which the land can be put, will be in general the rule for determining the amount of damages, which should be awarded to the owner for the confiscation of the property. It is not necessary that the property should have that particular value to the owner, or that he should put the property to the uses for which the property is adapted and which determines or increases its market value. The fact, that the propepty is adaptable to this valuable use, is sufficient to enable him to claim that value as the real rule for the measurement of his damages. In other

[1] Cruger v. Hudson R. R. R. Co., 12 N. Y. 190; Brooklyn v. Patchen, 8 Wend. (N. Y.) 47.

[2] Mobile v. Richardson, 1 Stew. & P. (Ala.) 12.

[3] Harvard College v. Boston, 104 Mass. 470; Brimmer v. Boston, 102 Mass. 19; Somerville v. Dickerman, 127 Mass. 272; Boylston Market Association v. Boston, 113 Mass. 523.

[4] Stafford v. Providence, 10 R. I. 567; 14 Am. Rep. 710; Kerr v. South Park Com'rs, 117 U. S. 379; Providence & W. R. Co. v. Worcester, (Mass. 92) 29 N. E. R. 56; Cook v. South Park Com'rs, 61 Ill. 115; Green v. Chicago, 97 Ill. 370.

words, it is the market value of the property, and not any special value of it to the particular owner, which constitutes the true measure of damages.[1]

The measurement of the damages, to be recovered by the owner of the private property, varies according to whether the entire property is taken, or only a part. Where the proposed confiscation to public use involves the appropriation of the entire property, there is no difficulty in ascertaining what is the true rule for measuring the damages to be recovered by the owner. Such owner is entitled to the full market value of the property, and this is determined by its adaptability to a valuable use; he is entitled to receive its full value and nothing more.[2] But where, as is probably the more common case, only a part of the property is taken, some difficult questions are likely to arise, in determining what rule is to be followed in the measuring of

[1] Goodin v. Cinc. & W. Canal Co., 18 Ohio St. 169; Young v. Harrison, 17 Ga. 30; Furman Street, *In re*, 17 Wend. (N. Y.) 669; Miss. & R. River Boom Co. v. Patterson, 98 U. S. 403 (1878); s. c., 3 Dillon, 465. The rule has been very clearly stated by the United States Supreme Court in the opinion of Justice Field (in Miss. & R. River Boom Co. v. Patterson, 98 U. S. 403): "In determining the value of land appropriated for public purposes the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, What is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated. So many and varied are the circumstances to be taken into account to determine the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be established by reference to the uses for which the property is suitable, having regard to the existing business or wants to the community, or such as may be reasonably expected in the immediate future." See, also, San Jose v. Reed, 65 Cal. 241.

[2] Patterson v. Miss. & R. Rivers Boom Co., 3 Dillon, 465, 467 (1875); affirmed by the Supreme Court, 98 U. S. 473 (1878); Giesy v. Cinc. W. & Z. R. R. Co., 4 Ohio St. 308 (1854); Stafford v. Providence, 10 R. I. 567 (1873); s. c., 14 Am. Rep. 710; Somerville & E. R. R. Co. v. Doughty, 22 N. J. L. 495 (1850); Driver & Western Union R. R. Co., 32 Wis. 569 (1873); s. c., 14 Am. Rep. 726.

the damages. He is entitled to whatever damage has been inflicted upon him and nothing more. But very often by the appropriation of a part of the property to a public use, for example in the laying out of the streets, the land which is left in the private owner is very much more valuable than the entire property was before the appropriation; and the question is, to what extent the courts can take into consideration the benefits or injuries which the property suffers by the appropriation, in determining the true amount of damages to be recovered by the property owner.

In this connection a distinction is made by the authorities between general or public benefits, and injuries special or local. A benefit or injury resulting from the public act is said to be general or public, where it is suffered or enjoyed by the public in general, and is not imposed or inflicted upon any one particular proprietor. A benefit or injury is said to be special or local, where it affects the particular proprietor, part of whose land has been taken in the exercise of the right of eminent domain, as, for example, by rendering his own land more useful or convenient, and thus increasing its value, or by making it less useful or convenient, and therefore diminishing its value. The courts have very generally held, that the public benefits and injuries are not to be considered at all in the estimation of the damages to be awarded to an owner of property for confiscation of the part for public use; but that special benefits, as well as injuries, which such owner has enjoyed or suffered, should be considered in determining the amount of damages, unless it is provided by the Constitution, or by the statutes of the State, that all benefits of whatever kind should be excluded.[1]

It seems that there is no doubt in regard to the fact, that the special damage to the part of the land, which it left to the owner, should be considered as well as the actual market value of the property which has been taken, in order to secure a proper

[1] Montgomery Co. v. Bridge Co., 110 Pa. St. 54; Harris v. Schuylkill, etc. Co., 21 Atl. R. 590; 28 W. N. C. 44; Lehigh Valley Coal Co. v. Chicago, 26 Fed. Rep. 415; Newman v. Metro. etc. Co., 118 N. Y. 618; San Jose v. Mayne, 83 Cal. 563; 23 Pac. R. 522; Upton v. South Reading Br. R. R. Co., 8 Cush. 600; Louisville Co. v. Ingram, (Ky.) 14 S. W. Rep. 534; Chattanooga v. Geiler, 13 Lea, 611; Louisville, etc. v. Asher, (Ky.) 15 S. W. Rep. 517; Dwight v. Hampden Co. Com'rs, 11 Cush. 201; Howard v. Providence, 6 R. I. 514; Chicago, etc. Co. v. Aldrich, (Ill.) 24 N. E. Rep. 763.

assessment of damages.[1] And it is very generally held that special benefits to the remaining property, accruing from the proposed improvements, should be deducted from the valuation of the property taken, in order to ascertain the measure of compensation.[2] In Massachusetts, it has been held, that the benefit from widening a street was to be considered as direct and special, although other estates on the same street have been similarly benefited by the same improvements.[3] But in some of the States, the special benefits are held to be excluded from the estimation of damages for confiscation.[4]

In widening streets, it very often occurs that a building will be found to be in the way, either wholly or partially so. Where the building is wholly within the line of the proposed street, the entire house would, of course, have to be condemned by the city and paid for; and the city could not compel the private owner to remove such building and pay him only for the

[1] Montgomery v. Townsend, 80 Ala. 480; Providence etc. Co. v. Worcester, (Mass. 92) 29 N. E. Rep. 56; Hercules v. Elgin etc. Co., (Ill. 92) 30 Ib. 1050; Fort Worth Co. v. Downie, 82 Tex. 383; Charleston etc. Co. v. Comstock, (W. Va. 92) 15 S. E. R. 69; Driver v. Western Union R. R. Co., 32 Wis. 569; s. c., 14 Am. Rep. 726; Chicago etc. Co. v. Nix, (Ill.) 27 N. E. Rep. 81; Chicago etc. Co. v. Blume, Ib. 601.

[2] Newman v. Metro. etc. Co., 118 N. Y. 618; Haynes v. Duluth, 47 Minn. 458; Smith v. Labore, 37 Kan. 480; 15 Pac. 577; Concordia Cem. Assn. v. Minn. etc. Co., 121 Ill. 199; 12 N. E. R. 536; Lears v. Seattle, (Wash. 93) 32 Pack. 794; Long v. Harrisburg, 126 Pa. St. 143; 19 Atl. R. 39; McReynolds v. Kansas etc. Co., 34 Mo. App. 581; State v. Digby, 5 Blackf. (Ind.) 543; Robbins v. Milw. & H. R. R. Co., 6 Wis. 636; Little Rock v. Woodruff, (Ark.) 14 N. E. Rep. 18; Hyde Park v. Washington Ice Co., 117 Ill. 233; Roberts v. Brown Co. Com'rs, 21 Kan. 247; Village of Hyde Park v. Dunham, 85 Ill. 569; Pacific R. R. Co. v. Chrystal, 25 Mo. 544; Jacob v. Louisville, 9 Dana (Ky.) 144; Arnold v. Cov. & Cinc. Br. Co., 1 Duvall (Ky.) 372; Louisville etc. Co. v. Barrett, 16 S. W. Rep. 278; Woodruff v. Nashville & C. R. R. Co., 2 Swan (Tenn.) 422; McIntire v. State, 2 Blackf. (Ind.) 384; Short v. Roch. etc. Co., (Pa.) 8 Atl. Rep. 598; McMahon v. Cinc. & C. S. L. R. R. Co., 5 Ind. 413; Isom v. Railroad Co., 36 Miss. 300; Cleveland & P. R. R. Co. v. Ball, 5 Ohio St. 568.

[3] Donovan v. Springfield, 125 Mass. 371; Upham v. Worcester, 113 Ib. 97; Cross v. Plymouth County, 125 Ib. 557.

[4] Israel v. Jewett, 29 Iowa, 475; Sater v. Burlington & Mt. P. Pl. R. Co., 1 Iowa, 393; Horbstein v. Atl. & Gt. W. R. R., 51 Pa. St. 87; Harrisburg & Pot. R. R. Co. v. Moore, 4 W. N. C. 537; Savannah v. Hartridge, 37 Ga. 113; Philadelphia v. Linnard, 97 Pa. St. 242. In Mississippi and other States, incidental benefits cannot be set off even against incidental damages. New Orleans, J. & Gt. N. R. R. Co. v. Moye, 39 Miss. 374.

cost of removal and restoration. Where only a part of the house is within the line of the proposed street, it is held that the city cannot be compelled to take the whole house; but, in such a case, it would be compelled to pay whatever was the actual damage, which was suffered by the owner by the destruction of a part of the house.[1]

But in estimating the damages suffered by a proposed improvement, it is impossible to include consequential damage, resulting from the character of the improvement, and its effect upon adjoining property where the public use, to which the property has been devoted, in itself constitutes a continuing nuisance. Where it is a nuisance, an appropriate action for the abatement of the nuisance could be employed by the owner of the adjoining property; such a circumstance would not be taken into consideration, in estimating the assessment of damages.[2]

In ascertaining the measure of damages for the taking of property for a public park, it has been held that it is impossible for evidence to be admitted to show the price, at which land adjoining the proposed park was sold, after the establishment of a park was announced and its boundaries established. The true rule of measurement of damages being the value of the land at the date of condemnation.[3]

§ 247. **When payment should be made.**—In the absence of constitutional provisions, controlling and limiting the discretion of the Legislature, it is competent for the Legislature to authorize private property to be taken by municipal corporations for a public use, without making prepayment of compensation. It is more customary, either in accordance with constitutional provision or legislative enactment, to require the compensation to precede, or at any rate to accompany, the act of appropriation.[4] But in the absence of constitutional provisions, this is

[1] Portland v. Kamm, 10 Oreg. 383; Schuchardt v. New York, 53 N. Y. 202.

[2] Badger v. Boston, 130 Mass. 170; Eames v. New Engl. Worsted Co., 11 Met. 570; Staple v. Spring, 10 Mass. 72.

[3] *In re* Butler, 127 N. Y. 463; Kerr v. South Park Com'rs, 117 U. S. 379; Cook v. South Park Com'rs, 61 Ill. 115.

[4] Ohio Riv. R. Co. v. Ward, 35 W. Va. 481; Georgia etc. Co. v. Archer, 87 Ga. 237; Miller v. Mobile, 47 Ala. 163; Baltimore v. St. Agnes Hospital, 48 Md. 419; Casey v. Inloes, 1 Gill (Md.) 510; Phillips v. South Park Com'rs, 119 Ill. 826; Colton

not necessary. A city may be permitted to make compensation for condemnation of lands to public use at a future time.[1] However, in permitting this, it is necessary that the Legislature shall make some certain and adequate provision for the compulsory payment of the compensation at the instance of the private owner, and without any unreasonable delay.[2]

Where the Legislature, in providing for the exercise of the right of eminent domain, likewise provides an adequate and complete remedy for the recovery of the compensation, it has been held that the compensation must be enforced by means of that remedy and by no other.[3] And even where compensation is not required to precede or to accompany the appropriation of the land, the owner is entitled to payment of compensation within a reasonable time, after the appropriation has been made. And it is generally held that such a party is entitled to payment of compensation, when the report of the commissioners of assessment, or the judgment of the jury, had been finally acted upon or confirmed; or, even before confirmation, when the municipal government has entered into possession of the

v. Rossi, 9 Cal. 595 (1858); McCann v. Sierra County, 7 Cal. 121; Bohlman v. Green Bay & L. P. R. R. Co., 30 Wis. 105; Williams v. New Orleans M. & T. R. R. Co., 60 Miss. 689.

[1] Bloodgood v. Mohawk & H. R. R. Co., 18 Wend. 9; Farmer's M. Co. v. R. R. Co., 21 Atl. R. 902; 28 W. N. C. 111; McCormick v. Lafayette, 1 Ind. 48; Comm'rs v. Bowie, 34 Ala. 461; Lafayette v. Bush, 19 Ind. 326; Beekman v. Saratoga & S. R. R. Co., 3 Paige (N. Y.) Ch. 45.

[2] Porter v. Midland etc. R. R. Co., 25 N. E. R. 556; 125 Ind. 476; Chapman v. Gates, 54 N. Y. 132, 146; Kansas etc. Co. v. Payne, 1 C. C. A. 192; 49 Fed. 119; State v. Lyle, 100 N. C. 497; Rexford v. Knight, 11 N. Y. 308; Zimmerman v. Kearney, (Neb. 92) 50 N. W. Rep. 1126; People v. Hayden, 6 Hill (N. Y.) 359; Currant v. Shattuck, 24 Cal. 427; McCann v. Sierra County, 7 Cal. 121; Sage v. Brooklyn, 89 N. Y. 189; *Re* United States, 96 N. Y. 227.

[3] Ross v. Georgia etc. Co., 12 S. E. R. 101; 33 S. C. 477; Strickler v. Midland Ry. Co., 125 Ind. 412; 25 N. E. R. 455; Railway Company v. Oakes, 20 Ind. 9; Jones v. Stanstead S. & C. R. R. Co., L. R. 4 P. C. App. 98, 120; McLean v. Great Western Railway Company, 33 Up. Can. Q. B. 198; Mitchell v. Franklin & C. Turnpike Company, 3 Humph. (Tenn.) 456; Brown v. Beatty, 34 Miss. 227; Dodge v. Essex Co. Commissioners, 3 Met. (Mass.) 380; Kimble v. White, W. V. Canal Co., 1 Ind. 285; Calking v. Baldwin, 4 Wend. (N. Y.) 667; Grimshawe v. Grand Trunk Railway Company, 19 Up. Can. Q. B. 493; Welland v. Buffalo & L. H. Ry. Co., 30 Up. Can. Q. B. 147; s. c., 31 Up. Can. Q. B. 539; *contra*, Watson v. R. R. Co., 48 N. W. R. 1129; and McKee v. Canal Co., 125 N. Y. 353.

property.[1] The fact, that the street has not been opened to the public, is no reason for the city to claim the right to delay the payment of the compensation.[2] It would seem that, where there is an improper delay in the payment of compensation, the landowner would be entitled to recover interest on the assessed damages, or at any rate additional damages, for the detention.[3]

The right of compensation for confiscation of property under eminent domain is personal, and can be exercised only by one who was the owner of the property at the time when the property was taken.[4] As soon as the right to compensation or damages has been definitely and completely ascertained, the owner of the property may sue the corporation therefor, and have a *mandamus* to compel such corporation to collect the assessments, which, under the law, constitute the fund out of which the payment of the damages must be made.[5] As long as the proceedings are provisional and incomplete, there is no claim to compensation.[6] The claim to compensation, on the other hand, is not affected by the fact that, after proceedings for compensation have been instituted, the landowner has *platted* his adjoining property, and is selling lots adjoining the proposed streets, thus recognizing its existence.[7]

§ 248. **Apportionment of damages among lots benefited.** —In the absence of special constitutional limitations upon the power of the Legislature in the premises, it may be taken as settled law that the Legislature may confer upon municipal corporations, in opening streets and making other public improvements, the power to apportion the damages, awarded to

[1] Stewart v. Baltimore, 7 Md. 500; Johnson v. Alameda County, 14 Cal. 106.

[2] Philadelphia v. Dickson, 38 Pa. St. 247; *In re* Brooklyn Street, 118 Pa. St. 640; Griggs v. Foote, 4 Allen, 195; Shaw v. Charlestown, 3 Allen (Mass.) 538.

[3] United States v. Engeman, 46 Fed.R. 898; Weiss v. Bethlehem, 136 Pa. St. 294; Old Colony R. R. Co. v. Miller, 125 Mass. 1; Newgass v. Ryles, (Ark. 91) 15 S. W. Rep. 188; Phillips v. So. Park Com'rs, 119 Ill. 626; Haley v. Philadelphia, 68 Pa. St. 45, 48, 49; Fink v. Newark, 40 N. J. L. 11; Longworth v. Cincinnati, 48 Ohio St. 637.

[4] King v. New York, 102 N. Y. 171.

[5] Donnelly v. Brooklyn, 121 N. Y. 9; Shaw v. Charlestown, 3 Allen (Mass.) 538; Board v. Buffalo, 63 Hun, 565; Philadelphia v. Dyer, 41 Pa. St. 463; Rome v. Jenkins, 30 Ga. 154; Sage v. Brooklyn, 89 N. Y. 189; McCormick v. Brooklyn, 108 N. Y. 49; Rexford v. Knight, 11 N. Y. (1 Kern.) 308; Hollingsworth v. Tensas Parish, 17 Fed. Rep. 109.

[6] Carson v. Hartford, 48 Conn. 68.

[7] Jersey City v. Sackett, 44 N. J. L. 428.

the owner of the property which is taken for public use, among the lots which are specially benefited by its improvement, and to provide by such assessments for the payment of the damages or compensation due to such property owners. And, in levying this assessment upon lots especially benefited, it is also permitted to impose its proportionate share of assessments upon the part of the land which has been left in the possession of the owner, after the condemnation of the other part in the exercise of eminent domain.[1] And the imposition of assessments for special benefits upon adjoining property, including the remainder of the land left to its owner, is held not to be restrained by the constitutional provision, which requires that the assessment of damages, for confiscation of private property for public use, is to be made without deduction for benefits.[2] The power to levy assessments for public improvements upon

[1] Plum v. Kansas City, 101 Mo. 52; Wyandotte etc. v. R. R. Co., 70 Mo. 629; Eyerman v. Blaksley, 78 Mo. 145; Longworth v. Cincinnati, 34 Ohio St. 101; Chapin v. Worcester, 124 Mass. 464; Smith v. Aberdeen, 25 Miss. 458; Genet v. City of Brooklyn, 99 N. Y. 296; Burlington v. Quick, 47 Iowa, 222; Loweree v. Newark, 38 N. J. L. 155; Platt v. Pennsylvania Co., 43 Ohio St. 228; Howell v. Bristol, 8 Bush (Ky.) 493; Washington Av. Case, 69 Pa. St. 352; People v. Brooklyn, 4 N. Y. 419; Raleigh v. A. A. etc. Ry. Co., 74 N. C. 220; Weekler v. Chicago, 61 Ill. 142; Dorgan v. Boston, 13 Allen (Mass.) 223; Boston Seamen's F. Soc. v. Boston, 116 Mass. 181; Williams v. Cammack, 27 Miss. 209, 224; Nichols v. Bridgeport, 23 Conn. 189, 207; G. &. C. R. R. Co. v. Partlow, 5 Pick. L. 428; Morin v. St. Paul M. & R. Ry. Co., 30 Minn. 100; Stroud v. Philadelphia, 61 Pa. St. 255; Mt. Washington Co.'s Petition, 35 N. H. 134; Hussen v. Rochester, 65 N. Y. 516; State v. Portage, 12 Wis. 562.

[2] Cleveland v. Wick, 18 Ohio St. 303. But see, generally, in respect to the effect of such constitutional provisions, Carpenter v. Jennings, *et al.*, 77 Ill. 250; Ala. & F. R. R. Co. v. Burkett, 42 Ala. 83; Schenley v. Allegheny, 25 Pa. St. 128; St. L. A. & T. Ry. Co. v. Anderson, 39 Ark. 167; Atlanta v. Central R. R. & B. Co., 53 Ga. 120; Swayze v. New Jersey M. Ry. Co., 36 N. J. L. 295; Paducah etc. R. R. Co. v. Stovall, 12 Heisk. 1; Henderson etc. Ry. Co. v. Dickerson, 17 B. Mon. 173; Edgerton v. Green Cove Springs, 19 Fla. 140; Egyptian Levee Company v. Hardin, 27 Mo. 495; Washington Av. Case, 69 Pa. St. 352; s. c., 8 Am. Rep. 255; Livingston v. Mayor, 8 Wend. (N. Y.) 85; Britton v. Des Moines, etc. R. R. Co., 59 Iowa, 540; Milwaukee & N. R. R. Co. v. Strange, 63 Wis. 178; Williams v. Detroit, 2 Mich. 560; Cone v. Hartford, 28 Conn. 363, 374; Macon v. Patty, 57 Miss. 397; Fremont, E. & M. V. R. R. Co. v. Whalen, 11 Neb. 585; Argenti v. San Francisco, 16 Cal. 255; Clapp v. Hartford, 35 Conn. 66; Emery v. San Francisco Gas Co., 28 Cal. 345; Howard v. Church, 18 Md. 451.

abutting owners is also not in contravention of the constitutional provision, that property subject to taxation shall be taxed in proportion to its value; or of the constitutional provisions, which require equal and uniform taxation throughout the State.[1]

§ 249. **Revisory proceedings—Certiorari.**—Unless some special remedy, or the right of appeal, is given to the property owner in the case of confiscation of private property for public use, it has been very generally held that *certiorari* will lie against a town or municipal corporation for the purpose of furnishing to the property owner an opportunity of securing a revision of the proceedings instituted by the municipal corporation, in appropriating private property to public use, and for setting aside all such proceedings, whenever they are ascertained to be invalid.[2] In Vermont it is held that a writ of *mandamus*, in the nature of a *procedendo* may be employed as well as the *certiorari*,[3] but the court will not employ equitable remedies for protection of the property owner, as long as the legal remedies of *certiorari* and *mandamus* prove to be efficient remedies for his protection.

In compliance with the general rule for determining the scope of equitable jurisdiction, the court of equity, or a court in the

[1] Garrett v. St. Louis, 25 Mo. 505; State v. St. Louis, 62 Mo. 244; Amer. B. N. Co. v. N. Y. E. R. R., 13 N. Y. S. 626; Suarez v. Man. R. Co., 15 N. Y. S. 224; Washington Avenue, *In re*, 69 Pa. St. 352; s. c., 8 Am. Rep. 255. The general subject of assessment is more fully discussed in the succeeding paragraphs on taxation. See *post*, §§ 277–282.

[2] Com'rs v. Newby, 31 Ill. App. 378; Trainer v. Lawrence, 36 Ill. App. 90; Slater v. Kansas City, 89 Mo. 34; People v. Stedman, 10 N. Y. S. 787; Detroit etc. R. R. Co. v. Backus, 48 Mich. 582; Detroit etc. R. R. Co. v. Graham, 46 Mich. 642; State etc. R. R. Co. v. Hudson etc. Co., 38 N. J. L. 548; Campan v. Detroit, 14 Mich. 276; State v. Cockrell, 2 Rich. Law, 6; Parks v. Boston, 8 Pick. 218; Phillips v. County, 83 Me. 541; 22 Atl. 385; McCrary v. Griswold, 7 Iowa, 248; Spray v. Thompson, 9 Iowa, 40; Slate v. Stewart, 5 Strobh. L. 20; California R. R. R. Co. v. Cent. P. R. R. Co., 47 Cal. 528; Delaware, L. & W. R. Co. v. Buxson, 61 Pa. St. 369; Dorchester v. Wentworth, 31 N. H. 451; People v. Moore, 60 Hun, 586; French v. Springwells H. Com'rs, 12 Mich. 267; Bridgen v. Bannerman, 8 Jones (N. C.) 53; Baldwin v. Bangor, 36 Me. 518; *In re* Roaring Brook, 21 Atl. Rep. 412; 28 W. N. C. 141; Myers v. Simms, 4 Iowa, 500; Gay v. Bradstreet, 39 Me. 580; Preble v. Portland, 45 Me. 241; Stone v. Boston, 2 Met. 220; Dwight v. Springfield, 4 Gray, 107.

[3] Adams v. Newfane, 8 Vt. 271; Lyman v. Burlington, 22 Vt. 131; Woodstock v. Gallup, 28 Vt. 587.

exercise of its equitable jurisdiction, will not undertake revisory proceedings, except when it is demonstrated that the common law remedies are inadequate to protect the property owner from loss or damage.[1] A municipal corporation will not be interfered with by injunction, unless legal remedies prove inadequate.[2] It has been held in Missouri, that where land has been wrongfully taken by a city and appropriated to a public use, the owner of the land may maintain ejectment against the city for the recovery of such lands.[3]

It is possible, perhaps, under some circumstances, to employ

[1] Harvey v. Kansas etc. Co., 48 Kan. 228; Knox v. Metro. R. R. Co., 58 Hun, 517; Hartley v. Keokuk etc. Co., (Iowa, 92) 52 N. W. R. 352; Guest v. Brooklyn, 69 N. Y. 506; Anderson v. St. Louis, 47 Mo. 479, 486; Leslie v. St. Louis, 47 Mo. 474; Hannewinkle v. Georgetown, 15 Wall. 547; Miller v. Mobile, 47 Ala. 163; s. c., 11 Am. Rep. 768. "Of these grounds for relief, the principal are," says Mr. Justice Field, giving the judgment of the Supreme Court, in Ewing v. St. Louis, 5 Wall. 413, "that the proceedings were taken without notice to the complainant, or any appearance by him; that the notice provided by law was not published or required; that no provision was made for compensation for the property taken; that no power to render judgment was vested in the mayor by the Legislature or charter, and that the statute under which the proceedings purported to have been taken was repealed before the proceedings were completed. These grounds are, by the demurrer, admitted to be true; and being true, no reason exists upon which to justify the interposition of a court of equity. . . The second object of the bill—the obtaining of compensation for the property actually appropriated by the city—falls with the first. If the proceedings for its appropriation were void, the title remains in the complainant, and he can resort (unless the Legislature has required him to pursue a particular remedy) to the ordinary remedies afforded by law for the recovery of the possession of the real property wrongfully withheld, or for the redress or trespass upon it."

[2] Zimmerman v. Kearney Co., (Neb. 92) 50 N. W. R. 1126; Henry v. Dubuque & Pac. R. R. Co., 10 Iowa, 580; Van de Vere v. Kansas City, (Mo. 92) 17 S. W. R. 695; Lafayette v. Bush, 19 Ind. 326; Kansas etc. Co. v. Payne, 49 Fed. 114; 4 U. S. App. 77; Sower v. Philadelphia, 35 Pa. St. 231; Ohio Riv. R. Co. v. Ward, 14 S. E. R. 142; 35 W. Va. 481; Gardner v. Newburgh Trs., 2 Johns. Ch. 162; Illinois etc. Co. v. Chicago, (Ill. 92) 28 N. E. R. 740; Miller v. Morristown, 47 N. J. Eq. 62; McDaniel v. Columbus, 13 S. E. R. 745; 87 Ga. 440; Mont. etc. Co. v. R. R. Co., 12 Pack. 916; West Md. Ry. Co. v. Owings, 15 Md. 199; Walker v. Mad River & L. R. R. Co., 8 Ohio, 38.

[3] Anderson v. St. Louis, 47 Mo. 484; Hammerslough v. Kansas City, 57 Mo. 219; Armstrong v. St. Louis, 69 Mo. 309.

the remedy of prohibition, in restraining illegal proceedings of condemnation to public use.[1]

§ 250. **Effect of accepting damages.**—The voluntary acceptance of damages by the property owner will, in the absence of proof of fraud or mistake of fact, operate as a bar to any subsequent inquiry into the illegality or regularity of the proceedings, instituted and conducted for the condemnation of land for public use. The owner is estopped by the acceptance of such damages from disputing the legality of such proceedings.[2] Thus, any delay in the deposit and payment of money may be a serious irregularity; but the actual receipt for damages by the party, who is entitled to them, will operate as a waiver of such delay, and a ratification of the proceedings.[3] Defective proceedings, in the exercise of the right of eminent domain, may also be confirmed or ratified by legislative authority.[4]

[1] See Williams, *In re*, 4 Ark. 537; Arnold v. Shields, 5 Dana (Ky.) 18; State v. Walkely, 2 Nott & McCord (S. C.) 410; Mayo v. James, 12 Gratt. (Va.) 17; Warwick v. Mayo, 15 Gratt. (Va.) 528.

[2] Commonwealth v. Shuman's Adm., 18 Pa. St. 343; Burns v. Milw. & Miss. R. R. Co., 9 Wis. 450; Smith v. Warden, 19 Pa. St. 426; State v. Stanley, 14 Ind. 409; Magrath v. Brock. Tp., 13 Up. Can. Q. B. 629; Kile v. Yellowhead, 80 Ill. 208; Hartshorn v. Potroff, 89 Ill. 509; Rees v. Chicago, 38 Ill. 322; Town v. Blackberry, 29 Ill. 137; Pursley v. Hays, 17 Iowa, 310; Deford v. Mercer, 24 Iowa, 118; 2 Smith Lead Cas. (5 Am. ed.) 662; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234 (1871).

[3] Hawley v. Harrall, 19 Conn. 142, 151; Embury v. Conner, 3 N. Y. 511; Ib. 197; Arnot v. McClure, 4 Denio (N. Y.) 45; Striker v. Kelly, 7 Hill (N. Y.) 9; s. c. in error, 2 Denio, 323; Doughty v. Hope, 3 Denio (N. Y.) 249; Kennedy v. Newman, 1 Sandf. (N. Y.) 187.

[4] Yost's Report, 17 Pa. St. 524; Bennett v. Fisher, 26 Iowa, 497 (1868); Baltimore v. Horn, 26 Md. 194 (1866); Lennon v. New York, 55 N. Y. 361, 365 (1874); Indianapolis v. Kingsbury, 101 Ind. 200.

CHAPTER XV.

MUNICIPAL TAXATION AND LOCAL ASSESSMENTS.

§ 253. **Taxation defined and distinguished from eminent domain and police power.**—Taxation may be defined to be the power of government to compel the citizens and proprietors of property to contribute money to the support of the government, and the maintenance of public institutions and interests. It

is to be distinguished from the right of eminent domain, in that the right of eminent domain involves the appropriation of private property to public use upon payment of compensation to the owner, whereas taxation involves an appropriation of the property of private individuals, irrespective of any special compensation for the same.[1]

Although the benefits, accruing to the people of a community from the expenditure of the money collected by taxation, may be maintained as the compensation received by the taxpayers, and as justifying the exercise of the power of taxation; yet, that is never a condition precedent to the exercise of the power, except so far as it requires that taxation should only be imposed for some public use or purpose. Irrespective of any inquiry into the existence of a benefit, resulting to the taxpayers from the expenditure of the money collected by taxation, the exercise of the power cannot be contested. The citizen owes that duty to the government, and as such must submit to its exercise. This is certainly the case in regard to the imposition of taxes upon citizens or residents of the country, in whose behalf the tax is imposed. But where, as is permissible, the government undertakes to impose a tax upon the lands and upon other property, whose *corpus* is located within the territory of such country, but whose owner is not domiciled therein, some other ground than that of civic duty must be found, upon which to rest the power of taxation. It has been elsewhere asserted by the author[2] that the power to tax lands of non-resident owners, is in fact an exercise by the State of its rights as an ultimate owner of such lands, and that it is in the nature of a rent due to the State as the ultimate landlord. But, whether this reason for the exercise of the power of taxation over the real property of non-resident owners be just or not, there is no question that the power to exercise the right of taxation over such property is universally asserted and exercised.

[1] Stewart v. Polk Co., 30 Iowa, 9; Williams v. Detroit, 2 Mich. 565; People v. Salem, 20 Mich. 477; No. Ind. R. R. Co. v. Connelly, 10 Ohio St. 165; 1 Desty Taxation, sec. 11, p. 31; 1 Hare Am. Const. Law, 332; People v. Brooklyn, 4 N. Y. 419 (1851); Litchfield v. Vernon, 41 N. Y. 12 (1869); Gilman v. Sheboygan, 2 Black (U. S.) 510 (1862); Moale v. Baltimore, 5 Md. 314 (1854). Eminent Domain. Hanson v. Vernon, 27 Iowa, 28, 54 (1869).

[2] See Tiedeman's Limitations of Police Power, § 115.

There is also the same necessity for raising a distinction between the power of taxation and the police power of the government. It has been elsewhere asserted by the writer,[1] that the power of taxation is but one phase of the police power of the government. But, whether that be true or not, the power of taxation is certainly distinguishable from the ordinary exercise of police power; and the necessity for that distinction is most marked, when an inquiry is made into the power of the government to impose a tax upon the trades and professions. The necessity is felt in that instance of distinguishing between the license, which is required of one pursuing a particular trade or calling, as a police regulation for the purpose of preventing injuries to the public by an improper prosecution of the trade or business, and the license tax, which is imposed upon such trade or business for the purpose of revenue solely. Where the license is a police regulation, as in the case of licenses exacted from liquor dealers and proprietors of saloons, the justification for the exercise of the power, and the requirement of the license, is to be found in the injurious character of the business, when permitted to be conducted without police supervision. And the extent of the power is determined by the necessity for such police regulation to prevent the anticipated evils resulting from the prosecution of the business. But where the license is a tax, imposed upon the trade or business for the purpose of increasing the revenue of the city or town, then it is brought within the taxing power of the government; and the exercise of such power is limited only by those provisions of the constitution, which control the exercise of the power of taxation. This matter has been more fully explained and the cases digested in the writer's work on the Limitations of Police Power,[2] and, elsewhere, in the present volume.[3]

§ 254.—**Taxation authorized only for public purposes.**— The levy of a tax is only permissible, except under tyrannical government, when it is made for a public purpose; and it is proportioned uniformly among the subjects of taxation. When the tax is imposed for some private or individual benefit, or it is not uniformly imposed upon those who ought to bear it; it is perfectly proper, nay, it is the duty of the courts to interfere

[1] See Tiedeman's Limitations of Police Power, p. 481, note.

[2] § 101.

[3] §§ 123, 124.

and prohibit what may be justly called an extortion.[1] But the term "public purpose" must not be used in this connection in any narrow sense. Taxes are levied for a public purpose, not only when they are designed to pay the salaries of government officials, to erect and keep in repair government buildings; to maintain the public roads, harbors and rivers in a fit condition, and to provide for the defences of the country; but also for all purposes of public charity. It is a public purpose to erect with State funds, obtained from taxes, penitentiaries, orphan and lunatic asylums, hospitals and lazarettos, public schools and colleges. But it is only for the support of public charities that the government may tax the people. A levy of a tax for a donation to some private benevolent or charitable institution is void.[2] It is a public purpose to provide pensions for the soldiers and other employees of the government, when they have become disabled in service or superannuated.[3] And wherever there is a reasonable doubt as to the character of the purpose for which the tax was levied, the doubt should be solved in favor of the power of the Legislature to lay the tax.[4]

But if the purpose be truly private; if the tax in effect takes the property of one man and gives it to another, it is illegal

[1] "It is the clear right of every citizen to insist that no unlawful or unauthorized exaction shall be made upon him under the guise of taxation. If any such illegal taxation is attempted, he can always invoke the aid of the judicial tribunals for his protection, and prevent his money or other property from being taken and appropriated for a purpose and in a manner not authorized by the constitution and laws." Bigelow, Ch. J., in Freeland v. Hastings, 10 Allen, 570, 575. See, also, to the same effect, Hooper v. Emery, 14 Me. 375; Allen v. Jay, 60 Me. 124 (11 Am. Rep. 185); Talbert v. Hudson, 16 Gray, 417; Weismer v. Douglass, 64 N. Y. 91 (21 Am. Rep. 588); Tyson v. School Directors, 51 Pa. St. 9; Washington Avenue, 69 Pa. St. 352 (8 Am. Rep. 255); People v. Township Board of Salem, 20 Mich. 452; People v. Supervisors of Saginaw, 26 Mich. 22; Fergusou v. Landran, 5 Bush, 230; Morford v. Unger, 8 Iowa, 82; Hansen v. Vernon, 27 Iowa, 28.

[2] St. Mary's Industrial School v. Brown, 45 Md. 310.

[3] Booth v. Woodbury, 32 Conn. 118; Speer v. School Directors of Blairville, 50 Pa. St. 150.

[4] "To justify the court in arresting the proceedings and declaring the tax void, the absence of all public interest in the purposes for which the funds are raised must be clear and palpable; so clear and palpable as to be perceptible by every mind at the first blush." Per Dixon, Ch. J., in Brodhead v. City of Milwaukee, 19 Wis. 624, 652. See Spring v. Russell, 7 Me. 273; Mills v. Charleton, 29 Wis. 411 (9 Am. Rep. 578).

and it is the duty of the courts to enjoin its collection.[1] For example, it has been held unlawful to levy taxes in aid of manufacturing and other private industrial enterprises,[2] for the relief of farmers, whose crops have been destroyed, to supply them with seeds and provisions,[3] or for making loans to persons whose homes have been destroyed by fire.[4] It has also been held illegal to pay a subscription to a private corporation which is to be devoted to a private purpose.[5] On the other hand, it has been repeatedly held that the Legislature may authorize counties and municipal corporations to subscribe for capital stock in railroad companies, in aid of their construction, and may levy a tax in order to pay the subscription.[6]

[1] "The legislature has no constitutional right to . . . lay a tax, or to authorize any municipal corporation to do it in order to raise funds for a mere private purpose. No such authority passed to the assembly by the general grant of the legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interest or welfare, it ceases to be taxation and becomes plunder. Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the Legislature to usurp any other power not granted to them." Black, Ch. J., in Sharpless v. Mayor etc., 21 Pa. St. 147, 168.

[2] Loan Association v. Topeka, 20 Wall. 655; Opinions of Judges, 58 Me. 590; Allen v. Jay, 60 Me. 124 (11 Am. Rep. 185); Commercial Bank v. Iola, 2 Dill. 353.

[3] State v. Osawkee, 14 Kan. 418. But the United States, as well as the State governments, have frequently come with the public funds to the rescue of people of sections which have been inundated by floods, or devastated by disease or fire; and it would seem that the State aid under such circumstances differed little if at all from the ordinary bestowal of alms upon the poor, and is equally justifiable, as being a public charity.

[4] Lowell v. Boston, 111 Mass. 454 (15 Am. Rep. 39).

[5] Weismer v. Douglass, 64 N. Y. 91 (21 Am. Rep. 586).

[6] Zabriskie v. Cleveland, C. & R. R. Co., 23 How. 381; Bissell v. City of Jeffersonville, 54 How. 287; Amey v. Allegheny City, 24 How. 364; Curtis v. Butler Co., 24 How. 435; Mercer Co. v. Hacket, 1 Wall. 83; Gelpcke v. City of Dubuque, 1 Wall. 175; Seybert v. City of Pittsburgh, 1 Wall. 272; Van Hortrup v. Madison City, 1 Wall. 291; Meyer v. City of Muscatine, 1 Wall. 384; Havemeyer v. Iowa Co., 3 Wall. 294; Thomson v. Lee Co., 3 Wall. 327; Rogers v. Burlington, 3 Wall. 654; Mitchell v. Burlington, 4 Wall. 270; Campbell v. City of Kenosha, 5 Wall. 194; Riggs v. Johnson, 6 Wall. 166; Lee Co. v. Rogers, 7 Wall. 181; Chicago B. & Q. R. R. Co. v. County of Otoe, 16 Wall. 667; Gilman v. Sheboygan, 2 Black, 510; Tipton Co. v. Rogers L. & M. Works, 103 U. S. 523. The cases from the State courts are too numerous to cite in detail. But see, to the same ef-

Since the Legislature is prohibited from making levies for private purposes, it cannot authorize municipal corporations to do so.[1]

In addition to this general proposition limiting the exercise of the power of taxation to the provision of means for the effectuation of public purposes, there is a special provision in many of the State Constitutions,—and which is probably implied from the general provisions of all of them,—that the exercise of the power of taxation by a municipal corporation must be limited to local or corporate purposes. It is not permitted, in other words, of a municipal corporation to exercise the right of taxation for any other but local or municipal purposes. This is especially provided in the Constitution of Illinois.[2] It has also been held that a State reform school was a State institution, and not a local one, and that therefore taxation could not be levied by a city or town for the purpose of maintaining and supporting such a school.[3] So, likewise, the taxation for the maintenance of bridges and highways.[4] It is very plain that under no circumstances can a municipal corporation tax itself for the benefit of any private institution or business, even though the successful establishment of either of them may work a consequential benefit to the community.[5] It has also been held, under the same constitutional provision, that taxes should be levied by municipal corporations for corporate purposes, only when it is possible for the municipal corporation to levy such a tax through its lawfully constituted authority, and that the State could not compel the community to pay taxes which are levied by officers appointed by the State.[6] But where the peo-

fect, Supervisors of Portage Co. v. Wis. Cent. R. R. Co., 121 Mass. 467; Augusta Bank v. Augusta, 49 Me. 500; Williams v. Duanesburg, 66 N. Y. 129; Brown v. County Com'rs, 21 Pa. St. 37; St. Louis v. Alexander, 23 Mo. 483; Smith v. Clark Co., 54 Mo. 58. See, also, §§ 184–186, for a fuller discussion of this subject.

Attorney-General v. Eau Claire, 37 Wis. 400.

[2] Spencer v. People, 68 Ill. 510 (1873); Murphy v. People, 120 Ill. 234; Constitution of Illinois, art. IX. sec. 5; Harward v. St. Clair & M. Levee & Dr. Co., 51 Ill. 130; Primm v. Belleville, 59 Ill. 142 (1872).

[3] The Supervisors of Livingston County v. Weider, 427 (1872).

[4] Will Co. Sup. v. People, 110 Ill. 511. But see Burr v. Carbondale, 76 Ill. 455; Southern Illinois University and Merrick v. Amherst, 12 Allen (Mass.) 500, where it was held that municipal bonds could be issued in aid of State universities.

[5] Jenkins v. Andover, 103 Mass. 94.

[6] People v. Chicago, 51 Ill. 17; s. c.,

ple of the municipality adopt or accept the indebtedness incurred in their names by State commissioners, the adoption of the debt is an implied appointment of the commissioners as agents of the municipality, and makes their acts valid and binding upon the corporation to the extent of the taxes levied by them, for the settlement of the debts which were incurred in the name of the municipality.[1]

§ 255. **Municipal authority to levy taxes whence derived.** —It is manifest that the power to levy taxes is in the first instance alone vested in the Legislature of the State; and no subordinate body politic may, for any other purpose whatever, impose taxes upon the public, unless the power to impose such taxes has been lawfully conferred upon it by the Legislature.

Even in the absence of express constitutional provisions, the Legislature has the power, as an implication from the power to create local and municipal corporations, to vest such municipalities and local instruments of government with the power to levy taxes for corporate purposes upon the persons and property, coming within the jurisdiction of the body politic.[2] Not only would the power to impose taxes be construed to be a necessary implication, in order to enable the municipal government

2 Am. Rep. 278; see also Wetherell v. Devine, 116 Ill. 631; State v. Hennepin Co. Dist. Court, 33 Minn. 235.

[1] Wider v. East St. Louis, 55 Ill. 133; Gage v. Graham, 57 Ill. 144; School Trs. v. People, 63 Ill. 299.

[2] Speer v. Athens, 85 Ga. 49; Magneau v. Fremont, (Neb. 90) 47 N. W. R. 280; Tyrrell v. Wheeler, 123 N. Y. 76; Dasey v. Skinner, 11 N. Y. S. 821; 57 Hun, 593; Jones v. Chamberlain, 16 N. E. R. 72; State v. Estabrook, 6 Ala. 653; Battle v. Mobile, 9 Ala. 234; Osborne v. Mobile, 44 Ala. 493; Cincinnati v. McMicken, 6 Ohio Cir. Ct. R. 188; Hurford v. Omaha, 4 Neb. 336; St. Louis v. Laughlin, 49 Mo. 659; People v. Hurlbut, 24 Mich. 44; State v. Noyes, 30 N. H. 279; Cheaney v. Hooser, 9 B. Mon. (Ky.) 330; Slack v. Maysville & Lex. R. R. Co., 13 B. Mon. 1; San Luis Obispo v. Pettit, 87 Cal. 499; People v. Kelsey, 34 Cal. 470; Harrison v. Vicksburg, 11 Miss. 581; Ranken v. Henderson, 7 S. W. Rep. 174; Shreveport v. Jones, 26 La. An. 708; Dowling v. Allschrel, (Cal. 93) 33 Pac. 532; Stein v. Mobile, 24 Ala. 591; Niles v. Albany, (Vt.) 7 Atl. Rep. 601; Alexander v. Baltimore, 5 Gill (Md.) 383, 393; Hope v. Deaderick, 8 Humph. (Tenn.) 1; Smith v. Aberdeen, 25 Miss. 458; Anderson v. Mayfield (Ky. 92), 19 S. W. Rep. 598; Washington v. State, 13 Ark. 752; Butler's Appeal, 73 Pa. St. 448; Kinney v. Zimpleman, 36 Tex. 554; Schultes v. Eberly (Ala. 87) 2 So. R. 345; Bull v. Read, 13 Gratt. 78, 98; Caldwell v. Burke Co. Jus., 4 Jones Eq. (N. C.) 323.

to successfully perform the duties imposed upon it by the State, but the delegation of the power of taxation to a municipal corporation is demanded by public sentiment, which studiously and persistently resists the imposition of taxes for local purposes by any other power but the local government. The authorization of local taxation is in close harmony with the political sentiment that pervades Anglo-Saxon countries in support of local self-government.[1] But the Legislature cannot confer the power of taxation upon a municipal corporation to a greater extent than what it possesses itself; and, therefore, the power of the municipality to impose taxes is limited by the same restrictions and limitations of the constitution, which the Legislature must itself observe.[2] The special limitations will be referred to in a subsequent connection.[3]

§ 256. **Municipal power to tax when implied.**—Although the general rule is laid down that the power of taxation cannot be exercised by the municipal corporation except when it has been conferred upon it by the Legislature; and it is further provided that the corporation cannot levy a tax, unless the power to do so is plainly and clearly conferred upon it;[4] yet

[1] State *ex rel.* Jameson v. Denny, 118 Ind. 382; Evansville v. State, Ib. 426; State *ex rel.* Holt v. Denny, Ib. 449.

[2] Moore v. St. Paul, (Minn. 92) 51 N. W. R. 219; Brooks v. Mangam, 86 Mich. 576; Memphis v. Hernando Ins. Co., 6 Baxter, 527; Reineman v. Cov., C. & B. H. R. R. Co., 7 Neb. 310; Lancaster v. Clayton, (Ky. 92) 5 S. W. Rep. 864; *Ex parte* Montgomery, 64 Ala. 463; Sayre v. Phillips, 30 W. N. C. 196; Union Bank of Tenn. v. State, 9 Yerg. (Tenn.) 490; and see, Weightman v. Clark, 103 U. S. 256; O'Donnell v. Bailey, 24 Miss. 386; No. Mo. R. R. Co. v. Maguire, 49 Mo. 490, 500; Erie v. Reed's Ex., 113 Pa. St. 468; Nashville v. Thomas, 5 Coldw. (Tenn.) 600; Clark v. Leathers, 5 S. W. R. 576.

[3] See §§ 258, 259, *et seq.*

[4] Parsons v. Northampton, 154 Mass. 410; Covington etc. Co. v. Covington, (Ky. 92) 17 S. W. R. 808; Gage v. Nichols, (Ill.) 25 N. E. R. 672; Board v. Currituck, 107 N. C. 110; Tacoma L. Co. v. Pierce Co., 1 Wash. St. 482; Kniper v. Louisville, 7 Bush, 593; Lum v. Bowie, 18 S. W. Rep. 142; M. E. Church, *In re*, 66 N. Y. 396; Jacksonville v. Ledwith, (Fla.) 7 So. Rep. 885; Sewall v. St. Paul, 20 Minn. 511; Lot v. Ross, 38 Ala. 156, 161; People v. Coffey, 21 N. Y. S. 34; *In re* Walnut St., 10 Pa. Co. Ct. 173; Swamp Land Dist. v. Haggin, 64 Cal. 204; Green v. Ward, 82 Va. 324; Scammon v. Chicago, 40 Ill. 146; English v. People, 96 Ill. 566; State v. Van Every, 75 Mo. 530; State v. Jersey City, 26 N. J. L. 444; Chicago v. Wright, 32 Ill. 193; Plainfield v. Plainfield, (Wis.) 30 N. W. Rep. 672; Taylor v. Donner, 31 Cal. 480; Emery v. San Francisco Gas Co., 28 Cal. 345; St. Louis v. Laughlin, 49 Mo. 559; Schoolfield, v. Lynch

this statement must be understood with the qualification, that the power to impose a tax may be implied, whenever the implication is absolutely necessary to the exercise of some power expressly granted. Thus, it has been held by the Supreme Court of the United States, where a municipal corporation has been given the power to incur a certain obligation, that the power to levy taxes for the payment of such obligation is necessarily implied, in the absence of some express provision for the satisfaction of such obligation.[1]

But it has been held that the power to tax cannot be implied from a general welfare clause in the charter.[2] So, also, has it been held that, where a statute supplies the purpose for which taxes may be levied, and adds "or for any other purpose they may deem necessary," this general clause will only authorize the exercise of the power of taxation for purposes similar to those, which have been already enumerated.[3] Thus, special assessments for local improvements cannot be enforced by fines or penalties, which are imposed by ordinances, and are not provided for in the charter authorizing the local assessment.[4] It

burg, 78 Va. 366; Port Townsend v. Sheehan, (Wash. 93) 33 Pac. Rep. 427; Leavenworth v. Norton, 1 Kan. 432; Burner v. Atchison, 2 Kan. 454; Murray v. Tucker, 10 Bush, 249; Stone v. Mobile, 57 Ala. 61; Beatty v. Knowles, 4 Pet. 152; Henry v. Chester, 15 Vt. 460; Dyckman v. New York, 1 Seld. (5 N. Y.) 434; State v. Guttenberg, 39 N. J. L. 660; Asheville Commissioners v. Means, 7 Ired. L. (N. C.) 406; Jonas v. Cincinnati, 18 Ohio, 318; Mays v. Cincinnati, 1 Ohio St. 268; Zanesville v. Richards, 5 Ohio St. 589; Fairfield v. Ratcliff, 20 Iowa, 396; Va. & Tenn. R. R. Co. v. Washington Co., 30 Gratt. 471; Sharp v. Spier, 4 Hill (N. Y.) 76; Sharp v. Johnson, Ib. 92; Manice v. New York, 8 N. Y. 120; Oregon S. Nav. Co v. Portland, 2 Oreg. 81; Harmony Tp. Trs. v. Osborne, 9 Ind. 458; Henderson v. Baltimore, 8 Md. 352; Rathbun v. Acker, 18 Barb. (N. Y.) 393; Howell v. Buffalo, 15 N. Y. 512; Burnett v. Buffalo, 17 N. Y. 383.

[1] United States v. Orleans, 78 U. S. 341; Ralls Co. Ct. v. United States, 105 U. S. 733; State v. Toledo, (Ohio 92) 26 N. E. R. 1061; Meriwether v. Garrett, 102 U. S. 472; Chicago v. Wright, 32 Ill. 192; Wright v. Chicago, 20 Ill. 252; Columbia v. Hunt, 5 Rich. (S. C.) 550; Annapolis v. Harwood, 32 Md. 471; Taylor v. McFadden, 50 N. W. Rep. 1070; State v. Maysville, 12 S. C. 76; Fairfield v. Ratcliff, 20 Iowa, 396; but see *contra*, Jeffries v. Lawrence, 42 Iowa, 498.

[2] Mays v. Cincinnati, 1 Ohio St. 268.

[3] Drake v. Phillips, 40 Ill. 388; Hyde Park v. Borden, 94 Ill. 26; Pomfrey v. Saratoga, (N. Y.) 11 N. E. R. 43; Asheville Com'rs v. Means, 7 Ired. L. 406.

[4] Augusta v. Dunbar, 50 Ga. 387 (1873); see Ottawa v. Spencer, 40 Ill. 211; Gridley v. Bloomington, 88 Ill. 555.

has also been held that the power, to levy a special tax for lighting a city, will not authorize the addition of a percentage for the collector's fees, or for the cost of the proceedings before the mayor. The service and expense must be provided for out of the general revenue of the city.[1] It would, however, be unconstitutional for a Legislature to provide, that no cost shall be recovered against the city in suits brought against it.[2] The power to levy a tax for purposes of revenue is ordinarily not to be implied from an authority to license and regulate certain trades and occupations.[3] It has also been held that the power to tax a community, for the payment of the expense of procuring the location of a railroad along the line of a town, cannot be implied from the power to make by-laws, which are necessary "to promote the peace, good order, benefit and advantage" of a corporation, and to assess taxes that may be necesary to carry such power into effect.[4] And where the power to levy a tax has a *proviso* annexed thereto, the power cannot be exercised, except in compliance with the terms and conditions of the *proviso*.[5]

§ 257. **Legislature may change the taxing power of municipalities at will.**—Except so far as the legislative power of control over the municipal power of taxation is restrained by a constitional provision, protecting the rights of the creditors against subsequent legislative interference,[6] the Legislature has full power to change, modify or enlarge at its pleasure the taxing power of a municipality; and may even take away such power of taxation from the municipal government, and vest it in a board of commissioners.[7]

[1] Minn. Linseed Oil Co. v. Palmer, 20 Minn. 468, 475; Bucknall v. Story, 36 Cal. 67; Williams v. Detroit, 2 Mich. 560; Jones v. Cincinnati, 18 Ohio, 318-323; Nelson v. La Porte, 33 Ind. 258.

[2] Durkee v. Janesville, 28 Wis. 464.

[3] Tiedeman's Limitations of Police Power, § 101; Columbia v. Beasley, 1 Humph. (Tenn.) 240; Mobile v. Yuille, 3 Ala. 137; Collins v. Louisville, 2 B. Mon. (Ky.) 134; State v. Roberts, 11 Gill & J. (Md.) 506; Cincinnati v. Bryson, 15 Ohio, 625; Boston v. Schaffer, 9 Pick. 419; Cincinnati v. Buckingham, 10 Ohio, 261.

[4] Minn. etc. Co. v. Palmer, 20 Minn. 468.

[5] *In re* Methodist Church, 60 N. Y. 395.

[6] See *ante*, §§ 12, 41-43, 194, 212.

[7] Von Hoffman v. Quincy, 4 Wall. 535; State v. Newark, 11 Atl. R. 147; 49 N. J. L. 344; Butz v. Muscatine, 8 Wall. 575; McKusick v. Stillwater, 44 Minn. 372; 46 N. W. 769; Louisiana v. Pilsbury, 105 U. S. 301; Wolff v. New Orleans, 103 U. S. 358; State

§ 258. **Federal limitations on the exercise of the power of taxation.**—The United States Constitution contains several provisions, which operate to restrain the exercise of the power of taxation, both of State and municipal corporations. It has elsewhere been explained that the provision of the United States Constitution, which prohibits the passing of laws impairing the obligation of contracts, operates to restrain any curtailment or modification of the taxing power of municipal corporations where the exercise of the power of taxation has been pledged to the liquidation of the interest or principal of its existing indebtedness.[1] And the same provision of the constitution has been invoked for the purpose of invalidating an attempt of the city government to impose a special tax upon the interest due on its bonds, whether the bonds are held by a resident or nonresident. It was held that this deduction of the amount of the taxes from the bond, and the payment only of the balance of the interest due thereon, was a violation of the constitutional provision, prohibiting the passing of laws impairing the obligation of contracts.[2] The power of the State, and of the municipalities created by the State, to levy taxes, is also subject to other express and implied restrictions in the United States Constitution, designed to avoid the present conflict of authority between these two distinct branches of the government. Thus, it is expressly provided that the States cannot, without the consent of Congress, lay any imposts or duties upon imports or exports, except what might be necessary for the purpose of enforcing their inspection laws; nor can they, without the consent of Congress, lay any duty on tonnage.[3]

In the United States, the independence of the Federal and State governments of each other is guaranteed by the express

v. Brewer, 64 Ala. 287; Blanding v. Burr, 13 Cal. 343; Lansing v. County Treasurer, 1 Dillon, C. C. 522; Muscatine v. Miss. & Mo. R. R. Co., Ib. 536; Chicago etc. Co. v. Chicago, (Ill. 90) 27 N. E. R. 926; Gilman v. Sheboygan, 2 Black, 510; Aspinwall v. Daviess Co. 22 How. 364.

[1] See *ante*, § 194.

[2] Cleveland etc. Co. v. Pennsylvania, 15 Wall. 300; No. Cen. R. R. Co. v. Jackson, 7 Ib. 262; Murray v. Charleston, 96 U. S. 432.

[3] U. S. Const., art. I, § 1, cl. 3. See Tiedeman's Limitation of Police Power, § 204; Inman Steamship Co. v. Tinker, 94 U. S. 238; Packet Company v. Keokuk, 95 U. S. 80; Harbor Com'rs v. Pashley, 19 S. C. 315. See Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365; City of New Orleans v. Eclipse Towboat Co., 33 La. An. 647; 39 Am. Rep. 279; Transportation Co. v. Wheeling, 9 W. Va. 170.

and implied limitations of the constitution, in order that the success of the system may be assured. And to such an extent is this limitation upon the power of both considered necessary, that it has been held by the courts, that neither the United States nor the State can tax the agencies of the government of the other. Thus, the State cannot lay a tax upon the securities of the national government. The courts hold "that the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those measures, is declared to be supreme over that which exerts the control, are propositions not to be denied."[1] Nor can the United States lay a tax upon the securities and other agencies of the State government.[2] For these reasons

[1] Marshall, Ch. J., in McCulloch v. Maryland, 4 Wheat. 316, 413; Weston v. Charleston, 2 Pet. 449; Bank of Commerce v. New York City, 2 Black, 620; Bank Tax Case, 2 Wall. 200; Society of Savings v. Conite, 6 Wall. 594; Van Allen v. Assessors, 3 Wall. 573; People v. Commissioners, 4 Wall. 244; Bradley v. People, 4 Wall. 459; Banks v. The Mayor, 7 Wall. 16; Bank v. Supervisors, 7 Wall. 26. Revenue stamps are not taxable. Palfrey v. Boston, 101 Mass. 329. United States treasury notes are not taxable. Montgomery Co. v. Elston, 32 Ind. 27. See People v. United States, 93 Ill. 30 (34 Am. Rep. 155), in which the power of the State to tax the property of the United States held by private individuals for any purpose was denied. See State v. Jackson, 33 N. J. 450; Union Pac. R. R. Co. v. Peniston, 18 Wall. 5 (1873); Thomson v. Union Pac. R. R. Co., 9 Wall. 579; Union Pac. R. R. Co. v. Lincoln County, 1 Dillon C. C. R. 314 (1871); sec. 775; State v. Central Pac. R. R. Co., 10 Nev. 47; People v. Central Pac. R. R. Co., 43 Cal. 398 (1872); McCulloch v. Maryland, 4 Wheat. 316, 424; Weston v. Charleston, 2 Pet. (U. S.) 449 (1829); reversing s. c., 1 Harper Eq. (S. C.) 340; First Nat. Bank of Louisville v. Commonwealth, 9 Wall. 353; Osborn v. Bank of U. S., 9 Wheat. 738; Desty Taxation, sec. 20, p. 67.

[2] Collector v. Day, 11 Wall. 113; Ward v. Maryland, 12 Wall. 418; Railroad Company v. Peniston, 18 Wall. 5; Fifield v. Close, 15 Mich. 505. "In respect to the reserved powers, the State is as sovereign and independent as the general government. And if the means and instrumentalities employed by the government to carry into operation the powers granted to it are necessarily, and for the sake of self-preservation, exempt from the taxation by the States, why are not those of the States depending upon their several powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States

it has been held that the State cannot tax the property of a bank, or the bank itself, which has been established by the United States government, as a governmental agency, as was the old Bank of the United States, or the present national banks.[1] So, also, has it been held incompetent for a State to tax the salary of a United States official.[2] On the same ground, it has been held that the act of Congress, declaring the papers used in judicial process, either as pleadings or as evidence, shall be invalid unless stamped, was unconstitutional in its application to the State courts.[3] And it has, likewise, been held incompetent for the United States to declare an ordinary contract or deed, which is valid according to the State law, invalid because it has not been stamped.[4]

So, also, the State and its municipalities cannot impose any tax upon interstate commerce, as long as the subject-matter constitutes interstate commerce. Thus, it has been held that State laws, exacting a license tax from drummers or traveling salesmen, engaged in interstate commerce, are unconstitutional, because they constitute a tax upon interstate commerce.[5] But

from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations are subject to the control of another and distinct government, can only exist at the mercy of that government, of what avail are these means if another power may tax them at discretion?" Nelson, J., in Collector v. Day, 11 Wall. 113, 124.

[1] McCulloch v. Maryland, 4 Wheat. 316; Osborn v. United States Bank, 9 Wheat. 738. See National Bank v. Commonwealth, 9 Wall. 353.

[2] Dobbins v. Commissioners of Erie Co., 16 Pet. 435; Collector v. Day, 11 Wall. 113; Freedman v. Sigel, 10 Blatchf. 327.

[3] Carpenter v. Snelling, 97 Mass. 452; Green v. Holway, 101 Mass. 243 (3 Am. Rep. 339); Atkins v. Plimpton, 44 Vt. 21; Griffin v. Ranney, 35 Conn., 239; People v. Gates, 43 N. Y. 40; Moore v. Moore, 47 N. Y. 467 (7 Am. Rep. 466); Hale v. Wilkinson, 21 Gratt. 75; Haight v. Grist, 64 N. S. 739; Smith v. Short, 40 Ala. 385; Davis v. Richardson, 45 Miss. 499 (7 Am. Rep. 632); Bumpass v. Taggart, 26 Ark. 398 (7 Am. Rep. 623); Union Bank v. Hill, 3 Cold. 325; Hunter v. Cobb, 1 Bush, 239; Warren v. Paul, 22 Ind. 276; Craig v. Dimmock, 447 Ill. 308; Jones v. Estate of Keep, 19 Wis. 369; Sammons v. Holloway, 21 Mich. 162 (4 Am. Rep. 465); Burson v. Huntington, 21 Mich. 415 (4 Am. Rep. 497); Duffy v. Hobson, 40 Cal. 240.

[4] Moore v. Quirk, 105 Mass. 49 (7 Am. Rep. 499); Sayles v. Davis, 22 Wis. 225.

[5] Osborne v. Mobile, 16 Wall. 479; Ratterman v. West. Union Tel. Co., 127 U. S. 411; West. Union Tel. Co. v. Texas, 105 U. S. 460; Robbins v

the distinction is made in this connection between traveling salesmen who are engaged in interstate commerce, and itinerant peddlers, who are selling goods held by them, and already brought by them into the State, and which therefore have ceased to be articles of interstate commerce. It is held that the municipal corporation may tax its transient traders or peddlers, without violating any express or implied prohibition of the Federal Constitution.[1]

But in all such exactions of licenses from nonresidents, it is a further constitutional requirement that there should be no discrimination against the nonresidents, or in favor of the residents. The citizens of each State are granted by the Federal Constitution, equal participation in the privileges and immunities of the several States.[2] And the same rule applies to taxes which are imposed upon the sales of merchandise brought within the State, but belonging to the citizens of other States. A tax is valid, provided it is uniform with the similar tax imposed upon the similar goods of resident owners, and invalid if there be any discrimination in the amount of the tax or in its mode of levying against the goods of nonresident owners.[3]

Shelby Co. Tax Dist. 120 U. S. 489; Asher v. Texas, 128 U. S. 129; Leloup v. Port of Mobile, 127 U. S. 640; Chicago v. Bartee, 100 Ill. 57; Kansas v. Collins, 34 Kans. 434.

[1] *Ex parte* Heyleman, 92 Cal. 492; Martin v. Rosedale, 29 N. E. R. 410; Wiley v. Parmer, 14 Ala. 627; Wiggins v. Chicago, 68 Ill. 372; Morrill v. State, 38 Wis. 428; *Ex parte* Thomas, 71 Cal. 204; Welton v. Missouri, 91 U. S. 275; Snyder v. Crossan, 50 N. W. R. 678; *In re* Spain, 47 Fed. R. 208; Com. v. Crowell, 30 N. E. R. 1015; Webber v. Virginia, 103 U. S. 344; Warren Bor. v. Geer, 117 Pa. St. 207; Burr v. Atlanta, 64 Ga. 225; Corfield v. Coryell, 4 Wash. C. C. 380; Leloup v. Port of Mobile, 127 U. S. 649; *In re* Houston, 47 Fed. R. 539; State v. Smithson, 106 Mo. 149; Ficklin v. Taxing Dist., 145 U. S. 1; 12 S. Ct. 810; Titusville v. Brennan, 143 Pa. St. 642; 28 W. N. C. 534; *Ex parte* Brown, 48 Fed. R. 435; Daniel v. Richmond Trs., 78 Ky. 542; *Ex parte* Taylor, 58 Miss. 473; Charleston County v. Ahrens, 4 Strob. (S. C.) 241; State v. Stevenson, 109 N. C. 730; State v. French, 14 S. E. R. 383; 109 N. C. 722; *In re* Wilson, 19 D. C. 341; West. Union Tel. Co. v. Mass. Atty. Gen., 125 U. S. 530; State v. Hodgdon, 41 Vt. 139; Ward v. Maryland, 31 Md. 279; s. c., 12 Wall. 418; Cowles v. Brittain, 2 Hawks (N. C.) 204; Randolph v. Yellowstone Kit., 3 So. R. 706.

[2] Guy v. Baltimore, 100 U. S. 434; State v. Green, 14 N. E. R. 352; People v. Loundes, 130 N. Y. 455; Black v. Seal, 6 Houst. (Del. 92) 541; Robey v. Smith, (Ind. 92) 30 N. E. R. 1093; Ward v. Maryland, 12 Wall. 418; Paul v. Virginia, 8 Wall. 177; State v. North, 27 Mo. 464.

[3] Woodruff v. Parham, 8 Wall. 139; Reading R. R. Co. v. Pa., 15 Wall. 232; Pacific Junction v. Dyer, 64 Iowa, 38; Marshalltown v. Blum, 58

This constitutional provision does not apply to foreign corporations in their regulation and control by the State and municipal authorities. The privileges and immunities of citizenship are held not to be guaranteed by the Constitution of the United States to corporations, but only to natural persons who can claim the rights and privileges of a citizen. Foreign corporations acquire by the act of incorporation the privilege of doing business, or of conducting their affairs and acting in a corporate capacity, only in the State or country which grants the charter. And if such a corporation is permitted to act in its corporate capacity in any other State or country, it is in the nature of a grant of a new or special privilege, and not the exercise by such corporation of any right which is guaranteed to it by the State Constitution. Since a foreign corporation cannot claim as a matter of right the privilege of conducting business in every State and country, any taxes that might be levied upon foreign corporations, whether equal to or in excess of the tax which is imposed upon domestic corporations, would be perfectly valid under the provisions of the Federal Constitution. And such will be the case, it matters not how great may be the discrimination against the foreign corporation in favor of the domestic.[1]

§ 259. **Constitutional provisions as to requirements of uniformity and equality.**—A tax levy may also be open to objection, because it does not comply with the constitutional re-

Iowa, 184; Welton v. Missouri, 91 U. S. 275.

Pullman etc. Co. v. Com., 141 U. S. 18; People v. Wemple, 15 N. Y. S. 446; Walker v. Springfield, 94 Ill. 364; Hughes v. Cairo, 92 Ill. 339; State v. Morgan, (S. D. 92) 48 N. W. R. 314; Com. v. N. Y. etc. Co., (Pa. 90) 22 Atl. R. 212; Leavenworth v. Booth, 15 Kans. 627; Rothermel v. Meyerle, 136 Pa. St. 250; Port of Mobile v. Leloup, 76 Ala. 401; Cincinnati Mut. Health Ass. v. Rosenthal, 55 Ill. 85; Osborne v. Mobile, 16 Wall. 479; Southern Exp. Co. v. Mobile, 49 Ala. 404; Walker v. Springfield, 94 Ill. 364; Amer. F. Co. v. Board, 43 Fed. R. 609; Singer M. Co. v. Wright, 33 Fed. R. 121; Augusta etc. Co. v. Randall, 4 S. E. R. 674; Liverpool Ins. Co. v. Mass., 10 Wall. 566; West. Union Tel. Co. v. Lieb, 76 Ill. 172; Woodward v. Com'rs, (Ky. 90) 7 S. W. Rep. 643; Commonwealth v. Hamilton Manuf. Co., 12 Allen, 298; Augusta etc. Co. v. Randall, 4 S. E. R. 674; Ducat v. Chicago, 10 Wall. 410; Pembina etc. Co. v. Pennsylvania, 8 S. Ct. 737; Commonwealth v. Milton, 12 B. Mon. (Ky.) 212; Slaughter's Case, 13 Gratt. (Va.) 767; Commonwealth v. Berkshire Ins. Co., 98 Mass. 25; Price v. Hunter, 34 Fed. 355; Commonwealth v. Cary Improvement Co., 98 Ib. 19, 22; Boston Manuf. Co. v. Commonwealth, 144 Ib. 598; Pac. Ex. Co. v. Seibert, 142 U. S. 339.

quirement of uniform apportionment. The exact phraseology of the constitutional provisions appears in the different States[1] to be, generally, that "taxation shall be equal and uniform throughout the State," and any ordinary change in phraseology is not material; certainly, in securing or ascertaining the practical results of the same. Where the requirement by the State Constitution of uniformity in State taxation is held to be applicable to and to control municipal taxation, the result, in respect to the constitutionality of the common method of municipal taxation, is the same, whatever may be the phraseology of the constitutional provision. In some of the States, however, it is held, that the constitutional provision requiring uniformity is not applicable to municipal taxation; while, on the other hand, the conclusion is reached, that, although the provision does apply and does control municipal corporations, yet the common methods of taxation are not unconstitutional.

Taxation must be equal and uniform; but the constitutions do not require that the same rule of uniformity should be employed in the apportionment of all taxes. No one rule of uniformity can be devised, which will be applicable to all kinds of taxation; and consequently for each mode of taxation there must be a special rule of apportionment. Thus, for example, the taxation of property is apportioned according to the value of the property; it being considered that such an apportionment will bring about a more perfect equalization of the tax than any other rule. But in laying a tax upon professions and occupations, a different rule of uniformity must be followed;[2] and the usual rule is to establish a scale of taxation upon the occupations, graded in proportion to their relative profits. The meaning, therefore, of this constitutional limitation is, that whatever the rule of apportionment may be, it must be uniformly and impartially applied to all the subjects of the special taxation.[3]

[1] With the exception of Massachusetts, which simply requires that taxation should be "reasonable and proportional." Merrick v. Amherst, 12 Allen (Mass.) 500.

[2] See *post*, § 261, and Tiedeman's Limitations of Police Power, § 101.

[3] See State Railroad Tax Cases, 92 U. S. 575; Cummings v. National Bank, 101 U. S. 153; Oliver v. Washington Mills, 11 Allen, 268; Tidewater Co. v. Costar, 18 N. J. Eq. 518; Kittanning Coal Co. v. Commonwealth, 78 Pa. St. 100; Galtin v. Tarborough, 78 N. C. 119; Youngblood v. Sexton, 32 Mich. 406; Bureau Co. v. Railroad Co., 44 Ill. 229; Marsh v. Supervisors, 42 Wis. 502; Phillies v. Hiles, 42 Wis. 527; *Ex parte* Robinson, 12 Nev. 263; Sanborn v. Rice, 9

There cannot be any partial discrimination between persons or property living in the same taxing district, and falling within the established rule of apportionment.

The State has the right to determine the limits of the taxing district. But the tax district must be of uniform character, so that the tax shall fall upon those who are almost equally benefited by the expenditure. It has thus been held unlawful for a Legislature to extend the limits of a city, so as to include farming lands, and thus increase the revenue of the city.[1] But when the taxing district is established, and the rule of apportionment determined upon, the tax must be uniformly apportioned throughout the taxing district. There cannot be different rules of apportionment for different persons or different sections of the district.[2]

§ 259 *a*. **Uniformity and equality in local assessments.**— The charge of illegality, because of the violation of the constitutional requirements of equality and uniformity in the apportionment, is most commonly brought against local assessments so called. It is very common at the present day for municipal corporations,—instead of providing for the improvement of the streets, the construction of sewers and drains, and other local arrangements for the promotion of health and comfort, by the

La Salle etc. Co. v. Donoghue, 127 Ill. 27; Com. v. Germania Ins. Co., 22 Atl. R. 240; Singer v. Wright, 33 Fed. R. 121; State v. Morgan, 48 N. W. R. 314; Stirling Gas Co. v. Higgins, (Ill. 92) 25 N. E. R. 660; State v. Traders Bank, 6 So. R. 582; 41 La. An. 329; Daly v. Morgan, 16 Atl. R. 287; 60 Md. 460; St. Louis v. Consol. Coal Co., (Mo. 93) 20; S. W. Rep. 699; Verdery v. Pummersville, 82 Ga. 138; Coal Ridge etc. Co. v. Jennings, 127 Pa. St. 397; State v. So. Ca. R. R. Co., 4 S. C. 376.

[1] Bradshaw v. Omaha, 1 Neb. 16; Durant v. Kauffman, 34 Iowa, 194; City of Covington v. Southgate, 15 B. Mon. 491; Arbegust v. Louisville, 2 Bush, 271. But see *contra*, Stilts v. Indianapolis, 55 Ind. 515; Martin v. Dix, 52 Miss. 53 (24 Am. Rep. 661); Giboney v. Cape Girardeau, 58 Mo. 141; Kelly v. Pittsburgh, 85 Pa. St. 170; Hewitt's Appeal, 88 Pa. St. 55; New Orleans v. Cazelear, 27 La. An. 156; see *ante*, §§ 56, 57.

[2] *In re* Pittsburgh, 138 Pa. St. 401; 27 W. N. C. 457; Fayette Co. v. Peoples Bk., 47 Ohio St. 503; Commissioners of Ottawa Co. v. Nelson, 19 Kans. 234 (27 Am. Rep. 101); First Nat. Bk. v. Lindsay, 45 Fed. Rep. 619; East Portland v. Multnomah Co., 6 Ore. 62; Kent v. Kentland, 62 Ind. 291 (30 Am. Rep. 182); State v. New Orleans, 15 La. An. 354; Pine Grove v. Talcott, 19 Wall. 666, 675; Chicago, etc. R. R. Co. v. Boone Co., 44 Ill. 240; Fletcher v. Oliver, 25 Ark. 289; Gillette v. Hartford, 31 Conn. 351; Serrill v. Philadelphia, 38 Pa. St. 355.

imposition of a general tax, collectible from all the taxpayers of the city according to the value of their taxable property,—to apportion the cost of the improvement among those contiguous proprietors who are more directly benefited by the improvement. There are two modes of apportionment of the cost of these local improvements, both of which have been sustained as being a substantial compliance with the constitutional requirement of uniformity. One method is the more or less arbitrary apportionment of the cost according to the legislative judgment of the benefits received by each proprietor for the improvement;[1] and the other method is to make a taxing district of one street of a city, and apportion the cost of improvements among abutting proprietors, in proportion to the frontage of their lots.[2] The reasoning of the courts is invariable that in local assessments, as in the case of a general tax, there is a more or less successful attempt at uniformity, although the rules of apportionment may be different. "A property tax for the general purposes of the government, either of the State at large, or of a county, city, or other district, is regarded as a just and equitable tax. The reason is obvious. It apportions the burden according to the benefit, more nearly than any other inflexible rule of general taxation. A rich man derives more benefit from taxation in the protection and improvement of his property than a poor man, and ought therefore to pay more. But the amount of each man's benefit in general taxation cannot be ascertained and estimated with any degree of certainty; and for that reason a property tax is adopted, in-

[1] People v. Mayor etc. of Brooklyn, 4 N. Y. 419; Livingston v. New York, 8 Wend. 85 (22 Am. Dec. 622); Wright v. Boston, 9 Cush. 233; Jones v. Boston, 104 Mass. 461; Nichols v. Bridgeport, 23 Conn. 189; Cone v. Hartford, 28 Conn. 363; State v. Fuller, 34 N. J. 227; McMasters v. Commonwealth, 3 Watts, 292; Weber v. Reinhard, 73 Pa. St. 370 (13 Am. Rep. 747); Alexander v. Baltimore, 5 Gill, 383; Howard v. The Church, 18 Md. 451; Scoville v. Cleveland, 1 Ohio St. 126; Sessions v. Crunkleton, 20 Ohio St. 349; Maloy v. Marietta, 11 Ohio St. 636; Bradley v. McAtee, 7 Bush, 667 (3 Am. Rep. 309); Hoyt v. East Saginaw, 19 Mich. 39; Sheley v. Detroit, 45 Mich. 431; Cook v. Slocum, 27 Minn. 500; Lafayette v. Fowler, 34 Ind. 140; Peoria v. Kidder, 26 Ill. 351; Garrett v. St. Louis, 25 Mo. 505; Uhrig v. St. Louis, 44 Mo. 458; Burnett v. Sacramento, 12 Cal. 76. See *contra*, State v. Charleston, 12 Rich. 702.

[2] Williams v. Detroit, 2 Mich. 560; Northern R. R. Co. v. Connelly, 10 Ohio St. 159; Lamsden v. Cross, 10 Wis. 282; *contra*, McBean v. Chandler, 9 Heisk. 349; Perry v. Little Rock, 32 Ark. 31.

stead of an estimate of benefits. In local taxation, however, for special purposes, the local benefits may in many cases be seen, traced, and estimated to a reasonable certainty."[1] In Ohio, the Legislature has expressly authorized the municipal governments to apportion local assessments, either according to the frontage of lots or their assessed value.[2]

A local assessment differs from a general tax in that it is levied upon specific property lying more or less near to the street in which the improvement has been made or opened up, and on the ground, more or less well founded, that the property abutting thereon has been especially benefited, and that it is

[1] People v. Mayor etc. of Brooklyn, 4 N. Y. 419, 427.

[2] In declaring this law to be constitutional, Peck, J. says: "It is said that assessments, as distinguished from general taxation, rest solely upon the idea of equivalents; a compensation proportioned to the special benefits derived from the improvement, and that in the case at bar, the railroad company is not, and in the nature of things cannot be, in any degree benefited by the improvement. It is quite true that the right to impose such special taxes is based upon a presumed equivalent, but it by no means follows that there must be in fact such full equivalent in every instance, or that its absence will render the assessment invalid. The rule of apportionment, whether by the front foot or a percentage upon the assessed valuation must be uniform, affecting all the owners and all the property abutting on the street alike. One rule cannot be applied to one owner, and a different rule to another owner. One could not be assessed ten per cent, another five, another three, and another left altogether unassessed, because he was not in fact benefited. It is manifest that the actual benefits resulting from the improvements may be as various almost as the number of the owners, and the uses to which the property may be applied. No general rule, therefore, could be laid down which would do equal and exact justice to all. The Legislature has not attempted so vain a thing, but has prescribed two different modes in which the assessment may be made, and left the city authorities free to adopt either. The mode adopted by the council becomes the statutory equivalent for the benefits conferred, although in fact the burden imposed may greatly preponderate," in Northern Indiana R. R. Co. v. Connelly, 10 Ohio St. 159. See, generally, Willard v. Presbury, 14 Wall. 676; Allen v. Drew, 44 Vt. 174; Washington Avenue, 69 Pa. St. 352 (8 Am. Rep. 255); Craig v. Philadelphia, 89 Pa. St. 265; Philadelphia v. Rule, 93 Pa. St. 15; Hill v. Higdon, 5 Ohio St. 243; Ernst v. Kunkle, 5 Ohio St. 520, White v. People, 94 Ill. 604; Palmer v. Stumph, 29 Ind. 329; St. Joseph v. O'Donaghue, 31 Mo. 345; Hines v. Leavenworth, 3 Kan. 186; Burnett v. Sacramento, 12 Cal. 76; Chambers v. Satterlee, 40 Cal. 497. See, for an exhaustive treatment of this subject Cooley Const. Lim. 616, 634; 2 Dill. Mun. Corp. §§ 752-761.

but equitable and just that the property so especially benefited by the improvement should pay for the same, instead of imposing upon the community at large the burden of providing for such improvement. The constitutional provision already referred to, requiring uniformity and equality in the levying of taxes, has been invoked in favor of the abutting landowners and in proof of the unconstitutionality of such local assessments. The cases are very numerous in which this constitutional question is raised and settled, and the question has been raised in probably every State in the Union. There must necessarily be a great deal of variation in the views and opinions expressed by the courts in rendering judgment in the causes of action brought before them; but it would be impossible in this connection to go into these details for the want of space; and it seems to the writer to be of no advantage to the general student that this should be done. After all, it would be necessary for him, in order to ascertain the exact conditions of the law in the particular State to enter upon the close study of all the cases of that State. For this reason, only the general statement of the principles of law, applicable to the question will be given, so far as they are necessary to a thorough knowledge of the character of the issue.

It is manifest that a local assessment, or any other tax, cannot be declared by the courts to be inequitable or unjust, unless it is so imposed as to be a violation of some constitutional principle. The provisions of the constitution, already referred to, provide generally that taxes should be uniform and equal throughout the State. In some of the States, such as Kansas and Arkansas, express reference is made in the constitutions to assessments being required to be uniform or equitable; and, of course, in these States there can be no question as to the applicableness of the constitutional requirement of uniformity to the local assessment. But in every other State, where the provision simply requires that taxation should be uniform, it is a question whether the constitutional provision is applicable to the matter of municipal taxation, and especially to that of local assessments upon abutting property. A very large number of cases maintain that the local assessments are not to be treated as identical with taxation in the constitutional sense,

which requires uniformity in its levy.[1] And certainly this is the only rational conclusion to take, if one is determined to recognize the constitutionality of a local assessment. A special tax, imposed upon abutting owners who are declared to be especially benefited by the improvements made, is certainly not a uniform tax throughout the State.

If the imposition of this tax is to be justified, it is not in the nature of a tax, but rather in the character of a police regulation, compelling the abutting owners and others, who may be benefited by such improvement, either to make the improvement themselves, or to pay for such improvement, when it is made by the municipal authorities; and, as a police regulation, it would escape the requirement of uniformity, and probably at the same time avoid any charge of injustice, as long as the parties who are called on to pay for such improvement are not required to pay more than the value of the special benefit, which they have received from such improvement. However, the local assess-

[1] Boston Seam. Soc. v. Boston, 116 Mass. 185; s. c., 17 Am. Rep. 153; Wright v. Boston, 9 Cush. 233, 241; Yateman v. Crandall, 11 La. An. 220; Allen v. Galveston, 51 Tex. 302; Austin v. Gulf, Col. & Santa Fe R. R., 45 Tex. 234; Roundtree v. Galveston, 42 Tex. 613, 626; Palmer v. Strumpf, 29 Ind. 329; Baker v. Cincinnati, 11 Ohio St. 534; Mays v. Cincinnati, 11 Ohio St. 268, 273. See Peay v. Little Rock, 32 Ark. 31 (1877); see also *Ex parte* Montgomery, 64 Ala. 463; Charity Hospital v. Stickney, 2 La. An. 550 (1847); Municipality No. 2 v. Duncan, Ib. 182; State v. Volkman, 20 La. An. 585; Hamilton v. Fort Wayne, 40 Ind. 491 (1872); Municipality No. 2 v. Dunn, 10 La. An. 57 (1855); see Municipality No. 2 v. White, 9 Ib. 447; Birmingham v. Klein, 89 Ala. 461, holding that an assessment was not a tax within the constitutional provisions referred to. See Reeves v. Wood County Treas., 8 Ohio St. 333; 9 Ohio St. 520; No. Ind. R. R. Co. v. Connelly, 10 Ohio St. 159, Richmond & Allegheny R. R. Co. v. Lynchburg, 81 Va. 473; Norfolk v. Ellis, 26 Gratt. 224; Roosevelt Hospital v. New York, 84 N. Y. 108. "It is not ordained (by the constitution) that taxation shall be general, so as to embrace all persons of all taxable property within the State, or within any district or territorial division of the State; nor that it shall or shall not be numerically equal, as in the case of a capitation tax; nor that it must be in the ratio of the value of each man's land, or of his goods, or of both combined; nor that a tax 'must be coextensive with the district, or upon all the property in a district which has the character of, and is known to the laws as, a local sovereignty.' Nor has the constitution ordained or forbidden that a tax shall be apportioned according to the benefit which each taxpayer is supposed to receive from the object on which the tax is expended. In all of these particulars, the power of taxation (in this State) is unrestrained." People v. Brooklyn, 4 N. Y. 419, 427.

ment is declared by many of the cases to be a tax in the constitutional sense, and they have held that the constitutional provisions referring to it apply in their full force.[1]

But even where it is held that the State constitutional requirement of uniformity does apply to and control municipal taxation, yet the general ruling of the courts is, that where there is no special constitutional restriction, the expenses of the local improvement may be assessed against property owners on some other basis than that of the value of all of the property within the taxing district, and yet not offend the constitutional requirement of uniformity, as long as the apportionment is determined in some way by reference to the amount of special benefit received by individual property owners.[2] It has also

[1] Austin v. Austin Gasl. & C. Co., 69 Tex. 180; Van Antwerp, *In re*, 56 N. Y. 241; Monticello v. Banks, 48 Ark. 251.

[2] Jefferson v. Mt. Vernon, (93) 33 N. E. Rep. 109; Masters v. Portland, 33 Pac. R. 540; State v. Trenton, (N. J. 93) 26 Atl. R. 83; *In re* Rogers Ave., 22 N. Y. S. 27; Lewis v. Seattle, (Wash. St.) 32 Pac. Rep. 794; Kankakee Stone & Lime Co. v. Kankakee, 128 Ill. 173; Blair v. City of Atchison, 40 Kan. 353; Palmyra v. Morton, 25 Mo. 593; Egyptian Levee Co. v. Hardin, 27 Mo. 495; Sinton v. Ashbury, 41 Cal. 525; State v. Leffingwell, 54 Mo. 458; Olson v. City of Topeka, (Kan.) 21 Pac. R. 219; De Koven v. City of Lake View, (Ill.) 31 N. E. R. 813; Springfield v. Sale, 20 N. E. R. 86; 127 Ill. 359; State v. Marvin, 51 N. J. L. 298; St. Louis v. Clemens, 36 Mo. 46; Eyerman v. Blaksley, 78 Mo. 145; St. Joseph v. O'Donoghue, 31 Mo. 345; Hunerberg v. Hyde Park, 22 N. E. R. 486; Busbee v. Wake Co. Com'rs, 93 N. C. 143; Galveston v. Heard, 54 Tex. 420; McChesney v. Hyde Park, 28 N. E. R. 1102; Detroit v. Beecher, 75 Mich. 454; Preston v. Rudd, 84 Ky. 150; Keith v. Philadelphia, 126 Pa. St. 575; Baltimore v. Johns Hopkins Hospital, 56 Md. 1; Baltimore v. Hanson, 61 Md. 462; Jaeger v. Burr, 36 Ohio St. 164. "Local impositions for grading, paving, sewerage, and the like, have been many times sustained by this court, and are, in the long run, perfectly fair, for they enter into and enhance the value of the property assessed. The public, it is true, are benefited, but so is the individual; and as an owner of urban property, he is further benefited when, in due time, the same tax falls on his neighbor." Philadelphia v. Tryon, 35 Pa. St. 401, 404. But see also, Guest v. Brooklyn, 69 N. Y. 506, in which Chief Justice Church, while conceding the power of the Legislature to authorize the imposition of local assessments, condemns the practice, wherever it is without legislative restraint, "as unjust and oppressive, unsound in principle, and various in practice. The right to make a public street is based upon public necessity, and the public should pay for it. To force an expensive improvement upon a few property owners against their consent, and compel them to pay the entire expense, under the delusive pretence of a corresponding specific benefit conferred

been held that Congress has the legislative authority, in the District of Columbia, to authorize the city of Washington to assess the expense of local improvement, in or upon streets, upon the adjoining landowners; and that such tax need not be laid generally upon all the property owners of the city.[1] But a power to provide "general ordinances" for street improvements, does not include the power to improve particular streets for the public benefit generally, or for the benefit of the whole city, at the expense of the abutting owner, in the absence of a purpose to benefit the property in the locality of the improvement.[2]

Not only can the Legislature authorize the making of improvements in streets and highways and the assessment of the expenses upon adjoining property owners, but it has also been held that the Legislature may compel a municipal corporation to do the same.[3]

Where the expenses of a local assessment are imposed upon adjoining property owners, in cases where the property is held by parties as tenant for life and remaindermen, such expenses should be apportioned between them according to the value of their respective interests in the estate.[4]

In Pennsylvania, there are no express constitutional provisions, requiring uniformity of taxation; but the general clause of the constitution, looking to the protection of the individual citizen against a tyrannical exercise of power, is held to be sufficient to raise the question of constitutionality in the case of

upon their property, is a species of despotism that ought not to be perpetuated under a government which claims to protect property equally with life and liberty. Besides its manifest injustice, it deprives the citizen practically of the principal protection (aside from constitutional restraints) against unjust taxation, viz., the responsibility of the representative for his acts to his constituents. As respects general taxation where all are equally affected, this operates, but it has no beneficial application in preventing local taxation for public improvements. The majority are never backward in consenting to, or even demanding, improvements which they may enjoy without expense to themselves."

[1] Willard v. Presbury, 14 Wall. 676 (1871).

[2] Burns v. Baltimore, 48 Md. 198.

[3] People *ex rel.* McLean v. Flagg, 46 N. Y. 401.

[4] Peck v. Sherwood, 56 N. Y. 614 (1874); Sands v. Richmond, 31 Gratt. (Va.) 571. See Tiedeman's Real Property, § 66, for the rule of apportionment in such cases, and the algebraic formula which may be profitably employed in making such an apportionment.

unjust taxation. The courts in this State hold that local assessments upon abutting property are constitutional.[1]

It does not seem to be doubted anywhere that the imposition upon adjoining property of the expense of making a local improvement, to the extent of the special benefit received by such property owners from the improvement, is constitutional, although there may, possibly, not be a strict compliance with the constitutional requirement of uniformity.[2] But where there is any ground for claiming, that the improvement made does not constitute or confer upon the property owner a special benefit, apart from the general benefit which he receives as a resident of the community at large; there is, likewise, a general unanimity of opinion that the local assessment is unconstitutional. There must be a special benefit to the adjoining proprietor in order that there may be any justification of an imposition upon him of the cost of the improvement, in whole or in part.[3] It has thus been held that a bridge, which is part of a public highway or street of a city, is not a local but a public improvement; and a local assessment of the cost of such bridge upon the adjoining property owners would not be constitutional, because of the supposed special benefit which those individuals may receive from the construction of the bridge.[4]

[1] Kirby v. Shaw, 19 Pa. St. 258; Schenley v. Allegheny, 25 Pa. St. 128; McGonigle v. Allegheny, 44 Pa. St. 118; Seely v. Pittsburgh, 82 Pa St. 360. See Wolf v. McHargue, (Ky.) 10 S. W. Rep. 809. Whenever an assessment is made upon the adjoining property for local improvement, it may be made a lien upon the property benefited and the payment thus secured. Greensburg Bor. v. Young, 53 Pa. St. 280.

[2] Raleigh v. Peace, 110 N. C. 32; Maddux v. Newport, (Ky. 90) 14 S. W. R. 957; Beaumont v. Wilkes-Barre, (Pa. 90) 21 Atl. 888; Speer v. Athens, 85 Ga. 49; Darst v. Griffin, 48 N. W. R. 819; Ancoin v. Board of Com'rs, 8 So. R. 906; 43 La. An. 15; *In re* Howard St., 21 Atl. R. 974; 28 W. N. C. 159; Richman v. Board of Sup'rs, 42 N. W. R. 422; 77 Iowa, 513; Covington v. Worthington, (Ky. 90) 10 S. W. R. 790; Rutherford v. Hamilton, 97 Mo. 543; Conger v. Bergman, 11 S. W. R. 84.

[3] Mock v. Muncie, (Ind. 93) 32 N. E. R. 718; Grand Rapids etc. Co. v. Grand Rapids, (Mich. 93) 52 N. W. R. 1028; Preston v. Rudd, 84 Ky. 150; *In re* Sycamore Alley, 9 Pa. Co. Ct. R. 61; Fort Wayne v. Shoaff, 106 Ill. 66; Watkins v. Zwietusch, 47 Wis. 315; Danershower v. District, 7 Mackey, 99; Davis v. Los Angeles, 86 Cal. 37; City v. Tiffany, 22 N. Y. S. 604; Johnson v. Duer, 21 S. W. R. 800; State v. Judges, (Minn. 93) 53 N. W. R. 800.

[4] Sawmill Run Bridge, 85 Pa. St. 247; Tide-Water Co. v. Coster, 18 N. J. Eq. 518; State v. Leffingwell, 54 Mo. 458; Hudson v. Nashua, 62 N. H. 491; Broadway Bapt. Ch. v. McAtee,

It has also been held in Pennsylvania, that where a street has been already paved, it cannot be considered a special benefit, in the nature of a local improvement, to have such street repaved, so far as to impose upon the adjoining property owners the cost of such repaving. The original paving is a local improvement; and so, likewise, any necessary repair of the original paving; but the substitution of a more expensive and ornate paving for the original paving would be a public improvement, which could only be provided for by general taxation.[1] But it has, on the other hand, been held that the widening of a street would be a local improvement, which could be assessed against the adjoining property owners.[2]

Involved in this question of confining the power of imposing local taxes on property for local improvement, is the question how far may abutting railroad property be assessed for such local improvements. But it seems to be generally held, that a railroad which has abutting property, is properly assessable for its due proportion of the cost of the improvement of the street or road.[3] But it has been held that where a railroad runs parallel to a street, it would be an improper exercise of the power of local taxation, to assess upon such railroad its proportionate share of the cost of such improvement, certainly, by measurement of its frontage on such street.[4]

The existence of a special benefit being the ground of justification for the imposition of a local assessment, it is important to determine whether it is a legislative or judicial question

8 Bush (Ky.) 508, 512; compare Lafayette v. Fowler; 34 Ind. 140; Williams v. Detroit, 2 Mich. 560; Hoyt v. East Saginaw, 19 Mich. 39.

[1] Hammett v. Philadelphia, 65 Pa. St. 146; s. c., 3 Am. Rep. 615; Halpin v. Campbell, 71 Mo. 493.

[2] *Re* Centre Street Vac., 115 Pa. St. 247.

[3] Louisville N. A. & C. Ry. Co. v. State, 122 Ind. 443; Chicago v. Baer, 41 Ill. 306; No. Ind. R. R. Co. v. Connelly, 10 Ohio St. 159; Philadelphia v. Phila., W. & B. R. R. Co., 33 Pa. St. 41; New Haven v. Fair Haven & W. R. R. Co., 38 Conn. 422; s. c., 10 Am. Rep. 399; Baltimore, O. & C. R. Co. v. Ketring, 122 Ind. 5; St. Paul & Pac. R. R. Co. v. St. Paul, 21 Minn. 526; Illinois Cen. R. R. Co. v. Com'rs of East Lake Fork Drainage Dist., 21 N. E. R. 925; Burl. & Mo. R. R. R. Co. v. Spearman, 12 Iowa, 112; Junction R. R. Co. v. Philadelphia, 88 Pa. St. 424; Mulherrin v. Del., L. & W. R. R. Co., 81 Pa. St. 366; New York & N. H. R. R. Co. v. New Haven, 42 Conn. 279; s. c., 19 Am. Rep. 534.

[4] Burl. & Mo. R. R. R. Co. v. Spearman, 12 Iowa, 112; State v. Atlantic City, 34 N. J. L. 99; Louisville N. A. v. C. Ry. Co., 122 Ind. 443; No. Ind. R. R. Co. v. Connelly, 10 Ohio St. 159.

whether such benefit exists or not, and whether the cost of such assessment is greater or less than the benefit received therefrom by the abutting owners. It has been held in New York, and other states following its ruling, that it is a purely legislative question; and that the courts cannot interfere at all in determining the accuracy of the legislative judgment, either as to the existence of such a special benefit, or as to the extent of such a benefit in relation to the cost of such improvement.[1] And it has also been held that the validity of an assessment on lots benefited by a local improvement, is not affected by the fact, that the amount of such assessment is greater than the assessed value of the lot.[2]

On the other hand, it has been held by other courts, and particularly in the later decisions of New Jersey, Pennsylvania, and other States, that the power of the Legislature is not unlimited; and in order that any local assessment may be justifiable, and within the constitutional authority of the Legislature and municipality, it must be so apportioned as to avoid an imposition of a greater burden upon the local property owner than the amount of the benefit which he has received from the local improvement.[3] "The whole amount of the assessment must

[1] Guest v. Brooklyn, 69 N. Y. 506; Alexander v. Baltimore, 5 Gill, 383; Craycraft v. Selvage, 10 Bush (Ky.) 696; Howell v. Bristol, 8 Bush, 493; Centre Street Vac., *In re*, 115 Pa. St. 247; White v. People, 94 Ill. 604; Warren v. Henley, 31 Iowa, 31; Dickson v. Racine, 61 Wis. 545.

[2] *In re* Sackett St., 74 N. Y. 95; *contra*, Preston v. Rudd, 84 Ky. 250.

[3] Hammett v. Philadelphia, 65 Pa. St. 146; *In re* Sycamore Alley, 9 Pa. Co. Ct. R. 61; Grand Rap. Sch. Fur. Co. v. Grand Rapids, 52 N. W. R. 1028 (Mich. 93); Loeser v. Redd, 14 Bush (Ky.) 18; State v. Fuller, 39 N. J. L. 576; Watkins v. Zwietusch, 47 Wis. 513; Johnson v. Milwaukee, 40 Wis. 315; Mock v. Muncil, (Ind. 93) 32 N. E. R. 718; Danenhower v. District, 7 Mackey, 99; Johnson v. Duer, 21 S. W. R. 800; Ottawa v. Spencer, 36 Ill. 211; Taylor v. Chandler, 9 Heisk. (Tenn.) 349; Municipality No. 2 v. Dunn, 10 La. An. 57; Watkins v. Milwaukee, 52 Wis. 98; s. c., 55 Wis. 335; Zwietusch v. Milwaukee, 55 Wis. 369; Broadway Bapt. Ch. v. McAtee, 8 Bush, 508; 8 Am. Rep. 481; City v. Tiffany, 22 N. Y. S. 604; States v. Judges, (Minn. 93) 53 N. W. R. 800; McChesney v. Hyde Park, 28 N. E. R. 1102; Philadelphia v. Sheridan, 24 Atl. R. 80; Beecher v. Detroit, (Mich. 92) 52 N. W. R. 731; Graham v. Conger, (Ky.) 4 S. W. Rep. 327; Ill. Cen. R. R. Co. v. Chicago, (Ill. 92) 30 N. E. R. 1036; Ferguson v. Stamford, 60 Conn. 432; Savage v. Buffalo, 131 N. Y. 568; Hoffeld v. Buffalo, 130 N. Y. 387; Independence v. Gates, 19 S. W. R. 728; Holmes v. Jersey City, 12 N. J. Eq. 299; State v. Fuller, 34 N. J. L. 227; City of Kansas v. Baird, 11 S. W. R. 562; 98 Mo. 215; Niklans v. Conkling, 20 N. E. R. 797;

be apportioned amongst the several lots and parcels of land specially benefited, in the proportion that the special benefit to each lot or parcel bears to the whole special benefits conferred by the improvement. If the opening of a street rendered it practicable to open another contemplated street, which could not have been opened before, and this fact of itself specially benefits lots adjacent to the new street, such special benefits may properly be considered in estimating the special benefit conferred by the opening of the new street. The right, which is given to municipal corporations of resorting to this kind of taxation is not, like the right of general taxation in the State, founded on necessity; but on a principle of justice, by which the public may take from an individual whose lands, owing to their proximity to it, are specially benefited by the improvement, such a portion of the cost thereof as is equivalent to, but not in excess of, the special benefits conferred by the improvement; and this principle of justice in itself impliedly furnishes the measure of, and limits the extent of the right."[1]

The same contradiction of authority is found as to the proper method of imposing the local assessment, so as to meet the constitutional requirement of uniformity and equality. The common method adopted is to impose the tax upon the adjoining property owners in proportion to the frontage of their property upon the street, in which the improvement has been made. And generally, this method of assessment is held to be a just and equitable method of apportionment.[2] On the other hand, it has

118 Ind. 289; State v. Paterson, 37 N. J. L. 380; State v. Newark, 37 Ib. 415; Thomas v. Gaines, 35 Mich. 156; Nichols v. Bridgeport, 23 Conn. 204; Davis v. City of New Orleans, 6 So. 100; 40 La. An. 806; DeKoven v. Lake View, (Ill. 90) 21 N. E. R. 813; Brooks v. Baltimore, 48 Md. 265; Springfield v. Sale, 20 N. E. R. 86; 127 Ill. 359; Walters v. Town of Lake, 129 Ill. 23; State v. Town of West Hoboken, (N. J. 90) 17 Atl. R. 110; State v. Ramsey Co. Dist. Ct., 33 Minn. 295; Hill v. Higdon, 5 Ohio St. 243; Meissner v. Toledo, 31 Ohio St. 387.

[1] Chamberlain v. Cleveland, 34 Ohio St. 551. See Walnut St., *In re*, 10 Pa. Co. Ct. 173.

[2] Rutherford v. Hamilton, 97 Mo. 543; Denver v. Knowles, (Col. 93) 30 Pac. R. 1041; Barber Asph. P. Co. v. Gogreve, 41 La. An. 241; 5 So. 848; Noonan v. Smith, 50 Mo. 525; O'Connor v. Pittsburgh, 18 Pa. St. 187; Keith v. Philadelphia, 126 Pa. St. 575; 17 Atl. R. 883; Seely v. Pittsburgh, 82 Pa. St. 360; Springfield v. Green, 120 Ill. 269; McCormick's Est. v. Harrisburg, 18 Atl. R. 126; O'Reilly v. Kingston, 114 N. Y. 439; Jennings v. Le Breton, 21 Pac. R. 1127; 80 Cal. 8; Greensburg v. Laird, 8 Pa. Co. Ct. R. 608; Beaumont v.

been held, in a number of cases, that the assessment of the cost of local improvement, in proportion to the frontage of property on the street, would be unjust and inequitable; and, therefore, in violation of the Constitution of the State. Probably, in some of these cases the facts bring out some special circumstance of inequity, upon which the court rests its judgment as to its being unconstitutional.[1] In some late cases[2]—which arose out of reckless schemes for local improvements, and which resulted in the insolvency or, at least, serious financial embarrassment of the

City of Wilkes-Barre, (Pa. 90) 21 Atl. R. 888; Bacon v. Savannah, 12 S. E. R. 580; 86 Ga. 301; Holmes v. Jersey City, 12 N. J. Eq. 299; State v. Fuller, 34 N. J. L. 227; State v. Newark, 37 N. J. L. 415; Hoyt v. East Saginaw, 19 Mich. 39; Warren v. Henly, 31 Iowa, 31; Gatch v. Des Moines, 63 Iowa, 718; Paxson v. Sweet, 13 N. J. L. (1 J. S. Green) 196; Alberger v. City of Baltimore, 20 Atl. R. 988; 64 Md. 1; State v. Newark, 35 N. J. L. 168; State v. Passaic, 37 N. J. L. 65, 68; St. Paul & Pac. R. R. Co. v. St. Paul, 21 Minn. 526, 528; Sewall v. St. Paul, 20 Minn. 511, 525; Ottawa Co. v. Nelson, 19 Kan. 234; Hurford v. Omaha, 4 Neb. 336, 347; Shehan v. Cincinnati, 25 Wkly. L. Bul. 212; *In re* Walnut St., 10 Pa. Co. Ct. R. 173; Irwin v. Mobile, 57 Ala. 6, 9; Birmingham v. Klein, 89 Ala. 461; Williams v. Cammack, 27 Miss. 209, 224; State v. Dean, 23 N. J. L. 335; Raleigh v. Peace, 110 N. C. 32; Scott Co. v. Hinds, 52 N. W. R. 523; Parker v. Atchison, (Kan. 92) 30 Pac. 20; Broadway Bapt. Ch. v. McAtee, 8 Bush (Ky.) 508; s. c., 8 Am. Rep. 481; Hammett v. Philadelphia, 65 Pa. St. 146; Martin v. Carron, 26 N. J. L. 228; State v. Newark, 27 N. J. L. 185, 193; State v. New Brunswick, 30 N. J. L. 395; Emery v. San Francisco Gas Co., 28 Cal. 345; Hines v. Leavenworth, 3 Kan. 186; State v. Elizabeth, 40 N. J. L. 278; Lexington v. McQuillan's Heirs, 9 Dana (Ky.) 514; Louisville v. Hyatt, 2 B. Mon. (Ky.) 277; No. Ind. R. R. v. Connelly, 10 Ohio St. 166; Alcorn v. Horner, 38 Miss. 652; Covington v. Boyle, 6 Bush (Ky.) 204; Bradley v. McAtee, 7 Bush (Ky.) 667.

[1] See Howell v. Bristol, 8 Bush (Ky.) 493; State v. Newark, 37 N. J. L. 415; 18 Am. Rep. 729; Peay v. Little Rock, 32 Ark. 31; Bogert v. Elizabeth, 27 N. J. Eq. 568; McBean v. Chandler, 9 Heisk. (Tenn.) 349; 24 Am. Rep. 308; State v. Jersey City, 40 N. J. L. 485; State v. Hudson, 29 Ib. 104; Ib. 115; Taylor v. Chandler, 9 Heisk. 349; State v. Rahway, 39 N. J. L. 646; Ottawa v. Spencer, 36 Ill. 211; State v. Guttenberg, 38 N. J. L. 419; Chicago v. Larned, 34 Ill. 203; Mobile v. Dargan, 45 Ala. 310. So it has been held that while a frontage assessment is valid, yet the assessment can only be made on abutting property by this mode (Kline v. Cincinnati, 28 W'kly L. Bul. 139); it must apply to *each front foot along the entire street* (Frey v. Findlay, 7 Ohio Cir. Ct. 311), and the lots assessed should be of substantially the same depth. Denver v. Knowles, 17 Colo. 204.

[2] Bogert v. Elizabeth, 27 N. J. Eq. 568; State v. Newark, 37 N. J. L. 415; s. c., 18 Am. Rep. 729.

municipal communities concerned—the question was raised by the New Jersey Court as to whether the Legislature had the power without limitation to authorize the municipal corporation to enter upon an extensive scheme of taxation for local improvement, and to assess the cost of such improvement upon adjoining property, without considering the benefit of such improvement to the property owner. And it was held in these cases, that the entire cost of such improvement cannot in any case be imposed upon the adjoining property; but that such cost should be apportioned between the abutting owner and the general public, according to the amount of benefit which the local property owner has derived from the improvement; and that the cost as assessed upon him shall not exceed such benefit.

When one owns a corner lot, it is held that he can be required to be assessed for improvements made on both of the streets, upon which the land fronts.[1]

Where the law requires that the cost of improvement shall be assessed upon property abutting the streets, upon which the improvement is made, it is held that land cannot be said to be bounded by a highway, when the lines of a railroad pass between the street and the property in question.[2]

It has also been held that municipal corporations may assess the cost of a local improvement upon the lots benefited, in proportion to their superficial area, instead of their frontage on the streets.[3]

The relative justice and injustice of local assessments according to the frontage upon streets, has also been raised in Pennsylvania, in regard to the levying a tax for the improvement of a highway upon rural property, which is brought within the jurisdiction of a city; and which, because of its rural character, cannot be supposed to have derived the benefit from local im-

[1] Morrison v. Hershire, 32 Iowa, 271 (1871); Wolf v. Keokuk, 48 Iowa, 129; Warren v. Henly, 31 Iowa, 31 (1870); Springfield v. Green, 120 Ill. 269.

[2] Philadelphia v. Eastwick, 35 Pa. St. 75 (1860); Philadelphia v. Phila., W. & B. R. R. Co., 33 Pa. St. 41. See, also, Ward, *In re*, 52 N. Y. 395 (1873), *per* Andrews, J.; O'Reilley v. Kingston, 114 N. Y. 439 (1889), where the words "adjacent and adjoining" are distinguished and construed. "Adjoining," being construed to mean touching, while "adjacent" means, lying near to it, not contiguous.

[3] Ray v. Jeffersonville, 90 Ind. 567; Constitution of California, art. XI. sec. 13; Emery v. San Fr. Gas. Co., 28 Cal. 345 (1865).

provements which would necessarily accrue to such property, where it had been adapted or appropriated to urban uses; and for that reason, it has been held by later decisions in the Pennsylvania courts, that assessment of property in the rural district by the foot front rule is unconstitutional, because it imposes upon the property so taxed a greater assessment than the benefit which such property has derived from the improvement.[1]

Finally, it may be stated that the question of constitutionality raised by these cases of local assessments has been held by the Supreme Court of the United States not to be within amendment XIV. of the United States Constitution, which declares that no State shall pass any law depriving the owner of his property without due process of law.[2]

It is very likely that the fact, that these local assessment laws have been adopted generally and declared to be constitutional, may be accounted for by the circumstance that this method of local taxation was a common practice among the earlier English municipalities, and therefore is an inheritance from the mother country, where the American objection to the local assessment could not possibly be raised.[3]

[1] Scranton v. Pa. Coal Co., 105 Pa. St. 445; Washington Ave. Case, 69 Pa. St. 352; Seely v. Pittsburgh, 82 Pa. St. 360; Craig v. Philadelphia, 89 Pa. St. 265; City v. Rule, 93 Pa. St. 15; but see *contra*, Malchus v. Highlands Dist., 4 Bush (Ky.) 547.

[2] Davidson v. New Orleans, 96 U. S. 97, 104; County of Mobile v. Kimball, 102 U. S. 691.

[3] Bedford Union Poor Guard v. Bedford Impr. Commissioners, 7 Exch. 777; Viner's Abr. "Sewers." But it is a curious fact that at present (1893) the landed proprietors of London are objecting to proposed local assessments for local improvements, on the ground that they violate the legal requirement of uniformity and equality in taxation. See generally, on this subject: Frey v. Findley, 7 Ohio Cir. Ct. 311; Kline v. Cincinnati, 28 W'kly L. Bull. 139; Denver v. Knowles, 17 Colo. 204; Boston Seamen's Fr. Soc. v. Boston, 116 Mass. 181; *In re* Board of Street Openings, 133 N. Y. 436; Raleigh v. Peace, 110 N. C. 32; Davies v. Saginaw, 87 Mich. 439; Drummond v. Eau Claire, 79 Wis. 97; Schmidt v. R. Co., 90 Cal. 37; Beaumont v. Wilkes-Barre, 142 Pa. St. 198; Fitzgerald v. Walker, 55 Ark. 148; State v. Ramsey Co., 47 Minn. 406; Ede v. Knight, 93 Cal. 159; Whitney v. Pittsburgh, 29 W. N. C. 363; Lowe v. Omaha, (Neb. 92) 50 N. W. R. 760; *In re* Walnut St., 10 Pa. Co. Ct. 173; Malory v. Marietta, 11 Ohio St. 636; Punshon v. Cincinnati, 27 Wkly. Bul. 155; McChesney v. Hyde Park, 28 N. E. R. 1102; R. R. Co. v. East St. Louis, 134 Ill. 656; Wilson v. Trenton, 53 N. J. L. 645; Hoyt v. Saginaw, 19 Mich. 39; s. c., 2 Am. Rep. 76; Egyptian Levee Co. v.

§ 260. **Road tax and compulsory labor on the same.**—It is a very common practice in rural communities for the repair of the road to be provided for by special road tax, or by compulsory labor of the residents of the community upon such road; the provision originally being that each individual male citizen is required to perform so many days labor upon the road, or to provide a laborer for the required number of days as his substitute. No question has ever been raised as to the constitutionality of such regulation; and it is believed that the Legislature has the power to impose upon individuals, apart from any ownership of lands, the burden of maintaining in good repair the streets of a city, by the performance of the necessary labor on the streets. And the grant to a municipal corporation, in its charter, of the power to require of the citizens labor in the repair of roads, does not violate the constitutional requirement that all taxation should be by valuation of the property of the taxpayer.[1] The municipal corporation can also exercise the power to require such labor of its inhabitants, as an implication from the general power "to make such rules, orders, regulations, and ordinances as to them shall seem meet for repairing streets."[2]

The tax may be imposed for the repair of the public roads, although such roads may be outside of the city limits, as long as they lead into the city.[3]

§ 260 *a*. **Poll tax, constitutional.**—A poll tax may also be levied by municipal corporations for municipal purposes, without violating any constitutional requirement as to uniformity; even though certain persons, such as members of fire companies, are exempted.[4]

§ 261. **Power to tax professions, trades and callings.**—Notwithstanding the constitutional provision, requiring equal-

Hardin, 27 Mo. 495, 497; Uhrig v. St. Louis, 44 Mo. 458; Lockwood v. St. Louis, 24 Mo. 20; Garrett v. St. Louis, 25 Mo. 505; Crowley v. Copley, 2 La. An. 329; Wilmington v. Yopp, 71 N. C. 76; Hayden v. Atlanta, 70 Ga. 817; Egerton v. Green Cove Springs, 19 Fla. 140; Wright v. Chicago, 46 Ill. 44; Hines v. Leavenworth, 3 Kan. 186.

[1] Sawyer v. Alton, 4 Ill. 130; Tipton v. Norman, 72 Mo. 380.

[2] State v. Halifax Comm'rs, 4 Dev. L. (N. C.) 345 (1833).

[3] Skinner v. Hutton, 33 Mo. 244 (1862); Chess v. Birmingham, 1 Grant (Pa.) Cas. 438 (1857); Brooklyn v. Breslin, 57 N. Y. 591 (1874); Bennett v. Birmingham, 31 Pa. St. 15 (1850).

[4] Faribault v. Misener, 20 Minn. 396 (1874).

ity and uniformity in the imposition of taxes, it has been held that there is no implied prohibition of the imposition of a tax upon trades and professions and callings, even though the amount of the tax should vary with each calling or profession, as long as all persons engaged in a particular occupation or trade are taxed by and in accordance with the same rule. The variance of the amount of the tax, which is imposed upon the different trades and occupations, will be no ground for claiming that the constitutional requirement of uniformity has been violated.[1] And in imposing the tax, it may be made individual, so that the persons engaged in the occupation or trade may be subject to the tax, although two or more of them may be as-

[1] Arkadelphia L. Co. v. City of Arkadelphia, (Ark. 92) 19 S. W. R. 1053; Ould v. Richmond, 23 Gratt. 464; s. c., 14 Am. Rep. 139; *Ex parte* Montgomery, 64 Ala. 463; Simmons v. State, 12 Mo. 268; Rankin v. Henderson, (Ky. 92) 7 S. W. R. 174; Rome v. McWilliams, 52 Ga. 251; Goldthwaite v. Montgomery Council, 50 Ala. 486; Glasgow v. Rouse, 43 Mo. 479; Spaulding v. Hill, 7 S. W. R. 27; Sacramento v. Crocker, 16 Cal. 119; Simmons v. State, 12 Mo. 268; St. Louis v. Steinberg, 4 Mo. App. 453; St. Louis v. Laughlin, 49 Mo. 550; Blackman v. Royal Ins. Co., 17 N. E. R. 580; Nashville v. Althrop, 5 Coldw. (Tenn.) 554; Mason v. Lancaster, 4 Bush (Ky.) 406; Germania v. State, 7 Md. 1; Lynchburg v. Norfolk & N. W. R. R. Co., 80 Va. 237; Cuthbert v. Commonwealth, (Va. 88) 9 S. E. R. 185; Gilkerson v. Frederick Jus., 13 Gratt. 577; Baton Rouge Bd. of Sel. v. Spalding, 8 La. An. 87; Portland v. O'Neill, 1 Oreg. 218; Little Rock v. Barton, 33 Ark. 436; State v. Traders Bank, 41 La. An. 329; McGrath v. Newton, 29 Kan. 364; Walcott v. People, 17 Mich. 68; Williams v. Detroit, 2 Ib. 560; St. Louis v. Sternberg, 69 Mo. 289; Shotwell v. Moore, 45 Ohio St. 632; 16 N. E. R. 470; Morrill v. State, 38 Wis. 428; s. c., 20 Am. Rep. 12; Wiley v. Owens, 39 Ind. 429; Braun v. Chicago, 110 Ill. 186; Baker v. Cincinnati, 11 Ohio St. 534; Richmond etc. Co. v. Reidsville, 101 N. C. 404; Concord Comm'rs v. Patterson, 8 Jones L. (N. C.) 102; Cousins v. State, 50 Ala. 113; s. c., 20 Am. Rep. 290; Ottawa v. Nelson, 19 Kan. 234; Com. v. Maury, 82 Va. 882; Kneeland v. Pittsburgh, 11 Atl. R. 657; Woodbridge v. Detroit, 8 Mich. 274; Stein v. Mobile, 49 Ala. 362; s. c., 20 Am. Rep. 283; Slaughter v. Commonwealth, 13 Gratt. (Va.) 767; St. Louis v. Spiegel, 2 S. W. R. 839; 90 Mo. 587; Marmet v. State, 45 Ohio St. 12 N. E. R. 463; Los Angeles v. Los Angeles Water Co., 61 Cal. 65; Detroit v. Det. Ry. Co., (Mich.) 43 N. W. Rep. 447; Livingston v. Paducah, 80 Ky. 656; New Orleans v. Com. Bank of N. O., Ib. 735; Seller v. Phillips, 37 Ill. App. 74; Municipality No. 2 v. Dubois, 10 La. An. 56; New Orleans v. Staiger, 11 Ib. 68; New Orleans v. Southern Bank, Ib. 41; New Orleans v. Turpin, 13 Ib. 56; Merriam v. New Orleans, 14 Ib. 318; New Orleans v. Kaufman, 29 Ib. 283. But see San Jose v. San I. & S. C. R. R. Co., 53 Cal. 476.

sociated as partners; each individual tradesman or business man may be required to pay the tax.[1] Where nonresidents pursue their business or calling within the corporate limits, the fact that they reside beyond these limits does not restrain the power of the municipal corporation to impose the same license tax upon them as upon residents of the city.[2] But the power to tax nonresidents, who do business within the city limits, must be fairly and properly exercised; and any discrimination against such nonresidents, in favor of the resident of the city, will be in violation of the provision of the Federal Constitution, which grants to each citizen the equal privileges and immunities of the citizens of the several States.[3]

A city is authorized to impose a special license tax upon express companies in the nature of an *ad valorem* tax upon the gross annual receipts of such express company, notwithstanding the fact that no tax of the same kind was imposed upon the merchants.[4]

§ 262. **Power to levy retrospective taxes.**—If, for any reason, a tax has been declared to be invalid, because the constitutional or statutory requirements have not been complied with, and the imposition of the tax may have been valid in the first instance by a compliance with the provisions of the Constitution of the State; such defective or illegal taxation may be remedied or ratified by a subsequent act, authorizing the imposition of the tax. It would not be strictly a ratification of an illegal tax, but rather a present imposition of a tax, in liquidation of some obligation previously contracted, for the satisfaction of which the prior illegal taxation was invoked. A tax

[1] Lanier v. Macon, 59 Ga. 187; Wilder v. Savannah, 70 Ga. 760; McIver v. Clarke, (Miss. 92) 10 So. Rep. 581.

[2] Worth v. Fayetteville Comm'rs, Winst. Eq. (N. C.) 70; Baltimore v. Hussey, (Md.) 9 Atl. Rep. 9; State v. Charleston, Ib. 719; Bridges v. Griffin, 33 Ga. 113 (1861); Johnson v. Lexington, 14 B. Mon. 648; Louisville v. Henning, 1 Bush, 381; see Moore v. Fayetteville Com'rs, 80 N. C. 154.

[3] State v. Charleston, 2 Speers L. (S. C.) 719; Hefling v. San Antonio, (Tex. 92) 20 S. W. R. 85; Joyce v. Woods, 78 Ky. 386; Bennett v. Birmingham Bor.,31 Pa. St. 15, where it is held that statutes authorizing the registration and taxation of vehicles for the maintenance of the repairs upon the streets have to be strictly construed, and in the absence of an express provision these statutes do not apply to nonresidents.

[4] American Union Express Co. v. St. Joseph, 66 Mo. 675.

to pay for past indebtedness of a municipality is not objectionable on any constitutional grounds.[1]

§ 263. **Municipality cannot delegate its authority.**—The municipal corporation, like any other legal personality, cannot delegate to another the power vested in it, unless the power to delegate is expressly given to it in its charter.[2] And this prohibition of delegation extends to the authority conferred by the Legislature on municipal corporations, to levy and impose taxes or assessments on property for local interests; such an authority cannot be delegated, unless the right of delegation is expressly given to the corporation.[3] It has thus been held impossible, in making local assessments, for the municipal corporation to leave to some official the determination of the amount of the tax or assessment to be levied upon abutting owners, and to make their judgment in such matters final.[4] And where the power has been so delegated, there cannot be any subsequent ratification of the assessment.[5] But the Legislature may authorize such delegation by the municipal corporation, or it may expressly provide in the charter that the

[1] St. Louis v. Clemens, 52 Mo. 133; Municipality No. 1 v. Wheeler, 10 La. An. 745; Fairfield v. People, 94 Ill. 244; Tallman v. Janesville, 17 Wis. 71; New Orleans v. Poutz, 14 La. An. 853; see §§ 16, 17.

[2] *Ante*, § 113; Foss v. Chicago, 56 Ill. 354; Thompson v. Booneville, 61 Mo. 282; Hunt v. Booneville, 65 Ib. 620; Macon v. First Nat. Bank, 59 Ga. 648; Indianapolis v. Lawyer, 38 Ind. 348; Johnston v. Macon, 62 Ga. 645; Macon v. Macon Sav. Bank, 60 Ib. 133.

[3] Stifel v. Cooperage Co., 38 Mo. Ap. 340; Purcell v. Bear Creek, 38 Ill. Ap. 499; Thompson v. Schermerhorn, 6 N. Y. 92; see Page v. Chicago, 60 Ill. 441; Ould v. Richmond, 23 Gratt. 471; Peoria etc. Co. v. People, (Ill. 92) 31 N. E. R. 113; Matthews v. Alexandria, 68 Mo. 115; Richardson v. Heydenfeldt, 46 Cal. 68; People v. Clark, 47 Ib. 456; Randolph v. Gawley, 47 Ib. 458; White v. Stevens, 34 N. W. R. 255; Sheehan v. Gleason, 46 Mo. 100; Lord v. Oconto, 47 Wis. 386; Davis v. Rood, 65 N. Y. 566; Scofield v. Lansing, 17 Mich. 437; People v. Hagadorn, 10 N. E. R. 891; 104 N. Y. 516; Bellinger v. Gray, 51 Ib. 610; Hitchcock v. Galveston, 96 U. S. 341; Murray v. Tucker, 10 Bush (Ky.) 240; Davis v. Reed, 65 N. Y. 566; Fay v. Wood, (Mich. 87) 32 N. W. R. 612; (Apportionment;) Walker v. Chicago, 62 Ill. 286; East St. Louis v. Wehrung, 46 Ib. 392; Lake Shore & M. S. R. R. Co. v. Chicago, 56 Ib. 454; Bryan v. Chicago, 60 Ib. 507; Foss v. Chicago, 56 Ill. 354; State v. Copeland, 3 R. I. 33; Meuser v. Risdon, 36 Cal. 239; State v. Swisher, 17 Tex. 441; and comp. State v. Briggs, 15 R. I. 425; 7 Atl. R. 454; Danenhower v. District, 7 Mackey, 99.

[4] Phelps v. New York, 112 N. Y. 216.

[5] Murray v. Tucker, 10 Bush, 240; see Hitchcock v. Galveston, 96 U. S. 341; Davis v. Reed, 65 N. Y. 566.

assessment shall be made by some other body than the city council; and such grant of the power to delegate is within the constitutional limitations of the authority of the Legislature.[1] But where the ascertainment of the cost of an improvement, and the apportionment of the expenses between property owners, are delegated to an official of the corporation, to be reported upon by him to the city council for its approval or rejection; the discretionary power of the city council has not been delegated and the acts of this officer are only ministerial; and hence, there is no objection to the assessment, on the ground of the unlawful delegation of the authority of the city council.[2]

§ 264. **Power of taxation a continuing one.**—Where the municipal corporation is given the power to tax, whether it is the power to impose a general tax, or to levy a special assessment for a local improvement, in both cases the power is a continuing one; and the authority is given to the municipality to exercise the power from time to time, as the public needs may require. Such a power is not exhausted by a single exercise of it.[3] Thus, for example, the power to compel property owners to pave the streets of the city, includes the power to compel them to repave such streets, when required by the municipal authorities.[4] But these decisions have been denied, especially in Pennsylvania, where it is held that the power to impose a local assessment upon abutting owners for the original paving of a street is justifiable on the ground that it was the creation

[1] Schwatz v. Flatboats, 14 La. An. 243; Schenley v. Commonwealth, 36 Pa. St. 62; State v. New Brunswick, 30 N. J. L. 395.

[2] City of Nevada v. Morris, (91) 43 Mo. App. 586; Strauss v. City of Cincinnati, 24 Wkly. Law Bull. 422; McKusick v. Stillwater, 44 Minn. 372.

[3] Dickinson v. Worcester, 138 Mass. 555; Budge v. City of Grand Forks, 47 N. W. R. 390; Warner v. Knox, 50 Wis. 429; State v. New Brunswick, 44 N. J. L. 116; McVerry v. Boyd, (Cal. 92) 26 Pac. 885; Taber v. Grafmiller, 109 Ind. 206; McCormick v. Patchin, 53 Mo. 33; 14 Am. Rep. 440; Burmeister, *In re*, 76 N. Y. 174; Smith v. City of Louisville, 14 S. W. R. 349; Dooley v. Sullivan, 112 Ind. 451; Wiles v. Hoss, 114 Ib. 371; Phillips, *In re*, 60 N. Y. 16; Burke, *In re*, 62 Ib. 224.

[4] Chicago B. & Q. R. Co. v. City of Quincy, (Ill. 90) 27 N. E. R. 192; Farrar v. St. Louis, 80 Mo. 379; Estes v. Owen, 90 Ib. 113; Town of Marion v. O'Killman, (Ind. 91) 26 N. E. R. 676; Wilkins v. Detroit, 46 Mich. 120; McCormick v. Patchin, 53 Mo. 33; Hovey v. Barker, (Kan. 92) 26 Pac. Rep. 591; Kokomo v. Mahan, 100 Ind. 242; Jelliff v. Newark, 48 N. J. L. 101; Williams v. Detroit, 2 Mich. 560.

of a special benefit to such local property owners; but that the repaving of such street, as distinguished from the repair of that street, would not be included within the original power to pave, and therefore the cost of such paving could not be imposed upon the adjoining property owners.[1] In following out this distinction between original paving and subsequent change in the same, it has been held that where in the original plan of paving a street a strip of land was left in the middle of such street for trees and shrubbery, and a subsequent change in the plan called for the paving of such strip, this subsequent requirement of the paving of such strip, covered by the trees and shrubbery, would be an original paving for which the property owners could be assessed.[2] In the city of New York, the property owners are protected against the change of paving of the street by a provision of the charter, which prohibits the cost of the paving to be imposed upon the adjoining property owners, unless such change in paving has been petitioned for by a majority of the owners of the abutting property.[3] And so, also, it has been held in Iowa, that the abutting owners cannot be charged with the cost of repaving, where a good pavement has been torn up for the purpose of constructing a sewer; that the cost of the repaving should be considered an item of expense in the construction of the sewer.[4]

§ 265. **Power of taxation cannot be varied or enlarged by city ordinances.**—The power of taxation is conferred upon a municipal corporation by its charter, and the extent and limitations of this power can alone be determined by the provisions of the charter. Hence, the extent of the exercise of the power, and the amount of its exercise, can in no wise be varied or controlled by ordinance, except, of course, where the regulation of the exercise of the power in any one particular has been intrusted to the corporation by its charter.[5] The city, therefore, cannot impose terms or conditions on the exercise of the power, which will in any way affect the validity of a tax-sale

[1] Hammett v. Philadelphia, 65 Pa. St. 146; s. c., 3 Am. Rep. 615; Orphan Asylum's Appeal, 111 Pa. St. 135; Wistar v. Philadelphia, 111 Pa. St. 604; s. c., 80 Pa. St. 112 (1876); s. c., 21 Am. Rep. 112.

[2] Alcorn v. Philadelphia, 112 Pa. St. 494.

[3] Garvey, *In re*, 77 N. Y. 523.

[4] Battle v. Mobile, 9 Ala. 234 (1846).

[5] *Ante*, chap. on Ordinances, § 146; Weeks v. Milwaukee, 10 Wis. 242.

made under authority from the Legislature.[1] And, unless a special authority is given to the municipal corporation to exercise discretion in the matter, the municipal corporation cannot transfer the power of collecting taxes from the officer designated for that purpose in the charter, to some other appointee of the city council,[2] or exempt property from taxation, which the general law of the State made taxable,[3] or to exempt from taxation the improvements made upon the land, where the charter directs the assessment to be made upon the value of the property.[4] So, also, is it impossible for a city to make the liability for taxes a lien upon the property, binding such property into whosesoever hands the land may come, where the intention of the Legislature is expressed to be that the taxes should be a personal debt of the one who is the owner of the land, at the time the levy was made.[5]

It is manifest, therefore, from what has just been stated in general terms, that the mode of levying taxes, prescribed by the charter of the city, or by the general laws of the State under which municipal corporations are regulated, must be strictly pursued. Any deviation of a material nature from the mode prescribed will have the effect of vitiating the proceedings for the levy of the tax.[6] The same rule applies, perhaps even more strictly, to matters of proceedings for local assess-

[1] Thompson v. Carroll, 22 How. (U. S.) 422.

[2] Placerville v. Wilcox, 35 Cal. 21.

[3] State v. H. & St. J. R. R. Co., 75 Mo. 208.

[4] Fitch v. Pinckard, 5 Ill. 68; Primm v. Belleville, 59 Ill. 142.

[5] Moale v. Baltimore, 61 Md. 224, citing Dashiell v. Baltimore, 45 Ib. 615; Gould v. Baltimore, 58 Ib. 46; s. c., 59 Ib. 378; Handy v. Collins, 60 Id. 229.

[6] Sewall v. St. Paul, 20 Minn. 511; Ellison v. Lindford, (Utah, 91) 25 Pac. R. 744; State v. Perth Amboy, 38 N. J. L. 425; Brophy v. Landman, 28 Ohio St. 542; Fort Worth v. Davis, 57 Tex. 225; State v. Hagerty, 5 Ohio Cir. Ct. 22; Butler v. Nevin, 88 Ill. 575; Churchman v. Indianapolis, 110 Ind. 259; Wabash Ry. Co. v. People, (Ill. 91) 28 N. E. R. 57; Chicago v. Wright, 32 Ill. 192; Crane v. Janesville, 20 Wis. 305; State v. Phillips, 102 Mo. 664; Knox v. Peterson, 21 Wis. 247; Collins v. Louisville, 2 B. Mon. (Ky.) 134; Tobin v. Gillespie, 152 Mass. 219; State v. Jersey City, 24 N. J. L. 662, 666; State v. Plainfield, 38 Ib. 95; Hewlett v. White, (Mich. 90) 43 N. W. R. 1043; State v. Crawford, 36 N. J. L. 394; D'Antignac v. Augusta, 31 Ga. 700; Nissom v. Furman, 22 Fla. 581; State v. Babcock, 20 Neb. 522; Sims v. Warren, (Miss. 90) 7 So. 226; Fitch v. Pinckard, 5 Ill. 78; Henderson v. Baltimore, 8 Md. 352; Frost v. Leatherman, 55 Mich. 33; Green v. Ward, 82 Va. 324.

ments; any substantial departure from the statute, which authorizes the recovery of a local assessment, will avoid the proceeding.[1] And where, in the provision for the recovery of a local assessment, certain requirements are made as conditions precedent to the imposition of the liability for the improvement upon the abutting owner, the contractor who fails to take the necessary steps to impose the liability upon the abutting owner, cannot recover from the city for the value of the improvement thus made; notwithstanding a provision of the charter declares that under the circumstances, when work is ordered to be done on a local improvement, the abutting owner should be held responsible for it. This provision is construed as a guaranty that the cost of the improvement will be paid by the lot owner when everything is done by the contractor to create the liability upon the lot owners, which is required by the laws of the State.[2]

No liability on a local assessment for local improvements, which has been ordered by a municipal government, will be imposed thereby on either the city or the abutting owner, unless all the requirements of the Constitution or general laws of the State relating thereto, which are intended to serve as conditions precedent, have been fully complied with.[3] The commissioners, who are directed to assess the damages and benefits for a local improvement, have judicial powers; and are judicial officers to such an extent, that the general rule of law applies, which incapacitates them to act as commissioners, where they have any special interest in the assessment proposed.[4] It has also been held that it is fatal to the validity of a legal assessment, where

[1] Bensinger v. Columbia, 6 Mackey, 285; Allen v. Galveston, 51 Tex. 302; Gilmore v. Utica, 55 Hun, 514; 9 N. Y. S. 912; Pound v. Chippewa Co. Sup., 43 Wis. 65; Merrett v. Portchester, 71 N. Y. 309.

[2] Hall v. Chippewa Falls, 47 Wis. 267; Philadelphia v. Jewell's Est., 19 Atl. R. 947; 26 W. N. C. 292; Fletcher v. Oshkosh, 18 Wis. 229; Owens v. Milwaukee, 47 Ib. 461; Bouldin v. Baltimore, 15 Md. 18; No. Pac. Lum. & M. Co. v. East Portland, 14 Or. 3; Philan v. New York, 119 N. Y. 86; Benton v. Milwaukee, 50 Wis. 368; Harrison v. Milwaukee, 49 Ib. 247.

[3] Ziegler v. Flack, 54 N. Y. Super. Ct. 69; Eager, *In re*, 46 N. Y. 100; Hewes v. Reis, 40 Cal. 255; Hager v. Burlington, 42 Iowa, 661; Egerman v. Payne, 28 Mo. Ap. 72; Nicolson Paving Co. v. Painter, Ib. 699; Himmelman v. Oliver, 34 Cal. 246; Newman v. Emporia, 32 Kan. 456; De Koven v. Lake View, 129 Ill. 399; Long v. Cincinnati, 23 Wkly. L. Bul. 100; Hawthorne v. East Portland, 13 Oreg. 271.

[4] State v. Crawford, 36 N. J. L. 394.

the commissioners failed to take the oath required by the statute, or to hold such meeting at the place, which was named in the notice of the assessment.[1] Where the provision of the charter is silent as to the manner in which the city shall exercise its power in providing for the levy of taxes, or for the improvement of its streets, it is possible for provision to be made by resolution, or by motion of the city council, as well as by a formal ordinance.[2] But if the charter requires that the determination to order an improvement of a street, or a levy of the tax, shall be made by ordinance, then the simple resolution of the city council will not be valid.[3]

In this connection, however, it is difficult at times to distinguish provisions of the charter which are strictly mandatory, from those which are merely directory. The mandatory or imperative provision of the charter must, of course, be strictly followed, while obedience to the directory provision is more or less discretionary. Thus, a statute, requiring a tax to be levied on a certain date named, is held as to the time of levy to be directory; and the same power may be exercised within a reasonable time thereafter.[4] But the question, whether the provision as to the time of the exercise of the power is imperative or directory, depends wholly upon the intention of the Legislature, as manifested by the context of the statute and the nature of the power to be exercised, and the relation of the parties and the circumstances surrounding them. Thus, it has been held, that where a statute provides that the town board of trustees shall, before a given date, determine the amount of the general tax for the current year, the assessment of the tax before that date was mandatory, and that a levy made after the statutory time would be void.[5] It seems that where the object of a provision is the protection of the taxpayer against undue exaction or excessive hardship, the provision is mandatory and must be strictly complied with. But where the provisions only serve

[1] Wheeler v. Chicago, 57 Ill. 415; State v. Perth Amboy, 38 N. J. L. 425.

[2] Warrensburg v. Miller, 77 Mo. 56; Indianapolis v. Imberry, 17 Ind. 175 (1865); Moberry v. Jeffersonville, 38 Ind. 198; Terre Haute v. Turner, 36 Ind. 522; Delphi v. Evans, 36 Ind. 90 (1871).

[3] Newman v. Emporia, 32 Kan. 456. For the distinction between ordinance and resolution, see § 145.

[4] Gearhart v. Dixon, 1 Pa. St. 224 (1845).

[5] Williamsport v. Kent, 14 Ind. 306 (1860).

to promote dispatch, or provide a method or system of levying or collecting the tax, and can in no wise or in any material degree serve as an advantage to the taxpayer, the provisions are generally held to be directory.[1]

§ 266. **Limitation of tax rate cannot be exceeded.**—It is quite common in municipal charters, or in the general law under which the municipality had been incorporated, to limit the rate of taxes which may be raised in one year. Wherever the power is so limited, any levy of a tax beyond the limit would, of course, be void, and could be restrained by appropriate proceedings on the part of the citizens. Nor would the power be enlarged ordinarily by implication, by other provisions of the charter which confer generally the power to make contracts, or to make improvements of a general character.[2] And where the limit of taxation has been reached, without provision for the payment of the principal or interest of the municipal debt, it is not possible for a court to award a *mandamus*, to compel the levy of an additional tax to pay a judgment recovered for such debt against the city or county.[3] So, also, where the entire amount of the tax has not been exhausted in the provision for the current expenses; and the surplus of the amount of taxation is still to be determined; it has been held, by the Supreme Court of the United States, that the disposition of the remainder of the taxes, which could be imposed under the charter limits, was within the power of the city council; and could not be reached by *mandamus*, in advance of any ascertained surplus.[4] Under the statutes of Georgia, the power of a municipal corporation to levy taxes was limited to such a levy for ordinary current expenses; but it was held that the cost of furnishing a building for city government use, was an ordinary current expense, which is authorized under this statutory provision.[5]

While the statutory or charter limit of the power of taxation

[1] Steckert v. E. Saginaw, 22 Mich. 104; Starr v. Burlington, 45 Iowa, 87.

[2] Clark v. Davenport, 14 Iowa, 494; Arnold v. Hawkins, 95 Mo. 569; 8 S. W. R. 718; Johnston v. Becker Co., 27 Minn. 64; 6 N. W. R. 411; Hecock v. Van Dusen, (Mich. 91) 45 Ib. 343; Newaygo v. Echtinaw, (Mich. 91) 45 Ib. 1010; United States v. Cicero, 41 Fed. 8; Burnes v. Atchison, 2 Kan. 454.

[3] Clay County v. McAleer, 115 U. S. 616.

[4] East St. Louis v. Zebley, 110 U. S. 321; Weber v. Traubel, 95 Ill. 427; East St. Louis v. Underwood, 105 Ib. 308.

[5] Rome v. McWilliams, 67 Ga. 106.

cannot be impliedly enlarged by other provisions of the charter, calling for general improvement, or giving a general power to contract debts; yet, a special grant of power in the charter may have that effect; *i. e.*, where the charter grants to the corporation a special authority to borrow money or contract a debt for a specific purpose, and the exercise of this special power would necessarily call for an assessment of taxes in excess of the charter limit as to the rate of taxation; for this special purpose, the charter limit will be held to have been impliedly repealed. Thus, a special act which authorizes a municipal corporation to issue bonds in payment of a railroad subscription, and which provides for the payment of such bonds by the levy of taxes; or, even independently of any express provision, that the bonds shall be paid by a special levy; it has been held that this special act would confer an authority to levy taxes in excess of the charter limit, for the purpose of providing for payment of the bonds.[1]

But where the charter limit of rate of taxation for a particular year has not been exhausted by the single levy, there may be any number of levies during the same year, provided the charter limit has not been exhausted by the total sum of taxes levied; and as long as the charter does not require that the entire tax for the given year shall be levied at once.[2]

§ 267. **Construction and reconcilement of general laws with special charter provisions.**—The general statutes of the State usually contain provisions for taxation, applicable throughout the entire State, and declaring what property is taxable, and how the taxes should be levied. As has already been explained, the municipal corporation has no implied power to levy taxes for local purposes, but must rest its claim to such power upon a special grant of the power to it. It is the fact that municipal corporations are expressly granted the power to impose taxes, either in the charter, or by the general laws under which the municipality has been incorporated. But the grant of power to the corporation is ordinarily very general in its

[1] Quincy v. Jackson, 113 U. S. 332; distinguishing United States v. Macon County, 99 U. S. 582; Commonwealth v. Pittsburgh, 34 Pa. St. 496; Amey v. Allegheny City, 24 How. 364; Fosdick v. Perrysburg, 14 Ohio St. 472; Butz v. Muscatine, 8 Wall. 575 (1869).

[2] Municipality No. 2 v. Orleans Cot. Press Co., 6 Rob. (La.) 411; Benoist v. St. Louis, 19 Mo. 179 (1873); Wattles v. Papeer, 40 Mich. 624.

character, and the details, as to the extent of the power and the manner of its exercise, are generally left to be determined by judicial construction. Where the special grant of power contains no express provision for the application to municipal taxation of the general rules laid down by the general statutes of the State; and where the charter contains no substitute regulation of the same, presumptively, the scope and limitation of the municipal power of taxation can only be found in the provisions of the State statutes in respect to taxation. But, in every case, it is a question of judicial construction; and where the provisions of the general statute in respect to taxation cannot be carried out in the case of municipal taxation, this provision of the statute will be held by the courts to have no application to the municipal taxation.[1] Thus, it has been held in Virginia,—where the general laws of the State, in requiring railroad companies to pay for their passenger transportation by such company one mill for every mile of travel, provide that "every company paying such tax shall not be assessed with any tax on its lands, buildings or equipments;"—that this general law of taxation, providing for an exemption of the railroad corporation from the liability for any other tax, was intended to apply only to State levies of taxes, and did not include the tax of municipal corporations.[2] Where the authority is granted to a municipal corporation, to levy taxes "upon the freeholders and inhabitants of such village, according to law," the provision "according to law" means, according to the provisions of the general statutes of the State, in respect to the power of taxation.[3] So, also, it has been held that, where a city is author-

[1] Cemetery v. Com'rs, 152 Mass. 408; City of Kansas v. Johnson, 78 Mo. 661; Savannah v. Jesup, 106 U. S. 563; City of Wilkes-Barre App., 116 Pa. St. 246; 9 Atl. R. 308; Municipality No. 2 v. Com. Bank of N. O., 5 Rob. (La.) 151; Farrell v. Hathaway, 22 N. E. R. 849; Columbia v. Beasly, 1 Humph. 232, 240; Glass v. White, 5 Sneed (Tenn.) 475; South Bend v. Cushing, (Ind. 89) 24 N. E. R. 114; Furman v. Knapp, 19 Johns. 248; Trimble v. Sterling, (Ky. 91) 12 S. W. R. 1066; Shoalwater v. Armstrong, 9 Humph. 217.

[2] Winona etc. Co. v. Watertown, (S. D. 92) 44 N. W. R. 1072; Green etc. Co. v. Outagamie Co., (Wis. 91) 45 Ib. 536.

[3] Troy v. Mutual Bank, 20 N. Y. 387; Holtzhausen v. Newport, (Ky. 93) 22 S. W. R. 752; Davenport v. Miss. & Mo. R. R. Co., 16 Iowa, 348; State v. Carson, (Wash. 93) 33 Pac. R. 428; Barrett v. Henderson, 4 Bush, 255; Dunleith & D. Br. Co. v. Dubuque, 32 Iowa, 427; State Bank v. Madison, 3 Ind. 43; Gardner v.

ized by its charter to "assess all taxable real and personal property within the city," reference must be made to the general statute law of taxation, in order to ascertain what kind of property is subject to taxation. And the power of the municipal corporation, under the provision of the charter referred to, can be exercised, not only in respect to the property which was taxable under the State laws when the charter was granted; but, likewise, any other property which may subsequently be made taxable by any general statute of the State.[1] It has been held in South Carolina that, where a city is authorized by its charter to assess for taxes all taxable property, it authorizes the municipal corporation to levy taxes, not only upon the kinds of property which are actually taxed by the State, but all property which is not exempt from taxation by the State laws; and that property may be included in municipal taxation, which may not be actually taxed by the State, as long as it is not exempt from taxation.[2]

§ 268. **What can be taxed.** As has been intimated by the concluding statement of the preceding paragraph, the authority of the municipal corporation to levy and collect taxes is limited, not only in respect to the rate of taxation, but likewise as to the subjects of it. In other words, a municipal corporation can only levy taxes upon the property mentioned directly or inferentially in the charter.[3] But it is not necessary that the corporate charter should contain a direct limitation or specification of the subjects of municipal taxation; it would be sufficient

State, 21 N. J. L. 557; Am. Transp. Co. v. Buffalo, 20 N. Y. 388, Denio, J.: "Where the general law is made applicable (to cities) in this way any change in the general law would produce a corresponding change in the method of taxation by municipal corporations, the reference being to the law as it shall exist for the time being."

[1] Redmond v. Tarboro, 10 S. E. R. 845; 106 N. C. 122; see also, 106 N. C. 151; Tackaberry v. Keokuk, 32 Iowa, 155; Lot v. Ross, 38 Ala. 156; Ontario Bank v. Bunnell, 10 Wend. 186; Davenport v. Miss. & Mo. R. R. Co., 16 Iowa, 348.

[2] Asylum v. City of New York, 104 N. Y. 581; 12 N. E. R. 279; State v. Charleston Council, 10 Rich. L. 240; Charleston Council v. St. Philip's Church, 1 McMul. Eq. 139; Council v. Condy, 4 Rich. L. 254; State v. Charleston, 2 Speers L. 719.

[3] Winnipiseogee etc. Co. v. Gilford, 10 Atl. 849; 64 N. H. 337; Rabassa v. New Orleans, 3 Martin, O. S. 218; Ogden v. St. Joseph, 90 Mo. 522; 3 S. W. R. 25; Harper v. Elberton, 23 Ga. 566; Morris v. Lone Star Chapter, (Tex. 87) 5 S. W. R. 519; Barret v. Henderson, 4 Bush, 255.

if the municipal authority was generally described as being the power to tax all property which is taxable by the State. But where there is a general specification in the charter of the subjects of taxation, the court will determine by judicial construction, what kinds of property can be brought within the power of taxation. Thus, for example, where the power is simply to tax real and personal property within the city limits, it is held that the right to tax capital, employed in mercantile pursuits, is not implied in such power, distinct from the changeable property in which the capital is invested.[1] So, also, has it been held that, where the charter simply authorizes the municipal corporation to tax real and personal property, this grant of power does not include the power to tax the income or particular occupations.[2]

But it has been held in South Carolina, that a municipal corporation, under the grant of power to assess taxable property, may tax the income.[3] And it has been likewise implied, under the charter of the city of Richmond, that the corporation has the power to impose a license tax upon lawyers.[4] But there can be no doubt, however, that where the subjects of taxation have been specified in a municipal charter, the power of taxation must be limited to those specified, and cannot by implication be applied to subjects not specified.[5] Under the general grant of power, to levy taxes upon real and personal property, it has been held that improvements made by a lessee will be taxable as real estate.[6] And the same conclusion is reached in a case, where the lessor was the municipal corporation itself.[7]

§ 269. **Discrimination between real and personal property, when permissible.**—In accordance with the provision of the general laws of the State, and of the constitution, providing that uniformity shall be observed in the imposition of taxes; it has been held that all kinds of property, which are not lawfully exempted from taxation, must be taxed alike, and on the

[1] Municipality No. 3 v. Johnson, 6 La. An. 20 (1851).

[2] Savannah v. Hartridge, 8 Ga. 23 (1850).

[3] Lining v. Charleston Council, 1 McCord, 345; 1 Nott & McCord, 527;

[4] Ould v. Richmond, 23 Gratt. 464 (1873); s. c , 14 Am. Rep. 139.

[5] Baldwin v. Montgomery Council, 53 Ala. 437; Selma v. Selma Press & W. Co., 67 Ala. 430.

[6] Russell v. New Haven, 51 Conn. 259.

[7] San Francisco v. McGinn, 67 Cal. 110.

same standard of valuation, and by the same rate of taxation. And, therefore, a levy of a tax, to pay a certain debt of the city, exclusively upon the real property situated within such city, is such a discrimination against the real property, and in favor of the personal property, as to violate the constitutional requirement of uniformity, and is therefore void.[1] But this doctrine has not been uniformly followed; on the contrary, where the corporation is simply permitted to levy taxes upon both real and personal property, it has been held that the levy of a tax, upon the real property exclusively, would not be a violation of the constitutional requirement of uniformity, and hence would be lawful. The authority of the city to levy taxes upon both kinds of property is not imperative, but simply permissive.[2] But where the tax has been levied, the power to release the lien from certain kinds of property, and to relieve the owner of such property from the liability to pay it, cannot be exercised by a municipal corporation or a county, unless such power is expressly conferred by the statute of the State.[3]

§ 270. **Exemption from taxes, when permitted.**—The question, as to uniformity of taxes and the extent to which the constitution requires it, is also raised in connection with the more or less common practice to exempt certain classes of property from taxation. But the power of the State Legislature, to exempt property from taxes for charitable and *quasi*-public purposes, has been everywhere conceded to involve no conflict with this constitutional provision.[4] But, as a matter

[1] Exchange Bk. & Hines, 3 Ohio St. 1; Muscatine v. R. R. Co., 1 Dillon C. C. 536; State v. Severance, 55 Mo. 378; Hale v. Kenosha, 29 Wis. 599; Zanesville v. Richards, 5 Ohio St. 589; Cape Girardeau v. Hill, 118 U. S. 68; Attorney General v. Wilkes-Barre, etc. Co., 11 Wis. 42; Livingston v. Albany, 41 Ga. 21; Weeks v. Milwaukee, 10 Wis. 242; Mobile v. Dargan, 45 Ala. 310.

[2] Winter v. Montgomery, 65 Ala. 404; s. c., 79 Ib. 481; Prinam v. Belleville, 59 Ill. 142; Oakey v. New Orleans, 1 La. 1; Municipality No. 2 v. Duncan, 2 La. An. 182; Frederick v. Augusta, 5 Ga. 561.

[3] Lowell v. Middlesex Co. Comm'rs, 3 Allen (Mass.) 550; State v. Central Pac. R. R. Co., 9 Nev. 79; State v. Central Pac. R. R. Co., 10 Ib. 47; Finch v. Temaha Co. Sup., 29 Cal. 453.

[4] State v. Woodruff, 37 N. J. L. 139; Files v. State, 48 Ark. 529; 3 S. W. R. 817; Tomlinson v. Branch, 15 Wall. 460; Highgate v. State, 7 Atl. R. 898; State v. Hannibal & St. J. R. R. Co., 75 Mo. 208; Northwestern Univ. v. People, 80 Ill. 333; Clark v. Leathers, (Ky.) 5 S. W. R. 576; Leicht v. Burlington, 73 Iowa, 29; 34 N. W. R. 494; Zabel v. Louisville Home, (Ky. 92) 17 S. W. R. 212; Peo-

of course, the municipal corporation cannot exercise the power to exempt property from taxation, unless the power has been conferred upon it by its charter; or unless its exercise of the power is authorized by the general laws of the State.[1] It has been held that, wherever the right of exemption exists at all, it must be found to rest upon a clear and explicit grant of power; and the power to exempt will be denied to the municipal corporation, unless the grant of the power is free from reasonable doubt. "An intent to exempt any property, or any portion of the value of any property, from taxation must not be presumed, but must be found plainly expressed in the statutes."[2]

These statutes, which authorize the exemption from taxation, are construed strictly against those claiming the benefit of the exemption.[3] The common cases of exemption are usually granted in favor of churches and schools, and other pub-

ple v. McCreery, 34 Cal. 432; Life Assoc. of Am. v. St. Louis Co. Assessors, 49 Mo. 512; State v. Butler, (Tenn.) 8 S. W. R. 586; Com. v. McKibben, 14 S. W. R. 572; Chippewa Co. v. Auditor Gen., 32 N. W. R. 651; Orange, etc. R. R. v. Alexandria, 17 Gratt. 176; State v. Newark, 26 N. J. L. 519; People v. Eddy, 43 Cal. 333.

[1] Anderson v. Mayfield, (Ky. 92) 19 S. W. R. 598; Whiting v. Westpoint, 14 S. E. R. 698; Cartersville W. Co. v. Cartersville, (Ga. 92) 16 S. E. R. 70; Austin v. Gas. Co., (Tex.) 7 S. W. R. 200.

[2] People v. N. Y. Tax Com'rs, 95 N. Y. 554; *In re* Revenue Law, 48 N. W. R. 813; Le Duc v. Hastings, (Minn.) 38 Ib. 803; Lord Colchester v. Kewney, L. R. 1 Exch. 368; Platt v. Rice, 10 Watts (Pa.) 352; State v. Parker, 32 N. J. L. 426; Crawford v. Burrell Tp., 53 Pa. St. 219; Newport v. R'way Co., 89 Ky. 29; Chicago etc. Co. v. Missouri, 7 S. Ct. 693; 120 U. S. 569; 122 Ib. 561; Providence Bank v. Billings, 4 Pet. 514; Delaware Railroad Tax, 18 Wall. 206; Washington University v. Rowse, 42 Mo. 308; Pacific R. R. Co. v. Cass County, 53; South Bend v. Notre Dame Univ., 69 Ind. 344; Trask v. Maguire, 18 Wall. 206; Auditor v. Maier, 54. N. W. Rep. 640; Bordages v. Higgins, (Tex. 93) 20 S. W. R. 726; Com. v. Arnott S. R. Co., (Pa.) 22 Atl. R. 243; Lancaster v. Clayton, 5 S. W. R. 864; New Orleans, etc. Co. v. New Orleans, 143 U. S. 192; Biscoe v. Coulter, 18 Ark. 423; Harvard College v. Boston, 104 Mass. 470; Swan Point Cemetery v. Tripp, 14 R. I. 199; Austin v. Austin Gasl. & C. Co., 69 Tex. 180; State v. Chamberlain, 24 Atl. R. 479; Salem M. Co. v. Salem, 29 N. E. R. 584; Meth. E. Church v. Ellis, 38 Ind. 3; Baltimore v. State, 15 Md. 376.

[3] New Orleans etc. Co. v. City, 143 U. S. 192; Smulley v. Burlington, 63 Vt. 443; Jefferson Branch Bank v. Skelly, 1 Black (U. S.) 436; Phillips Exeter Acad. Trs. v. Exeter, 58 N. H. 306; Bordager v. Higgins, *supra;* Providence Bank v. Billings, 4 Pet. 514; Charles River Br. Prop. v. Warren Br. Prop., 11 Pet. 420.

lic or charitable institutions. Where the question is raised in respect to such institutions, its determination depends rather upon the use of the property by such institution, than upon its ownership of the property.[1] Thus, it has been held that the statute, which exempts a church lot from taxation, does not exempt a parsonage and a lot, upon which it is located.[2] So, also, the exemption cannot be applied to land, upon which a church is being built, where the exemption is, by express provision of the statute, applicable only to churches already built.[3]

The Legislature has the power of extending the list of property, which is exempt from taxation, and of making such exemption to apply to municipal taxation, without the consent of the municipality.[4] Where property is assessed by the municipal corporation when it is exempt under the State law of taxation, the owner of the property can defend all proceedings for enforcing the tax, and perhaps secure an injunction against the sale of the property for such tax.[5]

It is an interesting question, what is the effect of an illegal exemption of property from taxation upon the validity of the general assessment. And the answer to that question depends upon the effect of such illegal exemption upon the rate or amount of taxation, which is assessed upon the other property beyond what would be assessed upon it, if there had not been an illegal exemption. The mere omission by an assessor of certain property from his assessment list, without authority of law, will not invalidate the entire assessment,[6] as long as the

[1] Salem Lyceum v. Salem, 27 N. E. R. 672; St. Edwards Col. v. Marrison, 82 Tex. 1; Detroit Y. M. Soc. v. Detroit, 3 Mich. 172; St. Mary's Col. v. Crowl, Treas., 10 Kan. 442; City v. College, (Mo. 92) 20 S. W. R. 35; Bishop's Residence v. Hudson, 91 Mo. 671; 4 S. W. R. 435; Phillips Exeter Academy v. Exeter, 58 N. H. 506; Salem M. Soc. v. Salem, 29 N. E. R. 584; Brown v. Pittsburgh, (Pa. 88) 16 Atl. R. 43.

[2] Morris v. Lone Star Chapter, 5 S. W. R. 519; 68 Tex. 698; State v. Axtell, 41 N. J. L. 117; Ramsay v. Church, 45 Minn. 229; People v. Ryan, (Ill. 92) 27 N. E. R. 1095; St. James Ins. v. Salem, (Mass.) 26 N. E. R. 636; Association v. New York City, 104 N. Y. 581.

[3] St. Mark's Church v. Brunswick, 78 Ga. 541; 3 S. E. R. 561; Mullen v. Com'rs, 85 Pa. St. 288; State v. Newberry Council, 12 Rich. L. 339; Orr v. Baker, 4 Ind. 86.

[4] Richmond v. Richmond & D. R. Co., 21 Gratt. 60.

[5] St. Louis B. & Sav. Assoc. v. Lightner, 47 Mo. 393; Atl. & Pac. R. R. Co. v. Cleino, 2 Dillon, 175; Lee v. Thomas, 49 Mo. 112; Jefferson City v. Opel, Ib. 190; Walden v. Dudley, Ib. 419.

[6] People v. McCreery, 34 Cal. 43;

illegal exemption cannot be shown to have increased the amount of the tax, which the other taxpayers have been required to pay.[1] Where there has been an exemption from municipal taxation in favor of a particular corporation, a dissolution of the corporation will not have the effect of terminating the exemption; the provision for exemption will continue to be enforced in favor of any successors of the defunct corporation.[2]

In determining the scope and operation of the exemption from taxation,—and in compliance with the general rule that the provision for exemption from taxation must be strictly construed against the owner of property to be exempted—it has been held that where in general terms a piece of property, as for example, a church, is by general law exempted from taxation, unless the law contained language relating to the exemption, which makes the provision apply to assessments for local improvements, as well as to all sorts of general taxation; such exemption will not be applied to street assessments; and the property so exempt from general taxation will be held liable for assessments for local improvements on the streets. The ground, upon which the decisions rest this distinction, is that the assessment for local improvement is different in creation and in its general character; and is assessed against property, in consideration of the special benefit which such property has received from the local improvement.[3] The same principle has

Doyle v. Austin, 47 Ib. 353, 359; Williams v. Lunenburg Sch. Dist., 21 Pick. 75; Kneeland v. Milwaukee, 15 Ib. 454; Welch v. Milwaukee, 10 Wis. 282; Dean v. Gleason, 16 Wis. 1, 15; Hersey v. Milw. Co. Sup., Ib. 185; Bond v. Kenosha, 17 Wis. 274; Hale v. Kenosha, 29 Ib. 599.

[1] Balfe v. Bell, 40 Ind. 337; Winters v. Montgomery, 65 Ala. 403; Hassen v. Rochester, 65 N. Y. 516; Dunham v. Chicago, 55 Ill. 357.

[2] Mobile etc. Co. v. Kennerly, 74 Ala. 566.

[3] Kilgus v. Trustees, (Ky. 93) 22 S. W. R. 750; Clinton v. Henry Co., (Mo. 93) Ib. 494; Brick Presb. Church v. New York, 5 Cow. (N. Y.) 538; New York v. Cushman, 10 Johns. 96; Bloomington Assn. v. People, (Ill. 90) 28 N. E. R. 1076; Pray v. Northern Liberties, 31 Pa. St. 69; Northern Liberties v. St. John's Church, 13 Ib. 104; Board v. School District, (Ark. 90) 19 S. W. R. 969; Zabel v. Louisville Bap. Orph. Home, (Ky. 90) 17 Ib. 212; Philadelphia v. Penn. Hospital, 22 Atl. R. 744; 143 Pa. St. 367; Boston Seamen's Fr. Soc. v. Boston, 116 Mass. 181; Beals v. Providence Rubber Co., 11 R. I. 381; Railroad Co. v. Decatur, 18 N. E. R. 315; 126 Ill. 92; Sharp v. Speir, 4 Hill, 76; Sharp v. Johnson, 4 Ib. 92; Rosevelt Hosp. v. New York, 84 N. Y. 108; Sheehan v. Good Sam. Hosp., 50 Mo. 155; Church v. New York, 55 N. Y. Super. 160; Second Av. M. E.

been applied to the real estate, which is held by the board of public schools, a corporation distinct from the municipal corporation.[1] The same ruling has been maintained, denying the application of the exemption to local assessments, where a railroad charter exempts the company from "any other or further tax or imposition upon it."[2] But where the charter of a charitable institution provides that the corporate property "shall not be subject to taxes or *assessments*," it is clear that the Legislature intends that such a corporation shall not be liable either for general taxation or for assessments for local improvements of the streets.[3] It has been held in Vermont that, where a charter provides that the property of a college shall be exempt from "public tax," this would not exempt the land from local municipal taxes, which were to be expended for the benefit of the college.[4]

§ 271. **Public property not taxable.**—The general statutes of the State, referring to the subjects of taxation, unquestionably refer to private property only, and cannot reasonably be presumed to include property, which is owned by the State or by a municipal corporation. Hence, it is impossible for the property owned by the State or by the municipal corporation to be taxed without express authority from the Legislature by any other municipal corporation. Thus, for example, the city of Brooklyn has been held not to have the power to impose a tax upon land located within the city, and owned and used as a landing for a ferry company, who is a lessee of the city of

Church, *In re*, 66 N. Y. 395; Marshall v. Vicksburg, 15 Wall. 146; State v. Newark, 36 N. J. L. 478; Indianapolis, P. & C. R. R. Co. v. Ross, 47 Ind. 25; Church v. City of New York, 55 N. Y. Super. 160; Paine v. Spratley, 5 Kan. 525; Bridgeport v. N. Y. & N. H. R. R. Co., 36 Conn. 255; Ludlow v. Cinc. So. Ry. Trs., 78 Ky. 357; Paterson v. Soc. for E. U. Manuf., 24 N. J. L. 385. See also Henderson v. McCullagh, 12 S. W. R. 932 (Ky. 90); Montgomery v. Wyman, 22 N. E. R. 845; 130 Ill. 17; State v. Bell, 43 Minn. 344.

[1] Public Schools v. St. Louis, 26 Mo. 468; Hartford v. West Middle Sch. Dist., 145 Conn. 462.

[2] Baltimore v. Green Mt. Cem. Prop., 7 Md. 517.

[3] See State v. Newark, 36 N. J. L. 478; 13 Am. Rep. 464, reversing 36 N. J. L. 157, and distinguishing the case from State v. Newark, 27 N. J. L. 185, in which the exception was declared to be "from all taxes, charges and impositions." And see First Presb. Church v. Wayne, 36 Ind. 338; Gould v. Baltimore, 59 Md. 378.

[4] Morgan v. Cree, 46 Vt. 773; 14 Am. Rep. 640.

New York. The exemption from taxation of such property, as the property of the city of New York, is held to apply for the benefit of the lessee.[1] The same ruling has been made in Texas, in respect to a public wharf owned by a municipal corporation; the public wharf being held to be non-taxable under the general laws of the State.[2] The same rule has been maintained in respect to property of the city which is used as a cemetery.[3] Nor is it possible for lands, which are used by the county for a court house and other county purposes, to be taxed by a municipal corporation. Nor does it seem to be possible to subject such land to a liability for a local assessment;[4] unless, of course, an express authority is obtained from the Legislature.

The general rule, therefore, is that property, which is owned by any instrument of government, cannot become the subject of taxation, unless it is so provided by positive legislation.[5] In Kentucky, a distinction has been made in respect to municipal property, as a subject of taxation by the State authorities, between property which the municipal corporation holds in its

[1] People v. Brooklyn Assessors, 111 N. Y. 505.

[2] Galveston Wharf Co. v. Galveston, 63 Tex. 14; Black v. Sherwood, 6 S. E. R. 484.

[3] As to exemption of public property see Clark v. Louisville W. Co., (Ky. 91) 14 S. W. R. 502; Lockwood v. St. Louis, 24 Mo. 20; Garrett v. St. Louis, 25 Ib. 505; Willard v. Pike, 59 Va. 202; 9 Atl. 907; Blackman v. Houston, (La.) 2 So. 193; County of Erie v. Erie, 113 Pa. St. 360; Nashville v. Smith, 86 Tenn. 213; Rochester v. Rush, 80 N. Y. 302; Egyptian Lev. Co. v. Hardin, 27 Mo. 495; Sheehan v. Good Sam. Hosp., 50 Ib. 155; s. c., 11 Am. Rep. 412; Omaha Col. v. Rush, 22 Neb. 449; 35 N. W. R. 222; Green v. Hotaling, 44 N. J. L. 347; People v. Doe, 36 Cal. 220; Farnham v. Sherry, 74 Wis. 568; Witt v. Armstrong, (Ark.) 6 S. W. R. 225; Doyle v. Austin, 47 Cal. 353; Tyler v. People, 66 Ill. 322; Piper v. Singer, 4 Serg. & R. 354; Nashville v. Smith, (Tenn.) 6 S. W. R. 273; Hall v. Marysville, 19 Cal. 391; Low v. Lewis, 46 Ib. 549; People v. Shearer, 30 Ib. 645; Callanan v. Wayne Co., 73 Iowa, 109; 36 N. W. R. 654; Meridan v. Phillips, (Miss.) 4 So. R. 119; Emery v. Gas Co., 28 Cal. 345; Taylor v. Palmer, 31 Ib. 240; Brightman v. Kirner, 22 Wis. 54; Seamen's Fr. Soc. v. Boston, 116 Mass. 181 (1874); s. c., 17 Am. Rep. 153.

[4] Worcester Co. v. Worcester, 116 Mass. 193 (1874); s. c., 17 Am. Rep. 159; but see *supra*, § 270, on subject of assessment and exemptions.

[5] Board v. School District, (Ark. 90) 19 S. W. R. 969; Bloomington Ass'n v. People, (Ill. 90) 28 N. E. R. 1076; Hall v. Marysville, 19 Cal. 391; Low v. Lewis, 46 Ib. 549; Daugherty v. Thompson, (Tex.) 9 S. W. R. 99; State v. Gaffney, 32 N. J. L. 133; Nashville v. Smith, 86 Tenn. 213; Von Steen v. Beatrice, (Neb. 93) 54 N. W. R. 677; State v. Recorder, (La. 93) 12 So. R. 880; Clinton v. Henry Co., (Mo. 93) 22 S. W. R. 494.

governmental character for public use, such as public buildings and prisons and hospitals, which cannot be taxed by the State, or any other municipal government; and property which is owned and held by a municipal corporation for private purposes, and, therefore in its *quasi*-private character, which can be subjected to taxation, such as vacant lots, fire engines and the like.[1] It has, however, been held elsewhere, that while it is possible for the Legislature by express provision to subject all municipal property to taxation, it is not presumed that the Legislature intended to do so in respect to any municipal property, in the absence of an express declaration to that effect.[2]

It has also been held that the general government cannot tax bonds belonging to a municipal corporation.[3] And, on the other hand, it has been held that a municipal corporation cannot in the absence of an express authority levy a tax upon State securities.[4]

§ 272. **What property is within municipality for purposes of taxation.**—One of the general limitations upon the taxing power of a municipal corporation is, that such taxation can only be levied upon property within the municipality. And, sometimes, it is hard to determine, whether property is to be considered within a municipality for the purpose of taxation. The general rule, however, is very plain, that the municipal power of taxation cannot be extended by the corporation by implication, to property not within its territorial limits. Hence, for this reason, it has been held that a municipal corporation cannot tax the coal beds under a river, upon whose bank the city is situated, where the boundary line of such city is the low water mark of the river.[5] The same question has been raised in respect to the power of a city to tax bridges located over navigable streams, where only a part of the bridge is located within the city limits. In the Kentucky case, it has been held that the city of Louisville could not tax a bridge in

[1] Louisville v. Commonwealth, 1 Duvall (Ky.) 295 (1864); see also to same effect, Mitchellville v. Polk Co. Sup., 54 Iowa, 554; Erie County v. E. Water Com'rs, 113 Pa. St. 368; Sewickley Bor. v. Sholes, 118 Pa. St. 165.

[2] People v. McCreery, 34 Cal. 432; Doyle v. Austin, 47 Cal. 353 (1874); Nashville v. Bank of Tenn., 1 Swan (Tenn.) 269.

[3] United States v. Balt. & O. R. R. Co., 17 Wall. 322 (1872).

[4] Augusta Council v. Dunbar, 50 Ga. 387 (1873).

[5] Gilchrist's Appeal, 109 Pa. St. 600.

respect to the part of its property not located within the city limits; because, for the purpose of taxation, such property cannot be said to be within the city limits; and the further special reason is assigned by the court that the bridge derived no benefit from the municipal taxation.[1] It has, however, been held elsewhere that bridges may be taxed under such circumstances by the municipal corporation.[2]

Except in the case of bridges, there cannot be much difficulty at any time in determining the *situs* of real estate for the purpose of taxation. It is rather a matter of geographical location alone that is involved in this inquiry.[3] But where the question of situation for taxation is raised in respect to personal property, considerable difficulty is experienced at times in determining the right of taxation of such property. It seems, however, to be the general rule of law that, where the property is tangible or corporeal, and it is actually situated or held within the corporate limits, that property may be subjected to municipal taxation, although the owner of it does not reside within the city limits.[4] But the question becomes still more perplexing, where

[1] Louisville Br. Co. v. Louisville, 30 Ky. 189.

[2] St. Louis Br. Co. v. East St. Louis, 121 Ill. 238; State *ex rel.* C. Br. Co. v. Columbia, 27 S. C. 137.

[3] Hittinger v. Boston, 139 Mass. 17; Augusta v. Dunbar, 50 Ga. 387; Finley v. Philadelphia, 32 Pa. St. 381; People v. Niles, 35 Cal. 282; Bel v. Piercc, 51 N. Y. 12; Mills v. Thornton, 26 Ill. 300; Sangamon & M. R. R. Co. v. Morgan County, 14 Ib. 163; People v. N. Y. Tax Comm'rs, 64 N. Y. 541; Denver, etc. Co. v. Church, 28 Pac. R. 468.

[4] Dunleith v. Reynolds, 53 Ill. 45; People v. Ogdensburgh, 48 N. Y. 390; Rieman v. Shephard, 27 Ind. 288; Bates v. Mobile, 46 Ala. 158; Pierce v. Eddy, 152 Mass. 594 (taxation on farm located in two towns); Hoyt v. N. Y. Tax Comm'rs, 23 N. Y. 223; New Albany v. Meekin, 3 Ind. 481; St. Louis v. Wiggins Ferry Co., 40 Mo. 580; Pomeroy Salt Co. v. Davis, Treas., 21 Ohio St. 555; Evansville v. Hall, 14 Ind. 27; Madison v. Whitney, 31 Ind. 261; Powell v. Madison, 21 Ind. 335. "We do not think that, for the purposes of taxation, a court is authorized to apply the rule of law governing the personal estate of deceased persons, which regards its *situs* as following the domicil of the owner. Surely, no one would risk asserting the general proposition that, under the charter of New Albany, all the personal property owned by every resident of the city no matter where situated, was liable to be taxed by said city; that if a citizen of New Albany was a partner in a steamboat plying on some river in California, or in a flock of sheep kept in Kentucky, or in some part of Floyd county in this State, out of the corporation of New Albany, he was liable to be taxed for it under its charter. We do not deny that the State might have authorized it to

the owner of property resides in one town and does business in another.[1] It is, however, not possible for a municipal corporation, under a power to tax all property within its corporate limits, to impose a tax upon its own bonds.[2]

The question is equally difficult when the attempt is made to determine for the purpose of taxation the *situs* of vessels. The general rule is, that the legal *situs* of vessels, for purposes of taxation, is in the port, where such vessels are registered as their home port, it matters not where the owner lives; and this *situs*, which is dependent upon registration under the laws of the United States, continues until the vessel has acquired a new *situs*. Its more or less prolonged absence, in the course of its navigation, does not affect the continuance of the *situs* so acquired.[3] It has been held that ferry boats are taxable, wherever their owner resides.[4] Whether a municipal corporation can tax the ferry boat of a foreign private corporation is a doubtful question. The Supreme Court of Missouri held that the city had such a power,[5] while the Supreme Court of the United States held, on the appeal of the same case, that the city had no such power; for the reason that the chief relation of such ferry boat to the city was "merely that of contract there as one of the *termini* of their *transit* across the river in the prosecution of their business."[6]

Where the property of nonresident owners is subject to taxation; in order that such taxation may not be invalid, there

tax such property, but we think that she has not." Perkins, J., in New Albany v. Meekin, 3 Ind. 481.

[1] Gardiner Cotton & W. F. Co. v. Gardiner, 5 Me. 133.

[2] Macon v. Jones, 67 Ga. 489. This is certainly the case where the holder of the bonds does not reside within the limits of the city. Murray v. Charleston Council, 96 U. S. 43; see Bank v. Wilkes-Barre, (Pa. 92) 24 Atl. 11.

[3] Newport v. Berry, (Ky. 92) 19 S. W. R. 238; Howell v. State, 3 Gil. (Md.) 14; New Albany v. Meekin, 3 Ind. 481; Hays v. Pac. M. St. Co., 17 How. 596; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365; Morgan v. Parham, 16 Wall. 471; Mobile v. Baldwin, 57 Ala. 61; People v. N. Y. Tax Com'rs, 58 N. Y. 242; Perry v. Torrence, 8 Ohio, 521; Irwin v. N. O., St. L. & C. R. R. Co., 94 Ill. 105; Wheeling etc. Co. v. Wheeling, 99 U. S. 273, aff'g 9 W. Va. 170; Hoyt v. Com'rs, 23 N. Y. 224; Johnson v. Drummond, 20 Gratt. 419; St. Joseph v. Hannibal etc. Co., 39 Mo. 476; Oakland v. Whipple, 39 Cal. 112; *contra*, Battle v. Mobile, 9 Ala. 234.

[4] Mobile v. Baldwin, 57 Ala. 61.

[5] St. Louis v. Wiggins Ferry Co., 40 Mo. 580.

[6] St. Louis v. Wiggins Ferry Co., 11 Wall. 423.

must be no discrimination against nonresidents, either as to the right of taxation or assessment of the property, or as the mode of levying such a tax. The constitutional provision prohibits any discrimination on any grounds in favor of residents and citizens of the State against the citizens of other States.[1] It has been held that, where statutes provide for the registration and taxation of vehicles, which are used in the public streets of a city, the statute cannot be applied by implication to nonresidents; and unless such a statute expressly provides that it shall apply to nonresidents, the tax cannot be levied upon them.[2] So, also, an ordinance was held to be void, under this constitutional provision, which permitted persons, doing business within certain limits, to sell goods under a license tax, either from wagons or in their shops, and denied the same right to persons not residing within its limits.[3] But this protection of nonresidents, against discrimination in favor of the residents, does not apply to foreign corporations. A foreign corporation can only do business within a State or municipality, by complying with whatever conditions and terms such State or municipality may require, even though similar conditions and terms are not required of domestic corporations and their residents.[4]

§ 273. **Taxation of railways, banks and other corporations.**—Where a corporation exists, and has property within a certain State or Territory, the right of taxing such property will depend upon the *situs* of such property, and upon the character of the property. Thus, in the case of railroads, railroad tracks and other tangible property, held by such a railroad, will be taxable in the State or county or town, where such property is located.[5] And such property is likewise subject to special taxes and local assessments.[6] The rolling stock

[1] Hill v. Warrell, 49 N. W. R. 479; 87 Mich. 135; State v. Charleston, 2 Spears' L. (S. C.) 719.

[2] Joyce v. Woods, 78 Ky. 386; Bennett v. Birmingham Bor., 31 Pa. St. 15; see *ante*, § 261.

[3] St. Louis v. Spiegel, 90 Mo. 587.

[4] *In re Prime*, 18 N. Y. S. 603; American Union Express Co. v. St. Joseph, 66 Mo. 675, and *ante*, 261; Republican V. etc. Co. v. Chase Co., (Neb. 92) 51 N. W. R. 132; Columbus etc. Co. v. Wright, (Ga. 92) 15 S. E. R. 293.

[5] Wilmington etc. Co. v. Alsbrook, 110 N. C. 137; Wheeler v. Rochester & S. R. R. Co., 12 Barb. 227; Railroad Co. v. Morgan County, 14 Ill. 1; People v. Reed, 19 N. Y. S. 528; Prov. & Wor. R. R. Co. v. Wright, 2 R. I. 459.

[6] No. Ind. R. R. Co. v. Connelly, 10 Ohio St. 159; Burl. & Mo. R. R. Co. v. Spearman, 12 Iowa, 112.

of a corporation is, however, taxable in a State, town or county where the corporation has its principal office.[1]

Banks and bank stock are taxable by the municipality, in which the banks are located.[2] The same rule applies in respect to insurance companies[3] and other domestic corporations.[4] Where the general law of the State provides that the capital stock of a bank shall be taxable only for State purposes, the city cannot exercise the power of taxation over such bank or its capital stock.[5] So, also, it was held in Louisiana, that where a bank was exempt from taxation by the State, a city corporation is likewise prohibited from imposing taxes upon such bank.[6]

[1] People v. Coleman, 133 N. Y. 279; Minnesota v. St. Paul, 2 Wall. 609; Stevens v. Buffalo & N. Y. C. R. R. Co., 31 Barb. 590; Delaware County v. R. R. Co., 10 Pa. Co. Ct. 326; Hill v. La Crosse R. R. Co., 11 Wis. 214; Coe v. Railroad Co., 10 Ohio St. 372; Pac. R. R. Co. v. Cass County, 53 Mo. 17; Meyer v. Johnson, 53 Ala. 241; Georgia etc. Co. v. State, 15 S. E. R. 293; App. Tax Ct. of Baltimore v. No. Cent. Ry., 50 Md. 417; Phila., W. B. & B. R. R. Co. v. App. Tax Ct. of Balt., 50 Ib. 397; Columbus S. R. Co. v. Wright, (Ga. 92) 15 S. E. R. 293; Hoyle v. P. & M. R. R., 54 N. Y. 314; Randall v. Elwell, 52 Ib. 522; Beardsley v. Ontario Bank, 31 Barb. 619; Howe v. Freeman, 14 Gray, 566; People v. Wemple, 129 N. Y. 558; Denver & R. G. Ry. Co. v. Church, (Col. 92) 28 Pac. R. 468; Dubuque v. Ill. Cent. R. R. Co., 39 Iowa, 56; Williamson v. N. J. So. R. R. Co., 29 N. J. Eq. 311.

[2] Gordon v. Appeal Tax Court, 3 How. (U. S.) 133; Connersville v. Bank of Ind., 16 Ind. 105; Wilkes-Barre D. & S. Bank v. Wilkes-Barre, (Pa. 92) 24 Atl. R. 111; Cherokee Ins. & B. Co. v. Whitfield Jus., 28 Ga. 121; Savannah v. Hartridge, 8 Ib. 213; Bank of Ga. v. Savannah, Dudley, 130; State v. Charleston Council, 5 Rich. L. 561; Bank of Chester v. Chester T. Council, 10 Rich. L. 104; People v. Coleman, 63 Hun, 633; 133 N. Y. 279; Nashville v. Thomas, 5 Coldw. (Tenn.) 600; Bank of Ind. v. Madison, 3 Ind. 43; Evansville v. Hall, 14 Ib. 27; King v. Madison, 17 Ib. 48; Madison v. Whitney, 21 Ib. 261; Macon v. Savings Bank, 60 Ga. 133; Gordon v. Baltimore, 5 Gill (Md.) 231; O'Donnell v. Bailey, 24 Miss. 386; City Bank of Dallas v. Vogel, 51 Tex. 354.

[3] Tripp Treas. v. Merchants Mut. F. Ins. Co., 12 R. I. 435; Porter v. Rockford, R. I. & St. L. R. R. Co., 76 Ill. 561; Dubuque v. N. W. L. Ins. Co., 29 Iowa, 9; St. Louis v. Indep. Ins. Co. of Mass., 47 Mo. 146, 168; Republic L. Ins. Co. v. Pollak, 75 Ill. 292; Smalley v. Burlington, 63 Vt. 443.

[4] State v. Heppenheimer, (N. J. 92) 24 Atl. 446; Lockwood v. Weston, (Conn. 92) 23 Ib. 9; Danville Lumber & M. Co. v. Parks, 88 Ill. 463.

[5] Farrington v. Tennessee, 95 U. S. 679; State v. Union & Planters Bank, (Tenn. 92) 19 S. W. R. 758; Schuylkill Co. v. Citizens Gas Co., (Pa. 92) 23 Atl. 1055.

[6] Municipality No. 1 v. La. State Bank, 5 La. An. 394; New Orleans v. Com. Bank of N. O., 10 Ib. 735; New Orleans v. Southern Bank, 11 Ib. 41; New Orleans v. Mech. & T. Bank, 15 Ib. 107.

Domestic corporations, located within a municipality, will be taxable by such municipal corporation, even though the charter authorizes such corporation "to raise money by a tax to be assessed upon the freeholders and inhabitants according to law." It was held that a banking corporation, located within such a town, was an inhabitant of such town for purposes of taxation.[1]

§ 274. **Taxation of incorporeal hereditaments.**—The question has also been raised as to whether a municipal corporation can tax incorporeal hereditaments, held and enjoyed within its territorial limits. The question has been raised, particularly, in respect to the right to tax the old bed of a street railway company,[2] and the property of gas and water companies.[3] Whether the lessee of a city waterworks for a term of years may be taxed by the municipal corporation, has been decided in the affirmative,[4] as well as in the negative.[5] The elevated railways, in the streets of the city of New York, are held to be taxable as lands, or as real estate.[6]

The power to tax street railways is not taken away from a municipal corporation, where there has been an exclusive grant to such railway company of the use of streets in the city for railway purposes. And such railway company may, notwithstanding, be required to pay a license tax.[7] Where a city grants to a railway company the right to lay and maintain its track over a bridge belonging to the city, without reserving its right to levy toll or tax upon such railway company, it has been held that it cannot impose a tax by any subsequent ordinance.[8]

It has been held that city railways may be subjected to an *ad*

[1] Bank v. Burnell, 10 Wend. 186.

[2] So. Nash. etc. Co. v. Morrow, 3 Pickle, 106; 11 S. W. 348; Middlesex R. R. Co. v. Charlestown, 8 Allen (Mass.) 330; People v. Cassidy, 2 Lansing, 294; People v. Comrs, 4 N. Y. S. 41; St. Louis v. St. Louis Railroad Co., 50 Mo. 94; No. Beach & M. R. R. Co.'s Appeal, 32 Cal. 499; Prov. & Wor. R. R. Co. v. Wright, 2 R. I. 459; L. City Ry. v. Louisville, 4 Bush, 478.

[3] Commonwealth v. Lowell Gasl. Co., 12 Allen (Mass.) 75; Providence Gas Co. v. Thurber, 2 R. I. 15.

[4] Stein v. Mobile, 24 Ala. 591; see also Covington, etc. Co. v. Covington, (Ky. 92) 17 S. W. R. 808; Jacksonville v. Ledwith, 7 So. R. 885, holding franchise cannot be taxed.

[5] Stein v. Mobile, 49 Ala. 362; s. c., 20 Am. Rep. 283; but see Dillon's Mun. Corp., sec. 793, note.

[6] People v. N. Y. Tax Comm'rs, 82 N. Y. 462.

[7] State v. Herod, 29 Iowa, 123; Columbus v. Street R. R. Co., 45 Ohio St. 98; Los Angeles v. Pac. R. R. Co., 67 Cal. 433.

[8] Des Moines v. The Chicago, R. I. & P. R. R. Co., 41 Iowa, 569.

valorem tax on their property, notwithstanding the fact that the city requires a license tax on each car employed by the city railway company.[1]

§ 275. **Choses in action, when taxable.**—Whether a municipal corporation may impose taxes upon instruments of indebtedness, and *other choses in action*, without express authority to do so, has been differently decided. So it has been held that notes and mortgages belonging to a resident will be taxable by the municipality although they may be deposited outside the city.[2] It has, however, on the other hand, been held that the power vested in a municipal corporation to tax real and personal property, is confined to tangible or visible property, actually situated within the limits of the city, and does not extend to debts and *choses in action*.[3]

§ 276. **Taxation of agricultural land.**—Elsewhere [4] it has been explained how a municipal corporation may, in the absence of express constitutional restrictions, extend the corporate limits, and include within such limits lands which are used for agricultural purposes, with or without the consent of the residents of the territory so annexed. The right to include agricultural lands within the corporate limits has never been contested by the owners of such property except for the reason that such inclusion of their lands within the city limits would have the effect of increasing the rate of taxation, beyond what was imposed upon it as agricultural lands.

In Kentucky and Iowa, and other States, it is held that the courts will discriminate, in the imposition of municipal taxes upon agricultural lands located within the city limits, between the lands which are held strictly for agricultural purposes, and the properties which, although not presently occupied as residences, have been platted as city lots, and are held for an in-

[1] L. City Ry. Co. v. Louisville, 4 Bush, 478; Union Pass. Ry. Co. v. Philadelphia, 101 U. S. 528; New York v. Broadway & S. A. R. R. Co., 17 Hun, 242.

[2] Johnson v. Oregon City, 2 Oreg. 327; Trimble v. Sterling, (Ky. 91) 12 S. W. R. 1066; Trustees v. McConnell, 2 Ill. 138; Macon v. Jones, 67 Ga. 489; Redwood v. Tarboro, 10 S. E. R. 845; 106 N. C. 122; Wood v. Edenton, 10 S. E. R. 854; 106 N. C. 151.

[3] Johnston v. Lexington, 14 B. Mon. 648; Louisville v. Henning, 1 Bush, 381; but see Augusta v. Dunbar, 50 Ga. 387, 392; Bridges v. Griffin, 33 Ib. 113.

[4] *Ante*, § 56.

crease in their value, due to the growth and development of the city. The courts maintain that where property is held strictly for agricultural purposes, even in the absence of an express constitutional provision, the municipal corporation cannot apply the same rate of taxation to such land, but must apportion the tax, by a consideration of the degree of benefit which is received by the owners of the agricultural lands from the city improvements. But where property is platted, or held for other than agricultural purposes, then there is no reason why such lands should be exempt from the ordinary municipal rate of taxation which is assessed upon the property which is actually used and occupied for purposes of residence or business.[1]

"To enable us correctly to apply the rule above stated, we must consider and determine the character of the benefits, which will render lands, located within the city limits, liable to general municipal taxation. These are not such as attach to all lands near a city or large town, whereby they are rendered more valuable, but are such as accrue to the lands considered as city property. Lands, lying contiguous to or near a city, though incapable of any use except for agricultural purposes, are nevertheless of greater value on account of their location, than those more remotely situated. Convenience to a market, etc., adds to their value. Therefore, lands within a city kept and used only for agriculture, and not capable of being used as city property, or not needed for that purpose, nor possessing a value based upon their adaptation for the purpose of dwellings or business, cannot be considered to be directly benefited by the fact of their being within the city limits. It is held that such lands cannot be taxed for general municipal purposes. The controlling fact

[1] Maltus v. Shields, 2 Met. (Ky.) 553; Henderson v. Lambert, 8 Bush, 607; Cheaney v. Hooser, 9 B. Mon. 330; Southgate v. Covington, 15 B. Mon. 491; Sharp v. Dunavan, 17 Ib. 223; Louisville Bridge Co. v. Louisville, 81 Ky. 189; Langworthy v. Dubuque, 13 Iowa, 86; s. c. 16 Ib. 271; Fulton v. Davenport, 17 Ib. 404; Buell v. Ball, 20 Ib. 282; Davis v. Dubuque, 20 Ib. 458; Deeds v. Sanborn, 26 Ib. 419; Durant v. Kauffman, 34 Ib. 194; Brooks v. Polk Co., 52 Ib. 460; Winzer v. Burlington, 68 Ib. 279; Evans v. Council Bluffs, 65 Ib. 238. In Courtney v. Louisville, 12 Bush, 419, the court said: "Something more than benefits is necessary to warrant that character of taxation. There must be both benefits actual or presumed, and a town or city population" so near as to necessitate the extension of municipal government over the farm land.

to be considered in such cases is the purpose for which they are held. If held as city property, to be brought upon the market as such whenever they reach a value corresponding with the views of the owner, they ought to be taxed as city property. There would be neither reason nor justice in permitting a proprietor of a large tract of land, within a city, to hold it for an opportunity to bring it into the market as city lots, and for no other purpose; and, under the pretence that it is agricultural lands, to escape taxation for the general improvement of the city, the very thing which will bring his lands into market, and thus add greatly to their value."[1] In adopting the rule laid down by the Kentucky court, the Iowa court provides that, in order to exempt unplatted lands from municipal taxation, it must appear that such land is employed exclusively for agricultural purposes.[2]

But the position, which is taken by these courts, is not indorsed generally by the courts of other States. The contrary proposition is elsewhere held that, in the absence of express provisions to the contrary, either in the State Constitution or State laws, a municipal corporation may impose the same rate of taxation upon agricultural lands, located within its limits, as is provided for other lands and other property.[3] And it seems to be very generally held that rural property, situated within city limits, may be subjected to assessments for street improvements.[4]

[1] Beck, C. J., in Durant v. Kauffman, 34 Iowa, 194.

[2] Subbesing v. Burlington, 68 Iowa, 691. See also, Washburn v. Oshkosh, 60 Wis. 453; Baldwin v. Hastings, 83 Mich. 639; State v. Brown, 53 N. J. L. 162; Eifert v. Central Covington, (Ky. 90) 15 S. W. Rep. 180.

[3] Martin v. Dix, 52 Miss. 53; s. c., 24 Am. Rep. 661; Kelly v. Pittsburgh, 85 Pa. St. 170; Santa Rosa v. Coulter, 58 Cal. 537; Dixon v. Mayes, 72 Ib. 166; St. Louis v. Allen, 13 Mo. 400; Benoist v. St. Louis, 15 Ib. 668; Giboney v. Cape Girardeau, 58 Ib. 141; Lancaster v. Rush, (93) 52 N. W. R. 837; Kaiser v. Weise, 85 Pa. St. 366; Cook v. Crandall, (Utah, 91) 26 Pac. R. 927; Hurla v. Kansas City, 46 Kan. 738; Turner v. Althaus, 6 Neb. 54, overruling Bradshaw v. Omaha, 1 Ib. 16; Kountze v. Omaha, 5 Dillon C. C. 443; Ellison v. Lindford, (Utah, 91) 25 Pac. R. 744.

[4] Kelly v. Pittsburgh, 85 Pa. St. 170; s. c., 104 U. S. 78; New Orleans v. Michoud, 10 La. An. 763; Serrill v. Philadelphia, 38 Pa. St. 355; Gillette v. Hartford, 31 Conn. 351; Kalbrier v. Leonard, 34 Ind. 497; Leeper v. South Bend, 106 Ib. 375; Taber v. Grafmiller, 109 Ib. 206; Cary v. Pekin, 88 Ill. 154; Gillette v. Hartford, 31 Conn. 351; Carriger v. Morristown, 1 Lea (Tenn.) 116.

§ 277. **Local assessments for sewers.**—From whatever source the authority to construct sewers may be derived, whether from the corporate authority to make by-laws, or as part of the corporate control over sanitary affairs, it is well settled that assessments to meet the expenses thus incurred may be levied upon owners of the land which is likely to be benefited.[1]

It has been held that a sewer assessment is apportionable upon the face value of the lots[2] of those who can use the sewer; and that the benefit derived from its construction is a necessary element in the imposition of the tax.[3] And in Connecticut and New Jersey, rules apportioning assessments according to frontage have been disapproved.[4] But when the lots are small, of an equal depth and similarly situated so as to approximate equality in value and in benefit from the construction of the sewer, the assessment according to frontage is, with respect to sewers and drains, as fair and just as any that can be devised.[5]

If there be no special constitutional limitation, the cost of municipal sewers may be paid for out of the funds arising from general taxation, or by assessment upon the property benefited, according to the discretion of the city council.[6] This latter method is the one generally in use; and upon the principle applicable in all classes of assessments for local improvements the special benefit, actual and probable, which each particular piece of property receives, is the only foundation upon which a lawful assessment can be made.[7]

[1] Murphy v. Wilmington, 6 Houst. (Del.) 108; Boston v. Shaw, 1 Met. 130; Downer v. Boston, 7 Cush. 277; Wright v. Boston, 9 Ib. 233; Patton v. Springfield, 99 Mass. 627; see *ante*, § 259 *a*.

[2] Snow v. Fitchburg, 136 Mass. 183; Gilmore v. Hentig, 32 Kan. 156; Mason v. Spencer, 35 Ib. 512.

[3] See Gilmore v. Hentig, 32 Kans. 156.

[4] Clapp v. Hartford, 35 Conn. 66; State v. Hudson, 29 N. J. L. 104.

[5] Dil. Mun. Corp. 809; Hoyt v. E. Saginaw, 19 Mich. 39; Warren v. Grand Haven, 30 Ib. 24; Seeley v. Pittsburgh, 82 Pa. St. 360; St. Joseph v. Owen, (Mo. 92) 19 S. W. R. 713; *In re* Washington Ave., 69 Pa. St. 301; Lipps v. Philadelphia, 38 Ib 503.

[6] St. Joseph v. Owen, (Mo. 92) 19 S. W. R. 713; Stroud v. Philada., 61 Pa. St. 255; Williamsport v. Com., 84 Ib. 487.

[7] Gray v. Board of Aldermen, 139 Mass. 328; Tide Water Co. v. Coster, 18 N. J. Eq. 519; State v. Newark, 37 N. J. L. 415; Wright v. Boston, 9 Cush. 233; *In re* Washington Ave., 69 Pa. St. 360; Seely v. Pittsb., 82 Ib. 360; Topeka v. Huntoon, (Kan. 90) 26 Pac. R. 488; *In re* Lawden, 89 N. Y. 548; Paterson v. Society, etc., 24 N. J. L. 385; Collins v. Holyoke, 146 Mass. 298; Dorey v. Boston, 146

§ 278. **Notice to and assent of abutters to assessments.**— When the exercise of the power to pave or otherwise improve a street depends upon the assent of a certain proportion of the owners of abutting lands, who are to be assessed for the expense, the whole proceeding of levying the assessment is void without that assent; and non-assent will be a good defence in an action to collect the assessment.[1] When the validity of an assessment for grading, improving or openings treets is in issue, the burden of proof is upon the corporation to show that everything has been done to render the assessment legal, and the most necessary fact is the requisite application or consent, to be shown in some way, of a proper number of interested property holders.[2]

It has been held that it is within the power of the Legislature to confer upon a municipal corporation the authority to improve its public ways at the costs of the adjoining property owners without a petition on their part;[3] but when a petition is required by statute, it is indispensable to the valitity of the

Ib. 336; Thomas v. Gain, 35 Mich. 155. As to what use of a sewer will authorize an assessment, see Brown v. Fitchburg, 128 Mass. 282; Fairbanks v. Fitchburg, 132 Ib. 42; Newell v. Cincin., 45 Ohio St. 407; King v. Reed, 43 N. J. L. 186.

[1] Voght v. Buffalo, (31 N. E. R.) 133 N. Y. 463; Sharp v. Johnson, 4 Hill (N. Y.) 92; *In re* Sharp, 56 N. Y. 257; Daniel v. New Orleans, 29 La. An. 1; McGuinn v. Peri, 16 Ib. 326; Litchfield v. Vernon, 41 Mo. 123; *In re* Royal St., 16 La. An. 393; James v. Pine Bluff, 49 Ark. 199; Richman v. Muscatine Sup'rs, 70 Iowa, 627; Evans v. People, (Ill. 92) 28 N. E. R. 1111; Linck v. Litchfield, 31 Ib. 123; Henry v. Thomas, 119 Mass. 583; Mulligan v. Smith, 59 Cal. 206; Turrill v. Grattan, 52 Ib. 97; Moberry v. Jeffersonville, 38 Ind. 198; Shaffer v. Weech, 34 Kan. 595; Welsford v. Weidlein, 23 Ib. 601; Henderson v. Baltimore, 8 Md. 352; Covington v. Casey, 3 Bush, 698; State v. Nelson, 57 Wis. 147; Wilson v. Trenton City, 53 N. J. L. 645; Lexington v. Headley, 5 Bush, 508; Burnett v. Sacramento, 12 Cal. 76; Boyle v. Bk'lyn, 71 N. Y. 1; People v. Bk'lyn, 71 Ib. 495; Miller v. Mobile, 47 Ala. 163; State v. Newark, 37 N. J. L. 415; State v. Elizabeth, 30 Ib. 176; Forsyth v. Kreuter, 100 Ind. 27; Ely v. Morgan Co. etc., 112 Ib. 361; *In re* Lexington Ave., 63 Hun, 629; Jef. Co. v. Cowan, 54 Mo. 234; St. Louis v. Clemens, 36 Ib. 467; Zimmerman v. Snowden, 88 Ib. 218; State v. Hand, 31 N. J. L. 547; State v. Orange, 32 Ib. 49; Wells v. Burnham, 20 Wis. 112; Baltimore v. Eschbach, 18 Md. 276; Holland v. Baltimore, 11 Ib. 186; Bereldin v. Baltimore, 15 Ib. 18.

[2] Howell v. Tacoma, 3 Wash. St. 711; 29 Pac. 447; Pittsburgh v. Walter, 69 Pa. St. 365; Zeigler v. Hopkins, 117 U. S. 683.

[3] Elliott Roads & Streets, p. 249 *et seq.*; Dennison v. Kansas City, 95 Mo. 416; Farrar v. St. Louis, 80 Ib. 379.

assessment.[1] In raising the question as to the validity of an assessment for a local improvement, made upon a petition of an alleged majority of the lot owners, a signer of such petition is not estopped from denying that the required number have signed it, if he has made no representation that it was signed by the proper number.[2] When the petition lacked one of the necessary number of petitioners because the signer proved not to be a proprietor, the proceedings were held to be void; and the plaintiff, a nonassenting lot owner, was granted an injunction to prevent the sale of his property for nonpayment of the assessment.[3]

Before the corporation acts upon a petition of the abutting owners, by entering into a contract for the desired improvement, any one of the signers of the petition may revoke his action, even though such revocation reduces the number below the minimum required by law. The power to make the improvement is thereby withdrawn.[4]

Fraud in procuring the requisite number of signatures to the petition, will, of course, vitiate the entire proceeding. Thus, where a few lot owners procured the additional signatures of other property holders to a petition, by paying and agreeing to pay them for the same, the whole proceeding was invalid as a fraud upon the abutting owners, who did not participate in the same, and who opposed the proposed improvement.[5]

Although the grading and paving of streets, and other similar local improvements, tend to enhance the value of the adjacent property, they are manifestly a great benefit to the whole municipality; and to assess the entire cost of such improvements upon the local lot owners, without obtaining their consent, or giving them an opportunity to be heard for or against the proposed assessment, would work a manifest injustice, some-

[1] State v. Morse, 50 N. H. 9; State v. Otoe, 6 Neb. 129; People v. Judge, 40 Mich. 64; State v. Berry, 12 Iowa, 58; Oliphant v. Com'rs, 18 Kan. 386.

[2] *In re* Sharp, 56 N. Y. 257; compare People v. Goodwin, 5 N. Y. 568; Kellogg v. Ely, 15 Ohio St. 64; see *contra*, Burlington v. Gilbert, 31 Iowa, 356. As to estoppel, see State v. Hudson, 34 N. J. L. 531; Quinn v. Paterson, 27 Ib. 35; State v. Burlington, 45 Iowa, 87; Johnson v. Allen, 62 Ind. 57; Keese v. Denver, 10 Colo. 112; Tone v. Columbus, 39 Ohio St. 281; Columbus v. Sohl, 44 Ib. 479.

[3] Holland v. Baltimore, 11 Md. 186; Bouldin v. Baltimore, 15 Ib. 18; Miller v. Mobile, 47 Ala. 163.

[4] Irwin v. Mobile, 57 Ala. 6.

[5] Maguire, v. Smock, 42 Ind. 1.

what in the nature of taking private property without compensation. As in a case, where the charter provided that the city council "should have full power to procure all streets to be improved in any manner they may deem advisable, at the expense of the property owners," and that the council may without the petition or consent of the property owners authorize such improvements by the unanimous vote of the council; it was held that an assessment, attempted to be levied under an ordinance passed by the council, but not unanimously, could not be collected.[1]

The Legislature has power, however, to make the determination of a municipal council, that the requisite number have signed a petition when one is required, conclusive; and under such a provision of the law, the decision of the council is unimpeachable, except for fraud.[2] But the power delegated to a council is in all such cases limited and special; and all acts performed in pursuance of it are legal, only when done strictly in conformity with the statutory directions.[3] Thus, where a statute authorized contracts to be made by the heads of municipal departments for such objects only as may be authorized by the city council; and the council authorized a paving contract, with the proviso, that the contractor should be chosen by a majority of the lot owners; it was held that such selection was absolutely necessary to render the adjoining lot owner liable for the assessment.[4] When it is required by statute that local improvements, the expense of which is to be met by special assessments, shall be authorized by an ordinance "specifying the nature, character, locality and description of such improvement," any assessment made by an ordinance, not conformable to this requirement, is invalid.[5]

[1] Gage v. Chicago, 32 N. E. R. 264; Merrill v. Abbott, 62 Ind. 549; Smith v. Duncan, 77 Ib. 92.

[2] King v. Portland, (Or. 93) 31 Pac. R. 482; *In re* Kiernan, 62 N. Y. 457; Von Steem v. Beatrice, (Neb. 92) 54 N. W. R. 677.

[3] Merrill v. Abbott, 62 Ind. 549; Carlyle v. Clinton, 30 N. E. R. 782; Hitchcock v. Galveston, 96 U. S. 341; Mills v. City of Detroit, (Mich. 93) 54 N. W. R. 897; Perrine v. Farr, 22 N. J. L. 356; Brophy v. Landman, 28 Ohio St. 542; Carron v. Martin, 26 N. J. L. 594; State v. Passaic, 41 Ib. 90; *In re* Clay, 22 N. Y. S. 112; 67 Hun, 190.

[4] Reilly v. Philada., 60 Pa. St. 467; see Philadelphia v. Wistar, 35 Pa. St. 427; see Lach v. Cargill, 60 Mo. 316.

[5] City of Springfield v. Knott, 49 Mo. App. 412; Hyde Park v. Spencer, 118 Ill. 446; Kankakee v. Potter, 119 Ib. 327.

§ 279. **Power of Legislature to dispense with notice.**— It has been held that the Legislature may directly, or through the local authorities, decide upon the question whether a local improvement will be specially beneficial and to what extent, so as to justify the levying of an assessment to meet the expenses incurred.[1] So, likewise, when the proposition for a local improvement is determined without consent of the abutters, and nothing further remains to be done, except to apportion the special assessment, it is held that notice may be dispensed with.[2] But it is not difficult to point out the injustice of a rule, by which the amount, which each lot owner will have to pay, can be arbitrarily fixed without giving him a hearing, whereby he may be able to see that he is required to pay only what can be justly required of him. For these reasons, statutes, which authorize the levy of assessments, usually contain the requirement, that at some stage of the proceedings the abutter shall have his "day in court."[3] But there are many decisions from courts, which are entitled to respect, as well as eminent writers, who hold that, independently of statutory requirements, no notice and no hearing is necessary to the validity of the assessment.[4]

If notice is required, and the mode of giving it has been prescribed by statute, the prescribed mode must be substantially

[1] Dowling v. Altschule, (Cal. 93) 33 Pac. 495; Dennison v. Kansas City, 95 Mo. 416; Farrar v. St. Louis, 80 Ib. 379, and *ante*, § 277.

[2] Cleveland v. Tripp, 13 R. I. 50; State v. Elizabeth, (N. J.) 17 Atl. R. 91; Amery v. City, 72 Iowa, 701; Clapp v. City, 35 Conn. 66; Auburn v. Paul, 24 Atl. R. 817; 84 Me. 212; Mayor v. Johns Hopkins' Hosp., 56 Md. 1; Gillett v. Denver, 21 Fed. Rep. 822; Amery v. City, 72 Iowa, 401.

[3] Ulman v. Baltimore, (Md. 93) 20 Atl. R. 141.

[4] Scott v. Philadelphia, 81 Pa. St. 80; Craig v. Philadelphia, 89 Ib. 269; Philadelphia v. Thomas, 25 Atl. R. 888; Sewell v. St. Paul, 20 Minn. 511; Merritt v. Portchester, 71 N. Y. 309; Davidson v. New Orls., 96 U. S. 134; Lowell v. Wentworth, 6 Cush. 221; Chesapeake & O. R. Co. v. Mullens, 22 S. W. R. 558; Williams v. Detroit, 2 Mich. 560; Nashville v. Weiser, 54 Ill. 245; Butler v. Chicago, 56 Ib. 341; Myrick v. La Crosse, 17 Wis. 442; New Albany v. Connelly, 7 Ind. 32; Dailing v. Gunn, 50 Ill. 424; Spencer v. Merchant, 125 U. S. 345; *In re* Washington Ave., 69 Pa. St. 352; Boorman v. Santa Barbara, 65 Cal. 313; Grand Rapids School Furniture Co. v. City of Grand Rapids, 52 N. W. R. 1028; 92 Mich. 564; Butler v. Saginaw Co., 26 Ib. 221; Cleghorn v. Postlethwaite, 43 Ill. 428; Barker v. Omaha, 16 Neb. 269; Leat v. Tilson, 72 Cal. 404; Stuart v. Palmer, 74 N. Y. 183; Garviss v. Daussman, 114 Ind. 429; 16 N. E. R. 826; Law v. Johnston, 118 Ind. 261; Darling v. Gunn, 50 Ill. 424; Lehman v. Robinson, 59 Ala. 219.

followed.[1] But while there must be substantial compliance with these requirements of the statute, a mere technical or literal departure from the provisions of the statute, if it is not substantial, will not affect the validity of the assessment.[2] Thus, notice by advertisement, and notice by publication, are held to be equivalent.[3] But when the ordinance, which is passed in pursuance of charter powers to levy a special tax, prescribes publication in the official organ of the municipality, such a publication is necessary to the validity of the tax.[4] It has been held in one case that, where there is no charter provision to the contrary, the ordinance ordering the improvement is sufficient notice.[5] And, so, otherwise, has it been held that, where the statute or ordinance, under which the assessment is made, does not require that the notice be in writing or by publication, an oral notice will be sufficient.[6] If proper notice be not given, a writ of *certiorari* will lie to review the proceedings by the proper court; and if they are substantially defective, they will be quashed.[7] But it has been held that, where an appeal is allowed,[8] *certiorari* will not lie.[9] But there are authorities, which hold that either remedy may be resorted to.[10]

[1] Ladd v. Spencer, (Or. 93) 31 Pac. R. 474; Lake Shore etc. Co. v. Chicago, (Ill. 93) 33 N. E. R. 602; Kroop v. Forman, 31 Mich. 144; Bensinger v. District, 6 Mackey, 285; Humboldt Co. v. Dinsmore, 75 Cal. 604; Vail v. Morris, etc. Co., 21 N. J. L. 189; People v. Gilon, 24 N. E. R. 944; Dehail v. Morford, (Cal. 93) 30 Pac. R. 593; Wilson v. Trenton, 53 N. J. L. 645; 23 Atl. R. 278; Wilson v. Seattle, 2 Wash. St. 543; 27 Pac. R. 474.

[2] Gibson v. Owens, (Mo. 93) 21 S. W. R. 1107; Windham v. Commissioners, 26 Me. 406; Hildreth v. Lowell, 11 Gray, 560; Dickinson Co. v. Hogan, 39 Kans. 606; 18 Pac. Rep. 611; Philadelphia etc. Co. v. Shipley, (Md. 93) 19 Atl. R. 522; Toledo, etc. Co. v. East Saginaw, etc. Co., (Mich.) 40 N. W. 436; Auburn v. Paul, 84 Me. 212; Voght v. Buffalo, 133 N. Y. 463; State v. Elizabeth, 30 N. J. L. 365; Durant v. Jersey City, 25 Ib. 309.

[3] State v. Plainfield, 38 N. J. L. 95; Vantilburgh v. Shann, 24 Ib. 740; State v. Jersey City, 24 Ib. 662; State v. Patterson Ave. etc., 41 Ib. 83.

[4] Dubuque v. Wooten, 25 Iowa, 571; *In re* Burmeister, 56 How. Pr. 416.

[5] Palmyra v. Morton, 25 Mo. 597.

[6] Whitworth v. Puchett, 2 Gratt. 527; Hawkins v. The Justices, 12 Lea, 351. This is doubted in Elliott's Roads & Streets, p. 249.

[7] Dil. Mun. Cor. § 805; Walker v. District, 6 Mackey, 352; People v. Betts, 55 N. Y. 600; Farmington, etc. Co. v. Commissioners, 112 Mass. 206.

[8] See Howard v. Shaw, 126 Ill. 53; Bridge v. Hampton, 47 N. H. 151; Felton v. Addison, 101 Ind. 58.

[9] Cedar Rapids, etc. Co. v. Whelan, 64 Iowa, 694; People v. Myers, 32 N. E. R. 241; Boston, etc. Co. v. Folsom, 46 N. H. 64.

[10] Ladd v. Spencer, (Or. 93) 31 Pac. Rep. 474; Com'rs v. Harper, 38 Ill. 104; Roberts v. Williams, 13 Ark. 355.

A failure to object after due notice will be taken as a waiver of all irregularities, if a party subsequently apply for an injunction to restrain the collection of an assessment.[1] The defect of the notice cannot be attacked in any collateral proceeding, unless the defect be of such a nature, as that it will raise a question of jurisdiction of the court over the pending cause of action.[2]

§ 280. **Re-assessments.**—When the amount raised by an assessment is insufficient; or when for any reason the validity of the assessment has been successfully attacked; the Legislature may, if there exists no constitutional provision forbidding it, authorize a re-assessment, or pass a bill validating the former assessment.[3] A re-assessment may be ordered notwithstanding the collection of the original assessment has been permanently enjoined by a court of competent jurisdiction.[4] A legislative act of ratification or validation will, it has been held, validate a void assessment only from the date of its passage.[5] But where, in any State, the constitution contains a prohibition of retrospec-

[1] State v. Paterson, 39 N. J. L. 159; as to waiver, see Walker v. Aurora, (Ill. 92) 29 N. E. R. 741; Auditor v. Maier, (Mich. 93) 54 N. W. R. 640; Nashville v. Weiser, 54 Ill. 245; Gardner v. Boston, 106 Mass. 549; Quick v. River Forrest, 22 N. E. R. 816; 130 Ill. 323; Hopkins v. Mason, 61 Barb. 469; State v. Perthamboy, 29 N. J. L. 259; Gilmore v. Utica, 29 N. E. R. 841; 131 N. Y. 26.

[2] United States v. Arredondo, 6 Pet. 691; Scott v. People, (93) 33 N. E. R. 180; Godchaux v. Carpenter, 19 Nev. 415; see Brown v. Rome, etc. Co., 86 Ala. 206; Zimmerman v. Snowdon, 88 Mo. 218; Shaffer v. Welch, 34 Kans. 595; King v. Benton Co., 10 Oreg. 512; Townsend v. Manistee, 88 Mich. 408; 50 N. W. R. 321; Town v. Williamson, 91 Ind. 541; United States v. Arredondo, 6 Peters, 691; Lake Shore etc. Co. v. Cincinnati etc. Co., 116 Ind. 578; Weinickie v. R. R. Co., 61 Hun, 619; 15 N. Y. S. 689; Colville v. Judy, 73 Mo. 651; Grand Rapids etc. Co. v. Van Drille, 24 Mich. 409.

[3] *In re* Mead, 74 N. Y. 216; Owensboro v. Callaghan, (Ky. 92) 17 S. W. R. 278; *In re* Van Antwerp, 56 N. Y. 261; Brown v. New York, 63 Ib. 239; Howard S. Ins. Co. v. Newark, (N. J.) 18 Atl. R. 672; Howell v. Buffalo, 37 N. Y. 267; People v. McDonald, 69 Ib. 362; Whitely v. Lansing, 27 Mich. 131; Manley v. Emlen, 46 Kan. 655; 27 Pac. R. 844; State v. Newark, 34 N. J. L. 236; State v. Plainfield, 38 Ib. 95; Edwards v. Jersey City, 40 Ib. 176; Righter v. Newark, 45 Ib. 104; Butler v. Toledo, 5 Ohio St. 225; Dill v. Roberts, 30 Wis. 178; Whitney v. Pittsburgh, (Pa. 93) 23 Atl. R. 395; Dean v. Borchsenius, 30 Wis. 236; Bingaman v. Pittsburgh, 29 W. N. C. 364; Lennon v. New York, 55 N. Y. 361, 365.

[4] State v. Newark, 34 N. J. L. 236; Emporia v. Bates, 16 Kan. 495; Mills v. Charleton, 29 Wis. 400.

[5] Reis v. Graff, 51 Cal. 86; San Fran. v. O'Neil, Ib. 91; Same v. Kinsman, Ib. 92.

tive laws, any statute, having for its object the validation of a prior void assessment, would be void.[1]

§ 281. **Adjoining owner's relation to contract—His liability.**—An assessment, levied to meet the expense of a local improvement, is always a tax; and the claim against the abutter is not subject to any set-off, even though, under statutory authority, the suit to recover it is brought by the contractor, who made the improvement.[2] But any defence, which would be good and effective in a suit against the city is good in his behalf;[3] as, for example, the poor quality of the work.[4]

The general power to make contracts for local improvements is implied from an express grant to a municipal corporation of power to make such improvements, provided there be nothing in the act to show a contrary legislative intent.[5] When, however, the statute directs the mode, in which the contract is to be executed, or what it shall contain, the assessment will be invalid if these directions are not substantially complied with.[6] As between the municipal corporation and the contractor, it may be said that, while the property owners cannot be strictly considered to be parties or privies to the contract, the corporation is to a considerable extent their agent, and enters into the contract in that capacity. The burden of performing the contract falls on the shoulders of the abutting owners; they can only insist that the municipal authorities secure a faithful performance of the contract on the part of the

[1] St. Louis v. Clemens, 52 Mo. 133.

[2] Burlington v. Palmer, 67 Iowa, 681; Emery v. San F. G. Co., 28 Cal. 345; Meuser v. Risdon, 36 Ib. 239; Himmelman v. Spanagel, 39 Ib. 389.

[3] St. Louis v. Clemens, 36 Mo. 469.

[4] Erie Co. v. Butler, 120 Pa. St. 374.

[5] Galveston v. Heard, 54 Tex. 420; Lates v. Briggs, 64 N. Y. 404; Mayor v. New York, 63 Ib. 455, 459; Cumming v. B'klyn, 11 Paige, 596.

[6] Allen v. Galveston, 51 Tex. 302; People v. Weber, 89 Ill. 347; Dare v. Milwaukee, 42 Wis. 108; Bentley v. County, 25 Minn. 259; Hurford v. Omaha, 4 Neb. 350; Addis v. Pittsb., 85 Pa. St. 379; McDonald v. Mayor, 68 N. Y. 23; Leavenworth v. Rankin, 2 Kan. 357; Montgomery v. Barber, 45 Ala. 237; White v. N. O., 15 La. An. 667; Bank v. Dandridge, 12 Wheat. 64; Dey v. Jersey City, 19 N. J. Eq. 412. As to invitations for proposals, see *In re* Rosenbaum, 6 N. Y. Sup. Ct. 184; *In re* Pennie, 108 N. Y. 364; *In re* Marsh, 88 Ib. 423; *In re* Merriam, 84 N. Y. 596; Balto v. Johnson, 62 Md. 225; Stockton v. Whitemore, 50 Cal. 555; Yarnold v. Lawrence, 15 Kan. 126; Nash v. St. Paul, 8 Minn. 172; White v. N. O., 15 La. An. 667; State v. Barlow, 48 Mo. 317; Brevoort v. Detroit, 24 Mich. 322; Stuart v. Cambridge, 125 Mass. 102.

contractor.[1] In order to render an abutting owner liable to the city for the expense of a local improvement, the terms of the law authorizing it must be strictly complied with and all conditions precedent performed.[2] So, if the ordinance requires a sidewalk *on the side* of the street, the lot owner is not liable for an assessment for one several feet away from the side of the street.[3] Nor is he liable for the expense of laying a *stone* sidewalk, when by the ordinance a *plank* walk was specified.[4] And when the owner of a corner lot had paid for a water pipe laid along one front of his lot, at his request, he is not liable for pipe which is laid along the other front without his consent.[5] But a substantial compliance with the law is all that is needed to make the lot owners liable.[6] If the work has been accepted by the corporation as complete and satisfactory, a *prima facie* case is made out as against the abutting owner.[7]

§ 282. **Method of collection.**—There are many cases to support the doctrine, that a tax is not a debt for the recovery of which, in the absence of a statutory remedy, a common law action will lie.[8] And the principle, applicable in the case of a

[1] Williams v. Savings & Loan Soc., (Cal. 93) 31 Pac. 908; Liebstein v. Newark, 24 N. J. E. 200; Bond v. Newark, 19 Ib. 376; Heft v. Payne, (Cal. 93) 31 Pac. R. 874; City v. Fowler, 34 Ind. 140; see Brown v. Jenks, (Cal. 93) 32 Pac. R. 701; Perine v. Forbush, Ib. 226; Washburn v. Lyons, Ib. 310; Libbey v. Ellsworth, Ib. 228; Louisville v. L. Gas Co., (Ky. 93) 22 S. W. Rep. 550; Fairchild v. Wall, 93 Cal. 401; Gilmore v. Utica, 131 N. Y. 26.

[2] McBean v. Martin, (Cal. 92) 31 Pac. R. 5; Dorathy v. Chicago, 53 Ill. 79; Boyer v. Reading, (Pa. 92) 24 Atl. R. 1070; Himmelman v. Byrne, 41 Cal. 500; McBean v. Redick, (Cal. 92) 31 Pac. R. 7; McGee v. Avondale, 7 Ohio Cir. Ct. R. 246; Harper's Ap., 109 Pa. St. 9; Sheridan v. Fitchburg, 131 Mass. 523; Brown v. Jenks, (Cal. 93) 32 Pac. R. 701; Jefferson Co. v. City of Mount Vernon, 33 W. E. R. 1091.

[3] Lowell v. Whelock, 11 Cush. 391; *In re* N. Y. P. E. School, 47 N. Y. 556; City of Muscatine v. Chicago R. etc. Co., (Iowa, 93) 55 N. W. R. 100.

[4] Sloan v. Beebe, 24 Kan. 343.

[5] Baker v. Gartside, 86 Pa. St. 498.

[6] See *ante*, § 178.

[7] Munic. No. 2 v. Guillette, 14 La. An. 297; Murray v. Tucker, 10 Bush, 240; De Pay v. City of Wabash, 32 N. E. R. 1016; Risley v. St. Louis, 34 Mo. 404; St. Louis v. De None, 44 Ib. 136; Neenan v. Smith, 60 Ib. 292.

[8] Clinton v. Henry Co., (Mo. 93) 22 S. W. R. 494; Augusta v. North, 57 Me. 392; Perry v. Washburn, 20 Cal. 318; Shaw v. Pickett, 26 Vt. 486; Lane Co. v. Oregon, 7 Wall. 80; McCrowell v. Bristol, (Va. 93) 16 S. E. R. 867; Detroit v. Jopp, 52 Mich. 458; Comm'rs v. First Nat. Bank, (Kan. 92) 30 Pac. 22; Catling v. Carteret, 92 N. C. 536; Charleston v. Oliver, 16 S. C. 47; New Orleans v. Davidson, 30 La. An. 541; Greer v. Covington, 83 Ky. 410. In Meriwether v. Garrett, 102 U. S. 472, the court said.

general tax, acquires greater force in the case of a special assessment, which may in particular cases seriously burden the property it was designed to benefit.

Upon the ground, that the true basis for the power to levy assessment for local improvements is the benefit thereby conferred upon adjacent land, any statutory regulation, which authorizes other property than the abutting land to be held liable for such assessments, or which imposes a personal liability upon the abutting owners, is of doubtful constitutionality, as constituting a taking of private property for public use without compensation.[1] The general rule is, that only such property is liable, which is made so by the statute; and in this respect there is a substantial distinction between the power to levy general taxes and the purely statutory power to make a special assessment for local improvements, beneficial mainly to adjacent property. The power to assess other property belonging to the owner of a lot which is located on a street benefited by the local improvements, can only be conferred, if at all, by express statutory enactment.[2] And hence, in the absense of statute, there is no personal liability for local assessments.[3]

But the general taxes which are levied upon the whole community, or upon all members of a certain class, for the purpose of defraying the general municipal expenses, are placed upon a different basis.

"Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the government or for some special purpose authorized by it. . . Nor is their nature affected by the fact that in some States an action of debt can be instituted for their recovery."

[1] Brown v. Jenks, (Cal. 93) 32 Pac. R. 701; Burlington v. Quick, 47 Iowa, 226; Green v. Ward, 82 Va. 324; Neenan v. Smith, 50 Mo. 525; Macon v. Patty, 57 Miss. 378; Littler v. McCord, 38 Ill. App. 147; Higgins v. Ausmuss, 77 Mo. 351; Louisiana v. Miller, 66 Ib. 467; Leeds & Co. v. Hardy, (La. 92) 11 So. 1; see, Clemens v. Mayor, 16 Md. 208; Bonsall v. Lebanon, 19 Ohio, 419; Eshback v. Pitts., 6 Md. 71; New Orleans v. Wire, 20 La. An. 500; Lowell v. French, 6 Cush. 223; *In re* Vac. Center St., 115 Pa. St. 247.

[2] State v. State Board of Assessors, (N. J. 92) 22 Atl. R. 1085; Macon v. Patty, 57 Miss. 386; Wright v. Chicago, 20 Ill. 352; Meyer v. Burritt, 60 Conn. 117; Craw v. Tolono, 96 Ill. 255; Virginia v. Hall, 96 Ib. 278.

[3] Lake Shore & M. S. R. Co. v. Dunkirk, 20 N. Y. S. 596; Balfe v. Lammers, 109 Pa. St. 347, 350; Board v. Fulton, 111 Ib. 410; McCrowell v. City of Bristol, 16 S. E. R. 867 (Va. 93); Green v. Ward, 82 Va. 324; Wolf v. Philadelphia, 105 Pa. St. 25; City v. Moore, 113 Ib. 597.

For this reason, many of the courts have held—and by some the same doctrine has been errroneously as we think, deemed to apply to local assessments—that the levy of a tax by a municipal corporation, under and pursuant to authority conferred by its charter, creates an obligation or debt, the payment of which can be enforced by a common law action *ex contractu*, even though there may be a statutory method of recovery of a special and summary character.[1] But when the power to impose taxes is conferred by its charter upon a municipal corporation; and the charter is silent as to the express mode by which their collection is to be enforced, the power to collect them by an ordinary civil suit is necessarily implied.[2] But the general or special power to tax does not imply the power to enforce the collection of tax by any methods more summary than the ordinary judicial proceedings, by which debts are collected. The power to collect by distress and sale cannot be implied from the fact, that the State adopts that method.[3]

However, the Legislature has power to provide summary methods of collecting taxes and assessments, and to declare what shall be a *prima facie* case.[4] And such methods are constitutional; except, possibly, where the property-owner is deprived of his right to have the municipal action reviewed by a court of superior jurisdiction.[5] Proceedings to enforce the payment of taxes and assessments are usually statutory; and if by charter or statute a power to sell the property assessed or taxed, is conferred upon the municipality, the statute must be closely followed; and every requisite observed or no valid title will pass by the sale.[6] And if the municipality be given a

[1] Dugan v. Baltimore, 1 Gill & J. (Md.) 499; Baltimore v. Howard, 6 Har. & J. (Md.) 383; Gordon v. Baltimore, 5 Gill 236; 243; and comp. cases cited in last note. State v. So. S. S. Co., 13 La. An. 497; Dunlap v. Gallatin Co., 15 Ill. 9; Ryan v. Gallatin Co., 14 Ib. 82; Geneva v. Cole, 61 Ib. 397; Jonesboro v. McKee, 2 Yerg, 167; Dubuque v. Ill. C. R. etc., 39 Iowa, 56; Davenport v. C. R. I. etc., 38 Ib. 633; Burlington v. B. M. R. R., 41 Ib. 134; Perry Co. v. Selma. M. & M., 58 Ala. 546; Winter v. Montgomery, 79 Ib. 481; compare Dollar Savings Bank v. United States, 19 Wall. 227.

[2] State v. Severance, 55 Mo. 378, 389; Amite City v. Clementz, 24 La. An. 27; Jefferson v. McCarty, 74 Mo. 55.

[3] See Dillon Mun. Corp. § 818.

[4] Riley v. St. Joseph, 67 Mo. 491.

[5] Flournoy v. Jeffersonville, 17 Ind. 169.

[6] Goring v. McTaggart, 92 Ind. 200; Wilson v. Poole, 33 Ib. 443; Himmelman v. Townsend, 49 Cal. 150;

statutory remedy, it will ordinarily be considered exclusive of any other method of collecting or enforcing the tax at common law,[1] even though the statutory mode is inadequate.[2] So, where a town was empowered by its charter to *levy and collect taxes*, and to enforce the same by a civil action; it was held that the corporation was precluded from collecting taxes by any summary proceeding.[3] The power to sell for non-payment of taxes must be conferred in express terms, or by clear and unavoidable implication.[4] Thus, the power to sell for non-payment of taxes cannot be implied from a provision, that the collection of taxes may be enforced by ordinance,[5] nor does a power to sell delinquent lands for non-payment of taxes authorize their sale for non-payment of assessments.[6]

Unless expressly authorized, a municipal corporation cannot be a purchaser at a sale of lands for non-payment of taxes.[7]

§ 283. **Lien of taxes.**—In the absence of statute, taxes and assessments are not liens upon the property against which they have been assessed.[8] Such liens are statutory and their

Wyer v. Larocque, (Ky. 93) 33 Pac. 544; Jones v. Miracle, (Ky. 97) 21 S. W. R. 241; Carroll v. Mitchell, 37 W. Va. 130; Pierce v. Boston, 3 Met. 520; Deputron v. Young, 10 S. Ct. 539; 134 U. S. 241; Seattle v. Doran, (Wash. St.) 32 Pac. R. 105; Oil City v. Oil City B. Works, (Pa. 93) 25 Atl. R. 549; McPhee v. Venable, 77 Ga. 772; Mix v. Ross, 57 Ill. 121; Sanger v. Rice, 43 Kan. 580; Bender v. Dungan, 99 Mo. 126; Beckley v. English, 129 Ill. 646; O'Byrne v. Philadelphia, 93 Pa. St. 225; Allentown v. Hower, 93 Ib. 332; Carncross v. Lykes, 22 Fla. 587; Minter v. Durham, 13 Or. 470; Murdock v. Chaffee, 7 So. R. 519; Garlington v. Copeland, (S. C. 93) 10 S. E. R. 616.

[1] Flournoy v. Jeffersonville, 17 Ind. 169; Mix v. Ross, 57 Ill. 521; Cf. State v. Georgia Co., 17 S. E. R. 10; see Topsham v. Blaisdell, 82 Me. 152; Lord v. Parker, 83 Ib. 530.

[2] Fairbault v. Misener, 20 Minn. 396; Wood v. Nicholson, 43 Kan. 461; Board v. Bank, (Kan. 92) 30 Pac. 22; Board v. Johnson, (Miss. 90) 7 So. R. 390; Turnpike Com'rs v. Louisville etc. Co., 1 S. W. R. 671.

[3] Alexander v. Helber, 35 Mo. 334.

[4] Pueblo v. Robinson, 21 Pac. R. 899; 12 Colo. 593; Annapolis v. Harwood, 32 Md. 471; Merriam v. Moody, 25 Iowa, 163; McInerny v. Reed, 23 Iowa, 410; Haskell v. Burlington, 30 Ib. 232; Augusta v. Dunbar, 50 Ga. 387; Municipality v. Pance, 6 La. An. 515; Baltimore v. Howard, 6 H. & J. 383.

[5] Merriam v. Moody, 25 Iowa, 163; Paine v. Spratley, 5 Kan. 525; McInerney v. Reed, 23 Iowa, 410.

[6] Sharp v. Johnson, 4 Hill (N.Y.) 92.

[7] Knox v. Peterson, 21 Wis. 247; Bordages v. Higgins, (Tex. 92) 20 S. W. R. 184; Champaign v. Harmon, 98 Ill. 491; Logansport v. Humphrey, 84 Ind. 467; Eaton v. Manitowoc, 44 Wis. 489.

[8] State v. O'Neill, (N. J. 93) 25 Atl. 273; Howard v. Strother, 33 N. W. R. 238; Kansas City v. Payne, 71 Mo. 159; Jefferson v. Whipple, 71 Ib.

force and extent depend entirely upon the statute creating them.[1] But there is no doubt that the Legislature may declare taxes to be a lien on the land as against the owner and all subsequent purchasers,[2] and the practice of providing such liens is believed to be universal. The power to declare them a lien by ordinance may also be, and is almost invariably conferred upon a municipality.[3] Where the statute authorizes the municipality to make the taxes it levies a lien upon the real estate, the validity of the lien will, of course, depend upon the validity of the tax levy; and will fail with an avoidance of the levy.[4]

The personal liability of the owner of property, for the taxes levied against such property, which is enforceable by an action at law against such owners, does not affect the lien upon the property, which serves as a cumulative remedy,[5] unless the remedy *in personam* is made exclusive.[6] Water rents, paid to a city owning waterworks, although called so by the charter, are not taxes; and the obligation to pay them rests upon an implied or express contract to pay for water used. Nevertheless, such water rents may be declared a lien on specific property; and this lien may by statute be given priority over a subsequent mortgage.[7] In a case, where a city was given power to collect taxes; and the tax was declared to be a lien, but no power was given to enforce the lien by distress and sale; nor was any other mode of collection prescribed; it was held that the lien could be enforced by a bill in equity.[8]

519; United States v. Snyder, 149 U. S. 210; Bryn Mawr Col. v. Anderson, 51 N. W. R. 126; Allegheny City's App., 41 Pa. St. 60; Howell v. Philada., 38 Ib. 471.

[1] State v. Ætna L. Ins. Co., 117 Ind. 251; Shipman v. Forbes, 32 Pac. Rep. 599; Philada. v. Greble, 38 Pa. St. 339.

[2] People v. Brooklyn, 4 N. Y. 419; Vreeland v. Jersey City, 37 N. J. Eq. 574; Bordages v. Higgins, (Tex. 93) 20 S. W. Rep. 726; Philada. v. Tryon, 35 Pa. St. 401; Meddsville v. Dickson, 24 W. N. C. 451; New York v. Colgate, 12 N. Y. 149; Hancock v. Bowman, 49 Cal. 413; Fitch v. Creighton, 24 How. 159.

[3] Bordages v. Higgins, (Tex. 93) 20 S. W. Rep. 726.

[4] Herschberger v. Pittsburgh, 115 Pa. St. 78.

[5] Eschback v. Pitts, 6 Md. 71; Mix v. Ross, 57 Ill. 121; New Haven v. Railroad, 38 Conn. 422.

[6] Comp. as to liens and personal liability for assessments: Trustees v. Shotwell, 45 N. J. Eq. 106; Philadelphia v. Cook, 30 Pa. St. 56; Elma v. Carney, (Wash. 92) 30 Pac. Rep. 732; Jones v. Schulmyer, 39 Ind. 119; Heine v. Com'rs, 19 Wall. 655; Bennett v. Buffalo, 17 N. Y. 383; Guerin v. Reese, 33 Cal. 292.

[7] Prov. Inst. v. Jersey City, 113 U. S. 506.

[8] McInerny v. Reed, 23 Iowa, 410; Lima v. L. Cem. Ass'n, 42 Ohio St. 128.

The statutory lien for unpaid taxes attaches at the date prescribed by the statute;[1] and parties, acquiring interests in the property subsequently take it subject thereto.[2] As the lien is the creation of the sovereign power, and necessary to the effective exercise of the power of taxation there is no doubt that the Legislature may make this lien paramount to all other incumbrances.[3] And this is the universal practice.

Statutes creating the lien are, like all remedial statutes, to be liberally construed, so as to enable their purpose to be accomplished.[4] And being purely statutory, it may be modified or completely abrogated by subsequent statutes, even after it has attached to the property of the delinquent; at least, where the unpaid tax is due to the State or to a municipality or county.[5] But where the tax is a local assessment, and the lien is in favor of the contractor, who, in reliance upon this security, has done the work, involved in the local improvement; and who is subrogated to the claims of the city against the abutting owner,[6] any statute destroying the lien would be a violation of the constitutional prohibition of interference with vested rights, and of impairment of the obligation of contracts.[7]

§ 284. **Statute of Limitations.**—In those jurisdictions, where common law actions of debt are employed to recover taxes, the Statute of Limitations may under its general provisions be a bar to a personal judgment for taxes.[8] But it is doubtful, whether the Statute of Limitations applies generally to the statutory

[1] Langsdale v. Nicklans, 38 Ind. 289; Jones v. Schulmeyer, 39 Ib. 119.

[2] Chancy v. State, 118 Ib. 494.

[3] Prov. Inst. v. Jersey City, 113 U. S. 596; State v. Ætna etc. Co., 117 Ind. 251; Moffatt v. Henderson, 18 J. & S. (N. Y.) 211.

[4] Eckhard v. Donahue, 9 Daly, 214; Hudler v. Golden, 36 N. Y. 447; Weed v. Tucker, 19 Ib. 422.

[5] Watson v. N. Y. Cen. R. R., 47 N. Y. 157; Hall v. Bunte, 20 Ind. 304; Martin v. Hewit, 44 Ala. 418; Bangor v. Goding, 35 Me. 73; Gray v. Carleton, 35 Ib. 481; Frost v. Ilsley, 54 Ib. 345; Walker v. Whitehead, 16 Wall. 314; Antoni v. Greenhow, 107 U. S. 766; Edwards v. Kearzly, 96 Ib. 595; Van Hoffman v. Quincey, 4 Wall. 535.

[6] Philadelphia v. Wistar, 35 Pa. St. 427.

[7] *In re* Hope M. Co., 1 Sawy. 710; Weaver v. Sells, 10 Kan. 609; Handel v. Elliott, 60 Tex. 145; Wabash & E. Canal v. Beers, 2 Black. 448; Streubel v. Milwaukee, 12 Wis. 67; Hallahan v. Herbert, 11 Ab. Pr. N. S. 326; Crowning v. Barnett, 30 Ark. 560.

[8] Burlington v. B. & M. R. R. Co., 41 Iowa, 134; Davenport v. C. R. I. etc., 38 Ib. 633; Mellinger v. Houston, 68 Tex. 37; Jefferson v. Whipple, 71 Mo. 521.

remedies for enforcing the payment of taxes. There are many cases, which hold that, in the absence of a *special statutory* limitation, assessments and taxes, not arising out of contract, are not barred under any general provision of the Statute of Limitations.[1]

[1] District v. Wash. & Ct. R. Co., 1 Mackey, 361; Eschback v. Pitts, 6 Md. 71; Magee v. Com., 46 Pa. St. 358; Pease v. Howard, 14 Johns. 479; Newcomer v. Keedy, 2 Md. 19; Hogan v. Ingle, 2 Cranch, 355; B. & O. R. R. Co. v. District, 3 MacArthur, 122.

CHAPTER XVI.

STREETS, BRIDGES AND TURNPIKES.

§ 286. **Definition of street.**—A street is any public highway, improved or unimproved,[1] in a city, town or village, open to the use of all for purposes of travel and traffic, and such other public or private purposes as may be permitted by the municipality under whose control it is.[2] The term includes all public urban ways, whatever may be their length or width.

The fundamental idea of a street, that of a public highway, maintained primarily and chiefly, though not solely, for public benefit,[3] does not permit of the bestowal of the term on turnpikes, owned by private corporations;[4] and the distinction assumes importance when the question of maintenance of these two classes of public ways is to be considered.

If the owner of land causes it to be laid out in lots, and a map to be made, upon which certain spaces are designated as "streets," it will be understood that by that term are meant public ways for travel and commerce. In no event could the word, in the absence of express reservation, be considered to signify mere private ways for the sole use of those owning contiguous lands.[5] All persons, acquiring land on the line of any street so designated have the right, as against the grantor, to require such ways to be opened as streets, and to enjoy all the ordinary rights of the public in such highways.[6]

[1] Brace v. N. Y. Cen., 27 N. Y. 271; Com. v. Boston etc., 135 Mass. 551; Sharretts Road, 8 Pa. St. 92.

[2] Elliott on Roads and Streets, ch. II.; Perrin v. N. Y. etc., 36 N. Y. 120; Heiple v. East Portland, 13 Oreg. 97; State v. Moriarity, 74 Ind. 104; Livingston v. Mayor, 8 Wend. 85; Benedict v. Goit, 3 Barb. 459; State v. Wilkinson, 2 Vt. 480; Cox v. Louisville etc., 48 Ind. 178; Conner v. Prest. etc., 1 Blackf. 42; State v. Berdetta, 73 Ind. 185.

[3] Quincy v. Jones, 76 Ill. 231, 244; Henkel v. Detroit, 49 Mich. 249.

[4] Wilson v. Allegheny, 79 Pa. St. 272; State v. New Brnns'k, 30 N. J. L. 395; Elliott on Roads and Streets, p. 60.

[5] Denver v. Clements, 3 Colo. 470; see *ante*, chapter XIII. § 221.

[6] Indianapolis v. Kingsbury, 101 Ind. 200; Hanson v. Eastman, 21 Minn. 209; Yates v. Judd, 18 Wis. 118; Sanborn v. Chicago, etc., 16 Ib. 19; see *ante*, §§ 221–223.

§ 287. **Alleys.**—"A narrow way, less in size than a street is generally called an alley."[1] But whether such a passage is a street or an alley, depends not so much upon its size, or upon the limited number of persons using it, as upon its relation to other ways, its location, and frequently upon statutory regulations.[2] If an alley be open to public use, it is a highway, and the rules of law applicable to streets apply to it.[3] Of course, the alley cannot be considered a public way, so as to charge the city with its maintenance and repair, unless it has been legally established and accepted. But if such be the case, the city is undoubtedly liable for an injury which is sustained from a defect therein.[4] When the term "alley" is used on a map or in a statute, unqualified by the word "private" or by some similar term, it is presumed to mean a narrow street open to the public use of the community.[5] But there must be an acceptance of the proffered dedication,[6] as no merely permissive public use of a private alley will make it a public highway.[7]

The rights and duties of a municipality in regard to the repair, maintenance and vacation of public alleys are the same substantially, as those respecting streets.[8]

§ 288. **Conflict of jurisdiction over streets.**—Outside of towns and cities, the control and supervision of highways are ordinarily vested in the county or township, and exercised through boards of highway commissioners or other officials of a similar character.[9] When a municipal corporation is located within the territory, over which these county or township offi-

[1] Elliott Roads and Streets, p. 12.

[2] Rex v. Richardson, 8 T. R. 634; Osage City v. Larkin, 40 Kan. 206; 19 Pac. R. 658; *contra*, Paul v. Detroit, 32 Mich. 108; Beecher v. People, *supra;* Bagely v. People, 43 Mich. 355. Distinctive use of alleys. Beecher v. People, 38 Mich. 289.

[3] Morris v. Bowen, Wright (Pa.) 749.

[4] Indianapolis v. Murphy, 91 Ind. 382; Marseilles v. Howland, 124 Ill. 551.

[5] Hatton v. Chatham, 24 Ill. App. 622; Lasalle v. Mott, etc., 16 Ib. 74; Bailey v. Culver, 12 Mo. App. 175.

[6] Hamilton v. Chicago, etc., 124 Ill. 241.

[7] Dexter v. Tree, 117 Ill. 535.

[8] Marseilles v. Howland, 124 Ill. 551; Springfield v. Green, 120 Ib. 269; Spiegel v. Gansberg, 44 Ind. 418; Dexter v. Tree, 117 Ill. 535; St. Louis, etc., v. Bellville, 122 Ill. 376.

[9] For their powers and duties see Elliott on Roads & Streets, ch. XVIII.; Cummins v. Seymour, 79 Ind. 491; Board v. Barnett, 107 Ill. 507; Trans. Co. v. Chicago, 99 U. S. 635; Bloomfield v. Calkins, 62 N. Y. 386; Sterling's App., 111 Pa. St. 35; s. c., 2 Atl. Rep. 105; Suffield v. Hathaway, 44 Conn. 521; Mallory v. Griffey, 85 Pa. St. 275.

cers claim to have jurisdiction, a conflict of authority frequently arises. The solution of the question ordinarily depends upon the intention of the Legislature. In the interpretation and construction of statutes, conferring powers over highways, this intention can be best ascertained by viewing the subject, so far as the particular municipality is concerned, in the light of the whole course of similar State legislation.[1] The weight of authority favors the relegation to each jurisdiction of the exclusive control of its own highways.[2] As the Legislature has unlimited power over all public highways, it may delegate its control to two governmental corporations, even when the powers of both are to be exercised within the same territorial limits.[3] But in view of the facts, that a conflicting jurisdiction gives rise to a divided responsibility, and that the customary uses of a municipal street are essentially different from those to which county roads are applied,[4] the presumption is against the grant of a co-ordinate jurisdiction; and, except when required by express provisions of the statutes, or by necessary implication, which is not common, the courts will limit the jurisdiction of the county or township commissioners to the roads, located outside of the limits of the municipality, and give to the street commissioners exclusive jurisdiction over the streets and highways within the city boundaries.[5] For this reason, the term "highway" has sometimes been distinguished by the courts from "municipal streets;"[6] and where a statute gives to non-municipal officials the control over "highways" within certain territorial limits, it would be presumed that the Legislature did not intend to give to such officials the control of the streets of a city, which are located within the same limits.[7]

[1] Dil. Mun. Corp., 676; State v. Com'rs, 23 Fla. 632.

[2] Elliott on Roads & Streets, p. 329; People v. Chicago, 118 Ill. 520; s. c., 8 N. E. R. 824; Cowan's Case, 1 Overt. 311; State v. Jones, 18 Tex. 874; Indianapolis v. Croas, 7 Ind. 9; Lafayette v. Jenners, 10 Ib. 79; Tucker v. Conrad, 103 Ib. 349; Cross v. Morristown, 18 N. J. Eq. 305; State v. Morristown, 33 N. J. L. 57.

[3] Wells v. McLaughlin, 17 Ohio, 99; Baldwin v. Green, 10 Mo. 410; Norwich v. Story, 25 Conn. 44; Bennington v. Smith, 29 Vt. 254; Road in Milton, 40 Pa. St. 400.

[4] Palatine v. Kreuger, 121 Ill. 72; and comp. Heiple v. E. Portl., 13 Oreg. 97.

[5] See cases in preceding note.

[6] Indianapolis v. Croas, 7 Ind. 9.

[7] State v. Jones, 18 Tex. 874; Indianapolis v. Croas, *supra;* Cross v. Morristown, 18 N. J. Eq. 305; Clark v. Com., 14 Bush, 166.

The question becomes more difficult to settle, where a municipal corporation is established within a county or township, without an express curtailment or withdrawal of the prior jurisdiction of county or township officials over the highways, already opened to the public, which now fall within the territorial limits of the new municipality. The general rule of construction is that, upon the creation of a new governmental agency, it takes the place of the preceding agency, to the extent of the conflict of the two agencies; and to that extent becomes invested with the powers and duties of its predecessor, in conformity with the general principle, that the Legislature could not have intended to create conflicting governmental agencies.[1] This is sound as a general proposition of law, and we see no reason why it should not apply to the case in question, and give to the municipality exclusive control over a matter of so peculiarly local concern as streets and urban roads.[2] But the jurisdiction of the county officials over highways, located within the limits of a proposed municipality, will not be ousted, until the incorporation of the town has been completed. The recording of the town map will not have this effect.[3]

§ 289. **Delegation of legislative power over streets.**—It has been elsewhere explained in detail[4] how the Legislature can delegate a portion of its lawmaking power to municipal corporations; and that the local authorities can by virtue of

[1] Hon. v. State, 89 Ind. 249; School Town. v. Plain Sch. Tp., 86 Ib. 582; School Tp. of Allen v. School Town. of Macy, 109 Ib. 559; Sch. Dis. etc. v. Tapley, 1 Allen, 49.

[2] Elliott on Roads & Streets, p. 312–316, inc.; O'Kane v. Treat, 25 Ill. 458; Fox v. Rockford, 38 Ill. 451; Ottawa v. Walker, 21 Ib. 605; *Ex parte* Roberts, 11 S. W. R. 782; People v. Chicago, 118 Ill. 520; s. c., 8 N. E. Rep. 824; Cowan's Case, 1 Overt. 311; State v. Jones, 18 Tex. 874; Indianapolis v. Croas, 7 Ind. 9; Lafayette v. Jenners, 10 Ind. 79; Tucker v. Conrad, 103 Ind. 349; Cross v. Morristown, 18 N. J. Eq. 305; State v. Morristown, 33 N. J. L. 57; Townsend v. Hoyle, 20 Conn. 1. But see in opposition to above view, Norwich v. Story, 25 Conn. 44; Guthrie v. New Haven, 31 Ib. 308; Wells v. McLaughlin, 17 Ohio, 99; Butman v. Fowler, 17 Ib. 101; Baldwin v. Green, 10 Mo. 410; Bennington v. Smith, 29 Vt. 254. See, also, generally upon this subject, Waugh v. Leech, 28 Ill. 488; Bell v. Foutch, 21 Iowa, 119; Van Peet v. Davenport, 42 Ib. 308; Pope v. Com'rs, 12 Rich. (S. C.) Law, 407; Penn. R. R. v. Duquesne Bor., 46 Pa. St. 223; B. Mercer Bor. Road, 14 Serg. & R. 447; Newville Rd., 8 Watts, 172; Easton Road, 8 Rawle, 195.

[3] Waugh v. Leech, 28 Ill. 488.

[4] Ch. VIII.

such delegation enact ordinances and local laws, which have within their jurisdiction the force of the general statutes of the State. It is therefore well settled that the Legislature may delegate the power of regulating and controlling highways and streets to the local municipal government.[1] The municipal control over streets depends entirely upon the provisions of the charter or other legislative enactments.[2] But streets, in common with other public property, are held in trust by the municipality for public purposes; and for that reason the city cannot divest itself of responsibility for their improvement and care.[3] Nor, on the other hand, is the municipality subject to judicial supervision, in the exercise of its discretionary powers over streets, except where these powers are abused or exceeded.[4]

§ 290. **Construction of charter powers over streets.**—The general rule of construction, for the determination of the powers of a municipality, applies here, as elsewhere, viz.: that they depend upon the terms and provisions of the charter, and must be expressly granted therein, or necessarily implied therefrom, in order to carry into effect some power or municipal purpose which is expressly authorized by the charter. The powers thus delegated to cities are generally very broadly defined; and their scope and extent must be ascertained by liberal construction of the charter or statutory authority.[5]

The general authority to open, care for, regulate and improve streets, together with the implied or express authority to enact ordinances for the better carrying out of corporative ends, gives the city full authority to keep the streets open and free for

[1] See State v. Yopp, 97 N. C. 477; State v. Hoagland, 51 N. J. L. 62; s. c., 16 Atl. R. 166; Columbus Gas Co. v. Columbus, (Ohio) 33 N. E. R. 292; Hennepin Co. v. Bartelson, (Minn.) 34 N. W. R. 222; Sewer Street, (Pa. 92) 8 Pa. Co. Ct. 226; James v. Pine Bluff, 49 Ark. 199; s. c., 4 S. W. Rep. 760; Stoutenburgh v. Hennick, 129 U. S. 141; Phillips v. Huntington, 35 W. Va. 406.

[2] Citizens Ry. Co. v. Memphis, 53 Fed. Rep. 715; Denver Circle etc. v. Nestor, 10 Colo. 403; State v. Elizabeth, (N. J. 93) 26 Atl. R. 939; McGrew v. Stewart, (Kan. 93) 32 Pac. R. 896; *In re* Dassler, 35 Kan. 678.

[3] Kreigh v. Chicago, 86 Ill. 407.

[4] Platt v. Chicago etc., (Ia.) 31 N. W. R. 883; Terrill v. Bloomfield, (Ky. 93) 21 S. W. Rep. 1041; State v. Nat. Dock Co., (N. J. 93) 26 Atl. R. 145; Leeds v. Richmond, 102 Ind. 372; Weaver v. Templin, 113 Ib. 242.

[5] North Pac. etc. v. East Portland, 14 Oreg. 3; Northern Trans. Co. v. Chicago, 99 U. S. 635; Spokane St. Ry. Co. v. Spokane, (Wash. 93) 32 Pac. Rep. 456; Waukelha v. Village, (Wis. 93) 53 N. W. R. 675.

the public, to remove all obstructions, and to regulate their use.[1] Thus, it has been held that when a city has "the care, supervision and control of streets, squares and commons," it may prohibit the use of them for private purposes, such as auction sales.[2]

In general, a grant of authority, in broad and comprehensive terms, carries with it by implication all incidental powers, necessary to the execution of the main power. So, the power to *open streets* has been held to confer the power to *lay out* and *establish streets*,[3] and, to lay out such streets across an existing railroad track.[4] The power to *open and extend* streets has been held to include the power to construct them.[5] The power to "regulate streets and sidewalks" implies the incidental power to prescribe what shall be their width;[6] and the power to "construct sidewalks," must be construed to mean, not only that the city may construct them where they do not already exist; but that the municipality may also remove or dispense with them, if it be so disposed.[7] So, also, the power to lay out *highways* confers the power to lay out a *footway*.[8] As the sidewalk is a part of the street, the power to improve *streets* includes power to improve *sidewalks*;[9] and if an owner of property fails to remove an unsafe sidewalk in front of his lot, where the cost of sidewalks is imposed upon the abutting landowner, the city may remove it and relay it in its own way.[10] So, likewise, under a clause, empowering the city "to lay out, open, grade and otherwise improve the streets and keep them in repair," it was held that a city could establish the grade, and require the owners of lots to make their sidewalks conform thereto.[11]

[1] Toledo P. & W., etc., v. Chenon, 43 Ill. 209; Railroad Co. v. Galena, 40 Ib. 344; Terre Haute v. Turner, 36 Ind. 522; Citizens, etc., v. Elwood, 114 Ib. 332; Philadelphia v. Phila., etc., 58 Pa. St. 253; Mercer v. Pittsburgh, etc., 36 Ib. 99; Com. v. Brooks, 99 Mass. 434; Dudley v. Frankfort, 12 B. Mon. 617; Sinton v. Ashbury, 41 Cal. 525.

[2] White v. Kent, 11 Ohio St. 550; Shelton v. Mobile, 30 Ala. 540.

[3] Hannibal v. Hannibal & St. J., etc., 48 Mo. 480.

[4] Hannibal v. Winchell, 54 Mo. 172.

[5] Matthiessen, etc., v. Jersey City, 26 N. J. Eq. 247.

[6] State v. Morristown, 33 N. J. L. 57.

[7] Atty. Gen. v. Boston, 142 Mass. 200; Winter v. Montgomery, 83 Ala. 589; s. c., 3 So. Rep. 235.

[8] Boston, etc., v. Boston, 140 Mass. 87.

[9] Taber v. Grafmiller, 109 Ind. 206.

[10] Emporia v. Gilchrist, 37 Kan. 532; see *ante*, §§ 259*a*, 277–281.

[11] Burr v. Newcastle, 49 Ind. 322.

Power to make ordinances "respecting *streets*, *wagons*, *carts*, *drays*, *etc.*, as to the council shall appear necessary for the *security*, *welfare* and *convenience* of the city," was held to authorize a regulation fixing the weight of merchandise, which vehicles could carry when passing through the city.[1]

Under similar special clauses in charters, coupled with a clause empowering the city to enact rules for the "general welfare, it has been held that cities have the power to regulate or forbid street auctions;[2] to prohibit fast driving;[3] to regulate the speed of railroad trains passing through the streets,[4] and to make any other regulations, which may be proper and essential to protect the community in the use of the streets.[5]

§ 291. **Power to pave construed.**—The power to pave or repave streets, which is usually granted in express terms, has met with a most liberal construction by the courts. The word "pave" includes the use of all means, by which a covering of brick or stone is laid to make a level surface for the use of vehicles, animals or pedestrians.[6] Paving includes macadamizing,[7] flagging[8] and a sidewalk made of plank or other suitable material.[9] And the term "pavement" includes brick sidewalks, of which curbs and gutters form a part.[10]

So, the cost of paving street crossings and intersections is a part of the expense of paving for which abutting owners may be assessed.[11] The power to pave includes the power to pur-

[1] Nagle v. Augusta, 5 Ga. 546.

[2] Caldwell v. Alton, 33 Ill. 416; St. Paul v. Fraeger, 25 Minn. 248; White v. Kent, 11 Ohio St. 550.

[3] Nealis v. Hayward, 48 Ind. 19.

[4] Donnaher v. State, 8 Sm. & M. (Miss.) 649; R. R. Co. v. Buffalo, 5 Hill (N. Y.) 209; Knoblock v. R. R. Co., 31 Minn. 402; Grube v. Mo. Pacite, 11 S. W. Rep. 736; Whitson v. Franklin, 34 Ind. 392; Richmond, etc., v. Richmond, 96 U. S. 521.

[5] Nixon v. Biloxi, (Miss.) 5 So. Rep. 621; New Orleans, etc., v. Hart, 40 La. An. 474; Board v. Heister, 37 N. Y. 661; Brooklyn v. Breslin, 57 Ib. 591; Com. v. Curtis, 9 Allen, 266; Hawley v. Harrall, 19 Conn. 142; Pedrick v. Bailey, 12 Gray, (Mass.) 161; Shelton v. Mobile, 30 Ala. 540.

[6] Burnham v. Chicago, 24 Ill. 496. In this case, the court said "A pavement is not limited to uniformly arranged masses of solid material, as blocks of wood, brick or stone, but it may be as well formed of pebbles, or gravel, or other hard substances, which will make a compact, even, hard way or floor." Gurnee v. Chicago, 40 Ill. 165.

[7] Warren v. Henley, 31 Iowa, 31.

[8] *In re* Phillips, 60 N. Y. 16.

[9] Burl. & Mo. R. etc. v. Spearman, 12 Iowa, 112.

[10] O'Leary v. Sloo, 7 La. An. 25; *contra*, Dyer v. Chase, 52 Cal. 440.

[11] Powell v. St. Joseph, 31 Mo. 347; Creighton v. Scott, 14 Ohio St. 438;

chase paving materials,[1] and every other power which is necessary to the effectual exercise of the expressly granted power.[2] It has thus been held that *grading* is an incident of paving.[3] In Pennsylvania the power to *pave and grade* was construed to authorize the power to furnish and establish curbstones;[4] so "trimming and guttering" have been held to be included in "macadamizing."[5] And inasmuch as macadamizing has been held to be merely a species of paving, the power to trim and lay gutters would doubtless be included in the power to pave.[6]

On the other hand, it has been held that the power to repair does not include the power to pave in the first instance;[7] the word *repair* meaning to restore to sound or good condition after injury or partial destruction.[8]

§ 292. **Power to improve, pave and grade, continuous.**— The express power, conferred upon municipal corporations to *grade and improve* streets, is a continuing one, and may be exercised from time to time; it is not exhausted with its first exercise.[9] Thus, when the city had by ordinance established a grade, corresponding to which the plaintiff made improvements, and subsequently the city established another grade; an injunction against the city to restrain the second change of grade was dismissed; the court holding that, as the power was continuous, it was not exhausted by being exercised once, and

Gunning Gravel Co. v. New Orleans, (La. 93) 13 So. 182; *In re* Eager, 46 N. Y. 100; Schenectady v. Trustees, 21 N. Y. S. 147; 66 Hun, 179.

[1] Bigelow v. Perthamboy, 1 Dutch. 297.

[2] Schenley v. Com., 36 Pa. St. 29, 30, 60; Schenectady v. Trustees, *supra;* see Harrisburg v. Segelbaum, 151 Pa. St. 172; McNamara v. Estes, 22 Iowa, 246.

[3] State v. Elizabeth, 30 N. J. L. 365; Williams v. Detroit, 2 Mich. 560.

[4] Schenley v. Com., 36 Pa. St. 29; Steckert v. East Saginaw, 22 Mich. 104; Dean v. Borchenins, 30 Wis. 236.

[5] McNamara v. Estes, 22 Iowa, 246.

[6] Philadelphia v. Ehret, 153 Pa. St. 1; see New Haven v. Whitney, 36 Conn. 373; see further as to power to lay pavement, *In re* Burmeister, 76 N. Y. 174; Boyer v. Reading, 151 Pa. St. 185; *In re* Smith, 52 N. Y. 526; *In re* Levy, 63 Ib. 637; *In re* Folsom, 56 Ib. 60; *In re* Burke, 62 Ib. 224; City of Philadelphia v. Ball, 10 Pa. Co. Ct. 92; Morse v. Westport, 110 Mo. 502; 19 S. W. R. 831; Dooley v. Sullivan, 112 Ind. 451; Wiles v. Hoss, 114 Ib. 371; Warner v. Knox, 50 Wis. 429; Philadelphia v. Dibeler, 147 Pa. St. 243; 23 Atl. 567.

[7] State v. Jer. City, 28 N. J. L. 500; Watson v. Passaic, 46 Ib. 124.

[8] Pittsburgh etc. v. Pittsburgh, 80 Pa. St. 72.

[9] Columbus G. Co. v. Columbus, (Ohio 93) 33 N. E. R. 292; McCormick v. Patchen, 53 Mo. 33; Williams v. Detroit, 2 Mich. 560; Estes v. Owen, 2 S. W. R. 133; 90 Mo. 113; Farrar v. St. Louis, 80 Ib. 392.

that, although the grade had been declared by the first ordinance to be binding upon the corporation, and all other persons whatsoever, this enactment was not in the nature of a contract, and was therefore repealable at the pleasure of the municipal authorities. Neither the corporation nor the State can prevent, by contract or enactments of the kind described, the future exercise of legislative power. The counter-proposition is inconsistent with the successful maintenance of the government.[1]

The abutting owner has no claim against the city for damages caused by a change in the grade of the street, in the absence of a statutory provision for such compensation.[2] The injustice, occasioned by the enforcement of this rule, has led to the enactment of statutes in many of the States, giving to the abutting owner a right to recover for the damages caused by such changes in the grade of a street.[3]

[1] Goszler v. Georgetown, 6 Wheat. 597. In this case, Marshall, C. J., said: "When a government enters into a contract there is no question of its power to bind itself to any extent not prohibited by its constitution. A corporation can make such contracts only as are allowed by the acts of incorporation. The power of this body to make a contract which should so operate as to bind its legislative capacities forever thereafter, and disable it from enacting a by-law which the Legislature enables it to enact, may well be questioned. We rather think that the corporation cannot abridge its own legislative power."

[2] Columbus Gas Company v. Columbus, (Ohio 93) 33 N. E. Rep. 292; Quincy v. Jones, 76 Ill. 231; see notes to Radcliff v. Mayor, 53 Am. Dec. 366; Dormon v. Jacksonville, 13 Fla. 589; White v. Yazoo, 37 Miss. 357; City of Montgomery v. Townsend, 80 Ala. 489; 2 So. Rep. 155; Flagg v. Worcester, 13 Gray, 601; Reynolds v. Shreveport, 13 La. An. 426; Kepple v. Keokuk, 61 Iowa, 653; Genois v. St. Paul, 32 Minn. 330; Henderson v. Minneapolis, 32 Ib. 319; Oakland v. Carpentier, 13 Cal. 540; Gale v. Kalamazoo, 23 Mich. 344; McCash v. Burlington, 72 Iowa, 26; 33 N. W. Rep. 346; Lord v. Oconto, 47 Wis. 386; Belcher v. St. Louis etc., 82 Mo. 121; St. Louis v. Gurno, 12 Mo. 414; Imler v. Springfield, 55 Ib. 110; Schattner v. Kansas City, 53 Ib. 162; Freemansburg v. Rogers, (Pa.) 8 Atl. Rep. 872; Rounds v. Mumford, 2 R. I. 154; Graves v. Otis, 2 Hill, 466; Rome v. Omberg, 28 Ga. 46; Brown v. Lowell, 8 Met. 172; Skinner v. Bridge, 29 Conn. 523; Simmons v. Camden, 26 Ark. 276; Foliusbee v. Amsterdam, 21 N. Y. S. 42; Alexander v. Milw., 16 Wis. 247; Snyder v. President, 6 Ind. 237; Cummins v. Seymour, 79 Ib. 491; Rakowsky v. Duluth, 44 Minn. 188; Selden v. Jacksonville, 10 So. 457; 28 Fla. 558; City of Bloomington v. Pollock, 31 N. E. Rep. 146; State v. Judges, (Minn. 93) 53 N. W. Rep, 800; Topeka v. Sells, 29 Pac. Rep. 604; see *contra* in Ohio, Crawford v. Delaware, 7 Ohio St. 459; Akron v. Chamberlain Co., 34 Ib. 328; see Louisville v. Rolling Mill, 3 Bush, 416.

[3] Burr v. Leicester, 121 Mass. 241; Columbus v. Woolen Mills, 33 Ind. 435;

Since the power to grade and improve is continuous in character, it may be, and indeed, on principles of public policy, ought to be, employed whenever there is a municipal or public need for the same. And, inasmuch as legislative and discretionary powers are exempt from judicial review, the courts will not inquire into the motives and reasons upon which such municipal legislation is based, or into the necessity for it, provided the power is exercised in a reasonably impartial manner, and its results do not conflict with the constitution or with the principles of public policy.[1]

§ 293. **Rights of municipality in soil of streets.**—Except where the public acquires the title in fee to the roadbed, the proprietor of land, over which a highway has been laid out, continues his ownership of the soil of such highway for all purposes, which are consistent with the public easement.[2] He may remove his property situated thereon, such as trees, flagstones, stepping-stones, and the like;[3] or he may tunnel beneath it for minerals, or for the construction of cellars, provided the public easement is not impaired.

A distinction has in this connection been made between country roads and streets; and it has been held in some instances that, under the very extensive power of grading streets, if a removal of the earth be found necessary, it may be removed, sold or used by the corporation in any way and for any purpose it may deem proper,[4] and that although the abutting own-

Stearns v. Richmond, (Va. 92) 14 S. E. R. 847; McCarthy v. St. Paul, 22 Minn. 527; Reardon v. San Francisco, 6 Pac. Rep. 325; Page v. Belviu, (Va. 92) 14 S. E. R. 843; Elgin v. Eaton, 83 Ill. 535; Harmon v. Omaha, 17 Neb. 548; see authorities cited in Healey v. New Haven, 2 Am. & Eng. Corp. Cas. 450, 456.

[1] Roanoke Gas Co. v. Roanoke, (Va. 90) 14 S. E. R. 665; Columbus Gas Co. v. Columbus, (Ohio 93) 33 N. E. R. 292; McCormick v. Patchen, 53 Mo. 33; Estes v. Owen, 90 Ib. 113; Koons v. Lucas, 52 Iowa, 177; McKevitt v. Hobo, 45 N. J. L. 482; Elster v. Springfield, 30 N. E. R. 274; Dunham v. Hyde Park, 75 Ill. 371; Gall v. Cincin., 18 Ohio St. 563; Smith v. Washington, 20 How. (U. S.) 135; O'Connor v. Pittsb., 18 Pa. St. 187; Cooper v. Dallas, (Tex. 92) 18 S. W. R. 92; *In re* Furman Str., 17 Wend. 649.

[2] Rich v. Minneapolis, (Minn.) 35 N. W. R. 2; Denniston v. Clark, 125 Mass. 216; Tucker v. Tower, 9 Pick. 109.

[3] Palatine v. Krueger, 12 N. E. R. 75; 121 Ill. 75; Goodtitle v. Alker, 1 Kenyon, 427, 437; Com. v. Noxon, 121 Mass. 42; Wellman v. Dickey, 78 Me. 20; Clark v. Dasso, 34 Mich. 86.

[4] Griswold v. Bay City, 35 Mich. 452; Huston v. Fort Atkinson, 56 Wis. 350.

er may own the fee of the street, he has no title to the surplus soil, resulting from grading or improving it.[1] Where the city or State has acquired the title to the bed or soil of the streets, the right to remove and dispose of the soil cannot be questioned. But it may be stated as a general rule that, when the fee to the highway remains in the adjoining owner, all that the public or the municipality has acquired is *an easement for public travel;* and, while doubtless the municipality has the right to employ any appropriate means to render the street convenient or adapted to public purposes, it cannot justly be considered that the owner of the fee has agreed to allow the city to take the particles of soil owned by him without compensation and to devote them to purposes in no way beneficial to him.[2] Nor can it be said that the distinction as to public right between city streets and country roads will alter this principle. It seems, however, to be a well established exception to the general rule, that in cases of city streets "where there is a general plan for the gradation and improvement of highways, intersecting streets and highways in the vicinity of the one improved are to be deemed part of the same general plan, and soil may be removed from one street and placed upon another."[3]

§ 294. **Right of municipality to use the roadbed for construction of sewers and cisterns.**—Whether the fee be in the abutter or not, the corporation may, by virtue of its power to make and maintain streets, and by the power conferred upon it to do all necessary acts for the protection of the health of the community,[4] construct sewers, drains and culverts in or

[1] Davis v. Clinton, (Ia.) 20 Alb. L. Jour. 56; Hovey v. Mayo, 43 Me. 322; New Haven v. Sargent, 38 Conn. 50.

[2] Elliott Roads and Streets, p. 524; Althen v. Kelley, 32 Minn. 280.

[3] Aurora v. Fox, 78 Ind. 1, 6; Hovey v. Mayo, 43 Me. 322; New Haven v. Sargent, 38 Conn. 50; Denniston v. Clark, 125 Mass. 216; Smith v. Rome, 19 Ga. 89; Adams v. Emerson, 6 Pick. 58; Kendall v. Post, 8 Oreg. 141; Cusick v. Norwich, 40 Conn. 376; Tucker v. Eldred, 6 R. I. 404; Williams v. Kennedy, 14 Barb. 629; Higgins v. Reynolds, 31 N. Y. 151; Ladd v. French, 6 N. Y. Sup. 56; Fisher v. Rochester, 6 Lans. 225; Robert v. Sadler, 104 N. Y. 229; s. c., 58 Am. Rep. 498; and compare Burr v. Leicester, 121 Mass. 241; Jackson v. Hathaway, 15 Johns. 447, 453; Fish v. Rochester, 6 Paige, 268, 272; Bissell v. Collins, 28 Mich. 277; Baxter v. Winooski Turnp., 22 Vt. 114; Cole v. Drew, 44 Ib. 49; Chapin v. Sullivan etc., 39 N. H. 564.

[4] State v. Charleston, 12 Rich. 702; Ziggler v. Menges, (Ind.) 22 N. E. Rep. 722.

upon the soil of the street, not only without compensation being made to the adjacent owners, but at their expense.[1] Such use of a street is lawful,[2] and the power to construct sewers, like the power to grade, is continuous ;[3] which, however, should be exercised only when the safety and healthfulness of the vicinity demand it, and not for the private convenience and accommodation of particular individuals.[4]

Nor will the courts ordinarily interfere with the exercise of the power. It is not a judicial, but a legislative and municipal question, how and when the power should be exercised.[5] When the construction of a sewer has been decided upon and its prosecution begun, the duty of the city becomes ministerial, and liability for its negligent performance then attaches.[6] The power to construct sewers must be so exercised as not to result in a nuisance.[7]

Whether the power to construct sewers be a part of the police power[8] or an exercise of the right of eminent domain,[9] it is a sovereign power which cannot be bartered away or surrendered ; and parties, who contract with a municipal corporation upon matters involving such a use or occupation of the streets, do so

[1] Spokane Ry. Co. v. Spokane, 5 Wash. St. 634; Stoudinger v. Newark, 28 N. J. Eq. 72; Leeds v. Richmond, 102 Ind. 372; People v. Board, 69 Hun, 95; Adams v. Bay City, 44 N. W. R. 138; Griswold v. Bay City, 35 Mich. 452; *In re* Fowler, 53 N. Y. 60; Maywood Co. v. Maywood, 29 N. E. R. 704; Clapp v. Spokane, 53 Fed. R. 515; Gray v. Board, 139 Mass. 328; see *ante*, § 277.

[2] Cincin. v. Perry, 21 Ohio St. 499; Traphagen v. Jersey City, 29 N. J. Eq. 206; Stondinger v. Newark, 28 Ib. 187; s. c., Ib. 446.

[3] R. R. Co. v. Quincy, (Ill. 91) 28 N. E. R. 1069; McKevitt v. Hoboken, 45 N. J. L. 482.

[4] Kasmaks v. New York City, 117 N. Y. 361; Cone v. Hartford, 28 Conn. 363, 375; Heman v. Payne, 27 Mo. Ap. 481; Bayha v. Taylor, 36 Ib. 427.

[5] Kansas City v. Richards, 34 Mo. Ap. 521; Horton v. Mayor, 4 Lea, 39; 40 Am. Reps. 1; Freburg v. Davenport, 63 Iowa, 119; Martin v. Hilb, 14 S. W. R. 94 (Ark. 90); Leeds v. Richmond, 102 Ind. 372; Mayor v. Eldridge, 64 Ga. 524; s. c., 37 Am. Rep. 89; Oil City v. Boiler Wks., 25 Atl. R. 549; 152 Pa. St. 348.

[6] Denver v. Rhodes, (Colo.) 13 Pac. Rep. 729; Jones v. New Haven, 34 Conn. 1.

[7] Weis v. Madison, 75 Ind. 241; 39 Am. Rep. 135; Hebron R'd v. Harvey, 90 Ind. 192; 46 Am. Rep. 199; Kellogg v. Thompson, 66 N. Y. 88; Phinizy v. Augusta, 47 Ga. 260; Perry v. Worcester, 6 Gray, 544.

[8] Tiedeman Police Powers, 445; Cooley's Cons. Lim. 234; Lowell v. Boston, 111 Mass. 454; Donnelly v. Decker, 58 Wis. 461; Pool v. Trexler, 76 N. C. 297.

[9] People v. Nearing, 27 N. Y. 306; *In re* Ryers, 72 Ib. 1.

subject to the future exercise of this power.[1] In the exercise of the power to construct a system of sewerage, the municipal corporation is not limited as to the selection of a site for its dumping ground by the territorial limits of the city, but it may purchase such site wherever it is found to be best adapted for the discharge of the sewage.[2]

Analogous to the power to construct sewers and drains is the power to build street cisterns. The cases tend to support the doctrine that the corporation may, for the purpose of "preserving the public health, providing means for the prompt extinguishment of fires and promoting the general welfare," cause reservoirs and cisterns to be made in the soil of the streets.[3] On the other hand, it has been held that a city may abolish private wells in the soil of the street without compensation to their owners.[4]

§ 295. **Pipes in streets for gas and other purposes.**—In this country, as in England, legislative authority, either express or necessarily implied, is required, before gas pipes or pipes for like purposes can be laid in city streets by private corporations or individuals.[5] And the franchise may be granted, either directly by the Legislature, or indirectly by the municipality under its charter powers.[6] For the Legislature may grant to a city the power to permit private corporations to lay down gas mains in its streets.[7] The construction of a system of gas pipes in the bed of country roads, is so unusual,—and therefore not to be presumed to have been contemplated, when

[1] Elliott on Roads & Streets, p. 368; Louisville, etc. v. Louisville, 8 Bush, 415; Kirby v. Citizens St. R'y Co., 48 Md. 168; Dil. Mun. Corp. § 689.

[2] Coldwater v. Tucker, 56 Mich. 474; 24 Am. Rep. 601; Cummins v. Seymour, 79 Ind. 491; s. c., 41 Am. Rep. 618; Hyde Pk. v. Spencer, (Ill.) 6 West. Rep. 517; see *ante*, § 201.

[3] West v. Bancroft, 32 Vt. 367; Dil. Mun. Corp. § 690; Barter v. Conn., 3 Pa. St. 259; Branson v. Philadelphia, 47 Ib. 329; *contra*, Dubuque v. Maloney, 9 Iowa, 460.

[4] Ferrenbach v. Turner, 86 Mo. 416.

[5] Reg. v. Charlesworth, 16 Q. B. 1012; Reg. v. Train, 9 Cox C. C. 180; Thompson v. Sunderland etc., L. R. 2 Ex. Div. 429; Ellis v. Sheffield etc., 23 L. J. Q. B. 42; Reg. v. Longton G. Co., 29 L. J. M. C. 118.

[6] State v. Cincin. Gas Co., 18 Ohio St. 262.

[7] Quincy v. Bull, 106 Ill. 337; s. c., 4 Am. & Eng. Cor. Cas. 554; District v. Gas Company, 20 D. C. 39; Garrison v. Chicago, 7 Biss. 480; Brown v. Duplessis, 14 La. Ann. 842; People v. Gilroy, 67 Hun. 323; Smith v. Metro. etc. Co., 12 How. Pr. 187; Indianapolis v. Gas Co., 66 Ind. 396; Cf. People v. Benson, 30 Barb. 24; Gas Co. v. Norwich City Gas Co., 25 Conn. 19.

the road was laid out,—that it is held to be the imposition of an additional servitude for which, in Pennsylvania and New York, the abutter is entitled to compensation.[1] But the streets of a city are never deserted at any hour of the night; and the presence in the city of evil designing persons, together with the difficulty of locomotion in the dark, makes it highly essential to the safety and comfort of the inhabitants of a city that its streets be properly lighted at nights. And since the construction of gas pipes in the roadbed of the streets has become a common custom, it is presumed that the authority to do this was impliedly acquired by the public in the original dedication or confiscation of the land as a street, and the statement is warranted that the laying of gas pipes under legislative sanction is not an additional servitude, for which the owner of the fee can exact compensation.[2]

§ 296. **Power to grant exclusive franchise to lay pipes in streets.**—The power of the Legislature to grant to a private individual or corporation the exclusive right to use the streets of a city for the purpose of laying down gas pipes or other similar conduits in the roadbed, has been questioned; but it has been held very generally that such an exclusive Legislative grant is valid, if it does not conflict with some express provision of the State constitution.[3] But the Legislature does not thereby part with its police power of supervision in the interest of the public welfare; nor is the State relieved of its duty to protect the public health, morals or safety against an improper or harmful exercise of the franchise.[4]

[1] Bloomfield etc. Co. v. Calkins, 62 N. Y. 386; Sterling's App., 111 Pa. St. 35.

[2] Crooke v. Flat. W. Wks., 29 Hun, 245; Dil. Mun. Cor. § 691, note; see Nelson v. La Porte, 33 Ind. 258; New Orleans v. Clark, 95 U. S. 644; Richmond Co. Gasl. Co. v. Middletown, 59 N. Y. 228. In California, the right of laying gas and other pipes in the streets of a city, is regulated by the Constitution of 1879; People v. Stephens, 62 Cal. 209.

[3] N. O. Waterworks v. Rivers, 115 U. S. 674; Louisville Gas Co. v. Cit. Gas Co., 115 Ib. 683; N. O. Gas Co. v. Louisiana L. Co., 115 Ib. 650; State v. Milw. Gas Co., 29 Wis. 454; s. c., 9 Am. Rep. 598; Newport v. Newp. L. Co., 84 Ky. 167; Atlantic C. W. Wks. v. Atlantic City., 39 N. J. Eq. 367; comp. Citizens W. Co. v. Bridgeport Hyd. Co., 55 Conn. 1; State v. Cincin. G. & C. Co., 18 Ohio St. 262; see *ante*, § 144.

[4] N. O. Gas Co. v. Louisiana etc., 115 U. S. 650; Cf. Stein v. Bienville W. S. Co., 34 Fed. Rep. 145; Nat. W. Wks. Co. v. Kansas City, 28 Ib. 921.

It is very evident that all persons cannot have the right to lay pipes in the soil of the streets; and it is equally clear that capital cannot be induced to make such an investment, unless it can be guaranteed that the franchise granted will be so far protected from arbitrary molestation, that it may expect a safe and sure return. While it is true that the manufacture of gas is an ordinary business, and that to restrict its manufacture to one person would be a monopoly, the establishment of which is ordinarily contrary to the law and public policy,[1] it should be observed that the monopoly which is created by the legislation under inquiry is as to the right to use the only means by which it may be expeditiously and conveniently delivered to consumers, viz.: that of pipes, laid in the roadbed of the streets; and the justification for the creation of such a monopoly, is the protection of the streets against constant and unnecessary injury, through the laying of more pipes than what are needed to supply the public want.[2] For these reasons it is generally held to be within the power of the Legislature to grant such exclusive franchises, subject to such control and regulation as will prevent it from becoming oppressive or working injustice upon consumers. But a municipality cannot, in the absence of legislative authority, grant such an exclusive franchise.[3]

So, it has been held that a general power to light the city, expressly conferred, as, for example, to "use the streets for gasmains and for lampposts" or to "enter into a contract for the supply of gas," etc., will not authorize it to grant an exclusive franchise to any private individual or corporation;[4] and as such power is repealable by the Legislature, any contract entered into, or any privileges granted, are subject to annulment at any time.[5] It has thus been held that the power, to cause

[1] See Tiedeman, Police Power, § 105, and *ante*, § 144.

[2] Tiedeman, Police Power, § 105, and *ante*, § 144.

[3] City Gas & M. Co. v. Elwood, 114 Ind. 332; State v. Milwaukee, 29 Wis. 454; Crescent G. Co. v. New Orleans etc., 27 La. An. 148; Des Moines etc. Co. v. Des Moines, 44 Iowa, 505; Memphis etc. v. Williamson, 9 Heisk. 314; Grand Rapids etc. v. Grand Rapids etc., 20 Am. & Eug. Corp. Cas. 270; Davenport v. Kleinsmidt, 16 Ib. 301; R. R. Co. v. Transit Ry., 24 Fed. Rep. 306; see *ante*, § 144.

[4] State v. Cincin. Gasl. etc. Co., 18 Ohio St. 262; Indianapolis v. Gaslight Co., 66 Ind. 396; Parkersburg Gas Co. v. Parkersburg, 30 W. Va. 435.

[5] Richmond Co. Gasl. Co. v. Middletown, 59 N. Y. 228.

the streets to be lighted, does not authorize the grant of the exclusive privilege of laying mains for fifty years.[1] But under the power to light its streets, a municipality may authorize the party supplying the illuminating agent to lay the necessary pipes;[2] and when the grantee of this franchise has performed the public service thus required of him, the contract for compensation, which the city had made with him, is an obligation which cannot be impaired by subsequent legislation;[3] at least, so far as the contract fell short of granting an exclusive franchise.

The same rules of law are held to be applicable to corporations which are organized for supplying a city with water.[4]

§ 297. **Poles for the hanging of telegraph and other wires—Abutter's right to compensation.**—Whatever power the municipal corporation possesses over this subject is derivative; and legislative authorization is in all cases necessary, before the streets can be used for the placing of poles for the hanging of wire for telegraph, telephone, electric lighting or similar purposes. Without such legislative sanction the poles are nuisances, which may be abated.[5] In New Jersey it has been held that, when the city had indicated the streets where telegraph poles might be erected, it could not revoke its permission after the company had erected them.[6]

Despite the fact that the telegraph is an instrument of interstate commerce, a municipal corporation, through whose territory the line passes, may regulate its construction and use,[7]

[1] Saginaw etc. Co. v. Saginaw, 28 Fed. Rep. 529; see Brush E. L. Co. v. Jones, 5 Ohio C. C. 340; Roanoke G. Co. v. Roanoke, (Va. 92) 14 S. E. R. 665; Carlyle W. L. & P. Co. v. Carlyle, 31 Ill. App. 325.

[2] Indianapolis v. Ind. Gas L. Co., 66 Ind. 396; Des Moines G. Co. v. Des Moines, 44 Iowa, 508; Quincy v. Bull, 106 Ill. 337.

[3] N. O. Gas Co. v. Louisiana L. Co., 115 U. S. 650; Louisville Gas Co. v. Citizens Gas Co., 115 Ib. 683.

[4] Syracuse W. Co. v. Syracuse, 26 N. Y. State Rep. 364; Brenham v. Brenham Water Co., 67 Texas, 542; see *ante*, § 144.

[5] Com. v. Boston, 97 Mass. 555; Hauson v. Hunter, (93) 53 N. W. Rep. 84; Domestic T. & T. Co. v. Newark, 49 N. J. L. 344; Irwin v. Great So. etc., 37 La. An. 63; Julia Bldg. Assn. v. Bell Tel. Co., 88 Mo. 258.

[6] Hudson T. Co. v. Jersey City, 49 N. J. L. 303; Dunn v. Great Falls, (Mont. 93) 31 Pac. R. 1017; Citizens v. Sands, (Mich. 93) 55 N. W. Rep. 452; Rutland E. L. Co. v. Marble, (Vt. 93) 26 Atl. Rep. 635; Webb v. Demopolis, (Ala. 93) 13 So. Rep. 289.

[7] Mut. Un. Tel. Co. v. Chicago, 16 Fed. Rep. 309; St. Louis v. W. U. Tel. Co., 149 U. S. 465.

control by ordinance the erection of the poles and the stringing of wires, and impose a license upon the same under its police power over streets.[1] So, also, a statute passed by a State Legislature, requiring all wires in certain cities to be laid underground, was valid to be a proper police regulation.[2]

The right of the abutter to compensation, in a case where the legislature has authorized the erection of a telephone, telegraph or electric light plant opposite his property, has been variously determined. The question is, whether such a use, though public, is not an additional servitude, not contemplated when the street or highway was dedicated or condemned.[3] The fact, that the fee of the street is not in the abutter would, it has been held in analogous cases, not affect his right to compensation.[4] And the sounder rule seems to be that the abutting owner ought to be compensated for all actual injury to his property, or the right to use the same. These cases differ from the laying of gas and other pipes in the roadbed, in that there is in the latter only a technical violation of the right of property in any case, and no injury to the abutting property or any diminution of its enjoyment; whereas, telegraph poles and wires produce a serious positive damage to abutting property, not only by disfiguring the appearance of the street, but likewise by diminishing the light and air passing into the windows, and by increasing the dangers of destruction of buildings and loss of life by fire.[5]

[1] W. U. T. Co. v. Phila., 21 Am. & Eng. Corp. Cases, 40; see *contra*, St. Louis v. W. El. T. Co., 39 Fed. Rep. 59; Ratterman v. W. U. T. Co., 127 U. S. 411.

[2] W. U. T. Co. v. New York, 38 Fed. Rep. 552.

[3] Roake v. Am. Tel. & T. Co., 41 N. J. Eq. 35; Broome v. N. Y. & N. J. Tel. Co., 42 Ib. 141; 7 Atl. Rep. 851; Board of Trade Tel. Co. v. Barnett, 107 Ill. 507; Irwin v. Gt. So. Tel. Co., 37 La. An. 63; New Orleans M. & T. R. R. Co. v. Southern & Atl. Tel. Co., 53 Ala. 211; Gay v. Mut. Union Tel Co., 12 Mo. App. 485, 494.

[4] §§ 303, 304.

[5] Story v. Elev. R. R. Co., 90 N. Y. 122; Mahady v. Bushwick etc., 91 Ib. 148; N. Y. Cable Co. Case, 104 Ib. 1; Lahr's Case, 104 Ib. 268; N. Y. Dist. Ry. Case, 107 Ib. 42; Dusenbury v. M. U. T. Co., Abb. New Cas. 440; Metro. etc. Co. v. Caldwell Lead Co., 67 How. Pr. 365; Smith & Cen. etc. T. Co., 2 Ohio Circ. Ct. 259; Willis v. Erie etc. Co., 37 Minn. 347; Atl. etc. Tel. Co. v. Chicago etc. R. R. Co., 7 Biss. 158; Amer. Tel. etc. Co. v. Smith, (Md.) 18 Atl. Rep. 910; Clauser etc. v. Baltimore & O. T. Co., 17 Chic. Leg. News, 22; People v. Squire, 107 N. Y. 593; Southwestern R. R. Co. v. Southern etc. T. Co., 46 Ga. 43; s. c., 12 Am. Rep. 585; West. Union T. Co. v. Rich, 19 Kan. 517, s. c., 27 Am.

§ 298. **Openings in and vaults under sidewalks.** — For convenience in obtaining access to their cellars, it has become common for abutting owners to make openings in the sidewalk; and in some instances, vaults are excavated beneath the sidewalks for the purpose of obtaining additional space or room for the cellar, and for the construction of a fire-proof cellar, whose contents will not be injured by a destruction by fire of the abutting building. The streets, including the sidewalks, are devoted to public use; and this public use signifies their employment in any and every way which may be beneficial to the public; including the construction of sewers, pipes, cisterns and drains beneath the surface.[1] To permit the abutting owner to make openings in or to undermine the surface of a city street at pleasure, and free from municipal or legislative control, would most seriously impair, if not wholly destroy, the public easement therein; and this principle obtains whether the fee of the street be in the city or not.

It is clear that the use of the subsoil of the sidewalk, in the modes just indicated, may lawfully, and should always, be subjected to such police regulations as may be needed to insure the public safety and comfort in the legitimate use of the sidewalk. But whether the fact, that the title to the fee of this subsoil is in the abutting owner, would enable him to resist any interference

Rep. 159, and case cited in last note. See *contra*, Julia Build'g Assn. v. Bell Tel. Co., 88 Mo. 258; Pierce v. Drew, 136 Mass. 75. In his work on Mun. Corp. § 698, Judge Dillon says: "On the whole, the safer and perhaps sounder view is that such a use of the street or highway, attended as it may be especially in cities with serious damage and inconvenience to the abutting owner, is not a street or highway use proper, and hence entitles such owner to compensation for such use, or for any actual injury to his property caused by poles and lines of wire placed in front thereof." Judge Elliott says on the same subject: "Such a use bears a very remote analogy to the use [of streets] for passage and repassage. If one or two posts and wires may be placed in front of a man's property may not a dozen be placed there? Indeed, in most of our cities, the poles and wires are already so thick as to seriously interfere with the light and air and to greatly impair the chances of saving a building in case of fire. Has the owner no remedy in such a case? Where shall the line be drawn? . . . The abutting owner is specially benefited by drains and sewers and by gas mains, but this is not true of telegraph lines, and so far from facilitating travel, they rather impede it and interfere with the ordinary use of the way." Elliott Roads and Streets, pp. 535, 536.

[1] Tiedeman Police Powers, p. 407, Barney v. Keokuk, 94 U. S. 324, 440.

with his enjoyment of the same for the purposes of a cellar or vault by the laying of pipes and wires under the sidewalk, except in the exercise of the right of eminent domain, and upon payment of compensation, cannot be taken as definitely settled by the adjudications. The difficulty is further increased by the fact, often lost sight of, that in many cases, the title of the abutting owner to the subsoil stops at the curbstone. It has however been held in New York that, subject to municipal regulations, the abutting owner has a right to excavate the soil beneath the surface of the street, or at least under the sidewalk, and to use the space so obtained as a basement or for similar purposes, provided the full and complete public use of the surface of the street is not thereby interfered with.[1] In Illinois, the court held[2] that, while the abutting owner possessed no absolute right to construct a coal cellar beneath his sidewalk; yet, upon the ground that such privilege would be of great private convenience, authority might be implied, in the absence of any action by the municipal authorities to prevent the work, after it had become known. But the court adds that any such implied license to use a street requires that the licensee shall use more than ordinary care and expedition in prosecuting the work, and in closing the cellar openings or shafts on the sidewalk.

§ 299. **Municipal regulations of street travel and traffic.** —A municipality has the power by express grant, or by virtue of the general authority to make laws relating to the public welfare, to regulate the use of the streets in the interest of the public safety and comfort,[3] to regulate the speed of public travel in the streets,[4] prohibit the stoppage of vehicles for a longer period than what was stipulated in the statute, (twenty min-

[1] McCarthy v. Syracuse, 46 N. Y. 194; Robert v. Sadler, 104 N. Y. 229; Lahr's Cases, 104 Ib. 208; Irvine v. Wood, 51 Ib. 224; see, also, Fisher v. Thirkell, 21 Mich. 1; O'Linda v. Lathrop, 21 Pick. 292, 297; Papworth v. Milw., 64 Wis. 389; Davis v. City of Clinton, 50 Iowa, 585.

[2] Nelson v. Gridley, 12 Ill. 22, 23; Gridley v. Bloomington, 68 Ib. 50.

[3] Farwell v. Chicago, 71 Ill. 269; Joyce v. E. St. Louis, 77 Ib. 156; Knoxville v. Sanford, 13 Lea, 545; Griffin v. Powell, 64 Ga. 625; Snell v. Belleville, 30 U. C. Q. B. 81; Com. v. Fenton, 139 Mass. 195; Com. v. Brooks, 90 Mass. 439; see *post*, § 321, on Law of the Road.

[4] Com. v. Worcester, 3 Pick. 462; Washington v. Nashville, 1 Swan (Tenn.) 177; McBean v. Chandler, 9 Heisk. (Tenn.) 349.

utes;)[1] prohibit night walking;[2] compel the removal of snow from the sidewalk in certain specified localities;[3] and to regulate the removal of buildings, and the use of the streets for that purpose.[4]

Although a street is public and designed for general passage and traffic, without distinction as to persons or vehicles,[5] this is by no means its sole use.[6]

A distinction must be made between the general use, which all the public are permitted to make of the streets for ordinary purposes, and the special and peculiar use, which is made by classes of persons in the pursuit of their occupation or business, such as hackmen, drivers of express wagons, omnibuses, etc. A city may prescribe the routes in its streets to be taken by omnibuses;[7] and may designate proper localities or stands to be occupied by express wagons, hacks and vehicles which are being offered for hire,[8] provided such stands are not so located that they will impair or interfere with the right of the abutting owners.[9]

A municipality may require a license to be paid by the owner of vehicles used for the transportation of heavy loads;[10] and, it has been held, may regulate the width of the tires.[11] As a protection against the excessive damage to the roadbed, a license on vehicles for hire may be enforced, although the owner of such a vehicle does not reside in the city.[12] For the license in

[1] Com. v. Brooks, 109 Mass. 355; Com. v. Fenton, 139 Ib. 195.

[2] Braddy v. Milledgeville, 74 Ga. 516.

[3] *In re* Goddard, 16 Pick. 504; Union Railway Co. v. Cambridge, 11 Allen (Mass.) 287; Kirby v. Boylston, etc., 14 Gray, 252.

[4] Day v. Green, 4 Cush. (Mass.) 433.

[5] Starr v. Camden, etc., 24 N. J. L. 592; Barker v. Savage, 45 N. Y. 191; Belton v. Baxter, 54 N. Y. 245.

[6] See Quincy v. Jones, 76 Ill. 231, 244; Henkel v. Detroit, 49 Mich. 249.

[7] Com. v. Stodder, 2 Cush. 562.

[8] State v. Yopp, 97 N. C. 477; s. c., 2 Am. St. Rep. 305; Baker v. Boston, 12 Pick. 184; Vanderbilt v. Adams, 7 Cow. 349; Ib. 385; Veneman v. Jones, 118 Ind. 41, St. Paul v. Smith, 27 Minn. 364; Com. v. Brooks, 99 Mass. 434; Com. v. Mathews, 122 Ib. 60; Com. v. Robertson, 5 Cush. 438.

[9] McCaffrey v. Smith, 41 Hun, 117; Branahan v. Hotel Co., 39 Ohio St. 333; Lippincott v. Lasher, 44 N. J. Eq. 120; comp. Masterson v. Short, 7 Robt. (N. Y.) 241.

[10] Nagle v. Augusta, 5 Ga. 546; Gartside v. E. St. Louis, 43 Ill. 47; Brooklyn v. Breslin, 57 N. Y. 591; St. Louis v. Green, 70 Mo. 562; see *ante*, §§ 124, 126.

[11] People v. James, 16 Hun, 426; Reginald v. Pike, 1 Ontario, 43.

[12] Council v. Pepper, 1 Rich. L. 364; Memphis v. Battaille, 8 Heisk. 524.

all such cases is a police regulation, and not a tax.[1] But a license will not be enforced as against a nonresident whose use is occasional only, in view of the distinction between the ordinary use of the streets by vehicles and a special use or one which is habitually dangerous or unusually destructive.[2] And this is sometimes true, even when the tax is imposed upon vehicles of every sort, without making any distinction between the purposes for which the vehicles are employed.[3]

Under a charter power to regulate vehicles using the streets, street cars,[4] bicycles[5] and sprinkling carts are included.[6] Bicycles are vehicles, and the proper place for their use is the roadway. Therefore, one who rides a bicycle recklessly upon the sidewalk, in violation of a statute prohibiting riding or driving there, is liable civilly for the damage caused thereby.[7] Bicycles are subject to "the law of the road."[8]

§ 300. **Street obstructions.**—The public are entitled to the use of the whole street from side to side, and from end to end;[9] and a partial obstruction, or an encroachment on the boundaries of the street by the temporary deposit thereon of goods, is no less a nuisance, because a passageway still remains, through which travel and traffic may flow.[10]

The more or less nominal damage to the public, in a particular case of partial obstruction or encroachment upon the public highway, does not make it any less an actionable nuisance. If any one individual be permitted to apply a highway to his own

[1] See Tiedeman's Police Power, § 101, and *ante*, § 123; see Scudder v. Hinshaw, (Ind. 93) 33 N. E. Rep. 791; Com. v. Page, (Mass. 92) 29 Ib. 512; People v. Wilson, 62 Hun, 618; Gibson v. Corapolis, 22 Pitts. L. J. 64; Gibson v. Borough, Ib.

[2] Bennett v. Birmington, 31 Pa. St. 15; St. Charles v. Nolle, 51 Mo. 122; Gard. City v. Abbott, 34 Kan. 283; Gass v. Greenville, 4 Sneed, 62.

[3] B'klyn v. Nodine, 26 Hun, 512; *Ex parte* Gregory, 20 Tex. App. 210; see *ante*, §§ 123, 124, 261.

[4] Railway Co. v. Philada., 58 Pa. St. 119; see Allerton v. Chicago, 6 Fed. Rep. 555.

[5] Mercer v. Corbin, 117 Ind. 450; s. c., 10 Am. St. R. 76; *In re* Wright, 29 Hun, 357; Twilley v. Perkins, (Md. 93) 26 Atl. Rep. 286; State v. Yopp, 97 N. C. 471.

[6] St. Louis v. Woodruff, 71 Mo. 92.

[7] Mercer v. Corbin, 117 Ind. 450; State v. Brown, 109 N. C. 802.

[8] State v. Collins, (R. I.) 17 Atl. Rep. 131; see *post*, § 321.

[9] State v. Berdetta, 73 Ind. 185, 193.

[10] Emerson v. Babcock, 66 Iowa, 257; State v. Woodward, 23 Vt. 92; Philbrick v. Place, (Iowa, 93) 55 N. W. R. 345; People v. Vanderbilt, 28 N. Y. 396; Com. v. Blaisdell, 107 Mass. 234; Harrow v. State, 1 Greene, (Ia.) 439; Cf. People v. Carpenter, 1 Mich. 273.

use, however little, others would be tempted to do the same, with a consequent serious perversion of the street from its original purpose.[1] For this reason, the city may maintain an action to prevent the continuance of obstructions and to obtain their removal,[2] as well as resort to criminal proceedings, as a punishment for the past offence. Anything, which unnecessarily or unreasonably impedes or obstructs the lawful use of a street, is a public nuisance for which an indictment will lie.[3]

It is not necessary, to constitute a nuisance, that there should be an actual physical obstruction upon the surface of the street; for it is very evident that a structure, adjacent to, or projecting over, a street, may under certain conditions become dangerous to travel thereon, and so be considered a nuisance.[4] Under this rule, a bay window, sixteen feet above the ground,[5] a house or wall, adjoining the street, which is suffered to remain in a dilapidated condition;[6] and a wooden awning, covering a sidewalk,[7] have been adjudged to be unlawful obstructions and nuisances.[8] But the right of the public to an unobstructed use of the street is subject to some reasonable and necessary limitations.[9]

[1] Elliott on Roads and Streets, p. 478; Wright v. Saunders, 65 Barb. 213; Dickey v. Tel. Co., 46 Me. 483.

[2] Chase v. Oshkosh, (Wis. 92) 51 N. W. R. 560; State v. Smith, 54 Vt. 403; State v. Edens, 85 N. C. 522; Winona v. Hoff, 11 Minn. 119; Buffalo v. Harling, 52 N. W. R. 931; Neshkoro v. Nest, (Wis. 93) 55 Ib. 176; Dummer v. Jersey City, 20 N. J. L. 86; Metro. C. R. Co. v. Chicago, 96 Ill. 620.

[3] Waukesha etc. Co. v. Waukesha, 83 Wis. 475; Franklyn v. Portland, 67 Me. 46; Yates v. Warrentown, 84 Va. 337; 4 S. E. R. 818; Neshkoro v. West, *supra;* Runyon v. Bordiné, 2 J. S. Green (N. J.) 472; Smith v. State, 23 N. J. L. 712; Heckerman v. Hummell, 19 Pa. St. 64; N. O. v. Gravier, 11 Martin, 620; McNerney v. Reading, 150 Pa. St. 611; Cf. Bryans v. Almond, 87 Va. 564; Davis v. Bangor, 42 Me. 522; State v. Cincin. etc., 18 Ohio St. 268; Callanan v. Gilman, 107 N. Y. 360; Clifford v. Dam, 81 Ib. 52; State v. Merritt, 35 Conn. 314.

[4] Clift v. State, (Ind. 93) 33 N. E. R. 211; Grove v. Ft. Wayne, 45 Md. 429; Bybee v. State, 94 Ib. 443; Salisbury v. Herchenroder, 106 Mass. 548; Jones v. Railroad, 107 Ib. 261.

[5] Reimer's Appeal, 100 Pa. St. 182.

[6] Regina v. Watts, 1 Salk. 357.

[7] Hume v. Mayor, 74 N. Y. 264; Pedrick v. Baily, 12 Gray, 161; Cf. as to awnings, Hoey v. Gilroy, 129 N. Y. 132; doorsteps and stoops, Cushing v. Boston, 128 Mass. 330.

[8] Jenks v. Williams, 115 Mass. 217; Hawkins v. Sanders, 45 Mich. 491; Att'y Gen. v. Lombard, 1 W. N. C. 491; Miller v. St. Johns, 57 N. Y. 567; Garland v. Town, 55 N. H. 55; see Fresno v. Canal Ins. Co., (Cal. 93) 32 Pac. R. 943; Olean v. Steyner, 135 N. Y. 341.

[9] Clark v. Fry, 8 Ohio St. 358; Grant

It is a legitimate use of a street to employ it for the purpose of carrying coal, wood, grain and other bulky articles, and in delivering such merchandise the wagons or trucks may obstruct locomotion in the streets for a reasonable time.[1] So, also, may a street be temporarily obstructed by placing building material therein, if this be reasonable and necessary for want of room elsewhere.[2] But the free passage of a street must not be unnecessarily interfered with, as by loading or unloading wagons, or by the deposit of bulky articles in front of a warehouse facing thereon;[3] it is not permitted to turn the street into a warehouse or place of deposit. And if such use is unreasonably prolonged, or it interferes with the public use, it is a nuisance.[4] Cars may be temporarily unloaded in the street;[5] but a street cannot be used as a depot,[6] or for the storage of cars,[7] or for a timber[8] or stone yard;[9] or as a stable,[10] or as a place for the storage of carts and machinery;[11] or for the exhibition of wild animals,[12] or for the erection of buildings.[13] If the moving of a building through the streets is done carefully and expeditiously, it is generally permitted under municipal regulations.[14]

v. Stillwater, 35 Minn. 242; Cline v. Cornwall, 21 Grant (Can.) 142; State v. Omaha, 14 Neb. 265.

[1] Hobson v. Philadelphia, 155 Pa. St. 131; St. John v. New York, 3 Bosw. 483; Clark v. Fry, 8 Ohio St. 358, 374; Rex v. Cross, 3 Campb. 226.

[2] Raymond v. Kieseberg, 54 N. W. R. 612 (Wis. 93); Wood v. Mears, 12 Ind. 515.

[3] Rex v. Russell, 6 East, 427; People v. Cunningham, 1 Denio, 524; Birmingham v. R. R. Co., (Ala. 93) 13 So. 841; Rex v. Jones, 6 East, 230; Owensboro etc. Co. v. Sutton, (Ky. 91) 13 S. W. R. 1086.

[4] State v. Eastman, 109 N. C. 785; Palmer v. Silverthorn, 32 Pa. St. 65; Welsh v. Wilson, 101 N. Y. 254; Jochem v. Robinson, 66 Wis. 638; People v. Fowler, 63 Hun, 627; Callanan v. Gilman, 107 N. Y. 360; Cohen v. New York, 113 Ib. 532; Judd v. Fargo, 107 Mass. 267; Haight v. Keokuk, 4 Iowa, 199; Davis v. Mayor, 14 N. Y. 506.

[5] Mathews v. Kelsey, 58 Me. 56.

[6] Mahady v. Busher etc. Co., 91 N. Y. 148.

[7] Vars v. Grand Trunk etc. Co., 23 Up. Can. C. P. 143; Harris v. Mobbs, L. R. 3 Ex. D. 268.

[8] Thorpe v. Brumfitt, L. R. 8 Ch. Ap. 650.

[9] Cushing v. Adams, 18 Pickering (Mass.) 110; Com. v. King, 13 Met. (Mass.) 115.

[10] King v. Cross, 3 Campb. 224; Ridley v. Lamb, 10 Up. Can. Q. B. 254; Mott v. Schoolbred, L. R. 20 Eq. 22.

[11] Reg. v. Davis, 24 Up. Can. C. P. 575.

[12] Little v. Madison, 42 Wis. 643.

[13] State v. Morris etc. Co., 23 N. J. L. 360.

[14] Graves v. Shattuck, 35 N. H. 257; Day v. Green, 4 Ark. 433.

On the other hand, the location and carrying of show boards upon the streets or sidewalks may be forbidden.[1]

The act of inclosing a public street or square, by which the public is wholly excluded therefrom, constitutes in law a nuisance; and it is no defence that the inconvenience to the public was outweighed by the public benefit.[2]

§ 301. **Legislative control of street—Rights of abutting owners therein.**—The legislative control of the streets and highways, within the State, seems to be subject to very little, if any, limitation. The same may be said of the legislative control over commons, squares and the like. Nor are such public places any less subject to legislative, as distinguished from municipal, regulation, because they are located within the municipal limits, and are under local regulation, supervision and control.[3] But this legislative power of control is subject to constitutional restraints in favor of abutting owners, and does not extend to the granting of privileges which will impair the property rights of abutting owners, without payment of compensation.[4]

It is well settled that streets, once dedicated and accepted, or acquired by the right of eminent domain, are for a continuous public use, and that, when relying upon that fact, important public or private property rights have been acquired, the high-

[1] Com. v. McCafferty, 145 Mass. 384; Crawford v. Topeka, (Kan. 93) 33 Pac. Rep. 476; Wilkes-Barre v. Burgunder, 7 Kulp. 63.

[2] State v. Woodward, 23 Vt. 92; State v. Atkinson, 24 Ib. 448; Fresno v. Canal & Irr. Co., (Cal. 93) 32 Pac. Rep. 943; Olean v. Steyner, 135 N. Y. 341; Taylor v. R. R. Co., 83 Wis. 645; Smith v. State, 23 N. J. L. 712; State v. Mor. & Es. R. R. Co., 23 Ib. 360.

[3] Baird v. Rice, 63 Pa. St. 489; Gray v. Iowa Land Co., 26 Iowa, 387; Pittsburgh R. R. Co. v. Cheevers, 44 Ill. App. 118; Reading v. Com., 11 Pa. St. 196; Com'rs, etc. v. N. L. Gas Co., 12 Pa. St. 318; Phila. & Tren. R. R. Case, 6 Whart. 25; s. c., 27 Pa. St. 339; Stubers' Road, 28 Ib. 199; Pac. R. R. Co. v. Leavenworth, 1 Dillon C. C. R. 393; Albany North. R. R. v. Brownell, 24 N. Y. 345; Litchfield v. Vernon, 41 N. Y. 123; Southwark etc. v. Phila., 47 Pa. St. 314; Dilley v. Wilkes-Barre, etc. Co., 12 Pa. Co. Ct. 270; Barney v. Keokuk, 94 U. S. 324; Chicago v. Robbins, 2 Black, 418; Woodruff v. Neal, 28 Conn. 168; James River etc. v. Anderson, 12 Leigh, 278; Baily v. Phila. etc., 4 Harring. (Del.) 389; Adler v. Metro. R. R. Co., 138 N. Y. 173; Pusey v. Allegheny, 98 Pa. St. 526; Clinton v. Cedar Rap. etc., 24 Iowa, 455; Woodson v. Skinner, 22 Mo. 13; Perry v. New Orleans, 55 Ala. 413; Indianapolis, etc. v. Hartley, 67 Ill. 439; Stone v. F. P. & N. W. R. Co., 68 Ib. 394; Stack v. E. St. Louis, 85 Ib. 377; Cairo etc. v. People, 92 Ib. 170; but see Warren v. Lyons City, 22 Ia. 351.

[4] Story v. N. Y. Elev. R. R. Co., 90 N. Y. 122; Lahr's Case, 104 Ib. 268.

way cannot by legislative enactment be permanently diverted to a private use, without proper compensation being made to those who are injured thereby.[1] In considering the control which the Legislature may exercise over streets, or the powers over them, which it may delegate to corporations, private or municipal, we are confronted with two distinct, and sometimes more or less antagonistic, rights.

The street, so far as the public is concerned, is established for the purposes of travel and traffic thereon, and the public, in the employment of the street for these purposes, has the manifest right to utilize all the many modern agencies which render travel convenient and speedy, and traffic safe and lucrative.[2] But the abutting property owners have rights in relation to the adjoining streets, which have recently been established, defined and enforced, in a most emphatic manner, which conflict more or less with the efforts to secure a more agreeable and safe rapid transit.[3] The owner of land, abutting on a street, has, in common with the public at large, a right of passage and the right of free and unimpeded ingress and egress to and from his property, for himself and his animals or goods, even though he may thereby cause a temporary public inconvenience.[4]

So, also, he has other rights, peculiar to himself, and which rest upon the relation of his lot to the street, coupled with the further and equally important fact, that, by virtue of his ownership of that lot, he is charged with his private share of the expense of improving and maintaining the street in a condition for public use.[5]

These rights of the abutting owner in the street, which are necessary to the proper enjoyment of his property, are as much property as the land which he owns; and as equally within the protection of the constitution and the laws.[6] In Lahr's Case,[7] the court said: "The ownership of such an easement [8] is an interest in real estate, constituting property within the meaning

[1] Chicago v. Garrity, 115 Ill. 161; Lee v. Mound Sta., 118 Ib. 312; Chicago v. Crosby, 111 Ib. 540; State v. Berdetta, 73 Ind. 185; Scott v. Boston, 26 Ill. App. 108.

[2] Dil. Mun. Corp. § 656, note 2.

[3] Story's Case, 90 N. Y. 122; Mahady v. Bush, etc., 91 Ib. 148; N. Y. Cable Co. Case, 104 Ib. 1; N. Y. Dist. Ry. Case, 107 Ib. 42.

[4] Callanan v. Gilman, 107 N. Y. 360.

[5] Lahr's Case, 104 N. Y. 268.

[6] Dill. Mun. Corp. § 656 *a*.

[7] 104 N. Y. 268.

[8] *i. e.* of access.

of that term, as used in the Constitution of the State, and requires compensation to be made therefor, before it can be lawfully taken from its owner for a public use." Where the fee of the roadbed is in the public, the abutting proprietor has an incorporeal right to the use of the highway as such, and, if the New York Elevated Railroad cases [1] will be fully indorsed by subsequent adjudications in other States, to the free passage of light and air over the street. If the fee is in the abutting owner, the bed of the road is his property, subject only to the public easement, that it be left open for use as a highway. The abutting landowner may do anything with the land covered by the highway, which is not inconsistent with the full enjoyment of the right of way by the public. Thus, the abutting owner has the right to plant trees in the street, to construct cellars extending to the middle of the street, and to depasture his cattle in the street in front of his own land, where the right has not been taken away by police regulations in the interests of the public. And a law, which granted to another the right of pasturage in such a street or road, would operate as an exercise of the right of eminent domain, and constitute a taking of property.[2] Subject to the above qualifications, the authority of the Legislature over highways is broad and far reaching. By virtue of that authority alone, a municipality is authorized to permit the erection of obstructions in a street which otherwise would be nuisances.[3] Illustrations of this principle may be found in the use of streets for the construction of railway, telephone and telegraph lines and electric light plants.

And it may be said of all acts or obstructions, which at common law would be nuisances, that they cease to become such, if they are authorized by the Legislature in a constitutionally

[1] See *post*, § 305.

[2] Tonawanda R. R. Co. v. Munger, 5 Denio, 255; Woodruff v. Neal, 28 Conn. 165. In Ohio, by an ancient custom, as, also in many cattle raising States the right of pasturage in the public highways is in the public. Keawhacker v. Cleveland, etc. R. R. Co., 3 Ohio St. 172. In Adams v. Rivers, 11 Barb. 390, it was held that trespass would lie in favor of the abutting proprietor and against one who stood in the highway, opposite his land, and abused the proprietors on the ground that he was there without license, and was using the land of the abutter for other purposes than as a highway.

[3] Pittsburgh v. Scott, 1 Pa. St. 309; Com. v. Rush, 14 Ib. 186; Columbus v. Jacques, 30 Ga. 506; People v. Vanderbilt, 28 N. Y. 396; Shaubut v St. Paul, etc., 21 Minn. 502.

valid statute.[1] And whatever limitations upon this power may exist, so far as the rights of the original owner of the property dedicated or of adjoining owners may be concerned; it is well settled that, in respect to the public at large, the legislative power is absolute and limitless as to the uses to which the streets may be put.[2] The Legislature can validate and sanction any improvement in, or expenditure upon, streets which it could previously have authorized; and this, even though the improvements were extraordinary and hurtful, and were executed in an expensive and extravagant manner.[3] To cite an extreme illustration of the exercise of legislative power, it has been held that the Legislature may establish a turnpike gate in a city street,[4] but as such an act would be a public inconvenience and derogatory of common right, the intention must be clearly and unmistakably declared by the Legislature.[5]

It is a general rule of construction, applicable to the legislative legalization of a nuisance, that all statutes which interfere with public rights and impose public burdens, are to be strictly construed and closely followed; and the authority conferred must be exercised with an observance of proper care for the public interests.[6] An act of the Legislature, legalizing encroachments upon a public highway, being in the nature of a mere license, is revocable; and may be repealed at pleasure,

[1] Pine City v. Munch, 44 N. W. R. 197; 42 Minn. 342; Detroit v. Detroit etc., 37 Mich. 558; Sawyer v. Davis, 136 Mass. 239; People v. Rosenberg, 138 N. Y. 410; Clinton v. C. R. & M. R. R. R. Co., 24 Iowa, 455; Transp'n Co. v. Chicago, 99 U. S. 635; Williams v. Hynes, 55 N. Y. Super. Ct. 86; Kumler v. Silsbee, 38 Ohio St. 445; Ison v. Manley, 76 Ga. 804; Com. v. Capp, 48 Pa. St. 53; North Vernon v. Voegler, 103 Ind. 314, 327; United States Ill. Co. v. Grant, 55 Hun, 222; First Bap. Church v. Utica etc., 6 Barb. 313; Citizens St. Ry. Co. v. Memphis, 53 Fed. 715; Steincke v. Bentley, 34 N. E. R. 97; (statutory definition of nuisance.)

[2] Penna. R. Co. v. Angel, 41 N. J. Eq. 316; s. c., 7 Atl. Rep. 432; Sullivan v. Royer, 72 Cal. 248; Baltimore etc. v. Fifth Bap. Ch., 108 U. S. 317.

[3] Lennon v. New York, 55 N. Y. 365; Sinton v. Ashbury, 41 Cal. 525; *In re* Com'rs of Assessment, 18 Albany Law J. 199; *In re* Mead, 74 N. Y. 216; *In re* Sackett Street etc., 74 Ib. 95.

[4] Stormfeltz v. Manor Turnp. Co., 13 Pa. St. 555.

[5] Comp. People v. Detroit etc., 37 Mich. 195.

[6] St. Louis v. W. U. Tel. Co., 149 U. S. 465; Newark v. Del. etc. R. R. Co., 42 N. J. Eq. 196; s. c., 5 Cent. Rep. 630; Green v. Eastern Ry. Co., 53 N. W. R. 808; Jersey City v. N. J. Cen. R. R., 40 N. J. Eq. 417; s. c., 2 Atl. Rep. 262; Monongahela v. Mono. El. L. Co., 12 Pa. Co. Ct. R. 529.

unless by reason of some act done, or liability incurred, a contractual relation has been established,[1] which comes within the constitutional prohibition of the impairment of the obligation of a contract.

§ 302. **Legislative power over construction of railroads —Its delegation to cities—Construction of grants.**—In both England and America, legislative authorization is required to enable any one to construct and maintain a horse or street railroad. The right to carry passengers and to take tolls is a franchise, derivable from the sovereignty alone.[2] Because of the almost unlimited power, which the Legislature possesses over highways, it can, in the absence of express constitutional restraint, authorize a railroad company to construct its line on a street or highway of a city, without municipal consent.[3] The manifest danger of vesting such unlimited power in the Legislature has led, in several States, to the imposition of restraints upon its exercise. In New York, the Legislature is forbidden to pass any private or local act, conferring authority to lay down railroad tracks. Any such authority, derived from a general act, cannot be exercised and a street railroad constructed within municipal limits, unless it is consented to by the local authorities, and by one half in value of the owners of abutting property.[4] Similar constitutional provisions are to be found in several other States.[5] The amendment, by which these restric-

[1] Reading v. Com., 11 Pa. St. 196; Detroit v. Det. & E. Pl. R. Co., 12 Mich. 333.

[2] Arcata v. Arcata R. R. Co., 92 Cal. 639; Galbreath v. Armour, 4 Bell App. Cas. 374; Queen v. Gas Co., 2 Ellis & El. 651; State v. Hoboken, 35 N. J. L. 205; Newell v. Minn. etc. Co., 35 Minn. 112; Davis v. East Tenn. etc. Co., 87 Ga. 605; 13 S. E. R. 567; Reg. v. Train, 9 Cox Cr. Cas. 180; Boston v. Richardson, 13 Allen, 146, 160; Daily v. R. R. Co., 80 Ga. 793; 7 S. E. R. 146; Comr. v. Frankfort, (Ky. 92) 17 S. W. R. 827; Paterson Ry. v. Grundy, (N. J. 93) 26 Atl. R. 788; State v. Corrigan etc. Co., 85 Mo. 263.

[3] Savannah etc. Co. v. Savannah, 45 Ga. 602; Floyd Co. v. Rome etc. Co., 77 Ga. 614; People v. Kerr, 27 N. Y. 188; Dubach v. H. & St. Jo. etc. Co., 89 Mo. 483; Milwaukee v. Milw. etc. Co., 7 Wis. 85; Hine v. Keokuk, 42 Iowa, 636; see cases cited in § 301.

[4] *In re* Crosstown R. Co., 22 N. Y. S. 818; 68 Hun, 236; Const. New York, art. 3, § 15.

[5] Harner v. Columbus etc. Co., 29 W'kly L. Bul. 387; Sloane v. People El. Ry. Co., 7 Ohio Cir. Ct. R. 84; Neare v. Mt. Auburn R. Co., 29 W'kly L. Bul. 171; see also Chicago etc. v. Story, 73 Ill. 541; Pell v. Newark, 40 N. J. L. 71; Ewing v. Hoblitzelle, 85 Mo. 73, and the Constitutions of the States of Illinois, Colorado, Nebraska, Missouri, North and South Dakota, New Jersey, Montana and Pennsylvania.

tions were grafted upon the Constitution of the State of New York, has received much consideration from the Court of Appeals, and numerous important cases have arisen under it.

The amendment, so far as it applies to street railroads, includes all such as may be constructed under or above the surface, as well as those whose rails are laid upon it.[1]

The Legislature may delegate to the municipality, the power to authorize absolutely the construction of a railroad,[2] or it may confer upon the city the power to prescribe, when, and upon what conditions its streets may be so used.[3] In conferring the

Penn. R. R. Co., 31 N. J. Eq. 475, 489; State v. Hammer, 42 N. J. L. 435; Chamberlain v. Elizabeth, etc. Co., 41 N. J. Eq. 43.

[1] El. R. R. Cases, 70 N. Y. 327; 90 Ib. 122; 107 Ib. 42. In the first of these cases, the court, per Earl, J., said: "These constitutional provisions do not prohibit a private or local bill to amend the charter of a private corporation by regulating powers, rights, privileges, and franchises which it previously possessed. Such a bill may not be passed to give to an existing corporation any new right to lay down railroad tracks, or any new exclusive privilege or franchise, but it may be passed to regulate and control the right to lay down tracks previously existing or to give new privileges or franchises provided they be not exclusive. A bill may be passed waiving a forfeiture of corporate rights. Such a bill would confer no new rights upon the corporation, but would simply be a surrender or waiver by the sovereign of its right to claim a forfeiture. A bill may be passed to extend the time within which corporate rights may be exercised. Such a bill would give no new substantial rights but would simply extend the time within which rights previously granted would be exercised. So a bill may be passed giving a private railroad corporation the right to use a new or different motor power provided the right be not exclusive. . . The constitution provides that all general or special laws for the formation of corporations may be altered or repealed; but where a special act was passed prior to 1875, creating a private corporation, an act to amend its charter would be a private one, and it could not, therefore, since Jan. 1, 1875, grant the right to lay down railroad tracks. Nothing can be done by the Legislature under the power to alter acts of incorporation which it could not constitutionally do by an original bill. See also Astor v. N. Y. Arcade Ry. Co., 113 N. Y. 93; Bailey v. Same, 113 Ib. 615.

[2] Morris etc. Co. v. Newark, 10 N. J. Eq. 352, 357; Barney v. Keokuk, 94 U. S. 324; Atchison etc. Co. v. Miss. R. R. Co., 31 Kan. 660; Harrison v. N. O. Ry. Co., 34 La. An. 452; Springfield v. Conn. etc. Co., 4 Cush. 63; Cosby v. Owensboro etc., 10 Bush, 288; Black v. Phila. etc. Co., 58 Pa. St. 249; Phila. & T. R. R. Co., *In re*, 6 Whart. 25; Com. v. Erie etc. Co., 27 Pa. St. 339; Green v. Pittsburgh etc. Co., 8 Watts & S. 85; Tenn. etc. Co. v. Adams, 3 Head. 596; Murphy v. Chicago, 29 Ill. 279; see cases in next note.

[3] People's Pass. Ry. Co. v. Memphis C. etc. Co., 10 Wall. 38; Com. v. Erie etc. Co., 27 Pa. St. 339; Wolfe v. Cov. & L. etc. Co., 15 B. Mon. 404;

franchise in such a case, the city exercises a derivative and not an inherent power.[1] The conditions may be imposed, either by the Legislature in the creation of the company holding the franchise, or by the municipal corporation granting permission to the exercise of it.[2]

Thus, it was held that when city councils were forbidden to permit the construction of a street railroad, without the consent of a majority in interest of the owners of property upon the street being first obtained, such consent was essential to the creation of the power of granting permission; and the laying of a second track, upon a street where one already existed, required an independent consent.[3]

When, in pursuance of this delegated authority, permission

Arcata v. Arcata Ry. Co., 92 Cal. 639; Paterson Ry. Co. v. Grundy, (N. J. 93) 26 Atl. R. 788; State v. Atlantic C. C., 34 N. J. L. 99; Chicago, B. & Q. R. Co. v. Quincy, 28 N. E. R. 1069; Paterson, etc. Co. v. Paterson, 24 N. J. Eq. 158; State v. Hoboken, 35 N. J. L. 205; Detroit v. Ft. Wayne, etc. Co., (Mich. 91) 51 N. W. R. 688; s. c., (Mich. 93) 54 N. W. Rep. 958; Brooklyn v. B. City R. R. Co., 47 N. Y. 475; Richmond etc. Co. v. Richmond, 96 U. S. 521; *In re* Atlantic Ave. R. R. Co., 32 N. E. R. 771; 136 N. Y. 292; Parkhurst v. Salem, (Oreg. 92) 32 Pac. R. 304; Fox v. Catherine, etc. Co., 12 Pa. Co. Ct. 180; Mercer v. Pittsburgh etc. Co., 36 Pa. St. 99; New York City v. Eighth Ave. R. R. Co., 118 N. Y. 389; Heath v. Des Moines etc. Co., 61 Iowa, 11; Merchants' etc. Co. v. Railway Co., 70 Ib. 105; Houston v. Houston City Ry. Co., (Tex. 93) 19 S. W. Rep. 127.

[1] Electric Ry. Co. v. Grand Rapids, 84 Mich. 257; Buckner v. Hart, 52 Fed. 835; Canal etc. Co. v. C. C. Ry. Co., 41 La. An. 561; Cincinnati v. Mt. Auburn Co., 28 Wkly. Law Bul. 276; State v. Hilbert, 39 N. W. Rep. 326; Saginaw etc. v. Saginaw, 28 Fed. Rep. 529.

[2] No. Balt. P. Ry. Co. v. Baltimore, (Md. 92) 23 Atl. R. 470; Lexington etc. Co. v. Applegate, 8 Dana, 289; Cosby v. Owensboro etc. Co., 10 Bush, 288; Cinc. etc. Co. v. Cummingsville, 14 Ohio St. 523; Philadelphia v. Ridge Ave. R. Co., 140 Pa. St. 444; Kellinger v. Forty-sec. etc. Co., 50 N. Y. 206; Moses v. Pittsburgh etc. Co., 21 Ill. 522; Middlesex etc. Co. v. Wakefield, 103 Mass. 261; New York v. Third Ave. R. R. Co., 33 N. Y. 42; Hobart v. Milw. City R. R. Co., 27 Wis. 194; Coast Line etc. Co. v. Cohen, 50 Ga. 451; No. Cen. etc. Co. v. Baltimore, 21 Md. 93; Frankford etc. v. Philadelphia, 58 Pa. St. 119; Philadelphia v. Cit. Pass. Ry. Co., 10 Pa. Co. Ct. R. 16; Baltimore U. P. Co. v. Baltimore, 71 Md. 405; Detroit v. Ft. Wayue etc. Co., *supra;* Pittsburgh etc. Co. v. Birmingham, 51 Pa. St. 41; Memphis etc. Co. v. Memphis, 4 Coldw. 406; Jersey City etc. Co. v. J. C. & H. H. R. R. Co., 20 N. J. Eq. 61; Tenn. etc. Co. v. Adams, 3 Head. 596; St. Louis v. Ry. Co., 89 Mo. 44; Dry Dock etc. Co. v. New York, 47 Hun, 221; New York v. Third Ave. Ry. Co., 117 N. Y. 404, 646.

[3] Roberts v. Easton, 19 Ohio St. 78; Harner v. Columbia etc. Co., 29 Wkly. L. Bul. 387.

has been granted to use certain streets,—and the grant has been confirmed by the Legislature where such confirmation is required,—it cannot be revoked.[1] So, when the grant has been made, and the road constructed at great expense, a contract is created, the obligation of which cannot be impaired by subsequent legislation.[2] It was accordingly held that when the city had granted a license to lay a two-track road, which had been laid at great expense to the company, it could not limit the company to a single track, in a street where it was proposed to extend the line.[3] The company, having constructed the road, has a vested property in the franchise, of which it cannot be deprived, either by repeal of the grant or by a grant to another covering the same streets, unless the power to do this was reserved;[4] except, of course, in the exercise of the right of eminent domain, and upon payment of compensation for the partial confiscation of the franchise.[5]

Horse railroads have a private property, subject to ordinary use by the public, in the rails upon which their cars are run, so that a rival company cannot use or intersect them without the owners' consent.[6] A passenger car is entitled to the unob-

[1] Nash v. Lowry, 37 Minn. 261; Harrison v. New Orleans etc. Co., 34 La. An. 462; Burlington etc. Co. v. Reinhackle, 15 Neb. 279.

[2] Hovelman v. Kans. C. H. R. Co., 79 Mo. 632; People v. Chicago etc. Co., 18 Ill. App. 125; People v. O'Brien, 111 N. Y. 1; State v. Noyes, 47 Me. 189; Com. v. Proprietors, 2 Gray, 339.

[3] Burlington v. Burl. Ry. Co., 49 Iowa, 144.

[4] New Orleans etc. Co. v. Delamore, 114 W. S. 501.

[5] Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35; Tuckahoe Canal Co. v. R. R. Co., 11 Leigh, 42 (36 Am. Dec. 374); Boston Water Power Co. v. Boston & W. R. R. Co., 23 Pick. 360; Central Bridge Corp. v. Lowell, 4 Gray, 474; West River Bridge v. Dix, 6 How. 507; Richmond R. R. Co. v. Louisa. R. R. Co., 13 How. 71; White River Turnpike Co. v. Vermont Central R. R. Co., 21 Vt. 590; Commonwealth v. Pittsburgh etc. R. R. Co., 58 Pa. St. 26; *Re* Towanda Bridge Co., 91 Pa. St. 216; N. C. R. R. Co. v. Carolina Cent. R. R. Co., 83 N. C. 489. But see Central City Horse R'y Co. v. Fort Clarke Horse R'y Co., 87 Ill. 523, where it was held that a competing street railway cannot acquire by compulsion the joint use of the tracks of another previously created railway, although the track and the franchise of the latter railway may be completely appropriated under the power of eminent domain. See, also, Lake Shore etc. R. R. Co. v. Chicago etc. R. R. Co., 97 Ill. 506; *Re* Rochester Water Commissioners, 66 N. Y. 413; Little Miami etc. R. R. Co. v. Dayton, 23 Ohio St. 510.

[6] Brooklyn etc. Co. v. B. City R. R. Co., 32 Barb. 358; Jersey City etc. Co. v. J. C. & H. H. R. R. Co., 20 N.

structed use of the track over private vehicles,[1] and a municipal ordinance confirming such right would be sustained.[2] The franchise, which a horse or other railroad possessed to operate its lines upon a city street, is property which may be mortgaged[3] or sold,[4] and a purchaser may operate the road upon the same terms as its predecessor had enjoyed the franchise.[5] The grants of such franchises are, however, not necessarily exclusive; and their character in that regard depends upon the scope of the power of the municipality, as well as upon the language of the grant.[6] Thus, the municipality may grant the franchise to lay a track to one corporation, upon condition that another company may have the joint use of it with the grantee.[7]

In accordance with the rule that grants made by the sovereign are to be strictly construed against the grantee, his right must be clearly defined, in order that it may be claimed against the public and abutting owners.[8] But the grant of power, to construct a railroad, will include the power to construct the necessary appurtenances thereto;[9] and it has been held that the power to construct railroads in streets included the right to lay sidings to wharves,[10] and elevators.[11] The road must be constructed substantially upon the line prescribed,[12] and must be conducted as the statute requires;[13] but the power to con-

J. Eq. 61; Market etc. Co. v. Cen. etc. Co., 51 Cal. 583; Coach Co. v. Camden H. R. R. Co., 33 N. J. Eq. 267; Cottom v. Griest, 1 Am. & Eng. R. R. Cas. 474*n*.

[1] Wilbrand v. Eighth Ave. R. R. Co., 3 Bosw. 314; Adolph v. Central etc. Co., 65 N. Y. 554; Shea v. Potrero etc. Co., 44 Cal. 414; Mahady v. Bushwick etc. Co., 91 N. Y. 148.

[2] State v. Foley, 31 Iowa, 527; Com. v. Temple, 14 Gray, 69.

[3] Sixth Av. etc. Co., v. Kerr, 72 N. Y. 330; People v. Sturtevant, 9 N. Y. 263.

[4] New Orleans etc. Co. v. Delamore, 114 U. S. 501; Memphis etc. Co. v. Com'rs, 112 Ib. 619.

[5] People v. Brooklyn, 89 N. Y. 75.

[6] Brooklyn City etc. Co. v. Coney Isl. etc. Co., 35 Barb. 364; s. c., 18 N. Y. 160; Sixth etc. Co. v. Kerr, 45 Barb. 138; Louisville etc. Co. v. L. City Ry. Co., 2 Duvall, 175.

[7] Jersey City etc. Co. v. J. C. Bergen etc. Co., 21 N. J. Eq. 550.

[8] Chicago etc. Co. v. Chicago, 121 Ill. 176; Heath v. Des Moines etc., 61 Iowa, 11; Wyandotte v. Carrigan, 35 Kan. 21; Chamberlain v. Eliz. S. Cordage Co., 41 N. J. Eq. 43.

[9] New Orleans etc. Co. v. Second Mun., 1 La. An. 128; Knight v. Carrollton R. R. Co., 9 Ib. 284.

[10] Black v. Phila. etc. Co., 58 Pa. St. 249.

[11] Clarke v. Blackmar, 47 N. Y. 150.

[12] *In re* Metro. etc. Co., 19 N. E. R. 645; Concord v. Concord etc. Co., 18 Atl. R. 87.

[13] Atty. Gen. v. Toronto, 14 Grant's Ch. (Can.) 673.

struct a horse car line along a certain street involves the power to cross the intersecting streets, notwithstanding a law or ordinance which excepted these streets from use by railways.[1]

When permission is given by ordinance to use the city streets for a railroad, and to employ a certain specified motive power, the railroad company possesses no right whatever to operate the road by any other motive power than the one prescribed to them by the municipal corporation.[2] Where the charter of the railroad company, and the city ordinance, by which permission to use the streets is conferred, are silent as to the motive power to be used, it seems most reasonable to hold that the intention of the Legislature, and of the municipality, is that the railway may employ any motive power, which is ordinarily used, and which is not inimical to the public safety.[3] But when a railroad company had obtained a grant to operate a road upon express condition that no steam power should be employed; and had constructed and operated a horse railroad, it was held that the permission did not embrace the right to make excavations, in order to use the streets for a cable road.[4]

While it is true that an ordinance, conferring the right to operate a railway in a city street, either absolutely or upon conditions, when accepted by the grantee, and followed by the actual construction of the road, constitutes an irrevocable contract; it is equally true that a municipality cannot barter away its police power, the power to regulate highways and supervise the use made of them.[5] So, if permission has been given originally to use steam as a motive power, it is safe to assume that the city could, by virtue of its inherent power to provide for the public safety, prohibit the use of steam in streets, where its use has become, by reason of the growth of the municipality,

[1] State v. Newport etc. Co., 18 Atl. R. 161.

[2] People v. Newton, 112 N. Y. 396; 19 N. E. Rep. 664; Denver etc. Co. v. Denver etc. Co., 2 Col. 681; Citizens etc. Co. v. Jones, 34 Fed. Rep. 579; see Mayor v. Ohio etc. Co., 26 Pa. St. 355; Birmingham etc. Co. v. Birm. etc. Co., 79 Ala. 463.

[3] North Chi. C. R. Co. v. Lake View, 105 Ill. 207; see *post*, § 306 *a*, Electric and cable cars on street railways.

[4] People v. Newton, 112 N. Y. 396; see *post*, § 306 *a*.

[5] Thorpe v. Rutland etc. Co., 27 Vt. 140; Ind. etc. Co. v. Kercheval, 16 Ind. 84; Brick P. Ch. v. Mayor, 5 Cowen, 538; Brimmer v. Boston, 102 Mass. 19; Horn v. Atl. etc. Co., 35 N. H. 169; Bulckley v. N. Y. etc. Co., 27 Conn. 479; Penn. etc. Co. v. Riblet, 66 Pa. St. 164; State v. Herod, 29 Iowa, 123.

a menace to the lives and health of the public, who have a right to the safe and convenient use of the streets.[1]

General municipal power over streets and roads will not authorize the city, in the absence of statutory authorization, to grant permission to a steam railroad, running between places outside of its limits, to use its streets as a part of their line.[2] But the Legislature may authorize such a use of the street; and legislative, as distinct from municipal, authority to a railroad, to occupy and use streets for railroad purposes, need not be always conferred expressly, but may arise from necessary implication;[3] although, where the railroad company seeks to lay a track along a whole street, requiring embankments and excavations, the implication must be very clear and necessary.[4]

And so, also, in order that a municipality may grant to a street railway company the franchise of constructing and maintaining its line along a certain street, the Legislature must delegate the authority to it, expressly or by necessary implication; and it has been held that this authority cannot be implied from the charter power to "open, alter, repair and regulate streets."[5]

A general legislative grant to a corporation, authorizing it to construct a steam railroad between certain places, but not specifying the exact route, will authorize the crossing of streets or highways, but not their occupation longitudinally.[6] Where,

[1] Detroit v. Fort Wayne etc. Co., (Mich. 92) 51 N. W. R. 688; Fitchburg etc. Co. v. Grand etc. Co., 1 Allen, 552; Rodemacher v. Milw. etc. Co., 41 Iowa, 297; Stroudsburg v. Wilkes-Barre R. R. Co., 12 Pa. Co. Ct. 395; People v. Boston etc. Co., 70 N. Y. 569; Portland etc. Co. v. Boston etc. Co., 65 Me. 122.

[2] Daly v. R. R. Co., 7 S. E. R. 146; 80 Ga. 793; Savannah etc. Co. v. Shields, 33 Ga. 601; see People v. Carpenter, 1 Mich. 273; Arcata v. R. R. Co., 28 Pac. R. 676; 92 Cal. 639; Perry v. N. O. etc. Co., 55 Ala. 413; Lawrence etc. Co. v. Williams, 35 Ohio St. 168; Dooly Block v. S. L. T. Co., 33 Pac. R. 229; Davis v. R. R. Co., 87 Ga. 605.

[3] Trustees v. Milwaukee etc. Co., (Wis. 89) 45 N. W. R. 1086; Covington etc. Co. v. Covington, 9 Bush, 127; Atty. Gen. v. Morris etc. Co., 20 N. J. Eq. 530; State v. Jacksonville etc. Co., (Fla. 90) 10 So. R. 590; State v. Hoboken, 35 N. J. L. 205; Allegheny v. Ohio etc. Co., 26 Pa. St. 355; Com. v. Erie etc. Co., 27 Ib. 339.

[4] Com. v. Frankfort, (Ky. 92) 17 S. W. R. 287; Sav. etc. Co. v. Shiels, 33 Ga. 601; Dooley Block v. S. L. T. Co., *supra*.

[5] Strasser v. N. Y. L. & W. R. R., 128 N. Y. 157, 623; People R. R. v. Memphis R. R., 10 Wall. 38, 52; Citizens etc. Co. v. Jones, 34 Fed. Rep. 579; Gleck v. B. & O. R. R. Co., 19 D. C. 412; Coleman v. Sec. Ave. R. R., 38 N. Y. 201; Louisville etc. Co. v. Louisville, 8 Bush, 415, 421; Brooklyn v. Brooklyn etc. Co., 47 N. Y. 475.

[6] Burt v. Lima etc. Co., 21 N. Y.

however, the charter authorizes a railroad company to construct a line of road *to* or *from* a city, the power to enter the limits of the municipal corporation is implied, and the company is not compelled to erect its depot outside the city line.[1] But when a power was conferred to run a line to a city, where it was to connect with another road, it does not give by implication the power to run the road *through* the city.[2]

When a municipal corporation has the power to refuse its assent to the construction of a horse or steam railroad in its streets, it is not confined to a simple grant or denial of a right of way; but conditions may be imposed, as, for example, that the company shall erect a depot, and grade and repair the streets used by it. The company cannot then enjoy the franchise, unless it complies with these conditions.[3]

§ 303. **Rights of abutting owners, how affected by construction of a steam railroad along the street.**—In a preceding chapter,[4] the general subject of what constitutes a taking of private property in the exercise of the right of eminent domain, has been fully presented, with the announcement, that in a subsequent connection this matter would be discussed in its relation to the appropriation of streets to other than the ordinary purposes of a highway; and the fundamental principle was there recognized and accepted, that incidental injuries did not constitute a taking under eminent domain, and nothing short of a confiscation of some established and legally recognized right of property, either corporeal or incorporeal, would constitute such a taking of property for a public use, for which compensa-

S. 482; Chicago etc. Co. v. Dunbar, 100 Ill. 110; Ingraham v. Chic. etc. Co., 34 Ib. 249; Chicago etc. Co. v. Newton, 36 Iowa, 299; Com. v. Erie etc. Co., 27 Pa. St. 339; Northeastern etc. Co. v. Payne, 8 Rich. L. 177.

[1] Hazlehurst v. Freeman, 52 Ga. 245; Western etc. Co.'s Appeal, 99 Pa. St. 155; Houston etc. Co. v. Odam, 53 Tex. 343.

[2] St. Louis etc. Co. v. Haller, 82 Ill. 208; Richmond etc. Co. v. Richmond, 96 U. S. 521.

[3] Long Island R. R. Co. v. Brooklyn, 8 N. Y. S. 805; Ind. etc. Co. v. Lawrenceburg, 34 Ind. 304; Woodruff v. R. R. Co., (Conn. 90) 20 Atl. R. 17; Detroit v. Det. Ry. Co., 43 N. W. Rep. 447; Hovelden v. Kansas, etc. Co., 79 Mo. 632; Mey v. Missouri Pac. Ry. Co., 1 S. W. R. 382; Pac. etc. Co. v. Leavenworth, 1 Dillon C. C. 393; Northern etc. Co. v. Baltimore, 21 Md. 93; Eastern Ry. Co. v. Portsmouth, 62 N. H. 344; Kyne v. Wilmington etc. Co., (Del.) 14 Atl. R. 922; Newport v. So. Cov. etc. Co., 11 S. W. Rep. 954; see § 305, Horse railroads.

[4] Chapter XVI. § 239.

tion can be claimed. In referring to this general principle, Mr. Justice Miller has said [1] that the decisions, which have denied the right of compensation "for the consequential injury to the property of an individual from the prosecution of improvement of roads, streets, rivers and other highways," "have gone to the extreme and limit of sound judicial construction in favor of this principle, and in some cases beyond it; and it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed upon it, so as effectually to destroy or impair its usefulness, it is a taking within the meaning of the constitution." The greatest difficulty has been experienced in applying these principles to the police regulations of the highways or public streets, in consequence of the variety of uses, to which the demands of modern life require them to be put. Elsewhere in the present chapter, it has been explained how far there is any new taking, when the street is employed for the laying of pipes,[2] the construction of sewers, drains and cisterns [3] and the erection of poles for hanging of telegraph, and other electrical wires.[4] But the greatest difficulty is probably found in determining how far there has been a new taking of the property of the abutting owner, where the Legislature or municipal council authorizes the construction and maintenance of a railroad along the street of a city. The decisions on the subject are at variance, and the grounds upon which the judgments are placed are not always the same, and sometimes very confusing. In some of the cases, great stress is laid upon the fact that the fee is or is not in the public;[5] while in others, no importance seems to be attached to this distinction.[6] The authorities and facts will only justify this

[1] Pompelly v. Green Bay, etc. Co., 13 Wall. 166, 180.

[2] § 295.

[3] § 294.

[4] § 297.

[5] See Moses v. Pittsburgh, etc. R. R. Co., 21 Ill. 516, 522; People v. Kerr, 37 Barb. 357; s. c., 27 N. Y. 188; Millburn v. Cedar Rapids etc. R. R. Co., 12 Iowa, 246; Franz v. Railroad Co., 55 Iowa, 107.

[6] The Supreme Court of the United States has said in Barney v. Keokuk, 94 U. S. 324, 440: "On the general question as to the rights of the public in a city street, we cannot see any material difference in principle with regard to the extent of those rights, whether the fee is in the public or in the adjacent landowner or in some third person;" and Judge Cooley calls this distinction more technical

distinction; if the new use of the highway is inconsistent with its character as a highway, where the fee is in the abutting landowner, it is a taking of property for which compensation may be made, whatever incidental benefits or injuries the landowner may or may not sustain from the new uses; for incidental injuries never constitute a taking of property in the law of eminent domain.[1] But if the fee is in the public, no use of the highway will operate as a taking of the property of the abutting landowner, which does not interfere with his ordinary and customary use of the street.[2] Probably, this distinction might assist in explaining away many of the differences of opinion, which now make the cases on this subject confusing and perplexing. Where the fee is not in the public, it seems to be the opinion of an overwhelming majority of the cases, that the construction of an ordinary steam railway along a public street was a taking of the property of the owners of the fee for a different use, for which compensation had to be made. The common ground, upon which these decisions rest their judgment, is that the construction of such a railroad was the appropriation of the land, over which the highway or street was laid out, to a new and different use, not contemplated or included in the acquisition of the public easement for the purposes of a highway. As was said in one of these cases: "It is true that the actual use of the street by the railroad may not be so absolute and constant as to exclude the public also from its use. With its single track, and particularly, if the cars upon it were propelled by horse power, the interruption of the public easement in the street might be very trifling and of no practical consequence to the public at large. But this question cannot affect the question of the right of property, or of the increase of the burden upon the soil. It would present simply a question of degree in respect to the en-

than real. Cooley Const. Lim. 687 *n.* Theobald v. Louisville, 40 Alb. L. J. 335; Bloomfield etc. Co. v. Calkins, 62 N. Y. 386; compare Kucheman v. Chicago, 46 Iowa, 366; Mulholland v. Des Moines, etc., 60 Ib. 740; Morgan v. Des Moines, 64 Ib. 589; Scioto etc. v. Lawrence, 38 Ohio St. 41; Crowley v. Davis, 63 Cal. 460; Story's Case, 70 N. Y. 327; Lahr's Case, 90 N. Y. 122; Gilbert E. Ry. Case, 70 N. Y. 361; N. Y. Dis. Ry. Cas., 107 N. Y. 42.

[1] See *ante*, § 239.

[2] Protzman v. Indianapolis, 9 Ind. 467; New Albany, etc. v. O'Daily, 12 Ib. 551; 13 Ib. 353; Street Railway v. Cumminsville, 14 Ohio St. 523; Grand Rap., etc., Co., 38 Mich. 62; s. c., 47 Ib. 393.

largement of the easement, and would not affect the principle, that the use of a street for the purposes of a railroad imposed upon it a new burden."[1]

[1] Wager v. Troy Union R. R. Co., 25 N. Y. 526, 532; see, also, to same effect, Ford v. Chicago, etc., Co., 14 Wis. 609; Pomeroy v. Milwaukee, etc., Co., 16 Ib. 640; Perry v. New Orleans, etc., Co., 55 Ala. 413; Carli v. Stillwater, etc., Co., 28 Minn. 373; So. Pac., etc., Co. v. Reed, 41 Cal. 256; Ford v. Santa Cruz, etc., 59 Ib. 290; Harrington v. St. Paul, etc., Co., 17 Minn. 215, 224; Gray v. St. Paul, etc., Co., 13 Ib. 315; Williams v. N. Y. Cen., etc., Co., 16 N. Y. 97; Wager v. Troy, etc., Co., 25 Ib. 526; Mahon v. N. Y. Cen., etc., Co., 24 Ib. 658; Fletcher v. Auburn, etc., Co., 25 Wend. 462; Bissell v. N. Y. Cen., etc., Co., 23 Ib. 61; Davis v. New York, 14 Ib. 526; Carpenter v. Oswego, etc., 24 Ib. 655; Inhabitants of Springfield v. Conn. River R. R. Co., 4 Cush. 71; Imlay v. Union Branch R. R. Co., 26 Conn. 249; Presbyterian Society, etc., v. Auburn, etc., R. R. Co., 3 Hill, 567; Carpenter v. Oswego, etc., R. R. Co., 24 N. Y. 655; Starr v. Camden & Atlantic R. R. Co., 24 N. Y. 592; Central R. R. Co. v. Hetfield, 29 N. Y. 206; So. Car. R. R. Co. v. Steiner, 44 Ga. 546; Donnaher's Case, 16 Miss. 649; Cox v. Louisville, etc., R. R. Co., 48 Ind. 178; Schurmeier v. St. Paul, etc., R. R. Co., 10 Minn. 82; Cosby v. Railroad Co., 10 Bush, 288; Railroad Co. v. Combs, 10 Bush, 382 (19 Am. Rep. 67). See, *contra*, Mifflin v. Railroad Co., 16 Pa. St. 182; Cases of Phila. & Trenton R. R., 6 Whart. 25 (36 Am. Dec. 202); Struthers v. Railroad Co., 87 Pa. St. 282; Lexington, etc., R. R. Co. v. Applegate, 8 Dana, 289 (33 Am. Dec. 497); see, also, West Jersey R. R. Co. v. Cape May, etc., Co., 34 N. J. Eq. 164; Com. v. Erie, etc., R. R. Co., 27 Pa. St. 339; Snyder v. Pennsylvania R. R. Co., 55 Pa. St. 340; Peddicord v. Baltimore, etc., R. R. Co., 34 Md. 463; Wolfe v. Covington, etc., R. R. Co., 15 B. Mon. 404; Houston, etc., R. R. Co. v. Odum, 53 Tex. 343. In Nicholson v. N. Y., etc., R. R. Co., 22 Conn. 74, 85, the Supreme Court of Connecticut, *per* HINMAN, J., presented a very strong argument, in favor of the proposition of the text. The court said: "When land is condemned for a special purpose on the score of public utility, the sequestration is limited to the use, the specific use, for which the proprietor has been divested of a complete dominion over his own estate. These are propositions which are no longer open to discussion. But it is contended that land once taken and still held for highway purposes may be used for a railway without exceeding the limits of the easement already acquired by the public. If this is true, if the new use of the land is within the scope of the original sequestration or dedication, it would follow that the railway privileges are not an encroachment on the estate remaining in the owner of the soil, and that the new mode of enjoying the public easement will not enable him rightfully to assert a claim to damages therefor. On the contrary, if the time, intent and efficacy of the original condemnation was not to subject the land to such a burden as will be imposed upon it when it is confiscated to the uses and control of a corporation, it cannot be denied that in the latter case the estate of the owner of the soil is injuriously affected by the supervening servitude; that his rights are

The dissimilarity of highways and railways cannot be more strikingly presented than by a consideration of the numerous

abridged, and that in a legal sense his land is again taken for public uses. Thus, it appears that the court have simply to decide whether there is such an identity between a highway and a railway, that statutes conferring a right to establish the former include an authority to construct the latter. . . Such a construction is possibly only when it is made to appear that there is a substantial, practical or technical identity between the uses of land for highway and for railway purposes. No one can fail to see that the terms 'railway' and 'highway' are not convertible, or that the two uses, practically considered, although analagous, are not identical. Land, as ordinarily appropriated by a railroad company, is inconvenient and even impassable to those who would use it as a common highway. Such a corporation does not hold itself bound to make or keep its embankments and bridges in a condition which will facilitate the *transitus* of such vehicles as ply over an ordinary road.

"A practical dissimilarity obviously exists between a railway and a common highway, and is recognized as the basis of a legal distinction between them. It is so recognized on a large scale, when railway privileges are sought from legislative bodies, and granted by them. If the terms 'highway' and 'railway' are synonymous, or if one of them includes the other by legal implication, no act would be more superfluous than to require or to grant authority to construct railways over localities already occupied as highways. If a legal identity does not subsist between a highway and a railway, it is illogical to argue that, because a railway may be so constructed as not to interfere with the ordinary uses of a highway, and so as to be consistent with the highway right already existing, therefore such a new use is included within the old use. It might as well be urged that if a common or a canal, laid out over the route of a public road, could be so arranged as to leave an ample roadway for vehicles and passengers on foot, the land should be held to be originally condemned for a canal or a common, as properly incident to the highway use."

The two uses "are by no means the same thing to the proprietor whose land is taken; on the contrary, they suggest widely different standards of compensation. One can readily conceive of cases, where the value of real estate would be directly enhanced by the opening of a highway through it; while its confiscation for a railway at the same or a subsequent time would be a gross injury to the estate, and a total subversion of the mode of enjoyment expected by the owner, when he yielded his private rights to the public exigency. . . . No one ever thought of regarding highway acts as conferring railway privileges, involving a right in every individual, not only to break up ordinary travel, but also to exact tolls from the public for the privilege of using the peculiar conveyances adapted to a railroad. If a right of this description is not conferred when a highway is authorized by law, it is idle to pretend that any proprietor is divested of such a right. It would seem that, under such circumstances, the true construction of highway laws could hardly be debatable, and

safeguards which are thought necessary to be thrown around the public, when a railroad crosses a highway. The bells must be rung, the whistle must be blown, the speed must be slackened, and very often bars are laid across the highway, so that vehicles and foot passengers cannot attempt to cross the track while the train is passing. How much greater would be the inconvenience to the public, if a railroad track was laid along the highway, instead of across it.

But where the fee of the highway is in the public, the cases very generally hold that the establishment of a steam railroad along a highway is not such a taking of property of the adjoining landowner, as will require the payment of compensation.[1]

that the absence of legal identity between the two uses of which we speak was patent and entire."

[1] Milburn v. Cedar Rapids etc. R. R. Co., 12 Iowa, 246; Clinton v. Cedar Rapids etc. R. R. Co., 24 Ib. 455; Ingraham v. Chicago etc. Co., 34 Ib. 176; Rucheman v. Chicago etc. Co., 46 Ib. 366; Franz v. Railroad Co., 55 Ib. 101; Grand Rapids etc. R. R. Co. v. Heisel, 38 Mich. 62; 31 Am. Rep. 306; Grand Rapids etc. R. R. Co. v. Heisel, 47 Mich. 393; Harrison v. New Orleans etc. R. R. Co., 34 La. An. 462; 44 Am. Rep. 438; Protzman v. Indianapolis etc. R. R. Co., 9 Ind. 467; New Albany etc. R. R. Co. v. O'Daily, 13 Ind. 353; Chicago etc. R. R. Co. v. Joliet, 79 Ill. 25; Simplot v. Chicago etc. Ry., 5 McCrary, 158; Davenport v. Stevenson, 34 Iowa, 225; Elizabethtown etc. Co. v. Thompson, 79 Ky. 52; Hinchman v. Paterson etc. Co., 17 N. J. Eq. 75; Jersey City etc. Co. v. J. C. & H. H. R. R. Co., 20 Ib. 61; Dwenger v. Chicago etc. Ry. Co., 98 Ind. 153; Wager v. Troy etc. Ry., 25 N. Y. 527; People v. Kerr, 27 Ib. 188; Phila. etc. Co. v. Philadelphia, 47 Pa. St. 325; Struthers v. Dunkirk etc., 87 Ib. 282; Carson v. Central etc. Co., 35 Cal. 325. See § 302: Power of Legislature over railroads. In Moses v. Pittsburgh etc. R. R. Co., 22 Ill. 522, Caton, Ch. J., said: "By the city charter, the common council is vested with the exclusive control and regulation of the streets of the city, the fee simple title to which we have already decided is vested in the municipal corporation. The city charter also empowers the common council to direct and control the location of railroad tracks within the city. In granting this permission to locate the track in Beach street, the common council acted under an express power granted by the Legislature, so that the defendant has all the right, which both the Legislature and the common council could give, to occupy the street with its track. But the complainant assumes higher ground, and claims that any use of the street, even under the authority of the Legislature and the common council, which tends to deteriorate the value of his property on the street is a violation of that fundamental law which forbids private property to be taken for public use without just compensation. This is manifestly an erroneous view of the constitutional guaranty thus invoked. It must necessarily happen that streets will be used for various legitimate purposes, which will, to

It cannot be doubted, that in no case does the consequential depreciation in value of adjoining property, as a result of the construction of a steam railway along the street, constitute a taking of property which requires a payment of compensation, any more than the ordinary and reasonable exercise of any right gives rise to liability for incidental injuries to others. The appropriation of a highway to other purposes must interfere with some positive right of property, in order that it may be considered a taking of property. Where the public does not own the fee, any other and different use of the highway would be a taking, whatever effect it may have upon the adjoining property, as has been already explained, for there would be a fresh appropriation of the property of the owners of the fee. But when the fee is in the State, the adjoining landowner has only an easement in the street, which entitles him to a reasonable enjoyment of it as a street, and an appropriation of it to other

a greater or less extent, discommode persons residing or doing business upon them, and just to that extent damage their property; and yet such damage is incident to all city property, and for it a party can claim no remedy. . . The street is made for the passage of persons and property; and the law cannot define what exclusive means of transportation and passage shall be used. Universal experience shows that this can best be left to the determination of the municipal authorities, who are supposed to be the best acquainted with the wants and necessities of the citizens generally. To say that a new mode of passage shall be banished from the streets, no matter how much the general good may require it, simply because streets were not so used in the days of Blackstone, would hardly comport with the advancement and enlightenment of the present age. Steam has but lately taken the place, to any extent, of animal power for land transportation, and for that reason alone shall it be expelled the streets? . . . Cars upon street railroads are generally, if not universally, propelled by horses [in 1893 this is not quite accurate], but who can say how long it will be before it will be found safe and profitable to propel them with steam, or some other power besides horses? Should we say that this road should be enjoined, we could advance no reason for it which would not apply with equal force to street railroads; so that consistency would require that we should stop all. Nor would the evil which would result from the rule we must lay down, stop here. We must prohibit every use of a street which discommodes those who reside or do business upon it, because their property will else be damaged. The question has been presented in other States, and in some instances, where the public have only an easement of the street, and the owner of adjoining property still holds the fee in the street, it has been sustained; but the weight of authority, and certainly in our apprehension, all sound reasoning is the other way."

purposes, for example, for the construction of a steam railway, will constitute a taking of the property of the abutting proprietor, only when his reasonable enjoyment of the street is denied to him. The noise, smoke, etc., do not involve any taking of property, however much it may depreciate the value and the desirability of the adjoining property.[1]

§ 304. **Abutting owners how affected by surface street railways.**—The ordinary steam railway serves the purpose of transporting passengers and goods from one city, town or village to another, and not from one part to another of the same city, town or village. On the other hand, a street railway, it matters not by what motive power the cars may be propelled, is designed to carry passengers and goods from one part of the same local community to another part. For this reason, it is not doing violence to the meaning of words to recognize a vital distinction between the two kinds of railways, and to hold that, while the appropriation of a street to the use of the ordinary railroad was a new taking of property, where the title to the soil of the street is in the abutting owner, the construction of a surface street railway on a street, was not a diversion of the street from its use as a highway or street, but only a new provision for the more expeditious and convenient use of the street as such. And this would be a correct view of the effect of the grant of a franchise to a surface street railway, whether the motive power be animal, steam, cable or electrical. It is not surprising, therefore, to find that the courts are almost unanimously of the opinion that the use of a street, for the purpose of constructing and operating a surface street railroad, is not a taking of property for which compensation must be made; and this is true whether the fee is in the State or in the abutter.[2]

[1] Protzman v. Indianapolis etc. R. R. Co., 9 Ind. 467; New Albany etc. R. R. Co. v. O'Daily, 12 Ind. 551; s. c., 13 Ind. 353; Street Railway v. Cumminsville, 14 Ohio St. 523; Grand Rapids etc. R. R. Co., 38 Mich. 62 (31 Am. Rep. 306); s. c., 47 Mich. 393, and the cases cited in the two preceding notes.

[2] For cases, in which the fee was in the adjoining owner, see Atty. Gen. v. Metro. R. R. Co., 125 Mass. 515; Com. v. Temple, 14 Gray, 75; Elliott v. Fair Haven etc. Co., 32 Conn. 579; Hinchman v. R. R. Co., 17 N. J. Eq. 75; s. c., 20 Ib. 360; City R. R. Co. v. City R. R. Co., 20 Ib. 61; Street R'y Co. v. Cumminsville, 14 Ohio St. 523; Hobart v. Milwaukee etc. Co., 27 Wis. 194; 9 Am. R. 461. For cases, in which the fee was in the public, see People v. Kerr, 27 N. Y. 188; Kellinger v. Street R. R. Co., 50 Ib. 206; Metro. etc. Co. v.

The ordinary street railway interferes very slightly, if at all, with the use of the highway as such by the public, or by the abutter.[1] And if a slight inconvenience is inflicted on an abutter by a street railroad running its line past his property, it cannot constitute a taking of private property for public use; and such use of a street, where no material alteration is made in its surface or grade, should, upon the principles already pointed out, be considered as falling within the purpose for which the streets were dedicated.[2] But the abutting owner is entitled to a reasonable use of the street as such, and if it is materially interfered with by the construction of a street railway, it will constitute a taking of the property of the abutting owner, for which compensation must be made to him. Thus, if the street railroad be located in such a portion of the highway as not to leave space for the standing of vehicles in front of the abutter's property,[3] or if by storing cars upon its track it causes special damage,[4] the abutting owner is clearly entitled to compensation.

No rule can be laid down which would be universally applicable, but it is safe to say that while the owner of adjacent property may be incommoded to some extent without entitling him to compensation his complete exclusion from the ordinary use of the street, or an extraordinary and unreasonable interference with such use, would be a taking of property and entitle him to compensation.[5] And while the running of a street surface railway does not ordinarily interfere with the reasonable enjoyment of the street by the adjoining landowners, still, it might, under peculiar circumstances, interfere very seriously

Quincy etc. Co., 12 Allen, 262; Chicago v. Evans, 24 Ill. 52; Hess v. Baltimore etc. Co., 52 Md. 242; 36 Am. Rep. 371. See, generally, Citizens etc. Co. v. Camden H. R. R. Co., 33 N. J. Eq. 267; West Jer. etc. Co. v. Cape May etc. Co., 34 Ib. 164; Savannah etc. Co. v. Savanuah, 45 Ga. 602; Floyd Co. v. Rome St. R. R. Co., 77 Ib. 614; Stanley v. Davenport, 54 Iowa, 463; Peddicord v. Baltimore, 34 Md. 466; Brown v. Duplessis, 14 La. An. 842; Texas etc. Co. v. Rosedale, 64 Tex. 80.

[1] Eichels v. Evansville etc. Co., 78 Ind. 261; Briggs v. Lewiston etc. Co., 79 Me. 363.

[2] Lewis on Eminent Domain, § 124; Mills Em. Dom. § 205; Sears v. Marshalltown etc. Co., 65 Iowa, 742.

[3] Kellinger v. Street etc. Co., 50 N. Y. 206; People v. Kerr, 27 Ib. 188; Hobart v. M. C. R. R. Co., 27 Wis. 194.

[4] Mahady v. Bushwick etc. Co., 91 N. Y. 148.

[5] See Craig v. Rochester, etc., Co., 39 N. Y. 404; Cf. Story v. N. Y. E. R. R. Co., 90 N. Y. 122; Lahr's Case, 104 Ib. 268.

with the ordinary use of the street, as where the street is very narrow, and at the same time a great business thoroughfare; and whenever that happens, the construction of the railway would seem to constitute a taking of property, for which compensation could be demanded. But Mr. Cooley holds that, under such circumstances, the property owners would, in the light of the authorities, be without a remedy.[1]

§ 305. **Elevated street railways in relation to abutting owners.**—As has already been explained, in connection with ordinary railroads[2] and street surface railways,[3] whether the fee was in the public or in the abutting owner, it has been generally held that the proprietors of adjoining property have, as an easement over the land used as a highway, the right to the free and unobstructed use of the street, and any interference with such use was a taking of property, for which compensation had to be made.[4] In New York, however, whenever the fee of the streets is in the public, the earlier cases seemed to deny to the abutting owner, any right of property in the street, as a highway, which would be invaded by a different appropriation of the land.[5] And even those cases, which recognized that the abutting owner did have a peculiar easement in the street, as a highway, conceded to the abutter only the right to a reasonably convenient ingress and egress to and from his property. If the construction of a street or ordinary steam railroad did not materially obstruct his access to his property, he had no cause of action. But in a late case in New York,[6] it has been

[1] Cooley Const. Lim. 683.

[2] § 303.

[3] § 304.

[4] Haynes v. Thomas, 7 Ind. 38; Protzman v. Indianapolis, etc., R. R. Co., 9 Ind. 467; New Albany, etc., R. R. Co. v. O'Daily, 13 Ind. 453; Indianapolis R. R. Co. v. Smith, 52 Ind. 428; Crawford v. Delaware, 7 Ohio St. 459; Street Railway v. Cummingsville, 14 Ohio St. 523; State v. Cincinnati Gas, etc., Co., 18 Ohio St. 262; Grand Rapids, etc., R. R. Co. v. Heisel, 38 Mich. 62 (31 Am. Rep. 306); Pekin v. Winkel, 77 Ill. 56; Lackland v. No. Mo. R. R. Co., 31 Mo. 180; Green v. Portland, 32 Me. 431; Brown v. Duplessis, 14 La. An. 842. But see *contra*, Millburn v. Cedar Rapids, etc., R. R. Co., 12 Iowa, 246; Franz v. Railroad Co., 55 Iowa, 107.

[5] People v. Kerr, 37 Barb. 357; s. c., 27 N. Y. 188; Ferring v. Irwin, 55 N. Y. 486; Kellinger v. Forty-Second St., etc., R. R. Co., 50 N. Y. 206; Brooklyn Park Commissioners v. Armstrong, 45 N. Y. 234 (6 Am. Rep. 70); Coster v. Mayor, etc., 43 N. Y. 399.

[6] Story v. N. Y. Elevated R. R. Co., 90 N. Y. 122, 145, 146.

held, that the abutting owner has, as appurtenant to his land, not only an incorporeal right of property in the free and unobstructed use of the street or highway for purposes of locomotion, but also a right to the free passage of light and air over the land used as a street, and any interference with either right would constitute a taking of property, for which compensation must be made. In delivering the opinion of the court, Judge Danforth said: "Besides the right of passage, which the grantee as one of the public acquired, he gained certain other rights as purchaser of the lot, and became entitled to all the advantages which attached to it. . . . The value of the lot was enhanced thereby, and it is to be presumed that the grantee paid, and the grantor received an enlarged price by reason of this added value. There was thus secured to the plaintiff the right and privilege of having the street forever kept open as such. For that purpose, no special or express grant was necessary; the dedication, the sale in reference to it, the conveyance of the abutting lot with its appurtenances, and the consideration paid were of themselves sufficient.[1] . . Nor does it matter that the acts constituting such dedication are those of a municipality. The State even, under similar circumstances, would be bound.[2] . . . . Lesser corporations can claim no other immunity, and all are bound upon the principle, that to retract the promise implied by such conduct, and upon which the purchaser acted, would disappoint his just expectation.

"But what is the extent of this easement? What rights or privileges are secured thereby? Generally, it may be said, it is to have the street kept open, so that from it access may be had to the lot, and light and air furnished across the open way. The street occupies the surface, and to its uses the rights of the adjacent lots are subordinate, but above the surface there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner. To hold otherwise would enable the city to derogate from its own grant, and violate the arrangement on the faith of which the lot was purchased. This, in effect, was an agreement, that if the grantee would buy the lot abutting on the street, he might have the use of light

[1] Citing Wyman v. Mayor of N. Y., 11 Wend. 487; Trustees of Watertown v. Cowen, 4 Paige, 510.

[2] City of Oswego v. Oswego Canal Co., 6 N. Y. 257.

and air over the open space designated as a street. In this case, it is found by the trial court, in substance, that the structure proposed by the defendant, [a railroad elevated fifteen feet above the surface,] and intended for the street opposite to the plaintiff's premises, would cause an actual diminution of light, depreciate the value of the plaintiff's warehouse and thus work to his injury. In doing this thing, the defendant will take his property as much as if it took the tenement itself; without air and light, it would be of little value. Its profitable management is secured by adjusting it in reference to the right obtained by his grantor over the adjoining property. The elements of light and air are both to be derived from the space over the land, on the surface of which the street is constructed, and which is made servient for that purpose. He therefore has an interest in that land, and when it is sought to close it, or any part of it, above the surface of the street, so that light is in any measure to his injury prevented, that interest is to be taken, and one whose lot, acquired as this was, is directly dependent upon it for a supply, becomes a party interested and entitled, not only to be heard, but to compensation." In a strong dissenting opinion in the same case Judge Earl denies the proposition that the abutting owner "has an unqualified private easement" for light and air appurtenant to his lot, and holds that "whatever right an abutter, as such, has in the street, is subject to the paramount authority of the State to regulate and control the street, for all the purposes of a street, and to make it more suitable for the wants and convenience of the public."[1] This case has been confirmed by numerous subsequent cases, and may now be considered to be the settled law of New York. And the management and control of the elevated railroads of New York city have been provided for by a number of statutes.[2]

[1] Story v. N. Y. Elevated R. R. Co., 90 N. Y. 122, 186–188.

[2] Statutes of New York State relating to this subject. Act of June 17, 1872, ch. 885, p. 2179; Act of June 26, 1873, ch. 837, p. 1253; Act of June 28, 1874, ch. 275. p. 331; Act of June 18, 1875, ch. 606, p. 740. Laws of 1881, p. 540, ch. 399, regulates management of trains. See upon construction of these acts, *In re* N. Y. El. R. R., 70 N. Y. 327; Gilbert E. R. R. Co., Ib. 361; *In re* Kings Co. E. R. R. Co., 105 Ib. 97; *In re* N. Y. Cable Ry. Co., 109 Ib. 32; *In re* East River Bridge etc., 26 Hun, 490; *In re* N. Y. El. R. R. Co., 41 Ib. 502; *In re* So. Bklyn. R. R. & T. Co., 50 Ib. 405; see, also, 3 Abbott New Cases, 301, and note.

In estimating the damages caused by the operation of an elevated railroad the general character and extent of the injury must be considered. Does the structure injuriously affect the general character of the thoroughfare or decrease the current of business there. "Smoke, and gas, ashes and cinders affect and impair the easement of air. The structure itself and the passage of cars lessen the easement of light. These are elements of damages even though the necessary concomitants of the construction and operation of the road, and not the product of negligence, for they abridge the landowner's easement, and to that extent, at least, are subjects for redress in an action for damages." [1] Although noise and bustle are not such an injury to property as will require compensation,[2] the pollution of the air with noxious smells, rendering the enjoyment of abutting premises uncomfortable, is a taking of property.[3]

§ 306. **Municipal control over the construction and operation of railroads in streets.**—From the control, which a municipal corporation has over its streets, results the power to regulate the running of steam and other railways in city limits. The municipal authorities may prohibit the use of dangerous motors and regulate the rate of speed;[4] compel the company to send a horseman in front of its trains;[5] to report quarterly the number of passengers carried;[6] and to fence in its track.[7] Although a railroad, when operated in a street under legislative permission, is not a nuisance, *per se*, it may become such if it is operated so as to become dangerous to life and property; and such a nuisance may be abated by the municipal authori-

[1] Drucker v. Manhattan Ry Co., 106 N. Y. 157; s. c., 16 J. & S. 429, followed in Pond v. Metro. El. R. R. Co., 42 Hun, 567; *In re* N. Y. El. R. R., 36 Hun, 427; Peyser v. Metro. El. R. R., 13 Daly, 122.

[2] Meyer v. Metro. El. R. R. Co., Gen. Term Com. Pleas, N. Y. Daily Reg., April 1, 1886; *contra*, Taylor v. Metro. E. Ry. Co., 55 Super. Ct. 555.

[3] Caro v. Metro. Ry. Co., 46 N. Y. Super. Ct. 138.

[4] Meyers v. Chicago, etc. Co., 57 555; Knoblock v. Chicago, etc. Co., 31 Minn. 402; Robertson v. Wabash, etc. Co., 84 Mo. 119; Merz v. Miss. etc. Co., 88 Ib. 672; Chicago, etc. Co. v. Reidy, 66 Ill. 43; Chicago, etc. Co. v. Haggerty, 67 Ib. 113; Whitson v. Franklyn, 34 Ind. 392; Richmond, etc. Co. v. Richmond, 96 U. S. 521; Donnaher v. State, 16 Miss. 649.

[5] Baltimore, etc. Co. v. Mali, 66 Md. 53.

[6] St. Louis v. R. R. Co., 89 Mo. 44.

[7] Hayes v. Mich. etc. Co., 111 U. S. 228.

ties, under the ordinary police power.[1] So, cars may be prohibited by ordinance from unnecessarily obstructing the streets or blockading the crossings,[2] as a street cannot be used for depot or terminal facilities.[3] And an ordinance, forbidding all kinds of obstructions, has been held to include the obstruction of a street by railroad cars.[4] Flagmen may be required to be placed, not perhaps at every crossing, but at crossings and places where, in the judgment of prudent persons, danger to the public might be apprehended.[5] Under the very comprehensive grant of power, contained in most municipal charters, in the so-called "general welfare clause," a city may compel a street railroad to sprinkle its tracks for the purpose of keeping down the dust;[6] and it has been held that this power will authorize the city to remove the tracks temporarily or permanently, for the purpose of constructing a culvert or for any similar purpose connected with the health, or for the convenience of the community.[7]

The company may be compelled to number its cars and pay a license for each of them.[8]

In general, it may be said that the special privilege, which a street railroad possesses, must be exercised by it in such a manner as not to intrude upon the rights or privileges of others using the street.[9] As the company operating a horse railroad is not entitled to any further use or occupation of the highway than what is essential for the reasonable enjoyment of its franchise, it will be liable for negligently removing the snow from its track, and throwing it into the highway not occupied by its tracks.[10] The common law rule is clear that, when a railroad

[1] Hentz v. L. I. etc. Co., 13 Barb. 646; Redfield on Railways (6th ed.) § 226; Memphis, etc. Co. v. State, 11 S. W. R. 946.

[2] Ill. etc. Co. v. Galena, 40 Ill. 344; St. Louis, etc. Co. v. Belleville, 122 Ib. 376.

[3] Mahady v. Bushwick, etc. Co., 91 N. Y. 148.

[4] G. W. etc. Co. v. Decatur, 33 Ill. 381; Gahagan v. Boston, etc. Co., 1 Allen, 187.

[5] Toledo, etc. Co. v. Jacksonville, 67 Ill. 37; compare Burritt v. New Haven, 42 Conn. 172, as to requirement of viaducts at crossings; see State v. Miss. P. Ry. Co., 33 Kan. 176.

[6] City, etc. Co. v. Savannah, 77 Ga. 731.

[7] No. Penn. Ry. v. Stone, 3 Phila. 421; West Phila. etc. Co. v. City of Philadelphia, 10 Ib. 70.

[8] Frankford, etc. Co. v. City, 58 Pa. St. 119.

[9] Prime v. 23d St. etc. Co., 1 Abb. N. Cases, 63; Hussner v. Bklyn. etc. Co., 114 N. Y. 433.

[10] Bowen v. Detroit Ry., 54 Mich. 496; 52 Am. Rep. 822; Wallace v.

company or other corporation lays out a railway or canal across a public street or highway, it must restore and afterwards keep the highway in the same condition, in which it was originally used by the public. This duty is imposed upon such a company, by implication of law, where there is no express statutory requirement.

The duty of both horse and steam roads to repair is a continuous one; and is not discharged by a restoration of the street to the condition. in which it was originally, but includes a maintenance of the repairs.[1] This duty is imperative and performance may be compelled by *mandamus*, on application of any one who is aggrieved.[2] And the railroad is liable to an action for damages by the city, when a party injured by the company's failure to repair has recovered damages in a suit against the city;[3] or, if the city makes the necessary repairs, it may recover the expense thereby incurred, from the company by whose neglect it was made necessary.[4] When by ordinance, granting permission to use the street, it was provided that the company should pave the space between its tracks, it was held that with the acceptance and performance of the condition by the company a contract was created, which could not be impaired by a subsequent municipal requirement that additional space be

Same, 58 Mich. 231; Short v. Baltimore, 50 Md. 73; Prime v. 23d St. Ry. Co., 1 Abb. N. C. 63, 71; Broadway, etc. Co. v. New York, 49 Hun, 126; People v. Batchellor, 53 N. Y. 520; see Burger v. Mo. Pac. Ry., (Mo. 93) 20 S. W. R. 439.

[1] State v. Jacksonville, (Fla. 92) 10 So. 590; Burrett v. New Haven, 42 Conn. 174; State v. Minn. etc. Co., 39 N. W. R. 153; Philadelphia v. Ridge Ave. R. Co., 143 Pa. St. 144; Atlanta v. Gate City Ry. Co., (Ga.) 4 S. E. R. 269; Western Pav. & Sup. Co. v. Citizens Ry. Co., 26 N. E. R. 188; State v. N. O. C. & L. R. Co., 42 La. An. 550; 7 So. R. 606; Borough v. Norristown Ry. Co., (Pa. 91) 23 Atl. R. 1060; Sioux City St. R. Co. v. Sioux City, 78 Iowa, 742; 39 N. W. R. 498.

[2] No. Cen. R. R. v. Baltimore, 46 Md. 425; Paducah etc. Co. v. Com., 80 Ky. 147; State v. St. Paul etc. Co., (Minn.) 28 N. W. R. 3; Hamden v. New Haven etc. Co., 27 Conn. 158.

[3] Brooklyn v. B. City etc. Co., 47 N. Y. 475; People v. Brooklyn, 65 Ib. 349; Bloomfield etc. Gas Co. v. Calkins, 62 Ib. 386; Cf. Memphis etc. Co. v. State, 87 Tenn. 746; s. c., 11 S. W. R. 946.

[4] Gulf City S. R. Co. v. Galveston, 69 Tex. 660; 7 S. W. R. 520; Gulf etc. Co. v. Galveston, 32 Am. & Eng. R. R. Cas. 300; Rutland v. Dayton, 60 Ill. 58; Cf. Leake v. Philadelphia, 24 Atl R. 351 (Pa. 92); Binghamton v. Ry. Co., 61 Hun, 479; Philada. etc. Co. v. Philadelphia, 11 Phila. 358; New York v. Broadway etc. Co., 17 Hun, 242; Columbus v. Col. etc. Co., 45 Ohio, 98; Oconto v. Chicago etc. Co., 44 Wis. 231.

paved by the company.[1] But when the requirement is that the horse railroad shall keep the streets used by it in good repair, the company cannot be compelled to pave it or repave it in a certain way which is specified subsequently by the city council.[2]

The city is the owner of the streets as trustee for the public; and, as such it has the same right to question the corporate existence and the franchise rights of a railroad company, which desires to use its streets, as would a private trustee or owner.[3] A general legislative grant of authority to construct a road, does not, unless so stated in express terms, confer the right to use the streets without municipal license.[4] So, also, the municipality may raise the question of the legal existence of the company; the rule being very general, that a corporation, seeking to exercise such a franchise, must have an existence *de jure*, as well as *de facto*. The grant of a railroad franchise to an illegally incorporated company is void for the want of a legal grantee.[5]

§ 306 *a*. **Electric and cable cars on street railways.**[6]—In the past decade, the horse or mule, as a motor power in the hauling of street cars, is fast being superseded by the use of electrical and cable apparatus. Not only do the new methods of moving street cars reduce the cost of operating them, but likewise increase the speed at which the cars can be propelled or hauled. But the increased speed is also the occasion of an alarming increase in the danger of accidents to pedestrians in the lawful use of the street; and, on this account, this new departure, in matters relating to street railways, has met with

[1] Coast etc. Co. v. Savannah, 30 Fed. Rep. 646; Cf. People v. Fort Street etc. Co., 41 Mich. 413; Reg. v. Toronto etc. Co., 24 Q. B. (Can.) 454.

[2] Kansas City v. Carrigan, 85 Mo. 263; and 86 Mo. 67.

[3] Brooklyn S. T. Co. v. Brooklyn, 78 N. Y. 524.

[4] Hine v. Keokuk, 42 Iowa, 636; Chicago etc. v. Chicago, 121 Ill. 176; Penn. R. R. Co. v. Schuylkill Co., 116 Pa. St. 55, 8 Atl. R. 914; Clinton v. R. R. Co., 24 Iowa, 455; Ruttle v. Covington, 10 S. W. Rep. 644.

[5] Vason v. So. Car. R. R., 42 Ga. 631; Chicago v. Robbins, 2 Black, 424; Jas. River etc. v. Anderson, 12 Leigh, 276; Porter v. No. Mo. etc., 33 Mo. 128; Chicago etc. R. R. Co. v. Newton, 36 Iowa, 299; Clinton v. Cedar Rap. etc. R. R. Co., 24 Iowa, 455; People v. Kerr, 27 N. Y. 188; New Albany etc. R. R. Co. v. O'Daily, 13 Ind. 353; Savannah etc. v. Savannah, 45 Ga. 602; Tate v. Ohio etc. R. R. Co., 7 Ind. 479; Cable Co.'s Case, 104 N. Y. 43.

[6] See §§ 301, 302, for a general discussion of the principles underlying the present subject.

very serious popular opposition, with the consequent litigation over the right of the railway companies to make use of these motive powers, particularly that of the trolley system of electricity.

It does not seem at all possible for the abutting owners to claim successfully that the adoption of either of these motive powers would operate as an increase of the public servitude, which had been imposed upon their land by the opening of the street or road, even though they still owned the fee in the road-bed, and such has been the ruling of at least two courts.[1] But it has been held in New Jersey that a provision of the statute, which empowers a street railway "to use electrical or chemical motors or grip cable" does not authorize the erection of poles or wire in the public streets as an electrical system of propelling street cars.[2] It will be remembered that, in another connection,[3] the claim has been made that the erection of poles for the wires of the telegraph, the telephone and the electric lighting, should be considered an additional servitude on the abutter, for which additional compensation should be given. But this is not yet positive law.

Apart from this question of thereby imposing an additional servitude upon the abutting land, there is no limitation, in the absence of an express constitutional provision, of the legislative power to grant to a street railway the right to use the electric or cable motor in the propulsion or hauling of their cars. And the only question of practical importance, which can arise in the present connection, is whether the existing charter rights of a street railway company authorized the use of some other than horse power. Thus, where a railway was authorized by charter or statute to employ "any other than animal power,"[4] "mechanical or other power,"[5] "any power other than locomotives,"[6] "steam, horse or other power,"[7] it was held that such

[1] Williams v. City Electric St. R. Co., 41 Fed. Rep. 556; Koch v. North Ave. R'y Co., (Md. '92) 23 Atl. Rep. 463.

[2] State v. Trenton, (92 N. J.) 23 Atl. R. 281; Same v. Newark, Ib. 284.

[3] § 297.

[4] Detroit City R'y v. Mills, (Mich. '92) 48 N. W. 100.

[5] Hudson R. T. Co. v. Watervliet Tr. R. Co., 9 N. Y. S. 177; s. c., 56 Hun, 67.

[6] Com'rs v. West Chester, 9 Pa. Co. Ct. R. 542; Lockhardt v. Craig St. R'y Co., 21 Atl. Rep. 26; s. c., 139 Pa. St. 419; Williams v. City R'y Co., (Ind. '92) 29 N. E. Rep. 408.

[7] Taggart v. Newport St. R. Co., (R. I. '91) 19 Atl. Rep. 326.

railways could use the electric power without any further grant of authority from the State or municipal authorities. It has, however, been held in New York, that, although a street railway may have by statute and charter the right to use "steam, animal or mechanical power," it is not thereby authorized to employ the cable as the motive power, without the consent of the city.[1] But where by the laws of '89, ch. 531, street railways are authorized to employ cable or other power, other than steam, under approval of the State Board of Railroad Commissioners, the consent of the city would not be required to make the change from horse to cable power.[2]

In one case, it has been held that, although a street railway was authorized to use "any improved motive power," it did not authorize the use of the overhead wires, in the trolley electric system.[3] And so, likewise, it has been held in Texas that an ordinance, which permitted the use of "electricity or such other motive power as will not necessarily obstruct the street," does not authorize the employment of steam power.[4]

Where a railway company had an exclusive monopoly of "horse railroads" along certain streets, such an exclusive monopoly must be strictly construed against its owner, and it did not prevent the grant to a rival company the right to construct and maintain a cable road along the same route.[5]

But even where the street railways are fully authorized to employ electric or cable power, in the moving of cars, they are not beyond the reach of the police regulations of the State or city government, and they are obliged to conform to all reasonable regulations either in respect to the erection of poles and wires, construction of cable, or in the speed of the cars, which the State Legislature or municipal council may see fit to impose.[6]

[1] People v. Newton, 112 N. Y. 396.

[2] *In re* Third Ave. R'y Co., (N. Y. '91) 24 N. E. Rep. 651.

[3] Farrell v. Winchester Ave, 61 Conn. 127; s. c., 23 Atl. 757. But see, *contra*, Com'rs v. Westchester, 9 Pa. Co. Ct. Rep. 542; Lockhart v. Craig St. Ry. Co., 139 Pa. St. 419; s. c., 21 Atl. Rep. 26, and other cases cited *supra* in preceding notes.

[4] Houston v. H. B. & M. Ry. Co., (Tex. '92) 19 S. W. Rep. 786.

[5] Omaha H. R. Co. v. Cable Tramway Co., 30 Fed. Rep. 324.

[6] W. U. Tel. Co. v. Philadelphia, (Pa. '88) 12 Atl. Rep. 144; Lamb v. St. Louis & W. Ry. Co., 33 Mo. App. 489; Hudson R. T. Co. v. Watervliet T. & R. Co., 61 Hun, 140; Cent. Pa. Tel. & Supply Co. v. Wilkes-Barre & W. S. R. Co., 11 Pa. Co. Ct. 417; Cincinnati Inc. Plane Ry. Co. v. City & S. Tel. Ass'n, (Ohio '92) 27 N. E. 890.

And the electric and cable street railways will come under existing regulations as to construction and management, which had been expressly intended to apply to horse railways, so far as these regulations are applicable to them.[1]

It has been held that, where there was a grant to a railway of the right to use electric motive power, it was not authorized to use a system by which electricity may pass from its own wires to those of the telephone and telegraph wires, and thus interfere with the use of the latter, where this could be avoided by the use of some other system of electrical power, even though the latter system was more expensive.[2] But, on the contrary, it has been held in Ohio that the use of the street by the telegraph and telephone companies must always be subordinate to its use by the general public for travel and locomotion; and that if the construction of the electric railway affects injuriously the use of the wires of the telegraph and telephone companies, the latter must provide for the insulation of its own wires.[3]

§ 307. **Remedies of abutters—Measure of damages.**—If a railroad does not make compensation to abutting owners for their property which is taken or damaged in the exercise of the right of eminent domain, the company is a trespasser, and is liable in damages to the owners of such property; but the owner, who seeks his remedy in an action for damages of a common law nature, can only recover the damages which were sustained by him up to the date, when the action was instituted. He may bring successive actions of this character at such times as he may elect; or, if the land itself has been appropriated, he may bring an action of ejectment.[4] But such a proceeding is ineffectual to recover complete damages for the permanent depreciation or destruction of an easement which is invaded by the

[1] Lamb v. St. Louis & W. Ry. Co., 33 Mo. App. 489; Wolfe v. Erie R. T. Co., 33 Fed. Rep. 320; Criveaud v. St. Louis Cable & W. Ry. Co., 33 Mo. App. 458.

[2] Hudson R. T. Co. v. Watervliet T. & R. Co., 61 Hun, 140.

[3] Cincinnati Inc. Plane Ry. Co. v. City & S. Tel. Ass'n, (Ohio '92) 27 N. E. 890.

[4] Uline v. N. Y. Cen. R. R. Co., 101 N. Y. 98; s. c., 4 N. E. Rep. 536; Mahon v. R. R. Co., 24 Ib. 658; Wheelock v. Noonan, 198 N. Y. 179; N. Y. Nat. Ex. Bk. v. Metro. El. Ry. Co., 108 Ib. 660; Reed v. State, 108 Ib. 407; Pond v. Metro. E. R. R. Co., 112 Ib. 186; see *ante*, § 247, as to the time when payment of compensation must be made in cases of eminent domain.

company. It has accordingly been found that, to avoid the necessity of successive actions, an equitable suit, in which an injunction is demanded, restraining the company from running its trains, is best adapted to the purpose; for the court of equity can mould the relief granted to suit the exigences of the case.[1] It has been held that the proper measure of damages in the taking of property by street railways is the diminution in rental value; and that damages for loss of business cannot be considered, they being merely remote and consequential.[2]

§ 308. **Vacation of streets by the Legislature—Delegation of power to corporation.**—The power to vacate highways, which is possessed by the Legislature in the absence of constitutional restriction, can, like other powers, be delegated to the municipal authorities.[3] But the municipal corporation cannot claim the power to vacate streets and thereby destroy the public easement in them by implication; at least, in ordinary cases.[4] The power can only be derived from an express declaration or, in unusual cases from necessary implication; all ambiguous language being construed favorably to the continuance of the highway.[5] But it has been held that an illegal or invalid vacation of a public street by a municipality can be validated by subsequent State Legislation.[6] But even the legislative power in the present case is not unlimited. Thus, the legislative pow-

[1] Pond v. Met. R. R. Co., 112 N. Y. 186; see Henderson's Case, 78 Ib. 423; Story's Case, 90 Ib. 133.

[2] N. Y. Exch. Bk. v. Metro. El. Ry. Co., 53 Super. Ct. 511; s. c., 108 N. Y. 660; Taylor v. Metro. El. Ry. Co., 50 Super. 311; s. c., 55 Ib. 555.

[3] McGee's Appeal, 140 Pa. St. 570; Platt v. R. R. Co., (Iowa, 87) 31 N. W. R. 883; Wenicke v. N. Y. Cen. & H. R. R. Co., 61 Hun, 619; State v. Elizabeth, (N. J. 92) 24 Atl. 495; Whitsett v. Union Depot, etc., 10 Colo. 243; North Liberties Comrs. v. Gas Co., 12 Pa. St. 318; Stuber's Road, 28 Ib. 223; Marshalltown v. Forney, 61 Iowa, 578; Barr v. Oscaloosa, 45 Ib. 475; Reed v. Camden, (N. J. 92) 24 Atl. R. 549; Glasgow v. St. Louis, (Mo. 92) 17 S. W. R. 743; Chicago etc. Co. v. Chicago, 28 N. E. R. 756; Excelsior Brick Co. v. Haverstraw, 62 Hun, 620; Lindsay v. Omaha, (Neb. 90) 46 N. W. R. 627; Parker v. Catholic Bishop, (Ill. 93) 34 N. E. R. 473; Glasgow v. St. Louis, 17 S. W. R. 743; see also cases collected in 33 Am. & Eng. Corp. Cases, 453; Trenton R. R. Case, 6 Whart. (Pa.) 25; Spiegel v. Gansberg, 44 Ind. 418; Fearing v. Irwin, 55 Ib. 486; State v. Huggins, 47 Ind. 586; McGee v. Penn. R. R., 114 Pa. St. 470.

[4] Gants' Ap., 21 Pitts. Leg. J. 219; Rohmeiser v. Bannon, (Ky. 93) 22 S. W. R. 27; Hobo. Ld. Co. v. Hoboken, 36 N. J. L. 540.

[5] Campen v. Board, (Mich. 91) 49 N. W. R. 39; Newark v. Del., etc., 42 N. J. Eq. 106; Jersey City v. N. J. Cent., etc., 40 Ib. 217.

[6] Kettle v. Tremont, 1 Neb. 329.

er does not extend to the discontinuance of public highways for the purpose of applying them to private uses.[1] The public interests must alone be considered in all such propositions to vacate a highway.

§ 309. **Proceedings to vacate.**—These proceedings differ in different jurisdictions; and since they are usually statutory, any detailed explanation of them is impossible here. Since the discontinuance of highways is in derogation of public right, any proceedings, having such an object, must conform substantially, and in England strictly,[2] to the statute; and failure to give abutting owners an opportunity to be heard, may invalidate the proceedings.[3] So, although a town was authorized to discontinue "at a meeting called for the purpose," any town or private way; it was held that such action could only be taken by a tribunal acting judicially, after notice to adjoining owners, and not by a mere vote at a town meeting.[4] And so, likewise, county commissioners have usually no power to vacate city streets.[5] A city cannot vacate a street, unless it is authorized by the Legislature;[6] and an injunction will lie to restrain the enforcement of an illegal order to that effect.[7]

The applicant for an injunction must show that his property will sustain *special injury* by the illegal vacation.[8] And an owner of land which does not abut directly on the street, is a stranger, and has no standing in court.[9]

It has been held, however, that an alteration by competent authority of an existing way is not equivalent to a discontin-

[1] Winchester v. Capron, 63 N. H. 605; Le Clerq v. Gallipolis, 17 Ohio St., pt. 1, 217; *In re* John and Cherry Streets, 19 Wend. 659; Glasgow v. St. Louis, 87 Mo. 678; Dubach v. Hannibal, etc., 89 Ib. 483; Warren v. Lyons, 22 Ia. 351; Indianapolis, etc. v. State, 37 Ind. 489; Portland, etc. R. R. v. Portland, 14 Oreg. 188; see also Stevenson v. Mayor, etc., 20 Fed. Rep. 586; Atty. Gen. v. Goodrich, 5 Grant (Can.) 402, Patton v. Cresswell, (Ind.) 21 N. E. Rep. 663; Baird v. Rice, 63 Pa. St. 489; Hinchman v. v. Detroit, 9 Mich. 103.

[2] Rex v. Justices, 23 L. M. J. 113.

[3] James v. Darlington, (Wis.) 36 N. W. Rep. 835; Price v. Stagsay, (Mich.) 35 Ib. 815; Rex v. Jones, 12 Ad. & E. 684; Rex v. Milverton, 5 Ib. 841; De Ponthieu v. Pennyfather, 5 Taunt. 634.

[4] Lincoln v. Warren, (Mass.) 23 N. Pac. E. Rep. 45.

[5] Ottawa v. Rohrburgh, (Kan.) 21 Pac, R. 1061.

[6] Polack v. Orph. Asyl., 48 Cal. 490.

[7] Spiegel v. Gansberg, 44 Ind. 418.

[8] Hering v. Scott, 107 Ill. 600.

[9] House v. Greensburg, 93 Ind. 533.

uance of the portion rejected; and that no special order of discontinuance is required.[1]

In proceedings to vacate, the opinions of witnesses, as to the public utility of the existing street,—although this is often the only issue,—cannot be given in evidence.[2]

§ 310. **Burden and means of proving vacation and abandonment.**—In considering the vacation or abandonment of highways, two maxims are of use. The first is "once a highway always a highway;" the other is the rule of evidence, that "a thing known to exist is presumed to continue until the contrary is shown." The former maxim is applicable and useful when the rights of abutters, who have made improvements in the expectation of the continuance of the street, are involved. But where no such rights are involved; or when they are unclaimed; or when compensation is made for injury to them, a highway may cease to exist, either by abandonment or by legal vacation. The latter maxim applies in conjunction with the former, when it is sought to prove affirmatively, that the public and the abutters have abandoned their respective rights to the street. The burden of proof is on him who seeks to establish these propositions; and the continuance of the street will be presumed, until satisfactory evidence is produced to rebut it.[3]

In some instances, the nonuser of a way, coupled with the acquisition of another in its place, has been held to be an abandonment.[4] But to lay this down as the general rule, would be erroneous. In one case it was held, that nonuser for eleven years, although the highway had been fenced in; and a total neglect to repair for fifteen years, was not conclusive evidence of abandonment.[5] Nor is a compulsory nonuser of a road, in the absence of the acquisition of a new one,[6] nonuser for ten years and inclosure,[7] sowing grain and pasturing cattle,[8] nor the

[1] Brook v. Horton, 68 Cal. 554; Com. v. Westborough, 3 Mass. 406; Com. v. Cambridge, 7 Ib. 158; Bowley v. Walker, 8 Allen, 21.

[2] Fairchild v. Bascom, 35 Vt. 398; White v. Baily, 10 Mich. 155; Hughes v. Beggs, (Ind.) 16 N. E. Rep. 817.

[3] Elliott on Roads & Streets, p. 658.

[4] Peoria v. Johnston, 56 Ill. 45; Galbraith v. Littiech, 73 Ib. 210; Warner v. Holyoke, 112 Mass. 362; Jeffersonville v. O'Conner, 37 Ind. 95; Hamilton v. State, 106 Ib. 361; Davie v. Huebner, 45 Iowa, 575.

[5] Kelly, etc., v. Lawrence F. Co., 22 N. E. Rep. 639.

[6] Driggs v. Philips, 103 N. Y. 77; Freeholders v. Towns, 20 N. Y. State Rep. 394.

[7] State v. Culver, 65 Mo. 607.

[8] Watkins v. Lynch, 71 Cal. 21; Rose v. Bostyer, 22 Pac. Rep. 393.

drawing of a line across an official map,[1] satisfactory and conclusive evidence of abandonment. When no public need existed for the use of a street, abandonment cannot be presumed from nonuser.[2]

Parol evidence of abandonment is not admissible to show that a street has been legally vacated; as vacation can only be effected by a *quasi*-judicial proceeding, of which the record is the best evidence.[3]

§ 311. **Compensation to abutters on vacation.**—The expediency or necessity of vacating highways is wholly discretionary with the Legislature;[4] but when vacating a street or highway will cause special, as distinct from consequential, damages to the abutter, his consent must be obtained, or adequate compensation must be made him.[5] As has already been explained,[6] the abutter has a right in the highway, separate and distinct from that which he enjoys in the public easement; and as this private right to a convenient access to his property makes the property more valuable, it is itself real property, and comes within the protection of the constitutional inhibition against taking private property without compensation.[7] But the law cannot by any means be said to be settled upon this question, and there are many decisions which assert or countenance a contrary doctrine, or modify the operation of the principle just explained.[8]

In New York it has been held that the Legislature may au-

[1] Eureka v. Armstrong, 22 Pac. 828.

[2] Wolfe v. Sullivan, (Ind. 93) 32 N. E. R. 1017; Reilly v. Racine, 51 Wis. 526; Crocker v. Collins, (S. C. 93) 15 S. E. R. 951.

[3] Lathrop v. Cent. Ia., 69 Iowa, 105; Sanborn v. Sch. Dist., 12 Minn. 17; Whetton v. Clayton, 111 Ind. 360; Monaghan v. Sch. Dist., 38 Wis. 101.

[4] Hayes v. Taylor, (Iowa, 92) 52 N. W. R. 116; Bradbury v. Walton, (Ky. 93) 21 S. W. R. 869; Elliott, Roads and Streets, p. 664.

[5] Miller v. Schenck, (Iowa, 89) 43 N. W. R. 225; Rohmeiser v. Bannon, (Ky. 93) 22 S. W. R. 27; Parker v. Bishop, (Ill. 93) 34 N. E. R. 473; Haynes v. Thomas, 7 Ind. 38; Gilbert's Case, 70 N. Y. 361; Story's Case, 90 Ib. 122; Kimball v. Homan, (Mich. 89) 42 N. W. R. 167; Onset St. R. Co. v. Com'rs, 154 Mass. 395.

[6] §§ 301–305.

[7] Indianapolis v. Hartley, 67 Ill. 439; Gargan v. Railroad, (Ky. 89) 12 S. W. R. 259; Cincin. v. White, 6 Peters, 431; Petition of Concord, 50 N. H. 530; Butterworth v. Bartlett, 50 Ind. 537; Pearsall v. Eaton, (Mich.) 42 N. W. Rep. 77.

[8] Glasgow v. St. Louis, 17 S. W. R. 743; 107 Mo. 198; Gerhard v. Seekonk Com'rs, (R. I.) 5 Atl. Rep. 199, 201; Barr v. Oscaloosa, 45 Iowa, 275; Polack v. Trustees, 48 Cal. 490; Hielscher v. Minneapolis, (Minn. 91) 49 N. W. R. 287; Perry v. Sherbourne, 11 Cush. 888.

thorize the closing of one public way without compensating adjoining owners, provided another way to their property remains open.[1] And in Pennsylvania, where the constitution provided that private property should not be taken for public use without just compensation, and contains a special clause which makes this principle applicable to the taking of property by municipal corporations for the construction of highways; it was held that the abutter's interests, except when his tangible property is taken, were not to be considered or compensated for.[2]

§ 312. **Statute of Limitations as applicable to public easement in streets—Equitable estoppel.**—In the absence of express statutory provisions, it is generally held that the remedial rights of the United States, and of the several States, are not affected by Statutes of Limitation.[3] It would seem logical to apply the same rule to municipal corporations, since they are but agents of the general sovereignty, exercising the powers of local government. At any rate, this should be recognized as the controlling principle, where the rights or privileges, which they possess, are held by them in a representative public capacity, representative either of the State and Nation, or of the local community.[4] When a city is interested in, what may be termed, its private capacity, as distinguished from its governmental; as, for example, when as defendant or plaintiff, it is a party to an ordinary action; and, particularly, when the suit does not involve any property, which is held by it solely upon trust for public use and convenience, there seems to be no good ground for exempting it from the operation of the statute.[5] If a city, laying aside its sovereignty, enters upon terms of equality into contractual relations with individuals; there is no unfairness in the rule which permits it to enjoy the benefits of such a con-

[1] Coster v. New York, 43 N. Y. 399; Fearing v. Irwin, 55 Ib. 486.

[2] McGhee's Appeal, 114 Pa. St. 470.

[3] Angell on Limitations, § 36; Dickinson v. New York, 92 N. Y. 584; U. S. v. Kirkpatrick, 9 Wheat. 735; People v. Gilbert, 18 Johns. (N. Y.) 227; U. S. v. Hoar, 2 Mason, 134.

[4] Dil. Mun. Corp. 668; Elliott on Roads, p. 667, note 4.

[5] Elliott on Roads, p. 665; Wood on Limitations, § 53; Evans v. Erie Co., 66 Pa. St. 222; Koshkoning v. Burton, 104 U. S. 668; May v. Sch. Dist., 22 Neb. 205; Gaines v. Hot Spr. Co., 39 Ark. 262; Simplot v. Chicago etc., 16 Fed. Rep. 350; Mowry v. Providence, 10 R. I. 52.

dition only subject to the obligations and limitations which are binding on natural persons.[1]

Upon the question, whether the city's title to a street, owned by it in trust for public use, may be lost by adverse possession, and its action for recovery barred by the Statute of Limitations, the cases are at variance. In some of the States, it is held that when the public title to the street is concerned, the rules of the Statute of Limitations will bar the right of action of the municipality.[2] In other States, the directly contrary doctrine is upheld, and the public right to a highway is held not to be barred by adverse possession under the statute.[3] The true theory, at the basis of the law relating to streets, is undoubtedly that they are acquired or dedicated primarily, if not solely, for the use of the whole public, as distinct from the inhabitants of the municipality, within the limits of which they are located. The corporation possesses an interest in them as trustee for the real owners. Every erection or obstruction upon a street, by which its use is in danger of impairment, is, unless authorized by the Legislature, a public nuisance; and no mere lapse of time will, in the absence of a limit expressly imposed

[1] Burlington v. R. R. Co., 41 Iowa, 134.

[2] Chicago v. Middlebrook, 32 N. E. R. 457 (Ill. 93); Wheeling v. Campbell, 12 W. Va. 36; Bowen v. Team, 6 Rich. 398; Fort Smith v. McKibben, 41 Ark. 45; Litchfield v. Wilmot, 2 Root (Conn.) 288; Terrill v. Bloomfield, (Ky. 93) 21 S. W. R. 1041; Cincin. v. Evans, 5 Ohio St. 594; Levasser v. Washburn, 11 Gratt. 572; Richmond v. Poe, 24 Ib. 149; Gregory v. Knight, 50 Mich. 61; Coleman v. Flint etc., 64 Ib. 160; Black v. O'Hara, 5 Atl. Rep. 598; Meyer v. Graham, (Neb. 92) 51 N. W. R. 17.

[3] Dewitt v. Elmira Transfer Co., 134 N. Y. 495; Driggs v. Phillips, 103 Ib. 77; Vicksburg v. Marshall, 59 Miss. 563; Simplot v. Chicago etc., 16 Fed. Rep. 350; Webb v. Demopolis, (Ala. 91) 13 So. R. 289; St. Vincents etc. v. Troy, 76 N. Y. 108; Durham v. Hussman, (Iowa, 93) 55 N. W. R. 11; Ellis v. State, (Tex. 93) 21 S. W. R. 66; Sumner v. Peebles, 22 Pac. R. 221; 5 Wash. St. 471; Flynn v. Detroit, 93 Mich. 590; Devoe v. Smeltzer, (Iowa, 93) 53 N. W. R. 287; Pallers v. Sollers, (Md. 93) 26 Atl. R. 188; Koff v. Utler, 101 Pa. St. 27; Com. v. Moorhead, (Pa.) 12 Atl. R. 424; Philadelphia v. Phila. etc. R. Co., 58 Pa. St. 263; Mayor v. Cornell, 6 Coldw. 412; Almy v. Church, (R. I. 93) 26 Atl. R. 58; People v. Pope, 53 Cal. 437; Visalia v. Jacob, 65 Ib. 434; Wolfe v. Sullivan, (Ind. 93) 32 N. E. R. 1017; Logan Co. v. Lincoln, 81 Ill. 156; Jersey City v. State, 30 N. J. L. 521; Crocker v. Collins, (S. C. 93) 15 S. E. R. 951; People v. Pope, 53 Cal. 437; Sims v. Frankfort, 79 Ind. 446; Coleman v. Thurmond, 56 Tex. 514; McTarnahan v. Pike, 91 Cal. 540; Board v. Martin, 92 Ib. 209; San Francisco v. Bradbury, Ib. 414; Taylor v. Phillippi, 14 S. E. R. 130; 35 W. Va. 554.

by the sovereignty, make such obstruction other than a nuisance, subject to the public right of abatement.[1]

Every repetition of a nuisance is indictable; and upon general principles, it is clear that no one ought to be allowed to take such an advantage of his own wrong, as will enable him to acquire for private and individual purposes public lands, which by the policy of the law are taken out of the market and made inalienable for such purposes.[2] A distinction, however, has been made by some courts between the claims of the State and of the municipality, based upon the assumed fact, that the exemption from the statute is a prerogative of sovereignty alone; in other words, of the State.

The difference also is pointed out between the condition of the lands and highways in the State, outside of the city limits —frequently sparsely populated, subject to the intrusion of squatters, and distant from the central government; and the condition of the town or city—thickly inhabited and with the proper officials close at hand, and ready to prevent encroachments.[3]

[1] Dil. Mun. Corp. § 669.

[2] Elliott on Roads and Streets, p. 669; Sims v. Chattanooga, 1 Lea, 694; Com. v. McDonald, 16 R. & S. (Pa.) 390; Barter v. Com., 3 Pa. 253; Penny Pot Landing Cas., 16 Pa. St. 79; Phila. v. Phila. etc., 58 Pa. St. 253. In Com. v. Alburger, 1 Whart. 469, it was said: "These principles pervade the laws of the most enlightened nations as well as our own code, and are essential to the protection of public rights, which would be gradually frittered away, if the want of complaint or prosecution gave the party a right. Individuals may reasonably be held to a limited period to enforce their rights against adverse occupants, because they have an interest sufficient to make them vigilant. But in public rights of property, each individual feels but a slight interest, and rather tolerates even a manifest encroachment than seeks a dispute to set it right." See, also, Indianapolis etc. v. Ross, 47 Ind. 25; New Orleans v. Maggioli, 4 La. An. 73; Ingram v. Pol. Jury, 20 Ib. 226; Delabigarre v. Sec. Munic., 3 Ib. 237; Shreveport v. Walpole, 22 Ib. 526; Staffordshire v. Prop'rs etc. Law Rep., 1 E. & I. Appeals, 254; Rochdale Can. Co. v. Radcliffe, 18 Q. B. 287; Elwell v. Prop'rs etc., 3 H. of L. Cases, 812; Grand Surrey Can. Co. v. Hall, 1 M. & G. 392; see, also, as bearing upon adverse possession against a municipal corporation, Dil. Mun. Corp. §§ 667–675; Heushaw v. Hunting, 1 Gray, 203; Fox v. Hart, 11 Ohio, 414; Com'rs v. Taylor, 2 Bay (S. C.) 282; Oustott v. Murray, 22 Iowa, 457; McFarlane v. Kerr, 10 Bosw. (N. Y.) 249; Kellogg v. Thompson, 66 N. Y. 88; State v. Pettis, 7 Rich. (S. C.) Law, 390.

[3] Wheeling v. Campbell, 12 W. Va. 36; Dil. Mun. Corp., 473.

There are some extraordinary and exceptional cases, in which the courts have applied the doctrines of equitable estoppel to prevent the municipality from asserting its title to lands, once a part of the highway, which had been encroached upon by the abutting owner; where, through the criminal or culpable negligence of the municipal authorities, the abutting owner has been induced to rely upon his apparently good title, and where he would suffer irreparable damage, if the municipality were now allowed to assert its title.[1] But this cannot be safely taken as a definitely settled rule.[2]

§ 313. **Definition, character and construction of public bridges.**—A public bridge is a structure, erected across a natural or artificial water course and employed by the public in traversing the stream.[3] The erection of a public bridge is the "laying out of a highway,"[4] and "the principal circumstance necessary to constitute a public bridge is that the people at large may have a free and uninterrupted use of it, not upon sufferance, but as a matter of right."[5]

Such a bridge may be erected by the municipal authorities

[1] Meyer v. Graham, (Neb. 92) 50 N. W. R. 763; Simplot v. Dubuque, 49 Iowa, 630; Quincy v. C. B. & Q. R. R., 92 Ill. 21; Ramsay v. Clinton Co., Ib. 226; Flynn v. Detroit, 93 Mich. 590; 53 N. W. R. 815; Check v. Aurora, 92 Ind. 107; Com'rs v. Huff, 91 Ib. 333; Waterloo v. Union Mill, 72 Iowa, 437; Orr v. O'Brieu, 77 Ib. 253; Brooks v. Riding, 46 Ind. 15; Devaux v. Detroit, Harring. Ch. (Mich.) 98; Big Rapids v. Comstock, 65 Mich. 78; s. c., 31 N. W. Rep. 811; Elliott v. Williamson, 11 Lea, 38; Lane v. Kennedy, 13 Ohio St. 42, 49.

[2] See Tiedeman's Equity Jurisprudence, §§ 106–115, on explanation and scope of the doctrine of equitable estoppel.

[3] Elliott on Roads and Streets, 21; see, also, Com. v. Pittston F. B. Co., (Pa. 92) 24 Atl. R. 87; Enfield Bridge Co. v. Hartford, 17 Conn. 40; Tolland v. Wilmington, 26 Ib. 578; Board etc. v. Strader, 18 N. J. L. 108; McKinley v. Freeh., 29 N. J. Eq. 164; Whitall v. Freeholders, 40 N. J. L. 302; State v. Gloucester, Ib. 302; Board of Com'rs v. Beirly, 23 N. E. R. 672; 122 Ind. 46; Duncan v. State, (Fla. 92) 10 So. R. 815 (bridge defined); State v. Demarce, 80 Ind. 520; State v. Gorham, 37 Me. 451; White v. Quincy, 97 Mass. 430; Board v. Brown, 89 Ind. 48, 52.

[4] Washer v. Bullet Co., 110 U. S. 558; San Luis Obispo v. White, (Cal. 91) 24 Pac. 864; People v. Com'rs, 4 Neb. 150; Goshen v. Myers, 119 Ind. 196; People v. President, 23 Wend. 254; Mandershid v. Dubuque, 29 Iowa, 73; Jones v. Keith, 37 Tex. 394; Beaver v. Manchester, L. J. 26 Q. B. 311; Parker v. Bos. & M. R. R., 4 Cush. 107; Com. v. Cent. Bridge Corp., 12 Ib. 244; Chicago v. Powers, 42 Ill. 169; Rush v. Davenport, 6 Iowa, 443.

[5] Woolrych on Ways, 196, cited in Elliott on Roads and Streets, 22.

at public expense, by a turnpike or bridge[1] corporation, or by individuals and dedicated to public use.[2] On the principle that acceptance will be inferred from the beneficial nature of a grant, a bridge, built by an individual, but of which the public has the use, is deemed a public bridge.[3] A bridge may be open to the public; yet, if erected or maintained for private gain, the builder and not the public will be responsible for its repair.[4] The municipal authorities may either by express acceptance, or by laying out a road, so that the private bridge becomes a part of the highway or street, adopt a bridge which has been constructed by individuals; and the city thereby assumes charge of the bridge, and the duty to keep it safe and fit for use.[5]

Although highways and bridges are similar, in that both are used for the passage of the public, it is by no means true that the rules of law applicable to the former have equal application to the latter; and, in order to charge a person with failure to maintain a bridge, it will not be sufficient to use the word "highway," in imposing such a burden. "Highway" does not include a "bridge."[6]

The word "bridge" signifies the whole structure, including the approaches, abutments, anchorages, piers and all parts necessary to make it safe and convenient for public use.[7] Although

[1] Rex v. West Riding etc., 2 East, 342; Callendar v. Marsh, 1 Pick. 432.

[2] Pisca. B. Co. v. New Hampshire, 7 N. H. 59.

[3] State v. Compton, 2 N. H. 513; Heacock v. Sherman, 14 Wend. 58.

[4] Dygert v. Schenk, 23 Wend. 446; Heacock v. Sherman, 14 Ib. 58; Phœnixville v. Phœnix Iron Co., 45 Pa. St. 135. A good illustration of this principle is found in the erection of a bridge carrying the highway over a canal or railway cutting, and which is required to be kept in repair by the canal or railway company, the burden being imposed upon such company as the condition of authorizing this intersection of the highway: Lowell v. Prop'rs, 104 Mass. 18.

[5] Mayor v. Sheffield, 4 Wall. 189; Houfe v. Town, 34 Wis. 608; State v. Supervisors, 41 Ib. 28; Bisher v. Richard, 9 Ohio St. 495; Dayton v. Ruthland, 84 Ill. 279; Batty v. Duxberry, 24 Vt. 155; State v. Board, 80 Ind. 478.

[6] State v. Canterbury, 8 Foster, (N. H.) 195.

[7] Tinkham v. Town of Stockbridge, 24 Atl. Rep. 761; 64 Vt. 480; Bardwell v. Jamaica, 15 Ib. 442; Com. v. Deerfield, 6 Allen, 449; Whicher v. Somerville, 138 Mass. 454; Clinton Bridge, 10 Wall. (U. S.) 454, 462; Duncan v. State, (Fla. 92) 10 So. Rep. 815; Penn. Towns. v. Perry Co., 78 Pa. St. 457; Everett v. Beisly, 24 Atl. Rep. 700; 150 Pa. St. 152; Watson v. Proprietors, 14 Me. 201; Com'rs v. Pittston, (Pa. 92) 24 Atl. Rep. 87; Tolland v. Willington, 26 Conn. 578; Board of Com'rs v. Beirly, 23 N. E. R. 672; 122 Ind. 46; Proprietors, etc.

the question, whether a structure is or is not a bridge, is usually one of law, it may under peculiar circumstances be one of fact for the jury. So, also, what are parts of a bridge.[1]

§ 314. **Legislative and municipal powers over bridges.**— When the power is possessed by a municipal corporation to build or maintain bridges, it is always conferred upon it by statute, expressly or by necessary or reasonable implication.[2] And, in America, any one who claims the right to bridge over a *navigable* stream, must show statutory authority.[3] A general authorization, "to lay out and open" highways or streets, does not empower a municipality to build bridges across *navigable* streams, however it might be with respect to those not navigable.[4] Although there has been some conflict of the cases, it is now well settled that a State may authorize a municipal or other corporation to place a bridge across a navigable stream, although navigation may thereby be interfered with;[5] and the

v. Hoboken, etc., 13 N. J. Eq. 504; Board v. R. & V. Grav. Road Co., 87 Ind. 502; *contra*, Carter v. Bos. & Prov. R. R. Co., 139 Mass. 525; Swanzey v. Somerset, 132 Ib. 312; Moreland v. Mitchell Co., 40 Iowa, 394; Nims v. Boone Co., 66 Ib. 272.

[1] Polland v. Willington, 26 Conn. 578; Moreland v. Mitchell Co., 40 Iowa, 394; Reg. v. Southampton, 14 Eng. L. Eq. 116; Bardwell v. Jamaica, 15 Vt. 442; Reg. v. Gloucestershire, 1 Car. & M. 506.

[2] Freeholders v. State, 42 N. J. 263; Conn. v. Breed, 4 Pick. 460; Baltimore v. Stoll, 52 Md. 435; Humphrey v. Armstrong Co., 56 Pa. St. 204; Com. v. Taunton, 7 Allen, 309; Savannah v. State, 4 Ga. 26; Penn. Tp. v. Perry Co., 78 Pa. St. 457; Queen v. Inh., 6 Mod. 307; Beatty v. Titus, 47 N. J. L. 89; Springfield v. Conn. R. R., 4 Cush. 637; Fall Riv. I. W. v. Old Colony R. R., 5 Allen, 221.

[3] Whitehead v. Jessup, (93) 53 Fed. 707; People v. Sara. R. R. Co., 15 Wend. 130; Mohawk B. Co. v. Utica R. R., 6 Paige, 554; Fall Riv. etc. v. Old Col. R. R., 5 Allen, 221; State v. Oldtown B. Co., 85 Me. 17; Miller v. Prairie du Chien R. R., 34 Wis. 533; Costello v. Landwehr, 28 Ib. 533; Union Pac. R. R. v. Hall, 91 U. S. 343; Saugatuck B. Co. v. Westport, 39 Conn. 337; Boston, etc. v. Boston R. R., 23 Pick. 360.

[4] Snyder v. Foster, 77 Iowa, 638; Snyder v. Foster, *supra;* Com. v. Charlestown, 1 Pick. 130; Arundel v. McCulloch, 10 Mass. 70; Maxwell v. Bay Bridge Co., 41 Mich. 453; see Elliott, Roads and Streets, p. 35.

[5] Gibbons v. Ogden, 9 Wheat. 1; Williams v. Beardsley, 2 Ind. 59; Gilman v. Phila., 3 Wall. 713; Bridge Co. v. U. S., 105 U. S. 470; Escanaba v. Chicago, 107 Ib. 678; Cardwell v. Bridge Co., 113 Ib. 205; Wheeling Bridge Case, 13 How 518; Com. v. Breed, 4 Pick. 460; Carter v. Proprietors, 104 Mass. 236; People v. Kelly, 76 N. Y. 475; Packet Co. v. Peoria, etc., 38 Ill. 467; People v. Rensselaer, etc., 15 Wend. 113; Wilson v. Blackb. C. Cr. etc., 2 Peters, 245; Cox. v. State, 3 Blackf. 193; Palmer v. Cuyahoga Co., 3 McLean, 226; Chicago v. McGinn, 51 Ill.

corporation, upon which has been conferred this privilege, cannot be held liable for damages from such interference, as long as there is no negligence on its part, and proper skill and diligence are employed.[1]

The right to navigate a stream is one which should be jealously guarded; and although in a great public emergency or necessity it may possibly be destroyed or taken away, in the exercise of the police power;[2] yet, statutes, conferring the power to erect bridges, should be strictly construed in protection of the right of navigation of the streams.[3] Under the common law, the right of exacting toll imposed upon a municipal corporation the duty of keeping its bridges safe for public use, on the theory that the corporation thereby derives a private benefit.[4]

§ 314 *a*. **National control over the construction and maintenance of bridges.**—As a general proposition, the power to regulate the use of navigable rivers resides in the States, through which the rivers flow. And the only constitutional limitation upon the State's power of control, as against the United States government, is that which arises by implication from the express grant to Congress of the power to regulate foreign and interstate commerce. Inasmuch as a large part of this commerce is carried on by the use of the navigable streams of the country, it has been uniformly held by the courts, both Federal and State, that the Federal power to regulate commerce includes the power to institute regulations for the use and control of those streams which are used in the prosecution of foreign and interstate commerce.[5] But inasmuch as all

266; Bailey v. Phila. etc., 4 Harr. 389; Pumphrey v. Baltimore, 47 Md. 145; Hamilton v. Vicksburg, etc., 34 La. An. 970; Wisconsin, etc. v. Manson, 43 Wis. 255.

[1] Hamilton v. Vicksburg, etc., 119 U. S. 281; Carolina S. B. Co. v. Railroad, 30 S. C. 539; Alabama S. R. Co. v. Railroad, 87 Ala. 154. See Shawnee Co. v. Topeka, 39 Kan. 197; 18 Pac. R. 161; Delta Lumber Co. v. Board, (Mich.) 40 N. W. R. 1.

[2] Passaic Bridge Cases, 3 Wall. 782; Pound v. Turck, 95 U. S. 459; State v. Eau Claire, 40 Wis. 533.

[3] Stevens Pt. Boom Co. v. Reilly, 46 Wis 237; Boston v. Crowley, 38 Fed. Rep. 202; Dugan v. Bridge Co., 27 Pa. St. 303; Hickok v. Hine, 23 Ohio St. 523; State v. Freeport, 43 Me. 198.

[4] Oliver v. Worcester, 102 Mass. 489; Eastman v. Meredith, 36 N. H. 289; Biglow v. Randolph, 14 Gray, 543; Thayer v. Boston, 19 Pick. 511; Pittsburgh v. Grier, 22 Pa. St. 54; Aldrich v. Tripp, 11 R. I. 141.

[5] United States v. K. & H. B. Co., 45 Fed. Rep. 414; Rhea v. Newport, etc. Co., 50 Fed. Rep. 16; State v. Leighton, 22 Atl. Rep. 380; 83 Me. 419.

streams may be used in the carrying on of the domestic commerce, and serve other local interests, the congressional power of control does not exclude State regulation altogether. The power of the State to regulate the streams, which may be used in interstate commerce, is unaffected, as long as Congress does not exercise its power; and in any case the State regulations are void only so far as they conflict with the regulations of Congress.[1] In applying this general rule of constitutional limitation to the construction of bridges over navigable streams, it has been held that if the stream, over which it is proposed to construct a bridge, is one which is subject to congressional regulations, because it is used in the conduct of interstate commerce, the authority to construct the bridge may be granted by Congress or by the State Legislature. If Congress grants the franchise, the interference of the bridge with interstate commerce will constitute no objection to the legality of the structure—the determination of Congress, that it causes only a reasonable interference with the navigation of the stream, being conclusive, in the same manner as a like determination of the State Legislature is, in respect to bridges constructed over streams not adapted for use in interstate commerce. But if the State Legislature authorize the construction of a bridge over a stream used in interstate commerce,—inasmuch as the interference with interstate commerce by the State is only permissive, and secondary to the primary control of Congress,—the judgment of the Legislature, that the bridge causes only a reasonable interference with navigation, which is justifiable by the increased facilities for rapid transportation which the bridge affords, is not conclusive; and the ultimate decision, in the absence of congressional action, rests with the Federal Courts, who are deemed to have the power to pass upon the reasonableness of the interference with navigation, and to cause the bridge to be removed, if it is found to interfere materially with the use of the stream in foreign or interstate commerce.[2] But

[1] Cooley's Const. Lim. 730; Tiedeman's Lim. of Police Power, § 203; Wilson v. Black Bird Creek Marsh Co., 2 Pet. 245; Wheeling Bridge Case, 13 How. 518; 18 How. 421; Gilman v. Philadelphia, 3 Wall. 713; Withers v. Buckley, 20 How. 84; Gibbons v. Ogden, 9 Wheat. 1; Escanaba Company v. Chicago, 107 U. S. 678.

[2] Wheeling Bridge Case, 13 How. 518; Columbus Ins. Co. v. Peoria Bridge Co., 6 McLean, 70, 209; Jolly v. Terre Haute Drawbridge Co., 6

even after a bridge has been condemned by a Federal court, because of its unreasonable interference with interstate commerce, Congress may interpose, in the exercise of its power to regulate commerce, and declare the bridge to be a lawful structure.[1]

In consequence of these rulings, the consent of Congress, or the national authorities, to the construction of a bridge, is now always obtained in advance, whenever it is constructed over a stream, which is more or less adapted to use in interstate commerce.[2]

§ 315. **County liability for maintenance and repair of public bridges.**—At common law the duty of repairing public bridges was incumbent upon the county in which they were located;[3] and while this rule has been applied in some cases in America,[4] it may be said that this responsibility of counties to repair bridges has never prevailed generally in this country.[5]

It seems to be the general rule that a county is liable only for the repair of such bridges, which it is by statute authorized or commanded to build and maintain;[6] and it has been held that county funds cannot be used, without statutory authority, to aid in the construction of toll bridges, or even of free bridges.[7] But in Iowa, counties are permitted to aid in the construction of free bridges, within municipal limits, with the consent of the city.[8]

McLean, 237; Com'rs of St. Joseph Co. v. Pidge, 5 Ind. 13.

[1] Wheeling Bridge Case, 18 How. 421.

[2] Rex v. W. Riding, 5 Burr. 2594; Com'rs v. Martin, 4 Mich. 557; State v. Campton, 2 N. H. 513; Board v. Washington Tp., (Ind.) 23 N. E. Rep. 257.

[3] Hill v. Boston, 122 Mass. 344; Washer v. Bullett Co., 110 U. S. 558;

[4] *In re* Waverly Borough, 12 Pa. Co. Ct. 669; Beardsley v. Smith, 16 Conn. 375; Gilman v. Laconia, 55 N. H. 130; Weightman v. Washington, 1 Black, 39; Mackinnon v. Person, 25 Eng. L. & Eq. 457.

[5] *In re* Spier, 115 N. Y. 389; Hill v. Supervisors, 12 Ib. 52; Myers v. Com., 110 Pa. St. 217; Lee v. Yarborough, 85 Ala. 590; Huffman v. San Joaquin Co., 21 Cal. 426.

[6] Taylor v. Davis Co., 40 Iowa, 295; State v. Wood Co., (Wis.) 40 N. W. R. 381; Pandeman v. St. Charles Co., (Mo. 92) 19 S. W. R. 733; Heigel v. Wichita Co., (Tex. 92) 19 Ib. 562; Arnold v. Henry Co., 81 Ga. 730; Wabash v. Pearson, (Ind.) 22 N. E. R. 134; Dougherty v. Supervisors, 12 Pa. Co. Ct. 304; *In re* Kansas City B. & I. Co., 35 Kans. 557; Grayville v. Whitaker, 85 Ill. 439; Moreland v. Mitchell, 40 Ib. 394; Board v. Mitchelltown, (Ind. 92) 30 N. E. Rep. 937; Skinner v. Henderson, (Fla. 90) 7 So. Rep. 464.

[7] Colton v. Hanchet, 13 Ill. 615.

[8] Bell v. Foutch, 21 Iowa, 119; Barrett v. Brooks, Ib. 144.

§ 316. **Rights and duties of municipal corporations in building, rebuilding and maintaining bridges.**—If the expediency or necessity of building,[1] or rebuilding bridges,[2] be left to the discretion of the local authorities, the courts will not interfere in the exercise of what under the circumstances is a discretionary power.[3] But if the duty to repair or rebuild be imperative, *mandamus* will lie.[4] When, in locating or building bridges, the rights of private property are impaired or invaded, an injunction will be granted against the municipal corporation, when acting illegally;[5] but as a rule the courts will not interfere except upon clear proof of fraud or bad faith, or when the municipal or local authorities are exceeding their powers.

Municipal corporations have a qualified ownership in the bridges they build, as trustees for the public; and may maintain all actions which are necessary to protect such ownership and the public use of the structure. This ownership continues, even after the bridge may have been damaged to such an extent as to render it unfit for public use.[6]

The Legislature may provide that the expense attendant upon the construction, maintenance or repair of a bridge connecting two cities, be divided between them;[7] and if one of them under such a statute pays all the expenses, it is entitled to reimbursement by the other.[8] It has been held, however, in such a case that, where one pays more than its share because of an erro-

[1] Macon Co. v. People, 121 Ill. 616; Kankakee v. People, 24 Ill. App. 410; Com. v. Charleston, 1 Pick. 180; Hamilton v. State, 113 Ind. 179; 15 N. E. Rep. 258; Travis v. Skinner, 40 N. W. Rep. 234.

[2] State v. Board, 113 Ind. 179.

[3] State v. Mt. Pleasant, 16 Wis. 613; Jefferson v. St. Louis Co., (Mo. 93) 21 S. W. Rep. 217.

[4] Richards v. County, 120 Mass. 401; State v. Bramwell, (Kan.) 18 Pac. R. 952; State v. Board, 80 Ind. 478; Walker v. Kansas City, 99 Mo. 647; State v. Winterberg, 80 Ib. 519; Howe v. Com'rs, 47 Pa. St. 361; see chapter on *Mandamus*, §§ 362, 377; Augusta etc, *In re*, 12 Up. Can. Q. B. 522; State v. County Co., 11 S. E. R. 72; 33 W. Va. 589; Ottawa v. People, 48 Ill. 233; People v. Dutchess Co., 58 N. Y. 152.

[5] Kyle v. Board, 94 Ind. 115; Quinton v. Burton, 61 Iowa, 471.

[6] City v. Shirk, 88 Ind. 563; Shirk v. Board, 106 Ib. 573; St. Louis B. Co. v. Curtis, 103 Ill. 410.

[7] Kendall v. County, 12 Ill. App. 210; McHardy v. Corporation etc., 1 App. C. 629; 39 Q. B. (Canada) 546; State v. Canterbury, 58 N. H. 195.

[8] Pittsburgh v. Clarksville, 58 N. H. 291; see as to requisites to support the claim, Browning v. Board, 44 Ind. 11; Board v. Thompson, 106 Ib. 534; Browning v. Board, 44 Ib. 11.

neous construction of the statute, it cannot recover from the other.[1]

§ 317. **Private bridges on or intersecting highways.**— When a corporation in constructing a canal or railroad, intersects a street or other highway in such a manner, that a bridge on the highway becomes necessary for its continued use, the duty of constructing and maintaining such a bridge is incumbent upon the private corporation.[2] This duty is imperative and will be enforced by *mandamus*,[3] and, although usually imposed by statute, is equally binding in the absence of statute.[4]

Although owners of private bridges, which are used by the public, are not obliged to build or maintain structures that will support a very unusual weight, such as a railroad car,[5] or a wagon overloaded, or loaded in an unsafe or extraordinary way,[6] they must use ordinary care to keep their bridges reasonably safe for travel and traffic.[7] Where corporations operate canals or railroads for their own use, and erect bridges which intersect streets or highways, they must do so in such a way as not to interfere with the public use of the street, or render its use unnecessarily dangerous.[8] The bridge should be constructed and maintained, with a degree of care proportionate to the known or indicated dangers, although unusual.[9]

If a private corporation build a toll bridge upon a public highway, the corporation may, if it so elect, take such bridge

[1] Jefferson Co. v. St. Louis Co., (Mo. 93) 21 S. W. R. 217; Flynn v. Com'rs, (N. Y.) 22 N. E. R. 1109; Inhabitants v. Charlestown etc., 7 Met. 70; Rex v. Inhabitants, 14 East, 319; Rex v. Inhabitants, 13 Ib. 220.

[2] Wayne Co. etc. v. Berry, 5 Ind. 286; Board v. White Water etc. Co., 2 Ib. 162.

[3] Cambridge v. Charlestown etc., 7 Met. 70; State v. Gorham, 37 Me. 451; Reg. v. Wycomber, L. R. 2 Q. B. 310.

[4] People v. Chicago etc., 67 Ill. 118.

[5] Yordy v. Marshall Co., (Iowa, 93) 53 N. W. R. 298; Monongahela B. Co. v. Pittsburgh etc., 114 Pa. St. 478; Clulow v. McClelland, 151 Ib. 583.

[6] Dexter v. Canton, 79 Me. 463; Clapp v. Town, 3 N. Y. State Rep. 516; McCormick v. Washington, 112 Pa. St. 185.

[7] Board v. Cruiston, 32 N. E. R. 735; Stokes v. Tift, 64 Ga. 312; State v. Zanesville etc., 16 Ohio St. 308.

[8] State v. Minn. etc. Co., 38 Minn. 246; 39 N. W. R. 153; Rexford v. State, 105 N. Y. 229; Town of Roxbury v. R. R. Co., (Vt. 92) 14 Atl. R. 92; Appeal of Philadelphia etc. Co., 15 Atl. R. 476; B. & O. R. Co. v. Walker, 45 Ohio St. 577; 16 N. E. R. 475.

[9] N. Y. etc. Co. v. State, (N. J. 91) 13 Atl. R. 1; Penn. Ry. Co. v. Braddock, 31 W. N. C. 311; Ohio etc. Co. v. Bridgeport, 43 Ill. Ap. 89; Boston etc. Co. v. Cambridge, (Mass. 93) 34 N. E. R. 382; Parker v. Truesdale, (Minn. 93) 55 N. Y. S. 901; Humphrey

upon the dissolution of the company or the expiration of its franchise; upon the ground that such bridge has become a part of a regular system of highways for public use, and hence cannot be diverted to private purposes.[1]

§ 318. **Turnpikes.**—A road or highway, which is constructed and maintained by a private corporation, possessing the legal right to gather toll from travelers, is a turnpike;[2] the theory of the law being, that the tolls paid are the equivalent of taxes and assessments,[3] and that no additional burden is thereby imposed with the change in the mode of collection.[4] It is within the legislative power to grant franchises to turnpike corporations to construct turnpikes and collect toll on existing public roads.[5] And a turnpike may even be established on a city street.[6]

Although turnpikes are operated for private gain and are private property, they become the property of the municipal, or other local authorities, upon abandonment by their owners or forfeiture of their franchise.[7] And this should be the universal rule; although it has been held that, where the fee of the turnpike is in the corporation operating it, the land does not pass to the public on abandonment of the turnpike.[8] The maxim "once a highway always a highway" is as applicable to a turnpike as to a street; and the company to which the

v. Armstrong, 3 Brewster, 49; Gray v. Harris, 107 Mass. 492; Louisville etc. v. Thompson, 107 Ind. 442; Fort Dodge v. Minn. R. R. Co., (Iowa, 93) 54 N. W. R. 243.

[1] Elliott Roads and Streets, p. 34; compare Shirk v. Board, 106 Ind. 573; see § 318, where the same rule is adopted in relation to abandonment of a turnpike.

[2] State v. Haight, 30 N. J. Law, 448; Neff v. Mooresville, 66 Ind. 279.

[3] Craig v. People, 47 Ill. 487; Edward v. Payne, 17 Barb. 567; Regina v. E. & W. Dock, 22 Eng. L. & E. 113; see Buncombe T. Co. v. Baxter, 10 Ired. 222; Seneca R. Co. v. Auburn etc., 5 Hill, 170; Northern B. etc. v. London, etc., 6 M. & W. 428.

[4] Walker v. Caywood, 31 N. Y. 51; Com. v. Wilkinson, 16 Pick. 175; Willis v. Farley, 24 Cal. 490; Turn. Co. v. Atkinson, 1 Sneed, 426; Benedict v. Goit, 3 Barb. 459; Plank Rd. Co. v. Thomas, 8 Harris, 91.

[5] People v. Com'rs, 37 N. Y. 360; State v. Hampton, 2 N. H. 22; Pawton T. Co. v. Bishop, 11 Vt. 198; McKay v. D. & E. R. R., 2 Mich. 139; Chagrin F. Co. v. Cane, 2 Ohio St. 419; Noblesville T. Co. v. Baker, 4 Humph. 315.

[6] Stormfeltz v. Manor Turn. Co., 13 Pa. St. 555; Milakers v. Foster, 6 Oregon, 378.

[7] St. Clair Co. etc. v. Illinois, 96 U. S. 63; Craig v. People, 47 Ill. 487; State v. Dayton etc., 10 Nev. 155; State v. Duff, (Ky. 91) 49 N. W. R. 23; State v. Lawrence Bdg. Co., 22 Kan. 438; State v. Flanagan, 67 Ind. 140.

[8] People v. N. & S. etc., 86 N. Y. 1

franchise had been granted, has received in the tolls paid to them all the benefit, which was contemplated by the Legislature.

A turnpike is a public highway and should not be diverted to private use any more than a street dedicated by the owner; particularly, when, as is frequently the case, the local authorities have made it a part of its own system of streets or roads.[1]

In granting the franchise, there is nothing from which it may be inferred, that the road so established shall ever be anything but a public highway. On the other hand, there is a strong implication that its use as a public highway shall only cease, in strict conformity to law, by abandonment by the public.[2]

§ 319. **Extent of municipal power over turnpikes.**—It is clear that when, upon the surrender or forfeiture of its franchise by the turnpike company, the municipality adopts the turnpike as a public road or street, it becomes vested with the power and duty of maintaining and keeping it in repair, as fully as though it had laid out the way originally.

But a more difficult problem arises when a turnpike exists and is used by the public as a part of the existing system of city streets.[3] Inasmuch as the franchise of the turnpike corporation is beyond impairment, it follows that the municipality cannot exercise that extensive power of supervision and regulation over turnpikes, which it usually possesses over streets; and hence, it cannot be held to the same degree of responsibility for their condition.[4] But under the police power delegated to them, the city authorities can undoubtedly make such ordinances, and take such action, as will compel private corporations, operating turnpikes within the city limits, to keep them in a reasonable condition of repair, and to adopt such precautions that the public safety, health and convenience will not be

[1] Cooley on Const. Limit. 660, 661.

[2] State v. Western etc., 95 N. C. 602; Craig v. People, 47 Ill. 487; People v. Davidson, (Cal.) 21 Pac. R. 538; State v. Lake, 8 Nev. 276; Bridge Corp. v. Lowell, 15 Gray, 106; Thompson v. Mathews, 2 Edw. (N. Y.) Ch. 202; State v. Maine, 27 Conn. 641; Dawes v. Hawkins, 8 C. B. (N. S.) 857.

[3] See as to extent of municipal control, State v. New Brunswick, 30 N. J. L. 395; State v. Hoboken, 30 Ib. 225; Quinn v. Paterson, 27 Ib. 35; State v. Passaic Turnp., 27 Ib. 217. As to plank roads, see State v. Jersey City, 26 N. J. L. 445; McKay v. Detroit etc., 2 Mich. 138; Detroit v. Plank Rd., 12 Mich. 333; Reg. v. Cottle, 3 Eng. L. Eq. 474.

[4] Indianapolis v. McCluer, 2 Ind. 147; Joliet v. Verley, 35 Ill. 58; McCain v. State, 62 Ala. 138.

endangered. In the absence of special statutory authorization, there exists no authority on the part of a municipal corporation to maintain or repair turnpikes, which are operated for gain by a private corporation, upon the fundamental principle that money raised by taxation can only be used for public purposes. The fact that existing turnpikes are by the march of municipal improvement, or by legislative action, brought within city or town limits, does not destroy the franchise.[1] But turnpike companies, like owners of land, over which municipal jurisdiction has been extended, are subject to all the municipal regulations, which are at all applicable to them, or to their property.

Changes in the character of the country will require corresponding changes in the character of the roads; and when we consider that the franchise is granted subject, as is private property everywhere, to the burden of taxation which may become necessary by the growth of population, we see no reason for exempting such a company from its share of the expense or inconvenience, attendant upon a transition from rural to municipal conditions and jurisdiction.[2] Thus, it is held that a turnpike company must change the grade of its road, to correspond with the grade of streets intersecting it.[3] If there is a statutory obligation upon the turnpike corporation to repair its road, and it neglects to do so, the municipality may repair it and collect the cost from the company;[4] and it would seem to be free from reasonable doubt that the municipal corporation might do the same in the absence of statutory authority.

Adjoining landowners cannot be assessed for the expense which is necessary to improve or repair a turnpike,[5] as in the case of a street; but they may be estopped from denying that the way is a city street, by silent acquiescence in the repairs or improvement.[6] The fact, that the public use a turnpike as a street, has been held to justify the municipality in treating it as

[1] St. Catherines v. Gardner, 20 U. Canada C. P. 107; Quinn v. Paterson, 27 N. J. L. 35; Detroit v. Plank Rd. Co., 12 Mich. 333; People v. Detroit, 37 Ib. 195.

[2] See §§ 292, 329: grading streets; Elliott Roads and Streets, p. 58; Indianapolis v. State, 37 Ind. 489.

[3] People v. Squire, 107 N. Y. 593; compare Erie v. Erie Canal Co., 59 Pa. St. 174.

[4] Versailles v. Versailles Co., (Ky.) 10 S. W. Rep. 280.

[5] Wilson v. Allegheny, 79 Pa. St. 272.

[6] Palmer v. Strumph, 29 Ind. 329; State v. Fuller, 5 Vroom, 227.

a street; and no one can successfully object, except the turnpike corporation.[1]

§ 320. **Incidents of toll.**—The right to take toll, although arising sometimes at common law by prescription,[2] is usually in America, like all other franchises, conferred by statute.[3] And the provisions of the statute must be strictly observed and followed, whenever they are at all material, as a condition precedent to the enjoyment of the franchise.[4] When an ambiguity exists in the construction of a statute, which confers this franchise, it will be resolved in favor of the public and against the claimant.[5] Toll as a rule can only be collected at the turnpike gates,[6] the location of which cannot be altered, after being regularly established, unless it is authorized by statute, or compelled by some overpowering necessity.[7] The turnpike corporation must lay out its line within the territorial limit prescribed by its charter; and its gates must be located only at such places as are legally provided for,[8] unless a discretionary power in regard to their location is conferred, when the company may, if it uses its discretion in a fair and reasonable manner, so as not to harass or annoy the traveling public, establish the toll gates at such places, and in such numbers, as it may see fit.[9]

The company can legally close its gates against any one re-

[1] Conestoga, etc. Co. v. Lancaster Co., 151 Pa. St. 543; State v. Passaic, 42 N. J. L. 524; Jersey City v. State, 1 Vroom, 521; State v. Atlantic City, 5 Ib. 99.

[2] Panton Turnpike Co. v. Bishop, 11 Vt. 198; Yarmouth v. Eaton, 3 Burr, 1402; Harpurt v. Wils, 1 Mod. 47; Warren v. Pridaux, 1 Ib. 104.

[3] Boyle v. Phila. etc., 54 Pa. St. 314; Pa. R. R. Co. v. Sly, 65 Ib. 210; Covington etc. Co. v. Sandford, (Ky. 93) 20 S. W. Rep. 1031; Truman v. Walgam, 2 Wils. 296.

[4] Charles River Bridge v. Warren, etc., 11 Pet. 422; Bartram v. Cen. C. Co., 25 Cal. 283; Rives v. Wood, 15 S. W. Rep. 131; Justices v. G. & W. Co., 9 Ga. 475; Kemper v. Cincin. etc., 11 Ohio, 392.

[5] Lees v. Manchester, 11 East, 645; Hall v. Grantham, etc., 13 M. & W. 114.

[6] Lincoln Ave. Co. v. Daum, 79 Ill. 299; Russell v. Muldraugh, 13 Bush, (Ky.) 307; Turnp. Co. v. Vandusen, 10 Vt. 199; comp. New Albany, etc. v. Lewis, 49 Ind. 161; Patterson v. Ind. etc. Co., 56 Ib. 20.

[7] Hartford Co. v. Baker, 17 Pick. 432; State v. Norwalk Co., 10 Conn. 157; Turnp. Co. v. Hosmer, 12 Ib. 361; Griffin v. House, 18 Johns. 397;

[8] State v. Douglas, 10 Oreg. 185; Detroit, etc. Co. v. Mahoney, (Mich.) 36 N. W. Rep. 69.

[9] The Cheshire Co. etc. v. Stevens, 10 N. H. 133; People v. Kingston, etc., 23 Wend. 193; Mallory v. Austin, 7 Barb. 626; Stewart v. Rich, 1 Caines, 182; Farmers, etc. v. Coventry, 10 Johns. 389.

fusing to pay toll;[1] and cutting or breaking down a toll gate, thus lawfully closed, is in Indiana, and perhaps elsewhere, a misdemeanor, beside being a civil injury.[2] The Legislature may exempt certain persons from paying toll by inserting in the charter of the turnpike company a provision to that effect;[3] and the right of exacting tolls may also be waived by contract. But while a turnpike company may by contract exempt certain persons from the obligation to pay toll, it would seem that its power, so to contract, was limited, as in the case of railroads and other common carriers, by the rule that the same privileges and rights must be impartially extended to all, and that the turnpike company cannot enter into contracts, which will unjustly discriminate in favor of one class of the community, and aid it in securing an unfair advantage over others.[4] Not only may a turnpike company maintain an action to recover tolls due,[5] but in some cases penalties are imposed by statutes for non-payment,[6] but no such penalty can be imposed by a corporate by-law.[7]

§ 321. **Law of the road.**—In order that a proper and convenient use may be made of the highways by the public, certain rules have grown up as the result of a long continued and uniform practice, which in some of the States have been ratified and affirmed by statute.[8]

A traveler, generally, may legally occupy any portion of a highway, not occupied by some one else.[9] In England the customary rules for drivers are: *First.* Two parties meeting, each must keep to the left. *Second*, in passing, the first person keeping to the left, the other must pass on the off side. *Third*, in crossing, the person coming transverse shall turn to the left, so as to pass behind the other vehicle.[10]

[1] Bock v. State, 50 Ind. 281.

[2] State v. Walters, 64 Ind. 226.

[3] Turnp. Co. v. Freeman, 14 Conn. 85; Harrison v. James, 2 Chitty, 347; Hearsey v. Pruyn, 7 Johnson, 179; Angell on Highways, (3d ed.) § 359; Stratton v. Herrick, 9 Johns. 356; Stratton v. Hubel, 9 Ib. 357; Pass. Turn. Co. v. Langdon, 6 Vt. 546.

[4] Munn v. Illinois, 94 U. S. 113.

[5] Ayers v. Turnp. Co., 4 Halst. 33; Peacock v. Harris, 10 East, 104; Proprs. v. Taylor, 6 N. H. 499.

[6] Morton, etc. v. Wysong, 51 Ind. 4; W. U. T. Co. v. Scircle, 103 Ib. 227.

[7] Wayne v. Bosworth, 91 Ind. 210.

[8] Daniels v. Clegg, 28 Mich. 32, 44.

[9] Foster v. Goddard, 40 Me. 64; Johnson v. Small, 5 B. Mon. 25.

[10] Elliott Roads and Streets, p. 618, ch. 31; Wayde v. Carr, 2 Dow. & Ry. 255; Turley v. Thomas, 8 Carr. & P. 103.

In America the first of the above rules is reversed. In meeting, each person must bear to the right.[1] When it is provided by statute that travelers shall go to the right of the "center of the road," the center of the traveled part is meant.[2] If the usually traveled path is covered by snow, and another beaten path parallel to it is used, persons who meet upon the latter must turn to the right of its center.[3] The above rule is not an inflexible one, and one may under certain circumstances deviate from it.[4]

The rule does not apply to a building which is being moved along the road,[5] nor to persons crossing the road.[6] Street railroads are exempt from this rule, for their cars cannot be hauled elsewhere than in the tracks, to the use of which they are entitled. But the cars must not be permitted to obstruct travel[7] at crossings, or elsewhere. Other vehicles are permitted to use the tracks in a reasonable manner, and all persons have a right to drive or walk on them, or to cross them, provided they do not interrupt or impede the use of the tracks by the cars.[8] A person violating the law of the road does so at his own risk, and must in such a case use greater care.[9] If a collision takes place, particularly in the dark,[10] a presumption will exist against the person violating this rule.[11]

In this country on passing, the leading driver must turn to

[1] Kennard v. Burton, 25 Me. 39; Mahogany v. Ward, (R. I.) 17 Atl. Rep. 860; Com. v. Allen, 11 Met. 403; Wrinn v. Jones, 111 Mass. 350; O'Malley v. Dorn, 7 Wis. 236; McLane v. Sharp, 2 Harr. 481. The court will take judicial notice of this custom. Leame v. Bray, 3 East, 593.

[2] Clark v. Com., 4 Pick. 125; Earing v. Lansing, 17 Wend. 185; Daniels v. Clegg, 28 Mich. 32.

[3] Jacquith v. Richardson, 8 Met. 213; Smith v. Dygert, 12 Barb. 613.

[4] Kennard v. Burton, 25 Me. 39; Strouse v. Whittlesy, 41 Conn. 559; Dudley v. Bolles, 24 Wend. 465; Beach v. Parmenter, 23 Pa. St. 196; Johnson v. Small, 5 B. Mon. 25.

[5] Graves v. Shattuck, 35 N. H. 257.

[6] Lovejoy v. Dolan, 10 Cush. 495; Morse v. Sweenie, 15 Bradw. 486; Lloyd v. Ogleby, 5 C. B. 667.

[7] Com. v. Temple, 14 Gray, 69; Hegan v. Eighth Av. etc. Co., 15 N. Y. 380; Adolph v. Cen. Park etc. Co., 65 Ib. 554; Same v. Same, 76 Ib. 530.

[8] Adolph v. Cen. P. etc. Co., 76 N. Y. 530; Buhrens v. D. D. E. etc. Co., 53 Hun, 571; Gov. St. Ry. Co. v. Hanlon, 53 Ala. 70; Shea v. Potrero, 44 Cal. 414; *contra*, Johnson v. Canal St. Ry. Co., 27 La. An. 53.

[9] Holland v. Bartch, (Ind.) 22 N. E. R. 83; Pluckwell v. Wilson, 5 C. & P. 375; Brooks v. Hart, 14 N. H. 307; Wilson v. Rockland etc. Co., 2 Harr. 67.

[10] Cruden v. Fentham, 2 Esp. 685.

[11] Burdick v. Worrall, 4 Barb. 596; Spofford v. Harlow, 3 Allen, 176.

either side of the road which will allow enough room on the other side for the rear driver to pass,[1] either to the right or to the left as may be most convenient.[2] But the neglect or refusal of the leading traveler to turn to one side does not justify the other in attempting to pass him at all hazards, or in running him down. Persons using a highway owe to each other the duty of ordinary care, and each may assume that the other will employ that care.[3]

[1] Bolton v. Colder, 1 Watts, 360.
[2] Clifford v. Tyman, 61 N. H. 508.
[3] Harpell v. Curtis, 1 E. D. Smith, 78; Baker v. Tehr, 97 Pa. St. 70; Piggott v. Lilly, 27 N. W. Rep. 3; Avegno v. Hart, 20 La. An. 235; Center v. Finney, 17 Barb. 94; Burnham v. Butler, 31 N. Y. 480; Knowles v. Crampton, 11 Atl. Rep. 593.

CHAPTER XVII.

LIABILITY OF MUNICIPAL CORPORATIONS FOR TORTS.

§ 324. **Implied liability of municipal corporations.**—Municipal corporations are the creatures of statute, and the powers which they possess, and the duties which they perform, are in the majority of cases wholly imposed and defined by the statute law. It is therefore a cardinal rule, that in every case the liability of a body created by statute must be determined upon a true interpretation of the statute, by which it is created.[1] When express statutory provisions declare the corporation to be liable for a tortious act, or for failure to act, the question is simply one of degree; and, upon the facts being proven, little remains to be done but to ascertain the extent to which the corporation has been derelict, and the amount of the damages sustained by the complainant. But when there is no express or implied statutory municipal liability for tort, and a plain municipal duty has been violated with a consequent damage to some one's person, or property, there is no general rule by which it can be decided in every case whether a civil action will lie.[2] As will be seen farther on, a great deal depends upon the nature of the duty,[3] which is incumbent upon the municipal corpo-

[1] Mersey Docks v. Gibbs; Same v. Penhallow, L. R. 1 H. L. Cases, 93; 1 H. & N. 439; Richmond v. Long's Adm., 17 Gratt. 375; Southampton, etc., Co. v. Local Board, 8 El. & Bl. 812; Winch v. Conservators of Thames, L. R. 9 C. P. C. 378. It should be borne in mind in this connection that in many States a liberal statutory construction is expressly commanded and the common law rule, that statutes in derogation thereof are to be strictly construed, is abolished. Stimpson's Statutes, art. 102.

[2] Heeney v. Sprague, 11 R. I. 456; Flynn v. Canton, 40 Md. 312; 2 Thomps. Neg., ch. 16.

[3] Hill v. Boston, 122 Mass. 344.

ration; and this is to so large an extent based upon the peculiar facts and circumstances of each case, that it is best to refrain from laying down any universal rule, and endeavor justly to determine each case upon its own merits.[1]

Municipal duties may be divided into two classes: First, governmental duties, which have been delegated to the city or town by the people acting through the Legislature; and which, though performed within circumscribed territorial limits, serve to benefit the people of the State; and in the carrying out of which the municipal corporation is only an agent of the State.[2] Secondly, *quasi-private* duties, to be exercised for the peculiar advantage of the municipal locality and its inhabitants; and exclusive of any benefit to be conferred upon any person outside of the corporate jurisdiction. The first class of duties are the duties of sovereignty, delegated though they be; and for their violation the municipality is no more liable, unless made so by express statute, than is the State, whence they are derived.[3] The second class of duties are not imposed as a burden, but conferred on the municipal corporation and its inhabitants as a benefit, to be accepted and exercised to the advantage of the municipality alone, which the city receives somewhat as a private proprietor. There is, therefore, no injustice in the rule of law that these duties shall be carefully performed; and that the corporation shall be civilly liable in damages in all cases, where a person is injured by reason of their negligent performance.[4]

[1] Lloyd v. New York, 5 N. Y. 369, 375; Cobb v. Dalton, 53 Ga. 426; Conway v. Beaumont, 61 Tex. 10.

[2] Sebert v. Alpena, (Mich. 91) 43 N. W. R. 1098; Pettengill v. Yonkers, 22 N. E. R. 1095; 116 N. Y. 558; King v. Oshkosh, 44 N. W. R. 745; 75 Wis. 517; Michigan v. Boekling, 23 N. E. R. 518; 122 Ind. 39; Snyder v. St. Paul, (Minn. 93) 53 N. W. R. 763.

[3] O'Rourke v. Sioux Falls, (S. D. 93) 54 N. W. R. 1044; Lawson v. Seattle, (Wash. 93) 33 Pac. R. 347; Rahway v. Carter, (N. J. 93) 26 Atl. R. 96; Columbus etc. Co. v. Columbus, (Ohio 93) 33 N. E. R. 292; Brumbaugh v. Philadelphia, 154 Pa. St. 109; Howland v. Maynard, (Mass. 93) 34 N. E. R. 515; Reed v. Madison, 83 Wis. 171; O'Rourke v. Sioux City, (Neb. 93) 54 N. W. R. 1044; Snider v. St. Paul, (Minn. 93) 53 N. W. R. 763; Ulrich v. St. Louis, 112 Mo. 138; Peters v. Lindsborg, 40 Kan. 654; Le Clef v. Concordia, 21 Pac. Rep. 272; Hardy v. Keane, 52 N. H. 570; New York etc. Co. v. Brooklyn, 71 N. Y. 580; Summers v. Daviess Co., 103 Ind. 262; Detroit v. Blakely, 21 Mich. 84; McCarthy v. Boston, 135 Mass. 197; Sullivan v. Holyoke, 135 Ib. 273.

[4] Galveston v. Posnainsky, 62 Tex. 118; Hewison v. New Haven, 37 Conn. 475. In these two cases the

§ 325. **Quasi-municipal corporations not liable for breach of official duty.**—Following the principle that there is, in the absence of statute expressly creating it, no liability for the nonperformance or negligent performance of the purely public duties, which are imposed upon municipal corporations as a part of the sovereign power of the State, the courts have generally held that those *quasi*-municipal corporations, known as townships, counties, school districts and New England towns, are not liable in damages for injuries received by any person, through the misconduct or negligence of any officer of such *quasi* corporation in the performance of such public duties.[1]

distinction is clearly brought out. Rhodes v. Cleveland, 11 Ohio, 159; Lan. Can. Co. v. Parnably, 11 Ad. & E. 223; McKinnon v. Penson, 25 Eng. L. & E. 457; Scott v. Mayor, 37 Ib. 495; Requa v. Rochester, 45 N. Y. 129; Bear v. Allentown, (Pa. 90) 23 Atl. R. 1062; Roch. W. Lead Co. v. Rochester, 3 Ib. 463; Aldrich v. Tripp, 11 R. I. 141; McCormick v. City, 10 N. Y. S. 272; 63 Hun, 632; Conrad v. Ithaca, 16 N. Y. 158; Barton v. Syracuse, 36 Ib. 54; Vandalia v. Ropp, 39 Ill. App. 344; Bayly v. Mayor, 3 Hill, 538; West v. Brockport, 16 N. Y. 161; Ring v. Cohoes, 77 Ib. 83; Noonan v. Albany, 79 Ib. 470; Olney v. Riley, 39 Ill. App. 401; Bloomington v. Bay, 42 Ill. 503; Stirling v. Thomas, 60 Ib. 265; White v. Bond, 58 Ib. 298; Town v. Kemper, 55 Ib. 346; Barron v. Detroit, 54 N. W. R. 273; 94 Mich. 601; Jones v. New Haven, 34 Conn. 1; Allbrittin v. Huntsville, 60 Ala. 465; Augusta v. Hudson, 88 Ga. 599; 15 S. E. R. 678; Meares v. Wilmington, 9 Ired. L. (N. C.) 73; Barthold v. Philadelphia, 154 Pa. St. 109; Wheeler v. Troy, 20 N. H. 77; Ball v. Winchester, 32 Ib. 435; Hillsboro v. Ivey, 20 S. W. R. 1012; 1 Tex. Civ. Ap. 653; Anne Arundel Co. v. Duckett, 20 Md. 469; Com'rs etc. v. Gibson, 36 Ib. 229; Jacksonville v. Doan, (Ill. 93) 33 N. E. R. 878; Boyd v. Insurance Patrol, 113 Pa. St. 169; Mayor of Memphis v. Lessor of Humph. 757; Munk v. Watertown, 67 Hun, 261; Simmer v. St. Paul, 23 Minn. 408; Logansport v. Wright, 25 Ind. 513; Bohan v. Avoca, 154 Pa. St. 404; McConnell v. Dewey, 5 Neb. 385; Gould v. Topeka, 32 Kan. 485; Milnes v. Huddersfield, L. R. Q. B. Div. 124; McDonnell v. Philadelphia, 12 Pa. Co. Ct. R. 672; Marion v. New Bedford, (Mass. 93) 33 N. E. R. 605; Vandalia v. Huss, 41 Ill. Ap. 517; McInerney v. Reading, 150 Pa. St. 611; Greenwood v. Westport, 53 Fed. 824; Barron v. Detroit, 94 Mich. 601; Freeholders v. Strader, 18 N. J. L. 108; Young v. Comm'rs, 2 N. & McC. (S. C.) 537.

[1] Hollensworth v. County Com'rs, (Neb. 93) 54 N. W. R. 70; Huffman v. San Joaquin, 21 Cal. 426; Crowell v. Sonoma Co., 25 Ib. 313; Board v. Bish, (Colo. 93) 33 Pac. 184; Fulton Co. v. Rickel, 106 Ind. 501; Abbett v. Johnson Co., 114 Ib. 61; Bibb Co. v. Dorsey, (Ga. 93) 15 S. E. R. 687; White v. City of Charleston, 2 Hill L. (S. C.) 571; White v. Chowan Co., 90 N. C. 437; Turner v. Woodbury, 57 Iowa, 440; McGuinness v. Westchester, 66 Hun, 256; Detroit v. Blakely, 21 Mich. 84; Larkin v. Saginaw Co., 11 Ib. 88; Allen Co. v. Creirston, (Ind. 93) 32 N. E. R. 735;

And this is true of these territorial divisions, even though they may be vested by statute with corporate capacity, and with the power of taxation.[1] Thus, it has been held that a board of education, whose function is to administer the law of the State, by which a system of common schools is provided, is not liable to a pupil in one of its schools for an injury which resulted from the negligence of the board, unless the board or the school district is made liable by statute.[2]

It is the duty of a town or county to provide suitable buildings for schoolhouses, for holding town meetings, for courts of justice and similar purposes. But these and similar territorial divisions are generally considered to be simply the agencies created by the State more effectually to carry out the objects for which such buildings are used. And the fact, that they are declared by statute to be corporations, does not alter the relation they hold to their inhabitants, who would have to meet the charges of liability to persons injured by such misfeasances.[3]

Governor v. Justice of Clark Co., 19 Ga. 97; Smith v. Board of Carlton Co., 46 Fed. 340; Clark v. Lincoln Co., 25 Am. & Eng. Cor. Cas. 211; Com'rs etc. v. Martin, 4 Mich. 557; Frio v. Earnest, (Tex. 90) 16 S. W. R. 1036; Hickock v. Trustees, 16 N. Y. 161; Garlinghouse v. Jacob, 4 Ib. 161; Gould v. Booth, 66 Ib. 62; Hill v. Laurens Co., (S. C. 92) 13 S. E. R. 318; Conrad v. Ithaca, 16 N. Y. 158; Farnum v. Concord, 2 Ib. 392; Weightman v. Washington, 1 Black, 39; Whitney v. Town of Ticonderoga, 27 N. E. R. 403; Baxter v. Winooski, 22 Vt. 123; Beardsley v. Smith, 16 Conn. 375; Chidsey v. Canton, 17 Ib. 475; Fritz v. Kansas City, 84 Mo. 632; Spicer v. County Com'rs, 126 Ind. 369; Granger v. Pulaski Co., 26 Ark. 37; Mitchell v. Rockland, 52 Me. 118; Jernee v. Chosen Freeholders, 52 N. J. L. 553; Askew v. Hale Co., 54 Ala. 639; Barbour Co. v. Horn, 48 Ib. 566; Van Eppes v. Mobile, 25 Ib. 460; Morin v. Multonah Co., (Or. 90) 22 Pac. 490; Marion Co. v. Riggs, 24 Kan. 255; Eikenberry v. Township, 22 Ib. 556; Fry v. Albermarle Co., (Va. 90) 9 S. E. R. 1004; Woods v. Colfax Co., 10 Neb. 552; Lehigh Co. v. Hoffart, 19 W. N. C. (Pa.) 363; Ratliff v. County Co., (W. Va. 90) 10 S. E. R. 28; Young v. Edgefield, 2 Nott & McC. (S. C.) 537; Sulton v. Board, 41 Miss. 236; Navasota v. Pearce, 46 Tex. 525; Dashman v. Mills Co., (Iowa, 93) 55 N. W. R. 468.

[1] In California the rules of nonliability, applicable to counties, are applied to incorporated cities, upon the ground that they are governmental instruments, created for the purposes of administering the laws of the State. Winhiger v. Los Angeles, 45 Cal. 36; Tranter v. Sacramento, 61 Ib. 271.

[2] Finch v. Toledo Bd. of Ed., 30 Ohio St. 37; Kincaid v. Hardin Co., 53 Iowa, 430; Flori v. St. Louis, 69 Mo. 341; Brabham v. Hindo Co., 54 Miss. 363.

[3] Cooley v. Freeholders, 27 N. J. L. 415; White v. Chowan, 90 N. C. 437; Crowell v. Sonoma, 25 Cal. 313; Clark v. Adair, 79 Mo. 526; Marion

So, a town in New England is not responsible—unless made so by statute—to one who is injured by the defective condition of a school or meeting-house,[1] or to a scholar attending its school, who is injured by a dangerous excavation in the schoolhouse yard, where the exposure is due to the negligence of its officials.[2] It has been repeatedly held that counties are not liable for the defective condition of their public buildings, even when it was conclusively shown or admitted, that the condition of the building was to be attributed to the negligent conduct of the county officials;[3] nor are they liable for nuisances.[4] County courts have been held to be a part of the State judiciary, and the county is not liable for their action, or refusal to act.[5]

§ 326. **Liability of municipal corporations for illegal taxes, fines and licenses—Compulsory payment necessary.**—In the absence of any statutory remedy, actions to recover money, which has been illegally collected for taxes or assessments, are usually maintainable, only when the following prerequisites exist: First, the authority to levy the tax must have been wholly wanting, making the tax absolutely invalid, and not merely irregular.[6] Secondly, the money must have been received by the municipality for its own use, in carrying out cor-

Co. v. Riggs, 26 Kan. 255; White v. Bond, 58 Ill. 297; Barbour Co. v. Brinson, 36 Ala. 362; Greene v. Eubanks, 80 Ala. 204.

[1] Eastman v. Meredith, 36 N. H. 284; see Solomon v. Osceola, 43 N. W. R. 990; 77 Mich. 365; Mechanics' Bk. v. Granger, (R. I.) 20 Atl. Rep. 202.

[2] Bigelow v. Randolph, 14 Gray, 541.

[3] Governor v. Clark Co., 19 Ga. 97; Seales v. Chattahooche Co., 41 Ib. 225; Hamilton Co. v. Mighels, 7 Ohio St. 109; Ward v. Hartford Co., 12 Conn. 404; Kincaid v. Hardin Co., 53 Iowa, 430; Sherbourne v. Yuba Co., 21 Cal. 113; Mitchell v. Rockland, 52 Me. 118.

[4] Board v. Bish, (93) 55 N. W. 408; Crowell v. Sonoma Co., 25 Cal. 313; Threadgill v. Anson Co., 99 N. C. 352.

[5] Miller v. Iron Co., 29 Mo. 122; State v. St. Louis Co. Court, 34 Ib. 546.

[6] Biggs v. Board of Com'rs, (Ind. 93) 34 N. E. 500; Wiesman v. Brigham, 83 Wis. 550; 53 N. W. Rep. 911; Ratterman v. Exp. Co., 49 Ohio St. 698; 32 N. E. Rep. 754; Rushton v. Burke, (Dak.) 43 N. W. Rep. 815; Tarbitt v. Louisville, (Ky.) 4 S. W. Rep. 345; Fremont etc. Co. v. Holt Co., 45 N. W. Rep. 163; Boston M'f'g Co. v. Com., 144 Mass. 598; 32 N. E. R. 362; Hennel v. Board, 132 Ind. 32; 31 N. E. R. 462; Douch v. Board Com'rs of Lake Co., (Ind. 92) 30 Ib. 204; Michigan Ld. etc. Co. v. Republic, (Mich.) 32 N. W. R. 832; Indianapolis v. Vagen, 111 Ind. 240; Powers v. Sandford, 39 Me. 183; Emery v. Lowell, 127 Mass. 138; Peyser v. New York, 70 N. Y. 49; Hayford v. Belfast, 69 Me. 63; Gilman v. Waterville, 59 Ib. 491;

porate purposes as distinct from those public purposes, in the execution of which it acts as an agent of the State. Thirdly, the taxpayer must have paid the tax under compulsion. The same conditions determine the liability for return of an illegal license-tax or fine, which may be imposed by a municipal court.[1]

These actions are, in form, usually common law actions of *assumpsit*, for money had and received; but their character is equitable. And when the payment is founded on mistake or fraud, a court of equity will take and retain jurisdiction, in order that justice may be done upon all the facts of the case.

No action will lie to recover back taxes which are justly due, but upon which doubt has been cast, by reason of irregularities in the details of the levy or collection. But care should however be observed in the application of this rule to local assessments, which are always the subject of statutory provisions which are strictly construed,[2] and with which there must be a substantial if not literal compliance, in the details of the inception and execution of the work, in order that the municipality may acquire jurisdiction and levy a legal and valid assessment.[3] In seeking to recover illegal assessments, a material distinction should be recognized between proceedings which are void because of lack of jurisdiction, and proceedings which are irregular because of departure from statutory requirements. In the former case, the assessment is absolutely void; in the latter, its voidability depends upon the extent to which the requirements are mandatory.[4] For these reasons, it is not just to require the

[1] See, generally, The Collector v. Hubbard, 12 Wall. 1, 12; Grimley v. Santa Clara Co., 68 Cal. 575; Foley v. Haverhill, 144 Mass. 352; First Nat. Bank of H. v. Americus, 68 Ga. 119; Winter v. Montgomery, 65 Ala. 403; O'Brien v. Colusa Co., 67 Cal. 503; Stephenson Co. Sup. v. Manny, 56 Ill. 160; McKee v. Anderson Council, Rice L. 24; Taylor v. People, 66 Ill. 322; Bennett v. Buffalo, 17 N. Y. 383; Howell v. Buffalo, 15 N. Y. 512; Dewey v. Niagara Co. Sup., 62 N. Y. 294, where the defendant was held not to be liable, where the money was received for the use of others, and not for its own use.

[2] Walker v. District, 12 Cent. Rep. 408; City v. Murphy, 3 S. E. Rep. 326; Hewes v. Rice, 40 Cal. 255; Taylor v. Palmer, 31 Ib. 241; Smith v. Toledo, 24 Ohio St. 126.

[3] See ch. xv on Taxation; Merritt v. Portchester, 71 N. Y. 309; White v. Stevens, 34 N. W. R. 255; Rauch v. City, 22 Pa. Rep. 22; Sewall v. St. Paul, 22 Minn. 511; Chicago v. Wright, 32 Ill. 192; Butler v. Nevin, 88 Ib. 575.

[4] Sumner v. Dorchester First Parish, 4 Pick. 361; Osborn v. Danvers, 6 Pick. 98; Preston v. Boston, 12 Pick. 7; Howe v. Boston, 7 Cush. 273; Wright v. Boston, 9 Cush. 233; Emery v. Lowell, 127 Mass. 138; Hay-

same strictness in cases of assessments which are special charges of an exceptional nature, as is properly acquired in general taxation, which is a burden borne by all for the benefit of all; and which every landowner expects to pay in exchange for the protection his property receives.[1]

The principles, which are outlined above as employed in the recovery of illegal taxes, may be applied to illegal licenses or fines, keeping in view their special character which distinguishes them like assessments, from general taxation.[2] If the property taxed is exempt from taxation by federal law; as, for example, United States bonds,[3] an illegal tax levied thereon can be recovered from the city;[4] and so likewise, may a local assessment, which is originally invalid, but collected under color of authority for corporate purposes, be recovered with interest, even when the amount had been paid over to third persons.[5]

In actions to recover taxes or licenses illegally collected, the burden of proof of the illegality is upon the plaintiff.[6] The

ford v. Belfast, 69 Me. 63; Gilman v. Waterville, 59 Ib. 491; First Eccl. Soc. of H. v. Hartford, 38 Conn. 274; *In re* Aiken Ave., 11 Pa. Co. Ct. 228; Rogers v. Greenbush, 58 Me. 390; Peyser v. New York, 70 N. Y. 497.

[1] Cleveland v. Tripp, 13 R. I. 50; Manistee L. Co. v. Springfield, 52 N. W. Rep. 468; 92 Mich. 277; Donch v. Board Com'rs of Lake Co., (Ind. 92) 30 N. E. Rep. 204; R. & A. etc. Co. v. City, 81 Va. 473; Willard v. Presbury, 14 Wall. 676.

[2] People v. Mayor, 4 N. Y. 419; Palmer v. Stumph, 29 Ind. 329; Saturn v. Trenton, 85 Ga. 468; 11 S. E. R. 705; Garland v. Gaines, (Ark.) 2 S. W. R. 460; Collector v. Hubbard, 12 Wall. 1, 12; Stephenson Co. v. Manny, 56 Ill. 160; Grimley v. Santa Clara Co., 68 Cal. 575; Foley v. Haverhill, 144 Mass. 352; Winter v. Montgomery, 65 Ala. 403.

[3] Union Nat. Bank v. New York, 51 N. Y. 638.

[4] Nat. Bk. of Chemung v. Elmira, 53 N. Y. 49; Indianapolis v. McAvoy, 86 Ind. 587.

[5] Bank of Commonwealth v. New York, 43 N. Y. 189; Moss v. Cummings, 44 Mich. 359; 22 Alb. L. J. 376; Calloway v. Milledgeville, 48 Ga. 309; Wattles v. Lapeer, 40 Mich. 624; Tallant v. Bermingham, 39 Iowa, 543; Tuttle v. Everett, 15 Miss. 27; Grand Rapids v. Blakely, 40 Mich. 367. In this last case, the court said, "The further point that as the fund is not for city use, the city is not liable, is untenable. If the money was illegally exacted by the marshal under color of city authority, and was by him paid to and received by the city, the latter cannot escape liability by reason of the special object of the tax. Where the party entitled demands restoration, it is no answer for the city to say it holds the fund for somebody else." Comp. Dewey v. Niagara Co., 62 N. Y. 294.

[6] Tripler v. New York, 63 Hun, 630; Wiesman v. Brigham, 83 Wis. 550; 53 N. W. Rep. 911; Ligonier v. Ackerman, 46 Ind. 552; Douglasville v. Jones, 62 Ga. 423; Grim v. Weisenberg, 57 Pa. St. 433.

Statute of Limitations has been held to apply to actions of this sort.[1]

§ 326 *a*. **Payment must be compulsory.**—It has been said that the payment must have been made under compulsion;[2] but what shall constitute compulsion is not easy of decision, and depends to a great extent upon the facts and circumstances of each case. A threat that legal proceedings will be employed;[3] or the fact that a fine or imprisonment will be imposed for nonpayment, is not sufficient to make the payment involuntary.[4] And, as a general rule, compulsion may be said to exist, only when money is paid to prevent the seizure of one's person or property, or to secure their liberation from detention, following a seizure. A mere protest, in the presence of these facts, is not sufficient;[5] and so, also, the payment of money to an official, as a consideration for the performance of an act, which it was his duty to perform.[6] The payment of illegal taxes to avoid a cloud on the title to land is a compulsory payment.[7] And certainly, where the effect of a sale for delinquent taxes would be to confer an indefeasible title[8] upon the purchaser, the threatened dives-

[1] Brown v. Painter, 44 Iowa, 368; Hamilton v. Dubuque, 50 Ib. 213; Com. v. Philadelphia, 27 Pa. St. 497.

[2] Lamborn v. Dickinson, 97 U. S. 181; Union Pac. R. R. Co. v. Dodge Co., 98 Ib. 541; Manistee L. Co. v. Springfield, 92 Mich. 277; 52 N. W. Rep. 468; McCrickart v. Pittsburgh, 88 Pa. St. 133; Lester v. Baltimore, 29 Md. 415; Rushton v. Burke, (Dak.) 43 N. W. R. 815; Tupelo v. Beard, 56 Miss. 532; Dunnell v. Newell, 15 R. I. 233; 2 Atl. R. 766; Cahaba v. Bennett, 34 Ala. 400; Raisler v. Athens, 66 Ib. 194.

[3] Taylor v. Board, 31 Pa. St. 73.

[4] Cahaba T. Coun. v. Burnett, 34 Ala. 400; Louisville etc. Co. v. Com., (Ky.) 12 S. W. 1064; Ligonier v. Ackerman, 46 Ind. 552.

[5] Union Pac. R. R. Co. v. Dodge Co. Com'rs, 98 U. S. 541; Phelps v. New York, 112 N. Y. 216; Rushton v. Burke, (Dak.) 43 N. W. R. 815; Babcock v. Fond du Lac, 58 Wis. 230; McGehee v. Columbus, 69 Ga. 581; Sowles v. Soule, 59 Vt. 131; 7 Atl. R. 715; Haines v. Readfield, 41 Me. 256; Allentown Bor. v. Saeger, 20 Pa. St. 421; Baker v. Big Rapids, 31 N. W. R. 810; Fellows v. Fayette Sch. Dis., 29 Me. 559; Allen v. Burlington, 45 Vt. 202; Elliott v. Swartwout, 10 Pet. 137; Silliman v. Wing, 7 Hill (N. Y.) 159; Princeton v. Vierling, 40 Md. 340; Whitbeck v. Minch, 88 Ohio St. 210; 31 N. E. R. 743; Ratterman v. Express Co., 49 Ohio St. 698; 32 N. E. R. 754; Harvey v. Olney, 42 Ill. 336; Falls v. Cairo, 58 Ib. 403; Kan. Pac. R. R. Co. v. Wyandotte Co., 16 Kan. 587; Bradford v. Chicago, 25 Ill. 411; Conkling v. Springfield, 24 N. E. R. 67; 124 Ill. 420; Ripley v. Gelston, 9 Johns. 201; Preston v. Boston, 12 Pick. 7; Jersey City v. Riker, 38 N. J. L. 225; Boston & S. Glass Co. v. Boston, 4 Met. 181.

[6] Baker v. Cincinnati, 11 Ohio St. 534; La Salle v. Simmons, 10 Ill. 516.

[7] Stephan v. Daniels, 27 Ohio St. 527.

[8] In Illinois, Nebraska, Texas, and

titure of ownership is a distress or compulsion, which is equivalent to the detention of the owner's person.[1] But a payment to an officer, who is only empowered to levy on the lands of the delinquent and dispose of them by a sale, which would not disturb the owner's possession, is not compulsory, if an adequate remedy be available to avoid the illegal assessment and sale.[2] "The coercion or duress, which will render a payment of taxes involuntary, must in general consist of some actual or threatened exercise of power, possessed or believed to be possessed by the party exacting or receiving the payment, over the person or property of another, from which the latter has no other means of immediate relief except by making payment." This is the definition given by Judge Dillon in his learned work on municipal corporations,[3] and it is no doubt a correct general statement of the principles involved, which, if intelligently applied to the varying circumstances of the cases in which money has been illegally exacted, will furnish to the practitioner a reliable rule for determining in each case, whether the complainant has a right to recover back what he has paid without authority of law.[4]

Although voluntary payment of taxes does not confer a right

Louisiana the right to redeem lands sold for taxes is secured to the owner by constitutional enactment. Stimson's Statutes, art. 35.

[1] See Lamborn v. Dickinson Co. Com'rs, 97 U. S. 181; Bradford v. Chicago, 25 Ill. 412.

[2] Falls v. Cairo, 58 Ill. 403; Kan. Pac. R. R. Co. v. Wyandotte Co., 16 Kan. 587.

[3] § 943.

[4] First Nat. Bank v. Americus, 68 Ga. 119; Maxwell v. San Luis Obespo, 71 Cal. 466; 12 Pac. Rep. 484; Whitbeck v. Minch, 48 Ohio St. 210; 31 N. E. Rep. 743; Meylert's Executor v. Sullivan Co., 19 Pa. St. 181; Muscatine v. Keokuk N. L. etc. Co., 45 Iowa, 185; Harrison v. Milwaukee, 49 Wis. 247; Lyon v. Receiver of Taxes, 52 Mich. 271; Detroit v. Martin, 34 Ib. 170; Michigan Ld. etc. Co. v. Republic, (Mich.) 32 N. W. Rep. 882; Whitney v. Port Huron, 88 Mich. 268; 50 N. W. Rep. 316; Tarbitt v. Louisville, (Ky.) 4 S. W. Rep. 345; Coulson v. Portland, Deady, 481; La Salle Co. v. Simons, 10 Ill. 513; Elliott v. Swartwout, 10 Pet. 137, 150; Radick v. Hutchins, 95 U. S. 210; Leonard v. Canton, 35 Miss. 189; Harvey v. Olney, 42 Ill. 336; Babcock v. Beaver Creek, 31 N. W. Rep. 423; s. c., 32 Ib. 653; Shaw v. Allegheny, 115 Pa. St. 46; 7 Atl. Rep. 770; Hennel v. Board, 132 Ind. 32; 31 N. E. Rep. 462; Shoemaker v. Grant Co., 36 Ind. 175; Princeton v. Vierling, 40 Ib. 340; Bellinger v. Gray, 51 N. Y. 610; Bank v. New Orleans, 12 La. An. 421; Howell v. Buffalo, 15 N. Y. 512; Bennett v. Buffalo, 17 Ib. 383; Bowns v. May, 120 N. Y. 357; 24 N. E. Rep. 947; Brumagim v. Tillinghast, 18 Cal. 265.

to recover them back, it raises a moral obligation, and is a sufficient consideration to support a subsequent promise to repay.[1] Generally, the payment of taxes or assessments, coupled only with the declaration that the payment is under protest, will not deprive the act of the taxpayer of its voluntary character;[2] but if the protest be made in a case, where the collecting officer threatens a levy and sale, the payment will be compulsory.[3] But if payment is made under protest, to avoid a sale under a statute levying an assessment, and the statute is subsequently declared unconstitutional, it has been held that the sale, being absolutely invalid, would not constitute a cloud upon the title, and hence the payment was voluntary.[4] Money, voluntarily paid to a municipal corporation for taxes, licenses or fines, under a mistake of law,—as where an ordinance directing a local improvement is illegal;[5]—or where the act under which the payment is enacted is unconstitutional,[6]—in the absence of fraud or ignorance of the facts involved, cannot be recovered by the party paying, either at law or in equity, unless some statutory remedy be provided.[7] But the general rule, that equity will

[1] State v. Butler, 11 Lea, 418.

[2] Union Pac. R. R. Co. v. Dodge Co., 98 U. S. 541; Galveston City Co. v. Galveston, 56 Tex. 486; Allentown Bor. v. Saeger, 20 Pa. St. 421; Taylor v. Board, 31 Ib. 73; Parker v. Gt. West. Ry. Co., 7 M. & G. 253; Baker v. Cincinnati, 11 Ohio St. 534; Boston & S. Glass Co. v. Boston, 4 Met. 181.

[3] Ruggles v. Fond du Lac, 53 Wis. 436; Whitney v. Port Huron, 88 Mich. 268; 50 N. W. Rep. 316; Ratterman v. Express Company, 49 Ohio St. 698; 32 N. E. Rep. 754.

[4] Detroit v. Martin, 34 Mich. 170; Ligonier v. Ackerman, 46 Ind. 552; Grim v. Weissenberg Sch. Dis., 57 Pa. St. 433.

[5] Phelps v. New York, 112 U. S. 216.

[6] Baltimore v. Lefferman, 4 Gill, 425; Morris v. Baltimore, 5 Ib. 244; Detroit v. Martin, 34 Mich. 170; Taylor v. Board, 31 Pa. St. 73.

[7] Union Pac. R. R. Co. v. Dodge Co., 98 U. S. 541; Boyd v. Selma, 93 Ala. 567; 11 So. Rep. 393; Welch v. Marion, 48 Ala. 291; Gachet v. McCall, 50 Ib. 307; Robinson v. Charleston Council, 2 Rich. (S. C.) Law Rep. 317; Elston v. Chicago, 40 Ill. 514; Churchman v. Indianapolis, 110 Ind. 259; People v. Wemple, 133 N. Y. 617; 30 N. E. Rep. 1002; Bailey v. Paulina, 69 Iowa, 463; Muscatine v. Packet Co., 45 Ib. 185; Savannah v. Feeley, 66 Ga. 31; Bucknell v. Story, 46 Cal. 589; Cahaba v. Burnett, 34 Ala. 400; Barber v. Jackson Co., 40 Ill. App. 42; Christy's Adm. v. St. Louis, 20 Mo. 143; Smith v. Readfield, 27 Me. 145; Emery v. Lowell, 127 Mass. 138; Richmond etc. Co. v. Reidsville, 109 N. C. 494; 13 S. E. Rep. 869; Stephenson v. Manny, 56 Ill. 160; Sullivan v. McCammon, 51 Ind. 264; Moss v. Cummings, 44 Mich. 359; Manistee L. Co. v. Springfield, 92 Mich. 277; 52 N. W. Rep. 468; Bank of Commonwealth v. N. Y., 43 N.Y 184; Camden v. Green, 25 Atl. R. 357;

relieve against a mistake of a material fact, is applied to payment of taxes or similar dues to a municipal corporation;[1] and mistake of fact is no less a ground for relief, because the payor had adequate means of knowledge,[2] provided he was not negligent.[3]

The rule, that a mistake of law will not be relieved against, has in modern equity been so modified, that it is no longer applicable in its original severity.[4] The usual cases, in which relief is asked against a mistake of law, are controversies arising out of the distribution of estates and of conveyances of land. In such cases, all parties ordinarily use deliberation and employ and act under the advice of counsel; and to disturb arrangements which are thus made would involve limitless litigation and impair rights of property, which have become vested in those who are not parties to the original settlement.[5] This reasoning is not applicable to the payment of money to municipal officers, whose supposed legal duty is to receive it; and, accordingly, we find courts of equity giving relief, where money had by mistake of law been paid to their own officers.[6] So, equity will distinguish between mistakes arising out of ignorance of the general law, and those due to ignorance of private right; a distinction peculiarly applicable to claims against municipal corporations for money illegally collected, where the question frequently is one of the individual right in a particular case of the party paying the money.[7]

Ege v. Koontz, 3 Pa. St. 109; Benson v. Monroe, 7 Cush. 125; Milnes v. Duncan, 6 B. & C. 671; Stuart v. Stuart, 6 Cl. & Fin. 968.

[1] Hunt v. Rousmaniere, 1 Pet. 15; Bilbie v. Lumley, 2 East, 469; Lamborn v. Dickinson Co., 97 U. S. 181; Mayer v. New York, 63 N. Y. 455; Cooper v. Phibbs, L. R. 2 H. L. 149; Brett's Lead. Cas. 68; Colonial Bank v. Exch. Bank of Yarmouth, 11 App. Cas. 84; Daniell v. Sinclair, 6 Ib. 181, 190; Davis v. Krum, 12 Mo. 279; Grimes v. Blake, 16 Ind. 160; Goodspeed v. Fuller, 46 Me. 141; Glenn v. Shannon, 12 P. C. 570; Newell v. Smith, 53 Conn. 72; Wolf v. Beard, 123 Ill. 585; Buffalo v. O'Malley, 61 Wis. 255; Manzy v. Hardy, 13 Neb. 36; Baldwin v. Foss, 71 Iowa, 389; Wheadon v. Olds, 20 Wend. 174.

[2] Wilmot v. Barber, 15 Ch. D. 96.

[3] Smith v. Wheeler, 58 Iowa, 659.

[4] See Tiedeman's Equity Jurisprudence, §§ 185–191.

[5] Davis v. Morier, 2 Call. 303.

[6] *Ex parte* James, *In re* Condon, L. R. 9 Ch. 609; *Ex parte* Simmonds, 16 Q. B. Div. 308; *In re* Brown, Dixon v. Brown, 32 Ch. D. 597.

[7] Tiedeman on Equity Jur. § 189; Matlock v. Glover, 63 Tex. 231; Cooper v. Phibbs, L. R. 2 H. L. 149; Earl Beauchamp v. Winn, L. R. 6 H. L. 223; Stone v. Godfrey, 5 De G. M. & G. 76; *In re* Condon, L. R. 6 Ch.

The benefit conferred by local improvements is the only true basis, upon which their cost can be assessed upon adjacent property, and the general public be released from paying a share therein.[1] If, therefore, after the assessment for an improvement shall have been levied and collected, the improvement is abandoned altogether; or if there is an unreasonable delay in carrying out the plan devised, the abutting owners may recover the amounts paid into the city treasury, upon the ground that there has been a total failure of consideration.[2] The facts, that the payment was voluntary,[3] or that the plaintiff did not protest when he saw the improvement being made,[4] will not in such a case deprive him of his remedy.[5]

§ 327. **Municipal corporations not liable for nonperformance of discretionary duties — Failure to abate nuisances and supply water.**—When a duty has been expressly, or by necessary implication, imposed upon a municipal corporation by statute; and the exercise of the duty will result in some peculiar advantage to the corporation itself; it is liable by implication, under ordinary circumstances, for a neglect of that duty, provided the duty be absolute and imperative, and not one which may be performed or not, according to the discretion of the municipal authorities. It is a well settled rule that for the nonperformance of a discretionary duty, particularly if the duty be of a public nature, no private action for damages can be maintained against the corporation, for the reason that discretionary powers are intended to be exercised only when the interests of the public demand their exercise; and the question,

App. 609; Snell v. Insurance Co., 98 U. S. 85; Mut. Sav. Inst. v. Eustin, 46 Mo. 200, 203; Underwood v. Brockman, 4 Dana, 309; Northrop v. Graves, 19 Conn. 548; Louisville v. Henning, 1 Bush, 381; Noble v. Bullis, 23 Iowa, 559; Ripon v. Joint Sch. Dis., 17 Wis. 83; King v. Doolittle, 1 Head, 77; Jones v. Clifford, 3 Ch. Div. 779; Dunnell Mfg. Co. v. Pawtucket, 7 Gray, 277. In Charlestown v. Middlesex Co. Com'rs, 109 Mass. 270, the court said: "One, who by a mistake of his rights returns to the assessors as liable to taxation a list of property which by law is exempt, is not thereby estopped to claim an abatement of the tax."

[1] See *ante*, § 259.

[2] Bradford v. Chicago, 25 Ill. 412; Godfrey v. Claflin, 21 Pick. 1, 9, 13, 14; Valentine v. St. Paul, 34 Minn. 446.

[3] Bradford v. Chicago, 25 Ill. 412.

[4] Robinson v. Burlington, 50 Iowa, 240.

[5] Jersey City v. O'Callaghan, 41 N. J. L. 349; Peyser v. New York, 70 N. Y. 497; Weber v. San Francisco, 1 Cal. 455; Kellogg v. Ely, 15 Ohio St. 64.

whether the public interests do or do not demand it, is one for the municipality to determine.[1] Thus, the power to construct sidewalks,[2] to remove obstructions in the harbor,[3] and to construct sewers [4] does not create an imperative duty, for the nonperformance of which a civil action can be maintained.

§ 317 *a*. **Failure to abate nuisances.**—As a part of its police power, a municipality can abate nuisances, whether deleterious to the health, property or morals of the community; and this power is one which is repeatedly exercised by all municipal corporations. But it is a delegated power, and discretionary and judicial in its nature; and unless the nuisance be one, which will render the municipal highways within the corporate control dangerous and unsafe, there is no liability to a private person, if the city should fail to exert the power, with a resultant injury to the complainant.[5]

[1] Aaron v. Broiles, 64 Tex. 316; Easton v. Neff, 102 Pa. St. 474; Whitney v. New Haven, (Conn. 91) 20 Atl. Rep. 666; Collins v. Savannah, 77 Ga. 745; McDonough v. Virginia City, 6 Nev. 90; Lindholm v. St. Paul, 19 Minn. 245; Williams v. Grand Rapids, 59 Mich. 51; Amperse v. Kalamazoo, 75 Ib. 228; 42 N. W. Rep. 821; Bauman v. Campan, 58 Mich. 444; McArthur v. Saginaw, 58 Ib. 357; Petz v. Detroit, (Mich. 93) 54 N. W. Rep. 644; Urquhart v. Ogdensburg, 91 N. Y. 67; City of Anderson v. East, 117 Ind. 126; Keating v. Kansas City, 84 Mo. 415; Fritz v. Same, 84 Ib. 632; Terrill v. Bloomfield, (Ky. 93) 21 S. W. Rep. 1041; McDade v. Chester City, 117 Pa. St. 414; Trescott v. Waterloo, 26 Fed. Rep. 592; Hillsboro v. Ivey, 1 Tex. Civ. Ap. 653; 20 S. W. Rep. 1012; Trammell v. Russellville, 34 Ark. 105; Rivers v. Augusta Council, 65 Ga. 376; Wilkin v. Houston, (Kan. 90) 30 Pac. Rep. 23; Horton v. Bristol, 4 Lea, 39; Lehigh Co. v. Haffort, 116 Pa. St. 119; Alton v. Hope, 68 Ill. 167; Yanish v. St. Paul, (Minn. 92) 52 N. W. Rep. 925; Clemence v. Auburn, 66 N. Y. 334; Hyatt v. Rondout, 41 Ib. 619; Hoey v. Gilroy, 129 Ib. 132; Aurora v. Puffer, 56 Ga. 270; Freeport v. Isbell, 83 Ib. 440; Platt v. Chicago etc. Co., 31 N. W. Rep. 883; White v. Yazoo, 27 Miss. 357; James Adm'r v. Harrodsburg, (Ky.) 3 S. W. Rep. 135; Peru v. Gleason, 91 Ind. 566; Lafayette v. Timberlake, 88 Ib. 330; Walker v. Hallock, 33 Ib. 239; Hubbell v. Viroqua, 67 Wis. 343; 30 N. W. 847; Kelly v. Milwaukee, 18 Wis. 83; Schattner v. Sanderfur, 53 Mo. 162; Steines v. Franklin Co., 48 Ib. 167.

[2] Saulsburg v. Ithaca, 94 N. Y. 27; Vogel v. New York, 92 Ib. 10; Irving v. Ford, (Mich.) 32 N. E. Rep. 601.

[3] Goodrich v. Chicago, 20 Ill. 445.

[4] Anne Arundel Co. v. Duckett, 20 Md. 468; Bennett v. New Orleans, 14 La. An. 120; Monticello v. Fox, 3 Ind. App. 481; 28 N. E. Rep. 1025.

[5] Baker v. State, 27 Ind. 485; Walker v. Hallock, 32 Ib. 239; Worth v. Crawford, 64 Tex. 202; McCutcheon v. Homer, 43 Md. 483; O'Rourke v. Sioux Falls, (S. D. 93) 54 N. W. Rep. 1044; Detroit v. Beckman, 34 Mich. 125; Ball v. Woodbine, 61 Iowa, 83; Tainter v. Worcester, 123 Mass. 311; Austin v Lam-

So, also, a city will not be liable for damages by fire, caused by sparks from an engine, which had been pronounced a nuisance by an ordinance;[1] for injury by a bullet from a shooting gallery;[2] by a stone thrown in the air by blasting;[3] for injury caused by fireworks, while the operation of an ordinance forbidding their use is suspended;[4] for injury caused by animals running at large;[5] or for failure to provide a pest house.[6]

By reason of the dangerous character of fireworks, full power had been intrusted to a city to prohibit their manufacture; but even then the city was not liable to a person, who was injured at a fire in a building, where these articles were made.[7]

It has been held that, although a city has power to remove obstructions in its harbor, it is not liable for a failure to do so; although it was said it would be liable for removing them in such a careless manner, that injury was done to any one rightfully using the harbor.[8]

§ 327 *b*. **Liability for negligent supply of water.**—When, in pursuance of an express power, a municipal corporation departs from the purposes for which such corporations are created; and engages in business enterprises by which it becomes assimilated to private corporations, it is held strictly to the same liability as are private corporations and individuals. Thus a municipal corporation, selling water to all persons, upon pay-

beth, 27 L. J. Ch. 677; Hargreaves v. Taylor, 3 Best & S. 613; Levy v. Mayor, 1 Sandf. 465; Bennett v. New Orleans, 14 La. An. 120; Howe v. New Orleans, 12 Ib. 481; Kelly v. Milwaukee, 18 Wis. 83; Goodrich v. Chicago, 20 Ill. 445; Fair v. Philadelphia, 88 Pa. St. 309; Ogg v. Lansing, 35 Iowa, 495; Hafford v. New Bedford, 16 Gray, 297; Forsyth v. Atlanta, 45 Ga. 152; Parker v. Mayor etc., 39 Ib. 725; Campbell v. Montgomery, 53 Ib. 327; Stevenson v. Phœnixville, 1 Ches. Co. Rep. 113; Norristown v. Fitzpatrick, 94 Pa. St. 121; Kiley v. Kansas City, 87 Mo. 103; Armstrong v. Brunswick, 79 Ib. 319; Kistner v. Indianapolis, 100 Ind. 210; Faulkner v. Aurora, 85 Ib. 130; Cain v. Syracuse, 95 N. Y. 83; People v. Albany, 11 Wend. 539; Connors v. Mayor etc., 11 Hun, 439; Wilson v. Mayor etc., 1 Den. 595; Cole v. Medina, 27 Barb. 218; Fowle v. Alexandria, 3 Pet. (U. S.) 398; Hill v. Charlotte, 72 N. C. 55; Carr v. Northern Liberties, 35 Pa. St. 324; Grant v. Erie, 69 Ib. 420.

[1] Davis v. Montgomery Council, 51 Ala. 139; Kent v. Cheyenne, 2 Wyom. 6.

[2] Hubbell v. Viroqua, 67 Wis. 343.

[3] James v. Harrodsburgh, 85 Ky. 191.

[4] Hill v. Charlotte, 72 N. C. 55.

[5] Kelly v. Milwaukee, 18 Wis. 83.

[6] Aaron v. Broiles, 64 Tex. 316.

[7] McDade v. Chester, 117 Pa. St. 414.

[8] Goodrich v. Chicago, 20 Ill. 445; Seaman v. New York, 80 N. Y. 239.

ment of the proper price, is liable for the negligence of its agents, to the same extent as a private corporation.[1]

§ 328. **Corporation when liable for manner in which discretionary powers are exercised.**—Not only are municipal corporations exempt from liability for the nonperformance of public, or discretionary duties; but they are likewise exempt from liability for consequences, when they in good faith exercise such powers. Corporations are impliedly liable for the negligent or unskillful manner, in which purely ministerial and corporate, as distinct from public, powers are executed; but the liability will not attach in the case of public or judicial duties, until they have ceased to be such, and have become corporate and ministerial.[2]

The selection of the proper means, and the adoption of plans, by which these judicial and discretionary powers are to be executed, involve the employment of deliberation and discretion; and an honest and faithful exercise of these attributes is not subject to review by courts of law in a private action, brought by one alleging an injury to have been caused thereby.[3] Thus,

[1] Baily v. New York, 3 Hill (N. Y.) 531; Merrimack Bk. v. Lowell, 26 N. E. 97; 152 Mass. 556; Western Sav. F. Soc. v. Philadelphia, 31 Pa. St. 175.

[2] "Where a judicial duty ends and ministerial duty begins, there immunity ceases and liability attaches." Jones v. New Haven, 34 Conn. 1; Denver v. Rhodes, 13 Pac. 729.

[3] Barron v. Detroit, 94 Mich. 601; Barthold v. Philadelphia, 26 Atl. 304; 154 Pa. St. 109; Benson v. Waukesha, 41 N. W. R. 1017; Diamond Match Co. v. New Haven, 55 Conn. 510; Wessinan v. Brooklyn, 16 N. Y. St. 97; Thompson v. Polk Co., 38 Minn. 130; Denver v. Capelli, 4 Col. 25; Wicks v. DeWitt, 54 Iowa, 130; Bear v. Allentown, 23 Atl. 1062; 148 Pa. St. 80; Smith v. Gould, 61 Wis. 31; Horton v. Nashville, 4 Lea, 47; Gibbs v. Beaufort, 20 S. C. 213; Buckley v. New Bedford, 155 Mass. 64; 29 N. E. 201; Weis v. Madison, 75 Ind. 241; Cummins v. Seymour, 79 Ib. 491; Evansville v. Decker, 84 Ib. 325; Garratt v. Canandaigua, 64 Hun, 623; Imler v. Springfield, 55 Mo. 119; Foster v. St. Louis, 71 Ib. 157; Flori v. St. Louis, 69 Ib. 341; Fairlawn Coal Co. v. Scranton, 23 Atl. 1069; 148 Pa. St. 231; Welsh v. Rutland, 56 Vt. 228; McCaughey v. Tripp, 12 R. I. 449; Johnson v. District, 118 U. S. 19; Fair v. Philadelphia, 88 Pa. St. 309; Lynch v. Mayor of N. Y., 76 N. Y. 60; Monk v. New Utrecht, 104 Ib. 552; Hubbell v. Yonkers, 104 Ib. 434; Arms v. Knoxville, 32 Ill. Ap. 604; Madison v. Harbor Board, 25 Atl. 337; Dewey v. Detroit, 15 Mich. 307; Flagg v. Worcester, 13 Gray, 601; Merrifield v. Worcester, 110 Mass. 216; Collins v. Philadelphia, 93 Pa. St. 272; Pepper v. City, 114 Ib. 96; Roanoke Gas Co. v. Roanoke, (Va. 90) 14 S. E. R. 665; Howard v. Worcester, (Mass. 91) 27 N. E. 11; Hennessy v. New Bedford, (Mass. 91) 26 Ib. 999; O'Reilly v. Kingston, 114 N. Y. 439.

a city is not liable for extending a street, so as to bring an existing nuisance within its limits.[1]

The question of municipal liability in this connection arises most frequently out of the prosecution of local improvements by a municipal corporation, where the expediency or necessity of the improvement has been left to the discretion of the municipal authorities. Whether or no there shall be any local improvement, is a judicial question for the municipality to decide; but it is coupled very often with a statutory plan and method for carrying out the improvement, which is obligatory upon the city, when it shall have decided that the comtemplated work is desirable. In all such cases, the municipal corporation is liable to any one who is injured by a deviation from the statutory plan and method, or by its failure to comply therewith in any material respect.[2]

So, also, when the plan and method are left to the discretion of the municipality, the principle of non-liability should be applied with care; and each case be decided more or less upon its own merits. It is doubtless the law that a municipal corporation is not liable for defects and errors in the plan of a public work; but this can be true, only when due care is used by the corporation in the adoption of plans and instrumentalities. Not that a corporation is compelled to use the highest degree of care in planning and executing public works. Ordinary care as it is termed, is usually sufficient. But, in any event, if there is such a lack of skill, care and attention on the part of the city, or its officials, in devising or executing a plan for a public work, as will constitute negligence, it will be liable therefor in damages.[3] If the municipal officials, in planning or executing a

[1] McCutcheon v. Horner, 5 N. W. Rep. 668; Larkin v. Saginaw Co., 11 Mich. 88; Detroit v. Blakeby, 21 Ib. 84.

[2] Hardy v. Brooklyn, 90 N. Y. 435; Pekin v. Newell, 26 Ill. 320; Kankakee v. Linden, 38 Ill. App. 675; Harlow v. Humiston, 6 Cow. 189; Dygert v. Schenck, 23 Wend. 446.

[3] Jordan v. Hannibal, 87 Mo. 673; Weightman v. Washington, 1 Black, 39; Chalkley v. Richmond, 88 Va. 402; 14 S. E. Rep. 339; Milwaukee v. Davis, 6 Wis. 377; Ashley v. Pt. Huron, 35 Mich. 296; Jenney v. Brooklyn, 120 N. Y. 164; 24 N. E. Rep. 274; Olney v. Riley, 39 Ill. App. 401; Vandalia v. Ropp, 39 Ib. 344; Cummings v. Seymour, 79 Ind. 491; Crawfordsville v. Bond, 96 Ind. 236; North Vernon v. Vogeler, 103 Ib. 314; Rice v. Evansville, Ib. 314; Benton v. Hamilton, 110 Ib. 294; 11 N. E. R. 238; Terre Haute v. Hudnut, 112 Ind. 542; New Albany v. Ray, 3 Ind. App. 481; 29 N. E. Rep. 611.

work requiring professional skill and knowledge, consult persons who possess the requisite information and experience, and use reasonable care and prudence in selecting skilled persons to control and effectuate the plan, neither the officials nor the corporation they represent will be liable, if the plans turn out to be unsuitable and injudicious, or the structure be defective.[1] Of the municipal officials themselves, it is only required "that they shall bring to the service reasonable care and judgment, and that the professional men, employed by them in planning and superintending the work, shall have all the knowledge and skill that experience in such work would naturally give them."[2] If a board of commissioners undertake to execute a public work themselves, requiring skill and experience which they do not possess, instead of employing a competent person, they will render themselves liable for injury resulting from a defective, insufficient or faulty plan.[3] But if it becomes apparent during the prosecution of the work, that the plan decided on by the city, even if selected and executed with proper care, will work a direct injury to property, which is likely to be repeated and continuous, the city is liable in damages after notice thereof, unless it shall adopt such a change of plan, or such precautionary measures, as will obviate the difficulty.[4]

§ 329. **Damnum absque injuria—Consequential damages—Changes in the grade of streets—Improvements.**—When a municipal corporation, acting within the limits of its authority and jurisdiction, does an act by virtue of power conferred by a valid statute; and there is a reasonable degree of care and skill employed by it, there is no liability for injury caused to

Same v. Lawyer, 38 Ib. 348; Lehn v. San Francisco, 66 Cal. 76; Barnes v. District, 91 U. S. 540; Gould v. Topeka, 32 Kan. 485; Lacour v. Mayor, 3 Duer, 406; People v. Waterford, etc. Co., 2 Keyes, 327; Townsend v. Susquehanna T. Co., 6 Johns. 90; Watson v. Kingston, 43 Hun, 367; Helena v. Thompson, 29 Ark. 569; Chicago v. Gallagher, 44 Ill. 295; Nevins v. Peoria, 41 Ib. 502; Wilson v. Atlanta, 60 Ga. 473.

[1] Sutton v. Clark, 1 Marsh. 429; Van Pelt v. Davenport, 42 Iowa, 308.

[2] Diamond M. Co. v. New Haven, 55 Conn. 510.

[3] Robinson v. Roha, 73 Wis. 436; Wallace v. Menasha, 48 Ib. 79; Wren v. Walsh, 57 Ib. 98; Peck v. Cooper, 112 Ill. 192.

[4] Seifert v. Brooklyn, 101 N. Y. 136; Lynch v. Mayor, 76 N. Y. 60; Wilson v. Mayor, 1 Den. 595; Fleming v. Manchester, 44 L. J. N. S. 517; Weightman v. Washington, 1 Black, 39; Hardy v. Brooklyn, 90 N. Y. 435; Shearman & Redf. on Negligence (4th ed.) §§ 269–279.

third persons, although the same act, if done without legislative premission, would be actionable.

He, who does what the Legislature expressly commands or permits, cannot be a wrongdoer; but he cannot act without that reasonable care which men are supposed to employ in their affairs.[1]

Injuries caused by the careful and skillful performance of a lawful act are called consequential, and for such the law gives no redress; for, although there is a loss, there is no legal wrong. It is a case of *damnum absque injuria*.[2] The question of consequential injuries arises oftenest in the prosecution of public improvements. It is seldom that an improvement, though executed in the most careful manner, does not cause injury to some one; and it is extremely difficult at times to separate injuries

[1] Northern Transp. Co. v. Chicago, 99 U. S. 635; Smith v. Washington, 20 How. 135; Elster v. Springfield, (Ohio, 93) 30 N. E. R. 274; Hohman v. Chicago, (Ill. 92) 29 Ib. 671; Hovey v. Mayo, 43 Me. 322; Russell v. Burlington, 30 Iowa, 262; Hicks v. Dorn, 42 N. Y. 47; Siefert v. Brooklyn, 101 Ib. 136; Radcliff's Ex. v. Brooklyn, 4 Ib. 195; Bellinger v. N. Y. Cen. R. R. Co., 23 Ib. 42; *In re* Furman St., 17 Wend. 667; Wakefield v. Newell, 12 R. I. 75; Clark v. Saybrook, 21 Conn. 313; Fellowes v. New Haven, 44 Conn. 240; West Orange v. Field, 37 N. J. Eq. 600; Quinn v. Paterson, 27 N. J. L. 35; Allentown v. Kramer, 73 Pa. St. 406; Reading v. Keppleman, 61 Pa. St. 233; Magarity v. Wilmington, 5 Del. 530; Detroit v. Beckman, 34 Mich. 125; Cumberland v. Willison, 50 Md. 138; Perry v. Worcester, 6 Gray, 544; Flagg v. Worcester, 13 Ib. 601, 605; Sprague v. Worcester, 13 Gray, 193; Americus v. Eldridge, 64 Ga. 524; Pratt v. Stratford, 14 Ont. 260; Dixon v. Board of Works, L. R. 7 Q. B. D. 418; comp. Deringey v. Ottawa, 15 Ont. 712; Herring v. District, 3 Mackey, 572; Imler v. Springfield, 55 Mo. 119; Weyman v. Jefferson, 61 Ib. 553; Swenson v. Lexington, 69 Ib. 157; Stewart v. Lexington, 79 Ib. 503; Alden v. Minneapolis, 24 Minn. 254; Lee v. Minneapolis, 22 Ib. 13; Dore v. Milwaukee, 42 Wis. 108; Hume v. Knoxville, 1 Humph. 403; Rigney v. Chicago, 102 Ill. 64; Snyder v. Rockport, 6 Ind. 237; Cummins v. Seymour, 79 Ib. 491; Princeton v. Yieske, 93 Ib. 102; Kokonio v. Maham, 100 Ind. 242; Freburg v. Davenport, 63 Iowa, 119; Morris v. Council Bluffs, 67 Ib. 343; Simons v. Camden, 26 Ark. 276; Chicago v. McGraw, 75 Ill. 566; Nebraska City v. Lampkin, 6 Neb. 27; Lawler v. Boom Co., 56 Me. 443; Roll v. Augusta, 34 Ga. 326; Shaw v. Crocker, 42 Cal. 435; British C. R. Co. v. Meredith, 4 D. & E. T. R. 794; Docks Cases, 11 H. L. 713, 714; Prine v. G. & Western Ry. Co., 110 Eng. C. L. 402, 411.

[2] Eaton v. R. R. Co., 51 N. H. 504; Elliott on Roads and Streets, p. 204; Smith v. Thackerath, L. R. 1 C. P. 564; Cooke v. Waring, 1 H. & C. 332; Mahan v. Brown, 13 Wend. 309; Parker v. Foot, 19 Ib. 309; Hill v Balls, 2 H. & N. 299.

which are consequential, from those for which, upon the grounds of negligence, an action will be permitted.[1]

The rule as to consequential injury has been applied to damages caused by a system of drainage, by which a large amount of water was allowed to flow over private property;[2] to the discharge of fireworks by the city's servants under authority of statute;[3] to the straightening of a river;[4] to interruption to travel by the building of a railroad across a highway;[5] and to loss from business competition.[6] But its principal application in connection with municipal corporations is to the execution of the power to grade new streets, and to alter the grade of those already established. It has been a well settled rule of law that a municipal corporation, acting under the powers, conferred upon it by the Legislature, to make, repair, grade and improve streets, may grade, or alter the grade of streets already established, without being liable in the absence of statute for any damages whatever, provided there is no actual entry on private land and the work is confined to the limits of the street; and provided reasonable care is employed by the corporation.[7]

[1] Rakowsky v. Duluth, 44 Minn. 188; 46 N. W. Rep. 338; Marion v. Skillman, 26 N. E. Rep. 676; Kemper v. Campbell, (Kan. 91) 26 Pac. Rep. 55; McVerry v. Boyd, (Cal. 91) 885; Broadwell v. Kansas City, 75 Mo. 213; Smith v. Alexandria, 33 Gratt. 208.

[2] Alexander v. Milwaukee, 16 Wis. 247.

[3] Tindley v. Salem, 137 Mass. 171.

[4] Green v. Swift, 47 Cal. 536.

[5] Ham v. Wisconsin R. Co., 61 Iowa, 716.

[6] Whittier v. Portland etc. Co., 38 Me. 26.

[7] Goszler v. Georgetown, 6 Wheat. 593; Smith v. Washington, 20 How. 135, 149; Pumpelly v. Green Bay, 13 Wall. 166; North Tp. Co. v. Chicago, 99 U. S. 635; Mason v. Kennebec etc. Co., 31 Me. 215; Hovey v. Mayo, 43 Ib. 322; Eaton v. B. C. & M. R. R. Co., 51 N. H. 504, 509; Callendar v. Marsh, 1 Pick. 418; (leading case.) Griggs v. Foote, 4 Allen, 195; Brown v. Lowell, 8 Met. 172; Benjamin v. Wheeler, 8 Gray, 409; Rounds v. Mumford, 2 R. I. 154; Inman v. Tripp, 11 Ib. 520; Smith v. Same, 13 Ib. 152; Wakefield v. Pawtucket, 15 Ib. 75; Hollister v. Union Co., 9 Conn. 436; Hooker v. N. H. & N. Co., 14 Ib. 146; Skinner v. Hartf. Br. Co., 29 Ib. 523; Burritt v. New Haven, 42 Ib. 174; Healey v. Same, 49 Ib. 394; Graves v. Otis, 2 Hill, 466; Benedict v. Goit, 3 Barb. 459; *In re* Fifth St., 17 Wend. 667; Waddell v. New York, 8 Barb. 95; Radcliff's Ex. v. Brooklyn, 4 N. Y. 195; Mills v. Brooklyn, 32 Ib. 489; St. Peter v. Denison, 58 Ib. 416; People v. Green, 64 Ib. 606; Coggswell v. N. Y., N. H. & H. R. R. Co., 103 Ib. 10; Plum v. Morris Can Co., 10 N. J. Eq. 256; Quinn v. Paterson, 27 N. J. L. 35; Trenton W. P. Co. v. Raff, 36 Ib. 335, 340; Mersey Dock Cases, 11 H. L. Cas. 713; Sutton v. Clarke, 6 Taunton, 28;

A landowner is generally entitled to lateral support for his land in its natural unimproved state from the adjoining soil; but a city, it has been held, will not be liable to an abutting owner, who has erected buildings on his land, for injury caused by grading, where his building falls into the highway,[1] or where his shade trees are destroyed for lack of lateral support.[2] The power to grade is a continuous one, and may be exerted from time to time, whenever it is necessary to accomplish either of the two objects, for which it is granted, viz.: drainage, and the

Boulton v. Crowther, 2 B. & C. 703; Green v. Reading, 9 Watts (Pa.) 382; Henry v. Pittsburgh etc. Co., 8 Watts & S. 85; Charlton v. Allegheny, 1 Grant Cas. (Pa.) 208; Kensington Commissioners v. Woods, 10 Pa. St. 93; O'Conner v. Pittsburgh, 18 Ib. 187; Carr v. Northern Liberties, 35 Pa. St. 324; *In re* Ridge St., 29 Ib. 391; Reading v. Keppleman, 61 Ib. 233; Rome v. Omberg, 28 Ga. 46; Markham v. Atlanta, 23 Ib. 402; Roll v. Augusta, 34 Ib. 326; Mitchell v. Rome, 49 Ib. 29; Macon v. Hill, 58 Ib. 597; Fuller v. Atlanta, 66 Ib. 80; Castleberry v. Atlanta, 74 Ib. 164; Dorman v. Jacksonville, 13 Fla. 538; Selden v. Jacksonville, 28 Ib. 558; 10 So. Rep. 457; Whitehouse v. Fellowes, 10 C. B. 779; Cheever v. Shedd, 13 Blatchf. 258; Snyder v. Rockport, 6 Ind. 237; Lafayette v. Spencer, 14 Ib. 399; Macy v. Indianapolis, 17 Ib. 267; Lafayette v. Bush, 19 Ib. 326; Vincennes v. Richards, 23 Ib. 381; Terre Haute v. Turner, 36 Ib. 522; Weis v. Madison, 75 Ib. 241; St. Louis v. Gurno, 12 Mo. 414; Taylor v. St. Louis, 14 Ib. 20; Hoffman v. St. Louis, 15 Ib. 651; Schattner v. Kansas City, 53 Ib. 162; Imler v. Springfield, 55 Ib. 110; Wegman v. Jefferson, 61 Ib. 55, 56; Thompson v. Booneville, 61 Ib. 282; Tate v. Missouri, 64 Ib. 149; Pontiac v. Carter, 32 Mich. 164; Detroit v. Beckman, 34 Ib. 125; Keasy v. Louisville, 4 Dana, 154; Newport etc. Co. v. Foote, 9 Bush, 264; Kemper v. Louisville, 14 Ib. 87; Pearson v. Zable, 78 Ky. 170; Lee v. Minneapolis, 22 Minn. 13; Karst v. St. Paul etc. Co., 22 Ib. 118; Alden v. Minneapolis, 24 Ib. 254; Genois v. St. Paul, 35 Ib. 330; Nebraska City v. Lampkin, 6 Neb. 27; Creal v. Keokuk, 4 G. Greene, 87; Cotes v. Davenport, 9 Iowa, 227; Cole v. Muscatine, 14 Ib. 296; Ellis v. Iowa City, 29 Ib. 229; Russell v. Burlington, 30 Ib. 262; Warren v. Henley, 31 Ib. 31; Burlington v. Gilbert, 31 Ib. 356; Moses v. Pittsburgh etc. Co., 21 Ill. 516; Roberts v. Chicago, 26 Ib. 249; Murphy v. Chicago, 29 Ib. 279; Nevins v. Peoria, 41 Ib. 502; Quincy v. Jones, 76 Ib. 231; White v. Yazoo City, 27 Miss. 357; Simmons v. Camden, 26 Ark. 276; Reynolds v. Shreveport, 13 La. An. 426; Humes v. Knoxville, 1 Hump. 403; Shaw v. Crocker, 42 Cal. 435;

[1] Northern Trans. Co. v. Chicago, 99 U. S. 635; Moore v. Albany, 98 N. Y. 396; Thurston v. Hancock, 12 Mass. 220; Gilmore v. Driscoll, 122 Ib. 199; Wyatt v. Harrison, 3 B. & A. 871; Bonomi v. Backhouse, 9 H. L. 513; Taylor v. St. Louis, 14 Mo. 20; Rome v. Omberg, 28 Ga. 46; Roll v. Augusta, 34 Ib. 326; Meth. E. Church v. Wyandotte, 31 Kans. 721; Quincy v. Jones, 76 Ill. 231; Pontiac v. Carter, 32 Mich. 164; Hall v. Bristol, L. R. 2 C. P. 322; comp. *contra*, Meares v. Com'rs, 9 Ired. L. (N. C.) 73.

[2] Castleberry v. Atlanta, 74 Ga. 164.

furnishing of a level surface for drafting purposes.[1] Nor will the courts inquire into the motives for such an act when done under legal authority;[2] or ascertain whether the grade adopted is the best, or will cause the least injury.[3] So, also, a change in grade is not illegal, because unnecessary.[4] The arbitrary and unjust character of this rule, when applied to the constant changes and improvements, which are taking place in the rapidly growing municipalities of this country, was perceived by the courts; and they have been astute to raise distinctions which would, under certain circumstances, remove cases from its operation.[5] Thus, where grading was necessary to be done before the street could be improved, the corporation was held responsible for proceeding with the improvement prior to grading.[6] It is also the rule that, when the grade of a street is altered otherwise than in conformity with statutory provisions; as, for example, if the consent of the abutters is not secured, or some other condition precedent is not complied with, the city will be held liable for injuries caused in grading.[7] The signer of a petition for a change of grade is not estopped from claiming damages, when the city's action was illegal, because the preliminary petition had not been signed by a sufficient number.[8]

An exemption from liability for injuries, caused by a change in grade, will not absolve the municipality from an action for damages which are caused by the erection of a bridge upon a public street, which resulted in the abutting owner's loss of access to his property.[9]

[1] Larned v. Briscoe, 62 Mich. 393; Fuller v. Atlanta, 66 Ga. 80.

[2] Benjamin v. Wheeler, 8 Gray, 409; Chatfield v. Wilson, 28 Vt. 49.

[3] Roberts v. Chicago, 26 Ill. 249; Snyder v. Rockport, 6 Ind. 237.

[4] May v. Indianapolis, 17 Ind. 267.

[5] O'Conner v. Pittsburgh, 18 Pa. St. 187.

[6] Schneider v. City, 40 N. W. R. 329; Meinzer v. Racine, 70 Wis. 561.

[7] Crossett v. Janesville, 28 Wis. 420; P. E. Church v. Anamosa, 76 Iowa, 538; Dare v. Milwaukee, 42 Ib. 108; Hill v. St. Louis, 59 Mo. 412; Karst v. Stillwater etc. Co., 22 Minn. 118; Lafayette v. Wortman, 107 Ind. 404; Meinzer v. Racine, 68 Wis. 241; 70 Ib. 561.

[8] Cross v. Kansas City, 90 Mo. 13.

[9] Stack v. E. St. Louis, 85 Ill. 377; Pekin v. Brereton, 67 Ib. 477; Pekin v. Winkel, 77 Ib. 56. In Illinois, the court said, in a case adjudicated prior to the adoption of the constitutional provision, which requires compensation to be made to owners of property *damaged*: "While a city has the right to grade its streets by raising or lowering them, the property holder adjacent to the street thus graded cannot call the city to

In Ohio alone has the common law non-liability of municipalities for consequential damages been repudiated. The courts of that State have repeatedly held municipal corporations liable for consequential damages occurring in the exercise of judicial powers, when the exercise was in good faith and authorized by statute.[1] The grounds upon which this doctrine is founded are, that the benefit conferred upon all, to the injury of some individual, will justify a corresponding burden shared by all, to reimburse the injured party.[2] The doctrine of exemption from liability for consequential damages has no application to an intentional or negligent invasion of private property; and the city will be liable for a trespass on private property, as by negligently casting stones or soil upon it,[3] as well as for an entry

account for error in judgment in establishing the grade, nor can he recover damages for inconveniences or expense in adjusting the approach to his premises for the purposes of ingress or egress. Although the city may be the owner of the streets, it has no more power over them than a private owner over his own land, and it cannot, under the claim of public convenience, be permitted to exercise that dominion to the injury of another's property in a mode that would render a private individual responsible in damages, without itself becoming responsible. If it becomes necessary for the interest of the public, in grading or draining streets, that the lot of an individual should be rendered unfit for occupancy, either wholly or in part, the public should pay for it to the extent to which the owner is deprived of its legitimate use. Private property shall not be taken for public use without due compensation, applies as well to secure the payment for property partially taken for the use or convenience of a street, as where wholly taken or converted into a street. The question as to the extent to which the property is taken makes no difference in the application of the rule; private rights are never to be sacrificed to public convenience or necessity without full compensation, and for such an injury inflicted an action may be maintained and damage recovered as a compensation." Nevins v. Peoria, 41 Ill. 502. See *ante*, §§ 301–308.

[1] Rhodes v. Cleveland, 10 Ohio, 159; McCombs v. Akron Council, 15 Ib. 474.

[2] Goodloe v. Cincinnati, 4 Ohio, 500, 514; Crawford v. Delaware, 7 Ohio St. 459; Scovill v. Geddings, 7 Ohio, part 2, 211; Hickox v. Cleveland, 8 Ohio, 543; Cincinnati v. Penny, 21 Ohio St. 499; Youngstown v. Moore, 30 Ib. 133; Dodson v. Cincinnati, 34 Ib. 276; Keating v. Cincinnati, 38 Ib. 141; see late affirmance of the rule in Cohen v. Cleveland, 43 Ib. 190 (1885).

[3] Hendershatt v. Ottumwa, 46 Iowa, 658; Waldron v. Haverhill, 143 Mass. 582; Martiusville v. Shirley, 84 Ind. 546; Platter v. Seymour, 86 Ib. 323; Vanderlip v. Grand Rapids, 41 N. W. R. 677; Cf. Fellows v. New Haven, 44 Conn. 240.

thereon.[1] So, also, will the city be liable for injuries which are caused by official acts of wantonness or malice.[2]

§ 330. **Constitutional and statutory provisions, guaranteeing compensation for property damaged—Remedy.** It is a well recognized fact that the provisions in most of the constitutions of the States, forbidding a taking of private property for public use without compensation,[3] were wholly inadequate to protect private property from impairment by acts which could not be included in the meaning which the courts attached to the word taking,[4] and many of the constitutions have within recent years been amended.[5] In a majority of the States the clause, in the constitution as amended, which is to render private property inviolate, is to the effect that no man's property shall be taken, DAMAGED OR DESTROYED for public purposes, without just compensation being made or secured to the party injured.[6]

Such a provision in a constitution has been held by the Supreme Court of the United States[7] to impose upon a municipality a liability for damages to private property caused by changing the grades of streets; and this construction has been followed by those State courts, which have been called upon to construe clauses of this character.[8] These constitutional pro-

[1] Ward v. Peck, 6 Atl. Rep. 805; Broadwell v. City, 75 Mo. 213; Mayo v. Springfield, 136 Mass. 10.

[2] Rounds v. Mumford, 2 R. I. 154; Reynolds v. Shreveport, 13 La. An. 426; Mayor v. Randolph, 4 W. & S. 514; Chicago v. Roberts, 26 Ill. 249; Philadelphia v. Randolph, 4 W. & S. (Pa.) 514; Northern T. Co. v. Chicago, 99 U. S. 635.

[3] Northern Transp. Co. of O. v. Chicago, 99 U. S. 665; Platter v. Seymour, 86 Ind. 324; Henderschott v. Ottumwa, 46 Iowa, 658.

[4] *Ante*, §§ 239, 301–305.

[5] Callendar v. Marsh, 1 Pick. 418, 430 (1823); Thurston v. Hancock, 12 Mass. 220; Radcliff's Ex. v. Brooklyn, 4 N. Y. 195, 205; Tiedeman Police Power, pages, 397–420.

[6] See Constitutions of Massachusetts, Maine, Vermont, Connecticut, Rhode Island, New York, New Jersey, Ohio, Illinois, Michigan, Wisconsin, Iowa, Minnesota, Nebraska, Virginia, West Virginia, Missouri, Arkansas, California, Oregon, Nevada, Colorado, Georgia, Alabama, Mississippi, Louisiana and Arizona. Stimpson's Statutes, art. 9, §§ 90 to 92.

[7] Chicago v. Taylor, 125 U. S. 161.

[8] Rigney v. Chicago, 102 Ill. 64; Shawneetown v. Mason, 82 Ib. 337; Elgin v. Eaton, 83 Ill. 535; Pekin v. Brereton, 67 Ib. 477; Bloomington v. Brokaw, 77 Ib. 194; Pekin v. Winkel, Ib. 56; Pittsburgh etc. Co. v. Reich, 101 Ib. 157; Chicago v. Union B. Ass'n, 102 Ib. 379; Atlanta v. Green, 69 Ga. 386; Harmon v. Omaha, 17 Neb. 548; Goodrich v. Omaha, 10 Ib. 98; Gottschalk v. C. B. & Q. R. R. Co., 14 Ib. 550; Omaha, etc. Co. v.

visions are general in their application, and give a remedy whenever substantial damage is inflicted on the abutting property, sufficient to constitute a taking of property or a new use which is not contemplated in the original dedication or condemnation. Thus, damages have been awarded, where the grade was raised by a railroad company four feet,[1] fifteen feet,[2] and ten feet;[3] and where the street was lowered twenty feet.[4] So, also, have damages been awarded for other injuries, caused by laying a railroad track,[5] by erecting telegraph poles,[6] by excavations in sidewalks,[7] and by raising an embankment in front of plaintiff's premises.[8] In several of the States, statutes have been passed which require that compensation be made, irrespective of negligence, for damages caused by the change [9] of street grades.[10]

If the statute provides for a special remedy, that remedy is

Struden, 22 Ib. 343; Lowe v. Omaha, 50 N. W. Rep. 760; Sheehy v. Jersey City, 78 Mo. 107; Sheehy v. Kansas City etc. Co., 94 Ib. 574; Householder v. Kansas City, 83 Ib. 488; Whitmore v. Tarrytown, 62 Hun, 619; 16 N. Y. S. 740; Blanchard v. Kansas City, 16 Fed. Rep. 444; 5 McCrary C. C. R. 217; McElroy v. Kansas City, 21 Fed. Rep. 257; Denver Circle R. Co. v. Nestor, 10 Col. 403; Stearns v. Richmond, (Va. 93) 14 S. E. Rep. 847; Page v. Belvin, 88 Va. 985; Galveston etc. Co. v. Fuller, 63 Tex. 467; Cooper v. Dallas, (Tex.) 18 S. W. Rep. 565; Hot Springs, etc. Co. v. Williamson, 45 Ark. 429; Montgomery Council v. Townsend, 80 Ala. 489; New Brighton v. U. Pres. Church, 96 Pa. St. 331; New Brighton v. Peirsol, 107 Ib. 280; Hendrick's App., 103 Ib. 358; Pa. R. R. v. Lippincott, 116 Pa. St. 472; Pa. R. R. Co. v. Merchant, 119 Ib. 541; Bloomington v. Pollock, (Ill. 92) 31 N. E. Rep. 146.

[1] Hot Springs v. Williamson, 45 Ark. 429.

[2] Atlanta v. Green, 67 Ga. 386.

[3] Shawneetown v. Mason, 82 Ill. 337.

[4] Montgomery Council v. Townsend, 80 Ala. 489.

[5] Mollandin v. Union Pac. Co., 14 Fed. Rep. 394.

[6] Board of Trade I. C. v. Barnett, 107 Ill. 507.

[7] Stone v. Fairbury etc. Co., 68 Ib. 394; Shelton v. Birmingham, 62 Conn. 456; 26 Atl. Rep. 156.

[8] Harmon v. Omaha, 17 Neb. 548.

[9] Whether there has been such a change of grade as will entitle an owner to damages, is a question for the jury: Conklin v. Keokuk, 73 Iowa, 343.

[10] Phillips v. Council Bluffs, 63 Iowa, 576; Hampstead v. Des Moines, 63 Ib. 36; Pratt v. Des Moines etc. Co., 72 Ib. 249; Hovey v. Mays, 43 Me. 322; Shelton v. Birmingham, 62 Conn. 456; 26 Atl. Rep. 156; McCarthy v. St. Paul, 22 Minn. 527; Crossett v. Janesville, 28 Wis. 434; Lafayette v. Wartman, 107 Ind. 404; Reock v. Newark, 33 N. J. L. 129; White v. McKeesport, 101 Pa. St. 394; Jones v. Borough of Bangor, 144 Ib. 638; 29 W. N. C. 245; Fernald v. Boston, 12 Cush. 574; Flagg v. Worcester, 13 Gray, 601; Columbus v. Hydr. Woollen Mills Co., 33 Ind. 435; Fortworth v. Howard, (Tex. 93) 22 S. W. Rep. 1059.

generally exclusive.[1] So, where it was provided by the charter that the common council should compensate owners for injuries caused by change of grade, out of funds raised by an assessment which was levied upon all property benefited, it was held that the plaintiff could not recover in an ordinary civil action for damages, as the effect of such a recovery would be to impose a burden on all, which should be borne by a class only.[2]

When it was provided by charter that no change shall be made in grades, until damages shall be assessed and tendered, it was held that an abutter might enjoin the work until this provision of the charter had been complied with.[3]

Pecuniary loss furnishes a standard for the measurement of damages; and if the property has been benefited by the change of grade, as much as it has been damaged, no action will lie;[4] or, at least, only nominal damages may be recovered. All resulting damages for change of grade must be ascertained and recovered in one action, the property owner not being entitled to maintain successive actions for each fresh annoyance.[5]

Widening a street and grading a street are independent processes. Hence, although the abutting owners have received compensation for property taken in widening the street they will still be entitled to compensation, where a statutory provision authorizes the recovery of damages caused by a subsequent change in grade.[6]

The repeal of a statute, by which a city was made liable for

Queen v. Wallesey etc., L. R. 4 Q. B. 351; Queen v. Vestry etc., 6 Ib. 572; Caledonian Ry. Co. v. Ogilvie, 2 Macq. 229; Bigg v. London, L. R. 15 Eq. 376; Ricket v. Metro. Ry. Co., L. R. 2 H. L. 175; Duke of Buccleuch v. Metro. Board, L. R. 5 H. L. C. 418; McCarthy v. Same, L. R. 7 C. P. 508; Anderson v. Bain, 22 N. E. R. 323; Burham v. Ohio etc. Co., 23 Ib. 799.

[1] Andover v. Gould, 6 Mass. 40; Boston v. Shaw, 1 Met. 130; Cole v. Muscatine, 14 Iowa, 296; Dorman v. Jacksonville, 13 Fla. 50, 538; Heiser v. New York, 104 N. Y. 68; Hovey v. Mayo, 43 Me. 322.

[2] Reock v. Newark, 33 N. J. L. 129. But the contrary has been held, in Elgin v. Eaton, 83 Ill. 537; Lafayette v. Wortman, 107 Ind. 404.

[3] Hurford v. Omaha, 4 Neb. 336.

[4] Chicago v. Taylor, 125 U. S. 161; Lehigh C. Co. v. Chicago, 26 Fed. Rep. 415; Elgin v. Eaton, 83 Ill. 535; Stone v. Fairbury etc. Co., 68 Ib. 394; Chicago etc. Co. v. Francis, 70 Ib. 238; Shawneetown v. Mason, 82 Ib. 337.

[5] Lafayette v. Nagle, 113 Ind. 425; North Vernon v. Voegeler, 103 Ib. 314; Terre Haute v. Hudnut, 112 Ib. 542; Central Branch etc. Co. v. Andrews, 26 Kan. 702.

[6] Lane v. Boston, 125 Mass. 519; Cambridge v. Middlesex, 125 Ib. 519; Snow v. Provincetown, 109 Ib. 123.

consequential damages, will not take away the right to damages for a change of grade, which was ordered while it was in force.[1]

§ 331. **Municipal corporation not liable for failure to enforce ordinances.**—The enactment of ordinances is accomplished by the exercise of legislative power, which is conferred expressly, or by necessary implication, upon all municipal corporations; and, as the power is wholly discretionary, as to the time or manner of its exercise, there is generally no liability, either for a failure to enact an ordinance, or for failure to enforce it, after it shall have been enacted. The functions of the legislator are not, so far as they constitute him the judge of the expediency of legislative action, subject to judicial review; and, in the case of municipal ordinance, there is no civil liability in damages to a person, who is injured by the neglect of the city's officers to enforce them, unless this liability is imposed by statute, or the effect of enacting the ordinance has been to create a contract between the city and an individual or corporation.[2]

The violation of an ordinance, particularly one regulating the use of streets, makes the violator a wrongdoer, and gives the injured party a good cause of action against him,[3] for injuries caused by the violation;[4] but, generally the municipality is not liable for the violation of its ordinances, unless it has assumed to grant the permission to violate them to a private citizen for private purposes; and has taken compensation for this license to do an illegal act.[5] It has thus been held, that

[1] Healey v. New Haven, 49 Conn. 394.

[2] Levy v. New York, 1 Sandf. 465; Peck v. Austin, 2 Tex. 162; Fowle v. Alexander, 3 Pet. 398, 409; Lorillard v. Monroe, 11 N. Y. 292, 396; 12 Barb. 161; Chandler v. Bay St. Louis, 57 Miss. 327; Sutton v. Carroll Co., 41 Ib. 236; Sherman v. Grenada, 51 Ib. 186; McCrowell v. Bristol, 5 Lea, 685; Kiley v. Kansas, 87 Mo. 103; Howe v. New Orleans, 12 La. An. 481; Boyland v. Mayor of New York, 1 Sandf. 27; Rehberg v. Mayor, 91 N. Y. 137; Hill v. Charlotte, 72 N. C. 55; Odell v. Schroeder, 58 Ill. 353; Howe v. New Orleans, 12 La. An. 481; Cole v. Nashville, 4 Sneed, 162; Schultze v. Milwaukee, 49 Wis. 254; Davis v. Montgomery, 51 Ala. 139; Norristown v. Fitzpatrick, 94 Pa. St. 121; Robinson v. Greenville, 42 Ohio St. 625; Wheeler v. Plymouth, 116 Ind. 158; Pierce v. New Bedford, 129 Mass. 534; Steele v. Boston, 128 Mass. 583.

[3] Blanchard v. Bissell, 11 Ohio St. 96; State v. Lee, 4 Crim. Law Mag. 79.

[4] Whelan v. N. Y. etc. R. R. Co., 38 Fed. Rep. 15; Penna. Co. v. Stagemeier, 118 Ind. 305; Wanless v. N. E. R. W., L. R. 6 Q. B. 481.

[5] Cohen v. New York, 113 N. Y. 532.

a city is not liable for injuries received by a person using its streets, which are caused by persons coasting thereon by permission of the municipal authorities.[1] The suppression of a nuisance, is a police, and not a distinctly corporative duty; and for the nonperformance of such a duty, or for the nonenforcement of an ordinance, forbidding such a use of its streets, a city cannot be held liable.[2]

Municipal corporations are not liable in damages for violations of their by-laws by their own officials in performing discretionary duties, where no contractual relation exists between the party injured and the corporation.[3] So, it has been held that a city is not responsible for loss caused by fire, originating in a wooden building which was erected with full notice and knowledge of the city's officials, inside of the fire limits, within which the erection of frame structures had been forbidden by ordinance;[4] or for damages caused by the falling of the walls of a building, which had been burned, upon a house on the opposite side of the street, although the city marshal had volunteered to have them torn down.[5] No action can be maintained against the city by a person, who is injured by the act of another, though the act is by ordinance illegal, if at the time the operation of the ordinance had been temporarily suspended by the municipal governing body.[6]

§ 331 *a*. **Liability for mistake as to corporate powers.**—A municipal corporation is not liable for an injury which is wholly caused by a mistaken exercise of powers not granted it by the State, or by having misconceived their extent and limitations. Thus, a city will not be liable to individuals, who are injured

[1] Schultz v. Milwaukee, 49 Wis. 254; Lafayette v. Timberlake, 88 Ind. 330; Burford v. Grand Rapids, 58 Mich. 98; Frankner v. Aurora, 85 Ind. 130; Calwell v. Boone, 51 Iowa, 687; Pierce v. New Bedford, 129 Mass. 534; Steele v. Boston, 128 Ib. 583.

[2] Hayes v. Oshkosh, 33 Wis. 314; Wallace v. Menosha, 48 Ib. 79; 4 N. W. Rep. 101, *contra*, Taylor v. Cumberland, 64 Md. 68.

[3] Odell v. Schroeder, 58 Ill. 353; Ball v. Woodbine, 61 Iowa, 85; but see *contra*, where a city was held liable for injury caused by rapid driving of a steam engine by a member of its fire department. Morse v. Sweenie, 15 Bradw. 486.

[4] Hines v. Charlotte, 12 Mich. 278; see Forsythe v. Mayor, etc., Atlanta, 45 Ga. 152, where the erection was expressly authorized in contravention of existiug ordinance.

[5] City of Anderson v. East, 117 Ind. 126.

[6] Rivers v. Augusta, 67 Ga. 376; 23 Alb. L. J. 17; Hill v. Charlotte, 72 N. C. 55.

by the fraudulent or negligent conduct of those whom it licenses in good faith to carry on business within its limits,[1] because it had not the power to grant the license. But, as a general rule, where a city, acting within its corporate power, licenses a person to do an act which is dangerous *per se*,[2] or which will be dangerous, if done by this particular person,[3] and continues the license after it received actual or constructive notice that its licensee is acting under the license negligently, and to the great danger of the safety of others, it will be held responsible for any injury caused thereby.[4] And as a municipal corporation cannot, by the grant of a license, part with its powers of control, it is always under the obligation of exercising a supervision over its licensee. But, ordinarily, the city will not be liable for the negligence of the licensee, unless there is gross negligence on its part. So, when it is sought to fix a liability upon the city for the act of its licensee, municipal, as well as individual, negligence must be shown.[5]

The granting of a license being substantially a judicial act, a municipal corporation will not be liable to one to whom the license has been refused.[6]

332. **Municipal corporation not liable for neglect or misconduct of its health officers.**—The right of the State to enact laws for the protection of the public health, by which persons afflicted with contagious or infectious disorders may be confined, where they will not cause the disease to spread, is fully recognized.[7] So, too, the State may provide for the care of indigent, insane, sick and decrepit persons by general laws, and devolve their administration upon one or the other of the territorial governmental subdivisions, of which the State is com-

[1] Fowle v. Alexandria, 3 Pet. 398; 3 Cranch C. C. 70; Masterson v. Mt. Vernon, 58 N. Y. 391; Susquehanna v. Simmons, 112 Pa. St. 384; Warsaw v. Dunlap, 112 Ind. 576; Hunt v. New York, 109 N. Y. 134; Macomber v. Taunton, 100 Mass. 255.

[2] Little v. Madison, 42 Wis. 643.

[3] Cole v. Nashville, 4 Sneed, 162.

[4] Russell v. Columbia, 74 Mo. 480; Stephens v. Macon, 83 Ib. 345; Indianapolis v. Dougherty, 71 Ind. 5; Savannah v. Donnelly, 71 Ga. 258; Estelle v. Lake Crystal, 27 Minn. 243; Cohen v. New York, 113 N. Y. 532; *contra*, Robinson v. Greenville, 42 Ohio St. 625; Norristown v. Fitzpatrick, 94 Pa. St. 621; Lincoln v. Boston, 148 Mass. 578.

[5] Cleveland v. King, 28 Fed. Rep. 835.

[6] Duke v. Rome, 20 Ga. 635; White v. Yazoo City, 27 Miss. 357.

[7] Com. v. Parker, 9 Metc. 263; State v. Cooper, 22 N. J. L. 52; Tiedeman's Limitations of Police Power, § 43.

posed. A city, in enforcing such laws, is performing duties of a purely public character, and is not responsible for the neglect or misconduct of its agents or officials,[1] resulting in injury to a nonpaying patient;[2] or for damages to any inmate of one of its institutions, by reason of the unskillful treatment of the resident physicians.[3] So, too, the corporation will not be liable for failure to prevent the spread of an infectious disease;[4] for removing a healthy person to a pest house where he contracted the disease, when he was believed to be suffering from the contagious disease;[5] for ordering an infected ship to leave the harbor;[6] or for taking possession of and detaining it.[7]

The same rule of non-liability is applicable to a city corporation, when it is required by statute to care for paupers and orphan children; and to maintain hospitals and institutions of a public and charitable nature, where the treatment is gratuitous, even though they may be partly supported by private contributions.[8]

§ 333. **Municipal corporations not liable for the torts of their police officers or firemen.**—The police officers of a city, although appointed by it, are not its private agents. For the duties, which they perform in protecting life and property, and preserving the peace, are not strictly corporate; nor are they performed for the exclusive benefit of the city in its corporate capacity.[9] So, although a police officer may himself be liable

[1] Richmond v. Long's Adm., 17 Gratt. 375; Dargan v. Mobile, 31 Ala. 469.

[2] Murtagh v. St. Louis, 44 Mo. 479.

[3] Summers v. Daviess Co., 103 Ind. 262; Ogg v. Lansing, 35 Iowa, 495.

[4] Brown v. Vinalhaven, 65 Me. 402.

[5] Barbour v. Ellsworth, 67 Me. 294.

[6] Rudolphe v. New Orleans, 11 La. An. 242.

[7] Mitchell v. Rockland, 41 Me. 363; Harrison v. Baltimore, 1 Gill, (Md.) 264.

[8] Bryant v. St. Paul, 33 Minn. 289; Liberty v. Hurd, 74 Me. 101; Ogg v. Lansing, 35 Iowa, 495; McDonald v. Mass. Gen. Hos., 120 Mass. 432; Spring v. Hyde, 137 Ib. 554; Benton v. City Hos., 140 Ib. 13; Carrington v. St. Louis, 89 Mo. 208; Maximilian v. New York, 62 N. Y. 160; Ham v. Mayor of N. Y., 10 Ib. 459; Haight v. New York, 24 Fed. Rep. 98; Eastman v. Meredith, 36 N. H. 284.

[9] McKay v. Buffalo, 74 N. Y. 619; Elliott v. Philadelphia, 75 Pa. St. 347; Brown's Adm'r v. Guyandotte, 34 W. Va. 290; Caldwell v. Boone, 51 Iowa, 687; Odell v. Schroeder, 58 Ill. 353; Prather v. Lexington, 13 B. Mon. 559; Odell v. Schroeder, 58 Ill. 353; see Forbush v. Norwich, 38 Conn. 368; Campbell v. Montgomery, 53 Ala. 527; Cook v. Macon, 54 Ga. 468; Heller v. Mayor etc. of Sedalia, 53 Mo. 159; see *ante*, § 9.

in damages for an unlawful arrest, the city will not be responsible to a person who has been arrested illegally,[1] or to one who has been assaulted by a policeman, in an attempt to enforce a city ordinance;[2] for a horse negligently killed under such circumstances;[3] for the taking and detention of property by the police officer;[4] for selling the chattels of one person for the delinquent taxes of another;[5] or for any unlawful or tortious acts, by which property or life is injured in the performance of police duty.[6]

A city is not liable for the act of its recorder in refusing bail wrongfully;[7] nor to a person who suffers a bodily injury, while aiding peace officers, at their request, in making an arrest.[8] Although constables are appointed by the authorities of the town, the town is not liable for their default unless the statute has so provided.[9]

A city is also under no legal duty to furnish an adequate police force; and will not, unless an action is given by statute, be responsible for injury which is caused by insufficient police protection.[10]

§ 333 *a*. **Liability for torts of the firemen.**—Although a city may be expressly empowered and required to furnish water, and to maintain apparatus, adapted to the extinguishing of fires, it will not be impliedly liable to one, whose property has

[1] Grumbine v. Washington, 2 McArthur, 578; Corsicana v. White, 57 Tex. 382; Little v. Madison, 49 Wis. 605; Hart v. Bridgeport, 13 Blatchf. (U. S.) 289; Odell v. Schroeder, 58 Ill. 353; New York Lumber Co. v. Brooklyn, 71 N. Y. 580; Greenwood v. Louisville, 13 Bush, 226; Pollock's Adm. v. Louisville, Ib. 221; Cook v. Macon, 64 Ga. 460; McElroy v. Albany, 65 Ib. 387; Dargan v. Mobile, 31 Ala. 469.

[2] Bowditch v. Boston, 101 U. S. 16; Buttrick v. Lowell, 1 Allen, 172; Burch v. Hardwicke, 30 Gratt. 24; Worley v. Columbia, 88 Mo. 106; Caldwell v. Boone, 51 Iowa, 687; Culver v. Streator, 22 N. E. Rep. 810; Little v. Madison, 49 Wis. 605; Lafayette v. Timberlake, 88 Ind. 330; Norristown v. Fitzpatrick, 94 Pa. St. 121.

[3] Elliott v. Philadelphia, 75 Pa. St. 347.

[4] Stedman v. San Francisco, 63 Cal. 193.

[5] Wallace v. Menasha, 48 Wis. 79.

[6] Stewart v. New Orleans, 6 La. An. 461; Dargan v. Mobile, 31 Ala. 469, 477.

[7] Pesterfield v. Vickers, 3 Coldw. 205; Ready v. Tuskaloosa, 6 Ala. 327.

[8] Cobb v. Portland, 55 Me. 381; Sutton v. Carroll Co. Pol. Bd., 41 Miss. 236.

[9] Hurlbut v. Litchfield, 1 Root, (Conn.) 520.

[10] Hannon v. Agnew, 96 N. Y. 439; Dewey v. Detroit, 15 Mich. 307; Jones v. Richmond, 18 Gratt. 517.

been damaged, either by its failure to provide an adequate water supply ;[1] or by reason of negligence on the part of the officials, having charge thereof, in the use or care of the fire engines, or other similar apparatus owned by the city.[2]

A city is not liable for a failure to supply enough water to extinguish fires, even when the water company supplying it has agreed to indemnify the city for damages, caused by its misfeasance or nonfeasance.[3] And the fact, that the city entered into a contract to furnish the plaintiff with an adequate water supply to extinguish fires, is invalid, if such a contract when made is *ultra vires*.[4]

Municipal corporations are not liable for the negligence of their firemen,—although they may be appointed and removed by the city, and the performance of the duties are wholly subject to its control,—where a person is run over by a hose carriage on its way to a fire ;[5] for injuries caused by the bursting of a hose ;[6] for damage by fire caused by the negligence of the city's firemen ;[7] for neglect in cutting off water by which the fire might have been sooner extinguished ;[8] by the bursting of the mains ;[9] because a horse is frightened by steam from an engine left in the street ;[10] or for any similar lack of care or skill.[11]

[1] Van Horn v. Des Moines, 63 Iowa, 447; Black v. Columbia, 19 S. C. 412; Wheeler v. Cincinnati, 19 Ohio St. 19; Tainter v. Worcester, 123 Mass. 311; Brinkmeyer v. Evansville, 29 Ind. 187; Wright v. City Council, 78 Ga. 241; Patch v. Covington, 17 B. Mon. 722.

[2] McKenna v. St. Louis, 6 Mo. App. 320; Foster v. Lookout W. Co., 3 Lea, 42; Davis v. Montgomery, 51 Ala. 139; Grant v. Erie, 69 Pa. St. 420; Heller v. Sedalia, 53 Mo. 159; Greenwood v. Louisville, 13 Bush. 226; Howard v. San Francisco, 51 Cal. 52; Omeara v. Mayor, 1 Daly, 425; Jewett v. New Haven, 38 Ib. 368; Mendel v. Wheeling, 28 W. Va. 233; Wheller v. Cincinnati, 19 Ohio St. 19; Smith v. Rochester, 76 N. Y. 506; Wilcox v. Chicago, 107 Ill. 334; Wild v. Paterson, 47 N. J. L. 406.

[3] Van Horn v. Des Moines, 63 Iowa, 447.

[4] Black v. Columbia, 19 S. C. 412. This should be read in connection with § 336, on Negligence and the receipt of a consideration as elements in the implied liability of municipal corporations.

[5] Hafford v. New Bedford, 16 Gray, 297.

[6] Fisher v. Boston, 104 Mass. 87.

[7] Hayes v. Oshkosh, 33 Wis. 314; New Orleans v. Cresc. M. I. Co., 25 La. An. 390.

[8] Tainter v. Worcester, 123 Mass. 311; Davis v. Montgomery Council, 51 Ala. 139.

[9] Tainter v. Worc'r, 123 Mass. 311.

[10] Burrill v. Augusta, 78 Me. 118.

[11] Grnbe v. St. Paul, 34 Minn. 402; McCrowell v. Bristol, 5 Lea, 685; Welsh v. Rutland, 56 Vt. 228.

The city is not liable for failure to supply cisterns,[1] or to repair the reservoir.[2] And the fact, that the waterworks are owned by the city, will not alone, in the absence of statute, make it liable for an insufficient supply.[3]

§ 334. **Liability for property destroyed by mobs or rioters.**—The suppression of mob violence, and the prevention of injury to life and property, is a public duty, delegated to the municipality by the State, and is to be distinguished from corporate duties to be performed for the special benefit of the municipality, in that there is no common law liability upon a municipal corporation, to reimburse those whose property has been damaged or destroyed by mobs.[4]

So, it has been held, when the charter makes it the mandatory duty of the city council to regulate the police, preserve

[1] Wheeler v. Cincinnati, 19 Ohio St. 19.

[2] Grant v. Erie, 69 Pa. St. 420.

[3] Mendel v. Wheeling, 28 W. Va. 233.

[4] Baltimore v. Poultney, 25 Md. 107; Fauira v. New Orleans, 20 La. An. 410; Howe v. Same, 12 Ib. 481; Street v. Same, 32 Ib. 577; Campbell v. Montgomery, 53 Ala. 527; Dale Co. v. Gunter, 46 Ib. 118; Hart v. Bridgeport, 13 Blatchf. 289; Robinson v. Greenville, 42 Ohio St. 625; Louisiana v. Mayor of New Orleans, 109 U. S. 285; Cheaney v. Hooser, 9 B. Mon. 330; Williams v. New Orleans, 23 La. An. 507; Hagerstown v. Dechert, 32 Md. 369; Martin v. Brooklyn, 1 Hill, 545, 551; Chadhourne v. Newcastle, 48 N. H. 196; Buttrick v. Lowell, 1 Allen, 172; Ely v. Niagara Co., 36 N. Y. 297; Clear Lake W. W. Co. v. Lake Co., 45 Cal. 90. In Louisiana *ex rel.* Folsom v. New Orleans, 109 U. S. 285, the court said: "The right to reimbursement for damages caused by a mob or riotous assemblage of people is not founded upon any contract between the city and the sufferers. Its liability for damage is created by a law of the Legislature, and can be withdrawn or limited at pleasure. It is their duty [the cities'] to exercise their authority so as to prevent violence from any cause, and particularly from mobs and riotous assemblages. It has, therefore, been generally considered as a just burden, cast upon them, to require them to make good any loss sustained from the acts of such assemblages, which they should have repressed. The imposition has been supposed to create, in the holders of property liable to taxation within their limits, an interest to discourage and prevent any movements tending to such violent proceedings. But, however considered, the imposition is simply a measure of legislative policy, in no respect resting upon contract, and subject like all other measures of policy to any change the Legislature may see fit to make, either in the extent of the liability or in the means of its enforcement. And its character is not at all changed by the fact, that the amount of the loss, in pecuniary estimation, has been ascertained and established by the judgments rendered.

the peace and prevent riots and disorderly assemblages, that this duty was properly and fully performed by the enactment of the proper ordinances; and that the neglect of the officers, who were appointed by the city to enforce the ordinances, and to perform this duty, did not impose any liability on the city.[1] In many States, statutes have been enacted which give the person, whose property is destroyed, an action in damages against the city or county; and such statutes are constitutional.[2] Thus, it has been held that such an act does not conflict with a clause in a State constitution, that "a county shall never be made responsible for the acts of the sheriff."[3] This remedy is purely a matter of legislative policy and statutory creation. The action for damages is founded, not on contract, but on the tortious conduct of the municipality; and the remedy may be limited, modified or withdrawn at the pleasure of the lawmaking power; irrespective of the fact, that the damage has been ascertained and fixed by a judgment[4] of a court of competent jurisdiction. The municipal liability under such acts is general, arising in all cases where property[5] or life[6] is destroyed by a mob, irrespective of the size or character of the gathering,[7] and regardless of the fact, that many of the rioters were not residents of the municipality.[8] The inability of the municipality to quell the disturbance, even though the sheriff called the State militia to his aid, is no defence;[9] and the city is liable, whether the property destroyed is *in transit* through it,[10] and whether the owner is a resident of the city or not.[11]

The basis, upon which the statutory remedy is founded, be-

[1] Western Col. v. Cleveland, 12 Ohio St. 375; Hart v. Bridgeport, 13 Blatchf. 289; Prather v. Lexington, 13 B. Mon. 559; Ward v. Louisville, 16 Ib. 184.

[2] Orr v. Brooklyn, 36 N. Y. 661; Darlington v. New York, 31 Ib. 164; Eastman v. Mayor etc., 5 Rob. 389; *In re* Penn. Hall, 5 Pa. St. 204; Chadbourne v. Newcastle, 48 N. H. 196; Davidson v. Mayor, 27 How. Pr. 343; Folsom v. New Orleans, 28 La. An. 936; Williams v. New Orleans, 23 Ib. 507; Russell v. New York, 2 Denio, 461; Lowell v. Wyman, 12 Cush. 273, 276; Gray v. B'klyn, 10 Abb. Pr. 186.

[3] Moody v. Niagara, 36 N. Y. 297.

[4] Louisiana v. New Orleans, 109 U. S. 285.

[5] Moody v. Niagara, 36 N. Y. 297.

[6] Atchison v. Twine, 9 Kan. 350.

[7] Pittsburgh Riot, Allegheny v. Gibson, 90 Pa. St. 397.

[8] Chadbourne v. Newcastle, 48 N. H. 196.

[9] Allegheny Co. v. Gibson, 90 Pa. St. 397.

[10] Allegheny v. Gibson, *supra*.

[11] Williams v. New Orleans, 23 La. An. 507.

ing the negligence of the municipal corporation in securing a proper enforcement of the laws for the protection of life and property, the contributory negligence of the plaintiff is an element to be considered. If threats of violence have been made prior to the disturbance, the party threatened should give notice to the sheriff or mayor, that precautionary measures may be taken[1]. But such notice is not required, if the interval between the threat and the overt act is so short as to render notice impracticable ;[2] or if the authorities had received warning of the apprehended violence from others ;[3] or where the injured party had no previous warning.[4]

The property of those who break the law is entitled to its protection as well as that of the law abiding. For this reason, it is no defence that the house destroyed was frequented by thieves and murderers ;[5] that a policeman had been murdered in it,[6] or, that the house at the time was used for unlawful purposes.[7] But it is a good defence, that the riot arose out of the previous conduct of the plaintiff, *e. g.* where he had freely supplied the rioters with liquor, which made them quarrelsome;[8] or, where a disturbance arose out of a gambling transaction, which took place in the plaintiff's house, although he was not implicated.[9] If the plaintiff participated in or instigated the riot, he will, of course, not be entitled to recover.[10] The city may show in mitigation of damages that the property destroyed was exposed in a market, in violation of ordinance.[11]

The measure of damages, in such actions, is the actual value of the property when destroyed or carried away by the mob,[12]

[1] Newberry v. Mayor etc., 1 Sweeny, 369.

[2] Moody v. Niagara Co., 36 N. Y. 297; Allegheny v. Gibson, *supra ;* Schiellein v. Kings Co., 43 Barb. 490; Solomon v. Kingston, 24 Hun, 462.

[3] Newberry v. Mayor etc., 1 Sweeny, 369; Allegheny Co. v. Gibson, 90 Pa. St. 397.

[4] Ely v. Niagara, 36 N. Y. 297; Donoghue v. Philada. Co., 2 Pa. St. 230; St. Michaels Ch. v. Philada. Co., Bright. (Pa.) 121.

[5] Ely v. Niagara Co., 36 N. Y. 297; Blodgett v. Syracuse, 36 Barb. 526; Brightman v. Bristol, 65 Me. 426.

[6] Moody v. Niagara, 46 Barb. 669, s. c., 36 N. Y. 297.

[7] Moody v. Niagara, *supra.*

[8] Hill v. Rensselaer Co., 53 Hun, 194; Paladino v. Westchester, 47 Ib. 337.

[9] Underhill v. Manchester, 45 N. H. 214.

[10] Wing Chung v. Los Angeles, 47 Cal. 531.

[11] Fortunich v. New Orleans, 14 La. An. 115.

[12] Solomon v. Kingston, 24 Hun, 562; Hermits of St. Augustine v. Phila. Co., Bright, 116; St. Michael's Ch. v. Same, Bright, 121.

and the burden of proof is upon the plaintiff [1] to show its value. Interest should ordinarily be allowed.[2]

§ 335. **Destruction of buildings to prevent the spread of fire.**—As has already been explained in other connections, in the constitutions of most of the States it is provided that private property shall not be *taken*, *damaged* or *destroyed* for public use or benefit, unless compensation is made to the owner. But this constitutional prohibition is held to be inapplicable to the razing or demolishing of houses to prevent the spread of a conflagration. Such a destruction is not a taking of property in the constitutional meaning of the words.[3]

In such emergencies the public necessity is paramount, and any person may then destroy private property without making himself, the State or municipality, responsible to the owner for its value.[4] The further consideration is to be held in mind, that while the destruction of the building does result in benefit to those whose buildings have thus been saved, there has really been no taking of property for a public use, inasmuch as the building destroyed would have fallen a prey to the conflagration. This building was already doomed to destruction. But in order that the destruction of a building under such circumstances may not entail a liability for its destruction, the necessity must be urgent and the danger imminent. He who destroys a building to prevent the spread of fire, when it is not reasonably necessary, will render himself, or the corporation he represents, liable in damages.[5]

In the absence of statute, making the corporation liable, the fact, that municipal officials are empowered by ordinance to destroy private property, to prevent the spread of a fire, will give the owner of the property no claim against the municipality;

[1] Street v. New Orleans, 32 La. An. 577.

[2] Greer v. New York, 3 Rob. 406.

[3] Field v. Des Moines, 39 Iowa, 575; Amer. Print Wks. v. Lawrence, 23 N. J. L. 595; McDonald v. Redwing, 13 Minn. 38; Surrocco v. Geary, 3 Cal. 69.

[4] Maleverer v. Spink, 1 Dyer, 36 *b*; Respublica v. Sparhawk, 1 Dallas, 237; Taylor v. Plymouth, 8 Met. 462, 465; Neuert v. Boston, 120 Mass. 338; New York v. Lord, 18 Wend. 126; Smith v. Rochester, 76 N. Y. 285; Conwell v. Emeric, 2 Ind. 35; Keller v. Corpus Christi, 50 Tex. 614; Bowditch v. Boston, 101 U. S. 16; Fields v. Stockley, 99 Pa. St. 306; comp. Bishop v. Macon, 7 Ga. 200.

[5] As to necessity, see White v. Charleston, 2 Hill (S.C.) 571; Mouse's Case, 12 Coke, 63; Ib. 13; 15 Vin. Abr. *Necessity*.

not even when the destruction of the building was not necessary to the extinguishment of the fire.[1] But, in many cases, municipal corporations are made liable, by their charters or by general statutes, for property thus destroyed by the proper municipal officials. But in such a case the liability is purely statutory, and it attaches only when the circumstances of the case bring it within the statute.[2]

It has been held that the statutory remedy is not available, when the house is burned so that it is impossible to save it;[3] or if it would have inevitably been destroyed by fire, had it not been destroyed by the municipal officials.[4] The action is given to the owner, and it cannot be prosecuted by one not having an interest in the building;[5] as, for example, by a person who has bought the house, but in whom the title is not yet vested.[6] But this ruling can only be accepted as sound, as long as the vendor waives his right to enforce specific performance of the contract against the vendee. The vendee acquires under an executory contract of sale of land an insurable interest in the buildings; and if the vendor enforces specific performance, it is not a good defence to such action, in whole or in part, that the buildings have been destroyed or damaged by fire subsequent to the execution of the contract.[7] Certainly, under those circumstances, the loss by the destruction of the building, to prevent the spread of the fire, would fall on the vendee, and he alone would be entitled to the statutory compensation.

While the owner of a house can claim damages for the destruction of chattels in the house, to the extent of his interest

[1] Field v. Des Moines, 39 Iowa, 575; Amer. Print Works v. Lawrence, 23 N. J. L. 590; Ib. 9; 21 Ib. 248; Ib. 714.

[2] Dunbar v. San Francisco, 1 Ib. 355; Howard v. Same, 51 Ib. 52; Taylor v. Plymouth, 8 Met. 462, 465; Ruggles v. Nantucket, 11 Cush. 433; Hafford v. New Bedford, 16 Gray, 297; Wheeler v. Cincinnati, 19 Ohio St. 19; Western Col. v. Cleveland, 12 Ib. 375; Fisher v. Boston, 104 Mass. 87; Nevert v. Boston, 120 Mass. 338; Hayes v. Oshkosh, 33 Wis. 314; Coffin v. Nantucket, 5 Cush. 269; Stone v. New York, 25 Wend. 157; New York v. Lord, 18 Ib. 126; 17 Ib. 285.

[3] Taylor v. Plymouth, 8 Metc. 462.

[4] Mayor v. Lord, 17 Wend. 285. The opinions of bystanders that the house would or would not have been inevitably destroyed is not admissible, although the opinions of expert firemen may be. New York v. Pentz, 24 Wend. 668.

[5] Mayor v. Lord, *supra*.

[6] Ruggles v. Nantucket, 11 Cush. 433.

[7] Tiedeman's Eq. Jur. § 501.

in them, a person having goods stored in the building, of which he is neither owner nor occupant, is held to have no claim for damages.[1]

The fact, that the property destroyed was insured, is immaterial, so far as the city is concerned; but the insurance company will be subrogated to the rights of the insured, and may set up an equitable assignment of his claim against the municipality, or may claim the allowance on the policy of the amount received by the insured from the city.[2]

Statutes of this sort are remedial, and are designed to carry out the just and equitable principles of constitutional provisions, that private property shall not be damaged or taken without compensation. They should therefore receive a liberal construction in order to attain the results desired, the equitable distribution of an inevitable loss.[3]

§ 335 *a*. **Destruction of property under military and sanitary regulations.**—The principles, upon which is founded the non-liability of municipal corporations for property, which has been destroyed to prevent the spread of a fire, should apply, where private property is damaged or destroyed by city officials, in the maintenance of military or police rule, or in the enforcement of sanitary regulations. Thus, it is well settled that the Federal government is not liable in damages for injury to, or destruction of, private property during the operation of its armies;[4] and the same rule will doubtless obtain, when, by municipal command, property is destroyed or injured in order to resist foreign invasion, suppress domestic violence or to prevent anticipated riotous proceedings.[5]

Since the confinement of persons suffering from infectious or contagious disorders, is fully justified as a protection to the health of the community,[6] and creates no liability on the part of a State or municipality, there is no doubt that the destruction of the infected clothing or property of such persons, as

[1] Mayor v. Stone, 20 Wend. 139.

[2] New York v. Pentz, 24 Wend. 668; Pentz v. Ætna Ins. Co., 9 Paige, 568; City F. I. Co. v. Corliss, 21 Wend. 367.

[3] Lowell v. Wyman, 12 Cush. 273, 276; Russell v. New York, 2 Denio, 461; Auckland v. West. Loc. Board, L. R. 7 Ch. 597; Kerr v. Preston, L. R. 6 Ch. Div. 463; Dawson v. Huttner, 43 Ga. 133.

[4] United States v. Pacific Railroad, 120 U. S. 227.

[5] Harmon v. Lynchberg, 33 Gratt. 37; Jones v. Richmond, 18 Ib. 517.

[6] Harrison v. Baltimore, 1 Gill, 264.

far as it is essential to the public health, will not at common law render a municipal corporation liable in damages.[1]

§ 336. **Receipt of consideration as ground of liability for negligence.**—Municipal liability for negligence is particularly clear and enforceable, when the city has received a consideration for the duty to be performed; or if, having received permission or authority from the Legislature, it begins and carries on a work, from which it receives a toll, or other profit.[2] Although, as a rule, a municipal corporation is not liable for a failure to supply water, or for damages caused by defects in the appliances, by which water is furnished; if it lay and maintain mains for supplying the inhabitants with water, for which it receives water rates, it will be liable for injuries, which have been caused in any way by the negligent construction of its system of waterworks, and the consequent undermining of the roadbed by the escape of water, and which are sustained by one who is lawfully using the highway.[3] Here the liability is based upon the facts, that the municipality, by voluntarily accepting the power to engage in the business of supplying water, for which it derives a direct pecuniary benefit, has placed itself on a parity with private corporations, and should be responsible to the same extent as they.[4] And this rule has been applied in States, where there existed no implied liability for the non-repair of highways.

Where a stream of water was thrown across a street from a hydrant, the city was held liable for the injury thus caused to the plaintiff's horse, which was frightened and ran away. It is not material in such a case, that the water was being used for extinguishing a fire.[5] A city, owning and conducting its own gas works, will under similar circumstances, be liable for neg-

[1] Stedman v. San Francisco, 63 Cal. 193. See § 332. Municipality not liable for health officials.

[2] Scott v. Manchester, 2 H. & N. 204; Cowley v. Sunderland, 6 Ib. 565; Pittsburgh v. Grier, 22 Pa. St. 54; Mersey Dock Cases, 11 H. Lds. Cases, 687; Milnes v. Huddersfield, L. R. 10 Q. B. Div. 124.

[3] Stock v. Bostou, 149 Mass. 410; Hand v. Brookline, 126 Ib. 324; Wilson v. New Bedford, 108 Ib. 261; McAvoyo v. New York, 54 How. Pr. Rep. 245.

[4] Murphy v. Lowell, 124 Mass. 564; Hand v. Brookline, 126 Ib. 324; Wilson v. New Bedford, 108 Ib. 361; Aldrich v. Tripp, 11 R. I. 141; Levy v. Salt Lake City, 3 Utah, 63; Grimes v. Keene, 52 N. H. 335.

[5] Aldrich v. Tripp Treas., 11 R. I. 141. Distinguishing Butrick v. Lowell, 1 Allen, 172, and similar cases where it had been held that firemen

ligence in the conduct and management of such works, or in the service to the private consumer.[1]

§ 336 *a*. **Liability as an owner of property.**—There are, however, many cases of liability of municipal corporations for torts, in which the element of profit or consideration does not enter, and some other ground of liability must be discovered for such cases. Since municipal charters were in England, originally, royal grants, they were regarded as creating an implied contract between the corporators and the State, and as impliedly imposing duties, which under the earlier cases furnished the proper legal basis for the liability in tort of the municipal corporation to private individuals.[2] In this country, municipal corporations are wholly the creatures of statute, and are erected without the consent of those who are the incorporators.[3] The English view, therefore, which regards the charter as a contract, is properly denied.[4] And hence the doctrine of implied contract, which furnished in England a satisfactory foundation for the municipal liability for injuries sustained by private individuals, would not answer in American law. In the place of this theory is substituted the semi-private character of the municipal corporation as the owner of property. Upon the ground, that owners of property are liable for its improper use and condition, municipal corporations have been held liable for damages caused by the defective condition of property, which is held by them in the private character of owner or lessee, to the same extent, and in the same manner, as private corporations and individuals.[5]

were public and not corporate officers.

[1] Western Sav. Soc. v. Philadelphia, 31 Pa. St. 175; Kibele v. Same, 105 Ib. 41; Scott v. Manchester, 1 H. & N. 59; Coe & Wise, 5 B. & S. 440, 475.

Henley v. Lyme Regis, 5 Bing. 91; 3 Mo. & P. 298; 3 B. & Ad. 77; 2 Cl. & Fin. 331; 8 Bligh N. R. 690; 1 Bing. N. C. 222; 1 Scott, 29.

[3] "The erection of such a corporation is in truth simply the creation of a new instrumentality of government." Elliott on Roads and Streets, p. 313; Cf. West v. Brockport, 16 N. Y. 161, 173; Cooley, Const. Limit. 247, 248; see *ante*, § 24.

[4] Dil. Mun. Cor. § 967.

[5] Where a city holds and deals with property as its own, not in the discharge of a public duty, nor for the direct and immediate use of the public, but for its own benefit, by receiving rents or otherwise in the same manner as a private owner might, it is liable, to the same extent as he would be for negligence in the management or use of such property to the injury of others." Hill v. Boston, 122 Mass. 344, 359; see also Bailey v. New York, 3 Hill, 531, 539; Western S. F. Soc. v. Philadelphia, 31 Pa. St. 185, 189; Thayer v. Boston, 19 Pick. 511; Oliver v. Worcester, 102

So it was held that a city, owning a wharf, and receiving wharfage for its use, must employ the same degree of care to provide proper appliances, as would an individual owner under similar circumstances.[1] The city of New York, as the owner of a dam upon lands owned by it, and which had been negligently and unskillfully built, was held liable for injuries sustained by reason of the dam being carried away, although it was constructed by water commissioners who were appointed by the State ;[2] and a village, owning and operating an aqueduct through its streets, will be responsible as owners for permitting a water box to project above the surface of the highway; even though it might not be its duty to remove it, in the exercise of its control of highways.[3]

Under the same rule, a municipal corporation will be held liable, if it erect a building for corporate purposes, the foundation of which is so negligently laid as to cause water to flow back upon the land of private owners ;[4] or if it establishes a reservoir,

Mass. 489; McCaughey v. Providence, 12 R. I. 449; Sherman v. Laugham, 13 S. W. R. 1042; Moulton v. Scarborough, 71 Me. 267; Hannon v. St. Louis Co., 62 Mo. 313; Hillsboro v. Ivey, 1 Tex. C. C. App. 653; 20 S. W. R. 1012; Brown v. Atlanta, 66 Ga. 71; Millers v. Augusta, 63 Ib. 772; Worden v. New Bedford, 131 Mass. 23; Perkins v. Lawrence, 136 Ib. 305; Barthold v. Philadelphia, 154 Pa. St. 109; 26 Atl. Rep. 304; Waldron v. Haverhill, 10 N. E. R. 481; Mackey v. Vicksburg, 64 Miss. 777; Rowland v. Kalamazoo, 49 Mich. 553; Seaman v. Mayor, 80 N. Y. 239; Radway v. Briggs, 37 Ib. 256; Kennedy v. Mayor, 73 Ib. 365; McAvoy v. Mayor, 54 How. Pr. 245; Grimes v. Keane, 52 N. H. 335; Savannah v. Cullens, 38 Ga. 334; City Council v. Hudson, 88 Ib. 599; 15 S. E. Rep. 678; Wilkins v. Rutland, 25 Am. & Eng. Corp. Cases, 49; Aldrich v. Tripp, 11 R. I. 141; 23 Am. Rep. 434; Pittsburgh v. Grier, 22 Pa. St. 54; Erie v. Schwingle, 22 Pa. St. 338; Greenwood v. Westport, (D. C. 93) 53 Fed. Rep. 824; Memphis v. Kimborough, 12 Heisk. 133; Fennimore v. New Orleans, 20 La. An. 124; Hand v. Brookline, 126 Mass. 324; Wilson v. New Bedford, 108 Ib. 261; Eastman v. Meredith, 36 N. H. 284; 72 Am. Dec. 302; Cumberland v. Willison, 50 Md. 138; Rhodes v. Cleveland, 10 Ohio, 159; Jeffersonville v. Louisville, etc. Ferry Co., 27 Ind. 100; 89 Am. Dec. 495; Carrington v. St. Louis, 89 Mo. 208; Harper v. Milwaukee, 30 Wis. 365.

[1] Willey v. Allegheny, 118 Pa. St. 490; Allegheny v. Campbell, 107 Ib. 530.

[2] New York v. Bailey, 2 Denio, 433; see Darlington v. New York, 31 N. Y. 200; Fleming v. Susp. Bridge, 92 Ib. 368; Barnes v. District, 91 U. S. 540, 552; Wright v. Holbrook, 52 N. H. 120.

[3] Wilkins v. Rutland, (Vt.) 25 Am. & Eng. Corp. Cas. 49.

[4] Rhodes v. Cleveland, 10 Ohio, 159; Roch. W. L. Co. v. Rochester, 3 N. Y. 463; Harper v. Milwaukee, 30 Wis. 365.

from which the water percolated to the injury of adjoining lands.[1] So a municipal corporation is liable for the negligent plumbing and drainage in a school building, by which water was permitted to overflow neighboring cellars.[2] When a town, under authority from its charter, establishes a market, it must construct and maintain it and its appurtenances, in such a manner that they will not become a nuisance to the vicinage,[3] or dangerous to individuals, who use it.[4] So, also, municipal corporations have been repeatedly held liable for damages, caused by unguarded excavations, when made by the corporation upon its own grounds.[5]

But it should be noted in this connection that municipalities are not insurers of the safe condition of their public buildings,[6] apparatus for water supply, sewers or other municipal instrumentalities. A city is not liable for the improper condition of its property to a greater extent than are private corporations or individuals,[7] and the fact that a defect existed in any of them, is not enough to make the city liable; it must be affirmatively shown that the cause of the defect, or the cause of its continuance, was the negligence of the municipality, or of its officials.[8]

Though the municipality has paid for, and holds the title to

[1] Wilson v. New Bedford, 108 Mass. 26.

[2] Briegel v. Philadelphia, (Pa. 1890) 19 Atl. Rep. 10, 38.

[3] Suffolk v. Parker, 79 Va. 660.

[4] Savannah v. Cullens, 38 Ga. 334.

[5] Oliver v. Worcester, 102 Mass. 489; Hannon v. St. Louis Co., 62 Mo. 313.

[6] Chicago v. O'Brennan, 65 Ill. 560. Worden v. New Bedford, 131 Mass. 23; Perkins v. Lawrence, 136 Ib. 305; Levy v. St. Lake, 3 Utah, 63; Hofeston v. Eads, 32 Ill. App. 75; Orme v. Richmond, 79 Va. 86; Waldron v. Haverhill, 143 Mass. 582; 10 N. E. R. 481; Mackey v. Vicksburg, 64 Miss. 777; Fox v. Lansingburgh, 59 Hun, 617; 13 N. Y. S. 174; Barton v. Syracuse, 36 N. Y. 54; Lloyd v. New York, 5 Ib. 369; McCullough v. B'klyn, 23 Wend. 458; Clayburg v. Chicago, 25 Ill. 535; Tice v. Bay City, 47 N. W. Rep. 1062; 84 Mich. 461; Saxton v. St. Joseph, 60 Mo. 153; Sterrett v. Houston, 14 Tex. 153; Richmond v. Long's Adm., 17 Gratt. 375; Helena v. Thompson, 29 Ark. 569, 574; Markee v. Borough, (Pa. 91) 21 Atl. Rep. 794; Denver v. Dean, 7 Col. 328.

[8] Beach v. Elmira, 58 Hun, 606; Dannaher v. Brooklyn, 51 Ib., 563; Smith v. Mayor, 66 N. Y. 295; Jenney v. Brooklyn, 120 Ib. 164; Ring v. Cohoes, 77 Ib. 83; Todd v. Troy, 61 Ib. 506; Goodfellow v. Mayor, 100 Ib. 15; Dubois v. Kingston, 102 Ib. 219; Hunt v. New York, 109 Ib. 234; Bishop v. Schuylkill, 8 Atl. Rep. 449; Scranton v. Catterson, 94 Pa. St. 202; Moore v. Platteville, 47 N. W. Rep. 1055; Gay v. Cambridge, 128 Mass. 387; Flanders v. Norwood, 141 Ib. 17; Chicago v. McGiven, 78 Ill. 347; Rockford v. Hildebrand, 61 Ib. 155; Lee v. Barkhampstead, 46 Conn. 213; Bill v. Norwich, 39 Ib.

the property;[1] yet if it does not possess the usual rights and privileges of ownership, and cannot control or dispose of it, so as to rid itself of liability, it will not be within the principle above laid down.[2] Thus, even when a city is responsible for the condition of its aqueduct, it is not liable for injuries caused by defective lateral service pipes, which are inserted by consumers into the street mains.[3]

§ 337. **How may negligence be proven.**—Negligence may be inferred from the facts and circumstances of the case, without the introduction of positive and direct evidence pointing thereto.[4] But this does not mean that negligence will be found without evidence;[5] or that there is in any case a legal presumption, that officials of a corporation, private or municipal, have been negligent.[6] In extreme and exceptional cases, the dangerous character[7] or insufficiency of the streets[8] may be so manifest, that as a matter of law the court may be justified in holding them unsafe; but, usually, these are questions for

222; Mayor v. Perdue, 53 Ga. 607; Brown v. Atlanta, 66 Ib. 71; Cook v. Milwaukee, 24 Wis. 270; Smith v. Leavenworth, 15 Kan. 81; Atchison v. King, 9 Ib. 550; Wellington v. Gregson, 31 Ib. 99; Galveston v. Barbour, 62 Tex. 172; Noble v. Richmond, 31 Gratt. 271; Aurora v. Bitner, 100 Ind. 396; Cook v. Anamosa, 66 Iowa, 427; Holmes v. Hamburg, 47 Ib. 348; Stafford v. Oskaloosa, 57 Ib. 748.

[1] As to what evidence is admissible or sufficient to prove ownership by the city, see Terry v. Mayor etc. of New York, 8 Bosw. 504; Palmer v. St. Albans, 60 Vt. 427; El Paso v. Causey, 1 Ill. Ap. 531.

[2] Terry v. Mayor, *supra;* Curran v. Boston, 151 Mass. 505; New York v. B. S. & L. Co. v. B'k'lyn, 71 N. Y. 580; Palmer v. St. Albans, *supra;* Flori v. St. Louis, 69 Mo. 341.

[3] Bigelow v. Randolph, 14 Gray, 541; Treadwell v. Mayor, 1 Daly (N. Y.) 123; Smith v. Philadelphia, 81 Pa. St. 38.

[4] Briggs v. Oliver, 4 H. & N. 403; Feltham v. England, L. R. 2 Q. B. 33; Cleveland v. Spier, 16 Q. B. N. S. 399; Sherwood v. Hamilton, 37 U. C. Q. B. 410; Sterling v. Thomas, 60 Ill. 264; Stratton v. Staples, 59 Me. 94; Chicago v. Major, 18 Ill. 349; Lehman v. Brooklyn, 29 Barb. 234; Costello v. Landwehr, 28 Wis. 522; Cassidy v. Angell, 12 R. I. 447; Hart v. Hudson Riv. R. R. Co., 80 N. Y. 622; Mullen v. St. John, 57 N. Y. 567.

[5] Philadelphia etc. Co. v. Hummell, 44 Pa. St. 375.

[6] Jackson v. Hyde, 28 U. C. Q. B. 294; Harris v. Perry, 89 N. Y. 308; Singleton v. East. Counties R. R., 7 C. B. N. S. 287; Hammack v. White, 11 Ib. 588; Duffy v. Upton, 113 Mass. 544; Ward v. Andrews, 3 Mo. App. 275; Strouse v. Whittlesy, 41 Conn. 559; Kendall v. Boston, 118 Mass. 234; Goshorn v. Smith, 92 Pa. St. 435.

[7] Prideaux v. Mineral Pt., 43 Wis. 513.

[8] Maugh v. Milwaukee, 32 Wis. 200.

the jury[1] to decide or infer from the facts, as shown by the testimony. The opinions of witnesses, as to the sufficiency of the road, are not admissible.[2]

§ 338. **Negligence of municipal servants—What must be shown—Torts ultra vires.**—The rule that a principal or employer is responsible civilly for injury caused by the negligence or lack of skill of an agent or servant, when he is acting in the line of his employment, is applicable to municipal corporations. To create such a liability in the case of a municipal agent, it is essential, not only that the act, by which the injury is caused, should be within the powers conferred on him by the corporation; but it must also be within the corporate power; that is, the act must not be *ultra vires* to the corporation itself.[3]

The corporation cannot make itself liable for torts *ultra vires*, not even by express commands to its officers to do the tortious acts;[4] or by subsequent ratification.[5] But if the wrongful act be, when committed, within the powers which are expressly or impliedly conferred upon the corporation, it will be liable when it expressly authorized or commanded the wrongful act; or when not having commanded it, the agent is implied by law to have had the authority to act in the name of the corporation; or, when it has subsequently ratified or adopted it. And such ratification may be express, or may be inferred from circumstances; as when the corporation receives the benefit of the tortious action of its official.[6] The corporation is also liable for the negligent performance by its officials of corporate duties of a ministerial nature. Finally, it may be stated, in general explanation of this liability of the municipal corporation, that "A municipal corporation is liable for the acts of its agents, injurious to others, when the act is in its nature lawful and authorized but done in an unlawful manner or in an unauthorized place, but it is not

[1] Draper v. Ironton, 42 Wis. 696.

[2] Montgomery v. Scott, 34 Wis. 338; Oleson v. Tolford, 37 Ib. 327; Griffin v. Willow, 43 Ib. 509; Benedict v. Fond du Lac, 44 Ib. 495.

[3] Haag v. Vanderburgh Co., 60 Ind. 611; Smith v. Rochester, 76 N. Y. 506; Baltimore v. Eschback, 18 Md. 276; State v. Kirkley, 29 Md. 85, 111; Horn v. Baltimore, 30 Ib. 218; Hawell v. Buffalo, 15 N. Y. 512; Cole v. Nashville, 4 Sneed, 162; Trammell v. Russellville, 34 Ark. 105.

[4] Browning v. Owen Co., 44 Ind. 11, 13.

[5] Hodges v. Buffalo, 2 Denio, 110; Mitchell v. Rockland, 52 Me. 118.

[6] Wade v. Brantford, 19 Up. Can. Q. B. 207; Morse v. New York, 73 N. Y. 238; Trescott v. Waterloo, 26 Fed. Rep. 592.

liable for injuries or tortious acts, which are in their nature unlawful and prohibited."[1] A corporation is, however, not liable for an illegal act of its official *intra vires*, if the corporation has not authorized or ratified it.[2] But when in its answer a city ratifies and adopts the illegal official act, it will be liable if it fails to justify it.[3] And it has been held that, where an act is lawful when done, as where property is lawfully seized, yet if the officials of the municipality fail to pursue the proper legal methods in disposing of it, the city will be liable for what has become a trespass.[4]

The distinction above made between acts beyond the authority of the municipal corporation, and acts within its authority, but not within the authority of the particular officer, is very important. So, it may be well to note the general rule, that a corporation will be liable without ratification for official acts done *bona fide*, in pursuance of a general authority, which is granted by the city to act for it.[5] It is a general rule that the person, bringing an action for the breach of a legal duty against a municipality, or against one of its officials, must show the existence of the duty,[6] and his interest in its performance.[7] Not that he must show an express statute or rule of law, creat-

[1] Worley v. Columbia, 88 Mo. 106; see also, generally, Brown v. Cape Girardeau, 90 Ib. 37; New Decatur v. Berry, 90 Ala. 432; 7 So. Rep. 838; Wakefield v. Newport, 60 N. H. 374; Thayer v. Boston, 19 Pick. 511; Perley v. Georgetown, 7 Gray, 464; Deane v. Randolph, 132 Mass. 475; State v. Kirly, 29 Md. 85; Cooper v. Atlanta, 53 Ga. 638; Loyd v. Columbus, (Ga. 93) 15 S. E. 818; Chicago v. Megraw, 75 Ill. 566, 570; Sewall v. St. Paul, 20 Minn. 511, 524; Aldrich v. Tripp, 11 R. I. 141; Goddard v. Harpswell, 84 Me. 499; 24 Atl. 958; Haag v. Vanderburgh, 60 Ind. 511; Howland v. Maynard, (Mass. 93) 34 N. E. 515; Smith v. Rochester, 76 N. Y. 506; McDonald v. New York, 68 Ib. 23; 23 Am. Rep. 144; Collins v. Macon, 69 Ga. 542; Marsh v. Fulton Co., 10 Wall. 676; Thomas v. Richmond, 12 Ib. 349; Salt Lake City v. Hollister, 118 U. S. 256, 262.

[2] Fox v. Northern Liberties, 3 W. & S. 103; Everson v. Syracuse, 100 N. Y. 577; Corsicana v. White, 57 Tex. 382.

[3] Wilde v. New Orleans, 12 La. An. 15.

[4] Baumgard v. New Orleans, 9 La. An. 119; Hunt v. Booneville, 65 Mo. 620; Donnelly v. Tripp, 12 R. I. 97.

[5] Thayer v. Boston, 19 Pick. 511, 516; Lee v. Sandy Hill, 40 N. Y. 442, 449; Buffalo T. Co. v. Buffalo, 58 Ib. 639; Perley v. Georgetown, 7 Gray, 464.

[6] Mich. Cen. R. R. v. Coleman, 28 Mich. 440; Frech v. Philadelphia, 39 Md. 574; Button v. Frink, 51 Conn. 342.

[7] Skate v. Harris, 89 Ind. 363; Fish v. Kelly, 17 C. B. N. S. 194.

ing the duty for his benefit; but he must show facts sufficient to enable the court to infer that the duty existed.[1]

The rule as to the non-liability of municipal corporations for torts *ultra vires*, is one which in numerous instances works great hardship and loss to the injured person; but it is firmly established, and the courts seldom if ever depart from it. So, when a city had the authority to construct an embankment and plank road, instead of which a bridge was built, it was held, in overruling a defence of *ultra vires* to an action by a person injured thereon, that, as the city had the authority to construct a road, its failure to do so, in the manner prescribed by law, made its negligence more evident.[2] On account of the control which municipalities exercise over highways, and the impossibility of knowing, whether in any case the municipality is acting within its powers, a few exceptions have been made to the rule of non-liability for acts *ultra vires*, in cases arising out of permission being unlawfully given for uses of the highway which result in injury to travelers.[3]

A distinction has been made in a recent case by the Supreme Court of the United States between acts *ex contractu*, which are *ultra vires*, and those *ex delicto*. It arose in a case, where a municipal corporation, having no statutory authority to do so, engaged in the business of distilling spirits; and having been taxed by the United States upon spirits, in excess of the amount reported by it, sought unsuccessfully to recover the amount paid, and to avoid a seizure of its property, by claiming that its action as distiller was *ultra vires*.[4] In this case, Mr. Justice Miller said: "We do not agree that they (municipal corporations) are wholly exempt from liability for wrongful acts done, with all the evidences of their being acts of the corporation, to the injury of others, or in invasion of legal obligations to the State or the public. The question of the liability of corporations on contracts, which the law does not authorize them to make, and which are wholly beyond the scope of their powers, is governed

[1] Basset v. Fish, 73 N. Y. 310; State v. Haworth, 23 N. E. R. 946; Eslava v. Jones, 83 Ala. 139; State v. Harris, 89 Ind. 363; Murphy v. Brooklyn, 23 N. E. R. 887; Beck v. Carter, 68 N. Y. 283; Murphy, Jr., v. Brooklyn, 98 N. Y. 642.

[2] Pekin v. Newell, 26 Ill. 320; Chicago v. Turner, 80 Ib. 419.

[3] Cohen v. New York, 113 N. Y. 532; Stanley v. Davenport, 54 Iowa, 463; Howell v. Buffalo, 15 N. Y. 512.

[4] Salt Lake City v. Hollister, 118 U. S. 256.

by a different principle (from liability *ex delicto*). In such a case the party dealing with the corporation is under no obligation to enter into the contract. No force or restraint or fraud is placed upon him. The powers of the corporation are matters of public law open to his inspection, and he may and must judge for himself as to the power of the corporation to bind itself by the proposed agreement."

The charter of a town did not confer power to erect a dam. Nevertheless, the selectmen proceeded to construct one, by which the plaintiff's land was flooded. The town was held to be not liable, because of the lack of corporate power to construct a work of such a character;[1] a ruling, which would seem to be applicable to injuries caused by works of local improvements, unauthorized by statute,[2] or authorized by a statute which is unconstitutional.[3] A city has no power to call a meeting for political purposes. But a person present at such a meeting, who is injured by the discharge of a cannon, has no claim against the city, although the meeting may have been called, and held under the management of, the city councils.[4] And it may be stated as a general rule, that a municipality will not be liable for wrongs done by its officials, under ordinances and by-laws whose enactment is wholly outside of the corporate authority.[5]

A municipal corporation is liable for the wrongful acts of its servants, although it may be apparent from the malicious and illegal[6] character of their acts, that the servants are exceeding the power which their principal possesses. Of course, a mu-

[1] Anthony v. Adams, 1 Met. 284.

[2] Walling v. Shreveport, 5 La. An. 669; Seele v. Deering, 79 Me. 343; Idaho Springs v. Woodward, 10 Col. 104; Cavanagh v. Boston, 139 Mass. 426; Leeds v. Richmond, 102 Ind. 372; Denver v. Bayer, 7 Col. 113; Cummins v. City, 79 Ind. 491; Haag v. Board, 60 Ib. 511; Morrison v. Lawrence, 98 Mass. 219; Anthony v. Adams, 1 Metc. (Mass.) 284; Mitchell v. Rockland, 52 Me. 118; Cuyler v. Rochester, 12 Wend. 165; Mayor etc. v. Cunlif, 2 N. Y. 165; Smith v. Rochester, 76 N. Y. 506; Schipper v. Aurora, 22 N. E. R. 878; Campbell v. Montgomery, 53 Ala. 573.

[3] Albany v. Cunliff, 2 N. Y. 165; Browning v. Owen Co., 44 Ind. 11, 13; Shelby v. Deprez, 87 Ib. 509.

[4] Boyland v. New York, 1 Sandf. 27; Boom v. Utica, 2 Barb. 104; Swift v. Williamsburg, 24 Barb. 427; Morrison v. Lawrence, 98 Mass. 219.

[5] Field v. Des Moines, 39 Iowa, 575.

[6] McGary v. Lafayette, 15 Rob. (La.) 668; 4 La. An. 440; Wilde v. New Orleans, 12 La. An. 15; Gould v. Atlanta, 60 Ga. 164; Hunt v. Booneville, 65 Mo. 620.

nicipal corporation has no right to commit a trespass or appropriate property belonging to another; and if it does so, it must act through agents. If its agents, therefore, in exercising the powers conferred upon it as, for example, in carrying on local improvements trespass on, appropriate or destroy[1] private property, it will be liable in the same manner as would an individual principal.[2] But the city is not liable, unless the wrongful act is done in carrying out the improvement, or is proximately connected with it.[3]

Municipal corporations, and counties,[4] are impliedly liable to a patentee, whose invention they infringe in the execution and performance of corporate powers and duties.[5] But a municipal or *quasi* municipal corporation will not be liable, when the infringement is committed by a contractor,[6] on the general principle, that the employer of an independent contractor is not liable for the torts of the latter, committed in the course of the business to which the contract relates.

§ 338 *a*. **Who is a municipal officer or agent.**—In considering the liability of a municipal corporation for the torts of its officials, the primary questions are: Was the person a servant of the corporation; and if so, was the act for which responsi-

[1] Walling v. Shreveport, 5 La. An. 660.

[2] Allen v. Decatur, 24 Ill. 332; Lee v. Sandy Hill, 40 N. Y. 442; Sheldon v. Kalamazoo, 24 Mich. 383; Crossett v. Janesville, 28 Wis. 420; Buffalo Turnp. Co. v. Buffalo, 58 N. Y. 639; Hunt v. Booneville, 65 Mo. 620; Cf. Rowland v. Gallatin, 75 Mo. 134; Manners v. Haverhill, 135 Mass. 165; Hickerson v. Mexico, 58 Mo. 61; Hunt v. Booneville, 65 Ib. 620; Soulard v. St. Louis, 36 Mo. 546; Walling v. Shreveport, 5 La. An. 660; Platter v. Seymour, 86 Ind. 323; Conniff v. San Francisco, 67 Cal. 45; Waldron v. Haverhill, 143 Mass. 582; Dooley v. Kansas City, 82 Mo. 444; Anthony v. Adams, 1 Met. 287; Hawks v. Charlemont, 107 Mass. 414; Gordon v. Taunton, 126 Ib. 349; Ipswich Mills v. Essex Co., 108 Ib. 363; Bailey v. Woburn, 126 Ib. 416; Ætna Mills v. Waltham, 126 Ib. 122; Hildreth v. Lowell, 11 Gray, 345; Leeds v. Richmond, 102 Ind. 372.

[3] White v. Phillipston, 10 Metcf. 108; Bigelow v. Randolph, 17 Gray, 541; Barney v. Lowell, 98 Mass. 571.

[4] May v. Mercer Co., 30 Fed. Rep. 247; May v. Logan, 30 Ib. 250; see *contra*, Jacobs v. Hamilton Co., 4 Fisher Pat. Cas. 81.

[5] Rausen v. New York, 1 Fisher Pat. Cases, 254, 274; Bliss v. Brooklyn, 4 Ib. 596; Munson v. New York, 3 Fed. Rep. 338; Am. Nic. Pav. Co. v. Elizabeth City, 4 Fisher Pat. Cases, 189, 197; Allen v. Brooklyn, Ib. 598.

[6] Bigelow v. Louisville, 3 Fisher Pat. Cases, 602; May v. Juneau Co., 30 Fed. Rep. 241.

bility is sought to be fixed upon the corporation, a corporate, as distinct from a public act.[1]

If it can be shown that the appointment or election, the control and the removal of the official, are in the power of the corporation, then the official is its official or agent, either generally, or as to the wrong complained of; and for the nonperformance or negligent performance of a strictly corporate duty which devolved upon him by law, or which was commanded or ratified by the corporation, the municipality will be liable.[2]

And, so, likewise, will a municipal corporation be liable for the tortious actions of its officers *de facto*.[3] If the duties performed by an official are not corporate or not performed for the peculiar benefit of the corporation, as distinct from the public at large; if they are State and public duties, which for public convenience have been imposed upon municipal officials, the municipal corporation is not liable for misfeasance or nonfeasance in the performance of them.[4]

So, there may be officials who, although appointed by the corporation, are otherwise wholly independent of it, but whose jurisdiction territorially is coterminous with the municipality, and whose duties are wholly such as public or State officials perform. For the acts of this class of officials the municipality is not responsible.[5] So a city will not be liable for the negli-

[1] Alcorn v. Philadelphia, 44 Pa. St. 348; Barnes v. District, 45 Mo. 94; Lynam v. White, 2 Aiken, 255; Bennett v. Same, 14 La. An. 120; Hilsdorf v. St. Louis, 45 Mo. 94; Small v. Danville, 51 Me. 359; Fisher v. Boston, 104 Mass. 87; Morrison v. Lawrence, 98 Ib. 219; Hinde v. Wabash, 98 Ib. 219; Pollock v. Louisville, 13 Bush, 321; Brown v. Vinalhaven, 65 Me. 402; Grumbine v. Washington, 2 McArthur, 578.

[2] Saylor v. Harrisburg, 87 Pa. St. 216; Powers v. Council Bluffs, 50 Iowa, 197; Kobs v. Minneapolis, 22 Minn. 159; Rowell v. Williams, 29 Iowa, 210; Van Pelt v. Davenport, 42 Ib. 308; Damour v. Lyons, 44 Ib. 276; Sheldon v. Kalamazoo, 24 Mich. 383; Heuson v. New Haven, 37 Conn. 475; Osborne v. Detroit, 32 Fed. 36; Cowley v. Sunderland, 6 H. & W. 565.

[3] Clark v. Easton, 146 Mass. 43.

[4] Boehm v. Baltimore, 61 Md. 259; McCarthy v. Boston, 135 Mass. 197; Hannen v. St. Louis, 62 Mo. 313; Maximilian v. New York, 62 N. Y. 160; Sullivan v. Holyoke, 135 Mass. 273; Aldrich v. Tripp, 11 R. I. 141; Brinkmeyer v. Evans, 29 Ind. 187.

[5] Pratt v. Weymouth, 147 Mass. 245; Edgerly v. Concord, 59 N. H. 78; Dooley v. Sullivan, 112 Ind. 451; Walcott v. Swampscott, 1 Allen, 101; White v. Phillipston, 10 Met. 108; Hamilton v. Garrett, 62 Tex. 602; Greggs v. Foote, 4 Allen, 195; Hafford v. New Bedford, 16 Gray, 297; Fishe v. Boston, 104 Mass. 87; Ogg v. Lansing, 35 Iowa, 495; Brinkmeyer v. Evansville, 29 Ind. 187; Bryant v. St. Paul, 33 Minn. 289; Black v. Co-

gence of a board of health,[1] a surveyor of highways,[2] or for an assault by a policeman;[3] for the actions of the board of equalization of assessments;[4] or for those of the board of education, although the mayor appoints the members;[5] or of the commissioners of charities and correction;[6] for the actions of the city council, when erecting docks for the benefit of individuals;[7] for the negligence of a boiler inspector;[8] or of the driver of an ambulance;[9] or for the negligence of a city surveyor or engineer doing work for private persons;[10] or for the unlawful action of the mayor, in ordering a building to be destroyed.[11]

But the city of New York has been held liable for the negligence of the water commissioners, on the ground that the city had an interest in the grant of power to them;[12] and for the action of the park commissioners when, by statute, certain streets were put under their control.[13] The suspension bridge connecting the cities of New York and Brooklyn belongs to those cities; and the bridge trustees, and persons employed by them, are the servants of the cities, for whose negligence they will be responsible.[14]

On the other hand, it has been held that a tribunal, which is authorized by law to act in condemnation proceedings, is not the agent of the municipality, although it may represent it, for the reason that its functions are public, discretionary and judicial.[15]

In New England, the towns are not, in the absence of statute

lumbia, 10 S. C. 412; Coleman v. Chester, 14 Ib. 286; Johnston v. Charleston, 3 Ib. 232; Aldrich v. Tripp, 11 R. I. 141; Baltimore v. O'Neill, 63 Md. 336; Newert v. Boston, 120 Mass. 338.

[1] Bryant v. St. Paul, 33 Minn. 289; see § 332.

[2] Walcott v. Swampscott, 1 Allen, 101.

[3] Buttrick v. Lowell, 1 Allen, 172; see § 333.

[4] Tone v. New York, 70 N. Y. 157.

[5] Ham v. New York, 70 N. Y. 459; Swift v. New York, 83 Ib. 528.

[6] Maximilian v. New York, 62 N. Y. 160; Haight v. New York, 24 Fed. Rep. 93.

[7] N. Y. & B. Lumber Co. v. Brooklyn, 71 N. Y. 580.

[8] Mead v. New Haven, 40 Conn. 72.

[9] Maximilian v. New York, 62 N. Y. 160.

[10] Alcorn v. Philadelphia, 44 Pa. St. 348.

[11] Russell v. New York, 2 Denio, 461.

[12] Bailey v. New York, 2 Denio, 443.

[13] Ehrgott v. New York, 96 N. Y. 264.

[14] Walsh v. New York, 107 N. Y. 220; Walsh v. Bridge Trs., 96 Ib. 429.

[15] Board v. Fuller, 111 Ind. 410; Osborn v. Sutton, 108 Ib. 443; Black v. Thomson, 107 Ib. 162; Hays v. Parish, 52 Ib. 132.

responsible for the acts of a surveyor of highways or of a person employed by him;[1] and this is also the case in regard to town assessors and collectors of taxes in New York.[2] But in Vermont, towns have been made liable by statute for the default and neglect of the clerks.[3]

§ 339. **Liability for the condition of highways and streets —Municipal and quasi-municipal corporations distinguished.** —In England and Canada the parishes are charged with the maintenance and repair of highways, unless these duties are imposed by prescription on particular persons. But in neither country, are they liable civilly in damages.[4] In America a difference is made, as to liability to a person injured by failure to repair streets and highways, between municipal corporations proper and those of a *quasi*-municipal character, as counties and townships.

Highways and streets are to so large an extent the subject of legislation in all the States, that the only safe method to pursue, in endeavoring to fix a liability for defects therein, is to make a close inspection of the statute law.[5] It is an almost universal rule that *quasi*-municipal corporations are not in the absence of an express statutory declaration to that effect, liable to a civil action for damages by one who is injured by defective roads or bridges under their control. In the absence of a statute creating such a liability, there is no obligation on these *quasi* corporations to repair highways; and even when this statutory obligation to repair is imposed, and the power to levy taxes to provide for its execution is conferred, the court will regard such duties as public, and the county or town as the State's agent, and therefore, not impliedly liable for the omission or neglect to perform this duty.[6] But under precisely similar circumstances, it is generally held that there is an implied

[1] Barney v. Lowell, 98 Mass. 570; Judge v. Meriden, 38 Conn. 90.

[2] Lorillard v. Monroe, 11 N. Y. 392.

[3] Hunter v. Windsor, 24 Vt. 327; Lyman v. Edgerton, 29 Ib. 305; Jarvis v. Barnard, 30 Ib. 492.

[4] Rex v. St. George, 3 Campb. 222; Wellington v. Wilson, 14 Up. Can. C. P. 304; Rex v. Great Broughton, 5 Burr, 2700; Grassick v. Toronto, 30 U. C. Q. B. 306; Queen v. Harley, 8 L. T. (N. S.) 382; Harrold v. Simcoe, 16 U. C. C. R. 43.

[5] North Pac. etc. Co. v. East Portland, 14 Ore. 3; Barter v. Com., 3 Pa. 253; Com. v. R. R. Co., 27 Pa. St. 349.

[6] Chick v. Newberry Co., 27 S. C. 419; Manuel v. Cumberland, 98 N. C. 9; Threadgill v. Ansen, 99 Ib. 352; Pfefferlee v. Lyon, 39 Kan. 432; Peo. v. Auditors, 75 N. Y. 317; Swineford

liability upon cities to answer in damages, based upon the extensive statutory or charter powers of taxation and control and repair of the streets, which they possess and exercise as a distinct and separate legal entity.[1]

The courts and the writers of text books[2] have often adverted to the lack of any substantial reason for this distinction, which gives an injured person a remedy by implication of law against a municipal corporation, and denies it under precisely similar circumstances, when a county or *quasi*-municipal corporation is the defendant.[3] It has been sought to find a basis for the distinction in the peculiar and frequent use made of city streets, the supreme and special control exerted over them by the municipal authorities, and the ample means generally possessed by them for their proper maintenance and repair; yet, whatever may be the reasons of the distinction, and although the doc-

v. Franklin Co., 73 Mo. 279; Crowell v. Sonoma Co., 25 Cal. 313; Carpenter v. Cohoes, 21 Alb. L. J. 374; Clark v. Lincoln Co., 20 Pac. R. 576; Watkins v. County Co., 30 W. Va. 657; Tindley v. Salem, 137 Mass. 171; White v. Bond Co., 58 Ill. 297; Russell v. Steuben, 57 Ib. 35; Dutton v. Board, 41 Miss. 236; Cooley v. Essex Co., 27 N. J. L. 415; Ripley v. Essex, 40 Ib. 45; Granger v. Pulaski, 26 Ark. 37; Huffman v. San Joaquin, 21 Cal. 426; Atchison v. Jansen, 21 Kan. 560; Soper v. Henry Co., 26 Iowa, 264; Askew v. Hale, 54 Ala. 639; Barbour v. Horn, 48 Ib. 566; Wyandotte v. Seitz, 21 Kan. 649; Sims v. Butler Co., 49 Ala. 110; Hamilton v. Mighels, 7 Ohio St. 109.

[1] Albritten v. Huntsville, 60 Ala. 486; Kellogg v. Janesville, 34 Minn. 132; Diveney v. Elmira, 51 N. Y. 506; Delger v. St. Paul, 14 Fed. R. 567; Riddle v. Merrimac Riv. Co., 7 Mass. 169; Noble v. Richmond, 31 Gratt. 271; Chidsey v. Canton, 17 Conn. 475; Larson v. Grand Forks, 3 Dak. 307; Morey v. Newfane, 8 Barb. 645; Boulder v. Niles, 9 Col. 415; Barnes v. District, 91 U. S. 540; Young v. Waterville, 39 N. W. R. 97; Moore v. Richmond, (Va.) 8 S. E. R. 387; Nelson v. Canisteo, 100 N. Y. 89; 2 N. E. R. 473; Hiner v. Fond du Lac, 71 Wis. 74; Saulsbury v. Ithaca, 94 N. Y. 27; Weller v. St. Paul, 42 N. W. R. 392; Munger v. Marshalltown, 13 Ib. 642; Klein v. Dallas, 71 Tex. 280; Selma v. Perkins, 68 Ala. 145; Clark v. Richmond, 83 Va. 355.

[2] See Dillon Mun. Corp. 1022, *et seq.*, for a full discussion of the reasons, difficulties and limitations of this distinction. "The rule which exempts one class of governmental corporations from liability, and fastens it upon another, where the statutes are the same as to the character of the duty, and the means of performing it, must be an arbitrary one, since it is quite impossible to find any difference sufficient to create a distinction." Elliott Roads and Streets, p. 327. See Thompson on Negligence, 614.

[3] Young v. Charleston, 20 S. C. 116; Chick v. Newberry Co., 27 Ib. 419; Eastman v. Clackamas Co., 34 Fed. Rep. 139; Arkadelphia v. Windham, 49 Ark. 139.

trine may be anomalous, the rule is generally, though not universally, settled.[1] The only satisfactory explanation of this distinction is to be found in the statement that the municipal corporation is a legal personality, distinct and separate from the State government, which has independent rights and duties, while the county or township is only a subdivision of the State, without a separate legal existence, and therefore, cannot be held liable for the tortious acts of its officials, without violating the technical, but nevertheless well established doctrine, that the State cannot be sued, on account of its sovereign character. The State is also protected from such suits by the Eleventh Article of the Amendments to the United States Constitution. The application of this principle to *quasi*-municipal corporations has not been uniform, and in many cases statutes have subjected them to liability to actions *ex contractu* and *ex delicto;* but I am satisfied that it was the original cause of this distinction.

In many States this distinction has been disregarded, and it has been held that, in the absence of statute, there is no implied liability, even upon municipal corporations, for failure to keep streets in repair, to any one who is injured thereby. And although this is not in accordance with the current of decisions, it has received the indorsement of courts, whose decisions are worthy of careful consideration.[2]

§ 340. **Statutory liability for neglect in maintenance and repair of highways.**—In Canada, in the New England States and elsewhere, statutes have been enacted which provide that the streets shall be kept in repair and safe for public use; and that the town, city or other territorial division, on which this duty is cast, shall be liable to travelers injured by any defect, insufficiency or want of repair.[3] Construing the expression

[1] Barnes v. District, 91 U. S. 540, 551.

[2] Merrill v. Portland, 4 Cliff. C. C. R. 138; Detroit v. Blakeby, 21 Mich. 84; Jones v. New Haven, 34 Conn. 1; Pray v. Jersey City, 32 N. J. L. 394; Morgan v. Hallowell, 57 Me. 375; Albnow v. Sibley, 30 Minn. 186; Hixon v. Lowell, 13 Gray, 59; McArthur v. Saginaw, 58 Mich. 357; Young v. Charleston, 20 S. C. 116; Chick v. Newberry, 27 Ih. 419; Harwood v. Lowell, 4 Cush. 310; Winbigler v. Los Angeles, 45 Cal. 36; Brady v. Lowell, 3 Cush. 121; Arkadelphia v. Windham, 49 Ark. 139; Vorrath v. Hoboken, 49 N. J. L. 285; Weissenberg v. Winnecoune, 56 Wis. 667; Wild v. Paterson, 47 N. J. L. 406.

[3] Leslie v. Lewiston, 62 Me. 488; Hamilton v. Boston, 4 Allen, 475; Bliss v. So. Hadley, 145 Mass. 91; Barker v. Worcester, 139 Ib. 74; Varney v. Manchester, 58 N. H. 430.

"kept in repair," it has been held in Canada not to refer to construction.[1] The words should also be given a reasonable interpretation. It will not be expected that a new road, opened in a thinly settled township, shall be found in as good a condition, as a highway in a thickly settled neighborhood.[2] The adjudications in which the statutes, passed in the New England States for fixing such a liability upon the town, have been construed, are abundant and voluminous. The reported cases point out and define what is required of the town to exempt it from liability, how large a part of the highway or street must be made safe or convenient, what constitutes an actionable defect or want of repair, when the plaintiff is guilty of contributory negligence, and what is in any particular case the proximate cause of injury to him.[3]

In some of the New England States, the right to maintain actions under these statutes is confined to travelers; and it is held that children playing in the street,[4] or persons stopping by the wayside,[5] are not entitled to recovery for injuries caused by defective roads. Elsewhere, it is held that a city owes a duty, to keep its streets in repair, to all using them for any lawful purpose.[6]

Many of the questions, which are discussed in construing these statutes, are general in their nature; and while the duty

[1] Queen v. Epsom Union Guard, 8 L. T. R. N. S. 383.

[2] Colbeck v. Brantford, 21 Up. Can. Q. B. 276; Castor v. Uxbridge, 39 Ib. 113.

[3] Loan v. Boston, 106 Mass. 450; Post v. Boston, 141 Ib. 189; Hanscom v. Boston, 142 Ib. 242; Hixon v. Lowell, 13 Gray, 59; Barber v. Roxbury, 11 Allen, 318; Sanford v. Augusta, 32 Me. 536; Peck v. Ellsworth, 36 Ib. 393; Brackenridge v. Fitchburg, 145 Mass. 160; Gulline v. Lowell, 144 Ib. 491; Ward v. Jefferson, 24 Wis. 342; Clark v. Corinth, 41 Vt. 449; Prindle v. Fletcher, 39 Ib. 255; Hyde v. Jamaica, 27 Ib. 443; Bacon v. Boston, 3 Cush. 174; Bailey v. Southborough, 6 Ib. 141; Packard v. New Bedford, 9 Allen, 200; Ray v. Manchester, 46 N. H. 59; Howe v. Plainfield, 41 Ib. 135; Clark v. Barrington, 41 Ib. 44; Hall v. Manchester, 40 Ib. 410; Hardy v. Keene, 25 Ib. 370; Church v. Cherryfield, 33 Me. 460; Raymond v. Lowell, 6 Cush. 524; Smith v. Dedham, 8 Ib. 522; Vinal v. Dorchester, 7 Gray, 421; Gregory v. Adams, 14 Ib. 242; Farnum v. Concord, 2 N. H. 392; Mower v. Leicester, 9 Mass. 247; Reed v. Belfast, 20 Me. 248.

[4] Stinson v. Gardner, 42 Me. 248; Tighe v. Lowell, 119 Mass. 472.

[5] Blodgett v. Boston, 8 Allen, 237; Stickney v. Salem, 3 Ib. 374.

[6] Indianapolis v. Emmelman, 108 Ind. 530; Murray v. McShane, 52 Md. 517; Chicago v. Keefe, 114 Ill. 222; Babson v. Rockport, 101 Mass. 93; Gregory v. Adams, 14 Gray, 242; Varney v. Manchester, 58 N. H. 430.

and liability they impose are not of course coincident with the duty and liability which are impliedly imposed by the law elsewhere, the opinions and decisions of the courts upon these statutes may be consulted with advantage, in determining questions, involving the proximate cause of the plaintiff's injury, his contributory negligence if any, and the measure of damages.

As in the case of all statutes creating a liability, these statutes have received a strict construction at the hands of the courts.[1]

§ 341. **Quasi-municipal corporations liable for breach of specific duty.**—The weight of the authorities is to the effect that *quasi*-municipal corporations are not responsible in damages for the neglect of duty imposed on them, when the duty is common to all corporations of the class in question, even though they are empowered to raise money for corporate purposes, unless the liability is created by statute.[2] But there are exceptions to the above rule, at least so far as the New England towns are concerned, and for an actual wrongful trespass upon property rights they would be liable.[3]

The exemption of *quasi*-municipal corporations from liability for the performance of public duties, as explained in the preceding section,[4] is applicable only to such duties as are imposed upon *all towns* in general and which subserve public purposes exclusively. On the other hand, for a negligent performance of specific duties, or the execution of a special power, which was conferred on the town at its request, or with its consent, it will be subject to the same liability; as will any corporation, upon which such duties have been imposed, or such powers conferred.[5] And this distinction, based as it is upon the just principle, which renders municipalities impliedly liable for the nonperformance or neglect of corporate, as distinct from public, duties, has been followed and approved by the courts outside of New England,[6] in application to counties and other

[1] Arline v. Laurens Co., 77 Ga. 249.

[2] See last section.

[3] Gilman v. Laconia, 55 N. H. 130; Weed v. Greenwich, 45 Conn. 170.

[4] § 339.

[5] Bigelow v. Randolph, 14 Gray, 541; comp. Weisenberg, v. Winneconne, 56 Wis. 667; Oliver v. Worcester, 102 Mass. 489; Reed v. Belfast, 20 Me. 246; Blodgett v. Boston, 8 Allen, 237; Chidsey v. Canton, 17 Conn. 475; Stickney v. Salem, 8 Allen, 374.

[6] Conrad v. Ithaca Trs., 16 N. Y. 158; Hannon v. St. Louis Co., 62 Mo. 313, 316.

quasi corporations, wherever they are charged with a specific duty, and are provided with the means of enforcing it.[1]

§ 342. **Extent of municipal liability for injury from defective streets—Horses taking fright.**—The question, whether a street shall be repaired or improved, as a general rule, is solely for the municipality to answer;[2] but the city is bound to repair, when the failure to do so will menace the safety of the traveling public.[3] No public corporation is liable to a private action by an abutter[4] or other person, for a general failure to repair, or for making injudicious improvements if they are authorized,[5] if no one has received a special injury therefrom;[6] and it may be laid down, as a general rule of the law, that towns and cities are only required to keep their streets in a reasonably safe condition for travelers, and according to the practice and usage of those communities which may be said to exercise ordinary care in their attention to the highways.[7] Where the liability is for non-repair, it may arise from any defect, which renders a road unsafe for ordinary travel;[8] and the dangerous character of the defect is a question for the jury.[9] It has been held, however, in several instances, that the defect must be sufficient to render the corporation indictable for maintaining a nuisance.[10] And this rule has been applied to objects in the

[1] Mahaney v. Scholley, 84 Pa. St. 136; County v. Wise, 18 Atl. R. 31; Cooper v. Mills Co., 69 Iowa, 350; Cary v. Tama Co., 37 N. W. R. 38; Mayor v. Marriott, 9 Md. 160; Mayor v. Pendleton, 15 Ib. 12; County v. Baker, 44 Ib. 1; Harris v. Board, 32 N. E. R. 92; Pritchett v. Board, 61 Ind. 210; Board v. Arnett, 116 Ib. 438.

[2] Benson v. Waukesha, (Wis.) 41 N. W. R. 1017.

[3] Treise v. St. Paul, 36 Minn. 526.

[4] Gold v. Philadelphia, 115 Pa. St. 184.

[5] Pepper v. City, 114 Pa. St. 96; O'Reilly v. Kingston, 114 N. Y. 439.

[6] Slackhouse v. Lafayette, 26 Ind. 17; Lynch v. Mayor, 76 N. Y. 60; Williams v. Grand Rapids, 33 Alb. L. J. 237; Lyon v. Cambridge, 136 Mass. 419; Henderson v. Sandefur, 111 Bush. 530.

[7] Turner v. Newburgh, 109 N. Y. 301; Emporia v. Schmidling, 7 Am. Eng. Cor. Cas. 86; Hunt v. Mayor, 109 N. Y. 134; Indianapolis v. Cook, 99 Ind. 10; Ring v. Cohoes, 77 N. Y. 83; Aurora v. Pulfer, 56 Ill. 270; Raymond v. Lowell, 6 Cush. 524; Furnell v. St. Paul, 20 Minn. 117; Macomber v. Taimson, 100 Mass. 255.

[8] Davis v. Bangor, 42 Me. 522; Barber v. Roxbury, 11 Allen, 318; Castor v. Uxbridge, 39 Up. Can. Q. B. 113; Harrison v. New Haven, 34 Conn. 136.

[9] Caswell v. St. Mary's Pl. R. Co., 28 Up. Can. Q. B. 247, 254; Curry v. Mannington, 23 W. Va. 14; Wilson v. Wheeling, 19 Ib. 323; Denver v. Dean, 10 Col. 375.

[10] Merrill v. Hampden, 26 Me. 234; Goldthwaite v. East Bridgewater, 5 Gray, 61; Howard v. Bridgewater,

road which are not strictly defects, but which were calculated to frighten horses.[1]

The duty to repair is comprehensive and includes the removal of obstructions,[2] such as an inequality between a pavement and a crosswalk;[3] a water box, which extends an inch and a half above a sidewalk;[4] a pile of stones,[5] or of lumber;[6] sticks of timber, logs, etc.;[7] a rock,[8] a tent,[9] a portable furnace,[10] a steam roller,[11] thresher,[12] or motor;[13] machinery left by the roadside,[14] posts;[15] an ash pile,[16] and loose planks, projections and other inequalities in the surface[17] of the driveway or sidewalk,[18] as well as the filling up or guarding of dangerous holes and excavations[19] in the surface, or near the line, of the road.[20]

16 Pick. 189; Ringland v. Toronto, 23 Up. Can. C. P. 93; Ray v. Petrolia, 24 Ib. 73; Boyle v. Dundas, 25 Ib. 420.

[1] Bushville v. Adams, 107 Ind. 475; Fritsch v. Allegheny, 91 Pa. St. 226; Chicago v. Hoy, 75 Ill. 530.

[2] Michigan City v. Boeckling, (Ind.) 23 N. E. R. 518; Goodfellow v. New York, 100 N. Y. 15.

[3] Glantz v. So. Bend, 106 Ind. 305.

[4] Indianapolis v. Cook, 99 Ind. 10.

[5] Bigelow v. Weston, 3 Pick. 267; Kellogg v. Northampton, 4 Gray, 65; Foreman v. Canterbury, L. R. 6 Q. B. 214.

[6] North Manheim v. Arnold, 119 Pa. St. 380.

[7] Gorham v. Cooperstown, 59 N. Y. 660; Springer v. Bowdoinham, 7 Me. 442; Davis v. Bangor, 42 Ib. 522; Johnson v. Whitefield, 18 Ib. 286; Carter v. Uxbridge, 39 Up. Can. Q. B. 113; Snow v. Adams, 1 Cush. 443.

[8] Card v. Ellsworth, 65 Me. 547.

[9] Ayer v. Norwich, 39 Conn. 376.

[10] Rushville v. Adams, 107 Ind. 475.

[11] Young v. New Haven, 39 Conn. 435.

[12] Burrell v. Uncapher, 117 Pa. St. 353.

[13] Stanley v. Davenport, 54 Ia. 463.

[14] Bennett v. Lovell, 12 R. I. 166.

[15] Soule v. Gr. Trunk Ry. Co., 21 Up. Can. C. P. 308; Coggswell v. Lexington, 4 Cush. 307.

[16] Ring v. Cohoes, 77 N. Y. 83.

[17] Hall v. Manchester, 40 N. H. 410; Irwin v. Bradford, 22 Up. Can. C. P. 421; Hubbard v. Concord, 35 N. H. 52; Winn v. Lowell, 1 Allen, 177.

[18] As to removing such obstructions when seen by a traveler, it has been said that when to remove them would materially delay him or entail considerable labor upon him, he is under no obligation to do so; but he may use the road employing proper care in view of the obstruction; or he may, if the road be impassable, travel temporarily on the land adjoining. Morey v. Fitzgerald, 56 Vt. 487.

[19] Sherwood v. District, 3 Mackey 276; Walsh v. Mayor, 107 N. Y. 222; Murphy v. Gloucester, 105 Mass. 470; Pettingill v. Yonkers, 39 Hun, 449; Cromarty v. Boston, 127 Mass. 329; Chicago v. Robbins, 2 Black, 418; Reed v. Northfield, 13 Pick. 94; Congreve v. Morgan, 5 Duer, 495; Barnes v. District, 91 U. S. 540; Doherty v. Waltham, 4 Gray, 596; Brusso v. Buffalo, 90 N. Y. 679; Willard v. Newbury, 22 Vt. 458; O'Neill v. New Orleans, 30 La. An. 220; Batty v. Duxbury, 24 Vt. 155.

[20] Fritsch v. Allegheny, 91 Pa. St. 226; No. Manheim v. Arnold, 119 Ib. 380; Hinckley v. Somerset, 145 Mass. 326.

The place of the accident, the hour of the day, and the season of the year must all be considered, in determining the question of what constitutes negligence in municipal control of streets.[1] As municipalities are only bound to keep their streets in repair for ordinary modes of traveling, they need not keep them safe for furious and reckless driving and racing.[2]

If an ordinarily gentle horse shies to one side, and the driver does not lose control over him, but injury is caused by an obstacle or defect in the highway, the municipality will be liable.[3] But if the horse shies at something, for which the municipality is not responsible, and running away, comes in contact with an obstruction or defect in the street, the corporation will not be liable.[4] But there are many cases, which hold that the city would be liable, if it had been negligent in removing the obstacle or defect, and the injury would not have been sustained but for such obstacle or defect.[5] If a horse of average gentleness become frightened at an object which, being calculated to frighten horses, has been negligently placed or permitted to re-

[1] Castor v. Uxbridge, 39 Up. Can. Q. B. 113; Ringland v. Toronto, 23 Ib. 98; Hart v. Cedar Rapids, 63 Wis. 634; Schroth v. Prescott, 68 Ib. 678; Kelsey v. Glover, 15 Vt. 708; Cassedy v. Stockbridge, 21 Ib. 391; Rice v. Montpelier, 19 Ib. 470; Fritsch v. Allegheny, 91 Pa. St. 226; Dubois v. Kingston, 102 N. Y. 219; Yeaw v. Williams, 15 R. I. 20; Talbott v. Taunton, 140 Mass. 552; Merrill v. Hampden, 26 Me. 234; Pratt v. Amherst, 140 Mass. 167; Mayor v. Sheffield, 4 Wall. 189; Johnson v. Enfield, 42 N. H. 197; Johnson v. Haverhill, 35 Ib. 74; Young Twp. v. Sutter, 18 Atl. R. 610; Fitz v. Boston, 4 Cush. 365; Ponca v. Crawford, 23 Neb. 662; Providence v. Clapp, 17 How. 161; Hill v. Fond du Lac, 56 Wis. 342; Cook v. Milwaukee, 27 Ib. 191.

[2] McCarthy v. Portland, 67 Me. 167; Ring v. Cohoes, 77 N. Y. 83.

[3] Aldrich v. Gorham, 77 Me. 287; Baltimore etc. Co. v. Bateman, 68 Md. 389; Stone v. Hubbardstown, 100 Mass. 49; Cushing v. Bedford, 125 Ib. 526.

[4] Houfe v. Fulton, 29 Wis. 296; Moulton v. Sanford, 51 Me. 127; Perkins v. Fayette, 68 Ib. 152; Davis v. Dudley, 4 Allen, 557; Titus v. Northbridge, 97 Mass. 258; Dreher v. Fitchburg, 22 Wis. 675; Brown v. Mayor, 57 Mo. 156.

[5] Plymouth v. Graver, 125 Pa. St. 24; 17 Atl. R. 249; Campbell v. Stillwater, 32 Minn. 308; Hunt v. Pownal, 9 Vt. 411; Sherwood v. Hamilton, 37 Up. Can. Q. B. 410; Winship v. Enfield, 42 N. H. 197; Hey v. Philadelphia, 81 Pa. St. 44; Ward v. North Haven, 43 Conn. 148; Crawfordsville v. Smith, 79 Ind. 308; Howard v. North Bridgewater, 16 Pick. 189; Hull v. Kansas City, 54 Mo. 601; Fogg v. Nahant, 98 Mass. 578; Rockford v. Russell, 9 Ill. App. 229; Jackson v. Belleview, 30 Wis. 250; Manderschiel v. Dubuque, 25 Iowa, 108; Soule v. Gr. Tr. Ry. Co., 21 Up. Can. C. P. 308; Vars v. Same, 23 Ib. 308;

main in the highway by the municipality, the city will be liable.[1] But the obstacles must also be of a nature to frighten horses of ordinary gentleness;[2] and the city will not be liable for damages sustained by the affright of a very nervous horse, where the obstacle which frightened the horse, would not have disturbed the ordinary horse, which is accustomed to travel in the crowded streets of a city. And although they must ordinarily be within the limits of the highway or street, it has been sometimes held that they need not be within the traveled path.[3] There are many cases which hold, however, that objects, outside the part of a highway most used, but inside the highway limit, will not render the city liable for injury to horses frightened thereby.[4] Whether an obstacle is in any given case naturally calculated to frighten horses of average gentleness, is usually for the jury to say.[5] And evidence, that other horses took fright at the object, is admissible.[6] But a defect is never to be inferred merely from the fact that an injury was sustained.[7]

§ 343. **Railings or barriers, signs and lights to guard excavations, areas and basements.**—Where the highway is defective through the existence over the roadbed, either of excavations or a dangerous caving in or depression below the surface, it is the duty of the municipality to exercise a high degree

Moore v. Abbott, 32 Me. 46; Pickhard v. Smith, 10 C. B. N. S. 470; Corley v. Hill, 4 C. B. N. S. 556.

[1] Bennett v. Fifield, 13 R. I. 139; Morse v. Richmond, 41 Vt. 435; Stanley v. Davenport, 54 Iowa, 463; Card v. Ellsworth, 65 Me. 547; Kingsburg v. Dedham, 13 Ib. 186; Rushvill v. Adams, 107 Ind. 124; Cook v. Charlestown, 98 Mass. 80; Keith v. Easton, 2 Allen, 552; Ayer v. Norwich, 39 Conn. 376; Foshay v. Glen Haven, 25 Wis. 288; Chicago v. Hoy, 75 Ill. 530; Bartlett v. Hooksett, 48 N. H. 18.

[2] Piollet v. Simmers, 106 Pa. St. 95; Davis v. Bangor, 42 Me. 522.

[3] Foshay v. Glen Haven, 25 Wis. 288; Morse v. Richmond, 41 Vt. 435; Rushville v. Adams, 107 Ind. 475; comp. Nichols v. Atheus, 66 Me. 402.

[4] Rockford v. Tripp, 83 Ill. 247; Nichols v. Athens, 68 Me. 413; Perkins v. Fayette, 68 Ib. 152; Farrell v. Oldtown, 69 Ib. 72; Bartlett v. Kittery, 68 Ib. 358; Marble v. Worcester, 4 Gray, 395; Rounds v. Stratford, 26 Up. Can. C. B. 11.

[5] Lawrence v. Mt. Vernon, 35 Me. 100; Winship v. Enfield, 42 N. H. 197; Ayer v. Norwich, 39 Conn. 376; Cleveland etc. Co. v. Wynant, 114 Ind. 525.

[6] Darling v. Westmoreland, 52 N. H. 401.

[7] Church v. Cherryfield, 33 Me. 460; Sherman v. Kortright, 52 Barb. 567; Collins v. Dorchester, 6 Cush. 396; Packard v. New Bedford, 9 Allen, 200; Calkins v. Hartford, 33 Conn. 57; see Kearney v. London B. & S. C. Ry. Co., L. R. 5 Q. B. 411; Mullen v. St. John, 57 N. Y. 567.

of care, in protecting travelers from injury therefrom, by the use of the necessary railings, barriers, signs and lights.[1] Nor will the city be excused from the observance of these precautions, because the street was newly opened, and for that reason there was no regular travel thereon.[2]

A city is not liable, if it fail to erect barriers, to prevent travelers from going outside of the road or street.[3] And where the defect or excavation is so far from the highway, that it can cause injury only to one leaving the highway, no barriers are necessary,[4] so far as the city is concerned. A city is bound to erect barriers around an excavation, which is in close proximity to the street[5] but not around a dangerous place, twenty-eight,[6] twenty-five,[7] or thirty-four feet distant.[8]

A city is called upon to employ ordinary care only; and when an accident is such as has never occurred before, prudent men would not be expected to guard against it.[9] Nor is the city

[1] O'Leary v. Mankato, 21 Minn. 65; Newlin v. Davis, 77 Pa. St. 317; Atlanta v. Wilson, 60 Ga. 473; Keys v. Marcellus, 50 Mich. 439; Kennedy v. Mayor, 73 N. Y. 365; Chicago v. Hislop, 61 Ill. 86; Carlisle v. Brisbane, 113 Pa. St. 544; Blaisdell v. Portland, 39 Me. 113; Drew v. Sutton, 55 Vt. 586; Toms v. Whitby, 35 Up. Can. Q. B. 195; Zetther v. Atlanta, 66 Ga. 195; Delphi v. Lowery, 74 Ind. 520; Houfe v. Fulton, 29 Wis. 296; Williams v. Clinton, 28 Conn. 264; Ward v. North Haven, 23 Ib. 148; Jones v. Waltham, 4 Cush. 499; Scott v. Montgomery, 95 Pa. St. 444; Pittsburgh v. Hart, 89 Pa. St. 389; Britton v. Cummington, 107 Mass. 347; Halpin v. Kansas City, 76 Mo. 335; Stark v. Portsmouth, 52 N. H. 221; Freeport v. Isbell, 83 Ill. 440; Babson v. Rockport, 101 Mass. 93; Murphy v. Gloucester, 105 Mass. 470; Com. v. Wilmington, 105 Ib. 599; Barnes v. Chicopee, 138 Ib. 67; Davis v. Hill, 41 N. H. 329; Stimson v. Gardiner, 42 Me. 248; Blake v. Newfield, 68 Ib. 365; Stevens v. Boxford, 10 Allen, 93; Alger v. Lowell, 3 Ib. 402; Burnham v. Boston, 10 Ib. 290; Orme v. Richmond, 79 Va. 86; Clark v. Richmond, 83 Ib. 355; Koester v. Ottumwa, 34 Iowa, 41; Harris v. Newbury, 128 Mass. 321.

[2] Crystal v. Des Moines, 65 Iowa, 502.

[3] Murphy v. Gloucester, 105 Mass. 470; Puffer v. Orange, 122 Ib. 389; Barnes v. Chicopee, 138 Ib. 67; Chicago v. Gallagher, 44 Ill. 295; Adams v. Natick, 13 Allen, 429; Sparhawk v. Salem, 1 Ib. 30.

[4] Lansing v. Toolan, 37 Mich. 152; Goodin v. Des Moines, 55 Iowa, 67; Warren v. Holyoke, 112 Mass. 362; Darly v. Worcester, 131 Ib. 452; Duffy v. Dubuque, 63 Iowa, 171; Monmouth v. Sullivan, 8 Ill. App. 50.

[5] Harris v. Inh's, 138 Mass. 67; Chicago v. Hesing, 83 Ill. 204; Emmelmann v. Indianapolis, 108 Ind. 530.

[6] Daily v. Worcester, 131 Mass. 452.

[7] Murphy v. Gloucester, 105 Mass. 470.

[8] Barnes v. Inh's, 138 Mass. 67.

[9] Hubbells v. Yonkers, 104 N. Y. 434.

liable, when, after having placed the proper barriers around a dangerous place in the highway, they have been removed by third persons without the knowledge of the city.[1]

It is no excuse for the absence of barriers, that the horse driven by the traveler was not quiet and gentle.[2]

A city is not bound to maintain railings in front of basements and shops[3] or around cellar doors, which open from the sidewalk,[4] or areas or hatchways,[5] not in the sidewalk but on private property contiguous to it; or to provide hitching posts, or, if it does, to use extraordinary care in their selection and erection.[6] But where an open area or hatchway, whether in private property or not, is notoriously dangerous, a municipality should be liable for failure to properly guard it, or for failure to oblige the property owner to do so.[7] A railing along the side of a stairway, parallel with the sidewalk, is sufficient although no gate is maintained at the entrance.[8]

Whether, it is negligence to leave a highway unguarded by barriers in a particular place, is a question of fact for the jury,[9] to be decided upon a consideration of all the circumstances of each case.

§ 344. **Accidents caused by ice and snow.**—In determining whether the city is liable for the consequences of negligence in the removal of snow and ice from the streets, the amount of the snow fall, the temperature and state of the weather, and the length of time the ice or snow has been allowed to remain, are all to be considered,[10] as well as the expense of clearing it away.[11] Cities are not compelled by law to compensate every

[1] Klatt v. Milwaukee, 53 Wis. 196; Mullen v. Rutland, 55 Vt. 77.

[2] Lower Macungie v. Merkhoffer, 71 Pa. St. 276; Kennedy v. Mayor, 73 N. Y. 365; Hey v. Philadelphia, 81 Pa. St. 44; Newlin v. Davis, 77 Ib. 317.

[3] Beardsley v. Hartford, 50 Conn. 529.

[4] Day v. Mt. Pleasant, 70 Iowa, 193.

[5] Withan v. Portland, 72 Me. 539; Temperance Hall Ass'n v. Giles, 33 N. J. L. 260.

[6] Rockford v. Tripp, 83 Ill. 247; Marble v. Worcester, 4 Gray, 395.

[7] Augusta v. Hafers, 59 Ga. 151; Rowell v. Williams, 29 Iowa, 210; Grove v. Kansas City, 75 Mo. 672; Niblett v. Nashville, 12 Heisk. 63.

[8] Fitzgerald v. Berlin, 51 Wis. 81.

[9] Burrell Tp. v. Uncapher, 117 Pa. St. 353.

[10] Burr v. Plymouth, 48 Conn. 460; Taylor v. Yonkers, 105 N. Y. 202; 11 N. E. R. 642; Congdon v. Norwich, 37 Conn. 414; Hayes v. Cambridge, 136 Mass. 402; Siebert v. Boston, 31 N. E. 734; 139 Mass. 313; Richards v. Oshkosh, (Wis. 90) 51 N. W. 256.

[11] Rooney v. Randolph, 128 Mass. 580.

individual, who is injured by the presence of ice or snow on a thoroughfare; it has been held that a person, who walks upon a part of the street where ice has accumulated, and sustains an injury which he could have avoided by passing on either side of it, cannot recover from the city.[1]

The slippery condition of the sidewalk is not enough alone to render the city liable, where there is nothing to show that the city has been negligent, in allowing ice or snow to accumulate, and thus become a dangerous obstruction.[2] But if the municipality permits an unreasonable accumulation of snow and ice upon its pavements,[3] when it forms hills and ridges;[4] or it allows a road or street to be blocked up for from four to

[1] Quincy v. Barker, 81 Ill. 300; Coates v. Canaan, 51 Vt. 131; Chicago v. Bixby, 84 Ill. 82; Aurora v. Pulfer, 56 Ib. 270; Schaeffler v. Sandusky, 33 Ohio St. 246; Dunkin v. Troy, 61 Barb. 437; Evans v. Utica, 69 N. Y. 166; Belton v. Baxter, 54 Ib. 245; Wilson v. Charlestown, 8 Allen, 137; Penna. Co. v. Rathget, 32 Ohio St. 66; Chicago v. McGiven, 78 Ill. 347; Higirt v. Greencastle, 53 Ind. 574; Alline v. LaMars, 71 Iowa, 654.

[2] Stilling v. Thorpe, 54 Wis. 538; Ringland v. Toronto, 23 Up. Can. C. P. 93; Lawless v. Troy, 63 Hun, 632; Schroth v. Prescott, 63 Wis. 652; Harrington v. Buffalo, 24 N. E. R. 186; Evans v. Utica, 69 N. Y. 166; Dickinson v. N. York, 92 Ib. 584; Hill v. Fond du Lac, 56 Wis. 242; Grossenbach v. Milwaukee, 65 Ib. 31; Stewart v. Woodstock, 15 Up. Can. Q. B. 427; Henks v. Minneapolis, 42 Minn. 530; Nason v. Boston, 14 Allen, 508; Stanton v. Springfield, 12 Ib. 566; Keith v. Brockton, 136 Mass. 119; Stone v. Hubbardston, 100 Ib. 50; Seeley v. Litchfield, 49 Conn. 134; Landolt v. Norwich, 37 Ib. 615; Smyth v. Bangor, 72 Me. 249; Kinney v. Troy, 108 N. Y. 567; O'Conner v. New York, 9 N. Y. S. 492; Mauch Chunk v. Kline, 100 Pa. St. 119; Broburg v. Des Moines, 63 Iowa, 523; Chase v. Cleveland, 44 Ohio St. 505; Ayres v. Hammondsport, 29 N. E. R. 265; 130 N. Y. 665; Levasseur v. Havestraw, 63 Hun, 627.

[3] Collins v. Council Bluffs, 32 Iowa, 324; Whitman v. Groveland, 131 Mass. 553; Morse v. Boston, 109 Mass. 446; Todd v. Troy, 61 N. Y. 506; Barton v. Montpelier, 30 Vt. 650; Loker v. Brookline, 13 Pick. 343; Luther v. Worcester, 97 Mass. 268; Hall v. Manchester, 39 N. H. 295; Horton v. Ipswich, 12 Cush. 488; Hall v. Lowell, 10 Ib. 260; Savage v. Bangor, 40 Me. 176; Providence v. Clapp, 17 How. 161; Stanton v. Springfield, 12 Allen, 566; Shea v. Lowell, 8 Ib. 136; Street v. Holyoke, 105 Mass. 82; Gilbert v. Roxbury, 100 Ib. 185; McLaughlin v. Corry, 77 Pa. St. 109; Smyth v. Bangor, 72 Me. 249; Green v. Danby, 12 Vt. 338; Keane v. Waterford, 29 N. E. R. 130; 130 N. Y. 188; see generally, Johnson v. Glens Falls, (N. Y. 92) 63 Hun, 618; Winne v. Albany, (N. Y. 91) 61 Hun, 620; Bell v. City of York, 31 Neb. 842; Woolsey v. Trustees, 61 Hun, 136; O'Connor v. New York, 16 Daly, 88; Lincoln v. Smith, (Neb. 91) 45 N. W. R. 41.

[4] Mauch Chunk v. Kline, 100 Pa. St. 119; Grossenback v. Milwaukee, 65 Ib. 31.

six weeks,[1] or a street to remain covered with ice and snow for nine days,[2] or for two weeks,[3] it will be liable for injuries occasioned thereby. A city is not bound, in the removal of snow and ice,[4] to do for the driveway of its streets what it must do for its sidewalks; and if it is impossible to clear the whole street, it is bound to clear a passageway at the customary crossings.[5] When a municipality exercises due diligence in the removal of the accumulated ice or snow, it is of course not liable.[6] And when, in consequence of a sudden thaw, followed by extreme cold, a sidewalk becomes covered with ice, the municipality may, without being negligent, await a thaw to remove the ice; but should in the meantime require householders or its own agents to sprinkle ashes or sand thereon.[7]

A city is, also, not liable for injuries, which result from extraordinary snow falls, before it has had a reasonable time to clear its streets.[8]

§ 344 *a*. **Negligence in lighting streets.**—In the absence of statute, a city is not liable for not lighting its streets.[9] If, however, the duty is imposed by statute, failure to light the streets will render the city liable for injuries caused thereby.[10] So, the fact, that a street was not lighted, may be material as

[1] Green v. Danby, 12 Vt. 338.

[2] Fortin v. East Hampton, 145 Mass. 196.

[3] Pomfrey v. Saratoga Springs, 104 N. Y. 459; see Burr v. Plymouth, 48 Conn. 460, where the fact, that a highway was impassable three months, was held not to constitute negligence.

[4] Cloughessy v. Waterbury, 51 Conn. 405.

[5] Savage v. Bangor, 40 Me. 176.

[6] Battersby v. New York, 7 Daly, 16; Hayes v. Cambridge, 136 Mass. 402; Cunniugham v. St. Louis, 96 Mo. 53; Blakeley v. Troy, 18 Hun, 167.

[7] Taylor v. Yonkers, 105 N. Y. 203.

[8] Clark v. District, 3 Mackey, 79; Hayes v. Cambridge, 136 Mass. 402. "Several authorities treat the class of cases in question as involving want of repair and defects. But in the absence of statutes, which provide for them as such, it is not a natural construction, and the cases are more consistent which deal with those things as acts of negligence at common law. A great deal, however, must depend on local usage in determining duties concerning highways in winter. Where it is customary to treat the removal of snow and ice, as a part of highway management, the failure to look after it may properly be regarded as wrongful and neglectful." McKellar v. Detroit, 57 Mich. 158; Nebraska City v. Rathbone, 20 Neb. 288.

[9] Gaskins v. Allen, 73 Ga. 746; Randall v. R. R. Co., 106 Mass. 276; Macomber v. Taunton, 100 Ib. 255; Freeport v. Isbell, 83 Ill. 440; Lyon v. Cambridge, 136 Mass. 409.

[10] Davenport v. Hannibal, (Mo. 92) 18 S. W. R. 1122; Hayes v. West Bay

showing care or lack of care, during the time that the street was obstructed or was in process of repair.[1]

§ 345. **Falling substances in highways.**—Municipal corporations are often held liable upon the ground of negligence for personal injuries, caused by the falling into the streets and squares of dangerous substances, such as ice and snow from the roofs of abutting houses, awnings, cornices and the like; or trees and poles, which have become weakened or decayed by time and exposure to the weather.[2] The fact, that a dangerous awning or other obstruction is unauthorized,[3] or that the city has failed to pass an ordinance for the removal and abatement of such nuisances,[4] will not absolve the municipality from liability.[5] The duty of a city towards the public, in the use of its streets, is undefined and unlimited. And its control over streets and highways is usually so extensive, that it is not unjust to hold the municipality to a strict performance of its duty in this respect, especially when we consider that the public must to a great extent use the streets upon faith in, and in reliance upon, the care which the municipality is presumed to exercise over them.[6]

But the authorities are by no means in harmony. It has thus been held that, although a city may be impliedly liable for defects in its highways, it will not be liable in the absence of statute for injuries caused by objects, such as unsafe walls falling into the streets from abutting property.[7] So, also, a city has been exempted from liability, where the injury was caused by the fall of a mass of snow from a roof into the street;[8] of a sign suspended over a sidewalk;[9] of an iron weight attached

City, (Mich. 92) 51 N. W. R. 1067; Butler v. Bangor, 67 Me. 385; Noble v. Richmond, 31 Gratt. 271; Barnes v. District, 91 U. S. 540.

[1] Indianapolis v. Scott, 72 Ind. 196; Miller v. St. Paul, 38 Minn. 134; Lewis v. Atlanta, 77 Ga. 756.

[2] Grove v. Fort Wayne, 45 Ind. 429; House v. Montgomery Co., 60 Ib. 580; Hutson v. New York, 9 N. Y. 163; Davenport v. Rochester, 45 Ib. 129; Morristown v. Mayor, 67 Pa. St. 355; Drake v. Lowell, 13 Metc. 292; Day v. Milford, 5 Allen, 98; Merrill v. Portland, 4 Cliff. 438; Bieling v. Brooklyn, 24 N. E. R. 389; 120 N. Y. 98; Vicksburg v. McLean, (Miss. 90) 6 So. R. 774; Gray v. Emporia, 23 Pac. R. 944; 43 Kan. 704.

[3] Hume v. Mayor, 74 N. Y. 639.

[4] Bohen v. Waseca, 32 Minn. 176.

[5] Larsen v. Grand Forks, 3 Dak. 307.

[6] Grove v. Fort Wayne, 45 Ind. 429.

[7] Anderson v. East, 117 Ind. 126, 129.

[8] Hixon v. Lowell, 13 Gray, 59.

[9] Jones v. Boston, 104 Mass. 75; *contra*, West v. Luin, 110 Ib. 514.

to a flag, which was suspended across the street;[1] and of an unsafe wall, situated on private property.[2]

Upon the other hand, municipal corporations have been held impliedly liable for injury caused by the fall of a signboard which had been erected on private abutting land;[3] by the fall of a decayed limb from a tree, where the duty was imposed by charter of keeping the park, where the tree was situated, in good repair;[4] by the falling of the walls of a house which was left standing after its partial destruction by fire;[5] for injury caused by the falling into the street of part of an old roof which was leaning against a tree;[6] of a rotten pole standing in the street;[7] of a derrick;[8] of a tree in a street;[9] and of a banner which was allowed to remain suspended across a street.[10]

§ 346. **Right to go outside the traveled path—Estoppel to deny existence of highway—Liability for sidewalks.**—Although the public is entitled to the use of all of the road or street,[11] it is generally the duty of the municipality to keep in repair only that portion which is customarily used by travelers, provided that part is wide enough, and reasonably safe for those who use due care.[12] The duty of the municipality, in regard to the repair and maintenance of streets in thickly settled portions

[1] Hewison v. New Haven, 34 Conn. 136.

[2] Howe v. New Orleans, 12 La. An. 481; but in Parker v. Macon, 39 Ga. 725; and Savannah v. Waldner, 49 Ib. 324, an entirely opposite conclusion was reached.

[3] Langam v. Atchison, 35 Kan. 318.

[4] Jones v. New Haven, 34 Conn. 1; Salisbury v. Herchenroder, 106 Mass. 458; Chase v. Lowell, (Mass. 89) 24 N. E. R. 212.

[5] Grogan v. Broadway F. Co., 87 Mo. 321.

[6] Duffy v. Dubuque, 63 Iowa, 171.

[7] Gilmartin v. Mayor, 55 Barb. 239; Norristown v. Mayor, 67 Pa. St. 355.

[8] Hardy v. Keene, 52 N. H. 570.

[9] Chase v. Lowell (*supra*); Vosper v. New York, 49 N. Y. Superior, 296; Gilchrist v. Carden, 26 Up. Can. C. P. 1.

[10] Champlin v. Penn Yan, 34 Hun, 33; French v. Brunswick, 21 Me. 29.

[11] Queen v. U. K. Tel. Co., 3 F. & F. 74; Tutill v. West Ham L. Bd., L. R. 8 C. P. 447; Queen v. Fitzgerald, 39 Up. Can. Q. B. 297.

[12] Sykes v. Pawlet, 43 Vt. 446; Kling v. City, 27 Mo. App. 231; Kellogg v. Northampton, 4 Gray, 65; Hayden v. Attleborough, 7 Ib. 338; Fritz v. Kansas City, 84 Mo. 632; Perkins v. Inhabitants, 68 Me. 152; Shepardson v. Colerain, 13 Met. 55; Smith v. Wendell, 7 Cush. 498; Packard v. Packard, 16 Pick. 191; Tinsdale v. Norton, 8 Metc. 388; Fitzgerald v. Berlin, 64 Wis. 203; Ireland v. Oswego Co., 13 N. Y. 526; Kelly v. Columbus, 41 Ohio St. 263; Stone v. Attleborough, 140 Mass. 328; Morse v. Belfast, 77 Me. 44; Keith v. Easton, 2 Allen. 552; Baltimore v. Branmam, 14 Md. 227; Buck v. Biddeford, 84 Me. 433.

of the city, is more onerous than in the case of outlying or suburban roads.[1] A town need not keep the whole surface of a suburban road in repair,[2] or free from snow,[3] for ordinarily only a part of it is used for travel by the public. And whether in any case the city has performed its duty, so as to be exempt from the charge of negligence, is a question for the jury.[4] The duty to repair and the liability for nonrepair extends to the sidewalks,[5] and crosswalks or crossings.[6] Even though the sidewalk has been constructed by a private person, without the authority, and not under the direction, of the city, the municipality will be liable for defects therein, if it has assumed jurisdiction by permitting it to be used as a part of the thoroughfare.[7] And this assumption of jurisdiction may be inferred from the silence of the corporation.[8] Inequalities in the surface of the sidewalks, causing injury to foot passengers, will render the city liable.[9] The abutting owner is not bound to keep his

[1] Whitfield v. Meridian, 6 So. R. 244; Monongahela v. Fischer, 111 Pa. St. 9; Wellington v. Gregson, 31 Kan. 90; O'Connor v. Otenabee, 35 Up. Can. Q. B. 73; Colbeck v. Brantford, 21 Ib. 276; Queen v. Epsom Union, 8 L. T. N. O. 383.

[2] Keyes v. Marcellus, 50 Mich. 539.

[3] Seeley v. Litchfield, 49 Conn. 134.

[4] Bassett v. St. Joseph, 53 Mo. 290; Wellington v. Gregson, 31 Kan. 99; Fulliam v. Muscatine, 70 Iowa, 436.

[5] Roe v. City, 100 Mo. 190; 13 S. W. R. 404; O'Neill v. West Branch, (Mich. 90) 45 N. W. R. 1023; Sherman v. Williams, 14 S. W. R. 130; 77 Tex. 310; Banguss v. Atlanta, 12 S. W. R. 750; 74 Tex. 629; Lincoln v. Smith, (Neb. 90) 45 N. W. R. 41; Valparaiso v. Donovan, 44 N. W. R. 449; Knowlton v. Pittsfield, 62 N. H. 535; Cartersville v. Cook, 22 N. E. R. 14; 129 Ill. 152; Moon v. Ionia, (Mich. 90) 46 N. W. R. 25; Michigan v. Ballance, (Ind. 90) 24 N. E. R. 117; Yearance v. S. L. City, (Utah 90) 24 Pac. R. 254; Bly v. Whitehall, 24 N. E. R. 943; 120 N. Y. 506; Furnell v. St. Paul, 20 Minn. 117; Studley v. Oshkosh, 45 Wis. 380; Atlanta v. Perdue, 53 Ga. 607; Chicago v. McCarthy, 75 Ill. 602; Rockford v. Hilderbrand, 61 Ill. 155; Chicago v. Langlass, 66 Ib. 371; Kirby v. Boylston Ass'n, 14 Gray, 249; Manchester v. Hartford, 30 Conn. 118; Hubbard v. Concord, 35 N. H. 54; Market v. St. Louis, 56 Mo. 189; Burns v. Toronto, 42 Up. Can. Q. B. 560; Hutten v. Windsor, 34 Ib. 487; Ray v. Petrolia, 24 Id. 73; Barues v. Newton, 46 Iowa, 567; Higert v. Greencastle, 43 Ind. 574; O'Neil v. New Orleans, 35 La. An. 202.

[6] Coombs v. Purrington, 42 Me. 332; Whitney v. Milwaukee, 57 Wis. 639; Raymond v. Lowell, 6 Cush. 524; Stilling v. Thorp, 54 Wis. 538; Barker v. Savage, 45 N. Y. 19; Pequinot v. Detroit, 16 Fed. R. 211; Grossenbach v. Milwaukee, 65 Wis. 31; Hill v. Fond du Lac, 56 Ib. 242.

[7] Plattsmouth v. Mitchell, 20 Neb. 228; Russell v. Canastota, 98 N. Y. 496; Saulsbury v. Ithaca, 94 Ib. 27.

[8] Urquhart v. Ogdensburg, 98 N. Y. 238.

[9] Loan v. Boston, 156 Mass. 450; Raymond v. Lowell, 6 Cush. 524;

sidewalk in repair, unless he is required to do so by statute; and he is, therefore, not liable in damages for defects not caused by his own fault,[1] to one who is injured thereby; nor is he liable to the city for the failure to make repairs, which he was under no obligation to make, in a case where the municipality has been compelled to answer in damages for a defect or obstruction of the sidewalk.[2]

When a highway is out of repair, the public have a temporary right to go on the adjoining land;[3] keeping as near the road as possible. And, although sidewalks and crossings are intended for the use of foot passengers, if they be obstructed or in a dangerous condition, the public may, with ordinary care, walk elsewhere.[4] In Vermont, it has been held that, if a defect be in such close proximity to the road as to render it dangerous, the town will be liable.[5]

If the public are induced by any acts of the corporation to use any part of the highway, not actually dedicated,[6] or where any portion of a street is graded, with the result of inviting and inducing travel thereon;[7] or where land is held out or opened as a public thoroughfare, even though not improved or graded,[8] the city will be estopped to claim that it is not a street, and will be liable for its negligence in respect to its repair.[9]

Lacon v. Page, 48 Ill. 499; Hubbard v. Concord, 35 N. H. 52; Winn v. Lowell, 1 Allen, 177.

[1] Moore v. Gadsden, 87 N. Y. 84; 93 Ib. 12; Knupfle v. Knick. Ice Co., 84 Ib. 488; Weller v. McCormick, 47 N. J. L. 397.

[2] Kirby v. Boylston M. Ass'n, 14 Gray, 249; Keokuk v. Keokuk I. S. Dis., 53 Iowa, 352; Hartford v. Talcott, 48 Conn. 525; Flynn v. Canton, 40 Md. 312; Russell v. Canastota, 98 N. Y. 496; Heeney v. Sprague, 11 R. I. 456; Jansen v. Atchison, 16 Kan. 358; Eustace v. Johns, 38 Cal. 3.

[3] Taylor v. Douglas, 2 Douglas (Eng.) 744–748; Morey v. Fitzgerald, 56 Vt. 487; Carrick v. Johnston, 26 Up. Can. Q. B. 65; Ballard v. Harrison, 4 M. & W. 392; Holmes v. Seeley, 19 Wend. 507; Williams v. Safford, 7 Barb. 309; Newkirk v. Sabler, 9 Ib. 655; Pomfret v. Sicroft, 1 Saunders, 323; Carey v. Rae, 58 Cal. 168.

[4] See § 352, Contributory negligence; O'Laughlin v. Dubuque, 42 Iowa, 589.

[5] Drew v. Sutton, 55 Vt. 58; Patter v. Castleton, 53 Vt. 435.

[6] Saulsbury v. Ithaca, 94 N. Y. 27; Jewshurst v. Syracuse, 108 Ib. 303; Barton v. Montpelier, 30 Vt. 650.

[7] Lindholm v. St. Paul, 19 Minn. 245; Triese v. St. Paul, 36 Minn. 526.

[8] Murphy v. Indianapolis, 83 Ind. 76; Mansfield v. Moore, 21 Ill. App. 326.

[9] Craig v. Sedalia, 63 Mo. 417; Aurora v. Colshire, 55 Ind. 584; Coates v. Canaan, 51 Vt. 131; Ivory v. Deerpark, 116 N. Y. 476; Sewall v. Cohoes, 75 Ib. 45; Harper v. Milwaukee, 30 Wis. 365; Veale v. Boston, 135 Mass. 187; Stark v. Lancaster,

But this principle does not apply to a bridge and its approaches, which belong to the State; for here the city has no right to enter and repair, even though the bridge is used as a highway.[1]

§ 347. **Liability for work given out on contract—Liability for torts of the contractor.**—The obligation to discharge the duties incumbent upon municipal corporations in the proper care of their streets, cannot by contract or ordinance be shifted, evaded or imposed by the corporation upon others.[2] Thus the granting of a permit, to deposit building material in the street, will not exempt the city from liability for damages caused thereby.[3] On the other hand, no person is responsible in damages to a person injured by the negligence of another, unless the relation of principal and agent, or of master and servant, existed at the time between the wrongdoer and the person, whom it is desired to make responsible. And in the present connection, as elsewhere, the distinction between the ordinary agent and the independent contractor, is fully recognized in the limitation of the city's liability. Thus, it is well settled that no municipal liability exists, if the work be lawful and not intrinsically dangerous,[4] for the acts of independent contractors, where the city does not control the doer of the tortious act as it would the ordinary agent; and has no choice in the selection of the instrumentalities and means by which the work is to be accomplished.

If, however, the contracts calls for the execution of a work which is dangerous, no matter how skillfully it may be per-

57 N. H. 88; Bishop v. Centralia, 49 Wis. 669; Estelle v. Lake Crystal, 27 Minn. 243; Phelps v. Mankato, 23 Minn. 276; Manderscheid v. Dubuque, 25 Iowa, 108; Johnson v. Milwaukee, 46 Wis. 568; Mathews v. Baraboo, 39 Ib. 674; Kelly v. Fond du Lac, 31 Ib. 179; James v. Portage City, 5 N. W. R. 31; Gallegher v. St. Paul, 28 Fed. Rep. 305; Cartwright v. Belmont, 58 Wis. 370; Davis v. Fulton, 52 Ib. 657; Cronin v. Delavan, 50 Wis. 375.

[1] Carpenter v. Cohoes, 81 N. Y. 21; Brusso v. Buffalo, 90 Ib. 679.

[2] Watson v. Tripp, 11 R. I. 98; Troy v. Tr. Lans. R. R. Co., 49 N. Y. 657; Pearson v. Zable, 78 Ky. 170; Omaha v. Jensen, (Neb. 92), 52 N. W. R. 833.

[3] Cleveland v. King, 132 U. S. 295.

[4] Hale v. Johnson, 80 Ill. 185; Davy v. Levy, 39 La. 551; Ryan v. Curran, 64 Ind. 345; McGuire v. Grant, 25 N. J. L. 356; Dooley v. Sullivan, 112 Ind. 451; Leeds v. Richmond, 102 Ib. 372; Fink v. Missouri etc. Co., 82 Mo. 283; Kelly v. New York, 11 N. Y. 432; Pack v. New York, 8 Ib. 222; Erie v. Caulkins, 85 Pa. St. 247; Callahan v. Burlington, 23 Iowa, 562; Brown v. Werner, 40 Md. 15.

formed, the city, which authorizes it, will be liable to persons who are actually injured in its performance by the contractor.[1] Thus, the weight of the decisions tends to substantiate the rule, that where a dangerous excavation is made and left in an unsafe condition by a contractor, without the employment of the proper and necessary safeguards, upon a street or highway, the municipal corporation will be liable to a person injured, even when it had no control over the contractor's employees; and when it had expressly stipulated in the contract[2] that the contractor should hold himself liable for accidents caused by his neglect.[3] And this is the law, even where the municipality is compelled by statute to let the contract out to the lowest bidder.[4] And, so, also, where a city charter contained a provision that, when an injury resulted from a defect in the street, for which under ordinary circumstances the city would be liable, it would not be primarily liable where the defect was caused by the fault of some third person, it is ineffectual to protect the

[1] Hayes v. West Bay City, (Mich. 92) 51 N. W. R. 1067; Omaha v. Jensen, 52 N. W. R. 833; St. Paul v. Seitz, 3 Minn. 397; Storrs v. Utica, 17 N. Y. 104; Brusso v. Buffalo, 90 Ib. 679; Kunz v. Troy, 104 Ib. 344; Lockwood v. New York, 2 Hilton, 66; LeClaire v. Springfield, 49 Ill. 476; Waldner v. Savannah, 49 Ga. 316; Welsh v. St. Louis, 72 Mo. 71; Wright v. Holbrook, 52 N. H. 120; Wilson v. Wheeling, 19 W. Va. 324; Logansport v. Deck, 70 Ind. 65; Tiffin v. McCormack, 34 Ohio St. 638; Fay v. Davidson, 13 Minn. 523; Dooley v. Sullivan, 112 Ind. 451; Houston v. Izaaks, 68 Tex. 116; Murphy v. Lowell, 124 Mass. 564; Stone v. Cheshire etc. Corp., 19 N. H. 427; Harrisburg v. Sayler, 87 Pa. St. 216; Butler v. Hunter, 7 H. & N. 826; Reedie v. London etc. Co., 4 Exch. 244; Whitney v. Clifford, 46 Wis. 138; Allen v. Willard, 57 Pa. St. 374; Carman v. Steuh etc. Co., 4 Ohio St. 939; St. Paul W. Co. v. Ware, 16 Wall. 566; Joliet v. Harwood, 86 Ill. 110; Blake v. St. Louis, 40 Mo. 569; Circleville v. Neuding, 41 Ohio St. 465.

[2] Blake v. Ferris, 5 N. Y. 48; Kelly v. Mayor, 11 Ib. 432.

[3] Ironton v. Kelly, 38 Ohio St. 50; Nashville v. Brown, 9 Heisk. 1; Turner v. Newbergh, 109 N. Y. 301; Savannah v. Waldner, 49 Ga. 316; King v. Cleveland, 28 Fed. Rep. 835; Knoxville v. Bell, 12 Lea, 157; Seattle v. Buzby, 2 Wash. Ter. 25; Jacksonville v. Drew, 19 Fla. 106; Butler v. Bangor, 67 Me. 385; Eyler v. County Com'rs, 49 Md. 257; Baltimore v. Pennington, 15 Md. 12; St. Paul v. Seitz, 3 Minn. 297; Campbell v. Stillwater, 32 Minn. 308; Vogel v. New York, 92 N. Y. 10; Broadwell v. City, 75 Mo. 213; Detroit v. Corey, 9 Mich. 165; Chicago v. Robbins, 2 Black. 418; *contra*, Painter v. Pittsburgh, 46 Pa. St. 221; Westchester v. Appee, 35 Ib. 284.

[4] Detroit v. Corey, 9 Mich. 165; but compare O'Hale v. Sacramento, 48 Cal. 212; Pratt v. Lick, 33 Ib. 691; Boswell v. Laird, 8 Ib. 469.

city, when the person creating the obstacle or defect is a contractor doing work for the municipality.[1]

But a municipality, which does not direct, or is not authorized to direct, the manner in which a contract is to be performed, is not liable for the contractor's negligence, if the agreement called for an act to be done, which is lawful in itself, which does constitute a nuisance, and which is not essentially dangerous.[2]

If a city contract for a work of local improvement; and, in accordance with the law and the conditions of the contract, the work is done under the immediate supervision, direction or control of municipal officials, whose duty it is to supervise the work, and damages result, not from the negligence of the contractors, but from the performance of the work according to contract, the city will be liable for such damages. Under such circumstances, the party doing work for the city is its agent, and not an independent contractor.[3] The same rule governs when, in the prosecution of the work which is being done by a contractor for a round sum but wholly under municipal control, injury is caused by the negligence of the contractor's workmen.[4] But a right to cancel the contract, and an obligation on the part of the contractor to discharge any of his workmen, who are disobedient to the municipal supervising officer, or the fact that the work must be done to the satisfaction of a certain specified municipal official,[5] is not enough to create the relation of princi-

[1] Hincks v. Milwaukee, 46 Wis. 569; Durkee v. Janesville, 28 Ib. 464; Noonan v. Stillwater, 33 Minn. 198.

[2] Palmer v. Lincoln, 5 Neb. 136; Gray v. Pullen, 32 L. J. Rep. Q. 169; Clark v. Fry, 8 Ohio St. 358; Hilliard v. Richardson, 3 Gray, 349; Gondier v. Cormack, 2 E. D. Smith, 204; Blake v. Ferris, 5 N. Y. 48; Edmundston v. Pittsburgh, etc., Co., 111 Pa. St. 316; Painter v. Pittsburgh, 46 Ib. 213; Erie v. Calkins, 85 Ib. 287; Nashville v. Brown, 9 Heisk. 1; Cincinnati v. Stone, 5 Ohio St. 38; Susquehanna De Bor. v. Simmons, 79 Ind. 491; Scammon v. Chicago, 25 Ill. 424; Harrington v. Lansingburgh, 110 N. Y. 145; Barry v. St. Louis, 17 Mo. 121; Cuff v. Newark, 35 N. J. L. 17; King v. N. Y. Cent. & H. R. R. R. Co., 66 N. Y. 181; Harper v. Milwaukee, 30 Wis. 365; McCafferty v. Spuyten Duyvil etc. Co., 61 N. Y. 178; Cincinnati v. Stone, 5 Ohio St. 38.

[3] Hilliard v. Richardson, 3 Gray, 349; Reilly v. Philadelphia, 60 Pa. St. 467; Chicago v. Robbins, 2 Black, 418, 428; Sewall v. St. Paul, 20 Minn. 511.

[4] Lowell v. Boston, 23 Pick. 24; Dressell v. Kingston, 32 Hun, 533; Linnehan v. Rollins, 137 Mass. 123.

[5] Erie v. Caulkins, 85 Pa. St. 247; Pack v. Mayor, 8 N. Y. 222; Sammelson v. Cleveland etc. Co., 49 Mich. 164.

pal and agent between the city and the contractor.[1] Nor does the fact, that a person is paid by the day, negative the independent character of his employment.[2] So, generally, when the result of the work is the object considered by the employer, rather than the means by which the employed is to accomplish it, it is an independent employment.[3]

Although the city cannot evade responsibility by an agreement with the contractor that he will be responsible for injuries to third persons; yet, if an express stipulation exists to this effect, the city may recover from him the amount it has been compelled to pay, in a case where the accident was occasioned, wholly or in part, by his default or negligence.[4]

§ 348. **Liability for torts of abutters—Liability of abutters for the same.**—No one has a right to do anything, which leaves the streets in a dangerous condition, or less secure than they are kept by the municipality. Whoever does so in any manner, is guilty of creating a nuisance, which makes him a wrongdoer, and renders him liable to any one suffering special injury thereby, independent of negligence on the part of the person creating the nuisance.[5] This liability for the creation of the nuisance on the highway is not affected by the liability of the city to the party injured, or of the abutting owner. It is generally the duty of both the city and the owner to keep a sidewalk in repair, and both will be liable jointly or severally to

[1] Blumb v. City of Kansas, 84 Mo. 112.

[2] Forsythe v. Hooper, 11 Allen, 419; Corbin v. America Mills, 27 Conn. 274.

[3] Harrison v. Collins, 86 Pa. St. 153; East St. Louis v. Klug, 3 Ill. App. 90; Wood v. Mitchell, 44 Iowa, 27; Pack v. New York, 3 N. Y. 222; East St. Louis v. Giblin, 3 Ill. App. 219; Mercer v. Jackson, 54 Ill. 397.

[4] Herrington v. Lansingburgh, 110 N. Y. 545; Buffalo v. Hallaway, 7 Ib. 493; Storrs v. Utica, 17 Ib. 104; Brooklyn v. B. City R. R. Co., 47 Ib. 475; Myers v. Snyder, Bright. (Pa.) 489; Beatty v. Gilmore, 16 Pa. St. 463.

[5] Bush v. Johnston, 23 Pa. St. 109; Beatty v. Gilmore, 16 Ib. 463; Sexton v. Zett, 44 N. Y. 430; Garland v. Towne, 55 N. H. 55; Durant v. Palmer, 29 N. J. L. 544; Congreve v. Smith, 18 N. Y. 79; Congreve v. Morgan, 18 N. Y. 84; Jochem v. Robinson, 66 Wis. 638; Ottumwa v. Parks, 43 Iowa, 119; Jessen v. Sweigert, 66 Cal. 182; Rowell v. Williams, 29 Iowa, 210; Ryan v. Reynolds, 53 Ill. 212; Parker v. Macon, 39 Ga. 725; Howe v. New Orleans, 12 La. An. 481; Severin v. Eddy, 52 Ill. 189; Ball v. Armstrong, 10 Ind. 181; Wood v. Mears, 12 Ib. 515; Harlow v. Humiston, 6 Cow. 189; Hardcastle v. So. York. Ry. Co., 4 H. & N. 67; Temp. Hall Assn. v. Giles, 33 N. J. L. 260; Dygert v. Schenck, 23 Wend. 446; Cornwall v. Com'rs, 10 Ex. 771; Gridley v.

one injured by lack of repair.[1] And the same is true of the city and a railroad company, in respect to keeping the roadway in repair.[2] And when a nuisance, in or near the streets, has been created by the owner, the tenant or lessee, who maintains and continues it, partakes of the original liability of his landlord or lessor.[3] Abutting owners are, however, not liable at common law for injuries sustained by travelers, unless the defect or obstruction in the highway causing the injury was placed there by the abutter.[4] And this is particularly clear, when the city is expressly or impliedly under the legal duty of repairing.[5] As the municipality is responsible for the repair of streets, and has a property in them, as representative and trustee for the people, it has been held that it may, when compelled to repair a street which is rendered unsafe by some act of a wrongdoer, recover the amount it was under the necessity of expending in making the street safe, in an action against the person causing the damage.[6]

If an abutter has notice of an action pending against the municipality, and founded on his wrongful interference with the street; and he neglects to defend it, he will be concluded, in an action against himself, as to the existence of the defect, the liability of the corporation therefor, and the amount of the damages.[7] But he is not estopped from showing, that he was not

Bloomington, 68 Ill. 47; Hadley v. Taylor, L. R. 1 C. P. 53; Calder v. Smalley, 66 Iowa, 219; Barnes v. Ward, 9 C. B. 392.

[1] Bowen v. Hnntington, 14 S. E. R. 217; 35 W. Va. 682; Peoria v. Simpson, 110 Ill. 294.

[2] Philadelphia v. Weller, 4 Brewster, 24.

[3] Jennings v. Van Schaick, 108 N. Y. 530; Irvine v. Wood, 51 N. Y. 224; Cheetham v. Hampson, 4 D. & E. T. R. 318; Eakin v. Brown, 1 E. D. Smith, 44; Durant v. Palmer, 5 Dutch. 544; Chicago v. O'Brennan, 65 Ill. 160; Stephani v. Brown, 40 Ill. 428; Shipman v. Fifty Asso., 106 Mass. 194; Milford v. Holbrook, 9 Allen, 17; Lowell v. Spalding, 4 Cush. 277;

[4] Moore v. Gadsden, 87 N. Y. 84; Wenzlick v. McCotter, 87 Ib. 122; Eustace v. Johns, 38 Cal. 3; Elkhart v. Wickwire, 87 Ind. 77; Morton v. Smith, 48 Wis. 265; Robbins v. Johns, 15 C. B. N. S. 221, 243; Weller v. McCormick, 47 N. J. L. 397; Jansen v. Atchison, 16 Kan. 358; comp. St. Louis v. Life Ins. Co, (Mo. 90) 17 S. W. R. 637; Ryan v. Wilson, 87 N. Y. 471.

[5] Flynn v. Canton, 40 Md. 312; Heeney v. Sprague, 11 R. I. 456.

[6] Elliott Roads and Streets, 547; Centerville v. Woods, 57 Ind. 192; Bishop Non-contract Law, § 1005.

[7] Portland v. Richardson, 54 Me. 46; Brookville v. Arthurs, 18 Atl. R. 1076; Seneca Falls v. Zalinski, 8 Hun, 571; Lowell v. Boston & L. Co., 23 Pick. 24; Rochester v. Mont-

bound to keep the street in repair, or that the accident was not occasioned by any fault of his.[1]

The omission to give such notice does not however affect the city's right of action; its object being merely to save unnecessary litigation.[2] Unless required by statute, written notice to an abutter is not necessary;[3] and notice may be implied from the party's actual knowledge of the pendency of the action.[4] It has been held that the abutter is not liable for injuries occasioned by an accidental fall, which was caused by ice or snow upon the sidewalk, even though the city had enacted an ordinance, requiring him to remove it;[5] and such an ordinance, as an attempt to evade municipal responsibility, was held to be unconstitutional.[6] The general rule, however, in respect to the liability of the abutting landowner, is that, in a case where a verdict is recovered against the municipality for injury caused by a defect, due solely to his act or fault, the city can recover over in an action against him.[7]

A charter provision, exempting a city from liability for defects in streets, which have been caused by third persons, until all legal remedies shall have been exhausted against the primary

gomery, 72 N. Y. 65; Westfield v. Mayo, 122 Mass. 100; Morgan v. Muldoon, 82 Ind. 347; Troy v. Troy R. R. Co., 49 N. Y. 657; Bever v. North, 107 Ind. 544; Veazie v. Penob. R. R. Co., 49 Me. 119; Boston v. Worthington, 10 Gray, 496; Milford v. Holbrook, 9 Allen, 17.

[1] Chicago v. Robbins, 2 Black, 418; Littleton v. Richardson, 34 N. H. 179, 187; Brooklyn v. R. R. Co., 47 N. Y. 475.

[2] Port Jervis v. First Nat. Bk., 96 N. Y. 550; Aberdeen v. Blackmar, 6 Hill, 324; Binssee v. Wood, 37 N. Y. 530.

[3] Robbins v. Chicago, 4 Wall. 657; Barney v. Dewey, 12 Johns. 225; Beers v. Pinney, 12 Wend. 309.

[4] Port Jervis v. First Nat. Bank, 96 N. Y. 550; Morgan v. Muldoon, 82 Ind. 347.

[5] Moore v. Gadsden, 93 N. Y. 12; Hartford v. Talcott, 48 Conn. 525; Kirby v. Boyl. M., 14 Gray, 249; Flynn v. Canton Co., 40 Md. 312.

[6] Gridley v. Bloomington, 88 Ill. 554.

[7] Wickwire v. Angola, (Ind. 90) 30 N. E. R. 917; Chicago v. Robbins, 4 Wall. 657; Severin v. Eddy, 52 Ill. 189; Boylston v. Mason, 102 Mass. 541; Westfield v. Mayo, 122 Ib. 100; Milford v. Holbrook, 9 Allen, 17; Rochester v. Montgomery, 72 N. Y. 65; Brooklyn v. B. City R. R. Co., 47 N. Y. 475; Littleton v. Richardson, 34 N. H. 179; Norwich v. Breed, 30 Conn. 535; Brookville v. Arthurs, 18 Atl. R. 1076; Rockford v. Hildebrand, 61 Ill. 155; District v. Balt. & P. R. R. R. Co., 1 Mackey, 314; Portland v. Richardson, 54 Me. 46; Taylor v. Lake Shore etc. Co., 45 Mich. 74; MacNaughton v. Elkhart, 85 Ind. 384; Elkhart v. Wickwire, 87 Ib. 77; Catterlin v. Frankfort, 79 Ib. 547.

wrongdoers, is to be strictly construed[1] and does not of course apply, when the city is in fault.[2] There is no municipal liability for the proper maintenance of a private way, although it is used by the public.[3]

An abutter will be held liable for an accident caused by an unguarded excavation, as a coal hole, where it was made without authority, even though it was at first protected so as not to be a source of danger to the public, irrespective of any charge of negligence on his part; and regardless of the fact, that the covering thereto, provided by him, had been removed or broken by the act of others.[4] But if, on the other hand, the owner had permission to make such an excavation, he is only liable for the absence of ordinary care and diligence in constructing and guarding it.[5] Not only will an abutting owner be liable for damages resulting from an unauthorized excavation, which constitutes a nuisance when created in the highway; but he will also be liable to travelers for accidents occurring from excavations, such as areas[6] or cellar openings,[7] which are made by him near the highway, and left in a dangerously unguarded condition.[8]

[1] Raymond v. Sheboygan, 70 Wis. 318; Hines v. Fond du Lac, 71 Ib. 74.

[2] Papworth v. Milwaukee, 64 Wis. 389.

[3] Goodwin v. Des Moines, 55 Iowa, 617; distinguishing Bumham v. Rosston, 10 Allen, 290; see also Covington v. Bryant, 7 Bush, 248; Oliver v. Worcester, 102 Mass. 489; Young v. Harvey, 16 Ind. 314.

[4] Smith v. Ryan, 8 N. Y. S. 853; Hughes v. Orange Co. Assn., 56 Hun, 396; *contra*, Kirkpatrick v. Knapp, 28 Mo. App. 427; Portland v. Richardson, 54 Me. 46; Congreve v. Morgan, 18 N. Y. 84; Gwinnell v. Earner, 10 L. R. C. P. 658; Nelson v. Godfrey, 12 Ill. 22.

[5] Dickson v. Hollister, 123 Pa. St. 421; Norwich v. Breed, 30 Conn. 535; Clifford v. Dam, 81 N. Y. 52; Howland v. Vincent, 10 Met. 371; Wolf v. Kilpatrick, 101 N. Y. 146; Hardcastle v. So. Yorks. etc. Co., 4 H. & N. 67; Larrabee v. Peabody, 128 Mass. 561; Hormsel v. Smyth, 7 C. B. 729; Beach v. Frankenberger, 4 W. Va. 712; Victory v. Baker, 67 N. Y. 366; Fisher v. Prowse, 110 Eng. Com. L. 770; Beck v. Carter, 68 N. Y. 283; Parker v. Macon, 39 Ga. 725; Bunch v. Edenton, 90 N. C. 431; Haughey v. Hart, 62 Iowa, 96; Halpin v. Kansas City, 76 Mo. 335; Scranton v. Hills, 102 Pa. St. 378; Hawes v. Fox Lake, 33 Wis. 438; Kelly v. Columbus, 41 Ohio, 263; Drew v. Sutton, 55 Vt. 586.

[6] Hotel Ass'n v. Walter, 23 Neb. 280.

[7] McGill v. District, 4 Mackey, 70; Landon v. Lund, 38 N. W. Rep. 699.

[8] Mallory v. Hibernia etc. Co., 21 Pac. R. 525; Beck v. Carter, 68 N. Y. 283; Crogan v. Schieles, 53 Conn. 186; Jones v. Nichols, 46 Ark. 207; Stratton v. Staples, 59 Me. 94; comp. Graves v. Thomas, 95 Ind. 364; Haughey v. Hart, 62 Iowa, 96; Norwich v. Breed, 30 Conn. 535; Homan v. Stanley, 66 Pa. St. 464; Sanders v. Reiske, 1 Dak. 151.

Of course, an owner who makes an excavation on his own land, is not liable for injuries received by any trespassers who fall in it, or to travelers using the street, if the excavation be distant from the highway; or, being near the road, if the abutter employ due care in erecting barriers around it;[1] and whether the excavation is near enough to render travel unsafe, is a question for the jury.[2]

If an owner of land, contiguous to the street, erects a building, or stacks lumber,[3] or allows a ruinous wall to stand on his land,[4] near the street line, ordinary and reasonable care must be exercised by him to prevent it from falling and injuring travelers.[5] And he is liable for any such negligence, even if the work is done by an independent contractor.[6] So, an owner of abutting land must use ordinary care in the process of constructing a building, in order to protect passers-by from injury from falling objects.[7] If, having constructed a building carefully, it is thrown down and into the highway by some accident beyond his control, and which he could not reasonably anticipate, he will not be liable.[8]

It is customary to permit owners of land, abutting on a street to place building material on the street or sidewalk; but a reasonable diligence should be observed by them in the completion of the work of erection or repair;[9] and they must use ordinary care to warn and protect the traveling public.[10] So, too, while the adjoining landowner may use the street temporarily for loading and unloading his goods, he, and not the city, will be primarily responsible for injury resulting from any unreasona-

[1] Jennings v. Van Schaick, 20 Abb. N. C. 324; Beck v. Carter, 68 N. Y. 283; Binks v. Yorkshire etc. Co., 3 B. & S. 244; Gramlish v. Wurst, 86 Pa. St. 74; Campbell v. Lunsford, 83 Ala. 512; 3 S. R. 522; Hardcastle v. So. Yorkshire Ry. Co., 6 H. & N. 72.

[2] Murphy v. Brooklyn, 118 N. Y. 575; Drew v. Lutton, 55 Vt. 586; Warner v. Holyoke, 112 Mass. 362; Taylor v. Mt. Vernon, 58 Hun, 384.

[3] Weller v. McCormick, 19 Atl. R. 1101; Pastine v. Adams, 49 Cal. 87.

[4] Kappes v. Appel, 14 Bradw. 179; Church v. Burkhardt, 3 Hill, 193; Grogan v. Broadway etc. Co., 87 Mo. 321.

[5] Mullen v. St. John, 57 N. Y. 569; Murphy v. McShane, 52 Md. 217; Lowell v. Spalding, 4 Cush. 277.

[6] Noeling v. Allee, 10 N. Y. S. 97; Wilkinson v. Detroit etc. Co., 41 N. W. R. 490.

[7] Jager v. Adams, 123 Mass. 26.

[8] Couts v. Neer, 70 Tex. 468.

[9] Stuart v. Havens, 17 Neb. 211.

[10] Lewis v. Atlanta, 77 Ga. 756; McDonald v. Troy, 59 Hun, 618; Nolan v. King, 97 N. Y. 565; Vanderpool v. Husson, 28 Barb. 196; Jackson v. Schmidt, 14 La. An. 818.

ble interference with the highway, as constituting a nuisance, aside from any question of negligence.[1]

§ 349. **Liability for neglect in performance of ministerial duties.**—It is a general rule that officials who are charged with the performance of ministerial and corporate duties, and are acting within the scope of their authority, will make the corporation which they represent liable to one, to whom the performance of the duty is owing, and who receives special injury by a non-performance, or by a negligent performance. This liability, so far as municipal corporations are concerned, has been sometimes based upon the implication that, by their acceptance of the powers and duties imposed upon them by their charter, they promise to exercise their powers and perform their corporate duties in a proper manner.[2] Nor is it necessary, when the performance of a ministerial and absolute duty is concerned, that the municipality should have expressly imposed upon it, by statute, a liability to answer in damages to one, who may suffer by its breach of duty. If the duty clearly appears, expressly or by necessary implication, to be imposed upon the corporation for its own private or corporate advantage; and if the power, from which the duty arises, is not discretionary as to its exercise, the pecuniary liability for a breach of the duty will be implied and enforced.[3]

[1] King v. Oshkosh, 44 N. W. R. 745; 75 Wis. 517; Dubach v. Hannibal, Sq. Mo. 483; Queen v. Davis, 24 N. C. C. P. 575; Denby v. Willer, 59 Wis. 240; People v. Cunningham, 1 Denio, 524; Callanan v. Gilman, 107 N. Y. 360.

[2] Davenport v. Ruckman, 37 N. Y. 568; Nelson v. Canisteo, 100 Ib. 89; Requa v. Rochester, 45 Ib. 129; Ehrgott v. Mayor of N. Y., 96 Ib. 264; Kunz v. Troy, 104 Ib. 344; Barton v. Syracuse, 36 Ib. 54; Hutson v. Mayor, 9 Ib. 163; Maximilian v. Mayor, etc., 62 Ib. 160; Robinson v. Chamberlain, 34 Ib. 389; Cain v. Syracuse, 95 Ib. 83; Conrad v. Ithaca, 16 Ib. 158; Farquar v. Roseburg, (Oreg.) 21 Pac. Rep. 1103; Winn v. Rutland, 52 Vt. 481; Richmond v. Long, 17 Gratt. 375; Galveston v. Posnainsky, 62 Tex. 118; Denver v. Dunsmore, 7 Colo. 328.

[3] Hewison v. New Haven, 37 Conn. 475; Jones v. New Haven, 34 Ib. 1; Kiley v. Kansas City, 87 Mo. 103; Halpin v. Kansas City, 76 Mo. 335; Welsh v. St. Louis, 73 Ib. 71; Russell v. Columbia, 74 Ib. 490; Bassett v. St. Joseph, 53 Ib. 290; Gilluly v. Madison, 63 Wis. 518; Montgomery v. Gilmer, 33 Ala. 130; Hamilton v. Columbus, 52 Ga. 435; Little Rock v. Willis, 27 Ark. 572; Hitchins v. Frostburgh, 68 Md. 100; Albrittin v. Huntsville, 60 Ala. 486; McDonough v. Virginia City, 6 Nev. 90; Centerville v. Woods, 57 Ind. 192; Omaha v. Olmstead, 5 Neb. 446; Anne Arundel Co. v. Duckett, 20 Md. 469; Bell v. West Point, 51 Miss. 262; Dewey v. Detroit, 15 Mich. 311; Vicksburg v. Hennessy, 54 Miss. 392; Bohen v. Waseca, 32 Minn.

While the principle is settled beyond cavil that a municipality is liable for negligent nonfeasance or misfeasance of its officials, while performing ministerial duties, it is not so well settled, whether in any particular case duties are ministerial or judicial, corporate or public. It has been said, that the nature of the duty is to be determined from the statute creating it,[1] and, on the whole, the question resolves itself into one of statutory construction, depending in each particular instance upon the language employed. It is not necessary that the duty should be declared by the statute to be mandatory or ministerial; for the courts may infer its character, not only from the language used, but from the evil designed to be remedied, and from the purposes intended to be accomplished.[2] Ministerial duties are such as are absolute, certain and imperative.[3] The act itself, which

117; Simmer v. St. Paul, 23 Minn. 408; Tallahassee v. Fortune, 3 Fla. 19; Niblett v. Nashville, 12 Heisk. 684; Wilson v. Wheeling, 19 W. Va. 324; Mayor of Memphis v. Lasser, 9 Humph. 757; O'Neil v. New Orleans, 30 La.An. 220; Gilman v. Laconia, 55 N. H. 130; Mayor of Rome v. Dodd, 58 Ga. 239; Mayor etc. Milledgeville v. Cooley, 55 Ga. 17; Burns v. Elba, 32 Wis. 605; Ward v. Jefferson, 24 Ib. 342; Jansen v. Atchison, 16 Kan. 358; Pittsburgh v. Crier, 22 Pa. 54; Fritsch v. Allegheny, 91 Ib. St. 226; Meares v. Wilmington, 9 Ired. L. (N. C.) 73; Western College v. Cleveland, 12 Ohio St. 377; Noble v. Richmond, 31 Grat. 271; McCombs v. Akron, 15 Ohio, 476; Rhodes v. Cleveland, 10 Ib. 159; Gordon v. Richmond, 83 Va. 436; Soper v. Henry Co., 26 Iowa, 264; White v. Bond Co., 58 Ill. 298; Wallace v. Muscatine, 4 Greene (Iowa), 264; Sterling v. Thomas, 60 Ill. 265; Waltham v. Kemper, 55 Ib. 346; Bloomington v. Bay, 42 Ib. 503; Champaign v. Patterson, 50 Ib. 62; Clayburgh v. Chicago, 25 Ib. 535; Lacon v. Page, 48 Ib. 499; Lan. Can. Co. v. Parnably, 11 A. & E. 223; Harper v. Milwaukee, 30 Wis. 365; Mersey Docks v. Penhallow, 1 H. L. Cas. N. S. 93; Delger v. St. Paul, 14 Fed. Rep. 567; Mayor v. Sheffield, 4 Wall. 189; Mayor of Lynn v. Turner, Cowper, 86; Barnes v. District, 91 U. S. 541; Mersey Docks v. Gill, 11 H. L. Cas. 686; Rock Co. v. United States, 4 Wall. 435; Henley v. Lyme Regis., 3 B. & Ad. 77; Evanston v. Gunn, 99 U. S. 660; Scott v. Mayor, 37 Eng. L. & Eq. 495; Boulder v. Niles, 9 Colo. 415; Nelson v. Canisteo, 100 N. Y. 89; Weet v. Brockport, 16 Ib. 161; Denver v. Rhodes, 9 Colo. 554; Bailey v. Mayor, 3 Hill, 538; Kavanagh v. Brooklyn, 38 Barb. 232; Saulsburg v. Ithaca, 94 N. Y. 27; McCarthy v. Syracuse, 46 N. Y. 194; Cole v. Medina, 27 Barb. 218; Peck v. Batavia, 32 Ib. 634; Clark v. Lockport, 49 Ib. 580; Wendell v. Mayor of Troy, 39 Ib. 329; Storrs v. Utica, 17 Ib. 104; Ring v. Cohoes, 77 Ib. 83; Noonan v. Albany, 79 Ib. 470; and cases cited in last note.

[1] State v. Haworth, 23 N. E. R. 946.

[2] Perry v. Barnett, 65 Ind. 522, 525; Newman v. Sylvestre, 42 Ib. 106; Austin v. Carter, 1 Mass. 231; State v. Halifax, 4 Dev. 345.

[3] Lewenthal v. New York, 5 Lans. 532; Mills v. Brooklyn, 32 N. Y. 489.

is to be performed, will frequently determine the character of the duty. But the fact, that the municipal or official action requires skill and judgment, or involves an exercise of discretion, will not always make it judicial.[1]

Authority or power implies a duty to be performed by its possessor; and unless the power is expressly discretionary, the grant of power creates a peremptory public duty.[2] And it is not absolutely necessary that words of command should be used by the lawmaker; for, where power is conferred and the occasion for its exercise is not expressly left to the discretion of the municipal corporation, the interest, which the public or third persons have in its performance, is generally sufficient to cause the statute to be regarded as mandatory.[3] All acts, which are done in the performance of a duty prescribed by ordinance, are usually ministerial.[4]

§ 350. **Defects and obstructions created by municipal corporations.**—When a street has been made dangerous by the direct command or permission[5] of the city, as in the case of local improvements, carried on by the city officials, the city will be liable for injuries thereby sustained by travelers, who exercise proper care in the use of the highway.[6] Thus, it is no defence that the defect arose when necessary repairs were being made to the highway; for proper precautions to protect travelers, should then be employed.[7] This is true, even in those

[1] Wilson v. Marsh, 34 Vt. 352; McCord v. Hugh, 24 Iowa, 336.

[2] People v. Supervisors, 11 Abb. Pr. R. 114.

[3] Southwell v. Detroit, 42 N. W. 118; Madison v. Smith, 83 Ind. 502; Corbett v. Bradley, 7 Nev. 106; People v. Supervisors, 51 N. Y. 442; Koch v. Bridges, 45 Miss. 247; Supervisors v. United States, 4 Wall. 435; Mason v. Fearson, 9 How. 248.

[4] Amy v. Des Moines, 11 Wall. 136; Danbury & N. R. R. Co. v. Norwalk, 37 Conn. 109.

[5] Haniford v. City, 103 Mo. 172; Savannah v. Donnelly, 71 Ga. 258.

[6] City v. Cunningham, 47 N. W. R. 930; McAlister v. Albany, 18 Oreg. 426; Horey v. Haverstraw, 47 Hun, 356; Chicago etc. Co. v. Quincy, 27 N. E. R. 232; Blessington v. Boston, 26 N. E. R. 1113; Covington v. Bryant, 7 Bush, 248; Glantz v. So. Bend, 106 Ind. 305; Detroit v. Carey, 9 Mich. 165; Lloyd v. New York, 5 N. Y. 369; Weet v. Brockport, 16 N. Y. 161; Brooks v. Somerville, 106 Mass. 271; Chicago v. Mayor, 18 Ill. 349; Pfan v. Reynolds, 53 Ill. 212; Dayton v. Pease, 4 Ohio St. 80; Baltimore v. Pennington, 15 Md. 12; Grant v. Brooklyn, 41 Barb. 381; Cincinnati v. Stone, 5 Ohio St. 38; New York v. Sheffield, 4 Wall. 189; Conrad v. Ithaca, 16 N. Y. 158; Wendell v. Troy, 39 Barb. 329.

[7] Crowther v. Yonkers, 15 N. Y. S. 588; Pettigrew v. Evansville, 25

States where there exists no implied liability on the part of cities for non-repair, or for defects and obstructions created by others.[1]

The rule of law, that the city will not be responsible in an action for damages, where by statute it is vested with the discretionary power to arrange a plan for the prosecution of the projected work, and in doing which it acts under the advice of skilled and experienced persons, has been carried very far, particularly in those States, where in the absence of statute there is no implied liability for negligence in the care of streets.[2] But it should not be construed to exempt the city from liability, when the plan devised, if put in operation, leaves the city's streets in a dangerous condition for public use. The principle seems to be, that for a mere error of judgment, the municipality will not be liable; but for such a lack of care and skill, as will amount to negligence, it will be liable when there is an implied or statutory liability for defects or obstructions in the streets, which are caused by others.

In both these classes of cases, the liability is not imposed upon the corporation, because it is a corporation; or because of the very comprehensive powers it possesses over the subject-matter. The basis of the claim which the injured individual has against a city for damages, which were occasioned by a defect or obstruction in a public street, is in every instance the negligence of the corporation, acting through its officials.[3] Such being the basis of the plaintiff's claim, the necessity and importance of notice, or proof of circumstances which will be sufficient to dispense with actual notice,[4] in all cases where the defect is not due to some direct act or course of action by the municipality, is apparent.

Wis. 223; Milwaukee v. Davis, 6 Ib. 377; Smith v. Milwaukee, 18 Ib. 63; Storrs v. Utica, 17 N. Y. 104.

[1] Blessington v. Boston, 26 N. E. R. 1113; Hill v. Boston, 122 Mass. 344, 364.

[2] Detroit v. Blakeby, 21 Mich. 184; Lansing v. Toolan, 37 Mich. 152.

[3] Foreman v. Canterbury, L. R. 6 Q. B. 214; Taylor v. Greenhalgh, L. R. 9 Q. B. 487; Pendlebury v. Same, 1 Q. B. D. 36; Palmer v. St. Albans, 56 Vt. 522; when the municipal authorities in repairing streets are compelled to obstruct them, it is their duty to give travelers due warning of the obstruction. Carlisle v. Brisbane, 113 Pa. St. 544.

[4] Spiceland v. Allier, 98 Ind. 467; Turner v. Indianapolis, 96 Ind. 51; York v. Spellman, 19 Neb. 357; Russell v. Columbia, 74 Mo. 480.

§ 350 *a*. **Necessity for, and evidence admissible to show notice, in order to charge corporation with negligence.**— A municipal corporation cannot be charged with negligence, unless sufficient time has elapsed, after the authorities had had notice of the defect, for them to repair it; or after they ought by reasonable diligence to have acquired knowledge of the defect.[1] When the defect in the street is occasioned by a third party, notice of its existence is absolutely essential, in order to render the city liable.[2]

This notice may be either express or implied. Actual or express notice may be given, by serving a writing upon the proper officer,[3] or by knowledge of the defect coming to him through some other channel, and it may be proven by an entry in the books of the city,[4] by the report of the street commis-

[1] Squires v. Chillecothe, 89 Mo. 226; Whitney v. Lowell, 24 N. E. R. 47; Cairncross v. Pewaukee, (Mo. 91) 47 N. W. R. 13; Manning v. Woodstock, 22 Atl. R. 47; 59 Conn. 224; McNally v. Cohoes, (N. Y. 91) 29 N. E. R. 1043; Stoddard v. Winchester, (Mass. 91) 27 N. E. R. 1014; Burns v. Bradford, 137 Pa. St. 361; Prindle v. Fletcher, 39 Vt. 257; Goodsen v. Des Moines, 66 Iowa, 255; Carter v. Monticello, 68 Ib. 178; Yale v. Hampden, 18 Pick. 357; Aurora v. Bitner, 100 Ind. 396; Johnson v. Milwaukee, 46 Wis. 568; Larmon v. District, 5 Mackey, 330; Kibele v. Philadelphia, 105 Pa. St. 41; Cusick v. Norwich, 40 Conn. 376; Bellamy v. Atlanta, 75 Ga. 167; Townsend v. Des Moines, 42 Iowa, 657; Rice v. Des Moines, 40 Ib. 638; Sheel v. Appleton, 49 Wis. 125; McSimons v. Lancaster, 63 Ib. 596; Howe v. Plainfield, 41 N. H. 135; Madison v. Brown, 89 Ind. 48; Evansville v. Wilter, 86 Ib. 414; Logansport v. Justice, 74 Ib. 378; Hume v. New York, 47 N. Y. 639; McCarthy v. Syracuse, 46 Ib. 194; Turner v. Newburgh, 109 Ib. 301; Smith v. New York, 66 Ib. 295; Chicago v. Murphy, 84 Ill. 224; Chicago v. Stearns, 105 Ib. 554; Joliet v. Seward, 99 Ib. 267; Todd v. Troy, 61 N. Y. 506; Campbell v. Fairhaven, 54 Vt. 336; Rapho v. Moore, 68 Pa. St. 404; Bonine v. Richmond, 75 Mo. 437; Centralia v. Krouse, 64 Ill. 19; Datton v. Albion, 50 Mich. 129; Dooly v. Sullivan, 112 Ind. 451; Salina v. Prosper, 27 Kan. 544; Ironton v. Kelley, 38 Ohio St. 50; Indianapolis v. Scott, 72 Ind. 196; New York v. Sheffield, 4 Wall. 189; Requa v. Rochester, 45 N. Y. 129; Vandyke v. Cincinnati, 1 Disney, 532; Serrot v. Omaha, 1 Dil. C. C. R. 312; Bartlett v. Kittery, 68 Me. 357; Dorlon v. Brooklyn, 46 Barb. 604; Hart v. Brooklyn, 36 Ib. 226; Donlson v. Clinton, 33 Iowa, 397; Cleveland v. St. Paul, 18 Minn. 279; Smith v. New York, 66 N. Y. 295; Ward v. Jefferson City, 24 Wis. 342; Hubbard v. Concord, 35 N. H. 52; Worcester v. Canal Props., 16 Pick. 541; Howe v. Lowell, 101 Mass. 99.

[2] Hume v. New York, 47 N. Y. 639; Fort Wayne v. DeWitt, 47 Ind. 396. 397; Huntington v. Breen, 77 Ib. 29.

[3] Monies v. Lynn, 119 Mass. 273; Foster v. Boston, 127 Mass. 290; Rogers v. Shirley, 74 Me. 144; Risson v. Bettel, 30 Wis. 614.

[4] Blake v. Lowell, 143 Mass. 296.

sioner,[1] by a resolution directing repairs;[2] or by the report of a committee.[3]

A city, it has been held, is not charged with notice of a defect, which is not apparent to ordinary observers.[4] Nor is notice to a citizen to be considered as sufficient notice to the corporation.[5]

But the lack of such a notice is no defence, when the defect was caused, or the obstruction placed in the highway, by servants or employees of the municipal corporation;[6] or where the city has given permission to an individual to make an excavation in the highway.[7]

Proper officers, to whom notice may come or be given, are policemen,[8] or[9] street commissioners or road overseers;[10] and notice to one supervisor[11] or councilman, is notice to all and to the town.[12]

But actual notice of an existing defect is not always necessary[13] as municipal corporations, which have exclusive control of streets and public ways, and possess a power to provide for

[1] Bond v. Biddeford, 75 Me. 538.

[2] Erd v. St. Paul, 22 Minn. 443.

[3] Delphi v. Lowery, 74 Ind. 520, 526, and cases there cited.

[4] Cook v. Anamosa, 66 Iowa, 427. "The defect must be one, which the proper officers either had knowledge of, or, by the exercise of reasonable care and diligence, might have had knowledge of it in time to remedy it, or prevent the injury." The court, in Hanscom v. Boston, 141 Mass. 242; see, also, Joliet v. Walker, 7 Ill. Ap. 267; Scanlon v. New York, 12 Daly, 81; Lyman v. Hampshire, 140 Mass. 311; Rooney v. Randolph, 128 Ib. 580; Harriman v. Boston, 114 Ib. 241.

[5] Squires v. Chillicothe, *supra*; Donaldson v. Boston, 16 Gray, 508; *contra*, Springer v. Bowdoinham, 7 Greenl. 442; Masen v. Ellsworth, 32 Me. 271.

[6] Hines v. Fond du Lac, 71 Wis. 74.

[7] Stephens v. Macon, 83 Mo. 345; Cleveland v. King, 132 U. S. 295.

[8] Denver v. Deane, 10 Cal. 375.

[9] Goldsworthy v. Linden, 43 N. W. R. 656; Buck v. Biddeford, 82 Me. 433; Chase v. Lowell, 24 N. E. R. 212; Rehberg v. New York, 91 N. Y. 137; Goodfellow v. New York, 100 Ib. 15; Hume v. Mayor, 47 Ib. 639; Reinhard v. New York, 2 Daly, 243; Weed v. Ballston Spa, 76 N. Y. 329; Todd v. Troy, 61 Ib. 329; Donaldson v. Boston, 16 Gray, 508.

[10] Scranton v. Patterson, 94 Pa. St. 202; Parish v. Eden, 62 Wis. 372; Rogers v. Shirley, 74 Me. 144.

[11] Bailey v. Spring Lake, 5 Am. & Eng. Cor. Cas. 651.

[12] Logansport v. Justice, 74 Ind. 378; Carter v. Monticello, 68 Iowa, 378; Dundas v. Lansing, 42 N. W. R. 10, 11.

[13] Smith v. St. Joseph, 42 Mo. App. 392; Murphy's Boro. v. Baker, 34 Ill. App. 659; Lincoln v. Smith, 45 N. W. 41; District v. Woodbury, 136 U. S. 450; Pomfrey v. Village of Saratoga Springs, 104 N. Y. 459; Cook v. Anamosa, 66 Iowa, 427.

their maintenance and repair by taxation, are required to exercise positive and active vigilance over them. Upon this principle, a municipality will not be exempt from liability for latent defects, if by ordinary care such defects could have been discovered and guarded against.[1] So, too, the corporation must use care and diligence to guard against the decay and weakening of timber, caused by time and exposure.[2] When a city is clearly at fault, or when a sufficient period of time has elapsed since the occurrence of the defect, in which the city officials might or should have observed it, if they had exercised ordinary care and attention, notice will be implied.[3]

It is sometimes said that notice will be presumed under such circumstances from the character and notoriety of the defect, its location and surroundings, and from its continuance for such a time, as to create the presumption that the municipality did in fact know of it.[4] And the length of time, which must elapse, varies with the circumstances of each case. Thus, where a de-

[1] McGaffagan v. Boston, 149 Mass. 289; Weed v. Balston, 76 N. Y. 329; Gubaske v. New York, 12 Daly, 182; Cusick v. Norwich, 40 Conn. 375; Kunz v. Troy, 104 N. Y. 344; Market v. St. Louis, 56 Mo. 189; Boucher v. New Haven, 40 Conn. 456; Denver v. Dean, 10 Col. 375; Aurora v. Hillman, 90 Ill. 61.

[2] McDonald v. Ashland, 47 N. W. R. 434; Indianapolis v. Scott, 72 Ind. 196; Furnell v. St. Paul, 20 Minn. 117; Sherwood v. District, 3 Mackey, 276.

[3] Masters v. Troy, 50 Hun, 485; Mersey Docks v. Gibbs, 11 H. L. Cas. 687, 701; Weisenberg v. Appleton, 26 Wis. 56; Springfield v. Le Claire, 49 Ill. 476; Shipley v. Bolivar, 42 Mo. App. 401; Barton v. Syracuse, 36 N. Y. 54, 58; Chicago v. Johnson, 53 Ill. 91; Troxall v. Vinton, 77 Iowa, 90; Furnell v. St. Paul, 20 Minn. 117; Moore v. Minneapolis, 19 Ib. 300; Fort Wayne v. Coombs, 107 Ind. 75; Holmes v. Paris, 75 Me. 559; Rochefort v. Attleboro, 27 N. E. R. 1013; Gude v. Mankato, 30 Minn. 256; Medina v. Perkins, 48 Mich. 67; Albertine v. Huntsville, 60 Ala. 486; Houston v. Izaaks, 68 Tex. 116; Goodnough v. Oshkosh, 24 Wis. 549; comp. Submarine Tel. Co. v. Dickson, 15 C. B. N. S. 759; Rapho Tp. v. Moore, 8 Am. Rep. 202; comp. Joliet v. Walker, 7 Ill. App. 267; Gilman v. Haley, 7 Ib. 349; Chatsworth v. Ward, 10 Ib. 75; Chicago v. McCullough, 10 Ib. 459; Powers v. Council Bluffs, 50 Iowa, 197; Rowell v. Williams, 29 Ib. 210; Van Pelt v. Davenport, 42 Ib. 308; Colbeck v. Beautford, 21 Up. Can. Q. B. 276.

[4] Tice v. Bay, 84 Mich. 461; Fuller v. Jackson, 82 Ib. 480; Albrittin v. Huntsville, 60 Ala. 486; Board v. Dombke, 94 Ind. 72; Enright v. Atlanta, 78 Ga. 288; Reed v. Northfield, 13 Pick. 94; Doveny v. Elmira, 51 N. Y. 506; Todd v. Troy, 61 Ib. 506; Squires v. Chillicothe, 89 Mo. 226; Dalton v. Com. Council, 50 Mich. 129; Chicago v. Dalle, 115 Ill. 386; Chicago v. Fowler, 60 Ib. 322; Smally v. Appleton, 43 N. W. R. 826.

fect had existed three weeks,[1] and in other cases several months, notice was presumed to have been received by the city.[2] On the other hand, when an injury was sustained by a fall upon a sidewalk, which had been improperly constructed seven days prior thereto, actual notice of the defect was required.[3]

It has been held by the Supreme Court of the United States, that evidence of the occurrence of similar accidents at the same place is admissible, as tending to show notice to the municipal corporation.[4] So, also, where an accident was caused by a loose board, evidence, that the city knew of the general lack of repair and decay of the walk, was admitted as tending to prove notice,[5] even where it did not appear that the municipal authorities had special notice of this loose board. For, in seeking to recover for injury sustained from a defect at one point in a sidewalk, evidence is admissible of its defective condition elsewhere.[6] But in modification of this statement of the law, it has been held that evidence, of a walk being out of repair in a "locality near" where the accident occurred, is not admissible.[7] The same rules of evidence have been applied to suits for damages suffered from defects in a bridge.[8]

[1] Griffin v. Johnson, 10 S. E. R. 719; 84 Ga. 279; Studley v. Oshkosh, 45 Wis. 380; Pomfrey v. Saratoga, 104 N. Y. 459; Grand Rapids v. Wyman, 46 Mich. 516.

[2] Philadelphia v. Smith, 23 W. N. C. 242; Wheaton v. Hadley, 23 N. E. R. 422; Chicago v. Crocker, 2 Ill. App. 279; Evansville v. Wilter, 86 Ind. 414; Board v. Brown, 89 Ib. 48; Purple v. Greenfield, 138 Mass. 1; Smith v. Leavenworth, 15 Kan. 81.

[3] Chicago v. McCarthy, 75 Ill. 602; Cf. Barr v. Kansas City, 16 S. W. R. 483.

[4] Thompson v. Quincy, 83 Mich. 173; Abilene v. Hendricks, 36 Kan. 196; Augusta v. Hafers, 61 Ga. 48; Lombard v. East Towas, 48 N. W. R. 947; Smith v. Sherwood, 62 Mich. 159; Nave v. Flack, 90 Ind. 205, 214; District v. Armes, 107 U. S. 519; Delphi v. Lowery, 74 Ind. 520; Gilmer v. Atlanta, 77 Ga. 688; Quinlan v. Utica, 71 N. Y. 603; Osborne v. Detroit, 32 Fed. R. 36; Kent v. Lincoln, 32 Vt. 591; Darling v. Westmoreland, 52 N. H. 401; *contra*, Philips v. Willow, 70 Wis. 6; Moor v. Delafield, 69 Ib. 273; Blair v. Pelham, 118 Mass. 420.

[5] Fox v. Lansingburgh, 59 Hun, 617; Aurora v. Hillman, 90 Ill. 61; Bloomington v. Chamberlain, 104 Ib. 268; *contra*, Shelby v. Daggett, 22 N. E. R. 497.

[6] Village v. Brooks, 31 Ill. App. 62; Tice v. Bay City, 84 Mich. 461; Armstrong v. Ackley, 71 Iowa, 76.

[7] Ruggles v. Nevada, 63 Iowa, 185; Barr v. City, 16 S. W. R. 483 (Kan. 91); *contra*, Shaw v. Sun Prairie, 74 Wis. 105.

[8] Hines v. Fond du Lac, 71 Wis. 74; Spearbacker v. Larrabee, 64 Ib. 573; Aurora v. Hillman, 90 Ill. 61; Plattsmouth v. Mitchell, 20 Neb. 228; Cf. Dundas v. Lansing, 42 N. W. R. 1011.

In an action to recover for an injury, caused by falling into an open cesspool, the court admitted evidence showing, that the cover of the cesspool had been off several times before;[1] and, generally, where repairs have been made in a structure under municipal control, this fact should be taken into account, in connection with the age and appearance of the structure.[2]

§ 350 *b*. **Notice of claim prior to suit.**—In many municipal charters, and in the statutes of some of the States, provisions exist, which require the plaintiff to give notice to the city of the injury received by him, before he can begin an action to recover damages therefor. Such requirements are sometimes constitutional,[3] and compliance with them must generally be alleged and proved.[4] When it is required by statute that the notice be served upon a specified municipal official, it need not, it has been held, be handed to him directly by the person injured; but it will be sufficient if it reach him in time through the hands of some third person.[5] In a case, where notice required, the fact that the plaintiff was ill and under the influence

[1] Post v. Boston, 141 Mass. 189.

[2] Cooley v. Westbrook, 57 Me. 181; Grimes v. Keane, 52 N. H. 330; Medina v. Perkins, 48 Mich. 67; Klein v. Dallas, 8 S. W. Rep. 90, *per curiam:* "The question of notice must be left to the jury in all cases whether it be actual or constructive. What facts would be sufficient to put the corporation upon inquiry would depend upon a variety of circumstances, the length of time the defect had existed, its notoriety, the frequency of travel over it, and the character of the defect itself. Such facts would be admissible in evidence to be considered and weighed by the jury. The existence of a dangerous sidewalk or street would not in any case of itself justify a legal presumption, that it was known to the city authorities, except where it is visible, and where the city had itself constructed the sidewalk and made the excavation or obstruction. The act of a wrongdoer, rendering usual travel dangerous, without knowledge, actual or constructive, on the part of corporate officers, would not create a liability on the part of the city." Erd v. Paul, 22 Minn. 446; Hall v. Lowell, 10 Cush. 260; Alletson v. Chichester, L. R. C. P. 319; Mosey v. Troy, 61 Barb. 580; Stanton v. Springfield, 12 Allen, 566; Kellogg v. Janesville, 34 Minn. 132; Howe v. Lowell, 101 Mass. 99; Corcoran v. Peekskill, 108 N. Y. 151; Bailey v. Spring Lake, 61 Wis. 227.

[3] Reining v. Buffalo, 102 N. Y. 308; Nichols v. Minneapolis, 2 Am. & Eng. Cor. Cas. 562.

[4] Reining v. Buffalo, *supra;* Dorsey v. Racine, 60 Wis. 281; Benware v. Pine Valley, 53 Wis. 527; Minick v. Troy, 83 N. Y. 514, 516; Jones v. Minneapolis, 31 Minn. 230; Marshall Co. v. Jackson Co., 36 Ala. 613.

[5] Wormwood v. Waltham, 144 Mass. 184; McCabe v. Cambridge, 134 Ib. 484.

of opiates, was held to be insufficient to excuse the omission to give the notice.[1] If the charter prescribes the notice to be given, it should be complied with, although there may be general statutory provisions upon the subject.[2]

The notice should identify the locality where the accident occurred;[3] but a minute and specific description is never required.[4] The notice should also state that damages are claimed for the injury;[5] but a variance between the amount claimed in the complaint and that in the notice is not material.[6] Any material variance, particularly as to the manner or time of the injury will invalidate the notice.[7]

Whether this notice, when it is regarded as a condition precedent, can be waived by the defendant corporation, is not definitely settled, except in Massachusetts where it cannot be waived.[8]

§ 351. **Proximate cause.**—The law looks to the proximate, and not to the remote, cause of an injury; and from this follows the rule, that unless the defendant's negligence was the proximate or direct cause of this plaintiff's injury, no recovery can be had. So, unless the defect in the highway, whether it be ice or snow, a dangerous excavation or general lack of repair, is the proximate cause of the plaintiff's injury, the municipal corporation will not be liable in damages.[9] The injury for which a municipal corporation will be liable must be the natural

[1] May v. Boston, (Mass.) 23 N. E. Rep. 220.

[2] Hines v. Fond du Lac, 71 Wis. 74.

[3] Rogers v. Shirly, 74 Me. 144.

[4] Cloughessey v. Waterbury, 51 Conn. 405; Sargent v. Lynn, 138 Mass. 599; McCabe v. Cambridge, 134 Ib. 484; Pendergast v. Clinton, 147 Ib. 402; Liffin v. Beverly, 145 Ib. 549; Wall v. Highland, 72 Wis. 435.

[5] Kenaday v. Lawrence, 128 Mass. 318.

[6] Reed v. New York, 97 N. Y. 620; Wyandotte v. White, 13 Kan. 191.

[7] Shaw v. Waterbury, 46 Conn. 263; McDougall v. Boston, 134 Mass. 149; Spooner v. Freetown, 139 Ib. 235.

[8] Gay v. Cambridge, 128 Mass. 387; Maddox v. Randolph, 65 Ga. 216; Dorsey v. Racine, 60 Wis. 292; Babcock v. Guilford, 47 Vt. 519.

[9] Judd v. Claremont, (N. H. 92) 23 Atl. R. 427; White v. Conley, 52 Am. Rep. 154, 157; Forney v. Geldmacher, 42 Ib. 388, 390; Crafter v. Metro. Ry. Co., L. R. 1. C. P. 300; Thomas v. Winchester, 57 Am. Dec. 455; McDonald v. Snelling, 92 Ib. 768; Henderson v. Barnes, 32 Up. Can. Q. B. 176; Weick v. Lander, 75 Ill. 93; Agnew v. Corunna, 55 Mich. 428; Billman v. Ind., etc., Co., 76 Ind. 166; Bluffton v. Mathews, 92 Ind. 213; Cornman v. Eastern Counties R. Co., 4 H. & N. 781; Deverill v. Grand Tr. Ry. Co., 25 Up. Can. Q. B. 517; Toomey v. London, etc., Co., 3 C. B. N. S. 146; Cotton v. Wood, 8 Ib. 568.

and probable consequence of the lack of repair, defect or obstacle in the street or highway.[1]

It is also necessary, in order to sustain a separate action against the city, that the negligence of its agents should be the sole cause of the injury.[2] But care should be observed in distinguishing between the efficient cause of the injury, which is the city's negligence, and the conditions which contributed to the injury. Thus, where plaintiff's injury was caused partly by a fall on the ice with which the road was covered, and partly by a defect in the road itself, the city was liable for its negligence in not repairing the defect, which was the cause of the injury, even though the ice as a condition contributed to it.[3] So, too, where there was a defective gutter, which in conjunction with a heavy rainfall caused damage to the foundation of a building on adjacent land, the city was held liable.[4] Where there is a combination of causes, all of which are *quasi*-proximate in character; but one of them is a defect or obstacle caused by the city's negligence, while the others are occurrences for which neither party is responsible, the municipality is liable, provided the injury would not have been sustained, had not the obstacle or defect existed.[5] The concurrent negligence of a third person will not relieve a wrongdoer.[6] Thus, where a person, whose clothes were entangled in a defective sidewalk, was run over by a railroad train;[7] or where a child, falling into a ditch, which was negligently left unguarded, was hurt by broken glass at the bottom;[8] or where a traveler was injured by a horse, which had been frightened at a defect in the road and had run away;[9] or

[1] Ehrgott v. New York, 96 N. Y. 264; Hoag v. Lake Shore & Mich. S. R. Co., 85 Pa. St. 293; Ring v. Cohoes, 77 N. Y. 83.

[2] Flagg v. Hudson, 142 Mass. 280; Aldrich v. Gorham, 77 Me. 287.

[3] Wharton on Negligence, § 86; Atchison v. King, 9 Kan. 550.

[4] Hanney v. Kansas City, 94 Mo. 334.

[5] McNamara v. Clintonville, 62 Wis. 207; Ehrgott v. New York, 96 N. Y. 264; Palmer v. Andover, 56 Mass. 600; Hunt v. Pownal, 9 Vt. 411; Perkins v. Fayette, 68 Me. 152; Shearman & Red. on Neg. § 346; Moulton v. Sanford, 51 Me. 127; Castor v. Uxbridge, 39 Up. Can. Q. B. 113; Toms v. Whitby, 37 Ib. 100; Sherwood v. Hamilton, 37 Ib. 410; Merrill v. Portland, 4 Cliff. C. C. 138; Hampson v. Taylor, 15 R. I. 83.

[6] Franklin v. Winona, etc., Co., 37 Minn. 409.

[7] Chicago v. Schmidt, 107 Ill. 186.

[8] Galveston v. Posnainsky, 62 Tex. 118.

[9] Baldwin v. Turnpike, 40 Conn. 238; Fulsome v. Concord, 46 Vt. 135; Centerville v. Woods, 57 Ind. 192, 197; Merrill v. Claremont, 58 N. H. 468.

where plaintiff was injured, while he was trying to free his horse from a defect in the road;[1] in all of these cases, the negligence of the municipality was held to be the proximate cause without which the injury would not have been sustained, and the city was held liable for the damages.

§ 352. **Contributory negligence.**—On the other hand, there can be no recovery, where an injury was caused or proximately contributed to by the negligence or unskillfulness of the plaintiff in driving,[2] or by defects in his wagon, harness, etc.;[3] or by any other want of due care, which under the circumstances amounts to contributory negligence.[4] To deliberately venture to walk or drive upon a part of the street, which plaintiff knows is dangerous, would under ordinary circumstances be contributory negligence on his part.[5] It would, however, depend upon the circumstances of each case, whether the negligence of the plaintiff constituted, along with the negligence of the defendant municipality, the jointly co-operating cause of the injury complained of, so that it would be treated as contributory negligence, and preclude a recovery against the de-

[1] Page v. Bucksport, 64 Me. 51; Atlanta v. Wilson, 59 Ga. 544; Lund v. Tyngsborough, 11 Cush. 563; Brooksville v. Pumphrey, 59 Ind. 78.

[2] Bryant v. Randolph, 6 N. Y. S. 438; Clark v. Richmond, 5 S. E. R. 369; Marriott v. Stanley, 1 M. & G. 568; Cobb v. Standish, 14 Me. 477; Flower v. Adams, 2 Taunt. 314; Stuart v. Machiasport, 48 Me. 477; Peoria Br. Assoc. v. Loomis, 20 Ill. 402; Cassidy v. Stockbridge, 21 Vt. 391; Murphy v. Dean, 101 Mass. 455; Beatty v. Gilmore, 16 Pa. St. 463; District v. McElligott, 117 U. S. 621; Centralia v. Krouse, 64 Ill. 19; Craig v. Sedelia, 63 Mo. 417; Damon v. Scituate, 119 Mass. 66; Evans v. Utica, 69 N. Y. 166; Gilman v. Deerfield, 15 Gray, 577; Pettingill v. Yonkers, 116 Ib. 558.

[3] Winship v. Enfield, 42 N. H. 197; Clark v. Barrington, 41 Ib. 44; Tucker v. Heinecker, Ib. 317; Palmer v. Andover, 2 Cush. 600; Jenks v. Wilbraham, 11 Gray, 142; Moore v. Albert, 32 Me. 46; Noyes v. Morristown, 1 Vt. 357; Allen v. Hancock, 16 Vt. 230.

[4] Hutchins v. Priestly, 61 Mich. 252; Kelly v. Doody, 22 N. E. R. 1084; 116 N. Y. 575; Schonhohf v. Jackson, 97 Mo. 151; 10 S. W. R. 618; Smith v. Smith, 2 Pick. 621; Parkhill v. Brighton, 61 Iowa, 103; Mangan v. Atterbury, 1 Ex. 239; Bridge v. Grand Junc. R'y Co., 3 M. & W. 244; Witherley v. Regents Canal Co., 12 C. B. N. S. 2; Tuff v. Warman, 2 Ib. 573; Waite v. N. E. R'y Co., E. B. & E. 719; Bradley v. Brown, 32 Up. Can. Q. B. 463; Baker v. Portland, 58 Me. 199.

[5] Evans v. Adams, 122 Ind. 362; Erie v. Magill, 101 Pa. St. 616; McKee v. Bidwell, 74 Pa. St. 218; Coates v. Canaan, 51 Vt. 131; and cases cited in § 344. Ice and snow; Dunkin v. Troy, 61 Barb. 437; Baker v. Fehr, 97 Pa. St. 70.

fendant.[1] So, also, a reasonable choice between known dangers is not negligence; and the fact, that plaintiff, knowing the defect, voluntarily attempted to pass over it is not conclusive of his negligence; but it is a question for the jury to settle in the light of the facts in the case.[2] The traveler's familiarity with the condition of the road is only a circumstance to be considered as bearing upon the question of his contributory negligence.[3]

[1] Johnson v. Wilcox, (Pa. 90) 19 Atl. R. 939; Gaffney v. Brown, 150 Mass. 479; Ellis v. Peru, 23 Ill. App. 35; Lynch v. New York, 47 Hun, 524; McCracken v. Markesan, 45 N. W. R. 323; Bly v. Whitehall, 24 N. E. R. 943; 120 N. Y. 506; McGinty v. Keokuk, 66 Iowa, 725; Gribble v. Sioux City, 38 Iowa, 390; President v. Dusouchett, 2 Ind. 587; McKenzie v. Northfield, 30 Minn. 456; Farnum v. Concord, 2 N. H. 392; Carlett v. Leavenworth, 27 Kan. 673; Maultby v. Leavenworth, 28 Ib. 745; Reed v. Northfield, 13 Pick. 94; Gosport v. Evans, 112 Ind. 133; Bruker v. Covington, 69 Ib. 33; Wheeler v. Westport, 30 Wis. 392; Munger v. Marshalltown, 56 Iowa, 216; Bullock v. New York, 99 N. Y. 654; Dubois v. Kingston, 102 N. Y. 219; Mahoney v. Metro. Ry. Co., 104 Mass. 73; Crescent v. Anderson, 114 Pa. St. 643; Altoona v. Latz, 114 Ib. 238; Humphrey v. Armstrong Co., 56 Pa. St. 204; Strong v. Steven's Point, 62 Wis. 255; McKeigue v. Janesville, 68 Ib. 50; Estelle v. Lake Crystal, 27 Minn. 243; Loewer v. Sedalia, 77 Mo. 431; Lowell v. Watertown, 58 Mich. 568.

[2] Sandwich v. Dolan, (Mass. 90) 24 N. E. R. 526; Byerly v. Anamosa, (Iowa, 99) 44 N. W. 359; Allegheny County v. Broadwaters, 69 Md. 533; Fort Wayne v. Breeze, 23 N. E. R. 1038; Chicago v. McLean, 24 N. E. 527; Boland v. City, 32 Mo. App. 8; Weed v. Ballston, 76 N. Y. 329; At-Water v. Veteran, 6 N. Y. S. 607; Lyman v. Amherst, 107 Mass. 339; Kenworthy v. Ironton, 41 Wis. 647; Divney v. Elmira, 51 N. Y. 506; Bullock v. New York, 99 Ib. 654; Shook v. Cohoes, 108 Ib. 648; Whitaker v. West Boylston, 97 Mass. 273; Gilbert v. Boston, 139 Ib. 313; Pollard v. Woburn, 104 Ib. 84; Rindge v. Colrain, 11 Gray, 157; Frost v. Waltham, 12 Allen, 85; Harris v. Clinton, 64 Mich. 447; Maltby v. Leavenworth, 28 Kan. 745; Maw v. Township, 8 Ont. App. 248; Montgomery v. Wright, 72 Ala. 411; Jeffrey v. Keokuk, 56 Iowa, 546; Bronson v. Southbury, 37 Conn. 199; Aurora v. Dale, 90 Ill. 46.

[3] Ellis v. Peru, 23 Ill. Ap. 35; Fort Wayne v. Breeze, 23 N. E. 1038; Langan v. Atchison, 35 Kan. 318; Byerly v. Anamosa, (Cal.) 44 N. W. R. 459; Foster v. Swope, 41 Mo. App. 137; Hayes v. Hyde Park, (Mass. 91) 27 N. E. 522; Cornish v. Toronto St. R'y Co., 23 Up. Can. C. P. 355; Blackwell v. Same, 38 Up. Can. Q. B. 172; Clayards v. Dethick, 12 Q. B. 439; Gee v. Metro. R'y Co., L. R. 8 Q. B. 177; Snow v. Housatonic R. R. Co., 8 Allen, 441; Adams v. Lancashire & Y. R'y Co., L. R. 4 C. P. 739; Frost v. Waltham, 12 Allen, 85; Bellefontaine R'y Co. v. Hunter, 33 Ind. 335; Clark v. Lockport, 49 Barb. 580; Bridges v. No. London R'y Co., L. R. 6 Q. B. 377; Whittaker v. W. Boylston, 97 Mass. 273; Nicholls v. Gt. Western R'y Co., 27 Up. Can. Q. B. 382; Fox v. Sackett, 10 Allen, 535; Rastrick v. Gt. Western Ry. Co., 27 Up. Can. Q. B. 396; Hutton v.

His knowledge of a defect or obstruction is not decisive proof of contributory negligence; it is, however, an important element, and one from which contributory negligence is frequently and not unreasonably inferred.[1] But a corporation has no right, by keeping its streets in a notoriously unsafe condition, to debar the public from using them, upon the penalty of being guilty of contributory negligence if they do and are injured thereby.[2]

A person may walk or drive carefully, relying upon the belief, that the corporation has done its duty; and even a near sighted person, or one whose sight is dimmed by age,[3] may act on the assumption, that the streets are reasonably safe.[4] All, however, while using the highways, are bound to exercise the prudence and care, which is reasonable and proper under the varying circumstances and conditions of such use, for which no general rule can be given.[5] "Each case," it has been said,[6] "depends upon its own circumstances and each is a law unto itself."[7]

Those using highways are not bound to anticipate danger, where there is nothing to indicate it.[8] Nor are they expected

Windsor, 34 Ib. 487; Winckler v. Gt. Western Ry. Co., 18 Up. Can. C. P. 250, 262; Fox v. Glastenbury, 29 Conn. 204; James v. San Francisco, 6 Cal. 528; Folsom v. Underhill, 36 Vt. 580; Horton v. Ipswich, 12 Cush. 488; Jacobs v. Bangor, 16 Me. 187; Wilson v. Charlestown, 8 Allen, 177; Hanlon v. Keokuk, 7 Iowa, 477; Brown v. Jefferson, 16 Ib. 339.

[1] Hesser v. Grafton, 11 S. E. R. 211; 33 W. Va. 548; Skjeggerud v. Minn. etc. Co., 38 Minn. 56; Fulliam v. Muscatine, 30 N. W. R. 861; Evansville etc. Co. v. Crist, 116 Ind. 453; Gulf etc. Co. v. Gascamp, 69 Tex. 545; Gosport v. Evans, 112 Ind. 133; Penna. Co. v. Varnan, 15 Atl. R. 624; Richmond v. Mulholland, 116 Ind. 173.

[2] Bloomsburg, S. & E. L. Co. v. Gardner, 17 Atl. R. 521; 126 Pa. St. 80; Langan v. Atchison, 35 Kan. 318; Maultby v. Leavenworth, 28 Kan. 745; Frost v. Waltham, 12 Allen, 85; Rice v. Des Moines, 40 Iowa, 638; Rindge v. Colrain, 11 Gray, 157; Wheeler v. Westport, 30 Wis. 392; Whitaker v. W. Boylston, 97 Mass. 273; Humphreys v. County, 56 Pa. St. 204; Pollard v. Woburn, 104 Mass. 84.

[3] Neff v. Wellesley, 148 Mass. 487; 20 N. E. 111; Frost v. Waltham, 12 Allen, 85; Coates v. Canaan, 51 Vt. 131; Requa v. Rochester, 45 N. Y. 129; Harris v. Uebelhofer, 75 Ib. 169.

[4] Gordon v. Richmond, 18 Am. & Eng. Corp. Cases, 251.

[5] Parvis v. Philada. etc. Co., (Del. 89) 17 Atl. 702; Massey v. Columbus 75 Ga. 658; Minick v. Troy, 83 N. Y. 514; Farrar v. Greene, 32 Me. 574; Morrell v. Peck, 88 Ib. 398.

[6] Dillon Mun. Corp. § 1007.

[7] Chamberlain v. Wheatland, 7 N. Y. S. 190; Weed v. Ballston, 76 N. Y. 329; Davenport v. Ruckman, 37 Ib. 568, 573.

[8] Com'rs of Howard v. Legg, 110 Ind. 479; Turner v. Newburgh, 109 N. Y. 301.

to have perfect vision,[1] or to see defects not obvious to those of ordinary faculties, traveling at an ordinary pace.[2] But it is just to require from those, who have defective sight[3] or who drive horses which are blind[4] or have imperfect vision,[5] a greater degree of care, than what is required of others.

It is not contributory negligence for a woman to drive a horse,[6] nor for any one to drive over a smooth road at the rate of ten miles an hour,[7] or to drive in a violent storm through city streets, with which the driver is unacquainted,[8] or on a street, when its defects are covered by the snow.[9] Nor is it contributory negligence, in an action against the city for negligence in the repair of the roads, for one to drive on the wrong side of the road;[10] to travel by night,[11] or to go on a dark night without a lantern.[12]

The fact, that the harness or carriage breaks, is not conclusive proof of negligence, as it might be an accident caused by a defect, of which the owner had no knowledge and which he could not have discovered by the use of ordinary care. He is not an insurer of the condition of his tackle, and is liable only upon the principle, that he has not used ordinary care in the maintenance of it in good repair.[13]

When a foot passenger at night, without necessity therefor, steps from the sidewalk and is injured by falling into a hole;[14] or where a driver receives an injury, while he is on the edge of the highway, by his own fault;[15] as, when driving a horse and

[1] Neff v. Wellesley, *supra;* Thompson v. Bridgewater, 7 Pick. 188.

[2] Sheldon v. W. U. T. Co., 51 Hun, 591; Cox v. Westchester Tp. Co., 33 Barb. 414; Frost v. Waltham, 12 Allen, 85.

[3] Hutton v. Windsor, 34 Up. Can. Q. B. 487; Winn v. Lowell, 1 Allen, 177; Sleeper v. Sandown, 52 N. H. 244; Smith v. Wildes, 143 Mass. 556.

[4] Salem v. Goller, 76 Ind. 291; Breckenridge v. Fitchburg, 145 Mass. 160; Sleeper v. Sandown, 52 N. H. 244.

[5] Wright v. Templeton, 132 Mass. 49.

[6] Snow v. Provincetown, 120 Mass. 580; Cobb v. Standish, 14 Me. 198.

[7] Reed v. Deerfield, 8 Allen, 522.

[8] Brackenridge v. Fitchburg, 145 Mass. 160; Milwaukee v. Davis, 6 Wis. 377; Hart v. Red Cedar, 63 Wis. 634; Williams v. Clinton, 28 Conn. 264; Clark v. Lockport, 49 Barb. 580.

[9] Clark v. Lockport, 49 Barb. 580.

[10] Damon v. Scituate, 20 An. Rep. 315.

[11] Stier v. Oscaloosa, 41 Iowa, 353.

[12] Allegheny Co. v. Broadwaters, 69 Md. 533.

[13] Thompson on Neg. § 381; Doyle v. Wragg, 1 F. & F. 7.

[14] Alline v. Le Mars, 18 Am. & Eng. Cor. Cases, 262; Zettler v. Atlanta, 66 Ga. 195.

[15] Potter v. Castleton, 53 Vt. 435.

sleigh, he leaves the portion of the road which is bare, for that upon which the snow lies ;[1] he is guilty of contributory negligence, and cannot recover, even though he thought the side of the road was safer than the part he left, provided the regular track was reasonably safe and open.[2] But every departure from the highway or beaten path does not constitute negligence,[3] and whether any deviation is negligence, is usually a question for the jury.[4] When a traveler leaves the traveled path knowingly, he is bound to show a sufficient excuse or reason therefor. And if he does not, contributory negligence may be inferred.[5] But it is not negligence for a person to leave a street to obtain a drink of water from a hydrant, situated on an adjacent lot; in stopping, he exercises a lawful privilege.[6]

It is not enough alone to show that plaintiff was in fault. His negligence to defeat his recovery, must have proximately contributed to his injury ;[7] and while contributory negligence will not be presumed, its existence may be inferred from circumstances, showing a want of care.[8]

On the other hand, it has been held by many authorities that the strong instinct of self preservation will raise a presumption,[9] but not a proof,[10] of the use of due care. Although contributory negligence cannot be inferred from the single fact that plaintiff was intoxicated,[11] that is one of the circumstances which may be given in evidence,[12] and may, together with other circumstances, exert a controlling influence.[13] While a drunken man is not beyond the protection of the law of negligence,[14] his intoxication is no excuse ;[15] and if his injury is

[1] Rice v. Montpelier, 19 Vt. 470.

[2] Burr v. Plymouth, 48 Conn. 460.

[3] Briggs v. Guilford, 8 Vt. 264; Erie v. Schwingle, 22 Pa. St. 384.

[4] Ramsey v. Rushville, 81 Ind. 394.

[5] McLaury v. McGregor, 54 Iowa, 717; Carolus v. New York, 6 Bosw. 15; Vicksburg v. Henessy, 54 Miss. 391; Parkhill v. Brighton, 61 Ia. 103; Lovengarth v. Bloomington, 71 Ill. 238; Momence v. Kendall, 14 Ill. App. 229.

[6] Duffy v. Dubuque, 63 Iowa, 171.

[7] Nave v. Flack, 90 Ind. 205.

[8] Moore v. Richmond, 8 S. E. R. 387; King v. Thompson, 87 Pa. St. 365.

[9] Cassidy v. Angell, 12 R. I. 447; Central Br. etc. Co. v. Pate, 21 Kan. 539; Allen v. Willard, 57 Pa. St. 374; Northern Cen. R. R. v. State, 31 Ind. 357.

[10] Warner v. New York etc. Co., 44 N. Y. 465; Cordell v. New York etc. Co., 75 N. Y. 330.

[11] Healy v. New York, 3 Hun, 708.

[12] Alger v. Lowell, 3 Allen, 402.

[13] Wood v. Andes, 11 Hun, 543.

[14] Cincinnati etc. Co. v. Cooper, 22 N. E. R. 340.

[15] Illinois Cen. R. R. Co. v. Hutchinson, 47 Ill. 408; Woods v. Tipton, 27 N. E. R. 611.

attributable to his drunkenness as a proximate cause, he cannot recover.[1]

In some of the Eastern States, it is held that a person traveling on Sunday, except upon an errand of mercy or charity, cannot recover for injuries caused by a defective highway.[2] This ruling of the New England courts is the outcome of their strict enforcement of their Sunday laws, which makes travel on Sunday, except on an errand of mercy or charity, illegal. The Sunday traveler cannot recover in the New England States for injuries he sustains from a defective roadbed, because he was violating the law when he sustained the injury. This application of the general rule is not recognized elsewhere.[3]

Unless the facts are undisputed, the question of contributory negligence is for the jury.[4] Even if the facts are not controverted, if different conclusions may be drawn from them, the question is still for the jury to decide as a question of fact.[5] In respect to the burden of showing contributory negligence there is a hopeless contrariety of opinion; and for a full discussion of the subject, the reader is referred to any of the works, which treat specially of the subject of negligence. It suffices to say in the present connection, that where the contributory negligence of the plaintiff does not so clearly appear upon his own testimony, as to convince the jury that he was at fault, the burden of proof rests on the defendant;[6] and he may show the

[1] Fitzgerald v. Weston, 52 Wis. 354; Seymer v. Lake, 66 Ib. 651; Cramer v. Burlington, 42 Iowa, 315; Monk v. New Utrecht, 104 N. Y. 561; Hubbard v. Mason City, 60 Iowa, 400; Cassidy v. Stockbridge, 21 Vt. 391.

[2] Hinckley v. Penobscot, 42 Me. 89; Baker v. Portland, 58 Ib. 199; Davidson v. Portland, 69 Ib. 116; Bosworth v. Swausey, 10 Metcf. 363; Norris v. Litchfield, 35 N. H. 918; Johnson v. Irasburgh, 47 Vt. 28; Steele v. Burkhardt, 104 Mass. 59; Lyons v. Desotelle, 124 Mass. 387; Com. v. Adams, 114 Ib. 323.

[3] Armstrong v. Toler, 11 Wheat. 258; Platz v. Cohoes, 89 N. Y. 219; Sutton v. Wauwatosa, 29 Wis. 21, 28; White v. Lang, 128 Mass. 598; Woodward v. Hubbard, 25 N. H. 67; Piollet v. Simmers, 106 Pa. St. 95.

[4] Ponca v. Crawford, 23 Neb. 662; Daniels v. Lebanon, 58 N. H. 284; Albian v. Hedrick, 90 Ib. 545; Ramsey v. R. & M. Grar. Rd. Co., 81 Ib. 394; Dweny v. Elmira, 51 N. Y. 506; Baltimore v. Holmes, 39 Md. 243; Niven v. Rochester, 76 Ib. 619; Kelsey v. Glover, 15 Vt. 708; Hart v. Red Cedar, 63 Wis. 634.

[5] Montgomery v. Wright, 72 Ala. 411; Sioux C. & R. R. R. Co. v. Stout, 17 Wall. 657.

[6] Georgia P. Ry. v. Davis, (Ala. 91) 9 So. 252; Harmon v. W. & G. R. Co., 7 Mackey, 255; Sanders v. Reister, 1 Dak. 151; Bradwell v. Pittsburgh & W. E. R. Co., 139 Pa. St. 404; Inland

plaintiff's negligence by direct testimony, or inferentially from the testimony of the plaintiff.

§ 352 *a*. **Damages in suits for negligence.**—The question of damages in actions for negligence, is involved in great difficulty.[1] And an extended discussion of the subject is impossible in a treatise of this character. In England the rule has been laid down[2] that, in measuring the compensation, which an injured person ought to receive, in an action founded upon the negligence of a municipal corporation, the jury should consider, *first*, the pecuniary loss he sustains by the accident, and *secondly*, the injury he sustains in his person, or his physical capacity for enjoying life. In considering the pecuniary loss, his partial or total incapacity to earn a future income is just as much an element as his present loss. If the plaintiff's health be shattered or impaired, compensation therefor in damages should undoubtedly be made.[3]

It has generally been held in America, that pain and suffering are not elements to be considered in actions to recover damages for the death of a person by the negligence of a municipal corporation; and the doctrine of exemplary damages in this connection meets with very little recognition or favor.[4] No fixed rule can be laid down that will be of very much assist-

& Seaboard Co. v. Folson, 139 U. S. 551; Muller v. District, 5 Mackey, 286; Washington & G. Ry. Co. v. Gladmon, 15 Wall. 401.

[1] Rowley v. London etc. Co., L. R. 8 Ex. 221; Gee v. Lancashire etc. Co., 6 H. & N. 211.

[2] By Cockburn, C. J., in Fair v. London & N. W. Ry. Co., 21 L. T. N. S. 327.

[3] Terre Haute R. R. Co. v. Buck, 96 Ind. 346; Indiana Car Co. v. Parker, 100 Ib. 181; Curtis v. Rochester etc. Co., 18 N. Y. 534; Sunney v. Holt, 15 Ib. 880; Totten v. Penn. R. R. Co., 11 Ib. 564; Holyoke v. Grand Trunk etc. Co., 48 N. H. 541; Spicer v. Chicago etc. Co., 29 Wis. 580; Kendall v. Albia, 73 Iowa, 241: Weissenburg v. Appleton, 26 Ib. 56; Kennon v. Gilmer, 131 U. S. 22; Scott Tp. v. Montgomery, 95 Pa. St. 444; Weber v. Creston, 75 Iowa, 16; 39 N. W. R. 126; Elkhart v. Ritter, 66 Ind. 136; Malloy v. Bennett, 15 Fed. Rep. 371; Stafford v. Oscaloosa, 64 Iowa, 251; Canning v. Williamstown, 1 Cush. 451; Giblin v. McIntire, 2 Utah, 384; Masters v. Warren, 27 Conn. 294; Sheehan v. Edgar, 58 N. Y. 631; Oliver v. No. Pac. Ry. Co., 3 Ore. 84; Peoria B. Ass'n v. Loomis, 20 Ill. 235; Wade v. Leroy, 20 How. (U. S.) 34; Varnham v. Council Bluffs, 52 Iowa, 698.

[4] Raymond v. Lowell, 6 Cush. 524; Wilson v. Granby, 47 Conn. 59; Atchison v. King, 9 Kan. 550; Chicago v. Langlass, 52 Ill. 256; McGary v. Lafayette, 12 Rob. (La.) 668; Wilson v. Wheeling, 19 W. Va. 323; Decatur v. Fisher, 53 Ill. 407; Louisville etc. Co. v. Shanks, 94 Ind. 598.

ance. The amount, which will be a reasonable compensation in any given case, depends altogether upon the extent and nature of the plaintiff's injuries, considered in the light of the collateral facts and circumstances of the particular case. The reader is referred to the cases cited.[1]

[1] Decatur v. Fisher, 53 Ill. 407; Chicago v. Langlass, 52 Ib. 256; Whelan v. N. Y. etc. Co., 38 Fed. Rep. 15; Ripon v. Bittel, 30 Wis. 614; McNamara v. Clintonville, 62 Ib. 207; Luck v. Ripon, 52 Ib. 196; Page v. Sumpter, 53 Ib. 652; Abbott v. Tolliver, 71 Wis. 64; Crete v. Childs, 11 Neb. 252; Dickson v. Hollister, 123 Pa. St. 421; 16 Atl. R. 484; Galveston v. Barbour, 62 Tex. 172; Louisville etc. Co. v. Snider, (Ind. 90) 20 N. W. R. 284; Fleming v. Shenandoah, 71 Iowa, 456; Driess v. Frederick, (Tex. 90) 11 S. W. R. 493; Collins v. Council Bluffs, 32 Iowa, 324; Lapleine v. Morgan etc. Co., 40 La. An. 661; Nebraska City v. Campbell, 2 Black. 590; Louisville etc. Co. v. Wood, 113 Ind. 544; Read v. Belfast, 20 Me. 246; Tice v. Munn, 94 N. Y. 621; Wilson v. Wheeling, 19 W. Va. 324; Louisville etc. Co. v. Falvey, 104 Ind. 409; Lewis v. Atlas etc. Ins. Co., 61 Mo. 534; Baltimore etc. Co. v. Kemp, 61 Md. 74; Ætna L. I. Co. v. Nexson, 84 Ind. 347; Chicago v. Major, 18 Ill. 349; Schell v. Plumb, 55 N. Y. 592; Lehman v. Brooklyu, 29 Barb. 234; Sauter v. N. Y. Cent. etc. Co., 66 N. Y. 50; Etherington v. P. P. etc. R. R. Co., 88 N. Y. 641; Scheffler v. Minn. etc. Ry. Co., 32 Minn. 518; Owen v. Brockschmidt, 54 Mo. 285; Chicago v. Martin, 49 Ill. 241; McKeigue v. Janesville, 68 Wis. 50; Chicago v. Kelly, 69 Ill. 475; Prosser v. Ottumwa, 47 Iowa, 509; Ehrgott v. New York, 96 N. Y. 264; Ottawa v. Seely, 65 Ill. 434; Hunt v. Booneville, 65 Mo. 620; Barbour Co. v. Horn, 48 Ala. 566; Richmond v. Courtney, 32 Gratt. 792; Parsons v. Lindsay, 26 Kan. 426; Centreville v. Woods, 57 Ind. 192; Elizabeth L. etc. Co. v. Combs, 10 Bush. 382; Weeks v. Shirley, 33 Me. 271; Shartle v. Minneapolis, 17 Minn. 308; Verrill v. Minot, 31 Ib. 299; Masters v. Warren, 27 Conn. 293; Mason v. Ellsworth, 32 Me. 271; Raymond v. Lowell, 6 Cush. 524, 537; Brown v. Watson, 47 Me. 161; Atchison v. King, 9 Kan. 550; State v. Hewett, 31 Ib. 396, 400; Stover v. Bluehill, 51 Ib. 439; Sandford v. Augusta, 32 Ib. 536; Chicago v. Martin, 49 Ill. 241; Chidsey v. Canton, 17 Conn. 475; McGary v. Lafayette, 12 Rob. 668; Beecher v. Derby etc. Co., 24 Ib. 491; Decatur v. Fisher, 53 Ill. 407; Chicago v. Langlass, 52 Ib. 256; Canning v. Williamstown, 1 Cush. 451; Wylie v. Wausin, 48 Wis. 506; Sheel v. Appleton, 49 Ib. 125; Harwood v. Lowell, 4 Cush. 310; Peru v. French, 55 Ill. 318; Baily v. Fairfield, Brayt. (Vt.) 126; Farrelly v. Cincinnati, 2 Disney, 516; Weissenberg v. Appleton, 26 Wis. 56; Johnson v. Hud. R. R. Co., 6 Duer, 634; Armsworth v. S. E. Ry. Co., 11 Jur. 758; Rowley v. London & N. W. Ry. Co., L. R. 8 Ex. 221; Franklin v. S. E. Ry. Co., 3 H. & N. 211; Soule v. N. Y. & N. H. R. R. Co., 24 Conn. 575; Ducksworth v. Johnson, 4 H. & N. 653; Safford v. Drew, 3 Duer, 627; Blake v. Midland Ry. Co., 18 Q. B. 93; Lucas v. New York, 21 Barb. 245; Dalton v. S. E. Ry. Co., 4 C. B. N. O. 296; Quin v. Moore, 15 N. Y. 432; Pym v. Gt. Northern Ry. Co., 15 Up. Can. Q. B. 631; Penn. R. R. Co. v. McCloskey, 23 Pa. St. 526; Marley v. Gt. Western Ry. Co., 16 Up. Can. Q. B. 504; Secord v. Gt. Western Ry. Co., 15 Ib. 631.

§ 353. **Bridges.**—The duty of repairing bridges was imposed at common law upon the county, in which they were located; but while the duty was deemed an imperative one, no civil action could be maintained by one suffering injury on account of its breach, unless the county possessed the franchise of taking toll.[1]

In the United States, the common law obligation just mentioned is generally regulated by statute; and the same distinction is made as to liability for injuries sustained through negligence in the care of bridges between cities, towns and unincorporated villages on the one hand and townships and counties on the other, as in the cases of the repair and maintenance of highways.[2] When by statute or otherwise, a county is under a legal duty to keep a bridge in repair, it will be required to employ ordinary care to that end. Such care will require the county or municipal officials to exercise active diligence, in keeping themselves informed as to its condition, and to take notice of the natural tendency of the materials composing the bridge to decay.[3] When a statute requires a county to build and maintain bridges of a certain class, it has been held that the county will not be liable for injuries received from a defect in a bridge, which is not of the class mentioned in the statute.[4] When a township or county is charged with the statutory duty of caring for bridges within its limits, and provided with the means for performing this duty, it is held in some States to be liable for negligence.[5]

[1] Purdeman v. St. Charles, 19 G. W. R. 733; Heegel v. Wichita, 19 Ib. 562; Askew v. Hale Co., 54 Ala. 639; Hallenbeck v. Winnebago Co., 95 Ill. 148; Abbett v. Johnson Co., 114 Ind. 61; White v. Chowan Co., 90 N. C. 437.

[2] See §§ 324, 325.

[3] Raples v. Moore, 68 Pa. St. 404; Spaulding v. Sherman, 34 N. W. 558; O'Neill v. Deerfield, 86 Mich. 610; Abernethy v. Van Buren, 52 Mich. 353; Board v. Legg, 110 Ind. 479; Fort Wayne v. Combs, 107 Ib. 75.

[4] Granger v. Pulaski Co., 26 Ark. 37. Howard v. Pritchett, 85 Ind. 68; House v. Montgomery Co., 60 Ind. 580; Abbett v. Johnson Co., 114 Ib. 61; Knox Co. v. Montgomery, 109 Ib. 69; Moreland v. Mitchell Co., 40 Iowa, 394; Long v. Boone Co., 33 Ib. 181; Taylor v. Davis Co., 40 Ib. 295; Regina v. Inhabitants, 14 Eng. L. & E. 116.

[5] Arnold v. Henry Co., 81 Ga. 730; Yeager v. Tippecanoe, 81 Ind. 46; McCalla v. Multnomah Co., 3 Oreg. 424; Stebbins v. Keene, 55 Mich. 552; Zimmerman v. Conemaugh Tp., 2 Cent. Rep. 361; 5 Atl. Rep. 45; Moore v. Kenockee Tp., (Mich.) 42 N. W. R. 944.

In respect to the liability of municipal corporations for the care of bridges, it need only be said that bridges are highways, and the municipal corporation is called upon to exercise the same degree of care over bridges under its control, and upon which corporate funds may be expended, as it is over streets. That is to say, it is the duty of the municipality to keep bridges reasonably safe for ordinary travel.[1] But no municipal corporation will be answerable in damages to a person, who is injured by a defect in a bridge which is not under its control as a public bridge; as, for example, a bridge within the city limits, but erected and controlled by the county, township or State in which the city is located.[2] If, however, the bridge, though owned by the county, in severalty or jointly with the city,[3] forms a part of the general system of public highways, it becomes the duty of the corporation to keep it safe for public use; and the city will be liable to a person injured by any negligence in that respect.[4] This liability is founded on the principle, that a municipal corporation may by adoption so far make a private bridge its own, as to be estopped from denying its liability for a failure to keep it in a safe and convenient condition for travel.[5] And when two municipal corporations or counties are jointly bound to repair a bridge, and damages have been recovered against either for a neglect to do so, contribution may be enforced against the other.[6]

[1] Boston v. Crowley, 38 Fed. 202; Zimmerman v. Conemaugh, 2 Cent. R. 361; Jordan v. Hannibal, 87 Mo. 673; Board v. Deprez, 87 Ind. 509; Moreland v. Mitchell, 40 Iowa, 394; McDonald v. Corporation etc., 29 Up. Can. C. P. 249; Dale v. Webster Co., (Iowa) 41 N. W. Rep. 1; Hyatt v. Rondout, 44 Barb. 385; Medina v. Perkins, 48 Mich. 67; Tift v. Towns, 53 Ga. 47; Joliet v. Verley, 35 Ill. 58; Lowery v. Delphi, 55 Ind. 250.

[2] Board v. Washington, (Ind.) 23 N. E. Rep. 257; Indianapolis v. McClure, 2 Ind. 147; Titler v. Iowa Co., 48 Iowa, 90; Carpenter v. Cohoes, 81 N. Y. 21; Brusso v. Buffalo, 90 N. Y. 679; Veeder v. Little Falls, 100 Ib. 343; Hord v. Village, 26 Ill. Ap. 41; Sewall v. Cohoes, 75 N. Y. 45; Bishop v. Centralia, 49 Wis. 669.

[3] Hawkhurst v. New York, 43 Hun, 588; Shawnee Co. v. Topeka, 39 Kan. 197; Goshen v. Myers, 119 Ind. 196.

[4] Hyatt v. Rondout, 44 Barb. 385; Schomer v. Rochester, 15 Abb. N. C. 57; Eudora v. Miller, 30 Kan. 494; Bioard v. Deprez, 87 Ind. 508.

[5] Atlanta v. Buchanan, 76 Ga. 585; State v. Demaree, 80 Ind. 519; State v. Campton, 2 N. H. 513; Eudora v. Miller, 30 Kan. 494; Watson v. Proprietors, 14 Me. 201; Rex v. West Riding, 2 East, 342.

[6] Armstrong Co. v. Clarion Co., 66 Pa. St. 218; comp. Village v. Howland, 124 Ill. 547.

A municipal corporation will also be liable in damages to any one who is injured through its want of care and skill in constructing a bridge; as, for example, by an unnecessary obstruction of the current,[1] or for injuries to the rights of riparian owners.[2]

A bridge must be so constructed, that it shall possess sufficient strength [3] to stand against freshets which, from the character of the stream, and from the knowledge the municipal authorities have of its former history, may reasonably be expected to occur, although they may not be of frequent occurrence.[4] But it is not required to construct bridges which will withstand the force of floods or storms of an extraordinary and unexpected character,[5] such as are considered to come within the definition of the act of God or inevitable accident, for the result of which there is no legal liability.[6]

When no particular mode is prescribed by statute, in which the bridge should be constructed, the implication is that it shall be constructed in the usual manner; the municipality using due care and a just discretion.[7] And it has been held in Missouri that the rule, that a city acts judicially in selecting a plan for

[1] Scott v. Chicago, 1 Biss. 510; Thompson v. Inhabitants, 5 Gray, 110.

[2] Perry v. Worcester, 6 Gray, 544; Spencer v. Hartford etc. Co., 10 R. I. 14.

[3] Richardson v. Royalton & W. T. Co., 6 Vt. 496.

[4] Koenig v. Arcadia, (Wis. 91) 43 N. W. 734; Blythe v. Birmingham, 11 Exch. 781; Allen v. Chippewa Falls, 52 Wis. 530; Smith v. Margrave, 2 App. Cases, 781; 43 L. J. Ex. 70; Evansville v. Decker, 84 Ind. 325, 328; Louisville etc. Co. v. Thompson, 107 Ib. 442; Ross v. Madison, 1 Ind. 281.

[5] Dorman v. Ames, 12 Minn. 451; Pittsburgh etc. Co. v. Gilleland, 56 Pa. St. 445; Gray v. Harris, 107 Mass. 492; Livezey v. Philadelphia, 64 Pa. St. 106; Kansas etc. Co. v. Miller, 2 Col. 442; Ellet v. St. Louis etc. Co., 76 Mo. 518; Morris Canal Co. v. Ryerson, 27 N. J. L. 457; Nashville etc. Co. v. David, 6 Heisk. 261; Campbell v. Bear River Co., 35 Cal. 679; Richardson v. Kier, 34 Ib. 64; Lehigh Bridge Co. v. Lehigh, 4 Rawle, 24; Bell v. McClintock, 9 Watts, 119; Foster v. Juniata B. Co., 4 Har. (Pa.) 393; China v. Southwick, 12 Me. 238; Chicago, etc. Co. v. Sawyer, 69 Ill. 285; Lapham v. Curtis, 5 Vt. 371; Oakham v. Holbrook, 11 Cush. 299; Gillespie etc. Co. v. St. Louis etc., 6 Mo. App. 554; Shrewsbury v. Smith, 12 Cush. 177; International etc. Co. v. Halloran, 53 Tex. 46; Withers v. North Kent, 3 H. & N. 969; Wendell v. Pratt, 12 Allen, 464.

[6] Evans v. North Side etc. Co., 26 Fed. Rep. 718; The Modoc, 26 Ib. 718; Clarke v. Birmingham etc. Co., 41 Pa. St. 147.

[7] Wabash v. Pearson, 22 N. E. R. 134; Ferguson v. Davis Co., 57 Iowa, 601.

public improvements, is not applicable to bridges.[1] If the statute, which authorizes the municipality to construct the edifice, at the same time expressly points out the manner in which it shall be constructed, any material and substantial deviation from the statute will make the city a wrongdoer, and create municipal liability to any one injured thereby.[2]

In the work of constructing a public bridge, the municipal corporation is responsible for the same degree of care and must employ the same or similar precautions, which are generally required, when other improvements are carried on under its control or supervision. Thus, the city will be liable for damages, which result from a failure on its part to provide signals or guards, to the persons or property of those using the stream, across which the bridge is placed, or the highway, of which it is to form a part.[3]

The obligation of a city, to keep a bridge in a reasonably safe condition for ordinary public travel,[4] does not involve a liability, where injury is caused by the plaintiff's wagon being overloaded, or loaded in an unsafe manner.[5] But if a bridge is originally built to support a specific weight, the municipality will be liable if it be subsequently weakened in that respect by changes in the structure, or by repairs.[6] And, likewise, upon the principle, that a municipal corporation is not bound to provide against extraordinary accidents, it has been held that a city is under no obligation to provide a railing to protect passengers, upon the footway of a bridge, from injury by runaway horses.[7] The doctrine, that notice of a defect, obstacle or lack of repair must be brought home to the municipal corporation, before it can be held liable for negligence in respect to it, is applicable to the same extent, and its application is controlled by the same

[1] Jordan v. Hannibal, 87 Mo. 673.

[2] Ward v. Great West etc. Co., (Prov. Ort.) 13 Q. B. 315; Reg. v. Great West. etc. Co., (Prov. Ont.) 12 Q. B. 250; Attorney General v. Bridge Co., 20 Grant (U. C.) 34; Attorney General v. Mid. Kent etc., L. R. 3 Ch. 100.

[3] Doherty v. Braintree, 20 N. E. R. 106; 148 Mass. 495; The Modoc, 26 Fed. Rep. 718; Mullen v. Rutland, 55 Vt. 77.

[4] Wabash v. Carver, 129 Ind. 552; Gregory v. Adams, 14 Gray, 242.

[5] Board v. Chipps, (Ind. 92) 29 N. E. R. 1092; McCormick v. Washington Tp., 112 Pa. St. 185.

[6] O'Neill v. Deerfield, 49 N. W. R. 596; 86 Mich. 610; Board of Com'rs v. Brod., 29 N. E. R. 430; Stebbins v. Keene, 60 Mich. 214.

[7] Lehigh v. Hoffart, 116 Pa. St. 119.

rules, as in the case of streets and highways.[1] Notice is essential, only when the defect occurs subsequently to the erection of the bridge. For, if there has been negligence in its construction, a liability as a wrongdoer, it is held, has become fixed upon the corporation, for which it must answer in damages to any one injured afterwards.[2] When the municipal liability is statutory, the injured individual is required to bring his case within the statute. Thus, where the existence of a liability was dependent upon a failure to repair, it was held that there could be no recovery for an injury which was caused by being caught in the draw, although plaintiff was using the bridge upon the assurance of its keeper, that it was safe for him to do so.[3] And the same rule of non-liability has been invoked in the case of accidents, caused by runaway horses.[4] The general rule, exempting the defendant from liability for negligence when the plaintiff's negligence proximately contributed to his own injury, is applied in the present connection.[5]

§ 354. **Watercourses.** — "A water course is a stream of water, ordinarily flowing in a defined channel, having beds and banks, and flowing into some stream or other body of water;"[6] and for an unauthorized or illegal obstruction of such a water

[1] Bullock v. Durham, 19 N. Y. S. 635; Board v. Sisson, 2 Ind. App. 311; Board v. Dombke, 94 Ind. 72; Ford v. Umatilla Co., (Oregon) 16 Pac. Rep. 33; Board v. Bacon, 96 Ind. 31.

[2] Board v. Dombke, *supra;* see §§ 338, 338 *a*, on Negligence of Mun. Servants; § 351. Proximate cause. Board v. Pearson, 120 Ind. 426; Harris v. Board, (Ind.) 23 N. E. Rep. 92; Board v. Bacon, 96 Ind. 31.

[3] Nouell v. Wright, 3 Allen, 166; Butterfield v. Boston, (Mass.) 20 N. E. Rep. 113; McDougall v. Salem, 110 Mass. 21; French v. Boston, 129 Mass. 592.

[4] Fulton Co. v. Rickel, 106 Ind. 501; Acker v. Anderson, 20 S. C. 495.

[5] Taylor v. Constable, 13 N. Y. 597; Vance v. Franklin, 30 N. E. R. 149; Gulf etc. Co. v. Gascamp, 7 S. W. Rep. 227; Dale v. Webster Co., 41 N. W. Rep. 1; Monongahela B. Co. v. Bevard, 11 Atl. Rep. 575; Morrison v. Board, 116 Ind. 431; Fisher v. Cambridge, 133 N. Y. 527.

[6] Robinson v. Shanks, 20 N. E. R. 713; 118 Ind. 125; Geddis v. Parrish, (Wash. 91) 21 Pac. R. 314; Palmer v. Waddell, 22 Kan. 352; Gibbs v. Williams, 25 Ib. 214; Chicago etc. Co. v. Morrow, 22 Pac. R. 214; Simmons v. Winters, (Or. 91) 26 Pac. R. 7; Macomber v. Godfrey, 108 Mass. 219; Elliott Roads and Streets, p. 361; Chicago etc. Co. v. Morrow, (Kan.) 22 Pac. R. 413; Luther v. Winnisimmet Co., 9 Cush. 171; Gibbs v. Williams, 25 Kan. 214; Palmer v. Waddell, 23 Kan. 352; Stanchfield v. Newton, 142 Mass. 110; Howard v. Ingersoll, 13 How. (U. S.) 427; Jeffers v. Jeffers, 107 N. Y. 650; Rice v. Evansville, 108 Ind. 7; Weis v. Madison, 75 Ind. 253; Fryer v. Warne, 29 Wis. 511.

course, damages may be recovered by any one who has sustained actual injury.[1] But not every channel, or strip of land, through or over which water flows or makes its way, is a water course;[2] and the uniform and well recognized distinction, between surface water and a natural water course, flowing through a regular and permanent channel, becomes very important, when it is considered that the powers of a municipal corporation are very much more extensive in regard to the control and disposition of the former, than of the latter.[3] A municipality cannot merely by virtue of its power to grade streets, or to construct a system of drainage, lawfully cause injury to the property of riparian owners by obstructing or unnecessarily diverting the flow of a stream of water, which is properly denominated a water course, whether this be done by badly constructed culverts, or otherwise.[4] The comprehensive rights which are possessed by riparian owners in the stream, and the use which they are able to make of it, constitute private property, for the taking or dam-

[1] Schnitzins v. Bailey, 22 Atl. R. (48 N. J. E.) 409; Sherwood v. Judge, 41 N. W. 234; 40 Minn. 22. In Bellinger v. Railroad, 23 N. Y., the court said: "If one chooses of his *own authority* to interfere with a water course *even upon his own land*, he as a general rule, does it at his peril, as respects other riparian owners, above or below: Eulrich v. Richter, 37 Wis. 226; Conhocton etc. Co. v. Buffalo etc. Co., 3 Hun, 523; Barnes v. Sabron, 10 Nev. 217; Earl v. De Hart, 1 Beasley Ch. 280.

[2] Byrnes v. Minn. etc. Co., 38 Minn. 212; Bangor v. Lansil, 51 Me. 521; Hawley v. Sheldon, (Vt. 91) 24 Atl. R. 717; Parks v. Newburyport, 10 Gray, 28; 39 N. W. R. 390; Hoyt v. Hudson, 27 Wis. 656; Moore v. Chicago etc. Co., 75 Iowa, 263; Robinson v. Shanks, 118 Ind. 125; West v. Taylor, 16 Ore. 165.

[3] Hoehl v. Muscatine, 57 Iowa, 444; Vanpelt v. Davenport, 42 Ib. 308; Rose v. St. Charles, 49 Mo. 509; Hoyt v. Hudson, 27 Wis. 656; Imler v. Springfield, 55 Mo. 119, 127; Barns v. Hannibal, 71 Ib. 449; Vanderweile v. Taylor, 65 N. Y. 341; Goodale v. Tuttle, 29 Ib. 459; Kellogg v. Thompson, 66 Ib. 88; Gould v. Booth, 66 Ib. 62, 65; Wood v. Ward, 3 Exch. 748; Helena v. Thompson, 29 Ark. 569, 574; Little Rock v. Willis, 27 Ib. 572; Briscoe v. Drought, 11 Ir. C. L. R. 250.

[4] Butler v. Edgewater, 6 N. Y. S. 174; Schenectady v. Furman, 15 N. Y. S. 724; 61 Hun, 171; East St. Louis etc. Ry. Co. v. Eisentrant, 24 N. E. R. 760; Sherwood v. Judge, 40 Minn. 22; Stanchfield v. Newton, 142 Mass. 110; Morse v. Worcester, 139 Ib. 389; Barrow v. Baltimore, 2 Am. Jur. 203; Pye v. Mankato, 36 Minn. 373; Stetson v. Faxon, 19 Pick. 147, 158; Kemper v. Louisville, 14 Bush, 87; Thayer v. Boston, 19 Pick. 510; Crawfordsville v. Bond, 96 Ind. 236; Indianapolis v. Lawyer, 38 Ind. 348; Rice v. Evansville, 108 Ib. 7; Gardner v. Newburgh, 2 Johns, 162; Phinizy v. Augusta, 47 Ga. 260; Kellogg v. Thompson, 66 N. Y. 88.

aging of which compensation must be made.[1] The municipality has no right, either to take the water itself for public use,[2] or to divert the stream to the material injury of the riparian proprietor, without making compensation for the actual damages thus caused.[3] In either case, the act is an exercise of the right of eminent domain.

Where the embankment, dam or other obstruction to the natural flow of the stream, which was ordered or authorized by the municipal authorities, did not ordinarily retard or divert the flow of the stream to the injury of the riparian owners; but such injury was experienced only with the occurrence of extraordinary freshets, which could not be reasonably anticipated, and was occasioned by the insufficient capacity of the culverts, the city is not liable for such injuries. It is a case of *damnum absque injuria*.[4]

In all cases, where lands are submerged, the true measure of

[1] Miller v. Windham, 23 Atl. R. 1132; 30 W. N. C. 85; Ames v. Dorset, 23 Atl. R. 857; Kay v. Kerk, 24 Atl. R. 326; Wabash etc. Co. v. Spears, 16 Ind. 441; Evansville, etc. Co. v. Dick, 9 Ib. 433; Harding v. Stanford W. Co., 41 Conn. 87; Lee v. Pembroke etc. Co., 57 Me. 481; Proprietors etc. v. Nash. & Low. R. R. Co., 10 Cush. 388; Ten Eyck v. Canal Co., 18 N. J. L. 200; March v. Portsmouth etc. Co., 19 N. H. 372; Yates v. Milwaukee, 10 Wall. 497; Rome v. Addison, 34 N. H. 306; Varick v. Smith, 5 Paige, 143; Johnson v. Atlantic etc. Co., 35 N. H. 569; Smith v. Rochester, 92 N. Y. 463; Bonghton v. Carter, 18 Johns. 405; Pettigrew v. Evansville, 25 Wis. 223; Stein v. Burden, 24 Ala. 130; Baltimore etc. Co. v. Magender, 34 Md. 79.

[2] Bass v. Ft. Wayne, 23 N. E. R. 249; Woodruff v. Neal, 28 Conn. 167; Suffield v. Hathaway, 15 Johns. 447.

[3] Culver v. Garbe, 43 N. W. R. 237; *In re* Tracy, 16 N. Y. S. 606; 62 Hun, 619; *In re* Irwin, 16 N. Y. S. 606; 62 Hun, 619; Para Rub. Shoe Co. v. Boston, 139 Mass. 155; Haynes v. Burlington, 38 Vt. 350; Collins v. Philadelphia, 93 Pa. St. 272; Groton v. Haines, 36 N. H. 388; Philada. v. Randolph, 4 W. & S. Pa. 514; Gilman v. Laconia, 55 N. H. 130; Dayton v. Pease, 4 Ohio St. 80; Aurora v. Love, 93 Ill. 521; Ross v. Madison, 1 Ind. 281; Stack v. East St. Louis, 85 Ill. 377; Powers v. Council, 50 Iowa, 197; Mootry v. Danbury, 45 Conn. 550; Kobs v. Minneapolis, 22 Minn. 159, 164; Parker v. Lowell, 11 Gray, 353; Smith v. New York, 66 N. Y. 295; Perry v. Worcester, 6 Gray, 544; Lawrence v. Fair Haven, 5 Ib. 110; Talbot v. Whipple, 7 Ib. 122; Sprague v. Worcester, 13 Ib. 193; Seifert v. Brooklyn, 101 N. Y. 136; Rochester W. L. Co. v. Rochester, 3 N. Y. 463; Mills v. Brooklyn, 32 Ib. 489; see cases cited in last note.

[4] Velte v. U. S., 45 N. W. R. 119; Miller v. Manstow, 20 Atl. 6; Johnston v. District, 118 U. S. 19; New York v. Bailey, 2 Denio, 433; Cumberland v. Willison, 50 Ind. 138; Madison v. Ross, 3 Ib. 236; Lynch v. New York, 76 Ib. 60; Smith v. New York, 66 Ib. 295.

damages is the fair rental value of the ground, and not the possible or probable profits, which might have been made, if the land had not been overflowed.[1]

§ 354 *a*. **Surface water.**—An important distinction is made in the law of real property between water courses, which flow in fixed or definite channels, and the percolations of the subsoil and surface water. In the latter cases, there is no property in the water, except when it has been collected in a well, or some other convenient receptacle.[2] This is true of both percolations and surface water. There is here no conflict of authority, except in respect to the question of liability of the proprietor of the lower land who, by means of dams or other effective obstructions, keeps on the surface water from flowing on his own land from the higher land of his neighbor, whereby the higher land becomes flooded to the damage of its owner. According to one set of cases, the proprietor of the low land has the right to employ all the available means, in order to prevent surface drainage upon his own land, even though it results in damage to his neighbor of the higher land.[3] And while this is without doubt a sound rule in the case of urban servitudes,—on account of the fact that municipal governments usually provide for a proper disposition of the surface water by public drains, and there is, therefore, no need of imposing such a burden upon the proprietor of adjoining low lands,—the better opinion is, at least in respect to drainage of surface water on farms and woodlands,

[1] Omaha & R. V. R. Co. v. Brown, 46 N. W. R. 39; Velte v. U. S., 45 Ib. 119; Montgomery v. Locke, 11 Pack. 874; Mize v. Glenn, 38 Mo. App. 98; Anderson v. Boone Co., 61 Mich. 489; Boston v. Middlesex, etc., Co., 1 Allen, 324; Chicago v. Huenesbein, 85 Ill. 594; Watterson v. Allegheny, etc., Co., 74 Pa. St. 208; Loughran v. Des Moines, 72 Iowa, 772; Dullea v. Taylor, 35 Up. Can. Q. B. 395; Seymour v. Cummins, 119 Ind. 148; Minn. Vall. Co. v. Doran, 17 Minn. 188; Minn. Cent. Co. v. McNamara, 13 Ib. 508; Brown v. Prov. R. R. Co., 5 Gray, 35; Shaw v. Charlestown, 2 Ib. 107.

[2] Tiedeman Real Prop. §§ 614, 615.

[3] Tiedeman, Real Prop. § 615; Green v. Taylor, 79 Tex. 604; Burke v. Miss. R. Ry. Co., 29 Mo. App. 370; Illinois Cent. R. Co. v. Miller, 10 So. R. 61; 68 Miss. 760; Johnson v. Chi., St. P., M. & Q. Ry. Co., 50 N. W. 771; 80 Wis. 641; Schneider v. Miss. Pac. Ry. Co., 29 Mo. App. 68; Goodale v. Tuttle, 29 N. Y. 459; Swett v. Cutts, 50 N. H. 439; Greeley v. Maine Cent. R. R. Co., 53 Me. 200; Parks v. Newburyport, 16 Gray, 29; Gannon v. Hagadon, 10 Allen, 106; Wilson v. Duncan, 38 N. W. 371; Rowlsby v. Speer, 31 N. J. L. 351; Ogburn v. Connor, 46 Cal. 346; Hoyt v. Hudson, 27 Wis. 650; *contra*, if it does injury; Gerrish v. Clough, 48 N. H. 9.

that the upper land has a natural right to natural drainage over the lower land.[1] In many of the States the proprietors of lands, needing drainage, are authorized, by compulsory process, to secure the right to cut drains through lands adjoining, upon payment of damages therefor.[2] When the authority is vested in the municipal corporation, by charter or statute, to improve streets and establish street grades, and, in the exercise of that power, changes are made in the surface of the city's highways, by which surface water is caused to collect on, or flow over, the adjacent land of private owners, there is no implied liability on the part of the municipal corporation for such indirect and consequential injuries, provided the city does not exceed its lawful power.[3]

So, also, it has been held that, ordinarily, there is no obligation upon the city to provide drainage for the surface water upon its unimproved or unguarded streets;[4] and when a city has begun the process of grading, it is under no implied liability to keep open former existing drains,[5] or to construct new drains in their place, in order to prevent the surface water from overflowing land which may be situated below the level of the high-

[1] Jenkins v. Wilm. & W. R. Co., 110 N. C. 438; Staton v. Norfolk & C. R. Co., 19 S. E. R. 933; 109 N. C. 337; Mexill v. Morgan, (Pa. 92) 24 Atl. 216; Schneider v. Mo. Pac. R. R. Co., 29 Mo. App. 681; Farris v. Dudley, 78 Ala. 124; Burke v. Mo. Pac. R. R. Co., 29 Mo. App. 370; Boyd v. Conklin, 64 Mich. 583; C. & A. R. R. Co. v. Smith, 17 Ill. App. 58; Abbott v. K. C., etc., R. R. Co., 83 Mo. 271; Ribordy v. Pellachond, 28 Ill. App. 303.

[2] Stimpson's Statutes, § 2253.

[3] Glass v. Fritz, 23 Atl. R. 1050; Goulden v. Scranton, (Pa. 88) 15 Ib. R. 483; Alden v. Minneapolis, 24 Minn. 243; Wakefield v. Pawtucket, 12 R. I. 75; Lee v. Minneapolis, 24 Minn. 13; Inman v. Tripp, 11 R. I. 520; O'Brien v. St. Paul, 25 Minn. 331; Bloomington v. Brokaw, 77 Ill. 194; Davis v. Crawfordsville, 119 Ind. 1; Cairo, etc., Co. v. Stevens, 73 Ib. 278; Weis v. Madison, 75 Ib. 241; Clark v. Wilmington, 5 Harring. 243; Stanchfield v. Newton, 142 Mass. 110; Magarity v. Wilmington, 5 Hous. 530; Foster v. St. Louis, 71 Mo. 157; Gilfeather v. Council Bluffs, 69 Iowa, 310; Field v. West Orange, 36 N. J. Eq. 118; Morris v. Council Bluffs, 67 Iowa, 343; Lynch v. New York, 76 N. Y. 60; Hoard v. Des Moines, 62 Iowa, 326; Wilson v. New York, 1 Denio, 595, 598; Hoyt v. Hudson, 27 Ill. 656; Smith v. Milwaukee, 18 Wis. 63; Nevins v. Peoria, 41 Ill. 503.

[4] Crower v. Ewers, 39 Ill. App. 34; McInerney v. St. Joseph, 45 Mo. 291; Lynch v. New York, 76 N. Y. 60.

[5] Bush v. Portland, (Or. 90) 23 Pac. R. 667; Wilson v. New York, 1 Denio, 595; Imler v. Springfield, 55 Mo. 119; St. Louis v. Gurno, 12 Ib. 414.

way.[1] Upon this point, the decisions are far from harmonious, many cases holding that the city, when practicable, should provide drains and culverts.[2] Many cases go further, and deny any implied liability, where, in making local improvements, which are legally authorized, surface water is made or permitted to flow from the street directly upon the adjoining property.[3]

§ 355. **Drains and sewers.** — In the preceding section [4] the liability of the municipality was explained and stated, in cases where, through gradiug and other improvements in the roadbed of the streets, the surface water was *inadvertently* made to flow upon the adjoining land. In the present section will be discussed the liability of the city, where such an overflow of surface water upon abutting private property was occasioned by the city's construction of artificial means for the removal of surface water, such as drains and sewers. Whether the power to construct sewers, aside from the question of grading, shall be exercised or not in any particular case, is for the corporation, and not for the courts, to decide. Hence,— except, perhaps, in a case where the necessity for a sewer arises

[1] Mills v. Brooklyn, 32 N. Y. 489; Gould v. Booth, 66 Ib. 65; Wilson v. New York, 1 Denio, 595.

[2] Eufaula v. Simmons, 86 Ala. 515; Patoka v. Hopkins, (Ind. 92) 30 N. E. R. 896; Rychlicke v. St. Louis, 98 Mo. 497; Butler v. Edgewater, 6 N. Y. S. 174; Allen v. Chippewa Falls, 52 Wis. 430; Templin v. Iowa City, 14 Iowa, 59; Waters v. Bay View, 61 Wis. 642; Heth v. Fond du Lac, 63 Ib. 228; Mears v. Wilmington, 9 Ired. L. 73, 82; Kehrer v. Richmond, 81 Va. 745; Bloomington v. Brokaw, 77 Ill. 194; Aurora v. Reed, 57 Ill. 29; Moran v. McLeans, 63 Barb. 185; Stewart v. Clinton, 79 Mo. 603; Smith v. New York, 66 N. Y. 295; Baxter v. Providence, 12 R. I. 310; Fair v. Philadelphia, 88 Pa. St. 309; Henderson v. Minneapolis, 32 Minn. 219; Springfield v. Spence, 40 Ohio St. 665.

[3] Dickinson v. Worcester, 7 Allen, 18; Lambar v. St. Louis, 15 Mo. 610; Flagg v. Worcester, 13 Gray, 601; Adams v. Walker, 34 Conn. 466; Kensington Com'rs v. Wood, 10 Pa. St. 93; Pettigrew v. Evansville, 25 Wis. 223; Ellis v. Iowa City, 29 Iowa, 229; Bloomington v. Brokaw, 77 Ill. 194; Nevins v. Peoria, 41 Ib. 502; Stack v. East St. Louis, 85 Ib. 377; Aurora v. Gillett, 56 Ib. 132; Young v. Leedom, 67 Pa. St. 351; Turner v. Dartmouth, 13 Allen, 291; Mootry v. Danbury, 45 Conn. 550; Franklin v. Fisk, 13 Allen, 211; O'Brien v. St. Paul, 25 Minn. 331; Greeley v. Maine Cent. R. R. Co., 53 Mo. 200; Alton v. Hope, 68 Ill. 167; Gannon v. Hagadom, 10 Allen, 106; Hoyt v. Hudson, 27 Wis. 656; Pennoyer v. Saginaw, 8 Mich. 534; Barry v. Lowell, 8 Allen, 127; Brine v. Gt. West. Ry., 110 Eng. Com. L. 402; Parks v. Newburyport, 10 Gray, 28; Bangor v. Lansil, 51 Me. 521.

[4] § 354 *a*.

out of the negligent acts of the corporation,[1]—the city is not liable to a civil action for a total failure to provide any system of sewerage,[2] or for a defective or insufficient system of sewerage, which is adopted by it in good faith, provided due care was used in the selection of the plan, and the advice of those having experience and skill was employed;[3] certainly, where the error or want of judgment is not so gross, as to support the charge that, if the city's engineers had been possessed of the average skill of sanitary engineers of the present day, they would not have committed the error. So, likewise, when a city has devised and constructed a system of sewerage which is sufficient for all purposes at the time, it will not be liable when, by increase of population and the consequent extension of graded territory, the system has become inadequate and injurious.[4]

But these rules are qualified by the principle, which is held in some of the cases, that a municipality has no right, by a defective system of sewerage, to create a nuisance on or near private property. Some courts have gone very far in this direction and have held that if the sewer, however planned in good faith and with ordinary care, resulted in creating a nuisance, or caused a positive and clear invasion of private property by collecting water or sewage upon or near it, in such a way as to impair

[1] Aurora v. Love, 93 Ill. 521; Byrnes v. Cohoes, 67 N. Y. 204; Ellis v. Iowa City, 29 Iowa, 229.

[2] Frostburg v. Hitchins, (Ind. 89) 16 Atl. R. 380; Elkhart v. Weckwire, (Ind. 91) 22 N. E. R. 342; Collins v. Philadelphia, 93 Pa. St. 272; Mills v. Brooklyn, 32 N. Y. 489; Wright v. Wilmington, 52 N. C. 156; Wilson v. New York, 1 Denio, 595; Rozell v. Andersou, 91 Ind. 591; Child v. Boston, 4 Allen, 41, 52; McCarthy v. Syracuse, 46 N. Y. 194; Montgomery Council v. Gilmer, 33 Ala. 116; Judge v. Meriden, 38 Conn. 90; Atchison v. Challis, 9 Kan.605; Dermont v. Detroit, 4 Mich. 435; Barry v. Lowell, 8 Allen, 127; Urquhart v. Ogdensburg, 91 N. Y. 67; Watson v. Kingston, 114 N. Y. 88.

[3] Costello v. Conshohocken, 8 Pa. Co. Ct. R. 639; Chaplin v. Wheatland, 126 Ill. 264; Drexel v. Lake, 127 Ill. 54; Seifert v. Brooklyn, 101 N. Y. 136; Johnson v. District, 118 U. S. 19; Mills v. Brooklyn, 32 N. Y. 489; Merrifield v. Worcester, 110 Mass. 216; Smith v. Gould, 61 Wis. 31; Daniels v. Denver, 2 Col. 669; Brewster v. Davenport, 51 Iowa, 427; Horton v. Nashville, 4 Lea, 47; Wicks v. Dewitt, 54 Iowa, 130; Herring v. District, 2 Mackey, 87; Savannah v. Spears, 66 Ga. 304; cases in last note.

[4] Steirsmyer v. St. Louis, 3 Mo. App. 256; Carr v. Northern Liberties, 35 Pa. St. 324; Raulett v. Lowell, 126 Mass. 431; Grant v. Erie, 69 Pa. St. 420; Bannagan v. District, 2 Mackey, 285; Fair v. Philadelphia, 88 Pa. St. 309; Denver v. Capelli, 4 Col. 25.

its enjoyment, the city will be liable for the damages occasioned.[1] So where deposits of sewage caused a peculiar and special injury to, and impaired the use of, a wharf, the city was held liable in damages.[2]

Whatever difference of opinion may exist as to the liability of the corporation, so far as the plan of sewerage itself is concerned, there is a universal agreement that the city will be impliedly liable for the negligent execution of the plan[3] to one injured,[4] and for the negligent discharge or omission to discharge ministerial duties, in carrying on the work of construction,[5] or in keeping municipal sewers, drains and culverts in a

[1] Ashberry v. W. Seneca, 58 Hun, 602; Markle v. Berwick, 21 Atl. 794; Seymour v. Cummins, 119 Ind. 148; Young v. Kansas, 27 Mo. App. 101; Whipple v. Fair Haven, (Am. 90) 21 Atl. 533; Columbus v. Woolen Mills, 33 Ind. 435; Ashley v. Port Huron, 35 Mich. 296; Jacksonville v. Lambert, 62 Ill. 519; Seifert v. Brooklyn, 101 N. Y. 136; Haskell v. New Bedford, 108 Mass. 208; Rowe v. Portsmouth, 56 N. H. 291; Taylor v. Austin, 32 Minn. 247; Lehr v. San Francisco, 66 Cal. 76.

[2] Merrimac Riv. Can. Prop. v. Lowell, 7 Gray, 223; Franklin Whf. Co. v. Portland, 67 Me. 46; Emery v. Lowell, 104 Mass. 13; Richardson v. Boston, 19 How. 270; Haskell v. New Bedford, 108 Mass. 208; Kranz v. Baltimore, 64 Md. 491; Brayton v. Fall River, 113 Mass. 218; Barron v. Baltimore, 2 Am. Jour. 103; Morse v. Worcester, 139 Mass. 389; Gillery v. Madison, 53 Wis. 510.

[3] Frostburg v. Hutchins, (Md. 89) 16 Alt. R. 380; Gross v. Lampasas, (Tex. 90) 11 S. W. 1086; Child v. Boston, 4 Allen, 41; Gilluly v. Madison, 63 Wis. 518; Ball v. Winchester, 34 N. H. 435; Gilman v. Laconia, 55 Ib. 130; Reeves v. Toronto, 21 Up. Can. Q. B. 160; Nims v. Troy, 59 N. Y. 500; Stainton v. Metro. Board of Works, 23 Beav. 225; Barton v. Syracuse, 36 N. Y. 54; Cator v. Lenisham Dist., 5 B. & S. 115; Perdue v. Chingnacousy, 25 Up. Can. Q. B. 61; Darby v. Crowland, 38 Ib. 338; Farrell v. London, 12 Ib. 347; Coghlan v. Ottawa, 1 App. (Can.) R. 54.

[4] Indianapolis v. Huffer, 30 Ind. 235; Rice v. Evansville, 107 Ib. 7; Cummins v. Seymour, 79 Ib. 491; North Vernon v. Voegeler, 103 Ib. 314; Evansville v. Decker, 84 Ib. 325; Weis v. Madison, 75 Ib. 241; Crawfordsville v. Bond, 96 Ib. 236; Terre Haute v. Hudnut, 112 Ib. 542.

[5] Stoddard v. Saratoga, (N. Y. 91) 27 N. E. R. 1030; Young v. City, 27 Mo. App. 201; Seymour v. Cummins, 119 Ind. 148; Rochester W. Lead Co. v. Rochester, 3 N. Y. 463; Thurston v. St. Joseph, 51 Mo. 510; Barton v. Syracuse, 36 N. Y. 54; Seifert v. Brooklyn, 101 Ib. 36; Lloyd v. New York, 5 Ib. 369; Nims v. Troy, 59 Ib. 500; Mills v. Brooklyn, 32 Ib. 489; Smith v. New York, 66 Ib. 295; McCarthy v. Syracuse, 46 Ib. 194; Lacour v. New York, 3 Duer, 406; Parsons v. Bethnal Green, 17 L. T. 211; Parker v. Lowell, 11 Gray, 353; Holliday v. St. Leonardo Par., 11 C. B. 192; Wilson v. New York, 1 Denio, 595; Grant v. Brooklyn, 41 Barb. 381; Logansport v. Wright, 25 Ind. 512; Detroit v. Corey, 9 Mich. 165; Martin v. Brooklyn, 1 Hill, 545; Mem-

proper condition of repair, and free from obstructions. Since the abutting owners have been assessed for the expense of its construction, they have a right to use the sewer, and may recover damages for the failure to keep the sewer in such a condition of repair that it may be of use to them.[1] If the city permit a sewer to become obstructed, so that the water flows back through the private drains connected with it, and into cellars or basements, it will be liable for such negligence for creating a nuisance to others.[2]

The courts will also protect property owners against any acts of wanton or malicious injury to their property, on the part of municipal officials, in the construction or management of its sewers.[3] And it is a well settled rule in many of the States that, if the municipality, in constructing drains and sewers, collects the surface water of a large territory, which does not naturally flow in the direction of the adjoining land, and willfully causes it to be precipitated upon the premises of an individual, by which damage is done him, the city will undoubtedly be liable.[4] So, also, a city was held liable for injury, caused by

phis v. Lasser, 9 Humph. 757; Mellen v. West. R. R. Co., 4 Gray, 501; Munn v. Pittsburgh, 40 Pa. St. 364; Child v. Boston, 4 Allen, 41; Delmonico v. New York, 1 Sandf. 222; Wheeler v. Worcester, 10 Allen, 591; Mears v. Wilmington, 9 Ired. L. 73; Eastman v. Meredith, 36 N. H. 284; see cases cited, § 349.

[1] Buchanan v. Duluth, 40 Minn. 402; Frostburg v. Duffy, 70 Md. 47; Buchanan v. Duluth, 42 N. W. R. 204; Kranz v. Baltimore, 64 Md. 491; Wendell v. Mayor, 4 Keyes, 261; Taylor v. Austin, 32 Minn. 247; Masterton v. Mt. Vernon, 58 N. Y. 391; Stock v. Boston, 2 N. E. R. 871; Semple v. Vicksburg, 62 Miss. 63.

[2] Boston Belting Co. v. Boston, 149 Mass. 44; Elliott v. Oil City, 18 Atl. R. 553; Denver v. Capelli, 4 Col. 25; Smith v. New York, 66 N. Y. 295; Thurston v. St. Joseph, 51 Mo. 510; Hines v. Lockport, 50 N. Y. 236; Seifert v. Brooklyn, 101 Ib. 136; New York v. Furze, 3 Hill, 612; Nims v. Troy, 59 N. Y. 500.

[3] Whipple v. Fair Haven, 21 Atl. R. 533; Mayor v. Randolph, 4 W. & S. 514; Reynolds v. Shreveport, 13 La. An. 426; Rounds v. Mumford, 2 R. I. 145.

[4] Young v. Com'rs, 25 N. E. R. 689; Follman v. Mankato, 45 Minn. 457; Torrey v. Scranton, (Pa. 90) 19 Atl. R. 351; Bates v. Westborough, (Mass. 90) 23 N. E. R. 1070; Slack v. Lawrence, (N. J. 90) 19 Atl. R. 663. In Ashley v. Port Huron, 35 Mich. 296, Mr. Chief Justice Cooley uses this vigorous language: "It is very manifest from this reference to the authorities, that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of

discharging a public sewer upon private land, and into a mill pond.[1] A city has no right to pour its sewage into an artificial body of water owned by others.[2] But it may connect its system of drainage with any natural stream of water, such as a river or brook provided it use due care, so that the privileges of the

his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer, so constructed that the flood must be a necessary result. Each is a trespass and in each instance the city exceeds its lawful authority. A municipal charter never gives and never could give authority to appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession." See, also, Nevins v. Peoria, 41 Ill. 502; Smith v. Tripp, 13 R. I. 152; Aurora v. Gillett, 56 Ill. 122; Inman v. Tripp, 11 R. I. 520; Shawneetown v. Mason, 82 Ill. 337; Elgin v. Kimball, 90 Ill. 356; Bloomington v. Brokan, 77 Ib. 194; Lynch v. New York, 76 N. Y. 60; Noonan v. Albany, 79 Ib. 470; Ellis v. Iowa City, 29 Iowa, 229; Brown v. Sarnia, 11 Up. Can. Q. B. 87; Rowe v. Portsmouth, 56 N. H. 291; Eaton v. Boston C. & M. R. R., 51 Ib. 504; Perdue v. Chinquaconsy, 25 Up. Can. Q. B. 61; Arimond v. Green-bay & Miss. Can. Co., 31 Wis. 316; Rowe v. Rochester, 29 Up. Can. Q. B. 590; Huddleston v. West Belleview, 111 Pa. St. 110; Pumpelly v. Green Bay & Miss. Can. Co., 13 Wall. 166; Attorney Genl. v. Hackney Local Bd. L. R., 20 Eq. 626; Davis v. Crawfordsville, 119 Ind. 1; Byrnes v. Cohoes, 67 N. Y. 204; Rychlicke v. St. Louis, 11 S. W. R. 1001; Burton v. Chattanooga, 7 Lea, 739; McClure v. Redwig, 28 Minn. 186; Attorney General v. Leeds, L. R. 5 Ch. App. 583; Noble v. St. Albans, 56 Vt. 522; Hitchins v. Frostburg, 68 Md. 100; Rutherford v. Halley, 105 N. Y. 632; West Orange v. Field, 37 N. J. E. 600; Peters v. Fergus Falls, 35 Minn. 549; Blakely v. Devine, 36 Ib. 53; Pye v. Mankato, 36 Ib. 373; Manning v. Lowell, 130 Mass. 21; Herring v. District, 3 Mackey, 572; Arn v. Kansas City, 15 Fed. Rep. 336; Gillison v. Charlestown, 16 W. Va. 282; Addy v. Janesville, 70 Wis. 401; Pennoyer v. Saginaw, 8 Mich. 534; Crabtree v. Baker, 75 Ala. 91; Flagg v. Worcester, 13 Gray, 601; Winn v. Rutland, 52 Vt. 481; Livingston v. McDonald, 21 Iowa, 160; Bastable v. Syracuse, 72 N. Y. 64; Bentz v. Armstrong, 8 Watts & S. 40; Foot v. Bronson, 4 Lansing, 47; O'Brien v. St. Paul, 25 Minn. 331; Fremont v. Marley, 25 Neb. 138; Sullivan v. Phillips, 110 Ind. 320; Seifert v. Brooklyn, 101 N. Y. 136, 143; Olson v. St. Paul, 38 Minn. 419.

[1] Bloomington v. Murnin, 36 Ill. App. 647; Beach v. Elmira, 58 Hun, 606; Bacon v. Boston, 28 N. E. R. 9; Smith v. Atlanta, 75 Ga. 110; Vale Mills v. Nashua, 63 N. H. 136; Reid v. Atlanta, 73 Ga. 523.

[2] Columbus v. Hydr. Woolen Mills Co., 33 Ind. 435.

riparian owners are not thereby impaired, or their property injured.[1]

[1] Waffle v. N. Y. Cen. R. R. Co., 58 Barb. 413; O'Brien v. St. Paul, 18 Minn. 176; Gould v. Booth, 66 N. Y. 62, 65; Kobs v. Minneapolis, 22 Minn. 159.

CHAPTER XVIII.

MANDAMUS AND QUO WARRANTO.

§ 359. **Nature of mandamus and wherein it differs from injunction.**—An application for a writ of *mandamus* has for its object the coercion of a corporation through its agents or

officers, a public board or official or an inferior court, to perform some lawful act or duty imposed upon him or it.

The original theory upon which the writ of *mandamus* was issued was that its issuance was an exercise of the royal prerogative, and a means by which the king through the judges of the king's bench could effectuate that control and supervision which he possessed over public bodies and officials, municipal and other corporations included;[1] but as the royal vigilance had usually to be stimulated and invoked by the individual aggrieved, the early theory of a spontaneous exercise of the royal power gradually disappeared, until in America the remedy by *mandamus* has become in practice a species of civil action at law.[2]

Its usefulness is limited in that it is applicable in most instances to those only who have a public or corporate duty[3] to perform; and it cannot be used even then when, as is now frequently the case, other and more appropriate remedies exist.[4]

Upon the theory, that the arbitrary supervision and direction

[1] Att. Gen. v. Boston, 123 Mass. 460; People v. Collins, 19 Wend. 65; 3 Blackstone Com. 110; Am. & Eng. Enc. of Law, vol. 10, p. 92; Com. v. Pittsburgh, 34 Pa. St. 510.

[2] Kendall v. Stokes, 3 How. 100; Porter v. State, 78 Tex. 591; State v. Eddy, (Mont. 91) 25 Pac. R. 1032; Wood v. Lenawee Arc. Judge, 84 Mich. 521; State v. Mayo, 8 So. R. 52; 42 La. An. 637; U. S. v. Hall, 7 Mackey, 14; Tennant v. Crocker, (Mich. 91) 48 N. W. R. 577; State v. Heege, 40 Mo. App. 650; Woffenden v. Board, 1 Ariz. 237; 25 Pac. R. 647; State v. Association, (La. 91) 9 So. R. 564; Brown v. Crego, 29 Iowa, 321; Rosenbaum v. Bauer, 120 U. S. 461; Davis v. Corbin, 112 Ib. 36; State v. Williams, 69 Ala. 311; *In re* Fleming, 4 Hill, 581; McBane v. People, 50 Ill. 503; Com. v. Allegheny Co., 32 Pa. St. 218; Chamberlain v. Warburton, 1 Utah, 267; State v. Kirkwood, 29 Md. 85; State v. Jennings, 56 Wis. 113; Kentucky v. Denison, 24 How. 66, 97, 98; Wilkinson v. Prov. Bk., 3 R. I. 22.

[3] Trinity & S. Ry. Co. v. Lane, 79 Tex. 643; 16 S. W. R. 18; State v. Engle, (Ind. 91) 26 N. E. R. 1077; Cope v. State, 126 Ind. 51; State v. Raine, 47 Ohio St. 447; 25 N. E. R. 54; Board v. Gantt, (Md. 9) 21 Atl. R. 548; People v. Blackhurst, 25 Abb. N. C. 230; State v. Manitowoc, 52 Wis. 432; Crandall v. Amador, 20 Cal. 72; King Williams Co. v. Munday, 2 Leigh 165; Louisville & N. A., etc., v. State, 25 Ind. 177; Cleveland v. Jersey City, 39 N. J. L. 629; State v. McCrillus, 4 Kan. 250; People v. Edmonds, 15 Barb. 529; Baker v. Johnson, 41 Me. 15.

[4] United States v. Windom, 137 U. S. 636; Haines v. Saginaw Co., (Mich. 91) 49 N. W. 310; People v. Board of Education, 15 N. Y. S. 308; McGee v. State, (Neb. 92) 49 N. W. R. 220; State v. Board, (Mont. 92) 25 Pac. R. 440; McLeod v. Scott, (Or. 92) 26 Pac. R. 1061; Delgado v. Chavez, 11 S. Ct. 874; 140 U. S. 586; People v. Gilmore, 5 Gilm. (Ill.) 242; Com. v. Allegheny Co. Com'rs, 37 Pa. St. 277.

of public officials, and of corporations, formerly vested in the king, have under our system been delegated by the people to the lawmaking power subject to constitutional regulation and restraint, the Legislatures in nearly every State of the Union have by statute improved the remedy and extended its force and scope.[1] Although the writs of *mandamus* and injunction are similar in that both are commands to do or refrain from doing a particular act,[2] they differ in very material respects and are not concurrent; nor will either be granted when the facts of the case show that the other is the proper remedy.[3]

What a court of equity can do through the far-reaching preventive powers of an injunction, which by its pliability can be shaped to the infinite variety of human affairs, it were useless to attempt through a process so narrow and limited in effect as the writ of *mandamus*.[4] But when the duties to be performed, or the public services to be rendered, are imperative and ministerial, and the object sought is rather to compel the performance of a legal, than to restrain or prevent the commission of an illegal, act, a *mandamus* is the most effective if not the only remedy.[5]

But if there exist concurrent remedies, as a suit for damages or a proceeding by writ of *quo warranto* or indictment, yet if the rights of the applicant will not receive adequate protection or redress thereby, he is entitled to a *mandamus*.[6]

[1] Sikes v. Ransom, 6 Johnson (N. Y.) 279; Rex v. Barker, 3 Burr. 1265; *In re* Turner, 5 Ohio, 542; N. Y. Code Civ. Pro. §§ 2067-2990.

[2] Com. v. Boone Co., 82 Ky. 632; Legg v. Annapolis, 42 Md. 203.

[3] Proper remedy of bondholders against defaulting municipality is by *mandamus* and not in equity. 2 Dil. Mun. Corp., secs. 854, 855; Gay v. Gilmore, 76 Ga. 725; Thompson v. Allen Co., 115 U. S. 550; Rees v. Watertown, 19 Wall. 481; Walkley v. Muscatine, 6 Ib. 481.

[4] Butterworth v. U. S., 112 U. S. 50; Smith v. Bourbon Co., 127 U. S. 105 (1887).

[5] Gormley v. Day, 28 N. E. R. 693; 114 Ill. 195; State v. Shakespeare, 41 La. An. 156; McCullough v. Brooklyn, 23 Wend. 459; People v. New York, 10 Ib. 393; People v. Chenango Co., 11 N. Y. 563; Atty. General v. Boston, 123 Mass. 460; State v. Graves, 19 Md. 351; Prescott v. Duquesne Bor., 48 Pa. St. 118; Bedford etc. v. Anderson, 45 Ib. 388; People v. Board, 20 N. Y. S. 1 (1892); People v. Salomon, 46 Ill. 415; Pond v. Parrott, 42 Conn. 13; *In re* Parker, 120 U. S. 746; Craig v. Leitensdorfer, 123 U. S. 209; Washington Univ. v. Green, 1 Md. Ch. 97; Sherman v. Clark, 4 Nev. 138; People v. Insps., 4 Mich. 187; Crawford v. Carson, 35 Ark. 565.

[6] Peo. v. Alb. R. R., 24 N. Y. 261, 269; Peo. v. Troy etc., 37 How. Pr. 437; Union Pac. R. R. v. Hall, 91 U. S. 343, 355; Smith v. Bourbon Co., 127 U. S. 105.

§ 360. **Mandamus against municipal corporations.**—From the above it may be deduced as a general rule that the writ will lie when it is shown that the injured party or community has no *prompt, clear* and *adequate* means of compelling the performance of a non-discretionary or imperative duty.[1] If the aggrieved party has the right to bring an action to recover damages for the municipal neglect of duty, this extraordinary remedy will not lie.[2] But if such a corporation or its officials refuse, or unreasonably neglect, to perform a duty obligatory upon it or them, either by its charter or by the general law, and there is no adequate remedy by which a prompt and satisfactory performance can be enforced, the law is clear that a *mandamus* will be granted.[3] But when in general the writ would be of no

[1] State v. McGowan, 89 Mo. 156; *In re* Bradstreet, 17 Pet. 634; *In re* Manny, 14 How. 24; *In re* Cutting, 94 U. S. 14; Tennant v. Archer, (Mich. 92) 48 N. W. R. 577; Manus v. Givens, 7 Leigh, 689; King Williams Co. v. Munday, 2 Ib. 168; Page v. Clopton, 30 Gratt. 415; Cope v. State, 126 Ind. 51; Randolph v. Stahlnaker, 13 Ib. 523; Kent v. Dickinson, 25 Ib. 817; L. & F. Ins. Co. v. Wilson, 8 Pet. 291; L. & F. Ins. Co. v. Addams, 9 Ib. 571; Dawson v. Fred'k Co., 2 H. & M. (Va.) 132; Brown v. Crippen, 4 Ib. 173; United States v. Lawrence, 3 Dall. 42; People v. Crotty, 93 Ill. 180; Zanone v. Md. City, 103 Ib. 552; St. Clair v. Keller, 85 Ib. 396; People v. Trustees, 86 Ib. 613; Smalley v. Yates, 36 Kan. 519; State v. Hill, 32 Minn. 275; State v. Newman, 91 Mo. 445; Douglas v. Com., 108 Pa. St. 559; State v. Omaha, 14 Neb. 265; State v. Wilson, 21 Ib. 572; Ferry Co. v. Boston, 101 Mass. 359; Cairo v. Campbell, 116 Ill. 305.

[2] State v. Cape Girardeau Co., (Mo. Sup. 92) 19 S. W. R. 23; Sessions v. Boyken, 78 Ala. 328; Needham v. Thresher, 49 Cal. 393; McArthur v. Duncan, 34 Mich. 27; Lexington v. Mulliken, 7 Gray, 280; State v. Union Twp., 8 Vroom, 343; State v. Mount, 21 La. An. 755; State v. Titus, 47 N. J. L. 89; People v. Wood, 35 Barb. 653; People v. Booth, 49 Ib. 31; People v. Thompson, 25 Ib. 73; State v. County Jud., 5 Iowa, 380; State v. Supervisors, 29 Wis. 79; Burnet v. Auditor, 12 Ohio, 54; Com. v. Rodes, 5 Mon. (Ky.) 318; Mansfield v. Fuller, 50 Mo. 338; State v. Mayor, 4 Neb. 260; People v. Chenango, 11 N. Y. 563; Brown v. Ruse, 69 Tex. 589; Com'rs v. Hicks, 2 Ind. 527; People v. Clarke, 50 Ill. 213; Mich. Pav. Co. v. Detroit, Mich. 201; Portwood v. Montgomery, 52 Miss. 523.

[3] State v. Shakespeare, 43 La. An. 92; People v. Com. Council, 85 Cal. 369; 24 Pac. R. 727; Smith v. Lawrence, (S. D. 92) 49 N. W. 7; Coll v. Board, 47 N. W. R. 227; 83 Mich. 367; Cope v. State, 126 Ind. 51; State v. Heege, 40 Mo. App. 650; Thomason v. Ruggles, 69 Cal. 465; Smalley v. Yates, 36 Kan. 519; Silverthorne v. Warren R. R., 33 N. J. L. 372; Hall v. Somerswarth, 39 N. H. 511; Treat v. Middletown, 8 Conn. 243; Com. v. Allegheny, 32 Pa. St. 218; State v. Raine, 47 Ohio St. 447; Atty. General v. Myers, 58 Hun, 218; People v. Fitzgerald, 59 Ib. 625; Labette

avail,[1] as when the performance of the act demanded has become unlawful,[2] or when the occasion for it has passed and a *mandamus* would thus be futile, the court will not grant it.[3]

But the right of the relator must be clear, and the facts adduced by him must show *prima facie* a case for the relief demanded.[4] This does not mean that his case must exclude any and every possible doubt as to its legal sufficiency, or that he must show conclusively that he is without any other legal remedy; but only that he should present fair and reasonable grounds for his demand,[5] and on such grounds the writ will ordinarily be granted. But the municipal board or official affected will be allowed to disprove in the return the jurisdictional facts, which are stated by the plaintiff or relator.[6]

On the other hand, if the authority of the municipality to do the act be uncertain, a *mandamus* will not be granted;[7] nor generally for the control of rights of a purely private nature. For in such cases the party has an adequate remedy, by which he may recover damages or obtain a decree for specific performance in equity.[8] Accordingly, it has been repeatedly decided that no *mandamus* will lie to compel the payment of salary by a municipality, provided the official to whom it is owing can sue for it

v. Moulton, 112 U. S. 217; U. S. v. Oswego, 28 Fed. R. 55; Williamsport v. Com., 90 Pa. St. 498; Hawkins v. Hawke Co. Com'rs, 14 Ind. 521; McBride v. Grand Rapids, 47 Mich. 236; People v. N. Y. Pol. Board, 107 N. Y. 235; Martin v. Tripp, 51 Me. 184; State v. Kirkland, 29 Md. 85.

[1] Williams v. Com'rs, 35 Me. 345; Spirit Aph. v. Randolph, 58 Vt. 192; People v. Dulany, 96 Ill. 203; Fisher v. Charleston, 17 W. Va. 595; Roberts v. Smith, 63 Ga. 213; Wells v. Mason, 23 W. Va. 456; Cook v. Candee, 52 Ala. 109; Lamar v. Wilkins, 28 Ark. 34; Clark v. Crane, 57 Cal. 629; *Ex parte* Hurn, (Ala. 91) 9 So. R. 615; Grigsby v. Bowles, 79 Tex. 13; Mills v. Brevoort, 77 Mich. 210.

[2] Peo. v. Hyde Pk., 117 Ill. 462; Ross v. Lane, 3 S. & M. (Miss.) 695.

[3] *In re* Bristol, 3 Q. B. Div. 10; Gormley v. Day, 28 N. E. R. 693; 14 Ill. 185.

[4] People v. Board of Canvassers, 129 N. Y. 360; Smith v. Railroad, 67 Ill. 191; People v. Newton, 112 N. Y. 396; Langdon v. Mayor, 93 N. Y. 145; Morthorst v. N. Y. Cen. R. R., 66 Ib. 609; U. S. v. Bank, 1 Cranch. 7.

[5] See cases cited under sec. 359, *ante*.

[6] People v. Stevens, 5 Hill, 616; State v. Warren, 32 N. J. L. 439; Peo. v. Ransom, 2 N. Y. 490; see *post*, sec. 365, Practice and Procedure.

[7] People v. Bloomington, 38 Ill. App. 125; State v. Guttenberg Council, 39 N. J. L. 660.

[8] Parrott v. Bridgeport, 44 Conn. 180; Peo. v. East Saginaw, 40 Mich. 336.

in an ordinary common law action.[1] If he cannot sue at common law or in equity, *mandamus* will lie, unless the office be occupied by another, and the title to it is disputed, when a *quo warranto* is the proper remedy.[2]

§ 361. **Mandamus and quo warranto distinguished.**—Although in some jurisdictions these two remedies are concurrent when the title to official employment is involved,[3] this is very far from being a universal rule. In proper cases *mandamus* will lie to compel the admission of one legally elected to a municipal office [4] if the office be vacant, and the claimant's title to the office is undisputed. If it is sought to try the title to the office between the rightful claimant and a usurper, *mandamus* would not lie, there being already an adequate remedy in *quo warranto*.[5]

A certificate, showing the election of a municipal official or his commission, is *prima facie* evidence of his right to the office, and is so far conclusive that it cannot be questioned in any collateral proceedings whatever, and only in a proceeding to which the official is made defendant, in an information in the nature of *quo warranto;* when the court will inquire into the validity of his election or appointment.[6] In all cases where a person is in actual if not legal possession of an office, and is exercising the duties of such office under color of right, conferred by election or appointment, the validity or legality of such election

[1] Baker v. Johnson, 41 Me. 15; Commonwealth v. Johnson, 2 Binn. (Pa.) 275; Peo. v. Edmonds, 15 Barb. 529; Peo. v. N. Y. Sup., 32 N. Y. 473; State v. Jones, 1 Ired. L. 134.

[2] Fleming v. Guthrie, 3 Law Rep. An. 53, and cases there cited, sec. 368, on *quo warranto*.

[3] State v. Falconer, 44 Ala. 696; State v. Palmer, 10 Neb. 203; *In re* Reid, 50 Ala. 439.

[4] Eaton v. Burke, (N. H. 92) 22 Atl. R. 452; State v. Shakespeare, 43 La. An. 92; State v. Smith, (Mo. 91) 15 S. W. R. 614; Schehr v. Board, 83 Mich. 367; Cross v. R. R. Co., 12 S. E. R. 765; 34 W. Va. 742; Smith v. Rahway, 33 N. J. L. 111; McDermott v. Miller, 45 Ib. 251; Ellison v. Raleigh, 89 N. C. 125, but may be refused pending *quo warranto* proceedings, Hannon v. Halifax, 89 N. C. 123.

[5] Kelly v. Edwards, 69 Cal. 460; Cochran v. Cleary, 22 Iowa, 75; People v. Goetling, 133 N. Y. 569; *In re* Sawyer, 124 U. S. 200; Biggs v. McBride, 17 Or. 640; People v. Matteson, 17 Ill. 167; Brennan v. Bradshaw, 53 Tex. 330; Hullman v. Honcomp, 5 Ohio St. 237; Worthley v. Steen, 43 N. J. L. 542.

[6] People v. Riordan, 41 N. W. 482; People v. Thacher, 55 N. Y. 525; People v. Van Flyck, 4 Cow. 297; People v. Vail, 20 Wend. 12; State v. Frazier, 98 Mo. 426; Hunnecutt v. State, 12 S. W. R. 106; *Ex parte* Scarborough, (S. C. 91) 12 S. E. R. 666.

or appointment will not be adjudicated upon an application for a *mandamus*, but only upon an information in the nature of a *quo warranto*. Indeed it may be laid down as a principle of universal application, that where the applicant has a remedy by *quo warranto*, *mandamus* will not lie.[1] But there are authorities which hold that, in the case of a groundless claim to, or intrusion into, an office by an interloper, or an utterly illegal retention of an office, after the expiration of the incumbent's term of office, and the election of his successor, the rightful claimant will not be compelled to resort to a *quo warranto;* but he may have at once a *mandamus* to compel a delivery to him of the possession of the office, and of the books and papers belonging thereto.[2]

In consequence of the short periods for which officials are elected in American municipalities, regret has been expressed that a claimant to an office, which it is alleged has been usurped, is put to the dilatory process of an information in the nature of a *quo warranto,* and the opinion has been expressed that a court would be justified in granting a *mandamus* so far as to see that the incumbent is "a *bona fide* possessor of the place, and that there is a real dispute and fair doubt as to which party has the legal title."[3] It has been held in one State that *mandamus* was the only complete remedy, "as under the *quo warranto* information the judgment might remove the occupant but would not install the claimant."[4]

In New York by Code Civ. Pro. 1948, *et seq.*, the attorney-general may, on the relation of a private individual, bring "*an action against the usurper of an office or franchise*," triable by jury, and may obtain an order of arrest against defendant. If the defendant when ousted refuses to deliver on demand the books and papers of the office, he is guilty of a misdemeanor, and the successful party can recover costs and damages against him. And the court may in its discretion impose on the unsuc-

[1] Com. v. Philada. Co., 5 Rawle, 75; State v. Gaslight Co., 25 Mo. App. 44; State v. Thompson, 36 Mo. 70; Underwood v. White, 27 Ark. 382; Warner v. Myers, 3 Oreg. 218; State v. Rodman, 43 Mo. 256; Bonner v. State, 7 Ga. 473; Anderson v. Colson, 1 Neb. 172; State v. Bryce, 7 Ohio, pt. 2, 82.

[2] People v. Kilduff, 55 Ill. 492; Lindsey v. Sackett, 20 Tex. 516.

[3] 2 Dil. Mun. Corp. § 846.

[4] Luce v. Board, 153 Mass. 108; Keough v. Board, 31 N. E. R. 587; Harwood v. Marshall, 9 Md. 83.

cessful defendant in this action, as part of the final judgment, a fine not to exceed $2,000.[1]

§ 362. **Distinction between discretionary and mandatory powers as limiting the right to mandamus.**—This distinction is of great importance in its bearing upon the granting of the writ. As discretionary duties are, except in circumstances of gross abuse and injustice, beyond judicial control, it is well settled in modern times that a *mandamus* will not be granted to compel their performance.[2]

If, therefore, the law confers upon the municipal officers a clear and unmistakable power to decide upon the expediency or necessity of measures; or if the municipality is invested with the capacity of exercising a deliberative choice between several courses, either of which is legal and within the scope of the municipal powers, no *mandamus* will be granted.[3] Thus, when a statute calls for the acceptance of the bid of the lowest responsible bidder, a discretionary power is therewith granted; and if the municipality acts in good faith, in determining the responsibility of the bidders, *mandamus* will not lie.[4] But if, as is sometimes the case, a *mandamus* is asked for to compel the performance of a duty clearly discretionary, the court will grant it when the discretion is abused, or the officer is acting in bad faith, and great injustice will otherwise be done.[5]

Inasmuch as any gross, fraudulent or unlawful abuse of dis-

[1] § 1956.

[2] People v. Martin, 131 N. Y. 196; Grant v. Detroit, 51 N. W. 997; State v. Tippecanoe Co., (Ind. 92) 30 N. E. R. 892; Wintz v. Board, 28 W. Va. 227; State v. Mt. Pleasant, 16 Wis. 613; Howe v. Crawford, 47 Pa. St. 361; People v. Martin, 131 N. Y. 196; Mich. City v. Roberts, 34 Ind. 471; State v. Essex Co., 23 N. J. L. 214; Howe v. Crawf. Co., 47 Pa. St. 361; Grant v. Detroit, 51 N. W. R. 997; State v. Jefferson, 22 La. An. 611; Dechert v. Com'rs, 113 Pa. St. 229; People v. McLean, 16 N. Y. S. (1891) 401; State v. Tippecanoe Co., (Ind. 92) 30 N. E. R. 892; People v. Com. Council, 78 N. Y. 39; People v. Fairchild, 67 Ib. 336; Ferry Co. v. Boston, 101 Mass. 488; State v. Francis, 95 Mo. 44; Magee v. Sup., 10 Cal. 376; Gardenier v. Sup., 17 St. Rep. (N. Y.) 983; Supervisors v. People, 110 Ill. 511; State v. Demaree, 80 Ind. 519; *In re* Town Board, 7 N. Y. Supp. 165; Pfister v. State, 82 Ind. 382.

[3] Sansom v. Mercer, 68 Tex. 488; Peo. v. Com. Counc., 78 N. Y. 39.

[4] Grand v. Detroit, (92 Mich.) 51 N. W. R. 999; People v. Board, 5 N. Y. S. 392; Douglas v. Com'rs, 108 Pa. St. 559.

[5] Keogh v. Wilmington, 4 Del. Ch. 491; Glencoe v. Peo., 78 Ill. 382; Amperse v. Kal. Counc., 59 Mich. 78; Barrett v. New Orleans, 33 La. An. 542.

cretionary powers would as a misfeasance very likely render the municipal officer indictable, it seems, upon grounds already discussed, viz: the adequacy of other remedies, that the use of the writ in this connection must be very rare. Where the official is deprived of all discretion as to performance or nonperformance of the act; and the only discretion which he may exercise is as to the details of its execution, a *mandamus* will be granted to compel him to exercise his power for the accomplishment of the substantial result, which is required of him by law.[1]

But when the power, though discretionary and conferred in language of a permissive character, is one whose exercise is required for the furtherance of individual rights or public interests, and their protection from irreparable injury, a *mandamus* will issue. So where the levy of a tax was dependent upon the *belief* in the public benefit to be derived from it, or upon the advisableness of employing a statutory power for the public good, a *mandamus* will lie.[2]

[1] Ray v. Wilson, (Fla. 92) 10 So. R. 673; *Ex parte* Alabama State Bar Assn., (Ala. 91) 18 So. R. 768; Trinity & S. R. Co. v. Lane, 79 Tex. 643; Porter v. State, 78 Ib. 591; United States v. Hall, 7 Mackey, 14; Atty. Gen. v. Boston, 123 Mass. 469; Brander v. Chesterfield, 5 Call. (Va.) 548; Memphis v. Brown, 97 U. S. 203, 300; United States v. Memphis, 97 Ib. 284; United States v. Spurz, 102 Ib. 407; Queen v. Haldimond, etc., 7 Up. Can. L. J. 266; *In re* Augusta etc., 12 Up. Can. Q. B. 522; Coy v. Lyons, 17 Iowa, 1; Com. v. Parks, 9 Phila. (Pa.) 481; Treat v. Middletown, 8 Conn. 243; Howe v. Crawford Co., 47 Pa. St. 361; People v. Cass Co. Com'rs, 77 Ill. 438; Parker v. Portland, 54 Mich. 308; *Ex parte* Black, 1 Ohio St. 30; People v. Board of Police, 19 N. Y. 188; *In re* Turner, 5 Ohio, 542; Martin v. Ingham, 36 Kan. 641; Com. v. Henry, 49 Pa. St. 530; Burns v. Bender, 36 Mich. 139; Buchoz v. Pray, 37 Ib. 512; McKean v. Louisville, 18 B. Mon. (Ky.) 9; State v. Shaw, 23 La. An. 790; State v. Pol. Jury, 29 Ib. 146; *In re* State Board, 23 Ib. 388; Kennedy v. Washington, 3 Cranch C. C. 595; Magee v. Calaveras Co., 10 Cal. 376; Mayor v. Morgan, 7 Mart. N. S. (La.) 1; State v. Wilm. Coun., 3 Harring. (Del.) 294; Poultney v. Lafayette, 12 Peters, 472; Mich. City v. Roberts, 34 Ind. 471; U. S. v. Lawrence, 3 Dall. (U. S.) 42; Dechert v. Com., 113 Pa. St. 229; Deeham v. Johnson, 141 Mass. 23; Braconier v. Packard, 136 Mass. 50; Ahrens v. Fiedler, 43 N. J. L. 400; Mau v. Liddle, 15 Nev. 271; Elkins v. Athearn, 1 Hill (N. Y.) 50; People v. Albany Co. Suprs., 12 Johns. (N. Y.) 414; Hull v. Oneida Co., 19 Ib. 259; Rice B. & F. Co. v. Worcester, 130 Mass. 575; Madison v. Smith, 83 Ind. 502; Hudman v. Slaughter, 70 Ala. 546.

[2] When keeping streets in repair being mandatory is enforceable by *mandamus*. State v. Brown, 38 Ohio

If municipal officials, who are vested with discretionary powers, refuse to exercise those powers when it becomes lawful and necessary for them to do so, a *mandamus* will issue, not to control their discretion, but to compel them to exercise a power when public interests demand it.[1] In the following cases of discretionary power *mandamus* has been refused: To compel approval of official bonds,[2] or other bonds of sureties,[3] granting a license[4] and to audit illegal claim.[5]

§ 363. **Who may apply for the writ.**—Upon the ancient theory, that the writ was an exercise of the royal prerogative, it has been argued that the State by its attorney-general is the proper agency to put in motion this remedy against a municipality. This is undoubtedly true, when the object sought for is a public one, viz., to enforce a legislative act or a municipal charter, and in such cases the State is entitled to the writ as a matter of right.[6] In some States the performance of a public duty can only be compelled on *mandamus* procured by the attorney-general.[7] But there has been of late years a wide diver-

St. 344; State v. Staley, 38 Ib. 259; Hammar v. Covington, 3 Met. (Ky.) 494; People v. Thacher, 42 Hun, 319; Appleby v. N. York, 41 Ib. 481; Louisville v. Kean, 18 B. Mon. (Ky.) 9; State v. Baton Rouge, 34 La. An. 1197; Uniontown v. Commonwealth, 34 Pa. St. 293; Meyer v. Carolan, 9 Tex. 250; Napa V. R. Co. v. Napa Co., 30 Cal. 435; State v. Orange, 31 N. J. L. 131; People v. Bloomington, 63 Ill. 207; Mich. City v. Roberts, 34 Ind. 471; Ind. v. Cinc. R. R. Co., 37 Ib. 489; Hull v. Sup'rs, 19 Johns. (N. Y.) 259; Goodrich v. Chicago, 20 Ill. 445; Ottawa v. People, 48 Ib. 233; People v. Cass Co., 77 Ib. 438; People v. La Salle, 84 Ib. 303; People v. Dutchess, 58 N. Y. 154; Com. v. Pittsburgh, 34 Pa. St. 496; Sup'rs v. U. S., 4 Wall. 435. Memphis v. Brown, 97 U. S. 300; Rock Island etc. v. U. S., 4 Wall. 435; Robinson v. Butte Co. Sup., 43 Cal. 353; State v. New Orleans, 30 La. An. 129; Memphis v. United States, 97 U. S. 293; 97 Ib. 284.

[1] State v. Lewis, 10 Ohio St. 46; Nelson v. Edwards, 55 Tex. 389; Arapahoe Co. v. Crotty, 9 Colo. 138; Lewis v. Marion, 14 Ohio St. 515; Beebe v. Robinson, 52 Ala. 67.

[2] McDuffie v. Cook, 65 Ala. 430; Mobile M. I. Co. v. Cleveland, 76 Ala. 321.

[3] McHenry v. Township, 31 N. W. Rep. 602.

[4] Heblich v. Judge, 10 S. W. R. 465; Devine v. Belt, 70 Md. 352; *In re* Knarr, 127 Pa. St. 554; 18 Atl. R. 639; State v. Kramer, 96 Mo. 75; Schlandeker v. Marshall, 72 Pa. St. 200; Dunbar v. Frazer, 78 Ala. 538; Walsford v. Weidein, 23 Kan. 601.

[5] People v. Case, 19 N. Y. S. 625; People v. Greene Co., 39 Hun, 299.

[6] State v. Hartford & N. H. R. R. Co., 29 Conn. 538; Peo. v. Attorney General, 22 Barb. 114; Peo. v. Tracy, 1 Denio, 617; Moses v. Kearney, 31 Ark. 261.

[7] Smith v. Saginaw, 45 N. W. R. 964; No. Pac. R. Co. v. Territory, 142 U. S. 49; Boblett v. Dresher, 10

gence in the decisions of the American courts from the ancient theory.[1] And it may now be considered as an established rule that the writ against a municipality will issue upon the application or relation of any private person; provided he be interested as a citizen, and show facts which, in the discretion of the court, will warrant the issuance of the writ.[2]

The nature of the act, whose performance may be compelled, does not seem to make any difference, it being now the custom in most States for private persons to use the facilities afforded by the writ for the enforcement of rights of a purely private character, as well as those in which all the citizens residing in a municipality may have an interest.[3]

§ 364. **Prior judgment when not necessary.**—When in the law, under which a municipality has entered into contractual relations, there exists a provision for the levy of a *special tax*, or for as much as may be necessary *for the purpose of meeting the obligation* when it matures, *mandamus* is of right and there exists no necessity usually for the return of an execution

Kan. 9 (1872); Wyandotte & K. C. Co. v. Wyan Co. Comm'rs, 10 Kan. 331; Graves v. Cole, 3 Dak. 301; State v. Ware, 13 Oreg. 380.

[1] Union Pac. R. R. Co. v. Hall, 91 U. S. 343.

[2] Eaton v. Burke, 22 Atl. R. 452; State v. Archibald, 43 Minn. 328; *In re* Whitney, 3 N. Y. S. 838; Pumphrey v. Balto., 47 Md. 145; Peo. v. Brooklyn, 22 Barb. 404; Peo. v. Halsey, 53 Ib. 547; Pike Co. Com'rs v. State, 11 Ill. 202; Hamilton v. State, 3 Ind. 452; Attorney General v. Boston, 123 Mass. 460; State v. Rahway, 33 N. J. L. 110; People v. Collins, 19 Wend. 56; *In re* Fuller, 25 Ark. 261; Chambers v. Green, L. R. 20 Eq. 552; King v. Sev. & Wye. R. R., 2 B. & Ald. 646; People v. San Francisco, 36 Cal. 594; Cannon v. Janirer, 3 Houst. 27; Bryan v. Cattell, 15 Iowa, 538; Peo. v. Mich. Univ. Reg., 4 Mich. 98; Peo. v. Inspectors, 4 Ib. 187; Sanger v. Kennebec Co., 25 Me. 291; Bates v. Plymouth, 14 Gray, 163.

[3] Peo. v. Brooklyn Council, 77 N. Y. 503; State v. Marshall Co., 7 Iowa, 186; State v. Rahway, 33 N. J. L. 110; (to compel council to fill vacancy by holding an election;) State v. Baily, 7 Iowa, 390. As to private persons employing the writ to enforce private rights, see Mt. Moriah Cem., 81 Pa. St. 235; State v. Eddy, (Mont. 91) 25 Pac. R. 1032; State v. Engle, (Ind. 91) 26 N. E. R. 1077; Wood v. Lenawee, 84 Mich. 521; 47 N. W. R. 1103; United States v. Hall, 7 Mackey, 14; Cope v. State, 126 Ind. 51; Kendall v. Stokes, 5 How. (U. S.) 87; Peo. v. Man. Gas Co., 45 Barb. 136; Ottawa v. People, 48 Ill. 233; Insurance Co. v. Baltimore, 23 Md. 296; Price v. Riverside Co., 56 Cal. 431; Bryan v. Cattell, 15 Iowa, 538; Peo. v. State, 19 Mich. 392; Peo. v. Cummings, 72 N. Y. 433; State v. Trustees, 4 Nev. 400; State v. Wright, 10 Ib. 167; *In re* Whitney, 3 N. Y. S. 838; Cf. State v. Kearney, 25 Neb. 262.

nulla bona, before it may be issued; and it is no defence that the corporation may have property which may be levied on by the creditor.[1] In such a case, too, it has been held that no previous judgment is necessary,[2] and this is particularly true, if, as in the case of municipal bonds or coupons, there exists no doubt as to their genuineness or validity, and the relator is himself their holder.

On the same principles, *mandamus* will lie to collect official salaries, without recovering a prior judgment against the municipality for the same.[3]

§ 365. **Practice—Effect of laches.**—The statutory rules which exist in our States, governing this extraordinary remedy, have received a strict construction;[4] and the alternative writ or order to show cause, although usually founded upon an *ex parte* application or petition,[5] is not of right and is never granted, except upon proper affidavits or pleading, verified by the oath of the application. A *prima facie* case must always be made out, and all facts showing non-performance clearly and precisely stated,

[1] State v. Cutes, (Ohio 91) 26 N. E. R. 1052; State v. Davenport, 12 Iowa, 335; State v. Board, (N. J. 90) 20 Atl. R. 755; Ell. Co. v. Kitchen, 14 Bush. (Ky.) 289; Knox Co. Comm'rs v. Aspinwall, 24 How. 376; Com. v. Pittsburgh, 34 Pa. St. 496; Louisiana v. St. Martin's Par., 111 U. S. 716; Limestone Co. v. Rather, 48 Ala. 433; Greenfield v. Moore, 113 Ind. 597; Walkley v. Muscatine, 6 Wall. 481; Hoffman v. Quincy, 4 Ib. 535; Benbow v. Iowa City, 7 Ib. 313; Rock Island Co. Sup. v. U. S., 4 Ib. 435; Brown v. Gates, 15 W. Va. 131; State Com'rs, 6 Ohio St. 280; Washn. Co. Sup. v. Durant, 9 Wall. 415; Davenport v. Lord, 9 Ib. 409.

[2] Ray v. Wilson, (Fla. 92) 10 S. O. R. 673; Rahway Comrs. v. Rahway, 49 N. J. L. 384; Columbia Co. Comrs. v. King, 13 Fla. 451; Clark Co. v. Paris, 11 B. Mon. 143, 154; Com. v. Allegheny Co. Comrs., 37 Pa. St. 277; Maddox v. Graham, 2 Met. (Ky.) 56; State v. Anderson, 8 Baxt. 249; State v. Clinton Comrs., 6 Ohio St. 280, 287; Com. v. Pittsburgh, 34 Pa. St. 496; Winslow v. Perquimas Co., 64 N. C. 218; Flagg v. Palmyra, 33 Mo. 440; Pegram v. Cleveland Co., 64 N. C. 557; State v. Milw., 20 Wis. 87; People v. Brown, 55 N. Y. 180; Newman v. Justices, 5 Sneed (Tenn.); Stevenson v. Sum. Towns., 35 Iowa, 462; Brown v. Crego, 32 Ib. 498.

[3] State v. Starling, 13 S. Car. 262; Honea v. Monroe, 63 Miss. 171; Just v. Township, 42 Mich. 573; Peo. v. Smith, 77 N. Y. 347; State v. Ocean, 48 N. J. L. 70; Morley v. Power, 5 Lea, 691; Ray v. Wilson, (Fla. 92) 10 So. R. 673; State v. Hannon, 38 Kan. 593.

[4] Peo. v. Newton, 112 N. Y. 396; Langdon v. Mayor, 93 Ib. 145.

[5] Fisher v. Charleston, 17 W. Va. 595; Haight v. Turner, 2 Johns. 371; Barnett v. Meredith, 10 Gratt. 651.

in order to warrant the issuance of the writ.[1] Thus, a *mandamus* will be refused when facts are stated sufficient only to raise a presumption, that respondents intend to refuse to perform their duty when called upon.[2] Public policy is against granting the writ, if the applicant be not free from laches.[3] And it seems to be a question for the court to determine what shall be deemed a sufficient delay to induce a refusal of the writ.[4]

Although, in most respects, the issuance of the writ is wholly discretionary; yet it is not generally considered laches, if application be made for it within the statutory period of limitation for bringing an ordinary action, provided there is no special statutory regulation to the contrary.[5]

The applicant for the writ must as a rule show a previous demand, coupled with a refusal to act on the part of the corporation or official, on whom the duty was imposed.[6] But demand and refusal is unnecessary if clearly useless;[7] and in the case of a public official or board, where no one is privately interested sufficiently to induce him to make the demand, it is generally only necessary that circumstances exist, which show

[1] State v. Gayhart, (Neb. 92) 51 N. W. R. 746; Schrever v. Livingston, 9 Mo. 196; Keasey v. Bricker, 60 Pa. St. 9; Swan v. Gray, 44 Miss. 393; Speed v. Cocke, 57 Ala. 209; Cooke v. Tanner, 40 Conn. 378; Mason v. Minturn, 4 W. Va. 302; Ohio etc. v. Moundsville, 11 Ib. 8.

[2] State v. York Co., 8 Neb. 92; State v. Ramsey, Ib. 286.

[3] People v. Harper, 18 N. Y. S. 896; Smith v. Eaton Co., 56 Ib. 217; Chinn v. Trustees, 82 Ill. 236; State v. Jennings, 48 Wis. 549; People v. French, 12 Abb. (N. Y.) N. Cas. 156; True v. Melvin, 43 N. H. 503; Mitchell v. Boardman, 10 Atl. Rep. 452.

[4] Territory v. Potts, 3 Mont. 354; People v. Harper, 18 N. Y. S. 896; State v. Appleby, 25 S. C. 100; State v. Cardoza, 5 S. C. 297; People v. Sen. Com. Pleas, 2 Wend. 264; Walcott v. Mayor, 5 Mich. 249; Savannah v. State, 4 Ga. 26; True v. Melvin, 43 N. H. 503.

[5] Peo. v. Super's, 12 Barb. 446; Prescott v. Gonser, 34 Iowa, 175; Klein v. Warren Co., 51 Miss. 578; Carroll v. Tishamingo, 28 Ib. 38; Klein v. Smith Co., 54 Ib. 254; State v. Hull, 17 Minn. 429; Bryson v. Spaulding, 20 Kan. 427.

[6] State v. Adams, 19 Nev. 370; Crandall v. Amador Co., 20 Cal. 72; Jefferson Co. v. Arrighi, 51 Miss. 68; State v. Schaack, 28 Minn. 358; State v. Slick, 86 Ind. 501; Coit v. Elliott, 28 Ark. 204; Leroux v. Bay Circ. J., 45 Mich. 416; *In re* Whitney, 8 N. Y. Supp. 838; Peo. v. Hyde Pk., 117 Ill. 462; Kemmerer v. State, 7 Neb. 133; Peo. v. Whittemore, 4 Mich. 27; Dobbs v. Stauffer, 24 Kan. 12.

[7] U. S. v. Brooklyn, 8 Fed. Rep. 473; Chi. K. & W. R. Co. v. Harris, (Kan. 92) 30 Pac. R. 456.

positive neglect or evasion of a legal duty,[1] or a plain public manifestation of a disinclination to perform the desired official or corporate act. The demand need neither be made nor alleged. It is sufficient to prove the circumstances, which show such continued and settled intention to evade the performance of a duty which is clearly required to be done by law.[2]

§ 366. **Framing the writ and order to show cause.**—It is sometimes the practice upon an application for a writ, for the court to grant upon motion an *order to show cause* why a *mandamus* should not issue; but this is often dispensed with and an alternative writ of *mandamus* is granted, which as well as the order, may be demurred to or traversed by the municipal official on whom it is served.[3] If, upon the service of the order to show cause, the defendant is unable to disprove the applicant's statement of facts by counter affidavits; or if his demurrer be not well taken, an absolute *mandamus* will issue.

This alternative writ must conform substantially to the affidavits or pleadings on which it is founded, although in the absence of statutory requirements no particular form or language is necessary, provided the command to do the required act or duty be certain and specific in its nature.[4]

§ 367. **Importance of a correct direction and proper service of the alternative writ.**—Although in strictness of lan-

[1] State v. Bailey, 7 Iowa, 390; Chumasero v. Potts, 2 Mont. 242; Palmer v. Stacy, 44 Iowa, 44; Alexander v. McDowell, 67 N. C. 330 (1872); Maddox v. Graham, 2 Met. (Ky.) 56, 70; Peo. v. Whittemore, 4 Mich. 27; Commonwealth v. Allegheny Co. Com'r's, 37 Pa. St. 277, 291; State v. Lehre, 7 Rich. (S. C.) 234, 322; Chi. K. & W. R. Co. v. Harris, (Kan. 92) 30 Pac. R. 456; State v. Rahway, 33 N. J. L. 110; Columbia Co. Comrs. v. King, 13 Fla. 451; Oroville, etc., v. Plumas Co. Sups., 37 Cal. 354.

[2] Attorney General v. Boston, 123 Mass. 460 (1877); Maddox v. Graham, 2 Met. (Ky.) 56; Commonwealth v. Allegheny Co. Comm'rs, 37 Pa. St. 237; State v. Rahway Council, 33 N. J. L. 110.

[3] State v. Cities, (Ohio 91) 26 N. E. R. 1052; Cape v. State, 126 Ind. 51; *In re* Shay, 15 N. Y. 488.

[4] As a discussion of the minute technicalities to be employed in framing the writ would be out of place in a work of this character, the reader is referred to Stephens' Nisi Prius, 2321; *In re* Loftus, 61 Hun, 627; Parrish v. Reed, 2 Wash. St. 491; People v. Board, 62 Hun, 632; Peck v. Board, 90 Cal. 384; Chance v. Temple, 1 Iowa, 179; Hates v. Jones, 1 Ired. L. (N. C.) 129. As to the nature of the command and of the duty or act to be performed, Tapping on Mandamus, p. 327; State v. Milw., 22 Wis. 397; Rex v. Kingston, 8 Mod. 210; State v. Pac. T. Trs., 61 Mo. 155 (1875).

guage the direction of the writ is only a formal part of the paper, yet it is very material; for if the writ be erroneously directed, in the absence of a statute allowing amendment, the writ is liable to be quashed. Statutes of *jeofails* having been almost universally enacted, it is believed that a clerical error in the direction, as, for example, a mistake in naming the wrong official, would afford no valid ground for abating the writ.[1]

Upon the plain principle, which runs through all the decisions on this subject, that the writ be directed to that body, or to the person whose duty it is to do the thing commanded, it is evident that in seeking to enforce any charter obligation, which is incumbent upon a municipality, the writ should be directed to it under its *corporate name*, and should be served upon its chief official, as well as upon the subordinates in whose sphere the performance of the act lies.[2] But it has been held that a writ, directed to the "Mayor and City Council," is good and need not be directed to the corporation.[3] And under a liberal construction of the various statutes of *jeofails*, the courts are always ready to allow a reasonable amendment in cases of this character.[4]

If, however, the act commanded is to be performed by a select body as commissioners, or by a single official acting under an authority conferred by the municipal charter, it is proper to direct the *mandamus* to them or him. But even here the writ will not be abated because it is directed to the corporation; for at least, according to the English law, the select body or of-

[1] N. Y. Code C. P. 721; Knight v. Ferris, 6 Houst. (Del.) 293; People v. Yates Co., 40 Ill. 126; Davenport v. Lord, 9 Wall. 409; U. S. v. Union Pac. R. R. Co., 4 Dillon, 479; s. c., 91 U. S. 343; State v. Jones, 1 Ired. L. (N. C.) 129; State v. Board of Canvassers, 13 Fla. 55; People v. Hilliard, 29 Ill. 413; Johnes v. State, 4 Ohio St. 493; State v. Johnson Co., 12 Iowa, 237; Powsheik v. Durant, 9 Wall. 736; State v. Milwaukee, 22 Wis. 397; Chance v. Temple, 1 Iowa, 179; Lyons Highway Comm'rs v. People, 38 Ill. 347; State v. Ellwood, 11 Wis. 17; State v. Hastings, 10 Ib. 518; State v. Bailey, 7 Iowa, 390; Springfield v. Hampden, 10 Pick. 59.

[2] Hitchcock v. Galveston, 48 Fed. R. 640; United States v. Boutwell, 17 Wall. 604; Labette Co. Com'rs v. Moulton, 112 U. S. 217; Wren v. Indianapolis, 96 Ind. 206; Cherokee Co. v. Wilson, 109 U. S. 621; Farnsworth v. Boston, 121 Mass. 173; Glencoe v. People, 78 Ill. 382; Louisville v. Kean, 18 B. Mon. 9; Davenport v. Lord, 9 Wall. 409.

[3] Peo. v. Bloomington, 63 Ill. 207; Glencoe v. Peo., 78 Ill. 382.

[4] Commonwealth v. Pittsburgh, 34 Pa. St. 496.

ficial is a constitutional part of the municipality.[1] And, according to the American law, such a board or official would be treated in a representative capacity, as the agent of the corporation, which was in fact the real principal in the suit.

It is however very important to direct the writ to the municipal officials by their official titles, rather than by their personal appellations; as the former method avoids the danger of abatement, which may arise from the death, removal or resignation of such officials.[2] If, pending proceedings upon a writ, the official concerned goes out of office, it will not issue against him, as he cannot legally perform an official act after the close of his term of office;[3] but if the writ is directed to the officer by his title, and not to him individually; or if, as is the case generally with municipal officials, the duty is impersonal and devolves upon his successors, the writ is still operative.[4]

The service of the alternative writ is usually regulated by statute and does not differ materially from the service of a summons,[5] or other judicial process. The original should invariably be shown and a copy left with the official or officials who are to make the return thereto.[6]

§ 368. **Return to the alternative writ.**—The rules, governing the return to a writ served upon a municipal corporation, in no wise differ from those which control in other circumstances. The return must be direct and positive in its terms,[7]

[1] Willcock Corporations, 389, pls. 135, 137; Rex v. Abingdon, 1 Lord Raymond, 560.

[2] State v. New Orleans, 35 La. 68; Rex v. West Love, 3 B. & C. 685; State *ex rel.* Soutter v. Madison Council, 15 Wis. 30; Peo. v. Breen, 18 Mich. 247; State v. Gates, 22 Wis. 210; State v. Elkington, 30 N. J. L. 335; Beachy v. Lamkin, 1 Idaho, 48; Louisville v. Kean, 18 B. Mon. 9, 13; Peo. v. Maher, 19 N. Y. Sup. 759 (1892.)

[3] Peo. v. Greene Co., 12 Barb. 222; Peo. v. Hayt, 66 N. Y. 607.

[4] Thompson v. U. S., 103 U. S. 480; Peo. v. Collins Co., 19 Wend. 56; Peo. v. Champion, 16 Johns. 61.

[5] State v. Sups., 67 Wis. 274.

[6] New York Code Civ. Pro. § 2071; Clarke Co. Comm'rs v. State, 61 Ind. 75; see *contra*, State v. King, 29 Kan. 607; State *ex rel.* Havemeyer v. Min. Pt. Sup., 22 Wisc. 396; State v. Elkington, 30 N. J. L. 335; Hampstead v. Underhill, 20 Ark. 337; State v. Super., 39 Wis. 264; St. Louis v. Sparks, 10 Mo. 118; Peo. v. Pearson, 3 Scam. (Ill.) 274; Peo. v. Judges, 4 Cow. (N. Y.) 73; Ladue v. Spaulding, 17 Mo. 159; Havemeyer v. Min. Point, 22 Wis. 396.

[7] Pierce v. Bleckweun, 30 N. E. R. 67; 131 N. Y. 570; State v. Trammell, 106 Mo. 510; People v. Board, 46 Hun, 296; People v. Cromwell 102 N. Y. 477; People v. Super's, 53 Hun, 254.

either denying facts as stated by petitioner, or stating new facts sufficient to defeat his right.[1] Or the issue may be made by filing a demurrer to the alternative writ.[2]

In practice, a distinction is made between a return and a demurrer to an alternative writ for insufficiency of law. The *mandamus* may be considered to serve as a declaration or complaint; and if in the opinion of the respondent it does not state facts sufficient to impose the legal duty, he may demur.[3] But the return is in no case conclusive; and any issue, either of fact or law arising thereon, will be disposed of according to the practice of the jurisdiction, in which the action for *mandamus* has been instituted. If respondent declines to obey the command of the writ, he may select any one of four courses open to him: (1) he may object because of defects apparent upon the face of the writ; (2) he may demur; (3) deny the facts upon which the writ has been granted; (4) or allege other facts by way of confession and avoidance.[4]

§ 369. **Peremptory writ; when allowed means of enforcing obedience.**—If in his return to the alternative writ, or to a preliminary order to show cause, the defendant shall fail to disprove the facts stated by the relator; or if in an argument upon

[1] Canova v. State, 18 Fla. 512; Levy v. Inglish, 4 Ark. 65; Goss v. Vermontville etc., 44 Mich. 319; Woodruff v. N. Y. & N. E. R. R., 20 Atl. R. 17; Society etc. v. Com., 52 Pa. St. 125; People v. Com'rs, 11 How. Pr. 89; Ray v. Wilson, 10 So. R. 613; People v. Com'rs, 6 Colo. 202; Springfield v. Com'rs, 10 Pick. 59.

[2] Com. v. Alleg. Co., 37 Pa. St. 279; Legg v. Mayor, 42 Md. 203; Neuse v. Com'rs, 6 Jones L. (N. C.) 204; State v. Griscom, 3 Halst. (N. J.) ; Soutter v. Madison, 15 Wis. 30; Tallapoosa v. Tarver, 21 Ala. 661; Pollock v. Lawrence, P. L. J. 373; Loute v. All. Co., 10 Ib. 241; People v. Baker, 35 Barb. 105.

[3] People v. Ransom, 2 N. Y. 490; People v. Hayt, 66 Ib. 606; Canal Trs. v. People, 12 Ill. 254; State v. Baily, 7 Iowa, 390; State v. Johnson Co. Bd., 10 Iowa, 157; People v. Baker, 35 Barb. (N. Y.) 105; State v. Haben, 22 Wis. 660; People v. Hilliard, 29 Ill. 413; as to defence of officer *de facto*, see Kelly v. Wimberly, 61 Miss. 548; St. Louis v. Green, 7 Mo. App. 468; People v. Logan Co., 63 Ill. 374; Fowler v. Pierce, 2 Cal. 165; State v. Jones, 10 Iowa, 65; People v. Metro. Pol. Bd., 26 N. Y. 216; Maddox v. Graham, 2 Met. (Ky.) 56.

[4] 2 Dillon's Mun. Corp., § 877, citing: Commonwealth *ex rel.* Armstrong v. Allegheny Co. Com'rs, 37 Pa. St. 277; Same *ex rel.* Middleton v. Same, 37 Ib. 237; Tarver v. Tallapoosa Com'rs Ct., 17 Ala. 527; Commonwealth v. Lyndall, 2 Brew. (Pa.) 425; Dane v. Derby, 54 Me. 95; Benbow v. Iowa City, 7 Wall. 313; U. S. v. Ft. Scott, 99 U. S. 152; Elliott v. Oliver, (Or. 92) 29 Pac. R. 1.

a demurrer, either to the writ or to the return, the legal insufficiency of defendant's position be evident, a peremptory *mandamus* will issue.[1] If in the first instance the facts are unquestionable, and the rights of the relator clear; and especially if the matter is one of public interest and requiring immediate attention,[2] the peremptory *mandamus* may be issued at once.[3]

So far as form is concerned, the rules generally applicable to framing and amending pleadings and process, so as to secure substantial justice, are permitted to operate within reasonable and appropriate limits.[4]

This remedy being peculiarly within the discretion of the court, it may be annulled, even after the issue of the peremptory and final writ, if it be proven that unfair or improper means have been used in procuring it, or that the duty commanded is not required by law.[5] If the validity of the writ be admitted or if the defendant fails in his attempt to impugn it, he must obey its command; and such obedience is usually enforced, in the case of a municipal corporation, as the corporation cannot itself be adjudged guilty of contempt,[6] by attaching the persons of those officials who are actually in contempt by their refusal or neglect to observe the commands of the writ.[7]

Equity will not usually interfere by injunction to stay the proceedings attendant upon a peremptory *mandamus*, upon the ground that equity follows the law,[8] and it is no excuse for a municipality to show that it has been enjoined by a State court

[1] State v. Field, 37 Mo. App. 83; Com. v. Pittsburgh, 34 Pa. St. 496; Morganthaler v. Cities, 4 Ohio Cir. Ct. 495; Dow v. Hembert, 91 U. S. 294; People v. Seymour, 6 Cow. 579; Comm'rs v. Aspinwall, 24 How. (U. S.) 376; Weber v. Zimmerman, 23 Md. 45; Harkins v. Tencerbox, 2 Minn. 344; People v. Rich. Co. Sup., 28 N. Y. 112; *In re* Rogers, 7 Cow. 526; Attala Co. B'rd v. Grant, 17 Miss. 77; State v. Elkinton, 30 N. J. L. 335.

[2] People v. St. Louis & S. F. Ry., 47 Hun, 543; Knox Co. v. Aspinwall, 24 How. 376.

[3] Lutterloh v. Cumberland Co. Comm'rs, 65 N. C. 403; People v. Greene Co. Sup., 64 N. Y. 600; Hugg v. Camden, 39 N. J. L. 620; Cleveland v. Jer. City, 39 Ib. 629; State v. Hud. Co. Freeh., 35 Ib. 269; State v. Jones, 1 Ired. (N. C.) 129.

[4] Peo. v. Dutchess Co. etc., 58 N. Y. 152 and cases cited.

[5] State v. Johnson Co. J., 12 Iowa, 237; Weber v. Zimmerman, 23 Md. 45; Peo. v. Everett, 1 Cai. (N. Y.) 8.

[6] Bass v. Shakopee, 27 Minn. 250; Davis v. New York, 1 Duer, 451; London v. Lynn, 1 H. Bl. 206.

[7] Commonwealth v. Taylor, 36 Pa. St. 263; Regina v. Heathcote, 10 Mod. 56; State *ex rel.* Havemeyer v. Min Pt., 22 Wis. 396.

[8] Col. Co. v. Bryson, 13 Fla. 281.

from performing a duty, the enforcement of which is commanded by a Federal *mandamus*.[1] Under exceptional circumstances, when a municipality has been enjoined or otherwise prevented from obeying a Federal process, a U. S. marshal will be appointed a commissioner to carry such process into effect.[2]

§ 370. **Final judgment—Effect of resignation or death of officials.**—If, according to the general practice, the *mandamus* proceedings be instituted and carried on against the municipality in its corporate capacity, it is no ground for abating the judgment, granting a peremptory *mandamus*, that the officials who are to execute its commands have resigned, or that the membership of any board on whom it is obligatory has been changed.[3] But when judgment is rendered against an official, his resignation before it is entered will render it ineffectual as against his successor, unless such successor be made a party to the proceeding.[4]

This distinction, as to the effect of a resignation of an officer, whose duty is to obey the commands of a peremptory writ of *mandamus*, where the writ is directed against the municipality, and where it is directed against the individual official, is exceedingly important where, in pursuance of the effort of a municipal corporation to escape its liability to its creditors, the officials who would have to obey the *mandamus* resign their offices before the peremptory writ can be served upon them. Their resignation does not have any effect, if the writ is directed

[1] Riggs v. Johnson City, 6 Wall. 166; Seibert v. Lewis, 122 U. S. 284; Hill v. Scott, 32 Fed. Rep. 716; Wash'n Co. Suprs. v. Durant, 9 Wall. 415; Davenport v. Lord, 9 Ib. 409; State v. Rainey, 74 Mo. 229; Lansing v. County Tr., 1 Dillon, C. C. 522; United States v. Silverman, 4 Ib. 224; Weber v. Lee Co., 6 Wall. 210; United States v. Keokuk, 6 Ib. 214, 518; Amy v. Des Moines, 11 Ib. 136; Dillon Mun. Corp. § 861.

[2] Lans. v. County Treas., 1 Dillon C. C. 522; Lee Co. Sup. v. Rogers, 7 Wall. 175; Rees v. Watertown, 19 Wall. 107; Heine v. Levee Com'rs, 19 Ib. 655.

[3] Leavenworth Co. Comm'rs v. Sellew, 99 U. S. 624; Stat *ex rel.* Soutter v. Madison Coun., 15 Wis. 30; Louisville v. Keen, 18 B. Mon. 9, 13; People v. Collins, 19 Wend. 68; Maddox v. Graham, 2 Met. (Ky.) 56, 63, 71; Pegram v. Cleve. Co. Comm'rs, 65 N. C. 114; Columbia Co. Com. v. King, 13 Fla. 451; Leavenworth v. Kinney, 99 U. S. 623; see 2 Dillon Mun. Corp. § 861 a to § 861 d, inc.

[4] Secretary of the Int. v. McGarraham, 9 Wall. 298, 313; Beachy v. Lamkin, 1 Idaho, 48; State *ex rel.* Soutter v. Mad. Com., 15 Wis. 30; State v. Elkinton, 30 N. J. L. 335; Rees v. Watertown, 19 Wall. 107; United States v. Boutwell, 17 Wall. 604.

against the corporation; but if it is directed against the official, his prior resignation will render it nugatory, as, in his character as a private citizen, he is under no obligation to obey the writ of *mandamus* for the performance of an official duty. But it is held, where an official is declared by statute to continue in office, until his successor has been appointed or elected, and has qualified, that a resignation does not release such officer from the duty of obeying a peremptory writ issued against him as the incumbent of the office, unless his resignation has been accepted and his successor has been appointed.[1] But where the statute expressly declares that a resignation shall take effect, as soon as it is filed with a certain officer, the officer need not obey a writ of *mandamus*, which is served upon him after such filing of the resignation, although his successor has not been appointed or elected.[2]

§ 371. **Mandamus as applicable to municipal elections and to elective officers.**—In the constantly recurring litigation, arising out of our American system of selecting municipal officials by popular suffrage, the writ of *mandamus* has been of frequent use. If, in consequence of the refusal or delay of the officials to act, on whom the duty of calling an election is incumbent, the day appointed has passed and no election has been held, the municipality, or their officials, may be compelled by *mandamus* to perform their duty in this respect,[3] and the necessary preliminary steps in providing for the calling of such an election may also be required.[4] When, also, a vacancy occurs, and by law a special election is necessary for the purpose of filling it, *mandamus* in the name of the State will furnish the most appropriate and effective remedy for compelling the holding of the election.[5]

[1] Badger v. United States, 93 U. S. 599; s. c., 6 Biss. 308; Jones v. Jefferson, 66 Tex. 576; Edwards v. United States, 103 U. S. 471; Salamanca v. Wilson, 109 U. S. 671.

[2] Amy v. Watertown, 130 U. S. 302; City of Watertown v. Robinson, 69 Wis. 230.

[3] Demarest v. Wickham, 63 N. Y. 334; Lewis v. Marshall, 16 Kan. 102; Glencove v. Peo., 78 Ill. 382; Peo. v. Fairbury, 51 Ill. 149; State v. Smith, 22 Minn. 218; State v. Tolan, 33 N. J. L. 195; McConike v. State, 17 Fla. 238; Atty. Gen. v. Lawrence, 11 Mass. 90; State v. Holden, 19 Neb. 249.

[4] Gibbs v. Hampden, 19 Pick. 298; *In re* Morse, 18 Ib. 443; *In re* Strong, 20 Ib. 484; Lamb v. Lynd, 44 Pa. St. 336; State v. Boden, (N. J.) 16 Atl. Rep. 58.

[5] Fish v. Weatherwax, 2 Johns. Cas. 217; State v. Rahway, 33 N. J. L. 110; People v. Brooklyn Council, 77 N. Y. 503; People v. Carrique, 2

And if in place of being elected directly by popular vote, the municipal officer is appointed by one or more select bodies or councils, acting under rules laid down in the charter, by which the time for such appointment is determined, a mandatory duty is imposed and its performance may be compelled by *mandamus*.[1]

The control and supervision of elections, at which municipal, State and national officers are elected, are often vested in municipal officials and boards; and they may be compelled by *mandamus* to perform all such duties thus imposed upon them, which are not purely judicial,[2] such as canvassing election returns,[3] or announcing the result.[4]

The duty, which the returning officer or canvassing body owes to the person elected, of giving him a proper certificate of his election, may also be compelled by a *mandamus*,[5] unless the person so elected fails to show that he possesses the necessary and legal qualifications for the office, whenever that question has been raised before the canvassing board.[6]

Hill (N. Y.) 93; Lamb v. Lynd, 44 Pa. St. 336; Rex v. Cambridge, 4 Burr. 2011.

[1] Lamb v. Lynd, 44 Pa. St. 336; Kerr v. Trego, 44 Pa. St. 292; Brightley's Elect. Cases, 270, 455, 466, 656.

[2] Kimere v. State, 129 Ind. 589; Rice v. Smith, 9 Iowa, 570; McDiarmid v. Fitch, 27 Ark. 106; State v. Marston, 6 Kan. 524; State v. Shakespeare, 6 So. Rep. 592; State v. Batl, 4 Ib. 495; State v. Parish, 2 Ib. 305; State v. Meadows, 1 Kan. 90; State v. Magill, 4 Ih. 415; People v. Taylor, 45 Barb. 129; Roberts v. Davidson, 83 Ky. 279; Parker v. Hubbard, 64 Ala. 203; People v. French, 24 Hun, 63; State v. Palmer, 18 Neb. 644; Monroe v. State, 63 Miss. 135; Dickson v. Hill, 75 Ga. 369; State v. Cummings, 17 Neb. 311; People v. Registrar, 20 N. E. R. 611; State v. Mayor, 43 N. J. L. 542; People v. Purviance, 12 Ill. Ap. 216; Ridley v. Dougherty, (Iowa) 42 N. W. R. 78; State v. Wilson, (Neb.) 38 N. W. R. 31; Ramsey v. Clerk, 52 Mich. 344.

[3] State v. Howe, (Neb. 92) 44 N. W. R. 874; Peo. v. Super's, 47 Cal. 205; Peo. v. Hilliard, 29 Ill. 419; Kisler v. Cameron, 39 Ind. 488; State v. Carney, 3 Kan. 88; Territory v. B. Co., (New Mex.) 20 Am. & Eng. Cor. Cases, 44; Marshall v. Kerns, 2 Swan. (Tenn.) 68; O'Ferrall v. Colby, 2 Minn. 180; Taylor v. Taylor, 10 Ib. 107; Bacon v. York, 26 Me. 491; State v. Steers, 44 Mo. 228; State v. Rodman, 43 Ib. 256; Mayo v. Freeland, 10 Ib. 629; Peo. v. Van Cleve, 1 Mich. 362; Atty. Gen. v. Barstow, 4 Wis. 749.

[4] Peo. v. Saloman, 46 Ill. 415.

[5] Putman v. Langley, 133 Mass. 204; *In re* Strong, 20 Pick. (Mass.) 484; State v. Judge Cir. Ct., 13 Ala. 805; Clark v. McKenzie, 7 Bush. 523; Kisler v. Cameron, 39 Ind. 488; State v. Co. Jud., 7 Iowa, 186; Barnes v. Gottschalk, 3 Mo. App. 111; Roberts v. Rivers, 27 Ill. 242; Thompson v. Judge, 9 Ala. 338; State v. Baily, 7 Iowa, 390; Roberts v. Rivers, 27 Ill. 242; Ingerson v. Berry, 14 Ohio, 315; Territory v. Bern. Co., *supra*.

[6] O'Farrall v. Colby, 2 Minn. 180;

If, on receiving such a certificate he meets with a refusal of the proper officer to administer the oath of office to him, *mandamus* will lie, provided the office be vacant.[1] But where an office is filled by one, who holds it *de facto* and under color of right, and who is exercising the functions of the office, *mandamus* is not the proper remedy for determining between the two claimants the question of title to the office. *Quo warranto* is the proper remedy for this case, and the question of right to the office must first be determined by *quo warranto*, before *mandamus* will lie to compel parties in possession of the office to turn it over to the rightful claimants.[2]

§ 372. **Mandamus as applicable to removal and suspension of officials.**—In some cases, where a municipal official is removable by the municipality for malfeasance or nonfeasance, a *mandamus* will lie to compel the exercise of this power,[3] and the power to remove being inclusive of power to suspend for a reasonable time,[4] it may be inferred that a *mandamus* will be granted to compel the suspension of a municipal official pending investigation. On the other hand, if the powers of suspension or removal be illegally exercised, a *mandamus* will generally issue to reinstate the injured official.[5] But although the act of

State v. Moffatt, 5 Ohio, 358, 362; State v. Newman, 91 Mo. 445.

[1] *In re* Heath, 3 Hill (N. Y.) 42; *Ex parte* Diggs, 52 Ala. 381; *Ex parte* Wiley, 54 Ib. 226; State v. McCullough, 3 Nev. 202; Clayton v. Carey, 4 Md. 26; State v. Andr, 36 Mo. 70; Lindsley v. Trickett, 20 Tex. 516; Morley v. Power, 5 Lea, (Tenn.) 691; Putnam v. Langley, 133 Mass. 204; Peo. v. Matteson, 17 Ill. 167; Peo. v. Head, 25 Ib. 287; Peo. v. Hilliard, 29 Ib. 413; Peo. v. Langham, 20 Barb. (N. Y.) 302; Peo. v. Trustees, 7 N. Y. Sup. 125; Atty. Gen. v. Mayor, 128 Mass. 312; State v. Harlam, 25 Neb. 33; McDermott v. Miller, 45 N. J. L. 253; State v. Rahway, 33 Ib. 111.

[2] Ellison v. Aldermen of Raleigh, 89 N. C. 125; Kelley v. Edwards, 69 Cal. 460; St. Louis Co. v. Sparks, 10 Mo. 118; People v. Matterson, 17 Ill. 167; Meredith v. Supervisors of Sacramento, 50 Cal. 433; Denver v. Hobart, 10 Nev. 28; Brown v. Turner, 70 N. C. 93; Warner v. Myers, 4 Oreg. 72; People v. Hilliard, 29 Ill. 413; Bonner v. State, 7 Ga. 473; State v. Deliesseline, 1 McCord, 52; People v. Head, 25 Ill. 287; State v. Auditor, 36 Mo. 70; People v. New York, 3 Johns. Cas. 79; see State v. Falconer, 44 Ala. 696; Strong's Case, 20 Pick. 497; Lindsey v. Luckett, 20 Tex. 516; State v. Pilot, 21 La. An. 336; State v. John, 81 Mo. 13; Underwood v. White, 27 Ark. 382; Banton v. Wilson, 4 Tex. 400; Conlin v. Aldrich, 98 Mass. 557; Putnam v. Langley, 133 Mass. 204.

[3] Delahanty v. Warner, 75 Ill. 185.

[4] Shannon v. Portsmouth, 54 N. H. 183; 1 Dillon Mun. Cor., sec. 247, note 1, and cases cited.

[5] Angell & Ames, secs. 702, 706; Dew v. Judges, 3 Hen. & M. (Va.) 1;

removal has been done irregularly; if the court inquires into, and establishes the fact that good grounds for the removal existed,[1] or if the justice of the removal is admitted by the official applying for the *mandamus*, it will be denied.[2]

§ 373. **Mandamus, as applicable to custodians of public records and of public funds.**—This writ is the appropriate process for a legally elected or appointed official, to obtain possession of the records, seal of office and other property of which he is to be the custodian,[3] as against his predecessor or a usurper,[4] or against a committee acting illegally to compel delivery of documents belonging to the city.[5] *Mandamus* will lie against a custodian of public records; as, for example, a clerk having charge of registration lists, poll books or election returns,[6] to compel him to permit an inspection of them for any proper purpose; and, under reasonable precautionary regulations, to allow copies to be made thereof, on the application of any citizen having an interest therein.[7]

When, in order to give the right of appeal, officials must make a record of their action, they may be compelled to do so by *mandamus*;[8] and an official may be compelled to record a deed or file a paper,[9] or to correct his records.[10] Commissioners may

State v. Watertown Council, 9 Wis. 254; Delahanty v. Warner, 75 Ill. 185; State v. Patterson, 38 N. J. L. 190; State v. Jer. City, 25 Ib. 536; State v. Gall. Co. Commissioners, 1 Ill. 25; Delacy v. N. River N. Co., 1 Hawks (N. C.) 274.

[1] Rex v. London, 2 D. & E. T. R. 181; Rex v. Bristol, 1 D. & R. 389; s. c., 5 B. & A. 731; *In re* Paine, 1 Hill (N. Y.) 665, 667; Shaw v. Mayor etc., 21 Ga. 280; s. c., 25 Ga. 590.

[2] Rex v. Axbridge, Cowper, 523.

[3] State v. Bacon, 6 Neb. 286; Stone v. Small, 54 Vt. 498; Keokuk v. Merriam, 44 Iowa, 432; Conlin v. Aldrich, 98 Mass. 357; Amer. R. F. Co. v. Haven, 101 Ib. 398.

[4] Bates v. Plymouth, 14 Gray, 163; Perkins v. Weston, 3 Cush. 549; Parish v. Stearns, 21 Pick. 156; *Ex parte* Strong, 20 Ib. 484; Taylor v. Henry, 2 Ib. 397; Kimball v. Lamprey, 19 N. H. 215; Com. v. Athearn, 3 Mass. 285; Prop'rs v. Slack, 7 Cush. 226; People v. Kilduff, 15 Ill. 492.

[6] State v. Kirkley, 20 Md. 85.

[6] State v. Hoblitzelle, 85 Me. 620.

[7] Hayes v. White, 66 Me. 305; Stockman v. Brooks, 27 Pac. R. 746; O'Hara v. King, 52 Ill. 303; Diamond M. Co. v. Powers, 51 Mich. 145; Cormack v. Wolcott, 17 Am. & Eng. Corp. Cases, 309; State v. Rachac, 37 Minn. 372.

[8] State v. Field, 37 Mo. App. 83; Bennett v. McCaffrey, 28 Ib. 220; Warren Co. v. State, 15 Ind. 250.

[9] Trinity v. Lane, 79 Tex. 643; U. S. v. Hall, 7 Mackey, 14; Willflange v. McCollom, 83 Ky. 361; People v. Collins, 7 Johns. 549; *In re* Goodell, 14 Ib. 325; Strong's Case, Kirby (Conn.) 345.

[10] People v. Brooklyn, 7 N. Y. S. 327; State v. Clayton, 34 Mo. App. 563;

also be compelled by *mandamus* to receive and file a petition,[1] or to affix a seal to a document requiring it.[2] So, also, a *mandamus* will lie to compel the treasurer of a municipality to receive coupons for taxes, if this is required by statute,[3] or to issue a duplicate tax bill, with the legal rate stated thereon.[4]

§ 374. **Mandamus against school officers.**—*Mandamus* will lie against a school board,[5] to compel a mandatory duty, such as the admission of a child to the public schools,[6] but not if the school is full;[7] and when it is the absolute duty of the trustees to introduce certain text books, *mandamus* will lie to compel them to perform that duty.[8]

When the act to be done is ministerial, *mandamus* will lie, even though it is to be performed upon the occurrence of a certain condition of facts; and it is discretionary with the school officers to decide according to their best judgment, whether such a condition exists.[9]

As it is the duty of school trustees controlling the school funds of a township to apply such funds to indebtedness for tuition, *mandamus* will lie to compel the performance of this duty.[10]

§ 375. **Mandamus in aid of the rights of municipal creditors.**—When, in pursuance of the almost unlimited powers which are possessed by the legislative authority over the disposition of the funds, revenues and general financial resources of municipal corporations, statutes have been passed making it mandatory upon them to levy taxes to meet their contractual

Ellis v. Bristol, 2 Gray, 370; Bower v. O'Brien, 2 Ind. 423; People v. Matteson, 17 Ill. 167.

[1] Hawkius v. Com'rs, 14 Ind. 521.

[2] Tapping on Mandamus, p. 96; 3 Black Com. 110; 2 Dillon's Mun. Corp. § 831, *n.*; Prescott v. Ganser, 34 Iowa, 175 (seal to a county warrant).

[3] Sands v. Edmunds, 116 U. S. 585.

[4] Hamilton v. State, 3 Ind. 452.

[5] Case v. Blood, 71 Iowa, 632.

[6] Peo. v. Board, 18 Mich. 400; State v. Osborne, 24 Mo. App. 309; State v. Duffy, 7 Nev. 342; Clark v. Board, 24 Iowa, 366; Peo. v. Board etc., 127 Ill. 613.

[7] *Re* Nicoll, 44 Hun (N. Y.) 340.

[8] State v. School Directors, 74 Mo. 21; Cf. Effingham v. Hamilton, 68 Miss. 523.

[9] People v. Coffey, 131 N. Y. 569; Trustees v. People, 121 Ill. 552; Newby v. Free, 72 Iowa, 379; State v. Duffy, 7 Nev. 342; Morley v. Power, 5 Lea, 691; Clark v. Board, 24 Iowa, 266; State v. Haworth, 23 N. E. R. 946.

[10] Gardner v. Haney, 86 Ind. 17; Smith v. Johnson, 69 Ib. 55; Jessup v. Carey, 61 Ib. 584; Board v. State, 61 Ind. 379; State v. Cooprider, 96 Ib. 279.

obligations, obedience to such statutes will be enforced by *mandamus*.[1] The power to contract connotes the obligation and power to meet financial liabilities incurred thereby,[2] in the mode prescribed by special law, or by the municipal charter or other legislative enactment. Such cases fall within the rules already laid down, governing the right to a *mandamus*, when the injured party to the contract has no other adequate redress; and for this reason, the writ will generally be granted.[3]

Neglect to exert the power of levying taxes, at the time legally appointed, does not prevent the issue of a *mandamus* at some future period, provided the indebtedness is still unpaid.[4] Not only will *mandamus* lie to compel the levy of assessments or the appropriation of funds by a municipality; but it will usually be granted, if invoked to compel the performance of any preliminary acts which may be necessary and usual in the

[1] Bloomfield v. Char. Oak Bk., 121 U. S. 121; Lilly v. Taylor, 88 N. C. 489; Howers App., 127 Pa. St. 134; 17 Atl. R. 862; Meyer v. Brown, 65 Cal. 583; Shelly v. St. Charles Co., 30 Fed. Rep. 603; Commonwealth v. Pittsb.. 34 Pa. St. 496; Chero. Co. v. Wilson, 109 U. S. 621; Wakely v. Muscatine, 6 Wall. 481; State v. Board, etc., 27 Ohio St. 96; Cincinnati etc. v. Clinton Co., 1 Ib. 77; Atchison v. Jefferson Co., 12 Kan. 127; Com. v. Pittsburgh, 88 Pa. St. 66.

[2] Com. v. Alle. Co. Comm'rs, 37 Pa. St. 277, 290; U. S. v. New Orleans, 98 U. S. 381; U. S. v. New Orleans, 17 Fed. Rep. 483; Knox v. Baton Rouge, 36 La. An. 427; Ralls. Co. v. U. S., 105 U. S. 733; Loan Ass'n v. Topeka, 20 Wall. 655, 680; Parkersb. v. Brown, 106 U. S. 582.

[3] State v. Anderson, 18 Atl. R. 584; Brown v. Gates, 15 W. Va. 131; Crane v. Fond du Lac, 16 Wis. 196; State v. Beloit, 20 Ib. 79; Hasbrouck v. Milw., 25 Ib. 122; State v. Jacksonville, 22 Fla. 21; State v. Guttenberg, 30 N. J. L. 660; Lexington v. Mulliken, 7 Gray, 280; Von Hoffman v. Quincy, 4 Wall. 535; Alden v. Alameda Co., 43 Cal. 279; Young v. Clarendon, 132 U. S. 340; Vance v. Lit. Rock, 30 Ark. 435; Com. v. Perkins, 43 Pa. St. 400; Newman v. Scott etc., 1 Heisk. 787; Davenport v. Lord, 9 Wall. 409; Heine v. Comm'rs, 19 Ib. 655; Rees v. Watertown, 19 Ib. 107; Klein v. Smith Co., 54 Miss. 254; Flagg v. Palmyra, 33 Mo. 440; Klein v. Warren Co., 54 Miss. 254; Col. Co. Comm'rs v. King, 13 Fla. 451; State v. Burbank, 22 La. An. 318; State v. Buff. Co., 6 Neb. 455; Kelly v. Wimberly, 61 Miss. 548; Hawley v. Fayetteville, 82 N. C. 22; Brown v. Crego, 32 Ia. 498; Kennedy v. Sacramento, 19 Fed. 580; see *contra*, Coy v. Lyons, 17 Ia. 1; State v. Davenport, 12 Iowa, 335; Eyerly v. Jasper Co., 72 Iowa, 149; Barnes v. Marshall Co., 56 Ib. 20; Miller v. McWilliams, 50 Ala. 427; Elmore Co. v. Long, 52 Ib. 277; Covington Co. v. Dunklin, 52 Ib. 28; Shinbone v. Randolph Co., 56 Ib. 183; Monaghan v. Phila., 28 Pa. St. 207; Commonwealth v. Pitts., 88 Pa. 66; Commonwealth v. Lancaster, 5 Watts (Pa.) 152.

[4] Limestone Co. v. Rather, 48 Ala. 433.

settlement by ministerial officials of the claims of municipal creditors; as, for example, to compel a council to order an estimate to be made of the amount of tax necessary,[1] or to compel the auditing board or auditor to perform his duty in the premises,[2] such as to audit the claim, or to issue a warrant or other certificate of indebtedness, when directed to do so by superior authority.[3]

But if the amount be uncertain, *mandamus* will not lie against an auditor, and the claimant will be relegated to a civil action whereby the extent of his right can be ascertained.[4] Hence, it has been the general, although by no means a uniform rule, that a creditor must, by a judgment obtained in a civil action, establish with certainty the amount of the municipal indebtedness to him, before a *mandamus* will be granted to compel the levy of the taxes which will be necessary to liquidate the indebtedness. A court will not anticipate in a controverted case a judicial determination of the validity of a claim, by issuing a *mandamus* to compel its payment.[5] In the Federal courts, *man-*

[1] Greenfield v. Moore, 33 Ind. 597.

[2] People v. Fulton, 53 Hun, 254; Attala v. Grant, 17 Miss. 77; Klein v. Warren, 51 Ib. 878; Klein v. Smith Co., 54 Ib. 254; Putnam Co. v. Allen, 1 Ohio St. 322; Peo. v. Com. Coun., 34 Mich. 201; State v. Earl, 42 N. J. L. 94; Crandall v. Amadar, 20 Cal. 72; Gerrard v. McKee, 11 Bush, 234.

[3] Babcock v. Goodrich, 47 Cal. 488; Com. v. Lancaster, 5 Watts, 152; U. S. v. Ottawa, 28 Fed. Rep.; State v. Fiedler, 43 N. J. L. 400; State v. Anderson, 18 Atl. R. 584; People v. Abbott, 45 Hun, 293; State v. Mount, 21 La. An. 352; Jack v. Moore, 66 Ala. 184.

[4] Raisch v. Board, 22 Pac. R. 890; People v. Barnes, 114 N. Y. 317; Crawley v. Mershor, 61 Ga. 284; Burnett v. Portage Co. etc., 12 Ohio St. 57; People v. Supervisors, 38 Mich. 421; People v. Flagg, 17 N. Y. 584; Cal. Bank v. Shabe, 55 Cal. 322; State v. Trustees, 61 Mo. 155; State v. Scott, 15 Neb. 147; Peo. v. Green, 1 Hun, 1; People v. Johnson, 100 Ill. 537; People v. Connolly, 2 Abb. Pr. N. S. 315; State v. Earle, 42 N. J. L. 94; People v. Harris, 23 How. Pr. 107; Tenn. etc. Co. v. Moore, 36 Ala. 371; Peo. v. Vantassel, (Mich.) 40 N. W. R. 847.

[5] Territory v. Woodbury, 44 N. W. R. 1077; State v. Snodgrass, 98 Ind. 546; Alden v. Alameda, 43 Cal. 270; Jerome v. Rio Grande, 18 Fed. R. 873; Greene v. Daniel, 102 U. S. 187; Crane v. Fond du Lac, 16 Wis. 196; Marsh v. Little Valley, 64 N. Y. 112; People v. Clark Co., 50 Ill. 213; State v. New Orleans, 30 La. An. 82; 30 Ib. 129; Buck v. Lockport, 6 Lans. 251; Brown v. Gates, 15 W. Va. 131; State v. Clay Co., 46 Mo. 231; Mansfield v. Fuller, 50 Ib. 338; State v. Trustees, 61 Ib. 155; Knapp v. Hoboken, 38 N. J. L. 371; State v. Floyd, 5 Iowa, 380; Lexington v. Mulliken, 7 Gray, 280.

damus is granted only after judgments, and in suits against municipalities it takes the place of an execution.[1]

In the New England States, there is no necessity for the use of the writ, to compel the payment of indebtedness incurred by counties, towns and similar political divisions; the property of the individual members of the corporation may by common law and immemorial usage be taken in execution against the municipality.[2] But, in the absence of express statutory provisions, there is outside of these States, no individual liability on the part of the inhabitants of a municipality, nor can private property be taken in execution to pay municipal debts.[3]

Municipal corporations are created for public, governmental and political purposes and it is a corollary of this proposition, that all property, of whatever nature, held by them in trust for carrying out such purposes, should be exempted from seizure and sale under execution.[4] Under any other theory, the paramount importance of the proper execution of its public functions would be lost sight of, and its usefulness in subserving the interests of the community curtailed or destroyed.[5]

But when a judgment has been recovered, and either under the general principle above stated,[6] or under some local statute, execution is refused;[7] or when issued is returned unsatisfied;

[1] Greene Co. v. Daniel, 102 U. S. 187; Heine v. Levee Com'rs, 19 Wall. 655; McClung v. Silliman, 6 Wheat. 601; Bath Co. v. Amy, 13 Wall. 244; Kendall v. U. S., 12 Pet. 584; McIntire v. Wood, 7 Cranch, 504; Davenport v. Dodge, 105 U. S. 237; Smith v. Bourbon, 127 Ib. 105; Labette v. Moulton, 112 U. S. 217; 2 Dil. Mun. Corp. 856, 860, *et seq.*

[2] Bloomfield v. Charter O. Bk., 12 U. S. 129; Eames v. Savage, 77 Me. 212; Beardsley v. Smith, 16 Conn. 368; Hawkes v. New. Co., 7 Mass. 461, 463; Hill v. Boston, 122 Ib. 344; Chase v. Mer. Bk., 19 Pick. 564; Gaskill v. Dudley, 6 Met. (Mass.) 546.

[3] Reese v. Watertown, 19 Wall. 107, 122; Mill v. McWilliams, 50 Ala. 427; see also, *ante*, § 212; Horner v. Coffey, 25 Miss. 434; Merriwether v. Garrett, 102 U. S. 472; Crowell v. Sonoma Co., 25 Cal. 313; Symonds v. Clay Co. Sup., 71 Ill. 355; Sherbourne v. Yuba Co., 21 Cal. 113; Kincaid v. Hardin Co., 53 Iowa, 430; Flori v. St. Louis, 69 Mo. 341.

[4] Edgerton v. Municipality, 1 La. An. 435; Municipality v. Hart, 6 Ib. 570; U. S. v. B. & O. R. Co., 17 Wall. 322; Meriwether v. Garrett, 102 U. S. 472; *ante* §§ 196, 212.

[5] 2 Dillon Mun. Corp. §§ 576, 577, and cases cited. See *ante*, sec. 196.

[6] Morrison v. Hankson, 87 Ill. 587; Elrod v. Bernadotte, 53 Ib. 368; Chicago v. Hasley, 25 Ib. 598; Bloomington v. Brokaw, 77 Ill. 194.

[7] Monaghan v. Phila., 28 Pa. St. 207; Loute v. Allegheny Co., 10 Pitts. L. J. 24; Pollock v. Lawrence Co., 7 Ib. 373.

a *mandamus* will issue to compel the levy of a tax to be applied to satisfaction of the judgment creditor.[1]

§ 376. **Mandamus to compel levy of a special tax for specific object.** — The power of a municipal corporation to levy taxes is limited by the terms of the statutory enactment conferring the power, and must generally be expressly granted, although it may arise by necessary implication.[2]

If the power to create a debt is authorized by statute, but the power to levy taxes to provide for its payment is by the same or by any other statute limited and abridged, either as to amount or objects, then it is very evident that no *mandamus* will issue at the suit of any creditor to compel the exercise of the power of taxation beyond these limits.[3] For in such a case, the object aimed at would be illegal and beyond the power of the municipality.[4] In the absence of express statutory authority for the creation of municipal obligations, it is even more evident that the municipality is not bound, and that in all such cases of implied obligation no *mandamus* will lie.[5] A distinction is to

[1] Peoria Co. v. Garrison, 82 Ill. 435; United States v. Oswego Twp., 28 Fed. R. 55; King, etc., v. Otoe Co., 27 Ib. 800; Klein v. Warren Co., 51 Miss. 278; Klein v. Smith Co., 54 Ib. 254; Corpus Christi v. Waessner, 54 Tex. 462; Com. v. Pittsburgh, 88 Pa. St. 66; Fry v. Comrs., 82 N. C. 304; State v. Jackson Co., 19 Fla. 17; State v. Elizabeth, Treas., 42 N. J. L. 79; 42 Ib. 94; Fisher v. Charlestown, 17 W. Va. 595; 17 Ib. 682; United States v. Ottawa, 28 Fed. R. 407; State v. New Orls., 30 La. An., pt. 1, 705; Coy v. Lyons, 17 Iowa, 1; Louisiana *ex rel.* v. St. Martins, etc., 111 U. S. 716; Britton v. Platte City, 2 Dillon C. C. 1; Frank v. San Fran., 21 Cal. 668; Schaffer v. Cadwallader, 36 Pa. St. 126; Galena v. Amy, 5 Wall. 705; State v. King, 44 Mo. 116; Rogers v. People, 68 Ill. 154; State v. Milw. Council, 20 Wis. 87; State v. Beloit, 20 Ib. 79; 20 Ib. 501.

[2] See as to taxation *ante*, chap. xv.

[3] Clay Co. v. McAleer, 115 U. S. 616; East St. Louis v. U. S. *ex rel.*, 110 U. S. 321.

[4] People v. Hyde Pk., 117 Ill. 462; *In re* M. E. Church, 66 N. Y. 395; Vance v. Lit. Rock, 30 Ark. 435; U. S. v. Miller Co., 4 Dill. 233; U. S. v. Mayor etc., 2 Woods, 230; U. S. v. Carroll Co., 18 Wall. 71; U. S. v. Clark Co., 95 U. S. 769; State v. Board, 18 Atl. Rep. 571.

[5] U. S. v. Clark Co., 96 U. S. 212; U. S. v. Macon Co., 99 U. S. 582; (Cf. with this case Harshman v. Knox Co., 122 U. S. 306; and Brownsville v. Loague, 129 U. S. 493;) Knox Co. v. U. S., 109 U. S. 229; Williamson v. Keokuk, 44 Iowa, 88; People v. Jackson, 92 Ill. 444; Chicot Co. v. Kruse, 47 Ark. 80; Sykes v. Columbus, 55 Miss. 115; McPherson v. Foster, 43 Iowa, 48; State v. Macon Co., 68 Mo. 29; as to powers by implication, U. S. v. New Orleans, 98 U. S. 391; U. S. v. Lincoln, 5 Dill. C. C. 184, 194, and cases cited.

be recognized in this connection between the right to the levy of a special tax to pay municipal debts, where the debt is a negotiable bond, and where it is a non-negotiable instrument, such as a warrant. The power to levy a tax may be implied as an intended means of paying the former, but it would never be implied in favor of the latter.[1] And if *mandamus* to levy a tax would be issuable at all, at the instance of the holders of warrants and other non-negotiable debt, it must be in pursuance of an express authority, and is limited to the amount or rate of taxation authorized.[2]

The municipal creditor is not entitled to a *mandamus* to enforce the liquidation of a bonded indebtedness when, although the original statute authorizing the issue was valid, it had been abrogated prior to the issue of the bonds.[3] But the rule is otherwise, where a constitutional restriction is imposed subsequent to the contraction of the debt, but prior to the levy of the tax for its payment.[4]

§ 377. **Mandamus as applicable to municipal improvements.**—Where a mandatory duty is imposed by charter or other statute upon municipal corporations, to make improvements, such as the laying out of streets and highways and keeping them in repair, *mandamus* will lie to compel its performance,[5] but the duty must be clear.[6]

The erection of certain buildings, provided for by statute, may be compelled by *mandamus*.[7] But here, as in other similar cases, if the municipal authorities are invested with a discretion as to

[1] 2 Dillon Mun. Corp. § 862.

[2] Carroll Co. Sup. v. United States, 18 Wall. 71; United States v. Vernon Co. Court, 3 Dillon, 281.

[3] Brownsville v. Loague, 129 U. S. 493.

[4] Fisk v. Jefferson Par. etc., 116 U. S. 131; *Ex parte* Selma etc., 45 Ala. 696; see *ante*, § 14.

[5] Perrine v. Twp., 48 Mich. 641; Peo. v. San Luis, etc., 56 Cal. 561; Peo. v. Bloomington, 63 Ill. 207; State v. Super's, 41 Wis. 28; Trus. v. Kinner, 13 Bush. 334; Pumphrey v. Mayor, 47 Md. 145; State v. Demarce, 80 Ind. 519; State v. Board, 80 Ib. 478; Uniontown v. Com., 34 Pa. St. 293, 296; Com'rs v. Com., 72 Ib. 24; Ottawa v. Peo., 48 Ill. 233; Richards v. Com'rs, 120 Mass. 401; Peo. v. San Francisco, 36 Cal. 595; Hammar v. Covington, 3 Met. (Ky.) 494; Peo. v. Collins, 19 Wend. 36; Peo. v. Brooklyn, 23 Barb. 404; Reading v. Com., 11 Pa. St. 196; Peo. v. Champion, 16 Johns. 61; Bloomington v. Bay, 42 Ill. 503; Chicago v. Robbins, 2 Black, 418.

[6] Com. v. Peo., 99 Ill. 587; State v. Wood Co., 72 Mo. 629.

[7] Peo. v. Com., 45 Barb. 473; Manor v. McCall, 5 Ga. 522.

the expediency or advisability of the proposed improvements, no *mandamus* will issue to control such discretion.[1] But after the improvements have been consummated, *mandamus* will lie to compel the payment of damages to the property owners affected thereby[2] by a levy of taxes, or by issue of bonds for the purpose of raising the necessary funds.[3] So, also, will *mandamus* be granted to compel the taking of any of the usual preliminary steps which may be necessary to reimburse any owner, whose property has been taken or injured by the exercise of the power of eminent domain.[4]

§ 378. **Nature of quo warranto.**—In the case of an usurpation of a municipal office, or of the illegal exercise of a public franchise, an information in the nature of a *quo warranto* will lie.[5]

The principles, underlying the ancient common law writ of *quo warranto*, as regulated by the statute of Anne, have become part of the common law of our States, either by implication or by express declaration of the Legislatures.[6]

[1] Trans. v. Skinner, (Mich.) 40 W. W. Rep. 234; Com. v. Henry, 49 Pa. St. 530; People v. Manhattan Ry. Co., 22 Abb. N. C. 393; State v. Henry Co., 31 Ohio St. 211; State v. Morris, 43 Iowa, 192; Rice, etc., v. Worcester, 130 Mass. 575; Hitchcock v. Com'rs, 131 Ib. 519; Haskins v. Super's, 51 Miss. 506; Co. of St. Clair v. Peo., 85 Ill. 396; Mayor v. Roberts, 34 Ind. 471; Hill v. Worcester, 4 Gray, 414; State v. Essex, 3 Zab. N. J. 214; Peo. v. Croton Aq. Bod., 26 Barb. 240.

[2] Wilson v. Berkstresser, 45 Mo. 283; Minhinnah v. Haines, 29 N. J. L. 388; Peo. v. Supervisors, 4 Barb. 64; Trustees, etc., v. Johnson, 2 Cart. (Ind.) 219; State v. Keokuk, 9 Iowa, 438; Peo. v. Lowell, 9 Met. 144; Treat v. Middletown, 8 Conn. 243; Justices, etc., v. Jefferson, 1 Coldw. (Tenn.) 419.

[3] Miller v. Bridgewater, 29 N. J. L. 54; Jonnston v. Super's, 19 Johns. 272; State v. Keokuk, 9 Iowa, 438; Brock v. Hisben, 40 Wis. 674; Higgins v. Chicago, 18 Ill. 276; Duncan v. Louisville, 8 Bush, 98.

[4] Ryan v. Hoffman, 26 Ohio St. 109; Rudisill v. State, 40 Ind. 485; State v. Wilson, 17 Wis. 687; Dodge v. Essex, 3 Met. (Mass.) 380; Carpenter v. Bristol, 21 Pick. 258; see, *ante*, § 249.

[5] People v. Riordan, 41 N. W. R. 482; State v. Anderson, 45 Ohio St. 196; State v. Camden, 35 N. J. L. 217; Com. v. Allen, 128 Mass. 308; State v. Deliesseline, 1 McCord (S. C.) 52; Bartlet v. State, 13 Kan. 99; Demarest v. Wickham, 63 N. Y. 320; People v. Hall, 80 Ib. 117; Cochran v. McCleary, 22 Iowa, 75; Worthley v. Steen, 43 N. J. L. 542; 1 Dil. Mun. Corp. §§ 272, 275.

[6] 2 Dil. Mun. Corp. 888–9; Reynolds v. Bacowin, 1 La. An. 162; People v. Waite, 70 Ill. 25; Com. v. Cen. Pass. etc., Co., 52 Wend. 503; State v. Milwaukee, 45 Wis. 579; Peo. v. Thompson, 16 Wend. 655; State v. Cinc., 18 Ohio St. 262; Com. v. Cluley, 56 Pa. St. 270; State v. Tolan, 33 N. J. L. 195; State v. Pat. & H. Turn. etc., 21 Ib. 9; People v. Richardson, 4 Cow. N. Y. 101, 122, 133; Goddard v. Smithett,

In another section, the distinction between this remedy and *mandamus* is explained [1] and it need only be added that an information in the nature of a *quo warranto* should be granted, when the effect of final judgment will be to establish a controverted right, as, for example, to an office; while *mandamus* will lie to enforce a duty, arising out of a right already established or admitted, but not enforceable by ordinary process.[2]

So, if the right to hold an election be in dispute a *quo warranto* will lie;[3] whereas, if it be clearly the duty of the municipality to hold such election, *mandamus* is the appropriate remedy;[4] *quo warranto* will also lie to determine the title of a member to a seat in a city council [5] or his right to vote in or preside over a municipal body.[6]

§ 379. **By whom proceedings are instituted.**—Inasmuch as the creation of a municipal corporation, and the grant of a municipal franchise, is wholly discretionary with the State Legislature, and a matter over which it has exclusive control, no information in the nature of a *quo warranto* can be set in motion by a private citizen to prevent or inquire into the usurpation of such a franchise.[7] But when a municipal corporation has long existed and exercised its functions, with the acquiescence of the State; and its officials have been recognized by the State, the attorney general will be precluded from an information, which is intended to deprive the municipality of its franchise.[8] At common law, the attorney general alone has power to inquire

3 Gray (Mass.) 116. By the N. Y. Code, 1983, *et seq.*, the writ is abolished. An action must be brought in the name of the people on the relation of an interested person, who must give security and compensate the attorney general. Costs may be granted for or against the defendant. But execution will not issue against the people, nor is a municipal corporation or official required to give security for costs. See Code, §§ 1947–1956.

[1] See § 361.

[2] Commonwealth v. Meeser, 44 Pa. St. 341; *In re* Sawyer, 124 U. S. 200, 212; Hullman v. Honcomp, 5 Ohio, 237; Markle v. Wright, 13 Ind. 548; Peabody v. Flint, 6 Allen (Mass.) 52; Peo. v. Carpenter, 24 N. Y. 86; Peo. v. Draper, 15 Ib. 532; Com. v. Bank, 28 Pa. St. 389.

[3] Walton v. Develing, 61 Ill. 201; Dickey v. Reed, 78 Ib. 261; Peo. v. Galesburg, 48 Ib. 485.

[4] § 000, *ante*.

[5] Com. v. Meeser, 44 Pa. 341; State v. Frazier, 98 Mo. 426.

[6] Reynolds v. Baldwin, 1 La. An. 162; Cochran v. McCleary, 22 Iowa, 75; *In re* Sawyer, 124 U. S. 200.

[7] 2 Dil. Mun. Cor. § 898; Robinson v. Jones, 14 Fla. 256; State v. Vickers, 51 N. J. L. 180.

[8] Peo. v. Maynard, 15 Mich. 463.

into the usurpation of an office,[1] and in theory he is made the sole judge of the expediency of employing this remedy. This rule is so far modified that it has become usual as a matter of course for the State to begin such proceedings upon the relation of any person who is sufficiently interested to institute the suit; and such interest need be neither important nor engrossing.[2]

§ 380. **Practice and procedure—Power discretionary.**—Any lengthy discussion regarding the practice in *quo warranto* proceedings, regulated as it is by statutes in the various States, must be omitted here, and the reader is referred to the notes, and to an inspection of the authorities there cited.[3]

The granting of an information, in the nature of a *quo warranto*, is discretionary with the court, but the judicial discretion must be exercised in accordance with sound legal principles, and in the manner best calculated to advance the interests of justice.[4] If the matter be one which concerns the public interests alone, such as the abuse of a franchise, it is the duty of the State officials to seek a remedy, and to procure redress for the public wrong committed; and although in a case of this character the attorney general can, and often does, initiate the *quo warranto* proceedings on the relation of a private person, he should act in his official capacity. If the purpose of the proceedings be

[1] Commonwealth v. Allen, 128 Mass. 308; State v. Anderson, 45 Ohio St. 196.

[2] Com. v. Cluley, 56 Pa. St. 270; Com. v. Shepp, 10 Phila. 518; Eaton v. State, 7 Blackf. 65; Com. v. Bumm, 10 Phila. 162; (citizen claiming seat in municipal council.) State v. Tolan, 33 N. J. L. 195; (voter.) Churchill v. Walker, 68 Ga. 681; (every citizen.) Com. v. Jones, 12 Pa. St. 365; (defeated candidate.) Com. v. Meeser, 14 Ib. 341.

[3] *Order to show cause:* Com. v. Jones, 12 Pa. St. 365; *Process on filing:* Com. v. Smead, 11 Mass. 264; E. Dallas v. State, 73 Tex. 370; State v. Gummersall, 24 N. J. L. 529. *Removal to Federal Court:* Ames v. Kansas, 111 U. S. 449. *Forms:* State v. Parsons, 40 N. J. L. 1; Bank v. Niagara, 6 Cow. 196; People v. Van Slyke, 4 Ib. 297; Lavalle v. People, 68 Ill. 252; Eaton v. State, 7 Blackf. 65. *Verdict:* Thompson v. People, 23 Wend. 537. *Judgment:* State v. Herndon, 23 Fla. 287; Com. v. Fowler, 10 Mass. 290; Utica v. Scott, 8 Cow. (N. Y.) 721; Miners Bank v. U. S., 5 How. (U. S.) 213. *Costs:* Peter v. Blue, 40 Kan. 727; Peo. v. Loomis, 8 Wend. 396; State v. Jacobs, 17 Ohio, 143; State v. Jenkins, 46 Wis. 616. *Appeal:* Inter. & G. N. Ry. v. State, 73 Tex. 356; State v. Burnett, 2 Ala. 140.

[4] Commonwealth v. McCarter, 98 Pa. St. 607; Peo. v. No. Ch. Ry. Co., 88 Ill. 537; Peo. v. Callaghan, 83 Ib. 128; Peo. v. Waite, 70 Ib. 25.

merely to permit some disinterested person or meddler to interfere in a matter, which concerns the public welfare alone, the information should be refused.[1]

The court is bound to look into the motives actuating the relator; and if upon all the circumstances, as detailed in the affidavits, it seems clear to the court that he is impelled by wrong motives, and that the public necessity does not call for any action in his favor, his motion for a *quo warranto* will be denied.[2] So, likewise, if there be no adverse claimant,[3] or if respondent has acted in good faith.[4]

§ 381. **How far remedy by quo warranto is superseded by special statutory proceedings for the control of contested elections.**—It is sometimes difficult to determine to what extent the force and efficiency of the remedy under consideration is impaired by the legislative provision of special proceedings before judges of election or other *quasi*-judicial officers, for the purpose of settling all questions involved in municipal elections.

It is a general and salutary rule that the supervisory jurisdiction, exerted by the courts over elections and similar proceedings by means of the writs of *quo warranto*, *mandamus* and *certiorari*, should not be curtailed without sound reasons therefor; nor should the final decision of legal questions arising therein be relegated to tribunals, which may be incompetent to deal with them, and which are often swayed by partisan prejudice.[5]

The decisions conflict somewhat as to what *special* provisions for the trial of contested elections will operate as a repeal of the remedy by *quo warranto*.[6] The answer to the question,

[1] Peo. v. No. Ch. Ry. Co., 88 Ill. 537; Dorsey v. Ansley, 72 Ga. 460.

[2] Peo. v. Waite, 70 Ill. 25; Commonwealth v. Cluley, 56 Pa. St. 270.

[3] State v. Schnierle, 5 Rich. L. (S. C.) 299.

[4] Peo. v. Hartwell, 12 Mich. 508; Peo. v. Witherell, 12 Ib. 48. In State v. Tolan, 33 N. J. L. 195, the following rules have been laid down for the guidance of the discretionary powers of the court: "(1) The relator must not be a stranger or intermeddler. (2) He must not have concurred in the illegal act. (3) In the absence of fraud or intentional violation of law it must appear that public or private interests will not be seriously affected thereby." 2 Dil. Mun. Cor. § 901.

[5] Dil. Mun. Corp. § 891.

[6] Peo. v. Holden, 28 Cal. 123; Steele v. Martin, 6 Kan. 430; State v. Marlow, 15 Ohio St. 114; Com. v. Meeser, 44 Pa. St. 341; Com. v. Baxter, 35 Ib. 263. In New York, it has been held that the general jurisdiction of the courts over the municipal officers, is

whether such a special legislative provision abolishes the judicial supervision, always depends upon the phraseology contained in the provision itself, and upon the local laws regulating the subjects of *quo warranto* and elections.[1] For this reason, it can only be laid down as a general rule that the Superior Courts can only be considered to have lost the jurisdiction over cases arising out of contested election, where the legislative intent to bring about that result is manifest and certain.[2] It is, however, no violation of the constitutional provision, that the *judicial power shall be vested in a Supreme Court* and in *inferior courts*, for the Legislature to enact that a municipal council shall be the judge of the elections of its mayor, members and other officials, and that the ordinary courts of justice shall possess *no jurisdiction therein*.[3]

But when, as is usually the case, the wording of the statute is not so manifestly exclusive of judicial supervision, the statutory procedure will be considered as initiate and cumulative only, and the right of the party, who is unsuccessful before the special tribunal, to a *quo warranto* will not be denied.[4] But if the intent to supersede the ordinary jurisdiction of the courts is clear, the court will not inquire even into election frauds,[5] or into the eligibility of an elected official.[6]

§ 382. **User on part of usurper necessary.**—It is in all cases necessary to show a user on the part of the usurper; and

not ousted by a statute which makes an official board the judges of the election, and qualifications of its members. Peo. v. Hall, 80 N. Y. 117; *In re* Heath, 3 Hill (N. Y.) 42, 57; but it is otherwise, if they are the *final or sole* judges; Sellick v. Com. Council, 40 Conn. 359; Linega v. Rittenhouse, 94 Ill. 208; Peo. v. Metzker, 47 Cal. 524.

[1] 1 Dil. Mun. Corp., sec. 202; Kendall v. Camden, 47 N. J. L. 64; Peo. v. North, 72 N. Y. 124; Peo. v. Crissey, 91 Ib. 616; McVeany v. Mayor, 80 N. Y. 185; Peo. v. Detroit, 18 Mich. 338.

[2] 1 Dil. Mun. Corp. 202.

[3] Mayor v. Morgan, 7 Martin, La. 1; 9 Ib. (N. S.) 381.

[4] State v. Gates, 35 Minn. 385; State v. Governor, 1 Dutch. 331; Veany v. Mayor, 80 N. Y. 185; People v. Hull, 80 Ib. 117; People v. Kilduff, 15 Ill. 492; State v. Wilmington, 3 Har. (Del.) 294; State v. Clerk, 1 Dutch. 354; Hadley v. Mayor, 33 N. Y. 603; Gass v. State, 34 Ind. 424; Com. v. Allen, 70 Pa. St. 465; Macklot v. Davenport, 17 Iowa, 379; State v. Fitzgerald, 44 Mo. 425; Hummer v. Hummer, 3 G. Greene (Iowa) 42; Com. v. McClosky, 2 Rawle (Pa.) 369; *In re* Strahl, 16 Iowa, 369; Wammacks v. Hallaway, 2 Ala. 31; Kane v. People, 4 Neb. 509.

[5] Common. v. Leach, 44 Pa. St. 332; Com. v. Meeser, 44 Ib. 341.

[6] Seay v. Hunt, 55 Tex. 545.

it will not suffice to allege merely a claim against the defendant, that he holds or possesses and uses the office or franchise; but some overt act of user must be shown.[1]

§ 383. **The burden of proof.**—The burden of proof is in such an action wholly upon the defendant, and the State is not under the necessity of showing that he is a usurper; while he must substantiate his title to the office or franchise, and show by what authority he possesses it. And it is not enough to state generally, that he was legally or duly elected; but he must allege facts, from which the court may draw the proper inferences as to the legality and validity of his title.[2]

§ 384. **Quo warranto proceeding to secure the forfeiture of municipal charter.**—Inasmuch as the franchise of a municipal corporation is considered in the United States to exist solely for the benefit of the whole community, and not as a privilege of a few incorporators, as was the case under the early English Law, it is not likely that in this country an information in the nature of a *quo warranto* would be granted for the purpose of working a forfeiture of a municipal charter. At any rate, no American case can be cited, in which the court employed that remedy for that purpose. Such a proceeding would not harmonize with the spirit of American institutions. If municipal officials usurp powers which belong exclusively to the State, there exist ample remedies, both in law and equity, by which their acts can be nullified and their usurpation corrected.[3]

The constitutionality of an act which is performed by a municipal official[4] will not be determined in *quo warranto;* nor will the action lie against a city for taking property without compensation;[5] nor for the purpose of annulling irregular and improper city ordinances.[6] But in one State it has been held that the

[1] Rex v. Ponsonby, 1 Vesey (Eng.) 1; Peo. v. Thompson, 16 Wendell, 655; 2 Dil. Mun. Cor. § 903.

[2] People v. Clayton, 4 Utah, 421; People v. Jack, 4 Ib. 438; Com. v. Gill, 3 Whart. 228; Clark v. People, 15 Ill. 213; Crook v. People, 106 Ill. 237; People v. Fletcher, 55 N. Y. 525; Atty. Gen. v. Foote, 11 Wis. 14; State v. Gleason, 12 Fla. 190.

[3] See *post*, chapter XIX. on Remedies against Corporations. Com. v. Pittsb., 14 Pa. St. 177; Harris v. Nesbit, 24 Ala. 398; State v. Cahaba Co., 30 Ala. 66; Attorney Gen. v. Salem, 103 Mass. 138; Atty. Gen. v. Boston, 123 Ib. 460.

[4] Peo. v. Whitcomb, 55 Ill. 172.

[5] Peo. v. Hillsdale, 2 Johns. (N. Y.) 190; see, also, to the same general effect, People v. Mut. Gaslight Co., 38 Mich. 154.

[6] State v. Lyons, 31 Iowa, 432.

right of a municipality to exercise a certain power, as, for example, to tax certain property, may be determined upon an information in the nature of *quo warranto*, filed by the attorney general.[1]

§ 385. **Quo warranto to test the legal existence of municipal corporations.**—Municipal corporations in America are always the creatures of statute, and hence the occasion would seldom arise when there can be any doubts as to their legal existence. But when they do occur, the question is generally raised in collateral proceedings brought against them or their officials. But such a question may arise when by statutory enactment a municipal corporation has been legislated out of existence, or extinguished by annexation or consolidation.[2] And probably, they are more common where the town and cities are chartered under general statutes, by compliance with the provisions of the same, instead of by a special or private act of incorporation. But, whether the cases are rare or common, it is reasonably well settled by the current of judicial decisions in this country, that the corporate existence of a municipality may be put in issue and determined by the court in an information in the nature of a *quo warranto*, brought against an official who claims to act under the municipal authority.[3] And if in such a case it be found that no corporation exists, *de jure* or *de facto*, the relator is entitled to judgment.[4]

§ 386. **Effect of judgment in quo warranto.**—Judgment in a proceeding in *quo warranto* is conclusive, until reversed, upon all persons whomsoever; and may be given in evidence in any subsequent case, on an issue involving the rights, which have been settled thereby.[5] It has been held, however, that a

[1] State v. Charleston Com., 1 Mill. Const. R. (S. C.) 36; People v. Oakland, 92 Cal. 611.

[2] Dillon's Mun. Cor. § 184, *et seq.*; Taylor v. Fort Wayne, 47 Ind. 281.

[3] People v. Spring Valley, 129 Ill. 169; People v. Carpenter, 24 N. Y. 86; People v. Draper, 15 Ib. 532; People v. Clark, 70 N. Y. 518; People v. Bennett, 29 Ib. 471; State v. Carbondale, 29 Iowa, 254; State v. Brown, 31 N. J. L. 356; People v. Gartland, (Mich. 90) 42 W. W. R. 687; People v. Albertson, 55 N. Y. 50; People v. Clute, 22 Ib. 576; State v. Tracy, 51 N. W. R. 613; State v. Parker, 25 Minn. 215.

[4] State v. Weatherby, 45 Mo. 17; Cf. Territory v. Armstrong, 6 Dak. 226; State v. McReynolds, 61 Mo. 203; State v. Coffee, 59 Ib. 59; Renwick v. Hall, 84 Ill. 162.

[5] Utica Ins. Co. v. Scott, 8 Cow (N. Y.) 709, 721, and authorities cited. Hunter v. Chandler, 45 Mo. 452.

prior judgment, obtained on the relation of a district attorney, is not a bar to a subsequent proceeding by the State.[1] Nor will a judgment of ouster against an official bind one who does not hold under him.[2]

§ 387. **Effect of judgment when not rendered during official term.**—Since the terms of office in America are almost always of short duration, it becomes exceedingly important to ascertain whether a judgment can be rendered in a *quo warranto* proceeding, after the expiration of the term. In England it is held, where satisfactory reasons can be given for the delay, that the information will be granted, even though the application be filed after the close of the term of office.[3] The reason for this ruling is that the rightful claimant is entitled to a judicial determination of his right to the office. In the United States, the authorities are somewhat conflicting. The English rule is followed without qualification in North Carolina,[4] while in other States, the information has been refused, because the limited duration of the term of office made it impossible for a judgment to be rendered before its expiration.[5] But the better opinion seems to be that the judgment on an information in the nature of *quo warranto* will be granted, notwithstanding the resignation of the respondent, or the expiration of his term of office, provided the proceedings were begun prior to such termination of the opposition to the lawful claims of the relator.[6]

[1] State v. Cin. G. & C. Co., 18 Ohio St. 285.

[2] Wood v. State, 30 N. E. R. 309; State v. Kearn, 20 Atl. R. 1018; State v. Smith, 22 Ib. 1020; People v. Murray, 73 N. Y. 535; Dodge v. People, 113 Ill. 491.

[3] Rex v. Williams, 1 W. Black. 95; Rex v. Harris, 6 Ad. & El. 475; Rex v. Marlow, 2 M. & S. 76; Rex v. Payne, 2 Chitty, 367. In Regina v. Blizard, L. R. 2 Q. B. 634, the information was granted and judgment of ouster rendered, although the unlawful claimant had prior to judgment disclaimed the office.

[4] Burton v. Patton, 2 Jones (N. C.) L. 124.

[5] Morris v. Underwood, 19 Ga. 559; Howard v. Gage, 6 Ib. 462; State v. Jacobs, 17 Ohio, 143; Peo. v. Loomis, 8 Wend. (N. Y.) 396.

[6] Hunter v. Chandler, 35 Mo. 452; Com. v. Swasey, 133 Mass. 538; Com. v. Smith, 45 Pa. St. 59; People v. Hartwell, 12 Mich. 508.

CHAPTER XIX.

REMEDIES AGAINST MUNICIPAL CORPORATIONS IN GENERAL.

§ 391. **Equitable remedies.**—Questions, concerning the extent of the authority and powers of municipal corporations under the charter or general law of the State, generally involve a consideration of legal principles rather than of equitable; and as a rule a court of equity has very little control or supervision over corporations of this character.[1] Equity of course will not interfere in cases, where there is a plain, adequate and complete remedy at law,[2] but if a case should arise to which a municipal corporation is a party, equity will assume jurisdiction; and equitable relief will be given, if the subject-matter of the suit ranges itself under some one of the distinct heads of equity

[1] Boyle v. Brooklyn, 71 N. Y. 1; Brooklyn v. Meserole, 26 Wend. 132; Guest v. Brooklyn, 69 N. Y. 506; Moars v. Smedley, 6 Johns. Ch. 28; Jex v. New York, 103 N. Y. 536; Susquehanna Bk. v. Broome Co., 25 N. Y. 312; Brehm v. New York, 104 Ib. 586; Heywood v. Buffalo, 14 Ib. 534; Minnesota L. O. Co. v. Palmer, 20 Minn. 468, 474; Smith v. Oconomowoc, 49 Wis. 694; Douglas v. Harrison, 9 W. Va. 162.

[2] Paine v. Delhi, 116 N. Y. 224; Myall v. St. Paul, 30 Minn. 294; Miller v. Mobile, 47 Ala. 166; Hansmeister v. Porter, 21 Fed. Rep. 335; Ewing v. St. Louis, 5 Wall. 413; Hannewrukle v. Georgetown, 15 Ib. 547; Dows v. Chicago, 11 Ib. 108; Com. v. Wellsboro etc. Co., 35 Pa. St. 152; Hyatt v. Bates, 35 Barb. 308; Albany etc. Co. v. Brownell, 24 N. Y. 345; Dodd v. Hartford, 25 Conn. 232; Milwaukee Iron Co. v. Hubbard, 29 Wis. 51; Lewis v. Frankfort, 79 Ind. 446; Mayor v. Markham, 23 Ga. 402. The remedy at law must be shown to be inadequate. Nichols v. Salem, 14 Gray, 490; Frevert v. Finrock, 31 Ohio St. 621; Watson v. Sutherland, 5 Wall. 74; English v. Smock, 34 Ind. 115; Bishop v. Moorman, 98 Ind. 1.

jurisdiction.[1] As has been seen,[2] a municipal corporation has no right to create or maintain a nuisance, and a court of equity will enjoin a municipality from building a sewer through private property, which endangered the health of the community.[3] The jurisdiction of equity to enjoin nuisances is of ancient origin and generally acknowledged.[4] So, too, equity will enjoin municipal usurpation of jurisdiction under an unconstitutional act of the Legislature, upon the ground that an irreparable injury will be done thereby, for which damages, which may be recovered in an action at law, would afford no adequate compensation.[5]

§ 392. **Necessity for equitable remedies against cities and towns—Code of procedure—Preliminary injunction.**—The notorious fact, that the powers committed to municipal corporations are extremely liable to abuse and in fact frequently are abused and illegally exceeded to the serious detriment of the inhabitants, has brought about a *quasi* limitation of the rule, that equity will not act as long as there is a remedy at law. Many apparent exceptions to this rule are acknowledged, particularly in those systems of procedure which are employed in what are known as the Code States. In these States, the ancient line of demarkation between law and equity has become indistinct and the remedies afforded by both are blended in one cause of an action.

The "*preliminary injunction*" of the codes or injunction *pendente lite*, granted usually *ex parte* or a *prima facie* case, and employed with the utmost liberality and improvidence by the courts, is very extensively employed over municipal corporations, and their officers.

The whole matter is to so large an extent regulated by statutes and codes of procedure that no universal or general rules can be laid down; and the only safe method, as in all questions

[1] State v. Newark, 25 N. J. L. 399; Railroad Co. v. Jersey City, 26 N. J. Eq. 247; Foley v. Paterson, 26 Ib. 216; Carron v. Martin, 26 N. J. L. 594; Jersey City v. Lembeck, 31 N. J. Eq. 255; State v. Jersey City, 30 Ib. 521.

[2] §§ 340, 342.

[3] Butler v. Thomasville, 74 Ga. 570.

[4] Atty. Gen. v. Johnson, 2 Wils. Ch. 87; Columbus v. Jaques, 30 Ga. 506; Silliman v. Hudson Riv. B. Co., 4 Blatchf. (U. S.) 74; Demopolis v. Webb, 6 So. Rep. 408.

[5] Peoria v. Johnson, 56 Ill. 52; Smith v. Bangs, 15 Ib. 399; Hyde Park v. Chicago, 124 Ill. 156; McCord v. Pike, 121 Ill. 288; People v. Whitcomb, 55 Ib. 172.

of procedure, is an attentive examination of these local statutes or codes.

As a rule, it may be said that equity will interfere to aid or coerce municipal corporations upon the same principle, that they will assume jurisdiction over individuals. Thus, equity will not interfere at the instance of a private person, as against a municipal corporation, for an act perpetrated by the latter within its legal powers or for the exercise of its judgment or discretion, unless some irreparable or at least some substantial injury to private property rights is caused thereby;[1] or where the discretion is manifestly abused.[2] So, an injunction was refused an abutter, to restrain the closing of a street at a point three blocks distant from his land, upon the ground that he had no property rights which would be injured by the act of the city.[3]

The issue of municipal bonds having been authorized, to supply gas for public and private use, it was provided that the interest and principal were to be met by the money received for its use. Any deficiency was to be provided for by taxation. An injunction to restrain their issue was refused, upon the ground that it could not be shown that the anticipated income would be insufficient to meet the principal and interest.[4]

[1] Suffield v. Hathaway, 44 Conn. 521; Gartsede v. East St. Louis, 43 Ill. 47; Baltimore v. B. & O. R. R. Co., 21 Md. 50.

[2] Moore v. Atlanta, 70 Ga. 611; Varick v. New York, 4 Johns. Ch. 53, ch. XVI., Streets; Atty. Gen. v. Boston, 123 Mass. 460, 479; Hamerick v. Rouse, 17 Ga. 56; State v. Woody, Ib. 612; Alpero v. San Francisco, 32 Fed. Rep. 503; Torpedo Co. v. Clarendon, 19 Ib. 231; Brodnax v. Groom, 64 N. C. 244; Jenkins v. Andover, 103 Mass. 94, 104; Cape May etc. Co. v. Cape May, 419; Waterbury v. Laredo, 60 Tex. 510. In Erie v. Reed, 113 Pa. St. 468, it was said "if the discretion was abused no doubt the power of a court of equity would be adequate to restrain the perpetration of a palpable wrong." Spring Valley etc. Co. v. Schottler, 110 U. S. 347.

[3] Chicago v. Union Building Assn., 102 Ill. 379, 399, comp. Whiting v. Boston, 106 Mass. 89; Jones v. Boston, 104 Ib. 461; Sullivan v. Phillips, 110 Ind. 320.

[4] Fellows v. Walker, 39 Fed. Rep. 651. In this case the court said: "Injunctions are not granted in cases like the present, except when complainant's rights are clear, and where an injury more or less irreparable is likely to result to complainant, unless defendants are enjoined. In this case, complainant's rights are not clear and the injury likely to happen to them is not shown to be irreparable or even serious. On the other hand, the allowance of an injunction would be attended with irreparable loss and damage to the city of Toledo. See, also, Lane v. Schamp, 20 N. J. Eq. 82, Galoway v. London, 1 H. L. 34.

§ 393. **Equitable jurisdiction over municipal officials.**—It is a well settled rule, that courts of equity have no jurisdiction over public officers, either to determine the validity of their appointment, or the legality or justice of their removal. These subjects are exclusively for the consideration of courts of law, and the form of remedy properly employed is *mandamus*, *certiorari*, *quo warranto*, or some similar proceeding, according to the local rules of procedure.[1]

The jurisdiction of courts of equity, unless it is extended by statute, is confined to the protection of property rights, for the infringement of which there is no adequate, plain and complete remedy at law.[2]

§ 394. **Municipal corporations as trustees.**—By virtue of the control and supervision which is exercised over trusts and trustees by courts of equity, bills to restrain or prevent breaches of trust or misapplication of trust property by municipal authorities, or to enforce and obtain the performance of the important trusts, which are committed to cities and towns as trustees for their inhabitants, and for the public generally, have been frequently entertained favorably, both in England and in this country.[3]

The bill may in such cases be filed more properly by the attorney general on his own motion, as the advocate of the legal rights and interests of the public, or on the relation of the corporators or individual parties interested.[4]

[1] See ch. VI. Officers; ch. XVIII. *Mandamus;* see also *In re* Sawyer, 124 U. S. 200; Cobb v. Hague, 13 S. E. R. 633; 87 Ga. 450; Updegraff v. Crans, 47 Pa. St. 103; McCord v. Oakland, 27 Pac. 863; 64 Cal. 134; Delahanty v. Warner, 75 Ex. 185; Montgomery Gas Light Co. v. City Council, 6 So. 113; 87 Ala. 245; Stahl v. Brown, 1 S. W. R. 540; 85 Ky. 325; United States Ex. Co. v. Hess, 3 N. Y. S. 777; Payne v. English, 79 Cal. 540; Sperry v. Allina, 17 Or. 481; McDonald v. Rehrer, 22 Fla. 198.

[2] *In re* Sawyer, *supra*, § 391, Equitable remedies.

[3] Trevin v. Lewis, 4 M. & C. 249; Baltimore v. R. R. Co., 21 Md. 275; Barnum v. Baltimore, 62 Ib. 275; Atty. General v. Heelis, 2 Sim. & Stu. 67; Atty. Gen. v. Boston, 123 Mass. 460; People v. Canal Board, 55 N. Y. 390; Black v. Ross, 37 Mo. App. 250; Brockman v. Cresten, 44 Mo. R. 882 (Iowa, 90); Murphy v. East Portland, 42 Fed. 308; Russell v. Tate, 13 S. W. R. 130; 52 Ark. 541; Baltimore v. Horn, 26 Md. 194; High on Injunction, 783–795; see ch. XII. on Corporate Property.

[4] It is customary, though not necessary, to make the relators parties to the suit so that the defendant, if the bill is dismissed, may recover costs for which the crown is not liable. Atty. Gen. v. Dublin, Bligh N.

Under certain circumstances in this country, if not in England, equity will entertain bills, which are filed by private persons in suits of this nature against municipal corporations. And in Canada, it has been held that the attorney general is by no means a necessary party.[1]

In consequence of the greater power, which is possessed by the attorney general in England, and conferred upon him by the common law, in comparison with similar officials in the States, the principles regulating the governmental supervision of municipal and other corporations as enunciated by the English decisions are not wholly applicable to municipal corporations in the United States.

The English court of chancery will, upon the bill filed by the attorney general, relieve against fraud in the disposition of municipal property even though by statute there is another remedy. So, if property belonging to a municipal corporation is fraudulently or collusively alienated,[2] or if the municipal council contemplate making an unauthorized payment of compensation to officers of the borough,[3] equity will interpose.

A municipal corporation has been enjoined, on an information by the attorney general, from paying a note which was given for borrowed money, when the city had no power to give a note,[4] and from using corporate funds to pay the expenses of procuring an act of Parliament, beneficial to the corporation.[5] The property in the possession of municipal corporations is universally regarded by the English courts as trust property;[6] and over them and their officials as trustees, the State has the right to exercise the most rigid supervision, not only in equitable proceedings, but by criminal process as well.[7]

R. 312; Same v. Birmingham, 3 L. R. Eq. 552; Same v. Exeter, 29 Beav. 44.

[1] Paterson v. Bowes, 4 Grant, 170.

[2] Parr v. Attorney Gen'l, 8 Cl. & F. 409; Evans v. Avon, 29 Bear. 144; Attorney General v. Aspinwall, 2 My. & C. 613; Roper v. McWhorter, 77 Va. 214; Clapp v. City of Spokane, 53 Fed. 515; Russell v. Tate, 13 S. W. R. 130; 52 Ark. 541; Payne v. English, 79 Cal. 540; McDonald v. Rehrer, 22 Fla. 198.

[3] Attorney Gen'l v. Poole, 4 Mylne & C. 613.

[4] Attorney Gen'l v. Litchfield, 13 Simons, 547.

[5] Sherman v. Winnetka, 59 Ill. 389; Attorney General v. Norwich, 13 Simons, 225; Cf. Underwood v. Wood, (Ky. 92) 19 S. W. R. 405.

[6] Attorney Gen. v. Aspinwall, 2 M. & C. 613, 618, 623.

[7] Blakie v. Staples, 13 Grant, 67; Daniels v. Burford, 10 Up. Can. Q. B. 481.

In the United States, there is much difference of opinion upon some points, involved in the equitable control of the powers of municipal corporations, which is due to the fact, that with us the powers of the municipalities, and the duties of the attorney general or law officer of the State, are commonly such only as are prescribed by express statute. In consequence of the limited power of the attorney general of a State as compared with his English prototype, the question has been raised several times as to his power to invoke the aid of a court of equity to restrain the illegal action of a municipal corporation, in the absence of any statute authorizing him to do so. The weight of authority is decidedly to the effect, that he has such a right by virtue of his office, and by reason of the interest which the State has in a proper execution of the powers, delegated to or conferred upon municipal corporations.[1] But the facts upon which the law official of the State files a bill to prevent municipal corporations from making an illegal use of their powers, or to set aside their illegal acts, must bring the case within one of the universally recognized subdivisions or heads of equity jurisdiction,[2] although the courts are not very stringent in this regard; and have applied the English rule, that every abuse of corporate power is a breach of trust, with the object of giving the attorney general power over corporations, even when no jurisdiction is conferred on him by statute.[3]

§ 395. **Taxpayers' suits in equity.**—Following out the theory which regards the municipal corporation as a trustee for the inhabitants, it is almost, if not quite universally, conceded by the courts in the United States that, in the event of the failure of the State law officer to intervene by virtue of his statutory or implied power to protect the interest of the State and of the corporators, any property holder or municipal taxpayer may resort to equity, to prevent municipal corporations or officials from exceeding their lawful powers, or neglecting or violating their legal duties, under any circumstances where the taxpayer's interest will be injuriously affected.[4] And this

[1] State v. Saline Co., 51 Mo. 350.

[2] Dailey v. New Haven, 60 Conn. 314; Stahl v. Brown, 84 Ky. 324; People v. Lowber, 7 Abb. Pr. 158; People v. New York, 9 Ib. 253; 10 Ib. 144.

[3] Attorney General v. Detroit, 26 Mich. 263.

[4] See § 396. Damage to personal property.

is the privilege of the taxpayer, though it is not expressly conferred upon him by statute.[1] In private corporations, the beneficiaries of the trust reposed in the body corporate are the stockholders; and they, it is well settled, have the power to invoke the aid of equity to protect their rights and enforce the trust existing for their benefit in cases where the officials of the corporation refuse to act or act fraudulently. If the directors will not protect the rights of the creditors and stockholders then the latter may and should attend to their own interests.[2] There is no reason whatever why a different rule should be applied to municipal corporations, in which the taxpayers are the beneficiaries upon whose shoulders will ultimately fall the loss and expense which is caused by illegal, fraudulent or tortious acts, or by the inertness and general malfeasances of the municipal authorities.

[1] Crompton v. Zabriskie, 101 U. S. 601. In this case the court said: "Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt, which they in common with other property holders of the county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the State courts in numerous cases, and from the nature of the powers exercised by municipal corporations the great danger of their abuse, and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the taxpayers of a county, to prevent the consummation of a wrong, when the officers of these corporations assume, in excess of their powers, to create burdens upon property holders. Certainly, in the absence of legislation, restricting the right to interfere in such cases to public officers of the State or county, there would seem to be no substantial reason why a bill, by or in behalf of individual taxpayers, should not be entertained to prevent the misuse of corporate power. The courts may safely be trusted to prevent the abuse of their process in such cases." Colburn v. Chattanooga, 17 Am. L. R. N. S. 191; Solomon v. Fleming, (Neb. 92) 51 N. W. R. 304; Harrington v. Plainview, 27 Minn. 224; Grant v. Davenport, 36 Iowa, 396; Webster v. Harwinton, 32 Conn. 131; Brockman v. Creston, (Iowa, 90) 44 N. W. R. 822; Stevens v. Rutland etc. Co., 29 Vt. 546; Normand v. Comm'rs, 8 Neb. 18; Smith v. Magourich, 44 Ga. 163; Valparaiso v. Gardner, 97 Ind. 1; Merrill v. Plainfield, 45 N. H. 126; Hooper v. Ely, 46 Mo. 505; McCord v. Pike, 12 N. E. R. 259; Murphy v. East Portland, 42 Fed. R. 308; Terrett v. Sharon, 34 Conn. 105; The Liberty Bell, 23 Fed. R. 843; Winkler v. Halsted, 36 Mo. App. 25; Harrison v. Electric Co., 48 N. W. R. 1005; Baltimore v. Gill, 31 Md. 575; Hodgman v. Chicago etc. Co., 20 Minn. 48; *contra*, Pierce v. Smith, (Kan. 92) 29 Pac. 565.

[2] Tiedeman on Equity Jur. § 329.

A municipal corporation will, it is well settled, be enjoined at the suit of a taxpayer from appropriating corporate funds for purposes unauthorized by the general laws, or by its charter,[1] from making illegal contracts,[2] or from issuing their own bonds,[3] or delivering railroad aid bonds,[4] or indorsing the obligations of the railroad company,[5] when such acts are unauthorized. So a taxpayer and citizen may enjoin the issue or the sale after issue of void bonds,[6] or of scrip intended to circulate as money.[7] Not only will equity interfere to prevent an illegal appropriation of municipal funds or credit; but it has been held that when a city, in exercising a legal power to lease its wharves, disregards the charter forms prescribed, and, by failure to invite competition, attempts to make a lease upon terms extremely disadvantageous to the taxpayers, they have a standing in court to prevent the execution of the lease, and procure the amendment of the ordinance authorizing it.[8]

As a general rule, taxpayers have no right to contest, in an equity suit, the validity of a grant of an exclusive privilege or

[1] City of Rock Island v. Huesing, 25 Ill. App. 600; 21 N. E. R. 558; 128 Ill. 565; Bayle v. New Orleans, 28 Fed. R. 843; Willard v. Anisteck, 58 Wis. 565; Yarnell v. Los Angeles, 87 Cal. 603; 25 Pac. 767; Mazet v. Pittsburgh, 137 Pa. St. 548; 27 W. N. C. 73; Knorr v. Miller, 25 W'kly L. Bul. 128; Simmons v. Toledo, 5 Ohio Cir. Ct. R. 124; Sackett v. New Albany, 88 Ind. 473; Scott v. Alexander, 23 S. C. 120; Harney v. Indianapolis, 32 Ind. 244; Jacksonport v. Watson, 33 Ark. 704; Richmond v. Davis, 103 Ind. 449; Sherlock v. Winnetka, 59 Ill. 389; Wade v. Richmond, 18 Gratt. 583; Newmeyer v. M. & M. Co., 52 Mo. 81; Russell v. Tate, 52 Ark. 541; 13 S. W. R. 130; New London v. Brainard, 22 Conn. 552; Webster v. Harvinton, 32 Ib. 131; Winkler v. Halstead, 36 Mo. App. 25; Falmer v. Nuckolls Co., 6 Neb. 204.

[2] Mazet v. Pittsburgh, 137 Pa. St. 548; Knorr v. Miller, 25 W'kly L. Bul. 128; and cases in last note.

[3] Robertson v. Breedlove, 61 Tex. 316.

[4] Lynch v. R. R. Co., 57 Wis. 430.

[5] Blake v. Macon, 53 Ga. 172.

[6] Jackson v. Brush, 77 Ill. 59.

[7] Colburn v. Chattanooga, 17 Am. L. R. 191. Issue of bonds enjoined, see Wullenwater v. Dunnigan, (Neb. 91) 47 N. W. R. 420; Winn v. Shaw, (Cal. 91) 25 Pac. R. 244; 25 Ib. 968; 87 Cal. 631; Wood v. Bangs, 46 N. W. R. 586; 1 Dak. 179; Livingston Co. v. Weider, 64 Ill. 427; Allison v. Louisville etc. Co., 9 Bush, 247; Bound v. Wis. Cen. R. R., 45 Wis. 543; McCord v. Pike, (Ill. 87) 12 N. E. R. 259; Davenport v. Kleinschmidt, (6 Mont. 502) 13 Pac. 249; Marshall v. Silliman, 61 Ill. 218; Chestnutwood v. Hood, 68 Ib. 132; Carruthers v. Harnett, (Tex. 91) 2 S. W. R. 523; Wright v. Bishop, 88 Ill. 302; Springfield v. Edwards, 84 Ib. 626.

[8] Handy v. New Orleans, 39 La. An. 107; Conery v. New Orleans W. W. Co., 39 Ib. 770.

franchise,[1] or to enjoin a city from entering into a contract, unless they can show in both instances that they sustain special injury by the municipal action.[2] But taxpayers may enjoin the city from contracting debts, which will cause the municipal limit of taxation to be exceeded;[3] or which for any other reason are in violation of constitutional or statutory prohibitions.[4] And if such debts have been contracted, their payment may be likewise enjoined.[5] It is agreed by all that taxpayers have a right, founded on their property interests which are at stake, to interfere to prevent an unauthorized municipal act, by which the burden of taxation will be increased; the main difference of opinion being as to the proper party to institute the action. As above indicated, the majority of the decisions hold that such suits may, in the absence of statute, be instituted directly by the taxpayers who are affected. But there are many decisions which hold that since the illegal action of a municipal corporation affects the whole public, any measure to restrain or redress such acts must be instituted by a public officer, although, of course, he may do so upon the relation of the individual taxpayers.[6]

§ 396. **Injunction to restrain damages to private property—Multiplicity of suits.**—It has been held that an injunction will not lie at the suit of a private citizen, to abate a nuisance erected in the public streets,[7] upon the ground that the proper

[1] Grant v. Davenport, 36 Iowa, 396; Grand Rap. E. etc. Co. v. Grand Rap. Ed. Co., 33 Fed. Rep. 659; N. O. Gas Co. v. Louisiana L. Co., 115 U. S. 650.

[2] Searles v. Abraham, 73 Iowa, 507; Bolton v. San Antonio, (Tex. 93) 21 S. W. R. 64.

[3] Howell v. Peoria, 90 Ill. 104; Davenport v. Kleinschmidt, 6 Mont. 502.

[4] Merrill v. Plainfield, 45 N. H. 126; Frederick v. Goshen, 20 Md. 436; Baltimore v. Gill, 31 Ib. 375; Kelly v. Baltimore, 53 Ib. 134.

[5] Strohme v. Iowa City, 47 Iowa, 42.

[6] Bagg v. Detroit, 5 Mich. 336, 346; Kelly v. Chicago, 62 Ill. 279; compare Brown v. Manning, 6 Ohio, 298; State v. Perry Co., 5 Ohio St. 497, 502; Cornell College v. Iowa County, 32 Iowa, 520; State v. Carey, (N. D. 91) 49 N. W. R. 164; Doolittle v. Selectmen, 59 Conn. 402; Kilbourne v. St. John. 51 N. Y. 21; Merriam v. Yuba Co., 72 Cal. 517; State v. Grace, (Or. 91) 25 Pac. 382; Atty. Genl. v. Boston, 123 Mass. 460; Johnson v. Thorndike, 56 Me. 52; Spencer v. Menasha, 15 Kan. 259; Anderson v. State, 23 Miss. 459.

[7] Mowry v. Providence, (R. I. 91) 16 Atl. R. 433; Morris etc. Co. v. Prudden, 20 N. J. Eq. 530; Fay v. Weber, (Wis. 91) 48 N. W. R. 859; Bechtel v. Carslake, 11 N. J. Eq. 50; Higbee v. Camden etc. Co., 20 N. J. Eq. 435; Cf. Pennsylvania v. Bridge Co., 13 How. 518; Atty. Gen. v. Cohoes Co., 6 Paige, 133; People v. Third Ave.

party to procure the abatement of a public nuisance is the official acting for the state or municipal corporation. Though the cases are not harmonious the majority of the decisions sustain the opposite doctrine, *i. e.*, that a private person is entitled to an injunction in such case, at least when the street is so used as to constitute a special and irreparable damage to his property.[1]

R. R. Co., 45 Barb. 63; Craig v. People, 47 Ill. 487; Atty. Gen. v. Eau Claire, 37 Wis. 400; Rochester v. Erickson, 46 Barb. 92; Coast Line etc. Co. v. Cohen, 50 Ga. 451; Williams v. Smith, 22 Wis. 600; Waukesha H. M. S. Co. v. Waukesha, 83 Ib. 475; Webb v. Demopolis, (Ala. 93) 13 So. 289; Neshkoro v. West, 55 N. W. R. 476.

[1] Barton v. Union Cattle Co., 44 N. W. R. 454; McCowan v. Whiteside, 31 Ind. 235; Dubach v. Hannibal etc. Co., 89 Mo. 483; Harvard Col. v. Stearns, 15 Gray, 1; Crowley v. Davis, 63 Cal. 460; Billard v. Erhard, 35 Kan. 611; Board v. N. Y. H. M. Co., 19 Atl. R. 1098; Cumberland etc. R. R. App., 62 Pa. St. 218; Truesdale v. Peoria C. S. Co., 101 Ill. 561; Glaesner v. Anheuser etc. Co., 13 S. W. R. 707; Gray v. Bayward, 5 Del. Ch. 499; Vick v. Rochester, 46 Hun, 607; Morgan's Ap., 25 W. N. C. 532; Sullivan v. Phillips, (Ind.) 11 N. E. R. 310; Czarniecki's App., (Pa. 88) 11 Atl. R. 660; Smith v. Bangs, 15 Ill. 399; Pettibone v. Hamilton, 40 Wis. 402; Central B. Co. v. Lowell, 4 Gray, 474; Milhau v. Sharp, 27 N. Y. 611; Knox v. New York, 55 Barb. 404; Columbus v. Jaques, 30 Ga. 506; Shed v. Hawthorne, 3 Neb. 179. The word *irreparable* as used in this connection does not necessarily mean that there is no possibility of compensation in damages, or even that the damage is very great. Wood v. Sutcliffe, 2 Sim. (N. S.) 165; Cassebeer v. Mowrey, 55 Pa. St. 419; Dudley v. Hurst, 1 Am. St. Rep. 368, 374. The very fact that no actual damages could be shown while injury was caused furnished a good reason for the interference of a court of equity. Clowes v. Staffordshire, L. R. 8 Chapp. 125; Jerome v. Ross, 7 Johns. Ch. 315; Hunkerline's App., 70 Pa. St. 102; Coe v. Lake Co., 37 N. H. 254; see as to the necessity for irreparable damage and its elements: Bond v. Wool, 107 N. C. 139; Winter v. Montgomery, (Ala. 91) 9 So. 366; Ferris v. Wellborn, 64 Miss. 29; Watson v. Farrell, 34 W. Va. 406; Loeser v. Leebman, 14 N. Y. S. 569; Ohio Riv. R. Co. v. Gibbons, (W. Va. 91) 12 S. E. R. 1093; Strin v. Nash, 12 N. Y. S. 431; 19 Civ. Pro. R. 184; Empire L. & B. Ass'n v. City of Atlanta, 77 Ga. 496; Elwell v. Greenwood, 26 Iowa, 377; People v. Vanderbilt, 26 N. Y. 287; Bechtel v. Carslake, 3 Stockton Ch. 500; Conrad v. Smith, 32 Mich. 429; Pratt v. Lewis, 39 Ib. 7; Pettibone v. Hamilton, 40 Wis. 402; Payne v. McKinley, 54 Cal. 532; Keizer v. Lovett, 85 Ind. 240; White v. Williamson, 17 S. E. R. 604 (Ga. 93); Parsons v. Atlanta, 44 Ga. 529; Pratt v. Roseland, (N. J. 93) 24 Atl. R. 1037; Toledo A. A. etc. Co. v. Pennsyl. Co., 54 Fed. 730; Brooklyn S. T. Co. v. Brooklyn, 78 N. Y. 524; Cushman v. Highland Ditch Co., 33 Pac. 344; Hannibal v. Winchell, 57 Mo. 172; Graves v. Gas Co., 83 Iowa, 74; Columbus etc. Co. v. Witherow, 82 Ala. 190; Bell v. Edwards, 37 La. An. 475; Carning v. Lowerse, 6 Johns. Ch. 439; Scranton v. Steele Co., 154 Pa. St. 1717.

An injunction will lie to restrain the municipal authorities from the commission of acts which will illegally encroach or trespass upon the property of private persons;[1] as for example, to restrain a city from proceeding to open a street through land, without condemnation proceedings or the owner's consent;[2] or to prevent a seizure of land, when compensation has not been paid or tendered;[3] or for arbitrarily removing merchandise which is not a nuisance from the owner's yard;[4] or from selling land which has been dedicated as a common or park.[5]

The rights of abutters to a convenient use of the streets will be protected by injunction against the encroachment of the municipal corporation or railroad companies or others using the streets. Thus, an injunction will lie to prevent him from being deprived of his right of access.[6] So an abutting owner may enjoin the illegal removal of shade trees and fences by the city or others.[7]

Where abutters are entitled to compensation for the use of the street, on which they front, by a railroad company, the appropriation of the street will be enjoined until compensation is

[1] Ambrose v. Buffalo, 20 N. Y. S. 129; 29 Abb. N. C. 140; Kerr v. Joslin, 66 Hun, 629; Rafter v. Tagliabue, 29 Abb. N. C. 1; Payne v. English, 21 Pac. 952; 79 Cal. 540; McDonald v. Newark, 42 N. J. E. 136; Broome v. N. J. etc. Tel. Co., 7 Atl. R. 457; Emporia v. Soden, 25 Kan. 588; Kyle v. Board, 94 Ind. 115; Clark v. Syracuse, 13 Barb. 32; North Pac. Ry. Co. v. Spokane, 52 Fed. 428; Wright v. Chanahan, 51 Hun, 262; Taintor v. Morristown, 19 N. J. Eq. 46; Quinten v. Burton, 61 Iowa, 471; Holmes v. Jersey City, 12 N. J. Eq. 299; Dudley v. Frankfort, 12 B. Mon. 610; Carter v. Chicago, 57 Ill. 283; Boughman v. Clarksburgh, 10 W. Va. 394; Kern v. Isgrigg, (Ind. 92) 31 N. E. R. 455.

[2] Hudson v. Vareis, (Ind. 93) 34 N. W. R. 503; Cf. Smith v. Navasota, 72 Tex. 422; Kern v. Isgrigg, (Ind. 92) 31 N. E. R. 455; Mason City etc. Co. v. Mason, 23 W. Va. 211.

[3] Evans v. Miss. etc. Co., 64 Mo. 453; Gardner v. Newburg, 2 Johns. Ch. 162; Sidener v. Norristown etc. Co., 23 Ind. 623; Western Ry. v. Ala. G. T. R. Co., (Ala. 93) 11 So. 483.

[4] Pieri v. Shieldsboro, 42 Miss. 493.

[5] Cummings v. St. Louis, 90 Mo. 259; Mowry v. Providence, (R. I. 91) 16 Atl. 511.

[6] Carter v. Chicago, 57 Ill. 283; LeClerq v. Gallipolis, 7 Ohio, pt. 1, 218; Schaidt v. Bland, 66 Md. 141; Atchison etc. Co. v. Nare, 17 Pac. R. 587; Flynn v. Taylor, 28 N. E. R. 418; 127 N. Y. 596, aff'g 6 N. Y. S. 96; Prime v. Twenty-third etc. Co., 1 Abb. N. C. 1. The abutter is not bound to wait until actually damaged: Ross v. Thompson, 78 Ind. 90, 96.

[7] Winslow v. Mason, 113 Mass. 411; Crismon v. Deck, (Iowa 90) 51 N. W. 55; DeWitt v. Van Scheyk, 110 N. Y. 7; Chicago v. Union, 102 Ill. 379; Wilder v. De Core, 26 Minn. 10; Taintor v. Mayor, 19 N. J. Eq. 46.

made.[1] In all such cases, however, the right to an injunction may be lost by laches.[2]

A court of equity will restrain by injunction the prosecution of a multiplicity of suits by or against a municipal corporation, when the court in which they have been brought has no power to order them to be consolidated.[3] But the courts of equity will not entertain a bill for relief upon the ground of avoiding a multiplicity of suits or because irreparable damage will accrue, when the orator has been legally tried and convicted of violating an ordinance, the validity of which is not disputed, though there were seven suits for the offence pending against him. It is not the province of equity to decide upon the validity or legality of an ordinance, where there is an adequate remedy at law for the purpose.[4] If, however, a defendant claim a property right, as a justification or defence when a number of warrants have been issued against him for violating an ordinance, an injunction will issue to restrain their enforcement until his right can be decided upon by a court of competent jurisdiction.[5]

§ 397. **Injunction to restrain the collection of taxes.**— The collection of taxes will be enjoined upon application of one or more taxpayers, when the tax is tainted with fraud, or when the levy or assessment is unauthorized by law.[6] Illegal

[1] Atty. Genl. v. Walworth L. & P. Co., (Mass. 90) 31 N. E. R. 482; Lake Erie etc. Co. v. Michener, 117 Ind. 465; Vanderlip v. Grand Rapids, (Mich. 90) 41 N. W. R. 677; Nette v. N. Y. El. R. Co., 20 N. Y. S. 844; Potts v. Quaker City El. Ry. Co., 12 Pa. Co. Ct. R. 593; 2 Pa. Dis. Ct. R. 200; Syracuse etc. Co. v. Rome etc. Co., 22 N. Y. S. 321; Kavanagh v. Mobile etc. R. R. Co., (Ga.) 4 S. E. Rep. 113; Colstrum v. Minn. etc. R. R. Co., 33 Minn. 516; Scioto Val. R. R. Co. v. Lawrence, 38 Ohio St. 41; Western Ry. Co. v. Alabama G. T. R. Co., (Ala. 93) 11 So. 483; Stroub v. Railway Co., 59 N. Y. Super. Ct. 505; American Bk. Note v. Railway Co., 59 Ib. 175; Palmer v. Waddell, 22 Kan. 352; City of Gloversville v. Johnston G. & K. R. Co., 21 N. Y. S. 146; 66 Hun, 627; Hart v. Buckner, 54 Fed. Rep. 925;

[2] Sunderland v. Martin, 112 Ind. 411; Indianapolis etc. Co. v. Calvert 110 Ind. 555.

[3] Third Ave. etc. Co. v. New York, 54 N. Y. 159, prosecution for violations of an ordinance.

[4] Des Plaines v. Poyer, 123 Ill. 348; Davis v. American Soc., 76 N. Y. 362.

[5] Shinkle v. Covington, 83 Ky. 420.

[6] Lebanon v. O. & M. R. R. Co., 77 Ill. 539; Dupage Co. v. Jenks, 65 Ill. 275; Brandriff v. Harrison Co., 55 Iowa, 164; Warden v. Fond du Lac., 14 Wis. 618; Trowbridge v. Haran, 78 N. Y. 439; Kean v. Asch, 27 N. J. Eq. 57; Oliver v. Memphis etc. Co., 30 Ark. 128; Deming v. James, 72 Ill. 78; Trowbridge v. Horan, 78 N. Y. 439; First Nat. Bank v. Cook, 77 Ill. 622.

taxation will not be restrained by an injunction unless some special reason is shown for the employment of the equitable remedy; that is, unless it shall affirmatively appear that the levy of the tax was tainted with fraud, that irreparable injury will be done to the applicant or that he is without a plain, adequate and prompt legal remedy.[1]

If, however, a tax is so tainted with fraud that its invalidity is undoubted, its collection will be enjoined at the suit of a taxpayer.[2]

In any event, if the aggrieved taxpayer has an adequate remedy at law, either by certiorari or appeal, or by an action to recover the taxes paid, it is extremely doubtful if a court of equity will interfere with the exercise of the power of taxation by a municipal corporation.[3] The collection of a legal tax will not

[1] Dawson v. Croisan, 23 Pac. R. 257; 18 Ore. 431; Kembles App., (Pa.) 19 Atl. R. 946; Augusta Factory v. Counsel, 83 Ga. 734; 10 S. E. R. 359; Delaware Co. v. Atkins, 24 N. E. R. 319; Davis v. Lake Shore etc. Co., 114 Ind. 364; 16 N. E. R. 639; Dudley v. Gilmore, 35 Kan. 555; Clee v. Sanders, 74 Mich. 692; Puck v. Peeler, 74 Tex. 268; Lenawee Co. Bk. v. Adrian, (Mich.) 33 N. W. R. 304; Merriam v. Yuba Co., 72 Cal. 577; 14 Pac. R. 137; Philadelphia W. etc. Co. v. Meary, 8 Atl. R. 363; Oregon & W. M. S. Bk. v. Jordan, (Oregon) 17 Pac. R. 621; Coulsen v. Harris, 43 Miss. 728; Page v. St. Louis, 20 Mo. 138; Bank v. Meredith, 44 Mo. 500; Rockingham Sav. Bk. v. Portsmouth, 52 N. H. 17; Hoagland v. Delaware, 17 N. J. Eq. 107; Elyton Ld. Co. v. Ayres, 62 Ala. 413; Clayton v. Lafargue, 23 Ark. 137; Hobart v. Detroit, 7 Mich. 246; Rubey v. Shain, 54 Mo. 207; Ranney v. Bader, 67 Ib. 476; Paulser v. Portland, 16 Ore. 450; Hollister v. Sherman, 63 Cal. 38; Van Daren v. New York, 9 Paige, 388; Van Rensselaer v. Kidd, 4 Barb. 17; Waterbury Sav. Bk. v. Lawler, 46 Conn. 243; Frost v. Flick, 1 Dakota, 131; Georgia Loan Assn. v. McGowan, 59 Ga. 811; Brewer v. Springfield, 97 Mass. 152; Hunnewell v. Charleston, 106 Ib. 350; Carrothers v. Board, 16 W. Va. 527; Christie v. Malden, 23 Ib. 667; Louisen v. Hauee, 1 Wyo. 570; Hanscome v. Omaha, 11 Neb. 37; Merrill v. Humphrey, 24 Mich. 170; Mace v. Com'rs, 99 N. C. 65; 5 S. E. R. 740; Baldwin v. Shine, 84 Ky. 502; 2 S. W. R. 164; Breeze v. Haley, 10 Colo. 5; 13 Pac. R. 913; Duncan v. Cen. P. Ry. Co., (87 Ky.) 4 S. W. R. 228; Com'rs v. Bryson, 13 Fla. 281; Burnes v. Atchison, 2 Kan. 454; Mobile v. Baldwin, 57 Ala. 61; Porter v. Rockford etc. Co., 76 Ill. 561; Williams v. Pinney, 25 Iowa, 436; U. P. R. R. v. Lincoln Co., 2 Dill. C. C. 297; Dows v. Chicago, 11 Wall. 108; Hunnewinkle v. Georgetown, 15 Ib. 547.

[2] Litch v. Wentworth, 71 Ill. 146; First N. Bk. v. Cook, 77 Ib. 622.

[3] Boyd v. Selma, (Ala. 93) 11 So. 393; Odlin v. Woodruff, 12 So. Rep. 227; Arnold v. Cambridge, 106 Mass. 352; Whitney v. Boston, 106 Ib. 89; Hummill v. Boston, 106 Ib. 350; see also Murphy v. Harrison, 29 Ark. 340; Dusenbury v. Mayor, 25 N. J. Eq. 295; Vanover v. Terrell etc. Co., 27 Ga. 354; Harward v. St. Clair etc.

be enjoined in order to prevent the collection of one that is illegal;[1] and if an assessment has been made, so as to place an undue burden upon the property of some, the collection of the excess will be enjoined.[2] In such cases the court of equity may require the payment of that portion of the tax, which is admitted to be legal, as a condition precedent to relief against the illegal tax.[3]

An injunction will lie, where property has been illegally exempted from assessment or taxation, at the instance of one whose burden has been thus increased.[4] But an injunction will not lie, where there is no fraud (even though there be an over estimate of benefit received) where the error is simply one of judgment.[5]

When the municipal authorities assert a jurisdiction to assess property not subject to assessment, or lying outside of their territorial jurisdiction, they will be enjoined.[6]

An owner of land subject to assessment for local improvements may obtain an injunction to prevent an assessment being made without a petition;[7] or the awarding of a contract without advertisement, or to any except the lowest bidder,[8] where these are statutory requirements.

The question, whether the contract has been strictly per-

Co., 51 Ill. 531; Fleming v. Mershom, 37 Iowa, 413; Barr v. Denisten, 19 N. H. 170, 180; Mechanics' Bank v. Kansas City, 73 Mo. 555.

[1] Covington v. Rockingham, 93 N. C. 134; Sheperdson v. Gillett, (Ind. 93) 31 N. E. R. 788; Goodnough v. Powell, (Or. 93) 32 Pac. R. 396; Stilz v. Indianapolis, 81 Ind. 582.

[2] Cummings v. National Bk. 101 U. S. 153; Pelton v. National Bank, 101 Ib. 143.

[3] Morrison v. Jacoby, 14 N. E. R. 546; 114 Ind. 84; Deeflir v. Bowen, 61 Ind. 29; Cook v. Racine, 49 Wis. 244; Morrison v. Hershire, 32 Iowa, 271; Merrill v. Humphrey, 24 Mich. 170; Albuquerque v. Beres, 13 S. Ct. 143; 147 U. S. 87.

[4] Weeks v. Milwaukee, 10 Wis. 242; Hersey v. Suprs., 16 Ib. 198; Hassen v. Rochester, 65 N. Y. 256.

[5] Cleveland v. Board, 55 Barb. 288; Brevoort v. Detroit, 24 Mich. 322; Black v. Boyd, 155 Pa. St. 163; Kansas M. L. Ins. Co. v. Hill, (Kan. 93) 33 Pac. 300; Smith v. Kelly, (Oreg. 93) Ib. 642; Gage v. Evans, 90 Ill. 569; Hoke v. Perdue, 62 Cal. 545.

[6] Ft. Wayne v. Shaaf, 106 Ind. 66; Hawk v. Bonn, 6 Ohio Cir. Ct. R. 452; Pullman P. Car Co. v. Board, 55 Fed. 206; Balfe v. Lammers, 109 Ind. 347; Curry v. Jones, 4 Del. Ch. 559; Fremont v. Boling, 11 Cal. 380; Bouldin v. Mayor, 15 Md. 18.

[7] Covington v. Nelson, 35 Ind. 532; Makemson v. Kaufman, 35 Ohio St. 444.

[8] Mayor v. Johnson, 62 Md. 225; Schumm v. Seymour, 9 C. E. Green, 143; Board of Comrs. v. Templeton, 51 Ind. 266.

formed,[1] or whether the ordinance, directing the improvement, was legally enacted, cannot be tried in the injunction proceedings, but must be referred to an action at law.[2]

If the power to tax exists, and the only question for consideration is its irregular or erroneous exercise, injunction will not lie unless it is applied for in a reasonable time after the work has been begun; when the irregularities are substantial,[3] and the matter falls clearly and unmistakably under one of the heads into which equity jurisdiction is divided. In conformity with these principles, it is a general rule that a court of equity will not enjoin the enforcement of a personal tax, or a tax levied upon personal property by a municipality, merely because of its illegality or invalidity.[4] If, however, there is no adequate remedy at law, equity will enjoin the sale of personal property; as for example, in a case where a State, levying taxation on the rolling stock of a railroad, refused to receive payment in its own coupons in violation of its agreement to that effect.[5]

When the likelihood of a sale for nonpayment of illegal taxes would create a cloud on the title, the owner of the property is not compelled to allow the illegal transaction to be consummated, and resist the purchaser by a legal defence; but he may apply for an injunction at once upon the ground of removing a cloud upon his title.[6]

[1] Ricketts v. Spraker, 77 Ind. 371; McCafferty v. McCabe, 4 Abb. B. R. 87.

[2] Balfe v. Lammers, 109 Ind. 347; St. Louis v. Ranken, 9 S. W. R. 910; 96 Mo. 497; St. Louis v. Brewing Co., 9 S. W. R. 910; 96 Mo. 497; Michael v. St. Louis, 20 S. W. R. 666; 112 Mo. 610.

[3] Kennedy v. Troy, 77 N. Y. 493; Wright v. Tacoma, 3 Wash. Ter. 410; Tingue v. Rochester, 101 N. Y. 294; Brush v. Carbondale, 78 Ill. 74; McDonald v. Payne, 114 Ind. 359.

[4] Lockwood v. St. Louis, 24 Mo. 20; Milwaukee v. Kaefler, 116 U. S. 219; Dodd v. Hartford, 25 Conn. 232; Dows v. Chicago, 11 Wall. 108; Union Pac. R. R. v. Cheyenne, 113 U. S. 516, 525; Sheldon v. Centre L. D., 25 Conn. 224; Milwaukee Iron Co. v. Hubbard, 27 Wis. 51.

[5] Allen v. B. & O. R. R. Co., 114 U. S. 311.

[6] Jersey City v. Canal Co., 12 N. J. Eq. 227; Powell v. Parkersburg, 28 W. Va. 698; Huntington v. Union Pac. Ry. Co., 2 Sawy. (U. S.) 503; Mitchell v. Milwaukee, 18 Wis. 92; Wiley v. Flournoy, 30 Ark. 609; Mobile etc. Co. v. Peebles, 47 Ala. 317; Bend v. Kenosha, 17 Wis. 284; McPike v. Pen, 51 Mo. App. 63; Gilmore v. Fox, 10 Kan. 509; McCormick v. District, 4 Mackey, 396; Mutual Ins. Co. v. Supervisors, 32 Barb. 322; Stone v. Mobile, 57 Ala. 61; Ewing v. St. Louis, 5 Wall. 413, 419; Holland v. Baltimore, 11 Md. 186; Heywood v. Buffalo, 14 N. Y. 534; Baltimore v.

A suit will be entertained by equity to restrain the collection of taxes to pay fraudulent judgments, which have been collusively obtained against the corporation,[1] or the expenses of an unauthorized railroad survey,[2] to refund money voluntarily contributed by citizens to avoid a conscription in the town.[3]

In cases, where the taxpayer has a right to seek the assistance of courts of equity, they will be debarred from receiving its aid by injunction, or otherwise, when they have been guilty of laches, and have knowingly permitted third persons, acting in good faith, to rely upon the objectionable action of the municipality.[4] So, upon an application for an injunction, to prevent the collection of an alleged illegal assessment, the silence of the plaintiff during the progress of the improvement will be a sound reason for refusing the injunction.[5]

§ 398. **Scope of certiorari.**—By the common law, courts of superior and general jurisdiction have power to examine on *certiorari* the proceedings of inferior jurisdictions, and the actions of ministerial officials.[6] So, in this country, if there be no appeal or remedy, in the nature of a writ of error, as when a new jurisdiction or tribunal is created, whose procedure is summary in character or contrary to the rules of the common law, the superior or general courts of the State, having common law powers, have inherent power to review and correct or vacate the proceedings and findings of the inferior court, board or officers, exercising judicial authority.[7]

Porter, 18 Md. 284; Delphi v. Brown, 61 Ind. 29, 37.

[1] Barr v. Deniston, 19 N. H. 170, 180; Merrill v. Plainfield, 45 Ib. 126.

[2] Douglas v. Placerville, 18 Cal. 643.

[3] Drake v. Phillips, 40 Ill. 388.

[4] Elliott, Roads and Streets, p. 440; Claflin v. Hopkinton, 4 Gray, 502; Tash v. Adams, 10 Cush. 252; Stewart v. Kalamazoo, 30 Mich. 69; People v. Maynard, 15 Ib. 463; Hodges v. Buffalo, 2 Denio, 110.

[5] Lafayette v. Fowler, 34 Ind. 140; Ritchie v. So. Topeka, 38 Ib. 368; Schumm v. Seymour, 24 N. J. Eq. 143; Hyde Park v. Borden, 94 Ill. 26; Motz v. Detroit, 18 Mich. 495; Byram v. Detroit, 50 Ib. 56; Evansville v. Phistere, 34 Ind. 36; Lundborn v. Manistee, 93 Mich. 170; Weber v. San Francisco, 1 Cal. 455; Collins v. Camden, 27 N. J. Eq. 293; Dusenbury v. Newark, 25 Ib. 295; Storer v. Cincinnati, 4 Ohio Cir. Ct. 279; Bloomington v. Blodgett, 24 Ill. App. 650; Sleeper v. Bullen, 6 Kans. 300; Topeka v. Gage, (Kan. 90) 24 Pac. 82; Martin v. Town, 56 Hun, 510.

[6] Grovenvelt v. Burwell, 1 Ld. Raym. 454, 469; Rex v. Inh. Glamorganshire, 1 Ib. 580.

[7] Harris v. Barber, 129 U. S. 366; Marion v. Chandler, 6 Ala. 899; Savage v. Gulliver, 4 Mass. 178; Seattle etc. Co. v. State, 5 Wash. St. 807;

Under this rule, it is well settled that the courts of common law will in the United States examine on *certiorari* the acts or proceedings of municipal corporations or of their officials. If it is found, upon such examination, that such acts or proceedings are in excess of the municipal powers, or that they do not conform substantially to the requirements of the charter or the general law, they will be reversed or vacated by the court.[1]

In the absence of any statutory extension of its scope, a common law *certiorari* could be used only to review acts by courts of law or officials of a distinctly judicial character, and not acts of a ministerial nature.[2] In recent times, however, exceptions to this rule have been made, the scope of the writ greatly extended, and the writ employed to test the validity of municipal acts and ordinances, both judicial and ministerial.[3]

Certiorari will not be granted to review the determination of the local authorities, that the public interests demand the exer-

People v. Trustees, 42 Ill. Ap. 650; McDonald v. Williams, 41 Ib. 378; Mathias v. Mason, (Mich.) 33 N. W. R. 312; Com. v. Ellis, 11 Mass. 465; Miller v. Sch. Trustees, 88 Ill. 26; Welch v. Wetzel Co., (W. Va.) 1 S. E. R. 337; State v. District Court, 41 Minn. 42; Peterson v. Fowler, 76 Mich. 258.

[1] State v. Robbins, 54 N. J. L. 566; Lexington v. Sargent, 64 Miss. 621; Swift v. Wayne Co., 64 Mich. 479; 31 N. W. R. 434; Old Colony R. Co. v. Fall River, 147 Mass. 455; State v. Elizabeth, 50 N. J. L. 347; State v. Stewart, 5 Strob. L. 29; *In re* Schmidt, 24 S. C. 363; State v. Orange, 50 N. J. L. 347; Dwight v. Springfield, 4 Gray, 107; Cunningham v. Squires, 2 W. Va. 422; Champion v. Board, 5 Dak. 416; Taylor v. Americus, 39 Ga. 59; Macon v. Shaw, 16 Ib. 172; Wilson v. Seattle, 2 Wash. St. 543; 27 Pac. 474; Burns v. Lagrange, 17 Tex. 415; Carroll v. Tuscaloosa, 12 Ala. 173; Miller v. Jones, 80 Ib. 89; Great Falls Ice Co. v. District, 19 D. C. 327; Jackson v. People, 9 Mich. 111; Gager v. Chippewa, 47 Ib. 167; Carron v. Martin, 26 N. J. L. 594; State v. Trenton, (N. J. 92) 23 Atl. R. 281; State v. Newark, 25 N. J. L. 399; State v. Hudson, 32 Ib. 365; Dorchester v. Wentworth, 31 N. H. 451; State v. Dowling, 50 Mo. 134; Swan v. Cumberland, 8 Gill, (Md.) 150; Ewing v. St. Louis, 5 Wall. 413; Holberg v. Macon, 55 Miss. 112; Lonora v. Carthage, 27 Ill. 140; Genesee v. Harper, 38 Ib. 103; Collins v. Davis, 59 Iowa, 256; Oshkosh v. State, 59 Wis. 425; Board of Ald. of Denver v. Darrow, 22 Pac. Rep. 784; see ch. VII. Municipal Courts, § 105.

[2] Bacon's Abridgment, *Certiorari*, P; People v. New York, 2 Hill, 9, 11, 14, 21; People v. Com'rs, 97 N. Y. 37; Stone v. New York, 25 Wend. 157, 167; North & S. S. R. Co. v. Spullock, 88 Ga. 283; State v. Moniteau Co. Ct., 45 Mo. App. 387.

[3] Camden v. Mulford, 26 N. J. L. 49; State v. Hudson, 32 Ib. 365; State v. Donahay, 30 Ib. 404; Mowery v. Camden, 49 Ib. 106; State v. Newark Pol. Com'rs, 49 Ib. 170; Iske v. Newton, 54 Iowa, 586.

cise of the discretionary legislative powers which are possessed by the municipality; but proceedings, instituted in carrying into execution such determination, are reviewable by the proper court, with the object of correcting errors of law which have been committed therein.[1]

In the absence of statute, a writ of *certiorari* is not a matter of course and of right,[2] and a party seeking the remedy ought to show that substantial justice requires the issue of the writ.[3] If their error is merely one of policy or expediency,[4] or if there has been unreasonable delay in applying for it, the writ should be denied.[5]

Certiorari will be granted to review proceedings which are taken in condemnation of lands for highways and other public purposes;[6] sometimes, even when an appeal is provided for.[7]

A writ of *certiorari* will also lie to review a contested election case, where a writ of *quo warranto* is not called for.[8] So, likewise, the person aggrieved may by this writ obtain a revision of an assessment or tax, which has been wrongfully levied upon his property,[9] or procure the removal of his non-taxable property from the assessment roll.[10]

§ 399. **What may be examined under writ of certorari.** —A writ of *certiorari* is neither a substitute for an appeal, nor is it designed to correct errors of fact;[11] although it will be

[1] People v. Board, 62 Hun, 619; 16 N. Y. S. 705; People v. Queens Co., 131 N. Y. 468; Dwight v. Springfield, 4 Gray, 107; Monterey v. Berkshire, 7 Cush. 394; Read v. Camden, (N. J. L.) 24 Atl. R. 549; Macon v. Shaw, 16 Ga. 172; Stone v. Boston, 2 Met. 220.

[2] *Ex parte* Hitz, 111 U. S. 766; Welch v. Wetzel Co., (W. Va.) 1 S. E. Rep. 337; Lees v. Drainage Com'rs, 24 Ill. App. 487; Weaver v. Devendorf, 3 Denio, 117; 15 Wend. 198.

[3] Charlestown v. Com'rs, 109 Mass. 270.

[4] People v. Board, 131 N. Y. 468; Tiedt v. Carstevsen, 61 Iowa, 334.

[5] State v. Ten Eyck, 18 N. J. L. 373; Elmendorf v. Covert, 1 Hill, 674; Noyes v. City, 116 Mass. 87; Keys v. Marion Co., 42 Cal. 252.

[6] Farmington etc. Co. v. Com'rs, 112 Mass. 206; People v. Betts, 55 N. Y. 600; People v. Dodge, 45 Hun, 310.

[7] People v. Brighton, 20 Mich. 57; Comrs. v. Town, 19 Ill. App. 259; Phillips v. Franklin Co., 22 Atl. R. 385; 83 Me. 541; Roberts v. Williams, 13 Ark. 555; Saller v. Brown, 67 Mich. 422; State v. Poland, 50 N. J. Law, 367; Bixby v. Gass, 54 Mich. 551.

[8] Cunningham v. Squires, 2 W. Va. 422; Gibbons v. Sheppard, 65 Pa. St. 20.

[9] Swann v. Cumberland, 8 Gill, 150; Milwaukee I. Co. v. Schubel, 29 Wis. 444.

[10] Peo. v. Ogdensburg, 48 N. Y. 390.

[11] State v. Bill, 13 Ired. L. 373; State v. Swift, 1 Hill (S. C.) 29; State v. Cockrell, 2 Rich. (S. C.) 6; State v. Moniteau Co. Ct., 45 Mo. Ap. 387; North & S. S. R. Co. v. Sprillock, 88

granted, only when a final determination of the case has been had by an inferior tribunal.[1] But the revisory court can inquire, not only into the jurisdiction of the inferior court or officer, but into all alleged errors of law[2] in the proceedings which bear upon the merits of the matter under consideration. So, it has been held that it is the duty of the court to examine the evidence, upon which the action of the inferior tribunal is founded, and to determine if it was sufficient to justify the adjudication or decision of the court.[3] There is, however, much contrariety of opinion upon this point; and it has been held that the jurisdiction of the superior court is limited to an examination of the legality and regularity of the proceedings in point of form; and can only determine the question of proper observance of the requirments of the law.[4] The general rule is, that *certiorari* does not lie to review the evidence given in the inferior court,[5] is subject to the exception that the court may inquire, whether any evidence of a fact was presented to the inferior tribunal.[6] But the weight of the decisions seems to sustain the view, that the case cannot be retried upon its merits in a proceeding by *certiorari*, unless the scope of that writ has been enlarged by statute.[7]

Ga. 283; Com. v. Gillespie, 23 Atl. R. 393.

[1] Western Un. Co. v. Locke, 107 Ind. 9; Freshour v. Logansport, 104 Ib. 463.

[2] McAlliley v. Horton, 75 Ala. 491; Donahue v. Will Co., 100 Ill. 94; Hyslop v. Finch, 99 Ib. 571; State v. Dodge Co., 56 Wis. 79; Bea v. Seeman, (W. Va. 92) 15 S. E. R. 173; State v. St. Johns, 47 Minn. 315; Kane v. State, 17 Atl. R. 557; 70 Md. 546.

[3] People v. Metro. Pol. Board, 39 N. Y. 506; People v. Smith, 45 Ib. 772; Jackson v. People, 9 Mich. 111.

[4] Parks v. Boston, 8 Pick. 218; Dwight v. Springfield, 4 Gray, 107; State v. Perranet, 41 La. An. 179; People v. Parker, 45 Hun, 452; Farmington R. W. P. Co. v. Comrs., 112 Mass. 206; State v. Rightor, (La.) 2 So. R. 385; Herbert v. Curtis, (N. J. 93) 25 Atl. R. 386; Wilmington S. S. Co. v. Haas, 25 Ib. 85; 151 Pa. St. 131; 31 W. N. C. 79; Garvin v. Gorman, 63 Mich. 221.

[5] Com. v. Gillespie, 23 Atl. R. 393; DeRochburne v. Com., 12 Minn. 78; Betts v. Warren, 5 Harr. 4; *In re* Road in Bethlehem Tp., 10 Atl. R. 122; Barclay v. Brabston, 49 N. J. L. 629; Carrie v. Carrie, 42 Mich. 509; Rayner v. State, 52 Md. 568; State v. Davis, 48 N. J. L. 112; Hewitt v. Judge, 34 N. W. R. 248; Wilmington S. S. Co. v. Haas, 25 Atl. R. 85; 151 Pa. St. 131; 31 W. N. C. 79; People v. Assessors, 39 N. Y. 81.

[6] Jackson v. People, 9 Mich. 111; *Ex parte* Turnpike Co., 62 Ala. 93; Camden v. Bloch, 65 Ib. 236; People v. Police Board, 72 N. Y. 415; Moreland v. Whitford, 54 Wis. 150.

[7] *In re* Mount Morris Sq., 2 Hill, 14; *In re* Albany St., 23 Wend. 277;

The uncertainty of the law as to the extent of the power of the revisory court, where its power in a *certiorari* proceeding has not been expressly and distinctly enlarged by statute, is due wholly to the disposition manifest in some courts in recent times to extend this remedy, in order to make it cover particular cases, to which in its original character it was never intended to be applied.

A common law writ of *certiorari* will not lie to review the final determination of a court or officer, where an appeal or writ of error is allowed.[1] But if an appeal is improperly denied, or if the party is fraudulently, or by accident, deprived of it, he may have his whole case reviewed on *certiorari*, both as to law and fact.[2]

§ 400. **Indictment.**—In accordance with the present disposition to assimilate corporate duties and responsibilities to those of individuals, it is well settled that municipal and private corporations can be indicted for malfeasance or nonfeasance, in performing those mandatory public duties, which are imposed upon them by statute, or in England by prescription. Municipal corporations cannot be indicted for felonies, but they may be indicted for acts injurious to the public, which constitute a nuisance.[3] So, it has been held that the municipality is indictable at common law for a failure to keep its highways in re-

Stone v. New York, 25 Ib. 157, 167; People v. Rochester, 21 Barb. 656; 2 Hill, 27; People v. Com'rs, 106 N. Y. 64; People v. Fire Com'rs, 106 Ib. 257; Oshkosh v. State, 59 Wis. 425. But see State v. Kansas City, 89 Mo. 34, where it is held that *certiorari* will call for review of only those facts which appear upon the face of the record.

[1] State v. District, 41 Minn. 42; Harris v. Barber, 9 S. Ct. 314; 129 U. S. 366; Petty v. Ducker, 11 S. W. R. 2; 51 Ark. 281; *In re* Mt. Morris Sq., 2 Hill, 14; Bogart v. New York, 7 Cow. 158; Rundle v. Baltimore, 28 Md. 356; Beasley v. Beckley, 28 W. Va. 81; Wilson v. Burks, 71 Ga. 862; Galloway v. Corbett, 52 Mich. 460; Reynolds v. Los Angeles, 64 Cal. 372.

[2] State v. Bill, 13 Ired. L. 373; ch. VIII. Municipal Courts, § 100.

[3] Regina v. Great etc. Ry. Co., 9 Q. B. 315; Regina v. Bermingham etc. Co., 9 Car. & P. 469; Regina v. Nott, 4 Q. B. 773; Rex v. Oxfordshire, 16 East, 223; Com. v. New Bedford, 2 Gray, 229; McCrowell v. Bristol, 5 Lea, 685; Com. v. Kinperts, 12 Pa. Co. Ct. R. 463; State v. Raymond, 27 N. H. 388; Sussex v. Strader, 18 N. J. L. 108; Com. v. Vt. & Mass. R. R. Co., 4 Gray, 22; State v. Hudson Co., 27 N. J. L. 415; State v. R. R. Co., 27 Vt. 103; State v. Society, 54 N. J. Law, 260; People v. Equitable G. L. Co., 5 N. Y. S. 19; Phillips v. Com., 44 Pa. St. 197; State v. Portland, 74 Me. 268.

pair.[1] In such an indictment it is sufficient to allege generally that it is a public highway;[2] and it is not essential to name the owners of the land over which it runs.[3] Immaterial misdescriptions will not vitiate the indictment.[4] A town, having by charter the power to preserve health and remove nuisances, has been indicted for a neglect of its public duty, in permitting a slaughter house to remain on private property, to the annoyance of a citizen, and in danger of the public health.[5]

In one instance, it was held that a town was indictable at common law for failure to erect a bridge.[6] The liability of municipal corporations including towns and counties for the repair of bridges depends largely upon statute. But at common law they were indictable for failure to keep a bridge in repair, even though no damages could be recovered against them in a civil suit.[7]

The indictment of municipal corporations at common law without doubt rested upon the strictly private and possessory character of such corporations under the earlier English law.[8] In the United States, where the municipal franchise is given to the community in general, and not to a few citizens of the place, the indictment of a municipal corporation would appear to be a very anomalous proceeding, if it were not altogether impossible.

§ 401. **Writ of prohibition.**—In the United States, the writ of prohibition is employed to restrain the attempted illegal exercise of municipal powers, or the imposition of munic-

[1] State v. Murfreesboro, 11 Humph. 217; State v. Gorham, 37 Me. 451; Com. v. Hopkinsville, 7 B. Mon. 38; State v. Barksdale, 5 Humph. 154; Com. v. Newburyport, 103 Mass. 129; Louisville etc. Co. v. State, 3 Head, 523; Nowlin v. State, 49 Ala. 41; Phillips v. Com., 44 Pa. St. 197; Howard v. Bridgewater, 16 Pick. 189; Davis v. Bangor, 42 Me. 522.

[2] State v. Harsh, 6 Black. 346; Reg. v. Turwesten, 1 Eng. L. & Eq. 317; Nichols v. State, 89 Ind. 298.

[3] State v. Dover, 10 N. H. 394.

[4] Alexander v. State, 16 Ala. 661; State v. Lemay, 13 Ark. 405; State v. Fletcher, 13 Vt. 124.

[5] McCrowell v. Bristol, 5 Lea, 585; State v. Shelbyville, 4 Sneed, 176; *contra*, State v. Burlington, 36 Vt. 521.

[6] State v. Whitingham, 7 Vt. 390.

[7] Regina v. Bermingham, 9 Car. & P. 469; Rex v. Staffordshire, 16 East, 223; State v. Gorham, 37 Me. 451; Pittsburgh etc. Co. v. Com., 101 Pa. St. 192; Sawyer v. Northfield, 7 Cush. 490; *contra*, State v. Hudson, 30 N. J. L. 137; Eyman v. People, 6 Ill. 8; State v. Portland, 74 Me. 268.

[8] See *ante*, § 21, and, generally, ch. III. on Incorporation.

ipal fines and penalties which are unauthorized by law.[1] A writ of prohibition is directed by a superior to an inferior court, forbidding it to act, while an injunction is directed to a party and not to the court. So, a prohibition has been refused, when it was asked for, in order to control the action of a municipal council, acting not as a court, but as a legislative body.[2]

If a suit is pending, and injury is imminent to either of the parties, for which he can have no other remedy, a writ of prohibition will issue ; but such a writ will not be granted, merely because a suit is threatened.[3] If however there is a plain remedy in the ordinary course of law, as by putting in a defence in the inferior or municipal court, and the defendant upon conviction has the right of an appeal or to ask for a *certiorari* to review the trial, a writ of prohibition will not be granted.[4]

[1] Clayton v. Heidelberg, 17 Miss. 623; Warwick v. Mayo, 15 Gratt. 528; State v. Christ Ch. P. R. Com'rs, 1 Mill Const. 55.

[2] Mealing v. Augusta, Dud. (Ga.) 221.

[3] Bluffton v. Silver, 63 Ind. 262; Arnold v. Shields, 5 Dana, 18; State v. Columbia, 16 S. C. 412; *In re* Ellyson, 20 Gratt. 10; Culpeper v. Garrell, 20 Ib. 484; Gould v. Gapper, 5 East, 345. In Smith v. Whitney, 116 U. S. 167, Mr. Justice Gray says: "Where the inferior court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as matter of right, and a refusal to grant it, where all the proceedings appear of record, may be reversed on error."

[4] Ducheneau v. Ireland, (Utah, 87) 13 Pac. 87; Turner v. Forsyth, 3 S. E. R. 649; 78 Ga. 683; State v. Fournet, 13 So. R. 185; State v. Rightor, 44 La. An. 298; State v. Withrow, 108 Mo. 1.

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