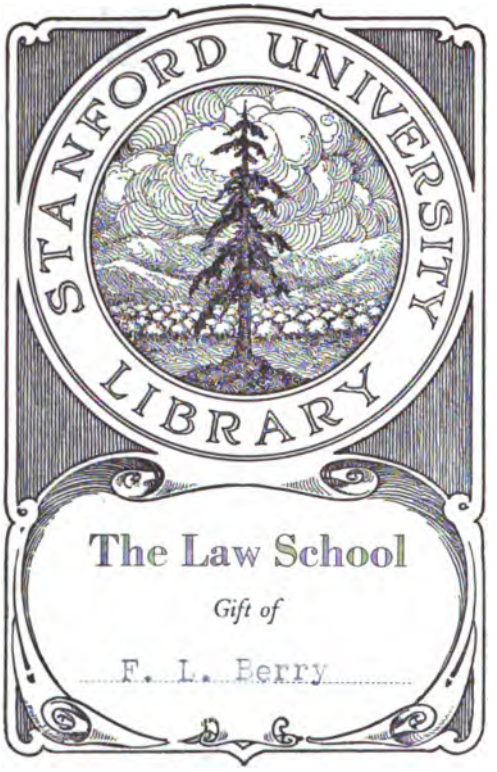
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A SUMMARY

OF THE LAW OF

PUBLIC CORPORATIONS

BY

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PREFACE.

This elementary work, which is intended especially for the use of students, has been written by the author of the lately published three volume treatise on the law of municipal corporations. His hope is that it will be useful for the purpose indicated.

Howard S. Abbott.

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A SUMMARY OF THE LAW

OF

PUBLIC CORPORATIONS.

CHAPTER I.

INTRODUCTORY AND DEFINITIONS.*

§ 1. Corporations defined and classified.

The idea that an association or combination of natural persons or things, may possess powers and properties distinct and different from, as well as some in common with, natural persons, has been a necessary and a favorite one in all systems of jurisprudence. One of the divisions, therefore, found in the earliest known codified law, is that of persons into natural and juridical, the latter including that "artificial person" existing only in contemplation of law, the logical sequence of existing conditions; and since that time all systems have recognized this artificial person.

The definition of a corporation most widely known and quoted is that of Chief Justice Marshall in the Dartmouth College Case: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. * * * Among the most important are immortality,

*6 Curr. Law, 714.

and, if the expression may be allowed, individuality,—properties by which a perpetual succession of many persons are considered as the same and many act as a single individual." [1]

Other definitions and descriptions have been given by text-book writers and judges during the course of many years.[2]

The definition prepared by Austin Abbott for the Century Dictionary is concise in its terms: A corporation is "an artificial person created by law, or under authority of law, from a group or succession of natural persons, and having a continuous existence irrespective of that of its members, and powers and liabilities different from those of its members."

Some of the characteristics of a corporation as compared with a natural person are suggested by the definition of Chief Justice Marshall, and include, as the most important, the idea of immortality. The corporation exists for the time limited in the charter irrespective of the individual lives of those who may compose it; its powers and rights, its duties and obligations, remaining the same, though its members may be constantly changing. It is a legal person distinct from its members.

The second characteristic worthy of note in the present discussion is that, while in a corporation, in the absence of statutory or constitutional provisions, the members are not personally liable for corporate debts, in a partnership—that other association of persons—each member is individually liable for the debts of the firm; and natural persons sui juris are liable to the fullest extent for debts contracted by them.

The occasion of the creation of a corporation is chiefly for the resulting convenience, economy, unity and continuity in the transaction of business or management of property. Certain powers and functions can be exercised better by an artificial body than natural persons; and the state or sovereign may better exercise over this collective body, this artificial person, its rights of control and regulation, than over a number of individuals. Great and advantageous economies in business can be effected by combinations of energy and capital.

[1] Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 636.

[2] Liverpool Ins. Co. v. State of Massachusetts, 77 U. S. (10 Wall.) 566; In re Gibbs' Estate, 157 Pa. 59; 1 Kyd, Corp. 70; Bouvier, Law Dict. "Corporations;" 1 Clark & M. Private Corp. § 1; 1 Thompson, Corp. §§ 1 et seq.; vol. 7, § 8140; Angell & A. Corp. (11th Ed.) §§ 30 et seq.; Bl. Comm. Book IV., 18; Standard Dict. "Corporation."

Corporations have been classified according to the functions which they may perform, their purpose of creation, the number of members comprising them, or upon the element of capital stock. The only classification which concerns the present work is that first suggested, namely, the division based upon functions performed. This was broadly suggested in the Dartmouth College Case in the opinion of Justice Story: "Public corporations are generally esteemed such as exist for public political purposes only, —such as towns, cities, parishes, and counties; and in many respects they are so, although they involve some private interests. But, strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government." [3]

The basis of the classification arises from a difference in the nature of the duties required and powers exercised, and has existed since the first recognition of artificial persons by the sovereign. This division or classification is that of public and private.

In a California case,[4-5] Chief Justice Sawyer in writing the opinion said in defining a corporation and discussing its nature: "So, also, there are several classes of corporations, such as public municipal corporations, the leading object of which is to promote the public interest; corporations technically private, but yet of a quasi public character, having in view some great public enterprise, in which the public interests are directly involved to such an extent as to justify conferring upon them important governmental powers, such as an exercise of the right of eminent domain. Of this class are railroad, turnpike, and canal companies; and corporations strictly private, the direct object of which is to promote private interests, and in which the public has no concern, except the indirect benefits resulting from the promotion of trade, and the development of the general resources of the country. They derive nothing from the government, except the right to be a corporation, and to exercise the powers granted."

§ 2. Quasi public corporations defined.

Public corporations are agencies of the state; and quasi public corporations are private corporations in all their essential charac-

[3] Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 668.

[4-5] Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 577. See, also, many authorities cited and full discussion of the subject in Abb. Mun. Corp. §§ 1 et seq.

teristics, but so affecting the interests of the public in the transaction of their business as to give to the state the right, subject to charter provisions,[6] to interfere with or control their management and operation to a greater extent than usual with private corporations.

The announcement of the doctrine of public control in the Munn Case did not contain any limitations upon its exercise. The power, however, is not one which can be exercised by the state unrestrained, but due regard must be had for constitutional provisions protecting property and vested rights. The power of public control is not synonymous with the right of confiscation. The later cases decided by the supreme court of the United States, while not lessening the weight of the Munn Case as an authority upon the right of public control, emphatically assert the principles just suggested. The Reagan and Smyth Cases are especially instructive in this respect.

§ 3. Public and private corporations distinguished.

The rights and powers, the duties and obligations, of a public corporation, as compared with those of a private corporation, are marked. This is true because of the entirely different purposes for which they are respectively created. A public corporation, as has been said, is an agency of the state, of the sovereign; it is organized to carry out some local political want as auxiliary to the sovereign power; it is a governmental agent created for the benefit of all affected; it is created and exists through the mere will of the legislature as the delegated agency of the sovereign and is independent of all contract as between itself and the sovereign. On the other hand, a private corporation is organized primarily for the benefit, generally pecuniary, of its members; for the advantage of the few as compared with the many. This distinction is very clearly and concisely stated in an early decision in North Carolina.[7]

[6] Munn v. State of Illinois, 94 U. S. 113; Chicago, B. & Q. R. Co. v. State of Iowa, 94 U. S. 155; Stone v. State of Mississippi, 101 U. S. 814; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362; Louisville & N. R. Co. v. State of Kentucky, 161 U. S. 695; Smyth v. Ames, 169 U. S. 466; City of Rushville v. Rushville Natural Gas Co., 132 Ind. 575; Attorney General v. Old Colony R. Co., 160 Mass. 96; State v. Columbus Gaslight & Coke Co., 34 Ohio St. 572.

[7] Mills v. Williams, 33 N. C. (11 Ired.) 558; Police Jury of Bossier

The most important difference between public and private corporations is that in the one case, as suggested in the North Carolina decision, there is but one party to the transaction. No contract relation exists as between the inhabitants of the territory organized and the state, and the charter or organization for this territory may be altered, amended or repealed at the pleasure of the sovereign. This is not true, except within certain well-recognized legal limitations, in respect to the private corporation. Its charter is a contract, subject only to the law of the land, governing the construction and enforcement of contracts.

§ 4. Public corporations classified.

There is found upon an examination of the reported cases a classification of public corporations based upon fundamental characteristics and differences, namely, public, municipal and public quasi corporations.[8]

These three classes have been generally recognized, though, owing to a confusion of ideas and a failure to comprehend the fundamental reasons for the division, the placing of the same governmental organization in the same class has not been uniform by the courts. This is not altogether their fault, for different state constitutions and statutes have placed in different classes the same governmental organization. The essential difference between these classes is in the varying power of local action or initiative. This diminishes in passing from public corporations to public quasi corporations, and accompanying this decrease in power is found a corresponding diminution of duty and liability.[9]

The state as a corporation. At the common law and in England today, the king is regarded by statute as a corporation sole for the purpose of succession and to preserve the possessions of the crown. In this country, for many purposes, both the state and national governments must be considered as corporations having power to enter into contracts, take, hold and convey property, sue, and, if they consent, be sued.[10]

v. Shreveport Corp., 5 La. Ann. 661; Kahn v. Sutro, 114 Cal. 316.

[8] Regents of University v. Williams, 9 Gill & J. (Md.) 365; People v. Morris, 13 Wend. (N. Y.) 325; Penobscot Boom Corp. v. Lamson, 16 Me. 224; Regents of University v. McConnell, 5 Neb. 423.

[9] State of Indiana v. Woram, 6 Hill (N. Y.) 33.

[10] State of Indiana v. Woram, 6 Hill (N. Y.) 33; Dugan v. U. S., 3 Wheat. (U. S.) 172; Beers v.

§ 5. Definition of a public corporation.

The term "public corporation" will be used in this work as a generic one, and includes both municipal corporations proper and public quasi corporations. Broadly speaking, the term "public corporation" may include the state. It certainly includes all public governmental agents or political or governmental subdivisions, whatever their powers or obligations, their rights or their duties, may be, though some of them may not have, strictly speaking, all of the powers and capacities of a corporation. The attributes of a corporation attach in a varying degree, and yet they all will be included in the class. Other definitions of a public corporation are, "The investing of the people of a place with the local government thereof." Again "one that is created for a political purpose with political power to be exercised for purposes connected with the public good in the administration of civil government. It is an instrument of the government, subject to the control of the legislature, and its members are officers of the government appointed for the discharge of public duties." [11]

§ 6. Definition of a municipal corporation.

"The power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper." Bouvier defines one as "a public corporation created by government for political purposes and having subordinate and local powers of legislation." [12]

"A corporation of persons, inhabitants of a particular place or connected with a particular district enabling them to conduct its local civil government," is still another definition given. A correct one should also convey the idea that organized territory

State of Arkansas, 20 How. (U. S.) 527; Ter. v. Hildebrand, 2 Mont. 426; Delafield v. State of Illinois, 2 Hill (N. Y.) 159; Governor v. Allen, 27 Tenn. (8 Humph.) 176; Dikes v. Miller, 25 Tex. Supp. 281. But see State v. Atkins, 35 Ga. 315.

[11] Cuddon v. Eastwick, 1 Salk. 143; 7 Thompson, Corp. § 8140; Standard Dict. "Corporation;" Trustees for Vincennes University v. State of Indiana, 14 How. (U. S.) 268; Reclamation Dist. No. 542 v. Turner, 104 Cal. 334; Inhabitants of Yarmouth v. Inhabitants of North Yarmouth, 34 Me. 411; Clark & M. Private Corp. § 31; Abb. Mun. Corp. § 6.

[12] Bouvier, Law Dict.

of itself does not constitute a municipal corporation, but that it includes also the people residing within that district.[13]

An excellent descriptive definition is given in a recent work:[14] "Municipal corporations are of a twofold character,—the one public as regards the state at large in so far as they are its agents in government; the other private in so far as they are to provide local necessities and conveniences for their own communities. And the fact that the legislature has blended the public and private functions of a municipal corporation in one grant of power does not destroy the clear and well-settled distinction between them. In its governmental character the corporation is made by the state a local depository of certain limited and prescribed political powers, to be exercised for the public good of the state. In its proprietary character the theory is that the powers are not conferred chiefly from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual."

§ 7. Public quasi corporations defined and distinguished from municipal.

Public quasi corporations have been defined as: "It is universally agreed that all those subdivisions of state territory, such as counties, townships, school districts, and like bodies, which are created by the legislature for public purposes and without regard to the wishes of their inhabitants, are to be included in the class known as 'quasi corporations.' They are in essence local branches of the state government, though clothed with a corporate form in order that they may the better perform the duties imposed upon them. Generally they comprise large areas of territory which are but sparsely settled, and the relations of life and business existing within them are extremely simple."[15]

As illustrating the different legal character assigned to munici-

[13] Kelly v. City of Pittsburg, 104 U. S. 78; People v. Bennett, 29 Mich. 451; People v. Morris, 13 Wend. (N. Y.) 325; City of Philadelphia v. Fox, 64 Pa. 180.

[14] 20 Am. & Eng. Enc. Law (2d Ed.) p. 1131, and cases cited. See also Abb. Mun. Corp. pp. 11, 12, with many citations; Hamilton County Com'rs v. Mighels, 7 Ohio St. 109.

[15] Williams, Mun. Liab. Tort. § 2; Hamilton County Com'rs v. Mighels, 7 Ohio St. 109; Cooley, Const. Lim. 247.

pal or public administrative and political organizations, see the cases cited in Abbott's Municipal Corporations, pp. 12–16, in the notes.

A corporation possesses certain rights and powers, and there may be imposed upon it by the sovereign certain duties and obligations. Between the two classes of public corporations under discussion a marked difference is found in these respects. This follows from various causes, one of which is the fact that as a rule the government of a public quasi corporation is imposed by the sovereign upon the people residing within certain geographical limits, without consulting their desires or wishes. On the other hand, the government or charter of a municipal corporation proper is usually suggested by the sovereign and adopted or accepted by the people residing within a certain district. The fact that the government or organization is imposed in the one case and adopted or accepted in the other leads to the correlative part of the proposition, namely, the relative duties and obligations of the two classes of corporations. And we find upon an examination of the authorities that the duties and obligations resting upon the public quasi corporations are less in number, and these less burdensome, than those which devolve upon the municipal corporation proper. The people residing within a municipal corporation are given a greater latitude and degree of local self government, in adopting measures looking to their local advantage, than those residing within a public quasi corporation; and as their powers and duties are not thrust upon them but acquired voluntarily to a large extent it follows as just and proper that their obligations and duties be in the same measure increased and of a higher character. A full discussion will be found under the proper subject in the succeeding sections of this work.[16]

[16] One of the leading cases discussing these differences is that of Hamilton County Com'rs v. Mighels, 7 Ohio St. 109, and the opinion of the court is well worthy of careful examination.

CHAPTER II.

CORPORATE LIFE AND EXISTENCE.

I. Creation and Dissolution of Corporations.

II. Territorial Changes and Their Effect.

I. Creation and Dissolution of Corporations.*

§ 8. The power to create a public corporation.

From the fact that all corporations are artificial persons it follows that they must be created by a sovereign power or the state. They may be organized or incorporated pursuant to general directions found in the constitution of the state, the provisions of general enabling acts or statutes, or through or by means of a special act or special charter granted by the legislature of the state when not in contravention of a constitutional provision prohibiting the passage of special legislation.

A brief resume of constitutional provisions regarding the creation of corporations will be found in the larger work by this author upon Municipal Corporations.

This is true of all clases of corporations, including the various subdivisions of public corporations. As the latter are governmental agents, incorporated or organized for the sole purpose, so far as their public duties are concerned, of aiding the state in the administration of government, the necessity or expediency of incorporating them should be decided, having reference to the advantages and interests of the whole people, as well as those within the lines of the proposed corporation.

The organization of municipal corporations whereby their members exercise political rights and duties is a marked feature of American government. It is based on the fundamental idea that the people are the source of all power and have the inherent right to exercise it whenever they see fit to do so. As local matters can best be regulated by the people of the locality, we have it so, rather than allow the central power to govern in these respects. This policy runs back into our earliest history, is seen in all state legislation, and is guaranteed by a greater number of state constitutions. In this connection a quotation from De Tocque-

* 6 Curr. Law, 716.

ville may not be amiss: "Local assemblies of citizens constitute the strength of free nations. Municipal institutions are to liberty what primary schools are to science; they bring it within the people's reach; they teach men how to use and how to enjoy it. A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty."

Formerly in England public corporations were created by a royal charter or special act of parliament but now under a general law relative to this subject. In the United States the power to create corporations is lodged in the Federal government and in the various state governments as quasi independent sovereigns.[1]

§ 9. As existing in the National government.

The theory which sustains the right of the Federal government to create a corporation either public or private, is that, while not one of the enumerated sovereign powers or ends of government, it may be the means of carrying into effect those granted. This power was denied the Federal government at first, but the doctrine is firmly established, and we find Congress passing laws creating or incorporating municipal and public quasi corporations in the District of Columbia and other territory under the sole jurisdiction of the Federal government. It has not yet attempted to create or organize such corporations within the territorial limits of the different states.[2]

§ 10. The states and their power to create.

The states, being quasi independent sovereigns or governments not of enumerated powers, possess the usual attributes of such sovereignty, including the creation of artificial persons;

[1] De Tocqueville, Democracy in America, c. 5; McCulloch v. Maryland, 4 Wheat. (U. S.) 316.

[2] Madison Federalist, Sept. 14, 1787; Jefferson's Memoirs (1829) 523, 526; House Documents, 50th Cong., 1st Sess. House Report Number 530. "Bill to incorporate the Maritime Canal Company of Nicaraugua." Stoutenburgh v. Hennick, 129 U. S. 141; McCulloch v. Maryland, 4 Wheat. (U. S.) 316; Osborn v. Bank of U. S., 9 Wheat. (U. S.) 738; Thomson v. Union Pac. R. Co., 76 U. S. (9 Wall.) 579; Barnes v. District of Columbia, 91 U. S. 540.

and in the exercise of this power it has been held that no precise form of words is necessary to create a corporation.[3] They have the power to create corporations for public purposes, with all the means of self-government, including that of levying taxes for local purposes,[4] and the possession of this power implies the further right to create them with such limitations and omissions as the legislative body may see fit to make.[5]

The power, however, to incorporate, possessed by the legislature since it is itself one delegated, cannot usually be delegated to subordinate bodies or officers either legislative, judicial or ministerial in their character, though the rule would not apply to purely clerical, mechanical or ministerial acts.[6]

§ 11. The exercise of the power.

The constitution of a state is the written expression of the sovereign will. Early constitutions as a rule contained no provisions for the organization of public corporations, limiting or defining the power of the legislature in this respect. Those adopted of late years, however, or recent amendments, usually provide in terms for their creation. Where they fail in this last regard, however, they direct the passage of general laws by the legislature effecting the same result and delegating to that body the usual discretion as to the details of such incorporation.[7]

In Wisconsin[8] the legislature may delegate this power and in the absence of constitutional provisions or of general laws, some states have adopted, as their settled policy, the creation of public corporations by the passage of special acts granting char-

[3] 2 Kent. Comm. 27; People v. City of Riverside, 70 Cal. 461; Bow v. Allenstown, 34 N. H. 351, 372; Thomas v. Dakin, 22 Wend. (N. Y.) 9, 84; State v. Covington, 29 Ohio St. 102.

[4] Sessions v. State, 115 Ga. 18, 41 S. E. 259; Carr v. McCampbell, 61 Ind. 97; Owen v. Sioux City, 91 Iowa, 190, 59 N. W. 3; Cheaney v. Hooser, 48 Ky. (9 B. Mon.) 330; State v. Stuht, 52 Neb. 209, 71 N. W. 941.

[5] Redell v. Moores, 63 Neb. 219, 88 N. W. 243; Butler v. Town of Montclair, 67 N. J. Law, 426, 51 Atl. 494.

[6] People v. Bancroft, 2 Idaho, 1077, 29 Pac. 112. But see contra, State v. Forest County, 74 Wis. 610.

[7] Darcy v. City of San Jose, 104 Cal. 642; City of Americus v. Perry, 114 Ga. 871, 40 S. E. 1004; People v. Cooper, 93 Ill. 585. Compare Kilgore v. Magee, 85 Pa. 401.

[8] State v. Forest County, 74 Wis. 610.

ters containing special powers and privileges to the inhabitants of a particular district.

Public corporations may, then, be organized or created under constitutions or general laws pursuant to constitutional provisions fixing universal terms and conditions upon which they may be organized, or special acts conferring special powers and privileges. The legislature in the absence of constitutional provisions, possesses the power, as the legislative branch or body of the sovereign, to pass laws general or special in their nature, subject only to constitutional restrictions applying to all legislation.[9]

§ 12. Conditions precedent; population.

A discussion of the power of the legislature to pass laws classifying cities, towns and villages, and providing for the organization of such corporations upon complying with or coming within the conditions fixed, will be found in the chapter relating to legislative power over public corporations and its limitations. In the creation of corporations, however, it can be said that a legislature may have the power, either as proceeding from the constitution of the state or as possessed originally and delegated by the people, to pass laws for the organization of public corporations dependent on the residence within certain geographical limits, of a certain number of people as determined by the latest official census.[10] And in determining the population of the district in proceedings to incorporate, only those can be included as "actual residents" of such territory who are in a place with the intent to establish, or who have already established, their domicile there.[11]

[9] See full citation of cases in Abb. Mun. Corp. pp. 26, 27.

[10] Sanders v. Sehorn, 98 Cal. 227; City of Wardner v. Pelkes (Idaho) 69 Pac. 64; Wilkison v. Board of Children's Guardians of Marion County, 158 Ind. 1, 62 N. E. 481; O'Bryan v. City of Owensboro, 24 Ky. L. R. 469, 68 S. W. 858; State v. Village of Fridley Park, 61 Minn. 146, 63 N. W. 613; State v. Stuht, 52 Neb. 209, 71 N. W. 941; Grey v. City of Dover, 62 N. J. Law, 40, 40 Atl. 640; In re Henneberger, 155 N. Y. 420; Ewing v. State, 81 Tex. 172; Watson v. Corey, 6 Utah, 150, 21 Pac. 1089; Town of South Morgantown v. City of Morgantown, 49 W. Va. 729, 40 S. E. 15; State v. Lammers, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501; Fremont County Com'rs v. Perkins, 5 Wyo. 166, 38 Pac. 915.

[11] State v. Mote, 48 Neb. 683, 67 N. W. 810. See, also, Attorney Gen-

§ 13. Conditions precedent; area and physical characteristics.

The area of a district contemplating incorporation may be the determining element or condition,[12] or the physical characteristics of territory to be organized.[13]

Where this last element determines the legal organization of or annexation to municipalities or public quasi corporations of territory, a successful result seems to depend upon the nature of the land. Is it fit for agricultural purposes or "farming land," and so far distant from the center of the city or town that it will not enjoy any of the advantages supposed to be derived from municipal organization, such as fire and police protection? And further, answering this proposition in the negative, is the value of the land enhanced to such an extent by the existence near it of a large center of population as to justly impose upon it a part of the burdens accompanying municipal organization?[14]

Upon an examination of the authorities the general rule seems to be well established that farm land situated so far distant from organized territory or of such a character as to be incapable of receiving the advantages derived from municipal organization, including fire and police protection, cannot be annexed, nor, in the first instance, in the absence of sufficient population, organized into a municipal corporation.

eral v. Borough of Anglesea, 58 N. J. Law, 372.

[12] State v. County of Dorsey, 28 Ark. 378; People v. Marquiss, 192 Ill. 377, 61 N. E. 352; State v. Garfield County Com'rs, 54 Kan. 372; Rice v. Ruddiman, 10 Mich. 125; Warren v. Barber Asphalt Paving Co., 115 Mo. 572; Brown v. Hamlett, 76 Tenn. (8 Lea) 732; State v. Broach (Tex. Civ. App.) 35 S. W. 86; State v. Lammers, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501.

[13] Fullington v. Williams, 98 Ga. 807; Christ v. Webster City, 105 Iowa, 119, 74 N. W. 743; State v. Fleming, 158 Mo. 558, 59 S. W. 118; State v. Dimond, 44 Neb. 154, 62 N. W. 498. See, also, citations in the following note.

[14] Indiana Imp. Co. v. Wagner, 138 Ind. 658, 38 N. E. 49; Stephens v. Felton, 99 Ky. 395; State v. Village of Fridley Park, 61 Minn. 146, 63 N. W. 613; Kansas City v. Marsh Oil Co., 140 Mo. 458; State v. Mote, 48 Neb. 683; Stout v. Borough of Glen Ridge, 59 N. J. Law, 201; In re Incorporation of Borough of Prospect Park, 166 Pa. 502; Pelletier v. City of Ashton, 12 S. D. 366, 81 N. W. 735; Ewing v. State, 81 Tex. 872; State v. Hoard, 94 Tex. 527, 62 S. W. 1054; Ferguson v. City of Snohomish, 8 Wash. 668; Philips v. City of Huntington, 35 W. Va. 406; State v. Lamoureux, 3 Wyo. 731. See, also, Russ v. City of Boston, 157 Mass. 60.

§ 14. Mode of creation.

No particular form of words is necessary to create a corporation. The essential is an existing intent on the part of the state or a legislative body that a public corporation shall be created. Following logically from this statement, then we may have three modes of creation: by prescription, by implication, and by affirmative action.*

By prescription. A public corporation exercises certain powers and we find imposed upon it certain duties and obligations. There may not be in existence an express act of the sovereign giving to the inhabitants of a certain district the right to exercise these powers, affected by their corresponding duties and obligations, but the cases hold in many instances that where an active corporation has existed for some time it will be presumed that at the time of the organization of such territory the affirmative permission of the sovereign was given. The people within certain geographical limits may have exercised, in other words, all the rights which usually appertain to a particular organization for such a length of time that their legal right to do so will not be questioned;[15] and because, as said in an Illinois case, "municipal corporations are created for the public good—are demanded by the wants of the community; and the law, after long-continued use of corporate powers, and the public acquiescence, will indulge in presumptions in favor of their legal existence."[16] The state may also, by long acquiesence in the continued exercise of corporate powers by the inhabitants of a certain district, be estopped or precluded from questioning or raising the legal existence as a corporation of such territory.[17]

* 6 Curr. Law, 715.

[15] Town of Enterprise v. State, 29 Fla. 128, 10 So. 740; Prentiss v. Davis, 83 Me. 364; People v. Maynard, 15 Mich. 463; City of Omaha v. City of South Omaha, 31 Neb. 378, 47 N. W. 1113; but contra, in New Boston v. Dunbarton, 12 N. H. 409. See, also, Bow v. Allenstown, 34 N. H. 351; Town of Londonderry v. Town of Andover, 28 Vt. 416.

[16] Jameson v. People, 16 Ill. 257. See, also, Stockbridge v. West Stockbridge, 12 Mass. 400; Bassett v. Porter, 58 Mass. (4 Cush.) 487.

[17] State v. Leatherman, 38 Ark. 81; Pidgeon v. McCarthy, 82 Ind. 321; Bow v. Allenstown, 34 N. H. 351; Sherry v. Gilmore, 58 Wis. 324; Austrian v. Guy, 21 Fed. 500; People v. Alturas County, 6 Idaho, 418, 55 Pac. 1067; Mendenhall v. Burton, 42 Kan. 570. But see State v. Fleming, 147 Mo. 1.

§ 15. By implication.

The creation of a public corporation through implication is slightly different from its creation by prescription, though both modes presuppose the existence of an intent on the part of the sovereign to create such a public corporation. The element of time differentiates them. The inhabitants of a certain district may have exercised the usual powers for such a length of time that the granting of them will be presumed. On the other hand, the inhabitants of such territory may not have exercised these powers for such a length of time as will give to them the right through prescription but the legislature may by some act recognize the legal incorporation or existence of such district, and therefore, as the courts have held, the corporation will be created by implication.[18]

§ 16. By affirmative action.

The third way in which a public corporation may be created is by what may be termed express affirmative action on the part of the sovereign, and, as has been already stated, this may be accomplished pursuant to constitutional provision, general enabling statutes, or special act. The discussion which follows will not attempt to distinguish as between the three modes, but will follow the decisions and state the necessary steps to be taken by the people in attempting to incorporate under legal authority.

§ 17. Petition and notice.

The petition. That certain territory, wherever found, become incorporated under authority of law, the first requisite may be the preparation and filing of a petition with the proper officer, containing the necessary averments of the signers' wishes, with an accurate and definite description of the boundaries limiting and inclosing the proposed organization.[19]

[18] Conservators of River Tone v. Ash, 10 Barn. & C. 349; Levy Court v. Coroner, 69 U. S. (2 Wall.) 501; Dean v. Davis, 51 Cal. 406; Town of Enterprise v. State, 29 Fla. 128, 10 So. 740; Abb. Mun. Corp. § 16, citing many cases.

[19] People v. Marquiss, 192 Ill. 377, 61 N. E. 352; Indiana Imp. Co. v. Wagner, 138 Ind. 658, 38 N. E. 49; Ford v. Town of North Des Moines, 80 Iowa, 626, 45 N. W. 1031; State v. Red Lake County Com'rs, 67 Minn. 352, 69 N. W.

The notice. It is a fundamental rule of law that before action or proceedings of any character can be legally taken affecting the rights either property or political, of an individual, he must have notice of the pendency of such proposed action or proceedings. This rule of law applies to the present question. A proposed municipal or public quasi corporation necessarily includes the property of a large number of individuals. The law gives them a right to be heard upon all matters pertaining to or affecting their rights. The necessary petition preliminary to the organization of a public corporation, under authority of law, must be brought home either by actual or constructive notice to the attention of all possessing rights within the limits of the territory included, and must contain substantially the legal requirements; it must be signed by the proper officers, as provided by law; and be either filed, posted or published for the length of time required by controlling statutory provisions.[20]

§ 18. The election and subsequent official action.

After the petition for election has been properly prepared and notice given, the voters of the district proposed to be incorporated pass upon the question at an election called by the legal officers at the time and in the manner as directed by law. At such election an official enumeration of the inhabitants within the proposed district is not necessary if the proper officers make a record, relative to the number of inhabitants, in their proceedings declaring the result of the election, and only duly qualified voters are permitted to pass upon the questions submitted.[21]

Subsequent official action. Upon the affirmative vote of the number required by law to organize certain territory into a

1083; Attorney General v. Rice, 64 Mich. 385, 31 N. W. 203; City of Wardner v. Pelkes (Idaho) 69 Pac. 64; Wood v. Quimby, 20 R. I. 482; State v. Hoard, 94 Tex. 527, 62 S. W. 1054.

[20] Smith v. Skagit County Com'rs, 45 Fed. 725; People v. City of Riverside, 70 Cal. 461; State v. Frost, 103 Tenn. 685; Butler v. Walker, 98 Ala. 358; State v. Town of Winter Park, 25 Fla. 371.

[21] State v. City of Blue Ridge, 113 Ga. 646, 38 S. E. 977; State v. Town of Tipton, 109 Ind. 73, 9 N. E. 704; People v. Hecht, 105 Cal. 621; State v. McGowan, 138 Mo. 187, 39 S. W. 771; State v. Red Lake County Com'rs, 67 Minn. 352, 69 N. W. 1083; Segars v. Parrott, 54 S. C. 1, 31 S. E. 677, 865; Cocke v. Gooch, 52 Tenn. (5 Heisk.) 294.

public corporation, the statutes of a state generally require action by some official body or public officer declaring the result, and following such declaration the district as an incorporation comes into existence. This official action is generally held to be judicial in its character, not ministerial; and the correctness of findings by such body or official upon questions coming within their jurisdiction usually cannot be raised on appeal nor in an attack on the validity of corporate acts after organization.[22]

§ 19. Incorporation without an election.

The creation of a public corporation or a change of grade through affirmative action may result from the casting of the required number of votes at an election held in the manner and under the authority suggested by preceding sections, or the statutes may give to some official body or public officer, the power to pass upon the regularity and sufficiency of the proceedings for incorporation, and declare the legal result. In such cases a petition signed by the required percentage of the qualified residents of that territory, and presented to the proper tribunal, if complying with all the provisions of the statute induces official action with the same result. The questions usually raised, when this last condition exists, go to the power or jurisdiction of an official or an official body to entertain the petition and pass upon the facts therein recited, the proceedings, and presentation of evidence, the legal nature of their decisions[23] irrespective of the character of the body, whether ministerial or judicial, and various ministerial and clerical duties to be performed by the official or body, such as the filing or acknowledgment of a plat or map of the proposed corporation, the petition, and the official record of their proceedings with its averments.[24]

[22] Ruohs v. Town of Athens, 91 Tenn. 20, 18 S. W. 400; State v. Goodwin, 69 Tex. 55, 5 S. W. 678; State v. Bilby, 60 Kan. 130, 55 Pac. 843; In re Summit Borough, 114 Pa. 362, 7 Atl. 219; Seabrook v. Fowler, 67 N. H. 428.

[23] Matthews v. Otsego County Sup'rs, 48 Mich. 587; Hill v. City of Kahoka, 35 Fed. 32; State v. Fleming, 147 Mo. 1, 44 S. W. 758; In re Borough of Taylor, 160 Pa. 475; State v. Goodwin, 69 Tex. 55, 5 S. W. 678.

[24] Davenport & R. I. Bridge R. & Terminal Co. v. Johnson, 188 Ill. 472, 59 N. E. 497; Appeal of Gross, 129 Pa. 567, 18 Atl. 557; State v. Broach (Tex. Civ. App.) 35 S. W 86.

§ 20. The charter of a public corporation and its legal nature.

The charter of a corporation is its legal authority to exist and exercise its powers as such. It may be a written instrument, or its existence may not be actual but presumed, through either the doctrines of prescription or implication.*

One of the fundamental differences, it might be said the essential difference, between a public and a private corporation, is that in the case of a private corporation the charter is regarded as a contract under that clause in the constitution of the United States forbidding the states from passing any law impairing the obligation of a contract. The charter of a public corporation is not considered a contract, nor does it come within the doctrine of the Dartmouth College Case.[25]

The reason for this difference of holding may be briefly stated: A public corporation, a municipal corporation considered in its character as a public corporation, and a public quasi corporation, are each and all regarded as agencies of the government. They are involuntary political or civil divisions of the state created by authority of law to aid in the administration of government. Whatever of power they possess, or whatever of duty they are required to perform, originates in the authority creating them. They are organized, mainly for the interest, advantage and convenience of the people residing within their territorial boundaries and the better to enable the government, the sovereign, to extend to them the protection to which they are entitled, and the more easily and beneficently to exercise over them its authority. The powers which they exercise in their public capacity are powers of the state, and the duties with which they are charged are duties of the state.[26]

The rights conferred upon the people residing within the limits of these organizations are political in their character, and it has been said that "It is an unsound and even absurd proposition that political power conferred by the legislature can become a vested right as against the government in any individual or body of men." Entirely different conditions exist and prin-

* 6 Curr. Law, 716.

[25] Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518; Town of Mt. Pleasant v. Beckwith, 100 U. S. 514; Newton v. Mahoning County Com'rs, 100 U. S. 548; Cain v. Brown, 111 Mich. 657; Prince v. Crocker, 166 Mass. 347.

[26] Askew v. Hale County, 54 Ala. 639.

ciples apply to private corporations so familiar to all that it is unnecessary to repeat them.[27]

Not being a contract, therefore, the state has the power to alter, amend, change or repeal the charter of a public corporation at will.[28]

A legislative body cannot part with its powers or delegate them to subordinate agencies so as to be unable to exercise them on all suitable occasions.[29]

"Public or municipal corporations are established for the local government of towns or particular districts. The special powers conferred upon them are not vested rights as against the state, but being wholly political, exist only during the will of the general legislature; otherwise there would be numberless petty governments existing within the state and forming part of it, but independent of the control of the sovereign power. Such powers may at any time be repealed or abrogated by the legislature, either by a general law operating upon the whole state, or by a special act altering the powers of the corporation." [30]

On the other hand, the grant of authority from the state to a private corporation is considered a contract, within the rule as announced in the Dartmouth College Case, subject only to change or repeal by the sovereign upon the terms and conditions which may be found within the instrument itself or which exist in the general laws as a part of it. This doctrine is so firmly established in the jurisprudence of the United States that a mere reference to it is sufficient, and authorities will be found in every state in the Union sustaining it.

§ 21. Rules of construction.

The better rule for the construction of the charter of a public corporation, and that sustained by the weight of authority, is what may be termed the rule of strict construction. The corporation takes nothing by its charter but what is plainly and

[27] People v. Morris, 13 Wend. (N. Y.) 325.

[28] 1 Hare, Const. Law, p. 628; Meriwether v. Garrett, 102 U. S. 472; City of Covington v. Com. of Kentucky, 173 U. S. 231, 19 S. Ct. 383.

[29] Town of East Hartford v. Hartford Bridge Co., 10 How. (U. S.) 511. See, also, Trustees of Schools v. Tatman, 13 Ill. 30; City of New Orleans v. Hoyle, 23 La. Ann. 740.

[30] Sloan v. State, 8 Blackf. (Ind.) 361.

unequivocally granted. This is especially true of all those powers, the exercise of which, if liberally considered, might lead to the placing of illegal, unjust or burdensome obligations upon the taxpayers of the community. The officers of public corporations are notoriously slack in their administration of public affairs. If there is doubt as to the existence of power the exercise of that power should be denied.[31]

A charter must be construed according to the subject-matter contemplated by the legislature, as a whole and its manifest intention and design not defeated, nor the rule of strict construction applied to such a degree as to defeat the purposes for which the corporation was organized.[32]

The general rule applies with all its force to words of exemption in the charter. Charter powers, it is clear, cannot be extended by an unusual or unauthorized construction of its terms, and it is equally certain that no public corporation can itself, by giving such construction, or interpretation, acquire powers not granted. Words should be taken in their ordinary sense and meaning as affected by local conditions, and, where no superior or controlling reasons exist for holding otherwise, that cardinal and elementary principle in the interpretation of statutes should be also applied, namely, that the true intent and meaning of the words used is to be ascertained by an examination of the grant of power as a whole.[33]

§ 22. The charter considered as evidence.

It is generally held that the act of incorporation or charter of a public corporation or municipality is a public act of which the

[31] Minturn v. Larue, 23 How. (U. S.) 435; Thomas v. City of Richmond, 12 Wall. (U. S.) 349; Brooks v. Fischer, 79 Cal. 173; McGarty v. Deming, 51 Conn. 422; Clark v. City of Davenport, 14 Iowa, 494; Tyler's Ex'r v. Elizabethtown, 72 Ky. (9 Bush) 510; Leonard v. City of Canton, 35 Miss. 189; Day v. City of Morristown, 63 N. J. Eq. 353, 46 Atl. 1098; Reeves v. Anderson, 13 Wash. 17. But see Memphis v. Brown, 97 U. S. 300.

[32] Curtis v. County of Butler, 24 How. (U. S.) 435; City & County of St. Louis v. Alexander, 23 Mo. 483; San Diego v. Granniss, 77 Cal. 511; Kyle v. Malin, 8 Ind. 34; City of Port Huron v. McCall, 46 Mich. 565.

[33] Butler v. City of Charlestown, 73 Mass. (7 Gray) 12; City of Brookfield v. Kitchen, 163 Mo. 546; Webber v. City of Chicago, 148 Ill. 313; Holland v. City of Baltimore, 11 Md. 186; Com. v. Dejardin, 126 Mass. 46.

courts will take judicial notice, but acts, votes and ordinances are not public matters and must be specially pleaded and proved.[34] But in Iowa it is held that when a city or town is incorporated by special act the courts will take judicial notice of its incorporation; otherwise when it is incorporated under a general act. There the court says the fact of its corporate character must be pleaded and proved.[35]

§ 23. Acceptance.

A public corporation being so emphatically and distinctly a governmental agent it follows that there is no necessity for provisions in a proposed charter or act of organization providing for its acceptance by the people residing within the limits of the territory affected. In this respect the law again is the direct antithesis of that relating to the acceptance of the charter of a private corporation by its incorporators. The charter of a private corporation cannot be arbitrarily forced upon its members by the state, and their acceptance is one of the essentials of a legal private corporation. To this rule there is no dissent.[36] Although the principle that a charter is a law and will take effect without the consent of those who are to be governed and whose property may be affected by it is well established, yet it is customary, in the granting of charters to municipal corporations proper, to permit a vote of the people upon the question of acceptance, and this fact leads, as will be learned, to material differences in the liabilities of such corporations as compared with those where the instrument of government is arbitrarily imposed. An acceptance is usually evidenced by a vote of the people given at an election, though some cases hold that it may be implied from acts done by the people under some provision of the proposed charter.[37]

[34] Beaty v. Knowles, 4 Pet. (U. S.) 152; People v. Potter, 35 Cal. 110; Stier v. City of Oskaloosa, 41 Iowa, 353; Winooski v. Gokey, 49 Vt. 282.

[35] Hard v. City of Decorah, 43 Iowa, 313. See, also, Hawthorne v. City of Hoboken, 32 N. J. Law, 172; People v. Hecht, 105 Cal. 621; Proprietors of Enfield v. Permit, 5 N. H. 280.

[36] 7 Thompson, Corp. § 8160; 1 Clark & M. Private Corp. § 44, and cases cited; 1 Cook, Stock & S. § 640.

[37] People v. McFadden, 81 Cal. 489; Clarke v. Rogers, 81 Ky. 43; Call v. Chadbourne, 46 Me. 206; Prince George's County Com'rs v. Village of Bladensburg, 51 Md. 465.

§ 24. Distinction between a public quasi and a municipal corporation in this regard.

An essential distinction or difference between a public or a public quasi corporation and a municipal corporation is logically considered here.

"Municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the people who compose them. Counties (and the same applies to other public and public quasi corporations) are local subdivisions of a 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 organization is asked for, or at least assented to, by the people it embraces; the latter is superimposed by a sovereign and paramount authority.

"A municipal corporation proper is created mainly for the interest, advantage and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy." [38]

The doctrine of this case is sustained without exception by the authorities, and it follows from an examination of the citations that the charter of a public or a public quasi corporation may be, and usually is, arbitrarily imposed upon the people residing within a certain district; while, on the other hand, there exists, or may exist, as already stated, the necessity of an acceptance or an assent by the people affected to the imposition of a charter or other organic form of government upon a municipality.[39]

[38] Hamilton County Com'rs v. Mighels, 7 Ohio St. 109.

[39] Berlin v. Gorham, 34 N. H. 266; State v. Haines, 35 Or. 379, 58 Pac. 39; Wood v. Quimby, 20 R. I. 482, 40 Atl. 161; Slate v. City of Blue Ridge, 113 Ga. 646, 38 S. E. 977; State v. Hertsch, 136 Ind. 293, 36 N. E. 213; Poor v. People, 142 Ill. 309; State v. Olinger (Iowa) 72 N. W. 441; Ray v. De Butts, 180 Mass. 155, 61 N. E. 887.

§ 25. Amendment of the charter.

The legislature, in the absence of constitutional restriction, has the power to amend, alter or repeal, directly or indirectly, the charters of all public corporations, the sole limitation upon this rule being that the rights of existing creditors or contract obligations to third parties cannot be impaired or destroyed.[40] The amendment of an existing charter may be effected through the passage of legislation directly amending charter provisions, in case of municipal corporations, subject to the vote of the people of the municipality, in the same manner as the acceptance of or assent to the original charter.[41]

§ 26. By implication or indirection.

An amendment is often effected by the passage of acts controlling or relating to certain powers or duties of a municipality, and which in their terms are different from existing charter provisions regulating the same matters; the courts hold in these cases that the effect of such legislation is to amend or change the provisions of existing law. Amendments or repeals by implication are not favored by the courts, however, and unless the intent clearly appears or the legislation is so inconsistent that all cannot stand, such an effect will not be given to it.[42] The principles above clearly apply where the charter of the municipality exists as spe-

[40] Mount Pleasant v. Beckwith, 100 U. S. 514; Port of Mobile v. Watson, 116 U. S. 289; Pacific Imp. Co. v. City of Clarksdale, 20 C. C. A. 635, 74 Fed. 528; Amy v. City of Selma, 77 Ala. 103; Boyd v. Chambers, 78 Ky. 140; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234; State v. City of Milwaukee, 25 Wis. 122. See, also, Abb. Mun. Corp. § 27.

[41] Girard v. City of Philadelphia, 74 U. S. (7 Wall.) 1; Essex Board v. Skinkle, 140 U. S. 334; Baader v. City of Cullman, 115 Ala. 539; Banaz v. Smith, 133 Cal. 102, 65 Pac. 309; Wiggin v. City of Lewiston (Idaho) 69 Pac. 286; City of Annapolis v. State, 30 Md. 112; Wade v. City of Tacoma, 4 Wash. 85, 29 Pac. 983; State v. Doherty, 16 Wash. 382; Shank v. Town of Ravenswood, 43 W. Va. 342; Oshkosh Waterworks Co. v. City of Oshkosh, 109 Wis. 208, 85 N. W. 376. See, also, Abb. Mun. Corp. § 27, with many cases cited.

[42] Baader v. City of Cullman, 115 Ala. 539, 22 So. 19; Williamson v. City of Keokuk, 44 Iowa, 88; Ford v. Town of North Des Moines, 80 Iowa, 626; Warren v. City of Evansville, 106 Ind. 104; State v. Zimmerman, 86 Minn. 353, 90 N. W. 783; City of St. Louis v. Dorr, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976.

cial legislation and the amendment or repeal is claimed to be effected by a general law or vice verse.[43] The adoption of an amendment to a state constitution is usually considered to amend or repeal all legislation whether general or special, inconsistent or in conflict with it.[44] The rights, however, of third parties, either as creditors or as holding contract obligations, cannot be impaired or destroyed by attempts at amendment or repeal whether by legislative act or constitutional amendment.[45]

§ 27. Effect of amendments.

The discussion of the effect of such amendments or changes by the courts is interesting. It has been held by the supreme court of the United States that neither the identity of a municipal corporation nor its right to hold property devised to it is destroyed by a change of its name, an enlargement of its area, or an increase of the number of its corporators.[46]

In Louisiana it is held that public acts empowering incorporated towns to amend their charters do not authorize them thereby to extend their privileges or alter the existing authority of the state or parish over their inhabitants.[47]

The effect of an amendment naturally increases or diminishes the powers of a corporation, either in the manner and time of their exercise, their number, or the limits within which old powers may be exercised. Where, by an amendment, political or governmental rights, questions or conditions are affected, the rule unquestionably is that by superior law the amendment can be made and the right to do this is uncontrolled except by constitutional provisions. If, however, the property or vested rights of third parties arising through the existence of a contract obligation or

[43] McGarty v. Deming, 51 Conn. 422; Hammond v. Haines, 25 Md. 541; Bodine v. Common Council of Trenton, 36 N. J. Law, 198; City of Harrisburg v. Sheck, 104 Pa. 53.

[44] City of East St. Louis v. Amy, 120 U. S. 600.

[45] Town of Mt. Pleasant v. Beckwith, 100 U. S. 514; Baader v. City of Cullman, 115 Ala. 539; Board of Councilmen of Frankford v. Mason, 100 Ky. 48. See, also, chapter on legislative power over public corporations and its limitations, and §§ 28–30, post.

[46] Girard v. City of Philadelphia, 74 U. S. (7 Wall.) 1; Broughton v. City of Pensacola, 93 U. S. 266; Boyd v. Chambers, 78 Ky. 140. See, however, Meriwether v. Garrett, 102 U. S. 472.

[47] Cook v. Dendinger, 38 La. Ann. 261.

the grant of a remedy are impaired, lessened or destroyed, the right of amendment does not exist so far as it may violate constitutional provisions protecting such rights. The effect under such circumstances is closely allied to that resulting from the repeal of charters and the cases are largely considered under that section.

§ 28. Repeal of charter.

The subject of the amendment or change of the organic act creating a public corporation has been chiefly considered in the preceding paragraphs, and it can be said that the right to repeal such organic act or charter exists with the same force and to the same extent.[48] Some municipal corporations, owing to constitutional provision however cannot be arbitrarily deprived of their charters, but in the absence of such the above rule is general. A repeal of the charter or particular provisions may be effected through the passage of legislation operating in express terms,[49] or again, as in the case of an amendment to the charter of a public corporation, the repeal may be effected through the application of the doctrine of implication. The courts, however, do not favor the repeal of existing laws and charters by implication and the authorities hold without substantial dissent that unless the intention of the legislature to repeal a charter or one of its provisions is clearly shown by all the circumstances and conditions attendant upon the legislation, a repeal by implication will not be allowed.[50]

§ 29. Effect of repeal.

In Tennessee the city of Memphis and other cities were abolished by legislative enactment, and taxing districts, public quasi

[48] State v. City of Mobile, 24 Ala. 701; Lynch v. Lafland, 44 Tenn. (4 Cold.) 96.

6 Curr. Law, 716.

[49] People v. Bagley, 85 Cal. 343; Southport v. Ogden, 23 Conn. 128; Hagerstown v. Dechert, 32 Md. 369; Tierney v. Dodge, 9 Minn. 166 (Gil. 9); Harris v. City of Water Valley, 78 Miss. 659, 29 So. 401. As contrary to the rule see State v. Clarke, 25 N. J. Law (1 Dutch.) 54.

[50] Martin v. Board of Election Com'rs of San Francisco, 126 Cal. 404; Braman v. City of New London, 74 Conn. 695, 51 Atl. 1082; Mattox v. State, 115 Ga. 212, 41 S. E. 709; Kelly v. Gahn, 112 Ill. 23. See Cooley, Const. Lim. 183, and Abb. Mun. Corp. § 30, with cases cited.

corporations, were established with most of the powers of the dissolved municipal corporations. Creditors brought suit to enforce their claims and the court held that these taxing districts were in practical effect municipal corporations and as such they had both the liabilities and the rights of the municipal corporations they were organized to supersede.[51]

In Alabama the state legislature dissolved the city of Mobile and created the corporation of the Port of Mobile. This included substantially the same area and population as the city which it superseded. The port was vested with all the property of the city and the act of incorporation followed immediately the act of dissolution. Creditors of the city brought suit against the port and the supreme court of the United States held the new organization liable for the claims and debts of the old.[52] However clearly it is established that the legislature has the right to alter, amend or repeal the charter of a public corporation or pass legislation affecting the political rights of its citizens except as limited by constitutional provisions, there is grave doubt as to its right to deprive the people residing within certain territorial limits of property or property rights which may have been acquired by them through corporate organization.[53] Like results, though in a varying degree, are effected through the amendment or repeal of the charter of a public corporation. Where such action deals with political rights or conditions, as already stated, it is within the power of the legislature or of the sovereign to deal arbitrarily and alter, amend or repeal at pleasure. The grant of charter rights usually, however, not only confers political and governmental powers, but in some degree or in some respect may operate, directly or indirectly, as the grant of a property, a vested or a contract right to third persons. In such cases the courts have held almost without dissent that where such rights are impaired or destroyed, the legislation in question is void as violating those provisions of the Federal and

[51] State v. Taxing Dist., 84 Tenn. (16 Lea) 240. As emphasizing certain phases of the litigation, the result of such legislation, see Meriwether v. Garrett, 102 U. S. 472.

[52] Port of Mobile v. Watson, 116 U. S. 289. See, also, Broughton v. City of Pensacola, 93 U. S. 266.

[53] Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 694; People v. Common Council of Detroit, 28 Mich. 228; People v. O'Brien, 111 N. Y. 1; Town of Montpelier v. Town of East Montpelier, 29 Vt. 12.

state constitutions protecting contract obligations and property or vested rights. As said in a Tennessee case:[54] "Neither the repeal of the charter of a municipal corporation nor a change of its name nor an increase or diminution of its territory or population nor a change in its mode of government nor all these combined will destroy the identity, continuity or succession of the corporation, if the people and territory reincorporated constitute an integral part of the corporation abolished."

The power of taxation existing when bonds are issued by a municipal corporation as duly authorized, and which is the only resource for their payment, is considered such a contract obligation, and any law which withdraws or limits this taxing power and leaves no adequate means for payment is null and void as violating the principle stated above.[55] The repeal of a charter and reincorporation, either under general laws or a new charter, does not destroy the rights of the corporation to collect taxes or debts due it arising under the provisions of the old organization, and, as has been seen, it does not cancel old obligations.

§ 30. Corporate existence, and the doctrine of collateral attack.

A public corporation is created by direct act of the sovereign or indirectly through a delegated body, by the granting of a charter, which is its written authority to act as a governmental agent, and exercise and perform the appurtenant powers and duties. The corporation may be organized under laws subsequently declared unconstitutional or void, or the formal steps in the organization may be imperfectly or irregularly taken, the

[54] O'Connor v. City of Memphis, 74 Tenn. (6 Lea) 730. See, also, Girard v. City of Philadelphia, 74 U. S. (7 Wall.) 1; Laramie County Com'rs v. Albany County Com'rs, 92 U. S. 307; Broughton v. City of Pensacola, 93 U. S. 266; Town of Mt. Pleasant v. Beckwith, 100 U. S. 514; Port of Mobile v. Watson, 116 U. S. 289, and the many cases cited in Abb. Mun. Corp. § 31.

[55] Von Hoffman v. City of Quincy, 71 U. S. (4 Wall.) 535; Louisiana v. City of New Orleans, 102 U. S. 203; Louisiana v. Police Jury of St. Martin's Parish, 111 U. S. 716; Seidert v. Lewis, 122 U. S. 284; Edwards v. Williamson, 70 Ala. 145; Amy v. City of Selma, 77 Ala. 103. The principle also applies to the amendment of a state constitution. Munday v. Assessors of Rahway, 43 N. J. Law, 338; Broadfoot v. City of Fayetteville, 124 N. C. 478; Basset v. City of El Paso (Tex.) 30 S. W. 893; Smith v. City of Appleton, 19 Wis. 468.

condition in either case raisng a doubt as to the legal existence of the corporation, this doubt with an adverse decision upon the question being resolved into a certainty. The corporation meanwhile has performed its duties and exercised its powers, it has levied and collected taxes, constructed public improvements, incurred debts and liabilities, and entered into contract relations with third parties who have acted in good faith and upon the assumption that the corporation possessed the necessary powers. The legality of the existence of the corporation or its right to perform these duties and exercise these powers is called in question. What is the effect upon past acts and the relations which exist as their result? And, again, the proposition may present itself,—in what manner, by whom, and at what time can the question of legal right be raised? The rule of law invariably is that the state alone can question the right of the public corporation to exist and perform its duties and exercise its rights, and then in a proceeding brought for that purpose. And also that the question of legal corporate existence cannot be raised in a case or proceeding as collateral to the main issue or through collateral attack.[56] This doctrine is adopted to protect the rights of innocent parties[57] and to enable the corporation, however irregularly formed, to compel obedience and enforce its rights.[58]

[56] Shapleigh v. San Angelo, 167 U. S. 646; National L. Ins. Co. of Montpelier v. City of Huron, 62 Fed. 778; Ex parte Moore, 62 Ala. 471; State v. North, 42 Conn. 79; State v. Town of Winter Park, 25 Fla. 371; State v. Independent School Dist., 44 Iowa, 227; People v. Maynard, 15 Mich. 463; St. Paul Gas Light Co. v. Village of Sandstone, 73 Minn. 225; Coler v. Dwight School Tp., 3 N. D. 249, with many authorities cited and collated. See, also, many cases cited in McQuillin, Mun. Ord. p. 546, note 86, and Abb. Mun. Corp. p. 59,

[57] Ashley v. Presque Isle County Sup'rs, 60 Fed. 55; Speer v. Kearney County Com'rs, 88 Fed. 749; State v. City of Des Moines, 96 Iowa, 521, 65 N. W. 818; Coler v. Dwight School Tp., 3 N. D. 249, 55 N. W. 587.

[58] In the levy of taxes. Presque Isle County Sup'rs v. Thompson, 61 Fed. 914; Dean v. Davis, 51 Cal. 406; People v. Newberry's Trustees, 87 Ill. 41; Mills v. Tp. of Richland, 72 Mich. 100, 40 N. W. 183.

The collection of fines. Hamilton v. President & Trustees of Carthage, 24 Ill. 22; Atchison, T. & S. F. R. Co. v. Wilson, 33 Kan. 223; Baker County v. Benson, 40 Or. 207, 66 Pac. 815.

The prosecution of criminals. In re Rabbitt, 47 Kan. 382; People v. Smith, 131 Mich. 70, 90 N. W. 666; State v. Fuller, 96 Mo. 165, 9 S. W. 583; Town of Henderson v. Davis, 106 N. C. 88.

The construction of public im-

This doctrine of collateral attacks applies also to official acts of officers of public corporations, and it is the rule that in disputes between private parties the validity of a public corporation acting under forms of law cannot be called in question where its corporate existence is unchallenged by the state.[59]

§ 31. The dissolution of the corporation and its effects.

Public corporations may be dissolved through an act of the legislature; they may voluntarily, under general laws, surrender their charters; again, under general laws, they may change their grade or class, effecting in this manner a dissolution of the old corporation;[60] or the corporation may be dissolved as the result of a judgment of ouster in proceedings brought to determine its rights to corporate existence.[61] The courts have held as negative propositions that a corporation will not be dissolved by its failure to elect officers, for the misuser or nonuser of its charter rights, or the misconduct of its officers.[62]

The debts and legal obligations of a public corporation cannot be impaired or destroyed by a change in the grade or class of a municipal organization, or through its dissolution. The duty of their payment or performance devolves upon the territory succeeding to the old corporation. Property belonging to the corporation dissolved usually passes to and under the control of the new organization embracing the identical territory.

§ 32. Forfeiture of charter.

The charter of a private corporation in the proper action may be forfeited by judicial decree for the commission of acts by the

provements. Powell v. City of Greensburg, 150 Ind. 148. Or, the enforcement of ordinances and the administration of public affairs. Graham v. City of Greenville, 67 Tex. 62.

[59] Miller v. Perris Irr. Dist., 85 Fed. 693; State v. Council, 106 Iowa, 731, 77 N. W. 474; Mendenhall v. Burton, 42 Kan. 570, 22 Pac. 558; Campbell v. Wainwright, 50 N. J. Law, 555; Stuart v. School Dist. of Kalamazoo, 30 Mich. 69.

[60] Town of Cicero v. City of Chicago, 182 Ill. 301; Woods v. Henry, 55 Mo. 560; James County v. Hamilton County, 89 Tenn. 237, 14 S. W. 601.

[61] Dodge v. People, 113 Ill. 491.

[62] Welch v. City of Ste. Genevieve, 1 Dill. 130, Fed. Cas. No. 17,372; Butler v. Walker, 98 Ala. 358, 13 So. 261; Swamp Land Dist. No. 150 v. Silver, 98 Cal. 51, 32 Pac. 866; Cain v. Brown, 111 Mich. 657, 70 N. W. 337.

corporation contrary to the provisions of general statutes or express provisions of its charter. The act of forfeiture is equivalent to the taking of corporate life, as without it, it cannot legally exist. Courts are slow to inflict a penalty which represents the extreme rigor of the law. A public corporation, it will be remembered, is a governmental institution or agency and created for the sole purpose of carrying out some aim of government resulting in the advantage and benefit of society. Because of the material and essential difference between a public and a private corporation, the courts generally hold in this country, at least, that the charter of a public corporation cannot be forfeited. The government of a particular agency of the sovereign may change its form, but under existing conditions and political theories, it is legally impossible that a particular district, however sparse or dense its population, can exist without some form of government.[63] In England the earlier cases held that the charter of a public corporation, like that of a private, could be forfeited by the sovereign in the proper proceedings.[64] The universal rule obtains that an incorporated town or city retains corporate capacity until its charter has been declared forfeited in a direct judicial proceeding looking to that end. The forfeiture of a charter cannot be declared in a collateral proceeding.[65]

II. Territorial Changes and Their Effect.

§ 33. Boundaries; their enlargement.

A public corporation is the organization of a certain geographical district under authority of law for the purpose, if a public or quasi public corporation, of acting as a governmental agent,—carrying out exclusively some one or more of the functions of government; or, if a municipal corporation, of combining with the above additional powers or privileges and of legislating upon matters more particularly affecting the conditions and con-

[63] Port of Mobile v. U. S., 116 U. S. 289; Harris v. Nesbit, 24 Ala. 398; State v. Stevens, 21 Kan. 210; Attorney General v. City of Salem, 103 Mass. 138; Attorney General v. City of Boston, 123 Mass. 460.

[64] Rex v. Grosvenor, 7 Mod. 198; Smith's Case, 4 Mod. 55; Rex v. Inhabitants of Kent, 13 East, 220; Attorney General v. Shrewsbury Corp., 6 Beav. 220.

[65] Harris v. Nesbit, 24 Ala. 398. See, also, § 31, ante, and cases cited.

venience of those residing within its limits, and the principle obtains that a public corporation, of whatever class, may have its territorial limits under authority of law, arbitrarily or otherwise enlarged or reduced.

The paramount question, if action is taken of this character, is that of legislative authority, and the extent and manner of such annexation is a question solely within the discretion of the legislature except as restrained by constitutional provisions with which the courts cannot interfere.[66]

§ 34. Location or character of territory annexed.

The next question to be considered on the annexation of territory to an existing organization is the location of the land sought to be annexed.* The mere fact that the municipal corporation may desire to enlarge its boundaries does not give it that right irrespective of the character or location of prospective territory, and its annexation seems to depend on its location, whether it is "contiguous" or "adjacent";[67] the benefit it may derive from the imposition of its new form of government;[68] and whether or not, as has already been suggested, its value is enhanced to such a degree by the existence of a center of population near by that it should justly share its proportion of the burdens of such municipality.[69]

Territory may be enlarged by the annexation of contiguous land notwithstanding the remonstrances of the people residing within such territory unless the constitution or general statutes

[66] U. S. v. City of Memphis, 97 U. S. 284; People v. City of Oakland, 123 Cal. 598; Stone v. City of Charleston, 114 Mass. 214; Daly v. Morgan, 69 Md. 460; Kansas City v. Stegmiller, 151 Mo. 189; People v. Bradley, 36 Mich. 447; State v. City of Cincinnati, 52 Ohio St. 419. Opinion of Justices, 60 Mass. (6 Cush.) 580; Village of Hartington v. Luge, 33 Neb. 623, 50 N. W. 957.

* 6 Curr. Law, 717.

[67] Vogel v. City of Little Rock, 54 Ark. 335, 15 S. W. 836; Woodruff v. City of Eureka Springs, 55 Ark. 618; Warren v. Barber Asphalt Pav. Co., 115 Mo. 572, 22 S. W. 490; State v. Van Camp, 36 Neb. 9, 91, 54 N. W. 113; Appeal of Brinton, 142 Pa. 511; Union County v. Knox County, 90 Tenn. 541; State v. City of Waxahachie, 81 Tex. 626.

[68] Lake Erie & W. R. Co. v. City of Alexandria, 153 Ind. 521; Town of Latonia v. Hopkins, 104 Ky. 419, 47 S. W. 248; Kansas City v. Stegmiller, 151 Mo. 189.

[69] Village of Syracuse v. Mapes, 55 Neb. 738, 76 N. W. 458; City of East Dallas v. State, 73 Tex. 370.

of the state require that the consent of all the inhabitants shall be first obtained. This consent is frequently required as a condition precedent to annexation.[70] Another question sometimes considered by the courts is its availability for certain uses; is it fit for platting or other urban purposes, or is a strictly rural use the only one to which it can be put?[71] Another limitation upon the power to annex may lie in the fact that the territory sought to be included forms in itself an organization of a municipal or public quasi corporation nature.[72]

§ 35. The petition for annexation.

It is difficult to state a general rule or principle of law which shall govern the formulating of a petition having for its purpose the annexation of territory to an existing public corporation. This difficulty arises from the fact that proceedings looking to this end are usually statutory in their character. It might be said that in the construction of such provisions that rule should be given which applies to all rights created by statute, namely, the rule of strict construction. The petition is usually held jurisdictional, and noncompliance with the statutes in form and averments is generally held fatal.[73] Statutory provisions govern amendments.[74]

The determination by an authorized official body that the petition contains the necessary legal averments and is signed by the required number of properly qualified voters, is usually held by the courts to be conclusive in the absence of fraud, and such is ordinarily the presumption of law.[75]

Where territory to be annexed must be contiguous or adjacent,

[70] City of Topeka v. Gillett, 32 Kan. 431; Stone v. City of Charlestown, 114 Mass. 214.

[71] Clark v. Kansas City, 176 U. S. 114; Vestal v. City of Little Rock, 54 Ark. 321, 15 S. W. 891, 16 S. W. 291; Pittsburgh, C., C. & St. L. R. Co. v. City of Indianapolis, 147 Ind. 292, 46 N. E. 641; Lake Erie & W. R. Co. v. City of Alexandria, 153 Ind. 521.

[72] McAskie's Appeal, 154 Pa. 24.

[73] People v. City of Oakland, 123 Cal. 598; In re Chester Tp., 174 Pa. 177; Paul v. Town of Walkerton, 150 Ind. 565, 50 N. E. 725; Layton v. City of Monroe, 50 La. Ann. 121.

[74] Woodruff v. City of Eureka Springs, 55 Ark. 616; Shugars v. Williams, 50 Ohio St. 297, 34 N. E. 248.

[75] People v. City of Peoria, 166 Ill. 517; State v. Crow Wing County Com'rs, 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631.

it is necessary to recite in the petition that land about to be annexed is of such character.[76] It is usually necessary to include in the petition averments to the effect that the territory sought to be annexed will, because of its character or location, be benefited by the annexation.[77]

§ 36. Necessity for notice and objections to annexation.

The usual rules that govern the giving of notice obtain here as to those whose rights may be affected by the annexation of territory, and it can be said that such proceedings will not be held legal and binding upon those not receiving notice of their pendency in the manner required by law, usually by publication, posting or personal service.[78]

Objections to the annexation of territory may be filed at the proper time by those whose rights are injuriously affected. These objections may go either to the jurisdiction of the tribunal then passing upon the question, or to the merits of the proceeding. The principle of estoppel as well as laches applies to objections or attacks made upon the validity of annexation proceedings.[79]

§ 37. The right of appeal.

In case of annexation, property owners should have the privilege and right of appeal, and this is especially true where the tribunal passing upon the matter is of a ministerial or quasi judicial character or an inferior judicial body. If this rule did not exist, the confiscation of property might be arbitrarily and effectually accomplished without an opportunity for the correction of the wrong.[80] The appeal is usually a trial de novo upon the questions which can be and are raised. As already suggested the findings or conclusion of the inferior body, in certain respects, may be conclusive, except in cases of fraud. One's right to appeal cannot

[76] Chandler v. City of Kokomo, 137 Ind. 295, 36 N. E. 847.

[77] Village of Hardington v. Luge, 33 Neb. 623.

[78] Gunter v. City of Fayetteville, 56 Ark. 202; Ford v. Town of North Des Moines, 80 Iowa, 626, 45 N. W. 1031; State v. Town of Westport, 116 Mo. 582, 22 S. W. 888.

[79] Black v. Town of Brinkley, 54 Ark. 372, 15 S. W. 1030; State v. City of Des Moines, 69 Iowa, 521, 65 N. W. 818; Cobb v. Kingman, 15 Mass. 197.

[80] Paul v. Town of Walkerton, 150 Ind. 565, 50 N. E. 725.

be questioned or denied on the ground that his interest may be trifling.[81]

§ 38. The effect of annexation upon those concerned.

Upon the annexation of territory existing rights either of the corporation itself, of those residing within its limits, or of those who have had dealings with the corporation, may be affected.* There may be suits pending by or against the corporation, and it is held that annexation does not or cannot affect or change the rights or status of the parties.[82] The territory annexed may have been a public quasi or a municipal corporation with obligations existing in favor of private parties. The rule of law is uniform that no organized territory can avoid or defeat such obligations by a change in its form of government, or even through its dissolution. The legislature itself cannot authorize or permit the destruction of contract rights or of legal obligations through such proceedings by dishonest public corporations.[83]

It seems to be also the general rule that in cases of annexation of organized territory, its powers cannot be diminished through the fact that in some respects the powers of the municipality to which it is annexed may be less, though this may be regulated by statutory provisions.[84]

The consolidation of territory into municipal organizations usually does not affect the lines of highway, parish, school, judicial or legislative districts embraced within such territory, but these continue the same as before the consolidation or annexation.[85]

The control of public property passes upon the consolidation of municipalities to the consolidated organization. It does not remain, as a rule, with the corporations consolidating. These, for purposes of regulation and ownership, pass out of existence. So long as the corporation retains the same identity, its claim and title to property remain unaffected.[86]

[81] State v. City of Des Moines, 96 Iowa, 521, 65 N. W. 818.

* 6 Curr. Law, 717.

[82] People v. City & County of San Francisco Sup'rs, 21 Cal. 668.

[83] D'Esterre v. City of New York (C. C. A.) 104 Fed. 605; Burlington Sav. Bank v. City of Clinton, 106 Fed. 269; Kearny County Com'rs v. Vandriss (C. C. A.) 115 Fed. 866.

[84] People v. Harrison, 191 Ill. 257; Glentz v. State, 38 Wis. 549.

[85] Harrisson v. Hernsheim, 28 La. Ann. 881; Overseers of Poor v. Sears, 39 Mass. (22 Pick.) 122.

[86] Inhabitants of Bloomfield v.

§ 39. Division of public corporations and the authority.

A municipal corporation proper partakes both of the nature of a public and private corporation. It is public in that it is a governmental agent performing public duties as directed by the legislature, receiving and holding its charter and powers at the will of the legislature; a private corporation but differing from others, in that it is one organized for the better comfort, advantage and convenience of those residing within its limits.

Certain territory becomes more densely populated; in order that this center of population shall be better governed and property better protected, there arises a demand for a change in the grade of governmental organization or for a division of organization. The authority for this may be found either in the general statutes of a state or in a special act, and it is within the discretion of the legislature, limited only by constitutional provisions, to provide the mode of division, either upon the consent of the voters of the district affected,[87] or arbitrarily and directly.[88]

Legal authority may also exist for the division of districts organized not only for municipal purposes, as commonly understood, but also for judicial or legislative.[89]

A division of territory may be effected either by petition signed by those duly qualified by law, or through an election called and held in the statutory manner.

§ 40. Division or adjustment of debts and liabilities.

A change of territorial boundaries may necessitate a division or readjustment of indebtedness or liabilities.[90] Sometimes, under laws authorizing division of territory, the liabilities of different

Borough of Glen Ridge, 54 N. J. Eq. 276, 33 Atl. 925; Wabash R. Co. v. City of Defiance, 52 Ohio St. 263, 40 N. E. 89.

[87] Monk v. Town of George, 86 Iowa, 315; State v. Clark, 59 Neb. 702, 82 N. W. 8; Sansom v. Mercer, 68 Tex. 488, 5 S. W. 62.

[88] People v. Martin, 178 Ill. 611; State v. Ruhe, 24 Nev. 251, 52 Pac. 274.

[89] Howard v. McDiarmid, 26 Ark. 100; Alfred v. State, 37 Miss. 296; Baker County v. Benson, 40 Or. 207, 66 Pac. 815; State v. Williams, 29 La. Ann. 779; In re Judges' Contested Election, 109 Pa. 337.

[90] Town of Mt. Pleasant v. Beckwith, 100 U. S. 514; Comanche County Com'rs v. Lewis, 133 U. S. 205; True v. Davis, 133 Ill. 532; Towle v. Brown, 110 Ind. 68; Mount Hope Cemetery v. City of Boston, 158 Mass. 512.

portions divided or annexed remain the sole obligation of the original debtor, and taxes are levied by that corporation upon the property within its district to apply on their reduction or payment. The indebtedness generally follows the name;[91] or the indebtedness is assumed proportionately by the reorganized corporations, and taxes to reduce or pay the same are assessed and levied upon all of the property within their limits.[92]

A public corporation may change its character under lawful authority, passing from a public quasi corporation to a municipal corporation of the highest grade or degree of organization, embracing, however, the same territory. The rule is clearly established that such change does not work a forfeiture of any rights existing as against the old corporation, or defeat any of its liabilities, but that, so far as its obligations and liabilities are concerned, the new corporation is liable for the debts of the old. The transition does not work the dissolution of the civil life of the corporation so as to extinguish its indebtedness. The obligations remain the same and are not impaired or destroyed.[93] And logically following this rule it is also held that the powers of the new corporation to levy taxes for the payment of such obligations remain the same. They are not or cannot be lessened so as to defeat the rights of creditors of the old corporation.

Some of the attempts to formulate a rule applying to the adjustment or reapportionment of debts or property in the case of division of territory are referred to in the cases cited. A favorite expression of the law makers in announcing such a rule is the use of the word "ratable" or "proportionate."[94] The debts and property must be adjusted in a "ratable" or "proportionate" manner, the words applying either to the population[95] or the com-

[91] Carter County v. Sinton, 120 U. S. 517; Kearny County Com'rs v. Vandriss (C. C. A.) 115 Fed. 866; Riverside County v. San Bernardino County, 134 Cal. 517, 66 Pac. 788; Town of Humboldt v. City of Barnesville, 83 Minn. 219, 86 N. W. 87; Huffmire v. City of Brooklyn, 162 N. Y. 584.

[92] D'Esterre v. City of New York, 104 Fed. 605; Dyar v. Village of Farmington, 70 Me. 515; Clay County v. Chickasaw County, 76 Miss. 418, 24 So. 975.

[93] Port of Mobile v. Watson, 116 U. S. 289; Lee v. City of Thief River Falls, 82 Minn. 88, 84 N. W. 654; Broadfoot v. City of Fayetteville, 124 N. C. 478, 32 S. E. 804. See, also, Abb. Mun. Corp. § 45 et seq.

[94] In re Sugar Notch Borough, 192 Pa. 349; Blount County v. Loudon County, 67 Tenn. (8 Baxt.) 74;

[95] Richardson v. Boske, 111 Ky.

parative assessed valuation of taxable property of the different portions.[96]

§ 41. The legal authority; where existing.

The legislature having arbitrary power, as has been said, over the organization of all public corporations, to create or dissolve them, increase or diminish their boundaries, legislate as to their debts or liabilities and property, except so far as the rights of third parties may be affected, it follows that upon the division or annexation of territory it has the right and the power to determine and apportion, in a fitting manner, the obligations and the property of those corporations,[97] and where an act of division imposes what seems to be a disproportionate part of the liabilities or burdens, the courts have no power to inquire and adjust the obligations upon a different basis.[98] The legislature may also provide the agency of apportionment.

The duty devolving upon such an agency is regarded as a continuing one, and a failure or refusal to perform it does not defeat or impair the rights of parties intended by the legislature to be established in this way.[99]

The indebtedness or obligations of territory divided may consist of an issue of valid outstanding negotiable bonds,[100] of "floating indebtedness";[101] or again the obligation may exist as the

893, 64 S. W. 919; Trinity County v. Polk County, 58 Tex. 321.

[96] Montgomery County v. Menefee County Ct., 93 Ky. 33; Town of South Portland v. Town of Cape Elizabeth, 92 Me. 328; Harrison Tp. v. Schoolcraft County Sup'rs, 117 Mich. 215; Mills County v. Brown County, 87 Tex. 475; Gilkey v. Town of How, 105 Wis. 41.

[97] State v. Browne, 56 Minn. 269, 57 N. W. 659; Town of Rutland v. Town of West Rutland, 68 Vt. 155, 34 Atl. 422; Town of Ackley v. Town of Vilas, 79 Wis. 157, 48 N. W. 257.

[98] County of Tulare v. Kings County, 117 Cal. 195, 49 Pac. 8; Town of Granby v. Thurston, 23 Conn. 416; Sharp's Ex'r v. Dunavan, 56 Ky. (17 B. Mon.) 223; Stone v. City of Charlestown, 114 Mass. 214; People v. Draper, 15 N. Y. 532; Town of Montpelier v. Town of East Montpelier, 29 Vt. 12.

[99] People v. Town of Oran, 121 Ill. 650, 13 N. E. 726; District Tp. of Franklin v. Wiggins, 110 Iowa, 702, 80 N. W. 432; School Dist. No. 46 of Douglas County v. School Dist. No. 53, 49 Neb. 33.

[100] Harper County Com'rs v. Rose, 140 U. S. 75; County of Tulare v. Kings County, 117 Cal. 195, 49 Pac. 8; Hodgeman County Com'rs v. Garfield County Com'rs, 42 Kan. 409, 22 Pac. 430; Canosia Tp. v. Grand Lake Tp., 80 Minn. 357, 83 N. W. 346.

[101] Colusa County v. Glenn County,

result of a contract, claim or subscription payable at some future time,[102] or a liability existing as the result of a tort.[103] The cases cited in the notes under these various propositions suggest the different rulings made, but the basic principles of division remain as given in the preceding sections.

The rule seems to be that the principal of the indebtedness should be adjusted and credit items treated as property to be divided in the same proportion, leaving it to the different organizations to apply these credits as they may elect, either upon the debt assigned to them or in the payment of current expenses. It is further held that an obligation, in order to be considered a "debt," need not be due and payable at the time of the division. The existence of an obligation is the determining question, not its due date.

§ 42. Division of assets.

Equally important with the adjustment and apportionment of the debts and liabilities of territory divided or rearranged is the division of assets belonging to the old or the different organizations. They are usually acquired through the expenditure of moneys raised by the levy of taxes upon property within its jurisdiction. These moneys may be expended in the construction of public buildings located within a certain portion of the organization. Territory forming an old corporation has been subject to the levy of taxes for the erection of these buildings, and in the process of division part is deprived of the use of this property. Here, as in all cases affecting the organization, powers, obligations and property of public corporations, the authority exists, without question, in the legislature to provide an equitable adjustment.[104] Public property may consist not only of buildings erected for public use, but moneys, taxes in process of collection, credits, real estate, other than buildings, claims, miscellaneous personal property, or public improvements.[105] The rules

117 Cal. 434, 49 Pac. 457; Town of Cicero v. Hill, 193 Ill. 226; Holliday v. Sweet Grass County, 19 Mont. 364, 48 Pac. 553; Knight v. Town of Ashland, 65 Wis. 166.

[102] Garland County v. Hot Springs County, 68 Ark. 83; Hensley Tp. v. People, 84 Ill. 544; Potter v. Black, 15 Wash. 186, 45 Pac. 787.

[103] Barber v. City of East Dallas, 83 Tex. 147, 18 S. W. 438.

[104] State v. Votaw, 8 Blackf. (Ind.) 2.

[105] County of Kings v. County of

adopted by the legislature and the courts for the division of this property are much the same as those applied in the adjustment or apportionment of the debt.[106]

§ 43. Agency for division of assets.

Property may be divided, as in the case of apportionment of debts or liabilities, by the legislature in the act authorizing the division, or it may be left to a local commission, who proceed in the same manner, whose duties are substantially the same, and whose official and legal character is in all respects similar to like bodies appointed for the adjustment of debts or liabilities. It seems, however, to be the rule that the authority should designate the agency by, and the manner in which, the property is to be apportioned.[107]

The power to levy taxes, granted in varying degrees to different portions of divided territory, upon division, seems to remain, as to any particular purpose, not less than as originally existing. And in apportionment of taxes levied and collected by the state authorities prior to the division of territory, the cases seem to hold that the officers of the state should separate the equalized valuation, if that is the basis for apportioning the debts and liabilities, and assign the taxes to the different portions of the divided territory in proportion to the valuation of the property therein.[108]

Tulare, 119 Cal. 509; Crawford County Com'rs v. Marion County Com'rs, 16 Ohio, 466; School Dist. No. 15 v. School Dist. of Waldron, 63 Ark. 433; Reeves County v. Pecos County, 69 Tex. 177, 7 S. W. 54; Presque Isle County Sup'rs v. Thompson, 10 C. C. A. 154, 61 Fed. 914; Goulding v. Inhabitants of Peabody, 170 Mass. 483, 49 N. E. 752; School Directors of Ashland v. City of Ashland, 87 Wis. 533; In re Fremont County, 8 Wyo. 1, 54 Pac. 1073; Almand v. Atlanta Consol. St. R. Co., 108 Ga. 417.

[106] State v. Maik, 113 Wis. 239, 89 N. W. 133; Laramie County Com'rs v. Albany County Com'rs, 92 U. S. 307; Board of Education of Topeka v. State, 64 Kan. 6, 67 Pac. 559; Inhabitants of Orvil v. Borough of Woodcliff, 64 N. J. Law, 286, 45 Atl. 686.

[107] Gregg v. French, 67 Minn. 402, 69 N. W. 1102.

[108] Auditor General v. Menominee County Sup'rs, 89 Mich. 552.

III. Corporate Name and Boundaries.*

§ 44. Existence of a public corporation.

The precise time when the steps necessary to the legal existence of a public corporation have been completed may be important in determining rights of third parties against the territory included within its limits or its own rights and powers. The necessity for a valid organization also exists that a corporation may legally perform its governmental duties and exercise its powers.[109] A town incorporated under an act held unconstitutional, thereafter has no legal existence, and a judgment against it is a mere nullity,[110] though it will be considered a de facto town from the time of its attempted organization until the law is declared unconstitutional, and the acts of its officers, the acts of de facto officers, binding between third parties dealing with them as public officials,[111] and also for the purpose of enforcing liabilities against the corporation contracted during its existence as a de facto organization.[112]

§ 45. Name of the corporation.

The existence of a public corporation presupposes a legal name, acquired in the proceedings incorporating it or by custom, under which it exercises its powers, performs its duties, and which it uses in assuming liabilities and contracting obligations.

The rule as to the use of the name by the corporation is substantially that relating to private individuals. A mere misnomer will not invalidate proceedings nor defeat rights. The essential thing is identity,[113] and if the name used in either a contract or a devise or grant to the corporation sufficiently describes and identifies it, it will be sufficient, although it may not be the precise and technical name. The use of the correct legal name in

* 6 Curr. Law, 717.

[109] People v. Morrow, 181 Ill. 315; City of Guthrie v. Wylie, 6 Okl. 61.

[110] Colton v. Rossi, 9 Cal. 595.

[111] Riley v. Garfield Tp., 58 Kan. 299, 49 Pac. 85; Town of Winneconne v. Village of Winneconne, 111 Wis. 13, 86 N. W. 590.

[112] White v. City of Quanah (Tex. Civ. App.) 27 S. W. 839.

[113] Attorney General v. Town of Rye, 7 Taunt. 546; Clement v. City of Lathrop, 18 Fed. 885; People v. Pike, 197 Ill. 449; State v. Hollis, 59 N. H. 390. But see Sweetwater County Com'rs v. Young, 8 Wyo. 684, 29 Pac. 1002.

actions is more strictly insisted upon.[114] The legislature may, at its pleasure, subject to statutory or constitutional restrictions, change the name of a public corporation, but its identity for the purpose of enforcing obligations will not, by such action, be destroyed.[115]

§ 46. The seal and its use.

The law regarding the use of a seal by a corporation, either public or private, has changed materially in recent years, the reasons evidently being the same leading to a change in the law as to the use of a seal by natural persons. Formerly the corporation "spoke" through its seal. A contract or other instrument to be valid must have had the corporate seal affixed and have been attested by the proper officer. The rule now is that the use of the seal is not necessary to bind a corporation except in those cases where this is directed in express terms by the statutes.[116]

§ 47. Corporate boundaries.

From the discussion of the subject thus far, it is apparent that the creation or organization of a public corporation consists in the setting apart of a certain geographical area and investing the people residing within the limits of this district with a greater or less degree of control over their local, political, governmental and economic conditions. These agencies of the state exercise certain functions, perform certain duties, and contract certain liabilities. The existence and performance of any or all of these rights and powers affect not only the property but the persons of those coming within their jurisdiction. It will be seen therefore that there exists the most urgent necessity for an accurate and definite establishment[117] of the boundaries in the first instance, under due authority of law, by the proper tribunal, and that if a subsequent change is made in these boundaries the change

[114] City of Ft. Wayne v. Jackson, 7 Blackf. (Ind.) 36; St. Louis County Court v. Griswold, 58 Mo. 175.

[115] Girard v. City of Philadelphia, 74 U. S. (7 Wall.) 1; Town of Mt. Pleasant v. Beckwith, 100 U. S. 524. See, also, §§ 40, 41, ante.

[116] Smeltzer v. White, 92 U. S. 390; Springer v. Clay County, 35 Iowa, 243; Colman v. Anderson, 10 Mass. 105; Attorney General v. Jochim, 99 Mich. 358, 58 N. W. 611.

[117] Town of Enterprise v. State, 29 Fla. 128 10 So. 740; People v. Bennett, 29 Mich. 451; City of Memphis v. Adams, 56 Tenn. (9 Heisk.) 518; Brennan v. City of Weatherford, 53 Tex. 330.

be also definite and certain, under authority of law, and by the proper tribunal.

The first essential to the existence of a boundary which shall legally limit and govern the exercise of jurisdiction by a public corporation over persons and property is its accurate and definite establishment and description,[118] either according to natural boundaries, which are in themselves definite and certain, or lines properly surveyed.[119]

Where a boundary line does not follow the course of a natural physical feature it is established by a line properly surveyed and determined according to stated monuments.[120] Following the rule that, that is certain which can be made certain, the calls and courses of a boundary will be held certain and definite if they can be readily ascertained and followed by surveyors or if their location can be established by reference to certain definite objects.[121]

In the establishment of boundaries the fundamental principle that a public corporation holds its existence and its powers at the will of the sovereign is again suggested. Its boundaries as a part of its legal existence are determined and changed by the same authority. We look therefore to the sovereign, acting directly or through a delegated body, usually the legislature, for the legal authority necessary to the valid establishment or change of boundary lines,[122] and it is also within its power, though some cases hold to the contrary, to delegate to some ministerial or judicial body the right to determine them in the manner provided.[123]

[118] State of Rhode Island v. State of Massachusetts, 4 How. (U. S.) 591; Edson v. Crangle, 62 Ohio St. 49; Smith v. Skagit County Com'rs, 45 Fed. 725.

[119] State of Indiana v. State of Kentucky, 136 U. S. 479; State of Iowa v. State of Illinois, 147 U. S. 1; Pratt v. State, 5 Conn. 388; Simpson v. State, 92 Ga. 41; Bellefontaine Imp. Co. v. Niedringhause, 181 Ill. 426; Henderson Bridge Co. v. City of Henderson, 90 Ky. 498. See, also, Abb. Mun. Corp., where subject is considered and many authorities cited.

[120] State of Virginia v. State of Tennessee, 148 U. S. 503; United States v. State of Texas, 162 U. S. 1.

[121] Town of New Decatur v. Nelson, 102 Ala. 556, 15 So. 275; People v. Town of Linden, 107 Cal. 94, 40 Pac. 115; New Jersey Southern R. Co. v. Chandler, 65 N. J. Law, 173, 46 Atl. 732.

[122] City of Little Rock v. Parish, 36 Ark. 166; City of Galesburg v. Hawkinson, 75 Ill. 152; Division of Howard County, 15 Kan. 194; Com. v. City of Roxbury, 75 Mass. (9 Gray) 512.

[123] Fisher v. San Diego City Police Ct., 86 Cal. 158; Town of Suf-

The cases holding contrary to this rule base their findings upon the principle that the establishment of boundaries, except so far as ministerial or clerical duties in connection with it are concerned, is a legislative matter, delegated to the legislature itself by the sovereign people, and that under a familiar rule the performance of this legislative duty cannot be delegated.[124]

Where the power to establish or change boundary lines is vested in a prescribed court or in an elective or appointive board especially provided for the occasion, the rule of law holds that objections to the bringing of such proceedings, to their validity in any respect, or to the jurisdiction of the tribunal, must be made within the time fixed by law. If parties are guilty of laches there can be no relief given even in cases where their objections, if made within the proper time, are well founded. This rule applies not only to the assignment of errors but also to the manner or the place of the pendency of such proceedings.[125]

It is within the discretion of the legislature to provide for an appeal, the establishment of the boundary line in the first instance being a question exclusively for its determination, although this right is not essential to the validity of such proceedings or the line established.[126] The time fixed by statute within which the validity of the line can be questioned, either by an appeal from the order of the commissioners or a suit brought to determine the question, is deemed mandatory.[127]

§ 48. Change of corporate boundary.

The boundary lines of a public corporation when established in the manner prescribed by law remain fixed until changed by like authority.*

In many cases a change of boundary is made dependent upon

field v. Town of East Granby, 52 Conn. 175; City of Delphi v. Startzman, 104 Ind. 343; City of Emporia v. Smith, 42 Kan. 433.

[124] People v. Bennett, 29 Mich. 451.

[125] Ex parte Rhodes, 43 Ala. 373; Belknap v. City of Louisville, 14 Ky. L. R. 420, 20 S. W. 309.

[126] Flynn v. City of Boston, 153 Mass. 372; In re Plunkett Creek Tp., 148 Pa. 299, 23 Ala. 1041; Roane County v. Anderson County, 89 Tenn. 259; Ewing v. State, 81 Tex. 172, 16 S. W. 872; Washburn v. City of Oshkosh, 60 Wis. 453.

[127] Routt County Com'rs v. Grand County Com'rs, 4 Colo. App. 306, 35 Pac. 1061; Marsalis v. Creager, 2 Tex. Civ. App. 368.

* 6 Curr. Law, 717.

the consent of the people residing within the districts affected. This is especially true of municipal corporations proper. A line may not be changed until after the consent of the requisite number of voters or the required majority in the legislature.[128] The duty imposed upon commissioners to change boundary lines on the presentation to them of a petition properly signed and verified is not discretionary in its character, and its performance may be compelled by mandamus.[129] If a petition is required by statute as preliminary to action, its averments and signatures must follow the provisions of the law.[130]

Judicial recognition. Boundary lines as established by competent tribunals become matters of public record of which the courts will take cognizance and exercise jurisdiction accordingly.[131] Nor can they be collaterally attacked in suits between private individuals.[132]

§ 49. Effect of the establishment or change of a boundary line.

A public corporation, of whatever grade, is given, by the legislature, certain duties for its performance, and, in order to perform these duties, certain rights and powers. Either as an agency of the government or considered as a private corporation, it entertains jurisdiction of, and control over, persons and property within its limits.[133] In order that it may act as an agency of government for the welfare and protection of those entitled, it is necessary that it levy taxes and disburse the proceeds for public purposes, and where boundary lines are changed it is competent for the legislature to authorize the levy of taxes at different rates upon different portions of municipal territory. A change in a boundary line takes from one corporation persons and property, and places them within the jurisdiction of another.[134]

[128] In re Executive Communication of Jan. 16, 1873, 14 Fla. 320; Howell v. Kinney, 99 Ga. 544; Walters v. Richardson, 93 Ky. 374, 20 S. W. 279; Adams v. Ulmer, 91 Me. 47, 39 Atl. 347; People v. Mabie, 142 N. Y. 343, 37 N. E. 115; Harrison Tp. v. Schoolcraft County Sup'rs, 117 Mich. 215, 75 N. W. 456.

[129] Hawkins v. Starke County Com'rs, 14 Ind. 521.

[130] Foster v. Hare, 26 Tex. Civ. App. 177, 62 S. W. 541.

[131] State v. Dunwell, 3 R. I. 127.

[132] Shank v. Town of Ravenswood, 43 W. Va. 223, 27 S. E. 223.

[133] Poole v. Fleeger's Lessee, 11 Pet. (U. S.) 185; Belding v. Hebard, 103 Fed. 432; Russ v. City of Boston, 157 Mass. 60, 31 N. E. 708.

[134] United States v. City of Mem-

A public corporation exercises the jurisdiction and the powers suggested in the preceding paragraph in many ways: It controls and regulates personal and property rights,[135] and exercises, over all within its borders, its police powers for the protection of life, health, good morals and property;[136] it maintains all the machinery of government, the use of which is granted to it by the sovereign,—judicial, quasi legislative, ministerial and clerical, officers and bodies; it enforces their orders and regulations with all the power of the state; and as these powers and bodies may vary under different organizations, it follows that a change from one to any other is a matter sometimes not lightly to be considered.

phis, 97 U. S. 284; Gillette v. City of Hartford, 31 Conn. 357; Evans v. City of Council Bluffs, 65 Iowa, 238; Cooley, Taxation (2d Ed.) p. 157; Langford v. Monteith, 102 U. S. 145; Yellowstone County Com'rs v. Northern Pac. R. Co., 10 Mont. 414, 25 Pac. 1058.

[135] Smith v. Skagit County Com'rs, 45 Fed. 725.

[136] Manchester v. Com. of Massachusetts, 139 U. S. 240, 264; Humboldt Lumber Manufacturers' Ass'n v. Christopherson, 73 Fed. 239.

CHAPTER III.

LEGISLATIVE POWER OVER PUBLIC CORPORATIONS AND ITS LIMITATIONS

§ 50. In general.

A public corporation is organized primarily to act as an agent of the sovereign in the performance of governmental duties and the administration of public affairs. A private corporation is created under authority of law by a group or association of individuals for the purpose, primarily, of advancing their personal interests. The organization of all corporations, private as well as public, is an advantage to the state and results, in the case of a public corporation, directly in a benefit; in the case of a private corporation indirectly. The basis of the continued existence of a public corporation is the will of the sovereign; of the private corporation, the contract between itself and the state. As between the state and the public corporation or the members comprising it, there exists no contract relation. This difference in purpose of organization and authority for corporate life leads, as can be inferred, to a fundamental and far-reaching difference in the power of the sovereign over them.[1]

[1] Laramie County Com'rs v. Albany County Com'rs, 92 U. S. 307; State v. City of Mobile, 24 Ala. 701; Hartford Bridge Co. v. Town of East Hartford, 16 Conn. 172; Town of North Hempstead v. Town of Hempstead, 2 Wend. (N. Y.) 109; People v. Draper, 15 N. Y. 532; City

In considering the question there must also be kept in mind the distinctions already suggested between the different grades of public corporations. We have public corporations as a generic term, including municipal corporations proper and public quasi corporations,—ignoring the cases holding that the state itself may be considered a corporation.

Referring to definitions already given of municipal corporations proper and public quasi corporations, it will be remembered that a public quasi corporation is that form of organization used for the exercising of governmental powers over territory less thickly settled than the territory usually included within the limits of a municipal corporation proper. The municipal corporation proper includes cities, towns (not the township organization) and villages, or congested centers of population. The wants and needs of the two classes differ essentially, and as agencies of the government they can each best perform their functions in a different manner. The property of public corporations acquired through the levy and collection of taxes or by grant and devise for public purposes can only be devoted to such uses.

Public corporations of all grades may assume the character of a private corporation and acquire property in that character or as an individual. Their rights in the acquisition, holding and disposal of this property, acquired in their capacity of private corporations, are the same as those pertaining to other private persons. The legislature cannot exercise over these the same degree of control which it ordinarily exercises over the public corporation and its public property.[2]

To state concisely the rule of control: A public corporation in its capacity as a public corporation, is absolutely under the control of the sovereign, subject only to constitutional provisions and the fundamental law that property contract, and vested rights of third parties dealing with it, cannot be impaired or destroyed.[3]

of Baltimore v. State, 15 Md. 376; Town of Montpelier v. Town of East Montpelier, 29 Vt. 12.

[2] State v. County of Dorsey, 28 Ark. 378; People v. Cook County Com'rs, 176 Ill. 576; Sloan v. State, 8 Blackf. (Ind.) 361; State v. McFadden, 23 Minn. 40.

[3] See elaborate notes in 1 L. R. A. 757, 48 L. R. A. 465, and also cases cited generally in this section.

Terrett v. Taylor, 9 Cranch (U. S.) 43. "In respect also, to public corporations which exist only for public purposes, such as counties, towns, cities, etc., the legislature may, under proper limitations, have a right to change, modify, enlarge

Acting as a private corporation, either in the acquirement of property or the exercise of certain powers, the public corporation, so far as legislative control is concerned, stands on an equal basis with a private corporation or an individual.[4] A municipal corporation proper more frequently acts as and assumes this character of a private corporation.

Without discussing at present the rights of the public as a private corporation, it can be said that public corporations, as governmental agents, so far as the exercise of their governmental powers are concerned, their corporate existence, boundaries, funds, revenues, property and contract rights, are subject to the will of the state, which may modify their franchises, increase or diminish their corporate powers, amend their charters, enlarge or reduce their privileges or annul their corporate existence, as, in its judgment, the general good requires, and irrespective of consent or objection on the part of the inhabitants of the territory affected, except so far as it is restrained by provisions in the constitution or fundamental law.[5-6] The limitations usually found in state constitutions are those which prohibit special legislation; laws not having "a uniform operation throughout the state," or relating to the "business," the "affairs" or "internal affairs" of the corporation.

§ 51. Legislative control over public funds.

The funds of a public corporation, acquired in its capacity as such, are raised by the imposition of taxes on taxable interests within its jurisdiction, and the legislature has the right to regulate and control either the original levy and collection of taxes, or to dispose of funds thus acquired[7] without the consent of the

or restrain them, securing, however, the property for the uses of those for whom and at whose expense it was originally purchased." Opinion on Tp. Organization Law, 55 Mo. 295; Berlin v. Gorham, 34 N. H. 266; Fish v. Branin, 23 N. J. Law (3 Zab.) 484; City of Philadelphia v. Fox, 64 Pa. 169; State v. Frost, 103 Tenn. 685; Graham v. City of Greenville, 67 Tex. 62; Atkins v. Town of Randolph, 31 Vt. 226.

[4] City of Louisville v. University of Louisville, 54 Ky. (15 B. Mon.) 642. See, also, New Orleans, M. & C. R. Co. v. City of New Orleans, 26 La. Ann. 478.

[5-6] Girard v. City of Philadelphia, 74 U. S. (7 Wall.) 1; Barnes v. District of Columbia, 91 U. S. 540; Town of Mt. Pleasant v. Beckwith, 100 U. S. 514.

[7] Pennie v. Reis, 132 U. S. 464; People v. Lynch, 51 Cal. 15; Pike

people within its limits, so long as they are applied to public uses and purposes.[8] Another limitation upon the legislative right to dispose of funds other than the one suggested is that those raised through taxation of taxable interests within a certain district cannot be used for the benefit and advantage of others.[9]

§ 52. Power of the legislature over public revenues.

The legislature, as the law-making arm of the sovereign, in the absence of constitutional restrictions, has the power to provide and regulate the manner in and the purpose for which the revenues of a public corporation may be raised [10] and employed. The sovereign has the inherent power of levying taxes for the purpose of raising revenue for its uses, which are presumably public. As it therefore possesses in the first instance the sole power, it has the right to direct the manner in which its mere agencies shall raise funds, either for their special and local public wants [11] or for general purposes,[12] and this right of the legislature goes not only to the original grant of power, but also to its modification, change or repeal, and the mode of collection.[13]

Further considering this power of the legislature there are cases holding, based upon sound reasons, that a public corporation cannot be compelled to undertake a public improvement purely local, not public or governmental in its character, to be paid for ultimately by compulsory taxation, without the consent of the peo-

County Com'rs v. State, 11 Ill. 202; Gutzweller v. People, 14 Ill. 142;

[8] Sinton v. Ashbury, 41 Cal. 525; Weismer v. Village of Douglas, 64 N. Y. 91; Allen v. Inhabitants of Jay, 60 Me. 124.

[9] State v. St. Louis County Ct., 34 Mo. 546; Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518; Terrett v. Taylor, 9 Cranch (U. S.) 43; Conlin v. City and County of San Francisco Sup'rs, 114 Cal. 404; State v. Haben, 22 Wis. 660.

[10] 6 Curr. Law, 1604, 1664.

[10] Gilman v. Sheboygan, 2 Black (U. S.) 510; Town of Hagerstown v. Sehner, 37 Md. 180; Detroit Citizens' St. R. Co. v. Common Council of Detroit, 125 Mich. 673, 85 N. W. 96; 86 N. W. 809; Brownell v. Town of Greenwich, 114 N. Y. 518.

[11] Meriwether v. Garrett, 102 U. S. 472; Sinton v. Ashbury, 41 Cal. 525; Allen v. Inhabitants of Jay, 60 Me. 124; Smith v. Stephan, 66 Md. 381.

[12] City of New Orleans v. Turpin, 13 La. Ann. 56; State v. Board of Education of St. Louis, 141 Mo. 45.

[13] Gilman v. City of Sheboygan, 2 Black (U. S.) 510; County of Calloway v. Foster, 93 U. S. 567; County of Scotland v. Thomas, 94 U. S. 682.

ple paying such taxes.[14] The same principle has also been applied in the granting of aid to railroad or other quasi public corporations, and it has been held in several cases that municipal corporations cannot be compelled against their consent, even by act of the legislature, to give such aid where the only means of meeting the obligation is by levying local taxes.[15]

§ 53. Legislative control over corporate boundaries.

The boundaries of public corporations as agents of the sovereign come within the doctrine of absolute control by the legislature. Originally possessing the right to create these agencies or subagencies, it can exercise the lesser power of changing or altering their boundaries.[16] The right of the people within the districts affected to consent to such change or alteration may be given as a matter of favor.[17]

The legislature has also the right to determine the basis for the organization of municipal corporations proper, one of the classes of public corporations, and this can be any determining factor, such as population or geographical area, it may consider a valid and expedient one[18] in the absence of constitutional restrictions. Some states even hold that this is a discretionary matter with the legislature, uncontrolled by subsequent constitutional provisions.[19] Courts have no power to control or interfere with, in any way, the exercise of this discretionary law-making power by the legislature.[20]

[14] Cooley, Taxation (2d Ed.) p. 688 et seq.; Park Com'rs v. Detroit Common Council, 28 Mich. 229; State v. Tappan, 29 Wis. 664.

[15] Township of Elmwood v. Marcy, 92 U. S. 289; People v. State Treasurer, 23 Mich. 499; People v. Batchellor, 53 N. Y. 128, a leading case citing and reviewing many authorities.

[16] Girard v. City of Philadelphia, 74 U. S. (7 Wall.) 1; Manchester v. Com., 139 U. S. 240; Chandler v. City of Boston, 112 Mass. 200; Portwood v. Montgomery County Sup'rs, 52 Miss. 523.

6 Curr. Law, 717.

[17] Reynolds v. Holland, 35 Ark. 56; Taylor v. Taylor, 10 Minn. 107 (Gil. 81). Consent necessary under constitutional provision. Mills v. Williams, 33 N. C. (11 Ired.) 558.

[18] City of Chicago v. Rumsey, 87 Ill. 348; People v. Bradley, 36 Mich. 447; Williams v. City of Nashville, 89 Tenn. 487, 15 S. W. 364; Smith v. City of Saginaw, 81 Mich. 123, 45 N. W. 964; Com. v. Blackley, 198 Pa. 372, 47 Atl. 1104.

[19] Mattox v. State, 115 Ga. 212, 41 S. E. 709; Wade v. City of Richmond, 18 Grat. (Va.) 583.

[20] Stilz v. City of Indianapolis, 55 Ind. 515. See, also, Abb. Mun. Corp. § 86; Martin v. Dix, 52 Miss. 53.

§ 54. Legislative power over public property.

The power of the legislature is full, ample and supreme over the property of the public corporation, acquired and held in its capacity as such and for public purposes. This property is usually acquired through the exercise of the power of taxation,—a direct gift of the sovereign. The legislature has the power to provide means for its acquisition, its control and management, and its final disposition.[20a] The only limitations upon this power are those already stated and well-recognized, viz., the use of public revenues for public purposes, and the retention of local property and revenues for public local uses. If property has been acquired by a public corporation in its capacity as a private corporation, the control of the legislature is limited by the general laws and rules applying to private property.[21]

This power of the legislature is sufficiently broad to enable it to grant to railroad companies the right to occupy the streets and highways of subordinate public corporations without securing their consent, on the theory that highways and streets are dedicated to a public use and the legislature as representing the community or government at large has complete control over public property.[22]

§ 55. Over corporate contracts and trust property.

Public corporations may, during their existence either as corporations de facto or de jure, enter into contract relations with third parties, and if these, at the time of their inspection, are valid, the legislature cannot, although its powers are broad as to the control of public corporations in all respects, pass laws changing or repealing the powers of the corporation in such a manner as to impair the obligations of these contract rights or relations.[23]

[20a] Inhabitants of North Yarmouth v. Skillings, 45 Me. 133; Barton County v. Walser, 47 Mo. 189.

[21] Grogan v. City of San Francisco, 18 Cal. 590; Coyle v. Gray, 7 Houst. (Del.) 44; Proprietors of Mt. Hope Cemetery v. City of Boston, 158 Mass. 509, 33 N. E. 695;

[22] See post, chapter IX, discussing the control of public property.

[23] Broughton v. City of Pensacola, 93 U. S. 266; Wolff v. City of New Orleans, 103 U. S. 358; City of San Francisco v. Canavan, 42 Cal. 541; Helena Consol. Water Co. v. Steele, 20 Mont. 1, 49 Pac. 382; Tax Assessors of Rahway v. Munday, 44 N. J. Law, 395.

Laws in force at the time of the making of such contracts and which were their authority in whole or in part, enter into and form a part of the same.[24] The principle applies to provisions for a sinking fund, particular powers of taxation and also to any property or security which at the time of legislation authorizing an issue of bonds was devoted to their payment; such sinking funds or means of payment cannot be diverted to other uses, the legislation repealed, or the power to tax lessened or destroyed.[25] Where a remedy is limited or abolished, this will constitute an impairment of a contract obligation for, as has been said, "nothing is more important than the means of enforcement.[26] This protection is not afforded, however, to the public corporation in its capacity as such. It is the personal property, contract or vested right of the individual which is protected.

Control over trust property held by public corporations. The control of the legislature over property or contract rights of the public corporation includes not only property belonging to the corporation in its public capacity, but also to property which it holds as a trustee for the benefit of a cestui que trust. The only limitation upon the power of the legislature in such a case is that the purpose for which the property or its income is to be applied can not be changed.[27]

§ 56. Payment of debts.

It is also clearly within the power of the legislature to compel the payment of legal and honest obligations by the public corporation in the manner which it may provide, and to enforce obedience to the directions contained in its positive laws through proper process of the judicial branch of the sovereign power.* The legislature can provide for the levy and collection of taxes with which

[24] German Sav. Bank v. Franklin County, 128 U. S. 526; Van Hoffman v. City of Quincy, 71 U. S. (4 Wall.) 535; City of Detroit v. Detroit Citizens' St. R. Co., 184 U. S. 368; State of Minnesota v. Duluth & I. R. R. Co., 97 Fed. 353.

[25] State of Louisana v. Pilsbury, 105 U. S. 278; Town of Mobile v. Watson, 116 U. S. 289; Seibert v. Lewis, 122 U. S. 284; State of Louisiana v. City of New Orleans, 102 U. S. 203; Munday v. Assessors of Rahway, 43 N. J. Law, 338; People v. Common Council of Buffalo, 140 N. Y. 300.

[26] Edwards v. Kearzey, 96 U. S. 595.

[27] Girard v. City of Philadelphia, 74 U. S. (7 Wall.) 1.

* 6 Curr. Law, 732.

to meet this obligation. The power of the sovereign through its law-making branch goes still further, so it has been held, even to the payment under compulsion of a debt or obligation owing by a public corporation which technically can be avoided but in favor of which there exist the strongest moral reasons.[28]

§ 57. Constitutional limitations in respect to special legislation.

During the early legislative history of this country there existed no limitations of this character upon the power of the different state law-making bodies. Nearly all legislation was special in its nature, and it will be readily understood that such a system led to great abuses.

Different states of the Union have adopted in their constitutions, or in amendments, limitations upon the right of legislatures to pass acts special in their nature or to meet a special condition or action. The wording of the constitutional provision in Minnesota is a good illustration of the form usually adopted, though many do not include the details there enumerated.[29]

The particular subjects usually covered by constitutional provisions prohibiting the passage of special legislation affecting the creation or the life of public corporations, relate to their creation, the amendment or repeal of their charters,[30] the alteration or change of their boundaries, their mode of raising revenues,[31] and their expenditure of public moneys.[32]

A general law has been defined as "a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special."[33] The mere arbitrary grouping, classifying or arranging of certain objects will not of itself make legislation general. There must be a

[28] City of Guthrie v. Ter., 1 Okl. 188, 31 Pac. 190; City of New Orleans v. Clark, 95 U. S. 644. See, also, Abb. Mun. Corp. § 90, citing many cases.

[29] Minn. Const. art. 4, § 33.

[30] State v. Duval County Com'rs, 23 Fla. 483; State v. Leffingwell, 54 Mo. 458.

[31] City of Wyandotte v. Wood, 5 Kan. 603.

[32] Pratt v. Browne, 135 Cal. 649, 67 Pac. 1082.

[33] Pepin Tp. v. Sage (C. C. A.) 129 Fed. 657; Nichols v. Walter, 37 Minn. 264; Richards v. Hammer, 42 N. J. Law, 435, 440; State v. Cooley, 56 Minn. 540; Wheeler v. City of Philadelphia, 77 Pa. 338; Harwood v. Wentworth, 162 U. S. 547. See, also, Abb. Mun. Corp. § 93, fully discussing and citing cases.

logical basis for the desired effect independent of conditions or circumstances then existing.

§ 58. Constitutionality of laws classifying public corporations.

In a preceding section, attention has been called to the constitutional limitations upon the power of the legislature to pass what is ordinarily termed "special legislation," these requiring the passage of laws general in their nature and under the provisions of which all bodies fulfilling or meeting the conditions specified can become organized. The necessity for legislation classifying public corporations arises from the fact, so often repeated, that the density of population varies in different portions of the state, and that those portions thickly populated experience wants and require for their proper government, and for the proper administration of public and governmental affairs and functions, organizations or forms of government more complex in their character than those required by sparsely settled regions. The constitutionality of legislation providing for the classification of public corporations is well established, so long as it comes within the constitutional inhibition, and is based upon some distinction that renders the legislation reasonable and expedient. A classification is inoperative when based upon unsubstantial, arbitrary or illogical differences or characteristics.[34]

That the law has for its basis of classification reasonable and uniform conditions, and genuine and substantial distinctions which may apply to the future as well as existing conditions, seems to be the test, though some cases hold that where the purpose of the law is temporary only, if it creates a distinctive class based upon existing circumstances it may still be constitutional.[35]

§ 59. Other constitutional objections.*

The unconstitutionality of legislation affecting public corporations has been urged not only upon the ground that it is special

[34] Darcey v. City of San Jose, 104 Cal. 642; Green v. Com., 95 Ky. 233, 24 S. W. 610; Kansas City v. Stegmiller, 151 Mo. 189; Land, Log & Lumber Co. v. Brown, 73 Wis. 294; State v. Jackson County Ct., 89 Mo. 237; State v. Anderson, 44 Ohio St. 247.

[35] Kelly v. Meeks, 87 Mo. 396; State v. Hawkins, 44 Ohio St. 98; Iowa R. Land Co. v. Soper, 39 Iowa, 112; Nichols v. Walter, 37 Minn. 272; Alexander v. City of Duluth, 77 Minn. 445.

* 6 Curr. Law, 1523, 1531.

legislation but also because state constitutions may contain provisions that all laws relating to certain matters "shall be uniform in their operation throughout the state,"[36] or there may be also provisions which prohibit the legislature from passing any local or special law "regulating the affairs of counties, cities, etc.,[37] or "regulating the internal affairs of towns and counties,"[38] and acts or resolves of the legislature may come within the prohibitions contained in these provisions. That a bill deals with more than one subject, one only being expressed in its title, is another constitutional objection urged against legislation looking to the organization or control of public corporations. Such a provision is intended to afford a protection to the people and to legislators against the passage of bills dealing with more than one subject, some of which might not be, but for this prohibition, included in the title.[39] It is not necessary, however, in the title of a bill, to recite in detail all its provisions. General information or notice of the subject legislated upon is sufficient.

§ 60. Control over the corporation in its private capacity.

In its capacity as an individual, a public corporation deals with the legislature or the sovereign upon the same basis of equality as a private person or corporation. The property, of whatever character, which it may acquire and hold, is acquired and held subject to all the rules and remedies of the law affecting private property and interests. The legislature can no more arbitrarily pass laws affecting these interests and property than it can those of private individuals.[40] As recently said, "they (the courts) are

[36] City of Kenyon v. State, 52 Ohio St. 59, 38 N. E. 885.

[37] Appeal of Ayars, 122 Pa. 266; City of Reading v. Savage, 124 Pa. 328. See, also, § 95 Abb. Mun. Corp.

[38] Grey v. City of Dover, 62 N. J. Law, 40, 40 Atl. 640; Hermann v. Town of Guttenberg, 63 N. J. Law, 616, 44 Atl. 758.

[39] Montclair v. Ramsdell, 107 U. S. 147; Carter County v. Sinton, 120 U. S. 517; Astor v. Arcade R. Co., 113 N. Y. 93.

[40] Town of East Hartford v. Hartford Bridge Co., 10 How. (U. S.) 511; Police Jury of Jefferson Parish v. McCormack, 32 La. Ann. 624; Proprietors of Mt. Hope Cemetery v. City of Boston, 158 Mass. 509; People v. Common Council of Detroit, 28 Mich. 228, where it is intimated that parks are in the nature of private property; David v. Portland Water Committee, 14 Or. 98.

also more and more recognizing that, from the point of view of the inviolable private rights of municipal corporations, these bodies may hold property as private in character and therefore as inviolable in character by any governmental action as the property of individuals. It is indeed true that this position has not been reached without considerable reluctance." [41]

[41] Darlington v. City of New York, 31 N. Y. 164.

CHAPTER IV.

CORPORATE ELECTIONS.

§ 61. Corporate elections.

That discriminating and keen observer, De Tocqueville, ascribes the success of American political institutions and ideas, in a great measure, to the existence of the New England town as a political organization and the opportunity afforded each individual at town meetings to participate in and assume the exercise of governmental duties.

In his opinion: "Town-meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it. A nation may establish a free government, but without municipal institutions, it cannot have the spirit of liberty."

"The New Englander is attached to his township, not so much because he was born in it, but because it is a free and strong community, of which he is a member, and which deserves the care spent in managing it. In Europe the absence of local public spirit is a frequent subject of regret to those who are in power; every one agrees that there is no surer guaranty of order and tranquility, and yet nothing is more difficult to create."

"The township, at the center of the ordinary relations of life, serves as a field for the desire of public esteem, the want of exciting interest, and the taste for authority and popularity; and the passions which commonly embroil society change their character, when they find a vent so near the domestic hearth and the family circle."[1]

This particular form of public quasi corporation is the favorite

[1] De Tocqueville, Democracy in America, c. 5.

model for all governmental agencies intended to effect the same results. The idea embodied is local self-government; the right of the people residing within a certain locality to meet, discuss and supply their wants, controlled only by the state. In some localities the agency employed for attaining the highest development of local self-government is the New England town, commonly so-called, first adopted in New England, hence its name. It has spread to all those parts of the United States settled and dominated by New England ideas. In other parts of the country the form of the organization intended to accomplish the same purpose is what is known as the county or shire. The agency, however, is immaterial. All forms of public corporations, including municipal, have for their purpose, their sole object, the better government of the people within a certain locality.

The town meeting, the representative assembly or election of the town, is the meeting, at the time designated by law, of all the qualified voters of the town at a public place, to elect officers for the ensuing year and to discuss and take action upon measures looking to their greater convenience and better government.[2]

§ 62. Notice.

That this meeting be legal, independent of statutory provisions, it is necessary that those entitled to assemble and participate in its deliberations should have notice.[3]

The form of notice is immaterial, unless prescribed by law, so long as the result to be accomplished is effected and it is necessary that it should direct attention to particular business to be transacted at the meeting called, and the powers of the town are limited strictly, except as authorized by statute, to the matters included within the notice.[4] The time and place of meeting should be definitely stated.[5]

§ 63. Time and place of holding.

A town meeting should be held at the time fixed in the warrant to render action taken valid,[6] and must also be held at the place

[2] See interesting discussion on local self-government in Andrews' American Law, §§ 452 et seq.

[3] Reynolds v. Inhabitants of New Salem, 47 Mass. (6 Metc.) 340; McVichie v. Town of Knight, 82 Wis. 137.

[4] Town of Bloomfield v. Charter Oak Bank, 121 U. S. 121.

[5] State v. Doyle, 84 Wis. 678.

[6] Chamberlain v. Inhabitants of Dover, 13 Me. 466; People v. Martin, 5 N. Y. (1 Seld.) 22

designated. If there are statutory provisions fixing the place and regulating the manner of conducting the meeting, these must be followed.[7] The officers in charge of the meeting may, when authorized by statute. adjourn the same to a time and at a place designated.

§ 64. The town meeting; its powers.

The town meeting being practically the legislative forum of the qualified voters of the town, it follows that it can be called only for the purpose of passing upon such matters as may be authorized by law.[8]

The law goes further and requires that action at a meeting, to be valid, must be taken pursuant to the warrant or notice calling it, which shall state with reasonable certainty, as already suggested, the matters of business expected to be considered at such meeting.[9] It need not state all subjects to be considered where by usage or custom certain questions are discussed, considered and passed upon without such notice, or where certain action has been taken for some time past under a special wording in the warrant. But unless questions are by usage or custom thus entitled to be considered at a town meeting, it is necessary that the warrant calling the meeting should distinctly and separately specify them.[10]

Under this rule it was held in a Connecticut case that a vote of the town limiting the right of fishing in a free and common fishery was void unless the meeting at which such vote was passed was specially warned for that purpose, and it was also held in this case that the burden was upon the one seeking to avail himself of the benefits of such action.[11]

[7] Brown v. Inhabitants of Winterport, 79 Me. 305; Auditor General v. Duluth, S. S. & A. R. Co., 116 Mich. 122; State v. Doyle, 84 Wis. 678.

[8] Crittenden v. Robertson, 13 Mich. 58; Schoff v. Bloomfield, 8 Vt. 472.

[9] Bull v. Town of Warren, 36 Conn. 83; Drisko v. Inhabitants of Columbia, 75 Me. 73; Torrey v. Millbury, 38 Mass. (21 Pick.) 64; Wood v. Inhabitants of Quincy, 65 Mass. (11 Cush.) 487; Smith v. Abington Sav. Bank, 171 Mass. 178; Kittredge v. Inhabitants of North Brookfield, 138 Mass. 286; Smith v. Town of Westerly, 19 R. I. 437; Alger v. Curry, 40 Vt. 437.

[10] Davenport v. Inhabitants of Hallowell, 10 Me. 317; Fuller v. Inhabitants of Groton, 77 Mass. (11 Gray) 340.

[11] Hayden v. Noyes, 5 Conn. 391;

§ 65. Purpose for which held; levy of taxes; election of officers.

Action can be taken, at a town meeting levying taxes and providing for the expenditure during the ensuing year, of moneys thus raised. The appropriations for town purposes must be public in their character.

Another authorized and legal purpose for which a town meeting can be held is the election of town officers for the coming year. The administration of the government of the town is placed in the hands of certain officials or agents who represent the corporation. They act for and bind the town by their action. The officers to be elected are usually designated by law, as well as the manner of their election.[12] As a rule the authority of officers elected at town meetings will be upheld and their action sustained. The fact that the warrant or notice calling the meeting may be imperfect is generally held insufficient to sustain a collateral attack upon de facto officers or their acts done in an official capacity.[13]

The town meeting is one of the essential characteristics pertaining to the town organization. Rights enjoyed and privileges possessed are exercised at that time by the voters of the town. The authority to meet in this manner is given by law, and the right of exercising powers obtained either by usage, custom, or by statute, cannot be destroyed by a failure to exercise such power. If the corporation fails to perform its duties it may be compelled by mandamus or other proper proceeding. A town meeting, legally called and organized, has, it is generally held, the incidental and inherent power of adjourning to meet at some appropriate place and at some future time definitely and specifically fixed in the adjournment. At such adjourned meeting it is customary and legal to transact such business as could have been properly transacted at the meeting as first held.[14]

Willard v. Borough of Killingworth, 8 Conn. 247.

[12] Craig v. Scandret, 8 Ky. (1 A. K. Marsh.) 15; Com. v. Wentworth, 145 Mass. 50; Baker v. Shephard, 24 N. H. (4 Fost.) 208; Order of Election of Town Officers, 20 R. I. 784.

[13] Cottrill v. Myrick, 12 Me. 222; Sherman v. Torrey, 99 Mass. 472.

[14] Inhabitants of Canton v. Smith, 65 Me. 203; Reed v. Inhabitants of Acton, 117 Mass. 384; Wisconsin Cent. R. Co. v. Ashland County, 81 Wis. 1.

§ 66. Voters and their qualifications.

The act of voting is not an inherent or inalienable right; it is a privilege; a special mark of favor given by the state to certain individuals to be exercised by them. As was said in a Missouri case, "It is neither a vested, an absolute, nor a natural right." [15] It being then a matter of favor, the state undoubtedly has the right to prescribe qualifications which must be possessed before the privilege can be lawfully exercised, the limitations upon such qualifications being that they be uniform and certain in their application, not based upon religious belief, and not within prohibitive clauses of either the Federal or state constitutions. The validity of laws prescribing such qualifications has been settled beyond doubt, a doubt arising only as to their application or construction.

§ 67. Miscellaneous matters.

It has been held an indictable offense to violently and rudely disturb a town meeting,[16] and the same is true of "repeating" at town elections.[17] The town meeting is considered a deliberative body to which, except when engaged in the election of officers, the usual rules of parliamentary law apply.[18] In New Hampshire, however, this rule is modified to the extent that the moderator may have the power to prescribe rules for the conduct of the meeting over which he presides.[19]

[15] Blair v. Ridgely, 41 Mo. 63, 97 Am. Dec. 248.

[16] Com. v. Hoxey, 16 Mass. 385.

[17] Bradley v. Heath, 29 Mass. (12 Pick.) 163.

[18] Hunneman v. Inhabitants of Grafton, 51 Mass. (10 Metc.) 454; Kimball v. Lamprey, 19 N. H. 215; State v. Davidson, 32 Wis. 114.

[19] Hill v. Goodwin, 56 N. H. 441.

CHAPTER V.

THE POWERS OF PUBLIC CORPORATIONS.

I. In General.

§ 68. General powers.

A public corporation is an agency of government created by the sovereign when such action seems most conducive to the public good, for the purpose of aiding in the exercise and administration of governmental functions.[1] A corporation, either public or private, is a creature of limited powers. Such powers as it possesses are to be found in the charter of its creation, which has been held to include not only the act of incorporation, whether a special or general law, but constitutional provisions and also decisions of the highest courts construing and applying these acts and provisions. In this charter, used thus in its broad sense, is to be found the powers which may be legally exercised by the corporation.[2] The powers of a municipal corporation have been classified[3] as follows: "(1) Those granted in express words;[4] (2) those neces-

[1] Barnes v. District of Columbia, 91 U. S. 540; Tippecanoe County Com'rs v. Lucas, 93 U. S. 108; Stoutenburgh v. Hennick, 129 U. S. 141; Goldthwaite v. City of Montgomery, 50 Ala. 186; Jacksonville Elec. Light Co. v. City of Jacksonville, 36 Fla. 229; Harmon v. City of Chicago, 110 Ill. 400; State v. Garibaldi, 44 La. Ann. 809; Inhabitants of Camden v. Camden Village Corp., 77 Me. 530; Ewing v. Hoblitzelle, 85 Mo. 64. "Public corporations are the auxiliary of the state in the important business of municipal rule and are called into being at the pleasure of the state, and the same voice which speaks them into existence can speak them out." But see later Missouri cases modifying this decision somewhat. Murnane v. City of St. Louis, 123 Mo. 479, which holds "that the important business of municipal rule is a local and not a state matter." But see Cooley, Taxation (2d Ed.) p. 678. See, also, People v. Common Council of Detroit, 29 Mich. 108, which holds that municipalities have a constitutional right to local self-government.

[2] City of Detroit v. Detroit City R. Co., 56 Fed. 867; City of Mobile v. Dargan, 45 Ala. 310; Low v. City of Marysville, 5 Cal. 214; People v. Henshaw, 76 Cal. 436; Field v. City of Des Moines, 39 Iowa, 575. See, also, Abb. Mun. Corp. § 108.

[3] Freeport Water Co. v. City of Freeport, 180 U. S. 587; affirming 186 Ill. 179; Town of New Decatur v. Berry, 90 Ala. 432; Reis v. Graff, 51 Cal. 86; Phillips v. City of Denver, 19 Colo. 179; City of New London v. Brainard, 22 Conn. 552; Huesing v. City of Rock Island, 128 Ill. 465; City of Brenham v. Brenham Water Co., 67 Tex. 542; Village of St. Johnsbury v. Thompson, 59 Vt. 300; Kirkham v. Russell, 76 Va. 956.

[4] Board of Liquidation of City Debt v. Louisville & N. R. Co., 109 U. S. 221; Low v. City of Marysville, 5 Cal. 214; Dailey v. City of

sarily or fairly implied in or incident to the powers expressly granted;[5] (3) those essential to the declared offices and purposes of the corporation, not simply convenient but indispensable."[6]

This classification and statement has been approved by many courts. The exercise of the governmental powers thus conferred upon public corporations is not optional. They are political subordinate divisions of the state organized as a part of its machinery of administration. Their duties are wholly of a public nature and their creation a matter of public convenience or governmental necessity. In order that they may better carry out the purposes for which they are created certain powers are conferred on them, and whether they will assume and exercise these powers or perform the duties imposed are matters with which they have no concern. The exercise of public powers is held involuntary.[7]

The author would suggest as a classification of powers to be exercised by municipal corporations proper, those possessed in their capacity, first, as agents of the government; second, as municipal corporations proper; third, as private corporations, and in case of public corporations other than municipal corporations proper, first—those possessed as agents of the government, and second, in rare instances as private corporations.

The powers exercised by all public corporations, as suggested, must be found in the charter of the corporation, this charter being based upon either a public or special act, limited and controlled by constitutional provisions and construed by judicial decisions.[8] Some cases also hold that powers enjoyed and exercised without

New Haven, 60 Conn. 314, where the court say. "It is a rule of great public utility and courts should recognize and enforce it as a safeguard against the tendency of municipalities to embark in enterprises not germane to the objects for which they are incorporated." Crofut v. City of Danbury, 65 Conn. 294; Kyle v. Malin, 8 Ind. 34; Town of Kirkwood v. Meramec Highlands Co., 160 Mo. 111.

[5] In re Lee Tong, 18 Fed. 253; Ex parte Burnett, 30 Ala. 461; Douglass v. City of Placerville, 18 Cal. 643; City of New London v. Brainard, 22 Conn. 552; Dailey v. City of New Haven, 60 Conn, 314.

[6] Scott's Ex'rs v. City of Shreveport, 20 Fed. 714; McFarlain v. Town of Jennings, 106 La. 541, 31 So. 62; Town of Kirkwood v. Meramec Highlands Co., 160 Mo. 111. Power to create a monopoly not an implied one.

[7] Granger v. Pulaski County, 26 Ark. 37; White v. County of Bond, 58 Ill. 297; Hill v. City of Boston, 122 Mass. 344; Brabham v. Hinds County Sup're, 54 Miss. 363.

[8] Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518;

interruption or objection for many years may be legally exercised by such corporations through the doctrine of prescription, but the weight of authority is against any increase or enlargement of the powers of a public corporation through the application of this doctrine and even in those states where occasional cases are found favoring the acquirement of a power by usage, the courts hold that the usage should be general and reasonable. The tendency is to a restriction and limitation of the powers capable of being legally exercised by public corporations.[9]

§ 69. Implied.*

Public corporations, by weight of authority, possess not only those powers granted in express words but also those necessarily or fairly incident to the powers expressly granted and those implied because essential to the declared offices and purposes of the corporation. Among the implied powers legally exercised by public corporations are those which may be termed usual municipal powers.[10] In Minnesota such corporations, it is declared, "shall have the general powers possessed by municipal corporations at common law."[11] And a Michigan case decided that municipal organizations in Michigan were of "common-law origin and having no less than common-law franchises."[12] In a discussion of the doctrine of implied municipal powers, it is also well to remember that a grant of power carries with it all the necessary incidents to make that grant effectual.[13]

To enact ordinances. Among the implied powers falling as the occasion may require either under one or the other of the classes

City of Mobile v. Moog, 53 Ala. 561; Stewart v. Adams, 50 Kan. 560.

[9] Attorney General v. Bank of Newbern, 21 N. C. (1 Dev. & B. Eq.) 216; Butler v. City of Charlestown, 73 Mass. (7 Gray) 12; Benoit v. Inhabitants of Conway, 92 Mass. (10 Allen) 528; Frazier v. Warfield, 13 Md. 279; City of Camden v. Varney, 63 N. J. Law, 325; Van Hostrup v. City of Madison, 68 U. S. (1 Wall.) 291; St. Louis Brewing Ass'n v. City of St. Louis, 140 Mo. 419; Hood v. City of Lynn, 83 Mass. (1 Allen) 103.

* 6 Curr. Law, 720.

[10] City of Ottawa v. Carey, 108 U. S. 110; Baumgartner v. Hasty, 100 Ind. 575; Mayo v. Dover & Foxcroft Village Fire Co., 96 Me. 539.

[11] Laws Minn. 1899, p. 51.

[12] People v. Hurlbut, 24 Mich. 44.

[13] McCulloch v. State of Maryland, 4 Wheat (U. S.) 316; Agnew v. Brall, 124 Ill. 312; City of Anderson v. O'Conner, 98 Ind. 168; State v. Missouri, K & T. R. Co., 164 Mo. 208; Linn v. Borough of Chambersburg, 160 Pa. 511.

above given is that to enact ordinances. The power or right of a corporation, private or public, to adopt such by-laws as it may deem proper for its own internal government in harmony with its charter, the laws and the constitution of the state and the general law of the land is not seriously questioned.[14]

Public offices. Another implied power possessed by municipal corporations is that of creating or instituting certain public offices and officials where such are necessary to the proper performance of the functions or duties imposed or required by law of the corporation.[15]

To acquire and hold property. A public corporation has also the implied power, unless restricted by law, to acquire and hold such property whether real, personal or mixed as may be necessary or convenient to enable it to either exercise powers directly granted or to perform properly the functions of government for which it was created.[16] This power to acquire property has been considered sufficient to authorize the purchase of property beyond the jurisdiction of the corporation where this was necessary for the proper government of a municipality.[17]

The police power. A public corporation unquestionably has the implied right to exercise the police power and to accomplish this purpose, to pass and enforce such police and sanitary regulations and ordinances as may be necessary and as such public corporations may deem expedient. The right to properly exercise the police power has been invoked as the basis of an implied power to supply the inhabitants of a municipal corporation proper with water and light. Of the soundness of this proposition, especially in regard to the latter, there is grave question.[18-19]

Miscellaneous implied powers. Public corporations and especially municipal corporations proper possess, in addition to the

[14] Lambert v. Thornton, 1 Ld. Raym. 91; A Coal-Float v. City of Jeffersonville, 112 Ind. 15; Cross v. Town of Morristown, 33 N. J. Law, 57; City of Nashville v. Linck, 80 Tenn. (12 Lea) 499.

[15] Lowry v. City of Lexington, 113 Ky. 763, 68 S. W. 1109; Boehm v. City of Baltimore, 61 Md. 259; State v. May, 106 Mo. 488.

[16] In re City of Buffalo, 68 N. Y. 167. See, also, Von Schmidt v. Widber, 105 Cal. 151, and pertinent authorities cited in the chapter relating to public property, its acquirement, control and disposal.

[17] City of Champaign v. Harmon, 98 Ill. 491.

[18-19] Rae v. City of Flint, 51 Mich. 526; Sayre Borough v. Phillips, 148 Pa. 482. See, also, post, those sections upon the police power and its exercise—also those discussing municipal water and light supply.

implied powers suggested above, the right to make and use a common seal and alter it at pleasure; the power to sue and be sued; complain and defend in any court; acquire a name and by that name to have perpetual succession and to exercise such powers as are recognized necessary to the existence of corporate life of the character and kind possessed by public corporations. The express action of the state in respect to any of the powers noted will, of course, control the corporation in the exercise of such power.

§ 70. Discretionary and imperative powers.

There is found upon an examination of the authorities, another division of powers not co-ordinate or co-extensive with the one given, but based upon the idea that a public corporation may possess powers granted to it by the sovereign the exercise of which is optional;[20] there also may be other powers granted to it the exercise of which is not a matter of choice. We have, then, imperative powers or those whose exercise is obligatory upon the public corporation and the performance of which can be compelled by proper process;[21-22] and discretionary powers or those to be exercised or not within the sound discretion of the officers controlling public affairs.

Their exercise. Powers conferred on public corporations to be exercised for the public good, involving the performance of governmental duties, are imperative in their nature.[23] They become a duty and their performance an obligation. The language used in conferring a power does not determine its character. Imperative powers granted or imposed upon public corporations cannot be abridged, surrendered or destroyed by any act of the corporation itself.[24] And the converse of this rule, that a public corporation

[20] City of Joliet v. Verley, 35 Ill. 58; Sinking Fund Com'rs v. Northern Bank, 58 Ky. (1 Metc.) 174; St. Joseph Board of Public Schools v. Patten, 62 Mo. 444.

[21-22] Mason v. Fearson, 9 How. (U. S.) 248; City of Ottawa v. People, 48 Ill. 233; Watts v. Police Jury of Carroll, 11 La. Ann. 141; Inhabitants of Veazie v. Inhabitants of China, 50 Me. 518; Phelps v. Hawley, 52 N. Y. 23.

[23] Goodrich v. City of Chicago, 20 Ill. 445; Middle Bridge Proprietors v. Brooks, 13 Me. 301; Anne Arundel County Com'rs v. Duckett, 20 Md. 468; Phelps v. Hawley, 52 N. Y. 23. "Where persons or the public have an interest in having the act done by a public body, 'may' in such a statute means 'must.'"

[24] City of New York v. Second Ave. R. Co., 32 N. Y. 261; McQuillin, Mun. Ord. § 84; Goszler v. Corporation of Georgetown, 6 Wheat.

cannot by any act of its own increase its powers, is also true. On the other hand, those duties or powers conferred upon a public corporation which are not made obligatory in their performance or exercise, either by the language of the statute conferring the power or by the character or nature of the act to be done, may be considered as discretionary and optional so far as their performance or exercise by the corporation is concerned.[25] The exercise of discretionary powers, as well as the manner of such exercise when not specified by the grant of authority,[26] is, as indicated by the plain meaning of the words, left to the discretion of the corporation and of its officials having in charge the management or the transaction of the specific act.[27] Courts are not permitted, nor do they assume, the right to exercise any restraining or other influence in regard to the performance or nonperformance of discretionary duties unless questions are involved of bad faith, fraud, corruption or the invasion of private rights.[28] The corrective and restraining influence of the courts can also be invoked where public corporations transcend or abuse their power or threaten to do

(U. S.) 593; City Council of Montgomery v. Capital City Water Co., 92 Ala. 361; City of Valparaiso v. Gardner, 97 Ind. 1; New Orleans Gas Light Co. v. City of New Orleans, 42 La. Ann. 188; State v. Graves, 19 Md. 351; Gale v. Village of Kalamazoo, 23 Mich. 344; Attorney General v. Lowell, 67 N. H. 198.

[25] Goodrich v. City of Chicago, 20 Ill. 445; State v. City of St. Louis, 158 Mo. 505; Spears v. City of New York, 72 N. Y. 442; Carr v. Northern Liberties, 35 Pa. 324.

[26] Public corporations generally possess a wide discretion both in regard to the opening of public streets or highways and their improvement, including the construction and establishment of drains, sewers, sidewalks, pavements or crosswalks. See generally United States v. City of New Orleans, 31 Fed. 537; Kitchen v. Union County Com'rs, 123 Ind. 540; Spaulding v. City of Lowell, 40 Mass. (23 Pick.) 71; Torrent v. City of Muskegon, 47 Mich. 115; Rotenberry v. Yalobusha County Sup'rs, 67 Miss. 470; and Abb. Mun. Corp. § 110, with many authorities there cited.

[27] The exercise of a discretionary municipal power should, however, be reasonable both as to its mode and time. Kirkham v. Russell, 76 Va. 956.

[28] City of East St. Louis v. Zebley, 110 U. S. 321; Boston Safe-Deposit & T. Co. v. Salem Water Co., 94 Fed. 238; City of Fayetteville v. Carter 52 Ark. 301; City of Vincennes v. Citizens' Gas Light Co., 132 Ind. 114; Moses v. Risdon, 46 Iowa, 251; State v. District Ct. of Ramsey County, 33 Minn. 295; Morse v. Westport, 136 Mo. 276; Babcock v. City of Buffalo, 56 N. Y. 268; Seitzinger v. Borough of Tamaqua, 187 Pa. 539.

so. But public corporations are ordinarily free to transact their police, administrative and local discretionary duties without restraint or hindrance by the judicial or other branches of the state.[29]

§ 71. Their delegation.

The powers possessed by public corporations are usually governmental in their nature and when granted by the legislature cannot be delegated by the corporation to others for their discharge or performance.[30] It must exercise the functions imposed upon it by its charter. The character of these duties and the manner of their performance is usually specified in the original grant of power. This rule does not prevent however the delegation of the performance of ministerial duties. The law recognizes the clear distinction between duties or powers involving the exercise of judgment and discretion and those purely mechanical, clerical or ministerial in their character.[31]

§ 72. Rules of construction.

It is seldom that a rule other than that of strict construction is applied or should be applied to powers, of whatever nature, exercised or attempted to be exercised, by a public corporation.* The reason for this salutary principle is that a public corporation is organized not for the personal pecuniary gain or profit of its members, but as an agency of the government, for the exercise of governmental powers and for the better performance of the duties which every good government owes to those within its jurisdiction. The charter of the corporation contains the grant of its powers, and powers, rights and privileges should not be read into this charter by judicial construction or interpretation.[32] Any ambiguity or doubt, if such exist, must be construed or resolved in

[29] Garrison v. Chicago, 7 Biss. 480, Fed. Cas. 5,255; State v. Swearingen, 12 Ga. 23; Chambers v. City of St. Louis, 29 Mo. 543; Phelps v. City of Watertown, 61 Barb. (N. Y.) 121.

[30] Dillard v. Webb, 55 Ala. 468; Smith v. Morse, 2 Cal. 524; Knight v. City of Eureka, 123 Cal. 192, 55 Pac. 768; Gundling v. City of Chicago, 176 Ill. 340.

[31] Hitchcock v. City of Galveston, 96 U. S. 341; Haughawout v. Hubbard, 131 Cal. 675; City of Burlington v. Dennison, 42 N. J. Law, 165.

* 6 Curr. Law, 720.

[32] Spaulding v. City of Lowell, 40 Mass. (23 Pick.) 71. See, also, the

favor of the public and as against the exercise, usually through irresponsible agents, of the power by the corporation.[33] If a public corporation exercises an ambiguous or a doubtful power, resulting in an oppressive debt, an injury or loss to public property, or an increase in taxation, it is the community at large, the property interests, that must sustain and bear the loss and burden. Therefore, to repeat, the rule of strict construction applies, and every doubt in the construction of a power granted is against its exercise and in favor of the tax-paying public.

Rule of strict construction; how modified. The rule of strict construction as given above is occasionally modified. The courts hold that the rule should not be carried to such an extent as to defeat the very purpose for which the power was granted, if proper to be exercised, and that where it is necessary to adopt a more liberal rule of construction of a corporate power to accomplish the result sought by the legislature, it should be done.[34]

II. The Police Power.

§ 73. Definitions.

Government should have for its end the welfare, convenience and advantage of the people, and the advancement of all their material, intellectual and moral interests. One of its important objects, if not the most important, is the protection and preservation of life and limb and the property and good morals of the public.

That particular and inherent power of the state which has for

following cases: Thomson v. Lee County, 70 U. S. (3 Wall.) 327; Minturn v. Larue, 23 How. (U. S.) 435; Leonard v. City of Canton, 35 Miss. 189; Collins v. Hatch, 18 Ohio, 523; Heeney v. Sprague, 11 R. I. 456.

[33] Ottawa v. Carey, 108 U. S. 110; City of Ft. Scott v. Eads Brokerage Co. (C. C. A.) 117 Fed. 51; Glass v. Ashbury, 49 Cal. 571; Crofut v. City of Danbury, 65 Conn. 294; Ex parte Sims, 40 Fla. 432, 25 So. 280; Agnew v. Brall, 124 Ill. 312; Meday v. Borough of Rutherford, 65 N. J. Law, 645; State v. Webber, 107 N. C. 962; Carolina Nat. Bank v. State, 60 S. C. 465, 38 S. E. 629; Lesley v. Kite, 192 Pa. 268; City of Winchester v. Redmond, 93 Va. 711; Richards v. Clarksburg, 30 W. Va. 491; Quint v. City of Merrill, 105 Wis. 406. See, also, Abb. Mun. Corp. § 114, citing many cases.

[34] City of Bridgeport v. Housatonic R. Co., 15 Conn. 475; Smith v. City of Madison, 7 Ind. 86; Gregory v. City of New York, 40 N. Y. 273; East Tennessee University v. City of Knoxville, 65 Tenn. (6 Baxt.) 166; Brennan v. City of Weatherford, 53 Tex. 330.

* 6 Curr. Law, 726.

its purpose the accomplishment of these results is termed the police power. It includes and comprehends within its exercise all those general laws and internal regulations which are necessary to secure the peace, good order, health and comfort of society.[35] It is that power of the state more than all others which affects most intimately the private and personal interests and relations of each individual. It is to a certain extent an indefinable power and the limits of its exercise are never clearly established; no general principle of law can be stated which will even with reasonable accuracy define its application or its exercise. What may be necessary and proper to accomplish this result at one time may be unnecessary and improper at another. The exercise of the power belongs properly to the law-making or legislative branch of the sovereign, and it is not within the power of any court to prescribe or say what rules and regulations are needful or necessary to the peace, health, safety and morals of the state. The power belongs to the legislature to be exercised within constitutional limitations.[36]

It is our theory of government that, controlled only by constitutional provisions, its three great branches, the executive, judicial and legislative, are co-ordinate and co-equal, and it is within the power, as well as the discretion of the law-making branch to determine within constitutional limitations what rules and regulations are best calculated to accomplish the great results comprehended and included within the exercise of the police power.[37]

[35] Gibbons v. Ogden, 9 Wheat. (U. S.) 203; Slaughter House Cases, 83 U. S. (16 Wall.) 36, 62; Munn v. State of Illinois, 94 U. S. 113; Boston Beer Co. v. State of Massachusetts, 97 U. S. 25; Stone v. State of Mississippi, 101 U. S. 814, 818; Barbier v. Connolly, 113 U. S. 31; In re Morgan, 26 Colo. 415; Lawton v. Steele, 152 U. S. 133; Com. v. Alger, 61 Mass. (7 Cush.) 53, 85; Muhlenbrinck v. Long Branch Com'rs, 42 N. J. Law, 364; People v. Warden of City Prison, 157 N. Y. 116; State v. Covington, 29 Ohio St. 102.

Cooley, Const. Lim. 829. See, also, Abb. Mun. Corp. § 115, citing many cases and discussing subject fully.

[36] Luther v. Borden, 7 How. (U. S.) 1; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 471; Mugler v. State of Kansas, 123 U. S. 623; Dorman v. State, 34 Ala. 232; State v. Wheeler, 25 Conn. 290; People v. Gillson, 109 N. Y. 389, 17 N. T. 343; Powell v. Com., 114 Pa. 265. But see Calder v. Bull, 3 Dall. (U. S.) 386; Bertholf v. O'Reilly, 74 N. Y. 509; Lawton v. Steele, 152 U. S. 133.

[37] Adler v. Whitbeck, 44 Ohio St. 539, 562; Marbury v. Madison, 1 Cranch (U. S.) 177.

The state has the power to select its agent for exercising the police power or the manner in which it itself shall do this,[38] and as this is a governmental power, no public corporation, not even the state itself, can waive or bargain away the right to exercise it.[39]

§ 74. General limitations upon its exercise.

The police power has for its purpose the accomplishment of certain desired results for the protection of society. The exercise of the power, as has been stated, belongs to the law-making branch of the sovereign, and its application in a particular instance is a matter of discretion. A general limitation upon the exercise of the power by the state is that the regulations or the means adopted for the accomplishment of a lawful purpose must have this for their sole result and aim. They must, as the courts have said, be fit, proper, and reasonable means for exercising the governmental power.[40]

The state cannot, under the guise of the police power, pass laws, rules, or regulations which ostensibly have for their end or purpose the comfort, safety, welfare and protection of society, but which are, as a matter of fact, passed for the purpose of impairing or destroying private rights and private property, or attacking personal interests.[41]

That a police regulation be valid, the preservation of the peace,

[38] Morris v. City of Columbus, 102 Ga. 792; McPherson v. Village of Chebanse, 114 Ill. 46; Walker v. Jameson, 140 Ind. 591; Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 505; Com. v. Plaisted, 148 Mass. 375; Boehm v. City of Baltimore, 61 Md. 259; People v. Hanrahan, 75 Mich. 611; City of St. Paul v. Colter, 12 Minn. 41 (Gil. 16); State v. Noyes, 30 N. H. 279; Iler v. Ross, 64 Neb. 710, 90 N. W. 869.

[39] Boyd v. State of Alabama, 94 U. S. 645; Boston Beer Co. v. State of Massachusetts, 97 U. S. 25; Stone v. State of Mississippi, 101 U. S. 814.

[40] In re Wilshire, 103 Fed. 620; In re Jacobs, 98 N. Y. 98; California Reduction Co. v. Sanitary Reduction Works (C. C. A.) 126 Fed. 29, and Abb. Mun. Corp. § 116.

[41] Marbury v. Madison, 1 Cranch (U. S.) 177; Yick Wo v. Hopkins, 118 U. S. 356; Lawton v. Steele, 152 U. S. 133; Calder v. Bull, 3 Dall. (U. S.) 386; Com. v. Brooks, 107 Mass. 355; People v. Jackson & M. Plank Road Co., 9 Mich. 285; State v. Fisher, 52 Mo. 174; Bertholf v. O'Reilly, 74 N. Y. 509.

comfort and morals of society must not only be its ulterior purpose but its real and substantial one.[42]

§ 75. Constitutional limitations.*

All constitutions contain provisions having for their purpose the protection of those rights usually enumerated in and included within what may be technically termed a bill of rights. These constitute the principal constitutional limitations upon the power of the state to exercise the police power, and according to the standard set forth in these provisions will be measured police regulations. If they clearly violate or infringe upon these fundamental, inherent, inalienable rights guaranteed by the constitution according to republican theories of government, they are clearly unconstitutional.[43] It must be remembered, however, that each individual owes something to society and that he should for its good willingly surrender rights of which he could not be legally deprived. Every police regulation may unnecessarily diminish rights belonging to the individual, but as long as they accomplish beneficial results they should be considered valid, even where involving a sacrifice on the part of the citizen.

§ 76. The preservation of public health.

The preservation of the public health is conceded by all authorities to be one of the legitimate purposes for the accomplishment of which the police power of the state can be exercised to its fullest extent.[44] The good health of the people of the community is one of the chief ends or aims of government, and this is true not only because of the great expense which the state necessarily incurs in caring for the indigent sick, one of its duties, but that

[42] 25 Am. St. Rep. 889, 890; Soon Hing v. Crowley, 113 U. S. 703; Mugler v. State of Kansas, 123 U. S. 623; Brimmer v. Rebman, 138 U. S. 78; Inhabitants of Watertown v. Mayo, 109 Mass. 315; In re Jacobs, 98 N. Y. 98; State v. Moore, 104 N. C. 714.

* 7 Curr. Law, 706.

[43] People v. Turner, 55 Ill. 280. See, also, annotations to this case by Justice Redfield, 10 Am. Law Reg. (N. S.) p. 373; In re Day, 181 Ill. 73; Noel v. People, 187 Ill. 587; Bessette v. People, 193 Ill. 334.

[44] Richardson v. City of Boston, 24 How. (U. S.) 188; Dunham v. City of New Britain, 55 Conn. 378, 11 Atl. 354; State v. Main, 69 Conn. 123; Murphy v. City of Wilmington, 6 Houst. (Del.) 108; Inhabitants of Quincy v. Kennard, 151 Mass. 563, 24 N. E. 860.

the state as composed of individuals may maintain the highest degree of efficiency possible in the advancement of its material, moral, and intellectual interests. That a sound body is the best agency for the promotion of general prosperity is a maxim which can be applied to the state as well as to the individual. The statements in this section are such truisms that it is unnecessary to cite authorities.

§ 77. Public agencies for the preservation of health.

The state in its exercise of the police power for the preservation of the public health has the right to select such agency as it deems best fitted for that purpose. The duty is usually entrusted to administrative or executive boards, duly appointed or elected by the people, called boards of health.[45] Sometimes this power is delegated by the state or the legislature to the municipal authorities for similar action. The state may also give the right to the people residing within certain territory to organize either under special or general laws, districts having for their sole purpose the preservation of the public health within such limits.[46]

§ 78. Boards of health; their jurisdiction and powers.

The particular agencies, under whatever name, employed by the state for the preservation of the public health, may exercise the powers with which they are clothed only within the district over which they are given jurisdiction,[47] and upon those matters the regulation of which is delegated to them. The care of the public health, it has been held, is an important object, and laws conferring powers upon the agencies for its preservation should receive a liberal construction in order to effect an advancement of the ends and an accomplishment of the purposes for which they are

[45] Dunwoody v. United States, 143 U. S. 578; Braman v. City of New London, 74 Conn. 695, 51 Atl. 1082; In re Opinion of Justices to Governor & Council, 136 Mass. 578.

[46] Woodward v. Fruitvale Sanitary Dist., 99 Cal. 554; In re Werner, 129 Cal. 567; Wilson v. Trustees of Sanitary Dist. of Chicago, 133 Ill. 443, 27 N. E. 203. See note 24 Am. Law Rev. 559, on boards of health, their objects, functions and powers. See, also, 47 Am. St. Rep. 533–552; 26 L. R. A. 727; 38 L. R. A. 305.

[47] Cotting v. Kansas City Stock Yards Co., 79 Fed. 679; City of South Pasadena v. Los Angeles Terminal R. Co., 109 Cal. 315; Begein v. City of Anderson, 28 Ind. 79

established.[48] These agencies are considered public quasi corporations or municipal corporations; agencies of the state; and as such entitled to its support and protection in the enforcement of their orders and regulations,[49] and with the power of suing and being sued.[50] The performance of their duties may be compelled in a proper proceeding, not being considered entirely discretionary in their character.[51] Powers granted these bodies may be limited by express terms,[52] or the grant of authority may exist in general language, a wide latitude of discretion existing in the latter case.[53]

A certain definite purpose is given them to carry out, and, subject only to constitutional provisions and general rules of the law limiting the exercise of the police power, they have the right to use all the reasonable and proper means for accomplishing this.[54] Their discretionary acts are not conclusive, but the measures which they may adopt are subject to review by the courts. It is also necessary to the validity of their acts that they perform them in the manner required by law, and in general their proceedings and rights of appeal are regulated by statute.[55]

Vaccination. Boards of health have the power to order the vaccination of all persons not having been successfully vaccinated within a certain time prior to such order, during the continuance of an epidemic of small-pox;[56] to require the vaccination of chil-

[48] Blue v. Beach, 155 Ind. 121, 56 N. E. 89, 80 Am. St. Rep. 195; Wyse v. Police Com'rs of New Jersey, 68 N. J. Law, 127, 52 Atl. 281; Health Dept. of New York v. Knoll, 70 N. Y. 530.

[49] Moore v. New Orleans Waterworks Co., 114 Fed. 380; People v. Williamson, 135 Cal. 415, 67 Pac. 504; City of Rockland v. Farnsworth, 87 Me. 473; People v. Shurly, 124 Mich. 645; Cartwright v. City of Cohoes, 165 N. Y. 631; Taylor v. Board of Health of Philadelphia, 31 Pa. 73.

[50] Henderson County Board of Health v. Ward, 107 Ky. 477, 54 S. W. 725; Inhabitants of Quincy v. Kennard, 151 Mass. 563; Board of Health of Asbury Park v. Rosenthal, 67 N. J. Law, 216, 50 Atl. 439.

[51] Com. v. Bredin, 165 Pa. 224.

[52] Wong Wai v. Williamson, 103 Fed. 1; State v. Burdge, 95 Wis. 390.

[53] Jew Ho v. Williamson, 103 Fed. 10, and cases cited in the opinion; Ex parte Whitwell, 98 Cal. 73; City of St. Louis v. Weber, 44 Mo. 547.

[54] State v. Orr, 68 Conn. 101; Johnson v. Borough of Belmar, 58 N. J. Eq. 354.

[55] Hurst v. Warner, 102 Mich. 238, 26 L. R. A. 484; White v. Kenney, 157 Mass. 12; Wilson v. Alabama G. S. R. Co., 77 Miss. 714, 28 So. 567; Marshall v. Cadwalader, 36 N. J. Law, 283; In re Smith, 146 N. Y. 68.

[56] Morris v. City of Columbus, 102 Ga. 792; City of St. Paul v. Peck, 78 Minn. 497; State v. Hay, 126 N. C. 999; Hazen v. Strong, 2 Vt. 427.

dren prior to their attendance at public schools;[57] or to require the injection of a serum supposed to be a preventative against contraction of bubonic plague.[58] They are authorized to take such measures as they may deem necessary to prevent the spread of infectious or contagious diseases affecting either persons[59] or domestic animals.[60] The scope of the exercise of their powers does not include generally a control or regulation of private hospitals within city limits.[61] They also have the authority to incur debts and employ physicians or other agencies in the extermination of contagious or infectious diseases and the execution of the general purposes to accomplish which they were appointed or elected.[62] They may legally adopt rules regulating the removal of dead bodies, and the manner, time and place of interring them.[63]

§ 79. Their liability.

Boards of health or health officers may, in the performance of their duties, destroy private property or injuriously affect rights

See, also, Parker & W. Pub. Health, § 123 and cases cited.

[57] Abeel v. Clark, 84 Cal. 226; Bissell v. Davison, 65 Conn. 183; Lawbaugh v. Board of Education of Dist. No. 2, 177 Ill. 572; Blue v. Beach, 155 Ind. 121.

[58] Wong Wai v. Williamson, 103 Fed. 1, and cases cited in opinion.

[59] Town of Greensboro v. Ehrenreich, 80 Ala. 579; Warner v. Stebbins, 111 Iowa, 86; Henderson County Board of Health v. Ward, 107 Ky. 477, 54 S. W. 725; Seavey v. Preble, 64 Me. 120; Train v. Boston Disinfecting Co., 144 Mass. 523.

[60] Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613; Id., 56 Kan. 694; Chicago & A. R. Co. v. Gasaway, 71 Ill. 570; Miller v. Horton, 152 Mass. 540; Grimes v. Eddy, 126 Mo. 168.

[61] Bessonies v. City of Indianapolis, 71 Ind. 189.

[62] Town of New Decatur v. Berry, 90 Ala. 432; Spearman v. City of Texarkana, 58 Ark. 348; City of McPherson v. Nichols, 48 Kan. 430, 29 Pac. 679; State v. City of New Orleans, 37 La. Ann. 894; Schmidt v. Stearns County, 34 Minn. 112; Wilkinson v. Long Rapids Tp., 74 Mich. 63; Rockaway Tp. v. Freeholders of Morris County, 68 N. J. Law, 16, 52 Atl. 373; In re Taxpayers & Freeholders of Plattsburgh, 157 N. Y. 78.

[63] Austin v. Murray, 33 Mass. (16 Pick.) 121; Wyse v. Police Com'rs of New Jersey, 68 N. J. Law, 127, 52 Atl. 281; Young v. Mahoning County Com'rs, 51 Fed. 585; Ex parte Bohen, 115 Cal. 372; Concordia Cemetery Ass'n v. Minnesota & N. W. R. Co., 121 Ill. 199; City of Austin v. Austin City Cemetery Ass'n, 87 Tex. 330; Pfleger v. Groth, 103 Wis. 104; County of Los Angeles v. Hollywood Cemetery Ass'n, 124 Cal. 344; Monk v. Packard, 71 Me. 309; Ex parte Wygant, 39 Or. 429; Dunn v. City of Austin, 77 Tex. 139.

of third parties in excess of their authority. The question of their liability then arises, and this may be either a personal one [64] or their acts may be performed in such manner as to create a liability, by consent of the state, resting upon the public agency they represent.[65] Such boards or agencies are invested with duties of a governmental character, the preservation of the public health, to be exercised for the benefit of the community at large. In the performance of their official duties when properly done and within the limits of their jurisdiction and powers, there can be no liability, either of a personal nature or against them in their capacity as public agents.[66] They necessarily must be vested with a large discretion in the performance of their duties, and so long as this discretion is exercised in a reasonable manner and in good faith, their acts cannot create liabilities. The presumption that they are acting in good faith and under lawful authority applies. The discretion given to such bodies or officers does not, however, permit them to promulgate regulations or rules in violation of constitutional provisions.[67]

§ 80. Quarantines and quarantine regulations.

One of the most effectual means for preventing the spread of contagious or infectious diseases during an epidemic is the establishment of a quarantine,[68] and in addition to the rules and regulations enforced by the state for the preservation of the public health through any of its permanent agencies, it may establish, during the emergency, a board of quarantine having special charge or control of the suppression of the epidemic; or special and extraordinary powers may be given to ordinary and existing

[64] Beers v. Board of Health, 35 La. Ann. 1132; Miller v. Horton, 152 Mass. 540; Webb v. Detroit Board of Health, 116 Mich. 516.

[65] Mead v. City of New Haven, 40 Conn. 72, 20 Am. Rep. 468; Fowler v. Kansas City, 64 Kan. 566, 68 Pac. 33; Barbour v. City of Ellsworth, 67 Me. 294; Gilboy v. City of Detroit, 115 Mich. 121, and cases cited.

[66] Forbes v. Board of Health of Escambia County, 28 Fla. 26; Frazer v. City of Chicago, 186 Ill. 480; Tweedy v. Fremont County, 99 Iowa, 721, 68 N. W. 921; Hall v. Staples, 166 Mass. 399.

[67] Smith v. St. Louis & S. W. R. Co., 181 U. S. 248; Williams, Mun. Liab. Tort, §§ 189 et seq.; Jones, Neg. Mun. Corp. § 30 and cases cited; and Abb. Mun. Corp. § 121 and many cases cited.

[68] Metcalf v. City of St. Louis, 11 Mo. 102.

agencies.[69] Rules and regulations may be adopted not only for the purpose of preventing the spread of disease among persons [70] but also of those affecting domestic animals.[71] The public authorities have the power to prevent the passing or repassing of quarantine lines or limits;[72] the right to establish and maintain hospitals or pest houses in which sick persons may be confined,[73] and the right to remove to such places persons afflicted.[74] They also have the right to destroy or disinfect property inoculated or supposed to be with the germs of the disease [75] without creating a liability or right of compensation except as given by statute.[76]

§ 81. Police power respecting the regulation of occupations.

The state directly or through its subordinate agencies may in the proper exercise of the police power exercise supervision over and a regulation of the manner of carrying on the occupations of those within its jurisdiction.[77] This regulation may consist either in ordinances or orders prohibiting the carrying on of cer-

[69] Forbes v. Board of Health of Escambia County, 28 Fla. 26; Lynde v. City of Rockland, 66 Me. 309.

[70] Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health, 186 U. S. 380, 22 Sup. Ct. 811; City of Anderson v. O'Conner, 98 Ind. 168; Warner v. Stebbins, 111 Iowa, 86, 82 N. W. 457.

[71] Field v. Clark, 143 U. S. 649; Haller v. Sheridan, 27 Ind. 494; Walker v. Towle, 156 Ind. 639; City of Hagerstown v. Witmer, 86 Md. 293; 2 Tiedeman, State & Fed. Control of Persons & Prop. p. 829.

[72] Wilson v. Alabama G. S. R. Co., 77 Miss. 714; Courter v. Board of Health of Newark, 54 N. J. Law, 325; Salisbury Com'rs v. Powe, 51 N. C. (6 Jones) 134; State v. Butts, 3 S. D. 577, 54 N. W. 603.

[73] City of Chicago v. Peck, 196 Ill. 260 63 N. E. 711; City of Anderson v. O'Conner, 98 Ind. 168; Staples v. Plymouth County, 62 Iowa, 364; Richmond v. Henrico County Sup'rs, 83 Va. 204.

[74] Minneapolis, St. P. & S. S. M. R. Co. v. Milner, 57 Fed. 276; Hengehold v. City of Covington, 108 Ky. 752, 57 S. W. 495; Lynde v. City of Rockland, 66 Me. 309.

[75] Ex parte O'Donovan, 24 Fla. 281; Train v. Boston Disinfecting Co., 144 Mass. 523, 59 Am. Rep. 113.

[76] Webb v. Detroit Board of Health, 116 Mich. 516, 72 Am. St. Rep. 541.

[77] Butchers' Union S. H. & L. S. Landing Co. v. Crescent City L. S. I. & Slaughter-House Co., 111 U. S. 746; Yick Wo v. Hopkins, 118 U. S. 356; Belcher v. Farrar, 90 Mass. (8 Allen) 325; Wilkinson v. Town of Albany, 28 N. H. 9; Weil v. Ricord, 24 N. J. Eq. (9 C. E. Green) 169; Bertholf v. O'Reilly, 74 N. Y. 509; People v. Marx, 99 N. Y. 377; In re Jacobs, 98 N. Y. 98.

6 Curr. Law, 727.

tain occupations within certain limits, for example laundries and slaughter houses,[78] or the prohibition altogether of certain trades and occupations.[79] These regulations may also require the possession of certain qualifications or a minimum knowledge of certain branches of study or trades by those desiring to pursue a certain calling, occupation or profession. These, so long as they are uniform in their application, reasonable and pertinent, will be considered valid.[80] The principle has been applied to barbers, dentists, lawyers, physicians and surgeons, druggists, plumbers, and livery stables. The state may also require the securing of a license from the proper authorities before certain trades or occupations can be followed.[81] The power also includes the imposition of license fees to defray expenses connected necessarily with supervision having for its object the preservation of the public health.[82]

There exist as limitations upon all regulations or attempted regulations by the state, constitutional provisions protecting personal rights and property. These regulations are also subject to the general principles of law that they should be uniform, certain

[78] The power as applied to the control of markets. City of New Orleans v. Graffina, 52 La. Ann. 1082. Regulations respecting *laundries* held *invalid*. Yick Wo. v. Hopkins, 118 U. S. 356; City of Shreveport v. Robinson, 51 La. Ann. 1314.

Regulations respecting *laundries* held *valid*. Soon Hing v. Crowley, 113 U. S. 703.

The power exercised as to *slaughter houses:* Butchers' Union Slaughter House & L. S. Landing Co. v. Crescent City Live Stock Landing & S. H. Co., 111 U. S. 746; City of Portland v. Meyer, 32 Or. 368; Pfingst v. Senn, 94 Ky. 556, 23 S. W. 358.

[79] O'Dell v. City of Atlanta, 97 Ga. 670, 25 S. E. 173; Com. v. Reid, 175 Mass. 325,—pool selling; State v. Schoenig, 72 Minn. 528; City of St. Louis v. Fischer, 167 Mo. 654,—dairy.

[80] Fillmore v. Van Horn, 129 Mich. 52, 88 N. W. 69; Williams v. State Board of Dental Examiners, 83 Tenn. 619; City of Chicago v. Stratton, 162 Ill. 494; State v. Benzenberg, 101 Wis. 172; Williams v. People 121 Ill. 84; State v. Buswell, 40 Neb. 158. Nebraska statutes relative to the practice of medicine include persons healing by "Christian Science." People v. Moorman, 86 Mich. 434.

[81] State v. Orr, 68 Conn. 101; Bessette v. People, 193 Ill. 334; City of Chicago v. Netcher, 183 Ill. 104, 55 N. E. 707; City of Grand Rapids v. De Vries, 123 Mich. 570; State v. Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134; State v. Hill, 126 N. C. 1139; Borough of Shamokin v. Flannigan, 156 Pa. 43.

[82] City of Hot Springs v. Curry, 64 Ark. 152; Mestayer v. Corrige, 38 La. Ann. 707; Horr. & Bemis, Mun. Ord. § 128.

and impartial in their application.[83] Guaranties limiting the exercise of the police power in respect to the matters suggested in this, as well as succeeding sections, are to be found in those general constitutional provisions relative to life, liberty and the pursuit of happiness and the special provisions pertaining to personal liberty and security including express or implied prohibitions of imprisonment for debt; religious liberty and freedom of conscience; the right to acquire, hold and dispose of property and to contract; freedom of speech; the right of assembly and petition; the destruction or impairment of vested or property rights; the taking of private property without payment of just compensation or the taking of life, liberty or property without due process of law.[84] The determination of the validity of all the regulations considered in this section is a judicial question, not legislative.[85]

§ 82. Inspection of foods.*

The state, or the state through any of its properly delegated agents, in the proper exercise of the police power looking to the preservation of the public health, can pass laws, rules and regulations providing for the inspection of foods,[86] places of food supply,[87] drugs and other articles intended for use or consumption; regulating their sale,[88] and confiscating and destroying such arti-

[83] Lasher v. People, 183 Ill. 226, 55 N. E. 663; Town of Crowley v. West, 52 La. Ann. 526.

[84] Slaughter Houses Cases, 83 U. S. (16 Wall.) 36; Boyd v. United States, 116 U. S. 616; State v. Williams, 68 Conn. 131. See Tiedeman, State & Fed. Control of Persons & Prop.; Horr. & Bemis, Mun. Ord. §§ 83 et seq., and 211 et seq.; McQuillin, Mun. Ord. §§ 29 et seq.

[85] Price v. People, 93 Ill. 114.

* 7 Curr. Law, 1670.

[86] State v. Campbell, 64 N. H. 402, 13 Atl. 585; People v. Wagner, 86 Mich. 594. See the following cases especially relating to the inspection, sale and adulteration of milk: Johnson v. Simonton, 43 Cal. 242; State v. Schlenker, 112 Iowa, 642. Cases passing upon laws relating to the inspection and sale of oleomargarine or other substitutes for butter. United States v. Eaton, 144 U. S. 677; People v. Arensberg, 105 N. Y. 123; Palmer v. State, 39 Ohio St. 236; Com. v. Shirley, 152 Pa. 170; State v. Smyth, 14 R. I. 100; State of Minnesota v. Barber, 136 U. S. 313; Brimmer v. Rebman, 138 U. S. 78. See, also, Abb. Mun. Corp. § 124, citing many authorities.

[87] Monroe v. City of Lawrence, 44 Kan. 607.

[88] In re Ah Lung, 45 Fed. 684; Frost v. City of Chicago, 178 Ill. 250; City of Chicago v. Netcher, 183 Ill. 104; Porter v. City of Water Valley, 70 Miss. 560, 12 So. 828;

cles if found unwholesome or unfit. The limitations upon the exercise of the power in this particular are much the same as those against the exercise of the power in other respects. Such regulations must operate uniformly and not discriminate as between individuals or localities;[89] must be reasonable, have for their real purpose the accomplishment of a lawful result, and come within the constitutional provisions protecting personal and property rights.

§ 83. Regulations as to the construction and use of buildings.

Another valid exercise of the police power by the state is the adoption of rules and regulations in regard to the construction and occupation of buildings.[90] These regulations have for their direct purpose not only the protection of life, limb and property, but also the preservation of the public health. The use to which certain buildings can be put may result in a condition exceedingly deleterious to the health and safety not only of the occupants of the buildings themselves but of persons in the immediate vicinity,[91] and the state in such case has the unquestioned right of regulation. It also includes the right to control or regulate in the first instance, having as a purpose the protection of life, health and property, either the dimensions,[92] the manner,[93] or the place of construction.[94] This right to regulate the construction of build-

State v. Bockstruck, 136 Mo. 335,—oleomargarine; State v. Marshall, 64 N. H. 549, 15 Atl. 219,—oleomargarine.

[89] City of Cairo v. Feuchter, 159 Ill. 155; State v. Schlemmer, 42 La. Ann. 1166.

[90] Sprigg v. Town of Garrett Park, 89 Md. 406, 43 Atl. 813; City of Salem v. Maynes, 123 Mass. 372; City of Philadelphia v. Wall, 184 Pa. 557; City of Sioux Falls v. Kirby, 6 S. D. 62, 60 N. W. 156. See McQuillin, Mun. Ord. §§ 470, 471, with many cases cited; and Abb. Mun. Corp. § 125.

[91] Inhabitants of Brooklyn v. Hatch, 167 Mass. 380; People v. Bennett, 83 Mich. 457; Com. v. Charity Hospital of Pittsburg, 198 Pa. 270.

[92] Attorney General v. Williams, 178 Mass. 330, 59 N. E. 812; People v. D'Oench, 111 N. Y. 359; City of Cleveland v. Lenze, 27 Ohio St. 383.

[93] See cases collected in 43 Alb. Law J. 349, note by W. S. Gordon; McCulloch v. Ayer, 96 Fed. 178,—fire escapes; Ex parte White, 67 Cal. 102; Arms v. Ayer, 192 Ill. 601.

[94] Phillips v. City of Denver, 19 Colo. 179, 34 Pac. 902; Pratt v. Borough of Litchfield, 62 Conn. 112; Easton Com'rs v. Covey, 74 Md. 262, 22 Atl. 266; City of Buffalo v. Chadeayne, 134 N. Y. 165; Livings-

ings extends to repairs as well as alterations or additions[95] and ornaments or appurtenances.[96] The exercise of the power in this respect goes further and includes the right of inspection of buildings used for certain purposes or by certain classes of people. The right to exercise the power also carries with it the right to enforce orders or regulations of the state or municipal authorities looking to the demolition or the purification of unwholesome, unsafe or infected premises,[97] and the enforcement of ordinances having for their purpose the exercise of rights enumerated in this and other sections. It has been held that in the exercise of the power possessed, the state or the municipal authorities can pass rules, regulations, ordinances or laws capable of enforcement through the imposition of penalties for their violation,[98] consisting either of a fine or imprisonment, or both.[99]

§ 84. Regulation and abatement of nuisances.

The state in the valid exercise of the police power may adopt, subject to constitutional and other restrictions and limitations suggested in the preceding sections, such measures as within the discretion of the proper officials, acting in good faith, may be necessary to abate nuisances detrimental in their character to the public health or peace or the safety of either life or property.* Regulations concerning the height of fences, bill-boards,[100] the storing of chemicals, inflammable materials, oils, explosives,[101] the

ton v. Wolf, 136 Pa. 519, 20 Am. St. Rep. 936; Beall v. City of Seattle, 28 Wash. 593, 69 Pac. 12.

[95] Borough of Stamford v. Studwell, 60 Conn. 85, 21 Atl. 101; First Nat. Bank of Mt. Vernon v. Sarlls, 129 Ind. 201,—validity of repair ordinance determined; City Council of Montgomery v. Louisville & N. R. Co., 84 Ala. 127; Greene v. Damrell, 175 Mass. 394; Carroll v. City of Lynchburg, 84 Va. 803.

[96] State v. Clarke, 69 Conn. 371,—awning; Attorney General v. Williams, 174 Mass. 476, and same case again in 178 Mass. 330, 59 N. E. 812.

[97] Dupree v. City of Brunswick, 82 Ga. 727; O'Rourke v. City of New Orleans, 106 La. 313; City of St. Paul v. Clark, 84 Minn. 138, 86 N. W. 893; Health Dept. of City of New York v. Trinity Church, 145 N. Y. 32.

[98] State v. Zurich, 49 La. Ann. 447.

[99] City of New Orleans v. Danneman, 51 La. Ann. 1093.

* 6 Curr. Law, 832.

[100] Brown v. Spilman, 155 U. S. 665; In re Wilshire, 103 Fed. 620, and cases cited in opinion; Western Granite & Marble Co. v. Knickerbocker, 103 Cal. 111, 37 Pac. 192; City of Rochester v. West, 164 N. Y. 510.

[101] City of Richmond v. Dudley, 129 Ind. 112.

carrying of concealed weapons [102] or the discharge of fire-arms,[103] requiring flagmen or safety gates at railroad crossings [104] and regulating the speed of trains,[105] are familiar illustrations of a valid exercise of the police power, each having for their purpose the prevention of a nuisance or an act detrimental to the public health, safety or welfare. The power also exists to require bicycles used after dark to be provided with lights, or otherwise regulate them,[106] to forbid by ordinance their use upon sidewalks,[107] to prohibit the blasting of rock or keeping of explosives without written consent or under other express regulations,[108] and to regulate the speed of vehicles in streets and highways.[109] But in this connection, bicycles, tricycles and automobiles are ordinarily considered vehicles and entitled to the use of that part of the street or highway set aside for them.[110]

The power of the public authorities to organize and maintain fire departments has for its basis the exercise of the police power in the protection of property.[111] Many rules and regulations, dif-

[102] Ex parte Cheney, 90 Cal. 617; City Council of Abbeville v. Leopard, 61 S. C. 99.

[103] City of Cottonwood Falls v. Smith, 36 Kan. 401.

[104] Western & A. R. Co. v. Young, 81 Ga. 397; Pennsylvania Co. v. Stegemeier, 118 Ind. 305; Textor v. Baltimore & O. R. Co., 59 Md. 63; City of Red Wing v. Chicago, M. & St. P. R. Co., 72 Minn. 240; Inhabitants of Palmyra Tp. v. Pennsylvania R. Co., 62 N. J. Eq. 601, 50 Atl. 369.

247; Cleveland, C., C. & I. R. Co. v.

[105] Richmond, F. & P. R. Co. v. City of Richmond, 96 U. S. 521; City of Lake View v. Tate, 130 Ill. Harrington, 131 Ind. 426; People v. Little, 86 Mich. 126; Knobloch v. Chicago, M. & St. P. R. Co., 31 Minn. 402.

[106] Mercer v. Corbin, 117 Ind. 450; Richardson v. Inhabitants of Danvers, 176 Mass. 413; State v. Missouri Pac. R. Co., 71 Mo. App. 385. "A bicycle belongs to the genus vehicle or carriage." Massinger v. City of Millville, 63 N. J. Law, 123, 43 Atl. 443.

[107] Town of Whiting v. Doob, 152 Ind. 157; Myers v. Hinds, 110 Mich. 300; Thompson v. Dodge, 58 Minn. 555.

[108] Hazard Powder Co. v. Volger, 58 Fed. 152; Kinney v. Koopman, 116 Ala. 310; City of Richmond v. Dudley, 129 Ind. 112; Com. v. Parks, 155 Mass. 531, 30 N. E. 174.

[109] Nealis v. Hayward, 48 Ind. 19; Kansas City v. McDonald, 60 Kan. 481; Com. v. Roy, 140 Mass. 432; People v. Little, 86 Mich. 125, 48 N. W. 693, holding such an ordinance applies to an ambulance equally with other vehicles.

[110] Swift v. City of Topeka, 43 Kan. 671; Taylor v. Union Traction Co., 184 Pa. 465.

[111] People v. Newman, 96 Cal. 605; State v. Fox, 158 Ind. 126; City of Lexington v. Thompson, 113 Ky. 540, 68 S. W. 477; State v. Moores, 55 Neb. 480, 76 N. W. 175; Green

fering in their character in different sections, have for their purpose the establishment of fire limits and prohibit within such limits the construction of buildings except of certain materials.[112]

§ 85. The protection of public morals.

The good morals of the community should be an especial care of the public authorities, and all regulations or laws passed by the proper authorities, looking to this end come within a valid exercise of the police power.[113] The usual limitations as to the exercise of the power apply. It might be said in connection with rules looking to the preservation of public morals that it is especially difficult in all cases to determine or to distinguish between a proper and an improper exercise of the power. Whether a certain act or series of acts is detrimental to the public morals may be a matter of opinion, and the mere fact that the law in a particular instance characterizes them as such and therefore invalid does not necessarily give to them that character.[114] Personal rights guaranteed by the constitution cannot arbitrarily be taken away from an individual through the mere discretionary determination of certain officials that the exercise of those rights is detrimental to public morals.[115]

§ 86. Regulations relative to the protection of public morals.

Regulations or ordinances having for their purpose the suppression of gambling come within a legitimate exercise of the police power, as having for their ultimate end the preservation of the good morals and peace of the community and the suppression

v. City of Cape May, 41 N. J. Law, 45.

[112] Canepa v. City of Birmingham, 92 Ala. 358, 9 So. 180; McCloskey v. Kreling, 76 Cal. 511, 18 Pac. 433; Hine v. City of New Haven, 40 Conn. 478; Ford v. Thralkill, 84 Ga. 169; Kaufman v. Stein, 138 Ind. 49, 37 N. E. 333.

[113] State v. Hart, 34 Me. 36; State v. Earnhardt, 107 N. C. 789; In re Snell, 58 Vt. 207, and 48 Am. Rep. 274-278.

[114] Paralee v. Town of Camden, 49 Ark 165; McAlister v. Clark, 33 Conn. 91; City of Grand Rapids v. Bateman, 93 Mich. 135; State v. Webber, 107 N. C. 962.

[115] Poyer v. Village of Des Plaines, 18 Ill. App. 225. An ordinance declaring "all public picnics and open-air dances within its limits" to be nuisances, held void. City of Charlton v. Barber, 54 Iowa, 360; Ely v. Niagara County Sup'rs, 36 N. Y. 297.

of vice and crime,[116] gambling being usually considered, independent of statutory provisions, such an immoral, baneful and vicious act and propensity as to justify its regulation or even suppression.

Some further concrete illustrations of a valid exercise of the police power may perhaps best define and explain its scope. The suppression of disorderly houses;[117] making it unlawful for any person to have lottery tickets in his possession, or prohibiting their sale;[118] the passage and enforcement of laws requiring the proper observance of Sundays[119] or regulating the conduct of those appearing on the streets.[120] The punishment of individuals following certain occupations[121] has been held a valid exercise of the police power, having for its purpose the care and protection of the public morals. In some cases it is held that municipal authorities have no power to pass ordinances protecting the public morals except when clearly granted by the legislature,[122] and it is self-evident that municipal corporations have no power to pass ordinances which shall regulate or attempt to regulate the conduct of those outside municipal limits.[123] It is also true that the power to regulate or control does not include the right to suppress.[124]

[116] Ex parte Tuttle, 91 Cal. 589; State v. Flint, 63 Conn. 248; Bagwell v. Town of Lawrenceville, 94 Ga. 654; Board of Police Com'rs v. Wagner, 93 Md. 182, 48 Atl. 455; Jackson v. People, 9 Mich. 111; State v. Woodman, 26 Mont. 348, 67 Pac. 1118.

[117] Buell v. State, 45 Ark. 336; State v. Botkin, 71 Iowa, 87; City of Shreveport v. Roos, 35 La. Ann. 1010; People v. Hanrahan, 75 Mich. 611; State v. Clarke, 54 Mo. 17.

[118] Nicholls v. Georgetown Corp., 4 Cranch, C. C. 576, Fed. Cas. No. 10,228; Ex parte McClain, 134 Cal. 110; Davenport v. City of Ottawa, 54 Kan. 711; City of New Orleans v. Collins, 52 La. Ann. 973.

[119] Theisen v. McDavid, 34 Fla. 440; Rothschild v. City of Darien, 69 Ga. 503. See, also, Abb. Mun. Corp. § 129, citing many cases.

[120] Braddy v. City of Milledgeville, 74 Ga. 516; In re Bushey, 105 Mich. 64; Roderick v. Whitson, 51 Hun (N. Y.) 620; State v. Hunter, 106 N. C. 796.

[121] McAlister v. Clark, 33 Conn. 91; Braddy v. City of Milledgeville, 74 Ga. 516; State v. Botkin, 71 Iowa, 87; Dunn v. Com., 105 Ky. 834; L'Hote v. City of New Orleans, 51 La. Ann. 93; State v. Oleson, 26 Minn. 507; Givens v. Van Studdiford, 86 Mo. 149; Ex parte Roberts, 166 Mo. 207. A law prohibiting a person from making or mending burglars' tools held not in contravention of the Bill of Rights, § 30.

[122] Goetler v. State, 45 Ark. 454; City of Owensboro v. Sparks, 99 Ky. 351.

[123] City of South Pasadena v. Los Angeles Terminal R. Co., 109 Cal. 315; Robb v. City of Indianapolis, 38 Ind. 49; State v. Franklin, 40 Kan. 410; Gass v. Greenville Corp., 36 Tenn. (4 Sneed) 62.

[124] State v. Owen, 50 La. Ann.

§ 87. The exercise of the police power in regulating the sale and consumption of intoxicating liquors.

It is clearly within the legitimate province of the state, in the exercise of its police power, to prohibit or control those individual acts that constitute a vice either on account of their character, the extent or the manner of their exercise. The use of intoxicating liquors if carried to an excess becomes a vice, and all authorities are agreed that as such, or considered independently, it leads to poverty, disease and crime. The state as a part of its governmental duties must protect and support the indigent and unfortunate, eradicate and control disease and punish crime. It may do this either by dealing with the tangible results of certain causes, or it may, through the control and regulation of their cause, accomplish the same thing more effectually and with less expense. Clearly, therefore, the state may prohibit absolutely [125] or it may license or limit [126] the sale of intoxicating liquors; or it may prohibit their sale on certain occasions,[127] within certain hours,[128] without certain places,[129] and the quantities in which they can be

1181; State v. Pamperin, 42 Minn. 320.

[125] Bartemeyer v. State of Iowa, 85 U. S. (18 Wall.) 129, 133; Mugler v. State of Kansas, 123 U. S. 623; State v. Noyes, 30 N. H. 279; Metropolitan Board of Excise v. Barrie, 34 N. Y. 657; Bertholf v. O'Reilly, 74 N. Y. 509.

[126] Ex parte Sikes, 102 Ala. 173; County of Los Angeles v. Eikenberry, 131 Cal. 461; Town of Valverde v. Shattuck, 19 Colo. 104; State v. Priester, 43 Minn. 373; Hershoff v. Treasurer of City of Beverly, 45 N. J. Law, 288; State v. Bennett, 19 Neb. 191; State v. Stevens, 114 N. C. 873; In re Schneider, 11 Or. 288; City of Seattle v. Chin Let, 19 Wash. 38; Rock County v. City of Edgerton, 90 Wis. 288.

Cider being to some extent intoxicating, a license may be imposed upon its sale. Town of Pikeville v. Huffman, 112 Ky. 360, 65 S. W. 794; Monroe v. City of Lawrence, 44 Kan. 607.

[127] *Election Day:* Newman v. State, 101 Ga. 534; Iowa City v. McInnerny, 114 Iowa, 586; State v. Hirsch, 125 Ind. 207.

Sunday: Moore v. Bahr, 82 Fed. 19; McCuen v. State, 19 Ark. 636; Ex parte Peacock, 25 Fla. 478; Hood v. Von Glahn, 88 Ga. 405.

[128] State v. Hellman, 56 Conn. 190; Davis v. Fasig, 128 Ind. 271; City of Clinton v. Grusendorf, 80 Iowa, 117; State v. Freeman, 38 N. H. 426; State v. Thomas, 118 N. C. 1221.

[129] State v. Davis, 130 Ala. 148; Hart v. State, 88 Ga. 635; People v. Cregier, 138 Ill. 401; Rowland v. City of Greencastle, 157 Ind. 591; City of Topeka v. Raynor, 61 Kan. 10.

sold.[130] It may go further and prohibit the sale to certain classes of society needing especially the protection of the state, namely, habitual drunkards and minors,[131] or it may select those to whom shall be granted the privilege of selling and regulate the manner of sale.[132]

Such prohibitions or regulations under license statutes to be valid, however, must not regulate interstate commerce; infringe upon or interfere with other rights granted exclusively to the Federal government.[133]

Without the power of enforcing these rules and regulations they would be of little use or efficacy. The state directly or indirectly, this being true of all its laws or regulations, may impose a punishment, either fine or imprisonment, or both, for the violation of its positive commands, and if in its wisdom it deems expedient, in order to secure the better observance of these positive laws or regulations, it may make those who violate such laws liable civilly for the legitimate and proximate consequences of such violation.[134]

§ 88. The exaction of license fees.

The state has the power as a means to an end, namely, the better exercise of the police power, to impose a fee or license upon prop-

[130] Tipton v. People, 156 Ill. 241; In re Jahn, 55 Kan. 694; State v. Priester, 43 Minn. 373; State v. Pratt, 52 N. J. Law, 306; State v. Drake, 86 Tex. 329.

[131] Sprayberry v. City of Atlanta, 87 Ga. 120; State v. Shinn, 63 Kan. 638,—habitual drunkard defined; State v. Yewell, 63 Md. 120; State v. Ferguson, 33 N. H. 424; State v. Austin, 114 N. C. 855; Woods v. Town of Prineville, 19 Or. 108; Com. v. Silvermen, 138 Pa. 642.

[132] In re Werner, 129 Cal. 567; Whitten v. City of Covington, 43 Ga. 421; City of Rochester v. Upman, 19 Minn. 108 (Gil. 78). Such a regulation held to include druggists. City of Hoboken v. Goodman, 68 N. J. Law, 217, 51 Atl. 1092.

[133] In re Rahrer, 140 U. S. 545; Rhodes v. State of Iowa, 170 U. S. 412; Ex parte Jervey, 66 Fed. 957; Bluthenthal v. Southern R. Co., 84 Fed. 920. See, also, Prentice & E. Commerce Clause of Fed. Const.; and State v. Rhodes, 90 Iowa, 496.

[134] Mulcahey v. Givens, 115 Ind. 286; Neu v. McKechnie, 95 N. Y. 632; Beers v. Walhizer, 43 Hun (N. Y.) 254. *Contra*, Bradford v. Boley, 167 Pa. 506. There is also a well established line of cases based in some states upon express statutory provisions holding that one injured by the wrongful act of a drunken person may have a right of recovery in an action for damages against the dealer in liquor causing the intoxication. See King v. Haley, 86 Ill. 106; Wilkerson v. Rust, 57 Ind. 172; Church v. Higham, 44 Iowa, 482; Brooks v. Cook, 44 Mich. 617; Bedore v. Newton, 54 N. H. 117; Quinlan v. Welch, 144 N. Y. 158.

erty used in a certain manner or upon certain callings or occupations. Ordinarily the state has no right under this power to impose license fees for purposes of revenue without regard to the question of the regulation, control, or use of such property or occupation. The imposition of license fees, having for their purpose the better regulation and control of such occupations, or the use of certain property, is valid as coming within the proper exercise of the police power, when they are imposed not for the purpose of obtaining a revenue but for the ostensible one.

As concrete illustrations of the valid imposition of license fees, we find, upon an examination of the authorities, that ordinances or regulations have been held valid licensing vehicles;[135] those engaged in certain occupations;[136] hackmen, draymen, expressmen, and others engaged in carrying passengers, baggage or freight;[137] regulating or restraining the soliciting of trade for boats, carriages, or railroads.[138] If the charge for such license or permit is greater than necessary to cover the cost of the regulation or inspection, such charge will undoubtedly be held unreasonable and the ordinance imposing the same invalid, upon the theory that the police power cannot be invoked or exercised as a general means of raising revenue.[139]

§ 89. Public markets; the power to establish and regulate.

The power exists to establish and maintain public markets[140] and also as incidental to that authority or as an implied power, to pass all the rules and regulations necessary to maintain the

[135] Johnson v. City of Macon, 114 Ga. 426; City of Collinsville v. Cole, 78 Ill. 114. Borough of North Plainfield v. Cary, 50 N. J. Law, 176; City of St. Louis v. Weitzel, 130 Mo. 600; Borough of Belmar v. Barkalow, 67 N. J. Law, 504.

[136] W. W. Cargill Co. v. State of Minnesota, 180 U. S. 452; Com. v. Brooks, 109 Mass. 355; City of St. Paul v. Lytle, 69 Minn. 1; Borough of Warren v. Geer, 117 Pa. 207, 11 Atl. 415.

[137] State v. Robinson, 42 Minn. 107.

[138] Lindsay v. City of Anniston, 104 Ala. 257; Com. v. Matthews, 122 Mass. 60.

[139] City of Saginaw v. Swift Elec. Light Co., 113 Mich. 660; City of New Haven v. New Haven Water Co., 44 Conn. 105; Taylor v. City of Pine Bluffs, 34 Ark. 603.

[140] Ex parte Byrd, 84 Ala. 17; Blancherd v. Ivers, 40 Fla.. 117; City of Atlanta v. White, 33 Ga. 239; City of Bloomington v. Wahl, 46 Ill. 489; Davis v. Town of Anita, 73 Iowa, 825; Gale v. Village of Kalamazoo, 23 Mich. 344; Petz v. City of Detroit, 95 Mich. 169. 6 Curr. Law, 726.

market itself and the foods offered for sale in that condition which best effects the purpose that forms the basis of a legal exercise of the power,[141] and so long as these rules and regulations, concerning the manner and the time in which goods shall be offered for sale, are uniform and certain in their application, are reasonable, and do not discriminate either as against persons or localities, they are valid and legitimate exercises of the police power of the state.[142] The power to regulate private markets exists in the same degree and to the same extent.[143]

§ 90. The control of nuisances.

Public authorities have also the further power either inherently possessed or as subordinate agencies obtained through the grant of lawful authority to regulate and suppress or abate what are commonly called public nuisances.[144]

A nuisance has been defined as "Anything that produces an annoyance, anything that disturbs one or is offensive; but in legal phraseology it is applied to that class of wrongs that arise from the unreasonable, unwarrantable or unlawful use by a person of his own property, real or personal, or from his own improper, indecent or unlawful personal conduct, working an obstruction of or injury to a right of another or of the public, and producing such material annoyance, inconvenience, discomfort or hurt, that the law will presume a consequent damage."[145]

[141] City of Bowling Green v. Carson, 73 Ky. (10 Bush.) 64; Vidalat v. City of New Orleans, 43 La. Ann. 1121; Graves v. City of Biloxi (Miss.) 29 So. 768; City of St. Louis v. Freivogel, 95 Mo. 533; Hutchins v. Town of Durham, 118 N. C. 457; Henry v. City of Macon, 91 Ga. 268; State v. Sarradat, 46 La. Ann. 700.

[142] Abb. Mun. Corp. § 135; Natal v. State of Louisiana, 139 U. S. 621; Ex parte Byrd, 84 Ala. 17; State v. Davidson, 50 La. Ann. 1297. But an ordinance cannot interfere with the sale of articles in the original packages in which they are imported into the state. Com. v. Ellis, 158 Mass. 555; People v. Keir, 78 Mich. 98; State v. McMahon, 62 Minn. 110; Porter v. City of Water Valley, 70 Miss. 560; State v. Pendergrass, 106 N. C. 664; Newson v. City of Galveston, 76 Tex. 559.

[143] City of Jacksonville v. Ledwith, 26 Fla. 163.

[144] Ex parte Taylor, 87 Cal. 91; Beckley v. Skroh, 19 Mo. App. 75; Board of Health v. Jersey City, 55 N. J. Eq. 116; Board of Health of Yonkers v. Copcutt, 140 N. Y. 12; Com. v. Miller, 139 Pa. 77.

6 Curr. Law, 832.

[145] Wood, Nuisances, §§ 1, 17; City & County of San Francisco v. Buckman, 111 Cal. 25; Walker v.

Motive ordinarily is not one of the essentials of an act necessary to characterize it as a nuisance. Neither is it true that the mere legislative determination that a certain act or use of property is a nuisance, establishes the fact that such act, condition or use of property is a nuisance, without regard, as the cases hold, to its nature, situation and use.[146]

The use of care in the doing of an act is not a question ordinarily involved in a determination of its character as a nuisance. As said by a writer on this subject, "It is merely a question of results."[147]

In Abbott on Municipal Corporations, sec. 137, will be found many cases classified and chronologically arranged illustrating the application of controlling principles to individual cases. The grant to a municipal corporation to control or regulate a nuisance, or the general grant of the right to exercise the police power, it seems to be quite generally held, does not carry with it the power to totally suppress a nuisance. An exercise of the police power is an inherent and discretionary right on the part of the state but still controlled by the great underlying principle of law that property, personal or vested rights cannot be confiscated nor arbitrarily destroyed. The act of the sovereign must have for its real and legitimate end and aim the accomplishment of a governmental power, and this must be done by agencies which are uniform, definite and certain in their operation and application.[148]

§ 91. Nuisances; their abatement and removal.

It is scarcely necessary to say that since public authorities possess the power in some instances to declare what are public nui-

Jameson, 140 Ind. 591; Ex parte O'Leary, 65 Miss. 80; Hutton v. City of Camden, 39 N. J. Law, 122; In re Jacobs, 98 N. Y. 98; People v. Rosenberg, 138 N. Y. 410; Wilson v. Phoenix Mfg. Co., 40 W. Va. 413; People v. Burtleson, 14 Utah, 258.

[146] Gaines v. Waters, 64 Ark. 609; Ex parte Fiske, 72 Cal. 125; In re Flaherty, 105 Cal. 558; Darst v. People, 51 Ill. 286. The declaration that all intoxicating liquors constitute a nuisance held in this case not to make them such without judicial determination. Chicago, R. I. & P. R. Co. v. City of Joliet, 79 Ill. 25; Village of Des Plaines v. Poyer, 123 Ill. 348; Everett v. City of Council Bluffs, 46 Iowa, 66; City of Newton v. Joyce, 166 Mass. 83.

[147] Wood, Nuisances, § 27.

[148] California Reduction Co. v. Sanitary Reduction Works (C. C. A.) 126 Fed. 29.

sances, and in all cases the power to remove or abate them, upon an official or judicial declaration of their character as such, they have the power to abate and remove all conditions or acts which in their nature, situation or use are public nuisances.[149] The doctrine, however, is well settled that municipal authorities cannot, arbitrarily, declare an act or thing a nuisance and remove and abate the same until there has been a judicial adjudication of this fact.[150] But this doctrine may not apply where the objectionable thing or act is unquestionably a nuisance per se.[151] And nuisances after a legal determination as such may be summarily abated or removed.[152] The creation of a nuisance may also be prevented by proceedings in equity where the usual rules in respect to the granting of injunctions will apply. The usual agency for the regulation or removal of a public nuisance is through a board or department of health acting under authority of the corporate charter or the general statutes and according to the manner designated by law.

In common with other powers granted public corporations, they have the right within their charter limitations to enforce regulations, rules or orders which they can legally make.[153] If the power exists to abate, remove or suppress a nuisance, with the necessary authority to execute this power, it impliedly follows

[149] Schoen v. City of Atlanta, 97 Ga. 697; Walker v. Jameson, 140 Ind. 591; California Reduction Co. v. Sanitary Reduction Works (C. C. A.) 126 Fed. 29; Chase v. Middleton, 123 Mich. 647; City of St. Paul v. Clark, 84 Minn. 138; State v. Tweedy, 115 N. C. 704; Heath v. Hall (Tex. Civ. App.) 27 S. W. 160. See, also, Abb. Mun. Corp. § 138.

[150] Bates v. District of Columbia, 1 MacArthur (D. C.) 433; Baker v. Bohannan, 69 Iowa, 60; City of Cambridge v. Munroe, 126 Mass. 496; Board of Health of Vailsburgh v. Inhabitants of East Orange, 53 N. J. Eq. 498; Gould v. City of Rochester, 105 N. Y. 46.

[151] City of Americus v. Mitchell, 79 Ga. 807, 5 S. E. 201; King v. Davenport, 98 Ill. 305; North Chicago City R. Co. v. Town of Lake View, 105 Ill. 207.

[152] License Cases, 5 How. (U.S.) 504; Mugler v. State of Kansas, 123 U. S. 661; Ferguson v. City of Selma, 43 Ala. 398; Baumgartner v. Hasty, 100 Ind. 575; Miller v. Horton, 152 Mass. 540; Green v. Lake, 60 Miss. 451; Newark & S. O. Horse Car R. Co. v. Hunt, 50 N. J. Law, 308; In re Jacobs, 98 N. Y. 98.

[153] United States v. The Emperor, 49 Fed. 751; City of Bloomington v. Costello, 65 Ill. App. 407. A city cannot acquire the prescriptive right to continue a public nuisance. Long v. City of Portland, 151 Ind. 442; Barring v. Com., 63 Ky. (2 Duv.) 95; City of Waycross v. Houk, 113 Ga. 963; Harper v. City of Milwaukee, 30 Wis. 365.

that the legal right exists to employ or use all necessary and proper means in the execution of the powers possessed, express or implied.[154] Duties prescribed devolving upon a certain governmental agent are discretionary in their character as to the extent and manner of their exercise, unless the provisions of the statute are mandatory in thus granting the powers and directing the extent and manner of their exercise when the right of delegation does not exist or unless they involve legislative function. If, however, a power is granted in general terms to the governmental agent, a public corporation, such agent usually possesses the power of delegation.[155]

It may be necessary that the owners of such property or those interested or affected should have notice of such proceedings or actions in respect to the abatement of nuisances, that they may have an opportunity to appear and defend themselves or their property against the charges made.[156]

III. The Power to Incur Indebtedness Other Than by the Issue of Bonds.*

§ 92. The corporate power to incur indebtedness.

Of the essential and characteristic differences between public and private corporations a few have been discussed, some have been suggested, and others have been merely intimated in the preceding sections. As one of the last, fundamental in its character and of controlling influence in doubtful cases involving the incurring of an indebtedness or the creation of an obligation, is the source of funds raised for the payment of these obligations. Public corporations are organized as governmental agents and as such share in the administration of governmental affairs and the exercise of public duties resting upon the sovereign. All

[154] Sanitary Reduction Works of San Francisco v. California Reduction Co., 94 Fed. 693. Validity of exclusive franchise for the cremation of city garbage decided in the affirmative with many authorities collated. Walker v. Jameson, 140 Ind. 591, and authorities cited.

[155] Gaines v. Waters, 64 Ark. 609; Welch v. Stowell, 2 Doug. (Mich.) 332.

[156] Bush v. City of Dubuque, 69 Iowa, 233; City of Salem v. Eastern R. Co., 98 Mass. 431; Weil v. Ricord, 24 N. J. Eq. (10 C. E. Green) 176; Gould v. City of Rochester, 105 N. Y. 46; City of Philadelphia v. Dungan, 124 Pa. 52; Teass v. City of St. Albans, 38 W. Va. 1.

* 6 Curr. Law, 732.

their expenditures in a public capacity are paid by moneys raised through the imposition and collection of taxes upon taxable interests of the community. There is ever an irresistible tendency on the part of public officials, prudent though they may be in the management of their private finances, to expend public moneys lavishly and extravagantly, and unnecessarily to incur debts or contract obligations. The expenditures of public moneys must be met by the levying and collection of taxes, and indebtedness incurred or obligations created fall ultimately upon the public purse. It is chiefly this difference in the manner of raising revenue which leads the courts to adopt the strict rule of construction in allowing and recognizing the right to incur indebtedness by public corporations.

§ 93. Must be expressly given; it cannot be implied.

The power to incur indebtedness, except as modified by the doctrine stated in a succeeding section, must be expressly given to a public corporation before a valid debt or obligation can be contracted or incurred.[157] This strict rule is adopted universally by the courts as the only available means for curbing and restraining the dishonesty or extravagance of public officials. The power must exist either in some charter, statutory or constitutional provision;[158] if necessary to corporate life it may impliedly exist though not expressly given. These provisions are usually considered mandatory in their character,[159] not directory, and if the manner for the incurring of the indebtedness is prescribed, all the steps directed by law to be taken must be, and in the way designated, or lawful authority does not exist.

§ 94. Implied power of the courts to compel the payment of debts.

To protect the tax-paying public the courts have adopted and enforced almost universally the strict rule of construction of a

[157] Brenham v. German-American Bank, 144 U. S. 173; Watson v. City of Huron, 97 Fed. 449; Lindsey v. Rottaken, 32 Ark. 619; Ex parte Sims, 40 Fla. 432; Myers v. City of Jeffersonville, 145 Ind. 439; Lovejoy v. Inhabitants of Foxcroft, 91 Me. 367.

[158] Coggeshall v. City of Des Moines, 78 Iowa, 235; Belknap v. City of Louisville, 99 Ky. 474; Washburn v. Com., 137 Mass. 139; French v. South Arm Tp., 122 Mich. 593.

[159] Dunbar v. Canyon County Com'rs, 6 Idaho, 725, 49 Pac. 409.

corporate right to incur a valid indebtedness. The practical effect of the workings of this rule is to deny to public corporations the legal authority to incur an indebtedness if the question may arise or if there exists any doubt or ambiguity. There will be found, however, on an examination of the authorities, cases holding that a defect of power may be no defense. For the purpose of enforcing honest obligations, courts have adopted what might be termed the implied power of a public corporation to incur indebtedness other than by ordinance, charter, or statutory provision,[160] either considered as withholding the power or regulating the manner in which it shall be exercised. The consideration that one of the parties to the transaction is a public corporation should not permit it to rob others or to play fast and loose with contract obligations. A rule of construction other than the strict ought to prevail where a corporation is endeavoring to extend its power to the injury of others, or where it sets up by way of defense to an action brought against it that it has itself been guilty of usurpation of power.[161] And the further fact should not be forgotten that the contract or other obligation is entered into on behalf of the corporate body by agents elected by the people to represent them and bind the corporation during official life. If these agents dishonestly or imprudently, or perhaps illegally, so far as the manner of the act is concerned, place burdens upon their principal, this of itself should be no excuse for the failure to compensate the other party to the transaction for that of value with which he has parted, or to enforce specific contracts.

§ 95. Manner of its exercise; body authorized.

A public corporation may be possessed of the power to incur indebtedness derived from lawful authority; the indebtedness however will be valid and enforceable only when contracted by the corporation in a specified manner and by the official body or agent

[160] Dodge v. City of Memphis, 51 Fed. 165; City of Denver v. Webber, 15 Colo. App. 511, 63 Pac. 804; Argenti v. City of San Francisco, 16 Cal. 25; San Francisco Gas Co. v. City of San Francisco, 9 Cal. 453-470; City of Logansport v. Dykeman, 116 Ind. 15; Lovejoy v. Inhabitants of Foxcroft, 91 Me. 367; Backman v. Town of Charlestown, 42 N. H. 125; Oklahoma City v. T. M. Richardson Lumber Co., 3 Okl. 5; Town of Topsham v. Rogers, 42 Vt. 189; Richmond & W. P. Land, N. & I. Co. v. Town of West Point, 94 Va. 668.

[161] Bank of Chillicothe v. Town of Chillicothe, 7 Ohio (pt. 2) 31.

of the corporation designated by law to act in a particular instance and bind the corporation by such action. There exists always the implied limitation that the indebtedness must be incurred for a public purpose which will be considered in later sections, and usually constitutional limitations upon the amount and the particular purpose for which it can be legally contracted.[162] It is self-evident that public corporations of all the different grades are represented in particular functions they possess or powers they may exercise by representative bodies or officials and indebtedness, to be valid, if the authority to incur exists, must be contracted by the particular official body representing the public corporation in the exercise of certain of its duties.[163]

It is also generally held that the implied power does not exist on the part of public officials to contract indebtedness of their own motion. Especially is this true where they do not possess original powers of administration.[164] It is equally true as to the character of the indebtedness they may incur.

§ 96. The power limited by the purpose or use of funds to be raised.

Limitations upon the power of a public corporation to incur indebtedness may exist either as an inherent, implied, or fundamental principle of law or as a written and express restriction found in the charter of the corporation, the statutes, or the constitution of the state. There is found, as an implied and inherent limitation on the power of every public corporation to incur a debt, the one, namely, that the purpose for which it may be con-

[162] Grady v. Pruit, 111 Ky. 100, 63 S. W. 283; Brown v. Inhabitants of Melrose, 155 Mass. 587; Tinkel v. Griffin, 26 Mont. 426, 68 Pac. 859; Read v. Atlantic City, 49 N. J. Law, 558.

[163] Seward County Com'rs v. Aetna Life Ins. Co., 90 Fed. 222; Hilliard v. Bunker, 68 Ark. 340; Whitney v. City of New Haven, 58 Conn. 450; Barnard v. Sangamon County, 190 Ill. 116; Citizens' Bank v. Town of Jennings, 107 La. 547; Shea v. Town of Milford, 145 Mass. 528, 14 N. E. 764; Holderness v. Baker, 44 N. H. 414; Redmon v. Chacey, 7 N. D. 231, 73 N. W. 1081; Barr v. City of Philadelphia, 191 Pa. 438; Jones v. Town of Lind, 79 Wis. 64. See, also, Abb. Mun. Corp. § 144, citing many cases construing the power of designated officials to incur obligations.

[164] Police Jury v. Britton, 82 U. S. (15 Wall.) 566; Sterling v. Parish of West Feliciana, 26 La. Ann. 59.

tracted or the uses to which the funds realized shall be put must be public in their character. This limitation impliedly exists, based upon inherent differences between a public and private corporation.[165] A public corporation is an agency of the government, an aid to the sovereign in carrying out its purposes and performing duties which are public in their nature and intended to protect and benefit society at large, the community rather than the individual. It is clearly beyond the power of a public corporation or the state itself to appropriate public property for private purposes or to expend public moneys for the personal advantage and benefit of private individuals or personal and private enterprises. The character of certain uses for which public moneys may be expended is established beyond question as well as certain purposes to which they shall not be put. It is impossible to give an exact definition of public purpose. Whether the purpose is a public one for the expenditure of moneys is a question exclusively for the courts to determine. Legislative bodies cannot be the judges of their own infractions of fundamental law.

§ 97. The construction of buildings a public purpose.

The cases hold without dissent that public moneys expended in the construction of buildings for use by government officials or departments in the performance of their public or governmental duties is a proper and legal expenditure for a "public purpose," and if such buildings are constructed in a lawful manner and upon legal authority, the indebtedness incurred by the corporation is a valid one and capable of enforcement. The power to construct public buildings is considered an implied one not only as necessary to corporate existence but also as a proper and convenient means for carrying into effect governmental

[165] Hackett v. City of Ottawa, 99 U. S. 86; Town of Bloomington v. Lillard, 39 Ill. App. 616; People v. Chicago & A. R. Co., 194 Ill. 51; Frantz v. Jacob, 88 Ky. 525; Rexroth v. Ames, 55 N. J. Law, 509, 26 Atl. 787; Thrift v. Town of Elizabeth City Com'rs, 122 N. C. 31, 30 S. E. 349. In Simonton, Mun. Bonds, § 36, is found an interesting discussion of a public purpose. See, also, Burroughs, Pub. Secur. p. 388; 20 Am. & Eng. Enc. Law (2d Ed.) p. 1084; Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 664; Weismer v. Village of Douglas, 64 N. Y. 91. See, also, Abb. Mun. Corp. § 146, citing many cases.

powers expressly granted. School houses,[166] town halls,[167] court houses and jails,[168] hospitals, poorhouses, public markets,[169] state [170] and county buildings, may be properly erected through the expenditure of public funds.

§ 98. Illustrations of a "public purpose" continued; the support of the poor; supply of water and light.

It is clearly within the province of a government to care for and support its indigent, infirm, or the suffering.[171] It is also clearly within the limits of a governmental or a public purpose to care for, maintain and protect the public health and safety. Modern authorities assume that one of the agencies most conducive to the maintenance and protection of the public health is a system by which a sufficient supply of pure and wholesome water may be furnished to a community. The expenditures of public moneys therefore for the establishment and maintenance of a system of water supply is now considered legal, such use or purpose being a public one and within the power of the corporation.[172]

[166] Allen v. Intendant & Councilmen of Lafayette, 89 Ala. 641; Turney v. Town of Bridgeport, 55 Conn. 412; City of Cartersville v. Baker, 73 Ga. 686.

[167] Greeley v. People, 60 Ill. 19; Foster v. City of Worcester, 164 Mass. 419; Clarke v. Inhabitants of Town of Brookfield, 81 Mo. 503; Bates v. Bassett, 60 Vt. 530.

[168] Pauly Jail-Bldg. & Mfg. Co. v. Kearney County Com'rs, 68 Fed. 171; Lewis v. Loney, 92 Ga. 804; Jackson County y. Rendleman, 100 Ill. 379; Rock v. Rinehart, 88 Iowa, 37; Johnson v. Wilson County Com'rs, 34 Kan. 670; Callam v. City of Saginaw, 50 Mich. 7; Borough of Henderson v. Sibley County, 28 Minn. 515; Black v. Buncombe County Com'rs, 129 N. C. 121, 39 S. E. 818.

[169] Wade v. City of New Bern, 77 N. C. 460.

[170] State v. McGraw, 13 Wash. 311.

[171] Town of Marlborough v. Town of Chatham, 50 Conn. 554; Perry County v. City of De Quoin, 99 Ill. 479; Crossman v. New Bedford Inst. for Savings, 160 Mass. 503.

[172] New Orleans Water-Works Co. v. Rivers, 115 U. S. 674; Little Falls Elec. & Water Co. v. City of Little Falls, 102 Fed. 663; Anoka Water-Works, Elec. Light & P. Co. v. City of Anoka, 109 Fed. 580; City of Ft. Madison v. Ft. Madison Water Co., 110 Fed. 901; affirmed (C. C. A.) 114 Fed. 292; City Council of Dawson v. Dawson Water-Works Co., 106 Ga.. 696; Prince v. City of Quincy, 128 Ill. 443; Schneck v. City of Jeffersonville, 152 Ind. 204; Miles v. Benton Tp., 11 S. D. 450, 78 N. W. 1004; Pearl v. Town of Nashville, 18 Tenn. (10 Yerg.) 179. See, also, Abb. Mun. Corp. § 146*b*.

In a case in the supreme court of the United States the court held in construing an exclusive contract for the use of the streets in supplying gas to the city and people of New Orleans that the proper lighting of public highways and streets was a valid exercise of the police power, having for its purpose the protection of the lives and property of the people of the community, a governmental purpose. Properly lighted streets and public places give a certain degree of immunity from attack by thieves or burglars at night. A public corporation consequently is justified in attending to this so it is claimed, a governmental duty, and supplying, either through a system of its own or through an exclusive contract, or otherwise, with private corporations or individuals, artificial light for lighting public places when necessary. Public moneys therefore when used for such purpose are properly and legally expended.[173]

§ 99. The construction of internal improvements.'

Considering other uses or purposes works of internal improvement, as they are termed, may constitute a use to the construction of which public moneys can be properly appropriated,[174] although many cases hold squarely to the contrary doctrine.[175] The protection of the public health is clearly a governmental power and duty. To execute this power and perform this duty all usual, necessary, convenient and proper means may be employed. To construct or aid in the construction of works of internal improvement is not so clearly a governmental power or duty. The character and purpose of a work of internal improvement depends largely upon the determination by public officials that the enterprise in question is not only one of the usual, proper, necessary and convenient means for performing or exercising a govern-

[173] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Hamilton Gas-Light & Coke Co. v. City of Hamilton, 146 U. S. 258; affirming 37 Fed. 832; City of Crawfordsville v. Braden, 130 Ind. 149; State v. City of Hiawatha, 53 Kan. 477; Windsor v. City of Des Moines, 110 Iowa, 175, 81 N. W. 476; Lebanon Light & Magnetic Water Co. v. City of Lebanon, 163 Mo. 246, 63 S. W. 809; Town of Klamath Falls v. Fachs, 35 Or. 325; Wheeler v. City of Philadelphia, 77 Pa. 338.

[174] Miles v. Benton Tp., 11 S. D. 450.

[175] Rippe v. Becker, 56 Minn. 100; Traver v. Merrick County Com'rs, 14 Neb. 327; Leavenworth County Com'rs v. Miller, 7 Kan. 493; People v. State Treasurer, 23 Mich. 499.

mental duty or power, but that it is itself such a power or duty. It certainly is unsafe to leave without restraint such a far-reaching and conclusive determination to public officials. The opportunity for the insidious and unconscious influence of self-interest is too apparent.[176]

There are certain works of internal improvement in regard to the construction or the granting of aid in the construction of which the law is well established, namely, the establishment of public highways, and canals,[177] the improvement of navigable waters,[178] or the digging of ditches, having for their purpose the draining of large tracts of low and swampy land. The construction of the last is justified by the double reason, the removal of a nuisance detrimental to the public health and an addition to the tillable and arable lands of the state. The erection of bridges[179] has also been held a purpose for which public moneys can be properly used.

Railway aid. For many years the granting of public aid in the construction of railways owned and operated by private individuals or corporations was not permitted, the purpose not being, as the courts then held, a "public one." The doctrine now is clearly established that such aid is valid, and the voting of public moneys, unless restrained by constitutional provisions, to aid in the construction of railways, is an appropriation for a public use. This holding is based upon the principle that a railway is a quasi public highway; that one of the duties of the state is to furnish means of safe and rapid communication within its limits, and having the power, even considered by some in the

[176] Mitchell v. Burlington & Mt. P. Plank-road Co., 72 U. S. (4 Wall.) 270; Brauns v. Town of Peoria, 82 Ill. 11; Prince v. Crocker, 166 Mass. 347, 44 N. E. 446; Attorney General v. Pingree, 120 Mich. 550, 79 N. W. 814; Walker v. City of Cincinnati, 21 Ohio St. 14.

[177] Mitchell v. Burlington & Mt. P. Plank-road Co., 72 U. S. (4 Wall.) 270; City v. Wetumpka v. Winter, 29 Ala. 651; Foreman v. Murphy, 70 Ky. (7 Bush) 304; Hammett v. City of Philadelphia, 65 Pa. 146; State v. Wirt County Ct., 37 W. Va. 808; Sedgwick, St. Const. Law, p. 446 et seq.

[178] Taylor v. Newberne Com'rs, 55 N. C. (2 Jones' Eq.) 141; Curtis' Adm'r v. Whipple, 24 Wis. 350. But see Whiting v. Sheboygan & F. R. Co., 25 Wis. 216.

[179] Simpson v. Lauderdale County, 56 Ala. 64; Dingley v. City of Boston, 100 Mass. 544; Egyptian Levee Co. v. Hardin, 27 Mo. 495; People v. Tompkins, 64 N. Y. 53; Garlinghouse v. Jacobs, 29 N. Y. 297; Waupaca County v. Town of Matteson, 79 Wis. 67.

light of a duty, to do this directly, it can accomplish the same result indirectly through private agencies. The tendency of public corporations to incur unwise debts and to make lavish expenditures is too great without giving public officials the least latitude and the power is one of doubtful expediency.[180]

§ 100. Express limitations on power to incur indebtedness.

It is an inherent and implied limitation upon the power of a public corporation to incur indebtedness that to be valid it must be, as has been stated in the preceding sections, incurred for "a public purpose." The state cannot arbitrarily under the guise of an ostensible public purpose, appropriate moneys for the benefit or advantage of private individuals and private enterprises.[181] The declaration by the legislature that certain purposes or uses are public is not conclusive. The purpose must be public in its nature or the use for which public funds are appropriated must be such before a legal expenditure will exist.

In the note will be found references to cases passing upon the validity of indebtedness incurred for specific purposes, the legal objections raised being those touching the character of the purpose of the expenditures of such moneys.[182]

[180] Jarrolt v. Moberly, 103 U. S. 580. Dissenting opinion by Mr. Justice Harlan; Pleasant Tp. v. Aetna Life Ins. Co., 138 U. S. 67; reversing 62 Fed. 718; Quincy, M. & P. R. Co. v. Morris, 84 Ill. 410; Wood v. Town of Oxford, 97 N. C. 227. But see Taylor v. Ross County Com'rs, 23 Ohio St. 22.

In Iowa decisions will be found both for and against the legality of railway aid. In Michigan the state courts have uniformly ruled against the validity of such a contribution on the part of public corporations and in Wisconsin the recent course of judicial decision has been against the granting of aid. McClure v. Owen, 26 Iowa, 243. Contra, Renwick v. Davenport & N. W. R. Co., 47 Iowa, 511; People v. Salem Tp., 20 Mich. 452. But see Pine Grove Tp. v. Talcott, 86 U. S. (19 Wall.) 666, where the supreme court of the United States in an able and exhaustive opinion held an act of the legislature of Michigan authorizing the issue of railroad aid bonds constitutional and valid thus reversing in effect the decisions of the supreme court of Michigan. Whiting v. Sheboygan & F. R. Co., 25 Wis. 167. The constitutionality of the same act considered in the Whiting Case, was before the supreme court of the United States in Olcott v. Fond du Lac Sup'rs, 83 U. S. (16 Wall.) 678, and its validity sustained.

[181] Sharpless v. City of Philadelphia, 21 Pa. 147, 59 Am. Dec. 759.

[182] Burlington Tp. v. Beasley, 94 U. S. 310; City of Ottawa v. Carey,

There are certain enterprises which while private in their organization, yet in their nature or the transaction of their business partake of a public character to such an extent that if the law specifically names them as capable of receiving public aid, indebtedness incurred in pursuance of such authority will be held valid and enforceable. This principle as already stated applies to the granting by public corporations of aid in the construction of railway lines through their territory or such adjoining territory as to result in substantial benefit or advantage to them. If authority to aid private enterprise already exists, subsequent legislation cannot affect the validity of debts legally incurred prior to such legislation.[183]

§ 101. Same subject continued.

In the preceding sections has been considered the power of a public corporation to incur indebtedness for proper municipal purposes other than by an issue of bonds. There has been suggested the implied limitation upon such power arising from the character of the purpose or use funds so derived are put, with a reference to further limitations found in the general statutes, the constitution of the state, or in the charter of the particular organization.[184] These restrictions have been found necessary because of the mania possessed apparently by all public corporations to incur debts without regard to the means or source of

108 U. S. 110; Cole v. City of La Grange, 113 U. S. 1; Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 655; Allen v. Inhabitants of Jay, 60 Me. 124; Weismer v. Village of Douglas, 64 N. Y. 91; In re Eureka Basin Warehouse & Mfg. Co., 96 N. Y. 42; English v. People, 96 Ill. 566. But see the opinion in Hackett v. City of Ottawa, 99 U. S. 86; Luques v. Inhabitants of Dresden, 77 Me. 186. Public moneys not authorized to be used in the care of private cemetery. In Lowell v. City of Boston, 111 Mass. 463, the question of a public purpose is thoroughly and fully discussed and many cases cited. See, also, Abb. Mun. Corp. § 148, citing many cases.

[183] Scotland County v. Thomas, 94 U. S. 682; County of Calloway v. Foster, 93 U. S. 567; Slack v. Maysville & L. R. Co., 52 Ky. (13 B. Mon.) 1; State v. Greene County, 54 Mo. 540.

[184] Gibbons v. Mobile & G. N. R. Co., 36 Ala. 410; Rice v. City of Keokuk, 15 Iowa, 579; Wallace v. City of San Jose, 29 Cal. 181; Wyncoop v. Congregational Soc., 10 Iowa, 185; Dunnovan v. Green, 57 Ill. 63; Foot v. Salem, 96 Mass. (14 Allen) 87.

payment. To restrict and limit the capacity for municipal extravagance, the courts have upheld their constitutionality whenever called in question, and applied to them the strict rule of construction, denying the power of the corporation to incur questionable debts. Their language varies and limits the amount of debt which can be legally incurred by public corporations by fixing a gross sum either in amount[185] or rate of taxation,[186] or, which is perhaps the usual and customary method, by limiting such indebtedness to a certain proportion of the assessable or taxable value of property within the jurisdiction of the corporation.[187] In some cases words are found to the effect that public corporations shall not expend in any year moneys in excess of the actual revenue for such year, and that this yearly revenue shall be devoted to the expenditures of that same year.[188] The existence of such limiting provisions does not ordinarily give to public authorities the discretionary or volitional power to incur indebtedness to the limit fixed, without a vote of the people upon its creation. This is necessary. The authority to incur indebtedness within constitutional or other limiting provisions proceeds and is derived from the qualified voters of the corporation.[189] What is or may be considered an indebtedness coming within limits thus fixed will be considered in later sections.

[185] City of Brenham v. German American Bank, 144 U. S. 173, 549; reversing 35 Fed. 185; Argenti v. City of San Francisco, 16 Cal. 256; Bank of Columbia v. Taylor County, 112 Ky. 243, 65 S. W. 451.

[186] School Town of Winamac v. Hess, 151 Ind. 229; Allen v. City of Davenport 107 Iowa, 90; Reynolds v. City of Waterville, 92 Me. 292; Chicago, B. & Q. R. Co. v. Klein, 52 Neb. 258, 71 N. W. 1069; Weber v. Dillon, 7 Okl. 568; Gable v. City of Altoona, 200 Pa. 15, 49 Atl. 367.

[187] Corning v. Meade County Com'rs, 102 Fed. 57. See, also, cases cited in the opinion. Campbell v. City of Indianapolis, 155 Ind. 186; Ft. Dodge Elec. Light & Power Co. v. City of Ft. Dodge, 115 Iowa, 568, 89 N. W. 7; Bartlett v. Atchison, T. & S. F. R. Co., 32 Kan. 134; City of Ashland v. Culbertson, 103 Ky. 161, 44 S. W. 441; Adams v. City of Waterville, 95 Me. 242; Browne v. City of Boston, 179 Mass. 321, 60 N. E. 934; City of Erie's Appeal, 91 Pa. 398; State v. Blake, 26 Wash. 237, 66 Pac. 396; Neale v. Wood County Ct., 43 W. Va. 90.

[188] Crebs v. City of Lebanon, 98 Fed. 549; Bradford v. City & County of San Francisco, 112 Cal. 537; Buck v. City of Eureka, 124 Cal. 61; Hodges v. Crowley, 186 Ill. 305.

[189] Cunningham v. City of Cleveland, 98 Fed. 657; Hudson v. City of Marietta, 64 Ga. 286; City of Covington v. McKenna, 18 Ky. L. R. 288, 36 S. W. 518; Grand Island & W. C. R. Co. v. Dawes County, 62 Neb. 44, 86 N. W. 934.

It is quite uniformly held that where limiting provisions of a public character exist as to the amount or the purpose of indebtedness legally incurred, those dealing with the corporations are bound to take notice of such limitations, and if they contract or deal with the corporation the result being an indebtedness or an obligation in excess of the amount limited, they do so at their risk. In other words the doctrine of notice of limitation of corporate powers, so-called, as applied to private corporations, is applied with even more strictness to the acts of a public corporation. This doctrine, as will be remembered, is that a corporation is an artificial person of limited capacity or powers. Those dealing with it are charged legally with knowledge of this fact, and if in transactions the corporation exceeds its powers those who are legally chargeable with knowledge of the existence of the limitation cannot complain if they lose through their negligence or failure to see that the corporation is acting in excess of legal authority.[190]

The failure on the part of public authorities to comply with constitutional or other provisions limiting the indebtedness legally to be incurred usually renders void their acts and the indebtedness incurred by them, and this is especially true if power is lacking rather than a failure to comply with some formality required by law in the exercise of a granted power.[191]

The total obligation liable to rest upon a public corporation by the terms of a contract extending through a series of years for services to be performed from time to time is not usually considered an indebtedness to be included within the constitutional or other limitation. A future contract obligation is not an absolute liability but is contingent on the performance of the contract before the corresponding obligation on the part of the municipality is created.[192]

[190] Jutte & Foley Co. v. City of Altoona (C. C. A.) 94 Fed. 61; Gamewell Fire Alarm Tel. Co. v. City of Laporte, 96 Fed. 664, 102 Fed. 417. See, also, City of Litchfield v. Ballou, 114 U. S. 190; Arbuckle-Ryan Co. v. City of Grand Ledge, 122 Mich. 491, 81 N. W. 358; Cleveland v. City Council of Spartanburg, 54 S. C. 83, 31 S. E. 871; Peck v. City of Hempstead, 27 Tex. Civ. App. 80, 65 S. W. 653; Fowler v. City of Superior, 85 Wis. 411.

[191] Norton v. Taxing Dist. of Brownsville Com'rs, 129 U. S. 479; Lyon County v. Ashuelot Nat. Bank, 87 Fed. 137; McPherson v. Foster, 43 Iowa, 48; State v. Winter, 15 Wash. 407.

[192] Walla Walla City v. Walla

§ 102. Retroactive effect and construction of limitations.

The uniform decision of courts has been that the adoption of constitutional provisions or the passage of legislation limiting and restricting the power and capacity of a public corporation to incur indebtedness of any character does not render illegal or void indebtedness which was valid at the time of adoption of such constitutional amendment or the passage of such legislation though such indebtedness may be in excess of the limit therein fixed.[193]

The courts in construing the extent and application of charter, statutory or constitutional limitations upon the power of a public corporation to incur an indebtedness, whether represented by negotiable bonds or other instruments, have adopted almost universally the strict rule of construction. In this there is a difference between a public and a private corporation, and the fundamental differences between them lead the courts to adopt the strict rule of construction in respect to all acts of public organizations. These differences consist in the purpose of organization, source of revenue, and expenditure of funds. In the note will be found reference to cases construing particular charter, statutory and constitutional provisions as affecting the power of different public corporations to incur indebtedness.[194]

Walla Water Co., 172 U. S. 1; Anoka Water Works, E. L. & P. Co. v. City of Anoka, 109 Fed. 580; City of San Diego v. Higgins, 115 Cal. 170; Foland v. Town of Frankton, 142 Ind. 546; Davis v. City of Des Moines, 71 Iowa, 500, 32 N. W. 470. See Abb. Mun. Corp. §§ 147, 152, 159, and 255, where this question is fully discussed and many cases cited.

[193] Sibley v. City of Mobile, 3 Woods, 535, Fed. Cas. No. 12,829; Johnson v. Pawnee County Com'rs, 7 Okl. 686; Lawrence County v. Meade County, 10 S. D. 175; Pleasant Valley Coal Co. v. Salt Lake County Com'rs, 15 Utah, 97, 48 Pac. 1032; Neale v. Wood County Ct., 43 W. Va. 90.

[194] Alabama G. S. R. Co. v. Reed, 124 Ala. 253, 27 So. 19; McRae v. County of Cochise (Ariz.) 44 Pac. 299; Monroe County Com'rs v. Harrell, 147 Ind. 500; Keene Five-Cent Sav. Bank v. Lyon County, 90 Fed. 523; Ft. Dodge Elec. Light & Power Co. v. City of Ft. Dodge, 115 Iowa, 568; Chicago, K. & N. R. Co. v. City of Manhattan, 45 Kan. 419; City of Cincinnati v. Holmes, 56 Ohio St. 104; Hall Lithographing Co. v. Roger Mills County Com'rs, 8 Okl. 378; Keller v. City of Scranton, 202 Pa. 586. See, also, full discussion of the subject in Abb. Mun. Corp. § 152, with elaborate notes.

§ 103. Definition of the word "indebtedness" or "debt" as used in limiting laws.

The word "debt" or "indebtedness" is the one ordinarily used in constitutional or other provisions limiting the obligations legally to be incurred by public corporations. What charges or obligations can be included properly within the meaning of these words may be material and important in determining the amount of such legal indebtedness, and the courts from time to time have defined these words and included or excluded from such definitions certain obligations.[195] There is no well-established rule of construction which the courts have adopted in defining the words. The desire on their part not to limit the legal indebtedness of a municipality or to compel the payment of a moral obligation rather than any fixed rule of construction has at times influenced their decision. But in an able decision [196] by Judge Lochren, construing a provision of the Iowa constitution, it was well said: "The language of this section is plain and simple, and its meaning is unmistakable. The incurring of indebtedness beyond the amount limited is absolutely and unqualifiedly prohibited; no matter what the pretext or circumstances, or the form which the indebtedness is made to assume. It curbs equally the power of the legislature, the officials and the people themselves, and was designed to protect the taxpayers from the folly and improvidence of either, or of all combined."

The courts have quite generally held that it is largely the form of the obligation which determines a general liability and the consequent result of holding it an "indebtedness" or a "debt." If the bonds or obligations in their form and recitals are not a general liability of the corporation but payable principal and interest from the proceeds of the special taxes or assessments levied upon benefited property, and if the holders are limited in their recovery to such sums as can be collected from these special or local assessments, then the bond or other evidence of indebtedness is not to be regarded as a general debt or charge against the municipality and should not be included within its indebtedness

[195] City of Conyers v. Kirk, 78 Ga. 480, 3 S. E. 442; Law v. People, 87 Ill. 385; Town of Kankakee v. McGrew, 178 Ill. 74; Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532; City of Springfield v. Edwards, 84 Ill. 626.

[196] City of Ottumwa v. City Water Supply Co. (C. C. A.) 119 Fed. 315.

in determining whether the constitutional limitation has been reached.[197] If, however, the form of such bonds or evidence of indebtedness is of a general character or nature and does not limit the holder in his right of recovery to such special assessments or taxes, then they will be considered as obligations or indebtedness of the city to be included within its total or aggregate debt.[198]

Another plan has been to issue bonds secured by a mortgage upon certain property, the interest and the principal of the mortgage payable from the net income of such property. This device has often been used in the construction of plants for the purpose of supplying the municipality and the inhabitants with water and light.[199]

The modern construction by courts of the words "debt" or "indebtedness," uninfluenced by ulterior motives, includes all liabilities of whatever nature and contracted for whatever purpose and in whatever manner, that are or may become an obligation owing and to be met by the public corporation from the proceeds of public taxes levied and collected upon taxable property within its limits.[200] Such construction, however, may exclude warrants issued in payment of compulsory obligations, fees of witnesses, jurors, constables or sheriffs, in criminal cases,[201] or the expense attending the holding of a session of the legislature,

[197] Commissioners of Highways v. Jackson, 165 Ill. 17; affirming 61 Ill. App. 381; Hopper v. Inhabitants of Union Tp., 54 N. J. Law, 243; Little v. City of Portland, 26 Or. 235; Addyston Pipe & Steel Co. v. City of Corry, 197 Pa. 41.

[198] Kimball v. Grant County Com'rs, 21 Fed. 145; Windsor v. City of Des Moines, 110 Iowa, 176, 81 N. W. 476; Fowler v. City of Superior, 85 Wis. 411.

[199] United States v. Ft. Scott, 99 U. S. 152; City of Ottumwa v. City Water Supply Co. (C. C. A.) 119 Fed. 315.

[200] Hitchcock v. City of Galveston, 96 U. S. 341; Manly Bldg. Co. v. Newton, 114 Ga. 245, 40 S. E. 274; Murphy v. Town of East Portland, 42 Fed. 308; Windsor v. City of Des Moines, 110 Iowa, 175; City of Springfield v. Edwards, 84 Ill. 626; Culbertson v. City of Fulton, 127 Ill. 30; Louisville & N. R. Co. v. Com., 106 Ky. 633; State v. Marion County Ct., 128 Mo. 427; Neale v. Wood County Ct., 43 W. Va. 90, 27 S. E. 370; State v. Common Council of Tomahawk, 96 Wis. 73, 71 N. W. 86; Crogster v. Bayfield County, 99 Wis. 1; German American Sav. Bank v. City of Spokane, 17 Wash. 315.

[201] Rollins v. Lake County, 34 Fed. 845; Miller v. Dearborn County Comr's, 66 Ind. 162; Ketchum v. City of Buffalo, 14 N. Y. 356; Grand Island & N. W. R. Co. v. Baker, 6 Wyo. 369, 45 Pac. 494.

the bill of rights providing for a speedy trial by jury for those accused of crime, and a legislative session considered necessary to the maintenance of organized government, a reason sometimes of doubtful applicability. Such construction also excludes bonds issued under authority of law for the purpose of funding or refunding outstanding corporate indebtedness, the courts holding without exception that the issue of such bonds does not increase or add to the debts or obligations of the corporation but merely changes their form.[202] The indebtedness must also be a legal demand.[203]

In determining the limit of such indebtedness the total indebtedness of each of the civil bodies or corporations is to be considered and not the aggregate of both or all the corporate organizations which may be wholly or partially co-extensive territorially.[204] The courts in such cases usually consider each of the civic corporations as bodies corporate separate, independent and distinct from each other.

Municipal warrants drawn anticipating the payment of taxes not then delinquent but levied and due [205] are not considered a debt within the meaning of constitutional provisions, and the ordinary current expenses of a public corporation should not be included in a computation for ascertaining its indebtedness considered with reference to a constitutional limitation.[206]

[202] Farson, Leach & Co. v. Commissioners of Sinking Fund of Louisville, 97 Ky. 119; Hotchkiss v. Marion, 12 Mont. 218, 29 Pac. 821; Palmer v. City of Helena, 19 Mont. 61.

[203] Keene Five-Cent Sav. Bank v. Lyon County, 90 Fed. 523; Lyon County v. Keene Five-Cent Sav. Bank (C. C. A.) 100 Fed. 337; affirming Keene Five-Cent Sav. Bank v. Lyon County, 90 Fed. 523; German Ins. Co. v. City of Manning, 95 Fed. 597; City of Chicago v. McDonald, 176 Ill. 404.

[204] Board of Education of Huron v. National Life Ins. Co. (C. C. A.) 94 Fed. 324; Wilcoxon v. City of Bluffton, 153 Ind. 267, 54 N. E. 110; Todd v. City of Laurens, 48 S. C. 395, 26 S. E. 682; Wilson v. Board of Education of Huron, 12 S. D. 535; State v. Common Council of Tomahawk, 96 Wis. 73, 71 N. W. 86.

[205] Fuller v. Heath, 89 Ill. 296; City of Springfield v. Edwards, 84 Ill. 626; City of Alpena v. Kelley, 97 Mich. 550; In re State Warrants, 6 S. D. 518, 62 N. W. 101; Fenton v. Blair, 11 Utah, 78, 39 Pac. 485. But see Fuller v. City of Chicago, 89 Ill. 282.

[206] City of Conyers v. Kirk & Co., 78 Ga. 480; Barrett v. City of East St. Louis, 89 Ill. 175; Brashear v. City of Madison, 142 Ind. 685; Grant v. City of Davenport, 36 Iowa, 396; Laycock v. City of Baton Rouge, 35 La. Ann. 475; Reynolds v. City of Waterville, 92 Me. 292.

§ 104. Corporate indebtedness; its payment from a special fund.*

Indebtedness legally incurred by a public corporation is often payable not out of the general revenues of the municipality but from some special fund raised through the imposition of taxes or special assessments upon certain property or in a certain manner and having for its purpose the education and ultimately the payment of such indebtedness.[207] This is especially true where the debt, whether evidenced by negotiable bonds or other forms, was contracted for the especial purpose of constructing works of internal or local improvement, namely, bridges, highways, and in municipal corporations proper for the grading, paving or general improvement of streets.[208] It seems to be the rule that where indebtedness is thus to be paid from a special fund created in the manner suggested, its legality will not be affected by the diversion of moneys from such funds or the failure to levy and collect the taxes which the corporation may be legally authorized to do in this behalf.[209]

§ 105. Its payment through the levy of taxes.

Corporate indebtedness legally incurred for a public purpose by the corporation in its capacity as a public or governmental agent is generally paid through the imposition and collection of taxes, and, as will be noted in a succeeding section,[210] the payment of a valid indebtedness is considered a public purpose and one authorizing such action. In the absence of a constitutional or statutory limitation upon the power to tax, the granting of the authority to incur an indebtedness impliedly authorizes the levy of taxes sufficient to pay the debt and the interest as it be-

* 6 Curr. Law, 733.

[207] Santa Ana Water Co. v. San Buenaventura, 56 Fed. 339; Smith Canal or Ditch Co. v. City of Denver, 20 Colo. 84; City of Indianapolis v. Wann, 144 Ind. 175; Wilson v. City of Shreveport, 29 La. Ann. 673; McElhinney v. City of Superior, 32 Neb. 744.

[208] Monroe County Com'rs v. Harrell, 147 Ind. 500, 46 N. E. 124; Affeld v. City of Detroit, 112 Mich. 560; Kelly v. City of Minneapolis, 63 Minn. 125; Baker v. City of Seattle, 2 Wash. St. 576.

[209] Elliott County v. Kitchen, 14 Bush (Ky.) 289; State v. City of Great Falls, 19 Mont. 518; City of Wilkesbarre's Appeal, 116 Pa. 246; White v. City of Decatur, 119 Ala. 476, 23 So. 999; Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532.

[210] City of Guthrie v. Ter., 1 Okl. 188, 31 Pac. 190.

comes due.[211] Though some few cases hold to the contrary, the weight of authority is sustained by the better reason.[212]

§ 106. Time and place of payment.

The ordinary rule applies to the payment of indebtedness of a public corporation in regard to the manner and time of its payments. The current and running expenses of the government and its indebtedness as well are payable at the office of the public treasury, unless otherwise specified, and at the time indicated by the evidence of indebtedness.[213] If no time is set for the payment, the debt is payable on demand. However, if the obligation is payable from a certain fund, the exhaustion of this fund necessarily postpones a payment. Interest can be collected on indebtedness payable at a certain time but not then paid by default of the debtor whether it consists of the principal of the debt or periodical installments of interest

IV. The Power of Public Corporations to Incur Indebtedness Through the Issue of Negotiable Securities.*

§ 107. Power to issue negotiable securities.

Must be expressly given. In preceding sections the power of the public corporation to incur a legal indebtedness as evidenced by instruments or obligations other than negotiable bonds has been generally considered. In the succeeding sections will be considered especially the power of a public corporation to incur indebtedness by the issue of negotiable bonds,[214] which it is

[211] Simonton, Mun. Bonds, § 133. Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. 655; Ralls County Court v. United States, 105 U. S. 735; City of Quincy v. Jackson, 113 U. S. 335; Young v. Tipton County Com'rs, 137 Ind. 323, 36 N. E. 1118; Feldman & Co. v. City Council of Charleston, 23 S. C. 62.

[212] Shackelton v. Town of Guttenberg, 39 N. J. Law, 660.

[213] Calhoun County Sup'rs v. Galbraith, 99 U. S. 214; Enfield v. Jordan, 119 U. S. 680; Sherlock v. Village of Winnetka, 68 Ill. 530; Skinker v. Butler County, 112 Mo. 332; Friend v. City of Pittsburg, 131 Pa. 305; National Bank of Republic v. City of St. Joseph, 31 Fed. 216; Davis v. Yuba County, 75 Cal. 452; Klaer v. Ridgway, 86 Pa. 529; Allentown School Dist. v. Derr, 115 Pa. 439.

* 6 Curr. Law, 704.

[214] See comments on Merrill v. Town of Monticello, 138 U. S. 673, in 5 Harv. Law Rev. 157, dealing with the subject of municipal bonds. Francis v. Howard County, 50 Fed. 44; Dent v. Cook, 45 Ga. 323; Holli-

held must be expressly given and can never be implied. As said by a writer on this question: "There is a marked legal distinction between the power to give a note to a lender for the amount of money borrowed or to a creditor for the amount due, and the power to issue for sale in open market a bond as a commercial security with immunity in the hands of a bona fide holder for value, from equitable defenses." [215] The power to issue bonds is usually conferred by statutory [216] or charter [217] provisions limited by constitutional measures.[218] The power thus granted must in its exercise be strictly followed, assuming the existence of all other conditions necessary to make it legal, in order to support an issue of bonds of this character, and if the right to issue bonds for a special purpose is given, in an action upon them, the authority relied on to support their validity must be specially pleaded.[219] The courts adhere so strictly to the rule that the power to issue negotiable bonds must be expressly given, that every person dealing with a corporation, it has been held many times, must at his peril take notice of the authority of the corporation and its power and the terms of the law by which the power

day v. Hildebrandt, 97 Iowa, 177; Livingston v. School Dist. No. 7, 9 S. D. 345.

[215] Smith, Mun. Corp. § 955.

[216] Scotland County v. Hill, 132 U. S. 107; Corning v. Meade County Com'rs (C. C. A.) 102 Fed. 57; City of Pierre v Dunscomb, 106 Fed. 611; Sawyer v. Colgan (Cal.) 33 Pac. 911; Neel v. Bartow County Com'rs, 94 Ga. 216; Lussem v. Sanitary Dist. of Chicago, 192 Ill. 404, 61 N. E. 544; State v. Babcock, 25 Neb. 709; Colburn v. Chattanooga W. R. Co., 94 Tenn. 43; Ball v. Presidio County, 88 Tex. 60, 29 S. W. 1042; Darke v. Salt Lake County Com'rs, 15 Utah, 467, 49 Pac. 257.

[217] Judson v. Plattsburg, 3 Dill. 181, Fed. Cas. No. 7,570; City of Brenham v. German-American Bank, 144 U. S. 173, reversing 35 Fed. 185; Lehman v. City of San Diego, 73 Fed. 105; City of Huron v. Second Ward Sav. Bank, 86 Fed. 272, 49 L. R. A. 534; City of Griffin v. Inman, 57 Ga. 370; Heilbron v. City of Cuthbert, 96 Ga. 312; Naegely v. City of Saginaw, 101 Mich. 532; City of Cumberland v. Magruder, 34 Md. 381; Town of Klamath Falls v. Sachs, 35 Or. 325, 57 Pac. 329; City of Williamsport v. Com., 84 Pa. 487; City of Memphis v. Bethel (Tenn.) 17 S. W. 191.

[218] Read v. City of Plattsmouth, 107 U. S. 568; Board of Liquidation of New Orleans v. State, 179 U. S. 622; City of Litchfield v. Ballou, 114 U. S. 190; John Hancock Mut. Life Ins. Co. v. City of Huron, 80 Fed. 652; Brattleboro Sav. Bank v. Trustees of Hardy Tp., 98 Fed. 524; City of Los Angeles v. Hance, 122 Cal. 77, 54 Pac. 387; Dundy v. Richardson County Com'rs, 8 Neb. 508.

[219] Hopper v. Town of Covington, 118 U. S. 148.

is supposed to be granted, even though such person be a bona fide holder for value of such securities.[220] In considering further this rule as to the power to issue negotiable bonds we have a difference between a public and a private corporation. The power of a private corporation to issue negotiable instruments or commercial paper is implied so long as the proceeds are to be used in the carrying on of its legitimate business. Borrowing money and issuing bonds, notes and bills as a rule are acts germane to the carrying on of the business of a private corporation. This is not true of public corporations. The ends for which they are organized or created are essentially different and in a broad sense the power to issue bonds for moneys borrowed is not included among the ordinary powers of such organizations.[221] They are governmental agents or bodies of limited powers and the rule of strict construction withholds a right or denies a power when it does not clearly exist or is not expressly given.

The capacity of public corporations to incur indebtedness is restricted through the application of every possible rule. The implied power is sometimes assumed as belonging to them of incurring indebtedness to pay current expenses or anticipating for a brief period only uncollected taxes. The burden of paying negotiable bonds with interest coupons issued as evidences of indebtedness for other purposes than those suggested is usually not felt by those authorizing the issue or incurring such indebtedness. They are generally issued payable after the lapse of long periods of time, the payment of the annual interest charges alone resting

[220] Nesbit v. Riverside Independent School-Dist., 144 U. S. 610, affirming 25 Fed. 635; United States v. Town of Cicero, 41 Fed 83; Risley v. Village of Howell, 57 Fed. 544; Quaker City Nat. Bank v. Nolan County, 66 Fed. 137; Inhabitants of Pompton v. Cooper Union, 101 U. S. 196; Gaddis v. Richland County, 92 Ill. 119; Silliman v. Fredericksburg, 27 Grat. (Va.) 119.

[221] City of Evansville v. Woodbury (C. C. A.) 60 Fed. 718; State v. City of Newark, 54 N. J. Law, 62, 23 Atl. 129. Simonton, Mun. Bonds, § 14; Police Jury v. Britton, 82 U. S. (15 Wall.) 566; City of Nashville v. Ray, 86 U. S. (19 Wall.) 468; Wiggins v. City of Lewiston (Idaho) 69 Pac. 286; Coquard v. Village of Oquawka, 192 Ill. 355, 61 N. E. 660; Witter v. Polk County Sup'rs, 112 Iowa, 380; Ashuelot Nat. Bank v. School Dist. No. 7 (C. C. A.) 56 Fed. 197; Lehman v. City of San Diego (C. C. A.) 83 Fed. 669; English v. Chicot County, 26 Ark. 454; State v. Moore, 45 Neb. 12, 63 N. W. 130; Morrison v. Inhabitants of Bernards, 36 N. J. Law, 219; Smathers v. Madison County Com'rs, 125 N. C. 480.

upon those immediately incurring the debt, the principal payment falling upon taxable interests many years in the future. It is a comparatively easy matter for extravagant officials or even the people themselves to incur indebtedness payable by negotiable bonds without regard to the burdens that may be placed upon posterity. Men are prone to be generous or even extravagant with the moneys of others and indifferent to their burdens. Where the task of paying a debt falls upon the one creating it, he will exercise greater care and more conservatism. Expenditures will be considered not only with reference to their results and expediency but also to tax levies. It is these considerations largely which have induced the courts to adopt and adhere to the rule stated at the beginning of this section, and we find repeated iterations in the decisions of all courts, state as well as Federal.[222]

§ 108. Ratification of void issue of negotiable bonds.

The common principle of law that an unauthorized act may be subsequently ratified does not apply to the issue of negotiable bonds by a public corporation. If such bonds are illegal or void because issued in excess of the original grant of power, or because it is lacking, it is clear that unless the power is subsequently given the corporation itself cannot by any act of its own ratify such issue, making that which was before illegal and void, legal and enforceable. The act of ratification cannot create the power where it never existed.[223]

§ 109. The issue of bonds; their purpose.

A public corporation in its capacity as such is restricted in all its actions by the principle that being a subordinate agent of government such acts to be valid must be done in furtherance of some well-recognized and legitimate aim or end of government,

[222] Police Jury v. Britton, 82 U. S. (15 Wall.) 566; Gause v. City of Clarksville, 5 Dill. 165, Fed. Cas. No. 5,276; Ketchum v. Buffalo, 14 N. Y. (4 Kern.) 356; City of Williamsport v. Com., 84 Pa. 487, 495. See, also, Abb. Mun. Corp. §§ 170, 171, citing and discussing many authorities, and the cases cited in preceding notes.

[223] Katzenberger v. City of Aberdeen, 121 U. S. 172; Kelley v. Milan, 127 U. S. 139–59; Doon Tp. v. Cummins, 142 U. S. 366; Sage v. Fargo Tp., 107 Fed. 383; Bell v. Waynesboro Borough, 195 Pa. 299; Simmonton, Mun. Bonds, § 247, p. 344; Bolles v. Town of Brimfield, 120 U. S. 759.

or, as has been frequently said, the corporation being public in its nature its expenditures especially must have for their end the advancement or execution of some public purpose. This principle of law is applicable in all its force to the issue of negotiable bonds by public corporations [224] for the appropriation of moneys raised through the levy and collection of public taxes upon taxable interests for private purposes amounts to confiscation and cannot be considered under any circumstances a legitimate use of such fund.

§ 110. Refunding bonds.

A public corporation during the course of its corporate existence may have incurred an authorized debt represented by negotiable bonds or other evidences of indebtedness. Such debt may consist of purchases made, obligations contracted, or moneys borrowed from time to time at varying rates of interest and payable at different times. In the administration of the corporate finances, it becomes good business policy and therefore expedient to fund or refund, as it is technically termed, such indebtedness, securing for the new debt as evidenced by an issue of negotiable bonds a uniform and usually lower rate of interest with provisions for the partial payment of the principal at times optional with the maker.

The objection has been raised that their issue creates an "indebtedness" or a "debt" within the meaning of a constitutional or other limitation and being in excess of the limit fixed by such provision therefore void. This objection has been repeatedly decided by the courts as not well taken, for the reason that the

[224] Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 655; City of Parkersburg v. Brown, 106 U. S. 487; Cole v. City of La Grange, 113 U. S. 1; Allen v. Inhabitants of Jay, 60 Me. 124; Lowell v. City of Boston, 111 Mass. 454; State v. Harper, 30 S. C. 586, 3 L. R. A. 111; Ohio Valley Iron Works v. Town of Moundsville, 11 W. Va. 1; Simonton, Mun. Bonds, § 40, p. 45; Feldman & Co. v. City Council of Charleston, 23 S. C. 57; Leavenworth County Com'rs v. Miller, 7 Kan. 479; State v. Osawkee Tp., 14 Kan. 418; Powell v. Heisler, 45 Minn. 549. Public corporations have no power to issue bonds or give aid to private sectarian schools, colleges or charitable institutions. See County of Cook v. Chicago Industrial School for Girls, 125 Ill. 540, 1 L. R. A. 437; Stevens v. St. Mary's Training School, 144 Ill. 336, 18 L. R. A. 832.

proceeds of such bonds are used not for the purpose of adding to the indebtedness or the obligations of the corporation but of paying outstanding ones, which immediately upon the exchange become canceled and not capable of enforcement as corporate obligations, the only legal indebtedness existing against the corporation as a result of the exchange consisting of the new refunding bonds.[225] The form of the debt alone is changed.

The power to issue refunding bonds is not ordinarily impliedly possessed, especially where the original authority to contract the indebtedness was not sufficiently broad to authorize the issue of bonds. If, however, the original bonded debt was legally incurred, some courts hold that the power to issue refunding bonds may be fairly inferred or implied from the original grant of authority.[226] There are also decisions to the effect that the power to borrow money carries with it the implied power to give as security or as evidence of such indebtedness the usual and necessary certificates or commercial instruments which enable the corporation to exercise the power expressly granted "to borrow money." It must not be understood, however, from the statements contained in the preceding sentences that the right to issue refunding bonds exists independent of an original grant of power or that they can be issued without regard to the formalities required by law in the making of negotiable bonds by such corporations. The power to issue negotiable bonds must have been given either directly in a specific instance or as derived from a prior general grant of authority limited in the manner and extent of its exercise by constitutional provisions.[227] The conditions precedent must be

[225] Gunnison County Com'rs v. E. H. Rollins & Sons, 173 U. S. 255; Aetna Life Ins. Co. v. Lyon County, 44 Fed. 329; affirmed in 82 Fed. 929; United States v. Board of Liquidation of City Debt of New Orleans (C. C. A.) 60 Fed. 387; McLean v. Valley County, 74 Fed. 389; affirmed in (C. C. A.) 79 Fed. 728; City of Huron v. Second Ward Sav. Bank (C. C. A.) 86 Fed. 272, 49 L. R. A. 534; Independent School Dist. v. Rew, 111 Fed. 1; 55 L. R. A. 364; California University v. Bernard, 57 Cal. 612; Lake County Com'rs v. Standley, 24 Colo. 1, 49 Pac. 23; Smith v. Stephan, 66 Md. 381; City of Port Huron v. McCall, 46 Mich. 565; Jefferson County Com'rs v. People, 5 Neb. 127.

[226] City of Galena v. Corwith, 48 Ill. 423; Simonton, Mun. Bonds, § 125, p. 165; Portland Sav. Bank v. City of Evansville, 25 Fed. 389; City of Pierre v. Dunscomb (C. C. A.) 106 Fed. 611.

[227] Merrill v. Town of Monticello, 138 U. S. 673; Fisher v. Board of Liquidation of New Orleans, 56 Fed. 49; Coffin v. City of Indianapolis,

performed, the agencies designated by law used to the same extent and in the same manner and legislative authority exist as in an issue of bonds not characterized by the term funding or refunding.[228]

§ 111. Purposes for which negotiable securities may be issued.*

The construction and improvement of public highways is without doubt a governmental purpose, and the expenditure of public moneys therefor is considered a public use and one authorizing not only the expenditure of public moneys but the incurrment of a debt, when specially given the right by a public corporation through the issue of negotiable bonds.[229]

The supplying of the inhabitants of a municipality with light has been held a public purpose for the appropriation or expenditure of public moneys, and though its expediency and legality is doubtful, the expenditure of public moneys for the purpose of constructing a lighting plant for supplying the city itself and public places with light is a public one within the recently accepted definition of such term. We therefore find cases holding that a public corporation may, if it deems this course expedient, assuming legislative authority, issue long-term negotiable bonds for the construction of a lighting plant.[230]

59 Fed. 221; Coquard v. Village of Oquawka, 192 Ill. 355, 61 N. E. 660; Bogart v. Lamotte Tp., 79 Mich. 294.

[228] Brown v. Ingalls Tp., 81 Fed. 485; Roberts v. City of Paducah, 95 Fed. 62; Coffin v. Richards, 6 Idaho, 741, 59 Pac. 562; City of Los Angeles v. Teed, 112 Cal. 319, 44 Pac. 580, disapproving Doon Tp. v. Cummins, 142 U. S. 366; Locke v. Davison, 111 Ill. 19; Riley v. Garfield Tp., 58 Kan. 299, 49 Pac. 85; Merrill v. Town of Monticello, 138 U. S. 673; Kiowa County Com'rs v. Howard (C. C. A.) 83 Fed. 296; Pratt County Com'rs v. Society for Savings (C. C. A.) 90 Fed. 233; Hartman v. Greenhow, 102 U. S. 672; New York Guaranty & Indemnity Co. v. Board of Liquidation, 105 U. S. 622. See, also, Abb. Mun. Corp. § 174, citing many cases.

* 6 Curr. Law, 704.

[229] Chilton v. Gratton, 82 Fed. 873; Devine v. Sacramento County Sup'rs, 121 Cal. 670; Catron v. La Fayette County, 106 Mo. 659; State v. Warren County Com'rs, 17 Ohio St. 558; Jones v. City of Camden, 44 S. C. 319; Greeley v. City of Jacksonville, 17 Fla. 174; Town of Parkland v. Gaines, 88 Ky. 562; Mittag v. Borough of Park Ridge, 61 N. J. Law, 151; Hubbard v. Sadler, 104 N. Y. 233.

[230] Fellows v. Walker, 39 Fed. 651; Middleton v. City of St. Augustine, 42 Fla. 287, 29 So. 421; Heilbron v. City of Cuthbert, 96 Ga. 312; City of Newport v. Newport Light Co., 84 Ky. 167; Janeway v.

It has already been stated in a preceding section that for the proper preservation of the public health a public corporation has the power to incur indebtedness for the purpose of constructing and operating a plant supplying water to the corporation itself for its necessary municipal purposes, and possibly to its inhabitants.[231] The power thus conferred includes the right to contract a floating debt or when specially authorized to issue negotiable bonds. The manner of the exercise of such power is usually discretionary,[232] and the only restriction upon it seems to be the limitation found in a constitutional or statutory provision fixing the amount of debt or indebtedness that a public corporation can legally incur.[233]

§ 12. Railway aid and miscellaneous purposes.

The reasons and the principle stated in a preceding section in regard to the incurrment of indebtedness or the granting of aid by public corporations for this purpose, apply to the issue of negotiable bonds. The principle is clearly established that where the legal authority exists public corporations may issue negotiable bonds for the purpose of constructing or aiding in the construction of lines of railway through or adjacent to them. A few of the many authorities will be cited in the note.[234]

City of Duluth, 65 Minn. 292; Mason v. Cranbury Tp., 68 N. J. Law, 149, 52 Atl. 568; Town of Klamath Falls v. Sachs, 35 Or. 325; Todd v. City of Laurens, 48 S. C. 395.

[231] Fergus Falls Water Co. v. City of Fergus Falls, 65 Fed. 586; Derby v. Modesto, 104 Cal. 515; Culbertson v. City of Fulton, 127 Ill. 30; Daily v. City of Columbus, 49 Ind. 169; Smalley v. Yates, 36 Kan. 519; Daniels v. Long, 111 Mich. 562; Janeway v. City of Duluth, 65 Minn. 292, 33 L. R. A. 511; Ackerman v. Buchman, 109 Pa. 254; Todd v. City of Laurens, 48 S. C. 395, 26 S. E. 682; State v. Town of Newberry, 47 S. C. 418.

[232] Town of Klamath Falls v. Sachs, 35 Or. 325; Ackerman v. Buchman, 109 Pa. 254.

[233] Buchanan v. City of Litchfield, 102 U. S. 278; City of Litchfield v. Ballou, 114 U. S. 190; Ironwood Water Works Co. v. City of Ironwood, 99 Mich. 454, 58 N. W. 371.

[234] Bates County v. Winters, 112 U. S. 325; Barnum v. Town of Okolona, 148 U. S. 393; Provident Life & Trust Co. v. Mercer County, 170 U. S. 593; Society for Savings v. City of New London, 29 Conn. 174; Stevens v. Inhabitants of Anson, 73 Me. 489; State v. Mississippi Bridge Co., 134 Mo. 321, 35 S. W. 592. Decisions collected in 31 Am. & Eng. Corp. Cas. 661, 669 and 682.

The construction of drains and sewers [235] and bridges [236] is considered a legitimate use of public moneys and a public corporation possesses the legal right to issue negotiable bonds where the cost of construction is in excess of the funds immediately available in the corporate treasury for such purpose controlled by constitutional provision relative to incurring debts. The authority in common with the issue of negotiable bonds for other purposes must, however, expressly exist in order to be available, and all of the formalities and limitations as required by law must be complied with to render them valid.[237]

§ 113. The construction of public buildings and local or internal improvements.

The power clearly exists in a public corporation when specially authorized by law to issue negotiable bonds for the construction of state capitols, county or public buildings,[238] court houses, jails and penitentiaries,[239] poorhouses, institutions for the feeble-minded or the insane,[240] school buildings, universities[241] and libraries.

[235] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup Ct. 56; Perkins County v. Graff, 114 Fed. 441; Clapp v. City of Hartford, 35 Conn. 66; Lussem v. Sanitary Dist. of Chicago, 192 Ill. 404, 61 N. E. 544; Cummings v. Hyatt, 54 Neb. 35, 74 N. W. 411; Robinson v. City of Goldsboro, 122 N. C. 211; Johnson v. City of Milwaukee, 88 Wis. 383.

[236] Ritchie v. Franklin County, 89 U. S. (22 Wall.) 67; Dodge County Com'rs v. Chandler, 96 U. S. 205; Naegely v. City of Saginaw, 101 Mich. 532; Bradley v. Franklin County, 65 Mo. 638; Burnett v. Maloney, 97 Tenn. 697, 34 L. R. A. 541; Mitchell County v. City Nat. Bank, 91 Tex. 361.

[237] Berlin Iron Bridge Co. v. City of San Antonio, 62 Fed. 882; Brazoria County v. Youngstown Bridge Co. (C. C. A.) 80 Fed. 10; Rondot v. Rogers Tp. (C. C. A.) 99 Fed. 202, and cases cited in opinion of Mr. Justice Taft; State v. Williams, 68 Conn. 131, 48 L. R. A. 465.

[238] McHugh v. City & County of San Francisco, 132 Cal. 381, 64 Pac. 570; Schneck v. City of Jeffersonville, 152 Ind. 204, 52 N. E. 212; Taggart v. City of Detroit, 71 Mich. 92.

[239] Alabama G. S. R. Co. v. Reed, 124 Ala. 253, 27 So. 19; Linn County Com'rs v. Snyder, 45 Kan. 636, and cases cited in opinion of Judge Green; Cushman v. Carver County Com'rs, 19 Minn. 295 (Gil. 252); Rogers v. Le Sueur County, 57 Minn. 434; Catron v. La Fayette County, 106 Mo. 659, 17 S. W. 577.

[240] Keyes v. St. Croix County, 108 Wis. 136, 83 N. W. 637.

[241] Board of Education of Pierre v. McLean, 106 Fed. 817; Wetmore v. City of Oakland, 99 Cal. 146;

The use of public moneys for the laying out or improvement of streets [242] and parks,[243] or the construction of public works not coming within the classes noted in the preceding section,[244] is considered a public use for which public corporations may when authorized by the legislature loan their credit or issue negotiable bonds for the immediate payment of their cost, and the rule also applies to the construction or the aiding in the construction of works of internal improvement, the phrase usually applied to those works of general improvement made by the state itself or public quasi corporations in the exercise under lawful authority of their governmental duties.[245]

§ 114. The power to issue and the conditions precedent to its exercise.

The issue of negotiable bonds by a public corporation is not considered one of its implied or incidental powers. The authority must be expressly conferred by statutory or constitutional provision. In order to limit the powers of public corporations in this respect even when the authority may be expressly granted, such authority usually confers the right only upon the perform-

Sherlock v. Village of Winnetka, 68 Ill. 530. State v. City of Terre Haute, 87 Ind. 212; Taylor v. Brownfield, 41 Iowa, 264; Board of Education of Topeka v. Welch, 51 Kan. 792, 33 Pac. 654; Revell v. City of Annapolis, 81 Md. 1, 31 Atl. 695; State v. School Dist. No. 9, 10 Neb. 544; Pierce, Butler & Pierce Mfg. Co. v. Bleckwenn, 131 N. Y. 570; State v. Bacon, 31 S. C. 120, 9 S. E. 765.

[242] Hitchcock v. City of Galveston, 96 U. S. 341; Burlington Sav. Bank v. City of Clinton, 111 Fed. 439; German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; Porter v. City of Tipton, 141 Ind. 347, 40 N. E. 802.

[243] McHugh v. City and County of San Francisco, 132 Cal. 381, 64 Pac. 570; Boston Water-Power Co. v. City of Boston, 143 Mass. 546, 10 N. E. 318; Choate v. City of Buffalo, 167 N. Y. 597, 60 N. E. 1108; Johnson v. City of Milwaukee, 88 Wis. 383.

[244] City of Gladstone v. Throop (C. C. A.) 71 Fed. 341; McHugh v. City & County of San Francisco, 132 Cal. 381, 64 Pac. 570; State v. Ames, 87 Minn. 23, 91 N. W. 18; People v. Gravesend Sup'rs, 154 N. Y. 381.

[245] Burlington Tp. v. Beasley, 94 U. S. 310; Osborne v. Adams County, 109 U. S. 1, affirming 106 U. S. 181; Unted States v. Dodge County Com'rs, 110 U. S. 156; Blair v. Cuming County, 111 U. S. 363; Wiesmer v. Village of Douglas, 64 N. Y. 91; City of Kearney v. Woodruff (C. C. A.) 115 Fed. 90; Hughson v. Crane, 115 Cal. 404; Greeley v. City of Jacksonville, 17 Fla. 174.

* 6 Curr. Law, 704, 707.

ance by the corporation of certain conditions before such an issue can be lawfully made and therefore considered valid. These conditions ordinarily consist of prescribed formalities attending the issue. The legal authority as granted may give the right to corporate officials directly to be exercised through resolution or ordinance,[246] or certain acts may be required of them as necessary to set in motion the agency of a general or special election. Without this preliminary official action the authority may be considered as lacking even though an election is held resulting in the required affirmative vote.[247] Or, as usually the case, the right is granted the public corporation contingent upon consent of the people,[248] thus giving an opportunity to the tax-paying interests to pass upon the question of incurring or an increase of indebtedness. The strict performance of all such conditions precedent is considered necessary to the validity of the bonds,[249] unless the corporation is estopped through the operation of principles of law to be considered in subsequent sections.

§ 115. Performance of conditions precedent required of railway companies.

The issue of negotiable bonds by public corporations to aid in the construction of railway lines through, into or adjoining them, has been of frequent occurrence under lawful authority, the basis of the legality of such issue being the supposed public advantage and benefit derived by the community issuing such bonds from the construction of such enterprises.[250] Railway lines are broadly regarded by the courts quasi public highways affording facilities for the rapid and economical transportation of the products of the country and its inhabitants. They are considered works of

[246] Lehman v. City of San Diego, 73 Fed. 105; McCoy v. Briant, 53 Cal. 250; Naegely v. City of Saginaw, 101 Mich. 532; Town of Ontario v. Hill, 99 N. Y. 324.

[247] People v. Pueblo County Com'rs, 2 Colo. 360; Wilmington, O. & E. C. R. Co. v. Onslow County Com'rs, 116 N. C. 563, 21 S. E. 205; Schultze v. Manchester Tp., 61 N. J. Law, 518, 40 Atl. 589.

[248] Hill v. City of Memphis, 134 U. S. 198; Locke v. Davison, 111 Ill. 19; Steines v. Franklin County, 48 Mo. 167; Cotton v. Inhabitants of New Providence, 47 N. J. Law, 401.

[249] Douglas v. Town of Chatham, 41 Conn. 211; Town of Eagle v. Kohn, 84 Ill. 292; Hutchinson & S. R. Co. v. Kingman County Com'rs, 48 Kan. 70, 15 L. R. A. 401.

[250] Chilton v. Town of Gratton, 82 Fed. 873; Carpenter v. Greene County, 130 Ala. 613, 29 So. 194.

6 Curr. Law, 707.

internal improvement of such a character and of such public utility and advantage as to authorize the issue of negotiable bonds considered with reference to use of public funds,[251] but this fact of itself does not create such legal right. Legislative or constitutional authority must exist, and when this is wanting, aid granted in the form of a negotiable bond will be regarded illegal and therefore void.[252] The basis of the issue being as suggested it follows that if there is a failure to perform the conditions required by the act giving authority, the bonds may be regarded illegally issued and therefore void even in the hands of bona fide purchasers.[253] Conditions most frequently found in acts authorizing the issue of bonds for this purpose are those fixing the time [254] and the manner [255] of the construction and use of the line or the terminal facilities in aid of which the issue is made. A speedy or proper completion of the enterprise may be necessary in order that the public corporation reap the advantage and benefits supposedly derived,[256] and if the railway company fails in either of these respects the courts have generally held that there exists such a failure to perform the conditions precedent prescribed as will render void the bonds issued. The courts do not generally require more than a substantial compliance with such conditions.[257]

The principles as stated in this section apply equally to dona-

[251] City of Macon v. East Tennessee, V. & G. R. Co., 82 Ga. 501.

[252] City of San Diego v. Higgins, 115 Cal. 170.

[253] German Sav. Bank v. Franklin County, 128 U. S. 526; Commissioners Ct. of Limestone County v. Rather, 48 Ala. 433; Chiniquy v. People, 78 Ill. 570; Harrington v. Town of Plainview, 27 Minn. 224. See, also, Abb. Mun. Corp. § 185.

[254] Buffalo & J. R. Co. v. Falconer, 103 U. S. 821; German Sav. Bank v. Franklin County, 128 U. S. 526; Grattan Tp. v. Chilton (C. C. A.) 97 Fed. 145; McManus v. Duluth, C. & N. R. Co., 51 Minn. 30.

[255] Taylor v. City of Ypsilanti, 105 U. S. 60; Purdy v. Town of Lansing, 128 U. S. 557; Grattan Tp. v Chilton (C. C. A.) 97 Fed. 145; Bras v. McConnell, 114 Iowa, 401, 87 N. W. 290.

[256] Chicago, P. & S. W. R. Co. v. Town of Marseilles, 84 Ill. 145; Cedar Rapids, I. F. & N. W. R. Co. v. Elseffer, 84 Iowa, 510, 51 N. W. 27; Baltimore & D. P. R. Co. v. Pumphrey, 74 Md. 86, 21 Atl. 559; Clark v. Town of Rosedale, 70 Miss. 542; Midland Tp. v. County Board of Gage County, 37 Neb. 582; Murfreesboro R. Co. v. Hertford County Com'rs, 108 N. C. 56, 12 S. E. 952.

[257] Nevada Bank v. Steinmitz, 64 Cal. 301; Barner v. Bayless, 134 Ind. 600; Pittsburgh, C., C. & St. L. R. Co. v. Harden, 137 Ind. 486, 37 N. E. 324. But see Lamb v. Anderson, 54 Iowa, 190; Guillory v. Avoyelles R. Co., 104 La. 11, 28 So. 899; Town of Birch Cooley v. First

tions of money or subscriptions to the capital stock of the corporation and the issue of negotiable bonds. In connection with this subject it is well to distinguish, however, between a failure to perform conditions precedent as required by the terms of the authority, and promises or oral conditions made by officers or agents of the railway at the time when the aid is solicited and having for their purpose the inducing of such aid. The performance of conditions precedent required by law is necessary to the validity of the bonds. The fact that promises or oral agreements are not fulfilled when not made a part of the authority does not, necessarily, affect their validity in the hands of bona fide holders.[258]

§ 116. Conditions precedent to issue.*

The notice or order for an election. The legal authority granting the right to a public corporation to issue negotiable bonds for any of the purposes considered in the preceding sections, provides, ordinarily, for its contingent exercise upon consent of the people at an election held for such purpose, after notice given to the electors in the form prescribed of the purpose of the election, and the questions to be submitted.[259]

Its form. Statutes generally prescribe the form of the notice or order calling for an election. Their provisions are considered mandatory, at least so far as the essentials of the notice are concerned,[260] but not the precise wording or phraseology. The test of the sufficiency or validity of a notice is not whether the words and punctuation as prescribed by the statutes were used, unless so required, but whether the voters at the election held pursuant to such notice understood the questions submitted to them.[261]

Nat. Bank of Minneapolis, 86 Minn. 385.

[258] Town of Brooklyn v. Aetna Life Ins. Co., 99 U. S. 362; Carpenter v. Greene County, 130 Ala. 613, 29 So. 194; Town of Eagle v. Kohn, 84 Ill. 292; Chicago, K. & W. R. Co. v. Ozark Tp., 46 Kan. 415, 26 Pac. 710; State v. City of Minneapolis, 32 Minn. 501; Simonton, Mun. Bonds, § 274.

* 6 Curr. Law, 707.

[259] Brown v. Ingalls Tp., 81 Fed. 485; Knox County v. Ninth Nat. Bank, 147 U. S. 91; Skinner v. City of Santa Rosa, 107 Cal. 464, 40 Pac. 742, 29 L. R. A. 512; Hauswirth v. Mueller, 25 Mont. 156, 64 Pac. 324. See, also, Abb. Mun. Corp. § 186b.

[260] Baltimore & D. P. R. Co. v. Pumphrey, 74 Md. 86, 21 Atl. 559.

[261] National Bank of Commerce v. Town of Grenada, 41 Fed. 87; Brown v. Ingalls Tp., 81 Fed. 485;

Its service. The service or publication of the notice or order calling the election must be made in the manner and for the time required by law if such provisions are to be found. If there is a failure to publish or serve for the time required, the election held in pursuance may not be regarded as legal, though the presumption that it is legal usually exists.[262] This presumption, however, does not follow when there is a failure to publish or post the notice.[263]

§ 117. Petition or ordinance.

The holding of an election at which is submitted the question of granting railroad aid bonds is frequently contingent, not upon the giving of the notice required by the statute or action by public officials, but upon the filing of a petition signed by a requisite number of qualified voters or electors of the taxing district.[264] The requirements of such petition and the right of individuals to sign is generally prescribed by statute and no general rule can be stated which will apply in all cases. Its filing, however, signed by the proper number of qualified petitioners, is held to be jurisdictional and the basis of the validity of all subsequent proceedings.[265]

The calling of an election by ordinance. The right existing in a public corporation to issue negotiable bonds based upon a grant of legislative power is usually exercised, as already suggested in a preceding section, by the people at an election held to vote upon the questions submitted, including that of the issue of bonds.[266]

Yarish v. Cedar Rapids, I. F. & N. W. R. Co., 72 Iowa, 556, 34 N. W. 417; Hamilton v. Village of Detroit, 83 Minn. 119, 85 N. W. 933; Chicago, B. & Q. R. Co. v. Village of Wilber, 63 Neb. 624, 88 N. W. 660.

[262] Humboldt Tp. v. Long, 92 U. S. 642; Knox County v. Ninth Nat. Bank, 147 U. S. 91; People v. Trustees of Village of Ft. Edwards, 70 N. Y. 28; Cleveland v. City Council of Spartanburg, 54 S. C. 83, 31 S. E. 871; Baker v. City of Seattle, 2 Wash. St. 576, 27 Pac. 462.

[263] Town of Clarksdale v. Broaddus, 77 Miss. 667, 28 So. 954.

[264] Kline v. City Council of Streator, 78 Ill. App. 42; Young v. Webster City & S. W. R. Co., 75 Iowa, 140; Hamilton v. Village of Detroit, 85 Minn. 83; Hoxie v. Scott, 45 Neb. 199; People v. Sawyer, 52 N. Y. 296.

[265] Chicago, K. & W. R. Co. v. Chase County Com'rs, 43 Kan. 760; Craig v. Town of Andes, 93 N. Y. 405; Cummings v. Hyatt, 54 Neb. 35; Simonton, Mun. Bonds, § 65. Contra, Town of Andes v. Ely, 158 U. S. 312; Calhoun v. Millard, 121 N. Y. 69, 8 L. R. A. 248.

[266] Calhoun County Sup'rs v. Galbraith, 99 U. S. 214; Brown v. Carl,

This election may be called by notice pursuant to an order of a quasi judicial body or upon the passage of an ordinance [267] or resolution [268] by the proper legislative body of the corporation. Whatever the mode may be as prescribed by law for the calling of the election, whether by notice, petition or ordinance, it will not be considered valid unless the statutory requirements are followed.[269]

§ 118. The election; time and manner of holding.

The election authorized by statutory authority at which the question of an issue of negotiable bonds is submitted to the electors for their determination should be held in the manner and in accordance with laws controlling general elections,[270] unless the authority specially provides otherwise.[271] The hours during which the polls shall be kept open, the manner of balloting, the form of ballots and the questions submitted, are all regulated in the manner suggested.[272] The recitals of officers authorized by law in regard to the legality of the election as affected by the time, notice and manner of holding, are regarded as conclusive.[273]

§ 119. Voters and their qualifications.

The qualification of electors at such an election is fixed by legislative action,[274] and the findings or conclusions of officials author-

111 Iowa, 608, 82 N. W. 1033; McCreight v. City of Camden, 49 S. C. 78, 26 S. E. 984; Davis v. Wayne County Ct., 38 W. Va. 104.

[267] National Bank of Commerce v. Town of Grenada, 44 Fed. 262; Bills v. City of Goshen, 117 Ind. 221, 3 L. R. A. 261.

[268] Atchison Board of Education v. De Kay, 148 U. S. 591; City of Alma v. Guaranty Sav. Bank (C. C. A.) 60 Fed. 203; Swan v. Arkansas City, 61 Fed. 478; City of Paterson v. Barnet, 46 N. J. Law, 62.

[269] Force v. Town of Batavia, 61 Ill. 99; Chicago & I. R. Co. v. Pinckney, 74 Ill. 277.

[270] Town of Concord v. Robinson, 121 U. S. 165; People v. Town of Berkeley, 102 Cal. 298, 36 Pac. 591, 23 L. R. A. 838; Bowen v. Town of Greenesboro, 79 Ga. 70; Union Bank of Richmond v. Town of Oxford, 116 N. C. 339, 21 S. E. 410.

[271] Humboldt Tp. v. Long, 92 U. S. 642; Bras v. McConnell, 114 Iowa, 401, 87 N. W. 290; People v. Caruthers School Dist., 102 Cal. 184, 36 Pac. 396.

[272] Hammond v. City of San Leandro, 135 Cal. 450, 67 Pac. 692; Bras v. McConnell, 114 Iowa, 401, 87 N. W. 290.

[273] Humboldt Tp. v. Long, 92 U. S. 642; Roberts v. Bolles, 101 U. S. 119; Anderson County Com'rs v. Beal, 113 U. S. 227.

[274] Walnut Tp. v. Wade, 103 U. S.

ized to pass upon all matters of fact in connection with such qualifications, the number of votes cast or the questions submitted, is generally regarded as conclusive and the public corporation estopped to deny such findings or conclusions;[275] this principle of law is especially true in regard to those matters dehors the record.[276]

§ 120. Negotiable securities; delivery and registration.

Delivery to purchasers by the proper officials, and when duly authorized, of negotiable bonds issued by public corporations, is essential to their validity.[277] So long as the bonds remain undelivered, it has been held repeatedly, equities between parties who may be entitled to receive them and the public corporation can be investigated and determined by the courts which could not be so considered after delivery.[278] In some cases the word "issue" or "issuance" is held to include delivery, and the issue is not regarded complete until delivery is made.[279] Though other authorities hold to the contrary and still others hold that the term "issue" applies only to delivery.[280]

As one of the required formalities that negotiable bonds when

695; McGraw v. Greene County Com'rs, 89 Ala. 407; Heilbron v. City of Cuthbert, 96 Ga. 312; Everett v. Smith, 22 Minn. 53; Webb v. Lafayette County, 67 Mo. 354; Cummings v. Hyatt, 54 Neb. 35, 74 N. W. 411; Claybrook v. Rockingham County Com'rs, 117 N. C. 456; Kimball v. Hendee, 57 N. J. Law, 307, 30 Atl. 894; Wilson v. City of Florence, 39 S. C. 397, 30 L. R. A. 720; Id., 40 S. C. 290.

[275] Livingstone County v. First Nat. Bank of Portsmouth, 128 U. S. 127; Reynolds & H. Const. Co. v. City of Monroe, 45 La. Ann. 1024, 13 So. 400; State v. School Dist. No. 13, 13 Neb. 466; McDowell v. Massachusetts & S. Const. Co., 98 N. C. 514, 2 S. E. 351; Nelson v. Haywood County, 89 Tenn. 781, 11 S. W. 885.

[276] Citizens' Sav. & Loan Ass'n v. Perry County, 156 U. S. 692; Woolley v. Louisville S. R. Co., 93 Ky. 223.

[277] Lewis v. Barbour County Com'rs, 105 U. S. 739; Young v. Clarendon Tp., 132 U. S. 340; Town of Prairie v. Lloyd, 97 Ill. 180; Jones v. City of Seattle, 19 Wash. 669. See Cooke v. United States, 12 Blatchf. 49, Fed. Cas. No. 3,178.

[278] Alessandro Irr. Dist. v. Savings and Trust Co., 88 Fed. 928; D'Esterre v. City of New York, 104 Fed. 605; Stewart v. Lansing, 104 U. S. 505; Schmid v. Village of Frankfort, 131 Mich. 197, 91 N. W. 131; People v. Walter, 68 N. Y. 403; Satterlee v. Strider, 31 W. Va. 781.

[279] Corning v. Meade County Com'rs, 102 Fed. 57.

[280] Perkins County v. Graff, 114 Fed. 441.

issued may become valid and enforceable obligations outstanding against the public corporations issuing them, there may be provisions, either in the general statutes or in the special act granting authority, requiring their registration in some designated office and by some designated officer.[281] If bonds contain recitals to the effect that they have been duly registered, if they contain such statement or if a certificate of registration is endorsed upon them, this will be held conclusive of the facts recited in such statement or endorsement irrespective of the true facts.[282] Some authorities hold that a registration does not deprive bonds of their negotiable character or quality.[283]

§ 121. Official signatures and seals.

Assuming the legality of negotiable bonds in other respects, it is still necessary to their validity that they be signed by such officers or persons as are legally capable of binding the corporation. These may be either those especially designated by the special authority for the issue of bonds or general officials, the scope of whose authority and power would include the performance of such an act.[284] The rule of law controlling this subject, however, is not the strict and technical one, but that which requires a sub-

[281] Anthony v. Jasper County, 101 U. S. 693; Coler v. City of Cleburne, 131 U. S. 162; D'Esterre v. City of Brooklyn, 90 Fed. 586; St. Louis County Com'rs v. Nettleton, 22 Minn. 356; State v. Babcock, 19 Neb. 223; State v. Roggen, 22 Neb. 118; Whann v. Coler, 159 N. Y. 535; Flagg v. School Dist. No. 70, 4 N. D. 30, 58 N. W. 499.

[282] Converse v. City of Ft. Scott, 92 U. S. 503; Rock Creek Tp. v. Strong, 96 U. S. 271; German Sav. Bank of Franklin County, 128 U. S. 526, 540; Comanche County v. Lewis, 133 U. S. 198; City of Cairo v. Zane, 149 U. S. 122; Flagg v. School Dist. No. 70, 4 N. D. 30, 58 N. W. 499, 25 L. R. A. 363; Priestly v. Watkins, 62 Miss. 798; Hardeman County v. Foard County, 19 Tex. Civ. App. 212, 47 S. W. 30, 536.

[283] D'Esterre v. City of Brooklyn, 90 Fed. 586; Manhattan Sav. Inst. v. New York Nat. Exch. Bank. 170 N. Y. 58; Cronin v. Patrick County, 4 Hughes, 524–530, 89 Fed. 79; Savannah & M. R. Co. v. Lancaster, 62 Ala. 555–563; Simonton, Mun. Bonds, § 115.

[284] Town of Grand Chute v. Winegar, 82 U. S. (15 Wall.) 355; Town of Aroma v. Auditor of State, 15 Fed. 843; Swan v. Arkansas City, 61 Fed. 478; Coler v. Santa Fe County Com'rs, 6 N. M. 88, 27 Pac. 619; Yesler v. City of Seattle, 1 Wash. St. 308; Middleton v. Mullica Tp., 112 U. S. 433; Town of Windsor v. Hallett, 97 Ill. 204; Lane v. Inhabitants of Embden, 72 Me. 354.

stantial compliance with ordinary rules affecting the making of negotiable instruments by corporate officials,[285] and the acts of de facto officers as to third persons which are binding upon the public corporation.[286]

The failure to fix the official seal of the public corporation to the bonds does not necessarily invalidate them,[287] neither does the failure of officials whose signatures are necessary to affix their own seals where required by law, after their signature.[288] The date of the signing and sealing, as determined by inspection of the face of a bond is conclusive.[289] The use of engraved or lithographic signatures does not invalidate bonds where the use of such signatures has been formally adopted by the officials signing.[290]

Sealing. It is not necessary, unless the statute expressly requires it, to affix the corporate seal, and this is particularly true where a corporation has no official seal.[291] The authorities are divided upon the question of the validity of bonds issued and in the hands of bona fide purchasers without a corporate seal affixed where the statute requires this to be done.[292]

[285] Curtis v. County of Butler, 24 How. (U. S.) 435; German Ins. Co. City of Manning, 78 Fed. 900; Lane v. Inhabitants of Embden, 72 Me. 354; Thompson v. Village of Mecosta, 127 Mich. 522, 86 N. W. 1044.

[286] Anthony v. Jasper County, 101 U. S. 693; Ralls County v. Douglass, 105 U. S. 728; Natonal Life Ins. Co. v. Board of Education of Huron, 62 Fed. 778; Coler v. Dwight School Tp., 3 N. D. 249, 55 N. W. 587, 28 L. R. A. 649; Norton v. Shelby County, 118 U. S. 426; City of Louisville v. Bank of Louisville, 174 U. S. 439, 19 Sup. Ct. 753; McDonald v. City of New York, 68 N. Y. 23-27.

[287] Draper v. Springport, 104 U. S. 501; Wiley v. Board of Education, 11 Minn. 371 (Gil. 268); Bernards v. Stebbins, 109 U. S. 341; Morton v. Carlin, 51 Neb. 202.

[288] Town of Solon v. Williamsburgh Sav. Bank, 114 N. Y. 122.

[289] Anthony v. Jasper County, 101 U. S. 693; Village of Kent v. Dana (C. C. A.) 100 Fed. 56; Inhabitants of Stoughton v. Paul, 173 Mass. 148, 53 N. E. 272; State v. Moore, 46 Neb. 590; Brown v. Bon Homme County, 1 S. D. 216.

[290] McKee v. Vernon County, 3 Dill. 210, Fed. Cas. No. 8,851; Pennington v. Baehr, 48 Cal. 565; Town of Lexington v. Union Nat. Bank, 75 Miss. 1, 22 So. 291.

[291] Draper v. Town of Springport, 104 U. S. 501; Bernards Tp. v. Stebbins, 109 U. S. 341; Stockton v. Powell, 29 Fla. 1, 15 L. R. A. 42; Morton v. Carlin, 51 Neb. 202.

[292] Draper v Town of Springport, 104 U. S. 501; Bernards Tp. v. Stebbins, 109 U. S. 341; Augusta Bank v. City of Augusta, 49 Me. 507; Town of Solon v. Williamsburgh Sav. Bank, 114 N. Y. 122; City of San Antonio v. Gould, 34 Tex. 49

§ 122. Form.

The necessary authority for an issue of negotiable bonds by a public corporation may contain provisions prescribing their formal wording. If in form they comply with the requirements of general rules of law fixing the form of valid instruments of such a character, it will be considered sufficient.[293] Where statutory authority does not require or prescribe a certain form, general rules of law will apply and bonds that may be defective in form when compared with others issued by the same corporation of a prescribed form will not be held invalid because of such deficiencies.[294] To protect bona fide holders, the courts are inclined to extend this principle further and to hold that bonds, where the form is prescribed by the legislative authority for their issuance, although not complying technically with the form as thus required but yet which in their substantial features follow the law, will not be considered invalid on account of such variation.[295]

The rule of a substantial compliance only with the provisions of legal authority also applies to the dating of the bond and the term of its maturity.

The rate of interest, however, as authorized, it is held, is not a directory provision, but mandatory, and a bond issued bearing interest at a different rate from that authorized, may be held invalid even in the hands of a bona fide holder or at least to the extent of such excess of interest rate.[296]

[293] Atchison Board of Education v. De Kay, 148 U. S. 591; D'Esterre v. City of New York (C. C. A.) 104 Fed. 605; Merced County v. California University, 66 Cal. 25.

[294] Wood v. Allegheny County, 3 Wall. Jr. 267, Fed. Cas. No. 17,937.

[295] City of New Orleans v. Clark, 95 U. S. 644; Calhoun County Sup'rs v. Galbraith, 99 U. S. 214; Board of Education of Atchison v. De Kay, 148 U. S. 591; D'Esterre v. City of New York, 104 Fed. 605; Murphy v. City of San Luis Obispo, 119 Cal. 624, 51 Pac. 1085; Hadley v. Dague, 130 Cal. 207, 62 Pac. 500; Woodward v. Reynolds, 58 Conn. 486; State v. Village of Perrysburg, 14 Ohio St. 472. Bonds issued in the name of the "Town of Perrysburg" instead of "the incorporated village of Perrysburg" held valid. State v. Anderson County, 67 Tenn. (8 Baxt.) 249; Brownson v. Smith, 93 Tex. 614.

[296] Lewis v. Clarendon, 5 Dill. 329, Fed. Cas. No. 8,320; E. M. Derby & Co. v. City of Modesto, 104 Cal. 515; City of Quincy v. Warfield, 25 Ill. 317; Sherlock v. Village of Winnetka, 68 Ill. 530; Beattie v. Andrew County, 56 Mo. 42; Parkinson v. City of Parker, 85 Pa. 313.

§ 123. The ratification of void securities.

The general rule of law applying to the ratification of an issue of bonds void for the want of authority, seems to be that to the extent the legislature could, constitutionally, authorize the bonds of public corporations, bonds issued without sufficient statutory authority may be cured or ratified by subsequent legislation and this ratification by the legislature, it has been held, is, in all respects, equal to original authority and cures all defects in power to issue and all irregularities in the execution of the bonds.[297] A ratification also, it has been held, relates back to the time of issuance of the bonds. It may apply, as already suggested, to informalities or defects in the execution or delivery,[298] or to defects and deficiencies in the legal authority to issue,[299] whether such defect of power arises from the fact that there was no legally incorporated organization capable of issuing bonds,[300] or granting the existence of a legal corporation that such corporation did not possess the legal power to issue the bonds or to issue them for the precise purpose.[301]

§ 124. Negotiable bonds; their validity.

The presumption of law at all times exists in favor of the validity of negotiable bonds, both as to the sufficiency of power and

[297] Bissell v. City of Jeffersonville, 24 How. (U. S.) 287; Read v. City of Plattsmouth, 107 U. S. 568; Bolles v. Town of Brimfield, 120 U. S. 759; City of Columbus v. Dennison (C. C. A.) 69 Fed. 58.

Stated negatively, the rule is that the legislature cannot, "by retrospective act exercise greater power than they could prospectively." Katzenberger v. City of Aberdeen, 121 U. S. 172; Quaker City Nat. Bank v. Nolan County, 59 Fed. 660; Gaddis v. Richland County, 92 Ill. 119; Choisser v. People, 140 Ill. 21; Shawnee County Com'rs v. Carter, 2 Kan. 115; Sykes v. Town of Columbus, 55 Miss. 115; Hasbrouck v. City of Milwaukee, 13 Wis. 37.

[298] Town of Duanesburgh v. Jenkins, 57 N. Y. 177, 191.

[299] Steele County v. Erskine (C. C. A.) 98 Fed. 215, affirming judgment in Erskine v. Steele County, 87 Fed. 630; Campbell v. City of Indianapolis, 155 Ind. 186.

[300] Comanche County v. Lewis, 133 U. S. 198; Harper County Com'rs v. Rose, 140 U. S. 71; New York Life Ins. Co. v. Cuyahoga County Com'rs (C. C. A.) 106 Fed. 123; Riley v. Garfield Tp., 54 Kan. 463.

[301] Utter v. Franklin, 172 U. S. 416; Schneck v. City of Jeffersonville, 152 Ind. 204, 52 N. E. 212.

the existence of all conditions and requirements necessary to and attendant upon their formal execution and delivery. This presumption throws upon the party attacking their validity, the burden of proof as to all questions raised.[302] This presumption of validity applies equally to the extent of necessary legal authority, the performance of all necessary acts by public officials and the existence of all the conditions necessary to warrant the issue of valid bonds.[303]

As affected by adverse decisions of a state court. The Federal authorities have adopted without dissent the rule that where a public corporation under authority of law has issued its bonds, negotiable in their character and payable to bearer at a future date, and which under the judicial decisions of the state are valid at the time of issue, that their validity before maturity, in the hands of bona fide purchasers, cannot be affected by subsequent decisions of the state courts holding the law, under authority of which the bonds were issued, unconstitutional or void.[304] Such decisions may affect the validity of bonds not issued, but all persons into whose hands bonds already issued may come have the right to consider the constitutionality of such authority conclusively established.[305]

[302] Murray v. Lardner, 69 U. S. (2 Wall.) 110; County of Henry v. Nicolay, 95 U. S. 619; Lake County Com'rs v. Keene Five-Cent Sav. Bank (C. C. A.) 108 Fed. 505; Washington County v. Williams (C. C. A.) 111 Fed. 801; Fidelity Trust Guaranty Co. v. Fowler Water Co., 113 Fed. 560; Coler v. Santa Fe County Com'rs, 6 N. M. 88, 27 Pac. 619; City of Memphis v. Bethel (Tenn. Ch. App.) 17 S. W. 191; Galbraith v. City of Knoxville, 105 Tenn. 453, 58 S. W. 643.

[303] City of South St. Paul v. Lamprecht Bros. Co. (C. C. A.). 88 Fed. 449; Union Bank of Richmond v. Oxford Com'rs, 90 Fed. 7; Burlington Sav. Bank v. City of Clinton, 106 Fed. 269; Akin v. Ordinary of Bartow County, 54 Ga. 59.

[304] Gelpcke v. City of Dubuque, 68 U. S. (1 Wall.) 175. "The sound and true rule is, that if the contract when made was valid by the laws of the state as then expounded by all departments of the government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts, altering the construction of the law." Douglass v. Pike County, 101 U. S. 677; State v. Saline County Ct., 48 Mo. 390; Stallcup v. City of Tacoma, 13 Wash. 141.

[305] Warren County v. Marcy, 97 U. S. 96; Waples v. City of Dubuque, 116 Iowa, 167, 98 N. W. 194.

§ 125. Validity of issue in excess of legal authority.*

A public corporation may possess the legal authority to issue negotiable bonds to and including a certain amount. There may be constitutional provisions prohibiting the incurring of indebtedness in excess of this amount, or the special authority may be limited to such amount. The corporation does, however, issue its negotiable bonds in excess of the sum thus legally authorized and the question of the validity of such excess bonds then arises. There are found two lines of decisions, the one holding that the bonds issued in excess of the amount authorized are totally void, even in the hands of bona fide purchasers,[306] the other holding that where a public corporation has issued bonds to an amount in excess of its constitutional or legislative authority, all of which were issued at the same time, each bond is valid to the extent of its proportionate share of the indebtedness authorized.[307]

§ 126. Legality as affected by subsequent legislation.

The validity of bonds, corporate indebtedness or obligations is determined by laws in force at the time when such bonds were issued or obligations incurred. They cannot be affected by changes subsequently made and this rule would apply in the case of bonds authorized but not yet formally executed and delivered.[308] This rule also applies to legislation which impairs or destroys the power of a public corporation to levy taxes for the payment of either principal or interest of bonds legally issued, which power, it is held, is a part of the contract between the corporation and the holder of negotiable bonds which cannot be impaired by subsequent action in violation of that provision of the Federal constitution forbidding the passage of laws impairing the obligation of a contract.[309] The principle also prevents the passage of legislation

* 6 Curr. Law, 710, 713.

[306] Francis v. Howard County, 50 Fed. 44; Aetna Life Ins. Co. v. Lyon County, 95 Fed. 325; Everett v. Independent School Dist. of Rock Rapids, 109 Fed. 697; Sutro v. Rhodes, 92 Cal. 117; Catron v. La Fayette County, 106 Mo. 659.

[307] City of Columbus v. Woonsocket Inst. of Savings (C. C. A.) 114 Fed. 162; Nolan County v. State, 83 Tex. 182, 17 S. W. 823.

[308] German Sav. Bank v. Franklin County, 128 U. S. 526; Slocomb v. City of Fayetteville, 125 N. C. 362; People v. Otis, 90 N. Y. 48; Stallcup v. City of Tacoma, 13 Wash. 141.

[309] Von Hoffman v. City of Quincy, 71 U. S. (4 Wall.) 535; Lou-

or other action diverting funds or property which at the time of the issue of the bonds was either devoted or to be devoted to the payment of either their principal or interest.[310] The general tendency of all courts, both Federal and state, is to protect the contract obligation existing in favor of the bona fide purchaser of negotiable securities issued by public corporations. The clause of the Federal constitution prohibiting a state from passing any law impairing the obligation of a contract affords a real and substantial protection to the investor.

§ 127. Securities of public corporations; their legal character.

Bonds issued by public corporations, either with or without coupons attached, were, at first, considered by the courts as non-negotiable instruments; later, however, they came to be recognized as negotiable paper and bona fide holders for value were protected to the same extent as holders of negotiable notes and bills under the law merchant. They are now fully and universally recognized as negotiable instruments.[311] The legal effect of this rule is to place them on an equality before the law with ordinary negotiable paper pertaining to the commercial business of the country and to make them marketable and vendible and before maturity, free of equities between the original parties.[312]

§ 128. Validity of negotiable securities. The doctrine of estoppel.

Bonds possessing all of the elements and characteristics of negotiable paper are not subject, before maturity, when in the hands

isiana v. Pilsbury, 105 U. S. 278; Port of Mobile v. Watson, 116 U. S. 289; Seibert v. Lewis, 122 U. S. 284; Padgett v. Post (C. C. A.) 106 Fed. 600. See, also, Abb. Mun. Corp. § 204, citing many cases.

[310] Louisana v. Police Jury of St. Martin's Parish, 111 U. S. 716; St. Tammany Water Works v. New Orleans Water Works, 120 U. S. 64; Bassett v. City of El Paso, 88 Tex. 168, 30 S. W. 893; Smith v. City of Appleton, 19 Wis. 468.

[311] Gelpcke v. City of Dubuque, 68 U. S. (1 Wall.) 175. "Bonds and coupons like these by universal commercial usage and consent have all the qualities of commercial paper." Meyer v. City of Muscatine, 68 U. S. (1 Wall.) 384; Police Jury of Tensas v. Britton, 82 U. S. (15 Wall.) 566; City of Nashville v. Ray, 86 U. S. (19 Wall.) 468; Carter County v. Sinton, 120 U. S. 517, 7 Sup. Ct. 650.

[312] Marion County Com'rs v. Clark, 94 U. S. 278; Consolidated Ass'n of Planters v. Avengo, 28 La. Ann. 552; Belo v. Forsythe County Com'rs, 76 N. C. 489; Boyd v. Kennedy, 38 N. J. Law, 146; Mason v. Frick, 105 Pa. 162.

of bona fide and innocent purchasers for value, to equities that may exist in favor of the maker. The doctrine of estoppel has been held to apply to the maker by recitals, course of dealing and the payment of interest to be considered in succeeding sections.

The nonperformance of conditions required to be fulfilled by the party entitled to bonds, if acquiesced in, is not sufficient to render such bonds invalid,[313] and a public corporation having the authority to issue bonds for one purpose is estopped from setting up as a defense against a bona fide and innocent purchaser of such bonds, the fact that the moneys derived from their sale were used for a different purpose, perhaps an illegal one, from that for which they purported or were authorized to be issued or that such moneys were never expended for the benefit of the corporation.[314] Some authorities also hold that where the statutory authority exists and bonds are issued, the maker will be estopped from denying their execution when it has received and retained the benefit of the moneys evidenced by the bonds.[315] These principles of estoppel apply, however, only to innocent purchasers, or those not having knowledge of irregularities or defects in issue, execution and delivery,—a rule so well established that the citation of many authorities is unnecessary.[316]

The principle or doctrine of equitable estoppel also is applied for the protection of the bona fide holder of such bonds, namely, that where public corporations with full knowledge of defects in

[313] Knox County Com'rs v. Aspinwall, 21 How. (U. S.) 539; Randolph County v. Post, 93 U. S. 502, and cases cited; Shurtleff v. Inhabitants of Wiscasset, 74 Me. 130.

[314] Hackett v. City of Ottawa, 99 U. S. 86. A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind and cannot by their representations or silence involve others in onerous engagements and then defeat the calculations and claims their own conduct had superinduced." National Life Ins. Co. v. Board of Education of Huron (C. C. A.) 62 Fed. 778; D'Esterre v. City of New York, 104 Fed. 605; Borough of Freeport v. Marks, 59 Pa. 253; Jones v. City of Camden, 44 S. C. 319; Nolan County v. State, 83 Tex. 182, 17 S. W. 823; Town of Clifton Forge v. Alleghany Bank, 92 Va. 283, 23 S. E. 284.

[315] Mobile v. Sands, 127 Ala. 493, 29 So. 26; Oswego Tp. v. Anderson, 44 Kan. 214, 24 Pac. 486. See, however, Municipal Security Co. v. Baker County, 33 Or. 338, 54 Pac. 174.

[316] Cromwell v. Sac County, 96 U. S. 59; Scotland County v. Hill, 132 U. S. 107; Town of Essex v. Day, 52 Conn. 483.

the manner of issue after having received and retained the benefits of the proceeds of their bonds[317] recognize directly or indirectly the validity of such bonds by the levying of a tax for their payment or the payment of interest,[318] the voting or retention of stock purchased with the proceeds,[319] their recognition by public officials or the corporation as valid,[320] the retention of the consideration,[321] or the issue or renewal of refunding bonds to replace them,[322] will not be heard to raise the question of such irregularities as a defense in an action against them.

§ 129. The doctrine of recitals.

The principle of estoppel also applies to recitals in bonds, which are statements of the constitutional or legislative authority

[317] Rondot v. Rogers Tp. (C. C. A.) 99 Fed. 202; New York Life Ins. Co. v. Cuyahoga County Com'rs (C. C. A.) 106 Fed. 123.

[318] Hill v. City of Memphis, 134 U. S. 198; Citizens' Sav. & Loan Ass'n v. Perry County, 156 U. S. 692. But see to the contrary, Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 665. See, also, Washington County v. Williams, 111 Fed. 801; People v. Cline, 63 Ill. 394; Brown v. Milliken, 42 Kan. 769; Town of Eminence v. Grasser's Ex'r, 81 Ky. 52; Town of Lexington v. Union Nat. Bank, 75 Miss. 1, 22 So. 291; Town of Cherry Creek v. Becker, 123 N. Y. 161.

[319] Pendleton County v. Amy, 80 U. S. (13 Wall.) 297.

[320] Atchison Board of Education v. De Kay, 148 U. S. 591; Cronin v. Patrick County, 89 Fed. 79; Washington County v. Williams, 111 Fed. 801; Town of Essex v. Day, 52 Conn. 483; State v. Scott County Com'rs, 58 Kan. 491, 49 Pac. 663; Town of Eminence v. Grasser's Ex'r, 81 Ky. 52. But see to the contrary, Weismer v. Village of Douglas, 64 N. Y. 91.

[321] Pendleton County v. Amy, 80 U. S. (13 Wall.) 297; Anderson County Com'rs v. Beal, 113 U. S. 227; Third Nat. Bank of Syracuse v. Town of Seneca Falls, 15 Fed. 783. Such bonds have been held void in some cases but the corporation receiving their proceeds will be required to do equity to the other party. Morville v. American Tract Soc., 123 Mass. 129. But the supreme court of the United States has held in a recent case that the rule will not apply where there is an absolute want of power and a violation of the constitution in issuing the bonds. See Hedges v. Dixon County, 150 U. S. 182; Chaffee County v. Potter, 142 U. S. 355.

[322] Graves v. Saline County, 161 U. S. 359; Brown v. Ingalls Tp., 81 Fed. 485; Barber County Com'rs v. Society for Savings (C. C. A.) 101 Fed. 767; Town of Lexington v. Union Nat. Bank, 75 Miss. 1, 22 So 291; State v. Dakota County, 22 Neb. 448, 35 N. W. 225; Hills v Peekskill Sav. Bank, 101 N. Y. 490 See, also, Abb. Mun. Corp. §§ 207 208.

for their issue and the performance or compliance with all of the conditions required by such authority necessary to be done or performed as precedent to a valid issue. The doctrine as applied to recitals is substantially this, that where legislative authority has been given a public corporation or its officials the power to issue bonds upon the performance of some precedent condition,[323] such as a particular manner of holding an election or the existence of some fact,[324] and where it may be gathered from the legislative enactment that certain officials of the corporation are invested with the power to decide whether the conditions precedent have been complied with or such facts existed,[325] their recital or statement in the bonds issued by them that they have been so complied with or that certain conditions exist, is conclusive of the fact and binding upon the corporation;[326] for, as said by the supreme court of the United States, "The recital is itself a decision of the fact by the appointed tribunal."[327] Such a recital or "decision," as it is termed, is conclusive upon the corporation as to bonds in the hands of a bona fide holder who, it is held, as to such matters, is not bound to look for further evidence of a compliance with the conditions of issue.[328] The recitals or statements work no estoppel, however,

[323] Clay County v. Society for Savings, 104 U. S. 579; Anderson County Com'rs v. Beal, 113 U. S. 227; National Life Ins. Co. v. Board of Education of Huron, 62 Fed. 778.

[324] Bernards Tp. v. Morrison, 133 U. S. 523; City of South St. Paul v. Lamprecht Bros. Co. (C. C. A.) 88 Fed. 449; Stanley County Com'rs v. Coler (C. C. A.) 113 Fed. 705, reversing on rehearing the judgment in (C. C. A.) 96 Fed. 284, and affirming 89 Fed. 257.

[325] Humboldt Tp. v. Long, 92 U. S. 642; Warren County v. Marcy, 97 U. S. 96; Town of Coloma v. Eaves, 92 U. S. 484; Livingston County v. First Nat. Bank, 128 U. S. 102; Rondot v. Rogers Tp. (C. C. A.) 99 Fed. 202.

[326] Knox County Com'rs v. Aspinwall, 21 How. (U. S.) 539; City of Menasha v. Hazard, 102 U. S. 81; Harter Tp. v. Kernochan, 103 U. S. 562; Town of Andes v. Ely, 158 U. S. 312; City of Evansville v. Dennett, 161 U. S. 434; Gunnison County Com'rs v. Rollins, 173 U. S. 255; Lane v. Schomp, 20 N. J. Eq. (5 C. E. Green) 82; Belo v. Forsythe County Com'rs, 76 N. C. 489; Coler v. Dwight School Tp., 3 N. D. 249, 55 N. W. 587, 28 L. R. A. 649; Kerr v. City of Corry, 105 Pa. 282; Wilson v. Board of Education of Huron, 12 S. D. 535, 81 N. W. 952; Cumberland County Sup'rs v. Randolph, 89 Va. 614, 16 S. E. 722. See, also, Abb. Mun. Corp. §§ 208, 209, citing many cases.

[327] Town of Coloma v. Eaves, 92 U. S. 484. One of the leading cases on this point.

[328] Johnson County Com'rs v. Jannary, 94 U. S. 202; Henry County v.

except when made by those officials or that tribunal either especially designated or having the general power to perform such acts. If not made by those having authority to decide and assert the facts which constitute the conditions precedent to a legal issue of bonds, the recitals will not be accepted as a substitute for proof.[329]

§ 130. Estoppel not applying to recitals of law.*

The principle of estoppel does not apply, however, to recitals of authority, for in this respect, it is held, every purchaser of bonds acquires and holds them charged with full notice of the possession of power in the first instance on the part of the public corporation to issue them: the question of legislative authority in a public corporation to issue negotiable bonds cannot be concluded by mere recitals, even when the bonds have come into the hands of bona fide holders for value,[330] and the doctrine of recitals, although applied frequently, has never been carried to the extreme of holding that public officials can, by their recitals or decisions, create a power on the part of the public corporation to issue bonds where none existed,[331] or to bonds containing no recital of authority.

Nicolay, 95 U. S. 619; State v. Saline County Ct., 48 Mo. 390; Claybrook v. Rockingham County Com'rs, 117 N. C. 456; Flagg v. School Dist. No. 70, 4 N. D. 30, 58 N. W. 499, 25 L. R. A. 363; State v. Fayette County Com'rs, 37 Ohio St. 526.

[329] Knox County Com'rs v. Aspinwall, 21 How. (U. S.) 539; Chisholm v. City of Montgomery, 2 Woods, 584, Fed. Cas. No. 2,686; Town of Coloma v. Eaves, 92 U. S. 484; Town of Oregon v. Jennings, 119 U. S. 74; Rich v. Mentz Tp., 134 U. S. 632; Simonton, Mun. Bonds, §§ 209 et seq.; Hainer, Mun. Secur. §§ 435 et seq.; Abb. Mun. Corp. § 209.

* 6 Curr. Law, 711.

[330] Town of South Ottawa v. Perkins, 94 U. S. 260; McClure v. Oxford Tp., 94 U. S. 429; Katzenberger v. City of Aberdeen, 121 U. S. 172; Nolan County v. State, 83 Tex. 182, 17 S. W. 823; Mitchell County v. City Nat. Bank, 91 Tex. 361, 43 S. W. 880.

[331] Town of South Ottawa v. Perkins, 94 U. S. 260; Hedges v. Dixon County, 150 U. S. 182; Nat. Life Ins. Co. v. Board of Ed. of Huron (C. C. A.) 62 Fed. 778; Fairfield v. Rural Independent School Dist., 111 Fed. 453; Buncombe County Com'rs v. Payne, 123 N. C. 432; National Life Ins. Co. v. Mead, 13 S. D. 37, 82 N. W. 78, 48 L. R. A. 785, rehearing denied, 13 S. D. 342, 83 N. W. 335. See, also, Abb. Mun. Corp. § 211, citing and discussing many cases.

§ 131. Bona fide holder.*

The question of who is or may become a bona fide holder[332] of negotiable bonds issued by public corporations is an important one, for upon the existence of such a condition depends the application of the principles of estoppel, as suggested in the preceding sections. To constitute a bona fide holder it is necesary that one should have purchased the bond before maturity,[333] have given value for it,[334] and have no legally competent knowledge of defects or irregularities in the manner of issue which as against one having such knowledge does not preclude the municipality from setting them up.[335] But one cannot be a bona fide holder where the conditions or circumstances are such as to charge him with notice of the want of original authority to issue bonds.[336]

§ 132. Coupons; their legal character.

The express authority granted public corporations to issue negotiable bonds bearing interest, carries with it the power to issue evidences of the latter obligation in the form of coupons payable to bearer or to order. A coupon is therefore a written promise by the maker of the bond to which it may be attached to pay one of the installments of interest due upon the prineipal.[337] When

[332] Mercer County v. Hacket, 68 U. S. (1 Wall.) 83; Sayles v. Garrett, 110 U. S. 288; Independent Dist. of Rock Rapids v. Society for Savings, 98 Iowa, 581, 67 N. W. 370; State v. Hart, 46 La. Ann. 40; Copper v. Jersey City, 44 N. J. Law, 634; 29 Am. Law Reg. (N. S.) 380; Simonton, Mun. Bonds, §§ 116 et seq.; Abb. Mun. Corp. § 213.

[333] Town of Grand Chute v. Winegar, 82 U. S. (15 Wall.) 355; Cromwell v. Sac County, 96 U. S. 51.

[334] D'Esterre v. City of Brooklyn, 90 Fed. 586; Town of Greenburg v. International Trust Co. (C. C. A.) 94 Fed. 755; Thompson v. Village of Mecosta, 127 Mich. 522, 86 N. W. 1044.

[335] Scotland County v. Hill, 132 U. S. 107; Suffolk Sav. Bank v. City of Boston, 149 Mass. 364, 4 L. R. A. 516; Schmid v. Village of Frankfort, 131 Mich. 197, 91 N. W. 131; City of Lynchburg v. Slaughter, 75 Va. 57.

[336] Farmers' Loan & Trust Co. v. City of Galesburg, 133 U. S. 156; Cagwin v. Town of Hancock, 84 N. Y. 532.

[337] Atchison Board of Education v. De Kay, 148 U. S. 591; Moore v. Greenhow, 114 U. S. 338. And see Vashon v. Greenhow, 135 U. S. 713, construing the coupon contract of the state of Virginia as authorized by the funding act of March 30, 1871, and March 28, 1879. Poindexter v. Greenhow, 84 Va. 441, 4 S. E. 742.

legally issued by public corporations they, equally with the bonds to which annexed, if payable to bearer or payable to order and endorsed in blank, become transferable by delivery and are subject to the same rules and principles of negotiable paper that apply to the bond itself with respect to the rights and title of a bona fide holder.[338] The bona fide holder of such coupons, therefore, has the right to invoke the same principles of law which attach to a negotiable bond and apply the same doctrines of estoppel and, though separated from the bond to which they were once attached, they retain the same nature and character as the bond.[339]

§ 133. Negotiable securities; sale.

The manner or time of sale of bonds may be so irregular as to raise a serious question of their validity even though in all other respects such bonds are legal.* Circumstances to be considered in determining their validity when considered with reference to sale may be their disposal at a price less than par when prohibited in this respect by law;[340] the consideration for the sale whether cash received or the delivery of the bonds as the payment of the original obligation;[341] the mode of sale or delivery whether through a financial agent or representative of the corporation, directly by

[338] City of Lexington v. Butler, 81 U. S. (14 Wall.) 282; Town of East Lincoln v. Davenport, 94 U. S. 801; Cooper v. Town of Thompson, 13 Blatchf. 434, Fed. Cas. No. 3,202; Manhattan Sav. Inst. v. New York Nat. Exch. Bank, 170 N. Y. 58.

[339] Lake County Com'rs v. Platt (C. C. A.) 79 Fed. 567; Augusta Bank v. City of Augusta, 49 Me. 507; First Nat. Bank of St. Paul v. Scott County Com'rs, 14 Minn. 77 (Gil. 59).

* 6 Curr. Law, 709.

[340] Richardson v. Lawrence County, 154 U. S. 536; National Life Ins. Co. v. Board of Education of Huron (C. C. A.) 62 Fed. 778; Williams v. Board of Revenue of Butler County, 123 Ala. 432, 26 So. 346; Town of Greenwich, 114 N. Y. 518, 4 L. R. A. 685, following Village of Ft. Edward v. Fish, 156 N. Y. 363, and distinguishing Town of Greenburg v. International Trust Co. (C. C. A.) 94 Fed. 755; Whelen's Appeal, 108 Pa. 162; Germania Sav. Bank v. Town of Darlington, 50 S. C. 337; Hunt v. Fawcett, 8 Wash. 396.

[341] Com. v. Inhabitants of Williamstown, 156 Mass. 70, 30 N. E. 472; Hoag v. Town of Greenwich, 133 N. Y. 152; Evans v. Tillman, 38 S. C. 238, 17 S. E. 49; Duryee v. Friars, 18 Wash. 55; Neale v. Wood County Ct., 43 W. Va. 90, 27 S. E. 370.

its own officers or after public notice to the best bidder;[842] and the time of sale considered with reference to their formal and legal issue or delivery.[843] In all these essentials the law presumes a full compliance with the terms of authority and it is seldom that bonds valid in other respects will be held void because of irregularities in the time or manner of sale. A substantial compliance with formalities attendant upon their disposition is all the courts require and this rule is especially applicable where there is authority for their issue, the manner of their issue has been regular and they have passed into the hands of bona fide holders.[844]

§ 134. The rule as to the payment of void bonds.

When bonds are held void, either for want of authority or other reasons, it may release the public corporation from the obligation to pay according to their terms. It does not, however, always relieve it from its obligation to pay the debt which may arise through the transaction. The authorities are quite unanimous in holding that where bonds have been issued, sold and the proceeds arising from such sales appropriated by the public corporation to its proper purposes, there exists a debt or obligation due and owing from the corporation to the party advancing moneys which can be enforced generally in an action on a quantum meruit or valebant for moneys or goods had and received.[845]

[842] Roberts & Co. v. Taft (C. C. A.) 109 Fed. 825; Smith v. Los Angeles County, 99 Cal. 628; Sidway v. South Park Com'rs, 120 Ill. 496, 11 N. E. 852; Sherlock v. Village of Winnetka, 59 Ill. 389; Young v. Tipton County Com'rs, 137 Ind. 323, 36 N. E. 1118; Suffolk Sav. Bank v. City of Boston, 149 Mass. 364; Powell v. Heisler, 45 Minn. 549.

[843] Gaddis v. Richland County, 92 Ill. 119; Attorney General v. City of Salem, 103 Mass. 138; Attorney General v. Burrell, 31 Mich. 25; People v. Booth, 32 N. Y. 397.

[844] In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354; Duval County v. Knight, 42 Fla. 366, 29 So. 408; Nininger v. Carver County Com'rs, 10 Minn. 133 (Gil. 106).

[845] Marsh v. Fulton County, 77 U. S. (10 Wall.) 676; Deyo v. Otoe County, 37 Fed. 246; Jefferson County v. Hawkins, 23 Fla. 223, 2 So. 362; Brown v. City of Atchison, 39 Kan. 37; State v. Hart, 46 La. Ann. 54; Borough of Rainsburg v. Fyan, 127 Pa. 74, 4 L. R. A. 336; Livingston v. School Dist. No. 7, 11 S. D. 150, 76 N. W. 301; Paul v. City of Kenosha, 22 Wis. 262. But see Norton v. Town of Dyersburg, 127 U. S. 160; Morton v. City of Nevada, 41 Fed. 582.

§ 135. The duty to levy taxes for the payment of interest or principal of negotiable bonds.

The authority granted the corporation, so it is held, to issue interest-bearing negotiable bonds, carries with it the implied power to levy taxes to pay principal and interest.[346] The power may be expressly given, but if not, it is held to exist as an implied one and of such a character as to constitute a contract between the bondholder and the corporation which cannot be affected or destroyed until the contract is satisfied.[347] A public corporation may be compelled by mandamus to levy the necessary taxes for the payment of either interest or principal notwithstanding the fact that the legislature of the state may have assumed or attempted to repeal the authority to levy such taxes.[348] A bond by its terms made payable from a fund raised in a specific manner or from taxes levied upon specific property and not so phrased as to constitute a general obligation of the public corporation issuing it is payable only from such fund or taxes. The obligation exists only to pay the net proceeds of such taxes or the amount which may be available in such fund.[349]

§ 136. Rights of a holder to maintain an action.

The bona fide holder of negotiable bonds has the right to maintain an action against a corporation issuing them upon its failure to comply with the terms of the contract they contain. This right is not affected by a failure of corporate officials to perform their duties. The obligation on the part of the public corporation exists independent of the performance of official duties by its agents from time to time[350] even if the bonds in question are those known as "local improvement" bonds payable from a spe-

[346] Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 655; United States v. North Carolina, 136 U. S. 211; Young v. Tipton County Com'rs, 137 Ind. 323, 36 N. E. 1118; State v. Macon County Ct., 68 Mo. 29.

[347] Von Hoffman v. City of Quincy, 71 U. S. (4 Wall.) 535; Buck v. People, 78 Ill. 560.

[348] Hicks v. Cleveland, 106 Fed. 459; Bates v. Gregory (Cal.) 22 Pac. 683.

[349] Braun v. Benton County Com'rs, 66 Fed. 476; State v. Trammel, 106 Mo. 510; McCless v. Meekins, 117 N. C. 34; Baker v. Meacham, 18 Wash. 319.

[350] Robertson v. Blaine County, 85 Fed. 735; Marsh v. Town of Little Valley, 64 N. Y. 112; Thornburg v. City of Tyler, 16 Tex. Civ. App. 439, 43 S. W. 1054.

cial fund or the proceeds of special taxes or assessments. Such fact does not prevent the holder from maintaining an action at law to enforce collection.[351]

V. Warrants and Miscellaneous Evidence of Indebtedness.

§ 137. Warrants; definition; by whom drawn.

A warrant is an instrument in writing executed by the proper officials acknowledging an indebtedness and directing the officials in charge of the fund from which it is payable to pay the same on demand or at some specified date.[352] The issue of warrants is the method by which the ordinary and current expenses of a public corporation are paid from current revenues; funds for their payment are usually immediately available; they are commonly drawn in pursuance of direct charter or statutory authority that may or may not specify the required details preliminary to their issue. Without such charter or statutory provisions, it is clear that public officials have no power to bind their principal in this respect.[353] That a warrant be valid, it is necessary then that it shall be issued or drawn by the proper official,[354] and authorized, audited

[351] Waite v. City of Santa Cruz, 75 Fed. 967; Shepard v. Tulare Irr. Dist., 94 Fed. 1; Washington County v. Williams, 111 Fed. 801; Farson v. Sioux City, 106 Fed. 278; Mather v. City & County of San Francisco (C. C. A.) 115 Fed. 37; Hammond v. Place, 116 Mich. 628, 74 N. W. 1002.

[352] City Council of Nashville v. Ray, 86 U. S. (19 Wall.) 468; City of Little Rock v. United States (C. C. A.) 103 Fed. 418; City of Springfield v. Edwards, 84 Ill. 626; Law v. People, 87 Ill. 385; Burrton v. Harvey County Sav. Bank, 28 Kan. 390; City of Terrell v. Dessaint, 71 Tex. 770; Daggett v. Lynch, 18 Utah, 49. The grant of authority to make a contract, it has been held, carries with it the implied power to issue warrants or orders in payment of the obligations of the contract. See Speer v. Kearney County Com'rs (C. C. A.) 88 Fed. 749; Allen v. Town of Lafayette, 89 Ala. 641, 9 L. R. A. 497.

[353] Stratton v. Green, 45 Cal. 149; People v. Canty, 55 Ill. 33; Flagg v. Parish of St. Charles, 27 La. Ann. 319; Aull Sav. Bank v. City of Lexington, 74 Mo. 104.

[354] Kearney County Com'rs v. McMaster (C. C. A.) 68 Fed. 177; Connor v. Morris, 23 Cal. 447; Clark v. Polk County, 19 Iowa, 248; Alberts v. Torrent, 98 Mich. 512; Bailey v. City of Philadelphia, 167 Pa. 569; Saline County v. Wilson, 61 Mo. 237; State v. Collins, 21 Mont. 448, 53 Pac. 1114; Oakley v. Valley County, 40 Neb. 900.

or allowed by that corporate body or official to whom is delegated by law this particular duty.[355]

Upon the presentation of a claim or charge audited or allowed by certain designated officers the duty may be obligatory and the official is then given no discretionary powers in the matter; it may then become his duty to draw such warrant even without request of the party in whose favor it is to be issued.[356] If he neglect or refuse to perform the duty, its performance can be compelled by mandamus directed against him.[357]

Unless the law otherwise provides, it is not necessary that there should be funds available for the payment of the warrant immediately upon its issue. The warrant is simply written evidence of an acknowledged legal claim against the public corporation; the time of its payment does not affect or determine the question of its validity.[358]

§ 138. Fund from which payable.

The usual method for the payment of the ordinary current expenses of a corporation is through the appropriation of moneys by a duly authorized body for this specified purpose. Where an appropriation is made for payment from a specific fund, the warrant can be drawn on and is payable only from such fund.[359]

[355] State v. Atkinson, 25 Wash. 283, 65 Pac. 531; Clark County Sup'rs v. Lawrence, 63 Ill. 32; Polk County v. Sherman, 99 Iowa, 60, 68 N. W. 562; Saline County v. Wilson, 61 Mo. 237; Ex parte Florence Graded School Com'rs, 43 S. C. 11, 20 S. E. 794; Henderson v. People, 17 Colo. 587; Kensington Elec. Co. v. City of Philadelphia, 187 Pa. 446; In re Statehouse Commission (R. I.) 33 Atl. 453.

[356] Board of Liquidation of Louisiana v. McComb, 92 U. S. 531; Jeffersonian Pub. Co. v. Hilliard, 105 Ala. 576; Sehorn v. Williams, 110 Cal. 621; State v. Buckles, 39 Ind. 272; Prime v. McCarthy, 92 Iowa, 569, 61 N. W. 220; Alberts v. Torrent, 98 Mich. 512; State v. Kenney, 10 Mont. 496, 26 Pac. 388; State v. Moore, 40 Neb. 854, 59 N. W. 755, 25 L. R. A. 774; Hayes v. Davis, 23 Nev. 318, 46 Pac. 888; Pace v. Ortiz, 72 Tex. 437.

[357] Wilson v. Neal, 23 Fed. 129; Babcock v. Goodrich, 47 Cal. 488; Ray v. Wilson, 29 Fla. 342, 10 So. 613; Rice v. Gwinn, 5 Idaho, 394, 49 Pac. 412; Evans v. McCarthy, 42 Kan. 426; State v. Clinton, 28 La. Ann. 47.

[358] Speer v. Kearney County Com'rs (C. C. A.) 88 Fed. 749; City of Little Rock v. United States (C. C. A.) 103 Fed. 418; State v. Sherman, 46 Iowa, 415; State v. Kenney, 10 Mont. 496, 26 Pac. 388.

[359] Peake v. City of New Orleans, 38 Fed. 779; McGowan v. Ford, 107 Cal. 177, 40 Pac. 231; Travelers'

The fiscal authorities cannot be compelled to pay warrants drawn against a special fund or appropriation from the general revenues.[360] Although a public corporation by drawing a warrant against a particular fund does not guarantee the existence of such a fund, it does guarantee the moneys in that fund legally belonging to it and if there has been a diversion or misappropriation of such moneys for other purposes, the corporation is liable from its general revenues to that extent.[361]

§ 139. Audit and allowance of claims as preliminary to issuance.

The audit and allowance of a claim is a recognition of its existence as a valid outstanding indebtedness and where the law provides for such action, if not done, warrants although drawn by the proper officials are not binding.[362] After the issuance of a warrant upon an audit and allowance, the public corporation is estopped to set up as a defense, in an action upon it, irregularities in the audit or allowance; to illustrate, the audit and allowance at a special instead of a regular meeting of the board upon whom such duty rests.[363]

§ 140. Their legal character.

Warrants issued by public corporations, purchased before maturity and for value, are subject to all defenses or equities, although in contradiction to their recitals, which may exist between

Ins. Co. v. City of Denver, 11 Colo. 434, 18 Pac. 556; Park v. Candler, 113 Ga. 647, 39 S. E. 89; People v. Treasurer of Merritt Tp., 38 Mich. 243; State v. Bartley, 41 Neb. 277, 59 N. W. 907; Morrow v. Surber, 97 Mo. 155; State v. Wright, 17 Mont. 565; People v. Wood, 71 N. Y. 371.

[360] Potter v. City of Whatcom, 25 Wash. 207, 65 Pac. 197.

[361] Wilder v. City of New Orleans (C. C. A.) 87 Fed. 843; Shotwell v. City of New Orleans, 36 La. Ann. 938. See, also, the following cases holding to a general liability where there is a neglect on the part of the corporation to collect or create the special fund designated. City of New Orleans v. Warner, 175 U. S. 120; Denny v. City of Spokane, 79 Fed. 719; Reilly v. City of Albany, 112 N. Y. 30, 2 L. R. A. 648.

[362] State v. City of New Orleans, 50 La. Ann. 880; Wilson v. State, 53 Neb. 113, 73 N. W. 456; State v. Hallock, 20 Nev. 326, 22 Pac. 123; In re Statehouse Bills, 19 R. I. 390, 35 Atl. 213.

[363] Speer v. Kearney County Com'rs (C. C. A.) 88 Fed. 749; Los Angeles County v. Lankershim, 100 Cal. 525.

the parties to the transaction whether such bona fide holder is the original payee or a subsequent purchaser for value.[364] In this respect they differ radically from negotiable bonds or securities issued by public corporations. The rules of law concerning the issue of warrants are applied with less strictness than in the case of negotiable bonds for this reason.

Warrants are not negotiable instruments in the full sense of the term as used in the law merchant. They are non-negotiable and merely prima facie evidence of a valid claim against the corporation issuing them.[365]

They are negotiable only so far that when endorsed, they become transferable by delivery and the holder may maintain an action thereon in his own name.

§ 141. Form.

A public corporation transacts its business, exercises all its powers and performs all its duties through its duly appointed or elected agents. To protect the corporation therefore, there are well defined and established rules of law controlling and regulating the manner in which and the acts that may be done by such agents for and in behalf of their principal. This is especially true of all those acts by or through which a pecuniary responsibility or obligation may be imposed upon a public corporation. The law or custom may require warrants in their form to be phrased in a certain manner,[366] signed by certain officials, endorsed by others[367] and sealed with the seal of the corporation, if any.[368]

[364] Watson v. City of Huron (C. C. A.) 97 Fed. 449.

[365] City of Nashville v. Ray, 86 U. S. (19 Wall.) 468; Lake County Com'rs v. Keene Five-Cent Sav. Bank (C. C. A.) 108 Fed. 505; Wall v. County of Monroe, 103 U. S. 74; Hill v. City of Memphis, 134 U. S. 198; Pacific Pav. Co. v. Mowbray, 127 Cal. 1; People v. Johnson, 100 Ill. 537; East Union Tp. v. Ryan, 86 Pa. 459; Hyde v. County of Franklin, 27 Vt. 185; West Philadelphia Title & Trust Co. v. City of Olympia, 19 Wash. 150, 52 Pac. 1015. See, also, Abb. Mun. Corp. § 230, citing many cases.

[366] Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301; State v. Pilsbury, 29 La. Ann. 787; Taylor v. Chickasaw County Sup'rs, 74 Miss. 23, 19 So. 834.

[367] Apache County v. Barth (Ariz.) 53 Pac. 187; National Bank of D. O. Mills & Co. v. Herold, 74 Cal. 603, 16 Pac. 507; State v. Dickerman, 16 Mont. 278, 40 Pac. 698; State v. Morton, 51 S. C. 323, 28 S. E. 945.

[368] Smeltzer v. White, 92 U. S.

Where a warrant in its mechanical execution does not comply with such reasonable requirements of the law, it may be considered invalid and the official to whom it is directed and whose duty it is to pay valid warrants, can properly refuse to recognize them.[869] This may be not only a discretionary matter with such official but an imperative duty; the right to refuse payment may also exist where the appropriation has been made to a certain individual for a specific purpose and the warrant as drawn is to another individual and without specifying the purpose.

§ 142. Validity.*

In general. The power to issue warrants must be found in some provision of the laws of the state or charter of the municipality before it can be exercised. To be valid, there must exist the legal authority for their issue assuming the absence of irregularities in other respects.[870] The presumption of law is, however, in favor of the legality of warrants, orders or other like evidences of indebtedness and the burden of proof is upon the party denying such validity.[871] Warrants issued by a de facto organization, if otherwise valid, are held good in the hands of third parties to whom they have been sold. Obligations incurred by the inhabitants of a certain district as a rule cannot be avoided by the tax-paying interests of such territory. The obligation exists not against the individuals but against the district.[872] An indebtedness incurred

390; Thompson v. Fellows, 21 N. H. (1 Fost.) 425. A warrant issued by selectmen need not be under seal. State v. Morton, 51 S. C. 323, 28 S. E. 945; Heffleman v. Pennington County, 3 S. D. 162.

[869] Hamilton County Com'rs v. Sherwood (C. C. A.) 64 Fed. 103; Freeman v. City of Huron, 10 S. D. 368, 73 N. W. 260; City of Burrton v. Harvey County Sav. Bank, 28 Kan. 390; Foote v. City of Salem, 96 Mass. (14 Allen) 87; Young v. Camden County, 19 Mo. 309; Kenyon v. City of Spokane, 17 Wash. 57.

* 6 Curr. Law, 734.

[870] City of Little Rock v. United States, 103 Fed. 418; Farmers' & M. Nat. Bank v. School Dist. No. 52, 6 Dak. 255; State v. Omaha Nat. Bank, 59 Neb. 483, 81 N. W. 819.

[871] Wall v. Monroe County, 103 U. S. 74; Rollins v. Rio Grande County Com'rs (C. C. A.) 90 Fed. 575; Apache County v. Barth (Ariz.) 53 Pac. 187; Ray v. Wilson, 29 Fla. 342, 14 L. R. A. 773; People v. Johnson, 100 Ill. 537; City of Connersville v. Connersville Hydraulic Co., 86 Ind. 184; Hospers v. Wyatt, 63 Iowa, 264; Mountain Grove Bank v. Douglas County, 146 Mo. 42.

[872] Board of Education of Atchison v. De Kay, 148 U. S. 591; Speer v. Kearney County Com'rs (C. C. A.) 88 Fed. 749; Merchants' Nat. Bank v. McKinney, 2 S. D. 106, 48 N. W. 841.

in excess of statutory or constitutional limitations is usually held void and not capable of enforcement.[373] Whether warrants as ordinarily issued constitute an "indebtedness" within the meaning of such constitutional or statutory phrases may depend upon the decisions of a particular state following what might be termed a local public policy.[374]

Warrants invalid because of purpose for which issued. Again, a warrant may be invalid because issued for a purpose which is not considered or regarded by the courts as a public one; the basis of all legal expenditure of public moneys by public corporations is the fact of the disbursement for some purpose germane to their organization and the transaction of public business by them. Clearly, therefore, if warrants are issued by public corporations, although regular in their form, for a purpose not public in its character, they will be regarded as illegal, and not being considered negotiable in their character, this question can be raised even where they have passed into the hands of bona fide holders for value and before maturity.[375]

Refunding. Warrants issued for the refunding of a prior indebtedness will partake of the original character of such indebtedness. Void debts cannot be rendered valid by a mere change of form,[376] and the reverse of this rule is also true that indebtedness which is valid and binding cannot be rendered invalid by the issue of warrants for which there is no authority.[377]

[373] Mountain Grove Bank v. Douglas County, 146 Mo. 42, 47 S. W. 944; Municipal Security Co. v. Baker County, 33 Or. 338, 54 Pac. 174; Baker v. City of Seattle, 2 Wash. St. 576. Invalid warrants, however, can be validated under legislative authority. Roe v. Town of Philippi, 45 W. Va. 785, 32 S. E. 224; Kane v. School Dist., 52 Wis. 502.

[374] George D. Barnard & Co. v. Knox County, 37 Fed. 563, 2 L. R. A. 426; Koppikus v. State Capitol Com'rs, 16 Cal. 248; Henderson v. People, 17 Colo. 587; City of Springfield v. Edwards, 84 Ill. 626; Fuller v. City of Chicago, 89 Ill. 282; In re State Warrants, 25 Neb. 659.

[375] First Nat. Bank of Lansdale v. Wyandotte County Com'rs (C. C. A.) 68 Fed. 878; Littler v. Jayne, 124 Ill. 123, 16 N. E. 374; D County Com'rs v. Sauer, 8 Okl. 235; King v. Sullivan County, 67 Tenn (8 Baxt.) 329; James v. City of Seattle, 22 Wash. 654, 62 Pac. 84.

[376] Royster v. Granville County Com'rs, 98 N. C. 148.

[377] Otis v. Inhabitants of Stockton, 76 Me. 506; Brown v. Bon Homme County, 1 S. D. 216, 46 N. W. 173; O'Connor v. Parish of East Baton Rouge, 31 La. Ann. 221; City of Plattsmouth v. Fitzgerald, 10 Neb. 401.

§ 143. Actions on warrants.

Warrants being non-negotiable and merely prima facie evidence of indebtedness against the public corporation issuing them, are subject to all equities existing between parties even when they are in the hands of a bona fide holder who has purchased the same and paid value therefor before maturity. In an action brought by such a holder against the maker with its consent,[878] in case of a refusal to pay, all the defenses which may be available or to which they were subject in the hands of the original payee may be taken advantage of by defendant.[879] And all conditions which under other circumstances would create an estoppel against one of the parties to the transaction will operate here to the same effect.[880] But a public corporation will not be excused, by a plea of lack of funds, from paying warrants drawn upon a special fund where the moneys in this fund have been illegally withdrawn and used for other purposes,[881] or where the public corporation has rendered itself incapable of creating such fund in the manner originally intended.[882] In actions against public corporations on warrants valid on their face, the presumption of law exists that they were lawfully and legally issued and the burden of establishing their illegality or the fraudulent and illegal character of the claims upon which they were based is on the defendant.[883]

§ 144. Their payment.

Where the power to audit, allow and authorize the issuance of warrants is by law placed in the hands of certain designated offi-

[878] Klein v. Smith County Sup'rs, 54 Miss. 254.

[879] Coffin v. Kearney County Com'rs, 114 Fed. 518; Grayson v. Latham, 84 Ala. 546; Wood v. Bangs, 1 Dak. 179. An action for equitable relief involving the validity of warrants cannot be maintained until the parties are placed in statu quo. Polk v. Tunica County Sup'rs, 52 Miss. 422; Crawford v. Noble County Com'rs, 8 Okl. 450. (C. C. A.) 57 Fed. 1030.

[880] Thompson v. Searcy County

[881] Valleau v. Newton County, 72 Mo. 593. The rule in the text, however, does not apply to warrants issued without authority, and for a debt which the city could not legally contract. Ayers v. Thurston County, 63 Neb. 96, 88 N. W. 178; Blackman v. City of Hot Springs, 14 S. D. 497, 85 N. W. 996; State Sav. Bank v. Davis, 22 Wash. 406. But see Quaker City Nat. Bank v. City of Tacoma, 27 Wash. 259, 67 Pac. 710.

[882] City of New Orleans v. Warner, 175 U. S. 120; Louisiana Nat. Bank v. Board of Liquidation, 30 La. Ann. 1356.

[883] Everts v. District Tp. of Rose Grove, 77 Iowa, 37; Scott v. School Directors of Armstrong, 103 Wis. 280, 79 N. W. 239.

cials of the public corporation upon the presentation of a warrant duly issued, other officials have no discretion in regard to its payment; this exists as an imperative duty capable of enforcement if there are sufficient funds.[384] The payment of warrants issued in settlement of a claim subsequently held invalid or of like warrants can be prohibited and all officials will be bound by orders of the proper authorities to this effect.[385]

As a rule, warrants must be presented to and a demand made for payment of the proper disbursing officer of the corporation. This is necessary that the holder may proceed by mandamus against the official to compel a payment or to bring an action based upon them and that interest may commence to run.[386]

§ 145. Time of payment and payee.*

Warrants where not otherwise provided are usually payable on demand.[387] Payment may also be due at a date specified,[388] in the order of their registration with designated public officers,[389] or in the order of their issuance by number or date.[390] The weight of authority is to the effect that after issue they become a prima facie evidence of indebtedness which cannot be affected by sub-

[384] Von Schmidt v. Widber, 105 Cal. 151; Bush v. Geisy, 16 Or. 355; Simmons v. Davis, 18 R. I. 46; Collier v. Peacock, 93 Tex. 255, 54 S. W. 1025; Webster v. Douglas County, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451.

[385] Polk County v. Sherman, 99 Iowa, 60; Hayes v. Davis, 23 Nev. 318; Frankl v. Bailey, 31 Or. 285, 50 Pac. 186; State v. Walker (Tenn.) 47 S. W. 417.

[386] Warner v. City of New Orleans, 87 Fed. 829; Grayson v. Latham, 84 Ala. 546; Johnson v. Wakulla County, 28 Fla. 720, 9 So. 690; Bodman v. Johnson County, 115 Iowa, 296, 88 N. W. 331; Hubbell v. City of South Hutchinson, 64 Kan. 645, 68 Pac. 52; Wilson v. Knox County (Mo.) 28 S. W. 896; Shipley v. Hacheney, 34 Or. 303, 55 Pac. 971.

6 Curr. Law, 734.

[387] United States v. Macon County Ct., 75 Fed. 259; Shaw v. Statler, 74 Cal. 258; Phillips v. Reed, 109 Iowa, 188; State v. Johnson, 162 Mo. 621, 63 S. W. 390; State v. Allison, 155 Mo. 325; Greeley v. Cascade County, 22 Mont. 580, 57 Pac. 274; Freeman v. City of Huron, 10 S. D. 368, 73 N. W. 260.

[388] Frankford Real Estate, Trust & Safe-Deposit Co. v. Jackson County (C. C. A.) 98 Fed. 942.

[389] Shepherd v. Helmers, 23 Kan. 504; State v. Allison, 155 Mo. 325; State v. Campbell, 7 S. D. 568, 64 N. W. 1125; Stewart v. Custer County, 14 S. D. 155, 84 N. W. 764.

[390] McCall v. Harris, 6 Cal. 281; Mitchell v. Speer, 39 Ga. 56; Hull v. Ames, 26 Wash. 272, 66 Pac. 391.

sequent legislation either as to the time, the mode or manner of payment.[391] Where the law contains provisions for their registration or record by certain officials, a failure to properly record or register them does not invalidate the warrants; their validity cannot be destroyed by such failure or neglect.

Warrants although not considered negotiable instruments according to the common rules of law are usually assignable, and when properly assigned and endorsed they become, in the hands of the holder subject to prior equities, an enforceable demand by him against the corporation.[392] The assignee of a warrant may demand payment and sue upon refusal to pay.[393] The manner in which the transfer must be made to give the transferee the privileges and rights of his transferor may depend largely upon statutory provisions prescribing the manner in which this shall be done;[394] otherwise, if the transfer is made in the customary manner for the sale and assignment of paper or articles of like character, it will be sufficient.[395]

§ 146. Miscellaneous forms of indebtedness.

A public corporation may, under authority of law, issue, as an evidence of an indebtedness legally incurred, orders,[396] nego-

[391] United States v. Macon County Ct., 45 Fed. 400; State v. Barret, 25 Mont. 112, 63 Pac. 1030; Shipley v. Hacheney, 34 Or. 303, 55 Pac. 971.

[392] City of Nashville v. Ray, 86 U. S. (19 Wall.) 468; Watson v. City of Huron (C. C. A.) 97 Fed. 449; People v. El Dorado County Sup'rs, 11 Cal. 170; Averett's Adm'r v. Booker, 15 Grat. (Va.) 163; Garvin v. Wiswell, 83 Ill. 215; Clark v. Polk County, 19 Iowa, 248; Heffleman v. Pennington County, 3 S. D. 162. Some cases, however, hold to the contrary. See Savage v. Mathews, 98 Ala. 535, and East Union Tp. v. Ryan, 86 Pa. 459.

[393] Laughlin v. District of Columbia, 116 U. S. 485; State v. Barret, 25 Mont. 112, 63 Pac. 1030; State v. Van Wyck, 20 Wash. 39, 54 Pac. 768; Webster v. Douglas County, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451.

[394] Savage v. Mathews, 98 Ala. 535; People v. Gray, 23 Cal. 125.

[395] Watson v. City of Huron (C. C. A.) 97 Fed. 449; Sweet v. Carver County Com'rs, 16 Minn. 106 (Gil. 96); Crawford v. Noble County Com'rs, 8 Okl. 450.

[396] State v. Corzilius, 35 Ohio St. 69; Stoll v. Johnson County Com'rs, 6 Wyo. 231.

[397] Brown v. Town of Canton, 4 Lans. (N. Y.) 409.

tiable certificates,[397] school orders,[398] or other acknowledgments of a similar character.[399] These miscellaneous forms of indebtedness when issued without authority are invalid;[400] but if the corporation had the power to make the contract creating the indebtedness, the payee may then maintain an action for money or things had and received or services rendered.[401]

Municipal evidences of indebtedness may be divided into two classes, based upon legal character and characteristics as affected by or depending for validity, in the hands of the original payee or a bona fide holder for value, on the availability, as a defense in an action upon the indebtedness, of equities existing between the payee and the public corporation. These two classes as suggested are, first, negotiable bonds or securities, and second, warrants or other evidences of a similar character. In the case of negotiable bonds and securities, the rule of law is clearly established that in the hands of a bona fide purchaser for value, equities between original parties are not available as a defense. Warrants, as stated in a preceding section, and all other evidences of a similar character are merely prima facie evidences of indebtedness and at no time can the maker of them be prevented from setting up as a defense equities that may have originally existed.[402] The power to issue promissory notes is denied by the weight of authority.[403]

[398] Whitney v. Inhabitants of Stow, 111 Mass. 368.

[399] Bloomfield v. Charter Oak Bank, 121 U. S. 121; Parsel v. Barnes, 25 Ark. 261; In re Certificates of Indebtedness, 18 Colo. 566; Foote v. City of Salem, 96 Mass. (14 Allen) 87.

[400] Bloomfield v. Charter Oak Bank, 121 U. S. 121, Scott's Ex'rs v. City of Shreveport, 20 Fed. 714; Smith v. Madison Parish, 30 La. Ann. 461; Parsons v. Inhabitants of Monmouth, 70 Me. 262; Abbott v. Inhabitants of North Andover, 145 Mass. 484; Smallwood v. Lafayette County, 75 Mo. 450; Chosen Freeholders of Hudson County v. Buck, 51 N. J. Law, 155; Smith v. Epping, 69 N. H. 558; Parker v. Saratoga County Sup'rs, 106 N. Y. 392; Loan & Exch. Bank v. Shealey, 62 S. C. 337; Exchange Bank of Virginia v. Lewis County, 28 W. Va. 273.

[401] Hitchcock v. City of Galveston, 96 U. S. 341, 350; Bangor Sav. Bank v. City of Stillwater, 49 Fed. 721; Morgan v. Town of Guttenberg, 40 N. J. Law, 394.

[402] Newell v. School Directors, 68 Ill. 514 (School order); Wood v. State, 155 Ind. 1; Abascal v. City of New Orleans, 48 La. Ann. 565 (Floating debt certificate); Emery v. Inhabitants of Mariaville, 56 Me. 315 (Town orders); Loan & Exch. Bank v. Shealey, 62 S. C. 337 (School warrant); Texas Transp. Co. v. Boyd, 67 Tex. 153.

[403] See Abb. Mun. Corp. § 242.

§ 147. Form and phraseology.

The law takes into consideration at all times the bona fides of the parties and the relative condition and circumstances attending the character of the corporation and the issuing of the particular indebtedness. Where the public corporation authorized is what may be termed a public quasi corporation and where the officers of such corporation are not presumed to have the same degree or extent of intelligence, experience and learning as that which it is presumed similar officers of a higher grade of corporation may have acquired or possess, the law will consider such circumstances or conditions and will hold an instrument valid issued by them which may be technically defective in its form but which substantially complies with the law authorizing its issue.

§ 148. Mode and time of payment.

The manner of payment,[404] the time,[405] the fund[406] from which payable, and the rights of parties holding such instruments whether the original payee or his assignee,[407] all depend upon the principles sufficiently discussed.

VI. The Power to Contract.*

§ 149. In general.

A public corporation, it must be remembered, is first an artificial person, and second an artificial person of such a character that, as compared with others, its powers are still further restricted and limited. This principle arises from the fact, so often repeated, that a public corporation is a governmental agent, one

[404] Allen v. McCreary, 101 Ala. 514; Armstrong v. Truitt, 53 Ark. 287.

[405] Owen v. Lincoln Tp., 41 Mich. 415; Brewer v. Otoe County, 1 Neb. 373; Miller v. City of Lynchburgh, 20 Grat. (Va.) 330; Packard v. Town of Bovina, 24 Wis. 382.

[406] Meath v. Phillips County, 108 U. S. 553; Mobile County v. Powers, 103 Ala. 207; Gamble v. Clark, 92 Ga. 695; Mills County Nat. Bank v. Mills County, 67 Iowa, 697, 25 N. W. 884; Hopper v. Inhabitants of Union Tp., 54 N. J. Law, 243, 24 Atl. 387; Wyoming County v. Bardwell, 84 Pa. 104.

[407] Terrell v. Town of Colebrook, 35 Conn. 188; People v. Clark County Com'rs, 50 Ill. 213; National State Bank v. Independent Dist. of Marshall, 39 Iowa, 490; Flemming v. City of Hoboken, 40 N. J. Law, 270; Eaton v. Manitowoc County Sup'rs, 40 Wis. 668.

* 6 Curr. Law, 731, 1109.

organized for the benefit and advantage of the community at large without special reference to any individual, family or class. The right to contract is one of the powers usually conferred upon public corporations through charter,[408] statutory,[409] or constitutional[410] provisions as construed and defined by court decisions. The tendency of the courts is to confine the exercise of corporate powers strictly to such as are clearly given, and following this rule the power to contract, of a particular public corporation of whatever class, will be determined not by the application of general rules or principles of law but by the specific right given to such corporation in some grant of legal authority. Public corporations have only such rights and powers as are especially granted them or absolutely necessary to carry into effect the rights and powers so granted. This rule applies with its full force to the making of contracts,[411] therefore, we find many cases where the legality of the contract, as executed by a public corporation, depends upon a local construction of some legal provision under which the right to contract is claimed.[412] The purpose of the contract may be one in furtherance of an act which the corporation is prohibited by general principles or specific restrictions of law from doing as not coming within the scope of the objects or the purpose for which it was incorporated.[413] Aid, donations or assist-

[408] City of Memphis v. Brown, 87 U. S. (20 Wall.) 289; Ex parte City of Birmingham, 116 Ala. 186, 22 So. 454; Covington & M. R. Co. v. City of Athens, 85 Ga. 367; Rae v. City of Flint, 51 Mich. 526; City of Buffalo v. Bettinger, 76 N. Y. 393.

[409] Berry v. Mitchell, 42 Ark. 243; Ramish v. Hartwell, 126 Cal. 443; Swift v. Inhabitants of Falmouth, 167 Mass. 115; City of Lexington v. Lafayette County Bank, 165 Mo. 671; Chamberlain v. City of Hoboken, 38 N. J. Law, 110; Hubbard v. Norton, 28 Ohio St. 116.

[410] State v. Hogan, 22 Mont. 384.

[411] City of Mobile v. Moog, 53 Ala. 561; City of New London v. Brainard, 22 Conn. 552; Jackson Tp. v. Barnes, 55 Ind. 136; Patterson v. City of New Orleans, 20 La. Ann. 103; Roberts v. City of Cambridge, 164 Mass. 176; Mayo v. Dover & F. V. Fire Co., 96 Me. 539; In re Board of Water Com'rs, 176 N. Y. 239.

[412] Erwin v. Town of Richmond, 42 Vt. 557.

[413] Burrill v. City of Boston, 2 Cliff, 590, Fed. Cas. No. 2,198. The Maggie P., 25 Fed. 202. City of Peru v. Gleason, 91 Ind. 568; Penley v. City of Auburn, 85 Me. 278, 21 L. R. A. 657; Sillcocks v. City of New York, 11 Hun (N. Y.) 431. A city is not liable for gold medals furnished each of the members of the city council. Higgins v. City of San Diego, 118 Cal. 524; City of New Haven v. New Haven & D. R. Co., 62 Conn. 252, 18 L. R. A. 256; Long v. City of Duluth, 49 Minn. 280; City of Jackson v. Bow-

ance rendered private individuals in the advancement of private enterprises or purposes are invariably prohibited by law. Public means or agencies cannot be used for the advancement of private interests.[414]

§ 150. The implied power to contract.

The implied power to contract on the part of a public corporation does not exist except so far as may be necessary to carry into effect those powers and rights which have been by law expressly granted. This rule precludes, except in exceptional cases, the existence of an implied or discretionary power to contract.[415] The principle that there cannot exist an implied power to make a contract must be distinguished, however, from the one that where the authority exists in the absence of an express contract when the public corporation has received services or goods of value, an implied contract will be held to exist sufficient to enable the party rendering the services or supplying the articles to recover their reasonable value.[416] If the lack of authority is questionable or the contract not void on its face, the right will be presumed and the public corporation may enter into a contract and incur a liability for its breach.[417]

man, 39 Miss. 671; City of New York v. Second Ave. R. Co., 32 N. Y. 261; Columbus Gas Light & Coke Co. v. City of Columbus, 50 Ohio St. 65, 19 L. R. A. 510.

[414] Sutherland-Innes Co. v. Village of Evart (C. C. A.) 86 Fed. 597; Park v. Modern Woodmen of America, 181 Ill. 214. See, also, Abb. Mun. Corp. § 247.

[415] City of Litchfield v. Ballou, 114 U. S. 190; Berlin Iron Bridge Co. v. City of San Antonio, 62 Fed. 882; Gillette-Herzog Mfg. Co. v. Canyon County, 85 Fed. 396; City of Hartford v. Hartford Elec. Light Co., 65 Conn. 324; Root v. City of Topeka, 63 Kan. 129, 65 Pac. 233.

[416] City of Austin v. Bartholomew, 107 Fed. 349; Fernald v. Town of Gilman, 123 Fed. 797; Brush Electric Light & Power Co. v. City Council of Montgomery, 114 Ala. 433; Capital Gas Co. v. Young, 109 Cal. 140, 29 L. R. A. 463; Fouke v. Jackson County, 84 Iowa, 616; Taylor v. City of Lambertville, 43 N. J. Eq. 107; Kramrath v. City of Albany, 127 N. Y. 575; Memphis Gas Light Co. v. City of Memphis, 93 Tenn. 612; Thomson v. Town of Elton, 109 Wis. 589. But see Argenti v. City of San Francisco, 16 Cal. 255; Zottman v. City & County of San Francisco, 20 Cal. 96; Tucker v. City of Grand Rapids, 104 Mich. 621; Virginia City Gas Co. v. Virginia City, 3 Nev. 320; McDonald v. City of New York, 68 N. Y. 23.

[417] The Maggie P., 25 Fed. 202; Gillette-Herzog Mfg. Co. v. Canyon County, 85 Fed. 396; Ogden City v. Weaver, 108 Fed. 564; Brown v.

§ 151. Contracts ultra vires for want of authority.

A corporation may do an act in excess of or beyond its lawful authority; such an act is termed ultra vires.[418]

A public corporation is, as already suggested, an artificial person and as such capable of doing such acts and exercising such powers only as may be conferred upon it by the charter of its creation or as are necessarily implied to carry into effect powers directly granted. The legal authority to execute a contract, therefore, lies at the basis of its validity; this may be found in charter, statutory or constitutional provisions and the absence of such authority acts as a limitation upon the right of the public corporation to contract. Contracts entered into without such authority or beyond the power of the corporation are necessarily void.[419] Persons dealing with public corporations are charged with notice of their right to contract upon the subject-matter and in the manner contemplated,[420] or of the legal authority of public officials to act on behalf of their principal.[421] The acceptance of work under a contract void for lack of authority does not usually validate it.[422]

Board of Education of Pomona, 103 Cal. 531; City of Chicago v. Peck, 196 Ill. 260; Town of Gosport v. Pritchard, 156 Ind. 704.

[418] City of Mobile v. Moog, 53 Ala. 561.

[419] Hitchcock v. City of Galveston, 96 U. S. 341. A contract partly lawful and partly unlawful if separable can be enforced to the extent that it is lawful. Higgins v. San Diego Water Co., 118 Cal. 524, 45 Pac. 824, 50 Pac. 670; Colusa County v. Welch, 122 Cal. 428; Waters v. Trovillo, 47 Kan. 197; Pleasant View Tp. v. Shawgo, 54 Kan. 742; Greenough v. Inhabitants of Wakefield, 127 Mass. 275; Westminster Water Co. v. City of Westminster, 98 Md. 551, 56 Atl. 990; Lamson v. City of Marshall, 133 Mich. 250, 95 N. W. 78; Sang v. City of Duluth, 58 Minn. 81; Grannis v. Blue Earth County Com'rs, 81 Minn. 55.

[420] City of Ft. Scott v. W. G. Eads Brokerage Co. (C. C. A.) 117 Fed. 51; Wallace v. City of San Jose, 29 Cal. 180; McKee v. City of Greensburg, 160 Ind. 378; McPherson v. Foster, 43 Iowa, 48; Murphy v. City of Louisville, 72 Ky. (9 Bush) 189; Osgood v. City of Boston, 165 Mass. 281; Moore v. City of New York, 73 N. Y. 238; Roberts v. City of Fargo, 10 N. D. 230; Kerr v. City of Bellefontaine, 59 Ohio St. 446; McAleer v. Angell, 19 R. I. 688, 36 Atl. 588; Schneider v. City of Menasha, 118 Wis. 298.

[421] Tamm v. Lavalle, 92 Ill. 263; Osgood v. City of Boston, 165 Mass. 281; Cheeney v. Inhabitants of Brookfield, 60 Mo. 53; Sprague v. Town of Cornish, 59 N. H. 161; Storey v. Murphy, 9 N. D. 115.

[422] Brady v. City of New York, 20 N. Y. 312.

§ 152. Because of purpose or result.

Public corporations are organized for the purpose of accomplishing certain specific ends in connection with government; they are public agencies and not considered in the conduct of their ordinary business as private corporations. Considering the result sought to be effected, without any express limitation or restriction, it follows necessarily, therefore, that an act or contract is void not in furtherance of the purpose or aim for which they are incorporated; the purpose of all acts, the result of all powers exercised by them, must be the public advantage; the advancement of the general welfare or the carrying out as a public agent of some one or more of the functions of government.[423] This prevents, by a process of exclusion, the granting of aid directly or indirectly to private enterprises and the making of contracts which do not clearly and unquestionably have for their end the accomplishment of some governmental purpose; it excludes all acts and contracts attempted under specious socialistic theories regarding the proper sphere of governmental duties and powers.[424]

§ 153. Contracts protected by constitutional provisions.

Valid contracts made by public corporations are protected by Federal or state constitutional provisions. The clause most ordinarily invoked is that of the Federal constitution which prohibits a state from passing a law impairing the obligation of a contract. The judicial interpretation based upon the term "law" in this provision is broad and includes not only a law passed by a legislative body but also a constitutional amendment or provision, de-

[423] Sutherland-Innes Co. v. Village of Evart (C. C. A.) 86 Fed. 597; House v. Los Angeles County, 104 Cal. 73; Hayward v. Trustees of Town of Red Cliff, 20 Colo. 33; City of Bay St. Louis v. Hancock County, 80 Miss. 364, 32 So. 54. The validity of an agreement for the procurement of volunteers for the United States army considered and determined. Arnold v. City of Pawtucket, 21 R. I. 15. See Abb. Mun. Corp. §§ 246–249, and many cases cited and discussed.

[424] Akin v. Ordinary of Bartow County, 54 Ga. 59; Gillett v. Logan County Sup'rs, 67 Ill. 256; City of Peru v. Gleason, 91 Ind. 566; Strahan v. Town of Malvern, 77 Iowa, 454; City of Cleburne v. Brown, 73 Tex. 443. See, also, as discussing the underlying principles relative to the granting of aid to private enterprises or individuals, Abb. Mun. Corp. §§ 145 et seq.; 172 et seq.

cree of court or any act which may be ultimately given the force and effect of law and which impairs the obligation of a contract previously entered into by a public corporation.[425] A contract between an individual and a public corporation is fully protected by constitutional provisions against the impairment of a contract obligation.

§ 154. Contracts ultra vires because of constitutional provisions.

There are frequently found constitutional or statutory provisions limiting the amount of the indebtedness which can be legally incurred by public corporations or prohibiting appropriations in the absence of the necessary funds either in cash or in process of collection pursuant to some tax levy.[426] The incurring of indebtedness may, it has been frequently held, be accomplished through the making of a contract because there will arise as the result of a contract an obligation on the part of the corporation which must be paid or satisfied. This obligation is an indebtedness, although it may not be an express one but merely implied, and the ultimate monetary obligation, when in excess of the debt limit fixed by law, to such an extent, will be void.[427]

Public corporations may make contracts which are ultra vires and therefore void because in violation of constitutional provisions or rights other than those above noted. They usually provide that no citizen or class of citizens shall be given privileges

[425] Houston & T. C. R. Co. v. State of Texas, 177 U. S. 66; Board of Liquidation of New Orleans v. State of Louisiana, 179 U. S. 622.

[426] Brazoria County v. Youngstown Bridge Co. (C. C. A.) 80 Fed. 10; Defiance Water Co. v. City of Defiance, 90 Fed. 753; Sullivan v. Highway Com'rs of Deer Park, 114 Ill. 262; Field v. Stroube, 103 Ky. 114, 44 S. W. 363; Hurley v. City of Trenton, 67 N. J. Law, 350, 51 Atl. 1109; Kingsley v. City of Brooklyn, 78 N. Y. 200; Roberts v. City of Fargo, 10 N. D. 230; City of Lancaster v. Miller, 58 Ohio St. 558; Reuting v. City of Titusville, 175 Pa. 512.

[427] Gillette-Herzog Mfg. Co. v. Canyon County, 85 Fed. 396; Kimball v. City of Cedar Rapids, 100 Fed. 802. If a contract is separable in its provisions, those which are valid may be enforced without regard to the invalidity of others. Rice v. Trustees of Town of Haywards, 107 Cal. 398; Raton Waterworks Co. v. Town of Raton, 9 N. M. 70; Carter v. Thorsen, 5 S. D. 474, 24 L. R. A. 734; Spilman v. City of Parkersburg, 35 W. Va. 605; Quill v. City of Indianapolis, 124 Ind. 292, 7 L. R. A. 681; Frantz v. Jacob, 88 Ky. 525; Newgass v. City of New Orleans, 42 La. Ann. 163.

or immunities not granted to all;[428] that the right which every citizen possesses to contract, except as prohibited by law shall remain inviolate;[429] and that no person shall be deprived of his life, liberty or property without due process of law,[430] the term property including the right to labor.[431]

§ 155. Contracts ultra vires because contravening some exclusive Federal right or power.

The government of the United States is a dual one consisting of the National or Federal organization and that of the different states. To the Federal government is given, by the Federal constitution, certain exclusive rights. A contract entered into by a state or a public corporation organized under the laws of any state which infringes upon or attempts to regulate any such exclusive right, privilege or power is clearly void.

§ 156. Contracts ultra vires because of a beneficial interest resulting to the public officers executing them.

An officer, agent or employe of a public corporation occupies as towards such corporation what is termed a fiduciary or trust relation.

The courts therefore hold uniformly to the rule that contracts executed by and in behalf of a public corporation in which the officers so executing them may directly or indirectly have a benefi-

[428] Van Harlingen v. Doyle, 134 Cal. 53, 66 Pac. 44, 54 L. R. A. 771; Tribune Printing & Binding Co. v. Barnes, 7 N. D. 591.

[429] United States v. Martin, 94 U. S. 400; United States v. Gates, 148 U. S. 134; Holden v. Hardy, 169 U. S. 366, affirming 14 Utah, 71; Leep v St. Louis, I. M. & S. R. Co., 58 Ark. 407, 23 L. R. A. 264; In re Morgan, 26 Colo. 415, 47 L. R. 52; People v. Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802, 60 L. R. A. 768; People v. Coler, 166 N. Y. 1, 52 L. R. A. 814; City of Cleveland v. Clements Bros. Const. Co., 67 Ohio St. 197, 59 L. R. A. 775; City of Portland v. Baker, 8 Or. 356; State v. Peel Splint Coal Co., 36 W. Va. 802, 17 L. R. A. 385.

[430] People v Coler, 166 N. Y. 1, 52 L. R. A. 814.

[431] Ex parte Kuback, 85 Cal. 274, 9 L. R. A. 482; Marshall & Bruce Co. v. City of Nashville, 109 Tenn. 495, 71 S. W. 815, 65 Alb. Law J. 102; City of Atlanta v. Stein, 111 Ga. 789, 51 L. R. A. 335; Grey v. People, 194 Ill. 486, 62 N. E. 894; Street v. Varney Electrical Supply Co., 160 Ind. 338, 66 N. E. 895; City of Cleveland v. Clements Bros. Const. Co., 67 Ohio St. 197, 59 L. R. A. 775; Mazet v. City of Pittsburgh, 137 Pa. 548.

cial interest are absolutely void.[432] This rule is necessary for the protection of public funds from dishonest and scheming public officials. As further emphasizing the rule suggested, many states contain statutory provisions to the effect that public officials or agents shall not be directly or indirectly interested in any present or future contract they may make on behalf of the public corporation they represent.[433] Where, under a contract invalid because of the principle stated above, the public corporation has received articles or services of value and which it properly could, many cases hold that though the contract cannot be enforced, still a recovery will be permitted on the basis of a quantum meruit for the services or things actually rendered or furnished.[434]

§ 157. Contracts ultra vires because of fraud or bribery.*

A contract to which a public corporation is a party may be void and incapable of enforcement because of illegal or fraudulent means used either in its original procurement or in its actual execution. The general rule of law in this respect applies to such contracts.[435]

§ 158. Contracts ultra vires because extending beyond official term.

Many contracts made by public corporations are for supplies used by them in the conduct of their public business or in the carrying on of various proprietary interests. Such contracts when

[432] Lower Kings River Reclamation Dist. v. McCullah, 124 Cal. 175; City of Ft. Wayne v. Lake Shore & M. S. R. Co., 132 Ind. 558, 18 L. R. A. 367; Holderness v. Baker, 44 N. H. 414; West Jersey Traction Co. v. Board of Public Works of Camden, 56 N. J. Law, 431; Nunemacher v. City of Louisville, 98 Ky. 334; Goodrich v. City of Waterville, 88 Me. 39; Lewick v. Glazier, 116 Mich. 493, 74 N. W. 717; Macy v. City of Duluth, 68 Minn. 452; Roosevelt v. Draper, 23 N. Y. 318.

[433] Santa Ana Water Co. v. Town of San Buenaventura, 65 Fed. 323; Berka v. Woodward, 125 Cal. 119, 2 Mun. Corp. Cas. 566, 45 L. R. A. 420; Nunemacher v. City of Louisville, 98 Ky. 334; Goddard v. City of Lowell, 179 Mass. 496.

[434] Spearman v. Texarkana, 58 Ark. 348, 22 L. R. A. 855; Capital Gas Co. v. Young, 109 Cal. 140, 29 L. R. A. 463; City of Macon v. Huff, 60 Ga. 221; Currie v. School Dist. No. 26, 35 Minn. 163.

[435] Rice v. Trustees of Hayward, 107 Cal. 398; State v. Kern, 51 N. J. Law, 259; In re Anderson, 109 N. Y. 554; Byers v. Manley Mfg. Co. (Tenn. Ch. App.) 46 S. W. 547

* 6 Curr. Law, 731.

involving large expenditures usually extend over a period of years; this is especially true of contracts or franchises in the nature of contracts granted private corporations for furnishing supplies of water and light. These have been claimed as ultra vires because restricting or limiting the power of succeeding public officials or legislative bodies, it being vital to the public welfare that each legislative body or public official should be able to do whatever the varying circumstances and present exigencies require,[436] and in some instances because of their extending for what is urged as an unreasonable length of time.

Such contracts usually held good when made for a reasonable time require for their performance the expenditure of large sums of money and the erection of plants such as it has been learned through experience, a public corporation should not directly attempt. Private capital will not engage in these enterprises when the contract runs for a limited time because the returns for such period will not be commensurate with the capital invested and necessary skill.[437]

§ 159. Ultra vires contracts; their enforcement.*

An unauthorized or an illegal contract executed by a public corporation is incapable of enforcement. It is absolutely void and neither the doctrine of estoppel nor ratification can be invoked to maintain it. The strict rule of law applying to ultra vires contracts of corporations as followed by the English courts and the Federal decisions in this country is strictly applied to

[436] Gale v. Village of Kalamazoo, 23 Mich. 344. See, also, authorities for and against the rule cited and reviewed in Columbus Water-Works Co. v. City of Columbus, 48 Kan. 99, 15 L. R. A. 354.

[437] Chenango Bridge Co. v. Binghampton Bridge Co., 70 U. S. (3 Wall.) 51; Manhattan Trust Co. v. City of Dayton (C. C. A.) 59 Fed. 327, affirming 55 Fed. 181; Defiance Water Co. v. City of Defiance, 90 Fed. 753; Capital City Water Co. v. City Council of Montgomery, 92 Ala. 366; McBean v. City of Fresno, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794; Columbus Water-Works Co. v. City of Columbus, 48 Kan. 99, 15 L. R. A. 354; State v. City of Great Falls, 19 Mont. 518; Blood v. Manchester Elec. Light Co., 68 N. H. 340, 39 L. R. A. 431. But see to the contrary, Mealey v. City of Hagerstown, 92 Md. 741; Long v. City of Duluth, 49 Minn. 280; City of Brenham v. Brenham Water Co., 67 Tex. 549. See, also, Abb. Municipal Corporations, § 257, with many cases.

* 6 Curr. Law, 731.

the acts of public corporations.[438] However, some cases hold that the character of a contract will not prevent the right of the public to equitable relief,[439] nor will it prevent extending the American rule regarding ultra vires acts where the application of the strict rule would not accomplish justice but effect a legal wrong.[440]

§ 160. Availability of the doctrine of estoppel.

Where an application of the strict rule relative to the ultra vires contracts of private corporations would result in injustice, many courts hold that a more liberal one should be followed and that the equities as between the parties should be established and maintained. The courts, however, quite uniformly agree that this principle cannot be applied under the same conditions or circumstances to acts of public corporations; that the corporation can never be estopped to set up as a defense the fact that the contract sought to be enforced was ultra vires either because of lack of authority or because in contravention of some charter, constitutional or statutory provision.[441] There are some decisions to the contrary and still other decisions hold that where, under an ultra vires contract, the public corporation has received and retained goods or services of value, there is an implied obligation on its part independent of the contract to return full value for benefits actually received.[442] As said in a preceding section discussing the

[438] Gamewell Fire Alarm Tel. Co. v. City of Laporte (C. C. A.) 102 Fed. 417; Frick v. City of Los Angeles, 115 Cal. 512; Grannis v. Blue Earth County Com'rs, 81 Minn. 55; State v. City of Crete, 32 Neb. 568; Perry v. Superior City, 26 Wis. 64.

[439] City of Detroit v. Detroit City R. Co., 56 Fed. 867; City of New Haven v. New Haven & D. R. Co., 62 Conn. 252, 18 L. R. A. 256.

[440] Paulding County v. Scoggins, 97 Ga. 253; State v. City of Helena, 24 Mont. 521, 55 L. R. A. 336.

[441] Willis v. Wyandotte County Com'rs (C. C. A.) 86 Fed. 827; Hays v. Ahlrichs, 115 Ala. 239, 22 So. 465; Wiegel v. Pulaski County, 61 Ark. 74; National Tube-Works Co. v. City of Chamberlain, 5 Dak. 54; Hovey v. Wyandotte County Com'rs, 56 Kan. 577; Mealey v. City of Hagerstown, 92 Md. 741; Huron Waterworks Co. v. City of Huron, 7 S. D. 9, 30 L. R. A. 848; Ellis v. City of Cleburne (Tex. Civ. App.) 35 S. W. 495; State v. City of Pullman, 23 Wash. 583; Beyer v. Town of Crandon, 98 Wis. 306. But see as holding that the doctrine of estoppel may operate against the public corporation, The Maggie P., 25 Fed. 202; City of New Orleans v. Crescent City R. Co., 41 La. Ann. 904; City of Natchez v. Mallery, 54 Miss. 499.

[442] Warner v. City of New Orleans, 87 Fed. 829; City Council of Montgomery v. Montgomery Water

nature and powers of a public corporation, there is always a broad distinction to be made between the irregular or informal exercise of a power granted and the doing of an act entirely beyond or in excess of the legal powers of the corporation. The application of the doctrine of estoppel may depend upon this distinction; the courts holding the corporation estopped in the former case while denying the application of the doctrine where the act is ultra vires in the proper and technical sense.[448] This distinction is the basis of many decisions although it may not appear as a reason. Other cases hold the corporation liable where it has received the benefits of the transaction because of that equitable rule that though they, the courts, will not lend their aid to further promote or enforce an ultra vires transaction, yet they will not permit the party who has obtained a benefit or advantage thereby to interpose ultra vires as a defense.

§ 161. Contracts; their formal execution.

A public corporation necessarily acts through its official representatives; and every possible safeguard, therefore, is thrown around its property and interests likely to be affected or wasted by a misuse or abuse of powers vested in public officials. Nowhere is this intent of the law more apparent than in the establishment and maintenance of rules controlling and regulating the manner in which public corporations, through the formal execution of contracts, may be found. As already stated the authority of public officials is special, not general; they have the right to exercise only such powers and perform such duties as are expressly given and the principal is only held under such conditions and circumstances. A public corporation is not bound by acts coming within the apparent scope of the agent's power and authority. In this respect the rule differs widely from that applying to an agent of

Works, 79 Ala. 233; Argenti v. City of San Francisco, 16 Cal. 255; Higgins v. City of San Diego, 131 Cal. 294, 45 Pac. 824, 63 Pac. 470; Brown v. City of Atchison, 39 Kan. 37; Municipal Sec. Co. v. Baker County, 39 Or. 396; London & New York Land Co. v. City of Jellico, 103 Tenn. 320; Earle v. Wallingford, 44 Vt. 367.

[448] Lake County v. Graham, 130 U. S. 674; Ryce v. City of Osage, 88 Iowa, 558; Wormstead v. City of Lynn, 184 Mass. 425; Black v. Common Council of Detroit, 119 Mich. 571; City of Cleveland v. State Bank, 16 Ohio St. 236; McTwiggan v. Hunter, 19 R. I. 265, 29 L. R. A. 526.

a private corporation or individual.[444] We may, therefore, find in charter or statutory provisions, minute details as to the manner and formalities attending the making and execution of a contract. The provisions are held mandatory, not directory merely.[445] Charter or statutory provisions may require the execution or approval of contracts on behalf of public corporations by certain designated officials [446] with countersignatures,[447] and those executed by others, or not in the manner required by law, will be invalid.[448] The law does not countenance dishonesty or a willful avoidance of an obligation entered into in good faith and following substantially the conditions required, but it does require a strict observance of those provisions intended to protect public property from private plunder.[449] Such charter or statutory provisions may require as preliminary to the execution of a contract requiring the expenditure of moneys, the certification of the cost or necessity of a proposed work of public improvement;[450] a resolution or ordinance of the council or legislative body authorizing the execution of the contract with its attendant expenditures;[451] the appro-

[444] The Floyd Acceptances, 74 U. S. 666; Story, Ag. § 707*a*. Sanitary Dist. of Chicago v. George F. Blake Mfg. Co., 179 Ill. 167; Rissing v. City of Ft. Wayne, 137 Ind. 427; City of Baltimore v. Eschbach, 18 Md. 282; City of St. Louis v. Gorman, 29 Mo. 593; Huron Waterworks Co. v. City of Huron, 7 S. D. 9, 30 L. R. A. 848; City of Nashville v. Hagan, 68 Tenn. (9 Baxt.) 495. See, also, United States v. Kirby, 74 U. S. (7 Wall.) 486; and Abb. Mun. Corp. § 260, pp. 582–584, citing many cases.

[445] Los Angeles Gas Co. v. Toberman, 61 Cal. 199; Butler v. City of Charlestown, 73 Mass. (7 Gray) 12; Beyer v. Town of Crandon, 98 Wis. 306.

[446] City of Superior v. Norton, 63 Fed. 357; City of Chicago v. Peck, 196 Ill. 260; State of Helms, 136 Ind. 122; City of Baltimore v. City of New Orleans, 45 La. Ann. 526; Wayne County Sup'rs v. Wayne Circ. Judge, 111 Mich. 33; City of Philadelphia v. Gorgas, 180 Pa. 296.

[447] City of Superior v. Norton (C. C. A.) 63 Fed. 357; State v. Ramsey County Dist. Ct., 32 Minn. 181.

[448] Bowditch v. Superintendent of Streets of Boston, 168 Mass. 239.

[449] City of Goldsboro v. Moffett, 49 Fed. 213; Town of Gosport v. Pritchard, 156 Ind. 400; Fehler v. Gosnell, 99 Ky. 380; Attorney-General v. City of Detroit, 55 Mich. 181.

[450] Continental Const. Co. v. City of Altoona (C. C. A.) 92 Fed. 822; City of Harrisburg v. Shepler, 190 Pa. 374.

[451] Town of Gosport v. Pritchard, 156 Ind. 400; Booth v. City of Shreveport, 29 La. Ann. 581; Goddard v. City of Lowell, 179 Mass. 496; State v. Noyes, 25 Nev. 31, 56 Pac. 946.

priation by the council or the possession of moneys for the purpose required;[452] the letting of the contract only upon public advertisement for a designated time,[453] or other provision concerning the time of its execution;[454] the making of the contract in duplicate;[455] a petition by a required number of residents or property owners who are to be affected by the proposed contract,[456] or the approval of the contract by the electors.[457]

§ 162. Presumption of legality.

As the law presumes in the absence of circumstances showing or proving the contrary that the authority to contract exists, it also presumes that all contracts are valid, not void upon their face and apparently formally executed as required by law.[458] A contract, having a legal character different from that of a negotiable instrument and affording at all times a reasonable opportunity for investigation and contest in the case of equities existing between the parties, acts or instruments of a questionable legal character, are regarded not as acts or instruments of a higher character but as contracts and they will be construed and enforced accordingly.[459]

§ 163. Mode of contracting; letting to the lowest bidder.*

It is to the advantage of a public corporation equally with a person or a private corporation, that all services rendered or supplies furnished should be upon the most economical basis with due

[452] City of Indianapolis v. Wann, 144 Ind. 175, 42 N. E. 901, 31 L. R. A. 743; City of Harrisburg v. Shepler, 190 Pa. 374, 42 Atl. 893.

[453] Woodruff v. Berry, 40 Ark. 251; Kretsch v. Helm, 45 Ind. 438; Mitchell v. City of Milwaukee, 18 Wis. 92.

[454] Burke v. Turney, 54 Cal. 486; Hall v. City of Chippewa Falls, 47 Wis. 267.

[455] Saleno v. City of Neosho, 127 Mo. 627, 30 S. W. 190, 27 L. R. A. 769.

[456] Seward v. Town of Liberty, 142 Ind. 551, 42 N. E. 39.

[457] Merrill R. & Lighting Co. v. City of Merrill, 80 Wis. 358.

[458] City of Lincoln v. Sun Vapor Street-Light Co. (C. C. A.) 59 Fed. 756; Lincoln Tp. v. Cambria Iron Co., 103 U. S. 412; Santa Rosa Lighting Co. v. Woodward, 119 Cal. 30, 50 Pac. 1025; City of Baxter Springs v. Baxter Springs Light & Power Co., 64 Kan. 591, 68 Pac. 63.

[459] Louisiana & N. W. R. Co. v. Police Jury of Bienville Parish, 48 La. Ann. 331; Beers v. Dalles City, 16 Or. 334, 18 Pac. 835.

* 6 Curr. Law, 1113.

regard to their character and existing conditions or circumstances. In this respect, at least, competition may have a most beneficial effect and it is therefore a favorite and customary requirement relative to contracts of all public corporations, by law, to provide that public notice shall be given by advertisement, or otherwise,[460] of services or supplies needed, inviting bids; the contract for the securing of which to be let to the lowest or the lowest responsible bidder as the statute may provide.[461] The authority for such procedure is usually found in some explicit provision of statutory or charter authority.[462] These requirements as a rule are considered not directory in their nature but mandatory [463] and a failure to comply with them will render any contract otherwise good, void and therefore incapable of enforcement.[464]

§ 164. Notice.

The purpose sought to be effected by the securing of bids under competition is the procurement of supplies or services as cheaply as possible. To effect this, it is necessary that the advertisement or invitation for submission of bids should be made in a public manner and for such a length of time that all desiring to bid intelligently and upon a reasonable basis may have seasonable opportunity to learn, in the first place, the needs of the corporation and the fact that bids are desired, and in the second place to acquaint

[460] California Imp. Co. v. Moran, 128 Cal. 373; City of Hartford v. Hartford Elec. Light Co., 65 Conn. 324; Wiles v. Hoss, 114 Ind. 371; Davenport v. Kleinschmidt, 6 Mont. 502; Board of Finance of Jersey City v. Jersey City, 57 N. J. Law, 452; Mutual Life Ins. Co. v. City of New York, 144 N. Y. 494; Public Ledger Co. v. City of Memphis, 93 Tenn. 77; McQuillin, Mun. Ord. § 553; Abb. Mun. Corp. § 262.

[461] City Imp. Co. v. Broderick, 125 Cal. 139, 57 Pac. 776; Seaboard Nat. Bank v. Woesten, 147 Mo. 467, 48 S. W. 939, 48 L. R. A. 279; Baum v. Sweeny, 5 Wash. 712.

[462] Electric Light & Power Co. v. City of San Bernardino, 100 Cal. 348; Dewey v. City of Des Moines, 101 Iowa, 416, 70 N. W. 605; Jones v. City of Seattle, 19 Wash. 669.

[463] Worthington v. City of Boston, 152 U. S. 695. City Imp. Co. v. Broderick, 125 Cal. 139; Whitney v. Common Council of Hudson, 69 Mich. 189; McDermott v. Street & Water Com'rs, 56 N. J. Law, 273.

[464] Burchfield v. City of New Orleans, 42 La. Ann. 235; City of Baltimore v. Eschbach, 18 Md. 276; State v. Coad, 23 Mont. 131, 57 Pac. 1092; Addis v. City of Pittsburgh, 85 Pa. 379; Breath v. City of Galveston, 92 Tex. 454, 49 S. W. 575.

themselves with the character and nature of the necessary services or supplies.[465] The time required by law may be, therefore, the essence of the proceeding, and bids let after the running of a proposal or an advertisement published for a time less than that required by law may be set aside and such contracts considered invalid and made without legal authority.[466]

§ 165. Specifications of services or supplies required.

That the purpose sought through proceedings considered in the preceding and succeeding sections may be effected, it is necessary that prospective bidders shall have an opportunity to familiarize themselves with the character, quality and extent of the services, work or supplies required. To enable them to act intelligently in this respect, and to afford a uniform standard as a basis of award,[467] provisions will be found requiring specifications covering such points, either as a part of the public advertisement,[468] or in detail, and on file in some office designated by law and referred to in the public advertisement or invitation for bids.[469] The authorities are about evenly divided upon the proposition that the fact of a patented article being called for by the advertisement or proposal for bids destroys the competitive feature of such bidding and, therefore, precludes a contract with a firm or a patentee controlling the sale of a patented article. The tendency of later decisions is in favor of the rule that the use of a patented article does not prevent the competitive conditions required by statute or ordinance.[470]

[465] Woodward v. Collett, 20 Ky. L. R. 1066, 48 S. W. 164; Duffy v. City of Saginaw, 106 Mich. 335, 64 N. W. 581; Warren v. Barber Asphalt Pav. Co., 115 Mo. 572, 22 S. W. 490.

[466] Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301; Williams v. Bergin, 129 Cal. 461; Case v. Fowler, 65 Ind. 29; Arnold v. City of Ft. Dodge, 111 Iowa, 152, 82 N. W. 495.

[467] Fones Hardware Co. v. Erb, 54 Ark. 645, 13 L. R. A. 353; Stansbury v. White, 121 Cal. 433, 53 Pac. 940; Dyer v. Erwin, 106 Ga. 845; Jenney v. City of Des Moines, 103 Iowa, 347; Delafield v. Village of Westfield, 169 N. Y. 582, 62 N. E. 1095.

[468] Manly Bldg. Co. v. Newton, 114 Ga. 245, 40 S. E. 274; Windsor v. City of Des Moines, 101 Iowa, 343, 70 N. W. 214.

[469] City of Elgin v. Joslyn, 136 Ill. 525, 26 N. E. 1090; Arnold v. City of Ft. Dodge, 111 Iowa, 152, 82 N. W. 495; Dixon v. Greene County, 76 Miss. 794, 25 So. 665.

[470] The following cases hold that this condition destroys the competitive features of such bidding. Cal-

§ 166. Discretionary power in officers to reject or accept bids.

The power may vest in public officials to arbitrarily reject all bids submitted, to select the "lowest bidder" or the "lowest responsible bidder."[471] Such discretion does not exist ordinarily as a matter of right on the part of public officials but is given them through the express terms of some existing law.[472] Otherwise the right to select the lowest responsible bidder might render nugatory the statute requiring competitive bids. Officials vested with the power, however, usually must award the contract to the person submitting the lowest bid in response to the invitation or proposal for the submission of bids.[473]

As stated in the preceding paragraph, the law may give to public officials the power to reject arbitrarily all bids unless some one of them is satisfactory, to select the lowest bidder or the lowest responsible bidder. The duties imposed upon officials when they are required by the provisions of the law to let the contract "to the lowest bidder" are ministerial or clerical in their character,[474] and ordinarily they can be compelled to perform them as in the

ifornia Imp. Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802; Barber Asphalt Pav. Co. v. Gogreve, 41 La. Ann. 251; Matter of Eager, 46 N. Y. 100; Kilvington v. City of Superior, 83 Wis. 222, 18 L. R. A. 45. The following cases hold that statutes or ordinances providing that contracts for work, services or supplies shall be advertised and given to the lowest bidder do not prevent contracts with firms controlling the sale of patented articles called for by the proposal for bids or patented articles: Mulrein v. Kalloch, 61 Cal. 522; Holmes v. Common Council of Detroit, 120 Mich. 226, 79 N. W. 200, 45 L. R. A. 121. Verdin v. City of St. Louis, 131 Mo. 26.

[471] Santa Rosa Lighting Co. v. Woodward, 119 Cal. 30, 50 Pac. 1025; Vincent v. Ellis, 116 Iowa, 609, 88 N. W. 836; Madison v. Harbor Board of Baltimore City, 76 Md. 395; Walsh v. City of New York, 113 N. Y. 142; Interstate Vetrified Brick Pav. Co. v. Philadelphia Mack Pav. Co., 164 Pa. 477.

[472] Colorado Pav. Co. v. Murphy (C. C. A.), 78 Fed. 28, 37 L. R. A. 630; Girvin v. Simon, 116 Cal. 604; Gibson v. Owens, 115 Mo. 258, 21 S. W. 1107; People v. Buffalo County Com'rs, 4 Neb. 150.

[473] Santa Cruz Rock Pavement Co. v. Broderick, 113 Cal. 628; Dement v. Rokker, 126 Ill. 174; Talbot Pav. Co. v. City of Detroit, 109 Mich. 657, 67 N. W. 979; Seaboard Nat. Bank v. Woesten, 147 Mo. 467, 48 S. W. 939, 48 L. R. A. 279; Goss v. State Capitol Commission, 11 Wash. 474, 39 Pac. 972; Mueller v. Eau Claire County, 108 Wis. 304, 84 N. W. 430. See, also, Spelling, Trusts & Monopolies, § 74.

[474] Kelly v. City of Chicago, 62 Ill. 279.

case of the nonperformance of other duties of a similar nature upon their failure or neglect.[475] Where, however, the power is given them to arbitrarily reject all bids or award the contract to the lowest responsible bidder, the duties imposed are not simply ministerial but discretionary and deliberative.[476] The courts will not, therefore, interfere with or restrain the action of the public authorities from letting contracts to one who is not the lowest bidder unless it appears that they have acted corruptly or not in good faith.[477] As stated repeatedly in cases passing upon this point, the duty imposed to award a contract to the lowest responsible bidder involves a determination of other questions than financial; the business judgment and capacity, skill, responsibility and reputation of the various bidders and the quality of the materials proposed to be supplied are all to be taken into consideration.[478]

§ 167. Discretionary power of officials to award to lowest bidder or otherwise.

In many cases the power is vested in public officials in their discretion to either let contracts for the furnishing of supplies, rendition of services or the construction of public works after competitive bidding,[478a] or to award such contracts directly to those who, in their judgment, will best perform them.[479] Where such discretion is granted, the duties performed by officials are of a discretionary character and so long as the legislative branch of the sovereign relies upon their integrity and business judgment,

[475] Crabtree v. Gibson, 78 Ga. 230, 3 S. E. 10.

[476] See, also, authorities cited in the next note. Johnson v. Sanitary Dist. of Chicago, 163 Ill. 285; Oliver v. Gale, 182 Mass. 39, 65 N. E. 415. McDermott v. Street & Water Com'rs of Jersey City, 56 N. J. Law, 273; Gilmore v. City of Utica, 131 N. Y. 26.

[477] Colorado Pav. Co. v. Murphy (C. C. A.) 78 Fed. 28, 37 L. R. A. 630; Stanley-Taylor Co. v. City & County of San Francisco Sup'rs, 135 Cal. 486, 67 Pac. 783; People v. Kent, 160 Ill. 655; Connors v. Stone, 177 Mass. 424, 59 N. E. 71; Anderson v. Public Schools of St. Louis, 122 Mo. 61, 26 L. R. A. 707.

[478] Johnson v. Sanitary Dist. of Chicago, 163 Ill. 285; Ryan v. City of Paterson, 66 N. J. Law, 533, 49 Atl. 587.

[478a] Manly Bldg. Co. v. Newton, 114 Ga. 245, 40 S. E. 274.

[479] Worthington v. City of Boston, 152 U. S. 695; reversing 41 Fed. 23; Henry County Com'rs v. Gillies, 138 Ind. 667, 38 N. E. 40.

the courts will not interfere when they refuse to ask for public and competitive bidding.[480] Laws requiring the purchase of supplies or the awarding of contracts to be made upon public competition may apply not to all supplies, services or work but only to those the cost of which may be in excess of a certain sum[481] or which may be specifically named.[482] As to all other supplies, services or work, the law will not apply and public officials having charge of such affairs can, in their discretion, ask for public and competitive bids or directly award contracts.[483]

§ 168. Conditions imposed.

To prevent fraud or collusion and to secure bids from those who are financially responsible and will perform the contract should it be awarded them, in the public advertisement calling for bids, conditions are valid that bidders must furnish a bond with good and sufficient securities for the proper performance of the work upon the awarding of the contract,[484] or that a certain deposit must accompany their bid to be forfeited in case the award is made to them and they refuse to execute a contract based upon such award.[485] A condition is also valid requiring the giving of a bond with good and sufficient securities by the contractor conditioned upon keeping the work in good repair for the period speci-

[480] Cummins v. City of Seymour, 79 Ind. 491.

[481] Sanitary Dist. of Chicago v. George F. Blake Mfg. Co., 179 Ill. 167; Packard v. Hayes, 94 Md. 233, 51 Atl. 32; Duffy v. City of Saginaw, 106 Mich. 335, 64 N. W. 581; Phelps v. City of New York, 112 N. Y. 216, 19 N. E. 408.

[482] Barber Asphalt Pav. Co. v. Hezel, 155 Mo. 391, 48 L. R. A. 285; City of Trenton v. Shaw, 49 N. J. Law, 638, 10 Atl. 273; Curley v. Chosen Freeholders of Hudson County, 66 N. J. Law, 401, 49 Atl. 471; Silsby Mfg. Co. v. City of Allentown, 153 Pa. 319; Com. v. Mercer, 165 Pa. 1.

[483] McGowan v. Ford, 107 Cal. 177, 40 Pac. 231; Reid v. Trowbridge, 78 Miss. 542, 29 So. 167; Mason v. Cranbury Tp., 68 N. J. Law, 149, 52 Atl. 568; Westmoreland County's Appeal, 164 Pa. 355.

[484] City of St. Paul v. Butler, 30 Minn. 459; Carey v. City of East Saginaw, 79 Mich. 73, 44 N. W. 168; Gibson v. Owens, 115 Mo. 258; Barrett v. Ocean City, 62 N. J. Law, 588, 41 Atl. 946; Walsh v. City of New York, 113 N. Y. 143.

[485] Village of Morgan Park v. Gahan, 136 Ill. 515, 26 N. E. 1085; Robling v. Pike County Com'rs, 141 Ind. 522; Selpho v. City of Brooklyn, 158 N. Y. 673, 52 N. E. 1126.

fied,[486] or requiring proof of satisfactory use of the material offered.[487]

§ 169. Contracts; how made; in writing or orally.

The statutory authority for the making of a contract by a public corporation may require that all contracts to be valid and binding upon the corporation must be in writing [488] or the provision may apply to such contracts as call for the expenditure of public moneys in excess of a certain sum. These provisions are usually considered valid, and contracts not made in accordance with them cannot be enforced although [489] in many instances when supplies are furnished under a contract afterwards held invalid because of this reason, the party furnishing such supplies or materials can recover the same or for the same in the proper proceedings.[490]

Where, however, there is no express provision requiring contracts or certain contracts to be made in writing, the usual rule applies that where the power to contract exists, such contract may be made orally as well as in writing, subject, of course, to the rules of law based upon the statute of frauds or those relating to the general law of contracts.[491]

§ 170. By whom made.

The legal principle cannot be too often repeated that a public corporation is not bound by acts of its agents coming within the

[486] Forsyth County v. Gwinnett County, 108 Ga. 510, 33 S. E. 892.

[487] Berghoffen v. City of New York, 31 Misc. 205, 64 N. Y. Supp. 1082.

[488] Goodyear Rubber Co. v. City of Eureka, 135 Cal. 613, 67 Pac. 1043; Milburn v. Glynn County Com'rs, 112 Ga. 160, 37 S. E. 178.

[489] Rice v. Plymouth County, 43 Iowa, 136; Basshor v. City of St. Paul, 26 Minn. 110; Bridges v. Clay County Sup'rs, 58 Miss. 817; Aurora Water Co. v. City of Aurora, 129 Mo. 540; Condon v. Jersey City, 43 N. J. Law, 452; Dougherty v. Borough of Norwood, 196 Pa. 92; Willoughby v. City of Florence, 51 S. C. 462.

[490] Crump v. Colfax County Sup'rs, 52 Miss. 107.

[491] Bluthenthal v. Town of Headland, 132 Ala. 249, 31 So. 87; Halbut v. Forrest City, 34 Ark. 246; Town of New Athens v. Thomas, 82 Ill. 259; City of Logansport v. Dykeman, 116 Ind. 15; Duncombe v. City of Ft. Dodge, 38 Iowa, 281; Argus Co. v. City of Albany, 55 N. Y. 495.

apparent scope of their power and authority. Their authority to act must be explicit and direct that the corporation be bound.[492] There are found therefore many contracts made or attempted to be made by public officials held invalid which, if executed on behalf of a private corporation or a natural person, would be enforced. The power of public officials to bind a corporation in the making of a contract or of the corporation itself to contract, is closely scrutinized, and unless the same clearly appears, its existence will not be presumed.[493]

Contracts made by officials concerning matters which do not come within the scope of duties thus specified or for which authority does not exist cannot be enforced. This doctrine is most emphatically applied in connection with those acts involving the expenditure of public moneys.[494]

The authority of public agents or officials being thus special and limited, all persons dealing with them are charged with notice of such limitations and are bound at their peril to ascertain the nature and the extent of their authority and especially is this true of acts or duties conferred specifically by statute.[495]

§ 171. As authorized by legislative bodies.

Legislative bodies, whether state legislatures or town or village councils or assemblies possessing the original power of making appropriations involving the expenditure of public moneys are usually given by express law the power of initiative in this respect. Under such a condition or limitation, contracts made by other officials or bodies and effecting the same result will not be enforced and further, the law granting the express authority to the legislative body must, as regards the time and the manner of the exercise of the power, be strictly followed.[496] The manner

[492] Whitney v. City of New Haven, 58 Conn. 450; Hunneman v. Inhabitants of Grafton, 51 Mass. (10 Metc.) 454; Mahon v. Luzerne County, 197 Pa. 1.

[493] Owen v. Hill, 67 Mich. 43.

[494] Intendant & Town Council of Livingston v. Pippin, 31 Ala. 542; City of Baltimore v. Reynolds, 20 Md. 1; Cuming County Com'rs v. Tate, 10 Neb. 193; Dey v. Jersey City, 19 N. J. Eq. (4 C. E. Green) 412.

[495] Hughson v. Crane, 115 Cal. 404; Town of Madison v. Newsome, 39 Fla. 149, 22 So. 270; Boston Elec. Co. v. City of Cambridge, 163 Mass. 64, 39 N. E. 787.

[496] City of Birmingham v. Rumsey, 63 Ala. 352; Greenwood v. Morrison, 128 Cal. 350; Ford v.

of exercising the power includes all the formalities required for the calling of a legal meeting, the adoption of [497] a resolution, ordinance or law, the approval of a contract and questions relating to a quorum or necessary vote.[498] These bodies may direct the execution of contracts by designated persons or officials who then possess the authority to execute contracts otherwise legal and which will be binding upon the public corporation; with respect to duties incapable of delegation this, however, cannot be done.[499]

§ 172. Contracts made by departments.

The power to contract with reference to a particular matter may be granted by authority of law to special departments having charge of a specific branch of government.* Their right to bind a corporation is then limited to those matters over which they are thus given control. Contracts made by them affecting expenditures of other departments of government or questions over which they have no control or a questionable one are not valid and binding. This principle applies to boards of public works [500] or education,[501] so called, police,[502] water, aqueduct,[503] or street commissioners [504] or special boards,[505] and also to numerous

Town of North Des Moines, 80 Iowa, 626; City of Logansport v. Dykeman, 116 Ind. 15; Municipal Signal Co. v. City of Holyoke, 168 Mass. 44, 46 N. E. 397.

[497] Harding v. Vandewater, 40 Cal. 77; Mitchell County Sup'rs v. Horton, 75 Iowa, 271; Beaver Creek Tp. v. Hastings, 52 Mich. 528; Lord v. City of Anoka, 36 Minn. 176.

[498] City of Lincoln v. San Vapor St. Light Co. (C. C. A.) 59 Fed. 756; Municipal Signal Co. v. City of Holyoke, 168 Mass. 44, 46 N. E. 397.

[499] Hill v. City of Indianapolis, 92 Fed. 467; Keller v. Wilson, 90 Ky. 350; Brackett v. City of Boston, 157 Mass. 177; Board of Finance v. Jersey City Com'rs, 55 N. J. Law, 230; Hackett v. Rockingham County, 52 N. H. 617; Reuting v. City of Titusville, 175 Pa. 512.

* 6 Curr. Law, 1109, 1115.

[500] Boston Elec. Co. v. City of Cambridge, 163 Mass. 64, 39 N. E. 787; Chittenden v. City of Lansing, 120 Mich. 539, 79 N. W. 797.

[501] Heughes v. Board of Education of Rochester, 37 App. Div. 180, 55 N. Y. Supp. 799.

[502] Tucker v. Common Council of Grand Rapids, 104 Mich. 621, 62 N. W. 1013.

[503] Morton v. Power, 33 Minn. 521; United New Jersey R. & Canal Co. v. National Docks & N. J. J. C. R. Co., 57 N. J. Law, 523, 31 Atl. 981; Nicoll v. Sands, 131 N. Y. 19.

[504] Dyer v. Hudson, 65 Cal. 374; City of Hartford v. Hartford Elec. Light Co., 65 Conn. 324.

[505] Lower Kings River Reclamation Dist. v. McCullah, 124 Cal. 175; New York, N. H. & H. R. Co. v. Wheeler, 72 Conn. 481; Sampson v. City of Boston, 161 Mass. 288,

organizations or departments composed of more than one official and having in charge the affairs of a township, town,[506] city,[507] county,[508] and variously designated throughout the United States as "Village," or "Town trustees," "Township supervisors," "Selectmen," "County commissioners," "Commissioners of highways," "Board of supervisors," or other designated names. It is also true that such authority when exercised must be in the manner, at the time and in the place, prescribed by law.[509]

§ 173. Made by public officials.

The principle stated in the preceding sections that the authority of an agent or official of a public corporation is special, limited and restricted in its character, applies in the making of contracts to individual officers of such corporations having charge of some designated branch of public service,* whether such officers represent political organizations dignified by the name of "City"[510] or those designated as a "Township," or "Town,"[511] "County,"[512] "Highway,"[513] "School district,"[514] or other subordinate political public quasi corporation.[515]

37 N. E. 177; State v. McCardy, 62 Minn. 509, 64 N. W. 1133.

[506] Town of Rocky Hill v. Hollister, 59 Conn. 434; Inhabitants of Industry v. Inhabitants of Starks, 65 Me. 167; Farr v. Inhabitants of Ware, 173 Mass. 403, 53 N. E. 898.

[507] Coward v. City of Bayonne, 67 N. J. Law, 470, 51 Atl. 490; Oakley v. Atlantic City, 63 N. J. Law, 127.

[508] Times Pub. Co. v. Alameda County, 64 Cal. 469; Fouke v. Jackson County, 84 Iowa, 616, 51 N. W. 71; Mitchell v. Leavenworth County Com'rs, 18 Kan. 188; Dixon v. Greene County, 76 Miss. 794, 25 So. 665; Keith County v. Ogalalla Power & Irr. Co., 64 Neb. 35, 89 N. W. 375; Schenck v. City of New York, 67 N. Y. 44; Cleveland Cotton Mills v. Cleveland County Com'rs, 108 N. C. 678; State v. Franklin County Com'rs, 21 Ohio St. 648.

[509] Babcock v. Goodrich, 47 Cal. 488; Matthews v. Cook County Com'rs, 87 Ill. 590; McCabe v. Fountain County Com'rs, 46 Ind. 380; Curtis v. City of Portland, 59 Me. 483; Jefferson County Sup'rs v. Arighi, 54 Miss. 668; Parr v. Village of Greenbush, 72 N. Y. 463; Dunlap v. Erie Water Com'rs, 151 Pa. 477.

* 6 Curr. Law, 1109, 1115.

[510] Buckman v. Ferguson, 108 Cal. 33, 40 Pac. 1057; Town of Madison v. Newsome, 39 Fla. 149; Campbell v. City of St. Louis, 71 Mo. 106; Providence v. Miller, 11 R. I. 272.

[511] State v. Fountain County Com'rs, 147 Ind. 235, 46 N. E. 525; Strafford v. Welch, 59 N. H. 46; Paine v. Caldwell, 65 N. C. 488.

[512] Price v. Chosen Freeholders of Passaic County, 96 Fed. 174; Dickerson Hardware Co. v. Pulaski County, 55 Ark. 437; Frandzen v.

§ 174. The ratification of an illegal contract.*

A contract may, because of some irregularity or informality in the manner or time of its execution, be illegal because defective and, therefore, incapable of enforcement. Such a contract, the authorities hold, may be ratified either by an acceptance of the benefits of the contract by the public corporation,[516] by the subsequent performance of those acts and conditions required by law in the execution of a legal contract,[517] or by acquiescence in existing conditions, or by operation of the doctrine of estoppel through silence or conduct other than that already suggested.[518]

§ 175. Ratification of a contract ultra vires.

The principles stated in the preceding section do not apply to an ultra vires contract.* If there is no legal authority for the contract, that authority cannot be created through the application of any doctrine or principle of estoppel, acceptance or ratifica-

San Diego County, 101 Cal. 317, 35 Pac. 897; Carroll County Com'rs v. O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16.

[513] Bean v. Inhabitants of Hyde Park, 143 Mass. 245; Reilly v. City of Albany, 112 N. Y. 30; Davis v. Wayne County Ct., 38 W. Va. 104.

[514] Roseboom v. Jefferson School Tp., 122 Ind. 377; Briggs v. Borden, 71 Mich. 87.

[515] Sanitary Dist. of Chicago v. Ricker (C. C. A.) 91 Fed. 833, reversing 89 Fed. 251. The principle applied to the chief engineer of the Sanitary District of Chicago.

* 6 Curr. Law, 1111.

[516] Frick v. Town of Brinkley, 61 Ark. 397; Argenti v. City of San Francisco, 16 Cal. 255; Sacramento County v. Southern Pac. Co., 127 Cal. 217; Town of Rocky Hill v. Hollister, 59 Conn. 434; City of Chicago v. Norton Mill Co., 196 Ill. 580; Lyman v. City of Lincoln, 38 Neb. 694; New Jersey Car-Spring & Rubber Co. v. Jersey City, 64 N. J. Law, 544, 46 Atl. 649; Backman v. Town of Charlestown, 42 N. H. 125; City of New York v. Sonneborn, 113 N. Y. 423; Beers v. Dallas City, 16 Or. 334; Sicilian Asphalt Pav. Co. v. City of Williamsport, 186 Pa. 256, 40 Atl. 471. But see Turney v. Town of Bridgeport, 55 Conn. 412.

[517] Town of Bloomfield v. Charter Oak Bank, 121 U. S. 121; Hill v. City of Indianapolis, 92 Fed. 467; Pimental v. City of San Francisco, 21 Cal. 351; City of Indianapolis v. Wann, 144 Ind. 175, 31 L. R. A. 743; Nelson v. City of New York, 131 N. Y. 4.

[518] Randolph County v. Post, 93 U. S. 502; City of Findley v. Pertz, 66 Fed. 427, 29 L. R. A. 188; Albany City Nat. Bank v. City of Albany, 92 N. Y. 363; Silsby Mfg. Co. v. City of Allentown, 153 Pa. 319; Pope Mfg. Co. v. Granger, 21 R. I. 298.

* 6 Curr. Law, 1111.

tion. The contract cannot be enforced.[519] The courts recognize and enforce the clear distinction between an irregular or informal exercise of a granted or implied power and the total lack or absence of power.[520]

If the legislature possess the power to authorize the execution of certain contracts by a public corporation, it can authorize such a corporation to ratify a contract previously executed by it without such authority;[521] the ratification is then equal in legal force to the granting of original authority, and relating back to the inception of the transaction validates all acts in conection therewith.[522]

§ 176. Ratification of illegal contracts.

The statement has been made in a preceding section that an illegal contract may be ratified by a subsequent performance of those acts or conditions requisite to the making of a legal contract.* This must be done in the manner and by the body authorized by law to perform such acts. The assent of the legislature[523] to the contract may be originally necessary, or consent of the people at an election[524] duly held for such purpose, or the affirmative action by a local legislative body,[525] or by a subordinate

[519] Town of Newport v. Batesville & B. R. Co., 58 Ark. 270; Berka v. Woodward, 125 Cal. 119, 57 Pac. 777, 45 L. R. A. 420; City of Indianapolis v. Wann, 144 Ind. 175, 42 N. E. 901, 31 L. R. A. 743; Tullock v. Webster County, 46 Neb. 211; Berlin Iron Bridge Co. v. Wilkes County Com'rs, 111 N. C. 317; Huron Water-works Co. v. City of Huron, 7 S. D. 9, 62 N. W. 975.

[520] Lake County v. Graham, 130 U. S. 674; Higgins v. City of San Diego, 118 Cal. 524; Ryce v. City of Osage, 88 Iowa, 558; Lincoln v. Inhavitants of Stockton, 75 Me. 141.

[521] Windsor v. City of Des Moines, 110 Iowa, 175, 81 N. W. 476; Id., 101 Iowa, 343, 70 N. W. 214; Chesapeake & P. Tel. Co. v. City of Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033; Brown v. City of New York, 63 N. Y. 239.

[522] Daviess County v. Dickinson, 117 U. S. 657; Hill v. City of Indianapolis, 92 Fed. 467.

* 6 Curr. Law, 1111.

[523] Santa Ana Water Co. v. Town of San Buenaventura, 65 Fed. 323; Reed v. Inhabitants of Lancaster, 152 Mass. 500; Atlantic City Waterworks Co. v. Read, 50 N. J. Law, 665.

[524] Crebs v. City of Lebanon, 98 Fed. 549; Inhabitants of Arlington v. Cutter, 114 Mass. 344; City of Lexington v. Lafayette County Bank, 165 Mo. 671, 65 S. W. 943; City of Portland v. Bituminuous Pav. Co., 33 Or. 307, 44 L. R. A. 527.

[525] City of Chicago v. Galpin, 183 Ill. 399; City of Owensboro v. Weir,

public officer to whom is delegated the performance of such designated duties.[526] A contract, therefore, where such original action is necessary, may be ratified by the proper subsequent performance of the requisite steps. This principle applies universally to the agencies suggested above. The ratification of an illegal contract, when this can be done, relates back to the inception of the transaction and validates all subsequent acts.

§ 177. Modification of a contract.

Where the power is possessed by certain designated officers, the legislature of the state, or a local legislative body, to enter into contract relations binding upon the public corporation they represent, the rule is true that with the consent of the other party to the contract, modifications or changes may be made and the contract as thus modified or changed will be the one determining and establishing the rights of parties. The making of these modifications or changes will be controlled by the general principles relating to the law of contracts.[527] The mere fact that one of the parties to a contract entered into by legal authority is a public corporation, a governmental agent of restricted and special powers does not enable it to willfully or dishonestly modify, change or avoid a contract without the consent of the other party though it may be onerous and burdensome or one resulting in a pecuniary loss to the corporation.[528]

§ 178. Avoidance or rescission of contract.

The right of a public corporation to rescind a contract is controlled by general rules of law.[529] There is a tendency of mu-

95 Ky. 158, 24 S. W. 115; Naegely v. City of Saginaw, 101 Mich. 532; State v. Cowgill & Hill Mill. Co., 156 Mo. 620; City of Omaha v. Croft, 60 Neb. 57; In re Borough of Millvale, 162 Pa. 374.

[526] Smeltzer v. Miller, 125 Cal. 41, 57 Pac. 668; Sexton v. Cook County, 114 Ill. 174; May v. City of Gloucester, 174 Mass. 583; State v. District Ct. of Hennepin County, 33 Minn. 235; New Jersey Car Spring & Rubber Co. v. Jersey City, 64 N. J. Law, 544, 46 Atl. 649.

[527] Smith v. Salt Lake City, 83 Fed. 784; Edwards v. Berlin, 123 Cal. 544; Terre Haute & L. R. Co. v. Nelson, 130 Ind. 258, 27 N. E. 486; Campau v. City of Detroit, 106 Mich. 414; Murphy v. City of Albina, 22 Or. 106; Filbert v. City of Philadelphia, 181 Pa. 530.

[528] State v. City of Great Falls, 19 Mont. 518, 49 Pac. 15; Markey v. City of Milwaukee, 76 Wis. 349, 45 N. W. 28.

[529] Farmers' Loan & Trust Co. v. City of Galesburg, 133 U. S. 156;

nicipal corporations to regard a contract especially those relating to so-called public utilities, binding upon them only so long as it operates in their favor. If it proves what is termed "a bad bargain," it is to be avoided irrespective of the rights of others, the fact that the complaining party is a public corporation being sufficient reason, so it is urged, for it to disregard at its pleasure all contract obligations whenever or under whatever circumstances incurred. This claim is not based upon sound principles and is, therefore, by the great weight of authority, not sustained by the courts.[530] An authorized contract between a public corporation and other parties if made in good faith, without fraud, should be enforced.[531] The question of advantage in the contract to either one party or the other is not to be considered. Courts should not make contracts but enforce them. The right of parties to maintain an action based upon a contract, the question of delay in performance, arbitration clauses, the assignment of a contract and payment for "extras" are all determined by the general principle controlling the law of contracts.

§ 179. Contracts; their construction.*

In the construction of contracts, the fact that a public corporation is one of the parties does not change, except in a few in-

City of New Orleans v. Great Southern Telep. & Tel. Co., 40 La. Ann. 41; Neill v. Gates, 152 Mo. 585; Powers v. City of Yonkers, 114 N. Y. 145.

[530] Warner v. City of New Orleans 167 U. S. 467, 477; City of New Orleans v. Warner, 175 U. S. 120; City of Vincennes v. Citizens' Gas Light Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; State v. City of Great Falls, 19 Mont. 518, 49 Pac. 15; United States Water Works Co. v. Borough of Du Bois, 176 Pa. 439. But see Rittenhouse v. City of Baltimore, 25 Md. 336.

[531] Southwest Missouri Light Co. v. City of Joplin, 113 Fed. 817. This case goes further than the principle in the text and holds that not only should the contract between the parties be enforced but that the municipality itself is prohibited, within the life of the contract, from erecting works of its own which would enter into competition with those of the other party to the contract. Cason v. City of Lebanon, 153 Ind. 567. An illegal arrangement not a part of a contract but made in connection with it is no ground for its rescission. State v. Heath, 20 La. Ann. 172, 96 Am. Dec. 390. "This court can only 'view the city as any other contracting party,' and it will not sanction the revocation of contracts made by her because she may find them onerous or incongruous." Goodale v. Fennell, 27 Ohio St. 426; Western Sav.

stances, the application of ordinary legal rules.[532] Some exceptions to this rule are based upon the reason that in all matters affecting public interests, a public corporation being a governmental or public agency, questions of doubt especially in grants are construed most strongly in favor of the corporation and against the other party to the contract.[533] The question should be determined of the legality of the contract at the time it was made; subsequent developments or newly arising conditions should not be permitted to influence or determine it.[534] The contracts requiring the most frequent construction by the courts are those which relate to or secure a supply of water[535] or light[536] for municipal or public uses; the paving,[537] repairing,[538] sprinkling,[539] or improvement[540] of streets and public highways; the construc-

Fund Soc. v. City of Philadelphia, 31 Pa. 175; City of Galveston v. Morton, 58 Tex. 409; Auerbach v. Salt Lake County, 23 Utah, 103, 63 Pac. 907.

* 6 Curr. Law, 1118.

[532] Worthington v. City of Covington, 82 Ky. 265; City of Grand Rapids v. Grand Rapids Hydraulic Co., 66 Mich. 606; City of Harrisburg v. Shepler, 190 Pa. 374; Milliken v. Callahan County, 69 Tex. 205, 6 S. W. 681.

[533] McPherson v. San Joaquin County (Cal.) 56 Pac. 802; National Water-Works Co. v. School Dist. No. 7, 48 Fed. 523; Chicago, B. & Q. R. Co. v. City of Chicago, 134 Ill. 323; Adrian Water Works v. City of Adrian, 64 Mich. 584.

[534] Los Angeles City Water Co. v. City of Los Angeles, 88 Fed. 720; Little Falls Elec. & Water Co. v. City of Little Falls, 102 Fed. 663.

[535] Little Falls Elec. & Water Co. v. City of Little Falls, 102 Fed. 663; Alpena City Water Co. v. City of Alpena, 130 Mich. 518, 90 N. W. 323; Port Jervis Water Works Co. v. Village of Port Jervis, 151 N. Y. 111.

[536] Hamilton Gas Light & Coke Co. v. City of Hamilton, 146 U. S. 258, affirming 37 Fed. 832; Southwest Missouri Light Co. v. City of Joplin, 113 Fed. 817; City of Vincennes v. Citizens' Gas Light Co., 132 Ind. 114, 16 L. R. A. 485.

[537] Piedmont Pav. Co. v. Allman, 136 Cal. 88, 68 Pac. 493; Shank v. Smith, 157 Ind. 401, 61 N. E. 932, 55 L. R. A. 564; Grant v. City of Detroit, 119 Mich. 43, 77 N. W. 307; Cole v. Skrainka, 105 Mo. 303; State v. Webster, 20 Mont. 219.

[538] McDonald v. Mezes, 107 Cal. 492; Latham v. Village of Wilmette, 168 Ill. 153; Shank v. Smith, 157 Ind. 401, 61 N. E. 932, 55 L. R. A. 564; Osburn v. City of Lyons, 104 Iowa, 160.

[539] Rosetta Gravel Pav. & Imp. Co. v. City of New Orleans, 50 La. Ann. 1173, 24 So. 237.

[540] Drew v. Smith, 38 Cal. 325; Palmer v. Burnham (Cal.) 47 Pac. 599; Ryan v. City of Dubuque, 112 Iowa, 284, 83 N. W. 1073; Gibson v. Owens, 115 Mo. 258, 21 S. W. 1107; Dean v. City of New York, 167 N. Y. 13, reversing 45 App. Div. 605, 61 N. Y. Supp. 374; McManus v. City of Philadelphia, 195 Pa. 304.

tion,[541] and maintenance,[542] of works of public improvement; the construction,[543] repairing,[544] and maintenance [545] of sewers, and the construction of sidewalks.[546]

§ 180. Corporate contracts; manner and time of performance.

A contract may be illegal in part; if it is separable, that portion which is legal can be enforced by the contractor and its performance to that extent insisted upon.[547]

Public contracts usually provide that the work done or materials or commodities furnished shall follow specifications or be performed to the satisfaction of some designated official,[548] or that the work shall be done in a good and workmanlike manner.[549]

A substantial compliance with provisions fixing the time for the commencement or completion of public work, unless time is made the essence of the contract, is all that is necessary to give a contractor the right of compensation for work done by him.[550]

A provision often found in public contracts is one requiring the contractor to guarantee the quality of his work, both as to materials and workmanship,[551] the guarantee being made efficient either through the giving of a bond by the contractor for a speci-

[541] People's Pass. R. Co. v. Memphis R. Co., 77 U. S. (10 Wall.) 38; Smith v. Salt Lake City, 83 Fed. 784; Salt Lake City v. Smith, 104 Fed. 457; City of Chicago v. Duffy, 179 Ill. 447; Fox. v. Bay City, 122 Mich. 499, 81 N. W. 352; City of Camden v. Ward, 67 N. J. Law, 558, 52 Atl. 392; Delafield v. Village of Westfield, 169 N. Y. 582, 62 N. E. 1095.

[542] Bork v. City of Buffalo, 37 N. Y. State Rep. 332.

[543] Rauer v. Lowe, 107 Cal. 229, 40 Pac. 337; Gartner v. City of Detroit, 131 Mich. 21, 90 N. W. 690; Jones v. City of New York, 170 N. Y. 580, 63 N. E. 1118; State v. Liebes, 19 Wash. 589; Herman v. City of Oconto, 110 Wis. 660, 86 N. W. 681.

[544] Seifert v. City of Brooklyn 15 Abb. N. C. (N. Y.) 97.

[545] Van Vorst v. Jersey City, 27 N. J. Law (3 Dutch.) 493.

[546] Gray v. Richardson, 124 Cal. 460.

[547] Chapman v. Douglas County, 107 U. S. 348; Stebbins v. Perry County, 167 Ill. 567; McGillivray v. Joint School Dist., 112 Wis. 354, 88 N. W. 310, 58 L. R. A. 100.

[548] Silsby Mfg. Co. v. Town of Chico, 24 Fed. 893; Gearty v. City of New York, 171 N. Y. 61, 63 N. E. 804.

[549] Murphy v. City of Yonkers, 45 App. Div. 621, 60 N. Y. Supp. 940.

[550] City of Elizabeth v. Fitzgerald (C. C. A.) 114 Fed. 547; Desmond-Dunne Co. v. Friedman-Doscher Co., 162 N. Y. 486, 56 N. E. 995.

[551] Jones v. Town of Marlborough, 70 Conn. 583, 40 Atl. 460.

fied time to maintain in good condition the work or to make all repairs necessary on account of imperfections in the work or materials,[552] or the retention of a certain percentage of the contract price for the purpose of accumulating a fund from which such repairs can be made, the work completed, or the work, if defective, redone by the public corporation.[553] These provisions are generally held valid despite the objection that the cost of the improvement or the public work may sometimes be arbitrarily or unnecessarily increased contrary to some charter or statutory obligation or rule.[554]

The performance of the contract in accordance with its terms and conditions is as obligatory upon the public corporation as upon the other parties to it, and when the contract has been fully performed by the other party it cannot willfully refuse to perform its obligations especially where it has received and retains its benefits.[555]

§ 181. A contract; acceptance of work.

Contracts for the construction of public works usually require that the work shall be constructed under the supervision and to the satisfaction of some designated official or official body, and further, that upon the final completion of the whole, the completed work shall be inspected and formally accepted in the manner provided either by the charter of the corporation or the terms of the contract.[556] In the absence of fraud, such action establishing the completion of work, and the fact that the contract in all

[552] Meriwether v. Lowndes County, 89 Ala. 362, 7 So. 198; Osburn v. City of Lyons, 104 Iowa, 160, 73 N. W. 650; State v. New Orleans & C. R. Co., 52 La. Ann. 1570; Warren-Scharf Asphalt Pav. Co. v. City of St. Paul, 69 Minn. 453, 72 N. W. 711.

[553] J. M. Griffith Co. v. City of Los Angeles (Cal.) 54 Pac. 383; Wilson v. Inhabitants of Trenton, 61 N. J. Law, 599, 40 Atl. 575; People v. Third Nat. Bank of Syracuse, 159 N. Y. 382.

[554] Brown v. Jenks, 98 Cal. 12; City of Portland v. Bituminous Pav. Co., 33 Or. 307, 44 L. R. A. 527. But see Alameda Macadamizing Co. v. Pringle, 130 Cal. 226, 62 Pac. 394, 52 L. R. A. 264.

[555] Town of Gosport v. Pritchard, 156 Ind. 400, 59 N. E. 1058; Western Sav. Fund Soc. v. City of Philadelphia, 31 Pa. 175; Norton v. City of Roslyn, 10 Wash. 44.

[556] Reid v. Clay, 134 Cal. 207, 66 Pac. 262; Creston Waterworks Co. v. City of Creston, 101 Iowa, 687; Richardson v. Mehler, 111 Ky. 408, 63 S. W. 957.

its terms and conditions has been complied with, is conclusive and binding upon both parties.[556a]

§ 182. Payment of contract obligations.

The obligation assumed by a public corporation under a contract may be general and payable from funds raised by general taxation or special and payable only from moneys raised by special assessments upon designated property. In the former case the contractor or his assignee can compel payment from the general funds at the disposal of the corporation;[557] if the obligation for the payment is based upon a special fund he is limited in his recovery to such fund.[558]

The payment of compensation depends first, upon the validity of the contract; if executed without proper authority or not in the manner required by law, and therefore invalid, the contractor in case of nonpayment cannot recover in an action based upon it.[559] In these instances, to effect a substantial equity between parties, he is usually permitted to recover for the work done, materials furnished or services rendered upon a quantum meruit or valebant.[560] The payment of compensation again may depend

[556a] City of Omaha v. Hammond, 94 U. S. 98; Ryan v. City of Dubuque, 106 Iowa, 312, 76 N. W. 703; Alpena City Water Co. v. City of Alpena, 130 Mich. 518, 90 N. W. 323; Schliess v. City of Grand Rapids, 131 Mich. 52, 90 N. W. 700; McCormick v. City of St. Louis, 166 Mo. 315, 65 S. W. 1038; Peck v. State, 137 N. Y. 372; City of Elizabeth v. Fitzgerald (C. C. A.) 114 Fed. 547; Jones v. Town of Marlborough, 70 Conn. 583, 40 Atl. 460; Smith v. Hubbard, 85 Tenn. 306, 2 S. W. 569.

[557] First Nat. Bank of Du Quoin v. Keith, 183 Ill. 475; Warren-Scharf Asphalt Pav. Co. v. City of St. Paul, 69 Minn. 453.

[558] City of Pontiac v. Talbot Pav. Co. (C. C. A.) 96 Fed. 679, denying a rehearing in 94 Fed. 65, 48 L. R. A. 326; City of Huntington v. Force, 152 Ind. 368; Moylan v. City of New Orleans, 32 La. Ann. 673; Wheeler v. City of Poplar Bluff, 149 Mo. 36.

[559] Richardson v. Grant County, 27 Fed. 495; Gamewell Fire-Alarm Tel. Co. v. City of Laporte (C. C. A.) 102 Fed. 417, affirming 96 Fed. 664; Seibrecht v. City of New Orleans, 12 La. Ann. 496; Warren v. Inhabitants of Durham, 61 Me. 19; Newbery v. Fox, 37 Minn. 141; Tappan v. Long Branch Police S. & I. Commission, 59 N. J. Law, 371, 35 Atl. 1070.

[560] Bill v. City of Denver, 29 Fed. 344; Illinois Trust & Sav. Bank v. Arkansas City Water Co., 67 Fed. 196; Dawson Water-Works Co. v. Carver, 95 Ga. 565; Sanitary Dist. of Chicago v. George F. Blake Mfg. Co., 179 Ill. 167; Schipper v.

upon the performance of the contract according to its terms and conditions. If there is a failure to perform or an imperfect performance, advantage can be taken of these conditions by the public corporation and payment refused. It is then questionable if the contractor can recover.[561]

§ 183. Bond required of contractors.

It is customary in the making of all contracts by public corporations to include as one of the conditions of the contract the requirement that the contractor shall give a bond with satisfactory sureties running to the corporation,[562] and conditioned upon the proper performance of the work,[563] the furnishing of satisfactory materials,[564] the payment of all debts in connection with the performance of the contract including labor and materials furnished.[565] The purpose of the first two conditions named is to secure the performance of the work in a statisfactory manner; to provide a means by which the corporation may indemnify itself against any attempt on the part of dishonest contractors to furnish materials or perform work not of the character or quality required by their contract. The purpose of the third condition is to insure the payment of all bills by the contractor which, if unpaid, would furnish a basis for the filing of liens in favor of laborers or material men.

City of Aurora, 121 Ind. 154, 6 L. R. A. 318; Scott v. School Dist. No. 9 in Williamstown, 67 Vt. 150, 31 Atl. 145, 27 L. R. A. 588.

[561] Trustees of Belleview v. Hohn, 82 Ky. 1; Mathewson v. City of Grand Rapids, 88 Mich. 558; Maupin v. Franklin County, 67 Mo. 327; Moore v. City of New York, 73 N. Y. 238.

[562] Stephenson v. Monmouth Min. & Mfg. Co. (C. C. A.) 84 Fed. 114; City of Newton v. Devlin, 134 Mass. 490.

[563] City of Ft. Madison v. Moore, 109 Iowa, 476; Seaboard Nat. Bank v. Woesten, 147 Mo. 467, 48 L. R. A. 279.

[564] Gosnel v. City of Louisville, 104 Ky. 201, 46 S. W. 722; City of Portland v. Bituminous Pav. & Imp. Co., 33 Or. 307, 52 Pac. 28, 44 L. R. A. 527.

[565] French v. Powell, 135 Cal. 636, 68 Pac. 92; Town of Grand Isle v. Kinney, 70 Vt. 381; State v. Liebes, 19 Wash. 589; Whitehouse v. American Surety Co., 117 Iowa, 328, 90 N. W. 727; Norton v. Sinkhorn, 63 N. J. Eq. 313, 50 Atl. 506.

CHAPTER VI.

PUBLIC REVENUES; THEIR COLLECTION AND DISBURSEMENT.

I. TAXATION.

II. SPECIAL ASSESSMENTS.

I. Taxation.

§ 184. Definition and nature.*

The power of taxation is one of the inherent attributes of sovereignty. It is that power, political and governmental in its nature, which can compel, if necessary, a contribution for the support of the government from those under its jurisdiction. Theo-

* 6 Curr. Law, 1602.

retically, it has no limit. It is that power most necessary to the existence and maintenance of government and the exercise of the various functions which are universally recognized as proper. Under some theories, the individual is supposed, in return for a surrender to government of the right to tax his person and property, to receive the obligation of that government to protect him in the proper use and enjoyment of his property and to guard his personal rights, but ordinarily the power of taxation is a governmental and political necessity and there is no legal obligation to render a return.[1]

The police power is purely regulative and its exercise designed to restrict the individual in the use of his physical powers and in the use and enjoyment of his property enforcing the maxim sic utere tuo ut alienum non loedas. Government recognizes the individual only as a member of society with obligations and duties to that society of which he is a member.[2]

The power of eminent domain is that inherent right possessed by the sovereign to appropriate private property for public use with the organic limitation in this land, "only upon the payment of just compensation," which must be "full, ample and complete" before the power can be exercised.[3]

The war power, like the power of taxation, is a governmental and political necessity, but properly used only for the maintenance or protection of national life or honor. The power of taxation being a governmental and political one, in the abstract sense is without limitation and can be exercised without restriction. In this country, however, there are well established and clearly defined limitations upon the right of the sovereign to levy taxes. These limitations and restrictions are to be found in the constitution of the United States and those of the different states and

[1] Rolph v. City of Fargo, 7 N. D. 640, 76 N. W. 242, 42 L. R. A. 646; Trustees of Public Schools v. Taylor, 30 N. J. Eq. (3 Stew.) 618. Cooley, Taxation, p. 2.

[2] Hanson v. Vernon, 27 Iowa, 28, 1 Am. Rep. 215, with cases there cited defining taxes. See, also, People v. Austin, 47 Cal. 360; Warren v. Henly, 31 Iowa, 31; Allen v. Inhabitants of Jay, 60 Me. 124; Weismer v. Village of Douglas, 64 N. Y. 91; Hilbish v. Catherman, 64 Pa. 154.

[3] Alexander v. City of Alexandria, 5 Cranch (U. S.) 1; Gilman v. City of Sheboygan, 2 Black (U. S.) 510; Chambers v. Satterlee, 40 Cal. 497; Nichols v. City of Bridgeport, 23 Conn. 189; Brittin v. Blake, 36 N. J. Law, 442; Lewis, Em. Dom.

exist as well in what might be termed for want of a better phrase the fundamental principles of law and equity.[4] The power of the sovereign to delegate to subordinate bodies or agencies its powers of taxation is unquestioned though such grant usually conveys no unlimited or irrevocable rights.[5] The limitations upon the power usually applied by courts have for their purpose the imposition of taxes in a uniform, orderly and impartial way, both as to the subjects and methods of taxation and the enforcement of the power.[6] It is not a discretionary power when once granted and its exercise for legitimate purposes can be compelled by those who would suffer from a failure or neglect to tax.[7] It is a continuing power, the exercise or nonuse of which does not defeat the right to tax whenever necessary, subject to legal limitations.[8] When granted by the sovereign to a subordinate agent, a public quasi or municipal corporation, it becoming then a delegated power, the rule universally holds that the exercise of the power cannot in turn be delegated to some officer or inferior body.[9] The power to be legally exercised must be expressly granted and further,[10] it is one of a limited and restricted nature. Provisions

[4] Sedgwick, St. Const. Law; Hare, Am. Const. Law; Cooley, Const. Lim.; Desty, Taxation; Burroughs, Taxation; Cooley, Taxation; Abb. Mun. Corp.

[5] Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 665; Bracey v. Ray, 26 La. Ann. 710; State v. Board of Education of St. Louis, 141 Mo. 45; State v. Mason, 153 Mo. 23.

[6] City of Mobile v. Dargan, 45 Ala. 310; Sangamon County v. City of Springfield, 63 Ill. 66; Adams v. Mississippi State Bank, 75 Miss. 701, 23 So. 395; Carolina Cent. R. Co. v. City of Wilmington, 72 N. C. 73; London v. City of Wilmington, 78 N. C. 109; Rolph v. City of Fargo, 7 N. D. 640, 76 N. W. 242, 42 L. R. A. 646, citing many cases; Germania Sav. Bank v. Town of Darlington, 50 S. C. 337.

[7] Meriwether v. Muhlenburg County Ct., 120 U. S. 354, 7 Sup. Ct. 563; Mayfield Woolen Mills v. City of Mayfield, 111 Ky. 172, 61 S. W. 43.

[8] Wells v. City of Savannah, 107 Ga. 1, 32 S. E. 669; City of Lake Charles v. Police Jury of Calcasieu, 50 La. Ann. 346, 23 So. 376; Mills v. Charleton, 29 Wis. 400.

[9] Johnston v. City of Macon, 62 Ga. 645; State v. City of Des Moines, 103 Iowa, 76, 72 N. W. 639, 39 L. R. A. 285; Harward v. St. Clair-M. Levee & Drainage Co., 51 Ill. 130; Councilmen of Frankfort v. Deposit Bank, 22 Ky. L. R. 1384, 60 S. W. 19; State v. McVea, 26 La. Ann. 151.

[10] United States v. Town of Cicero, 41 Fed. 83; Vance v. City of Little Rock, 30 Ark. 435; Livingston v. City Council of Albany, 41 Ga. 21; Walker v. Edmonds, 197 Pa. 645, 47 Atl. 867; State v. Town of Maysville, 12 S. C. 76

granting it cannot be extended or enlarged by implication beyond the clear import of the language used in the granting clause.[11]

§ 185. Municipal power to tax.

The use of the word "municipal" in the title of this section is intended to include not only municipal corporations proper, but all those public quasi corporations organized subsidiary to the sovereign. The term here is a comprehensive one and includes all subordinate grades of public corporations. The granted power in its nature and extent generally speaking is limited only by the authority conferring its exercise. In construing the power as granted, it is considered a continuing one and as operating prospectively, never retrospectively.

The authority or power to tax being a governmental power possessed only in the fullest extent by the sovereign, to be exercised by a subordinate agent, must be expressly given. A municipal corporation in its broad sense has no power to levy taxes or impose license fees, a species of taxation, when not expressly authorized so to do either by its charter or by some general provision of the law.[12] The legislature in delegating it should provide for its exercise in an equal and uniform manner.[13] The power of taxation in a municipal corporation, as a rule, is not general in its nature. Municipal corporations or subordinate corporations are local agencies of the government within a definite locality. The municipal power to tax, therefore, is restricted to community or local purposes.[14] General taxes cannot be levied by one for the support, either of the nation, the state, or communities of an equal

[11] Baldwin v. City Council of Montgomery, 53 Ala. 437; Metropolitan Life Ins. Co. v. Darenkamp, 23 Ky. L. R. 2249, 66 S. W. 1125; City of Baltimore v. State, 15 Md. 376; Smith v. City of Vicksburg, 54 Miss. 615; City of St. Louis, v. Laughlin, 49 Mo. 559; Directors of Alfalfa Irr. Dist. v. Collins, 46 Neb. 411; Dean v. Charlton, 27 Wis. 522.

[12] Sanders v. Commissioners of Butler, 30 Ga. 679; City of Independence v. Moore, 32 Mo. 392.

[13] United States v. City of New Orleans, 98 U. S. 381; City of Mobile v. Dargan, 45 Ala. 310; Security Sav. Bank & Trust Co. v. Hinton, 97 Cal. 214, 32 Pac. 3; Wells v. City of Savannah, 107 Ga. 1.

[14] United States v. City of New Orleans, 98 U. S. 381; Southern R. Co. v. St. Clair County, 124 Ala. 491, 27 So. 23; Midland Elevator Co. v. Stewart, 50 Kan. 378; McDonald v. City of Louisville, 113 Ky. 425, 68 S. W. 413.

or inferior grade to itself.[15] On the contrary, it is quite generally held that for purely local or municipal uses, the legislature cannot require a subordinate corporation to levy taxes. This principle has been applied to acts attempting to compel municipal authorities to issue bonds for the cost of acquiring and maintaining public parks.[16]

§ 186. Limitations as to rate, amount or purpose.

In this country it is the aim of the government as well as the desire of the individual that taxation should not result in a confiscation of private property. To secure this end the constitutions or general statutes of the different states limit the amount of taxation which can be levied either by the government itself or any of its subordinate agencies upon property within its jurisdiction for a specific period of time.[17] This limitation may be designated by a rate per-cent[18] or it may be fixed by specifying the gross amount which can be raised.[19] A tax in excess of the limitation provided by law is not necessarily void as a whole but will be sustained as to the portion within the limit if the excess can be separated from it.[20]

To maintain a governmental organization of any subordinate agency, certain well recognized expenditures are deemed necessary. The limitation of rate or amount of tax to be raised in any

[15] State v. Nelson, 105 Wis. 111.

[16] People v. City of Chicago, 51 Ill. 17; People v. Common Council of Detroit, 28 Mich. 228; Blades v. Water Com'rs of Detroit, 122 Mich. 366, 81 N. W. 271.

[17] City of Cleveland v. United States, 111 Fed. 341; Columbus Water-Works Co. v. City of Columbus, 48 Kan. 378; Stewart v. Kansas Town Co., 50 Kan. 553; Schneewind v. City of Niles, 103 Mich. 301; Cummings v. Fitch, 40 Ohio St. 56.

[18] United States v. Town of Cicero, 41 Fed. 83; State v. Southern R. Co., 115 Ala. 250, 22 So. 589; City of Santa Barbara v. Eldren, 95 Cal. 378, 30 Pac. 562; State v. City of Great Falls, 19 Mont. 518, 49 Pac. 15; Mohmking v. Bowes, 65 N. J. Law, 469, 47 Atl. 507; State v. Atkinson, 107 N. C. 317; State v. City of Toledo, 48 Ohio St. 112, 11 L. R. A. 729; Gadsby v. City of Portland, 38 Or. 135, 63 Pac. 14.

[19] Second Municipality v. Orleans Cotton Press Co., 6 Rob. (La.) 411; Newaygo Mfg. Co. v. Echtinaw, 81 Mich. 416, 45 N. W. 1010; People v. City of Syracuse, 128 N. Y. 632.

[20] Denver City R. Co. v. City of Denver, 21 Colo. 350, 29 L. R. A. 608; Mix v. People, 72 Ill. 242; Whaley v. Com., 23 Ky. L. R. 1292, 61 S. W. 35; Levi v. City of Louisville, 97 Ky. 394, 28 L. R. A. 480.

one year may apply not only to such regular disbursements [21] but also to what may be termed special purposes or uses of public money which are recognized as proper but which are not regularly made from year to year. The erection of new buildings or construction of works of public improvement permanent in their character may be considered special purposes.[22]

§ 187. Purpose of taxation.

Specific taxation may be illegal, and therefore void, although within the limitation as to rate or amount fixed by law because of the purpose for which levied. The very essence of the validity of a tax under our theory of government is a public use of the moneys derived. Private property, if taken for other than a public purpose without the payment of pecuniary compensation is confiscation and cannot be sustained or upheld under any attribute or theory of government as understood and practiced here.

Government should never undertake the execution or management of, nor extend aid to, enterprises, the character of which as defined by the use of the term "private" is questionable. The fact that a government engages in an enterprise does not change its economic character from a purely private enterprise or business to a public one. Taxation for all such questionable enterprises by the government is universally considered not only unwise but unconstitutional and invalid.[23]

The legislative body of a sovereign, much less a subordinate body, possessing the right only to exercise such powers as may expressly be granted or delegated to it is limited in its right to levy taxes to those imposed for public purposes or those in which the people of the corporation have a general interest.[24] If the purpose for which the obligation is contracted is one not of a pub-

[21] Drake v. Phillips, 40 Ill. 388; Otis v. People, 196 Ill. 542; Mayfield Woolen Mills v. City of Mayfield, 22 Ky. L. R. 1676, 61 S. W. 43.

[22] Combs v. Letcher County, 21 Ky. L. R. 1057, 54 S. W. 177.

[23] Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 655; People v. Parks, 58 Cal. 624; Opinion of the Justices, 58 Me. 590; Cooley, Taxation, p. 103. See, also, Abb. Mun. Corp. § 304, thoroughly discussing the question and citing many cases.

[24] Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 655; Webster v. Police Jury of Rapides, 51 La. Ann. 1204; Merrick v. Inhabitants of Amherst, 94 Mass. (12 Allen) 500; Hixon v. Oneida County, 82 Wis. 515, 52 N. W. 445.

lic character, a tax cannot be constitutionally or legally imposed to pay such obligation.[25] This question has already been discussed in connection with the subject of the right of a public corporation to incur indebtedness. The cases there cited sustain the principles given in this section. The construction of levees,[26] the maintenance of the public peace, safety and health,[27] the construction and repair of public buildings and improvements,[28] the establishment and maintenance of public parks,[29] are uses which come within the definition of those for a public purpose. The payment of expenses incurred in opposing before the legislature the passage of an act annexing contiguous territory,[30] a donation to a private institution not under the control of the municipality,[31] an appropriation for the reimbursement of a township treasurer who has been robbed of public moneys while in his keeping,[32] refunding a donation given to the town without expectation of repayment,[33] the benefits which may come to a city or village from

[25] Habersham County Com'rs v. Porter Mfg. Co., 103 Ga. 613; Sleight v. People, 74 Ill. 47; Gerry v. Inhabitants of Stoneham, 83 Mass. (1 Allen) 319; Coit v. City of Grand Rapids, 115 Mich. 493; Neale v. Wood County Ct., 43 W. Va. 90; Wisconsin Industrial School for Girls v. Clark County, 103 Wis. 651, 79 N. W. 422.

[26] People v. Whyler, 41 Cal. 351; State v. Maginnis, 26 La. Ann. 558.

[27] State v. Mason, 153 Mo. 23; Truesdell's Appeal, 58 Pa. 148; Hillbish v. Catherman, 64 Pa. 154; Trustees of Firemen's Benev. Fund v. Roome, 93 N. Y. 313. Cooley, Taxation, p. 110; State v. Tappan, 29 Wis. 664, 672.

[28] Durrett v. Buxton, 63 Ark. 397; Habersham County Com'rs v. Porter Mfg. Co., 103 Ga. 613, 30 S. E. 547; Lewis v. Lofley, 92 Ga. 804; Combs v. Letcher County, 21 Ky. L. R. 1057, 54 S. W. 177; Friend v. Gilbert, 108 Mass. 408.

[29] South Park Com'rs v. First Nat. Bank, 177 Ill. 234, affirming Knopf v. Chicago Real Estate Board, 173 Ill. 196.

[30] Coolidge v. Brookline, 114 Mass. 592.

[31] Hitchcock v. City of St. Louis, 49 Mo. 484.

[32] Thorndike v. Inhabitants of Camden, 82 Me. 39, 7 L. R. A. 463; Bristol v. Johnson, 34 Mich. 123. But see the following cases holding that where public officials have been subjected to loss in an honest attempt to perform their public duty, they may be indemnified by the municipality for which they were acting: Hadsell v. Inhabitants of Hancock, 69 Mass. (3 Gray) 526; Fuller v. Inhabitants of Groton, 77 Mass. (11 Gray) 340; Baker v. Inhabitants of Windham, 13 Me. 74; Pike v. Middleton, 12 N. H. 278; Sherman v. Carr, 8 R. I. 431; Briggs v. Whipple, 6 Vt. 95.

[33] Perkins v. Inhabitants of Milford, 59 Me. 315; Osgood v. Town of Conway, 67 N. H. 100, 36 Atl. 608; Bartholomew v. Jackson, 20 Johns. (N. Y.) 28.

the establishment of a successful manufacturing plant,[34] the expenditure of public moneys for the entertainment of a presidential candidate attending an industrial exposition,[35] the construction of a dam at the expense of the taxpayers, the main purpose of which is to generate power for lease to private manufacturing enterprises which may thereby be induced to come to the city,[36] are not public purposes within the meaning of that phrase and the levy of taxes to meet such disbursements will be held illegal and can be enjoined. To authorize the levy of taxes by a subordinate corporation it is not necessary, however, that they be of strictly local character so long as the public receive some direct advantage.

Railway aid. The use of a railroad though owned by a private corporation is public to such an extent, it has been repeatedly held, as to authorize taxation for its aid. This proposition at the present time is not disputed though the power to levy taxes for this purpose must be expressly given. It can never be implied.[37]

§ 188. The payment of debts.*

The payment by an individual as well as a public corporation of a legal debt or obligation is considered praiseworthy, and the levying of taxes, when within the limit fixed by law, is not open to objection. The right to levy for this purpose need not be expressly given where there is first legal authority for the incurrment of the expenditure. The power to incur the expense implies the power and the duty to pay the resulting obligation.[38] The performance of the duty can be enforced by mandamus.[39]

[34] Welsmer v. Village of Douglas, 4 Hun, 201, 64 N. Y. 91; City of Parkersburg v. Brown, 106 U. S. v. Smith, 23 Kan. 745; Opinions 487; Central Branch U. P. R. Co. of the Justices, 58 Me. 590; Allen v. Inhabitants of Jay, 60 Me. 124; Lowell v. City of Boston, 111 Mass. 454; Cooley, Taxation, p. 126.

[35] Moore v. Hoffman, 2 Cin. R. (Ohio) 453.

[36] Nalle v. City of Austin (Tex. Civ. App.) 21 S. W. 375.

[37] Scotland County Ct. v. United States, 140 U. S. 41; Northern Pac. R. Co. v. Roberts, 42 Fed. 734; Brocaw v. Gibson County om'rs, 73 Ind. 543; Stewart v. Polk County Sup'rs, 30 Iowa, 9; Clifton v. Hobgood, 106 La. 535, 31 So. 46.

* 6 Curr. Law, 1604.

[38] United States v. City of New Orleans, 98 U. S. 381; Quincy v. Jackson, 113 U. S. 332; City of Cleveland v. United States (C. C. A.) 111 Fed. 341; Webster v. Baltimore County Com'rs, 51 Md. 395; Raton Waterworks Co. v. Town of Raton, 9 N. M. 70, 49 Pac. 898; Slocomb v. City of Fayetteville, 125 N. C. 362.

[39] State v. City of New Orleans,

Of judgments. So the payment of a judgment secured by due process of law against the corporation is considered a public purpose and not open to objection. As the only method possessed by public corporations for raising revenues is the levying of taxes in the manner provided by law, the levy and collection for this specific purpose will not be considered invalid,[40] and if officials refuse to perform their duty in this respect, they can be compelled by mandamus or other proper proceedings [41] unless the total tax levy is then at the full limit fixed by law.[42]

Of bonds and interest. Where the express power has been given a public corporation to issue bonds, the implied power follows to levy taxes for their payment in the manner provided by law,[43] or for the payment of interest upon indebtedness whether such accrues upon bonds issued as above or upon other and general interest bearing legal corporate indebtedness.[44] This rule includes sinking fund provisions.[45]

23 La. Ann. 358; Attorney General v. City of Salem, 103 Mass. 138; Com. v. City of Pittsburgh, 34 Pa. 496; State v. City of Milwaukee, 25 Wis. 122.

[40] King v. Grand County Com'rs (C. C. A.) 77 Fed. 583; City of Helena v. United States, 104 Fed. 113; City Council of Augusta v. Pearce, 79 Ga. 98; Shippy v. Wilson, 90 Mich. 45, 51 N. W. 353; Custer County v. Chicago, B. & Q. R. Co., 62 Neb. 657, 87 N. W. 341; Brown v. Assessors of Rahway, 51 N. J. Law, 279, 17 Atl. 122; State v. City of Madison, 15 Wis. 33.

[41] United States v. City of Key West (C. C. A.) 78 Fed. 88; First Nat. Bank of Ceredo v. Society for Savings (C. C. A.) 80 Fed. 581; Sterling School Furniture Co. v. Harvey, 45 Iowa, 466; State v. Yellowstone County Com'rs, 12 Mont. 503.

[42] Sterling School Furniture Co. v. Harvey, 45 Iowa, 466. But see Dawson County v. Clark, 58 Neb. 756, 79 N. W. 822. See, also, Youngerman v. Murphy, 107 Iowa, 686; Phelps v. Lodge, 60 Kan. 122, 55 Pac. 840.

[43] United States v. Town of Cicero, 41 Fed. 83; United States v. Town of Cicero (C. C. A.) 50 Fed. 147; Security Sav. Bank & Trust Co. v. Hinton, 97 Cal. 214; Taylor v. McFadden, 84 Iowa, 262; Covington Gas Light Co. v. City of Covington, 92 Ky. 312; State v. Hannibal & St. J. R. Co., 101 Mo. 136, 13 S. W. 505; Shackelton v. Town of Guttenberg, 39 N. J. Law, 660.

[44] United States v. City of Key West (C. C. A.) 78 Fed. 88; United States v. Village of Kent, 107 Fed. 190; Louisville Sinking Fund Com'rs v. Grainger, 98 Ky. 319, 32 S. W. 954; City of Charlotte v. Shepard, 122 N. C. 602.

[45] Louisville Sinking Fund Com'rs v. Grainger, 98 Ky. 319; St. Louis County Com'rs v. Nettleton, 22 Minn. 356; Newark Aqueduct Board v. City of Newark, 50 N. J. Law, 126; Cummings v. Fitch, 40 Ohio St. 56.

Obligatory payments on contracts. Where legal authority exists to contract, unless some other mode for raising funds with which to meet the contract obligation is provided, the implied power exists for the levying and collection of taxes for the payment of the debt which may be created through the carrying out of the contract.[46]

The payment of warrants and claims. The corporate power also exists to levy taxes for the payment of legal outstanding warrants and properly established adverse claims.[47]

§ 189. Taxation for the support of public schools.

The support and maintenance of public schools is one of those purposes as to the public character of which there is no question, and, therefore, within the limits provided by law, the public corporation has the power to levy taxes for the support of a school system of the scope and efficiency commensurate and proportionate to the size and ability of the corporation.[48] Subordinate governmental agencies are usually considered, in this respect, political or municipal organizations possessing the power to levy taxes for school purposes as coming within the grant of a general power of taxation for local or community purposes.[49]

§ 190. The construction of roads.

The construction, maintenance or repair of public highways is considered such a purpose as will authorize without question the levy and collection of road tax moneys.[50] The general principles

[46] Marks v. Purdue University, 37 Ind. 155; Burnham v. Rogers, 167 Mo. 17, 66 S. W. 970; School Dist. of Central City v. Chicago, B. & Q. R. Co., 60 Neb. 454, 83 N. W. 667.

[47] Flemming v. Trowsdale (C. C. A.) 85 Fed. 189; West School Dist. of Canton v. Merrills, 12 Conn. 437; Fuller v. Heath, 89 Ill. 296; Auditor v. School Trustees of Frankfort, 81 Ky. 680; Vose v. Inhabitants of Frankfort, 64 Me. 229; Bigelow v. Town of Washburn, 98 Wis. 553, 74 N. W. 362.

[48] Francis v. Southern R. Co., 124 Ala. 544, 27 So. 22; Ayers v. McCalla, 95 Ga. 555; Marks v. Purdue University, 37 Ind. 155; Nelson v. Town of Homer, 48 La. Ann. 258; Cooley, Taxation, pp. 119 et seq.

[49] Opinion of the Justices, 67 Me. 582; Shepardson v. Gillett, 133 Ind. 125, 31 N. E. 788; Landis v. Ashworth, 57 N. J. Law, 509, 31 Atl. 1017.

[50] San Luis Obispo County v. White, 91 Cal. 432; Commissioners of Highways of Goshen v. Jackson, 165 Ill. 17; Hoffman v. Lynburn, 104 Mich. 494; Herring v. Dixon,

requiring uniformity and equality of poeration apply equally to laws imposing road taxes [51] which must also be levied in the manner and by the board provided by law.[52] The rate or amount to be raised for this special purpose may be limited.[53] If one is levied or raised in excess of this, the same principle is applied as in the cases of a similar nature and the proceedings will be held invalid only as to the excess.[54] The construction and maintenance of highways must be distinguished from the making of a "local improvement" so called. The cost of local improvements is usually met by local assessments which as to the basis of levy and collection, differ radically from taxes.[55] The legality of a local assessment is based upon the doctrine that the improvement will result in a local and special advantage to specific property, which should, therefore, pay the cost of such improvement, benefit or advantage. The community at large receiving no special benefit should not be required to pay its cost.

§ 191. The levy of taxes to secure a supply of water and light.

The purposes, namely, a supply of water [56] and light,[57] indicated in the title of this section, have been repeatedly held of such a character as to warrant not only the expenditure of public money but the levy of taxes for such purpose. Public corporations

122 N. C. 420, 29 S. E. 368; Bradford v. Newport, 42 N. H. 338; Miller v. Hixson, 64 Ohio St. 39, 59 N. E. 749; Com. v. Reiter, 78 Pa. 101. Cooley, Taxation, p. 130.

[51] Haney v. Bartow County Com'rs, 91 Ga. 770; Lima v. McBride, 34 Ohio St. 338; Adams v. Hyde, 27 Vt. 221.

[52] Chicago & N. W. R. Co. v. People, 193 Ill. 594; Kansas City, Ft. S. & G. R. Co. v. Scammon, 45 Kan. 481, 25 Pac. 858; Hudson v. Police Jury of Claiborne, 107 La. 387, 31 So. 868.

[53] C. N. Nelson Lumber Co. v. Town of Loraine, 24 Fed. 456; Chicago & A. R. Co. v. People, 190 Ill. 20; Ada Tp. v. Grove, 114 Mich. 77, 72 N. W. 35; State v. Kansas City, St. J. & C. B. R. Co., 145 Mo. 596.

[54] Peninsular Sav. Bank v. Ward, 118 Mich. 87, 76 N. W. 161, 79 N. W. 911.

[55] Barrow v. Helper, 34 La. Ann. 362; Rogers v. City of St. Paul, 22 Minn. 494–507; Sperry v. Flygare, 80 Minn. 325, 49 L. R. A. 757.

[56] City of Cleveland v. United States, 111 Fed. 341; Holt v. City of Birmingham, 111 Ala. 369; Taylor v. McFadden, 84 Iowa, 262; Gay v. City of New Whatcom, 26 Wash. 389, 67 Pac. 88; Oconto City Water Supply Co. v. City of Oconto, 105 Wis. 76.

[57] Stewart v. Kansas Town Co., 50 Kan. 553; State v. City of Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729; Western Sav. Fund Soc. v. City of Philadelphia, 31 Pa. 175.

may for these purposes incur indebtedness, expend moneys already raised or provide for the future expenditure of moneys by the levy of taxes.

§ 192. The exercise of the power.*

A public corporation or the sovereign itself can levy taxes only upon the persons and property within its jurisdiction. A personal tax upon nonresidents or upon their personal property is incapable of enforcement;[58] neither can a public corporation levy a tax upon real property lying beyond the corporate limits.[59] The converse of the rule thus stated is unquestionably true and all persons or property within the limits of a taxing district are subject to the taxes which it may impose.[60] Where persons or property are within the jurisdiction of different corporations, the limits of which are wholly or partially co-extensive with each other, they may be subject to the levy of taxes for the same or a different purpose by each of such corporate organizations.[61]

§ 193. Public property when exempt; other exemptions.

It is axiomatic to state that property owned, controlled and used by public corporations for public purposes is exempt from all species of taxation and even in many instances from the levying of special taxes or assessments except when otherwise provided by

* 6 Curr. Law, 1605.

[58] City of St. Louis v. Wiggins Ferry Co., 78 U. S. (11 Wall.) 423; In re Mahoney's Estate, 133 Cal. 180, 65 Pac. 389. The rule, however, does not apply to an inheritance tax. City of Augusta v. Dunbar, 50 Ga. 387; Louisville Bridge Co. v. City of Louisville, 81 Ky. 189.

[59] Large v. Washington Dist. Tp., 53 Iowa, 663; Trigg v. Trustees of Glasgow, 65 Ky. (2 Bush) 594; Deason v. Dixon, 54 Miss. 585; Sioux City Bridge Co. v. Dakota County, 61 Neb. 75, 84 N. W. 607; Allen v. Bidwell, 68 N. H. 245; Arthur v. School Dist. of Polk Borough, 164 Pa. 410.

[60] Alexander v. Town of Alexandria, 5 Cranch (U. S.) 1; Cutliff v. City of Albany, 60 Ga. 597; Raymond v. Hartford Fire Ins. Co., 196 Ill. 329; Byram v. Marion County Com'rs, 145 Ind. 240, 44 N. E. 357, 33 L. R. A. 476; Newport News & O. P. R. & Elec. Co. v. City of Newport News, 100 Va. 157, 40 S. E. 645.

[61] Martin v. Aston, 60 Cal. 63; People v. Knopf, 171 Ill. 191; Jackson Tp. v. Wood, 55 Kan. 628, 40 Pac. 897; Ryerson v. Laketon Tp., 52 Mich. 509; Sargent v. Inhabitants of Milo, 90 Me. 374, 38 Atl. 341.

law.[62] The rule, however, does not apply to the property of public corporations not held for governmental purposes but in their economic and commercial capacity as private corporations and for their own profit.[63] The only means possessed by public corporations for the payment of taxes is derived from its levy and collection of taxes. They have no independent sources of revenue.[64] The levying and collecting of taxes upon public property would be an unnecessary expense and a useless multiplication of accounts.

Other exemptions. In the grant of authority to tax, certain property may be excluded.[65]

In this country there are two independent governments, the federal and the government of the states. Each within certain well defined restrictions is supreme, and it is beyond the power of either, within such limitations, to take any action which may impair or destroy the integrity of the other as an independent sovereignty. This principle applies to the levying of taxes.[66] The right to tax includes the power to tax to the limit of confiscation. It includes, as Chief Justice Marshall said, "the power to destroy,"[67] therefore, agencies of either state or national governments cannot be taxed by the other without the consent of the taxed.[68] But the rule does not extend so far as to prevent the

[62] People v. Austin, 47 Cal. 353; Illinois Industrial University v. Champaign County Sup'rs, 76 Ill. 283; Reid v. State, 74 Ind. 252; Board of Regents v. Hamilton, 28 Kan. 376; Inhabitants of Worcester v. City of Worcester, 116 Mass. 193; Jersey City Water Com'rs v. Gaffney, 34 N. J. Law, 133; City of Rochester v. Town of Rush, 80 N. Y. 302; Directors of the Poor of S. County v. School Directors, 42 Pa. 21; Cooley, Taxation, p. 172.

[63] Town of West Hartford v. West Hartford Water Com'rs, 44 Conn. 360; McChesney v. People, 99 Ill. 216; In re Appeal of Des Moines Water Co., 48 Iowa, 324; Anne Arundel County Com'rs v. Duckett, 20 Md. 468.

[64] Low v. Lewis, 46 Cal. 549; Cook County v. City of Chicago, 103 Ill. 646; Ottumwa Brick & Const. Co. v. Ainley, 109 Iowa, 386.

[65] Baldwin v. City Council of Montgomery, 53 Ala. 437; City of Albany v. Savannah F. & W. R. Co., 71 Ga. 158; City of New Orleans v. Dunbar, 28 La. Ann. 722; Montague v. State, 54 Md. 481.

[66] Wagner v. Jackson, 33 N. J. Law, 450.

[67] McCulloch v. Maryland, 4 Wheat. (U. S.) 316–391.

[68] Northern Pac. R. Co. v. Traill County, 115 U. S. 600; Central Pac. R. Co. v. State of Nevada, 162 U. S. 512; First Nat. Bank of Louisville v. Com., 76 U. S. (9 Wall.) 353; McCulloch v. Maryland, 4 Wheat. (U. S.) 316; National Commercial Bank v. City of Mobile, 62

property of Federal or state agencies from being taxed in the same manner as similar property when no law forbids and when the effect of the taxation would not defeat or hinder the operations of government.[69]

Contract exemptions.* A public corporation may possess the power in consideration of certain benefits or advantages received or to be received, by contract express or implied, to relieve private property from the payment of taxes for a specified period;[70] where the consideration is substantial, the contract exemption can be enforced.[71]

Exemptions arising because of purpose for which property is used. The organization of a municipal corporation is supposed to result in certain local benefits to all persons and property within its limits, notably, fire and police protection. If property on account of the purposes for which used does not receive the benefits or advantages which usually accompany municipal organizations, the legislature may, by statutory exemption, exclude such property from the operation of tax laws granting municipal authority to tax.[72]

§ 194. Taxes; their levy and assessment.

Where the levy of taxes by a subordinate agency is authorized by a sovereign, this then becomes an obligatory duty and can be enforced in courts having jurisdiction of the questions raised by the proper proceedings, generally a writ of mandamus directed against the officials whose statutory and usual duty is to do those acts required by law and necessary to the legal levy and collec-

Ala. 284; Flint v. City of Boston, 99 Mass. 141; North Ward Nat. Bank v. City of Newark, 39 N. J. Law, 380. Cooley, Const. Lim. (5th Ed.) p. 598.

[69] Thompson v. Union Pac. R. Co. 76 U. S. (9 Wall.) 579.

* 6 Curr. Law, 1614.

[70] Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66; Whiting v. Town of West Point, 88 Va. 905, 14 S. E. 698, 15 L. R. A. 860; Cooper v. Ash, 76 Ill. 11; Adams v. Yazoo & M. V. R. Co., 77 Miss. 194, 60 L. R. A. 33.

[71] Bartholomew v. City of Austin (C. C. A.) 85 Fed. 359.

[72] State v. Southern R. Co., 115 Ala. 250; Town of Dixon v. Mayes, 72 Cal. 166, 13 Pac. 471; Glover v. City of Terre Haute, 129 Ind. 593; Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532; Kelly v. City of Pittsburgh, 85 Pa. 170; City of Erie v. Reed's Ex'rs, 113 Pa. 468; Linn v. City of Bowie (Tex.) 16 S. W. 142; Norris v. City of Waco, 57 Tex. 635; Ellison v. Linford, 7 Utah, 166.

tion of taxes.[73] This power to compel by mandamus the performance of a duty is vested not only in state but also in the Federal courts; they can only compel the levy of a municipal tax when state laws authorize it to be levied and the proper officials neglect or refuse. A mandamus does not confer power upon those to whom it is directed, it only enforces the exercise of a power already existing when its exercise has become or is a duty.[74]

§ 195. Basis or authority for tax levy.

The levy of a tax is usually based upon an assessment of property according to some uniform method prescribed by law,[75] or a gross tax may be levied directly by a vote of qualified electors to be apportioned subsequently and imposed upon property subject to it in some equitable and uniform manner.[76]

Agency of tax levy. The power of making such assessment is vested by law either in certain officials or official bodies;[77] they, in the performance of their duties, are limited strictly to their statutory authority; tax laws are construed technically. The power to assess or levy taxes either as to amount or as affecting certain interests cannot be implied but must be found in some express

[73] See, also, authorities cited in the following note as sustaining the right to compel by mandamus a levy of taxes: Vickery v. Sioux City, 104 Fed. 164; Wells v. Cole, 27 Ark. 603; Meyer v. Brown, 65 Cal. 583; Attorney General v. City of Salem, 103 Mass. 138; Musgrove v. Vicksburg & N. R. Co., 50 Miss. 677; State v. Paddock, 36 Neb. 263, 54 N. W. 515; Davis v. Simpson, 25 Nev. 123, 58 Pac. 146; Joint Free High School Dist. v. Town of Green Grove, 77 Wis. 532. See, also, Cooley, Taxation, pp. 734 et seq.

[74] Butz v. City of Muscatine, 75 U. S. (8 Wall.) 575; United States v. City of New Orleans, 98 U. S. 381; Com. v. Allegheny Com'rs, 37 Pa. 277.

[75] People v. Stockton & C. R. Co., 49 Cal. 414; Chicago & N. W. R. Co. v. People, 174 Ill. 80; Lockey v. Walker, 12 Mont. 577; Eustis v. City of Henrietta, 90 Tex. 468, 39 S. W. 567; Bigelow v. Town of Washburn, 98 Wis. 553, 74 N. W. 362.

[76] Holland v. Davies, 36 Ark. 446; Cooper v. Miller, 113 Cal. 238, 45 Pac. 325; Thayer Lumber Co. v. Springfield Tp., 131 Mich. 12, 90 N. W. 677; Taft v. Barrett, 58 N. H. 447.

[77] Chicago & N. W. R. Co. v. People, 174 Ill. 80; Chicago & N. W. R. Co. v. People, 183 Ill. 247; Connelly v. Trego County Com'rs, 64 Kan. 168, 67 Pac. 453; Hall v. Anne Arundel County Com'rs, 94 Md. 282, 51 Atl. 86; Barber Asphalt Pav. Co. v. Ullman, 137 Mo. 543; State v. Aitken, 62 Neb. 428, 87 N. W. 153.

provision of the law.[78] If the authority prescribes conditions either as to the manner,[79] the time,[80] or the place and manner [81] of the exercise of the power, such conditions must be complied with that the tax be legal. Limitations upon the power of taxation usually exist restricting the amount which can be legally levied or collected by either specifying the gross rate or amount. Officers in charge cannot exceed in this regard the limitations thus set.[82] Where rates, however, or amounts, are levied in excess of those allowed by law, this condition does not usually render the whole tax void if the illegal excess can be separated from that authorized, when the excess alone is usually held void and not capable of enforcement.[83] The converse of this principle is also true that where officials act within the limits prescribed by law and within their discretionary powers, their action cannot be set aside by higher authority.[84]

§ 196. Loss of power.

The authority to levy taxes may exist as an original or direct power and again as one delegated by some superior body or organization. The power is then exercised under authority of written law and when once given becomes vested to the extent that it cannot be lost through its misuse or abuse, or the neglect to exer-

[78] Comstock v. County of Yolo, 71 Cal. 599, 12 Pac. 728; Chicago & N. W. R. Co. v. People, 184 Ill. 174; City of Aurora v. McGannon, 138 Mo. 38; Libby v. State, 59 Neb. 264.

[79] City of Somerset v. Somerset Banking Co., 109 Ky. 549, 60 S. W. 5; State v. Mississippi River Bridge Co., 134 Mo. 321, 35 S. W. 592; Henderson v. Hughes County, 13 S. D. 576, 83 N. W. 682.

[80] City of San Luis Obispo v. Pettit, 87 Cal. 499; Chicago & N. W. R. Co. v. People, 193 Ill. 594; Wilcox v. Eagle Tp., 81 Mich. 271, 45 N. W. 987; In re Cloquet Lumber Co., 61 Minn. 233; Borough of Eatontown v. Metzgar, 43 N. J. Law, 170.

[81] People v. Chicago & N. W. R. Co., 183 Ill. 311; Chicago & N. W. R. Co. v. People, 184 Ill. 240.

[82] Thatcher v. Chicago N. W. R. Co., 120 Ill. 560; Vittum v. People, 183 Ill. 154; Indianapolis School Com'rs v. Magner, 84 Ind. 67; City of Baltimore v. Gorter, 93 Md. 1, 48 Atl. 445; Somo Lumber Co. v. Lincoln County, 110 Wis. 286, 85 N. W. 1023.

[83] McIntosh v. People, 93 Ill. 540; Union Pac. R. Co. v. Cheyenne County, 64 Neb. 777, 90 N. W. 917.

[84] Board of Education of Sacramento v. Trustees of Sacramento, 96 Cal. 42; Wood v. School Corp. of Tipton, 132 Ind. 206; Union School Dist. v. Parris, 97 Mich. 593; State v. Lakeside Land Co., 71 Minn. 283, 73 N. W. 970.

cise it by the officials to whom the right is given.[85] Generally, however, a single exercise of the taxing power is deemed to exhaust it for the time being, especially when the power can only be legally exercised at regular recurrent intervals.[86]

§ 197. Errors in proceedings.

Tax laws as ordinarily passed and changed by legislative bodies from session to session are often incongruous, inconsistent and complicated, resulting in many errors unintentionally made by officers to whom is charged the duty of administering them. The question then becomes important of the effect of such errors upon tax proceedings. The general rule applies that these provisions or statutory requirements are mandatory in their nature and because as being the outward manifestation of the sovereign power which in its result is a confiscation of property should be construed technically and strictly.[87]

The doctrine of ratification also applies in connection with this subject, that if an act which has been delegated for its performance to some other person or body is improperly done, that body or organization possessing the original power can, in the proper manner, ratify its irregular performance. The ratification relates back and renders the act of equal force and legal effect as though done at the proper time and in the proper manner.[88]

§ 198. The power; when exercised.

In delegating to subordinate bodies or officials the right to exercise the power of taxation, a time is usually fixed within which certain acts shall be done. The failure to perform these within or at the prescribed time is generally held to result in a loss by

[85] Himmelmann v. Cofran, 36 Cal. 411; Kansas City, Ft. S. & G. R. Co. v. Tontz, 29 Kan. 460; City of Bangor v. Lancey, 21 Me. 472; People v. Haines, 49 N. Y. 587; Oliver v. Carsner, 39 Tex. 396.

[86] Vance v. City of Little Rock, 30 Ark. 435; State v. Van Every, 75 Mo. 530; Cummings v. Fitch, 40 Ohio St. 56; Dean v. Lufkin, 54 Tex. 265; City of Tampa v. Mugge, 40 Fla. 326, 24 So. 489; Hopkins v. People, 174 Ill. 416, 51 N. E. 757.

[87] People v. Chicago & N. W. R. Co., 183 Ill. 311. Cooley, Taxation, p. 266.

[88] Williams v. Albany Sup'rs, 122 U. S. 154; Shepardson v. Gillette, 133 Ind. 125, 31 N. E. 788; State v. Richards, 42 N. J. Law, 497; East Tennessee, V. & G. R. Co. v. City of Morristown (Tenn. Ch. App.) 35 S. W. 771.

that subordinate official or organization of the right to do the particular act authorized.[89] However, when such provisions of the law are held to be directory merely, not mandatory in their character, the failure to follow their terms will not render invalid proceedings based upon such action.[90]

§ 199. The duty obligatory.

The use of the power as well as its mode of exercise is usually considered obligatory when delegated to subordinate officials or organizations; it is to be exercised not at the will or discretion of such delegated agent but in the manner and at the time set by law.[91] The performance of the duty can be required and compelled. Officers cannot through a failure to perform acts commanded by law, either deprive the organization which they represent of the right to exercise the power of taxation or affect individuals whose contract or other obligations would be defeated, impaired or destroyed by a failure to levy taxes.[92]

§ 200. Equalization of tax levies.

In each of the states will be found constitutional provisions relating to and limiting the exercise of the power of taxation.* The burden of these is equality and uniformity. Taxation to be valid must be exercised upon this principle. To secure this result, we have boards of equalization or review for the correction and equalization of assessments and of taxes levied and assessed either as against specific individuals or property. The powers of such board within their authority are generally plenary and in the absence of fraud not subject to review by the courts except as provided by law.[93]

[89] Board of Education of San Diego v. Common Council of San Diego, 128 Cal. 369; Gage v. Nichols, 135 Ill. 128, 25 N. E. 672; Keokuk & H. Bridge Co. v. People, 161 Ill. 132; Fahlor v. Wells County Com'rs, 101 Ind. 167; Standard Coal Co. v. Independent Dist. of Angus, 73 Iowa, 304, 34 N. W. 870; Walker v. Edmonds, 197 Pa. 645, 47 Atl. 867.

[90] Tousey v. Bell, 23 Ind. 423; Perrin v. Benson, 49 Iowa, 325; Fay v. Wood, 65 Mich. 390, 32 N. W. 614; Nixon v. City of Biloxi, 76 Miss. 810, 25 So. 664; Scammon v. Scammon, 28 N. H. 429.

[91] State v. Sullivan, 51 Ill. 486.

[92] Hart Tp. v. Oceana County, 44 Mich. 417; People v. Lockport Sup'rs, 49 Hun, 32, 1 N. Y. Supp. 460.

* 6 Curr. Law, 1627.

[93] City of Tampa v. Mugge, 40

§ 201. Taxpayers' rights.

To protect, however, the individual from the exercise of the power in an arbitrary or fraudulent manner, the right is given to appeal to the courts for the correction of abuses and a satisfaction of the injuries he may have suffered.[94] The right to review the levy and assessment of taxes for the purpose of correcting such errors or irregularities may be vested in a court legally authorized in this respect but performing in addition to such duties others of an administrative or executive character. This body is generally considered quasi judicial in its character and in the performance of its duties requiring the exercise of judgment and discretion.[95] The usual rules which apply to the performance of duties of such a character would apply here. The power to review and correct may not be vested in any particular court but one possessed by the ordinary judicial organizations of the state to be exercised when brought within their jurisdiction upon the proper pleadings and in the manner provided by law.[96]

§ 202. Lien and priority.

Both taxes and special assessments have a lien paramount, prior and superior on the property subject to them [97] which cannot be lost by the laches or neglect of public officials charged with en-

Fla. 326, 24 So. 489; Stewart v. Collier, 91 Ga. 117, 17 S. E. 279; People v. Chicago, B. & Q R. Co., 164 Ill. 506; Kinsey v. Sweeney, 63 Iowa, 254; Wakeley v. City of Omaha, 58 Neb. 245, 78 N. W. 511.

[94] Newton v. Roper, 150 Ind. 630; Meyer v. Dubuque County, 43 Iowa, 592; Johnson v. City of New Orleans, 105 La. 149; New Orleans, M. & C. R. Co. v. Dunn, 51 Ala. 128; Parsons v. City of Northampton, 154 Mass. 410, 28 N. E. 350; State v. Weyerhauser, 68 Minn. 353; Town of Grand Isle v. Town of Milton, 68 Vt. 234, 35 Atl. 71.

[95] People v. Cook County Com'rs, 176 Ill. 576; Collins v. Davis, 57 Iowa, 256; Hudson v. Police Jury of Claiborne Parish, 107 La. 387, 31 So. 868; Huntingdon County v. Kauffman, 126 Pa. 305.

[96] Pence v. City of Frankfort, 19 Ky. L. R. 721, 41 S. W. 1011; Greene v. Mumford, 5 R. I. 472; Wells v. Lincoln Board of Education, 20 W. Va. 157; State v. Cornwall, 91 Wis. 565, 73 N. W. 63.

[97] Parker v. City of Jacksonville, 37 Fla. 342, 20 So. 538. A lien, however, exists only against the specific property upon which the delinquent taxes are levied. Bothwell v. Milliken, 104 Ind. 162; Hohenstatt v. City of Bridgeton, 62 N. J. Law, 169, 40 Atl. 649.

forcing tax laws.[98] This lien need not be expressly given that it may exist,[99] and attaches usually from the time that the taxes are entered in the records kept for such purposes after their assessment and levy.[100]

§ 203. Collection of taxes.

When the right to levy and collect taxes has been once granted to a subordinate agent by the sovereign, it then becomes, to the extent of taxes levied under such authority, one which cannot be taken away by subsequent action of the legislature.[101] Its exercise can be invoked either by the corporation itself or some of its creditors who have become such upon the faith of the authority and because of the resulting tax levy.[102]

The grant of a right ever carries with it the implied power to use all proper, necessary or reasonable means and agencies for carrying it into effect. The right to levy taxes implies the power to enforce or collect either in an action [103] brought by the corporation against the party delinquent in their payment or through summary proceedings against persons or property subject to the lien.[104]

But it is seldom that there exists a personal liability on the part of the taxpayer for delinquent and unpaid taxes levied upon real property.[105]

[98] Justice v. City of Logansport, 101 Ind. 326; Eschbach v. Pitts, 6 Md. 71.

[99] City of Jefferson v. Whipple, 71 Mo. 519. The lien, however, must be given through some provision of the city charter. O'Neill v. Dringer, 31 N. J. Eq. (4 Stew.) 507; Howell v. City of Philadelphia, 38 Pa. 471.

[100] Eaton v. Chesebrough, 82 Mich. 214; Matter of Drainage Com'rs, 28 La. Ann. 513; City of Port Townsend v. Eisenbeis, 28 Wash. 533, 68 Pac. 1045.

[101] City of Dubuque v. Illinois Cent. R. Co., 39 Iowa, 56.

[102] Trafton v. Inhabitants of Alfred, 15 Me. 258. No such right can be based, however, upon an illegal tax.

[103] Amite City v. Clements, 24 La. Ann. 27; City of Aurora v. McGannon, 138 Mo. 38, 39 S. W. 469; Davis v. Simpson, 25 Nev. 123, 58 Pac. 146; Appanoose County v. Vermilion, 70 Iowa, 365, 30 N. W. 616; Greer v. City of Covington, 83 Ky. 410; State v. Edwards, 162 Mo. 660, 63 S. W. 388; City of San Antonio v. Berry, 92 Tex. 319, 48 S. W. 496.

[104] Parker v. City of Jacksonville, 37 Fla. 342, 20 So. 538; Smith v. Jones, 40 Ga. 39; City of Jefferson v. Curry, 77 Mo. 230; McCrary v. City of Comanche (Tex.) 34 S. W. 679.

[105] City of Grand Rapids v. Lake

§ 204. Right to prescribe and collect penalties.

Where the right is given to levy and enforce the collection of taxes or license fees, the public corporation has the power to prescribe penalties that may accrue upon a failure to pay the tax or fee at the time fixed by law. A delinquent taxpayer then becomes liable either personally or through his property not only for the amount of the tax levy as originally made but, in addition, the penalties prescribed.[106] These consist either of a specific amount or of interest to be added at a certain rate with possibly an increased rate after the lapse of additional time.[107]

§ 205. Enforcement of lien and summary proceedings.

Although the lien for taxes as a rule is a prior, paramount and superior one, yet the state or its delegated agencies must, in the enforcement and collection of the taxes, proceed in the manner required by law of other lienholders of record on property upon which the state seeks to attach its superior lien.[108] The neglect to do this may result in a failure of the proceedings as to other lienholders.

The power may be given a public corporation to collect a delinquent tax through what might be termed a summary proceeding, namely, the arbitrary taking of the property subject to tax upon the performance of certain acts required by law,[109] the property owner not having the same rights as when the state attempts to collect such delinquent taxes in an ordinary action governed by the usual rules of practice. Statutes conferring such summary power must be strictly followed since to a large degree they par-

Shore & M. S. R. Co., 130 Mich. 238, 89 N. W. 932; McCrowell v. City of Bristol, 89 Va. 652, 16 S. E. 867.

[106] Hintrager v. McElhinny, 112 Iowa, 325, 83 N. W. 1063, modifying 82 N. W. 1008; State v. Consolidated V. Min. Co., 16 Nev. 432; City of Seattle v. Whittlesey, 17 Wash. 292, 49 Pac. 489.

[107] City of New Orleans v. Fisher, 180 U. S. 185; State v. Norton, 63 Minn. 497, 65 N. W. 935.

[108] City of Newport v. Masonic Temple Ass'n, 20 Ky. L. R. 266, 45 S. W. 881, 46 S. W. 697; Smith v. Gatewood, 3 S. C. 333.

[109] Merriam v. Moody's Ex'rs, 25 Iowa, 163; Bigger v. Ryker, 62 Kan. 482, 63 Pac. 740; Loose v. Navarre, 95 Mich. 603, 55 N. W. 435; Bole v. McKelvy, 189 Pa. 505; Cooley, Taxation, p. 432.

take of the nature of a forfeiture.[110] In these proceedings the rule is different from that applied to the enforcement of the right under general laws. There irregularities or informalities may be cured through amendment or otherwise without defeating the right. In summary proceedings each and every act prescribed by law granting the right must be strictly done, both in the manner and at the time provided. A failure or neglect in this respect may result in a loss of the power.[111]

II. Special Assessments.

§ 206. Definition and explanation of the term.

The word "taxation" in its proper sense is a generic one and designates that power governmental and political in its nature which enables a government to levy and collect enforced contributions for its support. In the proper use of the word it includes that species of taxation termed "Local or special assessments." The authorities are agreed that these are valid because imposed through the exercise of the taxing power.[112] There exists, however, a clear, well defined and well established difference in the basis for the levy of the two. A levy of taxes as the word is commonly used, is based upon a governmental necessity irrespective of the immediate or personal return or benefit to the individual paying the tax. So long as the taxes levied are uniform and equal and conform to other constitutional restrictions or limitations in their levy and collection, they will be considered legal.[113] The idea of uniformity and equality is based and depends upon the amount of taxes levied as proportioned to the actual value of the property upon which levied; such valuation of the property being determined by its character and use. The idea of benefits received does not in theory enter into a determination of the legality of the tax.[114] A special or local assessment, however, involves the idea of an immediate and special benefit as a basis for its levy and the doctrine is well established that there can be a levy or

[110] Hays v. Hogan, 5 Cal. 241; Butler v. Nevin, 88 Ill. 575; Lane v. James, 25 Vt. 481.

[111] Collamer v. Drury, 16 Vt. 574.

[112] Hilliard v. City of Asheville, 118 N. C. 845, 24 S. E. 738.

[113] Emery v. San Francisco Gas Co., 28 Cal. 345.

[114] Hagar v. Yolo County Sup'rs, 47 Cal. 222; Perkins v. Inhabitants of Milford, 59 Me. 315.

imposition of special assessments or taxes only in proportion to the benefits specially, actually and physically received by the property taxed as will be seen upon an examination of the authorities considered in succeeding sections.[115] The determination of the extent of benefits received and the manner of ascertaining them whether based upon frontage, propinquity or the reception of a special benefit, are questions of legislative expediency. The legislative body of each state possesses the right to determine these questions, subject only to pertinent restrictions or provisions found in organic law.[116] This principle is firmly established and the further one that a special assessment to be valid must not be levied in substantial excess of the benefits conferred by the local improvement for the making of which the tax is levied.[117] Where the legislature fixes a liability for local assessments on abutting property, it will be presumed it has determined that the cost of the local improvement will not exceed the benefits.[118] Under any method if there is an excess of cost which may be charged against property liable over the benefits received, such excess must be provided for from the general corporate revenues,[119] and it is also within the province of legislative discretion to provide that an arbitrary proportion of the cost shall be borne

[115] See authorities cited in the next following notes: Zehnder v. Barber Asphalt Pav. Co., 106 Fed. 103; Thomas v. Gain, 35 Mich. 155; Richmond & A. R. Co. v. Lynchburg, 81 Va. 473; Germond v. City of Tacoma, 6 Wash. 365; Yates v. City of Milwaukee, 92 Wis. 352, 66 N. W. 248.

[116] French v. Barber Asphalt Pav. Co., 181 U. S. 324; Cass Farm Co. v. City of Detroit, 181 U. S. 396, affirming 124 Mich. 433, 83 N. W. 108; City of Detroit v. Parker, 181 U. S. 399, reversing Parker v. City of Detroit, 103 Fed. 357; Goodrich v. City of Detroit, 184 U. S. 432; People v. Pitt, 169 N. Y. 521, 58 L. R. A. 372; Cleveland v. Tripp, 13 R. I. 50; Johnson v. City of Milwaukee, 40 Wis. 315. See, also, Abb. Mun. Corp. § 337.

[117] Norwood v. Baker, 172 U. S. 269. See, also, the authorities cited and discussed in this case as well as in the case of French v. Barber Asphalt Pav. Co., 181 U. S. 324, including dissenting opinion. Kelly v. Chadwick, 104 La. 719, 29 So. 295: Sears v. City of Boston, 173 Mass. 71, 43 L. R. A. 834; Dexter v. City of Boston, 176 Mass. 247; State v. Robert P. Lewis Co., 82 Minn. 390, 86 N. W. 611, 53 L. R. A. 421.

[118] Chicago & A. R. Co. v. City of Joliet, 153 Ill. 649; Davis v. City of Litchfield, 155 Ill. 384; Sigler v. Fuller, 34 N. J. Law, 227.

[119] Adams v. City of Shelbyville, 154 Ind. 467, 49 L. R. A. 797; Frevert v. City of Bayonne, 63 N. J. Law, 202, 42 Atl. 773; In re Beechwood Ave, 194 Pa. 86.

by the general revenues and a part of it by private property liable in the manner fixed;[120] but the assessment levied upon property under any basis cannot exceed the cost of the improvement.[121]

The justice of this method of taxation is universally conceded. At one time the attempt was made to establish the right to make a local assessment as an exercise of the police power rather than the power of taxation but this has been abandoned; there is no doubt but that the right to levy special assessments is a part of the power of taxation.[122] All the principles which control the making, the levy or the collection of special assessments, are those which control and regulate the making, levying and collecting of governmental taxes; and constitutional provisions also apply.[123] That constitutional limitation requiring all taxes to be uniform and equal applies equally to the making of local assessments; but uniformity and equality as applied to general taxation involves the idea of valuation. The legality of a local assessment as determined by this same principle of uniformity and equality depends upon the relative benefit received by the property assessed.[124] There are many local improvements such as the construction and improvement of highways, the laying of water mains and sewers which result in a benefit or advantage to the community at large, yet that benefit or advantage is remote in its character and trivial in its extent. The immediate advantage and benefit resulting from the construction of such improvement ac-

[120] City Council of Montgomery v. Birdsong, 126 Ala. 632, 28 So. 522; Birket v. City of Peoria, 185 Ill. 369; Hutchinson v. City of Omaha, 52 Neb. 345, 72 N. W. 218; People v. Molloy, 161 N. Y. 621, 55 N. E. 1099; Hilliard v. City of Asheville, 118 N. C. 845; City of El Paso v. Mundy, 85 Tex. 316; City of Parkersburg v. Tavenner, 42 W. Va. 486.

[121] Davis v. City of Litchfield, 145 Ill. 313, 33 N. E. 888, 21 L. R. A. 563; Jackson v. Smith, 120 Ind. 520; Lorden v. Coffey, 178 Mass. 489, 60 N. E. 124; Thayer v. City of Grand Rapids, 82 Mich. 298, 46 N. W. 228; State v. Pillsbury, 82 Minn. 359. The authorities fully collated and reviewed in this case. Spangler v. City of Cleveland, 35 Ohio St. 469. But see Parsons v. District of Columbia, 170 U. S. 45.

[122] Bradley v. McAtee, 70 Ky. (7 Bush) 667; McComb v. Bell, 2 Minn. 295 (Gil. 256); J. & A. McKechnie Brewing Co. v. Village of Canandaigua, 162 N. Y. 631, 57 N. E. 1113; City of Raleigh v. Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330; In re Vacation of Centre St., 115 Pa. 247, 8 Atl. 56.

[123] Noonan v. City of Stillwater, 33 Minn. 198.

[124] See Abb. Mun. Corp. § 337, p. 784, citing and discussing many authorities.

crues to the property immediately adjacent or adjoining it. That the property thus specially benefited should meet the burden created is everywhere conceded.[125]

§ 207. The exercise of the power to levy.*

Since the levy of special assessments is a species of taxation, it follows that the right to exercise the power by a public corporation must be granted by the sovereign. The grant of power as in the case of ordinary taxation must be expressly given in clear and unmistakable terms and cannot be implied from a general grant of power to a corporation.[126] There cannot be implied, from a general-welfare clause so often found in municipal charters, a power to levy special assessments for the making of local improvements.[127] Neither can it be implied from the ordinary grant of power to levy taxes,[128] nor from the power to make local or public improvements.[129]

The power a continuing one. The power, when once granted, until repealed, is considered a continuing one, the right to exercise which is not lost either by its nonuse, excessive use, or by the making of a specific local improvement.[130] The law recognizes the fact that municipal conditions are constantly changing and street improvements which may be adequate at one time may become inadequate at a later period because of an increase in population or radically changed business and economic conditions.

[125] City of Little Rock v. Katzenstein, 52 Ark. 107; Bacon v. City of Savannah, 105 Ga. 62, 31 S. E. 127; Lowe v. White County Com'rs, 156 Ind. 163, 59 N. E. 466; Rogers v. City of St. Paul, 22 Minn. 494.

* 6 Curr. Law, 1158.

[126] O'Brien v. Wheelock, 95 Fed. 883; City Council of Augusta v. Murphey, 79 Ga. 101, 3 S. E. 326; McChesney v. Village of Hyde Park, 151 Ill. 634, 37 N. E. 858; Brady v. Hayward, 114 Mich. 326; State v. Ramsey County Dist. Ct., 80 Minn. 293, 83 N. W. 183; Dodge County v. Acom, 61 Neb. 376, 85 N. W. 292. See Abb. Mun. Corp. § 338.

[127] Lott v. Ross, 38 Ala. 156; Town of New Iberia v. Weeks, 104 La. 489, 29 So. 252; Winston Com'rs v. Taylor, 99 N. C. 210; Green v. Ward, 82 Va. 324.

[128] Hitchcock v. City of Galveston, 96 U. S. 341.

[129] Bucknall v. Story, 36 Cal. 67; City of Augusta v. Dunbar, 50 Ga. 387; Gridley v. City of Bloomington, 88 Ill. 555; City of Annapolis v. Harwood, 32 Md. 471.

[130] Pardridge v. Village of Hyde Park, 131 Ill. 537; Wilkins v. City of Detroit, 46 Mich. 120; People v. City of Buffalo, 166 N. Y. 604, 59 N. E. 1128; Ladd v. City of Portland, 32 Or. 271, 51 Pac. 654; Mauldin v. City Council of Greenville, 53 S. C. 285, 43 L. R. A. 101.

Cannot be delegated. When granted the power by the sovereign, a subordinate agent cannot delegate this right to other officials or bodies. Its exercise involves the performance of acts requiring judgment and discretion and the universal rule applies that the performance of such acts cannot be delegated to another by one possessing the right to exercise them.[131]

§ 208. Limitations upon the power.

Aside from the suggested limitation that the power to levy special assessments is a delegated one, there are found restrictions and limitations upon the right to exercise it either in particular municipal charters, general statutory provisions or state constitutions.[132] The general principle also applies in connection with this subject of limitations that since the power to be exercised must be expressly granted or must exist through necessary implication, its exercise is limited as to manner and time and place to the phraseology used in the grant.[133] The authority may include a limitation upon its exercise expressed either as a maximum amount [134] or rate per-cent [135] which can be levied and collected to pay the cost of a given improvement or the limitation may consist of a provision that the power shall not be exercised except at stated intervals of time.[136]

[131] In re Hearn, 96 N. Y. 378; Bartram v. City of Bridgeport, 55 Conn. 122; Ray v. City of Jeffersonville, 90 Ind. 567.

[132] City Council of Montgomery v. Birdsong, 126 Ala. 632, 28 So. 522; Dousman v. City of St. Paul, 23 Minn. 394; Cherington v. City of Columbus, 50 Ohio St. 475; Lombard v. West Chicago Park Com'rs, 181 U. S. 33; City of Raleigh v. Peace, 110 N. C. 32, 17 L. R. A. 330.

[133] Smith v. Cofran, 34 Cal. 310; Barber Asphalt Pav. Co. v. Watt, 51 La. Ann. 1345; Adams v. Bay City, 78 Mich. 211, 44 N. W. 138; Delaware & H. Canal Co. v. City of Buffalo, 167 N. Y. 589, 60 N. E. 1119; Merritt v. Portchester, 71 N. Y. 309; Oshkosh City R. Co. v. Winnebago County, 89 Wis. 435.

[134] Warren v. Postel, 99 Cal. 294; Benton v. Inhabitants of Brookline, 151 Mass. 250, 23 N. E. 846; City of Detroit v. Chapin, 112 Mich. 588, 71 N. W. 149, 42 L. R. A. 638.

[135] Kreling v. Muller, 86 Cal. 465; Sears v. City of Worcester, 180 Mass. 274, 62 N. E. 269; State v. Judges of District Ct., 51 Minn. 539, 53 N. W. 800, 55 N. W. 122; Hilliard v. City of Asheville, 118 N. C. 845; Pretzinger v. Sunderland, 63 Ohio St. 132, 57 N. E. 1097.

[136] Earl v. Board of Improvement of Morriton, 70 Ark. 211, 67 S. W. 312; City of Erie v. Griswold, 184 Pa. 435.

§ 209. Purposes for which exercised.

Since the rule is well established that general taxes cannot be levied or imposed to pay the cost of a specific local improvement,[137] the converse of this rule is also well established that local assessments or taxes cannot be levied or imposed to pay for the cost of construction or of making an improvement of a general character or one which results in a general benefit and advantage not only to the individual whose property is adjacent to or near but also to an equal extent to that individual whose property may be situated at the remotest distance from the improvement.[138] A local assessment, therefore, is only valid or legal when levied to pay the cost of a local improvement in its restricted sense.

What not considered local improvements. Applying the rule thus given above, courts have held that a local tax or assessment cannot be levied for the construction of a court house,[139] public market,[140] public school house,[141] or other buildings of a similar character, or a plant for supplying water [142] and light [143] to the entire municipality, or the construction and repair of large sewers,[144] or water mains [145] designed as the main arteries of a general system.

[137] Wolfe v. McHargue, 88 Ky. 251, 10 S. W. 809; City of Raleigh v. Peace, 110 N. C. 32, 17 L. R. A. 330; Murtaugh v. City of Paterson, 45 N. J. Law, 267.

[138] City of Chicago v. Law, 144 Ill. 569, 33 N. E. 855; Village of Morgan Park v. Wiswall, 155 Ill. 262; Louisville Steam Forge Co. v. Mehler, 23 Ky. L. R. 1335, 64 S. W. 396, 652; State v. Ramsey County Dist. Ct., 33 Minn. 295; Smith v. City of St. Joseph, 122 Mo. 643, 27 S. W. 344; Lasbury v. McCague, 56 Neb. 220, 76 N. W. 862; Ellwood v. City of Rochester, 122 N. Y. 229.

[139] Adams County v. City of Quincy, 130 Ill. 566.

[140] In Massachusetts the rule seems to be otherwise. Spaulding v. City of Lowell, 40 Mass. (23 Pick.) 71.

[141] Vanover v. Davis, 27 Ga. 354; Public School Com'rs v. Alleghany County Com'rs, 20 Md. 449.

[142] McChesney v. Village of Hyde Park, 151 Ill. 634, 37 N. E. 858; Hewes v. Glos, 170 Ill. 436; Moran v. Thompson, 20 Wash. 525, 56 Pac. 29.

[143] Mitchell v. City of Negaunee, 113 Mich. 359, 71 N. W. 646, 38 L. R. A. 157.

[144] Alley v. City of Lebanon, 146 Ind. 125, 44 N. E. 1003; Sears v. Street Com'rs of Boston, 173 Mass. 350, 53 N. E. 876; Sherwood v. City of Duluth, 40 Minn. 22; Hill v. Swingley, 159 Mo. 45, 60 S. W. 114; In re Park Ave. Sewers, 169 Pa. 433.

[145] Swain v. City of Philadelphia (Pa.) 13 Atl. 545.

What regarded as local improvements. On the contrary, the opening,[146] paving or macadamizing,[147] grading,[148] curbing and guttering,[149] sprinkling [150] or general improvement [151] of streets and highways, the running of water pipes and mains,[152] or placing of hydrants, construction of viaducts,[153] local sewers,[154] ditches or drains,[155] or the running of sewer pipes,[156] the construction or repair of sidewalks,[157] the establishment of park ways, public

[146] People v. Village of Hyde Park, 117 Ill. 462; Sears v. Street Com'rs of Boston, 180 Mass. 274, 62 N. E. 397; Fairchild v. City of St. Paul, 46 Minn. 540; Aldridge v. Essex Public Road Board, 46 N. J. Law, 126.

[147] Alameda Macadamizing Co. v. Williams, 70 Cal. 534, 12 Pac. 530; Vane v. City of Evanston, 150 Ill. 616, 37 N. E. 901; Lowe v. White County Com'rs, 156 Ind. 163, 59 N. E. 466.

[148] Wilcoxon v. City of San Luis Obispo, 101 Cal. 508, 35 Pac. 988; Vanatta v. City of Morristown, 34 N. J. Law, 445; Borough of Steelton v. Booser, 162 Pa. 630, 29 Atl. 854.

[149] Ryan v. Altschul, 103 Cal. 174, 37 Pac. 339; Job v. People, 193 Ill. 609; McNamara v. Estes, 22 Iowa, 246; City of Louisville v. Tyler, 111 Ky. 588, 64 S. W. 415, 65 S. W. 125.

[150] Reinken v. Fuehring, 130 Ind. 382, 30 N. E. 414, 15 L. R. A. 624; Stark v. City of Boston, 180 Mass. 293, 62 N. E. 375; State v. Reis, 38 Minn. 371; Maydwell v. City of Louisville, 25 Ky. L. R. 1062, 76 S. W. 1091. But see City of Chicago v. Blair, 149 Ill. 310, 24 L. R. A. 412; New York Life Ins. Co. v. Prest, 71 Fed. 815; Kansas City v. O'Connor, 82 Mo. App. 655.

[151] Shannon v. Village of Hinsdale, 180 Ill. 202; Cook v. Slocum, 27 Minn. 509; Kelly v. City of Minneapolis, 57 Minn. 294, 26 L. R. A. 92; Sperry v. Flygare, 80 Minn. 325, 83 N. W. 177, 49 L. R. A. 757; Berlin Iron-Bridge Co. v. City of San Antonio (Tex. Civ. App.) 50 S. W. 408.

[152] Hewes v. Glos, 170 Ill. 436; Landon v. City of Syracuse, 163 N. Y. 562, 57 N. E. 1114; City of Philadelphia v. Union Burial Ground Soc., 178 Pa. 533.

[153] Louisville & N. R. Co. v. City of East St. Louis, 134 Ill. 656, 25 N. E. 962.

[154] Mason v. City of Chicago, 178 Ill. 499; Hall v. Street Com'rs of Boston, 177 Mass. 434, 59 N. E. 68; Heman v. Schulte, 166 Mo. 409, 66 S. W. 163; Witt v. City of Elizabeth, 56 N. J. Law, 119, 27 Atl. 801.

[155] Peake v. City of New Orleans, 139 U. S. 342, 377; City of San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 35 L. R. A. 33; McChesney v. Village of Hyde Park, 151 Ill. 634, 37 N. E. 858; Beals v. Inhabitants of Brookline, 174 Mass. 1, 54 N. E. 339.

[156] Hungerford v. City of Hartford, 39 Conn. 279.

[157] Village of Western Springs v. Hill, 177 Ill. 634; Sloan v. Beebe, 24 Kan. 343; Flint v. Webb, 25 Minn. 93; Grant v. Bartholomew, 58 Neb. 839; Folmsbee v. City of Amsterdam, 142 N. Y. 118.

grounds or parks,[158] the construction of safe harbors, landings, wharves and docks,[159] have each been considered local improvements of such a character that the cost of their construction or making should be assessed against the property benefited in proportion to the benefits received.

§ 210. Extent of exercise and character of power.

The power to construct a local improvement, when it exists, can be exercised to any extent within its full limit as granted; the extent being dependent upon the discretion of the officials to whom is delegated this duty,[160] and unless some statutory restriction exists where the power to make local or public improvements has been granted to a subordinate public agency, such power is deemed of a discretionary character and the action of the municipal authorities in its reasonable exercise or non-exercise is not subject to control by the courts or open to judicial review.[161] Courts will not, therefore, ordinarily interfere in the ordering of a local improvement on the ground that it is unnecessary or unreasonable or that officers are not acting in good faith.[162] This official discretion may include not only the time of making the improvement but also its extent and nature,[163] and the material for construction.[164]

[158] Wilson v. Lambert, 168 U. S. 611; Heller v. Garden City, 58 Kan. 263, 48 Pac. 841; West Chicago Park Com'rs v. Farber, 171 Ill. 146; Davies v. City of New Orleans, 40 La. Ann. 806; Foster v. Boston Park Com'rs, 131 Mass. 225; Id., 133 Mass. 321; In re Beechwood Ave., 194 Pa. 86.

[159] Webb v. City of Demopolis, 95 Ala. 116, 21 L. R. A. 62; City of San Pedro v. Southern Pac. R. Co., 101 Cal. 333; City of Galveston v. Menard, 23 Tex. 349; Backus v. City of Detroit, 49 Mich. 110; City of Hannibal v. Winchell, 54 Mo. 172.

[160] Dickerson v. Franklin, 112 Ind. 178; Hall v. Street Com'rs of Boston, 177 Mass. 434, 59 N. E. 68.

[161] Harney v. Benson, 113 Cal. 314; Shannon v. Village of Hinsdale, 180 Ill. 202; Barber Asphalt Pav. Co. v. French, 158 Mo. 534, 54 L. R. A. 492; Taintor v. Town of Morristown, 33 N. J. Law, 57.

[162] Bacon v. City of Savannah, 105 Ga. 62; City of Chicago v. Nichols, 177 Ill. 97; City of Elkhart v. Wickwire, 121 Ind. 331; Morse v. City of Westport, 110 Mo. 502; Id., 136 Mo. 276; Oil City v. Oil City Boiler Works, 152 Pa. 348.

[163] Murphy v. City of Peoria, 119 Ill. 509; State v. City of Portage, 12 Wis. 562.

[164] Shannon v. Village of Hinsdale, 180 Ill. 202; Gunning Gravel & Pav. Co. v. City of New Orleans, 45 La. Ann. 911; Shimmons v. City

§ 211. Discretionary power with reference to locating limits of taxing district.

Where statutory or constitutional authority exists for the making of local assessments, a discretion is usually vested in the municipal authorities to divide their territory into such taxation districts for the construction of local improvements as seem advisable [165] and the exercise of a sound discretion by them will not be interfered with by the courts.[166] That the legislature of a state under constitutional authority may exercise the same discretion and power is axiomatic.

By whatever authority the taxing district is established, however, it must be accurately defined. This is necessary in order to determine what property is subject to the assessment and how such assessments are to be apportioned or divided according to the benefits.[167]

§ 212. Property subject to local assessments.

The difference in the theories and principles sustaining the imposition of local assessments distinguished from taxation, as the word is commonly understood, leads to a radical difference in determining the validity of local assessments levied upon specific property. The basis of a local assessment is a benefit or advantage peculiarly received by it from the making of the local improvement and in amount supposed to be equal to the local assessment levied upon it for the purpose of paying in part the cost of such improvement. Property which cannot by reason of its location or use be benefited to any extent through the making of a local

of Saginaw, 104 Mich. 511; City of Schenectady v. Union College, 144 N. Y. 241, 26 L. R. A. 614; City of Philadelphia v. Evans, 139 Pa. 483. See, also, Abb. Mun. Corp. § 341.

[165] Goodrich v. City of Detroit, 184 U. S. 432; Matthews v. Kimball, 70 Ark. 451, 66 S. W. 651, 69 S. W. 547; Mitchell v. City of Negaunee, 113 Mich. 359, 71 N. W. 646; City of Kalamazoo v. Francoise, 115 Mich. 554, 73 N. W. 801; City of St. Louis v. Brown, 155 Mo. 545; Jelliff v. City of Newark, 49 N. J. Law, 239, 12 Atl. 770.

[166] Matthews v. Kimball, 70 Ark. 451, 66 S. W. 651, 69 S. W. 547; Primm v. City of Belleville, 59 Ill. 142; Kountze v. City of Omaha, 63 Neb. 52, 88 N. W. 117; Butler v. Town of Montclair, 67 N. J. Law, 426, 51 Atl. 494.

[167] New Brunswick Rubber Co. v. New Brunsick St. Com'rs, 38 N. J. Law, 190.

improvement cannot be legally assessed for the making of such improvement.[168]

Statutory exemptions. The maintenance of private schools, seminaries, colleges, or other institutions of learning; hospitals for the care of the sick and institutions for the care and training of the unfortunate; churches and buildings used by religious bodies for the maintenance of their institutional work; is considered a benefit and advantage to society at large and, therefore, to some extent, an aid to government. For this reason it is usual to exempt their property from public or general taxation. The exemptions are usually for a limited period, are construed strictly and, it is well established, do not relieve these organizations or such property from the payment of special assessments. Their property receives from the construction of local improvements an equal advantage and benefit with other property similarly situated with respect to the improvement and it is but just that it bear its share of the cost.[169]

A state or municipal organization may also, by law, exempt from taxation manufacturing industries or other private enterprises from the construction and establishment of which the corporate organization is supposed to receive a special benefit equal to, at least, the prospective taxes which might be derived from taxation of their property; the same rule as suggested above in respect to special assessments applies to this class of industries.[170] It can be said to be a general rule that as all exemptions are in derogation of a common right they are to be construed strictly and not allowed except when given in the clearest language.[171]

[168] City of San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 35 L. R. A. 33; City of McKeesport v. Soles, 178 Pa. 363.

[169] See cases cited under the next following note. See, also, District of Columbia v. Sisters of Visitation of Washington, 15 App. D. C. 300; McLean County v. City of Bloomington, 106 Ill. 209; Harvard College v. City of Boston, 104 Mass. 470; Washburn Memorial Orphan Asylum v. State, 73 Minn. 343, 76 N. W. 204; Cooper Hospital v. City of Camden, 68 N. J. Law, 208, 52 Atl. 210. See, also, Cooley, Taxation, pp. 207 et seq., and Abb. Mun. Corp. § 343.

[170] City of Tampa v. Kaunitz, 39 Fla. 683; City of Middlesboro v. New South Brewing & Ice Co., 108 Ky. 351, 56 S. W. 427; City of Portland v. Portland Water Co., 67 Me. 135; Frederick Elec. Light & Power Co. v. Frederick City, 84 Md. 599; McTwiggan v. Hunter, 19 R. I. 265, 33 Atl. 5, 29 L. R. A. 526.

[171] Orange & A. R. Co. v. City Council of Alexandria, 17 Grat. (Va.) 176; City of Louisville v.

Contract exemptions. The reason for holding that statutory exemptions from taxation do not apply to local assessments would also hold as to property exempt from general taxation under a contract or special grant of exemption.[172]

Exemption from local assessment because of use by common carriers. The one idea underlying the validity of a local assessment is, benefits received by the property from the making of a local improvement. It is clear, therefore, that if property is so situated, either because of its physical location or use, as to be incapable of receiving a benefit by the construction of a local improvement, local assessments cannot be levied upon it. Property which ordinarily comes within this exemption is that belonging to and used by railroad corporations or common carriers in the transaction of that part of their business in which the public does not participate or as to which it is not necessary that the public should have direct access to their properties. The difficulty, lack of feasibility, and inadvisability as a matter of public policy, of enforcing a tax lien against a portion of railroad property or right of way is also a reason of equal weight.[173]

On the other hand, property which is not so used or of this character is clearly subject both to taxation and the levy of local assessments. The same rule has been applied by the courts in many cases in construing the word "taxation" as used in grants of exemption, that phrase being interpreted as not including assessments for local municipal improvements, it not being taxation within the common acceptation of that term.[174] And, further, in

Nevin, 73 Ky. (10 Bush) 549; Adams v. Yazoo & M. V. R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956; Crawford v. Burrell Tp., 53 Pa. 219; Cooley, Taxation, p. 205.

[172] Wells v. City of Savannah, 181 U. S. 531; Lake St. El. R. Co. v. City of Chicago, 183 Ill. 75, 47 L. R. A. 624; Maine Water Co. v. City of Waterville, 93 Me. 586, 45 Atl. 830; Buess v. Town of West Hoboken, 51 N. J. Law, 267, 17 Atl. 110.

[173] McVerry v. Boyd, 89 Cal. 304; Schmidt v. Market St. & W. G. R. Co., 90 Cal. 37; Farmers' Loan & Trust Co. v. Borough of Ansonia, 61 Conn. 76; City of Bloomington v. Chicago & A. R. Co., 134 Ill. 451, 26 N. E. 366. But see, however, the case of Illinois Cent. R. Co. v. City of Decatur, 147 U. S. 190, as holding that the property of the Ill. Cent. R. Co. is subject to taxation for local improvements. Boston v. Boston & A. R. Co., 170 Mass. 95, 49 N. E. 95; Detroit, G. H. & M. R. Co. v. City of Grand Rapids, 106 Mich. 13, 28 L. R. A. 793; State v. Ramsey County Dist. Ct., 68 Minn. 242; Chicago, M. & St. P. R. Co. v. City of Milwaukee, 89 Wis. 506, 28 L. R. A. 249.

[174] Illinois Cent. R. Co. v. City of Decatur, 147 U. S. 190, 37 L. Ed.

some states all property used by common carriers including their right of way, yards and other grounds of the character just noted, is subject to local assessment; the idea being that since such property might be put to a use by which it receives benefit from the local improvement, it would be inequitable to other property fronting on or adjacent to such improvement to make it bear the whole burden of its cost.[175]

Property exempt because of its location. Again the public corporation may include within its limits property other than that noted which, because of its location or use, does not or cannot receive the benefit of a local improvement.[176] To illustrate, land which is remotely situated from the business center of a municipality, upon which no buildings are erected and which is not platted, it has been held cannot be assessed for the laying of a water main.[177]

Public property; when exempt. The public ownership of property may again give rise to an exemption from local assessments. In some states, public property by law or policy is made exempt from local taxation or assessment.[178] In other states, it is liable to

132; Morris & E. R. Co. v. Jersey City, 64 N. J. Law, 151, 44 Atl. 938; Borough of Mt. Pleasant v. Baltimore & O. R. Co., 138 Pa. 365, 11 L. R. A. 520.

[175] Illinois Cent. R. Co. v. City of Decatur, 126 Ill. 92, 1 L. R. A. 613. Affirmed on appeal to the Supreme Court of the United States in 147 U. S. 190. Illinois Cent. R. Co. v. People, 170 Ill. 224; Atchison, T. & S. F. R. Co. v. Peterson, 58 Kan. 818, 51 Pac. 290; City of Ludlow v. Cincinnati So. R. Co., 78 Ky. 357.

[176] Hayward v. People, 145 Ill. 55, 33 N. E. 885; City of Ft. Scott v. Kaufman, 44 Kan. 137, 24 Pac. 64; McGrew v. Kansas City, 64 Kan. 61, 67 Pac. 438; Brown v. City of Fitchburg, 128 Mass. 282; Heiple v. City of East Portland, 13 Or. 97; City of McKeesport v. Soles, 178 Pa. 363.

Sewers: Harney v. Benson, 113 Cal. 314, 45 Pac. 687. Edwards v. City of Chicago, 140 Ill. 440, 30 N. E. 350; Heman v. Allen, 156 Mo. 534, affirmed in Shumate v. Heman, 181 U. S. 402.

Unplatted or farming lands: Farwell v. Des Moines Brick Mfg. Co., 97 Iowa, 286, 66 N. W. 176, 35 L. R. A. 63; Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532; City of Philadelphia v. Gorgas, 180 Pa. 296. See, also, Abb. Mun. Corp. § 343.

[177] State v. Robert P. Lewis Co., 72 Minn. 87, 75 N. W. 108, 42 L. R. A. 639.

[178] Ahern v. Board of Imp. Dist. No. 3, 69 Ark. 68, 61 S. W. 575; Witter v. Mission School Dist., 121 Cal. 350, 53 Pac. 905; State v. City of Hartford, 50 Conn. 89; In re City of Mt. Vernon, 147 Ill. 359, 23 L. R. A. 807; Polk County Sav. Bank v. State, 69 Iowa, 24; City of Louisville v. Leatherman, 99 Ky. 213;

assessment for local improvements to the same extent as private property similarly situated.[179] The objections to the levy of local assessments upon public property may be briefly stated as based, first, upon the fact that such obligations although paid by the public corporation can only be met by it through the levy and collection of general taxes upon all property within the jurisdiction, and second, that delinquent assessments are usually collected through the enforcement of a tax lien upon property liable; this as against public property would be against public policy.[180]

§ 213. The manner of determining local assessments; conversely, benefits.

In a preceding section the suggestion has been made that the manner of determining the amount of local assessments particular property shall pay is one of legislative expediency.[181] If reference is made to this question in organic law, the provisions or recommendations there found will control.[181a] And where, by such organic law, statutory provision or local ordinance, the method of apportioning a local assessment is fixed, an assessment according to some other rule or method will be fatally defective.[182] Where such legislative discretion is given, laws passed authorizing the levy of special assessments according to the methods usually employed based, however, upon a benefit received by the property, are constitutional.[183]

City of Louisville v. Hexagon Tile Walk Co., 103 Ky. 552, 45 S. W. 667.

[179] Warner v. City of New Orleans (C. C. A.) 87 Fed. 829; City of San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 35 L. R. A. 33; City of Hartford v. West Middle Dist., 45 Conn. 462; Edwards & Walsh Const. Co. v. Jasper County, 117 Iowa, 365, 90 N. W. 1006.

[180] Town of West Hartford v. Hartford Water Com'rs, 44 Conn. 360; City of St. Louis v. Brown, 155 Mo. 545; Dowdney v. City of New York, 54 N. Y. 186.

[181] Shoemaker v. United States, 147 U. S. 282; King v. City of Portland, 184 U. S. 61, affirming 38 Or. 402, 55 L. R. A. 812; Hadley v. Dague, 130 Cal. 207; Ahern v. Board of Imp. Dist. No. 3, 69 Ark. 68, 61 S. W. 575; Kelly v. Chadwick, 104 La. 719; Hoyt v. City of East Saginaw, 19 Mich. 39; City of Spokane v. Browne, 8 Wash. 317; Cooley, Taxation (2d Ed.) pp. 622, 646.

[181a] Parrotte v. City of Omaha, 61 Neb. 96, 84 N. W. 602;

[182] Ware v. City of Jerseyville, 158 Ill. 234; McKeesport Borough v. Busch, 166 Pa. 46.

[183] Lent v. Tillson, 72 Cal. 404; Fagan v. City of Chicago, 84 Ill. 227; Carpenter v. City of St. Paul, 23 Minn. 232.

The legislature cannot, however, change the method of determining the liability of property for special assessments after they have been levied to pay the cost of a local improvement authorized,[184] neither can it change the extent to which property shall be liable for local assessments after this has been determined by the ordering or construction of a local improvement.[185]

§ 214. According to frontage.

The method which is ordinarily adopted is what may be termed the "frontage rule."[186] The property fronting upon a public local improvement is assessed to the extent of its frontage and according to the benefits derived from such improvement, its frontage being the best measure or standard for ascertaining the benefits.[187] Under this method the cost of making the improvement in or on areas at the intersection of streets, alleys or highways, is usually paid from the general revenues.[188] The question of whether certain property fronts, adjoins or abuts upon a public improvement,[189] and the depth to which accessible,[190] is one of fact to be

[184] Keith v. City of Philadelphia, 126 Pa. 575.

[185] Niklaus v. Conkling, 118 Ind. 289.

[186] French v. Barber Asphalt Pav. Co., 181 U. S. 324; San Diego Inv. Co. v. Shaw, 129 Cal. 273; Job v. City of Alton, 189 Ill. 256; Kirkland v. Board of Public Works, 142 Ind. 123; City of Baltimore v. Brick 251; City of Baltimore v. Brick Co., 80 Md. 458; Findlay v. Frey, 51 Ohio St. 390; City of Scranton v. Koehler, 200 Pa. 126, 49 Atl. 792; Hutcheson v. Storrie (Tex. Civ. App.) 48 S. W. 785; Davis v. City of Lynchburg, 84 Va. 861; City of Norfolk v. Ellis, 26 Grat. (Va.) 224.

[187] French v. Barber Asphalt Pav. Co., 181 U. S. 324; Perine v. Erzgraber, 102 Cal. 234, 36 Pac. 585; San Francisco Pav. Co. v. Bates, 134 Cal. 39, 66 Pac. 2; McKee v. Town of Pendleton, 154 Ind. 652; City of Cincinnati v. Batsche, 52 Ohio St. 324, 27 L. R. A. 536; Ladd v. Gambell, 35 Or. 393; Hayes v. Douglas County, 92 Wis. 429, 31 L. R. A. 213.

[188] Boyle v. Tibbey, 82 Cal. 11; Praigg v. Western Pav. & Supply Co., 143 Ind. 358; Moale v. City of Baltimore, 61 Md. 224.

[189] Harney v. Benson, 113 Cal. 314; City of Toledo v. Sheill, 53 Ohio St. 447, 30 L. R. A. 598; City of Springfield v. Green, 120 Ill. 269; Haley v. City of Alton, 152 Ill. 113; Brown's Estate v. Town of Union, 62 N. J. Law, 142; Sandrock v. City of Columbus, 51 Ohio St. 317.

[190] Reeves v. Grottendick, 131 Ind. 107, 30 N. E. 889; Barber Asphalt Pav. Co. v. Watt, 51 La. Ann. 1345; Louisville Steam Forge Co. v. Mehler, 112 Ky. 438, 64 S. W. 396, 652; Weed v. City of Boston, 172 Mass. 28, 42 L. R. A. 642.

determined by an examination of each particular case.[191] The general principle, however, applies that there must be an actual contact with or abutting upon the local improvement or the street on which it is constructed.[192] Legislation that arbitrarily establishes the "front foot" or "frontage" rule as a basis for the levy of special assessments is not unconstitutional even when no opportunity is given for a preliminary examination of the relative benefits received by property liable and assessed.[193]

§ 215. Assessment based upon location.

Property which is benefited by the making of a public improvement may not directly front or abut upon the improvement although it may, as suggested, have received special benefits and most substantial ones from its making.[194] It is deemed inequitable that the property thus specially benefited should escape its share of the cost, and to meet this contingency the rule may be adopted that all benefited adjacent property is taxable; that the cost of making a local improvement should be paid by all property that receives a special benefit in excess of that received by the public at large. The right to levy in such a case depends upon propinquity to the public improvement,[195] and relative proximity therefore is the measure of benefit.

§ 216. Levy based upon ascertained benefits.

In other states, the doctrine is well established that all property without reference to its location whether it is near and adjacent

[191] Farr v. West Chicago Park Com'rs, 167 Ill. 355, 46 N. E. 893.

[192] Chicago, B. & Q. R. Co. v. City of Quincy, 135 Ill. 563, 27 N. E. 192; Gilcrest v. McCartney, 97 Iowa, 138; Scott County v. Hinds, 50 Minn. 204; City of Cincinnati v. Anderson, 52 Ohio St. 600; In re Orkney St., 194 Pa. 425, 48 L. R. A. 274.

[193] French v. Barber Asphalt Pav. Co., 181 U. S. 324; City of Harrisburg v. McPherran, 200 Pa. 343, 49 Atl. 988 Howe v. City of Cambridge, 114 Mass. 388; Conde v. City of Schenectady, 164 N. Y. 258; Masonic Bldg. Ass'n v. Brownell, 164 Mass. 306. Taxpayers are represented in and by the legislature passing such legislation.

[194] Olsson v. City of Topeka, 42 Kan. 709, 21 Pac. 219.

[195] City of Little Rock v. Katzenstein, 52 Ark. 107, 12 S. W. 198; Montgomery County Com'rs v. Fu len, 111 Ind. 410, 12 N. E. 298; Dumesnil v. Shanks, 97 Ky. 354, 30 S. W. 654, 31 S. W. 864; Lincoln v. Street Com'rs of Boston, 176 Mass. 210.

or abutting, is liable for the local assessment or tax in the proportion that it derives a benefit from the making of the local improvement. The rule as stated is that local assessments or taxes on particular estates are permissible and legal when founded on special and particular benefits to the property and then only to an amount not exceeding such benefits.[196]

Ascertainment of benefits. The measure of such benefits and the manner of ascertaining them is established by some arbitrary method provided by law,[197] usually either by a municipal council, duly qualified commissioners, or a jury,[198] in the manner provided by special charter or statutory provisions,[199] who pass upon the questions submitted, then ascertain and report the benefits received and levy the assessments in a proportionate manner.[200]

§ 217. What considered as benefits.

The general principle has been stated that the validity of special assessments is based upon the idea of an equivalent in benefits

[196] Voigt v. Detroit City, 184 U. S. 115; Burlington Sav. Bank v. City of Clinton, 106 Fed. 269; City Council of Montgomery v. Birdsong, 126 Ala. 632, 28 So. 522; In re Bonds of Madera Irr. Dist., 92 Cal. 296, 14 L. R. A. 755; Ferguson v. Borough of Stamford, 60 Conn. 432; Grand Rapids School Furniture Co. v. City of Grand Rapids, 92 Mich. 564; Parrotte v. City of Omaha, 61 Neb. 96, 84 N. W. 602; Coward v. City of North Plainfield, 63 N. J. Law, 61, 42 Atl. 805; Dooling v. Ocean City, 67 N. J. Law, 215, 50 Atl. 621; Woodhouse v. City of Burlington, 47 Vt. 301; Violett v. City Council of Alexandria, 92 Va. 561, 31 L. R. A. 382.

[197] German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; Givins v. City of Chicago, 188 Ill. 348, 58 N. E. 912; Lovitt v. Russell, 138 Mo. 474, 40 S. W. 123; King Real Estate Ass'n v. City of Portland, 23 Or. 199, 31 Pac. 482.

[198] Davis v. City of Litchfield, 155 Ill. 384; City of Baltimore v. Johns Hopkins Hospital, 56 Md. 1; Brown v. City of Saginaw, 107 Mich. 643, 65 N. W. 601; Spencer v. Merchant, 125 U. S. 345; Shank v. Smith, 157 Ind. 401, 61 N. E. 932, 55 L. R. A. 564; Hull v. People, 170 Ill. 246; Friedenwald v. City of Baltimore, 74 Md. 116, 21 Atl. 555; City of Detroit v. Beecher, 75 Mich. 454, 4 L R. A. 813; Kansas City v. Bacon, 157 Mo. 450.

[199] Sanitary Dist. of Chicago v. City of Joliet, 189 Ill. 270; King v. City of Portland, 38 Or. 402, 63 Pac. 2, 55 L. R. A. 812; Sowles v. Village of St. Albans, 71 Vt. 418.

[200] Chicago & N. W. R. Co. v. Village of Elmhurst, 165 Ill. 148; John v. Connell, 64 Neb. 233, 89 N. W. 806; Sinclaire v. Town of West Hoboken, 58 N. J. Law, 129, 32 Atl. 65; Coward v. City of North Plainfield, 63 N. J. Law, 61, 42 Atl. 805.

received by the property for the assessments paid, the question of what property receives a benefit being determined arbitrarily according to some fixed rule by the legislature or under its direction by subordinate agencies after an examination of all facts relating to a particular assessment.[200a] The word "benefit" as used in connection with the levy of special assessments conveys the idea of a special and peculiar advantage, convenience or benefit received by particular property in excess of that received by property in general. It is the idea of a special benefit as contra-distinguished from common or universal benefit.

Illustrations of benefits. The advancement of property in value,[201] its susceptibility for drainage to a sewerage system,[202] the fact that a water supply is made available,[203] better facilities and conveniences for ingress and egress,[204] and a greater advantage or convenience of any character resulting from the making of a local improvement,[205] have each and all been held special advantages or benefits sufficient to justify the imposition of local assessments upon property receiving these benefits.

§ 218. Levy based upon area or comparative value of property.*

The measure by which the proper assessment to be paid by certain property is ascertained may be, instead of those suggested in preceding sections, the total area of the property [206] or its value as determined by the proper officials; [207] the theory being in the latter case property supposedly receives benefits in proportion

[200a] Keith v. City of Boston, 120 Mass. 108; Delaware & H. Canal Co. v. City of Buffalo, 167 N. Y. 589, 60 N. E. 1119; Voght v. City of Buffalo, 133 N. Y. 463.

[201] Fahnestock v. City of Peoria, 171 Ill. 454; Mock v. City of Muncie (Ind.) 32 N. E. 718; City of Baltimore v. Smith & Schwartz Brick Co., 80 Md. 458, 31 Atl. 423; Kansas City v. Bacon, 147 Mo. 259, 48 S. W. 860.

[202] Kelly v. City of Chicago, 148 Ill. 90; Garratt v. Trustees of Canandaigua, 135 N. Y. 436.

[203] Baker v. Gartside, 86 Pa. 498.

[204] City of Omaha v. Schaller, 26 Neb. 522, 42 N. W. 721.

[205] Platt v. Town of Milton, 58 Vt. 608.

* 6 Curr. Law, 1161.

[206] Shumate v. Heman, 181 U. S. 402, affirming Heman v. Allen, 156 Mo. 534; Grimmell v. City of Des Moines, 57 Iowa, 144; Swain v. Fulmer, 135 Ind. 8, 34 N. E. 639; Malchus v. District of Highlands, 67 Ky. 547; Johnson v. Duer, 115 Mo. 366, 21 S. W. 800.

[207] Town of Monticello v. Banks, 48 Ark. 251; Parker v. City of Atchison, 48 Kan. 574, 30 Pac. 20; S. D.

to its value, and in the former case the arbitrary method is employed as a convenient way of ascertaining the assessment to be paid.

§ 219. Acquiring jurisdiction; preliminary proceedings.

Not only must the property which may be chargeable with a special assessment lie within the geographical limits of the taxing district, but it also must have been in the manner provided by law brought within its jurisdiction in other respects.[208] The power to levy and collect special assessments is one which does not exist as a matter of common right but must be specially granted to a municipal organization by the sovereign.[209] That a levy be legal and capable of enforcement in case of a failure to pay by the property owner, the taxing district must first have acquired jurisdiction or power over the property liable.[210] This power is acquired only by a strict and technical compliance with the various provisions of the law granting the authority in the first instance and further providing the details for its exercise. Such statutes are construed strictly,[211] their provisions are considered usually mandatory,[212] and, in cases of doubt, resolved against the corporation in favor of the property owner.[213]

The proceedings should clearly show from their inception the

Moody & Co. v. Chadwick, 52 La. Ann. 1888; Snow v. City of Fitchburg, 136 Mass. 183; Walker v. City of Ann Arbor, 118 Mich. 251, 76 N. W. 394.

[208] Bates v. City of Mobile, 46 Ala. 158.

[209] Walker v. District of Columbia, 6 Mackey (D. C.) 352; McManus v. Hornaday, 99 Iowa, 507, 68 N. W. 812; Ft. Dodge Elec. Light & Power Co. v. City of Ft. Dodge, 115 Iowa, 568, 89 N. W. 7; City of Portland v. Bituminous Pav. Co., 33 Or. 307, 52 Pac. 28.

[210] Zeigler v. Hopkins, 117 U. S. 683; Mulligan v. Smith, 59 Cal. 206; West Chicago Park Com'rs v. Sweet, 167 Ill. 326; Armstrong v. Ogden City, 12 Utah, 476, 43 Pac. 119.

[211] City of Charlton v. Holliday, 60 Iowa, 391; City of Argentine v. Simmons, 53 Kan. 491, 37 Pac. 14; Murphy v. City of Louisville, 72 Ky. (9 Bush) 189; Inhabitants of Northampton v. Aboll, 127 Mass. 507; Town of Trenton v. Coyle, 107 Mo. 193; Vreeland v. Jersey City, 54 N. J. Law, 49.

[212] Crane v. City of Siloam Springs, 67 Ark. 30; City of Sterling v. Galt, 117 Ill. 11; Village of Hammond v. Leavitt, 181 Ill. 416; John v. Connell, 61 Neb. 267, 85 N. W. 82.

[213] Preston v. Roberts, 75 Ky. (12 Bush) 570; Keith v. Bingham, 100 Mo. 300.

property assessed [214] and the locality of the local improvement [215] for which the assessment is levied; if diagrams or plat are used, they must contain such references as will enable the description of the premises to be understood.[216]

The filing or recording of plans, profiles and specifications may be also necessary for the validity of subsequent proceedings; [217] these must contain a description of the property or district or both likely to be affected or benefited by the proposed improvement.[218] An accurate and definite description of the work to be done is also necessary to obtain jurisdiction of property for the purpose of levying the special assessment; this description should be in writing and should be of such a character as to leave nothing open to oral proof. The character, the extent or the locality of the improvement, must not be left to the determination of subordinate officials or municipal employes.[219] In some states before these proceedings can be sustained, the local legislative body must have authorized the construction of the local improvement.[220]

§ 220. Execution of a contract.

Elsewhere we find it necessary that the proper authorities enter into a contract for the construction of the improvement before any steps can be taken for the levy and collection of the special assessments necessary to meet the financial obligations of such contract.[221] Without its execution the assessment will be invalid

[214] Blanchard v. Ladd, 135 Cal. 214, 67 Pac. 131; Upton v. People, 176 Ill. 632; Balfe v. Johnson, 40 Ind. 235; Heman Const. Co. v. Loevy, 64 Mo. App. 430; Drew v. Morrill, 62 N. H. 23; Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049.

[215] Banaz v. Smith, 133 Cal. 102, 65 Pac. 309; McChesney v. City of Chicago, 173 Ill. 75.

[216] Gafney v. City & County of San Francisco, 72 Cal. 146, 13 Pac. 467; Blanchard v. Ladd, 135 Cal. 24, 67 Pac. 131.

[217] Barrett v. Falls City Artificial Stone Co., 21 Ky. L. R. 669, 52 S. W. 947.

[218] Grant v. Barber, 125 Cal. 188, 67 Pac. 127; Haughawout v. Hubbard, 131 Cal. 675.

[219] Peters v. City of Newark, 31 N. J. Law, 364; Himmelmann v. McCreery, 51 Cal. 562; Andrews v. City of Chicago, 57 Ill. 240; Greenwood v. Morrison, 128 Cal. 350; Medland v. Connell, 57 Neb. 10, 77 N. W. 437; Central R. Co. v. City of Bayonne, 51 N. J. Law, 428, 17 Atl. 971.

[220] Lewis v. City of Seattle, 28 Wash. 639, 69 Pac. 393. See post, §§ 223 and 224.

[221] Wiles v. Hoss, 114 Ind. 371; City of Argentine v. Simmons, 53 Kan. 491, 37 Pac. 14; Oakley v. Atlantic City, 63 N. J. Law, 127.

and further it is essential that the contract must be legal, namely, executed in the manner required by law, observing all the requirements for competitive bidding if such exist. A legal contract must exist as a basis for legal proceedings, instituting and collecting local assessments.[222] In some jurisdictions not only must the contract be executed as above stated but the work called for must be fully completed.[223] An immaterial variance or a material one which has been ratified by the proper authorities will not usually, as a defense, be available to the property owner in an action brought to enforce the payment of a special assessment.[224]

§ 221. Preliminary investigation or estimates.

It is a common requirement that before a special assessment can be legally levied and collected, an investigation into the advisability and feasibility of the construction of the local improvement must be made by civil engineers or commissioners,[225] and an estimate of the cost of the improvement with or without maps; profiles and specifications filed in the proper office.[226] This estimate should contain in detail the various items entering into the cost of the improvement.[227]

§ 222. Declaration of necessity.

In still other municipalities we find the requirement that the city council, an assessing board or other official body must take

[222] Ede v. Knight, 93 Cal. 159; Gray v. Richardson, 124 Cal. 460; Bowditch v. Superintendent of Streets, 168 Mass. 239, 46 N. E. 1026.

[223] Wood v. Strother, 76 Cal. 545; Craig v. People, 193 Ill. 199; Shaw v. Des Moines County, 74 Iowa, 679; Nevin v. Roach, 86 Ky. 492.

[224] Hadley v. Dague, 130 Cal. 207, 62 Pac. 500; Ottumwa Brick & Const. Co. v. Ainley, 109 Iowa, 386; People v. City of Buffalo, 147 N. Y. 675; Murphy v. City of Albina, 22 Or. 106, 29 Pac. 353.

[225] Hammond v. City of San Leandro, 135 Cal. 450, 67 Pac. 692.

[226] Edgar v. City of Pittsburg, 114 Fed. 586; Kansas City v. Cullinan, 65 Kan. 68, 68 Pac. 1099; State v. City of St. Louis, 161 Mo. 371, 61 S. W. 658; Jones v. Town of Tonawanda, 158 N. Y. 438. See, in regard to the sufficiency of the estimate, Goodwille v. City of Detroit, 103 Mich. 283.

[227] City of Chicago v. Cummings, 144 Ill. 446, 33 N. E. 34; Moore v. City of Mattoon, 163 Ill. 622; Pfeiffer v. People, 170 Ill. 347; Adcock v. City of Chicago, 172 Ill. 24; Ronan v. People, 193 Ill. 631; Jenney v. City of Des Moines, 103 Iowa, 347; Kansas City v. Gray, 62 Kan. 198, 61 Pac. 746; Wewell v. City of Cincinnati, 45 Ohio St. 407, 15 N. E. 196; City of Erie v. Brady, 150 Pa. 462, 21 Atl. 641.

specific and definite action either in regard to the necessity for the improvement, by the adoption of a resolution of intention, or an order directing its construction,[228] or official action of some character.[229] The action of such officials is, in this respect, usually considered ministerial in its character, not judicial, but no appeal[230] will lie unless this right is expressly given by statute,[231] or unless they abuse their discretion or are palpably wrong in some important particular.[232]

§ 223. Jurisdiction acquired through the introduction and passage of an ordinance or resolution.

In the greater number of municipalities or other districts authorized to levy special assessments, it will be found that the entire machinery of the law relating thereto is set in motion through the adoption of an ordinance.[233] Without this, the authority for the levy of the assessment does not exist and if a failure to pass a legal ordinance can be shown, all subsequent proceedings will be considered invalid and the collection of the assessment can be successfully resisted by the property owner.[234]

[228] Grant v. Barber, 135 Cal. 188, 67 Pac. 127; West Chicago Park Com'rs v. Sweet, 167 Ill. 326; Clarke v. City of Chicago, 185 Ill. 354; City of Nevada v. Eddy, 123 Mo. 546; King v. City of Portland, 38 Or. 402, 63 Pac. 2, 55 L. R. A. 812; Naegely v. City of Saginaw, 101 Mich. 532; Cook v. Slocum, 27 Minn. 509; Clinton v. City of Portland, 26 Or. 410; Connor v. City of Paris, 87 Tex. 32; Boyd v. City of Milwaukee, 92 Wis. 456.

[229] West Chicago Park Com'rs v. Farber, 171 Ill. 146; Kingman, Petitioner, 156 Mass. 361, 30 N. E. 820.

[230] Galt v. City of Chicago, 174 Ill. 605; City of Terre Haute v. Mack, 139 Ind. 99, 38 N. E. 468.

[231] Vigo County Com'rs v. Davis, 136 Ind. 503, 36 N. E. 141, 22 L. R. A. 515.

[232] Davis v. City of Newark, 54 N. J. Law, 144, 23 Atl. 276; Sinclaire v. Town of West Hoboken, 58 N. J. Law, 129.

[233] Edgar v. City of Pittsburg, 114 Fed. 586; City of Atlanta v. Smith, 99 Ga. 462; Thomson v. People, 184 Ill. 17; Alberger v. City of Baltimore, 64 Md. 1; Barber Asphalt Pav. Co. v. French, 158 Mo. 534, 58 S. W. 934, 54 L. R. A. 492. Affirmed in French v. Barber Asphalt Pav. Co., 181 U. S. 364; Murphy v. City of Albina, 20 Or. 379, 26 Pac. 234; In re Beachwood Ave., 194 Pa. 86.

[234] Bacon v. City of Savannah, 105 Ga. 62, 31 S. E. 127; Connecticut Mut. Life Ins. Co. v. City of Chicago, 185 Ill. 148; Altman v. City of Dubuque, 111 Iowa, 105, 82 N. W. 461; Morse v. City of Westport, 136 Mo. 276; Neill v. Gates, 152 Mo. 585; Grant v. Bartholomew, 58 Neb. 839, modifying judgment in 57 Neb.

Legality of ordinances. The legality of the ordinance will depend upon the validity of the various steps required by law for its passage. The manner and mode of its introduction into the local legislative body,[235] the procedure within that body upon its passage,[236] the question of a quorum,[237] the necessary number of votes,[238] its publication or recording regarded both from the standpoint of manner and time,[239] will all be considered and due weight given to all statutory requirements controlling or affecting the passage of local legislation.

Form. As the collection of a local assessment may result in the confiscation of property, it follows that to protect the owner, the law may require all ordinances designed as a basis for the levy of local assessments to be of a special form setting forth in detail the character,[240] cost,[241] and locality or place[242] of the improve-

673; North Baptist Church v. City of Orange, 54 N. J. Law, 111, 22 Atl. 1004, 14 L. R. A. 62; Paulson v. City of Portland, 16 Or. 450, 1 L. R. A. 673; Vesta Mills v. City Council of Charleston, 60 S. C. 1.

[235] Wadlow v. City of Chicago, 159 Ill. 176; People v. Colvin, 165 Ill. 67. See, also, chapter on Ordinances, post.

[236] Gleason v. Barnett, 20 Ky. L. R. 1865, 49 S. W. 1060; Fehler v. Gosnell, 99 Ky. 380; Aurora Water Co. v. City of Aurora, 129 Mo. 540, validity of ordinance passed at special meeting considered; City of Springfield v. Weaver, 137 Mo. 650; Wright v. Forrestal, 65 Wis. 341. The manner of the passage of such an ordinance considered in the following cases: Hough v. City of Bridgeport, 57 Conn. 290; State v. Armstrong, 54 Minn. 457; Town of Trenton v. Coyle, 107 Mo. 193; Campbell v. City of Cincinnati, 49 Ohio St. 463.

[237] Ferguson v. Crittenden County, 6 Ark. 479; City of Logansport v. Legg, 20 Ind. 315.

[238] Bacon v. City of Savannah, 86 Ga. 301; Pittsburgh, C., C. & St. L. R. Co. v. Town of Crown Point, 150 Ind. 536, 50 N. E. 741; Tennant v. Crocker, 85 Mich. 328; Clark v. City of Elizabeth, 61 N. J. Law, 565, 40 Atl. 616, 737.

[239] Perine v. Lewis, 128 Cal. 236, 60 Pac. 422, judgment modified on rehearing in 128 Cal. 236, 60 Pac. 772; City of New Albany v. Endres, 143 Ind. 192; Fox v. Middlesborough Town Co., 96 Ky. 262, 28 S. W. 776; Inhabitants of Leominster v. Conant, 139 Mass. 384; City of Springfield v. Weaver, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276.

[240] City of Los Angeles v. Dehail, 97 Cal. 13; Peters v. City of Chicago, 192 Ill. 437, 61 N. E. 438; Chicago Terminal Transfer Co. v. City of Chicago, 178 Ill. 429; Ewart v. Village of Western Springs, 180 Ill. 318; Hardin v. City of Chicago, 186 Ill. 424; Markley v. City of Chicago, 190 Ill. 276; Richardson v. Mehler, 111 Ky. 408, 63 S. W. 957; Scott County v. Hinds, 50 Minn. 204. See, also, Abb. Mun. Corp. § 385, pp. 874–880, citing and discussing fully many cases.

ment with a description of the property upon which the assessment levied to pay its cost may become a lien;[243] and the manner of payment.[244] Clearness of expression, accuracy of description and particularity in detail, are all essential to the validity of an ordinance,[245] and strict compliance with its provisions necessary.

A local improvement ordinance must be reasonable. An improvement ordinance or one levying a local assessment must in common with other legislative enactments, in order to be valid, comply with the law, not only in the particulars suggested in the preceding paragraph, but must also be considered legal with reference to its subject-matter. It must be reasonable and not violate the other principles given in those sections treating generally this question.[246]

Resolution. The technical name applied to the statutory requirement suggested in the preceding section may be that of "resolution" instead of "ordinance." If this be the case, the same principles of law will apply and the same results will follow a failure to comply with statutory requirements.[247]

[241] Lake Shore & M. S. R. Co. v. City of Chicago, 144 Ill. 391, 33 N. E. 602; Ronan v. People, 193 Ill. 631.

[242] Rollo v. City of Chicago, 187 Ill. 417, 58 N. E. 355; Givins v. City of Chicago, 186 Ill. 399; Gage v. City of Chicago, 191 Ill. 210; Job v. People, 193 Ill. 609; City of Shreveport v. Prescott, 51 La. Ann. 1895, 26 So. 664, 46 L. R. A. 193; Browne v. City of Boston, 166 Mass. 229.

[243] Burckhardt v. City of Atlanta, 103 Ga. 302, 30 S. E. 32; Hyman v. City of Chicago, 188 Ill. 462, 59 N. E. 10; People v. Hills, 193 Ill. 281; Bush v. Lisle, 89 Ky. 400; Trustees of Phillip's Academy v. Inhabitants of Andover, 175 Mass. 118, 48 L. R. A. 550; City of Baltimore v. Stewart, 92 Md. 535, 48 Atl. 165.

[244] Lawrence v. People, 188 Ill. 407, 58 N. E. 991; Walker v. City of Chicago, 202 Ill. 531; Kansas City v. Marsh Oil Co., 140 Mo. 458, 41 S. W. 943; Moran v. Thompson, 20 Wash. 525, 56 Pac. 29.

[245] Cunningham v. City of Peoria, 157 Ill. 499; Title Guarantee & Trust Co. v. City of Chicago, 162 Ill. 505. McQuillin, Mun. Ord. § 540.

[246] Village of Norwood v. Baker, 172 U. S. 269; Field v. Barber Asphalt Pav. Co., 117 Fed. 925; Palmer v. City of Danville, 154 Ill. 156; Hawes v. City of Chicago, 158 Ill. 653, 30 L. R. A. 225; Corrigan v. Gage, 68 Mo. 541; Wistar v. City of Philadelphia, 111 Pa. 604; Allen v. Drew, 44 Vt. 174; Cooley, Taxation, c. 20, p. 428; McQuillin, Mun. Ord. § 550.

[247] Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057; City St. Imp. Co. v. Babcock, 123 Cal. 205, 55 Pac. 262; Boehme v. City of Monroe, 106 Mich. 401, 64 N. W. 204; Packard v. Bergen Neck R. Co., 48 N. J. Eq. 281, 22 Atl. 227.

§ 224. Petition by property owners.

The basis of the validity of a local assessment is the supposed local and special benefit or advantage received by the property owners in the immediate vicinity of the local improvement. As it is constructed, therefore, for their special benefit, it will be found in many states that action by them is necessary for the construction of a local improvement and the levy of special assessments to pay the cost.[248] The step contemplated by the statutes in such cases is usually the signing and filing of a petition signed by a certain percentage or number of the property owners asking for the construction of the improvement and virtually consenting to the institution of the proceedings for the levy of the assessment and its collection.[249]

Where a local improvement is paid from the general funds of a municipality, a petition by or the consent of the property owners who may be affected by the taxes is not necessary in order to authorize the ordering of a contract or a local improvement by the municipal authorities.[250] The law providing for such petition or consent may require either a certain percentage of frontage or value located upon the contemplated improvement,[251] or a certain percentage in number of the property owners affected.[252] The filing of a petition in the manner and at the time provided is jurisdictional and necessary to the legality of the assessment.

[248] Thomason v. Carroll, 132 Cal. 148, 64 Pac. 262; Merritt v. City of Kewanee, 175 Ill. 537; Thompson v. City of Lexington, 104 Ky. 165, 46 S. W. 481; Byrne v. Parish of East Carroll, 45 La. Ann. 392, 12 So. 521; Grant v. Bartholomew, 58 Neb. 839; App v. Town of Stockton, 61 N. J. of Tonawanda, 158 N. Y. 438.

[249] Ahern v. Board of Improvements, 69 Ark. 68, 61 S. W. 575; City of Atlanta v. Smith, 99 Ga. 462; Merritt v. City of Kewanee, 175 Ill. 537; Wahlgren v. Kansas City, 42 Kan. 243; Ready v. City of New Orleans, 27 La. Ann. 169; De Groot v. Jersey City, 55 N. J. Law, 120, 25 Atl. 272; Allen v. City of Portland, 35 Or. 420.

[250] Goodwille v. City of Detroit, 103 Mich. 283.

[251] Ahern v. Board of Improvement, 69 Ark. 68, 61 S. W. 575; Thomason v. Carroll, 132 Cal. 148, 64 Pac. 262; Farraher v. City of Keokuk, 111 Iowa, 310, 82 N. W. 773; Von Steen v. City of Beatrice, 36 Neb. 209, 54 N. W. 677; Northern R. Co. v. City of Englewood, 62 N. J. Law, 188, 40 Atl. 653; Miller v. City of Amsterdam, 149 N. Y. 288; Speer v. City of Pittsburg, 166 Pa. 86.

[252] Warren v. Russell, 129 Cal. 381; Pittsburgh, C., C. & St. L. R. Co. v. Town of Crown Point, 150 Ind. 536, 50 N. E. 741; Smith v. Syracuse Imp. Co., 161 N. Y. 484.

§ 225. Declaration of necessity.

In still other municipalities the act necessary for the construction of the local improvement and the resulting levy of a local assessment is based upon what may be termed "a declaration of necessity" by the proper public officials;[253] this, as the phrase implies, is simply an official declaration that the improvement contemplated is a public necessity and will result in a benefit or advantage to the property in that vicinity.[254] This declaration may be the result of an investigation in regard to its substance, and can be said, therefore, theoretically, to be based upon an official investigation of the merits, advantages and necessity for the public improvement or local improvement.[255] Ordinarily, the determination of whether a necessity exists is a matter of discretion for municipal authorities and their action will not be interfered with by the courts except in case of corruption or manifest abuse of the power.[256]

§ 226. Construction of the improvement and notice to property owners.

The improvement or assessment, however, authorized or commenced, must follow strictly the authority for its construction or levy;[257] the cost or amount cannot exceed that authorized,[258]

[253] Field v. Village of Western Springs, 181 Ill. 186; Hughes v. Parker, 148 Ind. 692; Cuming v. City of Grand Rapids, 46 Mich. 150.

[254] McManus v. Hornaday, 99 Iowa, 507; Dorman v. City Council of Lewiston, 81 Me. 411; City of Waco v. Prather, 90 Tex. 80; Kent v. Village of Enosburg Falls, 71 Vt. 255; Boyd v. City of Milwaukee, 92 Wis. 456, 66 N. W. 603.

[255] Young v. City of St. Louis, 47 Mo. 492; Jackson v. State, 104 Ind. 516.

[256] Bacon v. City of Savannah, 105 Ga. 62, 31 S. E. 127; McChesney v. City of Chicago, 171 Ill. 253; City of Elkhart v. Wickwire, 121 Ind. 331, 22 N. E. 342; Dewey v. City of Des Moines, 101 Iowa, 416, 70 N. W. 605; Miller v City of Fitchburg, 180 Mass. 32, 61 N. E. 277; Shimmons v. City of Saginaw, 104 Mich. 511, 62 N. W. 725; Monroe County v. Strong, 78 Miss. 565, 29 So. 530.

[257] Watkins v. Griffith, 59 Ark. 344, 27 S. W. 234; Jefferson County v. City of Mt. Vernon, 145 Ill. 80; Mead v. City of Chicago, 186 Ill. 54; Conde v. City of Schenectady, 164 N. Y. 258; Texas Transp. Co. v. Boyd, 67 Tex. 153.

[258] Piedmont Pav. Co. v. Allman, 136 Cal. 88, 68 Pac. 493; Chicago Terminal Transfer Co. v. City of

neither should the improvement differ in character or extent of work or materials [259] from that directed to be constructed or petitioned for.

The legality of special assessment proceedings depends also upon the further and most essential act, namely, the giving of notice to the owners of property that will become subject to the special assessment, the information that the municipal organization is contemplating the construction of a local improvement.[260] This, in some jurisdictions, is imparted to the property owner through what may be termed, technically, a notice to construct; [261] that is, a proper notice is served upon the property owner requiring the construction of the local improvement and giving him an opportunity to do so.

§ 227. Notice; when given; how and to whom.*

The time when notice shall be given depends upon the statutes or local ordinance of each state or organization. It may be given at the inception of the improvement, the time of making the original estimate of cost,[262] at the time of the passage of an ordinance if this is the mode used,[263] within a prescribed time after the work of special improvement has been done,[264] or even later, at the time

Chicago, 178 Ill. 429; Loesnitz v. Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887.

[259] N. P. Perine Contracting & Pav. Co. v. City of Pasadena, 116 Cal. 6; Jefferson County v. City of Mt. Vernon, 145 Ill. 80, 33 N. E. 1091; Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532; Davies v. City of Saginaw, 87 Mich. 439.

[260] Paulsen v. City of Portland, 149 U. S. 30. Also, Id., 16 Or. 450, 1 L. R. A. 673. Scott v. City of Toledo, 36 Fed. 385; Oakland Bank of Savings v. Sullivan, 107 Cal. 428; Walsh v. City of Ansonia, 69 Conn. 558, 37 Atl. 1096; Gage v. People, 188 Ill. 92; Adams v. City of Shelbyville, 154 Ind. 467, 49 L. R. A. 797; State v. Otis, 53 Minn. 318; Milner v. Inhabitants of Trenton, 66 N. J. Law, 150, 48 Atl. 531; Laughlin v. Miller, 124 N. Y. 510. The giving of notice to landowners is necessary though not required by statute. Cook v. City of Portland, 35 Or. 383; Buchanan v. Borough of Beaver, 171 Pa. 567.

[261] Village of Western Springs v. Hill, 177 Ill. 634; Leuly v. Town of West Hoboken, 53 N. J. Law, 64.

* 6 Curr. Law, 1162, 1170.

[262] Gage v. City of Chicago, 196 Ill. 512; Ulman v. City of Baltimore, 72 Md. 587, 11 L. R. A. 224; Hand v. City Council of Elizabeth, 31 N. J. Law, 547.

[263] Gill v. City of Oakland, 124 Cal. 335; City of Baltimore v. Scharf, 54 Md. 499.

[264] District of Columbia v. Burgdorf, 6 App. D. C. 465.

of what is termed the levy of the special assessment.[265] The purpose of such notice is to apprise the property owner of the contemplated action by muncipal authorities and give him an opportunity to protest, remonstrate or take such action to prevent the improvement as the law may afford.[266]

How given and to whom. In many cases property subject to the assessment is owned by nonresidents and we therefore find the statutes providing for the giving of either actual [267] or constructive [268] notice making either sufficient if given in the manner, at the time and in the form legally required.[269] The rule of strict construction, as usual, applies to such statutes and a failure to comply with their requirements in any particular will invalidate the proceedings depending upon the regularity and sufficiency of notice for their validity.[270]

If a failure to give notice affects no substantial rights [271] or if through some other provision of the statute the right is given to

[265] Bowman v. People, 137 Ill. 436, 27 N. E. 598, distinguishing 115 Ill. 150; Smith v. Abington Sav. Bank, 171 Mass. 178, 50 N. E. 545.

[266] Carson v. St. Francis Levee Dist., 59 Ark. 513; Smith v. Hazard, 110 Cal. 145; Kirkland v. Board of Public Works, 142 Ind. 123; Marshall v. City of Leavenworth, 44 Kan. 459; Daniel v. City of New Orleans, 26 La. Ann. 1; In re Street Opening & Improvement Board, 133 N. Y. 436.

[267] City of Auburn v. Paul, 84 Me. 212; City of Lawrence v. Webster, 167 Mass. 513; City of Springfield v. Weaver, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276; Locker v. Borough of South Amboy, 62 N. J. Law, 197, 40 Atl. 637; Landis v. Borough of Vineland, 60 N. J. Law, 264.

[268] Lent v. Tillson, 140 U. S. 316, affirming 72 Cal. 404, 14 Pac. 71; California Imp. Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802; Angus v. City of Hartford, 74 Conn. 27, 49 Atl. 192; State v. Pillsbury, 82 Minn. 359, 85 N. W. 175; Kansas City v. Ward, 134 Mo. 172, 35 S. W. 600; North Baptist Church v. City of Orange, 54 N. J. Law, 111, 22 Atl. 1004, 14 L. R. A. 62; North Baptist Church v. City of Orange, 54 N. J. Law, 111, 14 L. R. A. 62.

[269] Perine v. Erzgraber, 102 Cal. 234, 36 Pac. 585; King v. Lamb, 117 Cal. 401, 49 Pac. 561; Aldis v. South Park Com'rs, 171 Ill. 424; Voght v. City of Buffalo, 133 N. Y. 463; Bank of Columbia v. City of Portland, 41 Or. 1, 67 Pac. 1112; Jones v. City of Seattle, 19 Wash. 669.

[270] Paulsen v. City of Portland, 149 U. S. 30; Williams v. Bergin, 108 Cal. 166; City of Atlanta v. Gabbett, 93 Ga. 266; Poillon v. Borough of Rutherford, 65 N. J. Law, 538, 47 Atl. 439; Bank of Columbia v. City of Portland, 41 Or. 1, 67 Pac. 1112.

[271] Walker v. District of Columbia, 6 Mackey (D. C.) 252; Haley v. City of Alton, 152 Ill. 113; Clements v. Lee, 114 Ind. 397, 16 N. E. 799; Village of Tonawanda v. Price, 171 N. Y. 415.

the property owner to test all of the questions which may have been raised at the time of the service of notice,[272] then such defect or failure will be regarded as an immaterial one and, therefore, not making illegal the assessment proceedings; but if otherwise a failure to give proper notice will be fatal.[273]

§ 228. Variance of proceedings from notice given.

In a preceding section, the principle has been stated that the local improvement as constructed or carried out and the assessment proceedings as levied must follow in detail the authority for the construction and levy. The same principle applies where the giving of notice to a property owner is an essential part of the proceedings; the improvement and the assessment based upon such notice must not vary in a material way from the notice given to the property owners.[274] It is true, however, that a variance may affect no substantial rights,[275] or may be of such slight consequence as to be termed an immaterial one.[276] In this case, the principle clearly would not apply. The rule of strict construction will not be applied to an unreasonable degree or to such an extent as to prevent the construction of a local improvement where none of the rights of property owners have been jeopardized.[277]

§ 229. Benefits the basis of assessment.

In many jurisdictions a local assessment is legal because based upon a strict application of the doctrine of benefits or, as has been

[272] Goodrich v. City of Detroit, 184 U. S. 432, affirming judgment in 123 Mich. 559; Oskamp v. Lewis, 103 Fed. 906; Law v. Johnston, 118 Ind. 261, 20 N. E. 745.

[273] Harrison v. City of Chicago, 163 Ill. 129, 44 N. E. 395; Grace v. Newton Board of Health, 135 Mass. 490; Mills v. City of Detroit, 95 Mich. 422, 54 N. W. 897; Bacon v. City of Elizabeth, 51 N. J. Law, 246; Remsen v. Wheeler, 105 N. Y. 573; Hawthorne v. City of East Portland, 13 Or. 271; Hershberger v. City of Pittsburgh, 115 Pa. 78, 8 Atl. 381.

[274] Washburn v. Lyons, 97 Cal. 314; Owen v. City of Chicago, 53 Ill. 95; Malone v. Jersey City, 27 N. J. Law (3 Dutch.) 536; Ladd v. Spencer, 23 Or. 193.

[275] Felker v. City of New Whatcom, 16 Wash. 178.

[276] Jersey City v. State, 30 N. J. Law, 521; Barkley v. Oregon City, 24 Or. 515, 33 Pac. 978.

[277] Adams v. City of Shelbyville, 154 Ind. 467, 49 L. R. A. 797, but see the dissenting opinion of Judge Baker.

said, according to the benefits received.[278] The supreme court of the United States in a recent case,[279] in discussing generally the right of the legislature to arbitrarily provide a method for apportioning local assessments for the construction of local improvements, held that this was within the discretionary powers of a legislative body and could be done without giving the property owner any notice of the pendency of the proceedings at any stage, and an opportunity to raise the question of benefits received by his property.[280] There will be found, however, decisions holding that, under the method of apportioning assessments based upon benefits received, the property owner is entitled as a jurisdictional right to notice of the pendency of preliminary proceedings and the opportunity of raising this question, or the competency of a proposed tribunal.[281]

§ 230. The right of correction and review.

The right of review or appeal does not belong as an absolute one to the property owner;[282] he is protected in his property rights by federal and state constitutions, but it is possible that steps in special assessment proceedings may not, where notice is given to the owner of their pendency, affect his rights to such an extent or in such a manner as to bring him within protecting clauses.[283] The question of the necessity for and manner of making the improvement is held to be a legislative one and an appeal or the right of review does not exist from affirmative action in

[278] See § 216.

[279] French v. Barber Asphalt Pav. Co., 181 U. S. 324. See, also, Paulson v. City of Portland, 149 U. S 30.

[280] Goodrich v. City of Detroit, 184 U. S. 432; Arnold v. City of Ft. Dodge, 111 Iowa, 152, 82 N. W. 495; City of Baltimore v. Ulman, 79 Md. 469, 30 Atl. 43.

[281] Scott v. City of Toledo, 36 Fed. 385; Chicago & N. W. R. Co. v. Village of Elmhurst, 165 Ill. 148; Adams v. City of Shelbyville, 154 Ind. 467, 49 L. R. A. 797; State v. Otis, 53 Minn. 318, 55 N. W. 143; City of Greensboro v. McAdoo, 112 N. C. 359, 17 S. E. 178, reversing 110 N. C. 430, 14 S. E. 974.

[282] Hart v. West Chicago Park Com'rs, 186 Ill. 464; Graham v. City of Chicago, 187 Ill. 411; Hughes v. Parker, 148 Ind. 692; People v. Myers, 65 Hun, 14, 19 N. Y. Supp. 723.

[283] Davidson v. City of New Orleans, 96 U. S. 97; Hagar v. Reclamation Dist. No. 108, 111 U. S. 708; Gillette v. City of Denver, 21 Fed. 822; Brown v. Drain, 112 Fed. 582.

these respects by a legislative body.[284] The manner of assessment and basis of apportioning the cost of the improvement are also considered legislative questions and in the determination of which according to benefits received or the frontage rule, the court will not interfere.[285] Neither can the power of the municipality to contract for the construction of a local improvement be raised on an appeal from a special assessment tax.[286]

§ 231. The right of appeal or review; manner and time of exercise.*

As the right of appeal and review is a statutory one, the provisions requiring or providing for its exercise within a certain specified time,[287] or in a designated manner,[288] are generally considered mandatory and if the right is not so exercised by the property owner it is forfeited or lost.[289] The time for appeal when based upon specific action commences to run from the time when such action is legally taken.[290]

[284] Beals v. Inhabitants of Brookline, 174 Mass. 1, 54 N. E. 339; Harper v. City of Grand Rapids, 105 Mich. 551, 63 N. W. 517; City of Duluth v. Dibblee, 62 Minn. 18, 63 N. W. 1117; Warren v. Barber Asphalt Pav. Co., 115 Mo. 572, 22 S. W. 490; Mason v. City of Sioux Falls, 2 S. D. 640, 51 N. W. 770.

[285] Pike v. City of Chicago, 155 Ill. 656; Weed v. City of Boston, 172 Mass. 28, 51 N. E. 204, 42 L. R. A. 642; Middaugh v. City of Chicago, 187 Ill. 230; Davis v. City of Newark, 54 N. J. Law, 144, 23 Atl. 276; City of Raleigh v. Peace, 110 N. C. 32, 17 L. R. A. 330; Teegarden v. City of Racine, 56 Wis. 545.

[286] Hellenkamp v. City of Lafayette, 30 Ind. 192.

* 6 Curr. Law, 1166.

[287] Warren v. Riddell, 106 Cal. 325; State v. Norton, 63 Minn. 497; City of St. Louis v. Lang, 131 Mo. 412; In re Delaware & H. Canal Co., 129 N. Y. 105; Clinton v. City of Portland, 26 Or. 410; Garrison v. Dougherty, 18 S. C. 486.

[288] City of Montgomery v. Townsend, 84 Ala. 478; Frost v. Board of Review of Oskaloosa, 113 Iowa, 547, 85 N. W. 770.

[289] Perine v. Forbush, 97 Cal. 305, 32 Pac. 226; Hornung v. McCarthy, 126 Cal. 17; Ferguson v. Borough of Stamford, 60 Conn. 432; Chicago & E. R. Co. v. City of Huntington, 149 Ind. 518, 49 N. E. 379; Meadowcroft v. Kochersperger, 170 Ill. 356; Berry v. City of Des Moines, 115 Iowa, 44, 87 N. W. 747; Kansas City v. Kimball, 60 Kan. 224, 56 Pac. 78; Town of Bellevue v. Peacock, 89 Ky. 495.

[290] Bowditch v. Superintendent of Streets, 168 Mass. 239; Brown v. City of Saginaw, 107 Mich. 643; In re Duffy, 133 N. Y. 512, 31 N. E. 517.

§ 232. What questions raised on appeal and review.

Generally all questions affecting the legality and regularity of pending proceedings can be raised on the appeal.[291] The rule, however, does not apply in cases where the law provides that certain questions can be raised only in a specific manner and before a time which has already elapsed,[292] and it is also true that only such questions can be raised as by fair construction come within objections properly filed.[293]

§ 233. Estoppel of property owner.

By laches. The principle has been stated that as the right of appeal or review is a matter of favor, statutory provisions granting its exercise within a certain specified time were mandatory in their nature and upon a failure of a property owner to do the acts required within the time thus specified, the right was forfeited or lost. The property owner may, therefore, be prevented through the lapse of time from exercising his right of appeal or review,[294] and his failure to exercise the right will be considered a waiver by him of such objections as might have been raised.[295]

By course of action. The property owner may also be estopped from asserting a right of appeal or review through his action or

[291] Shreve v. Town of Cicero, 129 Ill. 226, 21 N. E. 815; O'Reilley v. City of Kingston, 114 N. Y. 439; Delamater v. City of Chicago, 158 Ill. 575; People v. McWethy, 177 Ill. 334; Jenkins v. Stetler, 118 Ind. 275; Mansur v. Aroostook County Com'rs, 83 Me. 514; Beals v. Inhabitants of Brookline, 174 Mass. 1, 54 N. E. 339; State v. District Ct. of St. Louis County, 61 Minn. 542.

[292] City of Chicago v. Nicholes, 192 Ill. 489, 61 N. E. 434; People v. Whidden, 191 Ill. 374, 56 L. R. A. 905; Balfe v. Lammers, 109 Ind. 347, 10 N. E. 92.

[293] Gross v. Village of Grossdale, 176 Ill. 572; Auditor General v. Maier, 95 Mich. 127, 54 N. W. 640; Simmons v. City of Passiac, 55 N. J. Law, 485, 27 Atl. 909; In re Livingston, 121 N. Y. 94, 24 N. E. 290; Potter v. City of New Whatcom, 25 Wash. 207, 65 Pac. 197.

[294] Minnesota & M. Land & Imp. Co. v. City of Billings, 111 Fed. 972; Warren v. Russell, 129 Cal. 381; Thompson v. People, 184 Ill. 17; Batty v. City of Hastings, 63 Neb. 26, 88 N. W. 139; Stewart v. City of Hoboken, 57 N. J. Law, 330, 31 Atl. 278; In re Sewer on 28th St., 158 Pa. 464, distinguishing Travers' Appeal, 152 Pa. 129; Annie Wright Seminary v. City of Tacoma, 23 Wash. 109, 62 Pac. 444.

[295] Dowling v. Conniff, 103 Cal. 75, 36 Pac. 1034; People v. Ryan, 156 Ill. 620, 41 N. E. 180; McManus v. People, 183 Ill. 391.

lack of action. To permit the completion of the work,[296] knowing of irregularities or fraud, forfeits his right as well as the voluntary payment of the whole or any part of his special tax.[297] This rule, however, does not hold where the payment is made under protest [298] or where there are pending proceedings brought for the purpose of testing the validity in some respect of the special assessment or its levy. The property owner further is estopped to allege irregularities for the purpose of defeating a special assessment after the work of local improvement has been partially or wholly completed and accepted by the proper authorities [299] in complying either with the provisions of the law or the contract calling for its construction, and also from setting up other reasons for the illegality of the assessment than those already urged in prior objections made at the time and in the manner required by law.[300] He may also be estopped by his written waivers of irregularities or agreements in open court concerning them.[301]

The doctrine of estoppel does not apply where there is a failure of jurisdictional facts,[302] the right of the municipality, for exam-

[296] City of Valparaiso v. Parker, 148 Ind. 379, 47 N. E. 330; Smyth v. State, 158 Ind. 332, 62 N. E. 449; Tuttle v. Polk, 92 Iowa, 433; Ritchie v. City of South Topeka, 38 Kan. 368, 16 Pac. 332; Towne v. City Council of Newton, 169 Mass. 240; Tuller v. City of Detroit, 126 Mich. 605, 85 N. W. 1080; Hutchinson v. City of Omaha, 52 Neb. 345; Brewer v. City of Elizabeth, 66 N. J. Law, 547, 49 Atl. 480; Conde v. City of Schenectady, 164 N. Y. 258.

[297] McSherry v. Wood, 102 Cal. 647, 36 Pac. 1010; Freeport St. R. Co. v. City of Freeport, 151 Ill. 451; Wakeley v. City of Omaha, 58 Neb. 245, 78 N. W. 511. But the rule will not apply to an assessment utterly void. Speir v. Town of Utrecht, 121 N. Y. 420, 24 N. E. 692.

[298] Phelan v. City & County of San Francisco, 120 Cal. 1; Gardner v. City of Boston, 106 Mass. 549; Murtland v. City of Pittsburg, 189 Pa. 371.

[299] Smith v. Hazard, 110 Cal. 145; Callister v. Kochersperger, 168 Ill. 334; Robinson v. City of Valparaiso, 136 Ind. 616, 36 N. E. 644; Arnold v. City of Ft. Dodge, 111 Iowa, 152, 82 N. W. 495; Richardson v. Mehler, 111 Ky. 408, 63 S. W. 957; Dixon v. City of Detroit, 86 Mich. 516.

[300] Pepper v. City of Philadelphia, 114 Pa. 96. But, see, to the contrary, City of Bradford v. Fox, 171 Pa. 343.

[301] Shepard v. McNeil, 38 Cal. 72; Hewetson v. City of Chicago, 172 Ill. 112; Sheridan v. City of Chicago, 175 Ill. 421.

[302] Pacific Pav. Co. v. Geary, 136 Cal. 373, 68 Pac. 1028; Powers v. Town of New Haven, 120 Ind. 185; Coggeshall v. City of Des Moines, 78 Iowa, 235, 41 N. W. 617, 42 N. W. 650; App v. Town of Stockton, 61 N. J. Law, 520, 39 Atl. 921.

ple, to construct the work of local improvement in question,[303] or the manner of apportionment of its cost.[304] Again, if the work is different in character, extent or cost of construction from that authorized,[304a] or if the form of proceedings in some respect are indefinite and uncertain in some particular affecting specific property,[305] the property owner can make objections based upon such facts, and he will not be estopped by his previous action or inaction. The failure of public officials to record or file objections will not prejudice the one making them.[306]

§ 234. Right of appeal as based on omission to tax other property or excessive assessment.

As a rule the fact that other property is not taxed to a proportionate extent or at all [307] is no ground for relief by one not the owner, although in some jurisdictions it is held that the right exists because a failure to equitably tax other property increases the burden upon that taxed.[308]

Excessive assessment. The property owner cannot avail himself, as a ground for relief, of the fact that the assessment as actually made may be in excess of the amount required to construct a local improvement; such excess usually belongs to the

[303] Union Pav. & Contracting Co. v. McGovern, 127 Cal. 638; Ritchie v. City of South Topeka, 38 Kan. 368; Fox v. Middlesborough Town Co., 96 Ky. 262.

[304] Cowley v. City of Spokane, 99 Fed. 840, citing Village of Norwood v. Baker, 172 U. S. 269. See this latter case as distinguished in French v. Barber Asphalt Pav. Co., 181 U. S. 324; Kenny v. Kelly, 113 Cal. 364, 45 Pac. 699; Grant v. Bartholomew, 58 Neb. 839, modifying judgment in 57 Neb. 673, 78 N. W. 314; In re Livingston, 121 N. Y. 94, 24 N. E. 290.

[304a] Watkins v. Griffith, 59 Ark. 344, 27 S. W. 234; City of Philadelphia v. Meighan, 159 Pa. 495.

[305] Keifer v. City of Bridgeport, 68 Conn. 401.

[306] Delaware & H. Canal Co. v. City of Buffalo, 39 App. Div. 333, 56 N. Y. Supp. 976.

[307] Regenstein v. City of Atlanta, 98 Ga. 167; Thomson v. People, 184 Ill. 17; Lincoln v. Street Com'rs of Boston, 176 Mass. 210; Humphreys v. City of Bayonne, 60 N. J. Law, 406; Phelan v. City & County of San Francisco, 120 Cal. 1, 52 Pac. 38; Bowditch v. City of New Haven, 40 Conn. 503; Powell v. City of Greensburg, 150 Ind. 148, 49 N. E. 955.

[308] Johnson v. People, 177 Ill. 64; J. & A. McKechnie Brew. Co. v. Trustees of Canandaigua, 162 N. Y. 631, 57 N. E. 1113; City of Scranton v. Levers, 200 Pa. 56, 49 Atl. 980.

property owner and should be returned to him.[309] Where the assessment is excessive, to obtain relief it is not necessary for the property owner to tender or pay the amount which is legally a charge upon his property or which he thinks should be justly apportioned upon it.[310] Ordinarily, where the assessment is excessive, this fact does not invalidate the entire proceedings but only so much of the assessment as is in excess of the legal amount.[311]

§ 235. Reassessment or supplemental assessment.*

The right exists in many states, through public policy[312] or legislative authority[313] in the public authorities, to procure a reassessment either upon the motion[314] or by action of property owners affected by the special assessment levied to pay the cost of a local improvement.[315] The proceedings for reassessment are based either upon irregularities, in those pending, sufficient, if tested, to render them invalid,[316] or upon an insufficiency[317] or

[309] Wells v. Wood, 114 Cal. 255; Gross v. People, 193 Ill. 260; Germania Bank v. City of St. Paul, 79 Minn. 29, 81 N. W. 542; City of Cincinnati v. James, 55 Ohio St. 180, 44 N. E. 925.

[310] Village of Norwood v. Baker, 172 U. S. 269; Steckert v. City of East Saginaw, 22 Mich. 104. See to the contrary, Redick v. City of Omaha, 35 Neb. 125, 52 N. W. 847; and Wells v. Western Pav. & Supply Co., 96 Wis. 116, 70 N. W. 1071.

[311] Kerfoot v. City of Chicago, 195 Ill. 229; Pittsburgh, C., C. & St. L. R. Co. v. Fish, 158 Ind. 525, 63 N. E. 454; Barber Asphalt Pav. Co. v. Watt, 51 La. Ann. 1345; Pike v. Cummings, 36 Ohio St. 213; In re Leake & Watts Orphan Home, 92 N. Y. 116.

* 6 Curr. Law, 1168.

[312] Townsend v. City of Manistee, 88 Mich. 408; Mills v. Charleton, 29 Wis. 400, 9 Am. Rep. 578.

[313] Ede v. Cuneo, 126 Cal. 167; Pardridge v. Village of Hyde Park, 131 Ill. 537, 23 N. E. 345; Ewart v. Village of Western Springs, 180 Ill. 318; Campbell v. Monroe County Com'rs, 118 Ind. 119; Manley v. Emlen, 46 Kan. 655; City of Baltimore v. Ulman, 79 Md. 469, 30 Atl. 43.

[314] Reid v. Clay, 134 Cal. 207, 66 Pac. 262; State v. Ensign, 55 Minn. 278.

[315] Westall v. Altschul, 126 Cal. 164; Culver v. Jersey City, 45 N. J. Law, 256.

[316] Lombard v. West Chicago Park Com'rs, 181 U. S. 33, affirming judgment in Cummings v. West Chicago Park Com'rs, 181 Ill. 136; Rector v. Board of Improvements, 50 Ark. 116; Thompson v. City of Chicago, 197 Ill. 599; Bogert v. Jackson Circuit Judge, 118 Mich. 457, 76 N. W. 983; Smith v. City of Detroit, 120 Mich. 572; State v. Ramsey County Dist. Ct., 77 Minn. 248, 79 N. W. 971; Phillips v. City of Olympia, 21 Wash. 153, 57 Pac. 347.

[317] Gill v. City of Oakland, 124 Cal. 335; Kline v. Huntington

excess [318] in amount realized as compared with the actual cost of the public improvement.

§ 236. Lien and priority of special assessments.

Although a special assessment is based upon the doctrine of benefits, so called, yet, as already stated, it is a tax within the strict meaning of that word and the result of the exercise of the power of taxation.[319] It follows from this that independent of statutory or charter provisions the special assessment may have a lien upon the property against which it is charged and possess the usual priority of liens of such a nature.[320] Its rights and priorities are usually prescribed by statute and its relative priority and superiority as a lien depend upon such provisions.[321] As a lien, special assessments are usually superior to all others except those for prior delinquent taxes or assessments upon the same property.[322]

§ 237. Summary proceedings for collection of special assessment.

A special assessment is usually made, by statute, a statutory lien upon the property charged. No action is then necessary in the ordinary sense of the word but upon the special assessment, or any installment becoming delinquent, the state or the indi-

County Com'rs, 152 Ind. 321, 51 N. E. 476; Thayer v. City of Grand Rapids, 82 Mich. 298, 46 N. W. 228.

[318] Himmelmann v. Cofran, 36 Cal. 411; City of Emporia v. Bates, 16 Kan. 495.

[319] Sargent v. Tuttle, 67 Conn. 162, 32 L. R. A. 822; City of Muscatine v. Chicago, R. I. & P. R. Co., 79 Iowa, 645, 44 N. W. 909.

[320] Barfield v. Gleason, 111 Ky. 491, 63 S. W. 964; Allegheny City's Appeal, 41 Pa. 60.

[321] Bauman v. Ross, 167 U. S. 548; City Council of Montgomery v. Birdsong, 126 Ala. 632, 28 So. 522; Durrell v. Dooner, 119 Cal. 411; Des Moines Brick Mfg. Co. v. Smith, 108 Iowa, 307, 79 N. W. 77; Richardson v. Mehler, 111 Ky. 408, 63 S. W. 957; Auditor General v. Maier, 95 Mich. 127; City of Pleasant Hill v. Dasher, 120 Mo. 675, 25 S. W. 566; In re Pequest River Drainage, 42 N. J. Law, 553; City of Chester v. Eyre, 181 Pa. 642.

[322] Ramish v. Hartwell, 126 Cal. 443; Des Moines Brick Mfg. Co. v. Smith, 108 Iowa, 307; Dressman v. Farmers' & Traders' Nat. Bank, 100 Ky. 571, 38 S. W. 1052, 36 L. R. A. 121; White v. Knowlton, 84 Minn. 141, 86 N. W. 755; Makley v. Whitmore, 61 Ohio St. 587, 56 N. E. 461; McMillan v. City of Tacoma, 26 Wash. 358, 67 Pac. 68.

vidual, if given the right of collection, has the power, upon complying with the provisions of the statute in respect to publication and other conditions, to enforce the statutory lien by a sale of the premises against which the special assessment is a charge.[323] The general principles of the law of taxation applying to the enforcement of a statutory lien for delinquent taxes as to notice,[324] the manner of publication,[325] the time and manner of sale, apply here. Provisions for redemption are liberally construed.[325a]

§ 238. Time of collection.

The right of the public corporation or an individual to collect a special assessment is usually dependent upon the completion of the work; the reason for the rule being self-evident.[326] Statutory or charter provisions may direct the payment of the assessment in equal installments distributed over a term of years,[327] this being done to lighten the burden of the property owner, as the cost of a local improvement is usually heavy in proportion to the value of property.

§ 239. The rights of property owners.

The property owner has the right, either through an appeal in a court of law,[328] or through the aid of a court of equity,[329]

[323] School Dist. of Ft. Smith v. Board of Improvement, 65 Ark. 343, 46 S. W. 418; Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301; Noonan v. People, 183 Ill. 52; Sanger v. Rice, 43 Kan. 580; City of Baltimore v. Ulman, 79 Md. 469, 30 Atl. 43; City of Clinton v. Henry County, 115 Mo. 557.

[324] Greenstreet v. Thornton, 60 Ark. 369, 27 L. R. A. 735; Hellman v. Shoulters, 114 Cal. 136; Montford v. Allen, 111 Ga. 18; Illinois Cent. R. Co. v. People, 189 Ill. 119, 59 N. E. 609; London & N. W. American Mortg. Co. v. Gibson, 77 Minn. 394, 80 N. W. 205, 777; Ferguson v. Quinn, 123 Pa. 337.

[325] Hertig v. People, 159 Ill. 237.

[325a] Martin's Ex'r v. Slaughter, 20 Ky. L. R. 1743, 50 S. W. 27; People v. Bleckwenn, 126 N. Y. 310, 27 N. E. 376; Nelson v. Bleckwenn, 137 N. Y. 565; Gault's Appeal, 33 Pa. 94.

[326] Sargent v. Tuttle, 67 Conn. 162, 32 L. R. A. 822; Adams v. City of Shelbyville, 154 Ind. 467, 57 N. E. 114, 49 L. R. A. 797; Hibben v. Smith, 158 Ind. 206, 62 N. E. 447.

[327] Sanders v. Brown, 65 Ark. 498, 47 S. W. 461; Phelps v. City of Mattoon, 177 Ill. 169; Wayne County Sav. Bank v. Gas City Land Co., 156 Ind. 662, 59 N. E. 1048; Talcott v. Noel, 107 Iowa, 470, 78 N. W. 39; State v. District Ct. of St. Louis County, 68 Minn. 147; Makley v. Whitmore, 61 Ohio St. 537, 56 N. E. 461.

[328] Dodd v. City of Hartford, 25

to have restrained the collection of a void assessment. A distinction in this respect must be made between such a right based upon an assessment utterly void for want of jurisdictional conditions[330] or one irregularly made. As to the latter, the courts usually hold that the property owner's right to a review and correction is limited both as to manner and time by statutory provisions, and if action is not taken by him within the time and in the manner thus prescribed, his rights are lost.[331]

§ 240. Personal liability.

It has been repeatedly held that a special assessment is a charge upon property not upon the individual, and the reason for this rule is well stated in the authorities cited in the note and need not be repeated.[332] It is within the power of the legislature, how-

Conn. 232; Meier v. Kelly, 20 Or. 86, 25 Pac. 73.

[329] Ogden City v. Armstrong, 168 U. S. 224; Lyon v. Town of Tonawanda, 98 Fed. 361; Byrne v. Drain, 127 Cal. 663; Fenwick Hall Co. v. Town of Old Saybrook, 69 Conn. 32; De Puy v. City of Wabash, 133 Ind. 336; Kansas City v. Kimball, 60 Kan. 224, 56 Pac. 78. But see the following cases as holding that a court of equity will not interfere to restrain by injunction the collection of an assessment for street improvements levied by a city within the authority granted by its charter: City of Peoria v. Kidder, 26 Ill. 351; Harper v. City of Grand Rapids, 105 Mich. 551; Buddecke v. Ziegenhein, 122 Mo. 239; Wilson v. City of Auburn, 27 Neb. 435; Jones v. City of Newark, 11 N. J. Eq. (3 Stockt.) 452; Hoffeld v. City of Buffalo, 130 N. Y. 387.

[330] Zehnder v. Barber Asphalt Pav. Co., 106 Fed. 103; Pittsburgh, C., C. & St. L. R. Co. v. Fish, 158 Ind. 525, 63 N. E. 454; Chicago, M. & St. P. R. Co. v. Phillips, 111 Iowa, 377, 82 N. W. 787; City of Manistee v. Harley, 79 Mich. 238, 44 N. W. 603; Henningsen v. City of Stillwater, 81 Minn. 215, 83 N. W. 983; Ives v. Irey, 51 Neb. 136; Gaston v. City of Portland, 41 Or. 373, 69 Pac. 34, 445.

[331] Williams v. Eggleston, 170 U. S. 304; Village of Norwood v. Baker, 172 U. S. 269; Crane v. City of Siloam Springs, 67 Ark. 30; Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301; State v. Williams, 68 Conn. 131, 48 L. R. A. 465; Fiske v. People, 188 Ill. 206, 52 L. R. A. 291; Bowen v. Hester, 143 Ind. 511; Kansas City v. Gray, 62 Kan. 198, 61 Pac. 746; Inhabitants of Leominster v. Conant, 139 Mass. 384; People v. Common Council of Detroit, 28 Mich. 228; Town of Macon v. Patty, 57 Miss. 378; Ives v. Frey, 51 Neb. 136; City of Cincinnati v. James, 55 Ohio St. 180; Wingate v. City of Astoria, 39 Or. 603, 65 Pac. 982; Wilson v. Town of Philippi, 39 W. Va. 75, 19 S. E. 553; Gleason v. Waukesha County, 103 Wis. 225, 79 N. W. 249.

[332] Escondido High School Dist. v. Escondido Seminary, 130 Cal.

ever, to remake an assessment for local improvement a personal charge, and it might be said that the weight of authority in the absence of restrictive legislation permits this to be done.[333]

§ 241. Recovery of invalid assessments.

A property owner may have paid the whole or a part of an invalid assessment, and the question then arises of his right to recover.[334] That this right exist it is necessary that the payment should have been made under protest [335] or while equivalent proceedings are pending to determine the validity of the tax.[336] Payments made under mistake of law cannot usually be recovered,[337] but this rule does not apply to those made under a misapprehension of facts.[338] And it is also true that the property owner may be estopped by laches [339] or his conduct [340] from asserting his right.

128, 62 Pac. 401; Kelly v. Mendelsohn, 105 La. 490; Cooley, Taxation (2d Ed.) pp. 674 et seq.; Barker v. Southern Const. Co., 20 Ky. L. R. 796, 47 S. W. 608; Fehler v. Gosnell, 99 Ky 380; S. D. Moody & Co. v. Chadwick, 52 La. Ann. 1888; Moale v. City of Baltimore, 61 Md. 224; Brown's Estate v. Town of Union, 62 N. J. Law, 142; Dreake v. Beasley, 26 Ohio St. 315; Nottage v. City of Portland, 35 Or. 539; Green v. Ward, 82 Va. 324.

[333] Davidson v. City of New Orleans, 96 U. S. 97. See, also, authorities cited in Cooley, Taxation, (2d Ed.) p. 672, note 2. Dodd v. City of Hartford, 25 Conn. 232; Dewey v. City of Des Moines, 101 Iowa, 416, 70 N. W. 605; Jaicks v. Sullivan, 128 Mo. 177, 30 S. W. 890; Lincoln St. R. Co. v. City of Lincoln, 61 Neb. 109, 84 N. W. 802; Ivanhoe v. City of Enterprise, 29 Or. 245, 35 L. R. A. 58.

[334] Dexter v. City of Boston, 176 Mass. 247; McConville v. City of St. Paul, 75 Minn. 383, 77 N. W. 933, 43 L. R. A. 584; Rogers v. City of St. Paul, 79 Minn. 5, 81 N. W. 539, 47 L. R. A. 537; Trimmer v. City of Rochester, 130 N. Y. 401, 29 N. E. 746; People v. Molloy, 161 N. Y. 621.

[335] Gill v. City of Oakland, 124 Cal. 335; Hoke v. City of Atlanta, 107 Ga. 416, 33 S. E. 412; Hawkeye Loan & Brokerage Co. v. City of Marion, 110 Iowa, 468, 81 N. W. 718; City of Omaha v. Kountz, 25 Neb. 60, 40 N. W. 597; Phelps v. City of New York, 112 N. Y. 216, 2 L. R. A. 626; Peebles v. City of Pittsburgh, 101 Pa. 304.

[336] Gable v. Seiben, 137 Ind. 155; Jersey City v. Green, 42 N. J. Law, 627; Brehm v. City of New York, 104 N. Y. 186.

[337] Brands v. City of Louisville, 23 Ky. L. R. 442, 63 S. W. 2; Hubbard v. City of Hickman, 67 Ky. (4 Bush) 204.

[338] City of Indianapolis v. Patterson, 112 Ind. 344, 14 N. E. 551.

[339] Ritchie v. City of South Topeka, 38 Kan. 368; Lundbom v. City of Manistee, 93 Mich. 170, 53 N. W. 161.

[340] Jackson v. City of Detroit, 10 Mich. 248; State v. Ramsey County Dist. Ct., 40 Minn. 5.

III. LICENSE FEES AND POLL TAXES.

§ 242. Power to impose.

The state may either, as an exercise of the power of taxation or of its police power,[341] impose a license fee upon those carrying on or engaging in certain specified trades, occupations or professions, the payment of which and the securing of the license will be necessary to the right to engage in such trade, occupation or profession.[342] This power of the state is an inherent one as both taxation and the exercise of the police power are sovereign attributes and also capable of delegation by the state to subordinate agencies.[343] It is the duty of the government to protect the lives, the health and good morals of those within its jurisdiction, and that this may be more effectively done it may be deemed advisable or even necessary to control the manner or place in which a certain occupation, business or profession may be carried on,[344] and also the number or qualifications of those who may desire to engage in such business or profession.[345] The state may, there-

6 Curr. Law, 727; 8 Curr. Law, 735.

[341] Goldthwaite v. City of Montgomery, 50 Ala. 486; State v. Hammond Packing Co., 110 La. 180, 34 So. 368; In re Guerrero, 69 Cal. 88; Price v. People, 193 Ill. 114, 55 L. R. A. 588; State v. Montgomery, 92 Me. 433; State v. Wagner, 69 Minn. 206, 38 L. R. A. 677; State v. Kleetzen, 8 N. D. 286, 78 N. W. 984.

[342] Welch v. Hotchkiss, 39 Conn. 140; Kniper v. City of Louisville, 70 Ky. (7 Bush) 599; Licks v. State, 42 Miss. 316; Oil City v. Oil City Trust Co., 151 Pa. 454; Borough of Belmar v. Barkalow, 67 N. J. Law, 504, 52 Atl. 157; Cooley, Taxation (2d Ed.) p. 592.

[343] Nashville, C. & St. L. R. Co. v. City of Attalla, 118 Ala. 362; Inyo County v. Erro, 119 Cal. 119; Welch v. Hotchkiss, 39 Conn. 140; Wright v. City of Atlanta, 54 Ga. 645. The power may exist in both the state and the municipality to license the same business or occupation. City of Huntington v. Cheesbro, 57 Ind. 74; Town of Mandeville v. Baudot, 49 La. Ann. 236; State v. Williams, 160 Mo. 333, 54 L. R. A. 950; City of York v. Chicago, B. & Q. R. Co., 56 Neb. 572; Ex parte Siebenhauer, 14 Nev. 365; State v. Green, 126 N. C. 1032. A delegated agency can only exercise the power within the limits of its jurisdiction. Ogden City v. Crossman, 17 Utah, 66; Village of St. Johnsbury v. Thompson, 59 Vt. 300; Fleetwood v. Read, 21 Wash. 547, 47 L. R. A. 205, 77 Am. St. Rep. 681.

[344] Barthet v. City of New Orleans, 24 Fed. 563; In re Hang Kie, 69 Cal. 149; Fox v. Mohawk & H. R. Humane Soc., 20 Misc. 461, 46 N. Y. Supp. 232; Hill v. City Council of Abbeville, 59 S. C. 396, 38 S. E. 11.

[345] City of Titusville v. Brennan,

fore, to the better exercise of its police power, exact a license fee from such as it may designate. In the application of this principle there is, however, a substantial distinction between a useful trade or honorable profession and an occupation, amusement or business, which may be regarded to a varying extent as injurious to the morals or the health of the people.[346] In respect to the latter, the power of the state is far reaching and less subject to restraint.[347] Where a license fee is imposed as a part of the exercise of the police power in amount and application it must be limited by the purpose for which it is imposed, namely, the control and regulation of the trade or calling for the purpose of protecting society.[348]

§ 243. As based upon power of taxation.

The state may, without any regard to the exercise of the police power, but as a means of raising revenue, impose license fees upon such trades, occupations or professions as it may elect, in the absence of constitutional restraint.[349] When a fee is imposed for this purpose, the principles of taxation as to uniformity and equality will apply.[350] If the fee is imposed as an exercise of the police

143 Pa. 642, 14 L. R. A. 100; State v. Benzenberg, 101 Wis. 172, 76 N. W. 345; Singer v. State, 72 Md. 464, 8 L. R. A. 551; People v. Warden of City Prison, 144 N. Y. 529, 27 L. R. A. 718; State v. Gardner, 58 Ohio St. 599, 51 N. E. 136, 41 L. R. A. 689.

[346] Banta v. City of Chicago, 172 Ill. 204, 40 L. R. A. 611; Walcott v. People, 17 Mich. 68; Guerin v. Borough of Asbury Park, 57 N. J. Law, 292, 30 Atl. 472.

[347] Town of Mena v. Smith, 64 Ark. 363; Humes v. City of Ft. Smith, 93 Fed. 857; Cache County v. Jensen, 21 Utah, 207.

[348] Borough of Sayre v. Phillips, 148 Pa. 482, 24 Atl. 76, 16 L. R. A. 49.

[349] License Tax Cases, 72 U. S. (5 Wall.) 462; Los Angeles County v. Eikenberry, 131 Cal. 461, 63 Pac. 766; Johnston v. City of Macon, 62 Ga. 645; North Hudson County R. Co. v. City of Hoboken, 41 N. J. Law, 71; Com. v. Clark, 195 Pa. 634; City of Memphis v. American Exp. Co., 102 Tenn. 336, 52 S. W. 172; Fleetwood v. Read, 21 Wash. 547, 47 L. R. A. 205; Cache County v. Jensen, 21 Utah, 207; Bogue v. City of Seattle, 19 Wash. 396; McQuillin, Mun. Ord. pp. 618 et seq. See, also, Abb. Mun. Corp. § 399, citing many cases.

[350] Nashville, C. & St. L. R. Co. v. City of Attalla, 118 Ala. 362, 24 So. 450; Stewart v. Kehrer, 115 Ga. 184, 41 S. E. 680; American Union Exp. Co. v. City of St. Joseph, 66 Mo. 675; Blue Jacket Consol. Copper Co. v. Scherr, 50 W. Va. 533, 40 S. E. 514; Newport News & O. P. R. & Elec. Co. v. City of Newport News, 100 Va. 157, 40 S. E. 645.

power, then those rules and principles of law which control a government in the exercise of that power will control and govern its right.[351]

§ 244. Limitations upon the power.

Independent of local limitations and treating generally the right to impose a license fee whether based upon a police power or that of taxation, certain statutory or constitutional restrictions and limitations exist upon this sovereign right.[352] The Federal constitution prohibits the states from exercising certain governmental powers and duties which the Federal government in the same instrument assumes exclusively for itself.[353] The power to regulate commerce between states, with foreign nations and Indian tribes is one of these.[354] The implied limitation also exists that an agency of the Federal government cannot be taxed by state authorities.[355]

A license fee or tax should not discriminate. License fees and taxes also in order to be valid should operate uniformly upon all within a certain class and must not discriminate as to individuals of the same class.[356] This rule applies to residents and nonresidents. These, it has been held, cannot be classified directly or indirectly as such.[357] The rule, however, does not operate to prevent

[351] Humes v. City of Ft. Smith, 93 Fed. 857: City of Terra Haute v. Kersey, 159 Ind. 330, 64 N. E. 469; Holberg v. Macon, 55 Miss. 112. See, also, §§ 242, et seq. supra.

[352] People v. Martin, 60 Cal. 153; State v. Ashbrook, 154 Mo. 375, 48 L. R. A. 265, 77 Am. St. Rep. 765; Bassett v. City of El Paso, 88 Tex. 168; City of Terre Haute v. Kersey, 159 Ind. 300, 64 N. E. 469; Kerrigan v. Poole, 131 Mich. 305, 91 N. W. 163.

[353] San Benito County v. Southern Pac. R. Co., 77 Cal. 518; State v. Thompson, 160 Mo. 333, 60 S. W. 1077, 54 L. R. A. 950; Debardelaben v. State, 99 Tenn. 649.

[354] Guy v. City of Baltimore, 100 U. S. 434; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, reversing 114 Pa. 256; McCall v. California, 136 U. S. 104; Robbins v. Shelby County Taxing Dist., 120 U. S. 490. See, also, Abb. Mun. Corp. § 408, citing many cases and discussing fully the authorities.

[355] Farmers' & Mechanics' Nat. Bank v. Dearing, 91 U. S. 29; Pacific Exp. Co. v. Seibert, 142 U. S. 339; Osborn v. Bank of U. S., 9 Wheat. (U. S.) 738.

[356] Singer Mfg. Co. v. Wright, 33 Fed. 121; Stewart v. Kehrer, 115 Ga. 184; Braun v. City of Chicago, 110 Ill. 186; City of Terre Haute v. Kersey, 159 Ind. 300, 64 N. E. 469; Browne v. Selser, 106 La. 691; City of St. Louis v. Bowler, 94 Mo. 630.

[357] Gould v. City of Atlanta, 55 Ga. 678; City of Indianapolis v. Bieler, 138 Ind. 30; City of Saginaw

a subclassification of those following a certain calling or occupation as based upon different conditions or degrees of knowledge or other qualifications.[358] Neither does the rule prohibiting discriminatory license fees or taxes prevent a public corporation from prescribing certain qualifications or certain degrees of fitness which must be possessed before a license fee can be exacted or granted, the absence of such qualifications operating as a prohibition in this respect. It may be deemed expedient and wise to prohibit entirely those lacking certain moral or other qualifications from engaging in a certain business or occupation.[359]

§ 245. Delegation of power for exercise by municipal corporations.

The state, as suggested, may delegate to a subordinate agency this right of imposing a license fee to be exercised in a manner, and at a time, within its discretion. The power as thus delegated is one to which is applied, because of its character, the rule of strict construction. General language, it has been repeatedly held, will not confer the right.[360]

Where the power has been properly delegated, courts will not interfere in its exercise except where there has been a gross abuse by the municipal authorities[361] of the discretion which it is held

v. McKnight, Circuit Judge, 106 Mich. 32; City of St. Louis v. Consolidated Coal Co., 113 Mo. 83; Thompson v. Camp Meeting Ass'n, 55 N. J. Law, 507; Simrall v. City of Covington 90 Ky. 444, 9 L. R. A. 556; Pullman Palace Car Co. v. State, 64 Tex. 274; Clements v. Town of Casper, 4 Wyo. 494, supra. See, also, cases cited under § 242, supra.

[358] Clark v. City of Titusville, 184 U. S. 329; Ex parte McKenna, 126 Cal. 429; Davis v. City of Macon, 64 Ga. 128; Moore v. City of St. Paul, 61 Minn. 427; State v. Elofson, 86 Minn. 103. A classification of dairy herds on the basis of counties is void. City of Aurora v. McGannon, 138 Mo. 38; State v. French, 17 Mont. 54, 30 L. R. A. 415.

[359] Jones v. Hilliard, 69 Ala. 300; In re Bickerstaff, 70 Cal. 35; Groesch v. State, 42 Ind. 547; Mason v. Trustees of Lancaster, 67 Ky. (4 Bush) 406; Rohrbacher v. City of Jackson, 51 Miss. 735.

[360] City of San Jose v. San Jose & S. C. R. Co., 53 Cal. 476; Shuman v. City of Ft. Wayne, 127 Ind. 109, 26 N. E. 560, 11 L. R. A. 378; Com. v. Turner, 55 Mass. (1 Cush.) 493; City of St. Paul v. Stoltz, 33 Minn. 233.

[361] Southern Car & Foundry Co. v. State, 133 Ala. 624, 32 So. 235; In re Martin, 62 Kan. 638, 64 Pac. 43; Mason v. City of Cumberland, 92 Md. 451, 48 Atl. 136; Potter v. Common Council of Homer, 59 Mich. 8; Borough of New Hope v. Postal Tel. Cable Co., 202 Pa. 532,

they must possess because of their greater knowledge of the needs of the municipality and the extent of the protection afforded either to the public or the licensees by the exaction of the license.[362]

A license fee, to be valid, must have been authorized and imposed by the lawful authority and in the manner designated by law.[363] This principle applies not only to the existence of authority to license but also to the mode in or time at which the particular license may be imposed.[364]

The rules governing the issue of a license should be such as to prevent arbitrary discrimination. This principle applies especially to licenses or permits for the use of streets by parades or processions.[365]

The rule also renders nugatory all of those attempts of municipal councils to delegate to property owners the power of determining whether in certain instances a license or permit for the carrying on of a certain occupation or business should be granted.[366]

§ 246. The power to license the sale of intoxicating liquors.

The sale and consumption of intoxicating liquors, it is unanimously held by all legal and economic authorities, tends to pov-

52 Atl. 127; Woodall v. City of Lynchburg, 100 Va. 318, 40 S. E. 915.

[362] Washington v. State, 13 Ark. 752; Bishoff v. State, 43 Fla. 67, 30 So. 808. This discretion also applies to the amount imposed. Carson v. City of Forsyth, 94 Ga. 617; In re White, 43 Minn. 250.

[363] Phœnix Carpet Co. v. State, 118 Ala. 143, 22 So. 627; Ex parte Pfirrmann, 134 Cal. 143, 66 Pac. 205; Holliman v. City of Hawkinsville, 109 Ga. 107; Webber v. City of Chicago, 148 Ill. 313; Com. v. Gage, 114 Mass. 328; Auditor General v. Sparrow, 116 Mich. 574; State v. Finch, 78 Minn. 118, 46 L. R. A. 437.

[364] City of East St. Louis v. Wehrung, 50 Ill. 28; Halloran v. McCullough, 68 Ind. 179; Margolies v. Atlantic City, 67 N. J. Law, 82, 50 Atl. 367; Child v. Bemus, 17 R. I. 230, 21 Atl. 539, 12 L. R. A. 57; Roche v. Jones, 87 Va. 484, 12 S. E. 965.

[365] City of Chicago v. Trotter, 136 Ill. 430; Anderson v. City of Wellington, 40 Kan. 173, 2 L. R. A. 110; In re Frazee, 63 Mich. 396; State v. Dering, 84 Wis. 585, 19 L. R. A. 858. But see Com. v. Plaisted, 148 Mass. 375, 2 L. R. A. 142.

[366] In re Quong Woo, 13 Fed. 229; Jones v. Hilliard, 69 Ala. 300; House v. State, 41 Miss. 737; City of St. Louis v. Russell, 116 Mo. 248, 20 L. R. A. 721. But see City of Chicago v. Stratton, 162 Ill. 494, 35 L. R. A. 84.

erty, disease and crime;[367] clearly then, it is within a legitimate exercise of the police power that the state or a delegated agency should impose a license fee upon the liquor traffic, since the business cannot be classed as a useful or honorable occupation.[368] It is also within the power of the state to impose a license fee on the right to sell liquors as a means solely of raising revenue.[369]

§ 247. Nature of license.*

A license when issued is not generally considered in the nature of a contract, is personal,[370] and may be revoked at any time without liability by the authorities granting it upon a failure to comply with the conditions imposed either by general law or special provision at the time it was granted.[371] It further only affords protection for acts done [372] within the period which it covers.

§ 248. Specific illustrations of the imposition of license fees.

Without attempting to distinguish except as may be suggested in the notes, the basis for the imposition of a license fee as between the exercise of the police power and the power of taxation, authorities are found sustaining the power of the state or its

[367] Duluth Brewing & Malting Co. v. City of Superior, 123 Fed. 353.

[368] Sheppard v. Dowling, 127 Ala. 1, 28 So. 791. The Alabama dispensary law (Acts 1898–99, p. 108), held constitutional. Los Angeles County v. Elkenberry, 131 Cal. 461, 63 Pac. 766; Daus v. City of Macon, 103 Ga. 774, 30 S. E. 670; Kiel v. City of Chicago, 176 Ill. 137; Rogerson v. City of Lambertville, 38 N. J. Law, 69; Williams v. Iredell County Com'rs, 132 N. C. 300, 43 S. E. 896; Bancroft v. Dumas, 21 Vt. 456; Moundsville v. Fountain, 27 W. Va. 182.

[369] Kitson v. City of Ann Arbor, 26 Mich. 325; Caldwell v. City of Lincoln, 19 Neb. 569.

* 8 Curr. Law, 746.

[370] Bishoff v. State, 43 Fla. 67, 30 So. 808. But it has also been held that it cannot be abrogated at any time without just and sufficient cause. City of St. Charles v. Hackman, 133 Mo. 634; Powell v. State, 69 Ala. 10; Columbus City v. Cutcomp, 61 Iowa, 672; Mabry's Ex'rs v. Bullock, 37 Ky. (7 Dana) 337. See, also, State v. Morrison, 126 N. C. 1123; Gibson v. Kauffield, 63 Pa. 168. The license is a special personal privilege and cannot be used by an employe of the licensee.

[371] Schwuchow v. City of Chicago, 68 Ill. 444; Hurber v. Baugh, 43 Iowa, 514; Metropolitan Board of Excise v. Barrie, 34 N. Y. 657; State v. Holmes, 38 N. H. 225; Child v. Bemus, 17 R. I. 230, 21 Atl. 539, 12 L. R. A. 57.

[372] Elsberry v. State, 52 Ala. 8; State v. Lindsay, 34 Ark. 372; State v. Myers, 63 Mo. 324.

delegated agencies to impose a license fee upon amusements,[373] the professions,[374] peddlers or itinerant merchants,[375] the carrying on or engaging in certain trades or occupations[376] and the use of vehicles for hire.[377] A full discussion of the meaning of the words "trades" and "occupations" will be found in Abbott, Muncipal Corporations, § 407, citing many illustrative cases, on pages 999–1010. In defining an occupation or business within the meaning of such statutes or ordinances, it is not necessary to establish the fact that the person pursued it during a protracted length of time,[378] neither on the other hand, does a single act or transaction bring a person within the statute or ordinances.[379]

[373] City of Nashville v. Althrop, 45 Tenn. (5 Cold.) 554; Gillman v. State, 55 Ala. 248; Com. v. McCarty, 141 Mass. 420; Morgan v. State, 64 Neb. 369, 90 N. W. 108; Wright v. State, 41 Tex. Cr. R. 200, 53 S. W. 640; Village of Winooski v. Gokey, 49 Vt. 282.

[374] Cardiff v. Board of Architects, 69 N. J. Law, 172, 54 Atl. 294; Ex parte Montgomery City Council, 64 Ala. 463; City of Sonora v. Curtin, 137 Cal. 583; Wright v. City of Atlanta, 54 Ga. 645; Parks v. State, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190; City of Cherokee v. Perkins, 118 Iowa, 405, 92 N. W. 68; Volp v. Saylor, 42 Or. 546, 71 Pac. 980.

[375] Howe Mach. Co. v. Gage, 100 U. S. 676; Ex parte Hanson, 28 Fed. 127; State v. Conlon, 65 Conn. 478, 31 L. R. A. 55; Holliman v. City of Hawkinsville, 109 Ga. 107; City of South Bend v. Martin, 142 Ind. 31, 29 L. R. A. 531; Iowa City v. Newell, 115 Iowa, 55, 87 N. W. 739; People v. Hotchkiss, 118 Mich. 59, 76 N. W. 142; City of St. Paul v. Briggs, 85 Minn. 290, 88 N. W. 984; Gerrard v. State, 64 Neb. 368, 89 N. W. 1062; State v. Franks, 127 N. C. 510, 37 S. E. 70; Com. v. Harmel, 166 Pa. 89, 27 L. R. A. 388. In the following cases the individuals in question were not regarded as peddlers: Coffey v. Hendrick, 23 Ky. L. R. 1328, 65 S. W. 127; Pegues v. Ray, 50 La. Ann. 574, 23 So. 904; Com. v. Reid, 175 Mass. 325; People v. Baker, 115 Mich. 199; State v. Angelo, 71 N. H. 224, 51 Atl. 905.

[376] Southern Car & Foundry Co. v. State, 133 Ala. 624, 32 So. 235; Asher v. Com., 113 Ky. 296, 68 S. W. 130; City of New Orleans v. Bienvenu, 23 La. Ann. 710; Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654; Town of Greenwood v. Delta Bank, 75 Miss. 162.

[377] Browne v. City of Mobile, 122 Ala. 159, 25 So. 223; Brewster v. City of Pine Bluff, 70 Ark. 28, 65 S. W. 934; San Luis Obispo County v. Greenberg, 120 Cal. 300; Johnson v. City of Macon, 114 Ga. 426, 40 S. E. 322; City of Terre Haute v. Kersey, 159 Ind. 300, 64 N. E. 469; City of Memphis v. Battaile, 55 Tenn. (8 Heisk.) 524; Frommer v. City of Richmond, 31 Grat. (Va.) 646; City of Cheyenne v. O'Connell, 6 Wyo. 491, 46 Pac. 1088; City of South Bend v. Martin, 142 Ind. 31, 29 L. R. A. 531.

[378] Johnson v. State, 44 Ala. 414.

[379] Cary v. Borough of North Plainfield, 49 N. J. Law, 110; Ayrnett v. Edmundson, 68 Tenn. (9

§ 249. Road or poll tax.

As an additional source of revenue imposed for a specific purpose, it is clearly within the power of the legislature to require a prescribed service for the improvement of streets and highways from such individuals as may be designated, or, in lieu of personal service or labor, the payment of a money substitute.[880] That a public or quasi public corporation exercise this right, it is necessary that the legislative authority exist.[881] It follows that as the power is one derived or delegated, all the provisions of the granting statutes in respect to notice required, and the enforcement of the right, must be strictly followed,[882] and only the property or individuals that clearly come within the provisions of the statute will be held subject to the burden.[883] Exemptions are not liberally construed,[884] and those remedies alone that may be given by law for the enforcement of the tax can be pursued, and in the manner and court prescribed.[885]

Baxt.) 610; Wooddy v. Com., 29 Grat. (Va.) 837.

[880] Baader v. City of Cullman, 115 Ala. 539, 22 So. 19; Moore v. Town of Jonesboro, 107 Ga. 704, 33 S. E. 435; In re Hagan, 65 Kan. 857, 68 Pac. 1104; Stone v. Bean, 81 Mass. (15 Gray) 42; Town of Tipton v. Norman, 72 Mo. 380; Wallace v. Bradshaw, 56 N. J. Law, 339.

[881] Galloway v. Town of Tavares, 37 Fla. 58, 19 So. 170; Chicago & N. W. R. Co. v. People, 193 Ill. 539; Bradish v. Lucken, 38 Minn. 186.

[882] State v. Wainright, 60 Ark. 280; Chicago & N. W. R. Co. v. People, 183 Ill. 196; Id., 184 Ill. 174; State v. Telfare, 130 N. C. 645, 40 S. E. 976; Kinney v. People, 52 Ill. App. 359; Reynolds v. Town of Foster, 89 Ill. 257; Hamilton & Merryman Co. v. L'Anse Tp., 107 Mich. 419, 65 N. W. 282; State v. Tracy, 82 Minn. 317, 84 N. W. 1015; Madison County v. Collier, 79 Miss. 220, 30 So. 610; In re Delinquent Poll Tax (R. I.) 44 Atl. 805.

[883] On Yuen Hai Co. v. Ross, 14 Fed. 338; Ward v. State, 88 Ala. 202; Porter v. State, 141 Ind. 488; Watkins v. State (Miss.) 11 So. 532.

[884] Lewin v. State, 77 Ala. 45; Winfield Tp. v. Wise, 73 Ind. 71; City of Faribault v. Misener, 20 Minn. 396 (Gil. 347); Moore v. Vaughan, 127 Mo. 538, 30 S. W. 162.

[885] Waters v. State, 117 Ala. 189, 23 So. 28; Coulson v. Harris, 43 Miss. 728; Ford v. State, 51 Ark. 103; State v. Cox, 53 La. Ann. 2049; State v. Telfare, 130 N. C. 645, 40 S. E. 976.

IV. THE DISBURSEMENT OF PUBLIC REVENUES.

§ 250. The distribution of public moneys in different funds.*

The authority to levy taxes for specific purposes must exist,[886] and that must be within the time and the purpose[887] for which collected. The first limitation, therefore, upon the expenditure of public moneys is that when provided for a specific use, their appropriation or use for other purposes or objects will be illegal.[888] Moneys raised for the support and maintenance of public schools must be expended for this object,[889] and the like principle applies to the many purposes suggested if there be specific authority for the levy of taxes for any special purpose,[890] and the converse principle holds that the obligations connected with specific uses or objects can only be met from funds established or raised by law for such purposes.[891] Where, however, the moneys expended are taken from the general revenues,[892] the only limitation which then

* 6 Curr. Law, 733.

[886] Vance v. City of Little Rock, 30 Ark. 435; City & County of San Francisco v. Broderick, 111 Cal. 302, 43 Pac. 960; Town of New Milford v. Litchfield County, 70 Conn. 435.

[887] Board of Education of Newport v. Nelson, 22 Ky. L. R. 680, 58 S. W. 700; Irwin v. Exton, 125 Cal. 622; Badger v. City of New Orleans, 49 La. Ann. 804, 21 So. 870, 37 L. R. A. 540; State v. City of Elizabeth, 51 N. J. Law, 246, 17 Atl. 91.

[888] Coler v. Stanley County Com'rs, 89 Fed. 257. "This being the case, these funds are dedicated to a special object and cannot be applied to any other. In other words, they are impressed with a trust and that trust can well be enforced in a court of equity." Higgins v. City of San Diego, 131 Cal. 294, 63 Pac. 470. A temporary diversion held not illegal. Park v. Candler, 113 Ga. 647, 39 S. E. 89; City of Chicago v. Williams, 182 Ill. 135, 55 N. E. 123; Florer v. McAffee, 135 Ind. 540, 35 N. E. 277.

[889] City of New Orleans v. Fisher, 91 Fed. 574; Los Angeles County v. Lankershim, 100 Cal. 525; County of Glynn v. Brunswick Terminal Co., 101 Ga. 244; Board of Education of Paducah v. City of Paducah, 108 Ky. 209, 56 S. W. 149; Rose v. Hufty, 63 N. J. Law, 195, 42 Atl. 836; Bailey v. City of Philadelphia, 167 Pa. 569.

[890] Carter v. Tilghman, 119 Cal. 104; Fuller v. Heath, 89 Ill. 296; Locker v. Keller, 110 Iowa, 707, 80 N. W. 433; Neumeyer v. Krakel, 110 Ky. 624, 62 S. W. 518; Flynn v. Turner, 99 Mich. 96, 57 N. W. 1092; State v. Appleby, 136 Mo. 408.

[891] State v. Street, 117 Ala. 203, 23 So. 807; Higgins v. City of San Diego, 131 Cal. 294, 63 Pac. 470; Bartholomew County Com'rs v. State, 116 Ind. 329; Carr v. State, 127 Ind. 204, 11 L. R. A. 370; Alli-

exists upon such disbursement is the principle that they must be applied to or used in furtherance of what is termed "a public purpose," [393] a phrase which has also been discussed in the sections relating to the incurring of indebtedness by a public corporation [394] and the issuance of bonds.[395]

§ 251. The appropriation of public moneys for specific purposes.

It may also be necessary to secure a legal appropriation, as it is termed, by that branch or agency of government having as one of its powers the disbursement of public moneys.[396-397] Where such system exists either as a result of direct legislation or of a settled public policy, before public moneys can be legally expended, there must have been a compliance with the rules established.[398] An expenditure for an unauthorized purpose or one for which the moneys are not specifically set apart or "appropriated" will not be legal [399] and can be prevented by a taxpayer. Where the manner of making such appropriation is prescribed by law, the provisions do not require generally more than a substantial compliance with their terms.[400]

bone v. Ames, 9 S. D. 74, 33 L. R. A. 585; Kennedy v. Montgomery County, 98 Tenn. 165.

[392] People v. Brooks, 16 Cal. 28; Ingram v. Colgan, 106 Cal. 113, 38 Pac. 315, 39 Pac. 437, 28 L. R. A. 187.

[393] Davis v. Inhabitants of Bath, 17 Me. 141; Cooley v. Inhabitants of Granville, 64 Mass. (10 Cush.) 56; Mahon v. Board of Education, 171 N. Y. 263, 63 N. E. 1107.

[394] See §§ 92 et seq.

[395] See §§ 107 et seq.; State v. Wapello County, 13 Iowa, 405.

[396-397] Sutherland-Innes Co. v. Village of Evart, 86 Fed. 597, 30 C. C. A. 305; White v. Town of Decatur, 119 Ala. 476; In re House Bill No. 168, 21 Colo. 46, 39 Pac. 1096; Culbertson v. City of Fulton, 127 Ill. 30, 18 N. E. 781; Carter v. Thorson, 5 S. D. 474, 59 N. W. 469, 24 L. R. A. 734; State v. Rogers, 24 Wash. 417, 64 Pac. 515; Stedman v. City of Berlin, 97 Wis. 505.

[398] State v. Street, 117 Ala. 203, 23 So. 807; Ingram v. Colgan, 106 Cal. 113, 28 L. R. A. 187; State v. Mason, 153 Mo. 23; McElhinney v. City of Superior, 32 Neb. 744; Roberts v. City of Fargo, 10 N. D. 230, 86 N. W. 726.

[399] Thompson v. Searcy County (C. C. A.) 57 Fed. 1030; State v. Frazee, 105 La. 250, 29 So. 478; May v. City of Gloucester, 174 Mass. 583; Pope Mfg. Co. v. Granger, 21 R. I. 298, 43 Atl. 590. Authority to pay the bills follows the making of an appropriation. People v. Schuyler, 79 N. Y. 189.

[400] Hilliard v. Bunker, 68 Ark. 340, 58 S. W. 362; Vickery v. Hendricks County Com'rs, 134 Ind. 554, 32 N. E. 880; City Pub. Co. v. Jersey City, 54 N. J. Law, 437, 24

§ 252. Agents of appropriation.

A public corporation, like all artificial persons, acts through its legally appointed or elected officers and agents each having certain prescribed duties and powers and not legally capable of exercising others. That a disbursing official be justified in the payment of public moneys for specific objects, there must have been not only an authorization for such expenditure but one by the proper legal body or bodies possessing the necessary powers as given by law.[401] An expenditure of public moneys under the direction of a body or official not possessing such power will be clearly illegal.

§ 253. Public revenue; limitations of amount in its disbursement.

Aside from the limitation which involves a discussion of the purpose for which public funds may be used, and which will be considered in succeeding sections, is found that one based generally upon some charter or statutory provision limiting the right of a corporation to expend more than a specified amount in disbursements of a public character. Such limitations as to the amount may consist of a provision restricting the proper expenditure to a given gross sum of the public revenues, a certain per cent of either the assessable property or its total revenues,[402] or limiting the annual expenses for current purposes to the yearly revenues.[403]

Limitations of amount for particular purposes. As a further restriction of the power of public corporations to expend money freely and extravagantly is found a limitation of the amount properly disbursable within a particular year for designated purposes.[404] Such limitations are usually applied to disbursement for

Atl. 571; Dhrew v. City of Altoona, 121 Pa. 401, 15 Atl. 636.

[401] Blair v. Dubuque County, 27 Iowa, 131; Weston v. Dane, 51 Me. 461; Keeney v. Jersey City, 47 N. J. Law, 449; Comstock v. Village of Nelsonville, 61 Ohio St. 288, 56 N. E. 15; Talbot County v. Mansfield, 115 Ga. 766, 42 S. E. 72.

[402] See §§ 100 et seq., supra.

[403] Weaver v. City & County of San Francisco, 111 Cal. 319; Lamar Water & Elec. Light Co. v. City of Lamar, 128 Mo. 188, 32 L. R. A. 157; Atlantic City Waterworks Co. v. Read, 50 N. J. Law, 665.

[404] Kingsley v. City of Brooklyn, 78 N. Y. 200; Howard v. City of Oshkosh, 33 Wis. 309. But see Dearborn v. Inhabitants of Brookline, 97 Mass. 466; Board of Finance of Jersey City v. Street &

works of internal improvement, the construction of local improvements or expenditures made in connection with the construction of plants for furnishing a supply of water and light.

§ 254. Purposes for which public moneys may be used.*

A general limitation exists that public moneys cannot be expended for other than public purposes, and although legislative bodies are usually vested with a wide discretion in this respect,[405] if this principle is violated, although apparently authorized by direct legislation, the expenditure of public funds for a private purpose can be enjoined.[406]

There are some extraordinary uses which, courts have held, come within the character of a public purpose, namely, encampment expenses, the expenses of a delegate to a congress of librarians,[407] those connected with the administration of justice other than statutory costs,[408] the support of institutions for "public good,"[409] the defense of a state,[410] appropriations for making and maintaining state exhibits at fairs or expositions which have generally been sustained,[411] the establishment and support of an

Water Com'rs, 55 N. J. Law, 230.

* 6 Curr. Law, 732.

[405] Agnew v. Brall, 124 Ill. 312; Matthews v. Inhabitants of Westborough, 134 Mass. 555; Hitchcock v. City of St. Louis, 49 Mo. 484; State v. Tappan, 29 Wis. 664; In re Opinion of Justices, 175 Mass. 599, 49 L. R. A. 564; State v. Polk County Com'rs, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161; Waterloo Woolen Mfg. Co. v. Shanahan, 128 N. Y. 345, 14 L. R. A. 481; McCallie v. City of Chattanooga, 40 Tenn. (3 Head) 317.

[406] City of Frederick v. Groshon, 30 Md. 436; Merrill v. Town of Plainfield, 45 N. H. 126.

[407] Kelso v. Teale, 106 Cal. 477, 39 Pac. 948.

[408] Bates v. Independence County, 23 Ark. 722; Justices of Richmond County v. State, 24 Ga. 82; La Plata County Com'rs v. Hampson, 24 Colo. 127, 48 Pac. 1101; Talbot County v. Mansfield, 115 Ga. 766, 42 S. E. 72.

[409] Goodykoontz v. People 20 Colo. 374. An appropriation for "the soldiers' and sailors' home" is authorized by the constitution. But see State v. City of New Orleans, 50 La. Ann. 880. And see also Farmer v. City of St. Paul, 65 Minn. 176, 33 L. R. A. 199.

[410] Reis v. State, 133 Cal. 593, 65 Pac. 1102; Auditor General v. Bay County Sup'rs, 106 Mich. 662, 64 N. W. 570.

[411] Daggett v. Colgan, 92 Cal. 53, 14 L. R. A. 474; Norman v. Kentucky Board of Managers, 93 Ky. 537, 18 L. R. A. 556; Flynn v. Truner, 99 Mich. 96, 57 N. W. 1092; City of Minneapolis v. Janney, 86 Minn. 111; State v. Cornell, 53 Neb. 556, 39 L. R. A. 513.

agricultural experiment station,[412] expenses connected with the care of the indigent, defective or criminal classes,[413] the satisfaction of a claim based upon a moral consideration but which is not a legal demand,[414] the celebration of holidays or the entertainment of distinguished guests when authorized by statute,[415] the care and preservation of public records and buildings,[416] the appropriation of moneys towards the payment of police pensions,[417] and a recent case [418] discusses the advisability and legality of an appropriation of public moneys for the establishment and partial support of an industrial exposition and holds that such institutions are calculated to advance the material interests and general welfare of the people of the community in which they are held, and thus far are so public in their character as to justify public aid. There are also authorities which sustain the proposition that the development of the industrial resources of a state is a proper subject for the appropriation of public moneys.[419]

While expenditures for the following purposes have not been held authorized or warranted as being for a public purpose, the offer of a reward for the arrest and conviction of fugitives from justice,[420] a recompense to a citizen for false imprisonment for crime,[421] the expense of public guests at or the construction of

[412] Wasson v. Wayne County Com'rs, 49 Ohio St. 622, 17 L. R. A. 795, 32 N. E. 472.

[413] Morris v. State, 96 Ind. 597. See post, sections dealing with these subjects.

[414] City of New Orleans v. Clark, 95 U. S. 644; United States v. Realty Company, 163 U. S. 427, citing Guthrie Nat. Bank v. City of Guthrie, 173 U. S. 528; Friend v. Gilbert, 108 Mass. 408; State v. Bruce, 50 Minn. 491.

[415] Hill v. Selectmen of Easthampton, 140 Mass. 381; Black v. Common Council of Detroit, 119 Mich. 571, 78 N. W. 660; Austin v. Coggeshall, 12 R. I. 329.

[416] Donahue v. Morgan, 24 Colo. 389; Potts v. Bennett, 140 Ind. 71, 39 N. E. 518; City of Paterson v. Chosen Freeholders of Passiac County, 56 N. J. Law, 459.

[417] Com. v. Walton, 182 Pa. 373.

[418] City of Minneapolis v. Janney, 86 Minn. 111.

[419] Hand Gold Min. Co. v. Parker, 59 Ga. 419; Lowell v. City of Boston, 111 Mass. 454; City of Minneapolis v. Janney, 86 Minn. 111; Cooley, Const. Lim. 654.

[420] Baker v. City of Washington, 7 D. C. 134; Morrell v. Quarles, 35 Ala. 544; Crofut v. City of Danbury, 65 Conn. 294; Hanger v. City of Des Moines, 52 Iowa, 193; Gale v. Inhabitants of South Berwick, 51 Me. 174; People v. Village of Holly, 119 Mich. 637, 78 N. W. 665, 44 L. R. A. 677; State v. Moore, 37 Neb. 229, 55 N. W. 635; Spafford v. Town of Norwich, 71 Vt. 78, 42 Atl. 970.

[421] Allen v. Board of State Auditors, 122 Mich. 324, 81 N. W. 113, 47 L. R. A. 117.

buildings for the use of celebrations or encampments, public banquets,[422] the appropriation of moneys for the celebration of holidays when not expressly authorized by law,[423] the reimbursement of private individuals for moneys expended in securing a decision holding certain county railroad bonds invalid,[424] the expenses attendant upon the passage of legislation,[425] the expenses of a committee attending a convention of American municipalities,[426] and appropriations for the relief of the destitute,[427] though the weight of authority is in favor of such action.

§ 255. Same subject; necessary governmental expenses.

Certain disbursements are recognized as necessary for the maintenance of government or for the care and protection of its citizens. The making and care of a system of public records available for general use,[428] the current expenses of government, including the salary or fees of officials,[429] the cost of legislative sessions,[430] the payment of rent or the expense of maintaining public buildings,[431] the care and lighting of streets,[432] the maintenance of

[422] Law v. People, 87 Ill. 385; Kingman v. City of Brockton, 153 Mass. 255, 26 N. E. 998, 11 L. R. A. 123; Thrift v. Elizabeth City, 122 N. C. 31, 44 L. R. A. 427; Com. v. City of Pittsburg, 183 Pa. 202; Austin v. Coggeshall, 12 R. I. 329.

[423] City of New London v. Brainard, 22 Conn. 552. Fourth of July. Hood v. Town of Lynn, 83 Mass. (1 Allen) 103. Fourth of July. Tash v. Adams, 64 Mass. (10 Cush.) 252. Anniversary of the surrender of Cornwallis. Love v. City of Raleigh, 116 N. C. 296, 21 S. E. 503, 28 L. R. A. 192. Fourth of July.

[424] Franklin County v. Layman, 34 Ill. App. 606.

[425] Farrel v. Town of Derby, 58 Conn. 234, 7 L. R. A. 776, 34 Am. & Eng. Corp. Cas. 391, note, p. 397; Inhabitants of Westbrook v. Inhabitants of Deering, 63 Me. 231.

[426] Waters v. Bonvouloir, 172 Mass. 286, 52 N. E. 500.

[427] In re Relief Bills, 21 Colo. 62, 39 Pac. 1089; Synod of Dakota v. State, 2 S. D. 366, 14 L. R. A. 418.

[428] Atchison, T. & S. R. Co. v. Kearney County Com'rs, 58 Kan. 19, 48 Pac. 583; Lund v. Chippewa County, 93 Wis. 640.

[429] Foland v. Town of Frankton, 142 Ind. 546; Dwyer v. City of Brenham, 65 Tex. 526; Gladwin v. Ames, 30 Wash. 608, 71 Pac. 189. All expenses necessary to municipal existence are proper and valid although the city has reached the limit of its indebtedness. People v. Onahan, 170 Ill. 449; Lebanon L. & M. Water Co. v. City of Lebanon, 163 Mo. 246, 63 S. W. 809.

[430] Rice v. State, 95 Ind. 33.

[431] Potts v. Bennett, 140 Ind. 71, 39 N. E. 518. The insuring of a public building a proper charge.

[432] White v. City of Decatur, 119 Ala. 476, 23 So. 999; Foland v. Town of Frankton, 142 Ind. 546.

a water system,[433] the purchase of ordinary supplies for office use,[434] and the expense of special departments or boards including fire, police, park, health and educational.[435] As a rule, all such expenses, as well as others of a similar character,[436] are held essential and necessary to the maintenance of corporate existence and the carrying out of the beneficent purposes for which government is created. The payment of adverse legal claims or of judgments rendered by a court or tribunal of competent jurisdiction, including statutory costs, is, without question, legal, as well as of the payment of the debts of a public corporation.[437]

§ 256. Statutory costs.

In addition to the disbursements authorized by the court or a public policy, there are others of a public character which, by constitutional or statutory provision, are made a charge upon different organizations. Statutory costs or fees are those incurred, ordinarily, in what can be termed, "the administration of public justice;" this purpose, it is universally recognized, is not only a necessary object of government but one of the highest for which it is organized. The cost of maintaining places of imprisonment with the care and lodging of those confined, the payment of the fees of jurors, witnesses, sheriffs, or officers of a similar character,[438] and other necessary fees or expenses in connection with

[433] Smith v. Inhabitants of Dedham, 144 Mass. 177; Comstock v. City of Syracuse, 5 N. Y. Supp. 874.

[434] Saylor v. Nodaway County, 159 Mo. 520, 60 S. W. 1057; Garfield County Com'rs v. Isenberg, 10 Okl. 378, 61 Pac. 1067.

[435] Hardy v. Inhabitants of Waltham, 44 Mass. (3 Metc.) 163; Oktibbeha County Sup'rs v. Cottrell, 70 Miss. 117; East Tennessee University v. City of Knoxville, 65 Tenn. (6 Baxt.) 166.

[436] Board of Library Trustees v. Orange County Sup'rs, 99 Cal. 571; McBride v. Hardin County, 58 Iowa, 219; Wisconsin Industrial School for Girls v. Clark County, 103 Wis. 651, 79 N. W. 422.

[437] In re Substitute for Senate Bill No. 83, 21 Colo. 69, 39 Pac. 1088; Metschan v. Hyde, 36 Or. 117, 58 Pac. 80; State v. Dorland, 106 Iowa, 40; City of Des Moines v. Polk County, 107 Iowa, 525; Greer County Com'rs v. Watson, 7 Okl. 174.

[438] Gates v. Johnson County, 36 Tex. 144; Greene County v. Hale County, 61 Ala. 72. See Hilton v. Curry, 124 Cal. 84. But see, also, Polk County v. Crocker, 112 Ga. 152, 37 S. E. 178. The fees of witnesses examined before a grand jury held not a public charge. Green County Com'rs v. Watson, 7 Okl. 174, 54 Pac. 441; Salt Lake County v. Richards, 14 Utah, 142.

holding terms of court or the trial of criminal causes, and enforcing the laws of a state or community, including attorneys' fees,[439] are also proper items of disbursement.

§ 257. Public buildings.

The construction and maintenance of public buildings for the housing of public officials and protection of public records and the use of various classes over which public corporations are required to exercise restraint and provide protection are clearly legitimate purposes for the use of public moneys.[440] But it is quite true that there should be special authority from the legislature for the construction of public buildings even where there are surplus funds to accomplish this without the levy of additional taxes or the incurring of indebtedness for such purpose.[441] The principle also should not be forgotten that public officials are agents with restricted powers.[442]

The power to construct a public building or supply public officers with necessary court rooms or offices includes usually the right, and implies the duty, to furnish for such purposes suitable accommodations, and the right generally exists in public officials, without the grant of specific authority, to make ordinary re-

[439] Lovejoy v. Inhabitants of Foxcroft, 91 Me. 367; Miner v. Shiawassee County Sup'rs, 49 Mich. 602; Washoe County v. Humboldt County, 14 Nev. 123; Pegram v. Guilford County Com'rs, 75 N. C. 120; State v. Evenson, 18 Wash. 609; Williams v. Dodge County, 95 Wis. 604.

[440] People v. Harris, 4 Cal. 9. But compare Vanover v. Davis, 27 Ga. 354; Allen v. Lytle, 114 Ga. 275, 40 S. E. 238; Hall v. City of Virginia, 91 Ill. 535; Spaulding v. City of Lowell, 40 Mass. (23 Pick.) 71; State v. McCardy, 62 Minn. 509; State v. Ehrmantrout, 63 Minn. 104; French v. City of Millville, 66 N. J. Law, 392, 49 Atl. 465. Where the authority to construct a public building exists, it carries with it the implied power to enforce it. Affirmed in 67 N. J. Law, 349, 51 Atl. 1109; State v. Metschan, 32 Or. 372, 41 L. R. A. 692; Cresswell Ranch & Cattle Co. v. Roberts County (Tex. Civ. App.) 27 S. W. 737.

[441] Thompson v. Town of Luverne, 128 Ala. 567, 29 So. 326; Russell v. Tate, 52 Ark. 541, 7 L. R. A. 180; Commissioners of Roads & Revenues v. Porter Mfg. Co., 103 Ga. 613, 30 S. E. 547; Jackson County Com'rs v. State, 155 Ind. 604, 58 N. E. 1037; Bennett v. Norton, 171 Pa. 221.

[442] Cass County v. Gibson (C. C. A.) 107 Fed. 363; Sexton v. Cook County, 114 Ill. 174; Campbell v. Commissioners of State Soldiers' & Sailors' Monument, 115 Ind. 591; Mahon v. Luzerne County, 197 Pa 1; Koch v. City of Milwaukee, 89 Wis. 220.

pairs.[443] Extensive or extraordinary repairs may require a special grant of authority and the furnishing of public buildings also requires as a rule such special authority.[444]

§ 258. Local or internal improvements.

A highway or street is one of the most familiar and frequently found examples of a "local improvement," and it is, unquestionably, the duty of a sovereign under modern theories of civilized government to construct and maintain highways, not only for defensive purposes with respect to the state itself, but also as a means for facilitating communication between the different parts of the country in order to advance, promote and encourage its internal improvement and industries.[445] Without considering a technical definition of a highway as found in the various decisions of various state courts, it is sufficient for our purpose to say that a highway is a generic term for a way, improved or unimproved, open to public use as a means of travel.[446] Ordinarily, as found in statutes or decisions, the term "highway" is used to define a country or suburban way, and the term or word "street" is used to define all ways of communication within the limits of a city, town or village.[447]

§ 259. Public highways.

Public moneys can be appropriated ordinarily only for the construction or the improvement of a public highway, and to con-

[443] Washington County v. Sallinger, 119 U. S. 176; Dean v. Saunders County, 55 Neb. 759, 76 N. W. 450. But see French v. City of Auburn, 62 Me. 452. See, also, Owen v. Nye County, 10 Nev. 338; Wade v. City of New Bern, 77 N. C. 460.

[444] Albany City Nat. Bank v. City of Albany, 92 N. Y. 363; Gammon v. Lafayette County, 79 Mo. 223; State v. Kiesewetter, 45 Ohio St. 524, 15 N. E. 208.

[445] City of Santa Ana v. Harlin, 99 Cal. 538; Barber Asphalt Pav. Co. v. City of New Orleans, 43 La. Ann. 464, 9 So. 484; In re Penn Tp. Road, 66 Pa. 461.

[446] Elliott, Roads & St. §§ 1 et seq.; Adams v. Harrington, 114 Ind. 66; Bartlett v. City of Bangor, 67 Me. 460; Mahler v. Brumder, 92 Wis. 477, 31 L. R. A. 695.

[447] Clark v. Com., 77 Ky. (14 Bush) 166; State v. Davis, 68 N. C. 297; State v. Harden, 11 S. C. 360; State v. Moriarty, 74 Ind. 103; Inhabitants of Waterford v. Oxford County Com'rs, 59 Me. 450; Foxworthy v. City of Hastings, 25 Neb. 133; In re Woolsey, 95 N. Y. 135; Taylor v. Town of Philippi, 35 W. Va. 555. Century Dictionary.

stitute such, a road or way must be laid out [448] and recorded, dedicated [449] to a public use or prescriptive rights acquired according to law.[450]

§ 260. The power to grade highways.

Where the authority exists to establish and construct a highway, using the term in its comprehensive sense, the implied power also exists to put and maintain it in a condition fit for public use. Grading is necessary work of this character.[451] The power to grade a street is generally held a continuing one [452] although there are authorities to the contrary.

§ 261. To pave streets.

The right to pave a street will be found as coming within the power of public authorities to construct and maintain public highways. This particular improvement is generally applied to the streets of a town or village where more than an ordinary improvement and one of a greater or less degree of permanency is required and desired.[453] It comes within the term "a local improvement" and its cost, therefore, is met by the levying and collection of a special assessment upon property benefited; this

[448] McCearley v. Lemennier, 40 La. Ann. 253, 3 So. 649; Geer v. Fleming, 110 Mass. 39; Flint & P. M. R. Co. v. Willey, 47 Mich. 88; State v. Auchard, 22 Mont. 14, 55 Pac. 361; State v. Davis, 68 N. C. 297.

[449] Harper v. State, 109 Ala. 66, 19 So. 901; State v. Taff, 37 Conn. 392; Butchers' S. & M. Ass'n v. City of Boston, 139 Mass. 290; Buskirk v. Strickland, 47 Mich. 389; Morgan v. Palmer, 48 N. H. 336.

[450] Harper v. State, 109 Ala. 66, 19 So. 901; Smith v. Gorrell, 81 Iowa, 218, 46 N. W. 992; Louisville & N. R. Co. v. Survant, 96 Ky. 197; Hobart v. Plymouth County, 100 Mass. 159.

[451] Chase v. Sheerer, 136 Cal. 248, 68 Pac. 768; City of Norwich v. Story, 25 Conn. 44; Inhabitants of Acton v. York County Com'rs, 77 Me. 128; Burns v. City of Baltimore, 48 Md. 198; Bergen Neck R. Co. v. City of Bayonne, 54 N. J. Law, 474, 24 Atl. 448; Borough of Steelton v. Booser, 162 Pa. 630, 29 Atl. 654.

[452] Smith v. City of Washington, 20 How. (U. S.) 135; City of New Haven v. Sargent, 38 Conn. 50; Karst v. St. Paul, S. & T. F. R. Co., 22 Minn. 118.

[453] Lightner v. City of Peoria, 150 Ill. 80; In re Phillips, 60 N. Y. 16; City of Philadelphia v. Hill, 166 Pa. 211; Dick v. City of Philadelphia, 197 Pa. 467.

liability being determined according to the various methods suggested in previous sections.[454] In common with other local or special improvements, it should be executed in the manner, at the time and place, and according to, in all respects, the terms of the authority necessary[455] and under which it is done, whether the authority be special or general in its application and terms.

§ 262. The repair and general improvement of highways.

The grant of authority or the existence of the power to open or establish highways, as repeatedly held, carries with it the implied power to make such ordinary repairs and improvements as are necessary to maintain them in that condition necessary to effect the original purpose of their establishment.[456] This does not, however, carry with it the implied power of making extraordinary repairs or those of a great degree of permanence.[457] The cost of these improvements is usually paid not from the general revenues but by the making of a local assessment upon property specially benefited without regard to the measure for such benefit in determining the liability of the property.[458]

The power to make extraordinary or unusual improvements, as they may be termed, aside from those already considered, must

[454] Shank v. Smith, 157 Ind. 401, 61 N. E. 932, 55 L. R. A. 564; Trustees of Paris v. Berry, 25 Ky. (2 J. J. Marsh.) 483; City of Schenectady v. Trustees of Union College, 144 N. Y. 241, 26 L. R. A. 614; Reuting v. City of Titusville, 175 Pa. 512; Sands v. City of Richmond, 31 Grat. (Va.) 517; City of Parkersburg v. Tavenner, 42 W. Va. 486.

[455] Adams County v. City of Quincy, 130 Ill. 566, 22 N. E. 624; Common Council of Grand Rapids v. Public Works of Grand Rapids, 99 Mich. 392, 58 N. W. 335; City of Harrisburg v. Segelbaum, 151 Pa. 172, 20 L. R. A. 834; City of Philadelphia v. Ball, 147 Pa. 243, 23 Atl. 564.

[456] Allen County Com'rs v. Silvers, 22 Ind. 491; State v. City of Neodesha, 3 Kan. App. 319, 45 Pac. 122; Wabash R. Co. v. City of Defiance, 52 Ohio St. 262, 40 N. E. 89.

[457] Demartini v. City & County of San Francisco, 107 Cal. 402; State v. Judges of Dist. Ct., 51 Minn. 539, 53 N. W. 800, 55 N. W. 122; Nugent v. City of Jackson, 72 Miss. 1040.

[458] Onderdonk v. City & County of San Francisco, 75 Ca. 534, 17 Pac. 678. Property of the Federal government may be exempted from special assessment. English v. City of Danville, 150 Ill. 92, 36 N. E. 994; Halsey v. Town of Lake View, 188 Ill. 540; Huelfeld v. City of Covington, 22 Ky. L. R. 1188, 60 S. W. 296; City of Springfield v. Harris, 107 Mass. 532.

be specially given [459] and exercised only by the authority possessing it, and in the precise manner indicated by its terms.[460] A general grant of power, however, always carries with it the right of exercise within certain discretionary limits.[461]

§ 263. Construction and maintenance of bridges.

A bridge, from a legal standpoint, is considered a highway.[462] The state has the right to erect or authorize the erection of bridges whenever and wherever it may deem them necessary for the convenience of the public as a part of its system or means of communication.[463] Having this right, it may authorize the construction of free bridges from the public revenues,[464] or where the cost of such construction is unusually large, it may charge a toll for their use.[465] The construction of bridges by private individuals may be also authorized.[466]

[459] Banaz v. Smith, 133 Cal. 102, 65 Pac. 309; Murphy v. City of Peoria, 119 Ill. 509, 9 N. E. 895; Dobbins v. Long Branch Police Com'rs, 59 N. J. Law, 146, 36 Atl. 482; Wilson v. Allegheny City, 79 Pa. 272.

[460] Bolton v. Gilleran, 105 Cal. 244; Bloomington Cemetery Ass'n v. People, 139 Ill. 16, 28 N. E. 1076; Millisor v. Wagner, 133 Ind. 400, 32 N. E. 927; Matawan Tp. Com'rs v. Horner, 48 N. J. Law, 441; Lewis v. Laylin, 46 Ohio St. 663; City of Waco v. Prather, 90 Tex. 80, 37 S. W. 312; San Jose Imp. Co. v. Auzerais, 106 Cal. 498, 39 Pac. 859.

[461] Bacon v. City of Savannah, 86 Ga. 301; Murphy v. City of Peoria, 119 Ill. 509; Cason v. City of Lebanon, 153 Ind. 567; Shimmons v. City of Saginaw, 104 Mich. 511, 62 N. W. 725; Seaboard Nat. Bank v. Woesten, 147 Mo. 467, 48 S. W. 939, 48 L. R. A. 279; Wabash R. Co. v. City of Defiance, 52 Ohio St. 262, 40 N. E. 89.

[462] San Luis Obispo County v. White, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756; Parke County Com'rs v. Wagner, 138 Ind. 609, 38 N. E. 171; Crosby v. Town of Hanover, 36 N. H. 404; Huggans v. Riley, 125 N. Y. 88; Pittsburg & W. E. Pass. R. Co. v. Point Bridge Co., 165 Pa. 37, 26 L. R. A. 323.

[463] Fall v. Sutter County, 21 Cal. 237; Brown v. Towns of Preston & Ledyard, 38 Conn. 219; St. Clair County v. People, 85 Ill. 396; Berube v. Wheeler, 128 Mich. 32, 87 N. W. 50; Bergen County Chosen Freeholders v. State, 42 N. J. Law, 263; Spencer v. Chosen Freeholders of Hudson County, 66 N. J. Law, 301, 49 Atl. 483.

[464] Washer v. Bullitt County, 110 U. S. 558; Fones Hardware Co. v. Erb, 54 Ark. 645, 13 L. R. A. 353; Andrews v. Ada County Com'rs, 7 Idaho, 453, 63 Pac. 592; City of Baltimore v. Stoll, 52 Md. 435; In re Pequea Creek Bridge, 68 Pa. 427; In re City Ave. & Germantown Bridge, 164 Pa. 394.

[465] Pittsburg & W. E. Pass. R. Co. v. Point Bridge Co., 165 Pa. 37, 26 L. R. A. 323.

[466] Stanislaus Bridge Co. v. Horsley, 46 Cal. 108; McCartney v. Chicago & E. R. Co., 112 Ill. 611; Max-

Their maintenance and repair. The burden of maintaining and repairing a bridge considered as a highway will depend largely upon the fact of its joint or sole ownership and control either by law, agreement or location. This may be assumed by one corporation,[467] and on the other hand, depending upon the same causes, the burden of its repair and maintenance may be charged upon the corporate authorities of two or more organizations.[468] In either case the power and duty to maintain and repair as devolving upon certain officials is not entirely of a ministerial character but contains a large element of discretion. The necessity for the extent and manner of repair is determined by officials having charge.[469] Ordinarily the exercise of such discretionary power is not subject to judicial review.[470]

§ 264. The construction and repair of sidewalks.

A portion of that particular highway known as a street or town way may be constructed and maintained especially for the use of foot passengers, as necessary for their safety, convenience or comfort. This power is naturally included within the grant of the greater use, namely, the construction and maintenance of

well v. Bay City Bridge Co., 46 Mich. 278; Plecker v. Rhodes, 30 Grat. (Va.) 795; Town of Grand Isle v. Kinney, 70 Vt. 381, 41 Atl. 130.

[467] Town of Granby v. Thurston, 23 Conn. 416; Abendorth v. Town of Greenwich, 29 Conn. 356; Polk County Com'rs v. City of Cedartown, 110 Ga. 824; Highway Com'rs of Richmond Tp. v. Martin, 88 Mich. 115; Boone County Com'rs v. Mutchler, 137 Ind. 140, 36 N. E. 534; Roby v. Appanoose County, 63 Iowa, 113; Wyandotte County Com'rs v. City of Wyandotte, 29 Kan. 431; City of Lowell v. Proprietors of Locks & Canals, 104 Mass. 18; Delta Lumber Co. v. Board of Auditors, 71 Mich. 572, 40 N. W. 1; Moore v. City of St. Paul, 82 Minn. 494, 85 N. W. 163; Dutton v. State, 42 Neb. 804; Bush v. Delaware, L. & W. R. Co., 166 N. Y. 210.

[468] State v. Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465; Daniels v. Intendent & Wardens of Athens, 55 Ga. 609; People v. Highway Com'rs of Dover, 158 Ill. 197; People v. Queens County Sup'rs, 142 N. Y. 271; Keiser v. Union County Com'rs, 156 Pa. 315; Town of Glover v. Carpenter, 77 Vt. 278, 40 Atl. 730; Gloucester County v. Middlesex County, 88 Va. 843; State v. Wood County, 72 Wis. 629, 40 N. W. 381.

[469] State v. Greene County Com'rs, 119 Ind. 444; Bembe v. Anne Arundel County Com'rs, 94 Md. 330, 51 Atl. 183, 57 L. R. A. 279.

[470] Batty v. Duxbury, 24 Vt. 155.

highways, and the authorities and principles given in connection with that subject are applicable, so far as pertinent, to the matter of this section.[471] The distinction appears that the right exists, without being granted in precise and express terms, to construct and maintain the roadway of a street in more permanent form than that portion devoted to the use of pedestrians; this limitation based upon the difference in the character of the use to which such portions are respectively put.[472] It is quite customary, before a municipality can exercise the right to arbitrarily construct a sidewalk and charge its cost against abutting property owners, to give the owners of such property the opportunity of constructing the same improvement[473] frequently upon more favorable terms, though under the direction of officers charged with the duty of the care of streets.[474] The construction and repair of sidewalks is considered a "local improvement" within the meaning of statutes authorizing them and providing for the payment of their cost in some arbitrary manner.[475]

§ 265. Public parks and boulevards.*

The expenditure of public moneys for objects having for their purpose the protection and betterment of the good morals and

[471] Manchester v. City of Hartford, 30 Conn. 118; Taber v. Grafmiller, 109 Ind. 206, 9 N. E. 721. " The word 'street' is a generic one and embraces sidewalks. Under an authority to improve streets a municipal corporation may improve sidewalks." Keith v. Wilson, 145 Ind. 149; Challiss v. Parker, 11 Kan. 384. In this case a sidewalk is defined as "A raised footway for passengers at the side of the street or road; a foot pavement."

[472] City of Little Rock v. Fitzgerald, 59 Ark. 494; Hartrick v. Town of Farmington, 108 Iowa, 31, 78 N. W. 794.

[473] State v. Richards, 74 Conn. 57, 49 Atl. 858; Drew v. Town of Geneva, 150 Ind. 662, 50 N. E. 871, 42 L. R. A. 814; Auditor General v. Hoffman, 129 Mich. 541, 89 N. W. 348; City of Lincoln v. Janesch, 63 Neb. 707, 89 N. W. 280, 56 L. R. A. 762; Carroll v. Village of Irvington, 50 N. J. Law, 361, 12 Atl. 712; Borough of Mt. Pleasant v. Baltimore & O. R. Co., 138 Pa. 365, 11 L. R. A. 520; Highland v. City of Galveston, 54 Tex. 527; City of Newport v. Northport Town Site Co., 27 Wash. 543, 68 Pac. 204.

[474] Nute v. Boston Co-op. Bldg. Co., 149 Mass. 465; State v. Bell, 34 Ohio St. 194.

[475] Job v. City of Alton, 189 Ill. 256; Gage v. City of Chicago, 192 Ill. 586; Attorney General v. City of Boston, 142 Mass. 200; Steffen v. City of St. Louis, 135 Mo. 44, 36 S. W. 31; Smith v. Borough of Kingston, 120 Pa. 357, 14 Atl. 170.

* 6 Curr. Law, 885.

health of the people has always been regarded not only legitimate but praiseworthy. The opportunity for diversion and amusement in the open air is an object of such character and may be effected through the establishment and maintenance of public parks and boulevards.[476] The same principle also has been held to justify the acquirement of large tracts or limited areas of land to which is attached some event of historic nature for the purpose of converting them into public grounds.[477] These come within the definition of "local improvements" and their cost and maintenance is often met by its arbitrary assessment upon benefited, adjoining or abutting property. Local parks, parkways or boulevards, are usually paid for in this way while those including large areas and intended for the use and benefit of the entire community are established and maintained from general revenues.[478]

§ 266. Construction of sewers.

The police power of the state as exercised by itself or any of its delegated or subordinate agencies includes as one of the objects of its legitimate exercise the preservation of the health of the people. Under congested municipal conditions this is especially true. The establishment and maintenance of a sewage system ample in size and perfect in its workings has been considered both essential and necessary by municipal authorities to the preservation of the public health in both ancient and modern times.[479]

[476] Shoemaker v. United States, 147 U. S. 282; City of Baltimore v. Reitz, 50 Md. 574; In re Adams, 165 Mass. 497; Abrey v. Livingstone, 95 Mich. 181; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234; People v. Adirondack R. Co., 160 N. Y. 225; Higginson v. Inhabitants of Nahant, 93 Mass. (11 Allen) 530; In re Mt. Washington Road Co., 35 N. H. 134. But see Bryan v. Town of Branford, 50 Conn. 246, and Town of Woodstock v. Gallup, 28 Vt. 587.

[477] United States v. Gettysburg Electric R. Co., 160 U. S. 668, reversing 67 Fed. 869.

[478] Woodward v. Reynolds, 58 Conn. 486, 19 Atl. 511; People v. Ennis, 188 Ill. 530; In re De las Casas, 180 Mass. 471, 62 N. E. 738; Foster v. Boston Park Com'rs, 131 Mass. 225.

[479] Park Ecclesiastical Soc. v. City of Hartford, 47 Conn. 89; O'Reiley v. Kankakee Valley Drainage Co., 32 Ind. 169; In re Kingman, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417; Carr v. Dooley, 122 Mass. 255; City of Detroit v. Corey, 9 Mich. 165. The power of a city to construct sewers is not given for governmental purposes and their construction and maintenance is not a public municipal duty. City of St. Louis v. Oeters, 36 Mo. 456; Brewster v. City of Syracuse, 19 N.

A sewage system is a "local improvement" within the meaning of that term as ordinarily employed in public statutes and the rule holds in respect to this particular one that before the power for its construction can be legally exercised, it must have been specially granted by the sovereign.[480] The grant of the express power to construct sewers carries with it by implication the right to purchase property or condemn lands [481] necessary for use.

The power in common with many others granted public corporations is or may be discretionary in its character and, therefore, not ordinarily subject to review by the courts unless, in its exercise, the public authorities have acted fraudulently or oppressively or there is a manifest abuse of discretion in other respects.[482]

§ 267. The location and construction.*

In locating a sewer, the main purpose of its construction cannot be forgotten and its precise location must be made with reference to this object and, therefore, in such a place as to best effect its purpose and serve the community for whose use it was designed.[483] Municipal authorities in determining the location of a sewer act in a legislative capacity and, unless there appears a manifest abuse of power, courts will not interfere although the selection of a particular location may result in damage to property.[484] A public corporation in order to provide a proper outlet

Y. 116; In re Fowler, 53 N. Y. 60; City of Philadelphia v. Tryon, 35 Pa. 401; Wood v. McGrath, 150 Pa. 451, 16 L. R. A. 715.

[480] City of Atchison v. Price, 45 Kan. 296, 25 Pac. 605; Brunswick Gas Light Co. v. Brunswick Village Corp., 92 Me. 493; Ostrander v. City of Lansing, 111 Mich. 693; Donahoe v. Kansas City, 136 Mo. 657; Stoudinger v. City of Newark, 28 N. J. Eq. (1 Stew.) 187.

[481] Freburg v. City of Davenport, 63 Iowa, 119; Page v. O'Toole, 144 Mass. 303, 10 N. E. 851; McDaniel v. City of Columbus, 91 Ga. 462; In re Kingman, 153 Mass. 566, 12 L. R. A. 417; Vreeland v. Jersey City, 54 N. J. Law, 49.

[482] Shumate v. Heman, 181 U. S. 402; Ryder's Estate v. City of Alton, 175 Ill. 94; City of Topeka v. Huntoon, 46 Kan. 634, 26 Pac. 488; Grimmell v. City of Des Moines, 57 Iowa, 144; City of Detroit v. Corey, 9 Mich. 165; City of St. Joseph v. Farrell, 106 Mo. 437; Stoudinger v. City of Newark, 28 N. J. Eq. (1 Stew.) 187, 446; Horton v. City of Nashville, 72 Tenn. (4 Lea.) 39; In re New York Institution for Deaf & Dumb, 55 Hun, 606, 7 N. Y. Supp. 860.

* 6 Curr. Law, 1448.

[483] Lingle v. City of Chicago, 172 Ill. 170; State v. City of St. Louis, 56 Mo. 277.

[484] Clapp v. City of Spokane, 53 Fed. 515. Where a manifest abuse of the power clearly appears, the

for its sewage system may acquire property and expend moneys beyond the geographical limits of its jurisdiction.[485]

A strict compliance with the terms of legislative authority is necessary in respect to the construction of sewers. The terms of the law, whether special or general, authorizing a particular improvement or series of improvements, must be strictly followed in all respects,[486] and especially in connection with the mechanical construction. The size, or form,[487] the materials of which constructed,[488] and the time and mode of construction [489-490] if prescribed by law, must be in the way provided. Where the power to construct sewers and drains is granted, the public authorities are usually vested with discretionary and legislative powers and their action, except in case of fraud or where there has been a gross abuse of such authority, will not be interfered with. The rule also holds that such legislative and discretionary powers cannot be delegated to subordinate agents or bodies, the rule applying to the size of the sewer, the materials of which constructed or the manner and time of its construction.[491] The public authorities can prescribe necessary and suitable regulations for their use [492]

action of municipal authorities will be restrained. Kirby v. Citizens' R. Co., 48 Md. 168; Waters v. Village of Bay View, 61 Wis. 642.

[485] Cochran v. Village of Park Ridge, 138 Ill. 295, 27 N. E. 939; Maywood Co. v. Village of Maywood, 140 Ill. 216; City of Coldwater v. Tucker, 36 Mich. 474, 24 Am. Rep. 601; Butler v. Town of Montclair, 67 N. J. Law, 426, 51 Atl. 494.

[486] Eyerman v. Blaksley, 78 Mo. 145; City of Kansas v. Swope, 79 Mo. 446; Traphagen v. Jersey City, 29 N. J. Eq. (2 Stew.) 206.

[487] Rickcords v. City of Hammond, 67 Fed. 380. But see Kansas v. Richards, 34 Mo. App. 521.

[488] Smythe v. City of Chicago, 197 Ill. 311.

[489-490] Burnham v. City of Milwaukee, 100 Wis. 8, 75 N. W. 1014.

[491] Hessler v. Drainage Commissioners, 53 Ill. 105; Ruggles v. Collier, 43 Mo. 353. "There is a clear distinction to be observed between legislative and ministerial powers. The former cannot be delegated; the latter may." Sheehan v. Gleeson, 46 Mo. 100; Neill v. Gates, 152 Mo. 585; Boyd v. Alabama, 94 U. S. 645; Kirby v. Citizens' R. Co., 48 Md. 168; North Pennsylvania R. Co. v. Stone, 3 Phila. (Pa.) 421; Elliott, Roads & St. § 476. But in some cases it has been held that mere matters of detail must be delegated to the proper officers. City of St. Joseph v. Owen, 110 Mo. 445.

[492] Boyden v. Walkley, 113 Mich. 609, 71 N. W. 1099; Hill v. City of St. Louis, 159 Mo. 159, 60 S. W. 116; Van Waggoner v. City of Paterson, 67 N. J. Law, 455, 51 Atl. 922; Slaughter v. O'Berry, 126 N. C. 181, 35 S. E. 241, 48 L. R. A. 442; Herr-

and fix terms upon which connections can be made by private property owners.[493]

§ 268. The construction of drains.

Closely connected with the construction of sewers is the establishment of a drainage system for a particular territory for the benefit of the public health, of public utility or the reclamation of low lands.[494]

Legislative authority for this purpose may be general or special in its terms [495] and like all other grants of power to public corporations is construed strictly.[496]

§ 269. Expenditures in connection with a supply of water.

It is the author's belief that the proper functions of a public corporation are to regulate and govern and that it is neither desirable nor legal that it engage in undertakings, do those things or transact that business, which, properly, should be left to private enterprise. To govern and regulate efficiently and rightly requires complete disinterestedness, a condition which cannot exist where hope of gain or fear of loss are attendant essentials of certain acts or transactions. It is difficult to separate completely at all times the radically different acts of governing and regulating and engaging in a pursuit or undertaking having for its ultimate purpose the making of a profit. As has been said, "the fundamental powers of a state are limited to safeguarding political and industrial equity between its citizens or the groups of citizens

man v. State, 54 Ohio St. 506, 32 L. R. A. 734; Crosby v. Village of Brattleboro, 68 Vt. 484.

[493] City of Chicago v. Corcoran, 196 Ill. 146; Smythe v. City of Chicago, 197 Ill. 311; Hendrie v. City of Boston, 179 Mass. 59, 60 N. E. 386; City of Fergus Falls v. Boen, 78 Minn. 186, 80 N. W. 961.

[494] Hagar v. Reclamation Dist. No. 108, 111 U. S. 701; Kilgour v. Drainage Com'rs, 111 Ill. 342; Trittipo v. Beaver, 155 Ind. 652, 58 N. E. 1034; City of Valparaiso v. Parker, 148 Ind. 379; Oliver v. Monona County, 117 Iowa, 43, 90 N. W. 510; Bryant v. Robbins, 70 Wis. 258.

[495] Hagar v. Yolo County Sup'rs, 47 Cal. 222; Kirkland v. Public Works of Indianapolis, 142 Ind. 123; In re Drainage along Pequest River, 39 N. J. Law, 433.

[496] Minnesota & M. Land & Imp. Co. v. City of Billings, 111 Fed. 972; In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354; Witty v. Nicollet County Com'rs, 76 Minn. 286, 79 N. W. 112; McLaughlin v. Sandusky, 17 Neb. 110. See, also, Abb. Mun. Corp. §§ 444 et seq.

who are created legal persons by its authority. This safeguarding necessarily requires judicial and impartial relations to the subject of control. Such relations can be maintained only where the controlling power has no interest in the subject of control either as "beneficiary, an owner or a user of its services." It is quite commonly conceded, at the present time, that public corporations, especially municipalities, have the legal right to make provision for a sufficient supply of water for their own use.[497] Whether they have such right to the same extent to furnish and supply water for private consumption is more questionable. In either case the weight of authority is to the effect that a municipal corporation in supplying itself and its inhabitants with water "is not exercising its governmental or legislative powers, but its business or proprietary powers."[498] The law in this respect has been conclusively settled by a recent decision of the circuit court of appeals of the eighth circuit, written by Judge Sanborn.[499] The use of the power when granted is supposedly based upon the exercise of the power which has for its purpose the protection of public and private property and the preservation of the good health of the community.[500]

Character of the power; a continuing one and to be expressly granted. The power when granted is regarded by the courts as a continuing one, discretionary in its character, and one, the exercise of which, or a failure to do so, will not be interfered with by

[497] Asher v. Hutchinson Water. Light & Power Co., 66 Kan. 496, 61 L. R. A. 52; Smith v. Inhabitants of Lincoln, 170 Mass. 488, 49 N. E. 743; Springfield F. & M. Ins. Co. v. Village of Keeseville, 148 N. Y. 46, 30 L. R. A. 660; David v. Portland Water Committee, 14 Or. 98; Murphy v. City of Waycross, 90 Ga. 36; City of Lexington v. Lafayette County Bank, 165 Mo. 671; City of Austin v. Nalle, 85 Tex. 520; Ellinwood v. City of Reedsburg, 91 Wis. 131.

[498] Little Falls Elec. & Water Co. v. City of Little Falls, 102 Fed. 663; City of Greenville v. Greenville Waterworks Co., 125 Ala. 625; Wagner v. City of Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; City of Newport v. Com., 21 Ky. L. R. 42, 50 S. W. 845, 51 S. W. 433; Blades v. Detroit Water Com'rs, 122 Mich. 366; State v. City of Great Falls, 19 Mont. 518, 49 Pac. 15; Kearney v. Borough of West Chester, 199 Pa. 392, 49 Atl. 227.

[499] Illinois Trust & Sav. Bank v. Arkansas City, 76 Fed. 271, 34 L. R. A. 518. But see Lehigh Water Co.'s Appeal, 102 Pa. 515.

[500] Hackenack Water Co. v. City of Hoboken, 51 N. J. Law, 220; Mauldin v. City Council of Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291.

the courts;[501] provided the action whatever it may be is taken in a legal manner. Assuming the legal right to expend moneys for this purpose, it is not regarded as one of those powers included in a common grant.[502] To be legally exercised the power must be expressly given;[503] it cannot be implied from general grants of authority though some few cases hold to the contrary.[504]

§ 270. Manner of exercise of the power.

When the power is granted, it generally takes one of two forms or the manner of its exercise may be optional in respect to the two. The power, if optional when exercised in either of the two ways suggested later, should be considered conclusive,[505] though some cases hold that a grant of a franchise, not exclusive, to private persons, will not prevent a municipality from subsequently erecting waterworks to supply water for its own use and that of

[501] Fidelity Trust & Guaranty Co. v. Fowler Water Co., 113 Fed. 560; Janeway v. City of Duluth, 65 Minn. 292; Skaneateles Waterworks Co. v. Village of Skaneateles, 161 N. Y. 154, 46 L. R. A. 687; Lehigh Water Co.'s Appeal, 102 Pa. 515, affirmed 121 U. S. 388; Lucia v. Village of Montpelier, 60 Vt. 537, 1 L. R. A. 169.

[502] Savidge v. Village of Spring Lake, 112 Mich. 91; White v. City of Meadville, 177 Pa. 643, 34 L. R. A. 567; Smith v. Town of Westerly, 19 R. I. 437; Huron Waterworks Co. v. City of Huron, 7 S. D. 9, 62 N. W. 975, 30 L. R. A. 848.

[503] City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1, affirming 60 Fed. 957; Los Angeles City Water Co. v. City of Los Angeles, 88 Fed. 720. The legislature if it possesses the right originally to grant a power to a subordinate public corporation may subsequently ratify an unauthorized exercise of it. Wagner v. City of Rock Island, 146 Ill. 139, 21 L. R. A. 519; Taylor v. McFadden, 84 Iowa, 262, 50 N. W. 1070; Inhabitants of Rockport v. Webster, 174 Mass. 385; Lewick v. Glazier, 116 Mich. 493, 74 N. W. 717; Webb City & C. Waterworks Co. v. City of Carterville, 142 Mo. 101; Lewis v. Moore, 54 N. J. Law, 121; Egerton v. Goldsboro Water Co., 126 N. C. 93; Lehigh Water Co.'s Appeal, 102 Pa. 515, affirmed 121 U. S. 388.

[504] City of Greenville v. Greenville Waterworks Co., 125 Ala. 625; Lake Charles Ice, Light & Waterworks Co. v. City of Lake Charles, 106 La. 65; Ellinwood v. City of Reedsburg, 91 Wis. 131.

[505] Andrews v. National Foundry & Pipe Works (C. C. A.) 61 Fed. 782; Westerly Waterworks Co. v. Town of Westerly, 80 Fed. 611; City of Austin v. Bartholomew (C. C. A.) 107 Fed. 349; Anoka Waterworks, Elec. Light & P. Co. v. City of Anoka, 109 Fed. 580; Farnham, Waters, § 147; Helena Consol. Water Co. v. Steele, 20 Mont. 1, 37 L. R. A. 412; Troy Water Co. v. Borough of Troy, 200 Pa. 453.

private consumers; these holdings being based upon specific charter or statutory provisions.[506] The corporation may be given the right to directly expend public moneys, either those in hand,[507] those secured by issuing bonds [508] or by incurring an indebtedness, in the construction of a water plant; [509] or it may be authorized to secure a supply through private enterprise either by a contract for such supply [510] or by the grant of an exclusive franchise or license for the construction of a water plant and the carrying on of the business,[511] retaining the power to supervise, control in all respects the management and operation of the undertaking,[512]

[506] Lehigh Water Co. v. Easton, 121 U. S. 388; Bienville Water Supply Co. v. City of Mobile, 95 Fed. 539; Id., 175 U. S. 109; Skaneateles Water Co. v. Village of Skaneateles, 184 U. S. 345; City of Helena v. Helena Waterworks Co. (C. C. A.) 122 Fed. 1; Janeway v. City of Duluth, 65 Minn. 292; In re City of Brooklyn, 143 N. Y. 596, 26 L. R. A. 270; North Springs Water Co. v. City of Tacoma, 21 Wash. 517, 47 L. R. A. 214; Continental Const. Co. v. City of Altoona (C. C. A.) 92 Fed. 822; Hughes v. City of Momence, 162 Ill. 535.

[507] Fergus Falls Water Co. v. City of Fergus Falls, 65 Fed. 586; City of North Platte v. North Platte Waterworks Co., 56 Neb. 403.

[508] Culbertson v. City of Fulton, 127 Ill. 30; Brady v. Moulton, 61 Minn. 185; Daniels v. Long, 111 Mich. 562; State v. Babcock, 25 Neb. 500; People v. Parmerter, 158 N. Y. 385; Elyria Gas & Water Co. v. Elyria, 57 Ohio St. 374; City of Austin v. Nalle, 85 Tex. 520.

[509] Dutton v. City of Aurora, 114 Ill. 138; Brady v. Moulton, 61 Minn. 185; Sweet v. City of Syracuse, 129 N. Y. 237; Miles v. Benton Tp., 11 S. D. 450; Faulkner v. City of Seattle, 19 Wash. 320.

[510] Fidelity Trust & Guaranty Co. v. Fowler Water Co., 113 Fed. 560; Davenport v. Kleinschmidt, 6 Mont. 502; City of Broken Bow v. Broken Bow Waterworks Co., 57 Neb. 548; Passiac Water Co. v. City of Paterson, 65 N. J. Law, 472; Palestine Water & Power Co. v. City of Palestine, 91 Tex. 540, 40 L. R. A. 203; Little Falls Elec. & Water Co. v. City of Little Falls, 74 Minn. 197. See, also, Abb. Mun. Corp. §§ 456 et seq.

[511] American Waterworks Co. v. Farmers' Loan & Trust Co. (C. C. A.) 73 Fed. 956; Fidelity Trust & Guaranty Co. v. Fowler Water Co., 113 Fed. 560; City of Valparaiso v. Gardner, 97 Ind. 1, 49 Am. Rep. 416; Gas & Water Co. of Downingtown v. Borough of Downingtown, 175 Pa. 341.

[512] Spring Valley Waterworks v. Schottler, 110 U. S. 347; Columbus Waterworks Co. v. Long, 121 Ala. 245; San Diego Water Co. v. City of San Diego, 59 Cal. 517; Danville Water Co. v. City of Danville, 186 Ill. 326, affirmed 180 U. S. 619; Inhabitants of Stoughton v. Paul, 173 Mass. 148; State Trust Co. v. City of Duluth, 70 Minn. 257; American Waterworks Co. v. State, 46 Neb. 194, 30 L. R. A. 447; City of Knoxville v. Knoxville Water Co., 107 Tenn. 647, 61 L. R. A. 888, affirmed 189 U. S. 434.

though limited by the application of the principle that such a contract, license or franchise is protected against any impairment of its obligation.[513] But such contract or franchise involves the due performance by the private water company of its obligation, namely, the rendering of good service, including both the quantity and quality of water and the manner of service;[514] and such a corporation is usually regarded as a public quasi corporation with a special duty to perform which can be enforced by the proper authorities.[515]

§ 271. Purchase of water plant already constructed.*

The specific grant of the power to establish and maintain a water supply has been held to include the power to purchase from private persons a plant wholly or partially constructed and in operation.[516] In a recent case,[517] the question of a "fair and

[513] Inhabitants of West Springfield v. West Springfield Aqueduct Co., 167 Mass. 128.

[514] Foster v. City of Joliet, 27 Fed. 899, affirmed U. S. Sup. Ct. by divided court in 30 Law. Ed. 942; City of Austin v. Bartholomew, 107 Fed. 349; Capital City Water Co. v. City Council of Montgomery, 92 Ala. 366; Belfast Water Co. v. City of Belfast, 92 Me. 52, 47 L. R. A. 82.

[515] Bienville Water Supply Co. v. City of Mobile, 112 Ala. 260, 33 L. R. A. 59; City of Danville v. Danville Water Co., 180 Ill. 235; Freeport Water Co. v. City of Freeport, 186 Ill. 179, affirmed 180 U. S. 587; City of Topeka v. Topeka Water Co., 58 Kan. 349; Kennebec Water Dist. v. City of Waterville, 97 Me. 185; Agua Pura Co. v. City of Las Vegas, 10 N. M. 6, 50 L. R. A. 224.

* 6 Curr. Law, 1868.

[516] Newburyport Water Co. v. City of Newburyport, 85 Fed. 723; Id., 103 Fed. 584; Stein v. McGrath, 128 Ala. 175; City of Los Angeles v. Los Angeles City Water Co., 124 Cal. 368; City of Enterprise v. Smith, 62 Kan. 815, 62 Pac. 324. The power "to purchase" does not authorize a condemnation of a private water plant upon a refusal of the owners to sell at the price offered by the municipality. Mayo v. Dover & F. V. Water Co., 96 Me. 589; Gloucester Water Supply Co. v. City of Gloucester, 179 Mass. 365, 60 N. E. 977; Newburyport v. City of Newburyport, 168 Mass. 541; Edgerton v. Goldsboro Water Co., 126 N. C. 98; Avery v. Job, 25 Or. 512; Town of Bristol v. Bristol & W. Waterworks, 23 R. I. 274, 49 Atl. 974; Stehmeyer v. City Council of Charleston, 53 S. C. 259. But see Helena Consol. Water Co. v. Steele, 20 Mont. 1, 37 L. R. A. 412; City of Austin v. McCall, 95 Tex. 565, 68 S. W. 791.

[517] National Waterworks Co. v. Kansas City (C. C. A.) 62 Fed. 853, 27 L. R. A. 827; Gloucester Water Supply Co. v. City of Gloucester, 179 Mass. 365; Inhabitants of Falmouth v. Falmouth Water Co., 180 Mass. 325; Town of Bristol v. Bristol & W. Waterworks, 23 R. I. 274, 49 Atl. 974; State v. Janesville Wa-

equitable value'' was discussed. The court said, ''The city by this purchase steps into possession of a waterworks plant,—not merely a complete system for bringing water to the city and distributing it through pipes placed in the streets, but a system already earning a large income by virtue of having acquired connections between the pipes in the streets and a multitude of private buildings. It steps into possession of a property which not only has the ability to earn but is, in fact, earning. It should pay, therefore, not merely the value of a system which might be made to earn but that of a system which does earn.''

§ 272. The power to construct includes what.

The power to construct must be found in some express provision of the law and comprises generally within the grant of the greater power the right to do all those acts which are reasonably necessary and proper to exercise efficiently the power granted.[518] It would include the implied right to lay and construct water mains, hydrants, standpipes and all the necessary adjuncts to an efficient system for the supply of water.[519]

Use of streets. The grant of an express or the existence of the implied power to construct and maintain a water supply including its details carries with it the implied right and power to use or permit to be used the streets of a public corporation for laying out and constructing such a system.[520] Ordinarily, the use of streets for such a purpose does not impose any additional burden or servitude and the adjoining owners, therefore, are not entitled to compensation for such use, it being one of the common and anticipated purposes to which they may be put.[521]

ter Co., 92 Wis. 496, 32 L. R. A. 391. See, also, as discussing the question of fair and equitable value, Bull v. City of Quincy, 155 Ill. 571; Newburyport Water Co. v. City of Newburyport, 168 Mass. 541; Inhabitants of Falmouth v. Falmouth Water Co., 180 Mass. 325; In re Water Com'rs of White Plains, 71 App. Div. 544, 76 N. Y. Supp. 11.

[518] Borough of Milford v. Milford Water Co., 124 Pa. 610, 3 L. R. A. 122.

[519] Fergus Falls Water Co. v. City of Fergus Falls, 65 Fed. 587; City of Austin v. Bartholomew, 107 Fed. 349; City of Lexington v. Lafayette County Bank, 165 Mo. 671, 65 S. W. 943; Inhabitants of Stoughton v. Paul, 173 Mass. 148, 53 N. E. 272.

[520] City of St. Louis v. Western Union Tel. Co., 149 U. S. 465; City of Quincy v. Bull, 106 Ill. 337; State v. City of St. Louis, 145 Mo. 551, 42 L. R. A. 113; Sharp v. City of South Omaha, 53 Neb. 700.

[521] Barrows v. City of Sycamore, 150 Ill. 588, 25 L. R. A. 535, revers-

Limitations upon the power to construct. Not only may a public corporation be limited in its power to construct water-works or contract therefor by the absence of statutory authority, but also when the statutory right exists by the fact that this course of action will throw upon the corporation a claim, obligation or debt in excess of the limit fixed by law.[522] In case of a contract extending through a term of years with provisions for future payments, the obligation to make the payments is not considered a debt within the meaning of the phrase as ordinarily used.[523] Some authorities, however, have held to the contrary, notably, those in Illinois, where there is a constitutional provision which forbids municipal or public corporations from becoming indebted "in any manner or for any purpose" in excess of a certain prescribed limit.[524]

§ 273. The implied power to furnish water or to purchase apparatus for the extinguishment of fire.

One of the reasons most frequently given as the basis of the right of a public corporation to furnish a supply of water is the protec-

ing 49 Ill. App. 590; Carpenter v. Capital Elec. Co., 178 Ill. 29, 43 L. R. A. 645; Lostutter v. City of Aurora, 126 Ind. 436, 12 L. R. A. 259. The right to use either the streets or highways for such a purpose by private persons or corporations is not necessarily limited to or granted from a municipal corporation. It may be secured from the legislature in the first instance. See City of Louisville v. Louisville Water Co., 105 Ky. 754; Atlantic Waterworks Co. v. Consumers' Water Co., 44 N. J. Eq. (17 Stew.) 427; Carlisle Gas & Water Co. v. Carlisle Water Co., 182 Pa. 17.

[522] City of Ottumwa v. City Water Supply Co. (C. C. A.) 119 Fed. 315, 59 L. R. A. 604; Grace v. City of Hawkinsville, 101 Ga. 553; People v. Lake Erie & W. R. Co., 167 Ill. 283; City of Valparaiso v. Gardner, 97 Ind. 1; Taylor v. McFadden, 84 Iowa, 262, 50 N. W. 1070; Monroe Water Co. v. Heath, 115 Mich. 277; Farnham, Waters, § 151.

[523] City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1, affirming 60 Fed. 957; City of Centerville v. Fidelity Trust & Guaranty Co., 118 Fed. 332; Higgins v. City of San Diego, 118 Cal. 524; Danville Water Co. v. City of Danville, 186 Ill. 326, affirmed 21 Sup. Ct. 505, 180 U. S. 619; Lamar Water & Elec. Light Co. v. City of Lamar, 128 Mo. 188, 32 L. R. A. 157.

[524] Prince v. City of Quincy, 105 Ill. 138; Id., 128 Ill. 443. See, also, City of Dawson v. Dawson Waterworks Co., 106 Ga. 696; Beard v. City of Hopkinsville, 95 Ky. 239, 23 L. R. A. 402; State v. City of Helena, 24 Mont. 521, 55 L. R. A. 336; Read v. Atlantic City, 49 N. J. Law, 558, affirmed by divided court in 50 N. J. Law, 665.

tion of property from fire, it being a legitimate exercise of the police power of the state or its delegated agencies to protect the property of those within their jurisdiction. The existence of the general power, it has been held, carries with it the implied power to purchase and maintain suitable apparatus for the extinguishment of fires including buildings for its housing and its permanent maintenance and to arrange for a supply of water for, as has been said, "science, so far as we know, has not yet suggested any means of extinguishing great fires without the application of water.[524a]

§ 274. The acquisition of a water supply.*

The grant of the power to furnish a water supply carries with it in addition to the right to construct and operate a plant for the accumulation and distribution of the water, the power to obtain from some natural source the water itself.[525]

The right of a public corporation, as suggested in the Minneapolis Mill Co. Case, supra, to divert water from some natural source, will depend upon the character of the waters—whether public, and to what extent, or private. A public corporation must acquire a right to the use of water by its purchase, through prescription or the process of eminent domain.[526] The property of riparian owners or water rights cannot be taken without the payment of just compensation or operation of law,[527] even though

[524a] Desmond v. City of Jefferson, 19 Fed. 483; City of Birmingham v. Rumsey & Co., 63 Ala. 352; Clark v. City of South Bend, 85 Ind. 276; Corporation of Bluffton v. Studabaker, 106 Ind. 129; Carleton & Co. v. City of Washington, 38 Kan. 726; Webb City & C. Waterworks Co. v. Webb City, 78 Mo. App. 422; Green v. City of Cape May, 41 N. J. Law, 45; Salena v. City of Neosho, 127 Mo. 627, 27 L. R. A. 769.

* 6 Curr. Law, 1868.

[525] Minneapolis Mill Co. v. St. Paul Water Com'rs, 56 Minn. 485, affirmed 168 U. S. 349.

[526] Saunders v. Bluefield Waterworks & Imp. Co., 58 Fed. 133; Stein v. Burden, 24 Ala. 130; Vernon Irr. Co. v. City of Los Angeles, 106 Cal. 237; City of Baltimore v. Day, 89 Md. 551; Warren v. Spencer Water Co., 143 Mass, 155; Gregory v. Lake Linden, 130 Mich. 368, 90 N. W. 29; In re Barre Water Co., 62 Vt. 27, 9 L. R. A. 195. See, however, the cases of Minneapolis Mill Co. v. St. Paul Water Com'rs, 56 Minn. 485, and Watuppa Reservoir Co. v. City of Fall River, 147 Mass. 548.

[527] Watuppa Reservoir Co. v. City of Fall River, 134 Mass. 267; Cowdrey v. Inhabitants of Woburn, 136 Mass. 409; Appeal of Haupt, 125 Pa. 211, 3 L. R. A. 536; Leo-

that property is water and its future use, the preservation of the health of the people within the limits of some governmental agent.

§ 275. Protection of water supply.

The primary purpose of the authority for and legal right of a public corporation to engage in the business of selling and distributing water is the preservation of the health of the people which, it has been repeatedly held and conclusively established, can in no wise be better maintained than by an ample supply of pure and wholesome water for drinking, cooking and other purposes. The absolute purity and the quality of the water, therefore, are essential to the maintenance and existence of the right. This leads logically to the legal proposition that a public corporation engaged in such business can avail itself of all those remedies afforded by law which may be necessary to preserve the purity of the water and to protect it either at the source of supply or in its distribution from pollution, obstruction or diversion.[528]

§ 276. The right to delegate the construction to private enterprise.

The power to authorize the construction by private individuals or corporations of a water plant in common with the direct power to construct must be expressly given [529] or the optional power on the part of the public corporation to acquire a system for the supply of water by either or both of the two methods suggested. These rights, it is needless to add, must be executed in the manner provided by law since they are regarded as the exercise of an extraordinary power and not the performance of a usual governmental function or purpose.[530] The grant to private parties is usually in the nature of an exclusive franchise or license giving the sole right to construct and operate the necessary facilities for

nard v. Village of Rutland, 66 Vt. 105; Martin v. Gleason, 139 Mass. 183.

[528] Missouri v. Illinois, 180 U. S. 208; Indianapolis Water Co. v. American Strawboard Co., 53 Fed. 970, affirmed 57 Fed. 1000; People v. Elk River Mill & Lumber Co., 107 Cal. 221; City of Durango v. Chapman, 27 Colo. 109; City of Baltimore v. Warren Mfg. Co., 59 Md. 96.

[529] Franke v. Paducah Water Supply Co., 11 Ky. L. R. 17, 11 S. W. 432, 718.

[530] Valparaiso v. Gardner, 97 Ind. 1.

obtaining and distributing a supply of water.[531] The greater weight of authority based upon moral, equitable and legal reasons is to the effect that such franchises are to be regarded as contracts and therefore protected by that provision of the Federal constitution prohibiting any state from passing a law impairing the obligation of a contract.[532] This doctrine holds without question where the contract has been made in good faith and the franchise secured upon reasonable terms and conditions from the standpoint of both parties taking into consideration the necessary charge, original investment and the contingencies and uncertainties of municipal growth.[533]

§ 277. Water rentals and regulations.*

A municipality possessing the power to construct a water plant of its own, to supply both its wants and those of the community, unquestionably has the right to charge, usually on the basis of water used,[534] such rentals as may be necessary to pay the cost of operating,[535] expensive and extravagant though it may be, to meet fixed charges and to protect itself against loss through the yearly depreciation of the property,[536] to provide a fund for the making of necessary repairs, and in addition to derive a profit from the business or aid in the construction of the works.[537] De-

[531] St. Tammany Waterworks Co. v. New Orleans Waterworks Co., 120 U. S. 64; Atlantic City Waterworks Co. v. Atlantic City, 39 N. J. Eq. (12 Stew.) 367.

[532] Newburyport Water Co. v. City of Newburyport, 113 Fed. 677.

[533] Los Angeles City Water Co. v. City of Los Angeles, 88 Fed. 720.

* 6 Curr. Law, 1869.

[534] Vreeland v. Jersey City, 43 N. J. Law, 135, affirmed in 43 N. J. Law, 638. See, as holding water rentals assessed against vacant lots invalid, In re Union College, 129 N. Y. 308; Remsen v. Wheeler, 105 N. Y. 573.

[535] Higgins v. City of San Diego, 131 Cal. 294; City of Detroit v. Water Com'rs of Detroit, 108 Mich. 494, 66 N. W. 377, 31 L. R. A. 463; Albert v. Davis, 49 Neb. 575; Red Star Line S. S. Co. v. Jersey City, 45 N. J. Law, 246. Water rents must be, it is here held, uniform and according to the benefits received. Skaneateles Waterworks Co. v. Village of Skaneateles, 161 N. Y. 154, 46 L. R. A. 687.

[536] City of Detroit v. Water Com'rs, 108 Mich. 494, 31 L. R. A. 463; Preston v. Detroit Water Com'rs, 117 Mich. 589.

[537] Wagner v. City of Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; Alter v. City of Cincinnati, 56 Ohio St. 47, 46 N. E. 69, 35 L. R. A. 737; City Council of Charleston v. Werner, 46 S. C. 323; Stephens v. City of Spokane, 14 Wash. 298.

linquent water rentals can be collected by public corporations through use of the ordinary remedies given litigants.[538] Water is considered property by the courts and if it is secretly or wrongfully taken and used by private consumers, the same rules of law would apply as to the taking of other property.[539]

Regulations. A public corporation owning and operating waterworks not only has the right to charge such rates as it may deem advisable to consumers of water based, usually, upon the quantity consumed, but also has in addition the unquestioned power of establishing such reasonable regulations as the proper officials, may in their discretion, deem necessary and proper, controlling and regulating the manner, quantity, and time of use by individual consumers.[540] So long as these regulations are not unreasonable and are uniform in their application, they will be sustained; their purpose being the better protection of property from fire, the prevention of waste and a facilitating of public control over the use of water by private consumers.[541]

§ 278. Performance of contract for water supply.*

In a preceding section it is said that a public corporation may secure a supply of water for its own use through contract with private parties; the contract involving necessarily, so long as its terms are complied with by one party, the due performance of the obligations resting upon the other.[542] On the part of the pri-

[538] Provident Sav. Inst. v. Jersey City, 113 U. S. 506. A water charge may be given a priority over prior mortgages. City of Los Angeles v. Los Angeles City Water Co., 61 Cal. 65; Springfield Water Com'rs v. Conkling, 113 Ill. 340; City of St. Louis v. Arnot, 94 Mo. 275; Hudson Trust & Sav. Inst. v. Carr-Curran Paper Mills Co., 58 N. J. Eq. 59, 43 Atl. 418.

[539] Prindiville v. Jackson, 79 Ill. 337; City of Milwaukee v. Herman Zoehrlaut Leather Co., 114 Wis. 276.

[540] Keen v. City of Waycross, 101 Ga. 588; Crosby v. City Council of Montgomery, 108 Ala. 498; Brass v. Rathbone, 153 N. Y. 435; McCrary v. Beaudry, 67 Cal. 120, 7 Pac. 264; Shiras v. Ewing, 48 Kan. 170.

[541] Kelsey v. Fire & Water Com'rs of Marquette, 113 Mich. 215, 71 N. W. 589, 37 L. R. A. 675, and cases therein reviewed; American Waterworks Co. v. State, 46 Neb. 194, 30 L. R. A. 447; State v. Griffin, 69 N. H. 1, 39 Atl. 260, 41 L. R. A. 177; Brass v. Rathbone, 153 N. Y. 435.

* 6 Curr. Law, 1869.

[542] Vicksburg Waterworks Co. v. City of Vicksburg, 185 U. S. 65. Where wrongful action on the part of a municipality is apprehended by a private water company an injunction will restrain it from doing

vate company, the contract obligations require the rendition of good service, which, it has been held, includes not only the quantity [543] and quality [544] of the water supply, but also the manner of such service; [545] and a breach of the contract may arise by a failure in any one or all of these respects. But it is usually held that a municipality cannot avail itself of the use of a valuable commodity and refuse payment because of the alleged invalidity of the contract or a failure to comply with the contract provisions at other times.[546]

In the performance and enforcement of a water supply contract, the rights of the parties will be determined by those rules of law

those acts which may impair the company' rights. Foster v. City of Joliet, 27 Fed. 899; Bartholomew v. City of Austin (C. C. A.) 85 Fed. 359; City of Ft. Madison v. Ft. Madison Water Co. (C. C. A.) 114 Fed. 292; Henry v. City of Sacramento, 116 Cal. 628; Lake Charles Ice, Light & Waterworks Co. v. City of Lake Charles, 106 La. 65.

[543] City of Winfield v. Winfield Water Co., 51 Kan. 70; Brady v. City of Bayonne, 57 N. J. Law, 379; Capital City Water Co. v. State, 105 Ala. 406, 29 L. R. A. 743; Eagle Iron Works v. Guthre Center, 97 Iowa, 128; Winfield Water Co. v. City of Winfield, 51 Kan. 104; City of Grand Haven v. Grand Haven Waterworks, 99 Mich. 106; Borough of Easton v. Lehigh Water Co., 97 Pa. 554.

[544] Capital City Water Co. v. State, 105 Ala. 406, 29 L. R. A. 743; City of Burlington v. Burlington Water Co., 86 Iowa, 266; Buckingham v. Plymouth Water Co., 142 Pa. 221; Brymer v. Butler Water Co., 172 Pa. 489. The water need not be chemically pure, if it is reasonably pure and wholesome, it will comply with the contract provision. United States Waterworks Co. v. City of Du Bois, 176 Pa. 439. If the contract is for a supply of water from a particular source, the municipality cannot complain if the supply from such source proves inadequate. Green v. Ashland Water Co., 101 Wis. 258, 43 L. R. A. 117. Frivolous objections to the quality of water will not be sustained when made for the purpose of depreciating the value of a private plant or when the municipality is estopped by its conduct. See the following: Creston Waterworks Co. v. City of Creston, 101 Iowa, 687; Cherryvale Water Co. v. City of Cherryvale, 65 Kan. 219; Wiley v. Inhabitants of Athol, 150 Mass. 426, 6 L. R. A. 342; Lamar Water & Elec. Light Co. v. City of Lamar, 140 Mo. 145; Bennett Water Co. v. Borough of Millvale, 202 Pa. 616.

[545] Los Angeles Water Co. v. City of Los Angeles, 55 Cal. 176; Light, Heat & Water Co. v. City of Jackson, 73 Miss. 598; Wilson v. City of Charlotte, 110 N. C. 449.

[546] National Waterworks Co. v. Kansas City (C. C. A.) 62 Fed. 853, 27 L. R. A. 827; City of Austin v. Bartholomew, 107 Fed. 349; City of Greenville v. Greenville Waterworks Co., 125 Ala. 625; Higgins v. City of San Diego, 118 Cal. 524.

which would apply under similar circumstances and between private parties.[547] The law, however, cannot ignore the fact that the basis of the validity of a water supply contract as executed by a public corporation is the exercise of a power having for its purpose and result the health of the community. This circumstance may lead in some cases to a somewhat stricter enforcement of the contract than might, perhaps, be otherwise made, and in some cases it has been held a mandatory duty on the part of public authorities to enforce such a contract and compel its proper performance by the water supply company.[548]

§ 279. Estoppel.

In common with other contracts or transactions, the parties may be estopped to claim forfeitures or to ask for a rescission of the contract because of a waiver, acquiescence in existing conditions, or participation in or a reception of the benefits.[549] The fact that one of the parties to the transaction is a public corporation and limited in its powers raises the principle that the other party is bound to know the extent of its powers and cannot claim an estoppel where the municipality plainly exceeds its powers in executing or entering into the contract.[550]

§ 280. Public expenditures in connection with a supply of light.

If there are doubts as to the advisability and legality of a public corporation engaging in the business of supplying water either for its own use or that of private consumers, there is much graver doubt in respect to a supply of light.[551] The operation of a lighting plant involves more complicated industrial operations

[547] Foster v. City of Joliet, 27 Fed. 899, affirmed by divided court in U. S. Sup. Ct., 30 Law. Ed. 942; Los Angeles Water Co. v. City of Los Angeles, 88 Fed. 720.

[548] City of Winfield v. Winfield Water Co., 51 Kan. 70, 32 Pac. 663.

[549] Illinois Trust & Sav. Bank v. Arkansas City (C. C. A.) 76 Fed. 271, 34 L. R. A. 518; Neosho City Water Co. v. City of Neosho, 136 Mo. 498; Monroe Waterworks Co. v. City of Monroe, 110 Wis. 11. But see Farmers' Loan & Trust Co. v. City of Galesburg, 133 U. S. 156.

[550] Smith v. Town of Westerly, 19 R. I. 437.

[551] Spaulding v. Inhabitants of Peabody, 153 Mass. 129, 26 N. E. 421, 10 L. R. A. 397; Baily v. City of Philadelphia, 184 Pa. 594, 39 L. R. A. 837; Joyce, Elec. Law, §§ 231 et seq.; Abb. Mun. Corp. § 472. But see City of Detroit v. Hosmer, 79 Mich. 384, and Wade v. Borough of Oakmont, 165 Pa. 479. The authorities, however, are not at all unanimous in holding that a duty rests upon a

"including the purchase of raw material, the employment of many skilled workmen and the use of technical manufacturing processes constantly subject to improvement," as well as the use of complicated machinery. It involves not only the supply and distribution of the commodity but also its manufacture, and the statement made in connection with the establishment of waterworks is also essentially true that judicial or impartial relations cannot be sustained where the controlling power has an interest in the object of control either as a "beneficiary, an owner or a user of its services."

§ 281. Nature of the power.

The power to erect and operate a lighting plant or to contract for a supply of light with private manufacturers is never included among the implied powers belonging to a public corporation. It must be expressly, positively and legally granted and in unmistakable terms.[552] When expressly granted, it is generally regarded as a continuing power and one which carries with it the right to use such agencies as may render the power effective.[553] The power when granted usually provides that the public corporation itself may exercise it by the construction of such a plant [554] or by making a contract with private persons for the manufac-

municipal corporation to light its public thoroughfares. The power it is considered is permissive rather than compulsory even under statutes directy authorizing such action. See Gaskins v. City of Atlanta, 73 Ga. 746; City of Freeport v. Isbell, 83 Ill. 440; Randall v. Eastern R. Co., 106 Mass. 276; Baily v. City of Philadelphia, 184 Pa. 594, 39 L. R. A. 837.

[552] Santa Ana Water Co. v. Town of San Buenaventura, 65 Fed. 323; Board of Finance of Jersey City v. Jersey City, 57 N. J. Law, 452, 31 Atl. 625; Windsor v. City of Des Moines, 110 Iowa, 175, 81 N. W. 476; Mealey v. City of Hagerstown, 92 Md. 741, 48 Atl. 746; Arbuckle-Ryan Co. v. City of Grand Ledge, 122 Mich. 491; Howell v. City of Millville, 60 N. J. Law, 95; Titusville Elec. Light & Power Co. v. City of Titusville, 196 Pa. 3; Stehmeyer v. City Council of Charleston, 53 S. C. 259, 31 S. E. 322; Hendrickson v. City of New York, 160 N. Y. 144.

[553] City of Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268; Belding Land & Imp. Co. v. City of Belding, 128 Mich. 79, 87 N. W. 113; Lynchburg & R. St. R. Co. v. Dameron, 95 Va. 545, 28 S. E. 951.

[554] Thompson Houston Elec. Co. v. City of Newton, 42 Fed. 723; Jacksonville Elec. Light Co. v. City of Jacksonville, 36 Fla. 229, 30 L. R. A. 540; City of Crawfordsville v. Braden, 130 Ind. 149; Hudson Elec.

ture and the supply of the commodity.[555] Or, the corporation may exercise the power by granting to private individuals an exclusive franchise or license for the construction of a lighting plant and the carrying on of the business of supplying light.[556] Whether such a corporation has the power, after having once entered into a contract with a private concern or after having once granted a franchise or license, to construct itself such a plant and enter into competition with the private enterprise will depend upon the language of the contract, franchise or license. If it is exclusive in its terms and lawfully made, its obligations will be protected by the Federal Constitution against any impairment;[557] and, on the other hand, if it clearly appears from the language of the franchise or license that no such exclusive privileges were ever given or intended to be given, then the fact of the grant of the license or franchise or the making of the contract will not be conclusive upon the public corporation and it may engage in the business or construct and operate a similar plant.[558]

§ 282. Charges for light supply; regulations.

A public corporation, if possessing the power to construct and operate a lighting plant, unquestionably has the right to make such charges for a use of this commodity as will not only pay the fixed charges and operating expenses, but also afford a substantial

Light Co. v. Inhabitants of Hudson, 163 Mass. 346, 40 N. E. 109.

[555] City of Hartford v. Hartford Elec. Light Co., 65 Conn. 324; City of Chicago v. Galpin, 183 Ill. 399; Seward v. Town of Liberty, 142 Ind. 551; City of Newport v. Newport Light Co., 84 Ky. 166; Oakley v. Atlantic City, 63 N. J. Law, 127, 44 Atl. 651; City of Wellston v. Morgan, 59 Ohio St. 147.

[556] Parfitt v. Kings County Gas & Illuminating Co., 12 Misc. 278, 33 N. Y. Supp. 1111. See the subject fully discussed and authorities cited under those sections post relating to exclusive franchises.

[557] Southwest Missouri Light Co. v. City of Joplin, 113 Fed. 817. "And then complainant will have a mere naked contract on paper; with the poles standing in the street and its power house idle. That is not only an impairment, but a wiping out of its contract. My own views are, * * * this should not be allowed."

[558] St. Paul Gaslight Co. v. City of St. Paul, 181 U. S. 142; Titusville Elec. Light & Power Co. v. City of Titusville, 196 Pa. 3; Jacksonville Elec. Light Co. v. City of Jacksonville, 36 Fla. 229, 30 L. R. A. 540; Thompson Houston Elec. Co. v. City of Newton, 42 Fed. 723.

profit.[559] If the corporation engage not only in the business of supplying its own wants in this respect, but also those of private consumers, it clearly is exercising in such case its business and proprietary powers.[560] The cases hold that, under these circumstances, it is acting purely and simply in its capacity as a private corporation, and as such it is subject to all of these principles and rules of law which control and protect private persons in the operation of a similar plant.[561]

§ 283. Performance of a contract.

A public corporation contracting with a private person or corporation for a supply of light for its public use will not, as a rule, be permitted to set up its lack of authority in this respect or alleged informalities or defects in the contract for the sole purpose of avoiding the payment for light used by it. The courts have held in some cases that granting the invalidity of the contract there will still exist an implied contract on the part of the public corporation to pay a reasonable price for whatever commodity it may have used.[562]

§ 284. Payment of debts.

The payment of debts is considered not only a public purpose but a praiseworthy one, and the use of public moneys for the liquidation of debts of whatever form is a proper expenditure of such funds.* It is a duty which not only devolves upon the public corporation, but also one, which it has been held, the sovereign power can compel where there is a failure to perform this duty.[563] To further emphasize the duty and necessity for such action, the courts have held many times that the grant of the power to incur

[559] State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262; City of Indianapolis v. Indianapolis Gaslight & Coke Co., 66 Ind. 396.

[560] Opinion of Justices, 150 Mass. 592, 8 L. R. A. 487. See authorities cited and a discussion of the subject in section 131 of Tiedeman, State & Fed. Control of Persons & Prop. and Abb. Mun. Corp.

[561] Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19.

* 6 Curr. Law, 732.

[562] Brush Elec. Light & Power Co. v. City Council of Montgomery, 114 Ala. 433, 21 So. 960.

[563] Cooley, Taxation (2d Ed.) pp. 685, 687; City of New Orleans v. Clark, 95 U. S. 644; Decker v. Hughes, 68 Ill. 33; Decatur County Com'rs v. State, 86 Ind. 8; Lycoming County v. Union County, 15 Pa. 166.

a debt carries with it the implied power to levy taxes sufficient for its liquidation.[564]

§ 285. Public education and health; charities and correction.

The preservation of the public health [565] and the education of the people [566] have each been considered public purposes of the highest character and such as to warrant the legal expenditure of public funds. In fact, it might be said that in many localities the greater portions of the funds raised for debts incurred are for these purposes.

The subject of charities and corrections involves a discussion of the law relating to the indigent, defective and criminal classes. It is the duty of the state acting through itself or by delegated agencies to care for the unfortunate and defective, either morally, physically or financially, and the expenditure of public moneys for these purposes will be considered proper.[567]

§ 286. Claims.*

Independent of, and in addition to, the various obligations and purposes above given, and to which the public moneys can be legally appropriated and used, is the further one authorizing expenditures, for the payment of legally established claims against public corporations.

Claims are naturally divided into two classes, those involving the presentment and payment of what can be termed liquidated or absolute demands, and those involving the settlement and allowance of unliquidated claims. The former class includes negotiable bonds and securities, warrants, orders, judgments and other fixed, definite and certain demands against public corporations.[568]

[564] Rees v. City of Watertown, 86 U. S. (19 Wall.) 107; United States v. Macon County, 99 U. S. 582; Ralls County v. United States, 105 U. S. 733; Peoria, D. & E. R. Co. v. People, 116 Ill. 401; State v. Police Jury of Jefferson, 34 La. Ann. 673.

[565] State v. Wordin, 56 Conn. 216.

[566] Vanover v. Davis, 27 Ga. 354; Alleghany Public School Com'rs v. Alleghany County Com'rs, 20 Md 449; Burr v. City of Carbondale, 76 Ill. 455.

[567] Vionet v. First Municipality, 4 La. Ann. 42; People v. Fitch, 154 N. Y. 14, 38 L. R. A. 591; Wilkesbarre City Hospital v. County of Luzerne, 84 Pa. 55.

* 6 Curr. Law, 737.

[568] Lincoln County v. Luning, 133 U. S. 529; City of New Orleans v. Fisher, 180 U. S. 185; Camp-

The other class of claims relates to those which are either unliquidated in amount or those where it is not certain what is due or how much is owing and which are based upon some contract provision either expressed or implied for the rendition of a service, either personal in its character or involving the supply of some commodity; claims which neither one of the parties to the contract can alone render certain.

Claims are based upon either a contract obligation or upon an alleged tort. If upon a contract, they may either follow from a violation of some of its provisions expressly made, or, if not expressly made, from one arising by implication.[569] An implied contract obligation usually exists where supplies or services [570] have been performed and accepted or used by the public corporation without an express contract having been made therefor.

Claims based upon contract provisions depend entirely for their validity upon the legality of the contract,[571] and a determination of this question involves, of course, a consideration of the authority of the public corporation to engage in or enter into such contract obligation.[572] Again, the manner of its execution, whether it was entered into and executed by the proper officers of the corporation,[573] and, assuming the legality of the obligation in all of the preceding respects, whether or not such officials were duly

bellsville Lumber Co. v. Hubbert (C. C. A.) 112 Fed. 718; Caldwell v. Dunklin, 65 Ala. 461; Sawyer v. Colgan, 102 Cal. 283, 36 Pac. 580; Flint & P. M. R. Co. v. Board of State Auditors, 102 Mich. 500, 60 N. W. 971; Parker v. Saratoga County, 106 N. Y. 392, 13 N. E. 308; State v. Daggett, 28 Wash. 1, 68 Pac. 340.

[569] Fuller v. Colfax County, 33 Neb. 716, 50 N. W. 1044; Oshkosh Waterworks Co. v. City of Oshkosh, 109 Wis. 208, 85 N. W. 376; Hamilton County Com'rs v. Newlin, 132 Ind. 27, 31 N. E. 465.

[570] La France Fire Engine Co. v. Town of Mt. Vernon, 11 Wash. 203, 39 Pac. 367; Hoffman v. Clark County, 61 Wis. 5; City of Ellsworth v. Rossiter, 46 Kan. 237, 26 Pac. 674; Auditor General v. Bay County Sup'rs, 106 Mich. 662; State v. Butler County, 164 Mo. 214, 64 S. W. 176.

[571] Edwards & Walsh Const. Co. v. Jasper County, 117 Iowa, 365, 90 N. W. 1006; People v. Coler, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814.

[572] United States v. Reed (C. C. A.) 69 Fed. 841; Marengo County v. Lyles, 101 Ala. 423; Armstrong v. Truitt, 53 Ark. 287; Irwin v. Yuba County, 119 Cal. 686; Gemmill v. Arthur, 125 Ind. 258; Atchison v. Lucas, 83 Ky. 451; Bunch's Ex'r v. Fluvanna County, 86 Va. 452; Kollock v. City of Stevens Point, 37 Wis. 348.

[573] State Trust Co. v. City of Duluth, 104 Fed. 632; Madison Coun-

authorized in a particular instance to bind the corporation in respect to a particular matter.[574]

The other class of claims considered most frequently against public corporations are those arising or sounding in tort and are based upon the liability of the public corporation as a result of its failure to perform some supposed duty in respect to which the sovereign has consented to the assumption of a liability.[575]

§ 287. Presentment.

Public opinion has realized to a certain degree the extent and character of claims against public corporations based upon personal injuries, and, in order to check them, statutes have been passed in some states providing for the presentment, allowance and payment of all claims including those of the character above indicated.[576] These statutes have been adopted not only for the purpose of checking the payment of personal injury claims, but also for the purpose of controlling and regulating claims made against public corporations based upon the rendition of some service or the supply of some commodity. These provisions have been found necessary to prevent the allowance of excessive or fictitious claims through collusion with corrupt or by taking advantage of ignorant or careless public officials,[577] and are considered mandatory in their character.[578]

§ 288. Time of presentment.

Provisions regulating the time of presentment of a claim have as their basis the protection of the municipality by requiring a

ty Com'rs v. Burford, 93 Ind. 383; Rulon v. Inhabitants of Woolwich, 55 N. J. Law, 489; Vogel v. City of Antigo, 81 Wis. 642, 51 N. W. 1008.

[574] Henry v. Cohen, 66 Ala. 382; Cass County Com'rs v. Crockett, 111 Ind. 316, 12 N. E. 486; State v. Fagan, 55 Kan. 150, 40 Pac. 314; Follensbee v. St. Clair Sup'rs, 67 Mich. 614, 35 N. W. 257; Union County v. Slocum, 16 Or. 237, 17 Pac. 876; Mansel v. Fulmer, 175 Pa. 377; Chesterfield County v. Hall's Ex'r, 80 Va. 321.

[575] Lewis v. State, 96 N. Y. 71, 48 Am. Rep. 607; Sipple v. State, 99 N. Y. 284.

[576] Rose v. Estudillo, 39 Cal. 270; Giles v. City of Shenandoah, 111 Iowa, 83, 82 N. W. 466; Mackie v. West Bay City, 106 Mich. 242, 64 N. W. 25.

[577] State v. Scates, 43 Kan. 330.

[578] Chicago & A. R. Co. v. People, 190 Ill. 20; Green v. Richland County Com'rs, 27 S. C. 9, 2 S. E. 618; State v. Smith, 89 Mo. 408, 14 S. W. 557.

prompt presentation of a claim in order that it may be better passed upon in respect to its legality and soundness.[579] An investigation can be more readily made and the correctness of the facts ascertained at the time or as soon thereafter as possible of the rendition of a service or the happening of an accident.[580] Witnesses can be more readily found; their recollection of the facts will be clearer and more positive. The time of a presentment of a claim may be also limited. These provisions usually require the presentment of claims to certain designated officials within a certain prescribed time from and after the date of an accident or injury, or the rendition of a service claimed,[581] and further prescribe that unless this is done and in the manner designated the claim cannot be urged as a valid one against the corporation,[582] or, if presented, must be disallowed without an opportunity for appeal or re-review.[583] The general statutes of limitation may also apply to the presentment of claims.

§ 289. Manner of presentment.

The manner of presentment is usually prescribed by statutory or charter provision, either by petition or notice to certain officials or official bodies.[584] The purpose of a petition or notice is to have placed before public officials, charged with certain prescribed duties, the facts and circumstances forming the basis of

[579] Nicol v. City of St. Paul, 80 Minn. 415, 83 N. W. 375; Whitney v. City of Port Huron, 88 Mich. 268, 50 N. W. 316; Neissen v. City of St. Paul, 80 Minn. 414, 83 N. W. 376.

[580] Lee v. Village of Greenwich, 48 App. Div. 391, 63 N. Y. Supp. 160.

[581] Dement v. DeKalb County, 97 Ga. 733; City of Covington v. Voskotter, 80 Ky. 219; Chase v. Inhabitants of Surry, 88 Me. 468; Parmenter v. State, 135 N. Y 154; Royster v. Granville County Com'rs, 98 N. C. 148, 3 S. E. 739.

[582] Sowter v. Town of Grafton, 65 N. H. 207, 19 Atl. 572; Benedict v. State, 120 N. Y. 228; Pitt County School Directors v. Town of Greenville, 130 N. C. 87, 40 S. E. 847; State v. Colleton County Com'rs, 31 S. C. 81, 9 S. E. 692; Goldsworthy v. Town of Linden, 75 Wis 24, 43 N. W. 656.

[583] Carroll v. Siebenthaler, 37 Cal. 193; San Miguel County Com'rs v. Pierce, 6 N. M. 324, 28 Pac. 512.

[584] Carberry v. Inhabitants of Sharon, 166 Mass. 32, 43 N. E. 912; Robey v. Prince George's County Com'rs, 92 Md. 150, 48 Atl. 48; Peterson v. Village of Cokato, 84 Minn. 205, 87 N. W. 615; State v Hallock, 20 Nev. 326, 22 Pac. 123; Gates v. State, 128 N. Y. 221.

an alleged claim, so definite, certain and in detail that they can the better and more justly pass upon it.[585] The cases, therefore, hold that such petitions or notices must be clear, certain, definite and full in their recitals of facts, and if lacking in any of these respects, the notice should be considered insufficient and the claim should be disallowed.[586]

§ 290. Audit and allowance of claims.

Statutory or charter provisions for the presentment of claims generally provide a tribunal of certain designated officers or official bodies to whom claims should be presented and by whom the action is to be taken.[587] These have for their purpose the examination of the account or claim having in view, first, the fact of a rendition of a service or the existence of a condition;[588] and second, the correctness and accuracy of the amount of the claim and whether payments have been made and, if so, to what extent.[589]

If a claim is allowed, the action is usually discretionary in its character and of quasi judicial nature,[590] but this does not place

[585] Colusa County v. Welch, 122 Cal. 428, 55 Pac. 243; Wood v. Borough of Stafford Springs, 74 Conn. 437, 51 Atl. 129; Epenter v. Montgomery County, 98 Iowa, 159, 67 N. W. 93; City of Enterprise v. Fowler, 38 Kan. 415, 16 Pac. 703; Burdick v. Richmond, 16 R. I. 502, 17 Atl. 917; Thomas v. Douglas County, 13 S. D. 520; Piper v. City of Spokane, 22 Wash. 147, 60 Pac. 138; Laird v. Town of Otsego, 90 Wis. 25.

[586] Crenshaw County v. Fleming, 109 Ala. 554, 19 So. 906; Kelso v. Teale, 106 Cal. 477, 39 Pac. 948; Epenter v. Montgomery County, 98 Iowa, 159; McLean v. City of Boston, 180 Mass. 69, 61 N. E. 758; Tattan v. City of Detroit, 128 Mich. 650, 87 N. W. 894; Chatters v. Coahoma County Sup'rs, 73 Miss. 351; Sowter v. Town of Grafton, 65 N. H. 207.

[587] Gamewell Fire-Alarm Tel. Co. v. City of New York, 31 Fed. 312; Speer v. Kearney County Com'rs, 88 Fed. 749; Smith v. San Bernardino County Sup'rs, 99 Cal. 262; Ragoss v. Cuming County, 36 Neb. 375, 54 N. W. 683; Pickens County v. Day, 45 S. C. 161, 22 S. E. 722.

[588] Hickey v. Oakland County Sup'rs, 62 Mich. 94; James P. Hall Incorporated Co. v. Jersey City, 62 N. J. Eq. 489, 50 Atl. 603.

[589] Santa Cruz County v. McPherson, 133 Cal. 282, 65 Pac. 574; State v. Moore, 37 Neb. 507.

[590] St. Paul Gas Light Co. v. City of St. Paul, 181 U. S. 142; Alameda County v. Evers, 136 Cal. 132, 68 Pac. 475; Fitzgerald v. Harms, 92 Ill. 372; Richmond County Sup'rs v. Ellis, 59 N. Y. 620; Boner v. Adams, 65 N. C. 639; Jones v. Lucas County Com'rs, 57 Ohio St. 189; Bank of Idaho v. Maheur County, 30 Or. 420, 35 L. R. A. 141; State v.

it beyond the re-review of judicial bodies, as a usual rule.[591] Claims against public corporations to be enforceable must be legally chargeable against them and neither the allowance, the audit, nor the payment of an illegal claim, can create any legal liability.[592]

The power possessed by certain officials or official bodies to pass upon and allow or reject claims presented in the proper manner would necessarily include the minor right of compromising[593] them.

§ 291. Time and manner of payment.

Time of payment. Upon the allowance of a claim,[594] its liquidation may depend upon other charter or statutory provisions in regard to the time of payment. Claims may, by such authority, be divided into classes of relative priority, the payment depending upon its character or class,[595] or again, the statutes may provide in express terms for payment and further designate the fund from which claims shall be paid.[596]

Manner of payment. The right to a payment established, considered from the standpoint of time, further provisions may limit and restrict immediate payment because of lack of funds. Certain claims may by charter or statutory provisions be legally paid only

Ferriss (Tenn. Ch.) 56 S. W. 1039; State v. Headlee, 18 Wash. 220. But see the following: Huntington County Com'rs v. Heaston, 144 Ind. 583, 41 N. E. 457, 42 N. E. 651; Cumberland County Sup'rs v. Edwards, 76 Ill. 544.

[591] Morse v. Norfolk County, 170 Mass. 555, 49 N. E. 925; Bott v. Wurts, 63 N. J. Law, 289; People v. Barnes, 114 N. Y. 317.

[592] Richmond County Sup'rs v. Ellis, 59 N. Y. 620; Municipal Security Co. v. Baker County, 33 Or. 338, 54 Pac. 174; Endion Imp. Co. v. Evening Tel. Co., 104 Wis. 432.

[593] St. Charles St. R. Co. v. Board of Assessors, 51 La. Ann. 459, 25 So. 90; Campbell v. Inhabitants of Upton, 113 Mass. 67. But see Com. v. Tilton, 23 Ky. L. R. 753, 63 S. W. 602.

[594] Smith v. Salt Lake City, 83 Fed. 784; Zirker v. Hughes, 77 Cal. 235, 19 Pac. 423; La Plata County Com'rs v. Morgan, 28 Colo. 322, 65 Pac. 41; Wightman v. Karsner, 20 Ala. 446; Looney v. Jackson County, 105 Ala. 597, 17 So. 105; Arbios v. San Bernardino County, 110 Cal. 553; Browne v. Livingston County Sup'rs, 126 Mich. 276, 85 N. W. 745.

[595] Auerbach v. Salt Lake County, 23 Utah, 103, 63 Pac. 907.

[596] Fresno Canal & Irr. Co. v. McKenzie, 135 Cal. 497, 67 Pac. 900; Houston County v. Kersh, 82 Ga. 252; Worcester County Com'rs v. Melvin, 89 Md. 37; State v. Cook, 13 Mont. 465; State v. Bartley, 41 Neb. 277.

from the proceeds of certain designated taxes set aside for such a purpose [597] or from a special fund raised for a like purpose.[598] The lack of moneys in any fund from which certain claims can be legally paid would necessarily defer liquidation.[599] On the other hand, if an appropriation has been made for the payment of specific claims after their presentment and allowance, if public officials then refuse to pay a claim, they can be compelled to do so by the proper proceedings.[600]

§ 292. Claims; enforcement by action.*

That a claimant be legally entitled to enforce his claim by statutory action against a public corporation, certain required steps may be necessary,[601] and within the time fixed [602] by law, and the failure to do this will operate as a bar to the prosecution of the action.[603] Such a rule of law or statute has been found necessary

[597] City of Chicago v. People, 48 Ill. 416; Porter v. City of Tipton, 141 Ind. 347; State v. Board of Liquidation of City Debt, 51 La. Ann. 1849, 26 So. 679; Creighton v. City of Toledo, 18 Ohio St. 447; Keenan v. City of Portland, 27 Or. 544; Rhode Island Mortg. & Trust Co. v. City of Spokane, 19 Wash. 616.

[598] Palmer v. Fitts, 51 Ala. 489; Higgins v. City of San Diego, 131 Cal. 294, 63 Pac. 470; Fernandez v. City of New Orleans, 46 La. Ann. 1130, 15 So. 378; Wadsworth v. City of New Orleans, 48 La. Ann. 886.

[599] Goyne v. Ashley County, 31 Ark. 552; Weaver v. City & County of San Francisco, 111 Cal. 319, 43 Pac. 972; State v. Monroe County Council, 158 Ind. 102, 62 N. E. 1000; Slusser v. City of Burlington, 42 Iowa, 378; State v. Burke, 37 La. Ann. 434; Sterling v. Inhabitants of Cumberland County, 91 Me. 316; State v. Holt County, 135 Mo. 535.

[600] Gray v. Abbott, 130 Ala. 322, 30 So. 346; White v. Hayden, 126 Cal. 621; Blair v. Hinrichsen, 151 Ill. 41, 25 L. R. A. 143; City of Greenfield v. State, 113 Ind. 597, 15 N. E. 241; State v. Minar, 13 Mont. 1, 31 Pac. 723; State v. Scott's Bluff County, 64 Neb. 419, 89 N. W. 1063; Werts v. Rogers, 56 N. J. Law, 480, 23 L. R. A. 354.

* 6 Curr. Law, 738.

[601] Roberts v. Cleburne County, 116 Ala. 378.

[602] Apache County v. Barth (Ariz.) 53 Pac. 187; Harrigan v. City of Brooklyn, 119 N. Y. 156.

[603] San Diego County v. Riverside County, 125 Cal. 495; Giles v. City of Shenandoah, 111 Iowa, 83 82 N. W. 466; Young v. Inhabitants of Douglas, 157 Mass. 383; Jones v. Bladen County Com'rs, 73 N. C. 182; Sheridan v. City of Salem, 14 Or. 328, 12 Pac. 925; City of Philomath v. Ingle, 41 Or. 289, 68 Pac. 803; Fish v. Higbee, 22 R. I. 223, 47 Atl. 212; Sheafe v. City of Seattle, 18 Wash. 298; Yates v. Taylor County, 47 W. Va. 376, 35 S. E. 24; Groundwater v. Town of Washington, 92 Wis. 56.

to protect public corporations from the prosecution of fictitious or stale claims.[604]

The steps most ordinarily required by law include a presentment to the proper officials of the corporation and within the time prescribed or limited by law,[605] the audit or examination of the claim,[606] its consideration by an official body charged with the duty and its final rejection or disallowance in whole or in part.[607] Where these steps have been taken and the disallowance of the claim is the result, the law may then authorize, but not before, its prosecution in a formal action brought before some legally organized judicial tribunal having jurisdiction.[608] These requirements it is held by the weight of authority do not apply to actions or demands based upon a tort but only those arising ex contractu.[609] This is true unless there is some statutory provision to the con-

[604] Homan v. Franklin County, 98 Iowa, 692; Nills County v. Lampasas County, 90 Tex. 603.

[605] May v. Cass County, 30 Fed. 762; Vincent v. Lincoln County, 62 Fed. 705; Alden v. Alameda County, 43 Cal. 270; Sullivan County Com'rs v. Arnett, 116 Ind. 438; Snyder v. City of Albion, 113 Mich. 275, 71 N. W. 475; Trost v. City of Casselton, 8 N. D. 534; Morgan v. City of Des Moines, 54 Fed. 456; Davidson v. City of Muskegon, 111 Mich. 454, 69 N. W. 670; Springer v. City of Detroit, 102 Mich. 300; Seegar v. City of Ashland, 101 Wis. 515, 77 N. W. 880.

[606] Dollar v. City of Marquette, 123 Mich. 184, 82 N. W. 33; Raymond v. Stearns County Com'rs, 18 Minn. 60 (Gil. 40); Lawrence County Com'rs v. City of Brookhaven, 51 Miss. 68; Hohman v. Comal County, 34 Tex. 36.

[607] Gamewell Fire-Alarm Tel. Co. v. City of New York, 31 Fed. 312; Dundas v. City of Lansing, 75 Mich. 499, 5 L. R. A. 143; Ludington Water-Supply Co. v. City of Ludington, 119 Mich. 480, 78 N. W. 558; Jones v. City of Albany, 151 N. Y. 223; Saunders v. City of Fitzgerald, 113 Ga. 619, 38 S. E. 978; Brown v. City of Owosso, 126 Mich. 91, 85 N. W. 256; Peterson v. Village of Cokato, 84 Minn. 205, 87 N. W. 615; Barrett v. Stutsman County, 4 N. D. 175, 59 N. W. 964; Nickeus v. Lewis County, 23 Wash. 125, 62 Pac. 763; State v. Bardon, 103 Wis. 297, 79 N. W. 226.

[608] Barret v. City of Mobile, 129 Ala. 179, 30 So. 36; San Diego County v. Riverside County, 125 Cal. 495, 58 Pac. 81; City of Huntington v. Griffith, 142 Ind. 280; Marsh v. Benton County, 75 Iowa, 469, 39 N. W. 713; City of Des Moines v. Polk County, 107 Iowa, 525, 78 N. W. 249.

[609] Neal v. Town of Marion, 126 N. C. 412. Such requirements apply only to actions or claims ex contractu. Hoexter v. Judson, 21 Wash. 646. Ball. Ann. Codes and St. § 359, applies to a liability arising in tort. This section requiring the presentment of a claim to county commissioners is a condition precedent to a right of action. Sommers v. City of Marshfield, 90 Wis. 59, 62 N. W. 937.

trary. The granting by statute of the right of appeal or of action cannot create any liability where none existed in the first instance.[610]

§ 293. Miscellaneous.

In order to prevent collusion or improper conduct on the part of public officials, they are generally prohibited by law from "dealing in" or buying and selling either all claims generally as against a corporation of which they are an official or certain designated classes of claims or demands.[611] A violation of this prohibition may lead to the invalidity of the claim when presented and pressed as against the corporation.

[610] Denning v. State, 123 Cal. 316, 55 Pac. 1000.

[611] Scruggs v. State, 111 Ala. 60, 20 So. 642; Herr v. Seymour, 76 Ala. 270; Moore v. Lawson, 19 Ky. L. R. 1104, 42 S. W. 1136, 43 S. W. 409.

CHAPTER VII.

GOVERNING BODIES.

I. LEGISLATIVE.

II. EXECUTIVE.

I. LEGISLATIVE.*

§ 294. Governing bodies.

The three-fold division of the powers of a state based upon their character and nature, into legislative, judicial and executive, is carried out wherever possible in the organization and government of public corporations in the United States; the officials or official bodies exercising each of the powers, acting along well defined lines and independent of each other except as provided by fundamental law;[1] judicial bodies or officers exercising judicial func-

* 6 Curr. Law, 721.

[1] Wilkinson v. Leland, 2 Pet. (U. S.) 628, where Mr. Justice Story observes: "That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body, without any restraint." Citizens' Sav. & Loan Ass'n v. Topeka City, 87 U. S. (20 Wall.) 655. "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers." Kilbourn v. Thompson, 103 U. S. 168; Lindsay v. United States Sav. & Loan Ass'n, 120 Ala. 156, 42 L. R. A. 783; Everett v. Deal, 148 Ind. 90; State v. Hitchcock, 1 Kan. 178; Prince v. Skillin, 71 Me. 361; Whitcomb's Case, 120 Mass. 118; Merrill v. Sherburne, 1 N. H. 199, 8 Am. Dec. 57. "It is well known and considered that 'in the distinct and separate existence of the judicial power consists one main preservative of the public liberty;'

tions only; legislative bodies executing the law-making power without interference from other departments, except as above indicated, and executive officers performing their discretionary duties under no control of either the courts or the legislature except in cases of fraud or gross and wanton abuse of authority.[2]

§ 295. Legislative.

A legislature or general assembly, as the term is variously used by the different state constitutions, exercises for the state, either considered as an independent sovereign or as a public corporation of the highest grade or class, its legislative functions. State constitutions following the Federal constitution designate with particularity the powers such a body is legally capable of exercising and the manner and time of the exercise.[3] To determine the legality of legislative action, the nature and character of the duties they should perform must be considered and the constitutional limitations controlling them.[4]

Membership. The number of members, their qualifications, and the districts from which elected,[5] are questions for determination by a state constitution or general laws passed under the authority

that indeed 'there is no liberty if the power of judging be not separated from the legislative and executive powers.' In other words, that 'the union of these two powers is tyranny;' or, as Mr. Madison observes, may justly be 'pronounced the very definition of tyranny,' or in the language of Mr. Jefferson 'is precisely the definition of despotic government.'" Warner v. People, 2 Denio (N. Y.) 272, 43 Am. Dec. 740.

[2] Marbury v. Madison, 1 Cranch (U. S.), 137; Weimer v. Bunbury, 30 Mich. 201; Bebee v. Bank of New York, 1 Johns. (N. Y.) 529; Andrews' American Law, §229; 1 Wilson's Works, 367; 1 Story, Const. (5th ed.) § 525.

[3] 6 Curr. Law, 721.

[4] Cheaney v. Hooser, 48 Ky. (9 B. Mon.) 330; Town of Berlin v. Town of Gorham, 34 N. H. 266.

[4] Horn v. Lockhart, 84 U. S. (17 Wall.) 570; Watson v. Stone, 40 Ala. 451; Hawkins v. Fikins, 24 Ark. 286; Snow v. Hudson, 56 Kan. 378; Lafon v. Dufrocq, 9 La. Ann. 350; Davis v. State, 7 Md. 151; Burnham v. Morrissey, 80 Mass. (14 Gray) 226; People v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

[5] Opinion of Justices, 20 Mass. (3 Pick.) 517; State v. Perry, 18 R. I. 276, 22 L. R. A. 65; People v. Markham, 96 Cal. 262; Opinion of Justices, 68 Me. 594; Opinion of Justices, 122 Mass. 594; State v. Orr, 61 Ohio St. 384, 56 N. E. 14; Denney v. State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726; Miller v. Chosen Freeholders of Cumberland County, 58 N. J. Law, 501, 33 Atl. 948; People v. Westchester County Sup'rs, 147 N. Y. 1, 30 L. R. A. 74; State v. Orr, 61 Ohio St. 384, 56 N. E. 14.

of some of its provisions.[6] It is well known that no portion of a community can be deprived of its right of representation in any fixing or readjusting of the lines of representative districts.[7]

§ 296. Municipal councils; town meetings.

A municipal corporation proper, it will be remembered, is not only a public corporation in the sense that it is an agent of the state or the sovereign, and performing its delegated governmental duties or functions, but also an organization of the people of a particular locality for their better comfort, convenience and welfare.[8] This latter fact is well recognized and to municipal corporations is, therefore, given the power of legislation or of acting for themselves in local matters under proper restrictions.[9] The legislative body to whom is delegated such functions is usually called a council and possesses, as derived from the municipal charter or general law, restricted legislative powers.[10] But action within their powers is conclusive and not subject to collateral attack unless reconsidered by them or reversed or held void in an authorized proceeding by a court of competent jurisdiction.[11] As a rule, the performance of duties entrusted to them by the legislature cannot be delegated.[12]

[6] People v. Markham, 96 Cal. 262; State v. Coombs, 32 Me. 526.

[7] Sabin v. Curtis (Idaho), 32 Pac. 1130; Bay County v. Bullock, 51 Mich. 544, 16 N. W. 896; Lanning v. Carpenter, 20 N. Y. 447; People v. Hill, 7 Cal. 97; People v. Thompson, 155 Ill. 451; Denney v. State, 144 Ind. 503, 31 L. R. A. 726; Giddings v. Blacker, 93 Mich. 1, 16 L. R. A. 402; People v. Rice, 135 N. Y. 473, 16 L. R. A. 836.

[8] Inhabitants of Camden v. Camden Village Corp., 77 Me. 530; People v. Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178.

[9] Harmon v. City of Chicago, 110 Ill 400; City of Des Moines v. Hillis, 55 Iowa, 643; People v. Commcn Council of Detroit, 29 Mich. 108; State v. Clarke, 25 N. J. Law (1 Dutch.) 54; People v. Green, 64 N. Y. 499; Culp v. Com., 42 Pa. Law J. 288.

[10] Hooper v. Emery, 144 Me. 375; Pubic Schools of Alleghany v. Alleghany County Com'rs, 20 Md. 449; In re Newport Charter, 14 R. I. 655.

[11] Everett v. Deal, 148 Ind. 90; Heman v. Allen, 156 Mo. 534; Ex parte City of Albany, 23 Wend. (N. Y.) 277.

[12] Blair v. City of Waco (C. C. A.) 75 Fed. 800; City of St. Louis v. Meyrose Lamp Mfg. Co., 139 Mo. 560; State v. Garibaldi, 44 La. Ann. 809; Danforth v. City of Paterson, 34 N. J. Law, 163; Baily v. City of Philadelphia, 184 Pa. 594, 39 Atl. 494, 39 L. R. A. 837; State v. Winter, 15 Wash. 409.

Town meetings. Another body to which is given legislative powers in respect to local concerns is the New England town meeting or other organization possessing similar characteristics. At these meetings as already suggested, the people of a particular district have the right to assemble and adopt local legislative measures having for their purpose the regulation and convenience of the people thus acting.

§ 297. Classification of legislative bodies.

Legislative assemblies other than the town meeting,—and this statement is true both in respect to state legislatures or other organizations,—are divided into branches, the purpose of such division being the creation of a check in the respective bodies upon the legislation or the acts of the other.[13] Concurrent action by the two is usually necessary in respect to all those questions or matters that are intended as general legislative measures or that are to become operative on the community at large.[14] Ordinarily, to each of the separate houses is given particular functions or duties and powers with relation to the performance of acts which affect them only.[15] The upper house or body may also alone possess the power of impeaching public officers.

§ 298. Municipal councils; organization; members

The members of municipal councils proper are elected pursuant to the provisions of a municipal charter [16] to represent especially the people residing within the certain limited or restricted areas of a particular public corporation which are fixed by general law or ordinance.[17] Legislative action to be legal and therefore binding upon the persons and property of a given community must have been passed or adopted by those who have the power under general laws or constitution of the state.[18] Legisla-

[13] Andrews' American Law, §§ 231 et seq.

[14] Darcantel v. People's Slaughterhouse and Refrigerating Co., 44 La. Ann. 632, 11 So. 239; Opinion of Justices, 6 Me. (6 Greenl.) 514; Chandler v. City of Lawrence, 128 Mass. 213.

[15] State v. Chapman, 44 Conn. 595.

[16] Town of Decorah v. Bullis, 25 Iowa, 12; City of Terre Haute v. Lake, 43 Ind. 480.

[17] State v. McMillan, 108 Mo. 153, 18 S. W. 784; Bennett v. Common Council of Trenton, 55 N J. Law, 72, 25 Atl. 113; Appeal of Ayars, 122 Pa. 266, 2 L. R. A. 577.

[18] State v. Kearns, 47 Ohio St. 566.

tive measures passed by an illegal assembly or legislative body have no operative effect. The first test of the validity of legislation whatever its grade is the right of the legislative body to act, and then a question may arise of its power to act in respect to a particular question.

Such bodies have the power of organization; that is, the right to elect officers [19] and designate committees and subcommittees [20] in order that the purpose for which they are elected may be carried out. This power of organization includes the right to select presiding officers [21] and those who perform the clerical and executive duties of the deliberative or legislative body [22] but does not include, unless it is specially given, the right to fill vacancies in the list of members occasioned by death, withdrawal or for cause.[23]

They possess usually the exclusive right to determine and pass upon the eligibility or the qualifications of those claiming membership.[24] The application of the rule does not, however, divest the courts of their corrective powers in the consideration of action by legislative bodies taken without authority or in an arbitrary, fraudulent or illegal manner.[25] It is further held universally that no person has the power to pass upon his own right to serve as a member of such body or, in other words, act as a judge upon his own case.[26]

[19] Trowbridge v. City of Newark, 46 N. J. Law, 140.

[20] Com. v. Hilenbrand, 96 Ky. 407; Van Worst v. Jersey City, 27 N. J. Law, (3 Dutch.) 493.

[21] Samis v. King, 40 Conn. 298; People v. Conover, 17 N. Y. 64.

[22] Gray v. Granger, 17 R. I. 201, 21 Atl. 342; Roche v. Jones, 87 Va. 484.

[23] Western Granite & Marble Co. v. Knickerbocker, 103 Cal. 111; State v. Wofford, 121 Mo. 61; Parker v. Common Council of Newark, 57 N. J. Law, 83, 30 Atl. 186; Hamilton County Com'rs v. Rosche, 50 Ohio St. 103, 19 L. R. A. 584.

[24] Green v. Adams, 119 Ala. 472; 24 So. 41; Selleck v. Common Council of South Norwalk, 40 Conn 359; Naumann v. City Canvassers of Detroit, 73 Mich. 252, 41 N. W. 267; Cate v. Martin, 69 N. H. 619, 45 Atl. 644; Opinion of Justices, 56 N. H. 570; Salmon v. Haynes, 50 N. J. Law, 97, 11 Atl. 151 Simon v. Common Council of Portland, 9 Or. 437; Lamb v. Lynd, 44 Pa. 336; Jobson v. Bridges, 84 Va. 298, 5 S. E. 529.

[25] San Diego County v. Seifert, 97 Cal. 594; State v. Pinkerman, 63 Conn. 176, 22 L. R. A. 653; State v. Anderson, 26 Fla. 240, 8 So. 1; Ridley v. Doughty, 85 Iowa, 418; Doran v. De Long, 48 Mich. 552; Banning v. McManus, 51 Minn. 289; Green v. Adams, 119 Ala. 472, 24 So. 41.

[26] Burwell v. Hawkins, 92 Ill.

§ 299. Meetings; when and where held.

The meetings of such bodies to be legal must have been called by notice, pursuant to some statutory authority and under the regulations and provisions of the law with respect to them.[27] They must be held at the time fixed by law.[28]

At regular meetings, all of the powers possessed ordinarily by such bodies may be exercised;[29] at special meetings only such action can be taken as specified or designated in the call for the meeting.[30] Statutory provisions with respect to the calling of a special meeting are considered of a mandatory nature and have been deemed necessary in order to prevent hasty, ill-advised and ill-considered legislation.[31]

The provisions of the law are not considered so mandatory in their character in respect to the place of the meeting of a deliberative body although it must be held at some public place of which notice must have been duly given.[32] The deliberations of a

App. 459; City of Evanston v. Carroll, 92 Ill. App. 495.

[27] Burns v. Thompson, 64 Ark. 489, 43 S. W. 499; Beaver Creek Tp. Board v. Hastings, 52 Mich. 528; Wayne County Sup'rs v. Wayne Circuit Judges, 106 Mich. 166, 64 N. W. 42; Tierney v. Brown, 67 Miss. 109, 6 So. 737; Morris v. Merrell, 44 Neb. 423, 62 N. W. 865.

[28] Ex parte Benninger, 64 Cal. 291; State v. Smith, 22 Minn. 218; Magneau v. City of Fremont, 30 Neb. 843, 47 N. W. 280, 9 L. R. A. 786.

[29] Hamilton v. State, 3 Ind. 452; Kearney County Com'rs v. Kent, 5 Neb. 227.

[30] Stockton v. Powell, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42; White v. Fleming, 114 Ind. 560, 16 N. E. 487; Torr v. State, 115 Ind. 188, 17 N. E. 286; Rutherford v. Hamilton, 97 Mo. 543; Boyce v. Auditor General, 90 Mich. 314, 51 N. W. 457.

[31] Harding v. Vandewater, 40 Cal. 77; Mitchell County Sup'rs v. Horton, 75 Iowa, 271; City of Auburn v. Union Water Power Co., 90 Me. 71; Russell v. Wellington, 157 Mass. 100, 31 N. E. 630; Lewick v. Glazier, 116 Mich. 493, 74 N. W. 717; Lord v. City of Anoka, 36 Minn. 176; People v. Batchelor, 22 N. Y. 128; London & N. Y. Land Co. v. City of Jellico, 103 Tenn. 320, 2 Mun. Corp. Cas. 704; City of Knoxville v. Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 883; Hamilton v. Tucker County, 38 W. Va. 71. But see City of Greeley v. Hamman, 17 Colo. 30, 28 Pac. 460.

[32] Stafford County Com'rs v. State, 40 Kan. 21, 18 Pac. 889; Harris v. State, 72 Miss. 960, 33 L. R. A. 85; Wisconsin Cent. R. Co. v. Ashland County, 81 Wis. 1, 50 N. W. 937. But see on this point the dissenting opinions of Judges Winslow and Lyon.

legislative body must be had at regular or stated intervals, and cannot be secret, either as to time or place.

Adjournments. A meeting when properly called and legally organized can, if not prohibited by law, be adjourned from time to time or from place to place and the power of the legislative body at such adjourned meeting will be full and ample to accomplish the work or transact the business which they could have legally done at the meeting from which the adjournment was taken.[33]

§ 300. Quorum.

To prevent action that may be corrupt or hasty in its character, statutory or charter provisions require not only the presence of a required number of the total members of the body[34] but also that of certain designated officials.[35] The rule is ordinarily applied that a majority of a quorum present can legally transact business,[36] but in some instances the action only of a majority of the whole number legally authorized to act is binding.[37] A number less than a quorum can, however, legally adjourn from time to time.[38]

Veto. Where the power to veto an ordinance or legislative act

[33] Hays v. Aldrichs, 115 Ala. 239; Tillman v. Otter, 93 Ky. 600, 20 S. W. 1036, 29 L. R. A. 110; Banning v. McManus, 51 Minn. 289, 53 N. W. 635; Magneau v City of Fremont, 30 Neb. 843, 47 N. W. 280, 9 L. R. A. 786.

[34] People v. Harrington, 63 Cal. 257; Bybee v. Smith, 22 Ky. L. R. 1684, 61 S. W. 15; In re State Treasurer's Settlement, 51 Neb. 116, 70 N. W. 532, 36 L. R. A. 746; Outwater v. Borough of Carlstadt, 66 N. J. Law, 510, 49 Atl. 533.

[35] State v. Pinkerman, 63 Conn. 176, 22 L. R. A. 653; Gostin v. Brooks, 89 Ga. 244, 15 S. E. 361; Griffin v. Messenger, 114 Iowa, 99, 86 N. W. 219; Zane v. Rosenberry, 153 Pa. 38; West v. Burke, 60 Tex. 51.

[36] People v. Harrington, 63 Cal. 257; Martin v. Townsend, 32 Fla. 318; City of Chariton v. Holliday, 60 Iowa, 391; State v. Cowgill & H. Mill Co., 156 Mo. 620; State v. Yates, 19 Mont. 239, 37 L. R. A. 205; Hutchinson v. Borough of Belmar, 61 N. J. Law, 443, 39 Atl. 643; Young v. Crane, 67 N. J. Law, 453, 51 Atl. 482.

[37] In re Executive Communication, 12 Fla. 653; Swift v. People, 162 Ill. 534, 44 N. E. 528, 33 L. R. A. 470; State v. Porter, 113 Ind. 79, 14 N. E. 883; State v. Alexander, 107 Iowa, 177, 77 N. W. 841; Pence v. City of Frankfort, 101 Ky. 534; State v. Mott, 111 Wis. 19, 86 N W. 569.

[38] Leavenworth, N. & S. R. Co. v. Meyer, 58 Kan. 305.

is given a designated official,[39] the law may require a particular number as a quorum or as necessary to adopt or pass such measures over the veto.[40]

§ 301. Legislative proceedings; their character; review of motive.

To the members of deliberative or legislative assemblies is entrusted the sole power of making laws. They are limited in the exercise of this power by the constitution, by their own rules of conduct and their official oath. The motives which induce the individual members of such bodies in the passage of particular statutes cannot, as a rule, be inquired into in proceedings testing the legality of such legislation.[41]

A deliberative body must act in the passage of legislation as such. This is a rule which applies also to the deliberative actions of all official bodies. That their action be considered legal, they must have met as such body and transacted business in the capacity given them by law.[42] The presumption of law exists in favor of the validity of the proceedings of legislative bodies. The manner of taking action, whether in the transaction of ordinary business or the election or appointment of officers or employes is designated by charter or statutory provisions or in their absence, by the adoption of governing rules.[43]

§ 302. Rules of order.

A legislative body possesses the inherent power to make rules which it can enforce consistent with the general law for its own

[39] North v. Cary, 4 T. & C. (N. Y.) 357; People v. Schroeder, 12 Hun, 413, affirmed in 76 N. Y. 160; People v. Fitchie, 76 Hun, 80, 28 N. Y. Supp. 600.

[40] McCracken v. City of San Francisco, 16 Cal. 591; Polasky v. Schmid, 128 Mich. 699, 87 N. W. 1030, 55 L. R. A. 614; Lawrence v. Ingersoll, 88 Tenn. 52, 12 S. W. 422, 6 L. R. A. 308. But see State v. Orr, 61 Ohio St. 384, 56 N. E. 14.

[41] Cooley, Const. Lim. 186, and cases cited; Soon Hing v. Crowley, 113 U. S. 703; Kerfoot v. City of Chicago, 195 Ill. 229; Paine v. City of Boston, 124 Mass. 486; Borough of Freeport v. Marks, 59 Pa. 253; Wood v. City of Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369. But see Champlin v. City of New York, 3 Paige (N. Y.) 573; State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262.

[42] City of Lowell v. Simpson, 92 Mass. (10 Allen) 88.

[43] Arthur v. Adam, 49 Miss. 404; Kohler v. Town of Guttenberg, 38 N. J. Law 419.

government and for regulating and controlling the transaction of its business.[44] This power may be given also either by statute or charter; if derived from these sources, it must be exercised in the manner prescribed.[45] If the authority does not exist, then, as already stated the inherent or implied power follows and it is customary in such cases to adopt those rules of order or regulations for the conduct of the members in performing their prescribed duties adopted by deliberative bodies and which are recognized and termed as "general parliamentary usage or custom."[46]

§ 303. Powers of legislative bodies.

Property or personal interests may be affected as the natural and logical result of action by a legislative body and to protect these from erroneous and illegal measures the courts are usually given by statute corrective powers,[47] although such power to exist need not be expressly granted.[48] The powers of a legislative body are necessarily large and complete, but this does not authorize an invasion of rights inherent in themselves or guaranteed by constitutional provisions.[49]

§ 304. Municipal legislation.

As already stated, the legislative branch of the sovereign power alone is competent and authorized to take valid legislative action. State legislatures have usually delegated municipal councils, or

[44] Malloy v. Board of Education of San Jose, 102 Cal. 642, 36 Pac. 948; Zeller v. Central R. Co,. 84 Md. 304, 34 L. R. A. 469.

[45] Atkins v. Phillips, 26 Fla. 281, 10 L. R. A. 158; Swift v. People, 162 Ill. 534, 44 N. E. 528, 33 L. R. A. 470; Mann v. City of Le Mars, 109 Iowa, 251; Wheeler v. Com., 98 Ky. 59; City of North Platte v. North Platte Waterworks Co., 56 Neb. 402, 76 N. W. 906.

[46] People v. Common Council of Rochester, 5 Lans. (N. Y.) 11.

[47] Hayes v. Rogers, 24 Kan. 143.

[48] Reynolds v. Oneida County Com'rs, 6 Idaho, 787, 59 Pac. 730; Huntington County Com'rs v. Beaver, 156 Ind. 450, 60 N. E. 150; Ferguson v. Monroe County Sup'rs, 71 Miss. 524; Hadlock v. G. County Com'rs, 5 Okl. 570, 49 Pac. 1012; Walsh v. Town Council of Johnston, 18 R. I. 88, 25 Atl. 849; Catron v Archuleta County Com'rs, 18 Colo. 553; Ravenscraft v. Blaine County Com'rs, 5 Idaho, 178, 47 Pac. 942.

[49] Spring Valley Waterworks v. Bartlett, 16 Fed. 615; Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 505; Tennant v. Crocker, 85 Mich. 328, 48 N. W. 577; Danforth v. City of Paterson, 34 N. J. Law, 163.

some body similar, the power to legislate with reference to those local matters which concern alone a municipality.[50] This delegation of power is apparently an exception to the rule which universally obtains that legislative powers cannot be delegated for their performance to others.[51]

A municipal council possessing, however, the power to legislate for those within its jurisdiction, must necessarily act in the same manner under the same conditions, and controlled by the same general principles of law and the special restrictions that may exist for its prototype, the legislative body of the state or nation.[52] Its enactments are laws in all their essential characteristics but limited in operation only with respect to territory.[53]

§ 305. Ordinances and resolution.

The result of legislative action by a municipal council or assembly is a local law usually denominated an ordinance.* This has been defined as "local law prescribing a general and permanent rule of conduct."[54] A recent text book writer[55] defines ordi-

[50] Ex parte Burnett, 30 Ala. 461; Fuller v. Heath, 89 Ill. 296; Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 505; State v. Clark, 28 N. H. 176; State v. Noyes, 30 N. H. 279.

[51] See the following cases with many others holding that in the exercise of such discretionary powers in the absence of fraud or a gross and wanton abuse of the power, courts will not ordinarily interfere. Shoemaker v. United States, 147 U. S. 282; Burckhardt v. City of Atlanta, 103 Ga. 302. Municipal discretion in repairing streets. Bacon v. City of Savannah, 105 Ga. 62. Question of necessity of street improvement. Church v. People, 179 Ill. 205. Extent of public improvement. Dewey v. City of Des Moines, 101 Iowa, 416. Necessity for public improvement. Sprigg v. Town of Garrett Park, 89 Md. 406, 43 Atl. 813; State v. Cornell, 53 Neb. 556, 39 L. R. A. 513; McGovern v. Inhabitants of Trenton, 60 N. J. Law, 402.

[52] City of Savannah v. Hussey, 21 Ga. 80, 68 Am. Dec. 452; City of St. Paul v. Briggs, 85 Minn. 290, 88 N. W. 984.

[53] Pittsburg, C. & St. L. R. Co. v. Hood, 94 Fed. 618; Murphy v. City of San Luis Obispo, 119 Cal. 624, 39 L. R. A. 444; City of Detroit v. Ft. Wayne & B. I. R. Co., 95 Mich. 456, 20 L. R. A. 79; Jackson v. Grand Ave. R. Co., 118 Mo. 199; Bradshaw v. City Council of Camden, 39 N. J. Law, 416; Village of Carthage v. Frederick, 122 N. Y. 268, 10 L. R. A. 178; Village of St. Johnsbury v. Thompson, 59 Vt. 300.

* 6 Curr. Law, 723.

[54] Bills v. City of Goshen, 117 Ind. 221, 3 L. R. A. 261; Blanchard v. Bissell, 11 Ohio St. 96; Robinson v. Town of Franklin, 20 Tenn. (1 Humph.) 156, 34 Am. Dec. 625.

[55] McQuillin, Mun. Ord.

nances as "local laws of a municipal corporation duly enacted by the proper authorities prescribing general, uniform and permanent rules of conduct relating to the corporate affairs of the municipality."

In common with all legislative bodies, action of municipal councils may pertain or relate to questions or subjects of a permanent or general character,[56] and those which are temporary or restricted in their operation and effect.[57] An ordinance is the result of legislative action of the former kind while a resolution is usually the form that legislative action of the latter class assumes. It may be, however, that the term resolution is the one which is applied to the permanent legislative action of a municipal body and it follows that in such cases this distinction will not apply.[58]

Where the two methods of taking legislative action can be legally followed, the resolution, ordinarily, is adopted with less formality, and, in a determination of its legal effects, laws are considered less strictly than where an ordinance is the method followed.[59] The ordinance is considered a formal law and all of the formalities prescribed by the charter or the general laws must be followed in its passage,[60] and in its construction and interpretation those principles control that are applied in the determination of the legality of legislative acts of higher bodies. Legislative powers delegated must be exercised by the municipal corporation through action of its legislative body. It cannot in turn delegate to other bodies or to individuals the performance of such duties or the exercise of such powers.[61]

[56] Village of Altamont v. Baltimore & O. S. W. R. Co., 184 Ill. 47; Cambell v. City of Cincinnati, 49 Ohio St. 463, 31 N. E. 606.

[57] State v. Ferguson, 33 N. H. 424.

[58] City of Paterson v. Barnet, 46 N. J. Law, 62; Kepner v. Com., 40 Pa. 124.

[59] City of Central v. Sears, 2 Colo. 588; City of Burlington v. Dennison, 42 N. J. Law, 165.

[60] Gleason v. Barnett, 22 Ky. L. R. 1660, 61 S. W. 20; Elyria Gas & Water Co. v. City of Elyria, 57 Ohio St. 374; Sower v. City of Philadelphia, 35 Pa. 231; City of Green Bay v. Brauns, 50 Wis. 204.

[61] Illinois Cent. R. Co. v. Illinois, 146 U. S. 387; State v. Graves, 19 Md. 351; Chicago, S. F. & C. R. Co. v. McGrew, 104 Mo. 59; Strong v. City of Brooklyn, 68 N. Y. 1; Foss v. City of Chicago, 56 Ill. 354; De Witt County v. City of Clinton, 194 Ill. 521; City of Plymouth v. Schultheis, 135 Ind. 339, 35 N. E. 12; Chilson v. Wilson, 38 Mich. 267; City of St. Louis v. Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721; Kansas City v. Mastin, 169 Mo.

It is impossible, considering the nature of a municipal corporation, that it have granted to it any powers or privileges that have for their purpose one other than a public one. Legislative attempts to accomplish this are futile, whether made by a legislative assembly of the state or a municipal council.[62] Neither in its capacity as a public agent of the government can a municipal corporation engage in a commercial or manufacturing business that involves the elements of profit and loss.[63]

§ 306. Power to pass.

To the outward form of government and the agencies created under it are given by the people the right to exercise, in the manner prescribed, specific powers,[64] and there follows from the grant of these specific powers the implied right to adopt those agencies or to exercise such other powers as are absolutely necessary to carry into effect those expressly granted.[65] The grant of powers, however, is usually construed strictly.[66]

Some cases, however, hold that certain implied powers are possessed by agencies of government in order that the results for which they were created may not be lessened, lost or destroyed.[67]

When exercised. All legislative action of a municipal corporation originates in the municipal council, and an ordinance or resolution is the visible manifestation or outward form of such action.[68] The exercise of many municipal powers, especially those

80, 68 S. W. 1037; City of Eureka v. Wilson, 15 Utah, 53; State v. Dering, 84 Wis. 585, 19 L. R. A. 858. See, also, Joyce, Elec. Law, § 236.

[62] Ex parte Byrd, 84 Ala. 17; O'Malley v. Borough of Freeport, 96 Pa. 24; Town of Greensboro v. Ehrenreich, 80 Ala. 579; Ex parte Chin Yan, 60 Cal. 78.

[63] City of Nashville v. Ray, 86 U. S. (19 Wall.) 468; City of Wetumpka v. Wetumpka Wharf Co., 63 Ala. 611; Cook v. Johnston, 58 Mich. 437.

[64] State v. Fourcade, 45 La. Ann. 717; People v. Armstrong, 73 Mich. 288; Aurora Water Co. v. City of Aurora, 129 Mo. 540, 31 S. W. 946.

[65] Littlefield v. State, 42 Neb. 223, 28 L. R. A. 588; Taintor v. Town of Morristown, 33 N. J. Law, 57; Farnsworth v. Town Council of Pawtucket, 13 R. I. 83.

[66] State v. Tryon, 39 Conn. 183; City of Keokuk v. Scroggs, 39 Iowa, 447.

[67] City of Alton v. Aetna Ins. Co., 82 Ill. 45; Champer v. City of Greencastle, 138 Ind. 339, 24 L. R. A. 768; Burg v. Chicago, R. I. & P. R. Co., 90 Iowa, 106; State v. Morris, 47 La. Ann. 1660; People v. Common Council of Detroit, 29 Mich. 108.

[68] City of St. Louis v. Bell Tel. Co., 96 Mo. 623, 2 L. R. A. 278.

pertaining to local necessities or demands, is left by the state, largely, to the discretion of the subordinate corporation, and this is true whether such powers and duties are legislative or ministerial in their character.[69] The making of local improvements belongs to this class, and municipal corporations may exercise or refrain from exercising their granted powers in respect to these without interference.[70] The power always exists, however, in the judiciary to redress wrongs, compensate injuries sustained and correct mistakes made or done by public corporations even in the exercise of discretionary and legislative powers.[71]

Where found. The power to pass ordinances, including peace ordinances so called, except in special and exceptional instances, may be found in the Constitution of the state, general or special statutes relating to or granting specific powers or dealing with specific questions and, finally, the charter of the particular municipality.[72] In this instrument will be found most commonly and frequently the grants of power to the municipal corporation.

§ 307. Limitations upon this powe.

The limitations upon the power to pass an ordinance are either express or implied and may be found either in the instrument, the source of power and authority,[73] or in the implied authority of the judicial branch of the sovereign power to pass upon and

[69] Union Pac. R. Co. v. City of Cheyenne, 113 U. S. 516; State v. Swearingen, 12 Ga. 23; Asher v. Hutchinson Water, Light & Power Co., 66 Kan. 496, 71 Pac. 813, 61 L. R. A. 52; Lincoln St. R. v. City of Lincoln, 61 Neb. 109; Poillon v. City of Brooklyn, 101 N. Y. 132.

[70] Sheridan v. Colvin, 78 Ill. 237; Fulton v. Cummings, 132 Ind. 453; City of Topeka v. Huntoon, 46 Kan. 634; Hovey v. Mayo, 43 Me. 322; Teegarden v. City of Racine, 56 Wis. 545.

[71] Union Pac. R. Co. v. City of Cheyenne, 113 U. S. 516. Illegal tax. Regenstein v. City of Atlanta, 98 Ga. 147; City of Vincennes v. Citizens' Gaslight Co., 132 Ind. 114, 16 L. R. A. 485; State v. District Court, 33 Minn. 295; Morse v. City of Westport, 136 Mo. 276; Sitzinger v. Tamaqua, 187 Pa. 539.

[72] Foster v. Police Com'rs, 102 Cal. 483; State v. Fourcade, 45 La. Ann. 717; State v. Noyes, 30 N. H. 279; Crofut v. City of Danbury, 65 Conn. 294; Lane v. City of Concord, 70 N. H. 485, 49 Atl. 687; City of El Dorado v. Beardsley, 53 Kan. 363; Landis v. Borough of Vineland, 54 N. J. Law, 75, 23 Atl. 357.

[73] Huesing v. City of Rock Island, 128 Ill. 465; City of Keokuk v. Scroggs, 39 Iowa, 447.

determine the validity [74] of all legislative action, and in exceptional cases to restrain it [75] as warranted by constitutional and statutory provisions.

The implied power of the courts to determine the legality of legislative action by municipal councils is itself restricted and limited by its character as the judicial arm or branch of the government. A legislative body is one of the three co-ordinate and distinct branches of government and to it is intrusted by the people the sole power of making laws. This involves the exercise of legislative powers which are discretionary in their character and which require for their proper exercise the use of individual judgment. It is a common principle that where an official or an official body is granted powers that partake of these characteristics, that official or official body is free to exercise them without restraint or interference by or an inquiry into of judicial bodies in the absence of fraud or action in excess of authority.[76]

Legislative action of municipal councils is further regulated by the courts through the application of those unwritten rules or canons for the construction and interpretation of statutes which have been formulated as the inevitable result of long experience,[77] and those which exist in written form providing for and controlling the passage and character of legislation.[78]

The validity of ordinances will depend upon an answer to two general questions: first, have the written and unwritten requirements controlling the enactment of legislation in respect to its verbal and mechanical form and mode of passage been complied with and, second, assuming the affirmative to the first query, is the ordinance valid considered in respect to its subject-matter and general characteristics?

[74] New Orleans M. & C. R. Co. v. Dunn, 51 Ala. 128; Sherlock v. Village of Winnetka, 59 Ill. 389; City of Frostburg v. Wineland, 98 Md. 239, 56 Atl. 811; Place v. City of Providence, 12 R. I. 1.

[75] Dailey v. City of New Haven, 60 Conn. 314, 14 L. R. A. 69; People v. Dwyer, 90 N. Y. 402; Smith v. McCarthy, 56 Pa. 359.

[76] Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 505; State v. Cozzens, 42 La. Ann. 1069, 46 Am. & Eng. R. Cas. 168; New Orleans M. & C. R. Co. v. Dunn, 51 Ala. 128; Macon Consol. St. R. C. v. City of Macon, 112 Ga. 782, 38 S. E. 60; State v. Superior Ct. of Milwaukee County, 105 Wis. 651, 48 L. R. A. 819.

[77] In re Yick Wo, 68 Cal. 294; Zorger v. City of Greensborough, 60 Ind. 1; Quinette v. City of St. Louis, 76 Mo. 402.

[78] In re Yick Wo, 68 Cal. 294; Flynn v. Canton Co., 40 Md. 312.

Presumption of validity. The presumption of law exists in favor of right acting and right thinking; this principle in criminal law finds expression in the familiar phrase that one is presumed innocent until he is proven guilty. In corporation law the courts adopt the principle that an act of a corporation is presumed to be within its legal powers until established to the contrary. The courts apply the same doctrine in the determination of cases involving the validity of ordinances where the presumption obtains that an ordinance is valid,[79] that all required formalities were complied with in its passage and that it is legal in respect to both its subject-matter and its general characteristics. The doctrine operates generally in favor of the legality of corporate action.

This principle, however, is not carried to such an extent as to conflict with the doctrine and theory that municipal corporations are bodies of restricted and limited powers. As said in an Illinois case,[80] "Municipal corporations exercise only delegated and limited powers and in the absence of express statutory provisions to that effect courts are authorized to indulge in no presumptions in favor of the validity of their ordinances. If in conformity with the express or necessarily implied grant in the charter, they are valid; otherwise, not."

§ 308. Form and title of ordinance.

The form of an ordinance may be prescribed by charter or general law;[81] otherwise, it can take any phraseology or form which the experience or taste of the writer may dictate.[82] Since it is a

[79] City of Birmingham v. Tayloe, 105 Ala. 170; Ex parte Haskell, 112 Cal. 416, 32 L. R. A. 527; Terre Haute & I. R. Co. v. Voelker, 129 Ill. 540, 22 N. E. 20; Parker v. Catholic Bishop of Chicago, 146 Ill. 158, 34 N. E. 473; Elliott v. City of Louisville, 101 Ky. 262, 40 S. W. 690; City of Duluth v. Krupp, 46 Minn. 435; Stafford v. Chippewa Valley Elec. R. Co., 110 Wis. 331; Wood v. City of Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369. But see City of Altoona v. Bowman, 171 Pa. 307.

[80] Schott v. People, 89 Ill. 195; City of St. Paul v. Laidler, 2 Minn. 190 (Gil. 159).

[81] Pope v. Town of Union, 32 N. J. Law, 343; State v. Fountain, 14 Wash. 236, 44 Pac. 270; State v. Nohl, 113 Wis. 15, 88 N. W. 1004.

[82] Los Angeles County v. Eikenberry, 131 Cal. 461, 63 Pac. 766; City of Tarkio v. Cook, 120 Mo. 1, 25 S. W. 202; Atkins v. Phillips, 26 Fla. 281, 10 L. R. A. 158; Bills v. City of Goshen, 117 Ind. 221, 3 L. R. A. 261; City of Topeka v. Huntoon, 46 Kan. 634; Hamilton v. State, 61 Md. 14; Tennant v.

law it should contain in its form the technical essentials of a law.

The form of an ordinance may also differ with its nature or character. They may be divided in this respect into administrative, contractual or penal. Penal statutes or laws are construed strictly and every intendment is taken against them.[83] On the other hand, ordinances involving contract relations and pertaining to the general administrative affairs of the city are construed liberally and given force when not in violation of some express law or principle of the law.[84]

Title. An ordinary constitutional provision in respect to legislation passed by state legislative bodies is that no law or statute shall contain more than one subject which shall be clearly expressed in the title; such a requirement is for the purpose of preventing legislation as introduced from passing upon more than one subject while the title refers to one alone,[85]—a serious reflection certainly upon the care and attention which legislators give to those matters upon which their action is expected.

It also has for its purpose the simplification of legislation by preventing incongruous and many subjects to be regulated or dealt with in the same bill and it also operates in preventing the people and legislators from being misled upon reading the title.[86] This same restriction is frequently found applying to the legislative action of municipal councils.[87]

Crocker, 85 Mich. 328; Schermerhorn v. Jersey City, 53 N. J. Law, 112; City of Allentown v. Grim, 109 Pa. 113; Boehme v. City of Monroe, 108 Mich. 401, 64 N. W. 204; Massinger v. City of Millville, 63 N. J. Law, 123, 43 Atl. 443.

[83] Ex parte Sims, 40 Fla. 432; City of Chicago v. Rumpff, 45 Ill. 90; City of St. Louis v. Dorr, 145 Mo. 466, 42 L. R. A. 686; People v. Rosenberg, 138 N. Y. 110, 20 L. R. A. 81; First Municipality v. Cutting, 4 La. Ann. 335.

[84] Whitlock v. West, 26 Conn. 406; Swift v. City of Topeka, 43 Kan. 671, 8 L. R. A. 722; Merriam v. City of New Orleans, 14 La. Ann. 318; Com. v. Robertson, 59 Mass. (5 Cush.) 438; Rounds v. Mumford, 2 R. I. 154.

[85] The Borrowdale, 39 Fed. 376; Baird v. State, 52 Ark. 326; Ex parte Haskell, 112 Cal. 412, 32 L. R. A. 527; Village of Hinsdale v. Shannon, 182 Ill. 312; Bush v. City of Indianapolis, 120 Ind. 476; City of Topeka v. Raynor, 60 Kan. 860; Elliott v. City of Louisville, 101 Ky. 262.

[86] Senn v. Southern R. Co., 124 Mo. 621; City of Chester v. Bullock, 187 Pa. 544.

[87] Ex parte Haskell, 112 Cal. 412, 32 L. R. A. 527; Stebbins v. Mayer, 38 Kan. 573, 16 Pac. 745; Callaghan v. Town of Alexandria, 52 La. Ann. 1013.

§ 309. Council and quorum; mode of action.

An ordinance or resolution, since it is a local law, must be passed by a legal legislative body acting in such capacity [88] at a meeting where that action can be legally taken and by the requisite number of votes.[89] The subject of a quorum has been considered in a preceding section to which reference is made.

A provision is frequently found in city charters to the effect that in case of a tie the mayor of the city or the presiding officer of the council shall have the power of casting the deciding vote.[90] In determining the question of a legal quorum, the right of a member to vote and act as a member of a council may be restricted by charter or statutory provisions that forbid members from voting or participating in proceedings where they are directly or indirectly interested in the subject under discussion and which is to be acted upon.[91]

Mode of action. A provision of frequent occurrence in city charters is that which requires that on the passage or adoption of every ordinance or resolution, the yeas and nays shall be called and a record made of the vote.[92] Usually it is necessary that an ordinance be read at one meeting of the city council and only voted upon for final passage after a final reading at some subsequent meeting.[93] The purpose of this provision is the prevention of ill-advised, hasty or corrupt legislation. It is scarcely neces-

[88] County of San Luis Obispo v. Hendricks, 71 Cal. 242.

[89] John v. Connell, 64 Neb. 233, 89 N. W. 806, modifying 61 Neb. 267, 85 N. W. 82.

[90] Wooster v. Mullins, 64 Conn. 340, 25 L. R. A. 694; Metropolitan St. R. Co. v. Johnson, 90 Ga. 500; Outwater v. Borough of Carlstadt, 66 N. J. Law, 510, 49 Atl. 533; People v. Bresler, 171 N. Y. 302; Campbell v. City of Cincinnati, 49 Ohio St. 463; State v. Mott, 111 Wis. 19, 86 N. W. 569.

[91] Smith v. Los Angeles I. & L. Co-operative Ass'n, 78 Cal. 289, 12 Am. St. Rep. 53; State v. Porter, 113 Ind. 79.

[92] German Ins. Co. of Freeport v. City of Manning, 95 Fed. 597; Goodyear Rubber Co. v. City of Eureka, 135 Cal. 613, 67 Pac. 1043; Sullivan v. City of Leadville, 11 Colo. 483, 18 Pac. 736; Swift v. People, 162 Ill. 534, 44 N. E. 528, 33 L. R. A. 470; Downing v. City of Miltonvale, 36 Kan. 740, 14 Pac. 281; McCormick v. Bay City, 23 Mich. 457; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434. But see City of Logansport v. Dykeman, 116 Ind. 15, 17 N. E. 587.

[93] McGraw v. Whitson, 69 Iowa, 348; Fehler v. Gosnell, 99 Ky. 380, 35 S. W. 1125; Specht v. City of Louisville, 22 Ky. L. R. 699, 58 S. W. 607; State v. Priester, 43 Minn. 373; Campbell v. City of Cincinnati, 49 Ohio St. 463, 31 N. E. 606; City of Altoona v. Bowman, 171 Pa. 307; Wright v. Forrestal, 65 Wis. 341.

sary to add that such provisions are considered mandatory in their character and compliance with them necessary to the validity of legislation.[94]

§ 310. Veto power.

As a further check upon hasty or corrupt legislation, the chief executive officer of the nation, the state or a municipal corporation, may be given the power to pass upon all bills, ordinances or resolutions and approve them if, within his judgment and discretion, they are worthy,[95] or return them to the house in which originated with his veto if, in his opinion, they are illegal, ill-advised or not warranted by reasons of public policy or of general good.[96]

After reconsideration a legislative body ordinarily has the power to pass a bill returned unapproved.[97] A larger number of votes is usually necessary to pass a bill or ordinance over an executive's veto, than required for the passage of ordinary legislation.[98]

§ 311. Ordinances; publication; manner and time of.*

It is a just and salutary principle which requires the legislative action of a municipal body to be promulgated or published in some manner before it can become effective.[99] Some charter pro-

[94] Pollok v. City of San Diego, 118 Cal. 593; Heins v. Lincoln, 102 Iowa, 69; State v. Dakota County Dist. Ct., 41 Minn. 518; Striker v. Kelly, 7 Hill (N. Y.) 9.

[95] New York & N. E. R. Co. v. City of Waterbury, 55 Conn. 19, 10 Atl. 162. The approval should be in writing. State v. Anderson, 26 Fla. 240, 8 So. 1; Chicago, R. I. & P. R. Co. v. City of Council Bluffs, 109 Iowa, 425; Hibbard v. Suffolk County, 163 Mass. 34; State v. Meier, 143 Mo. 439, 45 S. W. 306; Booth v. City of Bayonne, 56 N. J. Law, 268, 28 Atl. 381.

[96] Junction City v Webb, 44 Kan. 71; Baar v. Kirby,. 118 Mich. 392, 76 N. W. 754; Wilson v. Inhabitants of Trenton, 56 N. J. Law, 469; Pennsylvania Globe Gaslight Co. v. City of Scranton, 97 Pa. 538.

[97] Atlanta R. & P. Co. v. Atlanta Rapid Transit Co., 113 Ga. 481, 39 S. E. 12; Terre Haute & I R. Co. v. Voelker, 129 Ill. 540, 22 N. E. 20; Stutsman v. McVicar, 111 Iowa, 40, 82 N. W. 460; Caswell v. Recorder of Bay City, 99 Mich. 417, 58 N. W. 331; Oakley v. Atlantic City, 63 N. J. Law, 127.

[98] Heins v. Lincoln, 102 Iowa, 69; State v. Darrow, 65 Minn. 419, 67 N. W. 1012.

* 6 Curr. Law, 723.

[99] People v. City & County Sup'rs of San Francisco, 27 Cal. 655; County of San Francisco v. Buckman,

visions require publication or posting before final action is taken by the municipal legislative body [100] while other charters and the greater number, provide that it shall be done only after the passage of the ordinance or resolution and its approval by the mayor or presiding officer.[101]

Manner of publication. The manner of publication, as already suggested, is important in considering the reason for publication. English is the official and national language in this country and an ordinance or resolution written or published in a language other than English will not be binding.[102] Publication is usually limited to newspapers having a general circulation in the community [103] or those printed and published within the municipal limits.[104]

Form. Charter and statutory provisions again may vary as to the form of publication. This may be in book or pamphlet form,[105] or by merely posting in public places or official bulletin boards true copies of the ordinance or resolution.[106] The copy as printed or published should be duly authenticated [107] and usually,

111 Cal. 25, 43 Pac. 396; Com. v. McCafferty, 145 Mass. 384, 14 N. E. 451; McKusick v. City of Stillwater, 44 Minn. 372, 46 N. W. 769; Chamberlain v. City of Hoboken, 38 N. J. Law, 110; In re Anderson, 60 N. Y. 457; Olds v. Erie City, 79 Pa. 380; Herman v. City of Oconto, 100 Wis. 391, 76 N. W. 364.

[100] City & County of San Francisco v. Buckman, 111 Cal. 25, 43 Pac. 396; Ex parte Haskell, 112 Cal. 412, 32 L. R. A. 527; Doty v. Lyman, 166 Mass. 318; Barr v. City of New Brunswick, 58 N. J. Law, 255, 33 Atl. 477; In re Smith, 52 N. Y. 527; Bank of Columbia v. City of Portland, 41 Or. 1, 67 Pac. 1112; State v. Fountain, 14 Wash. 236.

[101] People v. City & County Sup'rs of San Francisco, 27 Cal. 655; Schweitzer v. City of Liberty, 82 Mo. 309.

[102] Davidson v. Houston, 35 La. Ann. 492; North Baptist Church v. City of Orange, 54 N. J. Law, 111, 22 Atl. 1004, 14 L. R. A. 62.

[103] Miller v. Smith, 7 Idaho, 204, 61 Pac. 824; Moss v. Village of Oakland, 88 Ill. 109; Smith v. Yoram, 37 Iowa, 89; State v. Omaha & C. B. R. & Bridge Co., 113 Iowa, 30; City of Knoxville v. Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888. An ordinance not invalid because published on Sunday

[104] Bayer v. City of Hoboken, 44 N. J. Law, 131.

[105] City of Birmingham v. Tayloe, 105 Ala. 170, 16 So. 576; Merced County v. Fleming, 111 Cal. 46, 43 Pac. 392; Union Pac. R. Co. v. Montgomery, 49 Neb. 429; People v. Maxon, 139 Ill. 306, 28 N. E. 1074, 16 L. R. A. 178.

[106] Higley v. Bunce, 10 Conn. 436; O'Hara v. Town of Park River, 1 N. D. 279, 47 N. W. 380.

[107] City of Napa v. Easterby, 76 Cal. 222, 18 Pac. 253; McChesney v. City of Chicago, 159 Ill. 223.

if an ordinance refers to maps and books, they need not be included.[108]

Time. The element of time as considered in the proper publication of a municipal ordinance may refer either to the time of publication or its frequency. The usual provision is to the effect that the ordinance or resolution shall be published in the manner provided by law for a certain length of time after its final passage,[109] or a prescribed number of times within a fixed limit of time.[110]

§ 312. Validity in respect to subject-matter and general characteristics.

The Constitution of the United States, in so far as specified, is the paramount law of this nation [111] and contains many provisions which operate as prohibitions upon the powers of all other governments or governmental agencies. Municipal action, therefore, which violates its provisions, is void. This instrument gives to the Federal government the exclusive right of exercising certain powers and also contains certain express prohibitions upon the powers of the states and, therefore, their subordinate agents, including those clauses preventing a state from enacting any law impairing the obligation of a contract,[112] the denial to any person within its jurisdiction of the equal protection of the law,[113] and the passage of laws depriving any person of life, liberty or property without due process of law.[114]

[108] City of Napa v. Easterby, 76 Cal. 222; Law v. People, 87 Ill. 385.

[109] E. M. Derby & Co. v. City of Modesto, 104 Cal. 515; People v. Town of Linden, 107 Cal. 94; Kimble v. City of Peoria, 140 Ill. 157; Richter v. Harper, 95 Mich. 221, 54 N. W. 768; North Baptist Church v. City of Orange, 54 N. J. Law, 111, 14 L. R. A. 62; Town of Stillwater v. Moor (Okl.) 33 Pac. 1024.

[110] Ex parte Fiske, 72 Cal. 125, 13 Pac. 310; People v. Keir, 78 Mich. 98, 43 N. W. 1039.

[111] United States v. Hart, Pet. C. C. 390, Fed. Cas. No. 15,316.

[112] U S. Const. art. 1, § 10, par. 1; New Jersey v. Wilson, 7 Cranch (U. S.) 164; Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 519; Nottage v. City of Portland, 35 Or. 539.

[113] U. S. Const. amend. art. XIV, § 1; Jacksonville, T. & K. R. Co. v. Prior, 34 Fla. 271; Owen v. Sioux City, 91 Iowa, 190; Sullivan v. Haug, 82 Mich. 548, 10 L. R. A. 263.

[114] See, also, the following cases holding ordinances unconstitutional because of containing discriminatory provisions directed against certain individuals because of their class, race or religious belief, thus coming within that clause of the

The Federal Constitution contains in addition in common with state constitutions what has been commonly termed a bill of rights. These provisions apply to all public corporations and they constitute a guaranty of certain personal rights and privileges.[115]

§ 313. Must not conflict with state laws or charters.

Neither can a municipal corporation or subordinate body take action that conflicts or is inconsistent with either the constitution or the laws of the state,[116] or the special provisions of its own charter,[117] and it should also harmonize with the public policy and the common law of the state.[118]

Federal Constitution cited above. Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546; Soon Hing v. Crowley, 113 U. S. 703; Yick Wo v. Hopkins, 118 U. S. 356; Gilham v. Wells, 64 Ga. 192. The following cases hold ordinances attempting to regulate personal association or employment unconstitutional because being an invasion of personal liberty: In re Maguire, 57 Cal. 604; Gastenau v. Com., 108 Ky. 473; Ex parte Smith, 135 Mo. 223, 33 L. R. A. 606. See also City of Gallatin v. Tarwater, 143 Mo. 40; U. S. Const. amend. art. XIV; In re Tiburcio Parrott, 6 Sawy. 349, 1 Fed. 481; Judson v. Reardon, 16 Minn. 431 (Gil. 387); Rutgers College Athletic Ass'n v. City of New Brunswick, 55 N. J. Law, 279, 26 Atl. 87; City of Memphis v. Winfield, 27 Tenn. (8 Humph.) 707; State v. Goodwill, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863.

[115] U. S. Const. amends. art. I, II, IV, V, VI, VIII; Lewis, Em. Dom. (2d Ed.) §§ 110–125 and 155 et seq. It has been held that the right to contract and the right to labor are property and many ordinances prohibiting or limiting these rights have been held void because considered a taking of property without due process of law or without the payment of just compensation. It is impossible even to cite the many cases bearing upon these subjects as well as the other constitutional provisions referred to in the preceding paragraphs and sections. The reader will find the questions thoroughly considered in works on Constitutional Law: Lewis, Em. Dom.; McQuillin, Mun. Ord.; Horr. & Bemis, Mun. Ord. and Tiedeman, State & Fed. Control of Persons & Prop. See, also, Abb. Mun. Corp.

[116] Hewlett v. Camp, 115 Ala. 499. Pool selling. Foster v. Police Com'rs of City & County of San Francisco, 102 Cal. 483; McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516; State v. Flint, 63 Conn. 248; State v. Callac, 45 La. Ann. 27; Crawshaw v. City of Roxbury, 73 Mass. (7 Gray) 374; People v. Detroit White Lead Works, 82 Mich. 471, 9 L. R. A. 722; Mulcahy v. City of Newark, 57 N. J. Law, 513, 31 Atl. 226; State v. McCoy, 116 N. C. 1059, 21 S. E. 690. See, also, cases fully collected in McQuillin, Mun. Ord. p. 24, n. 23.

[117] Thomas v. City of Richmond, 72 U. S. (12 Wall.) 349; Pollok v. City of San Diego, 118 Cal. 593, 50 Pac. 769; Brown v. Atlanta R. &

If, however, there is an express grant of the power to public corporations, including municipal, to deal with certain questions, especially those concerning the police power, it is immaterial that state statutes may also regulate the same matters. Municipal ordinances in such cases will be sustained though there may exist state laws upon the same subject.[119]

§ 314. General characteristics.

In addition to the prohibitions which operate as restrictions noted above, there are certain general characteristics which ordinances and resolutions as laws must possess in order that they may be valid and enforceable; they cannot be in restraint of trade, tend to monopoly,[120] or be oppressive.[121] They must operate with uniformity and equality;[122] they cannot contain provisions in derogation of common right,[123] and they must not be unreasonable

P. Co., 113 a. 462, 39 S. E. 71; State v. City of Nashville, 83 Tenn. 697; Wood v. City of Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369. The presumption, however, exists, that the city ordinance is not in conflict with the provisions of its charter.

[118] Phillips v. City of Denver, 19 Colo. 179; State v. Burns, 45 La. Ann. 34; Simrall v. City of Covington, 90 Ky. 444, 9 L. R. A. 556; Collins v. Hatch, 18 Ohio, 523; Pesterfield v. Vickers, 43 Tenn. (3 Cold.) 205.

[119] Town of Van Buren v. Wells, 53 Ark. 368, 14 S. W. 38; State v. Flint, 63 Conn. 248; Chambers v. Town of Barnsville, 89 Ga. 739; State v. Quong, 8 Idaho, 191, 67 Pac. 491; Beiling v. City of Evansville, 144 Ind. 644, 35 L. R. A. 272; In re Jahn, 55 Kan. 694; City of Monroe v. Hardy, 46 La. Ann. 1232, 15 So. 696; Mulcahy v. City of Newark, 57 N. J. Law, 513; State v. City of La Crosse, 107 Wis. 654, 84 N. W. 242.

[120] Ex parte McKenna, 126 Cal. 129; In re Lowe, 54 Kan. 757, 27 L. R. A. 545; City of St. Paul v. Laidler, 2 Minn. 190 (Gil. 159); Paterson Chronicle Co. v. City of Paterson, 66 N. J. Law, 121, 48 Atl. 589; People v. Warden of City Prison, 144 N. Y. 529, 27 L. R. A. 718; Barling v. West, 29 Wis. 307.

[121] McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516; City of Clinton v. Phillips, 58 Ill. 102; Pittsburg C., C. & St. L. R. Co. v. Town of Crown Point, 146 Ind. 421, 45 N. E. 587, 35 L. R. A. 684; People v. Keir, 78 Mich. 98; City of St. Louis v. Roche, 128 Mo. 541, 31 S. W. 915; City of Memphis v. Winfield, 27 Tenn. (8 Humph.) 707.

[122] Foster v. Police Com'rs of City & County of San Francisco, 102 Cal. 483; Borough of Norristown v. Norristown Pass. R. Co., 148 Pa. 87; City of Chattanooga v. Norman, 92 Tenn. 73, 20 S. W. 417.

[123] Soon Hing v. Crowley, 113 U. S. 703; Shelton v. City of Mobile, 30 Ala. 540; City of Atlanta v. Stein, 111 Ga. 789, 36 S. E. 932, 51 L. R. A. 335; De Ben v. Gerard, 4 La. Ann. 30; City of Tarkio v. Cook,

in their requirements,[124] they must be enacted in good faith,[125] and must be definite and certain,[126] and cannot delegate to other bodies or officials the performance of legislative and discretionary duties.[127]

The state may, however, have conferred the power on a municipal corporation to pass ordinances or take action relating to a particular subject. Many cases hold that where this is true, the determination of the municipal legislative body, as shown by the passage of an ordinance or resolution, is conclusive of the question of reasonableness or expediency.[128]

This principle is limited, however, by the rule of law which prohibits or prevents any legislative body from acting arbitrarily in regard to a matter without considering the nature of the subject, the condition sought to be remedied or the means provided.[129] Neither can municipal councils or their agencies of government

120 Mo. 1, 25 S. W. 202; State v. Hill, 126 N. C. 1139, 50 L. R. A. 473.

[124] Barbier v. Connolly, 113 U. S. 27; City of Denver v. Girard, 21 Colo. 447, 42 Pac. 662; City of Chicago v. Brownell, 146 Ill. 64; Champer v. City of Greencastle, 138 Ind. 339, 35 N. E. 14, 24 L. R. A. 768; Com. v. Wilkins, 121 Mass. 356; Read v. City of Camden, 54 N. J. Law, 347, 24 Atl. 549; Rahway Gaslight Co. v. City of Rahway, 58 N. J. Law, 510, 34 Atl. 3; State v. Ray, 131 N. C. 814, 60 L. R. A. 634; Kirkham v. Russell, 76 Va. 956.

[125] Austin v. Murray, 33 Mass. (16 Pick.) 121; State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262; Kirkham v. Russell, 76 Va. 956.

[126] Town of Huntsville v. Phelps, 27 Ala. 55; San Francisco Pioneer Woolen Factory v. Brickwedel, 60 Cal. 166; State v. Carpenter, 60 Conn. 97; Webber v. City of Chicago, 148 Ill. 313, 36 N. E. 70; City of Shreveport v. Roos, 35 La. Ann. 1010; Com. v. Cutter, 156 Mass. 52. 29 N. E. 1146; Com. v. Roy, 140 Mass. 432; State v. Zeigler, 32 N. J. Law, 262; State v. Rice, 97 N. C. 421, 2 S. E. 180.

[127] In re Flaherty, 105 Cal. 558, 27 L. R. A. 529; Harrison, De Haven and Fitzgerald, JJ. dissenting. City of Tampa v. Salomonson, 35 Fla. 446, 17 So. 581; Collins v. Hall, 92 Ga. 411; Webber v. City of Chicago, 148 Ill. 313, 36 N. E. 70; City of Plymouth v. Schultheis, 135 Ind. 339, 35 N. E. 12; City of Newton v. Belger, 143 Mass. 598; City of St. Louis v. Weitzel, 130 Mo. 600. 31 S. W. 1045; Borough of Madison v. Morristown Gaslight Co., 63 N. J. Eq. 120, 52 Atl. 158.

[128] Ex parte Delaney, 43 Cal. 478; A Coal Float v. City of Jeffersonville, 112 Ind. 15; Cleveland, C., C. & I. R. Co. v. Harrington, 131 Ind. 426; Thorpe v. Rutland & B. R. Co., 27 Vt. 140.

[129] Village of Desplaines v. Poyer, 22 Ill. App. 574, affirmed 123 Ill. 348. 14 N. E. 677; City of Evansville v. Miller, 146 Ind. 613, 45 N. E. 1054. 38 L. R. A. 161; City of Baltimore v. Radecke, 49 Md. 217.

renounce powers vested in them by the constitution and general laws of the state or pass ordinances which will disable or cripple them in performing their legal duties.[130]

§ 315. Interstate commerce.

The Federal Constitution gives to commerce the exclusive right of regulating "commerce with foreign nations and among the several states and with Indian tribes," and municipal action of whatever character taken in violation of this provision is void.[131] The absence of intention to regulate is immaterial; the effect of the action is that which will control the courts, and in construing such provisions,[132] it is the well-established principle followed without question that the Federal courts have the sole power and right of ultimately passing upon or determining questions arising under these clauses as well as other provisions that are found in the Federal constitution or Federal laws.[133]

The word "commerce" as used in the Constitution has been defined in the broadest way "it is a term of the largest import," it includes not only traffic but every species of commercial intercourse among the states and the agencies employed in the carrying on of that commercial intercourse.[134]

§ 316. The impairment of contract obligations.

That clause of the Federal Constitution which prohibits a state from passing any law impairing the obligation of a contract is important in connection with a determination of the rights which

[130] City of Rushville v. Rushville Nat. Gas Co., 132 Ind. 575, 15 L. R. A. 321; Municipality No. 3 v. Ursuline Nuns, 2 La. Ann. 611.

[131] U. S. Const. art. 1, § 8, par 3; Brown v. Maryland, 12 Wheat. (U. S.) 419; Cook v Pennsylvania, 97 U. S. 566; Tiernan v. Rinker, 102 U. S. 123. See, also, Prentice & E. Commerce Clause.

[132] Henderson v. City of New York, 92 U. S. 259; Morgan v. City of New Orleans, 112 U. S. 69; Mobile Bay Pilotage Com'rs v. Steamboat Cuba, 28 Ala. 185.

[133] Mobile County v. Kimball, 102 U. S. 691; Robbins v. Shelby County Taxing Dist., 120 U. S. 489; Myers v. Baltimore County Com'rs, 83 Md. 385, 55 Am. St. Rep. 349, 34 L. R. A. 309.

[134] Chicago & N. W. R. Co. v. Fuller, 84 U. S. (17 Wall.) 568; Mobile County v. Kimball, 102 U. S. 691; Crow v. State, 14 Mo. 237; State v. Delaware, L. & W. R. Co., 30 N. J. Law, 478; Ex parte Crandall, 1 Nev. 312; State v. Morgan, 2 S. D. 50.

may exist in favor of third parties and which, but for the existence of such a clause, might be impaired or destroyed by municipal action. The contract obligation protected by the Constitution may be one which arises because of certain transactions between the public corporation itself and some other party [135] to the transaction or altogether between third parties.[136] The state or its agencies may enter into contract obligations [137] or grant franchises or charters which partake of the nature of a contract [138] and which cannot be impaired by subsequent action. The inviolability of a contract or a contract obligation is the basis of a well governed and civilized community. Public corporations should not be exempt from performing their contracts; the fact that they are governmental agents does not relieve them of this obligation. The enforcement of this principle in respect to the contracts of public corporations is too often ignored. As said by the supreme court of the United States, "Its character as a municipal corporation does not affect the nature of its obligations to its creditors." [139]

The Federal Constitution employs the word "law" in stating the prohibition, and its meaning in connection with action impairing or destroying contract rights has been questioned at times. It is commonly in those cases where contract rights have been impaired or destroyed by the public corporation that the doubtful application of the word "law" to the particular action which accomplished certain illegal and injurious results has been raised. The law breaker or the dishonest person is usually a quibbler and seeks to avoid the results of his acts or justify his conduct by subtile and technical arguments or reasons. This term "law" has been defined as "Any enactment from whatever source originating, to which a state gives the force of law is a statute of the state within the meaning of the clause cited." [140] It would include a

[135] Nottage v. City of Portland, 35 Or. 539.

[136] Lindsay v. City of Anniston, 104 Ala. 257, 16 So. 545, 27 L. R. A. 436.

[137] Bietry v. City of New Orleans, 24 La. Ann. 21; Neill v. Gates, 152 Mo. 585.

[138] City of Chicago v. Sheldon, 76 U. S. (9 Wall.) 50; Cleveland City R. Co. v. City of Cleveland, 94 Fed. 385; Cincinnati & S. R. Co. v. Village of Carthage, 36 Ohio St. 634; City of Columbus v. Columbus St. R. Co., 45 Ohio St. 104; City of Ashland v. Wheeler, 88 Wis. 607.

[139] Meriwether v. Garrett, 102 U. S. 472. See, also, Cincinnati & S. R. Co. v. Village of Carthage, 36 Ohio St. 634.

[140] Swift v. Tyson, 16 Pet. (U. S.) 18; Chamberlain v. City of Evans-

constitutional provision, an act, ordinance or resolution, a judgment of a court of competent jurisdiction or, in short, any action whatever its character by a state or any of its subordinate agencies to which that state gives the force and effect of a law,[141] using the term in its broad sense as a command or rule of action laid down by a superior and which an inferior is bound to obey.

§ 317. Ordinances; reasonable or unreasonable.

The statement has been made that an ordinance, to be valid, must not be unreasonable.* The determination of this question, when necessary, is for the courts to decide and they will consider all of the circumstances and conditions of the necessity for the passage of the ordinance or regulation.[142] Where the element of reasonableness is involved, the weight of authority seems to be to the effect that the enactment of a law by a legislative body is conclusive on this point and precludes an investigation by the judicial branch of the government.[143] Those cases which hold to the contrary of this general rule, it seems to the author, are sustained by the better reason. A legislative body is not so far above reproach, superior in intelligence or fair and unprejudiced in its conclusions or conservative in its action as to render it infallible.[144]

§ 318. Tests of a reasonable ordinance.

It has already been suggested that when the courts have the right to determine the question of whether an ordinance is reasonable or unreasonable, they will consider all of the circumstances surrounding the purpose of, the necessity for and the passage of the ordinance.

ville, 77 Ind. 550; State v. McCann, 72 Tenn. (4 Lea) 7; 1 Bl. Comm. 14; 1 Kent, Comm. 447.

[141] District Tp. of Dubuque v. City of Dubuque, 7 Iowa, 281; Durkee v. City of Jainesville, 26 Wis. 703.

* 6 Curr. Law, 724.

[142] State v. Boardman, 93 Me. 73, 46 L. R. A. 750; City of Brownville v. Cook, 4 Neb. 101; Long v. Jersey City, 37 N. J. Law, 348; City of Lead v. Klatt, 11 S. D. 109. But see Clason v. City of Milwaukee, 30 Wis. 316.

[143] Town of Greensboro v. Ehrenreich, 80 Ala. 579; In re Ah You, 88 Cal. 99, 11 L. R. A. 408; Cosgrove v. City of Augusta, 103 Ga. 835, 42 L. R. A. 711.

[144] Com. v. Steffee, 70 Ky. (7 Bush) 161; Pieri v. City of Shieldsboro, 42 Miss. 493; Borough of Freeport v. Marks, 59 Pa. 253.

Purpose for which passed. If an ordinance as passed by a municipal corporation does not have in view the accomplishment of some object for which the corporation was especially created, it will not be considered as reasonable.[145]

Consistency with superior law. Again, an ordinance is a law of inferior class or grade, and, to be reasonable, it must conform to all laws of a superior grade or class. An ordinance or resolution, therefore, which is not in harmony with the constitution, the general laws of the state or the charter of the municipality, will not be regarded as reasonable.[146]

Surrounding conditions. The reasonableness of an ordinance or a resolution in many cases is determined entirely by the surrounding conditions and circumstances, and its operation upon the object the ordinance was designed to affect.[147] The population of a municipality, its character, its area, physical characteristics and charter, whether manufacturing, mercantile or otherwise, are a few of the many conditions that courts have to consider.[148]

§ 319. Amendment or repeal of legislative action.*

The power to legislate carries with it by implication, except as specially prohibited or limited by charter or constitutional provisions, the right to repeal or amend such legislation by subsequent action of the same body.[149] The amendment or repeal of existing laws may be effected directly or through the application

[145] Los Angeles County v. Hollywood Cemetery Ass'n, 124 Cal. 344; People v. Armstrong, 73 Mich. 288, 2 L. R. A. 721.

[146] City of Placerville v. Wilcox, 35 Cal. 21; City of Durango v. Reinsberg, 16 Colo. 327; Simrall v. City of Covington, 90 Ky. 444, 9 L. R. A. 556; State v. Payssan, 47 La. Ann. 1029.

[147] Wills v. City of Ft. Smith, 70 Ark. 221, 66 S. W. 922; City of Chicago v. Wilson, 195 Ill. 19, 57 L. R. A. 127; Evison v. Chicago, St. P., M. & O. R. Co., 45 Minn. 370, 11 L. R. A. 434; City of Austin v. Austin City Cemetery Ass'n, 87 Tex. 330.

[148] Kip v. City of Paterson, 26 N. J. Law (2 Dutch.) 298; City of Hudson v. Thorne, 7 Paige (N. Y.) 261. See, also, Abb. Mun. Corp. § 547.

[149] Southern Bell Tel. & Teleg. Co. v. City of Richmond, 98 Fed. 671, affirmed (C. C. A.) 103 Fed. 31; Foster v. Police Com'rs, 102 Cal. 483; Ryce v. City of Osage, 88 Iowa. 558; Lowry v. City of Lexington, 113 Ky. 763, 68 S. W. 1109; State v. Cozzens, 42 La. Ann. 1069, 8 So. 268; Robinson v. City of Baltimore, 93 Md. 208, 49 Atl. 4; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434.

of the doctrine of implication.[150] But courts are ever disinclined to repeal by implication in determining the effect of legislation upon that already existing, and,[151] unless it clearly appears from the attendant circumstances and conditions that it was the intent of the legislative body to amend or repeal [152] or unless the legislation is so clearly inconsistent and repugnant that all cannot stand, the doctrine will not be applied.[153]

The amendment or repeal may be effected through the adoption of a constitutional amendment or provision,[154] the passage of a statute either general or special when the latter is not prohibited,[155] and through the local action of a municipal council in respect to its own transactions.[156]

§ 320. Restrictions upon the power to amend or repeal.*

Limitations may exist in respect to the power to amend or repeal either as to the mode or because of the subject-matter of the legislation.[157]

[150] Goldsmith v. City of Huntsville, 120 Ala. 182, 24 So. 509; Holdom v. City of Chicago, 169 Ill. 109; Larkin v. Burlington, C. R. & N. R. Co., 85 Iowa 492, 52 N. W. 480; De Lano v. Doyle, 120 Mich. 258; State v. Enger, 81 Minn. 399, 84 N. W. 218; Hutchins v. Town of Durnham, 118 N. C. 457, 32 L. R. A. 706; Knight v. Town of West Union, 45 W. Va. 194, 32 S. E. 163.

[151] Goldsmith v. City of Huntsville, 120 Ala. 182; Thompson v. City of Highland Park, 187 Ill. 265; In re Bailey, 64 Kan. 887, 68 Pac. 53; Ruell v. City of Alpena, 108 Mich. 290, 66 N. W. 49; City of Erie v. Griswold, 184 Pa. 435; City of Providence v. Union R. Co., 12 R. I. 473.

[152] Rice v. Foster, 4 Harr. (Del.) 479; Greeley v. City of Jacksonville, 17 Fla. 174; City of Grand Rapids v. Norman, 110 Mich. 544, 68 N. W. 269.

[153] People v. Mount, 186 Ill. 560, 58 N. E. 360; Smyrk v. Sharp, 82 Md. 97; People v. Furman, 85 Mich. 110; City of St. Louis v. Weitzel, 130 Mo. 600, 31 S. W. 1045; Ex parte Wolf, 14 Neb. 24; Treasurer of Elizabeth v. Dunning, 58 N. J. Law, 554.

[154] Mulcahy v. City of Newark, 57 N. J. Law, 513.

[155] Wethington v. City of Owensboro, 21 Ky. L. R. 960, 53 S. W. 644; People v. Brill, 120 Mich. 42; Treasurer of Elizabeth v. Dunning, 58 N. J. Law, 554.

[156] Greeley v. City of Jacksonville, 17 Fla. 174; First Nat. Bank of Du Quoin v. Keith, 183 Ill. 475; Welch v. Bowen, 103 Ind. 256; Robinson v. City of Baltimore, 93 Md. 208; Chenango Bank v. Brown, 26 N. Y. 467; City of Philadelphia v. Bowman, 175 Pa. 91; Ashland Water Co. v. Ashland County, 87 Wis. 209, 58 N. W. 235.

* 6 Curr. Law, 723.

[157] People v. Mount, 186 Ill. 560,

Legislative action may result in the granting to or acquirement of contract, vested or property rights by third parties, and the law universally obtains that such rights cannot be impaired or destroyed by the passage of subsequent legislation.[158]

§ 321. Enforcement of ordinances.

The possession of the power to legislate or to pass laws with reference to matters of local interest and necessary to the preservation of the public peace necessarily carries with it the power to enforce such valid and reasonable laws and regulations as may in the discretion of the corporate authorities be adopted to secure these objects.[159] The power to enforce ordinances in conjunction with that necessary to their legal passage is derived from the legislature.[160] Municipal corporations, the cases hold, as a rule, do not possess an inherent or implied power to impose penalties for the violation of their laws, or to enforce them in any other manner than that prescribed by the charter.[161] But municipal corporations are not permitted, even where the express power to enforce ordinances is given, to impose severe fines or long terms of imprisonment.[162]

58 N. E. 360; Swindell v. State, 143 Ind. 153, 35 L. R. A. 50; Id., 146 Ind. 527, 45 N. E. 700; Ryce v. City of Osage, 88 Iowa, 558; Naegely v. City of Saginaw, 101 Mich. 532; State v. Cowgill & H. Mill Co., 156 Mo. 620; Ashland Water Co. v. Ashland County, 87 Wis. 209.

[158] Louisiana v. Police Jury of St. Martin's Parish, 111 U. S. 716; Bishoff v. State, 43 Fla. 67, 30 So. 808; Baldwin v. Smith, 82 Ill. 162; City of Terre Haute v. Lake, 43 Ind. 480; City of New Orleans v. Great Southern Tel. & Teleg. Co., 40 La. Ann. 41; Bigelow v. Hillman, 37 Me. 52; State v. Laclede Gaslight Co., 102 Mo. 472; Hudson Tel. Co. v. Jersey City, 49 N. J. Law, 303, 8 Atl. 123; Bassett v. City of El Paso, 88 Tex. 169; City of Ashland v. Wheeler, 88 Wis. 607. See, also, Abb. Mun. Corp. § 551.

[159] Siloam Springs v. Thompson, 41 Ark. 456; Hamilton v. City of Carthage, 24 Ill. 22. A public corporation de facto as well as one de jure can maintain an action for a penalty. Waters Pierce Oil Co. v. Town of New Iberia, 47 La. Ann. 863; City of Charleston v. Beller, 45 W. Va. 44, 30 S. E. 152.

[160] Moran v. City of Atlanta, 102 Ga. 840, 30 S. E. 298; State v. Bright, 38 La. Ann. 1.

[161] State v. Zeigler, 32 N. J. Law, 262; Blanchard v. City of Bristol, 100 Va. 469, 41 S. E. 948.

[162] City of Eureka Springs v. O'Neal, 56 Ark. 350, 19 S. W. 969; Ex parte Cheney, 90 Cal. 617; Ex parte Solomon, 91 Cal. 440; State v. Carpenter, 60 Conn. 97; City of Carlisle v. Hechinger, 20 Ky. L. R. 74, 45 S. W. 358; State v. Arnauld, 49 La. Ann. 104; Magneau v. City of Fremont, 30 Neb. 843, 9 L. R. A.

§ 322. Mode of enforcing ordinances; trial by jury.

A peace ordinance is usually enforced by the arrest of the offender, and a hearing in some court of competent jurisdiction in proceedings brought by the municipality.[163] When the gravamen of the offense is the violation of some municipal ordinance, because of the class of offenses dealt with and the urgent necessity for a speedy hearing and punishment, the procedure is informal in its character,[164] and the offender is not entitled to the constitutional right of a trial by jury.[165] This question is interesting and important and has given occasion for many decisions by the courts. The weight of authority sustains the principle given and these rulings are based upon the trivial and petty character of the offense and the urgent necessity as stated above for a speedy trial.[166]

§ 323. Enforcement by civil action.

The other mode of enforcing an ordinance is through the agency of a civil action brought against the offending party and designed

786; Smith v. Treasurer of Clinton, 53 N. J. Law, 329.

[163] People v. George, 26 Colo. 475; State v. Faber, 50 La. Ann. 952; Village of Vicksburg v. Briggs, 85 Mich. 502, 48 N. W. 625; Shafer v. Mumma, 17 Md. 331; State v. Robitshek, 60 Minn. 123, 61 N. W. 1023, 33 L. R. A. 33; City Council of Abbeville v. Leopard, 61 S. C. 99; State v. White, 76 N. C. 15; City of Spokane v. Robison, 6 Wash. 547. See, also, City of Seattle v. Chin Let, 19 Wash. 38, 52 Pac. 324, and Abb. Mun. Corp. § 554.

[164] Wheeler v. City of Plymouth, 116 Ind. 158; State v. Boneil, 42 La. Ann. 1110, 10 L. R. A. 60; City of Gallatin v. Tarwater, 143 Mo. 40, 44 S. W. 750; Haynes v. City of Cape May, 50 N. J. Law, 55; Weller v. City of Burlington, 60 Vt. 28.

[165] United States v. Green, 8 Mackey (D. C.) 230; Hill v. City of Dalton, 72 Ga. 314; Wagner v. City of Rock Island, 146 Ill. 139, 21 L. R. A. 519, affirming 45 Ill. App. 444; City of Lansing, v. Chicago, M. & St. P. R. Co., 85 Iowa, 215; State v. Glenn, 54 Md. 572; Giardina v. City of Greenville, 70 Miss. 896; Delione v. Long Branch Com'rs, 55 N. J. Law, 108; State v. Williams, 40 S. C. 373; State v. Prescott, 27 Vt. 194.

[166] Natal v. Louisiana, 139 U. S. 621, affirming State v. Natal, 39 La. Ann. 439; In re Kinsel, 64 Kan. 1, 56 L. R. A. 475; State v. Grimes, 83 Minn. 460; Delaney v. Kansas City Police Ct., 167 Mo. 667; Liberman v. State, 26 Neb. 464; Greeley v. City of Passaic, 42 N. J. Law, 87; People v. McCarthy, 45 How. Pr. (N. Y.) 97; Inwood v. State, 42 Ohio St. 186; Wong v. City of Astoria, 13 Or. 538; Ex parte Schmidt, 24 S. C. 363; Ex parte Marx, 86 Va.

to recover a penalty fixed by law.[167] These actions are civil in their nature, not criminal, and are generally brought in special courts of limited jurisdiction and possessing, as a rule, no general power to determine or pass upon civil rights.[168] A penalty incurred under an ordinance may be enforced after the expiration of the period it was intended to regulate.[169]

§ 324. Ordinances; on whom and what binding.

Municipal ordinances and resolutions being laws are binding upon all persons[170] and interests[171] temporarily or permanently within the limits of municipal jurisdiction. Aliens or transients equally with citizens and residents are bound by, and it is their duty to respect and obey, the laws of that government or governmental agency within whose borders they may be.[172] They cannot evade, in organized or civilized communities, their duty to society.

40; State v. Kennan, 25 Wash. 621; Ogden v. City of Madison, 111 Wis. 413.

[167] Goldsmith v. City of Huntsville, 120 Ala. 182, 24 So. 509; Miller v. O'Reilly, 84 Ind. 168; City of Davenport v. Bird, 34 Iowa, 524; In re Bushey, 105 Mich. 64; Moran v. Pullman Palace Car Co., 134 Mo. 641, 36 S. W. 659, 33 L. R. A. 755.

[168] City of Hartford v. Talcott, 48 Conn. 525; Brink's Chicago City Exp. Co. v. Kinnare, 168 Ill. 643; Brophy v. City of Perth Amboy, 44 N. J. Law, 217; State v. Threadgill, 76 N. C. 17; Com. v. Thompson, 110 Pa. 297; City of Lead v. Klatt, 13 S. D. 140; Sparta Corp. v. Lewis, 91 Tenn. 370; Village of Platteville v. Bell, 43 Wis. 488.

[169] City of Kansas City v. White, 69 Mo. 26; Stevens v. Dimond, 6 N. H. 330.

[170] North Birmingham St. R. Co. v. Calderwood, 89 Ala. 247; Bott v. Pratt, 33 Minn. 323; Grace v. Walker, 95 Tex. 39, 64 S. W. 930, 65 S. W. 482.

[171] Folmar v. Curtis, 86 Ala. 354; City & Suburban R. Co. v. City of Savannah, 77 Ga. 731; McKee v. McKee, 47 Ky. (8 B. Mon.) 433; Parker v. City of New Brunswick, 30 N. J. Law, 395; Rose v. Hardie, 98 N. C. 44; City of Knoxville v. King, 75 Tenn. (7 Lea) 441. But see exceptions to the general application of estray ordinances. Spitler v. Young, 63 Mo. 42, and Plymouth Com'rs v. Pettijohn, 15 N. C. (4 Dev.) 591.

[172] In re Vandine, 23 Mass. (6 Pick.) 187. "The by-laws which are made by corporations having a local jurisdiction are to be observed and obeyed by all who come within it in the same manner as aliens and strangers within the commonwealth are bound to know and obey the laws of the land notwithstanding they may not know the language in which they are written." Whitfield v. Longest, 28 N. C. (6 Ired.) 268; Town of Marietta v. Fearing, 4 Ohio, 427.

All persons upon whom ordinances are binding are chargeable with notice of their existence and the extent of their operation. An ordinance is a law and the familiar maxim that ignorance of the law excuses no one applies.[173]

§ 325. Ordinances; where operative.

On the other hand, municipal ordinances or resolutions can have no extra territorial force or effect,[174] and this is true even in cases where a municipality may have acquired property outside its geographical limits. But within the territorial limits municipal ordinances or resolutions apply to every part included within their operation.[175] Where the power to pass them exists, ordinances or resolutions applying only to certain restricted and designated parts of the municipality are valid.[176] These include the greater number of peace ordinances. Many acts done upon private premises cannot be controlled by a municipality, that can, however, prohibit or regulate the doing of the act in a public place or upon the streets.[177] The condition of drunkenness illustrates well this proposition. The rule also applies to local improvement ordinances.

§ 326. Ordinances invalid in part.

It often happens that certain provisions or sections of a municipal ordinance are invalid while other sections and portions are valid.* This fact or condition does not authorize a court to declare or hold void parts distinct and separate which can be en-

[173] North Birmingham St. R. Co. v. Calderwood, 89 Ala. 247; Mather v. City of Ottawa, 114 Ill. 659; Jackson v. Grand Ave. R. Co., 118 Mo. 199; Central of Georgia R. Co. v. Bond, 111 Ga. 13; Trigally v. City of Memphis, 46 Tenn. (6 Cold.) 382.

[174] South Pasadena v. Los Angeles Terminal R. Co., 109 Cal. 315; Taylor v. City of Americus, 39 Ga. 59; Robb v. City of Indianapolis, 38 Ind. 49; Gass v. City of Greenville, 36 Tenn. (4 Sneed) 62.

[175] The Palmetto, 1 Biss. 140, Fed. Cas. No. 10,699; Gilmore v. Holt, 21 Mass. (4 Pick.) 258; Ex parte McNair, 13 Neb. 195.

[176] Barbier v. Connolly, 113 U. S. 27; L'Hote v. City of New Orleans, 177 U. S. 587; City of Chicago v. Stratton, 162 Ill. 494, 35 L. R. A. 84; People v. Lewis, 86 Mich. 273; City of Chattanooga v. Norman, 92 Tenn. 73; Grace v. Walker, 95 Tex. 39, 64 S. W. 930, 65 S. W. 482.

[177] Hayden v Noyes, 5 Conn. 391; State v. Sevier, 117 Ind. 338; Com. v. Morrisey, 157 Mass. 471.

* 6 Curr. Law, 724.

forced.[178] In these cases the separable provisions or parts that are valid must stand as the law,[179] while the others should be held inoperative and, therefore, of no effect.[180] If, however, an ordinance is in part invalid and that part is so commingled with the valid portions as to render a separation impossible, the whole will be regarded as fatally defective.[181] This principle is also true where the ordinance is to be considered as an entirety and where each part has some bearing or influence over the rest.[182]

§ 327. Construction of ordinances.

An ordinance or resolution is a local law and, therefore, those rules of construction which ordinarily apply to statutes or laws of a higher grade are adopted by the courts in determining the force and effect of doubtful or ambiguous words, phrases, and clauses.[183] That construction is ordinarily adopted which gives a reasonable meaning and effect[184] and which will sustain or uphold the validity, not only of the different parts or clauses, but considering it as a whole.[185]

The intent of the legislative body is to be ascertained and this intent is best evidenced by a construction made cotemporaneously

[178] McQuillin, Mun. Ord. § 295, and many cases cited.

[179] City of Birmingham v. Alabama G. S. R. Co., 98 Ala. 134, 13 So. 141; In re Ah Toy, 45 Fed. 795; City of Eureka Springs v. O'Neal, 56 Ark. 350, 19 S. W. 969; San Luis Obispo v. Greenberg, 120 Cal. 300, 52 Pac. 797; State v. Dillon, 42 Fla. 95, 28 So. 781; Illinois Cent. R. Co. v. People, 161 Ill. 244; City of Indianapolis v. Bieler, 138 Ind. 30, 36 N. E. 857; State v. Schoenig, 72 Minn. 528; Bailey v. State, 30 Neb. 855, 47 N. W. 208; Sterling v. City of Camden, 65 N. J. Law, 190, 46 Atl. 781; Town of Rutherford v. Swink, 96 Tenn. 564.

[180] Magneau v. City of Fremont, 30 Neb. 843, 9 L. R. A. 786; In re Langston, 55 Neb. 310, 75 N. W. 828; State v. Earnhardt, 107 N. C. 789.

[181] City of Birmingham v. Alabama G. S. R. Co., 98 Ala. 134; Chamberlain v. City of Hoboken, 38 N. J. Law, 110; State v. Webber, 107 N. C. 962.

[182] Cicero Lumber Co. v. Town of Cicero, 176 Ill. 9, 42 L. R. A. 696; City of Omaha v. Harmon, 58 Neb. 339, 78 N. W. 623.

[183] Village of Vicksburg v. Briggs, 102 Mich. 551, 61 N. W. 1; Denning v. Yount, 62 Kan. 217, 61 Pac. 803.

[184] First Municipality v. Cutting, 4 La. Ann. 335; Rounds v. Mumford, 2 R. I. 154.

[185] Seaboard Nat. Bank v. Woesten, 147 Mo. 467, 48 S. W. 939, 43 L. R. A. 279; Cope v. Atlantic City (N. J. Law) 47 Atl. 440; Grace v. Walker, 95 Tex. 39, 64 S. W. 930, 65 S. W. 482.

with the passage of legislation.[186] That construction should also be given which is based upon a state of things existing at the date of the passage of the ordinance, not upon conditions before or after.[187] If two interpretations or meanings are possible as determined by the rules of construction, that should be adopted which would make the ordinance lawful,[188] and ordinances should also be construed in connection with the city charter and public laws.[189]

§ 328. When strictly and when liberally construed.

Ordinances that are penal in their character that provide some punishment, either a fine or imprisonment,[190] or that impose a forfeiture for their violation, should be construed strictly.[191] All ordinances also that are passed by virtue of the exercise of an implied power of a municipal corporation should be given a strict construction.[192]

A municipal corporation has for its purpose the better protection of public interests within its jurisdiction, and ordinances or resolutions passed in conservation of such should be construed liberally in favor of the public.[193] The same rule also applies to all legislative acts which directly or indirectly confer grants, franchises or privileges to private parties in derogation of common right or which partake of the nature of a monopoly or are exclusive in their character.[194]

[186] Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546; Brown v. Piper, 91 U. S. 37; In re Langston, 55 Neb. 310; Saunders v. City of Nashua, 69 N. H. 492, 43 Atl. 620; Clark v. City of Elizabeth, 61 N. J. Law, 565.

[187] Hazlehurst v. City of Baltimore, 37 Md. 199.

[188] Swift v. City of Topeka, 43 Kan. 671, 8 L. R. A. 772; Lowry v. City of Lexington, 113 Ky. 763, 68 S. W. 1109; Merriam v. City of New Orleans, 14 La. Ann. 318.

[189] Pittsburg, C. & St. L. R. Co. v. Hood (C. C. A.) 94 Fed. 618; City of San Luis Obispo v. Fitzgerald, 126 Cal. 279; Sparks v. Stokes, 40 N. J. Law, 487; State v. Austin, 114 N. C. 855, 19 S. E. 919, 25 L. R. A. 283; Town Council of McCormick v. Calhoun, 30 S. C. 93.

[190] City of Chicago v. Rumpff, 45 Ill. 90; Com. v. Brooks, 99 Mass. 434; City of St. Louis v. Dorr, 145 Mo. 466, 42 L. R. A. 686; Giardina v. City of Greenville, 70 Miss. 896, 13 So. 241; People v. Rosenbery, 138 N. Y. 410.

[191] Board of Health of Glen Ridge v. Werner, 67 N. J. Law, 103, 50 Atl. 585.

[192] Kyle v. Malin, 8 Ind. 34; Sharp v. Johnson, 4 Hill (N. Y.) 92.

[193] State v. Tryon, 39 Conn. 183; Doane v. City of Omaha, 58 Neb. 815.

[194] Freeport Water Co. v. Free-

II. EXECUTIVE.

§ 329. Introductory.

The second branch of our form of government is the executive whose business and duty it is to enforce legislation passed by law-making bodies and administer the executive and ministerial duties appertaining to this department. The judicial branch determines the methods and manner of the application of laws and, in many cases, acting under constitutional provisions, determines also their validity. The executive department, it is needless to say, is subject to statutory and constitutional provisions and to the judgment of the judiciary.

The line between the duties required of executive officials distinguished from those performed by legislative and judicial officers is clearly marked and one of the most essential of attributes for an efficient and just executive official is a recognition of the limitations imposed upon him by law; of the existence of two co-ordinate branches and of his place in the general scheme or plan of government.[195]

§ 330. Source of power.

To the legislative department of government is given the sole power of making laws; to the executive, the sole power of enforcing them, and to the judicial, the exclusive power of interpretation. Executive action, therefore, to be legal, must not only be warranted but authorized by some grant of power or through the imposition of some duty, otherwise it will be considered illegal and a usurpation of power.[196] The extent and scope of their

port City, 180 U. S. 587; Traverse City Gas Co. v. Traverse City, 130 Mich. 17, 89 N. W. 574.

[195] Mississippi v. Johnson, 71 U. S. (4 Wall.) 475; Fox v. McDonald, 101 Ala. 51, 21 L. R. A. 529; Ex parte Allen, 26 Ark. 9; State v. Staub, 61 Conn. 568; McWhorter v. Pensacola & A. R., 24 Fla. 417, 2 L. R. A. 504; State v. Towns, 8 Ga. 360; State v. Hyde, 121 Ind. 20; State v. Shakespeare, 41 La. Ann. 156; In re Dennett, 32 Me. 508; Magruder v. Swann, 25 Md. 173; In re Sup'rs of Election, 114 Mass. 247; People v. Hurlbut, 24 Mich. 63; Attorney General v. Brown, 1 Wis. 513; Wyman, Administrative Law, §§ 17–25.

[196] Dash v. Van Kleeck, 9 Johns. (N. Y.) 477; Lamar v. Brown, 92 U. S. 194; Kilbourn v. Thompson, 103 U. S. 191; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co., 110 U. S. 682; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418;

powers and the performance of their duties with the manner and time is designated by law. The measure or the test of the validity of executive or administrative action is the existence of a law or a custom or usage having the force and effect of law.[197]

§ 331. The governor and mayor.

The governor of a state and the mayor of a city are each the highest executive official respectively in their different organizations. Each as the highest executive official represents the community abroad and the government at home. The nature, extent and character of particular duties and the manner of their performance will be considered in that chapter discussing public office and officials.[198] Within the range of their discretionary powers and duties, as given them by law or custom, the expediency of their performance in respect to it, and the manner, is a matter of which they are the exclusive judges and their judgment is not to be interfered with by the courts except in cases of fraud or gross abuse of power.[199] Courts are not at liberty to determine whether such discretion is exercised wisely or unwisely; they act in this respect as the agents of a corporate organization and those persons and interests included within it and the familiar rule of principal and agent apply. The performance of duties can be compelled where they do not involve the elements of discretion or judgment and where the law requires them to be done.[200]

In re Neagle, 135 U. S. 1; Logan v. United States, 144 U. S. 295; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362; In re Debs, 158 U. S. 579; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co., 167 U. S. 499; In re Sims, 54 Kan. 1, 37 Pac. 135, 25 L. R. A. 110; State Treasurer v. Weeks, 4 Vt. 222; Paley, Moral Philosophy, bk. 6, c. 8. "The first maxim of a free state is that the laws be made by one set of men and administered by another; in other words, that the legislative and judicial characters be kept separate." 1 Bl. Comm. 269; Montesquieu, Spirit of Laws, bk. 11, c. 6.

[197] Harbin v. Stewart, 4 Port. (Ala.) 370; Haynes v. Butler, 30 Ark. 69; People v. Hays, 4 Cal. 127; Backman v. Town of Charlestown, 42 N. H. 125; Western Union Tel. Co. v. Myatt, 98 Fed. 335.

[198] Covington & M. R. Co. v City of Athens, 85 Ga. 667, 11 S. E. 663; Fletcher v. Collins, 111 Ga. 253; Pedrick v. Bailey, 78 Mass. (12 Gray) 161; Tryon v. Pingree, 112 Mich. 338, 70 N. W. 905, 37 L. R. A. 222.

[199] Halbut v. Forrest City, 34 Ark. 246; In re Inquires of Governor, 58 Mo. 369; City of St. Louis v. Brown, 155 Mo. 545; Jane v. Alley, 64 Miss. 446.

[200] Harrison County Com'rs v. Benson, 83 Ind. 469; Kansas Pac.

§ 332. Police and fire boards.

The abstract right to provide these boards for municipal corporations is generally conceded, as the necessity for them in such organizations exists without doubt. They have general charge of the protection of property and persons [200a] and the range of their duties may include not only the administrative management of their respective departments [201] but the exercise of quasi legislative duties in respect to the making and enforcement of regulations tending to their better efficiency.[202]

§ 333. Highway officers.

The right of a highway board or of a highway official to perform certain duties and maintain specific rights is dependent, as usual, with all executive or administrative officials, upon the existence of some law creating the office and prescribing its duties and powers.[203] Those properly attached to highway officers pertain to the making and maintenance of all public ways.[204] Within the scope of their powers, their action in this respect is conclusive, as the exercise of all administrative duties involves the use of judgment and discretion and a familiar principle of law applies protecting them in the honest use of their judgment and discre-

R. Co. v. Reynolds, 8 Kan. 628; State v. King, 136 Mo. 309; Salmon v. Haynes, 50 N. J. Law, 97, 11 Atl. 151.

[200a] Fowler v. Athens City Waterworks Co., 83 Ga. 222; Heller v. City of Sedalia, 53 Mo. 159.

[201] Odineal v. Barry, 24 Miss. 9; People v. Jewett, 15 Misc. 227, 36 N. Y. Supp. 778.

[202] People v. French, 32 Hun (N. Y.) 112; People v. Welles, 14 Misc. 226, 35 N. Y. Supp. 672; People v. McClave, 57 Hun, 587, 10 N. Y. Supp. 561.

[203] Spann v. State, 14 Ala. 588; Phinizy v. Eve, 108 Ga. 360; People v. Whipple, 187 Ill. 547, reversing 87 Ill. App. 145; State v. Sullivan, 74 Ind. 121; McManus v. Inhabitants of Weston, 164 Mass. 263, 31 L. R. A. 174; City of Vicksburg v. Marshall, 59 Miss. 563; In re Haynes, 54 N. J. Law, 6, 22 Atl. 923; Jensen v. Polk County Sup'rs, 47 Wis. 298.

[204] Webb v. Town of Rocky-Hill, 21 Conn. 468; Brown v. Robertson, 123 Ill. 631, 15 N. E. 30; Kruger v. Le Blanc, 70 Mich. 76, 37 N. W. 880; Onderdonk v. Inhabitants of Plainfield, 42 N. J. Law, 480; Talmage v. Huntting, 29 N. Y. 447; Hyde v. Town of Jamaica, 27 Vt. 443; Bibb County v. Reese, 115 Ga. 346, 41 S. E. 636; Balke v. Bailey, 20 Iowa, 124.

tion.[205] They are not considered as judicial or quasi judicial officers.

§ 334. Park and street boards.

The creation of a park board is a special exercise of what may be termed the power to minister to the local wants or needs of a particular community and the laws creating park districts or departments and placing their administration and control in special boards are construed strictly and their rights will depend conversely upon the ordinary interpretation of the statutory authority.[206] The extent and manner of control will depend upon the same authority. An exclusive power of control is usually vested in these boards and if this does not appear in the statute, it will be conceded by intendment as a manifest confusion will arise from an attempted concurrent exercise of independent authority.[207]

Park commissioners also perform quasi legislative duties in common with other boards in the formulating of rules regulating the use of public property within their jurisdiction,[208] and they also have the power, unless restricted by civil service rules, to hire, discharge and punish their employes.[209]

The time and manner of doing necessary work and the extent of improvements is ordinarily left to their discretion in the exercise of which courts will not usually interfere.[210]

§ 335. County boards, commissioners or supervisors.

A county or political division of similar character, under the classification of public corporations, is regarded as a public quasi

[205] Irving v. Ford, 65 Mich. 241; Beardslee v. Dolge, 143 N. Y. 160.

[206] McCormick v. South Park Com'rs, 150 Ill. 516, 37 N. E. 1075; Barney v. City of New York, 78 Hun, 337, 29 N. Y. Supp. 175.

[207] West Chicago Park Com'rs v. City of Chicago, 170 Ill. 618; Symons v. City & County of San Francisco, 115 Cal. 555; Philbrick v. Town of University Place, 106 Iowa, 352, 76 N. W. 742; West Chicago Park Com'rs v. McMullen, 134 Ill. 170, 25 N. E. 676, 10 L. R. A. 215.

[208] Gushee v. City of New York, 42 App. Div. 37, 58 N. Y. Supp. 967, and cases therein discussed.

[209] People v. Robb, 55 Hun, 425, 8 N. Y. Supp. 502.

[210] West Chicago Park Com'rs v. City of Chicago, 152 Ill. 392; West Chicago Park Com'rs v. City of Chicago, 170 Ill. 618; In re Knaust, 101 N. Y. 188; Brickwell v. Hamele, 57 Wis. 490; Turner v. City of Detroit, 104 Mich. 326, 62 N. W. 405.

corporation and, therefore, possesses small powers of local initiative. This condition tends to restrict county supervisors or commissioners in the performance of duties with which similar officers of other political organizations are charged.[211] At the same time because of this fact, such county boards and officers are usually vested with a greater diversity of duties and powers than officers of similar grades in other political organizations. Their powers and duties are not only administrative in their character but also quasi legislative and where they are vested with this power, quasi judicial in respect to the consideration and allowance of claims against the county.[212] As a general rule, a board of county commissioners or supervisors is clothed with the legal authority to do whatever the corporate or political entity, the county, can do, except in respect to those acts or matters the transaction or cognizance of which is exclusively vested by the constitution or statutes in some other officer or person.[213] Their duties include the general management of the finances and the property of the county including its protection and maintenance, the purchase of the necessary supplies, the hiring of the necessary employes,[214] and in addition they may be vested with the power of maintaining public ways,[215] including bridges.[216]

[211] Martin v. Townsend, 32 Fla. 327; Platter v. Elkhart County Com'rs, 103 Ind. 369; Hawkins v. Carroll County Sup'rs, 50 Miss. 735; 7 Am. & Eng. Enc. Law, p. 975, and cases therein cited.

[212] Betts v. Town of New Hartford, 25 Conn. 180; Warren County Com'rs v. Gregory, 42 Ind. 32; People v. Wright, 19 Mich. 351; Stenberg v. State, 48 Neb. 299, 67 N. W. 190; State v. Ormsby County Com'rs, 7 Nev. 392; Martin v. Greene County Sup'rs, 29 N. Y. 645.

[213] Hornblower v. Duden, 35 Cal. 664; Carleton v. People, 10 Mich. 250; Shanklin v. Madison County Com'rs, 21 Ohio St. 575; Mansel v. Nicely, 175 Pa. 367; Curtis v. Butler County, 24 How. (U. S.) 435.

[214] Cherokee County Com'rs v. Wilson, 109 U. S. 621; Holten v. Lake County Com'rs, 55 Ind. 194; Greene County Com'rs v. Axtell, 96 Ind. 384; Mitchell v. Leavenworth County Com'rs, 18 Kan. 188; Worcester County Com'rs v. Melvin, 89 Md. 37; State v. Dixon County Sup'rs, 24 Neb. 106, 37 N. W. 936; Hopkins v. Clayton County, 32 Iowa, 15; Ellis v. Washoe County, 7 Nev. 291; People v. Delaware County Sup'rs, 45 N. Y. 196; State v. Franklin County Com'rs, 21 Ohio St. 648.

[215] Webb v. Town of Rocky-Hill, 21 Conn. 468; Smith v. Highway Com'rs, 150 Ill. 385; Everett v. Pottawattamie County Sup'rs, 93 Iowa, 721, 61 N. W. 1062; Willis v. Sproule, 13 Kan. 257; Cyr v. Defour, 62 Me. 20; Mitchell v. Holderness, 34 N. H. 209; Conover v. Bird, 56 N. J. Law, 228; Com. v. Kline, 162 Pa. 499; Robinson v. Winch, 66 Vt. 110.

[216] Pierce v. Elmore County

§ 336. Character of duties.

The performance of their duties is regarded as personal and not capable of delegation to subordinate agents or employes; it is the judgment and discretion of the individual that is trusted by the electors rather than that of some unknown person to be selected by him.[217] Where the performance of a duty is obligatory, the element of discretion is not involved and upon a refusal its performance may be compelled by mandamus issued by the proper authorities.[218] These county boards of administration are bodies of limited jurisdiction legally capable of performing only such duties and exercising those powers that may be expressly granted to them by statutory or constitutional authority.[219] The rule of strict construction applies to their acts and, without doubt, action by them in excess of their authority is void and legally incapable of creating rights or liabilities.[220]

Within the scope of their discretionary powers and duties, however, their determination is ordinarily conclusive either in respect to the nature or kind and manner of work to be performed as well as the compensation to be paid therefor,[221] but where the

Com'rs, 117 Ala. 569; Spier v. Baker, 120 Cal. 370, 41 L. R. A. 196; City of Lansing v. State Auditors, 111 Mich. 327; Bryant v. Dakota County, 53 Neb. 755; Seabolt v. Northumberland County Com'rs, 187 Pa. 318; Alexandria County Sup'rs v. City Council of Alexandria, 95 Va. 469.

[217] Attorney General v. Lowell, 67 N. H. 198, 38 Atl. 270; French v. Dunn County, 58 Wis. 402.

[218] People v. La Salle County Sup'rs, 84 Ill. 303; Hull v. Oneida County Sup'rs, 19 Johns. (N. Y.) 259.

[219] San Joaquin County v. Jones, 18 Cal. 327; Territory v. Cass County Com'rs, 6 Dak. 39; Pulaski County v. Thompson, 83 Ga. 270, 9 S. E. 1065; Feek v. Bloomingdale Tp., 82 Mich. 393, 10 L. R. A. 69; Bray v. Chosen Freeholders of Hudson County, 50 N. J. Law, 82; State v. Gracey, 11 Nev. 223; Frost v. Cherry, 122 Pa. 417.

[220] Coman v. State, 4 Blackf. (Ind.) 241; Cushing v. Inhabitants of Stoughton, 60 Mass. (6 Cush.) 389; Mitchell v. St. Louis County Com'rs, 24 Minn. 459; State v. Clarke, 73 N. C. 255; Auerbach v. Salt Lake County, 23 Utah, 103, 63 Pac. 907.

[221] People v. Marin County Sup'rs, 10 Cal. 344; Andrews v. Knox County Sup'rs, 70 Ill. 65; Rothrock v. Carr, 55 Ind. 334; Hunting County Com'rs v. Beaver, 156 Ind. 450, 60 N. E. 150; Brewer v. Boston, C. & F. R. Co., 113 Mass. 52; People v. Carpenter, 24 N. Y. 86; Long v. Richmond County, 76 N. C. 273; Burwell v. Vance County Com'rs, 93 N. C. 73; Washington County v. Porter, 128 Ala. 278, 29 So. 185; People v. La Salle County Sup'rs, 84 Ill. 303.

statutes fix the compensation, any allowance in excess is void.[222] They must act not only within the scope of their authority but also as a body and at some regular or special meeting called and held in the manner provided by rule or by law.[223]

Motives that may have influenced the official conduct of the members of a board of county commissioners cannot be made the subject of judicial inquiry for the purpose of impeaching their official acts; this rule, it will be remembered, applies to all members of legislative bodies.[224]

§ 337. Legal character.

These as well as other boards created by law have been considered sometimes of themselves as public quasi corporations [225] and, therefore, endowed with those powers pertaining to such organizations, including perpetuity of existence notwithstanding a change in the individuals who may compose them at any one time.[226] Their action within their authority and in accordance with the rules of law ordinarily laid down is binding upon their successors in office.[227]

§ 338. Miscellaneous boards.

For the accomplishment of various results in the proper government and regulation of a community, it may be deemed advisable to create still other bodies or boards or sets of officials than those suggested in the preceding sections. They are clothed with the power to accomplish the necessary results as set out in the instrument creating them.[228] To them is generally entrusted the performance of duties not only administrative or executive in their

[222] People v. Dutchess County Sup'rs, 9 Wend. (N. Y.) 508.

[223] Douglass v. Baker County Com'rs, 23 Fla. 419; Torr v. State, 115 Ind. 188; Mitchell County Sup'rs v. Horton, 75 Iowa, 271; Joslyn v. Franklin County Com'rs, 81 Mass. (15 Gray) 567.

[224] Webster v. Washington County, 26 Minn. 220; Shannon v. City of Portsmouth, 54 N. H. 183.

[225] People v. Hester, 6 Cal. 679; Jackson v. Hartwell, 8 Johns. (N. Y.) 330; State v. Clarke, 73 N. C. 255.

[226] Cook v. Houston County Com'rs, 54 Ga. 163; Chapman v. York County Com'rs, 79 Me. 267, 9 Atl. 728; Pegram v. Cleveland County, 65 N. C. 114.

[227] Clark v. Pratt, 55 Me. 546.

[228] Miner's Lessee v. Cassat, 2 Ohio St. 199.

character but also quasi legislative or judicial,[229] and they also have the power of enforcing their rules and regulations made when acting in such a capacity.[230] They are differently called as the occasion for the existence of the board may determine; boards of health,[231] water departments,[232] of delegates,[233] of police,[234] of managers of different state institutions,[235] of medical examiners,[236] and of public safety, arid land commissioners,[237] road commissioners,[238] state boards of charities,[239] boards of rapid transit commissioners,[240] county canvassers,[241] boards of railroad and warehouse commissioners,[242] commissioners or boards of public works,[243] boards of auditors and examiners,[244] high school boards,[245] levee [246] or tax commissioners,[247] and many others each

[229] People v. Justices of Ct. of Special Sessions, 7 Hun. (N. Y.) 214; Trimmier v. Winsmith, 23 S. C. 449.

[230] Den d. Osborne v. Tunis, 25 N. J. Law (1 Dutch.) 633.

[231] People v. Perry, 79 Cal. 105; Davock v. Moore, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783; State v. Gregory, 83 Mo. 123.

[232] Continental Const. Co. v. City of Altoona, (C. C. A.) 92 Fed. 822; State v. Barker, 116 Iowa, 96, 89 N. W. 204, 57 L. R. A. 244; Nelson v. City of New York, 63 N. Y. 535; Ashby v. City of Erie, 85 Pa. 286.

[233] People v. Board of Delegates, 14 Cal. 479.

[234] People v. Wright, 70 Ill. 388; State v. Fox, 158 Ind. 126, 63 N. E. 19, 56 L. R. A. 893; City of Baltimore v. Howard, 20 Md. 335.

[235] People v. Mallary, 195 Ill. 582; In re Conditional Discharge of Convicts, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658.

[236] State v. Wilcox, 64 Kan. 789, 68 Pac. 634.

[237] State v. Wright, 17 Mont. 565; State v. Cook, 17 Mont. 529, 43 Pac. 928.

[238] Keyes v. Inhabitants of Westford, 34 Mass. (17 Pick.) 273; Ackerly v. Jersey City, 54 N. J. Law, 310, 23 Atl. 666; State v. Davis, 129 N. C. 570, 40 S. E. 112.

[239] In re New York Juvenile Asylum, 30 Misc. 633, 74 N. Y. Supp. 364; People v. Fitch, 154 N. Y. 14, 38 L. R. A. 591.

[240] Sun Printing & Pub. Ass'n v. City of New York, 8 App. Div. 230, 40 N. Y. Supp. 607.

[241] Hankins v. City of New York, 64 N. Y. 18.

[242] Moran v. Ross, 79 Cal. 159; Georgia R. Co. v. Smith, 70 Ga. 694; Railroad Commission v. Houston & T. C. R. Co., 90 Tex. 340.

[243] Sherman v. City of Des Moines. 100 Iowa, 88; Simpson v. City of North Adams, 174 Mass. 450, 54 N. E. 878; State v. Borden, 164 Mo. 221, 64 S. W. 172; State v. Hastings, 37 Neb. 96, 55 N. W. 774; Nelden v. Clark, 20 Utah, 382.

[244] Lewis v. Colgan (Cal.) 44 Pac. 1081; Newcomb v. City of Indianapolis, 141 Ind. 451, 40 N. E. 919, 28 L. R. A. 732.

[245] Hanrick v. Board of Education, 28 Kan. 388.

[246] People v. Lodi High School Dist., 124 Cal. 694, 57 Pac. 660; Davis v. City of Litchfield, 155 Ill. 384; Police Jury v. Tardos, 22 La.

of which is charged by the instrument of their creation with the performance of certain specific duties.[248] They are bodies of limited authority and jurisdiction.[249]

Each, as suggested, is especially charged with certain governmental functions or duties as a part of a general scheme or plan of government, the performance of which cannot be delegated.[250] Within the scope of their authority their power is ample to accomplish the purpose for which they were created considered from the legal standpoint and nature of the board, viz., that primarily it is executive or administrative in its character and neither legislative nor judicial, although the duties to be performed by the members of such board may partake somewhat of such a nature.[251]

§ 339. Board action; appeals from.

All boards considered in the preceding sections are administrative or executive in their nature and the manner and extent of the performance of their duties is left largely or entirely to the sound judgment and the wise discretion of the individual members of the board. Under such circumstances the right of appeal from their action or the right to have their action reviewed does not exist unless expressly granted by statute,[252] and it must be exercised in the manner [253] and at the time provided.[254]

Ann. 58; Bass v. State, 34 La. Ann. 494; Richardson v. Levee Com'rs, 68 Miss. 539; Egyptian Levee Co. v. Hardin, 27 Mo. 495.

[247] State v. Hannibal & St. J. R. Co., 97 Mo. 348, 10 S. W. 436; Virginia & T. R. Co. v. Ormsby County Com'rs, 5 Nev. 341.

[248] Blanchard v. Hartwell, 131 Cal. 263, 63 Pac. 349; Wilkison v. Children's Guardians of Marion County, 158 Ind. 1, 62 N. E. 481; Renaud v. State Court of Mediation & Arbitration, 124 Mich. 648, 83 N. W. 620, 51 L. R. A. 458; State v. Scott, 18 Neb. 597; In re Assessment of City of Passaic, 54 N. J. Law, 156, 23 Atl. 517; State v. City of Cincinnati, 23 Ohio St. 445.

[249] Town Council of Livingston v. Pippin, 31 Ala. 542; State v. Tryon, 39 Conn. 183.

[250] City of Baltimore v. Radecke, 49 Md. 228.

[251] Elliott v. City of Chicago, 48 Ill. 293; Northern Trust Co. v. Snyder, 113 Wis. 516, 89 N. W. 460.

[252] Catron v. Archuleta County Com'rs, 18 Colo. 553; Reynolds v. Oneida County Com'rs, 6 Idaho, 787, 59 Pac. 730; Huntington County Com'rs v. Beaver, 156 Ind. 450, 60 N. E. 150; Brown v. Lewis, 76 Iowa, 159; Hayes v. Rogers, 24 Kan. 143; City of Worcester v. Worcester County Com'rs, 167 Mass. 565, 46 N. E. 383; Hoffman v. Gallatin County Com'rs, 18 Mont. 224; Hadlock v. G. County Com'rs, 5 Okl. 570, 49 Pac. 1012.

[253] People v. Hester, 6 Cal. 679.

[254] Ravenscraft v. Blaine County Com'rs, 5 Idaho, 178, 47 Pac. 942; Siggins v. Com., 85 Pa. 278; Walsh

III. JUDICIAL.

§ 340. Introductory.

The third branch of our form of government is the judicial whose exclusive prerogative it is to pass upon and determine according to constitutional provisions and other established rules of law, the validity of laws passed by legislative bodies and the legality of administrative or executive action.[255] The three-fold division, independence and dependence of each has been discussed to a certain extent in previous sections.[256] As said in a Pennsylvania case,[257] the veriest tyro is familiar with this classification and with the broad lines of distinction which separate the three. The difficulty arises as usual in determining the character of acts by either of the three departments which approach in their nature that line of action which should be exercised exclusively by some other branch.[258] Especially in the government of public quasi corporations, which is committed to boards of limited and diverse powers, this difficulty is particularly noted.[259]

v. Town Council of Johnston, 18 R. I. 88, 25 Atl. 849; Town of Shelburn v. Eldridge, 10 Vt. 123.

[255] Den d. Murray v. Hoboken Land & Imp. Co., 18 How. (U. S.) 272; People v. Judge of Twelfth Dist., 17 Cal. 558; People v. Bennett, 29 Mich. 465; In re Cleveland, 51 N. J. Law, 311, 17 Atl. 772; Bond v. City of Newark, 19 N. J. Eq. (4 C. E. Green) 376; Reiser v. William Tell Sav. Fund Ass'n, 39 Pa. 146; State v. Dexter, 10 R. I. 341; Bl. Com. bk. 1, 146; Story, Const. § 525; Lewis, Sutherland, Stat. Const. (2d Ed.) §§ 2 and 5. See, also, Wyman, Adm. Law, §§ 17-25 and Abb. Mun. Corp. § 582.

[256] Fox v. McDonald, 101 Ala. 51, 21 L. R. A. 529; Spencer v. Sully County, 4 Dak. 474, 33 N. W. 97; Rev. St. U. S. § 1907 (1878); Wells v. City of Atlanta, 43 Ga. 67; People v. Chase, 165 Ill. 527, 36 L. R. A. 105; Albright v. Fisher, 164 Mo. 56; Ryan v. City of Paterson, 66 N. J. Law, 533, 49 Atl. 587; Carter v. Com., 96 Va. 791, 45 L. R. A. 310; Fleming v. Guthrie, 32 W. Va. 1.

[257] Greenough v. Greenough, 11 Pa. 494. "Every tyro or sciolist knows that it is the province of the legislature to enact, of the judiciary to expound, and of the executive to enforce."

[258] Dainese v. Hale, 91 U. S. 13; Wells v. City of Atlanta, 43 Ga. 67; Wilkinson v. Children's Guardians of Marion County, 158 Ind. 1, 62 N. E. 481; Curtis v. City of Portsmouth, 67 N. H. 506, 39 Atl. 439; Lewis, Sutherland, Stat. Const. (2d Ed.) § 4, with many authorities cited.

[259] Guthrie Nat. Bank v. City of Guthrie, 173 U. S. 528; E. A. Chatfield Co. v. City of New Haven, 110 Fed. 788; Robinson v. Benton County, 49 Ark. 49, 4 S. W. 195; Bowen v. Clifton, 105 Ga. 459; People v.

§ 341. Municipal courts.

The idea of local self-government is the predominant one in American law. The necessity for a centralized and general government is conceded for the regulation and control of those matters which are foreign or general in their nature and subject; but the right of the people of a particular community for themselves to determine under proper restrictions and to regulate their local necessities and conduct has been insisted upon and universally obtains. One of these rights of local self-government is the establishment and maintenance of local courts for the preservation of good order and the local protection of individual and property rights.[260]

Power to organize. The power is conceded in this country to the people of a state acting in constitutional conventions or through the state legislature to organize such courts of inferior jurisdiction as may be demanded by and as are necessary in the particular class of public corporations referred to, although within the same territory there may exist other courts of higher and broader jurisdiction.[261] Such local and inferior courts possess limited powers both or either in respect to the trial of civil or criminal cases.[262] The particular form of organization is a matter of legislative discretion and it has been customary in some localities to give executive officers judicial powers,[263] though this action

Kipley, 171 Ill. 44, 41 L. R. A. 775; Meffert v. State Board of Medical Registration, 66 Kan. 710; Tyler v. Judges of Registration, 175 Mass. 71, 51 L. R. A. 433; France v. State, 57 Ohio St. 1; People v. Hasbrouck, 11 Utah, 291; Milwaukee Industrial School v. Milwaukee County Sup'rs, 40 Wis. 326.

[260] Perkins v. Corbin, 45 Ala. 103; People v. Henshaw, 76 Cal. 436; Hill v. City of Dalton, 72 Ga. 314; Holmes v. Fihlenburg, 54 Ill. 203; City of New Orleans v. Costello, 14 La. Ann. 37; Callahan v. City of New York, 66 N. Y. 656; Peck v. Powell, 62 Vt. 296; Cahoon v. Com., 21 Grat. (Va.) 822; Mathie v. McIntosh, 40 Wis. 120.

[261] Bain v. Mitchell, 82 Ala. 304; People v. Provines, 34 Cal. 520; State v. Hanchett, 38 Conn. 35; Johnson v. Hilton & D. Lumber Co., 103 Ga. 212; Chesney v. McClintock, 61 Kan. 94; Allen v. Somers, 68 Me. 247; Curtin v. Barton, 139 N. Y. 505; State v. Pender, 66 N. C. 313; State v. Nohl, 113 Wis. 15, 88 N. W. 1004; Laws Minn. 1889, p. 598.

[262] Ex parte Simpson, 47 Cal. 127; Peck v. Powell, 62 Vt. 296.

[263] Thomas v. Austin, 103 Ga. 701; City of Lansing v. Chicago, M. & St. P. R. Co., 85 Iowa, 215, 52 N. W. 195; City of Brookfield v. Tooey, 141 Mo. 619, 43 S. W. 387; Louisburg Com'rs v. Harris, 52 N. C. (7 Jones) 281; Clemmensen v.

departs from the reason for the separation of the three classes, namely, that it is inadvisable and inexpedient to vest in one individual the power to make and administer the laws and also to punish for their violation.[264]

Conceding the power in the legislature to organize these courts, it follows that their jurisdiction or their procedure can be changed from time to time as the exigencies of an occasion may require or as it may deem expedient.[265]

§ 342. Jurisdiction; civil and criminal.

The jurisdiction of municipal courts is commonly limited to the trial of criminal matters and especially to the consideration of violations of local police ordinances and regulations; the punishment of trivial offenses against the good order of the community; acts which are not usually characterized as crimes or perhaps even as misdemeanors.[266] Their civil jurisdiction is limited both in respect to the questions at issue [267] and also the amount involved in those cases over which they possess jurisdiction.[268]

In the different states different policies have prevailed at different times in regard to the extent of powers granted or to be granted municipal corporations and the result of this is to be seen in the wide range of powers possessed by different municipal courts even in the same state.[269]

Peterson, 35 Or. 47, 56 Pac. 1015; Thomas v. Com., 22 Grat. (Va.) 912.

[264] Bain v. Mitchell, 82 Ala. 304; Howard v. Shoemaker, 35 Ind. 111; Morrison v. McDonald, 21 Me. 550.

[265] Ex parte Sparks, 120 Cal. 395; Vason v. City of Augusta, 38 Ga. 542; Boyd v. Chambers, 78 Ky. 140; Alexander v. Bennett, 60 N. Y. 204.

[266] Gentle v. Atlas Sav. & Loan Ass'n, 105 Ga. 406.

[267] Hecht v. P. H. Snook & Austin Furniture Co., 114 Ga. 921, 41 S. E. 74; Worthington v. London Guarantee & Acc. Co., 164 N. Y. 81 Such inferior courts, as a rule, have no equity jurisdiction. See the following cases: Gentle v. Atlas Sav. & Loan Ass'n, 105 Ga. 406; Norton v. Beckman, 53 Minn. 456; Tilleny v. Knoblauch, 73 Minn. 108.

[268] Smither's Adm'r v. Blanton, 58 Ky. (1 Metc.) 44; State v. Judge of Second City Ct., 37 La. Ann. 583; Walker v. Cooke, 163 Mass. 401; City Council of Charleston v. Ashley Phosphate Co., 33 S. C. 25; Tuffi v. Ralli, 74 Vt. 15, 51 Atl. 1059.

[269] Smither's Adm'r v. Blanton, 58 Ky. (1 Metc.) 44; State v. Judge of Second City Ct., 37 La. Ann. 583; Walker v. Cooke, 163 Mass. 401; Crawford v. Hurd Refrigerator Co., 57 Minn. 187; City Council of Charleston v. Ashley Phosphate Co., 33 S. C. 25; State v. Haynes, 104 Tenn. 406; Ex parte Coombs, 38 Tex. Cr. R. 648, 44 S. W. 854.

§ 343. Summary powers.

The Federal and state constitutions contain concise and emphatic provisions against all acts of those in authority resulting in a taking of life, liberty or property without due process of law or in depriving one of that privilege guaranteed by both state and Federal constitutions of a right to a trial by jury of one's peers on all questions of fact. In the organization and procedure of municipal courts there is found a power summary in its character of dealing arbitrarily with all questions relating to the violation of local police ordinances.[270] This arbitrary power of a police or local court in passing upon questions of fact, and upon an adverse determination against the accused of summarily imposing a fine[271] or imprisonment,[272] or, in many cases, a fine or an imprisonment,[273] has been questioned as being a violation of those constitutional guarantees noted. The question, however, has been decided by the general weight of authority, both on the grounds of public policy and expediency adversely to the contention that one is entitled to a trial by jury when charged with a violation of a petty police ordinance,[274] the basis of this decision being, as suggested, public policy; the inexpediency of allowing jury trials in the numberless petty cases tried in police courts and also because of the trivial character of the offense.[275] The cases almost universally hold that violations of petty police regulations are not to be considered as crimes or even as misdemeanors and as the constitutional guarantees only apply to such, their existence, therefore, cannot be invoked by the offender against a municipal police regulation.[276] There are offenses, however, sometimes punishable

[270] Floyd v. Eatonton Com'rs, 14 Ga. 358; Town of Louisiana v. Hardin, 11 Mo. 551.

[271] Phillips v. City of Atlanta, 87 Ga. 62; State v. Whitaker, 48 La. Ann. 527, 35 L. R. A. 561; City of Tarkio v. Cook, 120 Mo. 1; Taylor v. State, 35 Wis. 298.

[272] City of Miltonvale v. Lanoue, 35 Kan. 603; State v. Bringier, 42 La. Ann. 1095; Brown v. Borough of Asbury Park, 44 N. J. Law, 162.

[273] Newton v. Fain, 114 Ga. 833, 40 S. E. 993; State v. Cantieny, 34 Minn. 1, 24 N. W. 458; State v. Nohl, 113 Wis. 15, 88 N. W. 1004.

[274] State v. Lockwood, 43 Wis. 403.

[275] State v. Powell, 97 N. C. 417: Sedgwick, St. Const. Law, 548. See, also, the subject fully considered in McQuillin, Mun. Ord. ch. X and Abb. Mun. Corp. § 587.

[276] Vason v. City of Augusta, 38 Ga. 542; State v. City of Topeka,

by municipal courts, of a graver nature which come within the category of crimes or misdemeanors and in the trial of which, therefore, the accused is entitled to a trial by jury.[277]

§ 344. Appeals.

The right of appeal from the findings or decisions of an inferior tribunal in all but exceptional cases is not an inherent one, but dependent upon a statutory or constitutional provision.[278] There are certain formalities attendant upon the perfection of an appeal and certain essential steps as provided by statute are necessary to the exercise of the right.[279] Statutory provisions fixing and prescribing the time or the manner of taking an appeal with attendant formalities such as the giving of a bond, the filing of a record or transcript,[280] must be strictly complied with before the statutory right can be made available. The power to grant new trials is commonly possessed and exercised, although not conferred by either the act creating the court or the general statutes,[281] and the exercise of other corrective powers will depend upon the statutes creating the court.[282]

IV. Public Records.

§ 345. Public records.*

All public corporations in the proper exercise of their granted powers, act at times in such a manner as to affect arbitrarily, or otherwise, the personal or property rights of private persons. To

36 Kan. 76; City Council of Monroe v. Meuer, 35 La. Ann. 1192; City of Mankato v. Arnold, 36 Minn. 62; McGear v. Woodruff, 33 N. J. Law, 213; Borough of Dunmore's Appeal, 52 Pa. 374; Town of Moundsville v. Fountain, 27 W. Va. 182.

[277] Lewis v. State, 21 Ark. 211; Stebbins v. Mayer, 38 Kan. 573, 16 Pac. 745; State v. Moss, 47 N. C. (2 Jones) 66; Plimpton v. Town of Somerset, 33 Vt. 283.

[278] Stewart v. State, 98 Ga. 202; City of Topeka v. Wood, 62 Kan. 809, 64 Pac. 630; City of St. Charles v. Hackman, 133 Mo. 634, 34 S. W. 878; City of Water Valley v. Davis, 73 Miss. 521, 19 So. 235.

[279] City of Emporia v. Volmer, 12 Kan. 622; Flanagan v. Treasurer of Plainfield, 44 N. J. Law, 118.

[280] City of De Soto v. Merciel, 53 Mo. App. 57; Miller v. O'Reilly, 84 Ind. 168; City of Baton Rouge v. Cremonini, 35 La. Ann. 366; State v. Clesi, 44 La. Ann. 85.

[281] Welborne v. State, 114 Ga. 793, 40 S. E. 857. See, however, to the contrary, McFarland v. Donaldson, 115 Ga. 567, 41 S. E. 1000.

[282] Bale v. Pass, 64 App. Div. 302, 72 N. Y. Supp. 93; Dalrymple v. Williams, 63 N. Y. 361.

* 4 Curr. Law, 728.

afford the latter protection by securing an accurate and certain account of what has been done, the law requires public corporations to keep a true record of all their proceedings.[283] The necessity for this rule exists not only for the reason stated but also to enable these corporations to assert their rights in proper tribunals.[284] A further reason for the principle also obtains in that they are corporations, artificial persons, and can only speak by the records which have been kept of their acts.[285] The presumption of law exists that such records are accurate reports of particular proceedings and that the facts therein recited are true.[286]

§ 346. Right of access or inspection.*

The right to inspect public records by one who may be affected by them usually obtains although it is quite customary for this to be granted by law.[287] The right, however, cannot be exercised in an unreasonable manner or at an unreasonable and untimely hour.[288] Public documents and records can only be examined under such rules and restrictions as will preserve them from loss or mutilation and also prevent any serious interruption of the duties of their custodians.[289] The purpose of the one exercising the privilege should not be that of idle curiosity alone.[290] The right, where it exists, is, it has been held, a substantial one and where public records have been willfully or wrongfully withheld from inspec-

[283] Becker v. City of Henderson, 100 Ky. 450, 38 S. W. 857; Com. v. Sullivan, 165 Mass. 183; Auditor General v. Longyear, 110 Mich. 223, 68 N. W. 130; State v. Sovereign, 17 Neb. 173; Lincoln Land Co. v. Ackerman, 24 Neb. 46, 38 N. W. 25.

[284] Perryman v. City of Greenville, 51 Ala. 507; Barker v. Fogg, 34 Me. 392.

[285] Fayette County Com'rs v. Chitwood, 8 Ind. 504; Adams v. Mack, 3 N. H. 493.

[286] People v. Baldwin, 117 Cal. 244, 49 Pac. 186; Com. v. Sullivan, 165 Mass. 183; Auditor General v. Longyear, 110 Mich. 223, 68 N. W. 130; Bartlett v. Eau Claire County, 112 Wis. 237, 88 N. W. 61.

* 6 Curr. Law, 1270.

[287] Whelan v. Superior Ct. of City & County of San Francisco, 114 Cal. 548, 46 Pac. 468; State v. King, 154 Ind. 621; Burton v. Tuite, 78 Mich. 363, 7 L. R. A. 73; Ferry v. Williams, 41 N. J. Law, 333.

[288] People v. Walker, 9 Mich. 328; People v. Cornell, 35 How. Pr. (N. Y.) 31; State v. Williams, 110 Tenn. 549, 64 L. R. A. 418. See, also, note 64 L. R. A. 418, under the general subject of the right of a taxpayer to inspect the books of a municipality.

[289] Cormack v. Wolcott, 37 Kan. 394; Payne v. Staunton, 55 W. Va. 202, 46 S. E. 927.

[290] Cormack v. Wolcott, 37 Kan. 391, 15 Pac. 245.

tion, the officer in whose custody they are can be compelled by mandamus to permit the desired examination.[291]

§ 347. Custody and amendment.

The custody and making of all public records, documents and files and the record of the proceedings of public bodies may be given either to some designated officer [292] or, in the absence of a special statutory provision or regulation, to that officer legally or naturally charged with the responsibility of a certain department or function of government [293] by whom they should be delivered to their successors in office [294] and kept at the legally established seat of government.[295] The character of the records kept by different public officers is a matter of common knowledge and their mutilation or destruction may, by statute, be made a crime or misdemeanor and punishable in the manner designated.[296]

The record of proceedings of legislative, administrative or judicial bodies, should show the facts as they actually occur upon a particular occasion, the conditions existing at a particular moment of time, with all that was said and done by those entitled to participate in such proceedings.[297] The purpose of the records, then, being to establish a true account of official action, it follows that where the rights of third parties have not intervened,[298] amendments may be made by officers having them in their care or charged with the ministerial or clerical duty of making them.[299]

[291] State v. King, 154 Ind. 621, 57 N. E. 535; State v. Hoblitzelle, 85 Mo. 620; Barber v. West Jersey Title & G. Co., 53 N. J. Eq. 158.

[292] Johnston v. Wakulla County, 28 Fla. 720, 9 So. 690; Allen v. Hopkins, 62 Kan. 175, 61 Pac. 750; State v. Patton, 62 Minn. 388, 64 N. W. 922; Howze v. State, 59 Miss. 230.

[293] State v. Harwi, 36 Kan. 588; People v. State Treasurer, 24 Mich. 468; Town of Litchfield v. Parker, 64 N. H. 443, 14 Atl. 725.

[294] Thompson v. Holt, 52 Ala. 491; State v. Patton, 62 Minn. 388, 64 N. W. 922; Lincoln Land Co. v. Ackerman, 24 Neb. 46, 38 N. W. 25.

[295] Shaw v. Hill, 67 Ill. 455; Way v. Fox, 109 Iowa, 340, 80 N. W. 405; State v. Harwi, 36 Kan. 588; Caruthers v. Harnett, 67 Tex. 127.

[296] Whalley v. Tongue, 29 Or. 48; Zwietusch v. City of Milwaukee, 55 Wis. 369.

[297] Samis v. King, 40 Conn. 305; Vaughn v. School Dist. No. 31, 27 Or. 57, 39 Pac. 393.

[298] Ryder's Estate v. City of Alton, 175 Ill. 94, 51 N. E. 821; Jaquith v. Putney, 48 N. H. 138.

[299] City of Anniston v. Davis, 98 Ala. 629, 13 So. 331; Inhabitants of Dresden v. Lincoln County Com'rs, 62 Me. 365; Inhabitants of Gloucester v. Essex County Com'rs, 116 Mass. 579; Leighton v. Ossipee

Municipal records as evidence. Public records are admissible in evidence to show the facts therein cited if material when properly identified [300] and competent, which latter condition includes the character of the officer [301] and the manner in which made.[302] Parol evidence of facts not recited is inadmissible where the records themselves are offered and purport to contain all the evidence.[303]

School Dist., 66 N. H. 548, 31 Atl. 899.

[300] South School Dist. v. Blakeslee, 13 Conn. 227; Ryder's Estate v. City of Alton, 175 Ill. 95, 51 N. E 821; Lease v. Clark, 55 Kan. 621, 40 Pac. 1002; Pleasant Valley Coal Co. v. Salt Lake County Com'rs, 15 Utah, 97, 48 Pac. 1032.

[301] Hutchinson v. Pratt, 11 Vt. 402.

[302] Williams v. School Dist. No. 1 in Lunenburg, 38 Mass. (21 Pick.) 75.

[303] Swamp Land Reclamation Dist. No. 407 v. Wilcox (Cal.) 14 Pac. 843; Halleck v. Inhabitants of Boylston, 117 Mass. 469; Town of Lemont v. Singer & T. Stone Co., 98 Ill. 94; Jordan v. Osceola County, 59 Iowa, 388; Ragoss v. Cuming County, 36 Neb. 375, 54 N. W. 683.

CHAPTER VIII.

PUBLIC OFFICE AND OFFICERS.

I. COMMENCEMENT AND NATURE OF OFFICIAL LIFE.

II. TERMINATION OF OFFICIAL LIFE.

III. POWERS, DUTIES AND RIGHTS.

I. Commencement and Nature of Official Life.

§ 348. In general.

A public corporation is an artificial person and must, of necessity, act through natural persons serving as its agents. These are variously termed and perform the duties attending their respective offices whether legislative, administrative or judicial, the designation of an official in many cases indicating to a greater or less extent the character of his duties. The corporation having been created by the sovereign power, that power logically includes

the lesser one of creating public officials,[1] also that of designating their duties, tenure of office and rights, including that of compensation.[2] The sovereign people in this country act primarily through a constitution and provide in this instrument for many public offices which are termed because of this fact, constitutional offices.[3] A constitution may also authorize the legislative branch of the government, under the proper restrictions, to create still other offices, generally subordinate ones, and to establish tenure of office, duties, the manner of selection and official rights including that of compensation.[4]

§ 349. Legislative control.*

A public office is created by law and not by contract.[5] The rights and duties appertaining to it, therefore, do not partake of the nature of contract rights or duties and if the office with its duties, rights and emoluments has been created by a legislative body, that body can abolish or change these at its pleasure,[6] the

[1] Kavanaugh v. State, 11 Ala. 399; State Revenue Agent v. Hill, 70 Miss. 106.

[2] Reynolds v. McAfee, 44 Ala. 237; Allen v. State, 32 Ark. 241; People v. Squires, 14 Cal. 12; State v. Hyde, 129 Ind. 296, 28 N. E. 186, 13 L. R. A. 79.

[3] Beebe v. Robinson, 52 Ala. 66; Patton v. Board of Health of San Francisco, 127 Cal. 388; Overshiner v. State, 156 Ind. 187, 59 N. E. 468, 51 L. R. A. 748; State v. Spaulding, 102 Iowa, 639; Com. v. Certain Intoxicating Liquors, 110 Mass. 172; State v. Woodbury, 17 Nev. 337; State v. Stanley, 66 N. C. 59; State v. Bacon, 14 S. D. 284, 85 N. W. 225; Anderson v. Tyree, 12 Utah, 129, 42 Pac. 201.

[4] Board of Revenue v. Barber, 53 Ala. 589; People v. Mullender, 132 Cal. 217, 64 Pac. 299; Quigg v. Evans, 121 Cal. 546; Parks v. Commissioners of Soldiers' & Sailors' Home, 22 Colo. 86, 43 Pac. 542; State v. Peelle, 124 Ind. 515, 24 N. E. 440, 8 L. R. A. 228; Wilson v. Clark, 63 Kan. 505, 65 Pac. 705; Common Council of Detroit v Schmid, 128 Mich. 379, 87 N. W. 383; Gooch v. Town of Exeter, 70 N. H. 413, 48 Atl. 1100; Pacific Exp. Co. v. Cornell, 59 Neb. 364, 81 N. W. 377; State v. Dunn, 73 N. C. 595; State v. Baughman, 38 Ohio St. 455.

* 6 Curr. Law, 844.

[5] United States v. Hartwell, 73 U. S. (6 Wall.) 393; Goud v. City of Portland, 96 Me. 125; Attorney General v. Jochim, 99 Mich. 358, 23 L. R. A. 699; State Revenue Agent v. Hill, 70 Miss. 106; State v. Evans, 166 Mo. 347; Lloyd v. Silver Bow County, 11 Mont. 408; State v. Trousdale, 16 Nev. 357; Koch v. City of New York, 152 N. Y. 72; State v. Hawkins, 44 Ohio St. 98; Com. v. Weir, 165 Pa. 284; Foster v. Jones, 79 Va. 642, 52 Am. Rep. 637.

[6] Butler v. Pennsylvania, 10 How. (U. S.) 402; Hawkins v. Roberts,

reason being the nature of a public office. "Public offices are created for the purpose of effecting the ends for which government has been instituted, which are the common good, and not the profit, honor, or private interest of any one man, family, or class of men. In our form of government it is fundamental that public offices are a public trust and that the persons to be appointed shall be selected solely with a view to the public welfare."[7] The incumbent of a public office created by the proper authorities does not have such an interest in the office or its emoluments that the creative body cannot, at its discretion, abolish or modify this at its pleasure, subject only to constitutional limitations.[8] Public offices are regarded as mere agencies of the government created for the benefit of the public; not for the benefit of the incumbent and neither they nor their emoluments are rights or privileges secured to citizens by either state or Federal constitutions.[9] And there is nothing in the nature of a contract or a vested right in favor of a public official to prevent new legislation respecting either the powers, the duties or the rights of the office.[10]

Restrictions on legislative power. It was suggested in a preceding paragraph that the creation of a public office by a state constitution or by legislative act leads to material differences in connection with its abolition or regulation. If this is what has been termed a constitutional office, it is clear that a legislative body has no power to act or to interfere with either its existence, its

122 Ala. 130, 27 So. 327; People v. Davie, 114 Cal. 363; People v. Cook County Com'rs, 176 Ill. 576, 52 N. E. 334; Harvey v. Rush County Com'rs, 32 Kan. 159; Board of Councilmen of Frankfort v. Brawner, 100 Ky. 166, 37 S. W. 950, 38 S. W. 497; Prince v. Skillin, 71 Me. 361, 5 L. R. A. 756; Attorney General v. Bolger, 128 Mich. 355, 87 N. W. 366

[7] Brown v. Russell, 166 Mass. 14, 32 L. R. A. 283; Beebe v. Robinson, 52 Ala. 66; Opinion of Justices, 3 Me. (3 Greenl.) 481; Mechem, Pub. Off. § 4; Throop, Pub. Off. §§ 16 et seq.; Abb. Mun. Corp. § 597.

[8] Crittenden County v. Crump, 25 Ark. 235; Decatur County Com'rs v. Cox, 65 Ga. 80; State v. Davis, 44 Mo. 129.

[9] Hennepin County Com'rs v. Jones, 18 Minn. 199 (Gil. 182). "Public offices in this state are mere agencies of the government created for the benefit of the public; not for the benefit of the incumbent."

[10] Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518; Robinson v. White, 26 Ark. 139; Wilcox v. Rodman, 46 Mo. 322; Kendall v. City of Canton, 53 Miss. 526; Marden v. City of Portsmouth, 59 N. H. 18; Peal v. Newark, 66 N. J. Law, 105, 48 Atl. 576; State v. Douglas, 26 Wis. 428.

duties or its rights;[11] this can only be effected by a change in the instrument creating it and prescribing its adjuncts.[12]

The legislature may also be restricted in its power to deal with public offices, even those created by the same legislative body through constitutional provisions prescribing the manner in which public offices may be created,[13] and designating official duties,[14] prohibiting the increase or decrease of emoluments during official life,[15] and fixing a method for removal from office.[16]

§ 350. Definition of public office.

A public office has been defined as "an agency for the state, and the person whose duty it is to perform this agency is a public officer. This, we consider to be the true definition of a public officer in its original broad sense. The essence of it is, the duty of performing an agency, that is, of doing some act or acts, or series of acts for the state."[17] An office is a public employment or station conferred by the appointment or selection of the government and the phrase embraces the idea of tenure, duration, emolument and duties.[18] It is the duty of an office and its nature that makes a public officer and not the extent of his authority.[19]

Legislative, executive and judicial officers. In preceding paragraphs has been suggested the three-fold fundamental division of the government into the legislative, executive or administrative and judicial branches.

Legislative officers have been defined as "those whose duties relate mainly to the enactment of laws." Executive or administrative are "those whose duties are mainly to cause the laws to be executed." And judicial officers are "those whose duties are to

[11] Morgan v. Vance, 67 Ky. (4 Bush) 325; People v. Hurlbut, 24 Mich. 44; Fant v. Gibbs, 54 Miss. 396.

[12] Kahn v. Sutro, 114 Cal. 316, 46 Pac. 87, 33 L. R. A. 620; Massenburg v. Bibb County Com'rs, 96 Ga. 614; Lowe v. Com., 60 Ky. (3 Metc.) 237; State v. Arrington, 18 Nev. 412; State v. Brewster, 44 Ohio St. 589, 9 N. E. 849.

[13] Black v. Trower, 79 Va. 123.

[14] Bunting v. Gales, 77 N. C. 283.

[15] Miller v. Kister, 68 Cal. 142; Lloyd v. Silver Bow County, 11 Mont. 408, 28 Pac. 453.

[16] Lowe v. Com., 60 Ky. (3 Metc.) 237; Uffert v. Vogt, 65 N. J. Law, 621, 48 Atl. 574.

[17] State v. Stanley, 66 N. C. 59.

[18] United States v. Hartwell, 73 U. S. (6 Wall.) 385; Hall v. Wisconsin, 103 U. S. 5; Hendricks v. State, 20 Tex. Civ. App. 178, 49 S. W. 705.

[19] Leach v. Cassidy, 23 Ind. 449; Jones v. Shaw, 15 Tex. 577.

decide controversies between individuals, and accusations made in the name of the public against persons charged with violations of the law."[20]

§ 351. Office distinguished from employment.

An employe of the government is protected in his contract of employment by constitutional provisions.[21] The relation which exists between him and the public corporation is a contract one.[22] It has been difficult at times to distinguish between an employe protected by contract rights whatever they may be and a public officer in respect to whom the sovereign or its properly delegated legislative agent may deal at their discretion.[23] A person who receives no certificate of appointment, who is not required to take an oath, has no term or tenure of office and neither discharges his duties nor exercises his powers depending directly on the authority of law but who serves upon the request written or oral of some public officer duly authorized, and responsible only to him, is usually regarded as an employe, although his duties may involve high professional skill and attain dignity and importance in connection with public affairs.[24]

§ 352. Public office; how secured.

A public officer acting as he does as an agent of and for and on behalf of his principal, a public corporation, must necessarily, in order to have good title to his office, have secured his right to perform the duties appertaining to it in some manner prescribed by law and either through an appointment or election.[25] An individual cannot assume an office and perform his duties except by

[20] United States v. Fitzpatrick, 80 U. S. (13 Wall.) 568; Bishop v. City of Oakland, 58 Cal. 572; O'Neil v. American Fire Ins. Co., 166 Pa. 72, 26 L. R. A. 715.

[21] Vincenheller v. Reagan, 69 Ark. 460, 64 S. W. 278; White v. City of Alameda, 124 Cal. 95; People v. Kipley, 171 Ill. 44, 41 L. R. A. 775; Attorney General v. Jochim, 99 Mich. 358, 41 Am. St. Rep. 606, 23 L. R. A. 699; State v. Bus, 135 Mo. 325, 33 L. R. A. 616; Hardy v. City of Orange, 61 N. J. Law, 620; State v. Wilson, 29 Ohio St. 347.

[22] Montgomery v. State, 107 Ala. 372; Goud v. City of Portland, 96 Me. 125.

[23] Castle v. Lawlor, 47 Conn. 340; In re Newport Charter, 14 R. I. 655.

[24] State v. Jennings, 57 Ohio St. 415. See, also, Abb. Mun. Corp. § 599 and notes citing many cases.

[25] People v. Waite, 102 Cal. 251, 36 Pac. 518; Pinney v. Brown, 60 Conn. 164; White v. Screven Coun-

authority of law without being considered an intruder.[26] The power to appoint may be found either in the constitution [27] or some statute.[28] Such provisions vary in their details; some designate with explicitness the source of appointive authority and the manner of its exercise,[29] while others grant the authority in broad terms leaving the manner and the time of its exercise to usage and custom or the discretion of the individual in whom the appointive power is lodged.[30]

The presumption of law operates in favor of the validity of title to office [31] and the doctrine of collateral attack almost universally obtains.[32]

The principle also applies that one who has exercised the functions of a public office is estopped to deny that he was properly appointed or elected for the purpose of escaping liability,[33] and the rule includes as well the sureties on the official bond.[34]

ty, 112 Ga. 802; Poinier v. State, 44 N. J. Law, 433. An appointment under an unconstitutional act may be subsequently ratified. Dickinson v. Jersey City, 68 N. J. Law, 99, 52 Atl. 278; Ames v. Port Huron Log Driving Co., 11 Mich. 139; Kokes v. State, 55 Neb. 691, 76 N. W. 467; Baker v. Hobgood, 126 N. C. 149, 35 S. E. 253.

[26] Hooper v. Goodwin, 48 Me. 80; People v. Station, 73 N. C. 546; McCraw v. Williams, 33 Grat. (Va.) 510.

[27] State v. Gorby, 122 Ind. 17; State v. Washburn, 167 Mo. 680, 67 S. W. 592; State v. Bacon, 6 Neb. 286; People v. Bledsoe, 68 N. C. 457; Taggart v. Com., 102 Pa. 354; State v. Sheldon, 8 S. D. 525, 67 N. W. 613.

[28] Johnson v. State, 132 Ala. 43, 31 So. 493; Higgins v. City of San Diego, 131 Cal. 294, 63 Pac. 470; City of Americus v. Perry, 114 Ga. 871, 40 S. E. 1004; Adsit v. Osmun, 84 Mich. 420, 48 N. W. 31, 11 L. R. A. 534; State v. Ritt, 76 Minn. 531, 79 N. W. 535; Sales v. Barber Asphalt Pav. Co., 166 Mo. 671, 66 S. W. 979; Moores v. State, 54 Neb. 486, 74 N. W. 823; Lowthorp v. City of Trenton, 61 N. J. Law, 484; People v. Soheu, 167 N. Y. 292.

[29] Weir v. State, 96 Ind. 311; Eliason v. Coleman, 86 N. C. 235.

[30] State v. O'Leary, 64 Minn. 207, 66 N. W. 264; Whitney v. Van Buskirk, 40 N. J. Law, 463; Fagan v. City of New York, 84 N. Y. 348.

[31] Delphi School Dist. v. Murray, 53 Cal. 29; Carter v. Sympson, 47 Ky. (8 B. Mon.) 155; Hutchings v. Van Bokkelen, 34 Me. 126.

[32] Satterlee v. City of San Francisco, 23 Cal. 314; State v. Brooks, 39 La. Ann. 817; Fitchburg R. Co. v. Grand Junction R. & Depot Co., 83 Mass. (1 Allen) 552; Tower v. Welker, 93 Mich. 332, 53 N. W. 527; Van Dorn v. Mengedoht, 41 Neb. 525, 59 N. W. 800; McGregor v. Balch, 14 Vt. 428.

[33] People v. Jenkins, 17 Cal. 500; Taylor v. State, 51 Miss. 79; Kelly v. State, 25 Ohio St. 567.

[34] People v. Huson, 78 Cal. 154, 20 Pac. 369; Jones v. Gallatin Coun-

§ 353. Power to appoint.

The power to appoint or select subordinate officers or employes is regarded in its fundamental nature as an executive or administrative act,[35] and is usually vested in an administrative or executive official or body [36] or is exercised in some cases by an executive officer concurrently with a legislative or administrative body,[37] although the existence of the power of appointment is not conclusive that the one to whom it is given is an executive or an administrative officer.[38] The power may depend also upon some sudden exigency or emergency such as the unexpected failure of a public official to perform the duties of his office.[39]

Confirmatory action. The appointing power may be exercised absolutely [40] or the assent of some confirmatory legislative body may be required by law.[41] Under the United States government the president has, through the Federal constitution, the right to

ty, 78 Ky. 491; State v. Powell, 40 La. Ann. 234, 4 So. 46; Kelly v. State, 25 Ohio St. 567; King v. Ireland, 68 Tex. 682, 5 S. W. 499.

[35] Dillon v. Whatcom County, 12 Wash. 391, 41 Pac. 174.

[36] Oregon v. Jennings, 119 U. S. 74; In re Bulger, 45 Cal. 553; In re Inman, 8 Idaho, 398, 69 Pac. 120; Keating v. Stack, 116 Ill. 191; Overshiner v. State, 156 Ind. 187; Smith v. Thursby, 28 Md. 244; Opinion of Justices, 138 Mass. 601; Redell v. Moores, 63 Neb. 219, 88 N. W. 243, 55 L. R. A. 740; Hartshorn v. Schoff, 51 N. H. 316; Bakely v. Nowrey, 68 N. J. Law, 95, 52 Atl. 289; People v. Comstock, 78 N. Y. 356.

[37] In re Marshalship for the Southern & Middle Districts of Alabama, 20 Fed. 379; Somerville v. Wood, 129 Ala. 369, 30 So. 280; Hooper v. Creager, 84 Md. 195, 35 L. R. A. 202; Kip v. City of Buffalo, 123 N. Y. 152, 25 N. E. 165, 9 L. R. A. 493; State v. Tate, 68 N. C. 546.

[38] People v. Freeman, 80 Cal. 233; People v. Hoffman, 116 Ill. 587; State v. Peelle, 124 Ind. 515, 8 L. R. A. 228; Kimball v. Alcorn, 45 Miss. 151; Ex parte Lucas, 160 Mo. 218; Eddy v. Kincaid, 28 Or. 537.

[39] State v. Lovell, 70 Miss. 309, 12 So. 341; State v. Mayhew, 21 Mont. 93, 52 Pac. 981; King v. Duryea, 45 N. J. Law, 258; People v. Hall, 104 N. Y. 170, 10 N. E. 135; Pippin v. State, 34 Tenn. (2 Sneed) 43.

[40] Gilboy v. City of Detroit, 115 Mich. 121; Attorney General v. McCabe, 172 Mass. 417; States Prison v. Day, 124 N. C. 362, 32 S. E. 748, 46 L. R. A. 295.

[41] People v. Tyrrell, 87 Cal. 475; Monash v. Rhodes, 27 Colo. 235, 60 Pac. 569; State v. Murphy, 32 Fla. 138; Calvert County Com'rs v. Helen, 72 Md. 603, 20 Atl. 130; Hooper v. New, 85 Md. 565, 37 Atl. 424; Lynch v. Raymond, 45 Miss. 151; State v. Page, 20 Mont. 238, 50 Pac. 719; Hoell v. City Council of Camden, 68 N. J. Law, 226, 52 Atl. 213; State v. Manson, 105 Tenn. 232, 58 S. W. 319.

make designated appointments to office but certain of these selections must be confirmed by the United States senate.[42] In the greater number of instances the right to make appointments of subordinate officials and employes exists without the necessity of securing the consent directly or otherwise of a confirming body.[43]

§ 354. Appointments; manner of making.*

An appointment to public office should be made in writing,[44] although in some cases action has been held valid not made in this manner.[45] The weight of authority and the better reason calls, however, for the existence of title to office in some form more definite and more permanent than memory. A public officer exercises for the sovereign certain functions of government and it is highly important that his rights should be evidenced in a substantial manner.[46]

§ 355. Classes.

Appointments to office as made are usually of two classes—what may be termed original appointments and appointments to fill vacancies. The possession of the authority to make original appointments or selections of subordinate officials and employes leads to an unnecessary concentration of power in the hands of high executive officers and it should be the present policy and tendency to limit the power rather than to extend it. This reason is a strong argument against municipal or governmental ownership of private or quasi public enterprises or industries. The right

[42] U. S. Const. art. 1, § 2, par. 2. In re Marshalship for the Southern and Middle Districts of Alabama, 20 Fed. 379. Matter of Farrow, 3 Fed. 112; Gould v. United States, 19 Ct. Cl. 593.

[43] People v. Hammond, 66 Cal. 654; Carson v. State, 145 Ind. 348; Berry v. McCollough, 94 Ky. 247; Ash v. McVey, 85 Md. 119; Russell v. Wellington, 157 Mass. 100; Attorney General v. Corliss, 98 Mich. 372; People v. Andrews, 104 N. Y. 570; People v. Bledsoe, 68 N. C. 457; Briggs v. McBride, 17 Or. 640, 5 L. R. A. 115; Com. v. Oellers, 140 Pa. 457; State v. Manson, 105 Tenn. 232.

* 6 Curr. Law, 846.

[44] State v. Crawford, 28 Fla. 441, 14 L. R. A. 253; Phelon v. Inhabitants of Granville, 140 Mass. 386; State v. Meder, 22 Nev. 264, 38 Pac. 668; People v. Murray, 70 N. Y. 521; State v. Barber, 4 Wyo. 409, 34 Pac. 1028, 27 L. R. A. 45.

[45] Carter v. Sympson, 47 Ky. (8 B. Mon.) 155; Hoke v. Field, 73 Ky. (10 Bush) 144.

[46] People v. Murray, 70 N. Y. 521.

to directly select local public officers by those who are to sustain governmental relations with them is a necessary conclusion from our belief in the theory of local self-government.[47]

§ 356. To fill vacancies.

The power to appoint public officials is exercised frequently in connection with vacancies in public offices. A public official is vested with some portion of sovereign powers to be exercised for the benefit of the people. The existence of the office presupposes the existence of official duties and, therefore, the necessity, at all times, for some competent and qualified person to perform these duties.[48] If through removal,[49] change of residence,[50] death,[51] resignation[52] or other condition,[53] a vacancy arise in an office, it is necessary that the power exist in some individual or body to fill it temporarily[54] or as usual until the next general election[55]

[47] City of Evansville v. State, 118 Ind. 426, 4 L. R. A. 93; State v. Denny, 118 Ind. 49, 4 L. R. A. 65; People v. Hurlbut, 24 Mich. 44.

[48] Peck v. Barrien County Sup'rs, 102 Mich. 346, 60 N. W. 985; Attorney General v. Varney, 68 N. H. 64, 40 Atl. 394; In re Johnson County Com'rs (Wyo.) 32 Pac. 850.

[49] City of Somerset v. Somerset Banking Co., 109 Ky. 549, 60 S. W. 5; State v. Schumaker, 27 La. Ann. 332; Gage v. Dudley, 64 N. H. 437, 13 Atl. 865; Honey v. Graham, 39 Tex. 1.

[50] Smith v. State, 24 Ind. 101; Curry v. Stewart, 71 Ky. (8 Bush) 560; Ross v. Barber, 86 Mich. 380, 49 N. W. 35.

[51] State v. Hopkins, 10 Ohio St. 509; In re Supreme Ct. Vancancy, 4 S. D. 532, 57 N. W. 495; Gold v. Fite, 61 Tenn. (2 Baxt.) 237.

[52] Biddle v. Willard, 10 Ind. 62; Stubbs v. Lee, 64 Me. 195; In re Corliss, 11 R. I. 638; State v. Washburn, 17 Wis. 658.

[53] People v. Rodgers, 118 Cal. 393, 50 Pac. 668, reversing 46 Pac. 740; People v. Shorb, 100 Cal. 537; In re Executive Communication, 25 Fla. 426, 5 So. 613; Jones v. Collier, 65 Ga. 553; People v. Hanifan, 96 Ill. 420; State v. Craig, 132 Ind. 54, 31 N. E. 352, 16 L. R. A. 688; Bowen v. Long, 19 Ky. L. R. 1881, 44 S. W. 647; State v. Graham, 26 La. Ann. 568; State v. Lansing, 46 Neb. 514, 35 L. R. A. 124; People v. Hall, 104 N. Y. 170; State v. Butts, 9 S. C. (9 Rich.) 156; State v. City of Ballard, 10 Wash. 4, 38 Pac. 761; State v. Shank, 36 W. Va. 223, 14 S. E. 1001.

[54] Sheen v. Hughes, 4 Ariz. 337, 40 Pac. 679; In re Advisory Opinion to Governor, 31 Fla. 1, 12 So. 114, 18 L. R. A. 594; Carson v. State, 145 Ind. 348, 44 N. E. 360; Hoke v. Richie, 100 Ky. 66, 37 S. W. 266, 38 S. W. 132; Opinion of the Justices, 64 Me. 596; Moreland v. Millen, 126 Mich. 381, 85 N. W. 882; O'Leary v. Adler, 51 Miss. 28; State v. Kuhl, 51 N. J. Law, 191, 17 Atl. 102; State v. McKee, 65 N. C. 257.

[55] Falconer v. Robinson, 46 Ala. 340; State v. Hyde, 121 Ind. 20, 22

or until a special election [56] can be called in the manner provided by law for the election of an official incumbent.

§ 357. Public offices secured through election.

The greater number of public officials secure their title to office through an election held as authorized by constitutional or statutory provisions. As suggested in a preceding section, our form of government favors this method of securing public office rather than that of an appointment since the power to appoint to public office, it is thought and has been held, concentrates the administrative powers of government to an undesirable extent in the hands of a single individual. The time and the manner of election if prescribed by the source of authority suggested above must follow this strictly and one held in any other manner or at another time is void.[57-58] The rule, however, usually obtains that one elected to public office is to be considered an officer de facto with all the rights and liabilities accompanying such a status both with respect to the public generally, himself and the public corporation.[59]

§ 358. Eligibility of candidates for public office.

The holding of public office is a special grant or mark of favor by the sovereign. It is not an inherent, a vested or a natural

N. E. 644; Dyer v. Bagwell, 54 Iowa, 487; State v. Garrett, 29 La. Ann. 637; Munroe v. Wells, 83 Md. 505; Attorney General v. Trombly, 89 Mich. 50, 50 N. W. 744; State v. O'Leary, 64 Minn. 207; Com. v. Callen, 101 Pa. 375.

[56] People v. Ward, 107 Cal. 236, 40 Pac. 538; Reeves v. Ferguson, 31 N. J. Law, 107.

[57] Speed v. Crawford, 60 Ky. (3 Metc.) 207; State v. Sims, 18 S. C. 460.

[58] Lane v. Kolb, 92 Ala. 636, 9 So. 873; People v. Col, 132 Cal. 334, 64 Pac. 477; Mallett v. Plumb, 60 Conn. 352, 22 Atl. 772; Collins v. Russell, 107 Ga. 423, 33 S. E. 444; People v. Williams, 145 Ill. 573, 24 L. R. A. 492; State v. McFarland, 149 Ind. 266, 39 L. R. A. 282; Com. v. Donovan, 170 Mass. 228, 49 N. E. 104; Ostrander v. Gratiot County Sup'rs, 111 Mich. 64, 69 N. W. 91; Eddy v. Kincaid, 28 Or. 537, 41 Pac. 655; Young v. Crawford, 153 Pa. 34, 25 Atl. 617; Bush v. State, 100 Wis. 549, 76 N. W. 606.

[59] Delphi School Dist. v. Murray, 53 Cal. 29; State v. Rost, 47 La. Ann. 53; City of Vicksburg v. Lombard, 51 Miss. 111; Brinkerhoff v. Jersey City, 64 N. J. Law, 225, 46 Atl. 170; In re Kendall, 85 N. Y. 302; State v. Superior Ct. of Snohomish County, 17 Wash. 12, 48 Pac. 741.

right and the people acting in constitutional convention or through the state legislature can prescribe such qualifications as they may deem desirable or expedient and which must be possessed by those desiring to become public officials and perform public duties.[60] The qualifications required have as their reason the securing of competent persons, both mentally and physically, to perform the public or governmental duties which may be assigned to them. A high standard of excellence should at least be required. The establishment of specific qualifications will in no ways affect the right of a succeeding legislature or of a sovereign body to add to, alter or change them. No vested right can be acquired by any individual to public office or the privilege of holding it through the possession of the qualifications prescribed by statute at any precise moment of time.[61]

These requirements may not only apply to the eligibility of a public officer at the time of election or appointment to office but they may also be extended to the existence of a like condition during the entire term for which the official is elected or appointed and if an incumbent of office becomes ineligible at any time during his term, steps may be taken to have the office declared vacant.[62]

§ 359. Physical qualifications.

The fitness to perform the duties of certain offices may depend upon the physical strength of the incumbent, and since women[63] or minors[64] of both sexes are usually regarded as inferior in this

[60] Jeffries v. Harrington, 11 Colo. 191, 17 Pac. 505; In re Advisory Opinion to the Governor, 31 Fla. 1, 18 L. R. A. 594; Hudspeth v. Garrigues, 21 La. Ann. 684; Bramhall v. City of Bayonne, 35 N. J. Law, 476; Fox v. Mohawk & H. R. Humane Soc., 25 App. Div. 26, 48 N. Y. Supp. 625. A corporation cannot take an oath of office and does not possess moral qualities; it is, therefore, not eligible to public office. State v. Stevens, 29 Or. 464; State v. Crawford, 17 R. I. 292, 21 Atl. 546; Throop, Pub. Off. § 72; Abb. Mun. Corp. §§ 608 et seq.

6 Curr. Law, 844.

[61] Hall v. Hostetter, 56 Ky. (17 B. Mon.) 785; State v. Dunn, 73 N. C. 595; Ter. v. Stubblefield, 5 Okl. 310.

[62] Kean v. Rizer, 90 Md. 507, 45 Atl. 468.

[63] Schuchardt v. People, 99 Ill. 501; Wright v. Noell, 16 Kan. 601; Atchison v. Lucas, 83 Ky. 451; State v. Gorton, 33 Minn. 345; State v. Hostetter, 137 Mo. 636, 39 S. W. 270, 38 L. R. A. 208.

6 Curr. Law, 844.

[64] State v. Bradley, 48 Conn. 548; Lambert v. People, 76 N. Y. 220.

respect to males of full age, in some states these have been debarred from holding the particular offices specified. The question of whether women shall vote or hold office is one of local public policy merely. It is not to be compared with the same question in respect to aliens; the inclinations, interests and duties of the latter are presumptively with the nation of which they are citizens and therefore antagonistic. The rule almost universally obtains in the United States of the right of women to vote on questions connected with public education and to hold office in connection with the public school system.[65]

§ 360. Mental.

To properly perform the duties of many offices special educational or professional attainments are necessary and such qualifications are regarded as expedient and necessary.[65a] Age may also affect the mental capacity of candidates. Youth or extreme old age may, therefore, incapacitate certain persons from holding particular offices.[66]

§ 361. Condition of the candidate.

It was said by Judge Dixon of Wisconsin that "it is an acknowledged principle, which lies at the very foundation, and the enforcement of which needs neither the aid of statutory nor constitutional enactments or restrictions, that the government is instituted by the citizens for their liberty and protection, and that it is to be administered and its powers and functions exercised only by them and through their agency."[67] This principle has acted so universally that all of the states require as one of the first qualifications for the proper performance of public duties that one of citizenship.[68] In further maintaining the principle of

[65] Huff v. Cook, 44 Iowa, 639; Koontz v. Kurtzman, 12 Wash. 59.

[65a] State v. City Council of Wilmington, 3 Har. (Del.) 294; State v. Gylstrom, 77 Minn. 355, 79 N. W. 1038. But see State v. Nichols, 83 Minn. 3, 85 N. W. 727.

[66] United States v. Bixby, 9 Fed 78; Keniston v. State, 63 N. H. 37, 56 Am. Rep. 486; People v. Duane, 121 N. Y. 367.

[67] State v. Smith, 14 Wis. 497.

[68] Walther v. Rabolt, 30 Cal. 186; State v. Kilroy, 86 Ind. 118; State v. Van Beek, 87 Iowa, 569, 54 N. W. 525, 19 L. R. A. 622; State v. Boyd, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602; State v. Streukens, 60 Minn. 325, 62 N. W. 259.

6 Curr. Law, 844.

local self-government, the condition of residence[69] within the limits of the corporation as to which the public office exists is almost universally required and the lack of this qualification is sufficient to debar one from holding certain prescribed offices. In some instances, the ownership of real property is a necessary qualification for eligibility to office; the principle which is a sound one being that the ownership of property, real or personal, will make one more conservative in his official acts as affecting the public welfare and that he will, in all respects, exercise the duties of his office more carefully, efficiently and honestly since he will be personally affected in his property interests by any neglect, extravagance or misfeasance in office.[70]

§ 362. Act of candidate.*

The duties required of public officers are many and vary with the nature of each office. Some collect and disburse the public moneys, others enact laws, others construe them and still others perform administrative and executive duties. In order to secure the proper performance of these duties respectively, the law may require as qualifications that highest excellency and ability which is necessary. A defaulter or embezzler,[71] one who may have participated in a duel[72] or who may have engaged in an open or overt act against the government,[73] or is now holding a designated office,[74] may therefore be disqualified from holding or be-

[69] Wheat v. Smith, 50 Ark. 266, 7 S. W. 161; Bergevin v. Curtz, 127 Cal. 86, 59 Pac. 312; Gibson v. Wood, 20 Ky. L. R. 1547, 49 S. W. 768; Auditor General v. Longyear, 110 Mich. 223, 68 N. W. 130; State v. McGeary, 69 Vt. 461, 38 Atl. 165, 44 L. R. A. 446. But see Salamanac Tp. v. Wilson, 109 U. S. 627.

[70] Crovatt v Mason, 101 Ga. 246; Vanneman v. Pusey, 93 Md. 686, 49 Atl. 659; Roane v. Matthews, 75 Miss. 94, 21 So. 665; State v. Ruhe, 24 Nev. 251, 52 Pac. 274.

* 6 Curr. Law, 844.

[71] Shuck v. State, 136 Ind. 63, 35 N. E. 993; Carrothers v. Russell, 53 Iowa, 346; State v. Dart, 57 Minn. 261; State v. Moores, 52 Neb. 770, 73 N. W. 299; People v. French, 102 N. Y. 583.

[72] Anderson v. State, 72 Ala. 187; Royall v. Thomas, 28 Grat. (Va.) 130.

[73] Matter of Office of Attorney General, 14 Fla. 277; Hudspeth v. Garrigues, 21 La. Ann. 684; Privett v. Stevens, 25 Kan. 275; State v. Cosgrove, 34 Neb. 386, 51 N. W. 974.

[74] State v. Montgomery, 25 La. Ann. 138; State v. Plymell, 46 Kan. 294; State v. Sutton, 63 Minn. 147, 65 N. W. 262, 30 L. R. A. 630; In re Corliss, 11 R. I. 638; Carr v. Wilson, 32 W. Va. 419, 9 S. E. 31, 3 L. R. A. 64; Preston v. United States,

coming a candidate for a particular office. This latter reason proceeds upon the theory that one cannot, because of physical limitations, or because of the incompatible and diverse duties of the two offices, efficiently perform the duties of more than one. Statutory or constitutional provisions may also disqualify members of legislative bodies from holding any civil office which shall have been created or the emoluments of which have been increased during their incumbency in the legislative office.[75] One may also be rendered ineligible to office by reason of the fact that it has already been held by him for a designated time.[76]

§ 363. Right to change qualifications.

As suggested in a preceding section, the right to hold office if existing by reason of the possession of the required qualifications does not become a vested one and the people acting in constitutional convention or through the legislature, if the office is a legislative one, can at any time change or add to such qualifications.[77] Where no constitutional prohibition intervenes, the legislature may create or fix the qualifications of an office and may add to them or change them at pleasure.[78]

Limitations upon legislative power. The limitations, however, are found either as expressly made or inherently existing that neither political[79] nor religious opinions or beliefs[80] can be made a test of the right to hold office except as a particular board of public officers may, by law, be required to consist of the members of the two leading political bodies.[81] Nor can arbitrary, unreason-

37 Fed. 417; United States v. Saunders, 120 U. S. 126; Attorney General v. Common Council of Detroit, 112 Mich. 145, 70 N. W. 450, 37 L. R. A. 211; Oliver v. City of Jersey City, 63 N. J. Law, 96, 42 Atl. 782; People v. Purdy, 154 N. Y. 439, 48 N. E. 821; O'Connor v. City of Fond du Lac, 101 Wis. 83. See, also, Abb. Mun. Corp. § 612.

[75] State v. George, 22 Or. 142, 29 Pac. 356, 16 L. R. A. 737; State v. Boyd, 21 Wis. 208.

[76] State v. Linkhauer, 142 Ind. 94, 41 N. E. 325; Koontz v. Kurtzman, 12 Wash. 59, 40 Pac. 622.

[77] State v. McSpaden, 137 Mo. 628.

6 Curr. Law, 844.

[78] Jeffries v. Rowe, 63 Ind. 592; Buckner v. Gordon, 81 Ky. 665; State v. Holman, 58 Minn. 219; People v. Clute, 50 N. Y. 451.

[79] City of Evansville v. State, 118 Ind. 426, 4 L. R. A. 93; City of Baltimore v. State, 15 Md. 376.

[80] State v. Wilmington City Council, 3 Har. (Del.) 294.

[81] Rogers v. Common Council of Buffalo, 123 N. Y. 173, 9 L. R. A. 579.

able exclusions from office be made or qualifications prescribed which do not operate with uniformity.[82]

§ 364. Official oath.

One qualification for the office and also one of the criterions adopted by courts in distinguishing between a public office and an employment is the requirement that the incumbent shall take and file the oath prescribed by law [83] which includes, usually, an expression of allegiance to the government and the further pledge that the office-holder will perform the duties of his office honestly, efficiently, to the best of his ability, and according to law.[84] Where the taking of an oath is contrary to the religious belief of candidates, who in other respects are eligible, the provision is usually made for an affirmation which legally serves the same purpose.[85]

§ 365. Official bonds; nature.

Public officials to whom are entrusted and delegated the performance of duties and acts which affect not only the public corporation which they represent as an entity but also the public composing it and further create private rights between third parties by reason of such acts are usually required to give an official bond.[86] This is required and given not only to protect public property and the community from loss by reason of a failure on the part of a public officer to faithfully discharge the duties of his office but also on the broader principle of a protection to the whole world from injury resulting from an abuse of official position or negligence in performing official duties.[87]

[82] White v. Clements, 39 Ga. 232; City of Baltimore v. State, 15 Md. 376.

[83] Bennett v. Treat, 41 Me. 226; Doherty v. Buchanan, 173 Mass. 338; Duffy v. State, 60 Neb. 812, 84 N. W. 264; Armstrong v. Whitehead, 67 N. J. Law, 405, 51 Atl. 472; In re Bradley, 141 N. Y. 527, 36 N. E. 598.

[84] Greene v. Lunt, 58 Me. 518; Frans v. Young, 30 Neb. 360.

[85] Glidden v. Towle, 31 N. H. 147.

[86] Ex parte Plowman, 53 Ala. 440; Middleton v. State, 120 Ind. 166, 22 N. E. 123; Glass v. Hutchinson, 55 Kan. 162, 40 Pac. 287; Town of Gloster v. Harrell, 77 Miss. 793, 23 So. 520, 27 So. 609; Mead Tp. v. Couse, 156 Pa. 311, 27 Atl. 26; Milwaukee County Sup'rs v. Pabst, 70 Wis. 352, 35 N. W. 337.

6 Curr. Law, 868.

[87] National Bank of Redemption v. Rutledge, 84 Fed. 400; Somerville v. Wood, 129 Ala. 369, 30 So. 280;

Such provisions are usually construed as mandatory in their character in respect to the giving of the bond but directory as to the time and an individual is not properly qualified to perform the duties of an office until legal requirements in respect to the bond have been complied with.[88]

Defective or informal bond. Official bonds when not conformable with the statute which requires them may be good at common law though under these circumstances they are capable of enforcement only according to the rules of the common law. They may be good as common-law obligations and enforceable only as such.[89]

§ 366. Bond; execution, filing and approval.

The execution and delivery involves the elements of time, manner and approval.[90] It is not usually necessary that the sureties of a bond should reside within the district for which the official is to perform his duties although they should live within the jurisdiction of the state which includes as a component part the local or subordinate public corporation.[91]

In many cases it is provided that the bond must be approved by some designated official or body who, through this act, pass upon and endorse the sufficiency of the bond both in regard to its mechanical execution and also the financial responsibility of the sureties.[92] This action is necessary in all cases where public

People v. Smith, 123 Cal. 297, 55 Pac. 765; James v. State, 49 Miss. 420; Bray v. Barnard, 109 N. C. 44, 13 S. E. 729.

[88] Beebe v. Robinson, 52 Ala. 66; Albaugh v. State, 145 Ind. 356, 44 N. E. 355; Holt County v. Scott, 53 Neb. 176, 73 N. W. 681; Howell v. Com., 97 Pa. 332.

[89] United States v. Hodson, 77 U. S. (10 Wall.) 395; People v. Stacy, 74 Cal. 373; City of Brunswick v. Harvey, 114 Ga. 733, 40 S. E. 754; Fournier v. Cyr, 64 Me. 33; Swift County Com'rs v. Knudson, 71 Minn. 461; Clark v. Douglas, 58 Neb. 571, 79 N. W. 158.

[90] Hyne v. Osborn, 62 Mich. 235; State v. Paxton, 65 Neb. 110, 90 N. W. 983; Hecht v. Coale, 93 Md. 692, 49 Atl. 660; State v. Chick, 146 Mo. 654, 48 S. W. 829; Baker City v. Murphy, 30 Or. 405, 35 L. R. A. 88; Town of Rutland v. Paige, 24 Vt. 181; Marshall v. Hamilton, 41 Miss. 229.

6 Curr. Law, 868.

[91] Hyner v. Dickinson, 32 Ark. 776; McCormick v. Johnson County Com'rs, 68 Ind. 214; State v. Fowler, 41 La. Ann. 380.

[92] Ex parte Booth, 64 Ala. 312; Alexander v. Ison, 107 Ga. 745, 33 S. E. 657; Sullivan v. State, 121 Ind. 342, 23 N. E. 150; Moreland v. Millen, 126 Mich. 381, 85 N. W. 882;

moneys or properties are to be handled by an official; otherwise, the giving of straw bonds would be of frequent occurrence and dishonest officials would take advantage of the condition to embezzle moneys entrusted to them.

§ 367. Liability of sureties.

The liability is unquestioned of the principal and the sureties on an official bond for losses resulting from the neglect or dishonesty of the public official.[93] The question of liability, therefore, resolves itself largely into a discussion of the question of losses or damage resulting from conditions not existing through the default, neglect or dishonesty of the public official, or which may occur from causes entirely beyond his control.

With respect to this liability, there are two lines of decisions; those leading to a strict and literal interpretation of the bond and its conditions and a more liberal rule which is based upon reasons to be considered later. Under the first cases an official bond is construed strictly in favor of the sureties where defects or other conditions arise which legally lead to a release from their obligations,[94] and, on the other hand, they are held to a strict accountability in case the obligation of the bond is violated without regard to or a consideration of the causes leading to this condition.[95] A leading case[96] in which the opinion was written by Judge Cooley holds that the contract of the sureties upon an official bond is subject to the strictest interpretation and that they

In re Craig, 130 Mo. 590, 32 S. W. 1121; Rice's Appeal, 158 Pa. 157, 27 Atl. 842.

[93] National Bank of Redemption v. Rutledge, 84 Fed. 400; Briggs v. Coleman, 51 Ala. 561; Renfroe v. Colquitt, 74 Ga. 618; Wright v. Kinney, 123 N. C. 618, 31 S. E. 874; Moses v. United States, 166 U. S. 571; Walters-Cates v. Wilkinson, 92 Iowa, 129.

6 Curr. Law, 868.

[94] United States v. Boyd, 15 Pet. (U. S.) 187; San Luis Obispo County v. Farnum, 108 Cal. 562; State v. Flynn, 157 Ind. 52, 60 N. E. 684.

[95] Williams v. Lymann (C. C. A.) 88 Fed. 237; State v. Smith, 16 Fla. 175; Mason v. Road & Revenue Com'rs, 104 Ga. 35; Bonta v. Mercer County Court, 70 Ky. (7 Bush) 576; Inhabitants of Winthrop v. Soule, 175 Mass. 400, 56 N. E. 575; Cheboygan County v. Erratt, 110 Mich. 156, 67 N. W. 1117; City of Newark v. Stout, 52 N. J. Law, 35, 18 Atl. 943; Coe v. Nash, 91 Tex. 113, 40 S. W. 235.

[96] Detroit Sav. Bank v. Ziegler, 49 Mich. 157.

undertake nothing which is not within the letter of their contract. But a leading text book on the subject of public officers states:[97] "The officer having bound himself and his sureties, without reservation or qualification, by the express terms of his bond that he will duly deliver and pay over the public funds which come into his hands, this obligation 'can only be met or discharged by making such delivery or payment.' If the parties had desired exemption in a given contingency, it should have been 'so nominated in the bond.'"[98]

The reason given in the preceding paragraph for the strict accountability of a surety is based upon the terms of the contract; the same finding is supported in other cases holding to the rule of strict accountability because of public policy which requires that every depositary of public moneys should be held to a strict accountability.[99]

Still other cases holding the strict accountability theory base their findings upon the reason that because of the statutes governing the subject, the officer becomes, in effect, the debtor of the public and is, therefore, not relieved from a liability for a loss or a damage to property in his custody or under his control whatever the cause may be.[100]

The less strict rule. Another line of cases hold that the principal and sureties on an official bond are not liable where the loss or the damage occurs without the default of the public officer and where in the performance of his duties he has exercised reasonable care, diligence and honesty.[101] These cases proceed upon the principle that a public officer stands in the position of a bailee for hire and bound by virtue of his office to exercise good faith and reasonable skill and diligence in the discharge of his trust or, as has been said, in other words, "to bring to its discharge that prudence, caution and attention which careful men shall exercise in the management of their own affairs."[102] A leading case hold-

[97] Mechem, Pub. Off. § 298.

[98] Inhabitants of Hancock v. Hazzard, 66 Mass. (12 Cush.) 112; Prince v. McNeill, 77 N. C. 398.

[99] United States v. Thomas, 82 U. S. (15 Wall.) 338; United States v. Prescott, 3 How. (U. S.) 578; State v. Nevin, 19 Nev. 162.

[100] Inhabitants of Hancock v. Hazzard, 66 Mass. (12 Cush.) 112; Looney v. Hughes, 26 N. Y. 514; Wilson v. Wichita County, 67 Tex. 647.

[101] Rose v. Hatch, 5 Iowa, 149; Albany County Sup'rs v. Dorr, 25 Wend. (N. Y.) 440.

[102] Guille v. Swan, 19 Johns. (N. Y.) 381.

ing this theory was decided by the supreme court of the United States.[103] The liberal rule excuses the official and his sureties where the loss or the damage has occurred without his fault and by means beyond his control. Fire,[104] theft or robbery,[105] act of God or the public enemy,[106] and a failure of a depositary, caused by some great and sudden financial crisis or panic,[107] in which public moneys have been deposited for safe keeping and which under ordinary circumstances would have been secure, have each been assigned as reasons sufficient for the adoption of the liberal rule.

§ 368. Liability of the surety; the elements of time or duty considered.

The contract of suretyship is one very strictly construed. Nothing can be added to it by implication in cases of doubt or of ambiguity.[108] The obligation includes without doubt a responsibility for the acts of the public officer occurring only during the term of office for which the bond has been given.[109]

New or additional duties. The same principle also applies where after the execution of an official bond, laws or regulations have been passed imposing new duties upon the official or additional ones of the same character performed by him at the time of the execution of the bond.[110]

[103] United States v. Thomas, 82 U. S. (15 Wall.) 377.

[104] But see Heppe v. Johnson, 73 Cal. 265, 14 Pac. 833. See, also, Abb. Mun. Corp. § 623.

[105] State v. Houston, 83 Ala. 361; Taylor Dist. Tp. v. Morton, 37 Iowa, 550; Boyden v. United States, 80 U. S. (13 Wall.) 17.

[106] Clay County v. Simonsen, 1 Dak. 403; Maloy v. Bernalillo County Com'rs, 10 N. M. 638, 62 Pac. 1106.

[107] People v. Faulkner, 107 N. Y. 477, 14 N. E. 415; State v. Copeland, 96 Tenn. 296, 34 S. W. 427, 31 L. R. A. 844. But see United States v. Thomas, 82 U. S. (15 Wall.) 337; Swift v. Trustees of Schools, 189 Ill. 584, 60 N. E. 44; State v. Bobleter, 83 Minn. 479, 86 N. W. 461.

[108] Jeffreys v. Malone, 105 Ala. 489; Stoner v. Keith County, 48 Neb. 279; Fake v. Whipple, 39 N. Y. 394.

6 Curr. Law, 868.

[109] United States v. Honsman (C. C. A.) 70 Fed. 581; City of Cambridge v. Fifield, 126 Mass. 428; City of Grand Haven v. United States Fidelity & Guaranty Co., 128 Mich. 106, 87 N. W. 104; State v. Bobleter, 83 Minn. 479, 86 N. W. 461; Town of Parsons v. Miller, 46 W. Va. 334, 32 S. E. 1017. See, also, Abb. Mun. Corp. § 624.

[110] Brown v. Sneed, 77 Tex. 471, 14 S. W. 248; Com. v. Holmes, 25 Grat. (Va.) 771. Many cases hold,

Different offices or funds. In many cases public officials are permitted to hold and perform the duties of two or more offices with similar duties and in each case including the control of public funds and the management of public property. It is true that the liability of sureties in these cases is limited strictly to a liability arising from acts of the official done in the performance of the duties of the particular office for which the surety assumed a liability.[111]

II. TERMINATION OF OFFICIAL LIFE.

§ 369. Official life terminated by legislative action.

It is the settled doctrine in the United States that a public office contains nothing of the nature of a grant or of a contract, and in the absence of constitutional restrictions or where the office is not a constitutional one,[112] the legislature or a legislative body acting within its authority has the power to deal with public offices absolutely and without restraint in respect to their creation or abolition.[113] This rule applies to all grades of public officials, whether state or municipal, under the conditions suggested.[114]

§ 370. By expiration of term of office.

The phrase "term of office," in this connection, is usually understood to apply to a fixed and certain term established by law for

however, that an alteration, addition, or dimunition of the duties of a public officer so long as the duties required are the functions of a particular office do not discharge or release the sureties on official bonds. See Norton v. Kumpe, 121 Ala. 446, 25 So. 841; Board of Education of Auburn v. Quick, 99 N. Y. 138.

[111] Cooper v. People, 85 Ill. 417; State v. Johnson, 55 Mo. 80.

[112] Fitch v. City & County of San Francisco Sup'rs, 122 Cal. 285, 54 Pac. 901; Becker v. People, 156 Ill. 301, 40 N. E. 944; Indianapolis Brewing Co. v. Claypool, 149 Ind. 193, 48 Ind. 228; Sneath v. Mager, 64 N. J. Law, 94, 44 Atl. 983; People v. Palmer, 154 N. Y. 133, 47 N. E. 1084.

[113] Kimberlin v. State, 130 Ind. 120, 29 N. E. 773, 14 L. R. A. 858; In re Assessment for Construction of Sewer in City of Passaic, 54 N J. Law, 156, 23 Atl. 517.

6 Curr. Law, 850.

[114] State v. Chatfield, 71 Conn. 104, 40 Atl. 922; Goodwin v. State, 142 Ind. 117, 41 N. E. 359; State v. Jennings, 57 Ohio St. 415, 49 N. E. 404; Pratt v. Swan, 16 Utah, 483, 52 Pac. 1092.

the performance of certain official duties,[115] which if done for the time designated or until the time designated will terminate a further right to perform such duties.[116] This rule is modified in many cases by the provision that public officers or certain ones designated shall perform the duties of their office until their successors have been duly elected or appointed and have qualified.[117]

§ 371. Term of office; uncertain.

The term of office may be uncertain in its duration depending upon the performance of the duties prescribed or upon the favor of the appointing power.[118] Where a public office has been created for the sole purpose of performing certain duties of a temporary character, the completion of the work effects an expiration of the term of office.[119] Where an official holds his office at the pleasure of an appointing power, his term of office is necessarily uncertain and is further limited in duration by the term of that officer.[120]

§ 372. Resignation.

A term of office or official life is necessarily terminated by the death or permanent insanity of the incumbent[121] and also by voluntary action on his part. It is the theory in the United States.

[115] Gibbs v. Morgan, 39 N. J. Eq. 126; People v. Lacombe, 99 N. Y. 43.

[116] Ruggles v. Trustees of City of Woodland, 88 Cal. 430, 26 Pac. 520; Barrett v. State, 112 Ind. 322, 13 N. E. 677; State v. Lund, 167 Mo. 228, 66 S. W. 1062, 67 S. W. 572; Pettigrew v. Bell, 34 S. C. 104, 12 S. E. 1023; Smith v. Cosgrove, 71 Vt. 196, 44 Atl. 73.

[117] Barkley v. Levee Com'rs, 93 U. S. 258; People v. Feitner, 156 N. Y. 694; People v. Rodgers, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668; Sherman v. City of Des Moines, 100 Iowa, 88; Rounds v. Smart, 71 Me. 380; State v. Boyd, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602; Cherry v. Burns, 124 N. C. 761, 33 S. E. 136; State v. Wright, 56 Ohio St. 540; Sinclair v. Young, 100 Va. 284, 40 S. E. 907; State v. Mellike, 81 Wis. 574, 51 N. W. 875.

[118] Ward v. Elizabeth City, 121 N. C. 1; Pratt v. Swan, 16 Utah, 483. 6 Curr. Law, 850.

[119] Currier v. Boston & M. R. Co., 31 N. H. 209.

[120] Egan v. City of St. Paul, 57 Minn. 1, 58 N. W. 267; Greene v. Hudson County Freeholders, 44 N. J. Law, 388; State v. Williford, 104 Tenn. 694, 58 S. W. 295.

[121] State v. Hunt, 54 N. H. 431; State v. Speidel, 62 Ohio St. 156, 56 N. E. 871.
6 Curr. Law, 852.

unquestionably wrong,[122] but warranted by such long-continued practice as to make it effectual as a rule, that a public officer may decline to continue the performance of his public duties at any time.[123] A resignation may be made by parol in the absence of a statute law requiring it to be in writing[124] and may be either express or implied,[125] and, generally, the principle applies that when once made and presented to the authorities it cannot be subsequently withdrawn or lose its operative effect.[126]

Abandonment of an office. Official life may be also terminated by voluntary action on the part of the incumbent consisting of a refusal to qualify[127] or to further perform the duties of an office[128] effecting what the law considers an abandonment of the office. An office may also be abandoned by a removal of the incumbent from the state[129] or from the district for which he performs public duties where the law requires an official to reside within its limits.[130]

§ 373. Holding an incompatible office.

The principle has already been suggested in a preceding section that a person may become ineligible for the holding of an office by reason of holding or of being elected to what is termed an incompatible office. This principle is further emphasized by the rule that official life may be terminated through voluntary action of an incumbent by his acceptance of or the performance of the duties of an incompatible office which action it is held is equivalent to a

[122] Edwards v. United States, 103 U. S. 471.

[123] Miller v. Sacramento County Sup'rs, 25 Cal. 93; Parlseau v. Board of Education, 96 Mich. 302, 55 N. W. 799; State v. Dart, 57 Minn. 261, 59 N. W. 190. But see Badger v. United States, 93 U. S. 599.

[124] Van Orsdall v. Hazard, 3 Hill (N. Y.) 243.

[125] Barbour v. United States, 17 Ct. Cl. 149; People v. Hanifan, 6 Ill. App. 158.

[126] Griffing v. Danbury, 41 Conn. 96; Parcel v. State, 110 Ind. 122, 11 N. E. 4; Davidson v. Bryce, 91 Md. 681, 48 Atl. 52; Parlseau v. Board of Education, 96 Mich. 302, 55 N. W. 799; State v. Augustine, 113 Mo. 21, 20 S. W. 651; Hawkins v. Cook, 62 N. J. Law, 84, 40 Atl. 781; People v. Scheu, 167 N. Y. 292, 60 N. E. 650.

[127] Carpenter v. Titus, 33 Kan. 7; State v. Peck, 30 La. Ann. 280.

[128] Wardlaw v. City of New York, 137 N. Y. 194, 33 N. E. 140; Ward v. Elizabeth City, 121 N. C. 1, 27 S. E. 993.

[129] Relender v. State, 149 Ind. 283, 49 N. E. 30.

[130] Osborne v. State, 128 Ind. 129; State v. Walker, 17 Ohio, 135.

resignation or an abandonment of that other office.[131] A text book writer has said [132] "that incompatibility in offices exist where the nature and duty of the two offices are such as to render it improper, from consideration of public policy, for one incumbent to retain both." Offices are usually considered incompatible and inconsistent so as not to be executed by the same person when, from the multiplicity of business in them, their duties cannot be executed with care and ability or when, from the different nature and character of the duties, the presumption exists that they cannot be as between them executed with impartiality and with honesty.[133]

§ 374. Termination of official life through removal.

The power to remove is usually held to be co-extensive with the power to appoint where official authority is derived from an appointment.[134] Removals from an office may be arbitrarily made without reason or cause where the official holds the office at the pleasure of some appointing power.[135] And this action if within the limitation of a statutory or constitutional power will not arbitrarily be reviewed by the courts.[136]

Civil service or other provisions. In respect to certain offices although appointive in their character, the legislature may impose restrictions upon an arbitrary right to remove.[137] These limita-

[131] See Abbott, Mun. Corp. § 634, and notes for citations of and discussion of cases relative to offices held incompatible or otherwise. See, also, 6 Curr. Law, 853.

[132] Mechem, Pub. Off. § 422; State v. Buttz, 9 S. C. (9 Rich.) 156.

[133] People v. Green, 58 N. Y. 295.

[134] Taylor v. Kercheval, 82 Fed. 497; Smith v. Brown, 59 Cal. 672; City of Savannah v. Grayson, 104 Ga. 105, 30 S. E. 693; State v. City of South Bend, 154 Ind. 693, 56 N. E. 721; State v. City Council of New Orleans, 107 La. 632, 32 So. 22; State v. Schram, 82 Minn. 420, 85 N. W. 155; Mathis v. Rose, 64 N. J. Law, 45, 44 Atl. 875; People v. City of Brooklyn, 149 N. Y. 215, 43 N. E. 554; Richards v. Town of Clarksburg, 30 Va. 491, 4 S. E. 774. 6 Curr. Law, 853.

[135] Handlin v. Wickliffe, 79 U. S. (12 Wall.) 173; Nolen v. State, 118 Ala. 154; Baxter v. Town of Beacon, 112 Iowa, 744, 84 N. W. 932; State v. Rost, 47 La. Ann. 73, 16 So. 776; Attorney General v. Cahill, 169 Mass. 18, 47 N. E. 433; Brandau v. City of Detroit, 115 Mich. 643; People v. Nixon, 158 N. Y. 221, 52 N. E. 1117; Nehrling v. State, 112 Wis. 637, 88 N. W. 610.

[136] State v. City Council of New Orleans, 107 La. Ann. 632, 32 So. 22; Attorney General v. Berry, 99 Mich. 379.

[137] People v. Orr, 22 Colo. 142, 43 Pac. 1005; Sherman v. City of Des

tions are based upon the theory that a proper performance of official and public duties is dependent upon a feeling of security in the possession of an office except in case of a negligent, lax or dishonest performance of such duties by the incumbent. Removals from office can, therefore, be made only for cause [138] and after the making of charges by the proper body or official, duly considered by a competent tribunal after notice to the person charged, and when all the proceedings prescribed by law have been followed.[139]

The principles governing removal from office in respect to notice and hearing do not apply where the character of service is a mere employment and not an office unless the employe is protected by civil service rules which govern both the manner of his selection and discharge.[140]

The rules regulating removal from office as it is commonly as well as technically understood, do not apply where the power of arbitrary dismissal exists or where the loss of official position results from an abolition of the office, the lack of funds with which to carry on a particular work or business or the completion of the particular work in the performance of which a person was engaged.[141]

Right to a notice and hearing. Where removals for cause are authorized by statute, the mere commission of the act warranting a removal will not justify action without giving notice to the party charged with the commission of the offense and a reasonable opportunity to be heard.[142] This right of notice and defense may exist independent of statutory provisions.[143] Where the leg-

Moines, 100 Iowa, 88; Attorney General v. Cogshall, 107 Mich. 181.

[138] Croly v. Trustees of Sacramento, 119 Cal. 229; State v. Common Council of Duluth, 53 Minn. 238, 55 N. W. 118; Johnson v. City of Galveston, 11 Tex. Civ. App. 469, 33 S. W. 150. An assault with a pistol is not such misconduct in office as will warrant a removal.

[139] Kriseler v. LeValley, 122 Mich. 576, 81 N. W. 580; State v. Smith, 35 Neb. 13, 52 N. W. 700, 17 L. R. A. 440; State v. McCarty, 65 Wis. 163.

[140] City of Chicago v. Luthardt, 91 Ill. App. 324; People v. Brady, 166 N. Y. 44, 59 N. E. 701.

[141] Langdon v. City of New York, 92 N. Y. 427.

[142] Avery v. Studley, 74 Conn. 272, 50 Atl. 752; Todd v. Dunlap, 99 Ky. 419, 36 S. W. 541; State v. City of New Orleans, 107 La. Ann. 632.

[143] Brown v. Duffus, 66 Iowa, 193; State v. Walbridge, 119 Mo. 383, 24 S. W. 457; State v. Markley, 55 N. J. Law, 107.

islature has provided for the giving of notice and the right to a hearing, these are essential to the legal removal of a public officer.[144]

§ 375. Cause for removal.*

The cause for removal, where one is necessary to effect this result, may be either prescribed by law,[145] or it may be one which is indictable,[146] or still further, one which while not indictable, is of such a grave character, considering the administration of government, as to warrant the action of removal.[147] The latter class would include acts of general insubordination, the negligent performance of public duties or such an attitude or course of conduct, either in respect to matters concerning private life or opinions, as for reasons of public policy, will justify a removal.[148] Generally it is not necessary to warrant removal where provision is made for this by law for cause that the official charged with the misconduct or misfeasance in office should have been indicted for the offense or convicted upon an indictment if found.[149]

§ 376. Removal for cause; tribunal and proceedings.

Assuming the existence of a cause for removal with regular or statutory proceedings leading to this end, it is still, nevertheless essential that the charges be considered by a tribunal especially

[144] Todd v. Tilford, 99 Ky. 449, 36 S. W. 541; Miles v. Stevenson, 80 Md. 358, 30 Atl. 646; Bowlby v. City of Dover, 68 N. J. Law, 97, 52 Atl. 289; Maroney v. City Council of Pawtucket, 19 R. I. 3, 31 Atl. 265.

[145] Thurston v. Clark, 107 Cal. 285, 40 Pac. 435; State v. City of Noblesville, 157 Ind. 31, 60 N. E. 704; Attorney General v. Jochim, 99 Mich. 358, 58 N. W. 611, 23 L. R. A. 699.

6 Curr. Law, 854.

[146] Woods v. Barnum, 85 Cal. 639, 24 Pac. 843; Brackenridge v. State, 27 Tex. App. 513, 4 L. R. A. 360.

[147] Donahue v. Will County, 100 Ill. 94; Ayers v. Hatch, 175 Mass. 489, 56 N. E. 612; People v. Nichols, 79 N. Y. 582.

[148] Avery v. Studley, 74 Conn. 272, 50 Atl. 752; State v. Welsh, 109 Iowa, 19, 79 N. W. 369; Com. v. Williams, 79 Ky. 42; Townsend v. Common Council of Sauk Centre, 71 Minn. 379, 74 N. W. 150; State v. Alcorn, 78 Tex. 387; Nehrling v. State, 112 Wis. 637, 88 N. W. 610.

[149] Kilburn v. Law, 111 Cal. 237; Francis v. City of Newark, 58 N. J. Law, 522.

provided by law [150] or one having, by reason of its general powers, jurisdiction to consider and render a competent judgment.[151]

The proceedings. The proceedings relative to the removal of a public official for cause are generally prescribed by statute and include a consideration of the authority for removal, the giving of notice to the person charged, the existence of and consideration by a competent and impartial tribunal and the rendition of a judgment or order in the manner prescribed by law.[152]

§ 377. Removal by impeachment.

Constitutions may provide for the removal of a public officer by impeachment, the language relative to this, establishing the tribunal, the course of procedure including notice and hearing and the acts, the commission of which will warrant either the commencement of the proceedings or the rendition of a judgment of impeachment.[153] The Federal Constitution provides [154] that "the president, vice-president and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." With respect to offenses warranting an impeachment, the same differences of policy in different states obtain as given in the section relative to removals for cause. In some states the rule is followed that a public officer can be impeached not only for offenses which are indictable but also for such a general course of conduct which, if permitted in a public officer, would be subversive of good government.[155] In other states, only offenses which are indictable will warrant impeachment proceedings as authorized by constitutional or statutory provisions.[156]

[150] People v. Onahan, 170 Ill. 449, 48 N. E. 1003; Hoke v. Richie, 100 Ky. 66, 37 S. W. 83, 38 S. W. 132; State v. Ward, 70 Minn. 58, 72 N. W. 825; In re Guden, 171 N. Y. 529, 64 N. E. 451.

6 Curr. Law, 856.

[151] In re Curtis, 108 Cal. 661, 41 Pac. 793; People v. Therrien, 80 Mich. 137, 45 N. W. 78; Com. v. Allen, 70 Pa. 465.

[152] Miles v. Stevenson, 80 Md. 358, 30 Atl. 646; State v. Dart, 57 Minn. 26; Roberts v. Paull, 50 W. Va. 528, 40 S. E. 470; Nehrling v. State, 112 Wis. 637, 88 N. W. 610.

[153] State v. Tally, 102 Ala. 25, 15 So. 722; In re Opinion of Justices, 167 Mass. 599; State v. Hill, 37 Neb. 80, 55 N. W. 794, 20 L. R. A. 573.

6 Curr. Law, 856.

[154] Art. I, § 2, par. 5; art. I, § 3, par. 6, 7; Const. U. S. art. II, § 4.

[155] State v. Tally, 102 Ala. 25, 15 So. 722; State v. Hastings, 37 Neb. 96, 55 N. W. 774.

[156] State v. Green, 52 S. C. 520,

III. Powers, Duties and Rights.

§ 378. Public officers; their powers and authority.

The source of official power as possessed by public officers and employes must be found in some act or expression of the sovereign people and without which the exercise of governmental and administrative powers by an individual is clearly regarded as a usurpation and an unwarranted and illegal assumption of power.[157] Since the authority of public officials can only be created by law and is, therefore, a matter of public record, all persons dealing with them are bound to take notice of its existence and must ascertain that it is sufficient in an assumed use.[158] Their power and authority is special and limited, not general, and their right to act in a specific instance must be ascertained and determined by an inspection of the law interpreted strictly.[159]

Presumption in favor of proper exercise of powers. The presumption of law, however, is in favor of the proper performance of official duties,[160] but this rule, however, does not include a vital jurisdictional fact and one especially which results in a seizure or forfeiture of private property.[161]

§ 379. Official powers; where exercised.

It is axiomatic that, since a public corporation can only exercise its functions within the geographical limits of its jurisdiction, that its officers and agents are limited also in this respect and can only perform their official duties within the limits of the corporation they represent.[162]

30 S. E. 683; Pomeroy, Const. Law, § 716; Story, Const. §§ 792, 793; Mechem, Pub. Off. 468 et seq.; Throop, Pub. Off. §§ 399, 400.

[157] Hussey v. Smith, 99 U. S. 20; Ames v. Port Huron Log Driving & Booming Co., 11 Mich. 139.

6 Curr. Law, 860.

[158] Kaufman v. Stone, 25 Ark. 336; State v. Peelle, 124 Ind. 515, 24 N. E. 440, 8 L. R. A. 228; Taft v. Town of Pittsford, 28 Vt. 286.

[159] State v. Anderson, 39 Iowa, 274; Troy v. Doniphan County Com'rs, 32 Kan. 507.

[160] Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64; Bailey v. Winn, 101 Mo. 649; Mandeville v. Reynolds, 68 N. Y. 528.

[161] In re City of Buffalo, 78 N. Y. 362; Little v. Herndon, 77 U. S. (10 Wall.) 26; Anderson v. McCormick, 129 Ill. 308; Hilton v. Bender, 69 N. Y. 75; Eastern Land, Lumber & Mfg. Co. v. State Board of Education, 101 N. C. 35.

[162] Moulton v. Parks, 64 Cal. 166, 30 Pac. 613; State v. Gurley, 37

Powers; when exercised. The further general principle is also true that public officials can only exercise the duties of an office during their term of office which is limited by the time of its legal commencement and termination.[163] In some instances, however, the law authorizes an officer to do certain official acts after the expiration of his term of office, which are necessary to complete official action or correct errors made during his term of office.[164]

§ 380. Powers exercised as affected by the nature of an office.

The authority and power of a public officer to act in respect to a certain transaction, even where the apparent authority may exist, is determined in all cases not only by the existence of the office with its accompanying duties and powers but also by the character of those duties or the nature of the governmental functions performed by an official. The threefold division of governmental functions or powers into legislative, judicial and executive has already been fully considered and in this connection it is considered advisable to call attention to a familiar principle of the law that the inherent nature of an office or the character of its duties is not established or fixed by the terminology of a legislative or constitutional provision or by legislative action.[164a] A recent case [165] is instructive on this point.

The execution of legislation is given to the executive branch of government, and where the powers possessed by an official in this department partake of a political nature as well as administrative, the manner and the time of the exercise of the power or the performance of a duty discretionary in its character is dependent alone upon the will and the good judgment of the official to whom it has been entrusted.[166]

The making of laws has been confided by the American people to a particular branch of the government known as the legislative or law-making department, and, under our theories, this branch

Minn. 475, 35 N. W. 179; People v. Feitner, 156 N. Y. 694, 51 N. E. 1093.

6 Curr. Law, 860.

[163] Town of Lemington v. Stevens, 48 Vt. 38.

[164] O'Brien v. Annis, 120 Mass. 143; German American Bank v. Morris Run Coal Co., 68 N. Y. 585. But see Halleck v. Inhabitants of Boylston, 117 Mass. 469.

[164a] State v. Valle, 41 Mo. 29.

6 Curr. Law, 860.

[165] Western Union Tel. Co. v. Myatt (C. C. A.) 98 Fed. 335.

[166] Hudman v. Slaughter, 70 Ala. 546; Doyle v. Aldermen of Raleigh, 89 N. C. 133.

or department is regarded as one of the co-ordinate branches of government and responsible within its powers to no other.[167] The legality of its action as tested or determined by well recognized legal and equitable principles controlling and affecting all branches of government it is true is for the judiciary to determine,[168] but in respect to the expediency or advisability or character of legislation, the law-making branch is answerable to none and attempts by executive or judicial officers to dictate the character or the subjects of legislation can be justifiably resented as an unwarranted and impertinent interference.[169]

To judicial officers is given the power of interpreting legislative action and determining its ultimate validity according to constitutional standards.[170] The legality of executive action is also for its determination under rules laid down in the original plan of government.[171]

§ 381. Official authority and power; how given; character of.

The statement has been made that the authority of public officials is limited and special rather than general.[172] This rule is necessarily applicable because of the fact that their principal is a public corporation, a governmental agent, created and maintained for the benefit of the community rather than the particular advantage of the individual members of that community. The general statement can, therefore, with confidence, be made that official power to be legally exercised must be specifically and expressly given.[173]

[167] St. Paul Gaslight Co. v. Village of Sandstone, 73 Minn. 225; Leeper v. State, 103 Tenn. 500, 53 S. W. 962.

[168] State v. Doherty, 25 La. Ann. 119.

[169] Koehler v. Hill, 60 Iowa, 617; State v. Tufly, 19 Nev. 391.

[170] Bowen v. Clifton, 105 Ga. 459; Johnson v. Wells County Com'rs, 107 Ind. 15; City of Clinton v. Walliker, 98 Iowa, 655; Tifft v. City of Buffalo, 82 N. Y. 204; Whitney v. City of Pittsburgh, 147 Pa. 351.

[171] Hedges v. Lewis & Clarke County Com'rs, 4 Mont. 280.

[172] Ferrel v. Town of Derby, 58 Conn. 234, 20 Atl. 460, 7 L. R. A. 776; Kobs v. City of Minneapolis, 22 Minn. 159; Hawkins v. Carroll County Sup'rs, 50 Miss. 735; Kennedy v. Ryall, 67 N. Y. 379; Town of Butternut v. O'Malley, 50 Wis. 329.

6 Curr. Law, 860.

[173] Smith v. Jones, 50 Ala. 465; Santa Cruz County v. McPherson, 133 Cal. 282, 65 Pac. 574; Sherlock v. Village of Winnetka, 68 Ill. 530; Burgess v. Uxbridge School Dist., 100 Mass. 132; Fire Dept. of New York v. Atlas S. S. Co., 106 N. Y.

Official authority as granted may be ministerial and imperative or discretionary in its character. When of the former character, it can be said that official authority and duty is coincident and the performance of an act can be compelled in a proper proceeding by one authorized to maintain it.[174] What can be stated as the converse of this rule is also true, namely, that public officials cannot be enjoined from doing official acts unless it appears that they are proceeding without authority.[175] As a rule the greater number of official acts, especially of executive and administrative officials are of a discretionary character both in respect to the manner and the time of their performance and a failure or a neglect to perform them in a particular manner or a particular time or the converse can lead to no rights in an individual as against the official.[176]

§ 382. Official authority; how exercised.

The necessity for a personal execution of public duties depends upon their character as ministerial, clerical or otherwise.* Ministerial or clerical duties can be performed by subordinate appointees or employes,[177] while all acts judicial in their character or involving the elements of judgment and discretion as depending upon particular official qualifications require a personal performance.[178] The latter rule is also true where the law imposes a personal execution of official duties.[179] The referring of public business to a committee or a subcommittee with power to act is usually

566, 13 N. E. 329; Carolina Nat. Bank v. State, 60 S. C. 465, 38 S. E. 629.

[174] Ex parte Rowland, 104 U. S. 604; German Security Bank v. Coulter, 112 Ky. 577, 66 S. W. 425; Morton v. Comptroller General, 4 S. C. (4 Rich.) 430.

[175] People v. Shasta County, 75 Cal. 179, 16 Pac. 776; Davany v. Koon, 45 Miss. 71; Appeal of Delaware County, 119 Pa. 159, 13 Atl. 62.

[176] Bunnell v. White County Com'rs, 124 Ind. 1, 24 N. E. 370; Hubbard v. Woodsum, 87 Me. 88, 32 Atl. 802; Potts v. City of Philadelphia, 195 Pa. 619, 46 Atl. 195; Rood v. Wallace, 105 Iowa, 5, 79 N. W. 449; Farrelly v. Cole, 60 Kan. 356, 56 Pac. 492.

* 6 Curr. Law, 860.

[177] Hope v. Sawyer, 14 Ill. 254; Philadelphia & R. R. Co. v. Com., 104 Pa. 86.

[178] Dyer v. Brogan, 70 Cal. 136, 11 Pac. 589; People v. Governor, 29 Mich. 320; Turner v. City of Newburgh, 109 N. Y. 301, 16 N. E. 344.

[179] Coquard v. Chariton County, 14 Fed. 203; Warren v. Ferguson, 108 Cal. 535; Anderson v. Claman, 123 Ind. 471.

held as not coming within the principle requiring personal execution of official duties.[180]

Official authority must also be exercised in the name of the public [181] and in the manner prescribed by law.[182]

§ 383. Personal execution of official duties.*

It is customary in many cases to provide by law for the performance of official duties through deputies [183] or by designated officials in case of the absence or temporary disablement of a public officer,[184] and where these provisions exist, the existence of the conditions given will authorize such action as may be contemplated by law.

Joint authority; how exercised. Official authority or power must be exercised not only in the manner prescribed by law and in the name of the public but also when exercised by an official board or body by that board or body acting as such [185] at a meeting duly called and authorized by law [186] and at which under the law or regular rules of procedure particular action can be taken.[187]

§ 384. De facto officers; definition.

A de facto officer has been defined as one "who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." [188] Where the state is inquiring into the

[180] Holland v. State, 23 Fla. 123, 1 So. 521; Phinney v. Mann, 1 R. I. 205.

[181] Lehigh Coal & Nav. Co. v. Inter-County St. R. Co., 167 Pa. 75, 31 Atl. 471.

[182] Hoxie v. Shaw, 75 Iowa, 427, 39 N. W. 673; Weston v. Dane, 53 Me. 372; Jewell Nursery Co. v. State, 4 S. D. 213, 56 N. W. 113; Endion Imp. Co. v. Evening Telegram Co., 104 Wis. 432, 80 N. W. 732.

[183] Merlette v. State, 100 Ala. 42, 14 So. 562.

6 Curr. Law, 860.

[184] Lynde v. Winnebago County, 83 U. S. (16 Wall.) 6; People v. Shorb, 100 Cal. 537, 35 Pac. 163.

[185] Loesnitz v. Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887; Forcum v. Independent School Dist., 99 Iowa, 435; Goshorn's Ex'rs v. County Court of Kanawha County, 42 W. Va. 735, 26 S. E. 452.

[186] Butterfield v. Treichler, 113 Iowa, 328, 85 N. W. 19; Green v. Lancaster County, 61 Neb. 473, 85 N. W. 439; Tamaqua & L. St. R. Co. v. Inter-County St. R. Co., 167 Pa. 91, 31 Atl. 473.

[187] Mitchell County Sup'rs v. Horton, 75 Iowa, 271, 39 N. W. 394; Standeford v. Wingate, 63 Ky. (2 Duv.) 440.

[188] Rex v. Bedford Level, 6 East, 356. Definition by Lord Ellenborough. Wright v. United States, 158 U. S. 232.

claim of an individual to an office,[189] the requirements that must exist in order that one be considered a de facto officer are greater than where the question of the legality with respect to the public of the acts of one filling an official position and performing its duties alone is raised.[190] An officer de facto, it has been held, is one who exercises the duties of an office under color of right, by virtue of an appointment or election to that office,[191] being distinguished on one hand from an officer de jure [192] and on the other from a mere usurper of an office.[193] There must be, in order that one be constituted an officer de facto, a colorable title to the office and a presumption that he is rightfully in office.[194]

De jure officer and usurper defined. A de jure officer is one whose legal title to an office is clear; while a usurper is one who has intruded upon an office and assumes to exercise its functions without either color of right or the lawful title to it,[195] though when his assumption to office is acquiesced in, he may grow into an officer de facto.[196]

§ 385. There must be a legal office.*

In order that one be considered an officer de facto, it is necessary that there should exist a legal office for which there can be an officer de jure.[197] If this office does not exist, it is clear that no

6 Curr. Law, 843.

[189] People v. Weber, 86 Ill. 283; State v. Oates, 86 Wis. 634, 57 N. W. 296; Mechem, Pub. Off. § 317.

[190] Petersilea v. Stone, 119 Mass. 465.

[191] Town of Plymouth v. Painter, 17 Conn. 585; Rice v. Com., 66 Ky. (3 Bush) 14; Hooper v. Goodwin, 48 Me. 79; People v. Albertson, 8 How. Pr. (N. Y.) 363; Baker v. Hobgood, 126 N. C. 149, 35 S. E. 253.

[192] Town of Plymouth v. Painter, 17 Conn. 585; Hamlin v. Kassafer, 15 Or. 456.

[193] Usurper defined: Brown v. O'Connell, 36 Conn. 449; Hooper v. Goodwin, 48 Me. 79; McCraw v. Williams, 33 Grat. (Va.) 510.

[194] State v. Miltenberer, 33 La. Ann. 265; Ex parte Strang, 21 Ohio Santa Cruz County v. McPherson, St. 610; Hugg v. Ivins, 59 N. J. Law, 139, 36 Atl. 685; State v. Carroll, 38 Conn. 449.

[195] Elliott v. Burke, 24 Ky. L. R. 292, 68 S. W. 445; Petersilea v. Stone, 119 Mass. 465; Hamlin v. Kassafer, 15 Or. 456; McCraw v. Williams, 33 Grat. (Va.) 510; Kempster v. City of Milwaukee, 97 Wis. 343, 72 N. W. 743.

[196] State v. Carroll, 38 Conn. 449; Conover v. Devlin, 15 How. Pr. (N. Y.) 470; People v. Staton, 73 N. C. 546.

* 6 Curr. Law, 843.

[197] Norton v. Shelby County, 118 U. S. 425; State v. Carroll, 38 Conn. 449; People v. Knopf, 183 Ill. 410,

person, by performing the duties of an imaginary one, can establish even the relations which flow from the existence of a de facto office and the pretended officer is merely a usurper to whose acts no validity can be attached. Where the legal existence of an office depends upon the validity of a corporate organization until an irregular or illegally formed corporation is declared as such, its officers are considered de facto and their acts binding upon the people residing within the limits of such corporate organzation.[198]

§ 386. Acts of de facto officers; validity of.

The rule obtains that all reasonable presumptions must be made in favor of the legality and validity of the acts of public officers. This principle is applied to the acts of de facto officers [199] and the decisions are uniformly to the effect that the acts of an officer de facto, within the scope of his actual authority, are valid so far as the public and third persons are concerned.[200] This doctrine has been well stated by a text book writer [201] and applies both in respect to the creation of rights or relations between third parties and also between the corporation they represent and others.[202]

§ 387. Official acts contract liability.

In determining the contract liability of a public corporation as depending upon an act of one of its officials or employes, it must

56 N. E. 155; Carleton v. People, 10 Mich. 259. "Where there is no office there can be no officer de facto, for the reason that there can be none de jure." In re Quinn, 152 N. Y. 89, 46 N. E. 175; Williams v. Clayton, 6 Utah, 86, 21 Pac. 398.

[198] Leach v. People, 122 Ill. 420, 12 N. E. 726; Attorney General v. Town of Dover, 62 N. J. Law, 138, 41 Atl. 98.

6 Curr. Law, 862.

[199] Friedman v. Horning, 128 Mich. 606, 87 N. W. 752; In re Powers' Estate, 65 Vt. 399; Cooper v. Moore, 44 Miss. 386.

[200] People v. Hecht, 105 Cal. 621, 38 Pac. 941, 27 L. R. A. 203; Village of Chester v. Leonard, 68 Conn. 495, 37 Atl. 397; Golder v. Bressler, 105 Ill. 419; State v. Crowe, 150 Ind. 455, 50 N. E. 471; Whiting v. City of Ellsworth, 85 Me. 301, 27 Atl. 177; Attorney General v. Parsell, 99 Mich. 381; Dredla v. Baache, 60 Neb. 655, 83 N. W. 916; Erwin v. City of Jersey City, 60 N. J. Law, 141, 37 Atl. 732; People v. Stanton, 73 N. C. 546; Roche v. Jones, 87 Va. 484, 12 S. E. 965; Knight v. Town of West Union, 45 W. Va. 194, 32 S. E. 163.

[201] Mechem, Pub. Off. § 328.

[202] City of Lampasas v. Talcott (C. C. A.) 94 Fed. 457.

be remembered that a public corporation is one of limited or special powers [203] and that its officers and agents are not possessed of the general power and authority usually imputed to officers and agents of either natural persons or private corporations, but have special and limited powers only.[204] Two questions are naturally involved, therefore, and must be answered in the affirmative before a contract liability can exist. First, is the act one within the powers of the corporation either as expressly granted to it or as impliedly existing because absolutely necessary to its corporate life or to the exercise of some power expressly given.[205] Second, is the act one within the narrow and special authority possessed by an officer or employe.[206] It must be remembered in this connection that where authority is special, the right of a public officer or employe to act must be affirmatively shown, the usual presumption of law that an officer or agent is acting within the usual scope of his power and authority applying only to a slight extent.[207] Another general rule or principle of law also applies, that since a public corporation is one of limited powers expressly given and its officers and agents also having but special and limited powers, all grants of power either to the corporation or to its officers and employes are to be construed strictly and against the existence of the power.

In determining the liability of a public corporation upon a contract whether implied or express, the distinction must be remembered between what the courts hold a total want of power and a mere irregular exercise of a given power.[208] An act which is

[203] Clark v. City of Des Moines, 19 Iowa, 199, 87 Am. Dec. 423.

[204] Parsel v. Barnes, 25 Ark. 261; Jackson Tp. v. Home Ins. Co., 54 Ind. 184; Clark v. Russell, 116 Mass. 455; Gray v. Coahoma County, 72 Miss. 303, 16 So. 903; People v. Ulster County Sup'rs, 93 N. Y. 397; Miles v. Town of Albany, 59 Vt. 79.

6 Curr. Law, 867.

[205] Marion County v. Coler (C. C. A.) 67 Fed. 60; Moser v. Boone County, 91 Iowa, 359, 59 N. W. 39; Farnsworth v. Inhabitants of Melrose, 122 Mass. 268; Clark v. Saratoga County Sup'rs, 107 N. Y. 553, 14 N. E. 428.

[206] Indiana v. Glover, 155 U. S. 513; Goodwin v. Town of East Hartford, 70 Conn. 18; McKenzie v. Polk County Com'rs, 61 Minn. 145, 63 N. W. 613; Bartholomew v. Lehigh County, 148 Pa. 82, 23 Atl. 1122.

[207] Gilpatrick v. City of Biddeford, 51 Me. 182; City of San Diego v. San Diego & L. A. R. Co., 44 Cal. 106.

[208] Hitchcock v. City of Galveston, 96 U. S. 341; City of St. Louis v. Davidson, 102 Mo. 149.

clearly considered as ultra vires, under the rule of strict construction, cannot be made binding or operative or subsequently ratified.[209] Where, however, a power or right exists but which must be exercised in a manner specified to be legally binding, if it is exercised in an informal way, and without a compliance with statutory requirements either as to the manner or the time of its exercise, it may be made binding and operative by the courts or subsequently ratified [210] in order to render substantial justice as between the parties to the transaction, and this doctrine is especially applicable where there has been an acceptance and use of its benefits or for many years an acquiescence in its results.[211]

§ 388. Corporate liability for admissions of officers or employes.

The admissions of public officers are only binding when made in the performance of an official act within the actual scope of their authority.[212] As public officers and employes possess limited and special powers, parties dealing with them in an official capacity must, at their peril, ascertain the scope of this authority and a public corporation will not be bound by such acts except when coming within the principles as thus strictly applied and interpreted.[213]

§ 389. Personal liability of officers and agents; contracts.

A liability may be created against the individual or his principals ex contractu or as founded upon a tort. In respect to the liability of a public officer or agent on a contract executed by him

[209] Holland v. City of San Francisco, 7 Cal. 361.

[210] Brown v. Inhabitants of Melrose, 155 Mass. 587, 30 N. E. 87; Murphy v. Moies, 18 R. I. 100, 25 Atl. 977. See Mechem, Pub. Off. §§ 526 et seq.

[211] Hitchcock v. City of Galveston, 96 U. S. 341; Brown v. City of Webster City, 115 Iowa, 511, 88 N. W. 1070; Kramrath v. City of Albany, 127 N. Y. 575, 28 N. E. 400.

[212] Whiteside v. United States, 93 U. S. 247; City of Baltimore v. Eschbash, 18 Md. 282; Scofield Rolling Mill Co. v. State, 54 Ga. 635; Cook County v. Harms, 108 Ill. 151; Blanchard v. Inhabitants of Ayer, 148 Mass. 174, 19 N. E. 209; O'Leary v. Board of Education, 93 N. Y. 1.

[213] Huthsing v. Bosquet, 17 Fed. 54; Sutro v. Pettit, 74 Cal. 332; Rissing v. City of Ft. Wayne, 137 Ind. 427, 37 N. E. 328; Carpenter v. Union Dist. Tp., 58 Iowa, 335; City of Baltimore v. Reynolds, 20 Md. 10; First Nat. Bank of Detroit v. Becker County Com'rs, 81 Minn. 95, 83 N. W. 468.

on behalf of his principal, the presumption of law exists that no personal liability was intended to be assumed, and this is especially true where public officers or agents in the regular performance of their official duties or functions enter into contract relations with third parties.[214]

Clear intent. Where the intent is clear, however, that the officer or employe is acting for himself and not for the public corporation which officially he represents, the contract will be considered a personal one and not binding upon the corporation, although from its execution a doubt may arise in respect to the parties.[215]

§ 390. Duty; to whom due.

The personal liability of an officer or employe is not only dependent upon the nature of the duties or functions which he performs as based upon the threefold division of governmental powers, but also upon the further condition of to whom is the duty due.[216] The performance of all official duties and functions by public officers and employes is due either to the state, the community or the public as a whole,[217] or to a specific individual.[218] All quasi political and governmental duties are performed solely for the benefit and advantage of the community at large.

§ 391. The rule as to personal liability.

For the negligent performance or the nonperformance of a discretionary duty owed to the public there can arise no personal liability on the part of a public officer or employe and this is especially true of those duties and functions which are quasi political.[219] For the proper performance of these duties the official is

[214] Parks v. Ross, 11 How. (U. S.) 362; Pine Civil Tp. v. Huber Mfg. Co., 83 Ind. 121; Willett v. Young, 82 Iowa, 292, 11 L. R. A. 115; Cutler v. Inhabitants of Ashland, 121 Mass. 588; Knight v. Clark, 48 N. J. Law, 22; Leet v. Shedd, 42 Vt 277.

6 Curr. Law, 864.

[215] Hodgson v. Dexter, 1 Cranch (U. S.) 345; Field v. Towle, 34 Me. 405; People v. Abbott, 107 N. Y. 225, 13 N. E. 779; Mechem, Pub. Off. § 806.

[216] People v. Whipple, 47 Cal. 592.

6 Curr. Law, 864.

[217] Pritchard v. Keefer, 53 Ill. 117; Bowden v. City of Rockland, 96 Me. 129, 51 Atl. 815; Felch v. Town of Ware, 69 N. H. 617, 45 Atl. 591.

[218] Adams v. Slater, 8 Ill. App. 72.

[219] Crow v. Warren County Com'rs, 118 Ind. 51, 20 N. E. 642; Gross v. Portsmouth Water Com'rs, 68 N. H. 389, 44 Atl. 529.

6 Curr. Law, 864.

alone, as has already been suggested, answerable to those who may elect or appoint him and to his conscience.

Where, however, the duty is one not discretionary in its character and due to a particular individual and its performance results in a special and particular advantage or benefit to that individual, he is responsible to the one who employs him for the performance of that specific act, or who may be injured by it, for the proper performance of the duty if a cause of action can arise because of such neglect or failure.[220]

§ 392. Liability depending upon character of duties whether imperative or discretionary.

The liability of a corporation as well as the individual officer may depend somewhat, as above suggested, even in the case of duty due the public, upon its character whether imperative or discretionary. There are public duties imposed by laws mandatory or imperative in their character and, therefore, not optional in their performance.[221] In some cases the manner of performance is also prescribed by law.[222] The failure to execute these duties thus made obligatory upon public officials and employes may create the liability suggested if the individual or corporation claiming the right of redress can show not only that the duties negligently performed or omitted to be performed were of this character but also that he has sustained a special damage in addition to or beyond that sustained by the public or the community at large.[223] There are duties, even those owing to the individual, where a failure to perform them or their negligent performance will result in no cause of action. The legal maxim "damnum absque injuria" will apply.[224]

[220] Gregory v. City of Bridgeport, 41 Conn. 76; Porter v. Thomson, 22 Iowa, 391; Clark v. Miller, 54 N. Y. 528; Cooley, Torts (2d Ed.) p. 451.

[221] Shaw v. City of Macon, 21 Ga. 280; State v. Godwin, 123 N. C. 697, 31 S. E. 221.

6 Curr. Law, 864.

[222] Wells v. Board of Education, 78 Mich. 260, 44 N. W. 267; Atchison County v. De Armond, 60 Mo. 19.

[223] Strickfaden v. Zipprick, 49 Ill. 286; Case v. Dean, 16 Mich. 12; Clark v. Miller, 54 N. Y. 528.

[224] Transportation Co. v. City of Chicago, 99 U. S. 635, 641; Atwater v. Trustees of Canandaigua, 124 N. Y. 602, 27 N. E. 385.

§ 393. No liability in case of discretionary duties.

Discretionary duties due the public can create or involve in no event a liability either of the public corporation or the official performing such duties,[225] the rule applying not only to a negligent performance of such duties but the omission or entire failure to perform them.[226] In some cases the performance of the duty may be imperative but the manner of its performance or of the action may be discretionary and under these conditions, the performance may be enforced but the exercise of the discretionary element, namely, the manner of the performance, will not be coerced.[227]

Political and governmental or ministerial duties. These duties are largely of a discretionary character; they are imposed upon departmental officials for the benefit of the public at large and not for that of any special individual. Their performance as well as its manner cannot be controlled by the judiciary.[228] Their due performance has been confided to the political judgment and sagacity as well as the discretion and ability of the officers selected to perform them.[229]

§ 394. Ministerial duties; personal liability of official.

In many cases an officer is required by law to act, the manner and the time being specifically prescribed, the duty thus made obligatory involving no discretion with respect to the circumstances or conditions under which prescribed. Such duties are usually regarded as ministerial[230] duties and in their performance a personal liability of a public officer or employe more frequently arises. It must be remembered that the character of an act under

[225] Askew v. Hale County, 54 Ala. 639; Nagle v. Wakey, 161 Ill. 387, 43 N. E. 1079; Pawlowski v. Jenks, 115 Mich. 275, 73 N. W. 238; Atwater v. Village of Canandaigua, 124 N. Y. 602, 27 N. E. 385.

6 Curr. Law, 864.

[226] Pritchard v. Keefer, 53 Ill. 117; Weinberg v. Regents of University, 97 Mich. 246; Templeton v. Nipper, 107 Tenn. 548, 64 S. W. 889.

[227] Carr v. Northern Liberties, 35 Pa. 324.

[228] Brown v. United States, 6 Ct. Cl. 171; Cooley, Torts (2d ed.) pp. 443, 444.

[229] People v. Knickerbocker, 114 Ill. 539; People v. Auditor General, 36 Mich. 271; People v. Chaplin, 104 N. Y. 96; Com. v. McLaughlin, 120 Pa. 518; Mechem, Pub. Off. § 945; Marbury v. Madison, 1 Cranch (U. S.) 137.

[230] People v. Ridgley, 21 Ill. 65; McLean v. Jephson, 123 N. Y. 142, 9 L. R. A. 493.

6 Curr. Law, 864.

which a liability may arise is not established by the name of the office or the title of the officer who performs it;[231] by the terminology of the statute that creates the office and prescribes its duties[232] nor by the fact that the official also performs duties clearly judicial and legislative in their character.[233]

§ 395. Conditions under which ministerial officers incur a liability.*

A ministerial officer acting in good faith,[234] within the scope of his actual authority,[235] by a valid law[236] and performing a public and imperative duty[237] which he can lawfully perform[238] can incur no liability, whatever may be the result of his acts.[239]

The rule of liability stated. On the contrary, the weight of authority is equally to the effect that where the law imposes upon an officer, whether ministerial or otherwise, the performance of a ministerial duty within the definition of that phrase, which results in the special and peculiar advantage to an individual or in which he may have a special and direct interest, he may be liable[240] to that individual for nonfeasance, misfeasance and malfeasance in respect to the performance of the duty.[241]

[231] State v. Clinton, 28 La. Ann. 47; Reeves v. State, 47 Tenn. (7 Cold.) 96.

[232] Love v. Baehr, 47 Cal. 364.

[233] Bohler v. Verdery, 92 Ga. 715; Lee v. Lide, 111 Ala. 126, 20 So. 410; McCord v. High, 24 Iowa, 336; Kerns v. Schoonmaker, 4 Ohio, 331; McTeer v. Lebow, 85 Tenn. 121.

* 6 Curr. Law, 864.

[234] Tracy v. Swartout, 10 Pet. (U. S.) 80; Butler v. Ashworth, 102 Cal. 663; State v. Wedge, 24 Minn. 150; Rowe v. Addison, 34 N. H. 306.

[235] Huthsing v. Bosquet, 17 Fed. 54; Mock v. City of Santa Rosa, 126 Cal. 330, 58 Pac. 826; Mallory v. Town of Huntington, 64 Conn. 88; State v. Windle, 156 Ind. 648, 59 N. E. 276; Orr v. Quimby, 54 N. H. 590; City of Camden v. Varney, 63 N. J. Law, 325, 43 Atl. 889; Robinson v. Rohr, 73 Wis. 436, 40 N. W. 668, 2 L. R. A. 366.

[236] Poindexter v. Greenhow, 114 U. S. 270; Norton v. Shelby County, 118 U. S. 442; Sumner v. Beeler, 50 Ind. 341.

[237] Carr v. Northern Liberties, 35 Pa. 324.

[238] City of Blair v. Lantry, 21 Neb. 247.

[239] Bright v. Murphy, 105 La. 795, 30 So. 145; Smith v. Stephan, 66 Md. 381; Fitzpatrick v. Slocum, 89 N. Y. 358; First Nat. Bank of Gastonia v. Warlick, 125 N. C. 593, 34 S. E. 687; Mechem, Pub. Off. § 661.

[240] Amy v. Des Moines County Sup'rs, 78 U. S. (11 Wall.) 136; Eslava v. Jones, 83 Ala. 139; State v. Harris, 89 Ind. 363; Vose v. Reed, 54 N. Y. 657.

[241] Bell v. Josselyn, 69 Mass. (3

Ministerial duty; definition. A ministerial duty is one whose performance is imposed and prescribed by law both in respect to its time, mode and occasion and in all respects defined with such certainty that nothing remains for personal judgment or discretion.[242] It has been defined as[243] "the duty is ministerial, when the law, exacting its discharge, prescribes and defines the time, mode and occasion of its performance, with such certainty that nothing remains for judgment or discretion. Official action, the result of performing a certain and specific duty arising from fixed and designated facts, is a ministerial act."

§ 396. What protection afforded ministerial officers.*

A ministerial officer may be relieved from a liability for a failure to perform or a negligent performance of an imposed duty, first, through the lack of necessary public funds—the reason for an exemption in this case is apparent;[244] second, because of the contributory negligence of the individual to whom the duty negligently or omitted to be performed was due,[245] and third, because the official was acting under the authority of some process or order.[246] The protection afforded by the last reason is based upon the principle that all public officials are bound to obey, respect and execute the orders and processes of the courts or of superior officials.

§ 397. Judicial officers; personal liability.

A judicial officer is one having the authority to hear and determine the rights of persons or property or the propriety of doing

Gray) 309; Amy v. Des Moines County Sup'rs, 78 U. S. (11 Wall.) 136; Rounds v. Mansfield, 38 Me. 586; Bieling v. City of Brooklyn, 120 N. Y. 98, 24 N. E. 389.

[242] Flournoy v. City of Jeffersonville, 17 Ind. 169; Grider v. Tally, 77 Ala. 422; Ray v. City of Jeffersonville, 90 Ind. 572.

[243] State v. Johnson, 71 U. S. (4 Wall.) 475; Sullivan v. Shanklin, 63 Cal. 247; Ray v. City of Jeffersonville, 90 Ind. 572. See, also, Abb. Mun. Corp. § 678, citing many cases illustrating the questions raised above.

* 6 Curr. Law, 864.

[244] Studley v. Geyer, 72 Me. 286; Patterson v. Colebrook, 29 N. H. 94; Clapper v. Town of Waterford, 131 N. Y. 382.

[245] Lick v. Madden, 36 Cal. 208; Hatcher v. Dunn, 102 Iowa, 411, 36 L. R. A. 689; Com. v. Roark, 62 Mass. (8 Cush.) 210.

[246] Erskine v. Hohnbach, 81 U. S. (14 Wall.) 613; Stutsman County v. Wallace, 142 U. S. 293; Partlow v. Moore, 184 Ill. 119; Randles v. Waukesha County, 96 Wis. 629, 71 N. W. 1034.

an act;[247] one representing the highest type of public officials to whom has been granted the power to perform duties involving the elements of judgment and discretion. The authorities, without exception, sustain the rule that such an officer, irrespective of motives,[248] is not liable for the results of an official act[249] within his jurisdiction[250] and in respect to which he has jurisdiction,[251] however injuriously such an act may have resulted to persons or property or however erroneous it may be considered by one thus affected.[252] Such a rule of nonliability is justified not only by public policy but also by the character of the duties performed.[253]

The principle above stated will not apply where the public official was acting in a private capacity without his jurisdiction or in respect to a matter as to which he did not possess jurisdiction. Jurisdiction has been defined as "the authority of law to act officially in the matter then in hand,"[254] and may include jurisdiction of the person, of the subject-matter or of the thing involved.

§ 398. Distinction between superior and inferior judicial officers with respect to liability.

In respect to the liability of judicial officers for the results of their official and judicial acts, a distinction must be observed between judges of courts of superior and inferior jurisdiction.* In judicial systems as they exist in the states and the United States, are to be found courts of superior or general jurisdiction and those of inferior or of special and limited jurisdiction. The presumption of law with respect to acts of a judicial officer of a

[247] People v. Bartels, 138 Ill. 322; Hatcher v. Dunn, 102 Iowa, 411, 36 L. R. A. 689.

[248] Bradley v. Fisher, 80 U. S. (13 Wall.) 335; Calhoun v. Little, 106 Ga. 336, 32 S. E. 86, 43 L. R. A. 630; Barhyte v. Shepherd, 35 N. Y. 242; Johnston v. Moorman, 80 Va. 131.

[249] Bradley v. Fisher, 80 U. S. (13 Wall.) 351; Lange v. Benedict, 73 N. Y. 12, 29 Am. Rep. 80.

[250] Bradley v. Fisher, 80 U. S. (13 Wall.) 335; Hitch v. Lambright, 66 Ga. 228; Truesdell v. Combs, 33 Ohio St. 186.

[251] Randall v. Brigham, 74 U. S. (7 Wall.) 523; Yates v. Lansing, 5 Johns. (N. Y.) 282.

[252] Pratt v. Gardner, 56 Mass. (2 Cush.) 63; Mangold v. Thorpe, 33 N. J. Law, 134.

[253] Butler v. Bates, 7 Cal. 136; McCaslin v. State, 99 Ind. 428; Cooley, Torts (2d Ed.) p. 444.

[254] Fain v. Garthright, 5 Ga. 12. Cooper v. Reynolds, 77 U. S. (10 Wall.) 308; Lange v. Benedict, 73 N. Y. 12; Foltz v. St. Louis & S. F. Ry. Co., 60 Fed. 316.

* 6 Curr. Law, 864.

superior court is that he is acting within his powers and within the powers of the court.[255]

No such presumption exists with reference to the judicial action of an officer of an inferior or subordinate court. The jurisdiction of the latter must appear; that of the former is presumed and the burden of proof is upon the one attacking the jurisdiction.[256] The results of this distinction when considering the question of liability are apparent. A judge of a superior court possesses greater freedom of action, not only in passing upon matters clearly within his jurisdiction but also in determining whether he has the jurisdiction to try particular cases and a wrong decision in this respect will not render him civilly liable.[257] On the other hand, a judge of an inferior or subordinate court of limited jurisdiction is restricted in his action, and, in cases of doubtful jurisdiction, the doubt should be resolved against a retention of jurisdiction rather than in favor of it.

§ 399. Quasi judicial officers.

The rule of nonliability attaches to quasi judicial or ministerial officers performing judicial or quasi judicial duties under substantially the same conditions and circumstances as applying to a strictly judicial officer.[258] Some authorities go to the extent of holding that there can be no liability under the conditions noted in the preceding sections,[259] but the true rule undoubtedly is that quasi judicial officers are personally liable for the results of their official action when actuated by corrupt or malicious motives.[260] The same rule of nonliability will apply to executive officers for acts done in a judicial or quasi judicial capacity.[261]

[255] Haynes v. Butler, 30 Ark. 69.

[256] Tucker v. Harris, 13 Ga. 1; Rossiter v. Peck, 69 Mass. (3 Gray) 538; Reynolds v. Stansbury, 20 Ohio, 344.

[257] Bradley v. Fisher, 80 U. S. (13 Wall.) 335; McCall v. Cohen, 16 S. C. 445.

[258] McConoughey v. Jackson, 101 Cal. 265, 35 Pac. 863; Green v. Talbot, 36 Iowa, 499; State v. Hastings, 37 Neb. 96, 55 N. W. 774; Weaver v. Devendorf, 3 Denio (N. Y.) 117; Grant v. Lindsay, 58 Tenn. (11 Heisk.) 651.

6 Curr. Law, 864.

[259] Turpen v. Booth, 56 Cal. 65; Jones v. Brown, 54 Iowa, 74; Waldron v. Berry, 51 N. H. 136; East River Gaslight Co. v. Donnelly, 93 N. Y. 557; Wilson v. Marsh, 34 Vt. 352.

[260] Elmore v. Overton, 104 Ind. 548; Larned v. Wheeler, 140 Mass. 390.

[261] Elliott v. City of Chicago, 48 Ill. 293; Muscatine Western R. Co. v. Horton, 38 Iowa, 33.

§ 400. Legislative and quasi legislative duties.

The power of making laws for the government of separate communities is vested in the legislative or law-making branch of the government. It is a discretionary duty; one which cannot be coerced [262] and for a failure to perform which or for the passage of unjust and oppressive laws there can be no personal or civil liability to any individual member of the community or of the community at large for the damages which may have been suffered because of such legislation.[263] The weight of authority is to the effect that the motives influencing legislators in the passage of laws cannot be inquired into and cannot be made the basis of civil action for damages, whether such motives be corrupt, dishonest or malicious.[264]

§ 401. Rights of a public official.

The relation which exists between a public official and the corporation is one created by law and not partaking in the least of the nature of a contract.[265] The duties of a public official are those attached by law to a particular office; they are fixed and prescribed by law and the question of compensation is dependent upon the terms of the law which creates the office and prescribes its duties.[266] If there is no compensation provided, the services must be performed gratuitously.[267] The performance of a service attached to a public office carries with it no contract right of compensation.[268] The claims of a public official of this character are dependent upon the terms of a particular law.[269]

[262] Wells v. City of Atlanta, 43 Ga. 67; Ann Arundel County Com'rs v. Duckett, 20 Md. 469; Borough of Freeport v. Marks, 59 Pa. 253; Cooley, Torts (2d Ed.) p. 443.

[263] Wimbish v. Hamilton, 47 La. Ann. 246, 16 So. 856.

6 Curr. Law, 864.

[264] Coverdale v. Edwards, 155 Ind. 374, 58 N. E. 495; Jones v. Loving, 55 Miss. 109.

[265] See §§ 349 et seq., ante; Andrews v. Pratt, 44 Cal. 309.

6 Curr. Law, 870.

[266] Dunwoody v. United States, 143 U. S. 578; Gross v. Whitley County Com'rs, 158 Ind. 531, 64 N. E. 25, 58 L. R. A. 394.

[267] Kinney v. United States, 60 Fed. 883; Ellis v. Steuben County, 153 Ind. 91, 54 N. E. 382; Morgantown Deposit Bank v. Johnson, 108 Ky. 507, 56 S. W. 825; Wayne County v. Reynolds, 126 Mich. 231, 85 N. W. 574; Troth v. Chosen Freeholders of Camden County, 60 N. J. Law, 190, 37 Atl. 1017; Nash v. City of Knoxville, 108 Tenn. 68, 64 S. W. 1062.

[268] Gross v. Whitley County

Form of compensation; salary; commissions; fees. The payment of official compensation is usually made in the form of a salary which has been defined as a fixed and definite amount prescribed by law for the payment of the services required in the performance of designated official duties.[270]

In many cases, public officials, especially those having charge of the collection and disbursement of public moneys, receive their compensation through the payment of commissions fixed by law upon the amounts which they may either collect or disburse [271] or the total amount handled.[272]

Still another method for the payment of the compensation of public officials is by the establishment of a system of fees [273] or per

Com'rs, 158 Ind. 531, 64 N. E. 25, 58 L. R. A. 394; Hall v. State, 39 Wis. 79.

[269] Knox v. Los Angeles County Sup'rs, 58 Cal. 59; Brophy v. Marble, 118 Mass. 548; Browne v. Livingston County Sup'rs, 126 Mich. 276, 85 N. W. 745; McGrath v. Grout, 171 N. Y. 7; Herron v. Lyman County, 11 S. D. 414, 78 N. W. 996.

[270] Reynolds v. Taylor, 43 Ala. 420; Ellis v. Jefferds, 130 Cal. 478, 62 Pac. 734; Cook County v. Hartney, 169 Ill. 566, 48 N. E. 458; Sudbury v. Monroe County Com'rs, 157 Ind. 446, 62 N. E. 45; Daniels v. City of Des Moines, 108 Iowa, 484, 79 N. W. 269; Prince v. City of Boston, 148 Mass. 285, 19 N. E. 218; Lewis v. Lackawanna County, 200 Pa. 590, 50 Atl. 162; Chandler v. Town of Johnson City, 105 Tenn. 633, 59 S. W. 142; State v. McFetridge, 84 Wis. 473, 54 N. W. 1, 20 L. R. A. 223, 998; Morris v. Ocean Tp., 61 N. J. Law, 12, 38 Atl. 760; Merwine v. Monroe County, 141 Pa. 162, 21 Atl. 509.

[271] City of Hagerstown v. Startzman, 93 Md. 606, 49 Atl. 838; State v. Ewing, 116 Mo. 129, 22 S. W. 476.

[272] Shaver v. Sharp County, 62 Ark. 76, 34 S. W. 261; City of Baxley v. Holton, 114 Ga. 724, 40 S. E. 728; Purdy v. City of Independence, 75 Iowa, 356, 39 N. W. 641; Hughston v. Carroll County Sup'rs, 68 Miss. 660, 10 So. 51; Davenport v. Eastland County, 94 Tex. 277, 60 S. W. 243.

[273] The Antonio Zambrana, 88 Fed. 546; Tillman v. Wood, 58 Ala. 578; Wulff v. Aldrich, 124 Ill. 591, 16 N. E. 886; City of Des Moines v. Polk County, 107 Iowa, 525, 78 N. W. 249; Wight v. Meagher County Com'rs, 16 Mont. 479, 41 Pac. 271; Nance v. Anderson County, 60 S. C. 501, 39 S. E. 5.

Population as basis of classification. Darcy v. City of San Jose, 104 Cal. 642, 38 Pac. 500; Rauer v. Williams, 118 Cal. 401, 50 Pac. 691; Legler v. Paine, 147 Ind. 181, 45 N. E. 604; Bamble v. Marion County, 85 Iowa, 675, 52 N. W. 556; White v. Maniste County, 105 Mich. 608; Bowe v. City of St. Paul, 70 Minn. 341, 73 N. W. 184; Martin v. Ivins, 59 N. J. Law, 364, 36 Atl. 93; Stack v. City of Brooklyn, 150 N. Y. 335; City of Pittsburg v. Anderson, 194 Pa. 172, 44 Atl. 1092; O'Herrin v. Milwaukee County, 67 Wis. 142.

Volume of business. Lemoine v. City of St. Louis, 72 Mo. 404; Allen v. Com., 83 Va. 94, 1 S. E. 607.

diem charges[274] the law prescribing the payment of a specific amount for the performance of a designated service, the fee thus provided being paid as may be directed either by the public corporation[275] or by the individual[276] for whom the service is rendered.

§ 402. Actual rendition of services.

The rendition of services authorized or in the manner authorized, is necessary to the payment of compensation[277] and where officials are paid a per diem this can only be recovered for the days actually employed in public business,[278] and in some instances it has been held necessary to show affirmatively in a statement of account that public business was transacted on the days charged.[279] The payment of mileage, commissions, or fees in doubtful cases or where the charges are based upon constructive services, is usually discountenanced[280] as against public policy, and this rule is uniformly applied, for the principle holds that the interests of an individual should at all times, be subordinated to the public advantage or welfare.[281]

Value of property. Cook County Com'rs v. Fisher, 79 Minn. 380, 82 N. W. 652; Wilbarger County Com'rs v. Perkins, 86 Tex. 348, 24 S. W. 794.

[274] Chapin v. Wilcox, 114 Cal. 498, 46 Pac. 457; Kerlin v. Reynolds, 142 Ind. 460, 36 N. E. 693, 41 N. E. 827; Fournier v. West Bay City, 94 Mich. 463, 54 N. W. 277.

[275] City of Chicago v. O'Hara, 60 Ill. 413; Taylor v. Kearney County, 35 Neb. 381, 53 N. W. 211.

[276] Baldwin v. Kouns, 81 Ala. 272, 2 So. 638; Peters v. City of Davenport, 104 Iowa, 625, 74 N. W. 6; State v. Allen, 23 Neb. 451, 36 N. W. 756; Baker County v. Benson, 40 Or. 207, 66 Pac. 815.

[277] San Bernardino County v. Davidson, 112 Cal. 503, 44 Pac. 659; Miller v. Smith, 7 Idaho, 204, 61 Pac. 824; Wade v. Lewis & Clarke County, 24 Mont. 335, 61 Pac. 879; Hazelet v. Holt County, 51 Neb. 716, 71 N. W. 717; Martin v. Ivins, 59 N. J. Law, 364; Richmond County Sup'rs v. Ellis, 59 N. Y. 620.

6 Curr. Law, 870.

[278] Smith v. County Com'rs of Jefferson, 10 Colo. 17, 13 Pac. 917; Rankin v. Jauman, 4 Idaho, 394, 39 Pac. 111; Montgomery County Com'rs v. Bromley, 108 Ind. 158; Ewing v. Ainger, 96 Mich. 587, 55 N. W. 996; State v. Merry, 34 Ohio St. 137; Mansel v. Nicely, 175 Pa. 367, 34 Atl. 793.

[279] Reilly v. Cochise County (Ariz.) 53 Pac. 205.

[280] Hamilton County Com'rs v. Sherwood (C. C. A.) 64 Fed. 103; Howes v. Abblett, 78 Cal. 270, 20 Pac. 572; Vannatta v. Brewer, 85 Ill. 114; Cook v. Auditor General, 129 Mich. 48, 87 N. W. 1037.

[281] United States v. Clough (C. C.

§ 403. Change of compensation during term of office.

Public officials are entitled to protection in the exercise of their duties against an arbitrary or illegal exercise of legislative power. To effect this, constitutional and statutory provisions are found throughout the United States prohibiting a change in the compensation of a public officer during his term of office.[282] In some, a provision is found forbidding a decrease only. The independence of the judiciary especially is established and preserved by these provisions.[283]

§ 404. Miscellaneous disbursements.

A public official in performing the duties of his office may incur miscellaneous expenses which are a proper charge upon public funds and this is especially true where the expense was one incurred in the performance of a duty in which the public corporation has a direct and beneficial interest or one which rests upon it as a duty or as an agency of the sovereign. For such disbursements a public officer is clearly entitled as a matter of right to a reimbursement.[284] If the expenses, however, are incurred in connection with services not authorized by law or in the performance of duties in excess of corporate powers, no right of indemnity or reimbursement exists.[285]

A.) 55 Fed. 373; Cole v. White County, 32 Ark. 45.

6 Curr. Law, 870.

[282] Weeks v. Texarkana, 50 Ark. 81; Marquis v. City of Santa Ana, 103 Cal. 661, 37 Pac. 650; Smith v. City of Waterbury, 54 Conn. 174; Briscoe v. Clark County, 95 Ill. 309; Ryce v. City of Osage, 88 Iowa, 558; State v. Moores, 61 Neb. 9, 84 N. W. 399; Swift v. State, 89 N. Y. 52; Lancaster County v. Fulton, 128 Pa. 48, 18 Atl. 384, 5 L. R. A. 436; Neal v. Allen, 76 Va. 437; Reals v. Smith, 8 Wyo. 159, 56 Pac. 690.

[283] Chancellor's Case, 1 Bland (Md.) 595.

[284] Gregory v. City of Bridgeport, 41 Conn. 76; Zartman v. State, 109 Ind. 360, 10 N. E. 94; Miller v. Dickinson County, 68 Iowa, 102; Brown v. Inhabitants of Orland, 36 Me. 376; Cochrane v. Inhabitants of Melrose, 121 Mass. 562; Jenney v. Mussey Tp., 121 Mich. 229, 80 N. W. 2; Lewis v. Freeholders of Hudson County, 37 N. J. Law, 254; People v. Columbia County Sup'rs, 67 N. Y. 330; Mansel v. Nicely, 175 Pa. 367, 34 Atl. 793.

6 Curr. Law, 870.

[285] Irwin v. Yuba County, 119 Cal. 686, 52 Pac. 35; McGregor v. City of Logansport, 79 Ind. 166; Rasmusson v. Clay County, 41 Minn. 283, 43 N. W. 3; Lewis v. Chosen Freeholders of Hudson, 37 N. J. Law, 254; Mogel v. Berks County, 154 Pa. 14.

§ 405. Agents and employes; authority to hire.*

A public corporation may legally employ in its service, special agents and employes not considered as public officers in the legal sense of the term, the relation being a contract one and the rights and obligations of the parties being measured by the particular contract of employment,[286] and in this respect totally different from the relation existing between a public corporation and a public officer. The legality of the contract as usual depends upon the authority or power of the parties to enter into it.[287] One of these is necessarily a public corporation and its legal right to hire agents and employes is limited by the nature of the corporation and by the fact that it is a public corporation restricted in its legal capacity to undertake commercial or business enterprises or engage in ordinary work.[288] There certainly is no implied power in a public corporation to employ persons to do work outside of duties germane to public government.[289] Not only should the contract of employment be one within the power of the public corporation to make, but it must be made by one authorized to represent the corporation.[290] The difference in the character of an agency as representing a public corporation and one acting for a private person, whether natural or artificial, has already been discussed.

§ 406. Fire department; power to organize.

There seems no doubt but that it is a proper exercise of governmental power to guard the lives and property of those within its protection. Under this principle, fire departments within the limits of municipal corporations or elsewhere are organized and managed, supplies are purchased and firemen employed to carry on this particular function.[291] A public corporation having a fire department may control the retirement and the employment of fire-

[286] White v. City of Alameda, 124 Cal. 95, 56 Pac. 795; Call v. Hamilton County, 62 Iowa, 448.
6 Curr. Law, 842, 870.

[287] Cramer v. Water Com'rs of New Brunswick, 57 N. J. Law, 478, 31 Atl. 384.

[288] Potts v. City of Cape May, 66 N. J. Law, 544, 49 Atl. 584.

[289] Potts v. City of Cape May. 66 N. J. Law, 544, 49 Atl. 584.

[290] Ventura County v. Clay, 112 Cal. 65, 44 Pac. 488; Garrigus v. Howard County Com'rs, 157 Ind. 103, 60 N. E. 948.

[291] People v. Auburn Fire Com'rs, 27 App. Div. 530, 50 N. Y. Supp 506.

men and prescribe qualifications or tests, both physical and mental, as necessary for such employment.[292] Their pay may be fixed and funds set aside for the benefit of disabled or aged firemen or their families.[293] Civil service rules may also be adopted bearing upon and controlling their conduct while employed[294] and providing for their removal or suspension for cause[295] by an appropriate tribunal after notice and hearing, and upon charges made in an appropriate and prescribed manner.[296]

§ 407. Police department; organization.

The preservation of order is considered a public and governmental duty and is attained most efficiently through the organization of a department for this special purpose or the employment of individuals to perform this particular work.[297] It is regarded as a state or governmental function; not one belonging to a community in its municipal or private capacity, although it may be vested secondarily with the right to maintain order.

The ordinary method in large towns and cities provided for the maintenance of order is through the creation of police departments or boards of police commissioners to whom is entrusted this duty, perhaps with others.[298] The power of such a board or the officials of such a department is measured by the terms creating them.[299] The maintenance of discipline among those employed to

[292] People v. Trustees of Firemen's Pension Fund, 95 Ill. App. 300; Higgins v. Cole, 100 Cal. 260, 34 Pac. 678; Gilbert v. Salt Lake City Police & Fire Com'rs, 11 Utah, 378, 40 Pac. 264.

[293] Peterson v. City of Wilmington, 130 N. C. 76, 40 S. E. 853, 56 L. R. A. 959; Karb v. State, 54 Ohio St. 383, 43 N. E. 920.

[294] Newark Fire Com'rs v. Lyon, 53 N. J. Law, 632, 23 Atl. 274.

[295] Norton v. Inhabitants of Brookline, 181 Mass. 360, 63 N. E. 930; People v. Coler, 159 N. Y. 569.

[296] People v. Coyle, 66 N. Y. Supp. 827; Duerr v. Newark Fire Com'rs, 55 N. J. Law, 272, 26 Atl. 144; People v. Brooklyn Fire Dept. Com'rs, 106 N. Y. 64, 12 N. E. 641; People v. Brooklyn Fire Dept. Com'rs, 103 N. Y. 370.

[297] Doering v. State, 49 Ind. 56.

[298] City of Huntington v. Cast, 149 Ind. 255, 48 N. E. 1025; State v. Hunter, 38 Kan. 578, 17 Pac. 177; Joyce v. Parkhurst, 150 Mass. 243, 22 N. E. 899; Parish v. City of St. Paul, 84 Minn. 426, 87 N. W. 1124.

[299] City of Lexington v. Rennick, 20 Ky. L. R. 1609, 49 S. W. 787; Neumeyer v. Krakel, 110 Ky. 624, 62 S. W. 518; Andrews v. Police Board of Biddeford, 94 Me. 68, 46 Atl. 801; State v. Mason, 153 Mo. 23, 54 S. W. 524; People v. York, 163 N. Y. 604, 57 N. E. 1120.

enforce public regulations or public law is absolutely essential and large powers are generally given to police commissioners over the employment of men, the adoption of regulations and the enforcement of their orders.[300] The disbursement of public moneys for this purpose is considered a public one and, therefore, authorized by law.

§ 408. Pensions and beneficial funds.

Long and faithful service in performing governmental duties, it has been held as a question of public policy, merits some provision from the state for old age and where injuries have been suffered in the discharge of such duties, the person receiving them or those dependent upon him are entitled to some consideration from the public in the defense of whose interests they were received. The efficiency of a police or fire department is largely increased through its establishment and maintenance upon a civil service basis and also by the creation of beneficial funds for use in the payment of pensions to members having served faithfully a prescribed length of time [301] or to those disabled while in the performance of their duties and the further payment of gratuities to the families of those who have died [302] or who have been killed or totally disabled.[303]

§ 409. Employment of members of the learned professions.

It is often necessary for a public corporation to employ temporarily, for a particular case or special work, members of the learned professions or of the skilled trades. The authority of the corporation, where this is necessary, will depend upon the existence of the power and this is based upon the grant of the right [304] and the character of the purpose for which the employment is

[300] Keyser v. Upshur, 92 Md. 726, 48 Atl. 399; Wood v. City of Haverhill, 174 Mass. 578, 55 N. E. 381; Skillman v. Trenton Police Com'rs, 64 N. J. Law, 489, 45 Atl. 803.

6 Curr. Law, 1000.

[301] Slevin v. Police Fund Com'rs, 123 Cal. 130, 55 Pac. 785, 44 L. R. A. 114; People v. Matsell, 94 N. Y. 179.

[302] Kavanagh v. Police Pension Fund Com'rs, 134 Cal. 50, 66 Pac. 36.

[303] But see State v. Ziegenhein, 144 Mo. 283, 45 S. W. 1099.

[304] Modoc County v. Spencer, 103 Cal. 498, 37 Pac. 483; Knight v. Martin, 128 Cal. 245, 60 Pac. 849; Connolly v. Inhabitants of Beverly, 151 Mass. 437, 24 N. E. 404; Horn v. City of St. Paul, 80 Minn. 369, 83 N. W. 388; Purnell v. Worth, 117 N. C. 157, 23 S. E. 161, 30 L. R. A. 262; Hopper v. Ashland County, 84 Wis. 655, 54 N. W. 1024.

had.[305] The condition and principle must be remembered that a public corporation is a governmental agency of exceedingly limited and restricted powers; that it is not empowered in its public capacity to engage in work or enterprises which are not germane to its functions as such and that it has not, therefore, the power to expend public moneys for other than public purposes.

Work included in regular duties. The creation of legal relations under a contract of employment may not only depend upon the considerations above stated but upon the further one that the business which a person may be employed to transact is a part of his regular duties as a public official for and on behalf of the public corporation,[306] or services for the rendition of which he can receive no other compensation than that included in his regular salary.[307] This particular question cannot be raised where the one claiming employment was not at that time a public official.

The principles above stated will control and regulate the employment of attorneys,[308] physicians,[309] surveyors,[310] civil engineers,[311] architects[312] and others coming within the classes under discussion.[313]

[305] Fite v. Black, 92 Ga. 363, 17 S. E. 349; Ottawa Gaslight & Coke Co. v. People, 138 Ill. 336, 27 N. E. 924; Julian v. State, 140 Ind. 581, 39 N. E. 923; Garrigus v. Howard County Com'rs, 157 Ind. 103, 60 N. E. 948; Barr v. State, 148 Ind. 424, 47 N. E. 829.

[306] Moreland v. Common Council of Detroit, 130 Mich. 343, 89 N. W. 935.

[307] Mullett's Adm'x v. United States, 150 U. S. 566; City of Calais v. Whidden, 64 Me. 249; McHenderson v. Anderson County, 105 Tenn. 591, 59 S. W. 1016.

[308] Buck v. City of Eureka, 124 Cal. 61; Ponting v. Isaman, 7 Idaho, 581, 65 Pac. 434; Franklin County v. Layman, 145 Ill. 138, 33 N. E. 1094; Julian v. State, 140 Ind. 581, 39 N. E. 923; Bevington v. Woodbury County, 107 Iowa, 424, 78 N. W. 222; Connolly v. Inhabitants of Beverly, 151 Mass. 437, 24 N. E. 404; Cahill v. State Auditors, 127 Mich. 487, 86 N. W. 950, 55 L. R. A. 493; Reynolds v. Clark County, 162 Mo. 680, 63 S. W. 382; Hackett v. Rockington County, 52 N. H. 617; Wiley v. City of Seattle, 7 Wash. 576; Hopper v. Ashland County, 84 Wis. 655, 54 N. W. 1024.

[309] Castle v. Bannock County, 8 Idaho, 124, 67 Pac. 35; Perry County Com'rs v. Lamax (Ind. App.) 31 N. E. 584; State v. Vallins, 140 Mo. 523; Nash v. City of Knoxville, 108 Tenn. 68, 64 S. W. 1062.

[310] Kornburg v. Deer Lodge County Com'rs, 10 Mont. 325, 25 Pac. 1041.

[311] City of Ellsworth v. Rossiter, 46 Kan. 237, 26 Pac. 674; Rettinghouse v. City of Ashland, 106 Wis. 595, 82 N. W. 555.

[312] Butz v. Fayette County, 168 Pa. 464, 32 Atl. 28.

[313] Harris v. Gibbins, 114 Cal. 418, 46 Pac. 292; Garrigus v. How-

§ 410. The employment of clerks.

Different considerations affect the employment of persons to perform clerical and ministerial or menial duties. The engaging of members of the learned professions is what might be termed the exercise of an extraordinary power and one where the question of the right of its exercise is to be critically and closely examined. The hiring of clerks and laborers cannot be classed as the exercise of more than an ordinary power; a government is organized; departments and subdepartments and public offices are created and each one is charged by the sovereign with the performance on his behalf with certain governmental duties and functions. In order that this be properly done, it is necessary to employ unskilled laborers of the higher classes to do the more menial acts.[814] It is largely a question of the appropriation of public moneys rather than the inherent right to employ.[815] But the public corporation clearly cannot, even under these liberal principles, employ, to be paid from the public purse, unnecessary clerical help or that which is to be engaged in business or acts foreign to the purpose of the organization or the doing of which is not authorized by some express grant of power.[816]

The pay of a mere employe whether one belonging to the learned professions, skilled trades or an unskilled laborer, is dependent upon the terms of the particular contract of employment.[817]

§ 411. Compensation of public employes as affected by legislation.*

Attempts have been made by legislative bodies to regulate the compensation paid public employes and especially those perform-

ard County Com'rs, 157 Ind. 13, 60 N. E. 948; Ridgeway v. Michellon, 42 N. J. Law, 405.

[814] Herrick v. Hoos, 61 N. J. Law, 463, 39 Atl. 656; Costello v. City of New York, 63 N. Y. 48; Com. v. Gregg, 161 Pa. 528, 29 Atl. 297.

6 Curr. Law, 870.

[815] City & County of San Francisco v. Broderick, 125 Cal. 188, 57 Pac. 887; McDonald v. Norman, 95 Ky. 593, 26 S. W. 808; Lethbridge v. City of New York, 133 N. Y. 232, 30 N. E. 975.

[816] Hathaway v. City of Des Moines, 97 Iowa, 333, 66 N. W. 188.

[817] Lamont v. Solano County, 49 Cal. 158; Weatherhogg v. Jasper County Com'rs, 158 Ind. 14, 62 N. E. 477; Smith v. City of Albany, 61 N. Y. 444; Williams v. Dodge County, 95 Wis. 604, 70 N. W. 821; Kollock v. Dodge, 105 Wis. 187, 80 N. W. 608.

* 6 Curr. Law, 870.

ing menial labor or clerical duties by limiting the hours of labor which is necessary to constitute a legal day's work.[318] These provisions have been held constitutional where reasonable in their terms, and have been held to apply not only to laborers directly employed by municipalities but also to those employed by contractors engaged in construction of public works under contract with the corporation,[319] but such legislation will not deprive a laborer of the right to agree to work for a lesser sum. Beneficial provisions can be waived and a lower compensation contracted for.[320]

§ 412. Right of removal; civil service law.

As the relation between an employe of the public corporation and the corporation is a contract one, the right of removal is dependent upon the terms of the particular contract.[321] In general it might be said that the right is one to be arbitrarily exercised [322] upon the lack of necessity for such help,[323] the completion of the particular work for which one was employed [324] or the termination of the authority for employment.[325]

The carrying on of the business of government necessitates the employment of a large number of persons not engaged in the performance of discretionary duties or those requiring official and personal judgment. The use of these employes for the purposes of promoting the success of political parties, factions or cliques is destructive to good government, results in a waste of public money and may also result in the carrying on of extravagant and unnecessary public works. Even without such considerations the protection of the laborer in his employment adds to its efficiency.

[318] Beard v. Sedgwick County Com'rs, 63 Kan. 348, 65 Pac. 638; O'Boyle v. City of Detroit, 131 Mich. 15, 90 N. W. 669; McAvoy v. City of New York, 166 N. Y. 588, 59 N. E. 1125.

[319] McAvoy v. City of New York, 166 N. Y. 588, 59 N. E. 1125.

[320] Bell v. Town of Sullivan, 158 Ind. 199, 63 N. E. 209.

[321] Quigg v. Evans, 121 Cal. 546, 53 Pac. 1093.

6 Curr. Law, 853.

[322] White v. City of Alameda, 124 Cal. 95, 56 Pac. 795; State v. Walbridge, 119 Mo. 383.

[323] People v. Scannell, 163 N. Y. 599, 57 N. E. 1121.

[324] Cape Breton County v. McKay, 18 Can. Sup. Ct. R. 639.

[325] Mack v. City of New York, 37 Misc. 371. 75 N. Y. Supp. 809.

If employment and promotion are dependent upon racial, political or religious reasons rather than upon the character and accuracy of the work done, the routine work of government will not be performed either cheaply or efficiently. These with other considerations that readily suggest themselves have influenced legislative bodies in placing a large proportion of governmental employes under civil service rules [326] and regulations attempting to control, to minimize or prevent the evils existing under other conditions. Such laws generally exclude from their operation certain appointments or positions which, because of their nature or the character of the duties required, it is deemed advisable to exempt.[327]

Civil service legislation if not prescribing tests prohibited in the constitution is enforceable.[328]

§ 413. Right of discharge limited by veteran acts.

The congress of the United States and many state legislatures have passed laws which still further restrict and limit the arbitrary power of removal or suspension even where civil service laws have been adopted. The class of persons especially favored by such laws are honorably discharged veteran soldiers and sailors of the war of the rebellion [329] engaged on the Union side or persons participating in other wars as enlisted soldiers or sailors in the United States army or navy. Some state legislatures also favor, in this respect, the members of state militia. The purpose

[326] Cahen v. Wells, 132 Cal. 447, 64 Pac. 699; Brenan v. People, 176 Ill. 620, 52 N. E. 353; Morrison v. People, 196 Ill. 454; People v. Keller, 157 N. Y. 90, 51 N. E. 431; State v. Smith, 19 Wasn. 644, 54 Pac. 33.

[327] City of New Orleans v. Fire Com'rs, 50 La. Ann. 1000, 23 So. 906; Johnson v. Kimball, 170 Mass. 58, 48 N. E. 1020; Chittenden v. Wurster, 152 N. Y. 345, 46 N. E. 857, 37 L. R. A. 809.

[328] People v. Kipley, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775; Hope v. City of New Orleans, 106 La. 345, 30 So. 842; People v. Mosher, 163 N. Y. 32, 57 N. E. 88.

[329] Act of Congress Aug. 15, 1876 (19 Stat. 169); Kan. Laws, 1886, c. 160. Mass. St. 1896, c. 517, § 3, held unconstitutional in Opinion of Justices, 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58; Cal. Act March 31, 1891; New York Laws, c. 370; New York Const. 1895, art. 5, § 9; Allison v. Board of Education of San Bernardino, 125 Cal. 72, 57 Pac. 673; Ohio Law, 1892, p. 50.

* 6 Curr. Law, 853.

of this legislation is to give a preference both in the employment and retention [880] in public service, and eliminate causes which ordinarily result either in the rejection of an applicant for a public employment or in his removal or suspension if in the public service. Employments based upon confidential relations are usually exempted.[881]

[880] Keim v. United States, 177 U. S. 290; Ayers v. Hatch, 175 Mass. 489; State v. Miller, 66 Minn. 90, 68 N. W. 732; People v. Knauber, 163 N. Y. 23, 57 N. E. 161; Clark v. City of Boston, 179 Mass. 409, 60 N. E. 793; Ellis v. Common Council of Grand Rapids, 123 Mich. 567, 82 N. W. 244; Peterson v. Chosen Freeholders of Salem County, 63 N. J. Law, 57, 42 Atl. 844; People v. Van Wyck, 157 N. Y. 495, 52 N. E. 559.

[881] People v. Dalton, 160 N. Y. 680, 55 N. E. 1099; People v. Coler, 157 N. Y. 676, 51 N. E. 1093.

CHAPTER IX.

PUBLIC PROPERTY.

I. ITS ACQUIREMENT.

II. ITS CONTROL AND USE.

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I. ITS ACQUIREMENT.

II. ITS CONTROL AND USE.

I. Its Acquirement.

§ 414. The acquirement in its capacity as a public corporation.*

A public corporation whether a state itself as a sovereign or one of its subordinate divisions is an agency of government and as

* 6 Curr. Law, 730.

such it is legally controlled in the exercise of all its powers and the performance of all its duties by this fundamental principle that as an agency of government it is an artificial person of restricted and limited powers and rights,[1] the restrictions and limitations being based upon the sound doctrine and theory that the powers of a state should be directed to the act of governing and should, under no circumstances, consider or include any action that belongs to the domain of private activity and enterprise.[2] At the present time the purpose of the organization of agencies of government seems to be incorrectly understood; the tendency being towards the idea that a public corporation should not only perform its functions as an agency of government but should also supplant private enterprise, thrift and responsibility. Such an agency should not be permitted to secure property for any purpose other than a public one [3] and then only when the power has been expressly given [4] or is necessarily implied as essential to the life of the corporation or the carrying on of the particular governmental object for which it was organized.[5] The general authority whether expressly or impliedly existing to acquire and hold property should be limited to the purposes of the organization of the particular corporation and never construed as including those enterprises involving speculation and profit.[6]

§ 415. Power to acquire property in the capacity of a trustee.

The right of a public corporation to acquire and hold property in the capacity of a trustee has been a question considered by the

[1] People v. Ingersoll, 58 N. Y. 1.

[2] Opinion of Judges, 58 Me. 590; Opinion of the Justices, 155 Mass. 598, 30 N. E. 1142, 15 L. R. A. 809. See c. V, subd. 1, ante; Davies v. City of New York, 83 N. Y. 207; Alter v. City of Cincinnati, 56 Ohio St. 47, 46 N. E. 69, 35 L. R. A. 737.

[3] Avery v. United States, 104 Fed. 711; City of Somerville v. City of Waltham, 170 Mass. 160, 48 N. E. 1092; Markley v. Village of Mineral City, 58 Ohio St. 430, 51 N. E. 28; Beurhaus v. Cole, 94 Wis. 617, 69 N. W. 986.

[4] Von Schmidt v. Widber, 105 Cal. 151, 38 Pac. 682; Proprietors of Jeffries Neck Pasture v. Inhabitance of Ipswich, 153 Mass. 42, 26 N. E. 239; People v. Ingersoll, 58 N. Y. 1; In re Franklin's Estate, 150 Pa. 437, 24 Atl. 626; Trester v. City of Sheboygan, 87 Wis. 496, 58 N. W. 747.

[5] Phipps v. Morrow, 49 Ga. 37; Bluffton Corporation v. Studabaker, 106 Ind. 129, 6 N. E. 1; Duncan v. City of Lynchburg (Va.) 34 S. E. 964, 48 L. R. A. 331.

[6] Hunnicutt v. City of Atlanta, 104 Ga. 1, 30 S. E. 500; Opinion of Judges, 58 Me. 590; Opinion of Justices, 155 Mass. 598, 30 N. E. 1142, 15 L. R. A. 809.

supreme court of the United States [7] and decided in the affirmative.

The same question has also been passed upon in different states, including Pennsylvania,[8] Maryland,[9] Missouri,[10] Louisiana,[11] Ohio [12] and others.[13] The test in each case is whether the purpose of the grant or the gift is one which a public corporation itself might further or advance and if so, then the power exists because it is an object germane and appropriate to the general objects for which the public corporation as an agency of government was itself organized.[14] One of the leading cases on this subject, Vidal v. Girard's Ex'rs, is cited below.

The right, however, should be expressly granted. It is not usually considered as one which will be implied,[15] and, where the object for which the trust was created has failed, a court of chancery will afford relief by ordering a reconveyance of the property to those legally entitled to it.[16]

The reasoning which sustains the validity of the grants referred to in the preceding paragraphs has effectually prevented public corporations from accepting and administering bequests for objects foreign to the purposes for which they are created and in which they have no interest in their capacity as a public corporation.[17]

[7] Girard v. City of Philadelphia, 74 U. S. (7 Wall.) 1; McDonogh's Ex'rs v. Murdock, 15 How. (U. S.) 367.

6 Curr. Law, 730.

[8] Straub v. City of Pittsburgh, 138 Pa. 356, 22 Atl. 93; Philadelphia v. Fox, 64 Pa. 169.

[9] Barnum v. City of Baltimore, 62 Md. 275.

[10] Chambers v. City of St. Louis, 29 Mo. 543.

[11] Girard v. City of New Orleans, 2 La. Ann. 898; State v. McDonogh's Ex'rs, 8 La. Ann. 171.

[12] Perin v. Cary, 24 How. (U. S.) 465.

[13] City of New Orleans v. Gurley, 56 Fed. 376; Peake v. City of New Orleans (C. C. A.) 60 Fed. 127; In re Robinson's Estate, 63 Cal. 620; Craig v. Secrist, 54 Ind. 419; Phillips v. Harrow, 93 Iowa, 92, 61 N. W. 434; City of Maysville v. Wood, 19 Ky. L. R. 1292, 43 S. W. 403, 39 L. R. A. 93; Opinion of the Justices, 70 N. H. 638, 50 Atl. 328; Sargent v. Cornish, 54 N. H. 18.

[14] Handley v. Palmer (C. C. A.) 103 Fed. 39, affirming 91 Fed. 948; City of Philadelphia v. Fox, 64 Pa. 169; Vidal v. Girard's Ex'rs, 2 How. (U. S.) 127, 11 Law Ed. 205; Wrentham v. Inhabitants of Norfolk, 114 Mass. 555; City of Philadelphia v. Fox, 64 Pa. 169.

[15] Dailey v. City of New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69; City Council of Augusta v. Walton, 77 Ga. 517; In re Franklin's Estate, 150 Pa. 437, 24 Atl. 626.

[16] Harris v. Whiteside County Sup'rs, 105 Ill. 445.

§ 416. Power to acquire in the capacity of a private corporation.

The decisions recognize the fact that a public corporation may at times assume for certain purposes the character of a private corporation. The doctrine is wrong but the power to act in such a capacity has been affirmatively decided in some cases. Where this legal condition exists, the public corporation may, by the exercise of an express or an assumed power, acquire property in this capacity [18] and when this is done it will be treated as a private corporation and subject to all the rules of law which regulate rights and liabilities as devolving upon a private individual.[19] When a public corporation engages in a doubtful enterprise from a governmental standpoint it loses its character as a part of the sovereign, becomes a private individual and cannot invoke its character as a public corporation to aid it in taking advantage of those with whom it may have had business dealings. Its rights and its liabilities are measured strictly by the laws which determine all private rights or liabilities.[20]

Property may be acquired by a public corporation in its capacity as a local agent of government, the disposal and regulation of which will be subject to the principles of law based upon acquirement and use of property for a public purpose. When a public corporation acquires property in this capacity, the public use which attaches to property secured in this way cannot be changed or divested.[21]

[17] Vidal v. City of Philadelphia, 2 How. (U. S.) 128; Perin v. Carey, 24 How. (U. S.) 465; Sargent v. Cornish, 54 N. H. 18; Hornbeck v. Westbrook, 9 Johns. (N. Y.) 73.

[18] City of New Orleans v. Heirs of Guillotte, 12 La. Ann. 818; Town of New Shoreham v. Ball, 14 R. I. 566; Adams v. Natchez, J. & C. R. Co., 76 Miss. 714, 25 So. 667; Scalf v. Collin County, 80 Tex. 514, 16 S. W. 314.

[19] San Francisco Gas Co. v. City of San Francisco, 9 Cal. 453; Burbank v. Fay, 65 N. Y. 57; Hunneman v. Fire Dist. No. 1, 37 Vt. 40.

[20] Rittenhouse v. City of Baltimore, 25 Md. 336. "Where the corporation appears in the character of a mere property holder, and enters into a contract with reference to such property, as any private citizen or other proprietor might do; or where it engages in an enterprise not necessarily connected with, or growing out of, its public capacity as a part of the local government, then all its rights and liabilities are to be measured and determined by the same rules that govern individuals or private corporations, and it cannot claim exemption or immunity from the legal liabilities growing out of the contracts by reason of its public municipal character."

[21] Hoadley's Adm'rs v. City of San Francisco, 124 U. S. 639; Grogan v.

§ 417. Location of property; manner of acquirement; by purchase.

The power of a public corporation being so limited and restricted, the rule holds that it cannot acquire property outside the limits of its own territorial organization,[22] the exception being that where it is necessary to complete a park, water or sewage system, erect a pest house or contagious hospital, to acquire property outside of its own limits, this may be done.[23]

By purchase. The right of a public corporation to acquire property having been established, the manner of this acquirement is the next consideration and in all respects the same rules apply as to the acquirement of property by a private person or corporation. The usual mode for the acquisition of public property is by purchase and sale:[24]

Acquirement by lease. In many cases the purchase of property is considered by the authorities inadvisable or the purchase of particular property required is impossible and so long as the purpose or the use of the property is one which is public in its character and which is authorized, under the principles suggested in preceding sections, a leasehold interest can be acquired.[25]

City of San Francisco, 18 Cal. 590; Mt. Hope Cemetery v. City of Boston, 158 Mass. 509; People v. Common Council of Detroit, 28 Mich. 228; People v. Ingersoll, 58 N. Y. 1; Roper v. McWhorter, 77 Va. 214.

[22] Thompson v. Moran, 44 Mich. 602; Town of North Hempstead v. Town of Hempstead, 2 Wend. (N. Y.) 109.

6 Curr. Law, 885.

[23] Bank of Augusta v. Earle, 13 Pet. (U. S.) 519; Lester v. City of Jackson, 69 Miss. 887, 11 So. 114; Hafner v. City of St. Louis, 161 Mo. 34, 61 S. W. 632; In re City of New York, 99 N. Y. 569; Newman v. Ashe, 68 Tenn. (9 Baxt.) 380; Minnesota & M. Land & Ins. Co. v. City of Billings, 111 Fed. 972.

[24] Gillette-Herzog Mfg. Co. v. Canyon County, 85 Fed. 396; Hunnicutt v. City of Atlanta, 104 Ga. 1, 30 S. E. 500; Holten v. Lake County Com'rs, 55 Ind. 194; Bardstown & L. Turnpike Co. v. Nelson County, 109 Ky. 800, 60 S. W. 862; Inhabitants of Stoughton v. Paul, 173 Mass. 148, 53 N. E. 272; Mitchell v. City of Negaunee, 113 Mich. 359, 38 L. R. A. 157; James v. Wilder, 25 Minn. 305; Kansas City v. Bacon, 147 Mo. 259, 48 S. W. 860; Ketchum v. City of Buffalo, 14 N. Y. (4 Kern.) 356; Beckrich v. City of North Tonawanda, 171 N. Y. 292, 64 N. E. 6.

[25] City of Chicago v. Peck, 196 Ill. 260, 63 N. E. 711; Williams v. Kearny County Com'rs, 61 Kan. 708, 60 Pac. 1046; City of Somerville v. City of Waltham, 170 Mass. 160; Curtis v. City of Portsmouth, 67 N. H. 506; Davies v. City of New York, 83 N. Y. 207; Multnomah v. City & Suburban R. Co., 34 Or. 93, 55 Pac. 441.

Acquirement through grant or gift. A public corporation as a part of its governmental duties and functions can properly carry on many undertakings of a charitable nature and those, which it manages in its capacity as a public corporation, it has been held by many authorities, it holds as a trustee for the individuals as a whole who may permanently or temporarily reside within its limits. For reasons given a public corporation, it has been held, when authorized, can acquire and hold property through grant or gift from any source,[26] which it is generally held, where not limited by the terms of the grant or gift,[27] can be used for any of the many public purposes the corporation is authorized to undertake and carry out.[28]

§ 418. Property acquired through dedication.

The principle is well established in the United States that the public may acquire property through the doctrine of dedication.[29] The subject is an important one as an examination of existing conditions will show that a very large proportion of the public highways and pleasure grounds have been acquired in this manner.

Dedication has been defined as the setting apart of land for a public use [30] and involves not only the manner of dedication, but also a consideration of the right of the party to make the dedication, the question of intent and the nature and requisites of the dedicator's act.

[26] Vidal v. Girard's Ex'rs, 2 How. (U. S.) 127; Handley v. Palmer (C. C. A.) 103 Fed. 39; Fulbright v. Perry County, 145 Mo. 432, 46 S. W. 955; Sargent v. Cornish, 54 N. H. 18; In re Crane's Will, 159 N. Y. 557, 54 N. E. 1089; Beurhaus v. Cole, 94 Wis. 617, 69 N. W. 986.

[27] Ecroyd v. Coggeshall, 21 R. I. 1, 41 Atl. 260.

[28] Beatty v. Kurtz, 2 Pet. (U. S.) 566; Patrick v. Y. M. C. A. of Kalamazoo, 120 Mich. 185, 79 N. W. 208.

[29] Northern Pac. R. Co. v. City of Spokane (C. C. A.) 64 Fed. 506; Mayo v. Wood, 50 Cal. 171; City of Hartford v. New York & N. E. R. Co., 59 Conn. 250, 22 Atl. 37; McNeil v. City of Boston, 178 Mass. 326, 59 N. E. 810.

6 Curr. Law, 885; 8 Curr. Law, 41; 7 Curr. Law, 1098.

[30] City of Los Angeles v. Keysor, 125 Cal. 463; Welton v. Town of Wolcott, 50 Conn. 259; Smith v. City of St. Paul, 72 Minn. 472; In re Hunter, 164 N. Y. 365, 58 N. E. 288; Ferdinando v. City of Scranton, 190 Pa. 321, 42 Atl. 692.

§ 419. Statutory.

The statutes of the different states contain provisions for the granting or dedicating of property interests to the public and where it is thus granted it is termed a statutory dedication.[31] The statutory dedication is usually effected through the making of a map or plat of property laid out in streets, alleys, blocks or lots, to be signed and acknowledged by the owners of the property and then duly filed and recorded.[32] In order that it shall be effectual and complete as such, it is necessary that the terms of the law authorizing it be substantially complied with.[33] As the statutes afford the sole and only basis in the case of a statutory dedication for the claim on the part of the public it will be readily seen that the rule above stated must be the correct one. The filing and recording of a plat sufficient to constitute a statutory dedication is conclusive upon the one filing it and the designating of ground on a recorded plat as "streets," "alleys," "public grounds," or "parks," constitutes an unrestricted dedication of such land to the public use.[34]

[31] Pacific Gas Imp. Co. v. Ellert, 64 Fed. 421; London & San Francisco Bank v. City of Oakland, 86 Fed. 30; Ruddiman v. Taylor, 95 Mich. 547; Village of Buffalo v. Harling, 50 Minn. 551; Osterheldt v. City of Philadelphia, 195 Pa. 355, 45 Atl. 923; Vaughan v. Lewis, 89 Va. 187.

7 Curr. Law, 1099.

[32] City & County of San Francisco v. Center, 133 Cal. 673, 66 Pac. 83; City of Chicago v. Ward, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849; Palen v. City of Ocean City, 64 N. J. Law, 669, 46 Atl. 774; People v. Underhill, 144 N. Y. 316, 39 N. E. 333.

[33] London & San Francisco Bank v. City of Oakland, 90 Fed. 691, affirming 86 Fed. 30; City of Chicago v. Van Ingen, 152 Ill. 624; City of New Albany v. Williams, 126 Ind. 1, 25 N. E. 187; Edwards & Walsh Construction Co. v. Jasper County, 117 Iowa, 365, 90 N. W. 1006; Buschmann v. City of St. Louis, 121 Mo. 523, 26 S. W. 687; Brown v. City of Baraboo, 98 Wis. 273, 74 N. W. 223.

[34] Northern Pac. R. Co. v. City of Spokane, 56 Fed. 915; Clark v. City of Elizabeth, 40 N. J. Law, 172; City of Madison v. Mayers, 97 Wis 399, 73 N. W. 43, 40 L. R. A. 635; Webb v. City of Demopolis, 95 Ala. 116, 21 L. R. A. 62; Young v. Makaska County, 88 Iowa, 681, 56 N. W. 177; Attorney General v. Tarr, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87; St. Louis & S. F. R. Co. v. Gordon, 157 Mo. 71, 57 S. W. 742; Ehmen v. Village of Gottenburg, 50 Neb. 715, 70 N. W. 237; In re Hunter, 163 N. Y. 542, 57 N. E. 735. Rehearing denied, 164 N. Y. 365, 58 N. E. 238; Com. v. Connellville Borough, 201 Pa. 154, 50 Atl. 825; Bates v. City of Beloit, 103 Wis. 90, 78 N. W. 1102.

§ 420. Common-law.

Dedication implies a conveyance and an acceptance; the transaction including a contract either express or implied. But no specific length of time of use by the public is necessary.[35] A statutory dedication can be said to be based upon an express grant or contract as prescribed by statutory provisions. A common-law dedication operates by way of an estoppel in pais rather than by the affirmative and direct act of the parties as authorized by statute.[36] But in order to constitute a common-law dedication, no particular form, ceremony or instrument is necessary. All that is required is the assent of the owner of the land and its use by the public for the purposes intended by the appropriation.[37] To constitute a complete dedication, an acceptance is necessary by the public.[38]

§ 421. Essentials of dedication.*

The owner alone can dedicate his interest.[39] A gift by one not the owner is ineffectual [40] as well as the grant of a greater interest in real property than one possesses and such action can in no way impair the interests of those apparently diminished or given away.[41]

[35] Hall v. Armstrong, 53 Conn. 554; City of Chicago v. Borden, 190 Ill. 430, 60 N. E. 915; Schettler v. Lynch, 23 Utah, 305, 64 Pac. 955.

7 Curr. Law, 1099.

[36] McKinzie v. Gilmore (Cal.) 33 Pac. 262; People v. Eel River & E. R. Co., 98 Cal. 665, 33 Pac. 728; Chicago, R. I. & P. R. Co. v. City of Joliet, 79 Ill. 25; Witter v. Damitz, 81 Wis. 385; 3 Washburn, Real Prop. (4th Ed.) c. 2, § 6.

[37] Morgan v. Chicago & A. R. Co., 96 U. S. 716; Woodburn v. Town of Sterling, 184 Ill. 208, 56 N. E. 378; Baltimore & O. S. W. R. Co. v. City of Seymour, 144 Ind. 17; Agne v. Seitsinger, 104 Iowa, 482; Oswald v. Grenet, 22 Tex. 94; Buntin v. City of Danville, 93 Va. 200, 24 S. E. 830.

[38] Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141; Brakken v. Minneapolis & St. L. R. Co., 29 Minn. 41.

* 7 Curr. Law, 1098, 1099.

[39] Johnson v. Common Council of Dadeville, 127 Ala. 244, 28 So. 700; City of Eureka v. Fay, 107 Cal. 166; James v. Illinois Cent. R. Co., 195 Ill. 327, 63 N. E. 153; Town of Fowler v. Linquist, 138 Ind. 566; Plumb v. City of Grand Rapids, 81 Mich. 381, 45 N. W. 1024; Warren v. Brown, 31 Neb. 8, 47 N. W. 633; Robertson v. Meyer, 59 N. J. Eq. 366, 45 Atl. 983; Town of Gate City v. Richmond, 97 Va. 337, 33 S. E. 615.

[40] California Nav. & Imp. Co. v. Union Transp. Co., 126 Cal. 433, 58 Pac. 936, 46 L. R. A. 825; Village of Buffalo v. Harling, 50 Minn. 551, 52 N. W. 931.

[41] McKey v. Hyde Park Village,

Should be irrevocable. The dedication of property to a public use should be forever and irrevocable,[42] for it would be unjust to allow a public corporation to accept and improve a grant of real property, acquire valuable rights in it as a trustee for the public and have these interests constantly jeopardized through a possibility of an arbitrary revocation of the grant by the original donor or those claiming under him.

§ 422. Intent necessary to a dedication.

The act of dedication whether statutory or common law results in the transfer of property or property interests to the public for a public use and without direct compensation. It is necessary, therefore, that there should be established from words or acts clearly and beyond a reasonable doubt the fact that it was the owner's intention to dedicate the property [43] and this question is usually one for the jury.[44] "The doctrine of all the authorities that the intention to dedicate land to the public use is of the very essence of the act; but this intention may be proved as a fact, or inferred from circumstances." [45] This intent of the owner may be shown by signing a petition asking for the establishment of a

134 U. S. 84; Id., 37 Fed. 289; Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190; City of Alton v. Fishback, 181 Ill. 396, 55 N. E. 150; Gregory v. City of Ann Arbor, 127 Mich. 454, 86 N. W. 1013; Lewis v. City of Lincoln, 55 Neb. 1, 75 N. W. 154.

[42] London & San Francisco Bank v. City of Oakland (C. C. A.) 90 Fed. 691, affirming 86 Fed. 30; Davenport v. Buffington (C. C. A.) 97 Fed. 234, 46 L. R. A. 377; Stewart v. Conley, 122 Al. . 179; Town of Derby v. Alling, 40 Conn. 410; Osage City v. Larkins, 40 Kan. 206, 19 Pac. 658, 2 L. R. A. 56; Michigan Cent. R. Co. v. Bay City, 129 Mich. 264, 88 N. W. 638; City of Atlantic v. Groff, 64 N. J. Law. 527, 45 Atl. 916; In re Hunter, 163 N. Y. 542, 57 N. E. 735. Rehearing denied 164 N. Y. 365, 58 N. E. 288.

[43] City of Anaheim v. Langenberger, 134 Cal. 608, 66 Pac. 855; Starr v. People, 17 Colo. 458; Porter v. Carpenter, 39 Fla. 14; Swift v. City of Lithonia, 101 Ga. 706, 29 S. E. 12; Shelhouse v. State, 110 Ind. 509, 11 N. E. 484. See also Abb. Mun. Corp. § 728, citing many cases.

7 Curr. Law, 1100.

[44] Rees v. City of Chicago, 38 Ill. 322; State v. McClure, 53 Kan. 295, 36 Pac. 353; Adams v. Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270; Wood v. Hurd, 34 N. J. Law, 87; Flack v. Village of Green Island, 122 N. Y. 107, 25 N. E. 267.

[45] Smith v. State, 23 N. J. Law, (3 Zab.) 712.

highway to be used by the public,[46] the filing of a map or plat,[47] or the sale of property with reference to a plat or survey.[48]

An intent to dedicate is also evidenced by the acts of owners of real property in locating, extending or widening streets;[49] removing fences[50] or permitting ways thus opened to be used as a public thoroughfare,[51] and the inference from these acts or others of a similar character of the intent to dedicate is strengthened when public authorities are permitted to assume the control and regulation of these thoroughfares and to make improvements and repairs upon them.[52] But merely permitting land to lie open and

[46] People v. Martin County, 103 Cal. 223, 37 Pac. 203, 26 L. R. A. 659; Norfolk & W. R. Co. v. Rasnake, 90 Va. 170, 17 S. E. 879.

[47] City of Anaheim v. Langenberger, 134 Cal. 608, 66 Pac. 855; Earll v. City of Chicago, 136 Ill. 277; Town of Fowler v. Lindquist, 138 Ind. 566, 37 N. E. 133; Calhoun v. Town of Colfax, 105 La. 416, 29 So. 887; City of Seattle v. Hill, 23 Wash. 92, 62 Pac. 446.

[48] People v. Hibernia Sav. & Loan Soc., 84 Cal. 634, 24 Pac. 295; Hamilton County v. Rape, 101 Tenn. 222, 47 S. W. 416; United States v. Illinois Cent. R. Co., 154 U. S. 225; Cowley v. City of Spokane, 99 Fed. 840; Prescott v. Edwards, 117 Cal. 298, 49 Pac. 178; Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145; City of Cincinnati v. White's Lessee, 6 Pet. [U. S.] 431; Clark v. McCormick, 174 Ill. 164; In re 39th St., 1 Hill, 192; Village of Augusta v. Tyner, 197 Ill. 242, 64 N. E. 378; Hull v. City of Cedar Rapids, 111 Iowa, 466, 83 N. W. 28; Heselton v. Harmon, 80 Me. 326, 14 Atl. 286; Finnegan v. City of St. Joseph, 123 Mich. 330, 82 N. W. 51; Smith v. City of St. Paul, 72 Minn. 472, 75 N. W. 708; McCague v. Miller, 55 Neb. 762, 76 N. W. 422; Lord v. Atkins, 138 N. Y. 184, 33 N. E. 1035; Collins v. Asheville Land Co., 128 N. C. 563, 39 S. E. 21; Cotter v. City of Philadelphia, 194 Pa. 496, 45 Atl. 336; Riddle v. Town of Charlestown, 43 W. Va. 796, 28 S. E. 831. See, also, a late case upon this question—Village of Riverside v. McLain, 210 Ill. 308, 71 N. E. 408, and Abb. Mun. Corp. § 731.

[49] Caperton v. Humpick, 15 Ky. L. R. 430, 23 S. W. 875; Neal v. Hopkins, 87 Md. 19, 39 Atl. 322.

[50] City of Sullivan v. Tichenor, 179 Ill. 97, 53 N. E. 561; Town of Johnson City v. Wolfe, 103 Tenn. 227, 52 S. W. 991.

[51] Sussman v. County of San Luis Obispo, 126 Cal. 536; Township of Whitley v. Linville, 174 Ill. 579; Philbrick v. Town of University Place, 106 Iowa, 352, 76 N. W. 742; Hamlen v. Keith, 171 Mass. 77, 50 N. E. 462.

[52] Niles v. City of Los Angeles, 125 Cal. 572; Woodburn v. Town of Sterling, 184 Ill. 208, 56 N. E. 378; Lake Erie & W. R. Co. v. Town of Boswell, 137 Ind. 336, 36 N. E. 1103; Hull v. City of Cedar Rapids, 111 Iowa, 466, 83 N. W. 28; Conkling v. Village of Mackinaw City, 120 Mich. 67, 79 N. W. 6; Wakeman v. Wilbur, 147 N. Y. 657, 42 N. E. 341; McHugh v. Town of Minocqua, 102 Wis. 291, 78 N. W. 478.

unfenced and without an attempt to maintain exclusive, private possession [53] or permissive use of enclosed land,[54] does not establish an intent to throw it open for public use and this is especially true when considering the character of land, whether cultivated or wild and uncultivated and vacant.[55] Negatively, acts of the owner which show a lack of intent will rebut such a claim.[56] The fencing or enclosing of property,[57] its use, improvement or cultivation,[58] claims and assertions that it is private in its character [59] and opposition to the public authorities in their attempts to improve or regulate the property in dispute,[60] are some of these. Where the intent to dedicate has been established by the act or acts of the owner, no user by the public for a definite time is necessary.[61] The public rights are created and become fixed immediately upon the establishment of the intent to dedicate.

§ 423. The estate acquired.

The estate acquired by the public through a donation of property to a public use by private individuals is dependent upon the character of the dedication, whether statutory or common law,

[53] Coburn v. San Mateo County, 75 Fed. 520; Beach v. City of Meriden, 46 Conn. 502; City of Ottawa v. Yentzer, 160 Ill. 509, 43 N. Y. 601; Fairchild v. Stewart, 117 Iowa, 734, 89 N. W. 1075; Strong v. City of Brooklyn, 68 N. Y. 1; Town of Randall v. Rovelstad, 105 Wis. 410, 81 N. W. 819.

[54] Field v. Mark, 125 Mo. 502, 28 S. W. 1004; Morris & E. R. Co. v. Jersey City, 63 N. J. Eq. 45, 51 Atl. 387; Evans v. Borough of Lititz, 162 Pa. 561.

[55] Tutwiler v. Kendall, 113 Ala. 664, 21 So. 332; Conkling v. Village of Mackinaw, 120 Mich. 67; Oyler v. Ross, 48 Neb. 211.

[56] Gage v. Mobile & O. R. Co., 84 Ala. 224, 4 So. 415; Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190; Cotter v. City of Augusta, 80 Ga. 425; Huff v. Hastings Exp. Co., 195 Ill. 257, 63 N. E. 105; White v. Bradley, 66 Me. 254; Neal v. Hopkins, 87 Md. 19; In re Wayne Ave., 124 Pa. 135, 16 Atl. 631.

[57] People v. Sperry, 116 Cal. 593, 48 Pac. 723; City of Chicago v. Hill, 124 Ill. 646, 17 N. E. 46; Neal v. Hopkins, 87 Md. 19, 39 Atl. 322.

[58] Irwin v. Dixon, 9 How. (U. S.) 10; Bell v. City of Burlington, 68 Iowa, 296; Monaghan v. Memphis Fair & Exp. Co., 95 Tenn. 108, 31 S. W. 497.

[59] City of Eureka v. Fay, 107 Cal. 166, 40 Pac. 235; Lippincott v. Harvey, 72 Md. 572, 19 Atl. 1041; Village of White Bear v. Stewart, 40 Minn. 284; Reuter v. Lawe, 94 Wis. 300, 68 N. W. 955, 34 L. R. A. 733.

[60] Cook v. Sudden, 94 Cal. 443, 29 Pac. 949; Town of Gate City v. Richmond, 97 Va. 337, 33 S. E. 615.

[61] Hiner v. Jeanpert, 65 Ill. 428; Summers v. State, 51 Ind. 201; Dwinell v. Barnard, 28 Me. 554.

and further upon the extent of the estate which may be acquired in a particular state or locality by the public. Ordinarily, a common-law dedication does not convey a fee but an easement only,[62] restricted in extent by the limits as marked or established by public user [63] and where these are indefinite, then will the land be dedicated only to the extent necessary to accomplish the purpose in view, namely, a means of ingress and egress from particular lots or property.[64] The estate granted by the owner is further and always limited by the terms of a conditional grant if one is made.[65] The principle holds, established beyond controversy, that land dedicated to a public use whether by statute or common law can only be used for this purpose.[66] Property may also be dedicated for public parks or pleasure grounds and will be limited in its use to these purposes.[67] A public corporation will not be al-

[62] Barclay v. Howell's Lessee, 6 Pet. (U. S.) 498; Reed v. Leeds, 19 Conn. 182; Clark v. McCormick, 174 Ill. 164, 51 N. E. 215; Magee v. Overshiner, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370; Jaynes v. Omaha St. R. Co., 53 Neb. 631, 39 L. R. A. 751.

7 Curr. Law, 1102.

[63] Inhabitants of Franklin v. Fisk, 95 Mass. (13 Allen) 211.

[64] Hanbury v. Woodward Lumber Co., 98 Ga. 54, 26 S. E. 477; City of Baltimore v. Frick, 82 Md. 77, 33 Atl. 435; Speir v. Town of Utrecht, 121 N. Y. 420, 24 N. E. 692.

[65] Town of Princeton v. Templeton, 71 Ill. 68; Agne v. Seitsinger, 104 Iowa, 482, 73 N. W. 1048; Gregory v. City of Ann Arbor, 127 Mich. 454, 86 N. W. 1013; City of Atlantic City v. Atlantic City Steel Pier Co., 62 N. J. Eq. 139, 49 Atl. 822; Mark v. Village of West Troy, 151 N. Y. 453, 45 N. E. 842; State v. Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515.

[66] Taft v. Tarpey, 125 Cal. 376, 58 Pac. 24; Pierce v. Roberts, 57 Conn. 31, 17 Atl. 275; Attorney General v. Vineyard Grove Co., 181 Mass. 507, 64 N. E. 75; Kansas City v. Scarritt, 169 Mo. 471, 69 S. W. 283.

[67] Tyne Imp. Com'rs v. Imrie, 81 Law T. (N. S.) 174; Baker v. Johnston, 21 Mich. 319; United States v. City of Chicago, 7 How. (U. S.) 185; Price v. Thompson, 48 Mo. 361; Warren v. Lyon City, 22 Iowa, 351; Village of Princeville v. Auten, 77 Ill. 325; City of Chicago v. Ward, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849; Guttery v. Glenn, 201 Ill. 275; Youngerman v. Polk County Sup'rs, 110 Iowa, 731, 81 N. W. 166; Board of Education v. Kansas City, 62 of Education v. Kansas City, 62 Kan. 374, 63 Pac. 600; Attorney General v. Vineyard Grove Co., 181 Mass. 507, 64 N. E. 75; City of St. Paul v. Chicago, M. & St. P. R. Co, 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L. R. A. 184. "It is elementary and fundamental law that, if a grant is made for a specific, limited, and definite public use, the subject of the grant cannot be used for another and different use. Its use must be restricted to that for which it was dedicated. Even the

lowed to change this use or divest itself in such a way as to permit a change of use.[68]

Property dedicated to a public use cannot be occupied or used by private individuals or for private purposes. In some cases property is dedicated by an individual to a public corporation for a special use other than those of a highway and pleasure grounds. Grants of lands for sites of public buildings or educational institutions must remain devoted to the use named.[69] In these instances, the estate acquired by the public is limited. The owner donating property may also make reservations of mineral or other rights and they will be considered valid.[70]

§ 424. Acceptance of lands dedicated necessary.

As already stated, in order to effect a dedication of lands to a public use, not only must the intent of the owner to dedicate property appear by acts or words showing it conclusively and clearly, but there must also be on the part of the public authorities an acceptance of the grant.[71] This is held necessary not only on account of the legal nature of the transaction, but also because through

legislature itself has no power to destroy the trust, or to divert, or to authorize a municipality to divert, its subject to any other purpose, either public or private, inconsistent with the particular use to which it was granted." Regents for Normal School Dist. No. 3 v. Painter, 102 Mo. 464, 14 S. W. 938, 10 L. R. A. 493.

[68] Young v. Mahoning County Com'rs, 51 Fed. 585. The rule also precludes the sale of land dedicated to a special use and the application of the proceeds to a similar use. Holladay v. City & County of San Francisco, 124 Cal. 352, 57 Pac. 146; Com. v. Rush, 14 Pa. 186; Mahon v. Luzerene County, 197 Pa. 1, 46 Atl. 894. But see United States v. Illinois Cent. R. Co., 154 U. S. 225.

[69] Carpenteria School Dist. v. Heath, 56 Cal. 478; Youngerman v. Polk County Sup'rs, 110 Iowa, 731, 81 N. W. 166; Board of Education of Kansas City v. Kansas City, 62 Kan. 374, 63 Pac. 600; City of Maysville v. Wood, 19 Ky. L. R. 1292, 43 S. W. 403, 39 L. R. A. 93; Patrick v. Y. M. C. A. of Kalamazoo, 120 Mich. 185, 79 N. W. 208; City of Norfolk v. Nottingham, 96 Va. 34.

[70] Webb v. City of Demopolis, 95 Ala. 116, 21 L. R. A. 62; Snoddy v. Bolen, 122 Mo. 479, 24 S. W. 142, 24 L. R. A. 507; State v. Paine Lumber Co., 84 Wis. 205.

[71] Arkansas River Packet Co. v. Sorrels, 50 Ark. 466; City of Anaheim v. Langenberger, 134 Cal. 608, 66 Pac. 855; Jordan v. City of Chenoa, 166 Ill. 530, 47 N. E. 191; Lightcap v. Town of North Judson, 154 Ind. 43, 55 N. E. 952; Uptegraff v. Smith, 106 Iowa, 385, 76 N. W. 733; Muzzey v. Davis, 54 Me. 361; Attorney General v. Tarr, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87;

the legal establishment of a highway, boulevard or pleasure ground, a duty is imposed upon a public corporation to improve and care for the property to the extent rendered necessary by the frequency of its use. The performance of this duty requires the expenditure of public funds and it may become, because of this, a burden upon the community and one which should not at least be created without its consent.[72]

How shown. An acceptance of property dedicated to a public use may be either express or implied. Express, when by some instrument in writing executed by the proper authorities an acknowledgment of the dedication and the acceptance of it on behalf of the public for the public use named in the dedication.[73] An implied acceptance is shown either by public user for that length of time from which will be presumed a proper acceptance[74] or through the improvement and repair of the property dedicated by duly authorized authorities.[75] The opening or grading of a street,[76] the construction of sewers or sidewalks,[77] the expenditure of public moneys duly voted for this purpose by the public authorities[78] or the passage of resolutions or ordinances by

Niagara Falls Suspension Bridge Co. v. Bachman, 66 N. Y. 261; Ex parte Pittsburgh Alley, 114 Pa. 622; Frederick County Com'rs v. City of Winchester, 84 Va. 467.

7 Curr. Law, 1100.

[72] Pennsylvania Co. v. Plotz, 125 Ind. 26; Bryant v. Inhabitants of Biddeford, 39 Me. 193; Alton v. Meenwenberg, 108 Mich. 629, 66 N. W. 571; Rozell v. Anderson, 103 N. Y. 150.

[73] City of Little Rock v. Wright, 58 Ark. 142, 23 S. W. 876; City of Keokuk v. Cosgrove, 116 Iowa, 189, 89 N. W. 983; Central R. of N. J. v. City of Elizabeth, 35 N. J. Law, 359; Reilly v. City of Racine, 51 Wis. 526.

[74] London & San Francisco Bank v. City of Oakland (C. C. A.), 90 Fed. 691; Stewart v. Conley, 122 Ala. 179; Guthrie v. Town of New Haven, 31 Conn. 308; Town of Lake View v. Le Bahn, 120 Ill. 92, 9 N. E. 269; Moffatt v. Kenny, 174 Mass. 311; City of Detroit v. Detroit & M. R. Co., 23 Mich. 173; City of Scranton v. Scranton Steel Co., 154 Pa. 171, 26 Atl. 1.

[75] Stewart v. Conley, 122 Ala. 179, 27 So. 303; Fairbury Union A. Board v. Holly, 169 Ill. 9, 48 N. E. 149; Evansville & T. H. R. Co. v. State, 149 Ind. 276, 49 N. E. 2; Bates v. City of Beloit, 103 Wis. 90, 78 N. W. 1102.

[76] Hall v. Kauffman, 106 Cal. 451; Town of Fowler v. Linquist, 138 Ind. 566.

[77] In re Hunter, 163 N. Y. 542, 57 N. E. 735. Rehearing denied 164 N. Y. 365, 58 N. E. 288; City of Philadelphia v. Thomas' Heirs, 152 Pa. 494, 25 Atl. 873.

[78] Waring v. City of Little Rock, 62 Ark. 408.

public legislative bodies referring to lands dedicated and recognizing them as public property will be considered evidence of an acceptance.[79]

§ 425. Time of acceptance.

It is not necessary to constitute a valid acceptance that it be made immediately following the act of the owner indicating his intent to dedicate.[80] If the grant is accepted at any time before the dedication is withdrawn, it is usually held sufficient,[81] although this must take place within a reasonable time.[82]

Neither is it essential to a valid dedication that the user of the property appropriated be immediate upon the dedication or acceptance. Public necessity will determine the time and extent of use.[83]

Acceptance usually a question for a jury. It has already been stated that the question of the owner's intent to dedicate is one for a jury to determine, and the same rule holds with reference to the acceptance of a grant; it is for a jury to determine from all the conditions and circumstances surrounding each particular case the question of acceptance.[84]

§ 426. Acquirement of property by prescription.*

The distinction between the establishment of a highway or public ground by what is termed statutory dedication, and prescrip-

[79] City & County of San Francisco v. Sharp, 125 Cal. 534, 58 Pac. 173; Shirk v. City of Chicago, 195 Ill. 298, 63 N. E. 193; Michigan Cent. R. Co. v. City of Bay City, 129 Mich. 264, 88 N. W. 638.

[80] London & San Francisco Bank v. City of Oakland, 33 C. C. A. 237, 90 Fed. 691; Uptagraff v. Smith, 106 Iowa, 385; Valentine v. City of Hagerstown, 86 Md. 486; Slater v. Gunn, 170 Mass. 509, 41 L. R. A. 268.

7 Curr. Law, 1100.

[81] White v. Smith, 37 Mich. 291; Sanford v. City of Meridian, 52 Miss. 383; Eckerson v. Village of Haverstraw, 162 N. Y. 652, 57 N. E. 1109; State v. Fisher, 117 N. C. 733, 23 S. E. 158.

[82] Forsyth v. Dunnagan, 94 Cal. 438, 29 Pac. 770; Sarvis v. Caster, 116 Iowa, 707, 89 N. W. 84; Village of Grandville v. Jenison, 84 Mich. 54, 47 N. W. 600.

[83] Village of Augusta v. Tyner, 197 Ill. 242, 64 N. E. 378; Attorney General v. Tarr, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87; Methodist Episcopal Church v. City of Hoboken, 33 N. J. Law, 13.

[84] Hartford v. New York & N. E. R. Co., 59 Conn. 250, 22 Atl. 37; Flack v. Village of Green Island, 122 N. Y. 107.

* 8 Curr. Law, 41.

tion, is clearly understood. The difference between a dedication by common law and prescription is not so clear and is at times apparently confusing. The doctrine of prescription rests upon an open, notorious, exclusive and adverse possession and use under claim of right for the length of time prescribed by statute.[85] A common-law dedication is based upon the existence of an intent on the part of the owner to appropriate certain of his property to a public use, its acceptance by the public, and this intent and acceptance are not dependent in any measure upon the length of time which the property may have been used by the public.[86]

§ 427. Prescription; what necessary.

User is the essential element in the acquirement of a prescriptive right and questions naturally follow with respect to its length and character.* The length of time necessary for the possession and use may be determined either by the general statutes of limitation respecting actions concerning real property,[87] or special and local statutes of limitations such as are found in Illinois, Indiana, Missouri, Michigan, California, Minnesota, New York, North Dakota, and Rhode Island,[88] which provide for the acquirement of a prescriptive right in a highway under the conditions named in

[85] City of New Haven v. New York, N. H. & H. R. Co., 72 Conn. 225, 44 Atl. 31; McAllister v. Pickup, 84 Iowa, 65; Bassett v. Inhabitants of Harwich, 180 Mass. 585, 62 N. E. 974. Twenty years. Schroeder v. Village of Onekama, 95 Mich. 25; Bryant v. Town of Tamworth, 68 N. H. 483.

[86] Western R. of Ala. v. Alabama G. T. R. Co., 96 Ala. 272, 17 L. R. A. 474; Elliott, Roads & Streets (2d ed.) § 172.

* 8 Curr. Law, 43.

[87] Whaley v. Wilson, 120 Ala. 502; Schwerdtle v. Placer County, 108 Cal. 589, 41 Pac. 448; Bales v. Pidgeon, 129 Ind. 548, 29 N. E. 34. Fifty years. McAllister v. Pickup, 84 Iowa, 65, 50 N. W. 556. Forty years. White v. Inhabitants of Foxborough, 151 Mass. 28, 23 N. E. 652; Longworth v. Sedevic, 165 Mo. 221, 65 S. W. 260; Lydick v. State, 61 Neb. 309, 85 N. W. 70; State v. Wolf, 112 N. C. 889, 17 S. E. 528; City of Chippewa Falls v. Hopkins, 109 Wis. 611, 85 N. W. 553.

[88] Madison Tp. v. Gallagher, 159 Ill. 105, 42 N. E. 316. Twenty years. Strong v. Makeever, 102 Ind. 578; Zimmerman v. Snowden, 88 Mo. 218; Alton v. Meenwenberg, 108 Mich. 629, 66 N. W. 571; Cooper v. Monterey County, 104 Cal. 437, 38 Pac. 106; Hansen v. Town of Verdi, 83 Minn. 44, 85 N. W. 906. Six years. James v. Sammis, 132 N. Y. 239, 30 N. E. 502; Walcott Tp. v. Skauge, 6 N. D. 382, 71 N. W. 544; Simmons v. City of Providence, 12 R. I. 8.

some cases in less time than that which applies generally to actions in respect to real estate.

Character of the use and possession. The character of the use or possession must be adverse and exclusive; that is, known to the owner and against his interest.[89] Prescriptive rights can never be acquired through what may be termed permissive use.[90] The authorities quite generally hold, and with reason, that ways by prescription cannot be acquired over wild or uncultivated land where the owner or those representing him are absent.[91] Occasional travel on a way which has never been laid out, recorded or worked as a public road, will not constitute it a public highway by prescription.[92]

User must be continuous. The user or the possession must also be continuous for the length of time required either by general or special statutes.[93] Acts of the owner which interrupt possession and use by the public will destroy any claim for proportionate time and the prescription must commence anew.[94]

§ 428. Property acquired through eminent domain.

A public corporation may acquire property by purchase or gift which includes that secured by dedication, prescription, and also through the exercise of the power of eminent domain.* This

[89] Cooper v. Monterey County, 104 Cal. 437, 38 Pac. 106; Baltimore & O. S. W. R. Co. v. City of Seymour, 154 Ind. 17, 55 N. E. 953; Gray v. Haas, 98 Iowa, 502, 67 N. W. 394; Bassett v. Inhabitants of Harwich, 180 Mass. 585, 63 N. E. 974; Stewart v. Frink, 94 N. C. 487.

[90] District of Columbia v. Robinson, 180 U. S. 92; Huffman v. Hall, 102 Cal. 26, 36 Pac. 417; McCearley v. Lemennier, 40 La. Ann. 253, 3 So. 649; Cox v. Forrest, 60 Md. 74; Moffatt v. Kenny, 174 Mass. 311, 54 N. E. 850; Ferdinando v. City of Scranton, 190 Pa. 321, 42 Atl. 692; Frye v. Village of Highland, 109 Wis. 292, 85 N. W. 351.

[91] Duncombe v. Powers, 75 Iowa, 185, 39 N. W. 261; Engle v. Hunt, 50 Neb. 358, 69 N. W. 970; Marshfield Land & Lumber Co. v. John Week Lumber Co., 108 Wis. 268, 84 N. W. 434.

[92] Coburn v. San Mateo County, 75 Fed. 520; Fairchild v. Stewart, 117 Iowa, 734, 89 N. W. 1075.

[93] City of Chicago v. Howe, 169 Ill. 260, 48 N. E. 408; Coakley v. Boston & M. R. Co., 159 Mass. 32, 33 N. E. 930; Leonard v. City of Detroit, 108 Mich. 599; Eames v. City of Northumberland, 44 N. H. 67.

[94] Whaley v. Wilson, 120 Ala. 502, 24 So. 855; Town of Brushy Mound v. McClintock, 150 Ill. 129; Weld v. Brooks, 152 Mass. 297, 25 N. E. 719; Lewis v. City of Portland, 25 Or. 133, 22 L. R. A. 736.

* 7 Curr. Law, 1278.

is one of the great and inherent sovereign powers and it has been defined by Judge Cooley as,[95] "More accurately, it is the rightful authority, which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience or welfare may demand."

The individual holds all his property and exercises his rights subject in their use to the regulation of the state for the good of society at large; he also holds his property, both real and personal, subject to a seizure by the state or its delegated agencies in those cases where a great and urgent public necessity requires this course of action. The power of eminent domain is a taking of property but one that in its legal exercise must be accompanied by the payment of just compensation to the owner which, it has been held, must be full, ample and complete.[96] The police power is one of regulation; the power of taxation is that of taking; eminent domain is a taking, but one based upon the idea of a payment of compensation to the one deprived of his property.[97] This statement eliminates the forcible seizure of private property by the state, in cases of overwhelming public necessity, for the preservation of the public health, of private property or the organization of the state itself as a governmental and political agent. These are illustrated by the seizure and destruction of private property in an epidemic of disease,[98] an uncontrollable conflagration[99] or the arbitrary seizure or use of private property without compensation during times of war by a government.[100]

[95] Cooley, Const. Lim. (7th ed.) p. 753.

[96] People v. City of Brooklyn, 4 N. Y. 419; Cooley, Taxation, p. 1; Burroughs, Taxation, c. 1; French v. Barber Asphalt Pav. Co., 181 U. S. 324; City of Raleigh v. Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330; Earl Highway Com'rs v. People, 4 Ill. App. 391; State v. Graves, 19 Md. 351; Bradshaw v. Rodgers, 20 Johns. (N. Y.) 103.

[97] Bass v. State, 34 La. Ann. 494; Philadelphia v. Scott, 81 Pa. 80; Davenport v. Richmond City, 81 Va. 636.

[98] Russell v. City of New York, 2 Denio (N. Y.) 461.

[99] Bowditch v. City of Boston, 101 U. S. 16; Taylor v. Inhabitants of Plymouth, 49 Mass. (8 Metc.) 465; McDonald v. City of Red Wing, 13 Minn. 38 (Gil. 25); American Print Works v. Lawrence, 21 N. J. Law (1 Zab.) 248, 23 N. J. Law (3 Zab.) 615; Russell v. City of New York, 2 Denio (N. Y.) 461.

[100] Branch v. United States, 100

The power of eminent domain is only available for the acquirement of property for a public use or purpose and this statement naturally suggests the question of what is a public use or purpose, which will be considered later.

The use of the term "public use" is undoubtedly due to the constitutional provisions found in nearly every state of the Union which forbid the taking of private property, except for a public use, and upon the payment of just compensation [100a] The power is one to appropriate private property as the public necessities may require upon the payment of just compensation to the individual and it pertains to sovereignty as an inherent, necessary, continuing and inalienable right.[101]

§ 429. The power exercised; by what agencies.

Since the power of eminent domain belongs to sovereignty as a constant, necessary and inextinguishable right, it necessarily follows that the Federal government [102] and each of the different states [103] possess the power to the fullest extent and may exercise it for all legitimate purposes.

Constitutional provisions alone restrain congress or the state legislatures in the adoption of legislation relative to the subject. Unlike some governmental powers, it is one which, in its execise can be granted to such agencies as the sovereign may select, limited alone by constitutional provisions. The nature of the agency selected determines the character of the use and as nearly all of the states limit the taking of private property for a public use only,

U. S. 673; Kirk v. Lynd, 106 U. S. 315; City of Chicago v. Chicago League Ball Club, 196 Ill. 54, 63 N. E. 695; Beck v. Ingram, 64 Ky. (1 Bush) 355.

[100a] Const. U. S. 5th Amend. See, also, Abb. Mun. Corp. § 745, citing and collating many cases and constitutional provisions.

[101] United States v. Jones, 109 U. S. 513; West Chicago Park Com'rs v. McMullen, 134 Ill. 170, 25 N. E. 676, 10 L. R. A. 215; Sigler v. Fuller, 34 N. J. Law, 227; Matter of Deansville Cemetery, 66 N. Y. 569; McQuillen v. Hatton, 42 Ohio St. 102; Tyler v. Beacher, 1 Redfield, Railways (5th ed.) p. 229.

[102] Kohl v. United States, 91 U. S. 367; Chappell v. United States, 160 U. S. 499; Matter of United States, 96 N. Y. 227; Petition of U. S. for Appointment of Viewers, 24 Pittsb. Leg. J. 105; Trombley v. Humphrey, 23 Mich. 471; Darlington v. United States, 82 Pa. 382; Cooley, Const. Lim. (7th ed.) p. 755.

[103] Pollard v. Hagan, 3 How. (U. S.) 212; Abb. Mun. Corp. § 746.

it follows that only such corporations or individuals can be granted the power as are either public or public quasi corporations, quasi public corporations or those engaged in an occupation, the character of which will enable them to exercise the power under the application of the words "a public use."[104] Municipal corporations and public quasi corporations being subordinate agencies of government and an integral part of the sovereign are usually vested with the power.[105] Other agencies of the state competent to exercise eminent domain are not to be considered here.

§ 430. Power must be expressly given; how exercised.

To all subordinate public corporations the principle applies that to legally exercise the power of eminent domain, it must be expressly given.[106] It cannot come by any ordinary construction under implied powers of either class: those implied because essential to the life of the corporation or those implied because absolutely necessary and essential to carry into effect some power already expressly granted, and some authorities hold that even with the state itself the power lies dormant,[107] until the legislative branch prescribes the method and the manner by which it can be exercised.

Manner of the exercise. Not only must the power as granted to a subordinate corporation be expressly given but before it can be legally exercised, the authority for its exercise must pass successfully constitutional tests determining its validity, as the payment of just compensation,[108] and the prohibition against depriving any person of life, liberty or property without due process of law.[109] Due process of law has been held to include notice

[104] Varner v. Martin, 21 W. Va. 534. See Lewis, Em. Dom. (2d ed.) § 242.

[105] City of Atlanta v. Central R. & B. Co., 53 Ga. 120; Brimm v. City of Boston, 102 Mass. 19; State v. Rapp, 39 Minn. 65; Bodine v. City of Trenton, 36 N. J. Law, 198; Spring City Gaslight Co. v. Pennsylvania S. V. R. Co., 167 Pa. 6.

[106] Butler v. City of Thomasville, 74 Ga. 570; Allen v. Jones, 47 Ind. 438; Knowles v. City of Muscatine, 20 Iowa, 248; Brimmer v. City of Boston, 102 Mass. 19; Schmidt v. Densmore, 42 Mo. 225; People v. City of Rochester, 50 N. Y. 525.

7 Curr. Law, 1278.

[107] Cooley, Const. Lim. (7th ed.) pp. 759, 760.

[108] See § 446.

[109] United States Const. XIVth Amendment; Mugler v. Kansas, 123 U. S. 623; Den d. Murray v. Hoboken Land & Imp. Co., 18 How. (U. S.) 272; Trustees of Dartmouth Col-

to the one whose rights are affected;[110] the existence of an impartial tribunal of competent jurisdiction; a regular, orderly and uniform method of procedure for the determination of the questions involved,[111] with an opportunity to be heard on the part of the landowner;[112] and a final decision.

§ 431. What can be taken.

The word commonly used in connection with the exercise of the power of eminent domain is "property" and this suggests the question—what is property? A correct determination of the meaning of the word is important for if the thing taken be not legally considered property, clearly the owner is not entitled to compensation and an exercise of the power is not necessary.[113] The most satisfactory definition of property is that given by Jeremy Bentham in which he says: "The integral or entire right of property includes four particulars: 1, right of occupation; 2, right of excluding others; 3, right of disposition or the right of transferring the integral right to other persons; 4, right of transmission in virtue of which the integral right is often transmitted after the death of the proprietor without any disposition on his part to those in whose possession he would have wished to place it."[114] Or, summarized, the rights of occupation, exclusion, disposition and transmission. Property, therefore, consists not in the thing or the subject of a right itself but of rights in things created, sanctioned and protected by law.[115] Formerly, a narrow

lege v. Woodward, 4 Wheat. (U. S.) 581. "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." Cooley, Const. Lim. (7th ed.) pp. 502 et seq.

[110] Davidson v. City of New Orleans, 96 U. S. 97; Weimer v. Bunbury, 30 Mich. 201; Stuart v. Palmer, 74 N. Y. 183; City of Philadelphia v. Miller, 49 Pa. 440; Lewis, Em. Dom. (2d ed.) § 365.

[111] Davidson v. City of New Orleans, 96 U. S. 97; Stuart v. Palmer, 74 N. Y. 183.

[112] Stuart v. Palmer, 74 N. Y. 183.

[113] Lewis, Em. Dom. § 56.

7 Curr. Law, 1283.

[114] Bentham's Works, p. 182 (1843 Edinburg).

[115] Selden v. City of Jacksonville, 28 Fla. 558, 14 L. R. A. 370; Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79; City of St. Louis v. Hill, 116 Mo. 527, 21 L. R. A. 226; Jackson v. Housel, 17 Johns. (N. Y.) 281; City of Janesville v. Carpenter, 77 Wis. 288, 8 L. R. A. 808. See, also, Lewis, Eminent Domain (2d ed.) §§ 54, 55, for a very full and lucid discussion of the term.

and restricted meaning was attached to the word "property" and the property owner was, therefore, restricted in the amount of compensation which he might recover.[116] The modern tendency is towards a liberal construction of the word and the right of compensation is correspondingly enlarged.

§ 432. Concrete illustrations.

Where the necessity exists for an exercise of the power, all property including personal may be taken,[117] including portions of real property; rock, gravel, or soil;[118] or waters and riparian rights.[119] The doctrine is also thoroughly established and beyond

[116] Austin, Jur., § 1051; Lewis, Em. Dom.; Abb. Mun. Corp. §§ 749 et seq.

[117] Emery v. San Francisco Gas Co., 28 Cal. 345; Christy's Adm'rs v. City of St. Louis, 20 Mo. 143. In respect to the right of a state to authorize the appropriation of property of the United States, see United States v. City of Chicago, 7 How. (U. S.) 185; Pratt v. Brown, 3 Wis. 603. In respect to an exercise of power over property belonging to the state itself, see City of Atlanta v. Central R. & Banking Co., 53 Ga. 120; St. Louis, J. & C. R. Co. v. Institution for Education of the Blind, 43 Ill. 303; St. Paul & N. P. R. Co. v. State, 34 Minn. 227, 25 N. W. 345; Attorney General v. Hudson Tunnel R. Co., 27 N. J. Eq. 176.

7 Curr. Law, 1283.

[118] Lewis, Em. Dom. (2d ed.) §§ 61*a*, 262 et seq.

[119] Abb. Mun. Corp. §§ 750 et seq.; Gould, Waters, § 204; Farnham, Waters & Water Rights, §§ 62, 64, 65, 66, 76 et seq.; Lux v. Haggin, 69 Cal. 255; Harding v. Stamford Water Co., 41 Conn. 87; Clark v. Cambridge & A. Irr. & Imp. Co., 45 Neb. 799, 69 N. W. 239; Long Island Water Supply Co. v. City of Brooklyn, 166 U. S. 685; Pine v. City of New York, 103 Fed. 337; Stein v. Burden, 24 Ala. 130; Id., 29 Ala. 127; City of Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. 197; Bass v. City of Ft. Wayne, 121 Ind. 389, 23 N. E. 259; Nemasket Mills v. City of Taunton, 166 Mass. 540, 44 N. E. 609; Minneapolis Mill Co. v. St. Paul Water Com'rs, 56 Minn. 485, 58 N. W. 33; Id., 168 U. S. 349; Neal v. City of Rochester, 156 N. Y. 213; Lord v. Meadville Water Co., 135 Pa. 122, 19 Atl. 1007, 8 L. R. A. 202; Wisconsin Water Co. v. Winans, 85 Wis. 26, 54 N. W. 1003, 20 L. R. A. 662; Ft. Wayne Land & Imp. Co. v. Maumee Ave. Gravel Road Co., 132 Ind. 80, 15 L. R. A. 651; In re City of Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270. See, also, cases cited 10 Am. & Eng. Enc. of Law (2d ed.) pp. 1091, 1092, on the subject of "Franchises Subject to the Right of Eminent Domain." Many states have constitutional provisions relative to the appropriation of property of one corporation including its franchises by another. See Abb. Mun. Corp., p. 1805, note 251.

any question that a franchise is a species of property which may be taken or injuriously affected by a public corporation and for which the owner is entitled under these circumstances to compensation.[120] This question will be affected by the character of franchise or grant, whether exclusive or not,[121] and whether the interference or taking is by a duly authorized agency or the sovereign itself.[122]

The use or an enjoyment of an easement may be taken or interfered with to such an extent as to authorize a claim for compensation.[123] Lateral support is also one of the rights of property and if a public corporation in the construction of any work of public improvement interferes with this, it will amount to a taking of property for which compensation must be made.[124]

The annexation of land to a municipality is not usually regarded as a taking,[125] but the right to labor [126] and the right to contract [127] constitutes property, and any undue or illegal inter-

[120] Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 595.

[121] Minturn v. La Rue, 23 How. (U. S.) 435; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659; Newton v. Mahoning County Com'rs, 100 U. S. 548; Hamilton Gas Light & Coke Co. v. City of Hamilton, 146 U. S. 258; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, affirming 24 Mass. (7 Pick.) 344. Thompson Houston Elec. Co. v. City of Newton, 42 Fed. 723; Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546; St. Tammany Water-works Co. v. New Orleans Water-works Co., 120 U. S. 54; City of Newport v. Newport Light Co., 84 Ky. 166; Hydes Ferry Turnpike Co. v. Davidson County, 91 Tenn. 291; Gas Co. v. Parkersburg, 30 W. Va. 435. See, also, Abb. Mun. Corp. § 751.

[122] Stein v. Bienville Water Supply Co., 141 U. S. 67; Hamilton Gaslight & C. Co. v. City of Hamilton, 146 U. S. 258; Lehigh Water Co.'s Appeal, 102 Pa. 515; State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 293.

[123] Ladd v. City of Boston, 151 Mass. 585, 24 N. E. 858; Storey v. New York El. R. Co., 90 N. Y. 122; Plummer v. Sturtevant, 32 Me. 325; Ward v. Peck, 49 N. J. Law, 42; Smith v. City of Atlanta, 92 Ga. 119, 17 S. E. 981; Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79.

[124] Nichols v. City of Duluth, 40 Minn. 389; Keating v. City of Cincinnati, 38 Ohio St. 142; Stearns v. City of Richmond, 88 Va. 992, 14 S. E. 847.

[125] Forsythe v. City of Hammond, 68 Fed. 774; Groff v. Frederick City, 44 Md. 67; Martin v. Dix, 52 Miss. 53; Appeal of Hewitt, 88 Pa. 55; Turner v. Althaus, 6 Neb. 54.

[126] Fiske v. People, 188 Ill. 206, 52 L. R. A. 291; State v. Julow, 129 Mo. 163, 29 L. R. A. 257; McQuillin on Municipal Ordinances, § 553. See, also, note citing many cases, vol. 3, pp. 751 et seq., Current Law.

[127] United States v. Martin, 94 U. S. 400; Ex parte Kuback, 85 Cal.

ference with it will come under the prohibition of the eminent domain clause of the constitution.

§ 433. The quantity and estate taken.

The state through its legislative branch may determine the quantity of property and the particular estate to be taken. The selection of an agency for the exercise of the power as well as the quantity and the estate taken are questions of legislative discretion and where these are fixed in this manner it is not for the courts to interfere, unless the quantity taken is so clearly in excess of the necessities of an occasion for the exercise of the power that they will hold it unreasonable. The estate taken whether an easement or one in fee simple is also a question of legislative discretion and usually conclusive.[128] Ordinarily, the question of quantity and the estate is left to the grantee of the power to be determined by the needs of a particular exercise of the power and the rule holds that no more can be taken than is necessary to accomplish the result sought by the proceeding.

§ 434. Limitations upon a taking.

The operation of constitutional provisions, the restriction of agencies selected for the exercise of the power and the question of public use, all operate as a limitation upon the exercise of the power of eminent domain. There will be found, upon an examination of the authorities, the further principle that property which is already devoted to a public use cannot, be appropriated by other agencies for the same use.[129] A public corporation has no general or implied power to appropriate for its public uses, including those of highways and parks, property already devoted to

274, 24 Pac. 737, 9 L. R. A. 482; City of Atlanta v. Stein, 111 Ga. 789, 36 S. E. 932, 51 L. R. A. 335; McChesney v. People, 200 Ill. 146, 65 N. E. 626. Vol. 3, Current Law, pp. 751 et seq., note 88, citing many cases and Abb. Mun. Corp. § 754.

[128] People v. Blake, 19 Cal. 579; Fairchild v. City of St. Paul, 46 Minn. 540, 49 N. W. 325; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234.

[129] McCullough v. City & County of San Francisco, 51 Cal. 418; Inhabitants of Easthampton v. Hampshire County Com'rs, 154 Mass. 424, 13 L. R. A. 157; St. Paul Union Depot Co. v. City of St. Paul, 30 Minn. 359; Appeal of Tyrone Tp. School Dist. (Pa.) 15 Atl. 667.

7 Curr. Law, 1285.

a public use, especially the tracks, yards, depots, depot grounds or facilities of common carriers.[130] Strictly speaking, the power of eminent domain is continuing and inextinguishable, and, if the public good requires it, all property is subject to its exercise, but a second appropriation cannot be made where it is inconsistent with the first and tends to deprive the first person acquiring a public use from the full enjoyment of it.[131]

§ 435. Definition of the phrase "public use."

The power of eminent domain is authorized only when property is to be taken for a public use; it cannot be exercised for a mere private purpose. The state has no power even when compensation in full is paid, in any case, to divest an individual of his property and grant it to another without some reference to a use to which it is to be appropriated for the public benefit.[132] What is a public use is a judicial question [133] and one upon which there is a great variety and conflict of reasoning and results. The question of public use is not affected by the character of the agency employed. The query is what are the objects or results to be accomplished—not who are the instruments or agencies selected by the sovereign for attaining this.[134] Neither is the question of public use affected or determined by that fact that the use or the

[130] Evergreen Cemetery Ass'n v. City of New Haven, 43 Conn. 234; Illinois Cent. R. Co. v. City of Chicago, 138 Ill. 453, 28 N. E. 740; Boston & A. R. Co. v. City Council of Cambridge, 166 Mass. 224, 44 N. E. 140; St. Paul Union Depot Co. v. City of St. Paul, 30 Minn. 359, 15 N. W. 684; City of Hannibal v. Hannibal & St. J. R. Co., 49 Mo. 480; Van Reipen v. Jersey City, 58 N. J. Law, 262, 33 Atl. 740; Suburban Rapid-Transit Co. v. City of New York, 128 N. Y. 510, 28 N. E. 525.

[131] Lake Erie & W. R. Co. v. Seneca County Com'rs, 57 Fed. 945; St. Louis, H. & K. C. R. Co. v. Hannibal Union Depot Co., 125 Mo. 82.

* 7 Curr. Law, 1280.

[132] Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., 142 U. S. 254; Prior v. Swartz, 62 Conn. 132, 25 Atl. 398, 18 L. R. A. 668; Turner v. Nye, 154 Mass. 579, 28 N. E. 1048, 14 L. R. A. 487; Pocantico Water Works Co. v. Bird, 130 N. Y. 249, 29 N. E. 246; City of Wilkes-Barre v. Wyoming Historical Soc., 134 Pa. 616; Tyler v. Beacher, 44 Vt. 648; Lewis, Em. Dom. (2d ed.) § 157.

[133] Shoemaker v. United States, 147 U. S. 282; In re St. Paul & No. P. R. Co., 34 Minn. 227.

[134] Cottrill v. Myrick, 12 Me. 222; Bloodgood v. Mohawk & H. R. R. Co., 18 Wend. (N. Y.) 9; Lancey v. King County, 15 Wash. 9, 34 L. R. A. 817.

benefit is local or limited,[135] nor is it determined by the necessity or the lack of necessity for the condemnation;[136] neither is it established by the frequency or the infrequency of the use.[137]

There are two theories in respect to the proper and legal meaning of the words "public use" as used in constitutions or legislative enactments. The first might be termed the theory of strict construction and it maintains the principle that for a public use to exist there must be a literal use or right of use on the part of the public generally, or limited portion of it, without the payment of compensation for the exercise of this use or right of use.[138]

The second theory is based upon a liberal interpretation of the words "public use" and holds that the words are equivalent to public benefit, utility or advantage, and are not limited by the actual use by the public in the property taken or some limited portion of it.[139] The modern construction of the words seems to be in favor of the second or liberal interpretation and of an equivalent meaning of use by the public.[140]

§ 436. Concrete illustrations of public use.

One of the most common as well as familiar illustrations of an exercise of the power of eminent domain on the part of a public corporation is that for the acquisition of real property for use as a public highway,[141] and closely connected with the laying out of a public way is the establishment of public parks, boulevards, commons or pleasure grounds[142] and of the opening of places of historic interest to the public.[143]

[135] Ross v. Davis, 97 Ind. 79; Talbot v. Hudson, 82 Mass. (16 Gray) 417; In re Burns, 155 N. Y. 23; Lewis County v. Gordon, 20 Wash. 80.

[136] Dayton Gold & Silver Min. Co. v. Seawell, 11 Nev. 394; Varner v. Martin, 21 W. Va. 534.

[137] Green v. Elliot, 86 Ind. 53.

[138] Lewis, Em. Dom. §§ 164 et seq.

[139] Olmstead v. Camp, 33 Conn. 532; Concord R. Co. v. Greely, 17 N. H. 47; Trenton & N. B. Turnpike Co. v. American & E. Commercial News Co., 43 N. J. Law, 384.

[140] Board of Health of Portage Tp. v. Van Hoesen, 87 Mich. 533, 49 N. W. 894, 14 L. R. A. 114; In re Niagara Falls & W. R. Co., 108 N. Y. 375, 15 N. E. 429.

[141] Brimmer v. City of Boston, 102 Mass. 19; Smith v. City of St. Paul, 72 Minn. 472, 75 N. W. 708; Monterey County v. Cushing, 83 Cal. 507; Logan v. Stogsdale, 123 Ind. 372, 8 L. R. A. 58; Elliott, Roads & Streets (2d ed.) § 192.

7 Curr. Law, 1280.

[142] Shoemaker v. United States, 147 U. S. 282; West Chicago Park

As a means of communication connected with or forming a part of a system of public highways, it may be necessary to construct and maintain canals,[144] bridges and ferries;[145] and although the use of these may depend upon the payment of tolls, yet, their character is regarded as public, their use a public one, and the exercise of eminent domain will be justified if found necessary for their construction or completion.[146]

Real property appropriated by municipal or other public corporations for use as sites in the construction or establishment of public buildings is taken for a public use[147] and the condemnation of property will be warranted for the construction or maintenance of a system of public sewers[148] or one for furnishing a supply of water[149] or light.[150]

Com'rs v. City of Chicago, 152 Ill. 392, 38 N. E. 697; Rowan's Ex'rs v. Town of Portland, 47 Ky. (8 B. Mon.) 232; Foster v. Boston Park Com'rs, 133 Mass. 321; Id., 131 Mass. 225; In re City of Rochester, 137 N. Y. 243; In re Vernon Park, 163 Pa. 70, 29 Atl. 972.

[143] United States v. Gettysburg Elec. R. Co., 160 U. S. 668; United States v. Certain Tract of Land in Cumberland Tp., 67 Fed. 869; Inhabitants of Lanesborough v. Berkshire County Com'rs, 39 Mass. (22 Pick.) 278.

[144] Kaukauna Water Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254; Van Schoick v. Delaware & R. Canal Co., 20 N. J. Law, 249; Selden v. Delaware & Hudson Canal Co., 29 N. Y. 634; Little Miami Elec. Co. v. City of Cincinnati, 30 Ohio St. 629.

[145] Luxton v. North River Bridge Co., 153 U. S. 525; Barrington v. Neuse River Ferry Co., 69 N. C. 165; In re Towanda Bridge Co., 91 Pa. 216.

[146] Young v. Buckingham, 5 Ohio, 485.

[147] Kohl v. United States, 91 U. S. 367; Shanfelter v. City of Baltimore, 80 Md. 483, 31 Atl. 439, 27 L. R. A. 72; Reed v. Inhabitants of Acton, 117 Mass. 384; Long v. Fuller, 68 Pa. 170; Williams v. School Dist. No. 6, 33 Vt. 271; Cincinnati, S. & C. R. Co. v. Village of Belle Centre, 48 Ohio St. 273, 27 N. E. 464; Henkel v. City of Detroit, 49 Mich. 249; United States v. Fox, 94 U. S. 315; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525; Burt v. Merchants' Ins. Co., 106 Mass. 356; Morris v. Heppenheimer, 54 N. J. Law, 268; In re Military Parade Ground, 60 N. Y. 319; Chappel v. United States, 160 U. S. 499.

[148] City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; Leeds v. City of Richmond, 102 Ind. 372; Joplin Consol. Min. Co. v. City of Joplin, 124 Mo. 129; Herbert v. City of Bayonne, 63 N. J. Law, 532, 42 Atl. 833.

[149] Burden v. Stein, 25 Ala. 455; Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 28 Pac. 681; Ipswich Mills v. Essex County Com'rs, 108 Mass. 363; City of Duluth v. Duluth Gas & Water Co., 45 Minn. 210, 47 N. W. 781; Slinger-

The use of property for purposes of irrigation has been held as a public one especially in those sections where the rainfall is uncertain or confined to limited periods of time.[151] The taking of property for the construction of a system of drainage is considered proper under this power[152] although some cases have regarded the establishment of such works, especially where designed for the drainage of low and flooded lands, as authorized under an exercise of the police power rather than that of eminent domain.[153]

Land can also be acquired under the power of eminent domain for use as a public cemetery;[154] it is only necessary that the right of burial is public and general.

§ 437. Definition of a taking.*

The word "taking" was the one originally and most commonly used in statutory or constitutional provisions relative to the exercise of the power of eminent domain The extent of compensation to which one is entitled and the proper exercise of the power depend upon what is taken and whether there is a taking. The early meaning given to the word under discussion embodied the idea that before compensation could be recovered by the individual or in order to constitute a taking, there must be an actual physical dispossession of the thing taken from its original owner. This meaning was probably based upon a narrow construction of

land v. City of Newark, 54 N. J. Law, 62, 23 Atl. 129; Pocantico Water Works Co. v. Bird, 130 N. Y. 249, 29 N. E. 246.

[150] State v. City of Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729.

[151] Directors of Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. 1086. But see Bradley v. Fallbrook Irr. Dist., 68 Fed. 948.

[152] Sweet v. Rechel, 159 U. S. 380; Heick v. Voight, 110 Ind. 279, 11 N. E. 306; Bancroft v. Cambridge, 126 Mass. 438; People v. Nearing, 27 N. Y. 306; Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 779; In re Theresa Drainage Dist., 90 Wis. 301, 63 N. W. 288. See, also, the subject fully considered with many authorities cited in Lewis, Em. Dom. (2d ed.) §§ 185–199, inclusive, and Abb. Mun. Corp. § 763.

[153] Lowell v. City of Boston, 111 Mass. 454; Donnelly v. Decker, 58 Wis. 461; Coster v. Tidewater Co., 18 N. J. Eq. (3 C. E. Green) 54.

[154] Westfield Cemetery Ass'n v. Danielson, 62 Conn. 319; Farneman v. Mt. Pleasant Cemetery Ass'n, 135 Ind. 344; Crowell v. Londonderry, 63 N. H. 42; Fork Ridge Baptist Cemetery Ass'n v. Redd, 33 W. Va. 262.

* 7 Curr. Law, 1285.

the word "property" but with the adoption of a broader interpretation of that word, the meaning of the word "taking" has been correspondingly enlarged and the modern view is that to constitute a taking an actual physical divesting or dispossession of property is not necessary but a damage to or deprivation of any of the essential rights of property will be sufficient to constitute a taking and entitle the owner to compensation under the constitutional provision.[155] These essential rights have already been stated as being those of occupation, exclusion, dispossession and transmission.

§ 438. Eminent domain proceedings.*

Through the exercise of the power of eminent domain by the state or any of its delegated agencies, the private property of an individual is arbitrarily and forcibly taken in order to supply the demands of some great and urgent public need. It is elementary to say that under such circumstances, the authority to exercise the power must be strictly followed. Through the action of a legislative body the conditions precedent to a valid exercise of the power are prescribed and these consist of statutes directing the manner under which the power is to be exercised. The authority must be expressly given;[156] must be strictly construed,[157] and the manner of its exercise as prescribed by law strictly followed.[158] Essential provisions should be strictly followed and all statutory requirements are considered essential. The fact that they are prescribed by law in connection with the exercise of the power gives them this character and not their relative importance. It is not for the judiciary to say that because a statutory requirement is unimportant or relates to a matter of detail that it is not essential.[159]

[155] Lewis, Em. Dom. §§ 52–59; Eaton v. Boston, C. & M. R. Co., 51 N. H. 504.

* 7 Curr. Law, 1297.

[156] Trowbridge v. City of Detroit, 99 Mich. 443, 58 N. W. 368; Freeman v. Price, 63 N. J. Law, 151, 43 Atl. 432; Russell v. Leatherwood, 114 N. C. 683.

[157] Shields v. Ross, 158 Ill. 214, 41 N. E. 985; Sperry v. Flygare, 80 Minn. 325, 83 N. W. 177, 49 L. R. A. 757; Salsbury v. Gaskin, 66 N. J. Law, 111, 48 Atl. 531; In re City of New York, 158 N. Y. 668, 52 N. E. 1125.

[158] Humboldt County v. Dinsmore, 75 Cal. 604; Brown v. Robertson, 123 Ill. 631; Clark v. City of Elizabeth, 61 N. J. Law, 565; Woodworth v. Spirit Mound Tp., 10 S. D. 504, 74 N. W. 443.

[159] People v. Village of Whitney's Point, 32 Hun (N. Y.) 508.

§ 439. Attempt to agree and parties.

Many local requirements considered as conditions precedent are found. One of the most common is that requiring an attempt on the part of the one exercising the power to agree with the property owner as to the value and transfer of his property.[160] It is a jurisdictional condition and this statement can be applied as a rule to all the statutory provisions relative to setting in motion the necessary legal machinery for the exercise of the power.[161] The power and the necessity for the taking being established, it should be the purpose of the state to gain through subsequent proceedings a fair value of the property for the owner and to prevent through prejudice or passion the securing of an extortionate amount.

The statutes may prescribe the necessary parties; then a compliance with the statute is sufficient. It has been stated that the modern tendency is to enlarge the right of compensation through a liberal construction of the words "property" and "taking." This leads directly to the proposition that an interest, however slight, if it is considered as property in a particular jurisdiction, either by constitutional provision or court construction, cannot be taken from the owner without compensation and that this be secured, it is necessary that in some way he be made a party to the proceedings.[162]

§ 440. Petition and notice.

A petition or application by the one having right to exercise the power is usually necessary,—addressed to the court or tribunal designated by law.* It should set forth all jurisdictional facts in-

[160] Shelton v. Town of Derby, 27 Conn. 414; Laue v. City of Saginaw, 53 Mich. 442.

7 Curr. Law, 1298.

[161] Wabaunsee County Com'rs v. Muhlenbacker, 18 Kan. 129; Porter v. City of Abilene (Tex. App.) 16 S. W. 107.

[162] Ryder v. Horsting, 130 Ind. 104, 29 N. E. 567, 16 L. R. A. 186; Gist v. Owings, 95 Md. 302, 52 Atl. 395; Brush v. City of Detroit, 32 Mich. 43; Smith v. Hudson Highway Com'rs, 150 Ill. 385, 36 N. E. 967; Murphy v. Beard, 138 Ind. 560, 38 N. E. 33; Inhabitants of Monson v. County Com'rs, 84 Me. 99, 24 Atl. 672; Nedow v. Porter, 122 Mich. 456, 81 N. W. 256; Tench v. Abshire, 90 Va. 768.

* 7 Curr. Law, 1299.

cluding the authority [163] and necessity [164] for the exercise of the power, an accurate description of the property [165] sought to be taken, with the names of the owners,[166] and such other statements as may be specifically required by law.[167] If a particular form or phraseology is provided by statute, the petition should follow this form, and if other requirements are necessary, such as the filing of a bond or the giving of security to preserve to property owners the compensation which may be awarded them,[168] these are essentials, and should not be omitted.

In the exercise of the power by municipalities, the adoption of an ordinance or resolution relative to the proposed action is frequently substituted for or authorizes the filing and presentation of a petition and the ordinance instead of the petition then sets in motion the legal procedure necessary to an exercise of the power.[169] The contents and form of such an ordinance may be prescribed by law and the same rules relative to a compliance therewith and to the construction and sufficiency of the ordinance apply as determining the same questions raised in connection with a petition.[170]

Notice; when necessary. It is fundamental that a person cannot be legally or justly deprived of a personal or property right without notice to him of the action leading to this result. This is especially true of property interests. It is usually, therefore, a jurisdictional condition that the owner whose property is sought

[163] Commonwealth v. Inhabitants of Cambridge, 7 Mass. 158; New Jersey Junction R. Co. v. City of Jersey City, 68 N. J. Law, 108, 52 Atl. 352; Allen v. City of Chicago, 176 Ill. 113, 52 N. E. 33.

[164] City of Los Angeles v. Waldron, 65 Cal. 382; City of Helena v. Harvey, 6 Mont. 114; Leath v. Summers, 25 N. C. (3 Ired. Law) 108.

[165] Gascho v. Sohl, 155 Ind. 417, 58 N. E. 547; Ballou v. Elder, 95 Iowa, 693, 64 N. W. 622; Packard v. Androscoggin County Com'rs, 80 Me. 43, 12 Atl. 788; Carr v. Town of Berkley, 145 Mass. 539, 14 N. E. 746; Jackson v. Rankin, 67 Wis. 285.

[166] Cowing v. Ripley, 76 Mich. 650, 43 N. W. 648; State v. Stilwell, 50 N. J. Law, 530.

[167] In re Buel, 168 N. Y. 423, 61 N. E. 700.

[168] Hill v. Ventura County Sup'rs, 95 Cal. 239, 30 Pac. 385; Carroll County Com'rs v. Justice, 133 Ind. 89, 30 N. E. 1085; County of Douglas v. Clark, 15 Or. 3, 13 Pac. 511.

[169] City of St. Louis v. Lang, 131 Mo. 412, 33 S. W. 54.

[170] City of Los Angeles v. Waldron, 65 Cal. 283; In re Buffalo, 78 N. Y. 362; City of Scranton v. Barnes, 147 Pa. 461, 23 Atl. 777.

to be taken must be apprised in some way of the pendency of the proceedings by which this end is sought to be attained.[171] It is a question for the legislature to determine the character and extent of the notice necessary;[172] the legality of its action measured, of course, by that constitutional provision among others which prohibits the taking of property without due process of law.[173] Notice is universally considered one of the essentials of due process of law. It need not be, however, in all cases, actual, and in fact in many instances where the power is exercised by public corporations for the purpose of laying out highways and streets, constructive notice alone is given and is regarded by the courts as sufficient.[174]

The manner in which notice, when required by statute, must be served upon the property owner may be prescribed by the legislature and a strict compliance with statutory requirements in this respect is essential.[175] The absence of a statutory requirement calling for service of notice does not necessarily relieve one exercising the power from the giving of notice, many cases holding that, independent of statutory provisions, the fundamental provision obtains that private property cannot be taken without due process of law, and this includes, as one of its essentials, the giving of notice.[176]

§ 441. Waiver or loss of right to object.

The principle has been stated several times relative to a strict construction and a literal following of all statutory provisions

[171] Fulton County v. Amorous, 89 Ga. 614, 16 S. E. 201; Wells County Com'rs v. Fahlor, 132 Ind. 426, 31 N. E. 1112; Starry v. Treat, 102 Iowa, 449, 71 N. W. 350; Brown v. Greenfield Tp. Board, 109 Mich. 557; Grand Trunk R. Co. v. Town of Berlin, 68 N. H. 168, 36 Atl. 554; People v. Allen, 162 N. Y. 615, 57 N. E. 1122. See, also, Abb. Mun. Corp. § 770, citing many cases.

7 Curr. Law, 1301.

[172] Humboldt County v. Dinsmore, 75 Cal. 604, 17 Pac. 710; Gifford v. Baker, 158 Ind. 339, 62 N. E. 690.

[173] Chicago, R. I. & P. R. Co. v. Ellithrope, 77 Iowa, 415, 43 N. W. 277.

[174] Crane v. Camp, 12 Conn. 464; Fair v. Buss, 117 Iowa, 164, 90 N. W. 527; Forster v. Winona County Com'rs, 84 Minn. 308, 87 N. W. 921.

[175] Tucker v. O'Neal, 130 Ind. 597; Dorman v. City Council of Lewiston, 81 Me. 411, 17 Atl. 316; Welch v. Hodge, 94 Mich. 493, 54 N. W. 175; Lingo v. Burford, 112 Mo. 149, 20 S. W. 459, affirming 18 S. W. 1081; Boice v. Inhabitants of Plainfield, 38 N. J. Law, 95; People v. Kniskern, 54 N. Y. 52.

[176] Curran v. Shattuck, 24 Cal. 427.

relative to the exercise of the power. Upon the presentation of a petition, objections to all preceding action should be taken.[177] The form of the petition, with its necessary allegations,[178] its mechanical execution,[179] the form and manner of service of the notice,[180] may be inquired into, and the usual rule obtains that an appearance by the property owner at this time and the failure to raise objections will be regarded as a waiver on his part of a right to afterwards urge them.[181] This statement does not apply, however, to jurisdictional questions; the usual rule obtains that they can be raised at any time.[182]

§ 442. The tribunal and hearing.

After a favorable judicial decision upon the sufficiency of the petition and the right for appointment of commissioners, a tribunal is then selected for the determination of compensation to be awarded property owners.[183] The mode of selection is dependent upon provisions of local statutes. The question of the character and personnel of the tribunal, however, raises other and broader questions. It is a familiar and axiomatic principle that no person shall be the judge of his own cause[184] and further that in the

[177] Williams v. Town of Stonington, 49 Conn. 229; Inhabitants of Raymond v. Cumberland County Com'rs, 63 Me. 110; Inhabitants of Watertown v. Middlesex County Wharton v. Sorden, 59 N. J. Law, 356; In re Frederick Street, 155 Pa. 623, 26 Atl. 773.

[178] Smith v. Goldsborough, 80 Md. 49, 30 Atl. 574; Hardy v. Town of Keene, 54 N. H. 449.

[179] Miller v. Burks, 146 Ind. 219, 43 N. E. 930.

[180] Walker v. City of Aurora, 140 Ill. 402, 29 N. E. 741; Gifford v. Baker, 158 Ind. 339, 62 N. E. 690; Condon v. County Com'rs, 89 Me. 409, 36 Atl. 626; Inhabitants of Hyde Park v. Wiggin, 157 Mass. 94, 18 L. R. A. 188; Hurst v. Town of Martinsburg, 80 Minn. 40, 82 N. W. 1099; Tench v. Abshire, 90 Va. 768, 19 S. E. 779.

[181] Smyth v. State, 158 Ind. 332, 62 N. E. 449; Inhabitants of Hyde Park v. Wiggin, 157 Mass. 94, 31 N. E. 693, 17 L. R. A. 188; Kleckenapp v. Wheeling Sup'rs, 64 Minn. 547, 67 N. W. 662; In re Woolsey, 95 N. Y. 135.

[182] Hankins v. Calloway, 88 Ill. 155; Ely v. Morgan County Com'rs, 112 Ind. 361, 14 N. E. 236; People v. Allen, 163 N. Y. 559, 57 N. E. 1122; Griggs v. City of Tacoma, 3 Wash. St. 785, 29 Pac. 449.

[183] Tehama County v. Bryan, 68 Cal. 57; Abney v. Clark, 87 Iowa, 727, 55 N. W. 6; Evans v. Santana Live-Stock & Land Co., 81 Tex. 622, 17 S. W. 232.

7 Curr. Law, 1302.

[184] Bradley v. City of Frankfort, 99 Ind. 417; Lyon v. Hamor, 73 Me. 56; Hall v. Thayer, 195 Mass. 219; Locke v. Wyoming Tp. Highway

determination of all questions, those who are to consider and pass upon them should be competent and qualified for their work. The tribunal, therefore, for the determination of compensation, must be disinterested and impartial, competent and qualified,[185] and a failure to observe statutory requirements or fundamental rules in this respect may invalidate an award.

Hearing. Many of the questions raised in eminent domain proceedings, courts have held, cannot be urged by the property owner. The agency employed by the state, the character of a particular use, the necessity for the exercise of the power in the absence of constitutional or statutory provisions, are for the consideration of the legislature or a judicial tribunal, and the property owner, it has been held many times, is not legally interested in these propositions.[186] The question, however, of compensation, is one in which he is vitally concerned and upon which he must have his day in court. An award of commissioners is invalid, however legal the proceedings may be in other respects, if made without an opportunity being given the property owner for a presentation of the evidence which he considers necessary to substantiate the amount of his claim for damages.[187]

Action by either party to the proceedings of a character that may have a tendency to unduly influence or prejudice the commissioners is not permissible and if indulged in will justify setting aside an award.[188]

§ 443. Report of commissioners.*

It is essential to the validity of a report that it show the existence of all jurisdictional facts and conditions including the giving

Com'rs, 107 Mich. 631, 65 N. W. 558; Kieckenapp v. Wheeling Sup'rs, 64 Minn. 547, 67 N. W. 662; Lewis, Eminent Domain, §§ 405 and 406.

[185] Lewis, Eminent Domain, §§ 405 and 406; Chase v. City of Evanston, 172 Ill. 403, 50 N. E. 241; Thompson v. Goldthwait, 132 Ind. 20, 31 N. E. 451; Locke v. Wyoming Tp. Highway Com'r, 107 Mich. 631, 65 N. W. 558; Thompson v. Love, 42 Ohio St. 61; Coward v. City of North Plainfield, 63 N. J. Law, 61, 42 Atl. 805.

[186] Tucker v. Sellers, 130 Ind. 514, 30 N. E. 531.

[187] City of Santa Ana v. Brunner, 152 Cal. 234, 64 Pac. 287; Hobbs v. Tipton County Com'rs, 103 Ind. 575.

[188] Greene v. Town of East Haddam, 51 Conn. 547; Anderson v. Blake v. Norfolk County Com'rs, 114 Mass. 583.

* 7 Curr. Law, 1303.

of a required notice.[189] The authority under which they proceeded and the performance of the necessary steps[190] must be stated to give it legality. Jurisdictional conditions vary in different states. The report or award is prima facie evidence of the facts it contains and the burden of proof is upon those objecting to its sufficiency or legality or the regularity of the proceedings.[191]

An accurate description of the location of the highway or the proposed improvement is essential; it need not necessarily be understood by all but one technically correct is sufficient.[192]

The courts also require an accurate description of the property and interests which will be taken or damaged through the pending proceedings,[193] with the names of the owners.

§ 444. Award of damages.

In many of the steps connected with the exercise of the power of eminent domain the property owner is not concerned, and the law gives him no right to raise questions affecting their validity. In the subject of damages, he is, however, vitally interested, and the details of the exercise of the power relating to this are under his constant scrutiny. The report or award should show, therefore, affirmatively, that the amount of damages, if any, suffered by each property owner has been considered by the commissioners or viewers and passed upon, though not necessarily affirmatively or in favor of and award of damages.[194] It is necessary also that that portion of the report dealing with the question of damages

[189] State v. Lippincott, 25 N. J. Law (1 Dutch.) 434; Miller v. Brown, 56 N. Y. 383; French-Glenn Livestock Co. v. Harney County, 38 Or. 315, 58 Pac. 86; In re O'Hara Tp. Road, 152 Pa. 318, 25 Atl. 602; State v. Inhabitants of Trenton, 47 N. J. Law, 489.

[190] Jones v. Zink, 65 Mo. App. 409.

[191] Gifford v. Baker, 158 Ind. 339, 62 N. E. 690; Town of Randall v. Rovelstad, 105 Wis. 410, 81 N. W. 819.

[192] Blakeslee v. Tyler, 55 Conn. 387, 11 Atl. 291; Bronnenburg v. O'Bryant, 139 Ind. 17; Sonnek v. Town of Minnesota Lake, 50 Minn. 558, 52 N. W. 961; Rose v. Kansas City, 128 Mo. 135; In re Leet Tp. Road, 159 Pa. 72, 28 Atl. 338; Walbridge v. Cabot, 67 Vt. 114; McDonald v. Payne, 114 Ind. 359, 16 N. E. 795.

[193] Hays v. City of Vincennes, 82 Ind. 178.

[194] Butte County v. Boydston, 64 Cal. 110; Forsyth v. Wilcox, 143 Ind. 144, 41 N. E. 371; Dunham v. Runyon, 24 N. J. Law (4 Zab.) 256. 7 Curr. Law, 1309.

should show the amount awarded to the owner of each separate and distinct interest taken or affected by the proceedings.[195]

§ 445. Review and appeals.

The action of commissioners or of viewers either in making or filing their report or in respect to other questions submitted for their determination or action may be reviewed and the errors complained of corrected [196] or their proceedings set aside.[197] The common-law writ of certiorari is the remedy commonly used for this purpose.[198] In some states special remedies are given by statutory provision and the rule then obtains that these must be followed.[199]

A property owner or interested party alone is entitled to an appeal from the decision or award [200] and only those questions can be considered on appeal which are and can legally be raised in the notice of appeal.[201]

Where the appeal is taken from a report on questions other than that of damages, exception is usually made to the report or award either upon technical grounds [202] or those which require a reconsideration of the merits of the proceeding.[203]

[195] Rentz v. City of Detroit, 48 Mich. 544; Gregg v. French, 67 Minn. 402, 69 N. W. 1102; Combs v. Blauvelt, 33 N. J. Law, 36.

[196] Everett v. Pottawattamie County Sup'rs, 93 Iowa, 721; State v. Vandervere, 25 N. J. Law, 669; In re Wilson's Appeal, 152 Pa. 136, 25 Atl. 530.

7 Curr. Law, 1312.

[197] In re North Union Tp. Road, 150 Pa. 512, 24 Atl. 749.

[198] Grinstead v. Wilson, 69 Ark. 587, 65 S. W. 108; Butler Grove Highway Com'rs v. Barnes, 195 Ill. 43, 62 N. E. 775; Janvrin v. Poole, 181 Mass. 463, 63 N. E. 1066; Prince v. Town of Braintree, 64 Vt. 540, 26 Atl. 1095; State v. Wallman, 110 Wis. 312, 85 N. W. 975.

[199] Siskiyou County v. Gamlich, 110 Cal. 94, 42 Pac. 468; Chicago, S. F. & C. R. Co. v. Lorance, 180 Ill. 180, 54 N. E. 284; Monroe County Com'rs v. Conner, 155 Ind. 484, 58 N. E. 828.

[200] Butler Grove Highway Com'rs v. Barnes, 195 Ill. 43, 62 N. E. 775; Wilson v. Wheeler, 125 Ind. 173, 25 N. E. 190; Runyon v. Alton, 78 Minn. 81; Morse v. Wheeler, 69 N. H. 292, 45 Atl. 561; Losch's Appeal, 109 Pa. 72.

[201] Osborn v. Sutton, 108 Ind. 443, 9 N. E. 410; Rawlings v. Biggs, 85 Ky. 251, 3 S. W. 147; Bennett v. Woody, 137 Mo. 377, 38 S W. 972; Williams v. Turner Tp., 15 S. D. 182, 87 N. W. 968.

[202] Johnston v. Glenn County Sup'rs, 104 Cal. 390, 37 Pac. 1046; Goshen Highway Com'rs v. Jackson, 165 Ill. 17, 45 N. E. 1000; Ford v. Collins, 108 Ky. 553, 56 S. W. 993.

[203] Hughes v. Beggs, 114 Ind. 427, 16 N. E. 817; Sanger v. Browns-

The property owner may also appeal from that portion of an award or report that gives or refrains from giving compensation upon the ground of insufficiency.[204] The right to take private property for a public use is only granted upon the payment of full and just compensation for the property interests taken or damaged. Where an appeal is taken from the amount of damages awarded, it is customary to provide for a trial by jury de novo,[205] and the proceeding is controlled by the usual rules of law and practice that govern the trial of cases.

Time of appeal. The right to appeal or raise exceptions in respect to the manner and time of its exercise is usually limited by law and a strict compliance with statutory provisions is necessary.[206] Statutory rights are never liberally construed and if a property owner does not avail himself of one in the manner and at the time granted, he cannot complain and will be concluded by his neglect.[207]

§ 446. The question of compensation.

To the property owner is secured by constitutional provision the payment of just compensation for property taken or injuriously affected through the exercise of the power of eminent domain.* This right is now fully established and protected either by direct constitutional provision [208] or by judicial holdings in the

town Tp., 118 Mich. 19; Pairier v. Itasca County Com'rs, 68 Minn. 297, 71 N. W. 382; In re Diamond St., 196 Pa. 254, 46 Atl. 428; Painter v. St. Clair, 98 Va. 85, 34 S. E. 989.

[204] Manor v. Jay County Com'rs, 137 Ind. 367; Wabaunsee County Com'rs v. Bisby, 37 Kan. 253, 15 Pac. 241; Grimshaw v. City of Fall River, 160 Mass. 483; Russell v. Leatherwood, 114 N. C. 683; Appeal of City of Philadelphia, 191 Pa. 153, 43 Atl. 88.

[205] Sigafoos v. Talbot, 25 Iowa, 214; Inhabitants of Wrentham v. Corey, 159 Mass. 93, 34 N. E. 179; Fohl v. Common Council of Sleepy Eye Lake, 80 Minn. 67, 82 N. W. 1097; Lafollette v. Road Com'r, 105 Tenn. 536, 58 S. W. 1065.

[206] Kirsh v. Braun, 153 Ind. 247, 53 N. E. 1082; Russell v. Franklin County Com'rs, 51 Me. 384; Campau v. La Blanc, 127 Mich. 179, 86 N. W. 535; Geddes v. Rice, 24 Ohio St. 60.

[207] Searl v. Lake County School Dist. No. 2, 133 U. S. 553; Baugher v. Rudd, 53 Ark. 417, 14 S. W. 623; Wilkinson v. Lemasters, 122 Ind. 82, 23 N. E. 688.

* 7 Curr. Law, 1291.

[208] Smith v. Inge, 80 Ala. 283; Potter v. Ames, 43 Cal. 73; Whiting v. City of New Haven, 45 Conn. 303; City of Chicago v. Spoor, 190

absence of the former to the effect that under other constitutional clauses prohibiting the taking of property without due process of law, property interests cannot be taken under the exercise of the power without the payment of just compensation; thus holding, in effect, that the payment of compensation is an essential part of the taking of property by due process of law.

The medium of payment, it is clear, must be that which affords the property owner the compensation to which he is entitled and this, from a strictly legal standpoint, excludes all forms of payment except that which is regarded as a legal tender by the laws of the county.[209] Some cases hold that a modification of the rule extends to municipal or public quasi corporations.[210]

§ 447. Time of payment.

Constitutional or statutory provisions ordinarily prohibit the taking of private property without the payment of just compensation first paid or secured.[211] The transaction is regarded somewhat of the nature of a forced sale from the standpoint of the attitude of the parties to it and an application of strict legal principles requires, therefore, that the compensation should be paid or secured before entry upon the premises for the purpose of their appropriation.[212] The compensation and the transfer of possession should be contemporaneous acts.

This rule does not, however, ordinarily obtain where the party exercising the power is a state or a public corporation. These

Ill. 340, 60 N. E. 540; Attorney General v. Williams, 174 Mass. 476, 55 N. E. 77, 47 L. R. A. 314; Phelps v. City of Detroit, 120 Mich. 447, 79 N. W. 640; Cherry v. Town of Keyport Com'rs, 52 N. J. Law, 544, 20 Atl. 970; Benedict v. State, 120 N. Y. 228, 24 N. E. 314; City of Dayton v. Bauman, 66 Ohio St. 379, 64 N. E. 433; Butchers' Ice & Coal Co. v. City of Philadelphia, 156 Pa. 54; Hutchinson v. City of Parkersburg, 25 W. Va. 226.

[209] Sanborn v. Belden, 51 Cal. 266; Butler v. Ravine Road Sewer Com'rs, 39 N. J. Law, 665; In re Sedgeley Ave., 88 Pa. 509.

[210] Lowndes County Com'rs Ct. v. Bowie, 34 Ala. 461; Loweree v. City of Newark, 38 N. J. Law. 151.

[211] German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; Helms v. Bell, 155 Ind. 502, 58 N. E. 707; Corey v. Inhabitants of Wrentham, 164 Mass. 18, 41 N. E. 101; Lewis v. City of Lincoln, 55 Neb. 1, 75 N. W. 154.

[212] Jones v. Carragan, 36 N. J. Law, 52; Hawley v. Harrall, 19 Conn. 142; Abney v. Clark, 87 Iowa, 727; Ackerman v. Thummel, 40 Neb. 95; Lowmiller v. Fouser, 52 Ohio St. 123, 39 N. E. 419.

are regarded agencies of such a stable and substantial character as to warrant the courts in permitting an entry upon or an appropriation of private property in advance of the actual payment or tender of compensation.[213] The latter rule may be carried to an unreasonable extent. The good faith and credit of municipal and public quasi corporations as experience has proven in the past may not be of such a character as to warrant their being regarded by the owner of the property taken as the equivalent of cash.[214]

§ 448. Time of estimation of damages.*

In ascertaining the compensation to which one is entitled, the time of their estimation is important both from the standpoint of the one exercising the power and the one whose property is appropriated. The date when the proceedings are commenced is that usually considered as determining the measure of damages.[215] Some decisions based, in a few cases, upon statutory provisions hold that the date of the award of commissioners is the time with reference to which compensation should be estimated.[216] The value of property in its condition then is the one which fixes the amount of compensation; not its value as affected by subsequent conditions connected with the proceedings or otherwise which may either depreciate or appreciate it.[217]

[213] Great Falls Mfg. Co. v. Garland, 25 Fed. 521; Lowndes County Com'rs v. Bowie, 34 Ala. 461; Coburn v. Ames, 52 Cal. 385; In re City of Cedar Rapids, 85 Iowa, 39, 51 N. W. 1142; Kimball v. City of Rockland, 71 Me. 137; Page v. City of Boston, 106 Mass. 84; State v. Otis, 53 Minn. 318, 55 N. W. 143; Matter of City of New York, 99 N. Y. 569; Cherry v. Lane County, 25 Or. 487, 36 Pac. 531; Morris v. City of Philadelphia, 199 Pa. 357; State v. City of Superior, 81 Wis. 649, 51 N. W. 1014; Lewis, Eminent Domain (2d ed.) § 454. But see Hall v. People, 57 Ill. 307; Zimmerman v. Kearney County, 33 Neb. 620, 50 N. W. 1126.

[214] Huntington v. Smith, 25 Ind. 486; Covington Short-Route Transfer R. Co. v. Piel, 87 Ky. 267, 8 S. W. 449.

[215] City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585; Sanitary Dist. v. Loughran, 160 Ill. 362; Ford v. Lincoln County Com'rs, 64 Me. 408; Green v. City of Everett, 179 Mass. 147, 60 N. E. 490; Patten v. Fitz, 138 Mass. 456.

7 Curr. Law, 1291.

[216] Lamborn v. Bell, 18 Colo. 346, 32 Pac. 989, 20 L. R. A. 241.

[217] Albertson v. City of Philadelphia, 185 Pa. 223, 39 Atl. 887; Stafford v. City of Providence, 10 R. I. 567.

§ 449. Measure of damages.

The most simple condition in the estimation of damages is that which exists when the whole of the tract of land or property interest is appropriated. The compensation under such circumstances is, according to the great weight of authority, its market value at the time of the commencement of the proceedings.[218] The taking of the entire interest excludes necessarily any consideration of either the question of damages or benefits to a remainder. The measure of damages, as already stated, adopted almost universally, is the market value in cash of the premises or interest. This has been defined as being "the market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged to sell it, and is bought by one who is under no necessity of having it." [219] In ascertaining this market value the present condition of the property should be considered and its capability and adaptability for a present and special use.[220] The character of the land and consequently its market value is determined by present conditions and exigencies.[221] From the definition given above of market value it will be noted that the financial condition or necessities of either party to the transaction is not an element [222] and a characteristic definition also excludes any value based upon purely sentimental or psychological reasons,[223] or that which follows from the construc-

[218] City of Santa Ana v. Harlin, 99 Cal. 538; Tedens v. Sanitary Dist., 149 Ill. 87; City of Ft. Wayne v. Hamilton, 132 Ind. 487, 32 N. E. 324; Green v. City of Everett, 179 Mass. 147, 60 N. E. 490; City of Grand Rapids v. Luce, 92 Mich. 92; Lowe v. City of Omaha, 33 Neb. 587, 50 N. W. 760; Smith v. City of Goldsboro, 121 N. C. 350, 28 S. E. 479; In re Negley Ave., 146 Pa. 456. 7 Curr. Law, 1291.

[219] Lewis, Em. Dom. (2d ed.) § 478.

[220] Schuster v. Sanitary Dist., 177 Ill. 626; Prince v. Town of Braintree, 64 Vt. 540, 26 Atl. 1095; United States v. Seufert Bros. Co., 78 Fed. 520; City of Los Angeles v. Pomeroy, 124 Cal. 597; Manning v. City of Lowell, 173 Mass. 100; Dana v. Craddock, 66 N. H. 593, 32 Atl. 757; Bryant v. Pottsville Water Co., 190 Pa. 366.

[221] McCormick v. City of Baltimore, 45 Md. 512; Pinkham v. Inhabitants of Chelmsford, 109 Mass. 225; Reyenthaler v. City of Philadelphia, 160 Pa. 195.

[222] Moulton v. Newburyport Water Co., 137 Mass. 163; Heiser v. City of New York, 104 N. Y. 68; Lewis, Em. Dom. § 478.

[223] Whitney v. City of Lynn, 122 Mass. 338. No recovery can be had for the disquietude, vexation and annoyance experienced by the owner because of the proceedings.

tion of the improvement itself.[224] Remote, speculative or fictitious values are also excluded and evidence relative to the profits or income of the property for the purpose of promoting its market value is inadmissible.[225]

§ 450. Measure of damages when a part only is taken.

The compensation to which one may be entitled in case a part only of the property is taken is not limited to the market value of the part taken but includes any depreciation of or damage to the remainder because of the fact that a part of property considered as a whole is taken; this doctrine is thoroughly established by an overwhelming weight of authority.[226] The damage to the property or to the remainder includes not only the land itself, but also the improvements, if any,[227] or special franchises, easements or appurtenant privileges and in some cases fixtures.[228] The additional compensation which can thus be recovered not only includes payment for the damage sustained because a part is taken, but also any damage suffered by reason of the use of the part which is taken by the one appropriating it [229] or the construction of an improvement.[230] The latter element, however, does not in-

[224] Sanitary Dist. of Chicago v. Loughran, 160 Ill. 362, 43 N. E. 359; Benton v. Inhabitants of Brookline, 151 Mass. 250, 23 N. E. 846; In re Condemnation of Land for New State House, 19 R. I. 382, 33 Atl. 523.

[225] Monongahela Nav. Co. v. United States, 148 U. S. 312; Burke v. Sanitary Dist. of Chicago, 152 Ill. 125; Gardner v. Inhabitants of Brookline, 127 Mass. 358.

[226] Colbert County Com'rs v. Street, 116 Ala. 28, 22 So. 629; Van Bentham v. Osage County Com'rs, 49 Kan. 30, 30 Pac. 111; Cushing v. City of Boston, 144 Mass. 317, 11 N. E. 93; Moritz v. City of St. Paul, 52 Minn. 409; City of Omaha v. Hansen, 36 Neb. 135. See, also, Lewis, Em. Dom. (2d ed.) § 464.

7 Curr. Law, 1295.

[227] Newburyport Water Co. v. City of Newburyport, 85 Fed. 723, Id., 168 Mass. 541, 47 N. E. 533; Ford v. Lincoln County Com'rs, 64 Me. 408; City of Boston v. Robbins 126 Mass. 384; Westchester & W. Plank Road Co. v. Chester County, 182 Pa. 40.

[228] Williams v. Com., 168 Mass. 364; Shaw v. City of Philadelphia, 169 Pa. 506, 32 Atl. 593.

[229] District of Columbia v. Robinson, 14 App. D. C. 512; City of Baltimore v. Rice, 73 Md. 307, 21 Atl. 181; Lincoln v. Com., 164 Mass. 368; Harper v. City of Detroit, 110 Mich. 427; Petition of Mt. Washington Road Co., 35 N. H. 134; Gray v. City of Knoxville, 85 Tenn. 99.

[230] City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; Estes v. City of Macon, 103 Ga. 780, 30 S.

clude damages accruing from a wrongful construction of the improvement or use of property appropriated.[231] When property is taken for a highway which is already subject to a public easement by a dedication or prescription, the owner is ordinarily entitled to only nominal damages.[232]

Special damages only considered. The damages resulting from the appropriation of property for a particular and public use, as well as benefits, may be either general or special in their nature. General damages are those which are suffered by the community at large; no one individual being able to show that he has been injured in any manner or to any extent different or in excess of the injury suffered by the public at large. Special damages, on the contrary, are those which an individual may have received not only in excess of the damages suffered by the public at large, but also by himself peculiarly and alone.[233] The rule applies that the property owner is not entitled to recover for general damages; that he can claim and receive compensation only for the special and particular damage which he alone has suffered because of the appropriation of the property under the power of eminent domain.[234]

§ 451. The question of benefits.*

Where part is appropriated of the interest, not only must the question of damage to the remainder be considered and made a part of just compensation, but in the determination of this, other elements than the market value of the property enter. The fact that the property left may be benefited by the taking of a part

E. 246; Marsden v. City of Cambridge, 114 Mass. 490; Joplin Consol. Min. Co. v. City of Joplin, 124 Mo. 129, 27 S. W. 406; Churchill v. Beethe, 48 Neb. 87, 66 N. W. 992, 35 L. R. A. 442; Van Riper v. Essex Public Road Board, 38 N. J. Law, 23; Darlington v. Allegheny City, 189 Pa. 202, 42 Atl. 112; Bridgeman v. Village of Hardwick, 67 Vt. 653, 32 Atl. 502.

[231] White v. City of Medford, 163 Mass. 164, 39 N. E. 997; Alloway v. City of Nashville, 88 Tenn. 510, 8 L. R. A. 123.

[232] Sherer v. City of Jasper, 93 Ala. 530, 9 So. 584; Danforth v. City of Bangor, 85 Me. 423, 27 Atl. 268; Clark v. City of Elizabeth, 37 N. J. Law, 120; Village of Olean v. Steyner, 135 N. Y. 341, 32 N. E. 9, 17 L. R. A. 640.

[233] In re Beekman St., 4 Bradf. (N. Y.) 503; Lewis, Em. Dom. (2d ed.) §§ 227, 653e.

[234] Appeal of Campbell (Pa.) 12 Atl. 843; Mills, Em. Dom.; Lewis, Em. Dom.; Am. & Eng. Enc. Law (2d ed.) tit. Eminent Domain.

and the construction of the improvement is to be considered and the resulting benefit taken in connection with the total damage will form a basis for the estimation of what may be termed net damages, or to state the principle more concisely benefits received may lessen the damage to the remainder.[235] The benefits thus to be considered are usually those termed "special." The general benefit and advantage that property may receive as a part of a community from the construction of local improvements is not usually regarded but only the particular and the special advantages which a tract of land may receive or enjoy is to be considered in a determination of the compensation to which the owner is entitled.[236]

The courts recognize the existence, therefore, of both general and special damages as well as general and special benefits and the authorities are widely at variance in regard to the extent to which these various elements must be considered in determining what is just compensation.[237] The local decisions of each state must settle the question for the local practitioner, as no general rule can be given.

II. Its Control and Use.

§ 452. Generally.

A private person, natural or artificial, is limited in the control and use of its property by the manner in which it is acquired. The same principles of law apply to the control and use of property by a public corporation and a further limitation is found based upon the purpose for which property is secured. The ex-

[235] Bauman v. Ross, 167 U. S. 548; Peck v. Borough of Bristol, 74 Conn. 483, 51 Atl. 521; Rassler v. Grimmer, 130 Ind. 219, 29 N. E. 918; Wood v. Inhabitants of Hudson, 114 Mass. 513; State v. Miller, 23 N. J. Law, 383.

7 Curr. Law, 1294.

[236] City of Chicago v. Spoor, 190 Ill. 340, 60 N. E. 540; Goodwin v. Warren County Com'rs, 146 Ind. 164; Roberts v. Brown County Com'rs, 21 Kan. 247; Chase v. City of Portland, 86 Me. 267, 29 Atl. 1104; Janvrin v. Poole, 181 Mass. 463, 63 N. E. 1066; Kansas City v. Ward, 134 Mo. 172; City of Omaha v. Howell Lumber Co., 38 Neb. 633, 46 N. W. 919; Woodman v. Town of Northwood, 67 N. H. 307, 36 Atl. 255; Blair v. City of Charleston, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852.

[237] City of Kansas v. Morse, 105 Mo. 510, 16 S. W. 893; Covert v. Hulick, 33 N. J. Law, 307; Lewis, Em. Dom. (2d ed.) § 465.

tent and the manner of the control and use of property held by a public corporation is therefore dependent upon the character of its title, the manner of acquirement and the purpose for which it is acquired.[238] It necessarily follows, therefore, and because of the nature of a public corporation, that, as compared with private persons or corporations, its management and disposition of property is more restricted and its capacity comparatively limited. This principle obtains because of the fundamental differences found existing between a private person or corporation and a public corporation, in the exercise of their powers or legal capacities, based on the purpose for which created and the manner in which revenues are secured. A public corporation is created solely as a governmental necessity and the basis of a legal requirement of property is its use for a governmental or public purpose and control and that use is radically limited by this consideration.[239] As a legal principle, the inherent differences between a public corporation and a private person or corporation cannot be changed by legislation and the legal right in this respect of a public corporation to acquire, dispose of or use its property, cannot be increased or diminished by legislative action. Legislative attempts to vest a public corporation with the capacities and powers of a private person or corporation are necessary futile as a legal proposition. The fundamental character of a governmental agent cannot be changed through mere legislative desire that it should be changed as an economical or party convenience.

§ 453. The control of public highways.

The greater number of questions relating to the use and control of public property arise in connection with the public highways.* This is true both because of the fact that the holdings of these properties are relatively large and that private persons, both na-

[238] Spaulding v. Wesson, 115 Cal. 441, 47 Pac. 249; Town of Oldtown v. Dooley, 81 Ill. 255; Dodd v. Consolidated Traction Co., 57 N. J. Law, 482.

6 Curr. Law, 729.

[239] Hancock v. Louisville & N. R. Co., 145 U. S. 409; Inhabitants of Cumberland County v. Central Wharf Steam Tow-Boat Co, 90 Me. 95, 37 Atl. 867; City of Fergus Falls v. Boen, 78 Minn. 186, 80 N. W. 961; Jersey City v. Central R. Co., 40 N. J. Eq. (13 Stew.) 417; Methodist Episcopal Church v. City of Hoboken, 33 N. J. Law, 13.

* 6 Curr. Law, 729; 8 Curr. Law, 61.

tural and artificial, are interested to a greater extent in their use. The control, therefore, of a public highway, is limited by the purposes for which it can be acquired and only such control and use is legally possible as will come within the bearing of this purpose.[240] Where the land of an individual has been legally acquired for a highway, the public corporation controlling it has the right to appropriate the property so taken to all legitimate uses and servitudes that custom will permit and the public good, as thus measured, requires.[241] The lawful exercise of these powers does not create any liability.[242]

§ 454. Control discretionary.

In a large sense, the power to control public property is a discretionary one assuming that the control properly comes within the principles already laid down. Where the legal capacity is given to a public corporation in this regard, it is discretionary with local officials representing it to exercise or refrain from exercising the power and their action is not subject to criticism or judicial review.[243] The doctrine applies to the opening,[244] improvement, repair,[245] and the alteration of public ways, and the particular form of improvement [246] and the time of action.[247]

[240] Smith v. City of Leavenworth, 15 Kan. 81; City of Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. 408.

[241] Hatch v. Hawkes, 126. Mass. 177; Washington v. City of Nashville, 31 Tenn. (1 Swan) 177.

[242] City of Montgomery v. Townsend, 80 Ala. 489, 4 So. 780; De Baker v. Southern Cal. R. Co., 106 Cal. 257, 39 Pac. 610; Cole v. City of Muscatine, 14 Iowa, 296; Watson v. City of Kingston, 114 N. Y. 88, 21 N. E. 102; Home Bldg. & Conveyance Co. v. City of Roanoke, 91 Va. 52, 20 S. E. 895, 27 L. R. A. 551.

[243] Burckhardt v. City of Atlanta, 103 Ga. 302; Michigan Tel. Co. v. City of St. Joseph, 121 Mich. 502, 80 N. W. 383, 47 L. R. A. 87.

6 Curr. Law, 729, 8 Curr. Law, 61.

[244] Cherry v. Town of Keyport, 52 N. J. Law, 544, 20 Atl. 970; Anderson v. Turbeville, 46 Tenn. (6 Cold.) 150.

[245] Goszler v. Corporation of Georgetown, 6 Wheat. (U. S.) 593; McHale v. Easton & B. Transit Co., 169 Pa. 416, 32 Atl. 461; Blundon v. Crosier, 93 Md. 355, 49 Atl. 1; Brock v. Dore, 166 Mass. 161, 44 N. E. 142.

[246] Keith v. Wilson, 145 Ind. 149, 44 N. E. 13; Dewey v. City of Des Moines, 100 Iowa, 416, 70 N. W. 605; Schmitt v. City of New Orleans, 48 La. Ann. 1440, 21 So. 24.

[247] Allen v. La Force, 95 Mo. App. 324, 68 S. W. 1057.

§ 455. Legislative control.

The supreme control of the legislature representing the state or sovereign over the property of all public corporations has already been considered. This control is limited by constitutional provisions, especially those protecting private rights and by the inherent nature and character of public corporations.[248] The control of public property, therefore, ultimately and originally rests in the legislative branch of the government as representing the public at large. Such a grant may be withdrawn, diminished or enlarged at the pleasure of the legislative body, limited, to repeat, only by the character of the title to property and the purpose for which it has been acquired.[249]

§ 456. Delegation of power.

While the ultimate power to control and regulate the use of all public property is vested ultimately in the sovereign, it is usually delegated to subordinate public corporations; these being local governmental subdivisions and better capable of determining the extent and manner of control.[250] Such grants of power are usually held to be continuing in their nature and not exhausted upon their being once exercised,[251] neither does the failure to exercise a granted power of this character result in its loss.

The general grant of a power also as a rule includes a grant of the right to use such agencies or exercise such lesser powers as will be found necessary to carry into execution the larger powers granted.[252]

[248] Wilson v. Eureka City, 173 U. S. 32; Vernon School Dist. v. Los Angeles Board of Education, 125 Cal. 593, 58 Pac. 175; Taggart v. Claypool, 145 Ind. 590, 32 L. R. A. 586; McArthur v. Nelson, 81 Ky. 67; Bennett v. Davis, 90 Me. 102.

6 Curr. Law, 729, 8 Curr. Law, 61.

[249] Backus v. Fort St. Union Depot Co., 169 U. S. 557; Williams v. Eggleston, 170 U. S. 304; Ford v. Town of North Des Moines, 80 Iowa, 626; Warner v. Hoagland, 51 N. J. Law, 62; State v. City of Cincinnati, 52 Ohio St. 419, 40 N. E. 508, 27 L. R. A. 737; Roby v. Sheppard, 42 W. Va. 286, 26 S. E. 278.

[250] Banaz v. Smith, 133 Cal. 102, 65 Pac. 309; Weed v. City of Savannah, 87 Ga. 513, 13 S. E. 522; People v. Whipple, 187 Ill. 547, 58 N. E. 468; Smyrk v. Sharp, 82 Md. 97, 33 Atl. 411; State v. Childs, 109 Wis. 233, 85 N. W. 374.

6 Curr. Law, 729, 8 Curr. Law, 61.

[251] Grove v. City of Ft. Wayne, 45 Ind. 429; Town of Denver v. Meyers, 63 Neb. 107, 88 N. W. 191.

[252] Grove v. City of Ft. Wayne, 45 Ind. 429.

Municipal corporations proper exist as one of these agencies and to them is granted in the largest measure the sovereign power of control.[253] These corporations, because of their character and the conditions which lead to their creation, are, necessarily, given large powers in respect to the control of public highways within their limits. The uses to which urban ways are, of necessity, put, require a grant of the character suggested.[254]

Public quasi corporations are to be found as a class of agencies to which the legislative power of control and regulation of property has been delegated.[255] These possess the power of regulation and control in a less degree than municipal corporations proper because the public needs that lead to their establishment are different and less complex in character.

The extent of powers granted to delegated agencies. The fact that the legislature has deemed it advisable to delegate the exercise of certain sovereign powers to subordinate agencies should not lead to the conclusion that, through the grant, an exclusive power of control and regulation is given. The state retains, at all times, in respect to powers granted its subordinate agencies and where the rights of third parties have not intervened, its full power to deal with the questions embraced in the grants named; it can legislate under the conditions given with respect to the regulation and control of public property including the use of highways as freely as before the subordinate corporation was entrusted with a portion of these powers.[256] The delegation of a

[253] City of St. Louis v. Western Union Tel. Co., 149 U. S. 465; Id., 148 U. S. 92; Hodges v. Western Union Tel. Co., 72 Miss. 910; Cape May D. & S. P. R. Co. v. City of Cape May, 59 N. J. Law, 396, 6 Am. Electrical Cas. 51.

[254] Missouri v. Murphy, 170 U. S. 78; Louisville Trust Co. v. City of Cincinnati (C. C. A.) 76 Fed. 296; Magee v. Overshiner, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370; City of Louisville v. Bannon, 99 Ky. 74, 35 S. W. 120; Hershfield v. Rocky Mountain Bell Tel. Co., 12 Mont. 102; Domestic Telegraph & Tel. Co. v. City of Newark, 49 N. J. Law, 344; Ellinwood v. City of Reedsburg, 91 Wis. 131, 64 N. W. 885.

[255] State v. Voorhies, 50 La. Ann. 671, 23 So. 871; City of Bayonne v. Lord, 61 N. J. Law, 136, 38 Atl. 753; Bradley v. Southern New England Tel. Co., 66 Conn. 559, 34 Atl. 499, 32 L. R. A. 280; Suburban Light & Power Co. v. Aldermen of Boston, 153 Mass. 200, 10 L. R. A. 497.

[256] Barnes v. Dist. of Columbia, 91 U. S. 540; Abbott v. City of Duluth, 104 Fed. 833; State v. Murphy, 130 Mo. 10; American Rapid Tel. Co. v. Hess, 125 N. Y. 641, 26 N. E. 919, 13 L. R. A. 454.

governmental power to a subordinate agent is revokable at pleasure and does not partake of the nature of a contract.[257] The particular application of the principle lies in the fact that the legislature may give directly to individuals or corporations the right to use the streets of a municipal corporation without their first securing the grant of the right from the municipal corporation.

§ 457. Fundamental legislative limitations.

The power of the legislature to act in a given instance is restricted by its character as the law-making branch of the government and also by constitutional provisions existing in either or both Federal and state constitutions. As the law-making body, it is legally incapable of performing functions judicial or executive in their character.[258] If enactments may be also illegal because violating some constitutional provision. It is clear that if the legislature, because of these reasons, cannot act upon a particular subject-matter, that it cannot, by any enactment, grant to a subordinate agency the right to exercise a power touching the same question.[259] The common constitutional provisions are those relating to the impairment of a contract obligation,[260] special and uniform legislation,[261] and due process of and the equal protection of the law.[262]

Extent of power limited by character of property. The extent of the legislative power dealing with public property is limited

[257] Thomas v. City of Richmond, 79 U. S. (12 Wall.) 356; Indianapolis, D. & W. R. Co. v. Center Tp., 143 Ind. 63, 40 N. E. 134.

[258] Ex parte Siebold, 100 U. S. 371; Appeal of Norwalk St. R. Co., 69 Conn. 567, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794; McLean County Precinct v. Deposit Bank of Owensboro, 31 Ky. 254; Case of Supervisors of Election, 114 Mass. 247.

6 Curr. Law, 729, 8 Curr. Law, 61.

[259] Chicago, B. & Q. R. Co. v. City of Chicago, 166 U. S. 226.

[260] Constitution U. S. art. I, sec. 10, clause 1.

[261] Robert J. Boyd P. & C. Co. v. Ward, 85 Fed. 27; People v. Martin, 178 Ill. 611, 53 N. E. 309; In re Hegne-Hendrum Ditch Co., 80 Minn. 58, 82 N. W. 1094; Matter of Henneberger, 155 N. Y. 420, 50 N. E. 61, 42 L. R. A. 132.

[262] Palmer v. McMahon, 133 U. S. 660; Scott v. McNeal, 154 U. S. 34; City R. Co. v. Citizens' St. R. Co., 166 U. S. 557; State v. Weyerhauser, 68 Minn. 353, 71 N. W. 265; Ensign v. Barse, 107 N. Y. 329, 14 N. E. 400.

also by the purpose for which it is secured and the use for which it is held. That acquired by any public corporation in this capacity is held by it as a trustee for the public for the particular uses and purposes of its acquisition.[263] It is impossible, therefore, for a public corporation to dispossess itself, transfer to or permit the use of public property by private persons or for private purposes and the legality of acts of public authorities can be always tested by this well-known principle as well as those just mentioned.

§ 458. The power to open, repair and improve highways.

It is customary to grant to all subordinate public corporations the general and discretionary power to open or construct highways within their limits [264] although in the absence of such a grant some authorities claim that the power would still exist, being one implied because essential to the existence of the corporations.[265] The power to open a street or highway also carries with it the general power to improve and keep it in repair.[266]

The general statutory power to open highways carries with it also as a rule, the right to make needful alterations and official authorities are usually regarded as the exclusive judges of the propriety and the necessity of these changes.[267]

The right of the public authorities however to control the use

[263] Jaynes v. Omaha, St. R. Co., 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751; Kane v. New York El. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640.

[264] City of Hannibal v. Campbell, 86 Fed. 297; Cohen v. City of Alameda, 124 Cal. 504, 57 Pac. 377; City of Chicago v. Law, 143 Ill. 569, 33 N. E. 855; Bigelow v. City Council of Worcester, 169 Mass. 390, 48 N. E. 1; Keough v. City of St. Paul, 66 Minn. 114; In re Deering, 85 N. Y. 1; Hamilton County Com'rs v. State, 50 Ohio St. 653, 35 N. E. 887.

8 Curr. Law, 44.

[265] Serviss v. Detroit Public Works, 115 Mich. 63, 72 N. W. 1117; State v. District Court of Ramsey County, 80 Minn. 293, 83 N. W. 183.

[266] Flickinger v. Fay, 119 Cal. 590, 51 Pac. 855; Hines v. City of Lockport, 50 N. Y. 236; Somerset v. Stoystown Road, 74 Pa. 61.

[267] Dana v. City of Boston, 170 Mass. 593, 49 N. E. 1013; Lincoln v. Commonwealth, 164 Mass. 1, 41 N. E. 112; Weber v. Ryers, 82 Mich. 177, 46 N. W. 233; Chasmer v. Blew, 55 N. J. Law, 67, 25 Atl. 710; State v. Raborn, 60 S. C. 78, 38 S. E. 260; State v. Burgeson, 108 Wis. 174, 84 N. W. 241; Fowler v. Larabee, 59 N. J. Law, 259; Blackman v. Riley, 138 N. Y. 318, 34 N. E. 214; Mitchell v. Coosa County Com'rs Ct., 116 Ala. 650, 22 So. 993.

of highways largely depends upon their character as urban or suburban ways.[268]

§ 459. Change of grade in a highway or street.

The power to open a highway, whether a street proper or otherwise, usually carries with it the implied right to establish in a lawful manner [269] a certain grade with reference to abutting property, construct it upon the gradients determined upon,[270] and without the consent of property owners, to change the grade.[271] Where the grade of the street has once been established and fixed, and abutting property owners have constructed improvements upon the street or highway, with reference to the established grade, the question may arise as to whether they are not entitled to compensation for the damage or injuries they may suffer by reason of the change in grade.[272] The authorities in this country upon this question are not at variance and almost uniformly maintain the doctrine that under such circumstances the adjoining property owner is not entitled to consequential damages,[273] though some states hold otherwise.[274]

[268] Cater v. N. W. Telep. & Exch. Co., 60 Minn. 539, 28 L. R. A. 310; Elliott, Roads & St. (2d Ed.) §§ 398, 408; Lewis, Em. Dom. (2d Ed.) §§ 126 et seq.; Kincaid v. Indianapolis Nat. Gas Co., 124 Ind. 577, 8 L. R. A. 602; Van Brunt v. Town of Flatbush, 128 N. Y. 50, 27 N. E. 973.

[269] Chicago & N. P. R. Co. v. City of Chicago, 174 Ill. 439, 51 N. E. 596; Gould v. Schermer, 101 Iowa, 582; Wilder v. City of Cincinnati, 26 Ohio St. 284; Page v. Belvin, 88 Va. 985, 14 S. E. 843.

8 Curr. Law, 51.

[270] Goszler v. Corporation of Georgetown, 6 Wheat. (U. S.) 593; Flinn v. Mowry, 131 Cal. 481, 63 Pac. 724; Ball v. City of Tacoma, 9 Wash. 592.

[271] Thorn v. West Chicago Park Com'rs, 130 Ill. 594; Matingly v. City of Plymouth, 100 Ind. 545; Saxton Nat. Bank v. Bennett, 138 Mo. 494, 40 S. W. 97; Inhabitants of Trenton v. McQuade, 52 N. J. Eq. 669, 29 Atl. 354; Farrington v. City of Mt. Vernon, 166 N. Y. 233, 59 N. E. 826; Columbus Gas, Light & Coke Co. v. City of Columbus, 50 Ohio St. 65, 33 N. E. 292, 19 L. R. A. 510.

[272] Blanden v. City of Ft. Dodge, 102 Iowa, 441, 71 N. W. 411; City of Newark v. Sayre, 41 N. J. Law, 158; Clark v. City of Philadelphia, 171 Pa. 30, 33 Atl. 124.

[273] Smith v. Corporation of Washington, 20 How. (U. S.) 135; Healey v. City of New Haven, 47 Conn. 305; Selden v. City of Jacksonville, 28 Fla. 558, 10 So. 457, 14 L. R. A. 370; Farmer v. City of Cedar Rapids, 116 Iowa, 322, 89 N. W. 1105; Callender v. Marsh, 18 Mass. (1 Pick.) 418; Radcliff's Ex'rs v. City of Brooklyn, 4 N. Y. (4 Comst.) 195; Lewis, Em. Dom. (2d Ed.) §§ 92 et seq.

[274] Smith v. Wayne County Com'rs, 50 Ohio St. 628, 35 N. E.

Statutory compensation. The fact that a change of grade may seriously damage adjoining property has been the occasion for the passage of legislation in many states creating a liability for consequential damages.[275] The right of property owners under such conditions are measured naturally by the language creating the liability and providing the remedies for its determination and enforcement.[276] These laws are strictly construed in common with all laws forming the basis of a right not before existing,[277] and in their local wording and interpretation must be found the extent of the liability and the manner and time, how and when its provisions can be made available to an adjoining property owner who has suffered damages because of a change of grade.[278] A resume of this legislation and a full discussion will be found in Abbott on Municipal Corporations, sections 809 et seq.

In arriving at a proper conclusion the definition of "grade"[279] and "change of grade"[280] is naturally involved, and also the character[281] of the injuries or damage sustained by the property owner.

796; City of Louisville v. Louisville Rolling Mill Co., 66 Ky. (3 Bush) 416; Hamilton County v. Rape, 101 Tenn. 222, 47 S. W. 416.

[275] Smith v. Corporation of Washington, 20 How. (U. S.) 135; City of Chicago v. Spoor, 190 Ill. 340, 60 N. E. 540; City of Baltimore v. Rice, 73 Md. 307; Huckestein v. City of Allegheny, 165 Pa. 367, 30 Atl. 982.

[276] Harper v. State, 113 Ala. 91; German Sav. and Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; Noyes v. Town of Mason City, 53 Iowa, 418; Garrity v. City of Boston, 161 Mass. 530, 37 N. E. 672; Bartlett v. Bristol, 66 N. H. 420, 24 Atl. 906; Tate v. City of Greensborough, 114 N. C. 392, 24 L. R. A. 671.

[277] German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; City of Worcester v. Keith, 87 Mass. (5 Allen) 17; City of Port Huron v. McCall, 46 Mich. 565.

[278] Chicago, B. & Q. R. R. Co. v. City of Chicago, 166 U. S. 226; Sullivan v. City of Fall River, 144 Mass. 579, 12 N. E. 553; Hinckley v. City of Franklin, 69 N. H. 614, 45 Atl. 643; Fuller v. City of Mt. Vernon, 171 N. Y. 247, 63 N. E. 964; Eisenhart v. City of Philadelphia, 154 Pa. 393, 26 Atl. 367; Pittelkow v. City of Milwaukee, 94 Wis. 651.

[279] McGar v. Borough of Bristol, 71 Conn. 652, 42 Atl. 1000; Allen v. City of Davenport, 107 Iowa, 90; Smith v. City of St. Louis, 122 Mo. 643.

[280] City of Valparaiso v. Adams, 123 Ind. 250, 24 N. E. 107; Albro v. City of Fall River, 175 Mass. 590, 56 N. E. 894; McGavock v. City of Omaha, 40 Neb. 64, 58 N. W. 543; State v. City of Bayonne, 54 N. J. Law, 293, 23 Atl. 648; Folmsbee v. City of Amsterdam, 142 N. Y. 118, 36 N. E. 821; Aldrich v. City of Providence, 12 R. I. 241.

[281] New Haven Steam Saw Mill

In considering the damages sustained, any special benefits which his property may have received through the change of grade must be considered and deducted from the special damages that he may have suffered.[282]

The rules stated only apply, however, to a lawful change of grade and if public officials without authority take action in regrading a street that results in an injury to property owners, irrespective of statutory provisions, they can recover the damages sustained by them. The element of lawful authority necessarily excludes either action without authority or that not taken in the manner and at the time provided by law.[283]

Neither does the principle stated apply to any but consequential damages. If, through the grading or regrading of a highway, the property of adjoining owners is actually encroached upon, taken or damaged, they must be compensated [284] for the injuries suffered.

§ 460. Diversion from a public or specific use.

The principle that the state acting for itself or through its delegated agencies maintains an unlimited control over public property is not without its limitations.* The principal one is that based upon the purpose for which the property is acquired. The public

Co. v. City of New Haven, 72 Conn 276, 44 Atl. 229, 609; Natick Gas-Light Co. v. Inhabitants of Natick, 175 Mass. 246, 56 N. E. 292; Moritz v. City of St. Paul, 52 Minn. 409, 54 N. W. 370; Eachus v. Los Angeles Consol. Elec. R. Co., 103 Cal. 614; Davenport v. Inhabitants of Dedham, 178 Mass. 382, 59 N. E. 1029; In re Grade Crossing Com'rs of Buffalo, 166 N. Y. 69, 59 N. E. 706; Hohmann v. City of Chicago, 140 Ill. 226, 29 N. E. 671; Woodbury v. Inhabitants of Beverly, 153 Mass. 245, 26 N. E. 851; Cook v. City of Ansonia, 66 Conn. 413, 34 Atl. 183; Richardson v. Webster City, 111 Iowa, 427, 82 N. W. 920; Chase v. City of Portland, 86 Me. 367, 29 Atl. 1104; Seaman v. Borough of Washington, 172 Pa. 467, 33 Atl. 756; Cherry v. City of Rock Hill, 48 S. C. 553, 26 S. E. 798.

[282] Flicken v. City of Atlanta, 114 Ga. 970, 41 S. E. 58; Morton v. City of Burlington, 106 Iowa, 50; Woodbury v. Inhabitants of Beverly, 158 Mass. 245; Lotze v. City of Cincinnati, 61 Ohio St. 272, 55 N. E. 828; Philadelphia Ball Club v. City of Philadelphia, 182 Pa. 362, 38 Atl. 357.

[283] City of Burlington v. Gilbert, 31 Iowa, 356; Dore v. City of Milwaukee, 42 Wis. 108.

[284] Larrabee v. Town of Cloverdale, 131 Cal. 96, 63 Pac. 143; Brown v. Webster City, 115 Iowa, 511, 88 N. W. 1070; Gibson v. Owens, 115 Mo. 258; Stowers v. Gilbert, 156 N. Y. 600; Smith v. City of Seattle, 20 Wash. 613, 56 Pac. 389.

* 6 Curr. Law, 730.

property of a public corporation cannot be controlled or transferred in such a manner as to effect a diversion of its use as a public one.[285] The use and control must remain public and this cannot be lost,[286] bargained or legislated away,[287] and this is true whether the property is owned in fee or an easement only has been acquired.

§ 461. Control of property acquired by gift.

A public corporation may acquire by gift or grant, property, the transfer of ownership of which is conditional upon its use for a specific purpose. Familiar instances of this condition are to be found in donations of land for use as public parks or commons [288] or for the construction of some specially designated public building.[289] The use of this property is public in its character and the rule, therefore, stated in the preceding section with reference to a diversion of that use applies and the further principle obtains that a public corporation or even the sovereign cannot, without the consent of the donor, put the property to a use other than that included within the original condition.[290]

§ 462. Rights of abutting owners.

A highway, as already defined, is a public way used for the purpose of public travel, for passing and repassing and as a mode of

[285] Cook County v. City of Chicago, 167 Ill. 109; City of St. Paul v. Chicago & St. P. R. Co., 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L. R. A. 184; Simon v. Northup, 27 Or. 487, 40 Pac. 560, 30 L. R. A. 171.

[286] Bailey v. Culver, 84 Mo. 531; Dummer v. Selectmen of Jersey City, 20 N. J. Law (Spencer) 86.

[287] City of Shreveport v. Walpole, 22 La. Ann. 526; Reighard v. Flinn, 189 Pa. 355, 42 Atl. 23, 43 L. R. A. 502; Franklin County v. Gills, 96 Va. 330, 31 S. E. 507; Gilman v. City of Milwaukee, 55 Wis. 328; Meyers v. Hudson County Elec. Co., 63 N. J. Law, 573, 44 Atl. 713; Gleason v. City of Cleveland, 49 Ohio St. 431, 31 N. E. 802; Ransom v. Boal, 29 Iowa, 68.

[288] Davenport v. Buffington, 97 Fed. 234, 46 L. R. A. 377, 38 C. C. A. 453; Village of Princeville v. Auten, 77 Ill. 327; Price v. Thompson, 48 Mo. 361; Church v. City of Portland, 18 Or. 74.

[289] Church v. City of Portland, 18 Or. 73, 22 Pac. 528, 6 L. R. A. 259.

[290] Crampton v. Zabriskie, 101 U. S. 601; Davenport v. Buffington, 97 Fed. 234, 38 C. C. A. 453, 46 L. R. A. 377; Cummings v. City of St. Louis, 90 Mo. 261; Newell v. Town of Hancock, 67 N. H. 244; Seward v. City of Orange, 59 N. J. Law, 331, 35 Atl. 799.

access to abutting property. The sole basis of the right of acquisition of land from private owners for this purpose is its proposed public use for the well recognized purposes to which a public highway may be put. There are two parties interested; the public corporation holding the nominal title in trust for the public for its use and benefit as a public highway and its legitimate purposes, and the original owner of the property whose interests are twofold being first based upon the fact of servient ownership [291] and second on the further condition that, as an abutting property owner without regard to other circumstances, he is entitled not only to share in the general rights of the public but in addition he has a special and personal interest in access to his property, the improvements which he may have paid for and the further easements of light and air as coming from the highway.[292] All these interests of the abutting owner are property rights [293] and legislative control is limited by their special and peculiar rights.

The legitimate uses to which urban ways are and may be put differ in their degree and character from those which may be imposed upon suburban ways [294] and the rights of abutting property owners may therefore vary, although the principle is denied in some cases.[295]

§ 463. Abutter's special rights.

One of the special rights of property owners is that of lateral support; he is entitled to the use of his land in its natural condi-

[291] Town of Suffield v. Hathaway. 44 Conn. 521; Esty v. Baker, 48 Me. 495.

8 Curr. Law, 70.

[292] Smith v. McDowell, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393; Longworth v. Sedevic, 165 Mo. 221, 65 S. W. 260; Lahr v. Metropolitan El. R. Co., 104 N. Y. 268; Wolfe v. Pearsons, 114 N. C. 621, 19 S. E. 264.

[293] Story v. New York El. R. Co., 90 N. Y. 122; Lahr v. Metropolitan El. R. Co., 104 N. Y. 269; Reed v. State, 108 N. Y. 407; Dillenbach v. City of Xenia, 41 Ohio St. 207.

[294] Montgomery v. Santa Ana Westminister R. Co., 104 Cal. 186, 37 Pac. 786, 25 L. R. A. 654; Cater v. North Western Tel. Exch. Co., 60 Minn. 539, 28 L. R. A. 310; Van Brunt v. Town of Flatbush, 128 N. Y. 50, 27 N. E. 973; Lockhart v. Craig St. R. Co., 139 Pa. 419, 21 Atl. 26; Zehren v. Milwaukee Elec. R. & L. Co., 99 Wis. 83, 441 L. R. A. 575.

[295] Eels v. American Telephone & Tel. Co., 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640; Palmer v. Larchmont Elec. Co., 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672; Lewis, Em. Dom. (2 Ed.) §§ 91c et seq.

tion,[296] and in common with the public to the use of the highway but in addition, to what may be termed by means or from a highway [297] and also the access to his property from it.[298] The general right of a public corporation to improve, repair, maintain or control public highways is, therefore, limited again by these special and peculiar rights of the abutting owner and action on the part of public authorities, affirmative or negative in its character that may cause the impairment or destruction of access to abutting property [299] or its use of the light and air as naturally available,[300] will result clearly in a corporate liability. These rights, it has been repeatedly held, are property and vested rights incapable of damage or destruction without the payment of compensation.[301]

Neither have public authorities any power to regulate or control the use of private abutting property where such use does not interfere with the legitimate purposes for which the highway was created.[302] Utilitarian purposes and not ornamental determine in general the legitimate uses of the highway.

§ 464. Use of highway by abutter.

In the case of land acquired for highway purposes, a public corporation is limited in its control and use of it by its character as a public highway, although acquired in fee.[303] Where the title

[296] Gilmore v. Driscoll, 122 Mass. 199; Keating v. City of Cincinnati, 38 Ohio St. 141.

[297] Story v. New York El. R. Co., 90 N. Y. 122; Drucker v. Manhattan R. Co., 160 N. Y. 157.

[298] Bigelow v. Ballerino, 111 Cal. 559, 44 Pac. 307; Chesapeake & P. Tel. Co. v. MacKenzie, 74 Md. 36; Holloway v. Southmayd, 139 N. Y. 390; Frater v. Hamilton County, 90 Tenn. 661, 19 S. W. 238; Lewis, Eminent Domain (2d Ed.) § 91e, p. 170.

[299] Hart v. Buckner (C. C. A.) 54 Fed. 925; Fossion v. Landrey, 123 Ind. 136, 24 N. E. 96; Gustafson v. Hamm, 56 Minn. 334, 22 L. R. A. 565; Kinnear Mfg. Co. v. Beatty, 65 Ohio St. 264, 62 N. E. 341.

[300] First Nat. Bank of Montgomery v. Tyson, 133 Ala. 459, 32 So. 144, 59 L. R. A. 399.

[301] See cases cited generally in this section. See this question fully considered in the N. Y. Elevated R. R. Cases, notably Story v. New York El. R. Co., 90 N. Y. 122, and Lahr v. Metropolitan El. R. Co., 104 N. Y. 268. See also, Lewis, Em. Dom. (2d Ed.) §§ 91e et seq., citing many cases.

[302] City of St. Louis v. Dorr, 145 Mo. 466, 41 S. W. 1094, 42 L. R. A. 636; Thompson v. Androscoggin River Co., 54 N. H. 545; City of Philadelphia v. Linnard, 97 Pa. 242.

[303] Rummel v. New York & W. R. Co., 30 N. Y. St. Rep. 235, 9 N. Y. Supp. 404.

8 Curr. Law, 70.

acquired is an easement, the degree of control and possession is determined by the extent of the grant.[304] An abutting property owner transferring an easement only to the public authorities is entitled, by the weight of authority, to the use of such portions of the highway as may not be occupied or intended for the traveled way and its repair for such private and personal use as will not be inconsistent with, destroy or impair the use of the land as a highway,[305] though by this physical possession and use, no prescriptive rights can be acquired.[306] In this respect, however, a distinction has been made between urban and suburban ways, the principle applying that rights of the public in the latter may be lost by prescription where the use and possession has been of such a character as to create a prescriptive right.[307] In some states it has been held that a statute of limitations applies to municipal corporations the same as to private individuals.[308] The better reasons and the great weight of authority, however, support the rule that no right in public highways can be obtained by adverse use.

The extent of the title acquired in respect to the right to use

[304] Village of Brooklyn v. Smith, 104 Ill. 429; Julien v. Woodsmall, 82 Ind. 568; Bean v. Coleman, 44 N. H. 539; Woodring v. Forks Tp., 28 Pa. 355.

[305] City Council of Montgomery v. Parker, 114 Ala. 118, 21 So. 452; Smith v. McDowell, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393; Burr v. Stevens, 90 Me. 500, 36 Atl. 547; Towne v. City of Newton, 167 Mass. 311, 45 N. E. 745; Flynn v. Taylor, 127 N. Y. 596, 28 N. E. 418; Raymond v. Keseberg, 84 Wis. 302, 54 N. W. 612, 19 L. R. A. 643.

[306] London & San Francisco Bank v. City of Oakland, 90 Fed. 691; Harn v. Common Council of Dadeville, 100 Ala. 199, 14 So. 9; Ames v. City of San Diego, 101 Cal. 390, 35 Pac. 1005; Hibbard, Spencer, Bartlett & Co. v. City of Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; Laing v. United N. J. R. & Canal Co., 54 N. J. Law, 576; Driggs v. Phillips, 103 N. Y. 77; Commonwealth v. Moorehead, 118 Pa. 344, 12 Atl. 424; Ralston v. Town of Weston, 46 W. Va. 544, 33 S. E. 326; Elliott, Roads & Streets, §§ 882 et seq. See, also, Abbott, Mun. Corp. § 824.

[307] Black v. O'Hara, 54 Conn. 17; Webster v. City of Lincoln, 56 Neb. 502, 76 N. W. 1076; Lessee of Cincinnati v. First Presbyterian Church, 8 Ohio, 299. But see Heddleston v. Hendricks, 52 Ohio St. 460, 40 N. E. 408. See, also, Ralston v. Town of Weston, 46 W. Va. 544, 33 S. E. 326, overruling the earlier case of City of Wheeling v. Campbell, 12 W. Va. 36, one of the most frequently cited cases.

[308] Clements v. Anderson, 46 Miss. 581; Oxford Tp. v. Columbia, 38 Ohio St. 87; Evans v. Erie County, 66 Pa. 222; Knight v. Heaton, 22 Vt. 480.

materials found within the limits of a highway is again a determining consideration. Where an easement only is acquired, the public authorities have no right to any of the materials which may be found within the limits of the highway except such as are necessary to improve or maintain the highway at that immediate place,[309] although some authorities extend this right to the full length of the particular highway.[310] Where the corporation has acquired a fee, its right in respect to the use of materials is largely increased and practically coextensive with the rights of an owner of land in fee simple.[311] The limitation exists, however, that the materials may be used only for the purpose of constructing, repairing or maintaining highways within the limits of the corporation. An abutter, although owning the fee of the land upon which a highway is located cannot remove stone, earth or other material from within its limits so as to impair or destroy its present or prospective use as a highway.[312] The relative rights of the abutting owner and the public corporation in and to the materials found in the highways are dependent, to some extent, upon the character of the way, whether urban or suburban.

§ 465. Abutter's rights when highway is devoted to new or unusual use.

A highway when acquired from the original owner by whatever method passes to the public corporation in trust for the public for its use as a highway and the owner at that time is supposed to be compensated for all the damages or injuries which he may have sustained, by reason of the use and the acquirement of his property for highway purposes, unless special ones are allowed by statute as in the case of a change of grade.*

The use of the highway as a means of travel includes, ordinarily,

[309] Rawls v. Tallahassee Hotel Co., 43 Fla. 288, 31 So. 237; City of Macon v. Hill, 58 Ga. 595; Bent v. Emery, 173 Mass. 495, 53 N. E. 910; Cuming v. Prang, 24 Mich. 514; Rich v. City of Minneapolis, 40 Minn. 82, 41 N. W. 455; Robert v. Sadler, 104 N. Y. 229, 10 N. E. 428;.

[310] Bundy v. Catto, 61 Ill. App. 209; Robert v. Sadler, 37 Hun (N. Y.) 377.

[311] City of La Salle v. Matthiessen & Hegeler Zinc Co., 16 Ill. App. 69.

[312] City Council of Montgomery v. Parker, 114 Ala. 118; Union Coal Co. v. City of La Salle, 136 Ill. 119, 12 L. R. A. 326; Erwin v. Central Union Tel. Co., 148 Ind. 365.

* 8 Curr. Law, 71.

the usual mode or means of travel existing at the time of the establishment of the street or those that can be reasonably anticipated.

A new or unusual method of travel may come into use and the question then arises of the right of the abutting property owner to recover compensation for the use of his property in this manner. This right is partly determined by the character of the title acquired by the corporation, whether an easement or a fee only, and the consequent extent of control by the public.[313] Where an easement only is acquired, the weight of authority seems to give the abutting property owner the right to claim additional compensation for the imposition of a new or unusual burden or servitude upon property acquired from him,[314] and the fact that the highway may be held in fee would deny the right in these instances, though some authorities hold otherwise. The fact that a highway may be either suburban or urban in its character is also a condition determining the relative rights of the public and the abutting property owner.

§ 466. Obstructions in a highway.

The fundamental idea of a highway dedication is that land so used is set apart to the entire community for such public use and purposes as a means of passing and repassing, as the character of the highway, whether urban or suburban, seems to require. The primary use and purpose is public travel. The burden imposed upon the land so acquired and used, whether an easement only or a fee, is the right of the public authorities to construct and maintain thereon a safe and convenient roadway which shall, at all times, be open and free for public use as a means of travel.[315]

The legislature however, or one of its properly delegated agencies may, by its action, authorize the use of a street in such a manner as will cause an obstruction and which, without such authority, would be regarded as illegal and a nuisance.[316]

[313] Elliott, Roads & Streets, §§ 206 et seq.

[314] City of Richmond v. Smith, 148 Ind. 294; State v. Laverack, 34 N. J. Law, 201. See post, sections on use of streets by railways; Taylor v. Portsmouth, K & Y. St. R. Co., 91 Me. 193, 39 Atl. 560; Cater v. North Western Tel. Exch. Co., 60 Minn. 539, 28 L. R. A. 310.

[315] Jackson v. People, 9 Mich. 111; Graves v. Shattuck, 35 N. H. 257.

8 Curr. Law, 89.

[316] Dannenberg v. City of Macon, 114 Ga. 174, 39 S. E. 880; Garrett

The question of whether a use of a highway may or may not be an obstruction is entirely separate and distinct from the right of an abutting owner to receive compensation for that use. The legislature may authorize obstructions, but it cannot deprive an abutting owner of his right to compensation by the legislative imposition upon a highway of an additional burden or servitude and one which was not contemplated at the time of the dedication of the highway and for which the owner at that time received no compensation.

§ 467. Classification of obstructions and rule in respect to permanent.

Obstructions may be classed as permanent, temporary and recurring in their character and the general principle applies, that a legally created highway cannot be occupied by buildings [317] or their adjuncts; [318] gates and fences,[319] ditches,[320] or other permanent structures and improvements [321] which interfere with the primary purpose of the way.

v. Janes, 65 Md. 260; Cushing v. City of Boston, 128 Mass. 330; Jorgensen v. Squires, 144 N. Y. 280, 39 N. E. 373; Taylor v. Portsmouth, K. & Y. St. R. Co., 91 Me. 193, 39 Atl. 560.

[317] First Nat. Bank v. Tyson, 133 Ala. 459, 32 So. 144, 59 L. R. A. 399; McCormick v. South Park Com'rs, 150 Ill. 516, 37 N. E. 1075; Attorney General v. Vineyard Grove Co., 181 Mass. 507, 64 N. E. 75; Commonwealth v. Young Men's Christian Ass'n of Warren, 169 Pa. 24, 32 Atl. 121.

[318] First Nat. Bank v. Tyson, 133 Ala. 459, 32 So. 144, 59 L. R. A. 399; Hibbard v. City of Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; State v. Kean, 69 N. H. 122, 45 Atl. 256, 48 L. R. A. 102; Broadbelt v. Loew, 162 N. Y. 642, 57 N. E. 1105; Commonwealth v. Dicken, 145 Pa. 453, 22 Atl. 1043.

[319] Farlow v. Town of Camp Point, 186 Ill. 256; City of Mt. Clemens v. Mt. Clemens Sanitarium Co., 127 Mich. 115, 86 N. W. 537; Knowles v. Pennsylvania R. Co., 175 Pa. 623, 34 Atl. 974.

[320] City of Lewiston v. Booth, 3 Idaho, 692, 34 Pac. 809.

[321] Helm v. McClure, 107 Cal. 199; Snyder v. City of Pulaski, 176 Ill. 397, 52 N. E. 62, 44 L. R. A. 407; Dantzer v. Indianapolis R. Co., 141 Ind. 604, 34 L. R. A. 769; Tittabawassee Highway Com'rs v. Sperling, 120 Mich. 493, 79 N. W. 693; Beecher v. Newark Street & Water Com'rs, 65 N. J. Law, 307, 47 Atl. 466; Bates v. Holbrook, 171 N. Y. 460, 64 N. E. 181; Com. v. Pittston Ferry Bridge Co., 176 Pa. 394, 35 Atl. 240.

§ 468. Wires and poles as permanent obstructions.

It can safely be said that without legislative permission directly or indirectly given the erection and maintenance of poles and wires, in a legally established highway, is considered a public obstruction and nuisance, materially interfering with the proper use of the highway and subject to removal.[322] The grant, however, of such authority removes their character as an illegal obstruction but does not eliminate the question of whether this use is not an additional burden or servitude for which the abutting owner is entitled to compensation. The courts are at variance upon this latter question. In Indiana, Louisiana, Massachusetts, Minnesota, Missouri, Michigan, Montana and Pennsylvania,[323] it has been held that an easement of a highway is for intercommunication and the transmission of intelligence as well as for travel and transportation; that when new modes of travel and new means of communication become necessary, the public has the right to use them and no new burden is imposed unless inconsistent with the old use and that if it remains unimpaired, the abutting owner has no reason to complain. On the other hand some of the Federal courts and the states of Illinois, Kentucky, New Jersey, New York, Nebraska, Maryland, Mississipppi, Ohio, Pennsylvania, Virginia, Wisconsin and Washington,[324] have decided that highways were originally intended pri-

[322] Dickey v. Maine Tel. Co., 46 Me. 483; Patton v. City of Chattanooga, 108 Tenn. 197, 65 S. W. 414. 8 Curr. Law, 64.

[323] Magee v. Overshiner, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370; Irwin v. Great Southern Tel. Co., 37 La. Ann. 63; Pierce v. Drew, 136 Mass. 75; People v. Eaton, 100 Mich. 208, 24 L. R. A. 721; Cater v. North Western Tel Exch. Co., 60 Minn. 539, 63 N. W. 111, 28 L. R. A. 310; Hershfield v. Rocky Mountain Bell Tel. Co., 12 Mont. 102; Julia Bldg. Ass'n v. Bell Tel. Co., 88 Mo. 258.

[324] Pacific Postal Tel. Cable Co. v. Irvine, 49 Fed. 113; Postal Telegraph Cable Co. v. Eaton, 170 Ill. 513, 49 N. E. 365, 39 L. R. A. 722; East Tennessee Tel. Co. v. City of Russellville, 106 Ky. 667, 51 S. W. 308; Chesapeake & P. Tel. Co. v. Mackenzie, 74 Md. 36; Stowers v. Postal Tel. Cable Co., 68 Miss. 559, 3 Am. Electrical Cas. 855, 12 L. R. A. 864; Eels v. American Telephone & Tel. Co., 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640; Blashfield v. Empire State Telephone & Tel. Co., 147 N. Y. 520, 42 N. E. 2; Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022; Krueger v. Wisconsin Tel. Co., 106 Wis. 96, 50 L. R. A. 298; Hewitt v. W. U. Tel. Co., 13 Wash. L. R. 466; Abbott, Mun. Corp. §§ 832 et seq.; Elliott, Roads & St. (2d Ed.) §§ 705, 706 and 816

marily for travel and transportation and that though they were designed also for the transmission of intelligence and the telephone and telegraph are used for that purpose, yet this mode of use is so entirely different from the old one and necessitates such a permanent occupation of the soil that it cannot be supposed that the landowner ever contemplated such a use and occupation; that the primary law of the highway is motion and whether vehicles are used or intelligence transmitted, the vehicles must move and the intelligence be transmitted by some moving body which passes along the highway either on or over or perhaps under it, but which cannot permanently appropriate any part of it without giving to the abutting owner the right of compensation for the actual injury to his property or the right to use the same.

§ 469. Conditions imposed for use of highway by poles and wires.

Legislative permission, directly or indirectly given, is necessary for a legal use of a highway or street for wires whether these are strung upon poles or placed in conduits under the surface,[325] and the legislature[326] or one of its subordinate agencies,[327] notably, municipal corporations proper, have, in a grant of the right to telegraph, telephone or electric lighting companies to use highways including streets, the power to impose such con-

et seq.; Joyce, Elec. Law, §§ 295–320; Lewis, Em. Dom. (2d Ed.) §§ 131 et seq. and § 226.

[325] Western Union Tel. Co. v. City of New York, 38 Fed. 552, 3 L. R. A. 449; Southern Bell Telephone & Tel. Co. v. City of Richmond, 103 Fed. 31, 44 C. C. A. 147, affirming 98 Fed. 671; Abbott v. City of Duluth, 104 Fed. 833; City of Toledo v. Western Union Tel. Co., 107 Fed. 10, 52 L. R. A. 730; City of Morristown v. East Tennessee Tel. Co., 115 Fed. 304; People v. Central Union Tel. Co., 192 Ill. 307, 61 N. E. 428; Coverdale v. Edwards, 155 Ind. 374, 58 N. E. 495; North Western Tel. Exch. Co. v. City of Minneapolis, 81 Minn. 140, 83 N. W. 527, affirmed on rehearing, 81 Minn. 140, 86 N. W. 69, 53 L. R. A. 175; City of St. Paul v. Freedy, 86 Minn. 350, 90 N. W. 781; Duke v. Central N. J. Tel. Co., 53 N. J. Law, 341, 11 L. R. A. 664; City of Zanesville v. Zanesville Tel. & Tel. Co., 64 Ohio St. 67, 59 N. E. 781, 52 L. R. A. 150; People's Tel. & Tel. Co. v. Berks & D. Turnpike Road, 199 Pa. 411, 49 Atl. 284; State v. City of Sheboygan, 111 Wis. 23, 86 N. W. 657.

8 Curr. Law, 64.

[326] See cases cited in two preceding notes.

[327] Abbott v. City of Duluth, 104 Fed. 833; Thompson v. Alameda County Sup'rs, 111 Cal. 553, 44 Pac. 230.

ditions as may seem advisable and necessary for the maintenance of the highway in a safe condition for public use [328] and its use for these purposes in such a manner as to interfere in the least possible degree with the use of the street for ordinary purposes of travel [329] and with the abutting owner's access to his property, or other rights to which he may be entitled.[330] A new condition, however, cannot be required when it would be inconsistent with or impair a contract right already granted.[331] A grant of the right to use streets for telephone poles, though not a franchise, becomes, when the privileges granted are accepted, a binding contract between the parties which cannot be revoked or rescinded except for cause.[332]

One of the conditions ordinarily imposed is the payment of a license fee for the use of the street which may be either a general charge covering the operations of the company within specified limits and for a specified time or one based upon the lineal feet of conduits used or the number of poles erected and used,[333]

[328] Chicago General St. R. Co. v. Ellicott, 88 Fed. 941; Michigan Tel. Co. v. City of Charlotte, 93 Fed. 11; Com. v. City of Boston, 97 Mass. 555; Chalmers v. Paterson, P. & S. Tel. Co., 66 N. J. Law, 41, 48 Atl. 993; State v. City of Sheboygan, 111 Wis. 23, 86 N. W. 657.

[329] Sheffield v. Central Union Tel. Co., 36 Fed. 164; Southern Bell Telephone & Tel. Co. v. City of Richmond, 103 Fed. 31, 44 C. C. A. 147, affirming 98 Fed. 671; City of Toledo v. Western Union Tel. Co., 107 Fed. 10, 52 L. R. A. 730; State v. Murphy, 130 Mo. 10, 31 S. W. 594, 31 L. R. A. 798; Lundeen v. Livingston Elec. Light Co., 17 Mont. 32, 41 Pac. 995.

[330] Sunset Telephone & Tel. Co. v. City of Medford, 115 Fed. 202; Bradley v. Southern New England Tel. Co., 66 Conn. 559, 34 Atl. 499, 32 L. R. A. 280; McDermott v. Warren, B. & S. St. R. Co., 172 Mass. 197, 51 N. E. 972; Hershfield v. Rocky Mountain Bell Tel. Co., 12 Mont. 102; Marshall v. City of Bayonne, 59 N. J. Law, 101; Memphis Bell Tel. Co. v. Hunt, 84 Tenn. (16 Lea) 456.

[331] Sunset Telephone & Tel. Co. v. City of Medford, 115 Fed. 202; Callum v. District of Columbia, 15 App. D. C. 529.

[332] Sunset Telephone & Tel. Co. v. City of Medford, 115 Fed. 202; Chesapeake & P. Tel. Co. v. City of Baltimore, 89 Md. 689, 43 Atl. 784; Clarksburg Elec. Light Co. v. City of Clarksburg, 47 W. Va. 739, 35 S. W. 994, 50 L. R. A. 142.

[333] Western Union Tel. Co. v. City of Fremont, 39 Neb. 692, 26 L. R. A. 698. But see Sunset Telephone & Tel. Co. v. City of Medford, 115 Fed. 202. See, also, City of St. Louis v. Western Union Tel. Co., 148 U. S. 92, reversing 39 Fed. 59, rehearing denied 149 U. S. 465; Chesapeake & P. Tel. Co. v. City of Baltimore, 89 Md. 689, 43 Atl. 784,

and another is the reservation of the right on the part of public authorities to regulate the charges to be made for services rendered by these corporations.[334]

§ 470. Authority for occupation of highways by railroads.

The highways of the country in common with all other public property are under the direct and ultimate authority of the different state legislatures which have the continuing right to grant the authority to persons or corporations to use them in a manner which, without that authority, would render the use a nuisance, an encroachment upon public rights and, therefore, liable to abatement and removal.[335] The necessity for the legislative grant of a right of this character is entirely independent of the question of compensation for private property which may be taken in the large sense of that term in the exercise of the granted right. The legislature may itself directly grant to persons, natural or artificial, the right and power to construct and operate in, along and upon the highways within its jurisdiction, railways of all classes, subject to the exercise of the police power by either state or local officials and an application of those constitutional provisions which forbid the taking of private property for a public use without the payment of just compensation.[336]

It is also competent for the legislature to declare the uses to which public highways may be appropriated and impart to subordinate corporations both permissive and restraining powers in relation to them, and these rights may be exercised as fully and

44 Atl. 1033; City of Chester v. Western Union Tel. Co., 154 Pa. 464, 25 Atl. 1134.

[334] State of Missouri v. Bell Tel. Co., 23 Fed. 539, but see dissenting opinion, Nebraska Tel. Co. v. State, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113. But see City of St. Louis v. Bell Tel. Co., 96 Mo. 623, 2 L. R. A. 278. See, also, Joyce, Elec. Law, c. 23, on the subject of rates and charges; City of St. Louis v. Bell Tel. Co., 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278; State v. City of Sheboygan, 111 Wis. 23, 86 N. W. 657.

[335] Davis v. East Tennessee, V. & G. R. Co., 87 Ga. 605, 13 S. E. 567; Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; County of Stearns v. St. Cloud, M. & A. R. Co., 36 Minn. 425, 32 N. W. 91; Eldert v. Long Island Elec. R. Co., 165 N. Y. 651, 59 N. E. 1122; Lockhart v. Craig St. R. Co., 139 Pa. 419, 21 Atl. 26.

8 Curr. Law, 64.

[336] Daly v. Georgia S. & F. R. Co., 80 Ga. 793, 7 S. E. 146; Reining v. New York L. & W. R. Co., 128 N. Y. 157, 28 N. E. 640, 14 L. R. A. 133; Potts v. Quaker City El. R. Co., 161 Pa. 396, 29 Atl. 108.

as freely as if granted by the legislature itself, subject, however, to such limitations or restrictions as may appear in the original grant.[337]

The use of a highway by a railway whether the grant comes from the state or one of its subordinate agencies may be dependent upon the consent of the abutting owners or a certain proportion of them.[338]

Conversely, the principle also obtains that where an abutting owner is not given rights of the character above indicated, he cannot interfere with or enjoin the construction or operation of a railroad upon a highway.[339]

§ 471. Abutting owner's compensation for use of highways by railways.

The question of the authority or right to use the highways or streets of a community is entirely independent of the question or right of compensation in the abutting owner for the use which may be lawfully granted. The legislature or a legislative body acting under lawful authority cannot by its enactments override constitutional provisions. Private property may be taken and appropriated to a public use in this country, but cannot be taken even for a public use without the payment of just compensation.[340] The question of compensation in respect to the use of a highway by railways will be dependent upon a determination of the question of whether or not a particular authorized use of a highway is one coming within the purposes for which the highway was originally laid out, dedicated and secured.

[337] Detroit Citizens' St. R. Co. v. Detroit R. Co., 171 U. S. 48; Hedrick v. City of Olathe, 30 Kan. 348; Beekman v. Third Ave. R. Co., 153 N. Y. 144, 47 N. E. 277; Lockhart v. Craig St. R. Co., 139 St. 419, 21 Atl. 26.

[338] Doane v. Lake St. El. R. Co., 165 Ill. 510, 36 L. R. A. 97; Lincoln St. R. Co. v. City of Lincoln, 61 Neb. 109, 84 N. W. 802; Orton v. Borough of Metuchen, 66 N. J. Law, 572, 49 Atl. 814; Geneva & W. R. Co. v. New York Cent. & H. R. R. Co., 163 N. Y. 228, 57 N. E. 498; Mt. Auburn Cable R. Co. v. Neare, 54 Ohio St. 153, 42 N. E. 768; Hannum v. Media, M., A. & C. Elec. R. Co., 200 Pa. 44, 49 Atl. 789.

[339] Smith v. East End St. R. Co., 87 Tenn. 626, 11 S. W. 709; Aycock v. San Antonio Brewing Ass'n, 26 Tex. Civ. App. 341, 63 S. W. 953.

[340] City of New Haven v. New Haven & D. R. Co., 62 Conn. 252, 25 Atl. 316, 18 L. R. A. 256.

8 Curr. Law, 70.

§ 472. The use of highways by steam railways regarded as an additional servitude.

The great weight of authority in the United States is to the effect that the use of a highway by a steam railway or commercial road, as it is sometimes called, imposes an additional burden upon the highway; one which was not contemplated or anticipated by the owner at the time of the original creation of the highway as coming within the legitimate uses of a highway and for which he is, therefore, entitled to such compensation as may be awarded him under the protection of and the remedies given him by law.[341] There are some cases holding to the contrary[342] but the better reasons and the great weight of authority, as above stated, are in favor of the right of the abutting owner to recover compensation.

The right of the abutting owner to compensation for an occupation of the street may be dependent in some instances upon the extent of his interest in it. The fee of the highway may be vested in the abutting owner, the public having only an easement for the purpose of travel or other legitimate use.[343] He is then entitled, by the weight of authority, to the use of those portions of the highway not occupied or intended for the traveled way and its repair for such personal and private use as will not be inconsistent with, destroy or impair the use of the land as a highway. In addition, he is also entitled to his rights in common with the public and to his easements of light, air and access.

[341] Western R. of Alabama v. Alabama G. T. R. Co., 96 Ala. 272, 11 So. 483, 17 L. R. A. 474; City of New Haven v. New Haven & D. R. Co., 62 Conn. 252, 25 Atl. 316, 18 L. R. A. 256; Strange v. City of Dubuque, 62 Iowa, 303; Hoffman v. Flint & P. M. R. Co., 114 Mich. 316, 72 N. W. 167; Kaje v. Chicago, St. P., M. & O. R. Co., 57 Minn. 422, 59 N. W. 493; Craig v. Rochester City & B. R. Co., 39 N. Y. 404; White v. Willamette Iron Works Co. v. Oregon R. & Nav. Co., 26 Or. 224, 37 Pac. 1016, 29 L. R. A. 88. See Lewis, Em. Dom. (2d Ed) § 111; Elliott, R. R. § 1087.

8 Curr. Law, 64.

[342] Montgomery v. Santa Ana W. R. Co., 104 Cal. 186, 25 L. R. A. 654; Fulton v. Short Route R. Transfer Co., 85 Ky. 640; De Geofroy v. Merchants' Bridge Terminal R. Co., 179 Mo. 698, 79 S. W. 386; Yates v. Town of West Grafton, 34 W. Va. 783, 12 S. E. 1075. See, also, Mordhurst v. Ft. Wayne & S. W. Traction Co., 163 Ind. 268, 71 N. E. 642; Rische v. Texas Transp Co., 27 Tex. Civ. App. 33, 66 S. W. 324.

[343] Philadelphia & T. R. Co. v. Philadelphia & B. Pass. R. Co., 6 Pa. Dist. R. 487.

The existence of a commercial railroad with its permanent way and exclusive possession to all practical intents and purposes interferes with the rights of the abutting owner in all these respects and he is clearly entitled to compensation.[344]

§ 473. Abutter's rights when fee is in the public.

Where the fee of the highway is vested in the public, the existence of a commercial railroad in a highway still interferes with the abutter's rights as a member of the community and also with his easements of light and air and access and for an impairment or loss of these or any of them, he is as clearly entitled to compensation as if the fee were vested in him.[345] These rights are not at all dependent upon the character of the title resting in the abutting owner.

§ 474. The use of highways by street railways

The considerations given forming a basis for some of the reasons holding the doctrine that the use of a highway by a commercial steam road imposes an additional burden upon it for which the abutting owner is entitled to compensation, have led the courts to the holding by an equally and as great a weight of authority that in the absence of a statute to the contrary [346] the

[344] Alabama G. S. R. Co. v. Collier, 112 Ala. 681; Bond v. Pennsylvania Co., 171 Ill. 508; Strickler v. Midland R. Co., 125 Ind. 412; Theobald v. Louisville, N. O. & T. R. Co., 66 Miss. 279, 6 So. 230, 4 L. R. A. 735; White v. Northwestern North Carolina R. Co., 113 N. C. 610, 18 S. E. 330; Frey v. Duluth, S. S. & A. R. Co., 91 Wis. 309. But see to the contrary Mobile & M. R. Co. v. Alabama Midland R. Co., 116 Ala. 51; Harrison v. New Orleans Pac. R. Co., 34 La. Ann. 462.

[345] Western R. Co. of Ala. v. Alabama G. T. R. Co., 96 Ala. 272, 11 So. 483, 17 L. R. A. 474; Pittsburgh, C., C. & St. L. R. Co. v. Noftsger, 148 Ind. 101, 47 N. E. 332; Adams v. Chicago B. & N. R. Co., 39 Minn. 286, 39 N. W. 629, 1 L. R. A. 493. See, also, Abbott, Mun. Corp. §§ 842 et seq.

8 Curr. Law, 70.

[346] Birmingham Traction Co. v. Birmingham R. & Elec. Co., 119 Ala. 137, 24 So. 502, 43 L. R. A. 233; Canastota Knife Co. v. Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107; Snyder v. Ft. Madison St. R. Co., 105 Iowa, 284, 75 N. W. 179, 41 L. R. A. 345; Briggs v. Lewiston & A. H. R. Co., 79 Me. 363, 10 Atl. 47; Lonaconing M. & F. R. Co. v. Consolidated Coal Co., 95 Md. 630, 53 Atl. 420; Howe v. West End St. R. Co., 167 Mass. 46, 44 N. E. 386; Detroit City R. Co. v. Mills, 85

use of a highway by a street railway does not impose an additional burden or servitude upon it as a legitimate use of the street, one which was intended or anticipated by the original owner and for which, therefore, he is not entitled to compensation. Special damages caused by the negligent or unlawful construction of a street railway may, however, be recovered.[347]

The contrary doctrine. The contrary doctrine is held in the state of New York, and the abutting owner, even where the fee of the street is vested in the public, is entitled to compensation for its occupation by a street railway. The leading case establishing this rule[348] was decided in 1868 and the arguments pro and con are well set out in the majority and the dissenting opinion.

§ 475. Abutting owner. When entitled to compensation.*

The abutting owner, however, irrespective of his interest in the adjoining highway, is entitled to compensation for the occupation of that highway by a surface street railway when that use interferes with or destroys the easements which he possesses as an abutting owner in the access to his property and to light and air. These easements, as already stated, are property rights and

Mich. 634, 48 N. W. 1007; Roebling v. Trenton Pass. R. Co., 58 N. J. Law, 666, 34 Atl. 1090, 33 L. R. A. 129; Merrick v. Intramontaine R. Co., 118 N. C. 1081, 24 S. E. 667; Pennsylvania R. Co. v. Montgomery County Pass. R. Co., 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766; Reid v. Norfolk City R. Co., 94 Va. 117, 26 S. E. 428, 36 L. R. A. 274; Younkin v. Milwaukee, Light, Heat & Traction Co., 120 Wis. 477, 98 N. W. 215; Nellis, St. Surface R. R. pp. 135 et seq. See Lewis, Em. Dom. (2d Ed.) § 115c. See, also, Abbott, Mun. Corp. § 844.

The rule in the text above has been questioned of late in respect to the use of suburban highways by a street or interurban railway, so called. Note the following cases: Cedar Rapids & M. C. R. Co. v. Cummings, 125 Iowa, 430, 101 N. W. 176; Taylor v. Portsmouth, K. & Y. St. R. Co., 91 Me. 193, 39 Atl. 560; Zehren v. Milwaukee Elec. R. & Light Co., 99 Wis. 83, 74 N. W. 538, 41 L. R. A. 575; Newell v. Minneapolis, L. & M. R. Co., 35 Minn. 112, 27 N. W. 839.

8 Curr. Law, 64.

[347] Lorie v. North Chicago City R. Co., 32 Fed. 270.

[348] Craig v. Rochester City & B. R. Co., 39 N. Y. 404; Peck v. Schenectady R. Co., 170 N. Y. 298, 27 N. Y. Law J. 165. The rule in the Craig case followed in obedience to the doctrine of stare decisis. Parker, C. J., dissenting.

* 8 Curr. Law, 70.

where an authorized use of a highway impairs or destroys them, compensation can be recovered,[349]

Elevated railroads. The subject of this paragraph has been chiefly considered in the New York elevated railroad cases. An elevated road is different in its construction and method of operation from an ordinary surface street railroad and because of the resulting interference with the easements of access, light and air, the property owner is entitled to compensation for the use of the street irrespective of the title.[350]

Other street railroads.—The question of whether street railroads operated by other forms of motive power than horse or electricity has been considered in several states and the rule established that so long as they are street railroads proper in their essential characteristics, a difference in motive power will not, because of this fact, make them an additional burden or servitude for which the abutting owner is entitled to recover compensation. A steam motor railroad has been held to come within this rule in the states of Arkansas, Minnesota, Maine and Oregon;[351] while in Tennessee and Michigan[352] the contrary has been held.

§ 476. General summary.

A general rule, so far as one can be stated, in respect to the use of a highway by a railroad, which is a question of law, would, apparently, therefore, from the adopted cases, be as follows: A legitimate use of a highway includes one by a railroad de-

[349] Montgomery v. Santa Ana Westminister R. Co., 104 Cal. 186, 37 Pac. 186, 25 L. R. A. 654; Snyder v. Fort Madison Street Ry. Co., 105 Iowa, 284, 75 N. W. 179, 41 L. R. A. 345; Spencer v. Metropolitan St. R. Co., 120 Mo. 154, 23 S. W. 126, 22 L. R. A. 668; Budd v. Camden Horse R. Co., 61 N. J. Eq. 543, 48 Atl. 1028. But see Colclough v. City of Milwaukee, 92 Wis. 182, 65 N. W. 1039.

[350] In re New York El. R. Co., 70 N. Y. 327; Lahr v. Metropolitan El. R. Co., 104 N. Y. 268; Bischoff v. New York El. R. Co., 138 N. Y. 257. See the subject fully considered in Demarest, El. R. R. Law. See, also, Chicago & E. G. R. Co. v. Loeb, 118 Ill. 211.

[351] Williams v. City Elec. St. R. Co., 41 Fed. 556; Newell v. Minneapolis, L. & M. R. Co., 35 Minn. 112; Briggs v. Lewiston & A. H. R. Co., 79 Me. 363, 10 Atl. 47; Paquet v. Mt. Taber St. R. Co., 18 Or. 233, 22 Pac. 906.

[352] East End St. R. Co. v. Doyle, 88 Tenn. 747, 13 S. W. 936, 9 L. R. A. 100; Nichols v. Ann Arbor & Y. St. R. Co., 87 Mich. 361, 49 N. W. 538.

voted exclusively to street passenger travel and the tracks of which conform to the surface of the street.[353] This rule would exclude, therefore, a commercial steam road because of the character of its traffic;[354] an underground or elevated road because of the elevation or depression of the tracks and the necessary construction of a substructure or superstructure.[355] It would exclude also a road not conforming to the surface of the street but with cuts and fills.[356] A difference in motive power, in speed of trains or size and weight of equipment, would not affect the question and are not generally regarded as determining elements.[357] The discussion in this and the preceding sections is one which involves the question alone of the abutter's right to additional compensation or, stated differently, the question of whether a particular use is an additional servitude or burden for which a recovery for damages can be had.

§ 477. Railways in streets.

As already stated, the dominant power of control of public highways is vested in the legislature which has full authority to grant the right for legitimate uses of their occupation to rail-

[353] Potts v. Quaker City El. R. Co., 12 Pa. Co. Ct. R. 593. See cases cited § 472, ante.

[354] See cases cited under § 474, ante.

[355] Koch v. North Ave. R. Co., 75 Md. 222, 23 Atl. 463, 15 L. R. A. 377; In re New York Dist. R. Co., 107 N. Y. 42, 14 N. E. 187; Potts v. Quaker City El. R. Co., 161 Pa. 396. But see Doane v. Lake St. El. R. Co., 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97; Sears v. Crocker, 184 Mass. 586.

[356] Interstate Consol. Rapid Transit R. Co. v. Early, 46 Kan. 197; Sherlock v. Kansas City B. R. Co., 142 Mo. 172, 43 S. W. 629; Murray Hill Land Co. v. Milwaukee Light, Heat & Traction Co., 110 Wis. 555, 86 N. W. 199. But see Underwood v. City of Worcester, 177 Mass. 173, 58 N. E. 589.

[357] Chicago General R. Co. v. Chicago City R. Co., 186 Ill. 219, 57 N. E. 822, 50 L. R. A. 734; Snyder v. Ft. Madison St. R. Co., 105 Iowa, 284, 41 L. R. A. 345; Nieman v. Detroit Suburban St. R. Co., 103 Mich. 256, 61 N. W. 519; People v. Board of Railroad Com'rs, 158 N. Y. 711, 53 N. E. 1129; Pennsylvania R. Co. v. Montgomery County Pass. R. Co., 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766; Taggart v. Newport St. R. Co., 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205; City of Houston v. Houston, Belt & M. P. R. Co., 84 Tex. 581, 19 S. W. 786. See, also, Abbott, Mun. Corp. § 850, citing many cases.

roads and this without consulting or conferring with the public authorities of a particular subordinate public corporation within the limits of which the highway may be located.[358] The authority may also be given to such a subordinate public corporation to be exercised by it either exclusively or in conjunction with the legislature.[359] The language of the grant of authority whether an act of the legislature or a resolution or ordinance of some municipal council or body will determine the extent of the rights granted and whatever their character in this respect, they can only be given because of a proposed public service or use. Irrespective of the question of compensation to the abutting owner, the basic right of a railroad of any class for the occupation of a highway or any portion of it is this public use.[360]

The grant of authority may, by its terms, be regarded as a privilege, irrevocable in its character or only upon certain conditions and, therefore, a contract obligation protected by the Federal constitution against an unwarranted interference with the rights acquired under it,[361] or it may be considered as a

[358] Citizens' St. R. Co. v. City of Memphis, 53 Fed. 715; Birmingham R. & E. Co. v. Birmingham Traction Co., 122 Ala. 349; Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; Lincoln St. R. Co. v. City of Lincoln, 61 Neb. 109, 84 N. W. 802; People's Rapid Transit Co. v. Dash, 125 N. Y. 93, 26 N. E. 25, 10 L. R. A. 728.

8 Curr. Law, 64.

[359] Brown v. Atlanta R. & P. Co, 113 Ga. 462, 39 S. E. 71; Cook County v. Great Western R. Co., 119 Ill. 218; New Bedford & F. St. R. Co. v. Achushnet St. R. Co., 143 Mass. 200, 9 N. E. 536; Montclair Military Academy v. North Jersey Street R. Co., 65 N. J. Law, 328, 47 Atl. 890; Reeves v. Philadelphia Traction R. Co., 152 Pa. 153, 25 Atl. 516; Dooly Block v. Salt Lake Rapid Transit Co., 9 Utah, 31, 33 Pac. 229, 24 L. R. A. 610; Jordan v. City of Benwood, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519; City of South Pasadena v. Los Angeles Terminal R. Co., 109 Cal. 315, 41 Pac. 1093; Tudor v. Chicago & S. S. Rapid Transit Co., 164 Ill. 73, 46 N. E. 446, 36 L. R. A. 379; State v. Lindell R. Co., 151 Mo. 162, 52 N. W. 248; West Jersey Traction Co. v. Shivers, 58 N. J. Law, 124, 33 Atl. 55; Wood v. City of Seattle, 23 Wash. 1, 62 Pac. 135; Yates v. Town of West Grafton, 34 W. Va. 783, 12 S. E. 1075.

[360] Florida Cent. & P. R. Co. v. Ocala St. & S. R. Co., 39 Fla. 306, 22 So. 692; Hibbard, Spencer, Bartlett & Co. v. City of Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; Heath v. Des Moines & St. L. R. Co., 61 Iowa, 11; Gustafson v. Hamm, 56 Minn. 334, 57 N. W. 1054, 22 L. R. A. 565; Brown v. Chicago Great Western R. Co., 137 Mo. 529, 38 S. W. 1099.

[361] Baltimore Trust and Guarantee Co. v. City of Baltimore, 64 Fed. 153; Fair Haven & W. R. Co. v.

mere license revocable at pleasure and conveying no rights of the character above indicated.[362]

§ 478. Construction of grant of authority.

The rules of interpretation or construction to be applied in a particular instance will depend upon the nature of the grant. If this is one exclusive in its character or in derogation of common right, the rule of strict construction will apply and no privileges not clearly appearing will be read into the instrument through an application of the principle of implied powers.[363] Where the grant is not of the character above indicated, a more liberal rule of interpretation will be applied in the determination of ambiguous clauses or words.[364] It might be said, however, in this connection, that where it clearly appears from the language of the grant that certain powers and rights were given to be exercised, that no rule of construction should be adopted which will defeat or impair this grant,[365] or so long as the effect

City of New Haven, 74 Conn. 102, 49 Atl. 863; Atlanta R. & P. Co. v. Atlanta Rapid Transit Co., 113 Ga. 481, 39 S. E. 12; Harvey v. Aurora & G. R. Co., 186 Ill. 283, 57 N. E. 857; Electric R. Co. v. City of Grand Rapids, 84 Mich. 257, 47 N. W. 567; Union Depot R. Co. v. Southern R. Co., 105 Mo. 562, 16 S. W. 920; City of New York v. Eighth Ave. R. Co., 118 N. Y. 389, 23 N. E. 550; City of Columbus v. Columbus St. R. Co, 45 Ohio St. 98, 12 N. E. 651.

[362] Southern R. Co. v. Atlanta R. & P. Co., 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125; City R. Co. v. Citizens' St. R. Co. (Ind.) 52 N. E. 157; Lake Roland El. R. Co. v. City of Baltimore, 77 Md. 352, 26 Atl. 510, 20 L. R. A. 126.

[363] Hopkins v. Baltimore & P. R. Co., 17 D. C. (6 Mackey) 311; Southern & N. A. R. Co. v. Highland Ave. & B. R. Co., 119 Ala. 105, 24 So. 114; Harvey v. Aurora & G. R. Co., 186 Ill. 283, 57 N. E. 857; Thompson v. Citizens' St. R. Co., 152 Ind. 461, 53 N. E. 462; City of Baltimore v. Chesapeake & P. Tel. Co., 92 Md. 692, 48 Atl. 465; Browne v. Turner, 174 Mass. 150, 54 N. E. 510; Wabash R. Co. v. City of Definance, 52 Ohio St. 262, 40 N. E. 89

8 Curr. Law, 63.

[364] City of Owensboro v. Owensboro & N. R. Co., 19 Ky. L. R. 449, 40 S. W. 916; In re Brooklyn El. R. Co., 125 N. Y. 434, 26 N. E. 474.

[365] Ransom v. Citizens' R. Co., 104 Mo. 375, 16 S. W. 416; Paterson R. Co. v. Grundy, 51 N. J. Eq. 213, 26 Atl. 788.

The rule of strict construction in refrence to motive power has been adopted in the following cases: Omaha Horse R. Co. v. Cable Tramway Co., 30 Fed. 324; Citizens' St. R. Co. v. Jones, 34 Fed. 579; Farrell v. Winchester Ave. R. Co., 61 Conn. 127, 23 Atl. 757; Indianapolis Cable St. R. Co. v. Citizens' St. R. Co.,

of an act is not injurious to the public interests that rule should be adopted which tends to facilitate the success of the corporate enterprise rather than one which tends to defeat it.[366] The usual rule also obtains that the question of lawful authority is one to be raised solely by the state or the municipal authority in a proceeding brought for that purpose. The doctrine of collateral attack applies as well.[367]

§ 479. Right to impose conditions for use of highways.

A state legislature or a subordinate public corporation to whom the authority has been delegated can, in the grant of the right to either steam or street railroads to use the public highways, impose those conditions which may be considered advisable in respect to the exercise of the granted authority.[368] The

127 Ind. 369, 8 L. R. A. 539; People v. Newton, 112 N. Y. 296, 19 N. E. 831; City of Houston v. Houston City St. R. Co., 83 Tex. 548, 19 S. W. 786.

The liberal rule of construction in respect to motive power has been followed in the following cases: Williams v. City Elec. St. R. Co., 41 Fed. 556; Buckner v. Hart, 52 Fed. 835; Williams v. Citizens' R. Co., 130 Ind. 71, 15 L. R. A. 64; Detroit City R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007; Hudson River Tel. Co. v. Watervliet Co., 135 N. Y. 393, 32 N. E. 148, 17 L. R. A. 674; Lockhart v. Craig St. R. Co., 139 Pa. 419, 21 Atl. 26; Taggart v. Newport St. R. Co., 16 R. I. 668, 19 Atl. 226, 7 L. R. A. 205.

[366] City R. Co. v. Citizens' St. R. Co., 166 U. S. 557; Hooper v. Baltimore City Pass. R. Co., 85 Md. 909, 37 Atl. 359; Detroit Citizens' St. R Co. v. Board of Public Works of City of Detroit, 126 Mich. 554, 85 N. W. 1072; State v. Lindell R. Co., 151 Mo. 162, 52 S. W. 248; Farnum v. Concord Horse R. Co., 66 N. H. 569, 29 Atl. 541; North Jersey St. R. Co. v. South Orange Tp., 58 N. J. Eq. 83, 43 Atl. 53; Asheville St. R. Co. v. West Asheville & S. S. R. Co., 114 N. C. 725, 19 S. E. 697.

[367] Glass v. Memphis & C. R. Co., 94 Ala. 581, 10 So. 215; Chicago Gen. R. Co. v. Chicago City R. Co., 186 Ill. 219, 57 N. E. 822, 50 L. R. A. 734; Quinn v. Shields, 62 Iowa, 129, 17 N. W. 437; People v. Ft. Wayne & E. R. Co., 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752; North v. State, 107 Ind. 356; Junction Pass R. Co. v. Williamsport Pass. R. Co., 154 Pa. 116; Linden Land Co. v. Milwaukee Elec. R. & Light Co., 107 Wis. 493, 83 N. W. 851.

[368] Macon Consol. St. R. Co. v. City of Macon, 112 Ga. 782, 38 S. E. 60; Old Colony R. Co. v. Rockland & A. St. R. Co., 161 Mass. 416, 37 N. E. 370; Rapid R. Co. v. City of Mt. Clemens, 118 Mich. 133, 76 N. W. 318; In re Atlantic El. R. Co, 136 N. Y. 292, 32 N. E. 771; City of Reading v. Union Traction Co., 202 Pa. 571, 52 Atl. 106; Dern v. Salt Lake City R. Co., 19 Utah, 46, 56 Pac. 566; Wood v. City of Seattle,

conditions may roughly be classed as those which have for their object the payment of a tax or license fee for the privilege granted, those which have as their basis an exercise of the police power of the state or those which have for their purpose the maintenance of the highway as nearly as may be in its original condition and its use by the railroad in such a manner as to least interfere with the public travel.

Tickets and transfers or fares. The authorities hold that transportation is a commodity and the property of the one by whom it is supplied. Regulations, therefore, cannot be adopted by a public corporation relative to fares which will, in effect, amount to a taking of property without compensation even under the ostensible exercise of the police power.[369] In particular controversies the relative rights of the parties will be determined by the language of a particular grant.[370]

Police regulations. In regard to conditions based upon the police power, the doctrine is established beyond question and necessarily so that in case of their omission from the grant of authority, the state or its subordinate agencies will still have the power, and a continuing one, to adopt and enforce all necessary measures for the protection of life and property.[371] Familiar illustrations of an exercise of this power in connection with the use of public highways by either steam or street railroads include the adoption of laws or regulations relative to limiting the

23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369. See Nellis, St. Surface R. R. c. 4, pp. 206, 207.

8 Curr. Law, 63.

[369] Ex parte Lorenzon, 128 Cal. 431, 61 Pac. 68, 50 L. R. A. 55; Parker v. Elmira, C. & N. R. Co., 165 N. Y. 274; Ellis v. Milwaukee City R. Co., 67 Wis. 135; Nellis, St. Surface R. R. p. 221. City of Detroit v. Ft. Wayne & B. I. R. Co., 95 Mich. 456, 54 N. W. 958, 20 L. R. A. 79.

[370] City of Indianapolis v. Navin, 151 Ind. 144, 47 N. E. 526, 51 N. E. 80, 41 L. R. A. 340. Validity of three-cent fare ordinance sustained. State v. Omaha & C. B. R. & Bridge Co., 113 Iowa, 30, 84 N. W. 983, 52 L. R. A. 315. City of Cambridge v. Cambridge R. Co., 92 Mass. (10 Allen) 50; Rice v. Detroit, Y. & A. A. R. Co., 122 Mich. 677, 81 N. W. 927, 48 L. R. A.

[371] City of Baltimore v. Baltimore Trust & Guarantee Co., 166 U. S. 673; Jackson & S. Traction Co. v. Commissioners of Railroads, 128 Mich. 164, 87 N. W. 133; Trenton Horse R. Co. v. Inhabitants of Trenton, 53 N. J. Law, 132, 11 L. R. A. 410; Town of Mason v. Ohio River Co., 51 W. Va. 183, 41 S. E. 418.

speed of trains in the streets of cities and towns,[372] requiring the erection of safety gates or the maintenance of flagmen at highways crossings,[373] obstructing streets or blockading crossings,[374] lighting,[375] or fencing its tracks;[376] and in respect to street railroads especially the manner of use of tracks and propelling power,[377] construction or condition of tracks,[378] operation or construction of cars,[379] removal of ice and snow,[380] the making of track repairs,[381] the use of overhead or underground wires,[382] and rate of speed.[383]

[372] Evison v. Chicago, St. P., M. & O. R. Co., 45 Minn. 370, 11 L. R. A. 434; Ruschenberg v. Southern Elec. Co., 161 Mo. 70, 61 S. W. 626.

[373] Hayes v. Michigan Cent. R. Co., 111 U. S. 228; St. Louis, A. & T. H. Co. v. City of Belleville, 122 Ill. 376; Green v. Eastern R., 52 Minn. 79, 53 N. W. 808.

[374] Gude v. State, 76 Ala. 100; St. Louis, A. & T. H. R. Co. v. City of Belleville, 122 Ill. 376, 12 N. E. 680; Cleveland, C., C. & I. R. Co. v. Wynant, 114 Ind. 525; Burger v. Missouri Pac. R. Co., 112 Mo. 238, 20 S. W. 439; State v. Railroad Co., 91 Tenn. 445; Brownell v. Tracy & B. R. Co., 55 Vt. 218.

[375] Newark Pass. R. Co. v. Block, 55 N. J. Law, 605, 27 Atl. 1067, 22 L. R. A. 374.

[376] Hannah v. Metropolitan St. R. Co., 81 Mo. App. 78

[377] Sioux City St. R. Co. v. Sioux City, 138 U. S. 98; Chicago General R. Co. v. Chicago City R. Co., 186 Ill. 219, 57 N. E. 822, 50 L. R. A. 734; Lousiville Bagging Mfg. Co. v. Central Pass. R. Co., 95 Ky. 50, 23 S. W. 592. City of Detroit v. Ft. Wayne & E. R. Co., 90 Mich. 646; State v. King, 104 La. 735, 29 So. 359; In re Third Ave. R. Co., 121 N. Y. 536, 9 L. R. A. 124; Reeves v. Philadelphia Traction Co., 152 Pa. 153, 25 Atl. 516.

[378] City & Suburban R. Co. v. City of Savannah, 77 Ga. 431; Newcomb v. Norfolk W. St. R. Co., 179 Mass. 449, 61 N. E. 42; Washington, A. & Mt. V. R. Co. v. City Council of Alexandria, 98 Va. 344, 36 S. E. 385.

[379] South Covington & C. St. R. Co. v. Berry, 93 Ky. 43, 18 S. W. 1026. State v. Heidenhain, 42 La. Ann. 483. Smoking in street cars. Baltimore & O. R. Co. v. Mali, 66 Md. 53; State v. Whitaker, 160 Mo. 59, 60 S. W. 1068. Screen for protection of motormen. City of New York v. Dry-Dock, E. B. & B. R. Co., 133 N. Y. 104, 30 N. E. 563; State v. Nelson, 52 Ohio St. 88, 39 N. E. 22, 26 L. R. A. 317.

[380] McDonald v. Toledo Consol. St. R. Co., 74 Fed. 104; Short v. Baltimore City Pass. Ry. Co., 50 Md. 73; Ovington v. Lowell & S. R. Co., 163 Mass. 440, 40 N. E. 767; Smith v. Nashua St. R. Co., 69 N. H. 504, 44 Atl. 133.

[381] City of Westport v. Mulholland, 159 Mo. 86, 60 S. W. 77, 53 L. R. A. 442.

[382] State v. City of Newark, 54 N. J. Law, 102, 23 Atl. 284; American Rapid. Tel Co. v. Hess, 125 N. Y. 641, 26 N. E. 919, 13 L. R. A. 454.

[383] Ruschenberg v. Southern Elec. R. Co., 161 Mo. 70, 61 S. W. 626.

§ 480. Conditions imposed as revenue measures.

The state or a municipality when expressly authorized may, as a condition imposed for the grant of the privilege or franchise, occupy the public highways, require the payment of a license fee or a franchise tax based upon the volume of the gross or net business transacted by the grantee of the power,[384] the number of cars operated[385] or some other prescribed and equitable method.[386] Such franchises or privileges may be disposed of to the highest bidder and the amount bid in these instances will establish the sum which can be legally collected by the authorities for the exercise of the rights pertaining to the franchise or privilege.[387]

§ 481. Conditions having for their purpose the maintenance of the highways in its original condition.

Another class of conditions, frequently imposed is that which involves the exercise of an unquestionable right on the part of the state or municipality to require that the railroad authorized to occupy a highway shall first, in the construction of its roadbed,[388] and second, in the maintenance and operation of it, preserve the highway in as nearly its original condition as possible[389] and exercise the rights granted in such a manner as to

[384] Baltimore Union Pass. R. Co. v. City of Baltimore 71 Md. 405, 18 Atl. 917; City of New York v. Manhattan R. Co., 143 N. Y. 1, 37 N. E. 494; City of Philadelphia v. Empire Pass. R. Co., 177 Pa. 382, 35 Atl. 721.

[385] City of New York v. Third Ave. R. Co., 33 N. Y. 42; Id., 117 N. Y. 404, 22 N. E. 755; Id., 48 Hun, 621, 1 N. Y. Supp. 397.

[386] Union Pass. R. Co. v. City of Philadelphia, 101 U. S. 528; City of Aniston v. Southern R. Co., 112 Ala. 557, 20 So. 915; Chicago Gen. R. Co. v. City of Chicago, 176 Ill. 253, 52 N. E. 880; Harvey v. Aurora & G. R. Co., 186 Ill. 283, 57 N. E. 857; City of New Orleans v. New Orleans, C & L. R. Co., 40 La. Ann. 587; Pittsburg & B. Pass. R. Co. v. Borough of Birmingham, 51 Pa. 41.

8 Curr. Law, 63.

[387] People v. Craycroft, 111 Cal. 544, 44 Pac. 463; State v. West Side St. R. Co., 146 Mo. 155, 47 S. W. 959; People v. Pratt, 138 N. Y. 655, 34 N. E. 513; City of Houston v. Houston City St. R. Co., 83 Tex. 548.

[388] Offutt v. Montgomery County Com'rs, 94 Md. 115, 50 Atl. 419. Grade of road. Dickinson v. New Haven & Northhampton Co., 155 Mass. 16, 34 N. E. 334; Willis v. Erie City Pass. R. Co., 188 Pa. 56, 41 Atl. 307.

8 Curr. Law, 63.

[389] Commonwealth v. City of Frankfort, 92 Ky. 149, 17 S. W. 287; City of Albany v. Watervliet

least interfere at all times with the use of the highway by the public generally for legitimate purposes.[390]

§ 482. The duty to restore and repair or improve.

The duty to restore and repair exists independent of any imposed conditions although it may be included as a part of a grant. The highway must, upon the construction of a railroad system, be restored to its original condition as nearly as possible,[391] and, in respect to that part occupied by the roadbed, kept in repair.[392] This latter duty, it has been held, is a continuing one [393] and varies with the condition of the street, and if an unpaved street is subquently improved or kind of paving changed, the duty to repair is co-extensive with its changed condition.[394] The relative rights of the parties are frequently dependent upon the terms of special contracts or franchises which may have been made or granted in respect to the duty to either restore and repair or to improve. Their duties may be correspondingly increased or diminished and not subject to the general rules which

Turnpike & R. Co., 108 N. Y. 14, 15 N. E. 370; Miller v. Lebanon & A. St. R. Co., 186 Pa. 190, 40 Atl. 413; City of Oshkosh v. Milwaukee & L. W. R. Co., 74 Wis. 534, 43 N. W. 489.

[390] Town of Oxanna v. Allen, 90 Ala. 468, 8 So. 79; Chicago B & Q. R. Co. v. City of Quincy, 136 Ill. 489, 27 N. E. 232; Schild v. Central Park, N. & E. R. R. Co., 133 N. Y. 446; Town of Mason v. Ohio River R. Co., 51 W. Va. 183, 41 S. E. 418.

[391] City of Oshkosh v. Milwaukee & L. W. R. Co., 74 Wis. 534, 43 N. W. 489.

8 Curr. Law, 63.

[392] State v. Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590; Commonwealth v. Illinois Cent. R. Co., 104 Ky. 366, 47 S. W. 258; Mahoney v. Natick & C. St. R. Co., 173 Mass. 587; City of Duluth v. Duluth St. R. Co., 60 Minn. 178, 62 N. W. 267; City of Philadelphia v. Philadelphia City Pass. R. Co., 177 Pa. 379, 35 Atl. 720; Citizens' St. R. Co. v. Howard, 102 Tenn. 475, 52 S. W. 864.

[393] Buritt v. City of New Haven, 42 Conn. 174; Chicago, B. & Q. R. Co. v. City of Quincy, 139 Ill. 355, 28 N. E. 1069; Cooke v. Boston & L. R. Corp., 133 Mass. 185; Fitts v. Cream City R. Co., 59 Miss. 323.

[394] West Chicago St. R. Co. v. City of Chicago, 178 Ill. 339, 53 N. E. 112; Lincoln St. R. Co. v. City of Lincoln, 61 Neb. 109, 84 N. W. 802; Fielders v. North Jersey St. R. Co., 67 N. J. Law, 76, 50 Atl. 533; Borough of Norristown v. Norristown Pass. R. Co., 148 Pa. 87, 23 Atl. 1060.

usually obtain.[395] The duty to restore and repair is one that may be enforced by mandamus.[396]

The duty to improve. The duty to improve a highway depends, according to the authorities, upon the express imposition by statute or its express inclusion in the grant of the privilege or the franchise.[397] Unless it is so made an express condition for the occupation of a street, a railroad, whether steam or street, is not obliged to pave, for example, that portion of the street occupied by its tracks if at the time they were laid, the street was not in that condition.[398] However, after the space between tracks of a railroad is paved by a municipality, the duty to keep in repair this pavement, rests upon the company.[399]

§ 483. Temporary obstructions.

In section 467 obstructions in highways were classed as permanent, temporary, and recurring in their character, the word "permanent" involving the application of the customary and usual meaning of the word; and in the preceding sections have been considered various acts of individuals and uses of a public highway which have been regarded by the courts as coming within that class of obstructions that are permanent and lasting in their character. There are still other uses of a public high-

[395] Western Paving & Supply Co. v Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 10 L. R. A. 770; Borough of McKeesport v. McKeesport Pass. R. Co., 158 Pa. 447, 27 Atl. 1006.

[396] State v. Jacksonville St. R. Co., 29 Fla. 590; State v. St. P., M. & M. R. Co., 35 Minn. 131, 28 N. W. 3; Buchholz v. New York, L. E. & W. R. Co., 148 N. Y. 640, 43 N. E. 76.

[397] Atlanta Consol. St. R. Co. v. City of Atlanta, 111 Ga. 255, 36 S. E. 667; Billings v. City of Chicago, 167 Ill. 337, 47 N. E. 731; City of Cedar Rapids v. Cedar Rapids & M. C. R. Co., 108 Iowa, 406, 79 N. W. 125; City of Council Bluffs v. Omaha & C. B. St. R. & Bridge Co., 114 Iowa, 141, 86 N. W. 222; Lincoln St. R. Co. v. City of Lincoln, 61 Neb. 109, 84 N. W. 802; Conway v. City of Rochester, 157 N. Y. 33, 51 N. E. 395; City of Philadelphia v. Hestonville, M. & F. Pass. R. Co., 203 Pa. 38, 52 Atl. 184.

[398] City of Chicago v. Sheldon, 76 U. S. (9 Wall.) 50; Ft. Dodge Elec. Light & Power Co. v. City of Ft. Dodge, 115 Iowa, 568, 89 N. W. 7; City of Philadelphia v. Spring Garden Farmers' Market Co., 161 Pa. St. 522, 25 Atl. 1077.

[399] State v. Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590; Gilmore v. City of Utica, 121 N. Y. 561, 24 N. E. 1009; Leake v. City of Philadelphia, 150 Pa. 643, 24 Atl. 351.

way and acts of individuals which may constitute an obstruction in a highway but only for a brief period of time and these because of that condition are commonly regarded as temporary only, the difference in the two classes, namely, permanent and temporary, being based upon the length of time of the use of a highway.[400] The fact that an obstruction may be temporary in its character does not limit a public corporation in the exercise of its power to preserve a highway in its proper condition and character as a public way.

Permits given by public officials to use a highway or any portion of it for a purpose which, without such permit, would be regarded as a nuisance or an obstruction, are usually regarded as revocable licenses not pertaining of the nature of a contract,[401] their authority, however, extending only to legally established highways or grounds.[402] But the mere fact of affirmative legislation in these instances cannot remove from or give to that use or act, which under existing conditions and in its essential characteristics is or is not a nuisance, another character.[402a]

§ 484. Concrete illustrations of temporary obstructions.*

The use of highways for public speaking[403] or public meetings,[404] for political, civil or religious parades or processions,[405]

[400] Simon v. City of Atlanta, 67 Ga. 618; Com. v. Hauck, 103 Pa. 536; Hibbard Spencer, Bartlett & Co. v. City of Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; Townsend v. Epstein, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409; Gorham v. Withey, 52 Mich. 50; Northwestern Tel. Ex. Co. v. City of Minneapolis, 81 Minn. 140, 86 N. W. 69, 53 L. R. A. 175, affirming on rehearing 83 N. W. 527; Arthur v. City of Charleston, 51 W. Va. 132, 41 S. E. 171.

8 Curr. Law, 89.

[401] City of Detroit v. Detroit City R. Co., 56 Fed. 867; Readfield Tel. & T. Co. v. Cyr, 95 Me. 287, 49 Atl. 1047; Compton v. Inhabitants of Town of Revere, 179 Mass. 413, 60 N. E. 931; Robinson v. Lamb, 126 N. C. 492, 36 S. E. 29.

[402] Smith v. Smith, 19 Mass. (2 Pick.) 621.

[402a] Yates v. City of Milwaukee, 77 U. S. (10 Wall.) 497. "But the mere declaration by the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character." City of Evansville v. Martin, 41 Ind. 145.

* 8 Curr. Law, 89.

[403] Weinstein v. City of Terre Haute, 147 Ind. 56; Commonwealth v. Abrahams, 156 Mass. 57, 30 N. E. 79; Love v. Judge or Recorder's Court of Detroit, 128 Mich. 545, 87 N. W. 785, 55 L. R. A. 618; Scranton v. City of Minneapolis, 58 Minn. 437, 60 N. W. 26.

or for advertising purposes,[406] are usually regarded as obstructions temporary in their character and which can be prohibited or permitted as the legislative discretion of various localities may determine, or, in other words, the use of a highway for any one of these purposes is not a usual or legitimate one. The occupation of a highway for moving houses,[407] or as a hack stand,[408] so called, are regarded as unusual and improper uses of a highway and which to be lawfully done must have the permission of the public authorities, and, in general, the use of the public highway for any purpose which prevents its reasonable, seasonable, and ordinary use by the general public for purposes connected with its business is unlawful and in the proper case a continuance of that use may be enjoined.[409]

Regulations respecting the use of highways by obstructions are regarded as legislative or quasi legislative in their character and in order, therefore, to be legal, it is necessary that they be adopted in the manner prescribed and by the body designated by law;[410] they must be uniform and impartial in their operation

[404] People v. Cunningham, 1 Denio (N. Y.) 524; Barker v. Com., 19 Pa. 412.

[405] City of Chariton v. Frazier, 87 Iowa, 226, 54 N. W. 146; Savage v. City of Salem, 23 Or. 381, 24 L. R. A. 787; Mashburn v. City of Bloomington, 32 Ill. App. 245. Salvation Army.

[406] In re Flaherty, 105 Cal. 558, 27 L. R. A. 529; City of Chicago v. Trotter, 136 Ill. 430; Anderson v. City of Wellington, 40 Kan. 173, 2 L. R. A. 110; State v. Hughes, 72 N. C. 25.

[407] Wilson v. Eureka City, 173 U. S. 32; Inhabitants of Clinton v. Welch, 166 Mass. 133; State v. Sheppard, 64 Minn. 287, 36 L. R. A. 305; City of Concord v. Burleigh, 67 N. H. 106, 36 Atl. 606; City of Eureka v. Wilson, 15 Utah, 53, 48 Pac. 41.

[408] City Council of Montgomery v. Parker, 114 Ala. 118, 21 So. 452; Cohen v. City of New York, 113 N. Y. 532, 4 L. R. A. 406.

[409] Mackall v. Ratchford, 82 Fed. 41. "A highway is a way over which the public at large have a right to passage. It is a road maintained by the public for the general convenience. True, the strikers had a right to march over it as passengers just the same as all other citizens; but they had no right to make it a parade ground, or stop on its sideways at frequent intervals, and by the hour, at times when other people who had the same right to its use were in the habit of using it for purposes connected with their daily avocations."

[410] Perry v. New Orleans, M. & C. R. Co., 55 Ala. 413; City of Quincy v. Bull, 106 Ill. 337; City of North Vernon v. Voegeler, 103 Ind. 327; Com. v. Hauck, 103 Pa. 536.

and effect;[411] must not violate constitutional provisions;[412] contravene the law of the land,[413] or be inconsistent with the general law or the character of the particular corporation.[414]

§ 485. Recurring, temporary obstructions.

Another class of obstructions occurring frequently are those which have been designated as temporary recurring obstructions. Acts or uses of a highway which constitute these are usually the result of the grant of a general right by the public corporation to some individual or private corporation engaged in the manufacture or supply of gas, light, water, transportation, or means of communication.[415] They exist because of the grant of a right continuing in its nature to use highways in such a manner as to cause for a brief period of time, at any one time, its temporary obstruction. It is scarcely necessary to say that public corporations possess the full power to regulate and control the manner of the exercise of such a right; both under its police power and also under the general power which it possesses to control the use of all highways within its jurisdiction in that manner which will preserve to the greatest possible extent the ordinary and usual condition of the highway as a means of public travel.[416]

[411] City Council of Augusta v. Burum, 93 Ga. 68, 26 L. R. A. 340.

[412] City of Newark v. Delaware, L. & W. R. Co., 42 N. J. Eq. (15 Stew.) 196; Buchholz v. New York, L. E. & W. R. Co., 148 N. Y. 640.

[413] Pittsburgh & A. Bridge Co. v. Com. (Pa.) 8 Atl. 217; Stormfeltz v. Manor Turnpike Co., 13 Pa. 558.

[414] Snyder v. City of Mt. Pulaski, 176 Ill. 397, 44 L. R. A. 407; Pettis v. Johnson, 56 Ind. 139; Gould v. City of Topeka, 32 Kan. 485.

[415] Missouri v. Murphy, 170 U. S. 78; Kincaid v. Indianapolis Natural Gas. Co., 124 Ind. 577, 24 N. E. 1066, 8 L. R. A. 602; Parfitt v. Furguson, 159 N. Y. 111, 53 N. E. 707; Philadelphia Co. v. Borough of Freeport, 167 Pa. 279, 31 Atl. 571; Crocker v. Boston Elec. Light Co., 180 Mass. 516, 62 N. E. 978; Long Island Water Supply Co. v. City of Brooklyn, 166 U. S. 685; Hughes v. City of Momence, 163 Ill. 535, 45 N. E. 300; Provost v. New Chester Water Co., 162 Pa. 275, 29 Atl. 914; Village of Pelham Manor v. New Rochelle Water Co., 143 N. Y. 532, 38 N. E. 711; Benton v. City of Elizabeth, 61 N. J. Law, 411, 39 Atl. 683, 906.

8 Curr. Law, 89.

[416] City Council of Montgomery v. Capital City Water Co., 92 Ala. 361, 9 So. 339; City of Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 107, 39 N. E. 433, 27 L. R. A. 514;

§ 486. Use by abutters.

An abutter is entitled to the use of a highway for various purposes as incidental to either private or public rights in the highway and which cannot, therefore, be regarded as a nuisance except under the conditions previously noted.* The use of the street for structural materials while erecting buildings [417] and for business purposes such as loading or unloading goods [418] are familiar and ordinary illustrations of a legitimate use, while the use of a sidewalk for packages,[419] or the display of wares,[420] the construction of scales,[421] or areas [422] in an abutting street by the adjoining owner, are not ordinarily regarded as a proper use by him.

§ 487. Miscellaneous uses of a street regarded as obstructions or nuisances.

One of the proper purposes and the primary one for which a highway can be used is travel, and this idea, therefore, necessarily prohibits the use of a street or any portion of it as a lounging or gathering place either for an individual or a number of them [423] for standing vehicles during long periods of time,[424] plac-

Crocker v. Boston Elec. Light Co., 180 Mass. 516, 62 N. E. 978; City of Kalamazoo v. Kalamazoo Heat, Light & Power Co., 124 Mich. 74, 82 N. W. 811; Springfield Water Co. v. Borough of Darby, 199 Pa. 400, 49 Atl. 275; Philadelphia Co. v. Borough of Freeport, 167 Pa. 279, 31 Atl. 571; Rockland Water Co. v. City of Rockland, 83 Me. 267, 22 Atl. 166.

* 8 Curr. Law, 70, 89.

[417] City of Cleveland v. King, 132 U. S. 295; Price v. Betz, 199 Pa. 457, 49 Atl. 217.

[418] General Elec. R. Co. v. Chicago, I. & L. R. Co. (C. C. A.) 107 F. 771; Attorney General v. Brighton & H. Co-op. Supply Ass'n, 69 Law J. Chi. 204; Halsey v. Rapid Transit St. R. Co., 47 N. J. Eq. 380.

[419] Commonwealth v. Lennon (Mass.) 52 N. E. 521; Davis v. Corry, 154 Pa. 602.

[420] State v. Messolongitis, 74 Minn. 165, 77 N. W. 29; City of Philadelphia v. Sheppard, 158 Pa. 347, 27 Atl. 972.

[421] Incoporated Town of Spencer v. Andrew, 82 Iowa, 14, 47 N. W. 1007, 12 L. R. A. 115.

[422] Costello v. State, 108 Ala. 45.

[423] Barker v. Com., 19 Pa. 412. White v. Kent, 11 Ohio St. 550.

[424] Sikes v. Town of Manchester, 59 Iowa, 65; Conn. v. Fenton, 139 Mass. 195, 29 N. E. 653. People v. Keir, 78 Mich. 98, 43 N. W. 1039; Tomlin v. City of Cape May, 63 N. J. Law, 429, 44 Atl. 209. But see State v. Rayantis, 55 Minn. 126, 56 N. W. 586.

ing placards, signs,[425] depositing rubbish or impediments to travel,[426] or blockading street crossings with cars or engines.[427] But water, gas or sewer pipes laid under ground are not usually regarded as obstructions.[428]

Public authorities may prohibit and regulate the use of a street in such a manner as to constitute a nuisance. In addition to acts or uses already named and regarded as cases of this character may be suggested the scattering of hand bills through the streets,[429] or the accumulation of refuse or litter,[430] and others [431] of a similar nature or those involving the use of a highway by some strange vehicle, engine or motor.[432]

§ 488. Regulation of traffic.

Public authorities may also adopt measures which have for their purpose a regulation of traffic or travel on a street either based upon the idea of its constituting a nuisance and obstruction or upon the further one of preserving or maintaining the street in a proper condition for travel.* Ordinances fixing the limit of speed at which horses or vehicles can be driven or ridden,[433] or the maximum load carried by trucks or teams,[434] prescribing the kind of vehicles or traffic to be allowed on certain streets as

[425] Com. v. McCafferty, 145 Mass. 364, 14 N. E. 451. But see State v. Higgs, 126 N. C. 1014, 35 S. E. 473, 48 L. R. A. 446.

[426] Baird v. Clark, 12 Ohio St. 87. Temporary fence. Nagle v. Brown, 37 Ohio St. 7; City of Scranton v. Scranton Steel Co., 154 Pa. 171; Loberg v. Town of Amherst, 87 Wis. 634.

[427] State v. Chicago, M. & St. P. R. Co., 77 Iowa, 422, 4 L. R. A. 298; Com. v. New York, N. H. & H. R. Co. 112 Mass. 412.

[428] Kincaid v. Indianapolis Natural Gas Co., 124 Ind. 577, 8 L. R. A. 602; Borough of Brigantine v. Holland Trust Co. (N. J. Eq.) 37 Atl. 438; Sterling's Appeal, 111 Pa. 35.

[429] People v. Armstrong, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721.

[430] State v. City of St. Louis, 161 Mo. 371, 61 S. W. 658; Raymond v. Keseberg, 94 Wis. 302, 19 L. R. A. 643.

[431] Sierra County v. Butler, 136 Cal. 547, 69 Pac. 418.

[432] Kerney v. Barber Asphalt Pav. Co., 86 Mo. App. 573. Henline v. People, 81 Ill. 269. Gate. Pettis v. Johnson, 56 Ind. 139. Steps. Reimer's Appeal, 100 Pa. 182. Bay window.

* 8 Curr. Law, 61.

[433] Sykes v. Lawlor, 49 Cal. 237; Osborn v. Jenkinson, 100 Iowa, 432, 69 N. W. 548; Com. v. Crowninshield, 187 Mass. 221; Farley v. City of New York, 152 N. Y. 222, 46 N. E. 506.

[434] State v. Boardman, 93 Me. 73, 44 Atl. 118, 46 L. R. A. 750; Commonwealth v. Mulhall, 162 Mass

boulevards or park ways,[435] prohibiting the use of vehicles having tires less than a certain width,[436] or the use of sidewalks except by pedestrians,[437] requiring the hitching of horses,[438] regulating the passage of vehicles or animals through streets,[439] requiring the registration or licensing of automobiles,[440] are regulations which have for their purpose the prevention of acts suggested in this section. They are regarded as a lawful and reasonable exercise either of the police power of a public corporation or of its right to regulate and control the use of and to maintain public highways.

Road law. To prevent blockades or accidents, officials may also, under proper authority, adopt regulations relative to carrying lights or carrying bells,[441] or pass laws prescribing the manner in which highways may be used with reference to the direction in which individuals or teams shall go upon meeting or passing others,[442] or the side of a street to be used.[443]

496, 39 N. E. 183; State v. Messenger, 63 Ohio St. 398, 59 N. E. 105.

[435] Cicero Lumber Co. v. Town of Cicero, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696. An ordinance, however, is unreasonable and invalid which leaves to an unregulated official discretion a matter which should be controlled by permanent local provisions operating generally and impartially. Mercer v. Corbin, 117 Ind. 450, 3 L. R. A. 221; Boston & A. R. Co. v. City of Boston, 140 Mass. 87; State v. Bradford, 78 Minn. 387, 47 L. R. A. 144.

[436] Gordon v. State, 46 Ohio St. 607, 6 L. R. A. 749; State v. Messenger, 63 Ohio St. 398, 59 N. E. 10b.

[437] City of Indianapolis v. Higgins, 141 Ind. 1, 40 N. E. 671; State v. Aldrich, 70 N. H. 391, 47 Atl. 602; State v. Brown, 109 N. C. 802, 13 S. E. 940; Nelson v. Braman, 22 R. I. 283, 47 Atl. 696.

[438] Tenney v. Tuttle, 83 Mass. (1 Allen) 185; Loeser v. Humphrey, 41 Ohio St. 378; Bowen v. Flanagan, 84 Va. 313.

[439] Roberts v. Ogle, 30 Ill. 459; Creamer v. McIlwain, 89 Md. 343, 45 L. R. A. 531; Com. v. Derby, 162 Mass. 183, 38 N. E. 440.

[440] Com. v. Boyd, 188 Mass. 79, 74 N. E. 255; People v. Schneider (Mich.) 103 N. W. 172.

[441] Baucher v. City of New Haven, 40 Conn. 456; Cook v. Fogarty, 103 Iowa, 500, 72 N. W. 677, 39 L. R. A. 488; Lyon v. City of Cambridge, 136 Mass. 419.

[442] Diehl v. Roberts, 134 Cal. 164, 66 Pac. 202; Perlstein v. American Exp. Co., 177 Mass. 530, 59 N. E. 194; Rowland v. Wanamaker, 193 Pa. 598, 44 Atl. 918; Odom v. Schmidt, 52 La. Ann. 2129; Adams v. Swift, 172 Mass. 521, 52 N. E. 1068; Angell v. Lewis, 20 R. I. 391.

[443] Foote v. American Product Co., 195 Pa. 190, 45 Atl. 934, 49 L. R. A. 764; Winter v. Harris, 23 R. I. 47, 49 Atl. 398, 54 L. R. A. 643.

Stock ordinances. The authorities have also the right under a grant of the power to control public highways, or as a police measure, to pass ordinances prohibiting the running at large of stock [444] of any particular kind,[445] and to provide for impounding animals found running at large in violation of these regulations.[446] An exercise of this power necessarily includes the right to impose fines and to provide for the sale of stock in case of a non-payment.[447]

§ 489. Use of highways by public authorities.

The public authorities may, equally with individuals, use the highways or act in such a manner as to cause a nuisance or an obstruction and for which they will be liable under the same rules applicable to private individuals,[448] but, on the other hand, there are certain well recognized uses to which they can put highways and which are regarded as lawful in their character. The improvement of a highway in any manner is such a use, [449] and the construction of drains or sewers,[450] the laying of water or gas mains,[451] or conduits for electric wires or pneumatic tubes, the stringing of wires or electric poles,[452] are all uses regarded as legitimate and proper and which cannot be regarded either as a

[444] Folmar v. Curtis, 86 Ala. 354, 5 So. 678; Mathis v. Jones, 84 Ga. 804, 11 S. E. 1018. Welch v. Bowen, 103 Ind. 252; Com. v. Bean, 80 Mass. (14 Gray) 52; Goodale v. Sowell, 62 S. C. 516, 40 S. E. 970; Armstrong v. Traylor, 87 Tex. 598, 34 S. W. 440.

[445] Com. v. Curtis, 91 Mass. (9 Allen) 266; Jones v. Duncan, 127 N. C. 118, 37 S. E. 135; Kelley v. City of Milwaukee, 18 Wis. 83.

[446] Smith v. Ewers, 21 Ala. 38; Campau v. Langley, 39 Mich. 451; Burdett v. Allen, 35 W. Va. 347, 13 S. E. 1012, 14 L. R. A. 337.

[447] City of Cartersville v. Lanham, 67 Ga. 753; Slessman v. Crozier, 80 Ind. 487; Cochrane v. City of Frostburg, 81 Md. 54, 27 L. R. A. 728; Wilcox v. Hemming, 58 Wis. 144.

[448] City of Birmingham v. McCary, 84 Ala. 470; Rowell v. Williams, 29 Iowa, 210.

8 Curr. Law, 61.

[449] Pinnix v. City of Durham, 130 N. C. 360, 41 S. E. 932.

[450] Kiley v. Bond, 114 Mich. 447, 72 N. W. 253; Hunt v. City of Lambertville, 45 N. J. Law, 279; Ainley v. Hackensack Imp. Commission, 64 N. J. Law, 504, 45 Atl. 809; Wood v. McGrath, 150 Pa. 451, 24 Atl. 682, 16 L. R. A. 715.

[451] Boston v. City of Hoboken, 33 N. J. Law, 280; Smith v. City of Goldsboro, 121 N. C. 350, 28 S. E. 479.

[452] Domestic Teleg. & Tel. Co. v. City of Newark, 49 N. J. Law, 344.

nuisance or an obstruction. In the erection of poles or the stringing of wires, however, the same principles governing private persons with respect to the rights of abutting owners to access, air and light will also control public authorities.[453]

§ 490. Use of public buildings or public facilities.

Public corporations also have ample power to adopt and enforce all necessary regulations in respect to the use of individuals or public officials of public buildings [454] or public facilities, the latter including, ordinarily, landing places or wharves, ferries, and public waters.[455] Their rights in these respects include a control of the time and manner of use by the public, the charge to be made for a public inspection of public records or the use of facilities offered.[456]

§ 491. Protection of public property.

Public authorities have full power to care for, and protect from injury or destruction, property owned or held by public corporations either directly or as a trustee for the public, having in view the purposes for which the particular property may have been acquired, and its legitimate use by the public.[457] Under an application of this principle, regulations may be adopted and enforced relative to the breaking or trimming of shade trees [458] or the preservation of public waters, harbors and water channels.[459]

[453] Hershfield v. Rocky Mountain Bell Tel. Co., 12 Mont. 102.

[454] San Joaquin County v. Budd, 96 Cal. 47, 30 Pac. 967; State v. Hart, 144 Ind. 107, 33 L. R. A. 118; Borough of Henderson v. Sibley County, 28 Minn. 519.

6 Curr. Law, 730.

[455] Westfield Borough v. Tioga County, 150 Pa. 153; Keokuk N. L. Packet Co. v. City of Keokuk, 95 U. S. 80; Northwestern Union Packet Co. v. City of St. Louis, 4 Dill. 10 Minturn v. Larue, 23 How. (U. S.) 435; Attorney General v. City of Boston, 123 Mass. 460; McCready v. Virginia, 94 U. S. 391.

[456] Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 82 Mo. 121; Reighard v. Flinn, 194 Pa. 352, 4 Atl. 1080; Hanson v. Eichstaedt, 69 Wis. 538; City of Keokuk v. Keokuk N. L. Packet Co., 45 Iowa, 196; Id., 95 U. S. 80.

[457] Alexander v. Johnson, 144 Ind. 82; Rogers v. O'Brien, 153 N. Y. 357, 47 N. E. 456; Frederick County Sup'rs v. City of Winchester, 84 Va. 467, 4 S. E. 844.

6 Curr. Law, 730.

[458] Taylor v. Reynolds, 92 Cal. 573; Com. v. Wilder, 127 Mass. 1; Consolidated Traction Co. v. Township of East Orange, 61 N. J Law, 202, 38 Atl. 803.

[459] City of Portland v. Montgom-

§. 492. Removal of obstructions or nuisances.

Public corporations possess the power to acquire varying interests in property for the objects and purposes for which they may be directly or indirectly authorized. The right to protect these property interests acquired is co-extensive with the power and purpose of acquirement. It follows, therefore, logically and legally, that they may, in the manner prescribed by law, effect the removal of all obstructions or encroachments upon public property whether temporary or permanent in their character and without considering the further condition of whether such obstructions and encroachments constitute a nuisance. They may also effect the abatement of nuisances.[460]

The power as vested in public authorities to remove obstructions or nuisances is a continuing one, need not be expressly granted in all cases,[461] and further, is one which cannot be contracted or bargained away.[462] The power possessed to be exercised for the protection of public rights is governmental in its nature and, therefore, cannot be lost in any way so long as there remains an object or right in respect to which it may be exercised.

Removal of natural obstructions. Highways may be also obstructed by the fall of snow or the presence of natural objects. These may be arbitrarily removed when sanctioned by public officials as an exercise of a discretionary power vested in them to improve highways and streets and to preserve and maintain them in a proper condition for travel.[463] The removal of trees under

ery, 38 Or. 215, 62 Pac. 755; Wisconsin River Imp. Co. v. Lyons, 30 Wis. 61.

[460] People v. Com'rs of Highways, 130 Ill. 482, 22 N. E. 596, 6 L. R. A. 161; Nichols v. City of Minneapolis, 33 Minn. 430; Waukesha Hygeia Mineral Spring Co. v. Village of Waukesha, 83 Wis. 475, 53 N. W. 675; Ricker v. Barry, 34 Me. 116.

6 Curr. Law, 730; 8 Curr. Law, 89.

[461] Wabash R. Co. v. City of Defiance, 167 U. S. 88; Atwood v. Partree, 56 Conn. 80; Graves v. Shattuck, 35 N. H. 258; Cook v. Harris, 61 N. Y. 448; City of Terre Haute v. Turner, 36 Ind. 522; City of Philadelphia v. Philadelphia & R. R. Co., 58 Pa. 253.

[462] City of Grand Rapids v. Hughes, 15 Mich. 54; Sheen v. Stothart, 29 La. Ann. 630; Compton v. Waco Bridge Co., 62 Tex. 715.

[463] Vanderhurst v. Tholcke, 113 Cal. 147, 45 Pac. 266, 35 L. R. A. 267; City of Mt. Carmel v. Shaw, 155 Ill. 37, 39 N. E. 584, 27 L. R. A. 580; Wilson v. Simmons, 89 Me. 242, 36 Atl. 380. Trustees. Chase v. City of Lowell, 149 Mass. 85, 21 N. E. 233; Miller v. Detroit, Y. & A. A. R. Co., 125 Mich. 171, 84 N. W.

these circumstances will afford the adjoining property owner no claim for damages occasioned by the destruction of the obstructions removed or their removal.[464] Public authorities may also, in the case of a fall of a natural obstruction, for example sleet or snow, direct its removal by adjoining property owners, but the exercise of this power will be governed by the principles in respect to the passage of legislation. Ordinances or regulations adopted for this purpose must be reasonable to be valid.[465]

§ 493. Public highways or grounds must be legally established or acquired.

The power of the public authorities to remove obstructions or abate nuisances in public highways and grounds is limited not only by statutory restrictions or provisions, if these be found, but through the existence of the well known and recognized principle that to have jurisdiction it must be first established that the property over which an authority or power is sought to be exercised has been legally acquired and for the public uses and purposes urged.[466] It must affirmatively appear, therefore, to sustain proceedings either criminal or civil in their character in respect to obstructions or nuisances in public highways or grounds, that they have been legally acquired, laid out and estab-

49, 51 L. R. A. 955; Young v. Crane, 68 N. J. Law, 453, 51 Atl. 482; Chase v. City of Oshkosh, 81 Wis. 313, 51 N. W. 560, 15 L. R. A. 553. But see City of Atlanta v. Holliday, 96 Ga. 546, 23 S. E. 509, where injunction against removal of trees was granted.

[464] Wilson v. Simmons, 89 Me. 242, 36 Atl. 380; Murray v. Norfolk County, 149 Mass. 328, 21 N. E. 757; Chase v. City of Oshkosh, 81 Wis. 313, 51 N. W. 560, 15 L. R. A. 553.

[465] Michigan City v. Boeckling, 122 Ind. 39; Inhabitant of Clinton v. Welch, 166 Mass. 133, 43 N. E. 1116; Village of Carthate v. Frederick, 122 N. Y. 268, 25 N. E. 480, 10 L. R. A. 178.

[466] Whaley v. Wilson, 120 Ala. 502, 24 So. 855; People v. Goodin, 136 Cal. 455, 69 Pac. 85; Town of Kent v. Pratt, 73 Conn. 573, 48 Atl. 418; Carlisle v. Wilson, 110 Ga. 860, 36 S. E. 54; Township of Whitley v. Linville, 174 Ill. 579, 51 N. E. 832; Com. v. Carr, 143 Mass. 84; Village of Grandville v. Jenison, 84 Mich. 54, 47 N. W. 600; Village of Benson v. St. Paul, M. & M. R. Co., 62 Minn. 198, 64 N. W. 393; State v. Whitaker, 66 N. C. 630; Com. v. McNaughter, 131 Pa. 55, 18 Atl. 934; Thurston County v. Walker, 27 Wash. 500, 67 Pac. 1099.

6 Curr. Law, 730; 8 Curr. Law, 89.

lished,—the method is immaterial,—and if this is not shown, the proceedings must fail.[467]

§ 494. Use of public highways by agencies distributing water, power or light and furnishing telephone and telegraph or transportation services.

Public highways and commons are acquired for public uses and primarily as a means of communication by ordinary methods or agencies. They belong to the public from side to side and from end to end, as declared by one authority, and any private use granted to them is illegal.[468] Even the legislature is incapable of appropriating any portion to private persons or to devote them to a public use which is so exclusive as to deprive the public generally of their rights.[469] The ordinary use to which public highways are put is travel or transportation of persons and property in movable vehicles. The growth of modern cities and the making of new inventions imposes naturally new burdens upon the public ways within their limits. The occupation of them for constructing sewers, laying pipes for the conveyance of water, gas and the like, and stringing wires for the transmission of light and power or as a means of communication, is not in accord with their original and true character as public ways but uses thrust upon them through the necessities of urban conditions[470] which while it must be said are independent and secondary ones, yet,

[467] Alexander v. State, 117 Ala. 220; Shepherd v. Turner, 129 Cal. 530, 62 Pac. 106; State v. Teeters, 97 Iowa, 458, 66 N. W. 754; Bradford v. Hume, 90 Me. 233, 38 Atl. 143; Village of Benson v. St. Paul, M. & M. R. Co., 62 Minn. 198; Peterson v. Beha, 161 Mo. 513, 62 S. W. 462; State v. Myers, 20 Or. 442, 26 Pac. 307.

[468] Brand v. Multnomah County, 38 Or. 79, 60 Pac. 390, 50 L. R. A. 389; Pikes Peak Power Co. v. City of Colorado Springs, 105 Fed. 1; Jaynes v. Omaha St. R. Co., 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751; American Rapid Tel. Co. v. Hess, 125 N. Y. 641, 26 N. E. 919, 13 L. R. A. 454.

8 Curr. Law, 84.

[469] Kansas City, N. & D. R. Co. v. Cuykendall, 42 Kan. 234, 21 Pac. 1051; People v. Ft. Wayne & E. R. Co., 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752; Lockwood v. Wabash R. Co., 122 Mo. 86, 26 S. W. 698, 24 L. R. A. 516.

[470] Montgomery v. Santa Ana Westminster R. Co., 104 Cal. 186, 37 Pac. 786, 25 L. R. A. 654; Detroit City R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007. Dissenting opinion. Cater v. Northwestern Tel. Exch. Co., 60 Minn. 539, 63 N. W. 111, 28 L. R. 310.

they are within the general purposes for which highways are designated.[471] The necessities of an urban population require many conveniences which are either of a public or of a quasi public character and to supply them requires the occupation, to some extent, of the public streets;[472] a use which cannot be justified under the strict principles of law relating to public highways but which is considered legal because of the conditions and reasons noted above.

Abutter's rights. The control of a highway by public authorities whether state or some other subordinate agency is not absolute but is limited in another respect in addition to those suggested, namely, the consideration of the rights of abutting owners. These, as already noted, are entitled to certain private easements of light, air and access to their property[473] which are not dependent upon their title in the adjacent highway, and also to additional compensation for the use of that highway by any of the various agencies when, by the holdings of a particular state, that use or occupation is regarded as an additional burden or servitude upon their property.[474] The character of various uses of public highways as additional servitudes or otherwise, may vary in different jurisdictions.

§ 495. Use of highways for above purposes.

Public highways may be used for the laying of gas and water pipes and the stringing of wires by electric companies for supplying light and power or by either the public corporation itself or a private person natural or artificial. The power of a public cor-

[471] State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262.

[472] Taylor v. Portsmouth, K. & Y. St. R. Co., 91 Me. 193, 31 Atl. 560; Cater v. Northwestern Tel. Exch. Co., 60 Minn. 539, 63 N. W. 111, 28 L. R. A. 310. Opinion approved by three out of five judges—two dissenting.

[473] First Nat. Bank v. Tyson, 133 Ala. 459, 32 So. 144, 59 L. R. A. 399; Smith v. Southern Pac. R. Co., 146 Cal. 164, 79 Pac. 868; O'Brien v. Central Iron & Steel Co., 158 Ind. 218, 63 N. E. 302, 57 L. R. A. 508; Townsend v. Epstein, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 109; Jaynes v. Omaha St. R. Co., 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751; Paige v. Schenectady R. Co., 178 N. Y. 102, 70 N. E. 213; Parkersburg Gas Co. v. Parkersburg, 30 W. Va. 435, 4 S. E. 650.

[474] Ryan v. Preston, 59 App. Div. 97, 69 N. Y. Supp. 100. Bicycle path not an additional servitude.

poration to do any one or all of these things naturally involves a consideration of the legal right in its capacity as a public corporation.

If a municipal corporation is permitted to engage in the business of supplying water or light, it should be limited, from a legal standpoint, clearly to a supply of its own necessities.[474a] The question of the legal right to supply the needs of a public corporation and to engage in the business generally of furnishing to private consumers a certain commodity, are radically distinct. In either case, the doctrine is well established that a municipal corporation in supplying itself and its inhabitants with water or light or contracting for these commodities is not exercising its governmental or legislative but its business or proprietary powers.[475]

The legal right, to supply light, seems to be recognized. In some cases it is regarded as a duty under a proper exercise of the police power on the part of a municipal corporation to properly light its streets and public buildings in order both to protect lives and property.[476]

§ 496. Direct authority necessary.

The power to erect and operate a plant for either the supply of water or light is never included among the implied powers belonging to a public corporation; it must be expressly, positively

[474a] Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19. "But it is no part of the duty of the government to provide the community with lights in their dwellings, any more than it is to provide them with the dwellings themselves, or any part of the necessaries or luxuries which may be deemed important to the comfort or convenience of the community." Spaulding v. Inhabitants of Peabody, 153 Mass. 129, 26 N. E. 421, 10 L. R. A. 397; Mauldin v. City Council of Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291.

[475] Pike's Peak Power Co. v. City of Colorado Springs, 105 Fed. 1; Anoka Waterworks, Elec. Light & Power Co. v. City of Anoka, 109 Fed. 580; Gas Light & Coke Co. v. City of New Albany, 156 Ind. 406, 59 N. E. 176; Richmond County Gaslight Co. v. Town of Middletown, 59 N. Y. 228; Baily v. City of Philadelphia, 184 Pa. 594, 39 Atl. 494, 39 L. R. A. 837.

[476] Hamilton Gaslight & Coke Co. v. Hamilton City, 146 U. S. 258, affirming 37 Fed. 832; Citizens' Gas Light Co. v. Inhabitants of Wakefield, 161 Mass. 432, 37 N. E. 444, 31 L. R. A. 457; Palmer v. Larchmont Elec. Light Co., 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672.

and legally granted and in unmistakable terms; it cannot be inferred from a general grant of power to provide for the safety, comfort or welfare of the inhabitants of a particular locality.[477] The reason for this principle clearly appears from an application of the doctrine of limited powers to public corporations and the questionable character of the legality of the exercise of such a power.

Construction of authority. The universal doctrine prevails that the rule of strict construction applies to all statutes granting or attemping to grant powers to public corporations, especially municipal and which involve the exercise of the power of taxation,[478] the incurring of indebtedness, [479] or the expenditure of public moneys.[480]

§ 497. Mode of establishing municipal plant.

The grant of authority to public corporations to secure a supply of water and light either for their own needs or that of private consumers should prescribe in definite and certain language the mode in which the authority is to be exercised and this is usually found to be the case.

The existence of the authority to engage in the business of supplying water, light or other service is the essential condition and as a legal proposition it is immaterial whether the municipal corporation be given the right to erect its own plant or to purchase from private persons one already constructed and in operation.[481] The point to be observed in connection with the subject of this

[477] Village of Ladd v. Jones, 61 Ill. App. 584; Cooley, Const. Lim. (7th Ed.) p. 265, citing many cases.
8 Curr. Law, 1063.

[478] Townsend Gas & Elec. Co. v. City of Port Townsend, 19 Wash. 407, 53 Pac. 551.

[479] Heilbron v. City of Cuthbert, 96 Ga. 312, 23 S. E. 206; City of Laporte v. Gamewell Fire Alarm Tel. Co., 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686; Ludington Water-Supply Co. v. City of Ludington, 119 Mich. 480, 78 N. W. 558; Klichli v. Minnesota Brush Elec. Co., 58 Minn. 418, 59 N. W. 1088; Lynchburg & R. St. R. Co. v. Dameron, 95 Va. 545, 28 S. E. 951; Ellinwood v. City of Reedsburg, 91 Wis. 131.

[480] Ampt v. City of Cincinnati, 56 Ohio St. 47, 46 N. E. 69, 35 L. R. A. 737.
8 Curr. Law, 1063.

[481] Long Island Water Supply Co. v. City of Brooklyn, 166 U. S. 685; Hudson Elec. Light Co. v. Inhabitants of Hudson, 163 Mass. 346; Neosho City Water Co. v. City of Neosho, 136 Mo. 498, 38 S. W. 89.

paragraph as well as all other sections in which the subject is considered, is that the statutory authority is to be strictly construed and literally followed.[482]

§ 498. Operation of plant.

A municipal corporation when it engages in the business of manufacturing and supplying light or furnishing water either to its own self or private consumers, as already stated, exercises its business or proprietary powers and it follows, therefore, that those rules of construction with reference to the making and enforcement of contracts which apply as between private individuals will also apply here. The corporation will be liable in the same manner as private individuals engaged in a similar business, for the manufacture and sale of light and the furnishing of water to private consumers is a private business in all its characteristics and essentials and does not pertain in any manner to any of the functions of government.

Rules and regulations. Public corporations legally operating plants of the character under consideration have unquestionably the right to make reasonable rules and regulations having in view the economical operation of the business, the protection and preservation of the plant in all its parts and the collection of charges for the use of the commodity supplied. These rules and regulations may involve the compulsory use of meters, the collection of rates established, or the use of water in the absence of meters.[483]

§ 499. Use of highways by private persons

Highways may be also occupied or used by private persons, natural or artificial, in supplying the commodities under discussion to either municipal corporations, private consumers, or both.[484] The permission to occupy the highways has been variously termed a franchise, lease, privilege, easement and con-

[482] Citizens' Gas Light Co. of Reading v. Inhabitants of Wakefield, 161 Mass. 432, 37 N. E. 444, 31 L. R. A. 457.

[483] Sweeny v. Bienville Water Supply Co., 121 Ala. 454, 25 So. 575; Sheward v. Citizens' Water Co., 90 Cal. 635, 27 Pac. 439; State v. Gosnell, 116 Wis. 606, 93 N. W. 542, 61 L. R. A. 33. But see Smith v. Birmingham Water Works Co., 104 Ala. 315, 16 So. 123. Red Star Line S. S. Co. v. Jersey City, 45 N. J. Law, 246.

[484] Inhabitants of Falmouth v. Falmouth Water Co., 180 Mass. 325, 62 N. E. 255.

8 Curr. Law, 64.

tract.[485] The weight of authority and as based upon the better reasoning holds that where permission is granted for the use of public highways or grounds to one legally capable of exercising it, a right is obtained in the nature of an easement or contract and of which the grantee cannot be deprived legally.[486] There is created a contract obligation which is protected by the federal constitution [487] and which is subject to all principles of law in respect to change or alteration, amendment or revocation, that apply to ordinary contracts.[488] There are some authorities which consider the right as a franchise, but it does not seem to the author that the term is correctly and legally used in this connection.[489] The right to conduct a business or occupation or to exercise a privilege which does not belong to the citizens of a country generally of common right is regarded as a franchise and this is secured through the act of incorporation, not by the permission to exercise these privileges in a particular locality.[490] The absence of permission suspends merely the legal right to exercise a privilege in a particular place and municipal action in this respect whether negative or affirmative can have no other effect.[491]

[485] Jackson County Horse R. Co. v. Interstate Rapid Transit R. Co., 24 Fed. 306; Crowder v. Town of Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; United Railways & Elec. Co. of Baltimore v. Hayes, 92 Md. 490, 48 Atl. 364.

[486] Levis v. City of Newton, 75 Fed. 884; Southern R. Co. v. Atlanta Rapid-Transit Co., 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125; Metropolitan City R. Co. v. Chicago West Division Co., 87 Ill. 317; City of Vincennes v. Citizens' Gas Light Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; Rutland Elec. Light Co. v. Marble City Elec. Light Co., 65 Vt. 377, 26 Atl. 635, 20 L. R. A. 821.

[487] New Orleans Waterworks Co. v. Rivers, 115 U. S. 674; City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1; Illinois Trust & Sav. Bank v. Arkansas City (C. C. A.) 76 Fed. 271, 34 L. R. A. 518; South West Missouri Light Co. v. City of Joplin, 101 Fed. 23; Id., 113 Fed. 817; Little Falls Elec. & Water Co. v. City of Little Falls, 103 Fed. 663; Theberath v. City of Newark, 57 N. J. Law, 309, 30 Atl. 528.

[488] City of St. Louis v. Western Union Tel. Co., 148 U. S. 92; People v. Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; Michigan Tel. Co. v. City of Benton Harbor, 121 Mich. 512, 80 N. W. 336, 47 L. R. A. 104; Nicoll v. Sands, 131 N. Y. 19, 29 N. E. 818; City of Burlington v. Burlington Traction Co., 70 Vt. 491, 41 Atl. 514.

[489] Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co., 33 Fed. 669; Harrell v. Ellsworth, 17 Ala. 576; People v. Deehan, 153 N. Y. 528, 47 N. E. 787.

[490] Bank of Augusta v. Earle, 13 Pet. (U. S.) 519.

[491] Chicago City R. Co. v. People, 73 Ill. 541; Township of Plymouth

§ 500. Source of authority.

Any lawful permission, whatever it may be called, must proceed from the state legislature and the validity of grants is determined by the constitution and other tests applied to all legislation.[492]

The legislature can act in the granting of permission independent of subordinate governmental agencies of the state [493] though the tendency of later years which is well grounded in reason is for the state to confer upon local municipal authorities the right to represent and to act for it in the granting of permission for the occupation or use of the public highways.[494] The power, however, when exercised by municipal or other subordinate public corporations, must be expressly granted or appear by indisputable implication.[495] The rule ordinarily obtains that a general grant of power to municipal corporations to light streets and public places will not authorize them to grant exclusive privileges or licenses to private persons to occupy and use public highways for the purpose of constructing and operating lighting plants.[496]

The action of local authorities, however, cannot create a lawful right contrary to the constitution or under an unconstitutional act [497] or prevent a corporation from exercising powers granted

v. Chestnut Hill & N. R. Co., 168 Pa. 181, 32 Atl. 19; Nellis, St. Surface R. R. p. 55; People v. Mutual Gaslight Co., 38 Mich. 154.

[492] City of Knoxville v. Africa (C. C. A.) 77 Fed. 501; Jersey City Gas Co. v. Dwight, 29 N. J. Eq. (2 Stew.) 242; Beekman v. Third Ave. R. Co., 153 N. Y. 144, 47 N. E. 277; State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262; Allen v. Clausen, 114 Wis. 244, 90 N. W. 181; Joyce, Elec. Law, § 143; Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610.

8 Curr. Law, 64.

[493] Abbott v. City of Duluth, 104 Fed. 833.

[494] City R. Co. v. Citizens' St. R. Co., 166 U. S. 557; City of Philadelphia v. McManes, 175 Pa. 28, 34 Atl. 331; Galveston & W. R. Co. v. City of Galveston, 90 Tex. 398, 39 S. W. 96, 36 L. R. A. 33.

[495] Freeport Water Co. v. City of Freeport, 180 U. S. 587, affirming 186 Ill. 179, 57 N. E. 862; Farmer v. Myles, 106 La. 333, 30 So. 858; North Baltimore Pass. R. Co. v. City of Baltimore, 75 Md. 247; Ludington Water Supply Co. v. City of Ludington, 119 Mich. 480, 78 N. W. 558; Thompson v. Ocean City R. Co., 60 N. J. Law, 74, 36 Atl. 1087; Parkhurst v. Capitol City R. Co., 23 Or. 471, 32 Pac. 304.

[496] Saginaw Gaslight Co. v. City of Saginaw, 28 Fed. 529.

[497] City of Laporte v. Gamewell Fire Alarm Tel. Co., 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686; City of Allentown v. Western Union Tel. Co., 148 Pa. 117.

by the state in respect to particular localities where their action is not necessary.[498]

§ 501. Mode of grant.

The state may grant permission for the occupation and use of public highways by either general laws or special acts where the latter are not prohibited by constitutional provisions.[499] Where the consent of a municipality is necessary, it is usually secured by the passage of ordinances or resolutions or that which is the equivalent of local legislative action.[500] The validity of the grant under these circumstances will be determined by the legality of the affirmative action and the questions which are involved have been considered under the sections relating to legislative bodies and their proceedings.[501] The affirmative action of voters may be required by law.[502]

§ 502. Grant subject to regulation.

Whatever may be the mode by which one supplying water, light or a similar service to a community secures his legal right to do this, the grant is taken subject not only to a reserved right of regulation when expressly made, but also to the implied right of a public corporation to exercise the police power and to main-

[498] Abbott v. City of Duluth, 104 Fed. 833; Northwestern Tel. Exch. Co. v. City of Minneapolis, 81 Minn. 140, 86 N. W. 69, 53 L. R. A. 175, affirming on rehearing 83 N. W. 527.

[499] In re Portland R. Extension Co., 94 Me. 565, 48 Atl. 119.

8 Curr. Law, 64.

[500] Illinois Trust & Sav. Bank v. Arkansas City (C. C. A.) 76 Fed. 271, 34 L. R. A. 518; City of Morristown v. East Tennessee Tel. Co., 115 Fed. 304; In re Milbridge & C. Elec. R. Co., 96 Me. 110, 51 Atl. 818; State v. Cowgill & Hill Mill. Co., 156 Mo. 620, 57 S. W. 1008; Camden Horse R. Co. v. West Jersey Traction Co., 58 N. J. Law, 102, 32 Atl. 72; Pennsylvania R. Co. v. Inhabitants of Hamilton Tp., 67 N. J. Law, 477, 51 Atl. 926.

[501] Halsey v. Town of Lake View, 188 Ill. 540, 59 N. E. 234; State v. Omaha & C. B. R. & Bridge Co., 113 Iowa, 30, 84 N. W. 983, 52 L. R. A. 315; Sullivan v. Bailey, 125 Mich. 104, 83 N. W. 996.

[502] Thomson-Houston Elec. Co. v. City of Newton, 42 Fed. 723; Cartersville Water-Works Co. v. City of Cartersville, 89 Ga. 689, 16 S. E. 70; Mitchell v. City of Negaunee, 113 Mich. 359, 38 L. R. A. 157; Aurora Water Co. v. City of Aurora, 129 Mo. 540, 31 S. W. 946; Childs v. Hillsborough Elec. Light & Power Co., 70 N. H. 318, 47 Atl. 271.

tain and protect public property in the condition and for the purpose for which originally acquired.[503] The rules and regulations in this respect must be, however, reasonable, and must be obeyed by the company or individual[504] and one accepting a grant or license from a public corporation for the use of the public highways takes it subject to the continuing power of the corporation for the public benefit to grade and improve its highways.

§ 503. Acceptance and construction of the grant.

There must be an acceptance of the grant whatever its source, which may be formal or informal in its character. In the latter case by acts and in the former by writing or by some designated mode.[505] The grant must be accepted unconditionally and within the time designated if this is prescribed or within a reasonable time if no limit is fixed.[506]

Since the occupation of a highway by private persons for the purpose of supplying water, light, telephone, transportation or telegraphic service, is a use of public property for private gain, the universal rule obtains that licenses, contracts or privileges, exclusive or otherwise, granted for these purposes are to be construed strictly.[507] Courts are careful to see that public rights

[503] Railroad Commission Cases, 116 U. S. 307; Wabash R. Co. v. City of Defiance, 167 U. S. 88; American Rapid Tel. Co. v. Hess, 125 N. Y. 641, 26 N. E. 919, 13 L. R. A. 454; City of Knoxville v. Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888.

8 Curr. Law, 64.

[504] Pittsburg, Ft. W. & C. R. Co. v. City of Chicago, 159 Ill. 369, 42 N. E. 781; City of Kalamazoo v. Kalamazoo Heat, Light & Power Co., 124 Mich. 74, 82 N. W. 811; Benton v. City of Elizabeth, 61 N. J. L. 693, 40 Atl. 1132; Missouri v. Murphy, 170 U. S. 78; Hot Springs Elec. Light Co. v. City of Hot Springs, 70 Ark. 300, 67 S. W. 761; City of Noblesville v. Noblesville Gas & Imp. Co., 157 Ind. 162, 60 N. E. 1032.

[505] Illinois Trust & Sav. Bank v. Arkansas City (C. C. A.) 76 Fed. 271, 34 L. R. A. 518; City of Baxter Springs v. Baxter Springs Light & Power Co., 64 Kan. 591, 68 Pac. 63; Clarksburg Elec. Co. v. City of Clarksburg, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142.

8 Curr. Law, 64.

[506] Poppleton v. Moores, 62 Neb. 851, 88 N. W. 128.

[507] Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24; Edison Elec. Ill. Co. v. Hooper, 85 Md. 110; Tallon v. City of Hoboken, 60 N. J. Law, 212, 37 Atl. 895; Jones v. Erie & W. B. R. Co., 169 Pa. 333, 32 Atl. 535; In re Barre Water Co., 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 195.

are guarded and that nothing passes beyond what has been fairly granted or acquiesced in for many years.[508] No rule of construction is necessary where the language of the grant is definite and certain for, as courts have said, they construe and interpret instruments and contracts, not make them.[509]

The presumption of law, however, exists that a statute or ordinance is presumed to be valid both in respect to the power of the public body to pass or adopt it, its form or passage, and its subject matter,[510] and the existence of this presumption shifts the burden of proof to the one attacking the validity of the law.

§ 504. Exercise of the grant; the elements of time and place.

The question has been raised of the legal power of a municipal corporation to make a contract or grant a license extending over a period in excess of the official term of that legislative body or office granting the privilege or the license for the reason that all legislative bodies are limited in their legal capacity so as not to deprive succeeding bodies of the right to deal with matters involving the same questions as they arise from time to time in the future and as the then present exigencies may require.[511] Cases will be found upon this question both for and against the contention as stated. The weight of authority sustains the doctrine that contracts, privileges or license rights exclusive or otherwise, may be granted by a legislative body to be exercised for a reasonable time or one authorized by law in the future and in excess of the legislative life of a governing body.[513]

[508] City of Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, affirming 88 Fed. 720; Hudson River Tel. Co. v. Watervliet Turnpike & R. Co., 135 N. Y. 393, 17 L. R. A. 674; Pittsburg & W. E. Pass. R. Co. v. Point Bridge Co., 165 Pa. 37, 30 Atl. 511, 26 L. R. A. 323; Taggart v. Newport St. R. Co., 16 R. I. 668, 7 L. R. A. 205.

[509] Postal Tel. Cable Co. v. Norfolk & W. R. Co., 88 Va. 920; Joyce, Elec. Law, § 163; Hamilton Gaslight & Coke Co. v. Hamilton City, 146 U. S. 258; Skaneateles Water-Works Co. v. Village of Skaneateles, 184 U. S. 354, affirming 161 N. Y. 154, 55 N. E. 562, 46 L. R. A. 687; Warsaw Water Works Co. v. Village of Warsaw, 161 N. Y. 176, 55 N. E. 486.

[510] Lewis, Sutherland, Stat. Const. (2d Ed.) §§ 499 et seq.

[511] City of New York v. Second Ave. R. Co., 32 N. Y. 261. See, also, cases cited in two following notes. 8 Curr. Law, 64.

[512] Jackson County Horse R. Co. v. Interstate Rapid Transit R. Co., 24 Fed. 306; Hall v. City of Cedar Rapids, 115 Iowa, 199, 88 N. W. 448; Eddy, Combinations, § 26.

[513] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Dan-

Place of exercise. The right to occupy new streets without permission is dependent upon the language of the original grant of the license or privilege.[514] Where the corporate limits of a municipality are lawfully extended, the right to occupy and use the highways of the additional territory is dependent again upon the language of the original grant if it is definite in its terms and conveys clearly the general right to carry on the business authorized within the limits of the grantor. This privilege is coextensive territorially with the jurisdiction of the grantor.[515]

§ 505. Grant of license upon condition.

A public corporation may attach to the grant of a right such conditions as it may deem of advantage to itself,* an option to purchase, for example,[517] or which may be necessary in order to enable it to properly exercise its own public powers and perform its governmental duties.[518] The conditions which are ordinarily found relate to a free supply of water or light to the municipal-

ville Water Co. v. City of Danville, 180 U. S. 619, affirming 186 Ill. 326, 57 N. E. 1129; Fergus Falls Water Co. v. City of Fergus Falls, 65 Fed. 586; Little Falls Elec. & Water Co. v. City of Little Falls, 102 Fed. 663; City of Vincennes v. Citizens' Gaslight Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; Columbus Water-Works Co. v. City of Columbus, 48 Kan. 99, 28 Pac. 1097, 15 L. R. A. 354; Sullivan v. Bailey, 125 Mich. 104, 83 N. W. 996; Neosho City Water Co. v. City of Neosho, 136 Mo. 498, 38 S. W. 89; Logan Natural Gas & Fuel Co. v. City of Chillicothe, 65 Ohio St. 186, 62 N. E. 122; Bennett Water Co. v. Borough of Millvale, 202 Pa. 616, 51 Atl. 1098; The Binghampton Bridge Co., 70 U. S. (3 Wall.) 51; Beach, Monopolies, § 118. See, also, Abbott, Mun. Corp. §§ 903 et. seq., for a full discussion of the subject.

[514] People v. Deehan, 153 N. Y. 528, 47 N. E. 787.

[515] Pittsburg, Ft. W. & C. R. Co. v. City of Chicago, 159 Ill. 369, 42 N. E. 781.

* 8 Curr. Law, 64.

[516] State v. City of New Orleans, 41 La. 91, 5 So. 262; People v. Deehan, 153 N. Y. 528, 47 N. E. 787.

[517] Southern Bell Teleg. & Tel. Co. v. City of Richmond (C. C. A.) 103 Fed. 31, affirming 98 Fed. 671; Logansport R. Co. v. City of Logansport, 114 Fed. 688; Township of Grosse Pointe v. Detroit & L. St. C. R. Co., 130 Mich. 363, 90 N. W. 42; Trenton St. R. Co. v. Pennsylvania R. Co., 63 N. J. Eq. 276, 49 Atl. 481; Keokuk Gas-Light & Coke Co. v. City of Keokuk, 80 Iowa, 137, 45 N. W. 555.

[518] Mercantile Trust & Deposit Co. v. Collins Park & B. R. Co., 101 Fed. 347; Pikes Peak Power Co. v. City of Colorado Springs, 105 Fed. 1; Conover v. Long Branch Commission, 65 N. J. Law, 167, 47 Atl. 222.

ity,[519] to the construction and operation of the plant,[520] and a consideration, monetary or otherwise, in favor of the public corporation after competitive bidding.[521] Limitations may be placed upon the location of the plant, both in respect to its buildings and also its mains, pipes, wires and other facilities for distributing its commodity.[522]

Consent of abutters. The consent of abutting property owners may be imposed as a condition precedent to the lawful construction of street railways or laying of water or gas pipes or electric wires, even in those communities where the fee of the highway is vested in the public corporation and irrespective of the question of the imposition of an additional burden.[523]

The conditions may apply not only to the original construction of the plant but also to its maintenance, use, and operation thereafter.[524] It is not necessary, however, that the right be reserved to the grantor of a license that it be capable of regulating the manner of the exercise of a grant. The state and its subordinate agencies retain under all conditions and circumstances the right to exercise the police power [525] and also to maintain and preserve

[519] State Trust Co. v. City of Duluth, 104 Fed. 632; Boise City Artesian Hot & Cold Water Co. v. Boise City, 123 Fed. 232; City of New Orleans v. Great Southern Telep & Tel. Co. 40 La. Ann. 41; Kensington Elec. Co. v. City of Philadelphia, 187 Pa. 446, 41 Atl. 309; Louisville Water Co. v. Clark, 143 U. S. 1.

[520] Lanning v. Osborne, 76 Fed. 319; People v. Sutter St. R. Co., 117 Cal. 604, 49 Pac. 736; Coverdale v. Edwards, 155 Ind. 374, 58 N. E. 495; Village of Dearborn v. Detroit, Y., A. A. & J. R. Co., 131 Mich. 19, 90 N. W. 688; Jones v. Rochester Gas & Elec. Co., 168 N. Y. 65, 60 N. E. 1044.

[521] People v. Craycroft, 111 Cal. 544, 44 Pac. 463; Pereria v. Wallace, 129 Cal. 397, 62 Pac. 61; New Orleans City & L. R. Co. v. Watkins, 48 La. Ann. 1550, 21 So. 199; City of Allegheny v. Millville, E. & S. St. R. Co., 159 Pa. 411, 28 Atl. 202; Cavanaugh v. Pawtucket, 23 R. I. 102, 49 Atl. 494; People v. New York State Board of Tax Com'rs, 199 U. S. 48.

[522] Ricketts v. Birmingham St. R. Co., 85 Ala. 600; Norwalk & S. N. Elec. Light Co. v. Common Council, 71 Conn. 381, 42 Atl. 82; Meyers v. Hudson County Elect. Co., 60 N. J. Law, 350, 37 Atl. 618.

[523] Beeson v. City of Chicago, 75 Fed. 880; City of Knoxville v. Africa (C. C. A.) 77 Fed. 501, reversing 70 Fed. 729; McGann v. People, 194 Ill. 526, 62 N. E. 941; Kennedy v. Detroit R. Co., 108 Mich. 390, 66 N. W. 495; Point Pleasant Elec. Light & Power Co. v. Borough of Bayhead, 62 N. J. Eq. 296, 49 Atl. 1108; In re Buffalo Traction Co., 155 N. Y. 700.

[524] State v. Sloan, 48 S. C. 21.

[525] Nebraska Tel. Co. v. York Gas & Elec. Light Co., 27 Neb. 284;

the public highways for the chief and paramount purpose for which they were established.[526]

A regulation requiring a permit is also reasonable[527] and the grantee of a right can be required to restore the highway to the condition in which it was at the time it was torn up at its own expense and in the same permanent and workmanlike manner.[528] So, corporations occupying the public highways may be controlled in their use of them in respect to sewers, pipes, mains or wires belonging to the public corporation[529] or other private companies[530] and they may be made liable for any injuries to them which occur through their own use of the highway.

Destruction of or injury to trees. In some states the rights of companies organized for the purpose of supplying light, telephone or telegraph service in respect to the destruction of or injury to shade or other trees in the public highways, are determined by the language of statutes.[531] Aside from statutory provisions the right of these corporations to remove or trim trees without paying damages seems to be based upon the adoption of the rule in respect to whether or not such occupation of a highway constitutes an additional burden.[532]

§ 506. Regulation by public corporations, extent and character.

All public corporations within whose jurisdiction may be constructed and operated under lawful authority any of the public

Consolidated Traction Co. v. Elizabeth City, 58 N. J. Law, 619, 34 Atl. 146, 32 L. R. A. 170.

[526] North Chicago City R. Co. v. Town of Lake View, 105 Ill. 207; Benton v. Elizabeth City, 61 N. J. Law, 693, 40 Atl. 1132.

[527] Ghee v. Northern Union Gas Co., 34 App. Div. 551, 56 N. Y. Supp. 450, reversed in part in 158 N. Y. 510, 53 N. E. 692.

[528] Crebs v. City of Lebanon, 98 Fed. 549; State v. Lake Koen Navigation, Reservoir & Irr. Co., 63 Kan. 394, 65 Pac. 681; State v. Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; McHale v. Easton & B. Transit Co., 169 Pa. 416, 32 Atl. 461. But see Stillwater Water Co. v. City of Stillwater, 50 Minn. 498, 52 N. W. 893. See, also, City of Kalamazoo v. Kalamazoo Heat, Light & Power Co., 124 Mich. 74, 82 N. W. 811.

[529] City of San Antonio v. San Antonio St. R. Co., 15 Tex. Civ. App. 1, 39 S. W. 136.

[530] Rockland Water Co. v. Tillson, 75 Me. 170; People v. Squire, 107 N. Y. 593, affirmed 145 U. S. 175.

[531] Bradley v. Southern New England Tel. Co., 66 Conn. 559, 34 Atl. 499, 32 L. R. A. 280.

[532] Tate v. City of Greensboro, 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671; Clay v. Postal Tel. Cable Co., 70 Miss. 406; Daily v. State, 51 Ohio St. 348, 24 L. R. A. 724.

utilities, so called, and included within the present discussion, possess the right to regulate in a proper manner under the police power of the state these facilities both in their construction and operation.[533] It is not necessary that this right be reserved in the grant of a license or privilege but it is regarded as an implied one,[534] and because based upon an exercise of the police power as continuing and inextinguishable, and further, one that cannot be surrendered or bargained away.[535] Where public highways are occupied and used, the public authorities also retain the implied power to regulate these corporations because of their inherent power to preserve and maintain public ways for their original and primary purpose.[536] The public authorities, therefore, can regulate, because of these legal conditions and facts, such use and occupation. The right of subordinate public corporations and public quasi corporations will depend upon the extent and character of the powers belonging to them and as based upon their position among governmental agencies.[537]

Where municipal or public quasi corporations possess the power of regulation, an exercise of that power is legislative in its character and, therefore, discretionary.[538] Its exercise is

[533] Missouri v. Murphy, 170 U. S. 78; Id., 130 Mo. 10; Lahr v. Metropolitan El. R. Co., 104 N. Y. 268; Ogden City R. Co. v. Ogden City, 7 Utah, 207, 26 Pac. 288.

8 Curr. Law, 64.

[534] Stein v. Bienville Water Supply Co., 34 Fed. 145; Jamieson v. Indiana Natural Gas & Oil Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; State v. Inhabitants of City of Trenton, 53 N. J. Law, 132, 20 Atl. 1076; Commonwealth v. Warwick, 185 Pa. 623, 40 Atl. 93.

[535] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Railroad Commission Cases, 116 U. S. 307; City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1; Benedict v. Columbus Construction Co., 49 N. J. Eq. 23, 23 Atl. 485. But property or vested rights cannot be destroyed by an illegal regulation under guise of the police power.

[536] Wabash R. Co. v. City of Defiance, 167 U. S. 88; Milhau v. Sharp, 27 N. Y. 611; Pennsylvania Co. v. City of Chicago, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223; Thompson v. Ocean City R. Co., 60 N. J. Law, 74, 36 Atl. 1087; Delaware, L. & W. R. Co. v. City of Buffalo, 158 N. Y. 266, 53 N. E. 44.

[537] Laramie County Com'rs v. Albany County, 92 U. S. 310; Cooley, Const. Lim. (7th Ed.) p. 266, note 2; City of Philadelphia v. McManes, 175 Pa. 28, 34 Atl. 331; Ghee v. Northern Union Gas Co., 158 N. Y. 510, 53 N. E. 692.

[538] City of St. Louis v. Western Union Tel. Co., 63 Fed. 68; Brown v. Chicago Great Western R. Co., 137 Mo. 529, 38 S. W. 1099; Forman v. New Orleans & C. R. Co., 40 La. Ann. 446, 4 So. 246; Joyce, Elec. Law, § 220.

presumed to be within the powers of the corporation and in a lawful and proper manner.

Where delegated governmental powers or functions involve the exercise of judgment and discretion they cannot in turn be delegated but must be exercised under the immediate authority of the corporation to whom they have been originally delegated by the state.[539] The rule also obtains that the governmental power of regulation in whatever body it may exist cannot be surrendered or sold to corporate or natural private persons.[540]

§ 507. Rates for service rendered or commodities furnished.

The right of the licensee to fix the rates at which its commodities or services may be supplied and furnished may be limited by conditions in the license, grant or statutes.[541] Or again, by the universal rule which prevails that in the absence of express restrictions, rates charged must be reasonable.[542] The state or its subordinate agencies under these conditions retains the right to limit charges to those which are reasonable considering all of the circumstances under which they are supplied,[543] and to pre-

[539] City of Indianapolis v. Indianapolis Gaslight Co., 66 Ind. 396.

[540] Logansport R. Co. v. City of Logansport, 114 Fed. 688; City of Louisville v. Wible, 84 Ky. 290, 1 S. W. 605; State v. Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32; State v. Bell, 34 Ohio St. 194; North Springs Water Co. v. City of Tacoma, 21 Wash. 517, 58 Pac. 773, 47 L. R. A. 214.

[541] Osborne v. San Diego Land & Town Co., 178 U. S. 22, affirming 76 Fed. 319; Freeport Water Co. v. City of Freeport, 180 U. S. 587, affirming 186 Ill. 179, 57 N. E. 862; Peoples' Gaslight & Coke Co. v. City of Chicago, 114 Fed. 384; State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262; City of Allegheny v. Millville, E. & S. St. R. Co., 159 Pa. 411, 28 Atl. 202.

8 Curr. Law, 64.

[542] Capital City Gaslight Co. v. City of Des Moines, 72 Fed. 829; City of Mobile v. Bienville Water Supply Co., 130 Ala. 379, 30 So. 445; Redlands, L. & C. Domestic Water Co. v. City of Redlands, 121 Cal. 312, 53 Pac. 791; In re Janvrin, 174 Mass. 514, 55 N. E. 381, 47 L. R. A. 319; Goebel v. Grosse Pointe Waterworks, 126 Mich. 307, 85 N. W. 744; Brymer v. Butler Water Co., 179 Pa. 331, 36 Atl. 249.

[543] Osborne v. San Diego Land & Town Co., 178 U. S. 22; People's Gaslight & Coke Co. v. City of Chicago, 114 Fed. 384; Crosby v. City Council of Montgomery, 108 Ala. 498, 18 So. 723; Hall v. City of Cedar Rapids, 115 Iowa, 199, 88 N. W. 448; Haverhill Aqueduct Co. v. Page, 52 N. H. 472; Brymer v. Butler Water Co., 179 Pa. 331, 36 Atl. 249; City of Knoxville v. Knoxville Water Co., 107 Tenn. 647, 61 L. R. A. 888, affirmed 189 U. S. 434.

vent discrimination.[544] When a contract establishes the rates which may be charged, this provision creates an obligation which cannot be destroyed or impaired by attempts to reduce the rates thus fixed during the term of the license or contract.[545]

§ 508. The right to change rates.

It must not be forgotten, however, that the rendition of a service whether that of transportation or the supplying of some commodity is property within the meaning of constitutional provisions relative to the taking of property without due process of law or without the payment, when it is private, as in the case noted for a public use, of full and ample compensation.[546] The rule, therefore, is well established that rates, though the right to change them exist,[547] cannot be fixed so low as to effect a taking of property under any of the constitutional provisions mentioned;[548] neither can a contract provision fixing rates be broken by either party.[549] The principles which sustain this rule have been well and frequently stated by the Supreme Court of the United States in a series of cases involving the establishment and change of rates of transportation as charged by common carriers.[550]

[544] City of Mobile v. Bienville Water Supply Co., 130 Ala. 379, 30 So. 445; Wagner v. City of Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; Silkman v. Yonkers Water Com'rs, 152 N. Y. 327, 46 N. E. 612, 37 L. R. A. 827; Richmond Natural Gas Co. v. Clawson, 155 Ind. 659, 58 N. E. 1049, 51 L. R. A. 744.

[545] Santa Ana Water Co. v. Town of San Buenaventura, 56 Fed. 339.

[546] San Diego Land & Town Co. v. National City, 174 U. S. 739, affirming 74 Fed. 79; Central Trust Co. v. Citizen's St. R. Co., 80 Fed. 218.

[547] Freeport Water Co. v. City of Freeport, 180 U. S. 587, affirming 186 Ill. 179, 57 N. E. 862.

[548] San Diego Land & Town Co. v. National City, 174 U. S. 739, affirming 74 Fed. 79; City of Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, affirming 88 Fed. 720; San Diego Water Co. v. City of San Diego, 118 Cal. 556, 50 Pac. 663, 38 L. R. A. 460; City of Des Moines v. Des Moines Waterworks Co., 95 Iowa, 348, 64 N. W. 269; State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262.

[549] City of Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, affirming 88 Fed. 720; City of Noblesville v. Noblesville Gas & Improvement Co., 157 Ind. 162, 60 N. E. 1032; Logan Natural Gas & Fuel Co. v. City of Chillicothe, 65 Ohio St. 186, 62 N. E. 122; City of Ashland v. Wheeler, 88 Wis. 607, 60 N. W. 818.

[550] Stone v. Farmers' Loan & Trust Co., 116 U. S. 307; Chicago

§ 509. Assignment or revocation of privilege or license.

The legal right of the grantee of a privilege of the character considered to assign or transfer by sale or through consolidation the rights which it may possess under its original lawful authority is largely dependent upon the language of the license or contract.[551] Ordinarily the privileges granted are assignable to other persons or corporations with the same obligations for a period equal at least to the length of time which they may still lawfully exercised.[552]

Where a public corporation has the lawful power to grant a privilege or license to one to occupy public highways and thereafter carry on the business thus authorized, such a grant becomes a contract and one which cannot be revoked or impaired, except according to its terms.[553] The federal constitution protects as inviolable these contract rights—for such they are.[554]

Where however, the grant, privilege or license is not exclusive in its character, the grant of a similar privilege to others to en-

M. & St. Paul R. Co. v. Minnesota, 134 U. S. 418, reversing State v. Chicago, M. & St. Paul R. Co., 38 Minn. 281, 37 N. W. 782; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649; Smyth v. Ames, 169 U. S. 466.

[551] City of Los Angeles v. Los Angeles City Water Co., 177 U. S. 558; San Luis Water Co. v. Estrada, 117 Cal. 168; Consolidated Traction Co. v. Elizabeth City, 58 N. J. Law, 619, 32 L. R. A. 170.

[552] City of Austin v. Bartholomew (C. C. A.) 107 Fed. 349; San Luis Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075; Western Paving & Supply Co. v. Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770; City of Lawrence v. Inhabitants of Methuen, 166 Mass. 206, 44 N. E. 247; State v. Laclede Gas-Light Co., 102 Mo. 472, 14 S. W. 974, 15 S. W. 383; Cincinnati Inclined Plane R. Co. v. City of Cincinnati, 52 Ohio St. 609, 44 N. E. 327; City of Philadelphia v. Thirteenth & Fifteenth Sts. Pass. R. Co., 169 Pa. 269, 33 Atl. 126.

[553] The Binghamton Bridge, 70 U. S. (3 Wall.) 51; City R. Co. v. Citizens' St. R. Co., 166 U. S. 557; City of Laredo v. International Bridge & Tramway Co., 66 Fed. 246; Southwest Missouri Light Co. v. City of Joplin, 101 Fed. 23, 113 Fed. 817; Anoka Water-Works, Electric Light & Power Co. v. City of Anoka, 109 Fed. 580; Board of Com'rs of Hamilton County v. Indianapolis Nat. Gas Co., 134 Ind. 209, 33 N. E. 972; City of Louisville v. Wible, 84 Ky. 290; Bennett Water Co. v. Borough of Millvale, 202 Pa. 616, 51 Atl. 1098.

[554] American Water-works & Guarantee Co. v. Home Water Co., 115 Fed. 171; Little Falls Elec. & Water Co. v. City of Little Falls, 102 Fed. 663; Chicago Municipal Gas Light & Fuel Co. v. Town of Lake, 130 Ill. 42, 22 N. E. 616.

gage in the same business or even the erection of a competing plant by the public corporation itself it has been held does not result in an impairment of the prior grant.[555]

§ 510. Forfeiture of grant.

The license or grant may be made, however, dependent upon the performance of certain conditions by the licensee. If these conditions are not complied with, the license or privilege may be forfeited in the manner provided.[556] The arbitrary right, however, of a municipal corporation to revoke or declare forfeited license rights does not ordinarily exist;[557] the reasonable rights of the parties should be determined by a judicial tribunal having jurisdiction and before which the question is properly presented.[558] Conditions ordinarily imposed especially where the commodity supplied is water or light, are those which require the grantee to furnish a sufficient supply of the commodity or at a designated pressure[559] or one that reaches a certain standard of purity or quality.[560] A failure to comply with such conditions

[555] Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420; Skaneateles Water-works Co. v. Village of Skaneateles, 184 U. S. 354, affirming 161 N. Y. 154, 55 N. E. 562; Newburyport Water Co. v. City of Newburyport, 103 Fed. 584; Inhabitants of Franklin v. Nutley Water Co., 53 N. J. E. 601; Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 210.

[556] Louisville Trust Co. v. City of Cincinnati (C. C. A.) 76 Fed. 296; West Springfield & A. St. R. Co. v. Bodurtha, 181 Mass. 583, 64 N. E. 414; Water Supply Co. of Albuquerque v. City of Albuquerque, 9 N. M. 441, 54 Pac. 969; Township of Plymouth v. Chestnut Hill & N. R. Co., 168 Pa. 181, 32 Atl. 19; Kaukauna Elec. Light Co. v. City of Kaukauna, 114 Wis. 327, 89 N. W. 542. 8 Curr. Law, 63.

[557] New Orleans Water-works Co. v. St. Tammany Water-works Co., 14 Fed. 194; Citizens' St. R. Co. v. City of Memphis, 53 Fed. 715; Township of Plymouth v. Chestnut Hill & N. R. Co., 168 Pa. 181, 32 Atl. 19.

[558] Streator v. Village of Ashtabula, 98 Fed. 516; Phillipsburg Elec. Lighting, Heating & Power Co. v. Inhabitants of Phillipsburg, 60 N. J. Law, 505, 49 Atl. 445.

[559] New Orleans Water-works Co. v. Rivers, 115 U. S. 674; Capital City Water Co. v. State, 105 Ala. 406, 18 So. 62, 29 L. R. A. 743; Borough of Almsted v. Morris Aqueduct, 46 N. J. Law, 495; Du Bois Borough v. Du Bois City Water-works Co., 176 Pa. 430, 35 Atl. 248, 34 L. R. A. 92.

[560] Capital City Water Co. v. State, 105 Ala. 406, 18 So. 62; Henry v. City of Sacramento, 116 Cal. 628, 48 Pac. 728; Winfield Water Co. v. City of Winfield, 51 Kan. 104, 33 Pac. 714; Danaher v. City of Brook-

may lead to a refusal to pay charges or it may be the occasion for a forfeiture or revocation of rights granted by the license or under the contract.[561] A substantial compliance as a rule is all that is required especially in respect to non-essentials or minor details, and the principle also obtains that a municipal corporation should not be permitted to make captious objections to either the quantity or quality of water for the sole purpose of depreciating the value of works which it has an option to purchase.[562]

§ 511. Licenses or privileges of an exclusive nature.

The licenses or privileges considered in the preceding sections are not those which grant to the licensee the exclusive right of carrying on the business or occupation designated within the limits of the corporation granting the privilege or making the contract. The subject is readily divided into those grants which give an exclusive possession and occupation of the public highways for the purposes named and those which give the exclusive right of supplying certain commodities principally water and light, to the public corporation itself, or, in other words, an exclusive contract for the sale of a specified commodity. The presumption is against the existence of an exclusive grant.[563]

The only legal objection worthy of consideration against the granting of an exclusive privilege is that there is thereby created a monopoly.[564] An exclusive license or contract is not because of the grant, a monopoly, as originally understood and as prop-

lyn, 119 N. Y. 241, 23 N. E. 745, 7 L. R. A. 592; Brymer v. Butler Water Co., 172 Pa. 489.

[561] Bienville Water Supply Co. v. City of Mobile, 112 Ala. 260, 20 So. 742, 33 L. R. A. 59; Farmers' Loan & Trust Co. v. City of Galesburg, 133 U. S. 156; State v. New Orleans Water-works Co., 107 La. 1, 31 So. 395; State Trust Co. v. City of Duluth, 70 Minn. 257, 73 N. W. 249.

[562] Aurora Water Co. v. City of Aurora, 129 Mo. 540, 31 S. W. 946; Bennett Water Co. v. Borough of Millvale, 202 Pa. 616, 51 Atl. 1098.

[563] Pearsall v. Great Northern R. Co., 161 U. S. 646; Gulf City St. R. Co. v. Galveston City R. Co., 65 Tex. 502.

8 Curr. Law, 64.

[564] Gale v. Village of Kalamazoo, 23 Mich. 344; Beach, Monopolies, p. 360; Greenhood, Pub. Pol. c. 5, pp. 672 et seq.; Bl. Com. 159; 3 Coke, Inst., 181; Tiedeman, Limitations (2d ed.); Tiedeman, State & Fed. Control of Persons & Prop. § 27; Eddy, Combinations, c. 1; Spelling, Trusts & Monopolies, §§ 98–105; Abbott, Mun. Corp. § 922; City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1.

erly defined because it invariably includes the carrying on of a business or an occupation which before was not one capable of being enjoyed as a matter of universal or common right.[564a]

In the absence of a constitutional prohibition, therefore, the principle almost universally obtains that the state or subordinate agencies to whom the power has been granted can legally grant exclusive privileges, licenses or contracts because the rights of no private individual to carry a lawful business have been by such action violated.[565] It is clearly within the power of the legislature to determine who shall receive a franchise, in the strict sense of the word, under what terms, in what manner, and where it shall be exercised.[566] A grant or license though invalid either because of its exclusive character or the time of its existence may still be regarded as a binding contract or privilege for that length of time or to the extent that is within the legal power of the grantor to give.[567]

§ 512. Must be express authority.

It is necessary, however, to enable a municipal corporation proper to grant an exclusive privilege or license that the author-

[564a] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 567; Gale v. Village of Kalamazoo, 23 Mich. 344; Spelling, Trusts & Monopolies, § 100; Elliott, Roads & Streets (2d ed.) § 748. See, also, Abbott, Mun. Corp. § 922.

[565] Constitutional provisions in Alabama, North Carolina, Tennessee and Texas; Richmond, F. & P. R. Co. v. Louisiana R. Co., 13 How. (U. S.) 71; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Riverside Water Co. v. Sargent, 112 Cal. 230; Hanson v. Hunter, 86 Iowa, 722; Smiley v. MacDonald, 42 Neb. 5, 60 N. W. 355, 27 L. R. A. 540; Thrift v. Elizabeth City, 122 N. C. 31, 44 L. R. A. 427; Luzerne Water Co. v. Toby Creek Water Co., 148 Pa. 568, 24 Atl. 117; Clarksburg Elec. Light Co. v. City of Clarksburg, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142; Linden Land Co. v. Milwaukee Elec. R. & Light Co., 107 Wis. 493, 83 N. W. 851. See, also, Beach, Monopolies, c. 8; Eddy, Combinations, §§ 17 et seq.; Spelling, Trusts & Monopolies, § 102; Thornton, Oil & Gas, §§ 441 et seq.

[566] Fanning v. Gregoire, 16 How. (U. S.) 524; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674; Detroit Citizens' St. R. Co. v. City of Detroit, 110 Mich. 384, 68 N. W. 304, 35 L. R. A. 859; Patterson v. Wollmann, 5 N. D. 608, 33 L. R. A. 536; State v. Cincinnati Gas Light & Coke Co., 18 Ohio St. 262. See Spelling, Trusts & Monopolies, c. 9. But the right is modified because of constitutional or other reasons.

[567] Levis v. City of Newton, 75 Fed. 884.

ity should be expressly granted.[568] The same rule applies to all subordinate public agencies.[569]

It is customary in the grant of municipal charters in addition to specific grants of power to add what might be termed omnibus clauses which authorize in general terms the public authorities to take such action as they deem necessary to provide for the general comfort, welfare and safety of the community. It has been repeatedly held that through the grant of this power, a public corporation has no legal authority to give an exclusive license, privilege or contract to private persons, natural or artificial, for the use of the public highways and erection of a plant for the manufacture or distribution of these modern necessities. This rule has been well established by the great weight of authority.[570]

§ 513. Manner in which granted.

The power to grant an exclusive privilege or license must not only be expressly given as stated in the last section but the manner in which it is granted must strictly comply with the terms of that authority. The grant under such circumstances is a legislative and discretionary act and controlled by the various principles heretofore considered under the subject of legislative bodies and their action.[571] An exclusive grant to be valid must

[568] Grand Rapids E. L. & P. Co. v. Grand Rapids E. L. & F. G. Co., 33 Fed. 659; Jackson County Horse R. Co. v. Interstate Rapid Transit R. Co., 24 Fed. 306; Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. 19; Snyder v. City of Mt. Pulaski, 176 Ill. 397, 52 N. E. 62, 44 L. R. A. 407; Rockland Water Co. v. Camden & R. Water Co., 80 Me. 544, 1 L. R. A. 388; Long v. City of Duluth, 49 Minn. 280, 51 N. W. 913; Thompson v. Ocean City R. Co., 60 N. J. Law, 74, 36 Atl. 1087; Smith v. Town of Westerly, 19 R. I. 437, 35 Atl. 526.

8 Curr. Law, 64.

[569] Jackson County Horse R. Co. v. Interstate Rapid Transit R. Co., 24 Fed. 306; Westerly Water-works Co. v. Town of Westerly, 80 Fed. 611; Wright v. Nagle, 48 Ga. 367.

[570] American Water-works Co. v. Farmers' Loan & Trust Co., 73 Fed. 956, 20 C. C. A. 133; Howell v. City of Millville, 60 N. J. Law, 95, 36 Atl. 691; In re City of Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270. But see Andrews v. National Foundry & Pipe Works (C. C. A.) 61 Fed. 782; Heilbron v. City of Cuthbert, 96 Ga. 312, 23 S. E. 206; Oakley v. City of Atlantic City, 63 N. J. Law, 127, 44 Atl. 651.

[571] Louisville Bagging Mfg. Co. v. Central Pass. R. Co., 95 Ky. 50; Patton v. City of Chattanooga, 108 Tenn. 197, 65 S. W. 414; City of Brenham v. Water Co., 67 Tex. 542, 4 S. W. 143; Allen v. Clausen, 114 Wis. 244, 90 N. W. 181.

8 Curr. Law, 64.

not only, therefore, be authorized by the legislature but must also successfully pass all tests which determine the legality of legislation and which include a consideration in addition of the power to pass and determine the validity of specific action and also its subject-matter.[572]

It has already been stated that the presumption of law is against the existence of an exclusive grant or privilege and one must, therefore, be expressly granted before exclusive privileges be claimed under it.[573] The absence of language giving rights of an exclusive character operates against such a claim although there are some cases which hold that through the grant of a license or privilege there arises an implied contract on the part of the city granting it not again to exercise its powers in this respect until the former expires.[574]

§ 514. Grant strictly construed.

The courts do not regard with favor grants for the exclusive occupation and use of public highways or contracts for the exclusive sale to the public of a particular commodity. The rule of strict construction, therefore, applies to all grants, licenses or contracts of this character and unless a right claimed clearly appears, its existence will be denied.[575] This rule will apply not only to the existence of the exclusive privilege or contract itself, but also to any of the minor details or conditions of the instru-

[572] Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081; Helena Consol. Water Co. v. Steele, 20 Mont. 1, 49 Pac. 382, 37 L. R. A. 412; Baily v. City of Philadelphia, 184 Pa. 594, 39 Atl. 494, 39 L. R. A. 837.

[573] Freeport Water Co. v. City of Freeport, 180 U. S. 587, affirming 186 Ill. 179, 57 N. E. 862; Jackson County Horse R. Co. v. Interstate Rapid Transit R. Co., 24 Fed. 306; City of Vincennes v. Citizens' Gas Light Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; In re City of Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270.

[574] Long Island Water Supply Co. v. City of Brooklyn, 166 U. S. 685; Skaneateles Water-works Co. v. Village of Skaneateles, 184 U. S. 354, affirming 161 N. Y. 154, 55 N. E. 562; Boyertown Water Co. v. Borough of Boyertown, 200 Pa. 394, 50 Atl. 189; Citizens' Water Co. v. Bridgeport Hydraulic Co., 55 Conn. 1.

[575] Stein v. Bienville Water Supply Co., 141 U. S. 67, affirming 34 Fed. 145; Haines v. Crosby, 94 Me. 212, 47 Atl. 137; North Baltimore Pass. R. Co. v. North Ave. R. Co., 75 Md. 233.

8 Curr. Law, 64.

ment.[576] The principles of this section are not applied, however, to such an extent as to illegally deprive a grantee or licensee of property or rights which it may have acquired under a previous and more favorable construction of the license or grant. The doctrine of equitable estoppel operates as against the public authorities.[577]

§ 515. Nature of grant or license.*

The grant or license if legally made becomes, upon its acceptance, a valid contract as between the parties to be enforced and carried out in strict accordance with the rules of law pertaining to contracts.[578] An obligation is created between the parties which is embraced within that provision of the Federal Constitution that prohibits the passing of a law impairing the obligation of that contract.[579] Municipal corporations cannot be permitted to trifle with the legal rights of those to whom such license or privileges have been created.[580] But an ultra vires contract cannot be ratified or the doctrine of estoppel applied because of acquiesence.[581]

§ 516. Impairment of contract obligation by grantor of exclusive license or privilege.

It is well settled by the authorities and principles given in the preceding sections that the grant of an exclusive legal privilege

[576] Omaha Horse R. Co. v. Cable Tramway Co., 30 Fed. 324; Stein v. Bienville Water Supply Co., 34 Fed. 145; Passaic Water Co. v. City of Paterson, 65 N. J. Law, 472, 47 Atl. 462; Bly v. White Deer Mountain Water Co., 197 Pa. 80, 46 Atl. 929.

[577] Los Angeles City Water Co. v. City of Los Angeles, 88 Fed. 720, affirmed 177 U. S. 558; City of Los Angeles v. Los Angeles City Water Co., 124 Cal. 368, 57 Pac. 210, 571; Wyandotte Electric-Light Co. v. City of Wyandotte, 124 Mich. 43, 82 N. W. 821.

[578] Mercantile Trust & Deposit Co. v. Collins Park & B. R. Co., 101 Fed. 347.

[579] Williams v. Wingo, 177 U. S. 601; Mercantile Trust & Deposit Co. v. Collins Park & B. R. Co., 99 Fed. 812; Patton v. City of Chattanooga, 108 Tenn. 197, 65 S. W. 414.

[580] City of Kankakee v. Kankakee Water Co., 38 Ill. App. 620.

[581] Westerly Water-works Co. v. Town of Westerly, 80 Fed. 611; Cincinnati Gas Light & Coke Co. v. Avondale, 43 Ohio St. 257, 1 N. E. 527; Smith v. Town of Westerly, 19 R. I. 437, 35 Atl. 526.

* 8 Curr. Law, 84; 7 Curr. Law, 1773.

is a contract, the obligation of which cannot, therefore, be broken by either the public corporation or the one to whom the privilege or license has been given.[582] They extend, ordinarily, over a considerable period of time and the essential of the right in favor of the licensee or grantee is the exclusive privilege of selling some commodity or supplying some service at an agreed rate to the members of a community, the public corporation itself or both. Where the existence of a grant of this character is established, an attempt by the public authorities or the state to grant others rights of a similar character in whole or in part is conceded to be an impairment of the obligation and, therefore, void.[583] The question has been raised as to whether the engaging in a similar business or enterprise by the public corporation is a violation of the terms of an exclusive privilege already granted, or, stated differently, where individuals have been given the exclusive right of supplying and furnishing any of the commodities or services under discussion, whether the grantor can compete with them. Where by the terms of the grant the right is expressly reserved to the grantor or where the grant is not exclusive in its character,[584] there can be no question and in the absence of such a provision there are some authorities which hold that a public corporation still can engage in the same business.[585] The weight of

[582] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; St. Tammany Water-works Co. v. New Orleans Water-works Co., 120 U. S. 64; City of Louisville v. Wible, 84 Ky. 290, 1 S. W. 605; Asheville St. R. Co. v. City of Asheville, 109 N. C. 688, 14 S. E. 316; Carlisle Gas & Water Co. v. Carlisle Water Co., 188 Pa. 51, 41 Atl. 321; Beach, Monopolies, § 121.

[583] Omnibus R. Co. v. Baldwin, 57 Cal. 160; Des Moines St. R. Co. v. Des Moines B. G. St. R. Co., 73 Iowa, 513, 33 N. W. 610, 35 N. W. 602; City of Newport v. Newport Light Co., 84 Ky. 166; Atlantic City Water-works Co. v. Atlantic City, 39 N. J. Eq. (12 Stew.) 367; Bennett Water Co. v. Borough of Millvale, 200 Pa. 613, 50 Atl. 155; State v. Columbus Gas Light & Coke Co., 34 Ohio St. 581, 32 Am. Rep. 393.

[584] Lehigh Water Co. v. Borough of Easton, 121 U. S. 388, affirming 102 Pa. 515; Hamilton Gas Light & Coke Co. v. City of Hamilton, 146 U. S. 258; Long Island Water Supply Co. v. City of Brooklyn, 166 U. S. 685, affirming 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270; Long v. City of Duluth, 49 Minn. 280, 51 N. W. 913; Howard's Appeal, 162 Pa. 374, 29 Atl. 641; North Springs Water Co. v. City of Tacoma, 21 Wash. 517, 58 Pac. 773, 47 L. R. A. 214.

[585] Lehigh Water Co. v. Borough of Easton, 121 U. S. 388, affirming 102 Pa. 515; Hughes v. City of Momence, 163 Ill. 535, 45 N. E. 300; City of Austin v. Nalle, 85 Tex. 520, 22 S. W. 668, 960; Helena Water-

authority and the better considered cases, however, hold that the construction and operation of a competing plant even for the sole purpose of supplying the public corporation itself or rendering a certain service free to the public, is regarded an impairment of the contract obligation.[586]

§ 517. Forfeiture, revocation or assignment of grant or license.

Where an exclusive privilege or license has been granted the duty of the public corporation and its obligation is to refrain from granting similar privileges. The licensee or grantee on the other hand is obligated to comply strictly with the terms of the grant not only in the construction and maintenance of its plant but also, and especially, this is true in the case of a supply of water and light, in furnishing a commodity at a designated pressure or that reaches a certain standard of purity or quality.[587]

A failure to comply with these conditions may be the occasion for a refusal to pay charges, or forfeiture or revocation of the rights granted by the license or under the contract.[588] The existence of conditions or circumstances, however, which are sufficient to warrant this action, is a question for judicial determination unless by the terms of the grant or license the arbitrary right is given to the public authorities.

The legal right of the grantee of an exclusive privilege or license to assign or transfer by sale, or through consolidation, his rights is largely dependent upon the language of the license or grant. It is true as with privileges not of an exclusive char-

works Co. v. City of Helena, 195 U. S. 383; Knoxville Water Co. v. City of Knoxville, 26 Sup. Ct. 224.

[586] City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1; Southwest Missouri Light Co. v. City of Joplin, 101 Fed. 23; Bennett Water Co. v. Borough of Millvale, 202 Pa. 616, 51 Atl. 1098, affirming on rehearing, 200 Pa. 613, 50 Atl. 155; Welsh v. Beaver Falls Borough, 186 Pa. 578, 40 Atl. 784.

[587] City of Greenville v. Greenville Water Co., 125 Ala. 625, 27 So. 764; City of Winfield v. Winfield Water Co., 51 Kan. 70, 32 Pac. 663; Bennett Water Co. v. Borough of Millvale, 202 Pa. 616, 51 Atl. 1098, affirming on rehearing, 200 Pa. 613, 50 Atl. 155; Green v. Ashland Water Co., 101 Wis. 258, 77 N. W. 722, 43 L. R. A. 117.

7 Curr. Law, 1773, 1775.

[588] Burlington Water-works Co. v. City of Burlington, 43 Kan. 725, 23 Pac. 1068; State Trust Co. of New York v. City of Duluth, 70 Minn. 257, 73 N. W. 249; Brymer v. Butler Water Co., 172 Pa. 489, 33 Atl. 707; State v. City of Philipsburg, 23 Mont. 16, 57 Pac. 405.

acter that they are assignable ordinarily to other persons or corporations for a period equal to their unexpired term unless this is prohibited by the grant.[589]

§ 518. Exclusive contracts for supply of commodity.

A public corporation may secure a supply of water or light through a contract with private persons exclusive or otherwise in its character. These organizations are usually given the power to determine their course of action in this respect; they are not limited to the construction of a municipal plant to supply the commodities desired.[590] It is sufficient to say here that the authority for their execution must clearly appear [591] and that public authorities are further limited by restrictions relative to the incurring of indebtedness or the manner of raising or expending public moneys.[592] The rule of strict construction also applies to them in respect to the performance of conditions.[593]

Execution of contract. The subject of municipal contracts has been previously considered, but the principles might be emphasized here in respect to the limited power or capacity of public corporations to contract [594] and the urgent necessity for a strict compliance with all prescribed formalities in respect to the manner, form, or time [595] of their execution.

[589] City R. Co. v. Citizens' St. R. Co., 166 U. S. 557; Canal & C. R. Co. v. Orleans R. Co., 44 La. Ann. 54, 10 So. 389.

[590] City of Detroit v. Circuit Judge of Wayne County, 79 Mich. 384, 44 N. W. 622; Wade v. Oakmont Borough, 165 Pa. 479, 30 Atl. 959; Mauldin v. City Council of Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291.

6 Curr. Law, 1119.

[591] Winterport Water Co. v. Inhabitants of Winterport, 94 Me. 215, 47 Atl. 142, 1045; Lewick v. Glazier, 116 Mich. 493, 74 N. W. 717.

[592] City of East St. Louis v. East St. Louis Gas Light & Coke Co., 98 Ill. 415; East Jordan Lumber Co. v. Village of East Jordan, 100 Mich. 201, 58 N. W. 1012; Klichli v. Minnesota Brush Elec. Co., 58 Minn. 418, 59 N. W. 1088; Higgins v. City of San Diego, 118 Cal. 524; McGuire v. Rapid City, 6 Dak. 346, 5 L. R. A. 752; City of North Platte v. North Platte Water-works Co., 56 Neb. 403, 76 N. W. 906, Id., 50 Neb. 853, 70 N. W. 393; City of Cincinnati v. Holmes, 56 Ohio St. 104.

[593] City of Austin v. Bartholomew (C. C. A.), 107 Fed. 349; City of Winfield v. Winfield Gas Co., 37 Kan. 24, 14 Pac. 499; Belfast Water Co. v. City of Belfast, 92 Me. 52, 42 Atl. 235, 47 L. R. R. 82.

[594] Smith v. Dedham, 144 Mass. 177, 10 N. E. 782; State v. McCardy, 62 Minn. 509, 64 N. W. 1133; Seltzer v. Metropolitan Elec. Co., 199 Pa. 100, 48 Atl. 861.

[595] Lake Charles Ice, Light &

III. Its Disposition.

§ 519. Power of disposition.

The purposes for which public property may be acquired and the title obtained have been fully considered in subdivision 1 of this chapter. The control, use and alienation of property depends entirely upon, and the right of disposition is limited by, the character of the title and the purpose and the manner in which acquired.[596]

A public corporation which has acquired property as a trustee for the public cannot, as already stated, act in such a manner as to deprive the public or its individual members of their personal or collective rights in the use of that property. The public corporation acts solely as a trustee; the community is regarded as a cestui qui trust and action inconsistent with or contrary to this relation will be regarded as illegal.[597] The most frequent application of this rule is in connection with the acquirement, use and disposition of public highways and public grounds.[598] A public corporation may acquire property for certain public or quasi public uses by gift from private individuals to be used for an especial purpose, accompanied by conditions in respect to the use of the property thus donated and these conditions act, necessarily, as a legal restraint upon the power of the public corporation to dispose or alienate it or any interest therein.[599] The man-

Water-works Co. v. City of Lake Charles, 106 La. 65, 30 So. 289; City of Conyers v. Kirk, 78 Ga. 480, 3 S. E. 442; American Lighting Co. v. McCuen, 92 Md. 703, 48 Atl. 352.

[596] Lewis, Em. Dom. (2d Ed.) § 2; Mahoning County Com'rs v. Young (C. C. A.), 59 Fed. 96, Id., 51 Fed. 585; City of Oakland v. Oakland Water Front Co., 118 Cal. 160; City of Gainesville v. Caldwell, 81 Ga. 76; School Tp. of Allen v. School Town of Macy, 109 Ind. 559, 10 N. E. 578; Green v. Putnam, 62 Mass. (8 Cush.) 21; Urch v. City of Portsmouth, 69 N. H. 162; City of Southport v. Stanly, 125 N. C. 464, 34 S. E. 641; McCotter v. Town Council of New Shoreham, 21 R. I. 43; Huron Water-works Co. v. City of Huron, 7 S. D. 9, 62 N. W. 975, 30 L. R. A. 848.

6 Curr. Law, 730.

[597] Union Coal Co. v. City of La Salle, 136 Ill. 119, 26 N. E. 506, 12 L. R. A. 326; State v. Hart, 144 Ind. 407, 43 N. E. 7; Roberts v. City of Lousiville, 92 Ky. 95, 17 S. W. 216, 13 L. R. A. 844. Methodist Episcopal Church v. City of Hoboken, 33 N. J. Law, 13.

[598] People v. City of Albany, 4 Hun (N. Y.) 675.

[599] Douglas v. City Council of

ner in which it acquired whether by purchase, prescription, dedication or through an exercise of the power of eminent domain will again act as a restraint or limitation upon a complete and full power of alienation or disposition on the part of the public corporation.

§ 520. Mode of disposition; sale or lease.

The authority to dispose by sale of public property may be directly granted by the state in those cases where the action is legally possible. The power must be derived from the state[600] and by its terms it may be either what can be termed an imperative authority or a discretionary one. In the case of the former, certain action is made obligatory by the state. In the case of the latter, the public authorities are vested with a discretionary power, to be exercised or not, as their good judgment and discretion may determine; the necessity, desirability or feasibility of a disposition of public property being the determining elements in arriving at an exercise of the power thus granted.[601]

Manner of sale. Where authority is granted for the sale of public property, the manner of the sale may be prescribed by statute in detail and certain formalities and preliminary action required.[602] A sale may only be legally made after public advertisement and consequent sale to the highest bidder[603] or af-

Montgomery, 118 Ala. 599, 24 So. 745, 43 L. R. A. 376; Prescott v. Edwards, 117 Cal. 298, 49 Pac. 178; Patrick v. Y. M. C. A. of Kalamazoo, 120 Mich. 185, 79 N. W. 208; Rowzee v. Pierce, 75 Miss. 846, 23 So. 307, 40 L. R. A. 402; Board of Education of Van Wert v. Inhabitants of Van Wert, 18 Ohio St. 221; Portland & W. B. R. Co. v. City of Portland, 14 Or. 188, 12 Pac. 265.

[600] Fidelity Trust & Guaranty Co. v. Fowler Water Co., 113 Fed. 560; City of Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277; McCaslin v. State, 44 Ind. 151; City of Terre Haute v. Terre Haute Water-works Co., 94 Ind. 305; Huron Water-works Co. v. City of Huron, 7 S. D. 9, 62 N. W. 975, 30 L. R. A. 848.

6 Curr. Law, 730.

[601] Morgan v. Johnson (C. C. A.) 106 Fed. 452; Coopers v. City of San Jose, 55 Cal. 599; Lyman v. Gedney, 114 Ill. 388, 29 N. E. 282; Inhabitants of Nobleboro v. Clark, 68 Me. 87.

[602] Morgan v. Johnson (C. C. A.) 106 Fed. 452; Gordon v. City of San Diego, 101 Cal. 522, 36 Pac. 18, affirming (Cal.) 32 Pac. 885; City of Macon v. Dasher, 90 Ga. 195, 16 S. E. 75; McCord v. Pike, 121 Ill. 288, 12 N. E. 259; Straub v. City of Pittsburg, 138 Pa. 356, 22 Atl. 93.

[603] Buckner v. Hart, 52 Fed. 835; Thompson v. Alameda County

firmative action by voters.[604] Where a disposition of public property is the consequent result of certain authority or of specific municipal action, the rule of strict construction will apply and the application of this rule, as it is well known, operates as a limitation upon the exercise of an alleged right.[605] The same rules practically apply to the lease of public property varied as the difference in legal effect between an absolute sale of property and a grant of a limited interest may warrant or require.[606]

§ 521. Disposition by gift.

If the existence of a universal rule of action can be claimed as applying to all public corporations without limitation, that rule would undoubtedly be the universal restriction, constitutional, statutory or both or implied which prohibits a public corporation from making a grant or gift of public property or of public privileges to private individuals solely for private uses.[607] The reasons for this rule are too clear to warrant further discussion.

Sup'rs, 111 Cal. 553; McPheeters v. Wright, 110 Ind. 519, 10 N. E. 634; City of New York v. Sonneborn, 113 N. Y. 423.

[604] Douglas County v. Keller, 43 Neb. 635, 62 N. W. 60; Gumpert v. Hay, 202 Pa. 340, 51 Atl. 968.

[605] Town of Searcy v. Yarnell, 47 Ark. 269, 1 S. W. 319; Hunnicutt v. City of Atlanta, 104 Ga. 1, 30 S. E. 500; Crow v. Warren County Com'rs, 118 Ind. 51, 20 N. E. 642; Urch v. City of Portsmouth, 69 N. H. 162, 44 Atl. 112; Town of East Hampton v. Bowman, 136 N. Y. 521, 32 N. E. 987.

[606] City of New Orleans v. Steamship Co. 87 U. S. (20 Wall.) 387; Hirsch v. City of Brunswick, 114 Ga. 776, 40 S. E. 786; Inhabitants of Town of Rockport v. Rockport Granite Co., 177 Mass. 246, 58 N. E. 1017, 51 L. R. A. 779; Jones v. Inhabitants of Sanford, 66 Me. 585; Wells v. Pressy, 105 Mo. 164, 16 S. W. 670; Evans v. Hughes County, 3 S. D. 580, 54 N. W. 603; Baily v. City of Philadelphia, 184 Pa. 594, 39 Atl. 494, 39 L. R. A. 837; Town of Lemington v. Stevens, 48 Vt. 38. As to the public corporation to mortgage its property see the following cases: Adams v. City of Rome, 59 Ga. 765; Middleton Sav. Bank v. City of Dubuque, 15 Iowa, 394, and Adams v. Memphis & L. R. R. Co., 42 Tenn. (2 Coldw.) 645.

[607] Roberts v. Northern Pac. R. Co., 158 U. S. 1, affirming 42 Fed. 734; City of Patty v. Colgan, 97 Cal. 251, 31 Pac. 1133, 18 L. R. A. 744; State v. Hart, 144 Ind. 107, 43 N. E. 7, 33 L. R. A. 118; Trustees of Hawesville v. Hawes' Heirs, 69 Ky. (6 Bush) 232; Wendell v. City of Newark, 63 N. J. Law, 216, 42 Atl. 767; Gumpert v. Hay, 202 Pa. 340, 51 Atl. 968; Ellis v. Northern Pacific Ry. Co., 77 Wis. 114, 45 N. W. 811. But see Daggett v. Colgan, 92 Cal. 53, 28 Pac. 51, 14 L. R. A. 474. Appropriation for state ex-

§ 522. Vacation of highways.

In the legislature as representing the state is vested primarily an absolute control of all public property including highways, limited only by well recognized principles and constitutional provisions. It has power to open, improve, repair or vacate public highways,[608] but this power is usually delegated to local or subordinate political agencies because of greater convenience and a wider familiarity of the local authorities with local necessities and conditions.[609] The power is one which is not usually implied but must be expressly given,[610] but where the power is granted to vacate the whole of the street, it has been held to include the implied right to narrow or vacate a portion of it.[611] The vacation of public highways is usually co-extensive with the power to establish them and dependent, so far as its existence and its delegation, therefore, upon the same principle of law.[612]

Occasion for vacation. The vacation of highways as in the case of the creation of them is usually discretionary with local public authorities [613] and their action in this respect may be warranted and dictated by an insufficiency of revenues or the fact that a particular highway may be unnecessary or undesirable or all of these reasons combined.

hibit at World's Fair held constitutional. State v. Schwieckardt, 109 Mo. 496, 19 S. W. 47; Vaughn v. Board of Com'rs of Forsyth County, 118 N. C. 636, 24 S. E. 425; Cutting v. Taylor, 3 S. D. 11, 51 N. W. 949, 15 L. R. A. 691.

6 Curr. Law, 730.

[608] City of Eudora v. Darling, 54 Kan. 654, 39 Pac. 184; Haywood v. City of Charlestown, 34 N. H. 23.

8 Curr. Law, 56.

[609] Curry v. Place, 99 Mich. 524; Lindsay v. City of Omaha, 30 Neb. 512, 46 N. W. 627; Hammer v. Elizabeth City, 67 N. J. Law, 129, 50 Atl. 451; Buchholz v. New York, L. E. & W. R. Co., 148 N. Y. 640.

[610] City of Texarkana v. Leach, 66 Ark. 40, 48 S. W. 807; Brandt v. City of Milwaukee, 69 Wis. 386, 34 N. W. 246.

[611] City of Mt. Carmel v. Shaw, 155 Ill. 37, 39 N. E. 584, 27 L. R. A. 580; Newell v. Bassett, 33 N. J. Law, 26; In re Swansan Street, 163 Pa. 323, 30 Atl. 207.

[612] People v. Nankin Highway Com'rs, 15 Mich. 347.

[613] Meyer v. Village of Teutopolis, 131 Ill. 552, 23 N. E. 651; Spitzer v. Runyan, 113 Iowa, 619, 85 N. W. 782; Horton v. Williams, 99 Mich. 423; Knapp, Stout & Co. v. City of St. Louis, 153 Mo. 560, 55 S. W. 104; Id., 156 Mo. 343, 56 S. W. 1102; AttorneyGeneral v. Shepard, 23 R. I. 9, 49 Atl. 39; State v. Taylor, 107 Tenn. 455, 64 S. W. 766.

§ 523. Manner of vacation.

The vacation of a highway can only be effected through the carrying out of certain prescribed proceedings in an orderly manner which involves a petition, ordinance or other municipal action as may be required, notice to interested parties, a hearing at which remonstrances may be urged and considered and the right of appeal by those considering themselves aggrieved or injured.[613a]

§ 524. Damage to abutting owner.

The vacation of a highway may be regarded as a taking of private property and which to be legal must, therefore, include compensation to the one who has suffered damages. The abutting owner is ordinarily the one entitled to compensation, if at all, and to determine a measure of damage for him it is necessary to consider his rights. An adjoining property owner has a right in common with the public generally to the use and occupation of the highway adjoining his premises for proper purposes. For a loss of this right, no compensation, unless especially provided by statute, can be given.[614] He has in addition to his rights, however, shared in common with the public, the special easements of ingress to and egress from his property. These are rights peculiar to himself, not shared in by the public and for a destruction or an impairment of which he is, by the great weight of authority clearly entitled to compensation.[615] The rule, however obtains

[613a] See Abbott, Mun. Corp. §§ 940, et seq. for full discussion of these questions.

* 8 Curr. Law, 56.

[614] Symons v. City & County of San Francisco, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453; Parker v. Catholic Bishop of Chicago, 146 Ill. 158, 34 N. E. 473, Id., 41 Ill. App. 74; Natick Gas Light Co. v. Inhabitants of Natick, 175 Mass. 246, 56 N. E. 292; Kimball v. Homan, 74 Mich. 699, 42 N. W. 167; Knapp, Stout & Co. Company v. City of St. Louis, 153 Mo. 560, 55 S. W. 104; Elliott, Roads & Streets (2d Ed.) § 877.

8 Curr. Law, 56.

[615] City of Texarkana v. Leach, 66 Ark. 40, 48 S. W. 807; City of Chicago v. Burcky, 158 Ill. 103, 42 N. E. 178, 29 L. R. A. 568; Dana v. City of Boston, 170 Mass. 593, 49 N. E. 1013; Baudistel v. Michigan Cent. R. Co., 113 Mich. 687, 71 N. W. 1114; Purcell v. Edison Portland Cement Co., 65 N. J. Law, 541, 47 Atl. 587; In re East One Hundred & Sixty-eighth St., 157 N. Y. 409, 52 N. E. 1126; In re Melon St., 182 Pa.

that the right of access must be substantially impaired before damages can be recovered,[616] and the right is clearly limited to abutting property owners.[617] An abutting owner may also have a special interest in the public improvements which have been made in the highway at the expense of the adjoining property; for a destruction or impairment of this special right, he can also claim damages.[618]

§ 525. Abandonment of highways.

A highway may lose its character as a public road through its abandonment for use as a public way. This is accomplished in many states by statutory provisions to the effect that if within a prescribed time a highway is not opened and used it will be deemed to have been vacated or abandoned,[619]—a statutory abandonment as it has been termed in many cases. Public roads may also become abandoned by nonuser for a long period of time.[620] The maxim "once a highway, always a highway," applies here, and the rule obtains that mere nonuser of the whole or a portion, even though for many years, will not always effect an abandonment,[621] neither will a mere failure on the part of public authori-

397, 38 Atl. 482, 38 L. R. A. 275. A distinction is, however, made between country roads and city streets in Bradbury v. Walton, 94 Ky. 167.

[616] Cram v. Laconia, 71 N. H. 41, 51 Atl. 635, 57 L. R. A. 282; Stanwood v. City of Malden, 157 Mass. 17, 31 N. E. 702, 16 L. R. A. 591.

[617] Meyer v. City of Richmond, 172 U. S. 82; Dantzer v. Indianapolis Union R. Co., 141 Ind. 604, 39 N. E. 223, 34 L. R. A. 769; Nichols v. Inhabitants of Richmond, 162 Mass. 170, 38 N. E. 501.

[618] State v. Elizabeth City, 54 N. J. Law, 462, 24 Atl. 495; Snedeker v. Snedeker, 30 N. J. Law, 80; In re East One Hundred & Sixty-eighth St. 157 N. Y. 409, 52 N. E. 1126.

[619] Humphreys v. City of Woodstown, 48 N. J. Law, 588, 7 Atl. 301; Kelly Nail & Iron Co. v. Lawrence Furnace Co., 46 Ohio St. 544, 5 L. R. A. 652; Excelsior Brick Co. v. Village of Haverstraw, 142 N. Y. 146, 36 N. E. 819; Herrick v. Town of Geneva, 92 Wis. 114, 65 N. W. 1024.

8 Curr. Law, 56.

[620] Hewes v. Village of Crete, 175 Ill. 348, 51 N. E. 696; Baldwin v. Trimble, 85 Md. 396, 37 Atl. 176, 36 L. R. A. 489; Bayard v. Standard Oil Co., 38 Or. 438, 63 Pac. 614.

[621] London & S. F. Bank v. City of Oakland (C. C. A.) 90 Fed. 691, affirming 86 Fed. 30; City of Cleveland v. Cleveland, C., C. & St. L. R. Co., 93 Fed. 113; City of Hartford v. New York & N. E. R. Co., 59 Conn. 250, 22 Atl. 37; Bradley v. Appanoose County, 106 Iowa, 105,

ties to open, construct or repair a road or a portion of it legally established.[622] As in the case of a dedication of a highway it is necessary to establish the intent of the owner to dedicate,[623] so in its abandonment it is necessary to establish the intent of the proper legal authorities to abandon it [624] and in this respect the rule of strict construction will apply and a doubt reserved in favor of the continued existence of the highway rather than its abandonment.[625]

76 N. W. 519; Richardson v. Davis, 91 Md. 390, 46 Atl. 964; Crump v. Mims, 64 N. C. 767; Chafee v. City of Aiken, 57 S. C. 507, 35 S. E. 800.

[622] Holmes v. Cleveland, C. & C. R. Co., 93 Fed. 100; Uptagraff v. Smith, 106 Iowa, 385; Flersheim v. City of Baltimore, 85 Md. 489, 36 Atl. 1098; Ralston v. Town of Weston, 46 W. Va. 544, 33 S. E. 326; Reilly v. City of Racine, 51 Wis. 526, 8 N. W. 417.

[623] See §§ 421 et seq., ante.

[624] Shirk v. City of Chicago, 195 Ill. 298, 63 N. E. 193; Larson v. Fitzgerald, 87 Iowa, 402, 54 N. W. 441.

[625] Dingwell v. Weld County Com'rs, 19 Colo. 415, 36 Pac. 148; McNamara v. Minneapolis, St. P. & S. S. M. R. Co., 95 Mich. 545, 55 N. W. 440.

CHAPTER X.

LIABILITY OF PUBLIC CORPORATIONS FOR NEGLIGENCE.

§ 526. Negligence; definition.*

Actionable negligence has been defined [1] as "The inadvertent failure of a legally responsible person to use ordinary care under the circumstances in observing or performing a noncontractual duty, implied by law, which failure is the proximate cause of injury to a person to whom the duty is due." Another definition [2] is given as "A breach of the duty to exercise care, by which one to whom the duty is owing suffers damage justly attributable to the breach of duty." And still another,[3] "Negligence is the failure to observe for the protection or safety of the interests of another person, that degree of care, precaution and vigilance which

* 6 Curr. Law, 735.

[1] 16 Am. & Eng. Enc. Law (1st Ed.) p. 380.

[2] Jones, Neg. Mun. Corp. p. 3.

[3] Thompson, Neg. Vol. 1, § 1.

the circumstances justly demand." From the definitions selected above from many, it will be observed that in order to sustain a recovery in an action based on negligence, there must be established the existence of a duty, its breach, a resulting special damage to the one to whom it is due and the negligence must also be the proximate cause of the damage which involves a freedom from contributory negligence on the part of the one injured.[4] In respect to the liability of a public corporation, the character of the duty must be further established as one on account of which a failure to perform or perform properly will give rise to a cause of action.[5]

§ 527. Some essentials of actionable negligence.

It is not every obligation or duty of a public corporation that gives rise by its breach to a cause of action in favor of an individual. The duties which rest upon a corporation of this character may be legislative or judicial and, therefore, discretionary, or, again, imperative or ministerial.[6] A breach of the latter where a liability exists at all, creates a cause of action while this is not true of the former class.

Measure of care. Actionable negligence arises through a failure to exercise that care which is justly required of one under the circumstances or conditions arising in that particular case. The standard or measure of care is not fixed and varies with the legal status of the one from whom the duty is due and the condition of the one to whom it is due under the peculiar circumstances arising in a single specific instance.[7]

Damage. To enable one injured by a failure to observe the proper care in the performance of an existing duty, the one to whom it is due must show further that the damages which he claims and for which he seeks recovery are those suffered by him peculiarly and personally and not shared in common with the public at large or a particular set or class of persons.[8]

[4] Smith v. City of Leavenworth, 15 Kan. 81.

[5] See §§ 531 et seq., post.

[6] Millwood v. DeKalb County, 106 Ga. 743, 32 S. E. 577; Sherman v. Parish of Vermillion, 51 La. Ann. 880, 25 So. 538; Flagg v. City of Worcester, 79 Mass. (13 Gray) 601; Urquhart v. City of Odgensburg, 91 N. Y. 67.

6 Curr. Law, 735.

[7] See Jones, Neg. Mun. Corp. § 4.

[8] Sohn v. Cambern, 106 Ind. 302, 6 N. E. 813; Brant v. Plumer, 64

Proximate cause. It is not just that one should be made pecuniarily responsible for the negligence of another and the further condition must therefore exist that the injury complained of must be the proximate and immediate result of the negligent act and that the one injured must be free from any want of care which directly contributed to the injury.[9]

§ 528. Liability of the state or sovereign.*

Organized government is established for the benefit and advantage of the community at large and is engaged in carrying out purely governmental powers or functions,—those which are assumed exclusively by it for the benefit of the public. The proper performance of these duties requires an application of the privilege of sovereignty, which is beyond the realm of a legal duty. The state or sovereign, therefore, is not subject in the exercise of any of its powers or the performance of its duties to the judgment of the courts which it creates or the principles of law applying to private persons which it establishes and enforces, and further, as negligence is based upon a lack of care, the sovereign is not liable because there is no standard or measure of care which can be applied to it. Freedom from liability attaches both in respect to transactions of a contractual nature or those sounding in tort.[10] The sovereign may, however, by express assent, permit the bringing of actions against it in certain prescribed cases.

§ 529. Public corporations defined and classified.*

In sections 4 to 7, both inclusive, of this work, a classification of public corporations has already been given with definitions and a statement of the distinguishing characteristics of each class and to these sections the reader is referred. Public corporations are divided into quasi corporations and municipal corporations

Iowa, 33, 19 N. W. 842; Griffith v. Sanbornton, 44 N. H. 246; Gold v. City of Philadelphia, 115 Pa. St. 184, 8 Atl. 386.

9, 10 State v. Hill, 54 Ala. 67; People v. Talmage, 6 Cal. 256; Metz v. Soule, 40 Iowa, 236; Sinking Fund Com'rs v. Northern Bank, 58 Ky. (1 Metc.) 174 Clodfelter v. State, 86 N. C. 51; State v. Ward, 56 Tenn. (9 Heisk.) 100.

* 6 Curr. Law, 735.

* 6 Curr. Law, 735.

proper. Each is regarded as an agency of government. This character, quasi corporations sustain solely. They are political agencies; subdivisions of the state such as counties, townships, school districts or like bodies 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; organized almost exclusively with a view to the policy of the state at large for the purpose of political organization and civil administration in purely governmental matters like finance, education, provision for the poor, military organization, or the general administration of justice.[11] All of their powers and functions have a direct and exclusive reference to governmental affairs and they are, in fact, but branches of the general administration. Their duties are exclusively governmental. As a rule they include large areas sparsely settled and the relations of life and business within them are comparatively simple. Municipal corporations proper are not only governmental agents but are also organizations created under authority of law and possessing the power to provide for local necessities and conveniences for their own communities. They are created mainly for the interest, advantage and convenience of a particular locality and its people; they comprise ordinarily, congested centers of population in which the relations of private life and business are exceedingly complex. Their powers and functions in the latter respect are not, as a rule, arbitrarily imposed by the sovereign but secured through their own affirmative action or by their consent. The people residing within their limits are given a greater latitude and degree of local self-government in adopting measures looking to their local advantage. The duties which rest upon them are more in number and more burdensome than those which devolve upon quasi corporations.[12]

§ 530. Duties performed by each.*

From the discussion in the sections cited above and also in the preceding section, the chief points of differentiation can be log-

[11] Jones v. City of New Haven, 34 Conn. 1. See authorities cited from §§ 4 to 7, ante.

[12] See authorities cited §§ 4 et seq. See Williams, Mun. Liab. Tort, §§ 1 et seq.; Jones, Neg. Mun. Corp. §§ 20–25.

* 6 Curr. Law, 735.

ically deduced, namely, the element of consent as to form of government, simplicity or complexity of private life and business relations within their limits and the right of exercising a greater or less number of powers and functions. Because of these differences in the organization and powers there is to be found a difference also in their relative duties and obligations. The liability, obligations, and duties of a municipal corporation are justly increased and of a higher character than those which rest upon public quasi corporations.

Quasi corporation; liability. Since the government of a quasi corporation is ordinarily imposed by the sovereign, its business and private relations simple and further, because it performs solely governmental duties, the universal rule obtains that no liability exists in respect to the performance of its duties and obligations [13] unless one is expressly imposed by statute.[14]

Municipal corporations; liability. A municipal corporation proper as a governmental agent in performing the duties appertaining to that relation is subject to that rule of law just given in respect to public quasi corporations. There rests in addition, however, upon municipal corporations proper, certain obligations and duties which are the direct result of their private, local or proprietary character and in respect to their liability the rule above does not apply and they are almost universally held liable for a failure to properly perform these duties.[15] Such a liability may, however, be created solely by the result of some statutory provision.[16]

[13] May v. Juneau Co., 30 Fed. 241; Pettit v. Chosen Freeholders of Camden County, 87 Fed. 768; Daly v. City and Town of New Haven, 69 Conn. 644, 38 Atl. 397; White Star Line Steamboat Co. v. Gordon County Sup'rs 81 Ga. 47, 7 S. E. 231; Symonds v. Clay County Sup'rs, 71 Ill. 355; Freel v. School City of Crawfordsville, 142 Ind. 27, 41 N. E. 312, 37 L. R. A. 301; Bank v. Brainerd School Dist., 49 Minn. 106; Reed v. Howell County, 125 Mo. 58, 28 S. W. 177; Wakefield v. Village of Newport, 60 N. H. 374; Markey v. Queen's County, 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46; Field v. Albermarle County (Va.) 20 S. E. 504.

[14] City of Little Rock v. Willis, 27 Ark. 572.

[15] Weightman v. Washington Corp, 1 Black, (U. S.) 39; Bennett v. City of New Orleans, 14 La. Ann. 120; Boye v. City of Albert Lea, 74 Minn. 230, 76 N. W. 1131.

[16] City of Little Rock v. Willis, 27 Ark. 572.

§ 531. Character of duty.*

To give rise to actionable negligence the character of the duty must be established as one on account of which a failure to perform or perform properly will give rise to a cause of action. There can exist no liability in respect to the performance of a governmental duty by either class of public corporations. In performing duties of this character they are acting as a part of the sovereign and the same rule of immunity applies. All governmental agents partake of this freedom from scrutiny or liability unless a responsibility is directly assumed and imposed by statute.[17]

Governmental duties within the above discussion are in general those which are exercised by the state or its delegated agents as a part of its sovereignty for the benefit of the whole community, because there is a universal obligation resting upon organized government, whatever its form, to protect all interests within its jurisdiction both personal and properly and further, because the prevention of crime, the preservation of the public peace and health and the construction of general works of public improvement are beneficial acts in which the whole community is alike and equally interested.[18] The discharge of this obligation is delegated or imposed in many cases by the state upon municipal corporations proper. The obligations and duties which rests upon municipal corporations proper, the result of their private, local or proprietary character, are those which they are authorized to execute for their own emolument and from which they derive special advantage by the increased comfort of their citizens or the well ordering and convenient regulation of particular classes of the private business of their inhabitants but they are not exercised in the discharge of any general and recognized duty of government for the common or universal benefit.[19] Familiar ex-

* 6 Curr. Law, 735.

[17] Howland v. Inhabitants of Maynard, 159 Mass. 434, 34 N. E. 515, 21 L. R. A. 500; Alexander v. City of Milwaukee, 16 Wis. 247.

[18] Colwell v. City of Waterbury, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218; City of New Orleans v. Kerr, 50 La. Ann. 413, 23 So. 384; Portland & R. R. Co. v. Inhabitants of Deering, 78 Me. 61; Mahoney v. City of Boston, 171 Mass. 427; Coley v. City of Statesville, 121 N. C. 301; Connelly v. City of Nashville, 100 Tenn. 262.

[19] Clark v. City of Washington, 12 Wheat. (U. S.) 40; Fink v. City of Des Moines, 115 Iowa, 641, 89 N. W. 28; Coughlan v. City of Cambridge, 166 Mass. 268, 44 N. E.

amples of these duties or powers are the right to construct drains or sewers,[20] introduce water and light,[21] establish public parks and play grounds, erect public markets,[22] make local improvements, or maintain its public places.[23] The liability, if one exists, is not, however, an absolute one but only arises when a work of improvement or an act authorized by law is performed in an improper or unskilled manner.[24]

§ 532. Municipal duty; construction of drains or sewers.*

A familiar illustration of a municipal duty is the construction and maintenance of a system of drains or sewers and the principle commonly obtains that in respect to the performance of this duty, a liability may arise on the part of a municipal corporation. The action of public authorities relative to the construction of drains and sewers is a discretionary duty and any action negative or affirmative in its character relating to their establishment which may result in an injury to persons or property can create no liability on the part of the municipal corporation.[25] The power to establish a system being discretionary, the right to abolish or discontinue the maintenance of one already constructed

218; Wagner v. City of Portland, 40 Or. 389, 60 Pac. 985, 67 Pac. 300; Aldrich v. Tripp, 11 R. I. 141.

[20] Norton v. City of New Bedford, 166 Mass. 48, 43 N. E. 1034; Ostrander v. City of Lansing, 111 Mich. 693, 70 N. W. 332.

[21] Pine v. City of New York, 103 Fed. 337; Prince v. City of Quincy, 128 Ill. 443, 21 N. E. 768; Stock v. City of Boston, 149 Mass. 410, 21 N. E. 871; Bodge v. City of Philadelphia, 167 Pa. 492, 31 Atl. 728.

[22] Barron v. City of Detroit, 94 Mich. 601, 54 N. W. 273, 19 L. R. A. 452; Weymouth v. City of New Orleans, 40 La. Ann. 344, 4 So. 218.

[23] Brink v. Burough of Dunmore, 174 Pa. 395, 34 Atl. 598; McMahon v. City of Dubuque, 107 Iowa, 62, 77 N. W. 517; O'Donnell v. White, 23 R. I. 318, 50 Atl. 333; Barksdale v. City of Laurens, 58 S. C. 413, 36 S. E. 661.

[24] Fuller v. City of Atlanta, 66 Ga. 80; Hull v. Inhabitants of Westfield, 133 Mass. 433; Fuller v. City of Grand Rapids, 105 Mich. 529.

* 6 Curr. Law, 736.

[25] City of Huntsville v. Ewing, 116 Ala. 576, 22 So. 984; Wilson v. City of Waterbury, 73 Conn. 416, 47 Atl. 687; City of Americus v. Eldridge, 64 524; Knostman & Peterson Furniture Co. v. City of Davenport, 99 Iowa, 589; Bulger v. Inhabitants of Eden, 82 Me. 352, 19 Atl. 829, 9 L. R. A. 205; Carr v. Northern Liberties, 35 Pa. 324; City of Chattanooga v. Reid, 103 Tenn. 616, 53 S. W. 937.

is also discretionary in its character and no consequent liability can attach.[26]

Plan of work. The determination to construct a system of drains or sewers is regarded as a discretionary act and the adoption of a location or a plan of work or a comprehensive scheme and plan for drainage, unless palpably bad; partakes of the same nature.[27] The operation of this rule, however, will not prevent a recovery for injuries suffered by a failure to provide a suitable outlet for such a system,[28] or for the construction of drains or sewers lacking in capacity to carry off the natural drainage or sewage from the territory designed.[29] But a city is not bound to provide against an extraordinary or excessive rainfall.[30]

§ 533. Construction and maintenance.*

The adoption of a plan and the determination to establish certain sewers or drains is alone of a discretionary character. After action in these respects has been taken, the construction of the work then becomes of a ministerial character and the usual rule applies in respect to a liability.[31] A municipal corporation is obligated to have the work carefully and skillfully constructed.[32]

[26] Simpson v. Keokuk, 84 Iowa, 568.

[27] City of Troy v. Coleman, 58 Ala. 570; Atwood v. City of Bangor, 83 Me. 582, 22 Atl. 466; Uppington v. City of New York, 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550.

[28] City of Eufaula v. Simmons, 86 Ala. 515, 6 So. 47; City of Terre Haute v. Hudnut, 112 Ind. 542, 13 N. E. 686; Hardy v. City of Brooklyn, 90 N. Y. 435.

[29] Wilson v. Boise City, 6 Idaho, 391, 55 Pac. 887; Damour v. Lyon City, 44 Iowa, 276; Thoman v. City of Covington, 23 Ky. L. R. A. 117, 62 S. W. 721; Allen v. City of Boston, 159 Mass. 324; Seaman v. City of Marshall, 116 Mich. 327, 74 N. W. 484; Powell v. Town of Wytheville, 95 Va. 73; Wilson v. City of Waterbury, 73 Conn. 416, 47 Atl. 687.

[30] District of Columbia v. Gray, 6 App. D. C. 314. The question is one for a jury. Los Angeles Cemetery Ass'n v. City of Los Angeles, 103 Cal. 461; Judd v. City of Hartford, 72 Conn. 350, 44 Atl. 510; Brash v. City of St. Louis, 161 Mo. 433, 61 S. W. 808; Helbing v. Allegheny Cementery Co., 201 Pa. 171, 50 Atl. 970.

[31] City of Macon v. Small, 108 Ga. 309, 34 S. E. 152; Cooper v. City of Cedar Rapids, 112 Iowa, 367, 83 N. W. 1050; Perkins v. City of Lawrence, 136 Mass. 305; Winn v. Village of Rutland, 52 Vt. 481.

[32] City of Birmingham v. Lewis, 92 Ala. 352; City of Ft. Wayne v. Coombs, 107 Ind. 75; Hamlin v. City of Biddeford, 95 Me. 308, 95 Atl. 1100; Trowbridge v. Town of Brookline, 144 Mass. 139, 10 N. E. 796.

* 6 Curr. Law, 736.

and of the proper materials and appliances.[33] It must furnish the necessary appliances and a safe and suitable place for its employes engaged in the work.[34] For a failure in any of these respects, one injured may recover damages. These rules do not apply to quasi corporations.[35]

The obligation to maintain sewers and drains in a safe and suitable condition is not of a discretionary character and the authorities must perform their duty in these respects or become liable for any injuries suffered.[36] A municipal corporation cannot in respect to the construction or maintenance of a drainage or sewage system, especially in its discharge, create either a public or private nuisance.[37] For the former, it is subject to indictment, in some jurisdictions,[38] and for the latter, it will be liable for damages shown.[39]

§ 534. Governmental duties; maintenance of government.*

The organization of an established form of government is a purely governmental duty and no liability can arise in respect to

[33] City of Helena v. Thompson, 29 Ark 569.

[34] Welter v. City of St. Paul, 40 Minn. 460, 42 N. W 392; Coan v. City of Marlborough, 164 Mass. 206, 41 N. E. 238.

[35] Packard v. Voltz, 94 Iowa, 277, 62 N. W. 757.

[36] City of Macon v. Dannenberg, 113 Ga. 1111, 39 S. E. 446; Correll v. City of Cedar Rapids, 110 Iowa, 333, 81 N. W. 724; City of Baltimore v. Schnitker, 84 Md. 34, 34 Atl. 1132; Allen v. City of Boston, 159 Mass. 324, 34 N. E. 519; Tate v. City of St. Paul, 56 Minn. 527, 58 N. W. 158; Ballou v. State, 111 N. Y. 496, 18 N. E. 627; Briegel v. City of Philadelphia, 135 Pa. 451; City of Nashville v. Sutherland, 94 Tenn. 356; Willett v. Village of St. Albans, 69 Vt. 330, 38 Atl. 72.

[37] Carmichael v. City of Texarkana, 94 Fed. 561; Platt v. City of Waterbury, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691; City of Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206; City of Valparaiso v. Hagen, 153 Ind. 337, 54 N. E. 1062, 48 L. R. A. 707; Constitution Wharf Co. v. City of Boston, 156 Mass. 397, 30 N. E. 1134; Owens v. City of Lancaster, 182 Pa. 257, 37 Atl. 858; Winn v. Village of Rutland, 52 Vt. 481.

[38] Boston Rolling Mills v. City of Cambridge, 117 Mass. 396.

[39] Arn v. Kansas City, 14 Fed. 236; City of Seymour v. Cummins, 119 Ind. 148, 21 N. E. 549, 5 L. R. A. 126; Morse v. City of Worcester, 139 Mass. 389; Smith v. City of Sedalia, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711; Vale Mills v. Nashua, 63 N. H. 136; Owens v. City of Lancaster, 182 Pa. 257, 37 Atl. 858; Winchell v. City of Waukesha, 110 Wis. 101, 85 N. W. 668.

* 6 Curr. Law, 735.

acts which have this for their purpose.[40] Damages cannot be recovered, therefore, for injuries committed by tax officers while in the performance of their duty or for any act done in connection with the levy and the collection of general taxes.[41] In respect to the levy and the collection of local assessments or taxes in some cases, a different rule has been applied, for these are imposed for the purpose of constructing some local improvement in furtherance of a local, private or proprietary duty.[42] The rule of nonliability also applies to the condition or erection of public buildings.[43]

§ 535. The public safety.*

In respect to the duty of organized government to provide for the safety of property or life, the only dependence of those within its jurisdiction is the efficient maintenance of agencies or provisions having this for their purpose, for public corporations are not liable for the acts or failure to act of their officers or agents in the performance of this duty.[44] There can be no liability for an exercise of or a failure to exercise the police power.[45]

Fire department. Under this rule a public corporation is not ordinarily liable for injuries resulting from its failure to protect property from destruction by fire[46] or for damages to or caused

[40] Wallace v. Town of Norman, 9 Okl. 339, 60 Pac. 108, 48 L. R. A. 620; McAndrews v. Hamilton County, 105 Tenn. 399, 58 S. W. 483.

[41] Bank of the Commonwealth v. City of New York, 43 N. Y. 184; Bates v. Village of Rutland, 62 Vt. 178, 20 Atl. 278, 9 L. R. A. 363; Inhabitants of Liberty v. Hurd, 74 Me. 101; Dunbar v. City of Boston, 112 Mass. 75; Everson v. City of Syracuse, 100 N. Y. 577; Thomas v. Town of Grafton, 34 W. Va. 282, 12 S. E. 478.

[42] Gould v. Sity of Atlanta, 60 Ga. 164; Durkee v. City of Kenosha, 59 Wis. 123.

[43] Hollenbeck v. Winnebago County, 95 Ill. 148; Vigo Co. Com'rs v. Daily, 132 Ind. 73, 31 N. E. 531; McNeil v. City of Boston, 178 Mass. 326, 59 N. E. 810; Snider v. City of St. Paul, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151.

* 6 Curr. Law, 736.

[44] Kansas City v. Lemen (C. C. A.) 57 Fed. 905.

[45] Easterly v. Town of Irwin, 99 Iowa, 694; Betham v. City of Philadelphia, 196 Pa. 302, 46 Atl. 448.

[46] City of New York v. Workman (C. C. A.) 67 Fed. 347; Tainter v. City of Worcester, 123 Mass. 311; Springfield F. & Marine Ins. Co. v. Village of Keeseville, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660; Frederick v. City of Columbus, 58 Ohio St. 538, 51 N. E. 35; Irvine v. City of Chattanooga, 101 Tenn. 291, 47

by any of the agencies employed by it for this purpose.[47] The rule of nonliability also applies where the duty of furnishing a supply of water has been assumed under contract or otherwise by private persons engaged in the business of furnishing water not only for private but also public uses.[48]

§ 536. Destruction of property by mob.

Although it is the duty of organized government to protect property and life within its jurisdiction, yet it is not a legal one and the rule also obtains that no redress can be had for the destruction of property or of life by riotous assemblages or mobs unless this duty is expressly and clearly imposed by statute.[49] The reasons for the adoption of such salutory laws are principally two, namely, first, an application in a modified way of the contract theory of the state, and second, that the enforcement of the law and the protection of property and life is one of the main purposes of a vigorous government of civilized people and nothing can lead to a more efficient performance of those duties than the imposition of a local and pecuniary liability upon those who fail to properly perform them.[50]

S. W. 419; Mendel v. City of Wheeling, 28 W. Va. 233; Hayes v. City of Oshkosh, 33 Wis. 314.

[47] Howard v. City & County of San Francisco, 51 Cal. 52; Saunders v. City of Ft. Madison, 111 Iowa, 102, 82 N. W. 428; Pettingell v. City of Chelsea, 161 Mass. 368, 37 N. E. 380, 24 L. R. A. 426; Grube v. City of St. Paul, 34 Minn. 402; Dodge v. Granger, 17 R. I. 664, 24 Atl. 100 15 L. R. A. 781; Wagner v. City of Portland, 40 Or. 389, 69 Pac. 985, 67 Pac. 300.

[48] Boston Safe-Deposit & Trust Co. v. Salem Water Co., 94 Fed. 238; Nickerson v. Bridgeport Hydraulic Co., 46 Conn. 25; Eaton v. Fairbury Water-works Co., 37 Neb. 546, 56 N. W. 201, 21 L. R. A. 653; House v. Houston Water-works Co., 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532; Green v. Ashland Water Co., 101 Wis. 258, 43 L. R. A. 117. But see Bienville Water Supply Co. v. City of Mobile, 112 Ala. 260, 20 So. 742, 33 L. R. A. 59.

[49] Louisiana v. City of New Orleans, 109 U. S. 285; City of New Orleans v. Abbagnato (C. C. A.) 62 Fed. 240, 26 L. R. A. 329; Spring Valley Coal Co. v. City of Spring Valley, 96 Ill. App. 230, 65 Ill. App. 571; City of Chicago v. Manhattan Cement Co., 178 Ill. 372, 53 N. E. 68, 45 L. R. A. 848; Adams v. City of Salina, 58 Kan. 246, 48 Pac. 918; Brightman v. Inhabitants of Bristol, 65 Me. 426; May v. City of Anaconda, 26 Mont. 140, 66 Pac. 759; Aron v. City of Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733.

[50] City of Chicago v. Chicago League Ball Club, 196 Ill. 54, 63 N. E. 695; Allegheny County v. Gib-

§ 537. Destruction of property for public purposes.

Often in the performance of that duty by public officials which has for its result the preservation or safety of property, it is found necessary in their discretion to destroy buildings and other property. This is notably true in the case of extensive fires. Without giving a reason for the adoption of the rule, it is sufficient to say that where the destruction has been occasioned by public officials in good faith, and within the exercise of their best judgment and discretion, no liability can attach.[51]

The same rule of nonliability also attaches in the case of the destruction of goods or of property or injuries received in the enforcement of quarantine measures or in the suppression of some contagious or infectious disease.[52]

§ 538. The public peace.*

The preservation of the public peace is another purely governmental function in respect to the character of which there can be no dispute. The same rule of nonliability, therefore, applies[53] and public corporations will not be held liable for injuries either to its officers while in the performance of their duties or to others who may be injured by them,[54] nor for the defective condition of

son, 90 Pa. 397; Pennsylvania Co. v. City of Chicago, 81 Fed. 317.

[51] Field v. City of Des Moines, 39 Iowa, 575; McDonald v. City of Red Wing, 13 Minn. (Gil. 25) 38; American Print Works v. Lawrence, 23 N. J. Law (3 Zab.) 590; City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367; Aitken v. Village of Wells River, 705 Vt. 308, 40 Atl. 829, 41 L. R. A. 566; Town of Dawson v. Kuttner, 48 Ga. 133. See, also, Harman v. City of Lynchburg, 33 Grat. (Va.) 37, where a city was held not responsible for property destroyed by its police force without authority.

[52] Nicholson v. City of Detroit, 129 Mich. 246, 88 N. W. 695, 56 L. R. A. 601; Levin v. Town of Burlington, 129 N. C. 184, 39 S. E. 822, 55 L. R. A. 396.

* 6 Curr. Law, 736.

[53] Wyatt v. City of Rome, 105 Ga. 312, 42 L. R. A. 180; Lahner v. Village of Williams, 112 Iowa, 428, 84 N. W. 507; Corning v. City of Saginaw, 116 Mich. 74, 40 L. R. A. 526; McIlhenney v. City of Wilmington, 127 N. C. 146, 37 S. E. 187, 50 L. R. A. 470; Aitken v. Village of Wells River, 70 Vt. 308; Bartlett v. Town of Clarksburg, 45 W. Va. 393, 31 S. E. 918, 43 L. R. A. 295. But see Twist v. City of Rochester, 165 N. Y. 619, 59 N. E. 1131.

[54] Masters v. Village of Bowling Green, 101 Fed. 101; Nisbet v. City of Atlanta, 97 Ga. 650, 25 S. E. 173; Bailey v. Fulton County, 111 Ga. 313, 36 S. E. 596; City of Chicago v. Williams, 182 Ill. 135, 55 N. E. 123; City of Caldwell v. Prunell, 57 Kan. 511, 46 Pac. 949; Schussler v.

jails, court houses, prisons or buildings used in the administration of justice, or their appliances.[55]

§ 539. The public health and safety.*

It is also one of the duties resting upon organized government to properly protect the health of those who may reside within its jurisdiction and the performance of its duty in this respect or the carrying out of sanitary regulations or the lack of such action can give rise to no cause of action on the part of those who may be injured thereby.[56] Neither is a municipality liable to an individual for its breach of duty to the public to abate a nuisance,[57] but it may be subject to indictment if it has the power and fails to exercise it.[58] A city has no right, however, to create a nuisance in the exercise of its lawful power.[59] Acts may, however, be relieved of the character of nuisances if authorized by law.[60]

§ 540. Public education; charities and corrections.*

In modern days the proper education of the community is recognized as a governmental duty and no liability can arise in re-

Hennepin County Com'rs, 67 Minn. 412, 39 L. R. A. 75; Woodhull v. City of New York, 150 N. Y. 450, 44 N. E. 1038.

[55] Gray v. City of Griffin, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131; Snider v. City of St. Paul, 51 Minn. 466, 18 L. R. A. 151; Ulrich v. City of St. Louis, 112 Mo. 138, 20 S. W. 466; Moody v. State's Prison, 128 N. C. 112, 38 S. E. 131, 53 L. R. A. 855; Hart v. Union City, 107 Tenn. 294, 64 S. W. 6.

* 6 Curr. Law, 736.

[56] Sherbourne v. Yuba County 21, Cal. 113; Love v. City of Atlanta, 95 Ga. 129, 22 S. E. 29; Summers v. Davies County Com'rs, 103 Ind. 262; City of New Orleans v. Kerr, 50 La. Ann. 413; Butz v. Cavanaugh, 137 Mo. 503, 38 S. W. 1104; Missano v. City of New York, 160 N. Y. 123, 54 N. E. 744; Conelly v. City of Nashville, 100 Tenn. 262, 46 S. W. 565; Kempster v. City of Milwaukee, 103 Wis. 421.

[57] Davis v. City of Montgomery, 51 Ala. 139; Morse v. Borough of Fair Haven East, 48 Conn. 220; Cain v. City of Syracuse, 95 N. Y. 83; Borough of Norristown v. Fitzpatrick, 94 Pa. 121. But see Town of Rushville v. Adams, 107 Ind. 475; Cochrane v. City of Frostburg, 81 Md. 54, 31 Atl. 703, 27 L. R. A. 728.

[58] State v. Shelbyville Corp., 36 Tenn. (4 Sneed) 176.

[59] Nolan v. City of New Britain, 69 Conn. 668; Miles v. City of Worcester, 154 Mass. 511, 28 N. E. 676, 13 L. R. A. 841; Detroit Water Com'rs v. City of Detroit, 117 Mich. 458, 76 N. W. 70; City of Chattanooga v. Dowling, 101 Tenn. 342. But see Long v. City of Minneapolis, 61 Minn. 46.

[60] Hill v. City of New York, 139 N. Y. 495, 34 N. E. 1090.

* 6 Curr. Law, 735.

spect to the action or condition of any agency which the state may adopt as a means for the accomplishment of this result. This rule applies as in the case of all the subjects noted above to various officials, buildings or agencies employed,[61] used or acts done in connection with the subject of this section.

The furnishing of aid to indigent persons and the care of those morally, mentally or physically defective, are also duties which rest upon the state and which can be classed as governmental in their character. In the carrying out of this function, an immunity is granted in respect to all acts or agencies.[62]

§ 541. Failure to pass or enforce ordinances.*

The passage or enforcement of laws or ordinances has been regarded as a governmental duty, a failure to properly perform which, it has been held, can give rise to no cause of action. The statement as above given does not accurately state the law upon this question. Liability in a particular instance depends not upon the failure to take action but upon the character of the duty which is to be performed by the proposed action. If it is a governmental one, there can clearly be no liability merely in respect to the failure to pass or enforce an ordinance having for its purpose the carrying out of that duty.[63] If, on the other hand, action in this respect applies to a duty not governmental in its character but one which arises because of the character of the corporation as a municipal corporation proper in its local, proprietary or private sense, then, clearly, a liability may arise be-

[61] Freel v. School City of Crawfordsville, 142 Ind. 27, 41 N. E. 312, 37 L. R. A. 301; Kinnare v. City of Chicago, 171 Ill. 332, 49 N. E. 536; Hill v. City of Boston, 122 Mass. 344; Bank v. Brainerd School Dist., 49 Minn. 106, 51 N. W. 814; Eastman v. Meredith, 36 N. H. 284; Folk v. City of Milwaukee, 108 Wis. 359, 84 N. W. 420. Shearman & R. Neg. § 267.

[62] Town of Chelsea v. Town of Washington, 48 Vt. 610.

* 6 Curr. Law, 735.

[63] Fifield v. Common Council of Phoenix, 4 Ariz. 283, 36 Pac. 916; Love v. City of Raleigh, 116 N. C. 296, 21 S. E. 503, 28 L. R. A. 192; Wyatt v. City of Rome, 105 Ga. 312, 31 S. E. 188, 42 L. R. A. 180; Kinnare v. City of Chicago, 171 Ill. 332, 49 N. E. 536; Tindley v. City of Salem, 137 Mass. 171. Fireworks; Stevens v. City of Muskegon, 111 Mich. 72, 36 L. R. A. 777; Smith v. Borough of Selinsgrove, 199 Pa. 615, 49 Atl. 213. But see Cochrane v. City of Frostburg, 81 Md. 54, 31 Atl. 703, 27 L. R. A. 728.

cause of a failure to take legislative action.[64] It is not the failure to take action which creates or prevents a liability but the character of the duty involved in the action.

Liability for enforcement of ordinance. Public corporations are not liable either in the use of agencies or for the acts of their officers and employes in enforcing ordinances valid or invalid passed for the carrying out of some governmental or public duty or power,[65] and the contrary rule of course will apply where the ordinance relates to local proprietary or private powers or duties of a corporation.

§ 542. Ultra vires acts.

The character of a public corporation as a governmental agent of exceedingly restricted and limited powers should be constantly had in mind. An ultra vires act is one in excess of the lawful powers possessed by an artificial person. Even in respect to private corporations a liability for an ultra vires act is in many cases denied. The strict rule as to the consequences of an ultra vires act should be and is applied to a far greater extent in the case of a public corporation. They are governmental agents created by the sovereign and are its agencies or auxiliaries to carry out governmental measures and functions. Their property is acquired for public uses and through an exercise of the power of taxation. The great weight of authority and reason sustain the rule of no liability in the case of a public corporation whether municipal or quasi in respect to the consequences of an ultra vires act.[66]

[64] Speir v. City of Brooklyn, 139 N. Y. 6, 34 N. E. 727, 21 L. R. A. 641.

[65] Trescott v. City of Waterloo, 26 Fed. 592; Masters v. Village of Bowling Green, 101 Fed. 101; Culver v. City of Streator, 130 Ill. 238, 22 N. E. 810, 6 L. R. A. 270; Taylor v. City of Owensboro, 98 Ky. 271, 32 S. W. 948; City of Galveston v. Posnainsky, 62 Tex. 130. But see McGraw v. Town of Marion, 98 Ky. 673, 34 S. W. 18, 47 L. R. A. 593. See, also, notes on liability of municipal corporations for false imprisonment and unlawful arrest and liability for arrest and imprisonment under invalid ordinance, in 44 L. R. A. 795, and 47 L. R. A. 593.

[66] Lloyd v. City of Columbus, 90 Ga. 20, 15 S. E. 818; Goddard v. Inhabitants of Harpswell, 84 Me. 499, 24 Atl. 958; Boye v. City of Albert Lea, 74 Minn. 230, 76 N. W. 1131; Betham v. City of Philadelphia, 196 Pa. 302, 46 Atl. 448; Becker v. City of La Crosse, 99 Wis. 414, 75 N. W. 84, 40 L. R. A. 829. See, also, Salt Lake City v. Hollister, 118 U. S. 256.

§ 543. Nature of duty.*

It was suggested in a preceding section that the character of a duty, whether discretionary or ministerial, affected the question of liability of a public corporation for its negligent performance. The duties or powers of public corporations have been classified as legislative or judicial in their character, therefore discretionary and imperative or ministeral.[67] The former, for their performance being left to the judgment, the discretion of the particular officer or body in whom is vested the power of performance or exercise. To impose a liability for a failure to perform these duties or in respect to the manner of their performance would clearly deprive them of their discretionary character and impose their proper performance upon the courts.[68] In case of the latter or ministerial and imperative duties, the performance of the duty or the exercise of the power is not left to the judgment or the discretion of the public authorities but is directly imposed or prescribed to be performed in a manner specified. For a failure to perform duties of this character or for their negligent performance the courts almost universally hold the existence of a liability to the one injured.[69]

§ 544. Respondent superior.*

To render a public corporation liable for negligence, not only must the character of the duty negligently performed be established as one which gives rise to a cause of action together with the other essentials of actionable negligence, as stated in the preceding sections, but also since a public corporation as an artificial person acts through its officers and agents, must it clearly appear that the act complained of was committed by some one expressly

* 6 Curr. Law, 735.

[67] Jewett v. City of New Haven, 38 Conn. 368; City of Chicago v. Turner, 80 Ill. 419; Brunswick Gas Light Co. v. Brunswick Village Corp., 92 Me. 493; Gray v. City of Detroit, 113 Mich. 657; Pierce v. Tripp, 13 R. I. 181; Royce v. Salt Lake City, 15 Utah, 401, 49 Pac. 290.

[68] Weightman v. Washington Corp., 1 Black. (U. S) 39; Judge v. City of Meriden, 38 Conn. 90; Gray v. City of Griffin, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131; McGinnis v. Inhabitants of Medway, 176 Mass. 67, 57 N. E. 210.

[69] Jones v. City of New Haven, 34 Conn. 1; Hollman v. City of Platteville, 101 Wis. 94, 76 N. W. 1119.

* 6 Curr. Law, 735.

authorized to do the act by the public authorities [70] or that it was done bona fide in pursuance of a general authority to act on the subject to which the action relates.[71] If these conditions appear a liability will follow. A public corporation as a principal, is bound only for the acts of its agents coming within the precise scope of their express authority.[72]

Nature of duty performed. The liability of a public corporation for the acts of its agents will also depend upon the character of the act in doing which they are employed. If this is governmental, no liability can arise.[73] If, on the other hand, the cause of action arises from an act governmental in its nature, perhaps, but where there is a liability imposed by statute or contract,[74] or where, as in the case of municipal corporations proper, most frequently, the damage is the result of carrying out some one or more of its private, local or proprietary powers,[75] then the same rules of liability will apply as in respect to private persons or corporations. A liability will accrue in connection with the operation of a municipal water, lighting or power plant,[76] in the construction or maintenance of a garbage or sewage system,[77] in

[70] Herzo v. City of San Francisco, 33 Cal. 134; Gilpatrick v. City of Biddeford, 86 Me. 534, 30 Atl. 99.

[71] City of Mobile v. Bienville Water Supply Co., 130 Ala. 379, 30 So. 445; Sievers v. City & County of San Francisco, 115 Cal. 648, 47 Pac. 687; Palmer v. Village of St. Albans, 60 Vt. 427, 13 Atl. 569.

[72] Roughton v. City of Atlanta, 113 Ga. 948, 39 S. E. 316; Woodcock v. City of Calais, 66 Me. 234; McCann v. City of Waltham, 163 Mass. 344, 40 N. E. 20; Wabaska Elec. Co. v. City of Wymore, 60 Neb. 199, 82 N. W. 626.

[73] Mead v. City of New Haven, 40 Conn. 72; Kinnare v. City of Chicago, 171 Ill. 332, 49 N. E. 536; Bryant v. City of St. Paul, 33 Minn. 289; Tomlin v. Hildredth, 65 N. J. Law, 438, 47 Atl. 649; Bartlett v. Town of Clarksburg, 45 W. Va. 393, 43 L. R. A. 295.

[74] City of Richmond v. Smith, 82 U. S. (15 Wall.) 429; Lyman v. Town of Windsor, 24 Vt. 575.

[75] Barnes v. Dist. of Columbia, 91 U. S. 540. Danbury & N. R. Co. v. Town of Norwalk, 37 Conn. 109; Tomlin v. Hildreth, 65 N. J. Law, 438, 47 Atl. 649.

[76] City Council of Augusta v. Mackey, 113 Ga. 64, 38 S. E. 339; St. Germain v. City of Fall River, 177 Mass. 550, 59 N. E. 447; Wilson v. City of Troy, 135 N. Y. 96, 32 N. E. 44, 18 L. R. A. 449; Bragg v. City of Rutland, 70 Vt. 606, 41 Atl. 578.

[77] Barney Dumping Boat Co. v. City of New York, 40 Fed. 50; Cabot v. Kingman, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45; Webb v. Board of Health of Detroit, 116 Mich. 516.

the establishment and maintenance of streets, parks or boulevards,[78] or the carrying out of any other enterprise, private or quasi private in its nature.[79]

Quasi corporations. The strict rule of nonliability in respect to public quasi corporations must not be forgotten and these bodies will not be held responsible for those acts of their officers and agents which, when done by an officer or agent of a municipal corporation proper, would create a liability.[80]

§ 545. Independent contractor; fellow-servant.*

The same rule that governs the liability of a private person for the act of an independent contractor applies to a public corporation though modified by the character of the work done. If governmental in its character, under no circumstances can there be a liability, except as one may be prescribed by law. If not of this nature, then the rule above applies.[81] This it will be remembered, is substantially, that where the work is performed by an independent contractor who has full charge of the work, the employment and discharge of men and the use of agencies, no liability can arise.[82] The principle operates even where the contract provides that the work is to be done to the satsfaction of designated officials who, in pursuance of such a provision, su-

[78] Butman v. City of Newton, 179 Mass. 1, 60 N. E. 401; City of Omaha v. Croft, 60 Neb. 57, 82 N. W. 120; Johns v. City of Cincinnati, 45 Ohio St. 278, 12 N. E. 801; Sprague v. Tripp, 13 R. I. 38.

[79] City of Philadelphia v. Gavagnin (C. C. A.) 62 Fed. 617, affirming 59 Fed. 303; City Council of Augusta v. Owens, 111 Ga. 464, 36 S. E. 830; City of Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206; Collins v. Inhabitants of Greenfield, 172 Mass. 78, 51 N. E. 454. But see Mahoney v. City of Boston, 171 Mass. 427, 50 N. E. 939.

[80] Smith v. Carlton County Com'rs, 46 Fed. 340; Smith v. Allen County Com'rs, 131 Ind. 116, 30 N. E. 949; Clark v. Easton, 146 Mass. 43, 14 N. E. 795; Downes v. Town of Hopkinton, 67 N. H. 456, 40 Atl. 433; Hamilton County Com'rs v. Mighels, 7 Ohio St. 109.

* 6 Curr. Law, 737.

[81] Fuller v. City of Grand Rapids, 105 Mich. 529, 63 N. W. 530; Reed v. Allegheny City, 79 Pa. 300.

[82] Foster v. City of Chicago, 197 Ill. 264, 64 N. E. 322; City of Evansville v. Senhenn, 151 Ind. 42, 47 N. E. 634, 51 N. E. 88, 41 L. R. A. 728; Uppington v. City of New York, 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550; White v. City of Philadelphia, 201 Pa. 512, 51 Atl. 332. But see City of Logansport v. Dick, 70 Ind. 65.

pervise and pass upon the work from time to time.[83] If, however, the authorities retain full or partial control of the work both in respect to the manner of its construction or the employment and discharge of men or the use of appliances, or if the plan of work is defective,[84] even though the work is actually carried on by an independent contractor; a public corporation will be held liable for damages resulting from defective machinery or negligent work on the part of one performing the contract.

In the carrying out of any work in respect to which any part thereof, a liability may arise, the defense of common employment or fellow-servant is open equally to public corporations as well as to private persons or corporations and to the extent which may be prescribed by law.[85]

§ 546. Surface waters.

In respect to the liability of public corporations for acts done affecting surface waters, either in the construction of public improvements or their maintenance, the rule varies. In those jurisdictions where the common-law rule prevails, namely, that surface water is a common enemy which the owners of all lower estates are permitted to contend with in the manner they deem best, a public corporation will not be held liable for acts by which the flow of surface water has been diverted or changed in such a manner as to occasion damage.[86] In other states where the civil law is in force, that rule will regulate the action of public corporations in the construction or maintenance of improvements. This rule, as will be remembered, is to the effect that each lower estate is regarded as a servient one and is bound to permit surface

[83] Sewall v. St. Paul, 20 Minn. (Gil. 459) 511.

[84] De Baker v. Southern Cal. R. Co., 106 Cal. 257, 39 Pac. 610; Brooks v. Inhabitants of Somerville, 106 Mass. 271; City of Ironton v. Kelley, 38 Ohio St. 50; Kollock v. City of Madison, 84 Wis. 458; Pearson v. Zable, 78 Ky. 170.

[85] Toledo v. Cone, 41 Ohio St. 149; Flynn v. City of Salem, 134 Mass. 351.

[86] Lampe v. City & County of San Francisco, 124 Cal. 546, 57 Pac. 461; Gardiner v. Inhabitants of Camden, 86 Me. 377, 30 Atl. 13; Breuck v. City of Holyoke, 167 Mass. 258, 45 N. E. 732; Dudley v. Village of Buffalo, 73 Minn. 347, 76 N. W. 44; Jordan v. City of Benwood, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519; Hart v. City of Baraboo, 101 Wis. 368, 77 N. W. 744.

water to pass over it in the manner and the channels in which it is naturally accustomed.[87]

§ 547. Liability in respect to highways.*

The greater number of questions in connection with the subject of negligence of public corporations arise in respect to the duty to keep highways in a reasonably safe and fit condition for use, in a proper manner, by those entitled to the right. There are many conflicting decisions and to some extent a liability is created only by and, therefore, dependent upon the construction of some statutory provision.

§ 548. Of quasi corporations.*

The distinction between quasi corporations and municipal corporations proper is important and the determining element in a large number of adjudications. Public quasi corporations, it will be remembered, are regarded as mere political agencies having an arbitrarily imposed form of government, their duties strictly enjoined and limited by law. The establishment, improvement and maintenance of highways is considered as one of various governmental functions. The rule, therefore, exists established by such a weight of authority as to be regarded universal that no liability attaches to a public quasi corporation for a failure to maintain in a reasonably fit and safe condition for public travel, the highways within their jurisdicton.[88] Even where the duty is specifically imposed by statute, it is still regarded, in some cases, as public in its character, not corporate and no liability is thereby created.[89]

[87] Correll v. City of Cedar Rapids, 110 Iowa, 333, 81 N. W. 724; Elliott v. Oil City, 129 Pa. 570, 18 Atl. 553; Gillison v. City of Charleston, 16 W. Va. 282.

* 6 Curr. Law, 736; 8 Curr. Law, 72.

* 6 Curr. Law, 735.

[88] Barnes v. District of Columbia, 91 U. S. 540; Barbour County v. Horn, 48 Ala. 649; Jaspar County Com'rs v. Allman, 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58; Packard v. Voltz, 94 Iowa, 277, 62 N. W. 757; Frazer v. Inhabitants of Lewiston, 76 Me. 531; Altno v. Town of Sibley, 30 Minn. 186; Markey v. Queen's County, 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46.

[89] But see Willey v. City of Ellsworth, 64 Me. 57.

Exceptions. In a few states, however, a limited liability exists at common law or by force of some statute dealing only with designated conditions. In Iowa a liability attaches in respect to defective bridges only.[90]

§ 549. Of chartered municipalities.*

Municipal corporations proper, on the other hand, are not only governmental agents but in a certain sense are regarded as quasi private corporations possessing special privileges which are exercised for the benefit of their citizens alone. They possess local, private and proprietary powers which are exercised for the advantage and convenience of a local community not solely for the benefit or advantage of the community or the public at large. They are governed almost universally by charters from the state, not arbitrarily imposed, but voluntarily assumed. From these considerations the rule arises that they are charged with a liability express or implied for a failure to preserve and maintain the public ways within their limits in a reasonably safe condition for public travel.[91] The responsibilty cannot be evaded by its delegation to third parties either by contract, by imposing the duty upon abutting owners, or otherwise.[92]

[90] Munson v. Town of Derby, 37 Conn. 298; Hartford County Com'rs v. Hamilton, 60 Md. 340; Richardson v. Inhabitants of Danvers, 176 Mass. 413, 57 N. E. 688; Van Vane v. Inhabitants of Center Tp., 67 N. J. Law, 587, 52 Atl. 359; Perry Tp. v. John, 79 Pa. 412; Miller v. Boone County, 95 Iowa, 5.

* 6 Curr. Law, 735.

[91] City of Jacksonville v. Smith (C. C. A.) 78 Fed. 292; Lord v. City of Mobile, 113 Ala. 360; Doeg v. Cook, 126 Cal. 213, 58 Pac. 707; Makepeace v. City of Waterbury, 74 Conn. 360, 50 Atl. 876; Ford v. City of Des Moines, 106 Iowa, 94; Doak v. Saginaw Tp., 119 Mich. 680; Cunningham v. City of Thief River Falls, 84 Minn. 21, 86 N. W. 763; May v. City of Anaconda, 26 Mont. 140, 66 Pac. 759; Seymour v. Village of Salamanca, 137 N. Y. 364, 33 N. E. 304; City of Dayton v. Taylor's Adm'r, 62 Ohio St. 11, 56 N. E. 480; City of Guthrie v. Swan, 5 Okl. 779, 51 Pac. 562; Farquar v. City of Roseburg, 18 Or. 271, 22 Pac. 1103; Seamans v. Fitts, 20 R. I. 443; City of Roanoke v. Harrison (Va.) 19 S. E. 179; Griffin v. Town of Williamstown, 6 W. Va. 312; Bills v. Town of Kaukauna, 94 Wis. 310.

[92] City of Cleveland v. King, 132 U. S. 295; Blessington v. City of Boston, 153 Mass. 409, 26 N. E. 1113; Estelle v. Village of Lake Crystal, 27 Minn. 243; Watson v. Tripp, 11 R. I. 98; McCoull v. City of Manchester, 85 Va. 579, 8 S. E. 379.

Exception to the above rule. The principle stated above is not followed in a number of states, notably in New England, where it held that chartered municipalities, unless the liability is imposed by statute or charter, have no obligation resting upon them to maintain and repair their public ways.[93] The reasons for this are given in a leading decision [94] where all the authorities at that time were reviewed and considered.

§ 550. The duty to construct or improve highways.*

The duty to construct or improve public highways is regarded as coming within the class of discretionary or legislative duties and for a failure to exercise this duty or in some particular respect there can arise no liability. This rule is applied to all classes of public corporations.[95] The reason is apparent.

§ 551. Character of duty in respect to defective highways.*

The duty required is to keep public highways in a reasonably safe and fit condition for ordinary travel by those to whom the right is given and who are using them in a proper manner or,[96] as stated in another way, the duty is to exercise reasonable care in maintaining public highways in a safe condition for ordinary travel.[97] Under no circumstances or conditions is the corporation upon which the duty is imposed to be regarded as an insurer. This principle cannot be stated too emphatically.[98] Nor is it its

[93] City of Ft. Smith v. York, 52 Ark. 84, 12 S. W. 157; Arnold v. San Jose, 81 Cal. 618, 22 Pac. 877; Haines v. City of Lewiston, 84 Me. 18, 24 Atl. 430; Carter v. City of Rahway, 57 N. J. Law, 196, 30 Atl. 863; Mattson v. City of Astoria, 39 Or. 577, 65 Pac. 1066.

[94] Hill v. City of Boston, 122 Mass. 344; Arkadelphia v. Windham, 49 Ark. 139, 4 S. W. 450; Snider v. City of St. Paul, 51 Minn. 466, 53 N. W. 753, 18 L. R. A. 151.

* 6 Curr. Law, 736.

[95] City of Henderson v. Sandefur, 74 Ky. (11 Bush) 550.

* 6 Curr. Law, 736.

[96] City of Denver v. Cochran, 17 Colo. App. 72, 67 Pac. 23.

[97] City of Hannibal v. Campbell, 86 Fed. 297, 30 C. C. A. 63; Biesiegel v. Town of Seymour, 58 Conn. 43, 19 Atl. 372; City of Salem v. Webster, 192 Ill. 369, 61 N. E. 323; Church v. Inhabitants of Cherryfield, 33 Me. 460; Blood v. Inhabitants of Hubbardston, 121 Mass. 233; Twist v. City of Rochester, 165 N. Y. 619, 59 N. E. 1131; Moore v. City of Richmond, 85 Va. 538, 8 S. E. 387; Waggener v. Town of Point Pleasant, 42 W. Va. 798, 26 S. E. 352.

[98] City of Chicago v. McGiven, 78

duty to protect the public against latent defects.[99] It is bound to exercise reasonable care only in the performance of its obligations and this reasonable care is a varying one as required by changing conditions.[99a]

§ 552. Character of highways to which duty applies.*

The duty wherever existing applies only to a public highway or street. The importance of the discussion in previous sections in respect to the establishment and discontinuance of public highways will be therefore appreciated.[100] No liability will attach if the injury has occurred by reason of a defect in a highway not legally established or public in its character. The rule eliminates from a liability all private ways.[101]

Used portion only. The duty applies not only to legally established public highways, but further only to that portion of the way which is used ordinarily by the public as a traveled way or street.[102] Since the duty is a varying one under different conditions, the courts therefore apply a different rule in this regard to city streets as compared with country or suburban ways and also streets lying in the outskirts of an incorporated city or town.[103] The extent and the character of the travel from urban

Ill. 347; Magaha v. City of Hagerstown, 95 Md. 62, 51 Atl. 832; Turner v. City of Newburg, 109 N. Y. 301, 16 N. E. 344.

[99] Wakeham v. St. Clair Tp., 91 Mich. 15, 51 N. W. 696.

[99a] City of Rome v. Dodge, 58 Ga. 238; Yordy v. Marshall County, 80 Iowa, 405, 45 N. W. 1042; Brendlinger v. New Hanover Tp., 148 Pa. 93, 23 Atl. 1105.

* 6 Curr. Law, 736.

[100] City of New York v. Sheffield, 71 U. S. (4 Wall.) 189; Lewman v. Andrews, 129 Ala. 170, 29 So. 692; Byerly v. City of Anamosa, 79 Iowa, 204, 44 N. W. 359; Donahue v. State, 112 N. Y. 142, 19 N. E. 419, 2 L. R. A. 576; Nellums v. City of Nashville, 106 Tenn. 222, 61 S. W. 88; City of Winchester v. Carroll, 99 Va. 727, 40 S. E. 37.

[101] Ogle v. City of Cumberland, 90 Md. 59, 44 Atl. 1015; Downend v. Kansas City, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170, citing many cases; Horey v. Village of Haverstraw, 124 N. Y. 273, 26 N. E. 532; Brewer v. Sullivan County, 199 Pa. 594, 49 Atl. 259; Hill v. Laurens County, 34 S. C. 141, 13 S. E. 318; Will v. Village of Mendon, 108 Mich. 251, 66 N. W. 58.

[102] City of Hannibal v. Campbell (C. C. A.) 86 Fed. 297; Tasker v. Inhabitants of Farmingdale, 85 Me. 523, 27 Atl. 464; Moran v. Inhabitants of Palmer, 162 Mass. 196, 38 N. E. 442; Saltmarsh v. Bow, 56 N. H. 428.

[103] Hunter v. Weston, 111 Mo. 184; Lamb v. City of Cedar Rapids, 108 Iowa, 629, 79 N. W. 366; Kossman v. City of St. Louis, 153 Mo. 293, 54 S. W. 513.

or suburban conditions changes the measure of care to be applied and consequently, the duty.[104]

§ 553. The duty; to whom and when due.*

A highway is established primarily as a means of communication for ordinary travel. The duty, therefore, of keeping it in the reasonably safe condition required by law does not operate in favor of every one who may be upon or within its limits. Persons, therefore, who are using a highway for a purpose not consistent with the true one cannot recover for injuries sustained by them.[105] Public ways cannot be used as play grounds[106] for sight-seeing, loafing, or similar purposes.[107] Neither are public authorities bound to provide against the use of a public highway by unusual or extraordinary vehicles or objects or modes of locomotion or unusual loads.[108]

Unmanageable horses. The duty is not moreover imposed for the benefit of runaway teams[109] or those who may be using un-

[104] Fulliam v. City of Muscatine, 70 Iowa, 436, 30 N. W. 861. It is not the duty of a city to keep every street safe throughout its entire width regardless of location, amount of travel or other conditions. City of Ord v. Nash, 50 Neb. 335, 69 N. W. 964; Sessions v. Town of Newport, 23 Vt. 9.

* 6 Curr. Law, 736.

[105] Hawes v. Town of Fox Lake, 33 Wis. 438; Sykes v. Town of Pawlet, 43 Vt. 446.

[106] City of Indianapolis v. Emmelman, 108 Ind. 530; Lyons v. Inhabitants of Brookline, 119 Mass. 491; Jackson v. City of Greenville, 72 Miss. 220, 16 So. 382; City of Omaha v. Bowman, 52 Neb. 293, 72 N. W. 316, 40 L. R. A. 531; Gaughan v. City of Philadelphia, 119 Pa. 503, 13 Atl. 300. But see City of Chicago v. Keefe, 114 Ill. 222. Boy driving hoop. Graham v. City of Boston, 156 Mass. 75, 30 N. E. 170.

[107] McCarthy v. City of Portland, 67 Me. 167; Tighe v. City of Lowell, 119 Mass. 472; Fay v. Kent, 55 Vt. 557; Clark v. City of Richmond, 83 Va. 355. But see Mayor and Council of Jackson v. Boone, 93 Ga. 662, 20 S. E. 46; Graham v. City of Boston, 156 Mass. 75, 30 N. E. 170; Varney v. Manchester, 58 N. H. 430; Williams, Mun. Liab. Tort, pp. 122, 123.

[108] Bartlett v. Inhabitants of Kittery, 68 Me. 358; Walker v. Village of Ontario, 111 Wis. 113, 86 N. W. 566. But see Yordy v. Marshall County, 80 Iowa, 405, 45 N. W. 1042; Bush v. Delaware, L. & W. R. Co., 166 N. Y. 210, 59 N. E. 838; Megargee v. City of Philadelphia, 153 Pa. 340, 25 Atl. 1130, 19 L. R. A. 221; Hawkes v. Town of Chester, 70 Vt. 271, 40 Atl. 727.

[109] Bemis v. Inhabitants of Arlington, 114 Mass. 507; Ivory v. Town of Deerpark, 116 N. Y. 476, 22 N. E. 1080; Hungerman v. City of Wheeling, 46 W. Va. 761, 34 S. E.

manageable horses,[110] those riding or driving at an unusual rate of speed,[111] or not driving with ordinary skill and diligence,[112] but a recovery may be had if the act complained of as a defense did not in any way contribute to produce the injury.[113]

Violation of ordinance. The duty also operates in favor only of those who are using public ways for lawful purposes and in a lawful manner, and if injuries occur by reason of defects to those who may be at the time violating some ordinance in respect to the use of streets, or otherwise, where the violation directly contributes to the injury, they cannot recover.[114]

Special injury. Again, the person injured must not only show negligence on the part of the public authorities but further a special injury to himself which is the result of that negligence. Damage which he may have suffered in common with the public or others will not give him the right to recover.[115]

§ 554. Defective plan.*

The law seems to be well established, as stated in section 532 et seq. that ordinarily no liability follows from the adoption of a reasonable plan of sewage or drainage devised by reasonably competent and skillful officials or engineers. In respect to the adoption of a plan for the establishment or improvement of highways, the law is not so clearly settled and there will be found conflicting cases.[116] Some hold that where a plan for the estab-

778; Trexler v. Greenwich Tp., 168 Pa. 214, 31 Atl. 1090. But see Ward v. Town of North Haven, 43 Conn. 148.

[110] Spaulding v. Inhabitants of Winslow, 74 Me. 528; Glasier v. Town of Hebron, 131 N. Y. 447, 30 N. E. 239; Trexler v. Greenwich Tp., 168 Pa. 214, 31 Atl. 1090; Mason v. Spartanburg County, 40 S. C. 390, 19 S. E. 15; Cushing v. Inhabitants of Bedford, 125 Mass. 526.

[111] Anderson v. City of Wilmington, 2 Pen. (Del.) 28, 43 Atl. 841; McCarthy v. City of Portland, 67 Me. 167; Mullen v. City of Owosso, 100 Mich. 103, 58 N. W. 663, 23 L. R. A. 693; Abbott v. Town of Wolcott, 38 Vt. 666.

[112] Adams v. Inhabitants of Carlisle, 38 Mass. (21 Pick.) 146. See § 589, post.

[113] Baker v. City of Portland, 58 Me. 199.

[114] Arey v. City of Newton, 148 Mass. 598, 20 N. E. 327; Mullen v. City of Owosso, 100 Mich. 103, 58 N. W. 663, 23 L. R. A. 693.

[115] Halsey v. Rapid Transit St. R. Co., 47 N. J. Eq. 380, 20 Atl. 859; Griffin v. Sanbornton, 44 N. H. 246; Hale v. Town of Weston, 40 W. Va. 313, 21 S. E. 742.

* 6 Curr. Law, 736.

[116] Hughes v. City of Baltimore, Taney's Dec. 243; Fed. Cas. No. 6,844.

lishment or improvement of a highway has been devised by careful and reasonably competent officials or employes which is defective and by reason of such defects injuries occur, that no liability will follow.[117]

§ 555. Work of construction or repair.*

While the adjudications are not uniform as to the precise character which should be ascribed to the adoption of a plan of improvement of public highways there is no doubt that the actual work of construction of the improvement or the making of repairs is regarded as a ministerial act.[119] If it is negligently performed, therefore, and one receives an injury by reason of this fact, a liability will attach for the special damages which may be proximately caused by the negligent performance of the duty to carefully and skillfully construct.[120] The obligation also attaches during the progress of repairs.[121]

§ 556. Duty in respect to maintenance of public highways.*

By far the greater number of decided cases relate to defects arising from a negligent maintenance or repair of public highways. Attention is again called to the duty of the public corporation. It is not that of an insurer; it varies under different conditions and circumstances. It is not an absolute or an unvarying

[117] Northern Transp. Co. v. City of Chicago, 99 U. S. 635; Johnston v. District of Columbia, 118 U. S. 19; Sievers v. City and County of San Francisco, 115 Cal. 648, 47 Pac. 687; English v. City of Danville, 170 Ill. 131, 48 N. E. 328; Urquhart v. City of Ogdensburg, 91 N. Y. 67.

* 6 Curr. Law, 736; 8 Curr. Law, 72.

[118] Kane v. City of Indianapolis, 82 Fed. 770; City of Chicago v. Seben, 165 Ill. 371, 46 N. E. 244; Sawyer v. City of Newburyport, 157 Mass. 430, 32 N. E. 653; Blyhl v. Village of Waterville, 57 Minn. 115, 58 N. W. 817; Monk v. Town of New Utrecht, 104 N. Y. 552, 11 N. E. 268.

[119] Nevins v. City of Peoria, 41 Ill. 502; Nichols v. City of St. Paul, 44 Minn. 494, 47 N. W. 168; Davis v. City of Jackson, 61 Mich. 530, 28 N. W. 526; Borough of Easton v. Neff, 102 Pa. 474.

[120] Hitchins v. Town of Frostburg, 68 Md. 100, 11 Atl. 826; Gilman v. Town of Laconia, 55 N. H. 130.

[121] Robbins v. City of Chicago, 71 U. S. (4 Wall.) 657; Jones v. Collins, 177 Mass. 444, 59 N. E. 64; Beattie v. City of Detroit, 129 Mich. 20, 88 N. W. 71; Sauthof v. Granger, 19 R. I. 606, 35 Atl. 300.

* 6 Curr. Law, 736; 8 Curr. Law, 72.

one; it is simply the duty to keep in a reasonably safe condition for ordinary travel the public ways for the use of those having the right and exercising the privilege of travel. It is affected by the character and extent of travel, the age or condition of the traveler, the purpose for which used, the extent of use, the means at the disposition of the corporation for the purpose of repair or improvement, questions of proximate cause, notice to the corporation, contributory negligence, special injury to the one claiming damages, whether the way is urban or suburban and others which have been or will be suggested in the preceding and following sections.

§ 557. Lights, barriers and railings.*

The lighting of streets or highways is commonly regarded as a governmental duty of a discretionary character and no absolute obligation, therefore, rests upon a public corporation to perform it.[122] Where a municipality has undertaken the lighting of public ways or is specifically charged with the duty in some cases it has been held liable for a failure to light them in the usual manner.[123] If repairs or improvements are being made or obstructions left in the street, the public should be warned against the dangerous place by suitable lights or other means.[124]

The duty is also imposed in many instances of maintaining barriers and railings as a means of protection to travelers in dangerous places,[125] embankments,[126] approaches to or on bridges,[127] or

* 6 Curr. Law, 736; 8 Curr. Law, 76.

[122] Gaskins v. City of Atlanta, 73 Ga. 746; Randall v. Eastern R. Co., 106 Mass. 276; Lyon v. City of Cambridge, 136 Mass. 419.

[123] City of Chicago v. Baker, 195 Ill. 54, 62 N. E. 892; McHugh v. City of St. Paul, 67 Minn. 441, 70 N. W. 5; Canavan v. City of Oil City, 183 Pa. 611, 38 Atl. 1096.

[124] King v. City of Cleveland, 28 Fed. 835; City of Baltimore v. O'Donnell, 53 Md. 110; Powers v. City of Boston, 154 Mass. 60, 27 N. E. 995; Walker v. City of Ann Arbor, 111 Mich. 1, 69 N. W. 87; Miller v. City of St. Paul, 38 Minn. 134, 36 N. W. 271; Snowden v. Town of Somerset, 171 N. Y. 99, 63 N. E. 952.

[125] Robbins v. Chicago City, 71 U. S. (4 Wall.) 657; Wetmore Tp. v. Chamberlain, 64 Kan. 327, 67 Pac. 845; Lineburg v. City of St. Paul, 71 Minn. 245, 73 N. W. 723; Lane v. Town of Hancock, 142 N. Y. 510, 37 N. E. 473. The financial ability of a town is material. Davis v. Snyder Tp., 196 Pa. 273, 46 Atl. 301.

[126] City of Manchester v. Ericson, 105 U. S. 347. Question for jury.

[127] City of Chicago v. Wright, 68 Ill. 586; Faulk v. Iowa County, 103

in the vicinity of excavations,[128] or while repairs are being made.[129] The duty it must be remembered, however, is a varying one and no rule can be stated which will apply to all conditions or under all circumstances.

§ 558. Obstructions.*

The duty to maintain public highways is a reasonably safe condition for proper and ordinary travel includes the obligation to keep them free from unnecessary and unlawful obstructions.[130] It is not every actual obstruction, however, in a highway which constitutes a defect sufficient to create a cause of action. There are many objects necessarily placed or standing within the limits of a highway that are regarded as necessary obstructions, and injuries caused by them can create no liability.[134] Shade trees,[132] stepping stones,[133] hitching or lamp posts,[134] hydrants,[135] are the most familiar illustrations of this class. There are also obstruc-

Iowa, 442, 72 N. W. 757; Hand v. Inhabitants of Brookline, 126 Mass. 324; Grant v. City of Brainerd, 86 Minn. 126, 90 N. W. 307.

[128] City of Chicago v. Baker, 195 Ill. 54, 62 N. E. 892; Puffer v. Inhabitants of Orange, 122 Mass. 389.

[129] Jones v. Collins, 177 Mass. 444, 59 N. E. 64; Cartwright v. Town of Belmont, 58 Wis. 370.

* 6 Curr. Law, 736; 8 Curr. Law, 78.

[130] City of Cleveland v. King, 132 U. S. 295; City of Birmingham v. Tayloe, 105 Ala. 170, 16 So. 576; Herries v. City of Waterloo, 114 Iowa, 374, 86 N. W. 306; Farrell v. Inhabitants of Oldtown, 69 Me. 72; Tilton v. Inhabitants of Wenham, 172 Mass. 407, 52 N. E. 514; Sebert v. City of Alpena, 78 Mich. 165, 43 N. W. 1098. Stump in highway. May v. City of Anaconda, 26 Mont. 140, 66 Pac. 759; Farley v. City of New York, 152 N. Y. 222, 46 N. E. 506; Bowes v. City of Boston, 155 Mass. 344, 29 N. E. 633, 15 L. R. A. 365.

[131] Herries v. City of Waterloo, 114 Iowa, 374, 86 N. W. 306; Hebert v. City of Northampton, 152 Mass. 266, 25 N. E. 467; McDonald v. City of St. Paul, 82 Minn. 308, 84 N. W. 1022; Whitney v. Town of Ticonderoga, 127 N. Y. 40, 27 N. E. 403.

[132] City of Wellington v. Gregson, 31 Kan. 99; Washburn v. Inhabitants of Easton, 172 Mass. 525, 52 N. E. 1070; Dougherty v. Village of Horseheads, 159 N. Y. 154, 53 N. E. 799; Watkins v. County Court, 30 W. Va. 657, 5 S. E. 654.

[133] Tiesler v. Town of Norwich, 73 Conn. 199, 47 Atl. 161; Robert v. Powell, 168 N. Y. 411, 61 N. E. 699, 55 L. R. A. 775.

[134] Weinstein v. City of Terre Haute, 147 Ind. 556, 46 N. E. 1004; Arey v. City of Newton, 148 Mass. 598, 20 N. E. 327.

[135] Horner v. City of Philadelphia, 194 Pa. 542, 45 Atl. 330. But see St. Germain v. City of Fall River, 177 Mass. 550, 59 N. E. 447

tions directly authorized by the legislature placed in the public highways and the existence of these cannot give rise to a liability on account of injuries received from them. The duty to keep in a reasonably safe condition, as applied to obstructions, includes deposits of building materials lawfully placed within the limits of a highway for use in constructing buildings.[136]

Accumulation of rubbish. Negligence may arise in a maintenance of streets through a failure to remove accumulations of rubbish, whether caused by natural or artificial means,[137] by the corporation itself or private persons.[138]

§ 559. Ice and snow.*

The duty to exercise reasonable care in keeping highways in a fit condition for travel applies also to accumulations of ice and snow [139] or its removal from the surface when of such a character as to cause a dangerous and slippery condition.[140] This duty, it will be readily seen, varies with climatic conditions and the financial ability of the corporation to remove frequent or constant falls of snow or sleet.[141] The existence of the duty is also de-

[136] City of Cleveland v. King, 132 U. S. 295; Kansas City v. McDonald, 60 Kan. 481, 57 Pac. 123, 55 L. R. A. 429; Koch v. City of Williamsport, 195 Pa. 488, 46 Atl. 67.

[137] Hazzard v. City of Council Bluffs, 79 Iowa, 106, 44 N. W. 219; Hall v. City of Cadillac, 114 Mich. 99; Frazier v. Borough of Butler, 172 Pa. 407, 33 Atl. 691.

[138] Ray v. City of St. Paul, 40 Minn. 458, 42 N. W. 297; Badgley v. City of St. Louis, 149 Mo. 122, 50 S. W. 817.

* 6 Curr. Law, 736; 8 Curr. Law, 77.

[139] City of Providence v. Clapp, 17 How. (U. S.) 161; Ellis v. City of Lewiston, 89 Me. 60, 35 Atl. 1016; Spaulding v. Town of Beverly, 167 Mass. 149, 45 N. E. 1; City of Lincoln v. Janesch, 63 Neb. 707, 89 N. W. 280. The duty of keeping sidewalks free from ice and snow may be imposed by statute upon abutting owners. Templeton v. Warriorsmark Tp., 200 Pa. 165, 49 Atl. 950.

[140] Smith v. City of Chicago, 38 Fed. 388; Wood v. Borough of Stafford Springs, 74 Conn. 437, 51 Atl. 129; Newton v. City of Worcester, 174 Mass. 181; Wesley v. City of Detroit, 117 Mich. 658; Taylor v. City of Yonkers, 105 N. Y. 202, 11 N. E. 642; Scoville v. Salt Lake City, 11 Utah, 60, 39 Pac. 481; Ziegler v. City of Spokane, 25 Wash. 439, 65 Pac. 752; Byington v. City of Merrill, 112 Wis. 211, 88 N. W. 26.

[141] McDonald v. City of Toledo, 63 Fed. 60; Spillane v. City of Fitchburg, 177 Mass. 87, 58 N. E. 176; Dorn v. Town of Oyster Bay, 158 N. Y. 731, 53 N. E. 1124; Hayes v. City of Cambridge, 136 Mass. 402; Spear v. Town of Lowell, 47 Vt. 692.

pendent upon the character of the accumulation whther natural or artificial. In northern latitudes frequent falls of snow or sleet may cause obstructions or a dangerous condition even when left as naturally deposited. No liability arises under such circumstances.[142] On the other hand, where the accumulations of ice and snow are made by artificial means, or caused by defective construction of the way, a liability may arise if there is negligence on the part of the authorities in using the means at their disposal to remove them.[143] The duty of keeping sidewalks free from snow may be imposed by statute or ordinance upon the abutting owner.[144]

§ 560. Buildings with their adjuncts and projections.*

Public highways are established and should be maintained for purposes of ordinary travel and not as a location for buildings erected either by the public authorities or by private persons. The construction, therefore, of a building or any portion of it[145] or any of its adjuncts in a public way in such a manner as to interfere with the proper use of the highway at that place will be regarded as an illegal obstruction. The term "adjuncts and projections" include ordinarily projecting portions of a building or objects attached to it, and supported entirely from the building or partly from the street, such as signs, awnings and the like.[146]

But see Lindsay v. City of Des Moines, 68 Iowa, 368.

[142] McGuinness v. City of Worcester, 169 Mass. 272, 35 N. E. 1068; Kannenberg v. City of Alpena, 96 Mich. 53, 55 N. W. 614; Stanke v. City of St. Paul, 71 Minn. 51, 73 N. W. 629; Kaveny v. City of Troy, 108 N. Y. 571, 15 N. E. 726. City liable for slippery condition of the sidewalk made so by smooth ice of recent formation.

[143] City of Boulder v. Niles, 9 Colo. 415, 12 Pac. 632; Magaha v. City of Hagerstown, 95 Md. 62, 51 Atl. 832; Davis v. Rich, 180 Mass. 235, 62 N. E. 375; Foxworthy v. City of Hastings, 25 Neb. 133, 41 N. W. 132; Tremblay v. Harmony Mills, 171 N. Y. 598, 61 N. E. 501; Miller v. City of Bradford, 186 Pa. 164, 40 Atl. 409; McCloskey v. Moies, 19 R. I. 297, 33 Atl. 225.

[144] Inhabitants of Easthampton v. Hill, 162 Mass. 302, 38 N. E. 502; Norton v. City of St. Louis, 97 Mo. 537, 11 S. W. 242; City of Lincoln v. Janesch, 63 Neb. 707, 89 N. W. 280, 56 L. R. A. 762.

* 6 Curr. Law, 736; 8 Curr. Law, 78.

[145] Kies v. City of Erie, 169 Pa. 598, 32 Atl. 621.

[146] Gray v. City of Emporia, 43 Kan. 704, 23 Pac. 944; Bohen v. City of Waseca, 32 Minn. 176; Biel-

§ 561. Poles, wires and similar objects as obstructions.*

The use of public highways by telegraph, telephone or electric light wires and poles is undoubtedly contrary to the primary purpose for which public highways are established and maintained and unless they are erected and operated under proper and lawful authority are to be regarded as nuisances and obstructions of such a character as to create, unless remedied, a violation of the duty imposed upon public corporations in respect to the maintenance of their highways.[147] Where, however, their use is duly authorized, they then become defects only when by reason of their location or of their condition [148] they constitute a menace to the safety of travelers.

§ 562. Excavations or depressions; sidewalk openings.*

The duty is imperative in respect to the protection of travelers from excavations made in the street either by the corporation itself in its repair, the making of improvements, or by others in the performance of some lawful purpose. The dangerous character of excavations is not disputed and if the public are not either warned of their existence [149] or if the excavations are not properly lighted, protected or guarded,[150] a liability will follow. An interesting question frequently arises in respect to liability arising from an injury received because of a failure to guard or warn

ing v. City of Brooklyn, 120 N. Y. 98, 24 N. E. 389; Grove v. City of Ft. Wayne, 45 Ind. 429.

* 6 Curr. Law, 736; 8 Curr. Law, 78.

[147] Kennedy v. City of Lansing, 99 Mich. 518, 58 N. W. 70; Twist v. City of Rochester, 165 N. Y. 619, 59 N. E. 1131.

[148] Hayes v. Inhabitants of Hyde Park, 153 Mass. 514, 27 N. E. 522, 12 L. R. A. 249; Watts v. Southern Bell Tel. & Tel. Co., 100 Va. 45, 40 S. E. 107; Burns v. City of Emporia, 63 Kan. 285, 65 Pac. 260; Bourget v. City of Cambridge, 159 Mass. 388, 34 N. E. 455; Mooney v. Borough of Luzerne, 186 Pa. 161, 40 Atl. 311, 40 L. R. A. 811.

* 6 Curr. Law, 736; 8 Curr. Law, 78.

[149] Norwood v. City of Somerville, 159 Mass. 105; Foy v. City of Winston, 126 N. C. 381, 35 S. E. 609.

[150] City of Birmingham v. Lewis, 92 Ala. 352, 9 So. 243; Cummings v. City of Hartford, 70 Conn. 115, 38 Atl. 916; Norwood v. City of Somerville, 159 Mass. 105, 33 N. E. 1108. Whether precautions taken are sufficient is a question for the jury. Fox v. City of Chelsea, 171 Mass. 297, 50 N. E. 622; Reed v. City of Spokane, 21 Wash. 218, 57 Pac. 803. But see Ball v. City of Independence, 41 Mo. App. 469; City of Boston v. Coon, 175 Mass. 283, 56 N. E. 287.

against an excavation not within the limits of a highway but immediately contiguous to it. The rule seems to be in this class of cases that no liability will exist if the excavation is not immediately adjacent to the highway and, therefore, does not constitute a dangerous defect in connection with the use of the highway.[151]

Basement or sidewalk openings. Akin to excavations are cellar, basement and sidewalk openings[152] made by private owners in the public streets under license or otherwise or upon private property immediately contiguous to the traveled portion of the highway. The rule stated in the preceding section applies. The imperative duty is imposed on the public authorities because of the dangerous condition of these openings to guard the public against injury in a manner commensurate with the danger.[153]

§ 563. Ditches, culverts, catch basins or open sewers.*

In the construction of ditches, culverts, catch basins,[154] sewers, of water pipes,[154a] their condition as originally made or as it may subsequently become may constitute such a defect in the highway as to create a liability to one suffering injury by reason of this defective condition.[155]

[151] City of Chicago v. Baker, 195 Ill. 54, 62 N. E. 892. Question for jury. Talty v. City of Atlantic, 92 Iowa, 135, 60 N. W. 516; McHugh v. City of St. Paul, 67 Minn. 441, 70 N. W. 5; Wiggin v. City of St. Louis, 135 Mo. 558, 37 S. W. 528; Kelley v. City of Columbus, 41 Ohio St. 263.

[152] City of Augusta v. Hafers, 61 Ga. 48; Ledgerwood v. Webster City, 93 Iowa, 726, 61 N. W. 1089; Sweeney v. Newport, 65 N. H. 86, 18 Atl. 86; McNerney v. City of Reading, 150 Pa. 611, 25 Atl. 57; Rider v. Clark, 132 Cal. 382, 64 Pac. 564; Burt v. City of Boston, 122 Mass. 223; McNerney v. City of Reading, 150 Pa. 611, 25 Atl. 57.

[153] Burridge v. City of Detroit, 117 Mich. 557, 42 L. R. A. 684; Hall v. City of Austin, 73 Minn. 134; Whitty v. City of Oshkosh, 106 Wis. 87, 81 N. W. 992.

* 6 Curr. Law, 736.

[154] Lewman v. Andrews, 129 Ala. 170, 29 So. 692; Williams v. Town of Greenville, 130 N. C. 93, 40 S. E. 977, 57 L. R. A. 207; Wood v. Bridgeport Borough, 143 Pa. 167, 22 Atl. 752; City of La Salle v. Porterfield, 138 Ill. 114, 27 N. E. 937; Buck v. City of Biddeford, 82 Me. 433, 19 Atl. 912; Wright v. Lancaster, 203 Pa. 276, 52 Atl. 245.

[154a] City of Champaign v. Patterson, 50 Ill. 61; Lane v. City of Lewiston, 91 Me. 292; Post v. Boston, 141 Mass. 189; Burger v. City of Philadelphia, 196 Pa. 41, 46 Atl. 262.

[155] Johnson v. City of Worcester, 172 Mass. 122, 51 N. E. 519; Goins v. City of Moberly, 127 Mo. 116.

§ 564. Use of street.*

The particular use to which a street is put may constitute an obstruction in respect to the creation of a liability. A highway is designed, primarily, for the use of travelers on foot or otherwise but where horses are used as a means of locomotion, whenever the duty exists, it does not apply to those which are unmanageable, vicious, easily frightened, or in the act of running away.[156] The use of highways by objects, therefore, of such a character as to frighten or render unmanageable horses not coming within the classes above mentioned constitutes a defect in the proper maintenance of the highway and creates a liability on the part of the corporation.[157]

Illegal use of the street. The illegal use of a public way or park for a purpose not authorized by law or in violation of some specific statute or ordinance,[158] or in such a manner as to constitute a nuisance does not ordinarily give rise to a liability where injuries are received from this cause. The use of a street for coasting is a familiar illustration of the last proposition.[159]

§ 565. Side and cross walks.*

Side and cross walks are uniformly regarded as a part of the highway and the same duty can be enforced in respect to their condition and construction.[160] As already noted in the previous

* 6 Curr. Law, 736.

[156] See § 589, post; Johnston v. City of Philadelphia, 139 Pa. 646.

[157] Weinstein v. City of Terre Haute, 147 Ind. 556; Butman v. City of Newton, 179 Mass. 160; Chamberlain v. Town of Enfield, 43 N. H. 356. Lumber pile. Dunn v. Town of Barnwell, 43 S. C. 398; Ouverson v. City of Grafton, 5 N. D. 281, 65 N. W. 676; Baker v. Borough of North East, 151 Pa. 234, 24 Atl. 1079; Prahl v. Town of Waupaca, 109 Wis. 299, 85 N. W. 350. But see District of Columbia v. Moulton, 182 U. S. 576, 21 Sup. Ct. 840.

[158] Town of Cullman v. McMinn, 109 Ala. 614, 19 So. 981; Herries v. City of Waterloo, 114 Iowa, 374, 86 N. W. 306; Shehan v. City of Boston, 171 Mass. 296, 50 N. E. 543. But see O'Neil v. Town of East Windsor, 63 Conn. 150, 27 Atl. 237.

[159] City of Lafayette v. Timberlake, 88 Ind. 330; Pierce v. City of New Bedford, 129 Mass. 534; Hutchinson v. Town of Concord, 41 Vt. 271.

* 6 Curr. Law, 736; 8 Curr. Law, 75.

[160] Village of Evanston v. Gunn, 99 U. S. 660; Cusick v. City of Norwich, 40 Conn. 375; McLean v. Lewiston, 8 Idaho, 472, 69 Pac. 478; Village of Mansfield v. Moore, 124

sections, some classes of public corporations are exempt by statute or common law from any obligation whatever in these respects—some have special duties imposed by statute, while municipal corporations have usually imposed upon them either by common law or statutory regulation the largest measure of duty with its resulting liability. It is deemed advisable to again call attention to the well established principle of law that a public corporation whether municipal or quasi, is never regarded as an insurer of the safety of a person. The only duty is to keep the highways, including as an integral part, side and cross walks, in a reasonably safe condition for ordinary travel by those using them for a proper purpose and, therefore, entitled to the privilege.[161] This duty is a varying one, and is in all cases predicated upon negligence which is usually regarded as a question of fact for a jury under reasonable control of the court.[162]

§ 566. Duty; how modified.*

The obligation in respect to side and cross walks is changed through the fact that they are used by foot passengers. The duty by reason of this condition is measurably increased because of the increased danger from use by such travel and legally to be guarded against. Conditions either in plan, construction or maintenance regarded as defects in side and cross walks would not be so considered if found in that portion of the highway set aside for travel by other means of locomotion.[163]

Width to be kept in repair. It was said in a previous section that the duty to keep an ordinary highway in repair ap-

Ill. 133, 16 N. E. 246; Parmenter v. City of Marion, 113 Iowa, 297, 85 N. W. 90; Weare v. Inhabitants of Fitchburg, 110 Mass. 334; Burridge v. City of Detroit, 117 Mich. 557, 76 N. W. 84, 42 L. R. A. 684; McSherry v. Village of Canandaigua, 129 N. Y. 612, 29 N. E. 821; Byington v. City of Merrill, 112 Wis. 211, 88 N. W. 26.

[161] Enright v. City of Atlanta, 78 Ga. 288; Hall v. Town of Manson, 90 Iowa, 585, 58 N. W. 881; Brummett v. City of Boston, 179 Mass. 26, 60 N. E. 388; Phalen v. City of Detroit, 126 Mich. 683, 86 N. W. 126; Anderson v. Albion, 64 Neb. 280, 89 N. W. 794.

[162] Young v. Kansas City, 45 Mo. App. 600; Brooks v. Schwerin, 54 N. Y. 343; 5 Thompson, Neg. § 6155.

* 6 Curr. Law, 736; 8 Curr. Law, 75.

[163] Shippy v. Village of Au Sable, 65 Mich. 494, 32 N. W. 741. The rule stated in respect to use of sidewalks by children. Moore v. City of Kalamazoo, 109 Mich. 176, 66 N. W. 1089.

plied only to that portion used or likely to be used, ordinarily, as a traveled way. This rule does not apply to side and cross walks; the duty must be performed in respect to them in their entire length and width.[164] If a city or town invites the public to use a sidewalk, although it may be built on private ground, the duty is imposed of keeping it in a reasonably safe condition.[165]

Duty; to whom due. The law which protects a public corporation from liability where a highway has been used for an improper purpose, especially in its use by children while playing, is materially relaxed where side and cross walks are used for this purpose.[166] In either case the duty is a varying one depending upon the opportunity of children to use public play grounds on their own yards.

§ 567. Plan of improvement.*

It is quite universally held that a defect in the plan of construction of a side or cross walk may lead to a liability.[167] Plan defects usually involve questions in respect to the grade, whether too steep under existing conditions,[168] the height of steps or their location,[169] the absence of railings or barriers at or near

[164] City Council of Augusta v. Tharpe, 113 Ga. 152, 38 S. E. 389; City of Decatur v. Besten, 169 Ill. 340, 48 N. E. 186; Whitfield v. City of Meridian, 66 Miss. 570, 6 So. 244, 4 L. R. A. 834; Scott v. Provo City, 14 Utah, 31, 45 Pac. 1005.

[165] Seymour v. Village of Salamanca, 137 N. Y. 364, 33 N. E. 304; Gagnier v. City of Fargo, 11 N. D. 73, 88 N. W. 1030; Phillips v. City of Huntington, 35 W. Va. 406, 14 S. E. 17.

[166] Stinson v. City of Gardiner, 42 Me. 248; McLaughlin v. City of Philadelphia, 142 Pa. 80, 21 Atl. 754; City of Chicago v. Keefe, 114 Ill. 222; Graham v. City of Boston, 156 Mass. 75, 30 N. E. 170; City of Omaha v. Richards, 49 Neb. 244, 68 N. W. 528; McGarry v. Loomis, 63 N. Y. 104; Reed v. City of Madison, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733.

* 6 Curr. Law, 736.

[167] City of Birmingham v. Starr, 112 Ala. 98; Ledgerwood v. Webster City, 93 Iowa, 726; Weisse v. City of Detroit, 105 Mich. 482; Burrows v. Borough of Lake Crystal, 61 Minn. 357.

[168] Haskell v. City of Des Moines, 74 Iowa, 110, 37 N. W. 6; Readdy v. Borough of Shamokin, 137 Pa. 98, 20 Atl. 396; Morrison v. City of Madison, 96 Wis. 452, 71 N. W. 882.

[169] Shippy v. Village of Au Sable, 85 Mich. 280, 48 N. W. 584; Tabor v. City of St. Paul, 36 Minn. 188, 30 N. W. 765. But see City of Roanoke v. Harrison (Va.) 19 S. E. 179.

dangerous excavations or embankments,[170] uneven places,[171] and height above ground.[172]

Actual work of construction. There is no question but that a public corporation, where it is charged with the duty of constructing walks and cross walks is liable for negligence in the actual work of construction or repair.[173]

§ 568. Defects in condition.*

The duty, when existing applies to defects arising from acts of either private persons or the public corporation itself, and whether caused by the construction or repair of the improvement or by subsequent neglect or act.[174] The liability applies, however, only to actual defects as distinguished from latent, using that term in its proper sense. Actionable negligence cannot be predicated upon the existence of a latent defect which it is impossible to discover through ordinary agencies or means by the exercise of ordinary care and diligence.[175] The rule is the same in respect to all portions of a highway. Common defective conditions are smooth and slippery walks or cross walks,[176] broken, loose or defective planks, stones or bricks,[177] holes in the

[170] Hogan v. City of Chicago, 168 Ill. 551, 48 N. E. 210; City of Portland v. Taylor, 125 Ind. 522, 25 N. E. 459; Damon v. City of Boston, 149 Mass. 147, 21 N. E. 235; Donnelly v. City of Rochester, 166 N. Y. 315, 59 N. E. 989.

[171] Patterson v. City of Council Bluffs, 91 Iowa, 732, 59 N. W. 63; Sawyer v. Newburyport, 157 Mass. 430, 32 N. E. 653.

[172] Shaw v. President, etc., of Sun Prairie, 74 Wis. 105, 42 N. W. 271.

[173] City of Topeka v. Sherwood, 39 Kan. 690, 18 Pac. 933.

* 6 Curr. Law, 736; 8 Curr. Law, 75.

[174] City of Birmingham v. McCary, 84 Ala. 469, 4 So. 630; Hembling v. City of Grand Rapids, 99 Mich. 292, 58 N. W. 310; Cummings v. City of Hartford, 70 Conn. 115, 38 Atl. 916; Peterson v. Village of Cokato, 84 Minn. 205, 87 N. W. 615.

[175] City of Columbus v. Ogletree, 102 Ga. 293; Burleson v. Village of Reading, 110 Mich. 512; City of Lynchburg v. Wallace, 95 Va. 640.

[176] Dooley v. City of Meriden, 44 Conn. 117; Cromarty v. City of Boston, 127 Mass. 329; Yeager v. City of Bluefield, 40 W. Va. 484, 21 S. E. 752.

[177] City of Rome v. Baker, 107 Ga. 347, 33 S. E. 406; Noyes v. Gardner, 147 Mass. 505, 18 N. E. 423; Weisse v. City of Detroit, 105 Mich. 482, 63 N. W. 423; Chacey v. City of Fargo, 5 N. D. 173, 64 N. W. 932; McHugh v. Town of Minocqua, 102 Wis. 291, 78 N. W. 478.

walk or cross walk,[178] projecting nails, or other obstructions[179] of a similar character, inequalities in the surface,[180] or decayed materials.[181]

§ 569. Obstructions as defects.*

Objects may be placed in or near side or cross walks which, by their condition, or the mere fact of their location,[182] will be regarded as actionable defects where injuries are sustained because of them. There are obstructions, however, which are necessary and lawful by reason of a mode of living, some public or private improvement[183] or by force of some statute. These, it necessarily follows, are not defects which the corporation is bound to remedy.

§ 570. Ice and snow as defects.*

The mere presence of ice or snow upon a sidewalk may not be regarded as an actionable defect. The courts differ in their conclusions. The question should be regarded, ordinarily, from the standpoint of sound common sense. Climatic conditions and the financial ability of a municipality determine the liability or nonliability in many cases. The mere presence of ice, sleet or snow as naturally deposited and where there are no other defects in the way or walk, is not, by weight of authority, regarded as a defeet.[184] The accumulation of ice or snow in ridges or masses

[178] Michigan City v. Ballance, 123 Ind. 334; Marvin v. City of New Bedford, 158 Mass. 464, 33 N. E. 605; Kane v. City of Philadelphia, 196 Pa. 502, 46 Atl. 893.

[179] Doulon v. City of Clinton, 33 Iowa, 397; Town of Watertown v. Greaves (C. C. A.) 112 Fed. 183, 56 L. R. A. 865; Lamb v. City of Worcester, 177 Mass. 82, 58 N. E. 474.

[180] Labarre v. City of New Orleans, 106 La. 458, 30 So. 891; Haggerty v. City of Lewiston, 95 Me. 374, 50 Atl. 55; Bieber v. City of St. Paul, 87 Minn. 35, 91 N. W. 20.

[181] Hall v. City of Austin, 73 Minn. 134, 75 N. W. 1121; Stern v. Bensieck, 161 Mo. 146, 61 S. W. 594.

* 6 Curr. Law, 736; 8 Curr. Law, 78.

[182] Bibbins v. City of Chicago, 193 Ill. 359, 61 N. E. 1030; Jones v. City of Deering, 94 Me. 165, 47 Atl. 140; City Council of Augusta v. Tharpe, 113 Ga. 152, 38 S. E. 389.

[183] Jordan v. City of New York, 165 N. Y. 657, 59 N. E. 1124; City of Richmond v. Leaker, 99 Va. 1, 37 S. E. 248.

* 6 Curr. Law, 736; 8 Curr. Law, 77.

[184] Ford v. City of Des Moines, 106 Iowa, 94, 75 N. W. 630; Ayres

may, however, give rise to liability if other elements of actionable negligence exist. The rule also applies where the accumulations have been caused by artificial or extrinsic means rather than natural causes.[185] A sidewalk may also be defective by being so improperly constructed as to induce a special or constant deposit of ice and snow in a particular locality.[186]

§ 571. Proximity of defects.*

If the defects exist in the side or cross walk itself, the question of liability is easily determined. The particular defect, however, causing an injury may not be, and this is especially true of excavations, and embankments, in the walk itself or immediately adjacent to it, but in close proximity. In these cases the law properly limits the liability to those instances where the defect complained of is so close as to require special protection.[187]

§ 572. Bridges, viaducts and similar structures.*

Bridges, viaducts and similar structures used for public travel are legally regarded as public highways. The existence of a duty of public corporations in respect to their construction and maintenance, depends in the first instance upon the character of the corporation having control of them. If within the limits and under the jurisdiction of quasi corporations following the usual rule, no liability can arise for injuries resulting from defects in their construction or maintenance.[188] In many states, however, by statute, a liability is specifically imposed upon quasi corporations, especially towns or counties, in respect to bridges where

v. Village of Hammondsport, 130 N. Y. 665, 29 N. E. 265. But see Stanton v. City of Springfield, 94 Mass. (12 Allen) 566.

[185] Gerald v. City of Boston, 108 Mass. 580; Keane v. Village of Waterford, 130 N. Y. 188, 29 N. E. 130; Magaha v. Hagerstown, 95 Md. 62; Bly v. Village of Whitehall, 120 N. Y. 506, 24 N. E. 943.

[186] Hodges v. City of Waterloo, 109 Iowa, 444, 80 N. W. 523; Navarre v. City of Benton Harbor, 126 Mich. 618, 86 N. W. 138.

* 6 Curr. Law, 736; 8 Curr. Law, 75.

[187] Theissen v. City of Belle Plaine, 81 Iowa, 118; City of Columbus v. Pearson, 82 Ga. 288, 9 S. E. 1102; Randall v. City of Lowell, 156 Mass. 255, 30 N. E. 1020.

* 6 Curr. Law, 736; 8 Curr. Law, 72.

[188] Pundman v. St. Charles County, 110 Mo. 594, 19 S. W. 733; Livermore v. Chosen Freeholders of Camden County, 29 N. J. Law, 245.

none exists as to other portions of the highway.[189] In other cases it is held that where a quasi corporation is charged, by law, with a specific duty of constructing and maintaining bridges, viaducts and other similar structures, a liability will result, implied or otherwise, for a failure to construct them in a careful and proper manner and maintain them in a reasonably safe condition for public travel.[190] If under the control of municipal corporations proper a liability will depend upon the principles noted in preceding sections.[191] The duty, under whatever circumstances it may arise, is that which has been already stated namely to construct and maintain in a reasonably safe condition for ordinary travel by those using that particular part of the highway in a proper manner.[192] Under no conditions can a public corporation be regarded as an insurer of the safety of those using highways or any part even for proper purposes.[193]

§ 573. Liability as affected by notice.*

The liability of public corporations in the construction or maintenance of public improvements, especially highways, may result from either an act of misfeasance or nonfeasance or, as the modern cases express it, from acts of commission or omission. Liability is based upon negligence in respect to the performance of a duty. Whatever duty may exist, it is not that of an insurer of a person or his property. It is simply that of exercising reasonable care and diligence in constructing and maintaining public property or public improvements in a reasonably safe condition for those entitled to use them in a proper manner. A knowledge of the defect whether in plan, construction or maintenance, must, therefore, precede the existence of a duty and knowledge is obtained through notice of the defect. In acts of commission,

[189] Eastman v. Clackamas County, 32 Fed. 24; Willingham v. Elbert County, 113 Ga. 15, 38 S. E. 348; Jackson County Com'rs v. Nichols, 139 Ind. 611, 38 N. E. 526; Eginoire v. Union County, 112 Iowa, 558, 84 N. W. 758.

[190] Huston v. Iowa County, 43 Iowa, 456; Kirtley v. Spokane County, 20 Wash. 111, 54 Pac. 936.

[191] Weightman v. Washington Corp., 1 Black. (U. S.) 38.

[192] White v. Riley Tp., 121 Mich. 413, 80 N. W. 124.

[193] Wilson v. Town of Granby, 47 Conn. 59; Wabash County Com'rs v. Pierson, 120 Ind. 426, 22 N. E. 134.

* 6 Curr. Law, 737; 8 Curr. Law, 74.

which will be considered in a later section, no notice is necessary because the doing of the act by law charges a public corporation with notice of the defect. In acts of omission or nonfeasance, a liability can only arise where there has been a failure to repair or remedy the defect with a reasonable time after knowledge of the defect. There can be, therefore, no recovery unless the corporation has had either actual or constructive notice of the defect and has failed within a reasonable time to remedy it.[194]

The plaintiff must show affirmatively in all cases, notice either actual or constructive of the particular defect causing the injury complained of[195] and the lapse of a reasonable time thereafter within which it might have been remedied in the exercise of ordinary care and diligence as depending upon the circumstances of that particular case.[196]

§ 574. To whom given.*

The giving of actual notice of the existence of constructive notice does not, in all cases, create a liability. Not only must the corporation have had notice of the defect for a reasonable time, but that notice must have been given or the knowledge possessed by that public official sustaining such a relation to the public corporation as to charge it with the duty intended to be enforced by the fact of notice.[197] The notice must, therefore, be given to one whose legal duty it is to remedy or repair the defect com-

[194] City of New York v. Sheffield, 71 U. S. (4 Wall.) 189; Bill v. City of Norwich, 39 Conn. 222; City of Evansville v. Senhenn, 151 Ind. 42, 47 N. E. 634, 51 N. E. 88, 41 L. R. A. 728; Jones v. Walnut Tp., 59 Kan. 774, 52 Pac. 865; Parker v. City of Boston, 175 Mass. 501, 56 N. E. 569; Buckley v. Kansas City, 156 Mo. 16, 56 S. W. 319; Jones v. City of Greensboro, 124 N. C. 310, 32 S. E. 675; Ford v. Umatilla Co., 15 Or. 313, 16 Pac. 33.

[195] City of Jackson v. Boone, 93 Ga. 662, 20 S. E. 46; Whitney v. City of Lowell, 151 Mass. 212, 24 N. E. 47.

[196] Lamb v. City of Cedar Rapids, 108 Iowa, 629, 79 N. W. 366; Rogers v. City of Williamsport, 199 Pa. 450, 49 Atl. 293; Town of Franklin v. House, 104 Tenn. 1, 55 S. W. 153.

* 6 Curr. Law, 737; 8 Curr Law, 74.

[197] Hazard v. City of Council Bluffs, 87 Iowa, 51, 53 N. W. 1083; McFarland v. Emporia Tp., 59 Kan. 568, 53 Pac. 864; Hinckley v. Somerset, 145 Mass. 326, 14 N. E. 166; Cunningham v. City of Thief River Falls, 84 Minn. 21, 86 N. W. 763.

plained of [198] or to one whose legal duty it is to inform those public officials charged by law with this duty.[199]

§ 575. Actual notice.*

Actual notice exists where a knowledge of the defect is given to or possessed by one who is authorized by law to charge his principal, the public corporation, with this knowledge.[200] Actual notice obtains where a memorandum or entry is made of the defect in books kept for that purpose [201] or written or oral information of the defect is given to or acquired by the proper officer.[202]

In some states actual notice in respect to certain defects is provided for by charter or statutory provisions which designate its character and form, upon what officials to be served,[203] and the time which must elapse between the service of the notice prescribed and the time from which a liability of the corporation will accrue unless the defect described in the notice is remedied.[204] Statutes of this character are construed strictly and to create the rights contemplated by them they must be strictly followed in respect to the form of the notice, and the manner and time of its service.[205]

§ 576. Constructive notice.*

Constructive notice obtains where a defective condition has existed for that length of time in which the public corporation act-

[198] Pease v. Inhabitants of Parsonsfield, 92 Me. 345, 42 Atl. 502; Rogers v. Village of Orion, 116 Mich. 324, 74 N. W. 463; Beall v. City of Seattle, 28 Wash. 593, 69 Pac. 12, 61 L. R. A. 583.

[199] Morgan v. Fremont County, 92 Iowa, 644, 61 N. W. 231; Chase v. City of Lowell, 151 Mass. 422, 24 N. E. 212.

* 6 Curr. Law, 737; 8 Curr. Law, 74.

[200] Fee v. Borough of Columbus, 168 Pa. 382, 31 Atl. 1076; City of Lynchburg v. Wallace, 95 Va. 640, 29 S. E. 675; Mauch v. City of Hartford, 112 Wis. 40, 87 N. W. 816.

[201] City of Joliet v. Looney, 159 Ill. 471, 42 N. E. 854; Blake v. Lowell, 143 Mass. 296, 9 N. E. 627.

[202] Trapnell v. City of Red Oak Junction, 76 Iowa, 744, 39 N. W. 884.

[203] McAllister v. City of Bridgeport, 72 Conn. 733, 46 Atl. 552; Gurney v. Inhabitants of Rockport, 93 Me. 360, 45 Atl. 310; Elias v. City of Rochester, 162 N. Y. 614, 62 N. E. 1095.

[204] Bradbury v. City of Lewiston, 95 Me. 216, 49 Atl. 1041.

[205] Hurley v. Inhabitants of Bowdoinham, 88 Me. 293, 34 Atl. 72; Wormwood v. Waltham, 144 Mass. 184, 10 N. E. 800.

* 6 Curr. Law, 737; 3 Curr. Law, 74.

ing through its proper officers and the usual means by the exercise of reasonable care and diligence, might have discovered and remedied the defect. It arises or is presumed from the existence of facts with which ignorance is incompatible unless a failure to exercise care and diligence is assumed.[206] Constructive notice is, therefore, a presumption arising from the existence of certain facts and conditions. The principle element constituting it is the lapse of time. No rule or principle can be laid down from which it can be arbitrarily decided when constructive notice or knowledge exists. It is dependent upon the facts and the circumstances surrounding each particular case.[207] The existence of a defect for months has been held not to constitute constructive notice, and on the other hand this has been presumed from the existence of a defect for a period of twenty-four hours. In the notes will be found many cases arranged simply as a matter of convenience according to a specified length of time,[208] and also some where no liability was held because of the shortness of the time between the occurrence of the defect and the happening of the injury.[209] The determination of constructive notice in-

[206] City of Sterling v. Merrill, 124 Ill 522, 17 N. E. 6; Huntington County Com'rs v. Bonebrake, 146 Ind. 311; Germaine v. City of Muskegon, 105 Mich. 213, 63 N. W. 78; Born v. City of Spokane, 27 Wash. 719, 68 Pac. 386.

[207] City of Birmingham v. Starr, 112 Ala. 98; Keyes v. City of Cedar Falls, 107 Iowa, 509; Bingham v. City of Boston, 161 Mass. 3; Atherton v. Village of Bancroft, 114 Mich. 241; Davis v. City of Omaha, 47 Neb. 836; Poole v. City of Jackson, 93 Tenn. 62, 23 S. W. 57; Rhyner v. City of Menasha, 107 Wis. 201, 83 N. W. 303.

[208] *Hours:* Parsons v. City of Manchester, 67 N. H. 163, 27 Atl. 88.

Days: City of Griffin v. Johnson, 84 Ga. 279, 10 S. E. 719; Bloor v. Town of Delafield, 69 Wis. 273, 34 N. W. 115.

Weeks: Young v. Webb City, 150 Mo. 333, 51 S. W. 709. Six. McDonald v. City of Ashland, 78 Wis. 251, 47 N. W. 434.

Months: City of Montgomery v. Wright, 72 Ala. 411; City of Decatur v. Besten, 169 Ill. 340, 48 N. E. 186; Finnegan v. Sioux City, 112 Iowa, 232, 83 N. W. 907; Urtel v. City of Flint, 122 Mich. 65, 80 N. W. 991; Devenish v. City of Spokane, 21 Wash. 77, 57 Pac. 340. One to four. West v. City of Eau Claire, 89 Wis. 31, 61 N. W. 313.

Miscellaneous: City of Anna v. Boren, 77 Ill. App. 408. Sidewalk out of repair so long that witnesses cannot remember when it was otherwise. Tilton v. Inhabitants of Wenham, 172 Mass. 407, 52 N. E. 514; Hart v. New Haven, 130 Mich. 181, 89 N. W. 677. Two years. Grimm v. Town of Washburn, 100 Wis. 229, 75 N. W. 984.

[209] City of Montezuma v. Wilson,

volves the question of due care and diligence in the discovery of defects.[210] It depends upon the volume or character of travel, the materials used in the construction or the repair of an improvement,[211] and the character of the defect itself as one easily discovered, open and notorious or one which is slight and not easily ascertained.[212] The opportunity and means possessed by a public corporation for the discovery of defects is also an important consideration.[213]

§ 577. How proved.*

Constructive notice or knowledge may be proved by evidence of the condition and the existence of a particular defect complained of at the time of injury or prior thereto.[214] The presence of a public official at the defect, the fact that one resides in close proximity to it,[215] a report of the defect by officials, or official directions for its repair,[216] is considered proper evidence tending to show notice to the corporation.

82 Ga. 206, 9 S. E. 17. Afternoon before plaintiff was injured. City of Warsaw v. Dunlap, 112 Ind. 576, 14 N. E. 568. One hour and forty-five minutes. Jones v. City of Clinton, 100 Iowa, 333, 69 N. W. 418; Bingham v. City of Boston, 161 Mass. 3, 36 N. E. 473. Question for jury. Thomas v. City of Flint, 123 Mich. 10, 81 N. W. 936, 47 L. R. A. 499. Two or three days. Breil v. City of Buffalo, 144 N. Y. 163, 38 N. E. 977. See later case, Id., 156 N. Y. 699, 51 N. E. 1089; Carroll v. Allen, 20 R. I. 541, 40 Atl. 419.

[210] Cusick v. City of Norwich, 40 Conn. 375; City of Streator v. Chrisman, 182 Ill. 215, 54 N. E. 997; Bourget v. City of Cambridge, 159 Mass. 388; Jones v. City of Greensboro, 124 N. C. 310, 32 S. E. 675; City of Lynchburg v. Wallace, 95 Va. 640, 29 S. E. 675.

[211] Wilberding v. City of Dubuque, 111 Iowa, 484, 82 N. W. 957; Laurie v. City of Ballard, 25 Wash. 127, 64 Pac. 906; Town of Wheaton v. Hadley, 131 Ill. 640, 23 N. E. 422; Green v. Town of Nebagamain, 113 Wis. 508, 89 N. W. 520.

[212] Balls v. Woodward, 51 Fed. 646; Jones v. City of Clinton, 100 Iowa, 333; Chase v. City of Lowell, 151 Mass. 422, 24 N. E. 212; Rushton v. City of Allegheny, 192 Pa. 574, 44 Atl. 249.

[213] Moore v. City of Minneapolis, 19 Minn. 300 (Gil. 258).

* 6 Curr. Law, 737; 8 Curr. Law, 74.

[214] Kellogg v. Village of Jaynesville, 34 Minn. 132; City of Chicago v. Dalle, 115 Ill. 386; Pettengill v. City of Yonkers, 116 N. Y. 558, 22 N. E. 1095; Butcher v. City of Philadelphia, 202 Pa. 1, 51 Atl. 330.

[215] Doan v. Town of Willow Springs, 101 Wis. 112, 76 N. W. 1104; La Duke v. Exeter Tp., 97 Mich. 450, 56 N. W. 851.

[216] Bond v. City of Biddeford, 75 Me. 538; Butler v. Town of Mal-

Other accidents. For the purpose of proving constructive notice only, evidence is admissible as to the happenings of similar accidents at the same place and caused by the same defect.[217] Such evidence is not proper to establish a liability in another case nor can the fact that similar accidents have happened at the same place and caused by the same defect create a liability.

Subsequent or prior repairs. The fact that proper officials have, subsequent to an injury, repaired the defect causing that injury, made general repairs or improvements, is not admissible for the purpose of establishing constructive notice.[218] It is also true as in the case of the happening of other accidents that the mere making of subsequent repairs cannot create a liability on the part of the public corporation.[219]

§ 578. Notice; when not necessary.*

No notice is necessary to establish negligence on the part of the public corporation in its acts of commission or where the defect has been caused by others under its express authority and permission.[220] In these cases the doing of the negligent act is sufficient in law to charge the public corporation with a knowledge of the defect or notice of its negligence.[221] The rule holds

vern, 91 Iowa, 397, 59 N. W. 50; Erd v. City of St. Paul, 22 Minn. 443.

[217] Osborne v. City of Detroit, 32 Fed. 36; City of Goshen v. England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; Bailey v. City of Centerville, 115 Iowa, 271, 88 N. W. 379; Moore v. City of Kalamazoo, 109 Mich. 176, 66 N. W. 1089; Fordham v. Gouverneur Village, 160 N. Y. 541, 55 N. E. 290; Piper v. City of Spokane, 22 Wash. 147, 60 Pac. 138.

[218] Sylvester v. Town of Casey, 110 Iowa, 256, 81 N. W. 455; Getty v. Town of Hamlin, 127 N. Y. 636, 27 N. E. 399; Dillon v. City of Raleigh, 124 N. C. 184, 32 S. E. 548; Barrett v. Village of Hammond, 87 Wis. 654, 58 N. W. 1053.

[219] Castello v. Landwehr, 28 Wis. 522.

* 6 Curr. Law, 737; 8 Curr. Law, 74.

[220] Boone County Com'rs v. Mutchler, 137 Ind. 140, 36 N. E. 534; Jones v. City of Deering, 94 Me. 165, 47 Atl. 140; Wilson v. City of Troy, 135 N. Y. 96, 32 N. E. 44, 18 L. R. A. 449; Rowland v. City of Philadelphia, 202 Pa. 50, 51 Atl. 589; District of Columbia v. Woodbury, 136 U. S. 450; Foy v. City of Winston, 126 N. C. 381, 35 S. E. 609.

[221] Barks v. Jefferson County, 119 Ala. 600, 24 So. 505; Parker v. City of Boston, 175 Mass. 501; Ouverson v. City of Grafton, 5 N. D. 281; Village of Oak Harbor v. Kallagher, 52 Ohio St. 183; Croc-

where ignorance of the defect is the result of a clear and unmistakable omission.[222]

Notice a question for jury. The subject of negligence involves largely the determination of questions of fact. Proximate cause, contributory negligence and the existence of notice, are each and all questions for the jury to pass upon and determine under the circumstances and conditions of each particular case under proper instructions from the court.[223]

§ 579. Contributory negligence.*

To warrant a recovery of damages it is not only necessary that the essentials of actionable negligence exist, as discussed in the preceding sections, but further, that the one complaining must be free from any negligence on his part which directly contributed to the injury.[224] The reasons sustaining this principle are chiefly two, namely, the injustice of making another responsible for one's wrong and also the idea that as a matter of public policy, those principles of law should be adopted which incite or compel a person to exercise ordinary prudence and care. Contributory negligence has been defined as: "Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred."[225] For further definitions and discussions in detail of the question, the reader is referred to general works on the subject of negligence including those cited in the note.[226]

kett v. Village of Barre, 66 Vt. 269, 29 Atl. 147.

[222] Boucher v. City of New Haven, 40 Conn. 457.

[223] Dempsey v. City of Rome, 94 Ga. 420, 20 S. E. 335; Bingham v. City of Boston, 161 Mass. 3, 36 N. E. 473; Wilkins v. City of Flint, 128 Mich. 262, 87 N. W. 195; Scoville v. Salt Lake City, 11 Utah, 60, 39 Pac. 481.

* 6 Curr. Law, 760.

[224] City of Sandwich v. Dolan, 141 Ill. 430; Boyd v. City of Ames, 110 Iowa, 749, 82 N. W. 774; Norwood v. City of Somerville, 159 Mass. 105; Smith v. Walker Tp., 117 Mich. 14.

[225] 7 Am. & Eng. Enc. Law (2d Ed.) p. 371, article on contributory negligence.

[226] Beach, Contrib. Neg. 7 Am. & Eng. Enc. Law (2d Ed.) art. "Contributory negligence," 5 Thompson, Neg. c. CLI. p. 692; Williams, Mun. Liab. Tort, p. 220, § 127; Jones, Neg. Mun. Corp. c.c. 22 and 23, §§ 206–228; Shearman & R. Neg.

§ 580. Imputable negligence.*

The subject of contributory negligence involves the doctrine of imputable negligence and its application. This may arise under two conditions: First, where one is with another and through the contributory negligence of that person an injury is suffered by the one who is himself free from fault. Whether the contributory negligence of the other person is imputable to the one injured is a question upon which the courts disagree and there are two well established lines of cases, the one holding that it is so imputable [227] and the other the reverse.[228] The cases are referred to in the notes. The other and second condition under which the doctrine of imputable negligence may be raised is when a child, of such tender years that contributory negligence cannot be attributed to it, is injured. Whether the contributory negligence of the parents or guardians under these circumstances is imputable to it, is a question upon which the courts also disagree. There are contrary decisions; one line holding that the contributory negligence of a parent or guardian is imputable to a child,[229] and still another that a child can recover for injuries sustained irrespective of the contributory negligence of those in charge.[230]

§ 581. The application of the doctrine of contributory negligence to those non sui juris.*

The question is, can those non sui juris be guilty of contributory negligence. Upon this there is a great variety of judicial opinion. Some cases hold that arbitrarily that a child not having attained its majority, but having reached that age when it is capable of the commission of a crime, can be guilty of contributory negligence.[231] Other cases determine the question accord-

* 6 Curr. Law, 765.

[227] Bartram v. Town of Sharon, 71 Conn. 686, 43 Atl. 143, 46 L. R. A. 144; Leslie v. City of Lewiston, 62 Me. 468.

[228] Boone County Com'rs v. Mutchler, 137 Ind. 140, 35 N. E. 534; Barnes v. Inhabitants of Rumford, 96 Me. 315, 52 Atl. 844; Burt v. City of Boston, 122 Mass. 223; Cunningham v. City of Thief River Falls, 84 Minn. 21, 86 N. W. 763.

[229] Grant v. City of Fitchburg, 160 Mass. 16, 35 N. E. 84.

[230] Bliss v. South Hadley, 146 Mass. 91, 13 N. E. 352; Eskildsen v. Seattle, 29 Wash. 583, 70 Pac. 64.

* 6 Curr. Law, 764.

[231] Tucker v. New York Cent. & H. R. R. Co., 124 N. Y. 308; Thompson, Neg. §§ 306–318.

ing to the facts as they appear from the evidence of a particular case. The age, intelligence, knowedge of danger, mode or condition in life, and other material facts are all taken into consideration and a decision is reached accordingly.[232] In the case of young children especially, it is quite generally held that it is not negligence per se for them to use the streets, particularly sidewalks, for purposes of play.[233] The questions of negligence or contributory negligence, depend, as stated many times, upon the circumstances in a particular case. Children must have opportunities for play and fresh air. In crowded localities, the public highways afford them their only means of recreation. Clearly, under these conditions, they should not be held guilty of contributory negligence in the use of public highways for this purpose.[234]

§ 582. Duty of the traveler in respect to the use of highways.*

The duty of the public corporation in respect to the care of its highways is only that of exercising reasonable care and diligence in constructing and maintaining them in a condition fit for proper use by those entitled to the privilege. On the other hand the duty of the traveler in respect to the use of highways is only that of ordinary care under existing circumstances.[235] The ordinary care required of the traveler is measured at all times by the dangers to be avoided.[236]

The principle is well established that the traveler using a highway for a proper purpose in the absence of knowledge of the defect may lawfully presume that the public corporation has exer-

[232] Casey v. City of Malden, 163 Mass. 507, 40 N. E. 849; King v. Colon Tp., 125 Mich. 511, 84 N. W. 1077; Hudon v. City of Little Falls, 68 Minn. 463, 71 N. W. 678; Stern v. Bensieck, 161 Mo. 146, 61 S. W. 594; Eskildsen v. Seattle, 29 Wash. 583, 70 Pac. 64.

[233] City Council of Augusta v. Tharpe, 113 Ga. 152, 38 S. E. 389; Gulline v. City of Lowell, 144 Mass. 491, 11 N. E. 723; Arnold v. City of St. Louis, 152 Mo. 173, 53 S. W. 900, 48 L. R. A. 291.

[234] Straub v. St. Louis, 175 Mo. 413, 75 S. W. 100; Reed v. City of Madison, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733.

* 8 Curr. Law, 72.

[235] Town of Wheaton v. Hadley, 131 Ill. 640, 23 N. E. 422; Langhammer v. City of Manchester, 99 Iowa, 295, 68 N. W. 688; Kansas City v. McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429; Brown v. Town of Swanton, 69 Vt. 53, 37 Atl. 280.

[236] Rhyner v. City of Menasha, 107 Wis. 201, 83 N. W. 303.

cised, in respect to the condition of a highway which he is using, that degree of care which the law imposes upon it.[237] He is not bound, therefore, to be constantly on guard against defects which may cause him an injury. This presumption applies to all travelers using the highway and at all times when they can be lawfully used including both night and day.[238] The presumption does not, however, operate to relieve him from the performance of his duty to use ordinary care and the traveler further can rely upon the principle only in the absence of knowledge on his part of the defect and when the danger is not an obvious and notorious one.[239]

A traveler is not required to be constantly on the alert or keep his eye continually upon the roadway for the discovery of defects.[240] As already suggested, defects may be either patent or latent. Where a defect is open and easily discovered, the traveler cannot, acting upon the presumption which exists in his favor, run blindly into it. In so doing the courts hold that he will not be exercising ordinary care.[241] Where the defect, however, is a latent one, the duty imposed upon him does not require him to exercise such vigilance as to enable him to detect it and avoid injury.[242]

§ 583. Diverted attention.*

The exercise of ordinary care on the part of the traveler, further, does not require him to be continually on the lookout for defects whether open and notorious or latent. If his attention is, momentarily, diverted and in so doing, he is injured by a defect

[237] City of Birmingham v. Tayloe, 105 Ala. 170, 16 So. 576; City of Salem v. Webster, 192 Ill. 369, 61 N. E. 323; Perrette v. Kansas City, 162 Mo. 238, 62 S. W. 448; Turner v. City of Newburg, 109 N. Y. 301, 16 N. E. 344; Hardin County Com'rs v. Coffman, 60 Ohio St. 527, 54 N. E. 1054, 48 L. R. A. 455.

[238] Robinson v. City of Wilmington, 8 Houst. (Del.) 409, 32 Atl. 347.

[239] City of Birmingham v. Starr, 112 Ala. 98, 20 So. 424; Benedict v. City of Port Huron, 124 Mich. 600, 83 N. W. 614.

[240] Baxter v. City of Cedar Rapids, 103 Iowa, 599, 72 N. W. 790; Butcher v. City of Philadelphia, 202 Pa. 1, 51 Atl. 330.

[241] Benton v. City of Philadelphia, 198 Pa. 396, 48 Atl. 267; Nicholas v. Peck, 20 R. I. 533, 40 Atl. 418.

[242] Cox v. City of Des Moines, 111 Iowa, 646, 82 N. W. 993; Phillips v. City of Huntington, 35 W. Va. 406, 14 S. E. 17.

* 8 Curr. Law, 82.

which he could have avoided if his attention had been at that moment directed to it, it will not be regarded as contributory negligence.[243] The character of or a knowledge of the defect largely controls, however, the application of this principle. It may be so notorious and of such a dangerous nature or so well known that the principle of momentarily diverted attention will not relieve him from the charge of contributory negligence.[244]

§ 584. Nocturnal travel.*

Highways are constructed and maintained for travel at all times. The duty is imposed, therefore, upon the public corporation of maintaining its highways in a reasonably safe and fit condition for travel by night as well as day and the nocturnal traveler may presume that the corporation has performed its duty in this respect for his benefit as a traveler by night.[245] The fact that he is traveling in the darkness, however, when defects are not so easily discovered, imposes upon him a greater degree of care than if he were traveling by day. The proper determination of whether he used ordinary care would include a consideration of the circumstance that he was traveling in the darkness. He is required to exercise greater vigilance and care in his use of the highway,[246] as the ease with which defects may be discovered is affected by darkness.

§ 585. Attempting obvious or known danger.*

The character of a defect as a dangerous one may be open, notorious and obvious and well known. When of this nature, the traveler in the exercise of ordinary care must take into consideration this fact and if he is injured through an attempted use of a

[243] City of Birmingham v. Starr, 112 Ala. 98, 20 So. 424; City of Maysville v. Guilfoyle, 110 Ky. 670, 62 S. W. 493; Maloy v. City of St. Paul, 54 Minn, 398, 56 N. W. 94; Kenyon v. City of Mondovi, 98 Wis. 50, 73 N. W. 314.

[244] City of Plymouth v. Milner, 117 Ind. 324, 20 N. E. 235; Lichtenberger v. Town of Meriden, 91 Iowa, 45, 58 N. W. 1058.

* 8 Curr. Law, 72.

[245] City of Birmingham v. McCray, 84 Ala. 469, 4 So. 639; Keyes v. City of Cedar Falls, 107 Iowa, 509, 78 N. W. 227; May v. City of Anaconda, 26 Mont. 140, 66 Pac. 759.

[246] Jackson County Com'rs v. Nichols, 139 Ind. 611, 38 N. E. 526; Graham v. Town of Oxford, 105 Iowa, 705, 75 N. W. 473.

* 8 Curr. Law, 82.

highway in a notoriously defective and dangerous condition, he is chargeable with contributory negligence,[247] though this principle as all others stated in respect to the subject of negligence is not invariably applied. The circumstances of a particular case may be such that upon a fair consideration of them the traveler in attempting to pass an obvious defect or danger may not be chargeable with a lack of the ordinary care which the law imposes upon him.[248] Under no conditions, however, will a reckless disregard of one's safety be excused.[249]

§ 586. Choice between dangers or ways.*

It often happens that in the proper use of a highway by a traveler that condition arises which necessitates a choice between dangers or defects. The traveler selects or chooses as between them in his use of the road and is injured when, if he had selected or chosen another mode or way of passing he might not have been injured. The rule in this class of cases seems substantially to be that if he exercises his best judgment and discretion under the circumstances, unless the danger which he attempted was so obvious and patent as to charge him with contributory negligence in attempting it, that he will not be regarded as exercising less than ordinary care in making his election.[250]

Choice of ways. Where a traveler in passing chooses a way which is unsafe when another was open, less defective in its character or practically safe, by taking the other or dangerous one, he assumes all the risks of that route and if injured, he is chargeable

[247] City of Birmingham v. Starr, 112 Ala. 98, 20 So. 424; Morrison v. Shelby County Com'rs, 116 Ind. 431, 19 N. E. 316; Barce v. City of Shenandoah, 106 Iowa, 426, 76 N. W. 747; Lane v. City of Lewiston, 91 Me. 292, 39 Atl. 999; Friday v. City of Moorhead, 84 Minn. 273, 87 N. W. 780; Womach v. City of St. Joseph, 168 Mo. 236, 67 S. W. 588; Kleng v. City of Buffalo, 156 N. Y. 700, 51 N. E. 1091; City of De Pere v. Hibbard, 104 Wis. 666, 80 N. W. 933.

[248] Charles County Com'rs v. Mandanyohl, 93 Md. 150, 48 Atl. 1058; Butman v. City of Newton, 179 Mass. 1, 60 N. E. 401; Carroll v. Allen, 20 R. I. 144.

[249] City of Columbus v. Griggs, 113 Ga. 597, 38 S. E. 953; Church v. Village of Howard City, 111 Mich. 298, 69 N. W. 651; Kane v. City of Yonkers, 169 N. Y. 392, 62 N. E. 428.

* 8 Curr. Law, 82.

[250] Burr v. Town of Plymouth, 48 Conn. 460; Larrabee v. Sewall, 66 Me. 376.

with contributory negligence and cannot recover,[251] but this is ordinarily a question for the jury.[252]

§ 587. Condition of the traveler.*

The question of contributory negligence is also affected by or involves a discussion of the condition of the traveler either physical or mental. Public highways are constructed and maintained for the use, not only of the ablebodied, healthy and vigorous, but also for the infirm and the old and those with defective faculties, either natural or otherwise.[253] The use of a highway by travelers who are defective in sight or hearing, who are physically crippled or mentally disabled or who are intoxicated, is not negligence per se, and if they are injured by reason of these defects, or any of them, they are not, for this reason alone, chargeable with contributory negligence.[254] A public corporation is not bound to provide ways which shall be perfectly safe for classes of the character named. The degree of care is not intensified as to the corporation by the existence of these conditions, but in respect to the care to be exercised by the persons under discussion.[255]

§ 588. Knowledge of danger.

The use of a public highway by a traveler having knowledge of the dangers or defective condition may be, but not always, re-

[251] Sylvester v. Town of Casey, 110 Iowa, 256, 81 N. W. 455; Norwood v. City of Somerville, 159 Mass. 105, 33 N. E. 1108; Howey v. Fisher, 122 Mich. 43, 80 N. W. 1004; City of Dayton v. Taylor's Adm'r, 62 Ohio St. 11, 56 N. E. 480.

[252] Carstesen v. Town of Stratford, 67 Conn. 428, 35 Atl. 276; Comiskie v. City of Ypsilanti, 116 Mich. 321, 74 N. W. 487; Taylor v. City of Mankato, 81 Minn. 276, 83 N. W. 1084; Chilton v. City of Carbondale, 160 Pa. 463, 28 Atl. 833.

* 8 Curr. Law, 72, 82.

[253] Ham v. City of Lewiston, 94 Me. 265, 47 Atl. 548.

[254] Scott v. City of New Orleans (C. C. A.) 75 Fed. 373. Question for jury. Ott v. City of Buffalo, 131 N. Y. 594, 30 N. E. 67; Carpenter v. Town of Rolling, 107 Wis. 559, 83 N. W. 953. Intoxication. Robinson v. Pioche, 5 Cal. 460. "A drunken man is as much entitled to a safe street as a sober one and much more in need of it." Inhabitants of Wellesey, 148 Mass. 487, 20 N. E. 111, 2 L. R. A. 500; Arthur v. City of Charleston, 51 W. Va. 132, 41 S. E. 171.

[255] Ashborn v. Town of Waterbury, 70 Conn. 551, 40 Atl. 458; Mont v. Town of New Utrecht, 104 N. Y. 552, 11 N. E. 268; Krause v. Merrill, 115 Wis. 526, 92 N. W. 231.

garded as contributory negligence unless the way is obviously unsafe.[256] The question is one to be determined according to the circumstances of a particular case. Where a knowledge of the danger exists, the duty of ordinary care imposed upon the traveler is that degree of care and prudence which is commensurate with or measured by the danger.[257] The question to be determined by the jury is, considering the nature and the location of the defect, whether with a knowledge of it, the traveler used ordinary care under the circumstances.[258] When a knowledge of the danger exists on the part of the traveler if he temporarily forgets it[259] or misjudges his proximity to it[260] or assumes that the defect of which he had knowledge has been remedied,[261] these questions as affecting his contributory negligence are ordinarily all to be determined by the jury.

§ 589. Conduct of the traveler.

A traveler may be guilty of such conduct in the use of a highway as to charge him with contributory negligence. The duty of a public corporation is not that of an insurer. The traveler using the highway for a proper purpose must do this in a proper manner and exercise ordinary care and diligence, not only in respect to his

[256] Owen v. City of Ft. Dodge, 98 Iowa, 281, 67 N. W. 281; City of Winchester v. Carroll, 99 Va. 727, 40 S. E. 37.

[257] Giffen v. City of Lewiston, 6 Idaho, 231, 55 Pac. 545; City of Streator v. Crisman, 182 Ill. 215, 54 N. E. 997; Bailey v. City of Centerville, 115 Iowa, 271, 88 N. W. 379; Fox v. City of Chelsea, 171 Mass. 297, 50 N. E. 622; Lyons v. City of Red Wing, 76 Minn. 20, 78 N. W. 868; Willis v. City of Newbern, 118 N. C. 132, 24 S. E. 706.

[258] City of Birmingham v. Starr, 112 Ala. 98, 20 So. 424; Village of Clayton v. Brooks, 150 Ill. 97, 37 N. E. 574; Finnegan v. Sioux City, 112 Iowa, 232, 83 N. W. 907; City of Maysville v. Guilfoyle, 110 Ky. 670, 62 S. W. 493; Dipper v. Inhabitants of Milford, 167 Mass. 555, 46 N. E. 122; Stein v. Koster, 67 N. J. Law, 481, 51 Atl. 480; Shallcross v. City of Philadelphia, 187 Pa. 143.

[259] Coles v. Revere, 181 Mass. 175, 63 N. E. 430; Bouga v. Weare Tp., 109 Mich. 520, 67 N. W. 557; City of Knoxville v. Cox, 103 Tenn. 368, 53 S. W. 734.

[260] City of Milledgeville v. Brown, 87 Ga. 596, 13 S. E. 638; Bly v. Village of Whitehall, 120 N. Y. 506, 24 N. E. 943; Musselman v. Borough of Hatfield, 202 Pa. 489, 52 Atl. 15.

[261] Dale v. Webster County, 76 Iowa, 370, 41 N. W. 1; Whoram v. Argentine Tp., 112 Mich. 20, 70 N. W. 341.

* 8 Curr. Law. 82.

own acts or omissions,[262] but also in connection with the care and management of the vehicle which he may be using and its condition.[263]

Careless driving. The traveler is bound in using a highway to ride or drive in a careful manner; one in keeping with the kind of locomotion he employs and the load he may be transporting.[264]

Unmanageable teams. Ordinarily, the duty of a public corporation applies to a use of its public ways by well broken and horses not skittish and those carefully and skillfully driven. Where they become unmanageable through a lack of these conditions, if by a defect in the highway an injury occurs, contributory negligence can be charged and no recovery permitted.[265] This rule, however, applies only where the condition of the team results from the negligence of the driver or because of its character as indicated above.[266]

Rate of speed. It is not the duty of a public corporation to construct and maintain its highways for speeding purposes. If, therefore, a person drives or rides at an unreasonable rate of speed and an injury occurs through a defective condition of the way, ordinarily, he is not permitted to recover.[267]

Defective vehicles. The exercise of ordinary care on the part of the traveler includes the use of vehicles, animals and their accoutrements in a reasonably sound and safe condition.[268]

[262] Vermillion County Com'rs v. Chipps, 131 Ind. 56, 29 N. E. 1066, 16 L. R. A. 228; Anderson v. City of St. Cloud, 79 Minn. 88, 81 N. W. 746. Unusual load. Bailey v. Brown Tp., 190 Pa. 530, 42 Atl. 95; City of Wabash v. Carver, 129 Ind. 552, 29 N. E. 25, 13 L. R. A. 851.

[263] Jordan v. City of New York, 165 N. Y. 657, 59 N. E. 1124; Jennings v. Town of Albion, 90 Wis. 22, 62 N. W. 926.

[264] City of Aurora v. Scott, 185 Ill. 539, 57 N. E. 440; McDonald v. Inhabitants of Savoy, 110 Mass, 49; Belles v. Kellner, 67 N. J. Law, 255, 51 Atl. 700, 54 Atl. 99, 57 L. R. A. 627; Walker v. Village of Ontario, 111 Wis. 113, 86 N. W. 566; Cobb v. Inhabitants of Standish, 14 Me. 198. Permitting a woman to drive a horse is not conclusive evidence of such want of ordinary care as to preclude a recovery.

[265] Daniels v. Town of Saybrook, 34 Conn. 377; City of Macon v. Dykes, 103 Ga. 847, 31 S. E. 443; Fogg v. Inhabitants of Nahant, 98 Mass. 578; Bitting v. Maxatawny Tp., 177 Pa. 213, 35 Atl. 715; Ritger v. City of Milwaukee, 99 Wis. 190, 74 N. W. 815.

[266] Faulk v. Iowa County, 103 Iowa, 442, 72 N. W. 757.

[267] City of Salem v. Webster, 192 Ill. 369, 61 N. E. 323; Reed v. Inhabitants of Deerfield, 90 Mass. (8 Allen) 522; Bills v. Town of Kaukauna, 94 Wis. 310, 68 N. W. 992

[268] Farrar v. Inhabitants of

Deviation from traveled way. The principle has been stated in preceding sections that a public corporation, if the duty existed to maintain its highways in a reasonably safe condition, was obliged to maintain in this manner only that part of the legal highway required for use by public necessities. If a person deviate from the traveled way thus to be maintained in a reasonably safe condition and is injured by reason of defects or dangers existing outside the traveled way, he is guilty of such contributory negligence as to bar a recovery.[269]

Travel in violation of law. The use of a highway either in respect to the time or the manner may be limited by law. Sunday travel in many states, except in cases of necessity, or for certain specified reasons, is prohibited, but the use of a public highway at such a time is not regarded ordinarily as contributory negligence.[270] In respect to the manner of use of the highway, especially rate of speed, driving at a prohibited rate which is generally an unreasonable one, is commonly considered as contributory negligence which will defeat a recovery.[271]

§ 590. Defenses; statute of limitations; lack of funds.

The right to recover may be limited through the operation of a statute of limitations, irrespective of the question of negligence or contributory negligence and where a provision exists applicable to the class of cases under consideration, the action must be brought within the time limited or the right of recovery will be barred.[272] Lack of funds has been urged in some cases as a defense in actions growing out of the failure of a public corporation to properly perform its duty in respect to the repair of public highways. The defense may be urged either where there is a total lack or want of funds and no means of obtaining them or

Greene, 32 Me. 574; Horrigan v. Inhabitants of Clarksburg, 150 Mass. 218, 22 N. E. 897, 5 L. R. A. 609; Judd v. Town of Claremont, 66 N. H. 418, 23 Atl. 427; Cunningham v. City of Thief River Falls, 84 Minn. 21, 86 N. W. 763.

[269] Johnson v. Sioux City, 114 Iowa, 137, 86 N. W. 212; Carey v. Inhabitants of Hubbardston, 172 Mass. 106, 51 N. E. 521; Siegler v. Mellinger, 203 Pa. 256, 52 Atl. 175; Biggs v. City of Huntington, 32 W. Va. 55, 9 S. E. 51.

[270] Kansas City v. Orr, 62 Kan. 61, 61 Pac. 397, 50 L. R. A. 783.

[271] Anderson v. City of Wilmington, 2 Pen. (Del.) 28, 43 Atl. 841.

[272] Pardey v. Town of Mechanicsville, 112 Iowa, 68, 83 N. W. 828; Scurry v. City of Seattle, 8 Wash. 278, 36 Pac. 145.

where the fund for this particular purpose has been temporarily depleted and there was at the time of the accident no funds or no present means of obtaining them in the manner particularly provided by law. Where the defense is made under the first condition it is generally regarded as a sufficient one and no recovery can be had [273] but the cases almost universally hold where the defense is urged under the second condition, it is not good and a recovery can be had if the other elements of actionable negligence exist.[274]

§ 591. Defense; notice of accident.*

The right to recover whether given by statute or based upon some common-law principle may be dependent upon the service of notice by the one injured, or someone on his behalf, to the corporation, of the injury sustained. This condition may be either required by general law or by special charter provisions in particular instances.[275] The purpose of such a notice is to inform the public corporation of the fact of the injury that it may investigate and prepare a defense at a time when proper and accurate information is more easily obtained in respect to the actual conditions attending the injury that it may better defend itself against fictitious or exaggerated claims. The fact should never be disregarded even where a liability is imposed upon a public corporation that it is, primarily, a governmental agent organized for the benefit and advantage of the community at large and that all

[273] Weeks v. Inhabitants of Needham, 156 Mass. 289, 31 N. E. 8; Whitfield v. City of Meridian, 66 Miss. 570, 6 So. 244, 4 L. R. A. 834; Winship v. Town of Enfield, 42 N. H. 197.

[274] Lord v. City of Mobile, 113 Ala. 360, 21 So. 366; City of New Albany v. McCulloch, 127 Ind. 500, 26 N. E. 1074; Lombar v. Village of East Tawas, 86 Mich. 14, 48 N. W. 947; Snook v. City of Anaconda, 26 Mont. 128, 66 Pac. 756.

* 6 Curr. Law, 737.

[275] Morgan v. City of Des Moines (C. C. A.) 60 Fed. 208; May v. City of Boston, 150 Mass. 517, 23 N. E. 220; Terryll v. City of Fairbault, 81 Minn. 519, 84 N. W. 458; Newman v. City of Birmingham, 109 Ala. 630; Doyle v. City of Duluth, 74 Minn. 157, 76 N. W. 1029; City of Lincoln v. O'Brien, 56 Neb. 761; Jones v. City of Greensboro, 124 N. C. 310; Pearson v. City of Seattle, 14 Wash. 438; Steltz v. City of Wausau, 88 Wis. 618, 60 N. W. 1054. An action for damages to land by the overflow of a culvert is an action of tort and a statement must be presented to the common council within the time prescribed.

reasonable means should be used to enable it to successfully protect itself against a loss of public funds whether through their dishonest appropriation or by the paying of false claims on account of personal injuries received. The notice under discussion must be distinguished from that required by law in some jurisdictions relative to the existence of the defect. The two are entirely different and sustain no relation to each other. A law which requires notice of the injury to be served in order as precedent to the right of recovery is regarded as mandatory in its provisions, not merely directory,[276] and the fact of notice as thus required is an affirmative matter to be pleaded and proved by the plaintiff.[277] Provisions relative to the giving of notice include as a rule the elements of sufficiency [278] and its service.[279]

§ 592. Questions for the jury.*

The existence of the essentials of actionable negligence is, as a rule, a question for the jury; this principle has been repeatedly

[276] Starling v. Town of Bedford, 94 Iowa, 194, 62 N. W. 674; Clark v. Inhabitants of Tremont, 83 Me. 426, 22 Atl. 378; Gay v. City of Cambridge, 128 Mass. 387; Griswold v. City of Ludington, 116 Mich. 401, 74 N. W. 663.

[277] Wentworth v. Town of Summit, 60 Wis. 281.

[278] Lilly v. Town of Woodstock, 59 Conn. 219, 22 Atl. 40; Sherry v. Town of Rochester, 62 N. H. 346; Carstesen v. Town of Stratford, 67 Conn. 428, 35 Atl. 276; Rusch v. City of Dubuque, 116 Iowa, 402, 90 N. W. 80; Hutchings v. Inhabitants of Sullivan, 90 Me. 131, 37 Atl. 883; Coffin v. Inhabitants of Palmer, 162 Mass. 192, 38 N. E. 509; Lyons v. City of Red Wing, 76 Minn. 20, 78 N. W. 868; Harris v. Town of Townsend, 56 Vt. 716; Goodwin v. City of Gardiner, 84 Me. 278, 24 Atl. 846. Notice that one received "severe bodily injuries" not sufficient. Driscoll v. City of Fall River, 163 Mass. 105, 39 N. E. 1003; Bartlett v. Town of Cabot, 54 Vt. 242. A notice is sufficient describing the injuries sustained as follows "Greatly injured her head, neck, back, ribs and limbs." Higgins v. Inhabitants of North Andover, 168 Mass. 251, 47 N. E. 85; Carr v. Town of Ashland, 62 N. H. 665; Althouse v. Town of Jamestown, 91 Wis. 46, 64 N. W. 423. See, also, Abbott, Mun. Corp. §§ 1061, 1062, citing many cases.

[279] Gardner v. City of New London, 63 Conn. 267, 28 Atl. 42; Marcotte v. City of Lewiston, 94 Me. 233, 47 Atl. 137; City of Lincoln v. O'Brien, 56 Neb. 761, 77 N. W. 76; Sproul v. City of Seattle, 17 Wash. 256, 49 Pac. 489; McCabe v. City of Cambridge, 134 Mass. 484; Seamons v. Fitts, 21 R. I. 236, 42 Atl. 863; Tyler v. Williston, 62 Vt. 269, 20 Atl. 304, 9 L. R. A. 338; Doyle v. City of Duluth, 74 Minn. 157, 76 N. W. 1029. See, also, Abbott, Mun. Corp. § 1063.

* 6 Curr. Law, 774.

stated and many of the cases cited under different questions discussed will be found upon examination to also sustain it. Negligence,[280] contributory negligence,[281] proximate cause,[282] the service of notice of the accident as required by law, or notice of the defect, the manner and the time of such service, and notice of the defect,[283] are all for consideration and determination by the jury. Negligence in all its essentials and details involves questions of fact and seldom those of law.

[280] Baxter v. City of Cedar Rapids, 103 Iowa, 599, 72 N. W. 790; Keen v. City of Havre de Grace, 93 Md. 34, 48 Atl. 444; O'Brien v. City of Worcester, 172 Mass. 348, 52 N. E. 385; Butts v. City of Eaton Rapids, 116 Mich. 539, 74 N. W. 872; McDonald v. City of St. Paul, 82 Minn. 308, 84 N. W. 1022; Schafer v. City of New York, 154 N. Y. 466, 48 N. E. 749; Kane v. City of Philadelphia, 196 Pa. 502, 46 Atl. 893; Brown v. Town of Mt. Holly, 69 Vt. 364, 38 Atl. 69; City of Lynchburg v. Wallace, 95 Va. 640, 29 S. E. 675.

[281] City of Lincoln v. Power, 151 U. S. 436; Scott v. City of New Orleans (C. C. A.) 75 Fed. 373; Lamb v. City of Worcester, 177 Mass. 82, 58 N. E. 474; Perkins v. Delaware Tp., 113 Mich. 377, 71 N. W. 643; Gardner v. Wasco County, 37 Or. 392, 61 Pac. 834, 62 Pac. 753; O'Malley v. Borough of Parsons, 191 Pa. 612, 43 Atl. 384; Hampson v. Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732; Overpeck v. Rapid City, 14 S. D. 507, 85 N. W. 990.

[282] City of Rock Falls v. Wells, 169 Ill. 224, 48 N. E. 440; Daniels v. Lebanon, 58 N. H. 284; Gardner v. Wasco County, 37 Or. 392, 61 Pac. 834; rehearing denied, 62 Pac. 753.

[283] Hodges v. City of Waterloo, 109 Iowa, 444, 80 N. W. 523; McKissick v. City of St. Louis, 154 Mo. 588, 55 S. W. 859.

CHAPTER XI.

SOME PUBLIC DUTIES.

§ 593. Public school systems.*

In modern days it is not only considered a governmental function but also, and especially in the United States, an imperative governmental duty to provide for and maintain a system of public education. This is true not only because through education is the individual rendered better capable of rational and good government, but also because education adds to his economic efficiency. Governments recognize the fact that as a purely business proposition, public education pays.[1] The plan or scheme of organization

* 6 Curr. Law, 1418.

[1] Davies v. Hollond, 43 Ark. 425; In re Kindergarten Schools, 18 Colo. 234, 32 Pac. 422, 19 L. R. A. 469; State v. Hine, 59 Conn. 50, 21 Atl. 1024, 10 L. R. A. 83; Brenan v. People, 176 Ill. 620, 52 N. E. 353; State v. Bailey, 157 Ind. 324, 61 N. E. 730, 59 L. R. A. 435; Board of Education of Hawesville v. Louisville, H.

as generally adopted provides for district schools, as they are commonly called and various institutions of higher education comprising high, graded and normal schools and state universities. All these possess one characteristic, namely, that they are free and public. This principle is limited only by the power of the proper public authorities as given by law to make such rules and regulations as shall be compatible with their efficient control and discipline.[2] It is also common to charge for the facilities afforded for a professional education. Another characteristic is to be found as established by constitutional provision in many states, namely, that they shall be nonsectarian,[3] and further, that no discrimination shall be made on account of race, color, nationality or social position.[4] While the duty to provide public schools is commonly recognized, yet as it is governmental and discretionary in its character, there is no absolute obligation resting

& St. L. R. Co., 23 Ky. L. R. 376, 62 S. W. 1125; Third Ward School Dist. v. School Directors, 23 La. Ann. 152; Thomas v. Vistors of Frederick County School, 7 Gill & J. (Md.) 369; Stuart v. School Dist. No. 1, 30 Mich. 69; Chrisman v. City of Brookhaven, 70 Miss. 477, 12 So. 458; State v. Long, 21 Mont. 26, 52 Pac. 645; State v. Westerfield, 23 Nev. 468, 49 Pac. 119; Morris v. Ocean Tp., 61 N. J. Law, 12, 38 Atl. 760; School Committee of Providence v. Kesler, 67 N. C. 443; Pacific Mfg. Co. v. School Dist. No. 7, 6 Wash. 121, 33 Pac. 68.

[2] Ward v. Flood, 48 Cal. 36; People v. McAdams, 82 Ill. 356; Com. v. Inhabitants of Dedham, 16 Mass. 141; In re Malone's Estate, 21 S. C. 435; Young v. Trustees of Fountain Inn Graded School, 64 S. C. 131, 41 S. E. 824; Town School Dist. of Brattleboro v. School Dist. No. 2, 72 Vt. 451, 48 Atl. 697; State v. Joint School Dist. No. 1, 65 Wis. 631.

[3] In re Kindergarten Schools, 18 Colo. 234, 32 Pac. 422, 19 L. R. A. 469; Richter v. Cordes, 100 Mich. 278, 58 N. W. 1110; Synod of Dakota v. State, 2 S. D. 366, 50 N. W. 632, 14 L. R. A. 418.

[4] Clark v. Board of Directors, 24 Iowa, 266; Board of Education of Somerset Public Schools v. Trustees of Colored Dist. No. 1, 18 Ky. L. R. 103, 35 S. W. 549; People v. Board of Education of Detroit, 18 Mich. 400; State v. Thompson, 64 Mo. 26; State v. City of Cincinnati, 19 Ohio, 178. But see Board of Education v. Cumming, 103 Ga. 641, 29 S. E. 488; State v. Grubb, 85 Ind. 213; State v. Gray, 93 Ind. 303. Separate schools for colored children authorized. Harrodsburg Educational Dist. No. 28 v. Trustees of Colored School Dist. No. 1, 105 Ky. 675, 49 S. W. 538; Hickman College v. Colored Common School Dist. "A," 23 Ky. L. R. 1271, 65 S. W. 20; Roberts v. City of Boston, 59 Mass. (5 Cush.) 198; Chrisman v. City of Brookhaven, 70 Miss. 477, 12 So. 458; Lane v. Baker, 12 Ohio, 237.

upon the state or community to supply educational facilities. The performance of the duty cannot be compelled, neither will any liability arise from a failure to perform.[5]

§ 594. Maintenance of public schools.*

The funds by which a public school system is maintained are either those provided by the state at large from particular sources, investments, state school taxes and special state taxes,[6] or by local and special action, voted and collected by individual school districts.[7] These may be required by legislative act and without their consent to raise money by taxation for the support of certain designated schools.[8] The Federal government has made liberal donations of the public lands to the various states, the proceeds of the sale of which are used in the establishment of general school funds,[9] the income from which is appropriated to particular and various schools either as designated in the acts of Congress appropriating the land or by enactment of the state legislatures.[10] School funds can only be legally used for the purpose specified; neither the principal, the income, nor any part, can be diverted or appropriated for other objects.[11] It is common by constitutional

[5] Neal v. Burrows, 34 Ark. 491; But see Fiske v. Inhabitants of Huntington, 179 Mass. 571, 61 N. E. 260.

* 6 Curr. Law, 1427.

[6] Francis v. Peevey, 132 Ala. 58, 31 So. 372; Auditor General v. State Treasurer, 45 Mich. 161; State v. Henderson, 169 Mo. 190, 60 S. W. 1093; Webb County v. School Trustees of Laredo, 95 Tex. 131, 65 S. W. 878.

[7] Elberg v San Luis Obispo County, 112 Cal. 316, 41 Pac. 475, 44 Pac. 572; City of Gainesville v. Simmons, 96 Ga. 477, 23 S. E. 508; Public School Com'rs v. Allegheny County Com'rs, 20 Md. 449; Chamberlain v. Board of Education of Cranbury, 57 N. J. Law, 605; School Dist. No. 74 v. Long, 2 Okl. 460.

[8] Jenkins v. Inhabitants of Andover, 103 Mass. 94.

[9] Beecher v. Wetherby, 95 U. S. 517; Roberts v. Columbet, 63 Cal. 22; Baker v. Newland, 25 Kan. 25; Telle v. School Board, 44 La. Ann. 365, 10 So. 801; Bishop v. McDonald, 27 Miss. 371; State v. Crumb, 157 Mo. 545, 57 S. W. 1030; Coombs v. Lane, 4 Ohio St. 112; Hurst v. Hawn, 5 Or. 275; Martin v. State, 29 Tenn. (10 Hump.) 157; Romine v. State, 7 Wash. 215, 34 Pac. 924; State v. Town of Jericho, 12 Vt. 127.

[10] Jones v. Soulard, 24 How. (U. S.) 41; Cloud v. Danley, 16 Ark. 699; Sprayberry v. State, 62 Ala. 459; Springfield Tp. v. Quick, 22 How. (U. S.) 56; Wyman v. Banvard, 22 Cal. 524; Heston v. Mayhew, 9 S. D. 501, 70 N. W. 635; Callvert v. Winsor, 26 Wash. 368, 67 Pac. 91.

[11] Williams v. State, 65 Ark. 159; In re Loan of School Fund, 18 Colo.

or legislative enactment to provide for the investment of pubilc school funds.[12] Officials charged by law with their care and control are limited strictly to their authority [13] and acquire no right or title to the fund as against the corporation under which they held office; they are regarded as agents merely of the beneficiaries for whose benefit they hold the funds.[14] The principle of strict construction applies and laws or constitutional directions are universally regarded as mandatory in their character,[15] the purpose being to protect school funds from loss by misappropriation or unwise investment.

§ 595. School funds; how disbursed; purpose.*

Funds raised for educational purposes cannot be diverted to other objects.[16] This principle applies equally to public funds raiser for other purposes. The use of them in other ways will be regarded as a misappropriation for which their custodians are civilly and personally charged and a criminal liability may also arise in many cases. The purpose for which school funds are ordinarily used are either the payment of the current expenses, in-

195, 32 Pac. 273; State v. Fitzpatrick, 5 Idaho, 499, 51 Pac. 112; Trustees of Schools v. Braxer, 71 Ill. 546; Zartman v. State, 109 Ind. 360; Superintendent of Public Instruction v. Auditor of Public Accounts, 97 Ky. 180, 30 S. W. 404; Sun Mutual Ins. Co. v. Board of Liquidation, 31 La. Ann. 175; Pfeiffer v. Board of Education of Detroit, 118 Mich. 560, 42 L. R. A. 536; William Deering & Co. v. Peterson, 75 Minn. 118; State v. Henderson, 160 Mo. 190, 60 S. W. 1093; Foote v. Brown, 60 Miss. 155; Gordon v. Cornes, 47 N. Y. 608; Jernigan v. Finley, 90 Tex. 205, 38 S. W. 24; Pacific Mfg. Co. v. School Dist. No. 7, 6 Wash. 121, 33 Pac. 68.

[12] McGahey v. Virginia, 135 U. S. 662; Murray v. Smith, 28 Miss. 31; State v. Bank of Missouri, 45 Mo. 528; In re School Fund, 15 Neb. 684, 50 N. W. 272.

[13] In re School Fund, 15 Neb. 684, 50 N. W. 272; American Dock & Imp. Co. v. Public School Trustees, 35 N. J. Eq. (8 Stew.) 181.

[14] School Town of Leesburgh v. Plain School Tp., 86 Ind. 582; Goulding v. Inhabitants of Peabody, 170 Mass. 483, 49 N. E. 752.

[15] McGahey v. Virginia, 135 U. S. 662; In re Loan of School Fund, 18 Colo. 195, 32 Pac. 273; State v. Babcock, 17 Neb. 610.

* 6 Curr. Law, 1430.

[16] Francis v. Peevey, 132 Ala. 58, 31 So. 372; Hotchkiss v. Plunkett, 60 Conn. 230, 22 Atl. 535; Underwood v. Wood, 93 Ky. 177, 19 S. W. 405, 15 L. R. A. 825; Knox County v. Hunolt, 110 Mo. 67, 19 S. W. 628; City of Hoboken v. Ivison, 29 N. J. Law (5 Dutch.) 65; State v. Banks, 106 Tenn. 394, 61 S. W. 778.

cluding the payment of wages and the compensation of teachers or instructors,[17] the purchase of libraries,[18] the proper equipment for conducting the work of the particular school or college,[19] and the securing of necessary supplies in providing heat, water and other common expenses coming under this head.[20]

Another purpose for which public school funds can be legally used is in the making of improvements when authorized by law and in the manner designated.[21]

§ 596. School districts; organization.*

For school purposes and the better operation of a public school system, a state may be divided into common, special, and independent school districts.[22] Provisions may also be made for the organization of high, graded or normal school boards separate from the classes just named.[23] A special organization is usually provided for the State university.[24] Each of these organizations is usually regarded as a public quasi corporation [25] although some

[17] Edmundson v. Jackson Independent School Dist., 98 Iowa, 639.

[18] Clark v. School Directors, 78 Ill. 474.

[19] Springfield Furniture Co. v. School Dist. No. 4, 67 Ark. 236, 54 S. W. 217; Knabe v. Board of Education, 67 Mich. 262, 34 N. W. 568.

[20] Hemme v. School Dist. No. 4, 30 Kan. 377; School Dist. No. 5 v. Hopkins, 7 Okl. 154, 54 Pac. 437; Hackett v. Emporium Borough School Dist., 150 Pa. 220, 24 Atl. 627.

[21] Hale v. Brown, 70 Ark. 471, 69 S. W. 260; People v. Rea, 185 Ill. 633, 57 N. E. 778; Hartford School Dist. v. School Dist. No. 13, 69 Vt. 147, 37 Atl. 252. A school district can lawfully pay a just debt though barred by the statute of limitations.

* 6 Curr. Law, 1418.

[22] Presque Isle County Sup'rs v. Thompson (C. C. A.) 61 Fed. 914; People v. Ricker, 142 Ill. 650, 32 N. E. 671; Russell v. District Tp. of Cleveland, 97 Iowa, 573, 66 N. W. 771; Cist v. State, 21 Ohio St. 339; Rodemer v. Mitchell, 90 Tenn. 65, 15 S. W. 1067; Keystone Lumber Co. v. Town of Bayfield, 94 Wis. 491, 69 N. W. 162.

[23] Kramm v. Bogue, 127 Cal. 122, 59 Pac. 394; Board of Education v. Cumming, 103 Ga. 641, 29 S. E. 488; Koester v. Atchinson County Com'rs, 44 Kan. 141, 24 Pac. 65; State v. West Duluth Land Co., 75 Minn. 456, 78 N. W. 115; Com. v. Reynolds, 137 Pa. 389, 20 Atl. 1011; State v. Sweeney, 103 Wis. 404, 79 N. W. 420.

[24] Koester v. Atchison County Com'rs, 44 Kan. 141, 24 Pac. 65; Calivert v. Winsor, 26 Wash. 368, 67 Pac. 91.

[25] Hotchkiss v. Plunkett, 60 Conn. 230, 22 Atl. 535; Whitmore v. Hogan, 22 Me. 564; School Dist. No. 3 v. School Dist. No. 1, 63 Mich. 51, 29 N. W. 489.

are designated as public corporations, and in some instances municipal corporations.[26] From their nature and the powers which they exercise, and these considerations determine their true legal nature, they are to be considered as quasi corporations.[27] They are subordinate agents of the sovereign of exceedingly limited and restricted powers having for their purpose the accomplishment of a single governmental end, namely, that of the education of the people. Since they are quasi corporations, each in respect to its organization, property, powers, and duties is a creature of the legislature and these are held or maintained at its will.[28]

§ 597. School system; how governed.*

The government of a common school system, excluding normal and high schools and state universities, is commonly vested in a state superintendent of public instruction, or other officer of a similar character, county superintendents and in the immediate school districts, boards of school trustees and the qualified voters of the school district. To each of these officials or individuals is given by law the legal right to exercise certain powers and upon them devolve the performance of certain legally authorized duties.

Controlling in a general way the discipline and the management of the common schools throughout the state will be found a state superintendent of public instruction or an officer, under some other title, performing the duties indicated.[29]

The term of office and qualifications and the manner of election or appointment [30] of county superintendents of public schools

[26] Utica Tp. v. Miller, 62 Ind. 230; School Dist. No. 7 v. Thompson, 5 Minn. (Gil. 221) 280.

[27] Kinnare v. City of Chicago, 171 Ill. 332, 49 N. E. 536; State v. School Com'rs of Frederick County, 94 Md. 334, 51 Atl. 289.

[28] State v. Hine, 59 Conn. 50, 21 Atl. 1024, 10 L. R. A. 83; Waldron v. Lee, 22 Mass. (5 Pick.) 323. But the corporation cannot be so altered as to impair contracts made with it. Rawson v. Spencer, 113 Mass. 40.

* 6 Curr. Law, 1418, 1422.

[29] Jackson Independent School Dist. of Steamboat Rock (Iowa) 77 N. W. 860; Wiley v. Alleghany County School Com'rs 51 Md. 401; People v. Town Auditors of Hempstead, 126 N. Y. 528, 27 N. E. 968; Field v. Com., 32 Pa. 478.

[30] State v. Shaver, 54 Ala. 193; People v. Mayes, 117 Ill. 257; Wynn v. State, 67 Miss. 312, 7 So. 353; State v. Vanosdal, 131 Ind. 388, 31 N. E. 79, 15 L. R. A. 832; Frans v. Young, 30 Neb. 360; Williams v. Clayton, C Utah, 86, 21 Pac. 398.

and compensation [31] are also designated by law. They are usually vested with the duty of visiting and instructing schools under their charge and controlling in a general way the discipline and management of the public schools within their jurisdiction.[32] They are also, in some states, vested with the power of apportioning and distributing the school fund of their respective counties among the several districts thereof [33] and of dividing counties into school districts.[34]

§ 598. School districts.*

The local control of school districts is vested primarily in the legally designated and qualified voters of the school district who, at the annual meeting fixed by law, elect a board of school trustees or directors or a board of education usually consisting of three—one of whom is the treasurer and another a clerk of the board. This school board as thus elected, or as they may be appointed,[35] have general charge of the business of the district and of the school houses and of the interests of the schools located within it.[36] Their term of office, qualifications and compensation, if any,[37] are fixed by law. They are authorized, when empowered

[31] State v. Heinrich, 11 N. D. 31, 88 N. W. 734; Geraghty v. Ashland County, 81 Wis. 36, 50 N. W. 892.

[32] Sioux City School Dist. Tp. v. Pratt, 17 Iowa, 16; Macfarland v. Gloucester City Board of Education, 45 N. J. Law, 100.

[33] Gilbert v. Patterson, 32 N. J. Law, 177; Webb County v. School Trustees of Laredo, 95 Tex. 131, 65 S. W. 878; Board of Education of Duplin County v. State Board of Education, 114 N. C. 313, 19 S. E. 277.

[34] Trustees of Schools v. School Directors, 190 Ill. 390, 60 N. E. 531; School Tp. of Newton v. Independent School Dist., 110 Iowa, 30, 81 N. W. 184; School Dist. No. 1 v. Eckert, 84 Minn. 417, 87 N. W. 1019; Bay State Live-Stock Co. v. Bing, 51 Neb. 570, 71 N. W. 311; School Dist. No. 17 v. Zediker, 4 Okl. 599, 47 Pac. 482; School Dist. No. 56 v School Dist. No. 27, 9 S. D. 336, 69 N. W. 17.

* 6 Curr. Law, 1418.

[35] Opinion of the Justices, 115 Mass. 602; State v. Miller, 100 Mo. 439, 13 S. W. 677; Hendricks v. State, 2 0Tex. Civ. App. 178, 49 S. W. 705; Pierce v. Edington, 38 Ark. 150; State v. Sweeney, 24 Nev. 350, 55 Pac. 88.

[36] State v. Hine, 59 Conn. 50, 21 Atl. 1024, 10 L. R. A. 83; Louisville School Board v. City of Louisville, 103 Ky. 421, 45 S. W. 1047; Soule v. Thelander, 31 Minn. 227; Zimmerman v. State, 60 Neb. 633, 83 N. W. 919; Conley v. School Directors of West Deer Tp., 32 Pa. 194.

[37] School Dist. v. Bennett, 52 Ark. 511, 13 S. W. 132; State v. Van Patten, 26 Nev. 273, 66 Pac. 822;

by the district meeting, to acquire necessary sites for school houses by lease or purchase or condemnation under the laws of eminent domain,[38] erect or purchase necessary school houses or school rooms,[39] or abandon them and sell or exchange such school houses or sites and execute deeds of conveyance [40] and borrow money for proper purposes.[41] They also have the power, without special authority of the school districts, to purchase, sell or exchange school apparatus and school supplies;[42] make minor improvements to the school properties under their charge; [43] employ and contract with the necessary qualified teachers or employes and usually discharge the same for cause;[44] provide for heating and care of school houses and rooms;[45] provide for the payment of all just claims against the district in cases provided by law; defray the necessary expenses of their board within the limits provided by law; [46] superintend and manage the schools of their district; adopt, modify or repeal rules for their organization, government and instruction;[47] keep the records and registers of the district as provided by law; prescribe text books and courses of study,[48]

City of Manchester v. Potter, 30 N. H. 409.

[38] Danielly v. Cabaniss, 52 Ga. 211; Bogaard v. Independent Dist. of Plainview, 93 Iowa, 269, 61 N. W. 859.

[39] Davis v. Mendenhall, 150 Ind. 205, 49 N. E. 1048; Scripture v. Burns, 59 Iowa, 70; Burnham v. Rogers, 167 Mo. 17, 66 S. W. 970; Edinburg American Land & Mortg. Co. v. City of Mitchell, 1 S. D. 593, 48 N. W. 131.

[40] School Directors of Union School Dist. v. School Directors of New Union School Dist., 135 Ill. 464, 28 N. E. 49.

[41] School Directors v. Miller, 54 Ill. 338; Perry v. Brown, 21 Ky. L. R. 344, 51 S. W. 457: Board of Education of Sauk Center v. Moore, 17 Minn. 412 (Gil. 391).

[42] State v. Sherman, 90 Ind. 123; Knabe v. Board of Education, 67 Mich. 262, 34 N. W. 568.

[43] Monticello Bank v. Coffin's Grove Dist. Tp., 51 Iowa, 350. They have no authority to purchase lightning rods for a school house without a vote of the electors.

[44] People v. Babcock, 123 Cal. 307, 55 Pac. 1017; Brenan v. People, 176 Ill. 620, 52 N. E. 353; McCutcheon v. Windsor, 55 Mo. 149; State v. Burchfield, 80 Tenn. (12 Lea) 30.

[45] Davis v. School Dist. No. 1, 81 Mich. 214, 45 N. W. 989.

[46] In re Roach, 31 Misc. 590, 65 N. Y. Supp. 653.

[47] Tufts v. State, 119 Ind. 232, 21 N. E. 892; State v. Jones, 155 Mo. 570, 56 S. W. 307; People v. Board of Education of New York, 143 N. Y. 62, 37 N. E. 637.

[48] Sinnott v. Colombet, 107 Cal. 187, 40 Pac. 329, 28 L. R. A. 594; School Com'rs of Baltimore City v. State Board of Education, 26 Md. 505; Stuart v. School Dist. No. 1, 30 Mich. 69; Roach v. St. Louis Public Schools, 77 Mo. 484.

and in all proper cases defend and prosecute actions by and against the school district.[49] They are also authorized when directed by a vote of the district in some cases, or in others when the board deems it advisable, to purchase text books and provide for their free use by the pupils or sell them at cost.[50] They also may provide for the admission to the schools of the district of nonresident pupils or those above school age, and fix the rate of tuition for these. Their powers in respect to the above matters are narrow, fixed in detail by law [51] and usually are subject, as provided by law, to the general supervision and control of the state or county superintendent of schools.[52]

§ 599. School district meetings.*

The qualified voters of school districts are authorized by law to hold an annual meeting at a designated time and place, upon proper notice to be given by the clerk or secretary of the school board,[53] and special meetings upon proper notice of their purpose being given that may be required for the proper transaction of business of the district.[54] The annual meeting of voters has the power to select officers, to adjourn from time to time,[55] to elect by ballot or otherwise the officers of the district or the board of school trustees [56] and to exercise the extraordinary powers of a

[49] San Francisco Board of Education v. Donahue, 53 Cal. 190; Alderman v. School Directors, 91 Ill. 179; Fisher v. School Directors, 44 La. Ann. 184, 10 So. 494; Johnston v. Mitchell, 120 Mich. 589, 79 N. W. 812; Harrington v. School Dist. No. 6, 30 Vt. 155.

[50] Board of Education v. Common Council of Detroit, 80 Mich. 548, 45 N. W. 585. A school board has no power to furnish free text books except in pursuance of legislative authority.

[51] Henricks v. State, 151 Ind. 454, 50 N. E. 559, 51 N. E. 933; Keyser v. School Dist. No. 8, 35 N. H. 477; Lauenstein v. City Fond du Lac, 28 Wis. 336.

[52] State v. Daniel, 52 S. C. 201, 29 S. E. 633.

* 6 Curr. Law, 1422.

[53] Hodgkin v. Fry, 33 Ark. 716; Township Board of Education v. Carolan, 182 Ill. 119, 55 N. E. 58; McLain v. Maricle, 60 Neb. 353, 83 N. W. 85; Harris v. Burr, 32 Or. 348, 52 Pac. 17, 39 L. R. A. 768; Blaisdell v. School Dist. No. 2, 72 Vt. 63, 47 Atl. 173; Luzader v. Sargeant, 4 Wash. 299, 30 Pac. 142.

[54] Wright v. North School Dist., 53 Conn. 576; Peters v. Warren Tp., 98 Mich. 54, 56 N. W. 1051; Sturm v. School Dist. No. 70, 45 Minn. 88, 47 N. W. 462.

[55] Mitchell v. Brown, 18 N. H. 315; Maher v. State, 32 Neb. 354, 49 N. W. 436, 441.

[56] People v. Keechler, 194 Ill. 235, 62 N. E. 525; State v. Ogan, 159 Ind. 119, 63 N. E. 227; Jay v.

quasi corporation, these including all action relative to the purchase or sale of the real property of the corporation, the voting of a school tax, the incurring of indebtedness or a change in the location of school houses within its limits.[57] The regularity of a school district meeting is not subject usually to collateral attack.[58]

§ 600. Teachers.*

Teachers have the general control and government of a school. Different grades or classes are ordinarily established by law and the educational qualifications for each grade or class prescribed.[59] The fitness of applicants to teach is determined by examinations, and certificates or licenses are given to those successfully passing the examination required for a particular grade.[60] Certificates are ordinarily withheld from those not possessing a good moral character.[61] The power to require examination for certificates in respect to both educational and moral qualifications necessarily includes the right of revocation of a license for a failure to maintain these standards,[62] though notice to the teacher is usually held necessary [63] and if an official illegally revokes a teacher's certificate, a liability may arise to the person injured.[64] Examinations may be uniform in their character throughout the state as prescribed by a state superintendent of public instruction or given by a board of education or a county superintendent of

Board of Education of Emporia, 46 Kan. 525, 26 Pac. 1025.

[57] People v. Caruthers School Dist., 102 Cal. 184, 36 Pac. 396; Township Board of Education v. Carolan, 182 Ill. 119, 55 N. E. 58; Norton v. Perry, 65 Me. 183; Fullerton v. School District of Lincoln, 41 Neb. 593, 59 N. W. 896; State v. Clark, 52 N. J. Law, 291, 19 Atl. 462.

[58] Woods v. Inhabitants of Bristol, 84 Me. 358, 24 Atl. 865.

* 6 Curr. Law, 1430.

[59] Kemble v. McPhaill, 128 Cal. 444, 60 Pac. 1092; People v. Howlett, 94 Mich. 165, 53 N. W. 1100; People v. Maxwell, 163 N. Y. 599, 57 N. E. 1120.

[60] Keller v. Hewitt, 109 Cal. 146, 41 Pac. 871; Union School Dist. v. Sterricker, 86 Ill. 595. A certificate cannot be attacked collaterally. Doss v. Wiley, 72 Miss. 179, 16 So. 902.

[61] Crosby v. School Dist. No. 9, 35 Vt. 623.

[62] School Dist. v. Maury, 53 Ark. 471, 14 S. W. 669; Lee v. Huff, 61 Ark. 494, 33 S. W. 846.

[63] Lee v. Huff, 61 Ark. 494, 33 S. W. 846; Scheibner v. Baer, 174 Pa. 482, 34 Atl. 193.

[64] Love v. Moore, 45 Ill. 12.

schools.[65] No discrimination is usually made on account of sex though this may be taken into consideration by school boards in selecting a school principal or superintendent.[66]

§ 601. Employment; dismissal.*

To the board of school trustees or board of education in a particular district or for a special college is given the power of making all contracts of employment with teachers.[67] They are ordinarily limited to persons holding certificates or licenses to teach or, in other words, legally qualified teachers,[68] though this disqualification may be subsequently removed and the contract ordinarily then becomes a valid one from its inception.[69] The power to employ necessarily includes the discretionary right of suspension or dismissal,[70] limited, however, by the principle that action of this character can only be for cause and ordinarily after due notice, hearing and upon the preferment of specific charges.[71] There are cases, however, which hold that when, in the exercise of discretionary powers, a teacher has been dismissed or suspended, courts will not inquire into the wisdom of such action.[72]

[65] Brown v. Inhabitants of Chesterville, 63 Me. 241; People v. Board of Education of New York, 167 N. Y. 626, 60 N. E. 1118.

[66] School Dist. No. 13 v. Harvey, 56 Vt. 556; Com. v. Board of Education, 187 Pa. 70, 40 Atl. 806, 41 L. R. A. 498.

* 6 Curr. Law, 1431, 1432.

[67] Paterson v. City of Butler, 83 Ga. 606, 11 S. E. 399; Burkhead v. Independent School Dist., 107 Iowa, 29, 77 N. W. 491.

[68] Slone v. Berlin, 88 Iowa, 205, 55 N. W. 341; O'Leary v. School Dist. No. 4, 118 Mich. 469, 76 N. W. 1038.

[69] Libby v. Inhabitants of Douglas, 175 Mass. 128, 55 N. E. 808; O'Leary v. School Dist. No. 4, 118 Mich. 469.

[70] School Dist. v. Maury, 53 Ark. 471, 14 S. W. 669; Pierce v. Beck, 61 Ga. 413; Armstrong v. Union School Dist. No. 1, 28 Kan. 345; Superintendent of Common Schools v. Taylor, 105 Ky. 387, 49 S. W. 38; Freeman v. Inhabitants of Bourne, 170 Mass. 289, 49 N. E. 435, 39 L. R. A. 510; Gillan v. Regents of Normal Schools, 88 Wis. 7, 58 N. W. 1042, 24 L. R. A. 336.

[71] School Dist. No. 26 v. McComb, 18 Colo. 240, 32 Pac. 424; Branaman v. Hinkle, 137 Ind. 496, 37 N. E. 546; White v. Wohlenberg, 113 Iowa, 236, 84 N. W. 1026; Wallace v. School Dist. No. 27, 50 Neb. 171, 69 N. W. 772; Edinboro Normal School v. Cooper, 150 Pa. 78, 24 Atl. 348; Browne v. Gear, 21 Wash. 147, 57 Pac. 359.

[72] Eastman v. Rapids Dist. Tp., 21 Iowa, 590; Weatherly v. City of Chattanooga (Tenn. Ch. App.) 48 S. W. 136.

§ 602. Duties and rights.*

Teachers have the general control and government of the schools in their charge.[73] The relation of the teacher to his employer is a contract one and the relative rights of the parties are controlled and governed accordingly.[74] The validity of a particular contract will be determined by the authority of the officials to contract[75] and whether it was made in the particular manner, if any, required by law.[76] An unauthorized contract may be subsequently ratified where the power in this respect was originally possessed.[77] The contracts of de facto officers, as a rule, are binding.[78] Primarily, the teacher is placed in charge of certain pupils for the purpose not only of instructing them, but also of training them in habits of obedience as an essential part of their education. Their authority over the pupils under them to preserve good order and enforce reasonable rules and regulations is but slightly restricted.[79] Their power to punish for infractions of discipline is a discretionary one, and no personal liability can arise unless the punishment inflicted is unreasonable, cruel or malicious in its character.[80] Their compensation either in its amount, time or manner of payment, is a matter of contract,[81] and depends usually

* 6 Curr. Law, 1430.

[73] Kidder v. Chellis, 59 N. H. 473.

[74] Marion v. Board of Education of Oakland, 97 Cal. 606, 32 Pac. 643, 20 L. R. A. 197; Freeman v. Inhabitants of Bourne, 170 Mass. 289, 49 N. E. 435, 39 L. R. A. 510; Morrow v. Board of Education of Chamberlain, 7 S. D. 553, 64 N. W. 1126; Butcher v. Charles, 95 Tenn. 532, 32 S. W. 631.

[75] Caldwell v. School Dist. No. 7, 55 Fed. 372; Harrison Tp. v. McGregor, 67 Ind. 380; Ferguson v. True, 66 Ky. (3 Bush) 255; Davis v. Connor, 21 Ky. L. R. 658, 52 S. W. 945; Cleveland v. Amy, 88 Mich. 374, 50 N. W. 293; Montgomery v. State, 35 Neb. 655, 53 N. W. 568.

[76] Malloy v. Board of Education of San Jose, 102 Cal. 642, 36 Pac. 948; Benson v. District Tp. of Silver Lake, 100 Iowa, 328, 69 N. W. 419; Hutchings v. School Dist. No. 1, 128 Mich. 177, 87 N. W. 80; Leland v. School Dist. No. 28, 77 Minn. 469, 80 N. W. 354.

[77] Wells v. People, 71 Ill. 532; Place v. Colfax Dist. Tp., 56 Iowa, 573.

[78] Woodbury v. Inhabitants of Knox, 74 Me. 462; Whitman v. Owen, 76 Miss. 783, 25 So. 669.

[79] Hutton v. State, 23 Tex. App. 386.

[80] Patterson v. Nutter, 78 Me. 509; Com. v. Randall, 70 Mass. (4 Gray) 36; State v. Long, 117 N. C. 791, 23 S. E. 431.

[81] Earle v. San Francisco Board of Education, 55 Cal. 489; Libby v. Inhabitants of Douglas, 175 Mass. 128, 55 N. E. 808; Dewey v. Alpena

upon their possession of the proper certificate or license to teach, and upon the making of reports required by law.[82] In the absence of a special contract, a teacher undertakes to exercise only reasonable skill and judgment and ordinary care and diligence.[83]

§ 603. Control and discipline of public schools.*

Education consists not only of imparting knowledge to pupils, but also training them in habits of obedience and inculcating ideas of good order, morality and discipline. To accomplish these objects the legal duty and power is given to controlling officers or boards of adopting and enforcing such reasonable rules and regulations as they may deem necessary and expedient, having in view the character of the school, the grade of its instruction and the class of pupils attending it.[84] The laws may specifically provide for the adoption of rules respecting the admission and attendance of pupils.[85] Compulsory attendance is not illegal; on the other hand in many states will be found laws relating to this subject [86] and to truancy, creating truant officers or truant schools and providing for their duties and the manner of enforcing the law.[87] To maintain good order and discipline, rules may be adopted for the government of the pupils and providing for expulsion, suspension, or punishment [88] in case of an infraction of them by the pupil. Rules of this character must, however, be reasonable [89]

Union School Dist., 43 Mich. 480; Goodyear v. School Dist. No. 5, 17 Or. 517, 21 Pac. 664; Moultonborough School Dist. v. Tuttle, 26 N. H. 470; Harrison School Tp. v. McGregor, 96 Ind. 185; Hibbard v. State, 65 Ohio St. 574, 64 N. E. 109.

[82] Jose v. Moulton, 37 Me. 367; Kimball v. School Dist. No. 122, 23 Wash. 520, 62 Pac. 213; Owen School Tp. v. Hay, 107 Ind. 351.

[83] Richardson v. School Dist. No. 10, 38 Vt. 602.

* 6 Curr. Law, 1433.

[84] Watson v. City of Cambridge, 157 Mass. 561, 32 N. E. 864; Holman v. School Dist. No. 5, 77 Mich. 605, 43 N. W. 996, 6 L. R. A. 534.

[85] Miller v. Dailey, 136 Cal. 212, 68 Pac. 1029; Millard v. Inhabitants of Egremont, 164 Mass. 430, 41 N. E. 669.

[86] Com. v. Roberts, 159 Mass. 372, 34 N. E. 402; Milwaukee Industrial School v. Milwaukee County Sup'rs, 40 Wis. 328.

[87] State v. Bailey, 157 Ind. 324, 61 N. E. 730, 59 L. R. A. 435; City of Lynn v. Essex County Com'rs, 148 Mass. 148, 19 N. E. 171.

[88] Peck v. Smith, 41 Conn. 442; Board of Education of Cartersville v. Purse, 101 Ga. 422, 28 S. E. 896, 41 L. R. A. 593; State v. Burton, 45 Wis. 150.

[89] Fertich v. Michener, 111 Ind. 472, 11 N. E. 605; Dritt v. Snodgrass, 66 Mo. 286; State v. Fond du

and when enforced by corporal punishment or otherwise, in good faith, and in a reasonable manner considering the offense, age and condition of pupil, no resulting liability, civil or criminal, can follow either in respect to the teacher [90] imposing the punishment of the board under whose authority it was done.[91] Rules and regulations relate generally to the good order and discipline of the school and especially to misconduct, willful disobedience or insubordination, tardiness or unexcused absence.[92]

§ 604. Religious instruction.*

It was said in a previous section that one of the essential characteristics of public schools in the United States was their nonsectarian character, and it is quite common either by constitutional or statutory provision to prohibit the use of public moneys in the support of schools wherein the distinctive doctrines of any particular religious sect are taught and some states further prohibit the giving of religious instruction.[93] The question under consideration in this section has in common with all questions involving the discussion of religious doctrines given rise to bitter controversy. It is not within the province of a law book to give the reasons for or against decisions in particular cases but it can be said that while there are decisions to the contrary,[94] the weight of authority sustains the reading of the Bible in public schools when unaccompanied by any comment thereupon and when the presence of the pupil is not made compulsory at that time.[95]

§ 605. The race question in the public schools.*

A distinctive characteristic of the system of public education as it exists in the United States is that by constitution it is made

Lac Board of Education, 63 Wis. 234.

[90] Sheehan v. Sturges, 53 Conn. 481; Patterson v. Nutter, 78 Me. 509, 7 Atl. 273; Heritage v. Dodge, 64 N. H. 297, 9 Atl. 722.

[91] Board of Education of Covington v. Booth, 23 Ky. L. R. 288, 62 S. W. 872; Morrison v. Lawrence, 181 Mass. 127, 63 N. E. 400.

[92] Hodgkins v. Inhabitants of Rockport, 105 Mass. 475; Fertich v. Michener, 111 Ind. 472, 11 N. E. 605.

* 6 Curr. Law, 1416.

[93] Hysong v. Gallitzin Borough School Dist., 164 Pa. 629, 30 Atl. 482, 26 L. R. A. 203.

[94] State v. District Board of School Dist. No. 8, 76 Wis. 177, 44 N. W. 967, 7 L R. A. 330.

[95] Moore v. Monroe, 64 Iowa, 367, 20 N. W. 475; Donahoe v. Richards, 38 Me. 376; Spiller v. Inhabitants of Woburn, 96 Mass. (12 Allen) 127.

* 6 Curr. Law, 1418.

free and public and that no discrimination is made on account of race, color, nationality or social position.[96] The question is largely an academic one at the present time for the weight of authority, including the decisions of the Supreme Court of the United States, holds that such a constitutional provision is not violated by the establishment of separate schools for the different races.[97] For, as it has been said, a separation works no substantial inequality of school privileges between the children of two classes; that equality of rights does not involve the necessity of educating white and colored persons in the same school any more than it does that of educating children of both sexes in the same school or that different grades of pupils must be kept in the same school; and that any classification which preserves substantially equal school advantages is not prohibited by either the state or Federal constitutions nor would it contravene the provisions of either.[98]

§ 606. School terms; books; health regulations.*

School directors or boards of education have the power to establish and maintain terms of school during the school year[99] to prescribe uniform courses of study or special branches[100] and school books and to require the use of these.[101] They have the right to regulate the admission to the schools within their juris-

[96] Tape v. Hurley, 66 Cal. 473; Reid v. Town of Eatonton, 80 Ga. 755, 6 S. E. 602; People v. Quincy Board of Education, 101 Ill. 308.

[97] Hooker v. Town of Greenville, 136 N. C. 472, 42 S. E. 141; Marion v. Ter., 1 Okl. 210; People v. City of Alton, 193 Ill. 309, 61 N. E. 1077, 56 L. R. A. 95; Knox v. Board of Education, 45 Kan. 152, 25 Pac. 616, 11 L. R. A. 830.

[98] State v. McCann, 21 Ohio St. 198; Presser v. Illinois, 116 U. S. 252.

* 6 Curr. Law, 1418.

[99] Matney v. Boydston, 27 Mo. App. 36.

[100] Board of Education of Topeka, v. Welch, 51 Kan. 792, 33 Pac. 654; Samuel Benedict Memorial School v. Bradford, 111 Ga. 801, 36 S. E. 920; School Com'rs of Indianapolis v. State, 129 Ind. 14, 28 N. E. 61, 13 L. R. A. 147; State v. Webber, 108 Ind. 31.

[101] Ivison v. Board of School Com'rs, 39 Fed. 739; People v. Board of Education, 175 Ill. 9, 51 N. E. 633; State v. Haworth, 122 Ind. 462, 23 N. E. 946, 7 L. R. A. 240; Curryer v. Merrill, 25 Minn. 1; Leeper v. State, 103 Tenn. 500, 53 S. W. 692, 48 L. R. A. 167; State v. Wilson, 121 Wis. 523, 99 N. W. 336.

diction of non-resident pupils or those above school age [102] and fix the tuition for these classes,[103] or for special branches taught.[104]

§ 607. Charitable and corrective duties in general.*

It is the duty of every governmental organization to furnish adequate and necessary relief to the unfortunate and indigent.[105] The term "pauper" has been variously defined and includes those who are dependent upon the state for the whole or a part of their support. It includes from the affirmative point of view, those who are wholly or partially incapable of supporting themselves, and those dependent upon them, either by their own labor or by income derived from their psoperty.[106] It excludes those who are in need of occasional aid or who, through some temporary circumstance, require assistance upon occasion only.[107]

§ 608. Poor districts; organization.*

State relief is effected, ordinarily, through the organization of certain prescribed territory into districts each of which is charged with the duty within its territorial limits. The duty may be performed either by various governmental subdivisions already suggested, like cities, towns, counties and townships,[108] or through the organization of special public quasi corporations having as the sole purpose of their organization the performance of this

[102] Kramm v. Bogue, 127 Cal. 122, 59 Pac. 394; Needham. v. Inhabitants of Wellesley, 139 Mass, 372, 31 N. E. 732.

[103] Irvin v. Gregory, 86 Ga. 605, 13 S. E. 120; Fiske v. Inhabitants of Town of Huntington, 179 Mass. 571, 61 N. E. 260; Com. v. Directors of Brookville Borough School Dist., 164 Pa. 607, 30 Atl. 509, 26 L. R. A. 584; Edmondson v. Board of Education, 108 Tenn. 557, 69 S. W. 274, 58 L. R. A. 170.

[104] Major v. Cayce, 98 Ky. 357, 33 S. W. 93, 30 L. R. A. 697.

* 6 Curr. Law, 985.

[105] Cooledge v. Mahaska County, 24 Iowa, 211; City of Auburn v. Inhabitants of Wilton, 74 Me. 437; Strafford County v. Rockingham Co., 71 N. H. 37, 51 Atl. 677; Patrick v. Town of Baldwin, 109 Wis. 342, 85 N. W. 274, 53 L. R. A. 613.

[106] Town of New Hartford v. Town of Canaan, 52 Conn. 158; Jasper County v. Osborn, 59 Iowa, 208; Town of Winhall v. Town of Landgrove, 45 Vt. 376; Town of Ettrick v. Town of Bangor, 84 Wis. 256, 54 N. W. 401.

[107] Inhabitants of Bremen v. Inhabitants of Brewer, 54 Me. 528; Town of Danville v. Town of Sheffield, 50 Vt. 243.

* 6 Curr. Law, 985.

[108] Town of Cordova v. Village of Le Sueur Center, 74 Minn. 515, 77 N. W. 290, 430.

particular governmental function. A poor district or official board performing equivalent duties is regarded as a public quasi corporation and therefore subject to the rules of law in respect to liability since the relief to the poor is regarded as a governmental function.[109] A different rule will obtain where a general or special liability may be imposed by law.

The expenditures which can be lawfully made are limited by the character of the organization and also by the moneys set apart or raised by taxation or otherwise for this special purpose.[110]

§ 609. Settlement.*

The term as used in the legal decisions in respect to the liability of any public quasi corporation for the suport of paupers means "the place from which the pauper is entitled to support in case of need, and in which he is entitled to reside. There is a clear distinction between the place of legal settlement and the place of residence, and also between the place of settlement and the place of domicile, as the latter term is used in general or international law."[111] The right of settlement is usually regarded as a personal privilege and is acquired through the operation of laws passed determining the question. A strict compliance with these is necessary to acquire rights under them.

It is acquired either as a matter of personal right or by derivation, settlement of the latter class being termed a derivative one. Settlement by right may be acquired through the residence of an individual for the time prescribed within the limits of a certain district[112] by birth[113] the ownership of property[114] or the voluntary payment of taxes for a prescribed time.[115]

[109] Smith v. Peabody, 106 Mass. 262.

[110] Daniel v. Edgecombe County Com'rs, 74 N. C. 494.

* 6 Curr. Law, 985.

[111] 22 Am. & Eng. Enc. Law (2d Ed.) p. 949; Inhabitants of Jefferson v. Inhabitants of Washington, 19 Me. 293.

[112] Town of Guilford v. Town of New Haven, 56 Conn. 465, 16 Atl. 240; Inhabitants of Belmont v. Inhabitants of Vinalhaven, 82 Me. 524, 20 Atl. 89; Wellcome v. Town of Monticello, 41 Minn. 136, 42 N. W. 930; Town of Sunapee v. Town of Lempster, 65 N. H. 655, 23 Atl. 525; People v. Maynard, 160 N. Y. 453, 55 N. E. 9; City of Rutland v. Chittenden, 74 Vt. 219, 52 Atl. 426.

[113] Town of Washington v. Town of Kent, 38 Conn. 249.

[114] Town of Clinton v. Town of Westbrook, 38 Conn. 9; Inhabitants of Spencer v. Inhabitants of Leicester, 140 Mass. 224; Derry v.

§ 610. Derivative settlement.*

Derivative settlement is acquired not through the acts of an individual but because of the existence of a certain relation of that individual to some other person. The legal settlement of married women follows that of a husband,[116] and different rules will be found as given in the cases cited in the notes with reference to widows [117] and women who may have become separated, or divorced from, or deserted by, their husbands.[118] The settlement of children and adopted or step-children [119] naturally follows that of their father or step-father and the mother in case of his death although children not having reached legal age but who have become emancipated may have acquired a settlement in their own right.[120]

The relation of servant and master constitutes a relation as well

Rockinham County, 62 N. H. 485; Town of Newfane v. Town of Somerset, 49 Vt. 411.

[115] Town of New Hartford v. Town of Canaan, 54 Conn. 39; Inhabitants of Greenfield v. Inhabitants of Buckland, 159 Mass. 491, 34 N. E. 952; Huston Tp. Poor Dist. v. Benezette Tp. Poor Dist. 135 Pa. 393, 19 Atl. 1060.

* 6 Curr. Law, 985.

[116] Inhabitants of Harrison v. Inhabitants of Lincoln, 48 Me. 205; Concord v. Rumney, 45 N. H. 423; Wayne Tp. v. Porter Tp. 138 Pa. 181, 20 Atl. 939; Town of Newark v. Town of Sutton, 40 Vt. 261; City of Gardiner v. Inhabitants of Manchester, 88 Me. 249, 33 Atl. 990; Inhabitants of Stoughton v. City of Cambridge, 165 Mass. 251, 43 N. E. 106.

[117] Marden v. City of Boston, 155 Mass. 359, 29 N. E. 588.

[118] Town of Ossipee v. Carroll County, 65 N. H. 12, 17 Atl. 1058; Cascade Overseers v. Lewis Overseers, 148 Pa. 333; Washington County v. Mahaska County, 47 Iowa, 57; Burlington v. Swanville, 64 Me. 78; Town of Bethel v. Town of Tunbridge, 13 Vt. 445; Town of Danville v. Town of Wheelock, 47 Vt. 57; Monroe County v. Jackson County, 72 Wis. 449, 40 N. W. 224.

[119] Town of Vernon v. Town of Ellington, 53 Conn. 330; Clay County v. Palo Alto County, 82 Iowa, 626, 48 N. W. 1053; Inhabitants of Farmington v. Inhabitants of Jay, 18 Me. 376; City of Gardiner v. Inhabitants of Manchester, 88 Me. 249, 33 Atl. 990; Brower v. Smith, 46 N. J. Law, 72; Overseers of Poor of Montoursville v. Overseers of Poor of Fairfield, 112 Pa. 99; Paine v. Town Council of Smithfield, 10 R. I. 446; Town of Marshfield v. Town of Tunbridge, 62 Vt. 455, 20 Atl. 106; Inhabitants of Brookfield v. Inhabitants of Warren, 128 Mass. 287.

[120] Inhabitants of Hallowell v. Inhabitants of Augusta, 52 Me. 216; Town of Sherbourne v. Town of Hartland, 37 Vt. 528.

as that of apprenticeship which may establish a derivative settlement.[121]

In some states, the fact that a person may have held a certain designated office for a prescribed term establishes the legal right to a settlement in the district in which the office was held.[122] The rendition of military service may establish settlement.[123]

By special provisions, indigent soldiers or those non compos mentis [124] can acquire a settlement in the manner provided which may differ from that prescribed by the general laws in respect to the same subject.

§ 611. Settlement; how lost.*

Settlement may be lost by removal through the operation of the law where, in the manner prescribed, by petition or complaint, and after notice, proceedings by a body of competent jurisdiction, an order of removal can be made.[125]

Since settlement may be acquired by a person through the continuous residence for the time fixed by law, it may be lost and a new one gained by a change.[126] This must, however, be permanent in its character and not a mere temporary removal accompanied with the intention of returning.[127]

[121] Town of Dorr v. Town of Seneca, 74 Ill. 101; Poor Dist. of Buffalo Tp. v. Poor Dist. of Mifflinburg Borough, 168 Pa. 445, 32 Atl. 28.

[122] Inhabitants of Paris v. Inhabitants of Hiram, 12 Mass. 263; Cowanshannock Tp. Overseers v. Valley Tp. Overseers, 152 Pa. 504, 25 Atl. 801.

[123] Inhabitants of Milford v. Inhabitants of Uxbridge, 130 Mass. 107; City of Waltham v. City of Newburyport, 150 Mass. 569, 23 N. E. 379; Juneau County v. Wood County, 109 Wis. 330, 85 N. W. 387.

[124] Augusta v. Mercer, 80 Me. 122, 13 Atl. 401; Crossman v. New Bedford Inst. for Savings, 160 Mass. 503, 36 N. E. 477; Town of Plymouth v. Town of Waterbury, 31 Conn. 515; City of Taunton v. Inhabitants of Wareham, 153 Mass. 192, 26 N. E. 451.

[*] 6 Curr. Law, 985.

[125] Inhabitants of Wenham v. Inhabitants of Essex, 103 Mass. 117; Simpson v. Maybaum, 58 N. J. Law, 323, 33 Atl. 814; Town of Peacham v. Town of Waterford, 46 Vt. 154; Inhabitants of Shelburne v. Inhabitants of Buckland, 134 Mass. 177; Bridgewater Tp. v. Bethlehem Tp., 50 N. J. Law, 573, 14 Atl. 765; Rockingham v. Springfield, 59 Vt. 521, 9 Atl. 241.

[126] Town of Fairfield v. Town of Easton, 73 Conn. 735, 49 Atl. 200; Inhabitants of Monroe v. Inhabitants of Hampden, 95 Me. 111, 49 Atl. 604; Town of Cordova v. Village of Le Sueur Center, 78 Minn. 36, 80 N. W. 836.

[127] Town of Salem v. Town of Lyme, 29 Conn. 74; Sloan v. Webster County, 61 Iowa, 738; Inhabitants of South Thomaston v. In-

Loss of derivative settlement. A derivative settlement will be lost through a change in existing relations legally regarded as the source of the settlement.[128] Derivative settlement is based upon the existence of certain established relations and a change in these necessarily effects a change in the rights which flow from them.

§ 612. Support; character; medical attendance; right to service.*

Paupers are entitled to an adequate and necessary support which includes a sufficient quantity of wholesome food, reasonably healthful and comfortable quarters, funeral expenses and the necessary medical attendance in case of sickness.[129] The latter is ordinarily furnished by regularly employed physicians or upon an order of the proper officials, and where this is true, the value of medical services rendered by others cannot be recovered.[130]

Public authorities are entitled to the services of paupers to the extent and in the manner in which they can be performed without endangering the life and health of the persons.[131] They may rightfully be employed in manual or other labor in and about a poor house, farm or asylum or wherever they may be kept,[132] or, in the case of minors, bound out to serve as apprentices or servants.[133]

habitants of Friendship, 95 Me. 201, 49 Atl. 1056.

[128] Salisbury v. Fairfield (Conn.) 1 Root, 131.

* 6 Curr. Law, 985.

[129] State v. West, 82 Tenn. (14 Lea) 38; Meier v. Paulus, 70 Wis. 165, 35 N. W. 301; Inhabitants of Ellsworth v. Inhabitants of Houlton, 48 Me. 416; Town of Bridgewater v. Town of Roxbury, 54 Conn. 213; Alleghany County Com'rs v. McClintock, 60 Md. 559; Town of Montgomery v. County of Le Sueur, 32 Minn. 532; Putney Bros. Co. v. Milwaukee County, 108 Wis. 554, 84 N. W. 822.

[130] Bartholomew County Com'rs v. Ford, 27 Ind. 17; Collins v. Lucas County, 50 Iowa, 448; Bentley v. Chicago County Com'rs, 25 Minn. 259; St. Luke's Hospital Ass'n v. Grand Forks County, 8 N. D. 241, 77 N. W. 598; Mitchell v. Tallapoosa County, 30 Ala. 130; Morgan County v. Seaton, 122 Ind. 521, 24 N. E. 213.

[131] Inhabitants of Clinton v. Inhabitants of Benton, 49 Me. 550; Abbot v. Town of Fremont, 34 N. H. 432.

[132] Com. v. Inhabitants of Cambridge, 45 Mass. (4 Metc.) 35; Billings v. Kneen, 57 Vt. 428.

[133] Inhabitants of Oldtown v. Inhabitants of Falmouth, 40 Me. 106; Board of Sup'rs of Lowndes County v. Leigh, 69 Miss. 754, 13 So. 854; Commonwealth v. Coyle, 160 Pa. 36, 28 Atl. 576, 634, 24 L. R. A. 552.

§ 613. Corrective institutions.*

It is the sovereign duty of the state to adopt measures having for their purpose the prevention of crime and the punishment or reformation of the criminal. This power is based upon the well recognized function to protect the lives and property of persons within its jurisdictions. As a means of punishment or reformation, the state, or its subordinate agencies to which is given the right expressly or by implication, may construct and maintain penitentiaries, prisons, jails, workhouses or other places of confinement[134] and reformatories or training schools for youthful violators of the law or those convicted of the commisson of lesser offenses.[135] Rules of good order and discpline may be adopted and enforced and those confined required to perform constant manual labor. These regulations may be enforced by the public authorities for the better efficiency of the system[136] and no liability can arise because of the negligence of the state or its agents either in the selection or acts of officers,[137] the construction or condition of buildings or the use of machinery.[138] The rule also obtains that a public corporation cannot be liable for a tort committed by one of its convicts on the person of another.[139] The exception from liability is based upon the principle that the state or its subordinate agencies is exercising a governmental function. Prisoners may be employed by the state in manual labor or their services leased to contractors.[140]

* 6 Curr. Law, 1076.

[134] Richardson v. Clarion County, 14 Pa. 198.

[135] Farnham v. Pierce, 141 ass. 203, 6 N. E. 830; State v. Brown, 50 Minn. 353, 52 N. W. 935, 16 L. R. A. 691; Cincinnati House of Refuge v. Ryan, 37 Ohio St. 197.

[136] City of St. Louis v. Karr, 85 Mo. App. 608.

[137] Hollenbeck v. Winnebago County, 95 Ill. 148; White v. Sullivan County Com'rs, 129 Ind. 396, 28 N. E. 846; Watkins v. County Ct., 30 W. Va. 657, 5 S. E. 654.

[138] Payne v. Washington County, 25 Fla. 798: Morris v. Switzerland County Com'rs, 131 Ind. 285, 31 N. E. 77; Lindley v. Polk County, 84 Iowa, 308, 50 N. W. 975; Lewis v. State, 96 N. Y. 71; Moody v. State's Prison, 128 N. C. 12, 38 S. E. 131, 53 L. R. A. 855; Manuel v. Cumberland County Com'rs, 98 N. C. 9, 3 S. E. 829; Davis v. Knoxville, 90 Tenn. 599, 18 S. W. 254.

[139] Doster v. City of Atlanta, 72 Ga. 233.

[140] In re Burrow, 55 Ark. 275, 18 S. W. 170; Georgia Penitentiary Co. v. Melms, 71 Ga. 301; State v. Jack, 90 Tenn. 614, 18 S. W. 257.

CHAPTER XII.

ACTIONS BY AND AGAINST PUBLIC CORPORATIONS.*

§ 614. General principles governing issue of mandamus.*

Obviously a minute discussion of mandamus as a remedy is not pertinent to the scope of this work; on the other hand a general discussion of the remedy with reference to its use for the enforcement of the rights and obligations hereinbefore discussed is not inappropriate. It will issue only when the duty sought to be enforced is clearly imposed by law on the officer or governmental agency sought to be coerced.[1] Thus it will not issue to coerce the

* 6 Curr. Law, 738.

* 8 Curr. Law, 810.

1 Weaver v. Ogden City, 111 Fed. 323; State v. Police Jury of St. Charles, 29 La. Ann. 146; Gouldey v. City Council of Atlantic City, 63 N. J. Law, 537, 42 Atl. 852; State v. Anderson, 100 Wis. 523, 76 N. W. 482, 42 L. R. A. 239; People v. Board of State Canvassers, 129 N. Y. 360, 14 L. R. A. 646.

performance of a duty imposed by an unconstitutional statute,[2] nor where there is no law requiring the officer to act,[3] or the act does not come within his official duty.[4] Ordinarily it does not issue against mere employes of a municipal corporation,[5] nor to enforce purely contractual obligations.[6] It will not issue to compel the doing of an unlawful[7] or fraudulent act,[8] or to compel compliance with the strict letter of the law in disregard of its spirit,[9] or where its issuance would injuriously affect the public interests,[9a] or compel disobedience of an injunction issued by a court having jurisdiction.[10] The writ will not issue commanding an officer to do that which it is not within his power to do,[11] nor where the doing of the act requires the co-operative action of a third person, not joined as a party.[12] It will be refused if it appears that it would be fruitless or useless to issue it, or that doing so will result in no benefit to relator.[13] It will not issue against a public officer where it is in effect a suit against the state.[14]

To authorize the writ the duty must be mandatory[15] and the act sought to be coerced ministerial in its nature.[16]

[2] Board of Liquidation v. McComb, 92 U. S. 531.

[3] State v. Lockett, 52 La. Ann. 1620, 28 So. 157.

[4] Holtzclaw v. Riley, 113 Ga. 1023, 39 S. E. 425; Alger v. Seaver, 138 Mass. 331.

[5] Alger v. Seaver, 138 Mass. 331.

[6] Board of Education of South Milwaukee v. State, 100 Wis. 455, 76 N. W. 351; Bailey v. Oviatt, 46 Vt. 627.

[7] Edward C. Jones Co. v. Town of Guttenberg, 66 N. J. Law, 58, 48 Atl. 537; Johnson v. Lucas, 30 Tenn. (11 Humph.) 306.

[8] Board of Sup'rs of Cheboygan County v. Mentor Tp., 94 Mich. 386, 54 N. W. 169; People v. Board of Assessors of Brooklyn, 137 N. Y. 201, 33 N. E. 145.

[9] People v. Board of Assessors of Brooklyn, 137 N. Y. 201, 33 N. E. 145

[9a] Effingham v. Hamilton, 68 Miss. 523, 10 So. 39.

[10] Wilmarth v. Ritschlag, 9 S. D. 172, 68 N. W. 312.

[11] Bates v. Porter, 74 Cal. 224, 15 Pac. 732; City of Benton Harbor v. St. Joseph & B. H. St. R. Co., 102 Mich. 386, 60 N. W. 758, 26 L. R. A. 245.

[12] State v. Cavanac, 30 La. Ann. 237.

[13] State v. Atchison, T. & S. F. R. Co., 60 Kan. 858, 57 Pac. 106.

[14] State v. Burke, 33 La. Ann. 498; Miller v. State Board of Agriculture, 46 W. Va. 192, 32 S. E. 1007; Ottawa County v. Aplin, 69 Mich. 1, 36 N. W. 702.

[15] State v. Hobart, 12 Nev. 408; Will County Sup'rs v. People, 110 Ill. 511; State v. Fitzpatrick, 47 La. Ann. 1329, 17 So. 828.

[16] Roberts v. United States, 176 U. S. 221; Kimberlin v. Commission to Five Civilized Tribes, 104 Fed. 653; Marcum v. Ballot Com'rs 42 W. Va. 263, 36 L. R. A. 296.

§ 615. Writ; when issued and to whom.*

Ordinarily a demand on the officer to perform the duty and his refusal or neglect to do so is a prerequisite to the issuance of the writ,[17] though under some circumstances, as where it becomes his duty to act on the happening of a specified contingency, a failure to act after the contingency has eventuated is deemed equivalent to a refusal to act.[18] A positive refusal to act is not a prerequisite, it is sufficient if there is a manifest intention not to perform.

In some states the courts have no jurisdiction to issue mandamus to the governor,[19] while in others it is held that the writ will issue to compel the performance by him of ministerial duties.[20] It will issue to members of the president's cabinet,[21] and the various executive state officers,[22] as well as officers of the various governmental subdivisions of the state.

Where the law imposes on judicial officers duties which are purely ministerial and do not involve the exercise of judgment or discretion, the writ will issue to compel the performance of these duties by them.[23] So, too, superior courts may compel an inferior judicial tribunal to proceed with business properly before it and exercise its judicial functions in regard to any controversy or matter properly before it,[24] though they will not, of course, dictate the judgment or determination to be rendered or arrived at in so doing.[25]

* 8 Curr. Law, 810.

[17] United States v. Indian Grave Drainage Dist., 85 Fed. 928, 29 C. C. A. 578; Park v. Candler, 113 Ga. 647, 39 S. E. 89; State v. Davis, 17 Minn. 429 (Gil. 406); Gleaves v. Terry, 93 Va. 491, 25 S. E. 552, 34 L. R. A. 144.

[18] State Board of Equalization v. People, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513.

[19] Hovey v. State, 127 Ind. 588, 11 L. R. A. 763; People v. Morton, 156 N. Y. 136, 50 N. E. 791, 41 L. R. A. 231.

[20] State v. Smith, 23 Mont. 44, 57 Pac. 449; State v. Nicholls, 42 La. Ann. 209, 7 So. 738.

[21] United States v. Windom, 19 D. C. (8 Mackey) 54; Marbury v. Madison, 1 Cranch (U. S.) 137.

[22] State v. Crawford, 28 Fla. 441, 14 L. R. A. 253; State v. Jenkins, 20 Wash. 78, 54 Pac. 765; State v. Dubuclet, 26 La. Ann. 127; State v. Burdick, 3 Wyo. 588, 28 Pac. 146.

[23] Smith v. Moore, 38 Conn. 105; Ex parte Candee, 48 Ala. 386.

[24] City of Emporia v. Randolph, 56 Kan. 117, 42 Pac. 376; State v. Fawcett, 58 Neb. 371, 78 N. W. 636.

[25] Miltenberger v. St. Louis County Ct., 50 Mo. 172; Ex parte Candee, 48 Ala. 386.

The writ of mandamus may be invoked to coerce the performance of a purely ministerial duty by an officer of the state [26] or municipal legislative body.[27] Whether they are free from control of mandamus depends, not upon the office, but upon the nature of the duties with reference to which the right to the writ is asserted.[28]

Writ directed to a public corporation as such. In a number of cases it has been held that the writ may properly be directed to the corporation or governing body sought to be coerced eo nomine, and that the persons constituting the governing body of the corporation, or the board or body need not be joined as respondents.[29] It would seem to be better practice to direct the writ to the corporations or the board or body and the persons constituting the same, as such.[30]

§ 616. Certiorari; general principles.

Certiorari has been defined as "an extraordinary remedy resorted to for supplying defects of justice in cases obviously entitled to redress, and yet unprovided for by the ordinary forms of proceedings." [31] It is a proceeding in the nature of a writ of review and is used in correcting judicial or quasi judicial acts of inferior boards, courts or officials.[32] It does not lie in respect to legislative or ministerial acts nor cannot be used in reviewing the performance of discretionary duties.[33]

[26] Ex parte Pickett, 24 Ala. 91; Wolfe v. McCaull, 76 Va. 876; State v. Bolte, 151 Mo. 362, 52 S. W. 262; People v. Morton, 156 N. Y. 136, 66 Am. St. Rep. 547, 41 L. R. A. 231.

[27] Carney v. Neeley, 60 Kan. 672, 57 Pac. 527; State v. Meier, 143 Mo. 439.

[28] State v. Meier, 72 Mo. App. 618.

[29] Pegram v. Cleaveland County Com'rs, 65 N. C. 114; Fisher v. City of Charleston, 17 W. Va. 598; Leavenworth County Com'rs v. Sellew, 99 U. S. 624; Williams v. City of New Haven, 68 Conn. 263; People v. Getzendaner, 137 Ill. 234; Brown v. Assessors of Taxes of Rahway, 53 N. J. Law, 156; Mayor v. Lord, 76 U. S. (9 Wall.) 409.

[30] Cooperrider v. State, 46 Neb. 84; Wren v. City of Indianapolis, 96 Ind. 206; State v. City of Milwaukee, 25 Wis. 122.

[31] Enc. Pl. & Pr. vol. 4, p. 9; Stanfill v. Dallas County Ct., 80 Ala. 287.

[32] Archie v. State, 99 Ga. 23, 25 S. E. 612; State v. Washoe County Board of Com'rs, 23 Nev. 247; People v. Jones, 112 N. Y. 597, 20 N. E. 577; Hayden v. City of Memphis, 100 Tenn. 582, 47 S. W. 182.

[33] Frasher v. Rader, 124 Cal. 133. 56 Pac. 797; People v. Walter, 68 N. Y. 403.

§ 617. The writ; when issued.

The writ will not issue when there is another remedy available for the purpose of affording relief,[34] nor will it be granted where its issue would not be accompanied with beneficial results,[35] nor unless substantial injustice has been done,[36] and, as stated in the preceding section, its function is confined strictly to a review of judicial or quasi judicial action. The performance of discretionary duties cannot be controlled by it;[37] it will not therefore lie to review administrative or ministeral acts[38] nor the legislation of any body having authority to legislate[39] even where it has exceeded its powers, since discretionary legislative power is not subject to judicial control.[40] The courts have held, therefore, in accord with these general principles, that the writ will not lie to review action of subordinate boards or bodies,[41] officers[42] or courts in the performance of duties of the character

[34] Lawler v. Lynes, 112 Ala. 386, 20 So. 574; Stoddard v. Superior Court of Stanislaus County, 108 Cal. 303, 41 Pac. 278; Stroup v. Pruden, 104 Ga. 721, 30 S. E. 948; Gaither v. Watkins, 66 Md. 576, 8 Atl. 464; Hodgdon v. Lincoln County Com'rs, 68 Me. 226; Reynolds v. Town of West Hoboken, 63 N. J. Law, 497, 43 Atl. 682; People v. Board of Health of Yonkers, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481.

[35] Independent Dist. of Ottumwa v. Taylor, 100 Iowa, 617, 69 N. W. 1009; People v. Leavitt, 41 Mich. 470.

[36] Inhabitants of Strong v. County Com'rs, 31 Me. 578; Inhabitants of Grandville v. Hampden County Com'rs, 97 Mass. 193; Cavanagh v. City of Bayonne, 63 N. J. Law, 176, 43 Atl. 442.

[37] Steele v. Madison County Com'rs, 83 Ala. 304, 3 So. 761; Quinchard v. Board of Trustees of Alameda, 113 Cal. 664, 45 Pac. 856; McGovern v. Board of Public Works of Trenton, 57 N. J. Law, 580, 31 Atl. 613.

[38] State v. Harrison, 141 Mo. 12, 41 S. W. 971, 43 S. W. 867; State v. Board of Aldermen of Newport, 18 R. I. 381, 28 Atl. 347.

[39] Pine Bluff Water & Light Co. v. City of Pine Bluff, 62 Ark. 196, 35 S. W. 227; Brown v. San Francisco County Sup'rs, 124 Cal. 274, 57 Pac. 82; Whittaker v. Village of Venice, 150 Ill. 195, 37 N. E. 240; In re Wilson, 32 Minn. 145; People v. Queens County Sup'rs, 153 N. Y. 370, 47 N. E. 790.

[40] But see Jackson v. City of Newark, 53 N. J. Eq. 322, 31 Atl. 233.

[41] People v. Contra Costa County Sup'rs, 112 Cal. 421, 55 Pac. 131; Attorney-General v. City of Northampton, 143 Mass. 589; Lemont v. Dodge County, 39 Minn. 385, 40 N. W. 359; State v. Clough, 64 Minn. 378, 67 N. W. 202; State v. Osburn, 24 Nev. 187, 51 Pac. 837.

[42] State v. City of St. Paul, 34 Minn. 250.

above indicated. The writ cannot be used ordinarily to test the right of a party to an office [43] nor generally for purposes of collateral attack [44] or to test the legality of the organization of a subordinate public corporation.[45]

Certiorari is a discretionary writ [46] available for the purpose of reviewing and correcting the quasi or quasi judicial acts of subordinate or inferior boards,[47] officers [48] or courts.[49]

§ 618. Injunction; definition; general principles.*

An injunction has been defined as "A writ formed according to the circumstances of the case commanding an act which the court regards essential to justice or restraining an act which it esteems contrary to equity and good conscience." [50] This definition, it has been said, by a late author,[51] "it would be difficult to improve upon, and requires but little or no modification." "Without the power to prevent as well as to undo wrongs, to restrain as well as to compel action, to preserve as well as to reinstate the status of persons and things, courts of equity would possess but little power, and command but little respect as dispensers of justice and arbiters between man and man. The important restraining function is given effect by the great extraordinary remedy of injunction, which may be appropriately termed the strong arm of courts of equity." The remedy is generally regarded as a preventive one [52] though in some instances a writ of mandatory injunction will be issued.[53] It is also re-

[43] Bilderback v. Salem County Chosen Freeholders, 63 N. J. Law, 55, 42 Atl. 843.

[44] Town of Oswego v. Kellogg, 99 Ill. 590; State v. Recorder of First Dist., 48 La. Ann. 1375, 20 So. 908.

[45] Lees v. Drainage Com'rs, 125 Ill. 47, 16 N. E. 915; Atlee v. Wexford County Sup'rs, 94 Mich. 562, 54 N. W. 380.

[46] Sowles v. Bailey, 69 Vt. 277, 37 Atl. 751.

[47] People v. Eldorado County Sup'rs, 8 Cal. 58; Way v. Fox, 109 Iowa, 340, 80 N. W. 405; Locke v. Selectmen of Lexington, 122 Mass. 290; People v. Board of R. Com'rs, 158 N. Y. 421, 53 N. E. 163.

[48] Morgan v. City of Orange, 50 N. J. Law, 13 Atl. 240.

[49] City of Macon v. Shaw, 16 Ga. 172; Swift v. Wayne Circuit Judges, 64 Mich. 479, 31 N. W. 434; Watson v. City of Plainfield, 60 N. J. Law, 260, 37 Atl. 615.

* 8 Curr. Law, 279.

[50] Jeremy, Eq. Jur. p. 307.

[51] Spelling, Injunctions (2d Ed.) §§ 1, 3.

[52] Spelling, Injunctions (2d Ed.) § 11.

[53] City of Louisville v. Board of

garded in respect to its issuance as a discretionary writ; that is, the application is addressed to the sound discretion of the court to be exercised or not according to the circumstances of each case. It is generally refused where justice would be retarded or defeated rather than advanced by granting it.[54, 55]

§ 619. When granted; nature or character of injury.*

To authorize the grant of the writ it is necessary that the threatened injury be actual and impending,[56] irreparable at law [57] and special or peculiar to the one complaining.[58] It is also necessary that the remedies at law should be inadequate to afford the desired relief [59] and essential to prevent the accomplishment of a wrong.[60] Another ground for the granting of the writ is that by so doing there will be avoided a multiplicity of suits.[61]

The party applying for the writ may be guilty of such laches that a court of equity will refuse to grant the desired relief, this

Park Com'rs, 24 Ky. L. R. 38, 65 S. W. 860; Washington County Com'rs v. County School Com'rs, 77 Md. 283, 26 Atl. 115; State v. Condon, 108 Tenn. 82, 65 S. W. 871. In respect to the issue of a mandatory injunction to compel the restoration of a highway or the performance by a railway company of its duty to restore and repair streets see the following: State v. Minneapolis & St. L. R. Co., 39 Minn. 219, 39 N. W. 153; City of Oshkosh v. Milwaukee & L. W. R. Co., 74 Wis. 534. Elliott, Railroads, §§ 1092, 1106; Buchholz v. New York L. E. & W. R. Co., 148 N. Y. 640, 43 N. E. 76.

54, 55 Spelling on Injunctions (2d Ed.) §§ 22, 23.

* 8 Curr. Law, 284.

56 Commissioners of Perry County v. Medical Soc. of Perry County, 128 Ala. 257, 29 So. 586; Brockhausen v. Boochland, 137 Ill. 547, 27 N. E. 458; Borough of Shamokin v. Shamokin & M. C. E. R. Co., 196 Pa. 166, 46 Atl. 382.

57 Clapp v. City of Spokane, 53 Fed. 515; Southern Pac. Co. v. Board of R. R. Com'rs, 87 Fed. 21.

58 Commissioners' Court of Perry County v. Medical Soc. of Perry County, 128 Ala. 257, 29 So. 586; Cicero Lumber Co. v. Town of Cicero, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696.

59 Louisiana v. Lagarde, 60 F. 186; Taylor v. City of Crowfordsville, 155 Ind. 403, 58 N. E. 490; Point Pleasant Elec. Light & Power Co. v. Borough of Bayhead, 62 N. J. Eq. 296, 49 Atl. 1108.

60 McFadden v. Owens, 54 Ark. 118, 15 S. W. 84; Gas Light & Coke Co. v. City of New Albany, 139 Ind. 660, 39 N. E. 462; Carlisle v. City of Saginaw, 84 Mich. 134, 74 N. W. 444.

61 Roland Park Co. v. Hull, 92 Md. 301, 48 Atl. 366; International Trading Stamp Co. v. City of Memphis, 101 Tenn. 181, 47 S. W. 136.

action being based upon a well known equitable principle.[62] The parties may also, by an acquiescence in the conditions sought to be altered, have deprived themselves of the right to an injunction.[63]

Discretionary acts. The writ, as a general rule, will not be issued to restrain acts which are being or about to be done in the legitimate exercise of official discretion,[64] and this is especially true where the acts threatened are within the legal powers conferred upon an official or a public corporation.[65] The principle in respect to non-interference with the exercise of discretionary powers apply especially in the case of public corporations and public officials to the exercise of legislative powers.[66] The rule in this respect has been well stated in a recent text book.[67]

§ 620. When writ will issue.*

A common class of cases in which the writ has been granted are those pertaining to real property either in respect to matters affecting the title, the protection of possessory rights[68] or ease-

[62] Manko v. Borough of Chambersburgh, 25 N. J. Eq. (10 C. C. Green) 168.

[63] Bigelow v. City of Los Angeles, 85 Cal. 614, 24 Pac. 778; De Puy v. City of Wabash, 133 Ind. 336, 32 N. E. 1016.

[64] Enterprise Sav. Ass'n v. Zumstein (C. C. A.) 67 Fed. 1000; Dailey v. City of New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69; Colman v. Glenn, 103 Ga. 458, 30 S. E. 297; Verga v. Miller, 45 N. J. Eq. 93, 15 Atl. 835; Heilmann v. Lebannon & A. St. R. Co., 175 Pa. 188, 34 Atl. 647.

[65] Tupper v. Dart, 104 Ga. 179, 30 S. E. 624; Ladd v. City of Boston, 170 Mass. 332, 49 N. E. 627, 40 L. R. A. 171.

[66] New Orleans Waterworks Co. v. City of New Orleans, 164 U. S. 171; Stevens v. St. Mary's Training School, 144 Ill. 336, 32 N. E. 962, 18 L. R. A. 832; City of Detroit v. Circuit Judge of Wayne County, 79 Mich. 384, 44 N. W. 622; Carlisle v. City of Saginaw, 84 Mich. 134, 47 N. W. 444; State v. Superior Ct. of Milwaukee County, 105 Wis. 651, 81 N. W. 1046; Poppleton v. Moores, 62 Neb. 851, 88 N. W. 128.

[67] Spelling, Injunctions (2d Ed.) § 687; Goszler v. Corporation of Georgetown, 19 U. S. (6 Wheat.) 593; Little Falls Elec. & Water Co. v. City of Little Falls, 102 Fed. 663; Burckhardt v. City of Atlanta, 103 Ga. 302, 30 S. E. 32; Walker v. Village of Morgan Park, 175 Ill. 570, 51 N. E. 636; City of Valparaiso v. Hagen, 153 Ind. 337, 54 N. E. 1062, 48 L. R. A. 707; State v. Duffel, 41 La. Ann. 557, 6 So. 514; Morgan v. City of Binghamton, 102 N. Y. 500.

* 8 Curr. Law, 284.

[68] Miller v. City of Mobile, 47 Ala. 163; Coast Co. v. Borough of

ments,[69] the prevention of an injury to the property itself, or to prevent an illegal taking and injury under a claim of public right.[70]

A writ of injunction is frequently granted as a protection against the creation of or the maintenance of a nuisance whether it be public or private in its character.[71] A nuisance can be created through the occupation of public highways by railroad tracks,[72] telephone poles or wires,[73] or other obstacles[74] constituting an obstruction either to the proper use[75] of the highway or to some of the private rights of the owners of abutting property.[76] The acts of public officials in granting licenses or permits may also result in the same condition, namely, the existence of a nuisance. The erection, maintenance or use of public buildings or facilities, under some circumstances, also create conditions calling for this relief.[77]

A court of equity will interfere and restrain by injunction the

Spring Lake, 56 N. J. Law, 615, 36 Atl. 21; Sperry v. City of Albina, 17 Or. 481, 21 Pac. 453; City of Huntington v. Coast, 149 Ind. 255, 48 N. E. 1025.

[69] Hart v. Buckner (C. C. A.) 54 Fed. 925; Cabbell v. Williams, 127 Ala. 320, 28 So. 405; O'Rourke v. City of Orange, 51 N. J. Law, 561, 26 Atl. 858; Spelling, Injunctions (2d Ed.) §§ 219 et seq.

[70] Collins v. City of Keokuk, 91 Iowa, 293, 59 N. W. 200; Murphy v. Southern R. Co., 99 Ga. 207, 24 S. E. 867; Dudley v. Trustees of Frankfort, 51 Ky. (12 B. Mon.) 610; Jersey City v. Fitzpatrick, 30 N. J. Eq. (3 Stew.) 97; Mason City Salt & Min. Co. v. Town of Mason, 23 W. Va. 211.

[71] Ferguson v. City of Selma, 43 Ala. 398; Cleveland v. Citizens' Gaslight Co., 20 N. J. Eq. (5 C. E. Green) 201.

[72] City of Waterloo v. Waterloo St. R. Co., 71 Iowa, 193, 32 N. W. 329; Stockton v. Atlantic Highlands R. B. & L. B. Elec. R. Co., 53 N. J. Eq. 418, 32 Atl. 680; O'Brien v. Buffalo Traction Co., 165 N. Y. 637, 59 N. E. 1128.

[73] Paterson R. Co., v. Grundy, 51 N. J. Eq. 213, 26 Atl. 788; Mutual Elec. Light Co. v. Ashworth, 118 Cal. 1, 50 Pac. 10.

[74] Martin v. Marks, 154 Ind. 549, 57 N. E. 249. Fence. Clayton County v. Herwig, 100 Iowa, 631, 69 N. W. 1035; Village of Buffalo v. Harling, 50 Minn. 551, 52 N. W. 931; Inhabitants of Franklin v. Nutley Water Co., 53 N. J. Eq. 601, 32 Atl. 381.

[75] City of Georgetown v. Alexandria Canal Co., 12 Pet. (U. S.) 91; City of Pittsburg v. Epping-Carpenter Co., 194 Pa. 318, 45 Atl. 129; Pettibone v. Hamilton, 40 Wis. 402.

[76] City Council of Montgomery v. Parker, 114 Ala. 118, 21 So 452; Gustafson v. Hamm, 56 Minn. 334, 57 N. W. 1054, 22 L. R. A. 565.

[77] Kansas City v. Hobbs, 62 Kan. 866, 62 Pac. 324; Soule v. City of Passaic, 47 N. J. Eq. 28, 20 Atl. 346.

execution of a contract by a public corporation where the same involves the illegal use of public moneys or property,[78] where it is ultra vires or illegal because of irregularities in conditions precedent,[79] or where the effect of the contract would be a waste, misappropriation or misuse of public funds or property.[80] The writ will also clearly issue in those cases where the breaking of a legal contract is threatened.[81]

The remedy of injunction is also available in connection with the levy or collection of taxes whether general or special.[82] The conditions for relief, as already stated, must clearly exist;[83] mere irregularities are no ground for relief nor mere errors of judgment[84] The existence of a remedy at law will be considered at bar.[85] The writ will be granted where the tax or assessment is absolutely illegal, fraudulently excessive,[86] or where the party has exercised diligence in seeking equitable relief, and where he is not estopped by acquiescence in allowing the tax to be expended in the construction of improvements from which he receives a benefit.[87]

[78] Mooney v. Clark, 69 Conn. 241, 37 Atl. 506, 1080; Hanson v. William A. Hunter Elec. Light Co. (Iowa) 48 N. W. 1005.

[79] Yarnell v. City of Los Angeles, 87 Cal. 603, 25 Pac. 767; Adams v. Brenan, 177 Ill. 194, 52 N. E. 314, 42 L. R. A. 718; Alexander v. Johnson, 144 Ind. 82, 41 N. E. 811; Crabtree v. Gibson, 78 Ga. 230.

[80] Commissioners of Ct. of Perry County v. Medical Soc. of Perry County, 128 Ala. 257, 29 So. 586; Fones Hardware Co. v. Erb, 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353.

[81] Yale College v. Sanger, 62 Fed. 177; City of Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321.

[82] City of Chicago v. Nichols, 177 Ill. 97, 52 N. E. 359; Oregon & C. R. Co. v. City of Portland, 25 Or. 229, 22 L. R. A. 713.

[83] Town of Albertville v. Rains, 107 Ala. 691, 18 So. 255.

[84] Wilson v. City of Auburn, 27 Neb 435, 43 N. W. 257; Cooley, Taxation (2d Ed.) pp. 750, 775, et seq. Cooley, Taxation (2d Ed.) p. 786.

[85] Rickords v. City of Hammond, 67 Fed. 380; Taylor v. City of Crawfordsville, 155 Ind. 403, 58 N. E. 490.

[86] State v. Atkins, 35 Ga. 315; Everett v. Deal, 148 Ind. 90, 47 N. E. 219; Liebermann v. City of Milwaukee, 89 Wis. 336, 61 N. W. 1112; Chicago, B. & Q. R. Co., v. Cole, 75 Ill. 591; Moss v. Board of Education, 58 Ohio St. 354, 50 N. E. 921.

[87] Bigelow v. Los Angeles, 85 Cal. 614, 24 Pac. 778; City of Logansport v. Uhl, 99 Ind. 531; Taber v. City of New Bedford, 135 Mass. 162.

§ 621. Protection of public property.*

In many cases a threatened act of public officials or of a public corporation will result in a wrong or an injury to the public interests. A taxpayer under such circumstances is usually given the right of maintaining injunction proceedings to restrain the doing of the act or the exercise of the power. A public corporation acquires its property ordinarily, through the exercise of the power of taxation; all its funds are derived in this manner. It holds and uses property acquired for public uses and purposes as a trustee for the public. The relation which exists therefore between itself and the public is one of trust. Clearly, therefore, a taxpayer has the right to restrain the illegal use, waste or misappropriation of public funds or of public property,[88] donations or gifts to private persons or in aid of private persons;[89] the use of moneys or property secured or held for designated purposes for other than the authorized one;[90] the issue of bonds in violation of law[91] or for other than proper purposes,[92] or when their issue would create an indebtedness in excess of that allowed by law.[93]

§ 622. Quo warranto; nature of remedy.*

The states which have adopted the code system of pleading, as a general rule, have provided, by statute, for proceedings in the

* 8 Curr. Law, 291.

[88] Crampton v. Zabriskie, 101 U. S. 601; Winn v. Show, 87 Cal. 631, 25 Pac. 968; Sherlock v. Village of Winnetka, 59 Ill. 389; City of Chicago v. Nichols, 177 Ill. 97, 52 N. E. 359; Cascaden v. City of Waterloo, 106 Iowa, 673, 77 N. W. 333; Brown v. City of Concord, 56 N. H. 375; Zeigler v. Chapin, 126 N. Y. 342, 27 N. E. 471; White v. Multnomah County Com'rs, 13 Or. 317; Delano Land Co's Appeal, 103 Pa. 347. As to unathorized use of public property see the following: Scofield v. Eighth School Dist., 27 Conn. 499; Spencer v. Joint School Dist. No. 6, 15 Kan. 259; Inhabitants of Melrose v. Cutter, 159 Mass. 461, 34 N. E. 695.

[89] Town of Albertville v. Rains, 107 Ala. 691, 18 So. 255; Terrett v. Town of Sharon, 34 Conn. 105.

[90] Fazende v. City of Houston, 34 Fed. 95; Sturmer v. Randolph County Ct., 42 W. Va. 724, 26 S. E. 532, 36 L. R. A. 300.

[91] Russell v. Tate, 52 Ark 541, 13 S. W. 130, 7 L. R. A. 180; Avery v. Job, 25 Or. 512, 36 Pac. 293; Cleveland v. City of Spartanburg, 54 S. C. 83, 31 S. E. 871.

[92] Blake v. City of Macon, 53 Ga. 172.

[93] Reynolds v. City of Waterville, 92 Me. 292, 42 Atl. 553; In re Borough of Millvale, 162 Pa. 374, 29 Atl. 641, 644; Webster v. Douglas County, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451.

* 6 Curr. Law, 1190.

nature of quo warranto. These are generally regarded as substitutes for the common law remedy [94] and not, in the absence of clear legislative intent to do so, as narrowing or enlarging [95] the grounds of action or making the new remedy applicable when the common law writ would not have been.[96] Quo warranto, or a proceeding of a similar nature is the appropriate remedy for the trial of the title to a public office, [97] or the right of a public corporation to exercise a franchise,[98] including the franchise to exist as a public corporation,[99] but not to test the validity of a contract entered into by it,[100] nor the power of a city council to pass an ordinance.[101] The title to an office cannot be adjudicated in mandamus proceedings,[102] nor in a suit in equity to enjoin the incumbent from discharging the functions of an office.[103] So, too, one who claims to have been unlawfully removed from an office, to which another has been appointed, should use quo warranto and not certiorari to review the action removing him.[104] The remedy can not ordinarily be invoked to restrain a public officer from doing a particular act, which he claims the right to do by virtue of his office and which constitutes but a portion of the rights, powers, and privileges incident to the office.[105]

The remedy for usurpation by a city of authority over terri-

[94] Attorney General v. Sullivan, 163 Mass. 446, 40 N. E. 843, 28 L. R. A. 455.

[95] Watkins v. Venable, 99 Va. 440, 39 S. E. 147; Wishek v. Becker, 10 N. D. 63, 84 N. W. 590.

[96] Hinckley v. Breen, 55 Conn. 119, 9 Atl. 31.

[97] Werts v. Rogers, 56 N. J. Law, 480, 28 Atl. 726, 29 Atl. 173, 23 L. R. A. 354; Lindsey v. Attorney General, 33 Miss. 508; State v. Frazier, 98 Mo. 426, 11 S. W. 973; Parsons v. Durand, 150 Ind. 203, 49 N. E. 1047.

[98] People v. City of Oakland, 92 Cal. 611, 28 Pac. 807; State v. Regents of University, 55 Kan. 389, 40 Pac. 656, 29 L. R. A. 378.

[99] State v. Uridil, 37 Neb. 371, 55 N. W. 1072; Kamp v. People, 141 Ill. 9, 30 N. E. 680; Osborn v. Village of Oakland, 49 Neb. 340, 68 N. W. 506.

[100] People v. City of Springfield, 61 Ill. App. 86.

[101] State v. City of Newark, 57 Ohio St. 430, 49 N. E. 407; State v. City of Lyons, 31 Iowa, 432.

[102] In re Hart, 159 N. Y. 278, 54 N. E. 44; French v. Cowan, 79 Me. 426, 10 Atl. 335; People v. New York Infant Asylum, 122 N. Y. 190, 25 N. E. 241, 10 L. R. A. 381.

[103] Beebe v. Robinson, 52 Ala. 66; Burke v. Leland, 51 Minn. 335, 53 N. W. 716.

[104] State v. Kirkwood, 15 Wash. 298, 46 Pac. 331.

[105] State v. Smith, 55 Tex. 447. Compare Brown v. Reding, 50 N. H. 336.

tory not legally annexed to it,[106] or for the exercise by it of a power not conferred by its charter,[107] is by quo warranto. The proceeding should be brought against the city itself and not its officers.[108]

§ 623. Jurisdiction of courts; actions in general.

The jurisdiction of different courts to hear and determine cases or matters in which one of the parties is a public corporation is largely a matter of statute since the right of such a corporation to sue or its liability to action is dependent, to a certain extent, upon statutory provisions granting or withholding consent.[109] These may provide special courts for the determination of a certain class of cases or restrict other courts in respect to the same question.[110] Where, however, pursuant to law, a public corporation has commenced an action, it is then usually subject to all the rules of practice appertaining to that court in connection with the question of consent,[111] the removal to or trial of the case in the Federal courts,[112] or a review of its proceedings by higher tribunals.[113] Statutes relative to the question suggested above are generally strictly construed and cases may be dismissed if not within the jurisdiction of the court, as determined by their provi-

[106] People v. City of Los Angeles, 133 Cal. 338, 65 Pac. 749; Ewing v. State, 81 Tex. 172, 16 S. W. 872; State v. Crow Wing County Com'rs, 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631, 35 L. R. A. 746; State v. Fleming, 147 Mo. 1, 44 S. W. 758.

[107] State v. Tracy, 48 Minn. 497, 51 N. W. 613.

[108] People v. City of Peoria, 166 Ill. 517, 46 N. E 1075; State v. Fleming, 158 Mo. 558, 59 S. W. 118; State v. Atlantic Highlands Com'rs, 50 N. J. Law, 457, 14 Atl. 560.

[109] Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362. U. S. Const., amend. XI providing that the judicial power of the United States shall not be construed to extend to any suit against one state by citizens of another state does not apply to a suit against state railroad commissioners to restrain the enforcement of their regulations as unjust and unreasonable. Brown University v. Rhode Island College of Agriculture & Merchanic Arts, 56 Fed. 55.

[110] Smith v. Reeves, 178 U. S. 436; Griffith v. County of Sebastian, 49 Ark. 24, 3 S. W. 886, Dandurand v. Kankakee County, 196 Ill. 537, 63 N. E. 1011; Czarnowsky v. City of Rochester, 65 N. Y. 649, 59 N. E. 1121.

[111] Port Royal A. R. Co. v. South Carolina, 60 Fed. 552.

[112] Abeel v. Culberon, 56 Fed. 329.

[113] Hoagland v. State (Cal.) 22 Pac. 142.

sions.[114] The universal principle that the question of jurisdiction can be raised at any time applies here.

§ 624. Generally; liability to action.

It has already been observed that the state or the sovereign is not subject in the exercise of any of its powers or the performance of its duties to the judgment of the courts which it creates or the principles of law applying to private persons which it establishes and enforces. Freedom from liability both in respect to transactions of a contractual nature or those sounding in tort attaches to the state unless by its consent it assumes one. The question primarily, therefore, in determining the liability of a state to an action, is the one of consent.[115] The state may assent to a liability on a claim contractual in its nature.[116] Where the power to sue a state is denied, the question of whether a certain proceeding against it or some of its officials is a suit within the meaning of the prohibition is material and it does not necessarily follow that every action against it is a suit.[117]

Subordinate public corporations. Subordinate public corporations may, in the exercise of their legal powers, assume contractual obligations and in respect to these they are liable, if capacity has been conferred by statue,[118] to be sued and sue in the

[114] Galbes v. Girard, 46 Fed. 500; City of Fostoria v. Fox, 60 Ohio St. 340 54 N. E. 370.

[115] Christian v. Atlantic & N. C. R. Co., 133 U. S. 233; Holmes v. State, 100 Ala. 291, 14 So. 51; People v. Miles, 56 Cal. 401; People v. Dennison, 84 N. Y. 272; State v. Jumel, 38 La. Ann. 337; Lord & Polk Chemical Co. v. Board of Agriculture, 111 N. C 135, 15 S. E. 1032; Houston v. State, 98 Wis. 481, 42 L. R. A. 39.

[116] Clodfelter v. State, 86 N. C. 51; Lyman County v. State, 9 S. D. 413, 69 N. W. 601.

[117] North Carolina v. Temple, 134 U. S. 22; In re Tyler, 149 U. S. 191; Sanford v. Gregg, 58 Fed. 620; Tindall v. Wesley (C. C. A.) 65 Fed. 731; Western Union Tel. Co. v. Henderson, 68 Fed. 588; City of Terre Haute v. Farmers' Loan & Trust Co. (C. C. A.) 99 Fed. 838; Kruger v. Life & Annuity Ass'n, 106 Cal. 98, 39 Pac. 213. See, also, article 30 Am. Law Reg. (N. S.) 1, by A. H. Wintersteen.

[118] Vincent v. County of Lincoln, 30 Fed. 749; Whittaker v. Tuolumne County, 96 Cal. 100, 30 Pac. 1016; Talbot County v. Mansfield, 115 Ga. 766, 42 S. E. 72; Ayres v. Thurston County, 63 Neb. 96, 88 N. W. 178; Doolittle v. Town of Walpole, 67 N. H 554, 38 Atl. 19; Granville County Board of Education v. State Board of Education, 106 N. C. 81.

same manner and to the same effect as a private person under the same conditions.[119]

§ 625. Prohibition; indictment.*

In addition to other remedies the writ of prohibition is sometimes used as a specific remedy for a distinct species of wrong and is issued because of the absence or the inadequacy of ordinary ones. It has been defined [120] as "That process by which a superior court prevents an inferior court or tribunal from usurping or exercising a jurisdiction with which it has not been vested by law." The writ is granted to prevent action but, unlike an injunction, is addressed to or operates upon the court while injunction lies against the parties alone and does not interfere with the court itself.[121]

Indictment. A public corporation or its officers may also be subject to indictment for a neglect or failure to perform properly public duties which are imposed upon it. This method of redress is most frequently used either in respect to the opening and maintenance of highways in a proper condition for travel,[122] or where the corporation has been guilty of some act through or by which a public nuisance has been created.[123]

§ 626. Attachment and garnishment.*

The courts have quite generally held on the ground of public policy that public corporations are not subject to attachment or garnishment.[124] The rule of nonexemption would embarass pub-

[119] Lowndes County v. Hunter, 49 Ala. 507; Gross v. Kentucky Board of Managers of World's Columbian Exposition, 105 Ky. 840, 49 S. W. 458, 43 L. R. A. 703; Adams v. Tyler, 121 Mass. 380; Winslow v. Perquimans County Com'rs, 64 N. C. 218.

* 6 Curr. Law, 1102.

[120] Spelling, Injunctions (2d Ed.) § 1716.

[121] Smith v. Whitney, 116 U. S. 167; Spelling, Injunctions (2d Ed.) §§ 1716 et seq.

[122] Davis v. City of Bangor, 42 Me. 522; State v. Town of Northumberland, 44 N. H. 628; Pittsburg, V. & C. R. Co. v. Com., 101 Pa. 192; Thomp. Neg. §§ 6369 et seq.

[123] Town of Paris v. People, 27 Ill. 74; State v. City of Portland, 74 Me. 268; State v. Hudson County, 30 N. J. Law, 137; Town of Saukville v. State, 69 Wis. 178.

* 6 Curr. Law, 738.

[124] Clark v. Mobile School Com'rs, 36 Ala. 621; Bank of South Western Georgia v. City of Americus, 92 Ga. 361, 17 S. E. 287; Triebel v. Col-

lic officials, so it has been held, in the performance of their duties and might require their attendance in distant tribunals with a consequent absence from their respective offices, thus detrimentally affecting the proper performance of public business.[125] A municipal corporation, it has been held, by appearing and submitting to a liability, waives its exemption and becomes liable to the judgment of the court in the same manner as a private person or corporation.[126] On the other hand, a few cases have held to the rule of nonexemption.[127]

§ 627. Conditions precedent to right of action.*

Notice of intention to sue. In order that claims against a public corporation may be investigated and their correctness determined by the proper officials, and further, that it may be given an opportunity of settling meritorious ones,[128] statutes in some states provide that as a condition precedent to the prosecution of an action against a public corporation the claimant must give within the time, and in the manner prescribed by law, a notice of the defect causing an injury or of what might be termed his intention to bring in the manner prescribed by law, an action against the corporation and based upon the facts which are set forth in this notice.[129] This, it has been held, is jurisdictional,[130]

burn, 64 Ill. 376; Wallace v. Sawyer, 54 Ind. 501; Jenks v. Osceola Tp., 45 Iowa, 554; First Nat. Bank v. City of Ottawa, 43 Kan. 294, 23 Pac. 485; Keyser v. Rice, 47 Md. 203; Dewey v. Garvey, 130 Mass. 86; Clarksdale Compress Co. v. W. R. Caldwell Co., 80 Miss. 343, 31 So. 790; Wilson v. Lewis, 10 R. I. 285; City of Dallas v. Western Elec. Co., 83 Tex. 243, 18 S. W. 552; Merrell v. Campbell, 49 Wis. 535.

[125] Roeller v. Ames, 33 Minn. 132.

[126] Briscoe v. Bank of Ky., 11 Pet. (U. S.) 257; Clapp v. Walker, 25 Iowa, 315.

* 6 Curr. Law, 737, 738.

[127] City Council of Montgomery v. Van Dorn, 41 Ala. 505; City of Denver v. Brown, 11 Colo. 337, 18 Pac. 214; Adams v. Tyler, 121 Mass. 380; Jersey City v. Horton, 38 N. J. Law, 88; Wilson v. Lewis, 10 R. I. 285; Portsmouth Gas Co. v. Sanford, 97 Va. 124, 33 S. E. 516, 45 L. R. A. 246; Waterbury v. Deer Lodge County Com'rs 10 Mont. 515, 26 Pac. 1002.

[128] McLendon v. Anson County Com'rs, 71 N. C. 38.

[129] Sachs v. Sioux City, 109 Iowa, 224, 80 N. W. 336; Hutchings v. Inhabitants of Sullivan, 90 Me. 131; Higgins v. Inhabitants of North Andover, 168 Mass. 251; Atherton v. Village of Bancroft, 114 Mich. 241, 72 N. W. 208; Whalen v. Bates, 19 R. I. 274; Lawton v. Town of Weathersfield, 74 Vt. 41, 51 Atl. 1062; Harris v. City of

and no right of action can accrue unless the provisions of the statute have been complied with both in respect to the time and manner of the service of the notice and its form.[131]

Filing of claim. In other states the filing of the claim, which is the basis of the proposed action, with designated officials at a time prescribed,[132] is made a condition precedent to a legal cause of action founded upon that claim. It has been held that a law of this character applies only to claims ex contractu and not to those upon an alleged tort,[133] but many cases hold otherwise.[134] The purpose of such a provision is evidently to permit an examination of the claim by the proper officials, and if meritorious, its audit, allowance and payment in a regular manner and without unnecessary expense.[135]

§ 628. Taxpayer's actions.

The greater number of causes of actions against public corporations arise through the exercise by them of their powers in re-

Fond du Lac, 104 Wis. 44, 80 N. W. 66; Griswold v. City of Ludington, 116 Mich. 401, 74 N. W. 663; Sheehy v. City of New York, 160 N. Y. 139, 54 N. E. 749; Dean v. Town of Sharon, 72 Conn. 667, 45 Atl. 963; Angell v. West Bay City, 117 Mich. 685, 76 N. W. 128.

[130] Bausher v. City of St. Paul, 72 Minn. 539, 75 N. W. 745; Werner v. City of Rochester, 149 N. Y. 563, 44 N. E. 300.

[131] Webster v. City of Beaver Dam, 84 Fed. 280; Barcley v. City of Boston, 173 Mass. 310, 53 N. E. 822; Blumrich v. Highland Park, 131 Mich. 209, 91 N. W. 129; Roberts v. Village of St. James, 76 Minn. 456, 79 N. W. 519; Missano v. City of New York, 160 N. Y. 123, 54 N. E. 744; Maloney v. Cook, 21 R. I. 471, 42 Atl. 692. On the question of inability to file claim, see Chadbourne v. Town of Exeter, 67 N. H. 190, 29 Atl. 408, and Boyd v. Derry, 68 N. H. 272, 38 Atl. 1005.

As to effect of admission in the answer that claim was filed see Durham v. City of Spokane, 27 Wash. 615, 68 Pac. 382.

[132] Selden v. Village of St. Johns, 114 Mich. 698, 72 N. W. 991; Nicholson v. Dare County Com'rs, 121 N. C. 27, 27 S. E. 996; Morgan v. City of Rhinelander, 105 Wis. 138, 81 N. W. 132; Mobile County v. Sands, 127 Ala. 493, 29 So 261; Thoeni v. City of Dubuque, 115 Iowa, 482, 88 N. W. 967; Groundwater v. Town of Washington, 92 Wis. 56, 65 N. W. 871.

[133] Haggard v. City of Carthage, 168 Mo. 129, 67 S W. 567; Werner v. City of Rochester, 149 N. Y. 563, 44 N. E. 300; Chick v. Newberry Co., 27 S. C. 419, 3 S E. 787.

[134] Bancroft v. City of San Diego, 120 Cal. 432, 52 Pac. 712; Springer v. City of Detroit, 118 Mich. 69, 76 N. W. 122; Flieth v. City of Wausau, 93 Wis. 446, 67 N. W. 731.

[135] McLendon v. Anson County Com'rs, 71 N. C. 38; Brown v. Fleischner, 4 Or. 132.

spect to taxation or the expenditure of public moneys raised through taxation. The right of the taxpayer to bring suit or commence proceedings may arise from action of the public corporation in creating an excessive debt or an illegal one and which must be paid through an exercise of the power of taxation, a portion of which the taxpayer complaining must personally pay.[136] In previous sections the validity of an expenditure of public funds as based upon the purpose for which it is to be used was discussed and a taxpayer clearly has the right when public funds are to be used, a debt incurred, or a tax levied,[137] for a purpose not public in its character, to a remedy for such an illegal use of public revenue. A tax may also be irregularly or improperly levied or the power of taxation irregularly exercised.[138] A taxpayer also has the undoubted right to prevent the misappropriation of the proceeds of a tax levied for a special purpose.[139] Property exempt from taxation may, by public officers, be made subject to burdens not legally imposed upon it.[140] The tax levied may be upon property not within the jurisdiction of the district levying it. It may be illegal because of the principle on which it is based or void.[141] In all of these cases a taxpayer is entitled to a remedy for the correction of the wrong. The general principle however obtains that, for obvious reasons, courts of equity will not interfere, except in extreme cases, in the levy and collection of taxes,[142] although this rule is relaxed in connection with the levy and collection of municipal taxes.[143]

[136] Cason v. City of Lebanon, 153 Ind. 567, 55 N. E. 768; Holliday v. Hilderbrandt, 97 Iowa, 177, 66 N. W. 89; Dorothy v. Pierce, 27 Or. 373, 41 Pac. 668; Maudlin v. City Council of Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291; Wormington v. Pierce, 22 Or. 606, 30 Pac. 450; McVichie v. Town of Knight, 82 Wis. 137, 51 N. W. 1094.

[137] Crampton v. Zabriskie, 101 U. S. 601; Bradford v. City and County of San Francisco, 112 Cal. 537, 44 Pac. 912; Bittinger v. Bell, 65 Ind. 445. Cooley, Taxation (2d Ed.) p. 764.

[138] Chicago, M. & St. P. R. Co. v. Phillips, 111 Iowa, 377, 82 N. W. 787; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701; Parrotte v. City of Omaha, 61 Neb. 96, 84 N. W. 602.

[139] Board of Liquidation v. McComb, 92 U. S. 531. Cooley, Taxation (2d Ed.) pp. 766, 767.

[140] United States v. Lee, 106 U. S. 196; Phelan v. Smith, 22 Wash. 397, 51 Pac. 31.

[141] Union Trust Co. v. Weber, 96 Ill. 346; Bristol v. Johnson, 34 Mich. 123; Horn v. Town of New Lots, 83 N. Y. 100.

[142] Allen v. Baltimore & O. R. Co., 114 U. S. 311; Stilz v. City of Indianapolis, 81 Ind. 582; Willard v. Comstock, 58 Wis. 565.

§ 629. Waste of public property.*

A taxpayer or property owner has also the undoubted right to prevent by injunction public authorities from wasting or illegally disposing of public property,[144] or to restrain the diversion or misappropriation of property which a public corporation holds, acquired either by private gift or through the use of public moneys as a trustee for special uses and purposes.[145] This right in some states is definitely given by statute.[146] In accord with this same principle, it has been held in many cases that private persons may oppose and prevent the making of illegal contracts which involve the use of public moneys or property[147] or the granting of licenses and privileges by public legislative bodies which, although apparently within their discretionary powers, yet in effect result in a waste, misappropriation, or misuse of public funds or property.[148]

§ 630. Recovery of tax.

The right of a taxpayer to recover a tax, whether general or a local assessment wrongfully collected by some taxing body, is generally a matter of statute where the necessary procedure is prescribed.[149] The right, whether statutory or otherwise, is dependent upon the existence of certain fundamental essentials which include as the important ones the condition that the tax must be utterly illegal and void;[150] that it must have been paid by the complainant under compulsion[151] to some official charged

* 8 Curr. Law, 288.

[144] State Railroad Tax Cases, 92 U. S. 575.

[144] Chamberlain v. City of Tampa, 40 Fla. 74, 23 So. 572; Furey v. Town of Gravesend, 104 N. Y. 405.

[145] Rutherford v. Taylor, 38 Mo. 315.

[146] Barnes v. McGuire, 33 Misc. 438, 68 N. Y. Supp. 485.

[147] Mock v. City of Santa Rosa, 126 Cal. 330, 58 Pac. 826; Hendrickson v. City of New York, 160 N. Y. 144, 54 N. E. 680.

[148] State v. Murphy, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132.

[149] Bibbins v. Clark, 90 Iowa, 230, 57 N. W. 884, 59 N. W. 290, 29 L. R. A. 278. See Cooley, Taxation (2d Ed.) pp. 804 et seq., with many cases cited.

[150] Rogers v. Inhabitants of Greenbush, 58 Me. 390; Hicks v. Inhabitants of Westport, 130 Mass. 478; Moore v. City of Albany, 98 N. Y. 396. Cooley, Taxation (2d Ed.) p. 808.

[151] Russell v. City of New Haven, 51 Conn. 259; McGehee v. City of Columbus, 69 Ga. 581. Cooley, Tax-

by law with the duty of collecting it, and received by the corporation from which it is sought to be recovered,[152] and that the plaintiff is not prevented through a previous election of remedies from prosecuting the action under consideration.

§ 631. Power to sue.*

The right and power of a public corporation to sue generally exists without the grant of special authority though this may be necessary.[153] Claims and demands whatever their nature may be enforced by use of the remedies and under the procedure governing the private litigant.[154] The power to sue includes as a subordinate or lesser right the power to compromise a claim.[155] The action or proceeding must be brought or authorized, however, by that officer or official body charged by law with the exercise of this particular power,[156] and the same rule applies to the compromise of a claim.[157]

ation (2d Ed.) p. 809. As to character of protest see the following: Union Pac. R. Co. v. Dodge County Com'rs, 98 U. S. 541; Durham v. Montgomery County Com'rs, 95 Ind. 182; City of Muscatine v. Keokuk Northern Line Packet Co., 45 Iowa, 185; Peebles v. City of Pittsburg, 101 Pa. 304.

[152] Dickey v. Polk County, 58 Iowa, 287, 12 N. W. 290; Slack v. Town of Norwich, 32 Vt. 818; Phillips v. City of Stevens Point, 25 Wis. 595.

* 6 Curr. Law, 738.

[153] Wolffe v. State, 79 Ala. 201; El Dorado County v. Meiss, 100 Cal. 268, 34 Pac. 716; Polk County v. Sherman, 99 Iowa, 60, 68 N. W. 562; Town of South Portland v. Town of Cape Elizabeth, 92 Me. 328, 42 Atl. 503; Lancaster County v. City of Lancaster, 160 Pa. 411, 28 Atl. 854; City of Janesville v. Milwaukee & M. R. Co., 7 Wis. 484; Colusa Co. v. Glenn County, 117 Cal. 434, 49 Pac. 457; State v. Travis County, 85 Tex. 435, 21 S. W. 1029.

[154] Marion County v. McIntyre, 2 McCrary, 143, 10 Fed. 543; Gaston v. State, 88 Ala. 459, 7 So. 340; City of Chicago v. Wright, 69 Ill. 318; State v. Metschan, 32 Or. 372, 41 L. R. A. 692; State v. Evans, 33 S. C. 184, 11 S. E. 697.

[155] People v. San Francisco City & County Sup'rs, 27 Cal. 655; Agnew v. Brall, 124 Ill. 312, 16 N. E. 230; Clark v. Village of Davison, 118 Mich. 420, 76 N. W. 971; O'Brien v. City of New York, 160 N. Y. 691, 55 N. E. 1098; Smith v. Borough of Wilkinsburg, 172 Pa. 121, 33 Atl. 171.

[156] Missouri v. Luce, 62 Fed. 417; Winne v. People, 177 Ill. 268, 52 N. E. 377; City of Rockland v. Ulmer, 87 Me. 357, 32 Atl. 972; Lincoln St. R. Co. v. City of Lincoln, 61 Neb. 109, 84 N. W. 802; City of Seattle v. McDonald, 26 Wash. 98, 66 Pac. 145; City of Milwaukee v. Herman Zoehrlaut Leather Co., 114 Wis. 276, 90 N. W. 187.

[157] Town of Kankakee v. Kankakee & I. R. Co., 115 Ill. 88.

§ 632. Defenses.

The subject of defenses naturally is considered in the discussion of the rights and powers of parties in respect to the questions the subject of particular litigation. These have already been considered under their appropriate heads in previous sections of this work. The statute of limitations whether general or special provisions as a defense is open equally to public corporations as to private individuals,[158] and also the defenses of laches,[159] lack of power, fraud,[160] and absence of liability either as to a particular case or generally.[161] The principles which determine the availability of these and many other defenses have already been sufficiently considered and the reader is referred to the index for the subject in which he is especially interested.

§ 633. Execution.*

The property of public corporations acquired by them for public purposes and in their capacity as governmental agents is held

[158] Cressey v. Meyer, 138 U. S. 525; Cross v. Grant County Com'rs, 9 N. M. 410, 54 Pac. 880; Ralston v. Town of Weston, 46 W. V. 544, 33 S. E. 326; Preston v. City of Louisville, 84 Ky. 118; Klass v. City of Detroit, 129 Mich. 35, 88 N. W. 204; Swaney v. Gage County, 64 Neb. 627, 90 N. W. 542; Hartman v. Hunter, 56 Ohio St. 175, 46 N. E. 577; Municipal Security Co. v. Baker County, 39 Or. 396, 65 Pac. 369; State v. Town of McMinnville, 106 Tenn. 384, 61 S. W. 785.

[159] City of Helena v. United States, 104 Fed. 113; Hayday v. Ocean City, 67 N. J. Law, 155, 50 Atl. 584; Commonwealth v. Bala & B. M. Turnpike Co., 153 Pa. 47, 25 Atl. 1105; State v. Sponaugle, 45 W. Va. 415, 32 E. 283, 43 L. R. A. 727.

[160] Weston v. City of Syracuse, 158 N. Y. 274, 53 N. E. 12, 43 L. R. A. 678.

[161] City of Davenport v. Lord, 76 U. S. (9 Wall.) 409; Denison v. City of Columbus, 62 Fed. 775; City of Gladstone v. Throop (C. C. A.) 71 Fed. 341; Second Ward Sav. Bank v. City of Huron, 80 Fed. 660. That the proceeds of municipal bonds were used for illegal purposes is no defense in an action on them. People v. Talmadge, 194 Ill. 67, 61 N. E. 1049; Kansas City v. McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429; Bank of Santa Fe v. Board of Com'rs of Haskell County, 61 Kan. 785, 60 Pac. 1062; Neosho City Water Co. v. City of Neosho, 136 Mo. 498; F. C. Austin Mfg. Co. v. Brown County, 65 Neb. 60, 90 N. W. 929; Manchester & K. R. Co. v. City of Keene, 62 N. H. 81; Street v. Craven County Com'rs, 70 N. C. 644; Scranton v. Jermyn, 156 Pa. 107, 27 Atl. 66; Knapp v. City of Hoboken, 39 N. J. Law, 394.

* 6 Curr. Law, 738.

in trust for the public for the uses and purposes for which acquired.[162] This trust property cannot be reached by process and sold to satisfy their debts no more than can other trust property be sold to satisfy the individual debts of any other trustee.[163] A judgment, therefore, in the absence of express statutory provisions against a public corporation, cannot be enforced by execution,[164] neither is it a lien upon any of its property.[165] Specific property may by law, however, be made subject to process or the collection of a judgment authorized in a designated manner.[166] The remedy ordinarily available is writ of mandamus directed to the proper officers to compel the levy of a tax sufficient to pay the obligation,[167] or where the judgment is against the state to secure an appropriation from the legislature for its payment.[168] This principle has been universally adopted on the grounds of public policy since it is not considered permissible or advisable that the state or a governmental agent should be hampered or prevented through a loss of its public property from exercising its public powers or carrying out its governmental functions.[169] It has, however, been modified in some instances by confining its applica-

[162] Mobile Transp. Co. v. City of Mobile, 128 Ala. 335, 30 So. 645; City of Oakland v. Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277; Ransom v. Boal, 29 Iowa, 68; Mariner v. Mackey, 25 Kan. 669; Carter v. State, 42 La. Ann. 927, 8 So. 836; Darling v. City of Baltimore, 51 Md. 1; Burlington Mfg. Co. v. Board of Courthouse & City Hall Com'rs, 67 Minn. 327, 69 N. W. 1091; Foster v. Fowler, 60 Pa. 27; Hicks v. Roanoke Brick Co., 94 Va. 741, 27 S. E. 596; Brown v. Gates, 15 W. Va. 131. But see City of Louisville v. University of Louisville, 54 Ky. (15 B. Mon.) 642.

[163] Sioux City v. Weare, 59 Iowa, 95.

[164] Weaver v. Ogden City, 111 Fed. 323; Village of Dolton v. Dolton, 196 Ill. 154, 63 N. E. 642; Lyon v. Elizabeth City, 43 N. J. Law, 158; but see Littlefield v. Inhabitants of Grenefield, 69 Me. 86; Coler v. Coppin, 7 N. D. 418, 75 N. W. 795; Gordon v. Thorp (Tex. Civ. App.) 53 S. W. 357.

[165] Whiteside v. School Dist. No. 5, 20 Mont. 44, 49 Pac. 445.

[166] Buck v. City of Eureka, 119 Cal. 44, 50 Pac. 1065; Mason v. Commissioners of Roads & Revenues, 104 Ga. 35, 30 S. E. 513; People v. Chicago & A. R. Co., 193 Ill. 364, 61 N. E. 1063; Fernandez v. City of New Orleans, 50 La. Ann. 485, 23 So. 611; Griswold v. City of Ludington, 117 Mich. 317, 75 N. W. 609.

[167] Miller v. McWilliams, 50 Ala. 427; City of Chicago v. Sansum, 87 Ill. 182; Alter v. State, 62 Neb. 239, 86 N. W. 1080.

[168] Clements v. State, 77 N. C. 142.

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

tion to property absolutely essential to the existence of the corporation or necessary and useful to the exercise of governmental powers or the performance of public duties.[170] Property held by public corporation as an investment of funds merely, for the purposes of income or for sale and unconnected with purposes of municipal government,[171] or in its proprietary or private capacity,[172] can be seized upon execution for the debts of the corporation.

[170] City of New Orleans v. Home Mut. Ins. Co., 23 La. Ann. 61.

[171] Darlington v. City of New York, 31 N. Y. 164.

[172] City of New Orleans v. Morris, 3 Woods (C. C.) 115, Fed. Cas. No. 10,183; City of Birmingham v. Rumsey, 63 Ala. 352.

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