A TREATISE

ON THE LAW OF

MUNICIPAL CORPORATIONS

BY

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PUBLIC PROPERTY.

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(For Partial Analysis of this Subdivision see Vol. II, p. 1893, and its completion, Vol. III, p. 1981.)

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§ 835. Railroads in streets.

A very large proportion of the highways of this country are permanently occupied in part by railroads. The litigation in connection with this occupation has been great. The losses and annoy-

ance suffered by abutting property owners has been a question for much discussion and the law still differs upon important questions in the different states. It is well known as a matter of common observation that there exists different classes of railroads and the law with respect to the rights of each of these divisions varies although in many cases upon an assumed rather than a real and substantial basis of difference. The kind of equipment and method of operation, a difference in motive power, the character of the services rendered, whether local or otherwise, have each in turn served as a basis for distinction in the application of conceded principles of law.[707]

§ 836. Classification of railroads.

Mechanical and commercial conditions connected with the transportation of both freight and passengers are constantly changing in the United States and the future is likely to see as great a development and change as the past has witnessed It is an impossibility, therefore, to make a classification which will serve as a basis of a legal discussion by which any set of principles can be definitely stated as rigidly applying to one class of railroads and not to another. The extension of the trolley car system from a mere local street road, entirely within the limits of a village or city, to a system extending from one town to another and adapted and designed for carrying both passengers, freight and express matter, is a good illustration of a change which has very recently taken place and which must necessarily lead to a shifting of distinctions in a determination of the rights of both abutters and municipalities. The classification commonly adopted at the present time, however, is that of commercial or steam and street railroads, the latter including those constructed and intended solely for the transportation of local passenger traffic within and along the streets of towns and cities irrespective of the motive power whether that be horse, electric, steam or cable, and whether the road be upon, over or under the surface of the streets.[708]

[707] Massachusetts Loan & Trust Co. v. Hamilton, 88 Fed. 588, 32 C. C. A. 46. The word "railroad" has no such fixed meaning as will enable a court to decide whether it applies to street railways without the use of other language. Kane v. New York El. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640.

[708] Williams v. City Elec. St. R.

§ 837. Authority for occupation of highways.

The highways of the country in common with all other public property are under the direct and ultimate authority of the different state legislatures as representing the law-making branch of the sovereign body.[709] They have the right to grant the authority to persons or corporations to use these highways 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.[710] 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, and which, because of the existence of this legislative grant, are not to be regarded as public nuisances or as interfering with the

Co., 41 Fed. 556; Board of Railroad Com'rs v. Market St. R. Co., 132 Cal. 677, 64 Pac. 1065. Street railway companies are not railroad or transportation companies within the meaning of Constitution, art. 12, § 22, defining the jurisdiction of a railroad commission and authorizing it to establish rates of charges for the transportation of passengers and freight by railroad and other transportation companies.

Newell v. Minneapolis, L. & M. R. Co., 35 Minn. 112; Appeal of Montgomery, 136 Pa. 96, 20 Atl. 399, 9 L. R. A. 369. By the way the terms "railroad" and "railway" are used in the Constitution of Pa., art. 17, it is evident that "railroad" is applied to steam railroads and "railway" to street railways. Rafferty v. Central Traction Co., 147 Pa. 579.

[709] Daly v. Georgia S. & F. R. Co., 80 Ga. 793, 7 S. E. 146; Davis v. East Tennessee, V. & G. R. Co., 87 Ga. 605, 13 S. E. 567, following Daly v. Georgia, Southern & F. R. Co., 80 Ga. 793.

Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610. The legislature may provide for the construction of a railroad subway in a city without its consent though this deprives it, to a certain extent, of the control of the street. Powers given cities or town by general or special laws do not become vested rights as against the legislature. Com. v. Erie & N. E. R. Co., 27 Pa. 339. See, also, § 851, post.

[710] Burns v. Multnomah R. Co., 15 Fed. 177. This power is limited, however, to grants of authority upon legal highways only. Brown v. Atlanta R. & Power Co., 113 Ga. 462, 39 S. E. 71; County of Stearns v. St. Cloud, M. & A. R. Co., 36 Minn. 425, 32 N. W. 91; State v. Corrigan Consol. St. R. Co., 85 Mo. 263. The principle applies only with respect to street railways.

Inhabitants of Burlington v.

legitimate or legal use of the highways.[711] This power is ample and, like all other legislative powers, continuing in its nature, and its existence has never been seriously questioned. The grant, though, is always taken 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.[712]

§ 838. Power indirectly exercised.

Since the legislative authority in respect to the subject under discussion is so sufficient, it is held without question that it is competent for that body 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 that, if neither constitutional nor statutory provisions have been violated in the grant of these rights by municipal authorities, the one to whom they have been granted may exercise them as fully and as

Pennsylvania R. Co., 56 N. J. Eq. 259, 38 Atl. 849; New York & H. R. Co. v. Forty-second St. & G. St. Ferry R. Co., 50 Barb. (N. Y.) 309; People v. Board of Railroad Com'rs, 42 App. Div. 366, 59 N. Y. Supp. 144; Eldert v. Long Island Elec. R. Co., 165 N. Y. 651, 59 N. E. 1122, affirming 28 App. Div. 451, 51 N. Y. Supp. 186. The occupation of a highway by railroad structures in the absence of authority constitutes a nuisance. Hoey v. Gilroy, 129 N. Y. 132, 29 N. E. 85; Lockhart v. Craig St. R. Co., 139 Pa. 419, 21 Atl. 26.

[711] Edwardsville R. Co. v. Sawyer, 92 Ill. 377. The question of right is one between the public authorities and the railroad company. Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 8 N. E. 460; Town of Newcastle v. Lake Erie & W. R. Co., 155 Ind. 18, 57 N. E. 516; Milburn v. City of Cedar Rapids, 12 Iowa, 246; Ingram v. Chicago, D. & M. R. Co., 38 Iowa, 669. The repeal of a city ordinance by authority of which a street railway was built does not render its use of the highway necessarily a nuisance. Tate v. M., K. & T. R. Co., 64 Mo. 149; Randle v. Pacific R. Co., 65 Mo. 325; Redford v. Coggeshall, 19 R. I. 313, 36 Atl. 89; Schwede v. Hemrich Bros. Brew. Co., 29 Wash. 21, 69 Pac. 362.

[712] Daly v. Georgia S. & F. R. Co., 80 Ga. 793, 7 S. E. 146; Protzman v. Indianapolis & C. R. Co., 9 Ind. 467; People v. Keating, 62 App. Div. 348, 71 N. Y. Supp. 97; People v. Loew, 102 N. Y. 471; Reining v. New York L. & W. R. Co., 128 N. Y. 157, 28 N. E. 640, 14 L. R. A. 133, affirming 35 State Rep. 731, 13 N. Y. Supp. 238; Cincinnati & S. G. A. St. R. Co. v. Village of Cumminsville, 14 Ohio St. 523; Potts v. Quaker City El. R. Co., 161 Pa. 396, 29 Atl. 108; Pomeroy v. Milwaukee & C. R. Co., 16 Wis. 640.

freely as if granted by the legislature itself, subject, however, to such limitations or restrictions as may appear in the original grant.[713] Equally with the legislature, a subordinate public corporation has the right to exercise the police power in connection with the operation of the granted franchise or right and this is true although the power may not be directly given; for the right to exercise the police power in the protection of the property, lives and health of a community, is usually regarded as one impliedly possessed by subordinate corporations because necessary to the proper exercise of powers granted and even the existence of the corporation itself.[714] Some authorities go, moreover, to the extent of holding that the right to exercise the police power is inherent in every community irrespective or independent of other public corporations or even the sovereign power itself.[715]

§ 839. Authority as dependent upon abutter's consent.

The right of an abutter to control in a limited way the use of a highway adjoining his property for the better protection of his rights is recognized in many instances, and the use of a highway

[713] Detroit Citizens' St. R. Co. v. Detroit R. Co., 171 U. S. 48; City of Olney v. Wharf, 115 Ill. 519, 56 Am. Rep. 178. A town owning the fee of its streets is not liable for damages resulting from the grant of authority to a railroad company to construct its lines through the town.

North Chicago St. R. Co. v. Dudgeon, 184 Ill. 477, 56 N. E. 796. A permit to a street railroad to relay its track includes, necessarily, the right to take up the paving.

Eichels v. Evansville St. R. Co., 78 Ind. 261; Hedrick v. City of Olathe, 30 Kan. 348. A city is not liable to an adjacent lot owner for damage caused to his lot by the occupation of a street under legislative authority. The owner's claim, if any, is against the railroad company.

New York & H. R. Co. v. City of New York, 1 Hilt. (N. Y.) 562; Williams v. New York Cent. R. Co., 18 Barb. (N. Y.) 222; Gusthal v. Strong, 23 App. Div. 315, 48 N. Y. Supp. 652. By law a municipal corporation may be prohibited from granting a franchise for a longer period than twenty-five years.

Beekman v. Third Ave. R. Co., 153 N. Y. 144, 47 N. E. 277; Simmons v. City of Toledo, 5 Ohio Circ. R. 124. One not an abutting owner cannot raise the question of an excess of municipal authority.

Lockhart v. Craig St. R. Co., 139 St. 419, 21 Atl. 26. The fact that a street has been paved with asphalt at the cost of abutting owners does not affect the right of the municipality to grant the authority.

[714] See §§ 853–4, post.

[715] See §§ 115 et seq., ante.

by a railway whether the grant comes from the state or one of its subordinate agencies is made dependent upon the consent of the abutting owners or a certain proportion of them.[716] This condition has been held valid without exception and its enforcement affords a degree of security from loss and annoyance which can be attained in no other way.

[716] South Carolina R. Co. v. Steiner, 44 Ga. 546; Schuchert v. Wabash, C. & W. R. Co., 10 Ill. App. 397; Bez v. Chicago, R. I. & P. R. Co., 23 Ill. App. 137; Chicago & W. I. R. Co. v. Dunbar, 100 Ill. 110; Chicago Dock & Canal Co. v. Garrity, 115 Ill. 155; Doane v. Lake St. El. R. Co., 165 Ill. 510, 36 L. R. A. 97; Tilton v. New Orleans City R. Co., 35 La. Ann. 1062. Acquiescence by abutters is presumed by lapse of time.

Lincoln St. R. Co. v. City of Lincoln, 61 Neb. 109, 84 N. W. 802; Currie v. Atlantic City, 66 N. J. Law, 140, 48 Atl. 615. Consent in writing cannot be withdrawn after the resulting jurisdiction has vested in the municipality. Rehearing denied. Currie v. Atlantic City St. R. Co., 66 N. J. Law, 149, 48 Atl. 1116. An owner can only consent with respect to that portion of his property which is within the city limits.

Orton v. Borough of Metuchen, 66 N. J. Law, 572, 49 Atl. 814; Currie v. City of Atlantic City, 66 N. J. Law, 671, 50 Atl. 504; Paterson R. Co. v. Grundy, 51 N. J. Eq. 213; In re Saratoga Elec. R. Co., 58 Hun, 287, 12 N. Y. Supp. 318; In re New York Cable R. Co., 109 N. Y. 32, 15 N. E. 882; construing N. Y. Rapid Transit Act; In re Cortland & H. Horse R. Co., 31 Hun (N. Y.) 72; Case v. Cayuga County, 88 Hun, 59, 34 N. Y. Supp. 595.

Black v. Brooklyn Heights R. Co., 32 App. Div. 468, 53 N. Y. Supp. 312. A reasonable time may be allowed in which to obtain consent after the construction of the road. Kunz v. Brooklyn Heights R. Co., 25 Misc. 334, 54 N. Y. Supp. 187. The consent of abutting owners need not be obtained for the construction of a connecting curve between two street railway tracks.

Adee v. Nassau Elec. R. Co., 65 App. Div. 529, 72 N. Y. Supp. 992. The burden is on the party claiming a consent to be ineffectual. The consent as provided in the railroad law, § 91, may be executed and recorded at different times.

In re Kingsbridge R. Co., 66 App. Div. 497, 73 N. Y. Supp. 440; In re Kings County El. R. Co., 82 N. Y. 95; In re Thirty-fourth St. R. Co., 102 N. Y. 343; In re Kings County El. R. Co., 105 N. Y. 97; Geneva & W. R. Co. v. New York Cent. & H. R. R. Co., 163 N. Y. 228, 57 N. E. 498. An assignment may be made of the rights of the grantee.

Cincinnati College v. Nesmith, 2 Cin. R. (Ohio) 24; Roberts v. Easton, 19 Ohio St. 78; Harner v. Columbus St. Car R. Co., 29 Wkly. Law Bul. (Ohio) 387; Glidden v. City of Cincinnati, 30 Wkly. Law Bul. (Ohio) 213. The rights of abutting property owners can only be maintained by them and in respect to their own property.

Mt. Auburn Cable R. Co. v. Neare, 54 Ohio St. 153, 42 N. E. 768. Consent necessary to validity of franchise for an extension. Hannum v.

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.[717] The abutter's consent, it is held, is only necessary to the authority for the construction of the line, not to the mode or manner of the construction or the operation of the railway [718] unless statutes otherwise provide.[719]

§ 840. 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. Railroads of all classes are permanent obstructions, in a greater or less degree, of a highway, and without legislative authority, as already stated, they would be regarded as nuisances and subject to removal. The grant of this authority legalizes only their use of a highway but does not pass upon the other question involved and discussed in this and succeeding sections. 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. The necessity and the occasion for the exercise of such power have already been considered.[720] Private property, however, cannot be taken even for a public use without the payment of just compensation.[721] The

Media, M., A. & C. Elec. R. Co., 200 Pa. 44, 49 Atl. 789. The burden of proof is on the railroad company to show such consent. Commonwealth v. Central Pass. R. Co., 52 Pa. 506; Nellis, Street Surface Railroads, c. 2, sec. 6. See authorities cited Century Digest, vol. 44, col. 3205 et seq.

[717] 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.

[718] Sloane v. Peoples' Elec. R. Co., 7 Ohio Cir. R. 84. But see In re Rochester & L. O. R. Co., 51 App. Div. 65, 64 N. Y. Supp. 429. N. Y. Laws 1890, c. 565, § 100, requires abutter's consent to a change in the motive power of the street railway.

[719] In re Third Ave. R. Co., 121 N. Y. 536, 24 N. E. 951, 9 L. R. A. 124, reversing 56 Hun, 537, 9 N. Y. Supp. 833; People v. Roberts, 156 N. Y. 693, 51 N. E. 1093.

[720] See §§ 743 et seq., ante.

[721] City of New Haven v. New Haven & D. R. Co., 62 Conn. 252, 25 Atl. 316, 18 L. R. A. 256. See, also, §§ 787 et seq., ante.

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. A highway, including rural and urban, is regarded as a means or agency of passing and repassing,[722] and of supplying to the abutting owner the easements of light, air and access to his property.[723] The question of compensation in some jurisdictions has been made also somewhat dependent upon the fact of whether the title to the highway is vested in the public or in the abutting owner [724] and upon the question of whether the use is regarded as a legitimate use of the highway or an additional servitude and, further, upon a consideration of the abutter's special rights in property which are those enjoyed by him in common with the public, and in addition the easements of air, light and access to his property and [725] in many states a reversionary interest.

§ 841. 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.[726]

[722] See §§ 787 et seq., ante.

[723] See §§ 422, 809, 817 et seq., 825 and 828, ante, and 847, 848 post.

[724] See post, §§ 847, 848.

[725] Pittsburgh, Ft. W. & C. R. Co. v. Reich, 101 Ill. 157; Shaw v. Boston & A. R. Co., 159 Mass. 597, 35 N. E. 92.

[726] Western R. of Alabama v. Alabama G. T. R. Co., 96 Ala. 272, 11 So. 483, 17 L. R. A. 474; St. Louis, I. M. & S. R. Co. v. Petty, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434; Southern Pac. R. Co. v. Reed, 41 Cal. 256; City of New Haven v. New Haven & D. R. Co., 62 Conn. 252, 25 Atl. 316, 18 L. R. A. 256; Denver Circle R. Co. v. Nestor, 10 Colo. 403, 15 Pac. 714; South Carolina R. Co. v. Steiner, 44 Ga. 546; Frith v. City of Dubuque, 45 Iowa, 406; Stange v. City of Dubuque, 62 Iowa, 303; Hedrick v. City of Olathe, 30 Kan. 348; Ruttle v. City of Covington, 10 Ky. L. R. 766, 10 S. W. 644; Bradley v.

There are some cases holding to the contrary [727] 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. This holding is based with other reasons, upon the conditions found existing in connection with the construction and operation of steam railways. The nature of their roadbed and the manner of its construction, their equipment and motive power, the character of the traffic carried and the practically exclusive use of the ground occupied by them, are facts which have been considered by the courts and have lead to the adoption of the rule given

Pharr, 45 La. Ann. 426, 19 L. R. A. 647.

Hoffman v. Flint & P. M. R. Co., 114 Mich. 316, 72 N. W. 167. The right to recover compensation on the part of the abutting owner is in one having title to the property. Carli v. Stillwater St. R. & T. Co., 28 Minn. 373, 10 N. W. 205. A street railroad used solely as a freight transfer track between two steam railroads running into a city is an additional servitude for which abutting owners can recover compensation.

Kaje v. Chicago, St. P., M. & O. R. Co., 57 Minn. 422, 59 N. W. 493; Sherlock v. Kansas City Belt R. Co., 142 Mo. 172; Butte, A. & P. R. Co. v. Montana Union R. Co., 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298; Williams v. New York Cent. R. Co., 16 N. Y. 97; Craig v. Rochester City & B. R. Co., 39 N. Y. 404; White v. Northwestern North Carolina R. Co., 113 N. C. 610, 18 S. E. 330, 22 L. R. A. 627; Willamette Iron Works Co. v. Oregon R. & Nav. Co., 26 Or. 224, 37 Pac. 1016, 29 L. R. A. 88; Blesch v. Chicago & N. W. R. Co., 43 Wis. 183. The proposition is too well established to warrant the citation of other cases. See Lewis, Em. Dom. (2d Ed.) § 111; Elliott, R. R. § 1087; Dillon, Mun. Corp. (4th Ed.) § 725. The laying of additional tracks it has been held in some cases entitle the abutting property owner to further compensation. See the following cases: Southern Pac. R. Co. v. Reed, 41 Cal. 256; Bond v. Pennsylvania Co., 171 Ill. 508, 49 N. E. 545; Davenport & R. I. Bridge R. & Terminal R. Co. v. Johnson, 188 Ill. 472, 59 N. E. 497; Rock Island & P. R. Co. v. Johnson, 204 Ill. 488, 68 N. E. 549; Stephens v. New York, O. & W. R. Co., 175 N. Y. 72, 67 N. E. 119.

[727] Montgomery v. Santa Ana W. R. Co., 104 Cal. 186, 25 L. R. A. 654; Moses v. Pittsburgh, Ft. W. & C. R. Co., 21 Ill. 516; City of Alney v. Wharf, 115 Ill. 519; Fulton v. Short Route R. Transfer Co., 85 Ky. 640; Hepting v. New Orleans Pac. R. Co., 36 La. Ann. 898; Porter v. North Missouri R. Co., 33 Mo. 128; Tate v. M., K. & T. R. Co., 64 Mo. 149; De Geofroy v. Merchants' Bridge Terminal R. Co., 179 Mo. 698, 79 S. W. 386; Morris & E. R. Co. v. City of Newark, 10 N. J. Eq. (2 Stockt.) 352; Drake v. Hudson River R. Co., 7 Barb. (N. Y.) 508; Yates v. Town of West Grafton, 34 W. Va. 783, 12 S. E. 1075.

Some early cases in Iowa and Illinois hold the doctrine of no right to compensation but these have been

above.[728] Since the legislature directly or indirectly can authorize the use of a highway by either a steam or a street railroad, the

overruled by the latter ones: See Indianapolis, B. & W. R. Co. v. Hartley, 67 Ill. 439; Kucheman v. C., C. & D. R. Co., 46 Iowa, 366. See, also, the cases of Hoffman v. Flint & P. M. R. Co., 114 Mich. 316, 72 N. W. 167; Coatsworth v. Lehigh Valley R. Co., 156 N. Y. 451.

[728] See authorities cited in two preceding notes. Mordhurst v. Ft. Wayne & S. W. Traction Co., 163 Ind. 268, 71 N. E. 642. On page 278 of the report it is said by the court in distinguishing between the use of a street by a street railroad and an ordinary commercial road: "This distinction does not rest upon a difference in name—one being denominated a street railroad or a passenger railroad, and the other a commercial or freight railroad—nor upon the motive power employed, nor upon the kind of rail used, nor upon the length of the railroad. It results from the nature of the business done by each of the two kinds of railroads, and the physical agencies and manner by which and in which that business is carried on. Those of the one are consistent with the use of the street by the lot owner and the general public, and, if not directly beneficial to the abutting real estate, are not detrimental to it. They relieve the streets from some of the burdens of travel upon it, they facilitate travel between different parts of the city, and they enhance the value of abutting property by increasing the convenience of access to it. The business of the other class of railroads, and the means by which it is necessarily carried on, require the service of entirely dissimilar agencies and methods. Great trains of cars moving along the streets, or standing upon them, are real and serious obstructions to all other uses of the highway. Such trains make a loud noise by day and by night, and disturb the quiet of neighborhoods. Access to abutting property is rendered difficult and dangerous, and the jarring and shaking of buildings is annoying to the occupants, and often injurious to the structures themselves. If the cars are propelled by steam, then there is the additional inconvenience of smoke, cinders, sparks, the blowing off of steam, the ringing of the engine bell, and the whistling of the locomotive. There are good and substantial reasons why compensation should be paid to the owners of abutting lots when a street in a city is used for such a purpose and in such a manner."

Rische v. Texas Transp. Co., 27 Tex. Civ. App. 33, 66 S. W. 324. "It was first held that street cars drawn by horses, and used for the transportation of passengers from one part of a city to another, did not constitute an additional servitude on the streets. They were distinguished from steam railways in the rails and construction of the track, the speed at which they run, the noise and vibration produced, the smoke and steam emitted, the danger of frightening horses, the danger to life, and the size and weight of cars and locomotives. When the steam motor and electric cars were invented, all the reasons given why horse railways were not

right of the abutter to compensation, if any, is against the railroad company and not against the public corporation.[729]

§ 842. Right to compensation as dependent upon abutter's interest in a highway.

The right of the abutting owner to compensation for an occupation of the street is also made 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.[730] The fee, again, may rest in the public without a reversionary interest in the abutting owner. This latter condition does not, as seen, give to the public an indiscriminate right of use to the property. A highway, even where the fee is vested in the public, can be acquired and maintained only because of its public character and use for legitimate purposes.[731]

Where the fee belongs to the abutting owner he is 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. The question has been fully considered in previous sections.[732] In addition, he is also entitled to his rights in common with the public and to his easements of light, air and access. 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.[733]

an additional servitude to streets were ignored except that they must be carriers of passengers, and not a freight, from one point to another in a city."

[729] Bancroft v. City of San Diego, 120 Cal. 342, 52 Pac. 712; Burkam v. Ohio & M. R. Co., 122 Ind. 344, 23 N. E. 799; Duke v. Baltimore & C. V. R. Extension Co., 129 Pa. 422, 18 Atl. 566.

[730] Philadelphia & T. R. Co. v. Philadelphia & B. Pass. R. Co., 6 Pa. Dist. R. 487. The diversion of travel from one side of the street to the other is not regarded as an additional servitude even though occasioned by the construction of a railroad upon one side, the abutting owners having the fee only to the middle of the street.

[731] See §§ 422 et seq., and 797 et seq., ante.

[732] See §§ 817 et seq.

[733] Alabama G. S. R. Co. v. Collier, 112 Ala. 681; Reichert v. St.

§ 843. 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.[734] These rights are not at all dependent upon the character of the title resting in the

Louis & S. F. R. Co., 51 Ark. 491, 5 L. R. A. 183; Weyl v. Sonoma Valley R. Co., 69 Cal. 202; Imlay v. Union Branch R. Co., 26 Conn. 249; Bond v. Pennsylvania Co., 171 Ill. 508; Cox v. Louisville, N. A. & C. R. Co., 48 Ind. 178; Terre Haute & L. R. Co. v. Bissell, 108 Ind. 113; Strickler v. Midland R. Co., 125 Ind. 412; Phipps v. W. Md. R. Co., 66 Md. 319; Hartz v. St. Paul & S. C. R. Co., 21 Minn 358; Papooshek v. Winona, etc., R. Co., 44 Minn. 195, 46 N. W. 329; Grand Rapids & Ind. R. Co. v. Heisel, 47 Mich. 393; Gustafson v. Hamm, 56 Minn. 334, 57 N. W. 1054, 22 L. R. A. 565; Theobald v. Louisville, N. O. & T. R. Co., 66 Miss. 279, 6 So. 230, 4 L. R. A. 735; Starr v. Camden & A. R. Co., 24 N. J. Law (4 Zab.) 592; White v. Northwestern North Carolina R. Co., 113 N. C. 610, 18 S. E. 330; Lawrence R. Co. v. Williams, 35 Ohio St. 168; Harmon v. Louisville, N. O. & T. R. Co., 87 Tenn. 614; Hodges v. Seaboard & R. R. Co., 88 Va. 653, 14 S. E. 380; Hanlin v. Chicago & N. W. R. Co., 61 Wis. 515; Frey v. Duluth, S. S. & A. R. Co., 91 Wis. 309. See § 817 et seq. See, also, cases cited under first note of § 841, ante. But see to the contrary cases cited under second note of preceding section and among others Mobile & M. R. Co. v. Alabama Midland R. Co., 116 Ala. 51; Harrison v. New Orleans Pac. R. Co., 34 La. Ann. 462.

[734] Western R. Co. of Ala. v. Alabama G. T. R. Co., 96 Ala. 272, 11 So. 483, 17 L. R. A. 474; Ford v. Santa Cruz R. Co., 59 Cal. 290; Florida So. R. Co. v. Brown, 23 Fla. 104, 1 So. 512; South Carolina R. Co. v. Steiner, 44 Ga. 546; Dantzer v. Indianapolis Union R. Co., 141 Ind. 604, 39 N. E. 223, 34 L. R. A. 769. An abutting owner cannot recover for obstructions placed on that half of the street opposite his property.

Pittsburgh, C., C. & St. L. R. Co. v. Noftsger, 148 Ind. 101, 47 N. E. 332. But this case also holds that an abutting owner cannot recover damages for increased danger from fire nor for injuries suffered by the public at large. Fort Scott, W. & W. R. Co. v. Fox, 42 Kan. 490, 22 Pac. 583; Adams v. Chicago B. & N. R. Co., 39 Minn. 286, 39 N. W. 629, 1 L. R. A. 493; Randle v. Pacific R. Co., 65 Mo. 325. But see Jacksonville, T. & K. W. R. Co. v. Thompson, 34 Fla. 346, 16 So. 282, 26 L. R. A. 410.

The limit of this work forbid a further discussion of the subject or citation of authorities and the reader is referred to Lewis, Em. Dom. (2d Ed.) pp. 242–248, inclusive, where an exhaustive citation of cases is made by states with a

abutting owner. In a recent text book on Eminent Domain,[735] the author said: "The existence and operation of a commercial railroad in the street is necessarily some interference with those rights, and, to the extent of such interference, a right to compensation exists. For any physical injury to the abutting property, as by casting cinders upon it, polluting the air with smoke and gases, or by vibrations communicated through the soil to an extent which would be actionable if the property were not a street, a recovery may be had. With respect to this class of injuries the abutting owner's rights are the same as though the street were private property, and these rights are discussed elsewhere. The tendency of the later decisions is towards the protection of private rights and the more accurate ascertainment and definition of those rights. It is now well settled by the great weight of authority that, where the fee of a street is in the abutting owner, he may recover for the additional burden caused by a commercial railroad laid on the street. These cases necessarily proceed upon the basis that a commercial railroad is not a legitimate street use. The cases which deny compensation in any case, on the ground that such a railroad is a legitimate use of a highway, are so clearly against good sense and reason that we do not think they require further discussion. The right to recover when the fee is in the public is involved in so much doubt by the authorities that we have collected in a note all the cases which involve the question, with such comment as seems appropriate. We have allowed this to stand as it was written in the first edition. Since then it has become very firmly established that the abutter, though he has not the fee of the street, has certain private rights of access, light and air, which are as much property as the lot itself; also that any interference with such rights by a use which is not within the legitimate purposes of a highway, is a taking within the constitution."

§ 844. The use of highways by street railways.

The considerations given in the preceding sections as forming a basis for some of the reasons holding the doctrine there stated, that the use of a highway by a commercial steam road imposes an

discussion of the points decided in each case.

[735] Lewis, Eminent Domain, sec. 115.

additional burden upon it for which the abutting owner is entitled to compensation, have lead 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 [736] the 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.[737] Special damages caused by the neg-

[736] See § 845, post.

[737] Southern Bell Tel. Co. v. Francis, 109 Ala. 224, 19 So. 1; Miller v. Detroit, Y. & A. A. R. Co., 125 Mich. 171, 51 L. R. A. 955. "Street railways, in city and country, have come to be regarded as a public necessity, and their construction upon the highways universally sanctioned." Birmingham Traction Co. v. Birmingham R. & Elec. Co., 119 Ala. 137, 24 So. 502, 43 L. R. A. 233; Finch v. Riverside & A. R. Co., 87 Cal. 597; Elliott v. Fair Haven & W. R. Co., 32 Conn. 579; Canastota Knife Co. v. Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107; County of Floyd v. Rome St. R. Co., 77 Ga. 614, 3 S. E. 3; Chicago & W. I. R. Co. v. General Elec. R. Co., 79 Ill. App. 569; Chicago, B. & I. R. Co. v. West Chicago St. R. Co., 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485; Doane v. Lake St. El. R. Co., 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97; General Elec. R. Co. v. Chicago & W. I. R. Co., 184 Ill. 588, 56 N. E. 963; Eichels v. Evansville St. R. Co., 78 Ind. 261; Snyder v. Ft. Madison St. R. Co., 105 Iowa, 284, 75 N. W. 179, 41 L. R. A. 345; Ottawa, O. C. & C. G. R. Co. v. Larson, 40 Kan. 301, 19 Pac. 661, 2 L. R. A. 59; Ashland & C. St. R. Co. v. Faulkner, 106 Ky. 332, 45 S. W. 233, 51 S. W. 806, 43 L. R. A. 554; Briggs v. Lewiston & A. H. R. Co., 79 Me. 363, 10 Atl. 47; Taylor v. Portsmouth, K. & Y. St. R. Co., 91 Me. 193, 39 Atl. 560; Hodges v. Baltimore Union Pass. R. Co., 58 Md. 603; Poole v. Falls Road Elec. R. Co., 88 Md. 533, 41 Atl. 1069; Lonaconing M. & F. R. Co. v. Consolidated Coal Co., 95 Md. 630, 53 Atl. 420; Attorney General v. Metropolitan R. Co., 125 Mass. 515; Howe v. West End St. R. Co., 167 Mass. 46, 44 N. E. 386.

Taylor v. Bay City St. R. Co., 80 Mich. 77, 45 N. W. 335. Abutting owners may however be entitled to compensation through special statutory provisions. Detroit City R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007. Legislative provisions authorizing the operation of a railway by horse or other animal power or by steam or by pneumatic or any other motive power or by any combination of them authorizes the use of electricity for the motive power although this was not discovered until after their enactment.

Nichols v. Ann Arbor & Y. St. R. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; Dean v. Ann Arbor St. R. Co., 93 Mich. 330, 53 N. W. 396; Elfelt v. Stillwater St. R. Co., 53 Minn. 68, 55 N. W. 116; Placke v. Union Depot R. Co., 140 Mo. 634, 41 S. W. 915.

Hinchman v. Paterson Horse R. Co., 17 N. J. Eq. (2 C. E. Green) 75. Where the court in speaking of compensation with reference to a change in motive power said in

part. "They are ordinarily, as in this case, required to be laid level with the surface of the street, in conformity with existing grades. No excavations or embankments to affect the land are authorized or permitted. The use of the road is nearly identical with that of the ordinary highway. The motive power is the same. The noise and jarring of the street by the cars is not greater, and ordinarily less than that produced by omnibuses and other vehicles in ordinary use."

Hogencamp v. Paterson Horse R. Co., 17 N. J. Eq. (2 C. E. Green) 83; Roebling v. Trenton Pass. R. Co., 58 N. J. Law, 666, 34 Atl. 1090, 33 L. R. A. 129; People v. Kerr, 37 Barb. (N. Y.) 357; Brooklyn City & N. R. Co. v. Coney Island & B. R. Co., 35 Barb. (N. Y.) 364; Merrick v. Intramontaine R. Co., 118 N. C. 1081, 24 S. E. 667; Carolina Cent. R. Co. v. Wilmington St. R. Co., 120 N. C. 520, 26 S. E. 913. Joint use of bridge by a street railway company; additional servitude when imposed. Cincinnati Inclined Plane R. Co. v. Telegraph Ass'n, 48 Ohio St. 390, 27 N. E. 890, 12 L. R. A. 534; Schaaf v. Cleveland, M. & S. R. Co., 66 Ohio St. 215, 64 N. E. 145; Pennsylvania R. Co. v. Montgomery County Pass. R. Co., 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766; Lockhart v. Craig St. R. Co., 139 Pa. 419, 21 Atl. 26; Heilman v. Lebanon & A. St. R. Co., 145 Pa. 23, 23 Atl. 389; Cumberland Tel. & T. Co. v. United Elec. R. Co., 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236; San Antonio Rapid Transit St. R. Co. v. Limburger, 88 Tex. 79, 30 S. W. 533; Ogden City R. Co. v. Ogden City, 7 Utah, 207, 26 Pac. 288; Reid v. Norfolk City R. Co., 94 Va. 117, 26 S. E. 428, 36 L. R. A. 274; Hobart v. Milwaukee City R. Co., 27 Wis. 194; Chicago & N. W. R. Co. v. Milwaukee R. & K. Elec. R. Co., 95 Wis. 561, 70 N. W. 678, 37 L. R. A. 856; La Crosse City R. Co. v. Higbee, 107 Wis. 389, 83 N. W. 701, 51 L. R. A. 923.

Younkin v. Milwaukee, Light, Heat & Traction Co., 120 Wis. 477, 98 N. W. 215. Where it is held that an interurban line created an additional servitude as to points on the country highway and did not lose its character as such when passing through the city of Waukesha and that therefore it created an additional servitude upon the lots abutting on the street over which it passed. Nellis, St. Surface R. R. pp. 135 et seq. See Lewis, Em. Dom. (2d Ed.) § 115c. See, also, Philadelphia, W. & B. R. Co. v. Wilmington City R. Co. (Del.) 38 Atl. 1067; Georgetown & L. Traction Co. v. Mulholland, 25 Ky. L. R. 578, 76 S. W. 148; Green v. City & Suburban R. Co., 78 Md. 294, 28 Atl. 626; Austin v. Detroit, Y. & A. A. R. Co., 134 Mich. 149, 96 N. W. 35; Ehret v. Camden & T. R. Co., 61 N. J. Eq. 171, 47 Atl. 562.

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. Cummins, 125 Iowa, 430, 101 N. W. 176. By statute a railway extending beyond the corporate limits is known as an interurban line.

Taylor v. Portsmouth, K. & Y. St. R. Co., 91 Me. 193, 39 Atl. 560; Cincinnati, L. & A. Elec. St. R. Co. v. Lohe, 68 Ohio St. 101, 67 N. E. 161. An interurban electric road, under the statute, is classed as a street railroad. Zehren v. Milwaukee

ligent or unlawful construction of a street railway may, however, be recovered.[738]

§ 845. 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[739] was decided in 1868 and the arguments pro and con are well set out in the majority and the dissenting opinion. In the former, the court by Miller, Judge, holds in part: "The ground upon which these

Elec. R. & Light Co., 99 Wis. 83, 74 N. W. 538, 41 L. R. A. 575. But see Montgomery v. Santa Ana Westminister R. Co., 104 Cal. 186, 37 Pac. 786, 25 L. R. A. 654.

Newell v. Minneapolis, L. & M. R. Co., 35 Minn. 112, 27 N. W. 839, where the court say: "If it is, in fact, a passenger street railway within the city limits, how can it become anything else there because it becomes something else elsewhere? A person who desires to go from any part of Minneapolis to San Francisco has the same right to use the streets of the former city for the purpose of passing out of it on his way to his destination as a person who simply desires to pass from one place in Minneapolis to another in the same city. The use of the streets is just as legitimate, and just as clearly and completely a lawful and proper enjoyment of the public and common easement, in the one case as in the other."

[738] Lorie v. North Chicago City R. Co., 32 Fed. 270; Alton & U. A. Horse R. Co. v. Deitz, 50 Ill. 210.

[739] Craig v. Rochester City & B. R. Co., 39 N. Y. 404; McCruden v. Rochester R. Co., 5 Misc. (N. Y.) 59. "The amendment to the Constitution in 1874 did not at all affect the rule laid down in the Craig Case, 39 N. Y. 404. The legislature always had power to authorize the construction of street railways in any city. This they could do without compensation to the abutting owners, if the fee of the street was in the city while such owners were entitled to compensation if they had the fee." 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. See, also, Wager v. Troy Union R. Co., 25 N. Y. 526, where it was said by the court: "With a single track, and particularly if the cars used upon it were propelled by horse power, the interruption of the public easement in the street might be very trifling and of no practical consequence to the public at large. But this consideration cannot affect the question of right of property or of the increase of the burden upon the soil. It would present simply a question of degree in respect to the enlargement of the easement and would not affect the principle that the use of a street for the purpose of a railroad imposed upon it is a new burden."

cases are decided is, that the use of land for a railroad imposes an additional burden upon the owner of the fee. I am at a loss to see any apparent distinction in the application of the rule between cases where steam power is employed and those cases where the road is operated by horse power. It is true there is some difference in the manner in which the road is constructed, and in the speed with which its cars are propelled, at times; but there is precisely the same exclusive appropriation of the track for the purposes intended in each case, to the absolute exclusion of all who may interfere with its mode of operation. The power to use the road for the conveyance of passengers is entirely with the company, and no person can interfere with that method of conveyence, or with the right of the company to enjoy its monopoly. * * * The use of the railroad, no matter how it is operated, whether by horse or steam power, necessarily includes, to a certain extent, an exclusive occupation of a portion of the highway, for the track of the road, and the running of its cars by the company, and a permanent occupation of the soil. It requires that all other parties shall stand aside, and make way for its progress. This is clearly inconsistent with the legal object and design of a highway, which is entirely open and free to all, for purposes of locomotion, travel and transportation. The enjoyment of the easement in a highway never confers an exclusive right upon any one who may have occasion to use it, while the laying down of rails, and the employment of cars, is to the detriment and exclusion of all others at the time when the cars are running, and the restraint upon a free, undisturbed and general public use. It is an assertion of a right to the possession of the highway by the corporation, and an appropriation of it to private occupation, which, by lapse of time, might open into right, and vest a title in the company. Instead of being the exercise of a right of passage and repassage over a highway or a street, it cannot, I think, be denied, that it is sometimes an obstruction to travel, and the infringement upon the rights of the public, and owners of land. In narrow streets, where the rails of the road border close upon the sidewalk, it not only interposes obstacles to the traveler, but inflicts injury upon the lot owner, by blockading up the way, and preventing a free access to the premises. The large and unwieldy vehicles which are used, which can only proceed upon a track laid for that purpose, with no capacity to turn out, so as to avoid or accommodate ordinary car-

riages, are often a source of annoyance and obstruction to the free passage of horses and carriages, for periods of greater or less duration, and are inconsistent with the use of an open and free passage of the highway." In the dissenting opinion written by Judge Mason and in which two judges concurred, the arguments in favor of the contention that the abutting owner is not entitled to additional compensation are well stated and will be quoted in part in the notes.[740]

[740] Craig v. Rochester City & B. R. Co., 39 N. Y. on p. 414, dissenting opinion: "Those cases decide that the construction of a common railway to be run with steam-engines in a public street, without the consent of the owners of the fee of the street, is the imposition of a new use, and an additional burden upon the land embraced in the street, and is the taking of the property of the owner without compensation, and consequently is prohibited by the Constitution. There is certainly a broad distinction between these cases and that of a street railroad, with cars to be drawn by horses, at a speed of not more than six miles per hour. In the leading case of Williams v. New York Cent. R. Co. (16 N. Y. 97), the street was literally destroyed for any of the original common use for which the land was originally taken. With forty engines, and the trains which they draw, passing over the street daily, any use for carriages or common vehicles must be so very extremely dangerous, that the use of the street, for any such purpose, would necessarily be very limited, if not abandoned; and, besides, the railroad corporation, in such a case, takes the exclusive use of the street, and, in all these cases, actual and exclusive possession of the locus of the street is taken by the railroad corporations. In the case at bar, no such thing occurs. The construction of this railroad in the streets of the city of Rochester, and the operating of it, when completed, does not involve the taking of any title to the land. It is true, the iron rails are to be laid down in the street, but they are required to conform to the grade of the street, and as the same may be changed from time to time by the city authorities, and the rails to be six inches wide, and laid even with the surface of the street. The track of the road does not become the property of the railroad. All that the railroad corporation gets, is a license to construct and operate the railroad, but to be enjoyed, subject to the rules and regulations of the common council; and these regulations, in the case at bar, are well calculated to secure all the original public use of the street as an easement for public travel, and the common use for carriages and other vehicles, and no one is prohibited from passing over and along the track with teams and vehicles, but, on the contrary, these common rights are but little interfered with; all that is granted to the defendants is the right to use, not to take and hold, without at all excluding other persons from their former use of the same. The use

§ 846. Reasons for the difference in the rule as applied to steam and street railways.

The difference in the rule as given in a preceding section by virtue of which, in the greater number of jurisdictions, the abutting property owner is permitted to recover additional compensation for the use by a commercial steam road of a highway and does not possess this right in respect to the occupation of a highway by a street railway, is entirely the result of conditions existent at the time when the question was first presented. Street railways then had not attained their modern development. The motive power was the use of horses or mules. The cars were small, the rate of travel slow and the character of the traffic extremely local. The roadbed, generally, was not of a substantial character, the rails being light in weight and occupying, because of these characteristics, less permanently the highway and interfering slightly with its use by pedestrians and other vehicles.[741]

which is thus granted is nothing more than the privilege of passing over the streets in question with a species of conveyance somewhat different from that which the public generally use. The inconvenience to the public, in the common use of the street, must be small, and no individual can complain, that a public street is appropriated to a public use somewhat different, unless it is to be regarded a new use, and imposes an additional burden upon the land. This, in my judgment, is not a new use. When land is acquired to the public use of a street or highway, the public may lawfully claim the same for all the varying wants which the public may require, only so that such use is in subordination to its principal use as a street. The principal uses of a street are for the passage and repassage of the public, and this public right of passage is not limited to any particular mode of travel which may be in use at the time the land is taken, but to all such new methods as the progress of civilization and improvement may bring into use, only so that it remains a public street still, and devoted to the public use. The construction and use of such a street railway, as is provided for in the case under consideration, is but a mode of exercising the public right of passage, and I perceive no objection to the public exercising this right by means of public agents, or through the medium of corporations, where they become public common carriers and do not further encroach upon the general, public use, than do those street railways constructed and run in conformity to the regulations prescribed in the case at bar. There is no new appropriation of the property of the plaintiff requiring compensation in damages. Nor is there a burden imposed upon his land, caused by a use not contemplated in its original appropriation."

[741] Mordhurst v. Ft. Wayne & S. W. Traction Co., 163 Ind. 268, 71 N.

As opposed to these characteristics, the roadbed of the steam railway was of a permanent and substantial character and its occupation necessarily exclusive. The motive power was steam and the engines in use produced more or less noise which tended to frighten horses using the highway and to destroy that perfect freedom of use of the highway by pedestrians and others using it. The speed and weight of the cars was greater and on this account trains less under control. The traffic was both passenger and freight and consisted not of local traffic but of that carried on between places at long distances.[742]

The street railway as a means of traffic has been rapidly approaching the character of an ordinary steam railway in the nature of its roadbed, the frequency of travel effecting, therefore, a greater permanency in the use of a street, the size of the equipment and the character of its traffic. Horses have been supplanted as a means of motive power by steam and electricity and the local street car system of fifty years ago has become, in many cases, a means for transportation of both passengers and freight from points within municipalities to suburban places many miles distant. The point of the argument is that the substantial reason for the rule as originally adopted consisted of certain positive and negative characteristics differentiating a horse railway from a steam commercial road. These distinctions are gradually disappearing one by one but the rule still exists.[743] In a recent case[744] in Wisconsin, some of the suggestions above were considered by the court and in the opinion is found the following language: "The street railway in its inception is a purely urban institution. It is intended to facilitate travel in and about the city, from one part of the municipality to another, and thus relieve the sidewalks of foot passengers and the roadway of vehicles. It is thus

E. 642; Rische v. Texas Transportation Co., 27 Tex. Civ. App. 33, 66 S. W. 324. See, also, authorities cited under § 841, ante.

[742] See cases cited generally under §§ 841 and 844, ante.

[743] Hannah v. Metropolitan St. R. Co., 81 Mo. App. 78; Degrauw v. Long Island Elec. R. Co., 163 N. Y. 597, 57 N. E. 1108; State v. Dayton Traction Co., 64 Ohio St. 272, 60 N. E. 291. An electric railroad operating a road on the streets of a city may make a valid traffic arrangement with an interurban electric road company for the carriage of merchandise for hire. Aycock v. San Antonio Brewing Ass'n, 26 Tex. Civ. App. 341, 63 S. W. 953.

[744] Zehren v. Milwaukee Elec. R. & L. Co., 99 Wis. 83, 74 N. W. 538, 41 L. R. A. 575.

an aid to the exercise of the easement of passage; strictly a city convenience, for use in the city, by people living or stopping therein, and fully under the control of municipal authorities, who have been endowed with ample power for that purpose. This strictly urban character of the street railways remained practically unchanged for many years, and during these years the long line of decisions grew up recognizing the street railway as merely an improved method of using the street, and rather as a help to the street than as a burden thereon. Time, however, has made changes in conditions. New motive power has been discovered, and it is found that by its use an enlarged city street-car may profitably run long distances, and compete to some extent with the steam railway. It is proposed to convert the city railways into lines of passenger transportation, covering long distances and connecting widely separated cities and villages, by using the country highways and operating long and heavy coaches, sometimes made up into trains of several cars. Thus, the urban railway has developed into the interurban railway, and threatens soon to develop into the interstate railway. The small car which took up passengers at one corner, and dropped them at another, has become a large coach, approximating the ordinary railway coach in size, and has become a part, perhaps, of a train which sweeps across the country from one city to another, bearing its load of passengers ticketed through with an occasional local passenger picked up on the highway. The purely city purpose which the urban railway subserved has developed into or been supplanted by an entirely different purpose, namely, the transportation of passengers from city to city over long stretches of intervening country. When this train or car, with its load of through passengers, is passing through a country town, it is clearly serving no township purpose, save in the most limited sense. It is very difficult to say that this use of a country highway is not an additional burden. It is built and operated mainly to obtain the through travel from city to city, and only incidentally to take up a passenger in the country town. This through travel is unquestionably composed of people who otherwise would travel on the ordinary steam railroad, and would not use the highway at all. Thus the operation of this newly developed streeet railway (so called) upon the country road is precisely opposite to the operation of the urban railway upon the city street. It burdens the road with

travel which would otherwise not be there, instead of relieving it by the substitution of one vehicle for many."

§ 847. 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 where an authorized use of a highway impairs or destroys them, compensation can be received [745]

§ 848. Elevated railroads.

The subject of this section 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

[745] Montgomery v. Santa Ana Westminister R. Co., 104 Cal. 186, 37 Pac. 186, 25 L. R. A. 654; City of Pueblo v. Strait, 20 Colo. 13, 24 L. R. A. 392; Lake St. El. R. Co. v. Brooks, 90 Ill. App. 173. If an injury is suffered, no damages can be recovered. Snyder v. Fort Madison Street Ry. Co., 105 Iowa, 284, 75 N. W. 179, 41 L. R. A. 345; Kansas, N. & D. R. Co. v. Mahler, 45 Kan. 565, 26 Pac. 22. Access to abutting property is not injured so as to give a claim for compensation by the construction of a road in a street sixty feet wide and which at its nearest point to abutting property is distant twenty-five feet.

Walker v. Vicksburg, S. & P. R. Co., 52 La. Ann. 2036, 28 So. 324; Garrett v. Lake Roland El. R. Co., 79 Md. 277, 24 L. R. A. 396; Spencer v. Metropolitan St. R. Co., 120 Mo. 154, 23 S. W. 126, 22 L. R. A. 668; Kennelly v. City of Jersey City, 57 N. J. Law, 293, 30 Atl. 531, 26 L. R. A. 281; Budd v. Camden Horse R. Co., 61 N. J. Eq. 543, 48 Atl. 1028; Roebling v. Trenton Pass. R. Co., 58 N. J. Law, 666, 33 L. R. A. 129; New Mexican R. Co. v. Hendricks, 6 N. M. 611, 30 Pac. 901; Willamette Iron Works v. Oregon R. & Nav. Co., 26 Or. 224, 37 Pac. 1016, 29 L. R. A. 88; Hobart v. Milwaukee City R. Co., 27 Wis. 194. See, also, §§ 817 et seq., ante. But see Colclough v. City of Milwaukee, 92 Wis. 182, 65 N. W. 1039, where it is held that where by the construction by a city of an approach to a railroad bridge occupying the full width of the street, the grade only is changed, abutters are not entitled to damages or compensation for a taking of property. See, also, cases cited in the following section. Lewis, Em. Dom. (2d Ed.) §§ 115*a* et seq.; Wood, Nuisances, cc. 13, 14.

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.[746] The tendency of the authorities is to hold that the three private easements or quasi easements " are not confined to the abutter's one-half of the street nor laterally to the space in front of his lot, but to extend across the entire width of the street laterally and vertically as far as any actual detriment to light, air or access occasioned by the structure or operation of the elevated road is, in fact, experienced." The easement of light entitles the property owner, so it is held in the New York cases,[747] to receive upon his lot, by the process of radiation and reflection, the light from the sky, including the heavenly bodies, and the opposing house fronts without any obstruction except such as may be caused by ordinary street uses among which the maintenance of the structure and the running of the train of an elevated railroad are not included.[748] The easement of air is the right to a circula-

[746] Fifth Nat. Bank v. New York El. R. Co., 28 Fed. 231; Peyser v. Metropolitan El. R. Co., 13 Daly (N. Y.) 122; In re Gilbert El. R. Co., 38 Hun (N. Y.) 438; Heimburg v. Manhattan R. Co., 45 N. Y. Supp. 999; Waldmuller v. Brooklyn El. R. Co., 40 App. Div. 242, 58 N. Y. Supp. 7; In re New York El. R. Co., 70 N. Y. 327; Lahr v. Metropolitan El. R. Co., 104 N. Y. 268; Powers v. Manhattan R. Co., 120 N. Y. 183; Kane v. New York El. R. Co., 125 N. Y. 175; Pappenheim v. Metropolitan El. R. Co., 128 N. Y. 444; Kernochan v. New York El. R. Co., 128 N. Y. 559, 130 N. Y. 651; Kearney v. Metropolitan El. R. Co., 129 N. Y. 76; American Bank Note Co. v. New York El. R. Co., 129 N. Y. 252; Mitchell v. Metropolitan El. R. Co., 134 N. Y. 11; Doyle v. Metropolitan El. R. Co., 136 N. Y. 505; Livingston v. Metropolitan El. R. Co., 138 N. Y. 76; Bischoff v. New York El. R. Co., 138 N. Y. 257. See the subject fully considered in Demarest, El. R. R. Law. But see In re New York El. R. Co., 36 Hun (N. Y.) 427, which holds that an abutting owner is entitled to damages for loss of light and air but not for smoke, noise, vibration, ashes or dust, or the unsightly character of the structure. See, also, Williams v. New York Cent. R. Co., 16 N. Y. 97. In Illinois for injuries necessarily resulting from the operation of a road there was no remedy previous to the Constitution of 1870 so it is held in the case of Chicago & E. G. R. Co. v. Loeb, 118 Ill. 211. See, also, Illinois Cent. R. Co. v. Grabill, 50 Ill. 242, and Penn. Mut. Life Ins. Co. v. Heiss, 141 Ill. 60.

[747] See cases cited in preceding note. Sauer v. City of New York, 44 App. Div. 305, 60 N. Y. Supp. 648.

[748] Lawrence v. Inhabitants of Nahant, 136 Mass. 477; Lincoln v. Commonwealth, 164 Mass. 1, 41 N. E. 112; Warren v. City of Grand

tion or flow of air between the lot and the street and to have that which flows from the street of the ordinary street quality or purity.[749] The easement of access includes, obviously, unobstructed ingress and egress.[750] The Story case [751] determined that an elevated railroad in the streets of a city operated by steam power and constructed in respect to form, equipment and dimensions, like that under consideration, is a perversion of the use of a street from the purpose originally designed for it and is a use which neither the city authorities nor the legislature can legalize or sanction without providing compensation for the injury inflicted upon the property of abutting owners; that abutters upon a public street acquired and maintained upon the theory that it should ever continue as a public highway for the free and common passage of inhabitants of a particular locality and all others passing and repassing through or by the same, acquire an easement in the bed of a street for ingress and egress to and from their premises and also for the free and uninterrupted passage and circulation of light and air through and over the street for the benefit of the property located thereon. That the ownership of the easement above described is an interest in real estate constituting property within the meaning of that term as used in the constitution of the state and requires compensation to be made before it can be lawfully taken for public use from its owner and that the erection of an elevated railroad, the use of which is intended to be permanent in a public street and upon which cars are propelled by steam engines generating gas, steam and smoke and deleterious sub-

Haven, 30 Mich. 24; Jones v. Metropolitan El. R. Co., 39 N. Y. State Rep. 177, 14 N. Y. Supp. 632; Van Brunt v. Town of Flatbush, 59 Hun, 192, 13 N. Y. Supp. 545; Pond v. Metropolitan El. R. Co., 112 N. Y. 186; Huddleston v. City of Eugene, 34 Or. 343, 55 Pac. 868, 43 L. R. A. 444.

[749] Stanley v. New York El. R. Co., 44 N. Y. State Rep. 389; Johnson v. New York El. R. Co., 44 N. Y. State Rep. 935; Caro v. Metropolitan El. R. Co., 46 N. Y. Super. Ct. (14 J. & S.) 138; Glover v. Manhattan R. Co., 51 N. Y. Super. Ct. (19 J. & S.) 1; Drucker v. Manhattan R. Co., 106 N. Y. 157.

[750] Glover v. Manhattan R. Co., 66 How. Pr. (N. Y.) 77; Drucker v. Manhattan R. Co., 106 N. Y. 157, 164. "The drippings of oil and water and possibly the frequent columns interfere with convenience of access." Abendroth v. Manhattan R. Co., 122 N. Y. 1, 11 L. R. A. 634.

[751] Story v. New York El. R. Co., 90 N. Y. 122, 43 Am. Rep. 146, 11 Abbott's N. C. 236.

stances and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the abutting owners easements and renders the corporation liable to them for the damage occasioned by this taking.[752] The damages recoverable do not, however, include as elements a loss of business profit or a diminution of the rental value of property so long as it is used for the same business.[753]

§ 849. 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.[754] A steam motor railroad has been held to come within this rule in the states of Arkansas,[755] Minnesota,[756] Maine,[757] and Oregon;[758] while in Ten-

[752] Story v. New York El. R. Co., 90 N. Y. 122; Lahr v. Metropolitan El. R. Co., 104 N. Y. 268. See, also, Lake St. El. R. Co. v. Brooks, 90 Ill. App. 173.

[753] Seventh Ward Nat. Bank v. New York El. R. Co., 53 N. Y. Super. Ct. (21 J. & S.) 412.

[754] See cases cited in following notes under this section.

[755] Williams v. City Elec. St. R. Co., 41 Fed. 556. "The difference between street railroads and railroads for general traffic is well understood. The difference consists in their use, and not in their motive power. A railroad, the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public is not excluded from the use of any part of the street as a public way; which runs at a moderate rate of speed, compared to the speed of traffic railroads; which carries no freight, but only passengers, from one part of a thickly populated district to another, in a town or city and its suburbs, and for that purpose runs its cars at short intervals, stopping at the street crossings to receive and discharge its passengers,—is a street railroad, whether the cars are propelled by animal or mechanical power. The propelling power of such a road may be animal, steam, electricity, cable, fireless engines, or compressed air; all of which motors have been, and are now, in use for the purpose of propelling street-cars. Encyclop. Britannica (9th Ed.) tit. 'Tramway.' * * * The distinction attempted to be drawn between animal and mechanical power, as applied to street railroads, is not sound. The motor is not the criterion. It is the use of the street, and the mode of that use. A street railroad propelled by

nessee [759] and Michigan [760] the contrary has been held. The court in the Tennessee case based its decision upon the fact that steam motor railways approached more nearly the features characteristic of a commercial railroad, namely, in the noise, smoke and vibration, the motive power, the weight, length and speed of the trains, and the consequent danger to life and property. A street railroad constructed underground [761] or one occupying a street upon a different gradient [762] from that of the street proper it would seem, upon the reasoning adopted in the elevated railroad cases, constitute an additional burden or servitude for which compensation can be recovered.

animal power might be so constructed and operated as to be a public nuisance, and render its owners liable to those injured by its improper construction and operation. The same is true of a street railroad operated by mechanical power. It may be so constructed and operated as to be a public nuisance, but the use of steam on such a railroad, when authorized by law, does not per se make it a nuisance, or entitle the owners of the abutting property to compensation, though the fee of the street is vested in them. It is common knowledge that steam motors, for operating street railroads, are now constructed to emit so little gas, steam, or smoke, and make so little noise, that they do not constitute any reasonable ground of complaint to passengers or the public. They can be stopped and started as quickly and as safely as horse cars, and in some respects can be operated with greater accuracy and precision. Such motors are in use in cities and their suburbs in this country and in England. Encyclop. Britannica (9th Ed.). The operation of a street railroad by such steam motors, when authorized by law, on a public street, is not an additional servitude or burden on the land already dedicated or condemned to the use of a public street, and is therefore not a taking of private property, but is a modern and improved use, only, of the street, as public way, and affords to the abutting property owner, though he may own the fee of the street, no legal ground of complaint."

[756] Newell v. Minneapolis, L. & M. R. Co., 35 Minn. 112.

[757] Briggs v. Lewiston & A. H. R. Co., 79 Me. 363, 10 Atl. 47.

[758] Paquet v. Mt. Taber St. R. Co., 18 Or. 233, 22 Pac. 906; McQuaid v. Portland & V. R. Co., 18 Or. 237, 22 Pac. 899.

[759] East End St. R. Co. v. Doyle, 88 Tenn. 747, 13 S. W. 936, 9 L. R. A. 100.

[760] Nichols v. Ann Arbor & Y. St. R. Co., 87 Mich. 361, 49 N. W. 538.

[761] In re New York Dist. R. Co., 107 N. Y. 42; Terry v. City of Richmond, 94 Va. 537, 38 L. R. A. 834.

[762] See cases cited in following section, note 765.

§ 850. 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 devoted exclusively to street passenger travel and the track of which conforms to the surface of the street.[763] This rule would exclude, therefore, a commercial steam road because of the character of its traffic;[764] an underground or elevated road because of the elevation or depression of the tracks and the necessary construction of a substructure or superstructure.[765] It would exclude

[763] Potts v. Quaker City El. R. Co., 12 Pa. Co. Ct. R. 593. See cases cited § 844, ante.

[764] See cases cited under § 841, ante.

[765] 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. An underground road in a city is regarded as a street way within the meaning of that constitutional amendment of 1874, art. 3, § 18, relative to consent of property owners. Potts v. Quaker City El. R. Co., 161 Pa. 396. See cases cited §§ 848, 849, ante. But see Doane v. Lake St. El. R. Co., 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97. But see Sears v. Crocker, 184 Mass. 586. Where the court in holding that the construction of a subway for public travel below the surface of the public street imposes no additional servitude on the land of abutting owners, said in part that the streets were subject to "every kind of travel and communication for the movement or transportation of persons or property which is reasonable and proper in the use of a public street." And also—"It is now a fact of common knowledge that the streets of those parts of Boston which are most crowded are entirely inadequate to accommodate the public travel in a reasonably satisfactory way if the surface alone is used. Our system, which leaves to the landowner the use of a street above or below or on the surface, so far as he can use it without interference with the rights of the public, is just and right, but the public rights in these lands are plainly paramount, and they include, as they ought to include, the power to appropriate the streets above or below the surface as well as upon it, in any way that is not unreasonable, in reference either to the acts of all who have occasion to travel or to the effect upon the property of abutters. The increase of requirements for the public within the streets of our large cities has probably equalled, if it has not surpassed the increase of requirements for business along the streets. The legislature, the guardian of public interests and of private rights, has determined that the space below the surface of certain streets in Boston is needed for travel. The question is whether action under the statutes involves an acquisition of a new right as

also a road not conforming to the surface of the street but with cuts and fills.[766] 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.[767] The

against the land owner, or only an appropriation and regulation of existing rights. It hardly can be contended that this is an unreasonable mode of using the streets in reference either to travelers or abutters. If it is not an unreasonable mode of using them, the mere fact that it deprives abutters of the use of vaults and other similar underground structures in the streets, which they have heretofore maintained, is of little consequence. Abutters are bound to withdraw from occupation of streets above or below the surface whenever the public needs the occupied space for travel. The necessary requirements of the public for travel were all paid for when the land was taken, whatever they may be, and whether the particulars of them were foreseen or not. The only limitation upon them is that they shall be of a kind which is not unreasonable."

[766] Interstate Consol. Rapid Transit R. Co. v. Early, 46 Kan. 197. A street railway may construct its line on the established grade of a street although the rest of the street has not been improved on this grade. Vaile v. City of Independence, 116 Mo. 333, 22 S. W. 695; Sherlock v. Kansas City B. R. Co., 142 Mo. 172, 43 S. W. 629; Jackson v. Slate Belt Elec. St. R. Co., 7 North (Pa.) 286; Murray Hill Land Co. v. Milwaukee Light, Heat & Traction Co., 110 Wis. 555, 86 N. W. 199. But see Vigeant v. City of Marlborough, 175 Mass. 459, 56 N. E. 708; Underwood v. City of Worcester, 177 Mass. 173, 58 N. E. 589. Tracks may be laid upon an established grade different from the one then existing.

[767] Chicago General R. Co. v. Chicago City R. Co., 186 Ill. 219, 57 N. E. 822, 50 L. R. A. 734, affirming 87 Ill. App. 17; Snyder v. Ft. Madison St. R. Co., 105 Iowa, 284, 41 L. R. A. 345; Koch v. North Ave. R. Co., 75 Md. 222, 23 Atl. 463, 15 L. R. A. 377; Nieman v. Detroit Suburban St. R. Co., 103 Mich. 256, 61 N. W. 519. The use of a T rail by an electric railway company does not establish its character as a commercial road.

Hinchman v. Paterson Horse R. Co., 17 N. J. Eq. (2 C. E. Green) 75. "They are ordinarily, as in this case, required to be laid level with the surface of the street, in conformity with existing grades. No excavations or embankments to affect the land are authorized or permitted. The use of the road is nearly identical with that of the ordinary highway. The motive power is the same. The noise and jarring of the street by the cars is not greater, and ordinarily less, than that produced by omnibuses and other vehicles in ordinary use.

Paterson R. Co. v. Grundy, 51 N. J. Eq. 213, 26 Atl. 788; People v. Board of Railroad Com'rs, 158 N. Y. 711, 53 N. E. 1129, affirming 32 App. Div. 179, 52 N. Y. Supp. 908. Railroad commissioners have no power to withhold consent for the operation of a street railroad by kinetic motors. Such a motor is not a lo-

discussion in this and the preceding section 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. A late writer [768] is inclined to the opinion that there is no rational basis for a distinction between surface roads and that either all should be admitted as legitimate or excluded as illegitimate street uses. "As between these alternatives, the latter should be chosen; a railroad involves a fixed and permanent structure in the street which is more or less of an obstruction to ordinary travel. If one track is a legitimate use there seems to be no escape in the consequence that any number

comotive steam power contemplated by Laws 1890, c. 565, § 100, providing that a street surface railroad may not operate its road by locomotive steam power.

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. A change in power from horse to electric and the erection of poles necessary for its operation on a street railway does not impose an additional burden on abutting property owners. City of Houston v. Houston, Belt & M. P. R. Co., 84 Tex. 581, 19 S. W. 786. See, also, with reference to trolley and other lines, so called, in addition to the cases already cited, the following: Birmingham Traction Co. v. Birmingham R. & Elec. Co., 119 Ala. 137, 24 So. 502, 43 L. R. A. 233; New York, N. H. & H. R. Co. v. Brideport Traction Co., 65 Conn. 410, 32 Atl. 953, 29 L. R. A. 367; Canastota Knife Co. v. Newington Tramway Co., 69 Conn. 146; Chicago B. & Q. R. Co. v. West Chicago R. Co., 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485; Chicago & C. Terminal R. Co. v. Whiting, H. & E. C. St. R. Co., 139 Ind. 297, 38 N. E. 604; Louisville Bagging Mfg. Co. v. Central Pass. R. Co., 95 Ky. 50, 23 S. W. 592; Taylor v. Portsmouth, K. & Y. St. R. Co., 91 Me. 193; Poole v. Falls Road Elec. R. Co., 88 Md. 533; Howe v. West End St. R. Co., 167 Mass. 46, 44 N. E. 386; Dean v. Ann Arbor St. R. Co., 93 Mich. 330, 53 N. W. 396; Nieman v. Detroit Suburban St. R. Co., 103 Mich. 256, 61 N. W. 519; Placke v. Union Depot R. Co., 140 Mo. 634; Jaynes v. Omaha St. R. Co., 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751. Poles and wires held an additional burden. Roebling v. Trenton Pass. R. Co., 58 N. J. Law, 666, 34 Atl. 1090, 33 L. R. A. 129; Cincinnati Inclined Plane R. Co. v. Telegraph Ass'n, 48 Ohio St. 390, 27 N. E. 890, 12 L. R. A. 534; Lockhart v. Craig St. R. Co., 139 Pa. 419, 21 Atl. 26; Cumberland Tel. & T. Co. v. United Elec. R. Co., 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236; Dooly Block v. Salt Lake Rapid Transit Co., 9 Utah, 31, 33 Pac. 229, 24 L. R. A. 610.

[768] Lewis, Em. Dom. (2d Ed.) § 115*i*.

of tracks is legitimate; it rests simply with the proper public authorities to determine how many tracks will best subserve the public interests and so a street might be filled with railroad tracks and all ordinary traffic excluded therefrom and yet be held to be devoted to legitimate and proper street uses and this is a palpable absurdity. For these reasons we think that railroads are not legitimate street uses: this conclusion does not prevent the use of a street by railroads since property devoted to one public use may be taken for another public use or a joint use permitted. It simply prevents such use being made without just compensation to abutting property owners."

§ 851. 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 railroads 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.[769] The authority

[769] Citizens' St. R. Co. v. City of Memphis, 53 Fed. 715; Perry v. New Orleans, M. & C. R. Co., 55 Ala. 413; Birmingham R. & E. Co. v. Birmingham Traction Co., 122 Ala. 349; Wilmington City R. Co. v. People's R. Co. (Del.) 47 Atl. 245, construing General Incorporation Act, §§ 103 et seq.; State v. Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590; Savannah & T. R. Co. v. City of Savannah, 45 Ga. 602; City of Chicago v. Illinois Steel Co., 66 Ill. App. 561; City of Jacksonville v. Jacksonville R. Co., 67 Ill. 540. But land dedicated for a public square cannot be diverted from this use by either the legislature nor a municipal corporation and devoted to a railroad or to a private use.

City of Clinton v. Cedar Rapids & M. R. R. Co., 24 Iowa, 455; Chicago N. & S. W. R. Co. v. Town of Newton, 36 Iowa, 299; Hine v. Keokuk & D. M. R. Co., 42 Iowa, 636; Linn County v. Hewitt, 55 Iowa, 505; Hiss v. Baltimore & H. Pass. R. Co., 52 Md. 242; Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; Inhabitants of Springfield v. Connecticut River R. Co., 58 Mass. (4 Cush.) 63; City of St. Paul v. Chicago, M. & St. P. R. Co., 63 Minn. 330, 34 L. R. A. 184; Lincoln St. R. Co. v. City of Lincoln, 61 Neb. 109, 84 N. W. 802. The rights of a street railway company are established by the general statutes and not by the ordinances of a municipality. Morris & E. R. Co. v. City of Newark, 10 N. J. Eq. (2 Stockt.) 352; Jersey City v. Jersey City & B. R. Co., 20 N. J. Eq. (5 C. E. Green) 360; Inhabitants of Burlington v. Pennsylvania R. Co., 56 N. J. Eq. 259, 38 Atl. 849; In re

may also be given to such a subordinate public corporation to be exercised by it either exclusively [770] or in conjunction with the legislature.[771] The authority to grant such a right may be exer-

Trenton St. R. Co., 58 N. J. Eq. 533; In re Peoples' Rapid Transit R. Co., 57 Hun, 587, 10 N. Y. Supp. 849; In re Washington St. A. & P. R. Co., 115 N. Y. 442, 22 N. E. 356. General railroad act authorizes the construction of horse railroads on streets of the cities of the state except the city of New York.

Peoples' Rapid Transit Co. v. Dash, 125 N. Y. 93, 26 N. E. 25, 10 L. R. A. 728. The general railroad act of New York 1850 confers no authority for the construction of a two story elevated road. See, also, as holding the same, the case of Schaper v. Brooklyn & L. I. Cable R. Co., 124 N. Y. 630; Cincinnati & S. G. A. St. R. Co. v. Village of Cumminsville, 14 Ohio St. 523; Harrisburg City Pass. R. Co. v. City of Harrisburg, 149 Pa. 465, 24 Atl. 56; Tennessee & A. R. Co. v. Adams, 40 Tenn. (3 Head), 596. See Century Digest, vol. 41, col. 1788 et seq.; Elliott, R. R. § 1076; Elliott, Roads & S. cc. 19, 20. But see Donnaher v. State, 16 Miss. (8 Smedes & M.) 649; Atlantic & P. R. Co. v. City of St. Louis, 3 Mo. App. 315; Id., 66 Mo. 228.

[770] Columbus & W. R. Co. v. Witherow, 82 Ala. 190, 3 So. 23; Town of Arcata v. Arcata & M. R. Co., 92 Cal. 639, 28 Pac. 676; Brown v. Atlanta R. & P. Co., 113 Ga. 462, 39 S. E. 71; Moses v. Pittsburgh, Ft. W. & C. R. Co., 21 Ill. 516; Cairo & V. R. Co. v. People, 92 Ill. 170; Cook County v. Great Western R. Co., 119 Ill. 218; Wolfe v. Covington & L. R. Co., 54 Ky. (15 B. Mon.) 404; Brown v. Duplessis, 14 La. Ann. 842; Canal & C. St. R. Co. v. Crescent City R. Co., 41 La. Ann. 561, 6 So. 849; New Bedford & F. St. R. Co. v. Achushnet St. R. Co., 143 Mass. 200, 9 N. E. 536. There is no necessity for the concurrent action of two or more towns as required by Pub. St. Mass. c. 113, § 49, where the tracks are all to be laid in the same city.

South Boston R. Co. v. Middlesex R. Co., 121 Mass. 485; People v. Ft. Wayne & E. R. Co., 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752; Jersey City v. Jersey City & B. R. Co., 20 N. J. Eq. (5 C. E. Green) 360; Montclair Military Academy v. North Jersey Street R. Co., 65 N. J. Law, 328, 47 Atl. 890; Stuyvesant v. Pearsall, 15 Barb. (N. Y.) 244; In re Syracuse & Southern Bay R. Co., 33 Misc. 510, 68 N. Y. Supp. 881; Reeves v. Philadelphia Traction R. Co., 152 Pa. 153, 25 Atl. 516; Pittsburgh & B. Pass. R. Co. v. Borough of Birmingham, 51 Pa. 41; Aycock v. San Antonio Brewing Ass'n, 26 Tex. Civ. App. 341, 63 S. W. 953; Dooly Block v. Salt Lake Rapid Transit Co., 9 Utah, 31, 33 Pac. 229; 24 L. R. A. 610. The right granted to exclusively control streets of a city confers no power on the city to devote the entire width to railroad use so as to injuriously affect the property rights of abutting owners. Jordan v. City of Benwood, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519. A city is not liable for injuries resulting from the construction on its authority of railroad tracks in a street.

[771] Citizens' St. R. Co. v. Jones, 34

cised by some designated body or official only after an application and investigation in respect to the necessity for and feasibility of

Fed. 579; Port of Mobile v. Louisville & N. R. Co., 84 Ala. 115, 4 So. 106; City of South Pasadena v. Los Angeles Terminal R. Co., 109 Cal. 315, 41 Pac. 1093. A city has no extraterritorial jurisdiction in respect to rate of fares charged by the street railway. Almand v. Atlanta Consol. St. R. Co., 108 Ga. 417, 34 S. E. 6; Chicago, R. I. & P. R. Co. v. City of Joliet, 79 Ill. 25. A municipality may be estopped to deny the right of a railroad company to use certain public grounds for its right of way.

Tudor v. Chicago & S. S. Rapid Transit Co., 164 Ill. 73, 46 N. E. 446, 36 L. R. A. 379; Michigan City v. Boeckling, 122 Ind. 39, 23 N. E. 518. A city has the power to grant the use of its streets by a street railway company and is not liable for negligence of that company. Cook v. City of Burlington, 36 Iowa, 357; O'Brien v. Baltimore Belt R. Co., 74 Md. 363, 22 Atl. 141, 13 L. R. A. 126.

Detroit City R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007. Where in the use of motive power a company may exceed its rights, the question is one between the state and the railroad company. It cannot be raised collaterally in a controversy between an abutting lot owner and the company. State v. Lindell R. Co., 151 Mo. 162, 52 S. W. 248; Swenson v. City of Lexington, 69 Mo. 157. A city under its charter granting permission to a railroad company for the construction of its road along a street is not liable to the abutting land owners for any interruption of their use of the street.

Donnaher v. State, 16 Miss. (8 Smedes & M.) 649; Morris & E. R. Co. v. City of Newark, 10 N. J. Eq. (2 Stockt.) 352; Methodist Episcopal Church v. Pennsylvania R. Co., 48 N. J. Eq. 452, 22 Atl. 183. A city cannot give a railroad company terminal rights in a street where, by legislative grant, it is confined to a mere right of passage. State v. Inhabitants of Trenton, 54 N. J. Law, 92, 23 Atl. 281; Kennelly v. City of Jersey City, 57 N. J. Law, 293, 30 Atl. 531, 26 L. R. A. 281; West Jersey Traction Co. v. Shivers, 58 N. J. Law, 124, 33 Atl. 55. The privilege of laying tracks in a city by a street railroad company must be granted by ordinance.

Theberath v. City of Newark, 37 N. J. Law, 309, 30 Atl. 528; Budd v. Camden Horse R. Co., 61 N. J. Eq. 543, 48 Atl. 1028; People v. Gilroy, 56 Hun, 537, 9 N. Y. Supp. 833; Id., 9 N. Y. Supp. 686; People v. Barnard, 48 Hun (N. Y.) 57; Delaware, L. & W. R. Co. v. Syracuse, L. & B. R. Co., 28 Misc. 456, 59 N. Y. Supp. 1035; People v. Newton, 112 N. Y. 396. The change of motive power from horse to cable line cannot be made without the consent of the city.

Ghee v. North Union Gas Co., 158 N. Y. 510, 53 N. E. 692; Musser v. Fairmount & A. St. R. Co., 5 Pa. Law J. 466; Appeal of Williamsport Pass. R. Co., 120 Pa. 1, 13 Atl. 496; City of Philadelphia v. River Front R. Co., 173 Pa. 334, 34 Atl. 60; State v. Newport St. R. Co., 16 R. I. 533, 18 Atl. 161; Smith v. East End St. R. Co., 87 Tenn. 626, 11 S. W. 709; Laager v. City of San Antonio (Tex. Civ. App.) 57 S. W. 61; Texarkana

the proposed line[772] and this rule applies not only to the original construction but also extensions and changes.[773] In still further

& Ft. S. R. Co. v. Texas & N. O. R. Co., 28 Tex. Civ. App. 551, 67 S. W. 525.

Wood v. City of Seattle, 23 Wash. 1, 62 Pac. 135. The city of Seattle under its charter power, art. 4, §§ 1, 18, has the right to accept the voluntary surrender of a street railway franchise. Yates v. Town of West Grafton, 34 W. Va. 783, 12 S. E. 1075. See, also, Cooper v. Alden, Har. (Mich.) 72; Nellis, St. Surface R. R. c. 2, § 5, with authorities cited.

[772] People v. Craycroft, 111 Cal. 544; Hunt v. Chicago H. & D. R. Co., 121 Ill. 638, 13 N. E. 176; Metropolitan City R. Co. v. City of Chicago, 96 Ill. 620; City R. Co. v. Citizens' St. R. Co. (Ind.) 52 N. E. 157; Appeal of Cherryfield & M. Elec. R. Co., 95 Me. 361, 50 Atl. 27; In re Keene Elec. R. Co., 68 N. H. 434, 41 Atl. 775; In re Nashua St. R. Co., 69 N. H. 275, 41 Atl. 858; Kennelly v. City of Jersey City, 57 N. J. Law, 293, 30 Atl. 531, 26 L. R. A. 281; Hutchinson v. Borough of Belmar, (N. J. Err. & App.) 45 Atl. 1092, affirming 61 N. J. Law, 443; West Jersey Traction Co. v. Camden Horse R. Co., 53 N. J. Eq. 163; In re Union El. R. Co., 49 Hun, 609, 1 N. Y. Supp. 797; New York Cable Co. v. City of New York, 104 N. Y. 1, 10 N. E. 332, construing N. Y. rapid transit act (Laws 1875, c. 606); In re Rochester Elec. R. Co., 57 Hun, 56, 10 N. Y. Supp. 379; In re Atlantic Ave. R. Co., 58 Hun, 609, 12 N. Y. Supp. 228; In re New York Cable R. Co., 40 Hun (N. Y.) 1; Bohmer v. Haffen, 35 App. Div. 381, 54 N. Y. Supp. 1030, affirming 22 Misc. 565, 50 N. Y. Supp. 857; People v. Board of Railroad Com'rs, 42 App. Div. 366, 59 N. Y. Supp. 144; In re Brooklyn Rapid Transit Co., 62 How. Pr. (N. Y.) 404; Town of Lysander v. Syracuse, L. & B. R. Co., 31 Misc. 330, 65 N. Y. Supp. 415. Commissioners of highways. In re Amsterdam J. & G. R. Co., 86 Hun (N. Y.) 578; In re Union El. R. Co., 112 N. Y. 61, 19 N. E. 664, 2 L. R. A. 359; In re Peoples' R. Co., 112 N. Y. 578, 21 N. E. 367; People v. Grant, 138 N. Y. 653, 34 N. E. 513. A failure to advertise properly the time and place when an application will be made for a franchise is fatal to the right of the board to entertain the application.

People v. Board of Railroad Com'rs, 156 N. Y. 693, affirming 30 App. Div. 69, 51 N. Y. Supp. 781. An application for a change of motive power having been granted whereby the company has acquired a right in the nature of a contract, a board cannot subsequently reconsider or review its action. People v. Railroad Com'rs, 160 N. Y. 202, 54 N. E. 697; Kittinger v. Buffalo Traction Co., 160 N. Y. 377, 54 N. E. 1081; In re Nassau Elec. R. Co., 167 N. Y. 37, 60 N. E. 279; Appeal of Tp. of North Manheim (Pa.) 14 Atl. 137; Lehigh Coal & Nav. Co. v. Inter-County St. R. Co., 167 Pa. 75, 31 Atl. 471; City of Burlington v. Burlington Traction Co., 70 Vt. 491, 41 Atl. 514.

[773] City of Hartford v. Hartford St. R. Co., 73 Conn. 327, 47 Atl. 330; Rapid R. Co. v. City of Mt. Clemens, 118 Mich. 133, 76 N. W. 318. Construction of "Y."

instances, the right of occupation may be granted only upon the consent of the owners of abutting property.[774] Whether the right of the occupation of a highway by a steam railway is derived from one or more of these sources, the extent of its rights will be determined largely by the language of the grant which must be express, the authority of the grantor of the right and the power or the capacity of the grantee to accept the grant.[775] 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.[776] The authority for the occupation or use of a highway can-

[774] Linden Land Co. v. Milwaukee Elec. R. & L. Co., 107 Wis. 493, 83 N. W. 851. Abutting owners control only streets adjoining them. See, also, authorities cited in §§ 836, 837, ante.

[775] Williams v. Citizens' R. Co., 130 Ind. 71, 15 L. R. A. 64; Koch v. North Ave. R. Co., 75 Md. 222, 15 L. R. A. 377; Detroit Citizens' St. R. Co. v. City of Detroit, 110 Mich. 384, 35 L. R. A. 859; Traphagen v. Jersey City, 52 N. J. Law, 65, 18 Atl. 586, 696. A city has no power to confer upon a railroad company a right to occupy exclusively any portion of a public street.

Kelly v. City of Paterson, 35 N. J. Law, 196; De Grauw v. Long Island Elec. R. Co., 163 N. Y. 597, 57 N. E. 1108. Under authority to "convey persons and property in cars for compensation," cars may be operated by street surface railroads designed and used exclusively for carrying express matter, freight or property. Gillette v. Chester & M. R. Co., 2 Pa. Dist. R. Co., 450. Act May 14th, 1889, providing for the operation of street roads "by any power other than by locomotives," authorizes the use of electricity.

Com. v. Borough of West Chester, 9 Pa. Co. Ct. R. 542. Act May 14th, 1889, authorizes the construction and operation of electric railroads operated by means of permanent overhead wires carried on poles set within a street line. Citizens' St. R. Co. v. Africa, 100 Tenn. 26; Schwede v. Hemrich Bros. Brewing Co., 29 Wash. 21, 69 Pac. 362. A private corporation can secure no right to construct a railroad track on a public street through the granting of a permit to this effect by a board of public works.

[776] Florida Cent. & P. R. Co. v. Ocala St. & S. R. Co., 39 Fla. 306, 22 So. 692; Hanbury v. Woodward Lumber Co., 98 Ga. 54, 26 S. E. 477; Chicago Gen. R. Co. v. Chicago City R. Co., 62 Ill. App. 502; Hibbard, Spencer, Bartlett & Co. v. City of Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; Cook v. City of Burlington, 36 Iowa, 357; O'Neil v.

not be granted either by the legislature or a body to whom the power has been declared except upon a consideration of the principle that such use is subordinate to the rights of the public at large,[777] and if it appears that a highway is already burdened by existing grants a further one may be withheld. The right to use is also taken, affected with the implied condition that the highway shall not be used in such a manner as to destroy its proper and legitimate use by the public at all times.[778]

Lamb, 53 Iowa, 725. The presumption is that the railroad is for a public not a private use.

Heath v. Des Moines & St. L. R. Co., 61 Iowa, 11; Mikesell v. Durkee, 36 Kan. 97, 12 Pac. 351, 34 Kan. 509; Bradley v. Pharr, 45 La. Ann. 426, 12 So. 618; Green v. City of Portland, 32 Me. 431; Gustafson v. Hamm, 56 Minn. 334, 57 N. W. 1054, 22 L. R. A. 565; St. Louis R. Co. v. Southern R. Co. (Mo.) 15 S. W. 1013. A street railway operated solely for the carrying of passengers is a public highway and its use a public one.

Lackland v. North Missouri R. Co., 31 Mo. 180; Brown v. Chicago Great Western R. Co., 137 Mo. 529, 38 S. W. 1099. All railroads are declared public highways within the meaning of Mo. Const., art. 12, § 14. Glaessner v. Anheuser-Busch Brew. Co., 100 Mo. 508, 13 S. W. 707; City of Newark v. Delaware, L. & W. R. Co., 42 N. J. Eq. 196, 7 Atl. 123; Montgomery v. Inhabitants of Trenton, 36 N. J. Law, 79; Taylor v. Dunn, 652, 16 S. W. 732; Cereghino v. Oregon Short Line R. Co., 26 Utah, 467, 73 Pac. 634.

[777] Kansas Pac. R. Co. v. Pointer, 9 Kan. 620; Jeffersonville, M. & I. R. Co. v. Esterle, 76 Ky. (13 Bush.) 667; Middlesex R. Co. v. Wakefield, 103 Mass. 262; City of Detroit v. Ft. Wayne & E. R. Co., 90 Mich. 646, 51 N. W. 688; City of St. Paul v. Chicago, M. & St. P. R. Co., 63 Minn. 330, 34 L. R. A. 184.

Armstead v. Mendenhall, 83 Minn. 136, 85 N. W. 929. A street car company operating cars in public streets and the public lawfully using a street have rights alike except that the cars cannot leave the track, in which respect the company has a permanent right over its tracks. Newark Pass. R. Co. v. Block, 55 N. J. Law, 605, 27 Atl. 1067, 22 L. R. A. 374. The principle applied to rate of speed of cars.

Buhrens v. Dry-Dock, E. B. & B. R. Co., 53 Hun, 571, 6 N. Y. Supp. 224. Street cars have no greater rights where they cross over streets than those of other vehicles. Kellinger v. Forty-second St. & G. St. Ferry R. Co., 50 N. Y. 206; Houston & T. C. R. Co. v. Carson, 66 Tex. 345, 1 S. W. 107; Dooly Block v. Salt Lake Rapid Transit Co., 9 Utah, 31, 33 Pac. 229, 24 L. R. A. 610.

[778] City of Baltimore v. Baltimore Trust & Guarantee Co., 166 U. S. 673; People v. Rich, 54 Cal. 74; Commonwealth v. City of Frankfort, 92 Ky. 149, 17 S. W. 287; Detroit City R. Co. v. Mills, 85 Mich. 634; Watson v. Robberson Ave. R. Co., 69 Mo. App. 548; Lockwood v. Wabash R. Co., 122 Mo. 86, 26 S. W. 698; Schulenberg & B. Lumber Co.

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,[779] or it may be considered as a mere license revocable at pleasure and conveying no rights of the char-

v. St. Louis, K. & N. W. R. Co., 129 Mo. 455, 31 S. W. 796; Mahady v. Bushwick R. Co., 91 N. Y. 148; Dooly Block v. Salt Lake Rapid Transit Co., 9 Utah, 31, 4 Am. Electrical Cas. 189, 24 L. R. A. 610.

[779] Baltimore Trust and Guarantee Co. v. City of Baltimore, 64 Fed. 153; Town of Arcata v. Arcata & M. R. Co., 92 Cal. 639, 28 Pac. 676; Denver Tramway Co. v. Londoner, 20 Colo. 150, 37 Pac. 723; Fair Haven & W. R. Co. v. 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; People v. Chicago West Div. R. Co., 118 Ill. 113.

City of Chicago v. Union Stock Yards & Transit Co., 164 Ill. 224, 35 L. R. A. 281. Where a city has acquiesced in the use for twenty years by a railroad company of its streets, has authorized its construction and required it to make many improvements, it is estopped to deny the rightful authority to so use and occupy the streets. Harvey v. Aurora & G. R. Co., 186 Ill. 283, 57 N. E. 857; City R. Co. v. Citizens' St. R. Co. (Ind.) 52 N. E. 157; City of Burlington v. Burlington St. R. Co., 49 Iowa, 144; Louisville & N. R. Co. v. Bowling Green R. Co., 23 Ky. L. R. 273, 63 S. W. 4; New Orleans C. & L. R. Co. v. City of New Orleans, 44 La. Ann. 748; State v. New Orleans & C. R. Co., 44 La. Ann. 1026, 11 So. 709.

Medford & C. R. Co. v. Inhabitants of Somerville, 111 Mass. 232. What is sufficient notice of a revocation of the authority to construct a street railway discussed. Electric R. Co. v. City of Grand Rapids, 84 Mich. 257, 47 N. W. 567. Conditions are void imposed after a grant of privileges with an acceptance.

Union St. R. Co. v. Saginaw Circ. Judge, 113 Mich. 694; Nash v. Lowry, 37 Minn. 261, 33 N. W. 787; Union Depot R. Co. v. Southern R. Co., 105 Mo. 562, 16 S. W. 920. A street railway company accepting the provisions of a city charter enacted after its organization stands in the same position that it would had the charter been in effect before it was incorporated. Newark & H. Traction Co. v. Borough of North Arlington, 67 N. J. Law, 161, 50 Atl. 345; City of Elmira v. Maple Ave. R. Co., 51 Hun, 638, 4 N. Y. Supp. 943. The right to operate lines in a specified manner cannot be subsequently interfered with. Herzog v. New York El. R. Co., 37 N. Y. State Rep. 567, 14 N. Y. Supp. 296; Brooklyn Heights R. Co. v. City of Brooklyn, 18 N. Y. Supp. 876; Brooklyn Cent. R. Co. v. Brooklyn City R. Co., 32 Barb. (N. Y.) 358; Delaware, L. & W. R. Co. v. City of Buffalo, 65 Hun, 464, 20 N. Y. Supp. 448. A municipality cannot revoke authority granted by the legislature. City of Troy v. Troy & L. R. Co., 49 N. Y. 657; City of New York v. Eighth Ave. R. Co., 118 N. Y. 389, 23 N. E. 550; Akron, B. & C.

acter above indicated.[780] The question of the right of the legislature or a subordinate public corporation to grant an exclusive

R. Co. v. Village of Bedford, 6 Ohio N. P. 276.

City of Columbus v. Columbus St. R. Co., 45 Ohio St. 98, 12 N. E. 651. A street railway company by the construction and operation of its road under a franchise granted by a city ordinance accepts the whole ordinance, its burdens and privileges alike. Mill Creek Valley St. R. Co. v. Village of Carthage, 18 Ohio Circ. R. 216; Cincinnati & S. R. Co. v. Village of Carthage, 36 Ohio St. 631; Scranton & P. Traction Co. v. Delaware & H. Canal Co., 1 Pa. Super. Ct. 409; Hannum v. Media, M. & A. & C. R. Co., 8 Del. Co. R. (Pa.) 91; Hestonville, M. & F. Pass. R. Co. v. City of Philadelphia, 89 Pa. 210; Junction Pass. R. Co. v. Williamsport Pass. R. Co., 154 Pa. 116, 26 Atl. 295. The state alone has the power to enforce the forfeiture.

Pawcatuck Valley St. R. Co. v. Town Council of Westerly, 22 R. I. 307, 47 Atl. 691. An ordinance permitting the company to use certain streets and prescribing the use of a certain kind of rails in respect to the rails is not a contract so as to prohibit the city council from subsequently changing the rails. State v. Lebanon & N. Turnpike Co. (Tex. Civ. App.) 61 S. W. 1096; City of Houston v. Houston Belt & M. P. R. Co., 84 Tex. 581, 19 S. W. 786; Dern v. Salt Lake City R. Co., 19 Utah, 46, 56 Pac. 566.

Spokane St. R. Co. v. City of Spokane Falls, 6 Wash. 521, 33 Pac. 1072. A city may be estopped by acquiescence in the use of streets by a railroad company and the collection of taxes upon its property from afterwards denying its legal right to occupy these streets for the sole purpose of giving a similar right to another company. Sinnott v. Chicago & N. W. R. Co., 81 Wis. 95, 50 N. W. 1097. But see Des Moines St. R. Co. v. Des Moines B. G. St. R. Co., 73 Iowa, 513, 35 N. W. 602; City of Springfield v. Smith, 138 Mo. 645, 40 S. W. 757, 37 L. R. A. 446. See, also, the cases of Pawcatuck Val. St. R. Co. v. Town Council of Westerly, 22 R. I. 307, 47 Atl. 691. An ordinance requiring change of rails not a violation of a franchise. Easton, S. E. & W. E. P. R. Co. v. Easton, 133 Pa. 505, 19 Atl. 486.

[780] Southern R. Co. v. Atlanta R. & P. Co., 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125. A railroad corporation cannot complain because a street railway company is subsequently permitted to construct and operate an electric line on streets upon which its track it laid. The steam road's right to occupy streets is a mere easement subject to the inconvenience that may result from the growth and development of the city and consequent increase of or change in modes of travel. It cannot recover damages for a subsequent crossing by an electric line.

Chicago City R. Co. v. People, 73 Ill. 541; City of Bellville v. Citizens' Horse R. Co., 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; City R. Co. v. Citizens' St. R. Co. (Ind.) 52 N. E. 157. A street railway company and a city are bound by their construction of an ordinance granting privileges. Atchison St. R. Co. v. Nave,

privilege or right will be considered later.[781] A grant of the use of streets must be definite and accepted within the time fixed or a reasonable one.[782]

§ 852 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

38 Kan. 744, 17 Pac. 587; Lake Roland El. R. Co. v. City of Baltimore, 77 Md. 352, 26 Atl. 510, 20 L. R. A. 126.

City of St. Paul v. Chicago, M. & St. P. R. Co., 63 Minn. 330, 356, 34 L. R. A. 184. "But such a license lawfully granted and subsequently acted on by the licensee is not revocable in the ordinary sense of the word, that is, it is not revocable at the mere arbitrary pleasure or whim of the city or municipality. The licensee in such a case has vested rights under the license subject only to the permanent rights of the general public for the use to which it was dedicated." But see People v. Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650.

[781] See §§ 921 et seq., post.

[782] City R. Co. v. Citizens' St. R. Co., 166 U. S. 557; People v. Los Angeles Elec. R. Co., 91 Cal. 338, 27 Pac. 673. Where a forfeiture is claimed because of a failure to commence construction within the time required, the pleadings must state dates and facts sufficient to give a cause of action. Williamson v. Gordon Heights R. Co. (Del.) 40 Atl. 933; City R. Co. v. Citizens' St. R. Co. (Ind.) 52 N. E. 157; Louisville & N. R. Co. v. Bowling Green R Co., 110 Ky. 788, 63 S. W. 4. A failure to declare a forfeiture based upon a nonuse of streets specified within the time named will result in the loss of the right after the streets have been occupied.

United R. & E. Co. v. Hayes, 92 Md. 490, 48 Atl. 364. Where an ordinance required that a street railroad company should construct its tracks and begin running its cars within a prescribed time or forfeit its rights, to be excepted from the operation of the ordinance streets not graded or paved. A street macademized is not paved within the meaning of the ordinance. State v. Helena Power & Light Co., 22 Mont. 391, 44 L. R. A. 692; Inhabitants of Trenton v. Trenton Horse Ry. Co. (N. J. Eq.) 19 A. 263; Moore v. West Jersey Traction Co., 62 N. J. Law, 386, 792, 41 Atl. 946; People v. Broadway R. Co., 56 Hun, 45, 9 N. Y. Supp. 6. The failure to build one line within the time limited will not work a forfeiture in respect to other lines constructed in time. Junction Pass. R. Co. v. Williamsport Pass. R. Co., 154 Pa. 116, 26 Atl. 295. See, as to conditional acceptance, McNeil v. Chicago City R. Co., 61 Ill. 150.

application of the principle of implied powers.[783] Where the grant is not of the character above indicated, a more liberal rule of interpretation will be applied in the determination of ambiguous

[783] Citizens' St. R. Co. v. Jones, 34 Fed. 579; Hopkins v. Baltimore & P. R. Co., 17 D. C. (6 Mackey) 311. The authority granted a railroad corporation to lay its tracks in the city of Washington does not authorize the use of the public streets for general yard purposes. Glass v. Memphis & C. R. Co., 94 Ala. 581, 10 So. 215. The right of a railroad to occupy a street cannot be raised in a collateral proceeding.

Southern & N. A. R. Co. v. Highland Ave. & B. R. Co., 119 Ala. 105, 24 So. 114; Kavanagh v. Mobile & G. R. Co., 78 Ga. 271, 2 S. E. 636; Harvey v. Aurora & G. R. Co., 186 Ill. 283, 57 N. E. 857; Indianapolis Cable St. R. Co. v. Citizens' St. R. Co., 127 Ind. 369, 8 L. R. A. 539; Thompson v. Citizens' St. R. Co., 152 Ind. 461, 53 N. E. 462; Slatten v. Des Moines Valley R. Co., 29 Iowa, 148; Heath v. Des Moines & St. R. Co., 61 Iowa, 11; Klosterman v. Chesapeake & O. R. Co., 22 Ky. L. R. 192, 56 S. W. 820; City of Baltimore v. Chesapeake & P. Tel. Co., 92 Md. 692, 48 Atl. 465.

Metropolitan R. Co. v. Quincy R. Co., 94 Mass. (12 Allen) 262. One railroad cannot without authority from the public officials use the tracks of a similar corporation. Browne v. Turner, 174 Mass. 150, 54 N. E. 510; City of St. Paul v. Chicago, M. & St. P. R. Co., 63 Minn. 330, 34 L. R. A. 184; Village of Wayzata v. Great Northern R. Co., 67 Minn. 385, 69 N. W. 1073. The law authorizing the railroad company to construct its line over a public way "if necessary" contemplates the practical and not an absolute necessity. City of Concord v. Concord Horse R. Co., 15 N. H. 30, 18 Atl. 87.

City of Bridgeton v. Bridgeton & M. Traction Co., 62 N. J. Law, 592, 43 Atl. 715, 45 L. R. A. 837. An incorporated street railroad cannot at its discretion abandon any portion of its road and tracks which have been established by ordinance. Trenton St. R. Co. v. United N. J. R. & Canal Co., 60 N. J. Eq. 500, 46 Atl. 763; West Jersey Traction Co. v. Camden Horse R. Co., 53 N. J. Eq. 163, 35 Atl. 49; State v. Inhabitants of Trenton, 54 N. J. Law, 92, 23 Atl. 281. Use of motive power.

People v. Newton, 48 Hun, 477, 1 N. Y. Supp. 197. A street railway company under the authority to construct and operate a horse railroad has no right to construct a cable line. Mattlage v. New York El. R. Co., 14 Daly (N. Y.) 1.

Dry-Dock, E. B. & B. R. Co. v. City of N. Y., 55 Barb. (N. Y.) 298. A provision in a railroad charter which prohibits the city authorities from doing any act to obstruct the operation of the road cannot be construed so as to prevent the city from constructing and repairing sewers in the streets occupied by the company's tracks.

Wabash R. Co. v. City of Defiance, 52 Ohio St. 262, 40 N. E. 89; City of Philadelphia v. Continental Pass. R. Co., 11 Phila. (Pa.) 315. The rule applies to the part of the street in respect to which the authority to construct tracks is granted. City of Philadelphia v. Citizens' Pass. R. Co., 151 Pa. 128,

clauses or words.[784] 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,[785] or so long as the effect of an act is not injurious to

24 Atl. 1099. The occupation of street. Junction Pass. R. Co. v. Williamsport Pass. R. Co., 154 Pa. 116, 26 Atl. 295. Acceptance of grant. City of Burlington v. Burlington Traction Co., 70 Vt. 491.

[784] City of Owensboro v. Owensboro & N. R. Co., 19 Ky. L. R. 449, 40 S. W. 916. An unauthorized act of a railroad company may be made valid by subsequent ordinance. In re Brooklyn El. R. Co., 57 Hun, 590, 11 N. Y. Supp. 161; Id., 125 N. Y. 434, 26 N. E. 474.

[785] Ransom v. Citizens' R. Co., 104 Mo. 375, 16 S. W. 416. When a street railway company has authority to build a line of single or double track, the construction of a single track does not preclude it from later changing to a double track when business demands it. McFarland v. Orange & N. Horse Car R. Co., 13 N. J. Eq. (2 Beasl.) 17; Paterson R. Co. v. Grundy, 51 N. J. Eq. 213, 26 Atl. 788. A charter grant of 1866 where the company was given the right to operate cars by such motive power as it deemed expedient and proper held to authorize the use of electricity by the trolley system.

West Jersey Traction Co. v. Camden Horse R. Co., 52 N. J. Eq. 452; Brooklyn Heights R. Co. v. City of Brooklyn, 46 N. Y. State Rep. 299, 18 N. Y. Supp. 876; Bohmer v. Haffen, 35 App. Div. 381, 54 N. Y. Supp. 1030. Rights in regard to extensions. People v. Brooklyn, F. & C. I. R. Co., 89 N. Y. 75. A constitutional provision relative to the construction and operation of street railroads can only be prospective in its effect. Commonwealth v. Union Pass. R. Co., 163 Pa. 22, 29 Atl. 711; City of Houston v. Houston Belt & M. P. R. Co., 84 Tex. 581, 16 S. W. 786.

The rule of strict construction in reference to motive power has been adopted in the following cases: Henderson v. Central Pass. R. Co., 21 Fed. 358; Omaha Horse R. Co. v. Cable Tramway Co., 30 Fed. 324; Citizens' St. R. Co. v. Jones, 34 Fed. 579; Birmingham & P. Mines St. R. Co. v. Birmingham St. R. Co., 79 Ala. 465; Denver & S. R. Co. v. Denver City R. Co., 2 Colo. 673; Farrell v. Winchester Ave. R. Co., 61 Conn. 127, 23 Atl. 757; North Chicago City R. Co. v. Town of Lake View, 105 Ill. 207; Harmon v. City of Chicago, 110 Ill. 400; Indianapolis Cable St. R. Co. v. Citizens' St. R. Co., 127 Ind. 369, 8 L. R. A. 539; Stanley v. City of Davenport, 54 Iowa, 463; State v. Inhabitants of Trenton, 54 N. J. Law, 92, 23 Atl. 281; 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. "The propelling power of such a road (street railroad) may be animal, steam, electricity, cable, fireless engines, or compressed air; all of which mo-

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.[786] The usual rule also obtains that the question of lawful authority is one to be raised solely by the state

tors have been, and are now, in use for the purpose of propelling street cars. Doubtless, other methods of propelling the cars of street railroads will be discovered and applied. The legislature having empowered the city to authorize the construction of street railroads, without qualification or restriction as to the motive power to be used on such roads, the city had the undoubted right to authorize animal or mechanical power to be used as motors on such roads." Buckner v. Hart, 52 Fed. 835; Williams v. Citizens' R. Co., 130 Ind. 71, 15 L. R. A. 64; North Baltimore Pass. R. Co. v. North Ave. R. Co., 75 Md. 233, 23 Atl. 466; Green v. City & Suburban R. Co., 78 Md. 294, 28 Atl. 626; Detroit City R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007; Paterson R. Co. v. Grundy, 51 N. J. Eq. 213, 26 Atl. 788; Hudson River Tel. Co. v. Watervliet Co., 135 N. Y. 393, 32 N. E. 148, 17 L. R. A. 674; Fox v. Catharine & B. Sts. R. Co., 12 Pa. Co. Ct. R. 180; Lockhart v. Craig St. R. Co., 139 Pa. 419, 21 Atl. 26; Taggart v. Newport St. R. Co., 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205.

[786] City R. Co. v. Citizens' St. R. Co., 166 U. S. 557; Central R. & Elec. Co. v. New York, N. H. & H. R. Co., 72 Conn. 33, 43 Atl. 490; Huntting v. Hartford St. R. Co., 73 Conn. 179, 46 Atl. 824. The express grant of the right to lease other highways implies the existence of the power in the latter to give such a lease. Koch v. North Ave. R. Co., 75 Md. 222, 23 Atl. 463, 15 L. R. A. 377; Hooper v. Baltimore City Pass. R. Co., 85 Md. 909, 37 Atl. 359; Detroit City R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007. Motive power. 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. Rule applies to extension of street car line. Farnum v. Concord Horse R. Co., 66 N. H. 569, 29 Atl. 541. Motive power. Allen v. City of Jersey City, 53 N. J. Law, 522, 22 Atl. 257; Dodd v. Consolidated Traction Co., 57 N. J. Law, 482, 31 Atl. 980.

Randolph v. Chosen Freeholders of Union County, 63 N. J. Law, 155, 41 Atl. 960. The fact that a street railway has no franchise cannot be raised by an abutting owner. North Jersey St. R. Co. v. South Orange Tp. 58 N. J. Eq. 83, 43 Atl. 53. The rule applied to an attempted forfeiture of a franchise because of a failure to complete a line within a specified time. Paterson R. Co. v. Grundy, 51 N. J. Eq. 213, 26 Atl. 788. Motive power. McClean v. Westchester Elec. R. Co., 25 Misc. 383, 55 N. Y. Supp. 556. An extension cannot be constructed independent of existing tracks. Asheville St. R. Co. v. West Asheville & S. S. R. Co., 114 N. C. 725, 19 S. E. 697.

Watson v. Fairmont & S. R. Co., 49 W. Va. 528, 39 S. E. 193. The fact that a railroad company may be exceeding its corporate powers in the exercise of a granted authority to use the streets of a city is no

or the municipal authority in a proceeding brought for that purpose. The doctrine of collateral attack applies as well.[787] Both steam and street railways are enterprises of the greatest advantage and benefit to a community and without them it could not exist. A community is almost entirely dependent for its commercial growth upon the means of transportation afforded it. This, as well as other considerations, induce the courts to adopt the rule of liberal construction in many instances given above. The prosperity of a community is dependent largely upon the cheapness and facility with which its products and manufactures can be handled and the occupation of highways and streets by steam roads for their tracks, switches and terminal facilities, is almost the sole means of accomplishing this result.

Authority for use of streets. The rule of strict construction will be applied to grants of authority for the use of certain streets,

ground for equitable relief by an adjoining property owner. But see the case of Mory v. Oley Val. R. Co., 199 Pa. 152, 48 Atl. 971, holding to the contrary under special statutory provisions. Lonergan v. La Layette St. R. Co. (Ind.) 3 Am. Electrical Cas. 273.

[787] 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, affirming 87 Ill. App. 17. Change of motive power and use of additional cars on trains. Thomas v. St. Louis, B. & S. R. Co., 164 Ill. 634, 46 N. E. 8; General Elec. R. Co. v. Chicago & W. I. R. Co., 184 Ill. 588, 56 N. E. 963; Quinn v. Shields, 62 Iowa, 129, 17 N. W. 437; State v. Fagan, 22 La. Ann. 545; New Orleans, C. & L. R. Co. v. City of New Orleans, 44 La. Ann. 748, 11 So. 77; Nichols v. Ann Arbor & Y. St. R. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; People v. Ft. Wayne & E. R. Co., 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752; Kitchell v. Manchester Road & Elec. R. Co., 79 Mo. App. 340; North v. State, 107 Ind. 356; Minnick v. Lancaster, M. & N. H. R. Co., 24 Pa. Co. Ct. R. 312; Junction Pass. R. Co. v. Williamsport Pass. R. Co., 154 Pa. 116.

Spokane St. R. Co. v. City of Spokane Falls, 6 Wash. 521, 33 Pac. 1072. The local authorities may compel a street railroad company to operate it by the authorized motive power. Sinnott v. Chicago & N. W. R. Co., 81 Wis. 95, 50 N. W. 1097; Linden Land Co. v. Milwaukee Elec. R. & Light Co., 107 Wis. 493, 83 N. W. 851. But see New York Cable Co. v. City of New York, 104 N. Y. 1, where it is held that a company to exercise the power of eminent domain must be a corporation de jure. Where the consent of abutting property owners is necessary, one of these can raise the question of authority. See Merriman v. Utica Belt Line St. R. Co., 18 Misc. 269, 41 N. Y. Supp. 1049; O'Brien v. Buffalo Traction Co., 31 App. Div. 632, 52 N. Y. Supp. 322

and the grantee will be limited strictly to the occupation of those clearly specified and at place designated,[788] and to the construction of additions, cross-overs, switches or extensions at the places or in the manner designated in the grant of authority from whatever source derived.[789]

[788] Spokane St. R. Co. v. City of Spokane Falls, 46 Fed. 322; Baker v. Selma St. & S. R. Co., 130 Ala. 474, 30 So. 464. The grant to construct may be general in its terms with respect to the streets of the city. Finch v. Riverside & A. R. Co., 87 Cal. 597, 25 Pac. 765; Borough of Stamford v. Stamford Horse R. Co., 56 Conn. 381, 15 Atl. 749, 1 L. R. A. 375; Wilmington City R. Co. v. Wilmington & B. S. R. Co. (Del.) 46 Atl. 12; Harvey v. Aurora & G. R. Co., 186 Ill. 283, 57 N. E. 857; Board of Com'rs of St. Joseph County v. South Bend & M. R. Co., 118 Ind. 68, 20 N. E. 499; Heath v. Des Moines & St. L. R. Co., 61 Iowa, 11; Kennedy v. Detroit R. Co., 108 Mich. 390, 66 N. W. 495; McFarland v. Orange & N. Horse Car R. Co., 13 N. J. Eq. (2 Beasl.) 17; Inhabitants of Trenton v. Trenton Horse Power R. Co. (N. J. Eq.) 19 Atl. 263; In re Metropolitan Transit Co., 48 Hun, 620, 1 N. Y. Supp. 114; In re South Beach R. Co., 53 Hun, 131, 6 N. Y. Supp. 172; Mattlage v. New York El. R. Co., 14 Daly (N. Y.) 1; McCruden v. Rochester R. Co., 5 Misc. 59, 25 N. Y. Supp. 114; Curvin v. Rochester R. Co., 78 Hun, 555, 29 N. Y. Supp. 521; Negus v. City of Brooklyn, 62 How. Pr. (N. Y.) 291; Auchincloss v. Metropolitan El. R. Co., 69 App. Div. 63, 74 N. Y. Supp. 534.

Hough v. Smith, 37 Misc. 363, 75 N. Y. Supp. 451. A consent by village trustees owners of stock in a street railway corporation to which they granted a right to use the streets of the village is void. In re Metropolitan Transit Co., 111 N. Y. 588, 19 N. E. 645; Minnich v. Lancaster, M. & N. H. R. Co., 24 Pa. Co. Ct. R. 312. The question is one which can alone be raised by the public authorities. Commonwealth v. Union Pass. R. Co., 163 Pa. 22, 29 Atl. 711; Pawcatuk Val. St. R. Co. v. Town Council of Westerly, 22 R. I. 307, 47 Atl. 691; Fort Worth St. R. Co. v. Rosedale St. R. Co., 68 Tex. 169, 4 S. W. 534.

Norfolk R. & Light Co. v. Consolidated Turnpike Co., 100 Va. 243, 40 S. E. 897. Under Va. Acts 1893–94, p. 127, as amended by acts 1895–96, p. 846, the board of road trustees of Norfolk county cannot confer upon a street railway company the right to operate upon highways a street railway. State v. Madison St. R. Co., 72 Wis. 612, 40 N. W. 487, 1 L. R. A. 771. But see West Jersey Traction Co. v. Camden Horse R. Co., 52 N. J. Eq. 452, 29 Atl. 333; Commonwealth v. Wilkes-Barre & K. St. R. Co., 127 Pa. 278, 17 Atl. 996; Commonwealth v. Union Pass. R. Co., 163 Pa. 22, 29 Atl. 711.

[789] Baltimore v. Baltimore, T. & G. Co., 166 U. S. 673. Construing the reasonableness of an ordinance restricting the use of a particular street to one track where the general grant gave the company the right to construct double tracks through the streets mentioned.

Walker v. City of Denver (C. C. A). 76 Fed. 670. A railroad com-

§ 853. 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.[790] The conditions

pany authorized by its charter to build "three foot standard narrow gauge railway" cannot enlarge its tracks to standard gauge without the consent of the city authorities where its tracks are laid. City of Hartford v. Hartford St. R. Co., 73 Hun, 327, 47 Atl. 330; City of Concord v. Concord Horse R. Co., 65 N. H. 30, 18 Atl. 87. Turnout. Brooklyn Cent. R. Co. v. Brooklyn City Ry. Co., 32 Barb. (N. Y.) 358. McClean v. Westchester Elec. R. Co., 25 Misc. 383, 55 N. Y. Supp. 556. Extensions should be connected with the original line. Eldert v. Long Island Elec. R. Co., 165 N. Y. 651, 59 N. E. 1122; Harner v. Columbia St. Car R. Co., 29 Wkly. Law Bul. 387.

Sims v. Brooklyn St. R. Co., 37 Ohio 556. A municipal ordinance granting authority to a street railway company to extend its tracks is not an act conferring corporate powers within the prohibition of Ohio Const. art. 13, § 1. City of Philadelphia v. Citizens' Pass. R. Co., 10 Pa. Co. Ct. R. 16; Willis v. Erie City Pass. R. Co., 188 Pa. 56, 41 Atl. 307; Borough of Shamokin v. Shamokin & M. C. E. R. Co., 196 Pa. 166, 46 Atl. 382.

[790] Macon Consol. St. R. Co. v. City of Macon, 112 Ga. 782, 38 S. E. 60. A municipal corporation cannot make a contract which abrogates or restricts the lawful exercise of its legislative or discretionary power with reference to the location of the tracks of a street car company. Des Moines St. R. Co. v. Des Moines B. G. R. Co., 74 Iowa, 585, 38 N. W. 496. A city cannot require the use of a different gauge by a railroad company in making extensions. Getchell & M. Lumber Mfg. Co. v. Des Moines Union R. Co., 115 Iowa, 734, 87 N. W. 670; Old Colony R. Co. v. Rockland & A. St. R. Co., 161 Mass. 416, 37 N. E. 370.

City of Detroit v. Ft. Wayne & B. I. R. Co., 95 Mich. 456, 54 N. W. 958, 20 L. R. A. 79. A reserved power in a street railroad franchise on the part of a city to make such further regulations as may be necessary to protect the interests includes the right to require a street car company to keep for the accommodation of the public, tickets for sale on its cars.

Rapid R. Co. v. City of Mt. Clemens, 118 Mich. 133, 76 N. W. 318. A street railway constructing a Y upon the condition that if ordered to do so by the city, it must remove it on sixty days' notice, is bound by that condition. Hutchinson v. Borough of Belmar (N. J. Err. & App.) 45 Atl. 1092, affirming 61 N. J. Law, 443, 39 Atl. 643. The requirement that a railroad company shall pay the expense of the passage of the ordinance and a reasonable counsel fee is not illegal or improper.

Abraham v. Meyers, 29 Abb. N.

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

C. 384, 23 N. Y. Supp. 225, 228. It is a reasonable condition to require purchasers to deposit one-half of the amount necessary to complete a proposed road. Brooklyn El. R. Co. v. City of Brooklyn, 2 App. Div. 98, 37 N. Y. Supp. 560. The expense of protecting an elevated road from settling because of the construction of a sewer by the city must be met by the railroad company. Staten Island Midland R. Co. v. Staten Island Elec. R. Co., 34 App. Div. 181, 54 N. Y. Supp. 598. Condition applied to changed use of certain tracks.

People v. Barnard, 48 Hun, (N. Y.) 57. A condition that a company shall keep accurate books of account open at all times to the inspection of the city authorities is improper. In re Atlantic El. R. Co., 136 N. Y. 292, 32 N. E. 771; City of Philadelphia v. Lombard & S. Sts. Pass. Co., 3 Grant Cas. (Pa.) 403.

City of Reading v. United Traction Co., 202 Pa. 571, 52 Atl. 106. A railroad company may be required at its own expense to lower its tracks to conform to a change in the grade of a street. City of Philadelphia v. Ridge Ave. Pass. R. Co., 143 Pa. 444, 22 Atl. 695; Woonsocket St. R. Co. v. City of Woonsocket, 22 R. I. 64, 46 Atl. 272. An ordinance regulating the use of streets may be unreasonable. Smith v. East End St. R. Co., 87 Tenn. 626, 11 S. W. 709; Dern v. Salt Lake City R. Co., 19 Utah, 46, 56 Pac. 566. Legislation relative to conditions can only be prospective. Spokane St. R. Co. v. City of Spokane, 5 Wash. 634, 32 Pac. 456. A condition applied in respect to the right of the city to control and use its streets.

Wood v. City of Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369. A condition requiring compulsory arbitration in disputes between a street railway company and its employees held good. Ashland St. R. Co. v. City of Ashland, 78 Wis. 271, 47 N. W. 619. A street railway must change at its own expense the grade of its tracks to correspond with changes in the grade of a street used by them. Fitts v. Cream City R. Co., 59 Wis. 323; Pacific R. Co. v. Leavenworth City, 1 Dill. 393, Fed. Cas. No. 10,649.

See Nellis, St. Surface R. R. c. 4, pp. 206, 207. "A grant to a corporation of the right to own property and transact business confers no immunity from any police control to which a citizen could be subjected; and a reasonable regulation of the enjoyment of the franchise is not a denial of the right nor an invasion of the franchise, or a deprivation of this property, or interference with the business of the corporation. * * * Under this power, ordinances regulating the use of the streets by street railways have become frequent, especially so since the introduction of electricity as a motive power; with its capacity of a high rate of speed, as well as other dangerous and obstructive capacities. Their operation must be reasonably safe, rea-

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 os- the parties in respect to the subject of this paragraph may also tensible exercise of the police power.[791] The relative rights of be controlled by special franchise or contract provisions and it naturally follows that regulations which impair these contract obligations will not be considered valid.[792] In particular controversies the relative rights of the parties will be determined by the language of a particular grant,[793] and that rule universally ob-

sonably consistent and in harmony with the legal customary use of the street by the general public; and ordinances to enforce this rule of law are reasonable in purpose and effect." See §§ 115 et seq., ante. But see Fair Haven & W. R. Co. v. City of New Haven, 74 Conn. 102, 49 Atl. 863. Conditions imposed should be relevant and material to the rights granted.

[791] Ex parte Lorenzon, 128 Cal. 431, 61 Pac. 68, 50 L. R. A. 55. An ordinance relative to use of transfers within the time limit specified and prohibiting passengers from selling or giving them away held reasonable and not oppressive. 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. But see People v. Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650, where it is held that the legislature may enact laws to prevent extortion and unjust discrimination by street railways in the transportation of passengers.

[792] City of Detroit v. Ft. Wayne & B. I. R. Co., 95 Mich. 456, 54 N. W. 958, 20 L. R. A. 79. An ordinance requiring tickets to be kept for sale on the cars of a street railway company does not impair the granted rights and franchises of the company within the meaning of Howell's Ann. St. c. 94, § 3527, which prohibits city authorities from making any regulations whereby rights or franchises granted shall be destroyed or unreasonably impaired.

[793] 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. An ordinance giving residents of a city the special privilege of obtaining transportation on a street railway at a less rate than other residents of the state violates Iowa Const. art. 1, § 6, relative to laws of a general nature and uniform operation. Forman v. New Orleans & C. R. Co., 40 La. Ann. 446, 4 So. 246; City of Cambridge v.

tains that a municipal corporation in respect to rates charged has no extra territorial jurisdiction [794] though it may prescribe reasonable rates within its limits.[795]

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. [796] The rule is also established beyond doubt that municipal authorities of cities and large towns have the right to adopt such measures without any special legislative sanction by virtue of the general supervision and control which they have over the police protection of their respective jurisdictions.[797]

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. 84; Sternberg v. State, 36 Neb. 307, 54 N. W. 553, 19 L. R. A. 570. The city of Lincoln may fix the rates of fare to be charged by a street railway company. Ellis v. Milwaukee City R. Co., 67 Wis. 135, 30 N. W. 218.

[794] City of South Pasadena v. Los Angeles Terminal R. Co., 109 Cal. 315, 41 Pac. 1093.

[795] City of Indianapolis v. Navin, 151 Ind. 144, 47 N. E. 526, 51 N. E. 80, 41 L. R. A. 340; Forman v. New Orleans & C. R. Co., 40 La. Ann. 446; Baltimore & Y. Turnpike Road v. Boone, 45 Md. 344; Rice v. Detroit, Y & A. A. R. Co., 122 Mich. 677, 81 N. W. 927, 48 L. R. A. 84; City of Detroit v. Ft. Wayne & B. I. R. Co., 95 Mich. 457, 20 L. R. A. 79; Sternberg v. State, 36 Neb. 307, 54 N. W. 553, 19 L. R. A. 570; Barnett v. Brooklyn Heights R. Co., 53 App. Div. 432, 65 N. Y. Supp. 1068. Separate fare on branch road. People v. Barnard, 110 N. Y. 548; Ellis v. Milwaukee City R. Co., 67 Wis. 135, 30 N. W. 218; Nellis, St. Surface R. R. c. 4, § 3.

[796] City of Baltimore v. Baltimore Trust & Guarantee Co., 166 U. S. 673; Metropolitan City R. Co. v. City of Chicago, 96 Ill. 620; Drady v. Des Moines & Ft. D. R. Co., 57 Iowa, 393; New Orleans, C. & L. R. Co. v. City of New Orleans, 44 La. Ann. 748; City of Kalamazoo v. Michigan T[illegible]ction Co., 126 Mich. 525, 85 N. W. 1067; Jackson & S. Traction Co. v. Commissioners of Railroads, 128 Mich. 164, 87 N. W. 133. A street railroad company may be compelled to elevate its tracks at the crossing of a steam railroad. Consolidated Traction Co. v. City of Elizabeth, 58 N. J. Law, 619, 34 Atl. 146, 32 L. R. A. 170; Trenton Horse R. Co. v. Inhabitants of Trenton, 53 N. J. Law, 132, 11 L. R. A. 410; Hewlett v. Brooklyn Heights R. Co., 63 App. Div. 423, 71 N. Y. Supp. 531; Town of Mason v. Ohio River R. Co., 51 W. Va. 183, 41 S. E. 418. See §§ 115 et seq., ante.

[797] Whitson v. City of Franklin, 34 Ind. 392. Speed ordinance. Allen v. City of Jersey City, 53 N. J. Law,

§ 854. Conditions based upon the police power.

The police power of the state is ample to secure the purpose sought to be accomplished by its existence and exercise. It is an inherent sovereign and continuing power and cannot be granted or bargained away.[798] The failure in a grant of authority to refer to it cannot be regarded as the equivalent of a surrender of the power. Under it the state or subordinate public corporations may adopt all needful rules and regulations, that may be determined upon from time to time by changing circumstances and conditions, to protect property and life and the good morals of the people.[799] 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 speed of trains in the streets of cities and towns,[800] requiring the erection of safety gates or the maintenance of flagmen at highways crossings,[801] obstructing streets or blockading crossings,[802]

522, 22 Atl. 257; Inhabitants of Trenton v. Trenton Pass. R. Co. (N. J. Eq.) 27 Atl. 483. A municipal corporation must exercise a power conferred upon it in the manner especially prescribed by statute and if this is not done, in any appropriate way. Richmond, F. & P. R. Co. v. Richmond, 26 Grat. (Va.) 83.

[798] Stone v. Mississippi, 101 U. S. 814; Town of Westbrook's Appeal, 57 Conn. 95; Horn v. Atlantic & St. L. R. Co., 35 N. H. 169; Thorpe v. Rutland & B. R. Co., 27 Vt. 140. See, also, § 115, ante, and notes cited in notes 51 and 52.

[799] City of San Jose v. San Jose & S. C. R. Co., 53 Cal. 475; Pittsburgh, Ft. W. & C. R. Co. v. City of Chicago, 159 Ill. 369, 42 N. E. 781; City of Clinton v. Clinton & L. Horse R. Co., 37 Iowa, 61; City of Detroit v. Ft. Wayne & E. R. Co., 90 Mich. 646, 51 N. W. 688.

[800] Denver & S. F. R. Co. v. Domke, 11 Colo. 247, 17 Pac. 777; Evison v. Chicago, St. P., M. & O. R. Co., 45 Minn. 370, 11 L. R. A. 434; Merz v. Missouri Pac. R. Co., 88 Mo. 672, 1 S. W. 382; Ruschenberg v. Southern Elec. Co., 161 Mo. 70, 61 S. W. 626. The maximum speed fixed in a franchise is a part of the contract and a street railway is entitled to run its tracks at that speed although in excess of the rate fixed by general ordinances. Attorney General v. London & N. W. R. Co., 68 Law J. Q. B. 4 [1899] 1 Q. B. 72; Pennsylvania Co. v. James, 81 Pa. 194.

[801] Hayes v. Michigan Cent. R. Co., 111 U. S. 228; St. Louis, A. & T. H. Co. v. City of Belleville, 122 Ill. 376; City of Leavenworth v. Hurdle, 63 Kan. 886, 66 Pac. 238; Green v. Eastern R., 52 Minn. 79, 53 N. W. 808; Long Island City v. Long Island R. Co., 79 N. Y. 561. Such an ordinance cannot apply to a railroad whose road was constructed before the date of the charter under which the ordinance was passed.

[802] Gude v. State, 76 Ala. 100;

lighting,[803] or fencing its tracks;[804] and in respect to street railroads especially the manner of use of tracks and propelling power,[805] construction or condition of tracks,[806] operation or con-

City of Birmingham v. Alabama G. S. R. Co., 98 Ala. 134; St. Louis, A. & T. H. R. Co. v. City of Belleville, 122 Ill. 376, 12 N. E. 680; Illinois Cent. R. Co. v. City of Galena, 40 Ill. 344; Illinois Cent. R. Co. v. People, 49 Ill. App. 538; State v. Malone, 8 Ind. App. 8, 35 N. E. 198; Cleveland, C., C. & I. R. Co. v. Wynant, 114 Ind. 525; State v. Chicago, M. & St. P. R. Co., 77 Iowa, 442, 4 L. R. A. 298; Commonwealth v. City of Frankfort, 92 Ky. 149, 17 S. W. 287; Peterson v. Chicago & W. M. R. Co., 64 Mich. 621, 31 N. W. 548; City of Duluth v. Mallett, 43 Minn. 204, 45 N. W. 154; Burger v. Missouri Pac. R. Co., 112 Mo. 238, 20 S. W. 439; Illinois Cent. R. Co. v. State, 71 Miss. 253, 14 So. 459. Under Miss. Code, § 3551, the term "highway" relates only to roads in the country and "street" to public highways in a town, village, or city. Van Vorst v. Jersey City, 27 N. J. Law (3 Dutch.) 493; Murray v. South Carolina R. Co., 10 Rich. Law (S. C.) 227; State v. Railroad Co., 91 Tenn. 445; State v. Vermont Cent. R. Co., 27 Vt. 103; Brownell v. Troy & B. R. Co., 55 Vt. 218; State v. Ohio River R. Co., 39 W. Va. 242, 18 S. E. 582.

[803] Newark Pass. R. Co. v. Block, 55 N. J. Law, 605, 27 Atl. 1067, 22 L. R. A. 374; Village of St. Bernard v. C., C., C. & St. L. R. Co., 4 Ohio Low. D. 371.

[804] Hannah v. Metropolitan St. R. Co., 81 Mo. App. 78. A railroad operated by electricity and carrying passengers only may be required to fence its track.

[805] Sioux City St. R. Co. v. Sioux City, 138 U. S. 98; Buckner v. Hart, 52 Fed. 835; Van Hook v. City of Selma, 70 Ala. 361; Farrell v. Winchester Ave. R. Co., 61 Conn. 127, 23 Atl. 757; Chicago General R. Co. v. Chicago City R. Co., 186 Ill. 219, 57 N. E. 822, 50 L. R. A. 734, affirming 87 Ill. App. 17. The authority of a street railway to change its motive power cannot be raised by collateral attack; it is a question for the public corporation with whom the original contract was made alone to consider.

Toledo, W. & W. R. Co. v. City of Jacksonville, 67 Ill. 37; Chicago General St. R. Co. v. Chicago City R. Co., 87 Ill. App. 17, affirmed 186 Ill. 219, 57 N. E. 822, 50 L. R. A. 734. But in the absence of conditions a street railroad may change its motive power and operate more cars at a time and with increased speed. North Chicago City R. Co. v. Town of Lake View, 105 Ill. 183; Louisville Bagging Mfg. Co. v. Central Pass. R. Co., 95 Ky. 50, 23 S. W. 592. An electric street railway system operated by overhead wires is not so dangerous as to authorize its restraint by injunction.

City of Detroit v. Ft. Wayne & E. R. Co., 90 Mich. 646; State v. King, 104 La. 735, 29 So. 359; Consolidated Traction Co. v. City of Elizabeth, 58 N. J. Law, 619, 32 L. R. A. 170. Use of salt. New York & H. R. Co. v. City of New York, 1 Hilt. (N. Y.) 562; Buffalo R. Co. v. Buffalo, 5 Hill (N. Y.) 209; Hudson River Tel. Co. v. Watervliet T. & R. Co., 56 Hun, 67, 9 N. Y. Supp. 177;

struction of cars,[807] removal of ice and snow,[808] the making of

Id., 135 N. Y. 393, 32 N. E. 148, 17 L. R. A. 674. Authority to use "the power of horses, animals or any mechanical power or the combination of them" held to embrace electricity as a motive power. Distinguishing People v. Newton, 112 N. Y. 396, 19 N. E. 831, 3 L. R. A. 174.

In re Brooklyn El. R. Co., 57 Hun, 590, 11 N. Y. Supp. 161; Dry-Dock, E. B. & B. R. Co. v. City of New York, 47 Hun (N. Y.) 221; St. Michaels Protestant Episcopal Church v. Forty-Second St., M. & St. N. Ave. R. Co., 26 Misc. 601, 57 N. Y. Supp. 881; Stranahan v. Sea View R. Co., 84 N. Y. 308; In re Third Ave. R. Co., 121 N. Y. 536, 9 L. R. A. 124; Fox v. Catharine & B. St. R. Co., 12 Pa. Co. Ct. R. 180; Reeves v. Philadelphia Traction Co., 152 Pa. 153, 25 Atl. 516; Taggart v. Newport St. R. Co., 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205; State v. Janesville St. R. Co., 87 Wis. 72, 57 N. W. 970, 22 L. R. A. 759.

[806] McCoy v. Philadelphia, W. & B. R. Co., 5 Houst. (Del.) 599; City & Suburban R. Co. v. City of Savannah, 77 Ga. 431. Sprinkling street. Indianpolis & St. L. R. Co. v. People, 32 Ill. App. 286; Newcomb v. Norfolk W. St. R. Co., 179 Mass. 449, 61 N. E. 42. A street railway company can be compelled to sprinkle a street upon which its track is laid where this is one of the conditions of the grant.

City of Detroit v. Detroit City R. Co., 37 Mich. 558; Electric R. Co. v. Common Council of Grand Rapids, 84 Mich. 257; Appeal of Chester Traction Co. (Pa.) 40 Wkly. Notes Cas. (Pa.) 183. Particular ordinance requiring sprinkling between tracks held void because unreasonable. Pittsburgh & B. Pass. R. Co. v. Borough of Birmingham, 51 Pa. 41; Washington, A. & Mt. V. R. Co. v. City Council of Alexandria, 98 Va. 344, 36 S. E. 385. An ordinance requiring the substitution of a grooved rail for tram girder rails held reasonable. But see Easton, S. E. & W. E. P. R. Co. v. City of Easton, 133 Pa. 505, 19 Atl. 486.

[807] Wallen v. North Chicago St. R. Co., 82 Ill. App. 103; South Covington & C. St. R. Co. v. Berry, 93 Ky. 43, 18 S. W. 1026. An ordinance requiring a street car company to keep a driver and conductor on each car held a proper exercise of the police power and not unreasonable or oppressive. State v. Heidenhain, 42 La. Ann. 483. Smoking in street cars. Baltimore & O. R. Co. v. Mali, 66 Md. 53; City of St. Louis v. St. Louis R. Co., 89 Mo. 44, 1 S. W. 305. A regulation relative to the number of passengers carried on each car held valid. Dunn v. Cass Ave. & F. G. R. Co., 21 Mo. App. 188. Conductor on street cars. State v. Whitaker, 160 Mo. 59, 60 S. W. 1068. Screen for protection of motormen. State v. Inhabitants of Trenton, 53 N. J. Law, 132, 20 Atl. 1076, 11 L. R. A. 410. Two employees on same car. Cape May, D. B. & S. P. R. Co. v. City of Cape May, 59 N. J. Law, 396, 36 Atl. 696, 36 L. R. A. 653. Fenders. City of Brooklyn v. Nassau Electric R. Co., 38 App. Div. 365, 56 N. Y. Supp. 609; City of Yonkers v. Yonkers R. Co., 51 App. Div. 271, 64 N. Y. Supp. 955. Vestibule ordinance held unreasonable.

City of New York v. Dry-Dock, E. B. & B. R. Co., 133 N. Y. 104, 30 N. E. 563. An ordinance requiring a

track repairs,[809] the use of overhead or underground wires,[810] and rate of speed.[811]

§ 855. 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,[812] the number of cars

street railway to operate its cars as frequently as public convenience may require and not less than a certain minimum between certain specified hours is reasonable and that question is not controlled by a consideration of expense to the company.

State v. Nelson, 52 Ohio St. 88, 39 N. E. 22, 26 L. R. A. 317. A provision for screens for the protection of motormen during the winter months held constitutional. State v. Sloan, 48 S. C. 21, 6 Am. Electrical Cas. 57. Ordinance authorizing conductor on cars held valid. But see Michigan Public Acts 1889, No. 222, p. 329, relative to making full stop before crossing the tracks of a steam road.

[808] McDonald v. Toledo Consol. St. R. Co., 74 Fed. 104; West Chicago St. R. Co. v. O'Connor, 85 Ill. App. 278; Short v. Baltimore City Pass. Ry. Co., 50 Md. 73; Union R. Co. v. City of Cambridge, 93 Mass. (11 Allen) 287; Ovington v. Lowell & S. R. Co., 163 Mass. 440, 40 N. E. 767; Bowen v. Detroit City R. Co., 54 Mich. 496. In case of an extraordinary storm the railway company should make extraordinary effort to remove snow from the street. Wallace v. Detroit City R. Co., 58 Mich. 231; Smith v. Nashua St. R. Co., 69 N. H. 504, 44 Atl. 133; Broadway & S. A. R. Co. v. City of New York, 49 Hun, 126, 1 N. Y. Supp. 646; Dixon v. Brooklyn City & N. R. Co., 100 N. Y. 170; Bishop v. Union R. Co., 14 R. I. 314.

[809] City of Westport v. Mulholland, 159 Mo. 86, 60 S. W. 77, 53 L. R. A. 442.

[810] State v. City of Newark, 54 N. J. Law, 102, 23 Atl. 284; City of Rochester v. Bell Tel. Co., 52 App. Div. (N. Y.) 6; American Rapid Tel. Co. v. Hess, 125 N. Y. 641, 26 N. E. 919, 13 L. R. A. 454; People v. Squire, 107 N. Y. 593, 14 N. E. 820; Id., 145 U. S. 175; State v. Janesville St. R. Co., 87 Wis. 72, 57 N. W. 970, 22 L. R. A. 759. See, also, IV Harvard Law Rev. 245.

[811] Glenville v. St. Louis R. Co., 51 Mo. App. 629. An ordinance relative to rate of speed passed in 1860 will not be construed in 1892 to apply to cable cars. Ruschenberg v. Southern Elec. R. Co., 161 Mo. 70, 61 S. W. 626; Cape May, D. B. & S. P. R. Co. v. City of Cape May, 59 N. J. Law, 393, 36 Atl. 679, 36 L. R. A. 656; Lewis v. Cincinnati St. R. Co., 10 Ohio S. & C. P. Dec. 53.

[812] Baltimore Union Pass. R. Co. v. City of Baltimore 71 Md. 405, 18 Atl. 917. The prescribed percentage need not be based upon the earnings from passenger travel beyond the city limits. City of New

operated [813] or some other prescribed and equitable method.[814] 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 exer-

York v. Twenty-Third St. R. Co., 62 Hun, 545, 17 N. Y. Supp. 32; People v. Barnard, 110 N. Y. 548, 18 N. E. 354; City of New York v. Dry-Dock, E. B. & B. R. Co., 47 Hun (N. Y.) 199; City of New York v. Manhattan R. Co., 143 N. Y. 1, 37 N. E. 494; Id., 56 N. Y. State Rep. 58, 25 N. Y. Supp. 860; Cincinnati St. R. Co. v. City of Cincinnati, 8 Ohio N. P. 80; City of Cincinnati v. Mt. Auburn Cable R. Co., 28 Wkly. Law Bul. (Ohio) 276. Gross business originating outside of city limits may be taxed by it. Borough of Carlisle v. Cumberland Valley Pass. R. Co., 22 Pa. Co. Ct. R. 221; City of Philadelphia v. Empire Pass. R. Co., 177 Pa. 382, 35 Atl. 721. New York Ry. Law, § 95, as amended by Laws 1892, c. 676, 3 Heydecker's Gen. Laws (2d Ed.) p. 3314.

[813] New York v. Broadway & S. A. R. Co., 17 Hun (N. Y.) 242; City of New York v. Dry-Dock, E. B. & B. R. Co., 112 N. Y. 137, 19 N. E. 420; 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; City of New York v. Broadway & S. A. R. Co., 97 N. Y. 273. New York Laws 1901, vol. 3, §§ 44–50. Annual license is authorized.

[814] Union Pass. R. Co. v. City of Philadelphia, 101 U. S. 528. An act which provides that a street railway company shall pay such a license "for each car run by said company as is now paid by other passenger railway companies" is not a contract which prevents subsequent legislation increasing license fees. City of Aniston v. Southern R. Co., 112 Ala. 557, 20 So. 915; Byrne v. Chicago General Co., 63 Ill. App. 438; Chicago Gen. R. Co. v. City of Chicago, 176 Ill. 253, 52 N. E. 880. Under Rev. St. p. 571, § 3, a city may require a street railway to pay an annual tax on each mile of its track as a condition to its right to construct and operate its line.

Harvey v. Aurora & G. R. Co., 186 Ill. 283, 57 N. E. 857; City R. Co. v. Citizens' St. R. Co. (Ind.) 52 N. E. 157; City of Newport v. South Covington & C. St. R. Co., 89 Ky. 29, 11 S. W. 954; City of New Orleans v. New Orleans, C. & L. R. Co., 39 La. Ann. 587, 4 So. 512; Board of Liquidation of City Debt v. City of New Orleans, 32 La. Ann. 915; City of New Orleans v. New Orleans, C. & L. R. Co., 40 La. Ann. 587; City of Detroit v. Detroit City R. Co., 37 Mich. 558; Cincinnati St. R. Co. v. City of Cincinnati, 8 Ohio N. P. 80; Pittsburgh & B. Pass. R. Co. v. Borough of Birmingham, 51 Pa. 41; State v. Hilbert, 72 Wis. 184, 39 N. W. 326. But see Hoboken & W. Horse R. Co. v. City of Hoboken, 30 N. J. Law, 225, where it is held that the power to exact a license from a street railway company must be found as a condition annexed to the grant of the franchise to the company or in the grant of legislative power to the city by the legislature and in the case under consideration both grounds were found wanting.

cise of the rights pertaining to the franchise or privilege.[815] Conditions of the character above indicated have been uniformly sustained, as the grant of a privilege or franchise is usually regarded as in derogation of common right and one, therefore, for which a payment can be legally demanded.[816]

§ 856. Conditions having for their purpose the maintenance of the highway 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,[817] and second, in the maintenance and operation of it, pre-

[815] People v. Craycroft, 111 Cal. 544, 44 Pac. 463; State v. West Side St. R. Co., 146 Mo. 155, 47 S. W. 959. Mo. Act April 9, 1895, relative to the sale at public auction street car franchises held void because uncertain and indefinite. People v. Barnard, 110 N. Y. 548, 18 N. E. 354, reversing 48 Hun, 57; People v. Pratt, 138 N. Y. 655, 34 N. E. 513. Sale of invalid franchises.

City of Houston v. Houston City St. R. Co., 83 Tex. 548; Henderson v. Ogden City R. Co., 7 Utah, 199; Gallagher v. Johnson, 30 Wkly. Law Bul. (Ohio) 139. A proposal cannot be rejected on the ground that it is not made in good faith except for things done and said by the bidder in the presence of a city council. Ohio Rev. St. § 2502; N. Y. Ry. Law 1890, art. 4, c. 565. But see New Orleans City & L. R. Co. v. Watkins, 48 La. Ann. 1550, 21 So. 199. With reference to grant of franchise to steam railroad company for use of street. See, also, Goodrich v. Houghton, 134 N. Y. 115, 31 N. E. 516, in regard to understanding between competitive bidders.

[816] Hook v. Los Angeles R. Co., 129 Cal. 180, 61 Pac. 912; Covington St. R. Co. v. City of Covington, 72 Ky. (9 Bush.) 127; City of Springfield v. Smith, 138 Mo. 645, 40 S. W. 757, 37 L. R. A. 446; City of New York v. Eighth Ave. R. Co., 118 N. Y. 389, 23 N. E. 550; City of New York v. Dry-Dock, E. B. & B. R. Co., 47 Hun (N. Y.) 199; City of New York v. Manhattan R. Co., 143 N. Y. 1, 37 N. E. 494. The manner of payment may be prescribed by statute. City of Providence v. Union R. Co., 12 R. I. 473.

[817] Denver, U. & P. R. Co. v. Barsoloux, 15 Colo. 290, 25 Pac. 165, 10 L. R. A. 89. A railroad under original grant of authority may change the width of its tracks from a narrow to a broad gauge and the company will not be enjoined from doing this at the instance of abutting owners. Fulton County St. R. Co. v. McConnell, 87 Ga. 756, 13 S. E. 828; Cline v. Crescent City R. Co., 41 La. Ann. 1031, 6 So. 851; Offutt v. Montgomery County Com'rs, 94 Md. 115, 50 Atl. 419. Grade of road. Dickinson v. New Haven & Northampton Co., 155 Mass. 16, 34 N. E. 334; City of Detroit v. Ft. Wayne &

serve the highway in as nearly its original condition as possible [818] and exercise the rights granted in such a manner as to least interfere at all times with the use of the highway by the public generally for legitimate purposes.[819]

The duty usually rests upon the railroad company occupying a highway in case a change of grade is made to reconstruct its track at its own expense so as to conform to the changed grade.[820] The performance of this duty in some instances has been held to include not only the reconstruction of the track at the expense of the railroad company but also the cost of raising that portion of the street occupied by tracks of the new grade as lawfully established.[821]

E. R. Co., 90 Mich. 646, 51 N. W. 688. Matter of laying ties. Keitel v. St. Louis, C. & W. R. Co., 28 Mo. App. 657; Dubach v. Hannibal & St. J. R. Co., 89 Mo. 483, 1 S. W. 86; Willis v. Erie City Pass. R. Co., 188 Pa. 56, 41 Atl. 307; Town of Jamestown v. Chicago B. & N. R. Co., 69 Wis. 648, 34 N. W. 728; City of Oconto v. Chicago & N. W. R. Co., 44 Wis. 231.

[818] St. Louis, A. & T. Ry. Co. v. State, 52 Ark. 51, 11 S. W. 1035; Commonwealth v. City of Frankfort, 92 Ky. 149, 17 S. W. 287; Reed v. City of Camden, 53 N. J. Law, 322; City of Albany v. Watervliet Turnpike & R. Co., 108 N. Y. 14, 15 N. E. 370; Miller v. Lebanon & A. St. R. Co., 186 Pa. 190, 40 Atl. 413. The track of the street railway company may be built to a grade established by municipal authorities and differing from the rest of the grade of the street. Parsons v. State, 26 Tex. App. 192; Brownell v. Troy & B. R. Co., 55 Vt. 218; City of Oshkosh v. Milwaukee & L. W. R. Co., 74 Wis. 534, 43 N. W. 489.

[819] Town of Oxanna v. Allen, 90 Ala. 468, 8 So. 79; Finch v. Riverside & A. R. Co., 87 Cal. 597, 25 Pac. 765; Chicago, B. & Q. R. Co. v. City of Quincy, 136 Ill. 489, 27 N. E. 232, reversing 32 Ill. App. 377; Platt v. Chicago, B. & Q. R. Co. (Iowa) 31 N. W. 883; Nichols v. Ann Arbor & Y. St. R. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; City of Albany v. Watervliet Turnpike & R. Co., 45 Hun (N. Y.) 442. A county may be required by ordinance to remove its tracks from the side of the road where they obstruct travel, to the center of the street. Schild v. Central Park, N. & E. R. R. Co., 133 N. Y. 446; Little Miami R. Co. v. Greene County Com'rs, 31 Ohio St. 338; Galveston City R. Co. v. Nolan, 53 Tex. 139; Town of Mason v. Ohio River R. Co., 51 W. Va. 183, 41 S. E. 418.

[820] North Chicago City R. Co. v. Town of Lake View, 105 Ill. 184; Indianapolis & C. R. Co. v. State, 37 Ind. 489; City of New Orleans v. New Orleans Traction Co., 48 La. Ann. 567, 19 So. 565; Water Com'rs of Jersey City v. City of Hudson, 13 N. J. Eq. (2 Beasl.) 420; City of Albany v. Watervliet, 108 N. Y. 14; Ashland St. R. Co. v. City of Ashland, 78 Wis. 271.

[821] City of Little Rock v. Citizens' St. R. Co., 56 Ark. 28, 19 S. W. 17; West Chicago St. R. Co. v. City of Chicago, 178 Ill. 339, 53 N. E. 112; Borough v. McKeesport v. McKees-

The principle further obtains that public authorities may disturb the tracks of a company using the highways for the purpose of making proper improvements, the construction of sewers, laying water mains or the like and that any charges or expense caused by these acts to the railroad company in the temporary displacement and replacement must be paid exclusively by the company.[822]

§ 857. The duty to restore and repair.

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,[823] and, in respect to that part occupied by the roadbed, kept in repair.[824] This latter duty, it has been held, is a continuing

port Pass. R. Co., 158 Pa. 447, 27 Atl. 1006.

[822] National Water-works Co. v. City of Kansas, 28 Fed. 921; Kirby v. Citizens' R. Co., 48 Md. 168; Middlesex R. Co. v. Wakefield, 103 Mass. 262; City of Detroit v. Ft. Wayne & E. R. Co., 90 Mich. 646; State v. Corrigan Consol. St. R. Co., 85 Mo. 263; West Philadelphia R. Co. v. City of Philadelphia, 10 Phila. (Pa.) 70. But see Des Moines City R. Co. v. City of Des Moines, 90 Iowa, 770, 58 N. W. 906, 26 L. R. A. 767; McMahon v. Second Ave. R. Co., 75 N. Y. 231. See, also, Clapp v. City of Spokane, 53 Fed. 515, following City of Tacoma v. State, 4 Wash. 64, 29 Pac. 847; Warren v. City of Grand Haven, 30 Mich. 24. This case holds that a street is subject to all the uses ordinarily imposed upon it which the wants or convenience of the people may render necessary or imperative and one of these uses is the construction of sewers under them.

[823] Louisiana & N. R. Co. v. Whitley County Ct., 15 Ky. L. R. 734, 24 S. W. 604; Town of Jamestown v. Chicago B. & N. R. Co., 69 Wis. 648, 34 N. W. 728, following Town of Sheboygan v. Sheboygan & F. R. Co., 21 Wis. 675; City of Oshkosh v. Milwaukee & L. W. R. Co., 74 Wis. 534, 42 N. W. 489. See Elliott, R. R. § 1092.

[824] Palatka & I. R. R. Co. v. State, 23 Fla. 546; Robbins v. Omnibus R. Co., 32 Cal. 472. Under Act April 2d, 1866 (Stat. 1866, p. 850) horse railways are not required to keep in repair that part of the street running between a double track. 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; Groves v. Louisville R. Co., 22 Ky. L. R. 599, 58 S. W. 508; State v. St. Charles St. R. Co., 44 La. Ann. 562; Northern Cent. R. Co. v. City of Baltimore, 46 Md. 425; Mahoney v. Natick & C. St. R. Co., 173 Mass. 587; Ft. Wayne & E. R. Co. v. City of Detroit, 34 Mich. 78; People v. Fort St. & E. R. Co., 41 Mich. 413, 2 N. W. 188; City of Duluth v. Duluth St. R. Co., 60 Minn.

one [825] and varies with the condition of the street, and if an unpaved street is subsequently improved or kind of paving changed, the duty to repair is co-extensive with its changed condition.[826] 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

178, 62 N. W. 267; Baumgartner v. City of Mankato, 60 Minn. 244, 62 N. W. 127; City of St. Louis v. St. Louis R. Co., 50 Mo. 94. Relative to the expense of repairing a street between tracks. City of New York v. New York & H. R. Co., 64 Hun (N. Y.) 635; Doyle v. City of New York, 58 App. Div. 588, 69 N. Y. Supp. 120; Village of Mechanicville v. Stillwater & M. St. R. Co., 67 App. Div. 628, 74 N. Y. Supp. 1149; McMahon v. Second Ave. R. Co., 75 N. Y. 231; City of N. Y. v. Second Ave. R. Co., 102 N. Y. 572.

Pittsburg & B. Pass. R. Co. v. City of Pittsburg, 80 Pa. 72. The duty to keep in perpetual good repair requires the removal of a deposit of debris from an extraordinary grade. Ehrisman v. East Harrisburg City Pass. R. Co., 150 Pa. 180, 17 L. R. A. 448; 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; Memphis, P. P. & B. R. Co. v. State, 87 Tenn. 746; Laredo Elec. & R. Co. v. Hamilton, 23 Tex. Civ. App. 480, 56 S. W. 998.

[825] 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; Wellcome v. Inhabitants of Leeds, 51 Me. 313; Cooke v. Boston & L. R. Corp., 133 Mass. 185; Little Miami R. Co. v. Greene County Com'rs, 31 Ohio St. 338; Memphis, P. P. & B. R. Co. v. State, 87 Tenn. 746, 11 S. W. 946; Fitts v. Cream City R. Co., 59 Miss. 323.

[826] District of Columbia v. Washington & G. R. Co., 12 D. C. (1 Mackey) 361; Parmelee v. City of Chicago, 60 Ill. 267; 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; Doyle v. City of New York, 58 App. Div. 588, 69 N. Y. Supp. 120. Under a covenant to keep the pavement within its tracks and within three feet on each side in repair with the best waterstone when a change is made in the street paving to waterstone, the obligation of the company is likewise changed to that stone.

Village of Mechanicville v. Stillwater & M. St. R. Co., 67 App. Div. 628, 74 N. Y. Supp. 1149, affirming 35 Misc. 513, 71 N. Y. Supp. 1102; City of Columbus v. Columbus St. R. Co., 45 Ohio St. 98, 12 N. E. 651; Borough of Norristown v. Norristown Pass. R. Co., 148 Pa. 87, 23 Atl. 1060. But if the paving is in repair the street railway company cannot be compelled to change it to correspond with the change of paving in the rest of the streets. City of Reading v. Union Traction Co., 24 Pa. Co. Ct. R. 629; Id., 202

correspondingly increased or diminished and not subject to the general rules which usually obtain.[827] The duty to restore and repair is one that may be enforced by mandamus.[828]

§ 858. The duty to improve.

The duty to repair and restore as indicated in the last section is clearly established by adjudicated cases. 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.[829] Unless it is so made an express con-

Pa. 571, 52 Atl. 106; Borough of McKeesport v. McKeesport Pass. R. Co., 158 Pa. 447, 27 Atl. 1006.

[827] State v. Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590; Western Paving & Supply Co. v. Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 10 L. R. A. 770; State v. New Orleans, C. & L. R. Co., 42 La. Ann. 550, 7 So. 606; State v. St. Charles St. R. Co., 44 La. Ann. 562, 10 So. 927; State v. Canal & C. St. R. Co., 44 La. Ann. 526, 10 So. 940; Ft. Wayne & E. St. R. Co. v. City of Detroit, 39 Mich. 543; Brick & Terra Cotta Co. v. Hull, 49 Mo. App. 433; City of Binghamton v. Binghamton & P. D. R. Co., 61 Hun, 479, 16 N. Y. Supp. 225. The enactment of an ordinance requiring the paving of that part of a street occupied by railroad tracks is not presumptive evidence of the necessity for the improvement. City of New York v. New York & H. R. Co., 64 Hun, 635, 19 N. Y. Supp. 67; People v. Coffey, 66 Hun, 160, 21 N. Y. Supp. 34; Sullivan v. Staten Island Elec. R. Co., 50 App. Div. 558, 64 N. Y. Supp. 91; Davidge v. Common Council of Binghampton, 62 App. Div. 525, 71 N. Y. Supp. 282; Borough of McKeesport v. McKeesport Pass. R. Co., 158 Pa. 447, 27 Atl. 1006; Century Digest, vol. 44, cols. 3229 et seq.

[828] State v. Jacksonville St. R. Co., 29 Fla. 590; People v. Chicago & A. R. Co., 67 Ill. 118; Cummins v. Evansville & T. H. R. Co., 115 Ind. 417; 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; People v. Dutchess & C. R. Co., 58 N. Y. 152; City of Oshkosh v. Milwaukee & L. W. R. Co., 74 Wis. 534, 43 N. W. 489.

[829] District of Columbia v. Washington & G. R. Co., 12 D. C. (1 Mackey) 361; Id., 15 D. C. (4 Mackey) 214; City of Atlanta v. Gate City St. R. Co., 80 Ga. 276, 4 S. E. 269; Atlanta Consol. St. R. Co. v. City of Atlanta, 111 Ga. 255, 36 S. E. 667; Chicago, R. I. & P. R. Co. v. City of Chicago (Ill.) 27 N. E. 926.

A street railroad company is not liable to special assessments for paving the rest of the street where it is required to pave and keep in repair that part which it uses.

Billings v. City of Chicago, 167 Ill. 337, 47 N. E. 731. Where a franchise is granted with this condition when a street is subsequently paved, it is not necessary to give special notice to the rail-

dition for the occupation of a street, a railroad, whether steam or street, is not obliged to pave, for example, that portion of the

road company to make it liable for the cost of paving. City of Cedar Rapids v. Cedar Rapids & M. C. R. Co., 108 Iowa, 406, 79 N. W. 125. Under an obligation to pave, a street railroad company cannot be compelled to refloor with oak plank any portion of the bridge over which its tracks pass.

City of Council Bluffs v. Omaha & C. B. St. R. & Bridge Co., 114 Iowa, 141, 86 N. W. 222. A provision that a street railway company shall pay abutting property owners for the paving when tracks are laid on a street already paved does not apply to the city as an owner in respect to the paving at street intersections. City of Shreveport v. Shreveport Belt R. Co., 107 La. 785, 32 So. 189; City of Boston v. Union Freight R. Co., 181 Mass. 205, 63 N. E. 412; Ft. St. & E. R. Co. v. Schneider, 15 Mich. 74. A railway occupying city streets under an agreement for a certain portion is exempt from an assessment for the paving of a proportionate part of the remainder.

Ft. Wayne & E. R. Co. v. City of Detroit, 34 Mich. 78; City of Detroit v. Detroit City R. Co., 37 Mich. 558; City of St. Louis v. Missouri R. Co., 13 Mo. App. 524; Lincoln St. R. Co. v. City of Lincoln, 61 Neb. 109, 84 N. W. 802; Lake Shore & M. S. R. Co. v. City of Dunkirk, 65 Hun, 494, 20 N. Y. Supp. 596; City of New York v. Second Ave. R. Co., 31 Hun (N. Y.) 241; Weed v. Common Council of City of Binghamton, 26 Misc. 208, 56 N. Y. Supp. 105; Id. 62 App. Div. 525, 71 N. Y. Supp. 282. A city council has no power to exempt a street railway company from the application of state laws relative to paving certain portions of highways occupied by tracks.

Conway v. City of Rochester, 157 N. Y. 33, 51 N. E. 395; City of Philadelphia v. Second & T. Sts. Pass. R. Co., 13 Pa. Co. Ct. R. 580. Cost of paving at street intersections considered. City of Reading v. United Traction Co., 202 Pa. 571, 52 Atl. 106; City of Philadelphia v. Hestonville, M. & F. Pass. R. Co., 203 Pa. 38, 52 Atl. 184. But a city cannot, without notice to the company where it is required by ordinance itself to do the paving and then recover therefor from the company. Borough of West Chester v. West Chester St. R. Co., 203 Pa. 201, 52 Atl. 252; City of Philadelphia v. Ridge Ave. Pass. R. Co., 143 Pa. 444, 22 Atl. 695; City of Philadelphia v. Spring Garden Farmers' Market Co., 161 Pa. 522, 29 Atl. 286.

Berks County v. Reading City Pass. R. Co., 167 Pa. 102, 31 Atl. 474, 663. The use of a bridge by a street railway company may be conditioned upon the company's paying the expense of increasing its strength. Gulf City St. R. & Real-Estate Co. v. City of Galveston, 69 Tex. 660, 7 S. W. 520. A city cannot recover for filling, grading and paving a street, from a railroad company under a covenant to keep its roadbed in good repair and to pay all expenses of filling, and paving or otherwise including the street between its tracks when the railroad is not built until after the improvements have been made.

street occupied by its tracks if at the time they were laid, the street was not in that condition.[830] 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.[831]

§ 859. Highway crossings.

It is inevitable that both steam and street railroads cross at times, with their lines of road, highways already legally established. A duty of the railroad company may arise in respect to the compensation which shall be paid by it. This is determined by principles and cases already referred to in the preceding sections.[832] In the case of a highway crossing, relatively a small portion of the highway is occupied but this will not change or vary the rules applicable to the questions in respect to the occupation of a street by a railroad.

A duty also arises on the part of the railroad company, and especially a steam commercial railroad, in respect to the construction of its road thereafter.[833] The police power of the state can

[830] 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; State v. New Orleans, C. & L. R. Co., 42 La. Ann. 550, 7 So. 606. Construing special contract. State v. Corrigan Consol. St. R. Co., 85 Mo. 263; Kansas City v. Corrigan, 86 Mo. 67; Dean v. City of Paterson, 67 N. J. Law, 199, 50 Atl. 620; City of Binghamton v. Binghamton & P. D. R. Co., 61 Hun, 479, 16 N. Y. Supp. 225; Davidge v. Common Council of Binghamton, 62 App. Div. 525, 71 N. Y. Supp. 282; City of Philadelphia v. Evans, 139 Pa. 483, 21 Atl. 200; Leake v. City of Philadelphia, 150 Pa. 643, 24 Atl. 351; City of Philadelphia v. Spring Garden Farmers' Market Co., 161 Pa. St. 522, 25 Atl. 1077; Gulf City St. R. & Real Estate Co. v. City of Galveston, 69 Tex. 660, 7 S. W. 520. But see Chicago B. & Q. R. Co. v. City of Quincy, 136 Ill. 563, 27 N. E. 192. See, also, Sioux City St. R. Co. v. Sioux City, 78 Iowa, 742.

[831] 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, reversing 55 Hun, 514, 9 N. Y. Supp. 912. Abutting property owners cannot enforce a permissive duty in this respect. Leake v. City of Philadelphia, 150 Pa. 643, 24 Atl. 351. A voluntary paving by a street railway company of the middle of the street occupied by its tracks creates no liability for the subsequent repair at its own expense.

[832] See §§ 743 et seq., ante.

[833] Farley v. Chicago, R. I. & P. R. Co., 42 Iowa, 234; Thayer v. Flint & P. M. R. Co., 93 Mich. 150; Lincoln v. St. Louis, I. M. & S. R. Co., 75 Mo. 27; Moberly v. Kansas

be exercised equally in regard to a highway crossing as to the occupation of a larger portion of the highway by a railroad and the state or subordinate public corporation can pass all necessary laws for the protection of the public using a highway crossing.[834] The limitations upon an exercise of the police power have already been considered.[835]

§ 860. Duty to restore and maintain.

When a railroad is constructed across a public highway, it then becomes its duty not only to restore the highway as nearly as possible to its original condition, but also to maintain the crossing in that condition which will result in the least inconvenience and the greatest safety to the public.[836] The existence of a steam commer-

City, St. J. & C. B. R. Co., 98 Mo. 183; Burlington & M. R. Co. v. Koonce, 34 Neb. 479, 51 N. W. 1033; Ferguson v. Virginia & T. R. Co., 13 Nev. 184; Pittsburg, Ft. W. & C. R. Co. v. Dunn, 56 Pa. 280; Buchner v. Chicago, M. & N. W. R. Co., 60 Wis. 264.

[834] Dickinson v. New Haven & Northampton Co., 155 Mass. 16, 34 N. E. 334.

[835] See §§ 115 et seq., ante.

[836] Palatka & I. R. R. Co. v. State, 23 Fla. 546; County of Cook v. Great Western R. Co., 119 Ill. 218, 10 N. E. 564; Chicago, R. I. & P. R. Co. v. Moffitt, 75 Ill. 524; Clawson v. Chicago & G. S. R. Co., 95 Ind. 152; Louisville, E. & St. L. Consol. R. Co. v. Pritchard, 131 Ind. 564; Paducah & E. R. Co. v. Com., 80 Ky. 147; Wellcome v. Inhabitants of Leeds, 51 Me. 313; Northern Cent. R. Co. v. City of Baltimore, 46 Md. 425.

Brainard v. Connecticut River R. Co., 61 Mass. (7 Cush.) 506. A bill in equity to enforce rights respecting the manner of constructing a railroad where it crosses a public highway can only be maintained by public authorities, not by a private individual.

Cooke v. Boston & L. R. Corp., 133 Mass. 185; Maltby v. Chicago & W. M. R. Co., 52 Mich. 108; State v. St. Paul, M. & M. R. Co., 35 Minn. 131; State v. Hannibal & St. J. R. Co., 86 Mo. 13; Kansas City v. Kansas City Belt R. Co., 102 Mo. 633, 10 L. R. A. 851; Gale v. New York Cent. & H. R. R. Co., 76 N. Y. 594; Wasmer v. Delaware, L. & W. R. Co., 80 N. Y. 212; Northern Cent. R. Co. v. Com., 90 Pa. 300; Pittsburgh, V. & C. R. Co. v. Com., 101 Pa. 192; City of Chester v. Baltimore O. & P. R. Co., 140 Pa. 275.

Dyer County v. Paducah & M. R. Co., 87 Tenn. 712. "It is a well settled rule of the common law, resting upon the most obvious considerations of fairness and justice, that where a new highway is made across another one already in use, the crossing must not only be made with as little injury as possible to the old way, but whatever structures may be necessary to the convenience and safety of the crossing must be erected and maintained by the person or corporation con-

cial road on or across a public highway is a source of constant danger and a menace to life and property which did not exist before the construction of the crossing. The authorities hold with reason clearly to the existence of the duty to restore and maintain the highway in as nearly as possible its original condition.[837]

In respect to the duty to construct crossings over highways which are not in existence at the time of the construction of the highway the decisions are in conflict, the greater number, however, maintain the doctrine that under such circumstances the railroad company is not bound to construct a crossing at its own expense.[838]

§ 861. Restoration of highways. The duty to construct overhead or underground crossings.

The existence of a railroad for well known reasons and already stated on or across a public highway is a constant menace to life and property because of the size and weight of trains and the speed at which they are operated and the resulting condition of lack of quick and effective control.[839] In many cases it might be said to be the universal rule, because of these and other reasons,

structing and using the new way." Galveston H. & S. A. R. Co. v. Baudat, 21 Tex. Civ. App. 236, 51 S. W. 541; Town of Roxbury v. Central Vt. R. Co., 60 Vt. 121, 14 Atl. 92.

[837] Nickerson v. New York, N. H. & H. R. Co., 178 Mass. 195, 59 N. E. 636.

[838] Illinois Cent. R. Co. v. City of Bloomington, 76 Ill. 447; Rock Creek Tp. v. St. Joseph & G. I. R. Co., 43 Kan. 543; Chicago, K. & W. R. Co. v. Chautauqua County Com'rs, 49 Kan. 763, 31 Pac. 736; Northern Cent. R. Co. v. City of Baltimore, 46 Md. 425; Old Colony & F. R. R. Co. v. Inhabitants of Plymouth, 80 Mass. (14 Gray) 155; People v. Lake Shore & M. S. R. Co., 52 Mich. 277, 17 N. W. 841; People v. Detroit, G. H. & M. R. Co., 79 Mich. 471, 44 N. W. 934, 7 L. R. A. 717; Kansas City v. Kansas City Belt R. Co., 102 Mo. 633, 14 S. W. 808, 10 L. R. A. 851; New York & L. B. R. Co. v. Capner, 49 N. J. Law, 555; State v. Wilmington & W. R. Co., 74 N. C. 143; Dyer County v. Paducah & M. R. Co., 87 Tenn. 712; Gulf, C. & S. F. R. Co. v. Rowland, 70 Tex. 298. But see to the contrary the following cases: Chicago & N. W. R. Co. v. City of Chicago, 140 Ill. 309; Boston & M. R. Co. v. York County Com'rs, 79 Me. 386; State v. Chicago, B. & I. R. Co., 29 Neb. 412.

[839] Evansville & T. H. R. Co. v. Crist, 116 Ind. 446, 2 L. R. A. 450; People v. New York Cent. & H. R. R. Co., 74 N. Y. 302; Wasmer v. Delaware, L. & W. R. Co., 80 N. Y. 212; Com. v. Erie & N. E. R. Co., 27 Pa. 339. See, also, cases cited generally under this section.

that railroads have been required to construct and maintain overhead or underground crossings.[840] The performance of this duty was strongly contested for many years by railroad corporations. Their occupation of a highway is not regarded as a legitimate use of the highway. The duty to construct a bridge or an underground crossing to be enforceable by the state or a municipal corporation need not be included, necessarily, in the grant of the authority to occupy or use a highway.[841] Under the police power, if no other, these facilities can be required and their cost of construction must be paid exclusively by the railroad corporation.[842] The expense of an abolition of grade crossings may be apportioned between a railway and the municipality by special contracts which will be enforced according to the rules applying to the interpretation of contracts.[843] And the liability to either of the parties to such a contract to the other for damages caused by its carrying out will be determined according to the same rules.[844] The rights and liabilities of a public corporation and a railroad whether street or steam as well as the abutting property owners is based upon the existence of a legal highway,[845] or, where these are altered or changed, these rights and liabilities are shifted to the new loca-

[840] English v. New Haven & Northampton Co., 32 Conn. 240; Smith v. Town of New Haven, 59 Conn. 203; Illinois Cent. R. Co. v. City of Chicago, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530; In re Selectmen of Hadley, 178 Mass. 319, 59 N. E. 805; Harper v. City of Detroit, 110 Mich. 427, 68 N. W. 265; State v. City of Camden, 52 N. J. Law, 322, 21 Atl. 565; In re Road in Sterrett Tp., 114 Pa. 627, 7 Atl. 765. A grade crossing may be dangerous but it is not illegal per se. Pennsylvania R. Co. v. Warren St. R. Co., 188 Pa. 74, 41 Atl. 331; New York Cent. & H. R. R. Co. v. Warren St. R. Co., 188 Pa. 85; Chester Traction Co. v. Philadelphia, W. & D. R. Co., 188 Pa. 105, 41 Atl. 449, 44 L. R. A. 269; Barron v. Chicago, St. P., M. & O. R. Co., 89 Wis. 79, 61 N. W. 303. But see State v. Lebanon & N. Turnpike Co. (Tenn. Ch. App.) 61 S. W. 1096.

[841] People v. Union Pac. R. Co., 20 Colo. 186.

[842] New York & N. E. R. Co. v. Town of Bristol, 151 U. S. 556; Town of Suffield v. New Haven & Northampton Co., 53 Conn. 367; Town of Fairfield's Appeal, 57 Conn. 167; Doolittle v. Selectmen of Brayford, 59 Conn. 402; New York & N. E. R. Co.'s Appeal, 62 Conn. 527; In re City of Northampton, 158 Mass. 299.

[843] In re Grade Crossing Com'rs of Buffalo, 66 App. Div. 439, 73 N. Y. Supp. 10.

[844] In re Grade Crossing Com'rs of Buffalo, 66 App. Div. 439, 73 N. Y. Supp. 10.

[845] Burnes v. Multnomah R. Co., 15 Fed. 177.

tion.[846] When the duty exists on the part of the railroad company to construct an overhead crossing, its performance may be compelled by mandamus.[847] The duty is further regarded as a continuing one.[848]

§ 862. Highway crossings. Right of the public corporation to make.

A public corporation may, in the extension of a highway, find it necessary to cross the already established lines of a steam commercial road or a street railway. The rights of the parties then are directly reversed as compared with the discussion in the preceding section. It is true that property devoted to one public use may be appropriated in part for another public use or that a joint use may be established,[849] though private property devoted to a public use cannot be appropriated as an entirety for similar pub-

[846] Buchholz v. New York, L. E. & W. R. Co., 71 App. Div. 452, 75 N. Y. Supp. 824.

[847] State v. Savannah & O. Canal R. Co., 26 Ga. 665; Boggs v. Chicago, B. & I. R. Co., 54 Iowa, 435; City of Newton v. Chicago, R. I. & P. R. Co., 66 Iowa, 422; State v. Missouri Pac. R. Co., 33 Kan. 176; Cooke v. Boston & L. R. Corp., 133 Mass. 185; Maltby v. Chicago & W. M. R. Co., 52 Mich. 108, 17 N. W. 717; In re Trenton Water Power Co., 20 N. J. Law (Spencer) 659; New York & G. L. R. Co. v. State, 50 N. J. Law, 303; Town Council of Johnston v. Providence & S. R. Co., 10 R. I. 365. See, also, cases cited in following note.

[848] State v. St. Paul, M. & M. R. Co., 35 Minn. 131, 28 N. W. 3; State v. Minneapolis & St. L. R. Co., 39 Minn. 219.

[849] Chicago & A. R. Co. v. Joliet, L. & A. R. Co., 105 Ill. 388. "Unless, therefore, every railroad corporation takes its right of way subject to the right of the public to have other roads, both common highways and railways, constructed across its track whenever the public exigency might be thought to demand it, the grant of the privilege to construct a railroad across or through the state would be an obstacle in the way of its future prosperity of no inconsiderable magnitude."

Chicago & N. W. R. Co. v. City of Chicago, 140 Ill. 309, 29 N. E. 1109; City of Ft. Wayne v. Lake Shore & M. S. R. Co., 132 Ind. 558, 32 N. E. 215, 18 L. R. A. 367. Private corporations acquire the right to construct roads subject to the dominant right of the state to cross such road whenever the public necessity demands that new roads or streets shall be opened and for this reason it is held that the general power to construct and open streets or other public highways carries with it the power to construct them across railroad tracks. Boston & Albany R. Co. v. Middlesex County Com'rs, 177 Mass. 511, 59 N. E. 115;

lic use by some other agency.[850] Before a public corporation can legally acquire the right to extend or establish a highway over an existing line of road, if the parties are unable to agree upon the terms upon which this can be done, the power of eminent domain must be invoked and, as many times stated, compensation must be made for the damages suffered by the one whose property is appropriated.[851] In the case of a railroad line, whether steam or street, the elements of damage to be considered would include the value of the property actually taken,[852] the purpose for which it was

Williams Val. R. Co. v. Lykens & W. Val. St. R. Co., 192 Pa. 552, 44 Atl. 46. But see Riedinger v. Marquette & W. R. Co., 62 Mich. 29, 28 N. W. 775, where it is held that streets cannot be used for purposes inconsistent with the dedication.

[850] Lake Erie & W. R. Co. v. Town of Boswell, 137 Ind. 336; Cincinnati, W. & M. R. Co. v. City of Anderson, 139 Ind. 490. "Under the general law permitting cities to establish streets, we have no doubt of the implied power to extend streets transversely across the right of way of a railroad when in doing so the uses for which such right of way is employed are not materially injured or destroyed, and where such uses and those for a street may co-exist without impairment of the first uses. But where such uses cannot so co-exist, or where the first use is materially impaired or destroyed, it is well settled in this state and elsewhere that the second public use will be denied." Milwaukee & St. P. R. Co. v. City of Faribault, 23 Minn. 167; Lockwood v. Wabash R. Co., 122 Mo. 86, 26 S. W. 698, 24 L. R. A. 516; Hannibal & St. J. R. Co. v. Muder, 49 Mo. 165; State v. City of Jersey City, 152 N. J. Law, 65, 18 Atl. 586; New Jersey, etc., Co. v. Long Branch Com'rs, 39 N. J. Law 28; Prospect Park & C. I. R. Co. v. Williamson, 91 N. Y. 552; Lewis v. Germantown, N. & P. R. Co., 16 Phila. (Pa.) 608.

[851] Chicago, B. & I. R. Co. v. Wilson, 17 Ill. 123; Low v. Galena & C. U. R. Co., 18 Ill. 324; Cincinnati, W. & M. R. Co. v. City of Anderson, 139 Ind. 490; Housatonic R. Co. v. Lee & H. R. Co., 118 Mass. 391; Detroit, M. & T. R. Co. v. City of Detroit, 49 Mich. 47; Park & Boulevard Com'rs v. Chicago, D. & C. G. T. J. R. Co., 91 Mich. 291; St. Paul Union Depot R. Co. v. City of St. Paul, 30 Minn. 359; Hannibal & St. J. R. Co. v. Muder, 49 Mo. 165; In re Alexander Avenue, 63 Hun, 630, 17 N. Y. Supp. 933; New York & H. R. Co. v. Kip, 46 N. Y. 546; In re North Third Avenue, 32 App. Div. 394, 53 N. Y. Supp. 46. The extension of a highway across a railroad track is discretionary with the public authorities. In re New York Cent. & H. R. R. Co., 77 N. Y. 248; Winona & St. P. R. Co. v. City of Watertown, 4 S. D. 323, 56 N. W. 1077; State v. O'Connor, 78 Wis. 282, 47 N. W. 433. See, also, authorities cited generally under this section. See authorities cited in §§ 787 et seq., ante.

[852] City of Bridgeport v. New York & N. H. R. Co., 36 Conn. 255; Chicago & N. W. R. Co. v. City of Chicago, 140 Ill. 309, 29 N. E. 1109;

used, and in some cases the detriment and inconvenience to an established business. Whether a highway shall be laid out at grade or otherwise is generally discretionary with the public authorities.[853]

§ 863. Same subject. Duty to maintain and repair.

Where a highway is extended or established across a line of existing railroad, there is no duty on the part of the railroad to maintain the crossing in a safe condition or to repair and restore it to its original condition.[854] The burden of this duty is thrown upon the public corporation extending or establishing the highway; neither can it be claimed that a duty exists in these cases on the part of the railroad to construct or maintain underground or overhead crossings,[855] although in some cases the courts have attempted to make an adjustment as between the parties of the cost of construction and maintenance for bridges used for such purposes.

§ 864. Temporary obstructions.

In section 831, 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 preceding sections, 832 and those following, 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 highway 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

Boston & M. R. Co. v. York County Com'rs, 79 Me. 386; Old Colony & F. R. R. Co. v. Inhabitants of Plymouth, 80 Mass. (14 Gray) 155; Boston & A. R. Co. v. City of Cambridge, 159 Mass. 283, 34 N. E. 382; City of Grand Rapids v. Grand Rapids & I. R. Co., 66 Mich. 42, 33 N. W. 15; State v. District Ct. for Hennepin County, 42 Minn. 247, 7 L. R. A. 121.

[853] Connecticut & P. R. Co. v. St. Johnsbury, 59 Vt. 320, 10 Atl. 573.

[854] Rock Creek Tp. v. St. Joseph & G. I. R. Co., 43 Kan. 543, 23 Pac. 585.

[855] See § 861, ante.

temporary, being based upon the length of time of the use of a highway.[856] 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. Public authorities within the exercise of their lawfully delegated powers can adopt and exercise all necessary regulations or rules in respect to the use of a highway or of public parks by a temporary obstruction, permitting or prohibiting designated uses by or acts of individuals through affirmative and permissive legislation.[857]

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

[856] Simon v. City of Atlanta, 67 Ga. 618; Fisher v. Thirkell, 21 Mich. 1; Graves v. Shattuck, 35 N. H. 257; Com. v. Passmore, 1 Serg. & R. (Pa.) 219; Com. v. Hauck, 103 Pa. 536; Clark v. Fry, 8 Ohio St. 358.

[857] Hibbard Spencer, Bartlett & Co. v. City of Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; People v. Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; Grove v. City of Ft. Wayne, 45 Ind. 429; City of Frankfort v. Coleman, 19 Ind. App. 368, 49 N. E. 474. Authority over a street includes the sidewalks as a part thereof.

Townsend v. Epstein, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409. Public authorities hold streets in trust for the benefit of the public and have no right to authorize their use for a private purpose.

Gorham v. Withey, 52 Mich. 50. Under the Michigan decisions, an obstruction of a highway differs from an encroachment upon it. An impediment to travel constitutes an obstruction. An enclosure of a part of the highway is an encroachment.

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. The city of Minneapolis under its charter powers cannot arbitrarily remove telephone poles from its streets but can only regulate their placing and compel telephone companies to put their wires in conduits if the good government of the municipality requires it. St. John v. City of New York, 13 N. Y. Super. Ct. (6 Duer) 315; Hudson v. Caryl, 44 N. Y. 553; Whalen v. Willis, 18 App. Div. 350, 46 N. Y. Supp. 52; Flynn v. Taylor, 127 N. Y. 596, 14 L. R. A. 556.

Haines v. Barclay Tp., 181 Pa. 521, 37 Atl. 560. The authority of public officials does not extend to private property adjoining a highway. Hale v. Town of Weston, 40 W. Va. 313; Arthur v. City of Charleston, 51 W. Va. 132, 41 S. E. 171. But see Bogue v. Bennett, 156 Ind. 478, 60 N. E. 143. Burn's Rev. St. 1894, § 3541, gives no authority for the prohibition of the use of the public street by a traction engine; its effect is limited to a regulation of vehicles in use.

licenses not pertaining of the nature of a contract,[858] their authority, however, extending only to legally established highways or grounds.[859] Various uses of a highway which without such action would be regarded as nuisances and, therefore, illegal, may be made, if exercised in the designated manner, lawful. 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.[860]

§ 865. Concrete illustrations of temporary obstructions.

The use of highways for public speaking [861] or public meetings,[862] for political, civil [863] or religious [864] parades or processions,

[858] City of Detroit v. Detroit City R. Co., 56 Fed. 867; Gregsten v. City of Chicago, 40 Ill. App. 607; City of Indianpolis v. Miller, 27 Ind. 394; Readfield Tel. & T. Co. v. Cyr, 95 Me. 287, 49 Atl. 1047. The right of a telephone company to erect its posts and lines along a highway under St. 1885, c. 378, is a mere revocable license. Compton v. Inhabitants of Town of Revere, 179 Mass. 413, 60 N. E. 931; Gushee v. City of New York, 42 App. Div. 37, 58 N. Y. Supp. 967, affirming 26 Misc. 287, 56 N. Y. Supp. 1002; Robinson v. Lamb, 126 N. C. 492, 36 S. E. 29.

[859] Dorrance v. Simons, 2 Root (Conn.) 208; Irwin v. Sprigg, 6 Gill. (Md.) 200; Smith v. Smith, 19 Mass. (2 Pick.) 621.

[860] Yates v. City of Milwaukee, 77 U. S. (10 Wall.) 497. "The act of the Wisconsin legislature, approved March 31, 1854 (Laws 1854, p. 414) confers upon the city of Milwaukee the authority to establish dock and wharf lines on the banks of the Milwaukee and Menominee Rivers, and restrains and prevents encroachments upon said rivers and obstructions thereto, and it is by this statute that the summary proceedings for the removal of appellant's wharf are supposed to be authorized. 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. It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities." City of Evansville v. Martin, 41 Ind. 145.

[861] City of Bloomington v. Richardson, 38 Ill. App. 60. A municipal ordinance which prohibits public meetings on the streets without a permit applies only to those held

or those for advertising purposes,[865] 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,[866] or as a hack stand,[867] so

pursuant to notice. Weinstein v. City of Terre Haute, 147 Ind. 556; Commonwealth v. Abrahams, 156 Mass. 57, 30 N. E. 79; Commonwealth v. Davis, 140 Mass. 485; Id., 162 Mass. 510, 39 N. E. 113; Love v. Judge of 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. The right of the public to the use of public parks may be reasonably restrained by the authorities. City of Allegheny v. Zimmerman, 95 Pa. 287.

[862] Town of Dover v. Tawressey, 2 Marv. (Del.) 285, 43 Atl. 170; People v. Cunningham, 1 Denio (N. Y.) 524; Barker v. Com., 19 Pa. 412.

[863] Simon v. City of Atlanta, 67 Ga. 618; 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; Cook v. Dolan, 19 Pa. Co. Ct. R. 401. A parade confined to a limited portion of a public road repeated two or three times a day and for ten days or two weeks is not a legitimate one. Com. v. Remmel, 31 Pittsb. Leg. J. (N. S.; Pa.) 125; West v. Bancroft, 32 Vt. 371.

[864] Mashburn v. City of Bloomington, 32 Ill. App. 245. Salvation Army. See, also, cases cited under second note in the following section.

[865] In re Flaherty, 105 Cal. 558, 27 L. R. A. 529; City of Chicago v. Trotter, 136 Ill. 430. "Parades and processions upon the streets of a city are not necessarily so productive of danger and disorder as to render them per se the creators of public disturbances, nor are they necessarily nuisances. There is no authority, therefore, in the municipal corporation, to suppress such demonstrations of all kinds, at all times and under all circumstances. Citizens have the constitutional right 'of pursuing their own happiness,' and on suitable occasions an for lawful purposes, and in a peaceable manner, they may gather together in street parades and processions, if they so desire, provided they do not disturb or threaten the public peace or substantially interfere with the rights of others." Anderson v. City of Wellington, 40 Kan. 173, 2 L. R. A. 110; People v. City of Rochester, 44 Hun (N. Y.) 166; State v. Hughes, 72 N. C. 25.

[866] Wilson v. Eureka City, 173 U. S. 32; Dickson v. Kewanee Elec. Light & Motor Co., 53 Ill. App. 379; Caldwell v. Town of Pre-emption, 74 Ill. App. 32; Inhabitants of Clinton v. Welch, 166 Mass. 133; State v. Sheppard, 64 Minn. 287, 36 L. R. A. 305; Graves v. Shattuck, 35 N. H. 257; City of Concord v. Burleigh, 67 N. H. 106, 36 Atl. 606; Rice v. Buffalo Steel House Co., 17 App. Div. (N. Y.) 462; City of Eureka v. Wilson, 15 Utah, 53, 48 Pac. 41.

[867] Curry v. District of Columbia, 14 App. D. C. 423; City Council of

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 their business is unlawful and in the proper case a continuance of that use may be enjoined.[868]

Montgomery v. Parker, 114 Ala. 118, 21 So. 452; City of Colorado Springs v. Smith, 19 Colo. 554, 36 Pac. 540; Turner v. Holtzman, 54 Md. 148; Masterson v. Short, 3 Abb. Pr. (N. S.; N. Y.) 154; People v. Brookfield, 6 App. Div. 398, 39 N. Y. Supp. 673; Cohen v. City of New York, 113 N. Y. 532, 4 L. R. A. 406; McCaffrey v. Smith, 41 Hun (N. Y.) 117. The abutting owner's consent should be obtained. Branahan v. Cincinnati Hotel Co., 39 Ohio St. 333.

[868] Mackall v. Ratchford, 82 Fed. 41. "The marching men seemed to think that they could go and come on and over the county road as they pleased, because it was a public highway. But this was a mistake. The miners working at Montana had the same right to use the public road as the strikers had, and it was not open and free to their use when it was occupied by over 200 men stationed along it at intervals of three and five feet,—men who, if not open enemies, were not bosom friends. That some miners passed through this line is shown. That others feared to do so is plain. That the marching column intended to interfere with the work at the mines would be foolish to deny. A highway is a way over which the public at large have a right of 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. The miners of the Montana mines, as well as the owners of that property, had the same right to use the public road as had the marching strikers. It seems to the court that the men whose work is interrupted and the people whose property is damaged by the improper use and occupation of the highway are the people who have the true grounds of complaint because of the improper use of what in the early books of the law is called the 'king's highway.' The building in which we are now holding this court is located on the corner of Third and Pike streets, Clarksburg. All the citizens of that town can use those streets for purposes connected with their business. All persons properly deporting themselves can pass along and upon them for all proper business matters, or for the mere purpose of transit; and all persons, due regard being had for the public interest and safety, may parade, with banners, flags, and bands of music, along and over said streets at reasonable times and seasonable

§ 866. Limitations upon power of regulating temporary obstructions.

Regulations respecting the use of highways by temporary obstructions are regarded as legislative or quasi legislative in their character and are usually adopted by law-making bodies of various subordinate public corporations to which the power has been delegated by the state. In order that regulations of this character be, therefore, legal, it is necessary that they be adopted in the manner prescribed and by the body designated by law,[869] and the usual rule applies that if the power has been delegated to a particular body or official to be exercised upon appropriate occasions and according to definite rules of action, it cannot be delegated by that body or official in turn to others.[870] The rules in respect to the validity of ordinances or regulations regarded as legislative acts must also be followed. They must be uniform and impartial

hours, provided the same does not prevent the reasonable and seasonable use of said streets by those entitled to the same. If such use should close the business houses along said streets, by preventing employes from reaching them, then, if such parades were not prevented by the city authorities, the owners of property so affected would be entitled to the aid of the courts in protecting their rights. No one portion of the community has a right to march along those streets day after day, night after night, and station themselves along them at intervals of three or five feet, for hour after hour, thereby preventing the owners of property located thereon from reaching the same in person, or by their clerks or other employes, for purposes connected with their regular business. Under such circumstances the police of the city would either move the column along, out of the way of the public business, or take into custody the men who without authority obstruct the streets and public highways. The marching men had then no such right on the county road as they claimed." Hickman v. Maisey, 69 Law J. Q. B. 511.

[869] Perry v. New Orleans, M. & C. R. Co., 55 Ala. 413; City of Atlanta v. Gate City Gaslight Co., 71 Ga. 106; City of Quincy v. Bull, 106 Ill. 337; City of Indianapolis v. Miller, 27 Ind. 394; Cummins v. City of Seymour, 79 Ind. 491; City of North Vernon v. Voegeler, 103 Ind. 327; City of Leavenworth v. Douglass, 59 Kan. 416; Irwin v. Great Southern Tel. Co., 37 La. Ann. 63; City of Grand Rapids v. Hughes, 15 Mich. 54; Com. v. Hauck, 103 Pa. 536.

[870] City of Montgomery v. Parker, 114 Ala. 118; Sinton v. Ashbury, 41 Cal. 525; Denver & S. F. R. Co. v. Domke, 11 Colo. 247; City of Chicago v. Trotter, 136 Ill. 430, 26 N. E. 359; Rich v. City of Napierville, 42 Ill. App. 222; Cushing v. City of Boston, 128 Mass. 330; Garrabad v. Dering, 84 Wis. 585, 54 N. W. 1104, 19 L. R. A. 858.

in their operation and effect;[871] must not violate constitutional provisions;[872] contravene the law of the land,[873] or be inconsistent with the general law or the character of the particular corporation.[874] These questions have all been considered in previous sections.

§ 867. 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,[875] light,[876] water,[877] transportation,[878] or

[871] City Council of Augusta v. Burum, 93 Ga. 68, 26 L. R. A. 340; Bordentown & S. A. Turnpike Road v. Camden & A. R. & T. Co., 17 N. J. Law (2 Har.) 314; Hughes v. Providence & W. R. Co. 2 R. I. 493.

[872] 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.

[873] Potomac, etc., Co. v. U. S., etc., Co., 26 Wash. Law Rep. 19; Pittsburgh & A. Bridge Co. v. Com. (Pa.) 8 Atl. 217; Stormfeltz v. Manor Turnpike Co., 13 Pa. 558.

[874] Snyder v. City of Mt. Pulaski, 176 Ill. 397, 44 L. R. A. 407. "The claim of the appellant that the second ordinance, which granted him the privilege of using the well, in part of the whole contract and that without it he would not have accepted the franchise or erected the plant, in no way affects the question of law. * * * He must have acted with full knowledge of the fact that the municipality had no right or power to confer on him a right to a private use of the street, giving him a right to a permanent encroachment thereon and allowing him to create a purpresture. There being no power in the city to make a discrimination in the use of the streets in favor of appellant, and permit him to have a permanent private use of the same or to part thereof, if it has done so the most that can be said is, it amounted to a mere license that would not render him amenable to punishment for a violation of an ordinance of the city in obstructing the street. Such permission to so use the street is not binding upon the city, and is not irrevocable. The municipality having no power to grant such permanent use, there can be no estoppel against it from requiring the street to be open in its entirety, because no estoppel can arise from an act of the municipal authorities done without authority of law." Pettis v. Johnson, 56 Ind. 139; Gould v. City of Topeka, 32 Kan. 485.

[875] Missouri v. Murphy, 170 U. S. 78. A gas company having the right to make and vend gas in a certain city and lay all necessary pipes

means of communication.[879] They exist because of the grant of a

and fixtures in a street is not authorized to lay electric wires. City of Atlanta v. Gate City Gaslight Co., 71 Ga. 106; Citizens' Gas & Min. Co. v. Town of Elwood, 114 Ind. 332, 16 N. E. 624; Kincaid v. Indianapolis Natural Gas Co., 124 Ind. 577, 24 N. E. 1066, 8 L. R. A. 602; Coffeyville Min. & Gas Co. v. Citizens' Natural Gas & Min. Co., 55 Kan. 173, 40 Pac. 326. The claims of rival companies cannot be tested by injunction. Sharp v. City of South Omaha, 53 Neb. 700; Parfitt v. Furguson, 159 N. Y. 111, 53 N. E. 707; Philadelphia Co. v. Borough of Freeport, 167 Pa. 279, 31 Atl. 571.

[876] City of Chicago v. Mutual Elec. Light & Power Co., 55 Ill. App. 429; Edison Elec. Illum. Co. v. Hooper, 85 Md. 110; Crocker v. Boston Elec. Light Co., 180 Mass. 516, 62 N. E. 978; National Subway Co. v. City of St. Louis, 169 Mo. 319, 69 S. W. 290; State v. Murphy, 134 Mo. 548, 34 L. R. A. 369; Trustees of Presbyterian Church v. State Board of Com'rs of Electric Subways, 55 N. J. Law, 436, 27 Atl. 809; City of Cincinnati v. Cincinnati Edison Elec. Co., 26 Wkly. Law Bul. 104; City of Allegheny v. Peoples' Natural Gas & Pipeage Co., 172 Pa. 632.

[877] Long Island Water Supply Co. v. City of Brooklyn, 166 U. S. 685; Illinois Trust & Sav. Bank v. Arkansas City (C. C. A.) 76 Fed. 271, 34 L. R. A. 518; City & County of San Francisco v. Spring Val. Waterworks, 39 Cal. 473; Hughes v. City of Momence, 163 Ill. 535, 45 N. E. 300; Topeka Water Co. v. Whiting, 58 Kan. 639, 50 Pac. 877, 39 L. R. A. 90. A license to a water company to place its pipings in the street and to flush its mains must be exercised with reasonable care and due regard to the right of persons traveling on the street.

Franke v. Paducah Water Supply Co., 11 Ky. L. R. 17, 11 S. W. 432, 718; Wright v. Woodcock, 86 Me. 113, 29 Atl. 953, 25 L. R. A. 499. A water company is not liable to an abutting owner because its pipes lawfully laid under authority prevent him from building steps leading to a cellar. See, also, as holding to the same effect the case of Provost v. New Chester Water Co., 162 Pa. 275, 29 Atl. 914.

City of Grand Rapids v. Grand Rapids Hydraulic Co., 66 Mich. 606, 33 N. W. 749; Inhabitants of Franklin Tp. v. Nutley Water Co., 53 N. J. Eq. 601, 32 Atl. 381; Inhabitants of Saddle River v. Garfield Water Co. (N. J. Eq.) 32 Atl. 978; Village of Tarrytown v. Pocantico Water-Works Co., 48 Hun, 617, 1 N. Y. Supp. 394; Witcher v. Holland Water-Works Co., 66 Hun, 619, 20 N. Y. Supp. 560; Village of Pelham Manor v. New Rochelle Water Co., 143 N. Y. 532, 38 N. E. 711; Wheat v. City Council of Alexandria, 88 Va. 742, 14 S. E. 672; Chapman v. Fylde Water-works Co., 9 Rep. 582, [1894] 2 Q. B. 599. But see Passaic Water Co. v. City of Paterson, 65 N. J. Law, 472, 47 Atl. 462.

[878] St. Louis, A. & T. R. Co. v. State, 52 Ark. 51; Fitch v. New York, P. & B. R. Co., 59 Conn. 414, 10 L. R. A. 188; Palatka & I. R. R. Co. v. State, 23 Fla. 546; Sikes v. Town of Manchester, 59 Iowa, 65; Mathews v. Kelsey, 58 Me. 56; Benton v. City of Elizabeth, 61 N. J. Law, 411, 39 Atl. 683, 906:

[879] Borough of Brigantine v. Holland Trust Co. (N. J. Eq.) 37 Atl.

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.[880] Public corporations cannot alienate their plenary powers to grade and improve ways and the right is retained of lowering the grade of the street even if by so doing, water or gas pipes of private companies previously laid are exposed and the necessity of relaying them arises.[881]

438; Ampt v. City of Cincinnati, 6 Ohio N. P. 401. Ordinance authorizing use of streets for the laying of pneumatic tubes held void because of wording.

[880] City Council of Montgomery v. Capital City Water Co., 92 Ala. 361. 9 So. 339. Regulating depth at which water pipes shall be laid. Carlyle Water, Light & Power Co. v. City of Carlyle, 31 Ill. App. 325. A city cannot dictate to a water company the locality of a standpipe. City of Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 107, 39 N. E. 433, 27 L. R. A. 514; Crocker v Boston Elec. Light Co., 180 Mass. 516, 62 N. E. 978; Goodwillie v. City of Detroit, 103 Mich. 283, 61 N. W. 526. An ordinance requiring all water and gas pipes to be laid at least one year before a street shall be ordered paved held invalid. City of Kalamazoo v. Kalamazoo Heat, Light & Power Co., 124 Mich. 74, 82 N. W. 811; Benson v. City of Hoboken, 33 N. J. Law, 280; Springfield Water Co. v. Borough of Darby, 199 Pa. 400, 49 Atl. 275; Northern Liberties Com'rs v. Northern Liberties Gas Co., 12 Pa. 318. A prohibition of the use of streets for the purpose of laying gas mains from Dec. 1st to the following March held a reasonable regulation. Methodist Episcopal Church of Sewickley v. Independent National Gas Co., 22 Pittsb. Leg. J. (N. S.; Pa.) 274. The supply of gas free to churches as a condition for the use of streets held invalid. Philadelphia Co. v. Borough of Freeport, 167 Pa. 279, 31 Atl. 571. But see Springfield Water Co. v. Suburban Gas Co., 8 Del. Co. R. (Pa.) 130.

[881] Rockland Water Co. v. City of Rockland, 83 Me. 267, 22 Atl. 166. "The plaintiff had a right under its charter to lay its pipes through the streets of defendant city 'in such manner as not to obstruct or impede travel thereon.' The city, of course, retained the right to repair its streets in the ordinary manner. In picking one of such streets, it is charged with so uncovering one of the plaintiff's pipes as to expose it to frost. Suppose it did. In the absence of any improper method in so doing, it incurred no liability to the

§ 868. Manner of use; further considered.

There are many acts or uses of public highways which may not in effect constitute an obstruction technically speaking, of a highway, but which may be regarded as a nuisance unless authorized by some legislative act.[882] The purpose for which a highway is created and maintained should not be forgotten; it is established primarily as a means of communication by ordinary methods as a way of passing and repassing [883] and further for the secondary purpose of supplying to abutting owners several private rights, namely, the easements of air, light and access.[884] There are many uses to which an abutter is entitled because of the existence of these private rights that cannot be regarded as obstructions but which are incidental to the legitimate use of the street by him.[885] They are not either to be regarded as nuisances unless continued for that length of time or done in such a manner as to conflict with the right of the public as a whole to use the highway as a

plaintiff. The latter should have laid its pipes in such manner that ordinary and suitable repairs of the road would not affect them. The defendant has violated no law, nor has it invaded any right of the plaintiff." Elster v. City of Springfield, 49 Ohio St. 82, 30 N. E. 274; Bryn Mawr Water Co. v. Lower Merion Tp., 15 Pa. Co. Ct. R. 527; Roanoke Gas Co. v. City of Roanoke, 88 Va. 810, 14 S. E. 665. See, also, § 900, post.

[882] City of Lewiston v. Booth, 3 Idaho, 692, 34 Pac. 809; Scammon v. City of Chicago, 25 Ill. 424; Townsend v. Epstein, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409. The construction of a passageway over a street by an abutting owner is not a public use of the street and cannot be authorized. French v. Camp, 18 Me. 433; Runyon v. Bordine, 14 N. J. Law (2 J. S. Green) 472; Com. v. Christie, 13 Pa. Co. Ct. R. 149.

[883] Malone v. State, 51 Ala. 55; Craig v. People, 47 Ill. 487; Com. v. Wilkinson, 33 Mass. (16 Pick.) 175; Langley v. Town of Gallipolis, 2 Ohio St. 107. The easement of a public highway comprehends the right of all individuals in the community whether on foot or horseback or any kind of vehicle to pass and repass together with the right of the public to do all the acts necessary to improve it and keep it in repair.

[884] Peck v. Smith, 1 Com. 103; Madison Tp. v. Gallagher, 159 Ill. 105; Bankhead v. Brown, 25 Iowa, 540.

[885] Bybee v. State, 94 Ind. 443. The maintenance of an enclosed passageway between two buildings over a public street at a height from thirteen to fourteen feet above it but having no support on the street is held an obstruction of a highway. Callanan v. Gilman, 107 N. Y. 360; Clark v. Fry, 8 Ohio St. 358; Loberg v. Town of Amherst, 87 Wis. 641.

means of travel, which is usually regarded as the primary and the superior purpose for which public ways are established.[886]

Interference with abutter's rights. The principle also obtains that many uses of a highway can be prevented even though authorized by the public authorities because they constitute an interference with some one or more of the abutter's private easements in the street, namely, those of air, light and access.[887]

§ 869. 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 noted in the preceding section. The use of the street for structural materials while erecting buildings [888] and for business purposes such as loading or unloading goods [889] are familiar and ordinary illustrations of a legitimate use, while the use of a sidewalk for packages,[890] or the display of wares,[891] the

[886] Atttorney General v. Brighton & H. Co-op. Supply Ass'n, 69 Law J. Ch. 204; Kerr v. Forgue, 54 Ill. 482; McCloughry v. Finney, 37 La. Ann. 31; Stuart v. Havens, 17 Neb. 211; State v. Buckner, 61 N. C. (Phil.) 558; Davis v. Corry City, 154 Pa. 602; Clark v. Fry, 8 Ohio St. 358.

[887] Branahan v. Cincinnati Hotel Co., 39 Ohio St. 333; citing Schulte v. North. Pac. Transp. Co., 50 Cal. 592; Brayton v. City of Fall River, 113 Mass. 218; Pratt v. Lewis, 39 Mich. 7; State v. Lavarack, 34 N. J. Law, 201.

Flynn v. Taylor, 127 N. Y. 596; Coburn v. Ames, 52 Cal. 387.

[888] Chicago v. City of Robbins, 2 Black (U. S.) 418; City of Cleveland v. King, 132 U. S. 295; Martin v. Chicago, B. & Q. R. Co., 87 Ill. App. 208; Wood v. Mears, 12 Ind. 515; O'Linda v. Lothrop, 38 Mass. (21 Pick.) 292; City of New York v. Heft, 13 Daly (N. Y.) 301; In re Fiegle, 36 Misc. 27, 72 N. Y. Supp. 438; Price v. Betz, 199 Pa. 457, 49 Atl. 217. But see City of Lowell v. Simpson, 92 Mass. (10 Allen) 88.

[889] General Elec. R. Co. v. Chicago, I. & L. R. Co. (C. C. A.) 107 E. 771; Attorney General v. Brighton & H. Co-op. Supply Ass'n, 69 Law J. Ch. 204; Haight v. City of Keokuk, 4 Iowa, 214; Gerdes v. Christopher & S. A. I. & F. Co., 124 Mo. 347; Halsey v. Rapid Transit St. R. Co., 47 N. J. Eq. 380; Manley v. Leggett, 62 Hun, 562, 17 N. Y. Supp. 68.

[890] Commonwealth v. Lennon (Mass.) 52 N. E. 521. It is no defense for a violation of an ordinance against obstructing a sidewalk that it was done while removing furniture from a house in obedience to a writ of execution. People v. Cunningham, 1 Denio (N. Y.) 524; Davis v. Corry, 154 Pa. 602. But see People v. Van Houten, 13 Misc. 603, 35 N. Y. Supp. 186.

[891] State v. Rayantis, 55 Minn. 126; State v. Messolongitis, 74 Minn.

construction of scales,[892] or areas[893] in an abutting street by the adjoining owner, are not ordinarily regarded as a proper use by him. Yet a use which involves the placing of objects of such a character as will naturally frighten horses ordinarily gentle and well broken is not lawful or reasonable and constitutes a nuisance.[894]

§ 870. Miscellaneous uses of a street regarded as obstructions.

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,[895] for standing vehicles during long periods of time,[896] placing pla-

165, 77 N. W. 29. "We cannot hold that the license of a foot peddler authorizes him to expose for sale his goods on the sidewalk for an unreasonable length of time. Such a license does not authorize him to pre-empt a portion of the sidewalk, and use it as a market place or a fruit stand. He may, under such license, go from house to house, and from place to place, in search of customers; and, if there is no ordinance to the contrary, he may solicit customers on the street; but he cannot stop an unreasonable length of time for that purpose or for the purpose of making a sale." People v. Willis, 9 App. Div. 214, 41 N. Y. Supp. 168; Carlisle v. Baker, 1 Yeates (Pa.) 471; City of Philadelphia v. Sheppard, 158 Pa. 347, 27 Atl. 972. But see State v. Summerfield, 107 N. C. 895, 12 S. E. 114.

[892] Incorporated Town of Spencer v. Andrew, 82 Iowa, 14, 47 N. W. 1007, 12 L. R. A. 115; Emerson v. Babcock, 66 Iowa, 258; Davis v. Town of Anita, 73 Iowa, 325.

[893] Costello v. State, 108 Ala. 45; City of Denver v. Girard, 21 Colo. 447; Buek v. Collis, 17 App. Div. 465, 45 N. Y. Supp. 291.

[894] Webb v. City of Demopolis, 95 Ala. 116, 21 L. R. A. 62; Dimock v. Town of Suffield, 30 Conn. 129; Jewett v. Gage, 55 Me. 538; Lynn v. Hooper, 93 Me. 46, 44 Atl. 127, 47 L. R. A. 752. Hay caps. Kingsbury v. Inhabitants of Dedham, 95 Mass. (13 Allen) 186. It does not necessarily follow, however, that an object which frightens horses is either an obstruction or a nuisance. Bennett v. Lowell, 12 R. I. 167.

[895] People v. Cunningham, 1 Denio (N. Y.) 524; Barker v. Com., 19 Pa. 412. White v. Kent, 11 Ohio St. 550. Auction sales in streets prohibited.

[896] Sikes v. Town of Manchester, 59 Iowa, 65; Com. v. Fenton, 139 Mass. 195, 29 N. E. 653. A municipal regulation prohibiting the stoppage of teams on streets for more than twenty minutes is a valid police regulation. People v. Keir, 78 Mich. 98, 43 N. W. 1039; Tomlin v. City of Cape May, 63 N. J. Law, 429, 44 Atl. 209; Northrop v. Burrows, 10 Abb. Pr. (N. Y.) 365; Manley v. Leg-

cards, signs,[897] depositing rubbish or impediments to travel,[898] or blockading street crossings with cars or engines.[899] But water, gas or sewer pipes laid under ground are not usually regarded as obstructions.[900]

§ 871. Miscellaneous uses of a street regarded as a nuisance.

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,[901] or the accumulation of refuse or litter,[902] and others [903] of a similar

gett, 67 Hun (N. Y.) 562; Borough of Norristown v. Moyer, 67 Pa. 355. But see State v. Rayantis, 55 Minn. 126, 56 N. W. 586; State v. Edens, 85 N. C. 522.

[897] Com. v. McCafferty, 145 Mass. 364, 14 N. E. 451. An ordinance forbidding the display on sidewalks of shows or parades, placards and signs, held reasonable. But see State v. Higgs, 126 N. C. 1014, 35 S. E. 473, 48 L. R. A. 446.

[898] Williams v. Town of Hardin, 46 Ill. App. 67; Wood v. Mears, 12 Ind. 515; O'Linda v. Lothrop, 38 Mass. (21 Pick.) 292; State v. Campbell, 80 Mo. App. 110; Baird v. Clark, 12 Ihio St. 87. Temporary fence. Nagle v. Brown, 37 Ohio St. 7. Tree falling in highway. Com. v. Passmore, 1 Serg. & R. (Pa.) 217; City of Scranton v. Scranton Steel Co., 154 Pa. 171; Hundhauser v. Bond, 36 Wis. 29; Loberg v. Town of Amherst, 87 Wis. 634.

[899] State v. Chicago, M. & St. P. R. Co., 77 Iowa, 442, 4 L. R. A. 298; Com. v. New York, N. H. & H. R. Co. 112 Mass. 412; Rauch v. Lloyd, 31 Pa. 358. See, also, §§ 460, 818, and 854, ante.

[900] Consumers' Gas Trust Co. v. Huntsinger, 14 Ind. App. 156; 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; Kelsey v. King, 32 Barb. (N. Y.) 410; Sterling's Appeal, 111 Pa. 35. See, also, §§ 896 et seq., post.

[901] People v. Armstrong, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721. But the power must be expressly granted. City of Philadelphia v. Brabender, 9 Pa. Dist. R. 697, 17 Pa. Super. Ct. 331. Such an ordinance held valid even where it excludes from its operation the delivery of circulars enclosed in addressed envelopes.

[902] State v. City of St. Louis, 161 Mo. 371, 61 S. W. 658. Ordinance relative to construction of litter boxes held valid. Raymond v. Keseberg, 84 Wis. 302, 19 L. R. A. 643.

[903] Sierra County v. Butler, 136 Cal. 547, 69 Pac. 418. Running water in a highway. Mills v. Wilmington City R. Co., 1 Marv. (Del.) 269, 40 Atl. 1114. In the absence of proof to the contrary the use of a highway for blasting purposes will be presumed to be lawful. City of Rochester v. Close, 35 Hun (N. Y.) 208; Lewis v. Ballston Terminal R. Co., 45 App. Div. 129, 60 N. Y. Supp.

nature or those involving the use of a highway by some strange vehicle, engine or motor.[904]

§ 872. 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,[905] or the maximum load carried by trucks or teams,[906] prescribing the kind of

1035. Blowing whistles. Mason v. West, 61 App. Div. 40, 70 N. Y. Supp. 478. Use of street by automobiles.

[904] Kerney v. Barber Asphalt Pav. Co., 86 Mo. App. 573. Mo. Rev. St. 1899, § 5201, does not apply to the movements of steam carriages on city streets. Nason v. West, 31 Misc. 583, 65 N. Y. Supp. 651. An automobile is not within the application of N. Y. Laws 1890, c. 568; Laws 1891, c. 212 or Laws 1892, c. 686. Iowa Laws 1892, c. 68, p. 92.

Miscellaneous uses: Henline v. People, 81 Ill. 269. Gate. Pettis v. Johnson, 56 Ind. 139. Steps. Com. v. Ruggles, 88 Mass. (6 Allen) 588; Halsey v. Rapid Transit St. R. Co., 47 N. J. Eq. 380. Goods in transit. Hand v. Klinker, 54 N. Y. Super. Ct. (22 J. & S.) 433. Wagon on sidewalk. Reimer's Appeal, 100 Pa. 182. Bay window.

Temporary booths for trade: Costello v. State, 108 Ala. 45, 35 L. R. A. 303; Ely v. Campbell, 59 How. Pr. (N. Y.) 333; Barling v. West, 29 Wis. 307.

[905] Sykes v. Lawlor, 49 Cal. 237; Ford v. Whiteman, 2 Pen. (Del.) 355, 45 Atl. 543; City of Chicago v. Banker, 112 Ill. App. 940. Speed of automobiles. Green v. Eden, 24 Ind. App. 583, 56 N. E. 240; Osborn v. Jenkinson, 100 Iowa, 432, 69 N. W. 548; Com. v. Worcester, Thacher Ct. Cas. (Mass.) 100; Com. v. Roy, 140 Mass. 432; Com. v. Crowninshield, 187 Mass. 221; O'Hara v. Globe Iron & Foundry Co., 66 Mo. App. 53; Hanrahan v. Cochran, 12 App. Div. 91, 42 N. Y. Supp. 1031; Kahn v. Eisler, 22 Misc. 350, 49 N. Y. Supp. 135; Schaffer v. Baker Transfer Co., 29 App. Div. 459, 51 N. Y. Supp. 1092; Farley v. City of New York, 152 N. Y. 222, 46 N. E. 506; Crampton v. Ivie, 124 N. C. 591, 32 S. E. 968; May v. Hahn, 22 Tex. Civ. App. 365, 54 S. W. 416.

[906] Nagle v. City Council of Augusta, 5 Ga. 546; Harrison v. City of Elgin, 53 Ill. App. 452; Hamilton v. State, 22 Ind. App. 479, 52 N. E. 419. The belief of the defendant as to whether he had a lawful load is immaterial. State v. Boardman, 93 Me. 73, 44 Atl. 118, 46 L. R. A. 750; Commonwealth v. Mulhall, 162 Mass. 496, 39 N. E. 183; State v. Rayantis, 55 Minn. 126; People v. Wilson, 62 Hun, 618, 16 N. Y. Supp. 583; State v. Messenger, 63 Ohio St. 398, 59 N. E. 105. But see State v. Rohart, 83 Minn. 257, 86 N. W. 93, 333, 54 L. R. A. 947.

vehicles or traffic to be allowed on certain streets as boulevards or park ways,[907] prohibiting the use of vehicles having tires less than a certain width,[908] or the use of sidewalks except by pedestrians,[909] controlling the use of bicycle paths or bicycles,[910] requiring the hitching of horses,[911] regulating the passage of vehicles or ani-

[907] 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; City of St. Paul v. Smith, 27 Minn. 364; State v. Bradford, 78 Minn. 387, 47 L. R. A. 144. A portion of a public highway may be set apart as a bicycle path for the exclusive use of bicyclists. City of St. Louis v. Dorr, 145 Mo. 466, 46 S. W. 976, 42 L. R. A. 686; In re Wright, 29 Hun (N. Y.) 357; Doll v. Devery 27 Misc. 149, 57 N. Y. Supp. 767. But see State v. Rohart, 83 Minn. 257, 86 N. W. 93, 333, 54 L. R. A. 947.

[908] Cook v. State, 26 Ind. App. 278, 59 N. E. 489, citing Gordon v. State, 46 Ohio St. 607, 6 L. R. A. 749; Cincinnati, W. & Z. R. Co. v. Clinton County Com'rs, 1 Ohio St. 77. Particular statute held void because of uncertainty. State v. Messenger, 63 Ohio St. 398, 59 N. E. 105.

[909] City of Indianapolis v. Higgins, 141 Ind. 1, 40 N. E. 671; Wheeler v. City of Boone, 108 Iowa, 235, 78 N. W. 909, 44 L. R. A. 821. Such an ordinancce would not include a tricycle operated by hand for the convenience of one unable to walk. Swift v. City of Topeka, 43 Kan. 671, 23 Pac. 1075, 8 L. R. A. 772; State v. Aldrich, 70 N. H. 391, 47 Atl. 602; In re O'Keefe, 46 N. Y. State Rep. 557, 19 N. Y. Supp. 676. But dirt from excavations may be carried across a sidewalk. State v. Brown, 109 N. C. 802, 13 S. E. 940; Nelson v. Braman, 22 R. I. 283, 47 Atl. 696. See, also, cases cited in the following note. But see Hand v. Klinker, 54 N. Y. Super. Ct. (22 J. & S.) 433. Delivery wagon backing across sidewalk for purpose of delivering goods not a nuisance per se. Ordway v. Cornelius, 23 Pa. Co. Ct. R. 281.

[910] Mercer v. Corbin, 117 Ind. 450, 20 N. E. 132, 3 L. R. A. 221; Purple v. Inhabitants of Greenfield, 133 Mass. 1; Lee v. City of Port Huron, 128 Mich. 533, 87 N. W. 637, 55 L. R. A. 308; Thompson v. Dodge, 58 Minn. 555, 28 L. R. A. 608; State v. Bradford, 78 Minn. 387, 81 N. W. 202, 47 L. R. A. 144; Lechner v. Village of Newark, 19 Misc. 452, 44 N. Y. Supp. 556; State v. Lucas, 124 N. C. 804; Westgate v. Spalding, 8 Pa. Dist. R. 490; Porter v. Shields, 200 Pa. 241, 49 Atl. 785; State v. Collins, 16 R. I. 371, 3 L. R. A. 394; Crouch v. State, 39 Tex. Cr. R. 145; State v. Bruce, 23 Wash. 777. 63 Pac. 519.

[911] Higgins v. Wilmington City R. Co., 1 Marv. (Del.) 352, 41 Atl. 86; Tenney v. Tuttle, 83 Mass. (1 Allen) 185; Norris v. Kohler, 41 N. Y. 42; Becker v. Schutte, 85 Mo. App. 57; Wagner v. New York Condensed Milk Co., 46 N. Y. Supp. 939; Davis

mals through streets,[912] requiring the registration or licensing of automobiles,[913] 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. The use of highways by the owners of public conveyances is a right, however, not a privilege or an occupation and consequently, a municipality is not authorized to impose a license upon them for its exercise.[914] The regulation and control of municipal parks and boulevards is generally regarded as a discretionary power and a matter of purely local concern, these public grounds being held and owned by the corporation, not in its political or governmental capacity, but in a quasi private relation in which the authorities act for the exclusive benefit of the corporation.[915] Public authorities can adopt all necessary rules and regulations respecting their use equally with other public grounds or highways.[916]

v. Kallfelz, 22 Misc. 602, 50 N. Y. Supp. 928; Sondheim v. Nassau Brewing Co., 60 App. Div. 463, 69 N. Y. Supp. 880; Loeser v. Humphrey, 41 Ohio St. 378; Bowen v. Flanagan, 84 Va. 313.

[912] Roberts v. Ogle, 30 Ill. 459; Creamer v. McIlwain, 89 Md. 343, 45 L. R. A. 531; Commonwealth v. Curtis, 91 Mass. (9 Allen) 266; Com. v. Bean, 80 Mass. (14 Gray) 52; Com. v. Derby, 162 Mass. 183, 38 N. E. 440.

[913] City of Chicago v. Banker, 112 Ill. App. 94; Com. v. Boyd, 188 Mass. 79, 74 N. E. 255; People v. Schneider (Mich.) 103 N. W. 172; State v. Cobb (Mo. App.) 87 S. W. 551; People v. Ellis, 88 App. Div. 481, 85 N. Y. Supp. 120; People v. Mac Williams, 91 App. Div. 176, 86 N. Y. Supp. 357; Com. v. Hawkins, 14 Pa. Dist. R. 592; Com. v. Densmore, 29 Pa. Co. Ct. R. 217.

[914] City of Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. 408; State v. Berdetta, 73 Ind. 185; Trustees of Flemingsburg v. Wilson, 64 Ky. (1 Bush) 203. But see Gartside v. City of East St. Louis, 43 Ill. 47; Farwell v. City of Chicago, 71 Ill. 269; Joyce v. City of East St. Louis, 77 Ill. 156.

[915] McDonald v. City of St. Paul, 82 Minn. 308, 84 N. W. 1022. A city may set apart a portion of a public street as a boulevard. State v. Schweickhardt, 109 Mo. 496, 19 S. W. 47; State v. Long, 94 N. C. 896; State v. Eastman, 109 N. C. 785; City of Portland v. Whittle, 3 Or. 126; Com. v. Bowman, 3 Pa. 206; State v. Wilkinson, 2 Vt. 480.

[916] Ewing v. City of Minneapolis, 86 Minn. 51, 90 N. W. 10; State v. Long, 94 N. C. 896; Langley v. Town of Gallipolis, 2 Ohio St. 107. The use or beneficial purpose of a public common or square in a city or village where no special use or limitation is prescribed by the dedication is such that it may be improved and

Road law. To prevent blockades or accidents, officials may also, under proper authority, adopt regulations relative to carrying lights or ringing bells,[917] 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 [918] or passing others,[919] or the side of street to be used.[920] In the carriageway of a street, vehicles have an equal right with foot passengers, but at crossings the right of the latter is a superior one.[921] A viola-

ornamented for recreation and health; for public buildings or as a place for the transaction of public business or for both the purposes of pleasure and business at the discretion of the municipal authorities. Com. v. Bowman, 3 Pa. 206.

[917] Baucher v. City of New Haven, 40 Conn. 456; Cook v. Fogarty, 103 Iowa, 500, 72 N. W. 677, 39 L. R. A. 488; City of Emporia v. Wagoner, 6 Kan. App. 659, 49 Pac. 701; Kidder v. Inhabitants of Dunstable, 77 Mass. (11 Gray) 342; Lyon v. City of Cambridge, 136 Mass. 419; Miller v. City of St. Paul, 38 Minn. 134; Campbell v. City of Providence, 9 R. I. 262.

[918] Diehl v. Roberts, 134 Cal. 164, 66 Pac. 202; Dunn v. Moratz, 92 Ill. App. 477; City of Decatur v. Stoops, 21 Ind. App. 397; Cook Brewing Co. v. Ball, 22 Ind. App. 656, 52 N. E. 1002; Perlstein v. American Exp. Co., 177 Mass. 530, 59 N. E. 194; Dudley v. Bolles, 24 Wend. (N. Y.) 465; Savage v. Gerstner, 36 App. Div. 220, 55 N. Y. Supp. 306. The meeting law does not apply to pedestrians. Quinn v. Pietro, 38 App. Div. 484, 56 N. Y. Supp. 419; Rowland v. Wanamaker, 193 Pa. 598, 44 Atl. 918; State v. Collins, 16 R. I. 371, 17 Atl. 131, 3 L. R. A. 394. A bicycle is a vehicle or carriage within the meaning of the Stats of R. I. c. 66, § 1, relative to turning to the right when meeting others on public ways. May v. Hahn, 22 Tex. Civ App. 365; O'Malley v. Dorn, 7 Wis. 236.

[919] McLane v. Sharpe, 2 Harr. (Del.) 481; Walkup v. May, 9 Ind. App. 409; Loyacano v. Jurgens, 50 La. Ann. 441; Odom v. Schmidt, 52 La. Ann. 2129; Adams v. Swift, 172 Mass. 521 52 N. E. 1068; Daniels v. Clegg, 28 Mich. 32; Beach v. Parmeter, 23 Pa. 196; Angell v. Lewis, 20 R. I. 391.

[920] Mooney v. Trow Directory Print. & Book Binding Co., 2 Misc. 238, 21 N. Y. Supp. 957; Schaffer v. Baker Transfer Co., 29 App. Div. 459, 51 N. Y. Supp. 1092; Foote v. American Product Co., 195 Pa. 190; 45 Atl. 934; 49 L. R. A. 764; Angell v. Lewis, 20 R. I. 391, 39 Atl. 521; Winter v. Harris, 23 R. I. 47, 49 Atl. 398, 54 L. R. A. 643. But see Yore v. Muller Coal, Heavy Hauling & Transfer Co., 147 Mo. 679, 49 S. W. 855; Brownstein v. Imperial Elec. Light Co., 17 Rap. Jud. Que. C. S. 292.

[921] Carswell v. City of Wilmington, 2 Marv. (Del.) 360, 43 Atl. 169. The driver of a fire engine though entitled to the right of way is subject to the same rules as other travelers in regard to using due care. Holland v. Bartch, 120 Ind. 46, 22 N. E. 83; Thompson v. Dodge, 58 Minn. 555, 60 N. W. 545.

tion of a road law resulting in injury or damage to another may create a liability.[922]

§ 873. 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[923] of any particular kind,[924] and to provide for impounding animals found run-

28 L. R. A. 608. A bicycle is a vehicle, and a person driving a horse on a highway has no rights superior to those of the person riding the bicycle.

Dieter v. Zbaren, 81 Mo. App. 612; Barker v. Savage, 31 N. Y. Super. Ct. (1 Sweeny) 288; Savage v. Gerstner, 36 App. Div. 220, 55 N. Y. Supp. 306; Taylor v. Union Traction Co., 184 Pa. 465, 40 Atl. 159, 47 L. R. A. 289. A bicycle is not a vehicle in an ordinance giving vehicles right of way under certain circumstances.

Citizens' R. Co. v. Ford, 93 Tex. 110, 53 S. W. 575, 46 L. R. A. 457. An ordinance requiring persons riding or driving to check up for pedestrians in approaching alleys or street crossings does not apply to street cars.

[922] Diehl v. Roberts, 134 Cal. 164, 66 Pac. 202; Payne v. Smith, 34 Ky. (4 Dana) 497; Peoples' Ice Co. v. Steamer "Excelsior," 44 Mich. 229; Pigott v. Engle, 60 Mich. 221; Mittelstadt v. Morrison, 76 Wis. 265. But see Clifford v. Tyman, 61 N. H. 508.

[923] Folmar v. Curtis, 86 Ala. 354, 5 So. 678; Amyx v. Tabor, 23 Cal. 370; Mathis v. Jones, 84 Ga. 804, 11 S. E. 1018. Ga. Act Dec. 26, 1888, relative to stock running at large held unconstitutional because of lack of uniformity. Erlinger v. Boneau, 51 Ill. 94; Welch v. Bowen, 103 Ind. 252; Gilmore v. Holt, 21 Mass. (4 Pick) 258. Such a law refers to animals found at large within the limits of a town though their owners reside outside its limits. See, as holding to the contrary, the case of Town of Marietta v. Fearing, 4 Ohio, 429.

Com. v. Bean, 80 Mass. (14 Gray) 52; Fritz v. First Div. St. Paul & P. R. Co., 22 Minn. 404; State v. Aubuchon, 8 Mo. App. 325; Collins v. Hatch, 18 Ohio, 523. The power to pass must be expressly given to a municipal corporation. Johnson v. Mocabee, 1 Okl. 204, 32 Pac. 336; Goodale v. Sowell, 62 S. C. 516, 40 S. E. 970; Batsel v. Blaine (Tex. App.) 15 S. W. 283; Armstrong v. Traylor, 87 Tex. 598, 34 S. W. 440. But see State v. Johnson, 41 Minn. 111, 42 N. W. 786. See, also, p. 270, ante.

[924] Gosselink v. Campbell, 4 Iowa, 296; Com. v. Curtis, 91 Mass. (9 Allen) 266; Spitler v. Young, 63 Mo. 42. Ordinance sustained notwithstanding owner resided outside corporate limits. Shepherd v. Hees, 12 Johns. (N. Y.) 433; Jones v. Duncan, 127 N. C. 118, 37 S. E. 135. Such an ordinance operates upon all animals whether the owners live inside or outside the cor-

ning at large in violation of these regulations.[925] An exercise of this power necessarily includes the right to impose fines and to provide for the sale of stock in case of a nonpayment.[926]

§ 874. 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,[927] 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,[928] and the construction of drains or sewers,[929] the laying of water

porate limits. City of Waco v. Powell, 32 Tex. 258; Kelley v. City of Milwaukee, 18 Wis. 83.

[925] Smith v. Ewers, 21 Ala. 38; Hyde v. Pryor, 13 Ill. 64; Campau v. Langley, 39 Mich. 451; Wilson v. Beyers, 5 Wash. 303, 32 Pac. 90; Burdett v. Allen, 35 W. Va. 347, 13 S. E. 1012, 14 L. R. A. 337. See cases cited in last two preceding notes.

[926] City of Cartersville v. Lanham, 67 Ga. 753; Chamberlain v. City of Litchfield, 56 Ill. App. 652; Slessman v. Crozier, 80 Ind. 487. But towns incorporated under the general laws of Indiana have no such power. Third Municipality v. Blanc, 1 La. Ann. 385; Cochrane v. City of Frostburg, 81 Md. 54, 27 L. R. A. 728; Graves v. Rudd, 26 Tex. Civ. App. 554, 65 S. W. 63; Wilcox v. Hemming, 58 Wis. 144.

[927] City of Birmingham v. McCary, 84 Ala. 470; Rowell v. Williams, 29 Iowa, 210.

[928] Oliver v. Loftin, 4 Ala. 240; McKibbin v. State, 40 Ark. 480; Pinnix v. City of Durham, 130 N. C. 360, 41 S. E. 932; O'Brien v. City of Erie, 20 Pa. Co. Ct. R. 337.

[929] Swart v. District of Columbia, 17 App. D. C. 407; Stevens v. City of Muskegon, 111 Mich. 72, 69 N. W. 227, 36 L. R. A. 777. A right to construct a private sewer cannot be arbitrarily revoked. Boyden v. Walkeley, 113 Mich. 609, 71 N. W. 1099. Private sewer may be constructed under authority of municipality.

Kiley v. Bond, 114 Mich. 447, 72 N. W. 253; Hunt v. City of Lambertville, 45 N. J. Law, 279. The construction of the sewer must have been authorized in the manner required by law. Ainley v. Hackensack Imp. Commission, 64 N. J. Law, 504, 45 Atl. 807. A license to lay a private sewer in a public street is revocable at the option of the city.

Wood v. McGrath, 150 Pa. 451, 24 Atl. 682, 16 L. R. A. 715. The right may be granted by public authorities to construct a private sewer along a public street without the consent of the abutting lot owner. But see Borough of Torrington v. Messenger, 74 Conn. 321, 50 Atl. 873. See, also, §§ 437 et seq., 460, and 818, ante, and 886 et seq., post.

or gas mains,[930] or conduits for electric wires or pneumatic tubes, the stringing of wires or electric poles,[931] are all uses regarded as legitimate and proper and which cannot be regarded either as a 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.[932] The rule above given in respect to public improvements, sewers, water and gas mains or pipes, apply not only to the original construction of these improvements or facilities, but also to the use of the highways for their change or repair.[933]

§ 875. 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 by individuals or public officials of public buildings [934] or public facilities,[935] the latter including, ordinarily, landing places [936] or wharves,

[930] Swart v. District of Columbia, 17 App. D. C. 407; Boston v. City of Hoboken, 33 N. J. Law, 280; Crooke v. Flatbush Water-Works Co., 29 Hun (N. Y.) 245; Smith v. City of Goldsboro, 121 N. C. 350, 28 S. E. 479. See, also, §§ 437 et seq., 460, and 818, ante, and 886 et seq., post.

[931] Village of London Mills v. Fairview-London Tel. Circ., 105 Ill. App. 146; Domestic Teleg. & Tel. Co. v. City of Newark, 49 N. J. Law, 344.

[932] Hershfield v. Rocky Mountain Bell Tel. Co., 12 Mont. 102.

[933] Runyon v. Bordine, 14 N. J. Law (2 J. S. Green) 472.

[934] San Joaquin County v. Budd, 96 Cal. 47, 30 Pac. 967; Scofield v. Eighth School Dist., 27 Conn. 499; State v. Hart, 144 Ind. 107, 33 L. R. A. 118; Herbert v. Benson, 2 La. Ann. 770; Borough of Henderson v. Sibley County, 28 Minn. 519; Pancoast v. Troth, 34 N. J. Law, 377.

[935] State v. Chicago, M. & St. P. R. Co., 77 Iowa, 442, 4 L. R. A. 298; Westfield Borough v. Tioga County, 150 Pa. 153.

[936] Keokuk N. L. Packet Co. v. City of Keokuk, 95 U. S. 80; District of Columbia v. Johnson, 12 D. C. (1 Mackey) 51; Shinkle v. City of Covington, 64 Ky. (1 Bush) 617. A city keeping a wharf and charging for anchoring the boats is bound to protect them against the dangers of ordinary floods. Culbertson v. The Southern Belle, Newb. 461, Fed. Cas. No. 3,462; Remy v. Municipality No. 2, 15 La. Ann. 657; Watson v. Marshall, 16 La. Ann. 231; Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 10 Mo. App. 401; People v. Mallory, 2 Th. & C. (N. Y.) 76; Northwestern Union Packet Co. v. City of St. Louis, 4 Dill. 10, 23 Int. Rev. Rec. 33, Fed. Cas. No. 10,345. But see Northwestern Union

ferries,[937] and public waters.[938] Their rights in these respects include a control of the time and manner of use by the public,[939] the charge to be made for a public inspection of public records [940] or the use of facilities offered.[941]

§ 876. 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.[942] Under an appli-

Packet Co. v. City of St. Paul, 3 Dill. 454, Fed. Cas. No. 10,346, where a wharfage charge was held void because in conflict with that clause in the constitution of the United States which forbids the levy of any duty on tonnage without the consent of Congress. See, also, §§ 477, 478, ante.

[937] Minturn v. Larue, 23 How. (U. S.) 435; Murphy v. City Council of Montgomery, 11 Ala. 586; Ex parte Cass (Cal.), 13 Pac. 169; Attorney General v. City of Boston, 123 Mass. 460; Lansing v. Smith, 4 Wend. (N. Y.) 9; In re Union Ferry Co., 98 N. Y. 139; New York & B. Ferry Co. v. City of New York, 146 N. Y. 145, 40 N. E. 785. But see Waterbury v. City of Laredo, 68 Tex. 565, 5 S. W. 81.

[938] McCready v. Virginia, 94 U. S. 391.

[939] Dubois v. City Council Augusta, Dud. (Ga.) 30; Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 82 Mo. 121. A public wharf cannot be leased unconditionally for a term of years to be used for a strictly private business. Associates of Jersey County v. Jersey City, 34 N. J. Law, 31; City of New York v. Ryan, 2 E. D. Smith (N. Y.) 368; Hecker v. New York Balance Dock Co., 24 Barb. (N. Y.) 215; Reighard v. Flinn, 194 Pa. 352, 4 Atl. 1080.

[940] Hanson v. Eichstaedt, 69 Wis. 538.

[941] Northwestern Union Packet Co. v. City of St. Louis, 4 Dill. 10, Fed. Cas. No. 10,345; City of Sacramento v. Steamer "New World," 4 Cal. 41; Keokuk N. L. Packet Co. v. City of Quincy, 81 Ill. 422; City of Dubuque v. Stout, 32 Iowa, 47, 80; City of Muscatine v. Keokuk N. L. Packet Co., 45 Iowa, 185. In the absence of an ordinance prescribing wharfage, the vessel is not liable to make payment to a city for using a public wharf. City of Keokuk v. Keokuk N. L. Packet Co., 45 Iowa, 196; Id., 95 U. S. 80; First Municipality v. Pease, 2 La. Ann. 538; Dugan v. City of Baltimore, 5 Gill. & J. (Md.) 357; MacDonnell v. International & G. N. R. Co., 60 Tex. 590.

[942] 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; State v. Wood County Sup'rs, 41 Wis. 28.

cation of this principle, regulations may be adopted and enforced relative to the breaking or trimming of shade trees[943] or the preservation of public waters, harbors and water channels.[944]

§ 877. Removal of obstructions.

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 and preserve them for the various uses for which originally acquired is co-extensive with the power and purpose of acquirement. Not only is this right thus possessed but the law imposes upon them the duty of protection and preservation. These principles are self-evident upon a consideration of the nature of public corporations and the purpose of their organization.[945] 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. Property acquired by public corporations in this capacity is charged with a public character.[946]

[943] Taylor v. Reynolds, 92 Cal. 573; Burnham v. Hotchkiss, 14 Conn. 311; Bills v. Belknap, 36 Iowa, 583; Com. v. Wilder, 127 Mass. 1; Consolidated Traction Co. v. Township of East Orange, 61 N. J. Law, 202, 38 Atl. 803. See, also, §§ 880 and 916, post.

[944] City of Ogdensburgh v. Lyon, 7 Lans. (N. Y.) 215; Coonly v. City of Albany, 57 Hun, 327, 10 N. Y. Supp. 512, 132 N. Y. 145, 30 N. E. 382; City of Portland v. Montgomery, 38 Or. 215, 62 Pac. 755. An ordinance establishing a wharf line will be presumed to be reasonable unless the contrary is shown. Walpole v. City Council, 32 S. C. 545, 11 S. E. 391; Wisconsin River Imp. Co. v. Lyons, 30 Wis. 61.

[945] People v. Com'rs of Highways, 130 Ill. 482, 22 N. E. 596, 6 L. R. A. 161, reversing 29 Ill. App. 115; Bitzer v. Leverton, 9 Kan. App. 76, 57 Pac. 1045; Gray v. Henry County, 19 Ky. L. R. 885, 42 S. W. 333; Nichols v. City of Minneapolis, 33 Minn. 430; City of Newark v. Delaware, L. & W. R. Co., 42 N. J. Eq. 196, 7 Atl. 123; Kunz v. City of Troy, 48 Hun, 619, 1 N. Y. Supp. 596; Waukesha Hygeia Mineral Spring Co. v. Village of Waukesha, 83 Wis. 475, 53 N. W. 675. See, also, cases cited generally under this section.

[946] Clift v. State, 6 Ind. App. 199; State v. Wertzel, 84 Wis. 344; Crismon v. Deck, 84 Iowa, 344; Ricker v. Barry, 34 Me. 116. It is no defense in an action for obstructing a public way that the plaintiff ob-

Highways and pleasure grounds especially are secured for a devotion to certain public uses, the nature of which has been already sufficiently defined and discussed.[947] The public in whom may be vested the right to enjoy for certain lawful purposes and in a prescribed manner cannot be deprived of this right permanently or temporarily by a use or occupation which destroys or impairs that right.[948]

§ 878. Removal of nuisances.

It is not every use or act in a highway that may constitute an obstruction in the technical and literal sense of that word, and, further, there are many uses which abutting owners may make of public grounds which cannot be regarded either as obstructions or nuisances unless continued for such a length of time or done in such a manner as to conflict with the superior right of the community as a whole to use these highways or grounds as a means of travel or recreation which is regarded as the primary and superior purpose for which they are acquired and maintained.[949] The construction of a tunnel underneath the street or the passageway in the air over it, the placing of awnings,[950] or the construction

structs it on his own land. City of Grand Rapids v. Hughes, 15 Mich. 54. The power to impose a penalty for an encroachment on a street must be directly given.

Chaffin v. State (Tex. Cr. App.) 24 S. W. 411. The use of threatening language does not render defendant guilty of obstructing or injuring a highway. Raymond v. Keseberg, 84 Wis. 302, 19 L. R. A. 643. See sections immediately following and cases cited.

[947] See §§ 422 et seq., 436 and 797 et seq., ante.

[948] Carey v. Rae, 58 Cal. 159; New Orleans Gas-Light Co. v. Hart, 40 La. Ann. 474, 4 So. 215; Philbrick v. Town of University Place, 88 Iowa, 354, 55 N. W. 345; Emerson v. Babcock, 66 Iowa, 257, 23 N. W. 656; Hedgepeth v. Robertson, 18 Tex. 858. See §§ 853 et seq., ante and §§ 887 et seq., post.

[949] Webb v. City of Demopolis, 95 Ala. 116, 21 L. R. A. 62; City and County of San Francisco v. Buckman, 111 Cal. 25; City of Columbus v. Jaques, 30 Ga. 506; Attorney General v. Brighton & H. Co-op. Supply Ass'n, 69 Law Ch. 204.

[950] City Council of Augusta v. Burum, 93 Ga. 68, 26 L. R. A. 340; Pedrick v. Bailey, 78 Mass. (12 Gray) 161; Hawkins v. Sanders, 45 Mich. 491; Fox v. City of Winona, 23 Minn. 10; Bohen v. City of Waseca, 32 Minn. 176; Hisey v. City of Mexico, 61 Mo. App. 248; Farrell v. City of New York, 52 Hun, 611, 5 N. Y. Supp. 580; Lavery v. Hannigan, 52 N. Y. Super. Ct. 463; Hume v. City of New York, 74 N. Y. 264.

of projections from buildings [951] in a street, do not constitute obstructions to public travel and yet they may be removed as nuisances. One may also so drive or walk in a public highway,[952] or employ a startling or novel mode of progression,[953] in such a manner as to constitute a nuisance.

Definition of a nuisance. In a discussion of nuisances it is well to remember the definition of a nuisance and the principles laid down in those sections relating to the subject which control public authorities in their abatement.[954] This particular principle is so important that it will bear repetition, namely, that it is not legislative or official action in itself or by itself which can constitute an act or use of property a nuisance, when considering the circumstances and conditions which create one, it is not of this character.[955]

§ 879. Authority for removal of obstructions or nuisances.

The power as vested in public authorities to remove obstructions or nuisances is a continuing one,[956] need not be expressly granted in all cases,[957] and further, is one which cannot be contracted or

[951] People v. Holladay, 93 Cal. 248; Hawley v. Harrall, 19 Conn. 142; Day v. Green, 58 Mass. (4 Cush.) 433; State v. Higgs, 126 N. C. 1014, 48 L. R. A. 446. See, also, § 869, ante.

[952] Reg. v. Williams, 55 J. P. 406. Four men walking abreast on a pavement causing others to go into the carriageway in order to pass them does not constitute an unlawful obstruction of the highway. People v. Cunningham, 1 Denio (N. Y.) 524; Barker v. Com., 19 Pa. 412.

[953] Jackson v. Castle, 80 Me. 119; Taylor v. City of Cumberland, 64 Md. 68.

[954] See §§ 137 et seq., ante.

[955] Nutter v. Pearl, 71 N. H. 247, 51 Atl. 897. The question of whether a stepping stone is a nuisance is one for the jury. Avis v. Borough of Vineland, 56 N. J. Law, 474, 28 Atl. 1039, 23 L. R. A. 685. See, also, §§ 137 et seq., ante.

Question for jury. Burnham v. Hotchkiss, 14 Conn. 311; Zimmerman v. State, 4 Ind. App. 583; Hopkins v. Crombie, 4 N. H. 525.

[956] Wabash R. Co. v. City of Defiance, 167 U. S. 88; Ely v. Parsons, 55 Conn. 83; Atwood v. Partree, 56 Conn. 80; Jones v. Williams, 70 Ga. 704; Hurst v. Cassiday, 5 Ky. L. R. 771; Graves v. Shattuck, 35 N. H. 258; Cook v. Harris, 61 N. Y. 448; Compton v. Waco Bridge Co., 62 Tex. 715.

[957] City of Terre Haute v. Turner, 36 Ind. 522; Bitzer v. Leverton, 9 Kan. App. 76, 57 Pac. 1045; Dudley v. Trustees of Frankfort, 51 Ky. (12 B. Mon.) 610; City of Philadelphia v. Philadelphia & R. R. Co., 58 Pa. 253.

bargained away.[958] 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.[959] The determination of public authorities that an act or a use of a highway constitutes an obstruction is usually conclusive.[960] The authority for the removal must be strictly followed and where the statutes provide for the commencement of proceedings by certain designated officials, those brought by others,[961] or not in the manner provided, must be dismissed.[962]

The right as vested in an individual. It is seldom that a private individual possesses the legal right to personally remove an obstruction or abate a nuisance though instances where this is permitted have occurred.[963]

[958] City of Grand Rapids v. Hughes, 15 Mich. 54. See, also, §§ 912, 913, post.

[959] Sheen v. Stothart, 29 La. Ann. 630; Compton v. Waco Bridge Co., 62 Tex. 715.

[960] Vanderhurst v. Tholcke, 113 Cal. 147, 45 Pac. 266, 35 L. R. A. 267; Morrison v. Howe, 120 Mass. 565; Lewis v. Ballston Terminal R. Co., 45 App. Div. 129, 60 N. Y. Supp. 1035. In an action for damages for placing an obstruction in a highway, the question of whether or not there was a reasonable necessity therefor is one of fact for the jury. Chase v. City of Oshkosh, 81 Wis. 313, 51 N. W. 560, 15 L. R. A. 553.

[961] Hall v. Kauffman, 106 Cal. 451, 39 Pac. 756; San Benito County v. Whitesides, 51 Cal. 416; Bailey v. Dale, 71 Cal. 34, 11 Pac. 804; Bequette v. Patterson, 104 Cal. 282, 37 Pac. 917; Savage v. Cass County Com'rs, 10 Ill. App. 204; Town of Chatham v. Mason, 53 Ill. 411; Powell County v. Kentucky Lumber Co., 15 Ky. L. R. 577, 24 S. W. 114; Allen v. Hiles, 67 N. J. Law, 135, 50 Atl. 440; Lawrence R. Co. v. Mahoning County Com'rs, 35 Ohio St. 1; Appeal of North Manheim Tp. (Pa.) 14 Atl. 137; Woodward v. South Carolina & G. R. Co., 47 S. C. 233, 25 S. E. 146; State v. Wolfe, 61 S. C. 25, 39 S. E. 179. Concurrent jurisdiction may be by different bodies or officials.

[962] Mather v. Simonton, 73 Ind. 595; Sloan v. Rebman, 66 Iowa, 81; Ackerman v. True, 31 Misc. 597, 66 N. Y. Supp. 140; Rozell v. Andrews, 103 N. Y. 150; State v. Smith, 54 Vt. 403.

[963] Wellborn v. Davies, 40 Ark. 83; Bidinger v. Bishop, 76 Ind. 244; Inhabitants of Arundel v. McCulloch, 10 Mass. 70; White v. Leonidas Tp. Highway Com'rs, 95 Mich. 288, 54 N. W. 875; Currier v. Davis, 68 N. H. 596, 41 Atl. 239; Goldsmith v. Jones, 43 How. Pr. (N. Y.) 415; Higgins v. Grove, 40 Ohio St. 521; Williams v. Fink, 18 Wis. 265. But see Corthell v. Holmes, 88 Me. 376, 34 Atl. 173; State v. Galvin, 27 Minn. 16; Morris & E. R. Co. v.

§ 880. Mode of removal.

Obstructions or nuisances are summarily removed or abated usually through arbitrary official action on the part of the public authorities with or without notice where this mode is authorized,[904]

Newark Pass. R. Co., 51 N. J. Eq. 379; People v. Keating, 62 App. Div. 348, 71 N. Y. Supp. 97, reversed in 168 N. Y. 390, 61 N. E. 637. See, also, § 885, post.

[904] Winter v. City of Montgomery, 83 Ala. 589, 3 So. 235. Permission of a city council to construct a veranda which obstructs a sidewalk is a revocable license merely and an order for its removal without paying the owner is not the taking of property without compensation.

Freshour v. Hihn, 99 Cal. 443, 34 Pac. 87; City of Hartford v. Hartford St. R. Co., 73 Conn. 327, 47 Atl. 330. Sufficiency of notice. Keating v. McDonald, 73 Conn. 125, 46 Atl. 871; Laing v. City of Americus, 86 Ga. 756, 13 S. E. 107; Hatton v. Village of Chatham, 24 Ill. App. 622; Caldwell v. Town of Pre-emption, 74 Ill. App. 32; Epler v. Niman, 5 Ind. 459; Cook v. Gaylord, 91 Iowa, 219, 59 N. W. 30; Carver v. Com., 75 Ky. (12 Bush) 264; Witt v. Hughes, 23 Ky. L. R. 1836, 66 S. W. 281; Colburn v. Kittridge, 131 Mass. 470.

Whittier v. McIntyre, 59 Me. 143. A statutory provision for the removal of fences from a highway "under indictment of a conviction" does not provide an exclusive remedy. People v. Smith, 42 Mich. 138; Willson v. Gifford, 42 Mich. 454; White v. Leonidas Tp. Highway Com'rs, 95 Mich. 288, 54 N. W. 875; Krueger v. Le Blanc, 62 Mich. 70, 28 N. W. 757; Id., 75 Mich. 424; Osborn v. Longsduff, 70 Mich. 127; Kurz v. Turley, 54 Mo. App. 237; Bierwith v. Pieronnet, 65 Mo. App. 431; City of Concord v. Burleigh, 67 N. H. 106, 36 Atl. 606; New York & L. B. R. Co. v. Borough of South Amboy, 57 N. J. Law, 252, 30 Atl. 628. Obstructions in a street cannot be summarily and forcibly removed where its legal existence is in dispute.

City of Cape May v. Cape May, D. B. & S. R. Co., 60 N. J. Law, 224, 37 Atl. 892, 39 L. R. A. 609, modifying 34 Atl. 397; Delaware & A. Tel. Co. v. Committee of Pensauken Tp., 67 N. J. Law, 91, 50 Atl. 452. An attempt to remove poles placed in a street under color of right is illegal.

Traphagen v. Jersey City, 52 N. J. Law, 65; Kane v. City of Troy, 48 Hun, 619, 1 N. Y. Supp. 536; Olendorf v. Sullivan, 59 Hun, 620, 13 N. Y. Supp. 6; Hathaway v. Jenks, 67 Hun, 289, 22 N. Y. Supp. 421; Moore v. Village of Fairport, 11 Misc. 146, 32 N. Y. Supp. 633; Electric Power Co. v. City of New York, 29 Misc. 48, 60 N. Y. Supp. 590. After failure to comply with notice to place wires underground they may be summarily cut by the public officials.

Cook v. Harris, 61 N. Y. 448; Kellogg v. Thompson, 66 N. Y. 88; James v. Sammis, 132 N. Y. 239, 30 N. E. 502; Town of Sardinia v. Butler, 149 N. Y. 505, 44 N. E. 179, reversing 78 Hun, 527, 29 N. Y. Supp. 481; Delaware, L. & W. R. Co. v.

or by civil proceedings which have for their purpose not only the removal or abatement of the nuisance as it exists but their recurrence through writs of injunction.[965] The plan of procedure to be followed is prescribed by ordinances or statutes and vary not only in the different states but from time to time in each of them. They may be pursued by either the public authorities[966]

City of Buffalo, 158 N. Y. 266, 53 N. E. 44; Whittaker v. Ferguson, 16 Utah, 240, 51 Pac. 980; Neff v. Paddock, 26 Wis. 546; Pauer v. Albrecht, 72 Wis. 416, 39 N. W. 771; Nicolai v. Davis, 91 Wis. 370, 64 N. W. 1001. But see Childs v. Nelson, 69 Wis. 125, 33 N. W. 587.

[965] City of Detroit v. Detroit City R. Co., 56 Fed. 867; Draper v. Mackey, 35 Ark. 497; Chicago, B. & Q. R. Co. v. City of Quincy, 136 Ill. 489; Strunk v. Pritchett, 27 Ind. App. 582, 61 N. E. 973; Lebanon Tp. v. Burch, 78 Mich. 641; Fox v. City of Winona, 23 Minn. 10. Erection of awning post. Township of Hutchinson v. Filk, 44 Minn. 536, 47 N. W. 255; Illinois Cent. R. Co. v. Thomas, 75 Miss. 54; Inhabitants of Trenton v. McQuade, 52 N. J. Eq. 669, 29 Atl. 354; Adler v. Metropolitan El. R. Co., 46 N. Y. State Rep. 253, 18 N. Y. Supp. 858; Com. v. Pittston Ferry Bridge Co., 176 Pa. 394, 35 Atl. 240. It is error to decree the removal of a bridge pier from the limits of a highway where it is not found to what extent if any it encroaches upon it. Schwede v. Hemrich Bros. Brew. Co., 29 Wash. 21, 69 Pac. 362; Town of Neshkoro v. Nest, 85 Wis. 126, 55 N. W. 176; City of Eau Claire v. Matzke, 86 Wis. 291, 56 N. W. 874; City of Madison v. Mayers, 97 Wis. 399, 40 L. R. A. 635. But see Attorney General v. Bay State Brick Co., 115 Mass. 431.

[966] Reede v. City of Birmingham, 92 Ala. 339, 9 So. 961; City of Mobile v. Louisville & N. R. Co., 124 Ala. 132, 26 So. 902; Peck v. Los Angeles County Sup'rs, 90 Cal. 384, 27 Pac. 301; Chicago, B. & Q. R. Co. v. City of Quincy, 136 Ill. 489, 27 N. E. 232; McCormick v. South Park Com'rs, 150 Ill. 516; Com. v. Illinois Cent. R. Co., 20 Ky. L. R. 606, 47 S. W. 258. The fiscal court of each county as well as the circuit court have jurisdiction of proceedings relative to the obstruction of public roads.

City of Big Rapids v. Comstock, 65 Mich. 78. Where a building encroached on the street only four and one-half inches, an order for a decree directing the walls to be torn down should be reversed. Township of Hutchinson v. Filk, 44 Minn. 536, 47 N. W. 255; Lockwood v. Wabash R. Co., 122 Mo. 86, 24 L. R. A. 516; Nixon v. Town of Biloxi (Miss.) 5 So. 621; Town of Monroe v. Connecticut River Lumber Co., 68 N. H. 89, 39 Atl. 1019; City of Newark v. Delaware L. & W. R. Co., 42 N. J. Eq. 196, 7 Atl. 123; Borough of Brigantine v. Holland Trust Co. (N. J. Eq.) 35 Atl. 344. The power to remove nuisances and obstructions must be exercised in the manner prescribed by law.

Lathrop v. City of Morristown, 65 N. J. Law, 467, 47 Atl. 450; Darby v. Nash, 52 N. J. Law, 127; Trustees of Presbyterian Church v.

or in some cases by private individuals who have sustained injuries distinct and peculiar and different from those sustained by the public at large.[967] In proceedings for an injunction, the usual rules in respect to necessary and sufficient evidence [968] and necessity for the writ [969] obtain and it must also clearly appear that there is no adequate remedy at law for obtaining the desired relief.[970]

Electrical Subway Com'rs, 55 N. J. Law, 436; Metropolitan Exhibition Co. v. Newton, 51 Hun, 639, 4 N. Y. Supp. 593. The power to remove obstructions from a street may be delegated. Village of Hempstead v. Ball Elec. R. Co., 9 App. Div. 48, 41 N. Y. Supp. 124.

[967] Cabbell v. Williams, 127 Ala. 320, 28 So. 405; Goggans v. Myrick, 131 Ala. 286, 31 So. 22; First National Bank of Montgomery v. Tyson, 133 Ala. 459, 32 So. 144, 59 L. R. A. 399; San Jose Ranch Co. v. Brooks, 74 Cal. 463, 16 Pac. 250; Marini v. Graham, 67 Cal. 130; Atwood v. Partree, 56 Conn. 80, 14 Atl. 85; Brunswick & W. R. Co. v. Hardey, 112 Ga. 604, 37 S. E. 888, 52 L. R. A. 396; Earll v. City of Chicago, 136 Ill. 277, 26 N. E. 370; Sunderland v. Martin, 113 Ind. 411, 15 N. E. 689; Pittsburgh C., C. & St. L. R. Co. v. Noftsger, 148 Ind. 101, 47 N. E. 332; Powell v. Bunger, 91 Ind. 64; Matlock v. Hawkins, 92 Ind. 225; Miller v. Schenck, 78 Iowa, 372, 43 N. W. 225; Billard v. Erhart, 35 Kan. 611; Shields v. Louisville & N. R. Co., 16 Ky. L. R. 849, 29 S. W. 978; Holmes v. Corthell, 80 Me. 31, 12 Atl. 730; Roberts v. Fitzgerald, 33 Mich. 4; Thelen v. Farmer, 36 Minn. 225, 30 N. W. 670; Shero v. Carey, 35 Minn. 423; Bailey v. Culver, 84 Mo. 531; Parsons v. Travis, 8 N. Y. Super. Ct. (1 Duer) 439; Callanan v. Gilman, 52 N. Y. Super. Ct. (20 J. & S.) 112; Halleran v. Bell Tel. Co., 64 App. Div. 41, 71 N. Y. Supp. 685; Wakeman v. Wilbur, 147 N. Y. 657, 42 N. E. 341, reversing 51 Hun, 638, 4 N. Y. Supp. 938; Coatsworth v. Lehigh Val. R. Co., 156 N. Y. 451, 51 N. E. 301; Philadelphia & T. R. Co. v. Philadelphia & B. Pass. R. Co., 6 Pa. Dist. R. 269; Pittsburgh & L. E. R. Co. v. Jones, 111 Pa. 204; Hill v. Hoffman (Tenn. Ch. App.) 58 S. W. 929; Johnson v. Maxwell, 2 Wash. St. 482, 27 Pac. 1071; Wilson v. West & Slade Mill Co., 28 Wash. 312, 68 Pac. 716. See, also, § 885.

[968] Smith v. Talbot, 77 Cal. 16; People v. Young, 72 Ill. 411; Barnard v. Nacomis Highway Com'rs, 172 Ill. 391, 50 N. E. 120; Carlin v. Wolf, 154 Mo. 539, 51 S. W. 679, 55 S. W. 441; Town of New Castle v. Haywood, 67 N. H. 178; City of Philadelphia's Appeal, 78 Pa. 33.

[969] Inhabitants of Raritan Tp. v. Port Reading R. Co., 49 N. J. Eq. 11, 23 Atl. 127, citing Att'y Gen. v. New Jersey & T. R. Co., 3 N. J. Eq. (2 H. W. Green) 136; Inhabitants of Woodbridge v. Inslee, 37 N. J. Eq. (10 Stew.) 397.

People v. Equity Gas Light Co., 141 N. Y. 232, 36 N. E. 194.

[970] Murphy v. Harbison, 29 Ark. 340; Columbia County Com'rs v. Bryson, 13 Fla. 281; Montana Tp. v. Ruark, 39 Kan. 109, 18 Pac. 61;

Statutes may also impose penalties for obstructing public highways or interfering with public property.[971]

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.[972] The removal of trees under

Inhabitants of Needham v. New York & N. E. R. Co., 152 Mass. 61, 25 N. E. 20; Township of Lebanon v. Burch, 78 Mich. 641, 44 N. W. 148.

[971] Sierra County v. Butler, 136 Cal. 547, 69 Pac. 418. A statute providing for the recovery of a penalty for obstructing a highway is an exclusive remedy. Bailey v. Dale, 71 Cal. 34, 11 Pac. 804; Freshour v. Hihn, 99 Cal. 443, 34 Pac. 87; Hall v. Kauffman, 106 Cal. 451; Blakeslee v. Tyler, 55 Conn. 397, 11 Atl. 855; Scott v. Town of New Boston, 26 Ill. App. 108; Wragg v. Penn Tp., 94 Ill. 11; Boyd v. Town of Farm Ridge, 103 Ill. 408; Township of Madison v. Gallagher, 159 Ill. 105, 42 N. E. 316; Town of Wheatfield v. Grundmann, 164 Ill. 250, 45 N. E. 164; White v. Town of Foxborough, 151 Mass. 28, 23 N. E. 652; Pettinger v. People, 20 Mich. 336; Parker v. People, 22 Mich. 93; Hines v. Darling, 99 Mich. 47, 57 N. W. 1081. Obstructing ditch.

Overseer of Highways of Road Dist. No. 4 v. Pelton, 129 Mich. 31, 87 N. W. 1029; Hines v. Darling, 99 Mich. 47; Hariston v. Francher, 15 Miss. (7 Smedes & M.) 249; Town of Corning v. Head, 86 Hun, 12, 33 N. Y. Supp. 360; Lawrence R. Co. v. Mahoning County Com'rs, 35 Ohio St. 1. The measure of damages ordinarily under the Ohio Act 1873 is the cost of removing the obstructions and restoring the highway to its former condition.

State v. Floyd, 39 S. C. 23, 17 S. E. 505; State v. Smith, 52 Wis. 134; State v. Pomeroy, 73 Wis. 664, 41 N. W. 726. There is a clear distinction between an encroachment and an obstruction in a highway and an action to cover penalty for obstructing a highway does not lie where the remedy is by proceeding according to the statute to determine whether an encroachment has been made. State v. Childs, 109 Wis. 233, 85 N. W. 374.

[972] Vanderhurst v. Tholcke, 113 Cal. 147, 45 Pac. 266, 35 L. R. A. 267; Ely v. Parsons, 55 Conn. 83, 10 Atl. 499; City of Mt. Carmel v. Shaw, 155 Ill. 37, 39 N. E. 584, 27 L. R. A. 580, reversing 52 Ill. App. 429; Wilson v. Simmons, 89 Me. 242, 36 Atl. 380; Gaylord v. King, 142 Mass. 495. 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. 49, 51 L. R. A. 955. The right to remove shade trees is dependent under the statute upon giving notice and an opportunity to the owner to remove them and this is true whether the removal is sought by the public authorities or one to whom the use of the streets for the construction of an electric railway

these circumstances will afford the adjoining property owner no claim for damages occasioned by the destruction of the obstructions removed or their removal.[973] 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.[974]

line has been lawfully given. Dodd v. Consolidated Traction Co., 57 N. J. Law, 482, 31 Atl. 980. A company authorized by the city to erect trolley wires has the right to top the branches of trees when it is reasonably necessary for the passage of its wires.

Young v. Crane, 68 N. J. Law, 453, 51 Atl. 482; Town of Wheatfield v. Shasley, 23 Misc. 100, 51 N. Y. Supp. 835. Trees lawfully planted and maintained within a highway are not obstructions within N. Y. Laws 1890, c. 568, § 105, which authorizes highway commissioners to remove obstructions or encroachments on highways on notice to the adjoining landowner. 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. Crismon v. Deck, 84 Iowa, 344, 51 N. W. 55, where, under peculiar facts, a road supervisor was enjoined from removing shade trees and a hedge within the limits of a highway.

Evans v. Board of Street Com'rs, 84 Hun, 206, 32 N. Y. Supp. 547. An injunction will lie against the threatened removal of shade trees growing in a city street by street commissioners without its having first been determined under the statute that the trees proposed to be removed are detrimental or interfere with the full and free use of the street. See, also, § 911, post.

[973] Castleberry v. City of Atlanta, 74 Ga. 164; Wilson v. Simmons, 89 Me. 242, 36 Atl. 380; Murray v. Norfolk County, 149 Mass. 328, 21 N. E. 757; Phifer v. Cox, 21 Ohio St. 248; Chase v. City of Oshkosh, 81 Wis. 313, 51 N. W. 560, 15 L. R. A. 553. But see Clark v. Dasso, 34 Mich. 86, where it is held that the law favors the planting and preservation of shade trees in public streets when they do not constitute actual obstructions; that trees in the highway are the property of the abutting owner and if they encroach upon the highway and must be removed, he has the right and must be afforded a reasonable opportunity to transplant them as living trees elsewhere. See, also, as holding the same, Stretch v. Village of Cassopolis, 125 Mich. 167, 84 N. W. 51, 51 L. R. A. 345.

Village of Lancaster v. Richardson, 4 Lans. (N. Y.) 136; Town of Wheatfield v. Shasley, 23 Misc. 100, 51 N. Y. Supp. 835. Shade trees lawfully planted in a highway can only be removed by an appropriate proceeding to condemn them with compensation to their owners.

[974] Holtzman v. United States, 14 App. D. C. 454; City of Boulder v.

§ 881. Criminal proceedings.

Not only is the power commonly possessed by public authorities to effect a removal or abatement of obstructions and nuisances but the rights of the public are almost universally guarded in all states against the connivance or laxity of public officials by the passage of statutes which make the act of creating an obstruction or committing a nuisance a crime or a misdemeanor [975] and provide

Niles, 9 Colo. 415; Michigan City v. Boeckling, 122 Ind. 39; Union R. Co. v. City of Cambridge, 93 Mass. (11 Allen) 287; Inhabitants of Clinton v. Welch, 166 Mass. 133, 43 N. E. 1116; Hubbard v. City of Concord, 35 N. H. 52; City of New York v. Brown, 27 Misc. 218, 57 N. Y. Supp. 742; Village of Carthate v. Frederick, 122 N. Y. 268, 25 N. E. 480, 10 L. R. A. 178.

[975] Howard v. State, 47 Ark. 431, 2 S. W. 331. A statutory proceeding is not necessarily an exclusive remedy. St. Louis A. & T. R. Co. v. State, 52 Ark. 51, 11 S. W. 1035. Obstructing a highway may be made a misdemeanor. State v. Holman, 29 Ark. 58. To obstruct a public highway is indictable at common law. Sweeney v. People, 28 Ill. 208; Henline v. People, 81 Ill. 269; State v. Baltimore O. & C. R. Co., 120 Ind. 298, 22 N. E. 307; State v. Kowolski, 96 Iowa, 346; Com. v. Wilkinson, 33 Mass. (16 Pick.) 175; Vicksburg & M. R. Co. v. State, 64 Miss. 5, 8 So. 128. Miss. Code, § 2871, contemplates a positive obstruction to a highway and not a mere omission to repair.

State v. Bradley, 31 Mo. App. 308; Beaudean v. City of Cape Girardeau, 71 Mo. 392; Com. v. Capp, 48 Pa. 53; State v. Louisville & N. R. Co., 91 Tenn. 445, 19 S. W. 229. A railroad is liable to indictment for obstructing a highway. Parsons v. State, 26 Tex. App. 192, 9 S. W. 490. The obstructing must be willful, to constitute an offense. Crouch v. State, 39 Tex. Cr. Rep. 145, 45 S. W. 578. That one acted on the advice of attorneys is no defense in a criminal prosecution for obstructing a road. Ward v. State, 42 Tex. Cr. Rep. 435, 60 S. W. 757; Dyrley v. State (Tex. Cr. App.) 63 S. W. 631. In a prosecution for obstructing a road, the use of the word "willfully" is erroneous. State v. Troy & B. R. Co., 57 Vt. 144; State v. Monongahela R. Co., 37 W. Va. 108, 16 S. E. 519. A failure to restore a highway, as required by law, by one given the right to occupy it, is an indictable offense under Code, c. 43, sec. 45. State v. Dry Fork R. Co., 50 W. Va. 235, 40 S. E. 447. It is not necessary in an indictment against a railroad company for obstructing a public highway to aver that it had no license to occupy the road.

[976] State v. Lemay, 13 Ark. 405; Moll v. Town of Pickaway, 14 Ill. App. 343; State v. Hunter, 68 Iowa, 447; Rankin v. State, 25 Tex. App. 694, 8 S. W. 932. A penalty is necessary to the validity of a criminal statute relative to the obstruction of a highway.

penalties for a violation.[976] It is scarcely within the scope of this work to discuss at any length the principles of criminal law, but it can be said with reference to this particular question that the statute which creates the offense is to be strictly construed,[977] the indictment must conform to it,[978] the descriptions of a highway in an indictment or other formal paper should be precise, definite and certain,[979] and the character of the highway or public ground be established as a public one.[980] To constitute an offense in some

[977] Johnson v. State, 32 Ala. 583; Malone v. State, 51 Ala. 55; State v. Robinson, 52 Iowa, 228; People v. Young, 72 Ill. 411; Louisville & N. R. Co. v. Commonwealth, 16 Ky. L. R. 68, 26 S. W. 536; Com. v. Illinois Cent. R. Co., 20 Ky. L. R. 606, 47 S. W. 258; Com. v. King, 54 Mass. (13 Metc.) 115; State v. Atherton, 16 N. H. 203; Lydick v. State, 61 Neb. 309, 85 N. W. 70. Sufficiency of indictment construed. McClanahan v. State, 21 Tex. App. 429, 2 S. W. 813; Guthrie v. State, 23 Tex. App. 339, 4 S. W. 906; Watson v. State, 25 Tex. App. 651, 8 S. W. 817; Dyerle v. State (Tex. Cr. App.) 68 S. W. 174. But see State v. Turner, 21 Mo. App. 324.

[978] Hoadley v. People, 23 Ill. App. 39; Jeffries v. McNamara, 49 Ind. 142; State v. Middlesex & S. Traction Co., 67 N. J. Law, 14, 50 Atl. 354; Conner v. State, 21 Tex. App. 176; State v. Roanoke R. & Lumber Co., 109 N. C. 860, 13 S. E. 719.

[979] Alexander v. State, 117 Ala. 220, 23 So. 48; Patton v. State, 50 Ark. 53, 6 S. W. 227; State v. Lemay, 13 Ark. 405; Palatka & I. R. R. Co. v. State, 23 Fla. 546, 3 So. 158. The allegation in an indictment is sufficient when it describes the road as "a common highway, in Putnam County, made and laid out for the people of this state to go, return and pass at their free pleasure and will, on foot, on horseback, and in vehicles."

State v. Stewart, 66 Ind. 555; Varden v. Ritchie, 86 Mich. 197, 48 N. W. 1085; State v. Pullen, 43 Mo. App. 620; Peterson v. Beha, 161 Mo. 513, 62 S. W. 462. The same rule also applies to a judgment restraining defendant from obstructing a highway. State v. Crumpler, 88 N. C. 647; State v. Roanoke R. & Lumber Co., 109 N. C. 860, 13 S. E. 719; McClanahan v. State, 21 Tex. App. 429; Skinner v. State (Tex. Cr. App.) 65 S. W. 1073. A variance, however, may be immaterial.

Wilson v. Hull, 7 Utah, 90, 24 Pac. 799. A decree restraining the obstruction of a road is not erroneous because it merely describes the road as being "on the line or between two sections." But see State v. Finney, 99 Iowa, 43, 68 N. W. 568; Matthews v. State, 25 Ohio St. 536; State v. Hume, 12 Or. 133.

[980] United States v. Schwartz, 4 Cranch, C. C. 160, Fed. Cas. No. 16,237; State v. Trove, 1 Ind. App. 553; State v. Dubuque & S. C. R. Co., 88 Iowa, 508; Gedge v. Com., 72 Ky. (9 Bush) 61; State v. Beeman, 35 Me. 242; State v. Price, 21 Md. 449; People v. Jackson, 7 Mich. 432; State v. Cunningham, 1 Mo. App. Rep'r, 361; State v. Proctor, 90 Mo. 334, 2 S. W. 472; Golahar v. Gates, 20 Mo. 236; State v. Bald-

states it is necessary that the act should have been willful. This condition is, in these cases, a necessary element,[981] but otherwise if the statutes do not so provide.[982] The evidence must conform to the indictment and the offense must be proven beyond a reasonable doubt.[983]

§ 882. 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

ridge, 53 Mo. App. 415; State v. Craig, 79 Mo. App. 412; Illinois Cent. R. Co. v. State, 71 Miss. 253; State v. McDaniel, 53 N. C. (8 Jones) 284; State v. Stewart, 91 N. C. 566; State v. Long, 94 N. C. 896; State v. Eastman, 109 N. C. 785, 13 S. E. 1019. The public square of a county around and about the court house is a highway and one is indictable under Code, § 2065, for obstructing it.

Commonwealth v. Dicken, 145 Pa. 453, 22 Atl. 1043; State v. Floyd, 39 S. C. 23; Anderson v. State, 29 Tenn. (10 Humph.) 119; Michel v. State, 12 Tex. App. 108; Pierce v. State (Tex. Cr. App.) 22 S. W. 587; Ehilers v. State, 44 Tex. Cr. R. 156, 69 S. W. 148; State v. Dry-Fork R. Co., 50 W. Va. 235, 40 S. E. 447. See cases in two following notes. See, also, cases under following section.

[981] Savannah F. & W. R. Co. v. State, 23 Fla. 579, 3 So. 204; Nichols v. State, 89 Ind. 298; State v. Teeters, 97 Iowa, 458, 66 N. W. 754. The word "willfully" defined as "intentionally." State v. Raypholtz, 32 Kan. 450; Eagle Tp. Highway Com'rs v. Ely, 54 Mich. 173; Sneed v. State, 28 Tex. App. 56, 11 S. W. 834; Shubert v. State, 16 Tex. App. 645; Trice v. State, 17 Tex. App. 43; Myers v. State (Tex.) 36 S. W. 255; Lensing v. State (Tex. Cr. App.) 45 S. W. 572; Cornelieson v. State, 40 Tex. Cr. R. 159, 49 S. W. 384; Karney v. State (Tex. Cr. App.) 62 S. W. 754; Murphy v. State, 23 Tex. App. 333; Bailey v. Com., 78 Va. 19; State v. Castle, 44 Wis. 670.

[982] Com. v. Switzer, 134 Pa. 383; Owen v. State, 24 Tex. App. 201, 5 S. W. 830; Johnson v. State (Tex. App.) 14 S. W. 396; Meers v. State (Tex. App.) 16 S. W. 653; Baker v. State, 21 Tex. App. 264, 17 S. W. 144. Definition of word willful. State v. Chesapeake & O. R. Co., 24 W. Va. 809.

[983] State v. Dubuque & S. C. R. Co., 88 Iowa, 508, 55 N. W. 727; Illinois Cent. R. Co. v. Com., 104 Ky. 362, 47 S. W. 255; State v. Pullen, 43 Mo. App. 620. A variance if not material is no ground for reversal. State v. Weese, 67 Mo. App. 466. An immaterial variance is not material. Murphy v. State, 23 Tex. App. 333, 4 S. W. 906. Evidence which leaves the true location of a road in doubt will not support a conviction for willfully obstructing it. Brinkoeter v. State, 14 Tex. App. 67.

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.[984] 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

[984] Whaley v. Wilson, 120 Ala. 502, 24 So. 855; Reed v. City of Birmingham, 92 Ala. 339; Shepherd v. Turner, 129 Cal. 530, 62 Pac. 106; People v. Goodin, 136 Cal. 455, 69 Pac. 85; Patterson v. Munyan, 93 Cal. 128, 29 Pac. 250; Town of Kent v. Pratt, 73 Conn. 573, 48 Atl. 418; Glaze v. Bogle, 97 Ga. 340, 22 S. E. 969; Id., 105 Ga. 295, 31 S. E. 169; Carlisle v. Wilson, 110 Ga. 860, 36 S. E. 54; Seeger v. Mueller, 133 Ill. 86; Township of Whitley v. Linville, 174 Ill. 579, 51 N. E. 832; City of Evansville v. Page, 23 Ind. 525; Zimmerman v. State, 4 Ind. App. 583, 31 N. E. 550; Miller v. Porter, 71 Ind. 521; Johns v. State, 104 Ind. 557; Hamilton v. State, 106 Ind. 361; Ewell v. Greenwood, 26 Iowa, 377; State v. Ratliff, 32 Iowa, 189; State v. Schilb, 47 Iowa, 611; State v. Weimer, 64 Iowa, 243.

Alma Tp. v. Kast, 37 Kan. 433, 15 Pac. 585. The pleading should state facts sufficient to give jurisdiction. Montana Tp. v. Ruark, 39 Kan. 109, 18 Pac. 61; Gibbs v. Larrabee, 37 Me. 506; Richardson v. Davis, 91 Md. 390, 46 Atl. 964; Com. v. Carr, 143 Mass. 84; City of Big Rapids v. Comstock, 65 Mich. 78, 31 N. W. 811; Gregory v. Stanton, 40 Mich. 271; Village of Grandville v. Jenison, 84 Mich. 54, 47 N. W. 600; Gregory v. Knight, 50 Mich. 61; State v. Leslie, 30 Minn. 533.

Village of Benson v. St. Paul, M. & M. R. Co., 62 Minn. 198, 64 N. W. 393. The proof must sustain the allegation of the pleadings. State v. Gilbert, 73 Mo. 20; State v. Ramsey, 76 Mo. 398; Village of Sterling v. Pearson, 25 Neb. 684, 41 N. W. 653; Willey v. Town of Portsmouth, 35 N. H. 303; Jersey City v. National Docks R. Co., 55 N. J. Law, 194, 26 Atl. 145; Voorhees v. Borough of Bound Brook, 55 N. J. Law, 548, 26 Atl. 710; Newbold v. Taylor, 46 N. J. Law, 133; People v. Hunting, 39 Hun (N. Y.) 452; Christy v. Newton, 60 Barb. (N. Y.) 332; State v. Smith, 100 N. C. 550, 6 S. E. 251; State v. Whitaker, 66 N. C. 630.

Com. v. McNaugher, 131 Pa. 55, 18 Atl. 934. A street laid out by the state need not be used or accepted by the public before one may be guilty of a nuisance in obstructing it. Knowles v. District of Narragansett, 23 R. I. 339, 50 Atl. 386; State v. Sartor, 2 Strob. (S. C.) 60; Baker v. Hogaboom, 12 S. D. 405, 81 N. W. 730; Hill v. Hoffman (Tenn. Ch. App.) 58 S. W. 929; Day v. State, 14 Tex. App. 26; Kennedy v. State (Tex. Cr. App.) 40 S. W. 590; Grace v. Walker, 95 Tex. 39, 64 S. W. 930, 65 S. W. 482, modifying (Tex. Civ. App.) 61 S. W. 1103; Thurston County v. Walker, 27 Wash. 500, 67 Pac. 1099.

they have been legally acquired, laid out and established,—the method is immaterial,—and if this is not shown, the proceedings must fail.[985]

[985] Jones v. Doherty, 17 App. Div. (N. Y.) 628; Alexander v. State, 117 Ala. 220; Howard v. State, 47 Ark. 431, 2 S. W. 331. Failure to give personal notice of time and place of various meetings affords no defense for one indicted for obstructing a road.

Cockrum v. Williamson, 53 Ark. 131, 13 S. W. 592; Halliday v. Smith, 67 Ark. 310, 54 S. W. 970; Smith v. Talbot, 77 Cal. 16, 18 Pac. 795; Smithers v. Fitch, 82 Cal. 153, 22 Pac. 935; Peck v. Los Angeles County Sup'rs, 90 Cal. 384, 27 Pac. 301; Freshour v. Hihn, 99 Cal. 443, 34 Pac. 87; Shepherd v. Turner, 129 Cal. 530, 62 Pac. 106; Bowden v. Adams, 22 Fla. 208; Clements v. Logan, 44 Ga. 30; Bryans v. Almand, 87 Ga. 564, 13 S. E. 554; Glaze v. Bogle, 97 Ga. 340.

Willey v. People, 36 Ill. App. 609. To constitute a highway by dedication, acceptance must be shown. Galbraith v. Littiech, 73 Ill. 209; McIntyre v. Storey, 80 Ill. 127; Salter v. People, 92 Ill. App. 481; State v. Birmingham, 74 Iowa, 407, 38 N. W. 121. Hearsay evidence not admissible.

State v. Dubuque & S. C. R. Co., 88 Iowa, 508, 55 N. W. 727; State v. Teeters, 97 Iowa, 458, 66 N. W. 754; Commonwealth v. Abney, 20 Ky. (4 T. B. Mon.) 477; State v. Lochte, 45 La. Ann. 1405, 14 So. 215; Weed v. Sibley, 40 Me. 356; Bradford v. Hume, 90 Me. 233, 38 Atl. 143; Village of Benson v. St. Paul, M. & M. R. Co., 62 Minn. 198; State v. Parsons, 53 Mo. App. 135; Peterson v. Beha, 161 Mo. 513, 62 S. W. 462; Pavonia Land Ass'n v. Temfer (N. J. Eq.) 7 Atl. 423; New York & L. B. R. Co. v. Borough of South Amboy, 57 N. J. Law, 252, 30 Atl. 628; Wiggins v. Tallmadge, 11 Barb. (N. Y.) 457; Town of West Union v. Richey, 64 App. Div. 156, 71 N. Y. Supp. 871; State v. Myers, 20 Or. 442, 26 Pac. 307; Pittsburgh & A. Bridge Co. v. Com. (Pa.) 8 Atl. 217; State v. Kendall, 54 S. C. 192, 32 S. E. 300. The manner in which the highway is established is immaterial so long as it is a legal one.

Hill v. Hoffman (Tenn. Ch. App.) 58 S. W. 929; Laroe v. State, 30 Tex. Civ. App. 374, 17 S. W. 934; Baker v. State, 21 Tex. App. 264, 17 S. W. 144; Ewing v. State (Tex. Cr. App.) 38 S. W. 618. On trial for obstructing a highway it need not be shown that notice of its laying out was given to the landowners. McWhorter v. State, 43 Tex. 666. Character of evidence necessary.

Lensing v. State (Tex. Cr. App.) 45 S. W. 572. The manner in which the road may be established is immaterial. Cornelison v. State, 40 Tex. Cr. R. 159, 49 S. W. 384. The material question is whether a road is in fact a public one. Hatfield v. State (Tex. Cr. App.) 67 S. W. 110; Bailey v. Com., 78 Va. 19. A road merely ordered to be opened but not actually opened is not a "road" within the meaning of the criminal laws relative to obstructing roads. State v. Horlacher, 16 Wash. 325, 47 Pac. 748. But see Campau v. Button, 33 Mich. 525, which holds that the question

If public authorities proceed without jurisdiction in the above respect in the removal of supposed obstructions or abatement of alleged nuisances, they may render the corporation liable for their acts.[986]

§ 883. Prescriptive rights.

It has been suggested above that the power of public corporations to preserve and protect property acquired by them for the use and benefit of the public either directly or as a trustee is a governmental and continuing one; it cannot be lost by a failure to exercise it or an attempt to contract or bargain it away. This principle holds especially in respect to public highways and grounds, unless special statutory provisions limit or define the power. Prescriptive rights, therefore, cannot be acquired by private individuals through a continued obstruction or encroachment upon public property,[987] neither can the prescriptive right to commit a nuisance be acquired.[988] This question has been considered in a previous section where many cases are cited.[989]

§ 884. Legalized obstructions.

There are many uses of a highway and acts done by private individuals in respect to them which are not to be regarded as

of legal existence of a highway cannot be tried in proceedings under Michigan Statutes to remove obstructions to highways. See, also, cases cited in preceding note.

[986] Barnes v. District of Columbia, 91 U. S. 540; Jones v. City of New Haven, 34 Conn. 14; Weed v. Greenwich Borough, 45 Conn. 170; Hildreth v. City of Lowell, 77 Mass. (11 Gray) 349; Hawks v. Inhabitants of Charlemont, 107 Mass. 414; Attorney General v. Heishon, 18 N. J. Eq. (3 C. E. Green) 410; Conrad v. Village of Ithica, 16 N. Y. 158; Lee v. Village of Sandy Hill, 40 N. Y. 442.

[987] Webb v. City of Demopolis, 95 Ala. 116, 13 So. 289, 21 L. R. A. 62. "A city or town has no alienable interest in the public streets thereof, but holds them in trust for its citizens and the public generally; and neither its acquiescence in an obstruction or private use of a street by a citizen, or laches in resorting to legal remedies to remove it, nor the statute of limitations, nor the doctrine of equitable estoppel, nor prescription, can defeat the right of the city to maintain a suit in equity to remove the obstruction." Jones v. Williams, 70 Ga. 704; Sims v. City of Chattanooga, 70 Tenn. (2 Lea) 694; State v. Wertzel, 62 Wis. 184. But see City of Big Rapids v. Comstock, 65 Mich. 78.

[988] State v. Holman, 29 Ark. 58.

[989] See § 824.

nuisances or obstructions where legislative authority has been obtained for the doing of the act or the particular use of property.[990] Familiar illustrations of this rule are to be found in the occupation of highways by railroads, both steam and street, telegraph and telephone lines, the law in respect to which has been considered in previous sections.[991] A legalized obstruction cannot be regarded as a nuisance provided the use or the act is one which can be lawfully authorized having in view the character of the public property, the purpose for which it is acquired and the superior rights of the public in it.[992] It has already been suggested [993] in connection with this question that the use of public property or acts done in and upon it is to be considered both from the standpoint of its being an obstruction or a nuisance and of whether an abutting owner is not entitled to additional compensation for that use of public property. The question of a legal right to use and that of compensation on the part of the abutting owner are separate and distinct.

§ 885. Abutter's rights.

An abutter, it has been seen, is entitled to the easements of air, light and access to his property in addition to the rights which he may possess as a member of the community or as a revisionary proprietor.[994] An act or a use of a public highway or of public property may be considered as an obstruction or a nuisance from the standpoint of the abutter alone; he will, therefore, be entitled to damages, removal or abatement without a consideration of the rights of the public authorities or other individuals.[995]

[990] City of Denver v. Girard, 21 Colo. 447; People v. City of New York, 20 Misc. 189, 45 N. Y. Supp. 900; People v. Baltimore & O. R. Co., 117 N. Y. 150; Hoey v. Gilroy, 129 N. Y. 132; Jorgensen v. Squires, 144 N. Y. 280; Wormser v. Brown, 149 N. Y. 163; Sullivan v. Webster, 16 R. I. 33, 11 Atl. 771; Echols v. State, 12 Tex. App. 615.

[991] City of Concord v. City of Burleigh, 67 N. H. 106; Delaware & A. Tel. Co. v. Committee of Pensauken Tp., 67 N. J. Law, 91, 50 Atl. 452; East Tennessee Tel. Co. v. City of Russellville, 106 Ky. 667, 51 S. W. 308; Spokane St. R. Co. v. City of Spokane Falls, 6 Wash. 521, 35 Pac. 1072. See §§ 833 et seq., ante.

[992] Town of Salt Creek v. Highway Com'rs, 25 Ill. App. 187; State v. Edens, 85 N. C. 526.

[993] See §§ 820 et seq.

[994] Loberg v. Town of Amherst, 87 Wis. 641. See §§ 820 et seq., ante, and 885, 888, post.

[995] Arkansas River Packet Co. v. Sorrels, 50 Ark. 466, 8 S. W. 683;

§ 886. 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,[996] and any private use granted to them is illegal.[997] Even the legislature is incapable of appropriating any portion to private persons or to devote them

Helm v. McClure, 107 Cal. 199, 40 Pac. 437; Jackson v. Kiel, 13 Colo. 378, 22 Pac. 504, 6 L. R. A. 254; Johnson v. Stayton, 5 Har. (Del.) 362; Brunswick & W. R. Co. v. Hardey, 112 Ga. 604, 37 S. E. 888, 52 L. R. A. 396; Dantzer v. Indianapolis Union R. Co., 141 Ind. 604, 39 N. E. 223, 34 L. R. A. 679; Martin v. Marks, 154 Ind. 549, 57 N. E. 249; Miller v. Schenck, 78 Iowa, 372, 43 N. W. 225; Platt v. Chicago, B. & I. R. Co., 74 Iowa, 127; Ottawa, O. C. & C. G. R. Co. v. Larson, 40 Kan. 301, 2 L. R. A. 59; Bannon v. Rohmeiser, 17 Ky. L. R. 1378, 34 S. W. 1084, 35 S. W. 280; Bannon v. Murphy, 18 Ky. L. R. 989, 38 S. W. 889; Walker v. Vicksburg, S. & P. R. Co., 52 La. Ann. 2036, 28 So. 324; Crook v. Pitcher, 61 Md. 510; Adams v. Barry, 76 Mass. (10 Gray) 361; Peterson v. Chicago & W. M. R. Co., 64 Mich. 621; Wilder v. De Cou, 26 Minn. 10; Brakken v. Minneapolis & St. L. R. Co., 29 Minn. 41; Sheedy v. Union Press Brick Works, 25 Mo. App. 527; New Orleans J. & G. N. R. Co. v. Moye, 39 Miss. 374; Lamphier v. Worcester & N. R. Co., 33 N. H. 495; Dewitt v. Van Schoayk, 110 N. Y. 7, 17 N. E. 425; Adler v. Metropolitan El. R. Co., 46 N. Y. State Rep. 253, 18 N. Y. Supp. 858; Coatsworth v. Lehigh Val. R. Co., 156 N. Y. 451, 51 N. E. 301; Fisher v. Farley, 23 Pa. 501; Daflinger v. Pittsburgh & A. Tel. Co., 31 Pittsb. Leg. J. (N. S.; Pa.) 37; Gorton v. Tiffany, 14 R. I. 95; Burkitt v. Battle (Tenn. Ch. App.) 59 S. W. 429; Whittaker v. Ferguson, 16 Utah, 240; Johnson v. Maxwell, 2 Wash. St. 482, 27 Pac. 1071; Carpenter v. Mann, 17 Wis. 155. See, also, § 880, ante.

[996] Conner v. Town of New Albany, 1 Blackf. (Ind.) 43; State v. Berdetta, 73 Ind. 185; People v. Squire, 107 N. Y. 593; Brand v. Multnomah County, 38 Or. 79, 60 Pac. 390, 50 L. R. A. 389. See secs. 423, 723, 797, and 837 et seq. See, also, Elliott, Roads & S. (2d Ed.) §§ 645 et seq.

[997] Pikes Peak Power Co. v. City of Colorado Springs, 105 Fed. 1; Florida Cent. & P. Co. v. Ocala St. & S. R. Co., 39 Fla. 306, 22 So. 692; Jaynes v. Omaha St. R. Co., 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751; Metropolitan Teleg. & Tel. Co. v. Colwell Lead Co., 67 How. Pr. (N. Y.) 365; Forbes v. Rome, W. & O. R. Co., 121 N. Y. 505, 8 L. R. A. 453; Kane v. New York El. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640; American Rapid Tel. Co. v. Hess, 125 N. Y. 641, 26 N. E. 919,

to a public use which is so exclusive as to deprive the public generally of their rights.[998] 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[999] which while it must be said are independent and secondary ones, yet, they are within the general purposes for which highways are designated.[1000] The necessities of an urban population require many conveniences which are either of a public or of a quasi public character and to

13 L. R. A. 454; East Tennessee Tel. Co. v. Knoxville St. R. Co. (Tenn.) 3 Am. Electrical Cas. 406. But see People v. City of Rock Island, 215 Ill. 488, 74 N. E. 437.

[998] Kansas City, N. & D. R. Co. v. Cuykendall, 42 Kan. 234, 21 Pac. 1051; Detroit City R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007; 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. "The learned counsel urges with great force and plausibility that this railroad is a public use of the street, but it seems to us he ignores the fact that while the railroad is a public carrier, it has no right to the exclusive use of a public street, and such for all practicable purposes is the effect of this ordinance and its use of this street. No case in this state is authority for such exclusive use of a highway, and if it was we should not follow it. The company is a common carrier, and entitled as such to collect tolls, but not the exclusive right to monoplize a public street and shut out the public and other carriers."

[999] Montgomery v. Santa Ana Westminster R. Co., 104 Cal. 186, 37 Pac. 786, 25 L. R. A. 654. "In the case of streets in a city there are other and further uses, such as the construction of sewers and drains, laying of gas and water pipes, erection of telegraph and telephone wires, and a variety of other improvements, beneath, upon, and above the surface, to which in modern times urban streets have been subjected. These urban servitudes are essential to the enjoyment of streets in cities and to the comfort of citizens in their more densely populated limits." 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. A. 310.

[1000] State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262.

supply them requires the occupation, to some extent, of the public streets;[1001] 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. The occupation of highways by railroads both steam and street, telegraph and telephone lines, has been already considered [1002] and the distribution of water and light will now be discussed.

§ 887. Control of highways by public authorities.

Whatever the use to which public highways may be put and however authorized, it still remains true that they are created primarily as a means of travel that all other uses are subordinate,[1003] and that the public authorities ever retain the right to control and regulate an occupation or use of them in such a manner as to best preserve them for the original purpose for which they were established.[1004] This control and regulation is vested in the state which has the unquestioned power of delegating directly or by implication the right of local regulation to inferior public agencies because these may be best fitted to accomplish the desired

[1001] Smith v. Metropolitan Gaslight Co., 12 How. Pr. (N. Y.) 187; Taylor v. Portsmouth, K. & Y. St. R. Co., 91 Me. 193, 31 Atl. 560. "What servitude then does the public acquire by the taking of land for a public way? It is the right of transit for travelers, on foot and in vehicles of all descriptions. It is the right of transmitting intelligence by letter, message, or other contrivance suited for communication, as by telegraph or telephone. It is the right to transmit water, gas and sewage for the use of the public. It is a public use for the convenience of the public, to be moulded and applied as public necessity or convenience may demand and as the methods of life and communication may from time to time require. Society changes and new conditions attach themselves. The change evolves new ways of doing things, new methods of communication, new inventions for travel." 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. Tuttle v. Brush Elec. Ill. Co., 50 N. Y. Super. Ct. (10 J. & S.) 464.

[1002] See §§ 826 et seq., ante

[1003] State v. Murphy, 130 Mo. 10, 31 S. W. 594, 31 L. R. A. 798. See, also, cases cited note 1145 § 912, post.

[1004] New Orleans Waterworks Co. v. Rivers, 115 U. S. 674; City of Brooklyn v. Fulton Municipal Gas Co., 7 Abb. N. C. (N. Y.) 19; Attorney General v. Sheffield Gas Consumers Co., 22 Law J. Ch. 811. See §§ 886, ante, and 912, post.

result. The control of public highways in fact is almost universally vested in local authorities.[1005] The entire subject of regulation and control is usually a matter of minute statutory provisions and these must be considered in determining the extent of rights granted or the character of regulatory provisions adopted by municipal authorities in respect to water, gas, or electric companies.

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 in the preceding section, 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[1006] which are not dependent upon their title in the adjacent highway,[1007] 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

[1005] Sinton v. Ashbury, 41 Cal. 525; Louisville Bagging Mfg. Co. v. Central Pass. R. Co., 95 Ky. 50; State v. Murphy, 130 Mo. 10, 31 L. R. A. 798; Eureka City v. Wilson, 15 Utah, 53, 48 Pac. 41.

[1006] Saginaw Gaslight Co. v. City of Saginaw, 28 Fed. 529; 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; Selden v. City of Jacksonville, 28 Fla. 558, 10 So. 457, 14 L. R. A. 370; O'Brien v. Central Iron & Steel Co., 158 Ind. 218, 63 N. E. 302, 57 L. R. A. 508; Long v. Wilson, 119 Iowa, 267, 93 N. W. 282; City of Newport v. Newport Light Co., 11 Ky. L. R. 840, 12 S. W. 1040; Townsend v. Epstein, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 109; Nichols v. Ann Arbor & Y. St. R. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; Gaus & Sons Mfg. Co. v. St. Louis, K. & N. W. R. Co., 113 Mo. 308, 20 S. W. 658, 18 L. R. A. 339; Sherlock v. Kansas City Belt R. Co., 142 Mo. 172, 43 S. W. 629; De Geofroy v. Merchants' Bridge Terminal R. Co., 179 Mo. 698, 79 S. W. 386; 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; Brumit v. Virginia & S. W. R. Co., 106 Tenn. 124, 60 S. W. 505; Parkersburg Gas Co. v. Parkersburg, 30 W. Va. 435, 4 S. E. 650; Linden Land Co. v. Milwaukee Elec. R. & L. Co., 107 Wis. 493, 83 N. W. 851; Wright v. Austin, 101 Am. St. Rep. 102, and monographic note. See §§ 817 et seq., and 847, ante.

[1007] Town of Hazlehurst v. Mayes, 84 Miss. 7, 36 So. 433; De Geofroy v. Merchants' Bridge Terminal R. Co., 179 Mo. 698, 79 S. W. 386; Graham v. Stern, 168 N. Y. 517, 61 N. E. 891; Dooly Block v. Salt Lake Rapid Transit Co., 9 Utah, 31, 33 Pac. 229, 24 L. R. A. 610.

additional burden or servitude upon their property.[1008] The character of various uses of public highways as additional servitudes or otherwise, therefore, vary in different jurisdictions.[1009] A servitude has been defined as a burden affecting property and rights and may arise through the use of a highway in a manner that was not anticipated or assumed at the time of its dedication as a public way, which is inconsistent with and subversive of its use as a highway and which necessarily varies with its character as an urban or a suburban way.[1010] The abutting owner may, therefore, be entitled to consideration either in respect to an impairment or destruction of his private rights or through the imposition of the additional burden and these rights must be regarded and dealt with before the public authorities or private agencies acting under lawful authority can legally occupy or use the streets for the purpose of furnishing any of the commodities or services that are now being considered.

§ 888. 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.[1011] The power of a public corporation to do any one or all of these things naturally involves a consideration of the legal right in its capacity as a public corporation.[1012] The right to supply on the part of the public corporation either water, light or miscellaneous service, involves a consideration of essentially identical principles, but no discrimination will be made in the cases cited as to the particular question in dispute. The subject of the construction of drains and sewers [1013]

[1008] Ryan v. Preston, 59 App. Div. 97, 69 N. Y. Supp. 100. Bicycle path not an additional servitude. See §§ 826 et seq., ante.

[1009] See §§ 826 et seq., ante.

[1010] Montgomery v. Santa Ana St. R. Co., 104 Cal. 186, 25 L. R. A. 654; Schopp v. City of St. Louis, 117 Mo. 131, 22 S. W. 898, 20 L. R. A. 783; State v. Laverack, 34 N. J. Law, 201. Use of street for market purposes an additional burden. Brand v. Multnomah Co., 38 Or. 79, 60 Pac. 390, 62 Pac. 209, 50 L. R. A. 389. See, also, the general discussion as found in §§ 806 et seq., ante, where the question is fully considered and many cases cited.

[1011] See §§ 826 et seq., ante, and 896 et seq., post.

[1012] See §§ 455 et seq., ante.

[1013] See §§ 437 et seq., ante.

and the expenditure of public moneys in connection with the supply of water [1014] have been fully considered in preceding sections and the authorities cited presently will relate more to the question of a supply of light. In connection with the legal power of a public corporation to furnish water, light or other service it has already been said [1015] that 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, that it is the proper function of a public corporation to regulate and govern only and that it is neither desirable nor legal that it engage in undertakings which properly are not governmental and should be left, therefore, to private enterprise. Under an assumed exercise of the police power, municipal corporations have been authorized to supply water not only for its own uses but for those of private consumers.[1016] It scarcely seems possible to stretch the police power to the extent of authorizing a municipal corporation to supply private consumers with light or other service but this has been done in some cases.[1017] Their legal right to do so is questionable and not

[1014] See §§ 455 et seq., ante. Ruckert v. Grand Avenue R. Co., 163 Mo. 260, 63 S. W. 814. The condition may relate to the ascertaining and payment of damages for the construction of the road to real and personal property located on the line.

[1015] See §§ 455 et seq., ante.

[1016] City of Charlotte v. Shepard, 120 N. C. 411, 27 S. E. 109; Smith v. City of Nashville, 88 Tenn. 464, 12 S. W. 924, 7 L. R. A. 469. "Nothing should be of greater concern to a municipal corporation than the preservation of the good health of the inhabitants; nothing can be more conducive to that end than a regular and sufficient supply of wholesome water, which common observation teaches all men can be furnished, in a populous city, only through the instrumentality of well equipped water works. Hence, for a city to meet such a demand is to perform a public act and confer a public blessing. It is not a strictly governmental or municipal function, which every municipality is under legal obligation to assume and perform, but it is very close akin to it, and should always be recognized as within the scope of its authority, unless excluded by some positive law." Ellinwood v. City of Reedsburg, 91 Wis. 131. See § 455.

[1017] Thomson-Houston Elec. Co. v. City of Newton, 42 Fed. 723; Rushville Gas Co. v. City of Rushville, 121 Ind. 206, 23 N. E. 72, 6 L. R. A. 315; City of Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268. "The corporation (the state) possessing, as it does, the power to generate and distribute throughout its limits, electricity for the lighting of its

desirable from any standpoint. 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.[1018] The question of the legal right to supply the needs of a public corporation to engage in the business generally 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.[1019]

streets and other public places, we can see no good reason why it may not also, at the same time, furnish it to the inhabitants to light their residences and places of business. To do so is, in our opinion, a legitimate exercise of the police power for the preservation of property and health."

State v. City of Hiawatha, 53 Kan. 477, 36 Pac. 1119; Linn v. Borough of Chambersburg, 160 Pa. 511, 28 Atl. 842, 25 L. R. A. 217; Mauldin v. City Council of Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291. But see In re Board of Rapid Transit R. Com'rs, 5 App. Div. 290, 39 N. Y. Supp. 750. Construing N. Y. Laws 1891, c. 4, as amended relative to construction of a street railway in N. Y. City at the public expense.

[1018] 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. And if it be assumed that there would be no impropriety in the lighting of the streets under the control and direction of the sovereign power, this would be merely as a regulation of police, or an incident to the duty to provide safe and convenient ways." Spaulding v. Inhabitants of Peabody, 153 Mass. 129, 26 N. E. 421, 10 L. R. A. 397; Jersey City Gas Co. v. Dwight, 29 N. J. Eq. (2 Stew.) 242; Mauldin v. City Council of Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291.

[1019] 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; San Francisco Gas Co. v. City of San Francisco, 9 Cal. 453; Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19; City of Conyers v. Kirk, 78 Ga. 480, 3 S. E. 42; City of Valparaiso v. Gardner, 97 Ind. 1; Town of Gosport v. Pritchard, 156 Ind. 400, 59 N. E. 1058; Gas Light & Coke Co. v. City of New Albany, 156 Ind. 406, 59 N. E. 176; Davenport Gaslight & Coke Co. v. City of Davenport, 13 Iowa, 229; Bullmaster v. City of St. Joseph, 70 Mo. App. 60. A municipal corporation in operating an electric

§ 889. Legal right to supply light.

The operation of a lighting plant involves complicated industrial operations including the purchase of raw material, the employment of skilled workmen and the use of technical manufacturing processes constantly subject to improvement as well as the use of complicated machinery.[1020] It involves not only the supply and distribution of the commodity but also its manufacture and the elements of profit and loss either because of these facts to a large extent and one not at all comparable with the furnishing the supply of water. The legal right, however, seems to be recognized.[1021] 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.[1022] Where the further right is conceded of furnishing a supply of light to private consumers, it seems to be based not upon a consideration of the strict legal powers of a governmental agent but upon the necessities arising in a particular case and the greater convenience and freedom from interference in the use of highways, the result of where a supply of light to all consumers, both public and private, is fur-

plant exercises the functions of a private corporation. Nebraska City v. Nebraska Hydraulic G. & C. Co., 9 Neb. 339; Richmond County Gaslight Co. v. Town of Middletown, 59 N. Y. 228; Western Sav. Fund Soc. v. City of Philadelphia, 31 Pa. 175; City of Philadelphia v. Fox, 64 Pa. 169; Baily v. City of Philadelphia, 184 Pa. 594, 39 Atl. 494, 39 L. R. A. 837; State v. Milwaukee Gaslight Co., 29 Wis. 454. See, also, §§ 455 et seq.

[1020] See §§ 472, 474, ante.

[1021] Tuttle v. Brush Elec. Ill. Co., 50 N. Y. Super. Ct. (18 J. & S.) 464.

[1022] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Hamilton Gaslight & Coke Co. v. Hamilton City, 146 U. S. 258, affirming 37 Fed. 832; City of Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268; Opinion of Justices, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487; Citizens' Gas Light Co. v. Inhabitants of Wakefield, 161 Mass. 432, 37 N. E. 444, 31 L. R. A. 457; Halsey v. Rapid Transit St. R. Co., 47 N. J. Eq. 380; Palmer v. Larchmont Elec. Light Co., 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672; State v. City of Hamilton, 47 Ohio St. 52, 23 N. E. 935; Wheeler v. City of Philadelphia, 77 Pa. 338; Linn v. Chambersburg Borough, 160 Pa. 511, 28 Atl. 842, 25 L. R. A. 217. But 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; Lyon v. City of Cambridge, 136 Mass. 419; Baily v. City of Philadelphia, 184 Pa. 594, 39 L. R. A. 837.

nished by one agency rather than two or more.[1023] A further argument, if it is worthy of the name, is based upon the fact that a municipal corporation could scarcely be able to supply itself with light at a reasonable cost if it were restricted to furnishing its own needs. It is necessary, so it is claimed, in order to bring the cost to a reasonable basis, that the number of consumers be largely and relatively increased.[1024] The question of profit and loss does not, however, legally or properly determine the character of an act as a governmental duty or function.

§ 890. 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 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.[1025] 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. The discussion of the character of public corporations as artificial persons of exceedingly limited and restricted powers will be remembered.[1026] A quotation from Judge Cooley may serve to emphasize the rule.[1027] "The municipalities must look to the state for such charters of government as the legislature shall

[1023] Thomson Houston Elec. Co. v. City of Newton, 42 Fed. 723; City of Crawfordsville v. Braden, 130 Ind. 149, 14 L. R. A. 268; Mitchell v. City of Negaunee, 113 Mich. 359, 38 L. R. A. 157; Linn v. Chambersburg Borough, 160 Pa. 511, 25 L. R. A. 217; Black v. City of Chester, 175 Pa. 101, 34 Atl. 354; Smith v. City of Nashville, 88 Tenn. 464, 7 L. R. A. 469.

[1024] Fellows v. Walker, 39 Fed. 651; Jacksonville Elec. Light Co. v. City of Jacksonville, 36 Fla. 229, 18 So. 677, 30 L. R. A. 540; Mitchell v. City of Negaunee, 113 Mich. 359, 71 N. W. 646, 38 L. R. A. 157; State v. City of Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729; Schenck v. Borough of Olyphant, 181 Pa. 191; Townsend Gas & Elec. Co. v. City of Port Townsend, 19 Wash. 407, 53 Pac. 551.

[1025] Village of Ladd v. Jones, 61 Ill. App. 584. See §§ 897 and 924, post.

[1026] See §§ 108–114 et seq., ante.

[1027] Cooley, Const. Lim. (7th Ed.) p. 265, citing many cases. See, also, the general discussion by Cooley of this subject commencing on page 261.

see fit to provide; and they cannot prescribe for themselves the details, though they have a right to expect that those charters will be granted with a recognition of the general principles with which we are familiar. The charter, or the general law under which they exercise their powers, is their constitution, in which they must be able to show authority for the acts they assume to perform. They have no inherent jurisdiction to make laws or adopt regulations of government; they are governments of enumerated powers, acting by a delegated authority; so that while the state legislature may exercise such powers of government coming within a proper designation of legislative power as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred, and subject to such regulations or restrictions as are annexed to the grant." The class of powers referred to above as those impliedly conferred are those which are absolutely indispensable to the exercise of granted powers; not merely convenient or necessary to be exercised.

Construction of authority. The universal doctrine prevails that the rule of strict construction applies to all statutes granting or attempting to grant powers to public corporations, especially municipal, and which involve the exercise of the power of taxation,[1028] the incurring of indebtedness,[1029] or the expenditure of

[1028] Townsend Gas & Elec. Co. v. City of Port Townsend, 19 Wash. 407, 53 Pac. 551. See §§ 300 et seq., ante.

[1029] Heilbron v. City of Cuthbert, 96 Ga. 312, 23 S. E. 206; Hay v. City of Springfield, 64 Ill. App. 671; City of Laporte v. Gamewell Fire Alarm Tel. Co., 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686; Burlington Water Co. v. Woodward, 49 Iowa, 58. An option for the purchase of a water plant is not an "incurring of indebtedness" within the constitutional limitation. Ludington Water-Supply Co. v. City of Ludington, 119 Mich. 480, 78 N. W. 558. A municipal grant for supplying water if valid when made is not defeated by subsequent legislation decreasing the amount of debt the city can incur. Daniels v. Long, 111 Mich. 562; Kiichli 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; Spilman v. City of Parkersburg, 35 W. Va. 605, 14 S. E. 279; Ellinwood v. City of Reedsburg, 91 Wis. 131. But see Fergus Falls Water Co. v. City of Fergus Falls, 65 Fed. 586, where it is held that the grant of the power to contract for waterworks includes the right to pay for the same. State v. City of Great Falls, 19 Mont. 518, 49 Pac. 15. See § 140 et seq., ante.

public moneys.[1030] The reason for this rule has already been considered in the previous sections cited.[1031]

§ 891. 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.[1032] These facilities may be authorized directly by the legislature which unquestionably has a very large degree of control over even local affairs, or the grant may be given by the legislature to particular corporations to be carried into effect, in these instances by either designated public officials or by them only after the affirmative action of voters at an election held in the manner and at the time prescribed.[1033] The manner of raising funds with which to carry out the enterprise should be left to the discretion of the taxpayers of a particular district upon whom the burden of taxation will fall.

Power to purchase or erect. 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 con-

[1030] Ampt v. City of Cincinnati, 56 Ohio St. 47, 46 N. E. 69, 35 L. R. A. 737. See §§ 410–417, and 455 et seq., ante.

[1031] See, also, in addition to the cases referred to in the three preceding notes the following: Jacksonville Elec. Light Co. v. City of Jacksonville, 36 Fla. 229, 30 L. R. A. 540; City of Crawfordsville v. Braden, 130 Ind. 149, 14 L. R. A. 268; Citizens' Gaslight Co. v. Inhabitants of Wakefield, 161 Mass. 432, 31 L. R. A. 457; Mitchell v. City of Negaunee, 113 Mich. 359, 38 L. R. A. 157; Seitzinger v. Borough of Tamaqua, 187 Pa. 539, 41 Atl. 454; Smith v. City of Nashville, 88 Tenn. 464, 7 L. R. A. 469; Ellinwood v. City of Reedsburg, 91 Wis. 131, 64 N. W. 885.

[1032] See §§ 455 et seq., ante.

[1033] City of Harrodsburg v. Harrodsburg Water Co., 23 Ky. L. R. 956, 64 S. W. 658. A water supply contract must be ratified by the voters of the city. Citizens Gas Light Co. of Reading v. Inhabitants of Wakefield, 161 Mass. 432, 37 N. E. 444, 31 L. R. A. 457; George v. Wyandotte Elec. Light Co., 105 Mich. 1, 62 N. W. 985; Elyria Gas & Water Co. v. City of Elyria, 57 Ohio St. 374, 49 N. E. 335. See §§ 455 et seq., ante.

structed and in operation.[1034] The point to be observed in connection with the subject of this 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.[1035]

§ 892. 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. The soundness of this proposition is apparent when the question of charges is considered. Without doubt the charge for the commodity furnished should be sufficient to not only pay the cost of operation, expensive as it may be, but also enable the public authorities to pay the interest charges resulting from the use of moneys in the construction of the plant, the expense of relaying or repairing pavements or improvements,

[1034] Long Island Water Supply Co. v. City of Brooklyn, 166 U. S. 685. The condemnation of a water supply system is within the unquestioned limits of the power of eminent domain and the right is not taken away by a contract for the supply of water by a private company owning works during a term of years. Such a contract is property and, like any other property, may be taken under condemnation proceedings for public use. City Council of Montgomery v. Capital City Water Co., 92 Ala. 361, 9 So. 339; Spaulding v. Inhabitants of Peabody, 153 Mass. 129, 10 L. R. A. 397. Decided before authority expressly given. Citizens' Gaslight Co. v. Inhabitants of Wakefield, 161 Mass. 432, 31 L. R. A. 457; Hudson Elec. Light Co. v. Inhabitants of Hudson, 163 Mass. 346; City of St. Louis v. St. Louis Gaslight Co., 70 Mo. 69; Neosho City Water Co. v. City of Neosho, 136 Mo. 498, 38 S. W. 89. See, also, § 932, post.

[1035] Citizens' Gas Light Co. of Reading v. Inhabitants of Wakefield, 161 Mass. 432, 37 N. E. 444, 31 L. R. A. 457; Hudson Elec. Light Co. v. Inhabitants of Hudson, 163 Mass. 346, 40 N. E. 109.

injured or destroyed in the construction or operation of the plant, and a certain charge to cover its depreciation and which, in the course of time, as accumulated, will be sufficient to replace the machinery or such portions of it as may have become worn out.[1036] Charges including all of these items do not involve the making of a profit from the carrying on of the business. An interesting suggestion in this connection has been made by a recent author.[1037] "Of course, if a plant is self-sustaining, and the municipality thereby gets its street and own light free of charge (as is usually the case), then an inequality necessarily arises among its inhabitants; for those who use the gas necessarily pay a rate so high that it enables the municipality to supply its streets and its public buildings with light free of cost to itself, while those of its inhabitants who do not use the gas contribute nothing towards the lighting of such streets and public buildings. The inequality may not be very great, and yet it will exist. The author does not recall any instance where this fact of inequality has been urged as a reason why statutes authorizing a municipality to furnish gas, light or water to private consumers are unconstitutional, or such an enterprise unauthorized."

§ 893. 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. Many suggestions have been already made in previous sections.[1038] These rules and regulations may involve the compulsory use of meters,[1039] the collection of rates established, or the use of water in the absence of meters.[1040]

[1036] Hamilton v. Hamilton Gaslight Co., 11 Ohio Dec. 513; Smith v. City of Seattle, 25 Wash. 300, 65 Pac. 612. See authorities cited in §§ 468 and 475, ante.

[1037] Thornton, Oil & Gas, § 515.

[1038] See §§ 468, et seq.

[1039] Sweeny v. Bienville Water Supply Co., 121 Ala. 454, 25 So. 575; Sheward v. Citizens' Water Co., 90 Cal. 635, 27 Pac. 439; Hill v. Thompson, 48 N. Y. Super. Ct. (16 J. & S.) 481; 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; Spring Valley Water Works v. City of San Francisco, 82

§ 894. Other restrictions upon power to require and operate plants for the supply of water and light.

In a preceding chapter [1041] a discussion of the power of a public corporation to incur indebtedness is to be found and the universal rule prevails that it is limited in this respect by both statutory and constitutional provisions. The existence of these restrictions may prevent a municipal or quasi public corporation from supplying water or light or both because of the condition that the constitutional limitation has already been reached and any further expenditure will create an indebtedness in excess of statutory or constitutional limitations and which will, therefore, be void. This subject as well as the question of whether water or lighting contracts extending over a term of years is to be regarded as an indebtedness has already been considered.[1042]

§ 895. Sale or lease of property.

It might be said that the power to sell or lease a plant supplying water or light is co-extensive with the right to acquire and operate it; that is, it is dependent upon the express grant of authority to such an end. The terms and mode of carrying out the transaction as prescribed by statute is to be strictly followed.[1043]

§ 896. Use of highways by private persons.

Highways may be also occupied or used by private persons, natural or artificial, in supplying the commodities under discus-

Cal. 286, 22 Pac. 910, 1046, 6 L. R. A. 756; Albert v. Davis, 49 Neb. 579, 68 N. W. 945; Red Star Line S. S. Co. v. Jersey City, 45 N. J. Law, 246. The right to compel the use of meters is frequently dependent upon ordinance provisions. See generally Birmingham Water Works Co. v. Truss, 135 Ala. 530, 33 So. 657; Wagner v. City of Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519, affirming 45 Ill. App. 444; Ladd v. City of Boston, 170 Mass. 332, 49 N. E. 627, 40 L. R. A. 171; State v. Manitowoc Waterworks Co., 114 Wis. 487, 90 N. W. 442; Shaw v. San Diego Water Co. (Cal.) 50 Pac. 693.

[1040] See §§ 468 et seq., ante. Farnham, Waters, §§ 163 et seq.

[1041] See chapter V, subd. III.

[1042] See §§ 152 and 159, ante.

[1043] City of St. Louis v. Western Union Tel. Co., 149 U. S. 465; Councilmen of Frankfort v. Capital Gas & Elec. Light Co., 16 Ky. L. R. 780, 29 S. W. 855; American Rapid Tel. Co. v. Hess, 125 N. Y. 641, 26 N. E. 919, 13 L. R. A. 454; Thompson v. Nemeyer, 59 Ohio St. 486, 52 N. E.

sion to either municipal corporations, private consumers, or both.[1044] The nature of this right is not always clearly understood by the courts though this is without apparent reason. The permission to occupy the highways has been variously termed a franchise, lease, privilege, easement and contract.[1045] 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 to be deprived illegally.[1046] There is created a contract obliga-

1024; Pittsburgh Carbon Co. v. Philadelphia Co., 130 Pa. 438, 18 Atl. 732; Baily v. City of Philadelphia, 184 Pa. 594, 39 Atl. 494, 39 L. R. A. 837.

[1044] Inhabitants of Falmouth v. Falmouth Water Co., 180 Mass. 325, 62 N. E. 255. A water company may commence the construction of its plant before the issuance of its capital stock or bonds. See, generally, cases cited under this and succeeding sections.

[1045] Jackson County Horse R. Co. v. Interstate Rapid Transit R. Co., 24 Fed. 306; Chicago City R. Co. v. People, 73 Ill. 541; Crowder v. Town of Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647. An ordinance granting an electric light company the right to use its streets without making it exclusive is a mere license. United Railways & Elec. Co. of Baltimore v. Hayes, 92 Md. 490, 48 Atl. 364; Electric Const. Co. v. Heffernan, 58 Hun, 605, 12 N. Y. Supp. 336.

Central Crosstown R. Co. v. Metropolitan St. R. Co., 16 App. Div. 229, 44 N. Y. Supp. 752. Consent is a mere license—not a franchise. Brush Elec. Light Co. v. Jones Bros. Elec. Co., 5 Ohio Circ. R. 340. A franchise can only be acquired by express grant. Galveston City R. Co. v. Gulf City St. R. Co., 63 Tex. 529. The right to occupy streets by a street railway company is a mere license—not a contract. City of Seattle v. Columbia & P. S. R. Co., 6 Wash. 379, 33 Pac. 1048. A railroad franchise to occupy a street cannot, however, be destroyed by an arbitrary change in the grade of the streets. Thornton, Oil & Gas, § 469.

[1046] 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; City of Kankakee v. Kankakee Water Co., 38 Ill. App. 620; Metropolitan City R. Co. v. Chicago West Division Co., 87 Ill. 317. The right of a company operating a horse railway by contract with the city not to have a similar railway on certain streets is properly within the Eminent Domain Act, is subject to condemnation thereunder and is no part of the franchise. City of Vincennes v. Citizens' Gas Light Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; City of New Orleans v. Great Southern Telep. & Tel. Co., 40 La. Ann. 41; Rutland Elec. Light Co. v. Marble City Elec. Light Co., 65 Vt. 377, 26 Atl.

tion which is protected by the federal constitution [1047] and which is subject to all principles of law in respect to a change or alteration, amendment or revocation, that apply to ordinary contracts.[1048] There are some authorities which consider the right

635, 20 L. R. A. 821. See, also, authorities cited generally in this section.

Since writing the text included in § 896 and just as volume three is going to press, the Supreme Court of the United States in the Chicago Traction Cases, so called, has held that a license or contract in respect to the occupation of streets by a street railroad company is not to be confused or confounded with the grant of a corporate franchise by the state and that a license to occupy streets does not necessarily follow the granting of a franchise to carry on the business of transportation by means of street railways—thus sustaining the views as stated. The court say: "What then was conferred in the franchise granted by the state? It was the right to be a corporation for the period named and to acquire from the city the right to use the streets upon contract terms and conditions to be agreed upon."

[1047] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 685; City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1; Citizens' St. R. Co. v. City R. Co., 64 Fed. 647; Illinois Trust & Sav. Bank v. Arkansas City (C. C. A.) 76 Fed. 271; 34 L. R. A. 518; City of Knoxville v. Africa (C. C. A.) 77 Fed. 501; Cleveland City R. Co. v. City of Cleveland, 94 Fed. 385; 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, 102 Fed. 663; People v. Chicago West Div. R. Co., 18 Ill. App. 125; City of Belleville v. Citizens' Horse R. Co., 152 Ill. 171, 26 L. R. A. 681; City R. Co. v. Citizens' St. R. Co. (Ind.) 52 N. E. 157; East Louisiana R. Co. v. City of New Orleans, 46 La. Ann. 526, 15 So. 157; Proprietors of Bridges v. Hoboken Land & Imp. Co., 13 N. J. Eq. 81; Theberath v. City of Newark, 57 N. J. Law, 309, 30 Atl. 528; Western Union Tel. Co. v. City of Syracuse, 24 Misc. 338, 53 N. Y. Supp. 690; Lima Gas Co. v. City of Lima, 2 Ohio Cir. Dec. 396. See §§ 917, 919, 926 and 928, post.

[1048] City of St. Louis v. Western Union Tel. Co., 148 U. S. 92; Los Angeles Water Co. v. City of Los Angeles, 88 Fed. 720, affirmed 177 U. S. 558; People v. Suburban R. Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; Gas Light & Coke Co. v. City of New Albany, 156 Ind. 406, 59 N. E. 176. Where it is provided by the license that the city council shall determine the quantity of gas to be used by the city, the city is under no obligation to continue its use.

Lewick v. Glazier, 116 Mich. 493, 74 N. W. 717. It is not necessary to the validity of a waterworks company privilege that the water be furnished to the entire village. Michigan Tel. Co. v. City of Benton Harbor, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104; Hudson Tel.

as a franchise, but it does not seem to the author that the term is correctly and legally used in this connection.[1049] Public utility corporations are organized under authority of law and they are given solely through this act the power to carry out the purpose for which they are organized. 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. An early case in the Supreme Court of the United States,[1050] defined franchises as " special privileges conferred by government upon individuals and which do not belong to the citizens of the country generally of common right." The right of pursuing a business, calling or trade, the conduct of which is not a common natural one because it cannot be prosecuted without the aid of a legal grant or franchise, strictly speaking, from the state, is distinct as a legal proposition from the granting of a license to exercise powers granted in a particular place. The fact that a municipality may refrain from granting permission to use its streets to a public utility corporation organized under the general

Co. v. Jersey City, 49 N. J. Law, 303; Roebling v. Trenton Pass. R. Co., 58 N. J. Law, 666, 33 L. R. A. 129; Potter v. Collis, 19 App. Div. 392, 46 N. Y. Supp. 471; Nicoll v. Sands, 131 N. Y. 19, 29 N. E. 818; Rutland Elec. Light Co. v. Marble City Elec. Light Co., 65 Vt. 377, 20 L. R. A. 821; City of Burlington v. Burlington Traction Co., 70 Vt. 491, 41 Atl. 514. But see Spring Valley Water-works Co. v. Schottler, 110 U. S. 347.

[1049] Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co., 33 Fed. 669. "It is also well settled that the right to use the streets and other public thoroughfares of a city for the purpose of placing therein or thereon pipes, mains, wires, and poles for the distribution of gas, water, or electric lights for public and private use, is not an ordinary business in which any one may engage, but is a franchise belonging to the government, the privilege of exercising which can only be granted by the state or by the municipal government of the city, acting under legislative authority." Harrell v. Ellsworth, 17 Ala. 576. The grant of a license to a toll bridge is a privilege in its nature strongly resembling a franchise granted by the state and in the general establishment must be governed by the same principles. People v. Deehan, 153 N. Y. 528, 47 N. E. 787, reversing 11 App. Div. 175, 42 N. Y. Supp. 1071; State v. Portage City Water Co., 107 Wis. 441, 83 N. W. 697.

[1050] Bank of Augusta v. Earle, 13 Pet. (U. S.) 519.

laws for the purpose of manufacturing or supplying a certain commodity clearly does not deprive the corporation either of its existence or of its right to carry on the business for which it was organized wherever it may secure the desired permission. 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.[1051] In a Michigan case,[1052] it has been held that " the exercise of the power of using streets for laying gas pipes is rather an easement than a franchise, and a similar power is used as often for private drainage and other purposes as for other general purposes. It is a matter peculiarly local in its character, and which should always be to a reasonable extent under municipal supervision to prevent clashing among the many convenient uses to which ways must necessarily be subjected, for water, drainage and other urban needs. But the permission to lay these pipes does not differ in any respect from that required for laying railways over land, or ditches through it. It is not a state franchise, but a mere grant of authority, which, whether coming from pri-

[1051] Chicago City R. Co. v. People, 73 Ill. 541. "Where a company is incorporated by the legislature, with power to construct, maintain and operate a railway of a city, upon the consent of the city, in such manner and upon such conditions as the city may impose, and the city, by ordinance, grants the privilege of constructing and operating the same upon a certain street, the grant by the city is a mere license, and not a franchise. The franchise emanates from the state." Township of Plymouth v. Chestnut Hill & N. R. Co., 168 Pa. 181, 32 Atl. 19.

Nellis, St. Surface R. R. p. 55. "The franchises of a railroad corporation are rights or privileges which are essential to the operation of the corporation, and without which its road and works would be of little value; such as the franchises to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. There are certain other privileges, too, which are merely licenses, and not franchises, as where a corporation has a specific power to construct, maintain, and operate a railroad in a city, subject however to the consent of the city, and in such manner and upon such conditions as the city may impose; if the city, by ordinance, grants the privilege of constructing and operating the railroad upon a certain street, the grant by the municipality is a mere license and not a franchise."

[1052] People v. Mutual Gaslight Co., 38 Mich. 154.

vate owners, or public agents, rests in contract or license, and in nothing else." In New York it has been held, however, that the grant of the right to occupy highways is more than a mere license or privilege.[1053] That, as said in the case cited, "It is true that the franchise comes from the state but the act of the local authorities who represent the state by its permission and for the purpose constitutes the act upon which the law operates to create the franchise."

§ 897. Source of authority.

The state is the ultimate and original source of power in respect to the establishment, maintenance, and use of highways.[1054] 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.[1055] Special acts cannot be passed where the constitution forbids.[1056] The legislature can act in the granting of permission independent of subordinate governmental agencies of the state[1057] 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.[1058] The power, how-

[1053] People v. Deehan, 153 N. Y. 528, 47 N. E. 787.

[1054] City of Knoxville v. Africa (C. C. A.) 77 Fed. 501; Chesapeake & P. Tel. Co. v. Baltimore & O. Tel. Co., 66 Md. 399; Jersey City & B. R. Co. v. Jersey City & H. Horse R. Co., 20 N. J. Eq. (5 C. E. Green) 61; Jersey City Gas Co. v. Dwight, 29 N. J. Eq. (2 Stew.) 242; Barhite v. Home Tel. Co., 50 App. Div. 25, 63 N. Y. Supp. 659. A city has no rights in its streets which it can sell to a telephone or telegraph company desiring to use them since their exclusive dominion resides properly in the state and the telephone and telegraph companies are granted by laws of 1890, c. 566, § 102, the right to use public streets and highways. Beekman v. Third Ave. R. Co., 153 N. Y. 144, 47 N. E. 277, affg. 13 App. Div. 279, 43 N. Y. Supp. 174; State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262; Pennsylvania R. Co. v. Greensburg, J. & P. St. R. Co., 176 Pa. 559, 35 Atl. 122, 36 L. R. A. 839; Allen v. Clausen, 114 Wis. 244, 90 N. W. 181; Joyce, Elec. Law, § 143.

[1055] Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; City of Hannibal v. Missouri & K. Tel. Co., 31 Mo. App. 23.

[1056] Lewis v. Moore, 54 N. J. Law, 121, 22 Atl. 993. Act 1876 (Supp. Rev. 650) not void as special legislation.

[1057] Abbott v. City of Duluth, 104 Fed. 833.

[1058] City R. Co. v. Citizens' St. R. Co., 166 U. S. 557; Buckner v. Hart,

ever, when exercised by municipal or other subordinate public corporations, must be expressly granted or appear by indisputable implication.[1059] 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

52 Fed. 835. Under the charter of New Orleans which provides that the common council shall have power to authorize the use of the streets for "horse and steam railroads" it can grant a franchise to an electric street railway. McHale v. Easton & B. Transit Co., 169 Pa 416, 32 Atl. 461; 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; Henderson v. Ogden City R. Co., 7 Utah, 199, 26 Pac. 286.

[1059] Freeport Water Co. v. City of Freeport, 180 U. S. 587, affirming 186 Ill. 179, 57 N. E. 862; Danville Water Co. v. City of Danville, 180 U. S. 619, 21 Super. Ct. 505, affirming 186 Ill. 326, 57 N E. 1129; City of Mobile v. Louisville & N. R. Co., 124 Ala. 132, 26 So. 902; Hanson v. Hunter, 86 Iowa, 722, 53 N. W. 84, 48 N. W. 1005; Burlington Water Works Co. v. City of Burlington, 43 Kan. 725, 23 Pac. 1068; City of Louisville v. Bannon, 99 Ky. 74, 35 S. W. 120; Farmer v. Myles, 106 La. 333, 30 So. 858; New Orleans, C. & L. R. Co. v. City of New Orleans, 44 La. Ann. 728, 748; North Baltimore Pass. R. Co. v. City of Baltimore, 75 Md. 247; East Jordan Lumber Co. v. Village of East Jordan, 100 Mich. 201, 58 N. W. 1012.

Ludington Water Supply Co. v. City of Ludington, 119 Mich. 480, 78 N. W. 558. Where a city can lawfully grant a license privilege to a water company and it permits the company to spend large sums of money in the construction of the plant it is estopped to deny its power in this respect on the ground that no actual resolution or ordinance was passed. Thompson v. Ocean City R. Co., 60 N. J. Law, 74, 36 Atl. 1087; Domestic Teleg. & Tel. Co. v. City of Newark, 49 N. J. Law, 344; Camden Horse R. Co. v. West Jersey Traction Co., 58 N. J. Law, 102; West Jersey Traction Co. v. Shivers, 58 N. J. Law, 124; Attorney General v. City of New York, 10 N. Y. Super. Ct. (3 Duer) 119; Davis v. City of New York, 14 N. Y. 506; Beekman v. Third Ave. R. Co., 153 N. Y. 144, 47 N. E. 277; Parkhurst v. Capitol City R. Co., 23 Or. 471, 32 Pac. 304; City of Nashville v. Hagan, 68 Tenn. (9 Baxt.) 495; City of Houston v. Houston City St. R. Co., 83 Tex. 548; Henderson v. Ogden City R. Co., 7 Utah, 199. But see Levis v. City of Newton, 75 Fed. 884, where it is held that prior to Iowa Act April 9th, 1888, cities of the second class had by virtue of the general grant to them of the authority to light streets and public places the power to grant franchises to use the streets for the construction and operation of lighting plants. Town of New Castle v. Lake Erie & W. R. Co., 155 Ind. 18, 57 N. E. 516. See, also, § 924, post, and authorities cited.

licenses to private persons to occupy and use public highways for the purpose of constructing and operating lighting plants.[1060]

§ 898. Same subject continued.

As a general rule, the control of highways is vested in the local authorities within whose jurisdiction they may be located. This is true as a matter of convenience and also because of the principles of local self-government and regulation in respect to local affairs which so universally obtain.[1061] The action of local authorities, however, cannot create a lawful right contrary to the constitution or under an unconstitutional act[1062] or prevent a corporation from exercising powers granted by the state in respect to particular localities where their action is not necessary.[1063] The

[1060] Saginaw Gaslight Co. v. City of Saginaw, 28 Fed. 529.

[1061] Detroit City St. R. Co. v. City of Detroit (C. C. A.) 64 Fed. 628, 26 L. R. A. 667; Illinois Trust & Sav. Bank v. Arkansas City (C. C. A.) 76 Fed. 271, 34 L. R. A. 518; Dickson v. Kewanee Elec. Light & Motor Co., 53 Ill. App. 379; Smith v. Indianapolis St. R. Co., 158 Ind. 425, 63 N. E. 849; Attorney General ex rel., etc., v. Walworth Light & Power Co., 157 Mass. 86, 16 L. R. A. 398; Citizens' Elec. Light & Power Co. v. Sands, 95 Mich. 551, 55 N. W. 452, 20 L. R. A. 411; Wyandotte Elec. Light Co. v. City of Wyandotte, 124 Mich. 43, 82 N. W. 821; St. Louis & M. R. Co. v. City of Kirkwood, 159 Mo. 239, 60 S. W. 110, 53 L. R. A. 300; State v. City of Plainfield, 54 N. J. Law, 526, 24 Atl. 493; Grey v. New York & P. Traction Co., 56 N. J. Eq. 463.

Smith v. Metropolitan Gaslight Co., 12 How. Pr. (N. Y.) 187. The right to grant permission to lay down gas pipes is not property of the municipal corporation within statutory provisions restricting the power of municipal authorities to dispose of city property. Palmer v. Larchmont Elec. Co., 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672, rvg. 6 App. Div. 12, 39 N. Y. Supp. 522. The necessity for light in a highway within an unincorporated town is to be determined by the town board and not by the court in ejectment by an abutting owner against the company. Thomas v. Inter-County St. R. Co., 167 Pa. 120; Watson v. Fairmont & S. R. Co., 49 W. Va. 528, 39 S. E. 193; Allen v. Clausen, 114 Wis. 244, 90 N. W. 181.

[1062] Hull Elec. Co. v. Ottawa Elec. Co., 14 Rap. Jud. Que. C. S. 124; City of Laporte v. Gamewell Fire Alarm Tel. Co., 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686; City of Hannibal v. Missouri & K. Tel. Co., 31 Mo. App. 23; City of Allentown v. Western Union Tel. Co., 148 Pa. 117.

[1063] 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.

legislature may directly authorize public utility corporations to exercise all of their lawful powers and privileges within the limits of the state and independent of subordinate public corporations and irrespective of the fact that the power may have been already granted to them to control and regulate public highways within their limits.[1064] The question of municipal consent or the right of a municipality to act is one dependent upon the language of the statutes under which the private corporation is proceeding. It might be suggested, however, that the courts favor, in cases of doubt, the necessity of action by municipal authorities in respect to the use of streets over which they have control.[1065]

Federal acts relative to post roads. Congress has given, under the post roads Act,[1066] the right to construct, maintain and operate lines of telegraph through or over any portion of the public domain of the United States over and along any military or post roads then existing or thereafter to be established as such, and over, under or across navigable streams or waters of the United States. Under this authority it is lawful for telegraph companies to avail themselves of the privileges granted without the con-

[1064] Abbott v. City of Duluth, 104 Fed. 833; City of Atlanta v. Gate City Gaslight Co., 71 Ga. 106; Consumers' Gas Co. v. Huntsinger, 12 Ind. App. 285, 40 N. E. 34; City of Louisville v. Louisville Water Co., 105 Ky. 754, 49 S. W. 766; St. Louis R. Co. v. South St. Louis R. Co., 72 Mo. 67; Jersey City Gas Co. v. Dwight, 29 N. J. Eq. (2 Stew.) 242; Potter v. Collis, 19 App. Div. 392, 46 N. Y. Supp. 471; City of Memphis v. Memphis Water Co., 52 Tenn. (5 Heisk.) 495; City of Montreal v. Standard Light & Power Co., 77 Law T. (N. S.) 115.

[1065] Missouri v. Murphy, 170 U. S. 78; Detroit Citizens' St. R. Co. v. City of Detroit (C. C. A.) 64 Fed. 628, 26 L. R. A. 667, reversing 56 Fed. 867 and 60 Fed. 161; Louisville Trust Co. v. City of Cincinnati (C. C. A.) 76 Fed. 296; Philadelphia Co. v. Freeport Borough, 167 Pa. 279; City of Philadelphia v. River Front R. Co., 173 Pa. 334, 34 Atl. 60; City of Houston v. Houston City R. Co., 83 Tex. 548, 19 S. W. 127.

Joyce, Elec. Law, § 353. "As a general rule, the control of the streets and highways is vested in the local governments, each of which may exercise such control and so regulate the use thereof in its own limits as will best subserve the interests of the particular community. So, also, the legislative authority to use the streets for the purpose of telegraph, telephone, electric light or street railway lines is generally conditioned upon the consent of the local authorities having control of the street or highways upon which it is proposed to construct such lines."

[1066] United States Rev. St. §§ 5263 et seq.; Act July 24th, 1866, c. 230 (14 Stat. 221).

current authority or action either of the state or the local authorities. The license, however, exists subject to reasonable regulation by local public authorities. The interstate commerce clause of the Federal Constitution operates as a restriction upon the rights of the latter in the respect named. The subject has been fully considered and in detail in a recent text book.[1067]

Local consent for grant of authority. Local or subordinate governmental agencies are each vested by the state with designated powers in respect to the regulation, use or control of public property or public affairs within their respective limits and it follows that a grant or license for the use or occupation of the public highways for the construction and operation of water, light, power, telephone or telegraph plants to be valid must be secured from that public organization having jurisdiction. The consent of an official body proceeding without authority whether that of original power or as depending upon its territorial jurisdiction clearly can confer no rights upon individuals or corporations to carry on any of the occupations named.[1068]

[1067] Joyce, Elec. Law, c. 4.

[1068] Bradley v. Southern New England Tel. Co., 66 Conn. 559, 32 L. R. A. 280; Trotier v. St. Louis, B. & S. R. Co., 180 Ill. 471, 54 N. E. 487; Huffman v. State, 21 Ind. App. 449, 52 N. E. 713; Consumers' Gas Trust Co. v. Huntsinger, 14 Ind. App. 156, 42 N. E. 640; Board of Com'rs of Hamilton County v. Indianapolis Nat. Gas Co., 134 Ind. 209, 33 N. E. 972; Chicago & C. T. R. Co. v. Whiting, H. & E. C. St. R. Co., 139 Ind. 297. County commissioners. Drew v. Town of Geneva, 150 Ind. 662, 42 L. R. A. 814. Village trustees. Suburban Light & Power Co. v. Aldermen of Boston, 153 Mass. 200, 10 L. R. A. 497. Town selectmen. Boston & M. R. Co. v. City of Portsmouth, 71 N. H. 21, 51 Atl. 664; Bergen Traction Co. v. Ridgefield Tp. Committee (N. J. Eq.) 32 Atl. 754; Suburban Elec. Light & Power Co. v. Inhabitants of East Orange (N. J. Err. & App.) 44 Atl. 628, affirming 41 Atl. 865; West Jersey Traction Co. v. Camden Horse R. Co., 53 N. J. Eq. 163, 35 Atl. 49; Stockton v. Atlantic Highlands, R. B. & L. B. Elec. R. Co., 53 N. J. Eq. 418, 32 Atl. 680; Borough of Madison v. Morristown Gaslight Co., 65 N. J. Eq. 356, 54 Atl. 439; Lewis v. Chosen Freeholders of Cumberland, 56 N. J. Law, 416. County board of freeholders. Johnson v. Thomson-Houston Elec. Co., 54 Hun, 469, 7 N. Y. Supp. 716. Village trustees. Consumers' Gas & Elec. Co. v. Congress Spring Co., 39 N. Y. State Rep. 703, 15 N. Y. Supp. 624; Town of Wheatfield v. Tonawanda St. R. Co., 92 Hun, 460, 36 N. Y. Supp. 744; Secor v. Village of Pelham Manor, 6 App. Div. 236, 39 N. Y. Supp. 993.

Village of Hempstead v. Ball Elec. Light Co., 9 App. Div. 48, 41 N. Y. Supp. 124. Rights of village

§ 899. 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.[1069] 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.[1070] The validity of the

trustees to maintain an equitable action to restrain unlawful interference with a village highway. City of New York v. Third Ave. R. Co., 117 N. Y. 646, 22 N. E. 755; Palmer v. Larchmont Elec. Co., 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672, reversing 6 App. Div. 12, 39 N. Y. Supp. 522; Ghee v. Northern Union Gas Co., 158 N. Y. 510, 53 N. E. 692; In re Rochester Elec. R. Co., 123 N. Y. 351, affirming 57 Hun, 56, 10 N. Y. Supp. 379; Union St. R. Co. v. Hazleton & N. S. Elec. R. Co., 154 Pa. 422; Delaware County & P. Elec. R. Co. v. City of Philadelphia, 164 Pa. 457, 30 Atl. 396; Pennsylvania R. Co. v. Montgomery County Pass. R. Co., 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766. The consent of township supervisors must be also secured from them when acting together and in their official character. Rahn Tp. v. Tamaqua & L. St. R. Co., 167 Pa. 84, 31 Atl. 472; Galveston & W. R. Co. v. City of Galveston, 90 Tex. 398, 39 S. W. 96, 36 L. R. A. 33. An attempt by a city to enforce a condition outside its jurisdiction will be futile. Norfolk R. & Light Co. v. Consolidated Turnpike Co., 100 Va. 243, 40 S. E. 897; Western Union Tel. Co. v. Bullard, 65 Vt. 634. Village officials. Schwede v. Hemrich Bros. Brewing Co., 29 Wash. 21, 69 Pac. 362.

[1069] In re Portland R. Extension Co., 94 Me. 565, 48 Atl. 119. The law may provide for the determination of a public necessity for the construction of a street railway.

[1070] 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; Eisenhuth v. Ackerson, 105 Cal. 87, 38 Pac. 530. Right to franchise dependent upon two-thirds vote of a town or city from which the right must emanate.

Hall v. City of Cedar Rapids, 115 Iowa, 199, 88 N. W. 448. Under Iowa Code, § 955, which requires notice of an application for a franchise for the construction of water works, the terms of the franchise as proposed cannot be materially changed from the notice as originally drawn, nor after the question has been submitted to a vote. In re Milbridge & C. Elec. R. Co., 96 Me. 110, 51 Atl. 818; Suburban Light & Power Co. v. Aldermen of Boston, 153 Mass. 200, 10 L. R. A. 497; State v. Cowgill & Hill Mill. Co., 156 Mo. 620, 57 S. W. 1008. The privilege granted by ordinance cannot be modified by resolution. Taylor v. City of Lambertville, 43 N. J. Eq. 107, 10 Atl. 809.

Camden Horse R. Co. v. West Jersey Traction Co., 58 N. J. Law, 102, 32 Atl. 72. Authority to locate tracks of a traction company can only be exercised by the city coun-

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.[1071] The affirmative action of voters may be required by law.[1072]

cil after the giving of notices as required by Act of March 14th, 1893 (Pamph. Laws, p. 302); Act May 16th, 1894 (Pamph. Laws, p. 374) and granting a hearing to persons interested. See, also, as holding the same, Avon by-the-Sea Land & Imp. Co. v. Borough of Neptune City, 57 N. J. Law, 701, 32 Atl. 220, and as construing Act of March 24th, 1890 (Pamph. Laws, p. 113) Suburban Elec. Light & Power Co. v. Inhabitants of East Orange (N. J. Eq.) 41 Atl. 865.

Pennsylvania R. Co. v. Inhabitants of Hamilton Tp., 67 N. J. Law, 477, 51 Atl. 926; West Jersey Traction Co. v. Board of Public Works of City of Camden, 58 N. J. Law, 536, 37 Atl. 578; Adamson v. Nassau Elec. R. Co., 68 N. Y. State Rep. 851, 34 N. Y. Supp. 1073; Secor v. Village of Pelham Manor, 6 App. Div. 236, 39 N. Y. Supp. 993; Tuttle v. Brush Elec. Ill. Co., 50 N. Y. Super. Ct. (18 J. & S.) 464; Hough v. Smith, 37 Misc. 363, 75 N. Y. Supp. 451; Morrow County Ill. Co. v. Village of Mt. Gilead, 10 Ohio S. & C. P. Dec. 235; Watson v. Fairmont & S. R. Co., 49 W. Va. 528, 39 S. E. 193; Higgins v. Manhattan Elec. Light Co., Limited (N. Y.) 3 Am. Electrical Cas. 167; City of St. Louis v. Western Union Tel. Co., 63 Fed. 68, 5 Am. Electrical Cas. 50.

[1071] See §§ 496 et seq., ante and § 567. 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; Van Reipen v. City of Jersey City (N. J.) 33 Atl. 740. Where the power exists to contract for a water supply, the court can in passing upon it only determine whether there has been a violation of legal principles or a failure to comply with prescribed formalities.

Borough of Brigantine v. Holland Trust Co. (N. J. Eq.) 35 Atl. 344; People's Gaslight Co. v. Jersey City, 46 N. J. Law, 297; Moore v. West Jersey Traction Co., 62 N. J. Law, 386, 41 Atl. 946.

[1072] Thomson-Houston Elec. Co. v. City of Newton, 42 Fed. 723; Cartersville Improvement, Gas & Water Co. v. City of Cartersville, 89 Ga. 683, 16 S. E. 25; Cartersville Water-Works Co. v. City of Cartersville, 89 Ga. 689, 16 S. E. 70; City of Keokuk v. Ft. Wayne Elec. Co., 90 Iowa, 67, 57 N. W. 689; Hanson v. Hunter, 86 Iowa, 722, 48 N. W. 1005, 53 N. W. 84; Mitchell v. City of Negaunee, 113 Mich. 359, 38 L. R. A. 157; Lamar Water & Elec. Light Co. v. City of Lamar (Mo.) 26 S. W. 1025; Aurora Water Co. v. City of Aurora, 129 Mo. 540, 31 S. W. 946. An increase in the number of hydrants need not be submitted to the voters for their approval. Childs v. Hillsborough Elec. Light & Power Co., 70 N. H. 318, 47 Atl. 271; Squire v. Preston, 82 Hun, 88, 31 N. Y. Supp. 174; In re Village of Le Roy, 23 Misc. 53, 50 N. Y. Supp. 611; Mayo v. Town of Washington,

§ 900. 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,[1073] but also to the implied right of a public corporation to exercise the police power and to maintain and protect public property in the condition and for the purpose for which originally acquired.[1074] The rules and regulations in this respect must be, however, reasonable, and must be obeyed by the company or individual.[1075] The law in this respect has been clearly stated in a recent decision of the Supreme Court

122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163.

[1073] See, also, §§ 912 et seq., post.

[1074] Railroad Commission Cases, 116 U. S. 307. "This power of regulation is a power of government, continuing in its nature; and if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power." City of St. Louis v. Western Union Tel. Co., 149 U. S. 465; Wabash R. Co. v. City of Defiance, 167 U. S. 88; Pikes Peak Power Co. v. City of Colorado Springs, 105 Fed. 1; Stein v. Bienville Water Supply Co., 34 Fed. 145; City Council of Montgomery v. Capital City Water Co., 92 Ala. 361, 9 So. 339; Appeal of Central R. & Elec. Co., 67 Conn. 197, 35 Atl. 32; City of Quincy v. Bull, 106 Ill. 337; City of Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; Natick Gas Light Co. v. Inhabitants of Natick, 175 Mass. 246, 56 N. E. 292. A gas company is not entitled to compensation for the expense which it has incurred in taking up and relaying its gas mains occasioned by a change in the grade of the street. City of Westport v. Mulholland, 84 Mo. App. 319; State v. Inhabitants of Trenton, 53 N. J. Law, 132, 20 Atl. 1076, 11 L. R. A. 410; Lewis v. Board of Chosen Freeholders of Cumberland, 56 N. J. Law, 416, 28 Atl. 553; American Rapid Tel. Co. v. Hess, 125 N. Y. 641, 26 N. E. 919, 13 L. R. A. 454; Frankford & P. Pass. R. Co. v. City of Philadelphia, 58 Pa. 119; City of Knoxville v. Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888. Water rates may be regulated under an exercise of the police power of the city.

[1075] Pittsburg, Ft. W. & C. R. Co. v. City of Chicago, 159 Ill. 369, 42 N. E. 781; Michigan Tel. Co. v. City of Benton Harbor, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104; 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; Com. v. Warwick, 185 Pa. 623, 40 Atl. 93; Appeal of City of Pittsburgh, 115 Pa. 4, 7 Atl. 778.

of the United States,[1076] where it was said in the opinion by Chief Justice Fuller: "If the company, as it asserted, possessed the right to place electric wires beneath the surface of the streets, that right was subject to such reasonable regulations as the city deemed best to make for the public safety and convenience, and the duty rested on the company to comply with them. If requirements were exacted or duties imposed by the ordinances, which, if enforced, would have impaired the obligations of the company's contract, this did not relieve the company from offering to do those things which it was lawfully bound to do. The exemption of the company from requirements inconsistent with its charter could not operate to relieve it from submitting itself to such police regulations as the city might lawfully impose." They may be adopted after the passage of the original grant to occupy and use the highways if within the exercise of existing lawful powers.[1077] The subject of regulation will be further considered in other sections.

Power of public corporation to change grade of highway or otherwise improve it. Any individual or corporation 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 conferred upon it for the public benefit to grade and improve its highways. This power, as already stated, is not exhausted by its first exercise nor can it, in the absence of statutory authority, be bargained or ceded away. A licensee or grantee of the right under consideration is not entitled, therefore, to compensation for any expense or damage which it may incur or suffer in taking up and relaying its pipes, mains, subways, tracks, poles, wires or other portions of its plant and which may be occasioned by a change in the grade of the highway in which they have theretofore been placed or by any public im-

[1076] Missouri v. Murphy, 170 U. S. 78.

[1077] Hot Springs Elec. Light Co. v. City of Hot Springs, 70 Ark. 300, 67 S. W. 761. A regulation cannot be required which will in effect change or abrogate the existing contract. In re Johnston, 137 Cal. 115, 69 Pac. 973; People v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497; City of Rushville v. Rushville Natural Gas Co., 131 Ind. 575, 28 N. E. 853; City of Noblesville v. Noblesville Gas & Imp. Co., 157 Ind. 162, 60 N. E. 1032; Traverse City Gas Co. v. Traverse City, 130 Mich. 17, 89 N. W. 574; City of Westport v. Mulholland, 84 Mo. App. 319. See, also, cases cited in preceding note.

provement which the public authorities may lawfully make,[1078] but a municipal corporation is unquestionably liable for any injury to these appurtenances where it has been negligent in the making of street improvements.[1079]

§ 901. Acceptance of the grant.

There must be an acceptance of the grant whatever its source. The authorities are agreed upon this proposition.[1080] The acceptance 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.[1081] 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.[1082] An acceptance upon condition is generally regarded as none,[1083] and an offer not accepted within a reasonable time may be withdrawn. Where doubt exists as to the

[1078] National Water-Works Co. v. Kansas City, 28 Fed. 921; Pocatello Water Co. v. Standley, 7 Idaho, 155, 61 Pac. 518; Belfast Water Co. v. City of Belfast, 92 Me. 52, 42 Atl. 235, 47 L. R. A. 82; Jamaica Pond Aqueduct Co. v. Inhabitants of Brookline, 121 Mass. 5; Natick Gas Light Co. v. Inhabitants of Natick, 175 Mass. 246, 56 N. E. 292; In re Deering, 93 N. Y. 361; Columbus Gaslight & Coke Co. v. City of Columbus, 50 Ohio St. 65, 33 N. E. 292, 19 L. R. A. 510; Roanoke Gas Co. v. City of Roanoke, 88 Va. 810. But see Parfitt v. Furguson, 159 N. Y. 111, 53 N. E. 707. Where by contract a city may agree to reimburse a gas company for all damages caused by a change of grade. Id., 3 App. Div. 176, 38 N. Y. Supp. 466.

[1079] Norwalk Gaslight Co. v. Borough of Norwalk, 63 Conn. 495, 28 Atl. 32; Brunswick Gas Light Co. v. Brunswick Village Corp., 92 Me. 493, 43 Atl. 104; Gaslight & Coke Co. v. Vestry of St. Mary Abbotts, 54 Law J. Q. B. 414; Driscoll v. Poplar Board of Works, 14 Times Law R. 99.

[1080] Logansport R. Co. v. City of Logansport, 114 Fed. 688; City of Morristown v. East Tennessee Tel. Co., 115 Fed. 304; Peoples' Gas Light & Coke Co. v. Hale, 94 Ill. App. 406; Metropolitan Gas Co. v. Village of Hyde Park, 27 Ill. App. 361; Tudor v. Chicago & S. S. Rapid Transit R. Co., 154 Ill. 129, 39 N. E. 136.

[1081] Illinois Trust & Sav. Bank v. Arkansas City (C. C. A.) 76 Fed. 271, 34 L. R. A. 518; Metropolitan Gas Co. v. Village of Hyde Park, 27 Ill. App. 361; 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.

[1082] Poppleton v. Moores, 62 Neb. 851, 88 N. W. 128.

[1083] Allegheny v. Peoples' Natural Gas & Pipeage Co., 172 Pa. 632, 33 Atl. 704.

fact of acceptance, many courts have held that one will be presumed where the grant is beneficial to the grantee.

§ 902. Construction of grant.

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.[1084] Courts are careful to see that public rights are guarded and that nothing passes beyond what has been fairly granted. This rule, however, is not applied to the extent of defeating a grant when a more liberal one or one which has been acquiesced in for many years would enable the company to carry out the purpose for which it is organized and the powers it was reasonably intended should be exercised.[1085] No rule of construc-

[1084] Butchers' Union Slaughterhouse & L. S. L. Co. v. Crescent City Live-Stock Landing & S. H. Co., 111 U. S. 746; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24; Chicago General St. R. Co. v. Ellicott, 88 Fed. 941; Southern Bell Tel. & T. Co. v. D'Alemberete, 39 Fla. 25, 21 So. 570; Louisville & P. R. Co. v. Louisville City R. Co., 63 Ky. (2 Duv.) 175; Vicksburg, S. & P. R. Co. v. Town of Monroe, 48 La. Ann. 1102. The right of a railroad company to occupy a street cannot be collaterally attacked by the city. Edison Elec. Ill. Co. v. Hooper, 85 Md. 110; City of St. Paul v. Chicago, M. & St. P. R. Co., 63 Minn. 330, 65 N. W. 649, 34 L. R. A. 184; State v. Murphy, 130 Mo. 10, 31 S. W. 594, 31 L. R. A. 798; Tallon v. City of Hoboken, 60 N. J. Law, 212, 37 Atl. 895; People v. Newton, 48 Hun, 477, 1 N. Y. Supp. 197; City of Utica v. Utica Tel. Co., 24 App. Div. 361, 48 N. Y. Supp. 916; 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. See, also, § 926, post.

[1085] City of Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, affirming 88 Fed. 720; Buckner v. Hart, 52 Fed. 835; City of Los Angeles v. Los Angeles City Water Co., 124 Cal. 368, 57 Pac. 210, 571; City of Denver v. Denver City Cable R. Co., 22 Colo. 565, 45 Pac. 439; Western Pav. & Supply Co. v. Citizens' St. R. Co., 128 Ind. 525, 26 N. E. 188, 10 L. R. A. 770; Consumers' Gas & Elec. Light Co. v. Congress Spring Co., 61 Hun, 133, 15 N. Y. Supp. 624; Hudson River Tel. Co. v. Watervliet Turnpike & R. Co., 135 N. Y. 393, 17 L. R. A. 674; Appeal of Pittsburgh, 115 Pa. 4, 7 Atl. 778; Pittsburg & W. E. Pass. R. Co. v. Point Bridge Co., 165 Pa. 37, 30 Atl. 511, 26 L. R. A. 323. The words "any street or highway" in Act of May 14, 1889 (P. L. 211), authorizing the con-

tion 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.[1086] The strict rule has been well stated by a recent author.[1087] "Every public grant of property or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public, because an intention on the part of the government to grant to private persons or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed, or necessarily to be implied in the terms of the grant and because the grant is supposed to be made at the solicitation of the grantee and to be drawn up by him or his agents and, therefore, the words are to be treated as those of the grantee."

§ 903. Same subject.

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,[1088] and the existence of this presumption shifts the burden of proof to the one attacking the validity of the law. In

struction of street railways includes bridges as a part of said streets or highways. See, also, as holding the same, Berks County v. Reading City Pass. R. Co., 167 Pa. 102, 31 Atl. 474, 663.

Taggart v. Newport St. R. Co., 16 R. I. 668, 7 L. R. A. 205; City of Houston v. Houston City St. R. Co., 83 Tex. 548, 19 S. W. 127; Gray v. Dallas Terminal R. & Union Depot Co., 13 Tex. Civ. App. 158, 36 S. W. 252. An ordinance granting a street railway license indefinite as to some streets is not void as to other streets clearly specified. Ogden City R. Co. v. Ogden City, 7 Utah, 207, 26 Pac. 288. Joyce, Elec. Law, §§ 165 et seq.

[1086] Postal Tel. Cable Co. v. Norfolk & W. R. Co., 88 Va. 920.

[1087] Joyce, Elec. Law, § 163. New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Hamilton Gaslight & Coke Co. v. Hamilton City, 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; 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; Colby University v. Village of Canandaigua, 69 Fed. 671; Ft. Plain Bridge Co. v. Smith, 30 N. Y. 44; Syracuse Water Co. v. City of Syracuse, 116 N. Y 167, 22 N. E. 381, 5 L. R. A. 546; Warsaw Water Works Co. v. Village of Warsaw, 161 N. Y. 176, 55 N. E. 486.

[1088] Lewis, Sutherland, Stat. Const. (2d Ed.) §§ 499 et seq.

the making of a grant the rule also is true that every word used is supposed to have some clear and definite meaning. The burden of proof is again,therefore, because of this presumption, upon the one attacking the meaning or uncertainty of words used in a grant.

§ 904. Exercise of the grant; the element of time.

In determining the right of the grantee of a privilege or license to occupy public highways in respect to the element of time, the principle obtains that because of the nature of the license, namely, a use of public property, for private profit, the grantee is limited strictly in the exercise of his rights to the time named in the grant and this rule applies both to the time of commencement and the termination of the privilege.[1089] Acts of a grantee before or after these periods are unlawful and can lead to the establishment of no rights as between the parties in respect to the granting of the license itself.[1090] 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 granting the privilege or the license for the reason that all legislative bodies are limited in their legal capacity in such a manner as not to deprive succeeding bodies of the right to deal with matters involving the same questions as they may arise from time to time in the future and as the then present ex-

[1089] Detroit Citizens' Street Ry. Co. v. City of Detroit (C. C. A.) 64 Fed. 628, 26 L. R. A. 667, reversing 56 Fed. 867, and 60 Fed. 161. Louisville Trust Co. v. City of Cincinnati (C. C. A.) 76 Fed. 296; Gas Light & Coke Co. v. City of New Albany, 156 Ind. 406, 59 N. E. 176; State v. Lake, 8 Nev. 276; Blaschko v. Wurster, 156 N. Y. 437, 51 N. E. 303. A grant of rights in a street made by municipal authorities in excess of the period allowed by general statute is not good even for the latter time. Cincinnati Inclined Plane R. Co. v. City of Cincinnati, 52 Ohio St. 609, 44 N. E. 327.

[1090] Montgomery Gas-Light Co. v. City Council of Montgomery, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616; Southern California R. Co. v. Southern Pac. R. Co. (Cal.) 43 Pac. 1123; Cedar Rapids Water Co. v. City of Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081. A water company is entitled to remain in possession of streets for its pipes and connections for such reasonable time as may be necessary to negotiate with the city for an extension of its lines or close out its business without unnecessary sacrifice. See, also, National Water-Works Co. v. Kansas City (C. C. A.) 62 Fed. 853, 27 L. R. A. 827.

igencies may require.[1091] Cases will be found upon this question both for [1092] 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.[1093] The Supreme Court of the United States in a

[1091] City of New York v. Second Ave. R. Co., 32 N. Y. 261. See, also, cases cited in two following notes.

[1092] 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; Richmond County Gaslight Co. v. Town of Middletown, 59 N. Y. 228; City of Brenham v. Water Co., 67 Tex. 542, 4 S. W. 143; Altgelt v. City of San Antonio, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 383. Eddy, Combinations, § 26. Some cases, holding contracts for a term of years invalid, base their decision upon the fact that they were exclusive; these of course are not authority under the text. See the following cases: Long v. City of Duluth, 49 Minn. 280, 51 N. W. 915; Davenport v. Kleinschmidt, 6 Mont. 502, 13 Pac. 249; City of Brenham v. Water Co., 67 Tex. 542, 4 S. W. 143.

[1093] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Freeport Water Co. v. City of Freeport, 180 U. S. 587, affirming 186 Ill. 179, 57 N. E. 862. A contract giving a water company, under Ill. Act of April 9th, 1872, the power to charge certain rates for thirty years without interference considered. Danville 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; Illinois Trust & Sav. Bank v. Arkansas City (C. C. A.) 76 Fed. 271, 34 L. R. A. 518; Little Falls Elec. & Water Co. v. City of Little Falls, 102 Fed. 663. Thirty years held not an unreasonable length of time.

City of Denver v. Hubbard, 17 Colo. App. 346, 68 Pac. 993. A contract for furnishing light for a period of ten years is not invalid as extending for an unreasonable length of time. City of Carlyle v. Carlyle Water, Light & Power Co., 52 Ill. App. 577; Carlyle Water, Light & Power Co. v. City of Carlyle, 31 Ill. App. 325. A city may contract for a supply of water for a public use for a period not exceeding thirty years but cannot contract in respect to a certain price during the time fixed. Gas Light & Coke Co. v. City of New Albany, 156 Ind. 406, 59 N. E. 176. Where a city council is limited by statute to contract for lighting a period not extending ten years, a contract for a longer period is wholly void and not good even for the period of ten years.

City of Indianapolis v. Indianapolis Gaslight & Coke Co., 66 Ind. 296; City of Valparaiso v. Gardner, 97 Ind. 1. Twenty-year contract sustained. The court said: "The power to execute a contract for goods, for houses, for gas, for water

and the like, is neither a judicial nor a legislative power, but is a purely business power."

Crowder v. Town of Sullivan, 128 Ind. 486, 13 L. R. A. 647. "If municipal corporations cannot contract for a long period of time for such things as light or water, the result would be disastrous, for it is matter of common knowledge that it requires a large outlay of money to provide machinery and appliances for supplying towns and cities with light and water, and that no one will incur the necessary expense for such machinery and appliances if only short periods are allowed to be provided for by contract. The courts cannot presume that the legislature meant to so cripple the municipalities of the state as to prevent them from securing light upon reasonable terms, and in the ordinary mode in which such a thing as electric light or gas is obtained."

City of Vincennes v. Citizens' Gaslight Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485. It was held in this case that twenty-five years is not an unreasonable length of time for a city to bind itself for a supply of light or water. "The making of contracts for the supply of gas or water is a matter delegated to the governing powers of municipalities, to be exercised according to their own discretion; and, in the absence of fraud, while acting within the authority delegated to them, their action is not subject to review by the courts. The length of time for which they shall bind their towns or cities depends upon so many circumstances and conditions as to situation, cost of supply and future prospects, that the courts can interfere only in extreme cases and upon seasonable application. We cannot say that twenty-five years is an unreasonable time for which to contract for a supply of light or water. Improvements made in the methods and cost of street lighting have in many instances rendered contracts that were fair and equitable when made seem now to be grinding and oppressive." Columbus Water-Works Co. v. City of Columbus, 48 Kan. 99, 28 Pac. 1097, 15 L. R. A. 354; New Orleans Gas-Light Co. v. City of New Orleans, 42 La. Ann. 188, 7 So. 559; Commissioners on Inland Fisheries v. Holyoke Water Power Co., 104 Mass., 446; Adrian Water Works Co. v. City of Adrian, 64 Mich. 584, 31 N. W. 529; Sullivan v. Bailey, 125 Mich. 104, 83 N. W. 996; Ludington Water Supply Co. v. City of Ludington, 119 Mich. 480; Klichli v. Minnesota Brush Elec. Co., 58 Minn. 418; Light, Heat & Water Co. v. City of Jackson, 73 Miss. 598, 19 So. 771; Reid v. Trowbridge, 78 Miss. 542, 29 So. 167; Neosho City Water Co. v. City of Neosho, 136 Mo. 498, 38 S. W. 89; Schefbauer v. Board of Tp. Committee of Kearney Tp., 57 N. J. Law, 588, 31 Atl. 454.

Davis v. Town of Harrison, 46 N. J. Law, 79. The power of a municipal corporation to contract may be limited by statute to a specific term of years. State v. Ironton Gas Co., 37 Ohio St. 45; City of Wellston v. Morgan, 59 Ohio St. 147. A contract made in excess of the period fixed by statute is totally void. 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; City of Houston v. Houston City St. R. Co., 83

case decided some years ago [1094] said in an opinion by Mr. Justice Davis in sustaining privileges extending over a long period of time, "the purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of associated wealth. This will be risked unless privileges are given and securities furnished in an act of incorporation. The wants of the public are often so imperative, that a duty is imposed on government to provide for them; but as experience has proved that a state should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake. The legislature, therefore, says to public spirited citizens: 'If you will embark, with your time, money, and skill, in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill.' Such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it."

§ 905. Same subject. Manner of exercise in respect to time and place.

In the granting of a license or right, the public corporation has the power to impose upon the grantee all reasonable conditions and these may include conditions in respect to the commencement

Tex. 548, 19 S. W. 127; Waco Water & Light Co. v. City of Waco (Tex. Civ. App.) 27 S. W. 675; City of Palestine v. Barnes, 50 Tex. 538. The rule applied to the grant of exclusive market privileges for a period of twenty-one years. Townsend Gas & Elec. Co. v. City of Port Townsend, 19 Wash. 407, 53 Pac. 551; Oconto City Water Supply Co. v. City of Oconto, 105 Wis. 76, 80 N. W. 1113.

[1094] The Binghampton Bridge Co., 70 U. S. (3 Wall.) 51. See, also, Fidelity Trust & Guaranty Co. v. Fowler Water Co., 113 Fed. 560. Beach, Monopolies, § 118. "Where the length of time for which a franchise is granted is plainly unreasonable and inconsistent with the public welfare, the grant is not void, but voidable. It is voidable as an ultra vires act of the municipal authorities. A grant may be made for a term of years, and a privilege which is not a monopoly at the time at which it is granted does not become a monopoly by the lapse of any reasonable period. In municipal grants there is a necessity for a fixed and somewhat extended time. As the cost of sup-

of work or the completion of a specified part within a designated time.[1095]

Place of exercise. A sidewalk is a part of a highway and the grant of the right to occupy and use streets would necessarily convey the privilege of using that portion of the street occupied by the sidewalk.[1096] The language of the grant may be definite in respect to the particular streets or public ways to be occupied and used by the grantee. Where this is true it will be unlawful for the one exercising the grant to occupy or use other streets or grounds not so designated without the express permission of the public authorities lawfully granted.[1097] Where the grant is general in its terms and gives to the grantee his privileges without expressly designating the streets or public places, then it is not necessary, according to the weight of authority, for a special permit to be granted each time a new street is occupied or used for the lawful purposes of the grant.[1098] In a New York case [1099] it was said: "It cannot reasonably be contended that the relator is obliged to apply for a new grant whenever a new street is opened or an old one extended, as would be the case if the consent applied only to the situation existing when made. When the right to use the streets has been once granted in general terms to a corporation engaged in supplying gas for public and private

plying a city with gas or water is large and involves an expensive plant, it would not be undertaken by a private corporation on any temporary or uncertain franchise."

[1095] Chicago Municipal Gas Light & Fuel Co. v. Town of Lake, 130 Ill. 42, 22 N. E. 616; Inhabitants of West Springfield v. West Springfield Aqueduct Co., 167 Mass. 128, 44 N. E. 1063. The rule will not apply to additions made necessary by the growth of the town. Grey v. New York & P. Traction Co., 56 N. J. Eq. 463, 40 Atl. 21; Commercial Elec. Light & Power Co. v. City of Tacoma, 17 Wash. 661, 50 Pac. 592. A city may, however, be estopped by acquiescence to claim its rights in this respect.

[1096] Louisville Bagging Mfg. Co. v. Central Pass. R. Co., 95 Ky. 50; Knapp, Stout & Co. v. St. Louis Transfer R. Co., 126 Mo. 26, 28 S. W. 627; McDevitt v. Peoples' Nat. Gas Co., 160 Pa. 367, 28 Atl. 948.

[1097] City of Kalamazoo v. Kalamazoo Heat, Light & Power Co., 124 Mich. 74, 82 N. W. 811; People v. Deehan, 11 App. Div. 175, 42 N. Y. Supp. 1071.

[1098] Meyers v. Hudson County Elec. Co., 63 N. J. Law, 573, 44 Atl. 713, reversing 60 N. J. Law, 350, 37 Atl. 618.

[1099] People v. Deehan, 153 N. Y. 528, 47 N. E. 787, rvg. 11 App. Div. 175, 42 N. Y. Supp. 1071.

use, such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the privilege may be exercised in the new streets as well as in the old. Such a grant is generally in perpetuity or during the existence of the corporation, or at least for a long period of time, and should be given effect according to its nature, purpose and duration. There is no good reason for restricting its operation to existing highways unless that purpose appears from the language employed." The grant of a privilege or license can under no circumstances convey a right to construct or place pipe lines or water mains upon the surface of the highway for, as said in an Indiana case:[1100] "It is a nuisance and unlawful to place and keep or leave continuously in a public highway anything which either impedes or endangers public travel. This rule applies to the whole width of the highway, and not merely to a worn portion of it commonly used for passage. Privileges which, if usurped by a great number of persons or corporations would change the road from a public easement to a mere special benefit or convenience to such usurpers, are not lawful for any of them. The uses must be consistent with the continued use of the road and every part thereof as a passageway by all persons exercising ordinary care."

§ 906. New streets or extension of corporate limits.

The rule in respect to the occupation or use of new streets has been given in the previous section. The right to occupy them without permission is dependent upon the language of the original grant of the license or privilege.[1101] 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 co-extensive territorially with the jurisdiction of the grantor.[1102]

[1100] Indiana Natural & Ill. Gas Co. v. McMath, 26 Ind. App. 154, 57 N. E. 593, 59 N. E. 287; Lebanon Light, Heat & Power Co. v. Leap, 139 Ind. 443, 39 N. E. 57, 29 L. R. A. 342.

[1101] People v. Deehan, 153 N. Y. 528, 47 N. E. 787.

[1102] Pittsburg, Ft. W. & C. R. Co. v. City of Chicago, 159 Ill. 369, 42 N. E. 781. But see People v. Deehan, 11 App. Div. 175, 42 N. Y. Supp. 1071.

Neither can a change of boundaries deprive the grantee of such a license of his rights.[1103] The obligations of the contract are created by the people of a particular locality, not by the government that may represent them at a particular time. The people and the property constitute the contracting party; the external form of government is not considered.[1104]

§ 907. Change of commodity furnished.

The contract between a public corporation and the one supplying water, light or power, determines the relative rights of the parties in respect to a change of or an increase in the number of commodities furnished. The rule of strict construction applies as stated in a preceding section and where, therefore, a grant of the right to use the public highways for the purpose of supplying either water, light or power is not general in its terms but describes in specific language the particular business which can be legally carried on by the grantee of the right, that grantee cannot lawfully engage in supplying another commodity resulting in the same benefit or put the articles which it is authorized to supply for a designated purpose to another purpose;[1105] neither can the grantee of such a license or contract increase the number of commodities supplied by him though in a general way the business of furnishing them is similar in character. The application of these rules forbid a company authorized to supply electric light from furnishing an electric current for power though generated by the same plant and conveyed by the same wires or some of them. Neither can a company authorized to supply water or light alone engage in the business of furnishing both water and light. The rule also prevents a corporation organized for the purpose of manufacturing and selling artificial gas from

[1103] Johnson v. Owensboro & N. R. Co., 18 Ky. L. R. 276, 36 S. W. 8; State v. City of New Orleans, 41 La. 91, 5 So. 262; People v. Deehan, 153 N. Y. 528, 47 N. E. 787.

[1104] City of Grand Rapids v. Grand Rapids Hydraulic Co., 66 Mich. 606, 33 N. W. 749. Where a village was succeeded by a city organization, a privilege granted by the village for supplying water is not destroyed or abridged. People v. Deehan, 153 N. Y. 528, 47 N. E. 787.

[1105] State v. Murphy, 130 Mo. 10, 31 S. W. 594, 31 L. R. A. 798; Emerson v. Com., 108 Pa. 111; Warren Gaslight Co. v. Pennsylvania Gas Co., 161 Pa. 510.

using natural gas for the same identical purposes,[1106] and one authorized to furnish gas from supplying electricity.[1107] As a rule where a grant is made for the supply of a specific commodity, that grant is not impaired by the giving of a license to other parties to furnish a commodity resulting in the same benefit.[1108]

§ 908. Grant of license upon condition.

A public corporation, however advantageous the business of supplying certain commodities like water, light or power may be to the community, is not because of that fact under any obligation to grant a license or enter into a contract for the purpose under consideration.[1109] It is, therefore, free to attach to the granting of the right such conditions as it may deem of advantage to itself,[1110] an option to purchase, for example,[1111] or which may be necessary in order to enable it to properly exercise its own public powers and perform its governmental duties.[1112] The con-

[1106] Erie Min. & Natural Gas Co. v. Gas Fuel Co., 15 Wkly. Notes Cas. (Pa.) 399.

[1107] Scranton Elec. Light & Heat Co. v. Scranton Illuminating Heat & Power Co., 122 Pa. 154, 15 Atl. 446, 1 L. R. A. 285.

[1108] Johnston's Appeal (Pa.) 7 Atl. 167; Warren Gaslight Co. v. Pennsylvania Gas Co., 161 Pa. 510.

[1109] Eureka Light & Ice Co. v. City of Eureka, 5 Kan. App. 669, 48 Pac. 935.

[1110] Southern Bell Teleg. & Tel. Co. v. City of Richmond (C. C. A.) 103 Fed. 31, affirming 98 Fed. 671. A telephone company accepting certain conditions is bound by them even though a municipal council is not authorized under the statute to exact them. Logansport R. Co. v. City of Logansport, 114 Fed. 688. Consent of common council necessary. City of New Britain v. New Britain Tel. Co., 74 Conn. 326, 50 Atl. 881, 1015. Construing condition to maintain independent telephone line. Sioux City St. R. Co. v. City of Sioux City, 78 Iowa, 742, 39 N. W. 498; Brown v. Du Plessis, 14 La. Ann. 842; State v. City of New Orleans, 32 La. Ann. 268; Township of Grosse Pointe v. Detroit & L. St. C. R. Co., 130 Mich. 363, 90 N. W. 42; Virginia City Gas Co. v. Virginia City, 3 Nev. 320; Trenton St. R. Co. v. Pennsylvania R. Co., 63 N. J. Eq. 276, 49 Atl. 481; Davidge v. Common Council of Binghamton, 62 App. Div. 525, 71 N. Y. Supp. 282.

[1111] Montgomery Gas-Light Co. v. City Council of Montgomery, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616; Keokuk Gas-Light & Coke Co. v. City of Keokuk, 80 Iowa, 137, 45 N. W. 555. See § 932, post.

[1112] Mercantile Trust & Deposit Co. v. Collins Park & B. R. Co., 101 Fed. 347. Construing condition reserving in municipalities the power to secure an entrance to the heart of a city for other lines of road. Pikes Peak Power Co. v. City of

ditions which are ordinarily found relate to a free supply of water or light to the municipality,[1113] to the construction and operation of the plant,[1114] and a consideration, monetary or

Colorado Springs, 105 Fed. 1; Citizens' Horse R. Co. v. City of Belleville, 47 Ill. App. 388; State v. Murphy, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369. A grant of a subway which reserves to the city no control over the business or rules of the company is ultra vires. Conover v. Long Branch Commission, 65 N. J. Law, 167, 47 Atl. 222.

[1113] National Water-works Co. v. School Dist. No. 7, 4 McCrary, 198, 48 Fed. 523; State Trust Co. v. City of Duluth, 104 Fed. 632; Boise City Artesian Hot & Cold Water Co. v. Boise City, 123 Fed. 232; City and County of San Francisco v. Spring Valley Water-works Co., 48 Cal. 493; Boise City v. Artesian Hot & Cold Water Co., 4 Idaho, 351, 39 Pac. 562; Commercial Bank v. City of New Orleans, 17 La. Ann. 190; City of New Orleans v. Great Southern Telep. & Tel. Co., 40 La. Ann. 41.

National Water-works Co. v. Kansas City School Dist., 23 Mo. App. 227. School buildings are not public buildings of a city within the meaning of that phrase as used in a contract to furnish free water to "public buildings of the city." Water Supply Co. of Albuquerque v. City of Albuquerque, 9 N. M. 441, 54 Pac. 969; Borough of Easton v. Lehigh Water Co., 97 Pa. 554; St. Clair School Dist. v. Monongahela Water Co., 166 Pa. 81, 31 Atl. 71; Kensington Elec. Co. v. City of Philadelphia, 187 Pa. 446, 41 Atl. 309; City of Memphis v. Memphis Water Co., 67 Tenn. (8 Baxt.) 587. Such a condition will be strictly construed in favor of the company. See the following cases: Louisville Water Co. v. Clark, 143 U. S. 1. Where a supply of free water is based upon a fixed exemption, the withdrawal of the exemption will release it from its obligation in this respect. Hawes v. Contra Costa Water Co., 5 Sawy. 287, Fed. Cas. No. 6,235; City and County of San Francisco v. Spring Valley Water-works Co., 48 Cal. 493; Commercial Bank v. City of New Orleans, 17 La. Ann. 190; City of New Orleans v. New Orleans Water-works Co., 36 La. Ann. 432; Spring Brook Water Co. v. Pittston, 203 Pa. 233, 52 Atl. 249; Ashland Water Co. v. Ashland County, 87 Wis. 209, 58 N. W. 235.

[1114] Lanning v. Osborne, 76 Fed. 319. A consumer whose right to demand a supply of water from the company as now vested is protected in this right. People v. Sutter St. R. Co., 117 Cal. 604, 49 Pac. 736. A provision in a street railway franchise which conflicts with § 502 Civil Code, is necessarily invalid. Leadville Water Co. v. City of Leadville, 22 Colo. 297, 45 Pac. 362; Grand Junction Water Co. v. City of Grand Junction, 14 Colo. App. 424, 60 Pac. 196; Coverdale v. Edwards, 155 Ind. 374, 58 N. E. 495. The condition may be the right of the council to revoke the license at pleasure. Village of Dearborn v. Detroit, Y., A. A. & J. R. Co., 131 Mich. 19, 90 N. W. 688; City of Stillwater v. Lowry, 83 Minn. 275, 86 N. W. 103; Board of

otherwise, in favor of the public corporation after competitive bidding.[1115] Limitations may be placed upon the location of the

Finance of Jersey City v. Board of Street and Water Com'rs, 55 N. J. Law, 230, 26 Atl. 92; In re Loader, 35 N. Y. Supp. 996, 999; Jones v. Rochester Gas & Elec. Co., 168 N. Y. 65, 60 N. E. 1044. Laws 1890, c. 566, § 65, requires gas companies to supply any owner or occupant of a building in compliance with certain conditions with gas under certain penalties. Plymouth Tp. v. Chestnut Hill & N. R. Co., 168 Pa. 181, 32 Atl. 19; Wood v. City of Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369. Condition for compulsory arbitration of all disputes arising between the street railway company and its employes held valid.

[1115] People v. Craycroft, 111 Cal. 544, 44 Pac. 463. Act March 23d, 1893, statutes 1893, p. 288, which requires that "every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate railroads along or upon any public street or highway, or to exercise any other privilege whatever" proposed to be granted by the governing body of any town must be advertised and given to the highest bidder, does not apply to the grant of the right of way to a steam railroad company through a town.

Pereria v. Wallace, 129 Cal. 397, 62 Pac. 61; Borough of Ridley Park v. Citizens' Elec. Light & Power Co., 7 Del. Co. R. 395. An ordinance requiring an electric light company to pay a fixed sum for each of its poles comes within the proper exercise of the police power. State v. Herod, 29 Iowa, 123. The grant of an exclusive right for the construction and maintenance of street railway lines does not exempt the company from paying the license fee provided by prior ordinance to be paid by all persons engaged in carrying passengers. Keith v. Johnson, 22 Ky. L. R. 947, 59 S. W. 487; East Louisiana R. Co. v. City of New Orleans, 46 La. Ann. 526, 15 So. 157. La. Act 1888, No. 135, § 4, applies only to a sale of a railroad franchise to a street railway operated within the city and not to steam commercial railroads. New Orleans City & L. R. Co. v. Watkins, 48 La. Ann. 1550, 21 So. 199; Abraham v. Meyers, 29 Abb. N. C. 384, 23 N. Y. Supp. 225, 228; Adamson v. Nassau Elec. R. Co., 68 N. Y. State Rep. 851, 34 N. Y. Supp. 1073; In re Empire City Traction Co., 4 App. Div. 103, 38 N. Y. Supp. 983; Southern Boulevard R. Co. v. Peoples Traction Co., 39 N. Y. Supp. 266; Johnson v. City of Philadelphia, 60 Pa. 445; 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.

Linden Land Co. v. Milwaukee R. & Light Co., 107 Wis. 493, 83 N. W. 851. A grant of a franchise by a city without receiving any compensation but on the consideration that the company shall charge a reduced fare does not constitute a surrender of the property rights of the city such as would authorize a suit by a tax payer to restrain the acceptance of the franchise by the railway company.

The special franchise tax im-

plant, both in respect to its buildings and also its mains, pipes, wires and other facilities for distributing its commodity.[1116] The materials used in construction may also be designated in the grant and the manner in which the distributing part of the plant erected. It is well known that the manufacture and distribution of electricity for purposes of lighting and power is attended with great danger to the public. Currents are generated which are exceedingly destructive to both life and property if the apparatus conducting them is not properly constructed and insulated.[1117] Corporations may be required to grant the use of poles or tracks to other companies under certain conditions,[1118] and the rights of

posed by N. Y. Laws, 1899, c. 712, was sustained in People v. New York State Board of Tax Com'rs, 199 U. S. 1, where the court held that the imposition and collection of a license fee did not exempt a street railroad company from the tax imposed by the law above cited under this franchise. See, also, People v. New York State Board of Tax Com'rs, 199 U. S. 48, and a number of other cases decided at the same time and following the leading case first given above.

[1116] Ricketts v. Birmingham St. R. Co., 85 Ala. 600; Canastota Knife Co. v. Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107; Norwalk & S. N. Elec. Light Co. v. Common Council, 71 Conn. 381, 42 Atl. 82; Marshall v. City of Bayonne, 59 N. J. Law, 101, 34 Atl. 1080; Meyers v. Hudson County Elect. Co., 60 N. J. Law, 350, 37 Atl. 618.

[1117] Missouri v. Murphy, 170 U. S. 78; Id., 130 Mo. 10; City of Denver v. Sherret (C. C. A.) 88 Fed. 226; National Subway Co. v. City of St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113. Joyce, Elec. Law § 438.

[1118] Chicago, St. P. & K. C. R. Co. v. Kansas City, St. J. & C. B. R. Co., 52 Fed. 178; Pacific R. Co. v. Wade, 91 Cal. 449, 27 Pac. 768, 13 L. R. A. 754; Hook v. Los Angeles R. Co., 129 Cal. 180, 61 Pac. 912; Bergin v. Southern New England Tel. Co., 70 Conn. 54, 38 Atl. 888, 39 L. R. A. 192; Chicago General R. Co. v. West Chicago St. R. Co., 63 Ill. App. 464; Canal & C. R. Co. v. Orleans R. Co., 44 La. Ann. 54, 10 So. 389; New Orleans & C. R. Co. v. Canal & C. R. Co., 47 La. Ann. 1476, 17 So. 834; State v. King, 104 La. 735, 29 So. 359. The right may exist without its being made an express condition on the part of the city to authorize other street railroads to use certain tracks.

Koch v. North Ave. R. Co., 75 Md. 222, 23 Atl. 463, 15 L. R. A. 377; North Baltimore Pass. R. Co. v. North Ave. R. Co., 75 Md. 233, 23 Atl. 466. The condition exists, the fact that another street railway company may use a different power is immaterial. Citizens' Elec. Light & Power Co. v. Sands, 95 Mich. 551, 55 N. W. 452, 20 L. R. A. 411; Union Depot R. Co. v. Southern R. Co., 105 Mo. 562, 16 S. W. 920; Grand Ave. R. Co. v. Peoples' R. Co., 132 Mo. 34, 33 S. W. 472; Grand Ave. R. Co. v. Citizens'

electric light, telephone and telegraph companies restricted in respect to the trimming of shade trees.[1119]

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.[1120] The advantages

R. Co., 148 Mo. 665, 50 S. W. 305; Suburban Elec. Light & Power Co. v. Inhabitants of East Orange (N. J. Eq.) 41 Atl. 865; People v. Barnard, 110 N. Y. 548, 18 N. E. 354; Sixth Ave. R. Co. v. Kerr, 45 Barb. (N. Y.) 138; Staten Island Midland R. Co. v. Staten Island Elec. R. Co., 34 App. Div. 181, 54 N. Y. Supp. 598; Gallagher v. Keating, 27 Misc. 131, 58 N. Y. Supp. 366. Construing N. Y. Laws 1890, c. 565, § 78, which makes it lawful for any railroad corporation to contract with any other railroad for the use of their respective roads or any part thereof. Toledo Elec. St. R. Co. v. Toledo & M. V. R. Co., 7 Ohio N. P. 211; Kinsman St. R. Co. v. Broadway & N. St. R. Co., 36 Ohio St. 239; Com. v. Sycamore St. R. Co., 30 Pittsb. Leg. J. (N. S.) 333; Johnson v. City of Philadelphia, 60 Pa. 445.

[1119] Consolidated Traction Co. v. East Orange Tp., 63 N. J. Law, 669, 44 Atl. 1099, affirming 61 N. J. Law, 202, 38 Atl. 803; Brown v. Asheville Elec. Co., 138 N. C. 533, 69 L. R. A. 631. An abutting owner has the right to recover damages for the cutting of trees upon a sidewalk for the accommodation of electric light wires in entire disregard of his rights. See, also, § 911, post.

[1120] Beeson v. City of Chicago, 75 Fed. 880; City of Knoxville v. Africa (C. C. A.) 77 Fed. 501, reversing 70 Fed. 729; Tibbitts v. West & South Town St. R. Co., 54 Ill. App. 180, 153 Ill. 147, 38 N. E. 664; North Chicago St. R. Co. v. Cheetham, 58 Ill. App. 318; Stewart v. Chicago General St. R. Co., 58 Ill. App. 446, affirmed in 166 Ill. 61, 46 N. E. 765. An abutting owner has no such interest in a street as will entitle him to enjoin its use for a street railway. City of Chester v. Wabash, C. & W. R. Co., 182 Ill. 382, 55 N. E. 524; McGann v. People, 194 Ill. 526, 62 N. E. 941; Kennedy v. Detroit R. Co., 108 Mich. 390, 66 N. W. 495; West Jersey Traction Co. v. Board of Public Works of Camden, 56 N. J. Law, 431, 29 Atl. 163; Point Pleasant Elec. Light & Power Co. v. Borough of Bayhead, 62 N. J. Eq. 296, 49 Atl. 1108; Hutchinson v. Borough of Belmar, 61 N. J. Law, 443; In re Auburn City R. Co., 88 Hun, 603, 34 N. Y. Supp. 992; New York Cable R. Co. v. Chambers St. & G. St. Ferry R. Co., 40 Hun (N. Y.) 29; Merriman v. Utica Belt Line St. R. Co., 18 Misc. 269, 41 N. Y. Supp. 1049; Beekman v. Third Ave. R. Co., 13 App. Div. 279, 43 N. Y. Supp. 174. A property owner may enjoin the unauthorized construction of a street railroad in the street adjoining his property. An

of this condition are appreciated best by an inspection of many residence streets in cities and towns and where, unfortunately, it as well as a retention of the power to arbitrarily compel the laying of wires underground is too often lacking.

The owner of property can effectually control the use of public highways by reserving in the dedication the right to dictate in respect to the laying of mains and pipes, the erection and stringing of poles and wires or the laying of wires underground and further regulate their operation and the rates which may be charged. The consent of the abutting owner by this method may be made absolutely necessary to the granting of all privileges or licenses or the use of public highways.

§ 909. Exercise of the grant.

The power to impose conditions is one which impliedly belongs to all public corporations having the right to grant licenses of this character and the conditions may apply not only to the original construction of the plant but also to its maintenance, use, and operation thereafter.[1121] 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[1122] and also to maintain and preserve the public highways for the chief and par-

injunction against the city extending over seven miles is too broad.

Tiedemann v. Staten Island M. R. Co., 18 App. Div. 368, 46 N. Y. Supp. 64; Sea Beach R. Co. v. Coney Island & G. Elec. R. Co., 22 App. Div. 477, 47 N. Y. Supp. 981; In re Buffalo Traction Co., 155 N. Y. 700; Mt. Auburn Cable R. Co. v. Neare, 54 Ohio St. 153, 42 N. E. 768; Pennsylvania R. Co. v. Greensburg J. & P. St. R. Co., 176 Pa. 559, 35 Atl. 122, 36 L. R. A. 839. A steam road whose lines are crossed by a street railway is not an abutting owner whose consent is necessary to the construction of the street railway line. Gray v. Dallas Terminal R. & Union Depot Co., 13 Tex. Civ. App. 158, 36 S. W. 352; Western Union Tel. Co. v. Williams, 86 Va. 696, 8 L. R. A. 429. But see Kennelly v. City of Jersey City, 57 N. J. Law, 293, 30 Atl. 531, 26 L. R. A. 281; Ingersoll v. Nassau Elec. R. Co., 89 Hun, 213, 34 N. Y. Supp. 1044.

[1121] State v. Sloan, 48 S. C. 21.

[1122] Nebraska Tel. Co. v. York Gas & Elec. Light. Co., 27 Neb. 284; Consolidated Traction Co. v. Elizabeth City, 58 N. J. Law, 619, 34 Atl. 146, 32 L. R. A. 170. See, also, § 900, ante, and § 912, post.

amount purpose for which they were established.[1123] The erection of poles by telegraph, telephone and electric lighting companies and the stringing of necessary wires are unquestionably permanent obstructions in a highway, to be done in that manner which will minimize their true character as obstructions. The question of compensation to an abutting owner as based upon an additional burden or servitude has already been considered.[1124] Companies authorized to supply water and gas can be restricted in respect to the manner [1125] and the time [1126] in which their pipes and appurtenances can be laid either originally or for the purpose of making repairs.[1127] A regulation requiring the securing

[1123] 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; Wabash R. Co. v. City of Defiance, 52 Ohio St. 262, 40 N. E. 89. See § 912, post.

[1124] Chicago, B. & Q. R. Co. v. Chicago St. R. Co., 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485, afg. 54 Ill. App. 273. The use of a street by street cars whether propelled by horse power or electricity does not constitute an additional servitude. Pennsylvania R. Co. v. Montgomery County Pass. R. Co., 107 Pa. 62, 27 L. R. A. 766; Linden Land Co. v. Milwaukee Elec. R. & Light Co., 107 Wis. 493, 83 N. W. 851. Wis. Rev. St. § 1862, provides for the incorporation of street railways for the carrying of freight as well as passengers is not unconstitutional because of the imposition of an additional burden on abutting property owners without compensation for the law only authorizes the occupancy of a street as against the city. The occupation is still subject to the rights of abutting owners. See §§ 818 et seq.

[1125] Haugen v. Albina Light & Water Co., 21 Or. 411, 28 Pac. 244, 14 L. R. A. 424.

[1126] City Council of Montgomery v. Capital City Water Co., 92 Ala. 361; City and Council of San Francisco v. Spring Valley Water-works Co., 53 Cal. 608; Cedar Rapids Water Co. v. City of Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081; Heman v. St. Louis Merchants' Land Imp. Co., 75 Mo. App. 372; Benton v. Elizabeth City, 61 N. J. Law, 693, 40 Atl. 1132; Appeal of City of Pittsburgh, 115 Pa. 4, 7 Atl. 778; City of Ashland v. Wheeler, 88 Wis. 607, 60 N. W. 818; Chisholm v. City of Halifax, 29 Nova Scotia, 402.

[1127] City of New Haven v. New Haven Water Co., 44 Conn. 105. The right to charge a reasonable fee for granting a license to a water company to open the street sustained.

Ft. Pitt Gas Co. v. Borough of Sewickley, 198 Pa. 201, 47 Atl. 957. A fee of fifty cents required for making each excavation in a street is reasonable and proper. One of $3 for unpaved and $5.00 for paved street with a deposit of $10.00 in each case, held unreasonable and disproportionate for the expense incurred by the borough in the supervision of its streets.

of a permit from the proper officer before this can be done is not only a lawful one but reasonable.[1128]

§ 910. Replacing improvements.

In the larger cities and towns on the main streets and many of the residence streets, costly and permanent improvements are made at the expense of the abutting owner. The implied right unquestionably exists on the part of the public authorities to reasonably restrict companies to whom the right has been given to use the highway for any of the purposes indicated, in the tearing up of these improvements.[1129] A regulation requiring a permit is reasonable [1130] and the grantee of the right should be required to restore the highway to the condition in which it was at the time it was torn up at its own expense [1131] and in the same permanent and workmanlike manner.[1132] So, corporations occupying the

[1128] Missouri v. Murphy, 170 U. S. 78; Mutual Elec. Light Co. v. Ashworth, 118 Cal. 1. A city cannot discriminate in the granting of permits. United States Illuminating Co. v. Hess, 19 N. Y. State Rep. 883, 3 N. Y. Supp. 777; Ghee v. Northern Union Gas Co., 34 App. Div. 551, 56 N. Y. Supp. 450, reversed in some respects in 158 N. Y. 510, 53 N. E. 692.

[1129] City of Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 107, 27 L. R. A. 514; Northern Liberties Com'rs v. Northern Liberties Gas Co., 12 Pa. 318; Ft. Pitt Gas Co. v. Borough of Sewickley, 198 Pa. 201, 47 Atl. 957.

[1130] Ghee v. Northern Union Gas Co., 34 App. Div. 551, 56 N. Y. Supp. 450, reversed in some instances in 158 N. Y. 510, 53 N. E. 692.

[1131] Crebs v. City of Lebanon, 98 Fed. 549. A city has no power to enforce these conditions against a purchaser at foreclosure sale who removed the rails leaving ties in the streets. Indianapolis & C. R. Co. v. City of Lawrenceburg, 34 Ind. 304; State v. Lake Koen Navigation, Reservoir & Irr. Co., 63 Kan. 394, 65 Pac. 681; City of Duluth v. Duluth St. R. Co., 60 Minn. 178, 62 N. W. 267; State v. Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; Village of Mechanicville v. Stillwater & M. St. R. Co., 67 App. Div. 628, 74 N. Y. Supp. 1149; McHale v. Easton & B. Transit Co., 169 Pa. 416, 32 Atl. 461; City of Philadelphia v. Thirteenth & Fifteenth St. Pass. R. Co., 169 Pa. 269, 33 Atl. 126. But see State v. New Orleans Traction Co., 48 La. Ann. 567, 19 So. 565; Stillwater Water Co. v. City of Stillwater, 50 Minn. 498, 52 N. W. 893. Holding a nonliability under conditions considered. City of Dallas v. Dallas Consol. Traction Co. (Tex. Civ. App.) 33 S. W. 757. See §§ 857 et seq., ante.

[1132] City of Kalamazoo v. Kalamazoo Heat, Light & Power Co., 124 Mich. 74, 82 N. W. 811.

public highways may be controlled in their use of them in respect to sewers, pipes, mains or wires belonging to the public corporation [1133] or other private companies [1134] and they may be made liable for any injuries to them which occur through their own use of the highway.

§ 911. 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. In Connecticut [1135] the construction of a line of poles and wires upon a highway where the same interferes with or necessitates the removal or trimming of trees is dependent upon the consent of the abutting owner. 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.[1136] If the principle obtains in a particular state that a line of this character is an additional burden, then the company cannot destroy or trim trees even when reasonably necessary to the construction of the line without compensating the owner or becoming liable for the damages sustained by him.[1137] Where the other rule holds, however, namely, that the construction of a line of telegraph, telephone or electric wires

[1133] Hough v. Smith, 37 Misc. 363, 75 N. Y. Supp. 451; City of San Antonio v. San Antonio St. R. Co., 15 Tex. Civ. App. 1, 39 S. W. 136.

[1134] Rockland Water Co. v. Tillson, 75 Me. 170; People v. Squire, 107 N. Y. 593, affirmed 145 U. S. 175.

[1135] Hoyt v. Southern New England Tel. Co., 60 Conn. 385; Bradley v. Southern New England Tel. Co., 66 Conn. 559, 34 Atl. 499, 32 L. R. A. 280. Conn. Gen. St. §§ 3944, 3945, 3946.

[1136] Brown v. Ashville Elec. Light Co. (N. C.) 51 S. E. 62; Tate v. City of Greensboro, 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671. See, also, Donahue v. Keystone Gas Co., 181 N. Y. 313, 73 N. E. 1108.

[1137] McAntire v. Joplin Tel. Co., 75 Mo. App. 535; Clay v. Postal Tel. Cable Co., 70 Miss. 406; McCruden v. Rochester R. Co., 77 Hun, 609, 28 N. Y. Supp. 1135. Awarding damages under Code Civ. Proc. § 1667. Gorham v. Eastchester Elec. Co., 80 Hun (N. Y.) 290; Daily v. State, 51 Ohio St. 348, 24 L. R. A. 724; Rugg v. Commercial Union Tel. Co., 66 Vt. 208.

does not constitute an additional burden for which compensation may be recovered, these companies have the right, when they have been lawfully granted the authority to occupy highways, to remove or trim trees whenever this becomes reasonably necessary for the construction or in the proper maintenance of the line for the purpose for which it was constructed,[1138] but they clearly have no right to destroy or injure trees on private property.[1139]

§ 912. 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 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.[1140] 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,[1141] and because based upon an exercise of the police power

[1138] Southern Bell Telep. & Tel. Co. v. Constantine, 61 Fed. 61; Southern Bell Tel. Co. v. Francis, 109 Ala. 224, 19 So. 1, 31 L. R. A. 193; Consolidated Traction Co. v. East Orange Tp., 61 N. J. Law, 202, 38 Atl. 803. Joyce, Elec. Law, § 395.

[1139] Western Union Tel. Co. v. Satterfield, 34 Ill. App. 386; Tissot v. Great Southern Teleg. & Tel. Co., 39 La. Ann. 996; Cumberland Tel. & Tel. Co. v. Shaw, 102 Tenn. 313, 52 S. W. 163.

[1140] Missouri v. Murphy, 170 U. S. 78; Id., 130 Mo. 10; Elec. Imp. Co. v. City and Council of San Francisco, 45 Fed. 593; Electric Construction Co. v. Heffernan, 58 Hun, 605, 12 N. Y. Supp. 336; Lahr v. Metropolitan El. R. Co., 104 N. Y. 268; Ogden City R. Co. v. Ogden City, 7 Utah, 207, 26 Pac. 288. See, also, cases cited in the following notes.

[1141] 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. "The public safety and welfare is the highest consideration in all legislation, and to this consideration private rights must yield. No man has a right to so use a dangerous species of property as to put the safety of others in peril. Liberty does not imply the right of one man to so use property as to endanger the property of others, nor does ownership imply any such right. This is rudimental. It must, therefore, be true that the owner of property of such a dangerous nature as to require regulations to prevent injury to others can have no right paramount to the police power. It is not too much to say that as against the police power there is no such thing as a vested right." State v. Inhabitants of City of Trenton, 58 N. J. Law, 132, 20 Atl. 1076; Benedict v. Columbus

as continuing and inextinguishable,[1142] and further, one that cannot be surrendered or bargained away.[1143] 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.[1144] While it is true that, under modern conditions, railway, telephone and telegraph service, a supply of gas or water, electricity for light, or power, are regarded as not only conveniences but necessities and that it is impossible to distribute or supply them without a use of the public highways, yet it must be remembered that these uses of a public highway while indispensable according to present notions, are but secondary and subordinate uses.[1145] The public authorities,

Const. Co., 49 N. J. Eq. 23; Western Union Tel. Co. v. City of Philadelphia (Pa.) 12 Atl. 144. Northern Liberties Com'rs v. Northern Liberties Gas Co., 12 Pa. 318; Commonwealth v. Warwick, 185 Pa. 623, 40 Atl. 93.

[1142] 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; New Memphis Gas & Light Co. v. City of New Memphis, 72 Fed. 952. But property rights cannot be destroyed under an illegal exercise of the police power. 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. State v. Columbus Gaslight & Coke Co., 34 Ohio St. 572; Zanesville v. Zanesville Gas-Light Co., 47 Ohio St. 1, 23 N. E. 55; City of Knoxville v. Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888. See §§ 115 et seq., ante.

[1143] See § 913, post.

[1144] Wabash R. Co. v. City of Defiance, 167 U. S. 88; Schmitt v. City of New Orleans, 48 La. Ann. 1440, 21 So. 24. A city council in locating a street railway has a right to designate what part of the street it can occupy. Milhau v. Sharp, 27 N. Y. 611. A resolution of the common council of New York City permitting private persons to lay down and make use of a street railway with no power reserved to rescind it and no limitation in time is a contract and not a license and is void because it grants powers which are a public trust and cannot be delegated or abridged by the corporate authorities. Montreal Park & I. R. Co. v. Town of St. Louis, 17 Rap. Jud. Que. C. S. 545. See, also, § 909, ante.

[1145] City of Mobile v. Louisville & N. R. Co., 124 Ala. 132, 26 So. 902; Chicago General R. Co. v. Chicago City R. Co., 62 Ill. App. 502; Pennsylvania Co. v. City of Chicago, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223; Lebanon Light, Heat & Power Co. v. Leap, 139 Ind. 443, 39 N. E. 57, 29 L. R. A. 342. Laying pipes in a highway without per-

therefore, can regulate, because of this legal condition and fact, such use and occupation. The numerous subordinate public corporations and public quasi corporations vary in the extent of their powers according to the purpose for which they are created by the state.[1146] Their right to adopt regulations or control the use of the public highways either because of the police power or the other right just suggested will depend, therefore, upon the extent and character of the powers belonging to them and as based upon their position among governmental agencies. The legislature provides for the organization of municipal corporations proper including cities, villages and towns; and of public quasi corporations which include, ordinarily, townships, counties, and other similar organizations.[1147] To each one of these, either by general legislation or by special charters, is given the power of regulating the use of public property within their jurisdiction,[1148] and the statement of this broad principle necessarily includes a regulation of each separate act, of a license or grantee of the privilege of using that property or any portion of it for the purpose of constructing and operating street railway systems,[1149] light,[1150] power, water,[1151] gas,[1152] telephone[1153] or tele-

mission is unlawful. Commonwealth v. City of Frankfort, 92 Ky. 149, 17 S. W. 287; St. Louis, I. M. & S. R. Co. v. Neely, 63 Ark. 636, 40 S. W. 130, 37 L. R. A. 616; Elmer v. Board of Chosen Freeholders of Cumberland County, 57 N. J. Law, 366, 30 Atl. 475; Thompson v. Ocean City R. Co., 60 N. J. Law, 74, 36 Atl. 1087; Coney Island, Ft. H. & B. R. Co. v. Kennedy, 15 App. Div. 588, 44 N. Y. Supp. 825; Delaware, L. & W. R. Co. v. City of Buffalo, 158 N. Y. 266, 53 N. E. 44; Wabash R. Co. v. City of Defiance, 52 Ohio St. 262; Jones v. Erie & W. V. R. Co., 169 Pa. 333, 32 Atl. 535; Potter v. Scranton Traction Co., 176 Pa. 271, 35 Atl. 188. The right, however, of a street railway to use an ordinary and usual appliance upon its track to repair an overhead wire, is for a reasonable time paramount. San Antonio & A. P. R. Co. v. Bergsland, 12 Tex. Civ. App. 97, 34 S. W. 155; City of San Antonio v. San Antonio St. R. Co., 15 Tex. Civ. App. 1, 39 S. W. 136.

[1146] Barnes v. District of Columbia, 91 U. S. 540; Laramie County Com'rs v. Albany County, 92 U. S. 310. Cooley, Const. Lim. (7th Ed.) p. 266, note 2, citing many cases. See §§ 1 et seq.

[1147] City of Philadelphia v. McManes, 175 Pa. 28, 34 Atl. 331.

[1148] Ghee v. Northern Union Gas Co., 158 N. Y. 510, 53 N. E. 692, reversing 34 App. Div. 551, 56 N. Y. Supp. 450; Cuyahoga County Com'rs v. Akron, B. & C. R. Co., 21 Ohio Circ. R. 769.

[1149] Kennelly v. City of Jersey City, 57 N. J. Law, 293, 30 Atl. 531, 26 L. R. A. 281. The word "may" means "must" thus rendering man-

graph plants; whether those supplying any of these facilities or commodities engage in the business of furnishing them for public or private use or both.

§ 913. Character of right; regulation.

Where municipal or public quasi corporations possess the power of regulation, an exercise of that power is legislative in its character and, therefore, discretionary.[1154] Its exercise is presumed to be within the powers of the corporation and in a lawful and proper manner and, as said in a Missouri case,[1155] "In all matters pertaining to the police regulation of municipalities, their ordinances, being of the nature of legislative discretion, are prima facie reasonable." The exercise of a discretionary power is not, in the absence of fraud or a gross abuse, ordinarily subject to judicial control.[1156] This principle, however, does not apply to the result of such legislative discretion.

Delegation of delegated powers. To municipal and public corporations is given by the state the right to exercise certain governmental powers. There is a delegation of this right by the state to its agent. Where these governmental powers or functions involve the exercise of judgment and discretion they can-

datory that provision of Act 1893, § 3 (P. L. p. 241), relative to the manner in which place shall be located and strung wires for a city railway. Columbia Elec. St. R., Light & Power Co. v. Sloan, 48 S. C. 21, 25 S. E. 898.

[1150] Electric Imp. Co. v. City and County of San Francisco, 45 Fed. 593, 13 L. R. A. 131; Norwalk & S. N. Elec. Light Co. v. Common Council, 71 Conn. 381, 42 Atl. 82; Ellinwood v. City of Reedsburg, 91 Wis. 131, 64 N. W. 885.

[1151] City of New Haven v. New Haven Water Co., 44 Conn. 105.

[1152] See Thornton, Oil & Gas, § 480.

[1153] Hershfield v. Rocky Mountain Bell Tel. Co., 12 Mont. 102; Hudson Tel. Co. v. Jersey City, 49 N. J. Law, 303.

[1154] See §§ 496 et seq., ante.

[1155] City of St. Louis v. Western Union Tel. Co., 63 Fed. 68, 5 Am. Electrical Cas. 50; City of Des Moines v. Des Moines Water-works Co., 95 Iowa, 348, 64 N. W. 269. The principle applied to a schedule of water rates. Brown v. Chicago Great Western R. Co., 137 Mo. 529, 38 S. W. 1099.

[1156] Forman v. New Orleans & C. R. Co., 40 La. Ann. 446, 4 So. 246; Gay v. Mutual Union Tel. Co., 12 Mo. App. 485; Consolidated Traction Co. v. Elizabeth City, 58 N. J. Law, 619, 34 Atl. 146, 32 L. R. A. 170; Robinson v. Gilroy, 10 Misc. 205, 30 N. Y. Supp. 411; Sheehy v. Clausen, 26 Misc. 269, 55 N. Y. Supp. 1000. Joyce, Elec. Law, § 220, and cases cited.

not be delegated but must be exercised under the immediate authority of the corporation to whom they have been originally delegated by the state.[1157] The rule also obtains that governmental powers in whatever body the right to exercise which may exist cannot be surrendered or sold to corporate or natural private persons.[1158] Governmental powers are such as pertain to the sovereign to be exercised for the benefit of the public at large. It follows from an application of this principle that the right to regulate whether based upon the police power or that one which has for its purpose the protection and maintenance of public property to the uses for which acquired cannot be surrendered or disposed of by contract, license or grant to natural or corporate persons engaged in supplying the facilities or any of them under discussion.[1159]

[1157] City of Indianapolis v. Indianapolis Gaslight Co., 66 Ind. 396.

[1158] Citizens' St. R. Co. v. Jones, 34 Fed. 579; Logansport R. Co. v. City of Logansport, 114 Fed. 688; Florida Cent. & P. R. Co. v. Ocala St. & S. R. Co., 39 Fla. 306, 22 So. 692; City of Louisville v. Wible, 84 Ky. 290, 1 S. W. 605. "The power to protect, through her cities and towns, and other public agencies, the public health, the public morals and the public safety, cannot be relinquished or surrendered; for the government is bottomed upon the fundamental principle of the promotion of the peace, safety, happiness and security of its citizens. Therefore, any surrender of its power to protect the public health, the public morals, the public peace, the public safety of the citizen, would violate this fundamental principle, and tend to revolution and anarchy. The power, therefore, cannot be surrendered. The state, however, and its municipalities intrusted with the execution of this power, may provide the means of protecting the public health. It is its duty to do so, and any means may be adopted that will effect that end, such as employing competent and trusty persons to take the matter in charge under the supervision and control of the State or City."

State v. Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32; State v. Bell, 34 Ohio St. 194; City of Brenham v. Water Co., 67 Tex. 542, 4 S. W. 143; Altgelt v. City of San Antonio, 81 Tex. 436, 13 L. R. A. 383. The Constitution of Texas, however, forbids the granting of exclusive franchises. North Springs Water Co. v. City of Tacoma, 21 Wash. 517, 58 Pac. 773, 47 L. R. A. 214. But see Western Sav. Fund Soc. v. City of Philadelphia, 31 Pac. 185. See §§ 112 and 115 et seq., ante.

[1159] Rogers Park Water Co. v. Fergus, 180 U. S. 624, affirming 178 Ill. 571, 53 N. E. 363; Stone v. Mississippi, 101 U. S. 817; Jackson County Horse R. Co. v. Interstate Rapid Transit R. Co., 24 Fed. 306; Nash v. Lowry, 37 Minn. 261; Flynn v. Little Falls Elec. & Water Co., 74

§ 914. Subways.

As already suggested, the use of electricity for light and power, because of the high currents necessarily generated, is destructive to life and property, and the use and occupation of public highways by electric companies and also by telephone and telegraph companies in erecting poles and stringing wires may not be only an obstruction to legitimate travel,[1160] a nuisance because of their size and number, but also an interference in towns and cities in the work of extinguishing fires. It follows necessarily, therefore, that because of any or all of these reasons and conditions such companies may be required or given the option either when the license is granted to them for the use of the streets, or subsequently,[1161] to lay their wires in underground conduits or subways. Laws or ordinances when properly passed having this for their purpose will be regarded as reasonable and their re-

Minn. 186; State v. St. Paul City R. Co., 78 Minn. 331, 81 N. W. 200; State v. Minnesota Transfer R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656; West Point Water Power & Land Imp. Co. v. State, 49 Neb. 223, 68 N. W. 507, reversing 49 Neb. 218, 66 N. W. 6; Wabash R. Co. v. City of Defiance, 52 Ohio St. 262, 40 N. E. 89.

Cooley, Const. Lim. (7th Ed.) p. 293. "Another and very important limitation which rests upon municipal powers is that they shall be executed by the municipality itself, or by such agencies or officers as the statute has pointed out. So far as its functions are legislative, they rest in the discretion and judgment of the municipal body intrusted with them, and that body cannot refer the exercise of the power to the discretion and judgment of its subordinates or of any other authority."

[1160] See § 908, ante.

[1161] Missouri v. Murphy, 170 U. S. 78; Id., 130 Mo. 10; Western Union Tel. Co. v. City of New York, 38 Fed. 552, 3 L. R. A. 449; Hooper v. Baltimore City Pass. R. Co., 85 Md. 509, 37 Atl. 359, 38 L. R. A. 509; State v. Murphy, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 34 L. R. A. 369, 35 S. W. 1132; National Subway Co. v. City of St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113; Paterson R. Co. v. Grundy, 51 N. J. Eq. 213; Trustees of Presbyterian Church v. State Board of Com'rs of Electrical Subways, 55 N. J. Law, 436; United States Illuminating Co. v. Hess, 19 N. Y. State Rep. 883, 3 N. Y. Supp. 777; Postal Tel. Cable Co. v. Grant, 58 Hun, 603, 11 N. Y. Supp. 323; Electric Power Co. v. City of New York, 29 Misc. 48, 60 N. Y. Supp. 590; People v. Squire, 107 N. Y. 593, 14 N. E. 820; American Rapid Tel. Co. v. Hess, 125 N. Y. 641, 26 N. E. 919, 13 L. R. A. 454; Empire City Subway Co. v. Broadway & S. A. R. Co., 159 N. Y. 555, 54 N. E. 1092; Kaukauna Elec. Light Co. v. City of Kaukauna, 114 Wis. 327, 89 N. W. 542.

quirements enforced.[1162] The condition may be general and apply to all the streets or those within certain restricted limits which limits may be enlarged from time to time.[1163] There is authority to the effect that where the state has granted a license to use public highways for these purposes without this condition, that a subordinate municipal corporation cannot by ordinance unreasonably compel the placing of wires underground.[1164] A proper exercise of the police power it would seem would necessarily include the right of subordinate public corporations to protect the lives and property of their citizens irrespective of implied limitations existing in a license granted by the state.

[1162] United States Elec. Lighting Co. v. Ross, 24 Wash. Law Rep. 775. New York Laws 1884, c. 534; 1885, c. 499; 1887, c. 716.

[1163] United States Elec. Light Co. v. Ross, 24 Wash. Law Rep. 775.

[1164] Northwestern Tel. Exch. Co. v. City of Minneapolis, 81 Minn. 140, 53 L. R. A. 175, on reargument, 150. The court in this case held that where, under the state law, telephone companies were given a right to erect poles and wires upon the public roads and highways, this included urban streets as well as rural roads and that the city of Minneapolis had no authority to arbitrarily order a removal of poles and wires from the surface, but could only compel telephone companies to put their wires in underground conduits when reason, convenience or good government of the municipality required. In construing an ordinance granting a license to the telephone company, the court said: "An ordinance of a municipality, surrendering a part of its powers to a corporation to secure and encourage works of improvement, which require the outlay of money and labor, to subserve the public interests of its citizens, when accepted and acted upon, becomes a contract between the city and the corporation which relied upon it, and the grantee cannot be arbitrarily deprived of the rights thus secured. It is protected by the organic law which forbids the impairment of contracts or interference with vested rights without due process of law." In discussing the right of the city to enact ordinances the court said on pages 149: "We do not intend, in the disposition of this case, to abridge the wholesome right of municipal government to regulate their internal and domestic affairs within the limits essential to the welfare of their citizens. A city has the right to enact reasonable ordinances, and to enforce them; but it is the conservator, not the autocrat, of the police power. It may originate the exercise of its useful authority, and apply it by specific and valid regulations; but that exercise is not despotic, nor absolute, but is open to review, and an ordinance that upon its face is unreasonable and arbitrary is subject to judicial examination. When it is not bounded by a fair and wise administration of municipal authority, but is unreasonable and arbitrary, it will be declared void, and

§ 915. 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.[1165] Or again, by

the municipality restrained from its enforcement."

[1165] Osborne v. San Diego Land & Town Co., 178 U. S. 22, affirming 76 Fed. 319, construing Cal. Act 1885, p. 95, § 5, giving the supervisors the power to fix water rates. Freeport Water Co. v. City of Freeport, 180 U. S. 587, affirming 186 Ill. 179, 57 N. E. 862; Danville Water Co. v. City of Danville, 180 U. S. 619, affirming 186 Ill. 326, 57 N. E. 1129.

Santa Ana Water Co. v. Town of San Buenaventura, 56 Fed. 339. A condition in respect to fixing rates applying to a water company has no application to individuals engaged in the same business and this exemption will apply to a corporation organized to succeed them.

Manhattan Trust Co. v. City of Dayton, 59 Fed. 327. A provision for a maximum price is not a contract for any period but an exercise of the municipal power to regulate and a limitation on the license granted.

Cleveland City R. Co. v. City of Cleveland, 94 Fed. 385; Peoples' Gaslight & Coke Co. v. City of Chicago, 114 Fed. 384; Crosby v. City Council of Montgomery, 108 Ala. 498, 18 So. 723. An ordinance establishing water rates for domestic purposes is void for uncertainty in failing to designate what constitutes a domestic purpose. McFadden v. County of Los Angeles, 74 Cal. 571, 16 Pac. 397. Public authorities have no power to fix the water rate for a corporation organized to furnish water to the stockholders only.

Leadville Water Co. v. City of Leadville, 22 Colo. 297, 45 Pac. 362; Trustees of Illinois Cent. Hospital for Insane v. City of Jacksonville, 61 Ill. App. 199. Under Hurd's Rev. St. c. 24, secs. 254, 7, a city is not authorized to bind itself by contract to furnish water for a period of years at a fixed rate. Decatur Gas-Light & Coke Co. v. City of Decatur, 120 Ill. 67, 11 N. E. 406, afg. 24 Ill. App. 544.

Forman v. New Orleans & C. R. Co., 40 La. Ann. 446, 4 So. 246; Wabaska Elec. Co. v. City of Wymore, 60 Neb. 199, 82 N. W. 626. In the absence of such a charter right a city of the second class has no authority to regulate the rates and charges of an electric light company.

Brush Elec. Ill. Co. v. Consolidated Tel. & Electrical Subway Co., 15 N. Y. Supp. 81. The board of electrical control have power to determine the reasonableness of rents for use of an electrical subway. 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; Cleburne Water, Ice & Lighting Co. v. Cleburne, 13 Tex. Civ. App. 141, 35 S. W. 733; Tacoma Gas & Elec. Co. v. City of Tacoma, 14 Wash. 288, 44 Pac. 655. Act 1890, enables cities to adopt charters authorizing them to provide light by maintaining plants and to regulate and control the use thereof but

the universal rule which prevails that in the absence of express restrictions, rates charged must be reasonable.[1166] This latter principle is based upon the idea that persons or corporations carrying on the business of furnishing light, water, power or transportation are to be regarded as engaged in a quasi public business since the commodities they furnish are either necessary or convenient to the public convenience, health or welfare.[1167]

under this condition do not have the power to regulate the price to be charged for light by private companies under franchises granted them. Linden Land Co. v. Milwaukee Elec. R. & Light Co., 107 Wis. 493, 83 N. W. 851.

[1166] Santa Ana Water Co. v. Town of San Buenaventura, 56 Fed. 339; Cleveland Gaslight & Coke Co. v. City of Cleveland, 71 Fed. 610; 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. Construing items for basis of reasonable charges.

San Diego Water Co. v. City of San Diego, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460. A private corporation supplying water cannot be denied the privilege of being heard pending an investigation to the reasonableness of its charges by a city council. City of Rushville v. Rushville Natural Gas Co. (Ind.) 28 N. E. 853; Robria v. New Orleans & C. R. Co., 45 La. Ann. 1368, 14 So. 214; In re Janvrin, 174 Mass. 514, 55 N. E. 381, 47 L. R. A. 319. The power may be delegated to a court to determine the reasonableness of water rates. Goebel v. Grosse Pointe Waterworks, 126 Mich. 307, 85 N. W. 744. Rates considered and held reasonable.

Cline v. City of Springfield, 7 Ohio N. P. 626. As incident to the right of municipal corporations to regulate the price of gas, a city has authority to require gas companies to furnish annually such data and necessary information exclusively in their possession as will enable it to fix the price intelligently. Brymer v. Butler Water Co., 179 Pa. 331, 36 Atl. 249. A system of water rates that yields no more income than is required to maintain the plant, to pay fixed charges and operating expenses, to provide a suitable sinking fund for payment of debts and pay a fair profit to the stockholders on their investment, is not unreasonable. City of Knoxville v. Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888.

[1167] Rogers Park Water Co. v. Fergus, 180 U. S. 624, affirming 178 Ill. 571, 53 N. E. 363; Gray v. Western Union Tel. Co., 87 Ga. 350, 14 L. R. A. 95; People's Gas Light & Co. v. Hale, 94 Ill. App. 406; Central Union Tel. Co. v. Swoveland, 14 Ind. App. 341, 42 N. E. 1035; Indiana Natural & Illuminating Gas Co. v. Anthony, 26 Ind. App. 307, 58 N. E. 868; True v. International Tel. Co., 60 Me. 9; Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6; Ellis v. American Tel. Co., 95 Mass. (13 Allen) 226; American Water Works Co. v. State, 46 Neb. 194, 64 N. W. 711,

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,[1168] and to prevent discrimination.[1169] When a contract establishes the rates which may be charged, this provision creates an obligation which cannot be destroyed or impaired by attempts

30 L. R. A. 447; Griffin v. Goldsborro Water Co., 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240; Passmore v. Western Union Tel. Co., 78 Pa. 242.

[1168] Osborne v. San Diego Land & Town Co., 178 U. S. 22; San Diego Land & Town Co. v. National City, 74 Fed. 79; People's Gaslight & Coke Co. v. City of Chicago, 114 Fed. 384; Crosby v. City Council of Montgomery, 108 Ala. 498, 18 So. 723; Spring Valley Water Works Co. v. City of San Francisco, 82 Cal. 286, 22 Pac. 910, 1046, 6 L. R. A. 756; Creston Waterworks Co. v. City of Creston, 101 Iowa, 687, 70 N. W. 739; Hall v. City of Cedar Rapids, 115 Iowa, 199, 88 N. W. 448; Rockland Water Co. v. Adams, 84 Me. 472, 24 Atl. 840; In re Janvrin, 174 Mass. 514, 55 N. E. 381, 47 L. R. A. 319. That section of the water supply company, Statutes 1895, c. 488, is not unconstitutional as requiring the courts to exercise legislative functions because it provides for the determination of a reasonable water rate by certain designated judges.

City of St. Louis v. Arnot, 94 Mo. 275, 7 S. W. 15. Evidence of the cost of waterworks as a basis of water rates is irrelevant. Haverhill Aqueduct Co. v. Page, 52 N. H. 472; Brymer v. Butler Water Co., 179 Pa. 331, 36 Atl. 249. A court under Pennsylvania Act April 29th, 1874, has no jurisdiction to prepare a general tariff of water rates where a charge of unreasonableness is made. City of Knoxville v. Knoxville Water Co., 107 Tenn. 647, 61 L. R. A. 888, affirmed 189 U. S. 434. Power to regulate rates by a municipal corporation must be expressly given. But see City of Noblesville v. Noblesville Gas & Improvement Co., 157 Ind. 162, 60 N. E. 1032.

[1169] Lanning v. Osborne, 76 Fed. 319; 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. But rates based on the requirements of different consumers will not be regarded as discrimination. See, also, on this point, the following cases: Sheward v. Citizens' Water Co., 90 Cal. 635, 27 Pac. 439; Silkman v. Yonkers Water Com'rs, 152 N. Y. 327, 46 N. E. 612, 37 L. R. A. 827; Exchange Bldg. Co. v. Roanoke Gas & Water Co., 90 Va. 83, 17 S. E. 789; and State v. Gosnell, 116 Wis. 606, 93 N. W. 542, 61 L. R. A. 33.

Richmond Natural Gas Co. v. Clawson, 155 Ind. 659, 58 N. E. 1049, 51 L. R. A. 744; Meridian Waterworks Co. v. Schulherr (Miss.) 17 So. 167; St. Louis Brewing Ass'n v. City of St. Louis, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911; Passmore v. Western Union Tel. Co., 78 Pa. 242; Exchange & Bldg. Co. v. Roanoke Gas & Water Co., 90 Va. 83, 17 S. E. 789. Facts considered and held not discriminating.

to reduce the rates thus fixed during the term of the license or contract.[1170]

§ 916. 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.[1171] The rule, therefore, is well established that rates, though the right to change them exist,[1172] cannot be fixed so low as to effect a taking of property under any of the constitutional provisions mentioned;[1173] neither can a contract provision fixing rates be

[1170] Santa Ana Water Co. v. Town of San Buenaventura, 56 Fed. 339. See, also, authorities cited in the following section. Los Angeles City Water Co. v. City of Los Angeles, 88 Fed. 720; Agua Pura Co. v. City of Las Vegas, 10 N. M. 6, 60 Pac. 208; City of Ashland v. Wheeler, 88 Wis. 607, 60 N. W. 818.

[1171] 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. Act reducing street railway fares held unconstitutional as special legislation.

[1172] Freeport Water Co. v. City of Freeport, 180 U. S. 587, affirming 186 Ill. 179, 57 N. E. 862; Rogers Park Water Co. v. Fergus, 180 U. S. 624; Danville Water Co. v. City of Danville, 180 U. S. 619, 21 Sup. Ct. 505, affirming 186 Ill. 326, 57 N. E. 1129.

[1173] 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 Land & Town Co. v. Jasper, 89 Fed. 274. The actual present value of the property of the water company and not its cost is to be taken as a basis in ascertaining a reasonable rate to be charged by it for water. Such a basis should provide for the depreciation of the plant for profit to the owners.

San Joaquin & K. R. Canal & Irr. Co. v. Stanislaus County, 90 Fed. 516; Spring Valley Water Works Co. v. City of San Francisco, 82 Cal. 286, 22 Pac. 910, 1046, 6 L. R. 756; San Diego Water Co. v. City of San Diego, 118 Cal. 556, 50 Pac. 663, 38 L. R. A. 460; People's Gas Light & Coke Co. v. Hale, 94 Ill. App. 406; City of Des Moines v. Des Moines Waterworks Co., 95 Iowa, 348, 64 N. W. 269; Goebel v. Grosse Pointe Waterworks Co., 126 Mich. 307, 85 N. W. 744; State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262. "The intention of the legislature in empowering city councils to regulate the price of gas, was to limit incorporated gas companies to fair and reasonable prices

broken by either party.[1174] 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.[1175] In the San Diego case (174 U. S. 739) the Su-

for the gas which they might furnish for public or private use. This discretionary power of regulation might have been vested elsewhere; but wherever vested it must be exercised in good faith, for the purpose for which it was given. If, in the colorable exercise of this power, a majority of the members of the council, for a fraudulent purpose, combine to pass an ordinance fixing the price of gas at a rate at which they well know it cannot be manufactured and sold without loss, such an ordinance, so fraudulently passed, would impose no obligations on the gas company intended to be affected thereby. And in a proceeding like the present, the good faith of the members of the city council who passed the ordinance may be inquired into."

[1174] City of Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, affirming 88 Fed. 720; Los Angeles City Water Co. v. City of Los Angeles, 103 Fed. 711; Leadville Water Co. v. City of Leadville, 22 Colo. 297, 45 Pac. 362; Westfield G. & M. Co. v. Mendenhall, 142 Ind. 538; City of Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 107, 27 L. R. A. 514; City of Noblesville v. Noblesville Gas & Improvement Co., 157 Ind. 162, 60 N. E. 1032; Agua Pura Co. v. City of Las Vegas, 10 N. M. 6, 60 Pac. 208; Logan Natural Gas & Fuel Co. v. City of Chillicothe, 65 Ohio St. 186, 62 N. E. 122; Sewickly Borough School Dist. v. Ohio Val. Gas Co., 154 Pa. 539, 25 Atl. 868; City of Ashland v. Wheeler, 88 Wis. 607, 60 N. W. 818. But see Freeport Water Co. v. City of Freeport, 180 U. S. 587, affirming 186 Ill. 179, 57 N. E. 862; Danville Water Co. v. City of Danville, 180 U. S. 619, affirming 186 Ill. 326, 57 N. E. 1129.

[1175] Stone v. Farmers' Loan & Trust Co., 116 U. S. 307; Chicago 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; Minneapolis Eastern R. Co. v. Minnesota, 134 U. S. 467, reversing 40 Minn. 156, 41 N. W. 465; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362; Reagan v. Mercantile Trust Co., 154 U. S. 413; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649.

Smyth v. Ames, 169 U. S. 466. The court in this case said: "The basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the orginal cost of construction, the probable earning capacity of the prop-

preme Court of the United States in its opinion by Mr. Justice Harlan said in passing upon the question of reasonableness of rates: "That it was competent for the State of California to declare that the use of all water appropriated for sale, rental or distribution should be a public use and subject to public regulation and control and that it could confer upon the proper municipal corporation power to fix the rates of compensation to be collected for the use of water supplied to any city, county or town or to the inhabitants thereof, is not disputed, and is not, as we think, to be doubted. It is equally clear that this power could not be exercised arbitrarily and without reference to what was just and reasonable as between the public and those who appropriated water and supplied it for general use; for the state cannot by any of its agencies, legislative, executive or judicial, withhold from the owners of private property just compensation for its use. That would be a deprivation of property without due process of law. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226; Smyth v. Ames, 169 U. S. 466. But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use. * * * The contention of the appellant in the present case is that in ascertaining what are just rates the court should take into consideration the cost of its plant; the cost per annum of operating the plant, including interest paid on money borrowed and reasonably necessary to be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and a fair profit to the company over and above such charges for its services in supplying the water to consumers, either by way of interest on the money it has expended for the public use, or upon some other fair and equitable basis. Undoubtedly, all these matters ought to be taken into consideration, and such weight be given them, when rates are being fixed,

as under all the circumstances will be just to the company and to the public. The basis of calculation suggested by the appellant is, however, defective in not requiring the real value of the property and the fair value in themselves of services rendered to be taken into consideration. What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property. So that it cannot be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the company and to the public."

§ 917. Contract obligation.

Where a maximum charge is established in the grant of the license or privilege, the courts have repeatedly held that the right to collect this becomes then a contract obligation,[1176] and one which is protected by the federal constitution against ordinances, regulations or other action which seeks to effect a reduction in the rates thus lawfully permitted to be charged.[1177]

§ 918. Assignment 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

erty under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." City of Detroit v. Detroit Citizens' St. R. Co., 184 U. S. 368.

[1176] Cleveland City R. Co. v City of Cleveland, 94 Fed. 385; In re Pryor, 55 Kan. 724, 41 Pac. 958, 29 L. R. A. 398; Pingree v. Michigan Cent. R. Co., 118 Mich. 314, 76 N. W. 635, 53 L. R. A. 274.

[1177] City of Detroit v. Detroit Citizens' St. R. Co., 184 U. S. 368; Ball v. Rutland R. Co., 93 Fed. 513.

the rights which it may possess under its original lawful authority is largely dependent upon the language of the license or contract.[1178] 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 be lawfully exercised.[1179] Privileges may be granted for a term beyond

[1178] City of Los Angeles v. Los Angeles City Water Co., 177 U. S. 558; Louisville Trust Co. v. City of Cincinnati, 73 Fed. 716; American Waterworks Co. v. Farmers' Loan & Trust Co., 73 Fed. 956; People v. Stanford, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92; Visalia Gas & Electric Light Co. v. Sims, 104 Cal. 326, 37 Pac. 1042; San Luis Water Co. v. Estrada, 117 Cal. 168; Huntting v. Hartford St. R. Co., 73 Conn. 179, 46 Atl. 824; Consolidated Traction Co. v. Elizabeth City, 58 N. J. Law, 619, 32 L. R. A. 170; People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255. A street railway may, however, by statute, be prohibited from leasing its rights and franchises to any other company owning and operating a parallel road.

[1179] City of Detroit v. Detroit City R. Co., 60 Fed. 161; Africa v. City of Knoxville, 70 Fed. 729; American Water-works Co. v. Farmers' Loan & Trust Co. (C. C. A.) 73 Fed. 956; Los Angeles City Water Co. v. City of Los Angeles, 88 Fed. 720; City of Austin v. Bartholomew (C. C. A.) 107 Fed. 349; San Luis Water Co. v. Estrada, 117 Cal. 168, 48 Pac. 1075; Peoples' Gas Light & Coke Co. v. Hale, 94 Ill. App. 406; 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. The purchaser of a street railway receiving from the city council the privileges and franchises belonging to the former company is also obliged to assume the burdens accompanying it. Green v. City & Surburban R. Co., 78 Md. 294, 28 Atl. 626; City of Lawrence v. Inhabitants of Methuen, 166 Mass. 206, 44 N. E. 247; Horsky v. Helena Consolidated Water Co., 13 Mont. 229, 33 Pac. 689; State v. Laclede Gas-Light Co., 102 Mo. 472, 14 S. W. 974, 15 S. W. 383; Borough of Wilbur v. Trenton Pass. R. Co., 57 N. J. Law, 212, 31 Atl. 238; Consolidated Traction Co. v. Elizabeth City, 58 N. J. Law, 619, 34 Atl. 146, 32 L. R. A. 170; Brinkerhoff v. Newark & H. Traction Co., 66 N. J. Law, 478, 49 Atl. 812; Cincinnati Inclined Plane R. Co. v. City of Cincinnati, 52 Ohio St. 609, 44 N. E. 327; Borough of Sandy Lake v. Sandy Lake & S. Gas Co., 16 Pa. Super. Ct. 234; Borough of Easton v. Lehigh Water Co., 97 P. 554; City of Philadelphia v. Thirteenth & Fifteenth Sts. Pass. R. Co., 169 Pa. 269, 33 Atl. 126; Columbia Water Power Co. v. City of Columbia, 5 Rich. (S. C.) 225.

Ft. Worth St. R. Co. v. Allen (Tex.) 39 S. W. 125. A street railroad accepting its license on the condition that it will keep the streets in repair cannot relieve itself from this liability by leasing its line to another company. Jenkins v. Columbia Land & Imp. Co., 13 Wash. 502, 43 Pac. 328; Com-

the corporate life of the licensee or grantee under this principle for in this case they may be assigned to interests lawfully succeeding them.[1180]

§ 919. Revocation or impairment of the grant.

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 without the consent of the interested party to whom the license is granted.[1181] The federal constitution protects as inviolable these

mercial Elec. Light & Power Co. v. City of Tacoma, 17 Wash. 661, 50 Pac. 592; Wright v. Milwaukee Elec. R. & Light Co., 95 Wis. 29, 69 N. W. 791, 36 L. R. A. 47; but see Detroit v. Mutual Gas Light Co., 43 Mich. 594, 5 N. W. 1039, where a condition prohibiting a combination with competing companies was sustained. See, also, Stafford v. Chippewa Val. Elec. R. Co., 110 Wis. 331, 85 N. W. 1036, where a new franchise was held not subject to old conditions and regulations. Richmond Water-works Co. v. Vestry of Richmond, 45 Law J. Ch. 441; Id. 3 Ch. Div. 82. See, also, City Water Co. v. State (Tex. Civ. App.) 33 S. W. 259.

[1180] City of Detroit v. Detroit Citizens' St. R. Co., 184 U. S. 368; Edison Elec. Light Co. v. New Haven Elec. Co., 35 Fed. 233; Detroit Citizens' St. R. Co. v. City of Detroit, 64 Fed. 628, 26 L. R. A. 667; State v. Laclede Gas Light Co., 102 Mo. 472, 14 S. W. 974, 15 S. W. 383; State v. Payne, 129 Mo. 468, 31 S. W. 797, 33 L. R. A. 576; People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255. A franchise acquired is property which survives the dissolution of corporations by legislative act. Watson v. Fairmont & S. R. Co., 49 W. Va. 528, 39 S. E. 193. A franchise to operate a street railway may be granted to an individual who may then make a valid assignment of the same with the consent of the council to a private corporation.

[1181] The Binghamton Bridge, 70 U. S. (3 Wall.) 51; City R. Co. v. Citizens' St. R. Co., 166 U. S. 557; Citizens' St. R. Co. v. City R. Co., 64 Fed. 647; City of Laredo v. International Bridge & Tramway Co., 66 Fed. 246; Africa v. City of Knoxville, 70 Fed. 729; City of Knoxville v. Africa (C. C. A.) 77 Fed. 501; Southwest Missouri Light Co. v. City of Joplin, 101 Fed. 23, 113 Fed. 817; Anoka Water-works, Electric Light & Power Co. v. City Anoka, 109 Fed. 580; Harrell v. Ellsworth, 17 Ala. 576; Capital City Light & Fuel Co. v. City of Tallahassee, 42 Fla. 462, 28 S. 810; City of Los Angeles v. Los City Water Co., 61 Cal. 65; MeLeod v. Burroughs, 9 Ga. 213; Bellevue Water Co. v. City of Bellevue, 3 Hasbrouk (Idaho) 739, 35 Pac. 693; People v. Chicago West Div. R. Co., 18 Ill. App. 125; Peoples' Gas Light & Coke Co. v. Hale, 94 Ill. App. 406;

contract rights—for such they are.[1182] Questions concerning the revocation of a grant if properly presented become under these circumstances Federal questions and within the jurisdiction of the Federal courts as provided by law.

Grant of same privilege to others. While it is true that a grant or license of the character under discussion cannot be illegally revoked or impaired, as above stated, yet, where the grant, privilege or license is not exclusive in its character, the grant of a similar privilege to others to engage in the same business or even the erection of a competing plant by the public corporation itself does not result in an impairment of the prior grant.[1183]

City of Belleville v. Citizens' Horse R. Co., 152 Ill. 171, 26 L. R. A. 681; Tudor v. Chicago & S. S. Rapid Transit R. Co., 154 Ill. 129, 39 N. E. 136; City R. Co. v. Citizens' St. R. Co. (Ind.) 52 N. E. 157; Board of Com'rs of Hamilton County v. Indianapolis Nat. Gas Co., 134 Ind. 209, 33 N. E. 972; City of Newport v. Newport Light Co., 84 Ky. 166; City of Louisville v. Wible, 84 Ky. 290; East Louisiana R. Co. v. City of New Orleans, 46 La. Ann. 526, 15 So. 157; Vicksburg, S. & P. R. Co. v. Town of Monroe, 48 La. Ann. 1102; Proprietors of Bridges v. Hoboken Land & Imp. Co., 13 N. J. Eq. (2 Beasl.) 81; Theberath v. City of Newark, 57 N. J. Law, 309, 30 Atl. 528; Suburban Elec. Light & Power Co. v. Inhabitants of East Orange (N. J. Eq.) 41 Atl. 865; Phillipsburg Elec. Lighting, Heating & Power Co. v. Inhabitants of Phillipsburg, 66 N. J. Law, 505, 49 Atl. 445; Agua Pura Co. of Las Vegas v. City of Las Vegas, 10 N. M. 6, 60 Pac. 208; City of New York v. New York & H. R. Co., 10 Misc. 417, 31 N. Y. Supp. 147; People v. Deehan, 11 App. Div. 175, 42 N. Y. Supp. 1071; Chenango Bridge Co. v. Lewis, 63 Barb. (N. Y.) 111; New York Sanitary Utilization Co. v. Department of Public Health, 32 Misc. 577, 67 N. Y. Supp. 324; Bennett Water Co. v. Borough of Millvale, 202 Pa. 616, 51 Atl. 1098; Galveston & W. R. Co. v. City of Galveston (Tex. Civ. App.) 37 S. W. 27. But see Wilmington City R. Co. v. Peoples' R. Co. (Del. Ch. App.) 47 Atl. 245; United Railways & Elec. Co. v. Hayes, 92 Md. 490, 48 Atl. 364. Under Baltimore City Charter of 1898 all grants and franchises are revocable.

[1182] 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; Cleveland City R. Co. v. City of Cleveland, 94 Fed. 385; Mercantile Trust & Deposit Co. v. Collins Park & B. R. Co., 99 Fed. 812; Chicago Municipal Gas Light & Fuel Co. v. Town of Lake, 130 Ill. 42, 22 N. E. 616; State v. Laclede Gas Light Co., 102 Mo. 472, 14 S. W. 974, 15 S. W. 383. See § 927, post. See, also, cases cited in preceding note.

[1183] 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; Bienville Water Supply Co. v. City of Mobile, 95 Fed. 539.

Newburyport Water Co. v. City of

§ 920. 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.[1184] The arbitrary right, how-

Newburyport, 103 Fed. 584. "Where the state grants a franchise to a corporation, and subsequently grants a similar franchise to another corporation, the question of a taking may be considered from three points of view: Where the first grant is not exclusive, the subsequent grant is not a taking which entitles the owner of the first franchise to compensation. Where the first grant is exclusive, the grant of a rival franchise is a taking, and just compensation must be made. Where the first grant is exclusive, the grant of a similar franchise does not constitute a taking requiring compensation, when the state, by its constitution of state law, has reserved to itself the power to repeal, alter, or amend charters granted by the legislature. Such reservation becomes a part of the charter of every corporation. The franchise rights granted to the company by its charter were not exclusive. This is not disputed. We have been presented the question whether the subsequent grant to the city of the right to build competing waterworks constituted a taking of the plaintiff's property or franchise. It is the settled law of this country, established by the decisions of the federal and state courts, that such a grant is not a taking of a former franchise, giving any right to compensation."

Fall v. Sutter County, 21 Cal. 237; Hughes v. City of Momence, 163 Ill. 535, 45 N. E. 300; Atlantic City Water-works Co. v. Consumers Water Co., 44 N. J. Eq. 427, 15 Atl. 581; Inhabitants of Franklin v. Nutley Water Co., 53 N. J. Eq. 601; Oswego Falls Bridge Co. v. Fish, 1 Barb. Ch. (N. Y.) 547.

Smith v. Town of Westerly, 19 R. I. 437, 35 Atl. 526. A town is not bound by a contract which extends the authority conferred upon it by statute. Trent v. Cartersville Bridge Co., 11 Leigh (Va.) 529. See, also, the following cases considering exclusive privileges and the protection to be granted them against competition: Hartford Bridge Co. v. Town of East Hartford, 16 Conn. 149; Enfield Toll Bridge Co. v. Hartford & N. H. R. Co., 17 Conn. 454; Washington Bridge Co. v. State, 18 Conn. 53; Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 210.

[1184] Louisville Trust Co. v. City of Cincinnati (C. C. A.) 76 Fed. 296. A failure for twenty years to maintain a highway on certain streets included in a license will operate as an abandonment of the grant in respect to these streets. City of Chicago v. Chicago & W. I. R. Co., 105 Ill. 73. A street railway was granted the license to lay its tracks on the express condition that they should be constructed within a year. The failure to perform this condition caused by injunctions and interference of police officers acting under the direction

ever, of a municipal corporation to revoke or declare forfeited license rights does not ordinarily exist;[1185] the reasonable rights

of the mayor of the city cannot be made the occasion for a revocation of the license. New Orleans, C. & L. R. Co. v. City of New Orleans, 44 La. Ann. 748, 11 So. 77. A city may be estopped to declare a forfeiture if it permits without interference a street railroad to construct its line in a forfeited street. West Springfield & A. St. R. Co. v. Bodurtha, 181 Mass. 583, 64 N. E. 414; Whiting v. Village of New Baltimore, 127 Mich. 66, 86 N. W. 403; St. Louis & M. R. Co. v. City of Kirkwood, 159 Mo. 239, 60 S. W. 110, 53 L. R. A. 300.

Kitchell v. Manchester Road Elec. R. Co., 79 Mo. App. 340. The failure on the part of a street railroad company to complete its road in conformance with or within the time limited by its franchise cannot be taken advantage of in a suit to enjoin its operation by a private individual unless he can show peculiar injury to himself. Water Supply Co. of Albuquerque v. City of Albuquerque, 9 N. M. 441, 54 Pac. 969. One of the conditions of the grant under consideration was to furnish an agreed quantity of water for "city purposes." The court held that the water company could not be required to furnish water to the board of education for use in public schools under this condition as it was not a "city purpose." City of New York v. New York Refrigerating Const. Co., 8 Misc. 61, 28 N. Y. Supp. 614. Village of Bolivar v. Bolivar Water Co., 62 App. Div. 484, 70 N. Y. Supp. 750; Burke v. Carbondale Traction Co., 3 Lack. Jur. (Pa.) 297; Hannum v. Media, M., A. & C. Elec. R. Co., 200 Pa. 44, 49 Atl. 789; Township of Plymouth v. Chestnut Hill & N. R. Co., 168 Pa. 181, 32 Atl. 19. The fact that the company acted in good faith and that the revocation caused it great hardship is a ground for permitting it to continue in its work. Wright v. Milwaukee Elec. R. & Light Co., 95 Wis. 29, 69 N. W. 791, 36 L. R. A. 47. Conditions considered and not held sufficient to constitute an abandonment so as to extinguish a franchise. Kaukauna Elec. Light Co. v. City of Kaukauna, 114 Wis. 327, 89 N. W. 542. Condition considered in this case a stipulation on the part of the company to bury its wires when required. State v. Janesville Water Power Co., 92 Wis. 496, 66 N. W. 512, 32 L. R. A. 391. The doctrine of estoppel may apply as against the city or a municipality in respect to an illegal act.

Wright v. Milwaukee Elec. R. & Light Co., 95 Wis. 29, 69 N. W. 791, 36 L. R. A. 47. Nonuser of a street railway franchise for a period of four years under the circumstances in the case was here held not to constitute such an abandonment as to warrant its forfeiture. But see Dern v. Salt Lake City R. Co., 19 Utah, 46, 56 Pac. 556, where it is held that a street railway company having operated its lines for a period of twenty-seven years and no proceedings having been taken to forfeit its franchise, all deficiencies will be considered to have been waived.

[1185] New Orleans Water-works Co. v. St. Tammany Water-works

of the parties should be determined by a judicial tribunal having jurisdiction and before which the question is properly presented.[1186] Grounds for a forfeiture may exist with reference to portions of a license or grant; where the unquestioned right of forfeiture exists as to these, the remaining parts of the grant will not be forfeited.[1187] 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 [1188] or one that reaches

Co., 14 Fed. 194; Foster v. City of Joliet, 27 Fed. 899, affirmed 30 Law. Ed., 942; Citizens' St. R. Co. v. City of Memphis, 53 Fed. 715; Santa Rosa City R. Co. v. Central St. Co. (Cal.) 38 Pac. 986. A forfeiture of a street railroad franchise is not affected by the grant of the same rights by the city to another company. City of Kankakee v. Kankakee Water Co., 38 Ill. App. 620. Where notice is required by contract, the giving of notice is necessary. Chicago Gen. R. Co. v. Chicago City R. Co., 62 Ill. App. 502; Township of Plymouth v. Chestnut Hill & N. R. Co., 168 Pa. 181, 32 Atl. 19. The commonwealth alone can move for the forfeiture of a street railroad charter for a failure to construct its road within the time fixed by statute. But see Coverdale v. Edwards, 155 Ind. 374, 58 N. E. 495.

[1186] Streator v. Village of Ashtabula, 98 Fed. 516; Citizens' Horse R. Co. v. City of Belleville, 47 Ill. App. 388; Peoples' Gas Light & Coke Co. v. Hale, 94 Ill. App. 406; Phillipsburg Elec. Lighting, Heating & Power Co. v. Inhabitants of Phillipsburg, 66 N. J. Law, 505, 49 Atl. 445; Galveston & W. R. Co. v. City of Galveston, 90 Tex. 398, 39 S. W. 96, 36 L. R. A. 33. But see Galveston City R. Co. v. Gulf City St. R. Co., 63 Tex. 529, which holds that the right to occupy streets given by a city to a street railway company is a mere license, not a contract, and upon abandonment the city can confer the right on another company without first procuring a decree of forfeiture.

[1187] Levis v. City of Newton, 75 Fed. 884. The rule applies also to a grant void in part because ultra vires. Illinois Trust & Sav. Bank v. Arkansas City (C. C. A.) 76 Fed. 271, 34 L. R. A. 518; City of Greenville v. Greenville Water-works Co., 125 Ala. 625, 27 So. 764; City R. Co. v. Citizens' St. R. Co. (Ind.) 52 N. E. 157; New York Cable Co. v. City of New York, 104 N. Y. 1.

[1188] 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; City of Grand Haven v. Grand Haven Water-works Co., 99 Mich. 106, 57 N. W. 1075; Burns v. City of Fairmont, 28 Neb. 866, 45 N. W. 175; Borough of Almsted v. Morris Aqueduct, 46 N. J. Law, 495; Easton v. Lehigh Water Co., 97 Pa. 554; Du Bois Borough v. Du Bois City Water-works Co., 176 Pa. 430, 35 Atl. 248, 34 L. R. A. 92. If the contract provides for water from a certain source, no objection can be made if it proves inadequate. City of Sherman v. Connor, 88 Tex. 35, 29 S. W. 1053.

a certain standard of purity or quality.[1189] A failure to comply with such conditions may lead to a refusal to pay charges[1190] or it may be the occasion for a forfeiture or revocation of rights granted by the license or under the contract.[1191] The existence of circumstances, however, sufficient to warrant the latter action is a question for judicial determination unless by the terms of the grant an arbitrary right is given to the public authorities. 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.[1192] A public corporation may also be estopped by acquiescence or waiver in certain conditions to claim a forfeiture.[1193] Ordinarily, the failure of a licensee to

[1189] 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; Light, Heat & Water Co. v. City of Jackson, 73 Miss. 598; Danaher v. City of Brooklyn, 119 N. Y. 241, 23 N. E. 745, 7 L. R. A. 592; Com. v. Towanda Waterworks (Pa.) 15 Atl. 440; Brymer v. Butler Water Co., 172 Pa. 489; Palestine Water & Power Co. v. City of Palestine, 91 Tex. 540, 44 S. W. 814, 40 L. R. A. 203. But see Grand Junction Water Co. v. City of Grand Junction, 14 Colo. App. 424, 60 Pac. 196.

[1190] Bienville Water Supply Co. v. City of Mobile, 112 Ala. 260, 20 So. 742, 33 L. R. A. 59; City of Kankakee v. Kankakee Water Co., 38 Ill. App. 620. The rule will not apply to water used, or for water furnished fire hydrants. See, also, as holding same, City Council of Montgomery v. Montgomery Waterworks, 79 Ala. 233; Adrian Waterworks Co. v. City of Adrian, 64 Mich. 584, 31 N. W. 529. See cases cited in preceding notes.

[1191] Farmers' Loan & Trust Co. v. City of Galesburg, 133 U. S. 156; Capital City Water Co. v. State, 105 Ala. 406, 18 So. 62, 29 L. R. A. 743; 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; Palestine Water & Power Co. v. City of Palestine, 91 Tex. 540, 44 S. W. 814, 40 L. R. A. 203. But see City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1.

[1192] Cherryvale Water Co. v. Cherryvale, 65 Kan. 219, 69 Pac. 176; 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.

[1193] Creston Water-works Co. v. City of Creston, 101 Iowa, 687, 70 N. W. 739; Wiley v. Inhabitants of Athol, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342; City of Grand Rapids v. Grand Rapids Hydraulic Co., 66 Mich. 606, 33 N. W. 749; Lamar Water & Elec. Co. v. City of Lamar,

comply with conditions imposed in respect to quantity or quality cannot be taken advantage of by private consumers,[1194] but there are cases to the contrary.[1195]

§ 921. 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. In the following sections will be considered grants, licenses or privileges by or through which private corporations or individuals secure the exclusive right to conduct the business named or supply commodities designated. 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.[1196]

140 Mo. 145, 39 S. W. 768. But see St. Cloud v. Water, Light & Power Co., 88 Minn. 329, 92 N. W. 1112.

[1194] Fowler v. Athens City Water-works Co., 83 Ga. 219, 9 S. E. 673; Davis v. Clinton Water-works Co., 54 Iowa, 59; Ferris v. Carson Water Co., 16 Nev. 44; Eaton v. Fairbury Water-works Co., 37 Neb. 546, 56 N. W. 201, 21 L. R. A. 653; Gorrell v. Greensboro Water Supply Co., 124 N. C. 328, 46 L. R. A. 513. Farnham on Waters, § 160*b*.

[1195] Mott v. Cherryvale Water & Mfg. Co., 48 Kan. 152, 28 Pac. 989, 15 L. R. A. 375; Duncan v. Owensboro Water Co., 12 Ky. L. R. 35, 12 S. W. 557; Wainwright v. Queens County Water Co., 78 Hun, 146, 28 N. Y. Supp. 987; Nichol v. Huntington Water Co., 53 W. Va. 348, 44 S. E. 290; Britton v. Green Bay & Ft. H. Water-works Co., 81 Wis. 48, 51 N. W. 84.

[1196] Pearsall v. Great Northern R. Co., 161 U. S. 646. "An exclusive right to enjoy a certain franchise is never presumed, and unless the charter contain words of exclusion, it is no impairment of the grant to permit another to do the same thing, although the value of the franchise to the first grantee may be wholly destroyed. This principle was laid down at an early day in the case of the Charles River Bridge v. Warren Bridge, 11 Pet. 420, and has been steadily adhered to ever since." Gulf City St. R. Co. v. Galveston City R. Co., 65 Tex. 502. See, also, §§ 925, 926, post.

§ 922. Legal power to grant.

The only legal objection worthy of consideration against the granting of an exclusive privilege is that there is thereby created a monopoly.[1197] The original idea of a monopoly is that of an exclusive privilege of trade in a particular commodity within designated limits and for a specified time or as it has been said, the word has[1198] "Reference to a branch of business in which all had a right to engage and in which, as a matter of fact, many had previously been engaged." An exclusive license or contract is not because of the grant, a monopoly, as originally understood and as properly 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. The granting of an exclusive privilege for a supply of water, light, power, telephone or telegraph service again is not to be regarded as a monopoly because while as to some of these occupations the manufacture of the commodity may be an ordinary business yet the selling and distribution to the public is quite unlike the handling of other products.[1199] The grant of a monopoly is usually regarded as illegal but, as already suggested, it has reference to the carrying on of a business or occupation

[1197] Gale v. Village of Kalamazoo, 23 Mich. 344; Davenport v. Kleinschmidt, 6 Mont. 502, 13 Pac. 249; Coombs v. MacDonald, 43 Neb. 632, 62 N. W. 41; City of Brenham v. Water Co., 67 Tex. 542, 4 S. W. 143; Altgelt v. City of San Antonio, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 383. A taxpayer without showing that he can obtain water at better terms is not a proper party to a proceeding to vacate a contract by a city with the water-works company which, it is claimed, is illegal because granting a monopoly.

[1198] 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; City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1. Grant of a right to a water company considered and held not to create a monopoly. Gale v. Village of Kalamazoo, 23 Mich. 344. An exclusive privilege for the erection of a market house and its maintenance held to create a monopoly and therefore invalid. Davenport v. Kleinschmidt, 6 Mont. 502. Grant of an exclusive water contract held void as creating a monopoly. 7 Bacon's Abr. 22.

[1199] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650. See, also, cases cited generally under this and the following section.

which, because both of its character and the manner or place under which conducted should be enjoyed by all the citizens of a community as a matter of ancient and common right.[1200] The granting of an exclusive privilege for the sale and distribution of the commodities or service just suggested is not to be regarded as the grant of a monopoly because as to nearly all these occupations they cannot be exercised or carried on by the public as a matter of common right.[1201] A franchise in the strict sense of the

[1200] Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 567. "A monopoly is that which has been granted without consideration; as a monopoly of trade; or of the manufacture of any particular article, to the exclusion of all competition. It is withdrawing that which is a common right, from the community, and vesting it in one or more individuals to the exclusion of all others."

Gale v. Village of Kalamazoo, 23 Mich. 344. The grant of an exclusive market privilege held a monopoly and therefore invalid. The court in its opinion by Judge Cooley said in part: If a municipal corporation can preclude itself in this manner from establishing markets wherever they may be thought desirable, or from abolishing them when found undesirable, it must have the right also to agree that it will not open streets, or grade or pave such as are opened, or introduce water for the supply of its citizens, except from some specified source, or buy fire engines of any other than some stipulated kind, or contract for any public work except with persons named; and if it might do these things it is easy to perceive that it might not be long before the incorporation itself, instead of being a convenience to its citizens, would have been used in various ways to compel them to submit to innumerable inconveniences, and would itself constitute a public nuisance of the most serious and troublesome description. Individual citizens, looking only to the furtherance of their private interests, might, in various directions, engage it in permanent contracts, which, while ostensibly for the public benefit, should impose obligations precluding further improvements and depriving the town prospectively of those advantages and conveniences which the municipality was created to supply, and without which it is worthless."

Parfitt v. Ferguson, 3 App. Div. 176, 38 N. Y. Supp. 466. A grant to a gas company that no other shall have the consent of the town to lay pipes or conductors during the term of the contract is void.

Spelling, Trusts & Monopolies, § 100. "It is of the essence of a contract creating a monopoly that it confers upon one or more the exclusive privilege of doing that which others in the absence of such contract would have an equal right to do. It must be an invasion of a common right."

[1201] Citizens' Gas & Min. Co. v. Town of Elwood, 114 Ind. 332, 16 N. E. 624. A municipal corporation may by its refusal to grant to

word, must be given to a person or group of persons by the sovereign before the business can be regarded even as a legal one.[1202] Some of those mentioned above, it has been suggested, are to be regarded as an ordinary business but again they cannot be carried on because of the place and manner in which the business is usually conducted; the public highways are under the exclusive control of the sovereign or its delegated agencies and before the business can be carried on or conducted it is necessary to secure the permission of the state or of the sovereign for, as said by a case of the Supreme Court of the United States,[1203] in construing the grant of an exclusive right to manufacture and distribute gas; "Legislation of that character is not liable to the objection that it is a mere monopoly, preventing citizens from engaging in an ordinary pursuit or business, open as of common right to all, upon terms of equality; for, the right to dig up the streets and other public ways of New Orleans, and place therein pipes and mains for the distribution of gas for public and private use, is a franchise, the privilege of exercising which could only be granted by the state, or by the municipal government of that city acting under legislative authority." While, therefore, the grant of an exclusive right to lay gas pipes in the streets of a city may be void as in the nature of a monopoly on account of the existence of the common right to manufacture gas, it will not be regarded as a monopoly because of the place and the manner in which the business must be necessarily conducted and carried on.[1204] Public authorities unquestionably have the power to grant

other companies the special privilege of laying gas mains and pipes practically give to one this exclusive right.

Elliott, Roads & St. (2d ed.) § 748. "It is one thing to restrict the exercise of common right and quite another thing to create an extraordinary right or privilege and make it exclusive. In granting a right to use a highway for a street railway, the legislature makes that lawful which, but for the grant, would be unlawful, for no citizen has a right to use a highway in any other than the usual modes, except where the legislature authorizes him to do so." Tiedeman, State & Fed. Control of Persons & Prop. § 128. See, also, cases cited in this and the following section.

[1202] New Orleans Gas Co. v. Louisana Light Co., 115 U. S. 650; Crescent City Gas Light Co. v. New Orleans Gas Light Co., 27 La. Ann. 138. See, also, authorities cited generally in this and following section.

[1203] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650.

[1204] Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683, reversing 81

or deny at their discretion, with or without conditions, the right to individuals or private corporations to obstruct, tear down or occupy and use the public highways. A recent author[1205] has very concisely put the discussion and principle and the result of it as follows: "When, on the other hand, the state bestows upon one or more the privileges of pursuing a calling, or trade, the prosecution of which is not a common natural right because it cannot be prosecuted without the aid of a legal privilege, a lawful monopoly is created, but no right of the individual is violated; for, with the abolition of the monopoly thus created, would disappear all right to carry on the trade. The trade never existed before as a lawful calling. Such monopolies are valid, and free from all constitutional objections. The grant of exclusive franchises is a matter of relatively common occurrences, and is rarely questioned."

§ 923. Same subject continued.

In the absence of a constitutional prohibition,[1206] therefore, the principle almost universally obtains that under the conditions noted in the preceding section 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 on a lawful business have been by such action violated.[1207] It is clearly within the power of the legis-

Ky. 263; City of Indianapolis v. Indianapolis Gas Light & Coke Co., 66 Ind. 396; City of Newport v. Newport Light Co., 84 Ky. 167; Peoples' Gas Light Co. v. Jersey City, 46 N. J. Law, 297; State v. Milwaukee Gas Light Co., 29 Wis. 460. See, also, New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. 19.

[1205] Tiedeman, State & Fed. Control of Persons & Prop. § 127.

[1206] Constitutional provisions in Alabama, North Carolina, Tennessee and Texas.

[1207] Richmond, F. & P. R. Co. v. Louisa R. Co., 13 How. (U. S.) 71; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683; Decatur Gas Light Co. v. City of Decatur, 120 Ill. 67, 11 N. E. 406, affirming 24 Ill. App. 544. The validity of an ordinance giving a gas company the perpetual and exclusive right to furnish the city with gas cannot be questioned in an action by the gas company for gas furnished the city under the ordinance.

Baltimore Trust & Guarantee Co. v. City of Baltimore, 64 Fed. 153; Birmingham & P. M. St. R. Co. v. Birmingham St. R. Co., 79 Ala. 465. Constitutional provision prohibits

lature to determine who shall receive a franchise, in the strict sense of the word, under what terms, in what manner, and where

the "making of any irrevocable grant of special privileges or immunities." California State Tel. Co. v. Alta Tel. Co., 22 Cal. 398; Riverside Water Co. v. Sargent, 112 Cal. 230; Des Moines St. R. Co. v. Des Moines B. St. R. Co., 73 Iowa, 513, 33 N. W. 610, 35 S. W. 602; Teachout v. Des Moines Broad-Gauge St. R. Co., 75 Iowa, 722, 38 N. W. 145; Hanson v. Hunter, 86 Iowa, 722; City of Newport v. Newport Light Co., 11 Ky. L. R. 840, 12 S. W. 1040; Smiley v. MacDonald, 42 Neb. 5, 60 N. W. 355, 27 L. R. A. 540. An exclusive contract for the removal of garbage is not in conflict with constitution, art. 3, § 15, forbidding the grant of exclusive privileges. Thrift v. Elizabeth City, 122 N. C. 31, 44 L. R. A. 427; Cincinnati St. R. Co. v. Smith, 29 Ohio St. 291. The city council of Cincinnati have no power to pass an ordinance giving a street railroad the exclusive right to operate its road on the street.

Luzerne Water Co. v. Toby Creek Water Co., 148 Pa. 568, 24 Atl. 117; City of Memphis v. Memphis Water Co., 52 Tenn. (5 Heisk.) 495. See art. 41 Alb. Law J. 104, by W. W. Thornton on validity of grant to exercise an exclusive privilege in respect to the use of public highways. City of Memphis v. Memphis Water Co., 67 Tenn. (8 Baxt.) 587.

City of Houston v. Houston City St. R. Co., 83 Tex. 548, 19 S. W. 127. The right is clearly recognized by the Texas Constitution of any city to give its consent to the use of its streets by street railroads. Parkersburg Gas Co. v. City of Parkersburg, 30 W. Va. 435, 4 S. E. 650. Neither under its charter nor the general statutes in relation to municipal corporations has the city of Parkersburg the power to grant a private corporation the exclusive privilege of using its streets and alleys for laying gas pipes and furnishing the city and its inhabitants with gas for thirty years.

Clarksburg Elec. Light Co. v. City of Clarksburg, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142. A grant may be made to an intended corporation to be subsequently organized. Linden Land Co. v. Milwaukee Elec. R. & Light Co., 107 Wis. 493, 83 N. W. 851. A city may extend an existing franchise before its expiration. But see Board of Public Works of Denver v. Denver Tel. Co., 28 Colo. 401, 65 Pac. 35.

Citizens' Gas Light Co. v. Louisville Gas Co., 81 Ky 263. The grant of an exclusive right to vend gas in a city is void under that provision of the Kentucky Constitution which declares that no set of men are entitled "to exclusive public emoluments or privileges from the community but in consideration of public services." New Orleans, C. & L. R. Co. v. City of New Orleans, 44 La. Ann. 748, 11 So. 77. Under its charter the city of New Orleans has no power to grant an exclusive franchise to a street railroad company. Washington Toll Bridge Co. v. Beaufort County Com'rs, 81 N. C. 491; Parkhurst v. Capital City R. Co., 23 Or. 471; Henderson v. Ogden City R. Co., 7 Utah, 199, 26 Pac. 286. A grant by a municipality to a street railway company of the exclusive right to use its

it shall be exercised.[1208] A grant or license though invalid either because of its exclusive character or the time of its existence

streets is ultra vires. See, also, Beach, Monopolies, c. 8; Eddy, Combinations, §§ 17 et seq.; Spelling, Trusts & Monopolies, § 102; Thornton, Oil & Gas, §§ 441 et seq.

[1208] Fanning v. Gregoire, 16 How. (U. S.) 524. Exclusive grant to operate a ferry construed, and while it is held that no court or board of county commissioners could subsequently grant another franchise, the legislature could do so. New Orleans Water-works Co. v. Rivers, 115 U. S. 674. "For, if it was competent for the state, before the adoption of her present constitution, as we have held it was, to provide for supplying the City of New Orleans and its people with illuminating gas by means of pipes, mains, and conduits placed at the cost of a private corporation, in its public ways, it was equally competent for her to make a valid contract with a private corporation for supplying, by the same means, pure and wholesome water for like use in the same city. The right to dig up and use the streets and alleys of New Orleans for the purpose of placing pipes and mains to supply the city and its inhabitants with water is a franchise belonging to the state, which she could grant to such persons or corporations, and upon such terms, as she deemed best for the public interests. And as the object to be attained was a public one, for which the state could make provision by legislative enactment, the grant of the franchise could be accompanied with such exclusive privileges to the grantee, in respect of the subject of the grant, as in the judgment of the legislative department would best promote the public health and the public comfort, or the protection of public and private property."

City of Laredo v. International Bridge & Tramway Co. (C. C. A.) 66 Fed. 246; Taylor v. Montreal Harbour Com'rs, 17 Rap. Jud. Que. C. S. 275. Giving to a syndicate for a term of forty years the exclusive use and occupation of certain wharves for construction of elevators and the carrying on the business of buying and shipping grain is not the grant of an illegal monopoly.

Evans v. Hughes County, 6 Dak. 102, 50 N. W. 720. Political Code, c. 29, §§ 54 & 55, relative to the grant of ferry licenses or leases to the highest bidder and which further provides that when any lease has been granted, no other shall be given within two miles thereof, is valid. Detroit Citizens' St. R. Co. v. City of Detroit, 110 Mich. 384, 68 N. W. 304, 35 L. R. A. 859; Reid v. Trowbridge, 78 Miss. 542, 29 So. 167. The objection that a contract or lighting streets is void because exclusive can only be invoked by the city or one seeking a similar privilege.

Patterson v. Wollmann, 5 N. D. 608, 33 L. R. A. 536; Cincinnati Gas Light & Coke Co. v. Village of Avondale, 43 Ohio St. 257, Ohio Rev. St. §§ 2478, 2485, prohibit the giving of exclusive privileges to any person for the construction or extension of gas works. See, as holding the same. State v. Cincin-

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.[1209]

§ 924. Must be express authority.

It is necessary, however, to enable a municipal corporation proper to grant an exclusive privilege or license that the authority should be expressly granted.[1210] The same rule applies to all

nati Gas Light & Coke Co., 18 Ohio St. 262. See Spelling, Trusts & Monopolies, c 9. But see the following cases where the right is modified because of constitutional provisions or for other reasons: Minturn v. LaRue, 23 How. (U. S.) 435; City of Chicago v. Rumpff, 45 Ill. 90; Long v. City of Duluth, 49 Minn. 280, 51 N. W. 913; Janeway v. City of Duluth, 65 Minn. 292, 68 N. W. 24; Davenport v. Kleinschmidt, 6 Mont. 502, 13 Pac. 249; Iler v. Ross, 64 Neb. 710, 90 N. W. 869, 57 L. R. A. 895; Atlantic City Water-works Co. v. Consumers' Water Co., 44 N. J. Eq. 427, 15 Atl. 581. But see, in connection with this case, Atlantic City Water-works Co. v. Atlantic City, 48 N. J. Law, 378, and Logan v. Pyne, 43 Iowa, 524.

Brenham v. Brenham Water Co., 67 Tex. 542, 4 S. W. 143.

[1209] Levis v. City of Newton, 75 Fed. 884.

[1210] Grand Rapids E. L. & P. Co. v. Grand Rapids E. L. & F. G. Co., 33 Fed. 659. "To confer exclusive rights and privileges, either in the streets of a city or in the public highways, necessarily involves the assertion and exercise of exclusive powers and control over the same. Nothing short of the whole sovereign power of the state can confer exclusive rights and privileges in public streets, dedicated or acquired for public use, and which are held in trust for the public at large." Jackson County Horse R. Co. v. Interstate Rapid Transit R. Co., 24 Fed. 306; City of Detroit v. Detroit City R. Co., 56 Fed. 867; Logansport R. Co. v. City of Logansport, 114 Fed. 688; In re Robinson & City of St. Thomas, 23 Ont. 489; Birmingham & P. M. St. R. Co. v. Birmingham St. R. Co., 79 Ala. 465; Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. 19; Capital City Light & Fuel Co. v. City of Tallahassee, 42 Fla. 462, 28 So. 810; City of East St. Louis v. East St. Louis Gas Light & Coke Co., 98 Ill. 415; Snyder v. City of Mt. Pulaski, 176 Ill. 397, 52 N. E. 62, 44 L. R. A. 407; Citizens' Gas & Min. Co. v. Town of Elwood, 114 Ind. 332, 16 N. E. 624; City of Indianapolis v. Indianapolis Gas Light & Coke Co. 66 Ind. 396; Rockland Water Co. v. Camden & R. Water Co., 80 Me. 544, 1 L. R. A. 388; Detroit Citizens' St. R. Co. v. City of Detroit, 110 Mich. 384, 68 N. W. 304, 35 L. R. A. 859.

Long v. City of Duluth, 49 Minn. 280, 51 N. W. 913. Dickinson, Judge, in the opinion said: "It is hardly necessary to advert in this connection to the fact that municipal corporations have only such powers as are conferred by the legislature, and the same principle of strict construction which forbids that a

subordinate public agencies.[1211] A state legislature, however, possesses the right to exercise all powers not prohibited by the constitution and an exclusive privilege may be granted by it even though the power does not affirmatively appear in the constitution which is its written source of authority and so long as it has not been there prohibited.[1212]

Not included within general grant to provide for comfort and welfare or regulate highways. 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

direct grant of a franchise by the legislature be construed as exclusive, is applicable in the construction of powers delgated to municipal corporations with respect to such matters. The authority conferred upon such governmental agencies of the state to grant exclusive franchises or privileges must be as explicit and free from doubt as would be required if the franchise were created directly by the legislature."

Thompson v. Ocean City R. Co., 60 N. J. Law, 74, 36 Atl. 1087; Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546; In re City of Brooklyn, 143 N. Y. 596, 26 L. R. A. 270; Beekman v. Third Ave. R. Co., 153 N. Y. 144, 47 N. E. 277, affirming 13 App. Div. 279, 43 N. Y. Supp. 174; State v. Cincinnati Gas Light & Coke Co., 18 Ohio St. 262; Smith v. Town of Westerly, 19 R. I. 437, 35 Atl. 526; Memphis City R. Co. v. City of Memphis, 44 Tenn. (4 Cold.) 406. A municipal corporation cannot by contract confer upon individuals the exclusive right of constructing and operating a street railway. Peoples' Pass. R. Co. v. City of Memphis (Tenn.) 16 S. W. 973; State v. City of Spokane, 24 Wash. 53, 63 Pac. 1116. But see Wood v. City of Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369. Under Seattle city charter art. 4, § 22, the city has no power to grant an exclusive franchise for the use of any street.

[1211] Jackson County Horse R. Co. v. Interstate Rapid Transit R. Co., 24 Fed. 306; Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co., 33 Fed. 659; Florida Cent. & P. R. Co. v. Ocala St. & S. R. Co., 39 Fla. 306, 22 So. 692. The general power conferred upon cities and towns to regulate streets does not authorize a municipal corporation to vest by contract in a street railway corporation an exclusive right to construct railroad tracks in the streets of the city for a period of ten years. Westerly Water-works Co. v. Town of Westerly, 80 Fed. 611. An exclusive contract cannot be created by acquiesence in an existing condition. Wright v. Nagle, 48 Ga. 367. The principle applied to the grant of an exclusive right to build and maintain a bridge.

[1212] Wilmington City Ry. Co. v. People's R. Co. (Del.) 47 Atl. 245. The power of the legislature to revoke an exclusive license is coextensive with its power to grant and control the action of subordinate corporations.

terms the public authorities to take such action as they deem necessary to provide for the general comfort, welfare and safety of the community; to regulate the use of public highways; to arrange for either a supply of water or light and in so doing to consent to the construction of the facilities which are necessary to accomplish these purposes. It has been repeatedly held that through the grant of any or all of these powers, 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 or both of these modern necessities. This rule has been well established by the great weight or authority.[1213] The principle is also applied to the grant of privileges or licenses not exclusive in their character but which serve to furnish a supply of these same commodities or other service.[1214] In previous sections[1215] it has been stated that the modern tendency of the state is to give subordinate public corporations a large degree of control over public property within their jurisdiction and to require the consent of the public authorities before private persons engaged in the business of supplying water, light, power or telephone, telegraph or transportation service, can legally occupy public highways or lawfully carry on their business. Even the

[1213] American Water-works Co. v. Farmers' Loan & Trust Co., 73 Fed. 956, 20 C. C. A. 133; Saginaw Gas Light Co. v. City of Saginaw, 28 Fed. 529; State v. Towers, 71 Conn. 657, 42 Atl. 1083; Village of Ladd v. Jones, 61 Ill. App. 584; Greenville Water-works Co. v. City of Greenville (Miss.) 7 So. 409; Town of Kirkwood v. Meramec Highlands Co., 94 Mo. App. 637, 68 S. W. 761; Howell v. City of Millville, 60 N. J. Law, 95, 36 Atl. 691; Richmond County Gas Light Co. v. Town of Middletown, 59 N. Y. 228; In re City of Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270; Smith v. Town of Westerly, 19 R. I. 437, 35 Atl. 526; Arnold v. Price, 19 R. I. 437, 35 Atl. 526; City of Brenham v. Water Co., 67 Tex. 542, 4 S. W. 143. But see Andrews v. National Foundry & Pipe Works (C. C. A.) 61 Fed. 782; Jacksonville Elec. Light Co. v. City of Jacksonville, 36 Fla. 229, 18 S. E. 677, 30 L. R. A. 540; Heilbron v. City of Cuthbert, 96 Ga. 312, 23 S. E. 206; Hay v. City of Springfield, 64 Ill. App. 671; Arbuckle-Ryan Co. v. City of Grand Ledge, 122 Mich. 491, 81 N. W. 358; Oakley v. City of Atlantic City, 63 N. J. Law, 127, 44 Atl. 651; Tuttle v. Brush Elec. Ill. Co., 50 N. Y. Super. Ct. (18 J. & S.) 464; Ellinwood v. City of Reedsburg, 91 Wis. 131, 64 N. W. 885.

[1214] See authorities cited under § 897, note 1059.

[1215] See §§ 897, 898, ante.

existence of this principle does not prevent the application of the rule above given.

§ 925. 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.[1216] An exclusive grant to be valid must 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.[1217]

[1216] Louisville Bagging Mfg. Co. v. Central Pass. R. Co., 95 Ky. 50; Consumers' Gas & Elec. Co. v. Congress Spring Co., 61 Hun, 133, 15 N. Y. Supp. 624; Patton v. City of Chattanooga, 108 Tenn. 197, 65 S. W. 414. Private citizens suffering no injury not in common with the public generally have no status to call on the court to determine the validity of an ordinance granting an exclusive license to a telephone, telegraph or electric company.

City of Houston v. Houston City St. R. Co., 83 Tex. 548, 19 S. W. 127; City of Brenham v. Water Co., 67 Tex. 542, 4 S. W. 143. "The validity of every contract a municipal corporation may assume to make must at least depend upon the validity of the law or municipal ordinance under which it is made. If the legislature had expressly authorized the making of the contract under consideration, it would doubtless be binding, unless there be some constitutional objection to such a law—a matter which will be considered hereafter—and the ordinance could not be held to operate considered with its acceptance as a contract, as a surrender of any power the legislature intended the city government to exercise at all times. The question would then have been determined by a power superior to that of the municipality—a power from which it derives all the power it has, and even its existence as a corporation." Allen v. Clausen, 114 Wis. 244, 90 N. W. 181. See §§ 497 et seq.

[1217] Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co. 33 Fed. 659; Citizens' Water Co. v. Hydraulic Co., 55 Conn. 1, 10 Atl. 170; 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; Warsaw Waterworks Co. v. Village of Warsaw, 16 App. Div. 502, 44 N. Y. Supp. 876; Auchincloss v. Metropolitan El. R.

Must expressly appear. 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.[1218] Judge Brewer while on the Circuit Court, in a Kansas case,[1219] said: "And if a direct grant from a legislature carries no implication of exclusiveness, why should it be presumed that the legislature intended to vest in a city the power to give exclusive privileges, when it has in terms granted no such power? Will the power to create monopolies be presumed unless it is expressly withheld? That would reverse the settled rule of construction, which is that noth-

Co., 69 App. Div. 63, 74 N. Y. Supp. 534; Baily v. City of Philadelphia, 184 Pa. 594, 39 Atl. 494, 39 L. R. A. 837; Wood v. City of Seattle, 23 Wash. 1, 62 Pac. 135, 62 L. R. A. 369. The publication of a proposed ordinance granting a street railway franchise is sufficient though it does not contain the names of the actual grantees or the amount of their bid. See §§ 497 et seq. See, also, Culbertson v. City of Fulton, 127 Ill. 30; Adrian Water-works Co. v. City of Adrian, 64 Mich. 584; City of Grand Rapids v. Grand Rapids Hydraulic Co., 66 Mich. 606; Atlantic City Water-works Co. v. Read, 50 N. J. Law, 665.

[1218] 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; Oakland R. Co. v. Oakland, B. & F. V. R. Co., 45 Cal. 365; Capital City Light & Fuel Co. v. City of Tallahassee, 42 Fla. 462, 28 So. 810; Carlysle Water, Light & Power Co. v. City of Carlysle, 31 Ill. App. 325. An exclusive contract though ultra vires is not void but voidable so far as it is executory.

City of Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; City of Vincennes v. Citizens' Gas Light Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; North Baltimore City R. Co. v. City of Baltimore, 75 Md. 247, 23 Atl. 470; Detroit Citizens' St. R. Co. v. City of Detroit, 110 Mich. 384, 68 N. W. 304, 35 L. R. A. 859.

Tallon v. City of Hoboken, 60 N. J. Law, 212, 37 Atl. 895. The same principle applied distinguishing as between a street, steam or commercial railroad. Hackensack Water Co. v. City of Hoboken, 51 N. J. Law, 220, 17 Atl. 307; Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546. A city council having the power to make ordinances, rules, regulations and by-laws for lighting the streets and public buildings of a city and to supply the city with water is not authorized to grant exclusive privileges. In re City of Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270; Center Hall Water Co. v. Borough of Center Hall, 186 Pa. 74, 40 Atl. 153.

[1219] Jackson County Horse R. Co. v. Interstate Rapid Transit R. Co., 24 Fed. 306.

ing in the way of exclusiveness or monopoly passes, unless expressly named. It will not do to say that the grant of general supervision and control of the streets carries with it, by implication, the power to give exclusive privileges; for that grant implies a vesting in the city of continuous control. It is no authority for surrendering its constant supervision and management to any other corporation or individual. It implies that the city to-day, to-morrow, and so long as the grant remains, shall exercise its constant judgment as to the needs of the public in the streets, and not that it may to-day surrender to an individual or to a private corporation the right of determining a score of years hence what the public may then need. The city may to-day determine that one street railroad will answer all the wants of the public, and so give the privilege of occupying the streets to but a single company. Ten years hence its judgment may be that two railroads are needed. Where is the language in the charter which restricts it from carrying such judgment into effect by giving a like privilege to a second company? It is doubtless true, as counsel say, that capital is timid, and will not undertake such enterprises without abundant guaranties and undoubted security. But this suggests matters of policy, and presents considerations for the legislature. It does not aid in determining what powers have been granted, or in the construction of charters or ordinances. When the legislature deems that the public interests require that cities should be invested with power to grant exclusive privileges, it will say so in unmistakable terms, as it already has in some instances. Till then courts must deny the possession of such power." And a leading case[1220] in the Supreme Court of the United States on the subject of the power of a city to grant exclusive privileges and contract for rates states the rule as follows: "The rule which governs interpretation in such cases has been often declared. We expressed it, following many prior decisions, in Detroit Citizens' St. R. Co. v. Detroit R. Co., 171 U. S. 48, to be that the power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers, it is not enough that the power is convenient to other powers; it must be indispensable to them."

[1220] Freeport Water Co. v. City of Freeport, 180 U. S. 587, affirming 186 Ill. 179, 57 N. E. 862.

The absence of language giving rights of an exclusive character operates against such a claim[1221] 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.[1222]

§ 926. 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.[1223] This rule will apply not

[1221] 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. "There is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in the future be reduced. Such a contract would be altogether too far reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication. We think none such arises from the facts detailed."

Westerly Water-works Co. v. Town of Westerly, 80 Fed. 611; Cunningham v. City of Cleveland, 98 Fed. 657; North Baltimore Pass. R. Co. v. North Ave. R. Co., 75 Md. 233; Atlantic City Water Co. v. Consumers' Water Co., 51 N. J. Law, 420, 17 Atl. 824; In re City of Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270; Boyertown Water Co. v. Borough of Boyertown, 200 Pa. 394, 50 Atl. 189; City of Brenham v. Water Co., 67 Tex. 542, 4 S. W. 143; City of Houston v. Houston City St. R. Co., 83 Tex. 548, 19 S. W. 127; Ogden City R. Co. v. Ogden City, 7 Utah, 207, 26 Pac. 288.

[1222] Fidelity Trust & Safety Vault Co. v. Mobile St. R. Co., 53 Fed. 687; Citizens' Water Co. v. Bridgeport Hydraulic Co., 55 Conn. 1; Tyrone Gas & Water Co. v. Borough of Tyrone, 195 Pa. 566, 46 Atl. 134; Rutland Elec. Light Co. v. Marble City Elec. Co., 65 Vt. 377, 26 Atl. 635, 20 L. R. A. 821. An electric light company not having an exclusive contract to erect poles and string wires still has such a vested right to use its appliances that they cannot be infringed by another company stringing wires under a subsequent contract with the city.

[1223] Stein v. Bienville Water Supply Co., 141 U. S. 67, affirming 34 Fed. 145; Bartram v. Central Turnpike Co., 25 Cal. 283; Haines v. Crosby, 94 Me. 212, 47 Atl. 137;

only to the existence of the exclusive privilege or contract itself, but also to any of the minor details or conditions of the instrument.[1224] An exclusive grant in case of doubt, to state the rule in another way, is construed against the grantee in favor of the grantor.[1225] The principles of this section are not applied, however, to such an extent as to illegally deprive a grantee or licensee

North Baltimore Pass. R. Co. v. North Ave. R. Co., 75 Md. 233; Western Union Tel. Co. v. Guernsey & S. Elec. Light Co., 46 Mo. App. 120. The grant of the right to erect poles and wires for supplying electric light does not impair the rights of a telegraph company under a prior grant. City of Plattsburg v. Peoples' Tel. Co., 88 Mo. App. 306. See, also, § 902, ante.

[1224] Omaha Horse R. Co. v. Cable Tramway Co., 30 Fed. 324; Stein v. Bienville Water Supply Co., 34 Fed. 145; Birmingham Traction Co. v. Southern Bell Telep. & Tel. Co., 119 Ala. 144, 24 So. 731. Considering right to acquire through prior occupancy of a street by a telephone company as against an electric railway company. Reed v. Hanger, 20 Ark. 625; Los Angeles Water Co. v. City of Los Angeles, 55 Cal. 176; Tuebner v. California St. R. Co., 66 Cal. 171; City of Newport v. Newport Light Co., 11 Ky. L. R. 840, 12 S. W. 1040; Passaic Water Co. v. City of Paterson, 65 N. J. Law, 472, 47 Atl. 462. Ordinance construed and right of a private company to contract directly with the inhabitants of the town denied. Bly v. White Deer Mountain Water Co., 197 Pa. 80, 46 Atl. 929. See Joyce, Electric Law, §§ 165 et seq.

[1225] Knoxville Water Co. v. City of Knoxville. The U. S. Supreme court October Term, 1905 (26 Sup. Ct. 224): "It is, we think, important that the courts should adhere firmly to the salutory doctrine underlying the whole law of municipal corporations and the doctrines of the adjudged cases, that grants of special privileges affecting the general interests are to be liberally construed in favor of the public, and that no public body, charged with public duties, be held, upon mere implication or presumption, to have divested itself of its powers. As, then, the city of Knoxville cannot be held to have precluded itself by contract from establishing its own independent system of waterworks, it becomes unnecessary to consider any other question in the case. The judgment of that court dismissing the bill must be affirmed."

Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co., 33 Fed. 659; Citizens' St. R. Co. v. Jones, 34 Fed. 579; Louisville Home Tel. Co. v. Cumberland, Telep. & Tel. Co. (C. C. A.) 111 Fed. 663, reversing 110 Fed. 593; Capital City Light & Fuel Co. v. City of Tallahassee, 42 Fla. 462, 28 So. 810; Wabash R. Co. v. City of Defiance, 52 Ohio St. 262, 40 N. E. 89; Emerson v. Com. 108 Pa. 111.

Spelling, Trusts & Monopolies, § 100. "If there is any ambiguity or reasonable doubt, arising from the terms used by the legislative or granting body, as to whether an exclusive franchise has been con-

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.[1226]

§ 927. 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.[1227] 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.[1228] Municipal corporations cannot be permitted to trifle with the legal rights of those to whom such

ferred, or authorized to be conferred, the doubt is to be resolved against the corporation or individual claiming such grant. Public policy does not permit an unnecessary interference of authority to make a contract inconsistent with the continuance of the sovereign power and duty to make such laws as the public welfare may require."

[1226] City R. Co. v. Citizens' St. R. Co., 166 U. S. 557; 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; Wilmington City R. Co. v. Peoples' R. Co. (Del.) 47 Atl. 245; Wyandotte Electric Light Co. v. City of Wyandotte, 124 Mich. 43, 82 N. W. 821. But see Louisville Trust Co. v. City of Cincinnati, 73 Fed. 716.

[1227] Mercantile Trust & Deposit Co. v. Collins Park & B. R. Co. 101 Fed. 347; Western Union Tel. Co. v. Guernsey & S. Elec. Light Co., 46 Mo. App. 120. A grant of the right to erect poles and wires for supplying electric light does not impair the rights of a telegraph company under prior grant. See cases cited in following section.

[1228] Williams v. Wingo, 177 U. S. 601; Alpers v. City & County of San Francisco, 32 Fed. 503. The principle applied to an exclusive contract for the removal of dead animals not slain for food. See, also, as holding the same, National Fertilizer Co. v. Lambert, 48 Fed. 458; Cleveland City R. Co. v. City of Cleveland, 94 Fed. 385; 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. But see Clarksburg Elec. Light Co. v. City of Clarksburg, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142, where it is held that an exclusive grant of a franchise by a town in excess of its authority is not a contract protected by the clause of the Federal constitution which forbids the passage of laws impairing the obligation of contracts. Citing many cases.

licenses or privileges have been created.[1229] But an ultra vires contract cannot be ratified or the doctrine of estoppel applied because of acquiescence.[1230]

A Federal question. Since the determination of the existence of a contract obligation may arise in connection with litigation involving an exclusive license or privilege, a Federal question arises which, if properly presented, makes the action one either triable or removable to the Federal courts in accordance with the Federal statutes.[1231]

§ 928. 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 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.[1232] They extend, ordinarily, over a

[1229] City of Kankakee v. Kankakee Water Co., 38 Ill. App. 620. The grant of the use of streets to lay water pipes though void in respect to its exclusive character will be valid as to the grantees right to construct waterworks and lay his pipes and mains in streets.

[1230] Westerly Water-works Co. v. Town of Westerly, 80 Fed. 611; State v. Cincinnati Gas Light & Coke Co., 18 Ohio St. 262; 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. But see Wyandotte Elec. Light Co. v. City of Wyandotte, 124 Mich. 43, 82 N. W. 821, where a city was held estopped to attack the validity of the company's organization.

[1231] City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1; Southwest Missouri Light Co. v. City of Joplin, 113 Fed. 817.

[1232] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683; New Orleans Water-works Co. v. Rivers, 115 U. S. 674; 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. Exclusive contract for removal of dead animals held a contract not to be impaired. The court said: "She may also, in the exercise of her powers, grant 'exclusive separate public privileges in consideration of public services.' She may also grant special or private privileges to certain individuals, provided the rights of others are not affected by it. She has the right to confer upon cities and towns, as integral parts of the state, the exercise of such of these powers as may be deemed necessary, prudent or expedient for their local welfare and comfort. She may also grant many exclusive privileges to per-

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.[1233] The

sons and corporations; also relinquish many of her powers. She may also recall them at pleasure, except when the person to whom the grant is made proposes to render a public service in consideration thereof; or in case of the grant of a special private privilege, the person to whom the grant is made proposes, in consideration thereof, to engage in some enterprise that he would not or could not have otherwise done, then such grants of privileges, public and private, become contracts for a sufficient consideration, and cannot be impaired by any subsequent act of the state."

Proprietors of Bridges v. Hoboken Land & Imp. Co., 13 N. J. Eq. (2 Beasl.) 81; Boyer v. Village of Little Falls, 38 N. Y. Supp. 1114; In re Rochester Water Com'rs, 66 N. Y. 413; Satterthwaite v. Beaufort County Com'rs, 76 N. C. 153; Asheville St. R. Co. v. City of Asheville, 109 N. C. 688, 14 S. E. 316; In re Towanda Bridge Co., 91 Pa. 216; Carlisle Gas & Water Co. v. Carlisle Water Co., 188 Pa. 51, 41 Atl. 321; City of Brenham v. Water Co., 67 Tex. 542, 4 S. W. 143; Mason v. Harper's Ferry Bridge Co., 17 W. Va. 396. Beach, Monopolies, § 121. "But while corporations will not be favored and nothing will be presumed in their interests, it is the province of equity to protect corporations no less than individuals. Where the right is with the corporation it will be sustained against any usurpation of its franchise, and against any effort to put an end to its corporate existence. Public prejudice is not a rule to a court of chancery." But see Altgelt v. City of San Antonio, 81 Tex. 436, 13 L. R. A. 383. The constitution of Texas, however, forbids the granting of exclusive monopolies. See, also, cases cited generally in this section. See, also, §§ 916, 917, 919, ante.

[1233] Parrott v. City of Lawrence, 2 Dill. 332, Fed Cas. No. 10,772. An exclusive right of maintaining a bridge is not infringed by the establishment of a ferry. Aubert-Gallion Corp. v. Roy, 21 Can. Sup. Ct. 456; Newburgh & Co. Turnpike Road v. Miller, 5 John. Ch. (N. Y.) 101; Omnibus R. Co. v. Baldwin, 57 Cal. 160; McLeod v. Savannah, A. & G. R. Co., 25 Ga. 445. An exclusive right to construct and maintain a toll bridge is not impaired by a grant to erect a railroad bridge. 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; New Orleans Gas Light Co. v. Hart, 40 La. Ann. 474, 4 So. 215; Taylor v. City

exclusive character of the license may be granted on condition that the public corporation shall have the right to purchase the grantee's plant at a certain time. The breaking of this condition usually annuls the contract so far as the grantee of the exclusive privilege is concerned.[1234] 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,[1235] there can be

of Lambertville, 43 N. J. Eq. 107, 10 Atl. 809; Atlantic City Waterworks Co. v. Atlantic City, 39 N. J. Eq. (12 Stew.) 367; Cayuge Bridge Co. v. Magee, 6 Wend. (N. Y.) 85; Smith v. Harkins, 38 N. C. (3 Ired. Eq.) 613; Robinson v. Lamb, 126 N. C. 492, 36 S. E. 29. Ferry privilege. Appeal of Freeport Waterworks Co., 129 Pa. 605, 18 Atl. 560; Bennett Water Co. v. Borough of Millvale, 200 Pa. 613, 50 Atl. 155; Texarkana & Ft. S. R. Co. v. Texas & N. O. R. Co., 28 Tex. Civ. App. 551, 67 S. W. 525.

State v. Columbus Gas Light & Coke Co., 34 Ohio St. 581, 32 Am. Rep. 393. "The charter, in the present instance, grants to the defendant the exclusive right of supplying the city and its inhabitants with gas, for the term of twenty years. It operates, therefore, not only to confer a public franchise on the defendant, but also to restrict the public from supplying its necessities from any other source. This creates a monopoly in the defendant for the time the right is made exclusive." But see Fanning v. Gregoire, 16 How. (U. S.) 524; Williams v. Wingo, 177 U. S. 601. It was held in this case that a ferry license granted under an act which made it unlawful for another ferry license to be granted within one-half miles of any other ferry did not constitute a contract, the obligation of which was impaired by a subsequent act which especially authorized the establishment of a ferry within less than one-half mile of the former ferry.

Wilmington City R. Co. v. Wilmington & B. S. R. Co. (Del.) 46 Atl. 12; Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 505; Proprietors of Bridges v. Hoboken Land & Imp. Co., 13 N. J. Eq. (2 Beasl.) 81. Authority for the construction of a railroad viaduct does not impair the license granted to the proprietors of an ordinary bridge. See, also, as holding the same, Thompson v. New York & H. R. Co., 3 Sandf. Ch. (N. Y.) 625, and Mohawk Bridge Co. v. Utica & S. R. Co., 6 Paige (N. Y.) 554. See, also, § 896, notes 1046 and 1047, and § 930, and cases cited.

[1234] Montgomery Gas Light Co. v. City Council of Montgomery, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616.

[1235] Lehigh Water Co. v. Borough

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.[1236] In a recent case of the Supreme Court of the United States,[1237] where a city established its own system of waterworks in competition with that of a private company, the court, observing that the city had not specifically bound itself not to construct its own plant said: "Had it been intended to exclude the city from exercising the privilege of establishing its own plant, such purpose could have been expressed by apt words, as was the case of Walla Walla City v. Walla Walla Water Co., 172 U. S. 1. It is doubtless true that the erection of such a plant by the city will render the property of the water company less valuable, and perhaps, unprofitable; but if it was intended to prevent

of Easton, 121 U. S. 388, affirming 102 Pa. 515; Hamilton Gas Light & Coke Co. v. City of Hamilton, 146 U. S. 258. The court said: "It may be that the erection and maintenance of gas works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of the parties."

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; Thomson-Houston Elec. L. Co. v. City of Newton, 42 Fed. 723; Bienville Water Supply Co. v. City of Mobile, 95 Fed. 539; Colby University v. Village of Canandaigua, 96 Fed. 449;; Little Falls Elec. & Water Co. v. City of Little Falls, 102 Fed. 663; City of Helena v. Helena Water-works Co., 122 Fed. 1; City of Mobile v. Bienville Water Supply Co., 130 Ala. 379, 30 So. 445; Long v. City of Duluth, 49 Minn. 280, 51 N. W. 913; Des Moines St. R. Co. v. Des Moines Broad-Guage St. R. Co., 73 Iowa, 513; Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546; Freeport Water-works Co. v. Prager, 129 Pa. 605, 18 Atl. 560; Howard's Appeal, 162 Pa. 374, 29 Atl. 641; Fingal v. Millvale Borough, 162 Pa. 393, 29 Atl. 644; Boyertown Water Co. v. Borough of Boyertown, 200 Pa. 394, 50 Atl. 189; North Springs Water Co. v. City of Tacoma, 21 Wash. 517, 58 Pac. 773, 47 L. R. A. 214.

[1236] Memphis City v. Dean, 75 U. S. (8 Wall.) 64; Lehigh Water Co. v. Borough of Easton, 121 U. S. 388, affirming 102 Pa. 515; Thomas v. City of Grand Junction, 13 Colo. App. 80, 56 Pac. 665; 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; North Springs Water Co. v. City of Tacoma, 21 Wash. 517, 58 Pac. 773, 47 L. R. A. 214.

[1237] Helena Water-works Co. v. City of Helena, 195 U. S. 383; Knoxville Water Co. v. City of Knoxville, 26 Sup. Ct. 224.

such competition, a right to do so should not have been left to argument or implication, but made certain by the terms of the contract." The weight of 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.[1238] A leading

[1238] City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1; Southwest Missouri Light Co. v. City of Joplin, 101 Fed. 23. Where a city granted the right to a private corporation to supply light for public purposes and to private consumers for a period of twenty years, held there was an implied contract made by it through the acceptance of the ordinance granting the right that the city would not itself enter into competition with the grantee in supplying light to private consumers during the term of the grant and the private corporation is entitled to an injunction against such competition as the only adequate remedy. The court said in part: "The city of Joplin, 'in consideration of the benefits to be derived,' from the construction and erection of the plant by its grantees, gave them the right and privilege to its streets, etc. It compelled them to go to work within a given number of days, and to complete its works within a given time; to so erect its poles and string its wires as to furnish the streets of the city with electric lights if the city should demand a contract therefor; it required of the company to keep and maintain a light at a given place for lighting a railroad crossing; it invited the company to put its money into this plant, and to become the owner of property in the city. Will the law permit that, as soon as it becomes strong enough to stand alone, because, perhaps, the very presence of electric lights on the streets and in its houses, furnished by this complainant, has invited population and growth and increase of its wealth, the city itself should embark in the electric light business, lay its pipes alongside of those of the complainant, and enter the field of competition in the mercantile business of selling lights, and to tax the property of the complainant to help to support this competition, and ultimately drive it from the field and destroy its investment? When it exercised its option, under the statute of 1891, to enter into a contract with some other person or corporation for a period of 20 years, it thereby as effectually declared to its grantee that it did not propose to exercise contemporaneously the power given in the first part of the statute to erect its own works, and enter upon competition with its grantees, as if it had written it in italics in the ordinance itself. What is necessarily implied need not be expressed. My conclusion in this case is based largely upon the peculiar provisions of this statute, the object of the legislature in its grant to cities of the third class, as well as the obvious equities and

justice of the case. As the complainant does not ask that the defendant shall not supply for its public use electric lights, it certainly ought not to complain that it shall be restrained from entering the field of speculation in a business venture to compete for private patronage."

Aubert-Gallion Corp. v. Roy, 21 Can. Sup. Ct. 456. The construction of a free bridge by a city held to impair respondent's exclusive franchise for the construction of a toll bridge. Townsend v. Blewett, 6 Miss. (5 How.) 503; Atlantic City Water-works Co. v. Atlantic City, 39 N. J. Eq. (12 Stew.) 367; Bennett Water Co. v. Borough of Millvale, 202 Pa. 616, 51 Atl. 1098, affirming on rehearing, 200 Pa. 613, 50 Atl. 155.

White v. City of Meadville, 177 Pa. 643, 35 Atl. 694, 34 L. R. A. 567. "A municipality, in its beginnings, is perhaps not financially strong, or its debt may approach the constitutional limit so closely that it cannot borrow; nevertheless, the low state of its financial condition does not render less urgent the necessity of a water supply; it can obtain it in but one way, by contract with those who have the money and are willing to invest their private capital in the construction of water-works; the legislature knew capital would not be invested in such an enterprise if in the future it were liable to confiscation by competition with a public enterprise operated from a municipal treasury, capable of replenishment from the pocket of the taxpayer. That fact suggested clause 7 of the corporation act (which conferred the power to buy); the municipality will not be forever poor; the time will come when it will be of financial ability to own and operate its own works; the very fact of having a supply of water on an investment of private capital, has tended to stimulate its growth, and to largely appreciate the value of taxable property. * * * Both the contracting parties must be conclusively presumed to have had in view the law which empowered them to contract, and which became part of the contract. At the end of 20 years the defendants have a right to take the works at a price fixed by the law, and that is one of computation. True, as to the city, the taking of the works is only permissive."

Metzger v. Borough of Beaver Falls, 178 Pa. 1, 35 Atl. 1134. "The legislature never did intend to commit the duty of supplying water to a municipality to two different agencies, both in operation at the same time. The borough had authority 'to provide a supply of water for the use of the inhabitants.' This supply was provided by the Union Water Company, subject to such regulations in regard to streets, roads and grades as the borough imposed. The borough did not attempt to construct works until years after the water company had laid its mains, and the public had been served. The rights of the water company vested by consent of the municipality and its contract to supply water for public purposes. * * * After twenty years the borough has power to purchase the works at a price not exhorbitant."

Welsh v. Beaver Falls Borough, 186 Pa. 578, 40 Atl. 784. "When a contract is made with a private water company, authorized usually,

case [1239] decided by the Supreme Court of the United States said in maintaining the principle just stated: "There was no attempt made to create a monopoly by granting an exclusive right to this company, and the agreement that the city would not erect waterworks of its own was accompanied, in section 8 of the contract, with a reservation of a right to take, condemn and pay for the waterworks of the company at any time during the existence of the contract. Taking sections 7 and 8 together, they amount simply to this: That if the city should desire to establish waterworks of its own it would do so by condemning the property of the company and making such changes in its plant or such additions thereto as it might deem desirable for the better supply of its inhabitants; but that it would not enter into a direct competition with the company during the life of the contract. As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith. An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any person or association of persons for a term not exceeding twenty-five years. In

only to build its works and maintain its plant at one place, it would be grossly inequitable to hold that the municipality, after inviting the construction of such works, and contracting with the company for the water supply, could at any time thereafter destroy them by constructing its own works. To authorize such municipal action the statutory right must be explicit. It will not be implied from doubtful language."

Wilson v. Rochester Borough, 180 Pa. 509, 38 Atl. 136; Tyrone Gas & Water Co. v. Tyrone Borough, 195 Pa. 566, 46 Atl. 134; Troy Water Co. v. Borough of Troy, 200 Pa. 453 50 Atl. 259. A borough under Borough Act of April 3rd, 1851, having elected to contract with a company for a water supply has exhausted its power and cannot in a failure to furnish an adequate supply, erect a plant of its own.

Victoria County v. Victoria Bridge Co., 68 Tex. 62, 4 S. W. 140. A license to construct a toll bridge under Tex. Act of April 23, 1874, (p. 139, § 79) which forbids the establishment of another toll bridge or toll ferry on the same stream within six miles is not a contract that can be impaired by the construction of a free bridge by the county within the prohibited distance.

[1239] City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1.

establishing a system of waterworks the company would necessarily incur a large expense in the construction of the power house and the laying of its pipes through the streets, and, as the life of the contract was limited to twenty-five years, it would naturally desire to protect itself from competition as far as possible, and would have a right to expect that at least the city would not itself enter into such competition. It is not to be supposed that the company would have entered upon this large undertaking in view of the possibility that, in one of the sudden changes of public opinion to which all municipalities are more or less subject, the city might resolve to enter the field itself—a field in which it undoubtedly would have become the master—and practically extinguish the rights it had already granted to the company. We think a disclaimer of this kind was within the fair intendment of the contract, and that a stipulation to that effect was such a one as the city might lawfully make as an incident of the principal undertaking." The supplying of water, light or a similar service involves the construction, ordinarily, of an extensive plant and the investment of large sums of money. If the profit was dependent upon its sale to private consumers alone, in the great majority of cases, the business could not be carried on except at a loss and the right to sell to the corporation is regarded equally with the right to sell private consumers as an essential part of the contract.

§ 929. Forfeiture or revocation 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 [1240] or that reaches a certain standard of purity or quality.[1241]

[1240] City of Greenville v. Greenville Water Co., 125 Ala. 625, 27 So. 764; Grand Junction Water Co. v. City of Grand Junction, 14 Colo. App. 424, 60 Pac. 196; Wilson v. City of Charlotte, 108 N. C. 121, 12 S. E. 846. See §§ 469 & 470, ante.

[1241] City of Winfield v. Winfield Water Co., 51 Kan. 70, 32 Pac. 663; Bennett Water Co. v. Borough of

If the licensee persistently fails to furnish an adequate supply of pure, wholesome water, for example, this may be the occasion for a refusal to pay charges,[1242] forfeiture or revocation of the rights granted by the license or under the contract.[1243] 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. Where the forfeiture of a license or privilege is claimed because of broken conditions, the rule almost universally obtains that a substantial compliance, especially in respect to minor details or trivial matters, is all that is necessary.[1244]

Where the parties have in good faith given and accepted a license or privilege, exclusive or otherwise in its character, and

Millvale, 202 Pa. 616, 51 Atl. 1098, affirming on rehearing 200 Pa. 613, 50 Atl. 155; Borough of Du Bois v. Du Bois City Water Co., 176 Pa. 430, 35 Atl. 248, 34 L. R. A. 92; Green v. Ashland Water Co., 101 Wis. 258, 77 N. W. 722, 43 L. R. A. 117. Passing upon the responsibility of a water company is no implied warrantor of the purity of the water distributed by it. See, as to the same, Britton v. Green Bay & Ft. H. Water-works Co., 81 Wis. 48, 51 N. W. 84; City of Wilkesbarre v. Spring Brook Water Supply Co., 4 Lack. Leg. N. (Pa.) 367. There is no obligation to furnish water that is chemically pure but only that which is reasonably pure and wholesome. See, also, §§ 469 and 470, ante.

[1242] City of Kankakee v. Kankakee Water Co., 38 Ill. App. 620; Burlington Water-works Co. v. City of Burlington, 43 Kan. 725, 23 Pac. 1068. A city may be estopped from claiming a broken condition in this respect by an acceptance and use of water. State Trust Co. of New York v. City of Duluth, 70 Minn. 257, 73 N. W. 249. The fact that a water company has failed to furnish private consumers according to the terms of its grant is no ground for a refusal on the part of the city to pay the rental of fire hydrants which have been amply supplied. Brymer v. Butler Water Co., 172 Pa. 489, 33 Atl. 707. But see Wilson v. City of Charlotte, 108 N. C. 121, 12 S. E. 846.

[1243] State v. Capitol City Water Co., 102 Ala. 231, 14 So. 652; Capital City Water Co. v. State, 105 Ala. 406, 18 So. 62, 29 L. R. A. 743; State v. City of Philipsburg, 23 Mont. 16, 57 Pac. 405; Palestine Water & Power Co. v. City of Palestine, 91 Tex. 540, 44 S. W. 814; 40 L. R. A. 203, Id. (Tex. Civ. App.) 41 S. W. 659. But see Cherryvale, Water Co. v. City of Cherryvale, 65 Kan. 219, 69 Pac. 176.

[1244] Cunningham v. City of Cleveland (C. C. A.) 98 Fed. 657; State v. City of Crete, 32 Neb. 568, 49 N. W. 272; City of Elmira v. Maple Ave. R. Co., 51 Hun, 638, 4 N. Y. Supp. 943.

have expended large sums of money in constructing a plant and in maintaining it, an ordinary sense of right and fair dealing requires the application of this rule. The above rule in respect to the performance of conditions applies equally to contracts not exclusive in their character.

§ 930. Assignment of exclusive privilege or license.

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 character 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.[1245] The absence of a prohibition is sufficient affirmative authority. They may be granted for a time in excess of the corporate life of the grantee and under the operation of the principle stated above they may be assigned lawfully to interests succeeding them. The nonobservance of conditions imposed for the benefit of the municipality may be waived by it.[1246] A condition against assignment will not as between the parties prevent a legal transfer of interests for the condition is one imposed for the benefit of the grantor alone.

§ 931. Grants to street railway companies.

A grant to a street railway company of the right to occupy and use streets of a city may not only be an exclusive one because of the language used in the grant, but because of the character of the business carried on. A grant not exclusive in its terms is usually regarded as such during its term. The occupation of

[1245] 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. Where there is no prohibition, a street railroad owning and operating a street railway under a franchise from the city may lease to another company the right to use its tracks and the city has no interest in the amount of compensation which shall be paid by the lessee to the lessor. See, also, as holding the same, Canal & C. R. Co. v. St. Charles St. R. Co., 44 La. Ann. 1069, 11 So. 702; Adee v. Nassau Elec. R. Co., 65 App. Div. 529, 72 N. Y. Supp. 992.

Toledo Elec. St. R. Co. v. Toledo & M. V. Ry. Co., 7 Ohio, N. P. 211.

[1246] Chicago & S. S. Rapid Transit Co. v. Northern Trust Co., 90 Ill. App. 460.

streets by a street railway company with its tracks and other facilities is necessarily exclusive.[1247] The question of additional compensation to the abutting owner and conditions upon which licenses to street railways are usually granted have been considered in preceding sections.[1248] In common with all grants of a similar character one given to a street railway company is construed strictly both in respect to the existence of assumed rights[1249] and also the conditions which may exist in connection

[1247] Jackson County Horse R. Co. v. Interstate Rapid Transit R. Co., 24 Fed. 306. "But power to permit one citizen to use the streets in a given way is a very different thing from power to give such citizen the right to keep every other citizen from a like use of the streets. The one is a mere street regulation, a license; the other rises into the dignity of a contract,—a franchise. The one may rest upon the ordinary powers of a street management and control, the other requires the support of a special grant. Doubtless the city may practically secure exclusive occupation to one railway company; i. e., by giving permission to one, and withholding permission from all others, the occupation of that one becomes, for the time being, exclusive. But that is an altogether different matter. In the one case the exclusiveness depends on the continuous will of the city; in the other upon that of the individual company. In the one the full and constant control of the streets is retained; in the other it is partially transferred to the company. Again, exclusiveness of occupation is not necessary to the full performance of a street railroad company of all its functions. The running of a street railroad on one street is in no manner interfered with by the running of a similar road on a parallel street. Doubtless the profits of the one will be increased if the other is stopped. Monopoly implied increase of profits. But the question of profits is very different from that of the unimpeded facilities for transacting business. The latter may be granted without any exclusiveness. And power to grant all facilities for transacting business does not imply power to forbid all others from transacting like business."

Indianapolis Cable St. R. Co. v. Citizens' St. R. Co., 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539; Detroit Citizens' St. R. Co. v. City of Detroit, 110 Mich. 384, 68 N. W. 304, 35 L. R. A. 859; Edison Elec. Light & Power Co. v. Merchants' & Manufacturers' Elec. Light, Heat & Power Co., 200 Pa. 209, 49 Atl. 766. The same rule applied where franchises are given to two electric light companies and interference is unavoidable; the latter must in time give way. Homestead St. R. Co. v. Pittsburg & H. Elec. St. R. Co., 166 Pa. 162, 30 Atl. 950, 27 L. R. A. 383. Beach, Monopolies, § 122; Elliott, Roads & St. (2d Ed.) §§ 745 and 746.

[1248] See §§ 835 et seq., ante.

[1249] Detroit Citizens' St. R. Co. v. Detroit R. Co., 171 U. S. 48; City of Detroit v. Detroit City R. Co., 56 Fed. 867; Birmingham & P. M. St.

with the granting of the license or privilege.[1250] An exclusive license to operate a street railway company by means of animal power would not, under the application of this principle, be impaired by the grant of one to operate a system by electricity or other power.[1251] An interference with exclusive rights whether

R. Co. v. Birmingham St. R. Co., 79 Ala. 465; City of New Orleans v. Steinhardt, 52 La. Ann. 1043, 29 So. 586; New Bedford & F. St. R. Co. v. Achushnet St. R. Co., 143 Mass. 200, 9 N. E. 536; St. Louis Transfer R. Co. v. St. Louis Merchants' Bridge Terminal R. Co., Ill. Mo. 666, 20 S. W. 319; West Jersey Traction Co. v. Camden Horse R. Co., 53 N. J. Eq. 163, 35 Atl. 49; Pennsylvania S. V. R. Co. v. Pennsylvania & R. R. Co., 157 Pa. 42, 27 A. 683. The grant of the right to occupy so much of the street "as may be necessary" confers no exclusive privileges unless the whole width of the street is reasonably necessary for its business.

Potts v. Quaker City El. R. Co., 161 Pa. 396, 29 Atl. 108. Considering Pennsylvania Elevated Railroad Acts holding that an elevated railroad company in a city is a street passenger railway and can be incorporated under the general railroad acts. Commonwealth v. Northeastern L. R. Co., 161 Pa. 409, 29 Atl. 112. A company incorporated as a street passenger railroad cannot build an elevated street railroad. Peoples' Pass. R. Co. v. City of Memphis (Tenn.) 16 S. W. 973; Gulf City St. R. Co. v. Galveston City R. Co., 65 Tex. 502; Murray Hill Land Co. v. Milwaukee Light, Heat & Traction Co., 110 Wis. 555, 86 N. W. 199.

[1250] Denver Tramway Co. v. Londoner, 20 Colo. 150; West End & A. St. R. Co. v. Atlanta St. R. Co., 49 Ga. 151; Smith v. Indianapolis St. R. Co., 158 Ind. 425, 63 N. E. 849; Spitzer v. Runyan, 113 Iowa, 619, 85 N. W. 782. Erection and maintenance of a viaduct. State v. Latrobe, 81 Md. 222; Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610. Construing Mass. St. 1894, c. 548, Boston subway act; City of Duluth v. Duluth St. R. Co., 60 Minn. 178; Jersey City & B. R. Co. v. Jersey City & H. Horse R. Co., 20 N. J. Eq. (5 C. E. Green) 61, Id., 21 N. J. Eq. (6 C. E. Green) 550; Cape May, D. B. & S. P. R. Co. v. City of Cape May, 58 N. J. Law, 565, 34 Atl. 397. The rule applied to the construction of extensions. Camden Horse R. Co. v. Scott, 52 N. J. Eq. 452; Kennelly v. Jersey City, 57 N. J. Law, 293, 26 L. R. A. 281; Kent v. Common Council of City of Binghampton, 72 App. Div. 623, 76 N. Y. Supp. 584; Potter v. Scranton Traction Co., 176 Pa. 271, 35 Atl. 188. An acquiesence by a borough in a change of motive power for a term of five years will establish the right in a railroad company to the change. Gray v. Dallas Terminal R. & Union Depot Co., 13 Tex. Civ. App. 158, 36 S. W. 352.

[1251] Omaha Horse R. Co. v. Cable Tramway Co., 30 Fed. 324; Denver R. Co. v. Denver City R. Co., 2 Colo. 673; Wilmington City R. Co. v. Wilmington & B. S. R. Co. (Del.) 46 Atl. 12; Southern R. Co. v. Atlanta R. & Power Co., 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125. The

granted to street railways or others, where they clearly appear, by either the municipality or by others, can be enjoined.[1252] Exclusive privileges or rights are regarded as property which cannot be illegally or arbitrarily taken.[1253]

language of the grant from the city controls the power to be used, not that of the charter of the street railroad. Indianapolis Cable St. R. Co. v. Citizens' St. R. Co., 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539; Teachout v. Des Moines Broad-Guage St. R. Co., 75 Iowa, 722, 38 N. W. 145; Louisville & N. R. Co. v. Bowling Green Ry. Co., 23 Ky. L. R. 273, 63 S. W. 4. A change of power may be authorized. Louisville Bagging & Mfg. Co. v. Central Pass. R. Co., 95 Ky. 50; Canal & C. R. Co. v. Crescent City Ry. Co., 44 La. Ann. 485, 10 So. 888; Hooper v. Baltimore City Pass. R. Co., 85 Md. 509, 37 Atl. 359, 38 L. R. A. 509; Paterson R. Co. v. Grundy, 51 N. J. Eq. 213; Lockhart v. Craig St. R. Co., 139 Pa. 419. But see Buckner v. Hart, 52 Fed. 835.

[1252] Vicksburg Water-works Co. v. City of Vicksburg, 185 U. S. 65; Santa Rosa St. R. Co. v. Central St. R. Co. (Cal.) 38 Pac. 986; City of Los Angeles v. Los Angeles City Water Co., 124 Cal. 377, 57 Pac. 213, 571. The same rule applies to an unlawful attempt to take possession of a private waterworks plant by the city. Atlanta R. & Power Co. v. Atlanta Rapid Transit Co., 113 Ga. 481, 39 S. E. 12; Des Moines St. R. Co. v. Des Moines B. G. St. R. Co., 73 Iowa, 513, 33 N. W. 610, 35 N. W. 602; New Orleans, C. & L. R. Co. v. City of New Orleans, 44 La. Ann. 748, 11 So. 77; St. Louis R. Co. v. Northwestern St. L. R. Co., 69 Mo. 65; Jersey City Gas Co. v. Dwight, 29 N. J. Eq. (2 Stew.) 242; Citizens' Coach Co. v. Camden Horse R. Co., 33 N. J. Eq. (6 Stew.) 267. A horse railway may enjoin an omnibus company from the general as distinguished from the incidental use of its track. Pocantico Water-works Co. v. Bird, 51 Hun, 644, 4 N. Y. Supp. 317. The rule applied to nonexclusive franchise for supply of water. Ft. Worth St. R. Co. v. Queen City R. Co., 71 Tex. 165, 9 S. W. 94. But see Coatesville & D. St. R. Co. v. Uwchlan St. R. Co., 18 Pa. Super. Ct. 524; Birmingham Traction Co. v. Southern Bell Telep. & Tel. Co., 119 Ala. 144, 24 So. 731; Market St. R. Co. v. Central R. Co., 51 Cal. 583; Coffeyville Min. & Gas Co. v. Citizens' Natural Gas & Min. Co., 55 Kan. 173, 40 Pac. 326. Injunction will not lie where no exclusive rights are granted.

New York & H. R. Co. v. Forty-Second St. & G. S. Ferry R. Co., 50 Barb. (N. Y.) 285. Where exclusive rights are granted an injunction will not issue to restrain another railroad from laying tracks in the same street. Metropolitan St. R. Co. v. Toledo El. St. R. Co., 9 Ohio Circ. R. 664; Texas & P. R. Co. v. Rosedale St. R. Co., 64 Tex. 80.

[1253] West River Bridge Co. v. Dix, 6 How. (U. S.) 507; Long Island Water Supply Co. v. City of Brooklyn, 166 U. S. 685; Wilmington City R. Co. v. Wilmington & B. S. R. Co. (Del.) 46 Atl. 12; Chicago General R. Co. v. Chicago City R.

§ 932. Option to purchase.

Many licenses or contracts made between private individuals and municipal corporations whereby the right is granted to occupy and use the public highways for the purpose of supplying light, water, power or other service, contain an option for the purchase or condemnation of the plant on the part of the municipal authorities at the expiration of a specified time[1254] and

Co., 62 Ill. App. 502; Metropolitan City R. Co. v. Chicago West Division Co., 87 Ill. 317; Louisville City R. Co. v. City of Louisville, 71 Ky. (8 Bush) 415; Cape May, D. B. & S. P. R. Co. v. City of Cape May, 58 N. J. Law, 565, 34 Atl. 397; West Jersey Traction Co. v. Camden Horse R. Co., 53 N. J. Eq. 163, 35 Atl. 49; People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255; In re Board of Water Com'rs of Village of White Plains, 71 App. Div. 544, 76 N. Y. Supp. 11. The rule applied to a nonexclusive license or privilege. Pennsylvania R. Co. v. Philadelphia Belt Line R. Co., 10 Pa. Co. Ct. R. 625.

[1254] Long Island Water Supply Co. v. City of Brooklyn, 166 U. S. 685; National Water-works Co. v. Kansas City (C. C. A.) 62 Fed. 853, 27 L. R. A. 827; Fergus Falls Water Co. v. City of Fergus Falls, 65 Fed. 586; Newburyport Water Co. v. City of Newburyport, 103 Fed. 584; City of Greenville v. Greenville Water Co., 125 Ala. 625, 27 So. 764; Stein v. McGrath, 128 Ala. 175, 30 So. 792; Thomas v. City of Grand Junction, 13 Colo. App. 80, 56 Pac. 665. A city is not bound to purchase a water plant in preference to erecting one of its own through the reservation and grant of a franchise the option to purchase by it. Burlington Water Co. v. Woodward, 49 Iowa, 58; Crescent City Gas Light Co. v. New Orleans Gas Light Co., 27 La. Ann. 138; Rockport Water Co. v. Inhabitants of Rockport, 161 Mass. 279, 37 N. E. 168. The city authorized to purchase plant on payment of actual cost. Hudson Elec. Light Co. v. Inhabitants of Hudson, 163 Mass. 346, 40 N. E. 109; Long v. City of Duluth, 49 Minn. 280, 51 N. W. 913; State v. City of Newark, 54 N. J. Law, 62, 23 Atl. 129. Option for purchase assumed and held capable of being exercised at any time. Ziegler v. Chapin, 59 Hun, 214, 13 N. Y. Supp. 783. An option giving the right to the public authorities to acquire property or franchises by right of eminent domain within a specified time, expires after the lapse of that time.

In re Board of Water Com'rs of Village of White Plains, 71 App. Div. 544, 76 N. Y. Supp. 11; Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546. An option to purchase it was held but did not impose on the city any exclusive duty in this respect; or could lawfully supply itself with water from other sources. City of Chillicothe v. Logan Natural Gas & Fuel Co., 8 Ohio N. P. 88. This right is given by Ohio Rev. St. § 2485. Philipsburg Water Co. v. Philipsburg Borough, 203 Pa. 562, 53 Atl. 347; North Springs Water Co. v. City of Tacoma, 21 Wash.

in some cases at regular recurring intervals thereafter.[1255] Where the grant is not exclusive in its character no compensation can be made for the license.[1256] This right is usually given to be exercised in the first instance at the end of a period which has been exclusive so far as privileges are concerned in favor of the grantee. After a failure to exercise the option it has been held that the license loses thereafter its exclusive character. Where the purchase price is not agreed upon, this question becomes then an important one. In a preceding section[1257] has been given many authorities on this point and some quotations made from the leading decisions. In addition it might be added that in estimating the value of a company's plant, a contract with the city, if one exist, should be taken into consideration.[1258] An option to purchase, so it has been held, may be assigned by the city.[1259]

§ 933. 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

517, 58 Pac. 773, 47 L. R. A. 214; Wheeling Gas Co. v. City of Wheeling, 8 W. Va. 320.

Cooley, Const. Lim. (7th Ed.) p. 398. "The grant of an exclusive privilege will not prevent the legislature from exercising the power of eminent domain in respect thereto." See § 457, ante, with authorities cited discussing the question of the purchase of a private plant on a fair and equitable basis.

[1255] Cherryvale Water Co. v. City of Cherryvale, 65 Kan. 219, 69 Pac. 176; Covington Gas Light Co. v. City of Covington, 22 Ky. L. R. 796, 58 S. W. 805. The failure to exercise the option at one time will not deprive a city of its right to exercise it at the next period. City of St. Louis v. St. Louis Gas Light Co., 70 Mo. 69.

[1256] In re Long Island Water Supply Co., 73 Hun, 499, 26 N. Y. Supp. 198.

[1257] Montgomery Gas Light Co. v. Montgomery & E. R. Co., 86 Ala. 372, 5 So. 735; Braintree Water Supply Co. v. Inhabitants of Braintree, 146 Mass. 482, 16 N. E. 420; Turner v. Revere Water Co., 171 Mass. 329, 40 L. R. A. 657; Griffin v. Goldsboro Water Co., 122 N. C. 206, 41 L. R. A. 240. See, also, San Diego Water Co. v. City of San Diego, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460. See §§ 457 et seq.

[1258] Covington Gas Light Co. v. City of Covington, 22 Ky. L. R. 796, 58 S. W. 805; Town of Bristol v. Bristol & W. Water-works Co., 23 R. I. 274, 49 Atl. 974.

[1259] Covington Gas Light Co. v. City of Covington, 22 Ky. L. R. 796, 58 S. W. 805.

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.[1260] The principles governing these contracts have been discussed at length in other sections of this work.[1261] It is sufficient to say here that the authority for their execution must clearly appear[1262] and that public authorities are further limited by restrictions relative to the incurring of indebtedness[1263] or the manner of raising or expending public moneys.[1264]

[1260] 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. See, also, authorities cited in §§ 455, 896 & 904 et seq., ante.

[1261] See §§ 455 et seq., ante.

[1262] Winterport Water Co. v. Inhabitants of Winterport, 94 Me. 215, 47 Atl. 142, 1045; Lewick v. Glazier, 116 Mich. 493, 74 N. W. 717. But a water contract is valid to the extent of powers granted in the village charter. St. Louis Gas Light Co. v. St. Louis G., F. & P. Co., 16 Mo. App. 52; People v. Sisson, 75 App. Div. 138, 77 N. Y. Supp. 376.

[1263] City of East St. Louis v. East St. Louis Gas Light & Coke Co., 98 Ill. 415. A contract for lighting the streets which is fully carried out would be invalid because contrary to a charter provision in respect to the incurring of indebtedness by the city, is valid so far as executing on the part of the gas company.

Searle v. Abraham, 73 Iowa, 507, 35 N. W. 612; East Jordan Lumber Co. v. Village of East Jordan, 100 Mich. 201, 58 N. W. 1012. A village may make a valid contract for a supply of water without a vote of the electors as required by statute in respect to the borrowing or expending of moneys for the construction of waterworks. Kiichli v. Minnesota Brush Elec. Co., 58 Minn. 418, 59 N. W. 1088; Humphreys v. City of Bayonne, 55 N. J. Law, 241, 26 Atl. 81. But see New Orleans Gas Light Co. v. City of New Orleans, 42 La. Ann. 188, 7 So. 559; Merrill R. & Lighting Co. v. City of Merrill, 80 Wis. 358, 49 N. W. 965.

[1264] Higgins v. City of San Diego, 118 Cal. 524; Leadville Ill. Gas Co. v. City of Leadville, 9 Colo. App. 400; Grand Junction Water Co. v. City of Grand Junction, 14 Colo. App. 424, 60 Pac. 196; McGuire v. Rapid City, 6 Dak. 346, 5 L. R. A. 752; Maine Water Co. v. City of Waterville, 93 Me. 586, 45 Atl. 830, 49 L. R. A. 294; Winterport Water Co. v. Inhabitants of Winterport, 94 Me. 215, 47 Atl. 142, 1045; Lamar Water & Elec. Light Co. v. City of Lamar (Mo.) 26 S. W. 1025; City of North Platte v. North Platte Waterworks Co., 56 Neb. 403, 76 N. W. 906, Id., 50 Neb. 853, 70 N. W. 393; Suburban Elec. Co. v. Elizabeth City, 59 N. J. Law, 134; Shuttuck v. Smith, 6 N. D. 56; City of Cincinnati v. Holmes, 56 Ohio St. 104; McNeal v. City of Waco, 89 Tex. 83; Stedman v. City of Berlin, 97 Wis. 505, 73 N. W. 57. But see Creston Water-works Co. v. City of

The rule of strict construction also applies to them in respect to the performance of conditions.[1265] The point has been raised against the validity of a contract for the supply of water or light in that there is effected an increase of indebtedness beyond a constitutional or statutory limit by reason of the obligation of the contract to pay certain specified sums. This question has already received sufficient consideration in previous sections. As a rule it is held that the making of a contract of this character and extending through a term of years with provisions for future payments, the obligation to make them is not considered a debt within the meaning of the phrase as ordinarily used. The only liability which arises is a present one for the payment of that part of a contract obligation already acquired and it being in all cases a contingent one based upon an actual rendition of the services performed.[1266]

Execution of contract. The subject of municipal contracts has been previously considered,[1267] but the principles might be emphasized here in respect to the limited power or capacity of public corporations to contract[1268] and the urgent necessity for a

Creston, 101 Iowa, 687, 70 N. W. 739; State v. City of Crete, 32 Neb. 568, 49 N. W. 272.

[1265] 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. A. 82; Village of Bolivar v. Bolivar Water Co., 62 App. Div. 484, 70 N. Y. Supp. 750; Ellensburgh Water Supply Co. v. City of Ellensburgh, 13 Wash. 554, 43 Pac. 531; Monroe Water-works Co. v. City of Monroe, 110 Wis. 11, 85 N. W. 685. But see City of Greenville v. Greenville Water-works Co., 125 Ala. 625, 27 So. 764; City of New Orleans v. Firemen's Charitable Ass'n, 43 La. Ann. 447, 9 So. 486.

[1266] Keihl v. City of South Bend, 76 Fed. 921, 36 L. R. A. 228; City Water Supply Co. v. City of Ottumwa, 120 Fed. 309; State v. McCauley, 15 Cal. 429; Hay v. City of Springfield, 64 Ill. App. 671; City of East St. Louis v. East St. Louis Gas Light & Coke Co., 98 Ill. 415; Culbertson v. City of Fulton, 127 Ill. 30; Crowder v. Town of Sullivan, 128 Ind. 486, 13 L. R. A. 647; Town of Gosport v. Pritchard, 156 Ind. 400; French v. City of Burlington, 42 Iowa, 614; Lamar Water & Elec. Light Co. v. City of Lamar, 140 Mo. 145; Brown v. City of Corry, 175 Pa. 528; Winston v. City of Spokane, 12 Wash. 524; Spilman v. City of Parkersburg, 35 W. Va. 605. But see Prince v. City of Quincy, 105 Ill. 138; Id., 128 Ill. 443. See, also, City of Valparaiso v. Gardner, 97 Ind. 1. See § 149, p. 322 and § 460, p. 1167.

[1267] See §§ 246 et seq., ante.

[1268] East St. Louis Gas Light & Coke Co. v. City of East St. Louis,

strict compliance with all prescribed formalities in respect to the manner,[1269] form,[1270] or time of their execution.

§ 934. Additional servitude; subject further considered.

In the previous discussion commencing, approximately, with section 795, various rights of abutting owners have been suggested from time to time and as one of the most important, that to demand and collect compensation for use or occupation of a public highway by some private or quasi public agency engaged in the business of supplying water, light, telephone, telegraph or transportation service. A reference is made in the notes dealing with the question. A steam or commercial road is universally regarded as an additional burden or servitude whether the highway is an urban or interurban one.[1271] A street railway proper is almost as universally regarded as not an additional burden upon a street proper though there are some dissenting cases,[1272] and

47 Ill. App. 411; Nicholasville Water Co. v. Board of Councilmen, 18 Ky. L. R. 592, 36 S. W. 549; Smith v. Dedham, 144 Mass. 177, 10 N. E. 782; State v. McCardy, 62 Minn. 509, 64 N. W. 1133; Grand Island Gas Co. v. West, 28 Neb. 852, 45 N. W. 242. Under a contract illegal because of the interest of a public official in it, a city can be compelled to pay the fair value of light actually furnished. Borough of Milford v. Milford Water Co., 124 Pa. 610, 17 Atl. 185, 3 L. R. A. 122; Seltzer v. Metropolitan Elec. Co., 199 Pa. 100, 48 Atl. 861.

[1269] Lake Charles Ice, Light & Water-works Co. v. City of Lake Charles, 106 La. 65, 30 So. 289. Officers de facto are competent to make a binding contract. Blank v. Kearney, 28 Misc. 383, 59 N. Y. Supp. 645.

[1270] City of Conyers v. Kirk, 78 Ga. 480, 3 S. E. 442. A contract for street lighting informal in its character may become obligatory by ratification through the use of the light furnished for a considerable time without any objection to its informality. American Lighting Co. v. McCuen, 92 Md. 703, 48 Atl. 352. See, also, Dallas Elec. Co. v. City of Dallas, 23 Tex. Civ. App. 323, 58 S. W. 153. A lighting contract not formally executed but carried out for a series of years can be enforced; the city is liable for the services furnished during that time.

[1271] See § 841, ante.

[1272] Chicago & C. Terminal R. Co. v. Whiting H. & E. C. St. R. Co., 139 Ind. 297, 38 N. E. 604; Mordhurst v. Ft. Wayne & S. W. Traction Co., 163 Ind. 268, 71 N. E. 642, where in the syllabus it is said: "An interurban street passenger railway with the necessary turnouts, switches, feed wires and poles in and along a public street though anthorized to transport light express matter, passengers, baggage and United States mails does not impose any additional servitude on

a change to electricity or the use of that power imposes no addi-

the street entitling abutting property owners to compensation."

Appeal of Milbridge & C. Elec. R. Co., 96 Me. 110 51 Atl. 818; Attorney General v. Metropolitan R. Co., 125 Mass. 515; Grand Rapids, & G. R. Co. v. Heisel, 38 Mich. 62. "A street railway for local purposes, so far from constituting a new burden, is supposed to be permitted because it constitutes a relief to the street; it is in furtherance of the purpose for which the street is established, and relieves the pressure of local business and local travel instead of constituting an embarrassment. It is for this reason that the owners of lands over which a city street is laid are denied compensation if a street railway is subsequently authorized within it; if they were compensated for the taking of their land originally they are supposed to be compensated for all possible losses they may suffer from its being put to proper uses as an avenue of local trade and passage, and if without compensation they dedicated it to the public, they are supposed to have contemplated and assented to all such uses."

Hester v. Durham Traction Co., 138 N. C. 288, 50 S. E. 711; Rafferty v. Central Traction Co., 147 Pa. 579, 23 Atl. 884; La Crosse City R. Co. v. Higbee, 107 Wis. 389, 83 N. W. 701, 51 L. R. A. 923. "In determining whether a street railroad is an additional burden upon the land already set aside for the public use as a highway, we are to look to the manner of its construction and use, and not to the motive power. The latter may be steam, horse, electric or compressed air power, and the road and its operation be consistent with the common public use for which the street was originally designed, and not violate private rights; and either may be so used, and the road may be so constructed and operated as to have the opposite effect. Electric railroads constructed in the usual way and operated by the use of the overhead trolley wire supported by cross-wires fastened to poles set at the curb lines of the street, or otherwise located so as not to materially interfere with the ordinary common use of the street, belong to the former class, as we shall see later; and that has become so firmly established by the courts that it cannot be considered open to serious question." But see Jaynes v. Omaha St. R. Co., 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751, where the court held that the poles and wires of an electric railway constituted an additional burden. It was said in the opinion: "The use made of these streets by the railway company is not one common with that of the public generally; its poles and wires remain and must remain and exclusively occupy particular portions of the street and continuously exclude the public from such portions. Whether a use made of a street is an additional burden upon the easement we do not think depends upon the motive power which moves the vehicle employed. It depends upon the question whether the vehicle and appliances used in and necessary to effectuate that purpose permanently and exclusively occupy

tional burden.[1273] The construction and operation of an elevated road is ordinarily regarded as entitling the abutting owner to additional compensation.[1274] The construction and operation of telephone, telegraph and electric light or power systems upon a suburban highway, by almost universal authority is regarded as

all or a portion of the street to the continued exclusion of the rest of the public. If they do not, then it is not an additional burden. If they do, it is." See, also, very full note in 106 Am. St. Rep. p. 232. See §§ 844 et seq., ante.

[1273] Birmingham Traction Co. v. Birmingham & R. Elec. Co., 119 Ala. 137, 24 So. 502, 43 L. R. A. 233; General Elec. R. Co. v. Chicago & W. I. R. Co., 184 Ill. 588, 56 N. E. 963; Snyder v. Ft. Madison St. R. Co., 105 Iowa, 284, 75 N. W. 179, 41 L. R. A. 345; Louisville Bagging Mfg. Co. v. Central Pass. R. Co., 95 Ky. 50; Taylor v. Portsmouth, K. & Y. St. R. Co., 91 Me. 193, 39 Atl. 560; Poole v. Falls Road Elec. R. Co., 88 Md. 533, 41 Atl. 1069; Eustis v. Milton St. R. Co., 183 Mass. 586, 67 N. E. 663; Dean v. Ann Arbor St. R. Co., 93 Mich. 330, 53 N. W. 396; Placke v. Union Depot R. Co., 140 Mo. 634, 41 S. W. 915; Roebling v. Trenton Pass. R. Co., 58 N. J. Law, 666, 34 Atl. 1090, 33 L. R. A. 129; Budd v. Camden Horse R. Co., 70 N. J. Law, 782, 59 Atl. 229; Hudson River Tel. Co. v. Watervliet Turnpike & R. Co., 135 N. Y. 393, 32 N. E. 148, 17 L. R. A. 674; Cumberland Teleg. & Tel. Co. v. United Elec. R. Co., 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236; Reid v. Norfolk City R. Co., 94 Va. 117, 26 S. E. 428, 36 L. R. A. 274; La Crosse City R. Co. v. Higbee, 107 Wis. 389, 83 N. W. 701, 51 L. R. A. 923; Younkin v. Milwaukee Light, Heat & Traction Co., 120 Wis. 477, 98 N. W. 215; Western Pav. & Supply Co. v. Citizens' St. R. Co. (Ind.) 25 Am. St. Rep. 479, with note. But see Jaynes v. Omaha St. R. Co., 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751; Street R. Co. v. Doyle, 88 Tenn. 747, 13 S. W. 936, 9 L. R. A. 100.

[1274] New York El. R. Co. v. Fifth Nat. Bank, 135 U. S. 432; Freiday v. Sioux City Rapid Transit Co., 92 Iowa, 191, 60 N. W. 656, 26 L. R. A. 246; De Geofroy v. Merchants' Bridge Terminal R. Co., 179 Mo. 698, 79 S. W. 386. But see Jones v. Erie & W. V. R. Co., 151 Pa. 30, 25 Atl. 134, 17 L. R. A. 758. The construction of an electric road of itself imposes no additional servitude but if it interferes with the private easements of the abutting owner, he is entitled to compensation. See, also, the Illinois cases where it is held that an elevated railroad is not an additional burden, yet, abutting owners are entitled to compensation under the Illinois constitutional provision relative to the taking of private property for a public use without just compensation. See the following cases: Doane v. Lake St. El. R. Co., 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97; Aldrich v. Metropolitan W. S. R. Co., 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237, and Aldis v. Union El. R. Co., 203 Ill. 567, 68 N. E. 95.

See, also, Baker v. Boston El. R. Co., 183 Mass. 178, 66 N. E. 711, and see § 848, ante.

an additional servitude for which the owner can recover compensation.[1275] In respect to the use by these latter facilities of urban highways, the cases are divided, though the weight of authority as based upon the better reasons, regards them as an additional burden with its resulting consequences in favor of the abutter.[1276] A clear distinction, however, appears in the use

[1275] Postal Telegraph-Cable Co. v. Easton, 170 Ill. 513, 49 N. E. 365, 39 L. R. A. 722; Gray v. York State Tel. Co., 92 App. Div. 89, 86 N. Y. Supp. 771; Donovan v. Allert, 11 N. D. 289, 91 N. W. 441, 58 L. R. A. 775; Kirby v. Citizens' Tel. Co., 17 S. D. 362, 97 N. W. 3; Maxwell v. Central Dist. & Printing Tel. Co., 51 W. Va. 121, 41 S. E. 125; Krueger v. Wisconsin Tel. Co., 106 Wis. 96, 81 N. W. 1014, 50 L. R. A. 298. But see McCann v. Johnson County Tel. Co., 69 Kan. 210, 76 Pac. 870; Cumberland Telep. & Tel. Co. v. Avrite, 27 Ky. L. R. 394, 85 S. W. 204; Gulf Coast Ice & Mfg. Co. v. Bowers, 80 Miss. 570, 32 So. 113; Palmer v. Larchmont Elec. Co., 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672. "The care, management and control of the public ways devolve upon the local municipal government in which they are located, and it is the duty of the local government to maintain them in such condition that the public, by the exercise of due care, may pass over them in safety. In the darkness of the night, in crowded thoroughfares, light is an important aid, largely tending to promote the convenience, as well as the safety, of the traveling public. It is not only one of the uses to which the public ways may be devoted, but in the cases of crowded thoroughfares a duty devolves upon the municipality of supplying it. In such cases it is one of the burdens upon the fee which must be borne as an incident to the public right of traveling over the way, and is deemed one of the uses for which the land was taken as a public highway." See, also, Lowther v. Bridgeman (W. Va.) 50 S. E. 410. See § 833, ante, with cases cited.

[1276] Stowers v. Postal Telegraph-Cable Co., 68 Miss. 559, 9 So. 356, 12 L. R. A. 864; Bronson v. Albion Tel. Co. (Neb.) 93 N. W. 201; Halsey v. Rapid Transit St R. Co., 47 N. J. Eq. 380, 20 Atl. 859; Callen v. Columbus Edison Elec. Light Co., 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782; Central Union Tel. Co. v. Falley (Ind.) 10 Am. St. Rep. 128, with note; Chesapeake & P. Tel. Co. v. MacKenzie, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 229, with full notes. But see Loeber v. Butte General Elec. Co., 16 Mont. 1; Tuttle v. Brush Elec. Ill. Co., 50 N. Y. Super. Ct. (18 J. & S.) 464; MeLean v. Brush Elec. Lighting Co., 9 Wkly. Law Bul. 65, 1 Am. Electrical Cases, 483. "It seems to me clear then, from principle and authority that although the uses to which a street may be put, under a grant for street purposes, may include not only the sewers, water-pipes and gas-pipes, as these are all put under the ground, and do not interfere with the abutting lot owner, it is equally clear that this right cannot be extended so as

of streets proper for furnishing a supply of water or light to a public corporation for street lighting and other public purposes or to effect a sale of these commodities to private consumers. In the former case the weight of authority, as will be found upon an examination of the cases cited, is to the effect that no compensation can be recovered while the latter use is for a private purpose and should impose an additional servitude.[1277] The use of urban roads for gas and water pipes lawfully laid either by public authorities or private persons imposes no additional burden [1278] and

to impose any burden, no matter how slight, on the original proprietor, or his successor in the ownership of the abutting lot, unless a new grant be made, in short without obtaining the consent of the abutting lot owner, or otherwise acquiring his interest in the highway." See §§ 826 et seq., ante.

[1277] Johnson v. Thomson-Houston Elec. Co., 54 Hun, 469, 7 N. Y. Supp. 716; Tiffany v. United States Ill. Co., 51 N. Y. Super. Ct. (19 J. & S.) 286. "Its business is to furnish light to the city corporation for the public lighting of the streets, and to private individuals to light private houses. The former may involve a public and ordinary use of the street; the latter would involve a use of the street for private purposes." Joyce, Elec. Law, § 332. "It can hardly be contended that the use of streets for this purpose (private lighting) is for the furtherance of any of the purposes for which the street is dedicated or taken. It is not a use in aid of travel, commerce, or the communication of intelligence. It is, however, an occupation of a portion of the street to the exclusion of the traveling public, in so far as the portion of the street's surface occupied by it is affected, and is an encroachment upon the rights of the abutting owner, of which he should not be deprived, either without his consent or in pursuance of statutory provisions prescribing certain prerequisites to the taking of private property."

[1278] City of Quincy v. Bull, 106 Ill. 337; Lostutter v. City of Aurora, 126 Ind. 436, 26 N. E. 184, 12 L. R. A. 259; City of Boston v. Richardson, 95 Mass. (13 Allen) 160; Bishop v. North Adams Fire Dist., 167 Mass. 364, 45 N. E. 925; Witcher v. Holland Water-works Co., 66 Hun, 619, 20 N. Y. Supp. 560; Crooke v. Flatbush Water-works Co., 29 Hun (N. Y.) 245; Jayne v. Cortland Water-works Co., 42 Misc. 263, 86 N. Y. Supp. 571; Smith v. City of Goldsboro, 121 N. C. 350, 28 S. E. 479; Columbia Conduit Co. v. Com., 90 Pa. 307; West v. Bancroft, 32 Vt. 367. But see In re Condemnation of Land at Nahant, 128 Fed. 185, where it was held in condemnation proceedings by the United States that a town having a beneficial interest in an easement of aqueduct was entitled to compensation upon its being taken for another public use and that in laying a water pipe under a public highway, a town acted in the same capacity as a nonmunicipal water company and was not entitled to compensation for the easement in

the reverse of this rule is true in respect to rural highways.[1279] Where no additional compensation is allowed in any of these cases, it is because the courts have considered the rendition of the service as a quasi public duty and the adjoining owner is supposed to have received his compensation in the performance of the duty upon reasonable terms and without discrimination.[1280]

III. Its Disposition.

§ 935. Power of disposition.
936. Limitations on power of disposition.
937. Mode of disposition; sale or lease.
938. Disposition by gift.
939. Vacation of highways.
940. Manner of vacation.
941. Petition.
942. Vacation; when effective.
943. Damage to abutting owner.
944. Evidence.
945. Abandonment of highways.
946. Prescriptive title.
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948. Collateral attack.
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§ 935. 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 highway upon its being appropriated for a superior public use. City of Morrison v. Hinkson, 87 Ill. 587. The erection of a water tank in a street held an additional servitude.

See, also, § 440, note 996, §§ 752, 762, 807, 809 and 826 et seq., ante.

[1279] Consumers' Gas Trust Co. v. Huntsinger, 14 Ind. App. 156, 42 N. E. 640; Kincaid v. Indianapolis Natural Gas Co., 124 Ind. 577, 24 N. E. 1066, 8 L. R. A. 602; Board of Com'rs of Hamilton County, etc. v. Indianapolis Nat. Gas Co., 134 Ind. 209, 33 N. E. 972; Ward v. Triple State Natural Gas & Oil Co., 25 Ky. L. R. 116, 74 S. W. 709; Bloomfield F. R. N. G. Co. v. Calkins, 62 N. Y. 386; Sterling's Appeal, 111 Pa. 35. See, also, authorities cited in preceding note.

[1280] Whitcher v. Holland Waterworks Co., 142 N. Y. 626.

the character of the title and the purpose and the manner in which acquired. The state as a sovereign may acquire public property in that capacity for purposes of defense and the maintenance of its political organization and in which neither the public as a whole nor any individual has any peculiar or personal rights. It is needless to say that its control and power of disposition in respect to such property is complete, limited only by the character of the title which it may have acquired from private grantors. This condition applies to the state or the sovereign alone and rarely, if ever, to its subordinate political or public agencies.[1281] The state together with all its subordinate governmental agencies may, again, acquire public property for public purposes; highways, public buildings, grounds, and the like which it acquires and holds solely as a trustee for the public for special uses and which it can thus acquire only because it is to be devoted to these uses. In respect to this property the power of disposition is limited not only by the purpose for which it has been acquired but also by rights both individual and collective which the public possess in respect to the use and occupation of the property for the purpose for which acquired. The rule obtains here, therefore, that a public corporation cannot divest itself of its title or any interest therein in any manner that may occasion or result in an impairment in the least degree or the destruction of the public rights.[1282] This principle has been con-

[1281] Lewis, Em. Dom. (2d Ed.) § 2.

[1282] Mahoning County Com'rs v. Young (C. C. A.) 59 Fed. 96, Id. 51 Fed. 585; Illinois & St. L. R. & C. Co. v. City of St. Louis, 2 Dill. 70, Fed. Cas. No. 7,007; Beebe v. City of Little Rock, 68 Ark. 39, 56 S. W. 791; City & County of San Francisco v. Itsell, 80 Cal. 57, 22 Pac. 74; City of Oakland v. Oakland Water Front Co., 118 Cal. 160; Logan v. Clough, 2 Colo. 323; City of Gainesville v. Caldwell, 81 Ga. 76; Bakewell v. Board of Education of Ill. (Ill.) 33 N. E. 186, following Board of Education of Ill. v. Bakewell, 122 Ill. 339, 10 N. E. 378; Sherlock v. Village of Winnetka, 59 Ill. 389; School Tp. of Allen v. School Town of Macy, 109 Ind. 559, 10 N. E. 578; Giltner v. Trustees of Carrollton, 46 Ky. (7 B. Mon.) 680; Inhabitants of West Roxbury v. Stoddard, 89 Mass. (7 Allen) 158; Green v. Putnam, 62 Mass. (8 Cush.) 21; Urch v. City of Portsmouth, 69 N. H. 162; Stenberg v. State, 50 Neb. 127, Id., 48 Neb. 299, 67 N. W. 190; Milhau v. Sharp, 15 Barb. (N. Y.) 193; City of Southport v. Stanly, 125 N. C. 464, 34 S. E. 641; Thompson v. Nemeyer, 59 Ohio St. 486; McCotter v. Town

stantly suggested in connection with a treatment of the subject of public highways and parks in previous sections.[1283] The state or its subordinate agencies to which has been expressly granted the power may, also, so it has been held in a few extreme cases, acquire property which it holds, possesses and uses in a private or proprietary sense. Its control or power of disposition over this property is limited by the same rules which apply to ordinary private ownership.[1284] It seems to the author unsound and illogical that a governmental agent should be permitted to act in a dual capacity. It clearly should not engage in enterprises that long experience and conservative thought have regarded as private in all their essential characteristics and further undesirable for governmental action because of its consequent disas terous effect upon individual initiative and thrift.

§ 936. Limitations on power of disposition.

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.[1285] The most frequent appli-

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; City of San Antonio v. Lewis, 15 Tex. 388; Lampson v. Town of New Haven, 2 Vt. 14.

[1283] See §§ 423 et seq., 733, ante.

[1284] Town of Searcy v. Yarnell, 47 Ark. 269, 1 S. W. 319; Cummings v. City of St. Louis, 90 Mo. 259.

[1285] Marine Ins. Co. v. St. Louis, I. M. & S. R. Co., 41 Fed. 643; McCord v. Pike, 121 Ill. 288, 12 N. E. 259; 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; Brockman v. City of Creston, 79 Iowa, 587, 44 N. W. 822; Roberts v. City of Louisville, 92 Ky. 95, 17 S. W. 216, 13 L. R. A. 844. Injunction will lie to restrain illegal action in this respect.

Methodist Episcopal Church v. City of Hoboken, 33 N. J. Law, 13. Local authorities have power to regulate the public use of dedicated lands but this right is vested in them only as representatives of the public. They cannot sell lands so dedicated nor lease or extinguish the uses for which they were dedicated neither can they employ them in any way different from the

cation of this rule is in connection with the acquirement, use and disposition of public highways and public grounds.[1286] A public corporation may, as already stated, in previous sections,[1287] acquire property for certain public or quasi public uses by gift from private individuals to be used for an especial purpose. The gift may be 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.[1288] The manner 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.[1289]

Statutory authority. Public property may be acquired through the exercise of either an authority expressly granted or one which it may possess through the doctrine of implication. The grant of the express power to acquire property in many instances is

purposes for which they were dedicated. New Jersey & N. E. Tel. Co. v. Jersey City Fire Com'rs, 34 N. J. Eq. (7 Stew.) 117; Wenk v. City of New York, 69 App. Div. 621, 75 N. Y. Supp. 1135 affirming 36 Misc. 496, 73 N. Y. Supp. 1003; City of Pittsburg v. Epping Carpenter Co., 29 Pittsb. Leg. J. (N. S.) 255; Lewis v. City of San Antonio, 7 Tex. 298; Llano County v. Knowles (Tex. Civ. App.) 29 S. W. 549; City of Cleburne v. Gulf, C. & S. F. R. Co., 66 Tex. 457, 1 S. W. 342. See, also, §§ 815, 816, ante.

[1286] People v. City of Albany, 4 Hun (N. Y.) 675. See, also, §§ 815, 816, ante.

[1287] See §§ 722 and 733, ante.

[1288] See § 733. Douglas v. City Council of Montgomery, 118 Ala. 599, 24 So. 745, 43 L. R. A. 376; Prescott v. Edwards, 117 Cal. 298, 49 Pac. 178. An offer to dedicate for several years may be revoked. McCullough v. Board of Education of San Francisco, 51 Cal. 419; Warren v. Lyons City, 22 Iowa, 351, West Carroll Parish v. Gaddis, 34 La. Ann. 928; Inhabitants of Bucksport v. Spofford, 12 Me. 487; Plumb v. City of Grand Rapids, 81 Mich. 381, 45 N. W. 1024; Patrick v. Y. M. C. A. of Kalamazoo, 120 Mich. 185, 79 N. W. 208; Goode v. City of St. Louis, 113 Mo. 257, 20 S. W. 1048; Rowzee v. Pierce, 75 Miss. 846, 23 So. 307, 40 L. R. A. 402. Property dedicated for public use as an ornamental part reverts to the original donors upon the abandonment by the public authorities for that purpose. Board of Education of Van Wert v. Inhabitants of Van Wert, 18 Ohio St. 221; Harris County v. Taylor, 58 Tex. 690. But see Warren County Sup'rs v. Patterson, 56 Ill. 111; Travis County v. Christian (Tex. Civ. App.) 21 S. W. 119.

accompanied by direct grant of the right of disposition[1290] and property which has been acquired through the exercise of an implied power may also by the authority of the state be disposed of. The power of disposition in respect to the larger part of public property must be derived from the sovereign,[1291] and the principle applies that in cases of doubt as to the existence of the right, this doubt will be determined against the power rather than in its favor.[1292]

§ 937. Mode of disposition; sale or lease.

As stated in the preceding section, 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[1293] and by its terms it may be either

[1289] Brooklyn Park Com'rs v. Armstrong, 3 Lans. (N. Y.) 429; Portland & W. B. R. Co. v. City of Portland, 14 Or. 188, 12 Pac. 265. See §§ 722 et seq., 739 et seq., and 743 et seq., ante.

[1290] Wells v. Pressy, 105 Mo. 164, 16 S. W. 670; Taylor v. Hoya, 9 Tex. Civ. App. 312, 29 S. W. 540.

[1291] Cohas v. Raisin, 3 Cal. 444; Fiudla v. City & County of San Francisco, 13 Cal. 534; Hart v. Burnett, 15 Cal. 530; Denver & S. R. Co. v. Denver City R. Co., 2 Colo. 673; Hurd v. Hamill, 10 Colo. 174, 14 Pac. 126. A public corporation may be liable to a purchaser for failure of title. See, also, as holding the same, Nelson v. Hamilton County, 102 Iowa, 229, 71 N. W. 206, and Sanders v. Sexton, 36 Misc. 574, 73 N. Y. Supp. 1095; Lyman v. Gedney, 114 Ill. 388; Harney v. Indianapolis, C. & D. R. Co., 32 Ind. 244; Harrison v. Palo Alto County, 104 Iowa, 383, 73 N. W. 872; Millsaps v. Town of Monroe, 37 La. Ann. 641; Congregational Soc. in Lanesborough v. Curtis, 39 Mass. (22 Pick.) 320; City of Minneapolis v. Janney, 86 Minn. 111, 90 N. W. 312; Brooklyn Park Com'rs v. Armstrong, 3 Lans. (N. Y.) 429; City of Cincinnati v. Dexter, 55 Ohio St. 93, 44 N. E. 520; Thompson v. Nemeyer, 59 Ohio St. 486, 52 N. E. 1024. A municipal corporation has power to sell its gas plant under the power to purchase real estate and other property for the use of the corporation and to sell the same as given in Rev. St. § 1692, subd. 34. City of Ogden City v. Bear Lake & River Water-works & Irr. Co., 16 Utah, 440, 52 Pac. 697, 41 L. R. A. 305; Callvert v. Windsor, 26 Wash. 368, 67 Pac. 91. See, also, first paragraph in following section with authorities cited.

[1292] Knight v. Haight, 51 Cal. 169; Jefferson County v. Grafton, 74 Miss. 435, 21 So. 247, 36 L. R. A. 798; Atherton v. Johnson, 2 N. H. 31.

[1293] Fidelity Trust & Guaranty Co. v. Fowler Water Co., 113 Fed. 560. A municipal corporation has no power to encumber its property

what can be termed an imperative authority or a discretionary one. These phrases are almost self-explanatory. 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.[1294] Where the power of sale is discretionary, the question of consideration is also for the authorities to determine.[1295]

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

by mortgage in the absence of express legislative authority, and, further, is without power to purchase and hold property subject to a mortgage. Bartlett v. Crawford, 36 Ark. 637; City of Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277; McCaslin v. State, 44 Ind. 151. The authority to sell certain lands is authorized under a law entitled "an act to establish a house of refuge for juvenile offenders."

Shannon v. O'Boyle, 51 Ind. 565. County commissioners have power to sell shares of stock owned by the company in a railroad company. City of Terre Haute v. Terre Haute Water-works Co., 94 Ind. 305; Page County v. American Immigrant Co., 41 Iowa, 115. Considering the power of a county in Iowa to sell swamp lands. Clark v. City of Providence, 16 R. I. 337, 15 Atl. 763, 1 L. R. A. 725; Mowry v. City of Providence, 16 R. I. 422, 16 Atl. 511; Huron Water-works Co. v. City of Huron, 7 S. D. 9, 62 N. W. 975, 30 L. R. A. 848. A municipality cannot dispose of its waterworks without special legislative authority. See last paragraph of preceding section.

[1294] Morgan v. Johnson (C. C. A.) 106 Fed. 452; People v. Middleton, 14 Cal. 540; Ellis v. Commissioners of Funded Debt, 38 Cal. 629; Coopers v. City of San Jose, 55 Cal. 599; Martin v. Townsend, 32 Fla. 318, 13 So. 887; Lyman v. Gedney, 114 Ill. 388, 29 N. E. 282; Inhabitants of Nobleboro v. Clark, 68 Me. 87; Bowlin v. Furman, 28 Mo. 427; Cummings v. City of St. Louis, 90 Mo. 259, 2 S. W. 130; Wright v. Town of Victoria, 4 Tex. 375.

[1295] Roberts v. Northern Pac. R. Co., 158 U. S. 1, affirming 42 Fed. 734; distinguishing Whiting v. Sheboygan & F. du. L. R. Co., 25 Wis. 167; McConnell v. Hutchinson, 71 Iowa, 512, 32 N. W. 481; Spitzer v. Runyan, 113 Iowa, 619, 85 N. W. 782; City of Minneapolis v. Janney, 86 Minn. 111, 90 N. W. 312; Schanck v. City of New York, 10 Hun (N. Y.) 124; City of Cincinnati v. Dexter, 55 Ohio St. 93, 44 N. E. 520; State v. Taylor, 107 Tenn. 455, 64 S. W. 766. But see Adamson v. Nassau Elec. R. Co., 12 Misc. 600, 33 N. Y. Supp. 732.

required.[1296] A sale may only be legally made after public advertisement and consequent sale to the highest bidder[1297] or affirmative action by voters.[1298] 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.[1299] That action

[1296] Morgan v. Johnson (C. C. A.) 106 Fed. 452. Where no mode is prescribed by statute the adoption of a motion by a city council authorizing and directing the conveyance of property is as efficacious as the passage of an ordinance. 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. Where a deed is regular on its face and executed under the appropriate seal by the proper authorities, a presumption exists in favor of its validity and in favor of the grantee. McCord v. Pike, 121 Ill. 288, 12 N. E. 259; City of Chicago v. English, 80 Ill. App. 163. The mayor of a city is the proper officer to execute a lease. Platter v. Elkhart County Com'rs, 103 Ind. 360. An order by county commissioners to sell county property is a ministerial act. Chouquette v. Barada, 33 Mo. 249. A deed executed under authority of law by a municipal corporation is presumed to have been executed in pursuance thereof. City of New York v. Hart, 16 Hun (N. Y.) 380; Straub v. City of Pittsburg, 138 Pa. 356, 22 Atl. 93; Ferguson v. Halsell, 47 Tex. 421; State v. Forrest, 7 Wash. 54, 33 Pac. 1079.

[1297] Buckner v. Hart, 52 Fed. 835; Thompson v. Alameda County Sup'rs, 111 Cal. 553; McPheeters v. Wright, 110 Ind. 519, 10 N. E. 634. The presumption exists in Indiana that under its laws after a lapse of thirty years a sale of school lands is regularly made. Nicholasville Water Co. v. Board of Councilmen, 18 Ky. L. R. 592, 36 S. W. 549; Coquard v. School Dist., 46 Mo. App. 6; City of New York v. Sonneborn, 113 N. Y. 423; Kerr v. City of Philadelphia, 8 Phila. (Pa.) 292; Wilson v. Gabler, 11 S. D. 206. But see Newbold v. Glen, 67 Md. 489, 10 Atl. 242. Where property was sold without advertising as required by law and it was held that, it being sold for its full value, in the absence of fraud, the sale was valid and vested a good title to the purchaser.

[1298] Douglas County v. Keller, 43 Neb. 635, 62 N. W. 60. But a purchaser is not chargeable with constructive notice of the fact that the proposition to sell such property was in fact defeated by a vote of the electors. Gumpert v. Hay, 202 Pa. 340, 51 Atl. 968. Affirmative action of two successive grand juries required.

[1299] Town of Searcy v. Yarnell, 47 Ark. 269, 1 S. W. 319. The doctrine of estoppel applies to a public corporation in all things pertaining to its proprietary rights the same as natural persons. Smith v. Morse, 2 Cal. 524; Hunnicutt v. City of Atlanta, 104 Ga. 1, 30 S.

of public authorities which involves a disposition of public property acquired for public uses and with public moneys should be restricted in every possible manner. The practical application of the principles above render attempts not made in accordance with the statute or without authority illegal and, therefore, void.[1300] 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.[1301]

E. 500; Crow v. Warren County Com'rs, 118 Ind. 51, 20 N. E. 642; Wisconsin v. Torinus, 24 Minn. 332; Jefferson County v. Grafton, 74 Miss. 435, 36 L. R. A. 798; Urch v. City of Portsmouth, 69 N. H. 162, 44 Atl. 112; Stenberg v. State, 50 Neb. 127; Shimer v. Inhabitants of Town of Phillipsburg, 58 N. J. Law, 506, 33 Atl. 852; Town of East Hampton v. Bowman, 136 N. Y. 521, 32 N. E. 987, affirming 60 Hun, 163, 14 N. Y. Supp. 668. An action against a vendor for the purchase price is not a ratification of unauthorized acts of public officials. Beckrich v. City of North Tonawanda, 57 App. Div. 563, 67 N. Y. Supp. 992; Dean v. State, 34 Tex. Cr. R. 474, 31 S. W. 378. But see Larned v. Jenkins, 113 Fed. 634. A deed authorized by law is presumably valid and cannot be clearly assailed.

[1300] Young v. Mahoning County Com'rs, 53 Fed. 895; Haydenfeldt v. Hitchcock, 15 Cal. 514; Gardner v. Dakota County Com'rs, 21 Minn. 33; Urch v. City of Portsmouth, 69 N. H. 162, 44 Atl. 112; Den d. Osborne v. Tunis, 25 N. J. Law (1 Dutch.) 633; Gwyn v. Coffey, 117 N. C. 469, 23 S. E. 331; McReynolds v. Broussard, 18 Tex. Civ. App. 409, 45 S. W. 760; Central Wharf & Warehouse Co. v. City of Corpus Christi, 23 Tex. Civ. App. 390, 57 S. W. 982; Rice v. Ashland County, 114 Wis. 130, 89 N. W. 908.

[1301] City of New Orleans v. Steamship Co., 87 U. S. (20 Wall.) 387;; Illinois & St. L. R. & C. Co. v. City of St. Louis, 2 Dill. 70, Fed. Cas. No. 7,007; State v. Baxter, 50 Ark. 447, 8 S. W. 188; Hirsch v. City of Brunswick, 114 Ga. 776, 40 S. E. 786; State v. Taylor, 28 La. Ann. 460; Millsaps v. Town of Monroe, 37 La. Ann. 641; Dill v. Inhabitants of Wareham, 48 Mass. (7 Metcf.) 438; Inhabitants of Town of Rockport v. Rockport Granite Co., 177 Mass. 246, 58 N. E. 1017, 51 L. R. A. 779; Worden v. City of New Bedford, 131 Mass. 23. A city has the right to let one of its public buildings to be used occasionally for other purposes either with or without compensation. See, also, as holding the same, Jones v. Inhabitants of Sanford, 66 Me. 585; and Stone v. City of Oconomowoc, 71 Wis. 155, 36 N. W. 829.

Wells v. Pressy, 105 Mo. 164, 16 S. W. 670; McDonald v. Schneider, 27 Mo. 405; Southern Development Co. of Nevada v. City of Douglass, 26 Nev. 50, 63 Pac. 38; Tilyou v. Town of Gravesend, 104 N. Y. 356, 10 N. E. 542; Evans v. Hughes County, 3 S. D. 580, 54 N. W. 603;

§ 938. 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.[1302] The reasons for this rule are too clear to warrant further discussion.

Smith v. Heuston, 6 Ohio 101; Baily v. City of Philadelphia, 184 Pa. 594, 39 Atl. 494, 39 L. R. A. 837. A lease by a city of its gas works for a long term of years when made within statutory authority is valid being made in its business or proprietary capacity. Town of Lemington v. Stevens, 48 Vt. 38. A lease of public lands by the town selectmen may be enjoined by them after the expiration of their term of office. As to the power of 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.

[1302] Roberts v. Northern Pac. R. Co., 158 U. S. 1, affirming 42 Fed. 734, and distinguishing Whiting v. Sheboygan & F. du L. R. Co., 25 Wis. 167; City of Eufaula v. McNab, 67 Ala. 588; City of Patty v. Colgan, 97 Cal. 251, 31 Pac. 1133, 18 L. R. A. 744. An appropriation for benefit of sufferers from floods held void.

Bourn v. Hart, 93 Cal. 321, 28 Pac. 951, 15 L. R. A. 431. An appropriation by the legislature to an individual on account of personal injuries sustained by him while in service of the state and for which the state is not legally responsible is a gift within the California constitution, § 31, art. IV. Conlin v. Board of Sup'rs of City of San Francisco, 99 Cal. 17, 33 Pac. 753, 21 L. R. A. 474; State v. Hart, 144 Ind. 107, 43 N. E. 7, 33 L. R. A. 118; Brockman v. City of Creston, 79 Iowa, 587, 44 N. W. 822; Trustees of Hawesville v. Hawes' Heirs, 69 Ky. (6 Bush) 232; Xiques v. Bujac, 7 La. Ann. 498; Allen v. Inhabitants of Marion, 93 Mass. (11 Allen) 108.

Wendell v. City of Newark, 63 N. J. Law, 216, 42 Atl. 767. A city clerk is under no obligation to furnish gratuitously to private persons certified copies of municipal records. Adamson v. Nassau Electric R. Co., 12 Misc. 600, 33 N. Y. Supp. 732; Bush v. Board of Sup'rs of Orange County, 10 App. Div. 542, 42 N. Y. Supp. 417; City of New York v. Union Ferry Co., 55 How. Pr. (N. Y.) 138; Gumpert v. Hay, 202 Pa. 340, 51 Atl. 968. Exchange of property between city and county held valid. Madden v. Hardy 92 Tex. 613, 50 S. W. 926; Weekes v. City of Galveston, 21 Tex. Civ. App. 102, 51 S. W. 544; City of Cleburne v. Gulf, C. & S. F. R. Co., 66 Tex. 457; Ellis v. Northern Pacific Ry. Co., 77 Wis. 114, 45 N. W. 811. See, also, §§ 410 et seq., ante. But see Stevenson v. Colgan, 91 Cal.

§ 939. 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,[1303] 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.[1304] The power is one which is not usually implied but must be expressly given,[1305] but where the power is granted

649, 27 Pac. 1089, 14 L. R. A. 459; Daggett v. Colgan, 92 Cal. 53, 28 Pac. 51, 14 L. R. A. 474. Appropriation for state exhibit at World's Fair held constitutional. Thomas v. Inhabitants of Marshfield, 27 Mass. (10 Pick.) 364; Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 101 Mo. 192, 13 S. W. 822, 8 L. R. A. 801; State v. Schwieckardt, 109 Mo. 496, 19 S. W. 47; Perry v. Keene, 58 N. H. 40. Aid to railroad held valid. State v. Babcock, 19 Neb. 230. Donations may be made under legislative authority giving municipalities power to aid internal improvements. Vaughn v. Board of Com'rs of Forsyth County, 118 N. C. 636, 24 S. E. 425. County donations authorized to a state home for feeble-minded persons. Cutting v. Taylor, 3 S. D. 11, 51 N. W. 949, 15 L. R. A. 691. Donations to private fire companies sustained. Lund v. Chippewa Co., 93 Wis. 640, 67 N. W. 927, 34 L. R. A. 131.

[1303] Haynes v. Thomas, 7 Ind. 38; City of Eudora v. Darling, 54 Kan. 654, 39 Pac. 184; Haywood v. City of Charlestown, 34 N. H. 23; Bauer v. Andrews, 7 Phila. (Pa.) 359; McGee's Appeal, 114 Pa. 470.

[1304] State v. Putnam County Com'rs, 23 Fla. 632, 3 So. 164. The inclusion of a portion of a county road within the city limits does not affect a vacation of it. Williams v. Carey, 73 Iowa, 194, 34 N. W. 813; Curry v. Place, 99 Mich. 524; Blocker v. State, 72 Miss. 720, 18 So. 388; Gargan v. Louisville, N. A. & C. R. Co., 11 Ky. L. R. 489, 12 S. W. 259; Lindsay v. City of Omaha, 30 Neb. 512, 46 N. W. 627; State v. Elizabeth City, 54 N. J. Law, 495, 24 Atl. 495; Newell v. Bassett, 33 N. J. Law, 26; Hammer v. Elizabeth City, 67 N. J. Law, 129, 50 Atl. 451. The city of Elizabeth is not authorized to make a conditional vacation of a public street. Buchholz v. New York, L. E. & W. R. Co., 148 N. Y. 640; McGee's Appeal, 114 Pa. 470, 8 Atl. 237; In re Vacation of Union Street, Pottsville Borough, 140 Pa. 525, 21 Atl. 406; Wetherill v. Pennsylvania R. Co., 195 Pa. 156, 45 Atl. 658. See, also, cases cited generally under this subject.

[1305] City of Texarkana v. Leach, 66 Ark. 40, 48 S. W. 807; Florida Cent. & P. R. Co. v. Ocala St. & S. R. Co., 39 Fla. 306, 22 So. 692; City of Louisville v. Bannon, 18 Ky. L. R. 10, 35 S. W. 120; City of Paris v. Lilleston, 22 Ky. L. R.

to vacate the whole of the street, it has been held to include the implied right to narrow or vacate a portion of it.[1306] 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 principles of law.[1307]

Occasion for vacation. The vacation of highways as in the case of the creation of them is usually discretionary with local public authorities[1308] 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. As stated later, a municipal corporation proper is charged with a certain duty in respect to the maintenance of its streets and upon a failure to perform its duty there may result a liability to those sustaining injuries by reason of its nonperformance. The fact that a municipal corporation, therefore, may have insufficient revenues with which to properly

1506, 60 S. W. 919; Hoboken Land & Imp. Co. v. City of Hoboken, 36 N. J. Law, 540; Jersey City v. Central R. Co., 40 N. J. Eq. (13 Stew.) 417; Brandt v. City of Milwaukee, 69 Wis. 386, 34 N. W. 246; Brock v. Hishen, 40 Wis. 674.

[1306] 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 Swanson Street, 163 Pa. 323, 30 Atl. 207.

[1307] People v. Nankin Highway Com'rs, 15 Mich. 347. See cases on vacation of streets by municipal corporations in 33 Am. & Eng. Corp. Cas.

[1308] Florida Cent. & P. R. R. R. Co. v. Ocala St. & S. R. R. Co., 39 Fla. 306, 22 So. 692; Meyer v. Village of Teutopolis, 131 Ill. 552, 23 N. E. 651. Where the discretionary power exists to vacate, it is no objection that it was exercised for the benefit of a private corporation. Leeds v. City of Richmond, 102 Ind. 372; Weaver v. Templin, 113 Ind. 298; Platt v. Chicago, B. & Q. R. Co. (Iowa) 31 N. W. 883; Spitzer v. Runyan, 113 Iowa, 619, 85 N. W. 782; Pillsbury v. City of Augusta, 79 Me. 71, 8 Atl. 150; Com. v. Inhabitants of Roxbury, 8 Mass. 457; Riggs v. Board of Education of Detroit, 27 Mich. 262; Horton v. Williams, 99 Mich. 423; Atkinson v. Wykoff, 58 Mo. App. 86; Glasgow v. City of St. Louis, 107 Mo. 198; Knapp, Stout & Co. v. City of St. Louis, 153 Mo. 560, 55 S. W. 104; Id., 156 Mo. 343, 56 S. W. 1102; Village of Bellevue v. Bellevue Imp. Co., 65 Neb. 52, 90 N. W. 1002; United New Jersey R. & Canal Co. v. National Docks, etc. R. Co., 57 N. J. Law, 523, 31 Atl. 981; In re Road in McCandless Tp., 110 Pa. 605, 1 Atl. 594; Attorney-General v. Shepard, 23 R. I. 9, 49 Atl. 39; State v. Taylor, 107 Tenn. 455, 64 S. W. 766. But see Town of Cromwell v. Connecticut Brown Stone Quarry Co., 50 Conn. 470. See, also, §§ 807 et seq., ante.

repair and maintain public streets within its limits will be a valid reason for the vacation of some one or more of them.[1309] A public highway also whether urban or suburban many be rendered unnecessary or undesirable by reason of the opening or existence of other public roads.[1310] A vacation of a public highway is, therefore, based primarily upon a general benefit of the community[1311] though the fact that it is sometimes done for the advantage of abutting owners will not render a vacation void otherwise legal.[1312]

§ 940. Manner of vacation.

The vacation of a highway can only be effected through the carrying out of certain prescribed proceedings in an orderly manner. These may be originated either by the public authorities

[1309] Tuftonborough v. Fox, 58 N. H. 416; In re Palo Alto Road, 160 Pa. 104; Anderson v. Turbeville, 46 Tenn. (6 Cold.) 150. But see Ashcraft v. Lee, 81 N. C. 135.

[1310] Scutt v. Town of Southbury, 55 Conn. 405, 11 Atl. 854; Ponder v. Shannon, 54 Ga. 187; Green v. Ayers, 31 Ind. 248; Limming v. Barnett, 134 Ind. 332, 33 N. E. 1098; Rector v. Christy, 114 Iowa, 471, 87 N. W. 489; Bradbury v. Walton, 14 Ky. L. R. 823, 21 S. W. 869; Robertson v. McDowell, 15 Ky. L. R. 503, 24 S. W. 7; Com. v. Inhabitants of Roxbury, 8 Mass. 457; Phelps v. Pacific R. Co., 51 Mo. 477; Bethlehem's Petition, 20 N. H. 210; Town of Hopkinton's Petition, 27 N. H. 133; Petition of Marlborough, 45 N. H. 556; People v. Nichols, 51 N. Y. 470; Miller v. Oakwood Tp., 9 N. D. 623, 84 N. W. 556; De Forest v. Wheeler, 5 Ohio St. 286; In re Loretto Road, 29 Pa. 350; In re Vacation of Henry Street, 123 Pa. 346, 16 Atl. 785; In re Vacation of Public Road in Palo Alto, 160 Pa. 104, 28 Atl. 649; In re Swanson Street, 163 Pa. 323, 30 Atl. 207.

[1311] Douglass v. City Council of Montgomery, 118 Ala. 599, 24 So. 745, 43 L. R. A. 376; Whitsett v. Union Depot & R. Co., 10 Colo. 243, 15 Pac. 339; Smith v. McDowell, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393; Warren v. Lyons City, 22 Iowa, 351; Glasgow v. City of St. Louis, 87 Mo. 678; Winchester v. Capron, 63 N. H. 605; Portland & W. V. R. Co. v. City of Portland, 14 Or. 188; In re Palo Alto Road, 160 Pa. 104.

[1312] City of Mt. Carmel v. Shaw, 155 Ill. 37, 39 N. E. 584, 27 L. R. A. 580, reversing 52 Ill. App. 429; Hayes v. Tyler, 85 Iowa, 126, 52 N. W. 116; City of Marshalltown v. Forney, 61 Iowa, 578; Knapp, Stout & Company v. City of St. Louis, 153 Mo. 560, 55 S. W. 104; Village of Bellevue v. Bellevue Imp. Co., 65 Neb. 52, 90 N. W. 1002; State v. Elizabeth City, 54 N. J. Law, 462, 24 Atl. 495.

acting under statutory or charter authority [1313] or upon a petition of those interested or the owners of abutting property owners,[1314] and the rule of strict construction applies to the authority both in respect to the existence of the power and the manner of its exercise.[1315] A highway cannot be legally vacated

[1313] Rankin v. Com'rs of Road Dist. No. 15, 97 Ill. App. 206; Martin v. City of Louisville, 16 Ky. L. R. 786, 29 S. W. 864;; Lathan v. Inhabitants of Wilton, 23 Me. 125; Coakley v. Boston & Maine R. Co., 159 Mass. 32, 33 N. E. 930; Ruton v. Adams (N. J. Law) 21 Atl. 937; Read v. City of Camden, 54 N. J. Law, 347, 24 Atl. 549. Consent of abutting owners not necessary.

[1314] Johnson v. People, 42 Ill. App. 402; Patton v. Creswell, 120 Ind. 147, 21 N. E. 663; City of Indianapolis v. Ritzinger, 24 Ind. App. 65, 56 N. E. 141; Devoe v. Smeltzer, 86 Iowa, 385, 53 N. W. 287; Lorenzen v. Preston, 53 Iowa, 580; Dunham v. Fox, 100 Iowa, 131, 69 N. W. 436. A petitioner may withdraw his name at any time before action is taken. Uptagraff v. Smith, 106 Iowa, 385, 76 N. W. 733; Sullivan v. Robbins, 109 Iowa, 235, 80 N. W. 340. It is no ground for holding void the action of a county board in vacating a highway that one of the petitioners was induced through fraud to sign the petition.

Millett v. Franklin County Com'rs, 80 Me. 427, 15 Atl. 24; In re Albers Petition, 113 Mich. 640, 71 N. W. 1110; Baudistel v. Michigan Cent. R. Co., 113 Mich. 687, 71 N. W. 1114; Spurgeon v. Hennessey, 32 Mo. App. 83; State v. Board of Assessors of Taxes, 53 N. J. Law, 319, 21 Atl. 938; New York, N. H. & H. R. Co. v. Village of New Rochelle, 29 Misc. 195, 60 N. Y. Supp. 904; Excelsior Brick Co. v. Village of Haverstraw, 152 N. Y. 146, 156 N. E. 819, reversing 66 Hun, 631, 21 N. Y. Supp. 99; Vedder v. Marion County, 28 Or. 77, 41 Pac. 3, 36 Pac. 535, affirming 22 Or. 264; James v. City of Darlington, 71 Wis. 173, 36 N. W. 834.

[1315] People v. Marin County, 103 Cal. 223, 37 Pac. 203, 26 L. R. A. 659; People v. Hibernia Sav. & L. Ass'n, 84 Cal. 634, 24 Pac. 295; Chicago Anderson Pressed Brick Co. v. City of Chicago, 138 Ill. 628, 28 N. E. 756; Miller v. Schenck, 78 Iowa, 372, 43 N. W. 225; City of Ottawa v. Rohrbough, 42 Kan. 253, 21 Pac. 1061; Kansas Town Co. v. McLean, 7 Kan. App. 101, 53 Pac. 76; England v. Duncan, 10 Kan. App. 577, 62 Pac. 710; State v. Inhabitants of Oxford, 65 Me. 20; Com. v. Tucker, 19 Mass. (2 Pick.) 44; City of Grand Rapids v. Grand Rapids & I. R. Co., 66 Mich. 42, 33 N. W. 15; Campau v. Board of Public Works of City of Detroit, 86 Mich. 372, 49 N. W. 39; Horton v. Williams, 99 Mich. 423, 58 N. W. 369; McKay v. Doty, 63 Mich. 581, 30 N. W. 591; Bigelow v. Brooks, 119 Mich. 208, 77 N. W. 810; Miller v. Town of Corinna, 42 Minn. 391, 44 N. W. 127; Street v. Town of Alden, 62 Minn. 160, 64 N. W. 157; McNair v. State, 26 Neb. 257, 41 N. W. 1099; State v. Demott, 14 N. J. Law (2 J. S. Green) 254; Condict v. Ramsey, 65 N. J. Law, 503, 47

by a mere nonuser or a neglect on the part of the proper authorities to improve or repair,[1316] or by the laying out of an other road to take its place,[1317] though by statutory provisions or as based upon other reasons in some states this can be done.[1318] Proceedings to vacate highways are regulated by local statutes which vary materially in the different states and it is impossible to state more than a few general principles applicable to the subject.

§ 941. Petition.

That orderly manner in which a highway must be vacated involves a petition, ordinance or other municipal action as may be required, notice to interested parties, a hearing at which remon-

Atl. 423; Holtz v. Diehl, 26 Misc. 224, 56 N. Y. Supp. 841; People v. Griswold, 67 N. Y. 59; In re City of New York, 166 N. Y. 495, 60 N. E. 180; Heddleston v. Hendricks, 52 Ohio St. 460, 40 N. E. 408; Huddleston v. City of Eugene, 34 Or. 343, 43 L. R. A. 444; In re Osage St., 90 Pa. 114; Wead v. St. Johnsbury & L. C. R. Co., 64 Vt. 52, 24 Atl. 361. The presumption exists, however, that all steps taken in changing a highway and vacating the old one were regular. Baines v. City of Janesville, 100 Wis. 369, 75 N. W. 404; City of Ashland v. Chicago & N. W. R. Co., 105 Wis. 398, 80 N. W. 1101.

[1316] Ohio & M. River R. Co. v. Cox, 26 Ill. App. 491; Com'rs of Highways v. People, 69 Ill. App. 326; Davis v. Nicholson, 81 Ind. 183; City of Topeka v. Russam, 30 Kan. 550; State v. Reesa, 59 Wis. 106.

[1317] Brown v. Robertson, 123 Ill. 631, 15 N. E. 30; Chadwick v. McCausland, 47 Me. 342; Pratt v. Lewis, 39 Mich. 7; Crump v. Mims, 64 N. C. 767; In re Bridgeport & N. C. Turnpike Co., 171 Pa. 312, 33 Atl. 145; Burrows v. Kinsley, 27 Wash. 694, 68 Pac. 332; Witter v. Damitz, 81 Wis. 385, 51 N. W. 575. The old road, however, can be used by the public until the new highway is in fit condition to be traveled. City of Chippewa Falls v. Hopkins, 109 Wis. 611, 85 N. W. 553. See, also, Maire v. Kruse, 85 Wis. 302, 26 L. R. A. 449.

[1318] Brook v. Horton, 68 Cal. 554; City & County of San Francisco v. Burr, 108 Cal. 460; Brockenhausen v. Bochland, 137 Ill. 547, 27 N. E. 458, affirming 36 Ill. App. 224; Grube v. Nichols, 36 Ill. 92; City of Peoria v. Johnston, 56 Ill. 45; State v. Huggins, 47 Ind. 586; Stahr v. Carter, 116 Iowa, 380, 90 N. W. 64; Com. v. Inhabitants of Cambridge, 7 Mass. 158; Bowley v. Walker, 90 Mass. (8 Allen) 21; Commonwealth v. Boston & A. R. Co., 150 Mass. 174, 22 N. E. 913; Yates v. Town of West Grafton, 33 W. Va. 507, 11 S. E. 8; Poling v. Ohio River R. Co., 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215. See, also, Patton v. Creswell, 120 Ind. 147.

strances may be urged and considered and the right of appeal by those considering themselves aggrieved or injured. Municipal action or the owners' petition originating the proceedings for vacation should be governed in respect to its form and its subject-matter by the same rules which apply to the establishment of a highway. The descriptions should be accurate or reasonably so, and definite.[1319] The form, if one is prescribed by law or its essentials, should be strictly followed,[1320] and should show a prima facie right on the part of those seeking a vacation,[1321] and also the existence of a legal highway.[1322]

Notice and hearing. It is a fundamental rule of law that no action is legal which results in the destruction or impairment of private legal property or a vested right unless that one whose right is thus affected has been given effective notice of the contemplated action and an opportunity for defending it if he so

[1319] Keena v. Placer County Sup'rs, 89 Cal. 11; Hughes v. Beggs, 114 Ind. 427, 16 N. E. 817; Cook v. Quick, 127 Ind. 477, 26 N. E. 1007; Furman v. Furman, 86 Mich. 391; Pearsall v. Eaton County Sup'rs, 71 Mich. 438, 39 N. W. 578; Zelbold v. Foster, 118 Mo. 349, 24 S. W. 155. A description of the proposed road is sufficient if it can be readily and definitely located.

Milford's Petition, 37 N. H. 57; Evers v. Vreeland, 50 N. J. Law, 386, 13 Atl. 241. But a variance in the description as given in the establishment of a highway will not be considered in proceedings to vacate. Ruton v. Adams (N. J. Law) 21 Atl. 937; Vedder v. Marion County, 22 Or. 264, 29 Pac. 619; In re Road in Whiteley Tp. (Pa.) 15 Atl. 895. A reference to a plat attached to a report is sufficient.

[1320] Harris v. Board of Supervisors of Mahaska County, 88 Iowa, 219, 55 N. W. 324; Coakley v. Boston & M. R. Co., 159 Mass. 32; Chosmer v. Blew, 55 N. J. Law, 67; Vedder v. Marion County, 22 Or. 264; Attorney General v. Sherry, 20 R. I. 43. But see Devoe v. Smeltzer, 86 Iowa, 385, 53 N. W. 287. See, also, Bigelow v. Brooks, 119 Mich. 208.

[1321] Brandenburg v. Hittel, 16 Ind. App. 224, 45 N. E. 45; Pearsall v. Eaton County Sup'rs, 71 Mich. 438, 39 N. W. 578. The insufficiency of a petition will affect the validity of the proceedings only in respect to those persons injured by the discontinuance of the highway. Merchant v. Town of Marshfield, 35 Or. 55, 56 Pac. 1013; State v. Nelson, 57 Wis. 147.

[1322] People v. Marin County, 103 Cal. 223, 26 L. R. A. 659; Devoe v. Smeltzer, 86 Iowa, 385; Bradbury v. Walton, 94 Ky. 163; Hyde v. Teal, 46 La. Ann. 645; Jersey City v. Howeth, 30 N. J. Law, 521; Keen v. Board of Supervisors of Fairview Tp., 8 S. D. 558, 67 N. W. 623; In re Vernon Tp. Road, 70 Pa. 23; In re Swanson Street, 163 Pa. 323, 30 Atl. 207.

desires.[1323] This rule applies in connection with the present subject. Notice as required by law, whether actual or constructive, must be given and an opportunity afforded for the making of objections to those to whom is given by law the right, or the filing of remonstrances.[1324] The right to object is usually re-

[1323] Atherton v. Com'rs of Highways, 81 Ill. App. 59; Imhoff v. Highway Com'rs, 89 Ill. App. 66; Moffitt v. Brainard, 92 Iowa, 122, 60 N. W. 226, 26 L. R. A. 821; Miller v. Schenck, 78 Iowa, 372; McKinney v. Baker, 100 Iowa, 362, 69 N. W. 683; Sullivan v. Robbins, 109 Iowa, 235, 80 N. W. 340; Mills v. Board of Com'rs of Neosho Co., 50 Kan. 635, 32 Pac. 361; Garrett v. Hedges, 13 Ky. L. R. 647, 17 S. W. 871; Lincoln v. Inhabitants of Warren, 150 Mass. 309, 23 N. E. 45; White v. Inhabitants of Foxborough, 151 Mass. 28, 23 N. E. 652; Curry v. Place, 99 Mich. 524, 58 N. W. 472; Goss v. Highway Com'rs of Westphalia, 63 Mich. 608, 30 N. W. 197. The giving of notice is jurisdictional and an omission cannot be supplied after an order for vacation has been made. Kimball v. Homan, 74 Mich. 699; State v. Deer Lodge County Com'rs, 19 Mont. 582; Parkhurst v. Van Derveer, 48 N. J. Law, 80; Jersey City H. & P. St. R. Co. v. City of Passaic, 68 N. J. Law, 110, 52 Atl. 242; State v. Convery, 53 N. J. Law, 588, 22 Atl. 345; Latimer v. Tillamook County, 22 Or. 291, 29 Pac. 734. Jurisdiction will be presumed to have been acquired although the affidavit of posting notices was ambiguous. Hill v. Hoffman (Tenn.) Civ. App. 58 S. W. 929; Conrad v. Lewis County, 10 W. Va. 784; Lazzell v. Garlow, 44 W. Va. 466, 30 S. E. 171; Yates v. Town of West Grafton, 33 W. Va. 507, 11 S. E. 8. An acquiesence in the discontinuance of a highway for a period of eighteen years will be regarded as a waiver of the omission to serve notice upon the party affected. But see Dempsey v. City of Burlington, 66 Iowa, 687; Village of Bellevue v. Bellevue Imp. Co., 65 Neb. 52, 90 N. W. 1002; Haynes v. Lasell, 29 Vt. 157.

[1324] Spiegel v. Gansberg, 44 Ind. 418; Brandenburg v. Hittel, 16 Ind. App. 224, 45 N. E. 45. Defining an abutting owner. Martin v. City of Louisville, 97 Ky. 30, 29 S. W. 864; Hyde v. Teal, 46 La. Ann. 645, 15 So. 416; Raxedale v. Seip, 32 La. Ann. 435. Those living in the vicinity of a road are not necessarily "contiguous" proprietors within the meaning of the statute.

Shaw v. County Com'rs of Piscataquis, 92 Me. 498, 43 Atl. 105. The jurisdiction of commissioners in laying out a highway cannot be attacked in subseqent proceedings having for their purpose the discontinuance or alteration. People v. West Bay City Sugar Co., 124 Mich. 521, 83 N. W. 278. A property owner may be barred by laches in contesting the validity of proceedings vacating a street. Street v. Town of Alden, 62 Minn. 160; In re Coe, 19 Misc. 549, 44 N. Y. Supp. 910; People ex rel. Mershon v. Shaw, 34 App. Div. 61, 54 N. Y. Supp. 218; Buchanan

stricted to abutting or contiguous owners or those whose means of ingress and egress to property will be materially damaged or destroyed. The right of appeal to a higher tribunal or some other official body is usually a statutory one and unless the privilege of review is expressly granted or appears by indisputable implication, the judgment or order of the body acting in the first instance in respect to the vacation will not be considered appealable.[1325] The right if given is strictly construed.[1326]

§ 942. Vacation; when effective.

Assuming a compliance with statutory provisions and the legality of all previous action, this rule obtains that where the affirmative action of the voters is not required as in some cases,[1327] an order of the municipal authorities which has for its purpose the vacation of a highway must be of the same grade or have the same legal weight as action by the same authorities having for their purpose the establishment or the creation of a highway. Since the power to vacate is practically co-extensive with the power to create, it follows that the step can only be effectively

v. Baker, 54 Ohio St. 324, 43 N. E. 330; Hill v. Hoffman (Tenn. Ch. App.) 58 S. W. 929; Trudeau v. Town of Sheldon, 62 Vt. 198, 20 Atl. 161. But see Nicholson v. Stockett, 1 Miss. (Walk.) 67.

[1325] Early v. Hamilton, 75 Ind. 376. The appeal papers should show the right of the plaintiffs in this respect. Harris v. Board of Sup'rs of Mahaska County, 88 Iowa, 219, 55 N. W. 324; Inhabitants of Cambridge v. County Com'rs, 86 Me. 141, 29 Atl. 960. A failure to comply with directory provisions of a statute will not render void an appeal. Callaway County Ct. v. Inhabitants of Round Prairie, 10 Mo. 679; In re Big Hollow Road, 40 Mo. App. 363; Condict v. Ramsey, 65 N. J. Law, 503, 47 Atl. 423; Miller v. Oakwood Tp. 9 N. D. 623, 84 N. W. 556; Merchant v. Town of Marshfield, 35 Or. 55, 56 Pac. 1013; Crook v. Town of Bradford, 65 Vt. 513, 27 Atl. 118. Construing Rev. Laws, § 2940, relative to petition for rehearing. Hull v. Stephenson, 19 Wash. 572, 53 Pac. 669. One having the right to petition for the vacation of a highway under laws of 1895, p. 82, has the right to appeal from an adverse decision.

[1326] Commissioners of Highways v. Quinn, 136 Ill. 604, 27 N. E. 187.

[1327] Welton v. Town of Thomaston, 61 Conn. 397, 24 Atl. 333; State v. Inhabitants of Brewer, 45 Me. 606; Bath's Petition, 22 N. H. 576; Manchester's Petition, 28 N. H. 296; Drew v. Cotton, 68 N. H. 22, 42 Atl. 239; Thompson v. Major, 58 N. H. 242.

taken by the application of the rule above stated.[1328] The records should disclose upon their face upon the vacation or discontinuance of a highway sufficient facts to make the proceedings prima facie valid.[1329] And the same requirements ordinarily exist in respect to descriptions and identity of highways as applied to the petition or ordinances by which the proceedings are originated.[1330]

A vacation becomes effective finally only upon rendering and signing in the manner prescribed by law an order or judgment to that effect by a public officer, official body, or court of competent jurisdiction.[1331]

§ 943. 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

[1328] Rose v. Bottyer, 81 Cal. 122, 22 Pac. 393; Cooper v. City of Detroit, 42 Mich. 584; State v. City Council, 40 Minn. 483, 42 N. W. 355; Currier v. Davis, 68 N. H. 596, 41 Atl. 239; Village of Bellevue v. Bellevue Imp. Co., 65 Neb. 52, 90 N. W. 1002. Jurisdictional irregularities alone will render void proceedings by a village board in vacating streets and alleys. Schafhaus v. City of New York, 28 App. Div. 475, 51 N. Y. Supp. 114; Greene v. O'Connor, 18 R. I. 56, 25 Atl. 692, 19 L. R. A. 262.

[1329] People v. Caledonia Highway Com'rs, 16 Mich. 63.

[1330] Marlborough's Petition, 46 N. H. 494; Taintor v. Town of Morristown, 33 N. J. Law, 57. The presumption of validity exists. But see Shields v. Ross, 158 Ill. 214, 41 N. E. 985; Zeibold v. Foster, 118 Mo. 349, 24 S. W. 155.

[1331] Keena v. Placer County Sup'rs, 89 Cal. 11, 26 Pac. 615; Shields v. Ross, 158 Ill. 214, 41 N. E. 985. An order will be valid as to that portion of a highway within the jurisdiction of an official body. Cook v. Quick, 127 Ind. 477, 26 N. E. 1007; Dunham v. Fox, 100 Iowa, 131, 69 N. W. 436; Pillsbury v. City of Augusta, 79 Me. 71, 8 Atl. 150; In re Albers' Petition, 112 Mich. 640, 71 N. W. 1110. In proceedings to vacate a plat, the city is not a necessary party and therefore Pub. Acts 1881, No. 113, p. 98, § 13, relative to jurisdiction of superior court of Grand Rapids, has no application. Furman v. Furman, 86 Mich. 391; Keyes v. Minneapolis & St. L. R. Co., 36 Minn. 290, 30 N. W. 888; State v. Wells, 70 Mo. 635; Sheppard v. May, 83 Mo. App. 272. But see McKenzie v. Gilmore (Cal.) 33 Pac. 262.

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.[1332] 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.[1333] The rule, however,

[1332] Lakenan v. Prophett, 61 Ark. 631, 32 S. W. 384; Symons v. City & County of San Francisco, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453, Whitsett v. Union Depot & R. Co., 10 Colo. 243, 15 Pac. 339; City of East St. Louis v. O'Flynn, 119 Ill. 200, 10 N. E. 395; Parker v. Catholic Bishop of Chicago, 146 Ill. 158, 34 N. E. 473, Id. 41 Ill. App. 74; Gray v. Iowa Land Co., 26 Iowa, 387; Heller v. Atchison, T. & S. F. R. Co., 28 Kan. 625; Davis v. County Com'rs, 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750; Natick Gas Light Co. v. Inhabitants of Natick, 175 Mass. 246, 56 N. E. 292. A gas company cannot recover damages occasioned by a removal of its pipes necessitated by the vacation of a highway. Kimball v. Homan, 74 Mich. 699, 42 N. W. 167; Conklin v. Fillmore County Com'rs, 13 Minn. 454 (Gil. 423); Glasgow v. City of St. Louis, 107 Mo. 198, 17 S. W. 743.

Knapp, Stout & Co. Company v. City of St. Louis, 153 Mo. 560, 55 S. W. 104. To entitle an abutting owner to equitable relief where a city is proceeding to vacate a street, he must show that he will suffer greater than other property owners abutting on the same street: citing many cases. Cram v. Laconia, 71 N. H. 41, 51 Atl. 635, 57 L. R. A. 282; Kings County Fire Ins. Co. v. Stevens, 101 N. Y. 411; Elliott, Roads & Streets (2d Ed.) § 877.

[1333] City of Chicago v. Baker (C. C. A.) 86 Fed. 753, 98 Fed. 830. Evidence of decrease in rental in neighboring property is not competent in an action to recover damages to property by the closing of a street. City of Texarkana v. Leach, 66 Ark. 40, 48 S. W. 807; Symons v. City & County of San Francisco, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453; Hesing v. Scott, 107 Ill. 600; City of Chicago v. Burcky, 158 Ill. 103, 42 N. E. 178, 29 L. R. A. 568; Brandenburg v. Hittel (Ind.) 37 N. E. 329, Id., 16 Ind. App. 224, 45 N. E. 45; Gebhardt v. Beeves, 75 Ill. 301; Butterworth v. Bartlett, 50 Ind. 537; Pollard v. Dickinson Co., 71 Iowa, 438, 32 N. W. 418; Gargan v. Louisville, N. A. & C. R. Co., 11 Ky. L. R. 489, 12 S. W. 259; Rohmeiser v. Bannon, 15 Ky. L. R. 114, 22 S. W. 27; Peters v. Carleton, 48 Hun, 620, 1 N. Y. Supp. 531; Dana v. City of Boston, 170 Mass. 593, 49 N. E. 1013; Onset St. R. Co. v. County Com'rs, 154 Mass. 395, 28 N. E. 286; Baudistel v. Michigan Cent. R. Co., 113 Mich. 687, 71 N.

obtains that the right of access must be substantially impaired before damages can be recovered,[1334] and the right is clearly limited to abutting property owners.[1335] 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

W. 1114; Brakken v. Minneapolis & St. L. R. Co., 29 Minn. 41; Smith v. City of St. Paul, 72 Minn. 472, 75 N. W. 708; Heinrich v. City of St. Louis, 125 Mo. 424, 28 S. W. 626; Candia v. Chandler, 58 N. H. 127; Lindsay v. City of Omaha, 30 Neb. 512, 46 N. W. 627; Purcell v. Edison Portland Cement Co., 65 N. J. Law, 541, 47 Atl. 587; Peters v. Carleton, 48 Hun, 620, 1 N. Y. Supp. 531; People v. Board of Assessors, 59 Hun, 407, 13 N. Y. Supp. 404; In re East One Hundred & Sixty-eighth St., 157 N. Y. 409, 52 N. E. 1126, affirming 28 App. Div. 143, 52 N. Y. Supp. 588; Finegan v. Eckerson, 26 Misc. 574, 57 N. Y. Supp. 605; In re City of New York, 41 App. Div. 586, 58 N. Y. Supp. 736. The discontinuance of a private way gives no right to claim damages. In re Barclay, 91 N. Y. 430; In re Melon St., 182 Pa. 397, 38 Atl. 482, 38 L. R. A. 275; Attorney General v. Sherry, 20 R. I. 43, 37 Atl. 344; Hill v. Hoffman (Tenn. Ch. App.) 58 S. W. 929; Smith v. Gulf, C. & S. F. R. Co. (Tex. Civ. App.) 64 S. W. 943. No damages can be recovered for the closing of a private way. But see Barr v. City of Oskaloosa, 45 Iowa, 275; Preston v. City of Cedar Rapids, 95 Iowa, 71; Grove v. Allen, 92 Iowa, 519, 61 N. W. 175; McKinney v. Baker, 100 Iowa, 362, 69 N. W. 683; Coffey County Com'rs v. Venard, 10 Kan. 95; Hielscher v. City of Minneapolis, 46 Minn. 529, 49 N. W. 287; State v. Deer Lodge County Com'rs, 19 Mont. 582, 49 Pac. 147; McGee's Appeal, 114 Pa. 470.

A distinction is, however, made between country roads and city streets in Bradbury v. Walton, 94 Ky. 167, where is was said: "The streets of a town or city are acquired by grant with the implied right of ingress and egress to the abutting lot owner, the grantor, or the party making the dedication, saying to the owners of lots, 'This right of ingress and egress you shall have.' But not so with an ordinary public road. The state creates the easement for the entire public; its use is that of the public, one citizen having as much right to this use as the other, and when its abandonment or non use is deemed necessary for the public good, the county court may discontinue it altogether, and in that tribunal the question must be made."

[1334] 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. But see Heinrich v. City of St. Louis, 125 Mo. 424, 28 S. W. 626.

[1335] Meyer v. City of Richmond, 172 U. S. 82; City of East St. Louis v. O'Flynn, 119 Ill. 200, 10 N. E. 395; 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; Kings County Fire Ins. Co. v. Stevens, 101 N. Y. 411.

property; for a destruction or impairment of this special right, he can also claim damages.[1336]

§ 944. Evidence.

A question may arise in respect to the vacation of a highway. The rule here applies that the burden of proof is thrown upon the one alleging not only the vacation of a highway but also its abandonment.[1337] The familiar maxim will be remembered of "Once a highway, always a highway" and another rule of evidence is constantly applied in these cases to the effect that "A thing known to exist is presumed to continue until the contrary is shown." The reason for the rules as stated above is apparent; through the creation and maintenance of a public highway, certain public rights are acquired by the community as well as the public corporation,—rights which administer not only to the convenience but to the necessities of the public both individually and at large,[1338] and which cannot be lost, impaired or destroyed except by a preponderance of evidence and that which is competent, relevant and materal,[1339] or through proceedings valid in all respects.[1340]

§ 945. 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

[1336] State v. Elizabeth City, 54 N. J. Law, 462, 24 Atl. 495; Snedeker v. Snedeker, 30 N. J. Law, 80. But see Stout v. Noblesville & E. Gravel Road R. Co., 83 Ind. 466. See, also, In re East One Hundred & Sixty-eighth St., 157 N. Y. 409, 52 N. E. 1126, affirming 28 App. Div. 143, 52 N. Y. Supp. 588.

[1337] Dingwall v. Weld County Com'rs, 19 Colo. 415; McVee v. City of Watertown, 92 Hun, 306, 36 N. Y. Supp. 870; Horey v. Village of Haverstraw, 124 N. Y. 273, 26 N. E. 532; City of Cohoes v. Delaware & H. Canal Co., 134 N. Y. 397, 31 N. E. 887. But see Shelby v. State, 29 Tenn. (10 Humph.) 165.

[1338] Lorenzen v. Preston 53 Iowa, 580; Sarvis v. Caster, 116 Iowa, 707, 89 N. W. 84; Miller v. Oakwood Tp., 9 N. D. 623, 84 N. W. 556; McQuigg v. Cullins, 56 Ohio St. 649, 47 N. E. 595; Kalteyer v. Sullivan, 18 Tex. Civ. App. 488, 46 S. W. 288.

[1339] Whetten v. Clayton, 111 Ind. 360, 12 N. E. 513; Lathrop v. Central Iowa R. Co., 69 Iowa, 105; Union Pac. R. Co. v. Dyche, 28 Kan. 200; Anderson v. Hamilton County Com'rs, 12 Ohio St. 635.

[1340] Hatch v. Monroe County Sup'rs, 56 Miss. 26.

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,[1341]—a statutory abandonment as it has been termed in many cases. These statutory provisions it has been held in a number of cases apply where the road as a whole has been abandoned. They do not apply to unused portions of a road.[1342] Public roads may also become abandoned by nonuser for a long period of time.[1343] The maxim referred to in the preceding section—"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,[1344] neither will a mere failure on

[1341] Wragg v. Penn. Tp., 94 Ill. 11; Humphreys v. City of Woodstown, 48 N. J. Law, 588, 7 Atl. 301; Chosen Freeholders of Mercer v. Pennsylvania R. Co., 45 N. J. Law, 82; City of Cohoes v. Delaware & H. Canal Co., 54 Hun, 558, 7 N. Y. Supp. 885; Ludlow v. City of Oswego, 25 Hun (N. Y.) 260; Kelly Nail & Iron Co. v. Lawrence Furnace Co., 46 Ohio St. 544, 5 L. R. A. 652; Amsbry v. Hinds, 48 N. Y. 57; Riley v. Brodie, 22 Misc. 374, 50 N. Y. Supp. 347; Townsend v. Bishop, 61 App. Div. 18, 70 N. Y. Supp. 201; Excelsior Brick Co. v. Village of Haverstraw, 142 N. Y. 146, 36 N. E. 819. The statutory provision that all highways which have ceased to be traveled or used as highways for six years shall lose their character as such, applies to a street in an incorporated village. Heddleston v. Hendricks, 52 Ohio St. 460, 40 N. E. 408; Peck v. Clark, 19 Ohio, 367; Herrick v. Town of Geneva, 92 Wis. 114, 65 N. W. 1024; Paine Lumber Co. v. City of Oshkosh, 89 Wis. 449, 61 N. W. 1108.

[1342] Harden v. Metz, 10 Kan. App. 341, 58 Pac. 281. Neither does such a statute apply to a street dedicated by the making of a map or plat. Taintor v. Mayor of Morristown, 19 N. J. Eq. (4 C. E. Green) 46; Mangam v. Village of Sing Sing, 26 App. Div. 464, 50 N. Y. Supp. 647; Maire v. Kruse, 85 Wis. 302, 55 N. W. 389, 26 L. R. A. 449.

[1343] Beardslee v. French, 7 Conn. 125; Hewes v. Village of Crete, 175 Ill. 348, 51 N. E. 696; Galbraith v. Littiech 73 Ill. 209; Simplot v. City of Dubuque, 49 Iowa, 630; Phillips v. Lawrence, 23 Ky. L. R. 824, 64 S. W. 411; Baldwin v. Trimble, 85 Md. 396, 37 Atl. 176, 36 L. R. A. 489; Holt v. Sargent, 81 Mass. (15 Gray) 97; Woodruff v. Paddock, 56 Hun, 288, 9 N. Y. Supp. 381; Bayard v. Standard Oil Co., 38 Or. 438, 63 Pac. 614; Shelby v. State, 29 Tenn. (10 Humph.) 165.

[1344] 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; Beebe v. City of Little Rock, 68 Ark. 39, 56 S. W. 791; Southern Pac. R. Co. v. Ferris, 93 Cal. 263, 18 L. R. A. 510; City of Hartford v. New York & N. E. R. Co., 59 Conn. 250, 22 Atl. 37; City of Lawrenceburgh v.

the part of public authorities to open, construct or repair a road or a portion of it legally established [1345] or the payment of taxes by private persons on the land used.[1346] As in the case of a dedication of a highway it is necessary to establish the intent of the owner to dedicate,[1347] so in its abandonment it is necessary to establish the intent of the proper legal authorities to abandon it [1348]

Wesler, 10 Ind. App. 153, 37 N. E. 956; Wolfe v. Town of Sullivan, 133 Ind. 331; Davies v. Huebner, 45 Iowa, 574; Wenzel v. Kempmeier, 53 Iowa, 255; Bradley v. Appanoose County, 106 Iowa, 105, 76 N. W. 519; Stickel v. Stoddard, 28 Kan. 715; In re Railroad Com'rs, 91 Me. 135, 39 Atl. 478; Richardson v. Davis, 91 Md. 390, 46 Atl. 964; State v. Morse, 50 N. H. 9; Methodist Episcopal Church v. City of Hoboken, 33 N. J. Law, 13; Hoboken Land & Imp. Co. v. City of Hoboken, 36 N. J. Law, 540; Riehle v. Heulings, 38 N. J. Eq. (11 Stew.) 20; Amsbey v. Hinds, 46 Barb. (N. Y.) 622; Crump v. Mims, 64 N. C. 767; City of Pittsburg v. Epping-Carpenter Co., 194 Pa. 318, 45 Atl. 129; Greene v. O'Connor, 18 R. I. 56, 25 Atl. 692, 19 L. R. A. 262; Crocker v. Collins, 37 S. C. 327, 15 S. E. 951; Chafee v. City of Aiken, 57 S. C. 507, 35 S. E. 800; State v. Leaver, 62 Wis. 387; Moore v. Roberts, 64 Wis. 538; City of Madison v. Mayers, 97 Wis. 399, 73 N. W. 43, 40 L. R. A. 635.

[1345] London & S. F. Bank v. City of Oakland, 86 Fed. 30; Holmes v. Cleveland, C. & C. R. Co., 93 Fed. 100; Brown v. Hiatt, 16 Ind. App. 340, 45 N. E. 481; Shea v. City of Ottumwa, 67 Iowa, 39; Uptagraff v. Smith, 106 Iowa, 385; Webb v. Butler County Com'rs, 52 Kan. 375, 34 Pac. 973; Louisiana Ice Mfg. Co. v. City of New Orleans, 43 La. Ann. 217, 9 So. 21; Flersheim v. City of Baltimore, 85 Md. 489, 36 Atl. 1098; State v. Culver, 65 Mo. 607; Kelly Nail & Iron Co. v. Lawrence Furnace Co., 46 Ohio St. 544, 22 N. E. 639, 5 L. R. A. 652; Watts v. Southern Bell Telep. & Tel. Co., 100 Va. 45, 40 S. E. 107; 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. "Until the time arrives when any street or part of a street is required for actual public use, and when the public authorities may be promptly called upon to open it for the public use, no mere non user, of any length of time, will operate as an abandonment of it, and all persons in possession of it will be presumed to hold subject to the paramount right of the public."

[1346] Beebe v. City of Little Rock, 68 Ark. 39, 56 S. W. 791; Schwerdtle v. Placer County, 108 Cal. 589, 41 Pac. 448; City of Ashland v. Chicago & N. W. R. Co., 105 Wis. 398, 80 N. W. 1101. But see City of Huntington v. Townsend, 29 Ind. App. 269, 63 N. E. 36.

[1347] See §§ 928 et seq., ante.

[1348] Shirk v. City of Chicago, 195 Ill. 298, 63 N. E. 193; Duncombe v. Powers, 75 Iowa, 185, 39 N. W. 261; Larson v. Fitzgerald, 87 Iowa, 402, 54 N. W. 441.

[1349] Dingwall v. Weld County Com'rs, 19 Colo. 415, 36 Pac. 148;

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.[1349] The rule is based upon the same reasons as given in a preceding section as applying to the burden of proof and character of the evidence necessary in the vacation of public roads.

§ 946. Prescriptive title.

In preceding sections[1350] the question of the acquirement of a prescriptive title by private persons in public ways, has been considered and the rule there laid down that in the greater number of jurisdictions, and unless expressly provided by statute, the statute of limitations will not run as against the public authorities. The mere fact, therefore, that there may have been a user or even a long continued user by private parties for private uses of a highway or some portion of it will not establish the abandonment of that highway or the portion used[1351] unless expressly held otherwise for the reasons given in the section just referred to.

Champlin v. Morgan, 20 Ill. 181; McNamara v. Minneapaolis, St. P. & S. S. M. R. Co., 95 Mich. 545, 55 N. W. 440.

[1350] See §§ 824, 825, ante.

[1351] London & S. F. Bank v. City of Oakland (C. C. A.) 90 Fed. 691, affirming 86 Fed. 30; City & County of San Francisco v. Center, 133 Cal. 673, 66 Pac. 83; Schwerdtle v. Placer County, 108 Cal. 589, 31 Pac. 448; Marsh v. Village of Fairbury, 163 Ill. 401, 45 N. E. 236; Taylor v. Pearce, 179 Ill. 145, 53 N. E. 622; Wolfe v. Town of Sullivan, 133 Ind. 331, 32 N. E. 1017; Giffen v. City of Olathe, 44 Kan. 342, 24 Pac. 470; Hentzler v. Bradbury, 5 Kan. App. 1, 47 Pac. 330; La Fitte v. City of New Orleans, 52 La. Ann. 2099, 28 So. 327; Heald v. Moore, 79 Me. 271, 9 Atl. 734; City of Baltimore v. Frick, 82 Md. 77, 33 Atl. 435; Village of Crandville v. Jenison, 84 Mich. 54, 47 N. W. 600; Parker v. City of St. Paul, 47 Minn. 317, 50 N. W. 247; Zimmerman v. Snowden, 88 Mo. 218; Methodist Episcopal Church v. City of Hoboken, 33 N. J. Law, 13; Hoboken Land & Imp. Co. v. City of Hoboken, 36 N. J. Law, 540; Mangan v. Village of Sing Sing, 164 N. Y. 560, 58 N. E. 1089, affirming 26 App. Div. 464, 50 N. Y. Supp. 647; Fox v. Hart, 11 Ohio, 414; Commonwealth v. Moorehead, 118 Pa. 344, 12 Atl. 424; Hill v. Hoffman (Tenn. Ch. App.) 58 S. W. 929; Johnson v. Llano County, 15 Tex. Civ. App. 421, 39 S. W. 995; Yates v. Town of Warrenton, 84 Va. 337, 4 S. E. 818; Bartlett v. Beardmore, 77 Wis. 356, 46 N. W. 494. But see Rector v. Christy, 114 Iowa, 471, 87 N. W. 489.

§ 947. Reversion.

Upon the vacation or abandonment of a highway the title to the property passes to the abutting owner. The owner of the soil is restored to his original rights in the same,[1352] for, as has been said, "The land does not revert, because there has been no alienation. The public has only been entitled to a certain specific right, the enjoyment of which is incompatible with the exercise of certain private rights, which are therefore necessarily suspended. When, however, the public right is relinquished, this incompatibility vanishes, and, as an inevitable consequence, the private rights thereby suspended revive."[1353] In some states where the fee is held by the public corporation there are cases holding to the effect that upon the vacation or abandonment of a street or a portion of it, the land does not repass to the abutting owner,[1354] and the rule also obtains in some jurisdictions that upon the vacation or abandonment of a street or a portion of it, land will revert not to the abutting owner but to the original grantor[1355] though the conditions imposed in the original dedi-

[1352] Beebe v. City of Little Rock, 68 Ark. 39, 56 S. W. 791; Benham v. Potter, 52 Conn. 248; Olin v. Denver & R. G. R. Co., 25 Colo. 177, 53 Pac. 454; Hamilton v. Chicago, B. & Q. R. Co., 124 Ill. 235, 15 N. E. 854; Thomsen v. McCormick, 136 Ill. 135, 26 N. E. 373; Challis v. Depot & R. Co., 45 Kan. 398, 25 Pac. 894; Showalter v. Southern Kan. R. Co., 49 Kan. 421, 32 Pac. 42; Southern Kan. R. Co. v. Showalter, 57 Kan. 681, 47 Pac. 831; Scudder v. City of Detroit, 117 Mich. 77, 75 N. W. 286; Lamm v. Chicago, St. P., M. & C. R. Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268; Thomas v. Hunt, 134 Mo. 392, 35 S. W. 581, 32 L. R. A. 857; Omaha South R. Co. v. Beeson, 36 Neb. 361, 54 N. W. 557; Village of Bellevue v. Bellevue Imp. Co. (Neb.) 90 N. W. 1002; Blain v. Staab, 10 N. M. 743, 65 Pac. 177; St. Vincent F. C. Asylum v. City of Troy, 12 Hun (N. Y.) 317; Kinnear Mfg. Co. v. Beatty, 65 Ohio St. 264, 62 N. E. 341; Paul v. Carver, 24 Pa. 207; Ott v. Kreiter, 110 Pa. 370, 1 Atl. 724; State v. Taylor, 107 Tenn. 455; 64 S. W. 766; Hall v. La Salle County, 10 Tex. Civ. App. 379, 32 S. W. 433; Burmeister v. Howard 1 Wash. T. 207; Schwede v. Hemrich Bros. Brewing Co., 29 Wash. 21, 69 Pac. 362; Kimball v. City of Kenosha, 4 Wis. 321. See, also, Thomsen v. McCormick, 136 Ill. 135; Brown v. Taber, 103 Iowa, 1, 72 N. W. 416.

[1353] Angell, Highways, § 326.

[1354] Lindsay v. City of Omaha, 30 Neb. 512, 46 N. W. 627; Watson v. City of New York, 67 App. Div. 573, 73 N. Y. Supp. 1027, affirming 34 Misc. 701, 70 N. Y. Supp. 1033.

[1355] Wirt v. McHenry, 21 Fed. 233; Gebhardt v. Reeves, 75 Ill.

cation may determine to whom the title will pass upon the vacation or abandonment of the road.

§ 948. Collateral attack.

In all proceedings leading to the establishment of a public highway, its vacation or abandonment, the rule almost universally obtains that their validity cannot be made the subject of collateral attack. Questions arising connected with the conditions or rules given in the preceding sections must be raised in proceedings or actions brought directly for that purpose.[1356]

§ 949. Revocation of dedication as affecting right to vacate or abandon.

In a previous section[1357] the rule has been stated that if an offer to dedicate or a grant is accepted at any time before the dedication is withdrawn, this is usually held sufficient. The rights of the public authorities accrue only upon the establishment of a public highway as such and if an offer of dedication or grant is withdrawn or revoked before accepted, the principles in respect to the vacation or the abandonment of highways will not apply. The question of what constitutes a revocation or dedication is usually one of fact[1358] and will depend upon the existence of the

301; Huff v. Hastings Exp. Co., 195 Ill. 257, 63 N. E. 105. But see Earll v. City of Chicago, 136 Ill. 277, 26 N. E. 370; Board of Education of Van Wert v. Town of Van Wert, 18 Ohio St. 221.

[1356] Bailey v. McCain, 92 Ill. 277; Ellis v. Blue Mt. Forest Ass'n, 69 N. H. 385, 41 Atl. 856, 42 L. R. A. 570; Stanley v. Sharp, 48 Tenn. (1 Heisk.) 417; Robson v. Byler, 14 Tex. Civ. App. 374; Haynes v. Lasell, 29 Vt. 167. But see Larson v. Fitzgerald, 87 Iowa, 402, 54 N. W. 441.

[1357] See 737.

[1358] McKenzie v. Gilmore (Cal.) 33 Pac. 262; People v. Hibernia Sav. & Loan Soc. 84 Cal. 634, 24 Pac. 295; Schmitt v. City & County of San Francisco, 100 Cal. 302, 34 Pac. 961. A deed of property before an acceptance will operate as a revocation of an offer to dedicate. Moore v. Kleppish, 104 Iowa, 319, 73 N. W. 830; Rothbager v. Village of Tonawanda, 59 Hun, 628, 13 N. Y. Supp. 937; State v. Fisher, 117 N. C. 733, 23 S. E. 158.

intent to dedicate[1359] and a failure to accept on the part of the public authorities.[1360]

[1359] City of Eureka v. Croghan, 81 Cal. 524, 22 Pac. 693, reversing 19 Pac. 485; Lightcap v. Town of North Judson, 154 Ind. 43, 55 N. E. 952; Eckerson v. Village of Haverstraw, 6 App. Div. 102, 39 N. Y. Supp. 635; In re Hunter, 47 App. Div. 102, 62 N. Y. Supp. 169. See, also, Trine v. City of Pueblo, 21 Colo. 102, 39 Pac. 330; Minneapolis & St. L. R. Co. v. Town of Britt, 105 Iowa, 198, 74 N. W. 933.

[1360] People v. Reed (Cal.) 20 Pac. 708; Prescott v. Edwards, 117 Cal. 298; City of Edwardsville v. Barnsback, 66 Ill. App. 381; Hewes v. Village of Crete, 68 Ill. App. 305; Village of Vermont v. Miller, 161 Ill. 210, 43 N. E. 975; McGrew v. Town of Lettsville, 71 Iowa, 150, 32 N. W. 252;; Brown v. Taber, 103 Iowa, 1, 72 N. W. 416; Clendenin v. Maryland Const. Co., 86 Md. 80, 37 Atl. 709; Rosenberger v. Miller, 61 Mo. App. 422; People v. Kellogg, 67 Hun, 546, 22 N. Y. Supp. 490. An acceptance of a dedication after the death of the owner is too late. In re Beck St. Opening, 19 Misc. 571, 44 N. Y. Supp. 1087; Village of Lockland v. Smiley, 26 Ohio St. 94. The giving of a deed before acceptance by a general warranty operates in law as a revocation of land dedicated to a public use. Merchant v. Town of Marshfield, 35 Or. 55; City of Norfolk v. Nottingham, 96 Va. 34; Mahler v. Brumder, 92 Wis. 477, 66 N. W. 502, 31 L. R. A. 695. The refusal of public authorities to approve a plat dedicating a street to a public use operates as a failure to accept. See, also, Lightcap v. Town of North Judson, 154 Ind. 43.

CHAPTER X.

LIABILITY OF PUBLIC CORPORATIONS FOR NEGLIGENCE.

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§ 950. In general.

The question of the liability of a public corporation for injuries arising through its negligence is an important one and in some respects the law is well settled. It is not possible, within the limited space given to this subject, to discuss as fully as desirable, its various phases. It might be said that the tendency to hold municipal corporations liable, especially in respect to the condition of their streets, is rapidly increasing and conditions now sustain a recovery which would not have done so a few years ago. This tendency is to be regretted, for all public corporations, including

municipal, are governmental agents and engaged to a great extent, if not entirely, in the carrying out of some governmental duty.[1] As said in a previous section,[2] the greater number of personal injury claims might be avoided in spite of court and jury to the contrary by the exercise of ordinary care, caution or common sense on the part of the one injured and further, the care which the state or any of its delegated agencies is required to exercise in the physical protection of the individual while following ordinary and personal avocations, is very slight. For a full discussion of the subject, the reader is referred to various text-books which treat it at length.[3]

§ 951. Negligence; definition.

Actionable negligence has been defined[4] 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[5] 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,[6] "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 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.[7] In respect to the liability of a public corporation, the character

[1] See Chap. I.

[2] See § 485, ante.

[3] Thompson, Neg., Vol. 5; Cooley, Torts (2d Ed.); Williams, Mun. Liab. Tort; Jones, Neg. Mun. Corp.; Shearman & Redfield, Neg.; Am. & Eng. Enc. Law (2d Ed.) tit. "Negligence"; Wharton, Neg. (2d Ed.).

[4] 16 Am. & Eng. Enc. Law (1st Ed.) p. 389.

[5] Jones, Neg. Mun. Corp. p. 3.

[6] Thompson, Neg. Vol. 1, § 1.

[7] Smith v. City of Leavenworth, 15 Kan. 81.

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.[8] In the consideration of the subject in following sections the author will endeavor to ascertain the existence of a duty in a particular case, the character of that duty and to whom due. The scope of the discussion of a necessity subordinates the questions of damage, proximate cause and contributory negligence.

§ 952. 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.[9] 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. This proposition will be further considered in a later section.[10]

Measure of care. Actional 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.[11]

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

[8] See §§ 953 and 955 et seq., post.

[9] Duke v. City of Rome, 20 Ga. 635; Millwood v. De Kalb County, 106 Ga. 743, 32 S. E. 577; Bennett v. City of New Orleans, 14 La. Ann. 120; Sherman v. Parish of Vermillion, 51 La. Ann. 880, 25 So. 538; Flagg v. City of Worcester, 79 Mass. (13 Gray) 601; Mills v. City of Brooklyn, 32 N. Y. 489; Peck v. Village of Batavia, 32 Barb. (N. Y.) 634; Urquhart v. City of Ogdensburg, 91 N. Y. 67; Munn v. City of Pittsburg, 40 Pa. 364. But see Sheldon v. Village of Kalamazoo, 24 Mich. 383. See, also, §§ 958, 959 and 972, post, with many authorities cited.

[10] See § 972, post.

[11] See §§ 1045 and 1053, post. See Jones, Neg. Mun. Corp. § 4; Ingersoll, Pub. Corp. p. 421.

personally and not shared in common with the public at large or a particular set or class of persons.[12]

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.[13]

§ 953. 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.[14] The sovereign may, however, by express assent,

[12] See § 993, post. Chidsey v. Town of Canton, 17 Conn. 475; Sohn v. Cambern, 106 Ind. 302, 6 N. E. 813; Brant v. Plumer, 64 Iowa, 33, 19 N. W. 842; Houck v. Wachter, 34 Md. 265; Smith v. Inhabitants of Dedham, 62 Mass. (8 Cush.) 522; Griffith v. Sanbornton, 44 N. H. 246; Gold v. City of Philadelphia, 115 Pa. St. 184, 8 Atl. 386; Williams v. Tripp, 11 R. I. 447; Hale v. Town of Weston, 40 W. Va. 313, 21 S. E. 742.

[13] See §§ 993, 1026, 1043 and 1059, post.

[14] State v. Hill, 54 Ala. 67; People v. Talmage, 6 Cal. 256; Pattison v. Shaw, 6 Ind. 377; Metz v. Soule, 40 Iowa, 236; Sinking Fund Com'rs v. Northern Bank, 58 Ky. (1 Metc.) 174; Garr v. Bright, 1 Barb. Ch. (N. Y.) 157; Clodfelter v. State, 86 N. C. 51; Williamsport & E. R. Co. v. Com., 33 Pa. 288; Treasurers v. Cleary, 3 Rich. Law (S. C.) 372; State v. Ward, 56 Tenn. (9 Heisk.) 100. A state does not guarantee the fidelity of its officers. Hosner v. De Young, 1 Tex. 764. But a state may sue. See Spencer v. Brockway, 1 Ohio, 259.

permit the bringing of actions against it in certain prescribed cases. The United States has established a court of claims for the determination of cases of a contractual nature.[15] The state of New York has also made provision for the establishment of an official body for the consideration of claims which may be urged against it.[16] The same condition also exists in other states.[17]

§ 954. Public corporations defined and classified.

In sections 4 to 8, 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. To understand, however, more clearly, the basis of a liability for negligence, a brief resume of those sections is now given. Public corporations are divided into quasi corporations and municipal corporations 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, road and 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 organizaton and civil administration in purely governmental matters like finance, education, provision for the poor, military organization, or the general administration of justice.[18] All of their powers and functions have a direct and exclusive reference to govern-

[15] Langford v. United States, 101 U. S. 341; United States v. Lee, 106 U. S. 196; United States v. Great Falls M. Co., 112 U. S. 645; Hart v. United States, 118 U. S. 62; United States v. Irwin, 127 U. S. 125; Thayer v. United States, 20 Ct. Cl. 137; Burke v. United States, 21 Ct. Cl. 317; Cumming v. United States, 22 Ct. Cl. 344; Act March 3, 1887 (24 Stat. p. 505) c. 359.

[16] Laws N. Y. 1876, c. 444; Laws 1883, c. 205; Laws 1884, c. 85; Laws 1888, c. 435; Silsby Mfg. Co. v. State, 104 N. Y. 562, 11 N. E. 264. But see Coster v. City of Albany, 43 N. Y. 399; Lewis v. State, 96 N. Y. 71; Locke v. State, 140 N. Y. 480, 35 N. E. 1076.

[17] State v. Hill, 54 Ala. 67; Clodfelter v. State, 86 N. C. 51; Clark v. State, 47 Tenn. (7 Cold.) 306.

[18] Jones v. City of New Haven, 34 Conn. 1. See authorities cited from §§ 1 to 8, ante.

mental 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.[19]

§ 955. 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 logically 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.

(a) 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

[19] See authorities cited §§ 1 et seq. See Williams, Mun. Liab. Tort, §§ 1 et seq.; Jones Neg Mun. Corp. §§ 20–25.

liability exists in respect to the performance of its duties and obligations [20] unless one is expressly imposed by statute.[21]

[20] May v. Juneau Co., 30 Fed. 241. County not liable in tort for infringement of patent. Pettit v. Chosen Freeholders of Camden County, 87 Fed. 768; Barbour County v. Horn, 48 Ala. 649. Counties are liable for wrongs only when committed in the use or misuse of corporate powers conferred upon them.

School Dist. No. 11 v. Williams, 38 Ark. 454; Daly v. City & Town of New Haven, 69 Conn. 644, 38 Atl. 397; Carter v. Wilds, 8 Houst. (Del.) 14, 31 Atl. 715; White Star Line Steamboat Co. v. Gordon County, 81 Ga. 47, 7 S. E. 231. Defective bridge. Town of Waltham v. Kemper, 55 Ill. 346; Symonds v. Clay County Sup'rs, 71 Ill. 355. "Counties are involuntary quasi corporations being political or civil divisions of the state, created by general laws, to aid in the administration of the government. The statute prescribes all their duties, and imposes all the liabilities to which they are subject, and unless made so by express legislative enactment, they are not liable to persons injured by the wrongful neglect of duty or wrongful acts of their officers or agents, done in the course of the execution of corporate powers or in the performance of corporate duties. And the rule is the same in respect to such other corporations as townships, school districts, and road districts."

Johnson County Com'rs v. Reinler, 18 Ind. App. 119, 47 N. E. 642; Pittsburgh, C. C. & St. L. R. Co. v. Iddings, 28 Ind. App. 504, 62 N. E. 112; Freel v. School City of Crawfordsville, 142 Ind. 27, 41 N. E. 312, 37 L. R. A. 301; Packard v. Voltz, 94 Iowa, 277, 62 N. W. 757; Dashner v. Mills County, 88 Iowa, 401; Williams v. Board of Com'rs of Kearny County, 61 Kan. 708, 60 Pac. 1046. A county renting a building for use as a courthouse is liable to the owner for its destruction by fire through the negligence of county officials charged with the duty of caring for the building. Arnold v. Town of Walton, 21 Ky. L. R. 1722, 56 S. W. 17. Wrongful removal of public officials. Riddle v. Locks & Canals on Merrimac River, 7 Mass. 169; Mower v. Inhabitants of Leicester, 9 Mass. 247; Murphy v. Inhabitants of Needham, 176 Mass. 422, 57 N. E. 689.

Bank v. Brainerd School Dist., 49 Minn. 106. "So the board of education is a corporation, which holds and manages the property in its control as trustee for the district, for a public purpose. It is made its duty to take care of and keep in repair the property of the district, but this is a duty which it owes to the district, and not to individuals, and is a duty imposed for the benefit of the public, with no consideration or emolument to the corporation; and it is given a corporate existence solely for the exercise of this public, or administrative function. It is organized for educational purposes, not for the benefit or protection of property or business interests."

Reed v. Howell County, 125 Mo. 58, 28 S. W. 177; Ball v. Town of

(b) 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.[22] Such a liability may, however, be created solely by the result of some statutory provision.[23]

§ 956. Character of duty.

In a preceding section it was stated that 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 cause 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

Winchester, 32 N. H. 435; Wakefield v. Village of Newport, 60 N. H. 374; Hughes v. Monroe County, 79 Hun, 120, 29 N. Y. Supp. 120; Markey v. Queen's County, 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46; Jacobs v. Hamilton County, 1 Bond, 500, Fed. Cas. No. 7,161. County not liable for infringement of patent. Crause v. Harris County, 18 Tex. Civ. App. 375, 44 S. W. 616; Field v. Albermarle County (Va.) 20 S. E. 954. But see May v. Mercer County 30 Fed. 246, and May v. Logan County Com'rs, 30 Fed. 250, where counties are held liable for infringement of patent rights.

[21] City of Little Rock v. Willis, 27 Ark. 572.

[22] Weightman v. Washington Corp., 1 Black. (U. S.) 39; City of Chicago v. Norton Milling Co., 97 Ill. App. 651; Bennett v. City of New Orleans, 14 La. Ann. 120. A municipal corporation is not liable for damage to private property unless the act which caused it was done without lawful authority or being authorized by law was improperly or wantonly executed. Boye v. City of Albert Lea, 74 Minn. 230, 76 N. W. 1131; Conway v. Beaumont, 61 Tex. 10. A petition seeking to charge liability must clearly show that the act complained of was unlawful. See, also, § 984, post, with many authorities cited.

[23] City of Little Rock v. Willis, 27 Ark. 572.

of immunity applies. 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. All governmental agents partake of this freedom from scrutiny or liability unless a responsibility is directly assumed and imposed by statute.[24] As usual, there are certain duties which are clearly governmental in their character and in respect to which no dispute can arise and these will be noted in the immediate sections.

§ 957. Character of duty continued.

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 property 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.[25] The discharge of this obligation is delegated or imposed in many cases by the state upon municipal cor-

[24] 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. A municipal corporation is not answerable for consequential damages produced by work of public improvement made under lawful authority for the sole benefit of the public provided the work is done in a careful manner. See § 953, ante.

[25] Hart v. City of Bridgeport, 13 Blatchf. 289, Fed. Cas. No. 6,149; Jones v. City of New Haven, 34 Conn. 1; Colwell v. City of Waterbury, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218; Swan v. City of Bridgeport, 70 Conn. 143, 39 Atl. 110. But a liability may be especially imposed by a city charter. 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; Peaty v. City of New York, 33 Misc. 231, 67 N. Y. Supp. 276; Coley v. City of Statesville, 121 N. C. 301; Frederick v. City of Columbus, 58 Ohio St. 538; Conelly v. City of Nashville, 100 Tenn. 262; Bates v. City of Houston, 14 Tex. Civ. App. 287; Sawyer v. Corse, 17 Grat. (Va.) 230.

porations proper. The obligations and duties which rest 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.[26] Familiar examples of these duties or powers are the right to construct drains or sewers,[27] introduce water and light,[28] establish public parks and play grounds,[29] erect public markets,[30] make local improve-

[26] Clark v. City of Washington, 12 Wheat. (U. S.) 40. Municipal corporations are liable for the acts and contracts of their agents in connection with the establishment of a lottery authorized by law. Hart v. City of Bridgeport, 13 Blatchf. 289, Fed. Cas. No. 6,149; Guthrie v. City of Philadelphia, 73 Fed. 688; Fink v. City of Des Moines, 115 Iowa, 641, 89 N. W. 28; Stewart v. City of New Orleans, 9 La. Ann. 461; Coughlan v. City of Cambridge, 166 Mass. 268, 44 N. E. 218; Sheldon v. Village of Kalamazoo, 24 Mich. 383; Weet v. Village of Brockport, 16 N. Y. 161, note; Tormey v. City of New York, 12 Hun (N. Y.) 542; McCombs v. Town Council of Akron, 15 Ohio, 474; Wagner v. City of Portland, 40 Or. 389, 60 Pac. 985, 67 Pac. 300; Aldrich v. Tripp, 11 R. I. 141; City of Petersburg v. Applegarth's Adm'r, 28 Grat (Va.) 321. See, also, note 51 Cent. L. Jr., 126, on Municipal Liability for Breach of Duties.

[27] 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. But see Brunswick Gas Light Co. v. Brunswick Village Corp., 92 Me. 493, 43 Atl. 104. There is no liability on the part of a village for injury to gas pipes of a private company while it is constructing a public sewer in the village streets. See, also, §§ 958 and 973, post, and §§ 437 et seq., ante.

[28] Pine v. City of New York, 103 Fed. 337. The seizure and permanent diversion of the waters of a stream by a city without compensation to the lower owners is a continuing wrong. Prince v. City of Quincy, 128 Ill. 443, 21 N. E. 768; Stock v. City of Boston, 149 Mass. 410, 21 N. E. 871; Westphal v. City of New York, 34 Misc. 684, 70 N. Y. Supp. 1021; Bodge v. City of Philadelphia, 167 Pa. 492, 31 Atl. 728; City of Ysleta v. Babbitt, 8 Tex. Civ. App. 432, 28 S. W. 702. See §§ 973 and 1002, post, and §§ 472 et seq., ante.

[29] See § 973, post, and 436, ante.

[30] City of Savannah v. Cullens, 38 Ga. 344; 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. See, also, §§ 420 et seq., ante.

ments,[31] or maintain its public places.[32] 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.[33]

§ 958. 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. Such a system is usually constructed through the collection of local assessments and it results in the local and special advantage of those within its immediate vicinity. The action of public authorities relative to the construction of drains and sewers is a discretionary duty left for them to determine in their judgment and

[31] City of Chicago v. Spoor, 91 Ill. App. 472; Bear v. City of Allentown, 148 Pa. 80, 23 Atl. 1062; City of Allentown v. Kramer, 73 Pa. 406; Brink v. Borough of Dunmore, 174 Pa. 395, 34 Atl. 598. When a city though acting within its powers commits a trespass in the making of an improvement, it is liable. See, also, §§ 422, et seq., ante. But see Fuller v. City of Grand Rapids, 105 Mich. 529, 63 N. W. 530. City not guilty of conversion of private property used by paving contractor.

[32] McMahon v. City of Dubuque, 107 Iowa, 62, 77 N. W. 517; Mullen v. Village of Glens Falls, 11 App. Div. 275, 42 N. Y. Supp. 113. Liability resulting from use of steam roller. O'Donnell v. White, 23 R. I. 318, 50 Atl. 333; Barksdale v. City of Laurens, 58 S. C. 413, 36 S. E. 661. But see McMulkin v. City of Chicago, 92 Ill. App. 331. A city may rightfully use any ordinary implement operated by steam for the purpose of constructing or repairing its streets, such as a steam roller. Barney v. City of Lowell, 98 Mass. 570; Quinn v. City of Paterson, 27 N. J. Law (3 Dutch.) 35; Russell v. City of Tacoma, 8 Wash. 156, 35 Pac. 605.

[33] City of Denver v. Rhodes, 9 Colo. 554, 13 Pac. 729; Fuller v. City of Atlanta, 66 Ga. 80; City of Bloomington v. Brokaw, 77 Ill. 194. A city is liable for damages from surface water caused by raising the grade of a street. City of Joliet v. Harwood, 86 Ill. 110; City of Chicago v. Norton Milling Co., 97 Ill. App. 651; McQueen v. City of Elkhart, 14 Ind. App. 671, 43 N. E. 460; Murphy v. City of Lowell, 128 Mass. 396; Hull v. Inhabitants of Westfield, 133 Mass. 433; Fuller v. City of Grand Rapids, 105 Mich. 529; Tegeler v. Kansas City, 95 Mo. App. 162, 68 S. W. 953; Kavanaugh v. City of Brooklyn, 38 Barb. (N. Y.) 232; O'Donnell v. White, 23 R. I. 318, 50 Atl. 333.

discretion resting upon the feasibility of the proposed action as dependent upon local necessities and financial ability.[34] The determination, therefore, to establish sewers, drains or a system of them, being a discretionary power, any action negative or affirmative in its character which may result in an injury to persons or property can create no liability on the part of the municipal corporation.[35] The power to establish a system being discretionary, the right to abolish or discontinue the maintenance of one already constructed is also discretionary in its character and no consequent liability can attach.[36]

§ 959. 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.[37] Any injuries

[34] Byrne v. Town of Farmington, 64 Conn. 367, 30 Atl. 138; Darling v. City of Bangor, 68 Me. 108; White v. Yazoo City, 27 Miss. 357; Hart v. City of Baraboo, 101 Wis. 368, 77 N. W. 744. But see Damour v. Lyons City, 44 Iowa, 276. See, also, Bickerdike v. City of Chicago, 185 Ill. 280, 56 N. E. 1096.

[35] City of Huntsville v. Ewing, 116 Ala. 576, 22 So. 984; Wilson v. City of Waterbury, 73 Conn. 416, 47 Atl. 687; City of Rome v. Cheney, 114 Ga. 194, 39 S. E. 933, 55 L. R. A. 221. A city is not liable for the death by drowning of a child nine years old in a properly constructed drain made for the purpose of carrying off surface water. City of Americus v. Eldridge, 64 Ga. 524; City of Chicago v. Rustin, 99 Ill. App. 47; Town of Monticello v. Fox, 3 Ind. App. 481, 28 N. E. 1025; Hoard v. City of Des Moines, 62 Iowa, 326; Morris v. City of Council Bluffs, 67 Iowa, 343; 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; Flagg v. City of Worcester, 79 Mass. (13 Gray) 601; Woods v. Kansas City, 58 Mo. App. 272; Wilson v. City of New York, 1 Denio (N. Y.) 595; Anchor Brewing Co. v. Village of Dobbs Ferry, 84 Hun, 274, 32 N. Y. Supp. 371; Mills v. City of Brooklyn, 32 N. Y. 489; Barton v. City of Syracuse, 37 Barb. (N. Y.) 292; Lynch v. City of New York, 76 N. Y. 60; Carr v. Northern Liberties, 35 Pa. 324; City of Chattanooga v. Reid, 103 Tenn. 616, 53 S. W. 937; State v. McNay, 90 Wis. 104, 62 N. W. 917.

[36] Simpson v. Keokuk, 34 Iowa, 568; City of Atchison v. Challis, 9 Kan. 603. But see O'Brien v. City of Worcester, 172 Mass. 348, 52 N. E. 385; City of Dallas v. Cooper (Tex. Civ. App.) 34 S. W. 321; Schroeder v. City of Baraboo, 93 Wis. 95, 67 N. W. 27.

[37] McCoy v. Washington County,

which may result, therefore, from defects in a reasonable plan [38] or scheme as a whole [39] or in part, can create no liability. 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,[40] or for the construction of drains or sewers lacking in capacity to carry off the natural drainage or sewage from the

3 Wall. Jr. 381, Fed. Cas. No. 8,731; City of Troy v. Coleman, 58 Ala. 570; Wicks v. Town of DeWitt, 54 Iowa, 130; 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, affirming 44 App. Div. 630, 60 N. Y. Supp. 1150; Parks v. City Council of Greenville, 44 S. C. 168, 21 S. E. 540; Smith v. Gould, 61 Wis. 31. See, also, Child v. City of Boston, 86 Mass. (4 Allen) 41.

[38] City of Denver v. Capelli, 4 Colo. 25; Hession v. City of Wilmington (Del.) 27 Atl. 830, Id., 1 Mara. (Del.) 122, 40 Atl. 749; Bickerdike v. City of Chicago, 185 Ill. 280; City of Terre Haute v. Hudnut, 112 Ind. 542, 13 N. E. 686. In the erection of a plant, municipal authorities must exercise reasonable care in securing the services of persons skilled in such matters.

Van Pelt v. City of Davenport, 42 Iowa, 308; King v. Kansas City, 58 Kansas 334, 49 Pac. 88; Hitchins v. Town of Frostburg, 68 Md. 100, 11 Atl. 826; Buckley v. City of New Bedford, 155 Mass. 64; Foster v. City of St. Louis, 4 Mo. App. 564; Graves v. City of Olean, 64 App. Div. 598, 72 N. Y. Supp. 799; Garratt v. Trustees of Canandaigua, 135 N. Y. 436, 32 N. E. 142. Where the construction of a system of drainage and sewer is left to the discretion and judgment of public authorities, a village is not liable for the results of a faulty plan adopted in good faith.

Fair v. City of Philadelphia, 88 Pa. 309; Bear v. City of Allentown 148 Pa. 80, 23 Atl. 1062; Willett v. Village of St. Albans, 69 Vt. 330, 38 Atl. 72. But see Williams v. Raleigh Tp., 21 Can. Sup. Ct. R. 103; City of New Albany v. Ray, 3 Ind. App. 321, 29 N. E. 611; City of Louisville v. Norris, 23 Ky. L. R. 1195, 64 S. W. 958. Where a liability followed from the adoption of a plan which was palpably bad. Young v. Kansas City, 27 Mo. App. 101. The determination of the dimension of a culvert is of a ministerial and not of a judicial character.

[39] Wilson v. City of Waterbury, 73 Conn. 416, 47 Atl. 687. But see Lehn v. City & County of San Francisco, 66 Cal. 76.

[40] City of Eufaula v. Simmons, 86 Ala. 515, 6 So. 47; City of Bloomington v. Murnin, 36 Ill. App. 647; City of Terre Haute v. Hudnut, 112 Ind. 542, 13 N. E. 686; Flanders v. City of Franklin, 70 N. H. 168, 47 Atl. 88; Magee v. City of Brooklyn, 18 App. Div. 22, 45 N. Y. Supp. 473; Costich v. City of Rochester, 68 App. Div. 623, 73 N. Y. Supp. 835; Hardy v. City of Brooklyn, 90 N. Y. 435; Donovan v. Royal, 26 Tex. Civ. App. 248, 63 S. W. 1054. See, also, authorities cited note

——, § 961

territory designed.[41] In each of these instances a liability is imposed for a failure to properly perform the duty. But a city is not bound to provide against an extraordinary or excessive rainfall.[42]

[41] Bannagan v. District of Columbia, 2 Mackay (D. C.) 285; Scanlan v. City of Montreal, 17 Rap. Jud. Que. C. S. 363; Hession v. City of Wilmington, 1 Marv. (Del.) 122, 40 Atl. 749; Wilson v. Boise City, 6 Idaho, 391, 55 Pac. 887; City of Dixon v. Baker, 65 Ill. 518; City of Litchfield v. Southworth, 67 Ill. App. 398; City of Chicago v. Rustin, 99 Ill. App. 47; City of Indianapolis v. Huffer, 30 Ind. 235; City of Lebanon v. Twiford, 13 Ind. App. 384, 41 N. E. 844; Damour v. Lyon City, 44 Iowa, 276; Knostman & Peterson Furniture Co. v. City of Davenport, 99 Iowa, 589, 68 N. W. 887. If the damage was caused by clogging the catch basins of which the city had no notice and not by a negligent construction of them, no liability will accrue.

Fox v. City of Richmond, 19 Ky. L. R. 326, 40 S. W. 251; City of Louisville v. Gimpeel, 22 Ky. L. R. 1110, 59 S. W. 1096; Thoman v. City of Covington, 23 Ky. L. R. 117, 62 S. W. 721; City of Louisville v. Norris, 23 Ky. L. R. 1195, 64 S. W. 958; Allen v. City of Boston, 159 Mass. 324; Seaman v. City of Marshall, 116 Mich. 327, 74 N. W. 484; Pearson v. City of Duluth, 40 Minn. 438, 42 N. W. 394; Rochester White Lead Co. v. City of Rochester, 3 N. Y. (3 Comst.) 463; Seifert v. City of Brooklyn, 101 N. Y. 136; King v. Granger, 21 R. I. 93, 41 Atl. 1012; Powell v. Town of Wytheville, 95 Va. 73.

Wilson v. City of Waterbury, 73 Conn. 416, 47 Atl. 687. No liability where plaintiffs were negligent in making proper connections with the sewer. Rozell v. City of Anderson, 91 Ind. 591; Rice v. City of Evansville, 108 Ind. 7. An error in judgment in respect to the necessary size does not make a city liable. Buckley v. City of New Bedford, 155 Mass. 64, 29 N. E. 201; Munk v. City of Watertown, 67 Hun, 261, 22 N. Y. Supp. 227; Collins v. City of Philadelphia, 93 Pa. 72; Baer v. City of Allentown, 148 Pa. 80, 23 Atl. 1062; Baxter v. Tripp, 12 R. I. 310; Kiesel v. Ogden City, 8 Utah, 237.

[42] District of Columbia v. Gray, 6 App. D. C. 314. The question of whether a rainfall is such an extraordinary one as to amount to a providential visitation 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. If, however, the damage is caused by an obstruction left in the sewer by the city workmen, the fact that there was a severe but not extraordinary rainfall will not relieve the city of its liability.

Harrigan v. City of Wilmington, 8 Houst. (Del.) 140, 12 Atl. 779; Hession v. City of Wilmington, 1 Marv. (Del.) 122, 40 Atl. 749, Id., (Del.) 27 Atl. 830; City of Savannah v. Cleary, 67 Ga. 153; City of Keithsburg v. Simpson, 70 Ill. App. 467; City of Peoria v. Adams, 72

§ 960. Construction.

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.[43] A municipal corporation is obligated to have the work carefully and skillfully constructed[44]

Ill. App. 662; City of Madison v. Ross, 3 Ind. 236; Brash v. City of St. Louis, 161 Mo. 433, 61 S. W. 808; Smith v. City of New York, 4 Hun (N. Y.) 637; Graves v. City of Olean, 64 App. Div. 598, 72 N. Y. Supp. 799; Wright v. City of Wilmington, 92 N. C. 156; Fairlawn Coal Co. v. City of Scranton, 148 Pa. 231, 23 Atl. 1069; Helbling v. Allegheny Cemetery Co., 201 Pa. 171, 50 Atl. 970; Fair v. City of Philadelphia, 88 Pa. 309; Collins v. City of Philadelphia, 93 Pa. 272; Allen v. City of Chippewa Falls, 52 Wis. 430. But see Woods v. Kansas City, 58 Mo. App. 272. If a city is negligent in maintaining its sewers it is liable although the rain causing the damage may have been of an extraordinary character.

[43] City of Montgomery v. Gilmer, 33 Ala. 116; City of Macon v. Small, 108 Ga. 309, 34 S. E. 152; City of Logansport v. Wright, 25 Ind. 512; Peck v. Michigan City, 149 Ind. 670, 49 N. E. 800; Murphy v. City of Indianapolis, 158 Ind. 238, 63 N. E. 469; Wallace v. City of Muscatine, 4 G. Greene (Iowa) 373; Cooper v. City of Cedar Rapids, 112 Iowa, 367, 83 N. W. 1050; Perkins v. City of Lawrence, 136 Mass. 305; Simmer v. City of St. Paul, 23 Minn. 408; Foncannon v. City of Kirksville, 88 Mo. App. 279; Donohue v. City of New York, 3 Daly (N. Y.) 65; Evers v. Long Island City, 78 Hun, 242, 28 N. Y. Supp. 825; Barton v. City of Syracuse, 36 N. Y. 54; Lewenthal v. City of New York, 61 Barb. (N. Y.) 511; Winn v. Village of Rutland, 52 Vt. 481; Streiff v. City of Milwaukee, 89 Wis. 218, 61 N. W. 770. A city is not liable in making a negligent re-connection with a private sewer. See, also, Moody v. Village of Saratoga Springs, 17 App. Div. 207, 45 N. Y. Supp. 365, affirmed 163 N. Y. 581, 57 N. E. 1118.

[44] City of Birmingham v. Lewis, 92 Ala. 352; City of Denver v. Rhodes, 9 Colo. 554, 13 Pac. 729; City of Kankakee v. Linden, 38 Ill. App. 657. The rule also applies to repairs being made on a sewer. City of Springfield v. Le Claire, 49 Ill. 476. A city cannot escape liability because of the construction of a sewer by a contractor. City of Ft. Wayne v. Coombs, 107 Ind. 75; City of Leavenworth v. Casey, McCahon (Kan.) 544; Carondelet Canal & Nav. Co. v. City of New Orleans, 38 La. Ann. 308; Hamlin v. City of Biddeford, 95 Me. 308, 95 Atl. 1100; Trowbridge v. Town of Brookline, 144 Mass. 139, 10 N. E. 796. A city is liable to the owners of a well made dry by the construction of a sewer. Prentiss v. City of Boston, 112 Mass. 43; Defer

and of the proper materials and appliances.[45] It must furnish the necessary appliances and a safe and suitable place for its employes engaged in the work.[46] For a failure in any of these respects, one injured may recover damages. These rules do not apply to quasi corporations.[47]

§ 961. Maintenance of sewers and drains.

After the construction of drains and sewers, although originally this was a discretionary duty, yet, the obligation to maintain them in a safe and suitable condition is not one of that character and the authorities must perform their duty in these respects or become liable for any injuries suffered.[48] A municipal

v. City of Detroit, 67 Mich. 346, 34 N. W. 680; Chalkley v. City of Richmond, 88 Va. 402, 14 S. E. 339.

[45] City of Helena v. Thompson, 29 Ark. 569.

[46] Kansas City v. Slangsstrom, 53 Kan. 431; 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; Murphy v. City of Lowell, 124 Mass. 564; Pettingell v. City of Chelsea, 161 Mass. 368, 24 L. R. A. 426.

[47] Packard v. Voltz, 94 Iowa, 277, 62 N. W. 757.

[48] District of Columbia v. Gray, 6 App. D. C. 314; City of Little Rock v. Willis, 27 Ark. 572; City of Denver v. Capelli, 4 Colo. 25; City of Brunswick v. Tucker, 103 Ga. 233, 29 S. E. 701; City of Macon v. Dannenberg, 113 Ga. 1111, 39 S. E. 446; Massengale v. City of Atlanta, 113 Ga. 966, 39 S. E. 578; City of Valparaiso v. Cartwright 8 Ind. App. 429, 35 N. E. 1051; Roll v. City of Indianapolis, 52 Ind. 547; Hazzard v. City of Council Bluffs, 79 Iowa, 106; Correll v. City of Cedar Rapids, 110 Iowa, 333, 81 N. W. 724; Kansas City v. King, 65 Kan. 64, 68 Pac. 1093; City of Louisville v. O'Malley, 21 Ky. L. R. 873, 53 S. W. 287; Estes v. Inhabitants of China, 56 Me. 407. No liability will attach unless it appears that an obligation to construct the drain was imposed on the town.

Hamlin v. City of Biddeford, 95 Me. 308, 49 Atl. 1100; City of Baltimore v. Schnitker, 84 Md. 34, 34 Atl. 1132; Kranz v. City of Baltimore, 64 Md. 491; Allen v. City of Boston, 159 Mass. 324, 34 N. E. 519; Emery v. City of Lowell, 104 Mass. 13; Collins v. City of Waltham, 151 Mass. 196; Seaman v. City of Marshall, 116 Mich. 327; Tate v. City of St. Paul, 56 Minn. 527, 58 N. W. 158; Netzer v. City of Crookston, 59 Minn. 244, 61 N. W. 21; Woods v. Kansas City, 58 Mo. App. 272; Fuchs v. City of St. Louis, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136; Rowe v. Portsmouth, 56 N. H. 291; Boyd v. Town of Derry, 68 N. H. 272; Wessman v. City of Brooklyn, 40 N. Y. State Rep. 698, 16 N. Y. Supp. 97; Ballou v. State, 111 N. Y. 496, 18 N. E. 627; McCarthy v. City of Syracuse, 46 N. Y. 194;

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.[49] For the former, it is sub-

Burnett v. City of New York, 36 App. Div. 458, 55 N. Y. Supp. 893. Question of improper construction one for jury.

Nims v. City of Troy, 59 N. Y. 500; Smith v. City of New York, 66 N. Y. 295; Munn v. City of Hudson, 61 App. Div. 343, 70 N. Y. Supp. 525; Talcott v. City of New York, 58 App. Div. 514, 69 N. Y. Supp. 360; Williams v. Town of Greenville, 130 N. C. 93, 40 S. E. 977, 57 L. R. A. 207; Markle v. Borough of Berwick, 142 Pa. 84, 21 Atl. 794; Briegel v. City of Philadelphia, 135 Pa. 451; City of Nashville v. Sutherland, 94 Tenn. 356. City is liable only for want of ordinary care in the construction of sewers. City of Dallas v. Webb, 22 Tex. Civ. App. 48, 54 S. W. 398; City of Dallas v. Schultz (Tex. Civ. App.) 27 S. W. 292; Lindsay v. City of Sherman (Tex. Civ. App.) 36 S. W. 1019; Scott v. Provo City, 14 Utah, 31; Willett v. Village of St. Albans, 69 Vt. 330, 38 Atl. 72. City not liable for exemplary damages for the neglect or refusal of its trustees to repair a defective sewer. Livingstone v. City of Taunton, 155 Mass. 363; Cook v. City of Milwaukee, 24 Wis. 270; Gilluly v. City of Madison, 63 Wis. 518; Schroeder v. City of Baraboo, 93 Wis. 95. But see Dashner v. Mills County, 88 Iowa, 401, 55 N. W. 468; Green v. Harrison County, 61 Iowa, 311; Dermont v. City of Detroit, 4 Mich. 435; Nutting v. City of St. Paul, 73 Minn. 371, 76 N. W. 61. No liability for death of child drowned in a sewer. Clay v. Board, 85 Mo. App. 237; Hughes v. City of Auburn, 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 636; Weir v Borough of Plymouth, 148 Pa. 566. See note 33 Am. & Eng. Corp. Cas. 87.

As to necessity of notice see Parker v. City of Laredo, 9 Tex. Civ. App. 221, 28 S. W. 1048; City of Dallas v. McAllister (Tex. Civ. App.) 39 S. W. 173; City of Galveston v. Smith, 80 Tex. 69, 15 S. W. 589; Whipple v. Village of Fair Haven, 63 Vt. 221, 21 Atl. 533.

[49] Carmichael v. City of Texarkana, 94 Fed. 561; Morgan v. City of Danbury, 67 Conn. 484, 35 Atl. 499; Platt v. City of Waterbury, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691; Watson v. Town of New Milford, 72 Conn. 561, 45 Atl. 167; Dorman v. City of Jacksonville, 13 Fla. 538; Holmes v. City of Atlanta, 113 Ga. 961, 39 S. E. 458; Smith v. City of Atlanta, 75 Ga. 110; City of Champaign v. Forrester, 29 Ill. App. 117; City of Jacksonville v. Doan, 145 Ill. 23, 33 N. E. 878; City of Jacksonville v. Lambert, 62 Ill. 519; City of Bloomington v. Costello, 65 Ill. App. 407; Village of Kewanee v. Ladd, 68 Ill. App. 154; Mason v. City of Mattoon, 95 Ill. App. 525. Discharge of sewage in stream.

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. A city discharging its sewage in a natural watercourse in conformity to a statute, free from negligence, will not be enjoined. Topeka Water Supply Co. v. City

ject to indictment, in some jurisdictions,[50] and for the latter, it will be liable for damages shown.[51]

of Potwin Place, 43 Kan. 404, 23 Pac. 578. Polution of stream by discharge of sewage. King v. Kansas City, 58 Kan. 334, 49 Pac. 88; Witham v. City of New Orleans, 49 La. Ann. 929, 22 So. 38. Acts 1877, No. 14, prohibiting the casting of offal in the Mississippi river does not apply to a municipal corporation. Macon v. City of Boston, 154 Mass. 100, 28 N. E. 9; Constitution Wharf Co. v. City of Boston, 156 Mass. 397, 30 N. E. 1134; Butler v. City of Worcester, 112 Mass. 541. A channel of a stream may be converted into a common sewer by legislative act. Middlesex County v. City of Lowell, 149 Mass. 509, 21 N. E. 872. A city cannot acquire a prescriptive right to continue the unlawful discharge of its sewerage into a private mill pond.

Sayre v. City of Newark, 60 N. J. Eq 361, 45 Atl. 985, 48 L. R. A. 722, reversing 58 N. J. Eq. 136, 42 Atl. 1068, determining the right of the city of Newark under its charter to use the Passaic river as an outlet for a public sewer. Butler v. Village of Edgewater, 53 Hun, 633, 6 N. Y. Supp. 174; Beach v. City of Elmira, 58 Hun, 606, 11 N. Y. Supp. 913; Schriver v. Village of Johnstown, 71 Hun, 232, 24 N. Y. Supp. 1083; Stoddard v. Village of Saratoga Springs, 127 N. Y. 261, 27 N. E. 1030, affirming 52 Hun, 610, 4 N. Y. Supp. 745; Gillett v. Trustees of Village of Kinderhook, 77 Hun, 604, 28 N. Y. Supp. 1044; Magee v. City of Brooklyn, 18 App. Div. 22, 45 N. Y. Supp. 473; Martin v. City of Brooklyn, 32 App. Div. 411, 52 N. Y. Supp. 1086; Butler v. Village of White Plains, 59 App. Div. 30, 69 N. Y. Supp. 193; Briegel v. City of Philadelphia, 135 Pa. 451, 19 Atl. 1038; Butchers' Ice & Coal Co. v. City of Philadelphia, 156 Pa. 54; Owens v. City of Lancaster, 182 Pa. 257, 37 Atl. 858. If a city uses a stream as an open sewer, the duty still remains of keeping open the channel. City of San Antonio v. Pizzini (Tex. Civ. App.) 58 S. W. 635; City of San Antonio v. Diaz (Tex. Civ. App.) 62 S. W. 549; Donovan v. Royal, 26 Tex. Civ. App. 248, 63 S. W. 1054; Winn v. Village of Rutland, 52 Vt. 481; Harper v. City of Milwaukee, 30 Wis. 365. But see Merrifield v. City of Worcester, 110 Mass. 216.

[50] Brayton v. City of Fall River, 113 Mass. 218; Boston Rolling Mills v. City of Cambridge, 117 Mass. 396.

[51] Arn v. Kansas City, 14 Fed. 236; Watson v. Town of New Milford, 72 Conn. 561, 45 Atl. 167; City of Atlanta v. Warnock, 91 Ga. 210, 18 S. E. 135, 23 L. R. A. 301; Elgin Hydraulic Co. v. City of Elgin, 74 Ill. 433; City of Litchfield v. Whitenack, 78 Ill. App. 364. Admissibility of evidence. City of Seymour v. Cummins, 119 Ind. 148, 21 N. E. 549, 5 L. R. A. 126; Loughran v. City of Des Moines, 72 Iowa, 382, 34 N. W. 172; Morse v. City of Worcester, 139 Mass. 389; Semple v. City of Vicksburg, 62 Miss. 63; 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; Huffmire v. City of Brooklyn, 22 App. Div. 406, 48 N. Y. Supp. 132.

§ 962. 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 acts which have this for their purpose.[52] Damages cannot be recovered, therefore, for injuries committed by tax officers while in the performance of their duty [53] or for any act done in connection with the levy and the collection of general taxes.[54] 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.[55] The rule of nonliability also applies to the condition or erection of public buildings.[56]

City is liable for damage to oyster beds occasioned by discharge of sewage.

Vanderslice v. City of Philadelphia, 193 Pa. 102; Owens v. City of Lancaster, 182 Pa. 257, 37 Atl. 858; Pomroy v. Granger, 18 R. I. 624, 29 Atl. 690; City of San Antonio v. Mackey's Estate, 22 Tex. Civ. App. 145, 54 S. W. 33; Winchell v. City of Waukesha, 110 Wis. 101, 85 N. W. 668. A city has no greater right to pollute a navigable stream than an individual, in the absence of legislative authority. See, also, Fahey v. Town of Harvard, 62 Ill. 28.

[52] Wallace v. Town of Norman, 9 Okl. 339, 60 Pac. 108, 48 L. R. A. 620. The rule also applies to a failure to take efficient means for the protection of certain classes of residents; negroes for example. McAndrews v. Hamilton County, 105 Tenn. 399, 58 S. W. 483. See, also, note 19 L. R. A. 452, 43 L. R. A. 435.

[53] State v. Fish, 4 Nev. 216; 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.

[54] Sherbourne v. Yuba County, 21 Cal. 113; Pitkin County Com'rs v. Ball, 22 Colo. 125, 43 Pac. 1000; Estep v. Keokuk County, 18 Iowa, 199; Crafts v. Inhabitants of Elliotsville, 47 Me. 141; Snow v. Inhabitants of Brunswick, 71 Me. 580; Inhabitants of Liberty v. Hurd, 74 Me. 101; Dunbar v. City of Boston, 112 Mass. 75; Lorillard v. Town of Monroe, 11 N. Y. (1 Kern.) 392; De Grauw v. Queen's County Sup'rs, 13 Hun (N. Y.) 381; Everson v. City of Syracuse, 100 N. Y. 577; Hopkins v. Town of Elmore, 49 Vt. 176; Thomas v. Town of Grafton, 34 W. Va. 282, 12 S. E. 478; Wallace v. City of Menasha, 48 Wis. 79. But see Teall v. City of Syracuse, 120 N. Y. 184, 24 N. E. 450.

[55] Gould v. City of Atlanta, 60 Ga. 164; Williams v. Village of Dunkirk, 3 Lans. (N. Y.) 44; Howell v. City of Buffalo, 15 N. Y. 512; Durkee v. City of Kenosha, 59 Wis. 123.

[56] City of El Paso v. Causey, 1 Ill. App. 531; Hollenbeck v. Winne-

§ 963. 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.[57] There can be no liability for an exercise of or a failure to exercise the police power.[58]

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 [59] or for damages to or caused

bago County, 95 Ill. 148; Vigo Co. Com'rs v. Daily, 132 Ind. 73, 31 N. E. 531; Kincaid v. Hardin County, 53 Iowa, 430; Sheppard v. Pulaski County, 13 Ky. L. R. 672, 18 S. W. 15; McNeil v. City of Boston, 178 Mass. 326, 59 N. E. 810; Larrabee v. Inhabitants of Peabody, 128 Mass. 561; Worden v. City of New Bedford, 131 Mass. 23. But if a room in a public building is left for a hire to private persons, the city will be responsible for its safe condition. See, also, Little v. City of Holyoke, 177 Mass. 114, 58 N. E. 170, 52 L. R. A. 417.

Dosdall v. Olmsted County, 30 Minn. 96; Miller v. City of St. Paul, 38 Minn. 134, 36 N. W. 271; Snider v. City of St. Paul, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151; Miller v. City of Minneapolis, 75 Minn. 131, 77 N. W. 788; Cunningham v. City of St. Louis, 96 Mo. 53, 8 S. W. 787; Eastman v. Meredith, 36 N. H. 284.

[57] Kansas City v. Lemen (C. C. A.) 57 Fed. 905; Mead v. City of New Haven, 40 Conn. 72. Not liable for negligence of inspector of steam boiler. Green v. Eden, 24 Ind. App. 583, 56 N. E. 240.

[58] Easterly v. Town of Irwin, 99 Iowa, 694; Howe v. City of New Orleans, 12 La. Ann. 481; Betham v. City of Philadelphia, 196 Pa. 302, 46 Atl. 448; Stinnett v. City of Sherman (Tex. Civ. App.) 43 S. W. 847; Bolton v. Vellines, 94 Va. 393.

[59] City of New York v. Workman (C. C. A.) 67 Fed. 347; Wright v. City of Augusta, 78 Ga. 241; Robinson v. City of Evansville, 87 Ind. 334; Patch v. City of Covington, 56 Ky. (17 B. Mon.) 722; Davis v. City of Lebanon, 22 Ky. L. R. 384, 57 S. W. 471; Planters' Oil Mill v. Monroe Water-works & Light Co., 52 La. Ann. 1243, 27 So. 684; Hafford v. City of New Bedford, 82 Mass. 297; Tainter v. City of Worcester, 123 Mass. 311; Heller v. City of Sedalia, 53 Mo. 159; Smith v. City of Rochester, 76 N. Y. 506; Walter v. Meader, 75 App. Div. 612, 77 N. Y. Supp. 407; Springfield F. & Marine Ins. Co. v. Village of Keeseville, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, reversing 80 Hun, 162, 29 N. Y. Supp. 1130; Wheeler v. City of Cincinnati, 19 Ohio St. 19; Frederick v. City of Columbus, 58 Ohio St. 538, 51 N. E. 35; Irvine v. City of Chattanooga, 101 Tenn. 291,

by any of the agencies employed by it for this purpose.[60] 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.[61]

47 S. W. 419; Butterworth v. Henrietta, 25 Tex. Civ. App. 467, 61 S. W. 975; Terry v. City of Richmond, 94 Va. 537, 38 L. R. A. 834; Mendel v. City of Wheeling, 28 W. Va. 233; Hayes v. City of Oshkosh, 33 Wis. 314. See, also, note 23 L. R. A. 146, 30 L. R. A. 661. But see Lenzen v. City of New Braunfels, 13 Tex. Civ. App. 335, 35 S. W. 341.

[60] Howard v. City & County of San Francisco, 51 Cal. 52; Jewett v. City of New Haven, 38 Conn. 368; Saunders v. City of Ft. Madison, 111 Iowa, 102, 82 N. W. 428; Greenwood v. City of Louisville, 76 Ky. (13 Bush) 226; Burrill v. City of Augusta, 78 Me. 118; Pettingell v. City of Chelsea, 161 Mass. 368, 37 N. E. 380, 24 L. R. A. 426; Fisher v. City of Boston, 104 Mass. 87; Dolloff v. Inhabitants of Ayer, 162 Mass. 569, 39 N. E. 191; Grube v. City of St. Paul, 34 Minn. 402; Alexander v. City of Vicksburg, 68 Miss. 564, 10 So. 62; Gillespie v City of Lincoln, 35 Neb. 34, 52 N. W. 811, 16 L. R. A. 349; Edgerly v. City of Concord, 62 N. H. 8; Wild v. City of Paterson, 47 N. J. Law, 406; Kies v. City of Erie, 135 Pa. 144, 19 Atl. 942; Dodge v. Granger, 17 R. I. 664, 24 Atl. 100, 15 L. R. A. 781; Shanewerk v. City of Ft. Worth, 11 Tex. Civ. App. 271, 32 S. W. 918; Lawson v. City of Seattle, 6 Wash. 184, 33 Pac. 347. But see Newcomb v. Boston Protective Dept., 146 Mass. 596, 16 N. E. 555. The rule does not apply to a private corporation organized for the purpose of protecting insured property from fire.

Wagner v. City of Portland, 40 Or. 389, 69 Pac. 985, 67 Pac. 300. The rule of maritime law which holds the owner of a vessel liable for injuries inflicted through negligence in its navigation rests upon the fact of ownership, not on the relation of master and servant, and the principle which exempts a city from liability for negligent acts of its firemen does not apply and the public corporation may be held responsible to the extent of the value of the tug or fire vessel. See the following cases: Workman v. City of New York, 63 Fed. 298; Thompson Nav. Co. v. City of Chicago, 79 Fed. 984. The city is liable in personam for injuries caused to a vessel by the negligence of a fire tug. Henderson v. City of Cleveland, 93 Fed. 844.

[61] Boston Safe-Deposit & Trust Co. v. Salem Water Co., 94 Fed. 238; Nickerson v. Bridgeport Hydraulic Co., 46 Conn. 25, Bush v. Artesian Hot & Cold Water Co., 4 Idaho, 618, 43 Pac. 69; Fitch v. Seymour Water Co., 139 Ind. 214, 37 N. E. 982; Becker v. Keokuk Water-works, 79 Iowa, 419, 44 N. W. 694; Van Horn v. City of Des Moines, 63 Iowa, 447; Mott v. Cherryvale Water & Mfg. Co., 48 Kan. 12, 15 L. R. A. 375; Owensboro Water Co. v. Duncan's Adm'x, 17

§ 964. 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.[62]

Ky. L. R. 755, 32 S. W. 478. Nonliability result of special contract provision. Sandusky v. Central City, 22 Ky. L. R. 669, 58 S. W. 516; Howsmon v. Trenton Water Co., 24 Mo. 304, 24 S. W. 784; Phoenix Insurance Co. v. Trenton Water Co., 42 Mo. App. 118; Eaton v. Fairbury Water-works Co., 37 Neb. 546, 56 N. W. 201, 21 L. R. A. 653; Blackburn v. Reilly, 47 N. J. Law, 290, 1 Atl. 27; Gerli v. Poidebard Silk Manufacturing Co., 57 N. J. Law, 432, 31 Atl. 401, 30 L. R. A. 61; Wainwright v. Queens County Water Co., 78 Hun, 146, 28 N. Y. Supp. 987; Black v. City of Columbia, 19 S. C. 412; Foster v. Lookout Water Co., 71 Tenn. (3 Lea) 42; House v. Houston Water-works Co., 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532; Britton v. Green Bay & Ft. H. Water-works Co., 81 Wis. 48, 51 N. W. 84; 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; Paducah Lumber Co. v. Paducah Water Supply Co., 11 Ky. L. R. 738, 12 S. W. 554, 13 S. W. 249. Special contract provision. Graves County Water & Light Co. v. Ligon, 23 Ky. L. R. 2149, 66 S. W. 725; Light, Heat & Water Co. v. City of Jackson, 73 Miss. 598, 19 So. 771; Middlesex Water Co. v. Knappmann Whiting Co., 64 N. J. Law, 240, 45 Atl. 692, 49 L. R. A. 572. Liability imposed by special contract, following Public Schools of Trenton v. Bennett, 27 N. J. Law (3 Dutch) 513; Gorrell v. Greensboro Water Supply Co., 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513. Special contract creating liability.

[62] Louisiana v. City of New Orleans, 109 U. S. 285; Hart v. City of Bridgeport, 13 Blatchf. 289, Fed. Cas. No. 6,149; City of New Orleans v. Abbagnato (C. C. A.) 62 Fed. 240, 26 L. R. A. 329; Clear Lake Water-works v. Lake Co., 45 Cal. 90; Wing Chung v. City of Los Angeles, 47 Cal. 531. To recover, parties whose property is destroyed by mob, having knowledge of an impending danger, must use due diligence to notify mayor or sheriff of the threatened danger to their property. They cannot recover if they instigate or participate in a riot.

Spring Valley Coal Co. v. City of Spring Valley, 96 Ill. App. 230, 65 Ill. App. 571. It is not the duty of an owner of property to employ armed men to defend his property against a mob in order to recover, under Ill. Laws 1887, p. 239, which provides for the indemnification of the owners of property for damages occasioned by mobs and riots. City of Chicago v. Manhattan Cement Co., 178 Ill. 372, 53 N. E. 68, 45 L. R. A. 848. The obligations assumed in paying for property destroyed by mob under statutory

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. An individual not a member of society possesses the right to protect with all the means at his disposal and to the best of his ability his property and the lives of himself and family. Upon becoming a member of organized government, he surrenders this right to that government which is to protect his rights in this respect in return for his support. The contract duty, therefore, rests upon the state to protect the lives and property of all within its jurisdiction or, if it fails in this respect, it should assume a pecuniary responsibility.[63] The other reason for the adoption of these statutes is 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 these duties than the imposition of a local and pecuniary liability upon those who fail to properly perform them.[64]

liability is not an indebtedness unconstitutional under constitution, art. 9, §§ 9 and 10.

Adams v. City of Salina, 58 Kan. 246, 48 Pac. 918; Prather v. City of Lexington, 52 Ky. (13 B. Mon.) 559; Fortunich v. City of New Orleans, 14 La. Ann. 115; Folsom v. City of New Orleans, 28 La. Ann. 936; Brightman v. Inhabitants of Bristol, 65 Me. 426; City of Baltimore v. Poultney, 25 Md. 107; May v. City of Anaconda, 26 Mont. 140, 66 Pac. 759; Chadbourne v. Town of New Castle, 48 N. H. 196; Palmer v. City of Concord, 48 N. H. 211; Newberry v. City of New York, 31 N. Y. Super. Ct. (1 Sweeny) 369; Loomis v. Oneida County Sup'rs, 6 Lans. (N. Y.) 269; Blodgett v. City of Syracuse, 36 Barb. (N. Y.) 526; Sarles v. City of New York, 47 Barb. (N. Y.) 447; Western College of Homeopathic Medicine v. City of Cleveland, 12 Ohio St. 375; Fordyce v. Godman, 20 Ohio St. 1; Champaign County Com'rs v. Church, 62 Ohio St. 318, 57 N. E. 50, 48 L. R. A. 738; Caldwell v. Cuyahoga County Com'rs, 62 Ohio St. 318, 57 N. E. 50, 48 L. R. A. 738; Brown v. Orangeburg County, 55 S. C. 45, 32 S. E. 764, 44 L. R. A. 734; Aron v. City of Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733. See, also, notes 24 L. R. A. 592, 26 L. R. A. 332, 40 L. R. A. 733, and 48 L. R. A. 620.

[63] City of Chicago v. Chicago League Ball Club, 196 Ill. 54, 63 N. E. 695, reversing 97 Ill. App. 637. The owner of property used by public authorities in the quelling of a riot is not entitled to compensation. Luke v. City of Brooklyn, 43 Barb. (N. Y.) 54; Allegheny County v. Gibson, 90 Pa. 397.

[64] Pennsylvania Co. v. City of Chicago, 81 Fed. 317, Ill. Rev. St. 1895, c. 38, § 256*a*, making a city liable for loss of property arising from mobs and riots, is valid.

Where a liability is imposed by law, the right of one to recover is determined by absence of contributory negligence and by the scope of the statute.[65] It is not necessary that the property destroyed should be owned by a resident or citizen of the community; it may be goods in transit from one part of the country to another.[66] The right to recover also depends upon the character of the assemblage and in this question is involved a definition of a "mob,"[67] "riot,"[68] or whatever phraseology may be used in the particular law.[69]

[65] Gianfortone v. City of New Orleans, 61 Fed. 64, 24 L. R. A. 592, La. Rev. St. § 2453, making municipal corporations liable for the destruction of property by mobs, does not include a liability for the taking of life. City of New Orleans v. Abbagnato (C. C. A.) 62 Fed. 240, 26 L. R. A. 329; Dale County v. Gunter, 46 Ala. 118, 137, construing Ala. Act. of Dec. 28th, 1868, creating a liability for injury by mobs. Fisher Land & Improvement Co. v. Bordelon, 52 La. Ann. 429, 27 So. 59. A parish is not a municipal corporation within the intent of La. Rev. St. § 2453, providing that municipal corporations in the state shall be liable for damages done to property by mobs or riotous assemblages in their respective limits.

Underhill v. City of Manchester, 45 N. H. 214; Hill v. Rensselaer County Sup'rs, 53 Hun, 194, 6 N. Y. Supp. 716; Schiellein v. Kings County Sup'rs, 43 Barb. (N. Y.) 490; Moody v. Niagara County Sup'rs, 46 Barb. (N. Y.) 659; Paladino v. Westchester County Sup'rs, 47 Hun (N. Y.) 337; Salisbury v. Washington County, 22 Misc. 41, 48 N. Y. Supp. 122, construing Laws 1892, c. 685, § 21, Marshall v. City of Buffalo, 63 App. Div. 603, 71 N. Y. Supp. 719, 50 App. Div. 149, 64 N. Y. Supp. 411. See, also, as to the power of the city council to destroy public buildings, Whitney v. City of New Haven, 58 Conn. 450, 20 Atl. 666.

[66] Allegheny County v. Gibson, 90 Pa. 397.

[67] Street v. City of New Orleans, 32 La. Ann. 577; Duffy v. Baltimore, Taney, 200. Under Md. Laws 1835, c. 187, making any county and incorporated town in which a riot occurs liable for injuries to or destruction of property occasioned thereby, to entitle the plaintiff to recover, it must appear that the mob was too strong to be resisted without the aid of civil authorities and that they were negligent in the use of reasonable diligence to suppress or prevent it.

[68] Duryea v. City of New York, 10 Daly (N. Y.) 300; City of Madisonville v. Bishop, 23 Ky. L. R. 2346, 67 S. W. 269. To constitute a "riotous or tumultuous assemblage of people" it is not necessary that the assemblage be bent on evil; a city will be liable for injuries to property by such an assemblage though the persons composing it were celebrating Christmas.

[69] Dale County v. Gunter, 46 Ala. 118; Luke v. Calhoun County, 52 Ala. 115; Aron v. Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733.

§ 965. 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.[70]

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.[71] Neither can there arise any liability on the part of the public corporation for the destruction of property in the abatement of a nuisance [72] or in the abatement

[70] Dunbar v. Alcalde & Ayuntamiento of San Francisco, 1 Cal. 355; Correas v. City of San Francisco, 1 Cal. 452; Field v. City of Des Moines, 39 Iowa, 575; Parsons v. Pettingell, 93 Mass. (11 Allen) 507. The statute giving authority to fire tugs to destroy property to prevent the spread of fire should be strictly construed. McDonald v. City of Red Wing, 13 Minn. (Gil. 25), 38; American Print Works v. Lawrence, 23 N. J. Law, (3 Zab.) 590; Russell v. City of New York, 2 Denio (N. Y.) 464; City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367; People v. City of Buffalo, 76 N. Y. 558. By charter provision an owner may be allowed a limited indemnity for his property thus destroyed. Aitken v. Village of Wells River, 705 Vt. 308, 40 Atl. 829, 41 L. R. A. 566. The same rule also holds in respect to property destroyed to prevent a flood. But see City of Quebec v. Mahoney, 10 Rap. Jud. Que. B. R. 378; Town of Dawson v. Kuttner, 48 Ga. 133. See, also, City of Chicago v. Chicago League Ball Club, 196 Ill. 54, 63 N. E. 695, reversing 97 Ill. App. 637; Ruggles v. Inhabitants of Nantucket, 65 Mass. (11 Cush.) 433. Jones v. City of Richmond, 18 Grat. (Va.) 517. Where under special charter provision the city was held liable for the destruction of liquor in anticipation of an evacuation of the city by the confederate army. Wallace v. City of Richmond, 94 Va. 204. For the use of private property by public corporations without compensation see Ensley v. City of Nashville, 61 Tenn. (2 Baxt.) 144. 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.

[71] 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; see, also, §§ 122 et seq., ante.

[72] City of Orlando v. Pragg, 31

of a nuisance itself which possibly may be affected without the destruction of property.

§ 966. 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 [73] and public corporations will not be held liable for injuries either to its officers while in the performance of their duties or to others

Fla. 111, 12 So. 368, 19 L. R. A. 196. But a city will be liable for a resulting injury if in fact the thing abated is not a nuisance. Dunbar v. City Council of Augusta, 90 Ga. 390, 17 S. E. 907; City of Savannah v. Mulligan, 95 Ga. 323, 22 S. E. 621; Miller v. City of Valparaiso, 10 Ind. App. 22, 37 N. E. 418, Baumgartner v. Hasty, 100 Ind. 575. A city may destroy a wooden building erected within prohibited fire districts. Wood v. City of Hinton, 47 W. Va. 645, 35 S. E. 824. See, also, §§ 122 et seq., ante. But see Cavanagh v. City of Boston, 139 Mass. 426.

[73] City of Orlando v. Pragg, 31 Fla. 111, 12 So. 368, 19 L. R. A. 196; 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; Doolittle v. Town of Walpole, 67 N. H. 554, 38 Atl. 19. The failure of town selectmen to provide a suitable lockup creates no liability on the part of the town. Doty v. Village of Port Jervis, 23 Misc. 313, 52 N. Y. Supp. 57. The appointment of one as a police officer who is negligently inefficient and dangerous creates no liability on the part of the municipality through the wrongful killing of a person by him.

McIlhenney v. City of Wilmington, 127 N. C. 146, 37 S. E. 187, 50 L. R. A. 470; Love v. City of Raleigh, 116 N. C. 296, 28 L. R. A. 192; Shields v. Town of Durham, 118 N. C. 450, 36 L. R. A. 293; O'Rourke v. City of Sioux Falls, 4 S. D. 47, 19 L. R. A. 789; 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; Brown's Adm'r v. Town of Guyandotte, 34 W. Va. 299, 12 S. E. 707, 11 L. R. A. 121; Gibson v. City of Huntington, 38 W. Va. 177, 22 L. R. A. 561; Little v. City of Madison, 49 Wis. 605; Robinson v. Rohr, 73 Wis. 436, 40 N. W. 668, 2 L. R. A. 366. But see Twist v. City of Rochester, 165 N. Y. 619, 59 N. E. 1131; Town of Johnson City v. Wolfe, 105 Tenn. 227, 52 S. W. 991. A municipal corporation may be liable for a personal tort committed by a policeman. See note on municipal liability for imprisonment under invalid ordinance, 47 L. R. A. 593. See, also, notes on liability of municipal corporations for false imprisonment and unlawful arrest, 44 L. R. A. 795, 36 L. R. A. 293.

who may be injured by them,[74] nor for the defective condition of jails, court houses, prisons or buildings used in the administration of justice,[75] or their appliances.[76]

[74] Kansas City v. Lemen (C. C. A.) 57 Fed. 905; Masters v. Village of Bowling Green, 101 Fed. 101; Nisbet v. City of Atlanta, 97 Ga. 650, 25 S. E. 173. No liability arises for the death of a convict occasioned by the negligence of the public officers in whose charge he is placed. Cook v. City of Macon, 54 Ga. 468. Illegal arrest. McElroy v. City of Albany, 65 Ga. 387; Attaway v. City of Cartersville, 68 Ga. 740; Moss v. City Council of Augusta, 93 Ga. 797, 20 S. E. 653; Bartlett v. City of Columbus, 101 Ga. 300, 28 S. E. 599, 44 L. R. A. 795; Bailey v. Fulton County, 111 Ga. 313, 36 S. E. 596; Gray v. City of Griffin, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131; City of Chicago v. Williams, 182 Ill. 135, 55 N. E. 123, reversing 80 Ill. App. 33. Illegal arrest. Craig v. City of Charleston, 78 Ill. App. 312, affirmed 180 Ill. 154, 54 N. E. 184; Robertson v. City of Marion, 97 Ill. App. 332; Town of Laurel v. Blue, 1 Ind. App. 128, 27 N. E. 301; Vaughtman v. Town of Waterloo, 14 Ind. App. 649, 43 N. E. 476; Peters v. City of Lindsborg, 40 Kan. 654, 20 Pac. 490; City of Caldwell v. Prunell, 57 Kan. 511, 46 Pac. 949. A municipality is not liable for acts of its officials in enforcing an invalid ordinance. Pollock's Adm'r v. City of Louisville, 76 Ky. (13 Bush) 321; Bean v. City of Middlesborough, 22 Ky. L. R. 415, 57 S. W. 478; Spalding v. City of Jefferson, 27 La. Ann. 159; Cobb v. City of Portland, 55 Me. 381; Buttrick v. City of Lowell, 83 Mass. (1 Allen) 172; Gullikson v. McDonald, 62 Minn. 278, 64 N. W. 812; Schussler v. Hennepin County Com'rs, 67 Minn. 412, 39 L. R. A. 75; Worley v. Town of Columbia, 88 Mo. 106; Twist v. City of Rochester, 37 App. Div. 307, 55 N. Y. Supp. 850.. City liable for defective erection of wire. Woodhull v. City of New York, 150 N. Y. 450, 44 N. E. 1038; Kelley v. Cook, 21 R. I. 29, 41 Atl. 571; Crause v. Harris County, 18 Tex. Civ. App. 375, 44 S. W. 616; City of Corsicana v. White, 57 Tex. 382. See, also, notes 15 L. R. A. 783. But see Oklahoma City v. Hill, 4 Okl. 521, 46 Pac. 568; Parks v. City Council of Greenville, 44 S. C. 168, 21 S. E. 540.

[75] Gray v. City of Griffin, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131; Blake v. City of Pontiac, 49 Ill. App. 543; Hite v. Whitley County, 91 Ky. 168, 11 L. R. A. 122; Webster v. Hillsdale County, 99 Mich. 259, 58 N. W. 317; 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. No liability for injuries received while in workhouse. Eddy v. Village of Ellicottville, 35 App. Div. 256, 54 N. Y. Supp. 800; Moody v. State's Prison, 128 N. C. 112, 38 S. E. 131, 53 L. R. A. 855; Coley v. City of Statesville, 121 N. C. 301, 28 S. E. 482. It is the duty, however, of a city to afford reasonable comfort and protection from suffering and injuries to health and to exercise ordinary care in procuring necessaries for prisoners. Brown's Adm'r v. Town of Guyandotte, 34

§ 967. 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.[77] Neither is a municipality liable to an individual for its breach of duty to the public to abate a nuisance,[78]

W. Va. 299, 12 S. E. 707, 11 L. R. A. 121. But see Carrington v. City of St. Louis, 89 Mo. 208; Shields v. Town of Durham, 118 N. C. 450, 24 S. E. 794, 36 L. R. A. 293.

[76] Hart v. Union City, 107 Tenn. 294, 64 S. W. 6.

[77] Sherbourne v. Yuba County, 21 Cal. 113. No liability for unskillful treatment of an indigent sick person in a county hospital. Love v. City of Atlanta, 95 Ga. 129, 22 S. E. 29; Williams v. City of Indianapolis, 26 Ind. App. 628, 60 N. E. 367. No liability to patient at city hospital injured by alleged unskillful treatment of the physician employed by the city. Summers v. Davies County Com'rs, 103 Ind. 262; Ogg v. City of Lansing, 35 Iowa, 495; City of New Orleans v. Kerr, 50 La. Ann. 413; Brown v. Inhabitants of Vinalhaven, 65 Me. 402; Barbour v. City of Ellsworth, 67 Me. 294; Butz v. Cavanaugh, 137 Mo. 503, 38 S. W. 1104.

Davidson v. City of New York, 24 Misc. 560, 54 N. Y. Supp. 51; Missano v. City of New York, 160 N. Y. 123, 54 N. E. 744. In the latter case, it is held that a city is liable for injuries caused by the negligence of the driver of an ash cart employed in the street cleaning department, for it is then acting in relation to the care of the streets in the discharge of a special power granted to it by the legislature in the exercise of which it is a legal individual as distinguished from its governmental functions where it acts as a sovereign. Levin v. City of Burlington, 129 N. C. 184, 39 S. E. 822, 55 L. R. A. 396; O'Rourke v. City of Sioux Falls, 4 S. D. 47, 19 L. R. A. 789; Conelly v. City of Nashville, 100 Tenn. 262, 46 S. W. 565. Sprinkling streets is a governmental duty for the promotion of the general health and a municipal corporation is not liable for the negligent acts of a driver of a sprinkling cart in its service. Bates v. City of Houston, 14 Tex. Civ. App. 287, 37 S. W. 383; City of San Antonio v. White (Tex. Civ. App.) 57 S. W. 858; White v. City of San Antonio, 94 Tex. 313, 60 S. W. 426, affirming (Tex. Civ. App.) 57 S. W. 858; White v. Town of Marshfield, 48 Vt. 20; Kuehn v. City of Milwaukee, 92 Wis. 263, 65 N. W. 1030; Kempster v. City of Milwaukee, 103 Wis. 421. But see Bristol Door & Lumber Co. v. City of Bristol, 97 Va. 304, 33 S. E. 588.

[78] Davis v. City of Montgomery, 51 Ala. 139; Morse v. Borough of Fair Haven East, 48 Conn. 220; City of Wilmington v. Vandegrift, 1 Marv. (Del.) 5, 29 Atl. 1047. Coasting on public streets. Arms v. City

but it may be subject to indictment if it has the power and fails to exercise it.[79] A city has no right, however, to create a nuisance in the exercise of its lawful power.[80] Acts may, however, be relieved of the character of nuisances if authorized by law.[81]

of Knoxville, 32 Ill. App. 604. Firing cannon. James' Adm'r v. Trustees of Harrodsburg, 85 Ky. 191, 3 S. W. 135; Howe v. City of New Orleans, 12 La. Ann. 481; Whitfield v. Town of Carrollton, 50 Mo. App. 98. Standpipe. Armstrong v. City of Brunswick, 79 Mo. 319; Kiley v. Kansas City, 87 Mo. 103. Unsafe building. Arthur v. City of Cohoes, 56 Hun, 36, 9 N. Y. Supp. 160; Toomey v. City of Albany, 60 Hun, 580, 14 N. Y. Supp. 572. Coasting. Leonard v. City of Hornellsville, 41 App. Div. 106, 58 N. Y. Supp. 266; Cain v. City of Syracuse, 95 N. Y. 83. Dangerous walk. Robinson v. Village of Greenville, 42 Ohio St. 625, 51 Am. Rep. 857; Borough of Norristown v. Fitzpatrick, 94 Pa. 121. Cannon. McCrowell v. Town of Bristol, 73 Tenn. (5 Lea) 685; City of Chattanooga v. Reid, 103 Tenn. 616, 53 S. W. 937; State v. Town of Burlington, 36 Vt. 521; Schultz v. City of Milwaukee, 49 Wis. 254; Kent v. City of Cheyenne, 2 Wyo. 6. See, also, notes 16 L. R. A. 395; 43 L. R. A. 295. But see Town of Rushvillle v. Adams, 107 Ind. 475; Bannon v. Murphy, 18 Ky. L. R. 989, 38 S. W. 889; Clayton v. City of Henderson, 20 Ky. L. R. 87, 44 S. W. 667; Cochrane v. City of Frostburg, 81 Md. 54, 31 Atl. 703, 27 L. R. A. 728; Fritsch v. City of Allegheny, 91 Pa. 226. City's negligence question for jury.

[79] People v. Corporation of Albany, 11 Wend. (N. Y.) 539; State v. Shelbyville Corp., 36 Tenn. (4 Sneed) 176.

[80] Nolan v. City of New Britain, 69 Conn. 668; City of Bloomington v. Costello, 65 Ill. App. 407; City of New Albany v. Lines, 21 Ind. App. 380; City of New Albany v. Slider, 2 Ind. App. 392, 52 N. E. 626; Boston Rolling Mills v. City of Cambridge, 117 Mass. 396; 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; Lane v. City of Concord, 70 N. H. 485, 49 Atl. 687; Hart v. Chosen Freeholders of Union County, 57 N. J. Law, 90; Bolton v. City of New Rochelle, 84 Hun, 281, 32 N. Y. Supp. 442; Sullivan v. McManus, 19 App. Div. 167, 45 N. Y. Supp. 1079; Lefrois v. Monroe County, 24 App. Div. 421, 48 N. Y. Supp. 519; City of Chattanooga v. Dowling, 101 Tenn. 342; Lindsay v. City of Sherman (Tex. Civ. App.) 36 S. W. 1019; Parsons v. City of Ft. Worth, 26 Tex. Civ. App. 273, 63 S. W. 889; Willet v. Village of St. Albans, 69 Vt. 330; Town of Suffolk v. Parker, 79 Va. 660. But see Long v. City of Minneapolis, 61 Minn. 46; Wehn v. Gage County Com'rs, 5 Neb. 494. County not liable for damages sustained through erection of county jail even though it is a nuisance. City of Hillsboro v. Ivey, 1 Tex. Civ. App. 653, 20 S. W. 1012; Ostrom v. City of San Antonio, 94 Tex. 523, 62 S. W. 909; City of Ft. Worth v. Crawford, 64 Tex. 202, 53 Am. Rep. 753. City

§ 968. Public education.

In modern days the proper education of the community is recognized as a governmental duty and no liability can arise in respect 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,[82] buildings or agencies employed,[83] used or acts done in connection with the subject of this section.

§ 969. Charities and corrections.

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.[84] In the carrying out of this function, an immunity is granted in respect to all acts or agencies.[85]

§ 970. 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

not liable to an individual for sickness caused by deposit of its garbage in one place.

[81] Hill v. City of New York, 139 N. Y. 495, 34 N. E. 1090.

[82] Freel v. School City of Crawfordsville, 142 Ind. 27, 41 N. E. 312, 37 L. R. A. 301.

[83] Kinnare v. City of Chicago, 171 Ill. 332, 49 N. E. 536; Bigelow v. Inhabitants of Randolph, 80 Mass. (14 Gray) 541; Howard v. City of Worcester, 153 Mass. 426, 27 N. E. 11, 12 L. R. A. 160; 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; Reynolds v. Board of Education of Little Falls, 33 App. Div. 88, 53 N. Y. Supp. 75; Brown v. City of New York, 32 Misc. 571, 66 N. Y. Supp. 382; Finch v. Board of Education of Toledo, 30 Ohio St. 37; Wixon v. City of Newport, 13 R. I. 454; Folk v. City of Milwaukee, 108 Wis. 359, 84 N. W. 420. Shearman & R. Neg. § 267. "Boards of education on which is imposed by the state the duty of providing and keeping in repair public school buildings exercise a purely public function and agency for the public good for which they receive no private or corporate benefit; and they are, therefore, not liable to an individual for the negligence of their servants in the business of such agency."

[84] Moulton v. Inhabitants of Scarborough, 71 Me. 267. Where a town was held liable for an injury inflicted on a citizen by a ram owned by the town and kept on its poor farm. Town of Chelsea v. Town of Washington, 48 Vt. 610.

[85] Hughes v. Monroe County, 79

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.[86] 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.[87] If, on the other hand, action in

Hun, 120, 29 N. Y. Supp. 495, 147 N. Y. 49, 41 N. E. 407, 39 L. R. A. 33.

[86] Fifield v. Common Council of Phoenix, 4 Ariz. 283, 36 Pac. 916. Display of fireworks. Collins v. City of Savannah, 77 Ga. 745; Cole v. City of Newburyport, 129 Mass. 594; Sexton v. City of St. Joseph, 60 Mo. 153; Love v. City of Raleigh, 116 N. C. 296, 21 S. E. 503, 28 L. R. A. 192. Permitting display of fireworks.

[87] Hewison v. City of New Haven, 37 Conn. 475; Wyatt v. City of Rome, 105 Ga. 312, 31 S. E. 188, 42 L. R. A. 180; Rivers v. City of Augusta, 65 Ga. 376. Failure to enforce stock ordinance. Tarbutton v. Town of Tennille, 110 Ga. 90, 35 S. E. 282. No liability for failure to pass ordinance prohibiting the riding of bicycles on sidewalk. Barrows v. City of Sycamore, 150 Ill. 588, 37 N. E. 1096, 25 L. R. A. 535; Kinnare v. City of Chicago, 171 Ill. 332, 49 N. E. 536; Wheeler v. City of Plymouth, 116 Ind. 158, 18 N. E. 532; Kistner v. City of Indianapolis, 100 Ind. 210. Failure to require railroad company to provide suitable safe guards. Ball v. Town of Woodbine, 61 Iowa, 83. Discharge of fireworks. Easterly v. Town of Irwin, 99 Iowa, 694, 68 N. W. 919; Taylor City of Cumberland, 64 Md. 68; Scanlon v. Wedger, 156 Mass. 462, 31 N. E. 642, 16 L. R. A. 395. Display of fireworks. Tindley v. City of Salem, 137 Mass. 171. Fireworks. Hines v. City of Charlotte, 72 Mich. 278, 40 N. W. 333, 1 L. R. A. 844. Construction of wooden block in violation of ordinance. Stevens v. City of Muskegon, 111 Mich. 72, 36 L. R. A. 777; Schattner v. Kansas City, 53 Mo. 162; Moran v. Pullman Palace Car Co., 134 Mo. 641, 36 S. W. 659, 33 L. R. A. 755; Harman v. City of St. Louis, 137 Mo. 494, 38 S. W. 1102. Failure to prevent erection of wooden building in violation of ordinance. Rosenbaum v. City of Newbern, 118 N. C. 83, 24 S. E. 1, 32 L. R. A. 123; Hill v. Aldermen of Charlotte, 72 N. C. 55; Frederick v. City of Columbus, 58 Ohio St. 538; Smith v. Borough of Selinsgrove, 199 Pa. 615, 49 Atl. 213; Heidenwag v. City of Philadelphia, 168 Pa. 72, 31 Atl. 1063; O'Rourke v. City of Sioux Falls, 4 S. D. 47, 19 L. R. A. 789; Jones v. City of Williamsburg, 97 Va. 722, 34 S. E. 883. But see Cochrane v. City of Frostburg, 81 Md. 54, 31 Atl. 703, 27 L. R. A. 728. Domestic animals when running at large in such numbers as to be a serious discomfort and injury to the town are a nuisance which it is the duty of the municipality to abate by the pass-

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 because of a failure to take legislative action.[88] 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,[89] and the contrary rule of course will apply where the ordinance relates to local proprietary or private powers or duties of a corporation.

age of a proper ordinance. City of Hagerstown v. Koltz, 93 Md. 437, 49 Atl. 836, 54 L. R. A. 940. Failure to enforce speed ordinance. Saxton v. City of St. Joseph, 60 Mo. 153. See, also, § 972, post. A liability may, however, be imposed by statute. See City of Henderson v. Clayton, 22 Ky. L. R. 283, 57 S. W. 1.

[88] Speir v. City of Brooklyn, 139 N. Y. 6, 34 N. E. 727, 21 L. R. A. 641. Display of fireworks.

[89] Trescott v. City of Waterloo, 26 Fed. 592. A person who has served out in prison a fine imposed for the violation of an unconstitutional municipal ordinance has no right of action against the city for false imprisonment. Masters v. Village of Bowling Green, 101 Fed. 101; Town of Odell v. Schroeder, 58 Ill. 353; Culver v. City of Streator, 130 Ill. 238, 22 N. E. 810, 6 L. R. A. 270; Easterly v. Incorporated Town of Irwin, 99 Iowa, 694, 68 N. W. 919; Taylor v. City of Owensboro, 98 Ky. 271, 32 S. W. 948; Fox v. City of Richmond, 19 Ky. L. R. 326, 40 S. W. 251; McGraw v. Town of Marion, 98 Ky. 673, 34 S. W. 18, 47 L. R. A. 593. No municipal liability for arrest and imprisonment under invalid ordinances. City of New Orleans v. Kerr, 50 La. Ann. 413, 23 So. 384; Worley v. Town of Columbia, 88 Mo. 106; Fox v. Northern Liberties, 3 Watts & S. (Pa.) 103; Elliott v. City of Philadelphia, 75 Pa. 347, Id., 7 Phila. (Pa.) 128; Givens v. City of Paris, 5 Tex. Civ. App. 705, 24 S. W. 974; McFadin v. City of San Antonio, 22 Tex. Civ. App. 140, 54 S. W. 48; City of Corsicana v. White, 57 Tex. 382; 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.

§ 971. 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.[90] 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.[91] A recent case in the Supreme Court of the United States[92] has, however, made a distinction between ultra vires acts based upon a contract and tortious ultra vires acts, holding in the latter case to a liability. In the decision in that case written by Mr. Justice Miller, it was said: "The truth is, that, with the great increase in corporations in very recent times, and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name, and by corporation officers who were competent to exercise all the corporate powers. When such acts are not founded on contract, but are

[90] See §§ 108 et seq., ante.

[91] Lloyd v. City of Columbus, 90 Ga. 20, 15 S. E. 818; Hoggard v. City of Monroe, 51 La. Ann. 683, 25 So. 349, 44 L. R. A. 477; Horn v. City of Baltimore, 30 Md. 218; Goddard v. Inhabitants of Harpswell, 84 Me. 499, 24 Atl. 958; Kreger v. Bismarck Tp., 59 Minn. 3; Boye v. City of Albert Lea, 74 Minn. 230, 76 N. W. 1131; Beatty v. City of St. Joseph, 57 Mo. App. 251; Hunt v. City of Boonville, 65 Mo. 620; Rives v. City of Columbia, 80 Mo. App. 173; Betham v. City of Philadelphia, 196 Pa. 302, 46 Atl. 448; State v. McNay, 90 Wis. 104; Becker v. City of La Crosse, 99 Wis. 414, 75 N. W. 84, 40 L. R. A. 829. But see Stanley v. City of Davenport, 54 Iowa, 463. Liable for damages caused by unauthorized use of steam motor on public street; Allison v. City of Richmond, 51 Mo. App. 133; Hollman v. City of Platteville, 101 Wis. 94, 76 N. W. 1119.

[92] Salt Lake City v. Hollister, 118 U. S. 256.

arbitrary exercises of power in the nature of torts, or are quasi criminal, the corporation may be held to a pecuniary responsibility for them to the party injured. * * * It is said that Salt Lake city, being a municipal corporation, is not liable for tortious actions of its officers. While it may be true that the rule we have been discussing may require a more careful scrutiny in its application to this class of corporations than to corporations for pecuniary profit, we do not agree that they are wholly exempt from liability for wrongful acts done, with all the evidences of their being acts of the corporation, to the injury of others, or in evasion of legal obligations to the State or the public. * * * It remains to be observed, that the question of the liability of corporations on contracts which the law does not authorize them to make, and which are wholly beyond the scope of their powers, is governed by a different principle. Here the party dealing with the corporation is under no obligation to enter into the contract. No force, or restraint, or fraud is practiced on him. The powers of these corporations are matters of public law open to his examination, and he may and must judge for himself as to the powers of the corporation to bind itself by the proposed agreement. It is to this class of cases that most of the authorities cited by appellants belong—cases where corporations have been sued on contracts which they have successfully resisted because they were ultra vires. But, even in this class of cases, the courts have gone a long way to enable parties who had parted with property or money on the faith of such contracts, to obtain justice by recovery of the property or the money specifically, or as money had and received to plaintiff's use."

§ 972. Nature of duty.

It was suggested in a preceding section [93] 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 ministerial.[94] The former, for

[93] See § 951, ante.

[94] Jewett v. City of New Haven, 38 Conn. 368; City of Chicago v. Turner, 80 Ill. 419; City of Chicago v. Norton Milling Co., 97 Ill. App. 651; Browning v. Owen County

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.[95] 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.[96]

Com'rs, 44 Ind. 11; McMahon v. City of Dubuque, 107 Iowa, 62; Brunswick Gas Light Co. v. Brunswick Village Corp., 92 Me. 493; Cavanagh v. City of Boston, 139 Mass. 426; Gray v. City of Detroit, 113 Mich. 657; Thompson v. City of Boonville, 61 Mo. 282; Rowland v. City of Gallatin, 75 Mo. 134; Boyland v. City of New York, 3 N. Y. Super. Ct. (1 Sandf.) 27. Unauthorized discharge of cannon. City of Hamilton v. Ashbrook, 62 Ohio St. 511. The construction of levees for protection of lowlands is a discretionary duty. Pierce v. Tripp, 13 R. I. 181; City of Nashville v. Sutherland, 92 Tenn. 335, 21 S. W. 674, 19 L. R. A. 619. A guaranty in respect to the sufficiency of a sewer is ultra vires and void if it makes a city an insurer of property against injury from such a cause where it is only liable for lack of reasonable care and skill in the construction of the sewer. Harrison v. City of Columbus, 44 Tex. 418; Royce v. Salt Lake City, 15 Utah, 401, 49 Pac. 290.

[95] Weightman v. Washington Corp., 1 Black. (U. S.) 39; Irving v. City of Highlands, 11 Colo. App. 363, 53 Pac. 234; Judge v. City of Meriden, 38 Conn. 90; Duke v. City of Rome, 20 Ga. 635; Harper v. Town of Jonesboro, 94 Ga. 801, 22 S. E. 139; Gray v. City of Griffin, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131; Linck v. City of Litchfield, 31 Ill. App. 118; Backer v. West Chicago Park Com'rs, 66 Ill. App. 507; Brinkmeyer v. City of Evansville, 29 Ind. 187; Anne Arundel County Com'rs v. Duckett, 20 Md. 468; McGinnis v. Inhabitants of Medway, 176 Mass. 67, 57 N. E. 210; Larkin v. Saginaw County, 11 Mich. 88. The determination that a bridge must be built is a legislative or discretionary act. Carroll v. City of St. Louis, 4 Mo. App. 191; Schattner v. Kansas City, 53 Mo. 162; In re Opening of Albany St., 6 Abb. Pr. (N. Y.) 273; Kavanagh v. City of Brooklyn, 38 Barb. (N. Y.) 232; Tate v. City of Greensboro, 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671; Town of Norman v. Ince, 8 Okl. 412, 58 Pac. 632; State v. Ward, 56 Tenn. (9 Heisk.) 100; City of Richmond v. Long's Adm'r, 17 Grat. (Va.) 375.

[96] Jones v. City of New Haven, 34 Conn. 1; Danbury & N. R. Co. v.

§ 973. Respondeat 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 authorized to do the act by the public authorities [97] or that it was done bona fide in pursuance of a general authority to act on the subject to which the action relates.[98] If these conditions appear a liability will follow. In this respect the rule of agency in respect to private persons will be recalled, namely, that the principal is bound by all acts coming within the apparent scope of the agent's power and authority. This principle does not apply to agents of a public corporation. It, as a principal, is bound only for the acts of its agents coming within the precise scope of their express

Town of Norwalk, 37 Conn. 109; City Council of Augusta v. Owens, 111 Ga. 464, 36 S. E. 830; City of Richmond v. Long's Adm'rs, 17 Grat. (Va.) 375; Hollman v. City of Platteville, 101 Wis. 94, 76 N. W. 1119.

[97] Herzo v City of San Francisco, 33 Cal. 134; City of East St. Louis v. Klug, 3 Ill. App. 90; Lisso v. Red River Parish, 29 La. Ann. 590; Goddard v. Inhabitants of Harpswell, 84 Me. 499, 24 Atl. 958; Gilpatrick v. City of Biddeford, 86 Me. 534, 30 Atl. 99; Kreger v. Bismarck Tp., 59 Minn. 3, 60 N. W. 675; Reynolds v. Board of Education of Union Free School Dist., 33 App. Div. 88, 53 N. Y. Supp. 75; City of Galveston v. Brown, 28 Tex. Civ. App. 274, 67 S. W. 156.

[98] City Council of Sheffield v. Harris, 101 Ala. 564, 14 So. 357; 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; Town of Colorado City v. Liafe, 28 Colo. 468, 65 Pac. 630; Platt v. City of Waterbury, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691; City of Chicago v. McGraw, 75 Ill. 566; Wilde v. City of New Orleans, 12 La. Ann. 15; Thayer v. City of Boston, 36 Mass. (19 Pick.) 511; City of Detroit v. Corey, 9 Mich. 165; Lee v. Village of Sandy Hill, 40 N. Y. 442; Meares v. Town of Wilmington, 31 N. C. (9 Ired.) 73; Noble-Tp. v. Aasen, 8 N. D. 77; 76 N. W. 990; City of Dayton v. Pease, 4 Ohio St. 80; Caspary v. City of Portland, 19 Or. 496, 24 Pac. 1036; City of Hillsboro v. Ivey, 1 Tex. Civ. App. 653, 20 S. W. 1012; City of Ysleta v. Babbitt, 8 Tex. Civ. App. 432, 28 S. W. 702; Palmer v. Village of St. Albans, 60 Vt. 427, 13 Atl. 569.

authority.[99] A public corporation, when authorized to act, is equally with a private person obligated to employ competent agents for the work in which they are engaged.[100] An act within the scope of a public corporation though not presently authorized by it may be subsequently ratified and confirmed, and the usual rule will then apply in respect to the legal results of effects of that action,[101] but it must clearly appear that the act ratified was within the original power or proper duties of the corporation, or, stated in another way, the mere act of ratification cannot create a liability.[102]

(a) Nature of duty performed. The liability of a public corporation for the acts of its agents will again depend upon the character of the act in doing which they are employed. If this is government, no liability can arise.[103] If, on the other hand, the

[99] Roughton v. City of Atlanta, 113 Ga. 948, 39 S. E. 316; Hough v. Hoodless, 35 Ill. 166; Campbell v. City of Clinton, 94 Ill. App. 43; Kansas City v. Brady, 52 Kan. 297, 34 Pac. 884; Rounds v. City of Bangor, 46 Me. 541; Mitchell v. City of Rockland, 52 Me. 118; Woodcock v. City of Calais, 66 Me. 234; McCann v. City of Waltham, 163 Mass. 344, 40 N. E. 20; McCarthy v. City of Boston, 135 Mass. 197; Prince v. City of Lynn, 149 Mass. 193, 21 N. E. 296; Rainey v. Hinds County, 79 Miss. 238, 30 So. 636; Wabaska Elec. Co. v. City of Wymore, 60 Neb. 199, 82 N. W. 626; Jersey City v. Kiernan, 50 N. J. Law, 246, 13 Atl. 170.

[100] But see Taggart v. City of Fall River, 170 Mass. 325, 49 N. E. 622.

[101] Coburn v. San Mateo County, 75 Fed. 520; Schussler v. Hennepin County Com'rs, 67 Minn. 412, 70 N. W. 6, 39 L. R. A. 75; Sherman v. City of Grenada, 51 Miss. 186; City of Omaha v. Croft, 60 Neb. 57, 82 N. W. 120; Commercial Elec. Light & Power Co. v. City of Tacoma, 20 Wash. 288, 55 Pac. 219.

[102] Caldwell v. City of Boone, 51 Iowa, 687; Peters v. City of Lindsborg, 40 Kan. 654, 20 Pac. 490; Brunswick Gas Light Co. v. Brunswick Village Corp., 92 Me. 493, 43 Atl. 104.

[103] Hart v. City of Bridgeport, 13 Blatchf. 289, Fed. Cas. No. 6,149; Mead v. City of New Haven, 40 Conn. 72; Kinnare v. City of Chicago, 171 Ill. 332, 49 N. E. 536; Hafford v. City of New Bedford, 82 Mass. (16 Gray) 297; Dunbar v. City of Boston, 112 Mass. 75; McGinnis v. Inhabitants of Medway, 176 Mass. 67, 57 N. E. 210; Bryant v. City of St. Paul, 33 Minn. 289; Gullikson v. McDonald, 62 Minn. 278; Miller v. City of Minneapolis, 75 Minn. 131; Murtaugh v. City of St. Louis, 44 Mo. 479; Tomlin v. Hildredth, 65 N. J. Law, 438, 47 Atl. 649; Treadwell v. City of New York, 1 Daly (N. Y.) 123; Rosenbaum v. City of Newbern, 118 N. C. 83, 32 L. R. A. 123; Shields v. Town of Durham, 118 N. C. 450, 36 L. R.

cause of action arises from an act governmental in its nature, perhaps, but where there is a liability imposed by statute or contract,[104] 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,[105] 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,[106] lighting or power plant,[107]

A. 293; Wheeler v. City of Cincinnati, 19 Ohio St. 19; City of Victoria v. Jessel, 7 Tex. Civ. App. 520, 27 S. W. 159; City of Richmond v. Long's Adm'rs, 17 Grat. (Va.) 375; Bartlett v. Town of Clarksburg, 45 W. Va. 393, 43 L. R. A. 295; Kuehn v. City of Milwaukee, 92 Wis. 263; Kempster v. City of Milwaukee, 103 Wis. 421. See, also, Nisbet v. City of Atlanta, 97 Ga. 650.

[104] City of Richmond v Smith, 82 U. S. (15 Wall.) 429; City of Belleville v. Hoffman, 74 Ill. App. 503; State v. Montgomery County Com'rs, 26 Ind. 522; Lyman v. Town of Windsor, 24 Vt. 575.

[105] Barnes v. Dist. of Columbia, 91 U. S. 540. The liability of a municipal corporation for the acts of its officials and agents is not dependent upon the manner of securing office or source of compensation. Coburn v. San Mateo County, 75 Fed. 520; Danbury & N. R. Co. v. Town of Norwalk, 37 Conn. 109; Murtaugh v. City of St. Louis, 44 Mo. 479; Tomlin v. Hildreth, 65 N. J. Law, 438, 47 Atl. 649; Howell v. City of Buffalo, 15 N. Y. 512; McCombs v. Town Council of Akron, 15 Ohio, 474; De Voss v. City of Richmond, 18 Grat. (Va.) 338; Mulcairns v. City of Janesville, 67 Wis. 24.

[106] City Council of Augusta v. Mackey, 113 Ga. 64, 38 S. E. 339; Phinizy v. City of Augusta, 47 Ga. 260; City of Baltimore v. Merryman, 86 Md. 584, 39 Atl. 98; Stoddard v. Inhabitants of Winchester, 157 Mass. 567, 32 N. E. 948; St. Germain v. City of Fall River, 177 Mass. 550, 59 N. E. 447; Boston Belting Co. v. City of Boston, 149 Mass. 44, 20 N. E. 320; Lynch v. City of Springfield, 174 Mass. 430, 54 N. E. 871; Rhobidas v. City of Concord, 70 N. H. 90, 47 Atl. 82, 51 L. R. A. 381; City of New York v. Bailey, 2 Denio (N. Y.) 433; Tilford v. City of New York, 1 App. Div. 199, 37 N. Y. Supp. 185; Seeley v. City of Amsterdam, 54 App. Div. 9, 66 N. Y. Supp. 221; Pettengill v. City of Yonkers, 116 N. Y. 558, 22 N. E. 1095; Wilson v. City of Troy, 135 N. Y. 96, 32 N. E. 44, 18 L. R. A. 449. It is a question for the jury whether the workmen were guilty of negligence or at that time servants of the city. Town of Norman v. Ince, 8 Okl. 412, 58 Pac. 632; Smith v. City of Philadelphia, 81 Pa. 38; Irving v. Borough of Media, 194 Pa. 648, 45 Atl. 482; Bragg v. City of Rutland, 70 Vt. 606, 41 Atl. 578; Collensworth v. City of New Whatcom, 16 Wash. 224, 47 Pac. 439. See, also, Gross v. City of Portsmouth, 68 N. H. 266, 33 Atl. 256; Soule v. City of Passaic, 47 N. J. Eq. 28, 20 Atl.

in the construction or maintenance of a garbage or sewage system,[108] in the establishment and maintenance of streets, parks or boulevards,[109] or the carrying out of any other enterprise, private or quasi private in its nature.[110]

346; Jenney v. City of Brooklyn, 120 N. Y. 164, 24 N. E. 274. See, also, § 957, ante.

[107] Bullmaster v. City of St. Joseph, 70 Mo. App. 60; Boothe v. City of Fulton, 85 Mo. App. 16; Western Sav. Fund Soc. v. City of Philadelphia, 31 Pa. 175. See, also, § 957, ante.

[108] Barney Dumping Boat Co. v. City of New York, 40 Fed. 50; City of Savannah v. Waldner, 49 Ga. 316; Town of Thorntown v. Fugate, 21 Ind. App. 537, 52 N. E. 763; Leeds v. City of Richmond, 102 Ind. 372; Cabot v. Kingman, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45; Stock v. City of Boston, 149 Mass. 410, 21 N. E. 871; Ostrander v. City of Lansing, 111 Mich. 693, 70 N. W. 332; Webb v. Board of Health of Detroit, 116 Mich. 516; Fink v. City of St. Louis, 71 Mo. 52; Donohoe v. Kansas City, 136 Mo. 657, 38 S. W. 571. But see City of South Bend v. Turner, 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396; Condict v. Jersey City, 46 N. J. Law, 157; Missano v. City of New York, 160 N. Y. 123, 54 N. E. 744. Rule applies to duty of cleaning streets. See, also, State v. Dickson, 124 N. C. 871; Ostrom v. City of San Antonio (Tex. Civ. App.) 60 S. W. 591. See §§ 958 et seq., ante.

[109] Waldron v. City of Haverhill, 143 Mass. 582, 10 N. E. 481; Norton v. City of New Bedford, 166 Mass. 48, 43 N. E. 1034; Butman v. City of Newton, 179 Mass. 1, 60 N. E. 401; Deane v. Inhabitants of Randolph, 132 Mass. 475; Peters v. Town of Fergus Falls, 35 Minn. 549; City of Omaha v. Croft, 60 Neb. 57, 82 N. W. 120; Mahon v. City of New York, 10 Misc. 664, 31 N. Y. Supp. 676; Scott v. City of New York, 27 App. Div. 240, 50 N. Y. Supp. 191; Johns v. City of Cincinnati, 45 Ohio St. 278, 12 N. E. 801; Sprague v. Tripp, 13 R. I. 38. But see Jansen v. City of Waltham, 166 Mass. 344, 44 N. E. 339; Taggart v. City of Fall River, 170 Mass. 325, 49 N. E. 622; Tate v. City of Greensboro, 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671. See § 957, ante.

[110] Hooe v. Mayor of Alexandria, 1 Cranch, C. C. 98, Fed. Cas. No. 6,667; City of Philadelphia v. Gavagnin (C. C. A.) 62 Fed. 617, affirming 59 Fed. 303. A city, which pursuant to its charter powers engages in the business of towing vessels for profit, is liable for the negligence of its tugs so employed. McCord v. City of Pueblo, 5 Colo. App. 48, 36 Pac. 1109; Arline v. Laurens County, 77 Ga. 249, 2 S. E. 833; City Council of Augusta v. Lombard, 99 Ga. 282, 25 S. E. 722; City Council of Augusta v. Owens, 111 Ga. 464, 36 S. E. 830. Stone quarry. City of Savannah v. Cullens, 38 Ga. 344; City Council of Augusta v. Hudson, 88 Ga. 599, 15 S. E. 678. A city is liable for defects in a bridge kept by it for profit.

City of Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206; City of Winfield v. Peeden, 8 Kan. App. 671, 57 Pac. 131. Gravel bank. Fennimore v. City of New

(b) Quasi corporations. The strict rule of nonliability in respect to public quasi corporations, as stated in sections 954 and 955, 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.[111]

§ 974. Liability for acts of licensee.

Where a public corporation grants, under authority of law, a license, privilege or franchise for the use of its public ways to

Orleans, 20 La. Ann. 124; Anne Arundel County Com'rs v. Duckett, 20 Md. 468; Coughlan v. City of Cambridge, 166 Mass. 268; Collins v. Inhabitants of Greenfield, 172 Mass. 78, 51 N. E. 454; Whitfield v. Town of Carrollton, 50 Mo. App. 98; Bates v. Holbrook, 67 App. Div. 25, 73 N. Y. Supp. 417, reversing 35 Misc. 342, 71 N. Y. Supp. 1013. Construction of subway in New York City. Walker v. Wasco County (Or.) 19 Pac. 81, following Pruden v. Grant Co., 12 Or. 308, 7 Pac. 308; Wagner v. City of Portland, 40 Or. 389, 60 Pac. 985, 67 Pac. 300; Buchanan v. Town of Barre, 66 Vt. 129, 23 L. R. A. 488. But see Mahoney v. City of Boston, 171 Mass. 427, 50 N. E. 939. City of Boston not responsible for injuries received by workmen because of the negligence of the foreman in charge of the derrick where both were employed in the building of a subway. Ewen v. City of Philadelphia, 194 Pa. 548, 45 Atl. 339. See § 957, ante.

[111] Smith v. Carlton County Com'rs, 46 Fed. 340; Scales v. Ordinary of Chattahoochee County, 91 Ga. 225; McDonald v. Village of Lockport, 28 Ill. App. 157; Symonds v. Clay County Sup'rs, 71 Ill. 355; Cooney v. Town of Hartland, 95 Ill. 516; Smith v. Allen County Com'rs, 131 Ind. 116, 30 N. E. 949; Schnurr v. Huntington County Com'rs, 22 Ind. App. 188, 53 N. E. 425; Rock Island Lumber & Mfg. Co. v. Elliott, 59 Kan. 42, 51 Pac. 894. A board of education not liable in absence of express statute to that effect. Anne Arundel County Com'rs v. Duckett, 20 Md. 468. A liability may result from a statutory provision. Anne Arundel County Com'rs v. Duvall, 54 Md. 350; Clark v. Easton, 146 Mass. 43, 14 N. E. 795; Lemon v. City of Newton, 134 Mass. 476; Chase v. Middleton, 123 Mich. 647, 82 N. W. 612; McConnell v. Dewey, 5 Neb. 385; Downes v. Town of Hopkinton, 67 N. H. 456, 40 Atl. 433. A town is not responsible for the negligence of a highway surveyor in preparing a highway. Napier v. City of Brooklyn, 41 App. Div. 274, 58 N. Y. Supp. 506; People v. Westchester County, 57 App. Div. 135, 67 N. Y. Supp. 981; Hamilton County Com'rs v. Mighels, 7 Ohio St. 109; Com. v. Brice, 22 Pa. 211; Walton v. Travis County, 5 Tex. Civ. App. 525, 24 S. W. 352; Harrison v. City of Columbus, 44 Tex. 418; Florida v. Galveston County (Tex. Civ. App.) 55

private persons, the usual rule obtains that it will not be liable for the acts of such grantee though they may be negligent and result in injury.[112]

Liability for duty imposed on officer. The duty, a negligent performance or omission to perform which has resulted in injury, may be one which has been by law imposed as a ministerial one upon designated officials and the rule obtains that no liability can attach under these circumstances to the public corporation,[113] or the corporation with which they are officially connected.[114]

S. W. 50. See, also, note 35 Am. & Eng. Corp. Cas. 94. Authorities cited under note 20, 2d paragraph, § 955.

[112] City of Denver v. Sherret (C. C. A.) 88 Fed. 226; Town of Idaho Springs v. Filteau, 10 Colo. 105, 14 Pac. 48; Sorenson v. Town of Greeley, 10 Colo. 369, 15 Pac. 803; City of Chicago v. Ramsey, 90 Ill. App. 271; Schnurr v. Huntington County Com'rs, 22 Ind. App. 188, 53 N. E. 425; Michigan City v. Boeckling, 122 Ind. 39, 23 N. E. 518; Lincoln v. City of Boston, 148 Mass. 578, 20 N. E. 329, 3 L. R. A. 257; Fowler v. Inhabitants of Gardner, 169 Mass. 505, 48 N. E. 619; Burford v. City of Grand Rapids, 53 Mich. 98. A city is not made liable for injuries inflicted by coasters on a public street through the designation of that particular street for that purpose. Kornetzski v. City of Detroit, 94 Mich. 341, 53 N. W. 1106; Hunt v. City of New York, 109 N. Y. 134, 16 N. E. 320; Terry v. City of Richmond, 94 Va. 537, 27 S. E. 429, 38 L. R. A. 834; Hubbell v. City of Viroqua, 67 Wis. 343, 30 N. W. 847. But see City Council of Augusta v. Cone, 91 Ga. 714, 17 S. E. 1005; Speir v. City of Brooklyn, 139 N. Y. 6, 21 L. R. A. 641. A city is liable for damages to private property caused by discharge of fireworks duly licensed. See, also, note on liability for authorizing a dangerous nuisance such as fireworks: 16 L. R. A. 395, 21 L. R. A. 641, 43 L. R. A. 295.

[113] Case v. Hulsebush, 122 Ala. 212, 26 So. 155; Waller v. City of Dubuque, 69 Iowa, 541; McCarthy v. Bauer, 3 Kan. 237; Quincy Tp. v. Sheehan, 48 Kan. 620, 29 Pac. 1084; Layman v. Beeler, 24 Ky. L. R. A. 174, 67 S. W. 995. There may be a joint liability. Breen v. Field, 157 Mass. 277, 31 N. E. 1075; Gray v. City of Detroit, 113 Mich. 657, 71 N. W. 1107; Hannon v. St. Louis County, 62 Mo. 313; Sutton v. Board of Police of Carroll County, 41 Miss. 236; Martin v. City of Brooklyn, 1 Hill (N. Y.) 545; Ham v. City of New York, 37 N. Y. Super. Ct. (5 J. & S.) 458; Maxmilian v. City of New York, 62 N. Y. 160; New York & B. Sawmill & Lumber Co. v. City of Brooklyn, 71 N. Y. 580; Alcorn v. City of Philadelphia, 44 Pa. 348. But see Riggin v. Brown, 59 Fed. 1005. Members of the board of public works authorized by Md. Code, art. 72, are not personally liable for injuries to workmen in their employ. Lundy v. Delmas, 104 Cal. 655, 38 Pac. 445, 26 L. R. A. 651. Members of board of regents of state university are not individually liable. Worden v.

§ 975. Independent contractor.

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.[115] 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.[116] The principle operates even where the contract provides that the work is to be done to the satisfaction of designated officials who, in pursuance of such a provision, supervise and pass upon the work from time to time.[117] If, however, the authorities retain full or partial control of the work both

Witt, 4 Idaho, 404, 39 Pac. 1114. County commissioners not personally liable for injuries received through defective highways. Packard v. Voltz, 94 Iowa, 277, 62 N. W. 757. County officers not personally liable when no liability attaches to a county. O'Leary v. Board of Fire & Water Com'rs, 79 Mich. 281, 44 N. W. 608, 7 L. R. A. 170.

[114] Hennessey v. City of New Bedford, 153 Mass. 260, 26 N. E. 999.

[115] Foster v. City of Chicago, 96 Ill. App. 4; City of Bloomington v. Wilson, 14 Ind. App. 476, 43 N. E. 37; Fuller v. City of Grand Rapids, 105 Mich. 529, 63 N. W. 530; Reed v. Allegheny City, 79 Pa. 300.

[116] Foster v. City of Chicago, 197 Ill. 264, 64 N. E. 322, affirming 96 Ill. App. 4; City of Evansville v. Senhenn, 151 Ind. 42, 47 N. E. 634, 51 N. E. 88, 41 L. R. A. 728; Green v. Eden, 24 Ind. App. 583, 56 N. E. 240; Staldter v. City of Huntington, 153 Ind. 354, 55 N. E. 88; Eginoire v. Union County, 112 Iowa, 558, 84 N. W. 758; Barry v. City of St. Louis, 17 Mo. 121; Harrington v. Village of Lansingburgh, 110 N. Y. 145, 17 N. E. 728; Carroll v. City of New York, 159 N. Y. 559, 54 N. E. 1089, affirming 29 App. Div. 420, 51 N. Y. Supp. 620; Uppington v. City of New York, 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550. Parties doing work for a city under contract will be regarded as independent contractors though the city reserved the right to discharge incompetent workmen. White v. City of Philadelphia, 201 Pa. 512, 51 Atl. 332; Reed v. Allegheny City, 79 Pa. 300; Erie School Dist. v. Fuess, 98 Pa. 600. But see City of Logansport v. Dick, 70 Ind. 65; City of Glasgow v. Gillenwaters, 23 Ky. L. R. 2375, 67 S. W. 381; Pearson v. Zable, 78 Ky. 170.

[117] Sewall v. St. Paul, 20 Minn. (Gil. 459) 511; Pack v. City of New York, 8 N. Y. (4 Seld.) 222; Uppington v. City of New York, 165 N. Y. 222; 59 N. E. 91, 53 L. R. A. 550; City

in respect to the manner of its construction or the employment and discharge of men or the use of appliances,[118] or if the plan of work is defective,[119] 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. Where an independent contractor is using the public streets, many cases hold it is still the duty of the municipality to give notice of their defective or dangerous condition for travel, and if injuries occur through failure to do this, a city will be liable.[120]

§ 976. Defense of fellow-servant.

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.[121]

§ 977. Surface waters.

In respect to the liability of public corporations for acts done affecting surface waters, either in the construction of public im-

of Erie v. Caulkins, 85 Pa. 247. But see City of Chicago v. Dermody, 61 Ill. 431.

[118] De Baker v. Southern Cal. R. Co., 106 Cal. 257, 39 Pac. 610. A liability also attaches where the damage might have been prevented by the exercise of reasonable prudence in respect to the plan and erection of the public work. City of Chicago v. Joney, 60 Ill. 383; City of Chicago v. Dermody, 61 Ill. 431; Brooks v. Inhabitants of Somerville, 106 Mass. 271; Broadwell v. Kansas City, 75 Mo. 213; Schumacher v. City of New York, 40 App. Div. 320, 57 N. Y. Supp. 968; City of Ironton v. Kelley, 38 Ohio St. 50; City of Harrisburg v. Saylor, 187 Pa. 216; Stork v. City of Philadelphia, 199 Pa. 462, 49 Atl. 236; Hepburn v. City of Philadelphia, 149 Pa. 335; Kollock v. City of Madison, 84 Wis. 458. But see Sullivan v. City of Holyoke, 135 Mass. 273; City of Beatrice v. Reid, 41 Neb. 214, 59 N. W. 770.

[119] City of Springfield v. Le Claire, 49 Ill. 476; City of East St. Louis v. Murphy, 89 Ill. App. 22; City of Louisville v. Shanahan, 22 Ky. L. R. 163, 56 S. W. 808; Pearson v. Zable, 78 Ky. 170.

[120] City of Indianapolis v. Marold, 25 Ind. App. 428, 58 N. E. 512. See, also, §§ 1004 and 1009, post.

[121] McDermott v. City of Boston, 133 Mass. 349; Toledo v. Cone, 41 Ohio St. 149; Flynn v. City of

provements 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.[122] 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 water to pass over it in the manner and the channels in which it is naturally accustomed.[123]

Salem, 134 Mass. 351. But see Turner v. City of Indianapolis, 96 Ind. 51; Coots v. City of Detroit, 75 Mich. 628, 5 L. R. A. 315. Dissenting opinion. Wild v. City of Paterson, 47 N. J. Law, 406.

[122] Corcoran v. Benicia, 96 Cal. 1, 30 Pac. 798; Lampe v. City & County of San Francisco, 124 Cal. 546, 57 Pac. 461; Byrne v. Town of Farmington, 64 Conn. 367, 30 Atl. 138; City of Vincennes v. Richards, 23 Ind. 381; Weis v. City of Madison, 75 Ind. 241; City of Evansville v. Decker, 84 Ind. 325; Thibodaux v. Town of Thibodaux, 46 La. Ann. 1528, 16 So. 450; Gardiner v. Inhabitants of Camden, 86 Me. 377, 30 Atl. 13; Turner v. Inhabitants of Dartmouth, 95 Mass. (13 Allen) 291; Keith v. City of Brockton, 136 Mass. 119; Breuck v. City of Holyoke, 167 Mass. 258, 45 N. E. 732; Rice v. City of Flint, 67 Mich. 401; Alden v. City of Minneapolis, 24 Minn. 254; Follmann v. City of Mankato, 45 Minn. 457, 48 N. W. 192; Dudley v. Village of Buffalo, 73 Minn. 347, 76 N. W. 44; Churchill v. Beebe, 48 Neb. 87, 66 N. W. 992, 35 L. R. A. 442; City of Kearney v. Themanson, 48 Neb. 74, 66 N. W. 996; Wakefield v. Newell, 12 R. I. 75; Murray v. Allen, 20 R. I. 263, 38 Atl. 497; Jordan v. City of Benwood, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519; Hoyt v. City of Hudson, 27 Wis. 656; Waters v. Village of Bay View, 61 Wis. 642; Hart v. City of Baraboo, 101 Wis. 368, 77 N. W. 744. See, also, § 999, post. Addy v. City of Janesville, 70 Wis. 401, 35 N. W. 931. But if a municipal corporation acts without lawful authority in making an improvement, it will be liable for the injury caused by the accumulation of surface water.

[123] Arn v. Kansas City, 4 McCrary, 558, 14 Fed. 236; City of Albany v. Sikes, 94 Ga. 30, 20 S. E. 257, 26 L. R. A. 653; Correll v. City of Cedar Rapids, 110 Iowa, 333, 81 N. W. 724; Podhaisky v. City of Cedar Rapids, 106 Iowa, 543; Bowman v. New Orleans, 27 La. Ann. 501; Miller v. City of Morristown, 47 N. J. Eq. 62, 20 Atl. 61; Town of Union v. Durkes, 38 N. J. Law, 21; Elliott v. Oil City, 129 Pa. 570, 18 Atl. 553; Smith v. City of Alexan-

§ 978. Nonliability for exercise of discretionary or legislative power.

The rule of nonliability is also based, in some cases, upon the principle that if a public corporation in the exercise of some of its lawful powers, particularly the making of improvements, in a careful and skillful manner, causes consequential damages, it cannot be held responsible because they are the direct results of the exercise of a legislative, discretionary power.[124]

§ 979. Liability imposed as result of negligence.

The rule of nonliability, it has been said, presupposes the performance of the duty of the exercise of the power in a careful and skillful manner.

Where the work has been negligently done, or the duty performed in some respect in a careless, unskillful and negligent manner,[125] whereby injury is caused through the accumulation of surface waters upon private property,[126] or by the collection, diver-

dria, 33 Grat. (Va.) 208; Gillison v. City of Charleston, 16 W. Va. 282. See, also, § 999, post. But see Freburg v. City of Davenport, 63 Iowa, 119; Knostman & Peterson Furniture Co. v. City of Davenport, 99 Iowa, 589, 68 N. W. 887; Gilfeather v. City of Council Bluffs, 69 Iowa, 310.

[124] Bronson v. Borough of Wallingford, 54 Conn. 513, 9 Atl. 393; Roll v. City of Augusta, 34 Ga. 326; Templeton v. Voshloe, 72 Ind. 134; Davis v. City of Crawfordsville, 119 Ind. 1, 21 N. E. 449; City of Cumberland v. Willison, 50 Md. 138; Kennison v. Beverly, 146 Mass. 467; Lee v. City of Minneapolis, 22 Minn. 13; Stewart v. City of Clinton, 79 Mo. 603; Miller v. Morristown, 47 N. J. Eq. 62, 20 Atl. 61; Byrnes v. City of Cohoes, 67 N. Y. 204; Watson v. City of Kingston, 114 N. Y. 88, 21 N. E. 102; Paine v. Village of Delhi, 116 N. Y. 224; Bush v. City of Portland, 19 Or. 45, 23 Pac. 667; City of Allentown v. Kramer, 73 Pa. 406; Noble v. Village of St. Albans, 56 Vt. 522; Heth v. City of Fond du Lac, 63 Wis. 228, 23 N. W. 495. But see Weis v. City of Madison, 75 Ind. 241; Freburg v. City of Davenport, 63 Iowa, 119; Boston Belting Co. v. City of Boston, 149 Mass. 44; Gilluly v. City of Madison, 63 Wis. 518, distinguishing Heth v. City of Fond du Lac, 63 Wis. 228, 23 N. W. 495.

[125] City of Denver v. Rhodes, 9 Colo. 554, 13 Pac. 729; Benson v. City of Wilmington, 9 Houst. (Del.) 359, 32 Atl. 1047; Burton v. City of Chattanooga, 75 Tenn. (7 Lea) 739; Jordan v. City of Mt. Pleasant, 15 Utah, 449, 49 Pac. 746. See, also, § 999, post.

[126] Arn v. Kansas City, 14 Fed. 236; City of Dixon v. Baker, 65 Ill. 518; City of New Albany v.

sion and discharge of them upon private property in such a manner as to occasion injury,[127] whatever may be the rule adopted, whether common-law or civil law, the corporation will be held responsible for the damages it may have caused.[128] The authorities, however, are conflicting.

Natural watercourse. A liability will also follow where a natural watercourse has been negligently obstructed or destroyed.[129] It is true, however, in this respect as in all cases where the ques-

Lines, 21 Ind. App. 380, 51 N. E. 346; City of Seymour v. Cummins, 119 Ind. 148, 5 L. R. A. 126; City of Frostburg v. Dufty, 70 Md. 47; Ashley v. City of Port Huron, 35 Mich. 296, reviewing many authorities. O'Brien v. City of St. Paul, 25 Minn. 331; Gross v. City of Lampasas, 74 Tex. 195, 11 S. W. 1086; City of Dallas v. Cooper (Tex. Civ. App.) 34 S. W. 321.

[127] Gilmer v. City of Montgomery, 26 Ala. 665; Larrabee v. Town of Coverdale, 131 Cal. 96, 63 Pac. 143; Brown v. City of Atlanta, 66 Ga. 71; Nevins v. City of Peoria, 41 Ill. 502; Town of Princeton v. Geiske, 93 Ind. 102; Hoffman v. City of Muscatine, 113 Iowa, 332, 85 N. W. 17; Cahill v. City of Baltimore, 93 Md. 233, 48 Atl. 705; City of Frostburg v. Dufty, 70 Md. 47, 16 Atl. 642; Manning v. City of Lowell, 130 Mass. 21; Rychlicki v. City of St. Louis, 98 Mo. 497, 11 S. W. 1001, 4 L. R. A. 594; Flanders v. City of Franklin, 70 N. H. 168, 47 Atl. 88; Bradt v. City of Albany, 5 Hun (N. Y.) 591; Butler v. Village of Edgewater, 53 Hun, 633, 6 N. Y. Supp. 174; Byrnes v. City of Cohoes, 67 N. Y. 204; Vogel v. City of New York, 92 N. Y. 10; Weir v. Borough of Plymouth, 148 Pa. 566, 24 Atl. 94.

[128] City of Eufaula v. Simmons, 86 Ala. 515, 6 So. 47; Lehn v. City & County of San Francisco, 66 Cal. 76, 4 Pac. 965; City of Denver v. Rhodes, 9 Colo. 554, 13 Pac. 729; McArthur v. City of Dayton, 19 Ky. L. R. 82, 42 S. W. 343; Hitchins v. City of Frostburg, 68 Md. 100, 11 Atl. 826; Stanchfield v. Newton, 142 Mass. 110; Morley v. Village of Buchanan, 124 Mich. 128, 82 N. W. 802; McAskill v. Hancock Tp., 129 Mich. 74, 88 N. W. 78, 55 L. R. A. 738; Seaman v. City of Marshall, 116 Mich. 327, 74 N. W. 484; Kobbs v. City of Minneapolis, 22 Minn. 159; Robbins v. Village of Willmar, 71 Minn. 403, 73 N. W. 1097; Bedell v. Village of Sea Cliff, 18 App. Div. 261, 46 N. Y. Supp. 226; City of Comanche v. Zettlemoyer (Tex. Civ. App.) 40 S. W. 641.

[129] City of Helena v. Thompson, 29 Ark. 569; Los Angeles Cemetery Ass'n v. City of Los Angeles, 103 Cal. 461; Kansas City v. Slangstrom, 53 Kan. 431, 36 Pac. 706; Parker v. City of Atchison, 58 Kan. 29, 48 Pac. 631; Lalanne v. Savoy, 29 La. Ann. 516; Parker v. City of Lowell, 77 Mass. (11 Gray) 353; Biggio v. City of Boston, 179 Mass. 356, 60 N. E. 938; Boston Belting Co. v. City of Boston, 149 Mass. 44; McClure v. City of Red Wing, 28 Minn. 186; Buchanan v. City of Duluth, 40 Minn. 402, 42 N. W. 204; Stoehr v. City of St. Paul, bert v. City of St. Paul, 68 Minn.

tion of negligence arises, that the liability is dependent upon the facts alleged in each case to constitute negligence.

Where the watercourse is obstructed by third parties, no liability can arise on the part of the public authorities.[130] The rule stated in the first of this paragraph equally applies to obstructing natural watercourses by bridges or culverts.[131]

§ 980. Notice of injury or damage.

In some states where either by rule or statute a liability is imposed upon a public corporation to enable the one injured to successfully maintain an action, it is provided by law that a notice of the claim must be given to designated officials and within a prescribed time. This subject has been fully treated in other portions of this work.[132] The question has arisen whether such provisions apply both to injuries to persons and property or to either alone.[133] The application is determined largely by the phraseology of the statute though it is held in some cases that

54 Minn. 549, 56 N. W. 250; Tau- 519, 71 N. W. 664. No liability will result if the damage is caused by an unusual storm.

Boye v. City of Albert Lea, 74 Minn. 230, 76 N. W. 1131. It is within the corporate powers of the city of Albert Lea to dam the waters of the Shellrock river. Flanders v. City of Franklin, 70 N. H. 168, 47 Atl. 88, City of Beatrice v. Leary, 45 Neb. 149, 63 N. W. 370; West Orange Tp. v. Field, 37 N. J. Eq. (10 Stew.) 600; Ordway v. Village of Canisteo, 66 Hun, 569, 21 N. Y. Supp. 835; Rider v. City of Amsterdam, 31 Misc. 375, 65 N. Y. Supp. 579; Noonan v. City of Albany, 79 N. Y. 470; Haynes v. Burlington, 38 Vt. 350.

[130] Stockhouse v. City of Lafayette, 26 Ind. 17; Callahan v. City of Des Moines, 63 Iowa, 705; City of Kansas City v. Brady, 52 Kan. 297, 34 Pac. 884, affirmed 53 Kan. 312, 36 Pac. 726; Lander v. Bath, 85 Me. 141, 26 Atl. 1091; Perry v. City of Worcester, 72 Mass. (6 Gray) 544; City of Beatrice v. Knight, 45 Neb. 546, 63 N. W. 838; Haynes v. Town of Burlington, 38 Vt. 350.

[131] City of Helena v. Thompson, 29 Ark. 569; Mootry v. Town of Danbury, 45 Conn. 550; Kansas City v. Slangstrom, 53 Kan. 431; Wheeler v. City of Worcester, 92 Mass. (10 Allen) 591; McClure v. City of Red Wing, 28 Minn. 186; Young v. Kansas City, 27 Mo. App. 101; Haynes v. Town of Burlington, 38 Vt. 350; Barden v. City of Portage, 79 Wis. 126, 48 N. W. 210. But see Diamond Match Co. v. Town of New Haven, 55 Conn. 510, 13 Atl. 409. See, also, Barnes v. City of Hannibal, 71 Mo. 449.

[132] See §§ 484 et seq., ante, and §§ 1037, 1061 et seq., post.

[133] Cohen v. City of New York, 33 Hun (N. Y.) 404.

the term "damages" in referring to a notice necessary to be given applies only to injuries to property.[134]

§ 981. Damages.

When a plaintiff is successful in actions based on negligence, the damages recovered may be compensatory, punitive or both. Where the defendant is, however, a public corporation, it is not common to allow the recovery of other than compensatory damages,[135] although by statute the rule may be otherwise.[136]

§ 982. 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.

§ 983. 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 and with simple conditions existing

[134] City of Warren v. Davis, 43 Ohio St. 447. See, also, §§ 1037 & 1061 et seq., post.

[135] Wilson v. Town of Granby, 47 Conn. 59; Burr v. Town of Plymouth, 48 Conn. 460; City of Chicago v. Martin, 49 Ill. 241; City of Chicago v. Langlass, 52 Ill. 256; City of Jacksonville v. Lambert, 62 Ill. 519; City of Chicago v. Kelly, 69 Ill. 475; Bennett v. City of Marion, 102 Iowa, 425, 71 N. W. 360; City of New Orleans v. Heres, 23 La. Ann. 782; Littlefield v. Inhabitants of Biddeford, 29 Me. 310; Sanford v. Inhabitants of Augusta, 32 Me. 536; Stover v. Inhabitants of Bluehill, 51 Me. 439; Horrigan v. Inhabitants of Clarksburg, 150 Mass. 218, 22 N. E. 897, 5 L. R. A. 609; Farrelly v. City of Cincinnati, 2 Disn. (Ohio) 516; Raymond v. Keseberg, 91 Wis. 191, 64 N. W. 861. Liability limited to $5000. But see Whipple v. Walpole, 10 N. H. 130.

[136] Swift v. Berry, 1 Root (Conn.) 448.

both in respect to private life and business affairs and governmental acts. The powers they are permitted to exercise and the duties they are required to perform are regarded as of governmental nature only and therefore to be exercised and performed for the benefit of the community or the public at large. 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 jurisdiction.[137] 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.[138]

Exceptions. In a few states, however, a limited liability exists at common law or by force of some statute dealing only with designated conditions.[139] In Iowa a liability attaches in respect to defective bridges only.[140]

[137] Barnes v. District of Columbia, 91 U. S. 540; Covington County v. Kinney, 45 Ala. 176; Barbour County v. Horn, 48 Ala. 649; Scales v. Ordinary of Chattahoochee, 41 Ga. 225; Town of Waltham v. Kemper, 55 Ill. 346; Abbett v. Johnson County Com'rs, 114 Ind. 61, 16 N. E. 127; Jasper County Com'rs v. Allman, 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58; Cones v. Benton County Com'rs, 137 Ind. 404, 37 N. E. 272; Shrum v. Washington County Com'rs, 13 Ind. App. 585, 41 N. E. 349; Yeager v. Tippecanoe Tp., 81 Ind. 46; Fulton County Com'rs v. Rickel, 106 Ind. 501; Packard v. Voltz, 94 Iowa, 277, 62 N. W. 757; Eikenberry v. Bazaar Tp., 22 Kan. 556; Wheatly v. Mercer, 72 Ky. (9 Bush) 704; Sinkhorn v. Lexington H. & P. Turnpike R. Co., 23 Ky. L. R. 1479, 65 S. W. 356; Frazer v. Inhabitants of Lewiston, 76 Me. 531; Niles Highway Com'rs v. Martin, 4 Mich. 557; Altno v. Town of Sibley, 30 Minn. 186; Weltsch v. Town of Stark, 65 Minn. 5, 67 N. W. 648; Peck v. Village of Batavia, 32 Barb. (N. Y.) 634; Markey v. Queen's County, 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46; Reiss v. Town of Pelham, 53 App. Div. 459, 65 N. Y. Supp. 1033; Vail v. Town of Amenia, 4 N. D. 239; Prindle v. Town of Fletcher, 39 Vt. 255.

[138] But see Willey v. City of Ellsworth, 64 Me. 57.

[139] Munson v. Town of Derby, 37 Conn. 298; Pleasant Grove Tp. v. Ware, 7 Kan. App. 648, 53 Pac. 885; Calvert County Com'rs v. Gibson, 36 Md. 229; Hartford County Com'rs v. Hamilton, 60 Md. 340; Richardson v. Inhabitants of Danvers, 176 Mass. 413, 57 N. E. 688. A bicycle is not a carriage within the meaning of Pub. St. c. 52, § 1, which provides that highways shall

§ 984. 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. The conditions of life are complex and varied. 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.[141] The responsibility cannot be evaded by its delegation

be kept in repair "so that the same may be reasonably safe and convenient for travelers with their horses, teams, and carriages at all seasons of the year." Woodman v. Town of Nottingham, 49 N. H. 387; Van Vane v. Inhabitants of Center Tp., 67 N. J. Law, 587, 52 Atl. 359; McCalla v. Multnomah County, 3 Or. 424; Gardner v. Wasco County, 37 Or. 392, 61 P. 834, 62 P. 753; Dean v. New Milford Tp., 5 Watts & S. (Pa.) 545; Burrell Tp. v. Uncapher, 117 Pa. 353, 11 Atl. 619.

Perry Tp. v. John, 79 Pa. 412. The original construction of roads is to be controlled by the topographical features, population and taxable ability of the township and in an action to recover damages for injuries caused by the alleged narrowness of the way, it is error to exclude evidence that the road could not have been made wider at that point without incurring enormous expense such as the township could not bear. Shadler v. Blair County, 136 Pa. 488, 20 Atl. 539.

[140] Chandler v. Fremont County, 42 Iowa, 58; Huston v. Iowa County, 43 Iowa, 456; Krause v. Davis County, 44 Iowa, 141; Miller v. Boone County, 95 Iowa, 5.

[141] City of Jacksonville v. Smith (C. C. A.) 78 Fed. 292; City of Selma v. Perkins, 68 Ala. 145; Lord v. City of Mobile, 113 Ala. 360; Doeg v. Cook, 126 Cal. 213, 58 Pac. 707; City of Denver v. Dunsmore, 7 Colo. 328; City of Boulder v. Niles, 9 Colo. 415, 12 Pac. 632; Mead v. Town of Derby, 40 Conn. 205; Makepeace v. City of Waterbury, 74 Conn. 360, 50 Atl. 876; Hall v. City of Norwalk, 65 Conn. 310, 32 Atl. 400; City of Savannah v. Cullens, 38 Ga. 334; Giffen v. City of Lewiston, 6 Idaho, 231, 55 Pac. 545; City of Pekin v. Newell, 26 Ill. 320. The liability exists though the street may have been constructed in a different manner from that authorized by law. City of Sterling v. Thomas, 60 Ill. 264; City of

Frankfort v. Coleman, 19 Ind. App. 368, 49 N. E. 474. Upon the annexation of territory to a state the liability exists in respect to the annexed streets.

Town of Williamsport v. Lisk, 21 Ind. App. 414, 52 N. E. 628; Byerly v. City of Anamosa, 79 Iowa, 204; Ford v. City of Des Moines, 106 Iowa, 94; Cline v. Crescent City R. Co., 41 La. Ann. 1031, 6 So. 851; Bliss v. Inhabitants of Deerfield, 30 Mass. (13 Pick.) 102; Raymond v. City of Haverhill, 168 Mass. 382; Fox v. City of Chelsea, 171 Mass. 297; Johnson v. City of Worcester, 172 Mass. 122; Nicodemo v. Inhabitants of Southborough, 173 Mass. 455; Southwell v. City of Detroit, 74 Mich. 438, 42 N. W. 118; Face v. City of Ionia, 90 Mich. 104, 51 N. W. 184. Where the liability is imposed by statute it will be strictly construed.

Roberts v. City of Detroit, 102 Mich. 64, 60 N. W. 450, 27 L. R. A. 572. There is no common-law liability of a municipal corporation for injuries caused by a neglect to repair highways or sidewalks. Sebert v. City of Alpena, 78 Mich. 165, 43 N. W. 1098; Moon v. City of Ionia, 81 Mich. 635; Shietart v. City of Detroit, 108 Mich. 309; Walker v. City of Ann Arbor, 111 Mich. 1; Doak v. Saginaw Tp., 119 Mich. 680; Shartle v. City of Minneapolis, 17 Minn. 308 (Gil. 284); McHugh v. City of St. Paul, 67 Minn. 441; Tarras v. City of Winona, 71 Minn. 22; Hall v. City of Austin, 73 Minn. 134, 75 N. W. 1121; 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; City of Wahoo v. Reeder, 27 Neb. 770; McDonough v. Virginia City, 6 Nev. 90; Carter v. City of Rahway, 55 N. J. Law, 177; Lane v. Town of Hancock, 67 Hun, 623, 22 N. Y. Supp. 470; Seymour v. Village of Salamanca, 137 N. Y. 364, 33 N. E. 304; City of Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475. The duty cannot be evaded by contract with third persons for its performance.

Bieling v. City of Brooklyn, 120 N. Y. 98, 24 N. E. 389; Ludlow v. City of Fargo, 3 N. D. 485, 57 N. W. 506; City of Circleville v. Sohn, 59 Ohio St. 285, 52 N. E. 788; 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. Since municipal corporations have been granted the power to levy taxes for the opening, improving and maintaining of streets and have been given special powers of control over them, they are liable for personal injuries caused by negligence in permitting a street to be left in an unsafe condition even in the absence of an express statutory provision imposing such a liability.

Sheridan v. City of Salem, 14 Or. 328, 12 Pac. 925; Farquar v. City of Roseburg, 18 Or. 271, 22 Pac. 1103; Munn v. City of Pittsburg, 40 Pa. 364; City of Barthold v. City of Philadelphia, 154 Pa. 109, 26 Atl. 304; Seamans v. Fitts, 20 R. I. 443; State v. City of Loudon, 40 Tenn. (3 Head) 263; Hopkins v. Ogden City, 5 Utah, 390; City of Roanoke v. Harrison (Va.) 19 S. E. 179; Sutton v. City of Snohomish, 11 Wash. 24, 39 Pac. 273; Griffin v. Town of Williamstown, 6 W. Va. 312; Kittredge v. City of Milwaukee, 26 Wis. 46; Burns v. Town of Elba, 32 Wis. 605; McFarlane v. City of Milwaukee, 51 Wis. 691; Bills v. Town of Kaukauna, 94 Wis.

to third parties either by contract, by imposing the duty upon abutting owners, or otherwise.[142]

§ 985. Exceptions to the above rule.

The principle stated in the preceding section 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.[143] The reasons for this are given in

310. See, also, note 53 Cent. Law J. 123.

[142] City of Cleveland v. King, 132 U. S. 295; City of Jacksonville v. Drew, 19 Fla. 106; City of Rockford v. Hildebrand, 61 Ill. 155; Hogan v. City of Chicago, 168 Ill. 551, 48 N. E. 210; Gaff v. Hutchinson, 38 Ind. 341; Rowell v. Williams, 29 Iowa, 210; Union St. R. Co. v. Stone, 54 Kan. 83, 37 Pac. 1012; Wellcome v. Inhabitants of Leeds, 51 Me. 313; Prentiss v. City of Boston, 112 Mass. 43; Blessington v. City of Boston, 153 Mass. 409, 26 N. E. 1113; Hayes v. West Bay City, 91 Mich. 418, 51 N. W. 1067; Estelle v. Village of Lake Crystal, 27 Minn. 243; Blake v. City of St. Louis, 40 Mo. 569; Russell v. Town of Columbia, 74 Mo. 480; Carpenter v. Nashua, 58 N. H. 37; Davis v. City of Omaha, 47 Neb. 836, 66 N. W. 859; City of Lincoln v. Pirner, 59 Neb. 634, 81 N. W. 846; Scanlon v. City of Watertown, 14 App. Div. 1, 43 N. Y. Supp. 618; People v. City of Brooklyn, 65 N. Y. 349; City of Circleville v. Neuding, 41 Ohio St. 465; McAllister v. City of Albany, 18 Or. 426, 23 Pac. 845; Mahony Tp. v. Scholly, 84 Pa. 136; Watson v. Tripp, 11 R. I. 98; Patterson v. City of Austin (Tex. Civ. App.) 29 S. W. 1139; Willard v. Town of Newbury, 22 Vt. 458; McCoull v. City of Manchester, 85 Va. 579, 8 S. E. 379; Sproul v. City of Seattle, 17 Wash. 256, 49 Pac. 489.

[143] City of Ft. Smith v. York, 52 Ark. 84, 12 S. W. 157, following City of Arkadelphia v. Windham, 49 Ark. 139, 4 S. W. 450; Winbigler v. City of Los Angeles, 45 Cal. 36; Chope v. City of Eureka, 78 Cal. 588, 21 Pac. 364, 4 L. R. A. 325; Arnold v. San Jose, 81 Cal. 618, 22 Pac. 877; McGowan v. Town of Windham, 25 Conn. 86; Falls Village Water Power Co. v. Tibbetts, 31 Conn. 165; Haines v. City of Lewiston, 84 Me. 18, 24 Atl. 430; Carter v. City of Rahway, 57 N. J. Law, 196, 30 Atl. 863, affirming 55 N. J. Law, 177, 26 Atl. 96; Pray v. Jersey City, 32 N. J. Law, 394; Mattson v. City of Astoria, 39 Or. 577, 65 Pac. 1066. The provisions of the city charter of Astoria exempting the city and the members of the council from liability on account of damages resulting from defective streets is contrary to Constitution, art. 1, § 10, which guarantees to every person a remedy by due course of law for injuries sustained by him in person or property. Taylor v. Peckham, 8 R. I. 349; Parker v. Village of Rutland, 56 Vt. 224.

a leading decision [144] where all the authorities at that time were reviewed and considered. The question arising in this case was the liability of a city for an injury to a child caused by a defective school building, but the discussion in the decision includes generally the performance of governmental duties. A case in Arkansas [145] also considers fully the reason for this rule. In some of the states where the above common law is maintained, special liabilities have been imposed by statute.

§ 986. Reasons for different doctrines.

From an examination of the authorities as cited in a few preceding sections, it will be found that the courts, while maintaining substantially the same doctrine, namely, absolving quasi corporations from liability and imposing it upon municipal corporations proper, are widely at variance in the legal reasons given for maintaining the distinction. As a matter of fact, both quasi and municipal corporations are alike subdivisions of the state or sovereign created for public, although local in each case, governmental purposes. A difference is not found altogether in the condition that the one is given greater powers than the other unless the power is given not for governmental purposes but to engage in some enterprise of a quasi private nature and more frequently to municipal corporations from which they derive a pecuniary benefit in their corporate or proprietary capacity as for example, power to construct lighting plants or waterworks, to supply light or water for sale to private consumers or to maintain toll bridges or ferries from each of which a revenue would be derived. In this class of cases it is universally held that corporations are liable for their wrongful or negligent acts because done in what is termed their private or corporate character and not in their public capacity as governing agents in the discharge of duties imposed for the public or general benefit.[146] The governmental powers given to each class of corporations are conferred for political purposes and in each case because they are governmental agencies. As stated in the Arkansas case,[147] the

[144] Hill v. City of Boston, 122 Mass. 344.

[145] Arkadelphia v. Windham, 49 Ark. 139, 4 S. W. 450.

[146] Snider v. City of St. Paul, 51 Minn. 466, 53 N. W. 753, 18 L. R. A. 151.

[147] City of Arkadelphia v. Wind-

duty of keeping in repair the public highways in their respective limits is imposed on both for the benefit of the public without any consideration or emolument received by either. Before the incorporation of a town or city, the road district or county is charged with the duty of keeping its highways in repair; when the territory becomes incorporated as a city or town, the duty is simply transferred from one governmental agency to another. The mere incorporation does not deprive a certain district of its character as a governmental agent. The object, purpose, reason and character of the duty is the same in both cases. The application of the doctrine of liability in respect to keeping highways in repair to municipal corporations proper and the exemption in the case of quasi corporations should, it seems to the author, be better based upon certain special considerations of public policy or upon the doctrine of stare decisis rather than upon a strictly legal principle sufficient to justify the distinction. How-

ham, 49 Ark. 139, 4 S. W. 450. The rule of nonliability in respect to quasi corporations is stated, and the suggestion made that it is difficult to understand why the same rule should not apply and be enforced as to incorporated towns and cities. The court further says: "For, like counties, they are a part of the machinery of the state, and are its auxiliaries in the important business of municipal rule and internal administration, and their functions are almost wholly of a public nature. Like counties, their functions, rights and privileges, are under the control of the legislature, and may be changed, modified or repealed, as a general rule, as the exigencies of the public service or the public welfare demand. Like counties, they can sustain no right or privilege, or their existence, upon anything like a contract between them and the state, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are wholly incompatible with everything of the nature of a compact. The duty of keeping in repair the public highways in their respective limits is imposed on both for the benefit of the public, without any consideration or emolument received by either. Before the incorporation of the town or city the county was charged with the duty of keeping its highways in repair. When the town or city becomes incorporated that duty is transferred to the town or city, from one governmental agency to another. The object, purpose, reason and character of the duty are the same in both cases. This being true, there can be no reason why the town or city shall be any more liable to a private action for neglect to perform this duty than the county previously was, unless the statute transferring the duty clearly manifests an intention in the legislature to impose this liability."

ever, in some instances, the suggestion has been made as different from all others, that since a municipal corporation proper derives or has the right to derive a revenue from the use of its streets in the granting of privileges or licenses to quasi public corporations or individuals engaged in the business of supplying some public utility, so called, that the duty should be imposed upon it of keeping in repair such highways. While it is true that the general principle of law exists founded in reason, as it has been said: "That where one suffers an injury by the neglect of any duty or obligation owing him which rests upon another, the person injured has his action;" yet, the application of this principle has, by universal consent, been withheld from the sovereign and its properly delegated agencies.[148] The tendency to enlarge the liability of municipal corporations in the discharge of governmental duties seem to be founded not upon any legal principle or ground of public policy, but rather the reverse. A public, governmental, or political duty is one which all subordinate corporations owe to the state or the sovereignty which creates them. A private or corporate duty, the basis of liability, is a proprietary one due to the individual citizens who may compose the public corporation and who sustain towards it a position analogous to the stockholders or members of a private corporation.

§ 987. The duty to construct or improve.

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. The rule is applied to all classes of public corporations.[149] The reason is apparent. Local governmental agents are given by the legislature ample and, in many cases, exclusive powers to deal with all questions pertaining to the construction of public improvements because of their greater familiarity and knowledge of local conditions and necessities and further because these are almost universally constructed from local taxation. The determination of the necessity or the feasi-

[148] See §§ 953 et seq., ante.

[149] City of Henderson v. Sandefur, 74 Ky. (11 Bush) 550. See §§ 341 et seq., and 422 et seq.

bility of exercising these powers in respect to the subject under consideration is clearly a legislative or discretionary one; one not only vested in but consequently resting upon the public authorities and, therefore, no liability can arise for its exercise or for a failure to take action.

§ 988. Character of duty in respect to defective highways.

The rules to be given in this and following sections apply to all corporations upon which the duty rests except as they may be modified by local statutes. As it is impossible in this work to enter into the necessary detail in this respect, the reader is referred to local decisions for a determination of questions arising under local laws. 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,[150] as stated in another way, the duty is to exercise reasonable care in maintaining public highways in a safe condition for ordinary travel.[151] 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.[152]

[150] City of Denver v. Cochran, 17 Colo. App. 72, 67 Pac. 23.

[151] City of Hannibal v. Campbell, 86 Fed. 297, 30 C. C. A. 63; Biesiegel v. Town of Seymour, 58 Conn. 43, 19 Atl. 372; Pierce v. City of Wilmington, 2 Marv. (Del.) 306, 43 Atl. 162; City of Columbus v. Ogletree, 102 Ga. 293; Village of Mansfield v. Moore, 124 Ill. 133, 16 N. E. 246; City of Salem v. Webster, 192 Ill. 369, 61 N. E. 323, affirming 95 Ill. App. 120; City of Elgin v. Thompson, 98 Ill. App. 358; Town of Worthington v. Morgan, 17 Ind. App. 603, 47 N. E. 235; Graham v. Town of Oxford, 105 Iowa, 705; City of Covington v. Bryant, 70 Ky. (7 Bush) 248. The rule applies to streets in a city upon which repairs or improvements are being made. Merrill v. Inhabitants of Hampden, 26 Me. 234; Church v. Inhabitants of Cherryfield, 33 Me. 460; Blood v. Inhabitants of Hubbardston, 121 Mass. 233. The fact that the defect may have been increased through the action of the elements will not affect the liability of a town. Chilton v. City of St. Joseph, 143 Mo. 192; Twist v. City of Rochester, 165 N. Y. 619, 59 N. E. 1131; Bishop v. Schulkill Tp. (Pa.) 8 Atl. 449; Moore v. City of Richmond, 85 Va. 538, 8 S. E. 387; Lorence v. City of Ellensburgh, 13 Wash. 341, 43 Pac. 20; Sutton v. City of Snohomish, 11 Wash. 24, 39 Pac. 273; Taylor v. City of Ballard, 24 Wash. 191, 64 Pac. 143; Waggener v. Town of Point Pleasant, 42 W. Va. 798, 26 S. E. 352; Becker v. City of La Crosse, 99 Wis. 414, 40 L. R. A. 829.

[152] City of Boulder v. Niles, 9 Colo. 415, 12 Pac. 632; City of Den-

Nor is it its duty to protect the public against latent defects.[153] It is bound to exercise reasonable care only in the performance of its obligations and this reasonable care is a varying one. Public highways are liable to be used by all classes and conditions of men, the young, the old, the vigorous and the weak, at all seasons of the year and at all times of the day and night, for different kinds of vehicles and different classes of travel. In short, they are liable to be used and are used under innumerable and varying circumstances. The duty to exercise reasonable care, a negligent performance of which may be the basis of a liability, is not, therefore, fixed, absolute and unvarying but one which differs as required by changing conditions.[154]

Duty; when absolute. In a special sense the duty, when one exists, is absolute, namely, the public corporation is liable for a failure to properly perform the duty whether the defect was occasioned by its own acts or lack of attention or through the defects of third parties.[155] The fact that a defect may have been caused by the act of private persons will afford no defense if it is of such a character as to be regarded as a violation of the duty imposed in the first instance upon the public authorities.[156]

§ 989. Basis of liability.

The basis of liability as established by adjudicated cases is dependent upon the character or nature of the duty unless arbi-

ver v. Moewes, 15 Colo. App. 28, 60 Pac. 986; City of Rock Island v. Drost, 71 Ill. App. 613; City of Chicago v. McGiven, 78 Ill. 347; Magaha v. City of Hagerstown, 95 Md. 62, 51 Atl. 832; Craig v. City of Sedalia, 63 Mo. 417; Turner v. City of Newburg, 109 N. Y. 301, 16 N. E. 344.

153 Wakeham v. St. Clair Tp., 91 Mich. 15, 51 N. W. 696. See § 1041, post.

154 City of Milledgeville v. Cooley, 55 Ga. 17; City of Rome v. Dodge, 58 Ga. 238. The duty extends to night travel. Yordy v. Marshall County, 80 Iowa, 405, 45 N. W. 1042. Whether the use of a bridge by a threshing outfit is an unusual and extraordinary one so as to exempt a county from liability is a question for the jury. Foster v. Lyon County Com'rs, 63 Kan. 43, 64 Pac. 1037; Brendlinger v. New Hanover Tp., 148 Pa. 93, 23 Atl. 1105. Liability affected by nature of soil. Seward v. Town of Milford, 21 Wis. 485. Highways are made to be traveled by night as well as day.

155 City of Mt. Carmel v. Blackburn, 53 Ill. App. 658. See, also, § 994, post.

156 Eginoire v. Union County, 112 Iowa, 558, 84 N. W. 758; City of

trarily imposed by statute. The duty is supposed to be one which appertains to the corporation in its private or corporate capacity and which it enjoys for the local advantage and emolument of its citizens. It is not one imposed as a governmental or public duty except as modified by the principles noted.

§ 990. Character of highways to which duty applies.

The duty wherever existing applies only to a public highway or street.[157] The importance of the discussion in previous sections in respect to the establishment and discontinuance of public highways will be therefore appreciated.[158] 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.[159] The rule eliminates from a liability all private ways.[160]

Kansas City v. Orr, 62 Kan. 61, 61 Pac. 397, 50 L. R. A. 783. See, also, § 994, post.

[157] City of New York v. Sheffield, 71 U. S. (4 Wall.) 189. A city may be estopped to deny legal establishment of highway. Lewman v. Andrews, 129 Ala. 170, 29 So. 692; City of Atlanta v. Milam, 95 Ga. 135; Byerly v. City of Anamosa, 79 Iowa, 204, 44 N. W. 359; Reading Tp. v. Telfer, 57 Kan. 798, 48 Pac. 134; St. Paul & D. R. Co. v. City of Duluth, 56 Minn. 494, 58 N. W. 159, 23 L. R. A. 88; Hunter v. Weston, 111 Mo. 176, 19 S. W. 1098, 17 L. R. A. 633; Boyd v. City of Springfield, 62 Mo. App. 456; Beaudean v. City of Cape Girardeau, 71 Mo. 392; Meiners v. City of St. Louis, 130 Mo. 274, 32 S. W. 637; Lambert v. Pembroke, 66 N. H. 280; Donahue v. State, 112 N. Y. 142, 19 N. E. 419, 2 L. R. A. 576; Blair v. Granger, 24 R. I. 17, 51 Atl. 1042; Nellums v. City of Nashville, 106 Tenn. 222, 61 S. W. 88; City of Waxahachie v. Connor (Tex. Civ. App.) 35 S. W. 692; Still v. City of Houston, 27 Tex. Civ. App. 447, 66 S. W. 76; Whitney v. Town of Essex, 42 Vt. 520; City of Winchester v. Carroll, 99 Va. 727, 40 S. E. 37; Brabon v. City of Seattle, 29 Wash. 6, 69 Pac. 365.

[158] See §§ 423 et seq., and 723 et seq., ante.

[159] City of Sandersville v. Hurst, 11 Ga. 453, 36 S. E. 757; Cochran v. Town of Shepherdsville, 19 Ky. L. R. 1192, 43 S. W. 250; Ogle v. City of Cumberland, 90 Md. 59, 44 Atl. 1015; Drury v. Inhabitants of Worcester, 38 Mass. (21 Pick.) 44; Sullivan v. City of Boston, 126 Mass. 540; Garnett v. City of Slater, 56 Mo. App. 207; Downend v. Kansas City, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170, citing many cases. Village of Imperial v. Wright, 34 Neb. 732, 52 N. W. 374; Veeder v. Village of Little Falls, 100 N. Y. 343; Horey v. Village of Haverstraw, 124 N. Y. 273, 26 N. E. 532; Kaseman v. Borough of Sunbury, 197 Pa. 162, 46 Atl. 1032; Brewer v. Sullivan County, 199 Pa. 594, 49 Atl. 259; Blair v. Granger, 24 R. I.

Discontinuance of highway. Since the liability attaches only in case of a legal highway, upon the discontinuance of one there is a consequent release from the obligation to maintain in a reasonably safe condition for ordinary travel.[161]

§ 991. 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.[162] 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.[163] The duty to main-

17, 51 Atl. 1042; Hill v. Laurens County, 34 S. C. 141, 13 S. E. 318; Page v. Town of Weathersfield, 13 Vt. 424. But see Gallagher v. City of St. Paul, 28 Fed. 305.

[160] Will v. Village of Mendon, 108 Mich. 251, 66 N. W. 58; Dickinson v. Town of Rockingham, 45 Vt. 99. But the rule is different where a private way is used temporarily as a public one.

[161] Nicodemo v. Inhabitants of Southborough, 173 Mass. 455, 53 N. E. 887; Blodgett v. Town of Royalton, 17 Vt. 41; Hanley v. City of Huntington, 37 W. Va. 578, 16 S. E. 807; Schuenke v. Town of Pine River, 84 Wis. 669, 54 N. W. 1007.

[162] City of Hannibal v. Campbell (C. C. A.) 86 Fed. 297; O'Neil v. Town of East Windsor, 63 Conn. 150, 27 Atl. 237. Question for jury. Village of Rankin v. Smith, 63 Ill. App. 522; City of Henderson v. White, 20 Ky. L. R. 1525, 49 S. W. 764; Johnson v. Inhabitants of Whitfield, 18 Me. 286; Hunt v. Rich, 38 Me. 195; Perkins v. Inhabitants of Fayette, 68 Me. 152; Brown v. Inhabitants of Skowhegan, 82 Me. 273, 19 Atl. 399; Tasker v. Inhabitants of Farmingdale, 85 Me. 523, 27 Atl. 464; Marshall v. Inhabitants of Ipswich, 110 Mass. 522; Moran v. Inhabitants of Palmer, 162 Mass. 196, 38 N. E. 442; Keyes v. Village of Marcellus, 50 Mich. 439; McArthur v. City of Saginaw, 58 Mich. 357; Treise v. City of St. Paul, 36 Minn. 526, 32 N. W. 857; McHugh v. City of St. Paul, 67 Minn. 441, 70 N. W. 5; Kling v. Kansas City, 27 Mo. App. 231; Saltmarsh v. Bow, 56 N. H. 428; Newell v. Town of Stony Point, 59 App. Div. 237, 69 N. Y. Supp. 583; Potter v. Town of Castleton, 53 Vt. 435; Wheeler v. Town of Westport, 30 Wis. 392; Matthews v. Town of Baraboo, 39 Wis. 674; Rhyner v. City of Menasha, 97 Wis. 523, 73 N. W. 41; James v. City of Portage, 48 Wis. 677. But see Cobb v. Inhabitants of Standish, 14 Me. 198; Kelley v. Town of Fond du Lac, 31 Wis. 179.

[163] Hunter v. Weston, 111 Mo. 184; Crystal v. City of Des Moines, 65 Iowa, 502; Lamb v. City of Cedar Rapids, 108 Iowa, 629, 79 N. W. 366; Fockler v. Kansas City, 94

tain in each of these cases being based upon the necessities of the public, a public way is established and maintained for the use of the community as a means of communication and of ingress and egress to adjoining property. The extent and the character of the travel resulting from urban or suburban conditions changes the measure of care to be applied and consequently, the duty.[164]

What portion must be improved. The subject of the preceding paragraph naturally leads to a consideration of the duty of the public corporation in respect to the extent of the highway improved or kept in repair and to which, therefore, its duty will apply. This duty varies with the character of the way.[165] A suburban road or street in the outlying district of a town or city upon which there is light travel, and that infrequently, does not require improvement and repair to the same extent so far as surface is concerned as a street located in the business or central part of a city where the traffic is extensive and constant and where the public necessities require the use of the entire highway between its extreme limits. The duty, therefore, arises in the latter case to improve and keep it in repair to the extent demanded by the public necessities and its liability will be measured by the extent of that duty.[166]

Mo. App. 464, 68 S. W. 363; Kossman v. City of St. Louis, 153 Mo. 293, 54 S. W. 513.

[164] Village of Mt. Morris v. Kanode, 98 Ill. App. 373; 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 Maysville v. Guilfoyle, 23 Ky. L. R. 43, 62 S. W. 493; Dickey v. Maine Tel. Co., 46 Me. 483; Craig v. City of Sedalia, 63 Mo. 417; City of Ord v. Nash, 50 Neb. 335, 69 N. W. 964; McCormick v. City of Amsterdam, 63 Hun, 632, 18 N. Y. Supp. 272; Cassedy v. Town of Stockbridge, 21 Vt. 391; Sessions v. Town of Newport, 23 Vt. 9.

[165] Johnson v. Sioux City, 114 Iowa, 137, 86 N. W. 212; City of Henderson v. Sandefur, 74 Ky. (11 Bush) 550; Craig v. City of Sedalia, 63 Mo. 417; Bagley v. Town of Ludlow, 41 Vt. 425.

[166] Seward v. Wilmington, 2 Marv. (Del.) 189, 42 Atl. 451; City of Columbus v. Ogletree, 102 Ga. 293, 29 S. E. 749. The fact that the local taxes assessed were insufficient to keep the streets in a certain district in proper repair is no defense. Town of Odon v. Dobbs, 25 Ind. App. 522, 58 N. E. 562. The duty is to keep the streets in a reasonable safe condition for travel, not alone in the center of the street but from curb to curb. Barr v. Kansas City, 105 Mo. 550, 16 S. W. 483; Fritz v. Kansas City, 84 Mo.

§ 992. The duty; to whom 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.[167] Persons, therefore, who are using a highway for a purpose not consistent with the true one cannot recover for injuries sustained by them.[168] Public ways cannot be used as play grounds [169] for sightseeing, loafing, or similar purposes.[170] The rule as given in a

632; City of South Omaha v. Powell, 50 Neb. 798, 70 N. W. 391; Monongahela City v. Fischer, 111 Pa. 9; Musick v. Borough of Latrobe, 184 Pa. 375, 39 Atl. 226; Whitney v. Town of Essex, 38 Vt. 270; Mochler v. Town of Shaftsbury, 46 Vt. 580.

[167] Smith v. City of Leavenworth, 15 Kan. 81; Hawes v. Town of Fox Lake, 33 Wis. 438.

[168] Sykes v. Town of Pawlet, 43 Vt. 446.

[169] Ricketts v. Village of Markdale, 31 Ont. 180; City of Chicago v. Starr, 42 Ill. 175; City of Indianapolis v. Emmelman, 108 Ind. 530; Tighe v. City of Lowell, 119 Mass. 472; Lyons v. Inhabitants of Brookline, 119 Mass. 491; Hamilton v. City of Detroit, 105 Mich. 514, 63 N. W. 511; Donoho v. Vulcan Iron Works, 75 Mo. 401; Jackson v. City of Greenville, 72 Miss. 220, 16 So. 382; City of Omaha v. Richards, 49 Neb. 244, 68 N. W. 528. Question of negligence one for jury. City of Omaha v. Bowman, 52 Neb. 293, 72 N. W. 316, 40 L. R. A. 531. A city owes no duty beyond that which devolves on a private owner of property similarly situated to prevent a child from playing upon a pond created by it on private property. Gaughan v. City of Philadelphia, 119 Pa. 503, 13 Atl. 300; Clark v. City of Richmond, 83 Va. 355, 5 S. E. 369. But see City of Aurora v. Siedelman, 34 Ill. App. 285; City of Waverly v. Reesor, 93 Ill. App. 649; Village of Bath v. Blake, 97 Ill. App. 35; City of Chicago v. Keefe, 114 Ill. 222. Boy driving hoop. City of Elwood v. Addison, 26 Ind. App. 28, 59 N. E. 47; Graham v. City of Boston, 156 Mass. 75, 30 N. E. 170; City of Vicksburg v. McLain, 67 Miss. 4, 6 So. 774; Ramsay v. National Contracting Co., 49 App. Div. 11, 63 N. Y. Supp. 286; Gibson v. City of Huntington, 38 W. Va. 177, 18 S. E. 447, 22 L. R. A. 561.

[170] Stinson v. City of Gardiner, 42 Me. 248; Leslie v. City of Lewiston, 62 Me. 468; Philbrick v. Inhabitants of Pittston, 63 Me. 477; McCarthy v. City of Portland, 67 Me. 167; Stickney v. City of Salem, 85 Mass. (3 Allen) 374; McDougal v. City of Salem, 110 Mass. 21; Tighe v. City of Lowell, 119 Mass. 472; Lyons v. Inhabitants of Brookline, 119 Mass. 491; Hamilton v. City of Detroit, 105 Mich. 514, 63 N. W. 511; Borough of Norristown v. Moyer, 67 Pa. 355; Sykes v. Town of Pawlet, 43 Vt. 446; Fay v. Kent, 55 Vt. 557; Clark v. City of Richmond, 83 Va. 355; Strong v. City of Steven's Point, 62 Wis. 255, 22 N. W. 425. See, also, § 1055, post.

recent authority[171] is as follows: "The test to be applied in order to determine whether or not an injured person was a traveler at the time when he received his injury, so far as any test can be laid down, is whether his acts at that time could reasonably be regarded as the natural and ordinary incidents of travel upon the highway and as consistent with an intention on his part to continue upon and over the highway for the usual and proper purposes of travel." The question is one of fact ordinarily for the jury to determine. "Unless the character of his acts at that time make it perfectly clear that he had ceased to use the highway for the proper purposes of travel, in which case it becomes the duty of the court to take the case from the jury."[172] 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[173] or unusual loads.[174]

But see Mayor & Council of Jackson v. Boone, 93 Ga. 662, 20 S. E. 46; Duffy v. City of Dubuque, 63 Iowa, 171; Smethurst v. Barton Square Ind. Cong. Church, 148 Mass. 261, 19 N. E. 387, 2 L. R. A. 695; Graham v. City of Boston, 156 Mass. 75, 30 N. E. 170; Nesbitt v. City of Greenville, 69 Miss. 22, 10 So. 452; Varney v. Manchester, 58 N. H. 430; McGuire v. Spence, 91 N. Y. 303; Reed v. City of Madison, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733.

[171] Williams, Mun. Liab. Tort, p. 122.

[172] Williams, Mun. Liab. Tort, p. 123. Hunt v. City of Salem, 121 Mass. 294; Hardy v. Keene, 52 N. H. 370.

[173] Bartlett v. Inhabitants of Kittery, 68 Me. 358; Heib v. Town of Big Flats, 66 App. Div. 88, 73 N. Y. Supp. 86. Considering N. Y. Gen. Laws c. 19, § 154, which provides that no town shall be liable for damage resulting from the breaking of any bridge by transportation of any vehicle or load weighing four tons or over.

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. Question for jury. Foster v. Lyon County Com'rs, 63 Kan. 43, 64 Pac. 1037. Threshing engine. Gregory v. Inhabitants of Adams, 80 Mass. (14 Gray) 242. Liability for injury sustained by an elephant while being lead through a defective highway.

[174] Lee v. Delaware, L. & W. R. Co., 62 App. Div. 624, 71 N. Y. Supp. 120; Bush v. Delaware, L. & W. R. Co., 166 N. Y. 210, 59 N. E. 838, affirming 54 App. Div. 616, 66 N. Y. Supp. 1128. Construing highway laws 1890, c. 568, § 154, exempting towns from liability when loads of four tons or over use public bridges. McCormick v. Washington Tp., 112 Pa. 185. Steam threshing machine and traction engine. Megargee v. City of Philadelphia, 153 Pa. 340, 25 Atl. 1130, 19 L. R. A. 221; Barksdale v. City of Laurens, 58 S. C.

(a) Unmanageable horses. The duty is not moreover imposed for the benefit of runaway teams [175] or those who may be using unmanageable horses,[176] those riding or driving at an unusual rate of speed,[177] or not driving with ordinary skill and diligence,[178]

413, 36 S. E. 661; Howe v. Town of Castleton, 25 Vt. 162; Hawkes v. Town of Chester, 70 Vt. 271, 40 Atl. 727; Welch v. Town of Geneva, 110 Wis. 388, 85 N. W. 970.

[175] Davis v. Inhabitants of Dudley, 86 Mass. (4 Allen) 557; Titus v. Inhabitants of Northbridge, 97 Mass. 258; Fogg v. Inhabitants of Nahant, 98 Mass. 578; Howe v. City of Lowell, 101 Mass. 99; Bemis v. Inhabitants of Arlington, 114 Mass. 507; Ivory v. Town of Deerpark, 116 N. Y. 476, 22 N. E. 1080; Wagner v. Township of Jackson, 133 Pa. 61, 19 Atl. 312. Question for jury. West Mahoney Tp. v. Watson, 112 Pa. 574, 3 Atl. 866; Smith v. County Court, 33 W. Va. 713; Hungerman v. City of Wheeling, 46 W. Va. 761, 34 S. E. 778; Trexler v. Greenwich Tp., 168 Pa. 214, 31 Atl. 1090; Goldsworthy v. Town of Linden, 75 Wis. 24, 43 N. W. 656. But see Ward v. Town of North Haven, 43 Conn. 148; City of Joliet v. Shufeldt, 144 Ill. 403, 32 N. E. 969, 18 L. R. A. 750, affirming 42 Ill. App. 208; Byerly v. City of Anamosa, 79 Iowa, 204, 44 N. W. 359; City of Topeka v. Tuttle, 5 Kan. 312; Union St. R. Co. v. Stone, 54 Kan. 83, 37 Pac. 1012.

[176] Willey v. Inhabitants of Belfast, 61 Me. 569. But the rule is otherwise if the horse is kind, well broken, and in charge of a reasonably skillful and careful driver. Jennings v. Inhabitants of Wayne, 63 Me. 468; Card v. City of Ellsworth, 65 Me. 547; Perkins v. Inhabitants of Fayette, 68 Me. 152; Spaulding v. Inhabitants of Winslow, 74 Me. 528; Richards v. Inhabitants of Enfield, 79 Mass. (13 Gray) 344; Babson v. Inhabitants of Rockport, 101 Mass. 93; Kuhn v. Walker Tp., 97 Mich. 306; Kingsley v. Bloomingdale Tp., 109 Mich. 340, 67 N. W. 333; Glasier v. Town of Hebron, 131 N. Y. 447, 30 N. E. 239, reversing 62 Hun, 137, 16 N. Y. Supp. 503; Jackson Tp. v. Wagner, 127 Pa. 184, 17 Atl. 903. See, however, Wagner v. Jackson Tp., 133 Pa. 61, 19 Atl. 312. where the question of negligence was held to be one for the jury. Worrilow v. Upper Chichester Tp., 149 Pa. 40, 24 Atl. 85; Schaeffer v. Jackson Tp., 150 Pa. 145, 24 Atl. 629, 18 L. R. A. 100; Trexler v. Greenwich Tp., 168 Pa. 214, 31 Atl. 1090; Brown v. Laurens County, 38 S. C. 282, 17 S. E. 21; Mason v. Spartanburg County, 40 S. C. 390, 19 S. E. 15; Jackson v. Town of Bellevieu, 30 Wis. 250. See, also, § 1055, post. But see Aldrich v. Inhabitants of Gorham, 77 Me. 287; Woods v. Inhabitants of Groton, 111 Mass. 357; Cushing v. Inhabitants of Bedford, 125 Mass. 526; Simons v. Casco Tp., 105 Mich. 588, 63 N. W. 500; Ivory v. Town of Deerpark, 116 N. Y. 476, 22 N. E. 1080; Kitchen v. Union Tp., 171 Pa. 145, 33 Atl. 76; Yeaw v. Williams, 15 R. I. 20, 23 Atl. 33; Houfe v. Town of Fulton, 29 Wis. 296.

[177] Carswell v. City of Wilmington, 2 Marv. (Del.) 360, 43 Atl. 169; Anderson v. City of Wilmington, 2 Pen. (Del.) 28, 43 Atl. 841; Mc-

using modes of locomotion unusual or extraordinary in their character;[179] but a recovery may be had if the act complained of as a defense did not in any way contribute to produce the injury.[180]

(b) 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.[181]

§ 993. When due.

The duty to maintain public highways in a reasonably safe condition for ordinary travel is not only limited in its nature and application both in respect to character of the highway and the persons using it, but also in connection with the condition when the liability will accrue. To entitle one to recover for an injury received on account of a defective highway, negligence must be shown on the part of the public corporation charged with the duty of maintaining the highway in a reasonably safe condition.

Carthy v. City of Portland, 67 Me. 167; Heland v. City of Lowell, 85 Mass. (3 Allen) 407; 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. But see Fernbach v. City of Waterloo (Iowa) 34 N. W. 610.

[178] Adams v. Inhabitants of Carlisle, 38 Mass. (21 Pick.) 146. See § 1055, post.

[179] Gregory v. Inhabitants of Adams, 80 Mass. (14 Gray) 242. "The obligation of these municipal corporations is, not to keep all their highways and bridges in the highest possible state of repair, or so as to afford the utmost convenience to those who have occasion to use them. * * * * They are not required to make preparations for the safety or convenience of those who undertake to use those ways in an unusual or extraordinary manner, involving peculiar and special peril and danger, whether it be in respect to the kind or character of animals lead or driven, or the magnitude or construction of carriages used, or the bulk or weight of property transported."

[180] Baker v. City of Portland, 58 Me. 199; City of Marshal v. McAllister, 18 Tex. Civ. App. 159, 43 S. W. 1043.

[181] Baker v. City of Portland, 58 Me. 199; 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. But see City of Pueblo v. Smith, 3 Colo. App. 386, 33 Pac. 685. See, also, § 1056, post.

Negligence is the basis of the right to recover.[182] It is not the existence of the duty or even of the defect, but negligent action of the corporation in respect to the performance of the duty which creates the cause of action.

(a) 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.[183] Damage which he may have suffered in common with the public or others will not give him the right to recover.[184]

(b) Proximate cause. Negligence must be proven, a special injury, and further the fact that the breach of the duty complained of was the proximate cause of the injury complained of.[185] It is sufficient in the greater number of states to establish the failure to perform the duty as the proximate cause although there may be other causes concurring or contributing to the injury.[186] In

[182] City of Chicago v. Glanville, 18 Ill. App. 308; Town of Rushville v. Poe, 85 Ind. 83; Patton v. Montgomery County Com'rs, 96 Ind. 131; Davis v. City of Crawfordsville, 119 Ind. 1; Cooper v. Mills Co., 69 Iowa, 350, 28 N. W. 633; Graham v. Town of Oxford, 105 Iowa, 705, 75 N. W. 473; Nickols v. Inhabitants of Athens, 66 Me. 402; Flanders v. Norwood, 141 Mass. 17, 5 N. E. 256; Roberts v. City of Detroit, 102 Mich. 64, 60 N. W. 450, 27 L. R. A. 572; Medina Tp. v. Perkins, 48 Mich. 67, 11 N. W. 810; Hunt v. Mayor, etc. of New York, 109 N. Y. 134, 16 N. E. 320; Village of Oak Harbor v. Kallagher, 52 Ohio St. 183, 39 N. E. 144; Lehigh Co. v. Hoffort, 116 Pa. 119.

[183] Halsey v. Rapid Transit St. R. Co., 47 N. J. Eq. 380, 20 Atl. 859. See § 952, ante.

[184] Griffin v. Sanbornton, 44 N. H. 246; Hale v. Town of Weston, 40 W. Va. 313, 21 S. E. 742.

[185] City of Rockford v. Tripp, 83 Ill. 247; City of Vincennes v. Thuis, 28 Ind. App. 523, 63 N. E. 315; Smith v. City of Leavenworth, 15 Kan. 81; Brown v. Watson, 47 Me. 161; Moulton v. Inhabitants of Sanford, 51 Me. 127; Raymond v. City of Haverhill, 168 Mass. 382, 47 N. E. 101; Kelley v. City of Boston, 180 Mass. 233, 62 N. E. 259; Davis v. Inhabitants of Longmeadow, 169 Mass. 551; Hembling v. City of Grand Rapids, 99 Mich. 292, 58 N. W. 310; Smith v. Walker Tp., 117 Mich. 14, 75 N. W. 141; Butler v. Town of Oxford, 69 Miss, 618, 13 So. 626; Merrill v. Claremont, 58 N. H. 468; Ehrgott v. City of New York, 96 N. Y. 264; Ohl v. Bethlehem Tp., 199 Pa. 588, 49 Atl. 288; McGough v. Bates, 21 R. I. 213, 42 Atl. 873; Hodge v. Town of Bennington, 43 Vt. 450; Smith v. County Court, 33 W. Va. 713, 11 S. E. 1, 8 L. R. A. 82. See, also, §§ 952, ante, and 1059, post.

[186] Lincoln Tp. v. Koenig, 10 Kan. App. 504, 63 Pac. 90; Plymouth Tp. v. Graver, 125 Pa. 24, 17 Atl. 249; City of San Antonio v. Porter, 24

some states, however, the rule obtains that the defect complained of must not only be the proximate cause but the sole cause of the injury [187] and that a concurrent, casual connection of acts of the injured one, however slight, will destroy the right to recover damages.[188]

§ 994. Same subject; when imposed by statute.

Liability may accrue when specifically imposed by statute or upon the giving of notice of the injury to designated public authorities,[189] the notice to contain the statement of facts required by law, usually recitals in respect to the place and time,[190] the nature [191] and the extent of the injury.[192] Statutes of this character are strictly construed in favor of the public corporation and the right to recover will be lost if the statutory notice is not given in the manner and within the time so prescribed.[193] When a statute creates a liability against a public corporation where none before existed at common law, the rule of strict construction invariably applies.

§ 995. Defect occasioned by private persons.

Where a duty is imposed or exists in respect to the maintenance of public ways from defects, the cause of such defects is immaterial. They may be occasioned by the failure of the corporation

Tex. Civ. App. 444, 59 S. W. 922; Stickney v. Town of Maidstone, 30 Vt. 738.

[187] Howe v. City of Lowell, 101 Mass. 99; Hawes v. Town of Fox Lake, 33 Wis. 438. But see Lund v. Inhabitants of Tyngsboro, 65 Mass. (11 Cush.) 563.

[188] Moulton v. Inhabitants of Sanford, 51 Me. 127; Lavery v. Manchester, 58 N. H. 444.

[189] City of Denver v. Williams, 12 Colo. 475, 21 Pac. 617; Winsor v. Tripp, 12 R. I. 454; Campbell v. Town of Fair Haven, 54 Vt. 336. See §§ 1037, and 1061 et seq., post.

[190] City of Ottawa v. Black, 10 Kan. App. 439, 61 Pac. 985; Wilton v. City of Flint, 128 Mich. 156, 87 N. W. 86; White v. Town of Stowe, 54 Vt. 510.

[191] Wood v. Borough of Stafford Springs, 74 Conn. 437, 51 Atl. 129; Farrell v. Inhabitants of Oldtown, 69 Me. 72.

[192] See §§ 485 et seq., ante, and §§ 1061 et seq., post.

[193] Weber v. Town of Greenfield, 74 Wis. 234, 42 N. W. 101; Ziegler v. City of West Bend, 102 Wis. 17, 78 N. W. 164. But see Gitchell v. Andover, 59 N. H. 363. See §§ 1061 et seq., post.

itself or through the acts of third parties. In the latter case equally with the former condition the corporation against which a liability attaches will be held responsible.[194]

§ 996. Liability arising from construction.

The duty whenever existing, and a liability from a consequent failure to carefully and properly perform it arises, both in respect to the construction of the highway with its appurtenances and its condition. In the following sections will be considered the principles, so far as they can be stated, relating to the construction and following these a statement of the law in respect to the maintenance or condition of a highway. As stated in a previous

[194] District of Columbia v. Woodbury, 136 U. S. 450; Robbins v. City of Chicago, 71 U. S. (4 Wall.) 657; District of Columbia v. Sullivan, 11 App. D. C. 533; Anderson v. City of Wilmington, 8 Houst. (Del.) 516, 19 Atl. 509; Parker v. City of Macon, 39 Ga. 725; City of Peoria v. Gerber, 168 Ill. 318, 48 N. E. 152; Gaff v. Hutchinson, 38 Ind. 341; Senhenn v. City of Evansville, 140 Ind. 675, 40 N. E. 69; Town of Centerville v. Woods, 57 Ind. 192; City of Evansville v. Senhenn, 26 Ind. App. 362, 59 N. E. 863; Town of Elkhart v. Ritter, 66 Ind. 136; Michigan City v. Boeckling, 122 Ind. 39, 23 N. E. 518; Duffy v. City of Dubuque, 63 Iowa, 171; Fletcher v. City of Ellsworth, 53 Kan. 751; Union St. R. Co. v. Stone, 54 Kan. 83; Kansas City v. Hart, 60 Kan. 684; Paducah R. & L. Co. v. Ledsinger, 23 Ky. L. R. 441, 63 S. W. 11; Wellcome v. Inhabitants of Leeds, 51 Me. 313; Hawkes v. Inhabitants of North Hampton, 116 Mass. 420; Lawrence v. City of New Bedford, 160 Mass. 227, 35 N. E. 459; Southwell v. City of Detroit, 74 Mich. 438, 42 N. W. 118; Campbell v. City of Stillwater, 32 Minn. 308; Welsh v. City of St. Louis, 73 Mo. 71; Grogan v. Broadway Foundry Co., 87 Mo. 321; Hamford v. Kansas City, 103 Mo. 172, 15 S. W. 753; City of Natchez v. Shields, 74 Miss. 871, 21 So. 797; Sides v. Portsmouth, 59 N. H. 24; Davis v. City of Omaha, 47 Neb. 836, 66 N. W. 859; Byrne v. City of Syracuse, 79 Hun, 555, 29 N. Y. Supp. 912; Masterton v. Village of Mt. Vernon, 58 N. Y. 391; McGarry v. Loomis, 63 N. Y. 104; Rehberg v. City of New York, 91 N. Y. 137; McGuire v. Spence, 91 N. Y. 303; Bryant v. Town of Randolph, 133 N. Y. 70, 30 N. E. 657; Pettengill v. City of Yonkers, 116 N. Y. 558, 22 N. E. 1095; City of Zanesville v. Fannan, 53 Ohio St. 605, 42 N. E. 703; Aston Tp. v. McClure, 102 Pa. 322; Mills v. City of Philadelphia, 187 Pa. 287, 40 Atl. 821; White v. City of San Antonio (Tex. Civ. App.) 25 S. W. 1131; McCoull v. City of Manchester, 85 Va. 579, 8 S. E. 379, 2 L. R. A. 691; Raymond v. City of Sheboygan, 76 Wis. 335, 45 N. W. 125; McClure v. City of Sparta, 84 Wis. 269, 54 N. W. 337; Taake v. City of Seattle, 18 Wash. 178, 51 Pac. 362.

section,[195] the duty is a varying one. The existence of the same defect either in construction or condition does not necessarily lead to the presumption of negligence on the part of the public corporation. This must be established as dependent upon the facts in each particular instance where a liability is claimed and necessarily where there will be found in the reports numberless cases which consider and pass upon particular circumstances. No attempt will be made to make an exhaustive citation of authorities. This is impossible in the space assigned to the subject in this work.

§ 997. Defective plan.

The law seems to be well established, as stated in sections 959 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.[196] Some hold that where a plan for the establishment 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.[197] The adoption of the plan is held to be a legislative or a discretionary act requiring the application of judgment that, therefore, the usual rule of law applies which per-

[195] See § 988, ante.

[196] Hughes v. City of Baltimore, Tournay, 243, Fed. Cas. No. 6,844. See, also, cases cited in the following three notes.

[197] Northern Transp. Co. v. City of Chicago, 99 U. S. 635. A city is not liable for consequent damages caused by the proper construction of a tunnel lawfully authorized. Johnston v. District of Columbia, 118 U. S. 19; Bannagan v. District of Columbia, 2 Mackey (D. C.) 285; Sievers v. City & County of San Francisco, 115 Cal. 648, 47 Pac. 687; English v. City of Danville, 170 Ill. 131, 48 N. E. 328; Gould v. City of Topeka, 32 Kan. 485. If the plan is manifestly and unquestionably dangerous and unsafe a city is liable but not otherwise. Lincoln Tp. v. Koenig, 10 Kan. App. 504, 63 Pac. 90. Question for jury. Toolan v. City of Lansing, 38 Mich. 315; Foster v. City of St. Louis, 71 Mo. 157; Rhinelander v. City of Lockport, 60 Hun, 582, 14 N. Y. Supp. 850; Schreiber v. City of New York, 11 Misc. 551, 32 N. Y. Supp. 744; Urquhart v. City of Ogdensburg, 91 N. Y. 67; Alexander v. Brady, 61 Ohio St. 174, 55 N. E. 173.

tains ordinarily to acts of this character.[198] On the other hand, it might be said the weight of authority sustains the doctrine that if injuries occur through the adoption of a defective plan of improvement provided the other essentials of actionable negligence are to be found, a liability follows.[199] A legal reason for the distinction between sewers and highways does not clearly appear. It is held by some authorities that the construction, and by this term is now meant all steps preliminary to actual work, of both sewers, drains and highways, is a municipal or local duty, a failure to properly perform which will lead to corresponding liability. Some authorities place in the list of municipal, corporate or local duties the construction of highways but not that of sewers or drains imposing a liability in respect to the form and permitting an exemption in the case of the latter. The distinction is more interesting than substantial for the authorities are well divided along these lines.[200]

§ 998. 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.[201] If it is negligently performed,

[198] City of Peru v. Brown, 10 Ind. App. 597, 38 N. E. 223; Champion v. Town of Crandon, 84 Wis. 405, 54 N. W. 775, 19 L. R. A. 856.

[199] Kane v. City of Indianapolis, 82 Fed. 770; City of Springfield v. Le Claire, 49 Ill. 476; City of Chicago v. Seben, 165 Ill. 371, 46 N. E. 244; City of North Vernon v. Voegler, 103 Ind. 314; Smith v. City of Pella, 86 Iowa, 236; 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; Requa v. City of Rochester, 45 N. Y. 129; Lehmann v. City of Brooklyn, 30 App. Div. 305, 51 N. Y. Supp. 524; Collett v. City of New York, 51 App. Div. 394, 64 N. Y. Supp. 693. See, also, Borough of Norristown v. Moyer, 67 Pa. 365. Also, note, 51 Cent. Law J. 185. But see Heiss v. City of Lancaster, 203 Pa. 260, 52 Atl. 201. A failure to bridge over a gutter not a negligence.

[200] Judge v. City of Menden, 38 Conn. 90; Bigelow v. Inhabitants of Randolph, 80 Mass. (14 Gray) 541; Bates v. Inhabitants of Westborough, 151 Mass. 174, 23 N. E. 1070, 7 L. R. A. 156; Donovan v. New York Board of Education, 85 N. Y. 117; Gilman v. Town of Laconia, 55 N. H. 130.

[201] Nevins v. City of Peoria, 41 Ill. 502; Delphi v. Evans, 36 Ind.

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.[202] The obligation also attaches during the progress of repairs.[203]

§ 999. Change of grade or taking of property.

Through a change of grade, under lawful authority, damages to private property direct or consequential may follow. The question of a liability, whether statutory or otherwise, has been fully considered in sections 810 et seq., to which reference is made.

Taking of or injury to property. The principle of law universally obtains that private property cannot be taken for public use without the payment of just compensation, first had or received, the word "taken" receiving such a broad construction as to include the right to recover for injuries to property rights less than an actual physical taking. The subject of eminent domain which includes a discussion of the meaning of these words and phrases has been previously considered in sections 743 et seq. Constitutional provisions also protect private property rights against seizure or injury without due process of law. These fundamental principles prohibit all classes or grades of public corporations from taking or injuring private property in the construction or improvement of public highways without the payment of just compensation or without due process of law. If,

90; Town of Princeton v. Gieske, 93 Ind. 102; Perry v. City of Worcester, 72 Mass. (6 Gray) 544; 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; Lacour v. City of New York, 10 N. Y. Super. Ct. (3 Duer) 406; Borough of Easton v. Neff, 102 Pa. 474; Crossett v. City of Janesville, 28 Wis. 420.

[202] City of Durango v. Luttrell, 18 Colo. 123, 31 Pac. 853; Templin v. Iowa City, 14 Iowa, 59; Hitchins v. Town of Frostburg, 68 Md. 100, 11 Atl. 826; Gilman v. Town of Laconia, 55 N. H. 130; Keating v. City of Cincinnati, 38 Ohio St. 141.

[203] Robbins v. City of Chicago, 71 U. S. (4 Wall.) 657; Mulligan v. City of New Britain, 69 Conn. 96, 36 Atl. 1005; Jones v. Collins, 177 Mass. 444, 59 N. E. 64; Beattie v. City of Detroit, 129 Mich. 20, 88 N. W. 71; Ray v. City of Poplar Bluff, 70 Mo. App. 252; Sauthof v. Granger, 19 R. I. 606, 35 Atl. 300. But see Mills v. City of Philadelphia, 187 Pa. 287, 40 Atl. 821.

therefore, they in their construction or maintenance destroy, take or injure [204] private property, whether this is done in the adoption of the plan or in the actual work involved in the making of the improvement, they will be held liable for the damages sustained.[205]

§ 1000. Surface water injuries from plan or construction.

Many of the adjudicated cases are based upon a defective plan or construction of a highway which causes injury to private property through the accumulation or the diversion of surface waters. These for purposes of convenience are cited under this section. Where surface waters are collected in unusual quantities [206] or diverted and discharged [207] upon private property to its injury

[204] Long v. City of Elberton, 109 Ga. 28, 34 S. E. 333, 46 L. R. A. 428. The mere erection of a prison within the city limits is not an invasion of the property rights of adjacent owners and no liability will follow. Barfield v. Macon County, 109 Ga. 386, 34 S. E. 596; Fiske Wharf & Warehouse Co. v. City of Boston, 178 Mass. 526, 60 N. E. 7; Worcester Gas Light Co. v. County Com'rs, 138 Mass. 289; Town Council of Akron v. McComb, 18 Ohio, 229.

[205] City of Bloomington v. Brokaw, 77 Ill. 194; Kemper v. City of Louisville, 77 Ky. (14 Bush) 87; Inman v. Tripp, 11 R. I. 520.

[206] Stanford v. City & County of San Francisco, 111 Cal. 198, 43 Pac. 605; Phinizy v. City of Augusta, 47 Ga. 260; City of Elgin v. Welch, 16 Ill. App. 483. The right of recovery follows the title to the premises injured. City of Alton v. Hope, 68 Ill. 167; Roll v. City of Indianapolis, 52 Ind. 547; Town of Thorntown v. Fugate, 21 Ind. App. 537, 52 N. E. 763; Murphy v. City of Indianapolis, 83 Ind. 76; Town of Sullivan v. Phillips, 110 Ind. 320; City of Louisville v. Seifert, 21 Ky. L. R. 328, 51 S. W. 310; Schuett v. City of Stillwater, 80 Minn. 287, 83 N. W. 180. It is the duty of the city to take care of surface water so as to avoid injury to private property, accumulated because of street grading, when this can be done and at a reasonable expense. Carson v. City of Springfield, 53 Mo. App. 289; Bowman v. City of Omaha, 59 Neb. 84, 80 N. W. 259. Liability for death of child in pond partly within the city street. Schumacher v. City of New York, 166 N. Y. 103, 59 N. E. 773; City of Comanche v. Zettlemoyer (Tex. Civ. App.) 40 S. W. 641; Powell v. Town of Wytheville, 95 Va. 73, 27 S. E. 805; Spelman v. City of Portage, 41 Wis. 144. But see Collins v. City of Waltham, 151 Mass. 196, 24 N. E. 327; Rychlicki v. City of St. Louis, 115 Mo. 662, 22 S. W. 908. See, also, §§ 977 et seq., ante.

[207] Arndt v. City of Cullman, 132 Ala. 540, 31 So. 478; Geurkink v. City of Petaluma, 112 Cal. 306, 44 Pac. 570; Aicher v. City of Denver, 10 Colo. App. 413, 52 Pac. 86; Ivey v. City of Macon, 102 Ga. 141; City of Peoria v. Crawl, 28 Ill. App. 154,

by reason of the negligent construction or plan of an improvement, a liability will follow. A distinction seems to be made in this line of cases between an accumulation and diversion and a mere shifting of the flow of surface waters as they ordinarily gather upon the surface of the ground. In the latter case no liability seems to result.[208]

§ 1001. 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 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,[209] questions of proximate cause,[210] notice to the corporation,[211] contributory negligence,[212] special injury to the one

City of Aurora v. Reed, 57 Ill. 29; City of Effingham v. Surrells, 77 Ill. App. 460; City of New Albany v. Lines, 21 Ind. App. 380, 51 N. E. 346; Rice v. City of Flint, 67 Mich. 401, 34 N. W. 719; Pye v. City of Mankato, 36 Minn. 373, 31 N. W. 863; Taubert v. City of St. Paul, 68 Minn. 519; Barnes v. City of Hannibal, 71 Mo. 449; City of Beatrice v. Leary, 45 Neb. 149; Andrews v. Village of Steele City, 2 Neb. Unoff, 676, 89 N. W. 739; McCarthy v. Village of Far Rockaway, 3 App. Div. 379, 38 N. Y. Supp. 989; Schumacher v. City of York, 166 N. Y. 103, 59 N. E. 773; Bohan v. Avoca Borough, 154 Pa. 404, 26 Atl. 604; City of Houston v. Bryan, 21 Tex. Civ. App. 553, 22 S. W. 231. But see Noble v. Village of St. Albans, 56 Vt. 522. See, also, §§ 977 et seq., ante.

[208] Downs v. City of Ansonia, 73 Conn. 33, 46 Atl. 243; City of Atlanta v. Word, 78 Ga. 276; Hirth v. City of Indianapolis, 18 Ind. App. 673, 48 N. E. 876; Hoffman v. City of Muscatine, 113 Iowa, 332, 85 N. W. 17; Alden v. Minneapolis, 24 Minn. 254; Imler v. City of Springfield, 55 Mo. 119; Cannon v. City of St. Joseph, 67 Mo. App. 367; Rutherford v. Village of Holley, 105 N. Y. 632, 11 N. E. 818; Heth v. City of Fond du Lac, 63 Wis. 228.

[209] See §§ 1031 and 1060, post.

[210] See §§ 952, ante, and 993, and 1059, post.

[211] See §§ 1033 et seq., post.

[212] See §§ 1043 et seq., post.

claiming damages,[213] whether the way is urban or suburban and others which have been or will be suggested in the preceding and following sections. As already stated, the decisions are many and a few only of the leading and latest authorities will be cited.

§ 1002. Lights.

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.[214] 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.[215] The modifications of the rule first stated in the section are not important or usual and if such a duty should be held as existing, it is in common with others affected by the considerations named in the preceding section. What will be regarded as an insufficient or negligent lighting of a business street in a densely populated city would be considered as more than necessary in respect to a street in an outlying district of the same city or an urban highway.[216] 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.[217]

[213] See §§ 952 and 993, ante.

[214] City of Halifax v. Lordly, 20 Can. Sup. Ct. R. 505; Oliver v. City of Denver, 13 Colo. App. 345, 57 Pac. 729; Gaskins v. City of Atlanta, 73 Ga. 746; City of Vincennes v. Thuis, 28 Ind. App. 523, 63 N. E. 315; Randall v. Eastern R. Co., 106 Mass. 276; Lyon v. City of Cambridge, 136 Mass. 419; O'Rourke v. City of New York, 17 App. Div. 349, 45 N. Y. Supp. 261; Monongahela City v. Fischer, 111 Pa. 9.

[215] City of Freeport v. Isbell, 83 Ill. 440; 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; Collett v. City of New York, 51 App. Div. 394, 64 N. Y. Supp. 693; Canavan v. City of Oil City, 183 Pa. 611, 38 Atl. 1096; City of Winchester v. Carroll, 99 Va. 727, 40 S. E. 37.

[216] City of Columbus v. Sims, 94 Ga. 483, 20 S. 322; City of Chicago v. Apel, 50 Ill. App. 133; City of Chicago v. McDonald, 57 Ill. App. 250; Van Wie v. City of Mount Vernon, 26 App. Div. 330, 49 N. Y. Supp. 779; O'Rourke v. City of Sioux Falls, 4 S. D. 47, 54 N. W. 1044, 19 L. R. A. 789.

[217] King v. City of Cleveland, 28 Fed. 835; City of Indianapolis v. Marold, 25 Ind. App. 428, 58 N. E. 512; Kansas City v. Birmingnam, 45 Kan. 212, 25 Pac. 569; Kimball

§ 1003. Barriers and railings.

The duty is also imposed in many instances of maintaining barriers and railings as a means of protection to travelers in dangerous places,[218] embankments,[219] approaches to or on bridges,[220] or

v. City of Bath, 38 Me. 219; 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; Baker v. City of Grand Rapids, 111 Mich. 447, 69 N. W. 740. Negligence, question for jury. Miller v. City of St. Paul, 38 Minn. 134, 36 N. W. 271; Davenport v. City of Hannibal, 108 Mo. 471, 18 S. W. 1122; Village of Seneca Falls v. Zalinski, 8 Hun (N. Y.) 571; Van Vranken v. Village of Clifton Springs, 86 Hun, 67, 33 N. Y. Supp. 329; Snowden v. Town of Somerset, 171 N. Y. 99, 63 N. E. 952; Foy v. City of Winston, 126 N. C. 381, 35 S. E. 609. See § 1003, post.

[218] Robbins v. Chicago City, 71 U. S. (4 Wall.) 657; City of Chicago v. McDonald, 57 Ill. App. 250; City of Chicago v. Baker, 95 Ill. App. 413; Town of Worthington v. Morgan, 17 Ind. App. 603; Wetmore Tp. v. Chamberlain, 64 Kan. 327, 67 Pac. 845. Bridge while being repaired. Wakeham v. St. Clair Tp., 91 Mich. 15, 51 N. W. 696; Pratt v. Amherst, 140 Mass. 167. Question for jury. Lineburg v. City of St. Paul, 71 Minn. 245, 73 N. W. 723; City of Ord v. Nash, 50 Neb. 335; Tompkins v. City of Oswego, 61 Hun, 619, 15 N. Y. Supp. 371; Coney v. Town of Gilboa, 55 App. Div. 111, 67 N. Y. Supp. 116. Question for jury. Lane v. Town of Hancock, 142 N. Y. 510, 37 N. E. 473. The financial ability of a town is material. Wellman v. Borough of Susquehanna Depot, 167 Pa. 239, 31 Atl. 566; Trexler v. Greenwich Tp., 168 Pa. 214, 31 Atl. 1090; Davis v. Snyder Tp., 196 Pa. 273, 46 Atl. 301; City of San Antonio v. Porter, 24 Tex. Civ. App. 444, 59 S. W. 922; Peacock v. City of Dallas, 89 Tex. 438; Orme v. City of Richmond, 79 Va. 86. But see Beardsley v. City of Hartford, 50 Conn. 529; Scannal v. City of Cambridge, 163 Mass. 91, 39 N. E. 790; City of Denison v. Warren (Tex. Civ. App.) 36 S. W. 296; Hein v. Village of Fairchild, 87 Wis. 258.

[219] City of Manchester v. Ericson, 105 U. S. 347. Question for jury. City of Wyandotte v. Gibson, 25 Kan. 236; Woods v. Inhabitants of Groton, 111 Mass. 357; Malloy v. Walker Tp., 77 Mich. 448, 43 N. W. 1012, 6 L. R. A. 695; Bryant v. Town of Randolph, 60 Hun, 581, 14 N. Y. Supp. 844. Question for jury. Glasier v. Town of Hebron, 82 Hun, 311, 31 N. Y. Supp. 236. Where a highway is seventeen feet wide and level, no barrier is required. Kitchen v. Union Tp., 171 Pa. 145, 33 Atl. 76. But see Knowlton v. City of Augusta, 84 Me. 572, 24 Atl. 1039; Logan v. City of New Bedford, 157 Mass. 534, 32 N. E. 910; Waller v. Town of Hebron, 5 App. Div. 577, 39 N. Y. Supp. 381; Patchen v. Town of Walton, 17 App. Div. 158, 45 N. Y. Supp. 145.

[220] City of Chicago v. Wright, 68 Ill. 586; Van Winter v. Henry County, 61 Iowa, 684; Faulk v. Iowa County, 103 Iowa, 442, 72 N. W.

in the vicinity of excavations,[221] or while repairs are being made.[222] 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. A liability does not ordinarily attach for a failure to maintain barriers and railings of such a character or in such a place to guard against accidents occurring by reason of unmanageable, runaway, or frightened horses,[223] or where there is no dangerous place near enough to be reached without straying.[224]

757; City of Rosedale v. Golding, 55 Kan. 167, 40 Pac. 284; Hand v. Inhabitants of Brookline, 126 Mass. 324; Lauder v. St. Clair Tp., 125 Mich. 479, 85 N. W. 4; Grant v. City of Brainerd, 86 Minn. 126 90 N. W. 307; Norris v. Litchfield, 35 N. H. 271; Pelkey v. Town of Saranac, 67 App. Div. 337, 73 N. Y. Supp. 493; Strader v. Monroe County, 202 Pa. 626, 51 Atl. 1100; Gulf, C. & S. F. R. Co. v. Sandifer, 29 Tex. Civ. App. 356, 69 S. W. 461; Fidelity & Casualty Co. v. City of Seattle, 16 Wash. 445, 47 Pac. 963. But see Moody v. Town of Bristol, 71 Vt. 473, 45 Atl. 1038.

[221] City of Chicago v. Baker, 195 Ill. 54, 62 N. E. 892; Puffer v. Inhabitants of Orange, 122 Mass. 389. But the dangerous place must be near the highway. Noll v. City of Seattle, 29 Wash. 28, 69 Pac. 382. But see Goodin v. City of Des Moines, 55 Iowa, 67.

[222] D'Amico v. City of Boston, 176 Mass. 599, 58 N. E. 158; Jones v. Collins, 177 Mass. 444, 59 N. E. 64; Cartwright v. Town of Belmont, 58 Wis. 370.

[223] City of Hannibal v. Campbell (C. C. A.) 86 Fed. 297; Swart v. District of Columbia, 17 App. D. C. 407; City of Rockford v. Russell, 9 Ill. App. 229. Question for jury. Moss v. City of Burlington, 60 Iowa, 438; Hudson v. Inhabitants of Marlborough, 154 Mass. 218, 28 N. E. 147; Richardson v. City of Boston, 156 Mass. 145, 30 N. E. 478; Cook v. City of Charlestown, 98 Mass. 80; Higgins v. City of Boston, 148 Mass. 484, 20 N. E. 105; Tisdale v. Town of Bridgewater, 167 Mass. 248. Question for jury. Stacy v. Town of Phelps, 47 Hun (N. Y.) 54; Hubbell v. City of Yonkers, 104 N. Y. 434, 10 N. E. 858; Glasier v. Town of Hebron, 131 N. Y. 447, 30 N. E. 239, 579, reversing 62 Hun, 137, 16 N. Y. Supp. 503; Borough of Pittston v. Hart, 89 Pa. 389; Heister v. Fawn Tp., 189 Pa. 253, 42 Atl. 121; City of San Antonio v. Porter, 24 Tex. Civ. App. 444, 59 S. W. 922; Gulf, C. & S. F. R. Co. v. Sandifer, 29 Tex. Civ. App. 356, 64 S. W. 461. But see Ward v. Town of North Haven, 43 Conn. 148; Wilson v. City of Atlanta, 60 Ga. 473; City of Danville v. Makemson, 32 Ill. App. 112; Hinckley v. Town of Somerset, 145 Mass. 326, 14 N. E. 166; Stone v. Inhabitants of Hubbardston, 100 Mass. 49; Hey v. City of Philadelphia, 81 Pa. 44; White v. City of Ballard, 19 Wash. 284, 53 Pac. 159; Taylor v. City of Ballard, 24 Wash. 191, 64 Pac. 143; Olson v. City of Chippewa Falls, 71 Wis. 558, 37 N. W. 575.

[224] Warner v. Inhabitants of Holy-

§ 1004. Obstructions.

The duty to maintain public highways in a reasonably safe condition for proper and ordinary travel includes the obligation to keep them free from unnecessary and unlawful obstructions.[225] 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

oke, 112 Mass. 362. Question for jury. Puffer v. Inhabitants of Orange, 122 Mass. 389; Daily v. City of Worcester, 131 Mass. 452; Dehanitz v. City of St. Paul, 73 Minn. 385, 76 N. W. 48; Goeltz v. Town of Ashland, 75 Wis. 642, 44 N. W. 770.

[225] City of New York v. Sheffield, 71 U. S. (4 Wall.) 189; City of Cleveland v. King, 132 U. S. 295; District of Columbia v. Boswell, 6 App. D. C. 402. Gas box on sidewalk. City of Birmingham v. Tayloe, 105 Ala. 170, 16 So. 576; Anderson v. City of Wilmington, 2 Pen. (Del.) 28, 43 Atl. 841; Michigan City v. Boeckling, 122 Ind. 39, 23 N. E. 518; Rowel v. Williams, 29 Iowa, 210; Herries v. City of Waterloo, 114 Iowa, 374, 86 N. W. 306; Osage City v. Larkin, 40 Kan. 206, 19 Pac. 658, 2 L. R. A. 56; City of Henderson v. Burke, 19 Ky. L. R. 1781, 44 S. W. 422; City of Glasgow v. Gillenwaters, 23 Ky. L. R. 2375, 67 S. W. 381; Clark v. Inhabitants of Lebanon, 63 Me. 393; Farrell v. Inhabitants of Oldtown, 69 Me. 72; Tilton v. Inhabitants of Wenham, 172 Mass. 407, 52 N. E. 514; Pratt v. Inhabitants of Cohasset, 171 Mass. 188, 59 N. E. 79; Talbot v. Taunton, 140 Mass. 552; Sebert v. City of Alpena, 78 Mich. 165, 43 N. W. 1098. Stump in highway. Hayes v. City of West Bay City, 91 Mich. 418, 51 N. W. 1067. The failure to properly light a building being moved creates a liability. McCool v. City of Grand Rapids, 58 Mich. 41; Langworthy v. Green Tp., 88 Mich. 207, 50 N. W. 130; Gerdes v. Christopher & Simpson Architectural Iron & Foundry Co. (Mo.) 27 S. W. 615. It is actionable negligence as a matter of law for a manufacturer to obstruct for weeks the street in front of his premises for the purpose of receiving and discharging goods.

Fairgrieve v. City of Moberly, 39 Mo. App. 31; May v. City of Anaconda, 26 Mont. 140, 66 Pac. 759; Downes v. Town of Hopkinton, 67 N. H. 456; Kunz v. City of Troy, 104 N. Y. 344, 10 N. E. 442. Counter placed on a sidewalk. Wilson v. Town of Spafford, 57 Hun, 589, 10 N. Y. Supp. 649. Pile of stones. Shook v. City of Cohoes, 108 N. Y. 648, 15 N. E. 531; Gulliver v. Blauvelt, 14 App. Div. 523, 43 N. Y. Supp. 935. Cow tethered in highway. Embler v. Town of Wallkill, 132 N. Y. 222, 30 N. E. 404; Farley v. City of New York, 152 N. Y. 222, 46 N. E. 506; Dillon v. City of Raleigh, 124 N. C. 184; Heckman v. Evenson, 7 N. Dak. 173, 73 N. W. 427. Question for jury. Schaeffer v. Jackson Tp., 150 Pa. 145, 24 Atl. 629, 18 L. R. A. 100; Trego v. Honeybrook

injuries caused by them can create no liability.[226] Shade trees,[227]

Borough, 160 Pa. 76, 28 Atl. 639. Stump. City of Galveston v. Gonzales, 6 Tex. Civ. App. 538, 25 S. W. 978. Lumber pile. City of Palestine v. Hassell, 15 Tex. Civ. App. 519, 40 S. W. 147; City of Petersburg v. Todd (Va.) 24 S. E. 232; Saylor v. City of Montesano, 11 Wash. 328, 39 Pac. 653; Adams v. City of Oshkosh, 71 Wis. 49, 36 N. W. 614; Prideaux v. City of Mineral Point, 43 Wis. 513; Slivitzki v. Town of Wien, 93 Wis. 460, 67 N. W. 730; Bills v. Town of Kaukauna, 94 Wis. 310, 68 N. W. 992. Wire fence. Carpenter v. Town of Rolling, 107 Wis. 559, 83 N. W. 953; Raymond v. Keseberg, 84 Wis. 302, 19 L. R. A. 643; Boltz v. Town of Sullivan, 101 Wis. 608. But see Simon v. City of Atlanta, 67 Ga. 618; Sin Clair v. City of Baltimore, 59 Md. 592.

Bowes v. City of Boston, 155 Mass. 344, 29 N. E. 633, 15 L. R. A. 365. City not liable for accident caused by horses taking fright at the scraping sound of a vehicle against a stone in the road. Agnew v. City of Corunna, 55 Mich. 428. Boulder temporarily on highway not regarded as a defect. Jackson Tp. v. Wagner, 127 Pa. 184, 17 Atl. 903; Cairncross v. Village of Pewaukee, 86 Wis. 181, 56 N. W. 648. Steam launch in street. As to liability for damages caused by obstructions in a highway placed by private persons or the elements, see the following: Frost v. Inhabitants of Portland, 11 Me. 271; Willard v. City of Cambridge, 85 Mass. (3 Allen) 574; Griffin v. Sanbornton, 44 N. H. 246. But see District of Columbia v. Moulton, 182 U. S. 576. "No other notice to travelers of the presence of a steam roller on a street is needed than a view of the roller itself when it can be seen in ample time to avoid it."

[226] Oliver v. City of Denver, 13 Colo. App. 345, 57 Pac. 729; Herries v. City of Waterloo, 114 Iowa, 374, 86 N. W. 306; City of Wellington v. Gregson, 31 Kan. 99; 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. Question for jury; road scraper left by highway authorities near road. Jordan v. City of New York, 26 Misc. 53, 55 N. Y. Supp. 716; McLaughlin v. City of Philadelphia, 142 Pa. 80, 21 Atl. 754; City of Galveston v. Dazet (Tex.) 19 S. W. 142; Belvin v. City of Richmond, 85 Va. 574, 8 S. E. 378, 1 L. R. A. 807. No liability where rope is placed across a public street by order of the judge of the state court. Jochem v. Robinson, 72 Wis. 199, 39 N. W. 383, 1 L. R. A. 178. Use of sidewalk by loading skid.

[227] City of Wellington v. Gregson, 31 Kan. 99. The court held that a post put to protect a tree within a foot or two of the traveled track of the city street was not an obstruction. In the decision it was said: "It is a familiar fact that in all our cities lot owners are accustomed to plant shade trees in front of their lots. Many streets are thus rendered beautiful by the long rows on either side. * * * Sometimes these trees are in the sidewalk, but more often just outside the sidewalk in the street proper. Often, especially when the trees are young, they are inclosed with boxes

stepping stones,[228] hitching or lamp posts,[229] hydrants,[230] are the most familiar illustrations of this class. There are also obstructions 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.[231] 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.[232]

or railing, to prevent their injury by straying cattle or passing teams. Can it be that permitting these things is per se negligence on the part of the city; that every time a buggy runs against one of these trees or its protection, the city is liable for all injuries, unless the driver was also negligent? Cannot a party put a hitching post in front of his residence without exposing the city to a charge of negligence, unless he has placed it more than a carriage width from the traveled track? * * * * The question is not whether a city may grant permission to one to occupy the streets with trees, and railing, and posts, but whether the city must keep its streets and all its streets free from all such objects, or be held always, as matter of law, guilty of negligence and liable for all injuries resulting therefrom."

Chase v. City of Lowell, 151 Mass. 422, 24 N. E. 212. A city is liable for injuries caused by the falling of trees standing in public street. Washburn v. Inhabitants of Easton, 172 Mass. 525, 52 N. E. 1070; Ring v. City of Cohoes, 77 N. Y. 83; Dougherty v. Village of Horseheads, 159 N. Y. 154, 53 N. E. 799; Worrilow v. Upper Chichester Tp., 149 Pa. 40, 24 Atl. 85; Watkins v. County Court, 30 W. Va. 657, 5 S. E. 654. No liability for injury received in the falling of a dead tree within five feet of the public road.

[228] Tiesler v. Town of Norwich, 73 Conn. 199, 47 Atl. 161; City of Cincinnati v. Fleischer, 63 Ohio St. 229, 58 N. E. 568; Robert v. Powell, 168 N. Y. 411, 61 N. E. 699, 55 L. R. A. 775; DuBois v. City of Kingston, 102 N. Y. 219.

[229] Village of Bureau Junction v. Long, 56 Ill. App. 458; 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; Macomber v. City of Taunton, 100 Mass. 255.

[230] City of Vincennes v. Thuis, 28 Ind. App. 523, 63 N. E. 315; Archer v. City of Mt. Vernon, 57 App. Div. 1040, 67 N. Y. Supp. 1040; Ring v. City of Cohoes, 77 N. Y. 83; 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; City of Scranton v. Catterson, 94 Pa. St. 202; Wilkins v. Village of Rutland, 61 Vt. 336, 17 Atl. 735; King v. City of Oshkosh, 75 Wis. 517, 44 N. W. 745.

[231] See §§ 828 et seq., 864 et seq., 886 et seq.

[232] City of Cleveland v. King, 132 U. S. 295; Lewis v. City of Atlanta, 77 Ga. 756; Kansas City v. McDonald, 60 Kan. 481, 57 Pac. 123, 55 L. R. A. 429; Joslyn v. City of Detroit, 74 Mich. 458, 42 N. W. 50;

§ 1005. Same subject; accumulation of rubbish.

Negligence may arise in a maintenance of streets through a failure to remove accumulations of rubbish,[233] whether caused by natural or artificial means,[234] by the corporation itself or private persons.[235]

§ 1006. 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 [236] or its removal from the surface when of such a character

Pueschell v. Kansas City Wire & Iron Works, 79 Mo. App. 459. But it is not necessary to keep the portion of the street so used for building material in a proper condition for public travel or a playground for children. Rommeney v. City of New York, 49 App. Div. 64, 63 N. Y. Supp. 186; Koch v. City of Williamsport, 195 Pa. 488, 46 Atl. 67; Hundhausen v. Bond, 36 Wis. 29. But see Raymond v. Keseberg, 84 Wis. 302, 54 N. W. 612, 19 L. R. A. 643.

[233] Hazzard v. City of Council Bluffs, 79 Iowa, 106, 44 N. W. 219; Hall v. City of Cadillac, 114 Mich. 99; Heckman v. Evenson, 7 N. D. 173; Frazier v. Borough of Butler, 172 Pa. 407, 33 Atl. 691; Archer v. Town of Johnson City (Tenn.) 64 S. W. 474; City of El Paso v. Dolan (Tex. Civ. App.) 25 S. W. 669; City of Galveston v. Reagan (Tex. Civ. App.) 43 S. W. 48.

[234] Hazard v. City of Council Bluffs, 87 Iowa, 51, 53 N. W. 1083; City of Springfield v. Spence, 39 Ohio St. 665.

[235] 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.

[236] City of Providence v. Clapp, 17 How. (U. S.) 161; Congdon v. City of Norwich, 37 Conn. 414. Question for jury. Seeley v. Town of Litchfield, 49 Conn. 134. In respect to nature of duty. Savage v. City of Bangor, 40 Me. 176; Rogers v. Inhabitants of Newport, 62 Me. 101; Ellis v. City of Lewiston, 89 Me. 60, 35 Atl. 1016; Fortin v. Inhabitants of Easthampton, 145 Mass. 196, 13 N. E. 599; Harris v. Inhabitants of Newbury, 128 Mass. 321; Murphy v. City of Worcester, 159 Mass. 546, 34 N. E. 1080; Spaulding v. Town of Beverly, 167 Mass. 149, 45 N. E. 1; Nebraska City v. Rathbone, 20 Neb. 288; 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. Smith v. City of Brooklyn, 36 Hun (N. Y.) 224; Wyman v. City of Philadelphia, 175 Pa. 117; Templeton v. Warriorsmark Tp., 200 Pa. 165, 49 Atl. 950; Barton v. Town of Montpelier, 30 Vt. 650; McCabe v. Town of Hammond, 34 Wis. 590. Question for jury. Fife v. City of Oshkosh, 89 Wis. 540, 62 N. W. 541; Hyer v. City of Janesville, 101 Wis. 371, 77 N. W. 729. Reasonable care does not require a walk to be scraped. But see McKellar v. City

as to cause a dangerous and slippery condition.[237] This duty, it will be readily seen, varies with climatic conditions [238] and the financial ability of the corporation to remove frequent or constant falls of snow or sleet.[239] The existence of the duty is also dependent upon the character of the accumulation whether natural or artificial. In northern latitudes frequent falls of snow or sleet may cause obstructions or a dangerous condition even when left

of Detroit, 57 Mich. 158; Hutchinson v. City of Ypslanti, 103 Mich. 12, 61 N. W. 279. See, also, § 1021, post.

[237] Smith v. City of Chicago, 38 Fed. 388; Gaylord v. City of New Britain, 58 Conn. 398, 20 Atl. 365; City of Hartford v. Talcott, 48 Conn 525; Wood v. Borough of Stafford Springs, 74 Conn. 437, 51 Atl. 129; Cloughessey v. City of Waterbury, 51 Conn. 405; City of Virginia v. Plummer, 65 Ill. App. 419; Cosner v. City of Centerville, 90 Iowa, 33; Hodges v. City of Waterloo, 109 Iowa, 444, 80 N. W. 523; Newton v. City of Worcester, 174 Mass. 181; Rolf v. City of Greenville, 102 Mich. 544, 61 N. W. 3; Wesley v. City of Detroit, 117 Mich. 658; Waltemeyer v. Kansas City, 71 Mo. App. 354; Taylor v. City of Yonkers, 105 N. Y. 202, 11 N. E. 642; Gardner v. Wasco County, 37 Or. 392, 61 Pac. 834, 62 Pac. 753. Question for jury. Decker v. City of Scranton, 151 Pa. 241, 25 Atl. 36; Scoville v. Salt Lake City, 11 Utah, 60, 39 Pac. 481; Ziegler v. City of Spokane, 25 Wash. 439, 65 Pac. 752; Paulson v. Town of Pelican, 79 Wis. 445, 48 N. W. 715; Byington v. City of Merrill, 112 Wis. 211, 88 N. W. 26. No liability under Rev. St. 1898, § 1339 as amended by Laws 1899, c. 305, unless an accumulation of ice and snow has existed for three weeks before the damage occurred. Koch v. City of Ashland, 88 Wis. 603, 60 N. W. 990. But see Henkes v. City of Minneapolis, 42 Minn. 530, 44 N. W. 1026; Levasseur v. Village of Haverstraw, 63 Hun, 627, 18 N. Y. Supp. 237; Chase v. City of Cleveland, 44 Ohio St. 505; Borough of Mauch Chunk v. Kline, 100 Pa. 119. See, also, § 1021, post.

[238] McDonald v. City of Toledo, 63 Fed. 60; D'Estimonville v. City of Montreal, 18 Rap. Jud. Que. C. S. 470; Burr v. Town of Plymouth, 48 Conn. 460; Spillane v. City of Fitchburg, 177 Mass. 87, 58 N. E. 176; O'Hara v. City of Brooklyn, 57 App. Div. 176, 68 N. Y. Supp. 210; Berger v. City of New York, 65 App. Div. 394, 73 N. Y. Supp. 74; Dorn v. Town of Oyster Bay, 158 N. Y. 731, 53 N. E. 1124; Scoville v. Salt Lake City, 11 Utah, 60, 39 Pac. 481; City of Lynchburg v. Wallace, 95 Va. 640, 29 S. E. 675.

[239] Rooney v. Randolph, 128 Mass. 580; Hayes v. City of Cambridge, 136 Mass. 402; Battersby v. New York (N. Y.) 7 Daly, 16; Crawford v. City of New York, 86 App. Div. 107, 74 N. Y. Supp. 261; Spear v. Town of Lowell, 47 Vt. 692. But see Lindsay v. City of Des Moines, 68 Iowa, 368. Whether a city has greater or less area of sidewalks is immaterial on the question of its liability for want of proper care in keeping them free from snow and ice.

as naturally deposited. No liability arises under such circumstances.[240] 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.[241] The duty of keeping sidewalks free

[240] City of Chicago v. Richardson, 75 Ill. App. 198; Smyth v. City of Bangor, 712 Me. 249; Mason v. City of Boston, 96 Mass. 508; McGuinness v. City of Worcester, 169 Mass. 272, 35 N. E. 1068; Newton v. City of Worcester, 169 Mass. 516, 48 N. E. 274; 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; Harrington v. City of Buffalo, 50 Hun, 601, 2 N. Y. Supp. 333; 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. Kleng v. City of Buffalo, 72 Hun, 541, 25 N. Y. Supp. 445; Peard v. City of Mt. Vernon, 83 Hun, 250, 31 N. Y. Supp. 395, affirmed 158 N. Y. 681, 52 N. E. 1125; Anthony v. Village of Glens Falls, 4 App. Div. 218, 38 N. Y. Supp. 536; Staley v. City of New York, 37 App. Div. 598, 56 N. Y. Supp. 237; Taylor v. City of Yonkers, 105 N. Y. 202; Kleng v. City of Buffalo, 156 N. Y. 700, 51 N. E. 1091, affirming 72 Hun, 541, 25 N. Y. Supp. 445; Cook v. City of Milwaukee, 24 Wis. 270; Koepke v. City of Milwaukee, 112 Wis. 475, 88 N. W. 238; City of De Pere v. Hibbard, 104 Wis. 666, 80 N. W. 933; Dapper v. City of Milwaukee, 107 Wis. 88, 82 N. W. 725. See, also, § 1021, post.

[241] Town of Cornwall v. Derochie, 24 Can. Sup. Ct. R. 301; City of Boulder v. Niles, 9 Colo. 415, 12 Pac. 632; McQueen v. City of Elkhart, 14 Ind. App. 671, 43 N. E. 460; Huston v. City of Council Bluffs, 101 Iowa, 33, 69 N. W. 1130, 36 L. R. A. 211; Magaha v. City of Hagerstown, 95 Md. 62, 51 Atl. 832; Carville v. Inhabitants of Westford, 163 Mass. 544, 40 N. E. 893; McGowan v. City of Boston, 170 Mass. 384, 49 N. E. 633; Bailey v. City of Cambridge, 174 Mass. 188, 54 N. E. 523; Leahan v. Cochran, 178 Mass. 566, 60 N. E. 382, 53 L. R. A. 891; Davis v. Rich, 180 Mass. 235, 62 N. E. 375; Hughes v. City of Lawrence, 160 Mass. 474, 36 N. E. 485; Reedy v. St. Louis Brewing Ass'n, 161 Mo. 523, 61 S. W. 859, 53 L. A. R. 805; Foxworthy v. City of Hastings, 25 Neb. 133, 41 N. W. 132; Corbett v. City of Troy, 25 N. Y. State Rep. 520, 6 N. Y. Supp. 381; Conklin v. City of Elmira, 11 App. Div. 402, 42 N. Y. Supp. 518; Mosey v. City of Troy, 61 Barb. (N. Y.) 580; Pomfrey v. Village of Saratoga Springs, 104 N. Y. 459; Gillrie v. City of Lockport, 122 N. Y. 403, 25 N. E. 357; Tremblay v. Harmony Mills, 171 N. Y. 598, 61 N. E. 501, affirming 57 App. Div. 630, 68 N. Y. Supp. 1150; Miller v. City of Bradford, 186 Pa. 164, 40 Atl. 409; Hampson v. Taylor, 15 R. I. 83; McCloskey v. Moies, 19 R. I. 297, 33 Atl. 225; Scoville v. Salt Lake City, 11 Utah, 60, 39 Pac. 481; Hill v. City of Fond du Lac, 56 Wis. 242. But see Gavett v. City of Jackson, 109 Mich. 408, 67 N. W. 517, 32

from snow may be imposed by statute or ordinance upon the abutting owner.[242]

§ 1007. Same subject; 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.[243] The construction, therefore, of a building or any portion of it [244] 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 duty is imposed upon the public authorities to cause it to be removed and if there is a failure in the proper performance of this duty resulting in injury, damages can be recovered. 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,[245] awnings [246] and the like.[247] And

L. R. A. 861; Chamberlain v. City of Oshkosh, 84 Wis. 289, 54 N. W. 618, 19 L. R. A. 513; Beaton v. City of Milwaukee, 97 Wis. 416, 73 N. W. 53.

[242] Inhabitants of Easthampton v. Hill, 162 Mass. 302, 38 N. E. 502; Taylor v. Lake Shore & M. S. R. Co., 45 Mich. 74; City of St. Louis v. Connecticut Mut. Life Ins. Co., 107 Mo. 92, 17 S. W. 637; Norton v. City of St. Louis, 97 Mo. 537, 11 S. W. 242; State v. Jackman, 69 N. H. 318, 41 Atl. 347, 42 L. R. A. 438; City of Lincoln v. Janesch, 63 Neb. 707, 89 N. W. 280, 56 L. R. A. 762; Pomfrey v. Village of Saratoga Springs, 104 N. Y. 459, 11 N. E. 43; Taylor v. City of Yonkers, 105 N. Y. 202, 11 N. E. 642; Heeney v. Sprague, 11 R. I. 456; Calder v. City of Walla Walla, 6 Wash. 377, 33 Pac. 1054. But see City of Chicago v. O'Brien, 111 Ill. 532; State v. Jackman, 69 N. H. 318, 41 Atl. 347, 42 L. R. A. 438. Where such an ordinance was held valid not being an unreasonable exercise of the police power.

[243] But see Pennsylvania Co. v. City of Chicago, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223.

[244] Kies v. City of Erie, 169 Pa. 598, 32 Atl. 621.

[245] Gray v. City of Emporia, 43 Kan. 704, 23 Pac. 944; Champlin v. Village of Penn Yan, 34 Hun (N. Y.) 33. But see Hewison v. City of New Haven, 34 Conn. 136; Jones v. City of Boston, 104 Mass. 75; Taylor v. Peckham, 8 R. I. 349.

[246] Larson v. City of Grand Forks, 3 Dak. 307; Day v. Inhabitants of Milford, 87 Mass. (5 Allen) 98; Drake v. City of Lowell, 54 Mass. (13 Metc.) 292; Bohen v. City of Waseca, 32 Minn. 176; Hume v. City of New York, 47 N. Y. 639; Id., 74 N. Y. 264; Bieling v. City of Brooklyn, 120 N. Y. 98, 24 N. E. 389.

[247] Grove v. City of Ft. Wayne, 45

the rule also supplies to structures in a dangerous condition on or near the street.[248]

§ 1008. 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.[249] Where, however, their use is duly authorized, they then become defects only when by reason of their location [250] or of their condition [251] they constitute a menace to the safety of travelers.

§ 1009. Excavations or depressions.

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

Ind. 429; Borough of Norristown v. Moyer, 67 Pa. 355. But see City of Anderson v. East, 117 Ind. 126, 19 N. E. 726, 2 L. R. A. 712.

[248] City of Chicago v. Major, 18 Ill. 349. Defective city water tank. City of Chicago v. Smith, 95 Ill. App. 335. Defective arch across street. Langan v. City of Atchison, 35 Kan. 318, 11 Pac. 38. Bill board near sidewalk. Nesbitt v. City of Greenville, 69 Miss. 22, 10 So. 452; Grogan v. Broadway Foundry Co., 87 Mo. 321. But see Taylor v. Peckham, 8 R. I. 349.

[249] Young v. Inhabitants of Yarmouth, 75 Mass. (9 Gray) 386; 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, affirming 37 App. Div. 307, 55 N. Y. Supp. 850. No liability for death caused by falling wire negligently strung by the city. See § 833, ante.

[250] Atkinson v. City of Chatham, 26 Ont. App. 521; 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; Roberts v. Wisconsin Tel. Co., 77 Wis. 589, 46 N. W. 800.

[251] District of Columbia v. Dempsey, 13 App. D. C. 533; City of Sterling v. Schiffmacher, 47 Ill. App. 141; City of Decatur v. Hamilton, 89 Ill. App. 561; Burns v. City of Emporia, 63 Kan. 285, 65 Pac. 260; Bourget v. City of Cambridge, 159 Mass. 388, 34 N. E. 455; Neuert v. City of Boston, 120 Mass. 338;

warned of their existence [252] or if the excavations are not properly lighted,[253] protected or guarded,[254] a liability will follow. An interesting question frequently arises in respect to liability arising

Fisher v. City of Mt. Vernon, 41 App. Div. 293, 58 N. Y. Supp. 499. Question for jury. Twist v. City of City of Rochester, 165 N. Y. 619, 59 N. E. 1131; Mooney v. Borough of Luzerne, 186 Pa. 161, 40 Atl. 311, 40 L. R. A. 811.

[252] Sherwood v. District of Columbia, 3 Mackay (D. C.) 276. Well in highway. Norwood v. City of Somerville, 159 Mass. 105; Gilchrist v. City of South Omaha, 36 Neb. 163; Sherman v. Village of Oneonta, 66 Hun, 629, 21 N. Y. Supp. 137; Foy v. City of Winston, 126 N. C. 381, 35 S. E. 609; Seamons v. Fitts, 20 R. I. 443, 40 Atl. 3; Boyle v. Borough of Hazleton, 171 Pa. 167, 33 Atl. 142. But see O'Rourke v. City of Monroe, 98 Mich. 520; Bowen v. City of Huntington, 35 W. Va. 682, 14 S. E. 217; Gibson v. City of Huntington, 38 W. Va. 177, 18 S. E. 447, 22 L. R. A. 561. Not liable for caving in of embankment. See note 31 Am. & Eng. Corp. Cas. 40.

[253] City of Birmingham v. Lewis, 92 Ala. 352, 9 So. 243; Cummings v. City of Hartford, 70 Conn. 115, 38 Atl. 916; City of Americus v. Chapman, 94 Ga. 711, 20 S. E. 3; City of Salem v. Webster, 192 Ill. 369, 61 N. E. 323, affirming 95 Ill. App. 120; City of Olathe v. Mizee, 48 Kan. 435, 29 Pac. 754; Butler v. City of Bangor, 67 Me. 385; 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; Clark v. City of Austin, 38 Minn. 487, 38 N. W. 615; Haniford v. Kansas City, 103 Mo. 172, 15 S. W. 753, Myers v. Kansas City, 108 Mo. 480; City of Omaha v. Randolph, 30 Neb. 699, 46 N. W. 1013; Crowther v. City of Yonkers, 60 Hun, 586, 15 N. Y. Supp. 588; Storrs v. City of Utica, 17 N. Y. Supp. 104; Groves v. City of Rochester, 39 Hun (N. Y.) 5; Grant v. City of Brooklyn, 41 Barb. (N. Y.) 381; Blakeslee v. City of Geneva, 61 App. Div. 42, 69 N. Y. Supp. 1122; McAllister v. City of Albany, 18 Or. 426, 23 Pac. 845, Reed v. City of Spokane, 21 Wash. 218, 57 Pac. 803. But see Ball v. City of Independence, 41 Mo. App. 469. No liability where lights have been removed by a wrong doer.

[254] Carstesen v. Town of Stratford, 67 Conn. 428, 35 Atl. 276; Seward v. City of Wilmington, 2 Marv. (Del.) 189, 42 Atl. 451; City of Tallahassee v. Fortune, 3 Fla. 19; Jackson v. City Council of Buena Vista, 88 Ga. 466, 14 S. E. 867; Pfau v. Williamson, 63 Ill. 16; Dooley v. Town of Sullivan, 112 Ind. 451, 14 N. E. 566; Hall v. Town of Manson, 99 Iowa, 698, 68 N. W. 922, 34 L. R. A. 207; Kemper v. City of Burlington, 81 Iowa, 354; Johnson v. Sioux City, 114 Iowa, 137, 86 N. W. 212; Fletcher v. City of Ellsworth, 53 Kan. 751, 37 Pac. 115; Blessington v. City of Boston, 153 Mass. 409, 26 N. E. 1113; Powers v. City of Boston, 154 Mass. 60; City of Boston v. Coon, 175 Mass. 283, 56 N. E. 287; Brydon v. City of Detroit, 117 Mich. 296, 76 N. W. 620; Monje v. City of Grand Rapids, 122 Mich. 645, 81 N. W. 574; City of Grand Rapids v. Van Rossum, 126

from an injury received because of a failure to guard or warn 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.[255] Whether a depression or rut is sufficient to be regarded as a defect is a question of fact for the jury.[256]

§ 1010. Basement or sidewalk openings.

Akin to excavations are cellar,[257] basement[258] and sidewalk openings[259] made by private owners in the public streets under

Mich. 310, 85 N. W. 867; McCune v. Town of Missoula, 10 Mont. 146; City of Omaha v. Jensen, 35 Neb. 68, 52 N. W. 833; Brown v. Town of Louisburg, 126 N. C. 701, 36 S. E. 166; City of Circleville v. Neuding, 41 Ohio St. 465; Overpeck v. City of Rapid City, 14 S. D. 507, 85 N. W. 990; Town of Franklin v. House, 104 Tenn. 1. But see Gallagher v. Proctor, 84 Me. 41, 24 Atl. 459; City of Meridian v. Stainback (Miss.) 30 So. 607; O'Neil v. Bates, 20 R. I. 793, 40 Atl. 236. No liability where a barrier is taken down without authority.

[255] Zettler v. City of Atlanta, 66 Ga. 195; 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; Hawley v. City of Atlantic, 92 Iowa, 172, 60 N. W. 519; MacHugh v. City of St. Paul, 67 Minn. 441, 70 N. W. 5; Bassett v. City of St. Joseph, 53 Mo. 290; Halpin v. Kansas City, 76 Mo. 335; Wiggin v. City of St. Louis, 135 Mo. 558, 37 S. W. 528. Reasonable care is required for the protection of persons from falling into excavations adjacent to a sidewalk but upon private property. Baldwin v. City of Springfield, 141 Mo. 205, 42 S. W. 717. The alleged negligence is one of fact to be determined by the conditions of the case. City of Lincoln v. Beckman, 23 Neb. 677, 37 N. W. 593; City of South Omaha v. Cunningham, 31 Neb. 316, 47 N. W. 930; Kelley v. City of Columbus, 41 Ohio St. 263; City of Oklahoma City v. Meyers, 4 Okl. 686, 46 Pac. 552; Gorr v. Mittelstaedt, 96 Wis. 296, 71 N. W. 656; Boltz v. Town of Sullivan, 101 Wis. 608, 77 N. W. 870.

[256] Brush v. City of New York, 59 App. Div. 12, 69 N. Y. Supp. 51; Sutter v. Young Tp., 130 Pa. 72, 18 Atl. 610; Wiltze v. Town of Tilden, 77 Wis. 152, 46 N. W. 234; Rumrill v. Town of Delafield, 82 Wis. 184, 52 N. W. 261; Burroughs v. City of Milwaukee, 110 Wis. 478, 86 N. W. 159. But see Osterhout v. Town of Bethlehem, 55 App. Div. 198, 66 N. Y. Supp. 845.

[257] Chapman v. City of Macon, 55 Ga. 566; City of Augusta v. Hafers, 59 Ga. 151; City of Augusta v. Hafers, 61 Ga. 48; Village of Evanston v. Fitzgerald, 37 Ill. App. 86; Day v. City of Mt. Pleasant, 70 Iowa, 193, 30 N. W. 853; Lichtenberger v.

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.[260]

§ 1011. Ditches, culverts, catch basins or open sewers.

In the construction of ditches,[261] culverts,[262] catch basins,[263] sewers, or water pipes,[264] their condition as originally made or as

Town of Meriden, 91 Iowa, 45, 58 N. W. 1058; Ledgerwood v. Webster City, 93 Iowa, 726, 61 N. W. 1089; Smith v. City of Leavenworth, 15 Kan. 81. Negligence question for jury. City of Abilene v. Cowperthwait, 52 Kan. 324, 34 Pac. 795; Carrington v. City of St. Louis, 89 Mo. 208, 1 S. W. 240; Sweeney v. Newport, 65 N. H. 86, 18 Atl. 86; Barstow v. City of Berlin, 34 Wis. 357; Smalley v. City of Appleton, 75 Wis. 18.

[258] City of Galesburg v. Higley, 61 Ill. 287; McNerney v. City of Reading, 150 Pa. 611, 25 Atl. 57.

[259] Rider v. Clark, 132 Cal. 382, 64 Pac. 564; City of Denver v. Solomon, 2 Colo. App. 534, 31 Pac. 507; Littlefield v. City of Norwich, 40 Conn. 406; Wickwire v. Town of Angola, 4 Ind. App. 253, 30 N. E. 917; City of Henderson v. Reed, 23 Ky. L. R. 463, 62 S. W. 1039; Betz v. Limingi, 46 La. Ann. 1113; Burt v. City of Boston, 122 Mass. 223; Lynch v. Hubbard, 101 Mich. 43; City of Wabasha v. Southworth, 54 Minn. 79, 55 N. W. 818; Buckley v. Kansas City, 95 Mo. App. 188, 68 S. W. 1069; Grove v. Kansas City, 75 Mo. 672; Sweeney v. City of Butte, 15 Mont. 274, 39 Pac. 286; McNerney v. City of Reading, 150 Pa. 611, 25 Atl. 57; McLeod v. City of Spokane, 26 Wash. 346, 67 Pac. 74; McClure v. City of Sparta, 84 Wis. 269, 54 N. W. 337; Stege v. City of Milwaukee, 110 Wis. 484, 86 N. W. 161. But see Hanscom v. City of Boston, 141 Mass. 242.

[260] Burridge v. City of Detroit, 117 Mich. 557, 42 L. R. A. 684; Hall v. City of Austin, 73 Minn. 134; Dehanitz v. City of St. Paul, 73 Minn. 385; Young v. City of Webb City, 150 Mo. 333; City of Lincoln v. O'Brien, 56 Neb. 761; Temperance Hall Ass'n v. Giles, 33 N. J. Law, 260; City of Greenville v. Britton, 19 Tex. Civ. App. 79; Whitty v. City of Oshkosh, 106 Wis. 87, 81 N. W. 992.

[261] Lewman v. Andrews, 129 Ala. 170, 29 So. 692; Lewis v. Riverside Water Co., 76 Cal. 249, 18 Pac. 314; Davis v. Com'rs of Highways, 143 Ill. 9, 33 N. E. 58; Goucher v. Sioux City, 115 Iowa, 639, 89 N. W. 24; 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 Corsicana v. Tobin, 23 Tex. Civ. App. 492, 57 S. W. 319; City of Galveston v. Posnainsky, 62 Tex. 118; Hart v. Town of Red Cedar, 63 Wis. 634; Donahue v. Town of Warren, 95 Wis. 367, 70 N. W. 305.

[262] City of LaSalle v. Porterfield,

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.[265]

§ 1012. 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,[266] vicious, easily frightened,[267] or in the act of running away.[268] 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

138 Ill. 114, 27 N. E. 937; City of Mt. Vernon v. Lee, 36 Ill. App. 24; City of Elwood v. Addison, 26 Ind. App. 28, 59 N. E. 47; Hodgkins v. Inhabitants of Rockport, 116 Mass. 573; Howard v. Inhabitants of Mendon, 117 Mass. 585; O'Gorman v. Village of Morris, 26 Minn. 267. But see Ford v. Town of Braintree, 64 Vt. 144, 23 Atl. 633.

[263] Buck v. City of Biddeford, 82 Me. 433, 19 Atl. 912; Stone v. City of Troy, 60 Hun, 580, 14 N. Y. Supp. 616; Lloyd v. Village of Walton, 57 App. Div. 288, 67 N. Y. Supp. 929. But see City Council of Sheffield v. Harris, 101 Ala. 564; Lyon v. City of Logansport (Ind. App.) 32 N. E. 582; Buscher v. City of Lafayette, 8 Ind. App. 590, 36 N. E. 371; Bryant v. Inhabitants of Westbrook, 86 Me. 450, 29 Atl. 1109; Wright v. Lancaster, 203 Pa. 276, 52 Atl. 245; Canavan v. City of Oil City, 183 Pa. 611, 38 Atl. 1096; Van Pelt v. Town of Clarksburg, 42 W. Va. 218, 24 S. E. 878.

[264] Wilkins v. City of Wilmington, 2 Marv. (Del.) 132, 42 Atl. 418; City of Champaign v. Patterson, 50 Ill. 61; City of Baltimore v. Pendleton, 15 Md. 12; Lane v. City of Lewiston, 91 Me. 292; Hinckley v. Inhabitants of Barnstable, 109 Mass. 126; Post v. Boston, 141 Mass. 189; Lincoln v. City of Detroit, 101 Mich. 245, 59 N. W. 617; Gale v. Town of Dover, 68 N. H. 403, 44 Atl. 535; Blizzard v. Borough of Danville, 175 Pa. 479, 34 Atl. 846; Burger v. City of Philadelphia, 196 Pa. 41, 46 Atl. 262; City of Dallas v. McAllister (Tex. Civ. App.) 39 S. W. 173.

[265] Hall v. Town of Manson, 90 Iowa, 585; Johnson v. City of Worcester, 172 Mass. 122, 51 N. E. 519; Goins v. City of Moberly, 127 Mo. 116; Hopkins v. Ogden City, 5 Utah. 390, 15 Pac. 596. See, also, §§ 958 et seq., ante.

[266] See §§ 992, ante and 1055, post.

[267] Johnston v. City of Philadelphia, 139 Pa. 646.

[268] See §§ 992, ante, and 1055, post.

part of the corporation.[269] The reverse rule applies where the horses are of the nature first indicated in this section. The question of negligence in a particular instance in common with all the questions raised in the sections discussing the subject of liability or torts is one of fact for a jury to determine upon the circumstances arising in each particular case.

Moving objects. As a rule moving objects are not regarded as obstructions; they may become so, however, upon their becoming fixed and left in that condition for an unreasonable time. The duty requires their removal within a reasonable period.

§ 1013. 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,[270]

[269] Kyne v. Wilmington & N. R. Co., 8 Houst. (Del.) 185, 14 Atl. 922; City of Vandalia v. Huss, 41 Ill. App. 517. Pile of shavings. City of Elgin v. Thompson, 98 Ill. App. 358. Steam roller. Weinstein v. City of Terre Haute, 147 Ind. 556; Pease v. Inhabitants of Parsonsfield, 92 Me. 345; Butman v. City of Newton, 179 Mass. 160 N. E. 401; Winship v. Town of Enfield, 42 N. H. 197; Chamberlain v. Town of Enfield, 43 N. H. 356. Lumber pile. Mullen v. Village of Glens Falls, 11 App. Div. 275, 42 N. Y. Supp. 113. Use of steam roller not a defect. Burns v. Town of Farmington, 31 App. Div. 364, 52 N. Y. Supp. 229; Barr v. Village of Bainbridge, 42 App. Div. 628, 59 N. Y. Supp. 132; Dunn v. Town of Barnwell, 43 S. C. 398; Ouverson v. City of Grafton, 5 N. D. 281, 65 N. W. 676. It is a question for the jury whether a steam threshing machine standing on the city street is an object calculated to frighten horses of ordinary gentleness. North Manheim Tp. v. Arnold, 119 Pa. 380, 13 Atl. 444; Baker v. Borough of North East, 151 Pa 234, 24 Atl. 1079; Bennett v. Fifield, 13 R. I. 139; Stone v. Pendleton, 21 R. I. 332, 43 Atl. 643; Patterson v. City of Austin, 15 Tex. Civ. App. 201, 39 S. W. 976; City of Weatherford v. Lowery (Tex. Civ. App.) 47 S. W. 34; Morse v. Town of Richmond, 41 Vt. 435; Little v. City of Madison, 42 Wis. 643. Exhibiting wild animals. Prahl v. Town of Waupaca, 109 Wis. 299, 85 N. W. 350. Pile of drain pipes. But see District of Columbia v. Moulton, 182 U. S. 576, 21 Sup. Ct. 840, Id., 15 App. D. C. 363. Steam roller. Hebbard v. Town of Berlin, 66 N. H. 623, 32 Atl. 229. Following Knowlton v. Pittsfield, 62 N. H. 535. Steam engine. Dunn v. Town of Barnwell, 43 S. C. 398, 21 S. E. 315; Loberg v. Town of Amherst, 87 Wis. 634, 58 N. W. 1048.

[270] Town of Cullman v. McMinn, 109 Ala. 614, 19 So. 981; Carswell v. City of Wilmington, 2 Marv. (Del.) 360, 43 Atl. 169; Herries v. City of Waterloo, 114 Iowa, 374, 86 N. W.

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.[271]

§ 1014. 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.[272] As already noted in the previous

306; City of Atchison v. Acheson, 9 Kan. App. 33, 57 Pac. 248; Cratty v. City of Bangor, 57 Me. 423. Under the laws of Maine, a person driving on Sunday unless absolutely necessary, on a defective highway, cannot recover for injuries sustained. Sheehan v. City of Boston, 171 Mass. 296, 50 N. E. 543; Sharp v. Evergreen Tp., 67 Mich. 443, 35 N. W. 67. That plaintiff was driving on Sunday no defense. But see City of Pueblo v. Smith, 3 Colo. App. 386, 33 Pac. 685; O'Neil v. Town of East Windsor, 63 Conn. 150, 27 Atl. 237; McVoy v. City of Knoxville, 85 Tenn. 19, 1 S. W. 498.

[271] Faulkner v. City of Aurora, 85 Ind. 130; City of Lafayette v. Timberlake, 88 Ind. 330; Steele v. City of Boston, 128 Mass. 583; Pierce v. City of New Bedford, 129 Mass. 534; Ray v. City of Manchester, 46 N. H. 59; Hutchinson v. Town of Concord, 41 Vt. 271.

[272] Village of Evanston v. Gunn, 99 U. S. 660; Delger v. City of St. Paul, 14 Fed. 567; Osborne v. City of Detroit, 32 Fed. 36; City of Birmingham v. Starr, 112 Ala. 98, 20 So. 424; Bonnet v. City & County of San Francisco, 65 Cal. 230; Cusick v. City of Norwich, 40 Conn. 375; City of Wilmington v. Ewing, 2 Pen. (Del.) 66, 43 Atl. 305, 45 L. R. A. 79. Municipal liability may be limited by legislative act. Giffin v. Lewiston, 6 Idaho, 231, 55 Pac. 545; McLean v. Lewiston, 8 Idaho, 472, 69 Pac. 478; Dooley v. Town of Sullivan, 112 Ind. 451, 14 N. E. 566; Village of Mansfield v. Moore, 124 Ill. 133, 16 N. E. 246; Village of Sciota v. Norton, 63 Ill. App. 530; City of Chicago v. Baker, 95 Ill. App. 413. A city is liable for its neglect to keep a sidewalk in a proper repair though it is in fact on private property when it invites the public to use it as though it belonged to the city.

Higbert v. City of Greencastle, 43 Ind. 574; Town of Kentland v. Hagan, 17 Ind. App. 1, 46 N. E. 43; Graham v. Town of Oxford, 105 Iowa, 705, 75 N. W. 473; Parmenter v. City of Marion, 113 Iowa, 297, 85 N. W. 90; City of Wichita v. Coggshall, 3 Kan. App. 540, 43 Pac. 842. The number of miles of sidewalk in a city is immaterial in determining the question of whether the walk where the injury was received was in a reasonably safe condition. Aucoin v. City of New Orleans, 105 La. 271, 29 So. 502; Weare v. Inhabitants of Fitchburg, 110 Mass. 334; Frary v. Allen Tp., 91 Mich. 666, 52 N. W. 78; Burridge v. City of Detroit, 117 Mich. 557, 76 N. W.

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. The obligation, if one exists, is controlled by all of the considerations suggested in sections 950 et seq.,—which it is unnecessary here to repeat. It is deemed advisable however, 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.[273] This duty is a varying one and depends upon

84, 42 L. R. A. 684; Saunders v. Gun Plains Tp., 76 Mich. 182, 142 N. W. 1088; Fuller v. City of Jackson, 92 Mich. 197, 52 N. W. 1075; Moore v. City of Minneapolis, 19 Minn. 300 (Gil. 258); Furnell v. City of St. Paul, 20 Minn. 117 (Gil. 101); Kellogg v. Village of Janesville, 34 Minn. 132; Young v. Village of Waterville, 39 Minn. 196, 39 N. W. 97; Downend v. Kansas City, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170; City of Omaha v. Olmstead, 5 Neb. 446; City of Lincoln v. Calvert, 39 Neb. 305; City of Lincoln v. Smith, 28 Neb. 762, 45 N. W. 41. The number of miles of sidewalk does not lessen the duty of a city to keep its sidewalks in a reasonably safe condition for travel.

Hall v. City of Manchester, 40 N. H. 410; Dupuy v. Union Tp., 46 N. J. Law, 269. In the absence of a statute imposing the liability, none exists for injuries caused by a defective sidewalk. Kirk v. Village of Homer, 77 Hun, 459, 28 N. Y. Supp. 1009; McMahon v. City of New York, 33 N. Y. Supp. 642; Birngruber v. Town of Eastchester, 54 App. Div. 80, 66 N. Y. Supp. 278; McSherry v. Village of Canandaigua, 129 N. Y. 612, 29 N. E. 821; Neal v. Town of Marion, 129 N. C. 345, 40 S. E. 116; Miller v. City of Bradford, 186 Pa. 164, 40 Atl. 409; Poole v. City of Jackson, 93 Tenn. 62; City of Sherman v. Williams, 77 Tex. 310, 14 S. W. 130; City of Belton v. Turner (Tex. Civ. App.) 27 S. W. 831; Baugus v. City of Atlanta, 74 Tex. 629, 12 S. W. 750; Gordon v. City of Richmond, 83 Va. 436, 2 S. E. 727; Hutchinson v. City of Olympia, 2 Wash. T. 314; Clark v. Lincoln County, 1 Wash. St. 518, 20 Pac. 576. A county is not liable for injuries caused by a defective sidewalk under its control. Chapman v. Milton, 31 W. Va. 384, 7 S. E. 22; Byington v. City of Merrill, 112 Wis. 211, 88 N. W. 26. The liability of municipalities for injuries resulting from defective sidewalks is wholly the result of statutory provisions.

[273] Enright v. City of Atlanta, 78 Ga. 288; City of Sandwich v. Dolan,

many considerations suggested in other sections, 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.[274]

§ 1015. Duty; how modified.

The obligation in respect to side and cross walks is changed through the fact that they are used by foot passengers.[275] 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.[276]

(a) Width to be kept in repair. It was said in a previous section [277] that the duty to keep an ordinary highway in repair applied 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.[278] If a city or town invites the public to use a

141 Ill. 430, 31 N. E. 416; City of Centralia v. Krouse, 64 Ill. 19; City of Chicago v. Schoiten, 75 Ill. 468; Lindsay v. City of Des Moines, 74 Iowa, 111, 37 N. W. 9; Hall v. Town of Manson, 90 Iowa, 585, 58 N. W. 881; City of Atchison v. Jansen, 21 Kan. 560; City of Covington v. Manwaring, 24 Ky. L. R. 423, 68 S. W. 625; City of Covington v. Asman, 24 Ky. L. R. 415, 68 S. W. 646; Brummett v. City of Boston, 179 Mass. 26, 60 N. E. 388; Shietart v. City of Detroit, 108 Mich. 309, 66 N. W. 221. The mere failure to construct the sidewalk, however, will not create a liability. Phalen v. City of Detroit, 126 Mich. 683, 86 N. W. 126; Wallis v. City of Westport, 82 Mo. App. 522; City of Ord v. Nash, 50 Neb. 335, 69 N. W. 964. Sidewalks must be kept in a reasonably safe condition for travel by night as well as day. Anderson v. Albion, 64 Neb. 280, 89 N. W. 794; Lohr v. Borough of Phillipsburg, 156 Pa. 246, 27 Atl. 133; Poole v. City of Jackson, 93 Tenn. 62, 23 S .W. 57; Peake v. City of Superior, 106 Wis. 403, 82 N. W. 306.

[274] Young v. Kansas City, 45 Mo. App. 600. See §§ 1042, 1057, and 1066 post, and § 992, ante.

[275] Brooks v. Schwerin, 54 N. Y. 343. Foot passengers and others have equal rights in the streets of a city. 5 Thompson, Neg. § 6155.

[276] 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; Bieber v. City of St. Paul, 87 Minn. 35, 91 N. W. 20.

[277] See §991, ante.

[278] City of Denver v. Stein, 25 Colo. 125, 53 Pac. 283; City of Atlanta v. Milam, 95 Ga. 135, 22 S. E.

sidewalk, although it may be built on private ground, the duty is imposed of keeping it in a reasonably safe condition.[279]

(b) 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,[280] is materially relaxed where side and cross walks are used for this purpose.[281] In either case the duty is a varying one depending upon the opportunity of children to use public play grounds on

43; City Council of Augusta v. Tharpe, 113 Ga. 152, 38 S. E. 389; City of Flora v. Naney, 136 Ill. 45, 26 N. E. 645, affirming 31 Ill. App. 493; City of Vandalia v. Ropp, 39 Ill. App. 344; City of Bunker Hill v. Pearson, 46 Ill. App. 47; City of Springfield v. Burns, 51 Ill. App. 595; City of Decatur v. Besten, 169 Ill. 340, 48 N. E. 186; City of Huntington v. McClurg, 22 Ind. App. 261, 53 N. E. 658; City of Lafayette v. Larson, 73 Ind. 367; O'Neil v. Village of West Branch, 81 Mich. 544, 45 N. W. 1023; Goins v. City of Moberly, 127 Mo. 116, 29 S. W. 985; Rusher v. City of Aurora, 71 Mo. App. 418; Roe v. Kansas City, 100 Mo. 190, 13 S. W. 404; Whitfield v. City of Meridian, 66 Miss. 570, 6 So. 244, 4 L. R. A. 834; City of Chadron v. Glover, 43 Neb. 732, 62 N. W. 62; Sheridan v. Salem, 14 Or. 328, 12 Pac. 925; Tucker v. Salt Lake City, 10 Utah, 173, 37 Pac. 261; Scott v. Provo City, 14 Utah, 31, 45 Pac. 1005.

[279] Foxworthy v. City of Hastings, 31 Neb. 825, 48 N. W. 901; Jewhurst v. City of Syracuse, 108 N. Y. 303, 15 N. E. 409; Seymour v. Village of Salamanca, 137 N. Y. 364, 33 N. E. 304; Neal v. Town of Marion, 129 N. C. 345, 40 S. E. 116; 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. But see Knowlton v. Town of Pittsfield, 62 N. H. 535.

[280] City of Chicago v. Starr, 42 Ill. 174; Stinson v. City of Gardiner, 42 Me. 248; Hamilton v. City of Detroit, 105 Mich. 514, 63 N. W. 511; McLaughlin v. City of Philadelphia, 142 Pa. 80, 21 Atl. 754; Gaughan v. Philadelphia, 119 Pa. 503, 13 Atl. 300. See § 991, ante.

[281] City of Chicago v. Keefe, 114 Ill. 222; City of Indianapolis v. Emmelman, 108 Ind. 530, 9 N. E. 155; Murley v. Roche, 130 Mass. 330; Gulline v. Lowell, 144 Mass. 491, 11 N. E. 723; Graham v. City of Boston, 156 Mass. 75, 30 N. E. 170; City of Vicksburg v. McLain, 67 Miss. 4, 6 So. 774; Donoho v. Vulcan Iron Works, 75 Mo. 401; City of Omaha v. Richards, 49 Neb. 244, 68 N. W. 528; Crawford v. Wilson, & Baillie Mfg. Co., 8 Misc. 48, 28 N. Y. Supp. 514; McVee v. City of Watertown, 92 Hun, 306, 36 N. Y. Supp. 870; McGarry v. Loomis, 63 N. Y. Supp. 104. "A point is made upon an exception to the remark of the judge, that the child had the right to play on the sidewalk. This language was used in connection with the remark that the child had a right to be on the sidewalk, and the whole force of the remark as to the right to play was, that being on the sidewalk, the fact of playing there would not constitute con-

their own yards. In a thickly settled portion of a large city, greater rights undoubtedly should be allowed residents in this respect than in country towns, suburban localities or portions of a city or town. The rule of exemption from liability where a highway is used for an improper purpose or for unusual loads or in an unusual manner applies equally to side and cross walks.[282]

§ 1016. Duty; when absolute.

The obligation to properly construct and maintain in a reasonably safe condition applies to walks built by owners whether upon their own volition [283] or because of some ordinance or resolution requiring their construction.[284] In this particular, the duty can be said to be an absolute one as to the public corporation and cannot be evaded or shifted upon others.[285] A joint liability may

tributory negligence so as to defeat a recovery. If it did not mean this, it had no relevancy to the case, and was not, for that reason, error. There was no occasion for a charge as to the legal right of children to play on the sidewalk, to the exclusion of or interference with persons passing and repassing nor was any such idea intended. That it is not unlawful, wrongful or negligent for children to play on the sidewalk, is a proposition which it is too plain for comment." McGuire v. Spence, 91 N. Y. Supp. 303; Gibson v. City of Huntington, 38 W. Va. 177, 18 S. E. 447, 22 L. R. A. 561; Reed v. City of Madison, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733.

[282] Kohlhof v. City of Chicago, 192 Ill. 249, 61 N. E. 446. One cannot recover for injuries received from the breaking of a sidewalk where he was engaged in moving a safe upon it when the walk was reasonably safe for use in an ordinary manner. Wheeler v. City of Boone, 108 Iowa, 235, 78 N. W. 909, 44 L. R. A. 821. A city is under no obligation to keep its sidewalks reasonably safe for one riding a tricycle. Leslie v. City of Grand Rapids, 120 Mich. 28, 78 N. W. 885; Lee v. City of Port Huron, 128 Mich. 533, 87 N. W. 637, 55 L. R. A. 308. Not necessary to keep a sidewalk in safe condition for bicycle rider. Morrison v. City of Syracuse, 53 App. Div. 490, 65 N. Y. Supp. 939, Id., 45 App. Div. 421, 61 N. Y. Supp. 313.

[283] Oliver v. Kansas City, 69 Mo. 79; Hutchings v. Inhabitants of Sullivan, 90 Me. 131, 37 Atl. 883; Kinney v. City of Tekemah, 30 Neb. 605, 46 N. W. 835.

[284] Webster v. City of Beaver Dam, 84 Fed. 280; Boucher v. City of New Haven, 40 Conn. 457; City of Aurora v. Bitner, 100 Ind. 396. But see Dooley v. Town of Sullivan, 112 Ind. 451, 14 N. E. 566.

[285] Webster v. City of Beaver Dam, 84 Fed. 280; City of Denver v. Hickey, 9 Colo. App. 137, 47 Pac. 908; City of Rock Island v. Starkey, 189 Ill. 515, 59 N. E. 971; Shannon

exist,[286] but ordinarily an abutting owner is under no duty to the public to keep the sidewalk in front of his premises in repair.[287]

§ 1017. Liability for defects.

The same principles of law apply to the construction and maintenance of side and cross walks as a part of the highway which have been considered in previous sections.[288] The liability may arise because of a defect in the construction of the improvement or in its condition.

§ 1018. 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.[289] Plan de-

v. Town of Tama City, 74 Iowa, 22, 36 N. W. 776; Barnes v. Town of Newton, 46 Iowa, 567; City of Topeka v. Sherwood, 39 Kan. 690, 18 Pac. 933; Will v. Village of Mendon, 108 Mich. 251, 66 N. W. 58; Fuller v. City of Jackson, 82 Mich. 480, 46 N. W. 721; Graham v. City of Albert Lea, 48 Minn. 201, 50 N. W. 1108; Chilton v. City of St. Joseph, 143 Mo. 192, 44 S. W. 766; Blackwell v. Hill, 76 Mo. App. 46; Lambert v. Pembroke, 66 N. H. 280, 23 Atl. 81; Urquhart v. City of Ogdensburgh, 97 N. Y. 238; Russell v. Village of Canastota, 98 N. Y. 496; City of Dallas v. Jones (Tex. Civ. App.) 54 S. W. 606; City of Dallas v. Meyers (Tex. Civ. App.) 55 S. W. 742; Cuthbert v. City of Appleton, 22 Wis. 642; McHugh v. Town of Minocqua, 102 Wis. 291, 78 N. W. 478. But see City of Marquette v. Cleary, 37 Mich. 296.

[286] City of Lincoln v. O'Brien, 56 Neb. 761, 77 N. W. 761; City of Lincoln v. Pirner, 59 Neb. 634, 81 N. W. 846; Borough of Brookville v. Arthurs, 130 Pa. 501, 18 Atl. 1076; Borough of Wilkinsburg v. Home for Aged Women, 131 Pa. 109, 18 Atl. 937, 6 L. R. A. 531; City of Reading v. Reiner, 167 Pa. 41, 31 Atl. 357; Dutton v. Borough of Landsdowne, 198 Pa. 563, 48 Atl. 494, 53 L. R. A. 469; City of Pawtucket v. Bray, 20 R. I. 17, 37 Atl. 1; Papworth v. City of Milwaukee, 64 Wis. 389; Cooper v. Village of Waterloo, 88 Wis. 433, 60 N. W. 714.

[287] Martinovich v. Wooley, 128 Cal. 141, 60 Pac. 760; City of Chicago v. Crosby, 111 Ill. 538; City of Keokuk v. Independent Dist., 53 Iowa, 352; Fletcher v. Scotten, 74 Mich. 212, 41 N. W. 901; Lynch v. Hubbard, 101 Mich. 43, 59 N. W. 443. A liability may be imposed by law. Baustian v. Young, 152 Mo. 317, 53 S. W. 921; City of Rochester v. Campbell, 123 N. Y. 405, 25 N. E. 937, 10 L. R. A. 393; Sneeson v. Kupfer, 21 R. I. 560, 45 Atl. 579; Raymond v. City of Sheboygan, 76 Wis. 335; Fife v. City of Oshkosh, 89 Wis. 540, 62 N. W. 541. But see City of Detroit v. Chaffee, 70 Mich. 80, 37 N. W. 882; City of Wabasha v. Southworth, 54 Minn. 79, 55 N. W. 818; Devine v. City of Fond du Lac, 113 Wis. 61, 88 N. W. 913.

[288] See §§ 1001 et seq.

[289] City of Birmingham v. Starr, 112 Ala. 98; Smith v. City of Pella,

fects usually involve questions in respect to the grade, whether too steep under existing conditions,[290] the height[291] of steps or their location,[292] the absence of railings or barriers at or near dangerous excavations or embankments,[293] uneven places,[294] and height above ground.[295]

86 Iowa, 236, 53 N. W. 226; Ledgerwood v. Webster City, 93 Iowa, 726; City of Newport v. Miller, 13 Ky. L. R. 889, 18 S. W. 835; Bigelow v. City of Kalamazoo, 97 Mich. 121, 56 N. W. 339. Particular construction held not defective in plan. Weisse v. City of Detroit, 105 Mich. 482; Burrows v. Borough of Lake Crystal, 61 Minn. 357; Poole v. City of Jackson, 93 Tenn. 62, 23 S. W. 57; Yeager v. City of Bluefield, 40 W. Va. 484. See, also, note 27 Am. & Eng. Corp. Cas. 91. But see Hoyt v. City of Danbury, 69 Conn. 341, 37 Atl. 1051. The adoption by municipal officers for the construction of a sidewalk is the exercise of a governmental duty quasi judicial in character. City Council of Augusta v. Little, 115 Ga. 124, 41 S. E. 238.

[290] White v. City of Trinidad, 10 Colo. App. 327, 52 Pac. 214; Haskell v. City of Des Moines, 74 Iowa, 110, 37 N. W. 6; Readdy v. Borough of Shamokin, 137 Pa. 98, 20 Atl. 396; Perkins v. Fond du Lac, 34 Wis. 435; Schroth v. City of Prescott, 63 Wis. 652; Morrison v. City of Madison, 96 Wis. 452, 71 N. W. 882. No liability. City of Depere v. Hibbard, 104 Wis. 666, 80 N. W. 933.

[291] City of Indianapolis v. Mitchell, 27 Ind. App. 589, 61 N. E. 947; 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; Biermann v. City of St. Louis, 120 Mo. 457, 25 S. W. 369; Berg v. City of Milwaukee, 83 Wis. 599, 53 N. W. 890. But see Teager v. City of Flemingsburgs, 22 Ky. L. R. 1442, 60 S. W. 718; Miller v. City of St. Paul, 38 Minn. 134, 36 N. W. 271.

[292] But see City of Roanoke v. Harrison (Va.) 19 S. E. 179.

[293] City of Chicago v. Gallagher, 44 Ill. 295; Town of Normal v. Webb, 91 Ill. App. 183; Village of Cartersville v. Cook, 129 Ill. 152, 22 N. E. 14, 4 L. R. A. 721; Hogan v. City of Chicago, 168 Ill. 551, 48 N. E. 210; Knouff v. City of Logansport, 26 Ind. App. 202, 59 N. E. 347; City of Portland v. Taylor, 125 Ind. 522, 25 N. E. 459; Bridgeman v. City of Missouri Valley (Iowa) 88 N. W. 1069; Damon v. City of Boston, 149 Mass. 147, 21 N. E. 235; Nichols v. City of St. Paul, 44 Minn. 494, 47 N. W. 168; Bennett v. Village of Sing Sing, 60 Hun, 579, 14 N. Y. Supp. 463; Donnelly v. City of Rochester, 166 N. Y. 315, 59 N. E. 989; Bunch v. Town of Edenton, 90 N. C. 431; Lenich v. Beaver, 199 Pa. 420, 49 Atl. 220.

[294] Patterson v. City of Council Bluffs, 91 Iowa, 732, 59 N. W. 63; Sawyer v. Newburyport, 157 Mass. 430, 32 N. E. 653; City of Aurora v. Cox, 43 Neb. 727, 62 N. W. 66; Village of Plainview v. Mendelson, 65 Neb. 85, 90 N. W. 956. The duty to keep in repair extends to travel by night as well as day.

[295] Shaw v. President, etc., of Sun Prairie, 74 Wis. 105, 42 N. W. 271. But see City of Sumner v. Scaggs, 52 Ill. App. 551.

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.[296]

§ 1019. Defects in condition.

The duty, when existing, applies to defects arising from acts of either private persons or the public corporation itself,[297] and whether caused by the construction or repair of the improvement [298] or by subsequent neglect or act.[299] 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.[300] The rule is the same in respect to all portions of a highway. Common defective conditions

[296] City of Topeka v. Sherwood, 39 Kan. 690, 18 Pac. 933.

[297] City of Birmingham v. McCary, 84 Ala. 469, 4 So. 630; City of Huntington v. Breen, 77 Ind. 29; Baumeister v. Markham, 19 Ky. L. R. 308, 39 S. W. 844, 41 S. W. 816; Hembling v. City of Grand Rapids, 99 Mich. 292, 58 N. W. 310; Borough of Sandy Lake v. Forker, 130 Pa. 123; Smalley v. City of Appleton, 75 Wis. 18.

[298] Cummings v. City of Hartford, 70 Conn. 115, 38 Atl. 916; Town of Boswell v. Wakley, 149 Ind. 64, 48 N. E. 637; Ronn v. City of Des Moines, 78 Iowa, 63; Alexander v. City of Big Rapids, 70 Mich. 224, 38 N. W. 227; Whitfield v. City of Meridian, 66 Miss. 570, 4 L. R. A. 834; City of Lincoln v. Calvert, 39 Neb. 305, 58 N. W. 115. But see Heidenwag v. City of Philadelphia, 168 Pa. 72, 31 Atl. 1063.

[299] City of Atlanta v. Martin, 88 Ga. 21, 13 S. E. 805; City of Joliet v. McCraney, 49 Ill. App. 381; City of Aurora v. Hilman, 90 Ill. 61; City of Evansville v. Frazer, 24 Ind. App. 628, 56 N. E. 729; City of Atchison v. King, 9 Kan. 550; Burrows v. Village of Lake Crystal, 61 Minn. 357, 63 N. W. 745; Peterson v. Village of Cokato, 84 Minn. 205, 87 N. W. 615; Saulsbury v. Village of Ithaca, 94 N. Y. 27.

[300] City of Columbus v. Ogletree, 102 Ga. 293; Kenyon v. City of Indianapolis, 1 Wils. (Ind.) 129; Mulliken v. City of Corunna, 110 Mich. 212; Burleson v. Village of Reading, 110 Mich. 512; Gubasko v. City of New York, 14 Daly, 559, 1 N. Y. Supp. 215; Fitzpatrick v. Borough of Darby, 184 Pa. 645, 39 Atl. 545; City of Jackson v. Pool, 91 Tenn. 448, 19 S. W. 324; City of Lynchburg v. Wallace, 95 Va. 640; City of Ripon v. Bittel, 30 Wis. 614. Where a sidewalk is old and rotten and unsafe, these defects will not be considered latent ones. Cooper v. City of Milwaukee, 97 Wis. 458.

are smooth and slippery walks or cross walks,[301] broken, loose or defective planks, stones or bricks,[302] holes in the walk or cross walk,[303] projecting nails, or[304] other obstructions[305] of a similar character, inequalities in the surface,[306] or decayed materials.[307]

[301] Dooley v. City of Meriden, 44 Conn. 117; Lyon v. City of Logansport, 9 Ind. App. 21, 35 N. E. 128; Cromarty v. City of Boston, 127 Mass. 329; Fairgrieve v. City of Moberly, 39 Mo. App. 31. But no liability exists where a crossing is made temporarily slippery from natural causes. Leonard v. City of Butte, 25 Mont. 410, 65 Pac. 425; Yeager v. City of Bluefield, 40 W. Va. 484, 21 S. E. 752. No liability for the slippery condition caused by the accumulation of mud.

[302] City of Rome v. Baker, 107 Ga. 347, 33 S. E. 406; City of Joliet v. Youngs, 61 Ill. App. 589; City of Chicago v. Murphy, 84 Ill. 224; Ronn v. City of Des Moines, 78 Iowa, 63, 42 N. W. 582; Riley v. Town of Iowa Falls, 83 Iowa, 761, 50 N. W. 33; Troxel v. City of Vinton, 77 Iowa, 90, 41 N. W. 580; City of Wickliffe v. Moring, 24 Ky. L. R. 419, 68 S. W. 641; Noyes v. Gardner, 147 Mass. 505, 18 N. E. 423; Moon v. City of Ionia, 81 Mich. 635, 46 N. W. 25; Weisse v. City of Detroit, 105 Mich. 482, 63 N. W. 423. A cross walk containing a loose plank, the end of which is raised two inches above the level of the walk is reasonably safe and no liability follows from injuries received by reason of it. See, also, Village of Yotter v. City of Detroit, 107 Mich. 4, 64 N. W. 743.

City of Lincoln v. Staley, 32 Neb. 63, 48 N. W. 887; Chacey v. City of Fargo, 5 N. D. 173, 64 N. W. 932; Schively v. Borough of Jenkintown, 180 Pa. 196, 36 Atl. 754; Morris v. City of Philadelphia, 195 Pa. 372, 45 Atl. 1068. No recovery. Moore v. City of Platteville, 78 Wis. 644, 47 N. W. 1055; McHugh v. Town of Minocqua, 102 Wis. 291, 78 N. W. 478.

[303] Seward v. City of Wilmington, 2 Marv. (Del.) 189, 42 Atl. 451; City of Chicago v. Chase, 33 Ill. App. 551; City of Bloomington v. Mueller, 71 Ill. App. 268; Schmidt v. Chicago & N. W. Co., 83 Ill. 405; Michigan City v. Ballance, 123 Ind. 334; Cressy v. Town of Postville, 59 Iowa, 62; City of Lawrence v. Davis, 8 Kan. App. 225, 55 Pac. 492; City of Columbus v. Neise, 63 Kan. 885, 65 Pac. 643; Marvin v. City of New Bedford, 158 Mass. 464, 33 N. E. 605; Tice v. Bay City, 84 Mich. 461, 47 N. W. 1062; City of Lincoln v. Staley, 32 Neb. 63; Neal v. Town of Marion, 129 N. C. 345, 40 S. E. 116; Gschwend v. Borough of Millvale, 159 Pa. 257, 28 Atl. 139; Kane v. City of Philadelphia, 196 Pa. 502, 46 Atl. 893; Yearance v. Salt Lake City, 6 Utah, 398.

[304] Doulon v. City of Clinton, 33 Iowa, 397.

[305] Town of Watertown v. Greaves (C. C. A.) 112 Fed. 183, 56 L. R. A. 865; City of Denver v. Stein, 25 Colo. 125, 53 Pac. 283; City of Taylorville v. Stafford, 196 Ill. 288, 63 N. E. 624; City of Terre Haute v. Constans, 26 Ind. App. 421, 59 N. E. 1078; Baxter v. City of Cedar Rapids, 103 Iowa, 599, 72 N. W. 790; Redford v. City of Woburn, 176 Mass. 520, 57 N. E. 1008. Water shut-off box. Lamb v. City of Wor-

§ 1020. Obstructions as defects.

Objects may be placed in or near side or cross walks which, by their condition,[308] or the mere fact of their location,[309] 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[310] or by force of some statute. These, it necessarily follows, are not defects which the corporation is bound to remedy.

cester, 177 Mass. 82, 58 N. E. 474. Projecting hinges. Loan v. City of Boston, 106 Mass. 450; Sneeson v. Kupfer, 21 R. I. 560, 45 Atl. 579. But see Town of Gosport v. Evans, 112 Ind. 133, 13 N. E. 256; Bucher v. City of South Bend, 20 Ind. App. 177, 50 N. E. 412; City of Covington v. Manwaring, 24 Ky. L. R. 423, 68 S. W. 625.

[306] Labarre v. City of New Orleans, 106 La. 458, 30 So. 891; Blume v. City of New Orleans, 104 La. 345, 29 So. 106; Haggerty v. City of Lewiston, 95 Me. 374, 50 Atl. 55; Williams v. West Bay City, 126 Mich. 156, 85 N. W. 458; Bieber v. City of St. Paul, 87 Minn. 35, 91 N. W. 20; Clemence v. City of Auburn, 66 N. Y. 334; Beltz v. City of Yonkers, 148 N. Y. 67, 42 N. E. 401; Kellow v. City of Scranton, 195 Pa. 134, 45 Atl. 676; Bowen v. City of Huntington, 35 W. Va. 682, 14 S. E. 217. But see City of Hartford v. Graves, 8 Kan. App. 677, 57 Pac. 133; Morgan v. City of Lewiston, 91 Me. 566, 40 Atl. 545; Newton v. City of Worcester, 174 Mass. 181, 54 N. E. 521; McCarthy v. City of Lockport, 13 App. Div. 494, 43 N. Y. Supp. 693.

[307] Furnell v. City of St. Paul, 20 Minn. 117 (Gil. 101); Hall v. City of Austin, 73 Minn. 134, 75 N. W. 1121; Stern v. Bensieck, 161 Mo. 146, 61 S. W. 594; Williams v. City of Hannibal, 94 Mo. App. 549, 68 S. W. 380; Durham v. City of Spokane, 27 Wash. 615, 68 Pac. 383; Weisenberg v. City of Appleton, 26 Wis. 56; Laue v. City of Madison, 86 Wis. 453, 57 N. W. 93.

[308] Bibbins v. City of Chicago, 193 Ill. 359, 61 N. E. 1030, reversing 94 Ill. App. 319; Jones v. City of Deering, 94 Me. 165, 47 Atl. 140; Pittenger v. Town of Hamilton, 85 Wis. 356, 55 N. W. 423. See, also, notes 10 L. R. A. 473, 734.

[309] City Council of Augusta v. Tharpe, 113 Ga. 152, 38 S. E. 389; Parmenter v. City of Marion, 113 Iowa, 297, 85 N. W. 90. Platform on a level with second story not necessarily a defect. Whittal v. City of New York, 64 N. Y. Supp. 250. But see Town of Lewisville v. Batson, 29 Ind. App. 21, 63 N. E. 861. As to liability for obstruction placed on sidewalk by a third person.

[310] Jordan v. City of New York, 165 N. Y. 657, 59 N. E. 1124, affirming 44 App. Div. 149, 60 N. Y. Supp. 696; City of Richmond v. Leaker, 99 Va. 1, 37 S. E. 248.

§ 1021. 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 defect.[311] The leading cases are referred to in the notes. The accumulation of ice or snow in ridges or masses may, however, give rise to liability if other elements of actionable negligence exist.[312] The rule also applies where the accumulations have been caused by artificial or extrinsic means rather than natural causes.[313] A sidewalk may also be defective by being so improperly constructed as

[311] Village of Gibson v. Johnson, 4 Ill. App. 288; City of Chicago v. McGiven, 78 Ill. 347; City of Savanna v. Trusty, 98 Ill. App. 277; City of Quincy v. Barker, 81 Ill. 300; Ford v. City of Des Moines, 106 Iowa, 94, 75 N. W. 630; Nason v. City of Boston, 96 Mass. (14 Allen) 508; Lawless v. City of Troy, 63 Hun, 632, 18 N. Y. Supp. 506; O'Reilly v. City of Syracuse, 49 App. Div. 538, 63 N. Y. Supp. 520. The rule also applies to an even accumulation of mud. Ayres v. Village of Hammondsport, 130 N. Y. 665, 29 N. E. 265. But see Stanton v. City of Springfield, 94 Mass. (12 Allen) 566. The court in passing upon the principle stated in the text said: "It would require of all the towns an examination of all their roads so incessant and minute, and the application of an efficient remedy would be so laborious and expensive, that it would be manifestly unreasonable to require or expect it. The freezing mist of a single night may glaze over the whole territory of a town. The formation of thin but slippery ice in our climate is an effect which may be so suddenly and extensively produced, and which may continue or be renewed for such a length of time, that it would be extremely difficult if not impossible for towns to make adequate provisions against it." Adams v. Chicopee, 147 Mass. 440, 18 N. E. 231; McDonald v. City of Ashland, 78 Wis. 251, 47 N. W. 434. See, also, note 10 L. R. A. 178.

[312] Gerald v. City of Boston, 108 Mass. 580; Keane v. Village of Waterford, 130 N. Y. 188, 29 N. E. 130.

[313] City of Baltimore v. Marriott, 9 Md. 160; Magaha v. Hagerstown, 95 Md. 62; Reedy v. St. Louis Brewing Ass'n, 161 Mo. 523, 61 S. W. 859, 53 L. R. A. 805; Bly v. Village of Whitehall, 120 N. Y. 506, 24 N. E. 943; Miller v. City of Bradford, 186 Pa. 164, 40 Atl. 409. But see Gavett v. City of Jackson, 109 Mich. 408, 67 N. W. 517, 32 L. R. A. 861.

to induce a special or constant deposit of ice and snow in a particular locality.[314] Blocks of ice may also be obstructions as much as any other object or substance lying in the road.

§ 1022. 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 proximty.[315] 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.[316]

§ 1023. Falling or dangerous objects.

Injuries may occur through falling objects thrown from buildings near the highway or by the fall of dangerous objects directly contiguous to or upon the walk. A liability seems to exist in these cases.[317] It is the duty of a public corporation, if one exists, to remove or cause to be removed, dangerous buildings, trees or other objects which, by their fall, may cause injury to those using the highway for a proper purpose.[318] A municipality is not required,

[314] Ford v. City of Des Moines, 106 Iowa, 94, 75 N. W. 630; Hodges v. City of Waterloo, 109 Iowa, 444, 80 N. W. 523; Hughes v. City of Lawrence, 160 Mass. 474, 36 N. E. 485; Navarre v. City of Benton Harbor, 126 Mich. 618, 86 N. W. 138; Wesley v. City of Detroit, 117 Mich. 658, 76 N. W. 104. But see Beekman v. City of New York, 18 Misc. 509, 41 N. Y. Supp. 990; Morrison v. City of Madison, 96 Wis. 452, 71 N. W. 882.

[315] Theissen v. City of Belle Plaine, 81 Iowa, 118; Foxworthy v. City of Hastings, 31 Neb. 825; Sweeney v. Village of Newport, 65 N. H. 86; Moore v. City of Platteville, 78 Wis. 644.

[316] City of Columbus v. Pearson, 82 Ga. 288, 9 S. E. 1102; City of Mount Vernon v. Brooks, 39 Ill. App. 426; Randall v. City of Lowell, 156 Mass. 255, 30 N. E. 1020; Yearance v. Salt Lake City, 6 Utah, 398, 24 Pac. 254; Fitzgerald v. City of Berlin, 64 Wis. 203.

[317] Langan v. City of Atchison, 35 Kan. 318; Weller v. McCormick, 47 N. J. Law, 397; second trial, 52 N. J. Law, 470, 8 L. R. A. 798. Owner of a lot held liable for injury to a passerby by fall of limb from tree. See, also, Taylor v. Peckham, 8 R. I. 349; Thomp. Neg., §§ 1206 and 6103.

[318] Jones v. City of New Haven, 34 Conn. 1; Parmenter v. City of Marion, 113 Iowa, 297, 85 N. W. 90; Kiley v. Kansas City, 69 Mo. 102; Beall v. City of Seattle, 28 Wash. 593, 69 Pac. 12, 61 L. R. A. 583. City liable for injuries resulting

however, to protect passersby from the effect of articles thrown from buildings or other places by private persons.

§ 1024. 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.[319] In many states, however, by statute, a liability is specifically imposed upon quasi corporations, especially towns or counties, in respect to bridges where none exists as to other portions of the highway.[320] In other cases it is held that

for explosion of boiler located under sidewalk. But see Hixon v. City of Lowell, 79 Mass. (13 Gray) 59. No liability for fall of overhanging mass of ice and snow on roof of private building. Village of Oak Harbor v. Kalhagher, 52 Ohio St. 183, 39 N. E. 144. No liability for fall of bill board blown down by an extraordinary wind.

[319] El Paso County Com'rs v. Bish, 18 Colo. 474, 33 Pac. 184; Davis v. Ada County, 5 Idano, 126, 47 Pac. 93; Marion County Com'rs v. Riggs, 24 Kan. 255; King v. Police Jury of St. Landry, 12 La. Ann. 858; Leoni Tp. v. Taylor, 20 Mich. 148; Pundman v. St. Charles County, 110 Mo. 594, 19 S. W. 733; Clark v. Adair County, 79 Mo. 536; Brabham v. Hinds County Sup'rs, 54 Miss. 363; Woods v. Colfax County Com'rs, 10 Neb. 552; Cooley v. Chosen Freeholders of Essex, 27 N. J. Law, 415; Livermore v. Chosen Freeholders of Camden County, 29 N. J. Law, 245; Heigel v. Wichita County, 84 Tex. 392, 19 S. W. 562. See, also, Monroe County v. Flint, 80 Ga. 489; Merkle v. Bennington Tp., 68 Mich. 133.

[320] Eastman v. Clackamas County, 32 Fed. 24; Lee County v. Yarbrough, 85 Ala. 590, 5 So. 341; Cook v. De Kalb County, 95 Ga. 218, 22 S. E. 151; Helvingston v. Macon County, 103 Ga. 106, 29 S. E. 596; Willingham v. Elbert County, 113 Ga. 15, 38 S. E. 348; Davis v. Horne, 64 Ga. 69; De Kalb County v. Cook, 97 Ga. 415, 24 S. E. 157; Wabash County Com'rs v. Pearson, 120 Ind. 426, 22 N. E. 134; Knox County Com'rs v. Montgomery, 109 Ind. 69, 9 N. E. 590; Howard County Com'rs v. Legg, 110 Ind. 479, 11 N. E. 612; Jackson County Com'rs v. Nichols, 139 Ind. 611, 38 N. E. 526; Cooper v. Mills County, 69 Iowa, 350; Eginoire v. Union County, 112 Iowa, 558, 84 N. W. 758; Faulk v. Iowa County, 103 Iowa, 442; Atchison County Com'rs v. Sullivan, 7 Kan. App. 152, 53 Pac. 142; Doherty v. Inhabitants of Braintree, 148 Mass. 495, 20 N. E. 106; Hollingsworth v.

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.[321] If under the control of municipal corporations proper, a liability will depend upon the principles noted in sections 984 et seq.[322] The duty, under whatever circumstances it may arise, is that which has been stated in previous sections, 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.[323] 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.[324] Where a liability is imposed by statute upon counties or other quasi corproations, before a recovery can be had in a specific instance, the character of the bridge must be established as one coming within the meaning of the statute [325] and further, one that the corporation was especially

Saunders County, 36 Neb. 141, 54 N. W. 79; Humphreys v. Armstrong County, 3 Brewst. (Pa.) 49; Newlin Tp. v. Davis, 77 Pa. 317; Francis v. Franklin Tp., 179 Pa. 195, 36 Atl. 202; Town of Saukville v. State, 69 Wis. 178, 33 N. W. 88. See, also, Mappin v. Washington County, 92 Ga. 130, 17 S. E. 1009.

[321] Town of Mechanicsburg v. Meredith, 54 Ill. 84; Pritchett v. Morgan County Com'rs, 62 Ind. 210; Perry v. Barnett, 65 Ind. 522; Huston v. Iowa County, 43 Iowa, 456; Kirtley v. Spokane County, 20 Wash. 111, 54 Pac. 936; Barnett v. Contra Costa County, 67 Cal. 77; Reardon v. St. Louis County, 36 Mo. 555; Sussex County Chosen Freeholders v. Strader, 18 N. J. Law, 108; Ensign v. Livingstone County Sup'rs, 25 Hun (N. Y.) 20.

[322] Weightman v. Washington Corp., 1 Black. U. S. 38; City of Eudora v. Miller, 30 Kan. 494; Quinlan v. Village of Manistique, 85 Mich. 22. But see Scott v. Des Moines, 34 Iowa, 552. Where there is no obligation to maintain a bridge, a municipal corporation is not liable for injuries resulting from its defective condition.

[323] White v. Riley Tp., 121 Mich. 413, 80 N. W. 124.

[324] Wilson v. Town of Granby, 47 Conn. 59; Wabash County Com'rs v. Pierson, 120 Ind. 426, 22 N. E. 134; Blank v. Livonia Tp., 79 Mich. 1, 44 N. W. 157; Koenig v. Town of Arcadia, 75 Wis. 62, 43 N. W. 734.

[325] Covington County v. Kinney, 45 Ala. 176; Tattnall County v. Newton, 112 Ga. 779, 38 S. E. 47; Reinhart v. Martin County Com'rs 9 Ind. App. 572, 37 N. E. 38; Soper v. Henry County, 26 Iowa, 264; Casey v. Tama County, 75 Iowa, 655, 37 N. W. 138; Moreland v. Mitchell County, 40 Iowa, 394; Chandler v. Fremont County, 42 Iowa, 58; Taylor v. Davis County, 40 Iowa, 295.

authorized to construct. If without authority in this latter respect, no liability can follow from a failure to maintain the unauthorized structure even in a reasonably safe condition.[326]

In determining upon the construction of a bridge, a public corporation is exercising a discretionary power, as it has sometimes been held, is performing a governmental duty. Action or inaction in this respect, therefore, can lead to no liability.[327]

§ 1025. Definition of bridge.

The term "bridge" is applied to structures designed for public use and crossing at an elevation, bodies of water, watercourses, steam or street railways, other roads or other impediments to travel,[328] and includes as a component part, the approaches and abutments of the bridge proper, as commonly understood, whether these are solid embankments or otherwise.[329]

§ 1026. Liabilty; how affected.

The failure to properly perform the duty does not, in all cases, lead to liability. This, as has been said many times, is predicated solely upon negligence,[330] and is further dependent upon the fact

[326] Roberts v. Cleburne County, 116 Ala. 378, 22 So. 545; Sims v. Butler County, 49 Ala. 110; Spencer v. Hudson County Chosen Freeholders, 66 N. J. Law, 301, 49 Atl. 483; Greek v. Town of Bridge Creek, 38 Wis. 450.

[327] Kinne v. Town of New Haven, 32 Conn. 210; Hall v. Town of Oyster Bay, 171 N. Y. 646, 63 N. E. 1117, affirming 61 App. Div. 508, 70 N. Y. Supp. 710.

[328] Carroll County Com'rs v. Bailey, 122 Ind. 46, 23 N. E. 672. Jones, Neg. Mun. Corp. § 106.

[329] Town of Tolland v. Town of Willington, 26 Conn. 578; City of New Haven v. New York & N. H. R. Co., 39 Conn. 128. But in the apportionment of expense for the construction of bridges crossing the streets as between a railroad company and a city, the meaning of the word "bridge" is restricted to the bridge proper excluding embankments, approaches, etc. Driftwood Valley Turnpike Co. v. Bartholomew County Com'rs, 72 Ind. 226; Albee v. Floyd County, 46 Iowa, 177; Jessup v. Osceola County, 92 Iowa, 178, 60 N. W. 485; Eginoire v. Union County, 112 Iowa, 558, 84 N. W. 758; City of Eudora v. Miller, 30 Kan. 494; Williams v. Village of Petoskey, 108 Mich. 260, 66 N. W. 55; Dalton v. Upper Tyrone Tp., 137 Pa. 18, 20 Atl. 637; Tyler v. Williston, 62 Vt. 269, 20 Atl. 304, 9 L. R. A. 338; Bishop v. City of Centralia, 49 Wis. 669.

[330] Lindley v. City of Detroit, 131 Mich. 8, 90 N. W. 665; Eads v. City of Marshall (Tex. Civ. App.) 29 S. W. 170. See § 992, ante.

of whether or not the act or the omission complained of was the proximate cause of the injury as discussed in sections 592, 993, and 1059.[331]

Contributory negligence and notice. A liability is further dependent upon freedom from contributory negligence on the part of the one injured [332] and finally upon the element of notice. Not only must the defect exist but it must have existed for that length of time as to give the corporation having charge of the highway a reasonable opportunity to remedy it. Notice of the defect may be either actual or constructive. By constructive notice is commonly understood a defective condition existing for such a length of time as to charge by law the corporation with a knowledge of it.[333] Actual notice is where written or oral information is had or given of the defect by or to those public officers charged by law with the duty of making or authorizing the repairs necessary.[334] Actual notice to be effectual must be given to those officials who are specially charged by law with the duty of attending to such matters.[335] The authority of public officials to bind their principal is exceedingly limited, not only in respect to acts of their own, but also in connection with admissions by them, the service of process or notice upon, or the possession of information by them.[336]

[331] City of Chicago v. O'Malley, 95 Ill. App. 355; McClain v. Town of Garden Grove, 83 Iowa, 235, 48 N. W. 1031, 12 L. R. A. 482; Walrod v. Webster County, 110 Iowa, 349, 81 N. W. 598, 47 L. R. A. 480; Page v. Town of Bucksport, 64 Me. 51; Carleton v. Inhabitants of Carabou, 88 Me. 461, 34 Atl. 269; White v. Riley Tp., 113 Mich. 295, 71 N. W. 502. Question of proximate cause one for jury. Minkley v. Springwells Tp., 113 Mich. 347, N. W. 649. Question for jury. Shaw v. Saline Tp. 113 Mich. 342, 71 N. W. 642; Rohrbough v. Barbour County Ct. 39 W. Va. 472, 20 S. E. 565.

[332] Compton v. Town of Revere, 179 Mass. 413, 60 N. E. 931; Achtenhagen v. City of Watertown, 18 Wis. 331.

[333] Reiss v. Town of Pelham, 53 App. Div. 459, 65 N. Y. Supp. 1033. See §§ 1033 et seq., post.

[334] City of Atlanta v. Buchanan, 76 Ga. 585. Where floor planks are left unfastened by city employes in the reconstruction of a bridge, notice of this defect to them is notice to the city. Bradbury v. Inhabitants of Lewiston, 95 Me. 216, 49 Atl. 1041. Facts considered and held sufficient to constitute actual notice of the defects. See, also, §§ 1033 et seq., post.

[335] See §§ 1033 et seq., post.

[336] O'Neil v. Deerfield Tp., 86 Mich. 610, 49 N. W. 596; Shaw v. Town of Potsdam, 11 App. Div. 508, 42 N. Y. Supp. 779.

§ 1027. Liability for defects in construction.

A liability may follow where the duty exists in the construction of the bridge or similar structure in respect to either the plan or the improvement or in connection with the actual manual work of repair or construction.[337] Defects in plan involve a determination with others of the questions of grade, location or sufficient strength.[338] A public corporation is only bound to provide a structure sufficiently strong to accommodate ordinary travel,[339] carry ordinary loads, or those specified by statute,[340] and resist ordinary storms of any character. A difference of traffic, locality or climate, it will be readily be seen varies the duty.[341] The plan also involves the construction of railings or guards and the width

[337] Vickers v. Cloud County Com'rs, 59 Kan. 86, 52 Pac. 73; Walsh v. City of New York, 107 N. Y. 220, 13 N. E. 911; Walsh v. New York & Brooklyn Bridge, 96 N. Y. 437.

[338] Gray v. Borough of Danbury, 54 Conn. 574. City liable for insufficient headroom between highway and railroad bridge. Ferguson v. Davis County, 57 Iowa, 601; Cloud County Com'rs v. Vickers, 62 Kan. 25, 61 Pac. 391; Hartford County Com'rs v. Wise, 71 Md. 43, 18 Atl. 31; Perkins v. Delaware Tp., 113 Mich. 377, 71 N. W. 643. No negligence in constructing a bridge on an incline of about one foot in twenty.

[339] Gregory v. Inhabitants of Adams, 80 Mass. (14 Gray) 246; Coan v. Brownstown Tp., 126 Mich. 626, 86 N. W. 130; Fisher v. Village of Cambridge, 57 Hun, 296, 10 N. Y. Supp. 623; Hardin County Com'rs v. Coffman, 60 Ohio St. 527, 54 N. E. 1054, 48 L. R. A. 455; County of Lehigh v. Hoffort, 116 Pa. 119, 9 Atl. 177. But see Anderson v. City of St. Cloud, 79 Minn. 88, 81 N. W. 746. See, also, Note to City of Wabash v. Carver, 13 I. R. A. 851.

[340] City of Wabash v. Carver (Ind.) 26 N. E. 42; Allen County Com'rs v. Creviston, 133 Ind. 39, 32 N. E. 735. A traveler with an ordinary load has the right to rely on the apparent soundness and safety of a bridge which he is about to cross. Vermillion County Com'rs v. Chipps, 131 Ind. 56, 16 L. R. A. 228; Yordy v. Marshall County, 86 Iowa, 340, 53 N. W. 298, following Id., 80 Iowa, 405, 45 N. W. 1042. It is for the jury to determine whether the use which the plaintiff was making of a bridge was unusual and extraordinary. Woodbury v. City of Owosso, 64 Mich. 239, 31 N. W. 130; Moore v. Hazleton Tp., 118 Mich. 425, 76 N. W. 977; Lee v. Delaware, L. & W. R. Co., 57 App. Div. 378, 68 N. Y. Supp. 407; McCormick v. Washington Tp., 112 Pa. 185, 4 Atl. 164; Clulow v. McClelland, 151 Pa. 583, 25 Atl. 147, 17 L. R. A. 650; Coulter v. Pine Tp., 164 Pa. 543, 30 Atl. 490.

[341] Bonebrake v. Huntington County Com'rs, 141 Ind. 62, 40 N. E. 141. Where the use of traction engines was common in the neighborhood, their use of a bridge must be anticipated in its construction.

of the bridge or similar structure. It is necessary to provide railings and guards for all those portions of the bridge, which include, as above noted, the approaches, where their absence would constitute a dangerous defect.[342] Ordinarily the width of the bridge should be sufficient to accommodate the passing of teams.[343] A defective plan or negligent construction may not only result in an injury to a traveler but also to private property or rights in other respects through the diversion of water or the overflow of land.[344]

§ 1028. Defects in condition.

The duty to exercise reasonable care applies not only to the construction of the bridge or similar structure but its condition or maintenance after its erection. Common defective conditions are

[342] Bronson v. Town of Southbury, 37 Conn. 199; City Council of Augusta v. Hudson, 88 Ga. 599, 15 S. E. 678; Sullivan County Com'rs v. Sisson, 2 Ind. App. 311, 28 N. E. 374; Parks County Com'rs v. Sappenfield, 6 Ind. App. 577, 33 N. E. 1012; Shelby County Com'rs v. Deprez, 87 Ind. App. 509; Miller v. Boone County, 95 Iowa, 5, 63 N. W. 352; Gould v. Schermer, 101 Iowa, 582, 70 N. W. 697; Jessup v. Osceola County, 92 Iowa, 178; Faulk v. Iowa County, 103 Iowa, 442, 72 N. W. 757; City of Topeka v. Hempstead, 58 Kan. 328, 49 Pac. 87; Shaw v. Saline Tp., 113 Mich. 342, 71 N. W. 642; Perkins v. Delaware Tp., 113 Mich. 377, 71 N. W. 643; Titus v. Town of New Scotland, 11 App. Div. 266, 42 N. Y. Supp. 152. Question for jury. Pelkey v. Town of Saranac, 67 App. Div. 337, 73 N. Y. Supp. 493; Finnegan v. Coster Tp., 163 Pa. 135, 29 Atl. 780. The court in this case also charged that the defendant was not bound to put up guards merely to prevent travelers straying out of the path, which was not held error. Yoders v. Amwell Tp., 172 Pa. 447, 33 Atl. 1017; Bitting v. Maxatawny Tp., 177 Pa. 213, 35 Atl. 715; Eads v. City of Marshall (Tex. Civ. App.) 29 S. W. 170; Lazelle v. Town of Newfame, 69 Vt. 306, 37 Atl. 1045; Teater v. City of Seattle, 10 Wash. 327, 38 Pac. 1006. Nonsuit properly granted where team became unmanageable and ran away. Rorhbough v. Barber County Ct., 39 W. Va. 472, 20 S. E. 565; Schillinger v. Town of Verona, 96 Wis. 456, 71 N. W. 888. No liability where team became unmanageable. But see Auberle v. City of McKeesport, 179 Pa. 321, 36 Atl. 212.

[343] Quinton v. Burton, 61 Iowa, 471, 16 N. W. 569.

[344] Tyler v. Tehama County, 109 Cal. 618, 42 Pac. 240; Krug v. St. Mary's Borough, 152 Pa. 30, 25 Atl. 161; Id., 152 Pa. 37, 25 Atl. 162; But see Crowell v. Sonoma County, 25 Cal. 313; Jernee v. Monmouth County Freeholders, 52 N. J. Law, 553, 21 Atl. 295, 11 L. R. A. 416; Shieb v. Collier Tp. (Pa.) 11 Atl. 366.

obstructions on [345] or holes in the roadway,[346] broken, loose or defective planks or other material used in its repair or construction,[347] inequalities in its surface, defective railings,[348] or a general decayed, unrepaired and defective condition.[349]

§ 1029. Duty to inspect.

The duty to inspect is not an absolute one for this would make the corporation an insurer of the safety of a person, but is of the same character as the duty to construct and maintain, namely, to exercise reasonable care and diligence in the inspection,[350] having

[345] Cooley v. Trustees New York & Brooklyn Bridge, 46 App. Div. 243, 61 N. Y. Supp. 1.

[346] Bradford v. City of Anniston, 92 Ala. 349, 8 So. 683; Lee County v. Yarbrough, 85 Ala. 590, 5 So. 341; City of Jacksonville v. Drew, 19 Fla. 106; City of Atlanta v. Champe, 66 Ga. 659; City of Atlanta v. Buchanan, 76 Ga. 585; City of Griffin v. Johnson, 84 Ga. 279, 10 S. E. 719; Page v. Town of Bucksport, 64 Me. 51; Lyman v. Hampshire, 140 Mass. 311; Weet v. Village of Brockport, 16 N. Y. 161, note; City of Sherman v. Nairey, 77 Tex. 291; Strong v. City of Stevens Point, 62 Wis. 255.

[347] City of Brunswick v. Braxton, 70 Ga. 193; Page v. Town of Bucksport, 64 Me. 51; City of Marshall v. McAllister, 22 Tex. Civ. App. 214, 54 S. W. 1068; Koenig v. Town of Arcadia, 75 Wis. 62.

[348] Town of Tolland v. Town of Willington, 26 Conn. 578; Ward v. Town of North Haven, 43 Conn. 148; Town of Grayville v. Whitaker, 85 Ill. 439; Albee v. Floyd County, 46 Iowa, 177; City of Eudora v. Miller, 30 Kan. 494; Staples v. Town of Canton, 69 Mo. 592; Stickney v. City of Salem, 85 Mass. (3 Allen) 374; Loewer v. City of Sedalia, 77 Mo. 431; Walker v. Kansas City, 99 Mo. 647; Woodman v. Town of Nottingham, 49 N. H. 387; Langlois v. City of Cohoes, 58 Hun, 226, 11 N. Y. Supp. 908; Blakely v. Laurens County, 55 S. C. 422, 33 S. E. 503; Rice v. Town of Mount Pelier, 19 Vt. 470.

[349] Allen County Com'rs v. Bacon, 96 Ind. 31; Homan v. Franklin County, 98 Iowa, 692, 68 N. W. 559; City of Topeka v. Hempstead, 58 Kan. 328; Whitman v. Inhabitants of Groveland, 131 Mass. 553; Snyder v. City of Albion, 113 Mich. 275, 71 N. W. 475. Evidence of general decayed condition of bridge admissible. Gibson v. City of Jackson (Miss.) 22 So. 891; Walker v. Kansas City, 99 Mo. 647.

[350] Morgan v. Freemont County, 92 Iowa, 64, 61 N. W. 231; Murray v. Woodson County Com'rs, 58 Kan. 1, 48 Pac. 554; McKellar v. Monitor Tp., 78 Mich. 485, 44 N. W. 412. Question for jury. Medina Tp. v. Perkins, 48 Mich. 67; Stebbins v. Keene Tp., 55 Mich. 552; Bettys v. Denver Tp., 115 Mich. 228, 73 N. W. 138; Childs v. Crawford County, 176 Pa. 139, 34 Atl. 1020.

in view the material [351] of which the bridge is constructed, its location, the nature of the traffic passing over it,[352] or its age.[353]

§ 1030. Warning to the public.

It is also the duty, where one exists, of a public corporation, to exercise reasonable care in warning the public, by the erection of barriers, placing of lights or other means, of defects while they are being remedied or changes being made in the structure which causes a dangerous condition for travel or generally of any condition in respect to the bridge which it is unable immediately to remedy and of which the public should have notice.[354] Where the work is being done by an independent contractor, the rule may be otherwise.[355]

§ 1031. Defenses.

As said in previous sections,[356] the duty with its resultant liability to construct and maintain bridges in a reasonably safe condition does not always exist. Where no such duty is charged either by statutory provision or common law, this circumstance is clearly a perfect defense in an action brought to recover for injuries received because of a defective condition. To warrant a recovery in all cases, the action must also be brought against that

[351] Howard County Com'rs v. Legg, 110 Ind. 479, 11 N. E. 612; Ferguson v. Davis County, 57 Iowa, 601; Huff v. Poweshiek County, 60 Iowa, 529; Blank v. Lavonia Tp., 79 Mich. 1, 44 N. W. 157; Id., 95 Mich. 229, 54 N. W. 877; Rapho Tp. v. Moore, 68 Pa. 404.

[352] O'Neil v. Deerfield Tp., 86 Mich. 610, 49 N. W. 596.

[353] Allen County Com'rs v. Creviston, 133 Ind. 39, 33 N. E. 735; Spaulding v. Town of Sherman, 75 Wis. 77, 43 N. W. 558.

[354] Boone County Com'rs v. Mutchler, 137 Ind. 140; Brown v. Jefferson County, 16 Iowa, 339; Weirs v. Jones County, 80 Iowa, 351, 45 N. W. 883. Where barriers are removed without a county's knowledge or consent, it will not be liable for injuries resulting from injuries from a defective bridge. Morris County Chosen Freeholders v. Hough, 55 N. J. Law, 628, 28 Atl. 86; Clapp v. Town of Ellington, 87 Hun, 542, 34 N. Y. Supp. 283; Mullen v. Town of Rutland, 55 Vt. 77. But where a baricade has been rendered insufficient by accident or malicious interference, there can be no liability.

[355] Spicer v. Elkhart County Com'rs, 126 Ind. 369, 26 N. E. 58. But see Park v. Adams County Com'rs, 3 Ind. App. 536, 30 N. E. 147.

[356] See §§ 983 et seq.

corporation having control of the structure or a part of it and charged with the duty of maintaining it,[357] though there may be a joint liability.[358] In cases of divided authority, the provisions of specific statutes usually control.[359] Another defense sometimes interposed is that of want of funds. Public corporations are regarded as public agents not organized for their own pecuniary benefit or profit but for the advantage of the public. They are strictly limited by law in the raising of revenues and in their expenditures. Where, by cause of such restrictions they are unable to properly repair or construct highways or any parts of them, clearly, no liability can follow. The lack of means lawfully at their disposal necessarily defeats a recovery,[360] while the possession of funds or the availability of a source of revenue for this purpose creates, ordinarily, a liability.[361]

§ 1032. Injuries through operation.

In the construction of a draw bridge or movable structure, injuries may be received through its negligent operation.[362] The

[357] Crowell v. Sonoma County, 25 Cal. 313; Daniels v. Intendent & Wardens of Athens, 55 Ga. 609; Village of Marseilles v. Howland, 124 Ill. 547, 16 N. E. 883; Village of Marseilles v. Kiner, 34 Ill. App. 355; State v. Inhabitants of Madison, 59 Me. 538; Quinlan v. Village of Manistique, 85 Mich. 22, 48 N. W. 172; Clapper v. Town of Waterford, 62 Hun, 170, 16 N. Y. Supp. 640; Sheridan v. Palmyra Tp., 180 Pa. 439, 36 Atl. 868.

[358] Town of Tolland v. Town of Willington, 26 Conn. 578; Shaw v. Town of Potsdam, 11 App. Div. 508, 42 N. Y. Supp. 779; Armstrong County v. Clarion County, 66 Pa. 218.

[359] Perkins v. Inhabitants of Oxford, 66 Me. 545; Clapp v. Town of Ellington, 87 Hun, 542, 34 N. Y. Supp. 283.

[360] Covington County v. Kinney, 45 Ala. 176; People v. Adsit, 2 Hill (N. Y.) 619; McMahon v. Town of Salem, 25 App. Div. 1, 49 N. Y. Supp. 310; Bullock v. Town of Durham, 64 Hun, 380, 19 N. Y. Supp. 635; Orth v. City of Milwaukee, 59 Wis. 336. But see Carney v. Village of Marseilles, 136 Ill. 401, 26 N. E. 491, where it is held that if the bridge becomes defective through the lack of funds, the village should close it to travel as it is unsafe. See, also, Taylor v. Davis County, 40 Iowa, 295.

[361] City of Greensboro v. McGibbony, 93 Ga. 672, 20 S. E. 37; Shartle v. City of Minneapolis, 17 Minn. 308 (Gil. 284). See, also, cases cited in preceding note, and § 1060, post.

[362] Scott v. City of Chicago, 1 Biss. 510, Fed. Cas. No. 12,526; City of Boston v. Crowley, 38 Fed. 202; Greenwood v. Town of Westport, 53 Fed. 824, Id., 62 Conn. 575; Van Etten v. Town of Westport, 60

liability under these circumstances is not one which arises from a failure to perform the obligation of keeping this particular portion of the highway in a reasonably safe condition for travel. The duty to properly operate or keep in condition for safe operation is distinct from that of keeping the structure safe for travel;[363] but if there is a failure to maintain barriers or lights to prevent accidents when a draw is open, a liability may result for injuries to one using the street who, through the lack of such lights or barriers is injured while a draw bridge is open.

§ 1033. 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.[364] 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, which will be considered in a later section,[365] no notice is necessary because the doing of the act by law charges a public corporation with notice

Fed. 579; Houston v. Police Jury of St. Martin, 3 La. Ann. 566; Ripley v. Chosen Freeholders of Essex & Hudson Counties, 40 N. J. Law, 45; Weisenberg v. Town of Winneconne, 56 Wis. 667. But see McDougall v. City of Salem, 110 Mass. 21.

French v. City of Boston, 129 Mass. 592. No liability in the absence of express statutory provision. Godfrey v. Queen's County, 89 Hun, 18, 34 N. Y. Supp. 1052. No liability on the part of the county for injuries to a tug caused by collision with a draw bridge through the negligence of the bridge tender although Laws 1892, c. 686, art. 1, §§ 2 and 3, declare counties to be municipal corporations.

[363] Daly v. City of New Haven, 69 Conn. 644, 38 Atl. 397; Stephani v. City of Manitowoc, 89 Wis. 467, 62 N. W. 176.

[364] Village of Warren v. Wright, 3 Ill. App. 602. See §§ 982 et seq., 1001 et seq., 1015 et seq., and 1026, ante.

[365] See § 1040.

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 within 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.[366]

§ 1034. Notice must be shown affirmatively by the plaintiff.

The existence of a liability depending absolutely upon the possession of knowledge of the defect by the public corporation, it is, therefore, necessary for the plaintiff to show affirmatively, in all cases, notice either actual or constructive of the particular defect causing the injury complained of[367] and the lapse of a reasonable

[366] City of New York v. Sheffield, 71 U. S. (4 Wall.) 189; City of Denver v. Saulcey, 5 Colo. App. 420, 38 Pac. 1098; Bill v. City of Norwich, 39 Conn. 222; Cunningham v. City of Denver, 23 Colo. 18, 45 Pac. 356; Village of Mansfield v. Moore, 124 Ill. 133, 16 N. E. 246; Ransom v. City of Belvidere, 87 Ill. App. 167; Town of Rosedale v. Ferguson, 3 Ind. App. 596, 30 N. E. 156; City of Ft. Wayne v. De Witt, 47 Ind. 391; City of Evansville v. Senhenn, 151 Ind. 42, 47 N. E. 634, 51 N. E. 88, 41 L. R. A. 728; Doulon v. City of Clinton, 33 Iowa, 397; Robinson v. City of Cedar Rapids, 100 Iowa, 662, 69 N. W. 1064; City of Atchison v. King, 9 Kan. 550; Jones v. Walnut Tp., 59 Kan. 774, 52 Pac. 865; Hoey v. Inhabitants of Matick, 153 Mass. 528, 27 N. E. 595; Parker v. City of Boston, 175 Mass. 501, 56 N. E. 569; Burleson v. Village of Reading, 110 Mich. 512, 68 N. W. 294; Handy v. Meridian Tp., 114 Mich. 454, 72 N. W. 251; Aben v. Ecorse Tp., 113 Mich. 9; Schweickhardt v. City of St. Louis, 2 Mo. App. 571; Young v. Webb City, 150 Mo. 333, 51 S. W. 709; Bonine v. City of Richmond, 75 Mo. 437; Buckley v. Kansas City, 156 Mo. 16, 56 S. W. 319; City of York v. Spellman, 19 Neb. 357; Griffin v. City of New York, 9 N. Y. (5 Seld.) 456; Requa v. City of Rochester, 45 N. Y. 129; Jones v. City of Greensboro, 124 N. C. 310, 32 S. E. 675; Vandyke v. City of Cincinnati, 1 Disn. (Ohio) 532; City of Circleville v. Sohn, 59 Ohio St. 285, 52 N. E. 788; Mack v. City of Salem, 6 Or. 275; Ford v. Umatilla Co., 15 Or. 313, 16 Pac. 33; City of Philadelphia v. Smith (Pa.) 16 Atl. 493; Town of Franklin v. House, 104 Tenn. 1, 55 S. W. 153; Ward v. Town of Jefferson, 24 Wis. 342. But in West Virginia it is held that where the duty to repair highways is imposed, a liability will arise from the existence of defects irrespective of the question of notice. See the following cases: Evans v. City of Huntington, 37 W. Va. 601, 16 S. E. 801; Arthur v. City of Charleston, 51 W. Va. 132, 41 S. E. 171.

[367] City of Boulder v. Weger, 17 Colo. App. 69, 66 Pac. 1070; City of Jackson v. Boone, 93 Ga. 662, 20

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.[368] It is also necessary for the plaintiff in actions of this character, to plead the fact of notice, for without notice, as already stated, in acts of omission, there can be no liability.[369] The burden is, therefore, upon the plaintiff to both allege and prove notice or a reasonable knowledge as a condition precedent to the liability of a public corporation in acts of omission.[370] The burden, however, is on the defendant to plead and prove that it did not have a reasonable time in which to make the repairs before the injury was received.[371]

§ 1035. To whom given.

The giving of actual notice or the existence of constructive notice does not, in all cases, create a liability. Not only must the

S. E. 46; City of Joliet v. Meaghan, 22 Ill. App. 255; City of Decatur v. Fisher, 53 Ill. 407; City of Pleasanton v. Rhine, 8 Kan. App. 452, 54 Pac. 512; Whitney v. City of Lowell, 151 Mass. 212, 24 N. E. 47; Jones v. City of Greensboro, 124 N. C. 310, 32 S. E. 675; Otto Tp. v. Wolf, 106 Pa. 608; Loberg v. Town of Amherst, 87 Wis. 634, 58 N. W. 1048; Bailey v. Town of Spring Lake, 61 Wis. 227.

[368] Lamb v. City of Cedar Rapids, 108 Iowa, 629, 79 N. W. 366; Richardson v. City of Marceline, 73 Mo. App. 360; Taylor v. Village of Mt. Vernon, 58 Hun, 384, 12 N. Y. Supp. 25; Rogers v. City of Williamsport, 199 Pa. 450, 49 Atl. 293; Town of Franklin v. House, 104 Tenn. 1, 55 S. W. 153; Morrison v. City of Madison, 96 Wis. 452. But see City of Covington v. Diehl, 22 Ky. L. R. 955, 59 S. W. 492.

[369] Serrot v. Omaha City, 1 Dill. 312, Fed. Cas. No. 12,673. But if the facts alleged show prima facie the liability, it is not necessary to specifically allege that the city had notice of the defect. Lord v. City of Mobile, 113 Ala. 360, 21 So. 366. Sufficiency of averment. City of La Salle v. Porterfield, 138 Ill. 114, 27 N. E. 937; City of Nokomis v. Salter, 61 Ill. App. 150; Posey County Com'rs v. Stock, 11 Ind. App. 167, 36 N. E. 928; City of Madison v. Baker, 103 Ind. 41; Junction City v. Blades, 1 Kan. App. 85, 41 Pac. 677; Lewis v. City of Eskridge, 52 Kan. 282, 34 Pac. 892; Union St. R. Co. v. Stone, 54 Kan. 83, 37 Pac. 112; Hutchings v. Inhabitants of Sullivan, 90 Me. 131; Germaine v. City of Muskegan, 105 Mich. 213, 63 N. W. 78; Rusher v. City of Aurora, 71 Mo. App. 418; Vogelgesang v. City of St. Louis, 139 Mo. 127; Kusterer v. City of Beaver Dam, 52 Wis. 146. But see Carroll v. Allen, 20 R. I. 144, 37 Atl. 704.

[370] City of Evansville v. Frazier, 24 Ind. App. 628, 56 N. E. 729; City of Indianapolis v. Mitchell, 27 Ind. App. 589, 61 N. E. 947; City of Indianapolis v. Tansell, 157 Ind. 463, 62 N. E. 35; Noble v. City of Richmond, 31 Grat. (Va.) 271.

[371] City of Covington v. Diehl, 22 Ky. L. R. 955, 59 S. W. 492.

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.[372] The notice must, therefore, be given to one whose legal duty it is to remedy or repair the defect complained of [373] or to one whose legal duty it is to inform those public officials charged by law with this duty.[374] The giving of notice so as to create a liability depends upon the official duties of various officers as they are prescribed by law.[375] There is no general principle

[372] City of Savanna v. Trusty, 98 Ill. App. 277. Notice to a city treasurer, police magistrate or other municipal officer whose duties do not relate, in a way, to the care of streets, is not a notice to the city. Hazard v. City of Council Bluffs, 87 Iowa, 51, 53 N. W. 1083; Kansas City v. Bradbury, 45 Kan. 381, 25 Pac. 889; McFarland v. Emporia Tp., 59 Kan. 568, 53 Pac. 864; City of Topeka v. Noble, 9 Kan. App. 171, 58 Pac. 1015; Hinckley v. Somerset, 145 Mass. 326, 14 N. E. 166; Monies v. City of Lynn, 119 Mass. 273; Foster v. City of Boston, 127 Mass. 290. Notice to a janitor of a public school house of a defect will not charge the city. Moore v. Hazleton Tp., 118 Mich. 425, 76 N. W. 977.

Cunningham v. City of Thief River Falls, 84 Minn. 21, 86 N. W. 763. Notice is binding on the municipal corporation when made to officers clothed with general powers and duties with reference to the control of corporate affairs or with specific duties in respect to the care of streets. City of Austin v. Colgate (Tex. Civ. App.) 27 S. W. 896; City of San Antonio v. Ball (Tex. Civ. App.) 66 S. W. 713.

[373] City of Decatur v. Hamilton, 89 Ill. App. 561; Atchison County Com'rs v. Sullivan, 7 Kan. App. 152, 53 Pac. 142; Madison Tp. v. Scott, 9 Kan. App. 871, 61 Pac. 967. Township trustee. Pease v. Inhabitants of Parsonsfield, 92 Me. 345, 42 Atl. 502. Notice to officer de facto sufficient. Rogers v. Inhabitants of Shirley, 74 Me. 144; Bunker v. Inhabitants of Gouldsboro, 81 Me. 188, 16 Atl. 543; Rogers v. Village of Orion, 116 Mich. 324, 74 N. W. 463. Notice not specifying location of defect although served on proper officer is not sufficient to charge the village with notice. Edwards v. Common Council of Three Rivers, 96 Mich. 625, 55 N. W. 1003, Saylor v. City of Montesano, 11 Wash. 328, 39 Pac. 653; Beall v. City of Seattle, 28 Wash. 593, 69 Pac. 12, 61 L. A. R. 583. But see Dewey v. City of Detroit, 15 Mich. 307.

[374] Mareck v. City of Chicago, 89 Ill. App. 358; Morgan v. Fremont County, 92 Iowa, 644, 61 N. W. 231; Chase v. City of Lowell, 151 Mass. 422, 24 N. E. 212; City of Dallas v. Meyers (Tex. Civ. App.) 55 S. W. 742. But see Touhey v. City of Rochester, 64 App. Div. 56, 71 N. Y. Supp. 661.

[375] Eastman v. Clackamas County, 32 Fed. 24; Cummings v. City of Hartford, 70 Conn. 115, 38 Atl. 916.

which can be applied to determine absolutely, therefore, the liability of a corporation through the giving of notice to a particular designated person. The cases hold differently as depending upon custom or varying statutory or charter provisions.[376]

Where a policeman is charged with the duty of reporting or remedying defects, notice to him is notice to the city. Lundon v. City of Chicago, 83 Ill. App. 208; Reid v. City of Chicago, 83 Ill. App. 554. Unless a policeman is charged with the duty of reporting sidewalk defects, notice to him of one is not notice to the city. City of Lafayette v. Larson, 73 Ind. 367; City of Logansport v. Justice, 74 Ind. 378. Notice to city councilmen sufficient. City of Columbus v. Strassner, 124 Ind. 482, 25 N. E. 65. Notice to city councilmen is notice to the city. Smith v. City of Des Moines, 84 Iowa, 685, 51 N. W. 77; Cook v. City of Anamosa, 66 Iowa, 427. Notice to city marshal not sufficient, he being clothed with no power or charged with no duty in respect to sidewalks. Owen v. City of Ft. Dodge, 98 Iowa, 281, 67 N. W. 281. Notice to member of city council sufficient. Keyes v. City of Cedar Falls, 107 Iowa, 509, 78 N. W. 227. Knowledge of an alderman of the defect is knowledge of the city. Rich v. City of Rockland, 87 Me. 188, 32 Atl. 872. Notice to foreman employed by road commissioners not sufficient. Dundas v. City of Lansing, 75 Mich. 499, 42 N. W. 1011, 5 L. R. A. 143; Fuller v. City of Jackson, 82 Mich. 480, 46 N. W. 721. Notice to street commissioner or aldermen good. Platz v. McKean Tp., 178 Pa. 601, 36 Atl. 136; City of Bonham v. Crider (Tex. Civ. App.) 27 S. W. 419. Notice to aldermen sufficient. McKeigue v. City of Janesville, 68 Wis. 50, 31 N. W. 298; Jaquish v. Town of Ithaca, 36 Wis. 108. Notice to member of town board supervisors good. Goldsworthy v. Town of Linden, 75 Wis. 24, 43 N. W. 656. Notice to highway overseers charged by the city with the duty of keeping highways in repair is notice to the town.

[376] City of Denver v. Dean, 10 Colo. 375, 16 Pac. 30. Knowledge of chief of police held sufficient to charge a city with notice. City of Columbus v. Ogletree, 96 Ga. 177, 22 S. E. 709, Id., 102 Ga. 293, 29 S. E. 749. Where policemen are required to report defects in sidewalks, notice to one is notice to the city.

City of Salina v. Trosper, 27 Kan. 544. Notice to mayor and marshal sufficient. City of Erie v. Phelps, 56 Kan. 135, 42 Pac. 336. Notice to marshal sufficient. City of Pittsburg v. Broderson, 10 Kan. App. 430, 62 Pac. 5. If the members of a committee of the city council on streets and bridges have knowledge of a dangerous and defective condition, it is sufficient to charge the city with negligence. Tuell v. Inhabitants of Paris, 23 Me. 556; Mason v. Inhabitants of Ellsworth, 32 Me. 271; Ham v. Inhabitants of Wales, 58 Me. 222. Notice to any intelligent inhabitant is notice to the town. Blake v. Lowell, 143 Mass. 296; City of Lincoln v. Woodward, 19 Neb. 259. Street commissioner. Rehberg v. City of New York, 91 N. Y. 137. Knowledge by policemen is notice to the city

§ 1036. 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.[377] Actual notice obtains where a memorandum or entry is made of the defect in books kept for that purpose [378] or written or oral information of the defect is given to or acquired by the proper officer.[379]

§ 1037. Statutory notice.

In some states actual notice in respect to certain defects is provided for by charter or statutory provisions [380] which designate its character and form,[381] upon what officials to be served,[382] and

when the police are charged with the duty of removing nuisances from the street. Frazier v. Borough of Butler, 172 Pa. 407, 33 Atl. 691; Burger v. City of Philadelphia, 196 Pa. 41, 46 Atl. 262. City inspector. Jordan v. Peckham, 19 R. I. 28, 31 Atl. 305. Notice to individual member of town council not notice to town. See, also, authorities cited in preceding note.

[377] Village of Sorento v. Johnson, 52 Ill. App. 659; City of Mattoon v. Russell, 91 Ill. App. 252. City aldermen. Village of Mt. Morris v. Kanode, 98 Ill. App. 373; Madison Tp. v. Scott, 9 Kan. App. 871, 61 Pac. 967; Shipley v. City of Bolivar, 42 Mo. App. 401. Actual knowledge implied from the frequent passing over the defect by defendant's officers. Cropper v. City of Mexico, 62 Mo. App. 385. Knowledge of a member of the city council of a city of the third class is notice to the city. Michels v. City of Syracuse, 92 Hun, 365, 36 N. Y. Supp. 507; Fee v. Borough of Columbus, 168 Pa. 382, 31 Atl. 1076; City of Lynchburg v. Wallace, 95 Va. 640, 29 S. E. 675; Cantwell v. City of Appleton, 71 Wis. 463, 37 N. W. 813; Barrett v. Village of Hammond, 87 Wis. 654; Mauch v. City of Hartford, 112 Wis. 40, 87 N. W. 816.

[378] City of Joliet v. Looney, 159 Ill. 471, 42 N. E. 854; Blake v. Lowell, 143 Mass. 296, 9 N. E. 627.

[379] Trapnell v. City of Red Oak Junction, 76 Iowa, 744, 39 N. W. 884; Fortin v. Easthampton, 142 Mass. 486.

[380] McAllister v. City of Bridgeport, 72 Conn. 733, 46 Atl. 552; Tarba v. City of Rochester, 41 App. Div. 188, 58 N. Y. Supp. 755; Seamons v. Fitts, 21 R. I. 236. But see Hari v. Ohio Tp., 62 Kan. 315, 62 Pac. 1010. See, also, Madison Tp. v. Scott, 9 Kan. App. 871, 61 Pac. 967; McNally v. City of Cohoes, 53 Hun, 202, 6 N. Y. Supp. 842, 127 N. Y. 350, 27 N. E. 1043.

[381] Carleton v. Inhabitants of Caribou, 88 Me. 461, 34 Atl. 269; Littlefield v. Inhabitants of Webster, 90 Me. 213, 38 Atl. 141; Gurney v. Inhabitants of Rockport, 93 Me. 360, 45 Atl. 310.

[382] Smith v. City of Rochester, 64 Hun, 637, 19 N. Y. Supp. 459; Elias v. City of Rochester, 162 N. Y. 614, 62 N. E. 1095, affirming 49 App. Div.

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.[383] Statutes of this character are construed strictly [384] 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.[385]

§ 1038. Constructive notice.

Constructive notice obtains where a defective condition has existed for that length of time in which the public corporation acting through its proper officers and the usual means by the exercise of reasonable care and diligence, might have discovered and remedied the defect.[386] 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.[387] Constructive notice is,

597, 63 N. Y. Supp. 712; Sprague v. City of Rochester, 159 N. Y. 20, 53 N. E. 697, reversing 88 Hun, 613, 34 N. Y. Supp. 1126; Sullivan v. City of Oshkosh, 55 Wis. 508. But see Conlon v. City of St. Paul, 70 Minn. 216, 72 N. W. 1073.

[383] Bradbury v. City of Lewiston, 95 Me. 216, 49 Atl. 1041; Touhey v. City of Rochester, 64 App. Div. 56, 71 N. Y. Supp. 661.

[384] McNally v. City of Cohoes, 53 Hun, 202, 6 N. Y. Supp. 842.

[385] Hurley v. Inhabitants of Bowdoinham, 88 Me. 293, 34 Atl. 72; Wormwood v. Waltham, 144 Mass. 184, 10 N. E. 800. But see Schumacher v. City of New York, 166 N. Y. 103, 59 N. E. 773.

[386] Seward v. City of Wilmington, 2 Marv. (Del.) 189, 42 Atl. 451; Pierce v. City of Wilmington, 2 Marv. (Del.) 306, 43 Atl. 162; Village of Lockport v. Richards, 81 Ill. App. 533; City of Chicago v. Baker, 95 Ill. App. 413; City of Sterling v. Merrill, 124 Ill. 522, 17 N. E. 6; City of Joliet v. Johnson, 177 Ill. 178, 52 N. E. 498; City of Frankfort v. Coleman, 19 Ind. App. 368, 49 N. E. 474; Porter County Com'rs v. Dombke, 94 Ind. 72; Huntington County Com'rs v. Bonebrake, 146 Ind. 311; Murray v. Woodson County Com'rs, 58 Kan. 1; City of Covington v. Huber, 23 Ky. L. R. 2107, 66 S. W. 619; Holt v. Inhabitants of Penobscott, 56 Me. 15; Germaine v. City of Muskegon, 105 Mich. 213, 63 N. W. 78; Cleveland v. City of St. Paul, 18 Minn. 279 (Gil. 255); Williams v. City of Hannibal, 94 Mo. App. 549, 68 S. W. 380; City of Lincoln v. Pirner, 59 Neb. 634, 81 N. W. 846; Howe v. Plainfield, 41 N. H. 135; Duncan v. City of Philadelphia, 173 Pa. 550, 34 Atl. 235; Tucker v. Salt Lake City, 10 Utah, 173, 37 Pac. 261; Piper v. City of Spokane, 22 Wash. 147, 60 Pac. 138; Born v. City of Spokane, 27 Wash. 719, 68 Pac. 386.

[387] Dotton v. Village of Albion, 50 Mich. 129.

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.[388] 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,[389] and also some where no liability

[388] City of Birmingham v. Starr, 112 Ala. 98; City of Chicago v. Gillett, 91 Ill. App. 287; City of Ft. Wayne v. Patterson, 3 Ind. App. 34, 29 N. E. 167; Columbia City v. Langohr, 20 Ind. App. 395, 50 N. E. 831; Cason v. City of Ottumwa, 102 Iowa, 99, 71 N. W. 192; Keyes v. City of Cedar Falls, 107 Iowa, 509, Colley v. Inhabitants of Westbrook, 57 Me. 181; Olson v. Worcester, 142 Mass. 536; Stoddard v. Inhabitants of Winchester, 154 Mass. 149; Sawyer v. City of Newburyport, 157 Mass. 430; Bingham v. City of Boston, 161 Mass. 3; Baker v. City of Grand Rapids, 111 Mich. 447; Atherton v. Village of Bancroft, 114 Mich. 241; L'Herault v. City of Minneapolis, 69 Minn. 261; City of Lincoln v. Smith, 28 Neb. 762; Davis v. City of Omaha, 47 Neb. 836; Parsons v. Manchester, 67 N. H. 163; Barr v. Village of Bainbridge, 42 App. Div. 628, 59 N. Y. Supp. 132; Donnelly v. City of Rochester, 166 N. Y. 315, 59 N. E. 989; McCloskey v. Moies, 19 R. I. 297; Poole v. City of Jackson, 93 Tenn. 62, 23 S. W. 57; City of Palestine v. Hassell, 15 Tex. Civ. App. 519; City of Austin v. Colgate (Tex. Civ. App.) 27 S. W. 896. City of Dallas v. Jones, 93 Tex. 38, 49 S. W. 577, 53 S. W. 377; Brown v. Town of Swanton, 69 Vt. 53; Bergevin v. City of Chippewa Falls, 82 Wis. 505, 52 N. W. 588; Woodward v. City of Boscobel, 84 Wis. 226; Crites v. City of New Richmond, 98 Wis. 55; Rhyner v. City of Menasha, 107 Wis. 201, 83 N. W. 303. Constructive notice does not depend upon the lapse of a certain period of time alone but on all the facts and circumstances of the case.

[389] *Hours:* Parsons v. City of Manchester, 67 N. H. 163, 27 Atl. 88; Masters v. City of Troy, 50 Hun, 485, 3 N. Y. Supp. 450.

Days: City of Griffin v. Johnson, 84 Ga. 279, 10 S. E. 719; Town of Monticello v. Kennard, 7 Ind. App. 135, 34 N. E. 454. Three days. City of Ft. Wayne v. Duryee, 9 Ind. App. 620, 37 N. E. 299. Four. City of Mt. Vernon v. Hoehn, 22 Ind. App. 282, 53 N. E. 654; Naylor v. Salt Lake City, 9 Utah 491, 35 Pac. 509; Bloor v. Town of Delafield, 69 Wis. 273, 34 N. W. 115.

Weeks: Barr v. Kansas City, 105 Mo. 550, 16 S. W. 483; Young v. Webb City, 150 Mo. 333, 51 S. W. 709. Six. Chosen Freeholders of

was held because of the shortness of the time between the occurrence of the defect and the happening of the injury.[390] The de-

Morris County v. Hough, 55 N. J. Law, 628, 28 Atl. 86. Two. Warner v. Village of Randolph, 18 App. Div. 458, 45 N. Y. Supp. 1112. Six or more. Burns v. Town of Farmington, 31 App. Div. 364, 52 N. Y. Supp. 229; Tarba v. City of Rochester, 41 App. Div. 188, 58 N. Y. Supp. 755; McDonald v. City of Ashland, 78 Wis. 251, 47 N. W. 434; Sullivan v. City of Oshkosh, 55 Wis. 508.

Months: City of Montgomery v. Wright, 72 Ala. 411; Brownlee v. Village of Alexis, 39 Ill. App. 135; City of Decatur v. Besten, 169 Ill. 340, 48 N. E. 186. Six or more, question for jury. Waud v. Polk County, 88 Iowa, 617, 55 N. W. 528; Finnegan v. Sioux City, 112 Iowa, 232, 83 N. W. 907; City of Newport v. Miller, 93 Ky. 22, 18 S. W. 835; Mulliken v. City of Corunna, 110 Mich. 212, 68 N. W. 141; Rodda v. City of Detroit, 117 Mich. 412, 75 N. W. 939; Urtel v. City of Flint, 122 Mich. 65, 80 N. W. 991; Laverdure v. City of New York, 28 App. Div. 65, 50 N. Y. Supp. 882. April to following September. Parker v. City of Laredo, 9 Tex. Civ. App. 221, 28 S. W. 1048. Three or four. Lorence v. City of Ellensburgh, 13 Wash. 341, 43 Pac. 20; Sutton v. City of Snohomish, 11 Wash. 24, 39 Pac. 273; Devenish v. City of Spokane, 21 Wash. 77, 57 Pac. 340. One to four. Hall v. City of Fond du Lac, 42 Wis. 275; Schuenke v. Town of Pine River, 84 Wis. 669, 54 N. W. 1007. Several. West v. City of Eau Claire, 89 Wis. 31, 61 N. W. 313.

Miscellaneous: Downs v. Town of Smyrna, 2 Pen. (Del.) 132, 45 Atl. 717; 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. Whitfield v. City of Meridian, 66 Miss. 570, 6 So. 244, 4 L. R. A. 834; Turner v. City of Newburgh, 109 N. Y. 301, 16 N. E. 344; Bullock v. Town of Durham, 64 Hun, 380, 19 N. Y. Supp. 635. Four years. Fisher v. City of Mt. Vernon, 41 App. Div. 293, 58 N. Y. Supp. 499. More than a year. Grimm v. Town of Washburn, 100 Wis. 229, 75 N. W. 984.

[390] Ince v. City of Toronto, 27 Ont. App. 410. Five hours. City of Montezuma v. Wilson, 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. City of Lafayette v. Blood, 40 Ind. 62; Town of Lewisville v. Batson, 29 Ind. App. 21, 63 N. E. 861. From between three and five o'clock in the afternoon until nine o'clock that night, time of the injury. Jones v. City of Clinton, 100 Iowa, 333, 69 N. W. 418; Stoddard v. Inhabitants of Winchester, 154 Mass. 149, 27 N. E. 1014; Bingham v. City of Boston, 161 Mass. 3, 36 N. E. 473. Question for jury. Reed v. City of Detroit, 99 Mich. 204, 58 N. W. 44. Morning before accident. Thomas v. City of Flint, 123 Mich. 10, 81 N. W. 936, 47 L. R. A. 499. Two or three days. Dittrich v. City of Detroit, 98 Mich. 245, 57 N. W. 125; Butler v. Town of Oxford, 69

termination of constructive notice involves the question of due care and diligence in the discovery of defects.[391] It depends upon the volume or character of travel,[392] the materials used in the construction or the repair of an improvement,[393] and the character of the defect itself as one easily discovered, open and notorious or

Miss. 618, 13 So. 626. Within an hour or two before accident. Taylor v. Village of Mt. Vernon, 58 Hun, 384, 12 N. Y. Supp. 25; Riley v. Town of Eastchester, 18 App. Div. 94, 45 N. Y. Supp. 448; Morgan v. Village of Penn Yan, 42 App. Div. 582, 59 N. Y. Supp. 504; Hawkins v. City of New York, 54 App. Div. 258, 66 N. Y. Supp. 623; 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, holding that a city is chargeable with notice when an obstruction stands for three or four days in one of its much-used streets. Mattimore v. City of Erie, 144 Pa. 14, 22 Atl. 817; Otto Tp. v. Wolf, 106 Pa. 608; Burns v. City of Bradford, 137 Pa. 361, 20 Atl. 997, 11 L. R. A. 726; Carroll v. Allen, 20 R. I. 541, 40 Atl. 419; Hiner v. City of Fond du Lac, 71 Wis. 74, 36 N. W. 632; Cooper v. City of Milwaukee, 97 Wis. 458, 72 N. W. 1130. But see McPherson v. District of Columbia, 7 Mackey (D. C.) 564.

[391] District of Columbia v. Payne, 13 App. D. C. 500; Cusick v. City of Norwich, 40 Conn. 375; City of Atlanta v. Perdue, 53 Ga. 607; City of Chicago v. Hoy, 75 Ill. 530; City of Streator v. Chrisman, 182 Ill. 215, 54 N. E. 997; Rosenberg v. City of Des Moines, 41 Iowa, 415; Lorig v. City of Davenport, 99 Iowa, 479, 68 N. W. 717; City of Abilene v. Cowperthwait, 52 Kan. 324, 34 Pac. 795; Bourget v. City of Cambridge, 159 Mass. 388; Moon v. City of Ionia, 81 Mich. 635, 46 N. W. 25; Bettys v. Denver Tp., 115 Mich. 228, 73 N. W. 138; Randall v. Southfield Tp., 116 Mich. 501, 74 N. W. 716; Corey v. City of Ann Arbor, 124 Mich. 134, 82 N. W. 804; Stellwagen v. City of Winona, 54 Minn. 460, 56 N. W. 51; Market v. City of St. Louis, 56 Mo. 189; Squires v. City of Chillicothe, 89 Mo. 226, 1 S. W. 23; Williams v. City of Hannibal, 94 Mo. App. 549, 68 S. W. 380; City of Lincoln v. Pirner, 59 Neb. 634, 81 N. W. 846; Smith v. City of Rochester, 79 Hun, 174, 29 N. Y. Supp. 539; Dorn v. Town of Oyster Bay, 84 Hun, 510, 32 N. Y. Supp. 341; Boyce v. Town of Shawangunk, 40 App. Div. 593, 58 N. Y. Supp. 26; Todd v. City of Troy, 61 N. Y. 506; 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; Brown v. Town of Swanton, 69 Vt. 53, 37 Atl. 280; Cowie v. City of Seattle, 22 Wash. 659, 62 Pac. 121. But see Pearl v. Benton Tp., 123 Mich. 411, 82 N. W. 226.

[392] City of Denver v. Moewes, 15 Colo. App. 28, 60 Pac. 986; Wilberding v. City of Dubuque, 111 Iowa, 484, 82 N. W. 957; Baxter v. City of Cedar Rapids, 103 Iowa, 599, 72 N. W. 790; Hembling v. City of Grand Rapids, 99 Mich. 292, 58 N. W. 310; Laurie v. City of Ballard, 25 Wash. 127, 64 Pac. 906.

[393] Town of Wheaton v. Hadley, 131 Ill. 640, 23 N. E. 422; Weber v. City of Creston, 75 Iowa, 16, 39 N. W. 126; Moore v. Kenockee Tp., 75

one which is slight and not easily ascertained.[394] The opportunity and means possessed by a public corporation for the discovery of defects is also an important consideration.[395]

§ 1039. How proved.

Constructive notice or knowledge may be proved by evidence of the condition and the existence [396] of a particular defect complained of at the time of injury or prior thereto,[397] or in some cases by proof of the general condition in that immediate place [398]

Mich. 332, 42 N. W. 944, 4 L. R. A. 555; Green v. Town of Nebagamain, 113 Wis. 508, 89 N. W. 520.

[394] Balls v. Woodward, 51 Fed. 646; City of Chicago v. Fowler, 60 Ill. 322; Broburg v. City of Des Moines, 63 Iowa, 523; Hunt v. City of Dubuque, 96 Iowa, 314; Jones v. City of Clinton, 100 Iowa, 333; City of Salina v. Kerr, 7 Kan. App. 223, 52 Pac. 901; Chase v. City of Lowell, 151 Mass. 422, 24 N. E. 212; Snyder v. City of Albion, 113 Mich. 275, 71 N. W. 475; McGrail v. City of Kalamazoo, 94 Mich. 52, 53 N. W. 955; Lindholm v. City of St. Paul, 19 Minn. 245 (Gil. 204); Anderson v. Albion, 64 Neb. 280, 89 N. W. 794; Beekman v. City of New York, 18 Misc. 509, 41 N. Y. Supp. 990; Lohr v. Borough of Philipsburg, 165 Pa. 109, 30 Atl. 822; Rosevere v. Borough of Osceola Mills, 169 Pa. 555; 32 Atl. 548; Rushton v. City of Allegheny, 192 Pa. 574, 44 Atl. 249; Elster v. City of Seattle, 18 Wash. 304, 51 Pac. 394; Crites v. City of New Richmond, 98 Wis. 55, 73 N. W. 322. But see Bellamy v. City of Atlanta, 75 Ga. 167.

[395] Moore v. City of Minneapolis, 19 Minn. 300 (Gil. 258); Masters v. City of Troy, 50 Hun, 485, 3 N. Y. Supp. 450.

[396] Kellogg v. Village of Jaynesville, 34 Minn. 132.

[397] City of Chicago v. Dalle, 115 Ill. 386; Parker v. City of Ottumwa, 113 Iowa, 649, 85 N. W. 805; Pettengill v. City of Yonkers, 116 N. Y. 558, 22 N. E. 1095; Butcher v. City of Philadelphia, 202 Pa. 1, 51 Atl. 330; Scott v. Provo City, 14 Utah, 31, 45 Pac. 1005.

[398] City of Taylorville v. Stafford, 196 Ill. 288, 63 N. E. 624; Armstrong v. Town of Ackley, 71 Iowa, 76, 32 N. W. 180; Munger v. City of Waterloo, 83 Iowa, 559, 49 N. W. 1028; Smith v. City of Des Moines, 84 Iowa, 685, 51 N. W. 77; Aryman v. City of Marshalltown, 90 Iowa, 350, 57 N. W. 867; O'Neil v. Village of West Branch, 281 Mich. 544, 45 N. W. 1023; Edwards v. Common Council of Three Rivers, 102 Mich. 153, 60 N. W. 454; Strudgeon v. Village of Sand Beach, 107 Mich. 496, 65 N. W. 616; Will v. Village of Mendon, 108 Mich. 251, 66 N. W. 58; Boyle v. City of Saginaw, 124 Mich. 348, 82 N. W. 1057; Gude v. City of Mankato, 30 Minn. 256; Burrows v. Village of Lake Crystal, 61 Minn. 357, 63 N. W. 745; Smallwood v. City of Tipton, 63 Mo. App. 234; Chacey v. City of Fargo, 5 N. D. 173, 64 N. W. 932; City of Belton v. Turner (Tex. Civ. App.) 27 S. W.

or at a time different[399] from that when the accident occurred if followed by proof that the conditions were the same at the times alleged.[400] The presence of a public official at the defect,[401] the fact that one resided in close proximity to it,[402] a report of the defect by officials, [403] or official directions for its repair,[404] is considered proper evidence tending to show notice to the corporation.

(a) 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.[405] Such

831; Laurie v. City of Ballard, 25 Wash. 127, 64 Pac. 906; Viellesse v. City of Green Bay, 110 Wis. 160, 85 N. W. 665. But see Carter v. Town of Monticello, 68 Iowa, 178; Dundas v. City of Lansing, 75 Mich. 499, 42 N. W. 1011, 5 L. R. A. 143; Village of Shelby v. Clagett, 46 Ohio St. 549, 22 N. E. 407, 5 L. R. A. 606.

[399] Beaver v. City of Eagle Grove, 116 Iowa, 485, 89 N. W. 1100; Ledgerwood v. Webster City, 93 Iowa, 726; City of Ottawa v. Black, 10 Kan. App. 439, 61 Pac. 985. Evidence of an examination a year of the accident properly excluded. Butts v. City of Eaton Rapids, 116 Mich. 539, 74 N. W. 872; Scheel v. City of Detroit, 130 Mich. 51, 89 N. W. 554; rehearing denied 130 Mich. 51, 90 N. W. 274; Alberts v. Village of Vernon, 96 Mich. 549, 55 N. W. 1022; Mitchell v. City of Plattsburg, 33 Mo. App. 555; City of Omaha v. Coombe, 48 Neb. 879; Pettengill v. City of Yonkers, 116 N. Y. 558, 22 N. E. 1095; Wiltse v. Town of Tilden, 77 Wis. 152, 46 N. W. 234. But see City of Goshen v. England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253.

[400] Hunt v. City of Dubuque, 96 Iowa, 314, 65 N. W. 319; Bailey v. City of Centerville, 108 Iowa, 20, 78 N. W. 831.

[401] Doan v. Town of Willow Springs, 101 Wis. 112, 76 N. W. 1104.

[402] Malloy v. Walker Tp., 77 Mich. 448, 43 N. W. 1012, 6 L. R. A. 695; La Duke v. Exeter Tp., 97 Mich. 450, 56 N. W. 851; Smalley v. City of Appleton, 75 Wis. 18, 43 N. W. 826.

[403] Bond v. City of Biddeford, 75 Me. 538.

[404] Butler v. Town of Malvern, 91 Iowa, 397, 59 N. W. 50; City of Pittsburg v. Broderson, 10 Kan. App. 430, 62 Pac. 5; Grattan v. Village of Williamston, 116 Mich. 462, 74 N. W. 668; Thompson v. Village of Quincy, 83 Mich. 173, 47 N. W. 114, 10 L. R. A. 734; Erd v. City of St. Paul, 22 Minn. 443. But see Lappread v. City of Detroit, 95 Mich. 255, 54 N. W. 870.

[405] Osborne v. City of Detroit, 32 Fed. 36; Gilmer v. City of Atlanta, 77 Ga. 688; City of Goshen v. England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; Moore v. City of Burlington, 49 Iowa, 136; Wilberding v. City of Dubuque, 111 Iowa, 484, 82 N. W. 957; Smith v. City of Des Moines, 84 Iowa, 685, 51 N. W. 77. Such evidence admissible as tending to show defect. Bailey v. City of Centerville, 115 Iowa, 271, 88 N. W. 379; Cason v. City of Ottumwa, 102 Iowa, 99; Woodbury v. City of

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.[406] There are authorities holding that evidence of other accidents occurring at the same place is not admissible even for the purpose of showing a knowledge of the defect.[407] The admission of evidence of this character is likely to be prejudicial. The better reasons sustain the latter line of decisions.

(b) 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.[408] It is also true

Owosso, 64 Mich. 239, 31 N. W. 130; Lombar v. Village of East Tawas, 86 Mich. 14, 48 N. W. 947; Smith v. Sherwood Tp., 62 Mich. 159, 28 N. W. 806; Moore v. City of Kalamazoo, 109 Mich. 176, 66 N. W. 1089; Alberts v. Village of Vernon, 96 Mich. 549, 55 N. W. 1022; Leonard v. City of Butte, 25 Mont. 410, 65 Pac. 425; Stebbins v. Village of Oneida, 52 Hun, 613, 5 N. Y. Supp. 483; Fordham v. Gouverneur Village, 160 N. Y. 541, 55 N. E. 290; Elster v. City of Seattle, 18 Wash. 304, 51 Pac. 394; Piper v. City of Spokane, 22 Wash. 147, 60 Pac. 138; Little v. Town of Iron River, 102 Wis. 250, 78 N. W. 416. But see Lord v. City of Mobile, 113 Ala. 360; Johnson v. City of St. Paul, 52 Minn. 364; Cook v. New Durham, 64 N. H. 419, 13 Atl. 650; Grundy v. City of Janesville, 84 Wis. 574.

[406] But see City of Bloomington v. Legg, 151 Ill. 9, 37 N. E. 696; Golden v. City of Clinton, 54 Mo. App. 100.

[407] District of Columbia v. Armes, 107 U. S. 519; Mathews v. City of Cedar Rapids, 80 Iowa, 459, 45 N. W. 894; Frohs v. City of Dubuque, 109 Iowa, 219, 80 N. W. 341; Bremner v. Inhabitants of Newcastle, 83 Me. 415, 22 Atl. 382; McGrail v. City of Kalamazoo, 44 Mich. 52, 53 N. W. 955; Goble v. Kansas City, 148 Mo. 470, 50 S. W. 84; Norris v. Haverhill, 65 N. H. 89; City of San Antonio v. Mullaly, 11 Tex. Civ. App. 596; Shelley v. City of Austin, 74 Tex. 608, 12 S. W. 753; Moore v. City of Richmond, 85 Va. 538, 8 S. E. 387; Richards v. City of Oshkosh, 81 Wis. 226, 51 N. W. 256; See, also, Marvin v. City of New Bedford, 158 Mass. 464, 33 N. E. 605; Hillesum v. City of New York, 22 N. Y. State Rep. 420, 4 N. Y. Supp. 806; Getty v. Town of Hamlin, 127 N. Y. 636.

[408] City of Chicago v. Richardson, 75 Ill. App. 198; Sylvester v. Town of Casey, 110 Iowa, 256, 81 N. W. 455; City of Emporia v. Schmidling, 33 Kan. 485; Kennedy v. City of Cumberland, 65 Md. 514; Sweeney v. City of New York, 63 Hun, 630, 17 N. Y. Supp. 797; Getty v. Town of Hamlin, 127 N. Y. 636, 27 N. E. 399, reversing 55 Hun, 603, 8 N. Y. Supp. 190; Dillon v. City of Raleigh, 124 N. C. 184, 32 S. E. 548; Rushton v. City of Allegheny, 192 Pa. 574, 44 Atl. 249; City of Dallas v.

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. The making of repairs or of improvements subsequent to an accident cannot properly be construed as evidence of previous negligence,[409] though the making of repairs a short time before an accident has been held to constitute sufficient notice of the defect to fix a liability.[410]

§ 1040. Notice; when not necessary.

No notice is necessary to establish negligence on the part of the public corporation in its acts of commission [411] or where the defect has been caused by others under its express authority and

Meyers (Tex. Civ. App.) 55 S. W. 742; Moore v. City of Platteville, 78 Wis. 644, 47 N. W. 1055; Barrett v. Village of Hammond, 87 Wis. 654, 58 N. W. 1053. But see Osborne v. City of Detroit, 32 Fed. 36; City of Vandalia v. Ropp, 39 Ill. App. 344; City of East Dubuque v. Burhyte, 74 Ill. App. 99; City of Anna v. Boren, 77 Ill. App. 408; Smith v. City of Pella, 86 Iowa, 236, 53 N. W. 226; Frohs v. City of Dubuque, 109 Iowa, 219, 80 N. W. 341; Rusher v. City of Aurora, 71 Mo. App. 418; Sprague v. City of Rochester, 52 App. Div. 53, 64 N. Y. Supp. 846. Where evidence of this character was admitted on the question of the officer's authority.

[409] Castello v. Landwehr, 28 Wis. 522. But see City of Olathe v. Mizee, 48 Kan. 435, 29 Pac. 754.

[410] Stebbins v. Keene Tp., 60 Mich. 214, 26 N. W. 885; Brown v. City of Owosso, 130 Mich. 107, 89 N. W. 568. But see Abbott v. City of Mobile, 119 Ala. 595, 24 So. 565.

[411] City of Chicago v. Powers, 42 Ill. 169; City of Chicago v. Johnson, 53 Ill. 91; Alexander v. Town of Mt. Sterling, 71 Ill. 366; Village of Jefferson v. Chapman, 127 Ill. 438, 20 N. E. 33; Boone County Com'rs v. Mutchler, 137 Ind. 140, 36 N. E. 534; Lowrey v. City of Delphi, 55 Ind. 250; City of Goshen v. Myers, 119 Ind. 196, 21 N. E. 657; Weirs v. Jones County, 80 Iowa, 351; Holmes v. Inhabitants of Paris, 75 Me. 559; Buck v. City of Biddeford, 82 Me. 433, 19 Atl. 912; Jones v. City of Deering, 94 Me. 165, 47 Atl. 140; Guest v. Com'rs of Church Hill, 90 Md. 689, 45 Atl. 882; McKeller v. Monitor Tp., 78 Mich. 485; City of Lincoln v. Calvert, 39 Neb. 305; Tompkins v. City of Oswego, 61 Hun, 619, 15 N. Y. Supp. 371; Twist v. City of Rochester, 37 App. Div. 307, 55 N. Y. Supp. 850; Wilson v. City of Troy, 135 N. Y. 96, 32 N. E. 44, 18 L. R. A. 449; Ludlow v. City of Fargo, 3 N. D. 485; Hager v. Wharton Tp., 200 Pa. 281, 49 Atl. 757; Rowland v. City of Philadelphia, 202 Pa. 50, 51 Atl. 589; Ringelstein v. City of San Antonio (Tex. Civ. App.) 21 S. W. 634; Evans v. City of Huntington, 37 W. Va. 601, 16 S. E. 801; Boltz v. Town of Sullivan, 101 Wis. 608, 77 N. W. 870; Hughes v. City of Fond du Lac, 73

permission.[412] 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.[413] The rule holds where ignorance of the defect is the result of a clear and unmistakable omission.[414]

Wis. 380, 41 N. W. 407. But see Emery v. City of Waterville, 90 Me. 485, 38 Atl. 534.

[412] District of Columbia v. Woodbury, 136 U. S. 450; City of Denver v. Aaron, 6 Colo. App. 232, 40 Pac. 587; Carstesen v. Town of Stratford, 67 Conn. 428, 35 Atl. 276; McGaffigan v. City of Boston, 149 Mass. 289; Baker v. City of Grand Rapids, 111 Mich. 447, 69 N. W. 740; Monje v. City of Grand Rapids, 122 Mich. 645, 81 N. W. 574; Smith v. City of St. Joseph, 42 Mo. App. 392; Sweeney v. City of Butte, 15 Mont. 274, 39 Pac. 286; Ahern v. Kings County, 89 Hun, 148, 34 N. Y. Supp. 1023; O'Hara v. City of Buffalo, 39 App. Div. 443, 57 N. Y. Supp. 367; Brusso v. City of Buffalo, 90 N. Y. 679; Dillon v. City of Raleigh, 124 N. C. 184, 32 S. E. 548; Foy v. City of Winston, 126 N. C. 381, 35 S. E. 609; Ludlow v. City of Fargo, 3 N. D. 485, 57 N. W. 506; Vail v. Town of Amenia, 4 N. D. 239, 59 N. W. 1092; Oklahoma City v. Welsh, 3 Okl. 288, 41 Pac. 598; Templeton v. Linn County, 22 Or. 313, 29 Pac. 795, 15 L. R. A. 730; Bailey v. Lawrence County, 5 S. D. 393, 59 N. W. 219; Wood v. Tipton County, 66 Tenn. (7 Baxt.) 112; City of Corsicana v. Tobin, 23 Tex. Civ. App. 492, 57 S. W. 319; Sproul v. City of Seattle, 17 Wash. 256, 49 Pac. 489. But see Blakeslee v. City of Geneva, 60 App. Div. 42, 69 N. Y. Supp. 1122. See, also, note 34 Am. & Eng. Corp. Cas. 148, where cases are collected relating to the rights and duties of counties with respect to county bridges.

[413] Barks v. Jefferson County, 119 Ala. 600, 24 So. 505; Grays v. Bibb County, 94 Ga. 698, 19 S. E. 1021, following Bibb & Crawford Counties v. Dorsey, 90 Ga. 72. Act. Dec. 29th, 1888, not applied to county bridges erected before its passage and under the prior law counties were not liable for injuries resulting from defective bridges. Johnson County Com'rs v. Hemphill (Ind. App.) 41 N. E. 965, Id., 14 Ind. App. 219, 42 N. E. 760; Parker v. City of Boston, 175 Mass. 501; Merkle v. Bennington Tp., 68 Mich. 133, 35 N. W. 846; Raasch v. Dodge County, 43 Neb. 508, 61 N. W. 725; Willis v. City of Newbern, 118 N. C. 132; Ouverson v. City of Grafton, 5 N. D. 281; Village of Oak Harbor v. Kallagher, 52 Ohio St. 183; Allen v. Cook, 21 R. I. 525; Willard v. Town of Sherburne, 59 Vt. 361, 8 Atl. 735; Crockett v. Village of Barre, 66 Vt. 269, 29 Atl. 147; Sutton v. City of Snohomish, 11 Wash. 24. But see Stein v. City of Council Bluffs, 72 Iowa, 180, 33 N. W. 455. See, also, Butler v. Town of Malvern, 91 Iowa, 397; Templeton v. Linn County, 22 Or. 313.

[414] Boucher v. City of New Haven, 40 Conn. 457.

§ 1041. Latent defects; inevitable accidents.

The cases in applying the rules given above in a preceding section to latent defects are at variance. The weight of authority sustains the rule of no liability resulting from the existence of a latent defect[415] or an inevitable accident.[416] A latent defect in this connection and using the phrase in its proper sense may be defined as one which it was not possible to discover by the exercise of reasonable care and diligence.[417] A public corporation is under no greater obligation to exercise greater care in discovering latent defects than a private person under the same circumstances and conditions.

§ 1042. 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

[415] Ryan v. City of Chicago, 79 Ill. App. 28; Powell v. Village of Bowen, 92 Ill. App. 453; Jones v. Walnut Tp., 59 Kan. 774, 52 Pac. 865; Rochefort v. Inhabitants of Attleborough, 154 Mass. 140, 27 N. E. 1013; Hembling v. City of Grand Rapids, 99 Mich. 292, 58 N. W. 310; Thomas v. City of Flint, 123 Mich. 10, 81 N. W. 936, 47 L. R. A. 499. Citing many authorities, disproving. Medina Tp. v. Perkins, 48 Mich. 67; Randall v. Southfield Tp., 116 Mich. 501; Moore v. Hazleton Tp., 118 Mich. 425; Cohea v. City of Coffeeville, 69 Miss. 561, 13 So. 668; Carvin v. City of St. Louis, 151 Mo. 334, 52 S. W. 210; Ford v. Umatilla Co., 15 Or. 313, 16 Pac. 33; Dixon v. City of San Antonio (Tex. Civ. App.) 30 S. W. 359.

[416] City of Boston v. Crowley, 38 Fed. 202; Free v. District of Columbia, 21 App. D. C. 608; Smoot v. City of Wetumpka, 24 Ala. 112; City of Sandersville v. Hurst, 111 Ga. 453, 36 S. E. 757. No liability for defective condition of bridge over private property, though within the limits of the city. See, also, as holding the same, Crawford v. City of Griffin, 113 Ga. 562, 38 S. E. 988; City of Greensboro v. McGibbony, 93 Ga. 672, 20 S. E. 37; Fowler v. Town of Strawberry Hill, 74 Iowa, 644, 38 N. W. 521; Rouse v. City of Somerville, 130 Mass. 361; Morgan v. Village of Penn Yan, 42 App. Div. 582, 59 N. Y. Supp. 504; City of Piqua v. Geist, 59 Ohio St. 163, 52 N. E. 124; Ozier v. Town of Hinesburgh, 44 Vt. 220; Strong v. City of Stevens Point, 62 Wis. 255. The ulterior purpose of a traveler in crossing a bridge does not affect the liability of a city where the bridge is in a defective condition.

[417] Holmes v. City of Hamburg, 47 Iowa, 348.

pass upon and determine under the circumstances and conditions of each particular case under proper instructions from the court.[418]

§ 1043. 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,[419] but further, that the one complaining must be free from any negligence on his part which directly contributed to the injury.[420] The reasons sustaining this principle are chiefly

[418] Woodbury v. District of Columbia, 5 Mackey (D. C.) 127; Enright v. City of Atlanta, 78 Ga. 288; Dempsey v. City of Rome, 94 Ga. 420, 20 S. E. 335; Kunkel v. City of Chicago, 37 Ill. App. 325; Troxel v. City of Vinton, 77 Iowa, 90, 41 N. W. 19; City of Newport v. Miller, 93 Ky. 22, 18 S. W. 835; Sawyer v. City of Newburyport, 157 Mass. 430, 32 N. E. 653; Bourget v. City of Cambridge, 159 Mass. 388, 34 N. E. 455; Bingham v. City of Boston, 161 Mass. 3, 36 N. E. 473; Menard v. Bay City, 114 Mich. 450, 72 N. W. 231; Wilkins v. City of Flint, 128 Mich. 262, 87 N. W. 195; Lambert v. Pembroke, 66 N. H. 280; Bowen v. State, 108 N. Y. 166, 15 N. E. 56; Kirk v. Village of Homer, 77 Hun, 459, 28 N. Y. Supp. 1009; City of Philadelphia v. Smith, (Pa.) 16 Atl. 493; Davis v. City of Corry, 154 Pa. 598, 26 Atl. 621; Frazier v. Butler Borough, 172 Pa. 407, 33 Atl. 691; City of Ft. Worth v. Johnson, 84 Tex. 137, 19 S. W. 361; Scoville v. Salt Lake City, 11 Utah, 60, 39 Pac. 481; Schroth v. City of Prescott, 68 Wis. 678, 32 N. W. 621.

[419] See § 950 et seq., ante.

[420] City of Denver v. Moewes, 15 Colo. App. 28, 60 Pac. 986; Seward v. City of Wilmington, 2 Marv. (Del.) 189, 42 Atl. 451; City of La Salle v. Wright, 56 Ill. App. 294; City of Rockford v. Rannie, 77 Ill. App. 665; Kluska v. City of Chicago, 97 Ill. App. 665; City of Sandwich v. Dolan, 141 Ill. 430; City of Evansville v. Christy, 29 Ind. App. 44, 63 N. E. 867; Barce v. City of Shenandoah, 106 Iowa, 426; Boyd v. City of Ames, 110 Iowa, 749, 82 N. W. 774; Richards v. Enfield, 79 Mass. (13 Gray) 344; Little v. Inhabitants of Brockton, 123 Mass. 511; Norwood v. City of Somerville, 159 Mass. 105; Black v. City of Manistee, 107 Mich. 60; Smith v. Walker Tp., 117 Mich. 14; Flynn v. City of Neosho, 114 Mo. 567; Lynch v. City of Erie, 151 Pa. 380, 25 Atl. 43; Winner v. Oakland Tp., 158 Pa. 405, 27 Atl. 1110, 1111; Laney v. Chesterfield County, 29 S. C. 140, 7 S. E. 56; Roberts v. Holliday, 10 S. D. 576; Stephani v. City of Manitowoc, 101 Wis. 59; Nelson v. Shaw, 102 Wis. 274; Giffen v. City of Lewiston, 6 Idaho, 231, 55 Pac. 545. A charter provision imposing a liability for injuries received from defective streets does not deprive the city of the ordinary defense of contributory negligence in an action under this provision.

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."[421] It has also been defined as follows: "In an action for negligence, two conditions must concur,—a performance of duty by the plaintiff, and a breach of duty by the defendant. The more approved statement of the doctrine of contributory negligence is, that a person cannot recover for an injury to which he contributed by his own want of ordinary care."[422] 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.[423] The question of negligence is largely one of fact and each particular case, therefore, is a rule unto itself. The same remark applies equally to contributory negligence as a branch of the subject. The merits in each specific instance are difficult to determine and no general rule can be laid down which will be of any material assistance. There are principles, however, adopted by the courts, which enable them to effect substantial justice in all cases and which will be referred to in following sections.

§ 1044. Imputable negligence.

The subject of contributory negligence involves the doctrine of imputable negligence and its application.[424] 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

[421] 7 Am. & Eng. Enc. Law (2d Ed.) p. 371, article on contributory negligence.

[422] Pierce, R. R. p. 323.

[423] 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.

[424] 5 Thompson, Neg. §§ 6255 and 6309.

a question upon which the courts disagree and there are two well established lines of cases, the one holding that it is so imputable [425] and the other the reverse.[426] 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,[427] and still another that a child can recover for injuries sustained irrespective of the contributory negligence of those in charge of it.[428]

[425] Bartram v. Town of Sharon, 71 Conn. 686, 43 Atl. 143, 46 L. R. A. 144; City of Rock Island v. Vanlandschoot, 78 Ill. 485; City of Vincennes v. Thuis, 28 Ind. App. 523, 63 N. E. 315; Stafford v. City of Oskaloosa, 57 Iowa, 748; Leslie v. City of Lewiston, 62 Me. 468; Whitatker v. City of Helena, 14 Mont. 124, 35 Pac. 904; Prideaux v. City of Mineral Point, 43 Wis. 513; Otis v. Town of Janesville, 47 Wis. 422, 2 N. W. 783; Crescent Tp. v. Anderson, 114 Pa. 643.

[426] City of Chicago v. McCarthy, 61 Ill. App. 300; Town of Nappanee v. Ruckman, 7 Ind. App. 361, 34 N. E. 609; Town of Knightstown v. Musgrove, 116 Ind. 121, 18 N. E. 452; Boone County Com'rs v. Mutchler, 137 Ind. 140, 36 N. E. 534; Barnes v. Town of Marcus, 96 Iowa, 675, 65 N. W. 984; Barnes v. Inhabitants of Rumford, 96 Me. 315, 52 Atl. 844; Lyons v. Inhabitants of Brookline, 119 Mass. 491; Burt v. City of Boston, 122 Mass. 223; Cuddy v. Horn, 46 Mich. 596; Follman v. City of Mankato, 35 Minn. 522; Cunningham v. City of Thief River Falls, 84 Minn. 21, 86 N. W. 763; Koplitz v. City of St. Paul, 86 Minn. 373, 90 N. W. 794, 58 L. R. A. 74; Johnson v. St. Joseph, 96 Mo. App. 663, 71 S. W. 106; Noyes v. Boscawen, 64 N. H. 361, 10 Atl. 690; Ouverson v. City of Grafton, 5 N. D. 281, 65 N. W. 676; Carr v. City of Easton, 142 Pa. 139, 21 Atl. 822; Borough of Carlisle v. Brisbane, 113 Pa. 544; Merriman v. Phillipsburg Borough, 158 Pa. 78, 28 Atl. 122; Shearer v. Buckley, 31 Wash. 370, 72 Pac. 76.

[427] Gibbons v. Williams, 135 Mass. 333; Grant v. City of Fitchburg, 160 Mass. 16, 35 N. E. 84. See, also, Thompson, Neg. vol. 1, § 330; vol. 5, § 6310.

[428] City of Murphysboro v. Woolsey, 47 Ill. App. 447; City of Horton v. Trompeter, 53 Kan. 150, 35 Pac. 1106; Bliss v. South Hadley, 145 Mass. 91, 13 N. E. 352; McVee v. City of Watertown, 92 Hun, 306, 36 N. Y. Supp. 870; Eskildsen v. Seattle, 29 Wash. 583, 70 Pac. 64. See Thompson, Neg. c. 11, §§ 289–303, subject generally of imputable negligence of parent or custodian, discussed.

§ 1045. 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 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.[429] Other cases determine the question according to the facts as they appear from the evidence of a particular case. The age, intelligence, knowledge of danger, mode or condition in life, and other material facts are all taken into consideration and a decision is reached accordingly.[430] In another section it was stated that the duty of a public corporation in respect to its public highways existed only in favor of those using the highway for a proper purpose and as an illustration of an improper purpose, that of using them for play grounds or for loafing, was given.[431] In the case of young children especially, this rule is very materially relaxed and it is quite generally held that it is not negligence per se for young

[429] Tucker v. New York Cent. & H. R. R. Co., 124 N. Y. 308; Nagle v. Allegheny Valley R. Co., 88 Pa. 35; Thompson, Neg. §§ 306–318.

[430] City of Denver v. Murray, 18 Colo. App. 142, 70 Pac. 440; City of Chicago v. McCrudden, 92 Ill. App. 257. Girl of twelve walking backwards was injured; not guilty of contributory negligence as a matter of law. City of Chicago v. O'Malley, 95 Ill. App. 355; Casey v. City of Malden, 163 Mass. 507, 40 N. E. 849. Boy nine or twelve of average intelligence injured when walking backwards, guilty of contributory negligence. Snow v. Inhabitants of Provencetown, 120 Mass 580; Gulline v. Lowell, 144 Mass. 491; Casey v. City of Malden, 163 Mass. 507, 40 N. E. 849; King v. Colon Tp., 125 Mich. 511, 84 N. W. 1077. Girl of fourteen held guilty of contributory negligence. Hudon v. City of Little Falls, 68 Minn. 463, 71 N. W. 678. Boy of sixteen chargeable with contributory negligence. Stern v. Bensieck, 161 Mo. 146, 61 S. W. 594; Bresnehan v. Gove, 71 N. H. 236, 51 Atl. 916; Brennan v. City of New York, 67 Hun, 648, 22 N. Y. Supp. 304. Boy of twelve held guilty of contributory negligence. Crawford v. Wilson & B. Mfg. Co., 8 Misc. 48, 28 N. Y. Supp. 514; Brown v. City of Syracuse, 77 Hun, 411, 28 N. Y. Supp. 792; Ward v. City of New York, 19 App. Div. 48, 45 N. Y. Supp. 891. Boy of thirteen chargeable with contributory negligence. Storey v. City of New York, 29 App. Div. 316, 51 N. Y. Supp. 580; Lorence v. City of Ellensburgh, 13 Wash. 341, 43 Pac. 20; Eskildsen v. Seattle, 29 Wash. 583, 70 Pac. 64.

[431] City of Whitewright v. Taylor, 23 Tex. Civ. App. 486, 57 S. W. 311. See § 992, ante.

children to use the streets, particularly sidewalks, for purposes of play.[432] 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.[433]

§ 1046. 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.[434] 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.[435] This duty is invariable and if, apparently, it changes, it is not because of a change of principle but on account of altered conditions and cir-

[432] 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; Reed v. City of Madison, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733. See, also, cases cited generally under this section.

[433] City Council of Augusta v. Tharpe, 113 Ga. 152, 38 S. E. 389; City of Flora v. Pruett, 81 Ill. App. 161. Question for the jury. Caskey v. La Belle, 101 Mo. App. 590, 74 S. W. 113; 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.

[434] See §§ 988, 1014, and 1024, ante.

[435] Anderson v. City of Wilmington, 2 Pen. (Del.) 28, 43 Atl. 841; Branan v. May, 17 Ga. 136; Town of Wheaton v. Hadley, 131 Ill. 640, 23 N. E. 422; City of Rockford v. Hollenbeck, 34 Ill. App. 40; City of Beardstown v. Smith, 150 Ill. 169, 37 N. E. 211; City of Huntington v. McClurg, 22 Ind. App. 261, 53 N. E. 658; McQueen v. City of Elkhart, 14 Ind. App. 671, 43 N. E. 460; Langhammer v. City of Manchester, 99 Iowa, 295, 68 N. W. 688; City of Osborne v. Hamilton, 29 Kan. 1; Kansas City v. Manning, 50 Kan. 373, 31 Pac. 1104; Kansas City v. McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429; Griswold v. City of Ludington, 116 Mich. 401; Williams v. City of Hannibal, 94 Mo. App. 549, 68 S. W. 380; Brown v. Town of Swanton, 69 Vt. 53, 37 Atl 280; Griffon v. Town of Willow, 43 Wis. 509; Duthie v. Town of Washburn, 87 Wis. 231, 58 N. W. 380; Rhyner v. City of Menasha, 107 Wis. 201, 83 N. W. 303

cumstances. From the statement above, it is evident that the duty of each, that is, the public corporation and the traveler, is to exercise ordinary care and diligence and is, therefore, equal, but from the decisions it will be observed that a slightly greater and higher duty is placed upon the public corporation, especially municipal corporations proper.[436] The ordinary care required of the traveler is measured at all times by the dangers to be avoided.[437]

§ 1047. Presumption of care.

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 exercised, in respect to the condition of a highway which he is using, that degree of care which the law imposes upon it.[438] He is not bound, therefore, to be constantly on guard against defects which

[436] Lyman v. City of Green Bay, 91 Wis. 488, 65 N. W. 167.

[437] Swart v. District of Columbia, 17 App. D. C. 407; Collins v. City of Janesville, 107 Wis. 436, 83 N. W. 695; Rhyner v. City of Menasha, 107 Wis. 201, 83 N. W. 303.

[438] City of Birmingham v. Tayloe, 105 Ala. 170, 16 So. 576; Wilkins v. City of Wilmington, 2 Marv. (Del.) 132, 42 Atl. 418; Carswell v. City of Wilmington, 2 Marv. (Del.) 360, 43 Atl. 169; City of Salem v. Webster, 192 Ill. 369, 61 N. E. 323, affirming 95 Ill. App. 120; City of Spring Valley v. Gavin, 81 Ill. App. 456; Strehmann v. City of Chicago, 93 Ill. App. 206; City of East Dubuque v. Burhyte, 173 Ill. 553, 50 N. E. 1077; Allen County Com'rs v. Creviston, 133 Ind. 39, 32 N. E. 735; Lyon v. City of Logansport, 9 Ind. App. 21, 35 N. E. 128; Citizens' St. R. Co. v. Ballard, 22 Ind. App. 151, 52 N. E. 729; City of Indianapolis v. Gaston, 58 Ind. 224; Atchison v. Plunkett, 8 Kan. App. 308, 55 Pac. 677; Buck v. City of Biddeford, 82 Me. 433, 19 Atl. 912; Perrette v. Kansas City, 162 Mo. 238, 62 S. W. 448; Mahnken v. Chosen Freeholders of Monmouth County, 62 N. J. Law, 404, 41 Atl. 921; Turner v. City of Newburg, 109 N. Y. 301, 16 N. E. 344; Sherman v. Village of Oneonta, 66 Hun, 629, 21 N. Y. Supp. 137; Laverdure v. City of New York, 28 App. Div. 65, 50 N. Y. Supp. 882; Neal v. Town of Marion, 129 N. C. 345, 40 S. E. 116; Heckman v. Evenson, 7 N. D. 173, 73 N. W. 427; Hardin County Com'rs v. Coffman, 60 Ohio St. 527, 54 N. E. 1054, 48 L. R. A. 455; Glidden v. Town of Reading, 38 Vt. 52; Gordon v. City of Richmond, 83 Va. 436, 2 S. E. 727; Wall v. Town of Highland, 72 Wis. 435, 39 N. W. 560; McClure v. City of Sparta, 84 Wis. 269, 54 N. W. 337; Collins v. City of Janesville, 111 Wis. 348, 87 N. W. 241, 1087. But the presumption is overcome by a knowledge of the defect. But see Lyons v. City of Red Wing, 76 Minn. 20.

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.[439] 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.[440]

§ 1048. Vigilance in discovering defects.

As stated in the preceding section, the traveler may presume on his part the exercise of the duty imposed upon the public corporation whatever it may be and he is not, therefore, obliged to exercise more than ordinary vigilance for the purpose of discovering defects. He is not required to be constantly on the alert or keep his eye continually upon the roadway for this purpose.[441] 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.[442] Where the defect, however, is a latent one, the duty im-

[439] Robinson v. City of Wilmington, 8 Houst. (Del.) 409, 32 Atl. 347. But see City of Guthrie v. Swan, 3 Okl. 116, 41 Pac. 84.

[440] City of Birmingham v. Starr, 112 Ala. 98, 20 So. 424; City of Galesburg v. Hall, 45 Ill. App. 290; City of Sumner v. Scaggs, 52 Ill. App. 551; Benedict v. City of Port Huron, 124 Mich. 600, 83 N. W. 614; Crowe v. City of Seattle, 22 Wash. 659, 62 Pac. 121.

[441] City of Centralia v. Baker, 36 Ill. App. 46; City of Bluffton v. McAfee, 23 Ind. App. 112, 53 N. E. 1058; Barnes v. Town of Marcus, 96 Iowa, 675, 65 N. W. 984; Baxter v. City of Cedar Rapids, 103 Iowa, 599, 72 N. W. 790; Topeka Water Co. v. Whiting, 58 Kan. 639, 50 Pac. 877, 39 L. R. A. 90; Russell v. Town of Monroe, 116 N. C. 720, 21 S. E. 550; Dean v. City of New Castle, 201 Pa. 51, 50 Atl. 310; Butcher v. City of Philadelphia, 202 Pa. 1, 51 Atl. 330; Brown v. White, 202 Pa. 297, 51 Atl. 962, 58 L. R. A. 321; City of Dallas v. Webb, 22 Tex. Civ. App. 48, 54 S. W. 398; Gordon v. City of Richmond, 83 Va. 436, 2 S. E. 727.

[442] Sutphen v. Town of North Hempstead, 80 Hun, 409, 30 N. Y. Supp, 128; Benton v. City of Philadelphia, 198 Pa. 396, 48 Atl. 267; Robb v. Borough of Connellsville, 137 Pa. 42, 20 Atl. 564; Nicholas v. Peck, 20 R. I. 533, 40 Atl. 418; Cantwell v. City of Appleton, 71 Wis. 463, 37 N. W. 813. Question for the jury. See, also, § 1051, post and cases cited.

posed upon him does not require him to exercise such vigilance as to enable him to detect it and avoid injury.[443]

§ 1049. 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 which he could have avoided if his attention had been at that moment directed to it, it will not be regarded as contributory negligence.[444] 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.[445]

[443] City of Kokomo v. Boring, 24 Ind. App. 552, 57 N. E. 202; Hall v. Town of Manson, 99 Iowa, 698, 68 N. W. 922, 34 L. R. A. 207; Cox v. City of Des Moines, 111 Iowa, 646, 82 N. W. 993; Atchison v. Plunkett, 8 Kan. App. 308, 55 Pac. 677; Moore v. City of Huntington, 31 W. Va. 842, 8 S. E. 512; Phillips v. City of Huntington, 35 W. Va. 406, 14 S. E. 17.

[444] City of Birmingham v. Starr, 112 Ala. 98, 20 So. 424; Barry v. Terkildsen, 72 Cal. 254, 13 Pac. 657; City of Nokomis v. Salter, 61 Ill. App. 150; City of Maysville v. Guilfoyle, 110 Ky. 670, 62 S. W. 493; Flynn v. Inhabitants of Watertown, 173 Mass. 108, 53 N. E. 147; Coffin v. Inhabitants of Palmer, 162 Mass. 192, 38 N. E. 509; Maloy v. City of St. Paul, 54 Minn. 398, 56 N. W. 94; City of Meridian v. McBeath, 80 Miss. 485, 32 So. 53; O'Reilly v. Village of Sing Sing, 48 Hun, 618, 1 N. Y. Supp. 582; Butcher v. City of Philadelphia, 202 Pa. 1, 51 Atl. 330; Feather v. City of Reading, 155 Pa. 187, 26 Atl. 212. Question for the jury. Mischke v. City of Seattle, 26 Wash. 616, 67 Pac. 357; Cumisky v. City of Kenosha, 87 Wis. 286, 58 N. W. 395; Kenyon v. City of Mondovi, 98 Wis. 50, 73 N. W. 314; Crites v. City of New Richmond, 98 Wis. 55, 73 N. W. 322; West v. City of Eau Claire, 89 Wis. 31, 61 N. W. 313. But see City of Chicago v. Bixby, 84 Ill. 82. One who walks in an absent minded, inattentive and negligent manner, is guilty of contributory negligence. City of Vicksburg v. Hennessy, 54 Miss. 391.

[445] City of Plymouth v. Milner, 117 Ind. 324, 20 N. E. 235; Lichtenberger v. Town of Meriden, 91 Iowa, 45, 58 N. W. 1058. The question may be one for the jury to determine. Walker v. Town of Reidsville, 96 N. C. 382, 2 S. E. 74.

§ 1050. 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.[446] He is not, therefore, required to carry lights, for illustration, by means of which defects may be more readily discovered.[447] 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,[448] as the ease with which defects may be discovered is affected by darkness.

§ 1051. 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 highway in a notoriously defective and dangerous condition, he is

[446] City of Birmingham v. McCray, 84 Ala. 469, 4 So. 639; Seward v. City of Wilmington, 2 Marv. (Del.) 189, 42 Atl. 451; Keyes v. City of Cedar Falls, 107 Iowa, 509, 78 N. W. 227; Finn v. City of Adrian, 93 Mich. 504, 53 N. W. 614; May v. City of Anaconda, 26 Mont. 140, 66 Pac. 759; Village of Ponca v. Crawford, 23 Neb. 662, 37 N. W. 609; Chisholm v. State, 141 N. Y. 246, 36 N. E. 184; City of Scranton v. Gore, 124 Pa. 195, 17 Atl. 144.

[447] Vance v. City of Franklin, 4 Ind. App. 515, 30 N. E. 149. But see Conrad v. Upper Augusta Tp., 200 Pa. 337, 49 Atl. 770; Kaseman v. Borough of Sunbury, 197 Pa. 162, 46 Atl. 1032.

[448] City of Columbus v. Griggs, 113 Ga. 597, 38 S. E. 953; Jackson County Com'rs v. Nichols, 139 Ind. 611, 38 N. E. 526; City of Bloomington v. Rogers, 13 Ind. App. 121, 41 N. E. 395; Stier v. City of Oskaloosa, 41 Iowa, 353; Graham v. Town of Oxford, 105 Iowa, 705, 75 N. W. 473; Titus v. Town of New Scotland, 90 Hun, 468, 35 N. Y. Supp. 971. But see Hanlon v. City of Keokuk, 7 Iowa, 488; Perry v. City of Cedar Falls, 87 Iowa, 315, 54 N. W. 225. Where it was held that a person was guilty of contributory negli-

chargeable with contributory negligence,[449] 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 at-

gence in driving where it was so dark that he could not see. See, also, State v. Orr, 89 Iowa, 613.

[449] District of Columbia v. Ashton, 14 App. D. C. 571; City of Birmingham v. Starr, 112 Ala. 98, 20 So. 424; Sheats v. City of Rome, 92 Ga. 535, 17 S. E. 922; City of Alton v. English, 69 Ill. App. 197; City of Chicago v. Richardson, 75 Ill. App. 198; Shampay v. City of Chicago, 76 Ill. App. 429; City of Quincy v. Barker, 81 Ill. 300; Hursen v. City of Chicago, 85 Ill. App. 298; City of Bloomington v. Rogers, 9 Ind. App. 230, 36 N. E. 439; City of Huntingburgh v. First, 15 Ind. App. 552, 43 N. E. 17; Rogers v. City of Bloomintgon, 22 Ind. App. 601, 52 N. E. 242; City of Evansville v. Christy, 29 Ind. App. 44, 63 N. E. 867; Morrison v. Shelby County Com'rs, 116 Ind. 431, 19 N. E. 316; Alline v. City of Le Mars, 71 Iowa, 654, 33 N. W. 160; Weirs v. Jones County, 86 Iowa, 625, 53 N. W. 321, 17 L. R. A. 445. Inability to read a warning sign is no excuse. Barce v. City of Shenandoah, 106 Iowa, 426, 76 N. W. 747; Rusch v. City of Dubuque, 116 Iowa, 402, 90 N. W. 80. A projecting spike is not such an obvious defect in a sidewalk as to charge a pedestrian with notice thereof as a matter of law. Lane v. City of Lewiston, 91 Me. 292, 39 Atl. 999; Tasker v. Inhabitants of Farmingdale, 91 Me. 521, 40 Atl. 544, Id., 88 Me. 103, 33 Atl. 785; Wilson v. City of Charlestown, 90 Mass. (8 Allen) 137; Shepardson v. Inhabitants of Colerain, 54 Mass. (13 Metc.) 55.

Kelley v. City of Boston, 80 Mass. 233, 62 N. E. 259. No recovery can be had for injuries sustained by one descending into an uncovered catch basin to rescue a child who had fallen in. Wakeham v. St. Clair Tp., 91 Mich. 15, 51 N. W. 696; Smith v. City of Jackson, 106 Mich. 136, 63 N. W. 982; Black v. City of Manistee, 107 Mich. 60, 64 N. W. 868; Friday v. City of Moorhead, 84 Minn. 273, 87 N. W. 780; Cohea v. City of Coffeyville, 69 Miss. 561, 13 So. 668; Cohn v. Kansas City, 108 Mo. 387, 18 S. W. 973; Womach v. City of St. Joseph, 168 Mo. 236, 67 S. W. 588; Caven v. City of Troy, 32 App. Div. 154, 52 N. Y. Supp. 804; Spencer v. Town of Sardinia, 42 App. Div. 472, 59 N. Y. Supp. 412; Williams v. Village of Port Leyden, 62 App. Div. 490, 70 N. Y. Supp. 1100; Kleng v. City of Buffalo, 156 N. Y. 700, 51 N. E. 1091; Village of Conneaut v. Naef, 54 Ohio St. 529, 44 N. E. 236; Forker v. Borough of Sandy Lake, 130 Pa. 123, 18 Atl. 609; Hill v. Tionesta Tp., 146 Pa. 11, 23 Atl. 204; Winner v. Oakland Tp., 158 Pa. 405, 27 Atl. 1110, 1111; Auberle v. City of McKeesport, 179 Pa. 321, 36 Atl. 212; Boyle v. Borough of Mahony City, 187 Pa. 1, 40 Atl. 1093; O'Neill v. Bates, 20 R. I. 793, 40 Atl. 236; Phillips v. Ritchie County Ct., 31 W. Va. 477, 7 S. E. 427; Hesser v. Grafton, 33 W. Va. 548, 11 S. E. 211; Hausmann v. City of Madison, 85 Wis. 187, 55 N. W. 167, 21 L. R. A. 263; Cooper v. Village of Waterloo, 98 Wis. 424, 74 N. W. 115; Devine

tempting to pass an obvious defect or danger may not be chargeable with a lack of the ordinary care which the law imposes upon him.[450] Under no conditions, however, will a reckless disregard of one's safety be excused.[451]

§ 1052. 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 highway may be defective in several ways. 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,

v. City of Fond du Lac, 113 Wis. 61, 88 N. W. 913; Maanum v. City of Madison, 104 Wis. 272, 80 N. W. 591; City of De Pere v. Hibbard, 104 Wis. 666, 80 N. W. 933.

[450] District of Columbia v. Crumbaugh, 13 App. D. C. 553; Dempsey v. City of Rome, 94 Ga. 420, 20 S. E. 335; Hazard v. City of Council Bluffs, 87 Iowa, 51, 53 N. W. 1083; City of Ft. Scott v. Peck, 5 Kan. App. 593, 49 Pac. 111; City of Ottawa v. Black, 10 Kan. App. 439, 61 Pac. 985; Charles County Com'rs v. Mandanyohl, 93 Md. 150, 48 Atl. 1058; O'Neil v. Hanscom, 175 Mass. 313, 56 N. E. 587; Butman v. City of Newton, 179 Mass. 1, 60 N. E. 401; Perrette v. Kansas City, 162 Mo. 238, 62 S. W. 448; Kossman v. City of St. Louis, 153 Mo. 293, 54 S. W. 513; Dow v. Portsmouth, K. & Y. St. R. Co., 70 N. H. 410, 49 Atl. 570; Hawley v. City of Gloversville, 4 App. Div. 343, 38 N. Y. Supp. 647; Carroll v. Allen, 20 R. I. 144; Whitty v. City of Oshkosh, 106 Wis. 87, 81 N. W. 992.

[451] Wilkins v. City of Wilmington, 2 Marv. (Del.) 132, 42 Atl. 418; Pierce v. City of Wilmington, 2 Marv. (Del.) 306, 43 Atl. 162; Cooper v. Floyd County, 112 Ga. 70, 37 S. E. 91; City of Columbus v. Griggs, 113 Ga. 597, 38 S. E. 953; Massey v. City of Columbus, 75 Ga. 658; Town of Salem v. Walker, 16 Ind. App. 687, 46 N. E. 90; Town of Boswell v. Wakley, 149 Ind. 64, 48 N. E. 637; City of Henderson v. Burke, 19 Ky. L. R. 1781, 44 S. W. 422; Germaine v. City of Muskegon, 105 Mich. 213, 63 N. W. 78; Church v. Village of Howard City, 111 Mich. 298, 69 N. W. 651; Sindlinger v. Kansas City, 126 Mo. 315, 28 S. W. 857, 26 L. R. A. 723; Kane v. City of Yonkers, 169 N. Y. 392, 62 N. E. 428; Magill v. Lancaster County, 39 S. C. 27, 17 S. E. 507; Laney v. Chesterfield County, 29 S. C. 140, 7 S. E. 56; Moore v. City of Richmond, 85 Va. 538, 8 S. E. 387.

that he will not be regarded as exercising less than ordinary care in making his election.[452]

Choice of ways. Closely connected with the subject of the preceding paragraph is that of the selection of ways. Where a traveler in passing chooses one 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 with contributory negligence and cannot recover,[453] but this is ordinarily a question for the jury.[454]

§ 1053. Condition of the traveler.

The question of contributory negligence is also affected by or involves a discussion of the condition of the traveler either physi-

[452] Burr v. Town of Plymouth, 48 Conn. 460; City of East St. Louis v. Dougherty, 74 Ill. App. 490; Larrabee v. Sewall, 66 Me. 376; Burrows v. Village of Lake Crystal, 61 Minn. 357, 63 N. W. 745.

[453] District of Columbia v. Brewer, 7 App. D. C. 113; Mosheuvel v. District of Columbia, 17 App. D. C. 401; City of Peoria v. Walker, 47 Ill. App. 182; Lovenguth v. City of Bloomington, 71 Ill. 238; Weinstein v. City of Terre Haute, 147 Ind. 556, 46 N. E. 1004; Hartman v. City of Muscatine, 70 Iowa, 511, 30 N. W. 859; Cosner v. City of Centerville, 90 Iowa, 33, 57 N. W. 636; Homan v. Franklin County, 90 Iowa, 185, 57 N. W. 703; Barnes v. Town of Marcus, 96 Iowa, 675, 65 N. W. 984; Sylvester v. Town of Casey, 110 Iowa, 256, 81 N. W. 455; Welsh v. Town of Argyle, 89 Wis. 649, 62 N. W. 517; Norwood v. City of Somerville, 159 Mass. 105, 33 N. E. 1108; Irion v. City of Saginaw, 120 Mich. 295, 79 N. W. 572; Howey v. Fisher, 122 Mich. 43, 80 N. W. 1004; Wright v. City of St. Cloud, 54 Minn. 94, 55 N. W. 819; Ray v. City of Poplar Bluff, 70 Mo. App. 252; Kleng v. City of Buffalo, 72 Hun, 541, 25 N. Y. Supp. 445; City of Dayton v. Taylor's Adm'r, 62 Ohio St. 11, 56 N. E. 480; Forks Tp. v. King, 84 Pa. 230; Wellman v. Borough of Susquehana Depot, 167 Pa. 239, 31 Atl. 566; Hopkins v. Town of Rush River, 70 Wis. 10, 34 N. W. 909, 35 N. W. 939. But see District of Columbia v. Moulton, 15 App. D. C. 363. A failure to anticipate a possible danger not contributory negligence. City of Decatur v. Stoops, 21 Ind. App. 397, 52 N. E. 623; Raynor v. City of Wymore, 3 Neb. Unoff. 51, 90 N. W. 759; Hamerlynck v. Banfield, 36 Or. 436, 59 Pac. 712.

[454] Carstesen v. Town of Stratford, 67 Conn. 428, 35 Atl. 276; Nichols v. Town of Laurens, 96 Iowa, 388, 65 N. W. 335; Hoover v. Town of Mapleton, 110 Iowa, 571, 81 N. W. 776; Comiskie v. City of Ypsilanti, 116 Mich. 321, 74 N. W. 487; Taylor v. City of Mankato, 81 Minn. 276, 83 N. W. 1084; Graney v. City of St. Louis, 141 Mo. 80, 42 S. W. 941; Byrne v. City of Syracuse, 79 Hun, 555, 29 N. Y. Supp. 912; Ouverson v. City of Grafton,

cal 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.[455] 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.[456] They are entitled to the use of the public ways and contributory negligence with respect to them can only be charged upon a failure on their part to use ordinary care which includes a consideration of their particular condition.[457] A public

5 N. D. 281, 65 N. W. 676; Chilton v. City of Carbondale, 160 Pa. 463, 28 Atl. 833; Mellor v. Burgess of Bridgeport, 191 Pa. 562, 43 Atl. 365; Rowe v. City of Ballard, 19 Wash. 1, 52 Pac. 321.

[455] Ham v. City of Lewiston, 94 Me. 265, 47 Atl. 548. See, also, cases cited generally under this section.

[456] Scott v. City of New Orleans (C. C. A.) 75 Fed. 373. Question for jury. Homewood v. City of Hamilton, 1 Ont. Law Rep. 266; Yeager v. Town of Spirit Lake, 115 Iowa, 593, 88 N. W. 1095; Ott v. City of Buffalo, 131 N. Y. 594, 30 N. E. 67; Foy v. City of Winston, 126 N. C. 381, 35 S. E. 609. But see Enright v. City of Atlanta, 78 Ga. 288; Mareck v. City of Chicago, 89 Ill. App. 358; Woods v. Tipton County Com'rs, 128 Ind. 289, 27 N. E. 611. But driving when in an intoxicated condition constitutes contributory negligence. Fernbach v. City of Waterloo, 76 Iowa, 598, 41 N. W. 370; Monk v. Town of New Utrecht, 104 N. Y. 552, 11 N. E. 268. Intoxication. Lynch v. City of New York, 47 Hun (N. Y.) 524. But if intoxication contributes to the injury, the plaintiff cannot recover. Jaquish v. Town of Ithaca, 36 Wis. 108; McCracken v. Village of Markesan, 76 Wis. 499, 45 N. W. 323; Carpenter v. Town of Rolling, 107 Wis. 559, 83 N. W. 953. Intoxication.

[457] 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." Garbanati v. Durango, 30 Colo. 358, 70 Pac. 686; Hoyt v. City of Danbury, 69 Conn. 341, 37 Atl. 1051; Samples v. City of Atlanta, 95 Ga. 110; Village of Noble v. Hanna, 74 Ill. App. 564; Smith v. City of Cairo, 48 Ill. App. 166; Ham v. City of Lewiston, 94 Me. 265; Ryerson v. Inhabitants of Abington, 102 Mass. 526; Gilbert v. City of Boston, 139 Mass. 313, 31 N. E. 734; Neff v. Inhabitants of Wellesey, 148 Mass. 487, 20 N. E. 111, 2 L. R. A, 500; Sias v. Village of Reed City, 103 Mich. 312; Lewis v. City of Independence, 54 Mo. App. 183; Taylor v. City of Springfield, 61 Mo. App. 263; Smart v. Kansas City, 91 Mo. App. 586; Davenport v. Ruckman, 37 N. Y. 568; Pitman v. City of El Reno, 2 Okl. 414; Foy v. City of Winston, 126 N. C. 381, 35 S. E. 609;

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.[458]

§ 1054. 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, regarded as contributory negligence unless the way is obviously unsafe.[459] 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.[460] The question to be determined by the

Stewart v. City of Nashville, 96 Tenn. 50, 33 S. W. 613. Burden of proof is upon a blind person unattended upon the streets to show that he exercised due care. City of Austin v. Ritz, 72 Tex. 391, 9 S. W. 884; City of Sherman v. Nairey, 77 Tex. 291, 13 S. W. 1028; Arthur v. City of Charleston, 51 W. Va. 132, 41 S. E. 171. It is for the jury to determine whether a pedestrian is so intoxicated as to be unable to exercise ordinary care. Smalley v. City of Appleton, 75 Wis. 18, 43 N. W. 826. But see Edwards v. Village of Three Rivers, 102 Mich. 153, 60 N. W. 454.

[458] Thorp v. Town of Brookfield, 36 Conn. 321; Ashborn v. Town of Waterbury, 70 Conn. 551, 40 Atl. 458; City of Mt. Vernon v. Brooks, 39 Ill. App. 426; Smith v. City of Cairo, 48 Ill. App. 166; Ham v. City of Lewiston, 94 Me. 265, 47 Atl. 548; Winn v. City of Lowell, 83 Mass. (1 Allen) 177. But see Edwards v. Village of Three Rivers, 102 Mich. 153, 60 N. W. 454. See, also, cases cited in preceding note. Stuart v. Inhabitants of Machias Port, 48 Me. 477; Mont v. Town of New Utrecht, 104 N. Y. 552, 11 N. E. 268; Cassedy v. Town of Stockbridge, 21 Vt. 391; Arthur v. City of Charleston, 51 W. Va. 132, 41 S. E. 171; Burns v. Town of Elba, 32 Wis. 605; Krause v. Merrill, 115 Wis. 526, 92 N. W. 231.

[459] Ely v. City of Des Moines, 86 Iowa, 55, 52 N. W. 475, 17 L. R. A. 124; Owen v. City of Ft. Dodge, 98 Iowa, 281, 67 N. W. 281; Waltemeyer v. Kansas City, 71 Mo. App. 354; Swanson v. City of Sedalia, 89 Mo. App. 121; Atwater v. Town of Veteran, 52 Hun, 613, 6 N. Y. Supp. 907; Beck v. City of Buffalo, 50 App. Div. 621, 63 N. Y. Supp. 499; Stokes v. Ralpho Tp., 187 Pa. 333, 40 Atl. 958; City of Lynchburg v. Wallace, 95 Va. 640, 29 S. E. 675; City of Winchester v. Carroll, 99 Va. 727, 40 S. E. 37. See, also, cases cited in the two following notes.

[460] Giffen v. City of Lewiston, 6 Idaho, 231, 55 Pac. 545; City of Flora v. Naney, 136 Ill. 45, 26 N. E.

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.[461] When a knowledge of the danger ex-

645, affirming 31 Ill. App. 493; Village of Noble v. Hanna, 74 Ill. App. 564; Village of Altamont v. Carter, 97 Ill. App. 196; City of Streator v. Chrisman, 182 Ill. 215, 54 N. E. 997, affirming 82 Ill. App. 24; City of Spring Valley v. Gavin, 182 Ill. 232, 54 N. E. 1035; Town of Salem v. Walker, 16 Ind. App. 687, 46 N. E. 90; Town of Williamsport v. Lisk, 21 Ind. App. 414, 52 N. E. 628; City of Indianapolis v. Marold, 25 Ind. App. 428, 58 N. E. 512; City of Bedford v. Neal, 143 Ind. 425, 41 N. E. 1029, 42 N. E. 815; Kendall v. City of Albia, 73 Iowa, 241, 34 N. W. 833; Hoover Town of Mapleton, 110 Iowa, 571, 81 N. W. 776; Bailey v. City of Centerville, 115 Iowa, 271, 88 N. W. 379; Langan v. City of Atchison, 35 Kan. 318, 11 Pac. 38; City of Kingsley v. Morse, 40 Kan. 577, 20 Pac. 217; Fox v. City of Chelsea, 171 Mass. 297, 50 N. E. 622; Thomas v. Western Union Tel. Co., 100 Mass. 156; Mahoney v. Metropolitan R. Co., 104 Mass. 73; McGuinness v. City of Worcester, 160 Mass. 272, 35 N. E. 1068; Dittrich v. City of Detroit, 98 Mich. 245, 57 N. W. 125; Schwingschlegl v. City of Monroe, 113 Mich. 683, 72 N. W. 7; McKenzie v. City of Northfield, 30 Minn. 456; Lyons v. City of Red Wing, 76 Minn. 20, 78 N. W. 868; Foster v. Swope, 41 Mo. App. 137; Chilton v. City of St. Joseph, 143 Mo. 192, 44 S. W. 766; Culverson v. City of Marysville, 67 Mo. App. 343; Boulton v. City of Columbia, 71 Mo. App. 519; Gillespie v. City of Newburgh, 54 N. Y. 468; Evans v. City of Utica, 69 N. Y. Supp. 166; Willis v. City of Newbern, 118 N. C. 132, 24 S. E. 706; Gardner v. Wasco County, 37 Or. 392, 61 Pac. 834, rehearing denied, 62 Pac. 753; Wood v. Bridgewood Borough, 143 Pa. 167, 22 Atl. 752; City of Ft. Worth v. Johnson, 84 Tex. 137, 19 S. W. 361; City of Richmond v. Leaker, 99 Va. 1, 37 S. E. 348; Coates v. Town of Canaan, 51 Vt. 131; Nicks v. Town of Marshall, 24 Wis. 139; Richards v. City of Oshkosh, 81 Wis. 226, 51 N. W. 256; Salzer v. City of Milwaukee, 97 Wis. 471, 73 N. W. 20; Koch v. City of Ashland, 88 Wis. 603, 60 N. W. 990. See, also, Bills v. City of Ottumwa, 35 Iowa, 107. See, also, § 1051, ante.

[461] City of Birmingham v. Starr, 112 Ala. 98, 20 So. 424; City of Highlands v. Raine, 23 Colo. 295, 47 Pac. 283. It is not contributory negligence per se for a person to use, having knowledge of its condition, a defective sidewalk. Sampels v. City of Atlanta, 95 Ga. 110, 22 S. E. 135; City of Sandwich v. Dolan, 141 Ill. 430, 31 N. E. 416; Village of Clayton v. Brooks, 150 Ill. 97, 37 N. E. 574; City of Mt. Carmel v. Blackburn, 53 Ill. App. 658; City of Litchfield v. Anglim, 83 Ill. App. 55; City of Chicago v. McCabe, 93 Ill. App. 288; City of Frankfort v. Coleman, 19 Ind. App. 368, 49 N. E. 474; City of Huntington v. Folk, 154 Ind. 91, 54 N. E. 759; Larsh v. City of Des Moines, 74 Iowa, 512, 38 N. W. 384; Waud v. Polk County, 88 Iowa, 617, 55 N. W. 528; Graham v. Town of Oxford, 105 Iowa, 705, 75 N. W. 473; Troxel v. City of Vinton, 77 Iowa, 90, 41 N. W. 580; Har-

ists on the part of the traveler if he temporarily forgets it [462] or misjudges his proximity to it [463] or assumes that the defect of

vey v. City of Clarinda, 111 Iowa, 528, 82 N. W. 994; Finnegan v. Sioux City, 112 Iowa, 232, 83 N. W. 907; Keyes v. City of Cedar Falls, 107 Iowa, 509; Falls Tp. v. Stewart, 3 Kan. App. 403, 42 Pac. 926; City of Wichita v. Coggshall, 3 Kan. App. 540, 43 Pac. 842; City of Ottawa v. Black, 10 Kan. App. 439, 61 Pac. 985; City of Maysville v. Guilfoyle, 110 Ky. 670, 62 S. W. 493; Town of Fordsville v. Spencer, 23 Ky. L. R. 1260, 65 S. W. 132; Allegheny County Com'rs v. Broadwaters, 69 Md. 533, 16 Atl. 223; St. Germain v. City of Fall River, 177 Mass. 550, 59 N. E. 447; Pomeroy v. Inhabitants of Westfield, 154 Mass. 462, 28 N. E. 899; Dipper v. Inhabitants of Milford, 167 Mass. 555, 46 N. E. 122; Grattan v. Village of Williamston, 116 Mich. 462, 74 N. W. 668; Urtel v. City of Flint, 122 Mich. 65, 80 N. W. 991; Bratfisch v. Mason Tp., 120 Mich. 323; Wiggin v. City of St. Louis, 135 Mo. 558, 37 S. W. 528; Stein v. Koster, 67 N. J. Law, 481, 51 Atl. 480; Shook v. City of Cohoes, 108 N. Y. 648, 15 N. E. 531; Thompson v. City of Winston, 118 N. C. 662; Pitman v. City of El Reno, 2 Okl. 414, 37 Pac. 851, Id., 4 Okl. 638, 46 Pac. 495; Ford v. Umatilla County, 15 Or. 313, 16 Pac. 33; Humphreys v. Armstrong County, 56 Pa. 204; Manross v. Oil City, 178 Pa. 276, 35 Atl. 959; Shallcross v. City of Philadelphia, 187 Pa. 143; Stewart v. City of Nashville, 96 Tenn. 50; City of Denison v. Sanford, 2 Tex. Civ. App. 661, 21 S. W. 784; Ball v. City of El Paso, 5 Tex. Civ. App. 221, 23 S. W. 835; City of Hillsboro v. Jackson, 18 Tex. Civ. App. 325, 44 S. W. 1010; City of Galveston v. Hemmis, 72 Tex. 558, 11 S. W. 29; Dwyer v. Salt Lake City, 19 Utah, 521, 57 Pac. 535; Smith v. City of Spokane, 16 Wash. 403, 47 Pac. 888; Einseidler v. Whitman County, 22 Wash. 388, 60 Pac. 1122; Hinkley v. Town of Rosendale, 95 Wis. 271, 70 N. W. 158; Simonds v. City of Baraboo, 93 Wis. 40, 67 N. W. 40. But see Town of Boswell v. Wakley, 149 Ind. 64, 48 N. E. 637; Neddo v. Village of Ticonderoga, 77 Hun, 524, 28 N. Y. Supp. 887; McNish v. Village of Peekskill, 91 Hun, 324, 36 N. Y. Supp. 1022; Morgan v. Village of Penn Yan, 42 App. Div. 582, 59 N. Y. Supp. 504. See, also, § 1031, ante.

[462] Coles v. Revere, 181 Mass. 175, 63 N. E. 430. Question for jury. Slee v. City of Lawrence, 162 Mass. 405, 38 N. E. 708; Bouga v. Weare Tp., 109, Mich. 520, 67 N. W. 557; City of Knoxville v. Cox, 103 Tenn. 368, 53 S. W. 734; Doan v. Town of Willow Springs, 101 Wis. 112, 76 N. W. 1104. But see Benedict v. City of Port Huron, 124 Mich. 600, 83 N. W. 614.

[463] City of Milledgeville v. Brown, 87 Ga. 596, 13 S. E. 638; City of Bloomington v. Rogers, 9 Ind. App. 230, 36 N. E. 439; Village of Orleans v. Perry, 24 Neb. 831, 40 N. W. 417; Parcells v. City of Auburn, 77 Hun, 137, 28 N. Y. Supp. 471; Boyce v. Town of Shawangunk, 40 App. Div. 593, 58 N. Y. Supp. 26; Rysdyke v. Town of Mt. Hope, 46 App. Div. 624, 61 N. Y. Supp. 645; Bly v. Village of Whitehall, 120 N. Y. 506, 24 N. E. 943; Millcreek Tp.

which he had knowledge has been remedied,[464] these questions as affecting his contributory negligence are ordinarily all to be determined by the jury. It would seem on principle that where a traveler has knowledge of a defect and is injured because of it, a use of the highway on his part should be regarded as contributory negligence sufficient to bar a recovery. Public corporations having charge of highways are not eleemosynary institutions and should not be charged pecuniarily with the lack of ordinary care and diligence on the part of those using facilities constructed and maintained for the benefit of the community and from which the corporation derives no profits.

§ 1055. 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 own acts or omissions,[465] but also in connection with the care and management of the vehicle which he may be using and its condition.[466]

v. Perry (Pa.) 12 Atl. 149; Musselman v. Borough of Hatfield, 202 Pa. 489, 52 Atl. 15; McQuillan v. City of Seattle, 10 Wash. 464, 38 Pac. 1119.

[464] Dale v. Webster County, 76 Iowa, 370, 41 N. W. 1; Whoram v. Argentine Tp., 112 Mich. 20, 70 N. W. 341.

[465] City of Chicago v. Kohlhof, 64 Ill. App. 349; Vermillion County Com'rs v. Chipps, 131 Ind. 56, 29 N. E. 1066, 16 L. R. A. 228. Extraordinary load. La Porte County Com'rs v. Ellsworth, 9 Ind. App. 566, 37 N. E. 22. Not contributory negligence to attempt to cross a bridge with traction engine. Stickney v. City of Salem, 85 Mass. (3 Allen) 374; Anderson v. City of St. Cloud, 79 Minn. 88, 81 N. W. 746. Unusual load. Morhart v. North Jersey St. R. Co., 64 N. J. Law, 236, 45 Atl. 812; Smith v. Village of Henderson, 54 App. Div. 26, 66 N. Y. Supp. 347; Heib v. Town of Big Flats, 66 App. Div. 88, 73 N. Y. Supp. 86; Bailey v. Brown Tp., 190 Pa. 530, 42 Atl. 95; McVoy v. City of Knoxville, 85 Tenn. 19. But the fact that the plaintiff was coming from an unlawful place will not preclude his recovery. Fisher v. Town of Franklin, 89 Wis. 42, 61 N. W. 80; City of Wabash v. Carver, 129 Ind. 552, 29 N. E. 25, 13 L. R. A. 851. Where highway bridges are commonly used for crossing by traction engines, contributory negligence cannot be charged.

(a) Careless driving. The traveler is bound in using a highway to ride or drive in a careful manner;[467] one in keeping with the kind of locomotion he employs and the load he may be transporting.[468] This includes the question of a driver's competency.[469] Through careless or incompetent driving a person may be guilty of contributory negligence so as to relieve the corporation of any liability.

(b) 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.[470] This

[466] Jordan v. City of New York, 44 App. Div. 149, 60 N. Y. Supp. 696, affirmed 165 N. Y. 657, 59 N. E. 1124; Sewell v. City of Cohoes, 75 N. Y. 45; Jennings v. Town of Albion, 90 Wis. 22, 62 N. W. 926; Luedke v. Town of Mukwa, 90 Wis. 57, 62 N. W. 931. See, also, § 1056, post.

[467] CiCty of Aurora v. Scott, 185 Ill. 539, 57 N. E. 440; McDonald v. Inhabitants of Savoy, 110 Mass. 49. Evidence that the plaintiff was commonly careful and skillful in driving is not admissible to show that at the time of the accident he was in the exercise of due care. Langworthy v. Green Tp., 88 Mich. 207, 50 N. W. 130; Belles v. Kellner, 67 N. J. Law, 255, 51 Atl. 700, 54 Atl. 99, 57 L. R. A. 627; Titus v. Town of New Scotland, 11 App. Div. 266, 42 N. Y. Supp. 152; Mueller v. Ross Tp., 152 Pa. 399, 25 Atl. 604; Nelson v. Shaw, 102 Wis. 274, 78 N. W. 417. But see City of Chicago v. McCarthy, 61 Ill. App. 300.

[468] Bryant v. Town of Randolph, 53 Hun, 631, 6 N. Y. Supp. 438. Question for jury. Walker v. Village of Ontario, 111 Wis. 113, 86 N. W. 566. But see Tucker v. Henniker, 41 N. H. 317.

[469] City of Mt. Vernon v. Hoehn, 22 Ind. App. 282, 53 N. E. 654. Girl of sixteen competent to drive an ordinarily gentle team. 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. Britton v. Inhabitants of Cummington, 107 Mass. 347; Brush v. City of New York, 59 App. Div. 12, 69 N. Y. Supp. 51.

[470] Daniels v. Town of Saybrook, 34 Conn. 377. The rule applies only where the person injured has knowledge of the vicious propensities of the horse he is driving. City of Macon v. Dykes, 103 Ga. 847, 31 S. E. 443; City of Centralia v. Scott, 59 Ill. 129. Question for the jury. Langhammer v. City of Manchester, 99 Iowa, 295; Dennett v. Inhabitants of Wellington, 15 Me. 27; Bliss v. Inhabitants of Wilbrahan, 90 Mass. (8 Allen) 564; Titus v. Inhabitants of Northbridge, 97 Mass. 258; Fogg v. Inhabitants of Nahant, 98 Mass. 578;

rule, however, does not apply to teams which become unmanageable or which run away by reason of a cause not the fault of the driver or of some unlawful defect or obstruction in the highway,[471] but only where the condition of the team results from the negligence of the driver or because of its character as indicated above.[472]

(c) 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.[473]

Hulse v. Town of Goshen, 71 App. Div. 436, 75 N. Y. Supp. 723; Bitting v. Maxatawny Tp., 177 Pa. 213, 35 Atl. 715; Card v. Columbia Tp., 191 Pa. 254, 43 Atl. 217; Hungerman v. City of Wheeling, 46 W. Va. 761, 34 S. E. 778; Ritger v. City of Milwaukee, 99 Wis. 190, 74 N. W. 815. But see Hull v. Kansas City, 54 Mo. 598; Boone v. East Norwegian Tp., 192 Pa. 206, 43 Atl. 1025. See, also, Dillon v. City of Raleigh, 124 N. C. 184.

[471] City of Peoria v. Gerber, 68 Ill. App. 255; Town of Fowler v. Linquist, 138 Ind. 566, 37 N. E. 133; Byerly v. City of Anamosa, 79 Iowa, 204, 44 N. W. 359; Vogelgesang v. City of St. Louis, 139 Mo. 127, 40 S. W. 653; Norton v. Webber, 69 App. Div. 130, 74 N. Y. Supp. 524. Question for the jury. Dillon v. City of Raleigh, 124 N. C. 184, 32 S. E. 548; Hotchkin v. Borough of Philipsburg (Pa.) 8 Atl. 434; Schaeffer v. Jackson Tp., 150 Pa. 145, 24 Atl. 629, 18 L. R. A. 100; Davis v. Snyder Tp., 196 Pa. 273, 46 Atl. 301; City of Weatherford v. Lowery (Tex. Civ. App.) 47 S. W. 34; Thomas v. Springfield City, 9 Utah, 426, 35 Pac. 503; White v. City of Ballard, 19 Wash. 284, 53 Pac. 159. But see Foley v. East Flamborough Tp., 29 Ont. 139; Village of Bureau Junction v. Long, 56 Ill. App. 458; Marble v. City of Worcester, 70 Mass. (4 Gray) 395.

[472] Faulk v. Iowa County, 103 Iowa, 442, 72 N. W. 757; Wood v. Town of Gilboa, 76 Hun, 175, 27 N. Y. Supp. 586. It is for the jury to say whether a person driving a colt on a defective highway is guilty of contributory negligence.

[473] Huffman v. Bayham Tp., 26 Ont. App. 514. It is not negligence per se to travel at a rate of five to six miles an hour in a dark night on a much traveled road. City of Salem v. Webster, 192 Ill. 369, 61 N. E. 323. Evidence of fast driving at other times than that of the injury not admissible. City of Vincennes v. Thuis, 28 Ind. App. 523, 63 N. E. 315; Reed v. Inhabitants of Deerfield, 90 Mass. (8 Allen) 522. As a matter of law it is not contributory negligence to drive at night at a speed of ten miles an hour on a wide and level road. Oliver v. City of Nashville, 106 Tenn. 273, 61 S. W. 89; Luke v. City of El Paso, (Tex. Civ. App.) 60 S. W. 363; Bills v. Town of Kaukauna, 94 Wis. 310, 68 N. W. 992. It is not contributory negligence to drive a horse at a speed of five or six miles an hour

§ 1056. Conduct continued; 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.[474] If, through defects in these, an injury occurs, which would not otherwise have happened, by reason of a dangerous condition of the highway, the person so using the defective vehicle, animal or appliance, is guilty of contributory negligence.[475]

(a) Deviation from traveled way. The principle has been stated in preceding sections[476] 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.[477] In the case of a pedestrian

along the beaten track of a road. Johnson v. City of Superior, 103 Wis. 66, 78 N. W. 1100.

[474] Farrar v. Inhabitants of Greene, 32 Me. 574; Horrigan v. Inhabitants of Clarksburg, 150 Mass. 218, 22 N. E. 897, 5 L. R. A. 609; Brackenridge v. City of Fitchburg, 145 Mass. 160, 13 N. E. 457. Not guilty of contributory negligence as a matter of law in driving a blind horse on a dark night. Judd v. Town of Claremont, 66 N. H. 418, 23 Atl. 427; Clark v. Barrington, 41 N. H. 44; Chartiers Tp. v. Phillips, 122 Pa. 601, 16 Atl. 26; Hammond v. Town of Mukwa, 40 Wis. 35; Cairncross v. Village of Pewaukee, 86 Wis. 181, 56 N. W. 648.

[475] Gould v. Schermer, 101 Iowa, 582, 70 N. W. 697; Cunningham v. City of Thief River Falls, 84 Minn. 21; 86 N. W. 763; Winship v. Town of Enfield, 42 N. H. 197; Patchen v. Town of Walton, 17 App. Div. 158, 45 N. Y. Supp. 145; Jordan v. City of New York, 44 App. Div. 149, 60 N. Y. Supp. 696; Gardner v. Wasco County, 37 Or. 392, 61 Pac. 834, 62 Pac. 753. Question for jury. Heisey v. Rapho Tp., 181 Pa. 561; Allen v. Town of Hancock, 16 Vt. 230. But see Wright v. Inhabitants of Templeton, 132 Mass. 49; Hodge v. Town of Bennington, 43 Vt. 450.

[476] See §§ 991 and 1015, ante.

[477] Johnson v. Sioux City, 114 Iowa, 137, 86 N. W. 212; Mulvane v. City of South Topeka, 45 Kan. 45; Sparhawk v. City of Salem, 83 Mass. (1 Allen) 30; Carey v. Inhabitants of Hubbardston, 172 Mass. 106, 51 N. E. 521; Harwood v. Inhabitants of Oakham, 152 Mass. 421, 25 N. E. 625; Bell v. Village of Wayne, 123 Mich. 386, 82 N. W. 215, 48 L. R. A. 644; City of Meridian v. Hyde (Miss.) 11 So. 108; Siegler v. Mellinger, 203 Pa. 256, 52 Atl. 175. It is presumptive negligence for one to walk along the side of a country road on a dark

traveling in the road way of a street, it might be said that the public corporation owes to him a duty less in degree that in respect to its sidewalks. While it is true a pedestrian may use any portion of the street,[478] yet, certain parts are set aside for his exclusive use.[479] Obstructions or defects in the sidewalk, the existence of which might be regarded as negligence in respect to pedestrians there, cannot be considered of this character, when in the roadway and in respect to the traffic for which that part of the highway is especially designated.[480]

(b) 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. As a rule, the use of a highway at a time thus prohibited by law is not regarded as a good defense in an action brought to recover for injuries received by reason of a defective condition or, to state the doctrine in another way, the use of a public highway at a prohibited time is not regarded ordinarily as contributory negligence.[481] In respect to the manner of

night; the middle being the proper place. Chapman v. Cook, 10 R. I. 304; Biggs v. City of Huntington, 32 W. Va. 55, 9 S. E. 51; Stricker v. Town of Reedsburg, 101 Wis. 457, 77 N. W. 897; Seaver v. Town of Union, 113 Wis. 322, 89 N. W. 163. But see City of Austin v. Ritz, 72 Tex. 391, 9 S. W. 884. Question for the jury. City of Danville v. Robinson, 99 Va. 448, 39 S. E. 122, 55 L. R. A. 162; Boltz v. Town of Sullivan, 101 Wis. 608, 77 N. W. 870.

[478] Bell v. Town of Clarion, 115 Iowa, 357, 88 N. W. 824; City of Olathe v. Mizee, 48 Kan. 435, 29 Pac. 754; Baker v. City of Grand Rapids, 111 Mich. 447, 69 N. W. 740; Ringelstein v. City of San Antonio (Tex. Civ. App.) 21 S. W. 634.

[479] Bell v. Town of Clarion, 113 Iowa, 126, 84 N. W. 962. It is not negligence per se for a person to cross a street at a place other than the regular crossing. But see City of Glasgow v. Gillenwaters, 113 Ky. 140, 67 S. W. 381.

[480] Junction City v. Blades, 59 Kan. 774, 52 Pac. 444; City of Dallas v. Webb, 22 Tex. Civ. App. 48, 54 S. W. 398. Question for the jury. But see Magaha v. City of Hagerstown, 95 Md. 62, 51 Atl. 832; Neal v. Town of Marion, 129 N. C. 345, 40 S. E. 116.

[481] Kansas City v. Orr, 62 Kan. 61, 61 Pac. 397, 50 L. R. A. 783; Cratty v. City of Bangor, 57 Me. 423; Dutton v. Weare, 17 N. H. 34; Mohney v. Cook, 26 Pa. 342. But see Bosworth v. Inhabitants of Swansey, 51 Mass. (10 Metc.) 363; Connolly v. City of Boston, 117 Mass. 64; Lyons v. Desotelle, 124 Mass. 387. The rule in Maine has been changed by the Statutory laws of 1895, c. 129, p. 142, which provides that the right to recover shall not be availed of one for an injury

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.[482]

§ 1057. Contributory negligence; a question for the jury.

Ordinarily, the question of contributory negligence is one for the jury to pass upon, upon all the evidence submitted to them and, in the greater number of cases, this doctrine will be found to obtain.[483] It might be said, however, that this principle applies only where evidence is produced as to the legal effect of which the minds of ordinary and reasonable men will differ.[484] Where the

received on the Lord's day and growing out a failure to observe that day.

[482] Carswell v. City of Wilmington, 2 Marv. (Del.) 360, 43 Atl. 169; Anderson v. City of Wilmington, 2 Pen. (Del.) 28, 43 Atl. 841; Fernbach v. City of Waterloo, 76 Iowa, 598; Heland v. City of Lowell, 85 Mass. (3 Allen) 407; Tuttle v. City of Lawrence, 119 Mass. 276; Luke v. City of El Paso (Tex. Civ. App.) 60 S. W. 363. But see Baker v. City of Portland, 58 Me. 199.

[483] District of Columbia v. Whipps, 17 App. D. C. 415; Lord v. City of Mobile, 113 Ala. 360; Sheats v. City of Rome, 92 Ga. 535; City of Chicago v. McLean, 133 Ill. 148, 24 N. E. 527, 8 L. R. A. 765; Village of Clayton v. Brooks, 150 Ill. 97; Weinstein v. City of Terre Haute, 147 Ind. 556; Yeager v. Town of Spirit Lake, 115 Iowa, 593, 88 N. W. 1095; Robinson v. City of Cedar Rapids, 100 Iowa, 662; Cason v. City of Ottumwa, 102 Iowa, 99; Parker v. City of Springfield, 147 Mass. 391, 18 N. E. 70; Hayes v. Inhabitants of Hyde Park, 153 Mass. 514, 27 N. E. 522, 12 L. R. A. 249; Hickey v. City of Waltham, 159 Mass. 460, 34 N. E. 681; Woodbury v. City of Owosso, 64 Mich. 239, 31 N. W. 130; Malloy v. Walker Tp., 77 Mich. 448, 43 N. W. 1012, 6 L. R. A. 695; Lauder v. St. Clair Tp., 125 Mich. 479, 85 N. W. 4; Mullen v. City of Owosso, 100 Mich. 103, 23 L. R. A. 693; Smith v. City of Jackson, 106 Mich. 136; Will v. Village of Mendon, 108 Mich. 251; Wright v. City of St. Cloud, 54 Minn. 94; Maus v. City of Springfield, 101 Mo. 613, 14 S. W. 630; McPherson v. City of Buffalo, 13 App. Div. 502, 43 N. Y. Supp. 658; Stone v. City of Poughkeepsie, 15 App. Div. 582, 44 N. Y. Supp. 609; Fisher v. Village of Cambridge, 133 N. Y. 527, 30 N. E. 663; Magill v. Lancaster County, 39 S. C. 27; Rowe v. City of Ballard, 19 Wash. 1; Ritger v. City of Milwaukee, 99 Wis. 190; Gutkind v. City of Elroy, 97 Wis. 649, 73 N. W. 325.

[484] Hodges v. City of Waterloo, 109 Iowa, 444, 80 N. W. 523; Village of Plainview v. Mendelson, 65 Neb. 85, 90 N. W. 956; Nicholson v. City of Philadelphia, 194 Pa. 460, 45 Atl. 375; Reed v. City of Spokane, 21 Wash. 218, 57 Pac. 803. See, also, cases cited in preceding note.

evidence offered is of such a character that upon its consideration reasonable and ordinary men can come to but one conclusion, the question of contributory negligence is clearly then one not for the jury but for the court, and it becomes then a question of law.[485]

§ 1058. Burden of proof.

Where the question of contributory negligence is involved in a case as affecting the right of recovery by the plaintiff, the courts differ as to the party upon whom is thrown the burden of proof of establishing it. There are cases holding that not only must a plaintiff plead and prove the existence of a duty on the part of the defendant and a failure to perform that duty, but further must establish the fact that the plaintiff himself fully performed his duty and was free from contributory negligence.[486] On the other hand by far the greater number of cases and authorities support the doctrine that contributory negligence is a defense and that the burden of proof is upon the defendant to plead according to established rules of procedure and prove contributory negligence on the part of the plaintiff that it may be successfully availed of as a defense and in order to bar a recovery.[487] The reasons for the two doctrines are suggested in the cases cited and will be found considered at length in works on negligence.

[485] City of Montgomery v. Wright, 72 Ala. 411; Wood v. City of Danbury, 72 Conn. 69, 43 Atl. 554; Dale v. Webster County, 76 Iowa, 370, 41 N. W. 1; Worcester County v. Ryckman, 91 Md. 36; 46 Atl. 317; Casey v. City of Fitchburg, 162 Mass. 321, 38 N. E. 499; Cloney v. City of Kalamazoo, 124 Mich. 655, 83 N. W. 618; Maanum v. City of Madison, 104 Wis. 272, 80 N. W. 591.

[486] Trout v. City of Elkhart, 12 Ind. App. 343, 39 N. E. 1048; Falls Tp. v. Stewart, 3 Kan. App. 403, 42 Pac. 926. Where defendant pleads contributory negligence, burden of proof is shifted to it. Weston v. City of Troy, 139 N. Y. 281, 34 N. E. 780; City of Guthrie v. Thistle, 5 Okl. 517, 49 Pac. 1003; Stewart v. City of Nashville, 96 Tenn. 50, 33 S. W. 613. Burden of proof is upon a blind person upon a street unattended to show that he exercised due care. See, also, Clark County Com'rs v. Brod, 3 Ind. App. 585, 29 N. E. 430.

[487] Riest v. City of Goshen, 42 Ind. App. 339; Maultby v. City of Leavenworth, 28 Kan. 745; Independent Tp. v. Guldner, 7 Kan. App. 699, 51 Pac. 943. Under Gen. St. 1897, c. 42, § 48, if contributory negligence is pleaded by the defendant, the burden of proof is shifted from the plaintiff. Reading Tp. v. Telfer, 57 Kan. 798, 48 Pac. 134, construing Gen. St. 1889, par. 7134; May v. Inhabitants of Princeton, 52 Mass. (11 Metc.) 442; Snook v.

§ 1059. Proximate cause.

It has been stated in preceding sections [488] that one claiming damages for a failure on the part of the public corporation to properly perform a duty imposed upon it must show by a preponderance of the evidence that the failure to perform a duty complained of was the proximate and direct cause of the injury sustained. The same rule applies to contributory negligence. It must appear if this is claimed as a defense in order to be successful that the act of the plaintiff which is characterized as contributory negligence on his part must be the proximate cause of the injury [489] and that although there may be a concurring cause, namely the failure to perform the duty on the part of the corporation, yet, if the injury to the plaintiff is the immediate and direct result of his act or omission or that of a third person chargeable to him, he cannot recover.[490] This question of proximate cause is usually one for a jury to consider upon all the facts and circumstances in the case as presented to them.[491] The rule as ordinarily interpreted does not require one injured to be absolutely free from any negligence, for such a requirement would impose on him the exercise of extraordinary care.[492]

City of Anaconda, 26 Mont. 128, 66 Pac. 756; Pettingill v. Town of Olean, 65 Hun, 624, 20 N. Y. Supp. 367; Russell v. Town of Monroe, 116 N. C. 720, 21 S. E. 550; City of Dallas v. Myers, (Tex. Civ. App.) 64 S. W. 683; Hill v. Town of New Haven, 37 Vt. 501; Gordon v. City of Richmond, 83 Va. 436, 2 S. E. 727.

[488] See §§ 952 and 993, ante.

[489] City of Denver v. Johnson, 8 Colo. App. 384, 46 Pac. 621; Baldwin v. Greenwoods Turnpike Co., 40 Conn. 238; City of Rock Falls v. Wells, 169 Ill. 224, 48 N. E. 440; Hayes v. Inhabitants of Hyde Park, 153 Mass. 514, 27 N. E. 522, 12 L. R. A. 249; Monje v. City of Grand Rapids, 122 Mich. 645, 81 N. W. 574; Brennan v. City of St. Louis, 92 Mo. 482, 2 S. W. 481; Pinnix v. City of Durham, 130 N. C. 360, 41 S. E. 932; Boone v. East Norwegian Tp., 192 Pa. 206, 43 Atl. 1025; Luedke v. Town of Mukwa, 90 Wis. 57, 62 N. W. 931; Walker v. Village of Ontario, 111 Wis. 113, 86 N. W. 566.

[490] City of Macon v. Dykes, 103 Ga. 847, 31 S. E. 443; Town of Salem v. Walker, 16 Ind. App. 687, 46 N. E. 90; Kidder v. Inhabitants of Dunstable, 73 Mass. (7 Gray) 104; Howe v. City of Lowell, 101 Mass. 99; Card v. Columbia Tp., 191 Pa. 254, 43 Atl. 217.

[491] Benedict v. City of Port Huron, 124 Mich. 600, 83 N. W. 614. See, also, § 1057, ante, and § 1066, post.

[492] Town of Grayville v. Whitaker, 85 Ill. 439; McFall v. Barnwell County, 57 S. C. 294, 35 S. E.

§ 1060. 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.[493]

Lack of funds. 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 obligation, as will be remembered, requires the exercise only of ordinary care and diligence on the part of the corporation. Municipalities, as a rule, have ample funds or sources of revenue with which to perform this duty. The defense may be urged either where there is a total lack or want of funds and no means of obtaining them or 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,[494] but the cases almost universally hold where the defense is urged under the second

562; Cowie v. City of Seattle, 22 Wash. 659, 62 Pac. 121; Bloor v. Town of Delafield, 69 Wis. 273, 34 N. W. 115.

[493] Bliven v. Sioux City, 85 Iowa, 346, 52 N. W. 246; Pardey v. Town of Mechanicsville, 112 Iowa, 68, 83 N. W. 828; Maylone v. City of St. Paul, 40 Minn. 406, 42 N. W. 88. But a statute of this kind is not applicable to statutory actions by the personal representatives of a deceased person for negligence causing the death. McGaffin v. City of Cohoes, 74 N. Y. 387. Special charter provision does not include actions for tort. Scurry v. City of Seattle, 8 Wash. 278, 36 Pac. 145. But see City of Louisville v. O'Malley, 21 Ky. L. R. 873, 53 S. W. 287. Such a provision is unconstitutional; a recovery may be had for damages which have accrued to property within five years.

[494] 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; Stone v. Town of Poland, 58 Hun, 21, 11 N. Y. Supp. 498; Lane v. Town of Hancock, 67 Hun, 623, 22 N. Y. Supp. 470; Quinn v. Town of Sempronius, 33 App. Div. 70, 53 N. Y. Supp. 325; Boyce v. Town of Shawangunk, 40 App. Div. 593, 58 N. Y. Supp. 26; Chartiers v. Langdon, 114 Pa. 541; Russell v. Men of Devon, 2 Term. R. 667.

condition, it is not good and a recovery can be had if the other elements of actionable negligence exist.[495] If a public corporation is temporarily without means for making necessary repairs, its duty then is to prevent the use of the defective highway or give warning or notice of its dangerous condition.

§ 1061. 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,[496] to the corporation, of the injury sustained. This condition may be either required by general law or by special charter provisions in particular instances.[497] The purpose of such a notice is to inform the

[495] Lord v. City of Mobile, 113 Ala. 360, 21 So. 366; Albrittin v. City of Huntsville, 60 Ala. 486; City of Birmingham v. Lewis, 92 Ala. 352, 9 So. 243; City of Mt. Vernon v. Brooks, 39 Ill. App. 426; City of New Albany v. McCulloch, 127 Ind. 500, 26 N. E. 1074; Moon v. City of Ionia, 81 Mich. 635, 46 N. W. 25; Lombar v. Village of East Tawas, 86 Mich. 14, 48 N. W. 947; Shartle v. City of Minneapolis, 17 Minn. 308 (Gil. 284); Whitfield v. City of Meridian, 66 Miss. 570, 6 So. 244, 4 L. R. A. 834; Snook v. City of Anaconda, 26 Mont. 128, 66 Pac. 756; Pomfrey v. Village of Saratoga Springs, 104 N. Y. 459, 11 N. E. 43; Whitlock v. Town of Brighton, 2 App. Div. 21, 37 N. Y. Supp. 333; Hover v. Barkhoof, 44 N. Y. 113; Village of Shelby v. Clagett, 46 Ohio St. 549, 22 N. E. 407, 5 L. R. A. 606; City of Belton v. Turner (Tex. Civ. App.) 27 S. W. 831.

[496] Morgan v. City of Des Moines (C. C. A.) 60 Fed. 208. Iowa Act Feb. 17, 1888 (p. 31) requiring service of notice on a city within 90 days from injury as a precedent to a right to recover applies to infants as well as adults. Mitchell v. City of Worcester, 129 Mass. 525; Dalton v. City of Salem, 139 Mass. 91, 28 N. E. 576; May v. City of Boston, 150 Mass. 517, 23 N. E. 220; Terryll v. City of Faribault, 81 Minn. 519, 84 N. W. 458; McDonald v. City of Ashland, 78 Wis. 251, 47 N. W. 434.

[497] Newman v. City of Birmingham, 109 Ala. 630; City of Denver v. Barron, 6 Colo. App. 72, 39 Pac. 989; Walpole v. City of Pueblo, 12 Colo. App. 151; Giffen v. City of Lewiston, 6 Idaho, 231, 55 Pac. 548. Special charter provision construed and held only to apply to damages upon which actions ex contractu may be brought. Kennedy v. City of Des Moines, 84 Iowa, 187; Lamb v. City of Cedar Rapids, 108 Iowa, 629; D'Amico v. City of Boston, 176 Mass. 599, 58 N. E. 158. The statute does not apply to a contractual relation. Norwood v. City of Somerville, 159 Mass. 105; Carberry v. Inhabitants of Sharon, 166 Mass. 32; Barclay v. City of Boston, 173 Mass. 310; Monje v. City of Grand Rapids, 122 Mich. 645, 81 N. W. 574;

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 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.[498] 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,[499] and the fact of notice as thus required is

Rodda v. City of Detroit, 117 Mich. 412; Clark v. Village of Davidson, 118 Mich. 420; Doyle v. City of Duluth, 74 Minn. 157, 76 N. W. 1029. Notice should state amount of compensation claimed. Bausher v. City of St. Paul, 72 Minn. 539, 75 N. W. 745; Winters v. City of Duluth, 82 Minn. 127, 84 N. W. 788. Laws 1897, c. 248 relative to giving of notice held valid. Young v. Webb City, 150 Mo. 333; Carvin v. City of St. Louis, 151 Mo. 334; Dovey v. City of Plattsmouth, 52 Neb. 642; City of Lincoln v. O'Brien, 56 Neb. 761; Shields v. Town of Durham, 118 N. C. 450, 36 L. R. A. 293; Jones v. City of Greensboro, 124 N. C. 310; Pearson v. City of Seattle, 14 Wash. 438; Jung v. City of Stevens Point, 74 Wis. 547, 43 N. W. 513. The words "claim or damage" in a city charter providing that these must have been first presented to the city council, apply to claims arising upon a contract and not those sounding in tort.

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. Sharp v. City of Mauston, 92 Wis. 629; Flieth v. City of Wausau, 93 Wis. 446; Daniels v. City of Racine, 98 Wis. 649; Ziegler v. City of West Bend, 102 Wis. 17.

[498] See § 1037, ante.

[499] Starling v. Town of Bedford, 94 Iowa, 194, 62 N. W. 674. A failure to serve within the time limited by law cannot be waived even by the municipality. But see to the contrary, Foster v. Village of Bellaire, 127 Mich. 13, 86 N. W. 383, and Lindley v. City of Detroit, 131 Mich. 8, 90 N. W. 665.

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an affirmative matter to be pleaded and proved by the plaintiff.[500] Provisions relative to the giving of notice include as a rule the elements of its sufficiency and its service.

§ 1062. Notice of accident and its sufficiency.

The purpose of a notice being to afford the corporation an opportunity to investigate, it is, therefore, commonly required that it shall contain certain statements specific in their character and in reasonable detail concerning the time of the accident,[501] the place where it occurred,[502] and the nature or cause of the injury sus-

ridgwock, 82 Me. 62, 19 Atl. 91; Clark v. Inhabitants of Tremont, 83 Me. 426, 22 Atl. 378. Upon a failure to serve notice within the time required by law a vote of the inhabitants of the town to pay damages is a mere gratuity and not binding. Gay v. City of Cambridge, 128 Mass. 387; Griswold v. City of Ludington, 116 Mich. 401, 74 N. W. 663. Verification of the notice may be waived by a city council. Meyer v. City of New York, 14 Daly (N. Y.) 395; Kennedy v. City of New York, 34 App. Div. 311, 54 N. Y. Supp. 261; Trost v. City of Casselton, 8 N. D. 534, 79 N. W. 1071; Plum v. City of Fond du Lac, 51 Wis. 393.

[500] Olmstead v. Town of Pound Ridge, 71 Hun, 25, 24 N. Y. Supp. 615; Krall v. City of New York, 44 App. Div. 259, 60 N. Y. Supp. 661; Benware v. Town of Pine Valley, 53 Wis. 527; Wentworth v. Town of Summit, 60 Wis. 281; Dorsey v. City of Racine, 60 Wis. 292. But see Kent v. Town of Lincoln, 32 Vt. 591.

[501] Shaw v. City of Waterbury, 46 Conn. 263; Lilly v. Town of Woodstock, 59 Conn. 219, 22 Atl. 40. The notice need only state the day—not the hour when the injury occurred. Taylor v. Inhabitants of Woburn, 130 Mass. 494; Sherry v. Town of Rochester, 62 N. H. 346; Sullivan v. City of Syracuse, 77 Hun, 440, 29 N. Y. Supp. 105. Murphy v. Village of Seneca Falls, 57 App. Div. 438, 67 N. Y. Supp. 1013.

[502] City of Denver v. Barron, 6 Colo. App. 72, 39 Pac. 989; Tuttle v. Town of Winchester, 50 Conn. 496; Cloughessey v. City of Waterbury, 51 Conn. 405; Biesiegel v. Town of Seymour, 58 Conn. 43, 19 Atl. 372; Carstesen v. Town of Stratford, 67 Conn. 428, 35 Atl. 276; Owen v. City of Ft. Dodge, 98 Iowa, 281, 67 N. W. 281; Rusch v. City of Dubuque, 116 Iowa, 402, 90 N. W. 80; Hutchings v. Inhabitants of Sullivan, 90 Me. 131, 37 Atl. 883; Lord v. City of Saco, 87 Me. 231, 32 Atl. 887; Kaherl v. Inhabitants of Rockport, 87 Me. 527, 33 Atl. 20; Veno v. City of Waltham, 158, Mass. 279, 33 N. E. 398; Conners v. City of Lowell, 158 Mass. 336, 33 N. E. 514; Fuller v. Inhabitants of Hyde Park, 162 Mass. 51, 37 N. E. 782; Donnelly v. City of Fall River, 130 Mass. 115; Cronin v. City of Boston, 135 Mass. 110; Sargent v. City of Lynn, 138 Mass. 599; Dalton v. City of Salem, 139 Mass. 91; Coffin v. Inhabitants of Palmer, 162 Mass. 192, 38 N. E. 509; Lyons v. City

tained.[503] The courts require in respect to all these essentials a full though not strict compliance with the law [504] though not as to all, especially that relative to the injury where a technical descrip-

of Red Wing, 76 Minn. 20, 78 N. W. 868; Horne v. Town of Rochester, 62 N. H. 347; Currier v. City of Concord, 68 N. H. 294, 44 Atl. 386; City of Lincoln v. O'Brien, 56 Neb. 761, 77 N. W. 76; Masters v. City of Troy, 50 Hun, 485, 3 N. Y. Supp. 450; Paddock v. City of Syracuse, 61 Hun, 8, 15 N. Y. Supp. 387; Cross v. City of Elmira, 86 Hun, 467, 33 N. Y. Supp. 947; Maloney v. Cook, 21 R. I. 471, 44 Atl. 692; Law v. Town of Fairfield, 46 Vt. 425; Babcock v. Town of Guilford, 47 Vt. 519; Bean v. Town of Concord, 48 Vt. 30; Ranney v. Town of Sheffield, 49 Vt. 191; Melendy v. Town of Bradford, 56 Vt. 148; Harris v. Town of Townsend, 56 Vt. 716; Salladay v. Town of Dodgeville, 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541; Barrett v. Village of Hammond, 87 Wis. 654, 58 N. W. 1053; Benson v. City of Madison, 101 Wis. 312, 77 N. W. 161; Van Loan v. Village of Lake Mills, 88 Wis. 430, 60 N. W. 710; Dolan v. City of Milwaukee, 89 Wis. 497, 61 N. W. 564.

[503] City of Denver v. Barron, 6 Colo. App. 72, 39 Pac. 989; Tiesler v. Town of Norwich, 73 Conn. 199, 47 Atl. 161; Hoyt v. City of Danbury, 69 Conn. 341, 37 Atl. 1051; Wadleigh v. Inhabitants of Mt. Vernon, 75 Me. 79; Low v. Inhabitants of Windham, 75 Me. 113; Goodwin v. City of Gardiner, 84 Me. 278, 24 Atl. 846. Notice that one received "severe bodily injuries" not sufficient. Liffin v. Beverly, 145 Mass. 549, 14 N. E. 787; Driscoll v. City of Fall River, 163 Mass. 105, 39 N. E. 1003; Miller v. City of Springfield, 177 Mass. 373, 58 N. E. 1013; Noonan v. City of Lawrence, 130 Mass. 161; Bailey v. Inhabitants of Everett, 132 Mass. 441; Spooner v. Inhabitants of Freetown, 139 Mass. 235, 29 N. E. 662; Roberts v. Douglas, 140 Mass. 129; Brown v. City of Owosso, 126 Mich. 91, 85 N. W. 256; Stedman v. City of Rome, 88 Hun, 279, 34 N. Y. Supp. 737; Cook v. Town of Barton, 66 Vt. 65, 28 Atl. 631; Bartlett v. Town of Cabot, 54 Vt. 242. A notice is insufficient describing the injuries sustained as follows "Greatly injured her head, neck, back, ribs and limbs." Fassett v. Town of Roxbury, 55 Vt. 552; Laue v. City of Madison, 86 Wis. 453, 57 N. W. 93; Hein v. Village of Fairchild, 87 Wis. 258.

[504] Manning v. Town of Woodstock, 59 Conn. 224, 22 Atl. 42; Carberry v. Inhabitants of Sharon, 166 Mass. 32, 43 N. E. 912; Higgins v. Inhabitants of North Andover, 168 Mass. 251, 47 N. E. 85; Kenady v. City of Lawrence, 128 Mass. 318; Wilkins v. City of Flint, 128 Mich. 262, 87 N. W. 195; Harder v. City of Minneapolis, 40 Minn. 446, 42 N. W. 350; Carr v. Town of Ashland, 62 N. H. 665; City of Lincoln v. Pirner, 59 Neb. 634, 81 N. W. 846; Wall v. Town of Highland, 72 Wis. 435, 39 N. W. 560; Fopper v. Town of Wheatland, 59 Wis. 623; Laird v. Town of Otsego, 90 Wis. 25, 62 N. W. 1042; Collins v. City of Janesville, 107 Wis. 436, 83 N. W. 695; Althouse v. Town of Jamestown, 91 Wis. 46, 64 N. W. 423. But see Gardner v. Inhabitants of Weymouth, 155 Mass. 595, 30 N. E. 363.

tion is not necessary.[505] The question is usually one for the jury.[506]

§ 1063. Service of the notice.

This involves ordinarily, a consideration of the time and manner of service. That a public corporation may be informed and the law, therefore, complied with, it is necessary that the notice be served within the time fixed [507] and upon that officer or agent of the corporation designated as one who, because of his official capacity, is regarded as representing the corporation for this purpose.[508] The rule of strict construction stated above applies and a failure to serve within the time prescribed or upon the officer or in the manner designated will be sufficient to bar a recovery.[509]

[505] Brown v. Town of Southbury, 53 Conn. 212.

[506] Chapman v. Inhabitants of Nobleboro, 76 Me. 427. See, also, cases cited under second preceding note.

[507] Gardner v. City of New London, 63 Conn. 267, 28 Atl. 42; Kennedy v. City of Des Moines, 84 Iowa, 187, 50 N. W. 880. Legislation of this character cannot be retroactive. Marcotte v. City of Lewiston, 94 Me. 233, 47 Atl. 137; Nash v. Inhabitants of South Hadley, 145 Mass. 105, 13 N. E. 376; Lyons v. City of Cambridge, 132 Mass. 534; Ray v. City of St. Paul, 44 Minn. 340, 46 N. W. 675; Welsh v. City of Franklin, 70 N. H. 491, 48 Atl. 1102; City of Omaha v. Ayer, 32 Neb. 375, 49 N. W. 445; City of Lincoln v. O'Brien, 56 Neb. 761, 77 N. W. 76; Curry v. City of Buffalo, 57 Hun, 25, 10 N. Y. Supp. 392, affirmed 135 N. Y. 366, 32 N. E. 80; Werner v. City of Rochester, 77 Hun, 33, 28 N. Y. Supp. 226; Sproul v. City of Seattle, 17 Wash. 256, 49 Pac. 489; Berry v. Town of Wauwatosa, 87 Wis. 401, 58 N. W. 751. See, also, McKeigue v. City of Janesville, 68 Wis. 50, 31 N. W. 298.

[508] City of Denver v. Saulcey, 5 Colo. App. 420, 38 Pac. 1098; Taylor v. Inhabitants of Woburn, 130 Mass. 494; McCabe v. City of Cambridge, 134 Mass. 484; Johnson v. City of St. Paul, 52 Minn. 364, 54 N. W. 735; Lyons v. City of Red Wing, 76 Minn. 20, 78 N. W. 868; Kelly v. City of Minneapolis, 77 Minn. 76, 79 N. W. 653; Curry v. City of Buffalo, 57 Hun, 25, 10 N. Y. Supp. 392, affirmed 135 N. Y. 366, 32 N. E. 80; McDonald v. City of Troy, 59 Hun, 618, 13 N. Y. Supp. 385; Soper v. Town of Greenwich, 48 App. Div. 354, 62 N. Y. Supp. 1111. Mailing copy to town clerk sufficient. Seamons v. Fitts, 21 R. I. 236, 42 Atl. 863; Tyler v. Williston, 62 Vt. 269, 20 Atl. 304, 9 L. R. A. 338; Small v. Town of Prentice, 102 Wis. 256, 78 N. W. 415. Notice when mailed and received is sufficiently served.

[509] Gardner v. City of New London, 63 Conn. 267; Crocker v. City of Hartford, 66 Conn. 387, 34 Atl. 98; Smiley v. Inhabitants of Mer-

§ 1064. Pleadings; instructions to jury.

The usual rules of practice obtain in respect to the pleadings; the questions of the sufficiency of the allegations,[510] variance,[511]

rill Plantation, 84 Me. 322, 24 Atl. 872. The notice may be served upon the proper officials wherever they are found. Miles v. City of Lynn, 130 Mass. 398; Leonard v. City of Holyoke, 138 Mass. 78; Doyle v. City of Duluth, 74 Minn. 157, 76 N. W. 1029; Olmstead v. Town of Pound Ridge, 71 Hun, 25, 24 N. Y. Supp. 615; Gregg v. Town of Weatherfield, 55 Vt. 385; Sowle v. City of Tomah, 81 Wis. 349, 51 N. W. 571. But see Harris v. Inhabitants of Newbury, 128 Mass. 321; Carpenter v. Town of Rolling, 107 Wis. 559, 83 N. W. 953.

[510] Town of Cullman v. McMinn, 109 Ala. 614, 19 So. 981; City ot Birmingham v. Starr, 112 Ala. 98, 20 So. 424; City of Denver v. Baldasari, 15 Colo. App. 157, 61 Pac. 190; City of Denver v. Hyatt, 28 Colo. 129, 63 Pac. 403; Town of Griswold v. Gallup, 22 Conn. 208; Dean v. Town of Sharon, 72 Conn. 667, 45 Atl. 963; City of Orlando v. Heard, 29 Fla. 581, 11 So. 182; Collier v. Hyatt, 110 Ga. 317, 35 S. E. 271; Slowey v. Village of Grand Ridge, 95 Ill. App. 39; Town of Williamsport v. Smith, 2 Ind. App. 360, 28 N. E. 156; Clark County Com'rs v. Brod, 3 Ind. App. 585, 29 N. E. 430; Town of Nappanee v. Ruckman, 7 Ind. App. 361, 34 N. E. 609; City of Bloomington v. Rogers, 9 Ind. App. 230, 36 N. E. 439; Jackson County Com'rs v. Nichols, 139 Ind. 611, 38 N. E. 526; City of Huntingburgh v. First, 15 Ind. App. 552, 43 N. E. 17; Town of Odon v. Dobbs, 25 Ind. App. 522, 58 N. E. 562; City of Goshen v. Alford, 154 Ind. 58, 55 N. E. 27; Lewis v. City of Eskridge, 52 Kan. 282, 34 Pac. 892; City of Lawrence v. Littell, 9 Kan. App. 130, 58 Pac. 495; Guest v. Church Hill Com'rs, 90 Md. 689, 45 Atl. 882; Read v. Inhabitants of Chelmsford, 33 Mass. (16 Pick.) 128; McKormick v. West Bay City, 110 Mich. 265, 68 N. W. 148; Snyder v. City of Albion, 113 Mich. 275, 71 N. W. 475; Alexander v. City of Big Rapids, 76 Mich. 282, 42 N. W. 1071; Mitchell v. City of Plattsburg, 33 Mo. App. 555; Arnold v. City of St. Louis, 152 Mo. 173, 53 S. W. 900, 48 L. R. A. 291; Stainback v. City of Meridian, 79 Miss. 447, 28 So. 947, 30 So. 607; Snook v. City of Anaconda, 26 Mont. 128, 66 Pac. 756; Corey v. Bath, 35 N. H. 530; Stone v. Pendleton, 21 R. I. 332, 43 Atl. 643; City of Honey Grove v. Lamaster (Tex. Civ. App.) 50 S. W. 1053; Crockett v. Village of Barre, 66 Vt. 269, 29 Atl. 147. Sufficiency of allegations in respect to corporate existence considered. Whitty v. City of Oshkosh, 106 Wis. 87, 81 N. W. 992; Byington v. City of Merrill, 112 Wis. 211, 88 N. W. 26; Koepke v. City of Milwaukee, 112 Wis. 475, 88 N. W. 238.

[511] City of Birmingham v. Tayloe, 105 Ala. 170, 16 So. 576; Davis v. Town of Guilford, 55 Conn. 351, 11 Atl. 350; Ashborne v. Town of Waterbury, 70 Conn. 551, 40 Atl. 458; City of Rock Island v. Cuinely, 26 Ill. App. 173; City of Springfield v. Purdey, 61 Ill. App. 114; City of Joliet v. Johnson, 177 Ill. 178, 52 N. E. 498; Campbell v. City of Kalamazoo, 80 Mich. 655, 45 N. W.

amendments [512] and parties,[513] being determined by the procedure obtaining in a particular jurisdiction.

§ 1065. Proper evidence.

The admissibility of evidence is a matter of law to be determined under the rules regulating the subject. The condition of the highway at the place of the defect or in close proximity [514] at the time of the accident and subsequent [515] or prior to it are the questions most frequently presented, and the manner of proving these conditions.[516] No general rule can be given which will assist

652; Smith v. Walker Tp., 117 Mich. 14, 75 N. W. 141; Van Cleave v. City of St. Louis, 159 Mo. 574, 60 S. W. 1091; Plummer v. City of Milan, 70 Mo. App. 598.

[512] Grattan v. Village of Williamston, 116 Mich. 462, 74 N. W. 668.

[513] Severin v. Eddy, 52 Ill. 189; Mancuso v. Kansas City, 74 Mo. App. 138; Rhobidas v. City of Concord, 70 N. H. 90, 47 Atl. 82, 51 L. R. A. 381.

[514] Driscoll v. City of Ansonia, 73 Conn. 743, 47 Atl. 718; City of Kankakee v. Steinbach, 89 Ill. App. 513; Ledgerwood v. Webster City, 93 Iowa, 726, 61 N. W. 1089; Bailey v. City of Centerville, 108 Iowa, 20, 78 N. W. 831; Kansas City v. McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429; Rodda v. City of Detroit, 117 Mich. 412, 75 N. W. 939; Brown v. City of Owosso, 130 Mich. 107, 89 N. W. 568; Poole v. City of Jackson, 93 Tenn. 62, 23 S. W. 57; Grundy v. City of Janesville, 84 Wis. 574. 54 N. W. 1085; Spearbracker v. Town of Larrabee, 64 Wis. 573; Conrad v. Town of Ellington, 104 Wis. 367, 80 N. W. 456. See, also, § 1039, ante.

[515] District of Columbia v. Woodbury, 136 U. S. 450; City of Bloomington v. Osterle, 139 Ill. 120, 28 N. E. 1068; Munger v. City of Waterloo, 83 Iowa, 559, 49 N. W. 1028; Hoyt v. City of Des Moines, 76 Iowa, 430, 41 N. W. 63. Evidence of the condition of the walk after the accident is inadmissible in the absence of testimony that its condition was unchanged since the accident. Parker v. City of Ottumwa, 113 Iowa, 649, 85 N. W. 805; City of Abilene v. Hendricks, 36 Kan. 196, 13 Pac. 121; City of Ottawa v. Black, 10 Kan. App. 439, 61 Pac. 985; Haynes v. City of Hillsdale, 113 Mich. 44, 71 N. W. 466; Fuller v. City of Jackson, 92 Mich. 197, 52 N. W. 1075; Johnson v. City of St. Paul, 52 Minn. 364, 54 N. W. 735; Hall v. City of Austin, 73 Minn. 134, 75 N. W. 112; Plummer v. City of Milan, 79 Mo. App. 439; Kuntsch v. City of New Haven, 83 Mo. App. 174; City of Belton v. Turner (Tex. Civ. App.) 27 S. W. 831; City of Dallas v. Jones (Tex. Civ. App.) 54 S. W. 606; Cook v. Town of Barton, 66 Vt. 65, 28 Atl. 631; Brown v. Town of Swanton, 69 Vt. 53, 37 Atl. 280; Salladay v. Town of Dodgeville, 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541; Selleck v. City of Janesville, 104 Wis. 570, 80 N. W. 944, 47 L. R. A. 691. See, also, § 1039, ante.

[516] City of Denver v. Hyatt, 28 Colo. 129, 63 Pac. 403; Smith v.

the practitioner. In the notes will be found many cases with an indication of the particular question involved in each one.[517]

Sufficiency of evidence. The question of the sufficiency of evidence is one ordinarily for the jury to determine and necessarily varies with each particular case.[518]

City of Gilman, 38 Ill. App. 393; Bibbins v. City of Chicago, 193 Ill. 359, 61 N. E. 1030, reversing 94 Ill. App. 319; Nesbit v. Town of Garner, 75 Iowa, 314, 39 N. W. 516, 1 L. R. A. 152; McConnell v. City of Osage, 80 Iowa, 293, 45 N. W. 550, 8 L. R. A. 778; Ford v. City of Des Moines, 106 Iowa, 94, 75 N. W. 630; Hartford County Com'rs v. Wise, 71 Md. 43, 18 Atl. 31; Daniels v. City of Lowell, 139 Mass. 56, 29 N. E. 222; Neal v. City of Boston, 160 Mass. 518, 36 N. E. 308; Upham v. City of Salem, 162 Mass. 483, 39 N. E. 178; Shippy v. Village of Au Sable, 85 Mich. 280, 48 N. W. 584; Thompson v. Village of Quincy, 83 Mich. 173, 47 N. W. 114, 10 L. R. A. 734; Davis v. City of Manchester, 62 N. H. 422; Terwilliger v. Town of Crawford, 40 App. Div. 253, 59 N. Y. Supp. 64; Pearson v. Spartenburg County, 51 S. C. 480, 29 S. E. 193; City of Corsicana v. Tobin, 23 Tex. Civ. App. 492, 57 S. W. 319; Shelley v. City of Austin, 74 Tex. 608, 12 S. W. 753; Piper v. City of Spokane, 22 Wash. 147, 60 Pac. 138; Shafer v. City of Eau Claire, 105 Wis. 239, 81 N. W. 409; Collins v. City of Janesville, 111 Wis. 348, 87 N. W. 241, 1087.

[517] City of Lincoln v. Power, 151 U. S. 436. Provisions of municipal code relative to the duty of the city and its officers in respect to the care of its streets are admissible as evidence. City of Salem v. Webster, 192 Ill. 369, 61 N. E. 323, affirming 95 Ill. App. 120; Village of Cullom v. Justice, 161 Ill. 372, 43 N. E. 1098; City of Newport v. Miller, 93 Ky. 22, 18 S. W. 835; Dennett v. Inhabitants of Wellington, 15 Me. 27; Carle v. City of Desoto, 156 Mo. 443, 57 S. W. 113; Snook v. City of Anaconda, 26 Mont. 128, 66 Pac. 756; Card v. Columbia Tp., 191 Pa. 254, 43 Atl. 217; Stone v. Pendleton, 21 R. I. 332, 43 Atl. 643; Pearson v. Spartanburg County, 51 S. C. 480, 29 S. E. 193; Nellums v. City of Nashville, 106 Tenn. 222, 61 S. W. 88. A city may show under a plea of not guilty that it never accepted that portion of the street where the accident occurred. Stricker v. Town of Reedsburg, 101 Wis. 457, 77 N. W. 897.

[518] District of Columbia v. Payne, 13 App. D. C. 500; Central City Ice Works v. City of Macon, 92 Ga. 413, 17 S. E. 660; Williams v. City of Carterville, 97 Ill. App. 160; Sullivan County Com'rs v. Sisson, 2 Ind. App. 311, 28 N. E. 374; City of Ft. Wayne v. Durnell, 13 Ind. App. 669, 42 N. E. 242; City of Indianapolis v. Mitchell, 27 Ind. App. 589, 61 N. E. 947; Libbey v. Inhabitants of Greenbush, 20 Me. 47; Fuller v. Inhabitants of Hyde Park, 162 Mass. 51, 37 N. E. 782. Question for jury. Shipley v. Proctor, 177 Mass. 498, 59 N. E. 119; Murphy v. City of Worcester, 159 Mass. 546, 34 N. E. 1080; Baustian v. Young, 152 Mo. 317, 53 S. W. 921; Village of Edgar v. Mills, 32 Neb. 718, 49 N. W. 710; City of Grand Island v. Oberschulte, 36 Neb. 696,

§ 1066. 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 stated and many of the cases cited under different questions discussed will be found upon examination to also sustain it. Negligence,[519] contributory negligence,[520] proximate cause,[521] sufficiency

55 N. W. 301; Lynn v. Ralpho Tp., 186 Pa. 420, 40 Atl. 568; Ammerman v. Coal Tp., 187 Pa. 326, 40 Atl. 1005. Burden of showing negligence on plaintiff. Einseidler v. Whitman County, 22 Wash. 388, 60 Pac. 1122.

Verdict for defendant justified; see following cases: City of Elwood v. Carpenter, 12 Ind. App. 459, 40 N. E. 548; City of Bluffton v. McAfee, 12 Ind. App. 490, 40 N. E. 549; Parmenter v. City of Marion, 113 Iowa, 297, 85 N. W. 90; Butterfield v. City of Boston, 148 Mass. 544, 20 N. E. 113, 2 L. R. A. 447; Jackson v. City of Lansing, 121 Mich. 279, 80 N. W. 8; Tompsett v. Glade Tp., 198 Pa. 376, 48 Atl. 255; Stringert v. Ross Tp., 179 Pa. 614, 36 Atl. 345; Koepke v. City of Milwaukee, 112 Wis. 475, 88 N. W. 238.

[519] City of Denver v. Hyatt, 28 Colo. 129, 63 Pac. 403; Baxter v. City of Cedar Rapids, 103 Iowa, 599, 72 N. W. 790; City of Rosedale v. Cosgrove, 10 Kan. App. 211, 63 Pac. 287; Fugate v. City of Somerset, 97 Ky. 48, 29 S. W. 970; 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; Fuchs v. City of St. Louis, 133 Mo. 168, 31 S. W. 115, 34 S. W. 508, 34 L. R. A. 118; Cleveland v. City of Bangor, 87 Me. 259, 32 Atl. 892; Leggett v. City of Watertown, 55 App. Div. 321, 66 N. Y. Supp. 910; Bishop v. Village of Goshen, 120 N. Y. 337, 24 N. E. 720; Fisher v. Village of Cambridge, 133 N. Y. 527, 30 N. E. 663; Schafer v. City of New York, 154 N. Y. 466, 48 N. E. 749; Bauerle v. City of Philadelphia, 184 Pa. 545, 39 Atl. 298; Corbin v. City of Philadelphia, 195 Pa. 461, 45 Atl. 1070, 49 L. R. A. 715; 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; Laird v. Town of Otsego, 90 Wis. 25, 62 N. W. 1042; Schillinger v. Town of Verona, 88 Wis. 317, 69 N. W. 272; La Faye v. City of Superior, 104 Wis. 454, 80 N. W. 742. See, also, § 1057, ante.

[520] City of Lincoln v. Power, 151 U. S. 436; Scott v. City of New Orleans (C. C. A.) 75 Fed. 373; Lutton v. Town of Vernon, 62 Conn. 1, 23 Atl. 1020, 27 Atl. 589; Shiflett v. City of Cedartown, 111 Ga. 834, 36 S. E. 221; City of Flora v. Pruett, 81 Ill. App. 161; Town of Fordsville v. Spencer, 23 Ky. L. R. 1260, 65 S. W. 132; Prince George's County Com'rs v. Burgess, 61 Md. 29; Bourget v. City of Cambridge, 156 Mass. 391, 31 N. E. 390, 16 L. R. A. 605; Lamb v. City of Worcester, 177 Mass. 82, 58 N. E. 474; Calkins v. City of Springfield, 167

of the evidence,[522] 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,[523] 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. It might be said, however, that where the evidence upon a material question is such that men of ordinary intelligence can reach but one conclusion, it then becomes one for the court and not for a jury.[524]

Mass. 68, 44 N. E. 1055; Corcoran v. City of Detroit, 95 Mich. 84, 54 N. W. 692; Perkins v. Delaware Tp., 113 Mich. 377, 71 N. W. 643; Dundas v. City of Lansing, 75 Mich. 499, 42 N. W. 1011, 5 L. R. A. 143; Urtel v. City of Flint, 122 Mich. 65, 80 N. W. 991; Kopelka v. Bay City, 125 Mich. 625, 84 N. W. 1106; Heib v. Town of Big Flats, 66 App. Div. 88, 73 N. Y. Supp. 86; City of Guthrie v. Swan, 3 Okl. 116, Id., 5 Okl. 779, 41 Pac. 84, 51 Pac. 562; Oklahoma City v. Welsh, 3 Okl. 288, 41 Pac. 598; Hamerlynck v. Banfield, 36 Or. 436, 59 Pac. 712; Gardner v. Wasco County, 37 Or. 392, 61 Pac. 834, 62 Pac. 753; Bitting v. Maxatawny Tp., 180 Pa. 357, 36 Atl. 855; O'Malley v. Borough of Parsons, 191 Pa. 612, 43 Atl. 384; Allen v. Borough of Du Bois, 181 Pa. 184, 37 Atl. 195; 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; City of Galveston v. Hemmis, 72 Tex. 558, 11 S. W. 29; Jordan v. City of Seattle, 26 Wash. 61, 66 Pac. 114; McLeod v. City of Spokane, 26 Wash. 346, 67 Pac. 74; Arthur v. City of Charleston, 46 W. Va. 88, 32 S. E. 1024; McKeigue v. City of Janesville, 68 Wis. 50, 31 N. W. 298; Slivitski v. Town of Wein, 93 Wis. 460, 67 N. W. 730. But see Snoddy v. City of Huntington, 37 W. Va. 111, 16 S. E. 442. See § 1058, ante.

[521] City of Rock Falls v. Wells, 169 Ill. 224, 48 N. E. 440; Daniels v. Lebanon, 58 N. H. 284. Question for the jury. Gardner v. Wasco County, 37 Or. 392, 61 Pac. 834; rehearing denied, 62 Pac. 753; Blakely v. Laurens County, 55 S. C. 422, 33 S. E. 503; Gonzales v. City of Galveston, 84 Tex. 3, 19 S. W. 284. See §§ 952, 993 and 1059, ante.

[522] See § 1065, ante.

[523] 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. See, also, §§ 1037 et seq., and 1061 et seq., ante.

[524] Southworth v. Shea, 131 Ala. 419, 30 So. 774. See § 1057.

CHAPTER XI.

SOME PUBLIC DUTIES.

I. Educational.

II. Charitable and Corrective.

(For complete Analysis of this Subdivision see p. 2443.)

I. Educational.

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§ 1067. 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. The Federal government and the various states are thoroughly committed to this idea and have, by constitutional provisions and legislative enactments, established and provided for the maintenance of public free schools and colleges.[1] Public sentiment in this respect is well expressed in the article to be found in the Minnesota Constitution.[2] "The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature to establish a general and uniform system of public schools." The plan or scheme of organization 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, including colleges of agriculture, mechanic arts, law, medicine, dentistry and science, literature and the arts. 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.[3] It is also common to charge for the facilities afforded for a professional education. Another characteristic

[1] Davies v. Holland, 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; Quick v. Springfield Tp., 7 Ind. 636; State v. Bailey, 157 Ind. 324, 61 N. E. 730, 59 L. R. A. 435; Marshall v. Donovan, 73 Ky. (10 Bush) 682; Board of Education of Hawesville v. Louisville, H. & 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. Visitors 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; Com. v. Hartman, 17 Pa. 118; Webb County v. School Trustees of Laredo, 95 Tex. 131, 65 S. W. 878, reversing (Tex. Civ. App.) 64 S. W. 486; Pacific Mfg. Co. v. School Dist. No. 7, 6 Wash. 121, 33 Pac. 68.

[2] Minn. Const. Art. VIII, § 1.

[3] Ward v. Flood, 48 Cal. 36. The privilege of attending the public schools of a city is not one appertaining to citizenship, nor can any person demand admission on the mere status of citizenship; the right

is to be found as established by constitutional provision in many states, namely, that they shall be nonsectarian,[4] and further, that no discrimination shall be made on account of race, color, nationality or social position.[5] The Minnesota Constitution provides[6] that no public moneys or public property shall be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular christian or any religious sect are promulgated or taught. While the duty to provide public

is such as arises under and is limited by the state laws establishing and regulating public schools.

People v. McAdams, 82 Ill. 356; Com. v. Inhabitants of Dedham, 16 Mass. 141. It is not competent for a town to establish a normal school for the benefit of one part of the town to the exclusion of the other. Learock v. Putman, 111 Mass. 499. The right to attend a private school is not a private one held by the individual separately from the community at large, but a political right held in common. In re Malone's Estate, 21 S. C. 435. An orphan house open only to orphan children is not a free public school of the state.

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. The constitutional provision that district schools shall be free to all does not authorize children to insist on being admitted to a school in another district than that in which they live. But see State v. School Dist. No. 14, 10 Ohio St. 448. See, also, Halls Free School v. Horne, 80 Va. 470.

[4] 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; People v. Board of Education of Brooklyn, 13 Barb. (N. Y.) 400; Sargent v. Board of Education of Rochester, 35 Misc. 321, 71 N. Y. Supp. 54; Synod of Dakota v. State, 2 S. D. 366, 50 N. W. 632, 14 L. R. A. 418.

[5] 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. Act Feb. 10, 1849 (47 Ohio Laws, p. 17), authorizing the support of schools for the education of colored children held constitutional. 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. But see State v. Gray, 93 Ind. 303.

[6] Minn. Const. Art. VIII, § 3.

schools is commonly recognized, yet as it is governmental and discretionary in its character, there is no absolute obligation resting upon the state or a community to supply educational facilities. The performance of the duty cannot be compelled, neither will any liability arise from a failure to perform.[7]

§ 1068. 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,[8] or by local and special action, voted and collected by individual school districts.[9] These may be required by legislative act and without their consent to raise money by taxation for the support of certain designated schools.[10] 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,[11] the income from which is appropriated to particular and

[7] Neal v. Burrows, 34 Ark. 491; See, also, Fiske v. Inhabitants of Huntington, 179 Mass. 571, 61 N. E. 260. A town which fails to provide a school house may be required to pay the tuition in the high school of another town of children attending that school and who have completed their courses of study in the former town.

[8] Francis v. Peevey, 132 Ala. 58, 31 So. 372; Auditor General v. State Treasurer, 45 Mich. 161; State v. Henderson, 160 Mo. 190, 60 S. W. 1093. Taxation of collateral inheritances, the income to be devoted to educational purposes, legal. School Dist. of Agency v. Wallace, 75 Mo. App. 317; Webb County v. School Trustees of Laredo, 95 Tex. 131, 65 S. W. 878, reversing (Tex. Civ. App.) 64 S. W. 486.

[9] 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; Burgess v. Pue, 2 Gill (Md.) 254; 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.

[10] Jenkins v. Inhabitants of Andover, 103 Mass. 94.

[11] Beecher v. Wetherby, 95 U. S. 517; Stoutz v. Brown, 5 Dill. 445, Fed. Cas. No. 13,505; Roberts v. Columbet, 63 Cal. 22; Baker v. Newland, 25 Kan. 25; Telle v. School Board, 44 La. Ann. 365, 10 So. 801; Bres v. Louviere, 37 La. Ann. 736; State v. Batchelder, 7 Minn. 121 (Gil. 79); Bishop v. McDonald, 27 Miss. 371; Kissell v. St. Louis Public Schools, 16 Mo. 553; Patterson v. Fagan, 38 Mo. 70; Glasgow v. Baker, 85 Mo. 559; State v. Crumb, 157 Mo. 545, 57 S. W. 1030; Coombs v. Lane, 4 Ohio St. 112; Hurst v. Hawn, 5 Or. 275; Lowry v. Francis, 10 Tenn. (2 Yerg.) 534; Martin v. State, 29 Tenn. (10 Humph.) 157; Romine v.

various schools either as designated in the acts of Congress appropriating the land [12] or by enactment of the state legislatures.[13] 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.[14] It is common by constitutional or legislative enactment to provide for the investment of public school funds.[15] Officials charged by law with their care and control are limited strictly to their authority [16] 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.[17] The principle of strict construction applies and laws or constitutional directions are uni-

State, 7 Wash. 215, 34 Pac. 924; State v. Town of Jericho, 12 Vt. 127.

[12] Jones v. Soulard, 24 How. (U. S.) 41; Long v. Brown, 4 Ala. 622; Cloud v. Danley, 16 Ark. 699; Sprayberry v. State, 62 Ala. 459.

[13] Springfield Tp. v. Quick, 22 How. (U. S.) 56; Wyman v. Banvard, 22 Cal. 524; State v. Sickler, 9 Ind. 67; People v. Davenport, 30 Hun (N. Y.) 177; Heston v. Mayhew, 9 S. D. 501, 70 N. W. 635; Callvert v. Winsor, 26 Wash. 368, 67 Pac. 91. See, also, Fannin County v. Riddle, 51 Tex. 360.

[14] Williams v. State, 65 Ark. 159; In re Loan of School Fund, 18 Colo. 195, 32 Pac. 273; State v. Fitzpatrick, 5 Idaho, 499, 51 Pac. 112; Illinois & Mich. Canal v. Haven, 10 Ill. (5 Gilman) 548. The rule also applies to school lands. Trustees of Schools v. Braner, 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; State v. Board of Liquidators, 29 La. Ann. 77; 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; Otken v. Lamkin, 56 Miss. 758; Foote v. Brown, 60 Miss. 155. Funds raised for the support of the school during the current year cannot be used for the payment of outstanding school warrants. People v. Allen, 42 N. Y. 404; 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. See, also, Howard County Com'rs v. State, 120 Ind. 282, 22 N. E. 255.

[15] McGahey v. Virginia, 135 U. S. 662; Alexander v. Knox, 6 Sawy. 54, Fed. Cas. No. 170; 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; State v. Westerfield, 23 Nev. 468, 49 Pac. 119.

[16] 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.

[17] School Town of Leesburgh v. Plain School Tp., 86 Ind. 582; Goulding v. Inhabitants of Peabody, 170 Mass. 483, 49 N. E. 752.

versally regarded as mandatory in their character,[18] the purpose being to protect school funds from loss by misappropriation or unwise investment.

§ 1069. School funds; special; how raised.

The greater part of funds necessary to the public maintenance of public schools is raised through the levy and collection of taxes upon property within their jurisdiction by local districts.[19] It is common also to devote by charter or statutory provision the proceeds of certain special taxes, funds or license fees to the maintenance of public schools.[20] These cannot be used for other pur-

[18] 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.

[19] State v. Volusia County Com'rs, 28 Fla. 793, 10 So. 14; State v. Mathews, 150 Ind. 597; School Dist. No. 76 v. Ryker, 64 Kan. 612, 68 Pac. 34; Paintsville School Dist. v. Davis, 23 Ky. L. R. 838, 64 S. W. 438; Hundley v. Singleton, 23 Ky. L. R. 2006, 66 S. W. 279. Slight irregularities will not vitiate an election imposing a local tax for the support of public schools. School Dist. No. 1 v. Deering, 91 Me. 516; Robeson v. Mellick, 25 N. J. Law (1 Dutch.) 563. A school tax cannot lawfully exceed double the amount apportioned a town from a state school fund. State v. Clerk of Middletown, 24 N. J. Law (4 Zab.) 124. A vote at a town meeting to raise "all that the law will allow for schools" is not void. School Dist. No. 2 v. Lambert, 28 Or. 209; Joint School Dist. No. 8 v. School Dist. N. 5, 92 Wis. 608.

[20] City of East St. Louis v. Launtz, 20 111 App. 644; State v. Marion County Com'rs, 85 Ind. 489. Unclaimed money and valuables found on dead bodies belong to the common school fund of the county, not the state. School City of South Bend v. Jaquith, 90 Ind. 495; Tippecanoe County Com'rs v. State, 92 Ind. 353; Taggart v. State, 142 Ind. 668, 40 N. E. 260, 42 N. E. 352; Pfau v. State, 148 Ind. 539, 47 N. E. 927; Woodward v. Gregg, 3 G. Greene (Iowa) 287; Lucas County v. Wilson, 61 Iowa, 141; Portwood v. Baskett, 64 Miss. 213; State v. Heins, 14 Neb. 477; State v. Wilcox, 17 Neb. 219; State v. Brodboll, 28 Neb. 254, 44 N. W. 186; State v. Fenton, 29 Neb. 348, 45 N. W. 464.

State v. White, 29 Neb. 288, 45 N. W. 631. Where a village includes within its limits portions of three school districts, moneys raised by village authorities for liquor licenses will be equally divided among them.

Kas v. State, 63 Neb. 581, 88 N. W. 776, holding constitutional Neb. Comp. 1901, c. 80, § 28, providing that where portions of one or more than one school district are included in the corporate school limits of the state, license moneys are to be divided among these districts in proportion to the number of persons of school age in the whole of each district.

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poses.[21] Taxes levied by a school district on property within its jurisdiction belong to it [22] and must be paid by the officer in charge to the trustees or proper officers of that district. An action will lie against one wrongfully withholding these moneys or paying them to districts not entitled to them.[23] They are authorized by law to levy and collect, in the manner provided, certain sums for the support of the schools,[24] others for the purchase of school sites and the erection of school houses.[25]

County v. Town of Henderson, 126 N. C. 689, 36 S. E. 158. N. C. Laws 1889, c. 128, § 2, providing that no action shall be brought against any town to recover fines or penalties collected and making it apply to existing actions, violates contract clause of Federal constitution and therefore is void. State v. Folk, 45 S. C. 491, 23 S. E. 628; State v. Derham, 54 S. C. 349, 32 S. E. 418; Ex parte Cooper, 3 Tex. App. 489; State v. Casey, 5 Wis. 318.

[21] State v. Helms, 136 Ind. 122, 35 N. E. 893; Zartman v. State, 109 Ind. 360; School Dist. v. Edwards, 46 Wis. 150.

[22] School Dist. No. 8 v. Gibbs, 52 Kan. 564, 35 Pac. 222; Pontotoc Independent School Corp. v. Johnson (Tex. Civ. App.) 59 S. W. 53. But see Paintsville School Dist. v. Davis, 23 Ky. L. R. 838, 64 S. W. 438.

[23] Burns v. Minter, 12 Ala. 316; School Directors v. School Trustees, 61 Ill. App. 89; Hadley v. State, 66 Ind. 271. The rule applies to interest as well as principal. District Township of High Lake v. Espeset, 75 Iowa, 500, 39 N. W. 809; Honey Creek District Township v. Floete, 59 Iowa, 109; Independent School District v. Hubbard, 110 Iowa, 58, 81 N. W. 241. Where a treasurer of a school district makes a settlement and produces the funds in his control as he is required by law to do, this is in the absence of fraud or mistake conclusive, and no inquiry can be made as to the source of the necessary funds. Hadley v. State, 66 Ind. 271; East Carroll Parish School Board v. Union Parish School Board, 36 La. Ann. 806; School Dist. No. 9 v. Deshon, 51 Me. 454; School Dist. No. 13 v. Dean, 17 Mich. 223; School Dist. No. 9 v. School Dist. No. 5, 40 Mich. 551; School Dist. No. 10 v. Thelander, 31 Minn. 333; State v. Fenton, 29 Neb. 348, 45 N. W. 464; Guthrie v. State, 47 Neb. 819, 66 N. W. 853; Public Schools v. Hammell, 31 N. J. Law, 446; Prosser v. Behrens, 58 N. J. Law, 276, 33 Atl. 282; Hartford Tp. Board of Education v. Thompson, 33 Ohio St. 321. But see School Dist. No. 3 v. Riverside Tp., 67 Mich. 404, 34 N. W. 886; Fox v. Kountze, 58 Neb. 439, 78 N. W. 712; Lyme Board of Education v. Board of Education, 44 Ohio St. 278; School Dist. No. 1 v. Town of Bridport, 63 Vt. 383, 22 Atl. 570; Town of Cassville v. Morris, 14 Wis. 440. See, also, Gridley School Dist. v. Stout, 134 Cal. 592, 66 Pac. 785.

[24] Commercial Bank v. Sandford, 103 Fed. 98; White v. City of Decatur, 119 Ala. 476, 23 So. 999; People v. Sargent, 44 Cal. 430; Bramwell v. Guheen, 3 Idaho, 347, 29 Pac. 110. A literal compliance with the

Bonds; debt incurred. This subject has been previously considered.[26] In many instances the amounts necessary for the construction and equipment of public school buildings are too large to be raised by the levy of a yearly tax. An issue of bonds is consequently resorted to. When authorized by law a vote of the people of the district at a time designated and in the manner required is an essential requisite to their validity.[27] The form is also commonly fixed by law.[28] Constitutional or statutory provisions may exist which limit the incurring of indebtedness for designated purposes,[29] and, in accordance with the rules previously laid down, bonds issued or an obligation incurred in excess of a debt limitation where the power is absolutely lacking will be regarded as void.[30]

requirements of an act providing for the levy of a special school tax is necessary to its validity.

Bradley v. Case, 4 Ill. (3 Scam.) 585; Baltimore & O. S. W. R. Co. v. People, 195 Ill. 423, 63 N. E. 262; Koelling v. People, 196 Ill. 353, 63 N. E. 735. An ordinance levying a tax for school purposes which specified one amount as required for building purposes and another amount for educational purposes is sufficiently definite under Hurd's Rev. St. 1899, p. 1556, it being unnecessary to separate the amounts for building and site and to specify the items embraced under educational purposes. Otis v. People, 196 Ill. 542, 63 N. E. 1053; Anne Arundel County School Com'rs v. Gantt, 73 Md. 521; Board of Education of Detroit v. Common Council, 80 Mich. 548, 45 N. W. 585; Parker v. State (Miss.) 10 So. 571.

[25] Otis v. People, 196 Ill. 542, 63 N. E. 1053; Harmony Tp. v. Osborne, 9 Ind. 458; State v. Edwards, 151 Mo. 472, 52 S. W. 373; Pierce, Butler & Pierce Mfg. Co. v. Bleckwenn, 131 N. Y. 570, 30 N. E. 67; Hackett v. Emporium Borough School Dist., 150 Pa. 220, 24 Atl. 627; Edinburg-American Land & Mortg. Co. v. City of Mitchell, 1 S. D. 593, 48 N. W. 131.

[26] See §§ 169 et seq., ante. Oswego City Sav. Bank v. Board of Education, 35 Misc. 540, 72 N. Y. Supp. 15.

[27] Ashuelot Nat. Bank v. School Dist. No. 7, 56 Fed. 197, 5 C. C. A. 468; Board of Education of Topeka v. Welch, 51 Kan. 792; Smith v. Proctor, 130 N. Y. 319, 29 N. E. 312, 14 L. R. A. 403. A vote in favor of bonds by a majority of those voting is sufficient to authorize their issue although this majority is less than one-half the voters actually present at the meeting. Parkinson v. Seattle School Dist. No. 1, 28 Wash. 335, 68 Pac. 875. See, also, §§ 169 et seq., ante.

[28] Oswego City Sav. Bank v. Board of Education, 35 Misc. 540, 72 N. Y. Supp. 15. See §§ 169 et seq., ante.

[29] Bauer v. School Dist. No. 127, 78 Mo. App. 442. See §§ 140 et seq., and 169 et seq., ante.

[30] Everett v. Independent School Dist. of Rock Rapids, 109 Fed. 697. The proportion of an excess issue of

§ 1070. General and special school funds; how apportioned.

Public school funds raised by the state for distribution are to be apportioned in the manner provided by law.[31] This is usually upon the basis of attendance or number of resident pupils.[3] Where specified tax levies are made for the maintenance of a par-

bonds used in paying off valid prior indebtedness will not be held illegal and can be enforced to that extent. State v. Staub, 61 Conn. 553, 23 Atl. 924. Section 2228 Conn. Gen. Stats. is a sufficient appropriation of the income of the school fund to warrant its distribution under the specific appropriation act General Statutes 1888, §§ 377–384.

Baltimore & O. S. W. R. Co. v. People, 195 Ill. 423, 63 N. E. 262. A tax levied to pay an indebtedness incurred in excess of a constitutional limitation may be defeated by the objection that it is to pay an unconstitutional debt. Grady v. Pruitt, 23 Ky. L. R. 506, 63 S. W. 283; Lancaster City School Dist. v. Lamprecht Bros. Co., 198 Pa. 504, 48 Atl. 434. Bonds issued for the payment of a valid indebtedness not void. Wilson v. Board of Education of Huron, 12 S. D. 535, 81 N. W. 952. A board of education duly authorized to issue bonds is estopped to allege that the money realized from their sale was misapplied. See, also, Benton v. Scott, 168 Mo. 378, 68 S. W. 78, and §§ 140 et seq., and 169 et seq., ante.

[31] City of New Orleans v. Fisher (C. C. A.) 91 Fed. 574. Interest accruing on delinquent school taxes which belong to a school district is merely an incident to the principal and should be paid to the district to which it belongs. Bay View School Dist. v. Linscott, 99 Cal. 25, 33 Pac. 781; State v. Mathews, 150 Ind. 597, 50 N. E. 572; Posey v Corydon Public School, 19 Ky. L. R 466, 38 S. W. 1063; Moiles v. Wat son, 60 Mich. 415, 27 N. W. 553; State v. McConnel, 8 Neb. 28, construing Neb. Const. art. 8, § 5; St Patrick's Orphan Asylum v. Board of Education of Rochester, 34 How Pr. (N. Y.) 227; School Board of Brooklyn v. Board of Education of New York, 34 App. Div. 49, 53 N. Y. Supp. 1000, 54 N. Y. Supp. 185.

[32] Merritt v. School Dist., 54 Ark. 468, 16 S. W. 287; Maddox v. Neal, 45 Ark. 121; Stockton School Dist. v. Wright, 134 Cal. 64, 66 Pac. 34; State v. Barnes, 22 Fla. 8; Taggart v. State, 142 Ind. 668, 40 N. E. 260, 42 N. E. 352, overruling School City of South Bend v. Jaquith, 90 Ind. 495; Louisville School Board v. Superintendent of Public Instruction, 102 Ky. 394, 43 S. W. 718; Louisville School Board v. McChesney, 109 Ky. 9, 58 S. W. 427. Construing Ky. St. § 4375, which provides that any difference between the estimated and the actual revenue of a school fund of any school year shall be taken into account in the statement and payment for the succeeding school year. Deckerville High School Dist. v. School Dist. No. 3, 131 Mich. 272, 90 N. W. 1064. Maintenance of school for the maximum of three months in each year necessary to entitle the school district to its proportion of primary school fund for coming year.

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ticular public school or public college or university, it is necessary that the sums raised from this source be used strictly for the purpose authorized by law.[33] The general principle, if any can be stated, in respect to the apportionment of school funds is that the state in providing certain means of maintenance has considered the plan or scheme of public education as a whole and devoted to certain agencies such amounts as it has considered advisable and most necessary to the maintenance of the system as a whole. The laws relative to the apportionment of public school funds should, therefore, be strictly construed and literally followed.[34]

§ 1071. School funds; how disbursed; purpose.

Funds raised for educational purposes cannot be diverted to other objects.[35] This principle applies equally to public funds

(Miss.) 15 So. 114; School Dist. No. 7 v. Patterson, 10 Mont. 17, 24 Pac. 698; Fiske v. School Dist. of Lincoln, 58 Neb. 163, 78 N. W. 392; State v. Dovey, 19 Nev. 396, 12 Pac. 910; Romero v. Board of Education of Las Vegas, 10 N. M. 67, 61 Pac. 109; School Board of Brooklyn v. Board of Education of New York, 34 App. Div. 49, 53 N. Y. Supp. 1000, 54 N. Y. Supp. 185, affirmed 157 N. Y. 566, 52 N. E. 583; Trustees of Union College v. Coughlin, 159 N. Y. 540; Van Dolsen v. Board of Education, 162 N. Y. 446; Porter v. State, 78 Tex. 591, 14 S. W. 794; Merrill v. Spencer, 14 Utah, 273, 46 Pac. 1096. See, also, Joint School Dist. No. 8 v. School Dist. No. 5, 92 Wis. 608, 66 N. W. 794. Apportionment of school fund based on maximum time of maintenance of school.

[33] Vincenheller v. Reagan, 69 Ark. 460, 64 S. W. 278; Stockton School Dist. v. Wright, 134 Cal. 64, 66 Pac. 34; Cooke v. School Dist. No. 12, 12 Colo. 453, 21 Pac. 496, 719. The making of an estimate as required by law by the county superintendent does not of itself vest in the several districts the ownership of their respective shares of public school moneys. Zartman v. State, 109 Ind. 360; Sargent v. Board of Education, 35 Misc. 321, 71 N. Y. Supp. 954; Heston v. Mayhew, 9 S. D. 501, 70 N. W. 635.

[34] Claybrook v. City of Owensboro, 23 Fed. 634; Merritt v. School Dist. 54 Ark. 468, 16 S. W. 287. A school district which has been omitted in the apportioning of a school fund may, by mandamus, compel the payment of the funds belonging to it. School Dist. No. 3 v. School Dist. No. 1, 63 Mich. 51, 29 N. W. 489; School Dist. v. Morrill, 59 N. H. 367; People v. Glowacki, 2 T. & C. (N. Y.) 436. But see State v. Fay, 36 La. Ann. 241.

[35] City of Albertville v. Rains, 107 Ala. 691, 18 So. 255; Francis v. Peevey, 132 Ala. 58, 31 So. 372; Hotchkiss v. Plunkett, 60 Conn. 230 22 Atl. 535. Public funds cannot be used by a board of education of a school district to defend a law suit against them personally in respect

raised 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,[36] including the payment of wages and the compensation of teachers or instructors,[37] the purchase of libraries,[38] the proper equipment for conducting the work of the particular school or college,[39] and

to matters connected with the performance of their duties. State v. Fitzpatrick, 5 Idaho, 499, 51 Pac. 112; Sherlock v. Village of Winnetka, 68 Ill. 530; Case v. Blood, 71 Iowa, 632, 33 N. W. 144. A tax payer, though a nonresident, has such an interest in a school district as to give him a right of action to compel a proper administration of school funds.

Collins v. Henderson, 74 Ky. (11 Bush) 74. The appropriation of school funds for the purchase of "Collin's Historical Sketches of Kentucky" is unconstitutional, it not being in aid of common schools, within the meaning of the constitution.

City of Louisville v. Louisville School Board, 17 Ky. L. R. 697, 32 S. W. 406; 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; Black v. Cornell, 30 Mo. App. 641; Herman v. City of Crete, 9 Neb. 350; State v. Westerfield, 23 Nev. 468, 49 Pac. 119; School Dist. v. Twitchell, 63 N. H. 11; City of Hoboken v. Ivison, 29 N. J. Law (5 Dutch.) 65; Burhans v. Union Free School Dist. No. 1, 24 App. Div. 429, 48 N. Y. Supp. 702; Wright v. Rosenbloom, 52 App. Div. 579, 66 N. Y. Supp. 165. A board of education is not authorized to defray from its contingent fund the expenses of two members of the board and its clerk in attending a distant meeting of an annual national association. Wilson v. Board of Education of Huron, 12 S. D. 535, 81 N. W. 952. A board of education duly authorized to issue bonds is estopped to allege that the money realized from their sale was misapplied. State v. Banks, 106 Tenn. 394, 61 S. W. 778.

[36] Edmundson v. Jackson Independent School Dist., 98 Iowa, 639; Sheldon v. Purdy, 17 Wash. 135, 49 Pac. 228. Funds appropriated by the state for current expenses cannot be used for the payment of interest on bonds issued for the building of a school house. The term "current expenses" means continuing regular expenditures for the maintenance of the schools.

[37] Thomas v. Trustees of Schools, 16 Ill. 163; Harrison Tp. v. Conrad, 26 Ind. 337. A teacher not having the certificate of qualifications required by law cannot recover for services. Stuart v. School Dist. No. 1, 30 Mich. 69.

[38] Clark v. School Directors, 78 Ill. 474. But see First Nat. Bank of Elkhart v. Osborne, 18 Ind. App. 442, 48 N. E. 256.

[39] Springfield Furniture Co. v. School Dist. No. 4, 67 Ark. 236, 54 S. W. 217; Honey Creek School Tp. v. Barnes, 119 Ind. 213; W. P. Myers

the securing of necessary supplies in providing heat, water and other common expenses coming under this head.[40]

Improvements and general expenses. 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.[41] These include the erection of public school buildings for class room or laboratory work,[42] the purchase of grounds or sites and their improvement,[43] and, in general, expenditures which do not come under the head of ordinary or current expenses.[44]

§ 1072. Manner of disbursement.

Public schools must necessarily act through their officers or agents who are strictly limited in respect to their acts on account of which their principal may be held responsible. This principle

Pub. Co. v. White River School Tp. 28 Ind. App. 91, 62 N. E. 66; Yaggy v. Monroe Dist. Tp., 80 Iowa, 121; Knabe v. Board of Education, 67 Mich. 262, 34 N. W. 568. Board of trustees of graded schools have authority to purchase a piano for high school purposes.

[40] Hemme v. School Dist. No. 4, 30 Kan. 377; Bryan v. Board of Education of Perry, 7 Okl. 160, 54 Pac. 409. School moneys may be used for the insurance of school property. See, also, relative to the same question, School Dist. No. 5 v. Hopkins, 7 Okl. 154, 54 Pac. 437.

Hackett v. Emporium Borough School Dist., 150 Pa. 220, 24 Atl. 627. School room rental authorized. But see Estes v. School Dist., No. 19, 33 Me. 170.

[41] City of Lafayette v. Jenners, 10 Ind. 70.

[42] Hale v. Brown, 70 Ark. 471, 69 S. W. 260.

[43] Township Board of Education v. Carolan, 182 Ill. 119, 55 N. E. 58. An unauthorized purchase of a site for a high school may be subsequently ratified by a vote of the electors of the school district. Brock v. Bruce, 59 Vt. 313, 10 Atl. 93. The presumption of authority exists.

[44] People v. Rea, 185 Ill. 633, 57 N. E. 778, affirming 84 Ill. App. 504; Flint River Independent Dist. v. Kelley, 55 Iowa, 568; Bogaard v. Independent Dist. of Plainview, 93 Iowa, 269, 61 N. W. 859; Mason v. Fractional School Dist. No. 1, 34 Mich. 228; Jacobson v. Cary, 51 Neb. 762, 71 N. W. 723. The loss of moneys through the insolvency of a bank in which they are deposited, raised by taxation, for the purpose of paying indebtedness of a school district does not fall upon the creditor but upon the district. 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.

N. J. Laws 1890, c. 177, authorizes the purchase and display of United States flags upon and near public school buildings.

applies to the disbursement of public school funds. By law certain officials are charged with the duty of caring for and disbursing them.[45] The disbursement, therefore, to be legal, must be made [46] or authorized [47] by the proper official or officials and in the manner required by law.[48]

Form of disbursement. School funds are commonly disbursed through the medium of school orders or school warrants which are written orders executed by the proper officers,[49] directed to the proper disbursing officer, and authorizing the payment of the sums named in the manner and at the time specified.[50] The manner of issuing these, their form and legality, has been considered in previous sections.[51]

§ 1073. School districts; organization.

For school purposes and the better operation of a public school system, a state is divided into common, special, and independent

[45] Lovingston v. Board of Trustees, 99 Ill. 564; Pfau v. State, 148 Ind. 539, 47 N. E. 927; Auditor v. Holland, 77 Ky. (14 Bush) 147. The power vested by the Ky. Const. to the legislature to control the school fund cannot be surrendered to the county courts.

[46] Davis v. State, 44 Ind. 38.

[47] School Dist. No. 2 of Multnomah County v. Lambert, 28 Or. 209, 42 Pac. 221.

[48] Kennedy v. Miller, 97 Cal. 429, 32 Pac. 558; California University v. January, 66 Cal. 507; State v. Moore, 36 Neb. 579, 54 N. W. 866; McCornick v. Thatcher, 8 Utah, 294, 30 Pac. 1091, 17 L. R. A. 243.

[49] Shakespear v. Smith, 77 Cal. 638, 20 Pac. 294. An order for the payment of school funds drawn with the concurrence of two only of the three trustees of a district, one of whom is interested in it, is void. Faulk v. McCartney, 42 Kan. 695, 22 Pac. 712; State v. Bloom, 19 Neb. 562; Zimmerman v. Mathe, 49 N. J. Law, 45, 7 Atl. 674; State v. Hart, 106 Tenn. 269, 61 S. W. 780; Doyle v. Gill, 59 Wis. 518.

[50] Phelps v. District Tp. of Summit, 90 Iowa, 53, 57 N. W. 642. School directors cannot, under Iowa Code, § 2077, contract that school orders shall draw 10 per cent interest. State v. Slavan, 11 Wis. 153.

[51] Board of Education v. Foley, 88 Ill. App. 470; School Dist. No. 5 v. First Nat. Bank, 63 Kan. 668, 66 Pac. 630. A school district is estopped from interposing the defense of the statute of limitations when it appears that at no time since the debt was accrued had there been any money in the treasurer's hands applicable to the payment of the orders issued for its payment.

Meyer v. School Dist. No. 31, 4 S. D. 420, 57 N. W. 68. A school district order may be impeached though regular on its face and therefore prima facie legal. Coler v. Sterling, 15 S. D. 415, 89 N. W.

school districts.[52] Provisions may also be made for the organization of high, graded or normal school boards separate from the classes just named.[53] A special organization is usually provided

1022; Brown v. Ruse, 69 Tex. 589, 7 S. W. 489; Fine v. Stuart (Tenn. Ch. App.) 48 S. W. 371. See §§ 226 et seq., ante.

[52] Presque Isle County Sup'rs v. Thompson (C. C. A.) 61 Fed. 914. In the absence of constitutional restriction, the incorporation of a school district containing 180 square miles is not invalid. People v. Ricker, 142 Ill. 650, 32 N. E. 671; Thompson v. Beaver, 63 Ill. 353. The manner of laying off a township into school districts is left by law to the discretion of the trustees and their decision, unless it appears they acted fraudulently or from improper motives or that the division made was grossly unequal and oppressive and is not subject to review by a court of equity. See, also, on the same point, Directors of Schools, etc., v. School Directors and Trustees of Schools, 66 Ill. 247. State v. Carbondale Independent School Dist., 29 Iowa, 264. The organization of an independent school district with less than the number of inhabitants required by law is illegal.

Russell v. District Tp. of Cleveland, 97 Iowa, 573, 66 N. W. 771; Anderson v. Green, 21 Ky. L. R. 1439, 55 S. W. 420. The establishment of districts containing less than forty-five children prohibited except in cases of extreme emergency. Jackson v. Brewer, 23 Ky. L. R. 1871, 66 S. W. 396, construing Ky. St. art. 10, § 4464, relative to the establishment of graded schools and the boundaries of the districts. State v. Buckner, 54 Mo. App. 452. A school district under Mo. Rev. St. 1889, § 7972, cannot be created having territory of less than nine square miles and a minimum of $30,000 worth of taxable property. State v. Long, 21 Mont. 26, 52 Pac. 645.

Cist v. State, 21 Ohio St. 339. The mere incorporation of a village does not withdraw it from the school jurisdiction of the township. Territory v. School Dist. No. 83, 10 Okl. 556, 64 Pac. 241. Oklahoma Session Laws 1899, p. 226, creating a school district at the station of Waterloo, is local and special legislation prohibited by act of Congress July 30, 1886.

Rodemer v. Mitchell, 90 Tenn. 65, 15 S. W. 1067; Pinson v. Vesey, 23 Tex. Civ. App. 91, 56 S. W. 593. The incorporation of an incorporated town for school purposes may include agricultural and rural lands outside the town limits and not exceeding twenty-five square miles.

Bedford County Sup'rs v. Bedford High School, 92 Va. 292; State v. Wolfrom, 25 Wis. 468. The incorporation of a village will not destroy the organization of a school district partly included within its territory. Keystone Lumber Co. v. Town of Bayfield, 94 Wis. 491, 69 N. W. 162. Every school district must consist of contiguous territory and shall not embrace more than thirty-six square miles of land.

[53] Briggs v. Johnson County, 4 Dill. 148, Fed. Cas. No. 1,872; Bay View School Dist. v. Linscott, 99 Cal. 25, 33 Pac. 781; Kramm v. Bogue, 127 Cal. 122, 59 Pac. 394;

for the State university.[54] Each of these organizations is usually regarded as a public quasi corporation [55] although some are desig-

Board of Education v. Cumming, 103 Ga. 641, 29 S. E. 488; McGurn v. Board of Education, 133 Ill. 122, 24 N. E. 529; Boehm v. Hertz, 182 Ill. 154, 54 N. E. 973, 48 L. R. A. 575; Hanover School Tp. v. Gant, 125 Ind. 557, 25 N. E. 872; Drake v. Normal School at Oskaloosa, 11 Iowa, 54; Allen v. District Tp. of Bertram, 70 Iowa, 434, 30 N. W. 684; Koester v. Atchison County Com'rs, 44 Kan. 141, 24 Pac. 65. Session laws, Kan. 1886, c. 147, providing for the establishment of county high schools in certain counties not unconstitutional. State v. Elk County Com'rs, 61 Kan. 90, 58 Pac. 959, 47 L. R. A. 67; Ash v. Thorp, 65 Kan. 60, 68 Pac. 1067; Roberts v. Clay City, 102 Ky. 88, 42 S. W. 909; People v. Hatch, 60 Mich. 229, 26 N. W. 860; Ferris v. Board of Education of Detroit, 122 Mich. 315, 81 N. W. 98; Keweenaw Ass'n v. School Dist. No. 1, 98 Mich. 437, 57 N. W. 404; State v. Sharp, 27 Minn. 38; State v. West Duluth Land Co., 75 Minn. 456, 78 N. W. 115; State v. Searl, 50 Mo. 268; State v. Henderson, 160 Mo. 190, 60 S. W. 1093; Henry v. Dulle, 74 Mo. 443; State v. Westerfield, 23 Nev. 468, 49 Pac. 119; Seargent v. Union School Dist., 63 N. H. 528; Lowthorp v. Inhabitants of Trenton, 61 N. J. Law, 484, 40 Atl. 442; Plummer v. Borsheim, 8 N. D. 565, 80 N. W. 690. Laws 1899, c. 143, § 1, relating to the organization of separate and distinct school townships and which applies only to school townships including a city of 800 inhabitants or more is unconstitutional.

Com. v. Reynolds, 137 Pa. 389, 20 Atl. 1011; State v. Power, 5 S. D. 627, 59 N. W. 1090; State v. Allegree, 3 Tex. Civ. App. 437, 22 S. W. 289; Board of School Trustees v. City of Sherman, 91 Tex. 188, 42 S. W. 546; State v. Callaghan, 91 Tex. 313, 43 S. W. 12; City of El Paso v. Conklin, 91 Tex. 537, 44 S. W. 988; City of El Paso v. Ruckman, 92 Tex. 86, 46 S. W. 25; Bedford County Sup'rs v. Bedford High School, 92 Va. 292, 23 S. E. 299; City of Seattle School Dist. No. 1 v. County Com'rs, 3 Wash. St. 154, 28 Pac. 376; McGovern v. Fairchild, 2 Wash. St. 479, 27 Pac. 173; State v. Enos, 97 Wis. 164, 72 N. W. 222; State v. Fowle, 103 Wis. 388, 79 N. W. 419; State v. Sweeney, 103 Wis. 404, 79 N. W. 420.

[54] Koester v. Atchison County Com'rs, 44 Kan. 141, 24 Pac. 65; Callvert v. Winsor, 26 Wash. 368, 67 Pac. 91.

[55] School Dist. No. 3 v. Bodenhamer, 43 Ark. 140; Gilman v. Bassett, 33 Conn. 298; Hotchkiss v. Plunkett, 60 Conn. 230, 22 Atl. 535; Trustees of Schools v. Tatman, 13 Ill. 27; People v. Dupuyt, 71 Ill. 651; State v. Ogan, 159 Ind. 119, 63 N. E. 227; Mingo v. Trustees of Colored Common School Dist. No. "A," 24 Ky. L. R. 288, 68 S. W. 483; Whitmore v. Hogan, 22 Me. 564; O'Neal v. School Com'rs of Washington County, 27 Md. 227; Board of Education v. City of Detroit, 30 Mich. 505; School Dist. No. 3 v. School Dist. No. 1, 63 Mich. 51, 29 N. W. 489; Littlewort v. Davis, 50 Miss. 403; Water Supply Co. v. City of Albuquerque, 9 N. M. 441, 54

nated as public corporations, and in some instances municipal ocrporations.[56] 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.[57] 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.[58] State universities are, as a rule, constitutional organizations and this principle, therefore, does not apply, except to the extent that the control over them is given by the constitution to the state legislature.

Pac. 969; Horton v. Garrison, 23 Barb. (N. Y.) 176; Gould v. Board of Education, 34 Hun (N. Y.) 16; Maxon v. School Dist. No. 34, 5 Wash. 142, 31 Pac. 462, 32 Pac. 110; School Dist. No. 3 v. Macloon, 4 Wis. 79. But see Runyan v. School Dist. No. 3, 12 Iowa, 184; Allen v. Trustees of School Dist., 23 Mo. 418; Foster v. Lane, 30 N. H. 305.

[56] Utica Tp. v. Miller, 62 Ind. 230; State v. Wilson, 65 Kan. 237, 69 Pac. 172. Kan. Gen. St. 1901, § 3827, providing that eight hours shall constitute a day's work for all laborers employed by any municipality of the state applies to school districts. People v. Port Huron Board of Education, 39 Mich. 635; School Dist. No. 7 v. Thompson, 5 Minn. (Gil. 221) 280; Yellow Pine Co. v. Board of Education of Brooklyn, 15 Misc. 58, 36 N. Y. Supp. 922; Maxon v. School Dist. No. 34, 5 Wash. 142, 31 Pac. 462, 32 Pac. 110. But see Freeland v. Stillman, 49 Kan. 197, 30 Pac. 235.

[57] School Com'rs v. Aikin, 5 Port. (Ala.) 169; Kinnare v. City of Chicago, 171 Ill. 332, 49 N. E. 536; Burgess v. Pue, 2 Gill (Md.) 254; State v. School Com'rs of Frederick County, 94 Md. 334, 51 Atl. 289. A board of school commissioners which is declared to be a body corporate by law, capable of suing and being sued, is not liable in an action for damages as a result of personal injuries. The authority to sue and be sued relates to actions pertaining to educational matters only. Inhabitants of Fourth School Dist. v. Wood, 13 Mass. 193; Connell v. Woodward, 6 Miss. (5 How.) 665; Rapelye v. Van Sickler, 1 Edm. Sel. Cas. (N. Y.) 175; Wharton v. School Directors of Cass Tp., 42 Pa. 358.

[58] State v. Hine, 59 Conn. 50, 21 Atl. 1024, 10 L. R. A. 83; Greenleaf v. Township No. 41 Trustees, 22 Ill. 236; 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; People v. Van Siclen, 43 Hun (N. Y.) 537; Edmondson v. Board of Education,

(a) Formation or abolition of common or independent school districts. Common, special or city independent school districts may be organized and their boundaries established by an act of the legislature.[59] It is common, however, to permit designated freeholders or others in a certain territory to petition for the establishment of the district the character of which they desire to form.[60] The statutes usually provide for the statements to be contained in the petition [61] and for a hearing,[62] the proceedings on

108 Tenn. 557, 69 S. W. 274, 58 L. R. A. 170; Pumphrey v. Brown, 77 Va. 569.

[59] Greenleaf v. Township No. 41 Trustees, 22 Ill. 236; Campbell v. City of Indianapolis, 155 Ind. 186, 57 N. E. 920; Allen v. Bertram Dist. Tp., 70 Iowa, 434. A minimum of 200 inhabitants residing in contiguous territory is necessary to the organization of an independent school district. State v. Elk County Com'rs, 61 Kan. 90, 58 Pac. 959, 47 L. R. A. 67; School Dist. No. 76 v. Ryker, 64 Kan. 612, 68 Pac. 34; School Dist. No. 1 v. Deering, 91 Me. 516, 40 Atl. 541; Roeser v. Gartland, 75 Mich. 143, 42 N. W. 687. School districts cannot contain more than nine sections of land under How. St. Mich. § 5033. School Dist. v. Smart, 18 N. H. 268; Water Supply Co. of Albuquerque v. City of Albuquerque, 9 N. M. 414, 54 Pac. 969; State v. Shearer, 46 Ohio St. 275, 20 N. E. 335, overruling State v. Powers, 38 Ohio St. 54.

[60] Richards v. Raymond, 92 Ill. 612; People v. Keechler, 194 Ill. 235, 62 N. E. 525; Munn v. School Tp. of Soap Creek, 110 Iowa, 652, 82 N. W. 323; Bailey v. Figely, 106 Ky. 725, 51 S. W. 424; Hundley v. Singleton, 23 Ky. L. R. 2006, 66 S. W. 279; Perrizo v. Kesler, 93 Mich. 280, 53 N. W. 391; State v. Wilcox, 45 Mo. 458; State v. Henderson, 145 Mo. 329, 46 S. W. 1076. A school district extending in a city is not enlarged by the extension of the city limits. Neither is such a school district extinguished by the absorption of the city within which it lies into another city.

Perryman v. Bethune, 89 Mo. 158, 1 S. W. 231. The statutory requirement that taxpayers residing within the territory to be organized as a school district must call the first meeting is jurisdictional. State v. Gang, 10 N. D. 331, 87 N. W. 5; Pinson v. Vesey, 23 Tex. Civ. App. 91, 56 S. W. 593; State v. Wofford, 90 Tex. 514, 39 S. W. 921.

[61] Trustees of Schools v. People, 121 Ill. 552, 13 N. E. 526; School Tp. of Newton v. Independent School Dist., 110 Iowa, 30, 81 N. W. 184; Newlon v. Independent Dist. of Montrose, 109 Iowa, 169, 80 N. W. 316. Construing Iowa Code 1873, § 1797, providing that where by reason of natural obstacles a portion of the school district cannot with reasonable facility enjoy school advantages in their own school district they may be attached to an adjoining school district.

School Dist. No. 17 of Garfield County v. Zediker, 4 Okl. 599, 47 Pac. 482; Ter. v. School Dist. No. 83, 10 Okl. 556, 64 Pac. 241. A certain legislative act relative to the

such hearing; and a consideration of the matter by designated official bodies with the making of an order by them.[63] In some cases appeals from orders are provided for by law.[64] The action of such an official board is discretionary and the usual rule applies in respect to its acts of this character.[65]

(b) By election. The establishment of school districts whether common, special or independent is often authorized by statute through an election[66] held after notice[67] and in the manner re-

formation of the school district held "special" and therefore forbidden by Act of Congress July 30th, 1886. Duffield v. Williamsport School Dist., 162 Pa. 476, 25 L. R. A. 152; State v. Brownson, 94 Tex. 436, 61 S. W. 114; Pumphrey v. Brown, 77 Va. 569; Kuhn v. Board of Education of Wellsburg, 4 W. Va. 499; State v. Enos, 97 Wis. 164.

[62] Rayfield v. People, 144 Ill. 332, 33 N. E. 188.

[63] Board of Education v. Cumming, 103 Ga. 641; Parr v. Miller, 146 Ill. 596, 35 N. E. 230; Trustees of Schools v. School Directors, 190 Ill. 390, 60 N. E. 531; Independent Dist. of Fairview v. Durland, 45 Iowa, 353; Common School Dist. No. 50 v. Young, 105 Ky. 299, 49 S. W. 28; Inhabitants of School Dist. No. 1 v. Stearns, 48 Me. 568; Doxey v. School Inspectors of Martin, 67 Mich. 601, 35 N. W. 170; Smelser v. School Inspectors of Big Prairie Tp., 125 Mich. 666, 85 N. W. 94. School instructors have the power to take territory from existing school districts and from a new one after giving parties interested an ample opportunity to be heard on all questions raised.

Moede v. Stearns County, 43 Minn. 312, 45 N. W. 435. A board of county commissioners may appeal from an order of a district court reversing their action in establishing a new district. Smith v. Township Board of Education, 58 Mo. 297; School District No. 6 v. Burris, 84 Mo. App. 654. A vote at the final meetings of all the districts involved in the formation of a new school district is necessary to give the board of arbitration, provided for by Mo. Rev. St. 1899, § 9742, an opportunity to consider the necessity for a change in school districts. State v. Daniel, 52 S. C. 201; State v. Watson (Tenn. Ch. App.) 39 S. W. 536; Rhomberg v. McLaren, 2 Tex. Civ. App. 391, 21 S. W. 571; Reynolds Land & Cattle Co. v. McCabe, 72 Tex. 57, 12 S. W. 165.

[64] Hamilton v. Frette, 189 Ill. 190, 59 N. E. 588; Mason v. People, 185 Ill. 302, 56 N. E. 1069; Munn v. School Tp. of Soap Creek, 110 Iowa, 652, 82 N. W. 323. But see Brown v. Independent School Dist. (Pa.) 16 Atl. 32.

[65] School Dist. No. 67 v. School Dist. No. 24, 55 Neb. 716, 76 N. W. 420.

[66] Deane v. Washburn, 17 Me. 100; State v. Eidson, 76 Tex. 302, 13 S. W. 263, 7 L. R. A. 733. A tract of land containing twenty-eight square miles, not more than two of which are included in a town, cannot be incorporated under Sayles' Civ. St. art. 541*a*, for school purposes only.

[67] Young v. Town of Bethany, 73

quired by law,[68] and at which certain designated voters have the privilege of casting their ballots.[69] A strict compliance with these provisions is usually required, though, in respect to those deemed directory, a substantial compliance only is necessary. A prescribed affirmative vote may be also required.[70]

§ 1074. Alteration of school districts.

It is necessary in order to meet changing conditions that authority exist for the alteration of school districts. An alteration of boundaries may be either made through a division of an already existing district[71] or by its consolidation with others or the annexation of other districts.[72] A change of boundaries is made in

Conn. 166, 46 Atl. 822; Irving v. Gregory, 86 Ga. 605, 13 S. E. 120; Butterfield v. Inhabitants of School Dist. No. 6, 61 Me. 583; Sawyer v. Williams, 25 Vt. 311.

[68] Hesper Dist. Tp. v. Independent Dist. of Burr Oak, 34 Iowa, 306; District Tp. of Lincoln v. Independent Dist. of Germania, 112 Iowa, 321, 83 N. W. 1068. It is sufficient if the provision of the statutes in respect to the manner of election is substantially complied with. In re Clearfield Independent School Dist., 79 Pa. 419.

[69] Slate v. City of Blue Ridge, 113 Ga. 646, 38 S. E. 977.

[70] Ft. Dodge City School Dist. v. Wahkausa Dist. Tp., 17 Iowa, 85; State v. Board of Education of Appleton City, 64 Mo. 53; Pierce v. Carpenter, 10 Vt. 480; Literary Fund v. Dalby, 4 Grat. (Va.) 528.

[71] Sixteenth School Dist. v. Eighteenth School Dist., 54 Conn. 50; Trustees of Schools v. School Directors, 190 Ill. 390, 60 N. E. 531; Richards v. Daggett, 4 Mass. 534; Mendell v. Inhabitants of Marion, 82 Mass. (16 Gray) 353. Towns cannot be redistricted into school districts oftener than once in ten years, under Mass. Statutes. State v. Hill, 152 Mo. 234, 53 S. W. 1062. A district cannot be so divided as to leave it with a population of less than twenty children of school age. Pumphrey v. Brown, 77 Va. 569. The legislature can arbitrarily divide school districts.

[72] Vernon School Dist. v. Board of Education of Los Angeles, 125 Cal. 593, 58 Pac. 175; People v. Union High School Dist., 101 Cal. 655; In re Senate Bill No. 9, 26 Colo. 136, 56 Pac. 173. Under Const. art. 5, § 25, certain legislation relative to consolidation of school districts held unconstitutional. Independent Dist. of Lynnville v. District Tp. of Lynn Grove, 82 Iowa, 169, 47 N. W. 1030; Albin v. West Branch Independent Dist., 58 Iowa, 77; Newlon v. Independent Dist. of Montrose, 109 Iowa, 169, 80 N. W. 316. Construing Iowa Code 1873, § 1797, providing that where by reason of natural obstacles a portion of a school district cannot with reasonable facility enjoy school advantages in their own school district, they may be annexed to an adjoining district.

Call v. Chadbourne, 46 Me. 206;

some instances by action of the county commissioners,[73] in others by the county superintendent or school commissioner or inspectors,[74] and in still other cases through the action of some judicial or quasi judicial body.[75] The proceedings in respect to the alteration are governed entirely by local statutes. They usually provide for the determination of the question by a vote of the districts or territory affected [76] upon petition or other proceedings,[77] or at a gen-

School Dist. of Macon v. Goodding, 120 Mo. 67, 24 S. W. 1034. A school district composed of a certain city is not enlarged by the mere extension of the city limits. State v. Heath, 56 Mo. 231; State v. Heiser, 60 Mo. 540; State v. Miller, 65 Mo. 50; Henry v. Dulle, 74 Mo. 443; School Dist. of Agency v. Wallace, 75 Mo. App. 317; Perkins v. Langmaid, 34 N. H. 315; Converse v. Porter, 45 N. H. 385; Child v. Colburn, 54 N. H. 71; Dooley v. Meese, 31 Neb. 424.

Kaighn v. Browning, 27 N. J. Law (3 Dutch.) 527. An incorporated school district under § 41, school law, has no right to alter or abolish another school district without notice to it and its consent. School Dist. No. 74 v. Long, 2 Okl. 460, 37 Pac. 601; Redfield School Dist. No. 12 v. Redfield Independent School Dist. No. 20, 14 S. D. 229, 85 N. W. 180; State v. Watson (Tenn. Ch. App.) 39 S. W. 536; Rodemer v. Mitchell, 90 Tenn. 65; State v. Graham, 60 Wis. 395. The statute relative to the alteration of boundaries of school district must be strictly followed. But see District Tp. of Center v. Independent Dist. of Lansing, 82 Iowa, 10, 47 N. W. 1033.

[73] State v. Independent School Dist., 42 Minn. 357, 44 N. W. 120; State v. Compton, 28 Neb. 485, 44 N. W. 660; Baldwin v. Nickerson, 3 Wyo. 208, 19 Pac. 439.

[74] Board of Education v. Trustees of Schools, 74 Ill. App. 401; Brody v. Penn. Tp. Board, 32 Mich. 272; State v. Clary, 25 Neb. 403, 41 N. W. 256; Hendreschke v. Harvard High School Dist., 35 Neb. 400, 53 N. W. 204; School Dist. No. 10 of Polk County v. Coleman, 39 Neb. 391, 58 N. W. 146; Reeves v. Barrett, 31 N. J. Law, 31; People v. Hooper, 13 Hun (N. Y.) 639; Bull v. School Committee of Woonsocket, 11 R. I. 244. See, also, cases cited under last note of § 1077.

[75] In re Heidler, 122 Pa. 653, 16 Atl. 97; Porter v. State, 78 Tex. 591, 14 S. W. 794; Stephens v. Buie, 23 Tex. Civ. App. 491, 57 S. W. 312; Trustees of Lytle School Dist. v. Haas, 24 Tex. Civ. App. 433, 59 S. W. 830. But see Rodemer v. Mitchell, 90 Tenn. 65, 15 S. W. 1067.

[76] State v. Grimshaw (Mo.) 1 S. W. 363; State v. Burford, 82 Mo. App. 343.

[77] Hudspeth v. Wallis, 54 Ark. 134, 15 S. W. 184; School Dist. No. 11 v. School Dist. No. 20, 63 Ark. 543, 39 S. W. 850. Defining "elector and resident" under Sand. & H. Dig., § 7064. People v. Union High School Dist., 101 Cal. 655, 36 Pac. 119; Kramm v. Bogue, 127 Cal. 122, 59 Pac. 394; Carrico v. People, 123 Ill. 198, 14 N. E. 66; Scott v. Trustees of Schools, 71 Ill. App. 95; School Trustees v. People, 71 Ill. App. 559; People v. Allen, 155 Ill. 402, 40 N.

eral or special election or meeting.[78] Provision is also made for the transfer of records and property[79] including a proportionate part of school taxes, by the districts affected to that one legally entitled to hold the possession and title.[80] The law may also pro-

E. 350, following Parr v. Miller, 146 Ill. 596; Trustees of Schools of Tp. No. 9 v. People, 161 Ill. 146, 43 N. E. 696; People v. Simpson, 168 Ill. 127, 48 N. E. 302; Mullins v. Andrews, 20 Ky. L. R. 20, 45 S. W. 231; Webber v. Stover, 62 Me. 512; Burnett v. Board of School Inspectors, 97 Mich. 103, 56 N. W. 234; State v. Burford, 82 Mo. App. 343; State v. Compton, 28 Neb. 485, 44 N. W. 660. The petition must b in writing. State v. Wright, 17 Ohio, 32; Board of Education of Pond Creek v. Boyer, 5 Okl. 225, 47 Pac. 1090; School Dist. v. Palmer, 41 Or. 485, 69 Pac. 453; School Dist. No. 74 v. Lincoln County Com'rs, 9 S. D. 291, 68 N. W. 746.

[78] Beavers v. State, 60 Ark. 124, 29 S. W. 144; Gravel Hill School Dist. v. Old Farm School Dist. 55 Conn. 244, 10 Atl. 689; Trustees of Schools of Tp. 9 v. People, 161 Ill. 146, 43 N. E. 696; People v. Keechler, 194 Ill. 235, 62 N. E. 525; Grindle v. School Dist. No. 1, 64 Me. 44; Parker v. Titcomb, 82 Me. 180, 19 Atl. 162; Alden v. Rounseville, 48 Mass. (7 Metc.) 218; Gentle v. Board of School Inspectors, 73 Mich. 40, 40 N. W. 928; Shattock v. Phillips, 78 Mo. 80; Jones v. Camp, 34 Vt. 384; Greenbanks v. Boutwell, 43 Vt. 207; Bill v. Dow, 56 Vt. 562.

[79] People v. Keechler, 194 Ill. 235, 62 N. E. 525; Independent School Dist. of Oakville v. Independent School Dist. of Asbury, 43 Iowa, 444. The board of directors in making a division of the assets upon the division of a township school district, act in a judicial capacity; their jurisdiction is exclusive and their judgment cannot be set aside in a collateral proceeding.

School Dist. No. 49 v. School Dist. No. 70, 20 Kan. 76; Robinet v. School Dist. No. 83, 63 Kan. 1, 64 Pac. 970. The county superintendent in apportioning the value of school property justly due a new district, formed out of the territory taken from another district, acts in a judicial or quasi judicial capacity. Deckerville High School v. School Dist. No. 3, 131 Mich. 272, 90 N. W. 1064; Gregg v. French, 67 Minn. 402, 69 N. W. 1102; People v. Hodge, 4 Neb. 265; Board of Education v. Board of Education, 46 Ohio St. 595; In re Abbington School Dist., 84 Pa. 179; Lower Allen School Dist. v. Shiremanstown School Dist., 91 Pa. 182; Porter v. State, 78 Tex. 591, 14 S. W. 794; State v. Norwood, 24 Tex. Civ. App. 24, 57 S. W. 875; Trustees of Lytle School Dist. v. Haas, 24 Tex. Civ. App. 433, 59 S. W. 830; Webb County v. School Trustees of Laredo, 95 Tex. 131, 65 S. W. 878; Town of Barre v. School Dist. No. 13, 67 Vt. 108, 30 Atl. 807; State v. Joint School Dist. No. 1, 109 Wis. 313, 85 N. W. 349. But see School Dist. No. 1 v. School Dist. No. 4, 94 Mo. 612, 7 S. W. 285; State v. School Dist. No. 15, 90 Mo. 395.

[80] McGurn v. Board of Education, 133 Ill. 122, 24 N. E. 529; Whitmore v. Hogan, 22 Me. 564; School Dist. No. 6 v. Tapley, 83 Mass. (1 Allen)

vide for a proportionate assumption of existing indebtedness.[81] An independent school district is usually regarded as one of a higher grade or class than a common school district and statutes may provide for a change in character with or without a change in territorial boundaries.[82] Notice of meetings or elections at which the question is to be determined or any change either in character or boundaries must be given in the manner provided by law [83] and the required vote cast in favor of the proposition sub-

49; Perrizo v. Kesler, 93 Mich. 280, 53 N. W. 391; School Dist. No. 5-52 v. Neal, 74 Mo. App. 553; School Dist. No. 16 v. Concord, 64 N. H. 235, 9 Atl. 630; Town School Dist. of Barre v. Cook, 68 Vt. 88, 34 Atl. 33; Dodge v. South Royalton Graded School Dist., 67 Vt. 334. See, also, Elder v. Ter., 3 Wash. T. 438, 19 Pac. 29.

[81] Fairfield v. Rural Independent School Dist., 111 Fed. 453; Rogers v. People, 68 Ill. 154; Trustees of Schools v. School Directors, 190 Ill. 390, 60 N. E. 531; Axbury Independent School Dist. v. Dubuque County Dist. Ct., 48 Iowa, 182; Independent School Dist. of Lowell v. Independent School Dist. of Duser, 45 Iowa, 391. An apportionment of the assets and liabilities on the division of a district is final and conclusive until set aside by proper proceedings and cannot be attacked collaterally. Brewer v. Palmer, 13 Mich. 104; Halbert v. School Dists. Nos. 2, 3 and 5, 36 Mich. 421; Gregg v. French, 67 Minn. 402; Thompson v. Abbott, 61 Mo. 176; Clark v. Nichols, 52 N. H. 298; School Dist. No. 3 v. Greenfield, 64 N. H. 84, 6 Atl. 484; Sharp v. Froehlich (N. J. Law) 37 Atl. 1024; Coler v. Coppin, 10 N. D. 86, 85 N. W. 988; Butler School Dist. v. Gordon School Dist., 10 Pa. Co. Ct. R. 663; Dyer v. School Dist. No. 1, 61 Vt. 96, 17 Atl. 788; Blaisdell v. School Dist. No. 2, 72 Vt. 63, 47 Atl. 173; Cunningham v. Orange, 74 Vt. 115, 52 Atl. 269; School Dist. No. 2 v. School Dist. No. 1, 3 Wis. 333; Board of Education v. Board of Education, 30 W. Va. 424, 4 S. E. 640; Board of School Directors of Pelican v. School Directors of Rock Falls, 81 Wis. 428, 51 N. W. 871, 52 N. W. 1049. See §§ 45 et seq., ante. But see People v. Board of Education, 41 Mich. 547, 49 N. W. 920; School Dist. No. 76 v. Capitol Nat. Bank, 7 Okl. 45, 54 Pac. 309; Needham v. School Dist. No. 6, 62 Vt. 176, 20 Atl. 198.

[82] People v. Lodi High School Dist., 124 Cal. 694, 57 Pac. 660; Gale v. Knopf, 193 Ill. 245, 62 N. E. 229; Magnolia Dist. Tp. v. Boyer Independent Dist., 80 Iowa, 495, 45 N. W. 907; Webb v. Smith, 99 Ky. 11, 34 S. W. 704; Mullins v. Andrews, 20 Ky. L. R. 20, 45 S. W. 231; State v. Hamilton, 69 Miss. 116, 10 So. 57; State v. Sweeney, 24 Nev. 350, 55 Pac. 88. But see State v. Wofford, 90 Tex. 514, 39 S. W. 921.

[83] Young v. Town of Bethany, 73 Conn. 166, 46 Atl. 822; Howard v. Forrester, 109 Ky. 336, 59 S. W. 10; Fordsville Graded School Dist. No. 96 v. McCarty, 24 Ky. L. R. 164, 68 S. W. 147; Butterfield v. Inhabitants of School Dist. No. 6, 61 Me. 583; Coulter v. School Inspectors,

mitted before the legal change will be effected.[84] As a rule, the presumption of law exists that every school district exercising the powers and franchises of a district has been legally organized,[85] and furthermore, it is not subject to collateral attack.[86]

59 Mich. 391; Graves v. Joint Board of School Inspectors, 102 Mich. 634, 61 N. W. 60; Fractional School Dist. No. 3 v. School Inspectors of Martin, 63 Mich. 611, 30 N. W. 198; Donough v. Dewey, 82 Mich. 309, 46 N. W. 782; Fractional School Dist. No. 1 v. Metcalf, 93 Mich. 497, 53 N. W. 627; State v. Gibson, 78 Mo. App. 170; Mason v. Kennedy, 89 Mo. 23, 14 S. W. 514; Dooley v. Meese, 31 Neb. 424, 48 N. W. 143; State v. Steele, 106 Wis. 475, 82 N. W. 295.

[84] Sharp v. George (Ariz.) 46 Pac. 212. The majority referred to under the statute providing that a "majority of such votes cast in favor of a high school" is the majority of those voting and has no reference to the number of qualified electors residing in the district. Beavers v. State, 60 Ark. 124, 29 S. W. 144; People v. Union High School Dist., 101 Cal. 655, 36 Pac. 119; Parr v. Miller, 146 Ill. 596, 35 N. E. 230; Hamilton v. Frette, 189 Ill. 190, 59 N. E. 588; Mason v. People, 185 Ill. 302, 56 N. E. 1069; Independent Dist. of Sheldon v. Sioux County sup'rs, 51 Iowa, 658. Where two districts are organized members of certain common territory, that one whose organization is first commenced is entitled to have the school tax levied in its favor.

State v. Echols, 41 Kan. 1, 20 Pac. 523; State v. Grimshaw (Mo.) 1 S. W. 363; Howell v. Shannon, 130 Mich. 556, 90 N. W. 410; Sayre v. Tompkins, 23 Mo. 443; State v. Marshall, 48 Mo. App. 560; School Dist. No. 2 v. Gilman, 3 N. H. 168; State v. Oeshler, 25 N. J. Law (1 Dutch.) 177; Junction City School Incorporation v. School Dist. No. 6, 81 Tex. 148, 16 S. W. 742; Barrett v. Coleman, 12 Tex. Civ. App. 663, 35 S. W. 418; Hewett v. Miller, 21 Vt. 402; Lathrop v. Town of Sunderland, 64 Vt. 35, 23 Atl. 619.

[85] Fordsville Graded School Dist. No. 96 v. McCarty, 24 Ky. L. R. 164, 68 S. W. 147; Collins v. Inhabitants of School Dist. No. 7, 52 Me. 522; State v. School Dist. No. 152, 54 Minn. 213, 55 N. W. 1122; State v. Cooley, 65 Minn. 406, 68 N. W. 66. No presumption in favor of the continued legal existence of an independent school district arises from the action of some of its inhabitants where it has been dissolved pursuant to statute.

School Dist. of Agency v. Wallace, 75 Mo. App. 317. A de facto existence can be shown by actual user. Franklin Ave. German Sav. Inst. v. Roscoe Board of Education, 75 Mo. 408. The state alone can raise the question of irregularities in the organization of a district.

State v. School Dist. No. 24, 13 Neb. 78; State v. School Dist. No. 19, 42 Neb. 499, 60 N. W. 912; Wilson v. School Dist. No. 4, 32 N. H. 118; Stevens v. Newcomb, 4 Denio. (N. Y.) 437; Whitmire v. State (Tex. Civ. App.) 47 S. W. 293. A mere irregularity will not invalidate the creation of a school district. Sherwin v. Bugbee, 16 Vt. 439; State v. Williams, 27 Vt. 755. The existence of a school district

High, graded or normal school boards; state universities. The organization of schools of a higher grade and state universities is usually provided for by special act which applies to the special subject under consideration,[87] and which controls appropriations of public moneys.[88]

may be proved by ratification. Bowen v. King, 34 Vt. 156. But see Redfield School Dist. No. 12 v. Redfield Independent School Dist. No. 20, 14 S. D. 229, 85 N. W. 180.

[86] Presque Isle County Sup'rs v. Thompson, 61 Fed. 914, 10 C. C. A. 154; Dartmouth Sav. Bank v. School N. W. 822; Gale v. Knopf, 193 Ill. Dists. Nos. 6 and 31, 6 Dak. 332, 43 245, 62 N. E. 229; Voss v. Union School Dist. No. 11, 18 Kan. 467; School Dist. No. 2 v. School Dist. No. 1, 45 Kan. 543, 26 Pac. 43; School Dist. No. 1 v. Union School Dist., 81 Mich. 339, 45 N. W. 993; State v. School Dist. No. 108, 85 Minn. 230, 88 N. W. 751; Burnham v. Rogers, 167 Mo. 17, 66 S. W. 970; Winsor v. Donahay, 30 N. J. Law, 404; School Dist. No. 7 v. Sherman, 59 N. J. Law, 375, 35 Atl. 1060; Smith v. Coman, 47 App. Div. 116, 62 N. Y. Supp. 106; Coler v. Dwight School Tp., 3 N. D. 249, 55 N. W. 587, 28 L. R. A. 649; City of Cynthiana v. Board of Education, 21 Ky. L. R. 731, 52 S. W. 969.

[87] Sinnott v. Colombet, 107 Cal. 187, 40 Pac. 329, 28 L. R. A. 594; Nevada School Dist. v. Shoecraft, 88 Cal. 372, 26 Pac. 211; People v. Bruennemer, 168 Ill. 482, 48 N. E. 43; State v. Elk County Com'rs, 61 Kan. 90, 58 Pac. 959, 47 L. R. A. 67; Trustees of Harrodsburg v. Harrodsburg Educational Dist., 9 Ky. L. R. 605, 7 S. W. 312; Williamstown Graded Free School Dist. v. Webb, 89 Ky. 264, 12 S. W. 298; Trustees of Morganfield Public School v. Thomas, 12 Ky. L. R. 832, 15 S. W. 670; Bailey v. Figely, 106 Ky. 725, 51 S. W. 424. A city of the fourth class cannot include outlying territory for the purpose of establishing a graded school under Ky. St. §§ 4464 and 4489.

Louisville & N. R. Co. v. Eilzabethtown Dist. Public School, 23 Ky. L. R. 1169, 64 S. W. 974; City of Winona v. School Dist. No. 82, 40 Minn. 13, 41 N. W. 539, 3 L. R. A. 46; Putnam v. City of St. Paul, 75 Minn. 514, 78 N. W. 90; State v. Vaughan, 99 Mo. 332, 12 S. W. 507; Chicago, B. & Q. R. Co. v. School Dist. No. 10, 60 Neb. 164, 82 N. W. 373; School Dist. No. 1 v. Prentiss, 66 N. H. 145, 19 Atl. 1090; Conover v. Parker, 57 N. J. Law, 631, 31 Atl. 769; Landis v. Ashworth, 57 N. J. Law, 509, 31 Atl. 1017. A law is not special or local because it gives a higher grade of education to the children in one district than to those in another.

People v. Crissey, 45 Hun (N. Y.) 19; Gordon v. Cornes, 47 N. Y. 608; Board of Education v. Board of Education, 41 Ohio St. 680. A high school district independently organized is not absorbed by a board of education of an incorporated village. Com. v. Reynolds, 137 Pa. 389, 20 Atl. 1011. Pa. Act. May 23, 1889, "constituting each city of the 3rd class a single school district, etc.", is unconstitutional violating Pa. Constitution 1874, art. 15, § 1, art. 3, § 7. State v. Brownson, 94 Tex. 436, 61 S. W. 114; Bedford

§ 1075. 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 gvien by law the legal right to exercise certain powers and upon them devolve the performance of certain legally authorized duties.

§ 1076. State superintendent of public instruction.

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. Or, to state the proposition differently, the general supervision of the public schools of the state is vested in a state superintendent.[89] The

County Sup'rs v. Bedford High School, 92 Va. 292, 23 S. E. 299. But see Water Supply Co. of Albuquerque v. City of Albuquerque, 9 N. M. 441, 54 Pac. 969.

[88] Williamantic School Soc. v. Windham First School Soc., 14 Conn. 457; Alleghany County Schools v. Maffitt, 22 Md. 121; Town School Dist. of Brattleboro v. School Dist. No. 2, 72 Vt. 451, 48 Atl. 697. But see State Female Normal School v. Auditors, 79 Va. 233.

[89] Jones v. Benton, 4 G. Greene (Iowa) 40; Jackson Independent School Dist. of Steamboat Rock (Iowa) 77 N. W. 860. He may consider an appeal on alleged wrongful discharge of a teacher and his decision is final and conclusive. Wiley v. Alleghany County School Com'rs, 51 Md. 401. The state board of education of Maryland have a visitorial power of the most comprehensive character and this is in its nature summary and executive. State v. Albertson, 54 N. J. Law, 72, 22 Atl. 1083. A dispute over the election of school trustees is a controversy under the statute with regard to which the opinion and advice of the county and state superintendents may be sought.

People v. Town Auditors of Hempstead, 126 N. Y. 528, 27 N. E. 968, affirming 58 Hun, 608, 12 N. Y. Supp. 165; People v. Allen, 19 Misc. 464, 44 N. Y. Supp. 566. The superintendent of public instruction may restrain the apportionment of public money to a school district which refuses to comply with his decision that it carry out its contract with a teacher.

In re Light, 21 Misc. 737, 49 N. Y. Supp. 345; People v. Skinner, 7 App. Div. 58, 77 N. Y. Supp. 36 School Dist. No. 116 v. Irwin, 3 Or. 431, 56 Pac. 413. Hill's Ann

ualifications of such an officer may be prescribed, and the manner f his appointment or election is commonly designatd by law,[90] nd his rights in respect to the appointment by him of deputies nd assistants.[91] His salary and the aggregate expenses of his ffice may be also prescribed and limited.[92] His duties vary and sually include a meeting and consultation with the several ounty superintendents and other educational officers at the times nd places he shall deem most beneficial and upon such notice as e may give, for the purpose of discussing and considering any natters affecting the interest of the public schools. He is comonly required to prepare a report for submission to the legislaure through the governor of the state to contain information pon the questions required by law or those he may consider of mportance. These subjects usually relate to the general organzation of the school system in the state, the number of districts r schools, the enrollment of pupils and the average attendance; heir financial condition, the amount of school moneys collected nd expended each year, specifiying the amount received from ach source and the amount expended for each purpose; the number of schools receiving state aid, and finally all other matters elative to his office of public schools, school funds, and number nd character of teachers with the recommendations he may deem xpedient.[93]

Laws, § 2572, does not authorize an appeal to the superintendent of public instruction from a decision of a county superintendent. Field v. Com., 32 Pa. 478. A county superintendent may be removed by the superintendent of public schools for neglect of duty, incompetency, or immorality, but there must first be a charge, notice and an opportunity for defense and hearing. Kimbrough v. Barnett, 93 Tex. 301, 55 S. W. 120. A claimant for the office of superintendent of public schools of a city is under no necessity to present his claim to the state superintendent of public instruction before bringing suit for the office. Watkins v. Huff (Tex. Civ. App.) 63 S. W. 922. He is vested, by Sayles' Ann. Civ. St. art. 2938*b*, with the power of bearing and determining all appeals from the hearings and decisions of subordinate school officers.

[90] State v. Thompson, 38 Mo. 192. A superintendent continues in office until his successor is duly appointed and elected.

[91] Brown v. Cline, 62 N. J. Law, 489, 41 Atl. 690.

[92] State v. Westerfield, 24 Nev. 29, 49 Pac. 554.

[93] See Minn. Rev. Laws 1905, §§ 1373 et seq.

§ 1077. County superintendents; term of office. Powers.

The term of office and qualifications [94] and the manner of election or appointment [95] of county superintendents of public schools and compensation [96] are also designated by law. They are usually vested with the duty of visiting and instructing schools under their charge and in their respective counties at least once in each school term; in some states supervising and apportioning school moneys for use,[97] and controlling in a general way the discipline and management of the public schools within their jurisdiction.[98] The duties also devolve upon them in their discre-

[94] State v. Shaver, 54 Ala. 193. The removal of a county superintendent is discretionary with the state superintendent. People v. Mayes, 117 Ill. 257. A superintendent should be removed from office for a palpable violation of law or omission of duty. Repeated intoxication when attending to duty brings one within the operation of the statute and the removal may be made without written charges and without notice.

Howard v. Cornett, 8 Ky. L. R. 52, 1 S. W. 1; People v. Howlett, 94 Mich. 165, 53 N. W. 1100. A high school is not a college or university within the meaning of public acts 1891, No. 147, § 3, which provides that graduates of such institutions shall be eligible to the office of county commissioner of schools. Wynn v. State, 67 Miss. 312, 7 So. 353; Burnham v. Sumner, 50 Miss. 517; Com. v. Wickersham, 90 Pa. 311.

[95] State v. Edwards, 114 Ind. 581, 16 N. E. 627; State v. Vanosdal, 131 Ind. 388, 31 N. E. 79, 15 L. R. A. 832; Pickett v. Harrod, 86 Ky. 485, 5 S. W. 473; Johnson v. De Hart, 72 Ky. (9 Bush.) 640. Judges of the county court may elect the commissioner of common schools either by ballot or viva voce. Reed v. School Committee of Deerfield, 176 Mass. 473, 57 N. E. 961. Certain towns are authorized by statute 1898, c. 466, § 1, to unite for the purpose of employing a superintendent of schools. Wynn v. State, 67 Miss. 312, 7 So. 353; Frans v. Young, 30 Neb. 360; People v. Board of Education, 55 App. Div. 295, 66 N. Y. Supp. 963. City superintendent of schools appointed by board of education. State v. Crumbaugh, 26 Tex. Civ. App. 521, 63 S. W. 925; Williams v. Clayton, 6 Utah, 86, 21 Pac. 398.

[96] Garfield County Com'rs v. White, 16 Colo. App. 516, 66 Pac. 682; State v. Heinrich, 11 N. D. 31, 88 N. W. 734; Stevens v. Campbell, 26 Tex. Civ. App. 213, 63 S. W. 161; Clarke v. Milwaukee County, 53 Wis. 65; Houser v. Orangeburg County, 59 S. C. 265, 37 S. E. 831; Geraghty v. Ashland County, 81 Wis. 36, 50 N. W. 892.

[97] Gridley School Dist. v. Stout, 134 Cal. 592, 66 Pac. 785. A county superintendent is not liable in an action for tort for erroneously turning over an unused balance to the credit of the school district. School Dist. No. 13 v. State, 15 Kan. 43; Simmons v. Holmes, 49 Miss. 134.

[98] Catlin v. Christie, 15 Colo. App. 291, 63 Pac. 328; State v. Sherman,

tion of organizing and conducting teachers' institutes or teachers' associations,[99] advising teachers and school boards in regard to the best methods of administration or instruction,[100] the most approved plans for building, improving and ventilating school houses, and of adapting them to the convenience and healthful exercise of pupils;[101] approving school house sites;[102] stimulating school officers to the prompt and proper discharge of their duties; receiving and filing reports of subordinate officials required by law to be made,[103] and making reports to the state superintendent containing an abstract of the various information received by them and a written statement of the condition and prospect of the schools under their charge and such other matters as they may deem proper or as may be legally called for by the state superintendent or other officials.[104] The county superintendent is usually also charged with the duty of holding teachers' examinations at convenient places in his county upon such notice as may be prescribed.[105] These examinations are ordinarily of a uniform character throughout the state and determine the educational qualifications of applicants for teachers' certificates.[106]

90 Ind. 123; Sioux City School Dist. Tp. v. Pratt, 17 Iowa, 16. Allowing an appeal from a board of school directors to the county superintendent does not clothe the latter with judicial powers. Shelbourne v. Blatterman, 20 Ky. L. R. 1730, 49 S. W. 952; Smythe v. Lapsley, 23 Ky. L. R. 1065, 64 S. W. 733. Removal of trustees for misfeasance in office is void without notice. Macfarland v. Gloucester City Board of Education, 45 N. J. Law, 100.

[99] Murray v. Clay County Sup'rs, 81 Ill. 597. One must be authorized by the county board of commissioners.

[100] Barry v. Goad, 89 Cal. 215, 26 Pac. 785, reversing 24 Pac. 1023; Howard v. Forrester, 109 Ky. 336, 59 S. W. 10.

[101] School Dist. No. 1 v. Jamison (Ky.) 15 S. W. 1.

[102] State v. Wilson, 149 Ind. 253, 48 N. E. 1030. See, also, §§ 1084, etc.

[103] See Minn. Rev. Laws 1905, §§ 1379 et seq.

[104] Young v. State, 138 Ind. 206, 37 N. E. 984; Yeager v. Gibson County Com'rs, 95 Ind. 427. A county superintendent is not entitled to special compensation for making reports to the bureau of statistics as required by law. Louisville School Board v. Superintendent of Public Instruction, 102 Ky. 394, 43 S. W. 718; State v. Sweeney, 24 Nev. 350, 55 Pac. 88. A county superintendent is authorized to make an accurate census of the number of children in his county.

[105] Farrell v. Webster County, 49 Iowa, 245; State v. Board of Education, 73 Minn. 375, 76 N. W. 43.

[106] Steinson v. Board of Education of New York, 49 App. App. 143,

In some states the county superintendent passes upon the examination papers or causes them to be examined as they are handed him by applicants [107] and other states this power is given by law to the state superintendent. Upon the state or county superintendent is charged the duty of marking for or passing upon the professional requirements of teachers and they are also the judges of skill in teaching and the moral character of applicants.[108] Their duties in this respect are discretionary and in the absence of malice, fraud or a gross abuse of power, are not subject to review by the courts.[109] 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 [110] and of dividing counties into school districts.[111]

63 N. Y. Supp. 128, reversing 27 Misc. 687, 58 N. Y. Supp. 734.

[107] Johnson v. Ginn, 105 Ky. 654, 49 S. W. 470; People v. Stone, 78 Mich. 635, 44 N. W. 333.

[108] Perkins v. Wolf, 17 Iowa, 228. But a county superintendent cannot maintain a bill to restrain a person from teaching school on the ground that he has no certificate to teach. Jackson v. Independent School Dist. of Steamboat Rock (Iowa) 77 N. W. 860; School Dist. No. 10 v. Mowry, 91 Mass. (9 Allen) 94. The same rule applies to a school committee authorized to examine and engage teachers.

People v. Board of Education of New York, 17 Barb. (N. Y.) 299; People v. Masters, 21 Barb. (N. Y.) 252; Steinson v. Board of Education of New York, 27 Misc. 687, 58 N. Y. Supp. 734, reversed 49 App. Div. 143, 63 N. Y. Supp. 128; Com. v. Jenks, 154 Pa. 368, 26 Atl. 371. A school board has the discretionary power of appointing supervising principals for the schools under their control and may consider the sex of applicants in determining their fitness for such a position. This discretionary power is not subject to review by the courts unless in a clear case of its abuse.

George v. School Dist. No. 8, 20 Vt. 495. A teacher's certificate procured without examination is good if secured without the use of any fraudulent or improper means on his part. But see Libby v. Inhabitants of Douglas, 175 Mass. 123, 55 N. E. 808.

[109] Board of Education v. Stotlar, 95 Ill. App. 250; Desmond v. Independent Dist. of Glenwood, 71 Iowa, 23, 32 N. W. 6. The superintendent has the power to correct mistakes made in rendering a judgment in a case before him and can recall a decision actually rendered and publish a correct one. Elmore v. Overton, 104 Ind. 548. But see Jordan v. Davis, 10 Okl. 329, 61 Pac. 1063; First Nat. Bank of Morristown v. Felknor (Tenn. Ch. App.) 48 S. W. 382. Purchase of maps by director not warranted.

[110] Gilbert v. Patterson, 32 N. J. Law, 177; Webb County v. School Trustees of Laredo, 95 Tex. 131, 65 S. W. 878, reversing (Tex. Civ. App.) 64 S. W. 486; Oge v. Fro

§ 1078. 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

boese (Tex. Civ. App.) 66 S. W. 688; Wester v. Oge, 29 Tex. Civ. App. 615, 68 S. W. 1005. See, also, Board of Education of Duplin County v. State Board of Education, 114 N. C. 313, 19 S. E. 277.

111 Dartmouth Sav. Bank v. School Dists. Nos. 6 and 31, 6 Dak. 332, 43 N. W. 822; Trustees of Schools v. School Directors, 190 Ill. 390, 60 N. E. 531. The power of the county superintendent on appeal of considering the advisibility of a division of a school district is discretionary and proceedings in equity to review his action will not lie without averment of fraud or gross abuse of power.

Henricks v. State, 151 Ind. 454, 51 N. E. 933. Denying rehearing 50 N. E. 559. The power of the superintendent in this respect may be an appellate one when his decision is regarded as final. Barnett v. Independent Dist. of Earlham, 73 Iowa, 134, 34 N. W. 780; Eason v. Douglass, 55 Iowa, 390; School Tp. of Newton v. Independent School Dist., 110 Iowa, 30, 81 N. W. 184; Newlon v. Independent Dist. of Montrose, 109 Iowa, 169, 80 N. W. 316; Stewart v. Adams, 50 Kan. 560, 32 Pac. 122; State v. Secrest, 60 Kan. 641, 57 Pac. 500; School Dist. No. 1 v. Eckert, 84 Minn. 417, 87 N. W. 1019; School Dist. No. 1 v. Wheeler, 25 Neb. 199; State v. Clary 25 Neb. 403, 41 N. W. 256; Hendreschke v. Harvard High School Dist., 35 Neb. 400.

Cowles v. School Dist. No. 6, 23 Neb. 655, 37 N. W. 493. A superintendent can only act in this respect upon a petition signed by one-third of the legal voters of the whole district. Bay State Live-Stock Co. v. Bing, 51 Neb. 570, 71 N. W. 311; Landis v. Ashworth, 57 N. J. Law, 509, 31 Atl. 1017; School Dist. No. 17 v. Zediker, 4 Okl. 599, 47 Pac. 482. The power of a county superintendent under St. 1893, § 5760, to divide the county into school districts, is quasi judicial and his action will be interfered with by the courts only in case of an abuse of his discretion.

Board of Education of Pond Creek v. Boyer, 5 Okl. 225, 47 Pac. 1090. His powers may be restricted in this respect. Coler v. Rhoda School Tp., 6 S. D. 640, 63 N. W. 158; School Dist. No. 74 v. Lincoln County Com'rs, 9 S. D. 291, 68 N. W. 746. The power may be shared jointly with a board of county commissioners.

School Dist. No. 56 v. School Dist. No. 27, 9 S. D. 336, 69 N. W. 17. By Laws 1893, c. 78, subc. 3, § 6, authority is given the county superintendent of schools and a county commissioner to change boundaries of school districts and to create new ones in the manner provided by law. Sixteenth School

board. This school board as thus elected,[112] or as they may be appointed,[113] have general charge of the business of the district and of the school houses and of the interests of the schools located within it.[114] Their term of office, qualifications and compensation,

Dist. v. Davis County Com'rs, 16 Utah, 323, 52 Pac. 279. This power is vested jointly in the county superintendent and county commissioners.

[112] Campbell v. City of Indianapolis, 155 Ind. 186, 57 N. E. 920. Rev. St. 1881, § 4457, providing for the election of school commissioners in all cities having a population of 30,000 inhabitants is unconstitutional as special legislation under Const. art. 4, § 22. Opinion of the Justices, 115 Mass. 602. A woman may be a member of the school committee under Mass Constitution. Trautmann v. McLeod, 74 Minn. 110, 76 N. W. 964. Women have the right to vote at school elections. State v. Miller, 100 Mo. 439, 13 S. W. 677; Hendricks v. State, 20 Tex. Civ. App. 178, 49 S. W. 705. Trustees of school districts are public officers being interested in the sovereign functions of the state.

[113] Pierce v. Edington, 38 Ark. 150. Presumption of legality of appointment applies. Holbrook v. Trustees of Schools, 22 Ill. 539; Winans v. Williams, 5 Kan. 227. Under the Const, art. 2, § 23, females have no right to vote for school officers. Meadors v. Patrick, 22 Ky. L. R. 95, 56 S. W. 652; State v. Sweeney, 24 Nev. 350, 55 Pac. 88. The presumption exists in absence of evidence to the contrary that trustees were duly appointed.

[114] State v. Hine, 59 Conn. 50, 21 Atl. 1024, 10 L. R. A. 83. The legislature may make any provision it deems advisable in reference to the compensation and appointment of school trustees or committees of a town or district unless restricted by constitutional provisions. School Directors Dist. No. 7 v. People, 186 Ill. 331, 57 N. E. 780; Culver v. Smart, 1 Ind. 65; Clark School Tp. v. Home Ins. & Trust Co., 20 Ind. App. 543, 51 N. E. 107. Where school trustees have by law given them "the care and management of all property, real and personal, belonging to their respective corporations for common school purposes," the authority to expend a reasonable sum in insuring school property against fire will be implied.

Louisville School Board v. City of Louisville, 103 Ky. 421, 45 S. W. 1047; Graham v. Jackson, 23 Ky. L. R. 2235, 66 S. W. 1009. A failure of the record of the county superintendent to show the taking of an oath of a school trustee does not deprive him of his office. Soule v. Thelander, 31 Minn. 227. Trustees may be liable for neglecting to provide a school for the legally required time. Zimmerman v. State, 60 Neb. 633, 83 N. W. 919. Obligatory duties imposed by statute must be performed by them. Wheeler v. Alton School Dist., 66 N. H. 540, 23 Atl. 89. School boards are trustees of the district, not its agents. Conley v. School Directors of West Deer Tp., 32 Pa. 194. School directors cannot divest themselves of powers which have been conferred upon them for a public purpose. Holt's Appeal, 5 R. I. 603. The power to insure a

if any,[115] are fixed by law. They are authorized, when empowered by the district meeting, to acquire necessary sites for school houses by lease or purchase or condemnation under the laws of eminent domain,[116] erect or purchase necessary school houses or school rooms,[117] or abandon them and sell or exchange such school

school house is vested in the district, not in the board of trustees. Corrothers v. Clinton Dist. Board of Education, 16 W. Va. 527. A board of education may by mandamus be compelled to perform an act imposed upon it by law.

[115] School Dist. v. Bennett, 52 Ark. 511, 13 S. W. 132. It is necessary under Mansf. Dig. § 6206, that school directors to qualify should subscribe to an oath of office in writing and file it with the clerk. This provision is mandatory. Swango v. Rose, 105 Ky. 294, 49 S. W. 40, 435; Hinman v. School Dist. No. 1, 4 Mich. 168; Frazier v. School Dist. No. 1, 24 Mo. App. 252; Heller v. Stremmel, 52 Mo. 309; State v. Harris, 19 Nev. 222, 80 Pac. 462. The legislature cannot create a term of office for a longer period than that fixed by the constitution. State v. Van Patten, 26 Nev. 273, 66 Pac. 822. The failure to indorse on a certificate of election the oath required to be taken by a school trustee does not affect his qualification. Stone v. Towne, 67 N. H. 113, 29 Atl. 637; City of Manchester v. Potter, 30 N. H. 409; Trustees of Independent School Dist. of Houston v. Dow (Tex. Civ. App.) 63 S. W. 1027; Childrey v. Rady, 77 Va. 518. It is necessary for school trustees to take an oath of office within the time prescribed by law. State v. Nobles, 109 Wis. 202, 85 N. W. 367.

[116] Danielly v. Cabaniss, 52 Ga. 211; Bogaard v. Independent Dist. of Plainview, 93 Iowa, 269, 61 N. W. 859. The same rule applies to improvements necessary to make a school house more accessible. Aldredge v. School Dist. No. 16, 10 Okl. 694, 65 Pac. 96; Long v. Fuller, 68 Pa. 170; Howland v. School Dist. No. 3, 15 R. I. 184, 2 Atl. 549, 8 Atl. 337; Town of Castleton v. Langdon, 19 Vt. 210. Or by gift.

[117] Munson v. Minor, 22 Ill. 594; Davis v. Mendenhall, 150 Ind. 205, 49 N. E. 1048; Stevenson v. Summit Dist. Tp., 35 Iowa, 462; Scripture v. Burns, 59 Iowa, 70. School directors may in their discretion cause the school to be taught in a rented building instead of the public school house.

Allen v. School Dist. No. 2, 32 Mass. (15 Pick.) 35; Heard v. Calhoun School Dist., 45 Mo. App. 660; Burnham v. Rogers, 167 Mo. 17, 66 S. W. 970. A city school board may divide the district into school wards and erect suitable school buildings thereon. Kruell v. State, 59 Neb. 97, 80 N. W. 272; Keyser v. School Dist. No. 8, 35 N. H. 477; Nicklas' Petition, 146 Pa. 212, 23 Atl. 316; Tarbell v. School Dist. of Montrose, 129 Pa. 146, 18 Atl. 758; Hackett v. Emporium Borough School Dist., 150 Pa. 220, 24 Atl. 627; Edinburg American Land & Mortg. Co. v. City of Mitchell, 1 S. D. 593, 48 N. W. 131. A school board is limited in its expenditures in the construction of a school house

houses or sites and execute deeds of conveyance[118] and borrow money for proper purposes.[119] They also have the power, without special authority of the school districts, to purchase, sell or exchange school apparatus and school supplies;[120] make minor improvements to the school properties under their charge;[121] employ and contract with the necessary qualified teachers or employes and usually discharge the same for cause;[122] provide for

to the amount authorized by vote of the district. But see Black v. Cornell, 30 Mo. App. 641.

[118] School Directors of Union School Dist. v. School Directors of New Union School Dist., 135 Ill. 464, 28 N. E. 49; School Dist. No. 6 v. Aetna Ins. Co., 62 Me. 330. Ratification of an unauthorized transfer of property by school committee. Black v. Cornell, 30 Mo. App. 641; State v. Clark, 52 N. J. Law, 291, 19 Atl. 462.

[119] School Directors v. Miller, 54 Ill. 338; Austin v. Colony Dist. Tp., 51 Iowa, 102; Perry v. Brown, 21 Ky. L. R. 344, 51 S. W. 457. School trustees may be held on personal guaranty of a debt created by them on behalf of the district and in excess of the constitutional limitation of indebtedness. Board of Education of Sauk Center v. Moore, 17 Minn. 412 (Gil. 391); St. Joseph Public Schools v. Gaylord, 86 Mo. 401; Clarke v. School Dist. No. 7, 3 R. I. 199.

[120] Clark v. School Directors, 78 Ill. 474; W. P. Myers Pub. Co. v. White River School Tp., 28 Ind. App. 91, 62 N. E. 66; State v. Sherman, 90 Ind. 123; City of Baltimore v. Weatherby, 52 Md. 442; Knabe v. Board of Education, 67 Mich. 262, 34 N. W. 568; Smith v. Coman, 47 App. Div. 116, 62 N. Y. Supp. 106; Rutledge v. McCue, 10 Kulp (Pa.) 57. Parties dealing with school officers are bound to inform themselves as to the extent of their authority to bind the district in making contracts or supplies. But see Taylor v. Otter Creek Dist. Tp., 26 Iowa, 281; Gibson v. School Dist. No. 5, 36 Mich. 404. A director has no power to purchase school charts for the use of a school. Western Pub. House v. School Dist. No. 1, 94 Mich. 262, 53 N. W. 1103.

[121] 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.

[122] People v. Babcock, 123 Cal. 307, 55 Pac. 1017; Brenan v. People, 176 Ill. 620, 52 N. E. 353; Thompson v. Linn, 35 Iowa, 361; Aananson v. Anderson, 70 Iowa, 102; Adams v. Thomas, 11 Ky. L. R. 701, 12 S. W. 940. Members of a board of education are not liable for discharging a superintendent unless they act maliciously. Duer v. Dashiell, 91 Md. 660, 47 Atl. 1040. Secretary of board. Freeman v. Inhabitants of Bourne, 170 Mass. 289, 49 N. E. 435, 39 L. R. A. 510; Stuart v. School Dist. No. 1, 30 Mich. 69; Tappan v. School Dist. No. 1, 44 Mich. 500; McCutcheon v. Windsor, 55 Mo. 149. But a teacher cannot be dismissed unless for good and sufficient cause shown. People v. School Officers, 18 Abb. Pr. (N. Y.) 165; People v. Board of Educa-

heating and care of school houses and rooms;[123] 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;[124] superintend and manage the schools of their district; adopt, modify or repeal rules for their organization, government and instruction;[125] keep the records and registers of the district as provided by law; prescribe text books and courses of study,[126] and in all proper cases defend and prosecute actions by and against the school district.[127] They are also au-

tion, 32 How. Pr. (N. Y.) 167; State v. Wilcox, 11 Ohio St. 326; Gregory v. Small, 39 Ohio St. 346; Appeal of School Directors of Bloomsburg (Pa.) 15 Atl. 548; Robinson v. State, 41 Tenn. (2 Coldw.) 181; Morley v. Power, 78 Tenn. (10 Lea) 219; State v. Burchfield, 80 Tenn. (12 Lea) 30; Splaine v. School Dist. No. 122, 20 Wash. 74, 54 Pac. 766. But see Greensboro Tp. v. Cook, 58 Ind. 139; Moor v. Newfield, 4 Me. (4 Greenl.) 44; Jackson v. Inhabitants of Hampden, 16 Me. 184; Armstrong v. School Dist., 19 Mo. App. 462. The power of removal is vested in the county commissioner, not in the board of school directors. Finch v. Cleveland, 10 Barb. (N. Y.) 290. See, also, § 1088, post.

[123] Davis v. School Dist. No. 1, 81 Mich. 214, 45 N. W. 989.

[124] In re Roach, 31 Misc. 590, 65 N. Y. Supp. 653.

[125] Churchill v. Fewkes, 13 Ill. App. 520; Grove v. School Inspectors, 20 Ill. 532; Tufts v. State, 119 Ind. 232, 21 N. E. 892; Dubuque Dist. Tp. v. City of Dubuque, 7 Iowa, 262; Inhabitants of Ninth School Dist. v. Loud, 78 Mass. (12 Gray) 61; 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. New York City board of education is not authorized to fine a teacher for disobeying instructions of the city superintendent. Weatherly v. City of Chattanooga (Tenn. Ch. App.) 48 S. W. 136. See, also, § 1090, post.

[126] Sinnott v. Colombet, 107 Cal. 187, 40 Pac. 329, 28 L. R. A. 594; School Trustees v. People, 87 Ill. 303; Dobbs v. Stauffer, 24 Kan. 127; 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. See, also, § 1093, post. But see In re Kindergarten Schools, 18 Colo. 234, 32 Pac. 422, 19 L. R. A. 469; Johnson v. Ginn, 105 Ky. 654, 49 S. W. 470.

[127] State v. Aven, 70 Ark. 291, 67 S. W. 752; San Francisco Board of Education v. Donahue, 53 Cal. 190; School Dist. No. 8 v. Erskin, 1 Colo. 367; Shoudy v. School Directors, 32 Ill. 290; Alderman v. School Directors, 91 Ill. 179; Templin v. Fremont Dist. Tp., 36 Iowa, 411. The president of a school district has no authority to employ counsel at the expense of the district unless in a case brought by or against it.

Independent School Dist. No. 6 v. Wirtner, 85 Iowa, 387, 52 N. W. 243. Iowa Code, § 1740, does not authorize the president of the school board to bring a suit in his own name. Fisher v. School Directors,

thorized 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.[128] 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.[129] Their powers in respect to the above matters are narrow, fixed in detail by law [130] and usually

44 La. Ann. 184, 10 So. 494; Johnston v. Mitchell, 120 Mich. 589, 79 N. W. 812. A minority of a school board has no authority to commence an action in its name.

Thompson v. School Dist. No. 4, 71 Mo. 495; Donnelly v. Duras, 11 Neb. 283. An action must be brought in name of district. Denniston v. School Dist. No. 11, 17 N. H. 492; Harrington v. School Dist. No. 6, 30 Vt. 155. A vote of the district is necessary to authorize the employment of counsel. Fobes v. School Dist., 10 Wis. 117; School Directors of Sigel v. Coe, 40 Wis. 103. But see Scott v. Independent Dist. of Hardin, 91 Iowa, 156, 59 N. W. 15. Construing Code, § 1740, relative to employment of counsel. Burgess v. School Dist. in Uxbridge, 100 Mass. 132; School Dist. No. 4 v. Wing, 30 Mich. 351; Rabb v. Washington County Sup'rs, 62 Miss. 589.

[128] 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.

As to power to furnish free text books see the following: Del. Laws 1891, c. 66, p. 181; Ind. Laws 1891, c. 80, p. 99; Neb. Laws 1891, c. 46, p. 334; N. M. Laws 1891, c. 64, p. 119 and New Jersey Laws 1890, c. 121, p. 180. See, also, Board of Public Education of Wilmington v. Griffin, 9 Houst. (Del.) 334, 32 Atl. 775.

[129] See § 1093, post.

[130] Cheney v. Newton, 67 Ga. 477; Davis v. School Directors, 92 Ill. 293; First Nat. Bank of Marion v. Adams School Tp., 17 Ind. App. 375; Henricks v. State, 151 Ind. 454, 50 N. E. 559, 51 N. E. 933. A substantial compliance with the statute is sufficient. Union School Tp. v. First Nat. Bank of Crawfordsville, 102 Ind. 464; Middleton v. Greeson, 106 Ind. 18; Weir Furnace Co. v. Independent School Dist. of Seymour, 99 Iowa, 115; School Dist. No. 7 v. Thompson, 5 Minn. 280 (Gil. 221); Keyser v. School Dist. No. 8, 35 N. H. 477. An unauthorized action in respect to the purchase of a school house may be ratified by the district through claiming and holding the building. Taylor v. School Committee, 50 N. C. (5 Jones) 98; State v. Bateman, 96 N. C. 5; City of Philadelphia v. Johnson, 47 Pa. 382; Lauenstein v. City of Fond du Lac, 28 Wis. 336. Powers conferred upon a board of education to buy land for a school house site cannot be delegated by them to other persons. See, also, Springfield Furniture Co. v. School Dist. No. 4, 67 Ark. 236, 54 S. W. 217. An unauthorized purchase of school desks by directors may be ratified by the school district.

are subject, as provided by law, to the general supervision and control of the state or county superintendent of schools.[131] The duties to be performed by the clerk and the treasurer of the board and the chairman are those ordinarily devolving upon officials of like character as modified or affected by the fact of their special duties and special character as officials of a school board.[132]

Meetings. The subject of meetings of official bodies has been previously considered.[133] The common principle applies to those of school boards, whatever their powers or name, that they should be held at some regular time of after due notice,[134] and that action to be valid must be taken at a meeting of the board held as such.[135]

§ 1079. 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

[131] State v. Daniel, 52 S. C. 201, 29 S. E. 633.

[132] Trustees of Schools v. Shepherd, 139 Ill. 114, 28 N. E. 1073; Hinton v. School Dist., 12 Kan. 573; Hendricks v. Bobo, 12 La. Ann. 620; People v. Mahoney, 30 Mich. 100; People v. Bender, 36 Mich. 195; State v. McKee, 20 Or. 120, 25 Pac. 292.

[133] See § 655, ante.

[134] Springfield Furniture Co. v. School Dist. No. 4, 67 Ark. 236, 54 S. W. 217; Lawrence v. Traner, 136 Ill. 474; People v. Frost, 32 Ill. App. 242; Hanna v. Wright, 116 Iowa, 275, 89 N. W. 1108. If all the members of the board are present, the question of notice is immaterial. Passage v. School Inspectors of Williamstown, 19 Mich. 330; Waters v. School Dist. No. 4, 59 Mo. App. 580; People v. Skinner, 37 App. Div. 44, 55 N. Y. Supp. 337; Casto v. Board of Education of Lipley Dist., 38 W. Va. 707, 18 S. E. 923; Splaine v. School Dist. No. 122, 20 Wash. 74, 54 Pac. 766.

[135] School Dist. v. Bennett, 52 Ark. 511; School Dist. No. 49 v. Adams, 69 Ark. 159, 61 S. W. 793; Smith v. School Dist. No. 57, 1 Pen. (Del.) 401, 42 Atl. 368; Aikman v. School Dist. No. 16, 27 Kan. 129, Hazen v. Lerche, 47 Mich. 626; Cowley v. School Dist. No. 3, 130 Mich. 634, 90 N. W. 680; Thomas-Kane & Co. v. School Dist. of Calhoun, 48 Mo. App. 408; Blodgett v. Seals, 78 Miss. 522, 29 So. 852; People v. Peters, 4 Neb. 254; State v. School Dist. No. 49, 22 Neb. 48, 33 N. W. 480; Markey v. School Dist. No. 18, 58 Neb. 479, 78 N. W. 932; Whitford v. Scott, 14 How. Pr. (N. Y.) 302; State v. Treasurer of Liberty Tp., 22 Ohio St. 144; Fine v. Stuart (Tenn. Ch. App.) 48 S. W. 371; Dolan v. Joint School Dist. No. 13, 80 Wis. 155; Manthey v. School Dist. No. 6, 106 Wis. 340, 82 N. W. 132. But see Creager v. School

board,[136] and special meetings upon proper notice of their purpose being given that may be required for the proper transaction of business of the district.[137] The annual meeting of voters has the power to select officers,[138] to adjourn from time to time,[139] to elect by ballot or otherwise the officers of the district or the board

Dist. No. 9, 62 Mich. 101, 28 N. W. 794; In re Light, 21 Misc. 737, 49 N. Y. Supp. 345.

[136] Hodgkin v. Fry, 33 Ark. 716; Bartlett v. Kinsley, 15 Conn. 327; Township Board of Education v. Carolan, 182 Ill. 119, 55 N. E. 58, reversing 81 Ill. App. 359; McShane v. Independent Dist. of Pleasant Grove, 76 Iowa, 333, 41 N. W. 33. See Wakefield v. Patterson, 25 Kan. 709, as to effect upon legality of proceedings when place of meeting was changed without notice. Fletcher v. Inhabitants of Lincolnville, 20 Me. 439; School Dist. No. 5 v. Lord, 44 Me. 374; Kingsbury v. Centre School Dist., 53 Mass. (12 Metc.) 99.

McLain v. Maricle, 60 Neb. 353, 83 N. W. 85. Construing Neb. Com. St. 1899, c. 79, § 4, subd. 2, relative to qualification of voters at school district meeting. Holbrook v. Faulkner, 55 N. H. 311; Harris v. Burr, 32 Or. 348, 52 Pac. 17, 39 L. R. A. 768. Women are entitled to vote at school meetings for school directors. State v. Hingley, 32 Or. 440, 52 Pac. 89; Zulich v. Bowman, 42 Pa. 83; Colvin v. Beaver, 94 Pa. 388; In re Construction of School Law, c. 9, § 7, 2 S. D. 71, 48 N. W. 812, construing S. D. Act March 9, 1891, c. 56 subc. 9, § 7, relative to municipal elections for boards of education. Woodcock v. Bolster, 35 Vt. 632; Blaisdell v. School Dist. No. 2, 72 Vt. 63, 47 Atl. 173; School Dist. No. 1 v. Town of Bridport, 63 Vt. 383, 22 Atl. 570. Construing right of widow to vote under Rev. Laws Vt. § 2644. Scott v. School Dist. No. 9, 67 Vt. 150, 31 Atl. 145, 27 L. R. A. 588; School Dist. No. 13 v. Smith, 67 Vt. 566, 32 Atl. 484; Luzader v. Sargeant, 4 Wash. 299, 30 Pac. 142.

[137] South School Dist. v. Blakeslee, 13 Conn. 227; Wright v. North School Dist., 53 Conn. 576; Bramwell v. Guheen, 3 Idaho, 347, 29 Pac. 110; Merritt v. Farris, 22 Ill. 303; People v. Sisson, 98 Ill. 335; Starbird v. Inhabitants of School Dist. No. 7, 51 Me. 101; Central School Supply House v. School Dist. No. 3, 99 Mich. 402, 58 N. W. 324; Peters v. Warren Tp., 98 Mich. 54, 56 N. W. 1051; Sturm v. School Dist. No. 70, 45 Minn. 88, 47 N. W. 462; State v. Lockett, 54 Mo. App. 202; State v. Burford, 82 Mo. App. 343; Richardson v. McReynolds, 114 Mo. 641, 21 S. W. 901; State v. Cole, 51 N. J. Law, 277, 18 Atl. 52; Kaighn v. Browning, 28 N. J. Law, (4 Dutch.) 556; Bogert v. School Dist. No. 30, 43 N. J. Law, 358; Howland v. School Dist. No. 3, 15 R. I. 184, 2 Atl. 549, 8 Atl. 337; Luzader v. Sargeant, 4 Wash. 299, 30 Pac. 142.

[138] Mitchell v. Brown, 18 N. H. 315. It is not necessary to elect the moderator of the school district meeting by ballot.

[139] Maher v. State, 32 Neb. 354, 49 N. W. 436, 441. But see State v. Cones, 15 Neb. 444.

of school trustees [140] and to exercise the extraordinary powers of a 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.[141] The regularity of a school district meeting is not subject usually to collateral at-

[140] School Dist. v. Bennett, 52 Ark. 511, 13 S. W. 132; People v. Keechler, 194 Ill. 235, 62 N. E. 525; State v. Ogan, 159 Ind. 119, 63 N. E. 227. The mayor and common council have the right to elect school trustees under Burns' Rev. St. 1901, § 5915. State v. Vreeland, 79 Iowa, 466, 44 N. W. 709; Elliott v. Burke, 24 Ky. L. R. 292, 68 S. W. 445. Members of the board of education of a city of the 4th class may be elected by vote taken by vive voce. State v. Stratte, 83 Minn. 194, 86 N. W. 20. A newly elected clerk must file within ten days after his election and notice thereof. Beatty v. Walker, 1 Okl. 178, 32 Pac. 53; Stewart v. Purvis, 20 Tex. Civ. App. 647, 50 S. W. 204; Chandler v. Bradish, 23 Vt. 416. School district officers elected at a district meeting hold their office until their successors are duly elected and qualified. See, also, the case of Rowel v. School Dist., 59 Vt. 658, 10 Atl. 754.

State v. Perkins, 13 Wis. 411. See, also, Jay v. Board of Education of Emporia, 46 Kan. 525, 26 Pac. 1025. In respect to right of territory adjoining a city, to elect members of a board of education of the city to represent that territory.

[141] People v. Caruthers School Dist., 102 Cal. 184, 36 Pac. 396; Township Board of Education v. Carolan, 182 Ill. 119, 55 N. E. 58. An unauthorized purchase of a site for a high school may be subsequently ratified by a vote of the electors of the school district.

Cooper v. Nelson, 38 Iowa, 440; Locker v. Keiler, 110 Iowa, 707, 80 N. W. 433; Lander v. School Dist., 33 Me. 239; Davis v. School Dist. No. 2, 24 Me. 349. A district is limited in its expenditures to the amount voted at the district meeting. Norton v. Perry, 65 Me. 183; Jay v. School District No. 1, 24 Mont. 219, 61 Pac. 250; State v. Hutchins, 33 Neb. 335, 50 N. W. 165; Fullerton v. School District of Lincoln, 41 Neb. 593, 59 N. W. 896; Wilson v. School District No. 4, 32 N. H. 118; Weare v. School Dist., 44 N. H. 189; Middlesex Co. v. School Dist. No. 37, 49 N. J. Law, 607, 10 Atl. 191. Under the N. J. law the presence of a majority of the taxable residents of a district at a meeting is necessary to vote money for the erection of a school house. See, also, as holding the same Point Pleasant Land Co. v. School Dist. No. 16, 47 N. J. Law, 235.

State v. Clark, 52 N. J. Law, 291, 19 Atl. 462; School Dist. No. 4 v. Lewis, 35 N. J. Law, 377; Crandall v. School Dist. No. 38. 51 N. J. Law, 138, 16 Atl. 194. A majority of the votes of taxable residents present at a school meeting called to authorize the building of the school

tack.[142] Upon the formation of a new school district, it is often provided by statute that the voters shall meet within a designated time and organize by the election of officers and the transaction of other necessary business. Such a provision has been held mandatory.[143]

Records. The records of school districts and school boards are usually regarded, when duly certified by the officer having custody, as prima facie evidence of the facts therein stated,[144] and they are also subject to the inspection, ordinarily, of any voter of the district. They may be altered by the proper officers, even after a change in the personnel, to show true conditions and facts,[145] and a failure to properly keep them does not ordinarily render invalid the proceedings for which they were intended to be a record.[146]

§ 1080. Powers of school directors and officers other than of common school districts.

In many states the law provides for the organization of independent, graded, normal and other schools of a higher grade than those maintained by common school districts and in which the instruction received is broader in its scope. To the voters of these districts or the board of trustees in which the management may be vested is given by law other rights and powers than those enumerated in the previous section and which are rendered neces-

house is sufficient authority to act; a majority of the taxable residents of the district need not be present. Edinburg American Land & Mortg. Co. v. City of Mitchell, 1 S. D. 593, 48 N. W. 131; Harrington v. School Dist. No. 6, 30 Vt. 155. The prudential committee of a school district have no authority without vote of the district to employ counsel to defend a suit against an officer of a district in which the latter may be interested. Holmes & Bull Furniture Co. v. Hedges, 13 Wash. 696, 43 Pac. 944. See, also, cases cited under notes 116–119, of preceding section.

142 Woods v. Inhabitants of Bristol, 84 Me. 358, 24 Atl. 865; In re Purdy, 56 App. Div. 544, 67 N. Y. Supp. 642.

143 School Dist. of Agency v. Wallace, 75 Mo. App. 317.

144 Hadley v. Chamberlin, 11 Vt. 618. But an amendment of school records cannot be made on the trial of a cause for the purpose of meeting a particular decision of the court. But see Saville v. School Dist. No. 27, 22 Kan. 529.

145 Board of Education of Glencoe v. Trustees of Schools, 174 Ill. 510, 51 N. E. 656.

146 Higgins v. Reed, 8 Iowa, 298.

sary by the grade or character of the school and its instruction given[147] or existing conditions which have rendered necessary the establishment of such a school or the organization of such a district.[148] In common with the grant of powers to all subordinate and public quasi corporations, the rule of law applies of strict construction and a consequent limitation of the rights which may be exercised by them or the duties which they can legally perform.[149] The powers of an official board having in charge city, graded, normal or other schools of a higher class, are commonly sufficient to authorize the erection of school houses and the making of permanent improvements without a reference to the voters of the district and restricted only by constitutional or statutory provisions in respect to the incurring of indebtedness.[150]

§ 1081. State universities.

A state university represents in a scheme or plan of public education in a state an institution wherein an education of the broadest and most liberal character can be obtained. It is usually made a separate quasi corporation with the right to use a common seal and altar the same at pleasure with the control

[147] Chico High School Board v. Butte County Sup'rs, 118 Cal. 115, 50 Pac. 275; Board of Education v. Cumming, 103 Ga. 641, 29 S. E. 488; Spring v. Wright, 63 Ill. 90; Galesburg Educational Board v. Arnold, 112 Ill. 11; Campbell v. City of Indiapapolis, 155 Ind. 186, 57 N. E. 920; Bellmeyer v. Independent Dist. of Marshalltown, 44 Iowa, 564; Posey v. Trustees of Corydon Public School, 19 Ky. L. R. 466, 38 S. W. 1063; Goldsboro Graded School v. Broadhurst, 109 N. C. 228, 13 S. E. 781.

[148] Miller v. Dailey, 136 Cal. 212, 68 Pac. 1029. A joint board of normal school trustees have no right to arbitrate the question of an individual student's right to be admitted to the normal school. Hanover School Tp. v. Grant, 125 Ind. 557, 25 N. E. 872; Fatout v. Indianapolis School Com'rs, 102 Ind. 223; Pingree v. Board of Education of Detroit, 99 Mich. 404, 58 N. W. 333. An act making the mayor of Detroit a member ex officio of the board of education is not unconstitutional. Rose v. Hufty, 63 N. J. Law, 195, 42 Atl. 836; State v. Fowle, 103 Wis. 388, 79 N. W. 419.

[149] Peers v. Board of Education, 72 Ill. 598; Adams v. State, 82 Ill. 132; Stevenson v. School Directors, 87 Ill. 255; Adams v. Brenan, 177 Ill. 194, 52 N. E. 314, 42 L. R. A. 718. But see Burnham v. Police Jury of Claiborne Parish, 107 La. 513, 32 So. 87.

[150] Fatout v. Indianapolis School Com'rs, 102 Ind. 223; Times Pub. Co. v. White, 23 R. I. 334, 50 Atl. 383.

vested in a board commonly called a board of regents. To this board, from existing conditions, as will readily be seen, is necessarily granted the legal right to exercise broad powers.[151] The qualifications of individual members, their term of office, and the manner of their appointment or election, are designated by law and the manner of filling vacancies specified. Upon them is imposed the general supervision and control of the university which includes the election or appointment of professors, teachers, officers and employes, the determination of their salaries and terms of office, and the moral and educational qualifications of applicants for admission. They also may have the right to prescribe the text books and courses of study, and in their discretion confer such degrees and diplomas as are customary in colleges or universities of similar character.[152] They may be also charged with the duty of making special surveys and reports concerning the geological or natural history of the state or economic conditions arising therein. As a rule in the selection of professors, instructors, officers, or assistants in the exercise, management and government of the university, no partiality or preference is allowed on account of political or religious belief or opinion, and sectarian teachings are usually forbidden.

§ 1082. School property.

Property held or acquired for school purposes consists largely, if not entirely, of lands and invested funds; school sites and school houses;[153] and furniture, libraries and supplies.[154] The loss of school property from unwise investment or misappropriation by officials charged with its care seems to have been more carefully guarded against than other public property and the laws protecting school funds and school property are more strictly enforced than legislation of any other character.[155] As stated in a previous section,[156] the Federal government has liberally endowed the cause of public education through the United States by

[151] But see Callvert v. Windsor, 26 Wash. 368, 67 Pac. 91.

[152] See Minn. Rev. Laws 1905, §§ 1470 et seq.

[153] See §§ 1069, 1071 and 1078 ante, and §§ 1083 and 1084, post.

[154] See §§ 1071 and 1078, ante, and § 1085, post.

[155] Hurt v. Kelly, 43 Mo. 238; Mann v. Best, 62 Mo. 491; Standifer v. Wilson, 93 Tex. 232, 54 S. W. 898.

[156] See § 1067, ante.

its gifts of public lands. Proceeds from sales of these form the basis of public school funds in different states. The title to school lands is vested ordinarily in the state [157] and detailed statutory provisions exist prescribing the manner in which school lands can be disposed of [158] with the time [159] and terms of lease or sale. [160] Statutes relating to these questions are strictly construed and a sale or lease to be legal must be in the manner provided.[161] Boards of investment are commonly established by state legislatures for

[157] Long v. Brown, 4 Ala. 622; Widner v. State, 49 Ark. 172, 4 S. W. 657; School Dist. v. Driver, 50 Ark. 346, 7 S. W. 387; Clark v. State, 109 Ind. 388, 10 N. E. 125; Helphrey v. Ross, 19 Iowa, 40; Baker v. Newland, 25 Kan. 25; Wright v. Lauderdale County Sup'rs, 71 Miss. 800, 15 So. 116; Morton v. Grenada Academies, 16 Miss. (8 Smedes & M.) 773. School lands are trust property for the benefit of the whole township and the legislature has no power to divert them from that purpose.

Hester v. Crisler, 36 Miss. 681; State v. Crumb, 157 Mo. 545, 57 S. W. 1030. The state board of education is authorized in the name of the state to bring an action to set aside an illegal patent to school lands. But see Moore v. School Trustees, 19 Ill. 83. The title is held by the state in trust for common school purposes and trustees of the schools of the township may sue in equity in respect to matters affecting the school lands within their township.

Kissell v. St. Louis Public Schools, 16 Mo. 553; Patter[illegible] Fagan, 38 Mo. 70; Lowry v. Francis, 10 Tenn. (2 Yerg.) 534; Milam County v. Robertson, 33 Tex. 366. Counties of Texas are only trustees of the school lands for the use of the people. Galveston County v. Tankersley, 39 Tex. 651; Worley v. State, 48 Tex. 1.

[158] Hogan v. Winslow, 45 Cal. 588; Batchelder v. Willey, 64 Cal. 44, 30 Pac. 573; Seeger v. Mueller, 133 Ill. 86; Barker v. Torrey, 69 Tex. 74, 21 Miss. (13 Smedes & M.) 31; Maupin v. Parker, 3 Mo. 310; Corpe v. Brooks, 8 Or. 222. The Oregon board of commissioners for the sale of school lands are a department of the state government coordinate with the courts and its decisions they cannot review. McInnes v. Wallace (Tex. Civ. App.) 38 S. W. 816; Harrington v. Smith, 28 Wis. 43.

[159] Garland v. Jackson, 7 La. Ann. 68 Barker v. Torrey, 69 Tex. 7, 4 S. W. 646; State v. School Land Com'rs, 9 Wis. 200.

[160] Board of Education of San Francisco v. Grant, 118 Cal. 39, 50 Pac. 5; Kidder v. Trustees of Schools, 10 Ill. (5 Gilman) 191; Stout v. Hyatt, 13 Kan. 233; State v. Emmert, 19 Kan. 546; Bratton v. Cross, 22 Kan. 673. Only a resident can purchase school lands of the state to the exclusion of other parties. Telle v. School Board, 44 La. Ann. 365, 10 So. 801; State v. Kendall, 15 Neb. 242.

[161] People v. Roche, 124 Ill. 9, 14 N. E. 701; Lee v. Payne, 4 Mich. 106; Wright v. Burnham, 31 Minn. 285. Conditional sale of school lands

the investment of funds for school purposes derived from a sale of public school lands or from special taxes imposed for the benefit of the common school fund.[162] These boards are limited in the investments they can legally make, and, in the purchase of bonds or other securities[163] or in the making of loans,[164] they are restricted to those of the character designated. Loans or investments made by them must be made in the manner provided[165] and a failure to observe the strict requirements of the law ordinarily subjects one to a personal and civil responsibility as well as a liability under some provision of a criminal code.[166]

§ 1083. School sites and buildings.

The title to school sites and buildings is commonly vested in the local school district or in its board of directors or managers as

unauthorized and void. Bolivar County v. Coleman, 71 Miss. 832, 15 So. 107; Atkinson's Lessee v. Dailey, 2 Ohio, 212. A lease should be properly acknowledged. Strathern v. Gilmore, 184 Pa. 265, 39 Atl. 83; Pickens v. Reed, 31 Tenn. (1 Swan) 80; State v. Janssen, 2 Wis. 423; McCabe v. Mazzuchelli, 13 Wis. 478. But see Forsdick v. Tallahatchie County, 76 Miss. 622, 24 So. 962; State v. School & University Land Com'rs, 14 Wis. 345.

[162] Montgomery County v. Auchley, 103 Mo. 492, 15 S. W. 626. Their powers are limited. See Benton County v. Morgan, 163 Mo. 661, 64 S. W. 119, as to sale of land by sheriff school-fund mortgage. Kubli v. Martin, 5 Or. 436.

[163] Trustees of Schools v. Petefish, 181 Ill. 255, 54 N. E. 920; In re School Fund, 15 Neb. 684, 50 N. W. 272.

[164] Bush v. Shipman, 5 Ill. (4 Scam.) 186. The legislature has the power to direct in what manner school funds shall be loaned, upon what security, and at what rate of interest. Lopp v. Woodward, 1 Ind. App. 105, 27 N. E. 575; Carter v. Sherman, 63 Iowa, 689; Knox County v. Goggin, 105 Mo. 182, 16 S. W. 684. Unauthorized payment of school-fund mortgage to deputy county clerk who failed to pay the amount into the treasury does not release the mortgage.

[165] Trustees of School v. Southard, 31 Ill. App. 359; Ware v. State, 74 Ind. 181. This case, however, is modified in State v. Levi, 99 Ind. 77, which holds that where an official borrows and loans school moneys and gives a mortgage to secure the loan, the mortgage is voidable only at the option of those having supervisory control of the fund. See, also, the later case of Stockwell v. State, 101 Ind. 1.

Emmet County v. Skinner, 48 Iowa, 244. A board of supervisors may provide that the school fund shall only be loaned to residents of the county. But see Edwards v. Trustees of Schools, 30 Ill. App. 528; Grant v. Huston, 105 Mo. 97, 16 S. W. 680; Mann v. Best, 62 Mo. 491.

[166] Lawrey v. Sterling, 41 Or. 518,

trustees.[167] School officers are agents of a public quasi corporation and the use of this phrase leads to an application of the principles of the limited power of agency and a strict accountability. The qualified voters of the district in the manner provided by law alone possess the power to authorize the acquirement by purchase or otherwise of school property of this class together with its disposition whether by sale or otherwise, the mortgaging of that property or any portion to secure the payment of an obligation or the issue of bonds.[168] In some instances this power of a school district is exercised in conjunction with either the state or county superintendent of public instruction or official body exercising the same functions. The rule may also differ in cities or in graded or high school districts where by law the board of education or controlling body may be given the right to acquire or dispose of school property without the special authorization of the voters of the district.[169]

§ 1084. Erection and management.

In the school board as may be authorized by law directly or indirectly through the qualified voters of a district is vested the right to supervise the erection, repair and use of school build-

69 Pac. 460. A state land board authorized to loan the school fund may assign a mortgage given to secure a loan, although this power is not expressly conferred by statute. But see Pennoyer v. Willis (Or.) 32 Pac. 57.

[167] Morris v. School Dist. No. 86, 63 Ark. 149, 37 S. W. 569. A school district may sue for trespass on lands dedicated for school purposes. Board of Education v. Fowler, 19 Cal. 11; Trustees of Schools v. Petefish, 181 Ill. 255, 54 N. E. 920; Curtis v. Board of Education, 43 Kan. 138, 23 Pac. 98; Luckett v. Buckman, 8 Ky. L. R. 255, 1 S. W. 391; Telle v. School Board, 44 La. Ann. 365, 10 So. 801; State v. Benton, 29 Neb. 460, 45 N. W. 794. See, also, Board of Education of Monroe Tp. v. Board of Education of Dell Roy, 46 Ohio St. 595, 22 N. E. 641.

[168] Anderson v. Independent School Dist. of Angus, 78 Fed. 750; Pace v. Jefferson County Com'rs, 20 Ill. 644. To constitute a building a public school house it must be under the immediate control of the school directors. Salisbury v. School Dist. of Highland Tp., 101 Iowa, 556, 70 N. W. 706. A school site may be measured so as to include the area prescribed by law exclusive of a road. George v. Inhabitants of School Dist. in Mendon, 47 Mass. (6 Metc.) 497. See, also, Cousens v. Inhabitants of School Dist., 67 Mo. 280.

[169] Erwin v. St. Joseph's School Board, 2 McCrary, 608, 12 Fed. 680. But enlarged powers do not ordi-

ings.[170] The rule stated in the last section in respect to the varying authority of boards of directors in districts of different grades also applies. The officers of a common school district must derive their authority from a vote of the district and have no power in themselves to erect school buildings or make permanent and extensive repairs.[171] On the other hand the officials of districts other than common school are usually granted by statute ample powers to construct and repair or lease school buildings within their jurisdiction.[172] The same difference in authority applies to a large extent, in the management and control of school buildings;[173] a determination of the location[174] or a change in the location of a

narily authorize a board to create a debt for building a school house and issue bonds to pay the same. Roberts v. Louisville School Board, 16 Ky. L. R. 181, 26 S. W. 814.

[170] Shires v. Irwin, 87 Ill. App. 111. An election to build a new school house cannot be made void by the neglect or omission of election officers to make the proper returns. Braden v. McNutt, 114 Ind. 214, 16 N. E. 170; Carson v. State, 27 Ind. 465; Carpenter v. Independent Dist., 95 Iowa, 300; Rodgers v. Colfax Independent School Dist., 100 Iowa, 317; McCullough v. School Directors of 4th Ward, 11 Pa. 476; In re Walker, 179 Pa. 24, 36 Atl. 148; Swadley v. Haynes (Tenn. Ch. App.) 41 S. W. 1066.

[171] Sheldon v. Centre School Dist., 25 Conn. 224. The discretionary power given to inhabitants of school districts in respect to the erection of school houses will not be interfered with except in cases where it has been manifestly abused. Beverly v. Sabin, 20 Ill. 357; Board of Education v. Roehr, 23 Ill. App. 629; Ziesing v. Matthiessen, 79 Ill. App. 560; Township Board of Education v. Carolan, 182 Ill. 119, 55 N. E. 58, reversing 81 Ill. App. 359; Soper v. Inhabitants of School Dist. No. 9, 28 Me. 193; Morse v. School Dist. No. 7, 85 Mass. (3 Allen) 307; State v. City of St. Anthony, 10 Minn. 433 (Gil. 345); School Dist. No. 2 v. Stough, 4 Neb. 357; Maher v. State, 32 Neb. 354, 49 N. W. 436, 441; Mizera v. Auten, 45 Neb. 239, 63 N. W. 399; School Dist. No. 35 v. Randolph, 57 Neb. 546, 77 N. W. 1073; Bump v. Smith, 11 N. H. 48; Newell v. Town of Hancock, 67 N. H. 244, 35 Atl. 253; State v. School Dist. No. 10, 52 N. J. Law, 104, 18 Atl. 683; Capital Bank v. School Dist. No. 53, 1 N. D. 479, 48 N. W. 363; Board of Education v. Mills, 38 Ohio St. 383; Nevil v. Clifford, 63 Wis. 435. But see Blair v. Boggs Tp. School Dist., 31 Pa. 274. See, also, Martin v. Yolo County Sup'rs, 103 Cal. 668, 37 Pac. 758; Macklin v. Common School Dist. 88 Ky. 592, 11 S. W. 657.

[172] See § 1080, ante.

[173] Kreatz v. St. Cloud School Dist., 82 Minn. 516, 85 N. W. 518.

[174] Farmers' & Merchants' Nat. Bank v. School Dist. No. 53, 6 Dak. 255, 42 N. W. 767; Merritt v. Farris, 22 Ill. 303; School Directors v. Wright, 43 Ill. App. 270; Leavitt v. Eastman, 77 Me. 117; Ayers v.

building from one place to another part of the district.[175] In common school districts these questions must be determined by a vote of the district,[176] while in independent, graded or municipal school districts the board of trustees have the legal authority to act upon these matters without other authority than that given by statute. Where a change of location or the selection of a site for a school building is made dependent upon the vote of the district, one made in any other manner will not be binding.[177] The approval of a county or of a state superintendent of public instruction or some official body performing the same duties may be required by law and, therefore, necessary to a legal selection of a site for a school house.[178] School buildings are constructed for public edu-

School Dist. of Cornish, 67 N. H. 169, 29 Atl. 416; McCrea v. School Dist. of Pine Tp., 145 Pa. 550; Bean v. Prudential Committee, 38 Vt. 177; Egaard v. Dahlke, 109 Wis. 366, 85 N. W. 369. But see State v. Watson (Tenn. Ch. App.) 39 S. W. 536; Roth v. Marshall, 158 Pa. 272, 27 Atl. 945. The discretion of a board of school directors in respect to the location of a school house is not subject to review by a court of equity.

[175] School Directors v. People, 90 Ill. App. 670; Kiehna v. Mansker, 178 Ill. 15, 52 N. E. 1047; Day v. Hulpieu, 8 Kan. App. 742, 54 Pac. 926; Moore v. State, 9 Kan. App. 489, 58 Pac. 1004; State v. Marshall, 13 Mont. 136, 32 Pac. 648; McLain v. Maricle, 60 Neb. 353, 83 N. W. 85; Holbrook v. Faulkner, 55 N. H. 311; Graves v. Jasper School Tp., 2 S. D. 414, 50 N. W. 904. But see Ruble v. School Dist. No. 5, 42 Ill. App. 483.

[176] Stadtler v. School Dist. No. 40, 61 Minn. 259, 63 N. W. 638; Webb v. School Dist. No. 3, 83 Minn. 111, 85 N. W. 932; Seibert v. Botts, 57 Mo. 430; Wilber v. Woolley, 44 Neb. 739, 62 N. W. 1095; Zimmerman v. State, 60 Neb. 633, 83 N. W. 919; Farnum's Petition, 51 N. H. 376. But see Vance v. Wilton Dist. Tp., 23 Iowa, 408; Carpenter v. Independent Dist. No. 5, 95 Iowa, 300, 63 N. W. 708. See, also, cases cited in two preceding notes.

[177] Sligh v. Bowers, 62 S. C. 409, 40 S. E. 885.

[178] State v. Custer, 11 Ind. 210. Mandamus will lie to compel trustees to erect a school house according to the superintendent's decision. State v. Wilson, 149 Ind. 253, 48 N. E. 1030; Kessler v. State, 146 Ind. 221, 45 N. E. 102; Henricks v. State, 151 Ind. 454, 50 N. E. 559, 51 N. E. 933; Knight v. Woods, 129 Ind. 101, 28 N. E. 306; Carnahan v. State, 155 Ind. 156, 57 N. E. 717; Vance v. Wilton Dist. Tp., 23 Iowa, 408; Newby v. Free, 72 Iowa, 379, 34 N. W. 168; Independent Dist. of Center v. Gookin, 72 Iowa, 387, 34 N. W. 174; Davis v. Humphrey, 21 Ky. L. R. 660, 52 S. W. 946; Adams v. Slate, 65 N. H. 188, 18 Atl. 321; Leighton v. Ossipee School Dist., 66 N. H. 548, 31 Atl. 899; Moss v Board of Education, 58 Ohio St. 354, 50 N. E. 921; Cottrell's Appeal, 10 R. I. 615. See §§ 1076 and 1077, ante.

cation and ordinarily cannot be occupied for other purposes.[179] Their use for the holding of political or religious meetings, unless specially authorized, is unwarranted and illegal.[180] A different rule, however, ordinarily obtains when a school house is used for school society meetings, lectures or other purposes of an educational nature.[181] A statutory provision commonly found is one which prohibits the disturbance of any lawful school meeting and a liberal construction is usually given such a provision.[182]

§ 1085. School furniture; libraries and supplies.

To a varying extent as determined by the character of a school district whether common, graded, normal or that of a municipality, is given to the school board of trustees or directors, the power to acquire the necessary furniture for the proper equipment of school houses.[183] This rule also includes the purchase and maintenance of school libraries[184] and the purchase of all necessary supplies not included within the items given above.[185] The

[179] Board of Education of Twiggs County v. McRee, 88 Ga. 214, 14 S. E. 200. Public school houses cannot be used for carrying on private school. Weir v Day, 35 Ohio St. 143. Lease of a public school for a private school may be restrained at the suit of a resident taxpayer of the district. Russell v. Dodds, 37 Vt. 497. Lease of school house during vacation for private school held good. School Dist. No. 8 v. Arnold, 21 Wis. 657.

[180] Boyd v. Mitchell, 69 Ark. 202, 62 S. W. 61; Scofield v. Eighth School Dist., 27 Conn. 499; Nichols v. School Directors, 93 Ill. 61; Townsend v. Hagan, 35 Iowa, 194; Davis v. Boget, 50 Iowa, 11; Eckhardt v. Darby, 118 Mich. 199, 76 N. W. 761; Dorton v. Hearn, 67 Mo. 301. But see Millard v. Board of Education, 121 Ill. 297, 10 N. E. 669; Swadley v. Haynes (Tenn. Ch. App.) 41 S. W. 1066.

[181] Sheldon v. Centre School Dist., 25 Conn. 224; Harmony Tp. v. Osborne, 9 Ind. 458. But see Bender v. Streabich, 182 Pa. 251, 37 Atl. 853.

[182] State v. Gager, 26 Conn. 607. A singing school included within an act prohibiting the disturbance of any district school or any public, private or select school while the same is in session.

[183] Hamtramck Tp. v. Holihan, 46 Mich. 127; Stephenson v. Union Seating Co., 26 Tex. Civ. App. 16, 62 S. W. 128. But see State v. Sherman, 90 Ind. 123; Currie v. School Dist. No. 26, 35 Minn. 163, 27 N. W. 922.

[184] See, also, § 1071, ante.

[185] Johnson v. School Corp. of Cedar, 117 Iowa, 319, 90 N. W. 713; School Dist. No. 29 v. Perkins, 21 Kan. 536. A stereoscope and stereoscopic views are not "necessary appendages for the school house" within the meaning of Kan. Gen. St. p. 925, § 46. School Dist. No.

officials of common school districts are restricted in respect to the purchase of any of the articles named.[186] Their powers are strictly limited and for expenditures in excess of a certain amount or for supplies not an absolute necessity,[187] they are required to obtain authority from the voters of the district. Officials of schools of a higher grade or of municipal corporations proper are commonly granted larger powers.[188]

Limitation on indebtedness incurred. Whatever the character, however, of the school district, it or its officials may be limited in their purchase of property of any kind by statutory or constitutional provisions limiting the expenditure of public moneys, the rate of taxation or the incurring of indebtedness.[189]

§ 1086. Contracts.

The subject of municipal contracts has been fully considered in previous sections to which reference is made.[190] The principles

17 v. Swayze, 29 Kan. 211. Purchase of mathematical chart authorized. Honaker v. Board of Education of Pocatalico Dist., 42 W. Va. 170, 24 S. E. 544, 32 L. R. A. 413.

[186] Andrews v. School Dist. No. 4, 37 Minn. 96, 33 N. W. 217; Johnson v. School Dist. No. 1, 67 Mo. 319; Board of Education v. Andrews, 51 Ohio St. 199, 37 N. E. 260.

[187] Litten v. Wright School Tp., 1 Ind. App. 92, 27 N. E. 329.

[188] City of Baltimore v. Weatherby, 52 Md. 442.

[189] Husbands v. Talley, 3 Pen. (Del.) 88, 47 Atl. 1009; Williams v. Town of Albion, 58 Ind. 329; Roseboom v. Jefferson School Tp., 122 Ind. 377, 23 N. E. 796; Austin v. District Tp. of Colony, 51 Iowa, 102, 49 N. W. 1051; Macklin v. Common School Dist. No. 9, 88 Ky. 592, 11 S. W. 657; Greenbanks v. Boutwell, 43 Vt. 207; Davis v. Board of Education of Ft. Spring Dist., 38 W. Va. 382, 18 S. E. 588. See, also, §§ 140 et seq., and 169 et seq., ante.

[190] Sparta School Tp. v. Mendell, 138 Ind. 188, 37 N. E. 604. A contract made by the predecessor of a school trustee cannot be ignored by him because of mere formal or technical defects. Grady v. Pruitt, 23 Ky. L. R. 506, 63 S. W. 283. The presumption exists that a contract is the contract of the school district and not the personal obligation of the trustees. Waldron v. Lee, 22 Mass. (5 Pick.) 323. The limits of a school district cannot be changed so as to impair a contract obligation. Farrell v. School Dist. No. 2, 98 Mich. 43, 56 N. W. 1053. A legal contract must be carried out by the successor to the official making it. See Sidney School Furniture Co. v. Warsaw Tp. School Dist., 158 Pa. 35, 27 Atl. 856. Rescission of contract by school board. See Western Pub. House v. Murdick, 4 S. D. 207, 56 N. W. 120, 21 L. R. A. 671 for contract held to be a personal one of the school board. Carper v. Cook, 39 W. Va. 346, 19 S. E. 379. See § 246 et seq., ante.

as there stated apply equally to the particular public corporation now under consideration. The performance of a contract necessarily involves an expenditure of public moneys and the first principle to be observed is that the purpose for which the contract is made must be one for which public funds are authorized to be disbursed.[191] The contract must also be one that the corporation is capable of executing[192] and authorized in the manner provided by law, either by vote of the district[193] or action of officials upon whom this duty may be imposed.[194] Contracts must be executed in the manner directed by statute[195] and by those officers whose

[191] See § 410 et seq, ante.

[192] Fluty v. School Dist., 49 Ark. 94, 4 S. W. 287; Morgan v. Board of Education of San Francisco, 136 Cal. 245, 68 Pac. 703. The burden in on a board of education to allege and prove the defense of an ultra vires contract when the contract is sought to be avoided on that ground. Martin v. Jamison, 39 Ill. App. 248. Injunction will lie to prevent the carrying out of an illegal contract. McLaughlin v. Shelby Tp., 52 Ind. 114; Weitz v. Independent Dist. of Des Moines, Iowa 42 N. W. 577; Western Pub. House v. District Tp. of Rock, 84 Iowa 101, 50 N. W. 551; Grady v. Landram, 23 Ky. L. R. 506, 63 S. W. 284; B. T. Johnson Pub. Co. v. Mills, 79 Miss. 543, 31 So 101; Pomerene v. School Dist. No. 56, 56 Neb. 126, 76 N. W. 414; Brown v. School Dist. No. 6, 64 N. H. 303, 10 Atl. 119; Brown v. School Dist., 55 Vt. 43. A school committee may contract with one of their own number to board a teacher. McCaffery v. School Dist. No. 1, 74 Wis. 100, 42 N. W. 103. See §§ 1078, 1079 and 1083, ante.

[193] School Dist. No. 2 v. Stough, 4 Neb. 357; McGillivray v. Joint School Dist., 112 Wis. 354, 88 N. W. 310, 58 L. R. A. 100. An unauthorized act of a school board may be subsequently ratified by the district. See, also, § 663, ante.

[194] Van Dolsen v. Board of Education of New York, 29 App. Div. 501, 51 N. Y. Supp. 720; Roland v. Reading School Dist., 161 Pa. 102, 28 Atl. 995.

[195] Springfield Furniture Co. v. School Dist. No. 4, 67 Ark. 236, 54 S. W. 217; Jackson School Tp. v. Shera, 8 Ind. App. 330, 35 N. E. 842. Oral contract good when not required to be made in writing. American Ins. Co. v. Willow Dist. Tp., 55 Iowa, 606; Weir Furnace Co. v. Seymour Independent School Dist., 99 Iowa, 115; Broussard v. Verret, 43 La. Ann. 929, 9 So. 905. A verbal extension of a contract is void when the proceedings of a school board are required to be in writing. Globe Furniture Co. v. District 7, 51 Mo. App. 549; Page v. Township Board of Education, 59 Mo. 264. A verbal contract with a school board employing an attorney held valid. Terry v. Board of Education of St. Louis, 84 Mo. App. 21. Coward v. City of Bayonne, 67 N. J Law, 470, 51 Atl. 490. Where the law does not require the board of education to advertise for doing work, this of course is not necessary. See, also, as holding the same, Kraft v. Board of Education

official duties include the performance of this particular act.[196] The subject of ratification of an unauthorized contract has already been considered[197] and also that of an implied liability arising under an unauthorized contract when the articles supplied have been used by the school district or work performed was properly done.[198]

§ 1087. Teachers.

Teachers have the general control and government of a school. Different grades or classes are ordinarily established by law and

of Weehawen Tp., 67 N. J. Law, 512, 51 Atl. 483. Cascade v. Lewis School Dist., 43 Pa. 318; Sidney School Furniture Co. v. Warsaw Tp. School Dist., 158 Pa. 35, 27 Atl. 856. Contract held binding. Pennsylvania Lightning Rod Co. v. Cass Board of Education, 20 W. Va. 360. See, also, Kepm v. School Dist. of Sedalia, 84 Mo. App. 680. School Directors v. McBride, 22 Pa. 215; Burkhardt v. Georgia School Tp. 9 S. D. 315.

[196] Dubuque Female College v. Dubuque Dist. Tp., 13 Iowa, 555; Conklin v. School Dist. No 37, 22 Kan, 521; Jordan v. School Dist. No. 3, 38 Me. 164; State v. Tiedemann 69 Mo. 515; School Dist. No. 25 v. Cowlee, 9 Neb. 53. The acts of de facto officers will bind the district. O'Neil v. Battie, 61 Hun, 622, 15 N. Y. Supp. 818. Contract made by de facto officer binding. But see White v. School Dist. of Archibald (Pa.) 8 Atl. 443. A de facto school board cannot make a valid contract.

[197] Stevenson v. Summit Dist. Tp. 35 Iowa, 462; Western Pub. House v. District Tp. of Rock, 84 Iowa, 101, 50 N. W. 551; Everts v. District Tp. of Rose Grove, 77 Iowa, 37, 41 N. W. 478; Sullivan v. School Dist. No. 39, 39 Kan. 347, 18 Pac. 287; School Dist. No. 39 v. Sullivan, 48 Kan. 624, 29 Pac. 1141; Markey v. School Dist. No. 18, 58 Neb. 479, 78 N. W. 932. A school district cannot ratify a void contract made by its officers. Trainer v. Wolfe, 140 Pa. 279, 21 Atl. 391; McGillivray v. Joint School Dist., 112 Wis. 354, 88 N. W. 310, 58 L. R. A. 100. See Chap. 5, subd. I, & VI, and § 664, ante.

[198] Clark School Tp. v. Home Ins. & Trust Co., 20 Ind. App. 543, 51 N. E. 107; Oppenheimer v. Jackson School Tp., 22 Ind. App. 521, 54 N. E. 145; White River School Tp. v. Dorrell, 26 Ind. App. 538, 59 N. E. 867; First Nat. Bank of Crawfordsville v. Union School Tp., 75 Ind. 361; Bellows v. West Fork Dist. Tp., 70 Iowa, 320; Kagy v. Independent Dist. of West Des Moines, 117 Iowa, 694, 89 N. W. 972; Johnson v. School Corp. of Cedar, 117 Iowa, 319, 90 N. W. 713; Union School Furniture Co. v. School Dist. No. 60, 50 Kan. 727, 32 Pac. 368, 20 L. R. A. 136; Norris v. School Dist. No. 1, 12 Me. 293; Kreatz v. St. Cloud School Dist., 79 Minn. 14, 81 N. W. 533, 47 L. R. A. 537; Rowel v. School Dist., 59 Vt. 658, 10 Atl. 754; Kimball v. School Dist. No. 8, 28 Vt. 8.

Canby v. Sleepy Creek Dist. Board of Education, 19 W. Va. 93.

the educational qualifications for each grade or class prescribed.[199] 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.[200] Certificates are ordinarily withheld from those not possessing a good moral character.[201] 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,[202] though notice to the teacher is usually held necessary[203] and if an official illegally revokes a teacher's certificate, a liability may arise to the person injured.[204] 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 schools.[205]

The acceptance of an order against an individual in payment of a claim against a school district releases it from any liability. Kane v. School Dist., 52 Wis. 502. See, also, §§ 664 et seq., ante.

[199] Mitchell v. Winnek, 117 Cal. 520, 49 Pac. 579; Kemble v. McPhaill, 128 Cal. 444, 60 Pac. 1092; School Com'rs of Washington County v. Wagaman, 84 Md. 151, 35 Atl. 85; People v. Howlett, 94 Mich. 165, 53 N. W. 1100; People v. Maxwell, 163 N. Y. 599, 57 N. E. 1120, affirming 50 App. Div. 538, 64 N. Y. Supp. 96. See, also, Id., 169 N. Y. 608, 62 N. E. 1099, affirming 65 App. Div. 265, 73 N. Y. Supp. 527.

[200] Keller v. Hewitt, 109 Cal. 146, 41 Pac. 871. A board of education has no right to refuse to issue a certificate after it has determined that an applicant is in every way competent to teach. School Dist. No. 25 v. Stone, 14 Colo. App. 211, 59 Pac. 885; Union School Dist. v. Sterricker, 86 Ill. 595. A certificate cannot be attacked collaterally.

Sutton v. School City of Montpelier, 28 Ind. App. 315, 62 N. E. 710; Doss v. Wiley, 72 Miss. 179, 16 So. 902; Cruse v. McQueen (Tex. Civ. App.) 25 S. W. 711; Kimball v. School Dist. No. 122, 23 Wash. 520, 63 Pac. 213. A certificate is not subject to collateral attack.

[201] Crosby v. School Dist. No. 9, 35 Vt. 623. A certificate, however, need not contain any statement in respect to the possession of good moral character. Ky. Pub. Acts 1889–90, c. 128, p. 8.

[202] School Dist. v. Maury, 53 Ark. 471, 14 S. W. 669; Lee v. Huff, 61 Ark. 494, 33 S. W. 846. An examiner is not liable for damages if he acted in good faith and without malice in revoking a school teacher's license though his decision was erroneous.

[203] Lee v. Huff, 61 Ark. 494, 33 S. W. 846; Scheibner v. Baer, 174 Pa. 482, 34 Atl. 193.

[204] Love v. Moore, 45 Ill. 12.

[205] Kuenster v. Board of Education, 31 Ill. App. 386; Brown v. Inhabitants of Chesterville, 63 Me. 241; Randol v. Sloan, 79 Mo. App. 238; Hill v. Swinney, 72 Miss. 248, 16 So. 497. Examination papers as

No discrimination is usually made on account of sex[206] though this may be taken into consideration by school boards in selecting a school principal or superintendent.[207]

§ 1088. 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.[208] They are ordinarily limited to persons holding certificates or licenses to teach or, in other words, legally qualified teachers,[209] though this disqualification may be subsequently removed and the contract ordinarily then becomes a valid one from its inception.[210] The pur-

presented and corrected when marked and license issued cannot afterwards be re-examined and the teacher regraded. People v. Board of Education of New York, 167 N. Y. 626, 60 N. E. 1118, affirming 56 App. Div. 368, 67 N. Y. Supp. 836; Steinson v. Board of Education of New York, 49 App. Div. 143, 63 N. Y. Supp. 128. The city schools of New York are subject to the general state laws. Town School Dist. of Brattleboro v. School Dist. No. 2 of Brattleboro, 72 Vt. 451, 48 Atl. 697.

[206] School Dist. No. 13 v. Harvey, 56 Vt. 556. A vote of the school district instructing the committee to hire a certain teacher is advisory only. But see Com. v. Jenks, 154 Pa. 368, 26 Atl. 371.

[207] Com. v. Board of Education, 187 Pa. 70, 40 Atl. 806, 41 L. R. A. 498; Com. v. Jenks, 154 Pa. 368, 26 Atl. 371.

[208] Section Sixteen Com'rs v. Criswell, 6 Ala. 565; Paterson v. City of Butler, 83 Ga. 606, 11 S. E. 399; Independent Dist. of Eden v. Rhodes, 88 Iowa, 570, 55 N. W. 524; Burkhead v. Independent School Dist., 107 Iowa, 29, 77 N. W. 491. Contracts with the superintendent and teachers limited by law, in duration, to the school year. Golden v. New Orleans School Directors, 34 La. Ann. 354. Teacher's term limited by law to one year. But see O'Brien v. Moss, 131 Ind. 99, 30 N. E. 894; Rumble v. Barker, 27 Ind. App. 69, 60 N. E. 956.

[209] Holz v. School Dist. No. 9, 1 Colo. App. 40, 27 Pac. 15. Disqualification may be subsequently removed. Catlin v. Christie, 15 Colo. App. 291, 63 Pac. 328; Botkin v. Osborne, 39 Ill. 101; Stanhope v. School Directors, 42 Ill. App. 570; School Directors v. Newman, 47 Ill. App. 364; Slone v. Berlin, 88 Iowa, 205, 55 N. W. 341; Jackson v. Inhabitants of Hampden, 20 Me. 37; O'Leary v. School Dist. No. 4, 118 Mich. 469, 76 N. W. 1038; Ryan v. Dakota County School Dist., 27 Minn. 433; Jay v. School Dist. No. 1, 24 Mont. 219, 61 Pac. 250; Sproul v. Smith, 40 N. J. Law, 314; People v. Maxwell, 65 App. Div. 265, 73 N. Y. Supp. 527.

[210] School Dist. No. 1 v. Ross, 4 Colo. App. 493, 36 Pac. 560; School Dist. No. 4 v. Stilley, 36 Ill. App. 133; Pollard v. School Dist. No. 9,

pose of such a provision is apparent. Their powers are usually ample in this respect and no special authority is needed from the voters of the district.[211] The power to employ necessarily includes the discretionary right of suspension or dismissal,[212] limited, however, by the principle that action of this character can only be for cause and ordinarily after due notice, hearing and upon the pre-

65 Ill. App. 104; Libby v. Inhabitants of Douglas, 175 Mass. 128, 55 N. E. 808; Smith v. School Dist. No. 2, 69 Mich. 589, 37 N. W. 567; O'Leary v. School Dist. No. 4, 118 Mich. 469; School Dist. No. 1 v. Edmonston, 50 Mo. App. 65; Blanchard v. School Dist. No. 11, 29 Vt. 433; Holman v. School Dist. No. 4, 34 Vt. 270; Wells v. School Dist. No. 2, 41 Vt. 353; Scott v. School Dist. No. 2, 46 Vt. 452. But see Butler v. Haines, 79 Ind. 575; Bryan v. Fractional School Dist. No. 1, 111 Mich. 67, 69 N. W. 74; Hosmer v. Sheldon School Dist. No. 2, 4 N. D. 197, 59 N. W. 1035, 25 L. R. A. 383.

[211] School Dist. No. 10 v. Mowry, 91 Mass. (9 Allen) 94; State v. Smith, 49 Neb. 755, 69 N. W. 114; Com. v. Jenks, 154 Pa. 368, 26 Atl. 371. A rule requiring five years of proved experience as a teacher to render a person eligible to the office of supervising principal is reasonable. Bell v. Kuykendall, 3 Tex. Civ. App. 209, 22 S. W. 112; Watkins v. Huff (Tex. Civ. App.) 63 S. W. 922. A teacher is entitled to appeal to the state superintendent from a decision of a county superintendent refusing to approve the teacher's contract to teach in the county. Cobb v. School Dist. No. 1, 63 Vt. 647, 21 Atl. 957. But see Gilman v. Bassett, 33 Conn. 298.

[212] School Dist. v. Maury, 53 Ark. 471, 14 S. W. 669; Pierce v. Beck, 61 Ga. 413; School Directors of Dist. No. 2 v. Orr, 88 Ill. App. 648; School Directors v. Birch, 93 Ill. App. 499; Board of Education v. Stotlar, 95 Ill. App. 250; Robinson v. School Directors of Dist. No. 4, 96 Ill. App. 604; City of Crawfordsville v. Hays, 42 Ind. 200; Rumble v. Barker, 27 Ind. App. 69, 60 N. E. 956. An appeal lies from the decision of the trustees to the county superintendent relative to the dismissal of teachers.

School Dist. No. 5 v. Colvin, 10 Kan. 283. Discharge based upon a special contract provision. 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; McLellan v. St. Louis Public Schools, 15 Mo. App. 362; Jones v. Nebraska City, 1 Neb. 176; Draper v. Commissioners of Public Instruction, 66 N. J. Law, 54, 48 Atl. 556; Swartwood v. Walbridge, 57 Hun, 33, 10 N. Y. Supp. 862; Sub-School Dist. No. 7 v. Burton, 26 Ohio St. 421; Moreland v. Wynne (Tex. Civ. App.) 62 S. W. 1093; Gillan v. Regents of Normal Schools, 88 Wis. 7, 58 N. W. 1042, 24 L. R. A. 336. But see Carver v. School Dist. No. 6, 113 Mich. 524, 71 N. W. 859. A school board cannot discharge a legally qualified teacher on the ground of incompetency. Richardson v. School Dist. No. 10, 38 Vt. 602.

ferment of specific charges.[213] 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.[214] A wrongful discharge may give rise to a course of action against the school district by the teacher.[215] Boards of education, especially in cities, have also the power to assign teachers in different school houses or rooms and change such assignments when it may be necessary to proper discipline and the best results.[216]

§ 1089. Duties and rights.

Teachers have the general control and government of the schools in their charge.[217] The relation of the teacher to his employer is

[213] School Dist. No. 25 v. Stone, 14 Colo. App. 211, 59 Pac. 885; School Dist. No. 26 v. McComb, 18 Colo. 240, 32 Pac. 424; Neville v. School Directors, 36 Ill. 71; Branaman v. Hinkle, 137 Ind. 496, 37 N. E. 546; Benson v. District Tp. of Silver Lake, 100 Iowa, 328, 69 N. W. 419; White v. Wohlenberg, 113 Iowa, 236, 84 N. W. 1026; School Dist. No. 23 v. McCoy, 30 Kan. 268; Board of Education of Ottawa v. Cook, 3 Kan. App. 269, 45 Pac. 119; Wilson v. Hite, 21 Ky. L. R. 1199, 54 S. W. 726; Brown v. Owen, 75 Miss. 319, 23 So. 35; McCutchen v. Windsor, 55 Mo. 149; Wallace v. School Dist. No. 27, 50 Neb. 171, 69 N. W. 772; People v. Board of Education, 69 Hun, 212, 23 N. Y. Supp. 473; Ridenour v. Board of Education of Brooklyn, 15 Misc. 418, 37 N. Y. Supp. 109; People v. Board of Education, 32 Misc. 63, 66 N. Y. Supp. 149; Edinboro Normal School v. Cooper, 150 Pa. 78, 24 Atl. 348; Thompson v. Gibbs, 97 Tenn. 489, 37 S. W. 277; State v. Board of Education of Seattle, 19 Wash. 8, 52 Pac. 317, 40 L. R. A. 317; Browne v. Gear, 21 Wash. 147, 57 Pac. 359.

[214] Board of Education v. Stotlar, 95 Ill. App. 250; Eastman v. Rapids Dist. Tp., 21 Iowa, 590; Weatherly v. City of Chattanooga (Tenn. Ch. App.) 48 S. W. 136.

[215] Doyle v. School Directors, 36 Ill. App. 653; Kirkpatrick v. Independent School Dist. of Liberty, 53 Iowa, 585; Park v. Independent School Dist. No. 1, 65 Iowa, 209; Jackson v. Independent School Dist. 110 Iowa, 313, 81 N. W. 596; Kellison v. School Dist. No. 1, 20 Mont. 153, 50 Pac. 421; Scott v. Joint School Dist. No. 16, 51 Wis. 554. But see Burton v. Fulton, 49 Pa. 151; Harkness v. Hutcherson, 90 Tex. 383, 38 S. W. 1120.

[216] But see Fairchild v. Board of Education of San Francisco, 107 Cal. 92, 40 Pac. 26.

[217] Perkins v. School Dist. No. 2, 61 Mo. App. 512. A teacher may permit some of the older pupils to hear classes. Kidder v. Chellis, 59 N. H. 473. The authority of a school teacher cannot be contested by the pupils or their parents.

a contract one and the relative rights of the parties are controlled and governed accordingly.[218] The validity of a particular contract will be determined by the authority of the officials to contract[219] and whether it was made in the particular manner, if

[218] School Dist. No. 3 v. Hale, 15 Colo. 367, 25 Pac. 308; Marion v. Board of Education of Oakland, 97 Cal. 606, 32 Pac. 643, 20 L. R. A. 197; School Directors v. Kimmel, 31 Ill. App. 537; School Directors v. Sprague, 78 Ill. App. 390; Oil School Tp. v. Marting, 27 Ind. App. 525, 61 N. E. 740; Guilford School Tp. v. Roberts, 28 Ind. App. 355, 62 N. E. 711. Contract provision relative to marriage during school term. Curtt-right v. Independent School Dist., 111 Iowa, 20, 82 N. W. 444; Jones v. School Dist. No. 47, 8 Kan. 362. A teacher who began school on an oral contract is entitled to value of services rendered.

Freeman v. Inhabitants of Bourne, 170 Mass. 289, 49 N. E. 435, 39 L. R. A. 510; Farrell v. School Dist. No. 2, 98 Mich. 43; Case v. School Dist. No. 3, 14 Mont. 138, 35 Pac. 906; Wallace v. School Dist. No. 27, 50 Neb. 171, 69 N. W. 772: Robinson v. Howard, 84 N. C. 151. School committee not personally liable on a contract made in the line of their duty. Morrow v. Board of Education of Chamberlain, 7 S. D. 553, 64 N. W. 1126. Construing a contract in respect to duty to be performed by teacher. School Directors of 23d Dist. v. Leak (Tenn. Ch. App.) 48 S. W. 692; Butcher v. Charles, 95 Tenn. 532, 32 S. W. 631.

[219] Caldwell v. School Dist. No. 7, 55 Fed. 372. A school district cannot contract with a teacher for a term extending beyond the time for which some of the directors were elected. See, also, as holding the same, Gates v. School Dist., 53 Ark. 468, 14 S. W. 656, 10 L. R. A. 186; School Town of Milford v. Zeigler, 1 Ind. App. 138, 27 N. E. 303; Wait v. Ray, 67 N. Y. 36; and see to the contrary, Cross v. School Directors, 24 Ill. App. 191.

Harrison Tp. v. McGregor, 67 Ind. 380; Herrington v. Liston Dist. Tp., 47 Iowa, 11; Gambrell v. Lenox Dist. Tp., 54 Iowa, 417; Galentine v. Dist. Tp. of Washington (Iowa) 82 N. W. 993; Brown v. School Dist. No. 41, 1 Kan. App. 530, 40 Pac. 826. A majority of the board may legally contract. Ferguson v. True, 66 Ky. (3 Bush) 255. The duties of a school trustee are incompatible to those of teacher, and a trustee employed as a teacher vacates his office as trustee. Shelbourne v. Blatterman, 20 Ky. L. R. 1730, 49 S. W. 952. A majority of the board can contract.

Davis v. Connor, 21 Ky. L. R. 658, 52 S. W. 945; Everett v. Fractional School Dist. No. 2, 30 Mich. 249; Davis v. School Dist. No. 1, 81 Mich. 214, 45 N. W. 989; Hazen v. Town of Akron, 48 Mich. 188. The moderator may hire her husband to teach school and pay him more than is necessary to secure a better teacher. Cleveland v. Amy, 88 Mich. 374, 50 N. W. 293; School Dist. No. 1 v. Edmonston, 50 Mo. App. 65. Where a teacher has been legally employed by the board, a refusal of the president to sign the contract does not affect its validity. Wetmore v. Board of Education of St. Louis, 86 Mo. App. 362. Con-

any, required by law.[220] An unauthorized contract may be subsequently ratified where the power in this respect was originally possessed.[221] The contracts of de facto officers, as a rule, are binding.[222] The determination of the validity of a teacher's contract may, by law, be vested in the county or state superintendent of schools or some official body performing similar duties.[223] 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 a part of their education. Their authority

tracts must be in writing. Montgomery v. State, 35 Neb. 655, 53 N. W. 568. A majority of a board have authority to employ a teacher. Stebbins v. School Dist. of Columbia, 16 N. H. 510; Dennison School Dist. v. Padden, 89 Pa. 395; Town of Pearsall v. Woolls (Tex. Civ. App.) 50 S. W. 959. The employment by a majority of a school board is sufficient. Scott v. School Dist. No. 9, 67 Vt. 150, 31 Atl. 145, 27 L. R. A. 588. A member of the prudential committee cannot teach school himself.

[220] Malloy v. Board of Education of San Jose, 102 Cal. 642, 36 Pac. 948; School Dist. No. 25 v. Stone, 14 Colo. App. 211, 59 Pac. 885; Sparta School Tp. v. Mendell, 138 Ind. 188, 37 N. E. 604; Benson v. District Tp. of Silver Lake, 100 Iowa, 328, 69 N. W. 419; Lewis v. Hayden, 18 Ky. L. R. 980, 38 S. W. 1054; Roberts v. Clay City, 19 Ky. L. R. 1046, 42 S. W. 909; Mingo v. Colored Common School Dist. "A," 24 Ky. L. R. 288, 68 S. W. 483; Langston v. School Dist. No. 3, 121 Mich. 654, 80 N. W. 642, distinguishing Holloway v. School Dist. No. 9, 62 Mich. 153; Hutchings v. School Dist. No. 1, 128 Mich. 177, 87 N. W. 80. An oral contract not enforceable.

McGuiness v. School Dist. No. 10, 39 Minn. 499, 41 N. W. 103; Leland v. School Dist. No. 28, 77 Minn. 469, 80 N. W. 354. Contract must be in writing. McShane v. School Dist. No. 5, 70 Mo. App. 624. The statutory requirement that a contract should be executed in duplicate is directory merely. Board of Education v. Best, 52 Ohio St. 138, 39 N. E. 694, 27 L. R. A. 77; School Dist. of Dyberry v. Mercer, 115 Pa. 559, 9 Atl. 64; Genesee Independent School Dist. v. McDonald, 98 Pa. 444; McNolty v. School Directors of Morse, 102 Wis. 261, 78 N. W. 439.

[221] Wells v People, 71 Ill. 532; Cook v. Independent School Dist. of North McGregor, 40 Iowa, 444; Place v. Colfax Dist. Tp., 56 Iowa, 573. The performance of the contract by the teacher will not constitute a ratification. Jones v. School Dist. No. 144, 7 Kan. App. 372, 51 Pac. 927; Graham v. School Dist., 33 Or. 263, 54 Pac. 185.

[222] Woodbury v. Inhabitants of Knox, 74 Me. 462; Whitman v. Owen, 76 Miss. 783, 25 So. 669; DeWolf v. Watterson, 35 Hun (N. Y.) 111; Fuller v. Brown, 10 Tex. Civ. App. 64, 30 S. W. 506.

[223] Town of Pearsall v. Woolls (Tex. Civ. App.) 50 S. W. 959; Watkins v. Huff (Tex. Civ. App.) 63 S. W. 922.

over the pupils under them to preserve good order and enforce reasonable rules and regulations is but slightly restricted.[224] 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.[225] Their compensation either in its amount,[226] time [227] or manner of payment, is a matter of contract,[228] and depends usually upon

[224] Hutton v. State, 23 Tex. App. 386. See, also, cases cited in following note.

[225] Cooper v. McJunkin, 4 Ind. 290; Patterson v. Nutter, 78 Me. 509; Com. v. Randall, 70 Mass. (4 Gray) 36. The question of whether a punishment is excessive under the circumstances is one for the jury. Haycraft v. Grigsby, 88 Mo. App. 354; State v. Long, 117 N. C. 791, 23 S. E. 431; Lander v. Seaver, 32 Vt. 114.

[226] Earle v. San Francisco Board of Education, 55 Cal. 489; School Directors v. Crews, 23 Ill. App. 367. If school directors fail to furnish another room for school purposes when a school house is destroyed by fire, the teacher can still recover under his contract to teach for the prescribed time. See, as holding to the contrary, the case of Hall v. School Dist. No. 10, 24 Mo. App. 213.

Jackson School Tp. v. Grimes, 24 Ind. App. 331, 56 N. E. 724; Board of Education of Emporia v. State, 7 Kan. App. 620, 52 Pac. 466. Deduction of pay for two days' vacation at Thanksgiving time not allowed. City of Charlestown v. Gardner, 98 Mass. 587; Libby v. Inhabitants of Douglas, 175 Mass. 128, 55 N. E. 808. Where a teacher holds himself in readiness to teach, the fact that a school is closed during an epidemic will not defeat his right to recover full compensation. Dewey v. Alpena Union School Dist., 43 Mich. 480. A public school teacher may recover wages, although the school was suspended on account of smallpox. School Dist. No. 4 v. Gage, 39 Mich. 484. See, also, as holding the same, the case of Holloway v. School Dist. No. 9, 62 Mich. 153, 28 N. W. 764.

Goodyear v. School Dist. No. 5, 17 Or. 517, 21 Pac. 664. A district is liable for teachers' pay during the discontinuance on account of an epidemic of diphtheria. Randolph v. Sanders, 22 Tex. Civ. App. 331, 54 S. W. 621. A teacher is entitled to recover compensation for the time when city schools were suspended temporarily during an epidemic when he was in readiness, pursuant to notice, for work during all that time. McKay v. Barnett, 21 Utah, 239, 60 Pac. 1100, 50 L. R. A. 371. A teacher may collect wages during an arbitrary closing of the schools by a board of education on account of an epidemic of smallpox.

[227] Moultonborough School Dist. v. Tuttle, 26 N. H. 470. A teacher before he can recover his compensation, must make the reports required by statute.

[228] Harrison School Tp. v. McGregor, 96 Ind. 185. The defense of no funds on hand is not available in an action by a teacher for salary

their possession of the proper certificate or license to teach,[229] and upon the making of reports required by law.[230] Their rights in this respect will follow the terms of a particular contract. Their duties and rights may be also affected by the character and grade of the certificate or license to teach held by them.[231] In the absence of a special contract, a teacher undertakes to exercise only reasonable skill and judgment and ordinary care and diligence.[232]

§ 1090. 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

due under contract. Knowles v. City of Boston, 78 Mass. (12 Gray) 339; Rudy v. School Dist. of Poplar Bluff, 30 Mo. App. 113. Defense of no funds in treasury not good.

People v. Town Board of Plattsburgh, 29 Misc. 440, 61 N. Y. Supp. 932. Construing N. Y. Laws, 1895, c. 767, authorizing a town to pension school teachers employed in the common schools not less than twenty-five years. Mahon v. Board of Education, 68 App. Div. 154, 74 N. Y. Supp. 172, affirmed in 171 N. Y. 263, 63 N. E. 1107. Construing N. Y. Laws 1900, c. 725, relative to rendering teachers an annuity and holding the same unconstitutional, violating Const. art. 8, § 10, which forbids any city to give money in aid of an individual. Hibbard v. State, 65 Ohio St. 574, 64 N. E. 109. 92 Ohio Laws, p. 683, providing for the pensioning of school teachers is in violation of constitution, art. 2, § 26, which provides for laws of a general nature and to have a uniform operation throughout the state. Singleton v. Austin, 27 Tex. Civ. App. 88, 65 S. W. 686; Cashen v. School Dist. No. 12, 50 Vt. 30. A school teacher under age performing her duties can recover her wages. Williams v. Board of Education of Fairfax Dist., 45 W. Va. 199, 31 S. E. 985.

[229] Stanhope v. School Directors, 42 Ill. App. 570; Rolfe v. Inhabitants of Cooper, 20 Me. 154; Jose v. Moulton, 37 Me. 367; Devoe v. School Dist. No. 3, 77 Mich. 610, 43 N. W. 1062; School Dist. No. 8 v. Estes, 13 Neb. 52; Barr v. Deniston, 19 N. H. 170; Goose River Bank v. Willow Lake School Tp., 1 N. D. 26, 44 N. W. 1002; Goodrich v. School Dist. No. 1, 26 Vt. 115; Kimball v. School Dist. No. 122, 23 Wash. 520, 62 Pac. 213; School Dist. No. 4 v. Baier, 98 Wis. 22, 73 N. W. 448. But see Dore v. Billings, 26 Me. 56.

[230] Adkins v. Mitchell, 67 Ill. 511; Owen School Tp. v. Hay, 107 Ind. 351; School Com'rs of Alleghany County v. Adams, 43 Md. 349; Cobb v. School Dist. No. 1, 63 Vt. 647, 21 Atl. 957.

[231] Sinnott v. Colombet, 107 Cal. 187, 40 Pac. 329, 28 L. R. A. 594; Kennedy v. Board of Education, 82 Cal. 483, 22 Pac. 1042.

[232] Barngrover v. Maack, 46 Mo. App. 407; Richardson v. School Dist. No. 10, 38 Vt. 602.

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.[233] The law may specifically provide for the adoption of rules respecting the admission and attendance of pupils [234] but in addition to the rights accruing under such provisions, school boards have the broadest and most ample powers which can be exercised when in good faith and without malice, without fear of personal liability. The rules and regulations commonly adopted are designed to secure the attendance of children within certain ages [235] and regulate their admission into the public schools.[236] Compulsory attendance is not illegal; on the other hand, in many states will be found laws relating to this subject [237] and to truancy, creating truant officers or truant

[233] Watson v. City of Cambridge, 157 Mass. 561, 32 N. E. 864; Hodgkins v. Inhabitants of Rockport, 105 Mass. 475; Russell v. Inhabitants of Lynnfield, 116 Mass. 365. Rules necessarily need not be a matter of record to be enforceable. Holman v. School Dist. No. 5, 77 Mich. 605, 43 N. W. 996, 6 L. R. A. 534. A rule, which provides that a pupil who defaces or injures school property shall be suspended until the property is replaced, is unreasonable. State v. Hamilton, 42 Mo. App. 24. The directors may, after an informal examination, expel a pupil who transgresses unwritten but well defined rules of conduct prescribed by common sense and decency. Bourne v. State, 35 Neb. 1, 52 N. W. 710. The rule may require the signing of a written report by the parent of the pupil's record. See, also, note 6 L. R. A. 534.

[234] Miller v. Dailey, 136 Cal. 212, 68 Pac. 1029; Burdick v. Babcock, 31 Iowa, 562; Jones v. McProud, 62 Kan. 870, 64 Pac. 602; Sherman v. Inhabitants of Charlestown, 62 Mass. (8 Cuch.) 160. The general school committee of a city have the power in order to maintain the discipline of public schools to exclude a child whom they deem to be of immoral character, although this character is not manifested by such acts within the school. Millard v. Inhabitants of Egremont, 164 Mass. 430, 41 N. E. 669; People v. Board of Education, 4 N. Y. Supp. 102; Sewell v. Board of Education, 29 Ohio St. 89; Ferriter v. Tyler, 48 Vtt. 444; Morrow v. Wood, 35 Wis. 59.

[235] Board of Education v. Bolton, 85 Ill. App. 92; Alvord v. Inhabitants of Chester, 179 Mass. 20, 61 N. E. 263; Rogers v. McCraw, 61 Mo. App. 407; Roach v. St. Louis Public Schools, 77 Mo. 484.

[236] Miller v. Dailey, 136 Cal. 212, 68 Pac. 1029; Yale v. West Middle School Dist., 59 Conn. 489, 22 Atl. 295, 13 L. R. A. 161; Board of Education v. Lease, 64 Ill. App. 60.

[237] Com. v. Roberts, 159 Mass.

schools and providing for their duties and the manner of enforcing the law.[238] To maintain good order and discipline, rules may be adopted for the government of the pupils and providing for expulsion, [239] suspension,[240] or punishment [241] in case of an infraction of them by the pupil. Rules of this character must, however, be reasonable [242] 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 [243] imposing

372, 34 N. E. 402; Reynolds v. Board of Education of Union Free School Dist., 33 App. Div. 88, 53 N. Y. Supp. 75; State v. McCaffrey, 69 Vt. 85, 37 Atl. 234; State v. Macdonald, 25 Wash. 122, 64 Pac. 912; Milwaukee Industrial School v. Milwaukee County Sup'rs, 40 Wis. 328.

Compulsory attendance provided, Mass. Acts 1891, c. 361, p. 929; Wis. Laws 1891, c. 187, p. 217.

[238] State v. Bailey, 157 Ind. 324, 61 N. E. 730, 59 L. R. A. 435. It is competent for the legislature to compel parents to perform the natural duty of educating their children. City of Lynn v. Essex County Com'rs, 148 Mass. 148, 19 N. E. 171; Fountain County Com'rs v. Marr, 22 Ind. App. 539, 54 N. E. 402.

Truancy defined and punishment prescribed, Wis. Laws 1891, c. 187, p. 217.

[239] Peck v. Smith, 41 Conn. 442. Misconduct not in violation of an established rule may warrant expulsion. Board of Education of Cartersville v. Purse, 101 Ga. 422, 28 S. E. 896, 41 L. R. A. 593.

[240] Peck v. Smith, 41 Conn. 442; Sewell v. Board of Education, 29 Ohio St. 89; State v. Burton, 45 Wis. 150.

[241] Bolding v. State, 23 Tex. App. 172, 4 S. W. 579.

[242] Board of Education v. Helston, 32 Ill. App. 300; Fertich v. Michener, 111 Ind. 472, 11 N. E. 605. Whether a rule or regulation of the school authorities is reasonable is a question of law for the court.

State v. Vanderbilt, 116 Ind. 11, 18 N. E. 266; Dritt v. Snodgrass, 66 Mo. 286. A rule is illegal which attempts to control the conduct at home; for example, forbidding the attendance by the pupil, during school terms, of social parties. State v. Fond du Lac Board of Education, 63 Wis. 234. A rule requiring a scholar to bring into the schoolroom a stick of wood for the fire is unreasonable.

[243] Sheehan v. Sturges, 53 Conn. 481; Fox v. People, 84 Ill. App. 270; Vanvactor v. State, 113 Ind. 276, 15 N. E. 341; State v. Mizner, 45 Iowa, 248; Patterson v. Nutter, 78 Me. 509, 7 Atl. 273; State v. Boyer, 70 Mo. App. 156. It is for the jury to say whether the punishment inflicted was excessive or malicious.

Haycraft v. Grigsby, 88 Mo. App. 354; Heritage v. Dodge, 64 N. H. 297, 9 Atl. 722; Hutton v. State, 23 Tex. App. 386; 5 S. W. 122; Howerton v. State (Tex. Cr. R.) 43 S. W. 1018. Punishment excessive and teacher held guilty of aggravated assault. But see Boyd v. State, 88 Ala. 169, 7 So. 268. Malicious corporal punishment will warrant a

the punishment or the board under whose authority it was done.[244] Rules and regulations relate generally to the good order and discipline of the school and especially to misconduct,[245] willful disobedience or insubordination,[246] tardiness[247] or unexcused absence.[248]

§ 1091. 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,[249] 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.[250] The question under consideration in this section has in common with all questions in-

cause of action against the teacher inflicting it.

[244] Churchill v. Fewkes, 13 Ill. App. 520; Board of Education of Covington v. Booth, 23 Ky. L. R. 288, 62 S. W. 872. Courts will not review the action of school authorities in expelling a pupil for violating a rule of the school unless the action is arbitrary or malicious. Donohoe v. Richards, 38 Me. 376; Watson v. City of Cambridge, 157 Mass. 561, 32 N. E. 864; Morrison v. Lawrence, 181 Mass. 127, 63 N. E. 400. But see Bishop v. Inhabitants of Rowley, 165 Mass. 460, 43 N. E. 191. See, also, Mack v. Kelsey, 61 Vt. 399, 17 Atl. 780.

[245] State v. Randall, 79 Mo. App. 226; Deskins v. Gose, 85 Mo. 485; Metcalf v. State, 21 Tex. App. 174, 17 S. W. 142. Carrying pistol.

[246] Hodgkins v. Inhabitants of Rockport, 105 Mass. 475; State v. School Dist. No. 1, 31 Neb. 552, 48 N. W. 393. A pupil cannot be suspended on account of insubordination at a former term of school. Thomason v. State (Tex. Cr. R.) 43 S. W. 1013. But see Murphy v. Marengo Independent Dist., 30 Iowa, 429.

[247] Fertich v. Michener, 111 Ind. 472, 11 N. E. 605; Burdick v. Babcock, 31 Iowa, 562; Russell v. Inhabitants of Lynnfield, 116 Mass. 365.

[248] Churchill v. Fewkes, 13 Ill. App. 520; Danenhoffer v. State, 69 Ind. 295; Fessman v. Seeley (Tex. Civ. App.) 30 S. W. 268; Ferriter v. Tyler, 48 Vt. 444.

[249] Hysong v. Gallitzin Borough School Dist., 164 Pa. 629, 30 Atl. 482, 26 L. R. A. 203. Wearing garb and insignia of a sisterhood of nuns, while teaching in the public schools, held nonsectarian teaching. See dissenting opinion, however, by Williams, Judge. See Art. 29 Am. Law Reg. (N. S.) 321.

[250] Stevenson v. Hanyen, 1 Lack. Leg. News (Pa.) 99, 4 Lack. Leg. News, 215.

volving 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,[251] 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.[252]

§ 1092. 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 free and public and that no discrimination is made on account of race, color, nationality or social position.[253] The legality of laws providing for and establishing separate schools for different races has been repeatedly raised and the objection urged against them based upon the constitutional characteristics just noted. 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.[254] For, as it has been said, a separation works no

[251] State v. District Board of School Dist. No. 8, 76 Wis. 177, 44 N. W. 967, 7 L. R. A. 330. The reading of the Bible in the common schools is sectarian instruction, and prohibited by Wis. Const. art. 10, § 3.

[252] 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; Nessle v. Hum, 1 Ohio N. P. 140; Hysong v. Gallitzin Borough School Dist., 164 Pa. 629, 30 Atl. 482, 26 L. R. A. 203.

[253] Tape v. Hurley, 66 Cal. 473. No discrimnation permitted against Chinese children. Wysinger v. Crookshank, 82 Cal. 588, 23 Pac. 54; Reid v. Town of Eatonton, 80 Ga. 755, 6 S. E. 602; People v. Quincy Board of Education, 101 Ill. 308; Smith v. Independent School Dist. of Keokuk, 40 Iowa, 518; State v. Duffy, 7 Nev. 342. See note No. 5, § 1067, ante.

[254] Bertonneau v. City School Directors, 3 Woods, 177, Fed. Cas. No. 1,361; Union County Ct. v. Robinson, 27 Ark. 116; Dallas v. Fosdick, 40 How. Pr. (N. Y.) 249; Hooker v. Town of Greenville, 130 N. C. 472, 42 S. E. 141; McMillan v. School Committee, 107 N. C. 609, 12 S. E. 330, 10 L. R. A. 823; Hare v. Board of Education of Gates County, 113 N. C. 9, 18 S. E. 55; Marion v. Ter. 1 Okl. 210; Williams v. Board of Education of Fairfax Dist., 45 W. Va. 199, 31 S. E. 985. But a dis-

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 diffierent 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.[255] School privileges it is held are usually conferred by statute, except as controlled by fundamental law and are subject to such regulations as the legislature may prescribe providing for equal school advantages to all children, classifying them according to age, sex, attainments or such other uniform and impartial qualifications as the legislature in its wisdom may direct or authorize.[256]

§ 1093. 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[257] and discontinue these when the necessity may arise unless such action should violate some positive provision of the law. They

crimination in respect to length of school year, as between white and colored children in the same district, is illegal. People v. McFall, 26 Ill. App. 319; Chase v. Stephenson, 71 Ill. 383; People v. City of Alton, 193 Ill. 309, 61 N. E. 1077, 56 L. R. A. 95; Ottawa Board of Education v. Tinnon, 26 Kan. 1; Knox v. Board of Education, 45 Kan. 152, 25 Pac. 616, 11 L. R. A. 830; Pierce v. Union Dist. School, 46 N. J. Law, 76; Kaine v. Com., 101 Pa. 490.

[255] State v. McCann, 21 Ohio St. 198. But see Board of Education v. State, 45 Ohio St. 555, 16 N. E. 373. Ohio, Act Feb. 22, 1887, repealed, § 4008, Rev. St. of Ohio, conferring the power on boards of education to establish and maintain separate schools for colored children.

[256] Presser v. Illinois, 116 U. S. 252; McGuinn v. Forbes, 37 Fed. 639; Civil Rights Bill, 1 Hughes, 541; Fed. Cas. No. 18,258; Ward v. Flood, 48 Cal. 36; Pierce v. Union Dist. School, 46 N. J. Law, 76; People v. School Board, 161 N. Y. 598, 56 N. E. 81, 48 L. R. A. 113, affirming 44 App. Div. 469, 61 N. Y. Supp. 330, distinguishing People v. King, 110 N. Y. 418, 18 N. E. 245, 1 L. R. A. 293; People v. Gallagher, 93 N. Y. 438; Van Camp v. Board of Education of Logan, 9 Ohio St. 406.

[257] Matney v. Boydston, 27 Mo. App. 36. Power to vote school terms vested in annual meeting of the school district.

also have the power to prescribe uniform courses of study [258] or special branches [259] and school books and to require the use of these.[260] They have the right to regulate the admission to the schools within their jurisdiction of nonresident pupils or those above school age [261] and fix the tuition for these classes,[262] or for

[258] Board of Education of Topeka, v. Welch, 51 Kan. 792, 33 Pac. 654. See State v. School Dist. No. 1, 31 of selection of studies by parent. Neb. 552, 48 N. W. 393, as to right

[259] Samuel Benedict Memorial School v. Bradford, 111 Ga. 801, 36 S. E. 920. The authorities of the public schools have full power to make it a part of a school course to write compositions and enter into debates and prescribe that all pupils shall participate therein. Rulison v. Post, 79 Ill. 567. A pupil cannot be expelled for refusing to pursue a branch of study assigned by the directors, but not prescribed by law. See, also, Morrow v. Wood, 35 Wis. 59.

Powell v. Board of Education, 97 Ill. 375. German. School Com'rs of Indianapolis v. State, 129 Ind. 14, 28 N. E. 61, 13 L. R. A. 147. German. W. P. Myers Pub. Co. v. White River School Tp., 28 Ind. App. 91, 62 N. E. 66; State v. Webber, 108 Ind. 31. Music. Guernsey v. Pitkin, 32 Vt. 224. English compostition. But see Morrill v. Wood, 35 Wis. 59.

[260] Bancroft v. Thayer, 5 Sawy. 502, Fed. Cas. No. 835; Ivison v. Board of School Com'rs, 39 Fed. 739; People v. State Board of Education, 49 Cal. 684. A change in text books can only be made after six months' notice of the proposed change. People v. Board of Education, 175 Ill. 9, 51 N. E. 633. Under School law, art. 5, § 26 (Hurd's Rev. St. 1889, p. 1235), text books cannot be changed oftener than once in four years.

State v. Haworth, 122 Ind. 462, 23 N. E. 946, 7 L. R. A. 240; School Dist. No. 1 v. Shadduck, 25 Kan. 467; Maynard v. Olson, 48 Kan. 565, 30 Pac. 16; State v. Board of Education of Topeka, 59 Kan. 501, 53 Pac. 478; Com. v. Ginn, 23 Ky. L. R. 521, 63 S. W. 467; Jones v. Board of Education of Detroit, 88 Mich. 371, 50 N. W. 309. Text books cannot be changed oftener than once in five years without the consent of a majority of the voters of the district.

Curryer v. Merrill, 25 Minn. 1; Campana v. Calderhead, 17 Mont. 548, 44 Pac. 83, 36 L. R. A. 277; Board of Education of Cincinnati v. Minor, 23 Ohio St. 211. The power is a discretionary one not subject to review by the courts. State v. Columbus Board of Education, 35 Ohio St. 368; Leeper v. State, 103 Tenn. 500, 53 S. W. 962, 48 L. R. A. 167; State v. Wilson, 121 Wis. 523, 99 N. W. 336. But see State v. Bronson, 115 Mo. 271, 21 S. W. 1125.

[261] Gacking v. School Dist. of Ft. Smith, 65 Ark. 427, 46 S. W. 943; Kramm v. Bogue, 127 Cal. 122, 59 Pac. 394; Edwards v. State, 143 Ind. 84, 42 N. E. 525; Needham v. Inhabitants of Wellesley, 139 Mass. 372, 31 N. E. 732; Barnard School Dist. v. Matherly, 84 Mo. App. 140; Freeman v. School Directors of Franklin Tp., 37 Pa. 385; Eubank

special branches taught.[263] They may be authorized by law and in the manner provided to furnish public assistance in the form of school books or clothing to poor children.[264] They also have the right in exercising their police powers to establish quarantine regulations or to require the vaccination of children as a condition precedent in their admission to the public schools.[265] This subject has already been considered.[266]

v. Boughton, 98 Va. 499, 36 S. E. 529.

[262] Irvin v. Gregory, 86 Ga. 605, 13 S. E. 120; Weldon Independent School Dist. v. Shelby Independent School Dist., 113 Iowa, 549, 85 N. W. 794; Rogers v. Graded School of Carlisle, 11 Ky. L. R. 934, 13 S. W. 587; Hurlburt v. Inhabitants of Boxford, 171 Mass. 501, 50 N. E. 1043; Fiske v. Inhabitants of Town of Huntington, 179 Mass. 571, 61 N. E. 260; Inhabitants of Haverhill v. Gale, 103 Mass. 104; Millard v. Inhabitants of Egremont, 164 Mass. 430, 41 N. E. 669; Fractional School Dist. No. 1 v. Yerrington, 108 Mich. 414, 66 N. W. 324; State v. Hamilton, 69 Miss. 116, 10 So. 57; State v. School Dist. of Superior, 55 Neb. 317, 75 N. W. 855; 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; School Dist. No. 4 v. School Dist. No. 2, 64 Vt. 527, 25 Atl. 433; State v. Board of Education of Eau Claire, 96 Wis. 95, 71 N. W. 123.

[263] Major v. Cayce, 98 Ky. 357, 33 S. W. 93, 30 L. R. A. 697.

[264] Shelby County Council v. State, 155 Ind. 216, 57 N. E. 712.

[265] Abeel v. Clark, 84 Cal. 226, 24 Pac. 383; Bissell v. Davison, 65 Conn. 183, 32 Atl. 348, 29 L. R. A. 251; Morris v. City of Columbus, 102 Ga. 792, 30 S. E. 850, 42 L. R. A. 175; State v. Beil, 157 Ind. 25, 60 N. E. 672; Champer v. City of Greencastle, 138 Ind. 339, 35 N. E. 14, 24 L. R. A. 768; State v. Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313; Duffield v. Williamsport School Dist., 162 Pa. 476, 29 Atl. 742, 25 L. R. A. 152; Field v. Robinson, 198 Pa. 638, 48 Atl. 873; State v. Board of Education of Salt Lake City, 21 Utah, 401, 60 Pac. 1013; State v. Burdge, 95 Wis. 390, 37 L. R. A. 157; Miller v. School Dist. No. 3, 5 Wyo. 217. But see Potts v. Breen, 167 Ill. 67, 47 N. E. 81, 39 L. R. A. 152, affirming 60 Ill. App. 201. Vaccination cannot be required where the disease does not exist nor where there is no cause for apprehension. Lawbaugh v. Board of Education, 177 Ill. 572, 52 N. E. 850, reversing 66 Ill. App. 159; Osborn v. Russell, 64 Kan. 507, 68 Pac. 60; Mathews v. Kalimazoo Board of Education, 127 Mich. 530, 86 N. W. 1036, 54 L. R. A. 736; State v. Burdge, 95 Wis. 390, 70 N. W. 347, 37 L. R. A. 157. See, also, cases cited under §§ 118 et seq., ante.

[266] See §§ 118 et seq., ante.

II. Charitable and Corrective.

§ 1094. In general.
1095. Poor districts; organization.
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1098. Settlement; how acquired.
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§ 1094. In general.

It is the duty of every governmental organization to furnish adequate and necessary relief to the unfortunate and indigent.[267] It is not every person, however, needing assistance who is legally regarded as a pauper and therefore within the operation of poor laws which apply generally only to those included within the legal definition of the term. 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 property.[268] It

[267] Board of Com'rs of Tipton County v. Brown, 4 Ind. App. 288, 30 N. E. 925. Cooledge v. Mahaska County, 24 Iowa, 211. The obligation of a county to support its poor is strictly statutory.

Orphan Soc. of Lexington v. Fayette County, 69 Ky. (6 Bush) 413; City of Auburn v. Inhabitants of Wilton, 74 Me. 437; Strafford County v. Rockingham Co., 71 N. H. 37, 51 Atl. 677; Town of Plymouth v. Grafton County, 68 N. H. 361, 44 Atl. 523. The liability of counties and towns to support of poor entirely statutory. Patrick v. Town of Baldwin, 109 Wis. 342, 85 N. W. 274, 53 L. R. A. 613. But see Inhabitants of Sebec v. Inhabitants of Dover, 71 Me. 573.

[268] Town of East Lynne v. Haddam, 14 Conn. 394; Town of Wallingford v. Town of Southington, 16 Conn. 431. Question of ability to support himself and family is a question for the jury. Town of New Hartford v. Town of Canaan, 52 Conn. 158; Town of Big Grove v. Town of Fox, 89 Ill. App. 84; Jasper County v. Osborn, 59 Iowa,

excludes those who are in need of occasional aid or who, through some temporary circumstance, require assistance upon occasion only.[269] The duty of the state, as has been said, is to furnish adequate and prompt relief for the poor and the unfortunate.[270]

§ 1095. 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,[271] or through

208; Inhabitants of Foxcroft v. Inhabitants of Corinth, 61 Me. 559; Pittsfield v. Barnstead, 40 N. H. 477; In re Connellan, 25 Misc. 592, 56 N. Y. Supp. 157; Town of Winhall v. Town of Landgrove, 45 Vt. 376; Town of Ettrick v. Town of Bangor, 84 Wis. 256, 54 N. W. 401; Board of Com'rs of Sweetwater County v. Carbon County Com'rs, 6 Wyo. 254, 44 Pac. 66. But see Peters v. Town of Litchfield, 34 Conn. 264; Wilson v. Brooks, 31 Mass. (14 Pick.) 341; Town of Danville v. Town of Wheelock, 47 Vt. 57; Town of Craftsbury v. Town of Greensboro, 66 Vt. 585, 29 Atl. 1024.

[269] Bartholomew County Com'rs v. Wright, 22 Ind. 187; Inhabitants of Bremen v. Inhabitants of Brewer, 54 Me. 528; Lander County v. Humboldt County, 21 Nev. 415, 32 Pac. 849; Hamlin County v. Clark County, 1 S. D. 131, 45 N. W. 329; Town of Danville v. Town of Sheffield, 50 Vt. 243; Goodell v. Town of Mt. Holly, 51 Vt. 423; City of Port Washington v. Town of Saukville, 62 Wis. 454. But see Inhabitants of Sturbridge v. Inhabitants of Holland, 28 Mass. (11 Pick.) 459. Necessity for immediate relief constitutes a pauper.

[270] Trumbell v. Moss, 28 Conn. 253; Welton v. Town of Wolcott, 45 Conn. 329; Howard County Com'rs v. Jennings, 104 Ind. 108; Vionet v. Municipality No. 1, 4 La. Ann. 42; Brown v. Inhabitants of Orland, 36 Me. 376; Inhabitants of Holden v. Inhabitants of Brewer, 38 Me. 472; Inhabitants of Norridgewock v. Inhabitants of Solon, 49 Me. 385; Inhabitants of Veazie v. Inhabitants of Chester, 53 Me. 29; Inhabitants of Orono v. Peavey, 66 Me. 60; Curtis v. Allen, 43 Neb. 184; 61 N. W. 568. The institution for the blind at Nebraska City is one for educational purposes within the meaning of Const. Art. 5, § 19. Such institutions are under the control of the state board composed of the commissioner of public lands, the secretary and treasurer and attorney general of the state. Moultonborough v. Tuftonborough, 43 N. H. 316; Taylor Overseers v. Shenango Overseers, 114 Pa. 394; Town of Craftsbury v. Town of Greensboro, 66 Vt. 585, 29 Atl. 1024.

[271] Odegaard v. City of Albert Lea, 33 Minn. 351; Town of Cordova v. Village of Le Sueur Center, 74 Minn. 515, 77 N. W. 290, 430; State v. Hallock, 14 Nev. 202. Ne-

the organization of special public quasi corporations having as the sole purpose of their organization the performance of this particular governmental function. The territorial limits of these districts may be either co-existent with the boundaries of other public quasi corporations or otherwise, and may be changed at pleasure.[272] Whatever the organization, granting of aid is effected and applications are considered by officers specially elected or appointed [273] for this purpose with the term of office and compensation as legally provided. They are regarded as public officials [274] and their powers are limited strictly to the duties imposed upon them by positive law.[275] In many respects and within the line of their duty, these are discretionary and not subject to review by the courts.[276] The liability of the corporation for their acts is limited.[277]

A state may prohibit the immigration of paupers and impose a penalty upon those bringing into the state or taking into one poor

vada Act 1879, p. 142, establishing a state asylum for indigent unconstitutional.

[272] Lees v. Drainage Com'rs, 125 Ill. 47; State v. Davey, 39 La. Ann. 992; Town Council of Lexington v. Sargent, 64 Miss. 621, 1 So. 903; Baudistel v. Recorder & Common Council of City of Jackson, 110 Mich. 357, 68 N. W. 292; Benedictine Sisters v. City of Elizabeth, 50 N. J. Law 347; People v. St. Lawrence Sup'rs, 103 N. Y. 541, 9 N. E. 311; Jenks Tp. Poor Dist. v. Sheffield Tp. Poor Dist. Com'rs., 135 Pa. 400, 19 Atl. 1004. See, also, Swift v. Wayne Circ. Ct. Judges, 64 Mich 479.

[273] Burr v. Norton, 25 Conn. 103; Clay County Sup'rs v. Plaut, 42 Ill. 324; Lucas County v. Ringgold County 21 Iowa, 83; Inhabitants of Unity v. Inhabitants of Thorndike, 15 Me. 182; State v. Board of Control of State Institutions, 85 Minn. 165; State v. Board of Control of State Institutions, 25 Minn. 165, 88 N. W. 533. See, also, Board of Com'rs of Pulaski Co. v. Shields, 130 Ind. 6, 29 N. E. 385.

[274] State v. Hawkins, 77 N. C. 494.

[275] Inhabitants of Griswold v. Inhabitants of North Stonington, 5 Conn. 367; Fielding v. Jones, 38 Conn. 191; Baldwin v. Whittier, 16 Me. 33. Overseers of the poor have no power to bring an action of replevin for property alleged to belong to the town.

[276] Posey County Com'rs v. Harlem, 108 Ind. 164; Salisbury v. Merrimack County, 59 N. H. 359; Treadwell v. Powless, 37 N. J. Law, 145; City of Albany v. McNamara, 117 N. Y. 168, 22 N. E. 931, 6 L. R. A. 212; Holloway v. Town of Barton, 53 Vt. 300.

[277] Means v. Inhabitants of Blakesburg, 7 Me. (7 Greenl.) 132; Carter v. City of Augusta, 84 Me. 418, 24 Atl. 892; Nason v. Directors of the Poor, 126 Pa. 445, 17 Atl. 616; Town of Barnet v. Whitcher, 50 Vt. 170.

district from another, persons having no visible means of support.[278] Such a statute does not, however, prevent the return to the state of former residents or those whose residence is within the state.[279]

§ 1096. Legal character.

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.[280] A different rule will obtain where a general or special liability may be imposed by law.

Expenditures. The expenditures which can be lawfully made are limited in the first place by the character of the organization. They are created for the special object of affording relief to the poor and unfortunate and expenses for other purposes are therefore unlawful and obligations incurred cannot ordinarily be enforced. They are also limited in the amount of their expenditures by the moneys set apart or raised by taxation or otherwise for

[278] In re Ah Fong, 3 Sawy. 144, Fed. Cas. No. 102; Board of Com'rs of Pitkin County v. Law, 3 Colo. App. 328, 33 Pac. 143; Union County v. Axley, 53 Ill. App. 670; Inhabitants of Greenfield v. Cushman, 16 Mass. 393. Intent must appear to warrant a conviction under the statute; Inhabitants of Palmer v. Wakefield, 102 Mass. 214; Luton v. Newaygo Circ. Judge, 70 Mich. 152, 38 N. W. 13; Superintendents of the Poor of Newaygo County v. Nelson, 75 Mich. 154, 42 N. W. 797; Montfort v. Wheelock, 78 Minn. 169, 80 N. W. 955. The board of St. Paul workhouse directors are mere city officials and not a body corporate.

State v. Cornish, 66 N. H. 329, 21 Atl. 180, 11 L. R. A. 191; Winfield v. Mapes, 4 Denio (N. Y.) 571; Bartlett v. Ackerman, 66 Hun, 627, 21 N. Y. Supp. 53; Heard v. Com'rs of Charities, 51 N. Y. Supp. 375. The commissioners of charities of the city of New York, laws 1895, c. 912, have no corporate existence and cannot be sued as a body. Chapline v. Overseers of Poor, 7 Leigh (Va.) 231; Town of Marshfield v. Edwards, 40 Vt. 245; Town of Dover v. Wheeler, 51 Vt. 160; Town of Weybridge v. Cushman, 64 Vt. 415, 24 Atl. 1114. But see Gould v. Bailley, 2 N. J. Law (1 Penning.) 1; Mathews v. City of Philadelphia, 93 Pa. 147.

[279] Inhabitants of Middleborough v. Clark, 19 Mass. (2 Pick.) 28; Inhabitants of Sturbridge v. Winslow, 38 Mass. (21 Pick.) 83; State v. Benton, 18 N. H. 47; State v. Cornish, 66 N. H. 329, 21 Atl. 180, 11 L. R. A. 191.

[280] See, also, Smith v. Peabody, 106 Mass. 262.

this special purpose.[281] These expenses may arise either from the grant of relief to those legally entitled within their limits [282] or by authority of law in connection with disbursements made for paupers or others whose legal settlement is within another district but temporarily or permanently cared for by them and which in this case then become a legal charge upon that other district and can be collected in the manner prescribed.[283]

[281] Edwards v. Branch, 52 N. C. (7 Jones) 90; Daniel v. Edgecombe County Com'rs, 74 N. C. 494. But see Town of Kankakee v. McGrew, 178 Ill. 74, 52 N. E. 893.

[282] Auburn v. City of Lewiston, 85 Me. 282, 27 Atl. 159; Sullivan v. City of Lewiston, 93 Me. 71, 44 Atl. 118.

[283] Park County v. Jefferson County, 12 Colo. 585, 21 Pac. 912; Town of Beacon Falls v. Town of Seymour, 44 Conn. 210; Town of Canton v. Town of Burlington, 58 Conn. 277; Town of Bristol v. Town of New Britain, 71 Conn. 201, 41 Atl. 548. An action will lie by one town to recover money voluntarily paid to another town to reimburse it for the support of a pauper.

Town of Fox v. Town of Kendall, 97 Ill. 72; Town of Bristol v. Town of Fox, 159 Ill. 500, 42 N. E. 887; reversing 45 Ill. App. 330; Cerro Gordo County v. Wright County, 50 Iowa, 439; Hardin County v. Wright County, 67 Iowa, 127; Inhabitants of Camden v. Inhabitants of Lincolnville, 16 Me. 384; Inhabitants of New Vineyard v. Phillips, 45 Me. 405; City of Bangor v. Inhabitants of Fairfield, 46 Me. 558. Inhabitants of Ripley v. Inhabitants of Hebron, 60 Me. 379. Requisites of declaration stated in an action by one town against another to recover the value of supplies furnish a pauper. Inhabitants of West Gardiner v. Inhabitants of Hartland, 62 Me. 246; City of Taunton v. Inhabitants of Wareham, 153 Mass. 192, 26 N. E. 451; Inhabitants of Easton v. Inhabitants of Wareham, 131 Mass. 10; City of Northhampton v. Inhabitants of Plainfield, 164 Mass. 506, 41 N. E. 785, overruling City of Taunton v. Inhabitants of Wareham, 153 Mass. 192, 26 N. E. 451.

Lander County v. Humboldt County, 21 Nev. 415, 32 Pac. 849. A county is liable for relief furnished by another county only when the indigent is a pauper. Washoe County v. Eureka County, 25 Nev. 356, 50 Pac. 376; Strafford County v. Rockingham County, 71 N. H. 37, 51 Atl. 677; Town of Plymouth v. Grafton County, 68 N. H. 361, 44 Atl. 523; Stilwell v. Coons, 122 N. Y. 242, 25 N. E. 316; Burke County Com'rs v. Buncombe County Com'rs, 101 N. C. 520, 8 S. E. 176; Town of St. Johnsbury v. Town of Waterford, 15 Vt. 692; Town of Pawlet v. Town of Sandgate, 19 Vt. 621; Town of Westfield v. Sauk County, 18 Wis. 624; Town of Ettrick v. Town of Bangor, 84 Wis. 256, 54 N. W. 401; Town of Dakota v. Town of Winneconne, 55 Wis. 522; City of Plymouth v. Sheboygan County, 101 Wis. 200, 77 N. W. 196; Portage County v. Town of Neshkoro, 109 Wis. 520, 85 N. W. 414; Board of

§ 1097. Settlement.

The determination of the legal settlement of paupers is a question of local statutes and as these differ widely, no general principle can be stated which will determine accurately the question. As districts or official bodies performing the duty under consideration are regarded as governmental agencies and public quasi corporations, it follows that the legislature has full power to change their boundaries or authority as it deems best and to fix the settlement of paupers. The term as used in the legal decisions in respect to the liability of any public quasi corporation for the support 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."[284] 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. Such laws are construed technically and strictly as there is no disposition on the part of any particular district to expend more for this purpose than is absolutely necessary.

§ 1098. Settlement; how acquired.

Settlement 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.[285] A legal settlement of this nature

Com'rs of Sweetwater County v. Carbon County Com'rs, 6 Wyo. 254, 44 Pac. 66. But see Inhabitants of Naples v. Raymond, 72 Me. 213; Town of Danville v. Town of Hartford, 73 Vt. 300, 50 Atl. 1082; Dane County Superintendents of Poor v. Sauk County Superintendents of Poor, 38 Wis. 499. See, also, Rock Island County v. Mercer County, 96 Ill. App. 531.

[284] 22 Am. & Eng. Enc. Law (2d Ed.) p. 949; Inhabitants of Jefferson v. Inhabitants of Washington, 19 Me. 293.

[285] Town of Guilford v. Town of New Haven, 56 Conn. 465, 16 Atl. 240; Inhabitants of Searsmont v. Inhabitants of Lincolnville, 83 Me. 75, 21 Atl. 747; Inhabitants of Augusta v. Inhabitants of Turner, 24 Me. 112. Settlement may be ob-

depends upon two essentials, namely, duration of residence [286] and its continuity.[287] A settlement by right is also established through birth [288] and this will be taken as conclusive until it be shown that a person has a settlement elsewhere.[289]

tained through residence by one non compos mentis.

Inhabitants of Kirkland v. Inhabitants of Bradford, 33 Me. 580; Inhabitants of Newry v. Inhabitants of Gilead, 60 Me. 154; Inhabitants of Belmont v. Inhabitants of Vinalhaven, 82 Me. 524, 20 Atl. 89; City of Fitchburg v. Inhabitants of Athol, 130 Mass. 370; Inhabitants of Dedham v. Inhabitants of Milton, 136 Mass. 424; 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; Eatontown v. Shrewsbury, 49 N. J. Law, 482, 9 Atl. 718; McLorinan v. Bridgewater Tp., 49 N. J. Law, 614, 10 Atl. 187; In re Town of Hector, 24 N. Y. Supp. 475. Italian laborers leaving their families in Italy and employed in constructing railroads, liable to be discharged at any time and free to leave their employment when they see fit, do not gain a settlement in a town in which they work for a year.

City of Syracuse v. Onondaga County, 25 Misc. 371, 55 N. Y. Supp. 634; People v. Maynard, 160 N. Y. 453, 55 N. E. 9; Henrietta Tp. v. Brownhelm Tp., 9 Ohio, 76; Town of Hartford v. Town of Hartland, 19 Vt. 392; Town of Chittenden v. Town of Stockbridge, 63 Vt. 308, 21 Atl. 1102; Town of Fairfax v. Town of Westford, 67 Vt. 390, 31 Atl. 847; City of Rutland v. Town of Proctor, 68 Vt. 153, 34 Atl. 427; City of Rutland v. Chittenden, 74 Vt. 219, 52 Atl. 426; Town of Washington v. Town of Corinth, 55 Vt. 468. Continuous residence and the payment of taxes are both necessary to give a legal settlement. State v. Dodge County, 56 Wis. 79; Town of Craftsbury v. Town of Greenboro, 66 Vt. 585, 29 Atl. 1024; St. Johnsbury v. Waterford, 67 Vt. 641, 32 Atl. 630. But see Town of Londonderry v. Town of Landgrove, 66 Vt. 264, 29 Atl. 256.

[286] Town of New Haven v. Town of Middlebury, 63 Vt. 399, 21 Atl. 608; Town of Vershire v. Town of Hyde Park, 64 Vt. 638, 25 Atl. 431.

[287] Rockingham v. Springfield, 59 Vt. 521, 9 Atl. 241. The fact that the head of the family goes about working from town to town does not change the residence of the family. Town of Northfield v. Town of Vershire, 33 Vt. 110. Imprisonment in another town will not interrupt the legal residence of a man having a home to which he intends to return when he regains his liberty. Town of Baltimore v. Town of Chester, 53 Vt. 315. Imprisonment in a state's prison does not interrupt the legal residence of the prisoner under the pauper law when he has a family and a home in a town and resides there at the time he is imprisoned. See, also, Inhabitants of South Thomaston v. Inhabitants of Friendship, 95 Me. 201, 49 Atl. 1056.

[288] Inhabitants of Danbury v. Inhabitants of New Haven, 5 Conn. 584; Town of Salem v. Town of Lyme, 29 Conn. 74; Town of Washington v. Town of Kent, 38 Conn.

(a) Settlement through ownership of property. The ownership of property [290] may determine the legal settlement of an individual and it is not always necessary that this be owned in fee simple. An interest less than this may establish the right.[291]

249; Town of Windham v. Town of Lebanon, 51 Conn. 319; Town of Guilford v. Town of Norwalk, 73 Conn. 161, 46 Atl. 881; Inhabitants of Houlton v. Inhabitants of Lubec, 35 Me. 411. An illegitimate child cannot obtain a settlement by birth. Inhabitants of Brewer v. Inhabitants of Eddington, 42 Me. 541; Inhabitants of Starks v. Inhabitants of New Portland, 47 Me. 183; City of Lewiston v. Inhabitants of Harrison, 69 Me. 504. The receipt of aid will interrupt the gaining of the settlement. See, also, on the same point Inhabitants of Glenburn v. Inhabitants of Naples, 69 Me. 68, and City of Bangor v. Inhabitants of Wiscasset, 71 Me. 535.

Inhabitants of Topsham v. Inhabitants of Lewiston, 74 Me. 236. Imprisonment for five years in state's prison does not interrupt continuity of residence required for a settlement Overseers of Paterson v. Byram, 23 N. J. Law (3 Zab.) 394; Overseers of Poor of Northumberland v. Overseers of Poor of Milton (Pa.) 9 Atl. 449; Wayne Tp. v. Jersey Shore, 81* Pa. 264; Town of Exeter v. Town of Warwick, 1 R. I. 63.

[289] Shrewbury Overseer of Poor v. Holmdel Overseer of Poor, 42 N. J. Law, 373.

[290] Town of Clinton v. Town of Westbrook, 38 Conn. 9; Inhabitants of Freeport v. Inhabitants of Sidney, 21 Me. 305; Inhabitants of Salem v. Inhabitants of Andover, 3 Mass. 436; Inhabitants of Wellfleet v. Inhabitants of Truro, 91 Mass. (9 Allen) 137; Inhabitants of Conway v. Inhabitants of Deerfield, 11 Mass. 327; Inhabitants of Sudbury v. Inhabitants of Stow, 13 Mass. 463; Inhabitants of Southbridge v. Inhabitants of Charlton, 15 Mass. 248; Inhabitants of Spencer v. Inhabitants of Leicester, 140 Mass. 224. The rule does not apply to a married woman.

Gilsum v. Sullivan, 36 N. H. 368; Derry v. Rockingham County, 62 N. H. 485. The assessor's valuation of property is not conclusive as to its value. Eatonton v. Shrewsbury, 49 N. J. Law, 188, 6 Atl. 319; Overseers of Poor of Cascade v. Overseers of Poor of Lewis, 148 Pa. 333, 23 Atl. 1003; Beaver Poor Dist. v. Rose Poor Dist., 98 Pa. 636; Town of Kirby v. Town of Waterford, 15 Vt. 753; Town of Newfane v. Town of Somerset, 49 Vt. 411. But see Overseers of Tewksbury v. Overseers of Readington, 8 N. J. Law (3 Halst.) 319.

[291] Inhabitants of Oakham v. Inhabitants of Rutland, 58 Mass. (4 Cush.) 172. Interest necessary to acquire settlement by ownership of property. Inhabitants of Ipswich v. Inhabitants of Topsfield, 40 Mass. (5 Metc.) 350; Inhabitants of Oakham v. Inhabitants of Sutton, 54 Mass. (13 Metc.) 192; Inhabitants of Randolph v. Inhabitants of Norton, 82 Mass. (16 Gray) 395; Overseers of Newark v. Overseers of Pompton, 3 N. J. Law (3 Penning.) 1038; Rouse's Estate v. Directors of Poor of McKean County, 169 Pa. 116, 32 Atl. 541; Smith v. Angell, 14 R. I. 192; Town of Wal-

(b) By payment of taxes. The voluntary payment of taxes for a prescribed time may be also the means by which a legal settlement is acquired,[292] and this may be lost by a failure to pay those legally imposed.[293]

(c) Change of boundary. It has already been stated that the power of the legislature over the boundaries of poor districts is complete and a legal settlement may be changed or acquired conversely, through an alteration of the boundaries by this body, of districts.[294]

den v. Town of Cabot, 25 Vt. 522; Town of Weston v. Town of Landgrove, 53 Vt. 375.

[292] Town of North Stonington v. Town of Stonington, 31 Conn. 412; Town of New Hartford v. Town of Canaan, 54 Conn. 39; Inhabitants of Taunton v. Inhabitants of Middleborough, 53 Mass. (12 Metc.) 35. One does not gain a settlement by paying taxes, however, during the time he is supplied by the town with money to aid him in supporting his helpless children. Inhabitants of Shrewsbury v. Inhabitants of Salem, 36 Mass. (19 Pick.) 389; Inhabitants of Plymouth v. Inhabitants of Wareham, 126 Mass. 475. To acquire settlement under rule stated in the text, the taxes must be paid for the designated time.

City of Worcester v. City of Springfield, 127 Mass. 540; Inhabitants of Greenfield v. Inhabitants of Buckland, 159 Mass. 491, 34 N. E. 952; Jaffrey v. Town of Cornish, 10 N. H. 505. The giving of a promissory note in payment of taxes is not such a payment as will establish a settlement under the statute. Overseers of Poor of Wallkill v. Overseers of Poor of Malaking, 14 Johns. (N. Y.) 87; Tamworth v. Freedom, 17 N. H. 279. Payment of taxes for the prescribed time without residence does not establish a settlement.

Dalton v. Bethlehem, 20 N. H. 505; Orford v. Benton, 36 N. H. 395; Francestown v. Deering, 41 N. H. 438; Town of Warren v. Town of Wentworth, 45 N. H. 564; Huston Tp. Poor Dist. v. Benezette Tp. Poor Dist., 135 Pa. 393, 19 Atl. 1060. A settlement may be gained by the payment of road taxes. Lawrence Overseers v. Delaware Overseers, 148 Pa. 380, 23 Atl. 1124. The payment must be voluntary and authorized by the one asking a settlement if paid by another person. Overseers of Poor of Delaware Tp. c. Overseers of Poor of Anthony Tp., 170 Pa. 181, 32 Atl. 623; Poor Dist. of Edenburg Borough v. Poor Dist. of Strattanville Borough, 188 Pa. 373, 41 Atl. 589. But see Inhabitants of Ellsworth v. Inhabitants of Gouldsboro, 55 Me. 94; Weare v. Deering, 58 N. H. 206.

Poor Dist. v. Poor Dist. of Eaton Tp., 161 Pa. 142, 28 Atl. 1070. A legal payment is not accomplished through the unauthorized payment by a political committee of a person's taxes to enable him to vote.

[293] Town of Beacon Falls v. Town of Seymour, 43 Conn. 217. A failure to pay taxes illegally imposed will not defeat a right to a settlement. Berlin v. Gorham, 34 N. H. 266; Bradford v. Newport, 42 N. H. 338.

[294] Town of Vernon v. Town of

§ 1099. 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,[295] and different rules will be

East Hartford, 3 Conn. 475; Town of Waterbury v. Town of Bethany, 18 Conn. 424; Inhabitants of Bloomfield v. Inhabitants of Skowhegan, 16 Me. 59; Inhabitants of Belgrade v. Inhabitants of Dearborn, 21 Me. 334; Inhabitants of Starks v. Inhabitants of New Sharon, 39 Me. 368; Inhabitants of Eddington v. Inhabitants of Brewer, 41 Me. 462; Inhabitants of Yarmouth v. Inhabitants of North Yarmouth, 44 Me. 352; Inhabitants of Clinton v. Inhabitants of Benton, 49 Me. 550; Inhabitants of Monson v. Inhabitants of Fairfield, 55 Me. 117; Inhabitants of West Boylston v. Inhabitants of Boylston, 15 Mass. 261; Inhabitants of New Braintree v. Inhabitants of Boylston, 41 Mass. (24 Pick.) 164; Fenholt v. Freeborn County, 29 Minn. 158; Overseer of Poor of Town of Clinton v. Overseer of Poor of Tp. of Clinton, 56 N. J. Law, 240; Overseer of Franklin Tp. v. Overseer of Clinton Tp., 51 N. J. Law, 93, 16 Atl. 184, Pike Tp. v. Union Tp., 5 Ohio, 529; Ashland County Com'rs v. Richland County Infirmary, 7 Ohio St. 65; Town of Worcester v. Town of East Montpelier, 61 Vt. 139, 17 Atl. 842; Town of Hay River v. Town of Sherman, 60 Wis. 54.

[295] Inhabitants of Harrison v. Inhabitants of Lincoln, 48 Me. 205; Inhabitants of Shirley v. Inhabitants of Watertown, 3 Mass. 322; Inhabitants of Dalton v. Inhabitants of Bernardston, 9 Mass. 201; Inhabitants of Abington v. Inhabitants of Duxbury, 105 Mass. 287; Ex parte Madbury, 17 N. H. 569. In acquiring the settlement of her husband, the wife necessarily loses her own.

Concord v. Rumney, 45 N. H. 423; Overseers of Alexandria v. Overseers of Kingwood, 8 N. J. Law (3 Halst.) 370; Bateman v. Mathes, 54 N. J. Law, 536, 24 Atl. 444; Superintendent of Poor of Cattaraugus County v. Superintendent of Poor of Erie County, 66 Hun, 636, 21 N. Y. Supp. 729; Wayne Tp. v. Porter Tp., 138 Pa. 181, 20 Atl. 939. A void marriage cannot change the settlement of any one. West Greenwich v. Warwick, 4 R. I. 136; Exeter v. Richmond, 6 R. I. 149; Town of Mountholly v. Town of Andover, 11 Vt. 226; Town of Newark v. Town of Sutton, 40 Vt. 261. The marriage of a woman to a man who has no settlement in the state suspends her own right of settlement.

But see Inhabitants of Lebanon v. Inhabitants of Hebron, 6 Conn. 45; Town of Goshen v. Town of Canaan, 35 Conn. 186. Inhabitants of Minot v. Inhabitants of Bowdoin, 75 Me. 205. Where the authorities of a town procure the marriage of a pauper to a man having a settlement elsewhere for the purpose of relieveing the town of her support, she does not lose her settlement. See, also, on the same question inhabitants of Appleton v. City of Belfast, 67 Me. 579.

City of Gardiner v. Inhabitants

found as given in the cases cited in the notes with reference to widows [296] and women who may have become separated, or divorced from,[297] or deserted by, their husbands.[298]

(a) Children. The settlement of children [299] and adopted or step-children [300] naturally follows that of their father or step-

of Manchester, 88 Me. 249, 33 Atl. 990; Inhabitants of Stoughton v. City of Cambridge, 165 Mass. 251, 43 N. E. 106.

[296] Inhabitants of Dedham v. Inhabitants of Natick, 16 Mass. 135; Marden v. City of Boston, 155 Mass. 359, 29 N. E. 588; City of Cambridge v. City of Boston, 137 Mass. 152; Burrell Tp. v. Pittsburg Guardians of Poor, 62 Pa. 472.

[297] Inhabitants of Dalton v. Inhabitants of Bernardston, 9 Mass. 201; Town of Ossipee v. Carroll County, 65 N. H. 12, 17 Atl. 1058; Overseers of Poor of Williamsport v. Overseers of Poor of Eldred, 84 Pa. 429; Lake Dist. Overseers of Poor v. South Canaan Overseers of Poor, 87 Pa. 19; Cascade Overseers v. Lewis Overseers, 148 Pa. 333.

[298] Washington County v. Mahaska County, 47 Iowa, 57; Inhabitants of Raymond v. Inhabitants of Harrison, 11 Me. (2 Fairf.) 190; Burlington v. Swanville, 64 Me. 78; City of Syracuse v. Onondaga County, 25 Misc. 371, 55 N. Y. Supp. 634; Overseers of Poor of Parker City v. Overseers of Poor of Du Bois Borough (Pa.) 9 Atl. 457; Rockingham v. Springfield, 59 Vt. 521, 9 Atl. 241; Town of Bethel v. Town of Tunbridge, 13 Vt. 445. Minor children remaining with their mother who has been abandoned, retain her settlement.

Town of Wilmington v. Town of Jamaica, 42 Vt. 694; Town of Danville v. Town of Wheelock, 47 Vt. 57; Town of Rockingham v. Town of Springfield, 59 Vt. 521; Monroe County v. Jackson County, 72 Wis. 449, 40 N. W. 224. The settlement of a wife follows the husband although she may have been abandoned by him.

[299] Town of Hebron v. Town of Colchester, 5 Day (Conn.) 169; McCarthy v. Hinman, 35 Conn. 538; 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. The same rule applies to posthumous children. Inhabitants of Augusta v. Inhabitants of Kingfield, 36 Me. 235; Inhabitants of Oldtown v. Inhabitants of Bangor, 58 Me. 353; Inhabitants of Strong v. Inhabitants of Farmington, 74 Me. 46. An insane person is incapable of acquiring a pauper's settlement in his own right. See, also, on same point Inhabitants of Islesborough v. Inhabitants of Lincolnville, 76 Me. 572.

Inhabitants of Winterport v. Inhabitants of Newburgh, 78 Me. 136. The rule applies though the child is non compos mentis. City of Gardiner v. Inhabitants of Manchester, 88 Me. 249, 33 Atl. 990; City of Worcester v. City of Springfield, 127 Mass. 540; Overseers of Poor of Alexandria v. Overseers of Poor of Bethlehem, 16 N. J. Law (1 Har.) 119. An idiot, though over twenty-one, living with his father follows the settlement of his father. Little Falls Tp. v. Bernards Tp., 44

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.[301] The settlement of illegitimate children follows that of the mother [302] or the place of birth.[303]

N. J. Law, 621. In the absence of any settlement of the father, the maiden settlement of the mother is imparted to the minor children.

Brower v. Smith, 46 N. J. Law, 72; Poor Dist. of Curwensville v. Poor Dist. of Knox (Pa.) 9 Atl. 463; Lewis v. Turbut, 15 Pa. 145; Overseers of Poor of Montoursville v. Overseers of Poor of Fairfield, 112 Pa. 99; Paine v. Town Council of Smithfield, 10 R. I. 446. In Rhode Island the settlement derived by a child from its father continues until he has acquired one of his own. Town of Marshfield v. Town of Tunbridge, 62 Vt. 455, 20 Atl. 106; Town of Rupert v. Town of Winhall, 29 Vt. 245. Legitimate children take the settlement of the mother if the father has no settlement in the state. Town of Sharon v. Town of Cabot, 29 Vt. 394.

[300] Inhabitants of Waldoborough v. Inhabitants of Friendship, 87 Me. 211, 32 Atl. 880; Inhabitants of Brookfield v. Inhabitants of Warren, 128 Mass. 287; Washburne v. White, 140 Mass. 568; Overseers of Poor of Northumberland v. Overseers of Poor of Milton (Pa.) 9 Atl. 449.

[301] Inhabitants of Milo v. Inhabitants of Kilmarnock, 11 Me. (2 Fairf.) 455; Inhabitants of Portland v. Inhabitants of New Gloucester, 16 Me. 427; Inhabitants of Dennysville v. Inhabitants of Trescott, 30 Me. 470; Inhabitants of Lowell v. Inhabitants of Newport, 66 Me. 78; Inhabitants of Hallowell v. Inhabitants of Augusta, 52 Me. 216; Inhabitants of Petersham v. Inhabitants of Dana, 12 Mass. 429; Overseers of Poor of Canajoharie v. Overseers of Poor of Johnstown, 17 Johns. (N. Y.) 41; Town of Sherbourne v. Town of Hartland, 37 Vt. 528. But see Clay County v. Palo Alto County, 82 Iowa, 626, 48 N. W. 1053; Inhabitants of Veazie v. Inhabitants of Machias, 49 Me. 105.

[302] Inhabitants of Guilford v. Inhabitants of Oxford, 9 Conn. 321; Town of New Haven v. Town of Newtown, 12 Conn. 165; Town of Bethlehem v. Town of Roxbury, 20 Conn. 298; Inhabitants of North Bridgewater v. Inhabitants of East Bridgewater, 30 Mass. (13 Pick.) 303; Richardson v. Overseers of Poor of Burlington, 33 N. J. Law, 190; Martin v. Stanaback, 53 N. J. Law, 529; Spears v. Snell, 74 N. C. 210; Lower Augusta v. Selinsgrove, 64 Pa. 166; Town of Rockingham v. Town of Mt. Holly, 26 Vt. 653. An illegitimate child afterwards legitimatized will derive a settlement from the father.

[303] Martin v. Overseer of Poor of Hardyston, 53 N. J. Law, 529, 22 Atl. 58. The rule stated in the text is true unless it appears that the mother has a legal settlement elsewhere in the state. McCoy v. Overseer of Poor of Newton, 37 N. J. Law, 133; State v. McQuaig, 63 N. C. 550; Town of Manchester v. Town of Springfield, 15 Vt. 385.

(b) Servants and apprentices. The relation of servant and master constitutes a relation as well as that of apprenticeship which may establish a derivative settlement. The taking of service [304] and of entering into an apprenticeship [305] establishes a derivative settlement on the part of the servant or the apprentice. It follows that of the master in these instances.

(c) Holding office. 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.[306] The rendition of military service may establish settlement.[307]

(d) Soldiers and persons non sui juris. By special provisions, indigent soldiers [308] or those non compos mentis [309] can acquire a

[304] Town of Dorr v. Town of Seneca, 74 Ill. 101; Inhabitants of Frankfort v. Inhabitants of New Vineyard, 48 Me. 565. The rule does not apply where a child of a pauper is bound out until its majority to the inhabitants of another town. Franklin v. South Brunswick, 3 N. J. Law (2 Penning.) 35; Overseers of Poor of Byberry v. Directors of Poor of Oxford, 2 Ashm. (Pa.) 9; Overseers of Poor of Bellefonte Borough v. Somerset County Poor Dist., 168 Pa. 286, 31 Atl. 1086; Poor Dist. of Buffalo Tp. v. Poor Dist. of Mifflinburg Borough, 168 Pa. 445, 32 Atl. 28.

[305] Upper Alloways Creek v. Elsingborough, 1 N. J. Law (Coxe) 389; Overseers of Bloomfield v. Overseers of Acquackanunck, 8 N. J. Law, 257; Overseers of North Brunswick v. Overseers of Franklin, 16 N. J. Law (1 Har.) 535; Overseers of Jefferson v. Overseers of Pequanack, 13 N. J. Law (1 J. S. Green) 187; Overseers of Hudson v. Overseers of Taghkanac, 13 Johns. (N. Y.) 245.

[306] Inhabitants of Paris v. Inhabitants of Hiram, 12 Mass. 263; Cowanshannock Tp. Overseers v. Valley Tp. Overseers, 152 Pa. 504, 25 Atl. 801.

[307] Inhabitants of Griswold v. Inhabitants of North Stonington, 5 Conn. 367; Inhabitants of Milford v. Inhabitants of Uxbridge, 130 Mass. 107. The fact that a person enlisted under a false name does not prevent his gaining a settlement under Mass. St. 1878, c. 190, § 1, cl. 10. Inhabitants of Lunenburg v. Inhabitants of Shirley, 132 Mass. 498. Rights of a deserter under the statute.

City of Newburyport v. Inhabitants of Worthington, 132 Mass. 510; City of Boston v. Inhabitants of Warwick, 132 Mass. 519; City of Brockton v. Inhabitants of Uxbridge, 138 Mass. 292; City of Boston v. Inhabitants of Mt. Washington, 139 Mass. 15, 29 N. E. 60; City of Cambridge v. Inhabitants of Paxton, 144 Mass. 520. Statute does not apply to one deserting. 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.

[308] Augusta v. Mercer, 80 Me. 122,

settlement in the manner provided which may differ from that prescribed by the general laws in respect to the same subject. Indigent soldiers or their families when standing in need of assistance do not ordinarily incur the disabilities of paupers by receiving aid.[310]

§ 1100. Settlement; how lost; by removal.

Settlement may be lost by a removal through the operation of the law where, in the manner prescribed, by petition or complaint,[311] and after notice,[312] proceedings by a body of competent

13 Atl. 401; Inhabitants of Winslow v. Inhabitants of Pittsfield, 95 Me. 53, 49 Atl. 46; Inhabitants of Orland v. Inhabitants of Ellsworth, 56 Me. 47; Crossman v. New Bedford Inst. for Savings, 160 Mass. 503, 36 N. E. 477.

[309] Town of Plymouth v. Town of Waterbury, 31 Conn. 515; Payne v. Town of Dunham, 29 Ill. 125; Inhabitants of Machias v. Inhabitants of East Machias, 33 Me. 427; Inhabitants of Gardiner v. Inhabitants of Farmingdale, 45 Me. 537. An orphan non compos mentis may acquire a settlement in his own right. Inhabitants of Pittsfield v. Inhabitants of Detroit, 53 Me. 442. An insane person sent to an insane asylum as a patient, by the authorities of the town in which he has established his residence, does not thereby lose it. Inhabitants of Monroe v. Inhabitants of Jackson, 55 Me. 55. A person non compos mentis from birth who has passed the age of twenty-one years will follow the settlement of his father. Inhabitants of Harrison v. City of Portland, 86 Me. 307, 29 Atl. 1084; City of Taunton v. Inhabitants of Wareham, 153 Mass. 192, 26 N. E. 451. The power to acquire a settlement is taken away by the commitment of an insane person. Overseers of Poor of Gregg Tp. v. Overseers of Poor of New Berlin (Pa.) 9 Atl. 461. See, also, McHenry County v. Town of Dorr, 39 Ill. App. 240.

[310] Inhabitants of Veazie v. Inhabitants of China, 50 Me. 518; Ames v. Smith, 51 Me. 602; Inhabitants of Granville v. Inhabitants of Southampton, 138 Mass. 256.

[311] Cicero Tp. v. Falconberry, 14 Ind. App. 237, 42 N. E. 42; Inhabitants of Wenham v. Inhabitants of Essex, 103 Mass. 117; Booth v. Hillsborough County, 45 N. H. 139; Simpson v. Maybaum, 58 N. J. Law, 323, 33 Atl. 814; Town of Wilmington v. Town of Jamaica, 42 Vt. 694; Town of Windham v. Town of Chester, 45 Vt. 459; Town of Peacham v. Town of Waterford, 46 Vt. 154. Principles of humanity as well as public policy forbid the removal of paupers under the pauper laws to the town of their legal settlement, where the proceeding involves the separation of husband and wife.

[312] Inhabitants of Kennebunkport v. Inhabitants of Buxton, 26 Me. 61; Inhabitants of Shutesbury v. Inhabitants of Oxford, 16 Mass. 102; Inhabitants of Shelburne v. Inhabitants of Buckland, 124 Mass. 117;

jurisdiction,[313] an order of removal can be made.[314] The right of review [315] is sometimes given and the proper apportionment of payment of the cost and expenses connected with the proceedings and the removal prescribed.[316]

(a) Change of residence; receipt of aid. 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.[317] This must, however, be permanent in its character and not a mere temporary removal accompanied with the intention of

Overseers of Gilpin Tp. v. Overseers of Park Tp., 118 Pa. 84, 11 Atl. 791; City of La Crosse v. Town of Melrose, 22 Wis. 459.

[313] Bridgewater Tp. v. Bethlehem Tp., 50 N. J. Law, 578, 14 Atl. 765; Town of Morristown v. Town of Fairfield, 46 Vt. 33.

[314] Directors of Poor of West Morelend v. Overseers of Conneaugh, 34 Pa. 231; Rockingham v. Springfield, 59 Vt. 521, 9 Atl. 241; Town of Burlington v. Town of Essex, 19 Vt. 91. An order for the removal of a pauper, his wife and their "four children" is good, although it does not state the names of the children nor allege that they are minors.

Town of Whitingham v. Town of Wardsboro, 47 Vt. 496; Town of Landgrove v. Town of Plymouth, 52 Vt. 503. The warrant of removal is fatally defective in not stating briefly a record of the judgment of the justices order. See, also, Trustees of Millcreek v. Trustees of Miami, 10 Ohio, 375.

[315] South Brunswick v. Cranbury, 53 N. J. Law, 126, 20 Atl. 1084. An order of removal not appealed from is conclusive. Sugar Creek Overseers v. Washington Overseers, 62 Pa. 479; Renovo Overseer v. Half Moon Overseers, 78 Pa. 301. An order for removal of a pauper unappealed from is conclusive. Town of Orange v. Bill, 29 Vt. 442.

[316] Overseers of Sugarloaf v. Directors of Poor of Schuylkill, 44 Pa. 481.

[317] Town of Canton v. Town of Burlington, 61 Conn. 589, 24 Atl. 982; Town of Fairfield v. Town of Easton, 73 Conn. 735, 49 Atl. 200; Town of Freeport v. Stephenson County Sup'rs, 41 Ill. 496. One sent to the county poor house does not thereby cease to be a resident of the town from which he is sent and which is liable for his support.

Inhabitants of Smithfield v. Inhabitants of Belgrade, 19 Me. 387. The residence of a pauper with a person who supports him under contract with a town has no effect to change his settlement. Inhabitants of Topsham v. Inhabitants of Lewiston, 74 Me. 236. Imprisonment for five years in state's prison does not interrupt continuity of residence required for a settlement.

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; In re McCutcheon, 25 Misc. 650, 56 N. Y. Supp. 370; People v. Maynard, 160 N. Y. 453, 55 N. E. 9. N. Y. Laws 1896, c. 225, § 41, provides that no residence of a poor person in any town shall op-

returning.[318] A settlement may be lost or the gaining of one prevented by the receipt of public aid for the benefit of the person or any of those dependent upon him.[319]

(b) Loss of derivative settlement. A derivative settlement will be lost through a change in existing relations legally regarded as

erate to give such a person a settlement where he is supported by another town.

Overseers of Poor of Lower Augusta Tp. v. Overseers of Poor of Howard Tp. (Pa.) 9 Atl. 446; Town of Chittenden v. Town of Barnard, 61 Vt. 145, 17 Atl. 844; Town of Danville v. Town of Hartford, 73 Vt. 300, 50 Atl. 1082; Town of Scott v. Town of Clayton, 51 Wis. 185. An absence of the character necessary to change a settlement does not occur during the absence of a person from the town in which he has a legal settlement and which supports the absentee as a pauper in some other town in the state. But see Fayette County v. Bremer County, 56 Iowa, 516; Town of Waterford v. Town of Fayston, 29 Vt. 530.

[318] Town of Salem v. Town of Lyme, 29 Conn. 74; Sloan v. Webster County, 61 Iowa, 738; Inhabitants of Clinton v. Inhabitants of York, 26 Me. 167; Inhabitants of Warren v. Inhabitants of Thomaston, 43 Me. 406; Inhabitants of Ripley v. Inhabitants of Hebron, 60 Me. 379. Question of intent is for the jury. Inhabitants of Burnham v. Inhabitants of Pittsfield, 68 Me. 580. Inhabitants of Solon v. Inhabitants of Embden, 71 Me. 418. Question of intent one for jury.

Inhabitants of South Thomaston v. Inhabitants of Friendship, 95 Me. 201, 49 Atl. 1056; Town of Saukville v. Town of Grafton, 68 Wis. 192, 31 N. W. 719; Town of South Burlington v. Town of Worcester, 67 Vt. 411, 31 Atl. 891; Sheldon Poor House Ass'n v. Town of Sheldon, 72 Vt. 126, 47 Atl. 542. Where a town supports its paupers in a poor house located in another town, an inmate does not lose his residence in the town by which he is supported. McCaffrey v. Town of Shields, 54 Wis. 645. See, also, Juniata County v. Delaware Overseers of Poor, 107 Pa. 68.

[319] Scott County v. Polk County, 61 Iowa, 616; Inhabitants of Searsmont v. Inhabitants of Thorndike, 77 Me. 504; Inhabitants of Deer Isle v. Inhabitants of Winterport, 87 Me. 37, 32 Atl. 718. Admissibility of evidence in respect to question of intent.

Inhabitants of East Sudbury v. Inhabitants of Waltham, 13 Mass. 460; Inhabitants of Lee v. Inhabitants of Lenox, 81 Mass. (15 Gray) 496; Town of Croydon v. County of Sullivan, 47 N. H. 179; Town of Cavendish v. Town of Mt. Holly, 48 Vt. 525. But the rule will not apply when a town renders aid to a person in discharge of a duty that it has assumed by way of contract and not in discharge of a duty imposed by statute. Town of Weston v. Town of Wallingford, 52 Vt. 630. But see Liberty v. Palermo, 79 Me. 473, 10 Atl. 455; Gleason v. Boston, 144 Mass. 25, 10 N. E. 476; Inhabitants of Shrewsbury v. City of Worcester, 180 Mass. 38, 61 N. E. 260; Scranton Poor Dist. v. Directors of Poor of Danville, 106 Pa. 446.

the source of the settlement.[320] 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.

§ 1101. Support of paupers; by relatives or others.

The state is under no obligation to render assistance so long as relatives of the pauper can be found who are charged by statute with the duty of maintaining them, if able.[321] If they neglect or refuse to perform their duty in this respect, proceedings are authorized through which they can be compelled to do so.[322] The statute may not provide for any special proceeding for its enforcement, but under such circumstances a right of action exists under ordinary rules of procedure.[323]

[320] Salisbury v. Fairfield (Conn.) 1 Root, 131. A ward has a right to reside with his guardian and this gains him no settlement.

[321] Dawson v. Dawson, 12 Iowa 512. Nephew not liable for support of uncle.

Jasper County v. Osborn, 59 Iowa, 208; Tracy v. Inhabitants of Rome, 64 Me. 201; City of Charlestown v. Inhabitants of Groveland 81 Mass. (15 Gray) 15; Inhabitants of Templeton v. Stratton, 128 Mass. 137; Inhabitants of Arlington v. Lyons, 131 Mass. 328; Fitzgerald v. Donoher, 48 Neb. 852, 67 N. W. 880. The question of a child's liability under such a statute for the support of a parent depends not upon his age but upon his ability.

Colebrook v. Stewartstown, 30 N. H. (10 Fost.) 9; Gray v. Spalding, 58 N. H. 345; Buxton v. Chesterfield, 60 N. H. 357; Duffey v. Duffey, 44 Pa. 399. The grandfather is bound to relieve and maintain his destitute grandchildren when necessity requires. Laurens Dist. Com'rs of Poor v. Dooling, 1 Bailey (S. C.) 73; Durfey v. Town of South Burlington, 65 Vt. 412, 26 Atl. 587; Town of Danville v. Town of Hartford, 73 Vt. 300, 50 Atl. 1082; Willard v. Overseers of Poor of Wood County, 9 Grat. (Va.) 139.

[322] Stone v. Stone, 32 Conn. 142; Town of Kankakee v. McGrew, 178 Ill. 74, 52 N. E. 893. A town overseer of the poor cannot refuse, however, to assist a pauper because he has relatives under the statutes liable for his support but who have failed to support him. Auburn v. Lewiston, 85 Me. 282, 27 Atl. 159; Ackerman v. Ackerman, 55 N. J. Law, 422, 27 Atl. 807; Aldridge v. Walker, 73 Hun, 281, 26 N. Y. Supp. 296; Goodale v. Lawrence, 88 N. Y. 513; Springfield Tp. v. DeMott, 13 Ohio, 104; In re James, 116 Pa. 152, 9 Atl. 170; In re O'Donnell (Pa.) 19 Atl. 42; Dierkes v. City of Philadelphia, 93 Pa. 270; McCook County v. Kammoss, 7 S. D. 558, 64 N. W. 1123, 31 L. R. A. 461.

[323] McCook County v. Kammoss, 7 S. D. 558, 64 N. W. 1123, 31 L. R. A. 461.

From paupers' estate. The paupers' estate or income may be used for the purpose of partial support and can for this object be received and disbursed by the public authorities having charge of his person.[324] This power would include the appropriation of the whole or a portion of a soldier's pension by the authorities of a soldier's home in which he is being supported at public expense.[325]

§ 1102. Relief; how secured.

Relief is ordinarily obtained upon application to the proper officials who, in their discretion, pass upon the application and act accordingly.[326] It is necessary in order to obtain support as a pauper that an adjudication be made by a competent tribunal of the character of the person applying for relief.[327] Poor officials are not authorized to expend public moneys for relief of the poor without such action.[328] Orders or decisions of such a body may

[324] Stewart v. Lewis, 16 Ala. 734; Cook v. Town of Morris, 66 Conn. 137, 33 Atl. 594; Jones County v. Norton, 91 Iowa, 680, 60 N. W. 200; Central Kentucky Asylum for Insane v. Drane, 24 Ky. L. R. 176, 68 S. W. 149; Schroer v. Central Ky. Asylum for Insane, 24 Ky. L. R. 150, 68 S. W. 150; City of Newburyport v. Creedon, 146 Mass. 134, 15 N. E. 157; Crossman v. New Bedford Inst. for Savings, 160 Mass, 503, 36 N. E. 477; Briggs v. Whipple, 6 Vt. 95; Thurston v. Holbrook's Estate, 31 Vt. 354. But see Christian County v. Rockwell, 25 Ill. App 20; City of Albany v. McNamara, 117 N. Y. 168, 22 N. E. 931, 6 L. R. A. 212.

[325] Loser v. Soldier's Home Managers, 92 Mich. 633, 52 N. W. 956.

[326] Town of East Hartford v. Pitkin, 8 Conn. 393; Armstrong v. Tama County, 34 Iowa, 309; Inhabitants of Fayette v. Inhabitants of Livermore, 62 Me. 229; Inhabitants of Sebec v. Inhabitants of Foxcroft, 67 Me. 491; Town of Cordova v. Village of Le Seuer Center, 78 Minn. 36, 80 N. W. 836; Holloway v. Town of Barton, 53 Vt. 300.

[327] Clark County v. Huie, 49 Ark. 145, 4 S. W. 452. The same rule applies to a county's liability for funeral expenses, a previous adjudication is necessary. Lee County v. Lackie, 30 Ark. 764; Superintendents of Poor of Newaygo County v. Nelson, 75 Mich. 154, 42 N. W. 797; Ackerman v. Ackerman, 55 N. J. Law, 422 27 Atl. 807; Collins v. King County, 1 Wash. T. 416; Town of Holland v. Town of Belgium, 66 Wis. 557. See, also, Church v. Town of South Kingstown, 22 R. I. 381, 48 Atl. 3, 53 L. R. A. 739.

[328] Cantrell v. Clark County, 47 Ark. 239, 1 S. W. 200; Lee County Sup'rs v. Gilbert, 70 Miss. 791, 12 So. 593. Where the condition of a poor person requires the immediate services of a surgeon, the county is liable though that person has not, pursuant to law, been declared a pauper.

be reviewed [329] and are not conclusive as against subsequent application.

§ 1103. Place of support.

It is competent for poor districts to contract for the support of its paupers [330] and indigent sick [331] and the care of them by private individuals even though such a contract be prospective in its nature.[332] Poorhouses or poor farms are usually provided however, and the public authorities have the power, if they so elect, to remove to these places those needing permanent care and relief.[333] Where, however, it would endanger the health or the safety of a person, they may be required to maintain, temporarily, the pauper elsewhere.[334] The expense of the support of the insane, of idiots or of the feeble minded, others non compos mentis or persons confined in reformatories and prisoners, must be paid for wholly by the state.[335] By law, however, a certain portion of the

[329] Ellison v. Harrison County, 74 Iowa, 494, 38 N. W. 372.

[330] Board of Com'rs of Logan County v. McFall, 4 Idaho, 71, 35 Pac. 691; County of Macoupin v. Edwards, 15 Ill. 197; Hayford v Belfast, 80 Me. 315, 14 Atl. 287; Waltham v. Town of Mullally, 27 Neb. 483, 43 N. W. 252; Wimer v. Worth Poor Overseers, 104 Pa. 317; Kirk v. Brazos County, 73 Tex. 56, 11 S. W. 143; Houston v. Kimball, 22 Vt. 575; Baldwin v. Town of Worcester, 67 Vt. 285, 31 Atl. 413; Durfey v. Town of Worcester, 63 Vt. 418, 22 Atl. 609; Town of Leicester v. Town of Brandon, 65 Vt. 544, 27 Atl. 318. But see Lebcher v. Custer County Com'rs, 9 Mont. 315, 23 Pac. 713. Relative to validity of special contract. Rowell v. Town of Vershire, 63 Vt. 510, 22 Atl. 604. See, also, Polk v. Covington County, 77 Miss. 803.

[331] Tucker v. City of Virginia, 4 Nev. 20.

[332] Davenport v. Inhabitants of Hallowell, 10 Me. (1 Fairf.) 317.

[333] Town of Bristol v. Town of Fox, 159 Ill. 500, 42 N. E. 887. A district chargeable with the support of a pauper residing elsewhere has the right to remove him against his will to its territory. Rawson v. Inhabitants of Uxbridge, 113 Mass. 47; Winchester v. Cheshire County, 64 N. H. 100, 5 Atl. 767; Rockaway Tp. v. Morris County Freeholders, 68 N. J. Law, 16, 52 Atl. 373; In re Connellan, 25 Misc. 592, 56 N. Y. Supp. 157.

[334] Aldrich v. Inhabitants of Blackstone, 128 Mass. 148; Board of Sup'rs of Rankin County v. Watson, 70 Miss. 85, 11 So. 632; Derry v. Rockingham County, 64 N. H. 499, 14 Atl. 866; Town of Plymouth v. Town of Haverhill, 69 N. H. 400, 46 Atl. 460. The same rule applies to a prisoner.

[335] Watson v. Inhabitants of Cambridge, 35 Mass. (18 Pick.) 470; New Hampshire Asylum for Insane v. Belknap County, 69 N. H. 174, 44 Atl. 928. But see Schrorer v. Central Ky. Asylum for Insane, 24 Ky.

expense may be chargeable to the county or district from which a person was committed.[336]

§ 1104. Support; character; medical attendance.

Paupers are entitled to an adequate and necessary support which includes a sufficient quantity of wholesome food, reasonably healthful and comfortable quarters[337] funeral expenses[338] and the necessary medical attendance in case of sickness.[339] The letter is ordinarily furnished by regularly employed physicians or upon an order of the proper officials,[340] and where this is true, the

L. R. 150, 68 S. W. 150. See, also, McNorton v. Val Verde County (Tex. Civ. App.) 25 S. W. 653.

[336] Inhabitants of Cooper v. Inhabitants of Alexander, 33 Me. 453; Inhabitants of Lewiston v. Inhabitants of Fairfield, 47 Me. 481; Inhabitants of Jay v. Inhabitants of Gray, 57 Me. 345; Smith v. Inhabitants of Lee, 94 Mass. (12 Allen) 510; City of Taunton v. Inhabitants of Wareham, 153 Mass. 192, 26 N. E. 451; Adams v. Inhabitants of Ipswich, 116 Mass. 570; State v. Cole County Ct., 80 Mo. 80; Merrimack County v. Concord, 39 N. H. 213; People v. Herkimer County Sup'rs, 46 Hun (N. Y.) 354; Kelly v. Multnomah County, 18 Or. 356, 22 Pac. 1110; Forest County v. House of Refuge, 62 Pa. 441. See, also, City of Alton v. Madison County, 21 Ill. 115.

[337] Seagraves v. City of Alton, 13 Ill. 366; State v. West, 82 Tenn. (14 Lea) 38; Meier v. Paulus, 70 Wis. 165, 35 N. W. 301.

[338] Inhabitants of Ellsworth v. Inhabitants of Houlton, 48 Me. 416.

[339] Town of Bridgewater v. Town of Roxbury, 54 Conn. 213; County of Vermilion v. Knight, 2 Ill. (1 Scam.) 97; La Salle County Sup'rs v. Reynolds, 49 Ill. 186; Perry County v. City of Du Quoin, 99 Ill. 479; Morgan County Com'rs v. Seaton, 90 Ind. 158; Cooledge v. Mahaska County, 24 Iowa, 211; Clay County Com'rs v. Renner, 27 Kan. 225; Inhabitants of Bucksport v. Cushing, 69 Me. 224; Allegany County Com'rs v. McClintock, 60 Md. 559; Wing v. Inhabitants of Chesterfield, 116 Mass. 353; Town of Montgomery v. County of Le Sueur, 32 Minn. 532; Lee County Sup'rs v. Gilbert, 70 Miss. 791, 12 So. 593; Jones v. De Soto County Sup'rs, 60 Miss. 409; Directors of Poor v. Donnelly (Pa.) 7 Atl. 204; Poor Dist. of Summit Tp. v. Byers (Pa.) 11 Atl. 242; Directors of Poor of Chester v. Malany, 64 Pa. 144; Putney Bros. Co. v. Milwaukee County, 108 Wis. 554, 84 N. W. 822. County commissioners have no authority to contract for medical services to cure a pauper of habitual drunkenness as a disease. See, also, Edson v. Town of Pawlet, 22 Vt. 291.

[340] County of Fayette v. Morton, 53 Ill. App. 552; La Salle County v. Hatheway, 78 Ill. App. 95; Gaston v. Marion County Com'rs, 3 Ind. 497; Jefferson County Com'rs v. Rogers, 17 Ind. 341; Bartholomew County Com'rs v. Ford, 27 Ind. 17; Board of Com'rs of Warren

value of medical services rendered by others cannot be recovered.[341] Expenses may be incurred by private persons in caring for paupers and these may be recovered from the proper district when notice, if any, has been given as provided by law and the person to whom assistance was given is a legal charge upon public bounty.[342]

County v. Osburn, 4 Ind. App. 590, 31 N. E. 541. The authority from a township trustee for a physician to treat a poor person need not be in writing. Board of Com'rs of Perry County v. Lomax, 5 Ind. App. 567, 32 N. E. 800. A skilled surgeon may be employed to perform an operation where the regular physician lacks the necessary ability. Cooper v. Howard County Com'rs, 64 Ind. 520. Contract between county commissioner and physician.

Collins v. Lucas County, 50 Iowa, 448; Overseers of Poor of Windham v. City of Portland, 23 Me. 410; Boothby v. Inhabitants of Troy, 48 Me. 560; Bentley v. Chisago County Com'rs, 25 Minn. 259; St. Luke's Hospital Ass'n v. Grand Forks County, 8 N. D. 241, 77 N. W. 598; Beach v. Town of Neenah, 90 Wis. 623, 64 N. W. 319. The question of an agreement to pay for services of a physician rendered to a pauper family is for the jury. But see Clinton County v. Pace, 59 Ill. App. 576. A county is liable for necessary services rendered by a physician where prompt action is required without notice to or permission from the overseers of the poor.

[341] Mitchell v. Tallapoosa County, 30 Ala. 130; Scobey v. Town of Manteno, 56 Ill. App. 336; De Witt County v. Wright, 91 Ill. 529; Bartholomew County v. Boynton, 30 Ind. 359; Robinson v. Morgan County Com'rs, 91 Ind. 537; Morgan County v. Seaton, 122 Ind. 521, 24 N. E. 213; Mansfield v. Sac County, 59 Iowa, 694; Bean v. Inhabitants of Jay, 23 Me. 117; Goodrich v. City of Waterville, 88 Me. 39, 33 Atl. 659; Hamilton County v. Meyers, 23 Neb. 718, 37 N. W. 623; French v. Benton, 44 N. H. 28; Flower v. Allen, 5 Cow. (N. Y.) 654; St. Luke's Hospital Ass'n v. Grand Forks County, 8 N. D. 241, 77 N. W. 598; Campbell v. Grooms, 101 Pa. 481. But see Johnson v. Santa Clara County, 28 Cal. 545; Clinton County v. Pace, 59 Ill. App. 576; Carroll County Com'rs v. Wilson, 1 Ind. 478; Washburn v. Shelby County Com'rs, 104 Ind. 321. See, also, Morgan County Com'rs v. Johnson, 29 Ind. 35.

[342] Condon v. Pomroy-Grace, 73 Conn. 607, 48 Atl. 756; Town of Fairfield v. Town of Easton, 73 Conn. 735, 49 Atl. 200; Eshelman v. Clinton County, 88 Ill. App. 566; Scott v. Winneshiek County, 52 Iowa, 579; Speedling v. Worth County, 68 Iowa, 152; Cunningham v. Town of Frankfort (Me.) 12 Atl. 636; Perley v. Inhabitants of Oldtown, 49 Me. 31; Knight v. Inhabitants of Ft. Fairfield, 70 Me. 500; Carter v. City of Augusta, 84 Me. 418, 24 Atl. 892; Phelps v. Inhabitants of Westford, 124 Mass. 286; Eckman v. Brady Tp., 81 Mich. 70, 45 N. W. 502; Reynolds v. Alcorn County Sup'rs, 59 Miss. 132; Com'rs of Rouse's Estate v. Directors of

§ 1105. Right to services.

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.[343] 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,[344] or, in the case of minors, bound out to serve as apprentices or servants.[345]

§ 1106. 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.[346] 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

Poor of McKean County, 169 Pa. 116, 32 Atl. 541; Wolcott v. Town of Wolcott, 19 Vt. 37; Stone v. Town of Glover, 60 Vt. 651, 15 Atl. 334; Tufts v. Town of Chester, 62 Vt. 353, 19 Atl. 98; Town of Woodstock v. Town of Bernard, 67 Vt. 97, 30 Atl. 806; Walbridge v. Walbridge, 46 Vt. 617; Mappes v. Iowa County Sup'rs, 47 Wis. 31; Patrick v. Town of Baldwin, 109 Wis. 342, 85 N. W. 274, 53 L. R. A. 613. But see Seagraves v. City of Alton, 13 Ill. 366; State v. Gold, 140 Ind. 699, 40 N. E. 55; O'Keefe v. Northhampton, 145 Mass. 115, 13 N. E. 382; Smith v. Williams, 13 Misc. 761, 35 N. Y. Supp. 236; Brazee v. Stewart, 59 App. Div. 476, 69 N. Y. Supp. 231; Caswell v. Hazard, 10 R. I. 490; Macoon v. Town of Berlin, 49 Vt. 13.

[343] Inhabitants of Clinton v. Inhabitants of Benton, 49 Me. 550; Abbot v. Town of Fremont, 34 N. H. 432.

[344] Sawyer v. Aldag, 45 Ill. App. 77. A superintendent of a poor farm has no right to imprison a pauper upon his refusal to perform physical labor in the absence of rules to that effect prescribed by the proper county authorities. Com. v. Inhabitants of Cambridge, 45 Mass. (4 Metc.) 35; Billings v. Kneen, 57 Vt. 428.

[345] Demar v. Simonson, 4 Blackf. (Ind.) 132; Curry v. Jenkins, 3 Ky. (Hardin) 501; 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; Dyer v. Hunet, 5 N. H. 401; Glidden v. Town of Unity, 33 N. H. 571; Commonwealth v. Coyle, 160 Pa. 36, 28 Atl. 576, 634, 24 L. R. A. 552; Welborn v. Little, 1 Nott & McC. (S. C.) 263.

[346] French v. State, 141 Ind. 618, 41 N. E. 2, 29 L. R. A. 113. It is constitutional for the legislature to

penitentiaries, prisons, jails, workhouses or other places of confinement [347] and reformatories or training schools for youthful violators of the law or those convicted of the commission of lesser offenses.[348] Rules of good order and discipline 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 [349] and no liability can arise because of the negligence of the state or its agents either in the selection or acts of officers,[350] the construction or condition of buildings or the use of machinery.[351] The rule also ob-

pass an act designating certain state officials as a board for the selection of prison directors.

[347] Peters v. State, 9 Ga. 109; Richardson v. Clarion County, 14 Pa. 198.

[348] Roth v. House of Refuge, 31 Md. 329; Farnham v. Pierce, 141 Mass. 203, 6 N. E. 830; State v. Brown, 50 Minn. 353, 52 N. W. 935, 16 L. R. A. 691; State v. Pike County, 144 Mo. 275, 45 S. W. 1096; Cincinnati House of Refuge v. Ryan, 37 Ohio St. 197. See, also, McLean County v. Humphreys, 104 Ill. 378.

[349] City of St. Louis v. Karr, 85 Mo. App. 608. But an ordinance is unconstitutional which, under the guise of enforcing a rule of discipline, will result in the confinement of a prisoner in the city workhouse beyond the maximum period prescribed by the charter.

[350] Wilson v. City of Macon, 88 Ga. 455, 14 S. E. 710; Hollenbeck v. Winnebago County, 95 Ill. 148; White v. Sullivan County Com'rs, 129 Ind. 396, 28 N. E. 846; Pfefferle v. Lyon County Com'rs, 39 Kan. 432, 18 Pac. 506; Zollikoffer v. Havemeyer, 4 T. & C. (N. Y.) 478; Clodfelter v. State, 86 N. C. 51; Watkins v. County Ct., 30 W. Va. 657, 5 S. E. 654.

[351] Payne v. Washington County, 25 Fla. 798; Morris v. Switzerland County Com'rs, 131 Ind. 285, 31 N. E. 77. Action by one confined for impairment of health on account of its bad condition. The court say: "As the state is not liable for the acts or omissions of its officers, neither should a political subdivision of the state be liable for the acts or omissions of its officers as relating to political powers. Prisons are constructed and maintained as one of the instruments of and as a means for the purpose of carrying out the police power of the state, and the duty of constructing and maintaining them is imposed upon the counties by the state."

Kincaid v. Hardin Co., 53 Iowa, 430, 5 N. W. 589; Green v. Harrison Co., 61 Iowa, 311, 16 N. W. 136; Lindley v. Polk County, 84 Iowa, 308, 50 N. W. 975; Hite v. Whitley County Ct., 12 Ky. L. R. 764, 15 S. W. 57; 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. No liability where plaintiff while a prisoner contracted a disease of the lungs on account of insufficient bedding and warmth during cold weather.

Davis v. Knoxville, 90 Tenn. 599,

tains that a public corporation cannot be liable for a tort committed by one of its convicts on the person of another.[352] The exemption 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.[353]

Miscellaneous charitable institutions. The state also has the undoubted right to construct and maintain or aid institutions for the care of the physically defective or for the unfortunate.[354] It has also been held that an act which confers upon counties the

18 S. W. 254. "The preservation of order, the maintenance of sobriety, the arrest and detention of violators of the general law of the state is not for the local and private benefit of the corporation. It draws no private emolument from the enforcement of ordinances carrying out the general policy of the state, and in the exercise of the power incident to all these matters it is but an agency of the state, and its officers, in effect, officers of the state. Its discretion as to the character of its jail cannot be controlled by judgments holding it liable for negligence, if in the opinion of a jury it is not sufficiently commodious or properly arranged." Fry v. Albermarle County, 86 Va. 195, 9 S. E. 1004.

[352] Doster v. City of Atlanta, 72 Ga. 233.

[353] Ex parte Barnett, 51 Ark. 215; In re Burrow, 55 Ark. 275, 18 S. W. 170; Georgia Penitentiary Co. v. Nelms, 71 Ga. 301; State v. Jack, 90 Tenn. 614, 18 S. W. 257. See, also, Tramwell v. Lee County, 94 Ala. 194.

[354] Power v. May, 123 Cal. 147, 55 Pac. 796; Parks v. Soldiers' & Sailors' Home Com'rs, 22 Colo. 86, 43 Pac. 542; State v. Cassidy, 22 Minn. 312. Laws authorizing the erection and maintenance of an inebriate asylum held constitutional, reveiwing many cases.

People v. Comptroller of City of Brooklyn, 152 N. Y. 399, 46 N. E. 852; People v. Fitch, 154 N. Y. 14, 47 N. E. 983, 38 L. R. A. 591. Partial public support of a private institution for the blind, charitable in its nature, is legal. Bell v. Johnston County Com'rs, 127 N. C. 85, 37 S. E. 136. No action will lie against county commissions for failure to establish a county hospital as authorized by law. City of Zanesville v. Crossland, 8 Ohio Circ. R. 652; City of Richmond v. Henrico County Sup'rs, 83 Va. 204, 2 S. E. 26. But see Fox v. Mohawk & H. R. Humane Soc., 165 N. Y. 517, 59 N. E. 353, holding the appropriation of fees received from the license of dogs to a humane society an unauthorized appropriation of public moneys. See, also, Clarke v. Police & Health Ins. Board, 123 Cal. 24, 55 Pac. 576, holding constitutional act of March 4th, 1889, creating a police relief, health and life insurance pension fund. People v. Manhattan State Hospital, 33 Misc. 414, 68 N. Y. Supp. 647.

power to use county funds in the treatment and care of indigent inebriates is not a misappropriation of public moneys.[355] The right of individuals to the privileges afforded by these institutions is not absolute but dependent upon statutory provisions or regulations adopted pursuant to law.[356] Inmates are amenable to all reasonable rules of discipline.[357]

[355] Williamson v. Arapahoe County Com'rs, 23 Colo. 87, 46 Pac. 117, 33 L. R. A. 832. See, also, as holding the same principle, State v. City of New Orleans, 50 La. Ann. 80, 24 So. 666, in connection with the use of municipal moneys for charitable purposes, and State v. Seibert, 123 Mo. 424, 24 S. W. 750, 27 S. W. 624.

[356] Curtis v. Allen, 43 Neb. 184, 61 N. W. 568.

[357] Tuck v. Directors of Industrial Home of Mechanical Trades for Adult Blind, 106 Cal. 216, 39 Pac. 607.

CHAPTER XII.

ACTIONS BY AND AGAINST PUBLIC CORPORATIONS.

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I. Mandamus.

§ 1107. General principles governing issue of writ.

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

[1] Kimberlin v. Commission to Five Civilized Tribes, 104 Fed. 653; Weaver v. Ogden City, 111 Fed. 323; Pond v. Parrott, 42 Conn. 13; Auditors of Cottonwood v. People, 38 Ill. App. 239; Reddick v. People, 82 Ill. App. 85; State v. Herron, 29 La. Ann. 848; State v. Police Jury of

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

St. Charles, 29 La. Ann. 146; People v. Presque Isle County Sup'rs, 36 Mich. 377; People v. Auditor General, 36 Mich. 271; State v. Garesche, 3 Mo. App. 526; Beaman v. Police of Leake County, 42 Miss. 237; Gouldey v. City Council of Atlantic City, 63 N. J. Law, 537, 42 Atl. 852; People v. Easton, 13 Abb. Pr. (N. S., N. Y.) 159; Ex parte Barnwell, 8 S. C. (8 Rich.) 264; Puckett v. White, 22 Tex. 559; Harris v. Tarbet, 19 Utah, 328, 57 Pac. 33; Tyler v. Taylor, 29 Grat. (Va.) 765; State v. Anderson, 100 Wis. 523, 76 N. W. 482, 42 L. R. A. 239.

Writ refused because right not clear. People v. Coler, 58 App. Div. 131, 68 N. Y. Supp. 448; Teat v. McGaughey, 85 Tex. 478, 22 S. W. 302; People v. Board of State Canvassers, 129 N. Y. 360, 14 L. R. A. 646.

State v. Hoglan, 64 Ohio St. 532, 60 N. E. 627. Honest misconstruction of statute by officer does not preclude issuance of writ. United States v. Indian Grave Drainage Dist., 85 Fed. 928, 29 C. C. A. 587. Equitable as distinguished from legal rights will not be enforced by mandamus.

[2] State v. Tappan, 29 Wis. 664; Board of Liquidation v. McComb, 92 U. S. 531. Compare State v. Heard, 47 La. Ann. 1679, 18 So. 746, 47 L. R. A. 512.

[3] United States v. City of New Orleans, 2 Woods, 230, Fed. Cas. No. 15,871; State v. Lockett, 52 La. Ann. 1620, 28 So. 157; State v. Jenkins, 21 Wash. 364, 58 Pac. 217; Hilton v. Curry, 124 Cal. 84; State v. Knox County Com'rs, 101 Ind. 398; Marshall v. Clark, 22 Tex. 23.

[4] Holtzclaw v. Riley, 113 Ga. 1023, 39 S. E. 425; State v. Napier, 7 Iowa, 425; Crane v. Secretary of State, 51 Mich. 195; State v. Jenkins, 21 Wash. 364, 58 Pac. 217.

[5] Heath v. Johnson, 36 W. Va. 782; Alger v. Seaver, 138 Mass. 331; State v. Trent, 58 Mo. 571; Pond v. Parrott, 42 Conn. 13; State v. Powers, 14 Ga. 388.

[6] Board of Education of South Milwaukee v. State, 100 Wis. 455, 76 N. W. 351; Indiana, I. & I. R. Co. v. Rinehart, 14 Ind. App. 588, 43 N. E. 238. See, also, Payne v. School Dist. Nos. 3–25–10, 87 Mo. App. 415; People v. Central Car & Mfg. Co., 41 Mich. 166; Bailey v. Oviatt, 46 Vt. 627. Stenographer employed by legislative committee cannot be compelled to furnish transcript of evidence taken.

[7] Edward C. Jones Co. v. Town of Guttenberg, 66 N. J. Law, 58, 48 Atl. 537; Cook v. Candee, 52 Ala. 109; Rosenthal v. State Board of Canvassers, 50 Kan. 129, 32 Pac. 129, 19 L. R. A. 157; Johnson v. Lucas, 30 Tenn. (11 Humph.) 306; Gillespie v. Wood, 23 Tenn. (4 Humph.) 437; Ross v. Lane, 11 Miss. (3 Smedes & M.) 695. See, also, First Nat. Bank v. Hefflebower, 58 Kan. 792, 51 Pac. 225.

[8] Board of Sup'rs of Cheboygan

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]

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] State v. Beck, 25 Nev. 105, 57 Pac. 935; 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; Atchison, T. & S. F. R. Co. v. Jefferson County Com'rs, 12 Kan. 127. Compare Quan Wo Chung & Co. v. Laumeister, 83 Cal. 384, 23 Pac. 320.

[11] Bates v. Porter, 74 Cal. 224, 15 Pac. 732; Heumeister v. Porter (Cal.) 16 Pac. 187; Rice v. Walker, 44 Iowa, 458; Chosen Freeholders of Ocean v. Vanarsdale, 42 N. J. Law, 536; Warner v. Reading, 46 N. J. Law, 519. See, also, Ackerman v. Desha County, 27 Ark. 457. Compare People v. Bender, 36 Mich. 195.

Lack of funds. As where respondent is without funds or credit sufficient to do act sought to be coerced. City of Benton Harbor v. St. Joseph & B. H. St. R. Co., 102 Mich. 386, 60 N. W. 758, 26 L. R. A. 245; Bloomington Highway Com'rs v. People, 19 Ill. App. 253; Congregation of Mission of St. Vincent de Paul v. Street & Sewer Committee, 56 N. J. Law, 48, 27 Atl. 799. Where no appropriation has been made for public improvement which it was duty of respondent to make.

Rice v. Walker, 44 Iowa, 458. If the officer has put it out of his power to do his duty, he may be liable in damages to one prejudiced by his acts, but mandamus will not lie.

People v. Solomon, 54 Ill. 39. Where officer on making return to alternative writ did not disclose his inability to perform, the court held him in contempt for failure to obey peremptory writ.

[12] State v. Cavanac, 30 La. Ann. 237; Ball v. Lappius, 3 Or. 55.

[13] State v. Atchison, T. & S. F. R. Co., 60 Kan. 858, 57 Pac. 106. As where the writ is sought to secure information for a board that has met, performed its functions and passed out of existence. Cristman v. Peck, 90 Ill. 150. Or a school term has expired before the application to compel the reinstatement of an expelled scholar could be heard.

[14] State v. Burke, 33 La. Ann. 498; Marshall v. Clark, 22 Tex. 23; 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.

§ 1108. Character of duty sought to be coerced.

To authorize the writ, the duty must be mandatory,[15] and the act sought to be coerced, ministerial in its nature.[16] If the officer or governmental agency sought to be coerced is vested by law with discretionary powers as to the doing or not doing of the act sought to be coerced, or the manner of doing it, the writ will not issue,[17] nor will it lie to review or rescind any action already taken

[15] People v. Bell, 4 Cal. 177; People v. Guggenheimer, 28 Misc. 735, 59 N. Y. Supp. 913; State v. Hobart, 12 Nev. 408; People v. State Auditors, 42 Mich. 422; Will County Sup'rs v. People, 110 Ill. 511.

State v. Fitzpatrick, 47 La. Ann. 1329, 17 So. 828. Where an ordinance merely "authorizes," but does not make it the duty of an officer to do a certain thing, mandamus will not issue to compel him to do what he is authorized to do.

[16] Board of Liquidation v. McComb, 92 U. S. 531; Roberts v. United States, 176 U. S. 221; Kimberlin v. Commission to Five Civilized Tribes, 104 Fed. 653; Kuechler v. Wright, 40 Tex. 601; Lord v. Bates, 48 S. C. 95, 26 S. E. 213; Ex parte Lynch, 16 S. C. 32; State v. Police Jury of St. Charles, 29 La. Ann. 146; State v. Judge of Twenty-second Judicial Dist. Ct., 48 La. Ann. 847, 19 So. 946; State v. Johnson, 28 La. Ann. 932; Bryan v. Cattell, 15 Iowa, 538; Johnson v. Campbell, 39 Tex. 83; Bledsoe v. International R. Co., 40 Tex. 537.

Marcum v. Ballot Com'rs, 42 W. Va. 263, 36 L. R. A. 296. "A ministerial act or duty is one which is to be performed under a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to or exercise of the judgment of the one doing it upon the propriety of the act's being done."

[17] Black v. Auditor, 26 Ark. 237; McMillen v. Smith, 26 Ark. 613; Riverside County v. San Bernardino County, 134 Cal. 517, 66 Pac. 788; Boyne v. Ryan, 100 Cal. 265, 34 Pac. 707; People v. Bell, 4 Cal. 177; American Casualty Ins. & Security Co. v. Fyler, 60 Conn. 448; McCoy v. State, 2 Marv. (Del.) 543, 36 Atl. 81; Hastings v. Henry, 1 Marv. (Del.) 287, 40 Atl. 1125; Patterson v. Taylor, 98 Ga. 646, 25 S. E. 771; Booe v. Kenner, 20 Ky. L. R. 1343, 49 S. W. 330; Gohen v. Myers, 57 Ky. (18 B. Mon.) 423; State v. Police Jury of St. Charles, 29 La. Ann. 146; State v. Mount, 21 La. Ann. 369; State v. Warmoth, 23 La. Ann. 76; People v. Auditor General, 36 Mich. 271; People v. Judge of Monroe Circuit, 36 Mich. 274; People v. State Land Office Com'rs, 26 Mich. 146; People v. Regents of University, 30 Mich. 473; Reddick v. People, 82 Ill. App. 85; People v. Williams, 55 Ill. 178. Compare Village of Glencoe v. People, 78 Ill. 382; State v. Robinson, 1 Kan. 188; State v. Justices of Howell County Ct., 58 Mo. 583; Shober v. Cochrane, 53 Md. 544; Hart v. Folsom, 70 N. H. 213, 47 Atl. 603; People v. Scully, 23 Misc. 732, 53 N. Y. Supp. 125; Ex parte Black, 1 Ohio St. 30; Rollersville & P. Free Turnpike

which involved the exercise of discretionary powers,[18] though it has been said that the officer's judgment as to the extent of his discretion under the law, and the matters on which it may be exercised, is reviewable upon mandamus.[19] On the other hand, where it is the legal duty of an officer, or governmental agency, to exercise their discretion with reference to a particular matter, mandamus will lie to compel the exercise of the discretion, though not in any way to control it.[20] Ordinarily it will issue

Road Com'rs v. Sandusky County Com'rs, 1 Ohio St. 149; Everding v. McGinn, 23 Or. 15, 35 Pac. 178; Bledsoe v. International R. Co., 40 Tex. 537; Glasscock v. General Land Office Com'r, 3 Tex. 51; Bracken v. Wells, 3 Tex. 88; Meyer v. Carolan, 9 Tex. 250; State v. Washington County Sup'rs, 2 Chand. (Wis.) 247; Runkle v. Com. 97 Pa. 328; Patterson v. School Directors of Cecil, 24 Pa. Co. Ct. R. 574. See, also, Com. v. City of Philadelphia, 38 Wkly Notes Cas. 426, 35 Atl. 195; State v. State Board of Land Com'rs, 7 Wyo. 478, 53 Pac. 292.

People v. Casey, 66 App. Div. 211, 72 N. Y. Supp. 945. Examination of candidates for police force as to physical qualifications involves exercise of judicial discretion which is not subject to control or review in mandamus proceedings.

State v. Cheetham, 20 Wash. 64, 54 Pac. 772. "To examine and audit certain unpaid claims" vests the officer with quasi-judicial powers and functions which cannot be controlled by mandamus, hence writ will not lie to compel him to issue a warrant for claim rejected by him.

[18] Kimberlin v. Commission to Five Civilized Tribes, 104 Fed. 653; Jacobs v. San Francisco Sup'rs, 100 Cal. 121, 34 Pac. 630; People v. Chapin, 104 N. Y. 96, 10 N. E. 141; State v. Fire Com'rs of Cleveland, 26 Ohio St. 24; Tilden v. Sacramento County Sup'rs, 41 Cal. 68; Hayes v. Morgan, 81 Ill. App. 665; State v. Hastings, 10 Wis. 518; State v. Young, 84 Mo. 90; State v. Chittenden, 112 Wis. 569, 88 N. W. 587; State v. McMillan, 52 S. C. 60, 29 S. E. 540; Marcum v. Ballot Com'rs of Lincoln, 42 W. Va. 263, 26 S. E. 281, 36 L. R. A. 296; State v. Rice, 32 S. C. 97, 10 S. E. 833; Auditorial Board v. Hendrick, 20 Tex. 60; Weeden v. Town Council of Richmond, 9 R. I. 128; Jordan v. Board of Education, 14 Misc. 119, 35 N. Y. Supp. 247; Thurston v. Hudgius, 93 Va. 780, 20 S. E. 966.

[19] State v. Hastings, 10 Wis. 518.

[20] Kimberlin v. Commission to Five Civilized Tribes, 104 Fed. 653; Taylor v. Kolb, 100 Ala. 603, 13 So. 779; Tilden v. Sacramento County Sup'rs, 41 Cal. 68; Reddick v. People, 82 Ill. App. 85; Sanner v. Union Drainage Dist., 64 Ill. App. 62; Cook County Com'rs v. People, 78 Ill. App. 586; State v. Johnson, 28 La. Ann. 932; City of Vicksburg v. Rainwater, 47 Miss. 547; Irwin-Hodson Co. v. Kincaid, 31 Or. 478, 49 Pac. 765; Arberry v. Beavers, 6 Tex. 457.

Irwin v. Kincaid, 31 Or. 478, 49 Pac. 765. "Mandamus will issue to compel him to act, but not to direct how or to what effect he shall act."

State v. Board of Liquidation, 42 La. Ann. 647, 7 So. 706, 8 So. 577.

only when there is no other adequate legal remedy.[21] The fact that the person seeking the issuance of the writ might obtain relief in equity does not preclude its issuance, though this may influence the court's discretion.[22] The issuance of the writ in aid

If vested with discretion as to the time and manner of acting, mandamus will not lie to compel a board to meet and decide any of the matters as to which it has such discretion.

State v. Chittenden, 112 Wis. 569, 88 N. W. 587. Where the officer or board is vested with judicial powers in the premises as to the determination of facts, mandamus will issue to compel action, but not to direct result of action, unless the underlying facts are substantially undisputed leaving no reasonable ground for action other than in one way.

[21] Bank of Columbia v. Sweeny, 1 Pet. (U. S.) 567; Arrington v. Van Houton, 44 Ala. 284; State v. Dunn, Minor (Ala.) 46; Ex parte Williamson, 8 Ark. 424; Peck v. Booth, 42 Conn. 271; Etheridge v. Hall, 7 Port. (Ala.) 47; Hastings v. Henry, 1 Marv. (Del.) 287, 40 Atl. 1125; Marshall v. Sloan, 35 Iowa, 445; State v. Yant, 134 Ind. 121, 33 N. E. 896. See, also, Franklin Tp. v. State, 11 Ind. 205; Highway Com'rs of Yorktown v. People, 66 Ill. 339; State v. McCrillus, 4 Kan. 250; State v. Judge of Sixth Dist. Ct., 12 La. Ann. 342; Tyler v. Township Board of Lamar, 75 Mo. App. 561; Beaman v. Police of Leake County, 42 Miss. 237; Morgan v. Monmouth Plank Road Co., 26 N. J. Law (2 Dutch.) 99; State v. Osborn, 60 Neb. 415, 83 N. W. 357; State v. Holliday, 8 N. J. Law (3 Halst.) 205; People v. Bolte, 71 N. Y. Supp. 73; People v. McGoldrick, 24 Civ. Proc. R. 292, 33 N. Y. Supp. 441; Matter of Finnegan, 91 Hun, 176, 36 N. Y. Supp. 331; In re Village of Waverly, 158 N. Y. 710, 53 N. E. 1133. See, also, People v. Board of Town Canvassers, 32 Misc. 123, 66 N. Y. Supp. 199. Compare People v. Guggenheimer, 28 Misc. 735, 59 N. Y. Supp. 913.

Commissioners of the Poor v. Lynah, 2 McCord. (S. C.) 170; Shrewsbury v. Ellis, 26 Tex. Civ. App. 406, 64 S. W. 700; Cullem v. Latimer, 4 Tex. 329. Compare Terrell v. Greene, 88 Tex. 539, 31 S. W. 631; Ex parte Goolsby, 2 Grat. (Va.) 575; Justices v. Munday, 2 Leigh (Va.) 165; In re White River Bank, 23 Vt. 478; Farr v. Town of St. Johnsbury, 73 Vt. 42, 50 Atl. 548; State v. Cheetham, 20 Wash. 64, 54 Pac. 772.

State v. Wright, 10 Nev. 167. To preclude the issuance of the writ, "the relator must not only have a specific, adequate and legal remedy, but it must be one competent to afford relief upon the very subject-matter of his application; and if it be doubtful whether such action or proceeding will afford him a complete remedy, the writ should issue."

Thus it will not lie when the party aggrieved has the right to appeal from the action of the officer. Marshall v. Sloan, 35 Iowa, 445; Jefferson v. Board of Education of Atlantic City, 64 N. J. Law, 59, 45 Atl. 775; State v. Hitt, 13 Wash. 547, 43 Pac. 638.

[22] United States v. Western Un-

of private rights rests in the sound discretion of the court,[23] but where the writ is invoked in behalf of the state, as a pure prerogative one, in matters publici juris, there is no discretion.[24]

§ 1109. Writ; when issued.

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,[25] 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.[26] A positive refusal to act is not a prerequisite, it is sufficient if there is a manifest intention not to perform.[27] The writ will not be granted on facts which merely raise a presumption that the officer will refuse to perform his duty when the proper time comes,[28] though if, in advance of the time for performance, fixed by law, he declares his intention not to perform, mandamus will issue at once, to compel performance at the proper time.[29] The writ will lie to compel the performance of a duty by a de facto officer when occupying a de jure office,[30]

ion Tel. Co., 50 Fed. 28; Chance v. Temple, 1 Iowa, 190; Webster v. Newell, 66 Mich. 503; People v. Brennan, 39 Barb. (N. Y.) 522; German-American Sav. Bank v. City of Spokane, 17 Wash. 315.

[23] State v. Doyle, 40 Wis. 220; Talbot Paving Co. v. Common Council of Detroit, 91 Mich. 262, 51 N. W. 933.

[24] State v. Doyle, 40 Wis. 220.

[25] United States v. Indian Grave Drainage Dist., 85 Fed. 928, 29 C. C. A. 578; Shirley v. Trustees of Cottonwood School Dist. (Cal.) 31 Pac. 365; Park v. Candler, 113 Ga. 647, 39 S. E. 89; Dobbs v. Stauffer, 24 Kan. 127; Bryson v. Spaulding, 20 Kan. 427; State v. Davis, 17 Minn. 429 (Gil. 406); Throckmorton v. State, 20 Neb. 647; State v. Eberhardt, 14 Neb. 201; State v. Smith, 31 Neb. 590, 48 N. W. 468; People v. Common Council of Syracuse, 26 Misc. (N. Y.) 522; Gleaves v. Terry, 93 Va. 491, 25 S. E. 552, 34 L. R. A. 144.

[26] People v. Whittemore, 4 Mich. 27; State Board of Equalization v. People, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513.

[27] Cleveland v. Board of Finance & Taxation, 38 N. J. Law, 259; Hanna v. City of Rahway, 33 N. J. Law, 110; Cavanaugh v. Pawtucket, 23 R. I. 102, 49 Atl. 494. Delay in performance to seek advice of counsel and reference to another body not refusal to perform authorizing issuance of writ.

[28] Gormley v. Day, 114 Ill. 185, 28 N. E. 693; State v. School Dist. No. 9, 8 Neb. 92.

[29] State v. Rotwitt, 15 Mont. 29, 37 Pac. 845; Morton v. Comptroller General, 4 S. C. (4 Rich.) 430.

[30] Kelly v. Wimberly, 61 Miss. 548; Wright v. Kelley, 4 Idaho, 624,

but not to coerce one occupying an office not authorized by law.[31] Mandamus will not lie against a public officer to compel him to act after the expiration of his term of office,[32] unless his duty to perform continues after the expiration of his term.[33] Where the proceeding is against the officer or governmental agency in their official, rather than in an individual capacity, the obligation of obeying the mandate rests upon the successor in office of the person occuping the office when it was issued.[34] So, too, an officer may be compelled to do an act which should have been performed by his predecessor.[35] If the duty is personal and does not devolve on the successor in office, the writ will not issue.[36]

§ 1110. To whom it may issue; administrative public officers.

In some states the courts have no jurisdiction to issue mandamus to the governor,[37] while in others it is held that the writ will issue to compel the performance by him of ministerial du-

43 Pac. 565; People v. Treasurer of Ingham County, 36 Mich. 416. See, also, Vol. 2, §§ 656 et seq.

[31] City of Napa v. Rainey, 59 Cal. 275.

[32] State v. Kirman, 17 Nev. 380.

[33] State v. Boyd, 49 Neb. 303, 68 N. W. 510. See Vol. 2, § 645.

[34] State v. Gates, 22 Wis. 210; State v. Warner, 55 Wis. 271; People v. Wexford County Treasurer, 37 Mich. 351; People v. Collins, 19 Wend. (N. Y.) 56; Pegram v. Cleaveland County Com'rs, 65 N. C. 114; State Board of Equalization v. People, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513; People v. Maher, 64 Hun, 408, 19 N. Y. Supp. 758. See, also, State v. Police Jury of Jefferson, 39 La. Ann. 979, 3 So. 88; State v. City of New Orleans, 35 La. Ann. 68.

State v. Canfield, 40 Fla. 36, 23 So. 591, 42 L. R. A. 72. Members of council at time mandate issued bound to obey though proceedings were commenced against their predecessors in office. Compare Secretary v. McGarrahan, 9 Wall. (U. S.) 298.

Hicks v. Cleveland, 106 Fed. 459. The writ may be properly directed to certain designated officers and their successors in office.

[35] Prescott v. Gonser, 34 Iowa, 175. Attach seal to warrants issued by predecessor.

[36] People v. Board of Town Canvassers, 66 N. Y. Supp. 199, 32 Misc. 123.

[37] 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, reversing 24 App. Div. 563, 49 N. Y. Supp. 760; Vicksburg & M. R. Co. v. Lowry, 61 Miss. 102, 48 Am. Rep. 76; People v. Governor, 29 Mich. 320; State v. Stone, 120 Mo. 428, 23 L. R. A. 194; State v. Meier, 72 Mo. App. 618; Jernigan v. Finley, 90 Tex. 205, 38 S. W. 24; McKenzie v. Baker, 88 Tex. 669, 32 S. W. 1038; Jonesboro, F. B. & B. G. Turnpike Co. v. Brown, 67 Tenn. (8 Baxt.) 490.

ties.[38] It will issue to members of the president's cabinet,[39] and the various executive state officers,[40] as well as officers of the various governmental subdivisions of the state.

§ 1111. Judicial officers.

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.[41] 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,[42] though they will not, of course, dictate the judgment or determination to be rendered or arrived at in so doing.[43] Where a judicial officer or court has acted judicially, upon a matter legally and properly presented, their decision cannot

[38] State v. Blasdel, 4 Nev. 241; State v. Smith, 23 Mont. 44, 57 Pac. 449; State v. Nicholls, 42 La. Ann. 209, 7 So. 738; Groome v. Gwinn, 43 Md. 572; Magruder v. Swain, 25 Md. 173; Cotten v. Ellis, 52 N. C. (7 Jones) 545; Greenwood Cemetery Land Co. v. Routt, 17 Colo. 156, 28 Pac. 1125, 15 L. R. A. 369.

[39] United States v. Windom, 19 D. C. (8 Mackey) 54; Marbury v. Madison, 1 Cranch (U. S.) 137.

[40] *Secretary of state.* State v. Crawford, 28 Fla. 441, 14 L. R. A. 253; State v. Barker, 4 Kan. 379; State v. Mason, 43 La. Ann. 590; State v. Wrotnowski, 17 La. Ann. 156; State v. Secretary of State, 33 Mo. 293; Com. v. Atlantic & G. W. R. Co., 53 Pa. 9; State v. Barber, 4 Wyo. 409, 34 Pac. 1028, 27 L. R. A. 45; State v. Jenkins, 20 Wash. 78, 54 Pac. 765.

State treasurer. McDougal v. Roman, 2 Cal. 80; State v. Dubuclet, 26 La. Ann. 127.

State auditor. State v. Burdick, 3 Wyo. 588, 28 Pac. 146.

Attorney general. People v. Tremain, 17 How. Pr. (N. Y.) 10.

[41] Smith v. Moore, 38 Conn. 105; Ex parte Candee, 48 Ala. 386. "It by no means follows that a duty is judicial, because it is to be performed by a judge; if in its performance he does not exercise the powers that appropriately appertain to his judicial office, it is ministerial, and not judicial, although its performance requires the exercise of judgment." Approval of bond held a ministerial duty enforcible by mandamus.

[42] City of Emporia v. Randolph, 56 Kan. 117, 42 Pac. 376; Trainer v. Porter, 45 Mo. 336; State v. Walker, 85 Mo. App. 247; State v. Fawcett, 58 Neb. 371, 78 N. W. 636.

[43] Miltenberger v. St. Louis County Ct., 50 Mo 172; State v. Wilson, 49 Mo. 146; Ex parte Candee, 48 Ala. 386. "Where the duty to be performed is, accurately speaking, judicial, or rests in the discretion of the court, judge, or officer, a mandamus will lie to compel the

be altered or reviewed through the agency of mandamus, no matter how erroneous such determination may be.[44]

§ 1112. Members or officers of legislative bodies.

The writ of mandamus may be invoked to coerce the performance of a purely ministerial duty by an officer of the state [45] or municipal legislative body.[46] 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.[47]

§ 1113. Acts which may be coerced.

Obviously the right to the writ of mandamus in each particular case depends on the circumstances of that case and whether the statute under which the right is claimed clearly imposes the duty

court, judge or officer to go forward and do the duty, or to exercise the discretion, but it will not direct how the duty shall be performed or the discretion shall be exercised; if, however, the duty is ministerial, * * * and the duty itself is specific and defined, and it is neglected or refused to be performed, a writ of mandamus will be issued, not only to compel its performance, but it will direct particularly how the duty shall be performed."

[44] Ex parte Hoyt, 13 Pet. (U. S.) 279; Ex parte Perry, 102 U. S. 183; Com. v. Boone County, 82 Ky. 632; Potter v. Todd, 73 Mo. 101; State v. Megown, 89 Mo. 156; Judges of Oneida Common Pleas v. People, 18 Wend. (N. Y.) 79; Sansom v. Mercer, 68 Tex. 492; State v. Morris, 86 Tex. 226, 24 S. W. 393.

[45] Ex parte Pickett, 24 Ala. 91; State v. Moffitt, 5 Ohio, 358; State v. Elder. 31 Neb. 169, 10 L. R. A. 796; Wolfe v. McCaull, 76 Va. 876.

In State v. Bolte, 151 Mo. 362, 52 S. W. 262, the writ was refused on ground that the action sought to be coerced, rested in discretion of officers and was not purely ministerial.

People v. Morton, 156 N. Y. 136, 66 Am. St. Rep. 547, 41 L. R. A. 231. If the enforcement of a writ directed to an officer of a state legislature would interfere with the performance of his duties as a member of a co-ordinate branch of the state government, it is probable that the court would decline to enforce it until after the adjournment of the legislature.

[46] Carney v. Neeley, 60 Kan. 672, 57 Pac. 527; State v. Meier, 143 Mo. 439, affirming 72 Mo. App. 618; Tennant v. Crocker, 85 Mich. 328, 48 N. W. 577.

People v. Whipple, 41 Mich. 548. Will not lie to compel member of council to attend meetings regularly, since duty not sufficiently specific and also would require constant and continuous supervision of court.

[47] State v. Meier, 72 Mo. App. 618.

and whether or not the officer has discretionary powers as to its performance.

Numerous cases discussing the propriety of the issuance of the writ, to coerce the doing of certain acts by legislative, executive and judicial officers are grouped according to the nature of the act performance of which is sought. Thus its issuance has been granted or refused, in accordance with these considerations and the general principles hereinbefore discussed, in applications to compel an officer to institute quo warranto proceedings,[48] commence an action,[49] grant an appeal,[50] make a return on appeal,[51] appoint some person to vacant office,[52] keep office at county seat,[53] issue execution,[54] approve a bond,[55] issue land patent,[56] file and

[48] Fuller v. Ellis, 98 Mich. 96, 57 N. W. 33. Writ to attorney general granted.

Everding v. McGinn, 23 Or. 15, 35 Pac. 178. Writ to district attorney refused.

Writ to attorney general refused, see Lamoreaux v. Attorney General, 89 Mich. 146, 50 N. W. 812; Lewright v. Bell, 94 Tex. 556, 63 S. W. 623; Thompson v. Watson, 48 Ohio St. 552, 31 N. E. 742; People v. Fairchild, 67 N. Y. 334.

[49] Boyne v. Ryan, 100 Cal. 265, 34 Pac. 707. Writ to district attorney refused.

State v. Kamman, 151 Ind. 407, 51 N. E. 483. Writ to compel township trustee to bring action to recover fine granted.

Lewright v. Love, 95 Tex. 157, 65 S. W. 1089. Writ to compel comptroller to institute action to collect tax, refused.

[50] State v. City of Baton Rouge, 34 La. Ann. 1197.

[51] People v. Canal Appraisers, 73 N. Y. 443.

[52] Porter v. State, 78 Tex. 591, 14 S. W. 794; Kelly v. Van Wyck, 35 Misc. 210, 71 N. Y. Supp. 814; Attorney General v. City of New Bedford, 128 Mass. 312. Nomination of chief of police by mayor.

[53] State v. Walker, 5 S. C. (5 Rich.) 263. Sheriff. Rice v. Shay, 43 Mich. 380. County Treasurer.

Validity of an election changing county seat may be tested in proceeding for mandamus to compel holding at county seat. State v. Langlie, 5 N. D. 594, 67 N. W. 958, 32 L. R. A. 723; People v. Green, 29 Mich. 121; Hunter v. State, 14 Neb. 506.

[54] Scott v. Bedell, 108 Ga. 205, 33 S. E. 903; Chase v. De Wolff, 69 Ill. 47; Moore v. Muse, 47 Tex. 210; State v. Thomas, 25 Mont. 226, 64 Pac. 503; People v. Halsey, 53 Barb. (N. Y.) 547. Issuance of warrant by treasurer for collection of taxes.

[55] State v. Shannon, 133 Mo. 139, 33 S. W. 1137. By comptroller. State v. Stockwell, 7 Kan. 103. Clerk. State v. City of New Orleans, 49 La. Ann. 1322, 22 So. 354. Mayor. State v. Plambeck, 36 Neb. 401, 54 N. W. 667; Ex parte Candee, 48 Ala. 386. County judge. State v. Teall, 72 Minn. 37, 74 N. W. 1024. Clerk of school district. Copeland

record documents and instruments,[57] allow inspection and copying of public records,[58] furnish certified copy thereof,[59] execute and deliver tax and sheriff's deeds,[60] sign and countersign warrants,[61]

v. State, 126 Ind. 51, 25 N. E. 866. County auditor.

Approval of bond a judicial and not ministerial act, and hence writ will not issue. Swain v. Gray, 44 Miss. 393; Shotwell v. Covington, 69 Miss. 735, 12 So. 260.

[56] Smithee v. Moseley, 31 Ark. 425; Taylor v. Hall, 71 Tex. 206, 9 S. W. 148; Chappell v. Rogan, 94 Tex. 492, 62 S. W. 539; State v. Lanier, 47 La. Ann. 110, 16 So. 647; Myers v. State, 61 Miss. 138; State v. Blasdel, 4 Nev. 241; State v. Nicholls, 42 La. Ann. 209, 7 So. 738; Greenwood Cemetery Land Co. v. Routt, 17 Colo. 156, 28 Pac. 1125, 15 L. R. A. 369. See, also, Sullivan v. Shanklin, 63 Cal. 247.

[57] Callahan v. Young, 90 Va. 574, 19 S. E. 163; Douglas County Road Co. v. Douglas County, 5 Or. 373; Hill v. Goodwin, 56 N. H. 441. Clerk. McDiarmid v. Fitch, 27 Ark. 106. Register. Hogue v. Baker, 92 Tex. 58, 45 S. W. 1004. Land commissioner. People v. Payn, 28 Misc. 275, 59 N. Y. Supp. 851. Superintendent of insurance. State v. Rotwitt, 18 Mont. 92, 44 Pac. 407. Secretary of state. Illinois Watch Co. v. Pearson, 140 Ill. 423, 31 N. E. 400, 16 L. R. A. 429; Williams v. Lewis, 6 Idaho, 184, 54 Pac. 619. State v. Bates, 38 S. C. 326, 17 S. E. 28. Transfer of state stock by state treasurer.

[58] Brewer v. Watson, 61 Ala. 310. Auditor. State v. Hobart, 12 Nev. 408. State comptroller. Stocknan v. Brooks, 17 Colo. 248, 29 Pac. 746; Hawes v. White, 66 Me. 305. Register of deeds. Brown v. Knapp, 54 Mich. 132, 52 Am. Rep. 800. County treasurer. State v. Alvord, 80 Ind. 330. County clerk. State v. Hoblitzelle, 85 Mo. 620. Recorder of voters. Neville v. Board of Health, 29 Abb. No. C. 59, 21 N. Y. Supp. 574. Board of Health. Gleaves v. Terry, 93 Va. 491, 25 S. E. 552, 34 L. R. A. 144. Electoral Board.

Schmedding v. May, 85 Mich. 1, 48 N. W. 201, holding newspaper has no right to inspect records of action where no proceedings have been had in open court and no issue joined in action and judge has ordered suppression of files.

[59] United States v. Hall, 18 D. C. (7 Mackey) 14, 1 L. R. A. 738. Commissioner of patents. State v. Ryan, 2 Mo. App. 303. Land commissioner. Peters v. Auditor, 33 Grat. (Va.) 368. Auditor of public accounts. Smith v. Moore, 38 Conn. 105. Justice of the peace.

[60] Bryson v. Spaulding, 20 Kan. 427. County clerk. State v. Patterson, 11 Neb. 266; State v. Gayhart, 34 Neb. 192, 51 N. W. 746; Ritcheson v. Huebner, 90 Mich. 643, 51 N. W. 634. County treasurer. See, also, State v. Magill, 4 Kan. 415. Purifoy v. Lamar, 112 Ala. 123, 20 So. 975; McCulloch v. Stone, 64 Miss. 378. State auditor. Williams v. Smith, 6 Cal. 91. Sheriff's deed.

[61] State v. Clark, 61 Mo. 263. State auditor. Wood v. Strother, 76 Cal. 545, 18 Pac. 766. County auditor. Runkle v. Com., 97 Pa. 328; Padavano v. Fagan, 66 N. J. Law, 167, 48 Atl. 998. City comptroller.

execute and issue bonds,[62] licenses,[63] certificates and permits,[64] repay public money unlawfully received,[65] distribute funds according to law,[66] pay warrant,[67] interest coupons,[68] or bounty,[69] issue

Montgomery v. State, 35 Neb. 655, 53 N. W. 568. Moderator of School district.

[62] In re Attorney General, 58 Hun, 218, 12 N. Y. Supp. 754. City comptroller. People v. White, 54 Barb. (N. Y.) 622; Chalk v. White, 4 Wash. 156, 29 Pac. 979. Mayor. Pearsons v. Ranlett, 110 Mass. 120; Daniels v. Long, 111 Mich. 562, 69 N. W. 1112. City treasurer. People v. Parmerter, 158 N. Y. 385, 53 N. E. 40, reversing 19 App. Div. 632; People v. Holden, 91 Ill. 446; City of Los Angeles v. Hance, 130 Cal. 278, 62 Pac. 484. City clerk.

[63] Deehan v. Johnson, 141 Mass. 23; Braconier v. Packard, 136 Mass. 50; People v. Scully, 23 Misc. 732, 53 N. Y. Supp. 125; Welsford v. Weidlein, 23 Kan. 601; Bankers' Life Ins. Co. v. Howland, 73 Vt. 1, 48 Atl. 435, 57 L. R. A. 374; State v. Moore, 42 Ohio St. 103; American Casualty Ins. & Security Co. v. Fyler, 60 Conn. 448, 22 Atl. 494.

[64] Hubbard v. Auditor General, 120 Mich. 505, 79 N. W. 979. Auditor general. People v. Rosendale, 142 N. Y. 670, 37 N. E. 571; Id., 76 Hun, 112. Attorney general. In re Schmidt, 57 Hun, 590, 10 N. Y. Supp. 583. Superintendent of insurance. People v. Preston, 62 Hun, 185, 16 N. Y. Supp. 488. Superintendent of banks. State v. Porter, 134 Ind. 63, 32 N. E. 1021, 33 N. E. 687. Township trustee. State v. Holden, 62 Minn. 246, 64 N. W. 568. County auditor. Cruse v. McQueen (Tex. Civ. App.) 25 S. W. 711. County judge. Com. v. George, 148 Pa 463, 24 Atl. 59, 61. City comptroller. Missouri v. Murphy, 170 U. S. 78. Street commissioner. Bailey v. Ewart, 52 Iowa, 111. Superintendent of schools. De Poyster v. Baker, 89 Tex. 155, 34 S. W. 106. Land commissioner. In re O'Keefe, 19 N. Y. Supp. 676. Permit to cross walks with teams to make excavation. Com. v. Warwick, 185 Pa. 623, 40 Atl. 93. Permit to erect telephone poles.

[65] Pritchard v. Woodruff, 36 Ark. 196. State treasurer. Kings County v. Johnson, 104 Cal. 198, 37 Pac. 870. Tax collector. Fitzhugh v. Ashworth, 119 Cal. 393, 51 Pac. 635. Superintendent of streets. Butler v. Fayette County Sup'rs, 46 Iowa, 326; Webster v. Wheeler, 119 Mich. 601, 78 N. W. 657; Sheridan v. Van Winkle, 46 N. J. Law, 117. County treasurer. Nye v. Rose, 17 R. I. 733, 24 Atl. 777. De facto officer may be required to pay money to person entitled to its custody.

[66] State v. Staub, 61 Conn. 553, 23 Atl. 924; State v. Dougherty, 45 Mo. 294; Brandt v. Murphy, 68 Miss. 84, 8 So. 296; Libby v. State, 59 Neb. 264, 80 N. W. 817; State v. Dubuclet, 24 La. Ann. 16; State v. Stone, 69 Ala. 206; Murphy v. Reeder Tp. Treasurer, 56 Mich. 505; City of Oregon v. Moore, 30 Or. 215, 46 Pac. 1017, 47 Pac. 851; Joos v. McCandless (Pa.) 8 Atl. 159; Lee v. Taylor, 107 Ga. 362, 33 S. E. 408.

[67] Wheeler v. Adams, 161 Mo. 349, 61 S. W. 894; Carolina Grocery Co. v. Burnet, 61 S. C. 205, 39 S. E. 381, 58 L. R. A. 687. County treasurer. First Nat. Bank v. Arthur, 12 Colo.

estimate or certificate of performance to contractor,[70] account for and pay over public money,[71] assess property,[72] publish legal notices in designated paper,[73] order survey of disputed county lines,[74] execute contract in behalf of corporation,[75] publish legislative journal,[76] insert protest therein,[77] open,[78] repair[79] and remove obstructions from highways,[80] deposit funds in designated depository,[81] readmit expelled pupil to school,[82] survey public lands,[83] accept lowest bid for public work,[84] designate official newspaper,[85] imprison a person convicted of a crime,[86] change

App. 90, 54 Pac. 1107; Wyker v. Francis, 120 Ala. 509, 24 So. 895. City treasurer. Somerville v. Wood, 115 Ala. 534, 22 So. 476. Treasurer of school district.

[68] Bailey v. Lawrence County, 2 S. D. 533, 51 N. W. 331.

[69] Eichelberger v. Sifford, 27 Md. 320.

[70] State v. Bever, 143 Ind. 488, 41 N. E. 802; Conn v. Cass County Com'rs, 151 Ala. 517, 51 N. E. 1062.

[71] Ter. v. Cavanaugh, 3 Dak. 325; State v. Staley, 38 Ohio St. 259. County treasurer. Bates v. Keith, 66 Vt. 163, 28 Atl. 865. School district treasurer. State v. Boullt, 26 La. Ann. 259. Tax collector. State v. Meiley, 22 Ohio St. 534. Probate judge. Bearden v. Fullam, 129 N. C. 477, 40 S. E. 204. Chief of police. Wilson v. Swain, 60 N. J. Law, 115, 36 Atl. 778. State treasurer, return of deposit made by railroad company.

[72] State v. Buchanan, 24 W. Va. 362.

[73] Braddy v. Whiteley, 113 Ga. 746, 39 S. E. 317.

[74] Dickson v. Hill, 75 Ga. 369.

[75] People v. Campbell, 72 N. Y. 496; State v. Fitzpatrick, 45 La. Ann. 269, 12 So. 353; Independent Dist. of Eden v. Rhodes, 88 Iowa, 570, 55 N. W. 524; State v. Humphrey, 47 Kan. 561, 28 Pac. 722. Writ will not issue when no funds appropriated to meet obligation of contract, execution of which is sought.

[76] State v. Secretary of State, 43 La. Ann. 590, 9 So. 776.

[77] Turnbull v. Giddings, 95 Mich. 314, 54 N. W. 887, 19 L. R. A. 853,

[78] State v. Holliday, 8 N. J. Law (3 Halst.) 205.

[79] State v. Kamman, 151 Ind. 407, 51 N. E. 483.

[80] Patterson v. Vail, 43 Iowa, 142; People v. City of New York, 20 Misc. 189, 45 N. Y. Supp. 900; Highway Com'rs of Town of Hale v. People, 73 Ill. 203; State v. Yant, 134 Ind. 121, 33 N. E. 896; State v. Buhler, 90 Mo. 560; People v. Maher, 141 N. Y. 330, 36 N. E. 396, reversing 64 Hun, 408, 19 N. Y. Supp. 758; State v. McCann, 107 Wis. 348, 83 N. W. 647.

[81] People v. Gibler, 78 Ill. App. 193; Port Huron Board of Education v. Runnels, 57 Mich. 46.

[82] State v. Osborne, 24 Mo. App. 309.

[83] Schley v. Maddox (Tex. Civ. App.) 22 S. W. 998.

[84] Mayo v. Hampden County Com'rs, 141 Mass. 74; Brown v. City of Houston (Tex. Civ. App.) 48 S. W. 760.

[85] People v. Brennan, 39 Barb. (N. Y.) 651.

boundaries of school district,[87] advertise and hold tax sale of land,[88] furnish enumeration of school children,[89] sign ordinances,[90] and administer oaths.[91]

§ 1114. Writ directed to public boards and legislative bodies.

In accordance with the general principles previously discussed, mandamus will issue against public boards and legislative bodies to coerce the performance by them of mandatory ministerial duties; being those as to which they have no discretionary powers or functions.[92] So, too, where such a body has exercised its discretion with reference to a matter it may be compelled to carry out its decision, in respect to ministerial conditions.[93] If the body has discretionary powers with reference to the matter, of course the writ will not issue,[94] nor where there is an adequate remedy by appeal from its action.[95] When it is their duty to act on a given matter, as to which they have discretionary powers, the writ will issue to compel them to exercise, though not to control, their discretion.[96] It would seem that the writ should be directed to all the persons constituting the body, though a number less than all constitute a quorum.[97]

[86] Waite v. Washington, 44 Mich. 338.

[87] State v. Palmer, 18 Neb. 644.

[88] Hudson Common Council v. Whitney, 53 Mich. 158.

[89] Young v. State, 138 Ind. 206, 37 N. E. 984.

[90] Dreyfus v. Lonergan, 73 Mo. App. 336.

[91] Carney v. Neeley, 60 Kan. 672, 57 Pac. 527.

[92] People v. Guggenheimer, 28 Misc. 735, 59 N. Y. Supp. 913; Harkness v. Hutcherson, 90 Tex. 383, 38 S. W. 1120; Village of Glencoe v. People, 78 Ill. 382; People v. State Auditors, 42 Mich. 422. See, also, cases cited ——, post in this section.

[93] People v. Schenectady County Sup'rs. 35 Barb, (N. Y.) 408.

[94] United States v. City of New Orleans, 31 Fed. 537; Younger v. Santa Cruz County Sup'rs, 68 Cal. 241.

[95] Boone County Com'rs v. State, 38 Ind. 193; Eubank v. Boughton, 98 Va. 499, 36 S. E. 529.

[96] Case v. Blood, 71 Iowa, 632, 33 N. W. 144; District Tp. of Eden v. Independent Dist. of Templeton, 72 Iowa, 687, 34 N. W. 472; Karb v. State, 54 Ohio St. 383, 43 N. E. 920. Determine cause of disability of applicant for fireman's pension. People v. Sage, 11 App. Div. 4, 42 N. Y. Supp. 251. Determine amount of commutation convict entitled to. Hightower v. Overhaulser, 65 Iowa, 347; Pfister v. State, 82 Ind. 382; State v. Polk County Sup'rs, 88 Wis. 355, 60 N. W. 266. Grant or refuse a petition.

[97] Deen v. Tanner, 106 Ga. 394, 32 S. E. 368.

§ 1115. Acts which may be coerced.

Ordinarily the issue, in the numerous cases in which the issuance of the writ against these bodies has been sought, has been the determination of whether or not the particular case presented such circumstances as imposed a mandatory ministerial duty under the language of the particular statute pursuant to which the right is asserted.

Obviously an analysis of the circumstances and statutory provisions, so as to show when, in a given class of cases, the writ should or should not issue, even if susceptible of grouping or classification, is not appropriate to the scope of this treatise. The practitioner is referred to the cases in the notes, wherein is discussed the propriety of the issuance of the writ, in view of the considerations previously stated, to compel the approval of bonds [98] and plats,[99] granting permit to string electric wires,[100] to compel members to assemble and organize as a board,[101] or two bodies to hold joint convention,[102] receive insane person into state hospital,[103] admit pupil to public school,[104] consider applica-

[98] Speed v. Common Council of Detroit, 97 Mich. 198, 56 N. W. 570; State v. Warrick County Com'rs, 124 Ind. 554, 25 N. E. 10, 8 L. R. A. 607; Keough v. Board of Aldermen of Holyoke, 156 Mass. 403, 31 N. E. 387; Arapahoe County v. Crotty, 9 Colo. 318, 12 Pac. 151; Bennett v. Swain County Com'rs, 125 N. C. 468, 34 S. E. 632; State v. Owen, 41 Neb. 651, 59 N. W. 886; Stokes v. Camden County, 35 N. J. Law, 217; McHenry v. Township Board of Chippewa, 65 Mich. 9, 31 N. W. 602; Hawkins v. Common Council of Litchfield, 120 Mich. 390, 79 N. W. 570; Conger v. Board of Freeholders of Middlesex County, 55 N. J. Law, 112, 25 Atl. 275.

[99] Campau v. Board of Public Works of Detroit, 86 Mich. 372, 49 N. W. 39; Van Husan v. Heames, 91 Mich. 519, 52 N. W. 18.

[100] People v. Board of Trustees of Monticello, 35 Misc. 675, 72 N. Y. Supp. 350; United States v. Wight, 15 App. D. C. 463; State v. Towers, 71 Conn. 657, 42 Atl. 1083. Allow excavation of streets for wires. City of Wilmington v. Addicks (Del. Ch.) 47 Atl. 366. Permit to excavate streets and lay gas mains.

[101] State v. Board of Liquidation, 42 La. Ann. 647, 7 So. 706, 8 So. 577; Johnston v. Mitchell, 120 Mich. 589, 79 N. W. 812. See, also, Case v. Blood, 68 Iowa, 486.

[102] Littlefield v. Newell, 85 Me. 246, 27 Atl. 110; Attorney General v. City Council of Lawrence, 111 Mass. 90; Highway Com'rs of Elmira v. Highway Com'rs of Osceola, 74 Ill. App. 185; Lamb v. Lynd, 44 Pa. 336.

[103] People v. Manhattan State Hospital, 5 App. Div. 249, 39 N. Y. Supp. 158.

[104] People v. Board of Education of Detroit, 18 Mich. 400; In re Rebenack, 62 Mo. App. 8; In re Nicoll,

tion for,[105] issue,[106] or revoke liquor license,[107] as well as issue licenses to practice medicine,[108] dentistry,[109] pharmacy,[110] and plumbing,[111] to issue license to architect,[112] and for theatrical performances,[113] to compel a school board to furnish free text books,[114] use books adopted,[115] locate school house at certain place[116] and furnish proper school facilities,[117] apportion indebtedness on subdivision of county[118] or school district,[119] to hear and determine complaints of overvaluation by assessor,[120] accept lowest or best bid,[121] change or extend area of city[122] or school

44 Hun (N. Y.) 340; Jackson v. State, 57 Neb. 183, 77 N. W. 662, 42 L. R. A. 792; Eubank v. Boughton, 98 Va. 499, 36 S. E. 529; Cristman v. Peck, 90 Ill. 150.

[105] Loughran v. City of Hickory, 129 N. C. 281, 40 S. E. 46.

[106] State v. Hudson 13 Mo. App. 61; State v. Tippecanoe County Com'rs, 45 Ind. 501; United States v. Johnson County, 12 App. D. C. 545.

[107] Miles v. State, 53 Neb. 305, 73 N. W. 678; Swan v. Wilderson, 10 Okl. 547, 62 Pac. 422; State v. Johnson, 37 Neb. 362, 55 N. W. 874.

[108] State v. State Board of Health, 103 Mo. 22, 15 S. W. 322; State v. Coleman, 64 Ohio St. 377, 60 N. E. 568, 55 L. R. A. 105.

[109] People v. Illinois State Board of Dental Examiners, 110 Ill. 180; Williams v. State Board of Dental Examiners, 93 Tenn. 619, 27 S. W. 1019.

[110] Dean v. Campbell (Tex. Civ. App.) 59 S. W. 294.

[111] United States v. Ross, 5 App. D. C. 241.

[112] State Board of Examiners of Architects v. People, 93 Ill. App. 436.

[113] Armstrong v. Murphy, 65 App. Div. 123, 72 N. Y. Supp. 473.

[114] Farris v. State, 46 Neb. 857, 65 N. W. 890.

[115] State v. Springfield School Directors, 74 Mo. 21; State v. Haworth, 122 Ind. 462, 23 N. E. 946, 7 L. A. R. 240.

[116] Peters v. Warner, 81 Iowa, 335, 46 N. W. 1001; Board of Education of Union v. Board of Council, 52 N. J. Law, 69; Atkinson v. Hutchinson, 68 Iowa, 161; Heintz v. Moulton, 7 S. D. 272, 64 N. W. 135.

[117] Maddox v. Neal, 45 Ark. 121, 55 Am. Rep. 540; State v. Schmetzer, 156 Ind. 528, 60 N. E. 269.

[118] Hempstead County v. Grave, 44 Ark. 317; State v. McMillan, 52 S. C. 60, 29 S. E. 540; Blaine County v. Smith, 5 Idaho, 255, 48 Pac. 286.

[119] School District No. 115 v. School Dist., 34 Or. 97, 55 Pac. 98.

[120] Kinley Mfg. Co. v. Kochersperger, 174 Ill. 379, 51 N. E. 648; People v. Cook County Com'rs, 176 Ill. 576, 52 N. E. 334; People v. Green, 6 T. & C. (N. Y.) 129.

[121] State v. Scott, 17 Neb. 686; State v. Board of Education, 17 Ohio Circ. R. 663; State v. Allen, 8 Wash. 168, 35 Pac. 609; Com. v. Mitchell, 82 Pa. 343; Capital Printing Co. v. Hoey, 124 N. C. 767, 33 S. E. 160; Dibble v. Town of New Haven, 56 Conn 199, 14 Atl. 210; Moran v. Village of White Plains, 58 Hun, 608, 12 N. Y. Supp. 61; People v. Campbell, 72 N. Y. 496; People v. Contracting Board, 27 N. Y. 378; State v. Fond du Lac Board of Education, 24 Wis. 683; In re

district,[123] classify offices under civil services,[124] assess property for taxation,[125] audit and approve officer's accounts,[126] pay over money in their possession and due another person, corporation or officer,[127] erect,[128] repair or rebuild highway bridge, [129] open high-

McCain, 9 S. D. 57, 68 N. W. 163; People v. New York Canal Board, 13 Barb. (N. Y.) 450; People v. Contracting Board, 46 Barb. (N. Y.) 254; State v. Printing Com'rs, 18 Ohio St. 386; State v. Marion County Com'rs, 39 Ohio St. 188; Boren v. Darke County Com'rs, 21 Ohio St. 311; State v. Shelby County Com'rs, 36 Ohio St. 326; Times Pub. Co. v. City of Everett, 9 Wash. 518, 37 Pac. 695; Hanlin v. Charles City Independent Dist., 66 Iowa, 69; In re Hilton Bridge Const. Co., 13 App. Div. 24, 43 N. Y. Supp. 99; State v. Bartley, 50 Neb. 874, 70 N. W. 367; State v. Lincoln County, 35 Neb. 346, 53 N. W. 147; State v. McGrath, 91 Mo. 386; Tribune Printing and Binding Co. v. Barnes, 7 N. D. 591, 75 N. W. 904; Cook County Com'rs v. Peoples, 78 Ill. App. 586; Hoole v. Kinkead, 16 Nev. 217; State v. Kendall, 15 Neb. 262; Detroit Free Press Co. v. State Auditors, 47 Mich. 135. See, also, Grant v. Common Council of Detroit, 91 Mich. 274, 51 N. W. 997.

[122] Roberts v. People, 93 Ill. App. 645; Young v. Carey, 80 Ill. App. 601; People v. Common Council of San Diego, 85 Cal. 369, 24 Pac. 727; City of Lebanon v. Creel, 22 Ky. L. R. 865, 59 S. W. 16; Steele v. Willis, 23 Ky. L. R. 826, 64 S. W. 417.

[123] School Trustees v. Kay, 8 Ill. App. 30; Odendohl v. Russell, 86 Iowa, 669, 53 N. W. 336.

[124] People v. Kraus, 171 Ill. 130, 48 N. E. 1052.

[125] Harris v. State, 96 Tenn. 496, 34 S. W. 1017; State Board of Equalization v. People, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513; People v. Molloy, 35 App. Div. 136, 54 N. Y. Supp. 1084.

[126] Chase v. Board of Directors of State Penitentiary, 55 Kan. 320, 40 Pac. 665.

[127] Higgins Tp. v. Midland County Sup'rs, 52 Mich. 16; Roscommon Tp. v. Midland County Sup'rs, 49 Mich. 454; Public Schools v. Hammell, 31 N. J. Law, 446; State v. Wyoming Live Stock Com'rs, 4 Wyo. 126, 32 Pac. 114; Anne Arundel County School Com'rs v. Gautt, 73 Md. 521, 21 Atl. 548; Veghte v. Bernards Tp., 42 N. J. Law, 338; People v. Wayne County Auditors, 41 Mich. 223.

[128] Lewis Ex'rs v. Barry, 72 Pa. 18; Attorney General v. Board of Bernards Tp., 42 N. J. Law, 338; Sup'rs of Kalkaska & Antrim Counties, 120 Mich. 357, 79 N. W. 567; State v. Hamilton County Com'rs, 49 Ohio St. 301, 30 N. E. 785.

[129] State v. Demaree, 80 Ind. 519; People v. Commissioners of Highways of Towns of Dover & Ohio, 158 Ill. 197, 41 N. E. 1105; Perrine v. Hamlin, 48 Mich. 641; People v. Macon County Sup'rs, 19 Ill. App. 264; Bigelow v. Brooks, 119 Mich. 208, 77 N. W. 810; State v. Cloud County Com'rs, 39 Kan. 700, 18 Pac. 952; Inhabitants of Brunswick v. City of Bath, 90 Me. 479, 38 Atl. 532; People v. Post, 30 Mich. 353; Dutton v. State, 42 Neb. 804, 60 N. W. 1042; People v. Queens County

way,[130] keep streets and highways in repair,[131] remove obstructions from street,[132] hear and determine charges against officer,[133] issue permit to construct walk, in lieu of tax therefor,[134] appoint arbitrators,[135] submit designated proposition to electors,[136] remove photograph from rogues gallery,[137] furnish county officer with office room,[138] apportion state into legislative districts,[139] execute and deliver municipal bonds to purchaser,[140] issue and deliver warrants and checks,[141] establish toll rates for ferry,[142] make an appropriation for a designated purpose,[143] designate

Sup'rs, 142 N. Y. 271, 36 N. E. 1062; State v. City of Ahnapee, 99 Wis. 322, 74 N. W. 783.

[130] Throckmorton v. State, 20 Neb. 647; People v. Champion, 16 Johns. (N. Y.) 61; People v. Collins, 19 Wend. (N. Y.) 56; Bell v. Pike County Ct., 61 Mo. App. 173, 1 Mo. App. Rep'r. 351; Highbaugh v. Hardin County Ct., 99 Ky. 16, 34 S. W. 706; Hitchcock v. Hampden County Com'rs, 131 Mass. 519; Monroe County Sup'rs v. State, 63 Miss. 135. Furnish road overseers with road inplements.

[131] Uniontown Borough v. Com., 34 Pa. 293; Hammar v. City of Covington, 60 Ky. (3 Metc.) 494; Rice v. Middlesex Highway Com'rs, 30 Mass. (13 Pick.) 225. Complete unfinished highway accepted by commissioners. Michigan City v. Roberts, 34 Ind. 471. Make street improvement.

[132] People v. City of Bloomington, 38 Ill. App. 125; French v. Common Council of South Haven, 85 Mich. 135, 48 N. W. 174; Highway Com'rs of Yorktown v. People, 66 Ill. 339.

[133] Goodfellow v. Common Council of Detroit, 102 Mich. 343, 60 N. W. 760.

[134] State v. City of St. Louis, 158 Mo. 505, 59 S. W. 1101.

[135] Cleveland v. Board of Finance & Taxation, 38 N. J. Law, 259.

[136] State v. Juneau County Sup'rs, 38 Wis. 554.

[137] People v. York, 27 Misc. 658, 59 N. Y. Supp. 418.

[138] Cleary v. Eddy County, 2 N. D. 397, 51 N. W. 586; Broaddus v. Essex County Sup'rs, 99 Va. 370, 38 S. E. 177.

[139] State v. Campbell, 48 Ohio St. 435, 27 N. E. 884.

[140] Atchison, T. & S. F. R. Co. v. Jefferson County Com'rs, 12 Kan. 127; Smalley v. Yates, 36 Kan. 519, 13 Pac. 845; Morris v. Williams, 23 Wash. 459, 63 Pac. 236; New Orleans Liquidation Board v. Hart, 118 U. S. 136; People v. Common Council of New York, 45 Barb. (N. Y.) 473.

[141] Morley v. Power, 73 Tenn. (5 Lea) 691; Maynard v. Freeman (Tex. Civ. App.) 60 S. W. 334; McLaughlin v. Charleston County Com'rs, 7 S. C. 375.

[142] East Boston Ferry Co. v. City of Boston, 101 Mass. 488.

[143] State v. Board of Finance, 53 N. J. Law, 62, 20 Atl. 755; Humboldt County v. Churchill County Com'rs, 6 Nev. 30; State v. Wayne County Council, 157 Ind. 356, 61 N. E. 715; Marengo County v. Lyles (Ala.) 12 So. 412; South St. Bridge Com'rs v. City of Philadelphia, 3 Brewst. (Pa.) 596; Boston Water Power Co. v. City of Boston, 143 Mass. 546.

official newspaper,[144] establish water rates,[145] subscribe for stock of a corporation,[146] and place petitioner on police pension rolls.[147]

§ 1116. 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.[148] It would seem to be better practice to direct the writ to the corporation or the board or body and the persons constituting the same, as such.[149]

§ 1117. Who may apply for writ.

When public rights are to be subserved, the public law officers should apply for the writ.[150] If they decline to institute proceed-

[144] Bayer v. City of Hoboken, 40 N. J. Law, 152; People v. Troy Common Council, 78 N. Y. 33.

[145] Jacobs v. San Francisco County Sup'rs, 100 Cal. 121, 34 Pac. 630.

[146] Napa Valley R. Co. v. Napa County Sup'rs, 30 Cal. 435.

[147] People v. Martin, 131 N. Y. 196, affirming 57 Hun, 587, 11 N. Y. Supp. 123.

[148] Pegram v. Cleaveland County Com'rs, 65 N. C. 114; Fisher v. City of Charleston, 17 W. Va. 598; State v. City of Milwaukee, 25 Wis. 122; 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; Wren v. City of Indianapolis, 96 Ind. 213; State v. Bailey, 7 Iowa, 390; Cooperrider v. State, 46 Neb. 84; Boody v. Watson, 64 N. H. 162; Brown v. Assessors of Taxes of Rahway, 53 N. J. Law, 156; Mayor v. Lord, 76 U. S. (9 Wall.) 409; People v. City of Bloomington, 63 Ill. 207. Writ properly issued to "mayor and aldermen" of a city. People v. Common Council of New York, 3 Abb. Dec. (N. Y.) 502. Common council. Rex v. Taylor, 3 Salk. 231; Rex. v. City of Oxford, 6 Adol. & E. 349; Rex v. City of Abingdon, 2 Salk. 700.

[149] Cooperrider v. State, 46 Neb. 84. In City of Louisville v. Kean, 57 Ky. (18 B. Mon.) 9, a proceeding against the individuals was treated as one against the corporation and the corporation allowed to appeal.

The peremptory writ may be directed to the individuals though the alternative writ was issued to the corporation, or corporate body, eo nomine. People v. Champion, 16 Johns. (N. Y.) 61; Wren v. City of Indianapolis, 96 Ind. 206; State v. City of Milwaukee, 25 Wis. 122.

[150] Ter. v. Cole, 3 Dak. 301; Bobbett v. State, 10 Kan. 9; Attorney General v. City of Boston, 123 Mass. 460; People v. Board of Canvassers,

ings, when proceedings ought to be instituted, the courts may on a proper showing permit others to proceed in the name of the state, so that justice may not fail.[151] The general rule is that a private individual applying for a writ of mandamus must show in himself a specific legal right and the want of a specific legal remedy. If granted it must be in pursuit or protection of some particular right which he holds independent of that which he has in common with the public at large.[152] On the other hand there are cases holding that where the act to be done is of a public nature, in the performance of which the public is interested, its performance may be compelled by mandamus sued out on the relation of any citizen having an interest in the performance of the act.[153]

129 N. Y. 360; Doolittle v. Selectmen of Branford, 59 Conn. 402; Weeks v. Smith, 81 Me. 538.

[151] Bobbett v. State, 10 Kan. 9; People v. State Auditors, 42 Mich. 422; Van Horn v. State, 51 Neb. 232, 70 N. W. 941.

[152] Bamford v. Hollinshead, 47 N. J. Law, 439; Heffner v. Com., 28 Pa. 108; Sanger v. Kennebec County Com'rs, 25 Me. 291; People v. Green, 29 Mich. 121; Bobbett v. State, 10 Kan. 15; Bates v. Overseers of Poor of Plymouth, 80 Mass. (14 Gray) 163; Weeks v. Smith, 81 Me. 538.

[153] Baird v. Kings County Sup'rs, 138 N. Y. 95, 33 N. E. 827; State v. Marshall County Judge, 7 Iowa, 186; Pumphrey v. City of Baltimore, 47 Md. 145; Van Horn v. State, 51 Neb. 232, 70 N. W. 941. Compare Throckmorton v. State, 20 Neb. 647, 31 N. W. 232; State v. Weld, 39 Minn. 426.

Napier v. Poe, 12 Ga. 170. "Although mandamus in England is denominated a prerogative writ, yet it lies in Georgia, at the instance of any individual, who having a legal right has no remedy other than mandamus for its assertion."

In Village of Glencoe v. People, 78 Ill. 382, it was said "where the object is the enforcement of a public right, the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested, as a citizen, in having the laws executed." See, also, City of Ottawa v. People, 48 Ill. 235; Hall v. People, 57 Ill. 310.

In Union Pac. R. Co. v. Hall, 91 U. S. 355, per Justice Strong: "There is, we think, a decided preponderance of American authority in favor of the doctrine, that private persons may move for a mandamus to enforce a public duty, not due to the government as such, without the intervention of the government law-officer. The principal reasons urged against the doctrine are, that the writ is prerogative in its nature,—a reason which is of no force in this country, and no longer in England,—and that it exposes a defendant to be harrassed with many suits. An answer to the latter objection is, that granting the writ is discretionary with the court, and it may well be assumed that

§ 1118. The writ in connection with the audit, allowance and payment of claims.

The general principles governing the presentment,[154] audit and allowance,[155] and payment of claims,[156] have been discussed elsewhere in this treatise. Where it is the duty of an officer or board to examine and audit claims against a municipal corporation, mandamus will lie to compel him or it to act and either allow or reject the claim,[157] but not, when discretionary powers exist with reference to the matter, to direct how they shall be decided,[158] or that the claim be allowed for a designated amount.[159] If the amount of the claim is fixed by law,[160] or has been determined by some other

it will not be unnecessarily granted."

[154] See Vol. 2, § 487.

[155] See Vol. 2, § 490.

[156] See Vol. 2, § 492.

[157] Poling v. Board of Education, 50 W. Va. 374, 40 S. E. 357; Cheney v. Newton, 67 Ga. 477; People v. Schieren, 89 Hun, 220, 35 N. Y. Supp. 64; Pyke v. Steunenberg, 5 Idaho, 614, 51 Pac. 614; Bierman v. Seymour, 66 N. J. Law, 122, 48 Atl. 1005; Croasman v. Kincaid, 31 Or. 445, 49 Pac. 764; Chipman v. Wayne County Auditors, 127 Mich. 490, 86 N. W. 1024; People v. Macomb County Sup'rs, 3 Mich. 475; State v. Slocum, 34 Neb. 368, 51 N. W. 969; State v. Hamilton County Com'rs, 26 Ohio St. 364; People v. Elmira Auditors, 82 N. Y. 80; State v. McCardy, 62 Minn. 509, 64 N. W. 1133; Files v. State, 42 Ark. 233; Howell v. Cooper, 2 Colo. App. 530, 31 Pac. 523.

People v. City of New York, 3 Misc. (N. Y.) 131. A statute permissive in its terms authorizing a board to audit a certain claim held to impose a duty to examine and audit the claim which is enforceable by mandamus.

[158] Pyke v. Steunenberg, 5 Idaho, 614, 51 Pac. 614; Robey v. Prince George's County Com'rs, 92 Md. 150, 48 Atl. 48; State v. Slocum, 34 Neb. 368, 51 N. W. 969; State v. Merrell, 43 Neb. 575, 61 N. W. 754; People v. Oneida County Sup'rs, 24 Hun, 413; Simons v. Military Board of Virginia, 99 Va. 390, 39 S. E. 125; Whitesides v. Stuart, 91 Tenn. 710, 20 S. W. 245; Sawyer v. Mayhew, 10 S. D. 18, 71 N. W. 141; Osborn v. Clark, 1 Ariz. 397.

Writ will not lie to compel allowance of claim previously rejected. Payne v. State Board of Wagon-Road Com'rs, 4 Idaho, 384, 39 Pac. 548; City of Bangor v. County Com'rs, 87 Me. 294; Heman v. Flad, 108 Mo. 614, 18 S. W. 1128; Osborn v. Clark, 1 Ariz. 397, 25 Pac. 797.

[159] People v. Schieren, 89 Hun, 220, 35 N. Y. Supp. 64; Burton v. Furman, 115 N. C. 166, 20 S. E. 443.

[160] In re Woffenden, 1 Ariz. 237, 25 Pac. 647; Peck v. Powell, 62 Vt. 296, 19 Atl. 227; Fowler v. Peirce, 2 Cal. 165; Shattuck v. Kincaid, 31 Or. 379, 49 Pac. 758.

competent tribunal,[161] or is conceded to be correct as to amount,[162] and the only dispute is whether the claim is one which as a matter of law the relator is entitled to have paid,[163] the courts will direct its allowance in a designated amount. The writ will not lie to compel payment of a disputed claim,[164] or unliquidated demand,[165] nor one that has not been duly audited and allowed, where allowance by some auditing officer is a prerequisite to the respondent's duty to pay it.[166] The duty of a disbursing officer to pay a claim,[167] warrant,[168] or judgment[169] against a municipal corpora-

[161] State v. Heege, 40 Mo. App. 650; Lower v. United States, 91 U. S. 536; State v. Lander County Com'rs, 22 Nev. 71, 35 Pac. 300.

[162] Thoreson v. State Board of Examiners, 19 Utah, 18, 54 Pac. 175.

[163] Ramsdale v. Orleans County Sup'rs, 8 App. Div. 550, 40 N. Y. Supp. 840; In re Ryan, 6 Misc. 478, 27 N. Y. Supp. 169; People v. Smith, 83 Hun, 432, 31 N. Y. Supp. 749; People v. Washington County Sup'rs, 66 App. Div. 66, 72 N. Y. Supp. 568.

[164] Badger v. City of New Orleans, 49 La. Ann. 804, 21 So. 870, 37 L. R. A. 540; Simmons v. Davis, 18 R. I. 46, 25 Atl. 691; Foster v. Angell, 19 R. I. 285, 33 Atl. 406.

[165] People v. Common Council of Detroit, 34 Mich. 201.

[166] Foster v. Angell, 19 R. I. 285, 33 Atl. 406; Dubordieu v. Butler, 49 Cal. 522; State v. Doyle, 38 Wis. 92; Falkner v. Randolph County Judge & Com'rs, 19 Ala. 177.

[167] Commonwealth v. Jones, 192 Pa. 472, 43 Atl. 1089; State v. County Court, 37 W. Va. 808, 17 S. E. 379; Poling v. Board of Education of Dist. of Philippi, 50 W. Va. 374, 40 S. E. 357; Padgett v. McAlhany, 53 S. C. 139, 31 S. E. 58; Directors of Chicago Public Library v. Arnold, 60 Ill. App. 328; Portsmouth Tp. v. Bay City, 57 Mich. 420; Little v. Township Committee of Union, 37 N. J. Law, 84; Roberts v. United States, 13 App. D. C. 38; Byington v. Hamilton, 37 Kan. 758, 16 Pac. 54; State v. City of New Orleans, 34 La. Ann. 469; Baker v. Johnson, 41 Me. 15; Adams v. Hampden County Com'rs, 82 Mass. (16 Gray) 41; Van Akin v. Dunn, 117 Mich. 421, 75 N. W. 938; McKillop v. Cheyboygan County Sup'rs, 116 Mich. 614, 74 N. W. 1050; People v. Common Council of Detroit, 34 Mich. 201; People v. Fitch, 147 N. Y. 355, 41 N. E. 695; Knight v. Chosen Freeholders of Ocean, 48 N. J. Law, 70; Ingerman v. State, 128 Ind. 225, 27 N. E. 499.

People v. New York City Comptroller, 77 N. Y. 45. It is not always a defense to an application for mandamus to compel payment of a claim to show that money appropriated to pay such claim was wrongfully used for another purpose.

Reduction of a claim to judgment held a prerequisite to right to mandamus. Jerome v. Rio Grande County Com'rs, 18 Fed. 873; Hugg v. Ivins, 59 N. J. Law, 139, 36 Atl. 685.

Hayne v. Hood, 1 S. C. (1 Rich.) 16. Appropriation and respondent's possession of funds applicable to payment prerequisite to issuance of writ.

[168] State v. Mount, 21 La. Ann. 352; Dubordieu v. Butler, 49 Cal.

tion, is dependent on the statutory and charter provisions applicable to each particular case. The scope of this work does not permit of a classification of such provisions but some of the cases in which mandamus has been applied for to compel payment are referred to in the notes.

§ 1119. Elections.

A discussion of the law applicable to general elections is not deemed within the scope of this work.[170] In accordance with the general principles previously discussed, mandamus will issue to compel the holding of an election by municipal authorities, for the purpose of submitting to the electors the question of the acceptance or rejection of certain questions,[171] such as the relocation of a county seat,[172] and kindred matters.[173] Cases discussing the

512; State v. Gandy, 12 Neb. 232; Phillips v. School Dist. No. 3 of New Buffalo, 79 Mich. 170, 44 N. W. 429; Needham v. Thresher, 49 Cal. 393; Ward v. Forkner (Cal.) 50 Pac. 713; Mulnix v. Mutual Ben. Life Ins. Co., 23 Colo. 81, 46 Pac. 127; Huff v. Kimball, 39 Ind. 411; Kephart v. People, 28 Colo. 73, 62 Pac. 946; Bryant v. Moore, 50 Mich. 225; Beeny v. Irwin, 6 Colo. App. 66, 39 Pac. 900; Ray v. Wilson, 29 Fla. 342, 10 So. 613, 14 L. R. A. 773; Martin v. Tripp, 51 Mich. 184; State v. Cook, 43 Neb. 318, 61 N. W. 693; Maher v. State, 32 Neb. 354, 49 N. W. 436, 441; Garner v. Worth, 122 N. C. 250, 29 S. E. 364; Wright v. Kinney, 123 N. C. 618; Bardsley v. Sternberg, 17 Wash. 243, 49 Pac. 499; Cloud v. Town of Lumas, 9 Wash. 399, 37 Pac. 305; Walker v. George D. Barnard & Co., 8 Tex. Civ. App. 14, 27 S. W. 726; First Nat. Bank of Northampton v. Arthur, 10 Colo. App. 283, 50 Pac. 738; Nance v. People, 25 Colo. 252, 54 Pac. 631.

[169] City of Denison v. Foster (Tex. Civ. App.) 37 S. W. 167; City of Cleveland v. United States, 111 Fed. 341; Watts v. McLean, 28 Ill. App. 537; City of New Orleans v. United States, 49 Fed. 40; City of East St. Louis v. United States, 110 U. S. 321; California Bank v. Shaber, 55 Cal. 322; Brown v. Crego, 32 Iowa, 498; State v. Calhoun, 27 La. Ann. 167; State v. Kansas City, 58 Mo. App. 124; Steuberg v. State, 48 Neb. 299, 67 N. W. 190; Boasen v. State, 47 Neb. 245, 66 N. W. 303; Bear v. Brunswick County Com'rs, 122 N. C. 434, 29 S. E. 719; Evans v. Bradley, 5 S. D. 83, 55 N. W. 721.

The validity of the judgment cannot be questioned in proceedings for mandamus to compel payment Wells v. Town of Mason, 23 W. Va. 456; City of Sherman v. Langham, 92 Tex. 13, 40 S. W. 140, 42 S. W. 961, 39 L. R. A. 258.

[170] See Vol. 1, §§ 98 et seq.

[171] State v. St. Louis School Board, 131 Mo. 505, 33 S. W. 3.

[172] State v. Crabtree, 35 Neb. 106, 52 N. W. 842; Barry v. State, 57 Neb. 464, 77 N. W. 1096.

[173] People v. Common Council of

propriety of the issuance of the writ to compel, the giving of notice of an election,[174] filing of ticket nominated by party convention,[175] omitting name of certain candidate from official ballot,[176] appointment of election officials,[177] canvass of election returns,[178] and issuance of certificate of election,[179] are referred to in the notes.

§ 1120. Admission and restoration to office.

The legal principles applicable to the occupancy of a public office by individuals, and the rights and obligations of public officers, are treated elsewhere in this work.[180] The title to an office cannot be tried in mandamus proceedings.[181] This rule does not

San Diego, 85 Cal. 369, 24 Pac. 727. Kimberly v. Morris, 87 Tex. 637, 31 S. W. 808. Sale of intoxicating liquors.

[174] Morris v. Wrightson, 56 N. J. Law, 126, 28 Atl. 56, 22 L. R. A. 548; State v. Ware, 13 Or. 380; State v. Brown, 38 Ohio St. 344.

[175] Addle v. Davenport, 7 Idaho, 282, 62 Pac. 681.

[176] In re Noble, 34 App. Div. 55, 54 N. Y. Supp. 42.

[177] Butler v. Board of Aldermen of Pawtucket, 22 R. I. 249, 47 Atl. 364; Fort v. Howell, 58 N. J. Law, 541, 34 Atl. 751; People v. Board of Police, 107 N. Y. 235, 13 N. E. 920. State v. Directors of St. Louis Public Schools, 134 Mo. 296, 35 S. W. 617. Appointment of impartial election judges.

[178] State v. Matley, 17 Neb. 564; Kimerer v. State, 129 Ind. 589, 29 N. E. 178; Hudman v. Slaughter, 70 Ala. 546; People v. Pond, 89 Cal. 141, 26 Pac. 648; People v. Grand County Com'rs, 6 Colo. 202; Tanner v. Deen, 108 Ga. 95, 33 S. E. 832; City of Garden City v. Hall, 46 Kan. 531, 26 Pac. 1021; Smith v. Lawrence, 2 S. D. 185, 49 N. W. 7; State v. Thayer, 31 Neb. 82, 47 N. W. 704. *Recanvass.* People v. Mein, 66 App. Div. 615, 72 N. Y. Supp. 479; Hebb v. Cayton, 45 W. Va. 578, 32 S. E. 187; Runnel v. Dealy, 112 Iowa, 503, 84 N. W. 526; State v. Howe, 28 Neb. 618, 44 N. W. 874; People v. Parmelee, 22 Misc. 380, 50 N. Y. Supp. 451.

[179] Ex parte Scarborough, 34 S. C. 13, 12 S. E. 666; Hilton v. Common Council of Grand Rapids, 112 Mich. 500, 70 N. W. 1043; Sherburne v. Horn, 45 Mich. 160; Coll v. City Board of Canvassers, 83 Mich. 367, 47 N. W. 227; State v. Smith, 31 Neb. 590, 48 N. W. 468; People v. State Board of Canvassers, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646; State v. Smith (Mo.) 15 S. W. 614; Ex parte Ivey, 26 Fla. 537, 8 So. 427; Hovey v. State, 127 Ind. 588, 27 N. E. 175, 11 L. R. A. 763. Issuance of commission by governor.

[180] See Vol. 2, §§ 596 et seq.

[181] Lynde v. Dibble, 19 Wash. 328, 53 Pac. 370; State v. Smith, 49 Neb. 753, 69 N. W. 114; State v. Sullivan, 83 Wis. 416, 53 N. W. 677; Fort v. Howell, 58 N. J. Law, 541, 34 Atl. 751; Conklin v. Cunningham, 7 N. M. 445, 38 Pac. 170; Denver v. Ho-

apply to mere employers and a person of the latter class can maintain mandamus to compel reinstatement to a position from which he has been unlawfully removed.[182] Where there are no disputed questions of fact and relator's title to the office is clear, as a matter of law, mandamus will lie to compel his installation and recognition,[183] provided no other person claims the office.[184] Cases are referred to in the notes which discuss the propriety of the issuance of the writ to compel acceptance of the office,[185] administra-

bart, 10 Nev. 28; Warner v. Myers, 4 Or. 72; Meredith v. Sacramento County Sup'rs, 50 Cal. 433; Kelly v. Edwards, 69 Cal. 460, 11 Pac. 1; People v. Brush, 146 N. Y. 60, 40 N. E. 502; In re Gardner, 68 N. Y. 467; State v. Haverly, 62 Neb. 767, 87 N. W. 959; Bonner v. State, 7 Ga. 473; People v. City of Detroit, 18 Mich. 338; Ewing v. Turner, 2 Okl. 94, 35 Pac. 951; Cameron v. Parker, 2 Okl. 277, 38 Pac. 14. Compare cases cited post, reinstatement to office.

Cruse v. State, 52 Neb. 631, 73 N. W. 212. Sufficient investigation may be made in such proceeding to determine whether the relator has a prima facie title to the office.

Maverick Oil Co. v. Hanson, 67 N. H. 203, 29 Atl. 461. Quo warranto, and not mandamus to restrain the incumbent from exercising the duties of an office to which it is alleged he is not eligible, is the appropriate remedy for determination of such question. See, also, Stevens v. Carter, 27 Or. 553, 40 Pac. 1074, 31 L. R. A. 342.

Morton v. Broderick, 118 Cal. 474, 50 Pac. 644. Where the writ is sought to enforce some duty incumbent on an officer, relief will not be refused merely because title to the office is incidentally involved.

[182] People v. Sutton, 88 Hun, 173, 34 N. Y. Supp. 487; In re Ostrander, 12 Misc. 476, 34 N. Y. Supp. 295; Gilman v. Bassett, 33 Conn. 298; Eastman v. Householder, 54 Kan. 63, 37 Pac. 989; Thompson v. Board of Education of Elmer, 57 N. J. Law, 628, 31 Atl. 168; Kennedy v. Board of Education, 82 Cal. 483, 22 Pac. 1042. See Vol. 2, § 716.

Kennedy v. Board of Education, 82 Cal. 483, 22 Pac. 1042, holding that position of teacher is not an office and mandamus will lie to compel reinstatement though another has been placed in position. In re Hardy, 17 Misc. 667, 41 N. Y. Supp. 469, holds that place of janitor is an "office" under statutes defining duties and fixing salary and writ will not lie to compel restoration where another is in possession claiming title.

[183] In re Howard, 26 Misc. 233, 56 N. Y. Supp. 318.

[184] Board of Education of South Milwaukee v. State, 100 Wis. 455, 76 N. W. 351; Lyon v. Granville County Com'rs, 120 N. C. 237, 36 S. E. 929; Duane v. McDonald, 41 Conn. 517.

[185] People v. Williams, 145 Ill. 573, 33 N. E. 849, holding that writ will lie to compel acceptance of an office by one who has been appointed and who possesses requisite qualifications. See, also, Vol. 2, § 616.

tion of official oath,[186] reinstatement in office or position from which relator claims to have been unlawfully removed,[187] recognition of relator as member of a public board,[188] enforcement of right of veteran to preference in appointment,[189] and delivery of the books and records of an office to relator.[190]

[186] Blake v. Ada County Com'rs, 5 Idaho, 163, 47 Pac. 734; People v. Straight, 128 N. Y. 545, 28 N. E. 762.

[187] *Writ refused.* In re Broderick, 25 Misc. 534, 56 N. Y. Supp. 99; In re Torney, 11 Misc. 291, 32 N. Y. Supp. 277; People v. Adams, 64 Hun, 634, 18 N. Y. Supp. 896; In re Hardy, 17 Misc. 667, 41 N. Y. Supp. 469; People v. Welde, 66 App. Div. 580, 70 N. Y. Supp. 869; State v. Police Board of City of New Orleans, 51 Ann. 941, 25 So. 935; People v. Fitzgerald, 41 Mich. 2.

Writ granted. People v. Dalton, 158 N. Y. 204, 52 N. E. 1119; Thompson v. Troup, 74 Conn. 121, 49 Atl. 907; Johnson v. City of Galveston, 11 Tex. Civ. App. 469, 33 S. W. 150; Tyrrell v. Common Council of Jersey City, 25 N. J. Law (1 Dutch.) 536; State v. Kansas City Police Com'rs, 80 Mo. App. 206; Miles v. Stevenson, 80 Md. 358, 30 Atl. 646; State v. Teasdale, 21 Fla. 652; Schmulbach v. Speidel, 50 W. Va. 553, 40 S. E. 424, 55 L. R. A. 922; Pratt v. Board of Police & Fire Com'rs, 15 Utah, 1, 49 Pac. 747; State v. Atlantic City, 52 N. J. Law, 332, 19 Atl. 780, 8 L. R. A. 697.

The writ will not issue when it appears relator was justly removed, though in an irregular manner. Rex. v. Griffiths, 5 Barn. & Ald. 731; Rex v. City of Axbridge, Cowp. 523; Rex v. City of London, 2 Term R. 177.

[188] People v. Erie County Sup'rs, 42 App. Div. 510, 59 N. Y. Supp. 476; Tinker v. Board of Public Works, 97 Mich. 616, 55 N. W. 461; Conlin v. Aldrich, 98 Mass. 559; People v. Sheffield, 47 Hun (N. Y.) 481; School Dist. No. 15 v. Flanigan, 28 Colo. 431, 65 Pac. 24.

[189] Sullivan v. Gilroy, 55 Hun, 285, 8 N. Y. Supp. 401; People v. Trustees of Ballston Spa, 19 Misc. 671, 44 N. Y. Supp. 471; People v. Trustees of Cohocton, 17 Misc. 652, 41 N. Y. Supp. 499; People v. Palmer, 9 App. Div. 252, 41 N. Y. Supp. 494; People v. Rupp, 90 Hun, 145, 35 N. Y. Supp. 349, 749; People v. Scannell, 63 App. Div. 243, 71 N. Y. Supp. 383; State v. Copeland, 74 Minn. 371, 77 N. W. 221; Brown v. Duane, 60 Hun, 98, 14 N. Y. Supp. 450. Veterans' act does not apply to promotions.

[190] *Writ granted.* City of Keokuk v. Merriam, 44 Iowa, 432; Cruse v. State, 52 Neb. 831, 73 N. W. 212; Stone v. Small, 54 Vt. 498; Runion v. Latimer, 6 S. C. (6 Rich.) 126; Warner v. Myers, 4 Or. 72; Cameron v. Parker, 2 Okl. 277, 38 Pac. 14; Conklin v. Cunningham, 7 N. M. 445, 38 Pac. 170; Hooper v. Farnen, 85 Md. 587, 37 Atl. 430; Duer v. Dashiell, 91 Md. 660, 47 Atl. 1040; McGee v. State, 103 Ind. 444.

Writ refused. Beal v. Ray, 17 Ind. 554; Feurey v. Roe, 35 N. J. Law, 123.

Hussey v. Hamilton, 5 Kan. 462. Writ will not lie to recover books and records from one who does not

§ 1121. Levy and collection of taxes to pay judgment; when writ will issue.

In many instances charter or statutory provisions make it the duty of the municipality or its officers to levy a tax for the purpose of providing funds for the payment of judgments against the municipality. The performance of such duty may be compelled by mandamus.[191] In the absence of such a charter or statutory requirement, the courts have no power to compel the levy of a tax for this purpose.[192] In some instances the charter or statutes make the return of an execution unsatisfied, a condition precedent to the right to have a tax levied for its payment.[193] The Federal courts will issue the writ to compel a levy to pay their judgments, where under the same circumstances the writ would be issued by the state courts to collect their judgments.[194] The invalidity of the

claim to hold them as incumbent of the office to which they belong. See, also, Vol. 2, § 593.

[191] Walkley v. City of Muscatine, 73 U. S. (6 Wall.) 481; State v. Wharton, 103 Wis. 307, 79 N. W. 253; Fleming v. Dyer, 20 Ky. L. R. 689, 47 S. W. 444; City of Cairo v. Everett, 107 Ill. 75; State v. Hug, 44 Mo. 116; People v. Rio Grande County Com'rs, 7 Colo. App. 229, 42 Pac. 1032; Stevens v. Miller, 3 Kan. App. 192, 43 Pac. 439; Barrett v. City of New Orleans, 33 La. Ann. 542; City of Galena v. Amy, 72 U. S. (5 Wall.) 705; Padgett v. Post, 106 Fed. 600; Courtright v. Brooks Tp. Clerk, 54 Mich. 182; Grand County Com'rs. v. People, 8 Colo. App. 43, 46 Pac. 107; Muhlenburg County v. Morehead, 20 Ky. L. R. 436, 46 S. W. 691; United States v. City of New Orleans, 17 Fed. 483; State v. City of Milwaukee, 20 Wis. 87.

City of Sherman v. Smith, 12 Tex. Civ. App. 580, 35 S. W. 294. Courts will not compel the levy of a tax to pay a judgment where the amount levied for necessary current expenses and such as would be necessary to pay the judgment exceed in the aggregate the constitutional limit. See, also, Clay County v. McAleer, 115 U. S. 616.

[192] Grand County Com'rs v. King, 67 Fed. 202, 14 C. C. A. 421.

[193] State v. City of New Orleans, 34 La. Ann. 1149; Hubbel v. City of Maryville, 85 Mo. App. 165; Fisher v. City of Charleston, 17 W. Va. 595.

[194] In re Copenhaver, 54 Fed. 660; Deuel County v. First Nat. Bank (C. C. A.) 86 Fed. 264; United States v. City of Key West, 78 Fed. 88, 23 C. C. A. 663; Presque Isle County Sup'rs v. Thompson (C. C. A.) 61 Fed. 914; Stewart v. Justices of St. Clair County Ct., 47 Fed. 482. A writ will not issue to compel levy of tax to pay judgment where state laws do not authorize issuance of execution, since mandamus in such case is an ancillary proceeding, in the nature of an execution.

City of Memphis v. Brown, 97 U. S. 300. The writ is in the nature of an execution and the court issuing it retains control over its process to further direct what property shall be assessed.

claim merged in the judgment cannot be set up as a defense to such an application,[195] but the court may inquire into the nature of the debt merged in the judgment for the purpose of determining whether an issuance of the writ would require a levy in excess of the statutory limit, applicable to claims of the nature of the one on which the application is based.[196] The respondent may show in defense of the application that the judgment is coram non judice.[197]

II. Certiorari, Injunction and Quo Warranto.

§ 1122. 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."[198] 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.[199] It does not lie in respect to

[195] Louisiana v. St. Martin's Parish Police Jury, 111 U. S. 716; Harshman v. Knox County, 122 U. S. 306; Fleming v. Trowsdale, 85 Fed. 189, 29 C. C. A. 106; United States v. Ottawa Auditors, 28 Fed. 407; People v. Rio Grande County, Com'rs, 11 Colo. App. 124, 52 Pac. 748; City of Cairo v. Campbell, 116 Ill. 305.

[196] Grand County Com'rs v. People, 16 Colo. App. 215, 64 Pac. 675.

[197] Moore v. Town of Edgefield, 32 Fed. 498.

[198] Enc. Pl. & Pr. vol. 4, p. 9; Town of Camden v. Bloch, 65 Ala. 236; Stanfill v. Dallas County Ct., 80 Ala. 287.

[199] United States v. Mills, 11 App. D. C. 500; Archie v. State, 99 Ga. 23, 25 S. E. 612; State v. Washoe County Board of Com'rs, 23 Nev. 247. The writ will only run as to matters in which county commissioners exercise judicial functions. People v. Van Alstyne, 53 App. Div. 1, 65 N. Y. Supp. 451; People v. Board of Police & Excise, 69 N. Y. 408; People v. Phisterer, 66 App. Div. 52, 73 N. Y. Supp. 124. A board of examination with power to determine the general fitness of a person for services as an officer in the national guard acts in a judicial manner and its decisions are subject to review by certiorari.

People v. Jones, 112 N. Y. 597, 20 N. E. 577. The acts of the commissioners of the land office in awarding land under water to persons entitled to it are of a quasi judicial nature and subject to review under the statute by certiorari.

Wilson v. Lowe, 47 Tenn. (7 Cold.) 153; Hayden v. City of Memphis, 100 Tenn. 582, 47 S. W. 182. A circuit court may require a city council, through the writ of certiorari to send up for review the record of the proceedings on the

legislative or ministerial acts or cannot be used in reviewing the performance of discretionary duties.[200] The purpose of this work forbids any general discussion of the nature or practice in respect to the issue of this writ and the sections treating it will be confined, largely, to illustrative cases connected with the subject of public corporations.

§ 1123. The writ; when issued.

The writ will not issue when there is another remedy available for the purpose of affording relief,[201] nor will it be granted where its issue would not be accompanied with beneficial results,[202] nor

removal of one of its members. See, also, cases cited generally under two following sections.

[200] Frasher v. Rader, 124 Cal. 132, 56 Pac. 797; People v. Stilwell, 19 N. Y. 531; People v. Walter, 68 N. Y. 403. But see Treasurer of Camden v. Mulford, 26 N. J. Law (2 Dutch.) 49. See, also, Hoxsey v. City of Paterson, 39 N. J. Law, 489. In respect to testing validity of contract by certiorari. See cases cited generally under two following sections.

[201] Lawler v. Lyness, 112 Ala. 386, 20 So. 574; People v. Board of Delegates of San Francisco Fire Dept., 14 Cal. 479; Stoddard v. Superior Court of Stanislaus County, 108 Cal. 303, 41 Pac. 278; Stroup v. Pruden, 104 Ga. 721, 30 S. E. 948; Cranston v. City of Augusta, 61 Ga. 572; Wright v. Highway Com'rs of Carrollton, 150 Ill. 138, 36 N. E. 980; City of Harvey v. Dean, 62 Ill. App. 41; Gaither v. Watkins, 66 Md. 576, 8 Atl. 464; Hodgdon v. Lincoln County Com'rs, 68 Me. 226; Flint & P. M. R. Co. v. Norton, 64 Mich. 248, 31 N. W. 134; Weber v. Ryers, 82 Mich. 177, 46 N. W. 233; Bresler v. Ellis, 46 Mich. 335; City of St. Paul v. Marvin, 16 Minn. 102 (Gil. 91); Dousman v. City of St. Paul, 22 Minn. 387; Moore v. Bailey, 8 Mo. App. 156; Stites v. Board of Chosen Freeholders of Cumberland County, 58 N. J. Law, 340, 33 Atl. 737; Reynolds v. Town of West Hoboken, 63 N. J. Law, 497, 43 Atl. 682; People v. Thayer, 88 Hun, 136, 34 N. Y. Supp. 592.

People v. Board of Health of Yonkers, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481. A determination of a board of health that certain dams were a nuisance cannot be reviewed by certiorari; the only remedy is by injunction or in an action at law for damages.

People v. Board of R. R. Com'rs, 4 App. Div. 259, 38 N. Y. Supp. 528, 861; Sherry v. O'Brien, 22 R. I. 319, 47 Atl. 690; Stuart v. Hall, 2 Tenn. (2 Overt.) 179. Certiorari will not lie while a suit is pending in equity in respect to the same matter. Tomlinson v. Board of Equilization, 88 Tenn. 1, 12 S. W. 414, 6 L. R. A. 207; Dimmit County v. Salmon (Tex. Civ. App.) 35 S. W. 752; Gregory v. Dixon, 7 Wash. 27, 34 Pac. 212. But see State v. City of Ashland, 71 Wis. 502, 37 N. W. 809.

[202] Independent Dist. of Ottumwa v. Taylor, 100 Iowa, 617, 69 N. W.

unless substantial injustice has been done,[203] 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;[204] it will not therefore lie to review administrative or ministerial acts[205] nor the legislation of any body having authority to legislate[206] even where it

1009; People v. Leavitt, 41 Mich. 470. The writ will not lie to review a conviction for violating a city ordinance where the fine has been voluntarily paid. Newark Ledger Pub. Co. v. Common Council of Newark, 66 N. J. Law (37 Vroom.) 184, 48 Atl. 1020; People v. Board of Auditors of Hannibal, 47 N. Y. State Rep. 567, 20 N. Y. Supp. 165.

[203] Inhabitants of Strong v. County Com'rs, 31 Me. 578; Inhabitants of Grandville v. Hampden County Com'rs, 97 Mass. 193; Gager v. Chippewa County Sup'rs, 47 Mich. 167; Vanderstolph v. Boylan, 50 Mich. 330; Cavanagh v. City of Bayonne, 63 N. J. Law, 176, 43 Atl. 442; County Court v. Boreman, 34 W. Va. 87, 11 S. E. 747. But see City of Bangor v. Penobscot County Com'rs, 30 Me. 270. The question of whether an injustice has been done will not be considered where county commissioners have rendered a judgment in a case in which they have no jurisdiction.

[204] Steele v. Madison County Com'rs, 83 Ala. 304, 3 So. 761; Andrews v. Pratt, 44 Cal. 309. The writ will not lie to set aside proceedings of a board of supervisors in allowing an illegal claim against the county. Quinchard v. Board of Trustees of Alameda, 113 Cal. 664, 45 Pac. 856. The action of city authorities in ordering and making street improvements cannot be reviewed by certiorari. Midland County Sup'rs v. Auditor General, 27 Mich. 165. Action of the auditor general in charging back certain taxes in a settlement with the county not subject to judicial review and cannot, therefore, be examined upon certiorari.

McGovern v. Board of Public Works of Trenton, 57 N. J. Law, 580, 31 Atl. 613; People v. Moore, 60 Hun, 586, 15 N. Y. Supp. 504; People v. Trustees of Haverstraw, 11 App. Div. 108, 43 N. Y. Supp. 135. Armstrong v. Murphy, 65 App. Div. 126, 72 N. Y. Supp. 475. The action of a police commissioner in refusing a theatrical license is discretionary and not suject to review by certiorari. State v. Kemen, 61 Wis. 494. The writ will not lie to review an alleged unlawful sale of a school house by two of the district officials.

[205] City of Harvey v. Dean, 62 Ill. App. 41; State v. Harrison, 141 Mo. 12, 41 S. W. 971, 43 S. W. 867; People v. Carr, 5 Silv. 302, 23 N. Y. Supp. 112; People v. Gilroy, 72 Hun, 637, 25 N. Y. Supp. 878; People v. Burt, 65 App. Div. 157, 72 N. Y. Supp. 567; State v. Board of Aldermen of Newport, 18 R. I. 381, 28 Atl. 347.

[206] Pine Bluff Water & Light Co. v. City of Pine Bluff, 62 Ark. 196, 35 S. W. 227; People v. Oakland Board of Education, 54 Cal. 375; Brown v. San Francisco County Sup'rs, 124 Cal. 274, 57 Pac. 82.

has exceeded its powers, since discretionary legislative power is not subject to judicial control.[207] 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,[208] offi-

The determination of a board of supervisors to open or close streets is legislative action, not judicial, and certiorari therefore will not lie to review it. Whittaker v. Village of Venice, 150 Ill. 195, 37 N. E. 240; Iske v. City of Newton, 54 Iowa, 586; In re Wilson, 32 Minn. 145; People v. Manhattan State Hospital, 5 App. Div. 249, 39 N. Y. Supp. 158; People v. Queens County Sup'rs, 14 App. Div. 608, 43 N. Y. Supp. 1121, affirmed in 153 N. Y. 370, 47 N. E. 790. The creation of a fire district by a board of supervisors is a legislative act not reviewable by certiorari. People v. Queens County Sup'rs, 131 N. Y. 468, 30 N. E. 488. A county board of supervisors in borrowing money and issuing county bonds act in a legislative and not a judicial capacity. Certiorari will not lie to review their proceeding in this respect.

[207] But see Jackson v. City of Newark, 53 N. J. Eq. 322, 31 Atl. 233.

[208] People v. Contra Costa County Sup'rs, 112 Cal. 421, 55 Pac. 131. The action of a board of county supervisors in granting a franchise for a wharf under act of March 23, 1893, does not call for the exercise of judicial or quasi judicial functions and certiorari will not lie to review it. Frasher v. Rader, 124 Cal. 132, 56 Pac. 797; State Board of Land Com'rs v. Carpenter, 16 Colo. App. 436, 66 Pac. 165; Hudson v. Sullivan, 93 Ga. 631, 20 S. E. 77; Adleman v. Pierce, 6 Idaho, 294, 55 Pac. 658. The letting of a contract for public work is an administrative and not a judicial or quasi judicial act. Attorney-General v. City of Northhampton, 143 Mass. 589; Lemont v. Dodge County, 39 Minn. 385, 40 N. W. 359. The formation of a new school district by a court of county commissioners is legislative, not judicial, and therefore cannot be reviewed on certiorari. See, also, as holding the same, Moede v. Stearns County, 43 Minn. 312, 45 N. W. 435.

Christlieb v. Hennepin County, 41 Minn. 142, 42 N. W. 930. The action of a board of county commissioners in dividing a town is legislative and not subject to review. See, also, as following the same principle, State v. Clough, 64 Minn. 378, 67 N. W. 202, where the proceedings of the governor, secretary of state and state auditor relative to the division of an organized county were held neither judicial nor quasi judicial in their nature and therefore not subject to review on certiorari. Gouldey v. City of Atlantic City, 63 N. J. Law, 537, 42 Atl. 852. The action of a body which is not legal cannot be reviewed by the writ.

State v. Washoe County Com'rs, 23 Nev. 247, 45 Pac. 529; State v. Osburn, 24 Nev. 187, 51 Pac. 837. A determination of the result of an election is purely a matter of computation and therefore not a judicial act. People v. Bell, 55 Hun, 610, 8 N. Y. Supp. 748. The se-

cers [209] or courts in the performance of duties of the character above indicated. The writ cannot be used ordinarily to test the right of a party to an office [210] nor generally for purposes of collateral attack [211] or to test the legality of the organization of a subordinate public corporation.[212]

§ 1124. When the writ will issue.

Certiorari is a discretionary writ [213] available for the purpose of reviewing and correcting the quasi or quasi judicial acts of subordinate or inferior boards,[214] officers [215] or courts,[216] and the

verity of a punishment inflicted by a police commissioner is not reviewable by certiorari on that account. But see Stubenrauch v. Neyenesch, 54 Iowa, 567.

[209] State v. City of St. Paul, 34 Minn. 250. Revocation of an auctioneer's license by a mayor not subject to review by certiorari.

[210] United States v. Mills, 11 App. D. C. 500; Roberson v. City of Bayonne, 58 N. J. Law, 325, 33 Atl. 734; Clayton v. Hudson County Chosen Freeholders, 60 N. J. Law, 362, 37 Atl. 725; Bilderback v. Salem County Chosen Freeholders, 63 N. J. Law, 55, 42 Atl. 843; Van Reypen v. Jersey City, 48 N. J. Law, 428; Miller v. Inhabitants of Washington, 67 N. J. Law, 167, 50 Atl. 341. See, also, Bradshaw v. City Council of Camden, 39 N. J. Law, 416.

[211] Town of Oswego v. Kellogg, 99 Ill. 590; State v. Justice of Peace, 48 La. Ann. 1249, 20 So. 729; State v. Recorder of First Dist., 48 La. Ann. 1375, 20 So. 908; Parsell v. State, 30 N. J. Law, 530. But see People v. Gladwin County Sup'rs, 41 Mich. 647.

[212] Lees v. Drainage Com'rs, 125 Ill. 47, 16 N. E. 915; Fractional School Dist. No. 1 v. School Inspectors of Owosso, 27 Mich. 3; Atlee v. Wexford County Sup'rs, 94 Mich. 562, 54 N. W. 380; Perrizo v. Kesler, 93 Mich. 280, 53 N. W. 391. Corporate existence of school district cannot be tested by writ. But see Sanner v. Union Drainage Dist. No. 1, 175 Ill. 575, 51 N. E. 857, reversing 64 Ill. App. 62; State v. Forest County, 74 Wis. 610, 43 N. W. 551.

[213] Sowles v. Bailey, 69 Vt. 277, 37 Atl. 751.

[214] People v. Eldorado County Sup'rs, 8 Cal. 58; Potter v. School Trustees, 10 Ill. App. 343; Jordan v. Hayne, 36 Iowa, 9; Stone v. Miller, 60 Iowa, 243. Relocation of county seat. Way v. Fox, 109 Iowa, 340, 80 N. W. 405. The legality of proceedings by a county board in respect to changing site of court house may be tested by certiorari.

Locke v. Selectmen of Lexington, 122 Mass. 290. The writ lies to quash proceedings by selectmen, void for want of legal acceptance on the part of a town where the powers are conditionally conferred by statute. Merrick v. Arbela Tp. Board, 41 Mich. 631. Removal by township board of school district assessor. State v. Washoe County Com'rs, 14 Nev. 66. Settlement of claim against a county. Read v.

writ has been issued in connection with assessment,[217] highway,[218]

City of Camden, 54 N. J. Law, 347, 24 Atl. 549. Legality of an ordinance changing a street grade may be reviewed by certiorari. Inhabitants of Bloomfield v. Borough of Glen Ridge, 55 N. J. Eq. 505, 37 Atl. 63; People v. Board of Health, 58 Hun, 595, 12 N. Y. Supp. 561; People v. Village of New Rochelle, 17 App. Div. 603, 45 N. Y. Supp. 836.

People v. Madison County Sup'rs, 51 N. Y. 442. The action of a board of supervisors in passing upon a claim may be reviewed on certiorari. People v. Board of R. Com'rs, 158 N. Y. 421, 53 N. E. 163, affirming 32 App. Div. 158, 52 N. Y. Supp. 901. The decision of railroad commissioners on the discontinuance of a station is a judicial act and subject to review by certiorari. People v. Board of Police & Excise, 69 N. Y. 408. Errors in law affecting materially the rights of parties may be corrected.

People v. Board of R. Com'rs, 158 N. Y. 711, 53 N. E. 1129, affirming 32 App. Div. 179, 52 N. Y. Supp. 908. The action of a board of railroad commissioners in determining the right of a street railroad to operate its road with kinetic motors, after public proceedings, is judicial in its nature and subject to review by certiorari. Sherman Dist. Board of Education v. Hopkins, 19 W. Va. 84.

[215] Morgan v. City of Orange, 50 N. J. Law, 13 Atl. 240; People v. Chapin, 42 Hun (N. Y.) 239. State officers act in a quasi judicial character in apportioning among different railroad companies the expense of the railroad commissioners as provided by law. Browne v. Gear, 21 Wash. 147, 57 Pac. 359. A proceeding before a superintendent of public instruction to revoke a teacher's certificate is judicial and may be reviewed by certiorari. State v. Graham, 60 Wis. 395. The supreme court on certiorari may review the decision of the state superintendent of schools in a matter relating to the alteration of a school district.

[216] 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; City of Seattle v. Pearson, 15 Wash. 575, 46 Pac. 1053.

[217] Benedictine Sisters v. City of Elizabeth, 50 N. J. Law, 347, 13 Atl. 5; Vail v. Bentley, 23 N. J. Law (3 Zab.) 532; Doyle & Co. v. City of Newark, 30 N. J. Law, 303; People v. Board of Assessors of Gravesend, 51 Hun, 644, 4 N. Y. Supp. 85; People v. Cook, 62 Hun, 303, 17 N. Y. Supp. 546; Kennedy v. City of Troy, 77 N. Y. 493; Dixon v. City of Cincinnati, 14 Ohio, 240; Spooner v. City of Seattle, 6 Wash. 370, 33 Pac. 963; State v. City of Ashland, 71 Wis. 502, 37 N. W. 809; State v. Lawler, 103 Wis. 460, 79 N. W. 777. But see Bixler v. Sacramento County Sup'rs, 59 Cal. 698.

[218] Trainer v. Lawrence, 36 Ill. App. 90; Longfellow v. Quimby, 29 Me. 196; In re Inhabitants of Waterville, 31 Me. 506; Old Colony R. Co. v. Fall River, 147 Mass. 455, 18 N. E. 425; Com. v. West Boston Bridge, 30 Mass. (13 Pick) 195; Powell v. Hitchner, 32 N. J. Law, 211; Gulick v. Groendyke, 38 N. J. Law, 114; Fredericks v. Hoffmeis-

election,[219] taxation,[220] drainage,[221] removal from office or employment,[222] proceedings. Its legal use is determined in many cases by special statutory provisions which prescribe specifically the purposes in connection with which it is a proper remedy.[223]

ter, 62 N. J. Law, 565, 41 Atl. 722; In re Fitch, 147 N. Y. 334, 41 N. E. 699; Thompson v. Multnomah County, 2 Or. 34; Adams v. Newfane, 8 Vt. 271; Lyman v. Town of Burlington, 22 Vt. 131. But see Brooks v. Kirby, 19 Ala. 72; State v. Allen, 47 La. Ann. 1600, 18 So. 634; Inhabitants of Bethel v. Oxford County Com'rs, 60 Me. 535; Burt v. Highway Com'rs of Sumpter, 32 Mich. 190; Soller v. Tp. Board of Brown, 67 Mich. 422, 34 N. W. 888.

[219] Champion v. Board of County Com'rs, 5 Dak. 416, 41 N. W. 739; Roberts v. Shafer, 63 N. J. Law, 182, 42 Atl. 770; People v. Martin, 142 N. Y. 228, 36 N. E. 885, affirming 72 Hun, 354, 25 N. Y. Supp. 775. The act of a board of police commissioners in selecting newspapers in which to publish lists of candidates is judicial, not ministerial, and may be reviewed by certiorari. Sherry v. O'Brien, 22 R. I. 319, 47 Atl. 690; State v. Hughes County Com'rs, 1 S. D. 292, 46 N. W. 1127. But see Lorbeer v. Hutchinson, 111 Cal. 272, 43 Pac. 896; People v. Woods, 39 App. Div. 660, 57 N. Y. Supp. 715.

[220] Smith v. Powell, 55 Iowa, 215; Gibbs v. Hampden County Com'rs, 36 Mass. (19 Pick.) 298; People v. Wemple, 61 Hun, 83, 15 N. Y. Supp. 446; State v. Bell, 91 Wis. 271, 64 N. W. 845.

[221] Null v. Zierle, 52 Mich. 540. The proceedings of a drainage commissioner who has acted within his jurisdiction may be reviewed on certiorari.

[222] State v. Common Council of Duluth, 53 Minn. 238, 55 N. W. 118. Certiorari will lie to review proceedings before municipal bodies for the removal of a person from office. State v. Harrison, 141 Mo. 12, 41 S. W. 971, 43 S. W. 867; Daily v. Chosen Freeholders of Essex County, 58 N. J. Law, 319, 33 Atl. 739; Roberts v. City of Camden, 63 N. J. Law, 186, 42 Atl. 848; People v. Hannan, 56 Hun, 469, 10 N. Y. Supp. 71; People v. Strauss, 3 Misc. 617, 23 N. Y. Supp. 295; People v. Board of Police Com'rs, 84 Hun, 64, 32 N. Y. Supp. 18. Discharge of police. In re Cross, 85 Hun, 343, 32 N. Y. Supp. 933; Jordan v. Board of Education, 14 Misc. 119, 35 N. Y. Supp. 247. Dismissal of teacher. People v. Wright, 7 App. Div. 185, 40 N. Y. Supp. 285. Removal of veteran from public office. People v. McGuire, 27 App. Div. 593, 50 N. Y. Supp. 520; People v. Flood, 64 App. Div. 209, 71 N. Y. Supp. 1067. Removal of fireman. People v. Guilfoyle, 65 App. Div. 498, 72 N. Y. Supp. 891; People v. Nichols, 79 N. Y. 582; Gilbert v. Salt Lake City Police & Fire Com'rs, 11 Utah, 378, 40 Pac. 264. But see Wilson v. City Council of Camden, 63 N. J. Law, 200, 42 Atl. 837; People v. Com'rs of Charities & Corrections, 1 App. Div. 3, 36 N. Y. Supp. 1002; People v. Conway, 59 App. Div. 329, 69 N. Y. Supp. 837; People v. Simonson, 66 App. Div. 18, 72 N. Y. Supp. 957. Removal of janitor. People v. Brady, 166 N. Y. 44, 59 N. E. 701, reversing 53 App. Div. 279, 65 N. Y. Supp. 844.

[223] Way v. Fox, 109 Iowa, 340, 80

§ 1125. Petition and parties.

Certiorari proceedings deal with errors of law only, unless otherwise provided by statute, and it must appear, therefore, upon the face of the petition that an error of this character has been committed. The allegations must be specific in respect to the particular act complained of; certainty is required.[224] It must also appear that an injustice has been done [225] and one in respect to which the proceedings will afford relief [226] and that the proceeding is one which involves substantial merit.[227]

Parties. The state is the proper petitioning party when public rights are involved as ordinarily a private person is not permitted to commence proceedings involving public questions when he is not substantially interested or damaged.[228] Private persons, however, when it appears that they have suffered special damage or

N. W. 405; City of Detroit v. Murphy, 95 Mich. 531, 55 N. W. 445; Shields v. City of Paterson, 55 N. J. Law, 495, 27 Atl. 803. Certiorari is the proper remedy. Simmerman v. Borough of Wildwood, 60 N. J. Law, 367, 40 Atl. 1132, affirming 60 N. J. Law, 365.

Christie v. City of Bayonne, 64 N. J. Law, 191, 44 Atl. 887. Legality of municipal ordinance providing for the payment of official salary may be tested by the writ. Cowen v. Borough of Wildwood, 60 N. J. Law, 365, 30 Atl. 22. Review of ordinance for municipal improvement. People v. Shaw, 34 App. Div. 61, 54 N. Y. Supp. 218; People v. Board of Railroad Com'rs, 4 App. Div. 259, 38 N. Y. Supp. 528, 861, Id., 160 N. Y. 202, 54 N. E. 697, affirming 40 App. Div. 559, 58 N. Y. Supp. 94; People v. Schoonover, 43 App. Div. 539, 60 N. Y. Supp. 127; Lewis v. Bishop, 19 Wash. 312, 53 Pac. 165.

[224] State v. Davey, 39 La. Ann. 992, 3 So. 181; Inhabitants of Sumner v. Oxford County Com'rs, 37 Me. 112. A petition for certiorari based upon want of notice in highway proceedings should state that the party did not receive the notice prescribed by law.

[225] State v. Van Buskirk, 21 N. J. Law (1 Zab.) 86; Hancock v. Town of Worcester, 62 Vt. 106, 18 Atl. 1041.

[226] Hancock v. Town of Worcester, 62 Vt. 106, 18 Atl. 1041.

[227] McAloon v. Com'rs of Pawtucket License Com'rs, 22 R. I. 191, 46 Atl. 1047.

[228] Brown v. San Francisco County Sup'rs, 124 Cal. 274, 57 Pac. 82; Baudistel v. Recorder & Common Council of City of Jackson, 110 Mich. 357, 68 N. W. 292; Town Council of Lexington v. Sargent, 64 Miss. 621, 1 So. 903; Borden v. Justice, 24 N. J. Law (4 Zab.) 413; Warford v. Smith, 25 N. J. Law (1 Dutch.) 212; Hamblet v. City of Asbury Park, 61 N. J. Law, 502, 39 Atl. 1022. But see State v. Ravalli County Com'rs, 21 Mont. 469, 54 Pac. 939; Oliver v. Jersey City, 63 N. J. Law, 96, 42 Atl. 782.

injury in addition to or in excess of that suffered by the public at large, or the state, become then the proper parties.[229] Where it appears that one will not be injured through certain proceedings, their validity cannot be questioned by him by the writ of certiorari.[230] The writ is issued for the purpose of correcting judicial or quasi judicial acts of inferior bodies courts or officials and it is designed to obtain for the purpose of review by a higher tribunal a copy of the record of the proceedings of the body, court or officer, in connection with which the alleged error is claimed.[231] It should, therefore, be directed to that officer or body charged by law with the legal control of the records of the proceedings which it is designed to correct.[232]

[229] Champion v. Board of County Com'rs, 5 Dak. 416, 41 N. W. 739; Scheiwe v. Holz, 168 Ill. 432, 48 N. E. 65; Campau v. Button, 33 Mich. 525; Lewis v. Cumberland Chosen Freeholders, 56 N. J. Law, 416, 28 Atl. 553. The action of a board of freeholders in granting a commission to use a county bridge may be reviewed by a taxpayer on certiorari. Stroud v. Consumers' Water Co., 56 N. J. Law, 422, 28 Atl. 578. A taxpayer can prosecute a writ to test the legality of an ordinance for the purchase of waterworks. Biddle v. Borough of Riverton, 58 N. J. Law, 289, 33 Atl. 279. A taxpayer is a property party to a writ attacking the question of the issuance of improvement bonds.

Staates v. Inhabitants of Washington, 44 N. J. Law, 605; People v. Williams, 90 Hun, 501, 36 N. Y. Supp. 65; Rhode Island Soc. for Encouragement of Domestic Industry v. Budlong (R. I.) 25 Atl. 657; McAloon v. Com'rs of Pawtucket License Com'rs, 22 R. I. 191, 46 Atl. 1047; State v. Goldstucker, 40 Wis. 124. A landowner may, in his own name, procure a review on certiorari of the action of highway authorities in laying out a highway over his land. But see Avon-by-the-Sea Land & Imp. Co. v. Borough of Neptune City, 57 N. J. Law, 362, 30 Atl. 529, Id., 57 N. J. Law, 701 32 Atl. 220.

[230] Nightingale v. Simmons, 66 Mich. 528, 33 N. W. 414; Wolpert v. Newcomb, 106 Mich. 357, 64 N. W. 326; Jersey City v. Traphagen, 53 N. J. Law, 434, 22 Atl. 190, reversing 52 N. J. Law, 65, 18 Atl. 586, 696; Spear v. City of Perth Amboy, 38 N. J. Law, 425; McGovern v. Inhabitants of Trenton, 60 N. J. Law, 402, 38 Atl. 636; People v. Woodruff, 64 App. Div. 239, 71 N. Y. Supp. 1044.

[231] Hastings v. City & County of San Francisco, 18 Cal. 49.

[232] Roberts v. Highway Com'rs of Cottrellville, 24 Mich. 182; Reese v. Sherer, 49 N. J. Law, 610, 10 Atl. 286; Inhabitants of Woodbridge v. Allen, 43 N. J. Law, 262; Davis v. Town of Harrison, 46 N. J. Law, 79; People v. Carter, 52 Hun, 458, 5 N. Y. Supp. 507; People v. Trustees of New York & Brooklyn Bridge, 1 App. Div. 186, 37 N. Y. Supp. 168. A writ directed "to the board of trustees of the New York

§ 1126. Return and hearing.

The return consists of duly certified copies of all records or documents affecting the question at issue,[233] or the originals of such records or documents, and is made and transmitted by that court or body to whom the writ is directed, to the tribunal issuing it.[234] It is the basis of proceedings in connection with the writ and until it is made, no valid judgment or order can be entered by the higher court. If a portion of the record is omitted from the return, the reviewing court may properly permit respondents to supply it by amendment.[235]

Hearing. The tribunal of review on the hearing is limited ordinarily in its consideration of the questions involved to the jurisdiction of the subordinate court, official or body, to hear and determine the matters decided,[236] and in some instances where the

and Brooklyn Bridge" is not such a misnomer as will defeat a certiorari proceeding where the legal corporate name of the respondent was "the trustees of the New York and Brooklyn Bridge."

In re Evingson, 2 N. D. 184, 49 N. W. 733. A writ cannot be directed to an ex official after he has parted with the record sought to be reviewed. State v. City of Fond du Lac, 42 Wis. 287. A writ should run to the common council, not to the city clerk. State v. Weinfurther, 92 Wis. 546, 66 N. W. 702. Where there is a misdirection of the writ, a return by the parties to whom it runs will not give jurisdiction. State v. City of Milwaukee, 86 Wis. 376, 57 N. W. 45. Certiorari assessments for local improvements should be brought against the city council and not against the city and the city clerk.

[233] Lowndes County Ct. Com'rs v. Hearne, 59 Ala. 371; Haven v. Essex County Com'rs, 155 Mass. 467, 29 N. E. 1083. A full record of the proceedings of county commissioners should be returned if the same is not attached to the petition of the writ; it is insufficient to merely file an answer citing matters deemed by the respondents available as a defense. City of St. Paul v. Marvin, 16 Minn. 102 (Gil. 91); State v. Springer, 134 Mo. 212, 35 S. W. 589; State v. Washoe County Com'rs, 12 Nev. 17. The answer or return to a writ of certiorari should show that the inferior board has jurisdiction to make the order which they defend. People v. Wemple, 61 Hun, 83, 15 N. Y. Supp. 446; People v. MacLean, 61 N. Y. Super. Ct. 458, 19 N. Y. Supp. 548. A return should contain a statement in effect that it is complete, otherwise a proper return must be directed.

[234] Crawford v. Township Board of Scio, 22 Mich. 405; Nehrling v. State, 112 Wis. 637, 88 N. W. 610.

[235] State v. Springer, 134 Mo. 212, 35 S. W. 589; State v. Kansas City, 89 Mo. 34, 14 S. W. 515.

[236] Stumpf v. San Luis Obispo County Sup'rs, 131 Cal. 364, 63 Pac.

right is given by statute it may also pass upon the legal correctness of its decision.[237] It is confined to the return as transmitted to it and matters outside the record cannot be considered.[238] Oral evidence or affidavits are therefore not admissible upon the hearing.[239] The merits of the controversy, as a rule, cannot be passed upon [240] unless especially provided by law.[241] A presumption exists in favor of the legality of the proceedings and of the rulings by the lower court or inferior board or official,[242] or, to state the

663; White v. Superior Court of San Francisco, 110 Cal. 60, 42 Pac. 480; Schuchman v. Highway Com'rs, 52 Ill. App. 497; Inhabitants of Fairfield v. Somerset County Com'rs, 66 Me. 385; McGregor v. Gladwin, 37 Mich. 388; Fillmore v. Van Horn, 129 Mich. 52, 88 N. W. 89; Inhabitants of Tewksbury v. Middlesex County Com'rs, 117 Mass. 563; Ward v. Board of Equalization of Gentry County, 135 Mo. 309, 36 S. W. 648; People v. Talmage, 46 Hun (N. Y.) 603.

[237] Smith v. Vandervere, 25 N. J. Law (1 Dutch.) 233; People v. Barker, 1 App. Div. 532, 37 N. Y. Supp. 555; People v. Board of Police & Excise, 69 N. Y. 408. Errors in law materially affecting the rights of parties may be corrected, yet, questions of fact cannot be reviewed in respect to which there is conflicting evidence or matters of judgment and discretion.

[238] Highway Com'rs v. Newby, 31 Ill. App. 378; Randecker v. Highway Com'rs, 61 Ill. App. 426; Brown v. Robertson, 123 Ill. 631, 15 N. E. 30; Lincoln v. Boston St. Com'rs, 176 Mass. 210, 57 N. E. 356; Ward v. Board of Equalization of Gentry County, 135 Mo. 309, 36 S. W. 648. The mere fact that papers outside of record have been read will not make them a part of it. Hannibal & St. J. R. Co. v. State Board of Equalization, 64 Mo. 294; People v. Dolge, 45 Hun (N. Y.) 310; People v. Wurster, 149 N. Y. 549, 44 N. E. 298, reversing 91 Hun, 233, 36 N. Y. Supp. 160; People v. Sutphin, 166 N. Y. 163, 59 N. E. 770; Oshkosh Common Council v. State, 59 Wis. 425.

[239] Highway Com'rs v. Newby, 31 Ill. App. 378; Fowler v. Larrabee, 58 N. J. Law, 314, 33 Atl. 216; People v. Murray, 14 Misc. 177, 35 N. Y. Supp. 463.

[240] Brokaw v. Bergen, 24 N. J. Law (4 Zab.) 548; Stockton v. City of Newark, 58 N. J. Law, 116, 32 Atl. 67; In re Spring Garden Road, 43 Pa. 144; In re Germantown Ave., 99 Pa. 479.

[241] People v. Stedman, 57 Hun, 280, 10 N. Y. Supp. 787.

[242] McGovern v. Board of Public Works of City of Trenton, 57 N. J. Law, 580, 31 Atl. 613; People v. Purroy, 66 Hun, 626, 20 N. Y. Supp. 735; People v. Strauss, 3 Misc. 617, 23 N. Y. Supp. 295; People v. Roosevelt, 7 App. Div. 610, 40 N. Y. Supp. 119; People v. Scannell, 56 App. Div. 51, 67 N. Y. Supp. 433; People v. Feitner, 65 App. Div. 224, 72 N. Y. Supp. 641; Morris v. Palmer, 44 S. C. 462, 22 S. E. 726. Findings of fact for certiorari proceedings are conclusive upon higher courts. State v. Manitowoc County Clerk, 59 Wis. 15; State. v. Common Coun-

principle in another way, the decision reviewed is entitled on certiorari to the same presumptions that apply to a verdict of the jury on appeal.[243] It is necessary to give notice of the issue of the writ and of the time and place of hearing.[244]

§ 1127. Judgment; miscellaneous.

The judgment should be one of affirmance or a quashing of the writ.[245] It affects the validity of the record alone and is to be determined, as already stated, upon its face.

Miscellaneous. On the ground of public policy, costs are not usually taxed against public corporations, but they may be allowed against the respondents in some cases in the discretion of the reviewing court.[246] The time of application may be limited by statute,[247] but where a common-law writ is issued, a mere lapse of time short of the limitation for the prosecution of a writ of error will not deprive one of the right.[248]

cil of Oconomowoc, 104 Wis. 622, 80 N. W. 942.

[243] People v. New York Police Com'rs, 84 Hun, 64, 32 N. Y. Supp. 18; People v. New York Police Com'rs, 93 N. Y. 97.

[244] Moore v. State, 96 Ga. 309, 22 S. E. 960; Bowlby v. City of Dover, 64 N. J. Law, 184, 44 Atl. 844.

[245] State v. Board of Com'rs of Washoe County, 23 Nev. 247, 45 Pac. 529. The writ will be dismissed where any judgment that might be entered would not be binding upon the real parties interested. Wilkins v. Quarter Sessions of Camden County, 58 N. J. Law, 555, 34 Atl. 935; People v. French, 53 Hun, 637, 6 N. Y. Supp. 431. The writ should be quashed after a failure to present for six years.

[246] Town of Camden v. Bloch, 65 Ala. 236; Inhabitants of Stetson v. Penobscot County Com'rs, 72 Me. 17.

[247] Carson v. Town of Forsyth, 97 Ga. 258, 22 S. E. 955; Oliphant v. City of Paterson (N. J. Law) 25 Atl. 1098. A petition may be dismissed on account of the laches of the prosecutor. See, also, on the question of laches, Ware v. Borough of Rutherford, 55 N. J. Law, 450, 26 Atl. 933, and State v. Everitt, 23 N. J. Law (3 Zab.) 378.

Wetmore v. Elizabeth City, 41 N. J. Law, 152; People v. Wemple, 61 Hun, 83, 15 N. Y. Supp. 446. The provision in respect to the service of notice within the time prescribed by law is mandatory. People v. Martin, 82 Hun, 1, 30 N. Y. Supp. 1107; People v. York, 47 App. Div. 552, 62 N. Y. Supp. 662; People v. Sutphin, 166 N. Y. 163, 59 N. E. 770; Saucon Tp. v. Broadhead (Pa.) 9 Atl. 63; In re Road in Roaring Brook Tp., 140 Pa. 632, 21 Atl. 411; In re Salem Road, 103 Pa. 250. But see Essex Pub. Road Board v. Speer, 48 N. J. Law, 372, 9 Atl. 197.

[248] Drainage Com'rs v. Volke, 59 Ill. App. 283. See, also, Gentle v. Board of School Inspectors, 73 Mich. 40, 40 N. W. 928.

§ 1128. Injunction; definition; general principles.

The statements made in respect to a general discussion of mandamus, certiorari, and other special remedies apply equally to one of the most important, namely, the writ of injunction. A brief statement of the general principles only can be given leaving the practitioner to an investigation of works treating of this special subject alone. 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."[249] This definition, it has been said, by a late author,[250] "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."[251] As previously stated, public corporations are organizations of special and limited powers, their powers exercised in all cases by natural persons acting as their agents, and it necessarily follows, because of the fallibility of human nature, and especially when clothed with great power, that these corporations may equally, with natural persons, so act or threaten to act as to effect great and special injury or damage to property and personal rights. To meet this condition, courts of equity are open equally to protect the rights of private persons from illegal or inequitable acts of public corporations and also to protect the rights of the public against the injury from private persons or public officials. The remedy is generally regarded as a preventive one[252] though in some instances a writ of mandatory injunction will be issued.[253] It is also

[249] Jeremy, Eq. Jur. p. 307.

[250] Spelling, Injunctions (2d Ed.) § 1.

[251] Spelling, Injunctions, (2d Ed.) § 3.

[252] Gallagher v. Keating, 40 App. Div. 81, 57 N. Y. Supp. 632, 1123; Spelling, Injunctions (2d Ed.) § 11.

[253] Henderson County Board of Health v. Ward, 21 Ky. L. R. 1193, 54 S. W. 725; City of Louisville v. Board of Park Com'rs, 24 Ky. L. R.

regarded 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.[254] It is generally refused where justice would be retarded or defeated rather than advanced by granting it.[255]

§ 1129. 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,[256] irreparable at law [257] and special or peculiar to the one complaining.[258] It is also

38, 65 S. W. 860. Mandatory injunction issued to compel recount of votes at special election.

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. Mandatory injunction will be issued to compel the approval of bonds by a county judge.

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 Moundsville v. Ohio River R. Co., 37 W. Va. 92, 20 L. R. A. 161; Town of Jamestown v. Chicago, B. &. N. R. Co., 69 Wis. 648; City of Oshkosh v. Milwaukee, & L. W. R. Co., 74 Wis. 534. Elliott, Railroads, §§ 1092, 1106. See, also, Buchholz v. New York L. E. & W. R. Co., 148 N. Y. 640, 43 N. E. 76.

[254] Spelling, Injunctions (2d Ed.) § 22.

[255] Spelling, Injunctions (2d Ed.) § 23.

[256] Self v. Jenkins, 1 Hughes, 23, Fed. Cas. No. 12,640; Commissioners of Perry County, v. Medical Soc. of Perry County, 128 Ala. 257, 29 So. 586. Where a contract has been fully performed a bill to enjoin is too late.

Brockhausen v. Boochland, 137 Ill. 547, 27 N. E. 458; City of Chicago v. Reed, 27 Ill. App. 482; Barber County Com'rs v. Smith, 48 Kan. 331, 29 Pac. 565. Mere threats or declarations of intention are not sufficient to warrant the writ of injunction. Louisville & N. R. Co. v. McVean, 17 Ky. L. R. 1283, 34 S. W. 525; Gallagher v. Keating 40 App. Div. 81, 57 N. Y. Supp. 632, 1123; Union Cemetery Ass'n v. McConnell, 124 N. Y. 88, 26 N. E. 330; Borough of Shamokin v. Shamokin & M. C. E. R. Co., 196 Pa. 166, 46 Atl. 382.

[257] Clapp v. City of Spokane, 53 Fed. 515; Southern Pac. Co. v. Board of R. R. Com'rs, 87 Fed. 21. Suit to enjoin a board of railroad commissioners from prescribing reduced rates of transportation.

[258] Grant v. Cooke, 7 D. C. 165; 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; Baltimore & O. R. Co. v. Strauss, 37 Md. 237; Shulz v. City

necessary that the remedies at law should be inadequate to afford the desired relief [259] and essential to prevent the accomplishment of a wrong.[260] Another ground for the granting of the writ is that by so doing there will be avoided a multiplicity of suits.[261]

§ 1130. The writ; when refused.

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 action being based upon a well known equitable principle.[262] The parties may also, by an acquiescence in the conditions sought to be altered, have deprived themselves of the right to an injuction.[263]

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,[264] and this is espe-

of Albany, 42 App. Div. 437, 59 N. Y. Supp. 235. But see Attorney General v. Greenville & H. R. Co. (N. J. Eq.) 46 Atl. 638.

[259] Louisiana v. Lagarde, 60 F. 186; Taylor v. City of Crawfordsville, 155 Ind. 403, 58 N. E. 490; Louisville & N. R. Co. v. McVean, 17 Ky. L. R. 1283, 34 S. W. 525; Point Pleasant Elec. Light & Power Co. v. Borough of Bayhead, 62 N. J. Eq. 296, 49 Atl. 1108; Franklin v. Appel, 10 S. D. 391, 73 N. W. 259; Cummings v. Kendall County, 7 Tex. Civ. App. 164, 26 S. W. 439. Spelling, Injunctions (2d Ed.) § 13.

[260] McFadden v. Owens, 54 Ark. 118, 15 S. W. 84. But see Public Ledger Co. v. City of Memphis, 93 Tenn. 77, 23 S. W. 51. See, also, the following cases involving settlement of disputed legal right where, ordinarily, equity will not interfere: Gas Light & Coke Co. v. City of New Albany, 139 Ind. 660, 39 N. E. 462; Municipality No. 1 v. Municipality No. 2, 12 La. (O. S.) 49; Carlisle v. City of Saginaw, 84 Mich. 134, 74 N. W. 444. See, also, West Troy Waterworks Co. v. Village of Green Island, 32 Hun (N. Y.) 530.

[261] McIntyre v. Storey, 80 Ill. 127; Roland Park Co. v. Hull, 92 Md. 301, 48 Atl. 366; Blake v. City of Brooklyn, 26 Barb. (N. Y.) 301; International Trading Stamp Co. v. City of Memphis, 101 Tenn, 181, 47 S. W. 136.

[262] Self v. Jenkins, 1 Hughes, 23, Fed. Cas. No. 12,640; City of Atlanta v. Georgia R. & B. Co., 40 Ga. 471; Burlington & M. R. R. Co. v. Saunders County, 16 Neb. 123; Manko v. Borough of Chambersburgh, 25 N. J. Eq. (10 C. E. Green) 168; Collings v. City of Camden, 27 N. J. Eq. (12 C. E. Green) 293.

[263] Bigelow v. City of Los Angeles, 85 Cal. 614, 24 Pac. 778; City of Chicago v. Wright, 69 Ill. 318; DePuy v. City of Wabash, 133 Ind. 336, 32 N. E. 1016; City of Logansport v. Uhl, 99 Ind. 531. See, also, Section 1135, post.

[264] Lane v. Anderson, 67 Fed. 563; Enterprise Sav. Ass'n v. Zumstein (C. C. A.) 67 Fed. 1000. The post-

cially true where the acts threatened are within the legal powers conferred upon an official or a public corporation and have been performed in good faith.[265] This suggestion leads to the further statement that while equity does not ordinarily interfere with the exercise of discretionary powers, yet, it will afford relief in cases where there has been an abuse of discretion or a total disregard of the duties and obligations appertaining to a particular official position or an unreasonable or malicious exercise of a

master general cannot be restrained from making an order pursuant to statute that a certain corporation and its officers are engaged in conducting a lottery, since the making of this order involves an exercise of discretionary power reposed in him.

Dailey v. City of New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69; MacDonald v. Rehrer, 22 Fla. 198. Quo warranto is the proper remedy to prevent action of officers in an illegally organized corporation.

Colman v. Glenn, 103 Ga. 458, 30 S. E. 297; City of Americus v. Eldridge, 64 Ga. 524; Adams v. Harrington, 114 Ind. 66, 14 N. E. 603. Establishment of highway. City of Valparaizo v. Hagen, 153 Ind. 337, 54 N. E. 1062, 48 L. R. A. 707; Anderson v. City of St. Louis, 47 Mo. 479. Verga v. Miller, 45 N. J. Eq. 93, 15 Atl. 835. Opening of highway. Hugg v. City of Camden, 29 N. J. Eq. (2 Stew.) 6. An injunction will not be granted to restrain the city from employing other counsel than the city solicitor in a pending suit.

United States Illuminating Co. v. Grant, 55 Hun, 222, 7 N. Y. Supp. 788. The granting of permits to replace old electric wires with new ones is a discretionary power of the board of electrical control and will not be interfered with by injunction. Phoenix v. Com'rs of Immigration, 12 How. Pr. (N. Y.) 1; Wilkins v. City of New York, 9 Misc. 610, 30 N. Y. Supp. 424; Moore v. Commissioners of Pilots, 32 How. Pr. (N. Y.) 184; Nassau Elec. R. Co. v. White, 12 Misc. 631, 34 N. Y. Supp. 960; Hooker v. City of Rochester, 57 App. Div. 530, 68 N. Y. Supp. 301; Heilmann v. Lebannon & A. St. R. Co., 175 Pa. 188, 34 Atl. 647.

[265] Downing v. Ross, 1 App. D. C. 251; Bell v. Payne, 2 Stew. (Ala.) 414; Tupper v. Dart, 104 Ga. 179, 30 S. E. 624; First Nat. Bank of Medicine Lodge v. Stranathan, 43 Kan. 648, 23 Pac. 1079. A court of equity will not interfere in the selection of a depository for public moneys by a board of county commissioners for this action is in the exercise of a discretionary power.

Soden v. City of Emporia, 7 Kan. App. 583, 52 Pac. 461; Ladd v. City of Boston, 170 Mass. 332, 49 N. E. 627, 40 L. R. A. 171. Discretionary power of water commissioners in removing water meter will not be interfered with.

Hartwell v. Armstrong, 19 Barb. (N. Y.) 166; Pre-Digested Food Co. v. McNeal, 4 Ohio L. D. 356. A state dairy and food commissioner will not be enjoined from publishing statements in respect to the character and quality of food arti-

power granted.[266] The principle that equity will enjoin all ultra vires acts is also clearly established.[267] Neither will the writ issue to restrain the performance of a duty especially imposed by a constitutional legislative act.[268] 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.[269] The rule in this respect has been

cles manufactured and sold when he is authorized by law to publish and circulate such matter as may be necessary to properly inform dealers and the public of violations of the law against fraud and adulterations. Hurlbut v. Town of Lookout Mountain (Tenn. Ch. App.) 49 S. W. 301.

[266] Mutual Life Ins. Co. v. Boyle, 82 Fed. 705. Illegal refusal to issue insurance license. City of Valparaiso v. Hagen, 153 Ind. 337, 54 N. E. 1062. The presumption exists that all ministerial officers will properly perform their official duties.

Brockman v. City of Creston, 79 Iowa, 587, 44 N. W. 822; State v. City of Neodesha, 3 Kan. App. 319, 45 Pac. 122; Hoffman v. Gallitin County Com'rs, 18 Mont, 224, 44 Pac. 973; Coast Co. v. Borough of Spring Lake, 56 N. J. Law, 615, 36 Atl. 21. "While a court of equity will not, as a rule, correct irregularities in municipal procedure, it will nevertheless restrain an irregular proceeding if it threatens irreparable injury.

New York Cent. & H. R. Co. v. Mains, 71 Hun, 417, 24 N. Y. Supp. 962; Pittsburg's Appeal, 79 Pa. 317. But see Rosenbaum v. City of Newbern, 118 N. C. 83, 24 S. E. 1, 32 L. R. A. 123. See, also, New Orleans City & L. R. Co. v. State Board of Arbitration, 47 La. Ann. 874, 17 So. 418. Injunction will not lie to restrain action of public agents acting under legislative authority unless irreparable injury is done. See, also, Spelling, Injunctions (2d Ed.) § 676. "A municipality is considered to hold a similar relation to the citizens and taxpayers within its boundaries as that held by a private corporation to its members; that is, it occupies the relation of a trustee. As agents and trustees, those for the time occupying municipal offices may be called to account in equity by various actions, and restrained by injunction from all breaches of trust and abuses of power."

[267] Spelling, Injunctions (2d Ed.) § 684, citing many cases.

[268] Payne v. English, 79 Cal. 540, 21 Pac. 952; Mendenhall v. Denham, 35 Fla. 250, 17 So. 561; Southern Min. Co. v. Lowe, 105 Ga. 352, 31 S. E. 191. The writ does not lie to enjoin the making of a contract when, by its issue, it will interfere with the performance of duties imposed upon public officials by law.

Lincoln Medical College of Cotner University v. Poynter, 60 Neb. 228, 82 N. W. 855. See, also, State v. Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561; But see Melody v. Goodrich, 67 App. Div. 368, 73 N. Y. Supp. 741.

[269] New Orleans Waterworks Co. v. City of New Orleans, 164 U. S.

well stated in a recent text book.[270] "The general rule of non-interference with the exercise of discretionary powers legally conferred applies with exceptional force and appropriateness to municipal bodies having extensive and important trusts of a public character confided to them and being generally vested with important legislative powers. And it is a well settled equitable doctrine that the domain of discretionary powers conferred upon municipal bodies will in no case be invaded by the courts. This rule is very strictly adhered to with respect to the legislative powers conferred by statute. So long as the municipal body does not transcend the scope of its authority to enact ordinances, or violate any of the limitations to the exercise of such power, it will not in the absence of fraud be interfered with by injunction. Nor will courts, when it is found that municipal legislative bodies have acted in good faith and within the scope of the authority conferred upon them, investigate as to the wisdom or expediency of their action, or interfere because in the light of circumstances the court would have acted differently."

471; Murphy v. East Portland, 42 Fed. 308; Stevens v. St. Mary's Training School, 144 Ill. 336, 32 N. E. 962, 18 L. R. A. 832; Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 505; State v. Fagan, 22 La. Ann. 545. A state is entitled to an injunction restraining persons from doing what is prohibited by law and to prevent them from interfering with the agents of the state in the execution of legislative will.

City of Detroit v. Circuit Judge of Wayne County, 79 Mich. 384, 44 N. W. 622. A court of equity will not enjoin the legislative department of a municipal corporation in doing any act within its legal discretion though it will so act in case of an unlawful exercise of authority.

Carlisle v. City of Saginaw, 84 Mich. 134, 47 N. W. 444. Selection of location for city hall by common council will not be restrained.

Kittinger v. Buffalo Traction Co., 25 App. Div. 329, 49 N. Y. Supp. 713; State v. Superior Ct. of Milwaukee County, 105 Wis. 651, 81 N. W. 1046. But see Wabaska Elec. Co. v. City of Wymore, 60 Neb. 199, 82 N. W. 626. It is here held that an injunction in a proper case may issue not against the city but against the mayor and council of a city when they threaten to exceed their authority and adopt an ordinance which will be prejudicial to the rights of the complainant.

Poppleton v. Moores, 62 Neb. 851, 88 N. W. 128. Where, by ordinance, a franchise is extended, it is not such an act of legislative power as to be free from the interposition of the courts by injunction, the extension being clearly contrary to the charter of the city.

[270] Spelling, Injunctions (2d Ed.) § 687.

Public improvements; miscellaneous. Another discretionary power, the exercise of which is rarely interfered with, is the right of public corporations within their authority to determine upon and engage in the work of constructing public improvements. Its character in this respect is clearly established and therefore subject to the principle stated above.[271] Another class of cases in

[271] Downing v. Ross, 1 App. D. C. 251; Goszler v. Corporation of Georgetown, 19 U. S. (6 Wheat.) 593; Union Steamboat Co. v. City of Chicago, 39 Fed. 723; Moore v. City of Walla Walla, 60 Fed. 961; Little Falls Elec. & Water Co. v. City of Little Falls, 102 Fed. 663. A water company not having an exclusive franchise is not entitled to injunction to restrain a city from constructing a plant of its own, and where the construction of such a plant will not necessarily interfere with the contract right of a private company.

Payne v. English, 79 Cal. 540, 21 Pac. 952; Burckhardt v. City of Atlanta, 103 Ga. 302, 30 S. E. 32; Elliott v. Gammon, 76 Ga. 766; Bacon v. Walker, 77 Ga. 336. A property owner is not entitled to an injunction to restrain the erection of a jail near his land on the ground that its value will be reduced. Walker v. Village of Morgan Park, 175 Ill. 570, 51 N. E. 636. An ordinance requiring the construction of a sidewalk in a thinly settled part of a small village where there is no great necessity for it is not so unreasonable and oppressive as to justify interference by a court of equity.

Drew v. Town of Geneva, 150 Ind. 662, 50 N. E. 871, 42 L. R. A. 814. A municipality may restrain an abutting owner from constructing a sidewalk in a different manner and of different material from that prescribed by ordinance.

City of Valparaiso v. Hagen, 153 Ind. 337, 54 N. E. 1062, 48 L. R. A. 707; Dever v. Junction City, 45 Kan. 717, 25 Pac. 861; Soden v. City of Emporia, 7 Kan. App. 583, 52 Pac. 461; Trustees of Flemingsburg v. Wilson, 64 Ky. (1 Bush) 203. Town trustees will not be restrained in laying out a highway.

State v. Duffel, 41 La. Ann. 557, 6 So. 514; Vitt v. Owens, 42 Mo. 512; Tucker v. Freeholders of Burlington, 1 N. J. Eq. (1 Saxt.) 282; Inhabitants of Greenville v. Seymour, 22 N. J. Eq. (7 C. E. Green) 458; Champlin v. City of New York, 3 Paige (N. Y.) 573; Barker v. Town of Oswegatchie, 62 Hun, 618, 16 N. Y. Supp. 727, 732; Bell v. City of Rochester, 30 N. Y. Supp. 365; Ackerman v. Trustees of New York & Brooklyn Bridge, 10 App. Div. 22, 41 N. Y. Supp. 810; Hines v. City of Lockport, 50 N. Y. 236; Morgan v. City of Binghamton, 102 N. Y. 500; Wheeler v. Rice, 83 Pa. 232; Smart v. Town of Johnston, 17 R. I. 778, 24 Atl. 830; Spokane St. R. Co. v. City of Spokane, 5 Wash. 634, 32 Pac. 456. But see Everett v. Deal, 148 Ind. 90, 47 N. E. 219.

Armstrong v. City of St. Louis, 3 Mo. App. 151. A city may be enjoined from establishing a grade and opening a street if the work would not be beneficial to the public and would render the street im-

which a court of equity will rarely exercise the right to issue this writ are those which involve the determination of purely political rights.[272] Municipal authorities also in the enforcement of police regulations or, stated in another way, in the exercise of the police power, are rarely interfered with.[273] The relief afforded by writ of injunction will not be granted in cases where the injury is remote and contingent,[274] where the relief can be obtained at law,[275] or where the injury complained of does not result in a special damage to the one complaining.[276] However, as will be noted in some of the following sections, where the right of a taxpayer

passable. Touzalin v. City of Omaha, 25 Neb. 817, 41 N. W. 796.

[272] McKinney v. Bradford County Com'rs, 26 Fla. 267, 4 So. 855; Sheridan v. Colvin, 78 Ill. 237; Harris v. Schryock, 82 Ill. 119; Roudanez v. City of New Orleans, 29 La. Ann. 271; Wells v. City of New Orleans, 32 La. Ann. 676; Bynum v. Burke County Com'rs, 101 N. C. 412; Contempt Proceedings v. Grear, 9 Ohio S. & C. P. Dec. 299; Ex parte Lumsden, 41 S. C. 553, 19 S. E. 749. Spelling, Injunctions (1st Ed.) §§ 630 et seq. and § 692.

[273] Hine v. City of New Haven, 40 Conn. 478; Olympic Athletic Club v. Speer, 29 Colo. 158, 67 Pac. 161; Sheen v. Stothart, 29 La. Ann. 630; Hottinger v. City of New Orleans, 42 La. Ann. 629, 8 So. 575. Spelling, Injunctions (1st Ed.) §§ 628 and 691.

[274] Ferguson v. City of Selma, 43 Ala. 398; Merriam v. Yuba County Sup'rs, 72 Cal. 517, 14 Pac. 137; Lewis v. Denver City Water-works Co., 19 Colo. 236, 34 Pac. 993; Roudanez v. City of New Orleans, 29 La. Ann. 271; State v. Withrow, 154 Mo. 397, 55 S. W. 460; City of San Antonio v. Campbell (Tex. Civ. App.) 56 S. W. 97; Pedrick v. City of Ripon, 73 Wis. 622, 41 N. W. 705, 3 L. R. A. 269. See, also, authorities cited in preceding section.

[275] Winkler v. Winkler, 40 Ill. 179; Cason v. Harrison, 135 Ind. 330, 35 N. E. 268; Lowe v. White County Com'rs, 156 Ind. 163, 59 N. E. 466; Smith v. Goodknight, 121 Ind. 312, 23 N. E. 148; Newman v. City of Emporia, 41 Kan. 583, 21 Pac. 593; Weber v. Timlin, 37 Minn. 274, 34 N. W. 29. Statutes provide a mode for contesting county seat locations and afford a full remedy; injunction will not therefore lie. Fort v. Thompson, 49 Neb. 772, 69 N. W. 110. A court will not enjoin the punishment of an officer, the remedy being complete at law by quo warranto. West v. City of New York, 10 Paige (N. Y.) 539; Wood v. City of Victoria, 18 Tex. Civ. App. 573, 46 S. W. 284; Manly Mfg. Co. v. Broaddus, 94 Va. 547, 27 S. E. 438; Sage v. Town of Fifield, 68 Wis. 546, 32 N. W. 629. Spelling, Injunctions (2d Ed.) §§ 13 et seq. But see Sweatt v. Faville, 23 Iowa, 321. See, also, authorities cited in § 1129.

[276] Harrell v. Hannum, 56 Ga. 508; Barber County Com'rs v. Smith, 48 Kan. 331, 29 Pac. 565; Doolittle v. Broome County Sup'rs, 18 N. Y. 155; Wood v. City of Victoria, 18 Tex. Civ. App. 573, 46 S. W. 284.

to restrain the public authorities in a threatened illegal use or disposition of public property is discussed, the interest sufficient to sustain the party applying is not required to be substantial in amount nor will it be closely scrutinized in other respects.[277]

§ 1131. Purpose for which writ will issue.

The objects for which this remedial writ will issue are many and naturally cover every act of a public official or of a public corporation where the conditions exist which will authorize its issue. It is impossible therefore in this work to more than suggest a few of the most important, leaving to the litigant the knowledge that for every wrong there is a remedy and that courts of equity exist for the sole purpose of affording relief when all other means fail.[278]

§ 1132. Actions pertaining to real property.

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,[279] the protection of possessory rights[280] or

[277] Barry v. Goad, 89 Cal. 215, 26 Pac. 785; City of Springfield v. Edwards, 84 Ill. 626; Huesing v. City of Rock Island, 128 Ill. 465, 21 N. E. 558; Harney v. Indianapolis, C. & D. R. Co., 32 Ind. 244; City of Baltimore v. Gill, 31 Md. 375. Spelling, Injunctions (2d Ed.) § 678. "Whether or not the danger of loss to the public treasury, and the consequent charge upon taxpayers, constitutes irreparable injury within the general rule requiring it to be shown, seems immaterial. The demoralization in public administration of municipal affairs, if no such right of interference were recognized, ought to justify an exception based upon considerations of public welfare." But see Brasher v. Miller, 114 Ala. 485, 21 So. 467; Birmingham v. Cheetham, 19 Wash. 657, 54 Pac. 37. See, also, Business Mens' League v. Waddill, 143 Mo. 495, 40 L. R. A. 501.

[278] City of East St. Louis v. Village of New Brighton, 34 Ill. App. 494; City of Alpena v. Alpena Circuit Judge, 97 Mich. 550, 56 N. W. 941. Spelling, Injunctions (2d Ed.) § 675.

[279] Miller v. City of Mobile, 47 Ala. 163; McIntyre v. Storey, 80 Ill. 127; Touzalin v. City of Omaha, 25 Neb. 817, 41 N. W. 796; Coast Co. v. Borough of Spring Lake, 56 N. J. Law, 615, 36 Atl. 21; Dailey v. Nassau County R. Co., 52 App. Div. 272, 65 N. Y. Supp. 396; Sperry v. City of Albina, 17 Or. 481, 21 Pac. 453; Town of Weston v. Ralston, 48 W. Va. 170, 36 S. E. 446. Spelling, Injunctions (2d Ed.) §§ 180 et seq.

[280] City of Huntington v. Coast, 149 Ind. 255, 48 N. E. 1025; Brower v. City of New York, 3 Barb. (N. Y.)

easements,[281] the prevention of an injury to the property itself,[282] or to prevent an illegal taking and injury under a claim of public right.[283] In this connection the protection of water or riparian rights may be considered.[284] Municipal corporations frequently in the establishment and maintenance of a system of water supply commit or threaten to commit acts which effect an injury to the water or riparian rights of private persons.[285]

§ 1133. Protection against nuisances.

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.[286] This is best considered

254; State v. Goodnight, 70 Tex. 682, 11 S. W. 119.

[281] Caldwell v. Town of Galt, 27 Ont. App. 162; Hart v. Buckner (C. C. A.) 54 Fed. 925; City Council of Montgomery v. Parker, 114 Ala. 118, 21 So. 452; Cabbell v. Williams, 127 Ala. 320, 28 So. 405. Easement of access to property. Ruffner v. Phelps, 65 Ark. 410, 46 S. W. 728; Roman v. Strauss, 10 Md. 89; Jay v. Michael, 92 Md. 198, 48 Atl. 61; Armstrong v. City of St. Louis, 3 Mo. App. 151; Illinois Cent. R. Co. v. Thomas, 75 Mich. 54, 21 So. 601; O'Rourke v. City of Orange, 51 N. J. Law, 561, 26 Atl. 858; Hoag v. Pierce, 65 Hun, 424, 20 N. Y. Supp. 224. Spelling, Injunctions (2d Ed.) §§ 219 et seq. But see Christian v. City of St. Louis, 127 Mo. 109, 29 S. W. 996.

[282] Collins v. City of Keokuk, 91 Iowa, 293, 59 N. W. 200.

[283] Miller v. City of Mobile, 47 Ala. 163; Murphy v. Southern R. Co., 99 Ga. 207, 24 S. E. 867; Willett v. Woodhams, 1 Ill. App. 411; City of Lafayette v. Bush, 19 Ind. 326; Oliphant v. Atchison Co., 18 Kan. 386; Poirier v. Fetter, 20 Kan. 47; Dudley v. Trustees of Frankfort, 51 Ky. (12 B. Mon.) 610; Knox v. Police Jury of East Baton Rouge, 27 La. Ann. 204; Folley v. City of Passaic, 26 N. J. Eq. (11 C. E. Green) 216; Jersey City v. Fitzpatrick, 30 N. J. Eq. (3 Stew.) 97; New York v. Mapes, 6 Johns. Ch. (N. Y.) 46; City of Baldwin v. City of Buffalo, 29 Barb. (N. Y.) 396; Clark v. City of Providence, 10 R. I. 437; Pierpont v. Town of Harrisville, 9 W. Va. 215; Mason City Salt & Min. Co. v. Town of Mason, 23 W. Va. 211; Lumsden v. City of Milwaukee, 8 Wis. 485; Uren v. Walsh, 57 Wis. 98. Spelling, Injunctions (2d Ed.) §§ 273 et seq.

[284] Daniel v. Town of Princeton, 15 Ky. L. R. 108, 22 S. W. 324; Attorney General v. Woods, 108 Mass. 436.

[285] Holtz v. Hoyt, 34 Ill. App. 488; Winchell v. City of Waukesha, 110 Wis. 101, 85 N. W. 668.

[286] Ferguson v. City of Selma, 43 Ala. 398; Cleveland v. Citizens' Gaslight Co., 20 N. J. Eq. (5 C. E. Green) 201. Spelling, Injunctions (2d Ed.) c. 7. See, also, § 871, ante.

by the statement of concrete illustrations. A nuisance can be created through the occupation of public highways by railroad tracks,[287] telephone poles or wires,[288] or other obstacles[289] constituting an obstruction either to the proper use[290] of the highway

[287] City of Waterloo v. Waterloo St. R. Co., 71 Iowa, 193, 32 N. W. 329; District Attorney v. Lynn & B. R. Co., 82 Mass. (16 Gray) 242; City of Gloversville v. Johnstown, G. & K. Horse R. Co., 66 Hun, 627, 21 N. Y. Supp. 146; Jersey City v. Central R. Co., 40 N. J. Eq. (13 Stew.) 417, 2 Atl. 262; 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, affirming 31 App. Div. 632, 52 N. Y. Supp. 322; Town of Eastchester v. New York W. & C. Traction Co., 30 Misc. 571, 63 N. Y. Supp. 1032. See, also, Talbot v. New York & H. R. Co., 78 Hun, 473, 29 N. Y. Supp. 187.

Attorney General v. London & N. W. R. Co., 68 Law J. Q. B. 4, affirmed 69 Law J. Q. B. 26 (1900) 1 Q. B. 78. An injunction will not issue restraining a railroad company from disregarding statutory provisions in respect to speed of trains at turnpike crossings even though no actual injury to the public be proved.

[288] Paterson R. Co. v. Grundy, 51 N. J. Eq. 213, 26 Atl. 788. A street car company placing overhead wires along the street without authority is not entitled to an injunction restraining people from cutting them. City of Utica v. Utica Tel. Co., 24 App. Div. 361, 48 N. Y. Supp. 916; Mantell v. Bucyrus Tel. Co., 20 Ohio Circ. R. 345. Spelling, Injunctions (2d Ed.) § 225. See, also, Mutual Elec. Light Co. v. Ashworth, 118 Cal. 1, 50 Pac. 10.

[289] Martin v. Marks, 154 Ind. 549, 57 N. E. 249. Fence. Clayton County v. Herwig, 100 Iowa, 631, 69 N. W. 1035; Ellison v. City of Louisville, 17 Ky. L. R. 593, 31 S. W. 723; Village of Buffalo v. Harling, 50 Minn. 551, 52 N. W. 931. Erection of building on land alleged to have been dedicated as a street.

McLemore v. McNeley, 56 Mo. App. 556; Inhabitants of Franklin v. Nutley Water Co., 53 N. J. Eq. 601, 32 Atl. 381. The writ will issue to prevent the laying of water pipes in public streets without the consent of the town.

Hoey v. Gilroy, 14 N. Y. Supp. 159; Coykendall v. Durkee, 13 Hun (N. Y.) 260. But see Town of Newcastle v. Haywood, 67 N. H. 178, 37 Atl. 1040. Injunction will not issue where the question of right in respect to maintaining a fence in a highway has not been determined by law. See, also, §§ 864 et seq., ante.

[290] 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. The writ will issue to enjoin the construction by an individual of the building on land dedicated to a public use.

Pettibone v. Hamilton, 40 Wis. 402. But see State v. Taylor, 107 Tenn. 455, 64 S. W. 766. Injunction will not lie where a city has its easement in a street.

or to some of the private rights of the owners of abutting property.[291] 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,[292] maintenance or use[293] of public buildings or facilities, under some circumstances, also create conditions calling for this relief.

§ 1134. Contracts.

A court of equity will interfere and restrain by injunction the execution of a contract by a public corporation where the same involves the illegal use of public moneys or property,[294] where it is ultra vires[295] or illegal because of irregularities in conditions pre-

[291] City Council of Montgomery v. Parker, 114 Ala. 118, 21 So. 452; Yolo County v. City of Sacramento, 36 Cal. 193; Baltimore & O. R. Co. v. Strauss, 37 Md. 237; Gustafson v. Hamm, 56 Minn. 334, 57 N. W. 1054, 22 L. R. A. 565; Illinois Cent. R. Co. v. Thomas, 75 Miss. 54, 21 So. 601; Henry v. Trustees of Perry Tp., 48 Ohio St. 671, 30 N. E. 1123; Reighard v. Flinn, 189 Pa. 355, 42 Atl. 23, 43 L. R. A. 502. But see Redman v. Monongahela Boulevard Co., 189 Pa. 437, 42 Atl. 133. See, also, cases cited under third note of § 1131.

[292] Kansas City v. Hobbs, 62 Kan. 866, 62 Pac. 324. Injunction denied in the absence of material and necessary allegations.

[293] Herr v. Central Ky. Lunatic Asylum, 17 Ky. L. R. 320, 30 S. W. 971; Field v. Inhabitants of West Orange, 36 N. J. Eq. (9 Stew.) 118. Discharge of sewage may be enjoined.

Soule v. City of Passaic, 47 N. J. Eq. 28, 20 Atl. 346; Rowbotham v. Jones, 47 N. J. Eq. 337, 20 Atl. 731, 19 L. R. A. 663. Insane asylum.

Seaman v. Lee, 10 Hun (N. Y.) 607; Sammons v. City of Gloversville, 34 Misc. 439, 70 N. Y. Supp. 284. A plaintiff has the right where his property is injured by the discharge of city sewage to enjoin the defendant alone although others join in causing the injury. But see City of Tacoma v. Bridges, 25 Wash. 221, 65 Pac. 186.

[294] Taylor v. Montreal Harbour Com'rs, 17 Rap. Jud. Que. C. S. 275. That a private person may maintain an injunction to restrain the public corporation from entering into a contract it is necessary for him to show that some private right peculiar to himself has been inflicted and that a private injury separate and distinguishable from injury to the public generally will result to him. Mooney v. Clark, 69 Conn. 241, 37 Atl. 506, 1080; Hanson v. William A. Hunter Elec. Light Co. (Iowa) 48 N. W. 1005.

[295] 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. Injunction will lie to prevent the execution of a contract for public improvements providing that the contractor shall employ

cedent,[296] or where the effect of the contract would be a waste, misappropriation or misuse of public funds or property.[297] The writ will also clearly issue in those cases where the breaking of a legal contract is threatened,[298] or where some act is done by the public corporation, legislative or otherwise, which results in a violation of some contract provision.[299] The last condition most frequently occurs in connection with the passage of ordinances affecting the rights of parties under privileges or franchises theretofore granted to public service companies, which, if carried out or enforced, would materially change the rights of parties or the contract compensation received either from the corporation itself or from private persons to whom the service is rendered.[300]

none but nonunion men. Alexander v. Johnson, 144 Ind. 82, 41 N. E. 811; State v. City of New Orleans, 50 La. Ann. 880, 24 So. 666; Flynn v. Little Falls Elec. & Water Co., 74 Minn. 180, 77 N. W. 38, 78 N. W. 106; International Trading Stamp Co. v. City of Memphis, 101 Tenn. 181, 47 S. W. 136.

[296] Crabtree v. Gibson, 78 Ga. 230; Follmer v. Nuckolls County Com'rs, 6 Neb. 204; Schumm v. Seymour, 24 N. J. Eq. (9 C. E. Green) 143; People v. City of New York, 32 Barb. (N. Y.) 35. But see Ricketson v. City of Milwaukee, 105 Wis. 591, 81 N. W. 864, 47 L. R. A. 685. See, also, Union Cemetery Ass'n v. McConnell, 124 N. Y. 88, 26 N. E. 330.

[297] Commissioners of Ct. of Perry County v. Medical Soc. of Perry County, 128 Ala. 257, 29 So. 586. Where the contract has been fully performed a bill to enjoin is too late. Fones Hardware Co. v. Erb, 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353; Carthan v. Lang, 69 Iowa, 384; Beebe v. Sullivan County Sup'rs, 64 Hun, 377, 19 N. Y. Supp. 629; Winkler v. Summers, 51 Hun, 636, 5 N. Y. Supp. 723; Wood v. City of Victoria, 18 Tex. Civ. App. 573, 46 S. W. 284. But see Moore v. City of Walla Walla, 60 Fed. 961; Farmer v. City of St. Paul, 65 Minn. 176, 67 N. W. 990, 33 L. R. A. 199.

[298] 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; Inhabitants of Saddle River v. Garfield Water Co. (N. J. Eq.) 32 Atl. 978; Point Pleasant Elec. Light & Power Co. v. Borough of Bayhead, 62 N. J. Eq. 296, 49 Atl. 1108.

[299] City of Omaha v. Mageath, 46 Neb. 502, 64 N. W. 1091. See, also, Canal & C. St. R. Co. v. City of New Orleans, 39 La. Ann. 709, 2 So. 388.

[300] Old Colony Trust Co. v. City of Atlanta, 83 Fed. 39. Bond holders have sufficient standing in court to enjoin the enforcement of an ordinance fixing the rates of fare on street railroads.

Los Angeles City Water Co. v. City of Los Angeles, 88 Fed. 720; Los Angeles City Water Co. v. City of Los Angeles, 103 Fed. 711. See, also, Smith v. Birmingham Water Co., 104 Ala. 315, 16 So. 123. Injunction will lie to restrain a water com-

§ 1135. Taxation.

The remedy of injunction is also available in connection with the levy or collection of taxes whether general or special.[301] The conditions for relief, as already stated, must clearly exist;[302] mere irregularities are no ground for relief[303] nor mere errors of judgment.[304] The existence of a remedy at law will be considered at bar.[305] The writ will be granted where the tax or assessment is absolutely illegal,[306] fraudulently excessive;[307] where the party has exercised diligence in seeking equitable relief, and where he

pany from shutting off the supply of water for nonpayment of arbitrary rates.

[301] City of Chicago v. Nichols, 177 Ill. 97, 52 N. E. 359; Gilmer v. Hill, 22 La. Ann. 465; Tift v. City of Buffalo, 7 N. Y. Supp. 633. See, also, Buddecke v. Ziegenhein, 122 Mo. 239; Oregon & C. R. Co. v. City of Portland, 25 Or. 229, 22 L. R. A. 713; Wilson v. Town of Philippi, 39 W. Va. 75. But see Clee v. Village of Trenton, 108 Mich. 293, 66 N. W. 48; Scudder v. City of New York, 146 N. Y. 245, 40 N. E. 734. See, also, Spelling, Injunctions (2d Ed.) §§ 641 et seq. In § 643 it is said "A government could not calculate with any certainty upon the revenues if the collection of the taxes was subject to be hindered and delayed in every instance in which a taxpayer could make out a prima facie case for interference by injunction." See § 1157, post, with many cases cited.

[302] Town of Albertville v. Rains, 107 Ala. 691, 18 So. 255; Blake v. City of Brooklyn, 26 Barb. (N. Y.) 301. See § 1129, ante.

[303] Wilson v. City of Auburn, 27 Neb. 435, 43 N. W. 257; Cooley, Taxation (2d Ed.) pp. 750, 775 et seq.

[304] LeRoy v. City of New York, 4 Johns. Ch. (N. Y.) 352. Cooley, Taxation (2d Ed.) p. 786.

[305] Rickords v. City of Hammond, 67 Fed. 380; Picotte v. Watt, 2 Idaho, 1154, 31 Pac. 805; Loesnitz v. Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887; Cason v. Harrison, 135 Ind. 330, 35 N. E. 268; Taylor v. City of Crawfordsville, 155 Ind. 403, 58 N. E. 490.

[306] State v. Atkins, 35 Ga. 315; City of Terre Haute v. Mack, 139 Ind. 99, 38 N. E. 468; Everett v. Deal, 148 Ind. 90, 47 N. E. 219; City of Baltimore v. Porter, 18 Md. 284; Touzalin v. City of Omaha, 25 Neb. 817, 41 N. W. 796; Haisch v. City of Seattle, 10 Wash. 435, 38 Pac. 1131; Liebermann v. City of Milwaukee, 89 Wis. 336, 61 N. W. 1112.

[307] Chicago, B. & Q. R. Co. v. Cole, 75 Ill. 591. "But whenever the board undertakes to go beyond its jurisdiction, or to fix valuations through prejudice or a reckless disregard of duty, in opposition to what must necessarily be the judgment of all persons of reflection, it is the duty of the courts to interfere and protect taxpayers against the consequences of its acts."

Heinroth v. Kochersperger, 173 Ill. 205, 50 N. E. 171. Insufficient allegation. Moss v. Board of Education, 58 Ohio St. 354, 50 N. E. 921.

is not estopped by acquiescence in allowing the tax to be expended in the construction of improvements from which he receives a benefit.[308]

The right to relief is not restricted in these cases to a resident taxpayer,[309] and the same rule will apply in all cases where a taxpayer enjoys the right of restraining a public corporation or public official where the circumstances arise or the necessity requires.

§ 1136. 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.[310] The basis of the writ under such circumstances is based upon the nature and character of a public corporation. It 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,[311] donations or gifts to private persons or in aid

But see Denise v. Village of Fairport, 11 Misc. 199, 32 N. Y. Supp. 97.

[308] Bigelow v. Los Angeles, 85 Cal. 614, 24 Pac. 778; City of Logansport v. Uhl, 99 Ind. 531; Patterson v. Baumer, 43 Iowa, 477; Taber v. City of New Bedford, 135 Mass. 162; Barker v. City of Omaha, 16 Neb. 269; Brown v. Merrick County Com'rs, 18 Neb. 355; Traphagen v. Jersey City, 29 N. J. Eq. (2 Stew.) 206; Tone v. City of Columbus, 39 Ohio St. 281. Spelling, Injunctions (2d Ed.) § 657. See second note under § 1130, ante.

[309] Goedgen v. Manitowoc County Sup'rs, 2 Biss. 328, Fed. Cas. No. 5,501. See, also, Alexander v. Johnson, 144 Ind. 82, 41 N. E. 811. An owner of property which has been entered for taxation is a taxpayer and entitled to bring a suit for injunction against the misappropriation of public moneys.

[310] See also, §§ 1157 et seq., post.

[311] Crampton v. Zabriskie, 101 U. S. 601; Town of Jacksonport v. Watson, 33 Ark. 704; Winn v. Show, 87 Cal. 631, 25 Pac. 968; Webster v. Town of Harwinton, 32 Conn. 131; Peck v. Spencer, 26 Fla. 23, 7 So. 642; Hudson v. City of Marietta, 64 Ga. 286; Lundberg v. Boldenweck, 35 Ill. App. 79. Writ will issue to restrain payment of excessive fees to public official.

Sherlock v. Village of Winnetka, 59 Ill. 389; Bradley v. Gilbert, 46

of private persons;[312] the use of moneys or property secured or held for designated purposes for other than the authorized one;[313]

Ill. App. 623; City of Chicago v. Nichols, 177 Ill. 97, 52 N. E. 359; Alexander v. Johnson, 144 Ind. 82, 41 N. E. 811. An owner of property which has been entered for taxation is a taxpayer and entitled to bring a suit for injunction against the misappropriation of public funds.

Rothrock v. Carr, 55 Ind. 334; Brockman v. City of Creston, 79 Iowa, 587, 44 N. W. 822; Strohm v. Iowa City, 47 Iowa, 42; Hospers v. Wyatt, 63 Iowa, 264; Cascaden v. City of Waterloo, 106 Iowa, 673, 77 N. W. 333; Graham v. Horton, 6 Kan. 343; McFadden v. Dresden, 80 Me. 134, 13 Atl. 275; Peter v. Prettyman, 62 Md. 566; Black v. Ross, 37 Mo. App. 250; Davenport v. Kleinschmidt, 6 Mont. 502, 13 Pac. 249. The fact that a misapplication of moneys will increase the burden of taxation is ground for proceedings by a taxpayer to enjoin threatened action of municipal officers.

Solomon v. Fleming, 34 Neb. 40, 51 N. W. 304; Brown v. City of Concord, 56 N. H. 375; West v. City of Utica, 71 Hun, 540, 24 N. Y. Supp. 1075; Zeigler v. Chapin, 126 N. Y. 342, 27 N. E. 471, affirming 59 Hun, 214, 13 N. Y. Supp. 783. Injunction will not issue where it is merely charged that a purchase is to be made at an extravagant, unreasonable price without allegations of fraud or collusion.

Bardrick v. Dillon, 7 Okl. 535, 54 Pac. 785. A collection of municipal revenues will not be enjoined on the mere allegation that the authorities will misapply the funds when collected.

White v. Multnomah County Com'rs, 13 Or. 317; Delano Land Co's. Appeal, 103 Pa. 347; Fiske v. Hazard, 7 R. I. 438; Austin v. Coggeshall, 12 R. I. 329; Fine v. Stuart (Tenn. Ch. App.) 48 S. W. 371. Bill to enjoin payment of school orders fraudulently issued. Willard v. Comstock, 58 Wis. 565. Fraudulent sale of tax certificates at less than their value may be enjoined. Ebert v. Langlade County, 107 Wis. 569, 83 N. W. 942. Where the payment of bill will work no substantial injury to taxpayers, equity will not interfere. But see Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; Melody v. Goodrich, 67 App. Div. 368, 73 N. Y. Supp. 741. The presumption exists that proper disbursing officers will not illegally pay out public funds.

As to unauthorized use of public property see the following: Scofield v. Eighth School Dist., 27 Conn. 499; Hurd v. Walters, 48 Ind. 148; Spencer v. Joint School Dist. No. 6, 15 Kan. 259. Use of school house for private purposes. Inhabitants of Melrose v. Cutter, 159 Mass. 461, 34 N. E. 695.

[312] Town of Albertville v. Rains, 107 Ala. 691, 18 So. 255; Terrett v. Town of Sharon, 34 Conn. 105; Merrill v. Town of Plainfield, 45 N. H. 126.

[313] Chaffraix v. Board of Liquidation, 11 Fed. 638; Fazende v. City of Houston, 34 Fed. 95. An owner of bonds for the payment of which certain revenues have been appropriated as a sinking fund may enjoin its use for other purposes.

the issue of bonds in violation of law [314] or for other than proper purposes,[315] or when their issue would create an indebtedness in excess of that allowed by law.[316] Closely allied to the protection of public property are injunction proceedings originated for the purpose of restraining the removal of a county seat [317] or the con-

Shields v. City of Savannah, 55 Ga. 150; Courtney v. City of Cherryvale, 7 Kan. App. 391, 51 Pac. 930. Injunction refused.

Board of Trustees of Harrodsburg v. Harrodsburg Educational Dist., 9 Ky. L. R. 605, 7 S. W. 312; Underwood v. Wood, 14 Ky. L. R. 129, 19 S. W. 405; Lutes v. Briggs, 5 Hun (N. Y.) 67; Marshall v. Stanley County Com'rs, 89 N. C. 103; Sturmer v. Randolph County Ct., 42 W. Va. 724, 26 S. E. 532, 36 L. R. A. 300. But see Cartersville Water-works Co. v. City of Cartersville, 89 Ga. 689, 16 S. E. 70.

[314] Russell v. Tate, 52 Ark. 541, 13 S. W. 130, 7 L. R. A. 180. The same principle applies to an issue of town warrants.

Dunbar v. Canyon County Com'rs, 5 Idaho, 407, 49 Pac. 409; State v. Saline County Ct., 51 Mo. 350; Lane v. Schomp, 20 N. J. Eq. (5 C. E. Green) 82; Town of Rochester v. Davis, 44 How. Pr. (N. Y.) 95; Town of Duanesburgh v. Jenkins, 46 Barb. (N. Y.) 294; Avery v. Job, 25 Or. 512, 36 Pac. 293; Cleveland v. City of Spartanburg, 54 S. C. 83, 31 S. E. 871; Caruthers v. Harnett, 67 Tex. 127, 2 S. W. 523; Polly v. Hopkins, 74 Tex. 145, 11 S. W. 1084; Smith v. City of Appleton, 19 Wis. 468; Lawson v. Schnellen, 33 Wis. 288. Spelling, Injunctions (2d Ed.) §§ 699 et seq. But see Fellows v. Walker, 39 Fed. 651; Thomson-Houston Elec. Co. v. City of Newton, 42 Fed. 723; Jones v. City of Little Rock, 25 Ark. 301; Bolton v. City of San Antonio (Tex. Civ. App.) 21 S. W. 64; Hanley v. Randolph County Ct., 50 W. Va. 439, 40 S. E. 389.

[315] Blake v. City of Macon, 53 Ga. 172.

[316] Reynolds v. City of Waterville, 92 Me. 292, 42 Atl. 553; Wormington v. Pierce, 22 Or. 606, 30 Pac. 450; In re Borough of Millvale, 162 Pa. 374, 29 Atl. 641, 644; Fowler v. City of Superior, 85 Wis. 411, 54 N. W. 800; Webster v. Douglas County, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451. The same rule applies to disbursements in excess of the limit allowed by statute. But see Murphy v. East Portland, 42 Fed. 308; Bardrick v. Dillon, 7 Okl. 535, 54 Pac. 785.

[317] Dishon v. Smith, 10 Iowa, 212; Sweatt v. Faville, 23 Iowa, 321; Scott v. Paulen, 15 Kan. 162; Streissguth v. Geid, 67 Minn. 360, 69 N. W. 1097; Scott v. McGuire, 15 Neb. 303. Where the relocation of a county seat has been voted, county officers cannot be enjoined from removing their offices to the place selected for matters affecting the legality of the election.

Krieschel v. Snohomish County Com'rs, 12 Wash. 428, 41 Pac. 186; distinguishing Parmeter v. Bourne, 8 Wash. 45, 35 Pac. 586, 757. The illegal removal of a county seat may be enjoined at the instance of a resident taxpayer.

duct of the affairs of government in a manner not authorized by law.[318]

§ 1137. Public officers.

The use of this writ is common to restrain public officials from doing an illegal official act,[319] or in the illegal, arbitrary, or unauthorized performance of official duties, but it can only be used to restrain positive breaches of duty.[320] While it is true that dis-

[318] Caruthers v. Harnett, 67 Tex. 127, 2 S. W. 523. But see McMillen v. Butler, 15 Kan. 62. Proceedings for injunction to restrain county officers from removing their respective offices to another town cannot be maintained during the pendency of an action to determine the legality of the county seat removal. Lane v. Morrill, 51 N. H. 422.

[319] Smith v. Reynolds, 9 App. D. C. 261; Warrin v. Baldwin, 105 N. Y. 534, 12 N. E. 49; Moss v. Board of Education, 58 Ohio St. 354, 50 N. E. 921. Equity will restrain the collection of taxes levied to pay bonds for the erection of a school house where the school board has exceeded its authority in this respect. Trustees of Burroughs School v. Horry County Board of Control, 62 S. C. 68, 39 S. E. 793.

[320] Mississippi v. Johnson, 71 U. S. (4 Wall.) 475. The president of the United States cannot be enjoined from carrying into effect an unconstitutional act of congress.

Mason v. Rollins, 2 Biss. 99, Fed. Cas. No. 9,252; Grant v. Cooke, 7 D. C. 165; Creanor v. Nelson, 23 Cal. 465; People v. McClees, 20 Colo. 403, 38 Pac. 468, 26 L. R. A. 646. Title to office cannot be tried on injunction proceedings restraining the secretary of state from delivering certificates of election to certain persons claiming to be elected as district judges.

Lawrence v. Leidigh, 58 Kan. 676, 50 Pac. 889; Poyntz v. Shackelford, 107 Ky. 546, 54 S. W. 855. An officer in rightful possession of his office is entitled to an injunction to protect him from acts interfering with the discharge of his official duties to the detriment of public business.

Voisin v. Leche, 23 La. Ann. 25; First Nat. Bank of Charlotte v. Jenkins, 64 N. C. 719; State v. Wolfenden, 74 N. C. 103. Title to office cannot be tried by injunction. See as holding the same, Patterson v. Hubbs, 65 N. C. 119, and Cozart v. Fleming, 123 N. C. 547, 31 S. E. 822.

Updegraff v. Crans, 47 Pa. 103. The proper remedy to determine title to office is by quo warranto, not by injunction. State v. Herreid, 10 S. D. 16, 71 N. W. 319. In a contest for title to office, officials having a prima facie title will not be restrained from exercising their duties pending the litigation. See, also, on same point, Harding v. Eichinger, 57 Ohio St. 371, 49 N. E. 306.

Caruthers v. Harnett, 67 Tex. 127, 2 S. W. 523. The plaintiff must show not only that he is a resident of the county but also a citizen and a taxpayer and that he will be

cretionary acts or those directly imposed by law are not ordinarily interfered with by the courts, yet a court of equity will restrain an abuse of a discretionary power or the unwarranted and malicious performance of a discretionary duty [321] or an act unwarranted by law.[322] The removal of subordinate employees or officials unless under the protection of civil service rules [323] or positive provisions of law will not be restrained,[324] and public officials in the exercise of the police power of the state are not subject, except in extreme cases, to any control through a writ of injunction.[325]

greatly and irreparably injured by the acts which he seeks to enjoin. Ehlinger v. Rankin, 9 Tex. Civ. App. 424, 29 S. W. 240. A person can be restrained from usurping an office through injunction. Ward v. Sweeney, 106 Wis. 44, 82 N. W. 169. Title to office cannot be determined in injunction proceedings.

[321] Mutual Life Ins. Co. v. Boyle, 82 Fed. 705; Wong Wai v. Williamson, 103 Fed. 1; Rice v. Smith, 9 Iowa, 571; Cooper v. Alden, Har. (Mich.) 72; Tribune Ass'n v. Sun Printing & Pub. Ass'n, 7 Hun (N. Y.) 175. But see Cox v. Moores, 55 Neb. 34, 75 N. W. 35.

[322] Gibbs v. Usher, 1 Holmes, 348, Fed. Cas. No. 5,387; Woolsey v. Dodge, 6 McLean, 142, Fed. Cas. No. 18,032; Simpson v. Union Stock Yards Co., 110 Fed. 799; Niagara Fire Ins. Co. v. Cornell, 110 Fed. 816; People v. Pacheco, 27 Cal. 175; Delaware Surety Co. v. Layton (Del.) 50 Atl. 378; Parsons v. Durand, 150 Ind. 203, 49 N. E. 1047; Jones v. Board of Trade, 52 Kan. 95, 34 Pac. 453; Nelson v. State Board of Health, 108 Ky. 769, 57 S. W. 501, 50 L. R. A. 383. An injunction will issue to restrain a state board of health from interfering with one in the practice of his profession as an osteopath. Larcom v. Olin, 160 Mass. 102, 35 N. E. 113. The secretary of state cannot be restrained from issuing a city charter on the ground that the statute authorizing it is unconstitutional. Attala County Sup'rs v. Niles, 58 Miss. 48; Wabaska Elec. Co. v. City of Wymore, 60 Neb. 199, 82 N. W. 626; Armatage v. Fisher, 74 Hun, 167, 26 N. Y. Supp. 364; McCullough v. Brown, 41 S. C. 220, 19 S. E. 458, 23 L. R. A. 410.

[323] Priddie v. Thompson, 82 Fed. 186; Butler v. White, 83 Fed. 578; Couper v. Smyth, 84 Fed. 757.

[324] White v. Berry, 171 U. S. 366; Morgan v. Nunn, 84 Fed. 551; Page v. Moffett, 85 Fed. 38; Heffran v. Hutchins, 160 Ill. 550, 43 N. E. 709; Palmer v. Board of Education, 47 App. Div. 547, 62 N. Y. Supp. 485; Reeves v. Griffin, 29 Wkly. Law Bul. (Ohio) 281. But see Wheeler v. Board of Fire Com'rs, 46 La. Ann. 731, 15 So. 179; Stahlhut v. Bauer, 51 Neb. 64, 70 N. W. 496.

[325] Weiss v. Herlihy, 23 App. Div. 608, 49 N. Y. Supp. 81; Coykendall v. Hood, 36 App. Div. 558, 55 N. Y. Supp. 718; Campbell v. York, 30 Misc. 340, 63 N. Y. Supp. 581; Cohen v. Goldsboro Com'rs, 77 N. C. 2.

§ 1138. Ordinances; laws.

The passage of ordinances or laws through which conditions would be created giving rise to the equitable relief under discussion clearly may be restrained,[326] and this right most emphatically exists in connection with the enforcement of invalid laws or ordinances.[327] It is quite generally held, however, in this connection, that the existence of an ordinance prohibiting the construc-

[326] Leverich v. City of Mobile, 110 Fed. 170. Passage of ordinance prohibiting the charging of a public wharfage may be restrained by injunction.

Atkinson v. Wykoff, 58 Mo. App. 86. But see Lewis v. Denver City Water Works Co., 19 Colo. 236, 34 Pac. 993. Injunction will not issue to restrain the passage of an ordinance when it does not appear that irreparable injury will immediately result. Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 505. The courts can set aside a law because it is unconstitutional but cannot forbid its passage. State v. Superior Ct. of Milwaukee County, 105 Wis. 651, 81 N. W. 1046, 48 L. R. A. 819. See, also, Atkinson v. Wykoff, 58 Mo. App. 86.

[327] Yale College v. Sanger, 62 Fed. 177; Platte & D. Canal & Milling Co v. Lee, 2 Colo. App. 184, 29 Pac. 1036; Verdery v. Village of Summerville, 82 Ga. 138, 8 S. E. 213; City of Macon v. Hughes, 110 Ga. 795, 36 S. E. 247; City of Chicago v. Ferris Wheel Co., 60 Ill. App. 384; Cicero Lumber Co. v. Town of Cicero, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696. Ordinance excluding vehicles from certain streets. Davis v. Fasig, 128 Ind. 271, 27 N. E. 726. Where some of the provisions of an ordinance are not invalid, its enforcement cannot be enjoined.

City of Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; McFarlain v. Town of Jennings, 106 La. 541, 31 So. 62; Hottinger v. City of New Orleans, 42 La. Ann. 629, 8 So. 575; Deems v. City of Baltimore, 80 Md. 164, 30 Atl. 648, 26 L. R. A. 541; Folkerts v. Power, 42 Mich. 283; Sylvester Coal Co. v. City of St. Louis, 130 Mo. 323, 32 S. W. 649; Wood v. City of Brooklyn, 14 Barb. (N. Y.) 425; Hall v. Board of Excise, 31 How. Pr. (N. Y.) 331; Dailey v. Nassau County R. Co., 52 App. Div. 272, 65 N. Y. Supp. 396; United Traction Co. v. City of Watervliet, 35 Misc. 392, 71 N. Y. Supp. 977. An ordinance limiting the speed of street cars to six miles an hour will be enjoined upon the evidence that this speed was a detriment to the company and to public service. Wade v. Nunnelly, 19 Tex. Civ. App. 256, 46 S. W. 668. The enforcement of a void city ordinance not resulting in an injury cannot be restrained.

City of Austin v. Austin City Cemetery Ass'n, 87 Tex. 330, 28 S. W. 528; State v. Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561. But see Mutual Elec. Light Co. v. Ashworth, 118 Cal. 1, 50 Pac. 10; Ludlow & C. Coal Co. v. City of Ludlow, 19 Ky. L. R. 1381, 43 S. W. 435; Dubos v. Dreyfous, 52 La. Ann.

tion of a building of a certain character or within certain limits is no ground for the issue of an injunction to prevent its erection.[328]

§ 1139. Parties.

It is essential in injunction proceedings equally with other cases that all persons interested or against whom the same relief is sought should be made parties to the proceedings.[329] The strict rules of pleading apply in the use of the corporate name of a public corporation or an official board.[330] It is seldom that an action brought by a private individual is necessary in order to protect public interests, but, as already noted, a taxpayer or property owner under certain conditions is given this right where through the laxity, inaction, or connivance of those in authority, such a course of action is necessary.[331]

Pleadings. It is essential that all pleadings in injunction proceedings should state specifically and clearly the grounds for relief and the conditions which require the interposition of a court of equity.[332] Inferences which sometimes aid allegations in ordi-

1117, 27 So. 663. The writ will issue to enforce police regulations relative to partition walls.

[328] Incorporated Town of Rochester, v. Walters, 27 Ind. App. 194, 60 N. E. 1101; Rice v. Jefferson, 50 Mo. App. 464; City of Manchester v. Smyth, 64 N. H. 380, 10 Atl. 700; Young v. Scheu, 56 Hun, 307, 9 N. Y. Supp. 349; Village of New Rochelle v. Lang, 75 Hun, 608, 27 N. Y. Supp. 600; City of Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128. But see Kaufman v. Stein, 138 Ind. 49, 37 N. E. 333; Lemmon v. Town of Guthrie Center, 113 Iowa, 36, 84 N. W. 986. See, also, Northern Pac. R. Co. v. City of Spokane, 52 Fed. 428.

[329] Lussem v. Sanitary Dist. of Chicago, 192 Ill. 404, 61 N. E. 544; State v. Anderson, 5 Kan. 90; State v. Zachritz, 166 Mo. 307, 65 S. W. 999. Jurisdiction of the person is sufficient to give the court jurisdiction of the subject-matter in injunction proceedings which are solely equitable. Benson v. City of Albany, 24 Barb. (N. Y.) 248. Bond holders are necessary parties in a suit to restrain the payment of interest on city bonds. Stallcup v. City of Tacoma, 13 Wash. 141, 42 Pac. 541. The purchasers and holders of bonds are necessary parties in an action by the taxpayers to enjoin a city from paying interest upon them.

[330] Kansas City v. Hanson, 8 Kan. App. 290, 55 Pac. 513. The city clerk is not a necessary party in an action to restrain the collection of an illegal local assessment.

[331] See §§ 1157, 1160, post.

[332] Grant v. Cooke, 7 D. C. 165; Town of Albertville v. Rains, 107

nary actions are not permissible.[333] Allegations of irreparable injury are not sufficient, but the facts and conditions which exist and by reason of which the irreparable injury will occur must be definitely given.[334]

§ 1140. 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 nature of quo warranto. These are generally regarded as substitutes for the common law remedy [335] and not, in the absence of clear legislative intent to do so, as narrowing [336] or enlarging [337] the grounds of action or making the new remedy applicable when the common law writ would not have been.[338] Quo warranto, or a proceeding of a similar nature is the appropriate remedy for the trial of the title to a public office,[339] or the right of a public cor-

Ala. 691, 18 So. 255; Cabbell v. Williams, 127 Ala. 320, 28 So. 405; L. B. Price Co. v. City of Atlanta, 105 Ga. 358, 31 S. E. 619; Heinroth v. Kochersberger, 173 Ill. 205, 50 N. E. 171; Kansas City v. Hobbs, 62 Kan. 866, 62 Pac. 324; Shulz v. City of Albany, 42 App. Div. 437; 59 N. Y. Supp. 235; Hurlbut v. Town of Lookout Mountain (Tenn. Ch. App.) 49 S. W. 301; Wood v. City of Victoria, 18 Tex. Civ. App. 573, 46 S. W. 284; Hamer v. Brown, 40 S. C. 336, 18 S. E. 938; Strauss v. City of Dallas, 73 Tex. 649, 11 S. W. 872; City of Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128.

[333] Bardrick v. Dillon, 7 Okl. 535, 54 Pac. 785.

[334] McFarlain v. Town of Jennings, 106 La. 541, 31 So. 62. An allegation that plaintiff's property had been impounded and was about to be disposed of shows sufficiently the irreparable injury. White Sulphur Springs Co. v. Holly, 4 W. Va. 597.

[335] Attorney General v. Sullivan, 163 Mass. 446, 40 N. E. 843, 28 L. R. A. 455.

[336] Watkins v. Venable, 99 Va. 440, 39 S. E. 147.

[337] Wishek v. Becker, 10 N. D. 63, 84 N. W. 590.

[338] Hinckley v. Breen, 55 Conn. 119, 9 Atl. 31. The provisions of the Conn. Practice Act abolishing forms of action does not authorize the maintenance of a suit in equity to test the title to an office.

[339] Werts v. Rogers, 56 N. J. Law, 480, 28 Atl. 726, 29 Atl. 173, 23 L. R. A. 354; Ter. v. Ashenfelter, 4 Gildersleeve (N. M.) 93, 12 Pac. 879; Grant v. Chambers, 34 Tex. 573; Peters v. Bell, 51 La. Ann. 1621, 26 So. 442; People v. Scannell, 7 Cal. 432; First Parish in Sudbury v. Stearns, 38 Mass. (21 Pick.) 148; Lindsey v. Attorney General, 33 Miss. 508; Com. v. Cullen, 13 Pa. 133; Com. v. Small, 26 Pa. 31. The right to a military office is properly triable in quo warranto. Hyde v. State, 52 Miss. 665. The remedy lies to remove from office

poration to exercise a franchise,[340] including the franchise to exist as a public corporation,[341] but not to test the validity of a contract entered into by it,[342] nor the power of a city council to pass an ordinance.[343] The title to an office cannot be adjudicated in mandamus proceedings,[344] nor in a suit in equity to enjoin the incumbent from discharging the functions of an office.[345] 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.[346] The

one who is exercising its functions without having qualified.

People v. Riordan, 73 Mich. 508, 41 N. W. 482. Validity of statute creating office can be determined in quo warranto against incumbent.

State v. Frazier, 98 Mo. 426, 11 S. W. 973. Validity of election.

Parsons v. Durand, 150 Ind. 203, 49 N. E. 1047. Eligibility of respondent. State v. Leay, 64 Mo. 89. The fact as to whether or not there was, in law, a vacancy in the office at the time the respondent was appointed can be determined. State v. Parker, 25 Minn. 215. Right to exercise office in designated territory may be questioned in quo warranto. See, also, post, when and for what purposes writ issued.

[340] People v. City of Oakland, 92 Cal. 611, 28 Pac. 807. Right to govern and tax inhabitants of certain territory a franchise which can be tested in quo warranto. State v. Regents of University, 55 Kan. 389, 40 Pac. 656, 29 L. R. A. 378. Action lies to restrain exercise of corporate powers not conferred by law.

[341] State v. Uridil, 37 Neb. 371, 55 N. W. 1072; State v. Tracy, 48 Minn. 497, 51 N. W. 613; Atlee v. Wexford County Sup'rs, 94 Mich. 562, 54 N. W. 380; Ter. v. Armstrong, 6 Dak. 226, 50 N. W. 832; Renwick v. Hall, 84 Ill. 162; Kamp v. People, 141 Ill. 9, 30 N. E. 680; State v. Independent School Dist., 29 Iowa, 264. See, also, post, "when and for what purposes proceeding will lie."

Osborn v. Village of Oakland, 49 Neb. 340, 68 N. W. 506, holding that quo warranto and not injunction is the proper remedy to test the legality of incorporation.

[342] People v. City of Springfield, 61 Ill. App. 86.

[343] State v. City of Newark, 57 Ohio St. 430, 49 N. E. 407; State v. City of Lyons, 31 Iowa, 432.

[344] In re Hart, 159 N. Y. 278, 54 N. E. 44; French v. Cowan, 79 Me. 426, 10 Atl. 335; Henry v. City of Camden, 42 N. J. Law, 335; People v. New York Infant Asylum, 122 N. Y. 190, 25 N. E. 241, 10 L. R. A. 381. See, also, cases cited in this chapter, subdivision "Mandamus."

[345] Beebe v. Robinson, 52 Ala. 66; Moore v. Caldwell, 1 Freem. Ch. (Miss.) 222; Burke v. Leland, 51 Minn. 335, 53 N. W. 716. See, also, § 1137, ante.

[346] State v. Van Brocklin, 8 Wash. 557, 36 Pac. 495. See, also, Fraser v. Freelon, 53 Cal. 644.

State v. Kirkwood, 15 Wash. 298, 46 Pac. 331. In quo warranto proceedings the court may inquire into the sufficiency of the grounds on which the removal was made.

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.[347]

§ 1141. Scope of proceedings.

Originally, the remedy was available only for the trial of the respondent's title and this is the present rule in some jurisdictions,[348] in others, the statutes have enlarged the scope of the proceeding so that not only may the relator's title be adjudicated and he invested with possession of the office, but also a decree ousting the respondent obtained.[349] The respondent can draw in issue the relator's title.[350]

Right to jury trial. In some jurisdictions the proceeding is regarded as one proceeding according to the courses of the common law and the parties entitled to trial of issues of fact by jury,[351] while in others the right to jury trial is denied.[352]

[347] State v. Evans, 3 Ark. 585; State v. Smith, 55 Tex. 447. Compare Brown v. Reding, 50 N. H. 336; State v. Ramos, 10 La. Ann. 420.

[348] Rex v. Bedford Level Corp., 6 East, 356; Campbell v. Goodrich, 27 Ark. 14; Newcum v. Kirtley, 52 Ky. (13 B. Mon.) 519; State v. Rose, 84 Mo. 198; State v. Meek, 129 Mo. 432; State v. Lane, 16 R. I. 620; Allen v. Patterson, 85 Ill. App. 256.

[349] Griebel v. State, 111 Ind. 369, 12 N. E. 700; Tarbox v. Sughrue, 36 Kan. 225, 12 Pac. 935; Williams v. State, 69 Tex. 368, 6 S. W. 845; Ex parte Henshaw, 73 Cal. 486; Ellison v. Aldermen of Raleigh, 89 N. C. 125; Ter. v. Hauxhurst, 3 Dak. 205; State v. Herndon, 23 Fla. 287; Buckman v. State, 34 Fla. 48; Crovatt v. Mason, 101 Ga. 246; People v. Knight, 13 Mich. 231; Ter. v. Smith, 3 Minn. 240 (Gil. 164); State v. Moores, 52 Neb. 634; People v. Nolan, 101 N. Y. 543; McAllen v. Rhodes, 65 Tex. 348; People v. Tobey, 153 N. Y. 381, 47 N. E. 800. Relator not entitled to judgment giving him office to which he has not been appointed, though entitled to mandamus to compel his appointment thereto.

[350] Baxter v. Ellis, 111 N. C. 124, 15 S. E. 938, 17 L. R. A. 382; Lane v. Otis, 68 N. J. Law, 64, 52 Atl. 305; See, also, Watt v. Jones, 60 Kan. 201, 56 Pac. 16. Compare Edelstein v. Fraser, 56 N. J. Law, 3, 28 Atl. 434; Davis v. Davis, 57 N. J. Law, 203, 31 Atl. 218.

[351] Buckman v. State, 34 Fla. 48; People v. Havird, 2 Idaho, 531; Paul v. People, 82 Ill. 82; Reynolds v. State, 61 Ind. 402; Com. v. Walter, 83 Pa. 105; People v. Dorsburgh, 16 Mich. 133; People v. Albany & S. R. Co., 57 N. Y. 161; State v. McDonald, 108 Wis. 8, 84 N. W. 171.

[352] Wheat v. Smith, 50 Ark. 266, 7 S. W. 161; State v. Johnson, 26

§ 1142. Jurisdiction of the courts.

In some jurisdictions, laws providing that certain municipal bodies and boards shall be the judges of the election and qualification of their members are regarded as denying the right of the courts to inquire into these questions by quo warranto.[353] In others a contrary doctrine prevails.[354] So, too, statutes relative to prosecuting election contests before some tribunal other than the regularly constituted courts do not deprive the latter of jurisdiction in quo warranto proceedings.[355] The proceedings will lie against one alleged to be usurping the office of governor and will not be regarded as an interference by the courts with the functions of the executive.[356] The state courts have no jurisdiction of a proceeding to determine title to an office or the right to exercise a franchise granted under and pursuant to the constitution and laws of the United States.[357]

Ark. 281; Taliaferro v. Lee, 97 Ala. 92; State v. Lupton, 64 Mo. 415; State v. Fawcett, 17 Wash. 188.

[353] State v. Berry, 47 Ohio St. 232, 24 N. E. 266; Robertson v. State, 109 Ind. 79; State v. Tomlinson, 20 Kan. 692. See, also, Johnson v. Barham, 99 Va. 305, 38 S. E. 136.

State v. O'Brien, 47 Ohio St. 464, 25 N. E. 121. Such a statutory provision does not preclude quo warranto proceedings against one exercising the office of city councilman from a ward that has no legal existence, under an election held without lawful authority.

The determination of a city council is binding on rival claimants for office of councilman but not on the people in their sovereign capacity, and the state can question in quo warranto proceedings the right of the successful contestant to office. Latham v. People, 95 Ill. App. 528; Patterson v. People, 65 Ill. App. 651.

[354] State v. Anderson, 26 Fla. 240; People v. Bird, 20 Ill. App. 568; People v. Bingham, 82 Cal. 238, 22 Pac. 1039. See, also, Com. v. Allen, 70 Pa. 465; Com. v. Meeser, 44 Pa. 341.

[355] People v. Londoner, 13 Colo. 303, 22 Pac. 764, 6 L. R. A. 444; Tarbox v. Sughrue, 36 Kan. 225; Gray v. State, 92 Tex. 396, 49 S. W. 217; State v. Frantz, 55 Neb. 167, 75 N. W. 546; Snowball v. People, 147 Ill. 260, 35 N. E. 538; State v. Meilike, 119 Mont. 273, 51 N. W. 875; State v. Fransham, 81 Wis. 574, 48 Pac. 1; State v. Frazier, 28 Neb. 438, 44 N. W. 471. See, also, State v. Kearn, 17 R. I. 391, 22 Atl. 322, 1018; Hyde v. State, 52 Miss. 665. But see State v. McLain, 58 Ohio St. 313, 50 N. E. 907. Where the statutes or charter prescribe the grounds of forfeiture of an office and also the practice and procedure by which a forfeiture shall be effected, the remedy so provided is exclusive. Cutts v. Scandrett, 108 Ga. 620, 34 S. E. 186.

[356] Attorney General v. Barstow, 4 Wis. 567.

[357] State v. Bowen, 8 S. C. (8 Rich.) 400. An action to determine

§ 1143. Principles governing use of remedy.

In some states leave of court is a prerequisite to the right of a private person to carry on quo warranto proceedings.[358] The granting or withholding of such leave rests in the sound discretion of the court to which application is made.[359] The respondent is entitled to notice of and to be heard in opposition to an application.[360] The relator on the application must show that there are probable grounds for a successful prosecution.[361] No demand for possession of the office is necessary before commencement of the proceedings.[362] They will lie only as against persons in the actual wrongful possession of an office,[363] the right to which is denied by the relator,[364] or where the respondent is exercising a fran-

the title to an office can only be maintained by or in the name of the sovereign with whom the franchise and privileges of the office originated.

[358] Mitchell v. Tolan, 33 N. J. Law, 195, Crovatt v. Mason, 101 Ga. 246, 28 S. E. 891. See, also, cases cited post.

[359] People v. Mineral Marsh Drainage Dist. Com'rs, 193 Ill. 428, 62 N. E. 225; Deaver v. State, 27 Tex. Civ. App. 453, 66 S. W. 256; State v. Hoff, 88 Tex. 297, 31 S. W. 290; People v. Tisdale, 1 Doug. (Mich.) 59. See, also, People v. Lake St. El. R. Co., 54 Ill. App. 348; Watkins v. Venable, 99 Va. 440, 39 S. E. 147.

Mitchell v. Tolan, 33 N. J. Law, 195. The fact that an ousting of the respondent would result in a suspension of the municipal government for a considerable period is sufficient reason for refusing the remedy to a private relator who makes no claim to the office. State v. Brown, 5 R. I. 1. The discretion of the court extends only to the granting or withholding leave to prosecute the proceeding. After its institution the courts are bound to enforce the legal rights of the parties.

[360] Miller v. Seymour, 67 N. J. Law, 482, 51 Atl. 719. Contra, Watkins v. Venable, 99 Va. 440, 39 S. E. 147.

[361] State v. Bruggemann, 53 N. J. Law, 122, 20 Atl. 730; Vrooman v. Michie, 69 Mich. 42, 36 N. W. 749.

[362] State v. Withers, 121 N. C. 376, 28 S. E. 522. See, also, Dean v. State, 88 Tex. 290, 30 S. W. 1047, 31 S. W. 185.

[363] Com. v. Dearborn, 15 Mass. 125. An information in the nature of quo warranto lies against those only who claim to exercise some public office or authority.

[364] Rex v. Whitwell, 5 Term R. 85; Holmes v. Sikes, 113 Ga. 580, 38 S. E. 978; Nolen v. State, 118 Ala. 154, 24 So. 251; State v. Meek, 129 Mo. 431, 31 S. W. 913; Roberson v. City of Bayonne, 58 N. J. Law, 325, 33 Atl. 734; People v. Ferris, 16 Hun (N. Y.) 219; State v. McCullough, 20 Nev. 154, 18 Pac. 756. The proceeding cannot be maintained against one in office merely to determine in whom the power of appointment to the office is vested, when it appears the in-

chise.[365] The taking of an oath obligating the respondent to perform the duties of the office is a sufficient user to authorize the proceeding,[366] though tendering himself for the purpose of being sworn in is not.[367] Cases determining whether certain acts constitute a user, usurpation, or intrusion into office are referred to in the notes,[368] and also those discussing what constitutes the holding of an office, as to which the remedy will lie.[369] Ordinarily the proceeding will not lie where the law affords another adequate remedy.[370] The assumed power of a municipal corporation to ex-

cumbent would retain it in any event.

[365] Cochran v. McCleary, 22 Iowa, 75; State v. Flemming, 158 Mo. 558, 59 S. W. 118; McDonald v. Alcona County Sup'rs, 91 Mich. 459, 51 N. W. 1114; Miller v. Utter, 14 N. J. Law (2 J. S. Green) 84; State v. Jones, 16 Fla. 306. A pilot exercises a franchise under legislative authority though not an officer and his right to do so may be challenged in quo warranto proceedings. Compare Dean v. Healy, 66 Ga. 503.

[366] People v. Callaghan, 83 Ill. 128.

[367] Rex v. Whitwell, 5 Term R. 85.

[368] State v. Meek, 129 Mo. 431, 31 S. W. 913; Prather v. Hart, 17 Neb. 598; State v. Ward, 27 La. Ann. 659; Stine v. Berry, 16 Ky. L. R. 279, 27 S. W. 809.

An officer holding over is a usurper as against one elected to the office. Wheat v. Smith, 50 Ark. 266, 7 S. W. 161; Oliver v. Jersey City, 63 N. J. Law, 634, 44 Atl. 709, 48 L. R. A. 412.

[369] *Chief of Police.* State v. Hall, 111 N. C. 369, 16 S. E. 420; Ellis v. Lennon, 86 Mich. 468, 49 N. W. 308; Attorney General v. Cain, 84 Mich. 223, 47 N. W. 484.

Policeman. Johnson v. State, 132 Ala. 43, 31 So. 493.

Jail keeper. Bownes v. Meehan, 45 N. J. Law, 189.

Assistant superintendent of police. Ptacek v. People, 194 Ill. 125, 62 N. E. 530.

President of city council. State v. Anderson, 45 Ohio St. 196, 12 N. E. 656; Cochran v. McCleary, 22 Iowa, 75.

Pilots. Palmer v. Woodbury, 14 Cal. 43; State v. Jones, 16 Fla. 306; Dean v. Healy, 66 Ga. 503.

Street commissioner. State v. Alexander, 107 Iowa, 177, 77 N. W. 841.

County physician. Trainor v. Board of Auditors, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95.

Drainage commissioner. Smith v. People, 140 Ill. 355, 29 N. E. 676, affirming 39 Ill. App. 238.

Ptacek v. People, 194 Ill. 125, 62 N. E. 530. Respondent cannot on appeal, for the first time raise the contention that the position from which it is sought to oust him is not an "office."

[370] State v. Wilson, 30 Kan. 661; People v. Cooper, 139 Ill. 461, 29 N. E. 872; State v. Kill Buck Turnpike Co., 38 Ind. 71; State v. Elliott, 117 Ala. 150, 23 So. 124; Cutts v. Scandrett, 108 Ga. 620, 34 S. E. 186; State v. Sadler, 25 Nev. 131, 58 Pac. 284; Parks v. State, 100 Ala. 634, 13 So. 756. See, also, § 1142, ante.

ercise jurisdiction over certain territory,[371] or the title of a public officer actually in possession of an office under color of title and exercising its functions,[372] is not subject to collateral attack.[373] Ordinarily the only method of questioning the right of a corporation to exercise a power, or the title of the officer, is by quo warranto proceedings.[374]

§ 1144. Laches and estoppel.

The right of the state to maintain quo warranto proceedings questioning the power of a corporation to exercise jurisdiction over certain territory may be lost by laches,[375] and one who voluntarily surrenders possession of an office to another cannot thereafter assert title to the office as against the subsequent incumbent.[376] A respondent cannot defeat a relator's title by his own wrong.[377] A proceeding in the nature of quo warranto, for trial of title to office, will not be sustained where the term of office must necessarily expire before judgment can be rendered.[378] If

[371] Henry v. Steele, 28 Ark. 455; State v. Ohio & I. Mineral Land Co., 84 Mo. App. 32.

[372] Eaton v. Harris, 42 Ala. 491; Kaufman v. Stone, 25 Ark. 336; Hunter v. Chandler, 45 Mo. 452; Cochran v. McCleary, 22 Iowa, 75; Hagner v. Heyberger, 7 Watts & S. (Pa.) 104; State v. Alexander, 107 Iowa, 177, 77 N. W. 841.

[373] Desmond v. McCarthy, 17 Iowa, 525; Ex parte Strahl, 16 Iowa, 369; Facey v. Fuller, 13 Mich. 527. See Vol. 2, §§ 644 et seq.

[374] Neeland v. State, 39 Kan. 154, 18 Pac. 165; People v. Matteson, 17 Ill. 167; St. Louis County Ct. v. Sparks, 10 Mo. 117; Osgood v. Jones, 60 N. H. 543; Kerr v. Trego, 47 Pa. 292. Compare McAllen v. Rhodes, 65 Tex. 348; Sinclair v. Young, 100 Va. 284, 40 S. E. 907; McCue v. Wapello County Circuit Ct., 51 Iowa, 60.

[375] State v. Town of Westport, 116 Mo. 582, 22 S. W. 888; People v. Hauker, 197 Ill. 409, 64 N. E. 253. Compare Place v. People, 192 Ill. 160, 61 N. E. 354, affirming 87 Ill. App. 527; People v. Gary, 196 Ill. 310, 63 N. E. 749.

[376] State v. Moores, 52 Neb. 634, 72 N. W. 1056; Maddox v. York, 21 Tex. Civ. App. 622, 54 S. W. 24; State v. Boyd, 34 Neb. 435, 51 N. W. 964. See, also, Cate v. Furber, 56 N. H. 224.

State v. Frantz, 55 Neb. 167, 75 N. W. 546. One in possession of an office, who at the end of his term voluntarily surrenders his office to one who on the face of the election returns appears to be elected, is not estopped to bring quo warranto.

[377] State v. Steers, 44 Mo. 223.

[378] Morris v. Underwood, 19 Ga. 559; People v. Sweeting, 2 Johns. (N. Y.) 184; State v. Jacobs, 17 Ohio, 143. But see Burton v. Patton, 47 N. C. (2 Jones) 124.

pending proceedings the relator's title is terminated, they will ordinarily be dismissed.[379] Under certain circumstances the court will proceed to judgment, though the respondent has resigned [380] or abandoned the office.[381]

§ 1145. When and for what purposes writ will issue.

The remedy for usurpation by a city of authority over territory not legally annexed to it,[382] or for the exercise by it of a power not conferred by its charter,[383] is by quo warranto. The proceeding should be brought against the city itself and not its officers.[384] If, however, the municipal corporation is not legally incorporated, the proceedings will be sustained against the persons acting as its officers.[385]

§ 1146. At whose instance proceedings initiated.

In some jurisdictions quo warranto or proceedings in the nature thereof can under certain circumstances be instituted only on the

[379] Hurd v. Beck (Kan.) 45 Pac. 92; Lynde v. Dibble, 19 Wash. 528, 53 Pac. 370. When office has been abolished. But see People v. Rodgers, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668.

[380] Hunter v. Chandler, 45 Mo. 452; Attorney General v. Johnson, 63 N. H. 622, 7 Atl. 381.

[381] State v. Graham, 13 Kan. 136; Hammer v. State, 44 N. J. Law, 667.

[382] 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. 745; State v. Fleming, 147 Mo. 1, 44 S. W. 758. But see Stultz v. State, 65 Ind. 492, holding that injunction to restrain the officers of the corporation from exercising their powers over territory not within the city and not quo warranto is the proper remedy. See, also, People v. Whitcomb, 55 Ill. 172.

[383] State v. Tracy, 48 Minn. 497, 51 N. W. 613.

[384] People v. City of Peoria, 166 Ill. 517, 46 N. E. 1075; State v. Coffee, 59 Mo. 59; State v. Fleming, 158 Mo. 558, 59 S. W. 118; State v. Atlantic Highlands Com'rs, 50 N. J. Law, 457, 14 Atl. 560.

[385] Harness v. State, 76 Tex. 566, 13 S. W. 535; State v. Osburn, 24 Nev. 187, 51 Pac. 837; People v. Gladwin County Sup'rs, 41 Mich. 647; State v. Uridil, 37 Neb. 371; 55 N. W. 1072; Attorney General v. Page, 38 Mich. 286; Ter. v. Armstrong, 6 Dak. 226, 50 N. W. 832. See, also, Poor v. People, 142 Ill. 309, 31 N. E. 676; People v. Brunnemer, 168 Ill. 482, 48 N. E. 43.

Filing an information in quo warranto against a municipal corporation eo nomine is an admission of its corporate existence and cannot

relation of the attorney general,[386] or county attorney,[387] when the purpose of the proceeding is to oust a municipal corporation from the unlawful exercise of a franchise,[388] or a person from an office into which he has intruded.[389] In other jurisdictions the statutes provide that the appropriate law officer may [390] or shall [391] institute the proceedings on the relation of a private person. In some jurisdictions a proceeding may be instituted by a private relator, in the name of the state, with the consent of the law officer.[392] His authority to institute them cannot be collaterally attacked.[393]

Private persons. An information in the nature of quo warranto cannot be brought by private persons in their own names,

be controverted by the relator. People v. City of Spring Valley, 129 Ill. 169, 21 N. E. 843. But see State v. Tracy, 48 Minn. 497, 51 N. W. 613.

[386] Com. v. Burrell, 7 Pa. 34; State v. Schnierle, 5 Rich. Law (S. C.) 299; Wright v. Allen, 2 Tex. 158; Henry v. Steele, 28 Ark. 455; Patterson v. Hubbs, 65 N. C. 119; Miller v. Town of Palermo, 12 Kan. 14; Voisin v. Leche, 23 La. Ann. 25; State v. Davis, 64 Neb. 499, 90 N. W. 232.

[387] Bartlett v. State, 13 Kan. 99; Ter. v. Armstrong, 6 Dak. 226, 50 N. W. 832; State v. Agee, 105 Tenn. 588, 59 S. W. 340. Law officer may dismiss when he deems it for best interest of state to do so.

[388] Robinson v. Jones, 14 Fla. 256; McGahan v. People, 191 Ill. 493, 61 N. E. 418; Ter. v. Armstrong, 6 Dak. 226, 50 N. W. 832; Gibbs v. Borough of Somers Point, 49 N. J. Law, 515, 10 Atl. 377; Steelman v. Vickers, 51 N. J. Law, 180, 17 Atl. 153. See, also, State v. Town Council of Cohabo, 30 Ala. 66.

State v. Tracy, 48 Minn. 497, 51 N. W. 613. Cannot be prosecuted by private relator with formal approval of attorney general.

[389] Hayes v. Thompson, 21 La. Ann. 655; Harrison v. Greaves, 59 Miss. 453. Compare State v. Morgan, 80 Miss. 372, 31 So. 789.

State v. Anderson, 45 Ohio St. 196, 12 N. E. 656. The attorney general may, on his own relation, bring quo warranto against a person who usurps a public office.

[390] State v. Mott, 111 Wis. 19, 86 N. W. 569; Com. v. Fowler, 10 Mass. 295; Ter. v. Smith, 3 Minn. 240 (Gil. 164); People v. Bingham, 82 Cal. 238, 22 Pac. 1039; State v. Talty, 166 Mo. 529, 66 S. W. 361. The institution of the proceedings on the relation of a private person is within the discretion of the law officer, and his discretion can be interfered with only on clear abuse thereof. See, also, Haupt v. Rogers, 170 Mass. 71, 48 N. E. 1080.

[391] State v. Withers, 121 N. C. 376, 28 S. E. 522. Attorney General cannot refuse permission to prosecute in name of state where relator gives bond for costs and expenses.

[392] Duffy v. State, 60 Neb. 812, 84 N. W. 264; State v. Withers, 121 N. C. 376, 28 S. E. 522.

[393] Fowler v. State, 68 Tex. 30, 3

except in cases expressly authorized by statute.[394] In some states the statutes provide that the proceeding may be instituted by the public law officer or any other person [395] whenever he claims an interest in the office or franchise, which is the subject-matter of the suit.[396] In still other jurisdictions proceedings to try the title to an office may be instituted on the relation of a citizen and taxpayer, though he does not claim any title for himself,[397] or when the law officer refuses to act.[398]

§ 1147. Evidence and burden of proof.

When an action in the nature of quo warranto is commenced and prosecuted by the state or its public officer, the respondent

S. W. 255; McAllister's Ex'r v. Com., 69 Ky. (6 Bush) 581.

[394] Haupt v. Rogers, 170 Mass. 71, 48 N. E. 1080.

[395] Londoner v. People, 15 Colo. 557, 26 Pac. 135.

[396] Mills v. State, 2 Wash. St. 566, 27 Pac. 560; State v. Sheriff, 45 La. Ann. 162, 12 So. 189; Yonkey v. State, 27 Ind. 236; State v. Town of Tipton, 109 Ind. 73; State v. Matthews, 44 W. Va. 372, 29 S. E. 994; State v. Balcom, 71 Mo. App. 27; People v. De Bevoise, 27 Hun (N. Y.) 596; Guillotte v. Poincy, 41 La. Ann. 333, 6 So. 507, 5 L. R. A. 403; State v. Hamilton County Com'rs, 39 Kan. 85, 19 Pac. 2; State v. Hamilton, 29 Neb. 198, 45 N. W. 279.

Relator must show that he has a private interest distinct from other corporators and taxpayers. Demarest v. Wickham, 63 N. Y. 320; Miller v. Town of Palermo, 12 Kan. 14.

State v. Dimond, 44 Neb. 154, 62 N. W. 498. Proprietor of lands can maintain proceedings to question power of city to tax real estate not lawfully included within the corporate limits, though he is not a voter in the city.

Claimant for office. State v. Taylor, 50 Ohio St. 120, 38 N. E. 24; State v. Stein, 13 Neb. 529; State v. Matthews, 44 W. Va. 372, 29 S. E. 994. Defeated candidate has no such interest as will authorize proceedings to oust candidate receiving plurality, on the ground that respondent has disqualified himself from holding office. Andrews v. State, 69 Miss. 740, 13 So. 853. Information is demurrable when brought by private person where it does not show that relator is entitled to office, though respondent has no title.

[397] State v. Hall, 111 N. C. 369, 16 S. E. 420; State v. Orvis, 20 Wis. 235; Com. v. Jones, 12 Pa. 365; Taggart v. James, 73 Mich. 234, 41 N. W. 262; Churchill v. Walkee, 68 Ga. 681; Davis v. City Council of Dawson, 90 Ga. 817, 17 S. E. 110; Crovatt v. Mason, 101 Ga. 246, 28 S. E. 891; People v. Londoner, 13 Colo. 303, 22 Pac. 764, 6 L. R. A. 444; Hann v. Bedell, 67 N. J. Law, 148, 50 Atl. 364; State v. Taylor, 122 N. C. 141, 29 S. E. 101; State v. Jenkins, 25 Mo. App. 484; State v. Vann, 118 N. C. 3, 23 S. E. 932.

[398] Lamoreaux v. Attorney General, 89 Mich. 146, 50 N. W. 812;

has the burden of showing title to the office,[399] or the right to exercise the franchise.[400] When it is instituted by a private person who claims the office the burden is on the relator.[401]

Judgment. A judgment in quo warranto brought by a private person is res adjudicata in a subsequent action between the same parties to recover the emoluments of the office,[402] but not as to one who does not hold under either of the parties.[403] All acts done by respondent after judgment of ouster are null and void.[404] A judgment of ouster may be rendered though the effect thereof will be to leave the office vacant.[405] In some jurisdictions the statutes authorize the recovery of damages by the relator on judgment in his favor,[406] or authorize the imposition of a fine on the usurper.[407]

III. Actions in General.

§ 1148. Jurisdiction of courts.

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,

State v. Barker, 116 Iowa, 96, 89 N. W. 204, 57 L. R. A. 244; State v. Kinnerly, 26 Fla. 608, 8 So. 310; Harpham v. State, 63 Neb. 396, 88 N. W. 489.

[399] State v. Davis, 64 Neb. 499, 90 N. W. 232; State v. Beardsley, 13 Utah, 502, 45 Pac. 569; Montgomery v. State, 107 Ala. 372, 18 So. 157; State v. Foster, 130 Ala. 154, 30 So. 477; Simonton v. State, 44 Fla. 289, 31 So. 821; State v. Philips, 30 Fla. 579, 11 So. 922; State v. Tillma, 32 Neb. 789, 49 N. W. 806. See, also, Latham v. People, 95 Ill. App. 528; Relender v. State, 149 Ind. 283, 49 N. E. 30; People v. Gray, 23 Misc. 602, 51 N. Y. Supp. 1087.

[400] Town of Enterprise v. State, 29 Fla. 128, 10 So. 740; People v. Bruennemer, 168 Ill. 482, 48 N. E. 43; McGahan v. People, 191 Ill. 493, 61 N. E. 418.

[401] State v. Davis, 64 Neb. 499, 90 N. W. 232; Doane v. Scannell, 7 Cal. 393; State v. Bieler, 87 Ind. 320; State v. Long, 91 Ind. 351.

[402] Jones v. Carver, 17 Colo. App. 484, 68 Pac. 1066.

[403] People v. Murray, 73 N. Y. 535.

[404] State v. Johnson, 40 Ga. 164.

[405] State v. McGeary, 69 Vt. 461, 38 Atl. 165, 44 L. R. A. 446; People v. Howlett, 94 Mich. 165, 53 N. W. 1100.

[406] Bravin v. Tombstone, 4 Ariz. 83, 33 Pac. 589. See, also People v. Nolan, 101 N. Y. 539.

[407] People v. Weeks, 25 Abb. N. C. 230, 11 N. Y. Supp. 671; Davis v. Davis, 57 N. J. Law, 203, 31 Atl. 218. Compare Attorney General v. James, 74 Mich. 733, 42 N. W. 167; State v. Kearn, 17 R. I. 391, 22 Atl. 322, 1018. Not authorized in absence of statute.

upon statutory provisions granting or withholding consent.[1] These may provide special courts for the determination of a certain class of cases or restrict other courts in respect to the same question.[2] 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,[3] the removal to or trial of the case in the Federal courts,[4] or a review of its proceedings by higher tribunals.[5] 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 provisions.[6] The universal principle that the question of jurisdiction can be raised at any time applies here.

§ 1149. 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 perform-

[1] 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 & Mechanic Arts, 56 Fed. 55; Commissioners of Roads and Revenues v. Hurd, 49 Ga. 462; Shepard v. Easterling, 61 Neb. 882, 86 N. W. 941.

[2] Smith v. Reeves, 178 U. S. 436, affirming Smith v. Rackliffe, 87 Fed. 964. A state has the right to annex to its consent to be sued the condition that the action be brought in one of its own courts. 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, 55 App. Div. 388, 66 N. Y. Supp. 931, affirmed 165 N. Y. 649, 59 N. E. 1121; Steele v. Rutherford Com'rs, 70 N. C. 137; City Nat. Bank v. Presidio County (Tex. Civ. App.) 26 S. W. 775; Baker v. Briggs, 99 Va. 360, 38 S. E. 277.

[3] Port Royal A. R. Co. v. South Carolina, 60 Fed. 552.

[4] Vincent v. County of Lincoln, 30 Fed. 749; Abeel v. Culberon, 56 Fed. 329.

[5] Hoagland v. State (Cal.) 22 Pac. 142; Clermont Com'rs v. Robb, Wright (Ohio) 48.

[6] Galbes v. Girard, 46 Fed. 500; City of Fostoria v. Fox, 60 Ohio St. 340, 54 N. E. 370. A city located partly in two counties has its situs in that county where its municipal offices and government are located. An action not local in its character must be brought in that county. McIntosh v. Braden, 80 Va. 217.

ance 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.[7] 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.[8] The state may assent to a liability on a claim contractual in its nature.[9] Where the power to sue a state is denied, the question of whether a certain

[7] See §§ 953 et seq.

[8] Christian v. Atlantic & N. C. R. Co., 133 U. S. 233; Galbes v. Girard, 46 Fed. 500. Where the constitution provides that suits may be brought against a state "in such a manner and in such courts as shall be directed by law," affirmative action is necessary by the legislature to authorize an action against a state.

Holmes v. State, 100 Ala. 291, 14 So. 51; Ex parte State, 52 Ala. 231. A statute permitting a state to be sued is a mere matter of grace not conferring a right but a mere privilege which may be withdrawn at pleasure.

People v. Miles, 56 Cal. 401; In re Constitutionality of Substitute for Senate Bill No. 83, 21 Colo. 69, 39 Pac. 1088; Printup v. Cherokee R. Co., 45 Ga. 365; Asbell v. State, 60 Kan. 51, 55 Pac. 338; Meigs v. Roberts, 42 App. Div. 290, 59 N. Y. Supp. 215. Ejectment will not lie against a state unless it is expressly so provided by statute.

People v. Dennison, 84 N. Y. 272; Bloxham v. Florida Cent. & P. Ry. Co., 35 Fla. 625, 17 So. 902; State v. Gaines, 46 La. Ann. 431, 15 So. 174; State v. Nicholls, 42 La. Ann. 209; State v. Jumel, 38 La. Ann. 337; Meigs v. Roberts, 24 Misc. 668, 54 N. Y. Supp. 214; Baine v. State, 86 N. C. 49; Lord & Polk Chemical Co. v. Board of Agriculture, 111 N. C. 135, 15 S. E. 1032. The consent of the state is necessary to an action to recover back a license tax exacted under a public act for the sale of fertilizers, the defendant being the state board of agriculture. Following North Carolina v. Temple, 134 U. S. 22, and distinguishing County Board of Education v. State Board of Education, 106 N. C. 81, 10 S. E. 1002.

Dabney v. Bank of State, 3 S. C. (3 Rich.) 124; Ex parte Dunn, 8 S. C. (8 Rich.) 207; Columbia Water Power Co. v. Columbia Elec. St. R. L. & P. Co., 43 S. C. 154, 20 S. E. 1002; Chicago, M. & St. P. R. Co. v. State, 53 Wis. 509; Houston v. State, 98 Wis. 481, 42 L. R. A. 39. But see North British & Mercantile Ins. Co. v. Craig, 106 Tenn. 621, 62 S. W. 155. See, also, Melvin v. State, 121 Cal. 16; Com. v. Tunstall, 86 Va. 372.

[9] Clodfelter v. State, 86 N. C. 51; Lyman County v. State, 9 S. D. 413, 69 N. W. 601. The word "person" as used in Laws 1890, c. 1, authorizing a person to sue the state in certain prescribed cases, includes a county as it is an organized corporate body for civil and political purposes. East Tennessee, V. & G. R. Co. v. Nashville, C. & St. L. R.

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.[10] The subject in connection with torts has already been considered.[11] Where a sovereign consents to be sued, the rule universally obtains that the terms and conditions on which the consent is given must be strictly observed.[12]

Co. (Tenn. Ch. App.) 51 S. W. 202. The state in its private capacity may be the subject of a suit.

Com. v. Dunlop, 89 Va. 431, 16 S. E. 273. See, also, Carolina Nat. Bank v. State, 60 S. C. 465, 38 S. E. 629.

[10] Rolston v. Missouri Fund Com'rs, 120 U. S. 390; North Carolina v. Temple, 134 U. S. 22; In re Tyler, 149 U. S. 191. A contempt proceedings against a state officer who has violated an order of the Federal court is not a suit against the state.

Norfolk Trust Co. v. Marye, 25 Fed. 654; Chicago & N. W. R. Co. v. Dey, 35 Fed. 866, 1 L. R. A. 744; Tuchman v. Welch, 42 Fed. 548; McConnaughy v. Pennoyer, 43 Fed. 339, distinguishing In re Ayers, 123 U. S. 443, and Hans v. Lousiana, 134 U. S. 1.

Sanford v. Gregg, 58 Fed. 620. A suit to enjoin a state officer is not a suit against the state. Tindall v. Wesley (C. C. A.) 65 Fed. 731. An action of ejectment to recover possession of land sold by a state to the plaintiff is not a suit.

Saranac Land & Timber Co. v. Roberts, 68 Fed. 521; Mills v. Green, 67 Fed. 818; Donald v. Scott, 67 Fed. 854. A suit against a constable to prevent the seizure of liquors is not a suit against the state.

Wheeler v. City of Chicago, 68 Fed. 526; Western Union Tel. Co. v. Henderson, 68 Fed. 588. An injunction proceeding to restrain the state auditor acting under an unconstitutional act is not a suit against the state. City of Terre Haute v. Farmers' Loan & Trust Co. (C. C. A.) 99 Fed. 838. Injunction proceedings "to enjoin the opening of a street" is not a suit against the state within the meaning of the prohibition of the constitution of Indiana.

Kruger v. Life & Annuity Ass'n, 106 Cal. 98, 39 Pac. 213; State v. Lanier, 47 La. Ann. 110, 16 So. 647. An action against a state officer to compel the issue of a land patent is in effect a suit against the state which cannot be prosecuted without its consent. See, also, article 30 Am. Law Reg. (N. S.) 1, by A. H. Wintersteen discussing the question of what is or what is not a suit against a state considered with reference to the Eleventh Amendmnt.

[11] State v. Hill, 54 Ala. 67; Murdock Parlor Grate Co. v. Com., 152 Mass. 28, 24 N. E. 854, 8 L. R. A. 399. See, also, §§ 953 et seq., ante.

[12] Gilman v. Contra Costa County, 6 Cal. 676; Randolph County v. Ralls, 18 Ill. 29; Rock Island County v. Steele, 31 Ill. 543; State v. Pinckney, 22 S. C. 484; Com. v. Dunlop, 89 Va. 431, 16 S. E. 273; Dunnington v. Ford, 80 Va. 177.

§ 1150. 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,[13] to be sued and sue in the same manner and to the same effect as a private person under the same conditions.[14] For a liability to exist on account of actions arising in tort, statutory provisions are necessary to create the same; as these are strictly construed, a liability can only arise under the conditions and in the manner prescribed. The subject of liability for torts, has already been considered.[15]

[13] Vincent v. County of Lincoln, 30 Fed. 749; Randolph County v. Hutchins, 46 Ala. 397; Whittaker v. Tuolumne County, 96 Cal. 100, 30 Pac. 1016; Monroe County v. Flynt, 80 Ga. 489, 6 S. E. 173; Ward v. Appling County, 80 Ga. 662, 6 S. E. 914; Talbot County v. Mansfield, 115 Ga. 766, 42 S. E. 72; County of Rock Island v. Steele, 31 Ill. 543; Bank of Hopkinsville v. Western Kentucky Asylum for Insane, 108 Ky. 357, 56 S. W. 525; Ayres v. Thurston County, 63 Neb. 96, 88 N. W. 178; Doolittle v. Town of Walpole, 67 N. H. 554, 38 Atl. 19; Erhard v. Kings County, 36 N. Y. Supp. 656. A county cannot, by consent or inaction, validate an action against it on claims, by law, not enforceable against it.

Granville County Board of Education v. State Board of Education, 106 N. C. 81; State v. Baker County, 24 Or. 141, 33 Pac. 530. But see Lattin v. Town of Oyster Bay, 34 Misc. 568, 70 N. Y. Supp. 386.

[14] McCoy v. Washington County, 3 Wall. Jr. 381, Fed. Cas. No. 8,731; Lowndes County v. Hunter, 49 Ala. 507; Payne v. Washington County, 25 Fla. 798, 6 So. 881; Commissioners of Roads & Revenues v. Hurd, 49 Ga. 462; Warwick County Com'rs v. Butterworth, 17 Ind. 129; 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; Polk v. Tunica County Sup'rs, 52 Miss. 422; Shepard v. Easterling, 61 Neb. 882, 86 N. W. 941; Ayres v. Thurston County, 63 Neb. 96, 88 N. W. 178; Brown v. City of New York, 66 N. Y. 385. Action of dispossession authorized for nonpayment of rent.

Winslow v. Perquimans County Com'rs, 64 N. C. 218. But see Greer County Com'rs v. Watson, 7 Okl. 174, 54 Pac. 441. In respect to liability of county for witness' fees in a criminal case in the absence of a statute imposing it. Fuller v. Brown, 10 Tex. Civ. App. 64, 30 S. W. 506; Ratliff v. County Ct., 33 W. Va. 94, 10 S. E. 28.

[15] Madden v. Lancaster County (C. C. A.) 65 Fed. 188; Layman v. Beeler, 24 Ky. L. R. 174, 67 S. W. 995; Jones v. Franklin County Com'rs, 130 N. C. 451, 42 S. E. 144; White's Creek Turnpike Co. v. Davidson County, 82 Tenn. (14 Lea)

§ 1151. Subject of liability further considered.

It is a familiar maxim of the law that there is no wrong without a remedy and this has been applied to all public corporations other than the state. It is also a well known principle that courts of justice in this country are open for the protection of the citizen against those acting under governmental authority and without due process of law, for, as said by the supreme court of the United States:[16] "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." The further condition is well established that all subordinate public corporations are bodies of restricted powers and that in many cases they, through their officers and agents, act in excess of their powers and commit wrongs, to correct or prevent which remedies are always open in some court to one who may be injuriously affected or damaged by them.[17] The remedies of mandamus,[18] quo warranto,[19] certiorari,[20] and injunction,[21] and the occasions upon which they or some one or more of them are available have already been considered and pointed out.

§ 1152. Prohibition.

In addition to other remedies the writ of prohibition is sometimes used as a specific remedy for a distinct species of wrong and

73; Fry v. Albermarle County, 86 Va. 195, 9 S. E. 1004. See §§ 954 et seq., ante.

[16] United States v. Lee, 106 U. S. 196.

[17] Dunham v. Village of Hyde Park, 75 Ill. 371. Proceedings to enjoin village authorities from widening a street. Brush v. City of Carbondale, 78 Ill. 74. Bill to enjoin city authorities from tearing up and replacing a sidewalk.

Wilkins v. City of New York, 9 Misc. 610, 30 N. Y. Supp. 424; North British & Mercantile Co. v. Craig, 106 Tenn. 621, 62 S. W. 155; Blue Jackson Consol. Copper Co. v. Scherr, 50 W. Va. 533, 40 S. E. 514.

State officers who, under the color of the authority of unconstitutional state legislation, are guilty of personal trespass and wrongs may be sued although the constitution provides that the state shall neither be made defendant in any suit at law or in equity.

[18] People v. Roberts, 157 N. Y. 677, 51 N. E. 1093. A state cannot be compelled by mandamus to apply certain funds in its hands to the payment of taxes of a citizen. See, also, §§ 1107 et seq., ante.

[19] See §§ 1140 et seq., ante.

[20] See §§ 1122 et seq., ante.

[21] See §§ 1128 et seq., ante.

is issued because of the absence or the inadequacy of ordinary ones. It has been defined [22] 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.[23]

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,[24] or where the corporation has been guilty of some act through or by which a public nuisance has been created.[25]

[22] Spelling, Injunctions (2d Ed.) § 1716.

[23] Smith v. Whitney, 116 U. S. 167; Ex parte Williams, 4 Ark. 537; State v. Young, 29 Minn. 474; Clayton v. Heidelberg, 17 Miss. (9 Smedes & M.) 623; Ward v. Kelsey, 14 Abb. Pr. (N. Y.) 106; State v. City of Columbia, 16 S. C. 412. Spelling, Injunctions (2d Ed.) §§ 716 et seq. But see Corporation of Bluffton v. Silver, 63 Ind. 262. Proper remedy to prevent execution of contract for construction of sidewalk held to be injunction, not prohibition. See, also, the following cases where the writ was refused: People v. Election Com'rs, 54 Cal. 404; Spring Valley Waterworks v. Bartlett, 63 Cal. 245. Proceeding to restrain board of supervisors from fixing water rates. La Croix v. Fairfield County Com'rs, 50 Conn. 321. To prohibit grant of. People v. Lake County Dist. Ct., 6 Colo. 534. Investigation of charges against city solicitor. Casby v. Thompson, 42 Mo. 133; Hunter v. Moore, 39 S. C. 394, 17 S. E. 797.

[24] Com. v. Town of Hopkinsville, 46 Ky. (7 B. Mon.) 38; State v. City of Bangor, 30 Me. 341; State v. Inhabitants of Gorham, 37 Me. 451; Davis v. City of Bangor, 42 Me. 522; State v. Town of Northumberland, 44 N. H. 628; Easton & A. R. Co. v. Inhabitants of Greenwich, 25 N. J. Eq. (10 C. E. Green) 565; Com. v. Lansford Borough, 3 Pa. Dist. Rep. 365; Pittsburgh, V. & C. R. Co. v. Com., 101 Pa. 192; State v. Town of Cumberland, 7 R. I. 75; State v. Town of Whittingham, 7 Vt. 390; State v. Town of Alburgh, 23 Vt. 262. Thomp. Neg. §§ 6369 et seq. See, also, Nowlin v. State, 49 Ala. 41.

[25] 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; Phillips v. Com., 44 Pa. 197; State v. Shelbyville Corp., 36 Tenn. (4 Sneed) 176; State v. Town of Burlington, 36 Vt. 521; Town of Saukville v. State, 69 Wis. 178. See § 961, note 50.

§ 1153. 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.[26] The rule of nonexemption would embarass public 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.[27] 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.[28] On the other hand, a few cases have held to the rule of nonexemption.[29] A Montana case in discussing this

[26] Columbia Brick Co. v. District of Columbia, 1 App. D. C. 351; Clark v. Mobile School Com'rs, 36 Ala. 621; McMeekin v. State, 9 Ark. 553; Boone County v. Keck, 31 Ark. 387; Mesa County Com'rs v. Brown, 6 Colo. App. 43; Gann v. Mineral County Com'rs, 6 Colo. App. 484, 41 Pac. 829; Lewis v. City of Denver, 9 Colo. App. 328, 48 Pac. 317. Salary of public officer exempt.

Stermer v. La Plata County Com'rs, 5 Colo. App. 379, 38 Pac. 839; Dotterer v. Bowe, 84 Ga. 769, 11 S. E. 896; Born v. Williams, 81 Ga. 796; Bank of South Western Georgia v. City of Americus, 92 Ga. 361, 17 S. E. 287; Merwin v. City of Chicago, 45 Ill. 133; Triebel v. Colburn, 64 Ill. 376; Wallace v. Sawyer, 54 Ind. 501; Jenks v. Osceola Tp., 45 Iowa, 554; Switzer v. City of Wellington, 40 Kan. 250; First Nat. Bank v. City of Ottawa, 43 Kan. 294, 23 Pac. 485; Wild v. Ferguson, 23 La. Ann. 752; Keyser v. Rice, 47 Md. 203; Dewey v. Garvey, 130 Mass. 86; School Dist. No. 4 v. Gage, 39 Mich. 484; Clarksdale Compress Co. v. W. R. Caldwell Co., 80 Miss. 343, 31 So. 790; Hawthorne v. City of St. Louis, 11 Mo. 59; Fortune v. City of St. Louis, 23 Mo. 239; People v. City of Omaha, 2 Neb. 166; Bliss v. Lawrence, 58 N. Y. 442; Boalt v. Williams County Com'rs, 18 Ohio, 13; City of Erie v. Knapp, 29 Pa. 173; Wilson v. Lewis, 10 R. I. 285; Moore v. City of Chattanooga, 55 Tenn. (8 Heisk.) 850; Herring-Hall-Marvin Co. v. Bexar County, 16 Tex. Civ. App. 673, 40 S. W. 145; City of Dallas v. Western Elec. Co., 83 Tex. 243, 18 S. W. 552; Merrell v. Campbell, 49 Wis. 535. But see City of Denver v. Brown, 11 Colo. 337, 18 Pac. 214; Bailie v. Mosher, 72 Ga. 740. See, also, Shinn, Attachment, §§ 500 et seq.

[27] McDougal v. Hennepin County Sup'rs, 4 Minn. (Gil. 130) 184. See, also, Roeller v. Ames, 33 Minn. 132.

[28] Briscoe v. Bank of Ky., 11 Pet. (U. S.) 257; Las Anamas County Com'rs v. Bond, 3 Colo. 411; Clapp v. Walker, 25 Iowa, 315.

[29] City Council of Montgomery v. Van Dorn, 41 Ala. 505; City of Denver v. Brown, 11 Colo. 337, 18 Pac.

doctrine said:[30] "By garnishment the waterworks, fire engines, public buildings and revenues of the corporation are not seized. The corporation is simply required to hold, and finally pay over, a sum of money or property, in which it has no interest, to one person rather than another. It's business is not interrupted; its property is not touched; its functions are not deranged. * * * We cannot agree that there is any reason why the great public duties of a county need be imperfectly performed. * * * The county has no suit to defend, no counsel to employ, no witnesses to collect and pay. It has no burden cast upon it, and no duty to perform, except to act as temporary stake holder, to await the determination of a court, in an action in which the county has no interest." The latter rule, it seems to the author, is the better one since any fancied interruption to public business is not sufficiently serious to warrant the public corporation in protecting an officer or employe refusing to pay legitimate claims against him.

§ 1154. 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,[31] 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,[32] and in the man-

214; McLoud v. Selby, 10 Conn. 390; Adams v. Tyler, 121 Mass. 380; Whalen v. Harrison, 11 Mont. 63, 27 Pac. 384; Jersey City v. Horton, 38 N. J. Law, 88; City of Newark v. Funk, 15 Ohio St. 462; Wilson v. Lewis, 10 R. I. 285; Herring-Hall-Marvin Co. v. Bexar County, 16 Tex. Civ. App. 673, 40 S. W. 145; Portsmouth Gas Co. v. Sanford, 97 Va. 124, 33 S. E. 516, 45 L. R. A. 246.

[30] Waterbury v. Deer Lodge County Com'rs, 10 Mont. 515, 26 Pac. 1002.

[31] McLendon v. Anson County Com'rs, 71 N. C. 38. See, also, §§ 484 et seq., ante.

[32] Owen v. City of Ft. Dodge, 98 Iowa, 281; 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; Merz v. City of Brooklyn, 11 N. Y. Supp. 778. Holding that the legislature requires such a condition and also

ner prescribed by law,[33] 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.[34] A liability to state the principle in another way is made dependent upon the giving of notice. This, it has been held, is jurisdictional,[35] and no right of action can accrue unless the provisions of the statute

provides a limitation of one year for actions of the kind designated.

Borst v. Town of Sharon, 24 App. Div. 599, 48 N. Y. Supp. 996; Barry v. Village of Port Jervis, 64 App. Div. 268, 72 N. Y. Supp. 104. Charter provisions requiring notice to be filed within forty-eight hours after cause of action has accrued is unconstitutional under Const. art. 8, § 3, art. 1, § 6, and Const. U. S. Amend. art. 14.

Whalen v. Bates, 19 R. I. 274; Lawton v. Town of Weathersfield, 74 Vt. 41, 51 Atl. 1062; Sproul v. City of Seattle, 17 Wash. 256; Gutkind v. City of Elroy, 97 Wis. 649, 73 N. W. 325; Daniels v. City of Racine, 98 Wis. 649, 74 N. W. 553; Harris v. City of Fond du Lac, 104 Wis. 44, 80 N. W. 66. Charter provisions as to notice controls rather than general statute. See, also, Oklahoma City v. Hill, 4 Okl. 521.

[33] Griswold v. City of Ludington, 116 Mich. 401, 74 N. W. 663. Claim filed must be verified as required by law.

Kennedy v. City of New York, 18 Misc. 303, 41 N. Y. Supp. 1077; Sheehy v. City of New York, 29 App. Div. 263, 51 N. Y. Supp. 519, reversed 160 N. Y. 139, 54 N. E. 749. A notice must contain a statement "of an intention to commence an action." An allegation that the persons filing the notice "claims and demands" a specified sum is insufficient.

Spencer v. Town of Sardinia, 42 App. Div. 472, 59 N. Y. Supp. 412. Sufficiency of notice. Place v. City of Yonkers, 43 App. Div. 380, 60 N. Y. Supp. 171. Sufficiency of notice considered. See, also, §§ 1037 and 1061 et seq., ante.

[34] Dean v. Town of Sharon, 72 Conn. 667, 45 Atl. 963; Angell v. West Bay City, 117 Mich. 685, 76 N. W. 128; Davis v. Town of Rumney, 67 N. H. 591, 38 Atl. 18; Morgan v. City of Lewiston, 91 Me. 566, 40 Atl. 545. A notice under Rev. St. c. 18, § 80, need not specify the damages or state the amount claimed.

White v. City of New York, 15 App. Div. 440, 44 N. Y. Supp. 454; Learned v. City of New York, 21 Misc. 601, 48 N. Y. Supp. 142. A complaint is properly dismissed when it is shown that the notice states incorrectly the place of injury.

City of Ft. Worth v. Shero, 16 Tex. Civ. App. 487, 41 S. W. 704. See, also, §§ 1037 and 1061 et seq., post.

[35] Pardey v. Town of Mechanicsville, 101 Iowa, 266, 70 N. W. 189; Harvey v. City of Clarinda, 111 Iowa, 528, 82 N. W. 994, construing Code, § 1051, as applying to different classes.

Bausher v. City of St. Paul, 72 Minn. 539, 75 N. W. 745; Stanyon v.

have been complied with both in respect to the time and manner of the service of the notice and its form.[36]

§ 1155. Same subject; filing of claim.

In other states the filing of the claim, which is the basis of the proposed action,[37] with designated officials[38] at a time pre-

Town of Peterborough, 69 N. H. 372, 46 Atl. 191; Hamilton v. City of Buffalo, 55 App. Div. 423, 66 N. Y. Supp. 990. Requirement to file notice may be waived by the city. Werner v. City of Rochester, 149 N. Y. 563, 44 N. E. 300. No notice is required as a condition precedent to recovery for injuries to property.

[36] Webster v. City of Beaver Dam, 84 Fed. 280. But where an injured person is rendered incapable by the accident of serving such a notice, it is sufficient if it is filed and served as soon as the injured one is able. Barcley v. City of Boston, 173 Mass. 310, 53 N. E. 822. The physical ability of the person injured to give the notice within the time required is a question for the jury.

Blumrich v. Highland Park, 131 Mich. 209, 91 N. W. 129; Roberts v. Village of St. James, 76 Minn. 456, 79 N. W. 519. Service on the recorder is sufficient. Kelly v. City of Minneapolis, 77 Minn. 76, 79 N. W. 653. Notice is sufficient if served on the assistant city clerk. Dawson v. City of Troy, 49 Hun, 322, 2 N. Y. Supp. 137. Service of summons and complaint on mayor not sufficient. McMahon v. City of New York, 1 App. Div. 321, 37 N. Y. Supp. 289. Notice of intention is sufficiently served by being delivered to the assistant city counsel.

Kellogg v. City of New York, 15 App. Div. 326, 44 N. Y. Supp. 39; Krall v. City of New York, 44 App. Div. 259, 60 N. Y. Supp. 661; De Vore v. City of Auburn, 64 App. Div. 84, 71 N. Y. Supp. 747; Missano v. City of New York, 160 N. Y. 123, 54 N. E. 744. The fact that the legal authority for the notice is wrongly stated does not invalidate it.

Maloney v. Cook, 21 R. I. 471, 42 Atl. 692; Seamons v. Fitts, 21 R. I. 236, 42 Atl. 863. Service on the town treasurer insufficient. City of Ft. Worth v. Shero, 16 Tex. Civ. App. 487, 41 S. W. 704. Notice to city secretary insufficient. Parsons v. City of Ft. Worth, 26 Tex. Civ. App. 273, 63 S. W. 889.

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. 383. But see Peacock v. City of Dallas, 89 Tex. 438, 35 S. W. 8. See, also, Ward v. City of Troy, 55 App. Div. 192, 66 N. Y. Supp. 925. See §§ 1037 and 1061 et seq., ante.

[37] City of Wyandotte v. White, 13 Kan. 191; 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. The demand required by Code, § 757, before suing a municipal corporation,

scribed,[39] 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,[39a] but many cases hold otherwise.[40] The purpose of such a provision is evidently to permit an examination

is not necessary before bringing mandamus to enforce a judgment against the corporation.

Luzerne County v. Day, 23 Pa. 141; Morgan v. City of Rhinelander, 105 Wis. 138, 81 N. W. 132. But see Skinner v. Cowley County Com'rs, 63 Kan. 557, 66 Pac. 635; State v. Assmann, 46 S. C. 554, 24 S. E. 673; Short v. Civil Tp. of White Lake, 8 S. D. 148, 65 N. W. 432; Auerbach v. Salt Lake County, 23 Utah, 103, 63 Pac. 907. See, also, § 484 et seq., ante.

[38] Mobile County v. Sands, 127 Ala. 493, 29 So. 261; Valcourt v. City of Providence, 18 R. I. 160, 26 Atl. 45; Norwood v. Gonzales County, 79 Tex. 218, 14 S. W. 1057; Kraft v. City of Madison, 98 Wis. 252, 73 N. W. 775. But see State v. Pennington County, 13 S. D. 430, 83 N. W. 563.

[39] Thoeni v. City of Dubuque, 115 Iowa, 482, 88 N. W. 967. Such a statute will not be given a retroactive operation. Carroll v. Police of Tishamingo County, 28 Miss. 38. Unless the intention of the legislature be clear such a law will have a prospective action only. Hendry v. North Hampton, 71 N. H. 26, 51 Atl. 283. Considering Pub. St. c. 76, § 9, which allows an injured person who is prevented from filing his claim within the time prescribed to be heard on petition to the supreme court to be allowed to file it within six months of the injury if it appears that manifest injustice would otherwise be done. This is a question of fact.

Jewell v. City of Ithaca, 72 App. Div. 220, 76 N. Y. Supp. 126; Born v. City of Spokane, 27 Wash. 719, 68 Pac. 386. Physical or mental disability may excuse a literal compliance with the time limitation. Welsh v. Town of Argyle, 85 Wis. 307, 55 N. W. 412; Groundwater v. Town of Washington, 92 Wis. 56, 65 N. W. 871.

[39a] Haggard v. City of Carthage, 168 Mo. 129, 67 S. W. 567; Dovey v. City of Plattsmouth, 52 Neb. 642, 73 N. W. 11. The statute only applies in actions for negligence.

Champion v. Sessions, 1 Nev. 478; McDonough v. City of New York, 15 Misc. 593, 37 N. Y. Supp. 1; Quinn v. City of New York, 68 App. Div. 175, 74 N. Y. Supp. 89; 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; Kelley v. City of Madison, 43 Wis. 638; Bradley v. City of Eau Claire, 56 Wis. 168. See, also, Bausher v. City of St. Paul, 72 Minn. 539, 75 N. W. 745; Angell v. City of West Bay City, 117 Mich. 685, 76 N. W. 128. Section 980, ante.

[40] Barbour County v. Horn, 41 Ala. 114; Bancroft v. City of San Diego, 120 Cal. 432, 52 Pac. 712; Adams v. City of Modesto (Cal.) 61 Pac. 957; Springer v. City of Detroit, 118 Mich. 69, 76 N. W. 122; Pulitzer v. City of New York, 48 App. Div. 6, 62 N. Y. Supp. 587.

of the claim by the proper officials, and if meritorious, its audit, allowance and payment in a regular manner and without unnecessary expense.[41] The subject of claims has already been discussed in previous sections.[42] A compliance with the statutes is essential to the creation of a liability,[43] and this involves an application of the principle of strict construction in connection with the form in which the claim may be filed [44] and the time of its presentment.[45]

§ 1156. Service of process.

A legal judgment can only be obtained where the court has jurisdiction not only of the subject-matter but also of the parties. Where a right of action exists as against public corporations, it is essential to the rendition of a legal judgment that the court obtain jurisdiction of the defendant through the service of pro-

Section 261 of the charter of greater New York applies to actions against the city ex delicto; disapproving Harrigan v. City of Brooklyn, 119 N. Y. 156, 23 N. E. 741, and McDonough v. City of New York, 15 Misc. 593, 37 N. Y. Supp. 1.

Jewell v. City of Ithaca, 72 App. Div. 220, 76 N. Y. Supp. 126; Luke v. City of El Paso (Tex. Civ. App.), 60 S. W. 363; Welsh v. Town of Argyle, 85 Wis. 307, 55 N. W. 412; Flieth v. City of Wausau, 93 Wis. 446, 67 N. W. 731. But see City of Salina v. Kerr, 7 Kan. App. 223, 52 Pac. 901.

[41] Eppig v. City of New York, 57 App. Div. 114, 68 N. Y. Supp. 41; McLendon v. Anson County Com'rs, 71 N. C. 38; Brown v. Fleischner, 4 Or. 132.

[42] See §§ 484 et seq., ante.

[43] Barrett v. City of Mobile, 129 Ala. 179, 30 So. 36; Yolo County v. City of Sacramento, 36 Cal. 193; City of Hutchinson v. Van Cleve, 7 Kan. App. 676, 53 Pac. 888. Allowance of costs. Adams v. City of Modesto (Cal.) 61 Pac. 957; Eisenmenger v. St. Paul Water Board, 44 Minn. 457, 47 N. W. 156; City of Lincoln v. Grant, 38 Neb. 369, 56 N. W. 995; City of Hastings v. Foxworthy, 45 Neb. 676, 63 N. W. 955, 34 L. R. A. 321; Reining v. City of Buffalo, 102 N. Y. 308; Hohman v. Comal County, 34 Tex. 36; Flieth v. City of Wausau, 93 Wis. 446, 67 N. W. 731; O'Connor v. City of Fond du Lac, 109 Wis. 253, 85 N. W. 327, 53 L. R. A. 831; Steltz v. City of Wausau, 88 Wis. 618, 60 N. W. 1054.

[44] Rhoda v. Alameda Co., 69 Cal. 523, 11 Pac. 57; Johnson v. City of Troy, 24 App. Div. 602, 48 N. Y. Supp. 998. But see Taylor v. Canyon County, 7 Idaho 171, 61 Pac. 521.

[45] Selden v. Village of St. Johns, 114 Mich. 698, 72 N. W. 991. A statute is not waived by the introduction of testimony to meet the plaintiff's case. Arthur v. Village of Glens Falls, 66 Hun, 136, 21 N. Y. Supp. 81.

cess strictly in the manner provided by law.[46] Certain officials or agents of the corporation may be designated as those on whom process can be legally served.[47] It necessarily follows that if a judgment is based upon service in a manner or upon an official not thus designated, it cannot be enforced.[48]

§ 1157. Taxpayer's actions.

The greater number of causes of actions against public corporations arise through the exercise by them of their powers in respect to taxation or the expenditure of public moneys raised through taxation. The principle suggested in a previous section [49] applies with great force here and, as has been said by an eminent author:[50] "In one of the early chapters of this work reference was made to the fundamental principle of constitutional right that no one shall be deprived of his property except by the law of the land, or, as it is sometimes expressed, by due process of law; and it is was said that this principle was as much applicable in tax cases as in any others. It was also said, in substance, that however summary and apparently arbitrary may be the methods and processes in the levy and enforcement of taxes, they cannot deprive the citizen, when his property is taken * * * of a trial of the right to take it, before some impartial tribunal, to which the public authorities must justify their proceedings." The same author, however, after a full discussion of the remedies for wrongful action in tax proceedings, said as follows:[51] "It will be apparent from what has appeared in this chapter, that many serious errors may be committed and many wrongs done in the

[46] City of North Lawrence v. Hoysradt, 6 Kan. 170. Service of process may be waived by the corporation. Lucky v. Police Jury of Bienville, 46 La. Ann. 679.

[47] Kane County Sup'rs v. Young, 31 Ill. 194; Carr v. Belton School Dist., 42 Mo. App. 154; Inhabitants of Phillipsburg v. Raub, 37 N. J. Law, 48; Cooper v. Borough of Cape May Point, 67 N. J. Law 437, 51 Atl. 511; Loughran v. City of Hickory, 129 N. C. 281, 40 S. E. 46; Altman v. School Dist., 35 Or. 85, 56 Pac. 291.

[48] Gross v. Sioux County, 2 Dill. 509, Fed. Cas. No. 5,842; City of Waverly v. Auditor of Public Accounts, 100 Ill. 354. Both parties should be within the jurisdiction of the court. Vogel v. Brown Tp., 112 Ind. 299, 14 N. E. 77.

[49] See § 1151, ante.

[50] Cooley, Taxation (2d Ed.) p. 746.

[51] Cooley, Taxation (2d Ed.) p. 823.

exercise of the power to tax, which the parties wronged must submit to, because the law can afford them no redress whatever. All injuries which result from an exercise of political or legislative authority are to be included in this category; and these are often the most serious which, in matters of taxation, the people are visited with. In all such cases, the authority of the judiciary is confined to an inquiry into the jurisdictional question, and if it appears that the political or legislative body has kept within the limits of its authority, the judiciary must pause there, and admit its incompetency to inquire into wrongs which, within those limits, may have been committed. * * * Courts of equity have but a limited jurisdiction, extending to few cases besides those in which the impelling motive on the part of the assessors has been to do injustice and inflict injury. The chief protection of the citizen must at last be sought in the intelligence and integrity of public officers, and where these fail, as too often they do, the injury must frequently prove irreparable." 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.[52] In previous sections [53] 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,[54] a debt incurred,[55] or a tax

[52] Cason v. City of Lebanon, 153 Ind. 567, 55 N. E. 768; Holliday v. Hilderbrandt, 97 Iowa, 177, 66 N. W. 89. Action to enjoin payment of and cancel certain bonds of a school district. Dorothy v. Pierce, 27 Or. 373, 41 Pac. 668; Mauldin 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; Lynn v. Polk, 76 Tenn. (8 Lea) 121; Nalle v. City of Austin (Tex. Civ. App.) 21 S. W. 375; Board v. Texas & P. R. Co., 46 Tex. 316; McVichie v. Town of Knight, 82 Wis. 137, 51 N. W. 1094.

[53] See §§ 415 et seq.

[54] Rockefeller v. Taylor, 69 App. Div. 176, 74 N. Y. Supp. 812, reversing 28 Misc. 460, 59 N. Y. Supp. 1038. See, also, §§ 1131 and 1133, ante.

[55] Crampton v. Zabriskie, 101 U. S. 601. "Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property holders of the county may otherwise be compelled to pay, there is at this day no serious question." Bradford v. City and County of San Francisco,

levied,[56] 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 [57] or the power of taxation irregularly exercised.[58] A taxpayer also has the undoubted right to prevent the misappropriation of the proceeds of a tax levied for a special purpose.[59] Property exempt from taxation may, by public officers, be made subject to burdens not legally imposed upon it.[60] 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.[61] In all of these cases a taxpayer is entitled to a remedy for the correction of the wrong. The one ordinarily used is the writ of injunction and a reference is made

112 Cal. 537, 44 Pac. 912; Wright v. Dunham, 13 Mich. 414; Union Pac. R. Co. v. Dawson County, 12 Neb. 254; Moore v. School Directors of Clearfield, 59 Pa. 232.

[56] Jager v. Doherty, 61 Ind. 528; Bittinger v. Bell, 65 Ind. 445. Cooley, Taxation (2d Ed.) p. 764.

[57] Chicago, M. & St. P. R. Co. v. Phillips, 111 Iowa, 377, 82 N. W. 787; Winkler v. Halstead, 36 Mo. App. 25.

[58] Cleveland, P. & A. R. Co. v. Pennsylvania, 882 U. S. (15 Wall.) 300; Davidson v. City of New Orleans, 96 U. S. 97; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701; Davis v. City of Clinton, 55 Iowa, 549; Howe v. City of Cambridge, 114 Mass. 388; Parrotte v. City of Omaha, 61 Neb. 96, 84 N. W. 602. But see Union Pac. R. Co. v. Dodge County Com'rs, 98 U. S. 541. Cooley, Taxation (2d Ed.) p. 750. "For a merely irregular assessment the statutory remedy is also the exclusive remedy. It is supposed to be adequate to all the requirements of justice, and it is the party's own folly if he fails to avail himself of it." Citing many cases.

[59] Maenhaut v. City of New Orleans, 2 Woods, 108, Fed. Cas. No. 8,929; Board of Liquidation v. McComb, 92 U. S. 531; Sleight v. People, 74 Ill. 47; Hospers v. Wyatt, 63 Iowa, 264; National Bank of Lawrence v. Barber, 24 Kan. 534; Osterhoudt v. Rigney, 98 N. Y. 222; Dean v. Lufkin, 54 Tex. 266; State v. Haben, 22 Wis. 660. Cooley, Taxation (2d Ed.) pp. 766, 767. But see State v. Cobb, 8 S. C. (8 Rich.) 123; State v. Leaphart, 11 S. C. 458.

[60] United States v. Lee, 106 U. S. 196; Secor v. Singleton, 35 Fed. 376; Kimball v. Merchants' Sav., Loan & Trust Co., 89 Ill. 611; Com. v. Colley Tp. Sup'rs, 29 Pac. 121; Phelan v. Smith, 22 Wash. 397, 51 Pac. 31.

[61] Gage v. Graham, 57 Ill. 144; Union Trust Co. v. Weber, 96 Ill. 346; Morrison v. Wasson, 79 Ind. 477; Bristol v. Johnson, 34 Mich. 123; Horn v. Town of New Lots, 83 N. Y. 100; Weber v. Dillon, 7 Okl. 568, 54 Pac. 894; St. Clair School Board's Appeal, 74 Pa. 252. 2 Desty, Taxation, p. 607.

to the sections treating this subject.[62] Other remedies open to the taxpayer are statutory provisions having for their purpose an abatement of the tax, its review by certain designated administrative bodies, or the special remedies of certiorari,[63] mandamus [64] or prohibition which have been already considered in previous sections. 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,[65] although this rule is relaxed in connection with the levy and collection of municipal taxes.[66]

§ 1158. 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,[67] or to restrain the diversion or mis-

[62] Bush v. Coler, 60 App. Div. 56, 69 N. Y. Supp. 770. Sufficiency of pleading. Nalle v. City of Austin (Tex. Civ. App.) 21 S. W. 375; Nevil v. Clifford, 55 Wis. 161; Beyer v. Town of Crandon, 98 Wis. 306, 73 N. W. 771. Sections 1128 et seq., ante.

[63] Cunningham v. Borough of Merchantville, 61 N. J. Law, 466, 39 Atl. 639. Writ refused on the ground of laches. Sections 1122 et seq., ante.

[64] Sections 1107 et seq., ante.

[65] Allen v. Baltimore & O. R. Co., 114 U. S. 311; City of Montgomery v. Sayre, 65 Ala. 564; Floyd v. Gilbreath, 27 Ark. 675; Town of Lemont v. Singer & T. Stone Co., 98 Ill. 94; Stilz v. City of Indianapolis, 81 Ind. 582; South Platte Land Co. v. Crete, 11 Neb. 344, 7 N. W. 859; Covington v. Town of Rockingham, 93 N. C. 134; Willard v. Comstock, 58 Wis. 565.

[66] State Railroad Tax Cases, 92 U. S. 575. "Whether the same rigid rule should be applied to taxes levied by counties, towns, and cities, we need not here inquire; but there is both reason and authority for holding that the control of the courts, in the exercise of power over private property by these corporations, is more necessary, and is unaccompanied by many of the evils that belong to it when affecting the revenue of the state."

[67] Chamberlain v. City of Tampa, 40 Fla. 74, 23 So. 572; Knight v. Village of Thompsonville, 74 Ill. App. 550. Suit may be brought by a taxpayer to recover property belonging to a corporation which has been disposed of without authority of law. Hutchinson v. Skinner, 21 Misc. 729, 49 N. Y. Supp. 360. Proper parties to such an action considered. Lee v. Jefferson County Sup'rs, 62 How. Pr. (N. Y.) 201. A taxpayer, however, cannot through his statutory rights litigate questions already adjudicated.

Bush v. Coler, 60 App. Div. 56, 69 N. Y. Supp. 770; Furey v. Town of Gravesend, 104 N. Y. 405. One

appropriation 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.[68] This right in some states is definitely given by statute.[69]

Prevention of illegal contract. 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 [70] 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.[71]

§ 1159. 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

not a resident and therefore having no interest in the common lands of the town has no standing in court in an action to restrain the town from disposing of them.

Peppard v. City of Cincinnati, 6 Ohio N. P. 57. But see People v. New York & M. B. R. Co., 84 N. Y. 565.

[68] McIntyre v. El Paso County Com'rs, 15 Colo. App. 78, 61 Pac. 237. Use for another purpose of land dedicated for a city park can be enjoined.

Rutherford v. Taylor, 38 Mo. 315; Lawrence v. City of New York, 2 Barb. (N. Y.) 577; Wenk v. City of New York, 36 Misc. 496, 73 N. Y. Supp. 1003. See, also, §§ 815, 816, 1133 and 1135, ante. But see Smith v. Heuston, 6 Ohio, 101.

[69] Paul v. City of New York, 46 App. Div. 69, 61 N. Y. Supp. 570; Barnes v. McGuire, 33 Misc. 438, 68 N. Y. Supp. 485.

[70] Mock v. City of Santa Rosa, 126 Cal. 330, 58 Pac. 826; City of Louisville v. Gosnell, 22 Ky. L. R. 1524, 60 S. W. 411; Grand Island Gas Co. v. West, 28 Neb. 852, 45 N. W. 242; Terry v. Gleason, 21 Misc. 368, 47 N. Y. Supp. 741; Van Allen v. Dunton, 24 Misc. 230, 52 N. Y. Supp. 626; Feeley v. Wurster, 25 Misc. 544, 54 N. Y. Supp. 1060; Knowles v. City of New York, 37 Misc. 195, 75 N. Y. Supp. 189; Hendrickson v. City of New York, 160 N. Y. 144, 54 N. E. 680, affirming 38 App. Div. 480, 56 N. Y. Supp. 580; Pugh v. Edison Elec. Light Co., 19 Ohio Circ. R. 594. Taxpayers may, by laches, forfeit their right to equitable relief in such a case. City of Defiance v. Council of Defiance, 23 Ohio Circ. R. 96; Siegel v. Town of Liberty, 111 Wis. 470, 87 N. W. 487.

[71] Talcott v. City of Buffalo, 57 Hun, 43, 10 N. Y. Supp. 370; Adamson v. Union R. Co., 74 Hun, 3, 26 N. Y. Supp. 136; Norris v. Wurster, 23 App. Div. 124, 48 N. Y. Supp. 656; Barhite v. Home Tel. Co., 50 App. Div. 25, 63 N. Y. Supp. 659. See, also, State v. Murphy, 134 Mo.

generally a matter of statute where the necessary procedure is prescribed.[72] The right, whether statutory or otherwise, is depenent upon the existence of certain fundamental essentials which include as the important ones the condition that the tax must be utterly illegal and void;[73] that it must have been paid by the complainant under compulsion[74] to some official charged by law with the duty of collecting it, and received by the corporation from which it is sought to be recovered,[75] and that the plaintiff is not prevented through a previous election of remedies from prosecuting the action under consideration.

548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132. A municipal corporation is not estopped from denying the validity of a contract ultra vires.

[72] 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.

[73] Rogers v. Inhabitants of Greenbush, 58 Me. 390; Wright v. City of Boston, 63 Mass. (9 Cush.) 233; Hicks v. Inhabitants of Westport, 130 Mass. 478; Moore v. City of Albany, 98 N. Y. 396. Cooley, Taxation (2d Ed.) p. 808. "Irregular action does not necessarily injure the parties concerned; and where it does, the remedies given by review or repeal are supposed to afford full redress. Any further remedy must proceed upon the idea that the tax is void; a mere nullity."

[74] Russell v. City of New Haven, 51 Conn. 259. The same rule applies to a penalty paid without protest.

McGehee v. City of Columbus, 69 Ga. 581; Phillips v. Jefferson County Com'rs, 5 Kan. 412; Smith v. Inhabitants of Readfield, 27 Me. 145; Welton v. Merrick County Com'rs, 16 Neb. 83; Taylor v. Board of Health, 31 Pa. 73. Cooley, Taxation (2d Ed.) p. 809. "Every man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as the reason why the state should furnish him with legal remedies to recover it back. * * * All payments are supposed to be voluntary until the contrary is made to appear."

As to character of protest see the following: Union Pac. R. Co. v. Dodge County Com'rs, 98 U. S. 541; Patterson v. Cox, 25 Ind. 261; 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 Pittsburgh, 101 Pa. 304.

[75] Lauman v. Des Moines County, 29 Iowa, 310; Stone v. Woodbury County, 51 Iowa, 522, 1 N. W. 745; Dickey v. Polk County, 58 Iowa, 287, 12 N. W. 290; Noyes v. Inhabitants of Haverhill, 65 Mass. (11 Cush.) 338; Slack v. Town of Norwich, 32 Vt. 818; Phillips v. City of Stevens Point, 25 Wis. 595.

§ 1160. Power to sue.

The right and power of a public corporation to sue generally exists without the grant of special authority [76] though this may be necessary.[77] Claims and demands whatever their nature may be enforced by use of the remedies and under the procedure governing the private litigant.[78] The power to sue includes as a subordinate or lesser right the power to compromise a claim.[79] The action or proceeding must be brought or authorized, however, by

[76] Wolffe v. State, 79 Ala. 201; El Dorado County v. Meiss, 100 Cal. 268, 34 Pac. 716; Park v. Modern Woodmen of America, 181 Ill. 214, 54 N. E. 952. A city has no power to maintain a suit in behalf of any of its residents. Polk County v. Sherman, 99 Iowa, 60, 68 N. W. 562; Lawrence County v. Chattaroi R. Co., 81 Ky. 225; Town of South Portland v. Town of Cape Elizabeth, 92 Me. 328, 42 Atl. 503; United States v. Vietor, 16 Abb. Pr. (N. Y.) 153; Lancaster County v. City of Lancaster, 160 Pa. 411, 28 Atl. 854; Greenville County v. Runion, 9 S. C. (9 Rich.) 1; Palestine Water & Power Co. v. City of Palestine, 91 Tex. 540, 44 S. W. 814, 40 L. R. A. 203; Salt Lake County v. Golding, 2 Utah, 319; City of Janesville v. Milwaukee & M. R. Co., 7 Wis. 484.

[77] Colusa Co. v. Glenn County, 117 Cal. 434, 49 Pac. 457; Carroll County Sup'rs v. Georgia Pac. R. Co. (Miss.) 11 So. 471; State v. Travis County, 85 Tex. 435, 21 S. W. 1029; Day v. Johnson (Tex. Civ. App.) 33 S. W. 676. But see Nye v. Kelly, 19 Wash. 73, 52 Pac. 528.

[78] Marion County v. McIntyre, 2 McCrary, 143, 10 Fed. 543; Gaston v. State, 88 Ala. 459, 7 So. 340; Brown v. State, 5 Colo. 496. A state may maintain an action of ejectment. City of Chicago v. Wright, 69 Ill. 318. Municipal authority may maintain ejectment against any one who wrongfully endangers or occupies public property. Cedar County v. Gray, 90 Iowa, 11; Esley v. People, 23 Kan. 510; Com. v. Carter, 21 Ky. L. R. 1509, 55 S. W. 701; Inhabitants of Alna v. Plummer, 3 Me. (3 Greenl.) 88; Lincoln County v. Magruder, 3 Mo. App. 314; State v. Metschan, 32 Or. 372, 41 L. R. A. 692; State v. Evans, 33 S. C. 184, 11 S. E. 697.

[79] People v. San Francisco City & County Sup'rs, 27 Cal. 655; Ernst's Adm'rs v. Ernst, 1 Ill. (Breese) 316; Agnew v. Brall, 124 Ill. 312, 16 N. E. 230; Grimes v. Hamilton County, 37 Iowa, 290; Labette County Com'rs v. Elliott, 27 Kan. 606; Clark v. Village of Davison, 118 Mich. 420, 76 N. W. 971; State v. Martin, 27 Neb. 441; Paret v. City of Bayonne, 39 N. J. Law, 559; Orleans County Sup'rs v. Bowen, 4 Lans. (N. Y.) 24; Hulburt v. Defendorf, 58 Hun, 585, 12 N. Y. Supp. 673; Village of Ft. Edward v. Fish, 86 Hun, 548, 33 N. Y. Supp. 784; O'Brien v. City of New York, 40 App. Div. 331, 57 N. Y. Supp. 1039, affirmed 160 N. Y. 691, 55 N. E. 1098; City of Springfield v. Walker, 42 Ohio St. 543; Smith v. Borough of Wilkinsburg, 172 Pa. 121, 33 Atl. 171; City of

that officer or official body charged by law with the exercise of this particular power,[80] and the same rule applies to the compromise of a claim.[81]

§ 1161. Parties plaintiff.

Through the acts of a person, natural or artificial, public interests may suffer injury or a wrong may be done which places them in danger. These acts may thus injuriously affect either the public, considered as a whole, or in a collective sense,[82] or the injury may be of such a character as to affect not only public interests but also the rights or the interests of a private individual considered separate from his relation to the public at large as a part of it. The principle therefore obtains that where the public

San Antonio v. San Antonio St. R. Co., 22 Tex. Civ. App. 148, 54 S. W. 281; Dix v. Town of Dummerston, 19 Vt. 262. But see McCague v. City of Omaha, 58 Neb. 37, 78 N. W. 463; Morey v. Town of Newfane, 8 Barb. (N. Y.) 645. See, also, City Item Co-operative Printing Co. v. City of New Orleans, 51 La. Ann. 713.

[80] Missouri v. Luce, 62 Fed. 417; Winne v. People, 177 Ill. 268, 52 N. E. 377; State v. City of Neodesha, 3 Kan. App. 319; Daviess County v. Daviess County Gravel-Road Co., 23 Ky. L. R. 711, 63 S. W. 752; Succession of D'Aquin, 9 La. Ann. 400; Waldo County v. Moore, 33 Me. 511; City of Rockland v. Ulmer, 87 Me. 357, 32 Atl. 972; People v. Navarre, 22 Mich. 1; Chicaga, B. & Q. R. Co. v. Hitchcock County, 60 Neb. 722, 84 N. W. 97; Lincoln St. R. Co. v. City of Lincoln, 61 Neb. 109, 84 N. W. 802. The presumption exists that an action brought by a city in its corporate name by its proper law officers is authorized until the contrary appears. Ft. Covington v. United States & C. R. Co., 8 App. Div. 223, 40 N. Y. Supp. 313, affirmed 156 N. Y. 702, 51 N. E. 1094. The question of authority cannot be collaterally raised.

Meigs v. Roberts, 42 App. Div. 290, 59 N. Y. Supp. 215; City of Seattle v. McDonald, 26 Wash. 98, 66 Pac. 145; Mills County v. Lampasas County (Tex. App.) 40 S. W. 552. The bringing of an unauthorized action may be subsequently ratified. City of Milwaukee v. Herman Zoehrlaut Leather Co., 114 Wis. 276, 90 N. W. 187; Town of Woodman v. Bohan, 91 Wis. 36, 64 N. W. 323.

[81] City of Marshall v. Cleveland, C., C. & St. L. R. Co., 80 Ill. App. 531; Town of Kankakee v. Kankakee & I. R. Co., 115 Ill. 88; Olp v. Leddick, 59 Hun, 627, 14 N. Y. Supp. 41; City of San Antonio v. San Antonio St. R. Co., 22 Tex. Civ. App. 148, 54 S. W. 281.

[82] Town of Laconia v. Gilman, 55 N. H. 127; Eberstadt v. State, 92 Tex. 94, 45 S. W. 1007; State v. Bartlett, 35 Wis. 287. Under Wis. Const. art. 7, § 17, all criminal prosecutions are to be in the name of the state.

in its collective sense has suffered or will suffer injury or damage from an act or the existence of a condition, it alone is competent to bring an action or maintain a suit either for the purpose of obtaining redress or preventing the injury. In these cases a private person is not, as a general rule, permitted to act as a party plaintiff.[83] Inaction or lack of good faith by public authorities in respect to a matter in which public interests are involved may warrant a private individual in the prosecution of an action for their protection.[84] Where, however, an individual suffers damage from the doing of an act, peculiar and especial to himself in excess of or in addition to that suffered by or sustained by him as a member of the community or the public corporation, it is not necessary for him to await action by the public authorities but he may properly sue to secure the necessary and desired relief.[85] In either case where rights of public corporations are to be determined the action or proceedings should be brought and maintained in the name of that corporation,[86] unless designated officials are authorized so to act.[87]

[83] Fitch v. San Francisco County Sup'rs, 122 Cal. 285, 54 Pac. 901; City of Macon v. East Tennessee, V. & G. R. Co., 82 Ga. 501, 9 S. E. 1127; Cedar County v. Sager, 90 Iowa, 11, 57 N. W. 634; State Bank of Duluth v. Heney, 40 Minn. 145, 41 N. W. 411; Givens v. McIlroy, 79 Mo. App. 671; People v. Ingersoll, 58 N. Y. 1; State v. Welbes, 11 S. D. 86, 74 N. W. 820; Cleburne Water, Ice & Lighting Co. v. City of Cleburne, 13 Tex. Civ. App. 141, 35 S. W. 733; Birmingham v. Cheetham, 19 Wash. 657, 54 Pac. 37. But see Crane v. Chicago & N. W. R. Co., 74 Iowa, 330, 37 N. W. 397.

[84] Hedges v. Dam, 72 Cal. 520, 14 Pac. 133. It is necessary to allege under these conditions a refusal or neglect on the part of the district attorney to institute the action.

Cornell College v. Iowa County, 32 Iowa, 520; Commonwealth v. Tilton, 20 Ky. L. R. 1056, 48 S. W. 148; Auditor v. Treasurer, 4 S. C. (4 Rich.) 311; Quaw v. Paff, 98 Wis. 586, 74 N. W. 369; Land, Log & Lumber Co. v. McIntyre, 100 Wis. 245, 75 N. W. 964; In re Cole's Estate, 102 Wis. 1, 78 N. W. 402.

[85] Burlington Sav. Bank v. City of Clinton, 111 Fed. 439.

[86] Patrick v. Robinson, 83 Ala. 575, 3 So. 694; Montgomery County Com'rs v. Fry, 127 N. C. 258, 37 S. E. 259; State v. Wood, 51 Ark. 205, 10 S. W. 624; Sutter County v. McGriff, 130 Cal. 124, 62 Pac. 412; People v. Curtis, 1 Idaho, 753; United States v. Shoup, 2 Idaho, 459, 21 Pac. 656; Smith v. Ellis, 7 Idaho, 196, 61 Pac. 695. An action to remove a public officer is a penal one and therefore properly commenced by the state as plaintiff.

Town of Ofallon v. Ohio & M. R. Co., 45 Ill. App. 572; Tipton County Com'rs v. Kimberlin, 108 Ind. 449, 9 N. E. 407; Town of Noblesville v.

§ 1162. Defendant.

The proper party defendant is that one against whom the right of action exists,[88] and where the power to sue and be sued is given,

McFarland, 57 Ind. 335; Yater v. State, 58 Ind. 299; Coffman v. Parker, 11 Kan. 9; Ralston v. Dodge City, M. & T. R. Co., 53 Kan. 337, 36 Pac. 712; Com. v. Tilton, 20 Ky. L. R. 1216, 49 S. W. 2; Willis v. Standard Oil Co., 50 Minn. 290, 52 N. W. 652; Kemp v. State (Miss.) 24 So. 695; State v. Mayes, 54 Miss. 417; Lincoln St. R. Co. v. City of Lincoln, 61 Neb. 109, 84 N. W. 802; State v. Welbes, 11 S. D. 86, 75 N. W. 820; State v. Fountain, 14 Wash. 236, 44 Pac. 270; Sweetwater County Com'rs v. Young, 3 Wyo. 684. But see State v. Headlee, 18 Wash. 220, 51 Pac. 369. See, also, Jackson County v. Derrick, 117 Ala. 348; Hickory County v. Fugate, 143 Mo. 71; City of Bethany v. Howard, 149 Mo. 504, 51 S. W. 94.

[87] McDonough County v. Markham, 19 Ill. 149; Barber v. Trustees of Schools, 51 Ill. 396; Manor v. State, 149 Ind. 310, 49 N. E. 160; Pittsburgh, C., C. & St. L. R. Co. v. Iddings, 28 Ind. App. 504; 62 N. E. 112; Blake v. Johnson County Com'rs, 18 Kan. 266; Anderson v. Green, 21 Ky. L. R. 1439, 55 S. W. 420; Merrill v. Village of Kalamazoo, 35 Mich. 211; Johr v. St. Clair County Sup'rs, 38 Mich. 532; Moreland v. City of Detroit, 130 Mich. 343, 89 N. W. 935; Simmons v. Holmes, 49 Miss. 134; Potter v. Norris, 26 N. H. 330; Auburn Excise Com'rs v. Burtis, 103 N. Y. 136; Burke County Com'rs v. Catawba Lumber Co., 115 N. C. 590, 20 S. E. 707, 847; Wake County Com'rs v. Magnin, 78 N. C. 181; Perry County v. Newark, S. S. R. Co., 43 Ohio St. 451; State v. Woodside, 31 N. C. (9 Ired.) 496.

[88] Davenport v. Dodge County, 105 U. S. 237. Collection of bonds. Beckwith v. City of Racine, 7 Biss. 142, Fed. Cas. No. 1,213. The enforcement of the obligations of a town consolidated with others must be against those towns. Burlington Sav. Bank v. City of Clinton, 106 Fed. 269. A city is the proper party defendant in an action on bonds issued by it for making local improvements, although they are to be paid moneys from special assessments against abutting property. Shapter v. City & County of San Francisco, 110 Fed. 615. Proper defendants designated on default of local improvement bonds.

Carmichael v. Lawrence, 47 Ind. 554; City of Huntington v. Day, 55 Ind. 7; Jackson Tp. v. Barnes, 55 Ind. 136; Emmert v. De Long, 12 Kan. 67; Sepp v. McCann, 47 Minn. 364, 50 N. W. 246. Under Sp. Laws Minn. 1889, c. 360, § 1, relative to contractor's bond, the city is not a necessary party to an action on such a bond brought to enforce a claim for labor performed on the work covered by the contract.

Van Horn v. Kittitas County, 59 N. Y. Supp. 883, affirmed 46 App. Div. 623, 61 N. Y. Supp. 1150; Chatham County Com'rs v. Thorne, 117 N. C. 211, 23 S. E. 184; Lucier v. Granger, 20 R. I. 364, 39 Atl. 190; Gordon v. Weaver (Tenn. Ch. App.) 53 S. W. 740; Berlin Iron Bridge

the corporate name alone should be used [89] or that one which is specially designated by statutory provisions,[90] if any. Public officials are not proper defendants unless so required or permitted by statute in a case brought against the corporation which they represent.[91] That a judgment or decree against a public corporation be legal, it is necessary that it be made a party to the proceeding.[92]

§ 1163. Pleadings.

A particular discussion of the principles of law involved and included in pleadings presented or filed in actions by and against public corporations, except as necessarily discussed in the preceding sections of this chapter, is not within the scope of this work which is not designed primarily as a text book of practice. A few cases cited under appropriate heads may, however, be use-

Co. v. City of San Antonio (Tex. Civ. App.) 50 S. W. 408; Landon v. Village of Rutland, 41 Vt. 681; City of Seattle v. Baxter, 20 Wash. 714, 55 Pac. 320. A wife is a necessary party in an action to foreclose an assessment lien on community property on which she and her husband reside. Spokane & I. Lumber Co. v. Boyd, 28 Wash. 90, 68 Pac. 337.

[89] Pickens County Com'rs v. Bank of Commerce, 97 U. S. 374; Phillips County Com'rs v. Churning, 4 Colo. App. 321, 35 Pac. 918; Town of Dexter v. Gay, 115 Ga. 765, 42 S. E. 94; Arnett v. Decatur County Com'rs, 75 Ga. 782; De Kalb County Com'rs v. Auburn Foundry & Mach. Works, 14 Ind. App. 214, 42 N. E. 689; Wright v. Stockman, 59 Ind. 65; Collins v. Village of Saratoga Springs, 70 Hun, 583, 24 N. Y. Supp. 234; Thacher v. Board of Supervisors of Steuben County Sup'rs, 21 Misc. 271, 47 N. Y. Supp. 124; Loughran v. City of Hickory, 129 N. C. 281, 40 S. E. 46; Town of Latonia v. Hopkins, 20 Ky. L. R. 620, 47 S. W. 248; Siegel v. Town of Liberty, 111 Wis. 470, 87 N. W. 487.

[90] City of Gainesville v. Caldwell, 81 Ga. 76, 7 S. E. 99; Sims v. McClure, 52 Ind. 267; Neely v. Town of Yorkville, 10 S. C. (10 Rich.) 141.

[91] Board of Education of Atchison v. De Kay, 148 U. S. 591; Doeg v. Cook, 126 Cal. 213, 58 Pac. 707; Collins v. Hudson, 54 Ga. 25; Rock Island County v. Steele, 31 Ill. 543; Starr v. State, 149 Ind. 592, 49 N. E. 591; Heritage v. Bronnenberg, 25 Ind. App. 692, 58 N. E. 1064; Baldwin v. Ohio Tp., 63 Kan. 885, 65 Pac. 700; Hill v. Livingston County Sup'rs, 12 N. Y. (2 Kern.) 52; Matteson v. Whaley, 19 R. I. 648, 35 Atl. 692; Romine v. State, 7 Wash. 215, 34 Pac. 924; State v. Headlee, 18 Wash. 220, 51 Pac. 369. County officer may be a nominal party. But see Presque Isle County Sup'rs v. Thompson, 61 Fed. 914.

[92] Allen v. Turner, 77 Mass. (11 Gray) 436; Maxwell v. Auditor General, 125 Mich. 621, 84 N. W.

ful to the practitioner. A question most frequently arises as to the sufficiency of the pleadings, in cases involving torts,[93] claims,[94] the payment, issue or legality of bonds,[95] or other obligations to

[93] City of Huntsville v. Ewing, 116 Ala. 576, 22 So. 984; Schroeder v. Cobert County, 66 Ala. 137; Kellogg v. City of New Britain, 62 Conn. 232, 24 Atl. 996; Cook v. City of Ansonia, 66 Conn. 413, 34 Atl. 183; Downs v. Smyrna Com'rs, 2 Penn. (Del.) 132, 45 Atl. 717; Keehn v. McGillicuddy, 15 Ind. App. 580, 44 N. E. 554; City of Alexandria v. Young, 20 Ind. App. 672, 51 N. E. 109; City of Indianapolis v. Crans, 28 Ind. App. 584, 63 N. E. 478; Campbell v. City of Kalamazoo, 80 Mich. 655, 45 N. W. 652; Noble v. Kansas City, 95 Mo. App. 167, 68 S. W. 969; Tomlin v. Hildreth, 65 N. J. Law, 438, 47 Atl. 649; Frisby v. Town of Marshall, 119 N. C. 570, 26 S. E. 251; Redford v. Coggeshall, 19 R. I. 313, 36 Atl. 89; Lucier v. Granger, 20 R. I. 364, 39 Atl. 190; Rusher v. City of Dallas, 83 Tex. 151, 18 S. W. 333; City of San Antonio v. Mullaly, 11 Tex. Civ. App. 596, 33 S. W. 256; McCray v. Town of Fairmont, 46 W. Va. 442, 33 S. E. 245; Meinzer v. City of Racine, 68 Wis. 241, 32 N. W. 139; Smith v. City of Eau Claire, 78 Wis. 457, 47 N. W. 830; Koch v. City of Ashland, 83 Wis. 361, 53 N. W. 674.

[94] Nance v. People, 25 Colo. 252, 54 Pac. 631; Johnson v. Yuba County, 103 Cal. 528, 37 Pac. 538; Rio Grande County Com'rs v. Bloom, 14 Colo. App. 187, 59 Pac. 417; Maddox v. Randolph County, 65 Ga. 216; First Nat. Bank of Billings v. Custer County Com'rs, 7 Mont. 464, 17 Pac. 551; School Dists. of Hamilton County v. School Dist. No. 9, 12 Neb. 241. The declaration should show that the indebtedness was one which could be legally incurred.

Livingston v. School Dist. No. 7, 11 S. D. 150, 76 N. W. 301; Fenton v. Salt Lake County, 4 Utah, 466, 11 Pac. 611. Where the statutes require the presentation of a claim to the county court, it is necessary for a complainant to allege that it has been so presented and disallowed. Howard v. City of Oshkosh, 33 Wis. 309.

[95] Nauvoo v. Ritter, 97 U. S. 389; Lincoln Tp. v. Cambria Iron Co., 103 U. S. 412; Alabama v. Burr, 115 U. S. 413; Hopper v. Covington, 118 U. S. 148; Gilson v. Town of Dayton, 122 U. S. 59, 8 Sup. Ct. 66; Bissell v. Spring Valley Tp., 28 Fed. 54; Bangor Sav. Bank v. City of Stillwater, 45 Fed. 544; Shepard v. Tulare Irr. Dist., 94 Fed. 1; Hughes County v. Livingston, 104 Fed. 306; Kahn v. San Francisco City & County Sup'rs (Cal.) 12 Pac. 478; City of Kokomo v. State, 57 Ind. 152; Mosher v. Independent School Dist., 42 Iowa, 632; Catron v. La. Fayette County, 106 Mo. 659, 17 S. W. 577; Donaldson v. Butler County, 98 Mo. 163, 11 S. W. 572; Rahway Sav. Inst. v. City of Rahway, 53 N. J. Law, 48, 20 Atl. 756; Board of Education of Ridgefield Tp. v. Board of Education of Borough Cliffside Park, 63 N. J. Law, 371, 43 Atl. 722; Cotton v. Inhabitants of New Providence, 47 N. J. Law, 401; Brownell v. Town of Greenwich, 114 N. Y. 518, 22 N. E. 24, 4 L. R. A. 685; Vaughn v. Board Com'rs of Forsyth County Com'rs,

pay [96] public contracts; [97] the validity [98] or enforcement of laws

118 N. C. 636, 24 S. E. 425; Richardson v. Marshall County, 100 Tenn. 346, 45 S. W. 440; Commonwealth v. Tunstall, 86 Va. 372, 10 S. E. 414.

[96] Richards v. Independent School Dist. of Rock Rapids, 46 Fed. 460; Moll v. School Directors, 23 Ill. App. 508; Craig School Tp. v. Scott, 124 Ind. 72, 24 N. E. 585. School district note.

Kittenger v. Monroe School Tp., 3 Ind. App. 411, 29 N. E. 931; City of Connersville v. Connersville Hydraulic Co., 86 Ind. 184. City order.

Nevin v. Gaertner, 20 Ky. L. R. 1022, 48 S. W. 153; Middlesborough Town & Land Co. v. Knoll, 21 Ky. L. R. 1399, 55 S. W. 205; First Nat. Bank v. Board Com'rs of Becker County Com'rs, 81 Minn. 95, 83 N. W. 468; Taylor v. Chickasaw County Sup'rs (Miss.) 16 So. 907; Pollock v. Stanton County, 57 Neb. 399, 77 N. W. 1081; Hughes v. Craven County Com'rs, 107 N. C. 598, 12 S. E. 465; Roger Mills County Com'rs v. Sauer, 8 Okl. 409, 58 Pac. 625; Dorothy v. Pierce, 27 Or. 373, 41 Pac. 668; Sherwood v. La Salle County (Tex. Civ. App.) 26 S. W. 650; City of Waco v. McNeill (Tex. Civ. App.) 29 S. W. 1109; Biddle v. City of Terrell, 82 Tex. 335; Brown v. Town Board of School Directors, 77 Wis. 27, 45 N. W. 678. School order. Marvin v. Town of Jacobs, 77 Wis. 31, 45 N. W. 679. Town order.

[97] Raisch v. City & County of San Francisco, 80 Cal. 1, 22 Pac. 22; Willey v. City of Columbus, 109 Ga. 295, 34 S. E. 575; Milburn v. Glynn County, 109 Ga. 473, 34 S. E. 848; City of Peoria v. Fruin-Bambrick Construction Co., 169 Ill. 36, 48 N. E. 435; City of Logansport v. Dykeman, 116 Ind. 15, 17 N. E. 587; Smith v. Miami County Com'rs, 6 Ind. App. 153, 33 N. E. 243; Leffenbaugh v. Foster, 40 Ind. 382; Town of Petersburg v. Petersburg Elec. Light, Power & Waterworks Co., 16 Ind. App. 151, 44 N. E. 814; Clinton School Tp. v. Lebanon Nat. Bank, 18 Ind. App. 42, 47 N. E. 349; Town of Gosport v. Pritchard, 156 Ind. 400, 59 N. E. 1058; Foland v. Town of Frankton, 142 Ind. 546, 41 N. E. 1031; State v. Feagans, 148 Ind. 621, 48 N. E. 225; Barber Asphalt Pav. Co. v. City of Topeka, 6 Kan. App. 133, 50 Pac. 904; City of Louisville v. Gosnell, 22 Ky. L. R. 1524, 60 S. W. 411; City of Baltimore v. Keyser, 72 Md. 106, 19 Atl. 706; Folsom v. Chicago County, 28 Minn. 324; Chambers v. City of St. Joseph, 33 Mo. App. 536; Dinsmore v. Livingston County, 60 Mo. 241; McCormick v. City of St. Louis, 166 Mo. 315, 65 S. W. 1038; Devers v. Howard, 88 Mo. App. 253; Tullock v. Webster County, 46 Neb. 211, 64 N. W. 705; Knowles v. City of New York, 37 Misc. 195, 75 N. Y. Supp. 189; McNulty v. City of New York, 168 N. Y. 117, 61 N. E. 111; City of Wellston v. Morgan, 65 Ohio St. 219, 62 N. E. 127. A petition in an action ex contractu must declare on a contract made according to statute, since municipal corporations are not impliedly liable in matters ex contractu.

Klamath County v. Leavitt, 32 Or. 437; Shearer v. Hutchinson County, 10 S. D. 9; Meek v. Meade County, 12 S. D. 162, 80 N. W. 182; City of Galveston v. Devlin, 84 Tex. 319, 19 S. W. 395; Texas Water &

or ordinances,[99] proceedings for the levy or collection of taxes,[100] the construction and repair of public improvements including

Gas Co. v. City of Cleburne, 1 Tex. Civ. App. 580, 21 S. W. 393. A petition in an action to enforce an executory contract must allege that it is authorized by law and also the existence of necessary statutory conditions relative to its execution.

Waterworks Co. v. City of San Antonio (Tex. Civ. App.) 48 S. W. 205; Berlin Iron-Bridge Co. v. City of San Antonio (Tex. Civ. App.) 50 S. W. 408; Bank of British Columbia v. City of Port Townsend, 16 Wash. 450, 47 Pac. 896; Norton v. City of Roslyn, 10 Wash. 44, 38 Pac. 878; Kinsley v. Monongalia County Ct., 31 W. Va. 464, 7 S. E. 445; Burnham v. City of Milwaukee, 69 Wis. 379, 34 N. W. 389. A complaint in an action ex contractu against a board of public works need not state the names of the individuals composing the board.

[98] City of Tulare v. Hevren, 126 Cal. 226, 58 Pac. 530.

[99] Corporation of Washington v. Cooly, 4 Cranch, C. C. 103, Fed. Cas. No. 17,226; Browne v. City of Mobile, 122 Ala. 159, 25 So. 223; Keller v. State, 123 Ala. 94, 26 So. 323; Ahlrichs v. City of Cullman, 130 Ala. 439, 30 So. 415; Case v. City of Mobile, 30 Ala. 538; Goldthwaite v. City of Montgomery, 50 Ala. 486; Town of Van Buren v. Wells, 53 Ark. 368, 14 S. W. 38; San Luis Obispo Co. v. Greenberg, 120 Cal. 300, 52 Pac. 797; State v. Carpenter, 60 Conn. 97, 22 Atl. 497; State v. Gallagher, 72 Conn. 604, 45 Atl. 430; City of Durango v. Reinsberg, 16 Colo. 327, 26 Pac. 820; Hood v. City of Griffin, 113 Ga. 190, 38 S. E. 409; Town of Whiting v. Doob, 152 Ind. 157, 52 N. E. 759; City of Huntington v. Pease, 56 Ind. 305; City of Noblesville v. Noblesville Gas & Improvement Co., 157 Ind. 162, 60 N. E. 1032. Ordinance fixing gas rates. Wagner v. Town of Garrett, 118 Ind. 114, 20 N. E. 706; Town of Bayard v. Baker, 76 Iowa, 220, 40 N. W. 818; City of Emporia v. Volmer, 12 Kan. 622; State v. Wahl, 35 Kan. 608, 11 Pac. 911; Johnson v. City of Winfield, 48 Kan. 129, 29 Pac. 559; State v. Dunbar, 43 La. Ann. 836, 9 So. 492; State v. Montgomery, 92 Me. 433, 43 Atl. 13; Com. v. Bean, 80 Mass. (14 Gray) 52; Com. v. Cutter, 156 Mass. 52, 29 N. E. 1146; Village of Vicksburg v. Briggs, 85 Mich. 502, 48 N. W. 625; In re Bushey, 105 Mich. 64, 62 N. W. 1036; City of Faribault v. Wilson, 34 Minn. 254; State v. Finch, 78 Minn. 118, 80 N. W. 856, 46 L. R. A. 437; City of Springfield v. Ford, 40 Mo. App. 586; City of Gallatin v. Tarwater, 143 Mo. 40, 44 S. W. 750; Kansas City v. Whitman, 70 Mo. App. 630; City of Columbia v. Johnson, 72 Mo. App. 232; City of St. Louis v. Weitzel, 130 Mo. 600, 31 S. W. 1045; City of St. Louis v. Babcock, 156 Mo. 148, 56 S. W. 732; Miles City v. Kern, 12 Mont. 119, 29 Pac. 720; City of Philipsburg v. Weinstein, 21 Mont. 146, 53 Pac. 272; State v. City of Camden, 52 N. J. Law, 289, 19 Atl. 539; Tyler v. Lawson, 30 N. J. Law, 120; State v. Goulding, 44 N. H. 284; Atlantic City v. Crandol, 67 N. J. Law, 488, 51 Atl. 447; Osborne v. Borough of Spring Lake, 64 N. J. Law, 362, 46 Atl. 164; Harker v. City of New York, 17 Wend. (N. Y.) 199; People v. Murray, 37 Misc.

streets,[101] highways,[102] sewers,[103] drains,[104] or public buildings,[105] the legality of special assessments[106] or an election,[107] the perform-

687, 76 N. Y. Supp. 373; Barton v. City of La Grande, 17 Or. 577, 22 Pac. 111; City of Lead v. Klatt, 11 S. D. 109, 75 N. W. 896; State v. Brown, 72 Vt. 410, 48 Atl. 652; City of Spokane v. Robison, 6 Wash. 547, 33 Pac. 960.

[100] Huling v. Bandera Flag Stone Co., 87 Mo. App. 349; City of San Antonio v. Berry, 92 Tex. 319, 48 S. W. 496.

[101] Bituminous Lime Rock Pav. & Imp. Co. v. Fulton (Cal.) 33 Pac. 1117; City of San Jose v. Freyschlag, 56 Cal. 8; Dugger v. Hicks, 11 Ind. App. 374, 36 N. E. 1085; Shrum v. Town of Salem (Ind. App.) 39 N. E. 1050; City of Huntington v. Force, 152 Ind. 368, 53 N. E. 443; Trustees of Diocese of Iowa v. City of Anamosa, 76 Iowa, 538, 41 N. W. 313, 2 L. R. A. 606; Tennessee Paving Brick Co. v. Barker, 22 Ky. L. R. 1069, 59 S. W. 755; Duncan v. City of Lynchburg (Va.) 34 S. E. 964, 48 L. R. A. 331; Burnham v. City of Milwaukee, 100 Wis. 55.

[102] Suits v. Murdock, 63 Ind. 73; State v. Conlee, 25 Iowa, 237.

[103] Spaulding v. Baxter, 25 Ind. App. 485, 58 N. E. 551; Burris v. Baxter, 25 Ind. App. 536, 58 N. E. 733.

[104] Cauble v. Hultz, 118 Ind. 13, 20 N. E. 515.

[105] City of Argentine v. State, 46 Kan. 430, 26 Pac. 751; Pomerene v. School Dist. No. 56, 56 Neb. 126, 76 N. W. 414.

[106] Dewey v. City of Des Moines, 173 U. S. 193, reversing 101 Iowa, 416, 70 N. W. 605. Question attempted to be raised that of the taking of property without due process of law. Heft v. Payne, 97 Cal. 108, 31 Pac. 844; Washburn v. Lyons, 97 Cal. 314, 32 Pac. 310; Treanor v. Houghton, 103 Cal. 53, 36 Pac. 1081; Palmer v. Burnham, 120 Cal. 364, 52 Pac. 664; California Imp. Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802; Belser v. Allman, 134 Cal. 399, 66 Pac. 492; N. P. Perine Contracting & Paving Co. v. Quackenbush, 104 Cal. 684, 38 Pac. 533; Williams v. Bergin, 127 Cal. 578; Id., 129 Cal. 461, 62 Pac. 59; Greenwood v. Hassett, 128 Cal. xviii, 61 Pac. 173; City of New London v. Miller, 60 Conn. 112, 22 Atl. 499; City of Galesburg v. Searles, 114 Ill. 217, 29 N. E. 686; Sands v. Hatfield, 7 Ind. App. 357, 34 N. E. 654; Sloan v. Faurot, 11 Ind. App. 689, 39 N. E. 539; Cleveland, C., C. & St. L. R. Co. v. Edward C. Jones Co., 20 Ind. App. 87, 50 N. E. 319; Welch v. Town of Roanoke, 157 Ind. 398, 61 N. E. 791; Van Sickle v. Belknap, 129 Ind. 558, 28 N. E. 305; Zabel v. Louisville Baptist Orphans' Home, 13 Ky. L. R. 385, 17 S. W. 212; Bitzer v. Dinwiddie, 20 Ky. L. R. 298, 45 S. W. 1049; Richardson v. Dunn's Assignee, 22 Ky. L. R. 324, 57 S. W. 230; McAboy v. Gosnell, 23 Ky. L. R. 1187, 64 S. W. 961; Rogers v. City of St. Paul, 79 Minn. 5, 81 N. W. 539, 47 L. R. A. 537; Seaboard Nat. Bank v. Wright's Trustee, 68 Mo. App. 144; City of Carthage v. Badgley, 73 Mo. App. 123; Adkins v. Quest, 79 Mo. App. 36; Horn v. Town of New Lots, 83 N. Y. 100; Shannon v. City of Portland, 38 Or. 382, 62 Pac. 50; Bennison v. City of Galveston, 18 Tex. Civ. App. 20, 44 S. W. 613; Breath v. City of Gal-

ance of official duties,[108] the abatement of nuisances,[109] the existence or organization of corporations,[110] purchase of supplies,[111] sale

veston (Tex. Civ. App.) 46 S. W. 903; Town of Elma v. Carney, 4 Wash. 418, 30 Pac. 732; Beaser v. City of Ashland, 89 Wis. 28, 61 N. W. 77.

[107] Dupont v. City of Pittsburgh, 69 Fed. 13; Bragunier v. Penn, 79 Md. 244, 29 Atl. 12; Curry v. Cabliss, 37 Mo. 330.

[108] United States v. Scott, 74 Fed. 213; Burns v. Moragne, 128 Ala. 493, 29 So. 460; In re Stow, 98 Cal. 587, 33 Pac. 490; Woods v. Varnum, 85 Cal. 639, 24 Pac. 843; Ventura County v. Clay, 114 Cal. 242, 46 Pac. 9. Legal payment of moneys.

Fremont County v. Brandon, 6 Idaho, 482, 56 Pac. 264; Ponting v. Isaman, 7 Idaho, 283, 62 Pac. 680; Lyon v. Kee, 120 Ind. 150, 22 N. E. 128. Change of road district by township trustees.

Hennel v. Vanderburgh County Com'rs, 132 Ind. 32, 31 N. E. 462; Duty v. State, 9 Ind. App. 595, 36 N. E. 655; Leavell v. State, 16 Ind. App. 72, 44 N. E. 687; Hopewell v. State, 22 Ind. App. 489, 54 N. E. 127; State v. Bourgeois, 45 La. Ann. 1350, 14 So. 28; City of Boston v. Simmons, 150 Mass. 461, 23 N. E. 210, 6 L. R. A. 629; Fuller v. Ellis, 98 Mich. 96; Barker v. Phelps, 39 Mo. App. 288. Failure to publish financial statement. Hickory County v. Fugate, 143 Mo. 71, 44 S. W. 789; American Print Works v. Lawrence, 21 N. J. Law (1 Zab.) 248; Roberts v. Town of Southern Pines, 125 N. C. 172, 34 S. E. 268; Ramsey v. Riley, 13 Ohio, 157; Klamath County v. Leavitt, 32 Or. 437, 52 Pac. 20; Minnehaha County v. Thorne, 6 S. D. 449, 61 N. W. 688; Hunter v. Windsor, 24 Vt. 327; State v. Friars, 10 Wash. 348, 39 Pac. 104.

[109] State v. Brown, 66 Mo. App. 280; State Board of Health v. City of Jersey City, 55 N. J. Eq. 116, 35 Atl. 835.

[110] Camp v. Marion County, 91 Ala. 240, 8 So. 786. In a complaint filed by a county it is not necessary to aver its corporate existence. The court has judicial knowledge of all towns and their corporate character. Smith v. Town of Warrior, 99 Ala. 481, 12 So. 418; Swamp Land Dist. No. 121 v. Haggin, 64 Cal. 204, 30 Pac. 631; Morris v. Trustees of Schools, 15 Ill. 266; City of Rock Island v. Cuinely, 126 Ill. 408, 18 N. E. 753; Stier v. City of Oskaloosa, 41 Iowa, 353; City of Erie v. Phelps, 56 Kan. 135, 42 Pac. 336; Clark v. Village of North Muskegan, 88 Mich. 308, 50 N. W. 254; School Dist. No. 4 v. Holmes, 53 Mo. App. 487; City of Brookfield v. Tooey, 141 Mo. 619, 43 S. W. 387; Downs v. Commissioners of Town of Smyrna, 2 Pen. (Del.) 132, 45 Atl. 717; Pelletier v. City of Ashton, 12 S. D. 366, 81 N. W. 735; Eustis v. City of Henrietta (Tex. Civ. App.) 37 S. W. 632; Rains v. City of Oshkosh, 14 Wis. 372.

[111] Brashear v. City of Madison (Ind.) 36 N. E. 252; Jefferson School Tp. v. Litton, 116 Ind. 467, 19 N. E. 323; Buffalo School Furniture Co. v. School Dists. Nos. 4, 30, and 40, 7 Kan. App. 796, 54 Pac. 115; Kerr v. City of Bellefontaine, 59 Ohio St. 446, 52 N. E. 1024; Peck-Smead Co. v. City of Sherman, 26 Tex. Civ. App. 208, 63 S. W.

of bonds,[112] incurment of indebtedness,[113] actions on official bonds[114] or for official fees, or salary,[115] and for the removal of public officers[116] or employes.[117]

§ 1164. Evidence.

The application of rules of evidence in cases where one of the parties is a public corporation does not differ from those cases where the controversy is entirely between private persons. The questions usually arising relate to the admissibility of evidence[118]

340; Siegel v. Town of Liberty, 111 Wis. 470, 87 N. W. 487.

[112] Reed v. Town of Orleans, 1 Ind. App. 25, 27 N. E. 109. Sufficiency of allegation in respect to authority of trustees.

[113] City of South Bend v. Reynolds, 155 Ind. 70, 57 N. E. 706, 49 L. R. A. 795; Phillips v. Reed, 109 Iowa, 188, 80 N. W. 347.

[114] Moses v. United States, 166 U. S. 571; Commonwealth v. Tate, 12 Ky. L. R. 9, 13 S. W. 117, 56 S. W. 1130; Thompson v. Village of Mecosta, 127 Mich. 522, 86 N. W. 1044; State v. Hall, 68 Miss. 719, 10 So. 54; Morgan County v. Lutman, 63 Mo. 210; Anderson County v. Hays, 99 Tenn. 542, 42 S. W. 266; Town of Franklin v. Kirby, 25 Wis. 498; Washington County Sup'rs v. Semler, 41 Wis. 374; Sweetwater County Com'rs v. Young, 3 Wyo. 684, 29 Pac. 1002.

[115] Weed v. United States, 65 Fed. 399; Washington County v. Porter, 128 Ala. 278, 29 So. 185; Town of Eastman v. Cameron, 111 Ga. 110, 36 S. E. 462; City of Lebanon v. Cooper, 18 Ky. L. R. 636, 37 S. W. 579; Gorley v. City of Louisville, 23 Ky. L. R. 1782, 65 S. W. 844; Hart v. City of Minneapolis, 81 Minn. 476, 84 N. W. 342; Hughlett v. City of Wellsville, 75 Mo. App. 341.

[116] Eberstadt v. State, 20 Tex. Civ. App. 164, 49 S. W. 654.

[117] People v. Dalton, 54 N. Y. Supp. 216.

[118] Coffin v. Kearney County Com'rs, 114 Fed. 518. Admissibility of warrant stub book. City of Leadville v. Coronado Min. Co., 29 Colo. 17, 67 Pac. 289. Dedication and acceptance of public street.

City of Chicago v. Norton Milling Co., 196 Ill. 580, 63 N. E. 1043; Hamilton v. Village of Detroit, 85 Minn. 83, 88 N. W. 419. Evidence of the disqualification of a voter in a suit to restrain an issue of bonds is admissible.

People v. City of Syracuse, 144 N. Y. 63, 30 N. E. 1006; 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. A certificate in respect to matters not within the scope of the official duty of public officers making it is inadmissible in an action brought to determine the validity of an issue of bonds. Day v. City of Austin (Tex. Civ. App.) 22 S. W. 757. Evidence is immaterial of the motives prompting taxpayers to vote in favor of an issue of bonds. Starks v. State, 38 Tex. Cr. R. 233, 42 S. W. 379. Admissibility of book of city ordinances.

Lynds v. Town of Plymouth, 73

in cases ex contractu [119] as well as those sounding in tort [120] and including the defense of contributory negligence; [121] the burden of proof which is determined by general rules of law applicable to all parties; [122] the further rule that questions of fact are for a

Vt. 216, 50 Atl. 1083; Skagit County v. McLean, 20 Wash. 92, 54 Pac. 781; Stittgen v. Rundle, 99 Wis. 78, 74 N. W. 536. Municipal ordinances cannot be introduced in evidence unless they are pleaded.

[119] City of Hannibal v. Fauntleroy, 105 U. S. 408; City of Clarksdale v. Pacific Imp. Co. (C. C. A.) 81 Fed. 329. Parol evidence is not admissible to contradict the minutes of a board of aldermen.

Rollins v. Rio Grande County Com'rs, 90 Fed. 575; City of Greenville v. Greenville Water Works Co., 125 Ala. 625, 27 So. 764. Action for hydrant rentals.

Halbut v. Forrest City, 34 Ark. 246; Rio Grande County Com'rs v. Bloome, 14 Colo. App. 187, 59 Pac. 417; McGuire v. Rapid City, 6 Dak. 346, 43 N. W. 706, 5 L. R. A. 752; Kittenger v. Monroe School Tp., 3 Ind. App. 411, 29 N. E. 931; Cedar Rapids Water Co. v. City of Cedar Rapids, 117 Iowa, 250, 90 N. W. 746. Hydrant rental. City of Ft. Madison v. Moore, 109 Iowa, 476, 80 N. W. 527.

[120] Sanitary Dist. of Chicago v. McGuirl, 86 Ill. 392; Mahoney v. Dankwart, 108 Iowa, 421, 79 N. W. 134; Adams v. City of Salina, 58 Kan. 246, 48 Pac. 918; Moore v. Townsend, 76 Minn. 64, 78 N. W. 880; Lenz v. St. Paul, 87 Minn. 85, 91 N. W. 256; Dowe v. Weare, 68 N. H. 345, 44 Atl. 489; McLeod v. City of Spokane, 26 Wash. 346, 67 Pac. 74. See, also, § 1065, ante.

[121] City of Spring Valley v. Gavin, 182 Ill. 232, 54 N. E. 1035; City of Huntington v. Polk, 154 Ind. 91, 54 N. E. 759; Hoover v. Town of Mapleton, 110 Iowa, 571, 81 N. W. 776; Schwingschlegel v. City of Monroe, 113 Mich. 683, 72 N. W. 7; Reed v. City of Spokane, 21 Wash. 218, 57 Pac. 803; Crites v. City of New Richmond, 98 Wis. 55, 73 N. W. 222. See, also, §§ 1057 et seq., ante.

[122] Crebs v. City of Lebanon, 98 Fed. 549. The burden of proof is upon the city claiming as a defense the creation of indebtedness in excess of constitutional limit. Rondot v. Rogers Tp., 99 Fed. 202. The production of negotiable bonds by the plaintiff raises the presumption that he is their owner.

Kelley v. Sersanous (Cal.) 46 Pac. 299; Lake County Com'rs v. Linn, 29 Colo. 446, 68 Pac. 839; City of Dawson v. Dawson Waterworks Co., 102 Ga. 594, 29 S. E. 755; Givins v. City of Chicago, 188 Ill. 348, 58 N. E. 912; Village of Marysville v. Schoonover, 78 Ill. App. 189; Ramsay's Estate v. People, 97 Ill. App. 283; Cedar Rapids Water Co. v. City of Cedar Rapids, 117 Iowa, 250, 90 N. W. 746; Adams v. City of Waterville, 95 Me. 242, 49 Atl. 1042. Excess of debt as a defense.

People v. Swineford, 77 Mich. 573, 43 N. W. 929; Arbuckle-Ryan Co. v. City of Grand Ledge, 122 Mich. 491, 81 N. W. 358; Mountain Grove Bank v. Douglas County, 146 Mo. 42, 47 S. W. 944; City of New York v. Dry Dock, E. B. & B. R. Co., 15 N. Y. Supp. 297; Hoag v.

jury to determine [123] and finally, the subject of evidence as affected by the presumptions of law in favor of the existence of authority [124] and the correctness of the action under consideration.[125]

§ 1165. 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,[126] and also the defenses of laches,[127] lack

Town of Greenwich, 133 N. Y. 152; 30 N. E. 842; Johnson v. Pawnee County Com'rs, 7 Okl. 686, 50 Pac. 701. The burden of proof is upon a county to establish a defense that it was indebted beyond the Federal limitation.

Jones v. City of Portland, 35 Or. 512, 58 Pac. 657; Cooper v. City of Dallas, 83 Tex. 239, 18 S. W. 565; Smith v. Whiteside (Tex. Civ. App.) 39 S. W. 381; City of Tyler v. Adams (Tex. Civ. App.) 62 S. W. 119; Richmond & W. P. Land, Nav. & Imp. Co. v. Town of West Point, 94 Va. 668, 27 S. E. 460; Berg v. City of Milwaukee, 83 Wis. 599, 53 N. W. 890. See, also, § 1058, ante.

[123] Mulholland v. City of New York, 113 N. Y. 631, 20 N. E. 856; Mansel v. Fulmer, 175 Pa. 377, 31 Atl. 794; Bastian v. City of Philadelphia, 180 Pa. 227, 36 Atl. 746; Chafee v. City of Aiken, 57 S. C. 507, 35 S. E. 800. Question of dedication one for the jury. Gordon v. Denton County (Tex. Civ. App.) 48 S. W. 737; Denison & P. S. R. Co. v. James, 20 Tex. Civ. App. 358, 49 S. W. 660. See §§ 728, 738, 1042, 1057 and 1066, ante.

[124] City of Goshen v. Alford, 154 Ind. 58, 55 N. E. 27; State v. City of Shreveport, 27 La. Ann. 623; Belo v. Forsythe County Com'rs, 76 N. C. 489; Nalle v. City of Austin, 23 Tex. Civ. App. 595, 56 S. W. 954; City of Seattle v. McDonald, 26 Wash. 98, 66 Pac. 145. But see Bessey v. Unity Plantation, 65 Me. 342.

[125] Fanning v. Leviston, 93 Cal. 186; San Diego Water Co. v. City of San Diego, 118 Cal. 556, 50 Pac. 633. Evidence must be clear and satisfactory to overcome the presumption of the correctness of action by a city council.

Barrett v. Falls City Artificial Stone Co., 21 Ky. L. R. 669, 52 S. W. 947; Elder v. Cassily, 21 Ky. L. R. 1274, 54 S. W. 836; State v. Inhabitants of City of Trenton, 53 N. J. Law, 132, 20 Atl. 1076, 11 L. R. A. 410. The presumption exists that a municipal ordinance is reasonable and therefore legal.

[126] Cressey v. Meyer, 138 U. S. 525; Schloss v. County Com'rs, 1 Colo. App. 145, 28 Pac. 18; Cross v. Grant County Com'rs, 9 N. M. 410, 54 Pac. 880; Brown v. Painter, 44 Iowa, 368; Ralston v. Town of Wes-

of power, fraud,[128] and absence of liability either as to a particu-

ton, 46 W. Va. 544, 33 S. E. 326. Limitations run against municipal corporations the same as persons. Commonwealth v. Haly, 21 Ky. L. R. 666, 51 S. W. 430. A limitation will not commence to run against the commonwealth until it has consented to be sued. City of Louisville v. McGill, 21 Ky. L. R. 718, 52 S. W. 1053. Special legislation of six months as to actions against cities for injuries held special legislation and unconstitutional.

Preston v. City of Louisville, 84 Ky. 118; Rosetta Gravel-Paving & Imp. Co. v. Kennedy, 51 La. Ann. 1535, 26 So. 468; Klass v. City of Detroit, 129 Mich. 35, 88 N. W. 204; Greeley v. Cascade County, 22 Mont. 580, 57 Pac. 274; Swaney v. Gage County, 64 Neb. 627, 90 N. W. 542; In re Opening of Beck St., 19 Misc. 571, 44 N. Y. Supp. 1087. The statute of limitations runs against a municipal corporation the same as an individual. Hartman v. Hunter, 56 Ohio St. 175, 46 N. E. 577. Statute of limitations runs against a municipal corporation.

Municipal Security Co. v. Baker County, 39 Or. 396, 65 Pac. 369; Shelby County v. Bickford, 102 Tenn. 395, 52 S. W. 772; Galbraith v. City of Knoxville, 105 Tenn. 453, 58 S. W. 643; State v. Town of McMinnville, 106 Tenn. 384, 61 S. W. 785; City of Dallas v. Young (Tex. Civ. App.) 28 S. W. 1036; Johnson v. Llano County, 15 Tex. Civ. App. 421, 39 S. W. 995; Schaefer v. City of Fond du Lac, 104 Wis. 39, 80 N. W. 59. But see City of New Orleans v. Fisher, 180 U. S. 185, modifying 91 Fed. 574; Roberts v. Blaine County (C. C. A.) 90 Fed. 63, 47 L. R. A. 459; Fremont County v. Brandon, 6 Idaho, 482, 56 Pac. 264. The statute of limitations should not run against the right of a county to recover public moneys wrongfully withheld by a public official. See, also, as holding the same, Pike County v. Cadwell, 78 Ill. App. 201. But see as to the contrary, Bannock County v. Bell, 8 Idaho, 1, 67 Pac. 710; Thoeni v. City of Dubuque, 115 Iowa, 482, 88 N. W. 967; Foxworthy v. Hastings, 23 Neb. 772, 37 N. W. 657; Dinwiddie County v. Stuart, 28 Grat. (Va.) 526. See, also, United States v. Louisiana, 123 U. S. 32, 8 Sup. Ct. 17.

[127] City of Helena v. United States, 104 Fed. 113; Cunningham v. Borough of Merchantville, 61 N. J. Law, 466, 39 Atl. 639; Stetler v. Borough of East Rutherford, 65 N. J. Law, 528, 47 Atl. 489; Hayday v. Ocean City, 67 N. J. Law, 155, 50 Atl. 584; Scott v. Strawn, 85 Pa. 471; Commonwealth v. Bala & B. M. Turnpike Co., 153 Pa. 47, 25 Atl. 1105; State v. Sponaugle, 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727. In the absence of a statutory provision to that effect, laches is not imputable to the state. But see Hart v. United States, 95 U. S. 316; Haehnlen v. Com., 13 Pa. 617; State v. City of Columbia (Tenn. Ch. App.) 52 S. W. 511. See, also, People v. Brady, 49 App. Div. 238, 63 N. Y. Supp. 145.

[128] Darnell v. Keller, 18 Ind. App. 103, 45 N. E. 676; Nelson v. City of New York, 53 Hun, 630, 5 N. Y. Supp. 688; Weston v. City of Syracuse, 158 N. Y. 274, 53 N. E. 12, 43 L. R. A. 678.

lar case[129] or generally.[130] 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.

[129] City of Davenport v. Lord, 76 U. S. (9 Wall.) 409; Denison v. City of Columbus, 62 Fed. 775. The fact that a railroad in whose aid bonds were issued built a different road from the one originally chartered is no defense in an action by an innocent holder of the bonds. City of Gladstone v. Throop (C. C. A.) 71 Fed. 341. Irregularities in making an assessment is no defense in an action on local assessment bonds. 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. Hill v. City of Indianapolis, 92 Fed. 467. An injunction is no defense in an action against a city on a claim where neither of the parties to the action were parties in the injunction proceedings. Town of Colorado City v. Townsend, 9 Colo. App. 249, 47 Pac. 663. Where a town contracts with a person for electric lights, the source of the light is immaterial.

San Juan County Com'rs v. Tulley, 17 Colo. App. 113, 67 Pac. 346. See as holding same principle, Miller v. Board of Com'rs of Weld County, 17 Colo. App. 120, 67 Pac. 347; Clinton County v. Pace, 59 Ill. App. 576. The fact that a claim when originally presented and allowed in part was not sworn to is no defense against a county in a quantum meruit action for services rendered. City of Bloomington v. Perdue, 99 Ill. 329. It is no defense in an action for a personal injury arising from a defective sidewalk that the city is already indebted to an amount exceeding the constitutional limitation.

People v. Talmadge, 194 Ill. 67, 61 N. E. 1049; Davenport Gaslight & Coke Co. v. City of Davenport, 13 Iowa, 229. Inability to pay on account of tax limit having been reached is no defense in an action on a legal contract. Merrill v. Marshall County, 74 Iowa, 24, 36 N. W. 778. In an action for moneys voted by a township, the county cannot set up as a defense that the company had sold its property before the taxes became due. Atchison, T. & S. F. R. Co. v. Jefferson County Com'rs, 12 Kan. 127. An injunction restraining county commissioners from issuing certain bonds in a proceeding to which the persons claiming a right to them are not parties is no bar to an action by them to compel an issue of the bonds. Kansas City v. McDonald, 60 Kan. 481, 57 Pac. 123, 45 L. R. A. 429. The fact that a city secured an accident policy for one of its firemen, the amount of which was paid to the widow, is no defense in an action by her against the city for its negligence in case of death.

Bank of Santa Fe v. Board of Com'rs of Haskell County, 61 Kan. 785, 60 Pac. 1062; City of Louisville v. Muldoon, 20 Ky. L. R. 1576, 49 S. W. 791. Defects in an original construction of improvement. Petter v. Allen, 21 Ky. L.

§ 1166. Judgment.

The usual rules of law apply in the rendition of a judgment against a public corporation since, in the first instance, where a state invokes the aid of a court for any purpose it consents to abide by the decision of that court whether favorable or adverse and is bound by the doctrine of res adjudicata to the same extent as an ordinary suitor.[131] This principle also applies where, by

R. 1122, 54 S. W. 174. The defense is available that a street improvement was made without ordinance authority.

Murray v. Kansas City, 47 Mo. App. 105; Neosho City Water Co. v. City of Neosho, 136 Mo. 498. A city may be estopped from setting up nonacceptance of waterworks as a defense when it has actually used the hydrants. State v. School Dist. No. 24, 13 Neb. 78. Irregularities in the organization of a school district is no defense in an application for mandamus to compel the payment of its bonds.

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. That a railroad company has made no compensation to a private owner for land taken for its right of way cannot be urged as a defense by the city to recover money voted by it to aid in its construction. Kent v. Village of North Tarrytown, 26 Misc. 86, 56 N. Y. Supp. 885. A defense of no funds is not available to a legal claim unless there were none at the time the services were rendered.

Street v. Craven County Com'rs, 70 N. C. 644; Scranton v. Jermyn, 156 Pa. 107, 27 Atl. 66. An objection that a local improvement contract was void in that it was awarded by resolution instead of by ordinance will not be sustained in an action against a property owner to recover a local assessment.

Thomas Kane & Co. v. Hughes County, 12 S. D. 438, 81 N. W. 894; Rice v. Dickson Car Wheel Co. (Tex. Civ. App.) 65 S. W. 645. Breach of contract. See, also, Lawrence County Sup'rs v. Sage, 89 Ill. 265; Iowa Brick Co. v. City of Des Moines, 111 Iowa, 272, 82 N. W. 922. See §§ 1154, 1155, ante.

[130] Hoagland v. State (Cal.) 22 Pac. 142. The defense that the work was a public one engaged in by the state for the common good may be interposed in an action for damages. See, also, Green v. State, 73 Cal. 29, 11 Pac. 602, 14 Pac. 610.

City of Chicago v. Norton Milling Co., 97 Ill. App. 651. A municipal corporation may be estopped to raise the defense of ultra vires where the contract is within its power though irregularly entered into.

Knapp v. City of Hoboken, 39 N. J. Law 394; Richmond County Soc. for Prevention of Cruelty to Children v. City of New York, 73 App. Div. 607, 77 N. Y. Supp. 41. The defense of ultra vires cannot be raised by demurrer when the complaint merely sets out the contract, the performance, and a refusal to pay.

[131] Bloxham v. Florida Cent. &

law, a subordinate public corporation is made the subject of suit.[132] If there has been an appearance on the part of the corporation[133] and the court has jurisdiction,[134] a legal judgment can be rendered which is not subject to collateral attack[135] and which will bear interest.[136]

§ 1167. Execution.

The property of public corporations acquired by them for public purposes and in their capacity as governmental agents is held

P. R. Co., 35 Fla. 625, 17 So. 902. Consent by the state is an essential requisite to a valid judgment against either the state or officers of the state which would operate as a judgment against the state. State v. Gaines, 46 La. Ann. 431, 15 So. 174. Consent is necessary. State v. Kennedy, 60 Neb. 300, 83 N. W. 87; Clements v. State, 77 N. C. 142.

[132] Erskine v. Steele County, 87 Fed. 630; Higgins v. City of San Diego Water Co., 118 Cal. 524, 45 Pac. 824, 50 Pac. 670; People v. May, 9 Colo. 414, 15 Pac. 36; Sybert v. Ellis, 3 Blackf. (Ind.) 229; City of Wyandotte v. Zeitz, 21 Kan. 649; Byrne v. Parish of East Carroll, 45 La. Ann. 392, 12 So. 521. A contractor constructing a levee cannot recover judgment against the parish and ignore the means agreed upon in his contract to secure payment.

State v. Board of Liquidation of City Debt, 51 La. Ann. 1142, 26 So. 55; Interstate Transp. Co. v. City of New Orleans, 52 La. Ann. 1859, 28 So. 310; Thompson v. Village of Mecosta, 127 Mich. 522, 86 N. W. 1044. Sufficiency of findings considered.

Wiggin v. City of St. Louis, 135 Mo. 558, 35 S. W. 528; Sharp v. City of New York, 31 Barb. (N. Y.) 572; In re Taxpayers and Freeholders of Village of Plattsburgh, 27 App. Div. 353, 50 N. Y. Supp. 356; Holihan v. City of New York, 33 Misc. 249, 68 N. Y. Supp. 148; Mulholland v. City of New York, 113 N. Y. 631, 20 N. E. 856; City of Cincinnati v. Diekmeier, 31 Ohio St. 243; Austin Mfg. Co. v. Ayr Tp., 17 Pa. Super. Ct. 419; Town of Rutland v. Bixby (Wis.) 37 N. W. 228; Herman v. City of Oconto, 100 Wis. 391, 76 N. W. 364. But see State v. Dodge County Com'rs, 10 Neb. 20.

[133] People v. Madden, 133 Cal. 347, 65 Pac. 741; Smith v. State, 64 Kan. 730, 68 Pac. 641; State v. Lancaster County Bank, 8 Neb. 218. Consent of the attorney general, however, will not aid a judgment where the petition fails to state a cause of action against the state. State v. Headlee, 19 Wash. 477, 53 Pac. 948.

[134] The Lucy, 75 U. S. (8 Wall.) 307. "No consent of counsel can give jurisdiction." Oil City v. McAboy, 74 Pa. 249. Consent cannot give jurisdiction.

[135] Stevens v. Miller, 3 Kan. App. 192, 43 Pac. 439; Holihan v. City of New York, 33 Misc. 249, 68 N. Y. Supp. 148.

[136] Nevada County v. Hicks, 50 Ark. 416, 8 S. W. 180. A judgment against a county will draw interest

in trust for the public for the uses and purposes for which acquired.[137] 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.[138] A judgment, therefore, in the absence of express statutory provisions against a public corporation, cannot be enforced by execution,[139] neither is it a lien upon any of its property.[140] Specific

although the constitution of Ark., art. 16, § 1, forbids counties from issuing interest bearing evidences of indebtedness.

[137] 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; City of Salem v. Lane & Bodley Co., 90 Ill. App. 560. A mechanic's lien cannot be established through a sale of the property of a municipal corporation.

Ransom v. Boal, 29 Iowa, 68; Mariner v. Mackey, 25 Kan. 669; Egerton v. Third Municipality, 1 La. Ann. 435. Taxes due cannot be seized under execution. Carter v. State, 42 La. Ann. 927, 8 So. 836. The only effect of a judgment rendered in an action against the state and authorized by an act of the legislature is to effect a settlement of disputed questions of law and fact. The judgment is only morally binding upon the state and it possesses no executory force.

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. A mechanic's lien cannot run against public property. Brown v. Gates, 15 W. Va. 131. But see City of Louisville v. University of Louisville, 54 Ky. (15 B. Mon.) 642. See, also, Florman v. School Dist. No. 11, 6 Colo. App. 319; Monaghan v. City of Philadelphia, 28 Pa. 207.

[138] Sioux City v. Weare, 59 Iowa, 95. A judgment may be satisfied by the issue of bonds. Lowber v. City of New York, 7 Abb. Pr. (N. Y.) 248. See, also, Van Horn v. Kittitas Co., 46 App. Div. 623, 61 N. Y. Supp. 1150.

[139] Weaver v. Ogden City, 111 Fed. 323; City of Virden v. Fishback, 9 Ill. App. 82; Randolph County v. Ralls, 18 Ill. 29; King v. McDrew, 31 Ill. 418; City of Olney v. Harvey, 50 Ill. 453; City of Danville v. Mitchell, 63 Ill. App. 647; City of Morrison v. Hinkson, 87 Ill. 587; City of Geneva v. People, 98 Ill. App. 315; Village of Dolton v. Dolton, 196 Ill. 154, 63 N. E. 642; Gabler v. Elizabeth City, 42 N. J. Law, 79; Lyon v. Elizabeth City, 43 N. J. Law, 158; Presidio County v. City Nat. Bank (Tex. Civ. App.) 44 S. W. 1069. But see Ware v. Pleasant Grove Tp., 9 Kan. App. 700, 59 Pac. 1089; Littlefield v. Inhabitants of Greenfield, 69 Me. 86; Gaskill v. Dudley, 47 Mass. (6 Metc.) 546; Coler v. Coppin, 7 N. D. 418, 75 N. W. 795; Gordon v. Thorp (Tex. Civ. App.) 53 S. W. 357. An execution may run against a city since there is no statute expressly prohibiting it. See, also, Weaver v. City & County of San Francisco, 111 Cal. 319.

[140] People v. Superior Ct. of Cook

property may by law, however, be made subject to process or the collection of a judgment authorized in a designated manner.[141] 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,[142] or where the judgment is against the state to secure an appropriation from the legislature for its payment.[143] This principle has been universally adopted on the grounds of public policy since is 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.[144] It has,

County, 55 Ill. App. 376; Whiteside v. School Dist. No. 5, 20 Mont. 44, 49 Pac. 445.

[141] United States v. City of New Orleans, 31 Fed. 537; Higgins v. San Diego Water Co., 118 Cal. 524, 45 Pac. 824, 50 Pac. 670; Goldsmith v. San Francisco County Sup'rs, 115 Cal. 36, 46 Pac. 816; Buck v. City of Eureka, 119 Cal. 44, 50 Pac. 1065; Mason v. Commissioners of Roads & Revenues, 104 Ga. 35, 30 S. E. 513; City of Cairo v. Allen, 3 Ill. App. 398; Carney v. Village of Marseilles, 136 Ill. 401, 26 N. E. 491; People v. Chicago & A. R. Co., 193 Ill. 564, 61 N. E. 1063; Osborne County Com'rs v. Blake, 25 Kan. 356; Fernandez v. City of New Orleans, 50 La. Ann. 485, 23 So. 611; State v. City of New Orleans, 45 La. Ann. 1389, 14 So. 291; Hammond v. Place, 116 Mich. 628, 74 N. W. 1002; Griswold v. City of Ludington, 117 Mich. 317, 75 N. W. 609; State v. Cascade County Com'rs, 16 Mont. 271, 40 Pac. 595; McCully v. Tracy, 66 N. J. Law, 489, 49 Atl. 436; Lorence v. Bean, 18 Wash. 36, 50 Pac. 582; State v. City of Milwaukee, 20 Wis. 87.

[142] Miller v. McWilliams, 50 Ala. 427. Neither can the private property of inhabitants be seized under execution.

Emeric v. Gilman, 10 Cal. 404; City of Chicago v. Sansum, 87 Ill. 182; Chase v. Morrison, 40 Iowa, 620; Lockard v. Decatur County Com'rs, 10 Kan. App. 316, 62 Pac. 547; State v. Cape Girardeau County Ct. (Mo.) 3 S. W. 844; State v. Norvell, 80 Mo. App. 180; Alter v. State, 62 Neb. 239, 86 N. W. 1080. Neb. Code, § 482, relative to judgments becoming dormant, applies to those against municipal corporations; a mandamus proceeding, however, to compel a levy and collection of taxes will be regarded as the equivalent of issuing an execution.

[143] Clements v. State, 77 N. C. 142.

[144] Brinckerhoff v. Board of Education of N. Y., 37 How. Pr. (N. Y.) 499. See, also, Meriwether v. Garrett, 102 U. S. 472, where the court say: "And the decree further adjudged that all the property within the limits of the territory of the city of Memphis was liable and might be subjected to the payment of all the debts of the city, and that such liability would be enforced thereafter, from time to

however, been modified in some instances by confining its application 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.[145] Property held by a public corporation as an investment of funds merely, for the purposes of income or for sale and unconnected with purposes of municipal government,[146] or in its proprietary or private capacity,[147] can be seized upon execution for the debts of the corporation.

§ 1168. Costs and the right of appeal.

The right of a successful litigant to recover costs against a public corporation is limited usually by statutory provision.[148] The sovereign may, in giving its consent to be sued or permitting the assumption of liability by its subordinate agents, impose restric-

time, in such manner as the court might direct. This decree is manifestly erroneous in its main provisions. It proceeds upon the theory that the property of every description held by the municipality at the time of its extinction, whether held in its own right or for public uses, including also in that designation its uncollected taxes, were chargeable with the payment of its debts, and constituted a trust fund, of which the circuit court would take possession and enforce the trust; and that the private property of the inhabitants of the city was also liable, and could be subjected by the circuit court to the payment of its debts. In both particulars the theory is radically wrong. * * * What, then, is the property of a municipal corporation, which, upon its dissolution, a court of equity will lay hold of and apply to the payment of its debts? We answer, first, that it is not property held by the corporation in trust for a private charity, for in such property the corporation possesses no interest for its own uses; and, secondly, that it is not property held in trust for the public, for of such property the corporation is the mere agent of the state. In its streets, wharves, cemeteries, hospitals, court houses, and other public buildings, the corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without special legislative sanction."

[145] City of New Orleans v. Home Mut. Ins. Co., 23 La. Ann. 61.

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

[147] City of New Orleans v. Morris, 3 Woods (C. C.) 115, Fed. Cas. No. 10,183; City of Birmingham v. Rumsey, 63 Ala. 352.

[148] Village of Sparta v. Booroni, 129 Mich. 555, 89 N. W. 435, 90 N. W. 681; Harkness v. City of Independence, 56 Mo. App. 527; Hunt v. City of Oswego, 45 Hun (N. Y.)

tive conditions. The right is a statutory one [140] but in a recovery of costs by a public corporation the ordinary rule applies.[150] A state or one of its subordinate agencies in all civil proceedings in which it may legally participate possesses the rights usually accorded private litigants, including that of appeal.[151] This privilege does not, however, usually apply to criminal proceedings.[152]

305; Brewster v. City of Hornellville, 35 App. Div. 626, 54 N. Y. Supp. 915; State v. Simmons, 118 N. C. 9; Sandberg v. State, 113 Wis. 578, 89 N. W. 504.

[149] Dover v. State, 45 Ala. 244; Town of Grafton v. Mooney, 89 Ill. App. 622. A city is not exempt from paying costs in a personal injury case; it is only where it sues defendants as a representative of a state that a nonliability for costs exists.

State v. Dorland, 106 Iowa, 40, 75 N. W. 654; In re Town of Hempstead, 36 App. Div. 321, 55 N. Y. Supp. 345. Fees of an expert are taxable in a proceeding by the people to investigate the financial condition of a town.

Hallihan v. Village of Ft. Edwards, 26 Misc. 422, 57 N. Y. Supp. 162; Peppard v. City of Cincinnati, 6 Ohio N. P. 57; City of Oklahoma City v. Welsh, 3 Okl. 288, 41 Pac. 598; Henderson v. Walker, 101 Tenn. 229, 47 S. W. 430; State v. Buchanan (Tenn. Ch. App.) 62 S. W. 287; Noyes v. State, 46 Wis. 250. But see Mariner v. Mackey, 25 Kan. 669.

[150] Nixon v. City of Biloxi, 76 Miss. 810, 25 So. 664. But where an attorney is retained by the city at an annual salary, no counsel fees should be awarded it as damages on the entry of a decree in its favor.

[151] Hanna v. City of Kankakee, 34 Ill. App. 186; Holmes v. City of Mattoon, 111 Ill. 27. Municipal corporations may be given the right of appeal without giving bonds. Yandell v. Madison County, 79 Miss. 212, 30 So. 606; State v. California Min. Co., 15 Nev. 234; Boon v. City of Utica, 4 Misc. 583, 25 N. Y. Supp. 846; City of Scranton v. Silkman, 113 Pa. 191; Lyman County v. Lyman County Com'rs, 14 S. D. 341, 85 N. W. 597; Scott v. Forrest, 13 Wash. 166, 42 Pac. 519.

[152] Asbell v. State, 60 Kan. 51, 55 Pac. 338. But see Kansas City v. Clark, 68 Mo. 588.

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